GAI INSTITUTIONUM

Commentarii Quattuor

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Bk. I

dominorum fuerint, numquam aut ciues Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero cons titu

intelligemus.

16. Si uero in nulla tali turpitudine sit seruus, manumissum

V p. 4 modo ciuem Romanum, modo Latinum fieri dice/mus. 17. Nam

in cuius persona tria haec concurrent, ut maior sit annorum

triginta, et iuxta Quiritium domini, et iusta ac legitima

manumissione liberetur, id est uindicata aut censu aut testamento,

is ciuis Romanus fit; sin uero aliquid corum decerit, Latinus erit.

[VII. De manumissione uel causae probatone.]

18. Quod autem de aetate serui requiritur, lege Aelia Sentia

introductum est. nam ea lex minores xxx annorum seruos non

alter uoluit manumissos ciuies Romanos fieri quam si uindicata,

apud consilium iusta causa manumissionis adprobata, liberati

uerint. 19. Tota autem causa manumissionis est ueluti si quis

filium filiamque aut fratrem sororemque naturalem, aut alumnun aut

paedagogum, aut seruum procuratoris habendi gratia, aut ancillam

matrimonii causa apud consilium manumittat.

[III. De consilio adhibendo.]

20. Consilium autem adhibetur in urbe Roma quidem quinque

senatorum et quinque equestrium Romanorum [puberum]; in

provinciis autem uiginti recuperatorum ciuium Romanorum, idque

fit ultimo die consentius; sed Romanae certis diebus apud consilium

manumissuntur. maioris uero triginta annorum serui semper

manumittit solent, adeo ut uel in transitu manumissuntur, ueluti cum

praetor aut pro consule in balneum uel in theatrum eat. 21. Prae-

terea, minor triginta annorum seruis manumissus potest ciuis

Romanus fieri, si ab eo domino qui soluendo non erat testamento

V p. 5 cum liberum et heredem relictum aliis / heres nullus excludit. 6

1 V.2. The numbering has begun to go wrong.

2 apud interlined by V.2. apud consilium gloss according to Kneip.

3 V.2. IIII (Goeschel) no longer legible.

4 puberum: gloss according to Krüger. recuperatorum Hartmann. equo

publico Karlowa.

5 usus V. manumissus Kübler: gloss Krüger. 6

Mommsen's conjecture; sense practically certain: cf. Ulp. 1, 14. Nothing

can be made of V. p. 5: cf. Apogr. and Suppl. xx. Presumably Gaius, having

disposed of the first of the three conditions stated in §17, now proceeded to

the other two—Quiritary title and solemnity of form. It is to this lost passage


5, 6. Theophil. 1, 5, 4 (Ferrini 26). Epit. 1, 1, 2: Latinu sunt qui aut per epistolam

aut inter amisos aut consuini adhibitio in manumissuntur.

§S 15-21] MANUMISSION

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 manu-

mission (that is uindicata 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

uindicata 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

daugther, 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. . . .


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 *dedicitii* 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 *dedicitii* is the lowest; nor are they allowed admission to Roman citizenship by any *lex*, senatusconsultum, 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 become 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 province 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 the statute

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2 *Vz.*
3 *Vz.*
4 *Vz.*
5 This accepted exclusion regularizes *datur* below. Cf., however, *1, 13, 40, &c.*
6 Mommsen, and generally.
ciues Romani esse iubentur. 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. This right of obtaining Roman citizenship, though by the L. Aelia Senia it was conferred only on those who became Latins on manumission, owing to being under 30, was later, by a senatusconsult passed in the consultship of Pegasus and Fusio, granted to persons becoming Latins on manumission over 30. 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... 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. What we have said of a year-old son is to be taken to apply equally to a year-old daughter.

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. 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. 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. 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. Furthermore, persons manumitted above...
anorum manumissi et Latinī facti iteratiōnēs iūs Quiritium conse-
quī. quo . . . trīginta annorum manumittant . . . manumissiuis
uindicta aut censu aut testamento et ciuis Romanus et eius libertus
fit qui manumissionem iterauerit. ergo, si seruus in bonis tuis, ex
iuere Quiritium meus erit, Latinus quidem a te solo fieri potest,
iterari autem a me, non etiam a te potest, et eo modo meus
libertus fit. sed et ceteris modis iūs Quiritium consecutus meus
libertas fit. honorum autem quae . . . cūm is mortuīt reliquerit, tibi
possessio datur, quocunque modo iūs Quiritium fuerit consecutus.
quod si cuius et in bonis et ex iure Quiritium sit, manumissus ab
eodem scilicet et Latinus fieri potest et iūs Quiritium consequi.
36. Non tamen cuicumque uolenti manumittēre licet. 37. Nam is qui2
in fraudem creditorum uel in fraudem patrōni manumittit, nihil
agit, quia lex Aelia Sentia impedit libertatem. 38. Item, eadem
legem minōri xx annorum domino non aliter manumittēre
permissītur quam si uindicta apud con/silium iusta causa manumissionis
adprobata fuerit. 39. Iustae autem causae manumissionis sunt
uelti si quis patrem aut matrem aut paedagogum aut conalectanum
manumittat. sed et illae causae qua superius in seruo minore
xx annorum exposuimus ad hunc quoque casum de quo loquimur
adferri possunt. item, ex diuerso, hae causae qua in minore
xx annorum domino rettulimus porrīgi possunt et ad seruum minorem
xxx annorum. 40. Cum ergo certus modus manumittendi minoribus
xx annorum dominis per legem Aeliam Sentiam constitutus
sit, euenit ut qui xiii annos aetatis expluerit, licet testamentum
facere possit et in eo heredem sibi instituere legataque reliquere
possit, tamen adhuc minor sit annorum xx, libertatem seruo dare
non posse. 41. Et quamvis Latinum facere uellet minor xx anno-
rum dominus, tamen nihilominus debet apud consilium causam
probare, et ita postea inter amicos manumittere.

1 Cf. Ulp. 3, 4.
2 Nearly half a line illegible.
3 About 14 lines illegible.
5 Besides the italicized text (restored from Inst. 1, 6 pt.), lines 19 and 20
of V p. 9, now vacant, seem to have contained a title.
6 Confirmed on the whole by Inst. 1, 6, 4, but si, uindicta, and fuerit are
excluded as gloss by this or that greater authority.
7 potest V. Usually corrected, but cf. 1, 13; 29, &c.

§ 36-7. = Inst. 1, 6 pr. Cf. G. 1, 47. 139. § 38. = Inst. 1, 6, 4. § 39.
119, c. 3 (A.D. 544). § 41. inter amicos: cf. G. 1, 22, 44. Ulp. 1, 10.
Dowith. 4 sqq. 14.
DE PERSONIS [Bk. I]

42. Praeterea lege Fufia Caninia certus modus constitutus est in seruis testamento manumittendis. 43. Nam ei qui plures quam
duos neque plures quam decem seruos habebit, usque ad partem
dimidiam eius numeri manumittere permititur; ei uero qui plures / 
V p. 11 quad x neque plures quam xxx seruos habebit, usque ad tertiam 
partem eius numeri manumittere permititur. at ei qui plures
quam xxx neque plures quam centum habebit, usque ad partem 
quartam potestas manumittendi datur. nouissime, ei qui plures 
quam c nec plures quam d habebit, non plures [ei] manumittere 
permititur quam [ut] quintam partem; neque plures 
(manumittendi) ei qui plures quam d habebit potestas datur; sed praescribita 
lex ne cui plures manumittere liceat quam c. quodsi quis unum
seruum omnino aut duos habet, ad hanc legem non pertinet, et
ideo liberam habet potestatem manumittendi. 44. Ac ne ad eos
quidem omnino haec lex pertinet qui sine testamento manumittunt.
itaque licet iis qui undicta aut censu aut inter amicos manumit-
tunt, totam familiam3 liberare, scilicet si alia causa non impediat 
libertatem. 45. Sed quod de numero seruorum testamento manu-
mittendorum diximus ita intelligemus, ne unquam ex eo numero,
ex quo dimidia aut tertia aut quarta aut quinta partis liberari potest, 
pauciores manumittere liceat quam ex antecedenti numero licuit.
et hoc ipsa lege prouisum est: erat enim sane absursum ut x
seruorum dominio quinque liberare liceret, quia usque ad dimidiam
partem eius numeri manumittere ei conceditur, xii seruos habenti
non plures liceret manumittere quam IIII, at eis qui plures quam
V p. 12 x neque / . . . . / 46. Nam et si testamento scriptis in orbem 
seruis libertas data sit, quia nullus ordo manumissionis inuenitur, 
nuli liber erunt, quia lex Fufia Caninia quae in fraudem
eius facta siat rescindit. sunt etiam specialia senatusconsultorum 
qubus rescissa sunt ea quae in fraudem eius legis exegi
tata sunt.

47. In summa scindendum est, (quod)5 lege Aelia Sentia cautum
sit ut creditorum fraudandorum causa manumissi liberi non fiat,
hoc etiam6 ad peregrinos pertinere (senatus ita censuit ex auctoritate
Hadriani), cetera uero iura eius legis ad peregrinos non pertinere.

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1 Kniep's conjecture. There are others.
2 postscript V. Defended by Kniep.
3 V2 interlines suam after familiarum. Kept by Kübler; om. Krüger.
4 Cf. Suppl. xxii. ratione proximitatis Polenar-Kübler.
5 V p. 12 is illegible. It probably gave further details as to the L. Fufia
Caninia: cf. Epit. 1, 2, 2, 3.
6 quad Kübler. (cum) Krüger.
7 etiam hoc V.
8 Gloss according to Mommsen, followed by Kübler.

L. Fufia Caninia

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 undicta or by the
census or before 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 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 . . . . . 46. Similarly, if the names of the slaves manu-
mitted 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.

§§ 42-7. Cf. Inst. 1, 7. G. 1, 139; 2, 228, 239.
§ 46. Cf. Epit. 1, 2, 2-4. § 47. Cf. G. 1, 37; 4, 37.
DE PERSONIS

propositus de his qui sibi liberasque suis ab eo ciuitatem Romanam petebant, significavit. nec me praeterit Galataram gentem credere in potestate parentum liberos esse.

56. Itaque liberos suos in potestate habent ciues Romani, si ciues Romanas uxores duxerint, ut etiam Latinas peregrinasue cum quibus conubium habeant. cum enim conubium id efficient, ut liberi patris condicionem sequantur, euenit ut non (solum) ciues Romani fiant, sed etiam in potestate patris sint. 57. Unde et veterani quisbdam concedi solet principalibus constitutionibus conubium cum his Latinis peregrinisque, quas primas post missionem uxores duxerint; et qui ex eo matrimonio nascuntur et ciues Romani et in potestate parentum sunt.

58. Nec tamen omnes nobis uxores ducere licet; nam a quarundam nuptias abstiner debemus. 59. Inter eas enim personas quae parentum liberorum locum inter se optinent nuptiae contrahi non possunt; nec inter eas conubium est, ueluti inter patrem et filiam, uel inter matrem et filium, uel inter amum et nepotem, (vel inter aitam et nepotem.) et si tales personas inter se coerint, nefarias / et incestas nuptias contraxisse dicuntur. et haec adeo ita sunt ut, quamvis per adoptionem parentum liberorum loco sibi esse coeperint, non possint inter se matrimonio coeniungi; in tantum ut etiam dissoluta adoptione idem iuris maneant. itaque eam qua mihi per adoptionem fillae seu neptis loco esse coeperit non potero uxorem ducere, quamvis eam emancipaverim. 60. Inter eas quoque personas quae ex transuero gradu cognatione inunguntur est quaedam similis obseruation, sed non tanta. 61. Sane inter fratrem et sororem prohibita sunt nuptiae, siue eodem patre eademque mater nati fuerint siue alterturo eorum; sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem constat adoptione, sane inter me et eam nuptiae non possunt consistere; cum uero per emancipationem adoptione dissoluita sit, potero eam uxorem ducere; sed et si ego emancipatus fuero, nihil impedito

§§ 55-61] PATRIA POTESTAS: IUSTAE NUPTIAE

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
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erit nuptias. 62. Fratris filiam uxorrem ducere licet, idque primum in sumum uenit cum diuus Claudius Agrippinam fratris sui filiam uxorrem duxisset. sororis uero filiam uxorrem ducere non licet. et haec ita principalibus constitutionibus significatur. 63. Item amitiam et materteram uxorrem ducere non licet; item eam quae mihi quondam socius aut nurus aut priuigua aut nouerca fuit. ideo autem diximus ‘quondam’, quia, si adhuc constant eae nuptiae per quas talis adfecta quasestia est, alia ratione mihi nupta esse non potest, quia neque cadiu duobus nupta esse potest neque idem duas uxorres habere. 64. Ergo, si quis nefarias atque incestas nuptias contraxerit, neque uxorrem habere uidetur neque liberosis. itaque hi qui ex eo coitu nascantur matrem quidem habere uidetur, patrem uero non utique; nec ob id in potestate eius (sunt, sed tales), sunt quales sunt ii quos mater uulgo concepit; nam et hi patrem habere non intelleguntur, cum erat etiam incertus sit. unde solent spuri filii appellari, uel a Graeca uoce quasi omopòthn2 concepti, uel quasi sine patre filii.

65. Aliquando autem evenit ut liberi, qui statim ut nati sunt parentum in potestate non fiunt, ii postea tamen redigantur in potestatem. 66. Ueluti si Latinus ex leges Aelia Sentia uxorque ducta filium procreaverit aut Latinum ex Latina aut cieum Romanum ex cieu Romana, non habebit eum in potestate; sed si postea causa probata ius Quiritium consecutus fuerit,4 simul [ergo] cum in potestate statua sua habere incipit. 67. Item, si cieus Romanus Latinam aut peregrinam uxorrem duxerit per ignorantiam, cum eam cieum Romanam esse crederet, et filium procreaverit, hic non est in potestate eius, quia ne quidem cieus Romanus est, sed aut Latinus aut peregrinus, id est eius conditionis cuius et mater fuerit, quia non alter quise ad patris conditionem accedit quam si inter patrem et matrem eius comium sit; sed ex senatusconsulto permittitur causam erross probare, et ita uxor quoque et filius ad ciuitatem Romanam perueniunt, et ex eo tempore incipit filius in potestate patris esse. idem iuris est si eam per ignorantiam

1 Inserted by Krüger from Inst. 1, 10, 12; not by Kübler.
2 omopòthn. V. Apogr. 289 fin.
3 Two vacant lines, with traces of red. Text from Inst. 1, 10, 13.
4 Krüger’s reconstruction gives the certain sense, but may not be verbally correct: Apogr. and Suppl. xxiii.

§ 61-71 PATRIA POTESTAS AFTER BIRTH

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 whose 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 omopòthn, 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 comium 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
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P. 20 74. Si peregrinus ciuem Romanam uxorem duxerit, an ex senatusconsulto causam probare possit quasearum est. . .
hoc ei specialiter concessum est. sed cum peregrino ciuem
Romanam uxorem duxisset et, filio nato, ipsius ciuitatem Romanam
consentius esset, deinde, cum quaereretur an causam probare
posset, rescripsit imperator Antoninus proinde posse eum causam
probare atque si peregrino manisset. ex quo colligimus etiam
peregrinum causam probare posse. 75. Ex his quae diximus
apparet, siue ciuius Romanus peregrinam siue peregrinos ciuem
Romanae uxorem duxerit, eum qui nascitur peregrinum esse, sed
siquidem per errorem tale matrimonium contractum fuerit, emenda-
dari utius eius ex senatusconsulto secundum est quae superius
diximus. si uero nullo error interuenit, (sed) scientes suam
condicionem ita coirent, nullo casu emendatur utius eius
matrimonii.

76. Loquimur autem de his sicilicet (inter) quos conubium non
sit, nam aliquin, si ciuius Romanus peregrinam cum qua e conubium est
uxorem duxerit, sicut supra quoque diximus, iustum
matrimonium contrahitur, et tunc ex his qui nascitur ciuius
Romanus est et in potestate patris erit. 77. Item, si ciuius
Romanae peregrinae cum qua e conubium est nupersehit, peregrinos
sane procreatur, et eum iustus patris filius est, tamquam si e Pere-
grinam eum procreasset. hoc tamen tempore, (ex) senatusconsulto
quod auctore diu diu Hadriana sacratissimorum factum est, etiam non
fuerit conubium inter ciuiem Romanam et peregrinum, qui nascitur
iustus patris filius est. 78. Quod autem diximus, inter ciuiem
Romanum peregrinamque nisi conubium sit, qui nascitur peregrino
dissim eum esse, lege Miniciae caesatur, id est ut [si] quidem
peregrini parentis condicionem sequatur. eadem lege enim ex diverso caesatur
ut si peregrinam cum qua ciui conubium non sit uxor duxerit
ciuius Romanus, peregrinos ex eo coitu nascatur. sed hoc maxime

1 Illegible 14 lines. Cf. Suppl. xxiii.
2 So Kübler, citing Apogr. 396, line 16. Krüger: ex senatusconsulto licet
(see section) 6a. V. corrupt.
3 So Krüger. V. corrupt.
4 Si Kübler. peregrinum . . . procreatur V. procreat Krüger.
5 Si V. Cf. 1, 53.
6 peregrinum or peregrinamque V. As the preceding et may stand equally for
ciui Romanam, one must choose here between masculine and feminine. There
is a like choice in the next sentence (n. 8). We follow Krüger, but see p. 26, n. 1.
Kübler decides the other way. The whole section is beyond safe repair. V being
largely illegible and probably corrupt. See Suppl. and Krüger.
7 So Mommsen, contracto matrimonio eum Krüger.
8 Cf. n. 6.
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 *coniubium* 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 *coniubium* between the parties appears to be granted by that *lex* and the *L. Iunia*, and the invariable effect of *coniubium* 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...
quae alieno seruo uolente domino eius coit, ipsa ex pactione libera permanere, sed serum procreare; nam quod inter eam et dominum istius serui conuenit ex senatusconsulto ratum esse iubetur. sed postea diius Hadrianus, iniquitate rei et inelegancia iuris motus, V p. 23 restituit iuris gentium regula. ut, cum ipsa mulier libera permaneat, liberum pariat. 85. (Item e lege...).\(^1\) ex ancilla et libero poterant liberi nasci; nam ea lege caeutur ut, si quis cum aliena ancilla quam credebat liberam esse coeit, siquidem masculi nascantur, liberi sint, si uero feminae, ad eum pertineant cuius mater ancilla fucret. sed et in hac specie diius Uespasianus, inelegancia iuris motus, restituit iuris gentium regula. ut omni modo, etiam si masculi nascantur, serui sint eius cuius et mater fuerit. 86. Sed illa pars eiusdem legis salua est, ut ex libera et seruo alieno, quem sciebat seruum esse, serui nascantur. itaque apud quos talis lex non est, qui nascitur iure gentium matris condicionem sequitur, et ob id liber est.

87. Quibus autem casibus matris et non patris condicionem sequitur qui nascitur, idem casibus in potestate eum patris, etiam si eius Romanus sit, non esse plus quam manifestum est. et ideo superius retulimus quibusdam casibus, per errorem non iusto contractu matrimonio, senatum interuenire et emendare uitium matrimonii, eoque modo plerumque efficere ut in potestate patris filius redigatur. 88. Sed si ancilla ex iuvento Romano conceperit, deinde manumissa cuius Romana facta sit et tunc pariat, licet eius Romanus sit qui nascitur, / sicet pater eius, non tamen in potestate patris est, quia neque ex iusto coitu conceptus est neque ex ullo senatusconsulto talis coitus quasi iustus constituitur.

89. Quod autem placuit, si ancilla ex iuvento Romano conceperit, deinde manumissa pepererit, qui nascitur liberum nasci, naturali ratione fit. nam hi qui illegitime concepientur statum sumunt ex eo tempore quo nascuntur; itaque, si ex libera nascuntur, liberi fiunt, nec interest ex quo mater eos conceperit cum ancilla fuerit; at hi qui legitime concepientur ex conceptionis tempore statum sumunt. 90. Itaque, si cui mulieri cuius Romanae praegnati aqua

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\(^1\) No gap in V, but mention of some lex must have dropped out, since the lex referred to cannot be the SC. Claudianum.
II. LAW OF THINGS.

Preliminary—classifications of things, §§ 1–18.

A. Acquisition of res singulæ.

1. By civil methods.
   i. Of res corporales—traditio (natural), mancipatio, in iure cessio, §§ 19–27.

2. By natural methods (besides traditio), § 65.
   ii. Allusio and accessio, §§ 70–8.
   iii. Specificatio, § 79.

3. Alienation and acquisition by persons in tutela, §§ 80–5.

4. Acquisition through others, §§ 86–96.

B. Acquisition per universitatem—the cases of, §§ 97–9.

1. Testamentary succession, § 100.
   i. Forms of testation, §§ 101–11.
   ii. Capacity to make a will (fragment), §§ 112–13.
   iv. Subsequent invalidation—by postumii agnatio and quasi agnatio, §§ 130–43; by subsequent will, § 144; by capitis diminutis of testator, §§ 145–6.
   vi. Acquisition of hereditas—by heredes sui and heredes necessarii, §§ 152–60; by heredes extranei, §§ 161–73.
   viii. Institution of slaves, §§ 185–90.

1a. Legacies, § 191.
   i. The four forms, §§ 192–233.
   ii. The Leges Furtia, Voconia, Fufidia, Fufia Caninia, §§ 244–8.
   iii. Void legacies—ante heredis institutionem, §§ 239–41; post mortem heredis, §§ 232–4; poenae nomine, §§ 235–7; incertae personae, §§ 238–43; to a person in the heir's potestas and to a person having him in potestas, §§ 244–5.

1b. Fideicommissa § 246.
   iii. Differences from legacies—present, §§ 268–83; former, §§ 284–8; no appointment of tutor by fideicommisso, § 289.
99. Ac prius de hereditatis dispiciamus. quorum duplex condicio est: nam uel ex testamento uel ab intestato ad nos pertinent. 100. Et prius est ut de his dispiciamus quae nobis ex testamento obueniunt.

101. Testamentorum autem genera initio duo fuerunt: nam aut calitis comitis testamentum faciebant, quae comitis bis in anno testamentis faciebantessent erant, aut in procinctu, id est cum bellii causa arma semebant. procinctus est enim expeditus et armatus exercitus. alterum itaque in pace et in odio faciebant,

V p. 78 alterum in proelium exituri. 102. Accessit deinde tertium / genus testamenti, quod per aS et libram agitur: qui neque calitis comitis neque in procinctu testamentum fecerat, is si subita morte urgendebar, amico familiae suam, id est patrimonium suum, mancipio datbat, eumque rogabat quid cuique post mortem suam dari uellet. quod testamentum dicitur per aS et libram, scilicet quia per mancipationem peragitur. 103. Sed illa quidem duo genera testamentorum in desuetudinem abierunt, hoc uestro somum quod per aS et libram fit in usu retenent est. sane nunc alter ordinat quam olim solebat. namque olim familiae emplor, id est qui a testatore familiae accipiebat mancipio, hereditis locum optimebat, et ob et i pipemandor testator quid cuique post mortem suam dari uellet. nunc uestro alias heres testamenti instituist, a quo etiam legata relinquantur, alius dicis gratia, propter uetersis iuris imitationem, familiae emplor adhibetur. 104. Eaque res ita agitur: qui facit (testamentum), adhibitis, sicut in ceteris mancipiationibus, v testibus ciuibus Romanis superibus et libripende, postquam tabulas testamenti scripsisset, mancipiat aliqui dicis gratia familiam suam. in qua re his uestra familiae emplor utitur: FAMILIAE PECUNIAMQUE TUAM ENDO MANDATELA TU.\textsuperscript{1} CUSTODELAQUE MEA (ESSE AIO, Eaque,\textsuperscript{2})

V p. 79 QUO TU IURE TESTAMENTUM / FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE (et ut quidam adiciunt) AeneaE LIBRA ESTO MIHI EMPTA. deinde aere percucit libram, idque aes dat testatorio uelut preti loco. deinde testator tabulas testamenti\textsuperscript{3} tenens ita

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\textsuperscript{1} tuam V. Krüger om.
\textsuperscript{3} testamenti V. testamenti mun Kübler.

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HAEC, ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT, ITA DO, ITA LEGO, ITA TESTOR, ITAQUE OOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE; ET HOC DICITUR NUNCUPATIO. NUNCUPARE EST ENIM PALAM NOMINARE; ET SANE QuAE TESTATOR SPESIALITER IN TABULIS TESTAMENTI SCRIPSERIT, EA UIDETUR GENERALIS SERMONE NOMINARE ATQUE CONFIRMARE.

105. In testibus autem non debet esse qui in potestate est aut familiae emptoris aut ipsius testatoris,quia propter ueteris iuris imitationem totum hoc negotium quod agitur testamenti ordinandi gratia creditur inter familiae emptorem agi et testatorem; quippe olim, ut proxime diximus, is qui familiam testatoris mancipio accipiebat, heredis loco erat; itaque probatum est in ea re domesticum testimonium. 106. Unde, et si is qui in potestate patris est familiae emptorum adhibitus sit, pater eius testis esse non potest, ac ne is quidem qui in eadem potestate est, uelut frater eius. sed1 si filius familias ex castrensi peculio post missionem

V p. 80 faciat testamentum, nec pater eius recte testis / adhibetur, nec is qui in potestate patris est.2 107. De libripende eadem quae et de testibus dicta esse intellegemus; nam et is testium numero est. 108. Is uero qui in potestate heredis aut legatarii est, cuiususe heres ipse aut legatarius in potestate est, quiue in eiusdem potestate est, adeo testis et libripens adhiberi potest, ut ipse quoque heres aut legatarius iure adhibeantur. sed tamen, quod ad heredem pertinent quia in eius potestate est, cuiususe is in potestate eit, minime hoc iure uti debemus.

[De testamentis militum.]

109. Sed haec diligens observatio in ordinandis testamentis militibus propter niamim imperitiam principiorum remissa est. nam quamuis neque legitimum numerum testium adhibuerint neque uendiderint familiam neque nuncupuerint testamentum, recte nihil minus testantur. 110. Praeterea permission est iis et peregrinos et Latinos instituere heredes uel iis legare, cum aloquin peregrini quidem ratione ciuili prohibeantur capere hereditatem legataque, Latini uero per legem Iuniam.

III. Caebes quoque, qui lego Iulia hereditatem legataque capere uetantur, item orbi, id est qui liberos non habent, quos lex / Papia

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1 sed et Kübler.
2 sit V. est Inst. 2, 10, 9.

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plus quam dimidias partes hereditatis legatorumque capere uetat, ex V p. 81. militis testamento solidum capiant. 1 ... / /

112. ex auctoritate diuæ Hadriani senatusconsultum factum est, quo permissum est ... feminis etiam sine componione V p. 82 testamentum facere, si modo non minores essent / annorum XII. scilicet ut quae tutela liberatae non essent tutore auctore7 testari deberent. 113. Videntur ergo meliores conditionis esse feminae quam masculi; nam masculus minor annorum XIII testamentum facere non potest, etiamse tutore auctore testamentum facere uelit, feminæ uero post XII annum testamenti faciendiuis nasciscitur.

114. Igitur, si quaremus an ualeat testamentum, imprimis aduertere debemus an is qui iudex fecerit habuerit testamenti factionem; deinde, si habuerit, requiremus an secundum iuris ciuilius regulam testatus sit, exceptis militibus, quibus propter niman imperitiam, ut diximus, quomodo uelint uel quomodo possint pertinuumt testamentum facere.

115. Non tamen, ut iure ciuili ualeat testamentum, sufficit ea observatio quam supra exsuriae de familiae uenditione et de testibus et de nuncupationibus. 116. (Sed) ante omnia requirendum est an institutio heredis sollemni more facta sit; nam aliter facta institutione nihil profectum familiam testatoris ita ueniens testesque ita adhibere et ita nuncupare testamentum ut supra diximus. 117. Sollemnis autem institutio haece est: TITIUS HEREDIS ESTO; sed V p. 83 et illa iam comprobata uidetur: TITIUM HEREDEM ESSE / TIBEO; et illa non est comprobata: TITIUM HEREDEM ESSE UOLO; sed et illae a plurisques improbatae sunt: TITIUM HEREDEM INSTITUO, item HEREDEM FACIO.

118. Observandum praeterea est ut, si mulier quae in tutela est faciat testamentum, tutore auctore facere debat; alioquin inutiliter iure ciuili testabtur. 119. Praetor tamen, si septem signis testium signatum sit testamentum, scriptis herdes secund-
dum tabulas testamenti bonorum possessionem pollicitur; (et) si nemo sit ad quem ab intestato iure legitimo pertinet hereditatis, uelut frater codem patre natus aut patruus aut fratris filius, ita poterunt scripti heredes retinere hereditatem. nam idem iuris est et si alia ex causa testamentum non ualeat, uelut quod familia non uenierit aut nuncupationis uerba testator locutus non sit. 120. Sed uideamus an, etiamsi frater aut patruus extend, potiores scriptis hereditibus habeantur. rescripto enim imperatoris Antonini significatur eos qui secundum tabulas testamenti non uere factas bonorum possessionem petierint, posse aduersus eos qui ab intestato uindicant hereditatem, defendere se per exceptionem doli mali. 121. Quod sane quidem ad masculorum testamentum pertinere certum est; item ad feminarum quae ideo non utiliter testatae sunt, quia uerbi gratia familiarum non ueniderint aut

V p. 84 nuncupationis uerba locutae non sint. / an autem et ad ea testamenta feminarum, quae sine tutoris auctoritate fecerint, haec constitutio pertinet, uidebimus. 122. Loquimur autem de his scilicet feminis quae non in legittima parentium aut patronorum tutela sunt, sed [de his] quae alterius generis tutores habent, qui etiam iniuti coguntur auctores fieri; aliquo parentem et patronum sine auctoritate eius facto testamento non ssummeri palam est. 123. Item, qui filium in potestate habet curare debet ut eum uel heredem instituat uel nominatim exheredet; aliquo, si eum silentio praetererit, inutiliter testabitur, adeo quidem ut nostri praeceptores existiment, etiamsi uiuo patre filius defunctus sit, neminem heredem ex eo testamento existere posse, quia scilicet statim ab initiuo constiterit institutio. sed duerae scholae auctores, siquidem filius mortis patris tempore uiuat, sane impedimento eum esse scriptis hereditibus et illum ab intestato heredem fieri confinuentur; si uero ante mortem patris intercessus sit, posse ex testamento hereditatem adiri putant, nullo illo impeditimento, quia scilicet existimant (non) statim ab initio inutiliter fieri testamentum filio praeterito. 124. Ceteras uero liberorum personas si praetererit testator, ualeat testamentum, (sed) praeteritae istae personae scriptis hereditibus in / partem adrecscunt, si sui

1 impediente? So Mommsen, who further suspects the rest of the sentence to be misplaced gloss.


§§ 119–24] BONORUM POSSESSIO. DISINHERISON 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

1 That is, sui heredit, since the civil law is being stated.
LIBER HERESQUE ESTO, UEL HERES LIBERQUE ESTO. 187. Nam si sine libertate heres institutus sit, etiamsi postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona eius non constat; ideoque, licet alienatus sit, non potest iussu domini noui cernere hereditatem. 188. Cum libertate uero heres / institutus, siquidem in eadem causa duaruerit, fit ex testamento liber et inde necessarius heres. si uero ab ipso testatore manumissus fuerit, suor arbitrio hereditatem adire potest. quodsi alienatus sit, iussu noui domini adire hereditatem debet, qua ratione per eum dominus fit heres; nam ipse neque heres neque liber esse potest. 189. Alienus quoque seruus heres institutus, si in eadem causa duaruerit, iussu domini hereditatem adire debet; si uero alienatus ab eo fuerit aut uiuo testatore aut post mortem eius, antequam cernat, debet iussu noui domini cernere; si uero manumissus est, suo arbitrio adire hereditatem potest. 190. Si autem seruus alienus heres institutus est uulgari cretione data, ita intellegitur dies cretionis cedere, si ipse seruus scierit se heredem institutum esse, nec ullum impedimentum sit quominus certiorum dominum faceret, ut illius iussu cenere possit.

191. Post haec uideamus de legatis. quae pars iuris extra proposita quidem materiam uidetur; nam loquimur de his iuris figuris quiusquae per universitatem res nobis adquiruntur. sed cum omnino modo de testamentis deque hereditibus qui testamento instituuntur locuti sumus, non sine causa sequenti loco / poterit haec iuris materia tractari.

[De legatis.]

192. Legatorum itaque genera sunt quattuor: aut enim per uindicacionem legamus aut per damnationem aut sinendi modo aut per praecinctionem.

193. Per uindicacionem hoc modo legamus: TITIO, uerbi gratia, HOMINEM STICHIUM DO LENO; sed (et) si alterutrum tuerunt urbe posuit sit, ueluti DO AUT LENO, aequo per uindicacionem legatum est; item, ut magis uisum est, si ita legatum fuerit: SUMMTO, uel ita: SIBI HABETO, uel ita: CAPITO, aequo per uindicacionem legatum est.

1. So V. omnino most MSS. of Inst. 2, 20 pr.
2. In capitalis, in separate line.
3. So Kräger. altera...V. alterum Klüber.

§§ 187-93] INSTITUTION OF SLAVES. LEGACIES. 121

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 he been alienated, he cannot make creatio 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 creatio, 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 creatio, the period of the creatio 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 creatio with his sanction.

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 him-
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§ 194. Ideo autem per uindicationem legatum appellatur, quia post aditam hereditatem statim ex iure Quiritium res legatarit fit, et si eam rem legaturius ub ab herede ub ab alio quocumque qui eam possidet, petat, uindicare debet, id est intendere suum rem ex iure Quiritium esse. § 195. In eo solo dissentient prudentes, quod Sabinus quidem et Cassius ceterisque nostri praeceptores quod ita legatum sit statim post aditam hereditatem putant fieri legatarii, etiam si ignorant sibi legatum esse [dimissum], red posteaquam scrierit et spreuerit legatum, proinde esse atque si legatum non esset; Nerua uero et Proculus ceterique illius scholae auctores non aliter putant rem legatarii fieri quam si voluerit eam ad se pertinere.

V p. 104 sed hodie, ex diuì Pii Antonini / constitutione, hoc magis iure uti widemur quod Proculo placuit; nam cum legatus fuisset Latinus per uindicationem coloniae, 'Deliberent' inquit 'decuriones, an ad se uelint pertinere, proinde ac si uni legatus esset'. § 196. Eae autem sola ex per uindicationem legantur recte, quae ex iure Quiritium ipsius testatoris sunt. sed eae quidem res quae pondere numero mensura constant, placuit sufficiere si mortis tempore sint ex iure Quiritium testatoris, ueluti uinion, oleum, frumentum, pecuniâ numeratam. ceteras res uero placuit utroque tempore testatoris ex iure Quiritium esse debere, id est et quo faceret testamentum et quo moreretur; alioquin inutilis est legatum.

§ 197. Sed sane hoc ita est iure ciuili. postea uero auctore Nerone Caesare senatusconsultum factum est, quo cautum est ut, si eam rem quisque legauerit quae eius numquam fuerit, proinde utile sit legatum atque si optimo iure relictum esset; optimum autem ius est per damnationem legati,4 quo genere etiam alia res legari potest, sicur inferiorius apparebit. § 198. Sed si quis rem suam legauerit, deinde post testamentum factum eam alienauerit, plerique putant non solum iure ciuili inutilis esse legatum, sed nec ex senatusconsulto confirmari. quod ideo dictum est quia, et si per damnationem aliquid rem suam legauerit eamque postea alienauerit, plerique putant, licet ipso iure debeatur legatum, tamen legatum

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1 So Krüger and Kübler. dimissum et V. sibi legatum demissum esse; posteaquam Mommsen. Cf. Hschwke's preface to his first edition, towards the end; Nordelbd, Gaustudien 84.
2 So Kübler. omiserit Mommsen.
3 legatum V. Cf. Ulp. 24, 112.

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petentem posse per exceptionem doli mali repelli, quasi contra voluntatem defuncti petat. 199. Illud constat, si duobus pluribusque per uindicationem eadem res legata sit, siue coniunctius siue disjunctius, et omnes ueniunt ad legatum, partes ad singulos pertinent et deficientis portionem collegatariorum aderescere. Coniunctum autem ita legatur: TITIO ET SEIO HOMINEM STICHUM DI LEGO; disjunctum ita: L. TITIO HOMINEM STICHUM DI LEGO. SEIO EUNDEM HOMINEM DI LEGO. 200. Illud quaeritur, quod sub condicione per uindicationem legatum est, pendente condicione eius sit. nostrorum praecipit orationis esse putant exemplo statulibera, id est eius serui qui testamento sub aliqua condicioni liber esse iussus est, quem constat iterum hereditatis seruem esse. sed diuerse saeclae auctores putant nullius inteream rem esse; quod multo magis dicunt de eo quod sine condicioni2 pure legatum est, antequam legarius admissit legatum.

201. Per damnationem hoc modo legamus: HERES MEUS STICHUM V p. 106 SERUUM MEUM DARE DAMNAS ESTO. sed et si DATO / scriptum fuerit, per damnationem legatum est. 202. Eoque genere legati etiam alia res legari potest, ita ut heres redimere (rem) et praestare aut aetestimationem eius dare debeat. 203. Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, uelut fructus qui in illo fundo nati erunt, aut quoque ex illa ancilla natam erit. 204. Quod autem ita legatum est, post aditem hereditatem, etiamsi pure legatum est, non ut per uindicationem legatum, continuo legatorio adquiritur, sed nihilominus hereditis est, et idio legato in personam agere debet, id est intendere heredem sibi dare oportere; et tum heres (rem),3 si mancipi sit, mancipio dare aut in iure cedere possessionemque tradere debet; si nec mancipi sit, sufficit si tradiderit. nam si mancipi rem tantum tradiderit nec mancipauerit, usucapione pleno iure fit legatiari. completur autem usucapio, sicut alio quoque loco diximus, mobilium quidem rerum anno, eam uero qua quole solo

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1 estet V. ni Krüger.
2 sine condicione: gloss, P. Krüger.
3 So Kübler. heres si (res) mancipi Krüger.


less 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 accures 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 slave.' 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 statutliber, 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
tenetur\textsuperscript{1} biennio. \textbf{205.} Est et illa differentia huius \textit{(et)} per vindicationem legati, quod si eadem res duobus pluribusque per damnationem legata sit, siquidem coniunctim, plane singulis partes debentur, sicut in illo \textit{(per)} vindicationem legato \textit{diximus}, si uero\textsuperscript{2} disiunctim, singulis solidum debetur.\textsuperscript{3} Ita fit / ut scilicet heres alteri rem, alteri aestimationem eius praestare debet. et in coniunctis deficientis portio non ad collegatarium pertinet, sed in hereditate remanet.

\textbf{206.} Quod autem diximus deficientis portionem \textit{in} per damnationem quidem legato in hereditate retineri, in per vindicationem uero collegatario ad crescere, admonendi sumus ante legem Papiam \textit{hoc} iure ciuili ita fuisse; post legem uero Papiam deficientis portio caduca fit et ad eos pertinet qui in eo testamento liberos habent.

\textbf{207.} Et quamuis prima causa sit in caducis uindicandis heredum liberos habentium, deinde, si heredes liberos non habeant, legatariorum liberos habentium, tamen ipsa lega Papia significatur, ut collegatarius coniunctus, si liberos habeat, potior sit hereditus, etiamsi liberos habeatur. \textbf{208.} Sed plerisque placuit, quantum ad hoc ius quod lega Papia coniunctis constituitur, nihil interesse utrum per vindicationem an per damnationem legatum sit.

\textbf{209.} Sinendus modo ita legamus: \textit{HERES MEUS DAMNAS ESTO SINERE L. TITIUM HOMINEM STICHIUM SUMERE SIBIQUE HABERE.}

\textbf{210.} Quod genus legati plus quidem habet \textit{(quam)} per vindicationem legatum, minus autem quam per damnationem. nam eo modo non solum suam rem / testator utiliter legaret potest, sed etiam heredis sui; cum aliquo per uindicandam nisi suam rem legaret non potest, per damnationem autem cuiuslibet extranei rem legaret potest. \textbf{211.} Sed siquidem mortis testatoris tempore res uel ipsius testatoris sit uel heredis, plane utile legatum est, etiamsi testamenti faciendi tempore neutris fuerit. \textbf{212.} Quodsi post mortem testatoris ea res heredis esse coeperit, quaeritur an utile sit legatum. et plerique putant inutile esse. quid ergo est? licet aliquis eam rem legauerit, quae neque eius uquam fuerit neque postea heredis eius uquam esse coeperit, ex senatusconsulto Neronianio proinde uidetur ac si per damnationem relictu esset.

\textsuperscript{1} So Krüger. \textit{teneatur} V.
\textsuperscript{2} So (om. \textit{illo}) Kübler. \textit{sicut in illo uindicato legat (a letters illegible) / ro V. sicut in illo \textit{(quod per)} uindicationem legatum est. si uero Krüger.
\textsuperscript{3} So Krüger. \textit{solidae desunt} V. \textit{solida debetur} Kübler.

THE INSTITUTES
OF GAIUS

Part II
COMMENTARY

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of which he had no power to deprive him. The only manumission of a slave in this position that the praetor allowed to have practical effect was one performed by his bonitary owner. This made the slave *de facto* free, because the praetor would not allow the bonitary owner to go back on the manumission and continued to paralyse the civil rights of the Quiritary owner. The slave was thus *in libertate* but not *liber:* only manumission by his Quiritary owner could make him that.

(ii) The three old forms of manumission were cumbersome and expensive (5 per cent. tax). The praetor could not give civil effect to other forms, but he could, and did, give the effect above described (*in libertate esse*) to new customary forms. It has been shown that in classical times he recognized only two such forms, namely grants of freedom declared by letter (*per epistulam*) or before witnesses (*inter amicos*). Other customary forms grew up later, for instance *consuuii adhibito*, i.e. inviting the slave to sit at table with the free guests.2

(c) Legislation. Three statutes of the beginning of the Empire are mentioned.

*L. Iunia.* Its exact date is uncertain. *Inst.* 1, 5, 3 calls it *Iunia Norbana,* which suggests A.D. 19, but a date before the *L. Aelia Sentia* (A.D. 4) is at least as probable (§§ 17–18) and to assume this simplifies treatment.3 This lex conferred on the two above-mentioned classes of persons who were *in libertate tuitione praetoris* a civil law status, that of Latins, but with considerable restrictions: hence their name of Roman *Iuniani* (§ 22; 3, 50).

*L. Fufia Cannia* (2 B.C.). This is sufficiently explained by the text (§§ 42–46).

*L. Aelia Sentia* (A.D. 4). Four of its provisions4 are mentioned here. (i) If a slave was manumitted below the age of 30, he was not to become a *ciuis,* but only a Junian Latin, unless the manumission was performed *sin dacta* after proof of a proper motive before a *consilium* (§§ 16. 18 sq.) or unless it was *testamento* for the purpose of providing an insolvent master with a *heres* (§ 21). (ii) Manumission by a master under 20 was made absolutely void unless it was performed *sin dacta* after proof before a *consilium* as in the previous case (§§ 38 sq.). This applied equally to civil and praetorian methods of manumission (§ 41). (iii) Manumissions in fraud of creditors or a patron (successoral rights) were also to be void (§ 37; 2, 154; *Inst.* 1, 6, 1). (iv) Criminosi

1 Wlassuk, *SZ* 1905, 367; Buckland, *RH* 1908, 234.  
2 *Epit.* 1, 1, 2.  
5 Cf. 2, 153–5.

§§ 11–47]  

slaves (§ 13) if manumitted were to have only the status of *peregrini deditici.*

*Tria genera libertinorum* (§ 12). From all this there emerge three classes of freedmen.

(i) The *ciuis Romanae libertus* had under the Republic been under some political inferiorities and had been excluded from marriage with *ingenius.* Under the Empire the political disabilities ceased to matter, and by a *L. Iulia* of 18 B.C. a *libertus* was allowed to marry any one except a person of senatorial rank. The serious difference that remained between a *ciuis libertus* and an *ingenius* was the tie binding the *libertus* to his former master, his patron. This tie was transmitted to the patron’s male descendants, but not to the descendants of the *libertus.* Legal results of this relation will be mentioned in connexion with *tutela* (§ 165), a special form of the verbal contract (3, 96), succession to *libert* (3, 39 sq.) and procedure (4, 46 &c.).

(ii) *Latini Iuniani.* The privileges enjoyed by members of the cities of the Latin League until it was dissolved in 338 B.C. still existed under the Empire for citizens of Latin colonies in the provinces (§ 96) in a somewhat less beneficial form, whence the contrast *Latini uterque* and *coloniarum.* In private law *Latinin col.* had the *ius commercii,* but not the *ius conubii.* Their lack of *conubium* meant that their marriages even with Roman citizens were not *ius instalium* (§ 55), their possession of *commercium* that they were capable of the forms of conveyance and contract regarded as peculiar to *ciuies* and even of making, taking under, and witnessing a Roman will. The general position of the new Latins created by the *L. Iunia,* the *Latini Iuniani,* was the same during their lifetime, except that the *L. Iunia* forbade them to make or to take (directly) under a Roman will (1, 23, 24; 2, 275). But their freedom under the *L. Iunia,* like their *de facto* liberty previously under the Edict, expired at their death.1 Hence property left by them was treated as the *peculium* of a slave (§ 58 sq.). The status of their children would depend on that of the mother.

(iii) *Deditici.*2 The *L. Aelia Sentia* placed criminous slaves on manumission *dedicticiorum numero,* i.e. confined them to the status possessed by members of communities that had surrendered to Rome, but whose constitutions had never been recognized by her. Freedmen of this class, as *being peregrini,* had access to all institutions of the *ius gentium,* but as not being members of any *ciuies* had no power to

1 *Inst.* 3, 7, 4: licet ut liber utam suam peragebant, attamen ipso ultimo spiritu simul animam atque libertatem amitterent.  
make or take under any kind of will. Succession to their property on their death depended on the form under which they had been manumitted (3, 74–76). No avenue to citizenship was open to them, and if they took up residence within the hundredth milestone of Rome, they fell back into permanent slavery. They and their class seem to have been expressly excluded by Caracalla from his grant of citizenship to all free men in 212.

Promotion of Junian Latins to cius. The disabilities of Junian Latins account for the attention paid (§§ 28 sq.) to the various ways in which they could become cius, but of these only anniculi probatio (§§ 29 sq.) and iteratio (§ 35) possess juristic interest. Ann. probatio is a creation of the L. Aelius Sentia. Iteratio means repetition of manumission, and this time free from the impediment that had prevented the slave from becoming cius by the first manumission.

§§ 48–51. Classification of persons as sui or alieni iuris

We have finished with the first classification of persons (§§ 9–11) and pass to a second which will occupy us till § 141. The subheads in potestate manu mancipiuse are not exhaustive. They omit not only the obsolete nexiti but the generally important actuorati (3, 199) and redempti, but also the more important iudicati. These last are mentioned elsewhere (3, 78. 189. 199; 4, 21), but only incidentally and insufficiently.

§§ 52–54. Dominica potestas

Gaius does not define slavery, but is content to mention the two aspects of dominica potestas, absolute power over the slave’s person and absorption of his economic capacity. The slave was an article of property, a res corporalis (2, 13), but inevitably his manhood was recognized. The classical enactments (§ 53) protecting him from outrageous ill treatment may, indeed, be compared with legislation against cruelty to animals. More decisive is his capacity to be manumitted and, in spite of his incapacity to marry, a certain recognition of his

1 Ulp. 30, 14: ... quoniam nec quasi cius Romanus testari potest, cum est peregrinus, nec quasi peregrinus, quoniam nullius certas ciusitatis cius est, ut secundum leges ciusitatis suae testetur.


3 Below, p. 143.

4 Girard 142.

5 Buckland 61 ff.

§ 55. Patria potestas

Gaius’ main concern is with the sources of patria potestas. The chief source is birth ex iustis nuptiis. This stated (§ 53), we are led to consider iustae nuptiae (§§ 56–64) and thereafter the cases in which children are brought up p. pot. by events after birth, a disquisition which digresses into the general question of the status of children at birth (§§ 65–96). At length we come to the second great source, adoption (§§ 97–107). The termination of patria potestas is dealt with along with that of the other forms of adoption (§§ 124 sq.).

Patria potestas. In public law the position of sons and daughters (liberi) had always been very different from that of slaves, and even in private law there had always been the immense difference that the death of the materfamilias (pf) rendered the liberi independent. But during his lifetime there was in private law little or no difference simply because inside the family the sole law was the will of the pf. Gradually the law penetrated into the family and differentiated various classes of dependants. Some traces of the original lack of differentiation survive in our text. In the ceremony of adoption (§ 134) we find the form of an ordinary action to recover property applied to liberi. An actio furti in respect of liberi was still a possibility (3, 199). A pf. could still convey his son by mancipatio, though only in mancipii causam (1, 117; 4, 79) and not as of old trans Tiberim (out of the State) into slavery.

But in Gaius’ time the father’s powers over the persons of liberi (originally unlimited, though tempered by the family council and the censor) had been brought under legal control. His complete absorption of their economic productivity had, however, as yet been little impaired. The same principles still applied as in the case of a slave (2, 86 sq.; 3, 163 sq.), except in respect of a son’s acquisitions as a soldier


2 Below, p. 66.
§§ 56–64. Iustae Nuptiae

Gaius’ concern is with iustae nuptiae as a source of pat. pot. and therefore primarily with marriages in which the husband was a Roman, since a non-Roman father could not have pat. pot. (§ 55). The only requisite of iustae nuptiae that he deals with is conubium. Other requisites were that the parties should be of marriageable age and that they and their patresfam., if any, should consent (Inst. 1, 10 pr.).

Conubium. Besides cives only privileged peregrini (not in general Latini) had the ius conubii. Only marriage between persons having the ius con. was iustae nuptiae, and necessarily such. If both parties were cives the children were Romans and in the husband’s potestas, and the children followed his civic status and were under the family law of his civitas.

But conubium covers more than general capacity for iustae nuptiae; parties might possess that and yet not have conubium inter se. Till the L. Camuleia of 445 B.C. patricians and plebeians had not conubium with each other, and till the beginning of the Empire freeborn and freed could not intermarry. Another bar was consanguinity, that is, kinship up to a certain degree traced through females as well as through males (cognatio as opposed to agnatio). The originally wide ambit of this impediment had been much reduced by the time of Gaius. What he says (§§ 59 sq.) comes to this, that an descendant could not marry a descendant and that collaterals could not intermarry if either of them was only one degree removed from the common ancestor. Thus an aunt

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1 Mentioned in 2, 106 and probably in 2, 111.
2 Hadrian enacted that this should be so even if he had not conubium: § 77.
3 Corbett, Roman Law of Marriage, 90 ff.
4 But see now Volterra, La conception du mariage d’après les jurisistes romains, Padua 1946.
5 Tabulae nuptiales seem to have been customary, but only one fragment has as yet been discovered: Fontes 3, no. 17, with literature, especially Wenger, Sb. Ak. Wien 219, 1, 1943. There would also usually have been previous sponsalia, festinantia nuptiarum, and des.
obligations were originally so strictly personal that they were extinguished by the death of the creditor or the debtor. But this is a prehistorical question. In historical times it was as much a matter of course that an hereditas should comprise the obligations owed to and by the deceased as that it should comprise his res corporales; moreover the liability of the heres for the deceased’s debts was not limited to the hereditary assets. With certain exceptions (cf. 4, 112–13) hereditas was in very truth a successio in uniuersum ius.

Nature of hereditas: hereditas iacent. As usual Gaius is primarily occupied with the question of acquisition, which in this matter reduces itself to the question who is heres. We can gather no more of his conception of hereditas than that he regarded it as a distinct right, a ius successionis, which was a res incorporalis not to be confounded with the res corporales which it might contain (§ 14), but nevertheless susceptible in earlier times of being acquired by usucaepio (§ 54) and still in some cases of being ceded in iure (2, 34–37; 3, 85–87). Gaius would have been forced to a closer consideration if he had had occasion to treat of hereditas iacent, i.e. of the position that arose when a man died leaving no suus or necessarius heres and the hereditas lay vacant and ownerless until the heres extraneus, if any, accepted it. The subject, which is difficult and complicated, thus lies outside a commentary on the Institutes, but it cannot be completely ignored. During the interval between death and aditio the estate could not be stationary: the activities of slaves were bound to produce gains and losses for which a subject of inheritance and incidence had to be found. Roman jurisprudence found it in the hereditas itself, a solution which modern jurisprudence would describe as a personification of the hereditas. There are texts which come near to saying as much, but in classical and even later times persona had not acquired its modern technical meaning. The expedient adopted was to regard the hereditas iacent as representing according to one view the persona of the deceased, according to another that of the heres. On the whole (in plerisque) Justinian favoured the former view (e.g. Inst. 3, 17 pr.).

Hereditas ex testamento and ab intestato. In our view, though there is great modern authority to the contrary, intestate succession is older than testamentary. But Gaius takes testamentary succession first, and this is the practical order, since the first thing to be ascer-

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2 Cf. above, p. 71.
3 Cf. Buckley 306 ff., with literature, to which add Bortolucci, BIDR 42, 150; 43, 128; Albertario, ibid. 42, 550.

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§§ 101–8. The Civil Law Forms of Will

Gaius’ account is confirmed by Aulus Gellius (15, 27): In libro Laelii Felicis ad Q. Mucium primo scriptum est Labennon scribere ‘calata’ comitia esse quae pro conlegio pontificum habentur aut regis aut flaminum inaugurandorum causa. . . . ‘Curia’ per licorem curatum ‘calari’, id est ‘conuocari’, . . . ‘Iudicium’ quae ‘calata’ appellari diximus et sacrorum deestato et testamenta fieri solemunt. Tria enim genera testamentorum fuisset accepimus: unum quod calatis comitibus in populis constitutis fieret, alterum in procinctu, cum uiri ad proelium faciendum in aciem vocabantur, tertium per familiae [e]mancipationem, cui aet et libera adhibetur.

There being little other direct evidence the early history of the Roman will is largely conjectural and the conjectures of the authorities differ widely. We shall state with little detail or argument the conclusions that seem to us the most probable.

A. The Will in procinctu (§ 101)¹

We dispose of this first as standing outside the main development. It was a declaration made by a soldier before an impending battle. The best explanation is that the exercitus was taken as representing the comitia, but whether the declaration was made before an assembly of the whole army on the eve of battle or before the soldier’s neighbours in the ranks just before the joining of battle cannot be determined. In either case there would be no possibility of control being exercised by either pontifices or populus, so that the form can have amounted to no more than a witnessing and the wills can only have

² Siber, SZ 1937, 248.
been very simple. There is evidence of its existence as late as 150 B.C., but Cicero speaks of it as obsolete.

B. The Comititial Will (§ 101)

Meetings of the comitia curiata, under the style of comitia calata, were held twice a year² for religious business. This included adrogations³ and the making of wills.

Form. There is no direct evidence. One view is that a testamentum, like an adrogatio, was embodied in a lex of the comitia, but there are undeniable grounds⁴ for thinking that the function of the comitia may have been simply to witness. We prefer the first view, but the difference is not great. Witnessing by the comitia would carry public recognition and guarantee; on the other hand, if we assume a lex, it would probably become a formality, as in adrogatio. The important point is that in both cases there would be pontifical control. A lex would have to be proposed by the presiding officer, presumably the pontifex maximus, whose proposition the comitia could reject but not amend, but even if the comitia merely witnessed, pontifical control of a solemn act affecting the sacra performed at the comitia calata can be taken for granted.

Contents. The essential and only necessary disposition of this will was hereditis institutio, i.e. the nomination of a universal successor. If it were not for the authority of the dissenter⁶ one would think the arguments for this statement to be decisive. There is the analogy of adrogatio. There is the fact that hereditas and responsibility for sacra were inseparable and that, unless the will affected the devolution of this responsibility, its execution would not concern the comitia calata. Lastly, hereditis institutio cannot be a native product of familiae mancipatio; the necessity for it in the form of testamentum later derived from fam. manc.⁷ must be an importation from outside. We can only conclude that the principle that hereditis institutio was caput et fundamentum testamenti (§ 229) must have been laid down long previously by the pontifices for the only known testamentum, the comitial, and that when fam. manc. was transformed into a genuine testamentum it had to conform to the settled conception of a testamentum.

Another principle of the classical will that must, we hold, be traced to the same source is ex heredatio, i.e. the principle that sui heredes of the testator whom he was not instituting as heredes must be excluded from being heredes by (more or less) express words.¹ It is probable that the heredes instituted by the earliest wills were usually sui heredes, in which case the testator's main purpose would be to exclude other sui heredes either because of their incapacity or in order to avoid a possibly disastrous morellemente of the family estate.² He instituted as heredes the most suitable of his sui, but the pontifices showed a sound legal instinct by insisting that the disinheritance of the others, who even in the testator's lifetime were in a sense dominii (§ 157 &c.), should be express and not merely implied. This requirement, like heredis inst., became firmly established and was carried over into the later form of will. Whether the history of yet another principle, nemo pro parte testatus, pro parte intestatus moritur, was the same is not so certain. It seems probable.

Further contents of the comititial will. Besides heredis institutio and any necessary exheredations a comititial will could contain nominations of tutors and muniments,² but any further contents are a matter of speculation. It has been argued¹ that the effects of legacies per unificationem and per damnationem (§§ 193 sq., 201 sq.) are such that they must have originated in the comititial will.

Early obsolescence. Our uncertainties about the comititial will are due to its having died out pretty early, exactly when cannot be said, but Cicero³ implies that in about 150 B.C. it was obsolete.

C. The Will per aes et libram (§ 102 sq.)

On the history of this form Gaius is practically our sole evidence. The formulae reported by him (§ 104) are those in use in his own day, but though they are not in their earliest state, certain developments being obvious, they bear witness to what must originally have been the essential structure of mancipatio applied to testamentary purposes. Gaius' own account of the evolution of the classical will amounts to little more than what could be deduced from the formulae. Like him we distinguish two main phases in the evolution.

² Cf. 3, 1 30.
³ XII. Tabl. 5, 6; 7, 12: Texte 14, 17; Brun 1, 23, 28; Fontes 1, 19, 51.
⁴ c.g. by Girard 969.
⁵ De or. 1, 53.
First phase. Let us provisionally draw the conclusions which would follow from the application of later, but still quite early, law to our data. The familiae emptor, who it is important to note could not be a person in the would-be testator's potestas, acquired the whole estate at once. The supposedly dying man was left with nothing; to imagine deduction of usufruct in his favour would be a flagrant anachronism. If he recovered, remanicipation to him would naturally be possible and may have been compellable. If he died, the f.e. according to Gaius hereditis locum optinebat, but this cannot be taken literally. The f.e. resembled a heres in acquiring the whole estate and in being subject to duties of distribution, which one is at liberty to suppose to have been or to have become legally enforceable, but being already owner he could not become heres. The decisive question is, what happened to the sacra? We can only guess the answer. The deceased may have provided for them in his instructions to the f.e.; the pontifices are likely to have tied them to the assets. But in the state of our information we are bound to assume that the deceased's sui heredes, if he had any, were still his heredes; we cannot assume that they could be exheredated either expressly or impliedly by the familiae mancipatio.

On this showing familiae mancipatio began as a makeshift; it was not a testamentum, but a device for doing without one, the sort of device that is always required when a will is impossible. But it may not have been so crude a device as the logic of later law makes it seem. Most unfortunately our text of the f.e.'s formula (§ 104) is defective, but, as we read it, it substitutes for the usual ex iure Quiritium meum esse ais the qualified claim eno mandatela tuo custodelaque mea esse ais. This is clearly significant, but the fact remains that the formula ends with an emptio and that the speaker became emptor. There was therefore alienation, but whether the early prudentes thought of the f.e. as becoming dominus ex iure Quiritium as distinctly as we think of a trustee as being legal owner may well be doubted. The black and white of later jurisprudence may at times misinterpret primitive institutions.

Second phase. At an indeterminable date, after the Twelve Tables, familiae mancipatio was turned into a true will of the Roman pattern. The evolution is very curious. One might have expected the f.e. to develop into a heres; that might well have come about by custom but for the objection that the form of mancipation prevented a suis heres from being f.e. What actually happened was that the whole transaction was denatured and the mancipation reduced to an utterly empty form. The estate no longer went even momentarily to the f.e., but (subject of course to adito where required) vested after the testator's death, and not sooner, directly in the person designated as heres by the testator's nuncipatio. So radical a change cannot have been the slow work of custom alone. One might as well say in English legal history that uses gradually came to be considered executed. Thus the inference that there was some Roman equivalent of the Statute of Uses seems certain a priori, and it is strongly confirmed by the f.e.'s declaration (§ 104) that he is taking the mancipation quo tu iure testamentum facere possis secundum legem publicam.

The lex referred to is almost certainly some clause of the Twelve Tables, the lex per eminentiam of early speech (Ulp. 11, 3). Only one relevant clause is ever quoted, and we may be confident that there was no other that could be quoted. It comes to us in various versions; that given by § 224 runs: uti legasit suae rei, ita ius esto. The precise wording need not trouble us, since the variants are as to what might be 'legated'. Modern opinion is pretty well agreed that originally this was the pecunia or privy property of the paterfamilias, to the exclusion of the familia or family property. One can understand that, when the régime of familia had died out and the pf. had become absolute owner of familia and pecunia alike, the clause could be interpreted as covering the whole estate and would be likely to be misquoted accordingly. The really crucial question is: how could the word legare come to be interpreted as covering hereditis institutio?

Speculation as to what the decemvirs meant by legare is not a hopeful enterprise; what follows is merely tentative. It is improbable that they used the word in its sole classical technical sense of a gift charged by testamentum on a heres; if they did, the clause must have referred to the only existing testamentum, that made calatis comitiis. More probably the word bore at that date a wider sense, nearer to its primary meaning of 'appointing to a duty or 'commissioning'. The device of a conveyance inter vivos with post mortem instructions (legata), so natural where a will is impossible, is likely to have been resorted to at a very early date, though not at first in the form of a comprehensive mancipatio familiae (§ 102). The decemvirs may have thought good to give direct legal effect to such legata so far as they

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1 XII Tab. 5, 3: uti legasit super pecunia tutela suo rei, ita ius esto is the version preferred by Textor 14, Bruna 1, 23 and Fontes 1, 37, where the variants are given. Cf. however, Wissak, St. z. altirn. Brd. -und Vermönnischrecht 9 n. 6. 14 ff.
2 According to Wissak, i.e., the res sua as opposed to non sua.
3 Cf. above, p. 57.
deal with pecunia. Later, when the distinction between familia and pecunia disappeared, it became possible to understand the clause as covering the whole estate. This would enable a pf. to make a will in our sense, but not, unless he was allowed to include heredis institutio in his 'legata', a Roman testamentum, not the will desired by national sentiment and sanctioned by the tradition of the comital will. Our hypothesis obliges us to suppose the acceptance of an abusive interpretation of legare, a very bold interpretation, but not, we submit, inconceivable if the word had as yet no very definite technical sense. Pomponius at any rate does not blush, and that Gaius (§ 224) appears more cautious may be due to the context.

Explain it as we may, this transformation of the instructions given by the would-be testator in his nuncupatio is a matter of historical fact. Somehow mancipatio familiae was turned into a true testamentum, in which heredis institutio was not only possible, but indispensable. Though it displaced the comital will owing to its greater convenience, it was subjected to its fundamental rules.

Another notable development was that it became allowable for the testator to declare the terms of his will by referring in his nuncupatio to a document (tabulae testamenti) containing them, instead of announcing them orally (§ 104). Oral announcement always remained possible (Inst. 2, 10, 14), but for practical purposes the tabulae testamenti, authenticated by the seals of the f.e., the libripens, and the five witnesses of the mancipation, became the normal will, though it was unduly long before the formal familiae mancipatio and nuncupatio were rendered legally negligible; ultimately they disappeared.

Qualification of witnesses (§§ 105-8). The rules laid down are survivals from the time when the mancipation was a reality and illustrate Roman conservatism in an extreme form. They were brought up to date in later law (Inst. 2, 10, 5-11).

§§ 109-11. The Military Will

By sporadic ordinances which go back to Caesar the Emperors freed the wills of soldiers from all formalities of execution (§ 114). A definite regulation by Trajan was incorporated in the standing mandata to provincial governors. Inst. 2, 11 provides sufficient commentary.

1 D. 50, 16, 126: Verbis legis duodecim tabulorum his 'uti legavit sua rei, ita ius esto' latissima potentias tributa widetur et heredis institutio est legata et libertates dandi, tutoque quaque constitutendi.
3 Below, p. 95.
4 Ulp. D. 29, 1, 1 pr.

§ 109-11. The Military Will

The privilege was not confined to exemption from the formalities of execution; there were further indulgences, but our text, so far as it survives, tells us only that certain classes of persons incapable of taking under a normal will could take under a soldier’s. These will be mentioned below (at §§ 114-17).

§§ 112-13. Capacity to make a Will

The loss of nearly three pages of V between our §§ 111 and 112 leaves us with only a small fragment on capacity to make a will, which, to judge by Epit. 2, 2, Ulp. 20, 10 sq., and Inst. 2, 12, was Gaius’ next subject. To make a Roman testamentum one had to have the ius commerci: this excluded interdicted prodigals (Ulp. 20, 13) and, in general, peregrini, but not Latins; the incapacity of Junian Latins was statutory. A dumb man was excluded by the fact that he could not utter the nuncupatio, a deaf man by his not being able to hear the familiae emptor (Ulp. 20, 13). The testator had to have a patrimonium: this excluded all persons alieni iuris, servile or free, except sons possessed of peculium castrense (§ 106; cf. Inst. 2, 12 pr.). Lack of intellectus disabled furosi (Inst. 2, 12, 1; cf. 3, 106), immaturity impuberes, i.e. males below 14 and females below 12 (§ 113). A woman sui iuris above 12 could make a will with her tutor’s auctoritas, which she could compel him to give unless he was her patron or her parens manumissor (§ 122). But until Hadrian abolished it (§ 112; 1, 115), wills of ingeniae other than Vestals had been subject to the further requirement that the testatrix should have previously made a coemptio. The motive of this, to judge by its inapplicability to freedwomen (3, 43), must have been to protect the woman’s agnates: after a coemptio she would have none.

§§ 114-17. Heredis Institutio

After a recapitulation we pass to a further condition of initial validity, heredis institutio. This was the one indispensable disposition in every will: heredis institutio velut caput et fundamentum intellegitur totius testamenti (§ 229). A will containing no valid institution was void; there was a total intestacy; all other dispositions in it, such as legacies, manumissions, and nominations of tutors, failed. But there was a strong sentiment against intestacy, and this explains the marked tendency, when an institutio was combined with a legally incompatible
provision, to save the *institutio* by striking out the offending provision.

The *institutus* had to be capable (passive *testamenti factio*), and that, speaking generally, at the moment both of the making of the will and of death. The following were incapable: (i) *peregrini*, including of course *deutilicii*, as not having the *ius commercii*, (ii) women; by the *L. Vocationis* (169 B.C.) they were incapacitated from being instituted by testators classed in the *census* as having more than 100,000 asses, but in spite of § 274 this law was no longer in application, presumably owing to the *census* having become obsolete from the beginning of the Empire, (iii) *incertae personae* (§§ 242, 287), explained below (§ 238 sq.); these included *postumi*, but by the time of Gaius only *postumi alieni*, *sui* having been rendered capable by a progressive movement, (iv) municipalities and other corporate bodies, apart from special privilege, perhaps because they were regarded as being *incertae personae* (Ulp. 22, 5), but they could take a *fideicommissa hereditas* and legacies, and could even be instituted by their *liberti*, (v) *servi sui* and *alieni* could be instituted, but subject to conditions to be examined later (§§ 153 sq., 185 sq.).

The incapacities of Junian Latins and of *caelites* and *orbi* (§§ 110–11) were of a different order. Junian Latins could be validly instituted, but were disqualified by the *L. Junia* from becoming heredes if they did not become *ciues* before the time for acceptance of the *hereditas* had run out. *Caelites* (unmarried males above 25, females above 20) were placed in a similar position by the Augustan *L. Iulia et Papia Poppaea* (§ 286), while *orbi* (childless married persons) could take only half of what was left to them (§ 286 a).

It was essential that the *institutio* should be made *solemni more*, in approved words (§ 117). *Exheredationes* preceding it were valid, but legacies, *muniamissions*, and perhaps *tutoris datio* so placed were void (§§ 229–31). The placing of *fideicommissa*, which were outside the civil law, was a matter of indifference (§ 269? Ulp. 25, 8).

**Conditions and terms.** It was not possible to make the *hereditas* pass away from the instituted *heres* at some future date (resolutive *dies*) or in some future event (resolutive *condicio*); the *dies* or *condicio* was struck out and the *institutio* was absolute: *semel heres semper heres*. A provision suspending the taking effect of the *institutio* till a definite date (*dies certus*) was similarly treated, but suspension till the happening of a future event that might never happen (resolutive *condicio*) or

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1 On impossibility cf. Buckland 297.
2 Details: Buckland 292–3.
3 Complications Buckland 296.
4 Girard 845, n. 2.
why Gaius does not treat of the results of marriage as such apart from manus (§§ 108 sqq.). The only result to which he attends is that which in Roman eyes was the chief object of iustae nuptiae, namely the procreation of children who should be in patria potestate. There were, however, other results, especially the possibility of dos; the omission of which by Gaius may perhaps be considered a serious defect.\(^3\)

§§ 65–66. Patera Potestas over One’s Offspring arising after Birth

Children not born in one’s potestas might be brought under it by (i) amniculi probatio under the L. Aelia Sentia (§§ 29, 30, 66); (ii) erroris causa probatio (§§ 67–75, 87); (iii) imperial grant of ciuitas to a non-Roman father, provided that this was accompanied by express concession of potestas over children already born or conceived (§§ 55, 93, 94); (iv) ius Latii (§§ 95–96).

§§ 67–75. Erroris Causae Probatio

Mistakes as to one’s own status or that of the person one was marrying were easily made and might be disastrous. A sentiaconsult of unknown date gave relief in cases mentioned by our text on condition that the mistake (presumably a reasonable one) was proved and a child had been born. In general one of the parties must have been a ciuis, and the relief consisted in giving ciuitas to the other party and the child, and potestas over the child to the father; but of course a dedi- cius could not be given either ciuitas or potestas (§ 68 fn.). Where the effect of the mistake was to prevent a marriage from complying with the L. Aelia Sentia and thus opening the way to amniculi probatio, the child had to be one year old; in this case neither party need have been a ciuis, but one of them must have been a Latin. There are some lacunae and other difficulties in these sections; in § 71 Huchse’s correction is tempting.\(^5\)

§§ 76–96. Status of Children at Birth

We pass on to a general discussion of this wider subject. The basic principles were\(^6\) that the children of iustae nuptiae inherited their father’s status at the time of conception (rule of the ius ciuile) and that

children of any other union inherited that of their mother at the time of birth (rule of the ius gentium).\(^1\) But the L. Minicia (date unknown) departed from principle by providing that where one parent was a Roman and the other a peregrine not enjoying conubium, the child of their marriage should be a peregrine. Our text, however, is defective (§ 78). Obviously the law was superfluous where Romani married an unprivileged peregrina and was only required where Romana married an unprivileged peregrinus.

We pass (§§ 79–81) to mixed marriages of Latins. Gaius seems to have held (§ 79) that the Latins of his day were not peregrini within the meaning of the L. Minicia and that therefore the child of Latinus and Romana would be born a ciuis. Against this it had been ingeniously objected that the L. Aelia Sentia created conubium between parties marrying in compliance with it and that consequently in such a case the child of Latinus and Romana took the status of its father. But the objection was overruled by Hadrian (§ 86). The same Emperor further laid down that the offspring of Latins and peregrini should inherit their mother’s status, as, indeed, would result from the ius gentium (§ 81).

The digression which follows (§§ 82 sqq.) on the inheritance of the status of libertas to some extent makes good the meagre treatment of servitus (§§ 9, 52). If one parent was a slave and the other free, there could be no marriage at all. The rule of the ius gentium applied: the child was born free or a slave according as its mother was free or a slave at the moment of its birth. Some exceptions are mentioned,\(^2\) notably that under the SC. Claudianum, which also provides one of the rare cases of enslavement of a ciuis (§§ 91, 160; Inst. 3, 12, 1). It is pointed out incidentally (§ 87) that the Roman son of a Roman father would be in potestas only if he derived his citizenship from his father; he might acquire it through his mother, e.g., if she became a ciuis while pregnant (§§ 88–92. 94). This brings up the point that an imperial grant of ciuitas to a father and his children did not give them potestas over his existing children unless that, too, was expressly granted (§§ 93–94). The digression ends with a note on the ius Latii (§§ 95–96).

§§ 97–107. Adoption

Adoption in the wide sense covers adrogatiu, i.e. the adoption of a person sui iuris, as well as adoption in the narrower sense, i.e. that of a person already in pot. pot.

Adoption proper. By a complicated ceremony, described later in

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\(^1\) Below, p. 38.
\(^2\) Contrast Ulp. 6.
\(^3\) Above, p. 8.
\(^4\) Admirably summarized by Buckland 96.
\(^5\) See notes to text, Part I, p. 22.
\(^6\) Cf. Ulp. 5, 8–10.
moment of his death. However, the whole rule was abrogated by Justinian.

**Vesting and operation of legacies.** *Dies legati cedit* means that the legacy has vested, so that, if the legatee now dies, his *heres* can claim it, unless the gift was of a right terminating at the donee's death. In Gaius' day, owing to the *L. Papia, dies cedit* on the opening of the *tabulae testamenti* (Ulp. 24, 31), but Justinian restored the older rule that *dies cedit* on the death of the testator. *Dies uenit* means that the legacy is now recoverable from the *heres*. This occurred when the *hereditas* vested, i.e. at the death if the *heres* was *necessarius*, on *adito* if he was *extraneus*, except of course where the legacy was delayed by *condicio* or *dies*.

**Lapse of legacies.** A legacy, though good *ab initio* and contained in a will that took effect, might fail for various reasons, chiefly the legatee's death or loss of capacity before *dies cedens* or his rejection of the gift. The civil law of lapse of a legacy left to a single legatee was that the *heres* benefited, keeping the thing or being relieved of an obligation according to the case. The effect of lapse in the person of one of several joint legatees varied with the form of legacy employed and must therefore be dealt with after the forms have been considered. But the whole law of lapse had been profoundly changed by the Augustan *L. Iulia et Papia Poppaea*, to which, owing to their practical importance, Gaius devotes some attention, but which we shall pass over as having little interest for the ordinary student today.

**Ademptio (Inst. 2, 21).** A legacy could be revoked either by the will or by codicil; the revocation might be by express words (*ademptio*) or be implied by transference to another legatee (*translatio*); but in the latter case there might be a question as to the testator's intention. There could also be revocation operating only by *exceptio doli*, as in the case discussed in § 198 of alienation of the *res legata* by the testator after the will.

### §§ 192–223. The Four Forms of Legacy

**Legatum per unindicationem** (§§ 193–200). The original form was doubtless *do, lego* (cf. § 104), but according to Gaius either word sufficed, and any doubt as to *sumito* or *sibi habeto* or *capito* had disappeared before the end of the classical period (Ulp. 24, 3). This

5. But see further *Inst. 2, 20, 12*. Other cases: Buckland 346; Girard 974.

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legacy operated as a conveyance from the testator direct to the legatee, but the exception to the universality of the *heres* succession is more apparent than real since a *leg. p. u.* was subject to debts and the *L. Falcidius*. The *res corporalis* or other right in *rem* (usufruct, praedial servitude) legated had to belong to the testator *ex iure Quiritium* both when he made his will and when he died, except that ownership at the time of death sufficed in the case of *res quae pondere numero mensuratae constant* (§ 196). The Sabinians held that title to the *res legata* vested in the legatee at once on the *dies uenit*, i.e. on *adito* by the *heres* or on the later fulfilment of a condition, irrespective of the legatee's acceptance or even knowledge, though if he rejected the legacy they treated it as never having been made; pending a condition they laid the title in the *heres* (§§ 195, 200). The Proculians held that title vested in the legatee only on his acceptance and what meanwhile (and pending a condition) the thing was *res nullius* (§ 200). Gaius (§ 195) regards the Proculian view as having been confirmed by a constitution of Antoninus Pius, but it seems that it was the Sabinian view that on the whole ultimately triumphed.

**Legatum per damnationem** (§§ 201–8). The original form must have been *dare damnas esto*, but Gaius (§ 201) allows *dato* and Ulp. (24, 4) also *facito* and *dare iubo*. It transferred no previously existing right to the legatee, but merely imposed an obligation in his favour on the *heres*. It might be to convey to him, and in the best form (§ 204), a *res corporalis* or a lesser right in *rem*, to make over to him a fraction of the net *hereditas* (*partitio legata*: §§ 254 sq.) or the peculium of a slave (*Inst. 20*), to assign to him a debt due to the testator (*legatum nominis*; *Inst. 21*), to release him from a debt that he himself owed the testator (*legatum liberationis*; *Inst. 13*), or in general to render him some service, such as to build him a house (*facito*; Ulp. 24, 4; *Inst. 21*). The only case discussed by Gaius is the obligation to convey (*dare*) a *res corporalis*. Of course this could not be a *res extra commercium* nor yet a thing already belonging to the legatee (*Inst. 4*), but it might be a thing belonging neither to the testator nor the *heres*, but to a third party; the *heres* would have to buy the thing for the legatee or pay him its value if the owner would not sell (§ 202; *Inst. 2*).

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1. There is a curious parallel in English law. Till the *Wills Act, 1837*, a will could operate as regards real estate of freehold tenure only upon that which the testator had at the date of the will, and till the *Land Transfer Act, 1897*, a devise of freehold land operated as a conveyance direct to the devisee.

2. As noted above, p. 5 n. 1, this remark is suspected of being an early post-Gaian addition.

3. Cf., however, S. Romano, *Sull' acquisto del legato 'per iudic.'* (Padua 1933).
§ 4. The legacy might also be of res futurae (§ 203). This wide scope must be a development. The original case was probably that of an obligation dare certam rem or even certam pecuniam. This is made probable by the fact that a legacy per damn. of res quae pendere numero or (perhaps) mensura constant was one of those releasable by solutio per aes et libram (3, 175) and by the further fact that if the legacy was for a res certa (a specific thing or a definite quantity of fungibles), a heres who disposed could be condemned in double (4, 9, 171; cf. § 282–3). From these features some writers infer that the original sanction of a leg. p. d. was manus inietio (sinu damnatus: 4, 21).1

The contrast between these two principal forms of legacy stands out in the respective remedies: on leg. p. u. it was unindicatio (4, 3, 5), on leg. p. d. an actio ex testamento, which was a stricti iuris action in personam (§§ 204, 213) resembling that on a stipulation except that the words ex testamento occurred in the claim (4, 55), and that where the claim was for a res certa, condemnation was in duplum.2

Legatum sinendi modo (§§ 209–15). This meant what it said (§ 209). It amounted to a mild form of leg. p. d. The heres, according to what looks like the better opinion (§ 214), was not bound to convey (dare), but merely to let the legatee take. Such an obligation could apply only to a thing which at the moment of the testator’s death belonged either to him or the heres (§ 210), though a minority opinion brought in things acquired by the heres afterwards (§§ 211–12). Like a leg. p. d. this legacy was enforceable by a stricti iuris action in personam (§ 213), but apparently the formula always claimed an incertum (§ 213) and there was no doubling of damages. According to Julian (§ 280) interest and fructus were recoverable as on a fideicommissum.3

Legatum per praecessionem (§§ 216–23). On the Sabinian view, which probably was historically correct, a legacy in this form (§ 216) was valid only if the legatee was one of several cohereedes, and was enforceable only in the action for partition of the hereditas between them (ao. familiae eriscundeae). Thus the thing legated had to be something falling within the scope of the officium iudicis in that action: it must have belonged to the testator at death, if only by bonitary title (§ 222), with an extension to property he had alienated by fiducia cum creditore (§§ 59–60), which the index in the partition action had power to order to be redeemed at the expense of the estate (§ 220).

The Proculian view, however, was that there was little difference between this form of legacy and one per und. If a legacy per praec.

1 Below, p. 246.
2 Edictum § 170.
3 Below, p. 118.
The first requirement was not severe since, as we have seen, the two principal forms could be expressed in various ways. The second requirement, of an appropriate form, was a greater difficulty. This was removed by a SC. *Neronianum* (A.D. 54–68) which laid down that a legacy that failed because of having been put in an inappropriate form should be treated as if it had been put in the most favourable form (*optimo iure*; § 197; Ulp. 24, 11 a). The commonest defect would be that ownership of the *res legata* was not where the form employed required it to be; consequently the best form for practical purposes was *per damnationem*, which was exempt from any such requirement. It is in connexion with this defect that both Gaius and Ulpian mention the *SC.*, but it had a wider applicability, though this may not have been intended, or at any rate generally realized, at first. Thus Julian (§ 218), correcting Sabinus, held that a *l. p. praec.* to someone not a *heres*, even admitting the Sabinian view that it was void at civil law, was saved by the *SC.*, since it could have been validly made in one of the other forms. He was careful to add that a legacy which would have been invalid however expressed, e.g. one in favour of a *peregrinus*, would not be saved.

Thus after the *SC. Ner.* the validity of a legacy ceased to depend on the correct form being employed, but with some doubt we assume that it remained necessary to employ one or other of the old forms until at length even this was made unnecessary by a constitution of 339. Ultimately Justinian by a constitution of 529 enacted that all legacies should be treated as being of a single kind and be sanctioned by actions both *in rem* and *in personam*. Moreover by a constitution of 531 he fused, so far as that was possible, the law of legacies and *fideicommissa*.

**§§ 224–8. THE LEX FALCIDIA**

*Heredes* were not liable for legacies beyond the net *hereditas*, but to that extent were liable in full at civil law. This might induce a *heres*, if not *necessarius*, to refuse the *hereditas* and thus cause an intestacy, or at least to bargain with the legatees before consenting to *aditio*. The ineffectiveness of the two earlier *leges* mentioned, the *L. Furia* (c. 260 B.C.; § 225: 4, 23–24) and the *L. Voconia* (160 B.C.; §§ 226, 274), is so evident that one doubts whether the protection of *heredes* was their object. At any rate, the definite regulation of the matter came from the *L. Falcidia* of 40 B.C. Gaius merely states the general principle of the *lex*; the account in *Inst. 2*, 22 is fuller and more exact. It was to the effect that legacies were not to be allowed to reduce what remained for the *heredes* to less than a quarter of the *hereditas*. *Hereditas* meant for this purpose its value at the moment of death (*Inst. 2*, § 2), deducting debts, funeral expenses, and the value of slaves manumitted (*Inst. 3*, § 3). The right given to *heredes* applied to them individually: *in singulis hereditibus ratio legis Falcidiae ponenda est* (*Inst. 1* fin.; cf. § 259), each of them being entitled as against the legacies falling on his share to a quarter of his fraction of the *hereditas*, even if the total of all legacies did not exceed three-quarters of the whole *hereditas*. Abatement operated *ipsa iure* and fell on the legacies affected *pro rata*. The testator could not prevent a *heres* from getting his quarter, but he could order that abatement should fall on some legacy or legacies before others. Testamentary manumissions were not interfered with by the *L. Falcidia*; they were regulated by the slightly later *L. Fufia Caninia* (2 B.C.; §§ 228 &c.).

**§§ 229–45. VARIOUS CAUSES OF INVALIDITY OF LEGACIES**
The several topics have already been dealt with incidentally.  

**§ 246. FIDEICOMMISSA**

**Origin of fideicommissa.** Until the beginning of the Empire, if a man requested someone who took a benefit by his death to make over the whole or part of that benefit or its value to someone else, but made the request in a manner not binding at civil law (*non civilibus urbibus, sed precautiue*; Ulp. 25, 1), the resulting *fideicommissum* was of only moral obligation. Augustus, beginning with particular requests made *per salutem eius* and outrageous breaches of faith, ordered the consuls to intervene administratively (*auctoritatem interponere*), and this intervention grew up into a regular jurisdiction for the enforcement of *fideicommissa*, which was eventually entrusted to a special *praetor fideicommissarius*. This new institution, *fideicommissum*, was not praetorian, but in one sense civil; it was, however, no part of the old *ius*