GAI INSTITVTIONES OR INSTITUTES OF ROMAN LAW

Book III

INTESTACY Or Title By DESCENT

(E. Poste, *Gai Institutiones*.., 4th ed., Oxford, 1904).

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§ 1. Intestate inheritances by the law of the Twelve Tables devolve first on self-successors (sui heredes).

§ 2. Self-successors are children in the power of the deceased at the time of his death, such as a son or a daughter, a grandchild by a son, a great-grandchild by a grandson by a son, whether such children are natural or adoptive: subject, however, to this reservation, that a grandchild or great-grandchild is only self-successor when the person in the preceding degree has ceased to be in the power of the parent either by death or some other means, such as emancipation; for instance, if a son was in the power of the deceased at the time of his death, a grandson by that son cannot be a self-successor, and the same proviso applies to the subsequent degrees.

§ 3. A wife in the hand of her husband is a self-successor to him, for she is in the position of a quasi daughter; also a son's wife in the hand of the son, for she is a granddaughter: subject, however, to the proviso that she is not self-successor if her husband is in the power of his father at the time of his father's death. A wife in the hand of a grandson is a self-successor, subject to the same proviso, because she is in the position of a great-granddaughter.

§ 4. Afterborn children, who, if born in the lifetime of the parent, would have been subject to his power, are self-successors.

§ 5. Also those in whose behalf the provisions of the lex Aelia Sentia or the senatusconsult have been satisfied by proof of excusable error subsequently to the death of the parent, for if the error had been proved in the lifetime of the parent they would have been subject to his power.

§ 6. Also, a son, who has undergone a first or second mancipation and is manumitted after the death of the father, is a self-successor.

§ 7. Accordingly, a son or daughter and grandchildren by another son are equally called to the inheritance; nor does the nearer grade exclude the more remote, for justice seemed to dictate that grandchildren should succeed to their father's place and portion. Similarly, a grandchild by a son and a great-grandchild by a grandson by a son are called contemporaneously to the inheritance.

§ 8. And as it was deemed to be just that grandchildren and great-grandchildren should succeed to

their father's place, it seemed consistent that the number of stems (stirpes), and not the number of individuals (capita), should be the divisor of the inheritance; so that a son should take a moiety, and grandchildren by another son the other moiety; or if two sons left children, that a single grandchild or two grandchildren by one son should take one moiety, and three or four grandchildren by the other son the other moiety.

DE LEGITIMA AGNATORVM SVCCESSIONE.

§ 9. If there is no self-successor, the inheritance devolves by the same law of the Twelve Tables on the agnates.

§ 10. Those are called agnates who are related by civil law. Civil relationship is kinship through males. Thus brothers by the same father are agnates, whether by different mothers or not, and are called consanguineous; and a father's consanguineous brother is agnate to the nephew, and vice versa; and the sons of consanguineous brothers, who are generally called consobrini, are mutual agnates; so that there are various degrees of agnation.

§ 11. Agnates are not all called simultaneously to the inheritance by the law of the Twelve Tables, but only those of the nearest degree at the moment when it is certain that the deceased is intestate.

§ 12. And in title by agnation there is no succession; that is to say, if an agnate of the nearest grade abstains from taking the inheritance, or die before he has entered on it, the agnates of the next grade do not become entitled under the statute.

§ 13. The date for determining the nearest agnate is not the moment of death, but the moment when intestacy is certain, because it seemed better, when a will is left, to take the nearest agnate at the moment when it is ascertained that there will be no testamentary heir.

§ 14. As to females, the rules of civil law are not the same in respect of the inheritances which they leave and in respect of the inheritances which they take. An inheritance left by a female is acquired by the same title of agnation as an inheritance left by a male, but an inheritance left by a male does not devolve on females beyond sisters born of the same father. Thus a sister is by civil law the heir of a sister or brother by the same father, but the sister of a father and daughter of a brother have no civil title to the inheritance. The same rights as those of a sister belong to a mother or stepmother who passes into the hand of a father by marriage and acquires the position of a daughter.

§ 15. If the deceased leaves a brother and another brother's son, as observed before (§ 11), the brother has priority, because he is nearer in degree, which differs from the rule applied to self-successors.

§ 16. If the deceased leaves no brother, but children of more than one brother, they are all entitled to the inheritance; and it was once a question, in case the brothers left an unequal number of children, as if one of them leaves only one child and another three or four, whether the number of stems (stirpes) was to be the divisor of the inheritance, as among self-successors, or the number of individuals (capita); however, it has long been settled that the divisor is the number of individuals. Accordingly, the total number of persons determines the number of parts into which the inheritance must be divided, and each individual takes an equal portion.

§ 17. In the absence of agnates the same law of the Twelve Tables calls the gentiles to the inheritance. Who are gentiles was explained in the first book (1, § 164 *a*), and as we then stated that the whole law relating to gentiles is obsolete, it is unnecessary to go into its details on the present occasion.

§ 18. These are all the provisions in the law of the Twelve Tables for intestate devolution, and how strictly they operated is patent.

§ 19. For instance, children immediately they are emancipated have no right to the inheritance of their parent under that law, since they are thereby divested of the character of self-successors.

§ 20. In the same position also are children whose freedom from the power of their parent was only caused by the fact that on their receiving jointly with their father a grant of Roman citizenship (1, § 94), there was no express order of the emperor subjecting them to parental power.

§ 21. Again, agnates who have undergone a capitis deminutio are not admitted to the inheritance under this law, title by agnation being extinguished by capitis deminutio.

§ 22. And if the nearest agnate does not enter on an inheritance, the next degree, according to the law of the Twelve Tables, is not in any way entitled to succeed.

§ 23. Female agnates beyond the degree of sisters by the same father have no title to succeed under this statute.

§ 24. Cognates who trace their kin through females are similarly barred, so that even a mother and a son or daughter have no reciprocal right of succession, unless by subjection to the hand of the husband the mother has become a quasi sister to her children.

§ 25. But to these legal inequalities the edict of the praetor administers a corrective.

§ 26. For all children whose statutory title fails are called by the praetor to the inheritance, just as it they had been in the power of their parent at the time of his decease, whether they come in alone or in concurrence with self-successors, that is, with other children who were actually subject to the power of the parent.

§ 27. Agnates who have undergone a capitis deminutio minima are called by the praetor, not indeed in the next degree to self-successors, that is, in the order in which the law of the Twelve Tables would have called them but for their capitis deminutio, but in the third rank under the designation of cognates (next of kin); for though their capitis deminutio has blotted out their statutory title, they nevertheless are still entitled as cognates; though if another person exists with unimpaired title by agnation, he is called in preference, although he may be in a remoter degree.

§ 28. The rule is similar, according to some, in respect of the remoter agnate who has no statutory title to succeed on the nearest agnate failing to take; according to others, the praetor calls him to the succession in the order allotted by the statute to agnates.

§ 29. Female agnates, at all events, beyond the degree of sisters are called in the third degree, that is to say, after self-successors and other agnates.

§ 30. So are those persons who trace their kindred through females.

§ 31. Children in an adoptive family are called to succeed their natural parents in the same order.

§ 32. Those whom the praetor calls to an inheritance do not become heirs (heredes) at civil law, for the praetor cannot make an heres; only a statute or similar ordinance, such as a decree of the senate or an imperial constitution, being able to do so; thus the praetor's grant of possession only puts the grantee in the position of an heir.

§ 33. Several additional grades of bonorum possessio are recognized by the praetor on account of his desire that no one may die without a successor; but I forbear to examine them on the present occasion, because I have handled the whole subject of title by descent in a separate treatise devoted to this matter.

§ 33 *a*. [?Sc. Tertullianum; cf. Inst. 3, 3; Ulp. 26, 8.]

§ 33 *b*. Sometimes, however, the object of the praetor in granting bonorum possessio is rather to confirm the old law than to amend or contradict it, for he likewise gives juxta-tabular possession to those who have been instituted heredes in a legally valid will.

§ 34. So also, when a man dies intestate, the praetor grants bonorum possessio to self-successors and agnates, the only advantage they derive from the grant being that it entitles them to the interdict beginning with the words: 'Whatsoever portion of the goods' (the use of which will be explained in due time and place, 4, § 144), for independently of the grant of possession, they are entitled to the inheritance by the civil law.

§ 35. Possession is often granted to a person who will not in fact obtain the inheritance, in this case the grant is said to be one which has no effect (sine re).

§ 36. For instance, if an heir instituted by a duly executed will formally accepts the inheritance, but declines to demand possession according to the will, contenting himself with his title at civil law, those who without a will would be entitled by intestacy may nevertheless obtain a grant of possession from the praetor, but the grant will be one having no effect (sine re), because the testamentary heir can enforce his civil title to the inheritance against them.

§ 37. The same happens when a man dies intestate and a self-successor declines to demand possession, contenting himself with his civil title; for an agnate may obtain a grant of possession, but it will have no effect, because the civil inheritance can be claimed by the self-successor. Similarly, if an agnate entitled by civil law accepts the civil inheritance but omits to demand possession, a cognate can obtain a grant of possession, but it has no effect, for the same reason.

§ 38. There are other similar cases, some of which were mentioned in the preceding book.

§ 39. Succession to freedmen next demands our notice.

§ 40. Freedmen were originally allowed to pass over their patron in their testamentary dispositions. For by the law of the Twelve Tables the inheritance of a freedman only devolved on his patron when he died intestate and without leaving a self-successor. So if he died intestate leaving a self-successor, the patron was excluded, which, if the self-successor was a natural child, was no grievance; but if the self-successor was an adoptive child or a wife in hand (manu), it was clearly hard that they should bar all claim of the patron.

§ 41. Accordingly, at a later period, the praetor's edict corrected this injustice of the law. For if a freedman makes a will, he is commanded to leave a moiety of his fortune to his patron; and if he leaves him nothing, or less than a moiety, the patron can obtain contra-tabular possession of a moiety from the praetor. And if he die intestate, leaving as self-successor an adoptive son or a wife in his hand or a son's wife in the hand of his son, the patron can obtain in the same way against these self-successors intestate possession of a moiety from the praetor. But the freedman is enabled to exclude the patron if he leaves natural children, whether in his power at the time of his death or emancipated or given in adoption, provided he leaves them any portion of the inheritance, or that, being passed over in silence, they have demanded contra-tabular possession under the edict; for, if they are disinherited, they do not

at all bar the patron.

§ 42. At a still later period the lex Papia Poppaea augmented the rights of the patron against the estate of more opulent freedmen. For by the provisions of this statute whenever a freedman leaves property of the value of a hundred thousand sesterces and upwards, and not so many as three children, whether he dies testate or intestate, a portion equal to that of a single child is due to the patron. Accordingly, if a single son or daughter survives, half the estate is claimable by the patron, just as if the freedman had died childless; if two children inherit, a third of the property belongs to the patron; if three children survive, the patron is excluded.

§ 43. In respect of the property of freedwomen no wrong could possibly be done to the patron under the ancient law: for, as the patron was statutory guardian of the freedwoman, her will was not valid without his sanction, so that, if he sanctioned a will, he either would be therein instituted heir, or, if not, had only himself to blame: for if he did not sanction a will and consequently the freedwoman died intestate, he was assured of the inheritance, for she could leave no heres or bonorum possessor who could bar the claim of the patron.

§ 44. But when at a subsequent period, by the enactment of the lex Papia, four children were made a ground for releasing a freedwoman from the guardianship of her patron, so that his sanction ceased to be necessary to the validity of her will, it was provided by that law that the patron should have a claim to a portion of her estate equal to that of each single child she might have at the time of her death. So if a freedwoman left four children, a fifth part of her property went to her patron, but if she survived all her children, the patron on her decease took her whole property.

§ 45. What has been said of the patron applies to a son of the patron, a grandson by a son, a great-grandson by a grandson by a son.

§ 46. Although a daughter of a patron, a granddaughter by a son, a great-granddaughter by a grandson by a son have under the statute of the Twelve Tables identical rights with the patron, the praetorian edict only calls the male issue to the succession: but the lex Papia gives a daughter of the patron a contra - testamentary or intestate claim against an adoptive child, or a wife, or a son's wife to a moiety of the inheritance on account of the privilege of being mother of three children; a daughter not so privileged has no claim.

§ 47. In the succession to a testate freedwoman mother of four children, a patron's daughter, though mother of three children, is not, as some think, entitled to the portion of a child: but, if the freedwoman die intestate, the letter of the lex Papia gives her the portion of a child; if the freedwoman die testate, the patron's daughter has the same title to contra-tabular possession as she would have against the will of a freedman, that is, as the praetorian edict confers on a patron and his sons in respect of the property of a freedman, [viz. a claim to half against all but natural children] though this portion of the law is carelessly written.

§ 48. It is thus apparent that the external heirs of a patron are entirely excluded from the rights which the law confers on the patron himself, whether a freedman die intestate or it is a question of the freedman's will being set aside by the praetor in favour of the patron.

§ 49. Before the lex Papia was passed, patronesses had only the same rights in the property of their freedmen as patrons enjoyed under the statute of the Twelve Tables: for neither did the praetor intervene to give them a moiety of the inheritance by contratabular possession against a will of an ungrateful freedman, nor by making a grant of possession against the intestate claim of an adoptive child or a wife or a son's wife, as he did in the case of the patron and the patron's son.

§ 50. But subsequently by the lex Papia two children entitle a freeborn patroness, three children a patroness who is a freedwoman, to nearly the same rights as the praetor's edict confers on a patron; and it also provided that three children entitle a freeborn patroness to the same rights which the statute itself conferred on a patron: but the statute does not grant these latter rights to a patroness who is a freedwoman.

§ 51. As to the successions of freedwomen who die intestate, no new right is conferred on a patroness through the title of children by the lex Papia; accordingly, if neither the patroness nor the freedwoman has undergone a capitis deminutio, the law of the Twelve Tables transmits the inheritance to the patroness, and excludes the freedwoman's children, even when the patroness is childless; for a woman, as before remarked, can never have a self-successor: but if either of them has undergone a capitis deminutio, the children of the freedwoman exclude the patroness, because her statutory title having been obliterated by capitis deminutio, the children of the freedwoman are admitted by right of kinship in preference to her.

§ 52. When a freedwoman dies testate, a patroness not entitled by children has no right of contra-tabular possession: but a patroness entitled by children has conferred upon her by the lex Papia the same right to a moiety by contra-tabular possession as the praetorian edict confers on the patron to the inheritance of a freedman.

§ 53. By the same law a patroness's son privileged by having children has almost the rights of a patron [patroness?], but in this case one son or daughter is sufficient to give him the privilege.

§ 54. This summary indication of the rules of succession to freedmen and freedwomen who are Roman citizens may suffice for the present occasion: a more detailed exposition is to be found in my separate treatise on this branch of law.

§ 55. We proceed to the successions of Latini Juniani.

§ 56. To understand this branch of law we must recollect what has been already mentioned (1, § 22), that those who are called Latini Juniani were originally slaves by law of the Quirites, though maintained by the praetor's protection in a condition of de facto freedom, so that their possessions belonged to their patrons by the title of peculium. At a more recent period, when the lex Junia was enacted, those whom the praetor had protected in de facto freedom became legally free, and were called Latini Juniani: Latini, because the law intended to assimilate their freedom to that of freeborn citizens of Rome who, on quitting Rome for a Latin colony, became Latin colonists; Juniani, because their liberty was due to the lex Junia, although it did not make them Roman citizens: and as the author of the lex Junia foresaw that the effect of this fiction of their being on the same footing as Latini coloniarii would be that the goods of deceased Latini Juniani would cease to belong to the patron, since not being slaves at the time of their death, their goods would not belong to the patron by right of peculium, nor could the goods of a Latin colonist devolve on him by title of manumission; he deemed it necessary, to prevent the favour to these freedmen from becoming a wrong to the patron, to provide that their goods should belong to the manumitter in the same way as if the law had not been enacted. Consequently by that enactment the property of Latini Juniani belongs to their manumitters as if it were by right of peculium.

§ 57. Accordingly there are wide differences between the title to the property of Latini Juniani under the lex Junia and the title to the inheritance of freedmen who are Roman citizens.

§ 58. When a freedman, who is a Roman citizen, dies, an external heir of the patron has no claim to his inheritance, while a son of the patron, a grandson by a son, a great-grandson by a grandson by a son, have an indefeasible claim even if disinherited by their parent; whereas, when a Latinus Junianus dies,

his property belongs to his patron's external heir, like the peculium of a slave, and does not belong to the manumitter's children who are disinherited.

§ 59. Thus the inheritance of a freedman, who is a Roman citizen, belongs to two or more patrons in equal portions, in however unequal proportions they had been his proprietors; whereas the goods of a Latinus Junianus belong to his patrons according to their shares in him when he was a slave.

§ 60. Again, in the succession to a freedman who is a Roman citizen, one patron bars another patron's son, and a son of one patron bars another patron's grandson; whereas the goods of a Latinus Junianus belong jointly both to a patron and another patron's heir, the latter taking the share which would have belonged to the manumitter he represents.

§ 61. If one patron leave three children, and another patron one, the inheritance of a freedman who was a Roman citizen is divided by the number of individuals (in capita); that is to say, every one takes an equal portion; whereas the goods of a Latinus Junianus belong to those who succeed in the proportion in which they would have belonged to the manumitters they represent.

§ 62. If one patron renounce his part in the inheritance of a freedman who was a Roman citizen, or die before formal acceptance (cretio), the whole inheritance belongs to the other; but the share of the property of a Latinus Junianus which a patron fails to take is caducous and belongs to the people (aerarium).

§ 63. At a later period, when Lupus and Largus were consuls, the senate decreed that the goods of a Latinus Junianus should belong in the first place to the manumitter, in the next to such issue of the latter as are not individually disinherited, in the order of their proximity, and, in default of these, by the ancient law of devolution, to the heirs of those manumitting them.

§ 64. The effect of this senatusconsult is, according to some authorities, that the goods of a Latinus Junianus devolve in the same way as the inheritance of a freedman who was a Roman citizen, and this was the doctrine of Pegasus: but this opinion is clearly erroneous, for the inheritance of a freedman who is a Roman citizen never belongs to an external heir of his patron; whereas the goods of a Latinus Junianus, by the express terms of the senatusconsult, in default of children of the manumitter devolve on his external heir. Again, in the case of the inheritance of a freedman who was a Roman citizen, the children of the manumitter are not injuriously affected by any form of disinheritance; whereas Latini Juniani, in respect of their goods, are injured by individual disinheritance according to the very terms of the senatusconsult.

§ 64 *a*. The only true effect, then, of the senatusconsult is, that the manumitter's children in the absence of individual disinheritance are preferred to external heirs.

§ 65. Accordingly, an emancipated son of the patron who is passed over in silence by his father, though he makes no demand for contra-tabular possession, is nevertheless preferred to an external heir in respect of the goods of a Latinus Junianus.

§ 66. Again, a daughter and other self-successors who can be disinherited at civil law in a mass (inter ceteros) and thereby effectively deprived of the inheritance of their parent, in respect of the goods of a Latinus Junianus, unless they are individually (nominatim) disinherited, have priority over an external heir.

§ 67. Children, too, although they have abstained from the inheritance of their parent, are entitled to the goods of his Latinus Junianus in spite of their abstention, because they cannot be said to have been disinherited any more than children who are passed over by a testator in silence.

§ 68. From all these points it is sufficiently apparent that he who makes a Latinus Junianus....

§ 69. This also seems to be established, that if a patron has instituted his children as his sole heirs but in unequal portions, the property of a Latin belongs to them in the same unequal proportions, because in the absence of an external heir the senatusconsult has no application.

§ 70. If the children of the patron are left joint heirs with a stranger, Caelius Sabinus holds, that the entire goods of a Latinus Junianus devolve in equal portions on the children, because when an external heir intervenes he is brought within the senatusconsult instead of the lex Junia. According to Javolenus, only that part will devolve under the senatusconsult in equal portions on the children of the patron, which, before the senatusconsult was passed, the external heir would have been entitled to under the lex Junia, and the residue will belong to them in the proportion of their shares in their father's inheritance.

§ 71. It is a further question, whether this senatusconsult extends to descendants (liberi) of the patron born of a daughter or granddaughter of a patron, that is whether in respect of the goods of a Latinus Junianus a grandson by a daughter will be preferred to an external heir. Again, it is a question whether a Latinus Junianus belonging to a mother is within the senatusconsult, that is, whether in respect of the goods of a Latinus Junianus, manumitted by a mother, preference is given to the patroness' son over her external heir. Cassius held that both cases are within the scope of the senatusconsult; but his opinion is generally rejected on the ground that the senate could not contemplate the benefit of patronesses' sons; persons, that is, in another civil family to that of the manumitter; and this appears to be the true interpretation of the senatusconsult from its making individual disinheritance a bar; for herein the senate appears to contemplate those who must be disinherited by their parent if they are not instituted. Now a mother need not disinherit her child, nor a mother's father a grandchild, in default of institution, whether we look to the civil law or to that part of the praetorian edict which promises contra-tabular possession to children passed over by a testator in silence.

§ 72. Sometimes a freedman, who is a Roman citizen, dies as a Latinus Junianus; for instance, a Latinus Junianus who has obtained an imperial grant of citizenship, reserving the rights of his patron: for by a constitution of the emperor Trajan a Latinus Junianus who obtains an imperial grant of citizenship against the will or without the knowledge of his patron resembles during his lifetime other freedmen who are Roman citizens, and procreates lawful children, but dies with the status of a Latinus, so that his children are not his heirs; and has only this amount of testamentary capacity that he may institute his patron heir, and name a substitute to him in case of his renouncing the inheritance.

§ 73. But as the effect of this constitution seemed to be, that such a person could never die as if he were a Roman citizen, even though he subsequently acquired the title to which the lex Aelia Sentia or the senatusconsult (1, § 31) annexes the right of Roman citizenship, the emperor Hadrian, to mitigate the harshness of the law, caused to be passed a senatusconsult, that a freedman, who obtained from the emperor a grant of citizenship without the knowledge or contrary to the will of his patron, on subsequently acquiring the title to which the lex Aelia Sentia or the senatusconsult, if he had remained a Latinus Junianus, would have annexed the rights of Roman citizenship, should be deemed to be in the same position as if he had acquired Roman citizenship by the title of the lex Aelia Sentia or the senatusconsult.

§ 74. The property of those who under the lex Aelia Sentia are counted as if they were surrendered enemies devolves on their patrons sometimes as if they were freedmen who had Roman citizenship, sometimes as if they were Latini Juniani.

§ 75. For the goods of those of them who, but for some offence, would have obtained on manumission Roman citizenship are given by this statute to their patrons like freedmen who became Roman citizens

by the provision of the above-mentioned statute; but, according to the prevalent and better opinion, they cannot make a will; for it seems incredible that the most abject order of freedmen should have been intended by the legislator to enjoy the power of testamentary disposition.

§ 76. But the goods of those who, but for some offence, would have become on manumission Latini are assigned to their patrons as if they were the goods of Latini, though, as I am aware, the legislator has not expressed his intention in this matter in terms as unequivocal as might be desired.

§ 77. We next proceed to succession of a vendee arising from the purchase of a debtor's entire property.

§ 78. The entire property of a debtor may be sold either in his lifetime or after his death. It is sold in his lifetime when, for instance, he defrauds his creditors by absconding, and is absent and undefended, or when he avails himself of the lex Julia and makes a voluntary surrender of his estate, or when, after judgment recovered against him, he has suffered the term to expire that is prescribed, partly by the Twelve Tables, partly by the edict of the praetor, for the satisfaction of a judgment debt. A debtor's estate is sold after his death when it is certain that he has left neither an heir, nor a praetorian representative, nor any other lawful successor.

§ 79. If the bankrupt whose estate is to be sold is alive, an order issues from the praetor, and his estate is possessed and advertised for sale for thirty continuous days; if the debtor is dead, it is possessed and advertised for fifteen days. After this delay a second order issues from the praetor, directing the creditors to hold a meeting and elect out of their number a manager, by whom the estate may be sold. And after the expiration of the ten days next following, if the debtor is alive, or of five if he is dead, a third order issues from the praetor, under which the sale of the property is held. Thus after the expiration of forty days if the debtor is alive, after the expiration of twenty if he is dead, his universal estate is transferred by the creditors under the praetor's order to the purchaser. The longer delay prescribed for the sale of the estate of a living debtor is founded on the greater consideration due to the living than to the dead, and is designed to protect a living debtor from having his property sold too easily.

§ 80. Neither a praetorian successor nor a purchaser of a debtor's entire property acquires plenary, but only bonitarian, ownership. Quiritarian ownership is only acquired by usucapion, though sometimes a purchaser of a debtor's entire property cannot even acquire by usucapion (for instance, when a peregrinus is bonorum emptor).

§ 81. Debts owed to or by the person from whom the property is derived are not owed to or by the praetorian successor or purchaser of a debtor's entire property, but are recoverable by fictitious forms of action, which will be explained hereafter [4, § 34].

§ 82. There are other kinds of universal succession not governed by the law of the Twelve Tables nor by the praetor's edict, but by rules of consuetudinary law.

§ 83. When a paterfamilias gives himself in adoption, or a woman subjects herself to hand, all their property, incorporeal and corporeal, and all debts due to them, are acquired by the adoptive father and the fictitious purchaser, excepting such rights as are extinguished by loss of status — usufruct, for instance, bounden services of freedmen secured by oath, and claims in respect of which there has been joinder of issue in a statutory trial.

§ 84. Conversely, the debts of the person who gives himself in adoption or of the woman who becomes subjected to hand (manus), do not pass to the fictitious purchaser (coemptionator) or adoptive father, unless they are hereditary debts, for in this case as the adoptive father or coemptionator are heredes instead of the persons made subject to them, they become directly liable, while the person adopted and

woman sold into subjection are released from liability by ceasing to be heredes; but if the debt was owed in their own name, their adoptive father or fictitious purchaser incurs no liability, nor do the person adopted and woman subject to hand remain even themselves liable at civil law, their liability being extinguished by their capitis deminutio: a praetorian action, however, based on a feigned rescission of their capitis deminutio (4, § 38), is granted to the creditors against them, and if the action is not defended the property which would have belonged to them but for their capitis deminutio is allowed by the praetor to be all sold by the creditors.

§ 85. If a person who is entitled to succeed as agnate to an intestate, before declaring his formal acceptance or informally acting as heir, surrender the inheritance by in jure cessio, the inheritance (hereditas) passes to the surrenderee exactly as if he were called to it by the law of the Twelve Tables itself. But if the agnate first accepts and then surrenders, he nevertheless continues to be heir, and remains liable to the creditors for the debts of the deceased: in this case the corporeal objects of the inheritance pass to the surrenderee just as if they had been separately surrendered (res singulae), but the debts of the inheritance are thereby extinguished, the debtors gaining the advantage of being discharged of liability.

§ 86. The same happens when an heir instituted in a will accepts and then surrenders, but before acceptance his surrender is inoperative.

§ 87. Whether a self- and necessary successor passes the succession by such a surrender is a question. According to my school the surrender is in this case inoperative: the other school think that the effect is the same as when the voluntary heirs surrender after acceptance, and that it makes no difference whether a man is heir by legal necessity on the one hand or by formal acceptance or informal acts of heirship on the other.

§ 88. We proceed to treat of obligations, which fall into two principal classes, obligations created by contract and obligations created by delict.

§ 89. We first treat of those which we founded on contract, which are of four orders, for contract is concluded by delivery of a thing, by words, by writing, or by consent.

§ 90. Of real contracts, or contracts created by delivery of a thing, we have an example in loan for consumption, or loan whereby ownership of the thing lent is transferred. This relates to things which are estimated by weight, number, or measure, such as money, wine, oil, corn, bronze, silver, gold. We transfer ownership of our property in these on condition that the receiver shall transfer back to us at a future time, not the same things, but other things of the same nature: and this contract is called Mutuum, because thereby meum becomes tuum.

§ 91. The receiver of what was not owed from a person who pays in error is also under a real obligation, for he may be sued by Condictio with the formula: 'If it be proved that he ought to convey.' just as if he had received the property in pursuance of a loan. And, accordingly, some have held that a ward or female, if their guardian has not authorized them to receive a payment, are not liable to be sued for money paid in error any more than they are for money received as a loan. This, however, is a mistake, as the obligation in this case seems to be of a kind not arising from contract, as a payment in order to discharge a debt is intended to extinguish an obligation, not to establish one.

§ 92. A verbal contract is formed by question and answer, thus: 'Dost thou solemnly promise that a thing shall be conveyed to me?' 'I do solemnly promise.' 'Wilt thou convey?' 'I will convey.' 'Dost thou pledge thy credit?' 'I pledge my credit.' 'Dost thou bid me trust thee as guarantor?' 'I bid thee trust me as guarantor.' 'Wilt thou perform?' 'I will perform.'

§ 93. The formula, 'Wilt thou solemnly promise?' 'I will solemnly promise,' is only valid between Roman citizens; the others belong to gentile law, and bind all parties, whether Romans or aliens, and, if understood, bind Romans when expressed in Greek, and aliens when expressed in Latin. The formula, 'Wilt thou solemnly promise (dare spondes)?' is so peculiarly Roman that it cannot be expressed in Greek, though the word 'spondes' is said to have a Greek origin.

§ 94. According to some, there is one case in which an alien may be bound by this word, namely, when a Roman emperor in concluding a treaty thus interrogates a foreign sovereign: 'Art thou sponsor for peace?' and the Roman emperor is interrogated in the same way in his turn. But this is a refinement on the law, for the violation of a treaty is not redressed by an action ex stipulatu but by the law of war.

§ 95. (It may be questioned whether if the question is in the form 'Dost thou solemnly promise?' and the answer to it is simply, 'I promise,' or 'I will give,' any legal obligation is created.)

§ 95 *a*. (There are also other obligations which can be contracted without any antecedent question, as when a woman makes a solemn declaration settling dotal property, movable or immovable, on her betrothed or her husband. And not only can the woman herself be bound in this form, but also her father and her debtor, the latter having to declare that he owes the debt to her future husband as dower. It is only by these three persons that a woman can be legally bound by such a formal promise of dower without any antecedent form of question. Other persons who promise a man dower for a woman can only be made liable in the ordinary legal way, that is, by responding to a question and promising what has been put to them in the form of a stipulation.

§ 96. There is another case in which an obligation is contracted by a declaration of one of the parties without any previous interrogation, which is when a freedman takes an oath to his patron promising some payment or performance of some function or service, the obligation being created in this case not so much by the form of words as by the sanctity attaching to the oath. This is the only instance in Roman law of an obligation being contracted by means of an oath, though if we searched the particular laws of foreign communities, other instances might be found.)

§ 97. If we stipulate that something is to be conveyed to us which cannot be, the stipulation is void; for instance, if a man stipulates for the conveyance of a freeman whom he supposes to be a slave, or of a dead slave whom he supposes to be alive, or of ground devoted to the celestial or infernal gods which he supposes to be subject to human law.

§ 97 *a*. Or again if a man stipulates for a thing incapable of existing, such as a hippocentaur, the stipulation is void.

§ 98. An impossible condition, that the promisee, for instance, should touch the sky, makes the stipulation void, although a legacy with an impossible condition, according to the authorities of my school, has the same effect as if no condition were annexed. According to the other school it is as null and void as if it were a stipulation, and in truth no satisfactory reason can be alleged for making a distinction.

§ 99. So when a person stipulates by mistake that his own property shall be conveyed to himself, the stipulation is null and void, for what already belongs to a man, cannot be conveyed to him.

§ 100. A stipulation to convey after the death of the promisee or promisor is invalid, but a stipulation to convey at the death, that is, at the last moment of the life of the promisee or promisor, is valid. For it has been held anomalous to make the heir of either of the contracting parties the first subject of the obligation. Again, a stipulation to convey on the day before the death of the promisee or promisor is invalid, for the day before the death cannot be ascertained till after death, and after death the

stipulation has a retrospective effect, and amounts to a promise to convey to the promisee's heir, which is void.

§ 101. What is said of death must also be understood of capitis deminutio.

§ 102. Another cause of nullity is the want of correspondence between the question and answer; if I stipulate, for instance, for ten sestertia and you promise five, or if you meet my absolute stipulation by a conditional promise.

§ 103. No valid stipulation can be made to convey a thing to a third person to whose power the stipulator is not subject, whence the question has been mooted to what extent a stipulation in favour of the stipulator and such a stranger to the contract is valid. My school hold that it is valid for the whole amount stipulated, and that the stipulator is entitled to the whole, just as if the stranger had not been mentioned. The other school hold that he is only entitled to one moiety, and that the stipulation is of no effect as to the other.

§ 103 *a*. It is a different case if you promise to convey something to me or Titius, for then the whole is due to me, and I alone can sue on the stipulation, though the debt may be discharged by payment to Titius.

§ 104. No valid stipulation can be made between a person under power and the person to whom he is subject. In fact a slave, a person in domestic bondage (mancipium), a daughter of the family and a wife subjected to the hand of a husband, can incur an obligation neither to the person in whose power or mancipium they are, nor to any other person.

§ 105. The dumb cannot stipulate or promise, nor can the deaf, for the promisee in a stipulation must hear the answer, and the promisor must hear the question.

§ 106. A lunatic cannot enter into any transaction because he does not understand what he is doing.

§ 107. A ward can enter into any transaction provided that he has his guardian's sanction when necessary, as it is for his incurring an obligation for himself, although not for his imposing an obligation on another.

§ 108. The same rule applies to women who are wards.

§ 109. But what we have said about a pupil is of course only true of one who has some understanding: for infants and those who are bordering on infancy do not differ much from insane persons, not being capable of judging for themselves; nevertheless, when they will benefit by the transaction, a more accommodating interpretation is put on the law.

§ 110. Although another person cannot stipulate for us, yet in our stipulations we can associate with ourselves another person who stipulates for the same performance, and is called an adstipulator.

§ 111. He can sue as well as the stipulator, and payment to him discharges the debtor as well as payment to the stipulator, but whatever he recovers, the action of mandate compels him to hand over to the stipulator.

§ 112. The adstipulator need not employ the same terms as the stipulator; if the one says, 'Art thou sponsor for the conveyance?' the adstipulator may say, 'Dost thou for the same pledge thy credit?' or, 'Dost thou for the same bid me trust thee?' or vice versa.

§ 113. He may contract for less than the stipulator, but not for more. Thus, if I stipulate for ten

sestertia he may stipulate for five, or if I stipulate absolutely he may stipulate conditionally, but not vice versa. More and less is to be understood of time as well as of quantity, immediate payment being more, and future payment being less.

§ 114. In this institution there are some exceptional rules. The heir of the adstipulator cannot sue; a slave cannot be adstipulator, though in any other circumstance his stipulation acquires a right for his master; moreover it is the prevalent opinion that a person in domestic bondage cannot be adstipulator, because he is likened to a slave; a son in the power of his father can be adstipulator, but does not acquire a right for his father, as in all other stipulations, and he himself has no right of action until, without capitis diminutio, he ceases to be subject to his father, as by his father's death, or by being inaugurated priest of Jupiter. The same is true of a filiafamilias and a wife in the manus of her husband.

§ 115. For the promisor, similarly, other persons are bound, who are called sponsors or fidepromissors or fidejussors.

§ 116. A sponsor is thus interrogated: 'Art thou for the same payment sponsor?' a fidepromissor thus: 'Dost thou for the same pledge thy credit (fidei-promittis)?' a fidejussor thus: 'Dost thou the same guarantee (fide tua jubes)?' We shall have to consider the question what is the proper name for those who are thus interrogated: 'Wilt thou convey the same? Dost thou promise the same? Wilt thou do the same?'

§ 117. Sponsors and fidepromissors and fidejussors are often employed to provide additional security for a debt; an adstipulator is generally only employed by us to secure payment after our death. Our own stipulation for this purpose is void, and therefore we associate with ourselves an adstipulator, in order that he may sue on the contract after our death, but he is compelled by an action of mandate to hand over to our heir whatever he recovers.

§ 118. The rules which govern the sponsor and fidepromissor are similar, and very unlike those which govern the fidejussor.

§ 119. For the former are accessory to none but verbal contracts, and are sometimes even liable when the principal promisor himself is not so, as, for instance, when a woman or ward contracts without her guardian's sanction, or when a person promises a payment after his own death. But it is a moot question when a slave or alien promises by the term spondeo, whether his sponsor or fidepromissor is effectively bound.

§ 119 *a*. A fidejussor, on the other hand, may be accessory to any obligations, whether real, verbal, literal, or consensual, and whether civil or natural. So that he may even be bound for the obligation of a slave either to a stranger or to his own master; and this is the case whether it is a stranger who accepts a fidejussor for the slave, or whether it is the master himself who does so for a debt due from his slave to him.

§ 120. Again, the heir of the sponsor or fidepromissor is not bound by the guaranty, unless it is the heir of an alien fidepromissor in whose city (civitas) such a rule prevails; but the fidejussor's heir is always bound.

§ 121. Again, a sponsor and fidepromissor, by the lex Furia, at the end of two years are discharged of obligation, and whatever is the number of these kinds of sureties at the time when payment of the debt is due, the total obligation is divided into as many parts; and each surety is only liable for a single part. Fidejussors, on the other hand, are liable for ever, and, however many of them there are, each is liable for the whole amount of the debt, the creditor being thus entitled to sue whichever he chooses for the

whole. But now by the letter of Hadrian of sacred memory he can only recover from each of the fidejussors, who are solvent at the time an aliquot part of the debt. Thus the letter of Hadrian of sacred memory differs from the lex Furia in this respect, that the insolvency of one sponsor or fidepromissor does not increase the liability of the remainder, whereas if only one of several fidejussors is solvent, he has to bear the whole burden.

§ 121 *a*. But as the lex Furia only applies to Italy, it follows that in the provinces, sponsors and fidepromissors, like fidejussors, are liable for ever, and each would be liable for the whole amount, unless they are also partly relieved by the letter of Hadrian.

§ 122. Moreover, between sponsors and fidepromissors the lex Appuleia introduced a sort of partnership, for under this law any one of them who has paid more than his share is given an action to recover the excess from the others. The lex Appuleia was passed before the lex Furia, at a time when each sponsor and fidepromissor was liable for the whole amount; and hence it is questioned whether, since the lex Furia was passed, the benefit of the lex Appuleia still exists. Outside Italy it undoubtedly does; for the lex Furia is only in force in Italy, while the lex Appuleia extends also to the remaining provinces; but whether the benefit of the lex still continues in Italy is much disputed. Fidejussors are not governed by the lex Appuleia; accordingly, if one fidejussor pay the whole amount, he alone suffers by the insolvency of the principal; however, as was said above, a fidejussor sued for the whole amount may by the letter of Hadrian, if he chooses, require the claim to be reduced to his ratable portion.

§ 123. Further, the lex Cicereia provides that a creditor who obtains the guaranty of sponsors and fidepromissors shall previously announce and declare to them the amount of the debt to be guaranteed and the number of sponsors or fidepromissors by whom it is to be guaranteed; and in the absence of such declaration the sponsors or fidepromissors are permitted within thirty days to demand a preliminary trial of the issue (praejudicium), whether the requisite declaration was made; and on judgment that it was not made they are discharged of liability. The law makes no mention of fidejussors, but it is usual in a guaranty by fidejussors to make a similar declaration.

§ 124. But the benefit of the lex Cornelia is available for all sureties, which forbids the same person to be surety for the same debtor to the same creditor in the same year for more than twenty thousand sesterces of credita *pecunia*; and if a sponsor or fidepromissor guarantees a larger sum, for instance, one hundred thousand sesterces, he can only be condemned in twenty thousand sesterces. Pecunia credita for purposes of the statute is said to include, besides a present loan, everything which at the time of entering into the suretyship is certain to be due, that is, which depends on no contingency. Accordingly, it includes money stipulated to be paid on a future day; because it is certain that such money will be due, although an action to recover it cannot be brought till a future time. But *pecunia* in this law includes everything, so that, if we stipulate for the conveyance of wine, or corn, or land, or a slave, the lex Cornelia applies.

§ 125. In some circumstances, however, the law permits a surety to be bound for an indefinite amount, as security for dower, for instance, or for that which is due under a will, or by judicial order. Also the lex Julia, imposing a duty of one twentieth on testamentary successions, provides that the securities therein required shall be excepted from the scope of the lex Cornelia.

§ 126. The rights of sponsors, fidepromissors, and fidejussors are also equal in respect of the rule that they cannot be bound for more than their principal. They may, however, be bound for less, just as the adstipulator may stipulate for less. For their obligation, like that of the adstipulator, is an accessory of the principal obligation, and the accessory cannot be greater than the principal.

§ 127. They further resemble in this, that whoever pays for the principal can recover the amount from him by action of mandate. Sponsors by the lex Publilia have an additional remedy, being able, unless

reimbursed in six months, to recover twice the sum advanced by the action on money paid by a sponsor.

§ 128. Literal contracts, or obligations created by writing, are made by transcriptive entries of debit or credit in a journal. Transcriptive entries are of two kinds, either from thing to person or from person to person.

§ 129. Transcription from thing to person is made when the sum which you owe me on a contract of sale or letting or partnership is debited to you in my journal as if you had received it as a loan.

§ 130. Of transcription from person to person we have an example when the sum which Titius owes me is entered in my journal as debited to you, assuming that you are indebted to Titius and that Titius has substituted me for himself as your creditor.

§ 131. Transcriptive entries differ from mere entries of a person as debtor to cash; here the obligation is not Literal but Real, for it is invalid unless money has been actually paid, and payment of money constitutes a Real obligation. Consequently the entry of a person as debtor to cash does not constitute an obligation, but is evidence of an obligation.

§ 132. Accordingly, it is not correct to say that debits to cash (arcaria nomina) bind aliens as well as citizens, because it is not the entry in the journal but the payment of money that constitutes the contract, a mode of obligation which belongs to jus gentium.

§ 133. Whether transcriptive debits form a contract binding on aliens has been doubted with some reason, for this contract is an institution of civil law, as Nerva held. Sabinus and Cassius, however, held that transcription from thing to person forms a contract binding on an alien, though not transcription from person to person.

§ 134. Another Literal obligation is that created by chirographa and syngraphae, or written acknowledgements of debt or promises to pay, unaccompanied by stipulation. This mode of contract is proper to aliens.

CONSENSV OBLIGATIONES.

§ 135. Simple consent creates a contract in purchase and sale, letting and hiring, partnership, agency.

§ 136. In these contracts consent is said to create the obligation, because no form of words or of writing is required, but the mere consent of the parties is sufficient. Absent parties, therefore, can form these contracts; as, by letter or messenger; whereas Verbal obligations cannot be contracted between absent parties.

§ 137. Further, these contracts are bilateral and bonae fidei, that is, both parties incur a reciprocal obligation to perform whatever is fair and equal; whereas Verbal and Literal contracts are unilateral, that is, one party stipulates and the other promises, or one party makes an entry of the other's debit, and the other party is bound thereby.

§ 138. But absence is no impediment to Literal contracts, though it is to Verbal.

§ 139. The contract of purchase and sale is complete so soon as the price is agreed upon and before the price or any earnest money is paid. The earnest money is merely evidence of the completion of the contract.

§ 140. The price must be certain. If there is an agreement to purchase at a price to be fixed by another person, as say by Titius, Labeo, whose opinion is approved of by Cassius, says the contract is invalid, Ofilius says it is a sale, and his opinion is followed by Proculus.

§ 141. The price should be in money, for it is much disputed whether anything but money, such as a slave, a robe, a piece of land, can be treated as price. My school hold the affirmative, and regard exchange as a species, and the oldest species, of purchase and sale; in support of which they quote the lines of Homer:

'Here touched Achaean barks in quest of wine.
They purchased it with copper and with steel,
With hides, with horned cattle, and with slaves.'

The other school maintain the negative, and distinguish between exchange and purchase and sale, because in exchange we cannot determine which is the thing sold and which is the price, and both things cannot be regarded as both the thing sold and the price. Caelius Sabinus says that if Titius offers, say, land for sale, and I give him a slave for it, the thing sold is the land and the price is the slave [because the preceding offer determines which object is res and which is pretium].

§ 142. Letting and hiring are governed by rules like those of purchase and sale. Unless the sum to be paid as hire is fixed, the contract is not complete.

§ 143. And if the hire is to be fixed by an arbitrator, for instance, at the sum which Titius shall consider fair, it is a question whether there is a contract of letting and hiring. Accordingly, if I give clothes to a fuller to clean or finish, or to a tailor to mend, and the remuneration is not fixed at the time, but left to our subsequent agreement, it is a question whether there is a contract of letting and hiring.

§ 144. The same question arises if I lend a thing for use and receive in return the loan for use of another thing.

§ 145. Purchase and sale are so nearly akin to letting and hiring that in some cases it is a question under which category the contract falls; for instance, when land is leased in perpetuity, asoccurs with the land of municipalities, which is leased on the condition that, so long as the rent is paid, the lessee and his heirs shall continue in possession. But here the better opinion is that the contract is one of letting and hiring.

§ 146. If a band of gladiators are delivered on the following terms, that is to say, that for the performance of every one who leaves the arena safe and sound there shall be paid twenty denarii, and for every one who is killed or disabled there shall be paid one thousand denarii, it is disputed whether the contract is one of purchase and sale or of letting and hiring; but the better opinion is that the unharmed were let and hired, the killed or disabled were bought and sold, the contracts depending on contingent events, and each gladiator being the subject of a conditional hiring and a conditional sale, for it is now certain that both hiring and sale may be conditional.

§ 147. Again, if a goldsmith agrees to make me rings of a certain weight and fashion out of his own gold for, say, two hundred denarii, it is a question whether the contract is purchase and sale or letting and hiring. Cassius says the material is bought and sold, the labour is let and hired, but most writers hold that there is only a purchase and sale. But if I provide the gold and agree to pay him for his work, the contract is settled to be a letting and hiring.

§ 148. A partnership either extends to all the goods of the partners or is confined to a single business, for instance, the purchase and sale of slaves.

§ 149. It has been much can-vassed whether the law would recognize a partnership formed on the terms that a partner should have a greater share in the profit than he has in the loss. Quintus Mucius thought such an arrangement contrary to the nature of partnership, but Servius Sulpicius, whose opinion has prevailed, held that such a partnership was so far from invalid that a partnership might be formed on the terms that a partner should have a share in the gains and none in the losses, if the value of his services made such an arrangement fair. It is certain that a partnership may be formed on the terms that one partner shall contribute all the capital and that the gains shall be divided equally, for a man's services may be equivalent to capital.

§ 150. If no agreement has been made as to the division of the profit and loss, it must be in equal shares. If the shares are expressed in the event of profit but not in the event of loss, the loss must be divided in the same proportions as the profit.

§ 151. The continuance of partnership depends on the continuing consent of the members: the renunciation of one dissolves the partnership. If, however, the object of a partner in renouncing the partnership is to monopolize some accruing gain; if, for instance, a partner with others in all property (totorum bonorum) succeeds to an inheritance and renounces the partnership in order to have exclusive possession of the inheritance, he will be compelled to divide this gain with his partners; but what he gains undesignedly by the renunciation he keeps to himself; whatever acquisitions he makes his partner always has exclusive benefit of whatever accrues to him after the renunciation.

§ 152. Dissolution of partnership is also produced by the death of a partner, for he who enters into partnership elects a determinate person with whom he is willing to be partner.

§ 153. Loss of status (capitis diminutio) is also said to determine partnership, because by the doctrine of civil law loss of status is regarded as equivalent to death; but if the members still consent to be partners, a new partnership commences.

§ 154. Again, the sale of all the property of one of the partners, whether by the state or by private creditors, dissolves the partnership. But the private partnership of which we are speaking, that is formed by mere consent, belongs to jus gentium, and so prevails in accordance with natural reason among all men: [whereas societas publicanorum is not simply consensual and is not open to peregrini. Cf. Krueger and Studemund, Gaius, note, h. l.].

§ 155. Agency may contemplate the benefit either of the principal or of a stranger; that is to say, your undertaking at my request to transact my business or the business of a third person will create an obligation between us, and make us mutually liable to satisfy the demands of good faith.

§ 156. But if I give a mandate to you to perform anything for your own exclusive advantage, the mandate is void, for what you propose to do on your own account ought to be done on your own judgment and not by my mandate. Thus if you tell me that you have money lying in your cash-box, and, on my advice to lend it at interest, you lend it to a person from whom you cannot recover it, you will have no action of mandate against me: or if I recommend you to buy, and you lose by buying, I am not liable to be sued in action of mandate So settled is this, that it has been questioned, whether mandate can be brought on a specific recommendation to lend to Titius; Servius holds that no obligation arises in this case any more than in that of a general recommendation to lend money, but we adopt the opposite opinion of Sabinus, on the ground that the money would not have been lent to Titius, if there had been no recommendation.

§ 157. It is clear that by a mandate to do an unlawful act, as to steal or commit a personal wrong, no obligation is contracted.

§ 158. A mandate to be executed after the death of the mandatary is invalid by the general rule that an obligation cannot commence with the heir.

§ 159. A valid authority is annulled by revocation before a commencement of execution.

§ 160. So the death of either the principal or the agent before a commencement of execution is a revocation of a mandate: but equity requires that, if after the death of a person giving a mandate and without having notice of his decease a mandatary execute his commission, he may recover against the heir of the principal in an action of mandate; for otherwise a justifiable and natural error would bring loss upon him Similar to this is the rule which is supported by the weight of authority, that a debtor who pays a manumitted steward without notice of his manumission is discharged of liability; though by the strict letter of the law he is not discharged, because he has not paid the person whom he was bound to pay.

§ 161. If a mandatary goes beyond his mandate, he may be sued for the amount which the person giving the mandate loses by its non-execution, if the execution was possible; and he will have no right of action against the person giving the mandate. So if I give you a mandate to purchase an estate for, say, a hundred thousand sesterces, and you purchase for a hundred and fifty thousand, you will have no action of mandate against me, although you are willing to convey to me for the price at which I authorized you to buy: so Sabinus and Cassius have decided. If you buy it for less, you will have a right of action against me, for a mandate to buy for a hundred thousand sesterces is regarded as an implied mandate to buy, if possible, for any smaller sum.

§ 162. Finally, the delivery of material to be wrought or fashioned gratuitously, where if a remuneration had been fixed there would have been a letting and hiring, is ground for an action of mandate; for instance, if I give clothes to a fuller to be cleaned or bleached, or to a tailor to be mended.

§ 163. Having thus explained the different kinds of obligations produced by contract, we remark that obligations may be acquired not only by our own contracts, but also by the contracts of persons in our power, in our hand, or in our mancipium.

§ 164. Free persons, also, and the slaves of another person, acquire for the person who has bona fide possession of them as his slaves; but they only do so in two cases, that is if they acquire anything by their own labour, or from the property of the person who has bona fide possession of them.

§ 165. A slave held in usufruct similarly acquires for the usufructuary in the above two cases.

§ 166. A person who has the bare quiritary property in a slave, although he is his owner, has less right in his acquisitions than the usufructuary or bona fide possessor; for under no circumstances are the acquisitions of the slave acquired for him; so that even when the slave expressly stipulates for him or accepts a thing in mancipation on his account, according to some authorities, such a bare owner acquires no right.

§ 167. A common slave acqunes for all his proprietors in the proportion of their property, unless he names one exclusively in a stipulation or mancipation, in which case he acquires for him alone. For instance, if he stipulates thus: 'Dost thou promise to convey to Titius, my master?' or, when he takes by mancipation, thus: 'This thing by quiritary law I declare to be the property of Lucius Titius, my master, and for him be it purchased by this piece of bronze and bronze balance.'

§ 167 *a*. It is a question, whether the same effect is produced by the exclusive order of one of the masters, as by the exclusive mention of the name of one. My school maintain that the sole orderer is the sole acquirer, just as when one alone is named by the slave in a stipulation or mancipation; the other

school maintain that all the owners acquire, just as if there had been no order.

§ 168. Extinction of an obligation is effected chiefly by actual performance of that which is owed. Hence it is disputed, whether when a person with the consent of his creditor makes a different performance in the place of the one contracted for, he is directly discharged by law of his obligation, as my school consider him to be, or whether he nevertheless continues to be bound by direct law, but against a plaintiff trying to enforce his claim, may defend himself by the exception of fraud, as the other school maintain.

§ 169. Acceptilation is another mode of extinguishing an obligation. Acceptilation is, as it were, an imaginary performance of an obligation (imaginaria solutio). If a creditor is willing to release what a person owes him under a verbal obligation, the object may be accomplished by the latter interrogating him in these terms: 'That which I promised thee hast thou received?' upon which he answers: 'I have received it.'

§ 170. This process, as I said, only discharges obligations that arise from verbal contract, not others; for it seems to be consistent that when an obligation is made by words, it should be dissoluble by other words. However, a debt due from any other cause may be transformed into a stipulation, and released by acceptilation.

§ 171. But notwithstanding our statement that acceptilation is an imaginary payment, a woman without her guardian's sanction cannot release by acceptilation, although actual payment to her without her guardian's sanction discharges the debtor.

§ 172. So a debt may be legally paid in part, but whether it can be released in part by acceptilation is a question.

§ 173. There is another mode of imaginary payment, namely, by bronze and balance (per aes et libram). This also is only employed in certain cases, as when a debt is due on account of a proceeding per aes et libram, or in case of a judgment debt.

§ 174. This proceeding is thus effected. There must be present five witnesses and a holder of the scales, and the person to be released must say these words: 'Whereas I am condemned to thee in so many thousand sesterces, that debt I pay and discharge by this bronze and balance of bronze. This is the first, this the last, pound of bronze that I weigh out to thee according to the public statute (the Twelve Tables).' Then he strikes the scales with the bronze money and gives the latter to the creditor as if in payment.

§ 175. Similarly, the legatee releases the heir from a legacy left in the form of condemnation (per damnationem), except that whereas the judgment debtor recites the fact that he is a condemned person (condemnatum), the heir recites that he is charged (damnatum) by the testament of the deceased to pay the legacy. An obligation can be thus discharged only if certain in amount and estimated by number or weight, or, according to some, by measure.

§ 176. Novation is another mode of extinguishing an obligation, as when I stipulate with Titius that he shall pay me what you owe me, for the intervention of a new person gives birth to a new obligation, and the first obligation is done away with, being transformed into the succeeding one. So much so that sometimes, even though the new stipulation is invalid, the previous one is done away with by novation; for instance, if you owe me a sum, and I stipulate from Titius payment thereof after his death, or if I stipulate payment thereof from a woman or ward (pupillus) without the guardian's sanction, in this case my claim is extinguished, for the first debtor is discharged, and the subsequent obligation is void. The same does not hold if I stipulate from a slave, for then the former debtor continues bound, just as

if there was no subsequent stipulation.

§ 177. But when the original debtor is himself the promisor, a second stipulation only operates a novation if it contains something new; if a condition, for instance, or a time for payment, or a sponsor, is added or omitted.

§ 178. Respecting the sponsor, however, this statement is not free from doubt, for the other school held that novation is not operated by a sponsor being added or omitted.

§ 179. The statement that the introduction of a condition operates a novation must be restricted to mean, that a novation is produced if the condition is accomplished; for otherwise if the condition fails the prior obligation continues in force. However, it is a question, whether the creditor who sues on such a prior obligation cannot be repelled by the exception of fraud (doli), or of informal agreement not to sue; since it seems to have been the intention of the parties that the debt should be only recoverable if the condition of the second stipulation were realized. Servius Sulpicius even held that novation occurs immediately, and while the accomplishment of the condition is still uncertain; and that, if the condition fails, neither obligation can be sued upon, and the creditor's claim is extinguished; and, consistently herewith, he held that, if the debt due from Lucius Titius is stipulated by the creditor from his slave, novation takes place, and while the original obligation is extinguished, the second is void because the slave cannot be sued. But in both cases the contrary rule prevails, and no novation occurs in these cases any more than it occurs if an alien, who cannot be sponsor, promise payment of a debt due from you to me by the solemn term 'spondeo.'

§ 180. The extinction of an obligation is also effected by joinder of issue (litis contestatio), at least of a statutable action (judicium legitimum, 4, § 104). Then the original obligation is dissolved, and a new obligation is imposed on the defendant, by joinder of issue. But if he is condemned, the obligation arising from joinder of issue is discharged, and a new obligation arises from the judgment. Hence the saying of the old jurists, that, before action brought, a debtor is bound to pay his debt; after joinder of issue he is bound by the condemnatio of the formula; after condemnation passed, he is bound to satisfy the judgment.

§ 181. Accordingly, after suing by statutable action, the extinction of the original obligation disables me by strict law from bringing a second action, for the declaration that the defendant is bound to convey something to me is false, as joinder of issue in the first action terminated his obligation. It is otherwise if I sued at first by an action depending on the executive power (imperium) of the praetor, 4, § 105. For then the original obligation continues, and so, according to strict law, its non-extinction permits me to bring a second action; but I may be repelled by the exception of previous judgment (res judicata) or previous joinder of issue (res in judicium deducta) What actions are statutable, and what determine with (or, derive their force from) the praetor's executive power, will be explained in the next book of these Institutes.

§ 182. We proceed to obligations which originate in delict; theft, for instance, rapine, damage to property, or outrage; which are all of one kind, whereas contractual obligations are divided into four classes, as we have explained above.

§ 183. Thefts are divided by Servius Sulpicius and Masurius Sabinus into four kinds, theft manifest and not manifest, the possession of stolen goods discovered upon search, and the introduction into a house of stolen goods. Labeo makes only two kinds, theft manifest and not manifest, because the possession and introduction of stolen goods are not kinds of theft, but rather circumstances giving rise to special actions connected with theft; and this seems the better opinion, as will presently appear.

§ 184. Manifest theft is limited by some to detection in the act of taking; by others extended to

detection while the thief is in the place where the theft is committed; for instance, if olives are stolen from an oliveyard, or grapes from a vineyard, while the thief is in the oliveyard, or vineyard; or if a theft is committed in a house, while the thief is in the house. Others extend it to detection before the thief has carried the goods away to the place where he intends to deposit them; others to detection while the thief has the goods in his hands. The fourth opinion has not been adopted, and the third opinion that, until the thief has carried the stolen goods to their place of destination, his theft may be a manifest one, is also impugned on the ground of the uncertainty whether one day or several is the limit of the time within which he must be detected; for a thief often intends to carry the goods he has stolen in one city into another city or province. The first and second opinions are commonly adopted, and more generally the second.

§ 185. What is not manifest theft will be understood from what we have said about manifest theft, for what is not the one is the other.

§ 186. The discovery of stolen goods, when a person's premises are searched in the presence of witnesses, makes him liable, even though innocent of theft, to a special action for receiving stolen goods called actio concepti.

§ 187. To introduce stolen goods is to pass them off to a man, on whose premises they are discovered, with the intent that they should be discovered on his premises rather than on those of the introducer. The man on whose premises they are found may sue the passer off, though innocent of theft, in an action for the introduction of stolen goods called actio oblati.

§ 188. An action for prevention of search may be brought against the man who prevents a person from searching on his premises for stolen goods.

§ 189. The punishment provided by the law of the Twelve Tables for manifest theft was capital; a freeman was first scourged and then assigned, by judgment of the magistrate, to the person from whom he had stolen (whether made his slave by the assignment, or reduced to the condition of an insolvent judgment debtor, was a subject of controversy among the republican lawyers); a slave was also punished by scourging. But later ages disapproved of the severity of this punishment, and theft, whether by a slave or by a freeman, was punished by the praetorian edict with fourfold damages.

§ 190. Not manifest theft is punished by the law of the Twelve Tables with double damages, which penalty the praetor has retained.

§ 191. The penalty for the discovery or the introduction of stolen goods is by the law of the Twelve Tables triple damages, a penalty which the praetor has also retained.

§ 192. Prevention of search renders liable to fourfold damages, a penalty which the edict of the praetor first ordained. The Twelve Tables inflicted no penalty for such an offence, but directed that the person wishing to search must be naked, only wearing a girdle, and carrying a platter in his hands; and if anything was thus discovered the law of the Twelve Tables declares it to be manifest theft.

§ 193. What the girdle was is doubted, but it seems to have been a covering for the loins. The whole of this enactment of the Twelve Tables is nugatory, for he who prevents a man from searching in his clothes would prevent him from searching naked, especially as in such a search the finding of stolen goods would subject him to a heavier penalty. Besides, whether the platter is to be held by the searcher in order that his hands being engaged in holding it he may not bring anything into the house, or in order that what is found may be placed thereupon, neither of these reasons can be alleged when the thing searched for is of such a size or nature that it could not be brought into the house by hand, nor placed on the platter. It is not disputed that a platter of any material satisfies the requirement of the

Tables.

§ 194. On account of the enactment that a discovery in such a search is manifest theft, some writers say that manifest theft is of two kinds, statutory or actual: statutory being that of which we have just been speaking, actual being that kind of manifest theft which has been previously explained. But in truth, the only mode of manifest theft is the actual one, for law cannot turn a not manifest thief into a manifest thief, any more than it can turn a man who is not a thief into a thief; or make an adulterer or homicide out of a man who has not killed or committed adultery. What a statute can accomplish is this, that a person shall be subject to a penalty just as if he had committed theft, adultery, or homicide, although he have not committed any of those offences.

§ 195. Theft is not simply confined to the carrying away the property of another with intent of appropriation, but embraces any kind of physical handling of a thing belonging to another against the will of the owner.

§ 196. Thus, to use a thing committed to one's keeping as a deposit, or to put a thing that is lent to one for use to a different use than that for which it was lent, is theft; to borrow plate, for instance, on the representation that the borrower is going to entertain his friends, and then to carry it away into the country; or to borrow a horse for a mere ride, and then to take it far away out of the neighbourhood; or, as in the case described by the old lawyers, to take it into battle.

§ 197. It is held, however, that putting a thing lent for use to a different use than the lender contemplated is only theft if the borrower knows it to be contrary to the will of the owner, and that, if he had notice, he would refuse permission; but if he believes that the owner would give permission, it is not theft; and the distinction is just, for there is no theft without unlawful intention.

§ 198. But even to deal with a thing in the belief that you are acting against the will of the owner, if the owner is in fact consenting to your doing so, is said not to amount to theft; whence a question arises, if Titius solicits my slave to steal my property, and convey it to him, and my slave informs me of it, and I, wishing to detect Titius in the act, permit my slave to carry my goods to him; it has been questioned whether either an action of theft or one for corrupting a slave can be maintained against Titius. The answer (responsum) is that neither action is maintainable; not the action of theft, because his dealing with my property was not an act done against my will; not the action for corrupting a slave, because the slave was not in fact corrupted.

§ 199. Sometimes there may be a theft even of free persons; as, for instance, of a child in my power, of a wife in my hand, or even of my judgment debtor, or of my hired gladiator, should they be secretly removed from my control.

§ 200. A man may sometimes even steal his own property; as, for instance, a debtor who purloins the goods which he has pledged to a creditor, or an owner who surreptitiously takes away his own property from a bona fide possessor of it; and accordingly it has been held, that concealment by the owner of the fact of his slave having returned to him, from one who had possessed him in good faith, amounted to theft.

§ 201. Conversely, property belonging to another may sometimes be seized and acquired by usucapion without committing theft; hereditaments, for instance, before an heir has obtained possession, except in the case of a necessary heir; for where there is a necessary heir it is settled law that no usucapion as quasi-heir is possible (2, § 58). Also a debtor, having conveyed property on trust to his creditor by mancipation or surrender before the magistrate, as I mentioned in the preceding book, may, without committing theft, repossess it and acquire new ownership thereof by usucapion (2, § 59).

§ 202. In some cases theft may be chargeable on a person who is not the actual perpetrator, as on one, by whose aid and abetment a theft has been committed; to which class belongs the man who knocks out of your hand money for another to pick up, or stands in your way that another may snatch it, or scatters your sheep or oxen that another may steal them, like the man in the old books, who waved a red cloth to frighten a herd. But if the same thing were done as a frolic, without the intention of committing a theft, we will consider whether a praetorian form of action (in extension of the lex Aquilia) may not be maintainable, since the Aquilian statute relating to damage makes even negligence penal.

§ 203. The action of theft is maintainable by the person interested in the preservation of the property, although he is not the owner; and so even the owner cannot maintain it unless he has an interest in the safety of the thing.

§ 204. Hence when a thing pledged is stolen, the creditor can bring it, so much so that he can even maintain it against the owner or debtor who surreptitiously takes away from him the thing he has pledged.

§ 205. So if clothes are delivered to be cleaned or finished or mended for a certain remuneration, and then are stolen, the fuller or tailor has the action, and not the owner; for the owner is not interested in the loss, since he has his action on the contract of letting against the fuller or tailor to recover the value; supposing always, that the fuller or tailor has sufficient means to make the loss good. For if the latter is insolvent, then as the owner cannot recover what he has a right to claim from him, he can himself maintain the action of theft against the thief; because, in this hypothesis, he is interested in the loss of the property.

§ 206. What has been said of the fuller and tailor applies to the borrower of a thing (commodatarius); for as on account of the payment the former receive they are made responsible for safe custody of the thing, so on account of the advantage the borrower derives from the use of the thing he is likewise made responsible for its safe custody.

§ 207. But as a depositary is not answerable for the safe custody of the thing deposited, being only liable for his own fraud, so, if the thing is stolen from him, being not compellable to make restitution by action of deposit, he is not interested in the thing being safe; and therefore cannot maintain the action of theft which is only maintainable by the owner of the thing.

§ 208. Finally, it is a question whether if any one below the age of puberty takes the property of another, he commits a theft; and most jurists agree that as theft depends on intention, one below the age of puberty is not able to be charged with it unless, being near to that age, he understands that he is committing a delict.

§ 209. Rapine or robbery is chargeable as theft, for who more handles the property of another against the will of the owner than the robber? who has been well denominated a shameless thief. However, as a special remedy for this offence the praetor has introduced the action for rapine with violence; which may be brought within a year for four times the value, after a year for simple damages; and which lies when only a single thing of the slightest value has been taken with violence.

§ 210. Damage unlawfully caused is actionable under the lex Aquilia, whose first chapter provides, that if a slave of another man, or a quadruped of his cattle, be unlawfully slain, whatever within a year was the highest value thereof, that amount the offender shall pay to the owner.

§ 211. Unlawful slaying means slaying by intention or negligence; loss occasioned by no fault of the person committing it being punished by no law; hence a person who damages another accidentally and

not wilfully or negligently does so with impunity.

§ 212. It is not only the body of the slave or animal slain that is appraised in the action under this statute, but if the killing of a slave occasion to the owner the loss of anything in addition to his price, this loss is also appraised; for instance, if my slave has been instituted somebody's heir, and before by my order he has signified his acceptance, he is slain, valuation is made not only of his body but also of the inheritance I have missed; or if one of two twins, or one of a company of players, or one of a band of musicians is slain, an estimate is made not only of his value but also of the extent to which the remainder are depreciated. The same holds if one of a pair of mules, or one of a team of four chariot horses is killed.

§ 213. The owner whose slave is killed has the option of prosecuting the homicide for a capital crime or of suing him under this statute for damages.

§ 214. From the words of this statute, 'Whatever within a year was the highest value thereof,' it follows that if the slave killed was lame or blind of one eye, but had been sound within a year, the owner will recover not simply his value at the time of his death but his highest value within a year, the result being that a plaintiff will in some cases recover more than the amount of the loss he has sustained.

§ 215. By the second chapter an adstipulator who defrauds a principal stipulator by releasing the promissor can be sued for the amount of the loss occasioned.

§ 216. It is evident that in this part of the statute also an action was instituted on account of damage to property, though here the provision was not absolutely necessary, because the action of Mandate would give a sufficient remedy, except for this that the lex Aquilia, when the action is defended, gives double damages.

§ 217. The third chapter makes provision for all other damage. Therefore if a slave, or a quadruped included under the name of cattle, is wounded, or if a quadruped not included under the name of cattle, as a dog, or a wild beast, for instance, or a bear or lion, is wounded or is killed, in this chapter an action is provided: so too if other animals or any things inanimate are unlawfully damaged, this part of the statute supplies a remedy, since in this chapter an action is expressly established in case of anything burnt, broken in pieces, fractured: although the single word 'broken' (ruptum) will suffice to cover all these offences, for the word 'broken' (ruptum) is interpreted to mean injured in any way (corruptum quoquo modo); hence not only burning, breaking, crushing, but any cutting, bruising, spilling, vitiating in any way, destroying, or deteriorating, is hereby comprehended.

§ 218. We should notice that in this chapter it is not the value which the thing had within a year, but which it had within the last thirty days, that is chargeable on the person causing the damage, though the statute itself does not expressly mention the term highest value (plurimi). Hence some of the other school have held that it was left to the discretion of the judex whether the damages should be measured by the highest value or by any lower value which the thing may have had within the last thirty days: but Sabinus held that the law must be interpreted as if it contained the word 'highest' (plurimi), the legislator having thought it sufficient to use this word in the first chapter.

§ 219. It has been held that an action under this statute only lies when the body of the offender is the instrument of mischief; and therefore for any other mode of occasioning loss praetorian actions (actiones utiles) must be brought: for instance, if a slave or quadruped is shut up and starved to death, or a horse is foundered by hard driving, or a slave is persuaded to climb a tree or descend a well, and in climbing or descending falls and is killed or hurt. But if a slave is pushed off a bridge or bank into a river and there drowned, the body of the person by pushing him may fairly be held to have caused his death.

§ 220. Outrage is committed not only by striking with the fist or a stick or a whip, but by scandalous vociferation, or, though knowing that nothing is due to him, seizing and advertising for sale under an order of the praetor the goods of a person as if he were an insolvent or an absconding debtor, or by writing defamatory prose or verse, or by constantly following a matron or youth wearing the praetexta, and by many other modes.

§ 221. Outrage may be suffered not only in one's own person, but also in the person of a child in our power, or of a wife though not in our hand. So that if you insult my daughter who is married to Titius, but has not passed out of my power into his hand, you are suable for outrage, not only in her name, but also in my name, and in the name of her husband.

§ 222. A slave cannot be outraged himself, but his master may be outraged in his person, not however by all the acts whereby he might be outraged in the person of a child or wife, but only by atrocious assaults, clearly intended to dishonour the master, for instance, by flogging the slave; and for this affront a formula is provided in the praetor's album: but for verbal abuse of a slave, or striking him with the fist, no formula is provided, nor would an action be readily granted.

§ 223. The penalty of outrage in the Twelve Tables for a limb broken was retaliation (talio): for a bone broken or bruised three hundred asses, if the person injured was a freeman; one hundred and fifty, if he was a slave; for other injuries twenty-five asses: and in those days of excessive poverty such sums seemed an adequate reparation.

§ 224. The rule now in use is different: the plaintiff is permitted by the praetor to assess his own damages for the outrage, and the judex may either condemn the defendant in the whole of this sum, or in a lesser sum at his discretion Atrocious outrage, however, is generally for the praetor to estimate; and when he has once fixed the sum in which the defendant must give security to appear at the trial, the limit is fixed at this sum in the taxatio clause of the formula; and the judex, though he has the power of condemning the plaintiff in less, generally, out of deference to the praetor, will not venture to reduce the condemnation.

§ 225. Outrages are atrocious either by the act, as when a man is wounded, horse-whipped, or beaten with a stick; or from the place, as when an affront is offered in the theatre or the forum; or from the persons, as when a magistrate or a senator is insulted by one of inferior rank.
