GAI INSTITVTIONES OR INSTITUTES OF ROMAN LAW

Book II

EQUAL RIGHTS [DE REBVS]

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DE RERVM DIVISIONE.

§ 1. 1. In the preceding book the law of persons was expounded; now let us proceed to the law of things, which are either subject to private dominion or not subject to private dominion.

§ 2. The leading division of things is into two classes: things subjects of divine, and things subjects of human right.

§ 3. Subjects of divine right are things sacred and things religious.

§ 4. Sacred things are those consecrated to the gods above; religious, those devoted to the gods below.

§ 5. Sacred things can only become so with the authority of the people of Rome, by consecration in pursuance of a law or a decree of the senate.

§ 6. A religious thing becomes so by private will, when an individual buries a dead body in his own ground, provided the burial is his proper business.

§ 7. On provincial soil, according to most authorities, ground does not become religious as the dominion belongs to the people of Rome or the Emperor, and individuals only have possession or usufruct, but such places, though not properly religious, are to be regarded as quasi-religious.

§ 7 *a*. Just as provincial soil, in default of the authorization of the people of Rome, is rendered by consecration not sacred, but quasisacred.

§ 8. Sanctioned places are to a certain extent under divine dominion, such as city gates and city walls.

§ 9. Things subject to divine dominion are exempt from private dominion; things subject to human dominion are generally subject to private dominion, but may be otherwise: for things belonging to an inheritance before any one has become heir have no actual owner.

§ 10. Things subject to human dominion are either public or private.

§ 11. Things public belong to no individual, but to a society or corporation; things private are subject to individual dominion.

DE REBVS INCORPORALIBVS.

§ 12. Again, things are either corporeal or incorporeal.

§ 13. Things corporeal are tan gible, as land, a slave, clothing, gold, silver, and innumerable others.

§ 14. Things incorporeal are intangible; such as those which have an existence simply in law as inheritance, usufruct, obligation, however contracted. For though an inheritance comprises things corporeal, and the fruits of land enjoyed by a usufructuary are corporeal, and obligations generally bind us to make over the conveyance of something corporeal: land, slaves, money; yet the right of succession, the right of usufruct, and the right of obligation are incorporeal. So are the rights attached to property in houses and land. The following are rights attached to property in houses; the right of raising a building and thereby obstructing the lights of a neighbouring building; the right of prohibiting a building being raised, so that one's lights may not be interfered with; the right of letting rain-water fall in a body or in drops on a neighbour's roof or area; the right of having a sewer through a neighbour's area, or a window in a neighbour's wall (cf. Epit. 2, 1, 3). The following are rights attached to property in land: iter, a right of way on foot or horseback; actus, a right of way for ordinary carriages; via, a right of paved way for heavy-laden wagons; pecoris ad aquam appulsus, a

right of watering cattle; aquae ductus, a right of conveying water through the tenement of another.

RERVM CORPORALIVM ADQVISITIONES CIVILES.

§ 14 *a*. Things are further divided into mancipable and not mancipable; mancipable are land and houses in Italy; tame animals employed for draught and carriage, as oxen, horses, mules, and asses; rustic servitudes over Italian soil; but urban servitudes are not mancipable.

§ 15. Stipendiary and tributary estates are also not mancipable. According to my school animals which are generally tamed are mancipable as soon as they are born; according to Nerva and Proculus and their followers, such animals are not mancipable until tamed, or if too wild to be tamed, until they attain the age at which other individuals of the species are tamed.

§ 16. Things not mancipable include wild beasts, as bears, lions; and semi-wild beasts, as elephants and camels, notwithstanding that these animals are sometimes broken in for draught or carriage; for their name was not even known at the time when the distinction between res mancipi and nec mancipi was established.

§ 17. Also things incorporeal, except rustic servitudes on Italian soil; for it is clear that these are mancipable objects, although belonging to the class of incorporeal things.

§ 18. There is an important difference between things mancipable and things not mancipable.

§ 19. Complete ownership in things not mancipable is transferred by merely informal delivery of possession (tradition), if they are corporeal and capable of delivery.

§ 20. Thus when possession of clothes or gold or silver is delivered on account of a sale or gift or any other cause, the property passes at once, if the person who conveys is owner of them.

§ 21. Similarly transferable are estates in provincial lands, whether stipendiary or tributary; stipendiary being lands in provinces subject to the dominion of the people of Rome; tributary, lands in the provinces subject to the dominion of the Emperor.

§ 22. Mancipable things, on the contrary, are such as are conveyed by mancipation, whence their name; but surrender before a magistrate has exactly the same effect in this respect as mancipation.

§ 23. The process of mancipation was described in the preceding book (1, § 119).

§ 24. Conveyance by surrender before a magistrate (in jure cessio) is in the following form: in the presence of some magistrate of the Roman people, such as a praetor, the surrenderee grasping the object says: I SAY THIS SLAVE IS MY PROPERTY BY TITLE QUIRITARY. Then the praetor interrogates the surrenderor whether he makes a counter-vindication, and upon his disclaimer or silence awards the thing to the vindicant. This proceeding is called a statute-process; it can even take place in a province before the president.

§ 25. Generally, however, and almost always the method of mancipation is preferred; for why should a result that can be accomplished in private with the assistance of our friends be prosecuted with greater trouble before the praetor or president of the province?

§ 26. If neither mancipation nor surrender before the magistrate is employed in the conveyance of a mancipable thing ....

RERVM INCORPORALIVM ADQVISITIONES CIVILES.

§ 28. Incorporeal things are obviously incapable of transfer by delivery of possession (traditio).

§ 29. But while before a magistrate urban servitudes can only be created by surrender before a magistrate; rural servitudes may either be acquired by this method or by mancipation.

§ 30. Usufruct can only be created by surrender. A usufruct surrendered by the owner of the property passes to the surrenderee, leaving the bare property in the owner. A usufruct surrendered by the usufructuary to the owner of the property passes to the latter and is merged in the ownership. Surrendered to a stranger it continues in the usufructuary, for the surrender is deemed inoperative.

§ 31. These modes of creating usufruct are confined to estates in Italian soil, for only these estates can be conveyed by mancipation or judicial surrender. On provincial soil, usufructs and rights of way on foot, horseback, and for carriages, watercourses, rights of raising buildings or not raising, not obstructing lights, and the like, must be created by pact and stipulation; for the lands themselves, which are subject to these servitudes, are incapable of conveyance by mancipation or surrender before a magistrate.

§ 32. In slaves and other animals usufruct can be created even on provincial soil by surrender before a magistrate.

§ 33. My recent statement that usufruct was only constituted by surrender before a magistrate was not inaccurate, although it may in this sense be created by mancipation that we may mancipate the property and reserve the usufruct; for the usufruct itself is not mancipated, though in mancipating the property the usufruct is reserved so that the usufruct is vested in one person and the property or ownership in another.

§ 34. Inheritances also are only alienable by surrender before a magistrate.

§ 35. If the person entitled by the statutory rules of the civil law of intestacy surrender the inheritance before acceptance, that is to say, before his heirship is consummated, the surrenderee becomes heir just as if he was entitled by agnation; but if the agnate surrenders after acceptance, in spite of the surrender he continues heir and answerable to the creditors, his rights of action being extinguished and the debtors to the estate thus discharged of liability without payment, while the ownership in the corporeal objects of the inheritance passes to the surrenderee just as if it had been surrendered in separate lots.

§ 36. The surrender of an inheritance by a person instituted heir by will before acceptance is inoperative; but after acceptance it has the operation just ascribed to the agnate's surrender of an intestate succession after acceptance.

§ 37. And so has a surrender by a necessary successor according to the authorities of the other school, who maintain that it seems immaterial whether a man becomes heir by acceptance or whether he becomes heir ipso jure, irrespective of his intention (a distinction that will be explained in its proper place): according to my school a necessary heir's surrender of the inheritance is inoperative [3, § 85].

§ 38. Obligations, in whatever way contracted, are incapable of transfer by either method. For if I wish to transfer to you my claim against a third person, none of the modes whereby corporeal things are transferred is effective: but it is necessary that at my order the debtor should bind himself to you by stipulation: whereupon my debtor is discharged of his debt to me and becomes liable to you; which

transformation is called novation of an obligation.

§ 39. In default of such novation he cannot sue in his own name, but must sue in my name as my cognitor or procurator.

§ 40. We must next observe that for aliens there is only one ownership and only one owner at the same time of a thing, and so it was in ancient times with the people of Rome, for a man had either quiritary dominion or none at all. They afterwards decomposed dominion so that one person might have quiritary ownership of an object of which another person had bonitary ownership.

§ 41. For if a mancipable thing is neither mancipated nor surrendered before a magistrate but simply delivered to a person, the bonitary ownership passes to the alienee, but the quiritary ownership remains in the alienor until the alienee acquires it by usucapion; for as soon as usucapion is completed, plenary dominion, that is, the union of bonitary and quiritary ownership, vests in the alienee just as if he had acquired the thing by mancipation or surrender before a magistrate.

§ 42. Usucapion of movables requires a year's possession for its completion, of land and houses, two years' possession, a rule which dates from the law of the Twelve Tables.

§ 43. Quiritary ownership of a thing may also be acquired by usucapion, when possession of it has been transferred to one by a person who is not the owner of it, and this is the case in things either mancipable or not mancipable, if they are received in good faith by a person who believes the deliverer to be owner of them.

§ 44. The reason of the law appears to be the inexpediency of allowing ownership to be long unascertained, the previous owner having had ample time to look after his property in the year or two years which must elapse before usucapion is complete.

§ 45. Some things, however, notwithstanding the utmost good faith of the possessor, cannot be acquired by usucapion, things, for instance, which have been stolen or violently possessed, stolen things being declared incapable of usucapion by the law of the Twelve Tables, and things violently possessed by the lex Julia and Plautia.

§ 46. So, too, provincial land and houses are incapable of usucapion.

§ 47. Formerly, when a woman was under her agnate's guardianship, her mancipable things were not subject to usucapion, unless she herself delivered possession of them with her guardian's sanction, and this was an ordinance of the Twelve Tables.

§ 48. Free men, also, and things sacred or religious, are obviously not susceptible of usucapion.

§ 49. The common statement that in things stolen or violently possessed, usucapion is barred by the law of the Twelve Tables, means, not that the thief or violent dispossessor is incapable of acquiring by usucapion, for he is barred by another cause, his want of good faith; but that even a person who purchases in good faith from him is incapable of acquiring by usucapion.

§ 50. Accordingly, in things movable a possessor in good faith cannot easily acquire ownership by usucapion, because he that sells and delivers possession of a thing belonging to another is guilty of theft. However, sometimes this is otherwise, for an heir who believes a thing lent or let to, or deposited with, the deceased to be a portion of the inheritance, and sells it or gives it away, is not guilty of theft: again, the usufructuary of a female slave who believes her offspring to be his property and sells it or gives it away, is not guilty of theft; for there can be no theft without unlawful intention: and similarly other circumstances may prevent the taint of theft from attaching to the delivery of a thing belonging

to another, and enable the receiver to acquire by usucapion.

§ 51. Possession of land belonging to another may be acquired without violence, when vacant by neglect of the owner, or by his death without leaving a successor, or his long absence from the country, and an innocent person to whom the possession is transferred may acquire the property by usucapion; for though the original seizer of the vacant possession knew that the land belongs to another, yet his knowledge is no bar to the usucapion of the innocent alienee, as it is no longer held that theft can be committed of land.

§ 52. On the other hand, knowledge that one is acquiring possession of another person's property (mala fides) does not always prevent usucapion, for any one may seize a portion of an inheritance of which the heir has not yet taken possession and acquire it by usucapion, provided it is susceptible of usucapion, and he is said to acquire by title of quasi heir.

§ 53. With such facility is this usucapion permitted that even land may be thus acquired in a year.

§ 54. The reason why even land in these circumstances demands only a year for usucapion is, that in ancient times the possession of property belonging to the inheritance was held to be a means of acquiring the inheritance itself, and that in a year: for while the law of the Twelve Tables fixed two years for the usucapion of land and one year for the usucapion of other things, an inheritance was held to fall under the category of 'other things,' as it is neither land nor corporeal: and though it was afterwards held that the inheritance itself was not acquirable by usucapion, yet the property belonging to the inheritance, including land, continued acquirable by a year's possession.

§ 55. The motive for permitting at all so unscrupulous an acquisition was the wish of the ancient lawyers to accelerate the acceptance of inheritances, and thus provide persons to perform the sacred rites, to which in those days the highest importance was attached, and also to secure some one from whom creditors might obtain satisfaction of their claims.

§ 56. This mode of acquisition is sometimes called lucrative usucapion, for the possessor knowingly acquires the benefit of another's property.

§ 57. In the present day, however, this kind of usucapion is not lucrative, for the Senate on the motion of Hadrian decreed that such usucapions are revocable, and accordingly where a person thus acquired a thing by usucapion, the heir can sue him by hereditatis petitio and recover the thing just as if the usucapion had never been completed.

§ 58. The existence of a necessary heir excludes ipso jure the operation of this kind of usucapion.

§ 59. There are other conditions under which a knowledge of another's ownership is no bar to usucapion. After a fiduciary mancipation or surrender before a magistrate of his property, if the owner himself should become possessed of it, he recovers his ownership even over land in the period of a year, by what is called usureception or a recovery by possession, because a previous ownership is thereby recovered by usucapion.

§ 60. The fiduciary alienee is either a creditor holding the property as a pledge or a friend to whom the property is made over for safe custody; in the latter case the ownership is always capable of usureception: but in that of a creditor, though the owner can always thus re-acquire after payment of the debt, before payment of the debt he can only re-acquire provided he has not obtained the thing of his creditor on hire or got possession of it by request and licence; in this case he re-acquires by a lucrative usucapion.

§ 61. Again, the owner of a thing mortgaged to the people and sold for non-payment of the mortgage

debt may re-acquire it by possession, but in this case, if it is land, usucapion is biennial: and this is the meaning of the saying, that after praediatura (a public sale) land is recoverable by (biennial) possession, a purchaser from the people being called praediator.

§ 65. Thus it appears that some modes of alienation are based on natural law, as tradition, and others on civil law, as mancipation, surrender before the magistrate, usucapion, for these are titles confined to citizens of Rome.

§ 66. Another title of natural reason, besides Tradition, is Occupation, whereby things previously the property of no one become the property of the first occupant, as the wild inhabitants of earth, air, and water, as soon as they are captured.

§ 67. For wild beasts, birds, and fishes, as soon as they are captured, become, by natural law, the property of the captor, but only continue such so long as they continue in his power; after breaking from his custody and recovering their natural liberty, they may become the property of the next occupant; for the ownership of the first captor is terminated. Their natural liberty is deemed to be recovered when they have escaped from his sight, or, though they continue in his sight, when they are difficult to recapture.

§ 68. In the case of those wild animals, however, which are in the habit of going away and returning, as pigeons, and bees, and deer, which habitually visit the forests and return, the rule has been handed down, that only the cessation of the intention of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the intention of returning is held to be lost when the habit of returning is discontinued.

§ 69. Capture from an enemy is another title of property by natural law.

§ 70. Alluvion is another natural mode of acquisition. Alluvion is an addition of soil to land by a river, so gradual that at a particular moment the amount of accretion cannot be determined; or, to use the common expression, an addition made by alluvion is so gradual as to elude our sight.

§ 71. Accordingly a parcel of your land swept away by a river, and carried down to mine, continues your property.

§ 72. An island that rises in the middle of a river is the common property of the proprietors on both banks of the river; if it is not in the middle of the stream, it belongs to the proprietors of the nearer bank.

§ 73. Again, a building erected on my soil, though the builder has made it on his own account, belongs to me by natural law; for the ownership of a superstructure follows the ownership of the soil.

§ 74. The same occurs a fortiori when trees are planted on my land, provided they have struck root.

§ 75. Similarly, when corn is sown on my land.

§ 76. But if I bring an action to recover the land or the building, and refuse to compensate the other party for his outlay on the building or the plantation or the cornfield, he will defeat my action by the plea of fraud, at any rate if he was a bona fide possessor.

§ 77. On the same principle, the writing inscribed on my paper or parchment, even in letters of gold, becomes mine, for the property in the letters is accessory to the paper or parchment; but if I sue for the books or parchment without offering compensation for the writing, my action will be defeated by the plea of fraud.

§ 78. The canvas belonging to me, on which another man has painted, e. g. a portrait, is subject to a different rule, for the ownership of the canvas is held to be accessory to the painting: a difference which scarcely rests on a sufficient reason. By this rule, it is clear that if I am in possession, and you (the painter) claim the portrait without offering to pay the value of the canvas, I may defeat your claim by the plea of fraud. But if you are in possession, the effect is that I am entitled to an equitable action against you, but in this case unless I offer the price of the painting, you defeat me by the plea of fraud, at any rate if you are a bona fide possessor. It is certain, that, if either you or another purloined the canvas, I can bring an action of theft.

§ 79. On a change of species, also, we have recourse to natural law to determine the proprietor. Thus, if grapes, or olives, or sheaves of corn, belonging to me, are converted by another into wine, or oil, or (threshed out) corn, a question arises whether the property in the corn, wine, or oil, is in me, or in the author of the conversion; so too if my gold or silver is manufactured into a vessel, or a ship, chest, or chair is constructed from my timber, or my wool is made into clothing, or my wine and honey are made into mead, or my drugs into a plaster or eye-salve, it becomes a question whether the ownership of the new product is vested in me or in the manufacturer. According to some, the material or substance is the criterion; that is to say, the owner of the material is to be deemed the owner of the product; and this was the doctrine which commended itself to Sabinus and Cassius; according to others the ownership of the product is in the manufacturer, and this was the doctrine favoured by the opposite school; who further held that the owner of the substance or material could maintain an action of theft against the purloiner, and also an action for damages (condictio), because, though the property which is destroyed cannot be vindicated, this is no bar to a condictio or personal action for damages against the thief and against certain other possessors.

QVIBVS ALIENARE LICEAT VEL NON.

§ 62. It sometimes occurs that an owner has not a power of alienation, and that a person who is not owner has a power of alienation.

§ 63. The alienation of dower land by the husband, without the consent of the wife, is prohibited by the lex Julia, although the husband has become owner of the land by its mancipation to him as dower, or by its surrender to him before a magistrate, or by his usucapion of it. Whether this disability is confined to Italian soil, or extends to the provinces, authorities differ.

§ 64. Contrariwise, an agnate, as a lunatic's curator, is empowered to aliene the lunatic's property by the law of the Twelve Tables; and so is a procurator that of his principal (when invested by his principal with free power of administration: Inst. 2, 1, 43). Again, a pledgee, in pursuance of a pact authorizing him to sell, may aliene the pledge, though he is not owner of the thing; this, however, may be said to rest on the assent of the pledgor previously given in the agreement which empowered the pledgee to sell in default of payment.

WHETHER WARDS CAN ALIENE.

§ 80. We must next observe, that neither a woman nor a ward (pupillus) can aliene a mancipable thing without their guardian's sanction: nor can a ward even aliene a non-mancipable thing without such sanction, though a woman can.

§ 81. Thus a woman lending money without the guardian's sanction passes the property therein to the borrower, money being a non-mancipable thing, and so imposes a contractual obligation on the

borrower.

§ 82. But a ward lending money without his guardian's sanction does not pass the property, and so does not impose a contractual obligation on the borrower, he can therefore recover back the money, if it exists, by vindication, that is, by claiming it as quiritary owner; whereas a woman can only bring a personal action of debt. Whether a ward can maintain an action against the borrower in case the money has been spent by him, is a subject of controversy, for a ward can acquire a right of action against a person without the sanction of his guardian.

§ 83. On the contrary, both mancipable and non-mancipable things can be conveyed to women and to wards without their guardian's sanction, because they do not require his sanction to better their position.

§ 84. Accordingly, a debtor who pays money to a ward passes the property therein to the ward, but is not discharged of his obligation, because a ward cannot release a debtor from any liability without his guardian's sanction, as without such sanction he cannot part with any right: if, however, he is profiting by the money, and yet demands further payment, he may be barred by the plea of fraud.

§ 85. A woman may be lawfully paid without her guardian's sanction, and the payer is discharged of liability, because, as we have just mentioned, a woman does not need her guardian's sanction for the alienation of a non-mancipable thing, provided always that she receives actual payment: for if she is not actually paid, she cannot formally release her debtor by acceptilation (3, § 169) unless with her guardian's sanction.

§ 86. We may acquire property not only by our own acts but also by the acts of persons in our power, hand, or mancipium; further, by slaves in whom we have a usufruct; further, by freemen or another's slave of whom we are bona fide possessors: let us now examine these cases in detail.

§ 87. The rights of property which children under power or slaves acquire by mancipation or tradition, or claims they acquire by stipulation, or by any other title, are acquired for their superior; for a person subject to power is incapable of holding property, accordingly if instituted heir he must have the command of his superior to be capable of accepting the inheritance, and if he has the command of the superior and accepts the inheritance, it is acquired for the superior just as if the latter had himself been instituted heir: and the rule that it is the superior who acquires applies equally in the case of a legacy.

§ 88. But it is to be noticed that when one man is bonitary owner of a slave and another quiritary owner, whatever the mode of acquisition, it enures exclusively to the bonitary owner.

§ 89. Not only ownership is acquired for the superior but also possession, for the possession of the inferior is deemed to be the possession of the superior, and thus the former is to the latter an instrument of acquiring by usucapion.

§ 90. Persons in the hand or mancipation of a superior acquire ownership for him by all modes of acquisition just as children or slaves in his power; whether they acquire possession for him is a controversy, as they are not themselves in his possession.

§ 91. Respecting slaves in whom a person has only a usufruct, the rule is, that what they acquire by means of the property of the usufructuary or by their own labour is acquired for the usufructuary; but what they acquire by any other means belongs to their proprietor. Accordingly, if such a slave is instituted heir or made legatee, the inheritance or legacy is acquired, not for the usufructuary, but for the owner.

§ 92. The possessor in good faith of a freeman or a slave belonging to another is held to have the same rights as a usufructuary; what they acquire on any other account than the two we mentioned, belonging in the one case to the freeman himself in the other to the rightful owner.

§ 93. But after a possessor in good faith has acquired the ownership of a slave by usucapion, since he has thus become owner of him, all acquisitions by the slave enure to his benefit. A usufructuary cannot acquire a slave by usucapion, for, in the first place, he has not possession, but only a right of usufruct; and in the second place, he knows that the slave belongs to some one else.

§ 94. It is a question whether a slave can be an instrument of possession and usucapion for a usufructuary, the slave not being himself in his possession. A slave, undoubtedly, can be the instrument of possession and usucapion for a bona fide possessor. Both cases are subject to the limitation made above as to things acquired by the slave by means of the usufructuary's property or by his own labour.

§ 95. It appears that freemen not subject to my power nor in my bona fide possession, and slaves of other people of whom I am neither usufructuary nor lawful possessor, cannot under any circumstances be instruments of acquiring for me, and this is the import of the dictum that a stranger to the family cannot be an instrument in the acquisition of anything; only in respect of possession there is a controversy as to whether it cannot be acquired through a stranger.

§ 96. Finally, it is to be observed that persons under power, in hand, or in mancipium, cannot acquire by surrender before a magistrate, for, as nothing can belong to such persons, it follows that they cannot vindicate anything as their own before a magistrate.

QVIBVS MODIS PER VNIVERSITATEM RES ADQVIRANTVR.

§ 97. So much at present respecting the modes of acquiring SINGLE rights; for bequest by way of legacy, another title whereby single rights are acquired, will find a more suitable place in a later portion of our treatise. We proceed to the titles whereby an AGGREGATE of rights is acquired.

§ 98. If we become civil heirs of anyone, or claim praetorian succession to his property, or purchase the estate of an insolvent, or adopt a person sui juris, or receive a wife into our hand, the whole property of those persons is transferred to us in an aggregate mass.

§ 99. Let us begin with inheritances, whose mode of devolution is twofold, according as a person dies testate or intestate.

§ 100. And we first treat of acquisition by will.

§ 101. Wills were originally of two kinds, being made either at the comitia calata, which were held twice a year for making wills, or in martial array, that is to say, in the field before the enemy, martial array denoting an army equipped and armed for battle. One kind, then, was used in time of peace and quiet, the other by persons about to go to battle.

§ 102. More recently, a third kind was introduced, effected by bronze and balance. A man who had not made his will, either in the comitia calata or in martial array, being in apprehension of approaching death, used to convey his estate by mancipation to a friend, whom he requested to distribute it to certain persons in a certain manner after his death. This mode of testamentary disposition is called the will by bronze and balance, because it is carried out by the process of mancipation.

§ 103. The first two modes have fallen into desuetude, and that by bronze and balance, which alone

survives, has undergone a transformation. In former times the vendee of the estate, the alienee by mancipation from the testator, held the place of heir, and received the testator's instructions respecting the disposition of his property after his death. At the present day, the person who is instituted heir, and who is charged with the bequests, is different from the person who, for form's sake, and in imitation of the ancient law, represents the purchaser.

§ 104. The proceedings are as follows: The testator having summoned, moned, as is done in other mancipations, five witnesses, all Roman citizens of the age of puberty, and a holder of the balance, and having already reduced his will to writing, makes a pro-formâ mancipation of his estate to a certain vendee, who thereupon utters these words: 'Thy family and thy money into my charge, ward, and custody I receive, and, in order to validate thy will conformably to the public enactment (the Twelve Tables), with this ingot, and'—as some continue—'with this scale of bronze, unto me be it purchased.' Then with the ingot he strikes the scale, and delivers the ingot to the testator, as by way of purchase-money. Thereupon the testator, holding the tablets of his will, says as follows: 'This estate, as in these tablets and in this wax is written, I so grant, so bequeath, so declare; and do you, Quirites, so give me your attestation.' These words are called the nuncupation, for nuncupation signifies public declaration, and by these general words the specific written dispositions of the testator are published and confirmed.

§ 105. For the part of witness, it is a disqualification to be in the power of the purchaser of the estate or of the testator, because, the old proceeding furnishing the model, the whole testamentary process is supposed to be a transaction between the purchaser and the testator; and in old times, as was just observed, the purchaser was in the place of the heir; wherefore the testimony of persons in the same family was rejected.

§ 106. Hence too, if the vendee is a filiusfamilias, neither his father nor any one in his father's power, his brother, for instance, is competent to attest; on the other hand if a filiusfamilias, after his discharge from service, make a will of his military peculium, neither his father nor any one in his father's power is qualified to be a witness.

§ 107. The same rules apply to the balance-holder, for the balance-holder is reckoned as a witness.

§ 108. Not only is a person who is in the power of the heir or legatee, or a person who has power over the heir or legatee, or a person in the same power as the heir or legatee, capable of being witness or balance-holder. but the heir or legatee himself can act in this character. However, it is advisable that as regards the heir, and those in his power. and the person in whose power he is, the testator should not avail himself of this right.

[DE TESTAMENTIS MILI*T*VM.]

§ 109. But from these strict rules in the execution of a will soldiers, in consideration of their extreme ignorance of law, have by imperial constitutions a dispensation. For neither the legal number of witnesses, nor the ceremony of mancipation or of nuncupation, is necessary to give force to their will.

§ 110. Moreover, they may make aliens and Latini (Juniani) their heirs or legatees, whereas under other wills an alien is disqualified from taking a succession or legacy by the civil law, and Latini by the lex Junia.

§ 111. Celibates also, whom the lex Julia disqualifies for taking successions or legacies, and childless persons whom the lex Papia prohibits from taking more than half a succession or legacy (see § 286), are exempt from these incapacities under the will of a soldier.

TESTAMENTI FACTIO.

§ 112. But a senatusconsult under the late emperor Hadrian, as already mentioned (1, § 115 *a*), made coemption unnecessary, and permitted women to make a will on attaining 12 years of age, only requiring their guardian's sanction if they were still in a state of pupilage.

§ 113. Women, then, are in a better legal position than males, for a male under 14 years of age cannot make a will, even with his guardian's sanction, but a female acquires testamentary capacity as soon as she is 12 years old.

§ 114. Accordingly, to determine the validity of a will, we must first ascertain whether the testator had testamentary capacity; next, if he had, whether he conformed to the requisitions of the civil law in its execution, with this reservation, that soldiers, on account of their extreme ignorance of law, as was mentioned, are allowed to make their wills in any way they like and in any way they can.

BONORVM POSSESSIO SECVNDVM TABVLAS.

§ 115. The civil law, however, is not satisfied by our observing the requisitions hereinbefore explained respecting mancipation, attestation, and nuncupation.

§ 116. Above all things, we must observe whether the institution of an heir was in solemn form; for if the institution of an heir was not in the prescribed form, it is unavailing that the mancipation, attestation, nuncupation, were regular.

§ 117. The solemn form of institution is this: 'Be Titius my heir.' The following also seems now to be recognized: 'I order that Titius be my heir.' 'I wish Titius to be my heir' is not admitted; and most reject the following: 'I institute Titius my heir,' 'I make Titius my heir.'

§ 118. It is also to be remembered that a woman who has a guardian must have her guardian's sanction to make a will, otherwise her will is invalid at civil law.

§ 119. The praetor, however, if the will is attested by the seals of seven witnesses, promises to put the persons named in the will in juxta-tabular possession, and if there is no one to take the inheritance by statutory right under the rules of intestacy, a brother by the same father, for instance, a father's brother, or a brother's son, the persons named in the will are able to retain the inheritance; for the rule is the same as if the will is invalid from any other cause, as because the familia has not been sold or because the words of nuncupation have not been spoken.

§ 120. But are not the heirs named in the will preferred even to a brother and paternal uncle? since the rescript of the emperor Antoninus permits the person named in the will who has obtained juxta - tabular possession under an informal will to repel the claimants in intestacy by the plea of fraud.

§ 121. This certainly applies both to the wills of males and also to the wills of females which are informal for such faults as omission to sell the familia or to say the words of nuncupation: whether the constitution applies also to wills of females executed without their guardians's sanction, is a question.

§ 122. We are not speaking of females who are the statutory wards of their parent or patron, but of those who are wards of the other sort of guardian, who are compellable to give their sanction; for a parent or patron can certainly not be displaced by a will he has not chosen to sanction.

DE EXHEREDATIONE LIBERORVM.

§ 123. Moreover, a testator who has a son in his power must take care either to institute him heir or to disinherit him individually, for passing him over in silence invalidates the will. So much so, that according to the Sabinians, even if the son die in the lifetime of the father, no one can take as heir under the will on account of the original nullity of the institution. But the followers of the other school hold that although the son, if alive at the time of his father's death, bars the heirs mentioned in the will and takes as self-successor by intestacy, yet, if the son die before the father, the heirs under the will may succeed, the son being no longer in their way, because according to this view the will was not void ab initio by his silent pretermission.

§ 124. By the pretermission of other self-successors a will is not avoided, but the omitted persons come in to share with the heirs named in the will, taking an aliquot part if the latter are self-successors, a moiety if they are strangers. Thus if a man has three sons and institutes them heirs, saying nothing of his daughter, the daughter comes in as co-heir and takes a fourth of the estate, being entitled to the portion which would have devolved on her by intestacy: but when the instituted heirs are strangers, the daughter, if passed over, comes in and takes a moiety. What has been said of the daughter applies to the son's children, male and female.

§ 125. But though a female according to this statement of the law only deprives the heirs under the will of a moiety, the praetor promises to give her contra-tabular possession, so that, if strangers, they lose the whole, and become heirs without taking anything.

§ 126. And this was once the law, and there was no distinction between males and females; but the Emperor Antoninus has recently decided by rescript that female self-successors shall not take more by contra-tabular possession than they would by coming in as co-heirs at civil law, by right of accrual. And the same rule applies to emancipated daughters, that is, they obtain by contra-tabular possession the same shares as they would have obtained as co-heirs by right of accrual if they had not been emancipated.

§ 127. A son must be disinherited individually; otherwise the disherison is invalid. Individual disherison may be expressed in these terms: Be Titius my son disinherited: or in these: Be my son disinherited, without inserting his name.

§ 128. Other male and all female self-successors may be sufficiently disinherited inter ceteros thus: Be the remainder disinherited, which words usually follow the institution of the heir: this, however, is only the rule of the civil law.

§ 129. For the Praetor requires all male self-successors, sons, grandsons, greatgrandsons, to be disinherited individually, although he permits females to be disinherited in an aggregate (inter ceteros), and, failing such disherison, promises them the contra-tabular succession.

§ 130. Children born after the making of the will must either be instituted heirs or disinherited.

§ 131. And in this respect all stand in the same position, that if a son or any other child, male or female, born after the making of the will, be passed over in silence, the will is originally valid, but subsequently rescinded and totally avoided by the birth of the child; so that if the woman from whom a child was expected have an abortive delivery, there is nothing to prevent the heirs named in the will from taking the succession.

§ 132. Female self-successors born after the making of the will may be disinherited either individually or inter ceteros, with this proviso, that if they are disinherited inter ceteros, some legacy must be left them in order that they may not seem to have been pretermitted through forgetfulness. Male self-successors, sons and further lineal descendants, are held not to be duly disinherited unless they are disinherited individually, thus: Be any son that shall be born to me disinherited.

§ 133. With children born after the making of the will are classed children who by succeeding to the place of self-successors become subsequent self-successors like the afterborn. For instance, if a testator have a son, and by him a grandson or granddaughter under his power, the son being nearer in degree alone has the rights of self-successor, although the grandson and granddaughter are equally in the ancestor's power. But if the son die in the lifetime of the testator, or by any other means pass out of the testator's power, the grandson and granddaughter succeed to his place, and thus acquire the rights of self-successors to the testator just as if they were children born after the making of the will.

§ 134. To prevent this subsequent rupture of my will, just as a son must be either instituted heir or disinherited individually to make a will originally valid, so a grandson or granddaughter by a son must be either instituted heir or disinherited, lest if the son die in the testator's lifetime the grandson and granddaughter should take his place and rupture the will in the same way as if they had been children born after the execution of the will. The lex Junia Vellaea allows this and directs them to be disinherited like children born after a will is executed, that is to say, males individually, females either individually or inter ceteros, provided that those who are disinherited inter ceteros receive some legacy.

§ 135. Emancipated children by civil law need neither be appointed heirs nor disinherited because they are not self-successors. But the Praetor requires all, females as well as males, unless appointed heirs, to be disinherited, males individually, females either individually or inter ceteros, and if they are neither appointed heirs nor disinherited as described, the Praetor promises to give them the contratabular possession.

§ 135 *a*. Children who are made Roman citizens along with their father are not subject to his power, if at the time he either omitted to petition for, or failed to obtain, a grant of patria potestas: for those who are subjected to the father's power by the emperor differ in no respect from those under power from time of birth.

§ 136. Adoptive children, so long as they continue in the power of the adoptive father, have the rights of his natural children: but when emancipated by the adoptive father they neither at civil law nor in the Praetor's edict are regarded as his children.

§ 137. And conversely in respect of their natural father as long as they continue in the adoptive family they are reckoned as strangers: but when emancipated by the adoptive father they have the same rights in their natural family as they would have had if emancipated by their natural father (that is, unless either instituted heirs or disinherited by him, they may claim the contratabular succession).

QVIBVS MODIS TESTAMENTA INFIRMENTVR.

§ 138. If after making his will a man adopts as son either a person sui juris by means of the people (in comitia) or one subject to the power of an ascendant by means of the Praetor, his will is inevitably revoked as it would be by the subsequent birth of a self-successor.

§ 139. The same happens if after making his will the testator receives a wife into his hand, or marries a person who is in his hand, as she thereby acquires the status of a daughter and becomes his self-successor.

§ 140. Nor does it avail to prevent the rupture that such a wife or adopted son was in that will instituted heir, for as to disinheriting them, not having been self-successors when the will was made, the question could not then have been material.

§ 141. So a son manumitted after the first or second sale reverts into the power of his father and revokes a previous will, nor does it avail that he is therein appointed heir or disinherited.

§ 142. The same rule formerly held of the son in whose behalf the decree of the senate allows proof of error, if he was born of an alien or Latin mother who was married in the mistaken belief that she was a Roman: for whether he was appointed heir by his father or disinherited, and whether the error was proved in his father's life or after his death, in every case the will was revoked as by the subsequent birth of a self-successor.

§ 143. Now, however, by a recent decree of the senate, made on the proposition of the late emperor Hadrian, if the father is alive when the error is proved, the old rule obtains and the will is in every case avoided; but when the error is proved after the father's death, if the son was passed over in silence, the will is revoked; but if he was appointed heir or disinherited the will is not revoked; in order that carefully executed wills should not be rescinded at a period when reexecution is impossible.

§ 144. A subsequent will duly executed is a revocation of a prior will, and it makes no difference whether an heir ever actually takes under it or no; the only question is, whether one might. Accordingly, whether the heir instituted in a subsequent will duly executed declines to be heir, or dies in the lifetime of the testator, or after his death before accepting the inheritance, or is excluded by expiration of the time allowed for deliberation, or by failure of the condition under which he was instituted, or by celibacy as the lex Julia provides; in all these cases the testator dies intestate, for the earlier will is revoked by the later one, and the later one is inoperative, since no one becomes heir under it.

§ 145. There is another event whereby a will duly executed may be invalidated, namely, the testator's undergoing a loss of status: how this may happen was explained in the preceding book.

§ 146. In this case the will may be said to be rescinded; for although both those wills that are revoked and those that are not from the first made in proper form may be said to be rescinded, and those that are made in proper form but subsequently annulled by loss of status may be said to be revoked, yet as it is convenient that different grounds of invalidity should have different names to distinguish them, we will say that some wills are not made in proper form, others made in proper form are either revoked or rescinded.

BONORVM POSSESSIO SECVNDVM TABVLAS.

§ 147. Wills are not altogether inoperative either when originally informal or when though at first made in proper form they were subsequently rescinded or revoked; for if the seals of seven witnesses are attached, the testamentary heir is entitled to demand possession in accordance with the will, if the testator was a citizen of Rome and sui juris at the time of his death; but if the cause of nullity was, say, the testator's loss of citizenship, or loss of liberty, or adoption and he dies subject to his adoptive father's power, the heir instituted in the will is barred from demanding possession in accordance with the will.

§ 148. Persons granted possession in accordance with a will either originally not made in due form or originally made in due form and subsequently revoked or rescinded, have, if only they can maintain their right to the inheritance, effective possession of it (bonorum possessio cum re); but if they can be

deprived of the property by an adverse claimant, the grant of possession to them is ineffective (bonorum possessio sine re).

§ 149. For an heir instituted according to jus civile either by an earlier or later will, or a statutory heir by intestacy, can evict the mere bonorum possessor according to the will from the inheritance; but in default of such claim on the part of a civil heir, such possessor according to the will can retain the inheritance, and cannot be deprived of it by cognates, these having no civil title.

§ 149 *a*. Sometimes, however, an heir with a civil title is postponed to an irregularly appointed heir; for instance, if the irregularity was only the absence of mancipation or nuncupatory publication, since if the agnates of the deceased claim the inheritance, they may be repelled by the plea of fraud, according to the constitution of the Emperor Antoninus.

§ 150. Possession according to the will is not defeated by the lex Julia, under which law a condition of caducity or devolution to the fiscus is the absence of every kind of heir, whether civil or praetorian.

§ 151. A validly executed will may be invalidated by a contrary expression of will: but a will is not, it is clear, invalidated by the mere intention of revocation. And consequently, in spite of the testator's cutting the strings by which it is tied, it nevertheless, at civil law, continues valid: and his erasure or burning of the dispositions does not render them invalid, though it makes them difficult of proof.

§ 151 *a*. What then is the result? If a claimant demand bonorum possessio by intestacy. and a testamentary heir under such circumstances demand the civil inheritance under the will, the latter is repelled by the plea of fraud: and if no one should demand bonorum possessio by title of intestacy, the testamentary heir is superseded by the fiscus as unworthy of the succession in order to carry the testator's intention of excluding him into effect: and this was enacted by a rescript of the Emperor (Marcus Aurelius) Antoninus.

DE HEREDVM QVALITATE ET DIFFERENTIA.

§ 152. Heirs are either necessary successors or necessary self-successors or external successors.

§ 153. A necessary successor is a slave instituted heir with freedom annexed, so called because, willing or unwilling, without any alternative, on the death of the testator he immediately has his freedom and the succession.

§ 154. For when a man's affairs are embarrassed, it is common for his slave, either in the first place (institutio) or as a substitute in the second or any inferior place (substitutio), to be enfranchised and appointed heir, so that, if the creditors are not paid in full, the property may be sold rather as belonging to this heir than to the testator, the ignominy of insolvency thus attaching to the heir instead of to the testator; though, as Fufidius relates, Sabinus held that he ought to be exempted from ignominy, as it is not his own fault, but legal compulsion, that makes him insolvent; this, however, is not in our view the law.

§ 155. To compensate this disadvantage he has the advantage that his acquisitions after the death of his patron, and whether before or after the sale, are kept apart for his own benefit, and although a portion only of the debts is satisfied by the sale, he is not liable to a second sale of his after-acquired property for the debts of the testator, unless he gain anything in his capacity as heir, as if he inherit the property of a Latinus Junianus [another freedman of the testator]; whereas other persons, who only pay a dividend, on subsequently acquiring any property, are liable to subsequent sales again and again.

§ 156. Sui et necessarii heredes are such as a son or daughter, a grandson or granddaughter by the son, and further lineal descendants, provided that they were under the power of the ancestor when he died. To make a grandson or granddaughter self-successor it is, however, not sufficient that they were in the power of the grandfather at the time of his death, but it is further requisite that their father in the life of the grandfather shall have ceased to be self-successor, whether by death or by any mode of liberation from parental power, as the grandson and granddaughter then succeed to the place of the father.

§ 157. They are called sui heredes because they are family heirs, and even in the lifetime of the parent are deemed to a certain extent co-proprietors; wherefore in intestacy the first right of succession belongs to the children. They are called necessary, because they have no alternative, but, willing or unwilling, both in testacy and intestacy, they become heirs.

§ 158. The praetor, however, permits them to abstain from the succession, and leave the estate of the ancestor to be sold as an insolvent one.

§ 159. The same rule governs a wife in the hand of a husband, for she is on the footing of a daughter, and a son's wife in the hand of the son, for she is on the footing of a granddaughter.

§ 160. A similar power of abstention is granted by the praetor to a person held in mancipium when instituted heir with freedom annexed, although he is simply a necessary successor and not also a self-successor, mancipation being assimilated to servitude.

§ 161. Those who were not subject to the testator's power are called strangers, or external heirs. Thus children not in our power, if instituted heirs, are deemed strangers; and for the same reason children instituted by their mother belong to this class, because women are not invested with power over their children. Slaves instituted heirs with freedom annexed, and subsequently manumitted, belong to the same class.

§ 162. External heirs have the right of deliberating whether they will or will not enter on an inheritance.

§ 163. But if either a person who has the power of abstention or a person who has the power of deliberation as to his acceptance of the inheritance, interferes with the property belonging to the inheritance, he has no longer the right of relinquishing the inheritance, unless he is a minor under twenty-five years of age; for minors, both when they take any other injudicious step, and when they incautiously accept a disadvantageous inheritance, obtain relief from the praetor. The late Emperor Hadrian even relieved a person who had attained his majority, when, after his acceptance of an inheritance, a great debt, unknown at the time of acceptance, had come to light.

§ 164. External heirs are commonly given by the will a prescribed term for decision (cretio), that is, a definite delay for deliberation, within which time they must formally accept, and in default of formal acceptance are barred. Cretio is so called because the word cernere is equivalent to decernere, that is, to come to a determination and resolution.

§ 165. Accordingly, after the words, 'Titius, be thou my heir,' we ought to add, 'and formally declare thy acceptance within a hundred days in which thou knowest of thy institution and hast power to declare whether thou accept; or in default of so declaring be thou disinherited.'

§ 166. And the heir thus appointed, if he wish to inherit, must within the term prescribed solemnly declare his decision in the following words: 'Whereas Publius Mevius in his will has made me his heir, that inheritance I hereby accept and adjudge to myself.' In default of such formal declaration, the elapsing of the period allowed shuts him out from the inheritance, and it is of no avail that he behave as

heir, that is, deal with the estate of the deceased as if he were heir.

§ 167. In the absence of a prescribed term for deliberation in the case of testamentary succession, and in the case of a statutory right of succession on intestacy, a man takes the inheritance either by formal declaration, or by behaving as heir, or by informal declaration, and is not barred from accepting by any lapse of time; but it is usual for the praetor, at the demand of the creditors of the deceased, to appoint a period, on the expiration of which without his acceptance the creditors are permitted to put up the estate of the deceased for sale.

§ 168. But just as a person who is instituted heir subject to a prescribed term for decision does not actually become heir unless he makes a formal declaration of his acceptance, so the only way he is excluded from the inheritance is by his not thus declaring within the last day of the appointed term; and though, pending the term, he may have made up his mind to disclaim, yet if he change his mind before the time is expired and formally declare his acceptance, he can become heir.

§ 169. If no term is prescribed in the institution, or in the case of a statutory right of succession on intestacy, just as an informal declaration makes him heir, so the contrary declaration immediately bars him from the succession.

§ 170. Every prescribed term of deliberation has a certain limit, and a reasonable limit is held to be a hundred days, yet by the civil law a longer or shorter period is allowed to be fixed, though a longer period is sometimes shortened by the praetor.

§ 171. Although, however, the time of deliberation is always limited to certain days, yet one mode of limitation is called ordinary, the other determinate; the ordinary being that above indicated, namely, with the addition of the words 'in which he knows and is able'; determinate that in which these words are omitted.

§ 172. These modes are very different in effect, for when the ordinary period is allowed, the only days computed are those on which he knows of his institution and is in a position to decide, but when a determinate period is allowed, notwithstanding the heir's want of knowledge of his institution, the days begin to be counted continuously; and so notwithstanding his inability from any cause to declare, or any condition annexed to his institution, nevertheless the days begin to be reckoned. Accordingly, it is better and more convenient to employ the ordinary mode of limitation.

§ 173. The determinate period is called continuous, because the days are reckoned continuously. On account of the harshness of this condition the other is commonly employed, and hence is called ordinary.

§ 174. Sometimes two or more degrees of heirs are instituted, as follows: 'Lucius Titius, be thou my heir, and declare solemnly within a hundred days after you know and are able: or, in default of so declaring, be disinherited. Thereupon, be thou, Mevius, my heir, and solemnly declare within a hundred days,' etc.; and in this way we can make as many substitutions as we like.

§ 175. We may substitute in place of one either one or several, and, conversely, in the place of several we may substitute either several or one.

§ 176. Accordingly, if the person instituted in the first degree accepts the inheritance, he is heir, and the substitutes are excluded: if he fail to declare with due formality, he is barred in spite of acts of heirship, and his place is taken by the substitute; and if there are several degrees, in every one a similar result occurs.

§ 177. If the formula prescribing a term of deliberation contains no clause of disherison, but merely

consists of these words: 'If thou fail to declare, be Publius Mevius my heir' [cretio imperfecta], the result is herein different, that, if the person first instituted, though he omit the solemn declaration, act as heir, the substitute is only admitted to a portion, and both take a moiety: if he neither formally declare nor act as heir, he is entirely excluded, and the substitute succeeds to the whole inheritance.

§ 178. It was the opinion of Sabinus that, as long as a term for formally declaring and thereby becoming heir subsists, a person in a higher grade does not let in the substitute, even if he informally act as heir, and that only after the expiration of the term is the substitute admitted instead of the person instituted, who has been acting as heir. But the other school held that, even pending the allotted term, informal acts of heirship let in the substitute and bar the prior heir from reverting to his right of formal declaration.

§ 179. To children below the age of puberty in the power of the testator, not only can such a substitute as we have described be appointed, that is, one who shall take the inheritance on their failure to inherit, but also one who, if after inheriting they die before attaining the age of puberty, shall be their heir; which may be done in the following terms: 'Be my son Titius my heir, and if my son does not become my heir, or after becoming my heir die before becoming his own guardian, [that is before attaining the age of puberty], then be Seius the heir.'

§ 180. In which case, if the son fail to inherit, the substitute is the heir of the testator, but if the son die after inheriting and without attaining the age of puberty, the substitute is heir to the son. Thus there are two wills, so to speak, the father's and the son's. just as if the son himself had instituted an heir; or at any rate there is one will dealing with two inheritances.

§ 181. However, to save the ward from the danger of foul play after the death of the parent, it is common for the ordinary substitution to be made openly, that is, in the clause wherein the ward is instituted, for as the ordinary substitution only calls a man to the succession in case of the ward altogether failing to inherit, and this can only occur by his death in the lifetime of his parent, the substitute in this case is open to no suspicion of crime, because while the testator is alive the contents of the will are a secret. But the substitution, wherein a man is named heir after the succession and death of the ward before reaching the age of puberty, is written separately on later tablets, tied with their own cords and sealed with their own wax, and it is prohibited in the prior tablets that the will should be opened in the lifetime of the son before he attains the age of puberty. Indeed it is far safer that both kinds of substitution should be sealed up separately in two subsequent tablets, for if the ordinary substitution is contained in the first tablets it is easy to conjecture that the same substitute is appointed in the second.

§ 182. Not only when we appoint children under the age of puberty our heirs can we make such a substitution that if they die before puberty the substitute is their heir, but we can do it even when we disinherit them, so that in case the ward should acquire anything either by heirship, legacies, or by gifts of his relatives, all will belong to the substitute.

§ 183. What has been said of substitution to children below the age of puberty, whether appointed heirs or disinherited, is true of substitution to afterborn children.

§ 184. To a stranger instituted heir we cannot appoint a substitute who, if the stranger inherit and die within a certain time, is to be his heir; but we have only power to bind him by a trust to convey the inheritance to another, in part or in whole, a right which shall be explamed in the proper place [§ 277].

DE HEREDIBVS INSTITVENDIS.

§ 185. Not only freemen but slaves, whether belonging to the testator or to another person, may be instituted heirs.

§ 186. A slave belonging to the testator must be simultaneously instituted and enfranchised in the following manner: 'Stichus, my slave, be free and be my heir;' or, 'Be my heir and be free.'

§ 187. If he is not enfranchised at the same time that he is instituted, no subsequent manumission by his owner enables him to take the succession, because the institution is originally void, and even if aliened he cannot formally declare his acceptance by the order of the new master.

§ 188. When a slave is simultaneously instituted and enfranchised, if he continue in the same condition, the will converts him into a freeman and a necessary heir: if the testator himself manumits him in his lifetime, he is able to use his own discretion about acceptance: if he is aliened he must have the order of his new master to accept, and then his master through him becomes heir, the alienated slave himself becoming neither heir nor free.

§ 189. When another person's slave is instituted heir, if he continue in the same position, he must have the order of his master to accept the succession; if aliened by him in the lifetime of the testator, or after his death before formal acceptance, he must have the order of the new master to be able to accept: if manumitted before acceptance, he is able to follow his own judgement as to accepting.

§ 190. When a slave of another person is instituted heir with the ordinary term of cretio, the term only begins to run from the time when the slave has notice of his appointment, and is not prevented in any way from informing the master so that he may at his order make formal acceptance.

§ 191. Let us now examine legacies, a kind of title which seems foreign to the matter in hand, for we are expounding titles whereby aggregates of rights are acquired; but we had at any rate to treat of wills and heirs appointed by will, and it is natural in close connexion therewith to consider this species of title [for a legacy is an accessory of a will].

[DE LEGATIS.]

§ 192. Legacies are of four kinds; by vindication, by condemnation, by permission, by preception.

§ 193. A legacy by vindication is in the following form: 'To Lucius Titius I give and bequeath, say, my slave Stichus,' or only one word need be used as, 'I give or I bequeath;' and other terms such as: 'Let him take,' 'Let him have,' 'Let him seize,' equally confer a legacy by vindication according to the prevailing opinion.

§ 194. It is so called, because immediately on the acceptance of the inheritance the thing becomes the Quiritarian property of the legatee, and if he claims it from the heir or any other possessor, he ought to vindicate it, that is, claim by action that he is owner thereof by law of the Quirites.

§ 195. So far the two schools are agreed, the only point in dispute between them is this, that according to Sabinus and Cassius and the other authorities of my school, what is thus left becomes the property of the legatee immediately on the acceptance of the inheritance, even before he has notice of the legacy, and on notice and repundiation by the legatee, the legacy is cancelled. While Nerva and Proculus and the jurists of that school make the passing of the property to the legatee depend on his accepting the legacy; and now a constitution of the late emperor Pius Antoninus seems to have established the doctrine of Proculus as the rule, for in the case of a Latinus Junianus bequeathed by vindication to a colony, the Emperor said, 'The decurions must deliberate whether they wish to become owners as they

would have to do if the bequest was to an individual.'

§ 196. Only those things are properly bequeathed by vindication which are the Quiritarian property of the testator; things, however, estimated by weight, number, or measure, need only be the Quiritarian property of the testator at the time of his death, for instance, wine, oil, corn, ready-money: other things are required to be the testator's Quiritarian property at both periods, both at the time of his death and at the time of making his will, or the legacy is void.

§ 197. However, this is only the civil law. In later times, on the proposition of Nero, a senatus-consult was passed, providing that if a testator bequeathed a thing which never belonged to him, the bequest should be as valid as if it had been made in the most favourable form; the most favourable form being by condemnation, whereby the property of another person may be bequeathed, as will presently appear.

§ 198. If a man bequeath a thing belonging to him, and afterwards aliene it, most jurists hold that the bequest is not only avoided at civil law, but does not obtain validity by the senatusconsult, the ground of this opinion being that, even when a thing is bequeathed by condemnation and afterwards aliened, although the legacy is due ipso jure, a claim to it, as most jurists hold, may be repelled by the plea of fraud, as contravening the testator's intention.

§ 199. It is a settled rule, that if the same thing be bequeathed by vindication to two or more persons, whether jointly [in the same sentence] or severally [in different sentences], and all claim the legacy, each is only entitled to a ratable part, but a lapsed portion accrues to the co-legatees. A joint bequest is as follows: 'To Titius and Seius I give and bequeath my slave Stichus;' a several bequest as follows; 'To Lucius Titius I give and bequeath my slave Stichus. To Seius I give and bequeath the same slave.'

§ 200. When a condition is annexed to a bequest by vindication, it is a question who, pending the condition, is the owner: my school say, the heir, as in the case of the slave conditionally enfranchised by will, who is admittedly in the interim the property of the heir: the other school assert that there is no interim proprietor, and they insist still more strongly that this is so in the case of an unconditional simple bequest before the acceptance by the legatee.

§ 201. A legacy by condemnation is in the following form: 'Be my heir condemned to give my slave Stichus,' or simply, 'Let my heir give my slave Stichus.'

§ 202. By this form a testator may bequeath a thing belonging to another person, binding the heir to purchase and deliver the thing, or pay its value.

§ 203. A thing which does not exist provided that it will exist may be bequeathed by condemnation, as the future produce of such and such land, or the child to be born of such and such female slave.

§ 204. A bequest in this form, even though no condition is annexed, unlike a bequest by vindication, is not forthwith on the acceptance of the inheritance the property of the legatee, but continues the property of the heir; hence the legatee must sue for it by personal action, that is, lay claim that the heir is bound to convey it to him; and in this case the heir, if the thing is mancipable, ought to convey it to him by mancipation or to surrender it before a magistrate and deliver possession of it; if not mancipable, mere delivery of possession suffices: for if a mancipable thing is merely delivered without mancipation, the legatee must acquire plenary ownership by usucapion, and usucapion, as before mentioned, in the case of movables requires a year's possession, in the case of landed property two years' possession.

§ 205. There is another difference between bequest by vindication and bequest by condemnation

herein, that if the same thing is bequeathed to two or more by condemnation, if they are named jointly, each is entitled to a ratable part, as in legacy by vindication; if severally, each is entitled to the whole, and the heir is bound to convey the specific thing to one, and the value to the other; and in a joint bequest a lapsed portion does not accrue to the co-legatee, but belongs to the heir.

§ 206. The statement that a lapsed portion in legacy by condemnation falls to the heir, and in legacy by vindication accrues to the co-legatee, be it observed, gives the rule of the civil law before the lex Papia; but since the lex Papia, a lapsed portion becomes caducous, and belongs to the legatees who have children.

§ 207. And although the first title to a caducous legacy is that of heirs with children, and the second, if the heirs are childless, of legatees with children, yet the lex Papia itself declares that in a joint bequest a co-legatee with children is to be preferred to heirs even though they have children.

§ 208. And most jurists hold that, as to the rights which the lex Papia gives to joint legatees, it makes no difference whether the bequest is by vindication or by condemnation.

§ 209. A bequest by permission is in the following form: 'Be my heir condemned to permit Lucius Titius to take and to have to himself my slave Stichus.'

§ 210. A bequest in this form has a wider scope than one in the form of vindication, but less than one in the form of condemnation, for hereby not only can the testator's property be effectively bequeathed, but also that of the heir, whereas by the form of vindication the testator can only bequeath his own property, and by the form of condemnation he can bequeath the property of any stranger.

§ 211. If at the time of the testator's death the thing thus bequeathed belong to the testator or the heir, the bequest is valid, even though at the time of making the will it belonged to neither.

§ 212. If it first belong to the heir after the death of the testator it is a question whether the bequest is valid, and it is most generally held to be invalid. However, even though a thing bequeathed never belonged to the testator or after his death became the property of the heir, by the senatusconsult of Nero all bequests are put on the same footing as a bequest by condemnation.

§ 213. Just as a thing bequeathed by condemnation does not immediately on the acceptance of the inheritance belong to the legatee, but continues to belong to the heir until by delivery, or mancipation, or surrender before the magistrate, he makes it the property of the legatee; so it happens in bequest by permission, and accordingly this form of bequest is ground to support a personal action in the terms: 'Whatever the heir is bound by the will to convey or perform.'

§ 214. Although some hold that a bequest in this form does not bind the heir to mancipate or surrender before the magistrate, or convey by tradition, but is satisfied by his permitting the legatee to take the thing, as the testator only enjoined the heir to let him have it.

§ 215. A more serious question arises in another point respecting this form of bequest: if the same thing is bequeathed severally to two or more, some hold that each is entitled to the whole, [as in bequest by vindication (? condemnation);] others hold that the first occupant is alone entitled, because as this form of bequest only condemns the heir to suffer the legatee to have the thing, as soon as the first occupant has been suffered to take it, the heir is safe against any subsequent claimant, as he neither has possession of the thing, so as to let it again be taken, nor has fraudulently parted with possession.

§ 216. A bequest by preception is in the following form: 'Let Lucius Titius take my slave Stichus by preception [before partition].'

§ 217. My school hold that such a bequest can only be made to one of several co-heirs, because preception, or previous taking, can only be attributed to a person who, taking as heir, over and above his portion as heir, and before partition of the inheritance between the coheirs takes something as legatee.

§ 218. Therefore, if a stranger is given a legacy in this form it is void, and Sabinus held that the flaw is not remedied by the senatusconsult of Nero, for that senatusconsult only cures verbal flaws which make a bequest void at civil law, not personal disabilities of the legatee. Julian, however, and Sextus held that this bequest also is made valid by the senatusconsult, as only being avoided at civil law by a verbal informality; as appears from the fact that the very same person might take by the bequest in another form, as in those by vindication, condemnation, or permission, whereas a personal defect in the legatee only invalidates the legacy, if the legatee is a person totally disqualified from taking any legacy whatever, e. g. an alien, who is incapable of taking anything under a will: in which case (they contend) the senatusconsult is clearly inapplicable.

§ 219. Again, my school hold that in this form of bequest, the only action by which a legatee can recover is the action for partition of an inheritance, the judge's commission including a power of adjudicating a thing bequeathed by preception.

§ 220. From this it follows that, according to my school, nothing can be bequeathed by preception but what belongs to the testator, for nothing but what belongs to the inheritance forms the subject of this action. If, then, a thing that does not belong to the testator is bequeathed in this form, the bequest is void at civil law, but made valid by the senatusconsult. In one case they admit that another person's property may be bequeathed by preception, for instance, if a man bequeath a thing which he has conveyed by fiduciary mancipation to a creditor, as it is within the powers of the judge to order the co-heirs to redeem the property by payment of the mortgage debt, and thus enable the legatee to exercise his right of preception.

§ 221. The other school hold that a stranger may take a bequest in the form of preception just as if it were in the form: 'Let Titius take my slave Stichus,' the addition [by preception, or, before partition] being mere surplusage, and the bequest being in effect in the form of vindication; and this opinion is said to be confirmed by a constitution of the late emperor Hadrian.

§ 222. According to this view, if the thing was the Quiritarian property of the defunct, it can be recovered in a vindicatio by the legatee, whether an heir or a stranger, but if it was only the bonitarian property of the testator, a stranger will recover the bequest under the senatusconsult, an heir by the authority of the judge in an action for partition of inheritance. But if it was in no sense the property of the testator, either an heir or a stranger may recover it under the senatusconsult.

§ 223. Whether they are heirs, according to my school, or strangers, according to the other, if two or more legatees have the same thing bequeathed to them jointly or severally, each legatee is only entitled to a ratable portion.

[AD LEGEM FALCIDIAM.]

§ 224. By the ancient law a testator might exhaust his whole estate by bequests and enfranchisements, and leave nothing to the heir but an empty title; and this privilege seemed granted by the Twelve Tables, which concede an unlimited power of testamentary disposition, in these terms: 'As a man's last bequests respecting his property are, so let it be law:' hence the persons who were appointed heirs declined to accept the inheritance, and people commonly died intestate.

§ 225. This led to the enactment of the lex Furia, whereby, excepting certain specified classes, a thousand asses was made the maximum that a legatee or donee in contemplation of death was permitted to take. This law, however, failed to accomplish its purpose, for a testator with an estate of, say, five thousand asses, might leave to five legatees a thousand asses apiece, and strip the heir of the whole.

§ 226. This occasioned the enactment of the lex Voconia, which provided that no legatee or other person taking by reason of death should take more than the heirs took. By this law, some portion at all events was secured to the heir, but, like the former, it could be defeated, for the multitude of legatees among whom a man could distribute his estate might leave so little to the heir as to make it not worth his while to undertake the burden of the whole inheritance.

§ 227. At last, the lex Falcidia was enacted, prohibiting the bequest of more than three fourths of an estate, in other words, securing for the heir one fourth of the inheritance, and this is the rule of law now in force.

§ 228. The enfranchisement of slaves was likewise kept within limits by the lex Fufia Caninia, as mentioned in the first volume of these Institutions. 1, §§ 42-46.

[DE INVTILITER RELICTIS LEGATIS.]

§ 229. A legacy bequeathed before an heir is instituted is void, because a will derives its operation from the institution of an heir, and accordingly the institution of an heir is deemed the beginning and foundation of a will.

§ 230. For the same reason a slave cannot be enfranchised before an heir is appointed.

§ 231. Nor, according to my school, can a guardian be nominated before an heir is appointed: according to Labeo and Proculus he may, because no part of the inheritance is given away by the nomination of a guardian.

§ 232. A bequest to take effect after the death of the heir is void, that is to say, if limited in the following terms: 'After my heir's death I give and dispose,' or, 'let my heir give.' The following limitation is valid: 'When my heir dies,' because the legacy is not to take effect after his death, but at the last moment of his life. A bequest to take effect on the day preceding the death of the successor is void. This distinction reposes on no valid reason.

§ 233. The same rules apply to enfranchisements.

§ 234. Whether a guardian can be nominated after the death of the heir, probably admits of the same divergence of opinion as whether he can be nominated before the appointment of the heir.

[DE POENAE CAVSA RELICTIS LEGATIS.]

§ 235. Penal bequests are void. A penal bequest is one intended to coerce the heir to some performance or forbearance. For instance, the following: 'If my heir give his daughter in marriage to Titius, let him pay ten thousand sesterces to Seius:' and the following: 'If thou do not give thy daughter in marriage to Titius, do thou pay ten thousand sesterces to Titius:' and the following: 'If my heir does not, say, within two years build me a monument, I order him to pay ten thousand sesterces to Titius;' all these are penal bequests, and many similar instances may be imagined in accordance with the definition.

§ 236. Freedom cannot be left as a penal bequest, although the point has been disputed.

§ 237. The nomination of a guardian cannot give rise to the question, because the nomination of a guardian cannot be a means of compelling an heir to any performance or forbearance, and a penal nomination of a guardian is inconceivable: if, however, a nomination were made with this design, it would be deemed rather conditional than penal.

§ 238. A bequest to an uncertain person is void. An uncertain person is one of whom the testator has no certain conception, as the legatee in the following bequest: 'Any one who comes first to my funeral, do thou, my heir, pay him ten thousand sesterces:' or a whole class thus defined: 'Every one who comes to my funeral:' or a person thus defined: 'Any one who gives his daughter in marriage to my son, do thou, my heir, pay him ten thousand sesterces:' or persons thus defined: 'Whoever after my will is made are the first consuls designate:' all these persons are uncertain, and many others that might be instanced. A bequest, qualified by a definite description, to an uncertain person is valid, as the following: 'Of all my kindred now alive whoever first comes to my funeral, do thou, my heir, pay him ten thousand sesterces.'

§ 239. Freedom cannot be bequeathed to an uncertain person. because the lex Fufia Caninia requires slaves to be enfranchised by name.

§ 240. An uncertain person cannot be nominated guardian.

§ 241. An afterborn stranger cannot take a bequest: an afterborn stranger is one who on his birth will not be a self-successor to the testator: thus a grandson by an emancipated son is an afterborn stranger to his grandfather, and a child in the womb of one who is not regarded as a wife by civil law is an afterborn stranger to his father.

§ 242. An afterborn stranger cannot even be appointed heir, because he is an uncertain person.

§ 243. Though what was said above of penal dispositions refers properly to bequests, yet a penal institution of an heir is justly considered by some authorities to be void, for it makes no difference whether a legacy is left away from an heir on his doing or failing to do something, or a co-heir is appointed, as the addition of a co-heir is as effective a means of coercion as the giving a legacy, to force an heir to do or not do something against his inclination.

§ 244. Whether a legacy can be lawfully left to a person in the power of the heir is a question. Servius holds that the bequest is valid, though it lapses if he continue under power at the date when the legacies vest; and whether the bequest is absolute and the legatee ceases to be subject to the power of the heir in the lifetime of the testator, or whether it is conditional and he is liberated before the condition is accomplished, in either case he holds the legatee entitled to the legacy. Sabinus and Cassius hold that a conditional bequest is valid, an absolute bequest invalid, because though the legatee may cease to be subject to the heir in the lifetime of the testator, yet the bequest must be deemed invalid because it would be absurd to hold that a disposition which would be void if the testator died immediately after making his will, can acquire validity by the mere prolongation of his life. The other school of jurists hold that even a conditional bequest is invalid, because a person under power is as incapable of having conditional as absolute legal claims against his superior.

§ 245. Conversely it is certain that if a person in your power is appointed heir, he can be charged with payment of a legacy to you; though if you inherit by his means the legacy fails, because you cannot be bound to pay yourself; but if your son is emancipated, or your slave manumitted or aliened, and either he himself becomes heir or he makes the person to whom he is alienated heir, you are entitled to the legacy.

DE FIDEICOMMISSARIIS HEREDITATIBVS.

§ 246. We now proceed to trusts.

§ 247. And to begin with trust inheritances.

§ 248. The first requisite is that an heir should be duly instituted and that it be committed to his trust to transfer the inheritance to another, for the will is void unless an heir is duly instituted.

§ 249. The words properly and commonly used to create a trust are: 'I beg, I request, I wish, I intrust;' and they are just as binding separately as united.

§ 250. Accordingly, when we have written: 'Lucius Titius, be thou my heir,' we may add: 'I request and beg thee, Lucius Titius, as soon as thou canst accept my inheritance, to convey and transfer it to Gaius Seius;' or we may request him to transfer a part. So again a trust may be either conditional or absolute, and to be performed either immediately or from a certain day.

§ 251. After the transfer of the inheritance the transferror nevertheless continues heir, while the transferree sometimes is in the position of an heir, sometimes in that of a legatee.

§ 252. But formerly he was neither in the position of heir nor in that of legatee but rather in that of purchaser. Since in those times it was customary for the transferree of an inheritance to pay a sesterce as fictitious purchaser of it, and the stipulations appropriate to a vendor and purchaser of an inheritance were entered into by the heir and transferree, that is to say, the heir stipulated from the transferree that he should be indemnified for any sums he might be condemned to pay or might in good faith pay on account of the inheritance, and be adequately defended in any suit on account of the inheritance; and the transferree on the other hand stipulated that he should receive from the heir anything coming to the heir from the inheritance and be permitted to bring actions belonging to the heir as his cognitor or procurator.

§ 253. But subsequently, in the consulate of Trebellius Maximus and Annaeus Seneca, a senatusconsult was passed providing that, when an inheritance is transferred in pursuance of a trust, the actions which the civil law allows to be brought by the heir or against the heir shall be maintainable by the transferree and against the transferree. Hence the old covenants were discontinued, and the Praetor used to give to and against the transferree as quasi heir the modified forms of action (utiles actiones) which are formulated in the edict.

§ 254. However, as heirs, when requested to transfer the whole or nearly the whole of an inheritance, declined for only a small or no benefit to accept the inheritance, which caused a failure of the trusts, the senate in the consulship of Pegasus and Pusio decreed, that an heir requested to transfer an inheritance should have the same right to retain a fourth of it as the lex Falcidia gives to an heir charged with the payment of legacies; and gave a similar right of retaining the fourth of any separate things left in trust. When this senatusconsult comes into operation, the heir bears the burdens of the inheritance and the transferree of the residue is on the footing of a partiary legatee, that is, of a legatee of a certain part of the estate under the kind of legacy called partition, because the legatee shares the inheritance with the heir. Accordingly the stipulations appropriate between an heir and partiary legatee are entered into by the heir and transferree, in order to secure a ratable division of the gains and losses arising out of the succession.

§ 255. If then the heir is requested to transfer no more than three fourths of the inheritance the Sc.

Trebellianum governs the transfer, and both are liable to be sued for the debts of the inheritance in ratable portions, the heir by civil law, the transferree by the Sc. Trebellianum: for though the heir even as to the transferred portion continues heir, and can, according to jus Civile, sue or be sued for the entire debts, his liabilities and rights of action are limited by the Sc. in the proportion of his beneficial interest in the inheritance.

§ 256. If more than three fourths or the whole is devised in trust to be transferred, the Sc. Pegasianum comes into operation.

§ 257. And when once the heir has accepted, that is to say, voluntarily, whether he retains one fourth or declines to retain it, he bears the burdens of inheritance: but, if he retains a fourth, he should covenant with the transferree as quasi partiary legatee; if he transfers the whole, he should covenant with him as quasi vendee of an inheritance.

§ 258. If an heir refuse to accept an inheritance from a suspicion that the liabilities exceed that assets, it is provided by the Sc. Pegasianum, that on the request of the transferree he may be ordered by the Praetor to accept and transfer; whereupon the transferree shall be just as capable of suing and being sued as the transferree under the Sc. Trebellianum. In this case no stipulations are necessary, because the transferror is protected, and the hereditary actions pass to and against the transferree.

§ 259. It makes no difference whether a person appointed as heir to the whole inheritance be requested to restore the whole or part of it, or whether a person appointed as heir to a share be requested to restore his whole share or only a part of it; for in this case also a fourth of the share to which he is appointed is taken into account under the Sc. Pegasianum.

§ 260. Not only an inheritance, but also single things, may be bequeathed by way of trust, as land, a slave, a garment, plate, money; and the trust may be imposed either on an heir or on a legatee, although a legatee cannot be charged with a legacy.

§ 261. Again not only the testator's property, but that of the heir, or of a legatee, or that of any stranger, may be left by way of trust. Thus a legatee may be charged with a trust to transfer either a thing bequeathed to him, or any other thing belonging to himself or to a stranger; provided always that he is not charged with a trust to transfer more than he takes under the will, for in respect of such excess the trust would be void.

§ 262. When a stranger's property is bequeathed by way of trust, the trustee must either procure and convey the specific thing or pay its value, like an heir charged under a bequest by condemnation; though some hold that the owner's refusal to sell avoids such a trust, though it does not avoid a bequest by condemnation.

§ 263. Liberty can be left to a slave by a trust charging either an heir or a legatee with his manumission.

§ 264. And it makes no difference whether the slave is the testator's own property, or that of the heir himself, or of the legatee, or even that of a stranger.

§ 265. A stranger's slave, therefore, must be purchased and manumitted, but his owner's refusal to sell extinguishes the gift of liberty, because liberty admits of no valuation in money.

§ 266. A trust of manumission makes the slave the freedman, not of the testator, though he may have been the owner of the slave, but of the manumitter.

§ 267. A direct bequest of liberty, such as: 'Be my slave Stichus free,' or, 'I order that my slave Stichus

be free,' makes the slave the freedman of the testator. A direct bequest of liberty can only be made to a slave who is the testator's quiritarian property at both periods, both at the time of making his will and at the time of his decease.

§ 268. There are many differences between trust bequests and direct bequests.

§ 269. Thus by way of trust a bequest may be charged on the heir of the heir, whereas such a bequest made in any other form is void.

§ 270. Again, a man going to die intestate can charge his heir with a trust, but cannot charge him with a legacy.

§ 270 *a*. Again, a legacy left by codicil is not valid, unless the codicil has been confirmed by the testator, that is, unless the testator has provided in his will that anything written in his codicil is ratified: whereas a trust requires no ratification of the codicil.

§ 271. A legatee too cannot be charged with a direct legacy, but can be the subject of a trust, and the beneficiary of a trust may himself be charged with a further trust.

§ 272. So also a slave of a stranger cannot be enfranchised by direct bequest, but may by the interposition of a trust.

§ 273. A codicil is not a valid instrument for the institution of an heir or for his disinheritance, though it is ratified by will: but an heir instituted by will may be requested by a codicil to transfer the inheritance in whole or in part to another person without any ratification by will.

§ 274. A woman who cannot by the lex Voconia be instituted heiress by a testator registered in the census as owning a hundred thousand sesterces, can nevertheless take an inheritance bequeathed to her by way of a trust.

§ 275. And Latini Juniani, who are disabled by the lex Junia from taking an inheritance or legacy by direct bequest, can take it by means of a trust.

§ 276. Again a decree of the senate (rather, the lex Aelia Sentia 1, § 18) incapacitates a testator's slave under thirty years of age from being enfranchised and instituted heir; but, according to the prevalent opinion, he can be ordered to be free on attaining the age of thirty, and the heir may be bound by way of trust to transfer the inheritance to him on that event.

§ 277. An heir cannot be instituted after the death of a prior heir, but an heir may be bound by way of trust to transfer the inheritance, when he dies, in whole or in part to another person; or, as a trust may be limited to take effect after the death of the heir, the same purpose may be accomplished in these terms. 'When my heir is dead, I wish my inheritance to go to Publius Mevius;' and whichever terms are employed, the heir of my heir is bound by a trust to transfer the inheritance to the person designated.

§ 278. Legacies, moreover, are recovered by the formulary procedure; but trusts are enforced by the extraordinary jurisdiction of the consul or praetor fideicommissarius at Rome; in the provinces by the extraordinary jurisdiction of the president.

§ 279. Cases of trust are heard and determined at Rome at all times of the year; cases of legacy can only be litigated during the trial term.

§ 280. Trusts entitle to payment of interest and interim profits on delay of performance (mora) by the

trustee; legatees are not entitled to interest, as a rescript of Hadrian declares. Julianus, however, held that a legacy bequeathed in the form of permission is on the same footing as a trust, and this is now the prevalent doctrine.

§ 281. Bequests expressed in Greek are invalid; trusts expressed in Greek are valid.

§ 282. An heir who disputes a legacy in the form of condemnation is sued for double the sum bequeathed; but a trustee is only suable for the simple amount of the trust.

§ 283. On overpayment by mistake in the case of a trust, the excess can be recovered back by the trustee; but on overpayment from some mistaken ground of a bequest by condemnation, the excess cannot be recovered back by the heir; and the law is the same in the case of what is not due at all, but which has been paid by some mistake or other.

§ 284. There formerly were other differences which no longer exist.

§ 285. Thus aliens could take the benefit of a trust, and this was the principal motive in which trusts originated, but afterwards they were incapacitated; and now, by a decree of the senate passed on the proposition of Hadrian, trusts left for the benefit of aliens may be claimed by the fiscus.

§ 286. Unmarried persons, who are disabled by the lex Julia from taking inheritances or legacies, were formerly deemed capable of taking the benefit of a trust.

§ 286 *a*. And childless persons, who forfeit by the lex Papia, on account of not having children, half their inheritances and legacies, were formerly deemed capable of taking in full as beneficiaries of a trust. But at a later period the Sc. Pegasianum extended to trust dispositions the rules which attach to legacies and inheritances, transferring the trust property to those mentioned in the will who have children, and failing these to the people (aerarium), as happens to legacies or inheritances which on the same or similar grounds become 'caduca.'

§ 287. So too, at one time, an uncertain person or an afterborn stranger could take the benefit of a trust, though he could neither take as heir nor as legatee, but a decree of the senate, passed on the proposition of the emperor Hadrian, made the law in this respect relating to legacies and inheritances applicable also to trusts.

§ 288. It is now clear that trusts cannot be left with the object of inflicting a penalty.

§ 289. Although in many branches of law trusts have an ampler scope than direct dispositions, while in others they are on a par, yet a testamentary guardian can only be appointed by direct nomination, as thus: 'Be Titius guardian to my children;' or thus: 'I nominate Titius guardian to my children;' he cannot be appointed by way of trust.