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Medieval Sourcebook: The Institutes, 535 CE

Under the direction of Tribonian, the *Corpus Iurus Civilis* [Body of Civil Law] was issued in three parts, in Latin, at the order of the Emperor Justinian.

The *Codex Justinianus* (529) compiled all of the extant (in Justinian's time) imperial *constitutiones* from the time of Hadrian. It used both the *Codex Theodosianus* and private collections such as the *Codex Gregorianus* and *Codex Hermogenianus*.

The *Digest*, or *Pandects*, was issued in 533, and was a greater achievement: it compiled the writings of the great Roman jurists such as Ulpian along with current edicts. It constituted both the current law of the time, and a turning point in Roman Law: from then on the sometimes contradictory case law of the past was subsumed into an ordered legal system.

The *Institutes* was intended as sort of legal textbook for law schools and included extracts from the two major works. Later, Justinian issued a number of other laws, mostly in Greek, which were called *Novels*.

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Book I. Of Persons

I. Justice and Law.

JUSTICE is the constant and perpetual wish to render every one his due.

1. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.
2. Having explained these general terms, we think we shall commence our exposition of the law of the Roman people most advantageously, if we pursue at first a plain and easy path, and then proceed to explain particular details with the utmost care and exactness. For, if at the outset we overload the mind of the student, while yet new to the subject and unable to bear much, with a multitude and variety of topics, one of two things will happen---we shall either cause him wholly to abandon his studies, or, after great toil, and often after great distrust to himself (the most frequent stumbling block in the way of youth), we shall at last conduct him to the point, to which, if he had been led by an easier road, he might, without great labor, and without any distrust of his own powers, have been sooner conducted.
3. The maxims of law are these: to live honestly, to hurt no one, to give every one his due.
4. The study of law is divided into two branches; that of public and that of private law. Public law regards the government of the Roman empire; private law, the interest of the individuals. We are now to treat of the latter, which is composed of three elements, and consists of precepts belonging to the natural law, to the law of nations, and to the civil law.

II. Natural, Common, and Civil Law.

The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the earth, the air, or the water. Hence comes the union of the male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other animals besides men are considered as having knowledge of this law.

1. Civil law is thus distinguished from the law of nations. Every community governed by laws and customs uses partly its own law, partly laws common to all mankind. The law which a people makes for its own government belongs exclusively to that state and is called the civil law, as being the law of the particular state. But the law which natural reason appoints for all mankind obtains equally among all nations, because all nations make use of it. The people of Rome, then, are governed partly by their own laws, and partly by the laws which are common to all mankind. We will take notice of this distinction as occasion may arise.
2. Civil law takes its name from the state which it governs, as, for instance, from Athens; for it would be very proper to speak of the laws of Solon or Draco as the civil law of Athens. And thus the law which the Roman people make use of is called the civil law of the Romans, or that of the Quirites; for the Romans are called Quirites from Quirinum. But whenever we speak of civil law, without adding the name of any state, we mean our own law; just as the Greeks, when "the poet" is spoken of without any name being expressed, mean the great Homer, and we Romans mean Virgil.

The law of the nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. Wars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature; for by that law all men are originally born free. Further, by the law of nations almost all contracts were at first introduced, as, for instance, buying and selling, letting and hiring, partnership, deposits, loans returnable in kind, and very many others.

3. Our law is written and unwritten, just as among the Greeks some of their laws were written and others were not written. The written part consists of *leges* (lex), *plebiscita*, *senatusconsulta*, *constitutiones* of emperors, *edicta* of magistrates, and *responsa* of jurists [*i.e.*, jurists].

4. A *lex* is that which was enacted by the Roman people on its being proposed by a senatorian magistrate, as a consul. A *plebiscitum* is that which was enacted by the plebs on its being proposed by a plebeian magistrate, as a tribune. The plebs differ from the people as a species from its genus, for all the citizens, including patricians and senators, are comprehended in the *populi* (people); but the plebs only included citizens [who were] not patricians or senators. *Plebiscita*, after the Hortensian law had been passed, began to have the same force as *leges*.

5. A *senatusconsultum* is that which the senate commands or appoints: for, when the Roman people was so increased that it was difficult to assemble it together to pass laws, it seemed right that the senate should be consulted in place of the people.

6. That which seems good to the emperor has also the force of law; for the people, by the *Lex Regia*, which is passed to confer on him his power, make over to him their whole power and authority. Therefore whatever the emperor ordains by *rescript*, or decides in adjudging a cause, or lays down by edict, is unquestionably law; and it is these enactments of the emperor that are called *constitutiones*. Of these, some are personal, and are not to be drawn into precedent, such not being the intention of the emperor. Supposing the emperor has granted a favor to any man on account of his merit, or inflicted some punishment, or granted some extraordinary relief, the application of these acts does not extend beyond the particular individual. But the other *constitutiones*, being general, are undoubtedly binding on all.

7. The edicts of the praetors are also of great authority. These edicts are called the *ius honorarium*, because those who bear honors [*i.e.*, offices] in the state, that is, the magistrates, have given them their sanction. The curule

aediles also used to publish an edict relative to certain subjects, which edict also became a part of the *ius honorarium*.

8. The answers of the *jurisprudenti* are the decisions and opinions of persons who were authorized to determine the law. For anciently it was provided that there should be persons to interpret publicly the law, who were permitted by the emperor to give answers on questions of law. They were called *jurisconsulti*; and the authority of their decision and opinions, when they were all unanimous, was such, that the judge could not, according to the constitutiones, refuse to be guided by their answers.

9. The unwritten law is that which usage has established; for ancient customs, being sanctioned by the consent of those who adopt them, are like laws.

10. The civil law is not improperly divided into two kinds, for the division seems to have had its origin in the customs of the two states, Athens and Lacedaemon. For in these states it used to be the case, that the Lacedaemonians rather committed to memory what they observed as law, while the Athenians rather observed as law what they had consigned to writing, and included in the body of their laws.

11. The laws of nature, which all nations observe alike, being established by a divine providence, remain ever fixed and immutable. But the laws which every state has enacted, undergo frequent changes, either by the tacit consent of the people, or by a new law being subsequently passed.

III. The Law of Persons.

All our law relates either to persons, or to things, or to actions. Let us first speak of persons; as it is of little purpose to know the law, if we do not know the persons for whose sake the law was made. The chief division in the rights of persons is this: men are all either free or slaves.

1. Freedom, from which men are said to be free, is the natural power of doing what we each please, unless prevented by force or by law.

2. Slavery is an institution of the law of nations, by which one man is made the property of another, contrary to natural right.

3. Slaves are denominated *servi*, because generals order their captives to be sold, and thus preserve them, and do not put them to death. Slaves are also called *mancipia*, because they are taken from the enemy by the strong hand.

4. Slaves either are born or become so. They are born so when their mother is a slave; they become so either by the law of nations, that is, by captivity, or by the civil law, as when a free person, above the age of twenty, suffers himself to be sold, that he may share the price given for him.
5. In the condition of slaves there is no distinction; but there are many distinctions among free persons; for they are either born free, or have been set free.

IV. The Free-born.

A person is *ingenuus* who is free from the moment of his birth, by being born in matrimony, of parents who have been either both born free, or both made free, or one of whom has been born and the other made free; and when the mother is free, and the father a slave, the child nevertheless is born free; just as he is if his mother is free, and it is uncertain who is his father; for he had then no legal father. And it is sufficient if the mother is free at the time of the birth, although a slave when she conceived; and on the other hand, if she be free when she conceives, and is a slave when she gives birth to her child, yet the child is held to be born free; for the misfortune of the mother ought not to prejudice her unborn infant. The question hence arose, if a female slave with child is made free, but again becomes a slave before the child is born, whether the child is born free or a slave? Marcellus thinks it is born free, for it is sufficient for the unborn child, if the mother has been free, although only in the intermediate time; and this is true.

1. When a man has been born free he does not cease to be *ingenuus*, because he has been in the position of a slave, and has subsequently been enfranchised; for it has been often settled that enfranchisement does not prejudice the rights of birth.

V. Freedmen.

Freedmen are those who have been manumitted from just servitude. *Manumission* is the process of freeing from "the hand." For while any one is in slavery, he is under "the hand" and power of another, but by manumission he is freed from this power. This institution took its rise from the law of nations; for by the law of nature all men were born free; and manumission was not heard of, as slavery was unknown. But when slavery came in by the law of nations, the boon of manumission followed. And whereas all were denominated by the one natural name of "men," the law of nations introduced a division into three kinds of men, namely, freemen, and in opposition to them, slaves; and thirdly, freedmen who had ceased to be slaves.

1. Manumission is effected in various ways; either in the face of the Church, according to the imperial *constitutiones*, or by *vindicta*, or in the presence of friends, or by letter, or by testament, or by any other expression of a man's last will. And a slave may also gain his freedom in many other ways, introduced by

the *constitutiones*

of former emperors, and by our own.

2. Slaves may be manumitted by their masters at any time; even when the magistrate is only passing along, as when a praetor, or *praeses*, or proconsul is going to the baths, or the theater.

3. Freedmen were formerly divided into three classes. For those who were manumitted sometimes obtained a complete liberty, and became Roman citizens; sometimes a less complete, and became *Latini* under the *lex Julia Norbana*; and sometimes a liberty still inferior, and became *dedititii*, by the *lex Aelia Sentia*. But this lowest class, that of the *dedititii*, has long disappeared, and the title of *Latinus* become rare; and so in our benevolence, which leads us to complete and improve everything, we have introduced a great reform by two *constitutiones*, which re-established the ancient usage; for in the infancy of the state there was but one liberty, the same for the enfranchised slave as for the person who manumitted him; excepting, indeed, that the person manumitted was freeborn. We have abolished the class of *dedititii* by a *constitutio* published among our decisions, by which, at the suggestion of the eminent Tribonian, quaestor, we have put an end to difficulties arising from the ancient law. We have also, at his suggestion, done away with the *Latini Juniani*, and everything relating to them, by another *constitutio*, one of the most remarkable of our imperial *constitutiones*. We have made all freedmen whatsoever Roman citizens, without any distinction as to the age of the slave, or the interest of the manumittor, or the mode of manumission. We have also introduced many new methods by which slaves may become Roman citizens, the only kind of liberty that now exists.

VIII. Slaves.

We now come to another division relative to the rights of persons; for some persons are independent, some are subject to the power of others. Of those, again, who are subject to others, some are in the power of parents, others in that of masters. Let us first treat of those who are subject to others; for, when we have ascertained who these are, we shall at the same time discover who are independent. And first let us consider those who are in the power of masters.

1. Slaves are in the power of masters, a power derived from the law of nations: for among all nations it may be remarked that masters have the power of life and death over their slaves, and that everything acquired by the slave is acquired for the master.

2. But at the present day none of our subjects may use unrestrained violence towards their slaves, except for a reason recognized by law. For, by a *constitutio* of the Emperor Antoninus Pius,

he who without any reason kills his own slave is to be punished equally with one who has killed the slave of another. The excessive severity of masters is also restrained by another *constitutio* of the same emperor. For, when consulted by certain governors of provinces on the subject of slaves, who fly for sanctuary either to temples, or to the statues of the emperors, he decided that if the severity of masters should appear excessive, they might be compelled to make sale of their slaves upon equitable terms, so that the masters might receive the value; and this was a very wise decision, as it concerns the public good, that no one should misuse his own property. The following are the terms of this rescript of Antoninus, which was sent to Laelius Marcianus:

The power of masters over their slaves ought to be preserved unimpaired, nor ought any man to be deprived of his just right. But it is for the interest of all masters themselves, that relief prayed on good grounds against cruelty, the denial of sustenance, or any other intolerable injury, should not be refused.

Examine, therefore, into the complaints of the slaves who have fled from the house of Julius Sabinus, and taken refuge at the statue of the emperor; and, if you find that they have been too harshly treated, or wantonly disgraced, order them to be sold, so that they may not fall again under the power of their master; and, if Sabinus attempt to evade my
have him know, that I

constitutio, I would

*shall severely punish
his disobedience.*

IX. The Power of Parents.

Our children, begotten in lawful marriage, are in our power.

1. Marriage, or matrimony, is a binding together of a man and woman to live in an indivisible union.
2. The power which we have over our children is peculiar to the citizens of Rome; for no other people have a power over their children, such as we have over ours.
3. The child born to you and your wife is in your power. And so is the child born to your son of his wife, that is, your grandson or granddaughter; so are your great-grandchildren, and all your other descendants. But a child born of your daughter is not in your power, but in the power of its own father.

X. Marriage.

Roman citizens are bound together in lawful matrimony when they are united according to law, the males having attained the age of puberty, and the females a marriageable age, whether they are fathers or sons of a family; but, of the latter, they must first obtain the consent of their parents, in whose power they are. For both natural reason and the law require this consent; so much so, indeed, that it ought to precede the marriage. Hence the question has arisen, whether the daughter of a madman could be married, or his son marry? And as opinions were divided as to the son, we decided that as the daughter of a madman might, so may the son of a madman marry without the intervention of the father, according to the mode established by our *constitutio*.

1. We may not marry every woman without distinction; for with some, marriage is forbidden. Marriage cannot be contracted between persons standing to each other in the relation of ascendant and descendant, as between a father and daughter, a grandfather and his granddaughter, a mother and her son, a grandmother and her grandson; and so on, *ad infinitum*. And, if such persons unite together, they only contract a criminal and incestuous marriage; so much so, that ascendants and descendants, who are only so by adoption, cannot intermarry; and even after the adoption is dissolved, the prohibition remains. You cannot, therefore, marry a woman who has been either your daughter or granddaughter by adoption, although you may have emancipated her.
2. There are also restrictions, though not so extensive, on marriage between collateral relations. A brother and sister are forbidden to marry, whether they are the children of the same father and mother, or of one of the two only. And, if a woman becomes your sister by adoption, you certainly cannot marry; but, if the adoption

is destroyed by emancipation, you may marry her; as you may also, if you yourself are emancipated. Hence it follows, that if a man would adopt his son-in-law, he ought first to emancipate his daughter; and if he would adopt his daughter-in-law, he ought previously to emancipate his son.

3. A man may not marry the daughter of a brother, or a sister, nor the granddaughter, although she is in the fourth degree. For when we may not marry the daughter of any person, neither may we marry the granddaughter. But there does not appear to be any impediment to marrying the daughter of a woman whom your father has adopted; for she is no relation to you, either by natural or civil law.

4. The children of two brothers or two sisters, or of a brother and sister, may marry together.

5. So, too, a man may not marry his paternal aunt, even though she be so only by adoption; nor his maternal aunt; because they are regarded in the light of ascendants. For the same reason, no person may marry his great-aunt, either paternal or maternal.

6. There are, too, other marriages from which we must abstain, from regard to the ties created by marriage; for example, a man may not marry his wife's daughter, or his son's wife, for they are both in the place of daughters to him; and this must be understood to mean those who have been our stepdaughters or daughters-in-law; for if a woman is still your daughter-in-law, that is if she is still married to your son, you cannot marry her for another reason, as she cannot be the wife of two persons at once. And if your step-daughter, that is, if her mother is still married to you, you cannot marry her, because a person cannot have two wives at the same time.

7. Again, a man is forbidden to marry his wife's mother, and his father's wife, because they hold the place of mothers to him; a prohibition which can only operate when the affinity is dissolved; for if your step-mother is still your step-mother, that is, if she is still married to your father, she would be prohibited from marrying you by the common rule of law, which forbids a woman to have two husbands at the same time. So if your wife's mother is still your wife's mother, that is, if her daughter is still married to you, you cannot marry her, because you cannot have two wives at the same time.

8. The son of a husband by a former wife, and the daughter of a wife by a former husband, or the daughter of a husband by a former wife, and the son of a wife by a former husband, may lawfully contract marriage, even though they have a brother or sister born of the second marriage.

9. The daughter of a divorced wife by a second husband is not your step-daughter; and yet Julian says we ought to abstain from such a marriage. For the betrothed wife of a son is not your daughter-in-law; nor your betrothed wife your son's step-mother; and yet it is more decent and more in accordance with law to abstain from such marriage.

10. It is certain that the relationship of slaves is an impediment to marriage, even if the father and daughter or brother and sister, as the case may be, have been enfranchised.

11. There are other persons also, between whom marriage is prohibited for different reasons, which we have permitted to be enumerated in the books of the Digests or Pandects, collected from the old law.

12. If persons unite themselves in contravention of the rules thus laid down, there is no husband or wife, no nuptials, no marriage, nor marriage portion, and the children born in such a connection are not in the power of the father. For, with regard to the power of a father, they are in the position of children conceived in prostitution, who are looked upon as having no father, because it is uncertain who he is; and are therefore called *spurii*, either from a Greek word *sporadan*, meaning "at hazard," or as being *sine patre*, without a father. On the dissolution of such a connection there can be no claim made for the demand of a marriage portion. Persons who contract prohibited marriages are liable also to further penalties set forth in our imperial *constitutiones*.

13. It sometimes happens that children who at their birth were not in the power of their father are brought under it afterwards. Such is the case of a natural son, who is given to the *curia*, and then becomes subject to his father's power. Again, a child born of a free woman, with whom marriage was not prohibited by any law, but with whom the father only cohabited, will likewise become subject to the power of his father if at any time afterwards instruments of dowry are drawn up according to the provisions of our *constitutio*. And this *constitutio* confers the same benefits on any children who may be subsequently born of the same marriage.

XI. Adoption.

Not only are our natural children, as we have said, in our power, but those also whom we adopt.

1. Adoption takes place in two ways, either by imperial rescript, or by the authority of the magistrate. The imperial rescript gives power to adopt persons of either sex who are *sui juris*; and this species of adoption is called *arrogatio*. By the authority of the magistrate we adopt persons in the power of an ascendant, whether in the first degree, as sons and daughters, or in an inferior degree, as grandchildren or great-grandchildren.

2. But now, by our *constitutio*, when a *filiusfamilias* is given in adoption by his natural father to a stranger, the power of the natural father is not dissolved; no right passes to the adoptive father, nor is the adopted son in his power, although we allow such son the right of succession to his adoptive father dying intestate. But if a natural father should give his son in adoption, not to a stranger, but to the son's maternal grandfather;

or, supposing the natural father has been emancipated, if he gives the son in adoption to the son's paternal grandfather, or to the son's maternal great-grandfather, in this case, as the rights of nature and adoption concur in the same person, the power of the adoptive father, knit by natural ties and strengthened by the legal bond of adoption, is preserved undiminished, so that the adopted son is not only in the family, but in the power of his adoptive father.

3. When any one, under the age of puberty, is *arrogated* by the imperial rescript, the *arrogatio* is only allowed when inquiry has been made into the circumstances of the case. It is asked what is the motive leading to the *arrogatio*, and whether the *arrogatio* is honorable and expedient for the pupil. And the *arrogatio* is always made under certain conditions: the *arrogator* is obliged to give security before a public person, that is, before a notary, that if the pupil should die within the age of puberty, he will restore all the property to those who would have succeeded him if no adoption had been made. Nor, again, can the *arrogator* emancipate the person arrogated, unless, on examination into the case, it appears that the latter is worthy of emancipation; and, even then, the *arrogator* must restore the property belonging to the person he emancipates. Also, even if the *arrogator*, on his death-bed, has disinherited his arrogated son, or, during his life, has emancipated him without just cause, he is obliged to leave him the fourth part of all his goods, besides what the son brought to him at the time of *arrogatio*, or acquired for him afterwards.

4. A younger person cannot adopt an older; for adoption imitates nature; and it seems unnatural that a son should be older than his father. Anyone, therefore, who wishes either to adopt or arrogate a son should be the elder by the term of complete puberty, that is, by eighteen years.

5. A person may adopt another as grandson or granddaughter, great-grandson or great-granddaughter, or any other descendant, although he has no son.

6. A man may adopt the son of another as his grandson, and the grandson of another as his son.

7. If a man adopts a grandson to be the son of a man already adopted, or of a natural son in his power, the consent of this son ought first to be obtained, that he may not have a *suus heres* given him against his will. But, on the contrary, if a grandfather gives his grandson by a son in adoption, the consent of the son is not necessary.

8. He who is either adopted or arrogated is assimilated, in many points, to a son born in lawful matrimony; and therefore, if any one adopts a person who is not a stranger by imperial rescript, or before the praetor, or the *praeses* of a province, he can afterwards give in adoption to another the person whom he has adopted.

9. It is a rule common to both kinds of adoption, that persons, although incapable of procreating, as, for instance, impotent persons, may, but those who are castrated cannot adopt.

10. Women, also, cannot adopt; for they have not even their own children in their power; but, by the indulgence of the emperor, as a comfort for the loss of their own children, they are allowed to adopt.

11. Adoption by the rescript of the emperor has this peculiarity. If a person, having children under his power, should give himself in *arrogatio*, not only does he submit himself to the power of the *arrogator*, but his children are also in the *arrogator*'s power, being considered his grandchildren. It was for this reason that Augustus did not adopt Tiberius until Tiberius had adopted Germanicus; so that directly the adoption was made, Germanicus became the grandson of Augustus.

12. Cato, as we learn from the ancients, has with good reason written that slaves, when adopted by their masters, are thereby made free. In accordance with which opinion, we have decided by one of our *constitutiones* that a slave to whom his master by a solemn deed gives the title of son is thereby made free, although he does not require thereby the rights of a son.

XII. Freeing From Power.

Let us now inquire into the different ways in which persons in the power of others are freed from it. How slaves are freed from the power of their masters may be learnt from what we have already said with regard to manumission. Those who are in the power of a parent became independent at his death; a rule, however, which admits of a distinction. For when a father dies, his sons and daughters become undoubtedly independent; but when a grandfather dies, his grandchildren do not necessarily become independent, but only if on the grandfather's death they do not fall under the power of their father. Therefore, if their father is alive at the death of their grandfather, and was in his power, then, on the grandfather's death, they become subject to the power of their father. But, if at the time of the grandfather's death their father is either dead, or has already passed out of the grandfather's power by emancipation, as they do not fall under the power of their father, they become independent.

1. If a man, convicted of some crime, is deported to an island, he loses the rights of a Roman citizen; whence it follows, that the children of a person thus banished cease to be under his power, exactly as if he were dead. Equally, if a son is deported, does he cease to be under the power of his father? But, if by favor of the emperor anyone is restored, he regains his former position in every respect.

2. A father who is merely banished by *relegatio* still retains his children in his power: and a child who is relegated still remains in the power of his father.

3. When a man becomes a "slave of punishment" he ceases to have his sons in his power. Persons become "slaves of punishment" who are condemned to the mines, or exposed to wild beasts.

4. A son, though he becomes a soldier, a senator, or a consul, still remains in the power of his father, from which neither military service nor consular dignity can free him. But by our *constitutio patriciate* the supreme dignity of the frees the son from the power of his father immediately on the grant of the imperial patent. It is obviously absurd that a parent could emancipate his son from the tie of his power, and that the majesty of the emperor should not be able to release from the power of another, one whom he had chosen to be a father of the state.

5. If a parent is taken prisoner, although he become the slave of the enemy, yet his paternal power is only suspended, owing to the *ius postliminii*; for captives, when they return, are restored to all their former rights. Thus, on his return, the father will have his children in his power; for the *postliminium* supposes that the captive has never been absent. If, however, a prisoner dies in captivity, the son is considered to have been independent from the time when his father was taken a prisoner. So, too, if a son, or grandson, is taken prisoner, the power of the parent, by means of the *ius postliminii*, is only in suspense. The term *postliminium* is derived from *post* and *limen*. We therefore say of a person taken by the enemy, and then returning into our territory, that he is come back by *postliminium*. For, just as the threshold forms the boundary of a house, so the ancients have termed the boundary of the empire a threshold. Whence *limes* also is derived, and is used to signify a boundary and limit. Thence comes the word *postliminium*, because the prisoner returned to the same limits whence he had been lost. The prisoner, also, who is retaken on the defeat of the enemy, is considered to have come back by *postliminium*.

6. Children, also, cease to be under the power of their parents by emancipation. Formerly emancipation was effected, either adopting the process of the ancient law, consisting of imaginary sales, each followed by a manumission, or by imperial rescript; but we, in our wisdom, have introduced a reform on this point by one of our *constitutiones*. The old fictitious process is now done away with, and parents may now appear directly before a proper judge or magistrate, and free from their power their children, or grandchildren, or other descendants. And then, according to the praetorian edict, the parent has the same rights over the goods of those whom he emancipates, as the patron has over the goods of his freedman. And, further, if the child or children emancipated are within the age of puberty, the parent, by the emancipation, becomes their tutor.

7. It is also to be observed that a parent having in his power a son, and by that son a grandson or granddaughter, may emancipate his son, and retain in his power his grandson or granddaughter; or, conversely,

he may emancipate his grandson or granddaughter, and retain his son in his power; or, he may make them all independent. And it is the same in the case of a great-grandson, or a great-granddaughter.

8. If a father has a son in his power, and gives him in adoption to the son's natural grandfather or great-grandfather, in conformity with our *constitutiones* enacted on this subject, that is, if he declares his intention in a formal act before a competent judge, in the present and without the dissent of the person adopted, and also in the presence of the person who adopts, then the right of paternal power is extinguished as to the natural father, and passes from him to the adoptive father; with regard to whom, as we have before observed, adoption preserves all its effects.

9. It must be observed, that if your daughter-in-law becomes pregnant, and if during her pregnancy you emancipate your son, or give him in adoption, the child will be born in your power; but if the child is conceived subsequently to the emancipation or adoption, he is born in the power of his emancipated father, or his adoptive grandfather. Children, natural or adoptive, have almost no means of compelling their parents to free them from their power.

XIII. Guardianship.

Let us now proceed to another division of persons. Of those who are not in the power of a parent, some are under a tutor, some under a curator, some under neither. Let us treat, then, of the class of those persons who are under a tutor or curator; for we shall thus ascertain who are they who are not subject to either. And first of persons under a tutor.

1. Tutelage, as Servius has defined it, is an authority and power over a free person, given and permitted by the civil law, in order to protect one whose tender years prevent him defending himself.

2. Tutors are those who have this authority and power, and they take their name from the nature of their office; for they are called tutors, as being protectors [*i. e., tutores*] and defenders, just as those who have the care of the sacred edifices are called *aeditui*.

3. Parents may give tutors by testament to such of their children as have not attained the age of puberty, and are under their power. And this, without any distinction, in the case of all sons and daughters. But grandfathers can only give tutors to their grandchildren when these will not fall under the power of their father on the death of the grandfather. Hence, if your son is in your power at the time of your death, your grandchildren by that son cannot have a tutor appointed them by your testament, although they were in your power; because, at your decease, they will fall under the power of their father.

4. Posthumous children, as in many other respects, so also in this respect, are considered as already born

before the death of their fathers; and tutors may be given by testament to posthumous children, as well as to children already born, provided that the posthumous children, had they been born in the lifetime of their father, would have been *sui heredes*, and in their father's power.

5. But if a father gives a tutor by testament to his emancipated son, the appointment must be confirmed by the sentence of the *praeses* in all cases, that is, without inquiry.

XV. Agnate Tutorship.

They to whom no tutor has been appointed by testament, have their *agnati* as tutors, by the law of the Twelve Tables, and such testators are called "legal tutors."

1. *Agnati* are those who are related to each other through males, that is, are related through the father, as, for instance, a brother by the same father, or the son of a brother, or the son of such a son; or, again, a father's brother, or a father's brother's son, or the son of such a son. But those who are related to us through the females are not *agnati*, but merely *cognati* by their natural relationship. This the son of a father's sister is related to you not by *agnatio*, but by *cognatio*, and you are also related to him by *cognatio*; as children belong to the family of their father, and not to that of their mother.

XVI. Change of Station.

The *capitis deminutio* is a change of status, which may happen in three ways: for it may be the greatest *capitis deminutio*, or the less, also called the middle, or the least.

1. The greater *capitis deminutio* is, when a man loses both his citizenship and his liberty; as they do who by a terrible sentence are made "the slaves of punishment;" and freedmen, condemned to slavery for ingratitude towards their patrons; and all those who suffer themselves to be sold in order to share the price obtained.

2. The less or middle *capitis deminutio* is, when a man loses his citizenship, but retains his liberty; as is the case when anyone is forbidden the use of fire and water, or is deported to an island.

3. The least *capitis deminutio* is when a person's status is changed without forfeiture either of citizenship or liberty; as when a person *sui juris* becomes subject to the power of another, or a person *alieni juris* becomes independent.

4. A slave who is manumitted is not said to be *capite manutus*, as he has no "*caput*," or civil existence.

5. Those whose dignity rather than their status is changed, do not suffer a *capitis deminutio*, as those, for instance, who are removed from the senatorial dignity.

6. In saying that the right of *cognatio* remains in spite of a *capitis deminutio*, we were speaking only of the least *deminutio*, after which the *cognatio* subsists. For, by the greater *deminutio*, as, for example, if one of the *cognati* becomes a slave, the right of *cognatio* of wholly destroyed, so as not to be recovered even by manumission. So, too, the right of *cognatio* is lost by the less or middle *deminutio*, as, for example, by deportation to an island.

7. The right to be tutor, which belongs to the *agnati*, does not belong to all at the same time, but to the nearest in degree only; or, if there are many in the same degree, then to all in that degree. Several brothers, for instance, in the same degree, are all equally called to be tutor.

XVII. Patron Guardianship.

By the same law of the Twelve Tables, the tutelage of freedmen and freedwomen belongs to their patrons, and to the children of their patrons; and this tutelage is called *legal tutelage*, not that the law contains any express provision on the subject, but because it has been as firmly established by interpretation, as if it had been introduced by the express words of the law. For, as the law had ordered that patrons and their children should succeed to the inheritance of their freedmen or freedwomen who should die intestate, the ancients were of opinion that the intent of the law was that the tutelage also belonged to them; since the law which calls *agnati* to the inheritance, also appoints them to be tutors, because, in most cases, where the advantage of the succession is, there also ought to be the burden of the tutelage. We say "in most cases," because if a person below the age of puberty is manumitted by a female, she is called to the inheritance, although another person is tutor.

XX. Appointing of Tutors.

If any one had no tutor at all, one was given him, in the city of Rome by the *praetor urbanus*, and a majority of the tribunes of the plebs, under the *lex Atilia*; in the provinces, by the *praesides* under the *lex Julia et Titia*.

1. Again, if a testamentary tutor had been appointed conditionally, or for a certain time, until the completion of the condition or arrival of the time fixed, another tutor might be appointed under the same laws. Also, if a tutor had been given unconditionally, yet, as long as no one had accepted the inheritance, as heir by the testament, another tutor might be appointed for the interval. But this office ceased when the condition was accomplished, when the time arrived, or the inheritance was entered upon.
2. If, again, a tutor was taken prisoner by the enemy, application could be made, under the same laws, for another tutor, whose office ceased when the first tutor returned from captivity; for on his return he resumed the tutelage by the *ius postliminii*.
3. But tutors have ceased to be appointed under these laws, since they have been appointed to pupils of either sex, first by the consuls, after inquiry into the case, and afterwards by the praetors under imperial *constitutiones*. For the above-mentioned laws required no security from the tutors for the safety of the pupil's property, nor did they contain any provisions to compel them to accept the office.
4. Under our present system tutors are appointed at Rome by the prefect of the city, or the praetor, according to his jurisdiction, and, in the provinces, by the *praesides* after inquiry; or by an inferior magistrate, at the command of the *praeses*, if the property of the pupil is only small.
5. But by one of our *constitutiones*, to do away with these distinctions of different persons, and to avoid the necessity of waiting for the order of the *praeses*, we have enacted, that if the property of the pupil or adult does not exceed five hundred *solidi*, tutors or curators shall be appointed by the *defensores* of the city, acting in conjunction with the holy bishop, or by other public persons, that is, by the magistrates, or, in the city of Alexandria, by the judge; and legal security must be given according to the terms of the same *constitutio*, that is to say, at the risk of those who receive it.
6. It is agreeable to the law of nature that the persons under the age of puberty should be under tutelage, so that persons of tender years may be under the government of another.
7. As tutors administer the affairs of their pupils, they may be compelled to account, by the *actio tutela*, when their pupils arrive at puberty.

XXI. Authority of Tutors.

In some cases it is necessary that the tutor should authorize the acts of the pupil, in others not. When, for instance, the pupil stipulates for something to be given him, the authorization of the tutor is not requisite; but

if the pupil makes the promise, it is requisite; for the rule is, that pupils may make their condition better, but may not make it worse, without the authorization of their tutor. And therefore in all cases of reciprocal obligation, as in contracts of buying, selling, letting, hiring, bailment, and deposit, if the tutor does not authorize the pupil to enter into the contract, the person who contracts with the pupil is bound, but the pupil is not bound.

1. Pupils, however, cannot, without the authorization of the tutor, enter on an inheritance, demand the possession of goods, or take an inheritance given by a *fideicommissum*, even though to do so would be to their gain, and could involve them in no risk.
2. A tutor who wishes to authorize any act, which he esteems advantageous to his pupil, should do so at once while the business is going on, and in person, for his authorization is of no effect if given afterwards or by letter.
3. When a suit is to be commenced between a tutor and his pupil, as the tutor cannot give authority with regard to his own case, a *curator*, and not, as formerly, a *praetorian tutor*, is appointed, with whose intervention the suit is carried on, and who ceases to be curator when the suit is determined.

XXII. Freedom from Guardianship.

Pupils, both male and female, are freed from tutelage when they attain the age of puberty. The ancients judged of puberty in males, not only by their years, but also by the development of their bodies. But we, from a wish to conform to the purity of the present times, have thought it proper, that what seemed even to the ancients to be indecent towards females, namely, the inspection of the body, should be thought no less so towards males; and, therefore, by our sacred *constitutio*, we have enacted that puberty in males should be considered to commence immediately on the completion of their fourteenth year; while, as to females, we have preserved the wise rule adopted by the ancients, by which they are esteemed fit for marriage on the completion of their twelfth year.

1. Tutelage is also determined if the pupil, before attaining the age of puberty, is either arrogated, or suffers deportation, or is reduced to slavery, or becomes a captive.
2. Again, if a person is appointed by testament to be tutor until a condition is accomplished, he ceases to be tutor on the accomplishment of the condition.
3. Tutelage ends also by the death of the tutor, or of the pupil.
4. When a tutor, by a *capitis deminutio*, loses his liberty or

his citizenship, his tutelage is in every case at an end. But, if he undergo only the least *capitis deminutio*, as when a tutor gives himself in adoption, then only legal tutelage is ended, and not the other kinds; but any *capitis deminutio* of the pupil, even the least, always puts an end to the tutelage.

5. A tutor, again, who is appointed by testament to hold office during a certain time, lays down his office when the time is expired.

6. They also cease to be tutors who are removed from their office on suspicion, or who excuse themselves on good grounds from the burden of the tutelage, and rid themselves of it according to the rules we will give hereafter.

XXIII. Curatorship.

Males arrived at the age of puberty, and females of a marriageable age, receive curators, until they have completed their twenty-fifth year; for, although they have attained the age of puberty, they are still of an age which makes them unfit to protect their own interests.

1. Curators are appointed by the same magistrates who appoint tutors. A curator cannot be appointed by testament, but if appointed, he may be confirmed in his office by a decree of the praetor of *praeses*.

2. No adolescent is obliged to receive a curator against his will, unless in case of a lawsuit, for a curator may be appointed for a particular special purpose.

3. Madmen and prodigals, although past the age of twenty-five, are yet placed under the curatorship of their *agnati* by the law of the Twelve Tables. But, ordinarily, curators are appointed for them, at Rome, by the prefect of the city or the praetor: in the provinces, by the *praesides*, after inquiry into the circumstances has been made.

4. Persons who are of unsound mind, or who are deaf, mute, or subject to any perpetual malady, since they are unable to manage their own affairs, must be placed under curators.

5. Sometimes even pupils receive curators; as, for instance, when the legal tutor is unfit for the office; for a person who already has a tutor cannot have another given him; again, if a tutor appointed by testament, or by the praetor or *praeses* is unfit to administer the affairs of his pupil, although there is nothing fraudulent in the way he administers them, it is usual to appoint a curator to act conjointly with him. It is also usual to assign curators in the place of tutors excused for a time only.

6. If a tutor is prevented by illness or otherwise from administering the affairs of his pupil, and his pupil is absent, or an infant, then the praetor or *praeses* of the province will, at the tutor's risk, appoint by decree some one to be the agent of his pupil.

XXIV. Security by Guardians.

To prevent the property of pupils and persons placed under curators being wasted or destroyed by tutors or curators, the praetor sees that tutors and curators give security against such conduct. But this is not always necessary; a testamentary tutor is not compelled to give security, as his fidelity and diligence have been recognized by the testator. And tutors and curators appointed upon inquiry are not obliged to give security, because they have been chosen as being proper persons.

1. If two or more are appointed by testament, or by a magistrate, after inquiry, as tutors or curators, any of them, by offering security for the indemnification of the pupil or adolescent, may be preferred to his co-tutor or co-curator, so that he may either alone administer the property, or may oblige his co-tutor or co-curator to give security, if he wishes to obtain the preference, and become the sole administrator. He cannot directly demand security from his co-tutor or co-curator; he must offer it himself, and so give his co-tutor or co-curator the choice to receive or to give security. If no tutor or curator offers security, the person appointed by the testator to manage the property shall manage it; but if no such person be appointed, then the administration will fall to the person whom a majority of the tutors shall choose, as is provided for the praetorian edict. If the tutors disagree in their choice, the praetor must interpose. And in the same way, when several are appointed after inquiry by a magistrate, a majority is to determine who shall administer.

2. It should be observed that it is not only tutors and curators who are responsible for their administration to pupils, minors, and the other persons we have mentioned, but, as a last safeguard, a subsidiary *actio* may be brought against the magistrate who has accepted the security as sufficient. The subsidiary *actio* may be brought against a magistrate who has wholly omitted to take security, or has taken insufficient security; and the liability to this *actio*, according to the responses of the *jurisprudenti* as well as the imperial *constitutiones*, extends also to the heirs of the magistrate.

3. The same *constitutiones* also expressly enact that tutors and curators who do not give security, may be compelled to do so by seizure of their goods as pledges.

4. Neither the prefect of the city, nor the praetor, nor the praeses of a province, nor any one else to whom the appointment of tutors belongs, will be liable to this *actio*, but only those whose ordinary duty is to exact the security.

XXV. Excusal of Tutors or Curators.

Tutors and curators are excused on different grounds; most frequently on account of the number of their children, whether in their power or emancipated. For anyone who at Rome has three children living, in Italy four, or in the provinces five, may be excused from being tutor or curator as from other offices, for the office of both a tutor and a curator is considered a public one. Adopted children will not avail the adopter, but though given in adoption are reckoned in favor of their natural father. Grandchildren by a son may be reckoned in the number, so as to take the place of their father, but not grandchildren by a daughter. It is only those children who are living that can be reckoned to excuse any one from being tutor or curator, and not those who are dead. It has been questioned, however, whether those who have perished in war may not be reckoned; and it has been decided, that those who die in battle may, but they only, for glory renders those immortal who have fallen for their country.

1. The Emperor Marcus declared by rescript in his *Semestria* _____, that a person engaged in administering the property of the *fiscus* _____ is excused from being tutor or curator while his administration lasts.
2. Persons absent on the service of the state are excused from being tutors or curators; and if those who have already been appointed either as tutors or curators should afterwards be absent on the public service, they are excused during their absence, and meanwhile curators are appointed in their place. On their return, they must again take upon them the burden of the tutelage; and, according to Papinian's opinion, expressed in the fifth book of his answers, are not entitled to the privilege of a year's vacation, which is only allowed them when they are called to a new tutelage.
3. By a rescript of the Emperor Marcus, all persons invested with magisterial power may excuse themselves; but they cannot abandon the office of tutor, which they have already undertaken.
4. No tutor or curator can excuse himself by alleging a lawsuit with the pupil or adult; unless the suit embraces the whole of the goods, or the property, or is for an inheritance.
5. Three tutelages or curatorships, if unsolicited, serve as an excuse from filling any other such office, while the holder continues to discharge duties. But the tutelage of several pupils, or the curatorship of an undivided property, as where the pupils or adults are brothers, is reckoned as one only.
6. Poverty is a sufficient excuse, when it can be proved such as to render a man incapable of the burden imposed upon him, according to the rescripts given both by the imperial brothers together, and by the Emperor Marcus singly.
7. Illness also, if it prevents a man from superintending his own affairs, affords a ground of excuse.

- 8.** So, too, a person who cannot read must be excused, according to the rescript of the Emperor Antoninus Pius; but persons who cannot read are sometimes considered capable of administering.
- 9.** If it is through enmity that the father appoints by testament any one as tutor, this circumstance itself will afford a sufficient excuse; just as, on the other hand, they who have promised the father of the pupils to fill the office of tutor, cannot be excused.
- 10.** That the tutor was unknown to the father of a pupil is not of itself to be admitted as a sufficient excuse, as is decided by a rescript of the imperial brothers.
- 11.** Enmity against the father of the pupil or adult, if of a deadly character, and no reconciliation has taken place, is usually considered as an excuse from being tutor or curator.
- 12.** So, too, he whose status has been called in question by the father of the pupil, is excused from the office of tutor.
- 13.** Persons above seventy years of age may be excused from being tutors or curators. Persons under the age of twenty-five were formerly excused, but, by our *constitutio* _____, they are now prohibited from aspiring to these offices, so that excuses are become unnecessary. This *constitutio* _____ provides that neither pupils nor adults shall be called to a legal tutelage. For it is absurd that persons who are themselves governed, and are known to need assistance in the administration of their own affairs, should become the tutors or curators of others.
- 14.** The same rule holds good also as to military persons. They cannot, even though they wish it, be admitted to the office of tutor or curator.
- 15.** Grammarians, rhetoricians, and physicians at Rome, and those who exercise such professions in their own country, and are within the number authorized, are exempted from being tutors or curators.
- 16.** If a person wishes to excuse himself, and has several excuses, even supposing some are not admitted, there is nothing to prevent him employing others, providing he does so within the prescribed time. Those who wish to excuse themselves are not to appeal, but whatever kind of tutors they may be, that is, however they may have been appointed, must offer their excuses within the fifty days next after they have known of their appointment, if they are within a hundred miles of the place when they were appointed. If they are at a greater distance they are allowed a day for every twenty miles, and thirty days besides; but the time should, as Scaevola said, be so calculated as never to be less than fifty days in the whole.

17. The tutor who is appointed is considered as appointed for the whole patrimony.

18. A person who has discharged the office of tutor is not compelled against his will to become the curator of the same person; so much so, that although the father, after appointing a tutor by testament, adds that he also appoints the same person to be curator, the person so appointed if unwilling cannot be compelled to take the office of curator; so it has been decided by the rescript of the Emperors Severus and Antoninus.

19. The same emperors have decided by rescript, that a husband appointed as curator to his wife may excuse himself from the office, even after he has intermeddled with her affairs.

20. If any one has succeeded by false allegations in getting himself excused from the office of tutor, he is not discharged from the burden of the office.

XXVI. Suspected Guardians.

The right of accusing a suspected tutor or curator is derived from the law of the Twelve Tables.

1. The power of removing suspected tutors belongs at Rome to the praetor; in the provinces to the *praesides* , or to the legate of the proconsul.

2. We have shown what magistrates may take cognizance of suspected persons: let us now inquire, what persons may become suspected. All tutors may become so, whether testamentary, or others; thus even a legal tutor may be accused. But what is the case with a patron? He, too, may be accused; but we must remember that his reputation must be spared, although he be removed as suspected.

3. Let us inquire, by whom suspected persons may be accused. Now an accusation of this sort is in a measure public, that is, it is open to all. Nay, by a rescript of the Emperors Severus and Antoninus, even women are admitted to be accusers; but only those who are induced to do so through feelings of affection, as a mother, a nurse, or a grandmother, or a sister, who may all become accusers. But the praetor will admit any other woman to make the accusation, in whom he recognizes a real affection, and who, without overstepping the modesty of her sex, is impelled by this affection not to endure the pupil suffering harm.

4. No person below the age of puberty can bring an accusation against his tutor as suspected: but those who have attained that age may, under the advice of their near relations, accuse their curators. Such is the decision given in a rescript of the Emperors Severus and Antoninus.

5. A tutor is suspected who does not faithfully execute his trust, although perfectly solvent, as Julian writes, who also thinks that even before he enters on his office, a tutor may be removed, as suspected; and

a *constitutio*

has been made in accordance with this opinion.

6. A suspected person, if removed on account of fraud, is infamous, but not if for neglect only.

7. If an *actio* is brought against any one as suspected, his administration, according to Papinian, is suspended while the accusation is pending.

8. If a process is commenced against a tutor or curator, as suspected, and he dies while it is going on, the process is at an end.

9. If a tutor fails to appear, that a certain amount of maintenance may be fixed on for his pupil, it is provided by a rescript of the Emperors Severus and Antoninus that the pupil shall be put into the possession of the effects of the tutor, and that after a curator has been appointed, those things, which are perishable, may be sold. Therefore, a tutor who does not afford maintenance to his pupil may be removed, as suspected.

10. But if the tutor appears, and denies that maintenance can be allowed in consequence of the smallness of the pupil's estate; if he says this falsely, he shall be handed over to the prefect of the city, to be punished, just as a person is handed over who has purchased a tutelage by bribery.

11. Also a freedman, who is proved to have been guilty of fraud, when acting as tutor to the son or grandson of the patron, is handed over to the prefect of the city to be punished.

12. Lastly, it must be known that they who are guilty of fraud in their administration must be removed, although they offer sufficient security. For giving security makes no change in the malevolent purpose of the tutor, but only procures him a longer opportunity of injuring the estate.

13. We also deem every man suspected, whose conduct is such that we cannot but suspect him. A tutor or curator who is faithful and diligent is not to be removed as a suspected person merely because he is poor.

Book II.

Of Things.

I. Divisions of Things.

In the preceding book we have treated of the law of persons. Let us now speak of things, which either are in our *patrimony* , or not in our *patrimony* . For some things by the law of nature are common to all; some are public; some belong to corporate bodies, and some belong to no one. Most things are the property of individuals who acquire them in different ways, as will appear hereafter.

1. By the law of nature these things are common to mankind---the air, running water, the sea, and consequently the shores of the sea. No one, therefore, is forbidden to approach the seashore, provided that he respects *habitationes* , monuments, and buildings which are not, like the sea, subject only to the law of nations.
2. All rivers and ports are public; hence the right of fishing in a port, or in rivers, is common to all men.
3. The seashore extends as far as the greatest winter flood runs up.
4. The public use of the banks of a river is part of the law of nations, just as is that of the river itself. All persons, therefore, are as much at liberty to bring their vessels to the bank, to fasten ropes to the trees growing there, and to place any part of their cargo there, as to navigate the river itself. But the banks of a river are the property of those whose land they adjoin; and consequently the trees growing on them are also the property of the same persons.
5. The public use of the seashore, too, is part of the law of nations, as is that of the sea itself; and, therefore, any person is at liberty to place on it a cottage, to which he may retreat, or to dry his nets there, and haul them from the sea; for the shores may be said to be the property of no man, but are subject to the same law as the sea itself, and the sand or ground beneath it.
6. Among things belonging to a corporate body, not to individuals, are, for instance, buildings in cities, theaters, race-courses, and other similar places belonging in common to a whole city.
7. Things sacred, religious, and holy belong to no one; for that which is subject to divine law is not the property of any one.
8. Things are sacred which have been duly consecrated by the pontiffs, as sacred buildings and offerings, properly dedicated to the service of God, which we have forbidden by our *constitutio* to be sold or mortgaged, except for the purposes of purchasing the freedom of captives. But, if any one consecrates a building by his own authority, it is not sacred, but profane. But ground on which a sacred edifice has once been erected, even after the building has been destroyed, continues to be sacred, as Papinian also writes.

9. Any man at his pleasure makes a place religious by burying a dead body in his own ground; but it is not permitted to bury a dead body in land hitherto pure, which is held in common, against the wishes of a co-proprietor. But when a sepulcher is held in common, any one co-proprietor may bury in it, even against the wishes of the rest. So, too, if another person has the *usufructus*, the proprietor may not, without the consent of the *usufructuary*, render the place religious. But a dead body may be laid in a place belonging to another person, with the consent of the owner; and even if the owner only ratifies the act after the dead body has been buried, yet the place is religious.

10. Holy things also, as the walls and gates of a city, are to a certain degree subject to divine law, and therefore are not part of the property of any one. The walls of a city are said to be holy, inasmuch as any offence against them is punished capitally; so, too, those parts of laws by which punishments are established against transgressors, we term sanctions.

11. Things become the property of individuals in various ways; of some we acquire the ownership by natural law, which, as we have observed, is also termed the law of nations; of others by the civil law. It will be most convenient to begin with the more ancient law; and it is very evident that the law of nature, established by nature at the first origin of mankind, is the more ancient, for civil laws could then only begin to exist when states began to be founded, magistrates to be created, and laws to be written.

12. Wild beasts, birds, fish and all animals, which live either in the sea, the air, or the earth, so soon as they are taken by anyone, immediately become by the law of nations the property of the captor; for natural reason gives to the first occupant that which had no previous owner. And it is immaterial whether a man takes wild beasts or birds upon his own ground, or on that of another. Of course any one who enters the ground of another for the sake of hunting or fowling, may be prohibited by the proprietor, if he perceives his intention of entering. Whatever of this kind you take is regarded as your property, so long as it remains in your power, but when it has escaped and recovered its natural liberty, it ceases to be yours, and again becomes the property of him who captures it. It is considered to have recovered its natural liberty, if it has either escaped out of your sight, or if, though not out of your sight, it yet could not be pursued without great difficulty.

13. It has been asked, whether, if you have wounded a wild beast, so that it could be easily taken, it immediately becomes your property. Some have thought that it does become yours directly you wound it, and that it continues to be yours while you continue to pursue it, it then ceases to be yours, and again becomes the property of the first person who captures it. Others have thought that it does not become your property until you have captured it. We confirm this latter opinion, because many accidents may happen to prevent your capturing it.

14. Bees also are wild by nature. Therefore, bees that swarm upon your tree, until you have hived them, are no more considered to be your property than the birds which build their nests on your tree; so, if any one hives them, he becomes their owner. Any one, too, is at liberty to take the honeycombs the bees may have

made. But of course, if, before anything has been taken, you see any one entering on your land, you have a right to prevent his entering. A swarm which has flown from your hive is still considered yours as long as it is in your sight and may easily be pursued; otherwise it becomes the property of the first person that takes it.

15. Peacocks, too, and pigeons, are naturally wild, nor does it make any difference that they are in the habit of flying out and then returning again, for bees, which without doubt are naturally wild, do so too. Some persons have deer so tame, that they will go into the woods, and regularly again return; yet no one denies that deer are naturally wild. But, with respect to animals which are in the habit of going and returning, the rule has been adopted, that they are considered yours as long as they have the intention of returning, but if they cease to have this intention, they cease to be yours, and become the property of the first person that takes them. These animals are supposed to have lost the intention, when they have lost the habit, of returning.

16. But fowls and geese are not naturally wild, which we may learn from there being particular kinds of fowls and geese which we term wild. And, therefore, if your geese or fowls should be frightened, and take flight, they are still regarded as yours wherever they may be, although you may have lost sight of them; and whoever detains such animals with a view to his own profit, commits a theft.

17. The things we take from our enemies become immediately ours by the law of nations, so that even freemen thus become our slaves; but if they afterwards escape from us, and return to their own people, they regain their former condition.

18. Precious stones, gems, and other things found upon the seashore become immediately, by natural law, the property of the finder.

19. All that is born of animals of which you are the owner, becomes by the same law your property.

20. Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. *Alluvion* is an imperceptible increase; and that is added so gradually that no one can perceive how much is added at any one moment of time.

21. But if the violence of a river should bear away a portion of your land and unite it to the land of your neighbor, it undoubtedly still continues yours. If, however, it remains for long united to your neighbor's land, and the trees, which it swept away with it, take root in his ground, these trees from that time become part of your neighbor's estate.

22. When an island is formed in the sea, which rarely happens, it is the property of the first occupant; for before occupation, it belongs to no one. But when an island is formed in a river, which frequently happens, if it is placed in the middle of it, it belongs in common to those who possess the lands near the banks on each side of the river, in proportion to the extent of each man's estate adjoining the banks. But, if the island is nearer to

one side than the other, it belongs to those persons only who possess lands contiguous to the bank on that side. If a river divides itself and afterwards unites again, thus giving to any one's land the form of an island, the land still continues to belong to the person to whom it belonged before.

23. If a river, entirely forsaking its natural channel, begins to flow in another direction, the old bed of the river belongs to those who possess the lands adjoining its banks, in proportion to the extent that their respective estates adjoin the banks. The new bed follows the condition of the river, that is, it becomes public. And, if, after some time, the river returns to its former channel, the new bed again becomes the property of those who possess the lands contiguous to its banks.

24. The case is quite different if anyone's land is completely inundated; for the inundation does not alter the nature of the land, and therefore, when the waters have receded, the land is indisputably the property of its former owner.

25. When one man has made anything with materials belonging to another, it is often asked which, according to natural reason, ought to be considered the proprietor, whether he who gave the form, or he rather who owned the materials. For instance, suppose a person has made wine, oil, or wheat from the grapes, olives, or ears of corn belonging to another; has cast a vessel out of gold, silver, or brass, belonging to another; has made mead with another man's wine and honey; has composed a plaster, or eye-salve, with another man's medicaments; has made a garment with another man's wool; or a ship, or a bench, with another man's timber. After a long controversy between the Sabinians and Proculians, a middle opinion has been adopted based on the following distinction. If the thing made can be reduced to its former rude materials, then the owner of the materials is also considered the owner of the thing made; but, if the thing cannot be so reduced, then he who made it is the owner of it. For example, a vessel when cast, can easily be reduced to its rude materials of brass, silver, or gold; but wine, oil, or wheat, cannot be reconverted into grapes, olives, or ears of corn; nor can mead be resolved into wine and honey. But, if a man has made anything, partly with his own materials and partly with the materials of another, as if he has made mead with his own wine and another man's honey, or a plaster or eye-salve, partly with his own, and partly with another man's medicaments, or a garment with his own and also with another man's wool, then in such cases, he who made the thing is undoubtedly the proprietor; since he not only gave his labor, but furnished also a part of the materials.

26. If, however, any one has woven purple belonging to another into his own vestment, the purple, although the more valuable, attaches to the vestment as an accession, and its former owner has an *actio* of theft and a *condictio* against the person who stole it from him, whether it was he or some one else who made the vestment. For although things which have perished cannot be reclaimed by *vindicatio*, yet this gives ground for a *condictio* against the thief, and against many other possessors.

27. If materials belonging to two persons are mixed together by their mutual consent, whatever is

thence produced is common to both, as if, for instance, they have intermixed their wines, or melted together their gold or silver. And although the materials are different which are employed in the admixture, and thus a new substance is formed, as when mead is made with wine and honey, or electrum by fusing together gold and silver, the rule is the same; for in this case the new substance is undoubtedly common. And if it is by chance, and not by intention of the proprietors, that materials, whether similar or different, are mixed together, the rule is still the same.

28. If the wheat of Titius is mixed with yours, when this takes place by mutual consent, the mixed heap belongs to you in common because each body, that is, each grain, which before was the property of one or other of you, has by your mutual consent been made your common property; but, if the intermixture were accidental, or made by Titius without your consent, the mixed wheat does not then belong to you both in common; because the grains still remain distinct, and retain their proper substance. The wheat in such a case no more becomes common to you both, than a flock would be, if the sheep of Titius were mixed with yours; but, if either of you keep the whole quantity of mixed wheat, the other has a real *actio* for the amount of wheat belonging to him, but it is in the province of the judge to estimate the quality of the wheat belonging to each.

29. If a man builds upon his own ground with the materials of another, he is considered the proprietor of the building, because everything built on the soil accedes to it. The owner of the materials does not, however, cease to be owner; only while the building stands he cannot claim the materials, or demand to have them exhibited, on account of the law of the Twelve Tables, providing that no one is to be compelled to take away the *tignum* of another which has been made part of his own building, but that he may be made, by the *actio de tigno injuncto*, to pay double the value; and under the term *tignum* all materials for building are comprehended. The object of this provision was to prevent the necessity of buildings being pulled down. But if the building is destroyed from any cause, then the owner of the materials, if he has not already obtained the double value, may reclaim the materials, and demand to have them exhibited.

30. On the contrary, if anyone builds with his own materials on the ground of another, the building becomes the property of him to whom the ground belongs. But in this case the owner of the property, because he is presumed to have voluntarily parted with them, that is, if he knew he was building upon another's land; and, therefore, if the building should be destroyed, he cannot, even then, reclaim the materials. Of course, if the person who builds is in possession of the soil, and the owner of the soil claims the building, but refuses to pay the price of the materials and the wages of the workmen, the owner may be repelled by an exception of *dolus malus*, provided the builder was in possession *bona fide*. For if he knew that he was not the owner of the soil, it may be said against him that he was wrong to build on ground which he knew to be the property of another.

31. If Titius places another man's plant in ground belonging to himself, the plant will belong to Titius; on

the contrary, if Titius places his own plant in the ground of Maevius, the plant will belong then to Maevius---that is if, in either case, the plant has taken root; for before it has taken root, it remains the property of its former owner. But from the time it has taken root, the property in it is changed; so much so, that if the tree of a neighbor presses so closely on the ground of Titius as to take root in it, we pronounce that the tree becomes the property of Titius. For reason does not permit that a tree should be considered the property of anyone else than of him in whose ground it has taken root; and, therefore, if a tree, planted near a boundary extends its roots into the lands of a neighbor, it becomes common.

32. As plants rooted in the earth accede to the soil, so, in the same way, grains of wheat which have been sown are considered to accede to the soil. But as he who has built on the ground of another may, according to what we have said, defend himself by an exception of *dolus malus* , if the proprietor of the ground claims the building, so also he may protect himself by the aid of the same exception, who, at his own expense and acting *bona fide* , has sown another man's land.

33. Written characters, although of gold, accede to the paper or parchment on which they are written, just as whatever is built on, or sown in, the soil, accedes to the soil. And, therefore, if Titius has written a poem, a history, or an oration, on your paper or parchment, you, and not Titius, are the owner of the written paper. But, if you claim your books or parchments from Titius, but refuse to defray the cost of the writing, then Titius can defend himself by an exception of *dolus malus* ; that is, if it was *bona fide* that he obtained possession of the papers or parchments.

34. If a person has painted on the tablet of another, some think that the tablet accedes to the picture, others, that the picture, of whatever quality it may be, accedes to the tablet. It seems to us the better opinion that the tablet should accede to the picture; for it is ridiculous that a painting of Apelles or Parrhasius should be but the accessory of a thoroughly worthless tablet. But if the owner of the tablet is in possession of the picture, the painter, should he claim it from him, but refuse to pay the value of the tablet, may be repelled by the exception of *dolus malus* . If the painter is in possession of the picture, the law permits the owner of the tablet to bring a *utilis actio* against him; and in this case, if the owner of the tablet does not pay the cost of the picture, he may also be repelled by an exception of *dolus malus* ; that is, if the painter obtained possession *bona fide* . If the tablet has been stolen, whether by the painter or by any one else, the owner of the tablet may bring an *actio* of theft.

35. If any person has, *bona fide*, purchased land from another, whom he believed to be the true owner, when in fact he was not, or has, *bona fide* , acquired it from such person by gift or by other good title, natural reason demands that the fruits which he has gathered shall be his in return for his care and culture. And, therefore, if the real owner afterwards appears and claims his land, he can have no *actio* for fruits which the possessor has consumed. But the same allowance is not made to him who has knowingly been in possession of another's estate, and, therefore, he is compelled

to restore, together with the lands, all the fruits, although they may have been consumed.

36. The *usufructuary* of land is not owner of the fruits until he has himself gathered them; and, therefore, if he should die while the fruits, although ripe, are yet ungathered, they do not belong to his heirs, but are the property of the owner of the soil. And nearly the same may be said of the *colonus*.

37. In the fruits of animals are included their young, as well as their milk, hair and wool; and, therefore, lambs, kids, calves, colts, and young pigs immediately on their birth become, by the law of nature, the property of the *usufructory*, but the offspring of a female slave is not considered a fruit, but belongs to the owner of the property. For it seemed absurd that man should be reckoned as a fruit, when it is for man's benefit that all fruits are provided by nature.

38. The *usufructuary* of a flock ought to replace any of the flock that may happen to die by supplying the deficiency out of the young, as also Julian was of opinion. So, too, the *usufructuary* ought to supply the place of dead vines or trees. For he ought to cultivate with care, and to use everything as a good father of a family would use it.

39. The Emperor Hadrian, in accordance with natural equity, allowed any treasure found by a man in his own land to belong to the finder, as also any treasure found by chance in a sacred or religious place. But treasure found without any express search, but by mere chance, in a place belonging to another, he granted half to the finder, and half to the proprietor of the soil. Consequently, if anything is found in a place belonging to the emperor, half belongs to the finder, and half to the emperor. And hence it follows, that if a man finds anything in a place belonging to the *fiscus*, the public, or a city, half ought to belong to the finder, and half to the *fiscus* or the city.

40. Another mode of acquiring things according to natural law is traditional; for nothing is more conformable to natural equity than that the wishes of a person, who is desirous to transfer his property to another, should be confirmed; and, therefore, corporeal things, of whatever kind, may be so passed by tradition, and when so passed by their owner, are made the property of another. In this way are alienated stipendiary and tributary lands, that is, lands in the provinces, between which and Italian lands there is now, by our *constitutio*, no difference, so that when tradition is made of them for purpose of a gift, a marriage portion, or any other object, the property in them is undoubtedly transferred.

41. But things sold and delivered are not acquired by the buyer until he has paid the seller the price, or satisfied him in some way or other, as by procuring some one to be security, or by giving a pledge. And, although this is provided by a law of the Twelve Tables, yet it may be rightly said to spring from the law of nations, that is, the law of nature. But if the seller has accepted the credit of the buyer, the thing then becomes immediately the property of the buyer.

42. It is immaterial whether the owner deliver the thing himself, or some one else by his desire.

43. Hence, if any one is instructed by an owner with the uncontrolled administration of all his goods, and he sells and delivers anything which is a part of these goods, he passes the property in it to the person who receives the thing.

44. Sometimes, too, the mere wish of the owner, without tradition, is sufficient to transfer the property in a thing, as when a person has lent, or let to you anything, or deposited anything with you, and then afterwards sells or gives it to you. For, although he has not delivered it to you for the purpose of the sale or gift, yet by the mere fact of his consenting to it becoming yours, you instantly acquire the property in it, as fully as if it had actually been delivered to you for the express purpose of passing the property.

45. So, too, anyone who has sold goods deposited in a warehouse, as soon as he has handed over the keys of the warehouse to the buyer, transfers to the buyer the property in the goods.

46. Nay, more, sometimes the intention of an owner, although directed only towards an uncertain person, transfers the property in a thing. For instance, when the praetors and consuls throw their largesse to the mob, they do not know what each person in the mob will get; but as it is their intention that each should get what he gets, they make what each gets immediately belong to him.

47. Accordingly, it is true to say that anything which is seized on, when abandoned by its owners, becomes the property of the person who takes possession of it. And anything is considered as abandoned which its owner has thrown away with a wish no longer to have it as a part of his property, as it therefore immediately ceases to belong to him.

48. It is otherwise with respect to things thrown overboard in a storm, to lighten a vessel; for they remain the property of their owners; as it is evident that they were not thrown away through a wish to get rid of them, but that their owners and the ship itself might more easily escape the dangers of the sea. Hence, anyone who, with a view to profit himself by these, takes them away when washed on shore, or found at sea, is guilty of theft. And much the same may be said as to things which drop from a carriage in motion without the knowledge of their owners.

II. Incorporeal Things.

Certain things, again, are corporeal, others incorporeal.

1. Corporeal things are those which are by their nature tangible, as land, a slave, a garment, gold, silver, and other things innumerable.

2. Incorporeal things are those which are not tangible, such as are those which consist of a right, as an inheritance, a *usufructus*, *usus*, or obligations in whatever way contracted. Nor does it make any difference that things corporeal are contained in an inheritance; fruits, gathered by the *usufructuary*, are corporeal; and that which is due to us by virtue of an obligation, is generally a corporeal thing, as a field, a slave, or money; while the right of inheritance, the right of *usufructus*, and the right of obligation, are incorporeal.

3. Among things incorporeal are the rights over estates, urban and rural, which are also called *servitutions*.

III. *Servitutions*.

The *servitutions* of rural immovables are, the right of passage, the right of passage for beasts or vehicles, the right of way, the right of passage for water. The right of passage is the right of going or passing for a man, not of driving beasts or vehicles. The right of passage for beasts or vehicles is the right of driving beasts or vehicles over the land of another. So a man who has the right of passage simply has not the right of passage for beasts or vehicles; but if he has the latter right he has the former, and he may use the right of passing without having any beasts with him. The right of way is the right of going, of driving beasts or vehicles, and of walking; for the right of way includes the right of passage, and the right of passage for beasts or vehicles. The right of passage for water is the right of conducting water through the land of another.

1. The *servitutions* of urban immovables are those which appertain to buildings, and they are said to be *servitutions* of urban immovables, because we term all edifices urban immovables, although really built in the country. Among these *servitutions* are the following: that a person has to support the weight of an adjoining house, that a neighbor should have the right of inserting a beam into his wall, that he has to receive or not to receive the water that drops from the roof, or that runs from the gutter of another man's house on to his building, or into his court or drain; or that he is not to raise his house higher, or not to obstruct his neighbor's lights.

2. Some think that among the *servitutions* of rural estates are rightly included the right of drawing water, of watering cattle, of feeding cattle, of burning lime or digging sand.

3. These *servitutions* are called the *servitutions* of immovables, because they cannot exist without immovables. For no one can acquire or owe a *servitude* of a rural or urban immovable, unless he has an immovable belonging to him.

4. If anyone wishes to create a right of this sort in favor of his neighbor, he must effect it by agreements and stipulations. A person can also, by testament, oblige his heir not to raise his house higher, not to obstruct his neighbor's lights, to permit a neighbor to insert a beam into his wall, or to receive the water from an adjoining roof; or, again, he may oblige his heir to allow a neighbor to go across his land, or to drive beasts or vehicles, or to conduct water across it.

IV. *Usufructus*.

Usufructus is the right of using, and taking the fruits of things belonging to others, so long as the substance of the things used remains. It is a right over a corporeal thing, and if this thing perish, the *usufructus* itself necessarily perishes also.

1. The *usufructio* is detached from the property; and this separation takes place in many ways; for example, if the *usufructus* is given to anyone as a legacy; for the heir has then the bare ownership, and the legatee has the *usufructus*; conversely, if the estate is given as a legacy, subject to the deduction of the *usufructus*, the legatee has the bare ownership, and the heir has the *usufructus*. Again, the *usufructus* may be given as a legacy to one person, and the estate minus this *usufructus* may be given to another. If any one wishes to constitute a *usufructus* otherwise than by testament, he must effect it by pacts and stipulations. But, lest the property should be rendered wholly profitless by the *usufructus* being forever detached, it has been thought right that there should be certain ways in which the *usufructus* should become extinguished, and revert to the property.

2. A *usufructus* may be constituted not only of lands and buildings, but also of slaves, of beasts of burden, and everything else except those which are consumed by being used, for they are susceptible of a *usufructus* neither by natural nor by civil law. Among these things are wine, oil, garments, and we may almost say coined money; for it, too, is in a manner consumed by *usus*, as it continually passes from hand to hand. But the senate, thinking such a measure would be useful, has enacted that a *usufructus* even of these things may be constituted, if sufficient security be given to the heir; and, therefore, if the *usufructus* of money is given to a legatee, the money is considered to be given to him in complete ownership; but he has to give security to the heir for the repayment of an equal sum in the event of his death or his undergoing a *capitis deminutio*. All other things, too, of the same kind are delivered to the legatee so as to become his property; but their value is estimated and security is given for the payment of the amount at which they are valued, in the event of the legatee dying or undergoing a *capitis deminutio*. The senate has not then, to speak strictly, created a *usufructus* of these things, for that was impossible, but, by

requiring security, has established a right analogous to a *usufructus*.

3. The *usufructus* terminates by the death of the *usufructuary*, by two kinds of *capitis deminutio*, namely, the greatest and the middle, and also by not being used according to the manner and during the time fixed; all which points have been decided by our *constitutio*. The *usufructus* is also terminated if the *usufructuary* surrenders it to the owner of the property (a cession to a stranger would not have this effect); or, again, by the *usufructuary* acquiring the property, which is called *consolidatio*. Again, if a building is consumed by fire, or thrown down by an earthquake, or falls down through decay, the *usufructus* of it is necessarily destroyed, nor does there remain any *usufructus* due even of the soil on which it stood.

4. When the *usufructus* is entirely extinguished, it is reunited to the property; and the person who had the bare ownership begins thenceforth to have full power over the thing.

V. *Usus* and *Habitatio*.

The naked *usus* is constituted by the same means as the *usufructus*; and is terminated by the same means that make the *usufructus* to cease.

1. The right of *usus* is less extensive than that of *usufructus*; for he who has the naked *usus* of lands, has nothing more than the right of taking herbs, fruit, flowers, hay, straw, and wood, sufficient for his daily supply. He is permitted to establish himself upon the land, so long as he neither annoys the owner, nor hinders those who are engaged in the cultivation of the soil. He cannot let, or sell, or give gratuitously his right to another, while a *usufructuary* may.

2. He who has the *usus* of a house, has nothing more than the right of inhabiting it himself; for he cannot transfer this right to another; and it is not without considerable doubt that it has been thought allowable that he should receive a guest in the house, but he may live in it with his wife and children, and freedmen, and other free persons who may be attached to his service no less than his slaves are. A wife, in the same way, if it is she who has the *usus* of the house, may live in it with her husband.

3. So, too, he who has the *usus* of a slave, has only the right of himself using the labor and services of the slave: for he is not permitted in any way to transfer his right to another. And it is the same with regard to beasts of burden.

4. If the *usus* of a flock or herd, as, for instance, of a flock of sheep, be given as a legacy, the

person who has the *usus* cannot take the milk, the lambs, or the wool, for these are among the fruits. But he may certainly make use of the flock to manure his land.

5. If the right of *habitatio* is given to anyone, either as a legacy or in any other way, this does not seem a *usus* or a *usufructus*, but a right that stands as it were by itself. From a regard to what is useful, and conformably to an opinion of Marcellus, we have published a decision, by which we have permitted those who have this right of *habitatio*, not only themselves to inhabit the place over which the right extends, but also to let to others the right of inhabiting it.

6. Let it suffice to have said thus much concerning *servitutes*, *usufructus*, *usus* and *habitatio*. We shall treat of inheritances and *obligationes* in their proper places. We have already briefly explained how things are acquired by the law of nations; let us now examine how they are acquired by the civil law.

VI. Title Through Possession.

By the civil law it was provided, that if anyone by purchase, gift, or any other legal means, had *bona fide* received a thing from a person who was not the owner, but whom he thought to be so, he should acquire this thing by use if he held it for one year, if it were moveable, wherever it might be, or for two years, if it were an immoveable, but this if it were in the *solum Italicum*; the object of this provision being to prevent the ownership of things remaining in uncertainty. Such was the decision of the ancients, who thought the times we have mentioned sufficient for owners to search for their property, but we have come to a much better decision, from a wish to prevent owners being despoiled of their property too quickly, and to prevent the benefit of this mode of acquisition being confined to any particular locality. We have, accordingly, published a *constitutio* providing that movables be acquired by a *usus* extending for three years, and immovables by the "possession of long time," that is, ten years for persons present, and twenty years for persons absent; and that by these means, provided a just cause of possession precede, the ownership of things may be acquired, not only in Italy, but in every country subject to our empire.

1. Sometimes, however, although the thing be possessed with perfect good faith, yet use, however long, will never give the property; as, for instance, when the possession is of a free person, a thing sacred or religious, or a fugitive slave.

2. Things stolen, or seized by violence, cannot be acquired by use, although they have been possessed *bona fide* during the length of time above prescribed; for such acquisition is prohibited, as to things stolen, by the law of the Twelve Tables, and by the *lex Atinia*; as to things seized by violence, by the *lex*

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3. When it is said that the acquisition by use of things stolen or seized by violence is prohibited by these laws, it is not meant that the thief himself, or he who possesses himself of the thing by violence, is unable to acquire the property, for another reason prevents them, namely, that their possession is *mala fide*; but no one else, although he has in good faith purchased or taken away from them, is able to acquire the property in use. Whence, as to movables, it does not often happen that a *bona fide* possessor gains the property in them by use. For whenever any one sees, or makes over for any other reason, a thing belonging to another, it is a theft.

4. Sometimes, however, it is otherwise; for, if an heir, supposing a thing lent or let to the deceased, or deposited with him, to be a part of the inheritance, sells or gives it as a gift or dowry to a person who receives it *bona fide*, there is no doubt that the person receiving it may acquire the property in it by use; for the thing is not tainted with the vice of theft, as the heir who has *bona fide* alienated it as his own, has not been guilty of a theft.

5. So if the *usufructuary* of a female slave sells or gives away her child, believing it to be his property, he does not commit theft; for there is no theft without the intention to commit theft.

6. It may also happen in various other ways, that a man may transfer a thing belonging to another without committing a theft, so that the possessor acquires the property in it by use.

7. As to movables, it may more easily happen that a person may, without violence, take possession of a place vacant by the absence or negligence of the owner, or his having died without a successor; and although his possession is *mala fide*, since he knows that he has seized on land not belonging to him, yet if he transfers it to a person who receives it *bona fide*, this person will acquire the property in it by long possession, as the thing he receives has neither been stolen nor seized by violence. The opinion of the ancients, who thought that there could be a theft of a piece of land or a place, is now abandoned, and there are imperial *constitutiones* which provide that no possessor of an immoveable shall be deprived of the benefit of a long and undoubted possession.

8. Sometimes even a thing stolen or seized by violence may be acquired by use; for instance, if it has come back into the power of its owner, for then, the vice being purged, the acquisition by use may take place.

9. Things belonging to our *fiscus* cannot be acquired by use. But Papinian has given his opinion that if, before *bona vacantia* have been reported to the *fiscus*, a *bona fide* purchaser receives any of them, he can acquire the property by use. And the Emperor Antoninus Pius, and the Emperors Severus and Antoninus, have issued rescripts in accordance with this opinion.

10. Lastly, it is to be observed that a thing must be tainted with no vice, that the *bona fide* purchaser or person who possesses it from any other just cause may acquire it by use.

11. But if a mistake is made as to the cause of possession, and it is wrongly supposed to be just, there is no *usucapion*. As, for instance, if any one possesses in the belief that he has bought, when he has not bought, or that he has received a gift, when no gift has really been made to him.

12. Long possession, which has begun to reckon in favor of the deceased, is continued in favor of the heir or *bonorum possessor*, although he may know that the immovable belongs to another person; but if the deceased commenced his possession *mala fide*, the possession does not profit the heir or *bonorum possessor*, although ignorant of this. And our *constitutio* has enacted the same with respect to *usucapions*, in which the benefit of possession is to be in like manner continued.

13. Between the buyer and the seller, too, the Emperors Severus and Antoninus have decided by rescript that their several times of possession shall be reckoned together.

14. It is provided by an edict of the Emperor Marcus, that a person who has purchased from the *fiscus* a thing belonging to another person, may repel the owner of the thing by an exception, if five years have elapsed since the sale. But a *constitutio* of Zeno of sacred memory has completely protected those who receive anything from the *fiscus* by sale, gift, or any other title, by providing that they themselves are to be at once secure, and made certain of success, whether they sue or are themselves sued in an *actio*, while they who think that they have a good ground of action as owners or mortgagees of the things alienated may bring an *actio* against the sacred treasury within four years. An imperial *constitutio*, which we ourselves have recently published, extends to those who have received as a gift anything from our palace, or that of the empress, the provisions of the *constitutio* of Zeno relative to the alienations of the *fiscus*.

X. The Making of Wills.

The word testament is derived from *testatio mentis*; it testifies the determination of the mind.

1. That nothing belonging to antiquity may be altogether unknown, it is necessary to observe, that formerly there were two kinds of testaments in use: the one was employed in times of peace, and was named *calatic comitiis*, the other was employed at the moment

of setting out in battle, and was termed *procinctum* afterwards added, called *per aes libram* by *mancipatio*, that is, an imaginary sale in the presence of five witnesses, and the *libripens*, all citizens of Rome, above the age of puberty, together with him who was called the *emptor familiae*. The two former kinds of testament fell into disuse even in ancient times; and that made *per aes libram* also, although it has continued longer in practice, has now in part ceased to be made use of.

2. These three kinds of testament belonged to the civil law, but afterwards another kind was introduced by the edict of the praetor. By the *ius honorarium* no sale was necessary but the seals of seven witnesses were sufficient. The seals of witnesses were not required by the civil law.

3. But when the progress of society and the imperial *constitutiones* had produced a fusion of the civil and the praetorian law, it was established that the testament should be made all at one time, in the presence of seven witnesses (two points required by the civil law), with the subscription of the witnesses (a formality introduced by the *constitutiones*), and with their seals appended, according to the edict of the praetor. Thus the law of testament seems to have had a triple origin. The witnesses, and their presence at one continuous time for the purpose of giving the testament the requisite formality, are derived from the civil law; the subscriptions of the testator and witnesses, from the imperial *constitutiones*; and the seals of the witnesses and their number, from the edict of the praetor.

4. To all these formalities we have enacted by our *constitutio*, as an additional security for the genuineness of testaments, and to prevent fraud, that the name of the heir shall be written in the handwriting either of the testator or of the witnesses; and that everything shall be done according to the tenor of that *constitutio*.

5. All the witnesses may seal the testament with the same seal; for, as Pomponius says, what if the engraving on all seven seals were the same? And a witness may use a seal belonging to another person.

6. Those persons can be witnesses with whom there is *testamenti factio*. But women, persons under the age of puberty, slaves, madmen, dumb persons, deaf persons, prodigals restrained from having their property in their power, and persons declared by law to be worthless and incompetent to witness, cannot be witnesses.

7. A witness, who was thought to be free at the time of making the testament, was afterwards discovered to be a slave, and the Emperor Hadrian, in his rescript to Catonius Verus, and afterwards the Emperors Severus and Antoninus by rescript, declared, that they would aid such a defect in a testament, so that it should be considered as valid as if made quite regularly; since, at the time when the testament was sealed, this

witness was commonly considered a free man, and there was no one to contest his status.

8. A father, a son under his power, or two brothers under the power of the same father, may be witnesses to the same testament; for nothing prevents several persons of the same family being witnesses in a matter which only concerns a stranger.

9. But no person under power of the testator can be a witness. And if a *filliusfamilias* makes a testament giving his *castrense peculium*, after leaving the army, neither his father, nor any one in power of his father, can be a witness. For, in this case, the law does not allow the testimony of a member of the same family.

10. No person instituted heir, nor any one in subjection to him, nor his father, in whose power he is, nor his brothers under power of the same father, can be witnesses; for the whole business of making a testament is in the present day considered a transaction between the person who has purchased from the testator and the heir. But formerly there was great confusion; for although the ancients would never admit the testimony of the *familiae emptor*, nor of any one connected with him by the ties of *patria potestas*, yet they admitted that of the heir, and of persons connected with him by the ties of *patria potestas*, only exhorting them not to abuse their privilege. We have corrected this, making illegal what they endeavored to prevent by persuasion. For, in imitation of the old law respecting the *familiae emptor*, we refuse to permit the heir, who now represents the ancient *familiae emptor*, or any of those connected with the heir by the tie of *patria potestas*, to be, so to speak, witness in their own behalf; and accordingly we have not suffered the *constitutiones* of preceding emperors on the subject to be inserted in our code.

11. But we do not refuse the testimony of legatees, or persons taking *fideicommissa*, or of persons connected with them, because they do not succeed to the rights of the deceased. On the contrary, by one of our *constitutiones* we have specially granted them this privilege; and we give it still more readily to persons in their power, and to those in whose power they are.

12. It is immaterial whether a testament be written upon a tablet, upon paper, parchment, or any other substance.

13. Any person may execute any number of duplicates of the same testament, each, however, being made with prescribed forms. This may be sometimes necessary; as, for instance, when a man who is going on a voyage is desirous to carry with him, and also to leave at home, a memorial of his last wishes; or for any other of the numberless reasons that may arise from the various necessities of mankind.

14. Thus much may suffice concerning written testaments. But if any one wishes to make a testament, valid by the civil law, without writing, he may do so, in the presence of seven witnesses, verbally declaring his wishes, and this will be a testament perfectly valid according to the civil law, and confirmed by imperial *constitutiones*

Book III

Intestate Succession.

A person dies intestate, who either has made no testament at all, or has made one not legally valid; or if the testament he has made is revoked, or made useless; or if no one becomes heir under it.

1. The inheritances of intestates, by the law of the Twelve Tables, belong in the first place to the *sui heredes*

2. And, as we have observed before, those as *sui heredes* who, at the death of the deceased, were under his power; as a son or a daughter, a grandson or a granddaughter by a son, a great-grandson or great-granddaughter by a grandson of a son; nor does it make any difference whether these children are natural or adopted. We must also reckon among them those, who, though not born in lawful wedlock, nevertheless, according to the tenor of the imperial *constitutiones*, acquire the rights of *sui heredes* by being presented to the *curiae* of their cities; as also those to whom our own *constitutiones* refer, which enact that, if any person has lived with a woman not originally intending to marry her, but whom he is not prohibited to marry, and shall have children by her, and shall afterwards, feeling towards her the affection of a husband, enter into an act of marriage with her, and have by her sons or daughters, not only those born after the settlement of the dowry shall be legitimate, and in the power of the father, but also those born before, who gave occasion to the legitimacy of the children born after. And this law shall obtain, although no children are born subsequent to the making of the act of dowry, or those born are all a great-grandson or great-granddaughter, are not reckoned the *sui heredes*, unless the person preceding them in degree has ceased to be under the power of the decedent, either by death, or some other means, as by emancipation. For, if a son, when the grandfather died, was under the power of his father, the grandson cannot be *suus heres* of his grandfather; and so with regard to all other descendants. Posthumous children, also, who would have been under the power of their father, if they had

been born in his lifetime, are *sui heredes*

3. *Sui heredes* may become heirs, without their knowledge, and even though insane; for in every case in which inheritances may be acquired without our knowledge, they may also be acquired by the insane. At the death of the father, ownership in an inheritance is at once continued; accordingly, the authority of a tutor is not necessary, as inheritances may be acquired by *sui heredes* without their knowledge: neither does an insane person acquire by assent of his curator, but by operation of law.

4. But sometimes a child becomes a *suus heres*, although he was not under power at the death of his parent; as when a person returns from captivity after the death of his father. He is then made a *suus heres* by the *ius postliminii*.

5. On the contrary, it may happen that a child who, at the death of his parent, was under his power, is not his *suus heres*: as when a parent after his decease, is adjudged to have been guilty of treason. and his memory is thus made infamous. He can then have no *suus heres*, as it is the *fiscus* that succeeds to his estate. In this case it may be said that there has in law been a *sui heres*, but that he has ceased to be so.

6. A son, or a daughter, and a grandson or granddaughter by another son, are called equally to the inheritance; nor does the nearer in degree exclude the more remote; for it seems just that grandsons and granddaughters should succeed in the place of their father. For the same reason, a grandson or granddaughter by a son, and a great-grandson or great-granddaughter by a grandson, are called together. And since grandsons and granddaughters, great-grandsons and great-granddaughters, succeed in place of their parent, it appeared to follow that inheritances should not be divided *per capita*, but *per stirpes*; so that a son should possess one-half, and the grandchildren, whether two or more, of another son, the other half of the inheritance. So, where there were grandchildren by two sons, one or two perhaps by the one, and three or four by the other, the inheritance will belong half to the grandchild or the two grandchildren by the one son, and half to the three or four grandchildren by the other son.

7. When it is asked whether such a person is a *suus heres*, we must look to the time at which it was certain that the deceased died without a testament, including therein the case of the testament being abandoned. Thus, if a son is disinherited and a stranger is instituted heir, and after the death of the son it becomes certain that the instituted heir will not be heir, either because he is unwilling or unable to be so, in this case the grandson of the deceased becomes the *suus heres* of his grandfather; for, at the time when it was certain that the deceased died intestate, there exists only the grandchild, and of this there can be no doubt.

8. And although a child is born after the death of his grandfather, yet, if he was conceived in the lifetime of his grandfather, he will, if his father is dead, and his grandfather's testament abandoned, become the *suus heres* of his grandfather. But a child both conceived and born after the death of his grandfather, could not become the *suus heres*, although his father should die and the testament of his grandfather be abandoned; because he was never allied to his grandfather by any tie of relationship. Neither is a person adopted by an emancipated son to be reckoned among the children of the father of his adoptive father. And not only are these adoptive children of an emancipated son incapable of taking the inheritance as children of the deceased grandfather, but they cannot demand possession of the goods as the nearest *agnati*. Thus much concerning *sui heredes*.

9. Emancipated children by the civil law have no right to the inheritance of their father; being no longer under the power of their parent, they are not his *sui heredes*, nor are they called to inherit by any other right under the law of the Twelve Tables. But the praetor, obeying natural equity, grants them the possession of goods called *unde liberi*, as if they had been under the power of their father at the time of his death, and this, whether they stand alone, or whether there are also others, who are *sui heredes*. Thus, when there are two children, one thus emancipated, and the other under power at his father's death, the latter, by the civil law, is alone the heir, and alone the *suus heres*; but, as the emancipated son, by the indulgence of the praetor, is admitted to his share, the *suus heres* becomes heir only of a part.

10. But those who, after emancipation, have given themselves in adoption, are not admitted as children to the possession of the effects of their natural father, that is if, at the time of his death, they are still in their adoptive family. But, if, in the lifetime of their natural father, they have been emancipated by their adoptive father, they are then admitted to receive the goods of their natural father exactly as if they had been emancipated by him, and had never entered into the adoptive family. Accordingly, with regard to their adoptive father, they become from that moment strangers to him. But if they are emancipated by their adoptive father after the death of their natural father, they are equally considered as strangers to the adoptive father; and yet do not gain the position of children with regard to the inheritance of their natural father. This has been so laid down because it was unreasonable that it should be in the power of an adopter to determine to whom the inheritance of a natural father should belong, whether to his children, or to the *agnati*.

11. The rights of adoptive children are therefore less than those of natural children, who, even after emancipation, retain the rank of children by the indulgence of the praetor, although they lose it by the civil law. But adopted children, when emancipated, lose the rank of children by the civil law, and are not aided by the praetor. And the distinction between the two cases is very proper, for the civil law cannot destroy natural rights; and children cannot cease to be sons and daughters, grandsons and granddaughters, because they cease to be *sui heredes*. But adopted children, when emancipated, become instantly strangers; for the rights and title of son or daughter, which they have only obtained by

adoption, may be destroyed by another ceremony of the civil law, that, namely, of emancipation.

12. The same rules are observed in the possession of goods which the praetor gives *contra tabulas* to children who have been passed over, that is, who have neither been instituted heirs, nor properly disinherited. For the praetor calls to this possession of goods those children under the power of their father at the time of his death, and those also who are emancipated; but he excludes those who are in an adoptive family at the decease of their natural father. So, too, adoptive children emancipated by their adoptive father, as they are not admitted to succeed their adoptive father *ab intestato*, much less are they admitted to possess the goods of their adoptive father contrary to his testament, for they cease to be included in the number of his children.

13. It is, however, to be observed that children still remaining in an adoptive family, or who have been emancipated by their adoptive father, after the decease of their natural father, who dies intestate, although not admitted by the part of the edict calling children to the possession of goods, are admitted by another part, by which the *cognati* of the deceased are called. They are, however, only thus admitted in default of *sui heredes*, emancipated children, and *agnati*. For the praetor first calls the children, both the *sui heredes* and those emancipated, then the *legitimi heredes*, and then the *cognati*.

14. Such were the rules that formerly obtained; but they have received some emendation from our *constitutio* relating to persons given in adoption by their natural parents. For cases have occurred in which sons have lost by adoption their succession to their natural parents, and, the tie of adoption being easily dissolved by emancipation, have lost the right of succeeding to either parent. Correcting, therefore, as usual, what is wrong, we have promulgated a *constitutio* enacting that when a natural father has given his son in adoption, the rights of the son shall be preserved exactly as if he had still remained in the power of his natural father, and no adoption had taken place; except only in this, that the person adopted may succeed to his adoptive father if he dies intestate. But, if the adoptive father makes a testament, the adoptive son can neither by the civil law nor under the praetorian edict obtain any part of the inheritance, whether he demands possession of the effects *contra tabulas*, or alleges that the testament is inofficious: for an adoptive father is under no obligation to institute or disinherit his adopted son, there being no natural tie between them, not even if the adopted son has been chosen among three brothers, according to the *senatusconsultum Sabinianus*, for even in this case the son does not obtain the fourth part of his adoptive father's effects, nor has he any *actio* whereby to claim it. But persons adopted by an ascendant are excepted in our *constitutio*; for, as natural and civil rights both concur in their favor, we have thought proper to preserve to this adoption its effect under the old law, as also to the *arrogatio* of a *paterfamilias*. But this, in all

its details, may be collected from the tenor of the above-mentioned *constitutio*

15. The ancient law, favoring descendants from males, called only grandchildren so descended to the succession as *sui heredes*, in preference to the *agnati*, while grandchildren born of daughters, and great-grandchildren born of granddaughters, were reckoned among *cognati*, and succeeded only after the *agnati* to their maternal grandfather and great-grandfather, or to their grandmother, or great grandmother, maternal or paternal. But the emperors would not suffer such a violence against nature to continue without an adequate alteration; and, inasmuch as the name of the grandchild and great-grandchild is common, as well to descendants by females as by males, they gave all the same right and order of succession. But, that persons whose privileges rested not only on nature but also on the ancient law might enjoy some peculiar advantage, they thought it right that the portions of grandchildren, great-grandchildren, and other lineal descendants of a female should be somewhat diminished, so that they should not receive so much by a third part as their mother or grandmother would have received, or, when the succession is the inheritance of a woman, as their father or grandfather, paternal or maternal would have received; and, although there were no other descendants, if they entered on the inheritance, the emperors did not call the *agnati* to the succession. And as, upon the decease of a son, the law of the Twelve Tables calls the grandchildren and great-grandchildren, male and female, to represent their father in the succession to their grandfather, so the imperial *constitutiones* calls them to take in succession the place of their mother or grandmother, subject only to the above-mentioned deduction of a third part.

16. But, as there still remained matter of dispute between the *agnati* and the above-mentioned grandchildren, the *agnati* claiming the fourth part of the estate of the deceased by virtue of a *constitutio*, we have rejected this *constitutio*, and have not permitted it to be inserted into our code from that of Theodosius. And in the *constitutio* we have ourselves promulgated we have completely departed from the provisions of those former *constitutiones*, and have enacted that *agnati* shall take no part in the succession of the deceased, when there are grandchildren born of a daughter, or great-grandchildren born of a granddaughter, or any other descendants from a female in the direct line; as those in a collateral line ought not to be preferred to direct descendants. This *constitutio* is to prevail from the date of its promulgation in its full force, as we here again enact. And as the old law ordered, that between the sons of the deceased and his grandsons by a son, every inheritance should be divided *per stirpes*, and not *per capita*, so we also ordain that a similar distribution shall be made between sons and grandsons by a daughter, and between grandsons and granddaughters, great-grandsons and great-granddaughters, and all other descendants in a direct line; so that the children of either branch may receive the share of their mother or father, their grandmother or grandfather, without any diminution; and, if of the one branch there should be one or two children, and of the other branch three or four, then the one or two shall have one-half, and the three or four the other half of the inheritance.

XIII. *Obligationes*

Let us now pass to *obligationes*. An *obligatio* is a tie of law, which binds us, according to the rules of our civil law, to render something.

1. The principal division of *obligationes* is into two kinds, civil and praetorian. Civil *obligationes* are those constituted by the laws, or, at least, recognized by the civil law. Praetorian *obligationes* are those which a praetor has established by his own authority; they are also called honorary.

2. A further division separates them into four kinds, for they arise *ex contractu* or *quasi ex contractu*, *ex maleficio* or *quasi ex maleficio*. Let us first treat of those which arise from a contract; which again are divided into four kinds, according as they are formed by the thing, by word of mouth, by writing, or by consent. Let us examine each kind separately.

XIV. Other Ways of Contracting an *Obligatio*.

An *obligatio* may be contracted by the thing, as, for example, by giving a *mutuum*. This always consists of things which may be weighed, numbered, or measured, as wine, oil, corn, coin, brass, silver, or gold. In giving these things by number, measure or weight, we do so that they may become the property of those who receive them. The identical things lent are not returned, but only others of the same nature and quality; and hence the term *mutuum*, because what I give from being mine becomes yours. From this contract arises the *actio* termed *condictio*.

1. A person, also, who receives a payment which is not due to him, and which is made by mistake, is bound *re*, i. e., by the thing; and the plaintiff may have against him an *actio condictitia* to recover what he has paid. For the *condictio* *Si paret eum dare oportere* may be brought against him, exactly as if he had received a *mutuum*. Thus a pupil, to whom a payment has been made by mistake without the authorization of his tutor, is not subject to a *condictio indebiti*, any more than he would be by the gift of a *mutuum*. This species of *obligatio*, however, does not seem to arise from a contract, since he, who gives in order to acquit himself of something due from him, intends rather to dissolve than to make a contract.

2. A person, too, to whom a thing is given as a *commodatum*, i. e., is given that he

may make use of it, is bound *re* , and is subject to the *actio commodati* . But there is a wide difference between him and a person who has received a *mutuum* ; for the thing is not given him that it may become his property, and he therefore is bound to restore the identical thing he received. And, again, he who has received a *mutuum* , if by any accident, as fire, the fall of a building, shipwreck, the attack of thieves or enemies, he loses what he received, still remains bound. But he who has received a thing lent for his use, is indeed bound to employ his utmost diligence in keeping and preserving it; nor will it suffice that he should take the same care of it, which he was accustomed to take of his own property, if it appear that a more careful person might have preserved it in safety; but he has not to answer for loss occasioned by superior force, or extraordinary accident, provided the accident is not due to any fault of his. If, however, you take with you on a journey the thing lent you to make use of, and you lose it by the attack of enemies or robbers, or by shipwreck, you are undoubtedly bound to restore it. A thing is properly said to be *commodatum* when you are permitted to enjoy the use of it, without any recompense being given or agreed on; for, if there is any recompense, the contract is that of *locatio* , as a thing, to be a *commodatum* , must be lent gratuitously.

3. A person with whom a thing is deposited is bound *re* , and is subject to the *actio depositi* , and must give back the identical thing which he received. But he is only answerable if he is guilty of fraud, and not for a mere fault, such as carelessness or negligence; and he cannot, therefore, be called to account if the thing deposited, being carelessly kept, is stolen. For he who commits his property to the care of a negligent friend, should impute the loss to his own want of caution.

4. A creditor, also, who has received a pledge, is bound *re* , for he is obliged to restore the thing he has received, by the *actio pignoratitia* . But, inasmuch as a pledge is given for the benefit of both parties, of the debtor that he may borrow more easily, and of the creditor that repayment may be better secured, it has been decided that it will suffice if the creditor employs his utmost diligence in keeping the thing pledged; if, notwithstanding this care, it is lost by some accident, the creditor is not accountable for it, and he is not prohibited from suing for his debt.

XV. Verbal Obligations.

An *obligatio* by word of mouth is contracted by means of a question and an answer, when we stipulate that anything shall be given to, or done for us. It gives rise to two *actiones* ---the *conditio* , when the stipulation is certain, and the *actio ex stipulatu* , when it is uncertain. The term *stipulatio* is derived from *stipulum* , a word employed by the ancients to mean "firm," and coming perhaps from *stipes* , the trunk of a tree.

1. Formerly, the words used in making this kind of contract were as follows---*Spondes?*

do you engage yourself? *Spondeo Promittis?*
 promise. *Fidepromittis?*
 faith? *Fidepromitto*
 faith. *Fideiubes?*
fideiussor? Fideiubeo
 myself *fideiussor*.

, I do engage myself.
 do you promise? *Promitto* , I do
 do you promise on your good
 , I do promise on my good
 do you make yourself

give. *Facies?*
 the *stipulatio*

Dabis? , I do make
 will you give? *Dabo* , I will
 will you do? *Faciam* , I will do. And it is immaterial whether
 is in Latin or in Greek, or in any other language, so that the

parties understand it; nor is it necessary that the same language should be used by each person, but it is sufficient if the answer agree with the question. So two Greeks may contract in Latin. Anciently, indeed, it was necessary to use the solemn words just mentioned, but the *constitutio* of the Emperor Leo was afterwards enacted, which makes unnecessary this solemnity of the expressions, and only requires the apprehension and consent of each party, in whatever words it may be expressed.

2. Every *stipulatio* is made simply, or with the introduction of a particular time, or conditionally. Simply, as "Do you engage to give five *aurei* ?" in this case the money may be instantly demanded. With the introduction of a particular time, as when a day is mentioned on which the money is to be paid, as "Do you engage to give me *aurei* on the first of the kalends of March?" that which we stipulate to give at a particular time becomes immediately due, but cannot be demanded before the day arrives, nor can it even be demanded on that day, for the whole of the day is allowed to the debtor for payment, as it is never certain that payment has not been made on the day appointed until that day is at an end.

3. But, if you stipulate thus "Do you engage to give me ten *aurei* annually, as long as I live?" the *obligatio* is understood to be made simply, and is perpetual; for a debt cannot be due for a time only; but the heir, if he demands payment, will be repelled by the *exceptio pacti*.

4. A *stipulatio* is made conditionally, when the *obligatio* is made subject to the happening of some uncertain event, so that it takes effect if such a thing happens, or does not happen, as, for instance, "Do you engage to give five *aurei* , if Titius is made consul?" Such a *stipulatio* as "Do you engage to give five *aurei* if I do not go up to the Capitol?" is in effect the same as if the *stipulatio* had been, that five *aurei* should be given to the *stipulator* at the time of his death. From a conditional *stipulatio* , there arises only a hope that the thing will become due; and this hope we transmit to our heirs, if we die before the condition is accomplished.

5. It is customary to insert a particular place in a *stipulatio* , as, for instance, "Do

you engage to give me at Carthage?" and this *stipulatio* , although it appears to be made simply, yet necessarily implies a delay sufficient to enable the person who promises to pay the money at Carthage. And therefore, if anyone at Rome stipulates thus "Do you engage to give to me this day at Carthage?" the *stipulatio* is useless, because the thing promised is impossible.

6. Conditions, which relate to time present or past, either instantly make the *obligatio* void, or do not suspend it in any way; as, for instance, "If Titius has been consul, or if Maevius is alive, do you engage to give me?" If the thing mentioned is not really the case, the *stipulatio* is void; if it is the case, the *stipulatio* is immediately valid. Things certain, if regarded in themselves, although uncertain as far as our knowledge is concerned, do not delay the formation of the *obligatio* .

7. Not only things, but acts, may be the subject of a *stipulatio* : as when we stipulate that something shall, or shall not, be done. And, in these *stipulationes* , it will be best to subjoin a penalty, lest the amount included in the *stipulatio* should be uncertain, and the plaintiff should therefore be obliged to prove how great his interest is. Therefore, if any one stipulates that something shall be done, a penalty ought to be added as thus: "If the thing is not done, do you engage to give ten *aurei* by way of penalty?" But, if by one single question a *stipulatio* is made that some things shall be done, and that other things shall not be done, there ought to be added some such clause as this: "If anything is done contrary to what is agreed on, or anything agreed on is not done, then do you engage to give ten *aurei* by way of penalty?"

XVI. *Obligatio*

By Consent.

Obligationes are formed by the mere consent of the parties in the contracts of sale, of letting to hire, of partnership, and of *mandatum* . An *obligatio* is, in these cases, said to be made by the mere consent of the parties, because there is no necessity for any writing, nor even for the presence of the parties: nor is it requisite that anything should be given to make the contract binding, but the mere consent of those between whom the transaction is carried on suffices. Thus these contracts may be entered into by those who are at a distance from each other by means of letters, for instance, or of messengers. In these contracts each party is bound to the other to render him all that equity demands, while in verbal *obligationes* one party stipulates and the other promises.

XVII. Buying & Selling.

The contract of sale is formed as soon as the price is agreed upon, although it has not yet been paid, nor even an earnest given; for what is given as an earnest only serves as proof that the contract has been made. This

must be understood of sales made without writing; for with regard to these we have made no alteration in the law. But, where there is a written contract, we have enacted that a sale is not to be considered completed unless an instrument of sale has been drawn up, being either written by the contracting parties, or at least signed by them, if written by others; or if drawn up by a *tabellio*, it must be formally complete and finished throughout; for as long as anything is wanting, there is room to retreat, and either the buyer or seller may retreat, without suffering loss; that is, if no earnest has been given. If earnest has been given, then, whether the contract was written or unwritten, the purchaser, if he refuses to fulfill it, loses what he has given as earnest, and the seller, if he refuses, has to restore double; although no agreement on the subject of the earnest was expressly made.

1. It is necessary that a price should be agreed upon, for there can be no sale without a price. And the price must be fixed and certain. If the parties agree that the thing shall be sold at the sum at which Titius shall value it, it was a question much debated among the ancients, whether in such a case there is a sale or not. We have decided, that when a sale is made for a price to be fixed by a third person, the contract shall be binding under this condition---that if this third person does fix a price, the price to be paid shall be determined by that which he fixes, and that according to his decision the thing shall be delivered and the sale perfected. But if he will not or cannot fix a price, the sale is then void, as being made without any price being fixed on. This decision, which we have adopted with respect to sales, may reasonably be made to apply to contracts of letting to hire.

2. The price should consist in a sum of money. It has been much doubted whether it can consist in anything else, as in a slave, a piece of land, or a toga. Sabinus and Cassius thought that it could. And it is thus that it is commonly said that exchange is a sale, and that this form of sale is the most ancient. The testimony of Homer was quoted, who says that part of the army of the Greeks procured wine by an exchange of certain things. The passage is this:-

*The long-haired
Achaean procured wine,
some by giving copper,
others by giving
shining steel,
others by giving
hides, others by giving
oxen, others by
giving slaves.*

The authors of the opposite school were of a contrary opinion: they thought that exchange was one thing and sale another, otherwise, in an exchange, it would be impossible to say which was the thing sold, and which the thing given as the price; for it was contrary to reason to consider each thing as at once sold, and given as

the price. The opinion of Proculus, who maintained that exchange is a particular kind of contract distinct from sale, has deservedly prevailed, as it is supported by other lines from Homer, and by still more weighty reasons adopted by preceding emperors: it has been fully treated in our Digests.

3. As soon as the sale is contracted, that is, in the case of a sale made without writing, when the parties have agreed on the price, all risk attaching to the thing sold falls upon the purchaser, although the thing has not yet been delivered to him. Therefore, if the slave dies or receives an injury in any part of the body, or a whole or a portion of the house is burnt, or a whole or a portion of the land is carried by the force of a flood, or is diminished or deteriorated by an inundation, or by a tempest making havoc with the trees, the loss falls on the purchaser, and although he does not receive the thing, he is obliged to pay the price, for the seller does not suffer for anything which happens without any design or fault of his. On the other hand, if after the sale the land is increased by *alluvion*, it is the purchaser who receives the advantage, for he who bears the risk of harm ought to receive the benefit of all that is advantageous. If a slave who has been sold runs away or is stolen, without any fraud or fault on the part of the seller, we must inquire whether the seller undertook to keep him safely until he was delivered over; if he undertook this, what happens is at his risk; if he did not undertake it, he is not responsible. The same would hold in the case of any other animal or any other thing, but the seller is in any case bound to make over to the purchaser his right to a real or personal *actio*, for the person who has not delivered the thing is still its owner; and it is the same with regard to the *actio damni iniuria* of theft, and the *actio damni iniuria*.

4. A sale may be made conditionally or unconditionally; conditionally, as, for example, "If Stichus suits you within a certain time, he shall be purchased by you as such a price."

5. A sale is void when a person knowingly purchases a sacred or religious place, or a public place, such as a forum or basilica. If, however, deceived by the vendor, he has supposed that what he was buying was profane or private, as he cannot have what he purchased, he may bring an *actio ex empto* to recover whatever it would have been worth to him not to have been deceived. It is the same if he has purchased a freeman, supposing him to be a slave.

Book IV

Obligationes

Arising From *Delicta*

As we have treated in the preceding book of *obligationes* arising
ex contractu and *quasi*
ex contractu, we have now to treat
of *obligationes* arising *ex maleficio*. Of
the *obligationes* treated of in the last book, there were, as we have said,
four kinds; of those we are now to treat of, there is but one kind, for they all arise from the thing, that is, from
the *delictum*, as, for example, from theft, from robbery, or damage, or injury.

1. Theft is the fraudulent dealing with a thing itself, with its use, or its possession; an act which is prohibited by natural law.

2. The word *furtum* comes either from *furvum*, which means "black," because it is committed secretly, and often in the night; or from *fraus*; or from *ferre*, that is "taking away," or from the Greek word *phor* meaning a thief, which again comes from *pherin*, to carry away.

3. Of theft there are two kinds, theft manifest and theft not manifest; for the thefts termed *conceptum* and *oblatum* are rather kinds of *actiones* attaching to theft than kinds of theft, as will appear below. A manifest theft is one whom the Greek term *ep* = *autophors*, being not only, one taken in the fact, but also one taken in the place where the theft is committed; as, for example, before he has passed through the door of the house where he has committed a theft, or in a plantation of olives, or a vineyard where he has been stealing. We must also extend manifest theft to the case of a thief seen or seized by the owner or any one else in a public or private place, while still holding the thing he has stolen, before he has reached the place where he meant to take and deposit it. But if he once reaches his destination, although he is afterwards taken with the thing stolen on him, he is not a manifest thief. What we mean by a not manifest thief may be gathered from what we have said, for a theft which is not a manifest theft is a not manifest theft.

4. There is what is termed *conceptum furtum*, when a thing stolen has been sought and found in the presence of witnesses in any one's house; for although this person may not be the actual thief, he is liable to a special *actio* termed *concepti*. There is what is termed *furtum oblatum*, if a thing stolen has been placed in your hands and then seized in your house; that is, if the person who placed it in your hands did so, that it might be found rather in your house than in his. For you, in whose house it had been seized, would have against him who placed it in your hands, although he were not the actual thief, a special *actio* termed *oblata*. There is also the *actio prohibiti furti* against a person who prevents another who wishes to seek in the presence of witnesses for a thing stolen; there is, too, by means of the *actio furti non exhibiti*, a penalty provided

by the edict of the praetor against a person who has not produced a thing stolen which has been searched for and found in his possession. But these *actiones concepti, oblati, furti, prohibiti* and *furti non exhibiti*, have fallen into disuse; for search for things stolen is not now made according to the ancient practice, and therefore these *actiones* have naturally ceased to be in use, as all who knowingly have received and concealed a thing stolen are liable to the *actio furti nec manifesti*.

5. The penalty for manifest theft is quadruple the value of the thing stolen, whether the thief be a slave or a freeman; that for theft not manifest is double.

6. It is theft, not only when anyone takes away a thing belonging to another, in order to appropriate it, but generally when anyone deals with the property of another contrary to the wishes of its owner. Thus, if the creditor uses the thing pledged or the depository the thing deposited, or the *usuary* employs the thing for another purpose than that for which it is given, it is a theft; for example, if anyone borrows plate on the pretense of intending to invite friends to supper, and then carries it away with him to a distance, or if anyone borrows a horse, as for a ride, and takes it much farther than suits such a purpose, or, as we find supposed in the writings of the ancients, takes it into battle.

7. A person, however, who borrows a thing, and applies it to a purpose other than that for which it was lent, only commits theft, if he knows that he is acting against the wishes of the owner, and that the owner, if he were informed, would not permit it; for if he really thinks the owner would permit it, he does not commit a crime; and this is a very proper distinction, for there is no theft without the intention to commit theft.

8. And even if the borrower thinks he is applying the thing borrowed contrary to the wishes of the owner, yet if the owner as a matter of fact approves of the application, there is, it is said, no theft. Whence the following question arises: Titius has urged the slave of Maevius to steal from his master certain things, and to bring them to him; the slave informs his master, who, wishing to seize Titius in the act, permits his slave to take certain things to Titius; is Titius liable to an *actio furti*, or to one *servi corrupti*, or to neither? This doubtful question was submitted to us, and we examined the conflicting opinions of the ancient jurists on the subject, some of whom thought Titius was liable to both these *actiones*, while others thought he was only liable to the *actio* of theft; and to prevent subtleties, we have decided that in this case both these *actiones* may be brought. For, although the slave has not been corrupted, and the case does not seem therefore within the rules of the *actio servi corrupti*, yet the intention to corrupt the slave is indisputable, and he is therefore to be punished exactly as if the slave had been really corrupted, lest his impunity should incite others to act in the same criminal way towards a slave more easy to corrupt.

9. Sometimes there may be a theft of free persons, as if one of our children in our power is carried away.

10. A man may even commit a theft of his own property, as, if a debtor takes from a creditor a thing he has pledged to him.

11. A person may be liable to an *actio* of theft, although he has not himself committed a theft, as for instance, a person who has lent his aid and planned the crime. Among such is one who makes your money fall from your hand that another may seize upon it; or has placed himself in your way that another may carry off something belonging to you; or has driven your sheep or oxen that another may make away with them, or, to take an instance given by the old *advocati*, frightens the herd with a piece of scarlet cloth. But if such acts are only the fruits of reckless folly, with no design of assisting in the commission of a theft, the proper *actio* is one in *factum*. But if Maevius assists Titius to commit a robbery, both are liable to an *actio* of theft. A person, again, assists in a theft who places ladders under a window, or breaks a window or a door, that another may commit a theft; or who lends tools to break a door, or ladders to place under a window, knowing the purpose to which they are to be applied. But a person who does not actually assist, but only advises and urges the commission of a theft, is not liable to an *actio* of theft.

12. Those who are in the power of a parent or master, if they steal anything belonging to the person in whose power they are, commit a theft. The thing stolen, in such a case, is considered to be *furtiva*, and therefore no right in it can be acquired by *usucapion* before it has returned into the hands of the owner; but no *actio* of theft can be brought, because the relation of the parties is such that no *actio* whatever can arise between them. But if the theft has been committed by the assistance and advice of another, as a theft is actually committed, this person will be subject to the *actio* of theft as a theft is undoubtedly committed through his means.

13. An *actio* may be brought by any one who is interested in the safety of the thing, although he is not the owner; and the proprietor, consequently, cannot bring this *actio* unless he is interested in the thing not perishing.

14. Hence, a creditor may bring this *actio* if a thing pledged to him is stolen, although his debtor is solvent, because it may be more advantageous to him to rely upon his pledge than to bring an *actio* against his debtor personally; so much so, that although it is the debtor himself that has stolen the thing pledged, yet the creditor can bring an *actio* of theft.

15. So, too, if a fuller receives clothes to clean, or a tailor receives them to mend for a certain fixed sum, and has them stolen from him, it is he and not the owner who is able to bring an *actio* of theft, for

the owner is not considered as interested in their safety, having an *actio locati*, by which he may recover the thing stolen against the fuller or tailor. But if a thing is stolen from a *bona fide* purchaser, he is entitled, like a creditor, to an *actio* of theft, although he is not the proprietor. But an *actio* of theft is not maintainable by the fuller or tailor unless he is solvent, that is, unless he is able to pay the owner the value of the thing lost; for if the fuller or tailor is insolvent, then the owner, as he cannot recover anything from them, is allowed to bring an *actio* of theft, as he has in this case an interest in the safety of the thing. And it is the same although the fuller or tailor is partially solvent.

16. What we have said of the fuller and tailor is applied by the ancients to the borrower. For, as the fuller by accepting a sum for his labor makes himself answerable for the safe-keeping of the thing, so does a borrower by accepting the use of the thing he borrows. But our wisdom has introduced in our decisions an improvement on this point, and the owner may now bring an *actio commodati* against the borrower, or of theft against the thief; but when once his choice is made, he cannot change his mind and have recourse to the other *actio*. If he elects to sue the thief, the borrower is quite freed; if he elects to sue the borrower, he cannot bring an *actio* of theft against the thief, but the borrower may, that is, provided that the owner elects to sue the borrower knowing that the thing has been stolen. If he is ignorant or uncertain of this, and therefore sues the borrower, and then subsequently learns the true state of the case, and wishes to have recourse to an *actio* of theft, he will be permitted to sue the thief without any difficulty being thrown in his way, for it was in ignorance of the real fact that he sued the borrower; unless, indeed, his claim has been satisfied by the borrower, for then the thief is quite free from any *actio* of theft on the part of the owner, but the borrower takes the place of the owner in the power of bringing this *actio*. On the other hand, it is very evident that if the owner originally brings an *actio commodati*, in ignorance that the thing has been stolen, and, afterwards learning this, prefers to proceed against the real thief, the borrower is thereby entirely freed, whatever may be the issue of the *actio* against the thief; as in the previous case, the thief would be freed as against the lender, whether the borrower was wholly or only partially able to satisfy the claim against him.

17. A depository is not answerable for the safe-keeping of the thing deposited, but is only answerable for wilful wrong; therefore, if the thing is stolen from him, as he is not bound by the contract of deposit to restore it, and has no interest in its safety, he cannot bring an *actio* of theft, but it is the owner alone who can bring this *actio*.

18. It should be observed that the question has been asked whether, if a person under the age of puberty, takes away the property of another, he commits a theft. The answer is that it is the intention that makes the theft; such a person is only bound by the obligation springing from the *delictum* if he is near the age of puberty, and consequently understands that he commits a crime.

19. The *actio* of theft, whether brought to recover double or quadruple, has no other object than the recovery of the penalty. For the owner has also a means of recovering the thing itself, either by a *vindicatio* or a *condictio*. The former may be brought against the possessor, whether the thief or anyone else; the latter may be brought against the thief or the heir of the thief, although not in possession of the thing stolen.

II. Goods Taken by Force.

A person who takes a thing belonging to another by force is liable to an *actio* of theft, for who can be said to take the property of another more against his will than he who takes it by force? And he is therefore rightly said to be an *improbis fur*. The praetor, however, has introduced a peculiar *actio* in this case, called *vi bonorum raptorum*; by which, if brought within a year after the robbery, quadruple the value of the thing taken may be recovered; but if brought after the expiration of a year, then the single value only may be brought even against a person who has only taken by force a single thing, and one of the most trifling value. But this quadruple of the value is not altogether a penalty, as in the *actio furtum manifestum*; for the thing itself is included, so that, strictly, the penalty is only three times the value. And it is the same, whether the robber was or was not taken in the actual commission of the crime. For it would be ridiculous that a person who uses force should be in a better condition than he who secretly commits a theft.

1. As, however, this *actio* can only be brought against a person who robs with the intention of committing a wilful wrong, if anyone takes by force a thing, thinking himself, by a mistake, to be the owner, and, in ignorance of the law, believing it permitted an owner to take away, even by force, a thing belonging to himself from persons in whose possession it is, he ought to be held discharged of this *actio*, nor in such a case would he be liable to an *actio* of theft. But lest robbers, under cover of such an excuse, find means of gratifying their avarice with impunity, the imperial *constitutiones* have made a wise alteration, by providing that no one may carry off by force a thing that is moveable, or moves itself, although he thinks himself the owner. If any one acts contrary to these *constitutiones*, he, if the thing is his, ceases to be owner of it; if it is not, he is not only to restore the thing taken, but also to pay its value. The *constitutiones* have declared these rules applicable, not only in the case of moveables of a nature to be carried off by force, but also to the forcible entries made upon immovables, in order that every kind of violent robbery may be prevented.

2. In this *actio* it is not necessary that the thing should have been a part of the goods of the plaintiff; for whether it has been a part of his goods or not, yet if it has been taken from among his goods, the *actio* may be brought. Consequently, if anything has been let, lent or given in pledge to Titius, or deposited with him, so that he has an interest in its not being taken away by force, as, for instance, he

has engaged to be answerable for any fault committed respecting it; or if he possesses it *bona fide*, or has the *usufructus* of it, or has any other legal interest in its not being taken away by force, this *actio* may be brought, not to give him the ownership in the thing, but merely to restore him what he has lost by the thing being taken away from out of his goods, that is, from out of his property. And generally, we may say, that the same causes which would give rise to an *actio* of theft, if the theft is committed secretly, will give rise to this *actio*, if it is committed with force.

III. The *Lex Aquilia*.

The *actio damni iniuriae* is established by the *lex Aquilia*, of which the first head provides that if anyone shall have wrongfully killed a slave, or a four-footed beast, being one of those reckoned among cattle belonging to another, he shall be condemned to pay the owner the greatest value which the thing has possessed at any time within a year previous.

1. As the law does not speak generally of four-footed beasts, but only of those which are reckoned among cattle, we may consider its provision as not applying to dogs or wild animals, but only to animals which may be properly said to feed in herds, as horses, mules, asses, sheep, oxen, goats, and also swine, for they are included in the term "cattle," for they feed in herds. Thus Homer says, as Laelius Marcianus quotes in his *Institutes*:

*You will find him seated
by his swine,
and they are feeding by
the rock of Corax,
near the spring Arethusia.*

2. To kill wrongfully is to kill without any right: consequently, a person who kills a thief is not liable to this *actio*, that is, if he could not otherwise avoid the danger with which he was threatened.

3. Nor is a person made liable by this law who has killed by accident, provided there is no fault on his part, for this law punishes fault as well as wilful wrong-doing.

4. Consequently, if anyone playing or practicing with a javelin pierces with it your slave as he goes by, there is a distinction made; if the accident befalls a soldier while in the camp, or other places appropriated to military exercises, there is no fault in the soldier, but there would be in anyone else besides a soldier, and the soldier himself would be in fault if he inflicted such an injury in any other place than one appropriated to military exercises.

5. If, again, anyone, in pruning a tree, by letting a bough fall, kills your slave who is passing, and this takes place near a public way, or a way belonging to a neighbor, and he has not cried out to make persons take care, he is in fault; but if he has called out, and the passer-by would not take care, he is not to blame. He is also equally free from blame if he was cutting far from any public way, or in the middle of a field, even though he has not called out, for by such a place no stranger has a right to pass.

6. So, again, a physician who has performed an operation on your slave, and then neglected to attend to his cure, so that the slave dies, is guilty of a fault.

7. Unskillfulness is also a fault, as, if a physician kills your slave by unskillfully performing an operation on him, or by giving him wrong medicines.

8. So, too, if a muleteer, through his want of skill, cannot manage his mules, and runs over your slave, he is guilty of a fault. As, also, he would be if he could not hold them on account of his weakness, provided that a stronger man could have held them in. The same decisions apply to an unskillful or infirm horseman, unable to manage his horse.

9. The words above quoted "the greatest value the thing has possessed at any time within a year previously," mean that if your slave is killed, being at the time of his death lame, maimed, or one-eyed, but having been within a year quite sound and of considerable value, the person who kills him is bound to pay not his actual value, but the greatest value he ever possessed within the year. Hence, this *actio* may be said to be penal, as a person is bound under it not only for the damage he has done, but for much more; and, therefore, the *actio* does not pass against his heir, as it would have done if the condemnation had not exceeded the amount of the actual damage.

10. It has been decided not by virtue of the actual wording of the law, but by interpretation, that not only is the value of the thing perishing to be estimated as we have said, but also the loss which in any way we incur by its perishing; as, for instance, if your slave having been instituted heir by some one is killed before he enters at your command on the inheritance, the loss of the inheritance should be taken account of. So, too, if one pair of mules, or a set of four horses, or one slave of a band of comedians, is killed, account is to be taken not only of the value of the thing killed, but also of the diminished value of what remains.

11. The master of a slave who is killed may bring a private *actio* for the damages given by the *lex Aquilia*, and also bring a capital *actio* against the murderer.

12. The second head of the *lex Aquilia* is not now in use.

13. The third head provides for every kind of damage; and therefore, if a slave, or a four-footed beast, of

those reckoned among cattle, is wounded, or a four-footed beast of those not reckoned among cattle, as a dog or wild beast, is wounded or killed, an *actio* may be brought under the third head. Compensation may also be obtained under it for all wrongful injury to animals or inanimate things, and, in fact, for anything burnt, broken, or fractured, although the word broken ("*ruptum*") would have sufficed for all these cases; for a thing is *ruptum* which in any way is spoiled ("*corruptum*"), so that not only things fractured or burnt, but also things cut, bruised, split, or in any way destroyed or deteriorated may be said to be *rupta*. It has also been decided that any one who mixes anything with the oil or wine of another, so as to spoil the goodness of the wine or oil, is liable under this head of the *lex Aquilia*.

14. It is evident that as a person is liable under the first head, if by wilful injury or by his fault he kills a slave or a four-footed beast, so by this head a person is liable for every other damage if there is wrongful injury or fault in what he does. But in this case the offender is bound to pay the greatest value the thing has possessed, not within the year next preceding, but the thirty days next preceding.

15. Even the word *plurimi*, i. e., of the greatest value, is not expressed in this case. But Sabinus was rightly of opinion that the estimation ought to be made as if this word was in the law, since it must have been that the plebeians, who were the authors of this law on the motion of the tribune Aquilius, thought it sufficient to have used the word in the first head of the law.

16. But the direct *actio* under this law cannot be brought if anyone has, with his own body, done damage, and consequently *utiles actiones* are given against the person who does damage in any other way, as, for instance, a *utilis actio* is given against one who shuts up a slave or a beast, so as to produce death by hunger; who drives a horse so fast as to knock him to pieces, or drives cattle over a precipice, or persuades another man's slave to climb a tree, or go down in a well, and the slave in climbing or descending is killed or maimed. But if any one has flung the slave of another from a bridge or a bank into a river, and the slave is drowned, then, as he has actually flung him down, there can be no difficulty in deciding that he has caused the damage with his own body, and consequently he is directly liable under the *lex Aquilia*. But if no damage has been done by the body, nor to the body, but damage has been done in some other way, the *actio directa* and the *actio utilis* are both inapplicable, and an *actio in factum* is given against the wrongdoer; for instance, if any one through compassion has loosed the fetters of a slave, to enable him to escape.

IV. *Injuria*

Injuria, in its general sense, signifies every action contrary to law; in a special sense, it means, sometimes, the same as *contumelia* ("outrage"), which is derived

from *contemnere*, the Greek *ubris*; sometimes the same as *culpa* ("fault"), in Greek *adikama* as in the *lex Aquilia*, which speaks of damage done *injuria*; sometimes it has the sense of iniquity, injustice, or in Greek *adikia*; for a person against whom the praetor or judge pronounces an unjust sentence is said to have received an *injuria*.

1. An *injuria* is committed not only by striking with the fists, or striking with clubs or the lash, but also by shouting until a crowd gathers around any one; by taking possession of anyone's goods pretending that he is a debtor to the inflictor of the injury who knows he has no claim on him; by writing, composing, or publishing a libel or defamatory verses against anyone, or by maliciously contriving that another does any of these things; by following after an honest woman, or a young boy or girl; by attempting the chastity of any one; and in short, by numberless other acts.

2. A man may receive an *injuria*, not only in his own person, but in that of his children in his power, and even in that of his wife, according to the opinion that has prevailed. If, therefore, you injure a daughter in the power of her father, but married to Titius, the *actio* for the injury may be brought not only in the name of the daughter herself, but also in that of the father or husband. But, if a husband has sustained an *injuria*, the wife cannot bring the *actio injuriarum*, for the husband is the protector of the wife, not the wife of the husband. The father-in-law may also bring this *actio* in the name of his daughter-in-law, if her husband is in his power.

3. An *injuria* cannot, properly speaking, be done to a slave, but it is the master who, through the slave, is considered to be injured; not, however, in the same way as through a child or wife, but only when the act is of a character grave enough to make it a manifest insult to the master, as if a person has flogged severely the slave of another, in which case this *actio* is given against him. But a master cannot bring an *actio* against a person who has collected a crowd round his slave, or struck him with his fist.

4. If an *injuria* has been done to a slave held in common, equity demands that it shall be estimated not according to their respective shares in him, but according to their respective position, for it is the masters who are injured.

5. If Titius has the *usufructus*, and Maevius the property in a slave, the *injuria* is considered to be done rather to Maevius than to Titius.

6. If the injury has been done to a free man, who serves you *bona fide*, you have no *actio*, but he can bring an *actio* in his own name, unless he has been injured merely to insult you, for, in that case, you may bring the

actio injuriarum . So, too, with regard to a slave of another who serves you *bona fide* , you may bring this *actio* whenever the slave is injured for the purpose of insulting you.

7. The penalty for injuries under the law of the Twelve Tables was a limb for a limb, but if only a bone was fractured, pecuniary compensation being exacted proportionate to the great poverty of the times. Afterwards, the praetor permitted the injured parties themselves to estimate the injury, so that the *iudex* should condemn the defendants to pay the sum estimated, or less, as he may think proper. The penalty appointed by the Twelve Tables has fallen into desuetude, but that introduced by the praetors, and termed honorary, is adopted in the administration of justice. For, according to the rank and character of the person injured, the estimate is greater or less; and a similar gradation is observed, not improperly, even with regard to a slave, one amount being paid in the case of a slave who is a steward, a second in that of a slave holding an office of the intermediate class, and a third in that of one of the lowest rank, or one condemned to wear fetters.

8. The *lex Cornelia* also speaks of *injuriae* , and introduced an *actio injuriarum* , which may be brought when anyone alleges that he has been struck or beaten, or that his house has been broken into. And the term "his house" includes one which belongs to him and in which he lives, or one he hires, or one in which he is received gratuitously or as a guest.

9. An *injuria* is said to be of a grave character, either from the nature of the act, as if any one is wounded or beaten with clubs by another, or from the nature of the place, as when an injury is done in a theater, a forum, or in the presence of the praetor; sometimes from the quality of the person, as when it is a magistrate that has received the *injuria* , or a senator has sustained it at the hands of a person of low condition, or a parent or patron at the hands of a child or freedman. For the *injuria* done to a senator a parent or a patron is estimated differently from an injury done to a person of low condition or to a stranger. Sometimes it is the part of the body injured that gives the character to the *injuria* as if any one had been struck in the eye. Nor does it make any difference whether such an *injuria* has been done to a *paterfamilias* or a *filiusfamilias* , it being in either case considered of a grave character.

10. Lastly, it must be observed that in every case of *injuria* he who has received it may bring either a criminal or a civil *actio* . In the latter, it is a sum estimated, as we have said, that constitutes the penalty; in the former, the *iudex* , in the exercise of his duty, inflicts on the offender an extraordinary punishment. We must, however, remark that a *constitutio* of Zeno permits men of the rank of *illustris* , or any higher rank, to bring or defend the

actio injuriarum
seen more clearly by reading the *constitutio*

if brought criminally by a procurator, as may be
itself.

11. Not only is he liable to the *actio injuriarum* who has inflicted the injury, as, for instance, the person who has struck the blow; but he also who has maliciously caused or contrived that any one should be struck in the face with the fist.

12. This *actio* is extinguished by a person dissembling to have received the injury; and therefore, a person who has taken no account of the injury, that is, who immediately on receiving it has shown no resentment at it, cannot afterwards change his mind and resuscitate the injury he has allowed to rest.

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Scanned in and modernized by Dr. Jerome S. Arkenberg, Dept. of History, Cal. State Fullerton.

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halsall@murray.fordham.edu