GAI INSTITVTIONES OR INSTITUTES OF ROMAN LAW

Book I

STATUS OR UNEQUAL RIGHTS [DE PERSONIS]

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I. ON CIVIL LAW AND NATURAL LAW.

§ 1. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. The rules established by a given state for its own members are peculiar to itself, and are called jus civile; the rules constituted by natural reason for all are observed by all nations alike, and are called jus gentium. So the laws of the people of Rome are partly peculiar to itself, partly common to all nations; and this distinction shall be explained in detail in each place as it occurs.

§ 2. Roman law consists of statutes, plebiscites, senatusconsults, constitutions of the emperors, edicts of magistrates authorized to issue them, and opinions of jurists.

§ 3. A statute is a command and ordinance of the people: a plebiscite is a command and ordinance of the commonalty. The commonalty and the people are thus distinguished: the people are all the citizens, including the patricians; the commonalty are all the citizens, except the patricians. Whence in former times the patricians maintained that they were not bound by the plebiscites, as passed without their authority; but afterwards a statute called the lex Hortensia was enacted, which provided that the plebiscites should bind the people, and thus plebiscites were made co-ordinate with statutes.

§ 4. A senatusconsult is a command and ordinance of the senate, and has the force of a statute, a point which was formerly controverted.

§ 5. A constitution is law established by the emperor either by decree, edict, or letter; and was always recognized as having the force of a statute, since it is by a statute that the emperor himself acquires supreme executive power.

§ 6. Power to issue edicts is vested in magistrates of the people of Rome, the amplest authority belonging to the edicts of the two praetors, the home praetor and the foreign praetor, whose provincial jurisdiction is vested in the presidents of the provinces, and to the edicts of the curule aediles, whose jurisdiction in the provinces of the people of Rome is vested in quaestors: in the provinces of the emperor no quaestors are appointed, and in these provinces, accordingly, the edict of the aediles is not published.

§ 7. The answers of jurists are the decisions and opinions of persons authorized to lay down the law. If they are unanimous their decision has the force of law; if they disagree, the judge may follow whichever opinion he chooses, as is ruled by a rescript of the late emperor Hadrian.

II. ON THE BRANCHES OF THE LAW.

§ 8. The whole of the law by which we are governed relates either to persons, or to things, or to actions; and let us first examine the law of persons.

III. ON DIVERSITIES OF CONDITION.

§ 9. The first division of men by the law of persons is into freemen and slaves.

§ 10. Freemen are divided into freeborn and freedmen.

§ 11. The freeborn are free by birth; freedmen by manumission from legal slavery.

§ 12. Freedmen, again, are divided into three classes, citizens of Rome, Latins, and persons on the footing of enemies surrendered at discretion. Let us examine each class in order, and commence with freedmen assimilated to enemies surrendered at discretion.

IV. FREEDMEN ASSIMILATED TO SURRENDERED FOES AND DISPOSITIONS OF THE LEX AELIA SENTIA.

§ 13. The law Aelia Sentia enacts that slaves who have been punished by their proprietors with chains, or have been branded, or have been examined with torture on a criminal charge, and have been convicted, or have been delivered to fight with men or beasts, or have been committed to a gladiatorial school or a public prison, if subsequently manumitted by the same or by another proprietor, shall acquire by manumission the status of enemies surrendered at discretion.

V. CONCERNING SURRENDERED ENEMIES.

§ 14. Surrendered enemies are people who have taken up arms and fought against the people of Rome and having been defeated have surrendered.

§ 15. Slaves tainted with this degree of criminality, by whatever mode they are manumitted and at whatever age, and notwithstanding the plenary dominion of their proprietor, never become citizens of Rome or Latins, but can only acquire the status of enemies who have surrendered.

§ 16. If the slave has not committed offences of so deep a dye, manumission sometimes makes him a citizen of Rome, sometimes a Latin.

§ 17. A slave in whose person these three conditions are united, thirty years of age, quiritary ownership of the manumitter, liberation by a civil and statutory mode of manumission, i. e. by the form of vindicta, by entry on the censor's register, by testamentary disposition, becomes a citizen of Rome: a slave who fails to satisfy any one of these conditions becomes only a Latin.

VI. ON MANUMISSION AND PROOF OF ADEQUATE GROUNDS OF MANUMISSION.

§ 18. The requisition of a certain age of the slave was introduced by the lex Aelia Sentia, by the terms of which law, unless he is thirty years old, a slave cannot on manumission become a citizen of Rome, unless the mode of manumission is by the form of vindicta, preceded by proof of adequate motive before the council.

§ 19. There is an adequate motive of manumission if, for instance, a natural child or natural brother or sister or foster child of the manumitter's, or a teacher of the manumitter's child, or a male slave intended to be employed as an agent in business, or a female slave about to become the manumitter's wife, is presented to the council for manumission.

VII. CONCERNING THE CONSTITUTION OF THE COUNCIL.

§ 20. The council is composed in the city of Rome of five senators and five Roman knights above the age of puberty: in the provinces of twenty recuperators, who must be Roman citizens, and who hold their session on the last day of the assize. At Rome the council holds its session on certain days appointed for the purpose. A slave above the age of thirty can be manumitted at any time, and even in the streets, when the praetor or pro-consul is on his way to the bath or theatre.

§ 21. Under the age of thirty a slave becomes by manumission a citizen of Rome, when his owner being

insolvent leaves a will, in which he gives him his freedom and institutes him his heir (2, § 154), provided that no other heir accepts the succession.

§ 22. Slaves manumitted in writing, or in the presence of witnesses, or at a banquet, are called Latini Juniani: Latini because they are assimilated in status to Latin colonists (§ 131), Juniani because they owe their freedom to the lex Junia, before whose enactment they were slaves in the eye of the law.

§ 23. These freedmen, however, are not permitted by the lex Junia either to make a will or to take under the will of another, or to be appointed testamentary guardians.

§ 24. Their incapacity to take under a will must only be understood as an incapacity to take directly as heirs or legatees, not to take indirectly as beneficiaries of a trust.

§ 25. Freedmen classed with surrendered enemies are incapable of taking under a will in any form, as are other aliens, and are incompetent to make a will according to the prevalent opinion.

§ 26. It is only the lowest grade of freedom, then, that is enjoyed by freedmen assimilated to surrendered aliens, nor does any statute, senatusconsult, or constitution open to them a way of obtaining. Roman citizenship.

§ 27. Further, they are forbidden to reside in the city of Rome or within the hundredth milestone from it; and if they disobey the prohibition, their persons and goods are directed to be sold on the condition that they shall be held in servitude beyond the hundredth milestone from the city, and shall be incapable of subsequent manumission, and, if manumitted, shall be the slaves of the Roman people: and these provisions are dispositions of the lex Aelia Sentia.

MODES BY WHICH LATIN FREEDMEN BECOME ROMAN CITIZENS.

§ 28. Latins have many avenues to the Roman citizenship.

§ 29. For instance, the lex Aelia Sentia enacts that when a slave below the age of thirty becomes by manumission a Latin, if he take to himself as wife a citizen of Rome, or a Latin colonist, or a freedwoman of his own condition, and thereof procure attestation by not less than seven witnesses, citizens of Rome above the age of puberty, and begets a son, on the latter attaining the age of a year, he is entitled to apply to the praetor, or, if he reside in a province, to the president of the province, and to prove that he has married a wife in accordance with the lex Aelia Sentia, and has had by her a son who has completed the first year of his age: and thereupon if the magistrate to whom the proof is submitted pronounce the truth of the declaration, that Latin and his wife, if she is of the same condition, and their son, if he is of the same condition, are declared by the statute to be Roman citizens.

§ 30. The reason why I added, when I mentioned the son, if of the same condition, was this, that if the wife of the Latin is a citizen of Rome, the son, in virtue of the recent senatusconsult made on the motion of the late Emperor Hadrian, is a citizen of Rome from the date of his birth.

§ 31. This capacity of acquiring Roman citizenship, though by the lex Aelia Sentia exclusively granted to those under thirty years of age who had become Latins by this statute, by a subsequent senatusconsult, made in the consulship of Pegasus and Pusio, was extended to all freedmen who acquire the status of Latins, even though thirty years old when manumitted.

§ 32. If the Latin die before proof of his son's attaining the age of a year the mother may prove his condition, and thereupon both she and her son, if she be a Latin, become citizens of Rome. And if the

mother fails to prove it, the tutors of the son may do so or the son himself when he has attained the age of puberty. If the son himself is a Roman citizen owing to the fact of his having been born of a Roman citizen mother, he must nevertheless prove his condition in order to make himself his father's self successor.

§ 32 *a*. What has been said about a son of a year old, must be understood to be equally applicable to a daughter of that age.

§ 32 *b*. By the Visellian statute those either under or over thirty years of age, who when manumitted become Latins, acquire the jus quiritium, i. e. become Roman citizens, if they have served for six years in the guards at Rome. A subsequent senatusconsultum is said to have been passed, by which Roman citizenship was conferred on Latins, who completed three years' active military service.

§ 32 *c*. Similarly by an edict of Claudius Latins acquire the right of citizenship, if they build a ship which holds 10,000 modii of corn, and this ship or one substituted for it imports corn to Rome for six years.

§ 33. Nero further enacted that if a Latin having property worth 200,000 sesterces or more, build a house at Rome on which he expends not less than half his property, he shall acquire the right of citizenship.

§ 34. Lastly, Trajan enacted that if a Latin carry on the business of miller in Rome for three years, and grinds each day not less than a hundred measures of wheat, he shall attain Roman citizenship.

§ 35. Slaves who become Latins either because they are under thirty at the time of their manumission, or having attained that age because they are informally manumitted, may acquire Roman citizenship by re-manumission in one of the three legal forms, and they are thereby made freedmen of their re-manumitter. If a slave is the bonitary property of one person and the quiritary property of another he can be made a Latin by his bonitary owner, but his re-manumission must be the act of his quiritary owner, and even if he acquires citizenship in other ways he becomes the freedman of his quiritary owner. The praetor, however, invariably gives the bonitary owner possession of the inheritance of such freedman. A slave in whom his owner has both bonitary and quiritary property, if twice manumitted by his owner, may acquire by the first manumission the Latin status, and by the second Roman citizenship.

§ 36. Not every owner who is so disposed is permitted to manumit.

§ 37. An owner who would defraud his creditors or his own patron by an intended manumission, attempts in vain to manumit, because the lex Aelia Sentia prevents the manumission.

§ 38. Again, by a disposition of the same statute, before attaining twenty years of age, the only process by which an owner can manumit is fictitious vindication, preceded by proof of adequate motive before the council.

§ 39. It is an adequate motive of manumission, if the father, for instance, or mother or teacher or foster-brother of the manumitter, is the slave to be manumitted. In addition to these, the motives recently specified respecting the slave under thirty years of age may be alleged when the manumitting owner is under twenty; and, reciprocally, the motives valid when the manumitting owner is under twenty are admissible when the manumitted slave is under thirty.

§ 40. As, then, the lex Aelia Sentiaimposes a certain restriction on manumission for owners under the age of twenty, it follows that, though a person who has completed his fourteenth year is competent to make a will, and therein to institute an heir and leave bequests; yet, if he has not attained the age of

twenty, he cannot therein enfranchise a slave.

§ 41. And even to confer the Latin status, if he is under the age of twenty, the owner must satisfy the council of the adequacy of his motive before he manumits the slave in the presence of witnesses.

DE LEGE FVFIA CANINIA.

§ 42. Moreover, by the lex Fufia Caninia a certain limit is fixed to the number of slaves who can receive testamentary manumission.

§ 43. An owner who has more than two slaves and not more than ten is allowed to manumit as many as half that number; he who was more than ten and not more than thirty is allowed to manumit a third of that number; he who has more than thirty and not more than a hundred is allowed to manumit a fourth; lastly, he who has more than a hundred and not more than five hundred is allowed to manumit a fifth: and, however many a man possesses, he is never allowed to manumit more than this number, for the law prescribes that no one shall manumit more than a hundred. On the other hand, if a man has only one or only two, the law is not applicable, and the owner has unrestricted power of manumission.

§ 44. Nor does the statute apply to any but testamentary manumission, so that by the form of vindicta or inscription on the censor's register, or by attestation of friends, a proprietor of slaves may manumit his whole household, provided that there is no other let or hindrance to impede their manumission.

§ 46. If a testator manumits in excess of the permitted number, and arranges their names in a circle, as no order of manumission can be discovered, none of them can obtain their freedom, as both the lex Fufia Caninia itself and certain subsequent decrees of the senate declare null and void all dispositions contrived for the purpose of eluding the statute.

§ 47. Finally, it is to be noted that the provision in the lex Aelia Sentia making manumissions in fraud of creditors inoperative, was extended to aliens by a decree of the senate passed on the proposition of the Emperor Hadrian; whereas the remaining dispositions of that statute are inapplicable to aliens.

DE HIS QVI SVI VEL ALIENI IVRIS SINT.

§ 48. Another division in the law of Persons classifies men as either dependent or independent.

§ 49. Those who are dependent or subject to a superior, are either in his power, in his hand, or in his mancipation.

§ 50. Let us first explain what persons are dependent on a superior, and then we shall know what persons are independent.

§ 51. Of persons subject to a superior, let us first examine who are in his power.

§ 52. Slaves are in the power of their proprietors, a power recognized by jus gentium, since all nations present the spectacle of masters invested with power of life and death over slaves; and (by the Roman law) the owner acquires everything acquired by the slave.

§ 53. But in the present day neither Roman citizens, nor any other persons under the empire of the Roman people, are permitted to indulge in excessive or causeless harshness towards their slaves. By a constitution of the Emperor Antoninus, a man who kills a slave of whom he is owner, is as liable to

punishment as a man who kills a slave of whom he is not owner: and inordinate cruelty on the part of owners is checked by another constitution whereby the same emperor, in answer to inquiries from presidents of provinces concerning slaves who take refuge at temples of the gods, or statues of the emperor, commanded that on proof of intolerable cruelty a proprietor should be compelled to sell his slaves: and both ordinances are just, for we ought not to make a bad use of our lawful rights, a principle recognized in the interdiction of prodigals from the administration of their fortune.

§ 54. But as citizens of Rome may have a double kind of dominion, either bonitary or quiritary, or a union of both bonitary and quiritary dominion, a slave is in the power of an owner who has bonitary dominion over him, even unaccompanied with quiritary dominion; if an owner has only bare quiritary dominion he is not deemed to have the slave in his power.

DE PATRIA POTESTATE.

§ 55. Again, a man has power over his own children begotten in civil wedlock, a right peculiar to citizens of Rome, for there is scarcely any other nation where fathers are invested with such power over their children as at Rome; and this the late Emperor Hadrian declared in the edict he published respecting certain petitioners for a grant of Roman citizenship to themselves and their children; though I am aware that among the Galatians parents are invested with power over their children.

DE NVPTIIS.

§ 56. A Roman citizen contracts civil wedlock and begets children subject to his power when he takes to wife a citizen of Rome or a Latin or alien with whom a Roman has capacity of civil wedlock; for as civil wedlock has the effect of giving to the children the paternal condition, they become by birth not only citizens of Rome, but also subject to the power of the father.

§ 57. And for this purpose veterans often obtain by imperial constitution a power of civil wedlock with the first Latin or alien woman they take to wife after their discharge from service, and the children of such marriages are born citizens of Rome and subject to paternal power.

§ 58. But it is not any woman that can be taken to wife, for some marriages are prohibited.

§ 59. Persons related as ascendent and descendent are incapable of lawful marriage or civil wedlock, father and daughter, for instance, mother and son, grandfather and granddaughter; and if such relations unite, their unions are called incestuous and nefarious; and so absolute is the rule that merely adoptive ascendents and descendents are for ever prohibited from intermarriage, and dissolution of the adoption does not dissolve the prohibition: so that an adoptive daughter or granddaughter cannot be taken to wife even after emancipation.

§ 60. Collateral relatives also are subject to similar prohibitions, but not so stringent.

§ 61. Brother and sister, indeed, are prohibited from intermarriage whether they are born of the same father and mother or have only one parentin common: but though an adoptive sister cannot, during the subsistence of the adoption, become a man's wife, yet if the adoption is dissolved by her emancipation, or if the man is emancipated, there is no impediment to their intermarriage.

§ 62. A man may marry his brother's daughter, a practice first introduced when Claudiusmarried his brother's daughter Agrippina, but may not marry his sister's daughter, a distinction laid down in imperial constitutions, nor may he marry his father's sister or his mother's sister.

§ 63. He may not marry one who has been his wife's mother or his son's wife or his wife's daughter or his father's wife. I say, one who has been so allied, because during the continuance of the marriage that produced the alliance there would be another impediment to the union, for a man cannot have two wives nor a woman two husbands.

§ 64. A man who contracts a nefarious and incestuous marriage is not deemed to have either a wife or children; for the offspring of such a union are deemed to have a mother but no father, and therefore are not subject to paternal power; resembling children born in promiscuous intercourse, who are deemed to have no father, because their true father is uncertain, and who are called bastards either from the Greek word denoting illicit intercourse or because they are fatherless.

DE ERRORIS CAVSAE PROBATIONE.

§ 65. It sometimes happens that children when first born are not in their father's power, but are subsequently brought under it.

§ 66. Thus, under the lex Aelia Sentia a Latin who marries and begets a son of Latin status by a Latin mother, or a citizen of Rome by a Roman mother, has not power over him; but on proof of his case as required by the statute, he becomes a Roman citizen along with his son, who is henceforth subject to his power.

§ 67. Again, if a Roman citizen marry a Latin or an alien woman, in a mistaken belief that she is a Roman citizen, the son whom he begets is not in his power, not indeed being born a Roman citizen, but a Latin or an alien, that is to say. of the same status as his mother, for a child is not born into the condition of his father unless his parents had capacity of civil marriage: but a senatus-consult allows the father to prove a cause of justifiable error, and then the wife and son become Roman citizens, and the son is thenceforth in the power of the father. The same relief is given when a Roman citizen under a like misconception marries a freedwoman having the status of a surrendered foe, except that the wife does not become a Roman citizen.

§ 68. Again, a female Roman citizen who marries an alien, believing him to be a Roman citizen, is permitted to prove a cause of justifiable error, and thereupon her son and husband become Roman citizens, and simultaneously the son becomes subject to the power of his father. Similar relief is given if she marry an alien as a Latin intending to comply with the conditions of the lex Aelia Sentia, for this case is specially provided for in the senatus consult. Similar relief is given to a certain extent if she marry a freedman having the status of a surrendered foe instead of a Roman citizen, or instead of a Latin, whom she intended to marry according to the provision of the lex Aelia Sentia, except that the freedman husband continues of the same status, and therefore the son. though he becomes a Roman citizen, does not fall under paternal power.

§ 69. Also a Latin freedwoman married according to the provision of the lex Aelia Sentia to an alien whom she believed to be a Latin, is permitted by the senatusconsult, on the birth of a son, to prove a cause of justifiable error, and thereupon they all become Roman citizens, and the son becomes subject to paternal power.

§ 70. Exactly the same relief is given if a Latin freedman mistakenly marry an alien woman believing her to be a Latin freedwoman, or a Roman citizen, when he intended to comply with the lex Aelia Sentia.

§ 71. Further, a Roman citizen who marries a Latin freedwoman, believing himself to be a Latin, is permitted on the birth of a son to prove the cause of his mistake as if he had married according to the

provisions of the lex Aelia Sentia. So, too, a Roman citizen, who marries an alien, believing himself to be an alien, is permitted by the senatusconsult on the birth of a son to prove the cause of the mistake, and then the alien wife becomes a Roman citizen, and the son becomes a Roman citizen and subject to the power of the father.

§ 72. Whatever has been said of a son applies to a daughter.

§ 73. And as to the proof of the cause of error, the age of the son or daughter is immaterial, except that, if the marriage was contracted with an intention to satisfy the requirements of the lex Aelia Sentia, the child must be a year old before the cause can be proved. I am aware that a rescript of the late Emperor Hadrian speaks as if it was a condition of proof of the cause of error that the son must be a year old, but this is to be explained by the particular circumstances of the case in which this rescript was granted.

§ 74. It is a question whether an alien, who has married a Roman wife, can prove cause of error under the S. C. But when an alien, believed to be a Roman citizen, married a Roman wife, and subsequently to the birth of a son acquired Roman citizenship, on the question arising whether he could prove the cause of error, a rescript of Antoninus Pius decided that he was just as competent to prove as if he had continued an alien: from which may be gathered that an alien is competent to prove the cause of error.

§ 75. Hence it appears that a person born in marriage is an alien if his father was a Roman citizen and his mother an alien, or if his father was an alien and his mother a Roman citizen, though if the marriage was contracted under a mistake, a remedy is supplied by the S. C. as above explained. No relief is given in any case, where the parties did not contract marriage under an error, but were aware of their condition.

DE STATV LIBERORVM.

§ 76. It is to be remembered that we are speaking of a marriage between persons who have not the capacity of entering into a civil marriage with one another. When, however, a Roman citizen takes to wife an alien privileged as I described (§ 56), he contracts a civil marriage, and his son is born a Roman citizen and subject to his power.

§ 77. So if a female Roman citizen marry an alien with whom she has capacity of civil marriage, her son is an alien and a lawful son of his father, just as if his mother had been an alien. At the present day, by a senatusconsult passed on the proposition of the late Emperor Hadrian, even without civil marriage the offspring of a Roman woman and alien is a lawful son of his father.

§ 78. The rule we have stated that when a female Roman citizen marries an alien, the offspring is an alien, if there is no capacity of civil marriage between them, is enacted by the lex Minicia, which also provides that when a Roman citizen marries an alien woman, and there is no capacity of civil marriage between them, their offspring shall be an alien. This special enactment was required in the first case, as otherwise the child would follow the condition of the mother; for when there is no capacity of civil marriage between parents, their offspring belongs to the condition of his mother by jus gentium. But the part of this law which ordains that the offspring of a Roman citizen and an alien woman is an alien seems to be superfluous, since without any enactment this would be so under the rule of jus gentium.

§ 79. So much so that it is under this rule of jus gentium that the offspring of a Latin freedwoman by a Roman citizen with whom she has no capacity of civil marriage is a Latin, since the statute did not refer to those who are now designated Latins; for the Latins mentioned in the statute are Latins in another sense, Latins by race and members of a foreign state, that is to say, aliens.

§ 80. By the same principle, conversely, the son of a Latin and a Roman woman is by birth a Roman citizen, whether their marriage was contracted under the lex Aelia Sentia or otherwise. Some, however, thought that if the marriage was contracted in accordance with the lex Aelia Sentia, the offspring is a Latin by birth, because on this hypothesis the lex Aelia Sentia and Junia confer a capacity of civil marriage, and a civil marriage always transmits to the offspring the status of the father: if the marriage was otherwise contracted, they held the offspring acquires by jus gentium the status of his mother. However, the law on this point is now determined by the senatusconsult passed on the proposition of the late Emperor Hadrian, which enacts that the son of a Latin and a Roman woman is under every hypothesis a Roman citizen.

§ 81. Consistently herewith Hadrian's senatusconsult provides that the offspring of the marriage of a Latin freedman with an alien woman or of an alien with a Latin freedwoman follows the mother's condition.

§ 82. Consistently herewith the offspring of a female slave and a freeman is by jus gentium a slave, the offspring of a freewoman and a slave is free.

§ 83. We must observe, however, whether the jus gentium in any given instance is overruled by a statute or ordinance having the authority of a statute.

§ 84. For instance, the Sc. Claudianum permitted to a female citizen of Rome having intercourse with a slave with his owner's consent, to continue herself in virtue of the agreement free, while she gave birth to a slave, her agreement to that effect with the owner being made valid by the senatusconsult. Subsequently, however, the late Emperor Hadrian was induced by the injustice and anomaly of the ordinance to re-establish the rule of jus gentium, that as the mother continues free the offspring follows her status.

§ 85. By a law (*the name of which is unknown*) the offspring of a female slave by a freeman might be free, for that law provided that the offspring of a freeman by another person's female slave whom he believed to be free shall be free if they are male, but shall belong to their mother's proprietor if they are female: but here too the late Emperor Vespasian was moved by the anomalous character of the rule to re-establish the canon of jus gentium, and declared that the offspring in every case, whether male or female, should be slaves and the property of their mother's owner.

§ 86. But another clause of that law continues in force, providing that the offspring of a freewoman by another person's slave whom she knows to be a slave are born slaves, though where this law is not established the offspring by jus gentium follow the mother's condition and are free.

§ 87. When the child follows the mother's condition instead of the father's, it is obvious that he is not subject to the power of the father, even though the father is a Roman citizen: but in some cases, as I mentioned above (§ 67), when a mistake was the occasion of a non-civil marriage being contracted, the senate interferes and purges the defect of the marriage. and this generally has the effect of subjecting the son to the power of the father.

§ 88. If a female slave conceive by a Roman citizen and become herself by manumission a Roman citizen before giving birth to a son, her son, though a Roman citizen like his father, is not in his father's power, because he was not begotten in civil wedlock, and there is no senatusconsult which cures the defect of the intercourse in which he was begotten.

§ 89. The decision that when a female slave conceives by a Roman citizen and is manumitted before childbirth, her offspring is born free, is a rule of natural law; for in illegitimate or non-civil conception the status of the offspring depends on the moment of birth, and the mother's freedom at the moment of

birth makes the offspring free, and the status of the father is immaterial; but in statutory or civil conception the status of the child is determined by the time of conception.

§ 90. Accordingly, if a female citizen of Rome being pregnant is interdicted from fire and water, and becoming thus an alien gives birth to a child, many jurists distinguish and hold that her offspring is a Roman citizen if begotten in civil wedlock, but if in promiscuous intercourse, an alien.

§ 91. So if a female citizen of Rome being pregnant is reduced to slavery under the Sc. Claudianum for having intercourse with a slave in spite of the dissent and denunciation of his owner, many jurists make a distinction and hold that her offspring, if conceived in civil wedlock is a citizen of Rome, if conceived in illicit intercourse is a slave of the person who becomes proprietor of the mother.

§ 92. Also if an alien woman conceive in illicit intercourse and afterwards becomes a Roman citizen and gives birth to a child, the child is a Roman citizen; but if she conceived by an alien, to whom she was married in accordance with alien laws and customs, it seems that upon Hadrian's senatusconsult her offspring is only born a Roman citizen, if the father also has acquired the Roman citizenship.

§ 93. If an alien has obtained by petition for himself and his children a grant of Roman citizenship, the children do not fall under the power of the father except by express ordinance of the emperor, which he only makes if, on hearing the facts of the case, he deems it expedient for the interest of the children, and he makes a still more careful and minute inquiry if they are below the age of puberty and absent, as an ediot of the Emperor Hadrian intimates.

§ 94. Also if an alien and his pregnant wife receive a grant of Roman citizenship, the child, though a Roman citizen, as above mentioned, is not born in the power of his father according to a rescript of the late Emperor Hadrian; wherefore, if he knows his wife to be pregnant, an alien who petitions the emperor for Roman citizenship for himself and his wife ought at the same time to petition that his son may be subjected to his power.

§ 95. The rule is different for those who with their children are made Roman citizens by right of *Latinity*, for their children fall under their power; this right has been conceded to certain alien states either by the Roman people, or by the senate or by the emperor.

§ 96. The right of Latinity is either greater or lesser. Greater Latinity is the right whereby those who are chosen decuriones or hold some high office or magistracy acquire Roman citizenship: lesser Latinity is when only those who are magistrates or hold high office acquire Roman citizenship, a distinction intimated by several imperial rescripts.

DE ADOPTIONIBVS.

§ 97. Not only natural children are subject, as mentioned, to paternal power, but also adoptive children.

§ 98. Adoption is of two forms, adoption by authority of the people and adoption by the executive command of a magistrate, as of the praetor.

§ 99. Authority of the people is required for the adoption of an independent person, and this form is called adrogation, because the adopter is interrogated whether he wishes to have the person adopted for his lawful son, the person adopted is interrogated whether he thereto consents, and the people (in comitia) is interrogated whether such is its command. The executive command of a magistrate is the proceeding for the adoption of a person subject to the power of an ascendent, whether a descendent in

the first degree, as a son or daughter, or in a remoter degree, as a grandson or granddaughter, great-grandson or great-granddaughter.

§ 100. Adoption by vote of the people (in comitia) can only be solemnized at Rome, the other process is usually effected in the provinces in the court of the president.

§ 101. Adoption by vote of the people is inapplicable to females, as has finally been ruled; but females may be adopted by the other mode of adoption, at Rome in the court of the praetor, in provinces of the people it is usually effected in the court of the proconsul, in provinces of the emperor in the court of the legate.

§ 102. The legislative adoption of a child below the age of puberty by vote of the people was at one time prohibited, at another permitted; at the present day, by the epistle of the Emperor Antoninus addressed to the pontifices, on evidence of a just cause of adoption, it is permitted, subject to certain conditions. In the court of the praetor at Rome, in the court of the proconsul in a province of the people, and in the court of the legate in a province of the emperor, a person of any age may be adopted.

§ 103. Both forms of adoption agree in this point, that persons incapable of procreation by natural impotence are permitted to adopt.

§ 104. Women cannot adopt by either form of adoption, for even their natural children are not subject to their power.

§ 105. He who has adopted a person either by the vote of the people or by the authority of the praetor or of the president of a province, can transfer his adoptive son to another adoptive father.

§ 106. Whether a younger person can adopt an older is a disputed point in both forms of adoption.

§ 107. It is peculiar to adoption by the vote of the people that children in the power of the person adrogated, as well as their father, fall under the power of the adrogator, assuming the position of grandchildren.

DE MANV.

§ 108. Let us next proceed to consider what persons are subject to the hand, which also relates to law quite peculiar to Roman citizens.

§ 109. Power is a right over males as well as females: hand relates exclusively to females.

§ 110. In former days there were three modes of becoming subject to hand, use, confarreation, coemption.

§ 111. Use invested the husband with right of hand after a whole year of unbroken cohabitation. Such annual possession operated a kind of usucapion, and brought the wife into the family of the husband, where it gave her the status of a daughter. Accordingly, the law of the Twelve Tables provided that a wife who wished to avoid subjection to the hand of the husband should annually absent herself three nights from his roof to bar the annual usucapion: but the whole of this law has been either partly abolished by statute, or partly obliterated by mere disuse.

§ 112. Confarreation, another mode in which subjection to hand originates, is a sacrifice offered to Jupiter Farreus, in which they use a cake of spelt, whence the ceremony derives its name, and various other acts and things are done and made in the solemnization of this disposition with a traditional form

of words, in the presence of ten witnesses: and this law is still in use, for the functions of the greater flamens, that is, the flamens of Jove, of Mars, of Quirinus, and the duties of the ritual king, can only be performed by persons born in marriage solemnized by confarreation. Nor can such persons themselves hold a priestly office if they are not married by confarreation.

§ 113. In coemption the right of hand over a woman attaches to a person to whom she is conveyed by a mancipation or imaginary sale: for the man purchases the woman who comes into his power in the presence of at least five witnesses, citizens of Rome above the age of puberty, besides a balance holder.

§ 114. By coemption a woman may convey herself either to a husband or to a stranger, that is to say there are two forms of coemption, matrimonial and fiduciary. A coemption with a husband in order to acquire the status of daughter in his house is a matrimonial coemption: a coemption for another purpose, whether with a husband or with a stranger, for instance, for avoiding a guardianship, is a fiduciary coemption.

§ 115. This is accomplished by the following process: the woman who desires to set aside her present guardians and substitute another makes a coemption of herself to some one with their sanction: thereupon the party to this coemption remancipates her to the person intended to be substituted as guardian, and this person manumits her by the form of vindicta, and in virtue of this manumission becomes her guardian, being called a fiduciary guardian, as will hereafter be explained.

§ 115 *a*. In former times testamentary capacity was acquired by fiduciary coemption, for no woman was competent to dispose of her property by will, with the exception of certain persons, unless she had made a coemption, and had been remancipated and then manumitted: but this necessity of coemption was abolished by a senatusconsult made on the motion of Hadrian, of divine memory.

§ 115 *b*. Even if a woman makes only a fiduciary coemption with her husband, she acquires the status of his daughter, for it is held that from whatever cause a woman is in the hand of her husband, she acquires the position of his daughter.

DE MANCIPIO.

§ 116. It remains to examine what persons are held in mancipation.

§ 117. All children, male or female, in the power of their father are liable to be mancipated by their father just as his slaves may be mancipated.

§ 118. A woman in the hand is subject to the same mode of alienation, and may be mancipated by the person who has acquired her by coemption just as a daughter may be mancipated by her father: and although the acquirer of her by coemption otherwise than for the purpose of marriage has not the power of a father over her, nevertheless, though he is not her husband, and therefore has not the status of a father, he can dispose of her by mancipation.

§ 118 *a*. Almost the sole occasion of mancipation by a parent or by the acquirer of a woman by coemption is when the parent or acquirer by coemption designs to liberate the person mancipated from his lawful control, as will presently be more fully explained.

§ 119. Mancipation, as before stated, is an imaginary sale, belonging to that part of the law which is peculiar to Roman citizens, and consists in the following process: in the presence of not fewer than five witnesses, citizens of Rome above the age of puberty, and another person of the same condition, who holds a bronze balance in his hands and is called the balance holder, the alienee holding a bronze ingot

in his hand, pronounces the following words: THIS MAN I CLAIM AS BELONGING TO ME BY RIGHT QUIRTARY AND BE HE (OR, HE IS) PURCHASED TO ME BY THIS INGOT AND THIS SCALE OF BRONZE. He then strikes the scale with the ingot, which he delivers to the mancipator as by way of purchase money.

§ 120. By this formality both slaves and free persons may be mancipated, and also such animals as are mancipable, namely, oxen, horses, mules, and asses: immovables also, urban and rustic, if mancipable, such as Italic lands and houses, are aliened by the same process.

§ 121. The only point wherein the mancipation of land and buildings differs from the mancipation of other things is this, that mancipable persons, whether slaves or free, and animals that are mancipable, must be present to be mancipated: it being necessary that the alienee should grasp the object to be mancipated with his hand, and from this manual prehension the name of mancipation is derived; whereas land and buildings may be mancipated at a distance from them.

§ 122. The reason of using a bronze ingot and a weighing scale is the fact that bronze was the only metal used in the ancient currency, which consisted of pieces called the as, the double as, the half as, the quarter as, and that gold and silver were not used as media of exchange, as appears by the law of the Twelve Tables: and the value of the pieces was not measured by number but by weight. Thus the as was a pound of bronze, the double as two pounds, whence its name (dupondius), which still survives; while the half as and quarter as were masses defined by weighing those respective fractions of a pound. Accordingly, money payments were not made by tale, but by weight, whence slaves entrusted with the administration of money have been called cashiers.

§ 123. If it is asked in what respect coemptive conveyance differs from mancipation, the answer is this, that coemption does not reduce to a servile condition, whereas mancipation reduces to so completely a servile condition that a person held in mancipation cannot take as heir or legatee under the will of the person to whom he is mancipated, unless he is enfranchised by such will, thus labouring under the same incapacity as a slave: the reason too of the difference is plain, as the form of words employed in mancipation by a parent or previous acquirer by coemption is identical with that used in the mancipation of slaves, but it is not so in coemptive conveyance.

QVIBUS MODIS IVS POTESTATIS SOLVATVR.

§ 124. Let us now examine the modes whereby persons dependent on a superior are freed from their dependence.

§ 125. And, first, let us consider persons subject to power.

§ 126. How slaves are liberated may be intelligible from what we have explained above about servile manumission.

§ 127. Children under paternal power become independent at the parent's death, subject, however, to this reservation: the death of a father always releases his sons and daughters from dependence: the death of a grandfather only releases his grandchildren from dependence, provided that it does not subject them to the power of their father: for if at the death of the grandfather the father is alive and in his power, the grandchildren, after the grandfather's death, are in the power of the father; but if at the time of the grandfather's death the father is dead or not subject to the grandfather, the grandchildren will not fall under his power, but become independent.

§ 128. As interdiction from fire and water for an offence against the Cornelian law involves loss of citizenship, such removal of a man from the list of Roman citizens operates, like his death, to liberate

his children from his power, for it is inconsistent with civil law that an alien should exercise parental power over a citizen of Rome: conversely, the interdiction from fire and water of a person subject to parental power terminates the power of the parent, because it is a similar inconsistency that a person of alien status should be subject to the parental power of a Roman citizen.

§ 129. Though the hostile capture of the parent makes him a slave of the enemy, the status of his children is suspended by the jus postliminii, whereby on escape from captivity a man recovers all former rights: accordingly, if the father returns he will have his children in his power; if he dies in captivity his children will be independent, but whether their independence dates from the death of the parent or from his capture by the enemy may be disputed. Conversely, if a son or grandson is captured by the enemy, the power of his ascendent is also provisionally suspended by the jus postliminii.

§ 130. Further, a son is liberated from parental power by his inauguration as flamen of Jove, a daughter by her selection for the office of Vestal virgin.

§ 131. Formerly, too, when Rome used to send colonies into the Latin territory, a son who by his parents' order enrolled his name in a colony ceased to be under parental power, since he was made a citizen of another state.

§ 132. Emancipation also liberates children from the power of the parent, a son being liberated by three mancipations, other issue, male or female, by a single mancipation; for the law of the Twelve Tables only mentions three mancipations in the case of the son, which it does in the following terms: IF A FATHER SELL A SON THREE TIMES, THE SON SHALL BE FREE FROM THE FATHER. The ceremony is as follows: the father mancipates his son to some one; the alienee manumits him by fictitious vindication, whereupon he reverts into the power of his father; the father again mancipates him to the same or a different alienee, usually to the same, who again manumits him by fictitious vindication, whereupon he reverts a second time into the power of his father; the father then mancipates him a third time to the same or a different alienee, usually to the same, and by this third mancipation the son ceases to be in the power of the father even before manumission, while still in the status of a person held in mancipation. [The alienee or fiduciary father should then remancipate him to the natural father, in order that thereupon the natural father by manumitting him may acquire the rights of patron instead of the fiduciary father.]

§ 132 *a*. A manumitter of a free person from the state of mancipium has the same rights to the succession of his property as a patron has in respect of the property of his freedman. Women and male grandsons by a son pass out of the power of their father or grandfather after one mancipation; but unless they are remancipated by their fiduciary father, and manumitted by their natural father, the latter has no rights of succession to their property.

§ 133. But it should be noticed that a grandfather who has both a son, and by his son a grandson, in his power, may either release his son from his power and retain the grandson, or retain the son and manumit the grandson, or emancipate both son and grandson; and a great grandfather has a similar latitude of choice.

§ 134. A father is also divested of power over his children by giving them in adoption. To give a son in adoption, the first stage is three mancipations and two intervening manumissions, as in emancipation; after this the son is either remancipated to the father, and by the adopter claimed as son from him by vindication before the praetor, and in default of counterclaim by the natural father is awarded by the praetor to the adoptive father as his son; or without remancipation to the natural father is directly claimed by the adoptive father by vindication from the alienee of the third mancipation (fiduciary father); but it is more convenient to interpose a remancipation to the natural father. In the case of other issue, male or female, a single mancipation suffices, with or without remancipation to the natural

father. In the provinces a similar ceremony can be performed before the president of the province.

§ 135. A grandson begotten after the first or second mancipation of the son, though born after the third mancipation, is subject to the power of the grandfather, and may by him be given in adoption or emancipated: a grandson begotten after the third mancipation is not born in the power of the grandfather, but, according to Labeo, is born in mancipation to the person to whom his father is mancipated. The rule, however, which has obtained acceptance with us is, that so long as the father is in mancipation the status of the child is in suspension, and if the father is manumitted the child falls under his power; if the father dies in mancipation the child becomes independent.

§ 135 *a*. The rule is the same in the case of a child begotten of a grandson who has been once mancipated, but not yet manumitted; for, as before mentioned, the result of three mancipations of the son is obtained by a single mancipation of the grandson.

§ 136. A wife subjected to the hand of a husband by confarreation is not thereby freed from the power of her father; and this is declared by the senatusconsult of the consuls of Maximus and Tubero respecting the priestess of Jove, according to which she is only in the marital hand as far as the sacra are concerned, the status of the wife being unaffected in other respects by such subjection. Subjection to hand by coemption liberates from the power of the parent, and it is immaterial whether it is a coemption subjecting the woman to the hand of a husband or to the hand of a stranger, although the status of quasi daughter only belongs to a woman in the hand of a husband.

§ 137. A woman subjected to hand by coemption is, like a daughter, released therefrom by one mancipation, and on subsequent manumission becomes independent.

§ 137 *a*. Between a woman who has entered into a coemption with a stranger and a woman who has entered into a coemption with a husband there is this difference, that the former has the power of compelling the coemptionator to remancipate her to any one she pleases, whereas the latter cannot compel him to do this any more than a daughter can her father. A daughter, however, has no means of compelling her father to emancipate her even if she is only such by adoption, whereas a wife by sending a message of divorce can compel her husband to release her from his hand, just as if they had never been married.

§ 138. As persons in mancipation are in the position of slaves, manumission by fictitious vindication, by entry on the censor's register, by testamentary disposition, are the modes by which they acquire independence.

§ 139. But to them the lex Aelia Sentia has no application: no age of the person manumitting or the person manumitted is required; the manumission is subject to no proviso against fraud on the rights of patron or creditors, nor even to the numerical limitation of the lex Fufia Caninia.

§ 140. But even though the assent of the holder in mancipation is withheld, freedom may be acquired by entry on the register of the censor, except when a son has been mancipated by a father with a condition of remancipation, then the father is deemed to have reserved in a way his own power in consequence of the condition that he is to have him back in mancipation; nor can liberty be acquired without the assent of the holder in mancipation by entry on the censor's register when a delinquent son has been surrendered by his father in consequence of a noxal suit; when, for instance, the father has been condemned in an action for a theft committed by the son, and has by mancipation surrendered his son to the plaintiff, for in this case the plaintiff holds him in lieu of pecuniary damages.

§ 141. Finally, it is to be observed that contumelious treatment of a person held in mancipation is not permitted, but renders liable to an action of outrage; and the status generally is not persistent, but

merely formal and momentary, except when it is the consequence of surrender in lieu of damages in an action of trespass.

DE TVTELIS.

§ 142. Let us now proceed to another classification: persons not subject to power, nor to hand, nor held in mancipation, may still be subject either to tutelary guardianship or to curatorship, or may be exempt from both forms of control. We will first examine what persons are subject to tutelary guardianship and curatorship, and thus we shall know who are exempt from both kinds of control.

§ 143. And first of persons subject to tutelary guardianship or tutelage.

§ 144. The law allows a parent to appoint guardians in his will for the children in his power, below the age of puberty, if they are males; whatever their age, and notwithstanding their marriage, if they are females; for, according to our ancestors, even women who have attained their majority, on account of their levity of disposition, require to be kept in tutelage.

§ 145. Accordingly, when a brother and sister have a testamentary guardian, on attaining the age of puberty the brother ceases to be a ward, but the sister continues, for it is only under the lex Julia and Papia Poppaea by title of maternity that women are emancipated from tutelage; except in the case of vestal virgins, for these, even in our ancestors' opinion, are entitled on account of the dignity of their sacerdotal function to be free from control, and so the law of the Twelve Tables enacted.

§ 146. A grandson or grand-daughter can only receive a testamentary guardian provided the death of the testator does not bring them under parental power. Accordingly, if at the time of the grandfather's death the father was in the grandfather's power, the grandchildren, though in the grandfather's power, cannot have a testamentary guardian, because his death leaves them in the power of the father.

§ 147. As in many other matters after-born children are treated on the footing of children born before the execution of the will, so it is ruled that after-born children, as well as children born before the will was made, may have guardians therein appointed, provided that if born in the testator's lifetime they would be subject to his power [and self-successors], for such after-born children may be instituted heirs, but not afterborn strangers.

§ 148. A wife in the testator's hand may receive a testamentary guardian as if she were a daughter, and a son's wife in the son's hand as if she were a granddaughter.

§ 149. The most regular form of appointing a guardian is in the following terms: 'I APPOINT LUCIUS TITIUS GUARDIAN TO MY CHILDREN'; the form, 'BE LUCIUS TITIUS GUARDIAN TO MY CHILDREN'—or, 'TO MY WIFE'—is also valid.

§ 150. To a wife in his hand a testator is permitted to devise the selection of her guardian, that is, he may authorize her to choose whom she pleases, in the following terms: 'TO TITIA MY WIFE I DEVISE THE SELECTION OF HER GUARDIAN'; whereupon she may nominate either a general guardian or a guardian for certain specified matters.

§ 151. The option of a guardian may be limited or unlimited.

§ 152. Unlimited option is usually devised in the form above mentioned; limited option in the following terms: 'TO TITIA MY WIFE I DEVISE NOT MORE THAN ONE OPTION'—or, 'NOT MORE THAN TWO OPTIONS —OF A GUARDIAN.'

§ 153. The effect of these forms is very different: unlimited option is a power of choosing a guardian an indefinite number of times; limited option is the right of a single choice, or of two choices, as may happen.

§ 154. A guardian actually nominated by the will of the testator is called a dative guardian; one taken by selection (of the widow) is called an optative guardian.

DE LEGITIMA AGNATORVM TVTELA.

§ 155. In default of a testamentary guardian the statute of the Twelve Tables assigns the guardianship to the nearest agnates, who are hence called statutory guardians.

§ 156. Agnates (3, § 10) are persons related through males, that is, through their male ascendents: as a brother by the same father, such brother's son or son's son; a father's brother, his son or son's son. Persons related through female ascendents are not agnates but simply cognates. Thus, between an uncle and his sister's son there is not agnation, but cognation: so the son of my aunt, whether she is my father's sister, or my mother's sister, is not my agnate, but my cognate, and vice versa; for children are members of their father's family, not of their mother's.

§ 157. In former times, the statute of the Twelve Tables made females as well as males wards of their agnates: subsequently a law of the Emperor Claudius abolished this wardship in the case of females: accordingly, a male below the age of puberty has his brother above the age of puberty or his paternal uncle for guardian, but a female cannot have such a guardian.

§ 158. *Capitis deminutio* extinguishes rights by agnation, while it leaves unaffected rights by cognation, because civil changes can take away rights belonging to civil law (jus civile), but not rights belonging to natural law (jus naturale).

DE CAPITIS MINVTIONE.

§ 159. *Capitis deminutio* is a change of a former status which occurs in three ways, i. e. it is either greatest, minor or mediate, or least.

§ 160. The greatest *capitis deminutio* is the simultaneous loss of citizenship and freedom, which happens to those who having evaded inscription on the censorial register are sold into slavery according to the regulations of the census, also under the — law when persons in violation of it make Rome their place of residence, and also under the Sc. Claudianum in case of persistent intercourse on the part of a free woman with another person's slave in spite of the dissent and denunciation of the owner.

§ 161. Minor or intermediate loss of status is loss of citizenship unaccompanied by loss of liberty, and is incident to interdiction of fire and water.

§ 162. There is the least *capitis deminutio* retaining citizenship and freedom when a man's position in the family only is changed, which occurs in adoption, coemption, and in the case of those given in mancipium to be afterwards manumitted, so that after each successive mancipation and manumission a *capitis deminutio* takes place.

§ 163. Not only by the two greater losses of status are rights of agnation extinguished, but also by the least: accordingly, if one of two children is emancipated, the elder cannot on the father's decease be guardian to the younger by right of agnation.

§ 164. When agnates are entitled to be guardians, it is not all who are so entitled, but only those of the nearest degree.

DE LEGITIMA PATRONORVM TVTELA.

§ 165. The same statute of the Twelve Tables assigns the guardianship of freedwomen and of freedmen below the age of puberty to the patron and the patron's children, and this guardianship, like that of agnates, is called statutory guardianship, not that it is anywhere expressly enacted in the Twelve Tables, but because the interpretation has procured for it as much reception as it would have obtained from express enactment; for the fact that the statute gave the succession of a freedman or freedwoman, when they die intestate, to the patron and patron's children, was deemed by the lawyers of the republic (veteres) a proof that it intended to give them the guardianship also, because the Tables, when they call agnates to succeed to the inheritance, likewise confer on them the guardianship.

§ 166. The analogy of the patron guardian led in its turn to the establishment of other guardianships also called statutory. Thus when a person mancipates to another, on condition of remancipation to himself, either a son or grandson through a son, who are below the age of puberty, or a daughter or granddaughter through a son of whatever age they may be, he becomes their statutory guardian when he manumits them after remancipation.

§ 166 *a*. CONCERNING FIDUCIARY GUARDIANSHIP. But there are other kinds of guardianship, called fiduciary, which arise when a free person has been mancipated by his parent or coemptionator to an alienee and manumitted by the latter.

§ 167. The guardianship of Latins, male or female, below the age of puberty, does not necessarily belong to their manumitter, but on whoever before manumission was their quiritary owner. Accordingly, a female slave belonging to you as quiritary owner, to me as bonitary owner, if manumitted by me without your joining in the manumission, becomes a Latin, and her property belongs to me, but her guardianship to you, by the enactment of the lex Junia. If the slave is made a Latin by one who combines the character of bonitary and quiritary owner, both her effects, and the

guardianship of her, belong to one and the same person.

DE CESSICIA TVTELA.

§ 168. Statutory guardians, whether agnates or patrons, and manumitters of free persons, are permitted to transfer the guardianship of a female ward by surrender before a magistrate; the guardianship of a male ward is not allowed to be transferred, because it is not considered onerous, being terminated by the ward's attaining the age of puberty.

§ 169. The surrenderee of a guardianship is called a cessionary guardian.

§ 170. On his death or loss of status the guardianship reverts to the surrenderor, and on the surrenderor's death or loss of status it is devested from the cessionary and reverts to the person entitled after the surrenderor.

§ 171. As far, however, as agnates are concerned, in the present day there is no such thing as cessionary guardianship, for agnatic guardianship over female wards was abolished by the lex Claudia.

§ 172. Fiduciary guardians, according to some, are also disabled from transferring their guardianship, having voluntarily undertaken the burden; but although this is the better opinion, yet a parent who has mancipated a daughter, granddaughter, or great-granddaughter, with a condition of remancipation to himself, and manumitted her after remancipation, should be excepted from the rule, for he is ranked with statutory guardians, and has the same privilege as the patron of a manumitted slave.

DE PETENDO ALIO TVTORE.

§ 173. Moreover, a decree of the senate permits female wards to demand a substitute in the place of an absent guardian, who is thus superseded: and the distance of his residence from her domicil [provided it amounts to absence] is immaterial.

§ 174. But an exception is made in favour of an absent patron, who cannot be superseded on the application of a freedwoman.

§ 175. Ranked with patrons is the parent who by mancipation, remancipation, and manumission of a daughter, granddaughter, or great-granddaughter, has become her statutory guardian. His sons only rank as fiduciary guardians, unlike a patron's sons, who succeed to the same form of guardianship as vested in their father.

§ 176. For a special and limited purpose the senate permits even the place of a patron in his absence to be filled by a substitute; for instance, to authorize the acceptance of an inheritance.

§ 177. The senatusconsult gives similar permission when a patron's son is himself a ward.

§ 178. For likewise the lex Julia, regulating the marriages of the various orders, permitted a woman whose statutory guardian was himself a ward to apply to the praetor of the city to appoint a guardian for the purpose of constituting her dower.

§ 179. For a patron's son even before the age of puberty is a freedwoman's guardian, although unable to authorize any proceeding, being himself disabled from acting without his guardian's authorization.

§ 180. Also a woman whose statutory guardian is a lunatic or dumb is permitted by the senatusconsult,

for the purpose of settling her dower, to apply for a substitutive guardian.

§ 181. In which cases the continued guardianship of the patron or patron's son is undisputed.

§ 182. The senate further decreed that if the guardian of a male or female ward is suspected of misconduct and removed from office, or if he alleges valid grounds for declining to act and is relieved of his functions, a substitute shall be appointed by the magistrate, and on his appointment the office of the former guardian shall determine.

§ 183. These rules are in force both in Rome and in the provinces, but in Rome application for the appointment of a tutor must be made to the praetor; in the provinces, to the governor of the province.

§ 184. During the era of litigation by statute-process [4, § 10], another cause of appointing a substitute was the imminence of statute-process between the guardian and the woman or ward; for as the guardian could not give his authority in respect of his own suit, another guardian was appointed to authorize the proceedings in the action, who was called a praetorian guardian, because he was appointed by the praetor of the city. But some hold that since the abolition of statute-process this mode of appointing a guardian ceased to be used, others maintain that it is still the practice on the occasion of a statutory suit (4, § 103).

DE ATILIANO TVTORE, ET EO QVI EX LEGE IVLIA ET TITIA DATVR.

§ 185. Failing every other form of guardian, at Rome a guardian is appointed under the lex Atilia by the praetor of the city and the major part of the tribunes of the people, called an Atilian guardian: in the provinces, a guardian is appointed by the president of the province under the lex Julia and Titia.

§ 186. Accordingly, on the appointment of a testamentary guardian subject to a condition, or on an appointment which is not to commence till after a certain time, during the pendency of the condition and before the time has come, a substitute is appointed by these magistrates; also, when the appointment of a testamentary guardian is not subject to a condition, so long as no heir has entered under the will, a temporary guardian may be obtained under those statutes, whose office will determine as soon as the guardian becomes entitled under the will.

§ 187. On the hostile capture of a guardian the same statutes regulate the appointment of a substitute to continue in office until the return of the captive; for if the captive returns he recovers the guardianship in virtue of his rehabilitation.

§ 188. The foregoing statement shows the various forms of guardian: the question of the number of orders to which these forms may be reduced involves a long discussion, for it is a point on which the ancient jurists differed greatly; and as I have examined it at length, both in my interpretation of the edict and in my commentary on Quintus Mucius, for the present occasion it may suffice to observe that some, as Quintus Mucius, make five orders; others, as Servius Sulpicius, three; others, as Labeo, two; others make as many orders as there are forms of guardian.

DE MVLIERVM TVTELA.

§ 189. The wardship of children under the age of puberty is part of the law of every state, for it is a dictate of natural reason that persons of immature years should be under the guardianship of another, in fact there is scarcely any state which does not permit a parent to nominate a testamentary guardian for his children under the age of puberty, though, as we have before stated, only citizens of Rome

appear to be invested with parental power.

§ 190. But why women of full age should continue in wardship there appears to be no valid reason; for the common allegation, that on account of levity of disposition they are readily deceived, and that it is therefore right that they should be controlled by the sanctionary power of a guardian, seems rather specious than true, for women of full age administer their own property, and it is a mere formality that in some transactions their guardian interposes his sanction; and in these cases he is frequently compelled against his own will to give his sanction.

§ 191. Accordingly, a woman has not the tutelary action against her guardian; whereas since the guardians of youthful wards, both male and female, administer their wards' property, they are liable to be sued on account of such administration when the ward has come to the age of puberty.

§ 192. The statutory guardianship of patrons and parents is not purely ineffective, as they cannot be compelled to give their sanction to a will or to the alienation of mancipable property, or to the undertaking of obligations, unless there are very weighty reasons for the obligation or the alienation; but this rule is in their own interest as heirs of intestacy, and is designed to prevent their loss of the estate by testamentary disposition, or the diminution of its value by debt or by alienation of a considerable portion.

§ 193. In other countries, though not under the same tutelage as at Rome, women are generally subject to a quasi tutelage: for instance, the law of Bithynia requires the contract of a woman to be sanctioned by her husband or by a son above the age of puberty.

QVIBVS MODIS TVTELA FINIATVR.

§ 194. Guardianship is terminated for a freeborn woman by title of being mother of three children, for a freedwoman if under statutory guardianship of her patron or his children by being mother of four children: those who have other kinds of guardians, Atilian or fiduciary, for instance, are liberated from wardship by being mothers of three children.

§ 195. There are various ways by which a freedwoman may have other kinds of guardians: for instance in case of her manumission by a woman, when she must request a guardian under the lex Atilia, or, in the provinces, under the lex Julia and Titia, since a female patron cannot be her guardian.

§ 195 *a*. Also on manumission by a male, if with his sanction she makes a coemption, and then is remancipated and manumitted, for the patron then ceases to be guardian, and is replaced by the second manumitter, who is called a fiduciary guardian.

§ 195 *b*. Also on the adrogation of her patron or his son she must demand a guardian under the lex Atilia or Titia.

§ 195 *c*. Similarly in compliance with the same laws she must demand a guardian on the decease of her patron without leaving any male descendant in the family.

§ 196. For males the attainment of the age of puberty is a release from wardship. Puberty, according to Sabinus and Cassius and the other authorities of my school, depends on physical development, that is, on capacity of generation; or in case of impotence, eunuchs for instance, on the completion of the age which usually implies capacity of generation. The other school hold that puberty is to be exclusively measured by age, that is to say, that it should always be deemed to be attained on the completion by a male of his fourteenth year.

DE CVRATORIBVS.

§ 197. After release from tutelary guardianship the estate of a minor is managed by a curator until he reaches the age at which he is competent to attend to his own affairs, and the same rule obtains in other nations, as we have already mentioned.

§ 198. Under similar circumstances the president of a province appoints a curator.

DE SATISDATIONE TVTORVM VEL CVRATORVM.

§ 199. To protect tutelary wards and those having a curator from the destruction or waste of their property by their guardians and curators, it is the function of the praetor to require such guardians and curators to give security for due administration.

§ 200. But this is not without exception, for testamentary guardians are not compelled to give security, as their integrity and vigilance have been approved by the testator; and curators who have not been appointed by any statute, but by the nomination of a consul or praetor or president of a province, are generally not required to give security, their selection being deemed sufficient evidence of their trustworthiness.