THE INSTITUTES OF GAIUS

Part I

TEXT WITH CRITICAL NOTES
AND TRANSLATION

By

FRANCIS DE ZULUETA
D.C.L., F.B.A.
DOCTOR HONORIS CAUSA OF PARIS
REGIUS PROFESSOR OF CIVIL LAW IN THE
UNIVERSITY OF OXFORD
FELLOW OF ALL SOULS COLLEGE
HONORARY FELLOW OF MERTON COLLEGE

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PREFACE

THIS edition is intended primarily for law-students; it is hoped that it will satisfy wider needs also, but it does not aim at replacing the standard editions. Probably the edition most commonly used by scholars is Kübler's. It is very handy, suggests numerous textual improvements, and incorporates, as earlier editions could not, the new readings and passages of the Oxyrhynchus and Antinoite fragments. Nevertheless, apart from the new fragments, P. Krüger's edition (originally with Studemund) remains indispensable for all critical work. It marks by italics the slightest deviation, other than orthographical, from Studemund's *Apographum*, with its *Supplementa*, of the Veronese palimpsest, and it gives a full critical apparatus, which greatly assists, though it cannot dispense with, reference to the *Apographum* itself. All that remains for a future scientific edition is the evaluation of the endless modern suggestions of corruption of the Veronese text by post-Gaian matter. But what is already clear is that if these suggestions, or a large proportion of them, are correct, what passes for Gaius' *Institutes* can no longer be regarded as a suitable introduction to Roman Law. The present edition would not be undertaken by anyone holding that view.

Our text differs from Krüger's in various respects. (1) It preserves Krüger's italics, thus warning the reader of all departures from the manuscript, but endeavours to discriminate between cases which do and cases which, for the present purpose, do not require a footnote. (2) It adopts a number of later improvements of the text, chiefly from Kübler. (3) It incorporates the new fragments. Here a full critical apparatus has seemed desirable. (4) It places in the text many conjectures which the scientific editions rightly relegate to the footnotes. The motive is that what the ordinary reader wants is the sense, and that this is the shortest way of indicating it. The Egyptian fragments have increased our confidence in the substantial, though not always the verbal, correctness of the conjectures matured by more than a century of editing.

The translation endeavours to be literal rather than elegant. Naturally the excellent translations of Muirhead and Poste have been most helpful.

The apparatus of citations is not for the learned. Scholars will find all, and rather more than all, they need in, for example, so old

a work as Böcking's fifth edition of 1866; any deficiencies caused by new readings of V or fresh discoveries can be made good from Kübler's more judicious, but still full, selection. But to most readers an elaborate accumulation of references is merely discouraging. Internal cross-references and references to Justinian's *Institutes* are what is chiefly needed. Citations of texts outside the two *Institutes* have therefore been cut down to a minimum. On the other hand, the omission by the standard editions to refer to Lenel's *Edictum*, though logical, is regrettable; the temptation to cite it has not always been resisted.

F. DE Z.

OXFORD
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THE INSTITUTES OF GAIUS

SIGNS AND ABBREVIATIONS

MANUSCRIPTS

F = the Antinoite fragments, first published by V. Arangio-Ruiz in 1933 (*PSI* xi, 1182) and re-edited by him in BIDR 1935, 572–634.

O = the Oxyrhynchus fragments published by A. S. Hunt in 1927 (*P. Oxy.* xvii, 2103).

V = the Veronese *Codex* 13, as recorded in Studemund's *Apographum* (1874 = Apogr.) and *Supplementa* (1884 = Suppl.).

V2 = added in V by a later hand.

TYPOGRAPHY OF TEXT

Italic type indicates that the letter has not been read in the MS. (occasionally either MS.). The MS. is either illegible or has been corrected editorially.

[ ] Square brackets indicate a supposed intrusion—gloss and so forth.

⟨ ⟩ Angular brackets indicate editorial restoration of a supposed accidental omission by the MS.

EDITIONS

Girard = P. F. Girard's edition (mainly Krüger's) in his *Textes de Droit Romain*, ed. 5, 1923.

Kniep = *Gai Institutionum Commentarii i–iii*, ed. F. Kniep, 1911–17.

Krüger = *Gai Institutionum Commentarii quattuor*, edd. P. Krüger et G. Studemund, *in Collectio Librorum Iuris Anteiustiniani i*, ed. 6, 1912. This volume contains Studemund's *Supplementa*.

Kübler = *Gai Institutiones*, edd. O. Seckel et B. Kübler, ed. 8, 1939.

Polenaar = *Gai Institutiones Iuris Ciuilis Romani*, ed. B. J. Polenaar, 1874.

BOOKS AND PERIODICALS

Apogr. = *Gaii Institutionum Commentarii Quattuor. Codicis Veronensis Apographum*, ed. G. Studemund, 1874.

BIDR = *Bullettino del Istituto di Diritto Romano.*

Bruns = *Fontes Iuris Romani Antiqui*, ed. O. Gradenwitz, 1909.

Edictum = *Das Edictum Perpetuum*, O. Lenel, ed. 3, 1927.

JRS = *Journal of Roman Studies.*

Jurid. Rev. = *Juridical Review.*

LQR = *Law Quarterly Review.*

NRH = *Nouvelle Revue historique de Droit français et étranger.*

Pal. = *Palingenesia Iuris Ciuilis*, O. Lenel, 1889.

PW = Pauly-Wissowa-Kroll, *Realenzyklopädie der klassischen Altertumswissenschaft*, 1894–

RH = NRH *continued*, 1922–

Riccobono, Fontes = *Fontes Iuris Romani Anteiustiniani i et ii*, ed. 2, S. Riccobono, &c., 1940–1; *iii* (*Negotia*), ed. 1, V. Arangio-Ruiz, 1943.

SZ = *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung.*

Stud. et Doc. = *Studia et Documenta Historiae et Iuris.*

Suppl. = *Addenda et Corrigenda in Cod. Veronensis Apographo*, G. Studemund, 1884—*Collect. Libr. Iur. Anteiust. i.*

Textes = *Textes de Droit Romain*, P. F. Girard, ed. 5, 1923.

TEXTS

C = Justinian's *Codex.*

C.T. = *Codex Theodosianus.*

Coll. = *Mosaicarum et Romanarum Legum Collatio.*

D. = Justinian's *Digest.*

Dosith. = *Fragmentum quod dicitur Dositheanum* (in all the collections).

Epit. = *Epitome* of Gaius' *Institutes* appended to the *Lex Romana Visigothorum.*

F.V. = *Fragmenta Vaticana.*

G. = Gaius' *Institutes.*

Inst. = Justinian's *Institutes.*

Nou. = Justinian's *Novels.*

Paul = *Pauli Sententiae.*

Theoph. = *Institutionum Graeca Paraphrasis*, ed. E. C. Ferrini, 1884.

Ulp. = *Ulpiani Liber singularis Regularum*, now generally referred to as *Epitome Ulpiani.*

GAI INSTITUTIONUM

Commentarii Quattuor

CONTENTS OF THE INSTITUTES

CONTENTS OF BOOK I

V p. 1 ⟨COMMENTARIUS PRIMUS⟩

[I. De iure ciuili et naturali.[1]]

1. *Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum iure utuntur. nam quod quis*que[2] populus ipse sibi ius constituit, id ipsius proprium est uocaturque ius ciuile, quasi ius proprium ciuitatis; quod uero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur uocaturque ius gentium, quasi quo iure omnes gentes utuntur. populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utit*ur*. quae singula qualia sint, suis locis proponemus.

2. Constant autem iura populi Romani ex legibus, plebiscitis, senatusconsultis, constitutionibus principum, edictis eorum qui ius edicendi habent, responsis prudentium. **3.** Lex est quod populus iubet atque constituit. plebiscitum est quod plebs iubet atque constituit. plebs autem a populo eo distat, quod populi appellatione uniuersi ciues significantur, connumeratis et*iam* patriciis; plebis autem appellatione sine patriciis ceteri ciues significantur. unde olim patricii dicebant plebiscitis se non teneri, qu*ae*[3] sine
V p. 2 auctoritat*e* eorum facta essent. sed postea / lex Hortensia lata est, qua cautum est ut plebiscita uniuersum populum tenerent. itaque eo modo legibus exaequata sunt. **4.** Senatusconsultum est quod senatus iubet atque constituit; idque legis uicem optinet, quamuis fuerit quaesitum. **5.** Constitutio principis est quod imperator decreto uel edicto uel epistula constituit; nec umquam dubitatum est quin id legis uicem optineat, cum ipse imperator per legem imperium accipiat. **6.** Ius autem[4] edicendi habent magistratus populi Romani. sed amplissimum ius est in edictis duorum praetorum, urbani et peregrini, quorum in prouinciis iurisdictionem[5] praesides earum habent; item in edictis aedilium curulium, quorum

[1] V2, above the first line.

[2] The first three lines of V are now vacant, having been written in red. The supplement (from Inst. 1, 2, 1. D. 1, 1, 9) is too short for three lines of ordinary writing. There may have been more, but not necessarily.

[3] *q'* V, which may mean *quia* (Krüger) or *quae* (Kübler). Cf. Apogr. 290; 293.

[4] Mommsen om. *autem*, but Krüger supposes an omission—according to Huschke's conjecture: ⟨*Edicta sunt praecepta eorum qui ius edicendi habent.*⟩ *ius autem*, &c.

[5] Polenaar *iurisdictionem in prouinciis*.

§ 1. = Inst. 1, 2, 1 (D.). Cf. Cic. de off. 3, 17, 69. *suis locis*: G. 1, 52. 55. 78 sq. 89. 108. 119. 189. 193; 2, 65 sq.; 3, 93. 132–4. 154. Cf. 1, 47. 83; 3, 179 in fin.; 4, 37. § 2. Cf. Inst. 1, 2, 3. Pomp. D. 1, 2, 2, 12. Pap. D. 1, 1, 7.

BOOK I

1. Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *ius ciuile* (civil law) as being the special law of that *ciuitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *ius gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of mankind. This distinction we shall apply in detail at the proper places.

2. The laws of the Roman people consist of *leges* (comitial enactments), plebiscites, senatusconsults, imperial constitutions, edicts of those possessing the right to issue them, and answers of the learned. **3.** A *lex* is a command and ordinance of the *populus*. A plebiscite is a command or ordinance of the *plebs*. The *plebs* differs from the *populus* in that the term *populus* designates all citizens including patricians, while the term *plebs* designates all citizens excepting patricians. Hence in former times the patricians used to maintain that they were not bound by plebiscites, these having been made without their authorization. But later a *L. Hortensia* was passed, which provided that plebiscites should bind the entire *populus*. Thereby plebiscites were equated to *leges*. **4.** A senatusconsult is a command and ordinance of the senate; it has the force of *lex*, though this has been questioned. **5.** An imperial constitution is what the emperor by decree, edict, or letter ordains; it has never been doubted that this has the force of *lex*, seeing that the emperor himself receives his *imperium* (sovereign power) through a *lex*. **6.** The right of issuing edicts is possessed by magistrates of the Roman people. Very extensive law is contained in the edicts of the two praetors, the urban and the peregrine, whose jurisdiction is possessed in the provinces by the provincial governors; also in the edicts of the curule aediles, whose jurisdiction is possessed

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§ 3. Cf. Inst. 1, 2, 4. § 4. Cf. Inst. 1, 2, 5. Ulp. D. 1, 3, 9. § 5. Cf. Inst. 1, 2, 6 (Ulp. D.). § 6. Cf. Inst. 1, 2, 7. G. 3, 32; 4, 11. Pap. D. 1, 1, 7, 1; Marcian 8.

iurisdictionem in prouinciis populi Romani quaestores habent; nam in prouincias Caesaris omnino quaestores non mittuntur, et ob id hoc edictum in his prouinciis non proponitur. **7.** Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est iura condere. quorum omnium si in unum sententiae concurrunt, id quod ita sentiunt legis uicem optinet; si uero dissentiunt, iudici licet quam uelit sententiam sequi. idque rescripto diui Hadriani significatur.

[II. De iuris diuisione.[1]]

8. Omne autem ius quo utimur uel ad personas pertinet uel / ad res uel ad actiones. et prius uideamus de personis. V p. 3

[III. De condicione hominum.[1]]

9. Et quidem summa diuisio de iure[2] personarum haec est, quod omnes homines aut liberi sunt aut serui. **10.** Rursus, liberorum hominum alii ingenui sunt, alii libertini. **11.** Ingenui sunt qui liberi nati sunt; libertini qui ex iusta seruitute manumissi sunt. **12.** Rursus, libertinorum ⟨*tria sunt genera: nam aut ciues Romani aut Latini aut dediticiorum*⟩[3] numero sunt. de quibus singulis dispiciamus; ac prius de dediticiis.

[IIII. De dediticiis uel lege Aelia Sentia.[1]]

13. Lege itaque Aelia Sentia cauetur ut[4] qui serui a dominis poenae nomine uincti sint, quibusue stigmata inscripta sint, deue quibus ob noxam quaestio tormentis habita sit et in ea noxa fuisse conuicti sint, quiue ut ferro aut cum bestiis depugnarent traditi sint, inue ludum custodiamue coniecti fuerint, et postea uel ab eodem domino uel ab alio manumissi, eiusdem condicionis liberi fiant, cuius condicionis sunt peregrini dediticii. [V. De peregrinis dediticiis.[1]] **14.** Uocantur autem peregrini dediticii hi qui quondam aduersus populum Romanum armis susceptis pugnauerunt, deinde uicti se dediderunt. **15.** Huius ergo turpitudinis seruos quocumque modo et cuiuscumque aetatis manumissos, etsi pleno iure

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[1] V2.

[2] *de iure*: confirmed by Inst. and D. Gloss according to G. Beseler, SZ 1926, 268.

[3] Supplied from Epit. 1, 1 pr.

[4] *cauetur qui* V, with *ū* (= *uel*) interlined between the two words. The correction *ut* for *uel* seems almost compulsory, but its results are disastrous for the syntax of the sentence. Krüger simply corrects the moods: *sint* for *sunt* three times, and *fiant* for *fiunt*; but cf. infra 1, 29. 40, &c. Kniep explains the moods as being due to textual quotation from the *lex*; on that supposition it would be better to omit *uel* (*ut*) altogether.

in the provinces of the Roman people by quaestors; no quaestors are sent to the provinces of Caesar, and consequently the aedilician edict is not published there. **7.** The answers of the learned are the decisions and opinions of those who are authorized to lay down the law. If the decisions of all of them agree, what they so hold has the force of *lex*, but if they disagree, the judge is at liberty to follow whichever decision he pleases. This is declared by a rescript of the late emperor Hadrian.

8. The whole of the law observed by us relates either to persons or to things or to actions. Let us first consider persons.

9. The primary distinction in the law of persons is this, that all men are either free or slaves. **10.** Next, free men are either *ingenui* (freeborn) or *libertini* (freedmen). **11.** *Ingenui* are those born free, *libertini* those manumitted from lawful slavery. **12.** Next, of freedmen there are three classes: they are either Roman citizens or Latins or in the category of *dediticii*. Let us consider each class separately, and first *dediticii*.

13. By the *L. Aelia Sentia* it is provided that slaves who by way of punishment have been put in bonds by their masters or have been branded, or have been questioned under torture on account of some wrongdoing and have been found guilty of the same, also those who have been handed over to fight (in the arena) with men or beasts or who have been cast into a gladiatorial school or into prison—that such slaves, if afterwards manumitted whether by the same or another master, shall become free men of the same status as *peregrini dediticii*. **14.** Are called *peregrini dediticii* those who in the past have taken up arms and fought against the Roman people and being defeated have surrendered (at discretion). **15.** Slaves disgraced in the manner mentioned, by whatever method and at whatever age they are manumitted, and though they were

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§ 7. Cf. Inst. 1, 2, 8. Pomp. D. 1, 2, 2, 5. 12. 47 sq. § 8. = Inst. 1, 2, 12 (D.). § 9. = Inst. 1, 3 pr. (D.). § 11. = D. 1, 5, 6. Cf. Inst. 1, 4 pr. 1, 5 pr. § 12. Cf. Inst. 1, 5, 3. §§ 13–15. Cf. G. 1, 25–7. 68; 3, 74–6. *L. Aelia Sentia* A.D. 4.

dominorum fuerint, numquam aut ciues Romanos aut Latinos fieri dicemus, sed omni modo dediticiorum numero constitui intellegemus.

16. Si uero in nulla tali turpitudine sit seruus, manumissum
V p. 4 modo ciuem Romanum, modo Latinum fieri dice/mus. **17.** Nam in cuius persona tria haec concurrunt, ut maior sit annorum triginta, et ex iure Quiritium domini, et iusta ac legitima manumissione liberetur, id est uindicta aut censu aut testamento, is ciuis Romanus fit; sin uero aliquid eorum deerit, Latinus erit.

[VII. De manumissione uel causae probatione.[1]]

18. Quod autem de aetate serui requiritur, lege Aelia Sentia introductum est. nam ea lex minores XXX annorum seruos non aliter uoluit manumissos ciues Romanos fieri quam si uindicta, apud consilium iusta causa manumissionis adprobata, liberati fuerint. **19.** Iusta autem causa manumissionis est ueluti si quis filium filiamue aut fratrem sororemue naturalem, aut alumnum aut paedagogum, aut seruum procuratoris habendi gratia, aut ancillam matrimonii causa apud[2] consilium manumittat.

[IIII. De consilio adhibendo.[3]]

20. Consilium autem adhibetur in urbe Roma quidem quinque senatorum et quinque equitum Romanorum [puberum][4]; in prouinciis autem uiginti recuperatorum ciuium Romanorum, idque fit ultimo die conuentus; sed Romae certis diebus apud consilium manumittuntur. maiores uero triginta annorum serui semper manumitti solent, adeo ut uel in transitu manumittantur, ueluti cum praetor aut pro consule in balneum uel in theatrum eat. **21.** Praeterea, minor triginta annorum seruus manumissus[5] potest ciuis Romanus fieri, si ab eo domino qui soluendo non erat testamento
V p. 5 eum liberum et heredem relictum *alius | heres nullus excludit.*[6] . . .

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[1] V2. The numbering has begun to go wrong.

[2] *apud* interlined by V2. *apud consilium* gloss according to Kniep.

[3] V2. *IIII* (Goeschen) no longer legible.

[4] *puberum*: gloss according to Krüger. *recuperatorum* Hartmann. *equo publico* Karlowa.

[5] *mm* V. *manumissus* Kübler; gloss Krüger.

[6] Mommsen's conjecture; sense practically certain: cf. Ulp. 1, 14. Nothing can be made of V p. 5: cf. Apogr. and Suppl. xx. Presumably Gaius, having disposed of the first of the three conditions stated in § 17, now proceeded to the other two—Quiritary title and solemnity of form. It is to this lost passage that 3, 56 almost certainly, and 1, 126 probably, refer. Cf. Ulp. 1, 10 sq. 14. Dosith. 5, 6. Theoph. 1, 5, 4 (Ferrini 26). Epit. 1, 1, 2: *Latini sunt qui aut per epistolam aut inter amicos aut conuiuii adhibitione manumittuntur.*

in the full ownership of their masters, never become either Roman citizens or Latins, but are always ranked as *dediticii*.

16. On the other hand, a slave not so disgraced becomes on manumission sometimes a Roman citizen and sometimes a Latin. **17.** A slave in whom these three conditions are united—that he be over 30 years of age, that he be the Quiritary property of his master, and that he be set free by lawful and statutory manumission (that is *uindicta* or by the census or by will), becomes a Roman citizen; but if any of these conditions is lacking, he will be a Latin.

18. The requirement as to the age of the slave was introduced by the *L. Aelia Sentia*, which provided that slaves manumitted below 30 should not become Roman citizens except if freed *uindicta* after proof of adequate motive for the manumission before a *consilium* (council). **19.** There is adequate motive where, for instance, a man manumits before a *consilium* his natural son or daughter, or his natural brother or sister, or his foster-child, or his children's teacher, or a slave whom he wants as *procurator* (business agent), or a female slave whom he intends to marry.

20. The *consilium* is composed in the city of Rome of 5 senators and 5 Roman *equites* (knights); in the provinces of 20 *recuperatores* being Roman citizens. (In the provinces) it sits on the last day of the assizes, but at Rome manumissions before the *consilium* take place on fixed days. On the other hand, slaves above 30 can be manumitted at any time; indeed, manumissions may take place even in the street, for instance when the praetor or proconsul is on his way to the baths or the theatre. **21.** Furthermore, a slave under 30 can become a Roman citizen by manumission where he has been declared free and left heir by the will of an insolvent master, provided that he is not excluded by another heir. . . .

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§ 17. Cf. Ulp. 1, 6 sq. 16. Inst. 1, 5, 3 in fin. § 18. Cf. G. 1, 29 sq.; 2, 276. § 19. Cf. G. 1, 39. § 20. Cf. G. 1, 38. *maiores uero*: Inst. 1, 5, 2 fin. § 21. Cf. G. 2, 154. 276. Inst. 1, 6, 1.

V p. 6 **22.** . . . / homines Latini Iuniani appellantur; Latini ideo, quia adsimulati sunt Latinis coloniariis; Iuniani ideo, quia per legem Iuniam libertatem acceperunt, cum olim serui uiderentur esse. **23.** Non tamen illis permittit lex Iunia uel ipsis testamentum facere uel ex testamento alieno capere uel tutores testamento dari. **24.** Quod autem diximus ex testamento eos capere non posse ita intellegemus, ne quid [indirecto][1] hereditatis legatorumue nomine eos posse capere dicamus. alioquin per fideicommissum capere possunt.

25. Hi uero qui dediticiorum numero sunt nullo modo ex testamento capere possunt, non magis quam quilibet peregrinus; quin[2] nec ipsi testamentum facere possunt secundum id quod magis[3] placuit. **26.** Pessima itaque libertas eorum est qui dediticiorum numero sunt, nec ulla lege aut senatusconsulto aut constitutione principali aditus illis ad ciuitatem Romanam datur. **27.** Quin etiam in urbe Roma uel intra centesimum urbis Romae miliarium morari prohibentur, et si qui contra ea fecerint, ipsi bonaque eorum publice uenire iubentur ea condicione, ut ne in urbe Roma uel intra centesimum urbis Romae miliarium seruiant, neue umquam manumittantur; et si manumissi fuerint, serui populi Romani esse iubentur. et haec ita lege Aelia Sentia comprehensa sunt.

[*Quibus modis* Latini ad ciuitatem Romanam perueniant.[4]]

V p. 7 **28.** / Latini uero multis modis ad ciuitatem Romanam perueniunt. **29.** Statim enim ex lege Aelia Sentia [cautum est ut][5] minores triginta annorum manumissi et Latini facti si uxores duxerint uel ciues Romanas uel Latinas coloniarias uel eiusdem condicionis cuius et ipsi essent, idque testati fuerint adhibitis non minus quam septem testibus ciuibus Romanis puberibus, et filium procreauerint, cum is filius anniculus esse coeperit, datur eis potestas per eam legem adire praetorem uel in prouinciis praesidem prouinciae, et adprobare se ex lege Aelia Sentia uxorem duxisse et ex ea filium anniculum habere. et si is apud quem causa probata est id ita esse pronuntiauerit, tunc et ipse Latinus et uxor eius, si et ipsa ⟨*eiusdem condicionis sit, et filius, si et ipse*⟩[6] eiusdem condicionis sit,

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[1] Gloss according to Mommsen. *directo* Krüger. *inde directo* Kübler—tempting. [2] So Kübler. *quia* Vn. om. Krüger.
[3] *mgn* V. *magis* generally. *magis nunc* Kniep. [4] V2.
[5] This accepted exclusion regularizes *datur* below. Cf., however, 1, 13, 40, &c.
[6] Mommsen, and generally.

22. . . . such persons are called Junian Latins, Latins because they are assimilated to colonial Latins, Junian because they owe their freedom to the *L. Iunia*, whereas previously they were ranked as slaves. **23.** The *L. Iunia* does, however, not enable them either to make a will themselves or to take under, or be appointed tutors by, another's will. **24.** Our statement, that they are incapable of taking under a will, is, however, to be understood as meaning that they cannot take directly, by way of inheritance or legacy; for indirectly, by means of a *fideicommissum* (trust), they can take.

25. But by no method can those in the class of *dediticii* take by will any more than any other *peregrinus*, nor, according to the prevailing doctrine, can they make a will themselves. **26.** Thus the freedom of those classed as *dediticii* is the lowest; nor are they allowed admission to Roman citizenship by any *lex*, senatusconsult, or imperial constitution. **27.** Moreover, they are forbidden to reside in the city of Rome or within the hundredth milestone from Rome, and any who contravene this prohibition are ordered to be sold by the State with all their property, subject to the proviso that their servitude is not to be in the city of Rome or within the hundredth milestone, and that they are never to be manumitted; if they are manumitted, they are to be slaves of the Roman people. These provisions are contained in the *L. Aelia Sentia.*

28. Latins, however, attain to Roman citizenship by many methods. **29.** To begin with, under the *L. Aelia Sentia*, if a slave who has been manumitted under 30 and so become a Latin takes to wife either a Roman citizen or a colonial Latin or a woman of the same status as his own and has the fact attested by not less than 7 witnesses (Roman citizens, above puberty), then, if he begets a son, he is empowered by the statute, on the son becoming one year old, to go before the praetor, or in a province before its governor, and prove that he took a wife under the *L. Aelia Sentia* and has a year-old son by her. And if the magistrate before whom the case is proved finds that the case is as stated, then both the Latin himself and his wife, if she too be of the same status, and likewise the son, if he too be of the same status, are by the statute

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§ 22. Cf. G. 3, 56. Ulp. 1, 10. Dosith. 5, 6. §§ 23–4. Cf. G. 2, 110. 275; 3, 72–3. Ulp. 20, 14. § 25. Cf. G. 1, 13. 15; 2, 285; 3, 75. Ulp. 20, 14. § 26. Cf. G. 1, 67 fin. § 27. Cf. G. 1, 160? § 28. Cf. Ulp. 3, 1. §§ 29–30. Cf. G. 1, 66. 73. 80; 3, 5. 73.

ciues Romani esse iubentur. **30.** Ideo autem in *persona filii*[1] adiecimus 'si et ipse eiusdem condicionis sit', quia, si uxor Latini ciuis Romana est, qui ex ea nascitur, ex nouo senatusconsulto, quod auctore diuo Hadriano factum est, ciuis Romanus nascitur. **31.** Hoc tamen ius adipiscendae ciuitatis Romanae etiamsi so*li* minores triginta annorum manumissi et Latini facti ex lege Aelia Sentia habuerunt, tamen postea senatusconsulto, quod Pegaso et Pusione consulibus factum est, etiam maioribus triginta annorum manumissis Latinis factis concessum est. **32.** Ceterum, etiamsi ante decesserit Latinus quam anniculi filii causam pro-
V p. 8 barit,[2] potest mater eius causam probare, et sic et ipsa fiet / ciuis Romana, si Latina fuerit, . . . *quamuis enim* iam[3] ipse filius ciuis Romanus sit, quia ex ciue Romana matre natus est, tamen debet causam probare, ut suus heres patri fiat. **32a.** ⟨*Quae*⟩ uero diximus de filio annicul⟨*o, eadem et de filia annicula*⟩[4] dicta intellegemus. **32b.** *Praeterea, ex lege Uisellia, tam maiores quam minores XXX annorum manumissi et Latini facti ius Quiritium adipiscuntur*,[5] id est fiunt ciues Romani, si Romae inter uigiles sex annis militauerint. postea dicitur factum esse senatusconsultum quo data est illis ciuitas Romana si triennium militiae expleuerint. **32c.** Item, edicto Claudii, Latini ius Quiritium consequuntur si nauem marinam aedificauerint quae non minus quam X milia modior*um frumenti*[6] capi*at*, eaque nauis, uel quae in eius locum substituta *sit*, *sex*[6] annis frumentum Romam portauerit. **33.** Praeterea, *a Nero*ne *constitutum est* ut, si Latinus, qui patrimoni*um* sestertium CC milium plurisue habebit, in urbe Roma dom*um* aedificauerit, in qu*am* non minus quam partem dimidi*am* patrimonii sui impenderit, ius Quiritium consequatur. **34.** Denique, Traianus constituit ut, si *Latinus* in urbe tr*ien*nio pistrinum exercuerit, *quod in*[7] dies singulos non minus quam centenos m*odios* frumenti *pinseret*,[8] ad ius Quiri-
V p. 9 tium peruen*i/at*. . . . **35.** *Praeterea possunt*[9] maiores triginta

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[1] So Kübler. *in huius persona* Krüger.

[2] So corrected by V2. *probauerit* Krüger.

[3] Kniep's conjecture for the end of rather more than 2 illegible lines. Cf. Suppl. xx.

[4] Cf. 1, 72.

[5] Huschke's conjecture for two illegible lines. Rather long, since there seems also to have been a rubric. Cf. Ulp. 3, 5.

[6] Cf. Ulp. 3, 6.

[7] So Huschke–Kübler. *in quo in* Krüger.

[8] But see Apogr. and Suppl. xxi. Kniep *frangeret*.

[9] All that can be read in the first 3 lines of V p. 9 is *sequi* in the middle of the third. The topics may have been acquisition of *ciuitas beneficio principali* and, under *SC.*, by *mulier ter enixa* (Ulp. 3, 1).

ordained to be Roman citizens. **30.** The reason why in referring to the son we have added 'if he too be of the same status' is that if the Latin's wife is a Roman citizen, the son born of her is, under a recent senatusconsult made on the authority of the late emperor Hadrian, a Roman citizen from birth. **31.** This right of obtaining Roman citizenship, though by the *L. Aelia Sentia* it was conferred only on those who became Latins on manumission owing to being under 30, was later, by a senatusconsult passed in the consulship of Pegasus and Pusio, granted to persons becoming Latins on manumission over 30. **32.** Even if the Latin dies before having proved the case of a year-old son, the mother can prove it, and thereby she will both become a Roman citizen herself, if she was previously a Latin, *and so will the son* . . . and even though the son himself be already a Roman citizen, because born of a Roman mother, she ought still to prove his case, in order that he may become *suus heres* to his father. **32a.** What we have said of a year-old son is to be taken to apply equally to a year-old daughter. **32b.** Further, under the *L. Visellia*, persons becoming Latins by manumission, whether above or below 30, acquire Quiritary status, i.e. become Roman citizens, by 6 years' service in the police at Rome. A senatusconsult is said to have been passed later giving them citizenship on completion of 3 years' service. **32c.** Also, by an edict of Claudius, Latins obtain Quiritary status if they have built a sea-going ship of a capacity of not less than 10,000 measures of corn, which ship, or one substituted for it, has carried corn to Rome for 6 years. **33.** Further, it has been enacted by Nero that a Latin having a fortune of 200,000 sesterces or more, who builds a house in the city of Rome on which he spends not less than half his fortune, is to obtain Quiritary status. **34.** Lastly, Trajan has enacted that a Latin who for 3 years has worked a mill in the city which grinds not less than 100 measures of corn daily is to attain Quiritary status. . . . **35.** Furthermore, persons manumitted above

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§ 31. *Pegaso et Pusione consulibus*: Inst. 2, 23, 5 'Uespasiani temporibus'. Cf. G. 2, 254. § 32. Cf. G. 2, 142–3; 3, 5. § 32b. *ex lege Uisellia* (A.D. 24): so Ulp. 3, 5. § 33. Cf. Tac. ann. 15, 43.

annorum manumissi et Latini facti *iteratione*[1] ius Quiritium consequi. quo . . .[2] *tri*ginta annorum manumittant . . .[3] manumissus uindicta aut censu aut testamento *et ci*uis Romanus *et eius* libertus fit q*ui manumissionem* iterauerit.[4] ergo, si seruus i*n* bonis tuis, ex iure Quiritium meus erit, Latinus quidem a te solo fieri potest, iterari autem a me, non etiam a te potest, et eo modo meus libertus fit. s*ed* et ceteris modis ius Quiritium consecutus meus libertus fit. bonorum autem quae . . . *cum* is morietur reliquerit, tibi possessio datur, quocumque modo ius Quiritium fuerit consecutus. quod si cui*us* et in bonis et ex iure Quiritium sit, manumissus ab eodem scilicet et Latinus fieri potest et ius Quiritium consequi.

36. *Non tamen cuicumque uolenti manumittere licet.* **37.** *Nam is qui*[5] in fraudem creditorum uel in fraudem patroni manumittit, nihil agit, quia lex Aelia Sentia impedit libertatem. **38.** Ite*m*, eadem lege minori XX annorum domino non aliter manumittere permit-
V p. 10 titur quam si uindicta apud con/silium iusta causa manumissionis adprobata fuerit.[6] **39.** Iustae autem causae manumissionis sunt ueluti si quis patrem aut matrem aut paedagogum aut conlactaneum manumittat. sed et illae causae quas superiu*s* in seruo minore XXX annorum exposuimus ad hunc quoque casum de quo loquimur adferri possunt. item, ex diuerso, hae causae quas in minore XX annorum domino rettulimus porrigi possunt et ad seruum minor*em* XXX annorum. **40.** Cum ergo certus modus manumittendi minoribus XX annorum dominis per legem Aeliam Sentiam constitutus sit, euenit ut qui XIIII annos aetatis expleuerit, licet testamentum facere possit et in eo herede*m* sibi instituere legataque relinquere possit, tamen si adhuc minor sit annorum XX, libertatem seruo dare non po*ssit*.[7] **41.** Et quamuis Latinum facere uelit minor XX annorum dominus, tamen nihilominus debet apud consilium causam probare, et ita postea inter amicos manumittere.

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[1] Cf. Ulp. 3, 4.

[2] Nearly half a line illegible. [3] About 1½ lines illegible.

[4] Studemund's conjecture. Generally *qui eum iterauerit*. V *qcumitauerit*.

[5] Besides the italicized text (restored from Inst. 1, 6 pr.), lines 19 and 20 of V p. 9, now vacant, seem to have contained a title.

[6] Confirmed on the whole by Inst. 1, 6, 4, but *si*, *uindicta*, and *fuerit* are excluded as gloss by this or that great authority.

[7] *potest* V. Usually corrected, but cf. 1, 13; 29, &c.

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§ 35. *iteratione*: Ulp. 3, 4. *in bonis*: G. 1, 17. 54, &c. *bonorum possessio*: G. 3, 55 sq. §§ 36–7. = Inst. 1, 6 pr. Cf. G. 1, 47. 139. § 38. = Inst. 1, 6, 4. § 39. Cf. G. 1, 19. Inst. 1, 6, 5. § 40. = Inst. 1, 6, 7 init. Cf. G. 2, 113. Nou. 119, c. 2 (A.D. 544). § 41. *inter amicos*: cf. G. 1, 22. 44. Ulp. 1, 10. Dosith. 4 sq. 14.

30 and having become Latins can obtain Quiritary status *by repetition of the manumission, as can those manumitted under 30 on their reaching the age of 30. In every case a Junian Latin above 30, whose manumission is repeated by his Quiritary owner* by means of *uindicta*, the census, or will, becomes a Roman citizen and the freedman of him who has performed the second manumission. Thus, if a slave is yours by bonitary title, but mine by Quiritary, he can be made a Latin by your sole act, but the second manumission can be performed only by me, not by you, and by it he becomes my freedman. Indeed, if he obtains Quiritary status in any of the other ways, he becomes my freedman. But possession of the property left by him at death is granted to you, whatever be the way in which he had obtained Quiritary status. If, however, he belongs by both bonitary and Quiritary title to the same owner, he can both become a Latin and attain Quiritary status by being manumitted by that owner.

36. Not everyone who wishes to manumit is allowed to do so. **37.** For if a man manumits in order to defraud his creditors or his patron, his act is void, because the *L. Aelia Sentia* prevents the liberation. **38.** By the same *lex* also a master under 20 is not permitted to manumit except *uindicta* and with adequate motive for manumission shown before a council. **39.** There is adequate motive for manumission where, for instance, a master manumits his father or mother, or his teacher or foster-brother. Moreover, the motives we mentioned above in the case of a slave manumitted under 30 may be adduced in the present case, just as, conversely, those we have specified for the case of a master under 20 may be applied also to that of a slave under 30. **40.** A limitation being thus imposed by the *L. Aelia Sentia* on manumissions by masters under 20, the result is that, though a master who has reached the age of 14 can make a will and therein institute an heir and leave legacies, he cannot (therein) grant freedom to a slave. **41.** And though the master under 20 is seeking to make his slave a Latin, he must nevertheless show adequate motive before a council, and only then manumit before friends (informally).

42. Praeterea lege Fufia Caninia certus modus constitutus est in seruis testamento manumittendis. **43.** Nam ei qui plures quam duos neque plures quam decem seruos habebit, usque ad partem dimidiam eius numeri manumittere permittitur; *e*i uero qui plures /
V p. 11 quam X neque plures quam XXX seruos habebit, usque ad tertiam partem eius n*u*meri manumittere permittitur. at ei qui plures quam XXX neque plures quam centum habebit, usque ad partem quartam potestas manumittendi *d*atur. nouissime, ei qui plures quam C nec plures quam D habebit, non plures [ei] manumittere permittitur quam [ut] quintam partem; neque plures ⟨*manumittendi ei qui plures quam D habebit potestas d*⟩atur;[1] sed p*rae*scribit[2] lex ne cui plures manumittere liceat quam *C*. quodsi quis unum seruum omnino *a*ut duos habet, ad hanc legem non pertinet, et ideo libera*m* habet potestatem manumittendi. **44.** Ac ne ad eos quidem omnino haec lex pertinet qui sine testam*ento* manumittun*t*. itaque licet iis qui uindicta aut censu aut inter amicos manumittunt, totam familiam[3] liberare, scilicet si alia causa non impediat libertatem. **45.** S*ed* qu*od* de numero seruorum testamento manumittendorum diximus ita intellegemus, ne umquam ex eo numero, ex quo dimidia aut tertia aut quarta aut quinta pars liberari potest, *pauci*ores m*anumittere* liceat quam ex antecedenti numero licuit. et hoc ipsa *lege* p*r*ouisum[4] est: erat enim sane a*b*surdum ut X seruorum domino quinque liberare liceret, quia usque ad dimidiam partem eius numeri manumittere ei concedit*ur*, XII seruos habenti
V p. 12 non plures liceret manum*it*tere quam IIII, at eis qui plures quam
V p. 13 X neque / . . . . . .[5] / **46.** Nam et si t*estamento* scriptis in orbem seruis libertas data sit, quia nullus ordo manumissionis inuenitur, nulli liberi erunt, quia lex Fufia Caninia quae in fraudem eius facta sint rescindit. sunt etiam specialia senatusconsulta quibus rescissa sunt ea quae in fraudem eius legis excogitata sunt.

47. In summa sciendum est, ⟨*quod*⟩[6] lege Aelia Sentia cautum sit *u*t creditorum fraudandorum causa manumissi liberi non fiant, *hoc etiam*[7] ad peregrinos pertinere (senatus ita censuit ex auctoritate Hadriani),[8] cetera uero iura eius legis ad peregrinos non pertinere.

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[1] Kniep's conjecture. There are others.
[2] *postscribit* V. Defended by Kniep.
[3] V2 interlines *suam* after *familiam*. Kept by Kübler; om. Krüger.
[4] Cf. Suppl. xxii. *ratione prouisum* Polenaar–Kübler.
[5] V p. 12 is illegible. It probably gave further details as to the *L. Fufia Caninia*: cf. Epit. 1, 2, 2. 3.
[6] *quod* Kübler. ⟨*cum*⟩ Krüger.
[7] *etiam hoc* V.
[8] Gloss according to Mommsen, followed by Kübler.

42. Furthermore, a limitation has been set on the manumission of slaves by will by the *L. Fufia Caninia*. **43.** For a master who has more than 2 and not more than 10 slaves is allowed to manumit up to half their number; one who has more than 10 and not more than 30 is allowed to manumit up to a third; one who has more than 30 and not more than 100 is allowed to manumit up to a quarter; lastly, one who has more than 100 and not more than 500 is allowed to manumit not more than a fifth; nor is he allowed, even if he has more than 500, to manumit any more, the *lex* enacting that no one may manumit more than 100. On the other hand, a master who has only one or two slaves is not affected by this *lex*, and consequently has unrestricted power of manumission. **44.** Nor has the *lex* any application to masters manumitting otherwise than by will. Hence a master manumitting *uindicta* or by the census or before friends (informally) is allowed to free his whole household, provided of course that there be no other impediment to their freedom. **45.** The rules we have stated with regard to the number of slaves who may be manumitted by will must be taken with the qualification that, where only half or a third or a fourth or a fifth of the actual number may be manumitted, it is always permissible to manumit not fewer than could have been manumitted under the preceding scale. This is laid down by the *lex* itself, for it would indeed have been absurd that a master of 10 slaves should be allowed to manumit 5, as being allowed to manumit up to half, whereas a master of 12 should not be allowed to manumit more than 4; on the contrary, one who has more than 10, *but less than 15, may manumit 5, though this exceeds a third of his actual number* . . . . . **46.** Similarly, if the names of the slaves manumitted by the will are written in a circle, none of them will be freed, since no order of manumission is discoverable. For the *L. Fufia Caninia* and also certain special senatusconsults nullify anything contrived to evade the *lex*.

47. Finally it is to be noted that the provision of the *L. Aelia Sentia* nullifying manumissions in fraud of creditors applies also to *peregrini* (so ruled by the senate on the authority of Hadrian), but that its other provisions do not apply to them.

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§§ 42–5. Cf. Inst. 1, 7. G. 1, 139; 2, 228. 239. *L. Fuf. C.* 2 B.C.
§ 46. Cf. Epit. 1, 2, 2–4. § 47. Cf. G. 1, 37; 4, 37.

48. Sequitur de iure personarum alia diuisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae. **49.** Sed[1] rursus, earum personarum quae alieno iuri subiectae sunt aliae in potestate, aliae in manu, aliae in mancipio sunt. **50.** Uideamus nunc de iis quae alieno iuri subiectae sint. ⟨nam⟩[2] si cognouerimus quae istae personae sint,[3] simul intellegemus quae sui iuris sint. **51.** Ac prius dispiciamus de iis qui in aliena potestate sunt.

52. In potestate itaque sunt serui dominorum. quae quidem potestas iuris gentium est. nam apud omnes peraeque gentes animaduertere possumus dominis in seruos uitae necisque potestatem esse, et quodcumque per seruum adquiritur, id domino
V p. 14 adquiritur. **53.** Sed hoc tempore neque ciuibus / Romanis nec ullis aliis hominibus, qui sub imperio populi Romani sunt, licet supra modum et sine causa in seruos suos saeuire. nam, ex constitutione sacratissimi[4] imperatoris Antonini, qui sine causa seruum suum occiderit non minus teneri iubetur quam qui alienum seruum occiderit. sed et maior quoque asperitas dominorum per eiusdem principis constitutionem coercetur. nam consultus a quibusdam praesidibus prouinciarum de his seruis qui ad fana deorum uel ad statuas principum confugiunt, praecepit ut, si intolerabilis uideatur dominorum saeuitia, cogantur seruos suos uendere. et utrumque recte fit: [regula:][5] male enim nostro iure uti non debemus; qua ratione et prodigis interdicitur bonorum suorum administratio. **54.** Ceterum cum apud ciues Romanos duplex sit dominium (nam uel in bonis uel ex iure Quiritium uel ex utroque iure cuiusque seruus esse intellegitur), ita demum seruum in potestate domini esse dicemus, si in bonis eius sit, etiamsi simul ex iure Quiritium eiusdem non sit. nam qui nudum ius Quiritium in seruo habet, is potestatem habere non intellegitur.

55. Item in potestate nostra sunt liberi nostri quos iustis nuptiis procreauimus. quod ius proprium ciuium Romanorum est. fere enim nulli alii sunt homines qui talem in filios suos habent pote-
V p. 15 statem qualem nos habemus. idque diuus Hadrianus,[6] edicto quod

[1] So Kübler. *s̄ subiectae s rursus* V. *subiectae sunt. Rursus* Krüger, with Inst. 1, 8 pr. *subiectae sunt* D. 1, 6, 1 pr.

[2] *nam* Inst. D. [3] *s* V. *sint* Inst. *sunt* D.

[4] *sacratissimi*: extended from *s* by Kübler. See, however, Apogr. 300.

[5] This word is evidently gloss. Cf. 3, 113 init.; 126. 4, 24 fin. (?).

[6] So Krüger. *diui Hadriani* V. Alternatively, with Kübler, correct *significauit* below to *significatur.*

§§ 48–51. = Inst. 1, 8 pr. (D.). § 52. = Inst. 1, 8, 1 (D.). *quodcumque per seruum*: G. 2, 86 sq.; 3, 164 sq.; 4, 134. § 53. = Inst. 1, 8, 2 (D.).

48. Next comes another division in the law of persons. For some persons are *sui iuris* (independent) and others are *alieni iuris* (dependent on another). **49.** Again, of those *alieni iuris* some are in *potestas*, others in *manus*, and others in *mancipium*. **50.** Let us consider first persons *alieni iuris*; for, knowing these, we shall at the same time know who are *sui iuris*. **51.** And first let us consider persons in another's *potestas*.

52. Slaves are in the *potestas* of their masters. This *potestas* is *iuris gentium*, for it is observable that among all nations alike masters have power of life and death over their slaves, and whatever is acquired through a slave is acquired for his master. **53.** But at the present day neither Roman citizens nor any other persons subject to the rule of the Roman people are allowed to treat their slaves with excessive and causeless harshness. For by a constitution of the late emperor Antoninus it is laid down that one who without cause kills his own slave is as much amenable to justice as one who kills another's. And even excessive severity on the part of masters is restrained by a constitution of the same emperor; for, on being consulted by certain provincial governors as to slaves who take refuge at the temples of the gods or the statues of the emperors, he ordained that masters whose harshness is found to be unbearable are to be forced to sell their slaves. Both enactments are just, for we ought not to abuse our lawful right—the principle under which prodigals are interdicted from administering their own property. **54.** But whereas among Roman citizens there is double ownership (for a slave may belong to a master by bonitary or by Quiritary title, or by both), a slave is held to be in the *potestas* of the master who has the bonitary title to him, even though he have not also the Quiritary. For one who has the bare Quiritary title to a slave is not considered to have *potestas* over him.

55. Also in our *potestas* are the children whom we beget in *iustae nuptiae* (civil marriage). This right is peculiar to Roman citizens; for scarcely any other men have over their sons a power such as we have. The late emperor Hadrian declared as much in

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sine causa: 'legibus cognita' add. Inst. D. Cf. G. 3, 213. Further details: Coll. 3, 2. 3. § 54. Cf. G. 1, 17. 35; 2, 40. 88; 3, 166. Ulp. 1, 16. § 55. = Inst. 1, 9 pr. (D.). Cf. G. 1, 64. 93 sq. 128. 189; 2, 135a; 3, 20. *Galatarum*: Caes. bell. Gall. 6, 19, 3.

proposuit de his qui sibi liberisque suis ab eo ciuitatem Romanam petebant, significauit.[1] nec me praeterit Galatarum gentem credere in potestate parentum liberos esse.

56. *Itaque liberos suos in potestate habent ciues Romani*,[2] si ciues Romanas uxores duxerint, uel etiam Latinas peregrinasue cum quibus conubium habeant. cum enim conubium id efficiat, ut liberi patris condicionem sequantur, euenit ut non ⟨*solum*⟩ ciues Romani fiant, sed et*iam* in potestate patris sint. **57.** Unde *et*[3] ueteranis quibusdam concedi solet principalibus constitutionibus conubium cum his Latinis peregrinisue, quas primas p*ost* missionem uxores duxerint; et qui ex eo matrimonio nascuntur et ciues Romani et in potestate parentum fiunt.

58. *Nec tamen omnes nobis uxores ducere licet*;[4] nam a quarundam nuptiis abstinere debemus. **59.** Inter eas enim personas quae parentum liberorumue l*ocum* inter se optinent nuptiae contrahi non possunt, nec inter eas conubium est, ueluti inter patrem et filiam, uel inter matrem et filium, uel inter auum et neptem, ⟨*uel inter auiam et nepotem.*⟩[5] et si tales personae inter se coierint,
V p. 16 nefarias / et incestas nuptias contraxisse dicuntur. et haec adeo ita sunt ut, quamuis per adoptionem parentum liberorumue loco sibi esse coeperint, non poss*int*[6] inter se matrimonio coniungi; in tantum ut etiam dissoluta adoptione idem iuris maneat. itaque eam quae mihi per adoptionem filia*e seu* neptis loco esse coeperit non potero *uxorem* ducere, quamuis eam emancipauer*im*. **60.** Inter eas quoque personas quae ex transuerso gradu cognatione iunguntur est quaedam similis obseruatio, sed non tanta. **61.** Sane inter fratrem et sororem prohibitae sunt nuptiae, siue eodem patre eademque matre nati fuerint siue alterutro eorum; sed si qua per adoptionem soror mihi esse coeperit, quamdiu quidem const*at* adoptio, sane inter me et eam nuptiae non possunt consistere; cum uero per emancipationem adoptio dissoluta sit, potero eam uxorem ducere; sed et si ego emancipatus fuero, nihil im*pe*dimento

[1] See p. 16, n. 6.

[2] Two vacant lines. Traces of red, indicating rubric. Text as conjectured by Krüger.

[3] *undcc* V. Polenaar: *unde causa cognita.*

[4] Two vacant lines, showing traces of red indicating a title. Text from Inst. 1, 10, 1. Polenaar: *omnes ciues Romanas.*

[5] Inserted by Kniep and Kübler from Epit. 1, 4, 1 and Inst. 1, 10, 1.

[6] *possunt* V. Cf. supra 1, 40, &c.

§ 56. Cf. Inst. 1, 10 pr. G. 1, 67. 76 sq. 88. Ulp. 5, 2. § 57. Cf. diplomata militum: Textes 124. Bruns 1, 274. Riccobono, Fontes 1, 223. §§ 58–61. = Inst. 1, 10, 1. 2.

the edict he issued concerning those who petitioned him for citizenship for themselves and their children. I am not forgetting that the Galatians regard children as being in the *potestas* of their parents.

56. Thus Roman citizens have their children in their *potestas* if they take to wife Roman women, or even Latin or peregrine women with whom they have *conubium* (power to contract civil marriage). For, as the effect of *conubium* is that the children take the same status as their father, the result is that the children are not only Roman citizens, but are also in their father's *potestas*. **57.** Hence it is the practice by imperial constitution to grant to certain veterans *conubium* with the first Latin or peregrine women whom they take to wife after their discharge; children born of such a marriage become Roman citizens and in the *potestas* of their parents.

58. It is not, however, every woman whom we may take to wife, but there are some whom we must abstain from marrying. **59.** For no marriage can be contracted, and there is no *conubium*, between persons standing to each other in the relation of ascendant and descendant, for instance between father and daughter, mother and son, grandfather and granddaughter, grandmother and grandson. Persons so related who form a union are considered to have contracted a wicked and incestuous marriage. This principle is so strict that, though the relation of ascendant and descendant have come about only through adoption, they cannot be joined in matrimony; nay, even if the adoption has been dissolved, the legal position remains unaltered. Hence I cannot take to wife a woman who has come into the position of a daughter or granddaughter to me by adoption, even though I have subsequently emancipated her. **60.** Between persons collaterally related similar, but less stringent, rules obtain. **61.** Between brother and sister, whether born of the same two parents or having only one parent in common, marriage is of course forbidden. But where a woman has become my sister by adoption, though, so long as the adoption stands, there can clearly be no marriage between me and her, yet after the adoption has been dissolved by her emancipation I may take her to wife; or again, if I myself have been emancipated, there will be

erit nuptiis. **62.** Fratris filiam uxorem ducere licet, idque primum in usum uenit cum diuus Claudius Agrippinam fratris sui filiam uxorem duxisset. sororis uero filiam uxorem ducere non licet. et
V p. 17 haec ita principalibus co*n*stitutionibus significantur. **63.** / Item amitam et materteram uxorem ducere non licet; item eam quae mihi quondam socrus aut nurus aut priuigna aut nouerca fuit. ideo autem diximus 'quondam', quia, si adhuc constant eae nuptiae per quas talis adfinitas quaesita est, alia ratione mihi nupta esse non potest, quia neque eadem duobus nupta esse potest neque idem duas uxores habere. **64.** Ergo, si quis nefarias atque incestas nuptias contraxerit, neque uxorem habere uidetur neque liberos. itaque hi qui ex eo coitu nascuntur matrem quide*m* habere uidentur, patrem uero non utique; nec ob id in potestate eius ⟨*sunt, sed tales*⟩[1] sunt quales sunt ii quos mater uulgo conceptit; nam et hi patrem habere non intelleguntur, cum *i*s et*iam* incertus sit. unde solent spurii filii appellari, uel a Graeca uoce qu*a*si σποράδην[2] concepti, uel quasi sine patre filii.

65. *Aliquando autem euenit ut liberi, qui statim ut nat*i[3] sunt parentum in potestate non fiant, ii postea tamen redigantur in potestatem. **66.** *Ueluti si Lati*nus ex lege Aelia Sentia uxore ducta filium procreauerit aut Latinum ex Latina aut ciuem Romanum ex ciue Romana, non habebit eum in potestate; *sed si postea causa pro*bata *ius Quiritium* con*secutus fuerit*,[4] simul [ergo] cum in pote-
V p. 18 state / sua habere incipit. **67.** Item, si ciuis Romanus Latinam aut peregrinam uxorem duxerit per *i*gnorantiam, cum eam ciuem Romanam esse crederet, et filium procreauerit, hic non est in potestate eius, quia ne qu*i*dem ciuis Romanus est, sed aut Latinus aut peregrinus, id est eius condicionis cuius et mater fuerit, quia non aliter quisque ad patris condicionem accedit quam si inter patrem et matrem eius conubium sit; sed ex senatusconsulto permittitur causam erroris probare, et ita uxor quoque et filius ad ciuitatem Romanam perueniunt, et ex eo tempore incipit filius in potestate patris esse. idem iuris est si eam per ignorantiam

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

§ 62. Cf. Inst. 1, 10, 3. 4. *Claudius*: Tac. ann. 12, 5 sq. Suet. Claud. 26. § 63. Cf. Inst. 1, 10, 5–7. Cic. p. Cluent. 5, &c. § 64. Cf. Inst. 1, 10, 12. G. 1, 92. § 65. = Inst. 1, 10, 13 init. § 66. Cf. G. 1, 29, &c. Ulp. 7, 4. § 67. Cf. G. 2, 142; 3, 5. 73. *misi quod uxor*: G. 1, 15. 26 in fin. 68.

no impediment to our marriage. **62.** A man may lawfully marry his brother's daughter, a practice first introduced after the late emperor Claudius married Agrippina, his brother's daughter. But to marry one's sister's daughter is unlawful. These rules are declared by imperial constitutions. **63.** Also, I may not marry my aunt, paternal or maternal, nor yet a woman who has been my mother-in-law or daughter-in-law, or my stepdaughter or stepmother. We say 'has been' because, if the marriage through which the affinity has arisen still subsists, there is another reason why she cannot become my wife, namely that a woman cannot have two husbands at the same time nor a man two wives. **64.** Accordingly, one who has contracted a wicked and incestuous marriage is considered to have neither wife nor children. Hence the offspring of such a union are considered to have a mother, but no father; consequently they are not in his *potestas*, but are in the position of children whom their mother has conceived in promiscuous intercourse, these likewise being considered to have no father, since even his identity is uncertain. Hence they are termed spurious children, a word derived either from the Greek word σποράδην, describing the nature of their conception, or from *sine patre* owing to their being fatherless.

65. It happens sometimes that children who do not come under the paternal *potestas* at birth are subsequently brought under it. **66.** For instance, a Latin who marries under the *L. Aelia Sentia* and begets a Latin or a citizen son, according as the mother is the one or the other, will not hold him in *potestas*, but if afterwards he proves the case and obtains Quiritary status, he thereupon begins to hold him in *potestas*. **67.** Again, if a Roman citizen takes a Latin or a peregrine wife in a mistaken belief that she is a Roman citizen and begets a son, that son is not in his *potestas*: for he is not even a citizen, but either a Latin or a peregrine according to his mother's status, because, except if there be *conubium* between the father and the mother, a child does not take its father's status. But by a senatusconsult the father is allowed to prove a case of mistake, and thereupon both the wife and the son attain to Roman citizenship, and thenceforth the son is subject to his father's *potestas*. The law is the same if by mistake he marries a wife who

uxorem duxerit quae dedi*ti*ciorum numero est, nisi quod uxor non fit ciuis Romana. **68.** Item, si ciuis Romana per errorem nupta sit peregrino tamquam ciui Romano, permittitur ei causam erroris probare, et ita filius quoque eius et maritus ad ciuitatem Romanam perueniunt, et aeque simul incipit filius in potestate patris esse. idem iuris est si peregrino tamquam Latino ex lege Aelia Sentia nupta sit; nam et de hoc specialiter senatusconsulto cauetur. idem iuris est aliquatenus si ei qui dedi*ti*ciorum numero est tamquam ciui Romano aut Latino *e* lege Aelia Sentia nupta sit, nisi quod, scilicet, qui dediticiorum numero est in sua condicione permanet, et ideo filius, quamuis fiat ciuis Romanus, in potestatem patris non redigitur. **69.** Item, si Latina peregrino, cum eum Latinum esse
V p. 19 cre/deret, ⟨*e lege Aelia Sentia*⟩[1] nupserit, potest ex senatusconsulto, filio nato, causam erroris probare, *et ita*[2] omnes fiunt ciues Romani, et filius in potestate patris esse incipit. **70.** Idem constitutum est *e*t si Latinus per errorem peregrinam quasi Latinam aut ciuem Romanam e lege Aelia Sentia uxorem duxerit. **71.** Praeterea, si ciuis Romanus, qui se credidisset Latinum esse, ob id Latinam ⟨*uxorem duxerit*,⟩[3] permittitur ei, filio nato, erroris causam probare, tamquam ⟨*si*⟩ e lege Aelia Sentia uxorem duxisset.[4] item his qui, cum ciues Romani essent, peregrinos se esse credidissent et peregrinas uxores duxissent, permittitur ex senatusconsulto, filio nato, causam erroris probare. quo facto fiet uxor ciuis Romana, et filius[5] . . . non solum *ad ciuit*atem Romanam peruenit, sed etiam in potestatem patris redigitur. **72.** Quaecumque de filio [esse] diximus, eadem et de filia dicta intellegemus. **73.** Et quantum ad erroris causam probandam attinet, nihil interest cuius aetatis filius sit filiaue[6] . . . si minor anniculo sit filius filiaue, causa probari non potest. nec me praeterit in aliquo rescripto diui Hadriani ita esse constitutum tamquam, quod ad erroris quoque causam probandam. . . .[7]

[1] Might be implied.

[2] Three illegible letters. Polenaar: *quo modo.*

[3] So generally, but cf. n. 4.

[4] *duxissent* V. As Huschke saw, the words *tamquam—duxisset* would go better where the words *uxorem duxerit* (n. 3) are generally supplied.

[5] About 7 illegible letters, though the sense requires no more. Girard: *quoque ex ea.*

[6] *filiae* V (Goeschen). For two almost entirely illegible lines Goeschen conjectures: *filiaue, nisi forte eorum aliquis, qui e lege Aelia Sentia matrimonium se contrahere putarint, erroris causam probare uelit; ab hoc enim, si minor,* &c.

[7] The three practically illegible lines perhaps explained why the apparent implication of Hadrian's rescript was not to be accepted.

§ 68. Cf. G. 1, 15. 26. § 73. Cf. G. 1, 29.

is in the class of *dediticii*, except that the wife does not become a Roman citizen. **68.** Again, if a Roman woman marries a peregrine in the mistaken belief that he is a Roman citizen, she is allowed to prove a case of mistake, and in this way both her son and her husband attain to Roman citizenship, and at the same time the son becomes subject to his father's *potestas*. The law is the same if under the *L. Aelia Sentia* she marries a peregrine in the belief that he is a Latin; for this contingency also is expressly provided for by the senatusconsult. Up to a certain point the law is the same where she marries one who is in the class of *dediticii* in the belief that he is a Roman citizen, or a Latin under the *L. Aelia Sentia*, except, of course, that the husband remains in his class of *dediticii*, and consequently the son, though he becomes a Roman citizen, is not brought under his father's *potestas*. **69.** Again, if under the *L. Aelia Sentia* a Latin woman marries a peregrine in the belief that he is a Latin, she can under the senatusconsult, on birth of a son, prove a case of mistake, whereupon they all become Roman citizens and the son comes under his father's *potestas*. **70.** The same has been laid down also for the case of a Latin marrying a peregrine woman under the *L. Aelia Sentia* in the belief that she is a Latin or a Roman citizen. **71.** Furthermore, if a Roman citizen, believing himself to be a Latin, for that reason marries a Latin woman, he is allowed, on birth of a son, to prove a case of mistake, as though his marriage had fallen under the *L. Aelia Sentia*. Also those who, being Roman citizens, but believing themselves to be peregrines, take peregrine wives, are allowed under the senatusconsult, on birth of a son, to prove a case of mistake, with the result that the wife will become a Roman citizen, whilst the son not only attains to Roman citizenship, but is also brought under his father's *potestas*. **72.** All the above statements with regard to a son are to be taken to apply equally to a daughter. **73.** So far as showing a case of mistake is concerned, the age of the son or daughter is immaterial, *except where the proof is offered by one who thought he was* contracting a marriage under the *L. Aelia Sentia*; *such a person* cannot prove a case if the son or daughter be less than one year old. I do not forget that a rescript of the late emperor Hadrian is expressed as though, *wherever it is a case of proving mistake, the son must be one year old.*

V p. 20 **74.** / Si peregrinus ciuem Romanam uxorem duxerit, an ex senatusconsulto *causam* probare possit quaesitum est. . . .[1] hoc ei specialiter concessum est. sed cum peregrinus ciuem Romanam uxorem duxisset et, filio nato, alias ciuitatem Romanam consecutus esset, deinde, cum quaereretur an causam probare posset, rescripsit imperator Antoninus proinde posse eum causam probare atque si peregrinus mansisset. ex quo colligimus etiam peregrinum causam probare posse. **75.** Ex his quae diximus apparet, siue ciuis Romanus peregrinam siue peregrinus ciuem Romanam uxorem duxerit, eum qui nascitur peregrinum *esse*, *sed* siquidem per errorem tale matrimonium contractum fuerit, emendari uitium eius ex *senatusconsulto secundum* ea[2] quae superius diximus. si uero nullus error interuenerit, ⟨*sed*⟩ scientes suam condicionem ita coierint, nullo casu emendatur uitium eius matrimonii.

76. Loquimur autem de his scilicet ⟨*inter*⟩ quos conubium non sit. nam alioquin, si ciuis Romanus peregrinam cum qua ei conubium est uxorem duxerit, sicut supra quoque diximus, iustum matrimonium contrahitur, et tunc ex his qui nascitur ciuis Romanus est et in potestate patris erit. **77.** Item,[3] si ciuis Romana peregrino cum quo ei conubium est nupserit, peregrinus sane procreatur,[4] et is iustus patris filius est, tamquam si ex pere-
V p. 21 grina eum procreasset. / hoc tamen tempore, ⟨*ex*⟩ senatusconsulto quod auctore diuo Hadriano sacratissimo[5] factum est, etiamsi non fuerit conubium inter ciuem Romanam et peregrinum, qui nascitur iustus patris filius est. **78.** Quod autem diximus, inter ciuem Romanam peregrinumque[6] *nisi conubium sit*,[7] *qui* nascitur peregrinum esse, lege Minicia cauetur, *id* est ut [si] is quidem *peregrini* parentis condicionem sequatur. eadem lege enim ex diuerso cauetur *ut*, si peregrinam *cum*[8] qua ei conubium non sit uxorem duxerit *ciuis Romanus*,[8] peregrinus ex eo coitu nascatur. sed hoc maxime

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[1] Illegible 1½ lines. Cf. Suppl. xxiii.

[2] So Kübler, citing Apogr. 300, line 16. Krüger: *ex senatusconsulto licet ⟨secundum⟩ ea.* V corrupt.

[3] So Krüger. *itaque* V.

[4] So Kübler. *peregrinum . . . procreatur* V. *procreat* Krüger.

[5] $\bar{s}$ V. Cf. 1, 53.

[6] *peregrinuque* or *peregrinoque* V. As the preceding *cr* may stand equally for *ciuem Romanum*, one must choose here between masculine and feminine. There is a like choice in the next sentence (n. 8). We follow Krüger, but see p. 26, n. 1. Kübler decides the other way. The whole section is beyond safe repair, V being largely illegible and probably corrupt. See Suppl. and Krüger.

[7] So Mommsen. *contracto matrimonio eum* Krüger.

[8] Cf. n. 6.

74. Whether a peregrine who has married a Roman wife can show a case under the senatusconsult has been disputed. . . . But where a peregrine had married a Roman wife and, after the birth of a son, had acquired Roman citizenship by some other means, on the question arising whether he could show a case, the emperor Antoninus declared by rescript that he could do so just as well as if he had remained a peregrine: from which we infer that even a peregrine can show a case. **75.** From what we have said it appears that whether a Roman citizen takes a peregrine wife or a peregrine a Roman wife, their child is a peregrine, but that if such a marriage has been contracted in mistake, its defect is cured under the senatusconsult as explained above. But if there was no mistake, but they contracted the union with knowledge of their status, then in no case is the defect of such a marriage cured.

76. We are referring, of course, to persons between whom *conubium* does not exist. For otherwise, if a Roman citizen takes to wife a peregrine with whom he has *conubium*, a full civil marriage is contracted, as we have previously stated, and in that case their son is a Roman citizen and will be in his father's *potestas*. **77.** Also, if a Roman woman marries a peregrine with whom she has *conubium*, their child will be a peregrine and the lawful son of his father, just as if he had been begotten of a peregrine woman. But at the present day, in virtue of a senatusconsult passed on the authority of the late emperor Hadrian, the offspring of a Roman woman and a peregrine is the lawful son of his father even where *conubium* did not exist between the parents. **78.** Our proposition, that the offspring of a Roman woman and a peregrine is, in the absence of *conubium*, a peregrine, is laid down by the *L. Minicia*, which enacts that the child is to follow the status of the peregrine parent. In the reverse case, where a Roman citizen takes a peregrine wife with whom he has not *conubium*, the same *lex* provides that the offspring of their union shall be a peregrine. But it was

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§ 74. Cf. G. 1, 68. § 75. Cf. G. 1, 68. 78. § 76. Cf. G. 1, 56, &c.
§ 77. Cf. G. 1, 92. § 78. Cf. G. 1, 75. Ulp. 5, 8.

casu necessaria lex Minicia;[1] nam remota ea lege diuersam condicionem sequi debebat, *quia* ex eis inter quos non est conubium qui nascitur iure gentium matris condicioni accedit. qua parte autem iubet lex ex ciue Romano et peregrina peregrinum nasci, superuacua uidetur; nam et remota ea lege hoc utique iure gentium futurum erat. **79.** Adeo autem hoc ita est, ut *ex ciue Romano et Latina qui nascitur Latinus nascatur, quamquam ad eos qui hodie Latini appellantur lex Minicia non pertinet; nam comprehenduntur quidem peregrinorum appellatione in ea lege non*[2] solum exterae nationes et gentes, sed etiam qui Latini nominantur; sed ad alios Latinos pertinet, qui proprios populos propriasque ciuitates habebant et erant peregrinorum numero. **80.** Eadem ratione ex contrario ex Latino et ciue Romana, siue ex lege Aelia Sentia siue *aliter contractum fuerit* matrimonium, ciuis Romanus nascitur. fuerunt / V p. 22 tamen qui putauerunt ex lege Aelia Sentia contracto matrimonio Latinum nasci, quia uidetur eo casu per legem Aeliam Sentiam et Iuniam conubium inter eos dari, et semper conubium efficit ut qui nascitur patris condicioni accedat; aliter uero contracto matrimonio eum qui nascitur iure gentium matris condicionem sequi, et ob id esse ciuem Romanum. sed hoc iure utimur ex senatusconsulto, quod auctore diuo Hadriano significat,[3] ut quoquo modo ex Latino et ciue Romana natus ciuis Romanus nascatur. **81.** His conuenienter et illud senatusconsultum diuo Hadriano auctore significauit, ut ex Latino et peregrina, item contra ex peregrino et Latina ⟨*qui*⟩[4] nascitur, is matris condicionem sequatur. **82.** Illud quoque his consequens est, quod ex ancilla et libero iure gentium seruus nascitur, et contra ex libera et seruo liber nascitur. **83.** Animaduertere tamen debemus ne iuris gentium regulam uel lex aliqua, uel quod legis uicem optinet, aliquo casu commutauerit. **84.** Ecce enim ex senatusconsulto Claudiano poterat ciuis Romana,

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[1] Kübler supplies *fuit*. *hoc casu* is a stumbling-block to Krüger's interpretation, which requires *altero tantum casu* or perhaps *illo*.

[2] Mommsen's conjecture for 2¼ illegible lines.

[3] So Kübler. *quod . . . significatur* V. *quo* Krüger.

[4] Kübler's placing of a necessary insertion.

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§ 79. Cf. Ulp. 5, 4. *alios Latinos*: G. 1, 22. 96. 131. § 80. Cf. G. 1, 30. § 82. Cf. G. 1, 88. 89. Inst. 1, 4 pr. § 84. Cf. G. 1, 91. 160. Inst. 3, 12, 1.

in the case we are considering that the *L. Minicia* was really necessary; for apart from it the child would properly have taken the other status, seeing that the child of persons between whom *conubium* does not exist takes his mother's status under the rule of the *ius gentium*. But the provision of the *lex* that the offspring of a Roman citizen and a peregrine wife is a peregrine seems superfluous, seeing that even apart from the *lex* the same result would follow from the rule of the *ius gentium* in any case. **79.** This rule extends so far that the offspring of a Roman citizen and a Latin wife will be born a Latin, in spite of the fact that the *L. Minicia* does not apply to those who at the present day are called Latins. For though not only foreign races, but also those called Latins, are covered by the term peregrine in that *lex*, the reference is to Latins of another kind, namely those who then possessed communities and States of their own and ranked as peregrines. **80.** On the same principle, contrariwise, the offspring of a Latin husband and a Roman wife is born a Roman citizen, whether the marriage was contracted under the *L. Aelia Sentia* or otherwise. The opinion has indeed been held by some that where the marriage is contracted under the *L. Aelia Sentia* the child is born a Latin, because in this case *conubium* between the parties appears to be granted by that *lex* and the *L. Iunia*, and the invariable effect of *conubium* is that the child takes the father's status; but that if the marriage is contracted otherwise, the child follows the mother's status under the rule of the *ius gentium*, and is consequently a Roman citizen. But the law actually in force is as laid down by a senatusconsult with the authority of the late emperor Hadrian, namely, that in all cases the child of a Latin man and a Roman woman is born a Roman citizen. **81.** Consistently, the same senatusconsult, with the authority of the late emperor Hadrian, has also declared that the child of a Latin man and a peregrine woman, and conversely the child of a peregrine man and a Latin woman, shall follow the mother's status. **82.** From the same principles it also results that the child of a slave-woman and a free man is born a slave by the rule of the *ius gentium*, while on the other hand the child of a free woman and a slave is born free. **83.** But we must be careful to observe whether the rule of the *ius gentium* has not, in any particular case, been varied by some *lex* or by some equivalent of a *lex*. **84.** Thus under the *SC. Claudianum* it was possible

quae alieno seruo uolente domino eius coiit, ipsa ex pactione libera permancre, sed seruum procreare; n*am* quod inter eam et dominu*m* istius serui conuenerit ex senatusconsulto ratum esse iubetur. sed postea diuus Hadrianus, iniquitate rei et inelegantia iuris motus,
V p. 23 restituit iuris gen/tium regulam, ut, cum ipsa mulier libera permaneat, liberum pariat. **85.** ⟨*Item e lege . . .*⟩[1] ex a*n*cilla et libero poterant *l*iber*i* nasci; nam ea lege cauetur ut, si quis cum aliena a*n*cilla quam credebat liberam esse coierit, siquidem mascu*l*i nascantur, liberi sint, si uero feminae, ad e*u*m pertinea*n*t *c*uius mater a*n*cilla fuerit. sed et in hac specie diuus Uespasianus, in*e*legantia iuris motus, restituit iuris gentium regulam, ut omni modo, etiamsi masculi nascantur, serui sint eius cuius et mater fuerit. **86.** Sed illa pars eiusdem legis salua est, ut ex libera et seruo alieno, quem sciebat seruum esse, serui nascantur. itaque apud quos talis lex non est, qui nasc*i*tur iure gentium matris condicione*m* sequitu*r*, et ob id liber e*st*.

87. Quibus autem casibus matris et non patris condicione*m* sequitur qui nascitur, isdem casibus in potestate eum patris, etiamsi is ciuis Romanus sit, non esse plus quam manifestum est. et ideo superius rettulimus quibusdam casibus, per errorem non iusto contracto matrimonio, senatum interuenire et emendare uitium matrimonii, eoque modo plerumque efficere ut in potestatem patris filius redig*a*tur. **88.** Sed si ancilla ex ciue Romano conccp*e*rit, deinde manumissa ciuis Romana facta sit et tunc pariat,
V p. 24 licet ciu*i*s R*omanus* sit qui nascitur, / sicut pater eius, non tamen in potestat*e* patris est, quia neque ex iusto coitu conceptus est neque ex ullo senatusconsulto talis coitus quasi iustus constituit*ur*.

89. Quod autem placuit, si ancilla ex ciue Romano conceperit, deinde manumissa pepere*r*it, qui nascitur liberum nasci, *na*turali ratione fit. nam hi qui illegitime concipiuntur statum sumunt ex eo tempore quo nascuntur; itaque, si ex libera nascuntur, liberi fiunt, nec interest ex quo mater eos concepe*r*it cum ancilla fuerit; at hi qui legitime concipiuntur ex conceptionis tempore statum sumun*t*. **90.** Itaque, si cu*i* mulieri ciui Romanae praegnati aqua

[1] No gap in V, but mention of some *lex* must have dropped out, since the *lex* referred to cannot be the *SC. Claudianum*.

§ 87. *superius*: G. 1, 67 sq. §§ 88–9. Cf. G. 1, 82. 135. Inst. 1, 4 pr.

for a Roman woman who cohabited with another person's slave with that person's consent, while remaining free herself in virtue of the agreement, to give birth to a slave; for the senatusconsult ordains that what has been agreed between the woman and the slave's owner shall hold good. But subsequently the late emperor Hadrian was moved by the hardship of the case and the legal anomaly to restore the rule of the *ius gentium*, so that the woman, where she remains free herself, gives birth to a free child. **85.** Again, under a *lex* . . ., it was possible for the children of a slave-woman and a free man to be born free; for by this *lex* it is provided that, where a man has cohabited with another person's slave believing her to be free, their children, if male, shall be born free, but if female, shall belong to the mother's owner. But in this case also the late emperor Vespasian was moved by the legal anomaly to restore the rule of the *ius gentium*, so that the children in every case, even if male, are the slaves of the mother's owner. **86.** But that part of the same *lex* is unrepealed which enacts that the children of a free woman and a man known by her to be another person's slave are born slaves. Thus it is only among people among whom such a *lex* does not exist that the children follow the mother's status in accordance with the *ius gentium* and are consequently free.

87. It is abundantly clear that in those cases in which a child takes its mother's status and not its father's, the child is not in its father's *potestas* even if the father be a Roman citizen. This is why we explained above that in certain cases where, owing to some mistake, a civil marriage fails to be contracted, the senate intervenes to cure the defect in the marriage and in most cases by so doing causes the son to be brought into his father's *potestas*. **88.** But where a slave-woman after having conceived by a Roman citizen is manumitted and becomes a Roman citizen and then gives birth, her child, though a Roman citizen like its father, is nevertheless not in the father's *potestas*, because it was not begotten in civil marriage and there is no senatusconsult which enables such intercourse to be regularized.

89. The ruling that where a slave-woman conceives by a Roman citizen and then after being manumitted gives birth the child is born free, rests on natural reason. For children conceived outside civil marriage take their status from the moment of their birth; thus if born of a free mother they are born free, and it is immaterial by whom she conceived them whilst she was a slave. On the other hand, those conceived in civil marriage take their status from the moment of their conception. **90.** Hence if a

et igni interdictum fuerit, eoque modo peregrina *facta*[1] tunc pariat, complures distinguunt et puta*nt*, siquidem ex iustis nuptiis concepe*r*it, ciuem Romanum ex ea nasci, si uero uulgo concepe*r*it, peregrinu*m* ex ea nasc*i*. **91.** Item, si qua mulier ciuis Romana praegnas ex senatusconsulto Claudiano ancilla facta sit, ob id quod alieno seruo inuito et denuntiante domino eius ⟨*coierit*,⟩ complur*es* *distingu*unt[2] et existimant, siquidem ex iust*is* nuptiis concep*tus* sit, ciuem Romanum ex ea nasci, si uero uulgo conceptus sit, *seruum* nasci eius cuius mater facta esset ancilla. **92.** Peregrina quoque si uulgo conceperit, deinde ciuis Romana *facta*[3] tunc pariat, ciuem
V p. 25 Romanum parit; si uero ex peregrino / secundum leges moresque peregrinorum concepe*r*it, ita uidetur ex senatusconsulto quod auctore diuo Hadriano factum est ciuem Romanum parere, si et patri eius ciuitas Romana donet*ur*.

93. Si peregrinus sibi liberisque suis ciuitatem Romanam petierit, non aliter filii in potestate eius fient quam si imperator eos in potestatem redegerit; quod ita demum is facit, si causa cognita aestimauerit hoc filiis expedire. diligentius autem exactiusque causam cognoscit de impuberibus absentibusque. et haec ita edicto diui Hadriani significa*n*tur. **94.** Item, si quis cum uxore praegnate ciuitate Romana donatus sit, quamuis is qui nascit*ur*, ut supra dixi*mus*, ciu*is* Romanus sit, tamen in potestate patris non fit; idque subscriptione diui sacratissimi[4] Hadriani significatur. qua de causa, qui intellegit uxorem suam esse praegnatem, dum ciuitatem sibi et uxori ab imperatore petit, simul ab eodem petere debet ut eum qui natus erit in potestate su*a* habeat. **95.** Alia causa est eorum qui Latii iure cum liberis suis ad ciuitatem Romanam perueniunt; nam horum in potestate fiunt liberi. **96.** Quo*d* ius quibusdam peregrinis ciuitatibus datum est uel a populo Romano uel a senatu uel a Caesare. *huius autem iuris duae species sunt; nam*[5] aut maius est Latium aut minus. maius est Latium cum et hi qui decuriones leguntur, et ei qui honorem ali-
V p. 26 quem aut / magistratum gerunt, ciuitatem Romanam consequun-

[1] Studemund inclines against *fiat et*.
[2] Reading doubtful. Krüger thinks it might be *coierit plerique distinguunt*.
[3] So Kübler. Cf. n. 1, Krüger *fiat et*.
[4] *diuis hadr* V. Cf. 1, 53. 77.
[5] Krüger's suggestion for about half a line, or just: *Ceterum*.

§ 90. Cf. G. 1, 128. 161. § 91. Cf. G. 1, 84, &c. § 92. Cf. G. 1, 77. 94. § 93. Cf. G. 1, 55; 2, 135a; 3, 20. § 94. Cf. G. 1, 92. §§ 95–6. Cf. G. 1, 22. 79. 131. Lex Salpens. cc. 21. 22. 23 (Textes 109. Bruns 1,143).

Roman woman, being with child, is interdicted from fire and water, and having thus become a peregrine, gives birth, many draw a distinction, holding that if she conceived in civil marriage, her child is born a Roman citizen, but if in promiscuous intercourse, a peregrine. **91.** Again if a Roman woman, being with child, becomes a slave under the *SC. Claudianum* because of her having had intercourse with another person's slave against the will and warning of his master, many draw a distinction, holding that if she conceived in civil marriage, her child is born a Roman citizen, but if in promiscuous intercourse, the slave of the person whose slave its mother has become. **92.** Again, if a peregrine woman conceives in promiscuous intercourse and then, having become a Roman citizen, gives birth, the child is a Roman citizen; but if she conceives by a peregrine in accordance with the laws and customs of peregrines, then, under a senatusconsult passed on the authority of the late emperor Hadrian, the child is a Roman citizen only if citizenship is conferred on the father as well.

93. If a peregrine petitions for Roman citizenship for himself and his children, the children will not come under his *potestas* unless the emperor subjects them to it. This he does only if, after examining the case, he judges it to be for the children's benefit. He examines with special care and particularity the case of children who are below puberty or are not before him. These rules are laid down by an edict of the late emperor Hadrian. **94.** Again, if Roman citizenship is conferred on a man along with his wife who is with child, although, as we have said above, the child is born a Roman citizen, it does not come under its father's *potestas*; this is laid down by a *subscriptio* of the late emperor Hadrian. For this reason one who is aware that his wife is with child ought, when petitioning the emperor for citizenship for himself and his wife, to petition at the same time that he may have the expected child in his *potestas*. **95.** Those who attain to Roman citizenship along with their children in virtue of Latin right are in a different case; for their children do come under their *potestas*. **96.** This right is one that has been granted by the Roman people, the senate, or Caesar to various peregrine States. Two grades of it must be distinguished; for there is greater and lesser Latin right. The greater right is where both those who are elected decurions and those who hold some high office or a magistracy obtain Roman

tur. minus Latium est cum hi tantum *qui uel*[1] magistratum uel honorem gerunt ad ciuitatem Romanam perueniunt. idque compluribus epistulis principum significatur.

97. *Non solum tamen naturales liberi secundum ea quae*[2] diximus in potestate nostra sunt, uerum et hi quos adoptamus. **98.** Adoptio autem duobus modis fit, aut populi auctoritate, aut imperio magistratus uel*uti* praetoris. **99.** Populi auctoritate adoptamus eos qui sui iuris sunt. quae species adoptionis dicitur adrogatio, quia et is qui adoptat rogatur, id est interrogatur, an uelit eum quem adoptaturus sit iustum sibi filium esse, et is qui adoptat*ur* rogatur an id fieri patiatur, et populus rogatur an id fieri iubeat. imperio magistratus adoptamus eos qui in potestate parentium sunt, siue primum gradum liberorum optineant, qualis est filius et filia, siue inferiorem, qualis est nepos, neptis, pronepos, proneptis. **100.** Et quidem illa adoptio quae per populum fit nusquam nisi Romae fit; at haec etiam in prouinciis apud praesides earum fieri solet. **101.** Item, per populum feminae non adoptantur, nam id magis
V p. 27 placuit; apud / p*raetorem* uero, uel in prouinciis apud proconsul*em*[3] legatumue, etiam feminae solent adoptari. **102.** Item, impuberem apud populum adoptari aliquando prohibitum est, aliquando permissum est. nunc[4] ex epistula optimi imperatoris Antonini, quam scripsit pontificibus, si iusta causa adoptionis esse uidebitur, cum quibusdam condicionibus permissum est. apud praetorem uero, et in prouinciis apud proconsulem legatumue, cuiuscumque aetatis[5] adoptare possumus. **103.** Ill*ud* uero[6] utriusque adoptionis commune est, qu*od* et hi qui generare non possunt, quales sunt spadones, adoptare possunt. **104.** Feminae uero nullo modo adoptare possunt, quia ne quidem naturales liberos in potestate habent. **105.** Item, si quis per populum siue apud praetorem uel apud praesidem prouinciae adoptauerit, potest

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[1] So Kübler. *uel qui* V. *qui* Krüger.

[2] Two vacant lines showing traces of red. Text from Inst.

[3] *proconsules* V.

[4] *nunc* (V) may be a corruption of *nam*. Mommsen deletes *aliquando permissum est* as gloss.

[5] Krüger inserts *personas*.

[6] So Kübler. *illi uero* V. *Sed et illud* Inst. 1, 11, 9. *Illud* D. 1, 7, 2, 1 and Krüger.

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§ 97. = Inst. 1, 11 pr. §§ 98–9. = Inst. 1, 11, 1 (D.). Cf. G. 2, 138. Inst. 1, 11, 2. *populi auctoritate*: Gell. 5, 19. *imperio magistratus*: G. 1, 134. § 102. Cf. Inst. 1, 11, 3. § 103. = Inst. 1, 11, 9 (D.). § 104. = Inst. 1, 11, 10 init. *quia ne quidem*: G. 2, 161; 3, 43. 51. § 105. Cf. Inst. 1, 11, 8.

citizenship. The lesser right is where only those who hold some magistracy or high office attain to Roman citizenship. This is laid down in a number of imperial epistles.

97. Not only are the children of our bodies in our *potestas* according as we have stated, but also those whom we adopt. **98.** Adoption takes place in two ways, either by authority of the people or by the *imperium* of a magistrate, such as a praetor. **99.** By authority of the people we adopt those who are *sui iuris*. This kind of adoption is called adrogation because both the adopter is asked, that is interrogated, whether he wishes to have the person whom he is about to adopt as his lawful son, and he who is being adopted is asked whether he suffers this to take place, and the people are asked whether they sanction its taking place. By the *imperium* of a magistrate we adopt those who are in the *potestas* of their parents, whether they stand in the first degree of descent, as a son or daughter, or in a remoter degree, as a grandson or granddaughter, great-grandson or great-granddaughter. **100.** The former kind of adoption, that by authority of the people, can be performed nowhere but at Rome, whereas the latter kind is regularly performed in the provinces before the provincial governors. **101.** Further, females cannot be adopted by authority of the people, for this opinion has prevailed; but before a praetor or, in the provinces, before the proconsul or legate, females are regularly adopted. **102.** Also, adoption by authority of the people of a person below puberty has at one time been forbidden and at another time been allowed. At the present day, under an epistle addressed by the excellent emperor Antoninus to the pontiffs, it is allowed, if an adequate motive for it appears, subject to certain conditions. But before a praetor or, in a province, before the proconsul or legate, we can adopt a person of any age. **103.** On the other hand, it is common to both kinds of adoption that those who are incapable of procreation, such as the naturally impotent, can adopt. **104.** But women cannot adopt by any method, for they do not hold even the children of their bodies in their *potestas*. **105.** Also, whether the adoption has been by authority of the people or before a praetor or a provincial governor, the adopter

eundem alii in adoptionem dare. **106.** S*ed* et illa quaestio [est],[1] an minor natu maiorem natu adoptare possit, utriusque adoptionis commun*is*[2] est. **107.** Illud proprium est eius adoptionis quae per populum fit, quod is qui liberos in potestate habet, si se adrogandum dederit, non solum ipse potestati adrogatoris subicitur, sed etiam liberi eius in eiusdem fiunt potestate *t*amquam nepotes.

108. *Nunc de his personis uideamus quae in manu nostra sunt. quod*[3] et ipsum ius proprium ciuium Romanorum est. **109.** Sed in potestate quidem et masculi et feminae esse solent; in manum autem feminae tantum co*n*ueniunt. **110.** Olim itaque *t*ribus[4] modis in manum conueniebant: usu, farreo, coemptione. **111.** Usu in manum conueniebat quae anno continuo nupta perseuerab*at*; *quia* enim ueluti annua possessione usucapiebatur, in familiam uiri trans*i*bat filiaeque locum optinebat. itaque lege duodeci*m* tabularum cautu*m* est ut, si qua nollet eo modo in manu*m* mariti conuenire, ea quotannis trinoctio abesset atque eo modo ⟨*usum*⟩ cuiusque anni interrumperet. sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitteratum est. **112.** Farreo in manu*m* conueniunt per quoddam genus sacrificii quod Ioui Farreo fit; in quo farreus panis adhibetur, unde etiam con*farr*eatio dici*t*ur. complura praeterea huius iuris ordinandi gratia, cum certis et sollemnibus uerbis, praesentibus decem testibus, aguntur et fiunt. quo*d* ius etiam nostris temporibus in usu est. nam flamine*s* maiores, id est Diales, Martiales, Quirinales,
V p. 29 item / reges sacrorum, nisi ex farreatis nati *n*on leguntur; ac ne ipsi quidem sine confarreatione sacerdoti*u*m habere possunt. **113.** Coemptione uero in manum conueniunt per mancipationem, *id est*[5] per quandam imaginariam uenditionem. nam, adhibitis non mi*n*us quam v testibus ciuibus Romanis puberibus, item libripende, emit *is* mulierem[6] cuius in manum conuenit. **114.** Po*test*

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[1] So Krüger. *set illa quaestio est an* V. *sed et illud de quo quaestio est an* Kübler, following Polenaar.

[2] *commune* V, which Kübler is able to retain.

[3] Two vacant lines with traces of red. Text from Goeschen.

[4] *itaqueteribus* V. Possibly for *itaque ueteribus* or *ueteribus tribus* (Kniep).

[5] *id est* is pure conjecture; equally *siue*.

[6] *emit eum mulierem* V. For *eum* Goeschen *nummo*, Krüger *is*, Kübler *uir*. Huschke: *emit eum mulier et is mulierem*, tempting if there were solid support for mutual purchases.

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§ 106. Cf. Inst. 1, 11, 4. § 107. = Inst. 1, 11, 11 (D.). § 108. *nunc*: G. 1, 55. §§ 110–13. Cf. Boeth. in top. 3, 14 (Bruns 2, 73. Textes 193).

may give the person adopted in adoption to another. **106.** Also common to both kinds of adoption is the dispute whether a younger can adopt an older person. **107.** Peculiar to adoption by authority of the people is that, if a person having children in his *potestas* gives himself in adrogation, not only is he himself subjected to the adrogator's *potestas*, but his children also come under the same *potestas*, as grandchildren.

108. Let us proceed to consider persons who are in *manu* (hand, marital power), which is another right peculiar to Roman citizens. **109.** Now, while both males and females are found in *potestas*, only females can come under *manus*. **110.** Of old, women passed into *manus* in three ways, by *usus*, *confarreatio*, and *coemptio*. **111.** A woman used to pass into *manus* by *usus* if she cohabited with her husband for a year without interruption, being as it were acquired by a usucapion of one year and so passing into her husband's family and ranking as a daughter. Hence it was provided by the Twelve Tables that any woman wishing not to come under her husband's *manus* in this way should stay away from him for three nights in each year and thus interrupt the *usus* of each year. But the whole of this institution has been in part abolished by statutes and in part obliterated by simple disuse. **112.** Entry of a woman into *manus* by *confarreatio* is effected by a kind of sacrifice offered to Jupiter Farreus, in which a spelt cake is employed, whence the name *confarreatio*. In the performance of this ceremony a number of acts and things are done, accompanied by special formal words, in the presence of 10 witnesses. This institution still exists at the present day. For the higher flamens, that is those of Jupiter, Mars, and Quirinus, and also the *rex sacrorum*, can only be chosen from those born of parents married by *confarreatio*; indeed, no person can hold the priesthood without being himself so married. **113.** Entry of a woman into *manus* by *coemptio* takes the form of a mancipation, that is a sort of imaginary sale: in the presence of not less than 5 witnesses, being Roman citizens above puberty, and of a scale-holder, the woman is bought by him into whose *manus* she is passing. **114.** It is, however, possible for a woman to make

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Serv. in Aen. 4, 103. 374. in Georg. 1, 31 (Bruns 2, 76–8). Isid. Etym. 5, 24, 26 (Bruns 2, 81). § 112. Cf. Tac. ann. 4, 16. G. 1, 136. § 113. Cf. G. 1, 123. Cic. p. Flacco 34, 84. de orat. 1, 56, 237. § 114. Cf. Cic. p. Mur. 12, 27. Serv. et Boeth. ll. cc. G. 1, 115b. 118. 136; 2, 98. 139. 159; 3, 14. 40.

autem coemptionem facere mulier non solum cum marito suo, sed etiam cum extraneo; scilicet aut matrimonii causa facta coemptio dicitur aut fiduciae. quae enim cum marito suo facit coe*m*ptionem, ⟨*ut*⟩ apud eum filiae loco sit, dicitur matrimonii causa fccisse coemptioncm; quae uero alterius rei causa facit cocmptionem[1] aut cum uiro suo aut cum extranco, ueluti tutclae euitandae causa, dicitur fiduciae causa fecisse coemptionem.

115. Quod est tale: si qua uelit quos habet tutores *d*eponere et alium nancisci, illis tutoribus ⟨*auctoribus*⟩[2] coemptionem facit; deinde a coemptionatore remancipata ei cui ipsa uelit, et ab eo
V p.30 uindicta / manumissa, incipit eum habere tu*t*orem ⟨*a*⟩ quo manumissa est; qui tutor fiduciarius dicit*ur*, sicut inferi*us*[3] app*areb*it.

115a. Oli*m*[4] etiam testamenti faciendi gratia fiduciar*ia* fiebat coemptio. tunc enim non al*iter* feminae testamenti faciendi ius habebant, exceptis quib*us*dam personis, quam si coemptionem fecissent remancipataeque et manumissae fuissent. sed hanc necessitatem coemptionis faciendae ex auctoritate diui Hadriani senatus remisit.

115b. . . . fiduciae causa *c*um *ui*ro s*uo* *f*ecer*it* coemp*t*ione*m*,[5] nihilo minus filiae loco incipit esse. nam si omnino qualibet ex causa uxor in manu uiri sit, placu*it* eam filiae iura nancisci.

116. Superest ut exponamus quae personae in mancipio sint.

117. Omnes igitur liberorum personae siue masculini siue femi*n*ini sexus, quae in potestate parentis sunt, mancipari ab *hoc eodem*[6] modo possunt quo etiam serui mancipari possunt.

118. Idem iuris est in earum personis quae in manu sunt. *nam feminae a*[7] coemptionatoribus eodem modo possunt *mancipari*, *adeo quidem ut*, *quamuis ea sola*[8] apud coemptionatorem filiae loco sit *quae ei*[9] nupta
V p.31 sit, *tamen*[9] nihilo minus etia*m* / quae ei nupta non *s*it[10] nec ob id filiae loco sit, ab eo mancipari possit.

118a. Plerumque ⟨*uero tum*⟩ solum et a parentibus et a coemptionatoribus mancipantur,

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[1] V repeats this phrase 4 times. Cf. Apogr.

[2] So Kniep. More usually *tutoribus* is corrected to *auctoribus*.

[3] *sicut inferioribus apperauerit* V. Cf. Nordeblad, Gaiusstudien 93–4.

[4] A considerable proportion of the readings in this section depends on Goeschen and Bluhme.

[5] The reading for 2½ lines is very uncertain. Cf. Apogr.

[6] *eodem hoc* V.

[7] Bluhme's reading.

[8] Lachmann's conjecture for an illegible half-line, shortened.

[9] Reading very uncertain.

[10] *est* V.

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§ 115. Cf. G. 1, 166a. 195a.

§ 115a. Cf. G. 2, 112. Cic. top. 4, 18.

a *coemptio* not only with her husband, but also with a stranger; in other words, *coemptio* may be performed for either matrimonial or fiduciary purposes. A woman who makes a *coemptio* with her husband with the object of ranking as a daughter in his household is said to have made a *coemptio* for matrimonial purposes, whilst one who makes, whether with her husband or a stranger, a *coemptio* for some other object, such as that of evading a tutorship, is said to have done so for fiduciary purposes. **115.** What happens is as follows: a woman wishing to get rid of her existing tutors and to get another makes a *coemptio* with the *auctoritas* of her existing tutors; after that she is remancipated by her *coemptionator* to the person of her own choice and, having been manumitted *uindicta* by him, comes to have as her tutor the man by whom she has been manumitted. This person is called a fiduciary tutor, as will appear below. **115a.** Formerly too fiduciary *coemptio* used to be performed for the purpose of making a will. This was at a time when women, with certain exceptions, had not the right to make a will unless they had made a *coemptio* and had been remancipated and manumitted. But the senate on the authority of the late emperor Hadrian has dispensed from this requirement of a *coemptio*. **115b.** . . . but if a woman makes a fiduciary *coemptio* with her husband, she nevertheless acquires the position of his daughter. For it is the accepted view that, if for any reason whatever a wife be in her husband's *manus*, she acquires a daughter's rights.

116. We have still to explain what persons are *in mancipio* (bondage). **117.** All children, male or female, who are in a parent's *potestas* can be mancipated by him in just the same manner as slaves. **118.** The same holds good of persons in *manus*: women can be mancipated in the same manner by their *coemptionatores*; indeed, though only a woman married to her *coemptionator* ranks as a daughter in his household, nevertheless a woman not married to him, and consequently not ranking as his daughter, can be mancipated by him. **118a.** For the most part women are mancipated by their parents or *coemptionatores* only when the latter

§ 115b. Cf. G. 1, 114. 118; 2, 139; 3, 14. § 116. Cf. G. 1, 49. 108. § 117. Cf. G. 1, 132. 162. §§ 118–118a. Cf. G. 1, 115. 123. 132. 134; 4, 79.

cum uelint parentes coemptionatoresque ⟨*ex*⟩ suo iure eas personas dimittere, sicut inferius euidentius apparebit. **119.** Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam uenditio; quod et[1] ipsum ius proprium ciuium Romanorum est. eaque res ita agitur: adhibitis non minus quam[2] quinque testibus ciuibus Romanis puberibus, et praeterea alio eiusdem condicionis qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit, *aes*[3] tenens, ita dicit: HUNC EGO HOMINEM EX IURE[4] QUIRITIUM MEUM ESSE AIO ISQUE MIHI EMPTUS ESTO[5] HOC AERE AENEAQUE LIBRA. deinde aere percutit libram, idque aes dat ei a quo mancipio accipit quasi pretii loco. **120.** Eo modo et seruiles et liberae personae mancipantur; animalia quoque quae mancipi sunt, quo in numero habentur boues, equi, muli, asini; item praedia tam urbana quam rustica quae et ipsa mancipi sunt, qualia sunt Italica, eodem modo solent mancipari. **121.** In eo solo praediorum mancipatio a ceterorum mancipatione differt, quod personae seruiles et liberae, item animalia quae mancipi sunt, nisi in praesentia sint,
V p. 32 mancipari non possunt; adeo quidem / ut eum ⟨*qui*⟩[6] mancipio accipit adprehendere id ipsum quod ei[7] mancipio datur[8] necesse sit; unde etiam mancipatio dicitur, quia manu res capitur; praedia uero absentia solent mancipari. **122.** Ideo autem aes et libra adhibetur, quia olim aereis tantum nummis utebantur; et erant asses, dipundii, semisses, quadrantes, nec ullus aureus uel argenteus nummus in usu erat, sicut ex lege XII tabularum intellegere possumus; eorumque nummorum uis et potestas non in numero erat, sed in pondere. nam *apud ueteres et asses*[9] libralcs erant et dipondii *bilibres*;[10] unde etiam dupondius dictus *est quasi* duo pondo, quod nomen adhuc in usu retinetur. semisses *quoque* et quadrantes pro rata scilicet portione ad pondus examinati erant. *quamobrem* qui dabat *olim*[11] pecuniam non numerabat eam, sed appendebat; unde serui quibus permittitur administratio pecuniae dispensatores appellati sunt et adhuc *uocantur*.[12] **123.** *Si tamen*

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[1] *quia et* V. *quod* Boeth. in Cic. top. 5, 28.
[2] *quod* V. *quam* Boeth.
[3] *aes* Boeth., accepted by Krüger. Cf. Varro, de l. lat. 9, 83. *rem* V.
[4] *iure* Boeth. *iūst.* V.
[5] *est* Boeth. Cf. infra 3, 167.
[6] *qui* Isid. 5, 25, 31. om. V.
[7] *ei*: *et in* or *ei in* V.
[8] *dat* V. *datur* Isid.
[9] Kniep's conjecture for about 12 illegible letters. Krüger: *pondere posita; nam et asses*, but cf. Apogr., and Krüger, Introd. xii, n. 15.
[10] Krüger's conjecture, but too short for the space. Cf. his Introd. l.c.
[11] So Krüger. Kübler: *tunc igitur et qui dabat alicui pecuniam.*
[12] *aduncc* V. Not much legible for about 1½ lines.

desire to release them from their power, as will appear more clearly below. **119.** Now mancipation, as we have already said, is a sort of imaginary sale, and it too is an institution peculiar to Roman citizens. It is performed as follows: in the presence of not less than 5 Roman citizens of full age and also of a sixth person, having the same qualifications, known as the *libripens* (scale-holder), to hold a bronze scale, the party who is taking by the mancipation, holding a bronze ingot, says: 'I declare that this slave is mine by Quiritary right, and be he purchased to me with this bronze ingot and bronze scale.' He then strikes the scale with the ingot and gives it as a symbolic price to him from whom he is receiving by the mancipation. **120.** It is thus that both servile and free persons are mancipated, as also such animals as are *mancipi* (mancipable), namely oxen, horses, mules, and asses; lands also, whether built or unbuilt on, are mancipated in the same way, if they are *mancipi*, as are Italic lands. **121.** The mancipation of lands differs from that of other things in this point only, that persons, servile and free, and animals that are *mancipi* cannot be mancipated unless they are present—indeed, the taker by the mancipation must grasp the thing which is being mancipated to him, which is why the ceremony is called *mancipatio*, the thing being taken with the hand —whereas lands are regularly mancipated at a distance. **122.** The bronze ingot and scale are used because formerly only bronze money was in use; thus there were *asses*, double-*asses*, half- and quarter-*asses*, but neither gold nor silver money was current, as we may gather from the law of the Twelve Tables. The value of these pieces was reckoned not by counting but by weighing. Thus for the ancients the *as* was a pound and the double-*as* two pounds (the word *dupondius*, which is still in use, means *duo pondo*), and the half- and quarter-*as* meant a proportionate fraction of a pound's weight. Consequently in early times a man paying money did not count, but weighed it out, and hence slaves entrusted with the administration of cash were, as they still are, called dispensers. **123.** If it be asked why a woman who has made a *coemptio* differs

§ 119. = Boeth. in top. 5, 28 (ed. Baiter 322). Cf. G. 1, 113. 123; 3, 167. *proprium ciuium Romanorum*: Ulp. 19, 4. § 120. Cf. G. 1, 113. 117; 2, 14a sq. § 122. Cf. G. 2, 274; 3, 223; 4, 14. § 123. Cf. G. 1, 113. 117. 138; 2, 160; 3, 104. 114.

quaerat aliquis quare si qua coemptio*nem fecit differat a mancipatis, illa*[1] quidem quae coemptionem fac*it non deducitur in* seruilem condicionem, a *parentibus autem et a coemptionatoribus*[2] mancipa*ti* mancipataeue seruorum loco constituuntur, adeo quidem ut ab eo
V p. 33 cuius in mancipio / sunt neque hereditates neque legata aliter capere poss*int*[3] quam ⟨*si*⟩ simul eodem testamento liberi esse iubeant*ur*, sicuti iuris est in persona seruorum. sed differentiae ratio manifest*a est*, cum a parentibus et a coemptionatoribus isdem uerbis mancipio accipi*antur* quibus serui; quod non similiter *fit* in coemptione.

124. Uideamus nunc quomodo *ii* qui alieno iuri *subi*ecti sunt eo iure liberentur.

125. Ac prius de his dispiciamus qui in potestate sunt. **126.** Et quidem seru*i que*madmodum potestate liberen*tur* ex his intell*ege*re possumus quae de seruis manumittend*is su*perius exposuimus. **127.**[4] Hi uero qui *in potestate pa*rentis sun*t mortuo eo sui iuris fiunt. sed hoc di*stinctionem recipit; nam *mortuo pat*re san*e* omni modo filii filiaeue sui iuris efficiun*tur*, mortuo uero auo *non omni* modo *nepotes nept*esue *sui i*uris *fiunt*, *sed ita si post mortem aui* in patris sui potestatem recasuri non s*unt*. *ita*que, si moriente auo *pater eorum et uiuat*[5] *et in potesta*te patris fuer*it*, tunc post ob*itum aui in patris* sui potestate fiunt; si uero is, quo tempore au*us* moritur, aut iam mor*tuus est aut* exiit de potestate ⟨*patris, tunc hi, quia in pote-*
V p. 34 *statem*⟩ eius cadere non possunt, sui *i*uris fiunt. **128.** Cum / autem is cui ob aliquod maleficium ex lege Cornelia aqua et igni interdicitur ciuitatem Romanam amittat, sequitur ut, qui*a*[6] eo modo ex numero ciuium Romanorum tollit*ur*, proinde ac mortuo eo desinant liberi in potes*ta*te eius esse. nec enim ratio patitur ut peregrinae condicionis homo ciuem Romanum in potestate habeat. pari ratione, et si ei qui in potestate parentis sit aqua et igni interdictum fuerit, desinit in potestate parentis esse, quia aeque ratio non patitur ut peregrinae condicionis homo in potestate sit ciuis Romani parentis. **129.** Quodsi ab hostibus captus fuerit parens,

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[1] Huschke's conjecture. [2] Krüger's conjecture.
[3] *possunt* V. Cf. supra 1, 40, &c.
[4] The restorations in this section rest on Inst. 1, 12.
[5] *uiuit* Inst. [6] *qui* V, with some MSS. of Inst.

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§ 124. = Inst. 1, 12 pr. § 126. = Inst. 1, 12 pr. *superius*: G. 1, 13 sq. 21. 22. § 127. = Inst. 1, 12 pr. Cf. G. 1, 146; 2, 156; 3, 2. § 128. = Inst. 1, 12, 1. Cf. G. 1, 90. 161. *proinde ac mortuo*: G. 3, 153. *nec enim ratio*: G. 1, 55.

in status from persons who have been mancipated, the answer is that by making a *coemptio* she is not reduced to a servile status, whereas persons, male or female, who have been mancipated by their parents or their *coemptionatores* are placed in the position of slaves, and so much so that they can receive an inheritance or a legacy from their holder *in mancipio* only if by the same will they are at the same time declared free, as is the law in the case of slaves. The reason of the difference is plain: the same words are used by the persons who receive them by mancipation from their parents or *coemptionatores* as in the case of slaves, whereas in *coemptio* it is otherwise.

124. Let us now consider how persons subject to another's power are freed therefrom.

125. First let us treat of those who are in *potestas*. **126.** How slaves are freed from *potestas* can be learnt from our previous exposition of their manumission. **127.** Persons in a parent's *potestas* become *sui iuris* on his death. But here we must distinguish: when a father dies, his sons and daughters always become *sui iuris*, but when a grandfather dies, the grandsons and granddaughters do not always become *sui iuris*, but only if after their grandfather's death they will not relapse into their father's *potestas*. Thus, if at their grandfather's death their father is both alive and in the *potestas* of his father, they fall on the grandfather's death under their father's *potestas*; but if at that moment their father either is dead or has left his father's *potestas*, then, since they cannot fall under their father's *potestas*, they become *sui iuris*. **128.** Again, since one who for some crime has been interdicted from fire and water under the *L. Cornelia* loses Roman citizenship, it follows that, he being thus removed from the category of Roman citizens, his children cease to be in his *potestas* exactly as if he had died; for it is against principle that a man of peregrine status should have a Roman citizen in his *potestas*. For the like reason, if one who is in parental *potestas* is interdicted from fire and water, he ceases to be in his parent's *potestas*, because it is equally against principle that a man of peregrine status should be in the parental *potestas* of a Roman citizen. **129.** But where a parent has been

quamuis seruus hostium fiat, tamen pendet ius liberorum propter ius postliminii, quo[1] hi qui ab hostibus capti sunt, si reuersi fuerint, omnia pristina iura recipiunt. itaque reuersus habebit liberos in potestate; si uero illic mortuus sit, erunt quidem liberi sui iuris, sed utrum ex hoc tempore quo mortuus est apud hostes parens an ex illo quo ab hostibus captus est, dubitari potest. ipse quoque filius neposue si ab hostibus captus fuerit, similiter dicemus propter ius postliminii potestatem quoque parentis in suspenso esse. **130.** Praeterea exeunt liberi uirilis sexus de parentis pote-
V p. 35 state si flamines Diales inaugurentur, et / feminini sexus si uirgines Uestales capiantur. **131.** Olim quoque, quo tempore populus Romanus in Latinas regiones[2] colonias deducebat, qui iussu parentis in coloniam Latinam nomen dedissent, desinebant in potestate parentis esse, quia efficerentur alterius ciuitatis ciues.

132. *Praeterea*[3] emancipatione desinunt liberi in potestate parentum esse. sed filius quidem tribus mancipationibus, ceteri uero liberi siue masculini sexus siue feminini una mancipatione exeunt de parentium potestate. lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his uerbis: SI PATER FILIUM ⟨*TER*⟩[4] UENUM DUIT, A PATRE FILIUS LIBER ESTO. *eaque* res ita agitur: mancipat pater filium alicui; is eum uindicta manumittit; eo facto reuertitur in potestatem patris; is eum iterum mancipat uel eidem uel alii (sed in usu est eidem mancipari), isque eum postea similiter uindicta manumittit; eo facto rursus in potestatem patris reuertitur;[5] tertio pater eum mancipat uel eidem uel alii (sed hoc in usu est, ut eidem mancipetur), *eaque* mancipatione desinit in potestate patris esse, etiamsi nondum manumissus sit,
V p. 36 sed adhuc in causa mancipii. /[6] . . . . . **133.** *Admonendi autem sumus liberum esse arbitrium ei qui filium et ex eo nepotem in potestate habebit filium quidem de potestate dimittere, nepotem uero in potestate retinere; uel ex diuerso filium quidem in potestate retinere, nepotem*

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[1] *quod* V. *quo* Polenaar and generally. *quia* Inst.

[2] *in Latinas regiones*: gloss according to Mommsen, but cf. Krüger, Quellen 205, n. 27.

[3] About two lines vacant, with traces of red. *Praeterea* from Inst.

[4] *ter* V. om. Kübler: *pater ter filium*, but he cites Ulp. 10, 1 contra.

[5] *pater fueri reuertitur* V.

[6] V p. 36 is illegible except for a few letters and phrases: see Krüger 1, 132a and Suppl. xxv. It is pretty certain that Gaius first dealt with the third manumission necessary to make a son *sui iuris*, pointing out the advantages of a previous remancipation to the father, and next with the emancipation of *filiae* and *nepotes*. Cf. Epit. 1, 6, 3 med., Inst. 1, 12, 6 and Theoph. 1, 12, 6 (Ferrini 60). The scanty readings of V confirm.

taken prisoner by the enemy, though he becomes the slave of the enemy, his children's status is nevertheless in suspense owing to the *ius postliminii*, whereby those captured by the enemy, if they come back, recover all their anterior rights. Thus, if the parent returns, he will have his children in *potestas*; if, however, he dies in captivity, the children will be *sui iuris*, though whether as from the time of his death or from that of his capture is a doubtful point. Also, if a son or grandson is himself captured by the enemy, his parent's *potestas* must similarly in virtue of the *ius postliminii* be said to be in suspense. **130.** Furthermore, a male child passes out of parental *potestas* on being inaugurated *flamen* of Jupiter, and a female child on being taken as a Vestal virgin. **131.** In former times also, when the Roman people used to plant colonies in Latin districts, one who with his parent's sanction had enrolled himself in a Latin colony ceased to be in his parent's *potestas*, because he became a citizen of another State.

132. Further, children cease to be in parental *potestas* by emancipation. Now a son passes out of parental *potestas* by three mancipations, but all other children, male or female, leave it by a single mancipation. For the law of the Twelve Tables speaks of three mancipations only in the case of a son, its terms being these: 'if a father sells his son three times, the son shall be free of the father'. The procedure is as follows: the father mancipates the son to a third party; the latter manumits the son *uindicta*; thereupon he reverts to his father's *potestas*; the father mancipates him again, it may be to the same person or to another (the practice is to mancipate him to the same person), and that person then manumits him *uindicta* as before; thereby he returns once more into his father's *potestas*; the father mancipates him for the third time to the same or to another person (the practice is that he be mancipated to the same person), and by this mancipation he ceases to be in his father's *potestas*, even though he has not as yet been manumitted, but is still in *mancipii causa*. . . . . **133.** Note that one who holds in his *potestas* a son and a grandson by that son has full discretion either to release the son from *potestas* while retaining the grandson in *potestas*, or to keep the son in *potestas* while

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§ 129. = Inst. 1, 12, 5. Cf. G. 1, 187. *seruus hostium*: Inst. 1, 3, 4. *ius postliminii*: Inst. 1, 12, 5 fin. 2, 1, 17. *dubitari potest*: Ulp. D. 49, 15, 18. § 130. Cf. G. 1, 145; 3. 114. Inst. 1, 12, 4. Gell. 1, 12, 9. § 131. Cf. G. 1, 22. 79. 96; 3, 56. § 132. Cf. G. 1, 135; 2, 141; 3, 6; 4, 79. Inst. 1, 12, 6. 3, 2, 8. XII Tabb. 4, 2 (Textes 13. Bruns 1, 22). § 133. = Gaius D. 1, 7, 28. Inst. 1, 12, 7.

uero manumittere; uel omnes sui iuris efficere. eadem et de pronepote dicta esse intellegemus.[1]

134. *Praeterea parentes eos liberos in potestate habere desinunt quos aliis in adoptionem dederunt. et in filio quidem, si in adoptionem*
V p. 37 *datur, tres mancipationes*[2] / et duae intercedentes manumissiones proinde fiunt, ac fieri solent cum ita eum pater de potestate dimittit ut sui iuris efficiatur. deinde aut patri remancipatur, et ab eo is qui adoptat uindicat apud praetorem filium suum esse, et illo contra non uindicante ⟨a⟩ praetore uindicanti filius addicitur, aut non remancipatur patri, *sed* ab eo uindicat is qui adoptat, *apud* quem *in tertia* mancipatione est. sed sane commodius est patri remancipari. in ceteris uero liberorum personis seu masculini seu feminini sexus una scilicet mancipatio sufficit, et aut remancipantur parenti aut non remancipantur. eadem et in prouinciis apud praesidem prouinciae solent fieri. **135.** Qui ex filio semel iterumque mancipato conceptus est, licet post tertiam mancipationem patris sui nascatur, tamen in aui potestate est, et ideo ab eo et emancipari et in adoptionem dari potest. at is qui ex eo filio conceptus est qui in tertia mancipatione est, non nascitur in aui potestate. sed eum Labeo quidem existimat in eiusdem mancipio esse cuius et pater sit; utimur autem hoc iure ut, quamdiu pater eius in mancipio sit, pendeat ius eius, et siquidem pater eius ex mancipatione manumissus erit, cadat[3] in eius potestatem, si uero is, dum in mancipio
V p. 38 sit, de/cesserit, sui iuris fiat. **135a.** Eadem scilicet *dicemus de eo qui ex nepote semel mancipato necdum manumisso conceptus fuerit. nam*,[2] ut supra diximus, quod in filio faciunt tres mancipationes, hoc facit una mancipatio in nepote.

136. *Praeterea, mulieres quae in manum conueniunt in patris potestate esse desinunt. sed in confarreatis nuptiis de flaminica Diali senatusconsulto ex relatione*[4] Maximi et Tuberonis cautum est ut haec quod ad sacra tantum uideatur in manu esse, quod uero ad ceteras causas proinde habeatur atque si in manum non conuenisset. *eae uero mulieres, quae in manum conueniunt per coemptionem*,[5]

[1] Goeschen's generally accepted conjecture, from D. 1, 7, 28 and Inst. 1, 12, 7.
[2] Illegible. Krüger's restoration of the sense.
[3] *cadit* V.
[4] Krüger's conjecture, based on Huschke.
[5] So Huschke-Kübler, for rather more than one illegible line. Krüger: *coemptione autem facta mulieres omni modo potestate*, &c.

§ 134. Cf. G. 1, 132, &c.; 2, 24; 3, 31. § 135. Cf. G. 1, 89. 132. Inst. 1, 12, 9. § 135a. Cf. G. 1, 132. 134. § 136. Cf. G. 1, 112. 114. 115b. Tac. ann. 4, 16.

releasing the grandson, or to make them both *sui iuris*. The same is to be taken to apply to a great-grandson.

134. Further, parents cease to hold in their *potestas* those children whom they have given in adoption to others. In the case of a son three mancipations are performed, with two intervening manumissions, exactly as is the practice when a father is releasing his son from *potestas* in order that he may become *sui iuris*; next, either he is remancipated to his father and it is from the father that the adopter claims him as his son before the praetor, who, if the father makes no counterclaim, adjudges the son to the claimant, or else he is not remancipated to his father, but the adopter claims him from the person with whom he is under the third mancipation. Remancipation to the father is, however, more convenient. In the case of all other children, male or female, a single mancipation suffices, and they may or may not be remancipated to the parent. In the provinces the same proceedings are gone through before the provincial governor. **135.** A child begotten by a son after that son has been mancipated once or twice is nevertheless, even if born after its father's third mancipation, in the grandfather's *potestas*, and consequently can be emancipated or given in adoption by the grandfather. But a child begotten by a son who is under his third mancipation is not born in the grandfather's *potestas*. According to Labeo he is *in mancipio* to the same person as his father; but the rule now observed is that, so long as the father remains *in mancipio*, the child's status is in suspense, and that, if the father is manumitted from *mancipium*, the child falls into the father's *potestas*, but if the father dies whilst *in mancipio*, he becomes *sui iuris*. **135a.** The same naturally holds of a child begotten by a grandson who has been mancipated once, but has not yet been manumitted. For, as we said above, in the case of a grandson a single mancipation has the same effect as three mancipations in the case of a son.

136. Also, women cease to be in their father's *potestas* by passing into *manus*. But in the case of the confarreate marriage of the wife of a *flamen* of Jupiter a senatusconsult passed on the proposal of Maximus and Tubero has provided that she is to be considered to be in *manus* only for sacral purposes, while for all other purposes she is to be treated as though she had not entered *manus*. On the other hand, a woman who enters *manus* by *coemptio* is freed from

potestate patris liberantur; nec interest an in uiri sui manu sint an extranei, quamuis hae solae loco filiarum habeantur quae in uiri manu sunt.

137.[1] *In manu autem esse mulieres desinunt isdem modis quibus filiae familias potestate patris liberantur. sicut igitur filiae familias una mancipatione de potestate patris exeunt, ita eae quae in manu sunt una mancipatione* desinunt in manu esse, et si ex ea mancipatione manumissae fuerint, sui iuris efficiuntur. **137a.**[1] *Inter eam uero* quae *cum extraneo et eam quae cum uiro suo coemptionem fecerit, hoc interest, quod illa quidem* cogere coemptionatorem *potest* ut *se* remancipet cui ipsa uelit, h*aec autem uirum suum* nihilo magis
V p. 39 potest cogere / quam et filia patrem. sed filia quidem nullo modo patrem potest cogere, etiamsi adoptiua sit; haec autem ⟨*uirum*⟩ repudio misso proinde compellere potest atque si ei numquam nupta fuisset.

138. Ii qui in causa mancipii sunt, quia seruorum loco habentur, uindicta censu testamento manumissi sui iuris fiunt. **139.** Nec tamen in hoc casu lex Aelia Sentia locum habet. itaque nihil requirimus cuius aetatis sit is qui manumittit et qui manumittitur, ac ne illud quidem, an patronum creditoremue manumissor habeat. ac ne numerus quidem lege Fufia Caninia finitus in his personis locum habet. **140.** Quin etiam inuito quoque eo cuius in mancipio sunt censu libertatem consequi possunt, excepto eo quem pater ea lege mancipio dedit, ut sibi remancipetur; nam quodammodo tunc pater potestatem propriam reseruare sibi uidetur, eo ipso quod mancipio recipit. ac ne is quidem dicitur inuito eo cuius in mancipio est censu libertatem consequi quem pater ex noxali causa mancipio dedit,[2] ueluti quod furti eius nomine damnatus est et eum[2] mancipio actori dedit; nam hunc actor pro pecunia habet.

141. In summa admonendi sumus aduersus eos quos in mancipio
V p. 40 habemus nihil nobis / contumeliose facere licere; alioquin iniuriarum tenebimur. ac ne diu quidem in eo iure detinentur homines, sed plerumque hoc fit dicis gratia uno momento, nisi scilicet ex noxali causa mancipentur.

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[1] Krüger's conjectural restoration.

[2] Mommsen, followed by Krüger, but not Kübler, excludes *mancipio dedit* and *et eum* below as gloss.

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§ 137. Cf. G. 1, 118 sq. § 137a. Cf. Inst. 1, 12, 10. § 138. Cf. G. 1, 123, &c. § 139. *cuius aetatis*: G. 1, 18. 38. *patronum creditoremue*: G. 1, 27. 47. *lege Fufia Caninia*: G. 1, 42 sq. §§ 140–1. Cf. G. 1, 132. 134; 4, 75. 79. Inst. 4, 8, 7. Pap. Coll. 2, 3.

her father's *potestas*, and it makes no difference whether she be in her husband's or a stranger's *manus*, although only women who are in their husband's *manus* rank as daughters.

137. Women cease to be in *manus* in the same ways as those by which daughters are freed from their father's *potestas*. Thus, just as daughters pass out of their father's *potestas* by a single mancipation, so women in *manus* cease by a single mancipation to be in *manus*, and if manumitted from that mancipation become *sui iuris*. **137a.** Between a woman who has made a *coemptio* with a stranger and one who has done so with her husband there is, however, this difference, that the former can compel her *coemptionator* to remancipate her to the person of her choice, whereas the latter can no more compel her husband to do this than a daughter can compel her father. But, whilst a daughter, even if adoptive, is absolutely incapable of compelling her father, a woman in the *manus* of her husband can, if she has sent him notice of divorce, compel him to release her, just as though she had never been his wife.

138. Persons *in mancipio*, since they rank as slaves, become *sui iuris* if manumitted by *uindicta*, census, or will. **139.** In this case, however, the *L. Aelia Sentia* does not apply, so that no inquiry is made into the ages of the manumitter and manumitted, nor whether the manumitter has a patron or a creditor. Neither does the numerical scale laid down by the *L. Fufia Caninia* apply to these persons. **140.** More than this, it is possible for them to obtain liberty by the census even against the will of their holder *in mancipio*, with the exception of one whom his father has mancipated with a proviso for remancipation to himself; for in that case the father is considered in a sense to reserve his *potestas*, in virtue of the fact that he recovers him by mancipation. Nor, we are told, does a person acquire liberty by the census against the will of his holder *in mancipio* if his father gave him in mancipation on account of his wrongful act, for example if he (the father) was condemned for theft on his account and surrendered him by mancipation to the plaintiff; for in that case the plaintiff holds him in lieu of money. **141.** Be it noted finally that we are not allowed to behave insultingly to those whom we hold *in mancipio*; if we do, we shall be legally liable for the insult. And further, a man is not detained long in this status, which for the most part is created only for a moment, as a matter of form, except, of course, where a man is mancipated on account of wrongdoing.

142. Transeamus nune ad aliam diuisionem. nam, ex his personis quae neque in potestate neque in manu neque in mancipio sunt, quaedam uel in tutela sunt uel in curatione, quaedam neutro iure tenentur. uideamus igitur quae in tutela, quae in curatione sint; ita enim intellegemus [de] ceteras personas[1] quae neutro iure tenentur. **143.** Ac prius dispiciamus de his quae in tutela sunt.

144. Permissum est itaque parentibus liberis quos in potestate sua habent testamento tutores dare, maseulini quidem sexus impuberibus, ⟨*feminini autem sexus cuiuscumque aetatis sint, et tum quo*⟩-que[2] eum nuptae sint. ueteres enim uoluerunt feminas, etiamsi perfectae aetatis sint, propter animi leuitatem in tutela esse. **145.** Itaque, si quis filio filiaeque testamento tutorem dederit, et ambo ad pubertatem peruenerint, filius quidem desinit habere tutorem, filia uero nihilo minus in tutela permanet; tantum enim ex lege Iulia et Papia Poppaea iure liberorum tutela liberantur
V p. 41 feminae. loquimur autem / exceptis uirginibus Uestalibus, quas etiam ueteres in honorem sacerdotii liberas esse uoluerunt; itaque etiam lege XII tabularum eautum est. **146.** Nepotibus autem neptibusque ita demum possumus testamento tutores dare, si post mortem nostram in patris sui potestatem [iure][3] recasuri non sint. itaque, si filius meus mortis meae tempore in potestate mea sit, nepotes [quos] ex eo[4] non poterunt ex testamento meo habere tutorem, quamuis in potestate mea fuerint, scilicet quia mortuo me in patris sui potestate futuri sunt. **147.** Cum tamen in compluribus aliis eausis postumi pro iam natis habeantur, et in hae eausa placuit non minus postumis quam iam natis testamento tutores dari posse, si modo in ea eausa sint ut, si uiuis nobis nascantur, in potestate nostra fiant. hos ⟨*enim*⟩ etiam heredes instituere possumus, eum extraneos postumos heredes instituere permissum non sit. **148.** ⟨*Uxori*⟩ quae in manu est proinde ae [si] filiae, item nurui quae in filii manu est proinde ae nepti tutor dari potest. **149.** Retissime autem tutor sie dari potest: L. TITIUM LIBERIS MEIS TUTOREM

[1] So Inst. 1, 13 pr. *intellegimus de ceteris personas* V.
[2] From Krüger.
[3] *iure* om. Inst. 1, 13, 3.
[4] Inst. om. *quos*. Goeschen adds *habeo*.

§§ 142–3. = Inst. 1, 13 pr. Cf. G. 1, 50. § 144. Cf. G. 1, 189. 190; 2, 240. 289. Inst. 1, 13, 3. Cic. p. Mur. 12, 27. § 145. *filius quidem*: G. 1, 196. Inst. 1, 22 pr. *filia uero*: G. 1, 194; 3, 44. *lege Iulia*: 18 B.C. Papia Poppaea: A.D. 9. *Uestalibus*: G. 1, 130. XII Tabb. 5, 1 (Textes 14. Bruns 1, 22). § 146. = Inst. 1, 13, 3 med. Cf. G. 1, 127. § 147. = Inst. 1, 13, 4. *non minus postumis*: Inst. 1, 14, 5. *etiam heredes*: G. 2, 130. 242. 287. § 148. Cf. G. 1, 108 sq.; 2, 159; 3, 3. § 149. Cf. G. 2, 289.

142. Now let us pass to another classification: of persons who are neither in *potestas* nor in *manus* nor in *mancipium*, some are under *tutela* or under *curatio*, others under neither. Let us therefore see which are under *tutela* and which under *curatio*; so we shall know the others, who are under neither. **143.** First then of those who are in *tutela*.

144. Parents are allowed to appoint by will tutors to the children whom they hold in *potestas*, to males below the age of puberty, to females of whatever age, even if they be married. For the early lawyers held that women even of full age should be in *tutela* on account of their instability of judgment. **145.** Thus, if by his will a man has appointed a tutor to his son and daughter and both reach puberty, whereas the son ceases to have a tutor, the daughter none the less remains under *tutela*; for it is only by the *ius liberorum* (as mother of several children) that women are freed from *tutela* by the *L. Iulia et Papia Poppaea*. From this statement, however, we except Vestal virgins, whom even the early lawyers out of respect for their priestly office desired to be free from *tutela*; and so it was provided by the law of the Twelve Tables. **146.** To grandsons and granddaughters we can appoint tutors by will only if they do not eventually lapse at our death into the *potestas* of their father. Thus, if my son is in my *potestas* at the time of my death, my grandsons by him cannot receive a tutor under my will, in spite of their having been in my *potestas*, for the simple reason that on my death they will be in their father's *potestas*. **147.** Just as in a number of other cases posthumous children are treated as if already born, so in the present case it is settled that tutors can be appointed by will to posthumous children no less than to those already born, provided that in the given circumstances they would, if born in the testator's lifetime, come under his *potestas*. Such children we can also institute as our heirs, whereas we may not institute stranger posthumous children. **148.** To a wife in one's *manus* one can appoint a tutor exactly as to a daughter, and to a daughter-in-law in one's son's *manus* exactly as to a granddaughter. **149.** The most correct form of appointing a tutor is: 'I give

DO, ⟨*uel UXORI MEAE*⟩[1] TUTOREM DO. sed et si ita scriptum sit: LIBERIS MEIS uel UXORI MEAE TITIUS TUTOR ESTO, recte datus intellegitur.

V p. 42 **150.** In persona tamen / uxoris quae in manu est recepta est etiam tutoris optio, id est, ut liceat ei permittere quem uelit ipsa tutorem sibi optare, hoc modo: TITIAE UXORI MEAE TUTORIS OPTIONEM DO. quo casu licet uxori ⟨*tutorem optare*⟩ uel in omnes res uel in unam forte aut duas. **151.** Ceterum aut plena optio datur aut angusta. **152.** Plena ita dari solet ut proxime supra diximus. angusta ita dari solet: TITIAE UXORI MEAE *TUTORIS OPTIONEM DUMTAXAT*[2] SEMEL DO, aut DUMTAXAT BIS DO. **153.** Quae optiones plurimum inter se differunt. nam quae plenam optionem habet potest semel et bis et ter et saepius tutorem optare; quae uero angustam habet optionem, si dumtaxat semel data est optio, amplius quam semel optare non potest; si *dumtaxat*[3] bis, amplius quam bis optandi facultatem non habet. **154.** Uocantur autem hi qui nominatim testamento tutores dantur datiui, qui ex optione sumuntur optiui.

155. Quibus testamento quidem tutor datus non sit, iis ex lege XII ⟨*tabularum*⟩ agnati sunt tutores, qui uocantur legitimi. **156.** Sunt autem agnati per uirilis sexus personas cognatione iuncti, quasi a patre cognati, ueluti frater eodem patre natus,

V p. 43 fratris filius neposue ex eo, item patruus et patrui / filius et nepos ex eo. at hi qui per feminini sexus personas cognatione coniunguntur, non sunt agnati, sed alias naturali iure cognati. itaque inter auunculum et sororis filium non agnatio est, sed cognatio. item amitae, materterae filius[4] non est mihi agnatus, sed cognatus, et inuicem scilicet ego illi eodem iure coniungor, quia qui nascuntur patris, non matris familiam sequuntur. **157.** Sed[5] olim quidem, quantum ad legem XII tabularum attinet, etiam feminae agnatos habebant tutores. sed postea lex Claudia lata est quae, quod ad feminas attinet, ⟨*agnatorum*⟩ tutelas sustulit; itaque, masculus quidem impubes fratrem puberem aut patruum habet tutorem, femina uero talem habere tutorem non potest. **158.** Sed agnationis

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[1] So Kübler. *liberis meis tut(orem) do lic. tut(orem) do* V.
[2] *dumtaxat tutoris optionem* V.
[3] So Krüger. *tatum* (*tantum?*) V.
[4] *amitae tuae filius* Inst. *materterae* may be a corruption of *meae*.
[5] Mommsen and Krüger *et*.

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§§ 150–3. Cf. Liu. 39, 19. Lex Salpens. c. 22 (Textes 109. Bruns 1, 143). § 155. = Inst. 1, 15 pr. Cf. G. 1, 165. XII Tabb. 5, 6 (Textes 14. Bruns 1, 23). § 156. = Inst. 1, 15, 1. Cf. G. 3, 10. Inst. 3, 2, 1. § 157. Cf. G. 1, 171. C. 5, 30, 3 (A.D. 472). § 158. = Inst. 1, 15, 3. Cf. G. 1, 163. 170. 195b; 3, 21. 27. 51. 153.

Lucius Titius as tutor to my children' or 'to my wife'; but it is also considered a correct appointment if the will reads: 'Let Lucius Titius be tutor to my children' or 'to my wife'. **150.** In the case, however, of a wife in *manus* option of tutor is admitted, that is to say the will may allow her to choose whom she likes for her tutor. The form is: 'I give my wife Titia the option of a tutor'; this permits her to choose a tutor for all purposes or, it may be, for only one or two. **151.** The option given may be unlimited or limited. **152.** An unlimited option is commonly given in the form just stated; a limited option thus: 'I give my wife Titia the option of a tutor not more than once' or 'not more than twice'. **153.** Between these two options there is a wide difference: a woman having an unlimited option is able to choose a tutor once, twice, thrice, or oftener, whereas one having a limited option can do so only up to the number of times granted—once or twice, as the case may be, and not oftener. **154.** Tutors appointed by name in a will are called *datiui*, those selected under an option *optiui*.

155. Those to whom no tutor has been appointed by will have under the law of the Twelve Tables their agnates as tutors; these are called *legitimi*. **156.** Agnates are those akin to each other through persons of the male sex, being as it were cognates on the father's side, for instance one's brother by the same father, his son and his grandson by that son, or again one's paternal uncle, his son, and his grandson by that son. Those connected through persons of the female sex are not agnates, but cognates related only by natural law. Accordingly, between a mother's brother and her son there is not agnation, but cognation; again, the son of my father's or my mother's sister is not my agnate, but my cognate, and of course my relation to him is the same, since children follow their father's, not their mother's, family. **157.** In former times, under the law of the Twelve Tables, women as well as males had their agnates for tutors, but the subsequent *L. Claudia* has abolished the *tutela* of agnates so far as women are concerned, with the result that a male below puberty has as tutor his brother, if of full age, or his paternal uncle, whereas a woman cannot have a tutor of this kind. **158.** By *capitis deminutio* the tie of agnation

quidem ius capitis deminutione perimitur, cognationis uero ius eo modo non commutatur, quia ciuilis ratio ciuilia quidem iura corrumpere potest, naturalia uero non potest. **159.** Est autem capitis deminutio prioris *status*[1] permutatio. eaque tribus modis accidit: nam aut maxima est capitis dem*inutio*, aut minor, quam quidam mediam uocant, aut minima. **160.** Maxima est capitis deminutio cum aliquis simul et ciuitatem et libertatem amittit; quae accidit
V p. 44 incensis, qui ex forma censua/li uenire iubentur. quod ius p . . . . . .[2] qui contra eam legem in urbe Roma domicilium habuerint; item feminae, quae ex senatusconsulto Claudiano ancillae fiunt eorum dominorum, quibus inuitis et denuntiantibus [dominis] cum seruis eorum coierint. **161.** Minor siue media est capitis dem*inutio* cum ciuitas amittitur, libertas retinetur; quod accidit ei cui aqua et igni interdictum fuerit. **162.** Minima est capitis deminutio cum et ciuitas et libertas retinetur, sed status hominis commutatur; quod accidit in his qui adoptantur, item in his quae coemptionem faciunt, et in his qui mancipio dantur quique ex mancipatione manumittuntur; adeo quidem ut, quotiens quisque mancipetur aut manumittatur, totiens capite deminuatur. **163.** Nec solum maior*ibus* ⟨*capitis*⟩ deminutionibus ius agnationis corrumpitur, sed etiam minima. et ideo, si ex duobus liberis alterum pater emancipauerit, post obitum eius neuter alteri agnationis iure tutor esse poterit. **164.** Cum autem ad agnatos tutela pertineat, non simul ad omnes pertinet, sed ad eos tantum qui proximo gradu
V p. 45 sunt./. . . . . .[3]

165. Ex eadem lege XII tabularum liber*t*arum et impuberum liber*t*orum tutela ad patronos liberosque eorum pertinet. quae et ipsa tutela legitima uocatur, non *quia nominatim*[4] ea lege de hac tutela cauetur, *sed*[4] quia proinde accepta est per interpretationem atque si uerbis legis *introduc*ta[5] esset. eo enim ipso *quod* heredi-

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[1] So Inst. 1, 16 pr. *capitis* V.

[2] 1½ lines illegible except for *ex leg* towards the end. Mommsen: *quod ius proprie hodie in usu non est; sed libertatem poenae causa hodie amittunt ex lege Aelia Sentia qui dediticiorum numero sunt, si qui contra eam legem*, &c. But Krüger objects.

[3] The first 17 lines of V p. 45 are illegible except for a few letters (see Apogr. or Krüger 1, 164a). It is generally thought that the subject was the *legitima tutela* of *gentiles*: cf. 3, 17. But some other subject seems to have followed. Line 17 ends with a blank space, marking the next section (165) as distinct.

[4] Restored from Inst. 1, 17. [5] So Inst. *accepta* V.

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§ 159. = Inst. 1, 16 pr. Cf. Paul D. 4, 5, 11. § 160. Cf. Inst. 1, 16, 1. *forma*: G. 4, 24. 28. 32. *contra eam legem*: G. 1, 27? *senatusconsulto Claudia-*

is ended, but that of cognation is unaffected, because considerations of civil law can destroy civil but not natural rights. **159.** *Capitis deminutio* is a change of previous status; it occurs in three ways, there being *capitis deminutio maxima*, *minor* (also called *media*), and *minima*. **160.** There is *capitis deminutio maxima* when a man loses both citizenship and freedom at the same time. This happens to those who evade inscription in the census, whom the regulations for the census order to be sold. A similar legal provision . . . . . who in contravention of that *lex* take up residence in the city of Rome. Another case is that of a woman who under the *SC. Claudianum* becomes enslaved to the owner of a slave with whom she has cohabited against the will and warning of that owner. **161.** There is *capitis deminutio minor* or *media* when citizenship is lost but freedom is retained, as happens to one interdicted from fire and water. **162.** There is *capitis deminutio minima* when, though both citizenship and freedom are retained, there is a change of status, as happens to those who are adopted or who make a *coemptio*, and to those given in mancipation and manumitted from it, so much so that a man undergoes a *capitis deminutio* every time that he is mancipated or manumitted. **163.** Now, the right of agnation is destroyed not only by *capitis deminutio maxima* and *minor*, but also by *capitis deminutio minima*. Thus, if of two children a father has emancipated one, after the father's death neither can be the other's tutor by right of agnation. **164.** But though a *tutela* goes to agnates, it does not go to all of them at the same time, but only to those standing in the nearest degree. . . . . .

165. By the law of the Twelve Tables also the *tutela* of freedmen below puberty and of freedwomen belongs to their patrons and their patrons' children. This *tutela* likewise is styled *legitima*, not that there is any express provision concerning it in the *lex*, but because it has become accepted by interpretation exactly as though it had been introduced by the *lex* in so many words. For from the fact

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no: G. 1, 84, &c. § 161. = Inst. 1, 16, 2. Cf. G. 1, 128. § 162. = Inst. 1, 16, 3. Cf. G. 3, 51. 83. 84; 4, 38. § 163. Cf. Inst. 1, 15, 3. G. 1, 158, &c. § 164. = Inst. 1, 16, 7. Cf. G. 3, 11. Inst. 3, 2, 5. § 165. = Inst. 1, 17. Cf. Ulp. 11, 3.

V p.46 *ta*tes[1] libertorum libertarumque, si / *in*testati decessissent, iusserat lex ad patronos liberosue eorum pertinere, crediderunt ueteres uoluisse legem etiam tutelas ad eos pertinere, quia et agnatos, quos ad hereditatem uocauit, eosdem et tutores esse iusserat. **166.** Exemplo patronorum rec*e*pta e*st* ⟨*et alia tutela, quae et ipsa legitima uocatur. nam si quis filium nepotemue aut pronepotem impuberes, uel filiam neptemue aut proneptem tam puberes quam impuberes, alteri ea lege mancipio dederit, ut sibi remanciparentur, remancipatosque manumiserit, legitimus eorum tutor erit.*⟩[2]

[De fiduciaria ⟨*tutela*⟩.] **166a.** Sunt[3] et aliae tutelae quae fiduciariae uocantur, id est, quae ideo nobis competunt quia liberum caput mancipatum nobis uel a parente uel a coemptionatore manumiserimus. **167.** Sed Latinarum et Latinorum impuberum *tute*la non omni modo ad manumissores liber*osque* eorum[4] pertinet, sed ad eos quorum ante manumissionem ex iure Quiritium ⟨*fuerunt; unde si ancilla ex iure Quiritium*⟩ tua sit, in bonis mea, a me quidem solo, non etiam a te, manumissa Latina fieri potest, et bona eius ad me pertinent. sed eius *tu*tela tibi competit; nam ita lege Iunia cauetur. itaque, si ab eo cuius et in bonis et ex *iure* Qu*iritium* ancilla fuerit facta sit Latina, ad eundem et bona et tutela pertine*nt*.

168. Agnatis et patronis et liberorum capitum manumissoribus permissum est feminarum tutelam alii in iure cedere; pupillorum autem tutelam non est permissum cedere, quia non uidetur one-/
V p.47 rosa, cum tempore pubertatis finiatur. **169.** Is autem cui ceditur tutela cessicius *tu*tor uocatur. **170.** Quo mortuo aut capite deminuto reuertitur ad eum tutorem tutela qui cessit; ipse quoque qui cessit si mort*u*us aut capite deminutus sit, *a* cessicio[5] tutela discedit et reuertitur ad eum qui, post eum qui cesserat, secundum gradum in ea tutela habueri*t*. **171.** Sed quantum ad agnatos pertinet, nihil hoc tempore de cessicia tutela quaeritur, cum agnatorum tutelae in feminis lege Claudia sublatae sint.

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[1] Restored from Inst. 1, 17.

[2] After *iusserat* of § 165 V proceeds without a break: *exemplo*/*patronorum* (space) *de fiduciaria* (space)/*rectae sunt et aliae* and the rest § 166a. We must in any case disregard *de fiduciaria* as gloss or misplaced and incomplete title and emend *rectae*, but this done, we are faced with perfectly good sense. For the reader's convenience we print Krüger's insertion from Inst. 1, 18, with minor improvements by Kübler. But this is a very strong measure: see Buckland, Main Institutions 74; JRS 1943, 11.

[3] See § 166, n. 2. If § 166 is not inserted, the present section will begin: *Exemplo patronorum receptae sunt et aliae*, &c.

[4] Kniep. *liueris* (?) *in eorum* V. *libertinorum* Kübler. *eorum* Krüger.

[5] *accessio* V.

that the statute ordained that succession to freedmen and freedwomen dying intestate should go to their patrons and their patrons' children the early lawyers inferred that the intention of the statute was that *tutela* over them should go to the same persons, seeing that it had ordained that agnates whom it called to succession should also be tutors. **166.** On the analogy of the *tutela* of patrons yet another *tutela* has become accepted, which also is styled *legitima*. For if one mancipates to another one's son, grandson, or great-grandson who is below puberty, or one's daughter, granddaughter, or great-granddaughter whether of full age or not, with a proviso for remancipation to oneself, and when they have been remancipated manumits them, one will be their *legitimus tutor*.

166a. There are other *tutelae* that are called *fiduciariae*, namely those that come to us through our having manumitted a free person mancipated to us by a parent or *coemptionator*. **167.** But *tutela* over Latin freedwomen and over Latin freedmen below puberty does not in all cases go to their manumitters and their children, but to those to whom before their manumission they belonged by Quiritary title. Therefore, if a female slave is yours by Quiritary title but mine by bonitary, manumission by me alone and not by you can make her a Latin, and her estate goes to me. Her *tutela*, however, falls to you; for so the *L. Iunia* provides. But if she has been made a Latin by one who owns her by both bonitary and Quiritary title, then both her estate and her *tutela* go to him.

168. *Tutela* over women is allowed to be ceded *in iure* to another by agnates, patrons, and manumitters of free persons, but *tutela* over male wards is not allowed to be ceded, because, being terminated when the ward reaches puberty, it is not considered burdensome. **169.** The person to whom a *tutela* is ceded is called a *cessicius tutor*. **170.** If this tutor dies or undergoes *capitis deminutio*, the *tutela* reverts to the tutor who ceded it. Likewise, if he who ceded it himself dies or undergoes *capitis deminutio*, the *tutela* departs from the *cessicius* and reverts to him who stands in the next degree after the ceder in regard to that *tutela*. **171.** So far, however, as agnates are concerned no question of *tutela cessicia* arises at the present day, since agnatic *tutela* over women has been

§ 166. Cf. Inst. 1, 18. G. 1, 172. 175. 192; 2, 122. § 166a. Cf. Inst. 1, 19. G. 1, 114. 115. 172. 175. 195a. § 167. Cf. G. 1, 16. 22. 35; 3, 56. § 170. *capite deminuto*: G. 1, 158, &c. § 171. Cf. G. 1, 157.

172. Sed fiduciarios quoque quidam putauerunt cedendae tutelae ius non habere, cum ipsi se oneri subiecerint. quod etsi placeat, in parente tamen, qui filiam neptemue aut proneptem alteri ea lege mancipio dedit, ut sibi remanciparetur, remancipatamque manumisit, idem dici non debet, cum is et legitimus tutor habeatur, et non minus huic quam patronis honor praestandus *sit*.[1]

173. Praeterea, senatusconsulto mulieribus permissum est in absentis tutoris locum alium petere; quo petito prior desinit; nec interest quam longe ab*sit*[2] is tutor. **174.** Sed excipitur ne in absentis patroni locum liceat libertae tutorem petere. **175.** Patroni /
V p. 48 autem loco habemus etiam parentem qui, ex eo quod ipse sibi re*m*ancipatam filiam neptemue aut proneptem manumisit, legitimam tutelam nactus est. ⟨*sed*⟩ huius quidem liberi fiduciarii tutoris loco numerantur, *patroni autem*[3] liber*i* ea*n*dem tutelam adipiscuntur quam et pater eorum habuit. **176.** S*ed* aliquando etiam in patroni absentis locum p*ermittit*ur tutorem petere, ueluti ad hereditatem adeunda*m*. **177.** Idem senatus censuit et in persona pupilli patroni filii. **178.** Nam, e[4] lege Iulia de maritandis ordinibus, ei quae in legitima tutela pupilli sit permittitur dotis constituendae gratia a praetore urbano tutorem petere. **179.** Sane patroni filius, etiamsi impubes sit, libertae efficiet*ur* tutor, quamquam in nulla re auctor fieri potest, cum ipsi nihil permissum sit sine tutoris auctoritate agere. **180.** Item, si qua in tutela legitima furiosi aut muti sit, permittitur ei senatusconsulto dotis constituendae gratia tutorem petere. **181.** Quibus casibus saluam manere tutelam patrono patronique filio manifestum est. **182.** Praeterea senatus censuit ut, si tutor pupilli pu*pi*llaeue suspectus a tutela remotus sit, siue ex iusta causa fuerit excusatus, in locum eius alius tutor detur; quo facto prior tutor amittit tutelam. **183.** Haec omnia
V p. 49 similiter et Romae et in pro/uinciis obseruantur, scilicet ⟨*ut Romae a praetore*⟩[5] et in prouinciis a praeside prouinciae tutor p*eti debeat*.

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[1] *est* V.

[2] *aberit* V. *afuerit* Mommsen. *abierit* Polenaar.

[3] *autem patroni* V.

[4] *e*: usually and perhaps rightly corrected to *et*. This section, as Krüger points out, would come better after § 180.

[5] Supplied by Krüger. Alternatively, with Kübler, correct *et* to *ut*.

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§ 172. Cf. G. 1, 166. 166a, &c. Inst. 1, 18. § 175. Cf. G. 1, 166. 166a. Inst. 1, 19. § 178. *lege Iulia*: G. 1, 145. § 179. Cf. G. 1, 177. Inst. 1, 25, 13. § 182. Cf. Inst. 1, 26.

abolished by the *L. Claudia*. **172.** But some have held that fiduciary tutors also have no right of ceding their *tutela*, inasmuch as they have subjected themselves to the burden by their own act. But even if that view be accepted, the same should not be said in the case of a parent who has mancipated a daughter, granddaughter, or great-granddaughter to a third party with a proviso for remancipation to himself and who has manumitted her after such remancipation, since he is regarded as a *legitimus tutor* and should be accorded no less respect than a patron.

173. Furthermore, by a *senatusconsultum* women are allowed to apply for another tutor in place of a tutor who is absent; thereupon the previous tutor is retired. It does not matter how far away he is. **174.** But by an express exception a freedwoman is not allowed to apply for another tutor in place of her absent patron. **175.** We place on the same footing as a patron a parent who, by manumitting a daughter, granddaughter, or great-granddaughter after her remancipation to himself, has acquired *legitima tutela* over her. His children, however, are accounted fiduciary tutors, whereas a patron's children acquire the same kind of *tutela* as their parent had. **176.** But sometimes a woman is allowed to apply for another tutor in place of even an absent patron, for instance in order to accept an inheritance. **177.** The same has been decreed by the senate where a patron's son is himself a ward. **178.** For by the *L. Iulia de maritandis ordinibus* (regulating the marriages of the orders) a woman in the *legitima tutela* of a ward may apply to the urban praetor for a tutor for the purpose of creating a *dos* (dowry). **179.** Of course a patron's son becomes tutor of his father's freedwoman even if he be below puberty, though he is unable to give *auctoritas* in any matter, seeing that he himself is not allowed to do any act without his own tutor's *auctoritas*. **180.** Again, a woman in the *legitima tutela* of a lunatic or a dumb man is allowed by the senatusconsult to apply for a tutor for the purpose of creating a *dos*. **181.** In the above cases it is clear that the *tutela* of a patron or a patron's son remains unimpaired. **182.** The senate has further decreed that if the tutor of a male or female ward be removed from his *tutela* as suspect, or be excused from office on some lawful ground, another tutor shall be appointed in his place; whereupon the previous tutor loses his *tutela*. **183.** The practice in all these cases is the same at Rome and in the provinces, namely that application for a tutor should be made at Rome to the praetor and in the provinces to the provincial governor.

184. Olim, cum legis actiones in usu erant, etiam ex illa causa tutor dabatur, si inter tutorem et mulierem pupillumue lege agendum erat. nam, quia ipse tutor[1] in re sua auctor esse non poterat, alius dabatur, quo auctore legis actio perageretur, qui dicebatur praetorius tutor,[1] quia *a* praetore urbano dabatur.[2] sed post sublatas legis actiones quidam putant hanc speciem dandi tutoris in usu esse desisse; aliis *autem* placet adhuc in usu esse, si legitimo iudicio agatur.

185. Si cui nullus omnino tutor sit, ei datur in urbe Roma ex lege Atilia a praetore urbano et maiore parte tribunorum plebis, qui Atilianus tutor uocatur, in prouinciis uero a praesidibus prouinciarum ⟨*ex*⟩[3] lege Iulia et Titia. **186.** Et ideo, si cui testamento tutor sub condicione aut ex die certo datus sit, quamdiu condicio aut dies pendet, tutor dari potest; item, si pure datus fuerit, quamdiu nemo heres existat, tamdiu ex his legibus tutor petendus est; qui desinit tutor esse posteaquam aliquis ex testamento tutor esse coeperit. **187.** Ab hostibus quoque tutore capto ex his legibus tutor peti debet; qui desinit tutor esse, si is qui captus est in ciuitatem reuersus fuerit; nam reuersus recipit tutelam iure postliminii./

V p. 50 **188.** Ex his apparet quot sint species[4] tutelarum. si uero quaeramus in quot genera hae species diducantur, longa erit disputatio; nam de ea re ualde ueteres dubitauerunt. nos, qui diligentius hunc tractatum exsecuti sumus et in edicti interpretatione et in his libris quos ex Quinto Mucio fecimus, hoc totum ⟨*omittimus. hoc solum*⟩[5] tantisper sufficit admonuisse, quod quidam quinque genera esse dixerunt, ut Quintus Mucius, alii tria, ut Seruius Sulpicius, alii duo, ut Labeo; alii tot genera esse crediderunt quot etiam species essent.

189. Sed impuberes quidem in tutela esse omnium ciuitatium iure contingit, quia id naturali rationi[6] conueniens est, ut is qui

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[1] *tutelae* (?) V.
[2] *datur* V.
[3] So Inst. 1, 20 pr.
[4] *species in s* (or *i*) V. Kniep: *species in iure.*
[5] So Kübler, partly from Kniep. Krüger emends as follows: *nosque diligentius hunc tractatum . . . fecimus. hoc tantisper*, &c. Mommsen: *hoc loco tantisper.*
[6] *ratione* V, defensible. *iure* Inst.

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§ 184. Cf. Ulp. 11, 24. Inst. 1, 21, 3. *sublatas legis actiones*: G. 4, 30. *legitimo iudicio*: G. 4, 103 sq. § 185. = Inst. 1, 20 pr. *postliminii*: G. 1, 129, &c. §§ 186 7. = Inst. 1, 20, 1. 2. § 188. *in quot genera*: G. 3, 88. 89. 182. 183; 4, 1. § 189. = Inst. 1, 20, 6.

184. In earlier times, when the *legis actiones* were in use, a tutor used to be appointed if there was to be a *legis actio* between a tutor and his ward, whether a woman or a male under puberty. For, inasmuch as the tutor could not himself give *auctoritas* in a matter in which he was himself interested, another tutor used to be appointed, in order that the *legis actio* might be carried through with his *auctoritas*. He was called a *praetorius tutor*, because appointed by the urban praetor. Some hold that since the abolition of the *legis actiones* this case of appointment of a tutor has gone out of use, but another view is that it is still available if the proceedings in view be by *iudicium legitimum*.

185. If a person has no tutor at all, one is appointed for him, at Rome by the praetor and a majority of the tribunes of the *plebs* under the *L. Atilia*, who is called *Atilianus tutor*, and in the provinces by the provincial governors under the *L. Iulia et Titia*. **186.** Accordingly, where a tutor has been appointed by a will subject to a condition or as from a certain date, a tutor can be appointed pending the realization of the condition or the arrival of the date. Again, where the testamentary appointment is absolute, a tutor may be applied for under the *leges* mentioned during such time as no one has qualified as heir; the tutor appointed ceases to be tutor as soon as someone becomes tutor under the will. **187.** Application for a tutor should also be made under the same *leges* if a tutor has been captured by the enemy; this appointed tutor ceases to be tutor if the captive tutor returns to Roman territory; for *iure postliminii* he recovers his *tutela* on his return.

188. From all this it is evident how many species or varieties of *tutela* there are. But to inquire into the number of *genera* between which these species are distributed would involve a long discussion, this being a point on which the older lawyers have been exceedingly doubtful. For our part, having dealt with the matter very carefully in our commentary on the Edict and in our books *ex Quinto Mucio*, we omit the whole discussion. It is enough to observe that some, for instance Quintus Mucius, have said that there are five *genera*, others, for instance Servius Sulpicius, that there are three, others, for instance Labeo, that there are two, while others have held that there are as many *genera* as there are species.

189. That persons below puberty should be under guardianship occurs by the law of every State, it being consonant with natural

perfectae aetatis non sit alterius tutela regatur; nec fere ulla ciuitas est in qua non licet parentibus liberis suis impuberibus *testamento* tutorem dare, quamuis, ut supra diximus, soli ciues Romani uideantur[1] liberos suos in potestate habere. **190.** Feminas uero perfectae aetatis in tutela esse fere nulla pretiosa ratio suasisse uidetur. nam quae uulgo creditur, quia leuitate animi plerumque decipiuntur et aequum erat eas tutorum auctoritate regi, magis speciosa uidetur quam uera. mulieres enim quae perfectae aetatis
V p. 51 sunt, ipsae sibi negotia tractant, et in quibusdam / causis dicis gratia tutor interponit auctoritatem suam, saepe etiam inuitus auctor fieri a praetore cogitur. **191.** Unde cum tutore nullum ex tutela iudicium mulieri datur. at ubi pupillorum pupillarumue negotia tutores tractant, eis[2] post pubertatem tutelae iudicio rationem reddunt. **192.** Sane patronorum et parentum legitimae tutelae uim aliquam habere intelleguntur, eo quod hi neque ad testamentum faciendum neque ad res mancipi alienandas neque ad obligationes suscipiendas auctores fieri coguntur, praeterquam si magna causa alienandarum rerum mancipi obligationisque suscipiendae interueniat. eaque omnia ipsorum causa constituta sunt, ut, quia ad eos intestatarum mortuarum hereditates pertinent, neque per testamentum excludantur ab hereditate neque alienatis pretiosioribus rebus susceptoque aere alieno minus locuples ad eos hereditas perueniat. **193.** Apud peregrinos non similiter ut apud nos in tutela sunt feminae; sed tamen plerumque quasi in tutela sunt: ut ecce[3] lex Bithynorum, si quid mulier ⟨*contra*⟩ hat, maritum auctorem esse iubet aut filium eius puberem.

194. Tutela autem liberantur ingenuae quidem trium ⟨*liberorum iure, libertinae uero quattuor, si in patroni*⟩ liberorumue eius legitima tutela sint; nam [et] ceterae, quae alterius generis tutores
V p. 52 habent, uelut Atilianos aut fiduciarios,[4] trium liberorum / iure tutela liberantur. **195.** Potest autem pluribus modis libertina alterius generis ⟨*tutorem*⟩ habere, ueluti si a femina manumissa sit; tunc enim e lege Atilia petere debet tutorem uel in prouinc⟨*iis*

[1] So Krüger. *uideanturtant* V. *uideantur tantum* Kübler.
[2] *ei* V. om. Inst. *eis* is an old conjecture or reading, but not accepted by Studemund–Krüger. [3] *ui haecce* V.
[4] *uelut—fiduciarios*: gloss according to Polenaar and Krüger.

§ 190. Cf. G. 1, 144, &c.; 2, 122. Ulp. 11, 25–7. § 191. = Inst. 1, 20, 7. § 192. Cf. Ulp. 11, 27. *testamentum*: G. 2, 112. 118. 122; 3, 43. *res mancipi*: G. 2, 47. 80. 85. *obligationes*: G. 3, 91. 108. 176. Cf. 1, 176. 178. 180. § 193. Cf. Cic. p. Flacco 30, 74. § 194. Cf. G. 1, 145; 3, 44. § 195. *lege Atilia*: G. 1, 185.

reason that a person of immature age should be governed by the guardianship of another person; indeed, there can hardly be any State in which parents are not allowed to appoint guardians to their children below puberty by their will, though, as we have remarked, it seems that only Roman citizens have their children in their *potestas*. **190.** But hardly any valid argument seems to exist in favour of women of full age being in *tutela*. That which is commonly accepted, namely that they are very liable to be deceived owing to their instability of judgment and that therefore in fairness they should be governed by the *auctoritas* of tutors, seems more specious than true. For women of full age conduct their own affairs, the interposition of their tutor's *auctoritas* in certain cases being a mere matter of form; indeed, often a tutor is compelled by the praetor to give *auctoritas* even against his will. **191.** This is why no action on the *tutela* lies at the suit of a woman against her tutor. In contrast, where tutors manage the affairs of a male or female ward below age, they are held to account to their wards on their attaining full age by the *tutelae iudicium*. **192.** It must, however, be allowed that the *legitima tutela* of a patron or a parent is of some real efficacy, in that such guardians are not compelled to give *auctoritas* for the making of a will, the alienation of *res mancipi*, or the incurring of obligations, except where a strong reason for alienating *res mancipi* or incurring obligations exists. All this is provided in the interest of the tutors themselves, in order that, being entitled to the inheritance of their wards should these die intestate, they may not be excluded from it by a will nor receive it rendered less lucrative by the alienation of the more valuable property or by debts incurred. **193.** Among peregrines women are not in *tutela* in the same way as with us; still, in general, they are in a sort of *tutela*: a law of the Bithynians, for example, ordains that if a woman enters into any transaction, it must be authorized by her husband or full-grown son.

194. Freeborn women are released from *tutela* in right of three children, freedwomen in right of four if they are in the *legitima tutela* of their patron or his children, but otherwise, if they have tutors of another sort, such as *Atiliani* or *fiduciarii*, in right of three children. **195.** A freedwoman may have a tutor of another sort in various ways; thus, if she has been manumitted by a woman, she must apply for a tutor under the *L. Atilia* or, in a province,

e lege Iul)ia et Titia; nam in patronae tutela esse non potest. **195a.** Item, si ⟨*sit a*⟩[1] masculo manumissa et auctore eo coemptionem fecerit, deinde remancipata et manumissa sit, patronum quidem haberc tutorem desinit, incipit autem habere eum tutorem a quo manumissa est, qui fiduciarius dicitur. **195b.** Item, si patron*us eiusue filius* in adoptionem se dedit, debet liberta *e lege Atilia uel Iulia et* Titia tut*orem* petere. **195c.** Similiter, ex isdem legibus petere debet tutorem *lib*erta, si patronus decesserit nec ullum uirilis sexus liberorum in familia re*liquer*it. **196.** Masculi *autem cum* puberes esse coeperi*nt* tutela liberantur. p*uberem autem* Sabinus quidem et Cas*s*ius ceterique nostri praeceptores eum esse putan*t* qui habitu corporis pubertatem ostendit, id est, eum qui generare potest; sed in his qui pubescere non possunt, quales sunt spadones, eam aetatem esse spectandam cuius aetatis puberes fiunt. sed diuersae scholae auctores annis putant puber-
V p. 53 tatem aestimandam, id est, eum puberem esse existimant *qui* / *XIIII annos expleuit*. . . .[2]

V p. 54 **197.** . . .[3] / aetatem peruener*it*, in qua res suas tueri possit, sicuti apud peregrinas gentes custodiri superius indicauimus. **198.** Ex isdem causis et in prouinciis a praesidibus earum curato*res* dari *sol*ent.[4]

199. Ne tamen et pupillorum et eorum qui in curatione sunt negotia a tutoribus curatoribusque consumantur aut deminuantur, curat praetor ut et tutores ⟨*et*⟩ curatores eo nomine satisdent. **200.** Sed hoc non est perpetuum; nam et tutores t*estamento* dati satisdare non coguntur, quia fides eorum et diligentia ab ipso testatore probata est, et curatores ad quos no*n* e lege curat*io* pertinet, sed ⟨*qui*⟩ uel a consule uel a praetore uel a praeside prouinciae *dan*tur, plerumque non coguntur satisdare, scil*i*cet quia satis hon*esti electi s*unt.[5]

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[1] So Kübler. ⟨*a*⟩ *masculo manumissa* ⟨*fuerit*⟩ Krüger.

[2] The last letter of V p. 52 and the whole of 53 are illegible. Ulp. 11, 28: . . . *Proculeiani autem eum qui quattuordecim annos expleuit. uerum Priscus eum puberem esse in quem utrumque concurrit, et habitus corporis et numerus annorum.* This third view is probably also derived from the missing Gaian text.

[3] We lack the end of the discussion of termination of *tutela*: cf. Inst. 1, 22. Also all but the end of the treatment of *curatio*: cf. Inst. 1, 23; Ulp. 12; Epit. 1, 8. *superius*: presumably § 189.

[4] So Lachmann–Krüger. *uolunt* V.

[5] The rest of the page is blank. Cf. Apogr. xxviii, n.g.

under the *L. Iulia et Titia*, since she cannot be in the *tutela* of her patroness. **195a.** Again if, having been manumitted by a male and having with his *auctoritas* made a *coemptio*, she has then been remancipated and manumitted, she ceases to have her patron for tutor and now has him by whom she has been (secondly) manumitted, who is called a *fiduciarius tutor*. **195b.** Again, if her patron or his son has given himself in adoption, a freedwoman must apply for a tutor under the *L. Atilia* or *Iulia et Titia*. **195c.** A freedwoman must make a similar application under these *leges* if her patron dies leaving no issue of the male sex in the family. **196.** Males, on the other hand, are released from *tutela* when they reach puberty. Sabinus, Cassius, and the rest of our teachers consider that a boy reaches puberty when he shows the fact by his physical development, that is when he is capable of procreation, but in the case of those who cannot so develop, such as the naturally impotent, they hold that the normal age of puberty must be taken. The authorities of the other school consider that puberty must be judged simply by age, that is, they hold a boy to have reached puberty when he has reached the age of 14. . . .

197. . . . has reached an age at which he is capable of looking after his own affairs, a practice which, as we have pointed out above, is observed among peregrine peoples. **198.** On the same grounds curators are likewise appointed in the provinces by their governors.

199. Against the destruction or wasting by tutors and curators of the property of their wards or of those in their *curatio* the praetor requires both tutors and curators to give security. **200.** But not in every case. For neither are tutors appointed by will obliged to give security, their trustworthiness and diligence having been approved by the testator himself, nor, for the most part, are curators whose office does not devolve on them by statute, but who are appointed by a consul, praetor, or provincial governor, they of course having been selected as sufficiently trustworthy.

§ 195a. Cf. G. 1, 115. § 195b. Cf. Inst. 1, 22, 4 in fin. § 195c. Cf. G. 1, 165. 179. § 196. Cf. G. 1, 144. 145. 168. Inst. 1, 22 pr. Ulp. 11, 28. §§ 197–8. Cf. G. 1, 189; 4, 85. Inst. 1, 23. Hist. Aug. M. Ant. 10, 12. §§ 199–200. = Inst. 1, 24 pr. *a consule*: Inst. 1, 20, 3.

CONTENTS OF BOOK II

⟨COMMENTARIUS SECUNDUS⟩

V p. 55 **1.** / *Superiore commentario de iure personarum*[1] exposuimus; modo uideamus de rebus. quae uel in nostro patrimonio sunt uel extra nostrum patrimonium habentur.

2. Summa itaque rerum diuisio in duos articulos diducitur: nam aliae sunt diuini iuris, aliae humani. **3.** Diuini iuris sunt ueluti res sac*rae* et religiosae. **4.** Sacrae sunt quae diis superis consecratae sunt, religiosae quae diis Manibus relictae sunt. **5.** Sed sacrum quidem hoc solum existimatur quod *ex* auctoritate populi Romani consec*rat*um est, ueluti lege de ea re lata aut senatusconsulto facto. **6.** Religiosum uero nostra uoluntate facimus mortuum inferentes in locum nostrum, si modo eius mortui funus ad nos pertineat. **7.** Sed in prouinciali solo placet plerisque solum religiosum non fieri, quia in eo solo dominium populi Romani est uel Caesaris, nos autem possessionem tantum uel[2] usumfructum habere uidemur. utique tamen, etiamsi non sit religiosu*m*, pro rel*ig*ioso habetur. **7a.** Item quod in prouinciis[3] non ex auctoritate populi Romani consecratum est, proprie sacrum non est, tamen pro sacro habetur. **8.** Sanctae quoqu*e* res, uelut muri et portae, quodammodo diuini iuri*s* s*unt*. **9.** Quod autem *di*uini
V p. 56 iuri*s* est, id nullius in bonis est, id uero quod humani / *iuris est plerumque alicuius in bonis est; potest autem et nullius in bonis esse. nam res hereditariae, antequam aliquis heres existat, nullius in bonis sunt*. . . . . ue domino.[4] **10.** Hae autem quae humani iuris sunt, *aut pu*blic*ae sunt* aut priuatae. **11.** Quae publicae sunt nul*lius ui*dentur in bonis esse; ipsius enim uniuersitatis *esse* cre*dun*t*ur*. priuatae sunt quae singulorum homin*um sunt*.

12. Quaedam praeterea res corporales sunt, quaedam incorporales. **13.** ⟨*Corporales*⟩ hae ⟨*sunt*⟩[5] quae tangi possunt, uelut

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[1] Line 1 illegible. Restoration from Inst., with the Gaian *commentario* for *libro*.

[2] *uel* V. *et* Kübler.

[3] *in prouinciis* gloss according to Mommsen.

[4] The first 11 lines of V p. 56 are illegible. The first 3 lines or so can be restored, as above, from D. 1, 8, 1 pr. It is conjectured that in the remaining 8 lines further examples of *res* which are *nullius* but *humani iuris—ferae bestiae, res derelictae, serui sine domino*—were given (Krüger), or that *res hereditariae* were further explained (Huschke: cf. Epit. 2, 1, 1).

[5] Cf. Gaius D. 1, 8, 1, 1. Inst. 2, 2, 1.

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§ 1. = Inst. 2, 1 pr. §§ 2–3. = D. 1, 8, 1 pr. Cf. Inst. 2, 1, 7. §§ 4–5. Cf. Inst. 2, 1, 8. § 6. Cf. Inst. 2, 1, 9. § 7. Cf. G. 1, 6; 2, 14a.

BOOK II

1. In the preceding book we treated of the law of persons. Let us now consider things. These are either in private ownership or regarded as outside private ownership.

2. The leading division of things is into two classes: they are subject either to divine right or to human. **3.** Subject to divine right are *res sacrae* and *res religiosae*. **4.** *Res sacrae* are those consecrated to the gods above; *res religiosae* are those dedicated to the gods below. **5.** That alone is considered *sacrum* which has been consecrated under the authority of the Roman people, for instance by *lex* or senatusconsult passed to that effect. **6.** On the other hand, a thing is made *religiosum* by the act of a private person, when he buries a corpse in his own land, provided that the dead man's funeral is his affair. **7.** In the provinces, however, the general opinion is that land does not become *religiosum*, because the ownership of provincial land belongs to the Roman people or to the emperor, and individuals have only possession and enjoyment of it. Still, even if it be not *religiosum*, it is considered as such. **7a.** Again, though a thing consecrated in the provinces otherwise than under the authority of the Roman people is not strictly *sacrum*, it is nevertheless considered as such. **8.** Moreover *res sanctae*, such as the walls and gates of a city, are in a manner subject to divine right. **9.** Now what is subject to divine right cannot belong to anyone, whereas what is subject to human right belongs in general to someone, though it may belong to no one: thus, things forming part of a deceased's estate belong to no one until someone qualifies as heir. . . . **10.** Things subject to human right are either public or private. **11.** Public things are regarded as belonging to no individual, but as being the property of the corporate body. Private things are those belonging to individuals.

12. Further, things are divided into corporeal and incorporeal. **13.** Corporeal things are tangible things, such as land, a slave,

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21. 27. 31. 46. *possessionem uel usumfructum*: Edictum § 71. § 8. = Inst. 2, 1, 10 (D.). § 9. = D. 1, 8, 1 pr. Cf. Inst. 2, 1, 7. G. 3, 97. *res hereditarias*: G. 2, 52 sq.; 3, 201. §§ 10–11. = D. 1, 8, 1 pr. Cf. Inst. 2, 1, 6. Ulp. D. 50, 16, 15. §§ 12–14. = Inst. 2, 2 (D.).

fundus, homo, uestis, aurum, argentum, et denique aliae res innumerabiles. **14.** Incorporales *sunt* quae tangi non possunt, qualia sunt ea quae iure[1] consistunt, sicut hereditas, ususfructus, obligationes quoquo modo contractae. nec ad rem per(*tinet quod in hereditate res corporales con*)tinentur, et fructus qui ex fundo percipiuntur corporales *sunt*, et quod ex aliqua obligatione nobis
V p. 57 debetur, *id* / plerumque corporale *est*, *ueluti* fundus, homo, pecunia: nam ipsum ius successionis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. eodem numero sunt iura praediorum urbanorum et rusticorum.[2] *praediorum urbanorum iura sunt uelut ius* altius tollendi *aedes et officiendi* luminibus uicini aedium *aut* non extollendi, ne luminibus uicini officiatur; item fluminum et stilicidiorum *ius*, *id est*[3] ut *uicinus flumen uel stilicidium in* aream *uel in aedes suas recipiat; item cloacae immittendae et luminum immittendorum. praediorum rusticorum iura sunt uelut uia, iter, actus; item pecoris ad aquam adpulsus; item* ius aquae ducendae. *haec iura tam rusticorum quam urbanorum praediorum* seruitutes uocantur.

14a.[4] *Est etiam alia rerum diuisio: nam aut mancipi sunt aut* nec mancipi. mancipi *sunt uelut fundus in Italico solo*, item aedes in Italico solo, *item serui et* ea *animalia quae collo dorsoue domari solent, uelut boues, equi, muli, asini; item seruitutes praediorum rusticorum. nam seruitutes* praediorum urbanorum nec mancipi *sunt.* (**15.**) item stipendiaria praedia et tributaria nec mancipi sunt. **15.**[4] Sed quod diximus *ea animalia quae domari solent* mancipi esse, *quomodo intellegendum sit quaeritur, quia non statim ut nata sunt domantur.*
V p. 58 *et nostrae quidem scholae auctores* / statim ut nata sunt mancipi esse putant; Nerua uero et Proculus et ceteri diuersae scholae auctores non aliter ea mancipi esse putant quam si domita sunt, et, si propter nimiam feritatem domari non possunt, tunc uideri mancipi esse incipere, cum ad eam aetatem peruenerint qua domari solent. **16.** *Item* ferae bestiae nec mancipi sunt, uelut ursi, leones, item ea animalia quae fere bestiarum numero sunt, uelut elephanti et

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[1] *in iure* D., Inst., Epit. So Kübler.

[2] At this point D. and Inst. add: *quae etiam seruitutes uocantur.* Krüger's conjectural restoration of the rest of the section (Epit. 2, 1, 3; cf. Gaius D. 8, 2, 2), which for convenience we have placed in our text, defers the remark to the end. Cf. Apogr.

[3] *idem* (?) *ius ut* V.

[4] Krüger's conjectural restorations adopted in this section.

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§ 14a. Cf. G. 1, 120, &c. *iura praediorum*: G. 2, 17. 29. *stipendiaria et tributaria*: G. 2, 7, &c. § 16. *ferae bestiae*: G. 3, 217.

a garment, gold, silver, and countless other things. **14.** Incorporeal are things that are intangible, such as exist merely in law, for example an inheritance, a usufruct, obligations however contracted. It matters not that corporeal things are comprised in an inheritance, or that the fruits gathered from land (subject to a usufruct) are corporeal, or that what is due under an obligation is commonly corporeal, for instance land, a slave, money; for the rights themselves, of inheritance, usufruct, and obligation, are incorporeal. Incorporeal also are rights attached to urban and rural lands. Examples of the former are the right to raise one's building and so obstruct a neighbour's lights, or that of preventing a building from being raised lest neighbouring lights be obstructed, also the right that a neighbour shall suffer rain-water to pass into his courtyard or into his house in a channel or by dripping; also the right to introduce a sewer into a neighbour's property or to open lights over it. Examples of rights attached to rural lands are the various rights of way for vehicles, men, and beasts; also that of watering cattle and that of watercourse. Such rights, whether of urban or rural lands, are called servitudes.

14a. Things are further divided into *mancipi* and *nec mancipi*. *Mancipi* are lands and houses on Italic soil; likewise slaves and animals that are commonly broken to draught or burden, such as oxen, horses, mules, and asses; likewise rustic praedial servitudes, whereas urban praedial servitudes are *nec mancipi*. (**15.**) *Nec mancipi* also are stipendiary and tributary lands. **15.** But the effect of the statement we have made, that animals commonly broken to draught or burden are *mancipi*, is disputed, because they are not broken in at once on birth. The writers of our school hold that they are *mancipi* as soon as born, but Nerva, Proculus, and the other authorities of the opposing school hold that they become *mancipi* only when they have been broken in, or, if they cannot be broken in owing to their extreme wildness, that they become *mancipi* when they reach the usual age for breaking in. **16.** Further, wild beasts such as bears and lions are *nec mancipi*, as are animals such as elephants and camels which are in much the same category;

cameli; et ideo ad rem non pertinet quod haec animalia etiam collo dorsoue domari so*lent*; nam ne nom*en*[1] quidem eorum animalium illo tempore fuit, quo constituebatur quasdam res mancipi esse, quasdam n*ec* mancip*i*. **17.** Item fere omnia quae incorporalia sunt nec mancipi sunt, exceptis seruitutibus praediorum rusticorum; nam eas mancipi esse constat, quamuis sint ex numero rerum incorporalium.

18. Magna autem differentia est inter mancipi res et nec mancipi. **19.** Nam res nec mancipi ipsa traditione pleno iure alterius fiunt, si modo corporales sunt et ob id recipiunt traditionem. **20.** Itaque, si tibi uestem uel aur*um* uel argentum tradidero, *s*iue ex uenditionis causa siue ex donationis siue quauis alia ex causa, statim tua fit ea res, si modo ego eius dominus sim. **21.** *I*n eadem
V p. 59 / causa sunt prouincial*ia* praedia, quorum alia stipendiaria, alia tributaria uocamus. stipendiaria sunt ea quae in his prouinciis sunt quae propriae populi Romani esse intelleguntur; tributaria sunt ea quae in his prouinciis sunt quae propriae Caesaris esse creduntur. **22.** Mancipi uero res sunt quae per mancipationem ad alium transferuntur; unde etiam mancipi res sunt dictae. quod autem ualet mancipatio, ⟨*idem ualet et in iure cessio.* **23.** *Et mancipatio*⟩[2] quidem quemadmodum fiat, superiore commentario tradidimus. **24.** In iure cessio autem hoc modo fit: apud magistratum populi Romani, uel*uti* praetore*m*,[3] is cui res in iure ceditur rem tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO; deinde, postquam hic uindicaue*rit*, *praetor inter*rogat eum qui cedit, an contra uindicet; quo negante aut tacente, tunc ei qui uindicauerit eam rem addicit; idque legis actio uocatur. hoc fieri potest etiam in prouinciis, apud praesides earum. **25.** Plerumque tamen, et fere semper, mancipationibus utimur. quod enim ipsi per nos praesentibus amicis agere possumus, hoc non est necesse cum maiore difficultate apud praetorem aut apud praesidem prouinciae agere. **26.** Quodsi neque mancipata neque in iure cessa

[1] *nomen*: *nom* read by Studemund, who says that *notio* or *notitia* are impossible. Kübler: *notitia*. Krüger: *nomen . . . tempore ⟨notum⟩ fuit.*

[2] The usual restoration.

[3] *ueluti praetorem* Krüger. *uꝑr · uaꝑr · praesidem prouinciae* V. *uel apud praetorem uel apud praesidem prouinciae* Boethius. But the mention of the *praeses* is probably gloss: see the end of the section. Kübler: *uelut praetorem urbanum aut peregrinum.*

§ 17. Cf. G. 2, 14. 14a. 28. 29. § 19. Cf. Inst. 2, 1, 40 sq. *si modo corporales*: G. 2, 28. § 20. Cf. Paul D. 41, 1, 31 pr. *ex uenditionis causa*:

thus it does not matter that these last are commonly broken to draught or burden; for their very names did not exist in the times when the distinction between *res mancipi* and *nec mancipi* was being settled. **17.** Also *nec-mancipi* are almost all incorporeal things, except rustic praedial servitudes, which, it is settled, are *mancipi*, though they are in the category of incorporeal things.

18. Now there is an important difference between *res mancipi* and *nec mancipi*. **19.** For *res nec mancipi* become the full property of another by mere delivery, provided that they are corporeal and thus admit of being delivered. **20.** Thus, if I deliver a garment or gold or silver to you, whether on account of a sale or a gift or any other title, it at once becomes yours, provided only that I am its owner. **21.** The same applies to provincial lands, some of which we call stipendiary and others tributary. Stipendiary are lands in the provinces that are considered as belonging to the Roman people, tributary those in the provinces that are held to belong to the emperor. **22.** *Res mancipi*, on the other hand, are those things that are conveyed by mancipation; and that is why they are called *mancipi*. But *in iure cessio* (surrender in court) is as effective as mancipation. **23.** How mancipation is performed we have explained in the previous book. **24.** *In iure cessio* is performed as follows: in the presence of a magistrate of the Roman people, such as a praetor, the party to whom the surrender is being made, holding the thing, says: 'I declare that this slave is mine by Quiritary title'; then, after this vindication, the praetor asks the surrenderor whether he makes counter-vindication and, on his replying in the negative or keeping silence, adjudges the thing to the vindicant. This procedure is called a *legis actio*. It can also be performed in a province before the governor. **25.** Usually, however, indeed nearly always, we use mancipation, since there is no need for us to do with greater difficulty before a praetor or provincial governor what we can do for ourselves in the presence of friends. **26.** But if instead of being mancipated or surrendered

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Inst. 2, 1, 41. § 21. Cf. G. 2, 7, &c. Inst. 2, 1, 40. § 22. Cf. G. 1, 119 sq.; 2, 41. 204. § 23. Cf. G. 1, 119, &c. § 24. Cf. G. 1, 134; 2, 65, 96. § 26. Cf. G. 2, 41, &c.

V p. 60 sit res mancipi / . . .[1] / . . . **27.** . . . *Praeterea admo*nendi sumus,
V p. 61 *quod ueteres dicebant soli Italici nexum* esse, prouincialis soli nexum non e*sse*, *hanc habere* significationem: solum *Italicum* mancipi *esse*, prouinciale nec mancipi e*sse*. aliter enim ueteri lingua a*ct*us *uocatur*, *et quod illis nexus*, *idem nobis* e*st* mancipa*tio*.[2]

28. ⟨*Res*⟩ incorporales traditionem non recipere manifestum est. **29.** Sed iura praediorum urbanorum in iure cedi ⟨*tantum*⟩ possunt, rusticorum uero etiam mancipari possunt. **30.** Ususfructus in iure cessionem tantum recipit. na*m* dominus proprietatis alii usumfructum in iure cedere pote*st*, ut ille usumfructum habeat et ipse nudam proprietatem *retineat*. ipse usufructuarius in iure cedendo domino proprietatis usumfructum efficit ut a se discedat et conuertatur in proprietatem; alii uero in iure cedendo nihilo minus ius su*u*m retine*t*; creditur enim ea cessione nihil agi. **31.** Sed haec scilicet in Italicis praediis ita sunt, quia et ipsa praedia mancipa-
V p. 62 tionem / et in iure cessionem recipiunt. alioquin in prouincialibus praediis siue qu*i*s usumfructum siue ius eundi agendi aquamue ducendi uel altius tollendi aedes aut non tollendi, ne luminibus uicini officiatur, ceteraque similia iura constituere uelit, pactionibus et s*t*ipulationibus id efficere potest, quia ne ipsa quidem praedia mancipationem aut ⟨*in*⟩ iure cessionem recipiun*t*. **32.** *Sed*[3] cum ususfructus et hominum et ceterorum animalium constitui possit, intellegere debemus ho*r*um usumfructum etiam in prouinciis per in iure cessionem constitui posse. **33.** Quo*d* autem diximus usumfructum in iure cessionem tantum recipere, non est temere dictum, qu*amui*s etiam per mancipationem constitui possit, eo quod in mancipanda proprietate detrahi potest; non enim ipse ususfructus mancipatur, sed cum in mancipanda proprietate deducatur, eo fit ut apu*d* alium ususfructus, apud alium proprietas sit.

34. Hereditas quoque in iure cessionem tantum recipit.

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[1] So little of V 60 can be read that reconstruction is abandoned: see Apogr. and Suppl. Probably its first words were: *sed tantum tradita*, and then the legal result was stated, though 2, 41 gives no indication of a previous explanation. Other topics were probably the *ius commercii* and the method of conveying *solum prouinciale*. Cf. Ulp. 19, 4. 5: *Mancipatio locum habet inter ciues Romanos et Latinos colonarios Latinosque Iunianos eosque peregrinos quibus commercium datum est. Commercium est emendi uendendique inuicem ius.*

[2] Not much of the first 8 lines of V 61 is legible, but the reading gradually improves. The reconstruction, of course very conjectural, adopted above, of lines 8–12 was suggested by Beseler, SZ 1925, 414; approved by Kübler.

[3] *recipiuntur et* V.

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§ 27. Cf. G. 2, 7, &c. Frontinus, Gromatici Ueteres (ed. Lachmann) p. 36 (Bruns 2, 86). § 28. Cf. G. 2, 19. § 29. Cf. G. 2, 17. Inst. 2, 3, 4.

in iure a *res mancipi* (is merely delivered,) . . . **27.** . . . We must further note that the saying of the old lawyers, that there is *nexus* of Italic, but not of provincial land, means that Italic land is *mancipi* and provincial *nec mancipi*. For in ancient speech the act had a different name, and what for them was *nexus* is for us *mancipatio*.

28. That incorporeal things do not admit of delivery is obvious. **29.** But while urban praedial servitudes can only be surrendered *in iure*, rustic can also be mancipated. **30.** Usufruct is susceptible only of *in iure cessio*. For an owner can cede *in iure* to another person the usufruct of his thing, so that the other gets the usufruct whilst he himself retains bare property. If in his turn the usufructuary cedes the usufruct *in iure* to the owner of the property, he causes the usufruct to pass away from himself and to merge in the property; but if he makes the *cessio* to a third party, he retains his right none the less, it being held that such a *cessio* is of no effect. **31.** But these statements hold good in regard to Italic lands, because the lands themselves are susceptible of mancipation and *in iure cessio*. If, on the other hand, it is over provincial lands that a man wishes to create a usufruct, rights of way for man or beast, a right of watercourse, a right to raise buildings or to prevent buildings being raised to the detriment of neighbouring lights, or any similar rights, he can effect his purpose (only) by means of pacts and stipulations, because the lands themselves are not susceptible of either mancipation or *in iure cessio*. **32.** But as usufruct can be created over slaves and animals generally, it should be understood that even in the provinces this can be done by *in iure cessio*. **33.** Our statement that usufruct admits only of *in iure cessio* was made advisedly, although it can be created by means of mancipation also, in the sense that it can be deducted in mancipating the property; for though the usufruct is not mancipated, yet the result of its being deducted in a mancipation of the property is that the usufruct is vested in one person and the property in another.

34. An inheritance likewise is susceptible only of *in iure cessio*.

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§ 30. Cf. Inst. 2, 4, 1. *cedendo domino*: Inst. 2, 4, 3. Inst. 2, 3, 4. 2, 4, 1. § 31. Cf. G. 2, 7, &c. § 32. Cf. Inst. 2, 4, 2. § 33. Cf. G. 2, 30. Inst. 2, 4, 1. § 34. *Hereditas*: G. 2, 14. 54.

35. Nam si is ad quem ab intestato legitimo iure pertinet hereditas in iure eam alii ante aditionem cedat, id est antequam heres extiterit, proinde fit heres is cui in iure cesserit ac si ipse per legem ad here*dita*tem uocatus esset; post obligationem uero si cesserit,
V p. 63 nihilo minus ipse / heres permanet et ob i*d*[1] creditoribus tenebitur, debita uero pereunt, eoque modo debitores hereditarii lucrum faciunt; corpora uero eius hereditatis p*ro*inde transeunt ad eum cui cessa est hereditas ac si ei singula in iure cess*a* fuissent. **36.** Testamento autem scriptus heres ante aditam quidem hereditatem in iure cedendo eam alii nihil agi*t*; postea uero quam adierit si cedat, ea accidunt quae proxime diximus de eo ad quem ab intestato legitimo iure pertinet hereditas, si post obligationem ⟨*in*⟩[2] iure cedat. **37.** Idem et de necessariis heredibus diuersae scholae auctores existimant, quod nihil uidetur interesse utrum ⟨*aliquis*⟩ adeundo hereditate*m* fiat heres an inuitus exist*at*: quod quale sit, suo loco apparebi*t*. sed nostri praeceptores putant nihil agere necessarium heredem cum in iure cedat hereditatem.

38. Obligationes quoquo modo contractae nihil eorum recipiunt. nam quod mihi ab aliquo debetur, id si uelim tibi deberi, nullo eorum modo quibus res corporales ad alium transferuntur id efficere possu*m*,[3] sed opus est ut iubente me tu ab eo stipuleris; quae res efficit ut a me liberetur et incipiat tibi teneri; quae dicitur nouatio obligationis. **39.** Sine uero hac nouatione non poteri*s* tuo
V p. 64 nomine agere, sed debes ex persona mea quasi cognitor / aut procura*t*or meus experiri.

40. Sequitur ut admoneamus apud peregrinos quidem unum esse dominium: nam aut dominus quisque est aut dominus non intellegitur. quo iure etiam populus Romanus olim utebatur: aut enim ex iure Qui*ritium* unusquisque dominus erat aut non intellegebatur dominus. sed postea diuisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere. **41.** N*am* si tibi rem mancipi neque mancipauero neque in iure cessero, sed tantum tradidero, in bonis quidem tuis ea res efficitur, ex iure Quiritium uero mea permanebit, donec tu eam possidendo

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[1] *id a* V. Cf. 3, 85.
[2] Cf. 2, 31, i. f.
[3] *possumus* V.

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§ 35. Cf. G. 3, 85. § 36. Cf. G. 3, 86. § 37. Cf. G. 3, 87. *suo loco*: G. 2, 152 sq. § 38. Cf. G. 2, 14. 19. 28; 3, 176. Also 3, 130. § 39. Cf. G. 2, 252 fin.; 4, 82. 86. § 40. Cf. G. 1, 17. 35. 54. 167; 2, 88; 3, 166. C. 7, 25, 1 (A.D. 530–1). § 41. Cf. G. 2, 26. 204; 3, 80; 4, 36.

35. For if one on whom an inheritance devolves by the statute-law of intestacy, before accepting it, that is before he qualifies as heir, surrenders it *in iure* to another, the surrenderee becomes heir exactly as if he had himself been called to the inheritance by the statute. But if the heir surrenders after accepting responsibility, he remains heir himself none the less, and will thus be liable to the creditors of the inheritance, whereas the debts due to it are wiped out and so the debtors of the inheritance are the gainers. But the corporeal things in the inheritance pass to the surrenderee exactly as though they had been surrendered to him *in iure* one by one. **36.** *In iure cessio* of an inheritance by a testamentary heir is of no effect if made before his acceptance of the inheritance; if made after his acceptance, it has the same effects as those we have just mentioned in the case of a statutory heir by intestacy, if he surrenders *in iure* after accepting responsibility. **37.** The writers of the opposite school hold the same in the case of involuntary heirs, because they see no difference between one who becomes heir by acceptance and one who becomes such without choice; this distinction will be explained in the proper place. But our teachers regard *in iure cessio* of an inheritance by an involuntary heir as of no effect.

38. Obligations however contracted are susceptible of none of these modes of transfer. For if I wish a debt owed by someone to me to be owed to you, I can effect my purpose by none of the methods whereby corporeal things are conveyed, but it is necessary that you should on my instruction take a stipulatory promise from the debtor. The result will be that he will be released from me and become liable to you. This is called a novation of the obligation. **39.** Without such a novation you will not be able to sue for the debt in your own name, but must proceed in my name as my *cognitor* or *procurator*.

40. Next we must observe that among *peregrini* there is only one ownership: a man either is owner or is not considered owner. In olden times the Roman people followed the same principle: a man was either owner *ex iure Quiritium* or not considered owner at all. But afterwards ownership was made divisible, so that one man may be owner by Quiritary title and another by bonitary. **41.** Thus, if I neither mancipate nor surrender *in iure*, but merely deliver a *res mancipi* to you, it becomes yours by bonitary title, but will remain mine by Quiritary until you have usucapted it by posses-

usucapias. semel enim impleta usucapione proinde pleno iure incipit, id est et in bonis et ex iure Quiritium, tua res esse ac si ea mancipata uel in iure cessa ⟨*esset*.

42. *Usucapio autem*⟩ mobilium quidem rerum anno completur, fundi uero et aedium biennio; et ita lege XII tabularum cautum est.

43. Ceterum etiam earum rerum usucapio nobis competit quae non a domino nobis traditae fuerint, siue mancipi sint eae res siue nec mancipi, si modo eas bona fide acceperimus, cum crederemus eum qui traderet dominum esse. **44.** Quod ideo receptum uidetur, ne rerum dominia diutius in incerto essent, cum sufficeret domino
V p. 65 ad inquirendam rem suam anni aut / biennii spatium, quod tempus ad usucapionem possessori tributum est.

45. Sed aliquando etiamsi maxime quis bona fide alienam rem possideat, non tamen illi usucapio procedit, uelut si quis rem furtiuam aut ui possessam possideat; nam furtiuam lex XII tabularum usucapi prohibet, ui possessam lex Iulia et Plautia. **46.** Item prouincialia praedia usucapionem non recipiunt. **47.** ⟨*Item olim*⟩ mulieris[1] quae in agnatorum tutela erat res mancipi usucapi non poterant, praeterquam si ab ipsa tutore ⟨*auctore*⟩ traditae essent; id ita lege XII tabularum *cautum erat*.[2] **48.** Item liberos homines et res sacras et religiosas usucapi non posse manifestum est. **49.** Quod ergo uulgo dicitur, furtiuarum rerum et ui possessarum usucapionem per legem XII tabularum prohibitam esse, non eo pertinet ut ne *ipse fur quiue* per uim *possi*det[3] usucapere possit (nam huic alia ratione usucapio non competit, quia scilicet mala fide possidet), sed nec ullus alius, quamquam ab eo bona fide emerit, usucapiendi ius habeat. **50.** Unde in rebus mobilibus non facile *procedit ut bonae fidei possessori usucapio com*petat,[3] quia qui alienam rem uendidit et tradidit, furtum committit, idemque accidit etiam si ex alia causa tradatur. sed tamen hoc aliquando aliter se habet: nam si heres rem defuncto commodatam aut loca-
V p. 66 tam uel apud eum depositam,[4] existimans eam esse here/ditariam,

[1] So Goeschen and generally. *res mulieris* V.

[2] *cautum erat*: *mf.* or *caf* V. Cf. Apogr. 259.

[3] Inst. 2, 6, 3.

[4] *uel aput eundem positam* V, which may be right, but the text of Inst. 2, 6, 4 is usually adopted.

§ 42. Cf. G. 2, 54. 204. XII Tabb. 6, 3 (Textes 15. Bruns 1, 25). Inst. 2, 6 pr. C. 7, 31, 1 (A.D. 531).

§§ 43–4. Cf. G. 2, 49. Inst. 2, 6 pr. § 45. Cf. G. 2, 49. Inst. 2, 6, 1. 2. Lex Atinia (Textes 32. Bruns 1, 47) 150 B.C.? *lex Iulia*: probably of Augustus. *lex Plautia*: 78–63 B.C. § 46. Cf. G. 2, 7, &c. Inst. 2, 6 pr. C. 7, 31, 1 (A.D. 531). § 47. Cf. G. 1, 157. 192. Cic. ad Att. 1, 5, 6. § 48. Cf. Inst. 2, 6, 1.

sion; for once *usucapio* is completed it becomes yours by full title, that is by both bonitary and Quiritary, just as if it had been mancipated or surrendered *in iure*.

42. Usucapion of movables is completed in one year, of lands and buildings in two: so the law of the Twelve Tables provides.

43. We may also acquire by usucapion things which have been delivered to us by one who is not their owner, whether they be *mancipi* or *nec mancipi*, provided we have received them in good faith, believing the deliverer to be their owner. **44.** This system appears to have been adopted in order to obviate the ownership of things being uncertain for too long, the periods of one or two years appointed for usucapion by the possessor being sufficient for the owner to seek out his property.

45. But sometimes, though a man possess another's property in the best of faith, usucapion does not run in his favour, for example if he is in possession of a thing which has been stolen or taken by violence; for the law of the Twelve Tables forbids usucapion of a stolen thing, and the *L. Iulia et Plautia* that of a thing taken by violence. **46.** Again, provincial lands are not susceptible of usucapion. **47.** Again, in former times the *res mancipi* of a woman who was in the *tutela* of her agnates could not be acquired by usucapion, except where she had delivered them with the *auctoritas* of her tutor; this was provided by the law of the Twelve Tables. **48.** Again, it is obvious that free men and *res sacrae* or *religiosae* cannot be acquired by usucapion. **49.** The saying that the usucapion of things stolen and of things taken by violence is forbidden by the law of the Twelve Tables does not mean that the actual thief or violent taker is unable so to acquire (for to him usucapion is closed for another reason, namely that he possesses in bad faith); what it means is that no further person, though he have bought from him in good faith, has the right so to acquire. **50.** Consequently in the case of movables it does not readily happen that usucapion is open to their possessor in good faith, seeing that one who sells and delivers another's property commits theft; and the same is equally true of delivery on some other account. Still, sometimes it is otherwise: thus, if an heir sells or makes a gift of a thing lent or hired to or deposited with

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§ 49. = Inst. 2, 6, 3. *bona fide*: G. 2, 43. § 50. = Inst. 2, 6, 3 med.–6. *sine affectu*: G. 3, 197. 208; 4, 178.

uendiderit aut donauerit, furtum non committit; item, si is ad quem ancillae ususfructus pertinet, partum et*iam* suum esse credens, uendiderit aut donauerit, furtum non committit; *f*urtum enim sine adfectu furandi non committitur. aliis quoque modis accidere potest ut quis sine uitio furti rem alienam ad aliquem transferat et efficiat ut a possessore usucapiatur. **51.** Fundi quoque alieni potest aliquis *s*ine ui possessionem na*n*cisci, quae uel ex neglegentia domini uacet, uel quia dominus sine successore decesserit uel longo tempore afuerit; *qu*am[1] si ad alium bona fide accipientem transtulerit, poterit usucapere possessor; et quamuis ipse qui uacantem possessionem nactus est intellegat alienum esse fun*d*um, *tamen* nihil ho*c bonae fidei* possess*o*ri ad usucapionem noce*t*, ⟨*cum*⟩ impro*b*ata sit eorum se*n*tentia qui putauerint furt*iuum* fundum fieri po*ss*e.

52. Rursus ex contrario accidit ut qui sciat alienam rem se possidere usucapiat, ueluti si rem hereditariam, cuius possessionem heres nondum nactus est, aliquis poss*e*derit. nam ei concessum ⟨*est usu*⟩capere, si modo ea res est quae recipit usucapionem. quae species possessionis et usucapionis pro herede uocatur. **53.** Et in
V p. 67 tantum haec usucapio concessa est, / ut et res quae solo continentur anno usucapiantur. **54.** Quare autem *hoc casu etiam* soli rerum annua constituta sit usucapio, illa ratio est, quod olim rerum hereditariarum possessione *uel*ut ipsae[2] hereditates usucapi credebantur, scilicet anno. lex enim XII tabularum soli quidem res biennio usucapi iussit, ceteras uero anno. ergo hereditas in ceteris rebus uidebatur esse, quia soli non est, quia neque corporalis est. ⟨*et*⟩ quamuis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quae solo ten*e*ntur, annua usucapio remansit. **55.** Quare autem omnino tam improba possessio et usucapio concessa sit, illa ratio est, quod uoluerunt ueteres maturius hereditates adiri, ut essent qui sacra facerent, quorum illis temporibus summa obseruatio fuit, *e*t *ut*[3] creditores haberent a quo suum consequerentur. **56.** Haec autem species possessionis et usucapionis etiam lucratiua uocatur; nam sciens quisque rem alienam lucri facit. **57.** Sed hoc tempore *i*am non est

[1] *nam* V.
[2] So Krüger. *possessiones ut ipsae* V.
[3] So Krüger. *ut et* V: so Kübler.

§ 51. = D. 41, 3, 37, 1. Cf. Inst. 2, 6, 7. *eorum sententia*: Sabinus'—Gell. 11, 18, 13. § 52. Cf. G. 3, 201. *si modo ea res est*: G. 2, 45 sq. §§ 53–4. Cf. G. 2, 9. 14. 42. § 55. Cf. Cic. de leg. 2, 19, 48.

the deceased in the belief that it belongs to the inheritance, he does not commit theft; neither does one who having a usufruct over a female slave sells or makes a gift of her offspring in the belief that it too belongs to him; for theft is not committed in the absence of theftous intention. And there are other occasions on which a man may transfer the property of another without taint of theft and enable the possessor to acquire it by usucapion. **51.** It may happen also that a man may without violence take possession of another's land, which is lying vacant, either through the owner's neglect, or because the owner has died without a successor or has been absent for a considerable time; if the taker transfers this possession to one who receives it in good faith, the transferee will be able to acquire the land by usucapion; and even though he who took the vacant possession knows that the land is another's, this is no obstacle to usucapion by the *bona fide* possessor, since the opinion once held that land can be stolen has been exploded.

52. On the other hand, there are cases where one who knows that he is in possession of another's property will acquire it by usucapion. Thus, where a man takes possession of a thing which belongs to an inheritance, but of which the heir has not yet obtained possession, he is allowed to acquire it by usucapion, provided that it is a thing that is susceptible of usucapion. This kind of possession and usucapion is termed *pro herede* (as heir). **53.** So liberally is this kind of usucapion allowed, that even land is thereby acquired in one year. **54.** The reason why in this case usucapion of land as well as of other things in one year has been admitted is that in former times through the possession of things comprised in an inheritance the inheritance itself was deemed to be acquired by usucapion, and this in one year. For the law of the Twelve Tables laid down that lands should be acquired by usucapion in two years and other things in one. Thus an inheritance, not being land, indeed not even corporeal, was held to be among other things. And though later it was held that an inheritance itself could not be acquired by usucapion, yet usucapion in one year survived for everything, including land, comprised in an inheritance. **55.** That so dishonest a possession and usucapion should have been allowed at all is explained by the fact that the ancient lawyers wished inheritances to be accepted promptly, in order that there should be persons to carry on the family cults (*sacra*), to which the greatest importance was attached in those days, and in order that the creditors (of the inheritance) should have someone from whom to obtain their due. **56.** This kind of possession and usucapion is also termed *lucratiua* (gainful), because by it a man knowingly makes gain out of another's property. **57.** But at the present day

lucratiua. nam ex auctoritate Hadriani senatusconsultum factum est, ut tales usucapiones reuocarentur. et ideo potest heres ab eo qui rem usucepit hereditatem petendo proinde eam rem consequi atque si
V p. 68 usucapta non esset. / **58.** Necessario[1] tamen herede extante nihil ipso iure prō herede usucapi potest. **59.** Adhuc etiam ex aliis causis sciens quisque rem alienam usucapit. nam qui rem alicui fiduciae causa mancipio dederit uel in iure cesserit, si eandem ipse possederit, potest usucapere, anno scilicet[2] soli si sit. quae species usucapionis dicitur usureceptio, quia id quod aliquando habuimus, recipimus per usucapionem. **60.** Sed cum[3] fiducia contrahitur aut cum creditore pignoris iure aut cum amico, quo tutius nostrae res apud eum essent,[4] siquidem cum amico contracta sit fiducia, sane omni modo competit usureceptio, si uero cum creditore, soluta quidem pecunia omni modo competit, nondum uero soluta ita demum competit, si neque conduxerit eam rem a creditore debitor, neque precario rogauerit ut eam rem possidere liceret; quo casu lucratiua ususcapio competit. **61.** Item, si rem obligatam sibi populus uendiderit eamque dominus possederit, concessa est usureceptio; sed hoc casu[5] praedium biennio usurecipitur. et hoc est quod uulgo dicitur, ex praediatura possessionem usurecipi; nam qui mercatur a populo praediator appellatur.

62.[6] Accidit aliquando ut qui dominus sit alienandae rei pote-
V p. 69 statem non habeat, et qui dominus non sit / alienare possit. **63.** Nam dotale praedium maritus inuita muliere per legem Iuliam prohibetur alienare, quamuis ipsius sit, uel mancipatum ei dotis causa uel in iure cessum uel usucaptum. quod quidem ius utrum ad Italica tantum praedia an etiam ad prouincialia pertineat, dubitatur. **64.** Ex diuerso, agnatus furiosi curator rem furiosi alienare potest ex lege XII tabularum; item procurator *rem absentis*

[1] So Krüger. *esset et* / *Necessario* V. *esset.*⟨*Suo*⟩ *et necessario* Kübler, following Solazzi.

[2] *scilicet* ⟨*etiam*⟩ *soli* Krüger. *scilicet* ⟨*si mobilis sit, biennio*⟩ *soli* Kübler, following Beseler, Beitr. 2, 1, and in § 61: *sed* ⟨*et*⟩ *hoc casu.*

[3] *cum* om. Krüger. Cf. n. 4.

[4] *essent* V. *sint et* Krüger. Cf. n. 3.

[5] Cf. n. 2.

[6] Krüger places §§ 62–4 after § 79, so as, with §§ 80–5, to obtain correspondence with Inst. 2, 8. But Mommsen (Jur. Schr. 2, 41) and recent editors (Kübler, Girard, Kniep), as well as Gradenwitz, Bonfante, and Zanzucchi, do not agree.

§ 58. Cf. G. 2, 152 sq.; 3, 201. §§ 59–60. Cf. G. 2, 220; 4, 62. 182. §§ 62–3. = Inst. 2, 8 pr. § 64. *curator furiosi*: XII Tabb. 5, 7a (Textes 14. Bruns 1, 23). *procurator*: Inst. 2, 1, 42. 43. *creditor*: Inst. 2, 8, 1. Ulp. D. 13, 7, 4.

it is no longer *lucratiua*. For a senatusconsult passed on the authority of Hadrian has provided for such usucapions to be revoked. Thus, by *hereditatis petitio*, the heir can recover the thing from him who has acquired it by usucapion, just as if it had not been so acquired. **58.** However, if an involuntary heir exists, no usucapion *pro herede* is possible even at civil law. **59.** There are further cases in which a man knowingly acquires the property of another by usucapion. For if a man acquires possession of what he has mancipated or surrendered *in iure* to another by way of *fiducia* (trust), he can regain ownership of it by usucapion, and that in one year, even if it be land. This kind of usucapion is called *usureceptio*, because by the usucapion one recovers what one had previously owned. **60.** Now *fiducia* is contracted either with one's creditor by way of security or with a friend for the safer keeping of one's property in his hands. If it is contracted with a friend, *usureceptio* is allowed unconditionally, but if with a creditor, it is allowed unconditionally if the debt has been paid, but if the debt has not yet been paid, then only if the debtor has neither hired the thing from the creditor nor obtained his licence to possess it; in that case lucrative usucapion is admitted. **61.** Again, if a man obtains possession of property of his which has been mortgaged to the Roman people and sold by it, *usureceptio* is permitted; but in this case the period for land is two years. This is what is meant by the current saying that from *praediatura* there is *usureceptio*; for a purchaser from the people is called *praediator*.

62. It sometimes happens that an owner has not the power of alienation or that a non-owner has. **63.** Thus, a husband is forbidden by the *L. Iulia* to alienate dotal land without his wife's consent, although it belongs to him, having been acquired as *dos* by mancipation, *in iure cessio*, or usucapion. Whether this rule applies only to Italic lands, or to provincial as well, is doubtful. **64.** On the other hand, by the law of the Twelve Tables the agnate curator of a lunatic can alienate the lunatic's property; again a *procurator* who has been given full power of administration

cuius negotiorum libera administratio ei permissa[1] est; item creditor pignus ex pactione, quamuis eius ea res non sit. sed hoc forsitan ideo uideatur fieri, quod uoluntate debitoris intellegitur pignus alienari, qui olim pactus est ut liceret creditori pignus uendere, si pecunia non soluatur.

65. Ergo, ex his quae diximus, apparet quaedam naturali *i*ure alienari, qualia sunt ea quae traditione alienantur, quaedam ciuili; nam mancipationis et in iure cessionis et usucapionis ius proprium est ciuium Romanorum.

66. Nec tamen ea tantum quae traditione nostra fiunt naturali nobis ratione adquiruntur, sed etiam *quae* occupando ideo *adqui*sierimus qui*a* antea nullius essent, qualia sunt omnia quae terra mar*i* caelo capiunt*ur*.[2] **67.** Itaque, si *fera*m bestiam aut uolucrem aut piscem c*eperimus*, *quidquid ita* captum *fuerit statim nostrum fit*, *et*
V p. 70 *eo us*que[2] nostrum esse intellegitur / donec nostra custodia coerceatur; cum uero custodiam nostram euaserit et in naturalem se libertatem *re*ceperit, rursus occupantis fit, quia nostr*um* esse desinit. naturalem autem libertatem recipere uidetur cum aut oculos nostros euaserit aut, licet *i*n conspectu sit nostro, difficilis tamen *eius* persecutio sit. **68.** In *h*is autem animalibus quae ex consuetudine abire et redire solent, ueluti columbis et apibus, item ceruis qui in siluas ire et redire solent, talem habemus regulam traditam, ut si reuertendi animum habere desierint, etiam nostra esse desinant et fiant occupa*n*tium. reuertendi autem animum uidentur desinere habere cum reuertendi consuetudinem de*s*eruerint. **69.** Ea quoque quae ex hostibus capiuntur naturali ratione nostra fiunt.

70. Sed et id qu*od* per adluuionem nobis adicitur eodem iure nostrum fit. per adluuionem autem i*d* uidetur adici, quod ita paulatim flumen agro nostro *a*dicit, ut aestimare non possimus quantum quoquo momento temporis adiciatur. hoc est quod uulgo dicitur, per adluuionem id adici uideri, quod ita paulatim adicitur, ut oculos nostros fallat. **71.** Itaque, si flumen partem aliquam ex tuo praedio re*s*ciderit et ad meum praedium pertulerit, haec pars tua

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[1] Formulation of the sense by Krüger, from Inst. 2, 1, 43 and D. 41, 1, 9, 4 (Gaius, *Res cott.*). Mommsen (nearer the legible letters): *si quid ne corrumpatur distrahendum est* (Mod. D. 3, 3, 63).

[2] Goeschen's conjectures. There are others. The sense is certain: cf. Inst. 2, 1, 12 (Gaius).

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§ 65. Cf. Inst. 2, 1, 11. §§ 66–8. Cf. Inst. 2, 1, 12 sq. § 69. Cf. Inst. 2, 1, 17. G. 4, 16 in fin. Celsus D. 41, 1, 51, 1. §§ 70–2. Cf. Inst. 2, 1, 20–2.

can alienate property of his absent principal, and a creditor can under his agreement alienate property pledged to him, although it is not his; but here the explanation may be that the pledge is deemed to be alienated with the assent of the debtor, he having previously agreed that the creditor should have power to sell the pledge, if the debt were not paid.

65. It appears, then, from what we have said, that alienation takes place sometimes under natural law, as where it is by delivery, and sometimes under civil law; for mancipation, *in iure cessio*, and usucapion are institutions confined to Roman citizens.

66. But it is not only those things that become ours by delivery that we acquire under natural law, but also those that we acquire by occupation (by being the first takers), because they were previously no one's property, for example everything captured on land, in the sea, or in the air. **67.** Thus, if we capture a wild animal, a bird, or a fish, what we so capture becomes ours forthwith and is held to remain ours so long as it is kept in our control; but when it escapes from our keeping and recovers its natural liberty, it is once more the property of the first taker, because it ceases to belong to us. It is deemed to recover its natural liberty when it has escaped from our sight or when, although it is still in sight, its pursuit is difficult. **68.** But as regards such animals as habitually haunt some place, for instance pigeons and bees, or deer haunting a wood, there is a traditional rule that they cease to be ours and belong to the first taker, if they have ceased to have the disposition to return. They are considered to have ceased to have this disposition when they have abandoned the habit of returning. **69.** By natural law also things captured from the enemy become ours.

70. Alluvial accretions to our land become ours, again by natural law. That is held to be an accretion by alluvion which a river adds to our land so gradually that it is impossible to estimate how much is being added at any particular moment; whence the common saying, that an addition is by alluvion if it is so gradual as to be invisible. **71.** Accordingly, if a river tears away a piece of your land and carries it down to mine, that piece

V p. 71 ma/net. **72.** At si in medio flumine insula nata sit, haec eorum omnium communis est qui ab utraque parte fluminis prope ripam praedia possident. si uero non sit in medio flumine, ad eos pertinet qui ab ea parte quae proxima est iuxta ripam praedia habent. **73.** Praeterea, id quod in solo nostro ab aliquo aedificatum est, quamuis ille suo nomine aedificauerit, iure naturali nostrum fit, quia superficies solo cedit. **74.** Multoque magis id accidit et in planta quam quis in solo nostro posuerit, si modo radicibus terram complexa fuerit. **75.** Idem contingit et in frumento quod in solo nostro ab aliquo satum fucrit. **76.** Sed si ab eo petamus fundum uel aedificium, et impensas in aedificium uel in seminaria uel in sementem factas ei soluere nolimus, poterit nos per exceptionem doli mali repellere, utique si bonae fidei possessor fuerit. **77.** Eadem ratione probatum est, quod in cartulis siue membranis meis aliquis scripserit, licet aureis litteris, meum esse, quia litterae cartulis siue membranis cedunt. itaque, si ego eos libros easuc membranas petam, nec impensam scripturae soluam, per exceptionem doli mali summoueri potero. **78.** Sed si in tabula mea aliquis pinxerit

V p. 72 ueluti imaginem, contra probatur; / magis enim dicitur tabulam picturae cedere. cuius diuersitatis uix idonea ratio redditur. certe secundum hanc regulam, si me possidente petas imaginem tuam esse, nec soluas pretium tabulae, potcris per exceptionem doli mali summoueri; at si tu possideas, consequens est ut utilis mihi actio aduersum te dari debeat;[1] quo casu, nisi soluam impensam picturae, poteris me per exceptionem doli mali repellere, utique si bonae fidei possessor fueris. illud palam est, quod siue tu subripueris tabulam siuc alius, competit mihi furti actio.

79. In aliis quoque speciebus naturalis ratio requiritur. proinde si ex uuis ⟨*aut oliuis aut spicis*⟩[2] meis uinum aut oleum aut frumentum feceris, quaeritur utrum meum sit id uinum aut oleum aut frumentum, an tuum. itcm si ex auro aut argento[3] meo uas aliquod feceris, ucl ex tabulis meis nauem aut armarium aut subsellium fabricaueris, item si ex lana mea uestimentum feceris, uel si ex uino et melle meo mulsum feceris, siue ex medicamentis meis emplastrum uel collyrium feceris, ⟨*quaeritur utrum tuum sit id quod ex meo*

[1] *dari debet* V. *detur* Inst. 2, 1, 34.
[2] Cf. D. 41, 1, 7, 7.
[3] *argumento* V. Cf. infra 4, 48.

§ 73. Cf. Inst. 2, 1, 30. §§ 74–6. Cf. Inst. 2, 1, 31. 32. § 77. Cf. Inst. 2, 1, 33.
§ 78. Cf. Inst. 2, 1, 34. *furti actio*: G. 3, 203. *condici*: G. 4, 4.
§ 79. Cf. Inst. 2, 1, 25.

remains yours. **72.** But if an island arises in the middle of a river, it is shared by all the riparian owners on either side of the river; if, however, it be not in the middle of the river, it belongs to the riparian owners on the nearer side. **73.** Furthermore, what a man builds on my land becomes mine by natural law, although he built on his own account, because a superstructure goes with the land. **74.** Much more is this the case with a slip which someone has planted in my land, provided it has taken root there. **75.** The same holds likewise of corn sown by another in my land. **76.** But if I bring an action for the recovery of the land or the building against the other man, and refuse to pay him his expenses on the building, the young plants, or the seed, he will be able to defeat me with the *exceptio doli mali*, at any rate if he was a *bona fide* possessor. **77.** On the same principle it has been held that what another has written on my paper or parchment even in letters of gold is mine, because the lettering goes with the paper or parchment. Hence, if I sue for the rolls or parchments, but refuse to pay the cost of the writing, I can be defeated by the *exceptio doli mali*. **78.** But if, say, someone has painted a picture on my panel, the contrary is held, the opinion preferred being that the panel follows the picture. The reasoning supporting this distinction is hardly satisfactory, but at any rate according to this ruling, if you bring an action against me who am in possession, claiming the picture as yours, but refuse to pay the value of the panel, you can be defeated by the *exceptio doli mali*; if on the contrary you are in possession, it follows that I should be allowed an equitable action against you, in which case, if I refuse to pay the cost of the painting, you will be able to defeat me by the *exceptio doli mali*, at any rate if you are a *bona fide* possessor. Of course if you or anyone else have stolen the panel, I have an action of theft.

79. On a change of species also we have recourse to natural law. Thus, if you make wine, oil, or grain out of my grapes, olives, or ears of corn, the question arises whether this wine, oil, or grain is mine or yours. Or again, if you make some utensil out of my gold or silver, or fashion a boat, chest, or chair out of my planks, or make a garment out of my wool, mead out of my wine and honey, or a plaster or eyesalve out of my drugs, the question arises whether what you have thus made out of my property is yours or

effeceris,⟩[1] an meum. quidam materiam et substantiam spectandam esse putant, id est, ut cuius materia sit, illius et res quae facta sit uideatur esse, idque maxime placuit Sabino et Cassio. alii uero *eius rem* esse putant qui fecerit, idque maxime diuersae scholae
V p. 73 auctoribus uisum est; / sed eum quoque cuius materia et substantia fuerit, furti aduersus eum qui subripuerit habere actionem; nec minus aduersus eundem condictionem ei competere, quia extinctae res, licet uindicari non possint, condici tamen furibus et quibusdam aliis possessoribus possunt.

[R.V. De pupillis an aliquid a se alienare possunt.[2]]

80. Nunc admonendi sumus neque feminam neque pupillum sine tutoris auctoritate rem mancipi alienare posse, nec mancipi uero feminam quidem posse, pupillum non posse. **81.** Ideoque, si quando mulier mutuam pecuniam alicui sine tutoris auctoritate dederit, quia facit eam accipientis, cum scilicet pecunia res nec mancipi sit, contrahit obligationem. **82.**[3] At si pupillus idem fecerit, quia non *facit accipientis sine tutoris auctoritate*[4] *pecuniam*, nullam contrahit obligationem. unde pupillus uindicare quidem nummos suos potest, sicubi extent, id est eos petere suos ex iure Quiritium esse. mulier *uero minime hoc modo* repetere potest, sed *ita: dari sibi oportere.* unde de pupillo quidem quaeritur, an, *si* nummi[5] quos mutuos dedit ab eo qui accepit[6] *consumpti sunt, aliqua* actione eos persequi possit, quoniam *obligationem etiam sine tutoris auctoritate adquirere sibi*[7] potest. **83.** *At*[8] ex contrario *omnes res*
V p. 74 *tam mancipi quam* nec mancipi mulieribus / et pupillis sine tutoris auctoritate solui possunt, quoniam meliorem condicionem suam facere eis etiam sine tutoris auctoritate concessum est. **84.** Itaque, si debitor pecuniam pupillo soluat, facit quidem pecuniam pupilli, sed ipse non liberatur, quia nullam obligationem pupillus sine tutoris auctoritate dissoluere potest, quia nullius rei alienatio ei sine tutoris auctoritate concessa est. sed tamen, si ex ea pecunia locupletior factus sit et adhuc petat, per exceptionem doli mali summoueri potest. **85.** Mulieri uero etiam sine tutoris auctoritate

[1] Lachmann, and generally. [2] Separate line, principal hand.
[3] See Apogr. and Suppl.; cf. Inst. 2, 8, 2. Our text simply incorporates Krüger's conjectures, this being the readiest way of roughly indicating the state of V and a possible sense. It is not claimed that they square in all respects even with what has been read in V. Mommsen's conjectures (see Krüger) differ sensibly. [4] *sine tutoris auctoritate*: not a possible reading according to Suppl.
[5] *an num* . . . (?) V. Mommsen: *an nummis* . . . *consumptis.*
[6] *accipit* V. [7] But . . . *n potest* V.
[8] *at*: *et* V. *at* Inst.

mine. Some hold that the material substance is what counts, in other words that the manufactured article should be held to belong to the owner of the material substance; this is the opinion preferred by Sabinus and Cassius. But others consider that it belongs to its maker; this is the opinion preferred by the authorities of the other school, who add, however, that the former owner of the material substance has the action of theft against one who stole it, and also an action for its value (*condictio*), because, though things that have perished cannot be vindicated, they may nevertheless be the object of a *condictio* against thieves and certain other possessors.

80. Here we must observe that neither a woman nor a ward can alienate a *res mancipi* without *tutoris auctoritas*, but that, while a woman can, a ward cannot so alienate a *res nec mancipi*. **81.** Hence, if a woman lends money without her tutor's *auctoritas*, her contract is effective, because she makes the money—a *res nec mancipi*—the property of the borrower. **82.** But a ward who does the same makes no contract, because without his tutor's *auctoritas* he does not make the money the property of the borrower. He can therefore vindicate his coins, assuming them to be extant, that is he can claim that they are his own *ex iure Quiritium*, whereas a woman cannot make such a claim, but only that the money is owed to her. Hence in the case of a ward it is a question whether, supposing the money lent by him to have been spent by the borrower, he has an action of some sort by which he can claim it, seeing that even without his tutor's *auctoritas* he can acquire the benefit of an obligation. **83.** On the other hand, *res mancipi* and *nec mancipi* without distinction can be paid to women and wards without their tutor's *auctoritas*, because even without it they are allowed to improve their position. **84.** Thus a debtor who pays a ward money he owes him makes the money the property of the ward, but is not himself discharged, because without his tutor's *auctoritas* a ward cannot release an obligation; indeed, without it he is not allowed to part with anything. Still, if he is the richer for the money and yet sues for the debt, he can be defeated by the *exceptio doli mali*. **85.** But to a woman payment of a debt can

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§ 80. = Inst. 2, 8, 2 init. Cf. G. 1, 192; 2, 47. 85. § 81. *facit eam accipientis*: G. 3, 90. § 82. Cf. Inst. 2, 8, 2. G. 4, 2. 3. 2. 1, 21 pr. §§ 84–5. Cf. Inst. 2, 8, 2. Cic. top. 11, 46. § 83. Cf. Inst. 2, 8, *per acceptilationem*: G. 3, 171.

recte solui potest; nam qui soluit liberatur obligatione, quia res nec mancipi, ut proxime diximus, a se dimittere mulieres etiam sine tutoris auctoritate possunt; quamquam hoc ita est si accipiat pecuniam; at si non accipiat, *sed* habere se dicat, et per acceptilationem uelit debitorem sine tutoris auctoritate liberare, non potest.

86. Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate manu mancipioue habemus, item per eos seruos in quibus usumfructum habemus, item per homines liberos et seruos alienos quos bona fide possidemus. de quibus singulis diligenter dispiciamus. **87.** Igitur ⟨*quod*⟩ liberi nostri quos in potestate habemus, item quod serui *nostri* mancipio accipiunt uel ex traditione nanciscuntur, siue quid stipulentur uel ex aliqualibet
V p. 75 causa adquirunt, id nobis adquiritur. ipse enim / qui in potestate nostra est nihil suum habere potest. et ideo, si heres institutus sit, nisi nostro iussu hereditatem adire non potest, et si iubentibus nobis adierit, hereditas nobis adquiritur proinde atque si nos ipsi heredes instituti essemus. et conuenienter scilicet legatum per eos nobis adquiritur. **88.** Dum tamen sciamus, si alterius in bonis sit seruus, alterius ex iure Quiritium, ex omnibus causis ei soli per eum adquiri[1] cuius in bonis est. **89.** Non solum autem proprietas per eos quos in potestate habemus adquiritur nobis, sed etiam possessio: cuius enim rei possessionem adepti fuerint, id nos possidere uidemur; unde etiam per eos usucapio procedit. **90.** Per eas uero personas quas in manu mancipioue habemus proprietas quidem adquiritur nobis ex omnibus causis, sicut per eos qui in potestate nostra sunt; an autem possessio adquiratur, quaeri solet, quia ipsas non possidemus. **91.** De his autem seruis in quibus tantum usumfructum habemus ita placuit, ut quidquid ex re nostra uel ex operis suis adquirant,[2] id nobis adquiratur, quod uero extra eas causas, id ad dominum proprietatis pertineat. itaque, si iste seruus heres institutus sit legatumue quid ei ⟨*aut*⟩ donatum fuerit,[3] non mihi, sed domino proprietatis adquiritur. **92.** Idem
V p. 76 placet de eo qui a nobis bona fide possidetur, / siue liber sit siue

[1] *adquiritur* V.
[2] So Inst. 2, 9, 4 and D. 41, 1, 10, 3. *adquirunt* V.
[3] So Inst. and (almost) D. *legatumue quod ei datum fuerit* V.

§ 86. = Inst. 2, 9 pr. (D.). Cf. G. 1, 52; 3, 163 sq. § 87. = D. 41. 1. 10. 1. Cf. Inst. 2, 9, 1. 3. G. 3, 167. 167a. 114; 4, 134. *nihil suum*: G. 2, 96. *iubentibus nobis*: G. 2, 189. § 88. Cf. G. 1, 54; 2, 40; 3, 166. § 89. = Inst. 2. 9. 3 fin. (D.). § 90. *quia ipsas non possidemus*: G. 2, 94. §§ 91–2. = Inst. 2, 9, 4 (D.). Cf. G. 3, 165. 164.

properly be made even without her tutor's *auctoritas*: the payer is discharged, since, as we have just said, women can part with their *res nec mancipi* even without their tutor's *auctoritas*. At least this is true if she receives the money; but if she does not, but merely acknowledges its receipt, seeking to free her debtor by formal release without her tutor's *auctoritas*, this is beyond her power.

86. Acquisitions come to us not only by our own acts, but also through those whom we hold in *potestas*, *manus*, or *mancipium*; likewise through slaves over whom we have a usufruct, and again through free men and other people's slaves whom we possess *bona fide*. Let us consider these cases carefully one by one. **87.** Whatever children in our *potestas* or our slaves receive by mancipation or obtain by delivery, and whatever rights they acquire by their stipulations or any other title, are acquired for us, because a person in *potestas* can have nothing of his own. Thus such a person, if instituted heir, cannot accept the inheritance except with our sanction, and if he accepts it with that sanction, it is acquired for us exactly as if we had been instituted heirs ourselves; and of course any legacy left to them goes to us on the same principle. **88.** But we must bear in mind that if a slave belongs to one man by bonitary title and to another by Quiritary, his acquisitions from all sources go solely to the owner with the bonitary title. **89.** Through those whom we hold in *potestas* not only ownership but also possession is acquired for us. For we are held to possess anything of which they have acquired possession; hence through them usucapion likewise takes place. **90.** But though through persons whom we hold in *manus* or *mancipium* ownership is acquired for us by every method of acquisition, as much as through those in our *potestas*, it is commonly questioned whether possession is acquired for us through them, since we do not possess the persons themselves. **91.** With regard to slaves in whom we have only a usufruct the rule is that whatever they acquire in connexion with our affairs or from their own work is acquired for us, but that anything they acquire outside these two accounts belongs to the owner of the property in them. Hence if such a slave is instituted *heres* or is given some legacy or present, this acquisition is for the owner of the property in him, not for me. **92.** The same rule applies to a person *bona fide* possessed by us, whether he be a free man or

alienus seruus. quod enim placuit de usufructuario, idem probatur etiam de bonae fidei possessore. itaque, quod extra duas istas causas adquiritur, id uel ad ipsum pertinet, si liber est, uel ad dominum, si seruus est.[1] **93.** Sed bonae fidei possessor cum usuceperit seruum, quia eo modo dominus fit, ex omni causa per eum sibi adquirere potest. usufructuarius uero usucapere non potest, primum quia non possidet, sed habet ius utendi et fruendi, deinde quia scit alienum seruum esse. **94.** De illo quaeritur, an per eum seruum in quo usumfructum habemus possidere aliquam rem et usucapere possimus, quia ipsum non possidemus. per eum uero quem bona fide possidemus sine dubio et possidere et usucapere possumus. loquimur autem in utriusque persona secundum definitionem quam proxime exposuimus: id est, si quid ex re nostra uel ex operis suis adquirant, id nobis adquiritur. **95.** Ex his apparet per liberos homines quos neque iuri nostro subiectos habemus neque bona fide possidemus, item per alienos seruos in quibus neque usumfructum habemus neque iustam possessionem, nulla ex causa nobis adquiri posse. et hoc est quod uulgo dicitur, per extraneam personam nobis adquiri non posse. tantum de possessione quaeritur an per *procuratorem*[2] nobis adquiratur.
V p. 77 **96.** In summa sciendum est his qui in / potestate manu mancipioue sunt nihil in iure cedi posse. cum enim istarum personarum nihil suum esse possit, conueniens est scilicet ut nihil suum esse[3] in iure uindicare possint.

97. *Hactenus*[4] tantisper admonuisse sufficit quemadmodum singulae res nobis adquirantur. nam legatorum ius, quo et ipso singulas res adquirimus, opportunius alio loco referemus. uideamus itaque nunc quibus modis per uniuersitatem res nobis adquirantur. **98.** Si cui heredes facti sumus, siue cuius bonorum *possessionem* petierimus, siue cuius bona emerimus, siue quem adoptauerimus, siue quam in manum ut uxorem receperimus, eius res ad nos transeunt.

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[1] So Inst. and D. *sit* V.

[2] Cf. Suppl. xxviii. Our restoration (Goudsmit, Kniep) is conjectural, as are *per extraneam personam* (Krüger) and *per liberam personam* (Kübler).

[3] *suum esse posse* V. Gloss according to Mommsen.

[4] Inst. 2, 9, 6.

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§ 93. = Inst. 2, 9, 4 (D.). *quia non possidet*: Ulp. D. 41, 2, 12 pr. 1. § 94. Cf. Inst. 2, 9, 4 fin. § 95. = Inst. 2, 9, 5. Cf. Paul 5, 2, 2. C. 4, 27, 1 pr. (A.D. 290). 7, 32, 1 (A.D. 196). § 96. Cf. G. 2, 24. 87. §§ 97–100. = Inst. 2, 9, 6. § 97. *alio loco*: G. 2, 191 sq. § 98. *ut uxorem*: G. 1, 114, &c.

another's slave; for what has been held of a usufructuary is applied also to a *bona fide* possessor, so that whatever is acquired outside the two accounts above mentioned belongs either to the man himself if he is free, or to his owner if he is a slave. **93.** But once the *bona fide* possessor has acquired the slave by usucapion, he can, since he thereby becomes his owner, acquire for himself through the slave's instrumentality on every account. But a usufructuary cannot acquire the slave by usucapion, first because he has not possession of him, but only the right of using and taking profits, and secondly because he knows that the slave belongs to someone else. **94.** Through a slave in whom we have a usufruct it is a question whether we can possess a thing and acquire it by usucapion, because we have not possession of the slave himself. But through one whom we *bona fide* possess there is no doubt but that we can both possess and acquire by usucapion. In both cases what we are saying is subject to the limitation just explained, namely that acquisition by such persons is for us, when it is in connexion with our affairs or from their own work. **95.** From what we have said it is evident that through free men who are neither subject to our power nor *bona fide* possessed by us, and through the slaves of others of whom we have neither a usufruct nor a lawful possession, acquisition is impossible on any account. This is the meaning of the common saying that there cannot be acquisition for us through a stranger. The only doubt is whether possession can be acquired for us through a *procurator*. **96.** Finally it is to be noted that *in iure cessio* to persons in *potestas*, *manus*, or *mancipium* is impossible; for since such persons can have nothing of their own, it obviously follows that they cannot vindicate in court anything as their own.

97. For the present it suffices to have carried our exposition of the methods of acquiring single things thus far. For the law of legacies, under which likewise single things are acquired, will be treated of more conveniently in another place. Let us therefore now consider how things are acquired in mass (*per universitatem*). **98.** If we become heirs to some person or have been granted possession of his estate (*bonorum possessio*), or if we buy an insolvent's estate, or adopt someone, or take a woman into our *manus* as wife, that person's assets pass to us.

99. Ac prius de hereditatibus dispiciamus. quarum duplex condicio est: nam uel ex testamento uel ab intestato ad nos pertinent. **100.** Et prius est ut de his dispiciamus quae nobis ex testamento obueniunt.

101. Testamentorum autem genera initio duo fuerunt: nam aut calatis comitiis testamentum faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in procinctu, id est cum belli causa arma sumebant. procinctus est enim expeditus et armatus exercitus. alterum itaque in pace et in otio faciebant,
V p. 78 alterum in proelium exituri. **102.** Accessit deinde tertium / genus testamenti, quod per aes et libram agitur: qui neque calatis comitiis neque in procinctu testamentum fecerat, is si subita morte urguebatur, amico familiam suam, id est patrimonium suum, mancipio dabat, eumque rogabat quid cuique post mortem suam dari uellet. quod testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur. **103.** Sed illa quidem duo genera testamentorum in desuetudinem abierunt, hoc uero solum quod per aes et libram fit in usu retentum est. sane nunc aliter ordinatur quam olim solebat. namque olim familiae emptor, id est qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator quid cuique post mortem suam dari uellet. nunc uero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia, propter ueteris iuris imitationem, familiae emptor adhibetur. **104.** Eaque res ita agitur: qui facit ⟨*testamentum*,⟩ adhibitis, sicut in ceteris mancipationibus, v testibus ciuibus Romanis puberibus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam. in qua re his uerbis familiae emptor utitur: FAMILIAM PECUNIAMQUE TUAM ENDO MANDATELA TUA[1] CUSTODELAQUE MEA ⟨*ESSE AIO, EAQUE,*⟩[2]
V p. 79 QUO TU IURE TESTAMENTUM / FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE (et ut quidam adiciunt) AENEAQUE LIBRA ESTO MIHI EMPTA. deinde aere percutit libram, idque aes dat testatori uelut pretii loco. deinde testator tabulas testamenti[3] tenens ita

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[1] *tuam* V. Krüger om.

[2] So Kübler. Krüger: *familia pecuniaque tua endo mandatelam custodelamque meam, quo tu iure*, &c. But cf. E. Weiss, SZ 1921, 104 ff.

[3] *test·manti* V. *testamenti manu* Kübler.

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§§ 101–3. Cf. Inst. 2, 10, 1. Gell. 15, 27, 1. 3. See Clark, Hist. of R.L., Regal Period 439 ff. § 104. Cf. G. 1, 119. *secundum legem publicam* (om. Ulp. 20, 9; Isid. Etym. 5, 24, 12): G. 3, 174. Examples: Textes 801; Bruns 1, 304; Riccobono, Fontes 3, 129.

99. Let us consider first inheritances. Of these there are two kinds, according as they come to us by will or by intestacy. **100.** First let us consider those coming by will.

101. Originally there were two kinds of wills: men made them either in the *comitia calata*, which were held twice a year for the purpose of making wills, or *in procinctu*, that is when they were arming for battle, *procinctus* being the army mobilized and armed. Thus they made the former in the quiet of peace and the latter when on the point of sallying to battle. **102.** Later a third kind of will was added, that executed *per aes et libram*. A man who had not made a will either in the *comitia calata* or *in procinctu*, if threatened with sudden death, would mancipate his *familia*, that is his whole estate, to a friend, whom he would request to distribute it after his death to such persons as he desired. This is called the will *per aes et libram*, because it is executed by means of a mancipation. **103.** The two earlier kinds of will have fallen into desuetude, and that executed *per aes et libram* has alone remained in use. Its present scheme, however, is other than what it was of old. For then the *familiae emptor*, that is he who by mancipation received the estate from the testator, used to occupy the position of heir, and consequently it was to him that the testator gave instructions as to the distribution of the estate after his death; but at the present day one person is instituted heir and the legacies are charged on him, whilst another figures formally as *familiae emptor* in imitation of the ancient system. **104.** The proceedings are as follows: the testator, as in other mancipations, takes five Roman citizens above puberty to witness and a scale-holder, and, having previously written his will on tablets, formally mancipates his *familia* to someone. In the mancipation the *familiae emptor* utters these words: 'I declare your *familia* to be subject to your directions and in my custody, and be it bought to me with this bronze piece and' (as some add) 'this bronze scale, to the end that you may be able to make a lawful will in accordance with the public statute.' Then he strikes the scale with the bronze piece and gives it to the testator as the symbolic price. Next the testator, holding the tablets of his will,

dicit: HAEC, ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT, ITA DO, ITA LEGO, ITA TESTOR, ITAQUE UOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE; et hoc dicitur nuncupatio. nuncupare est enim palam nominare; et sane quae testator spccialiter in tabulis testamenti scripserit, ea uidetur generali sermone nominare atque confirmare.

105. In testibus autem non debet is esse qui in potestate *est* aut familiae emptoris aut ipsius testatoris, quia propter ueteris iuris imitationem totum hoc negotium quod agitur testamenti ordinandi gratia creditur inter familiae emptorem agi et testatorem; quippe olim, ut proxime diximus, is qui familiam testatoris mancipio accipiebat, heredis loco erat; itaque reprobatum est in ea re domesticum testimonium. **106.** Unde, et si is qui in potestate patris est familiae emptor adhibitus sit, pater eius testis esse non potest, ac ne is quidem qui in eadem potestate est, uelut frater eius. sed[1] si filius familias ex castrensi peculio post missionem
V p. 80 faciat testamentum, nec pater eius recte testis / adhibetur, nec is qui in potestate patris est.[2] **107.** De libripende eadem quae et de testibus dicta esse intellegemus; nam et is testium numero est. **108.** Is uero qui in potestate heredis aut legatarii est, cuiusue heres ipse aut legatarius in potestate est, quique in eiusdem potestate est, adeo testis et libripens adhiberi potest, ut ipse quoque heres aut legatarius iure adhibeantur. sed tamen, quod ad heredem pertinet quique in eius potestate est, cuiusue is in potestate erit, minime hoc iure uti debemus.

[De testamentis militum.[3]]

109. Sed haec diligens obseruatio in ordinandis testamentis militibus propter nimiam imperitiam constitutionibus principum remissa est. nam quamuis neque legitimum numerum testium adhibuerint neque uendiderint familiam neque nuncupauerint testamentum, recte nihilo minus testantur. **110.** Praeterea permissum est iis et peregrinos et Latinos instituere heredes uel iis legare, cum alioquin peregrini quidem ratione ciuili prohibeantur capere hereditatem legataque, Latini uero per legem Iuniam. **111.** Caelibes quoque, qui lege Iulia hereditatem legataque capere
V fol. deperd. uetantur, item orbi, id est qui liberos non habent, quos lex / *Papia*

[1] *sed et* Kübler. [2] *sit* V. *est* Inst. 2, 10, 9.
[3] In the middle of a separate line, in the principal hand.

§§ 105–8. Cf. Inst. 2, 10, 9–11. § 109. = Inst. 2, 11 pr. Cf. G. 2, 114. Ulp. 23, 10. § 110. Cf. G. 1, 23–5; 2, 218 in fin. 275. 285. Ulp. 22, 2. 3. § 111. Cf. G. 2, 144. 150(?). 206. 207. 286. 286a. Ulp. 22, 3.

says as follows: 'According as it is written in these tablets and on this wax, so do I give, so do I bequeath, so do I call to witness, and so, *Quirites*, do you bear me witness.' This utterance is called the nuncupation, *nuncupare* meaning to declare publicly; and the testator is considered by these general words to declare and confirm the specific dispositions which he has written on the tablets of his will.

105. One who is in the *potestas* of either the *familiae emptor* or the testator may not be among the witnesses, because, in imitation of the ancient law, the whole proceedings in executing a will are deemed to take place between the *familiae emptor* and the testator; indeed, as we have just said, in former times he who received the *familia* from the testator by mancipation was in the position of heir; consequently testimony from a man's own house was rejected. **106.** For the same reason, if the person serving as *familiae emptor* is in the *potestas* of his father, the father cannot be a witness, neither can a person in the same *potestas*, for example the *familiae emptor*'s brother. Again, if a *filiusfamilias* makes a will in virtue of his *peculium castrense* after his discharge from the army, neither his father nor anyone in the *potestas* of his father is properly employed as witness. **107.** What we have said with regard to witnesses must be understood to apply equally to the scale-holder; for he too ranks as a witness. **108.** But one who is in the *potestas* of the heir or of a legatee, or one in whose *potestas* the heir or a legatee is, or one who is in the same *potestas* as either of them, can serve as witness or as scale-holder; indeed, the heir himself or a legatee can do so lawfully. But as regards the heir or one who is in his *potestas* or in whose *potestas* he is, we do well not to avail ourselves of this right.

109. Such strict observance of formalities in the making of wills has by imperial constitutions been relaxed for soldiers, because of their extreme inexperience. For though they fail to employ the ordained number of witnesses, or to sell their *familia*, or to make nuncupation of their wills, these are none the less valid. **110.** Moreover, they are allowed to institute both Latins and peregrines as heirs or to leave them legacies, though in general peregrines are prohibited from taking an inheritance or legacies by the principles of civil law, and Latins by the *L. Iunia*. **111.** Furthermore, unmarried persons, who are forbidden by the *L. Iulia* to receive an inheritance or legacies, and childless persons,

plus quam dimidias partes hereditatis legatorumque capere uetat, ex
V p. 81 *militis testamento solidum capiunt.*[1] . . . / . . .

112. . . .[2] *ex auctoritate* diui Hadriani senatusconsultum factum est, quo permissum est . . . s[3] feminis etiam sine coemptione
V p. 82 testamentum facere, si modo non minores essent / ann*orum XII*,[4] scilicet ut quae tutela liberatae non essent *tutore auctore*[5] testari debe*re*nt. **113.** Uidentur ergo melioris condicionis esse feminae quam masculi; nam masculus mino*r* ann*orum* XIIII testamentum facere non potest, etiamsi tutore auctore testamentum facere uelit, femina uero po*s*t xii ann*um* testamenti faci*endi i*us nanci*s*citur.

114. Igitur, si quaeramus an ualeat testamentum, imprimis aduertere debemus an is qui id fecerit habuerit testamenti factionem; deinde, si habuerit, requiremus an secundum iuris ciuilis regulam *te*status sit, exceptis militibus, qui*bus* propter nimiam *impe*ritiam, ut diximus, quomodo uelint uel quomo*do poss*int permittitur testamentum facere.

115. Non tamen, ut iure ciuili *uale*at testamentum, sufficit ea obseru*a*tio quam supra expo*s*uimus de familiae uenditione et de testibus et de nuncupationibus.[6] **116.** ⟨*Sed*⟩ ante omnia requirendum e*st* a*n* institutio heredis sollemni more facta sit; nam aliter facta institutione nihil proficit familiam testatoris ita uenire testesque ita adhibere *et ita* nun*c*upare testamentum ut supra diximus.
117. Sollemnis autem institutio haec est: TIT*I*US HERES ESTO; sed
V p. 83 et ill*a* iam comprobata uidetur: TITIUM HEREDEM ESSE / IUBEO; at illa non est comprobata: TITIUM HEREDEM ESSE UOLO; sed et illae a plerisque improbatae s*unt*: TITIUM HEREDEM INSTITU*O*, item HEREDEM FACIO.

118. Obseruandum praeterea est ut, si mulier quae in tutela est faciat testamentu*m*, tutor*e auctore*[7] facere debeat; alioquin inutiliter iure ciuili testabitur. **119.** Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secun-

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[1] A folio is missing between V pp. 80 and 81. This is Huschke's conjecture for the first words. Probably, after first completing the military will, Gaius proceeded to capacity to make a will: cf. Inst. 2, 12, Epit. 2, 2, and Ulp. 20, 10 sq.

[2] The first 21 lines of V p. 81 are almost entirely illegible.

[3] About 9 letters illegible. Conjectures: *sui iuris* or *ingenuis* (Krüger) or *capite non minutis* (Huschke). Cf. supra 1, 115a.

[4] *annixii · tab ·* V.

[5] *ita* V.

[6] *nuncupatione* Huschke–Kübler.

[7] *tutores habet* V.

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§ 112. Cf. G. 1, 115a. 192; 2, 118. 121. 122. § 113. Cf. G. 1, 40. Inst. 2, 12, 1. § 114. = D. 28, 1, 4. *testamenti factionem*: G. 1, 23. 25; 3, 75. *ut diximus*: G. 2, 109. § 115. = Inst. 2, 13 pr. init. *ea obseruatio*: G. 2, 104 sq.

whom the *L. Papia* forbids to take more than half of an inheritance or of legacies, take in full under the will of a soldier. . . .

112. . . . *But later* a senatusconsult was passed under the authority of the late emperor Hadrian whereby permission was given to women . . . to make wills without a *coemptio*, provided that they were not below the age of 12, and also, of course, that those not exempted from *tutela* must make their wills with the *auctoritas* of their tutors. **113.** Thus females appear to be better off than males; for a male below the age of 14 cannot make a will, even if he should propose to do so with his tutor's *auctoritas*, whereas a female acquires the right to make a will from the age of 12.

114. Accordingly, in considering whether a will is valid, we must first ascertain whether its maker had the capacity to make it; next, supposing he had capacity, whether he made it according to the requirements of the civil law, except that, as stated, soldiers owing to their extreme inexperience are allowed to make their wills in any way they will or can.

115. The formalities which we have explained above, of selling the *familia*, witnesses and nuncupation, are not, however, sufficient for the validity of a will at civil law; **116.** but before everything else it must be ascertained whether there has been an institution of an heir made in solemn form; for if an institution has been made otherwise, it is unavailing that the sale of the *familia*, the employment of witnesses, and the utterance of the nuncupation have been made in the manner we have mentioned. **117.** The solemn form of institution is this: 'Be thou Titius my heir'; but the form: 'I order that Titius be my heir' seems now also to be approved; not approved is the form: 'I wish Titius to be my heir'; also disapproved by most authorities are the forms: 'I institute Titius my heir', and 'I make Titius my heir'.

118. It is further to be observed that if a woman who is in *tutela* makes a will, she must do so with her tutor's *auctoritas*; otherwise her testament will be of no effect at civil law. **119.** The praetor, however, if the will is sealed with the seals of 7 witnesses,

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§ 116. Cf. G. 2, 229. 248. Inst. 2, 20, 34. § 117. Cf. C. 6, 23, 15 (A.D. 339). § 118. Cf. G. 1, 192; 2, 112; 3, 43. § 119. Cf. G. 2, 147 sq. Inst. 2, 10, 2. 2, 17, 6 (5). Edictum § 149.

dum tabulas testamenti b*onorum possessionem* pollicetur; ⟨*et*⟩ si nemo sit ad quem ab intestato iure legitimo pertineat hereditas, uelut frater codem patre natus aut patruus aut fratris filius, ita poterunt scripti heredes retinere hereditatem. nam idem iuris est et si alia ex *causa* testamentum non ualeat, uelut quod familia non uenierit aut nuncupationis uerba testator locutus non sit. **120.** Sed uideamus an, etiamsi frater aut patruus extent, potior*es* scriptis heredibus habeant*ur*. rescripto enim imperatoris Antonini significat*ur* eos qui secundu*m* tabulas testamenti non iure factas bonorum possessionem petierint, posse aduersus eos qui ab intestato uindicant hereditatem, defendere se per exceptionem doli mali. **121.** Quod sane quidem ad masculorum testamenta pertinere certum est; item ad feminarum quae ideo non utiliter testatae sunt, qu*ia* uerbi gratia familiam non ue*n*diderint aut
V p. 84 nuncupationis uerba locutae non sint. / an autem et ad ea testamenta feminarum, quae sine tutoris auctoritate fecerint, haec constitutio pertineat, uidebimus. **122.** Loquimur autem de his scilicet feminis quae n*on* in legitima parentium aut patronorum tutela s*unt*, sed [de his] quae alterius generis tutor*es* habent, qui etiam inuiti coguntur auctores fieri; alioquin parentem et patron*um* sine auctoritate cius facto testamento non summoueri palam est.

123. Item, qui filium in potestate habet curare debe*t* ut eum uel heredem instituat uel nominatim exheredet; alioquin, si eum silentio praeterierit, inutiliter testabitur, adeo quidem ut nostri praeceptores existiment, etiamsi uiuo patre fili*us* defunctus sit, neminem heredem ex eo testamento existere posse, qu*ia* scilice*t* statim ab initio non constiterit institutio. sed diuersae scholae auctores, siquidem fili*us* mortis patris tempore uiuat, sane impedimento eum esse scriptis heredibus et illum ab intestato heredem fieri confitentur; si uero ante mortem patris interceptus sit, posse ex testamento hered*itat*em adiri putant, nullo iam filio impedimento,[1] quia scilicet existimant ⟨*non*⟩ statim ab initio inutiliter fieri testamentum filio praeterito. **124.** Ceteras uero liberorum personas si praeterierit testator, ualet testamentum, ⟨*sed*⟩ praeteritae
V p. 85 istae personae scriptis heredibus in / partem adcrescunt, si sui

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

§ 120. Cf. G. 2, 149a. Paul 4, 8, 1. § 121. Cf. G. 2, 104 sq. § 122. Cf. G. 1, 192, &c.; 3, 43. § 123. = Inst. 2, 13 pr. *nominatim*: G. 2, 127. *etiamsi uiuo patre*: Paul D. 28, 2, 7. § 124. Cf. Inst. 2, 13 pr.

promises *bonorum possessio secundum tabulas* (possession of the estate in accordance with the testamentary tablets) to the heirs named in the will, and if there is no one to whom the inheritance goes by the statute-law of intestacy—for example a brother by the same father, or a father's brother, or a brother's son—the testamentary heirs will thus be able to keep the inheritance. And the law is the same when the will is invalid on some other account, such as that the *familia* was not sold, or that the testator did not utter the nuncupation. **120.** But let us consider whether, even if there is a brother or a father's brother, they are preferred to the heirs named in the will. For by a rescript of the emperor Antoninus it is laid down that those who have been granted *bonorum possessio* under an improperly executed will can defend themselves by *exceptio doli mali* against parties claiming the inheritance by intestacy. **121.** Now it is certain that the rescript applies to the wills of males, and also to those of females that are invalid for such reason as that they have failed to sell their *familia* or to utter the nuncupation. What we have to consider is whether it applies to wills made by women without their tutor's *auctoritas*. **122.** We refer only to women who are not in *legitima tutela* of parents or patrons, but have a tutor of some other kind, one who can be compelled to give *auctoritas* even against his will. For it is obvious that a parent or a patron is not ousted by a will made without his *auctoritas*.

123. Moreover, a testator who has a son in *potestas* must be careful either to institute him heir or to disinherit him by name; for if he passes him over in silence, his testament will be of no effect. So much so, that the teachers of our school hold that even if the son dies in the father's lifetime, no one can qualify as heir under the will, because the institution was void *ab initio*. The authorities of the other school admit that if the son is living at the time of his father's death, he bars the heirs named by the will and becomes himself heir by intestacy; but they hold that if he predeceases his father, entry on the inheritance can be made under the will, there being now no son to bar it, because evidently, in their view, the will is not avoided *ab initio* by the son being passed over. **124.** But if a testator passes over any other *liberi*[1] than a son, the will is good, but the persons so passed over come in by accretion with the testamentary heirs, for an aliquot

[1] That is, *sui heredes*, since the civil law is being stated.

heredes sint, in uirilem, si extranei, in dimidiam. id est, si quis tres uerb*i* gratia fili*os* heredes instituerit et filiam praeterierit, filia adcrescendo pro quarta parte fit heres, et ea ratione id consequitur quod ab intestato patre m*ortuo* habitura esset; at si extraneos ille heredes instituerit et filiam praeterierit, filia adcrescendo ex dimidia parte fit here*s*. quae de filia diximus, eadem et de nepote deque omnibus liberorum personis *seu* masculini seu *f*eminini sexus dicta intellegemus. **125.** Quid ergo est? licet *h*ae, secundum ea quae diximus, scriptis *heredibus dim*i*diam modo partem*[1] detrahant, tamen praetor eis contra tabulas bonorum possessionem promitti*t*; qua ratione extranei heredes a tota hereditate repelluntur et efficiuntur sine re heredes. **126.** Et hoc iure uteb*amur*, *quas*i nihil inter feminas et masculos interesset. sed nuper imperator Antoninus significauit rescripto su*as*[2] non plus nanci*s*ci feminas per bonorum possessionem qu*am* qu*od*[1] iure adcrescendi consequerent*ur*. quod in emancipatarum quoque person*is*[3] obseruandum es*t*, *ut hae quoque quod*[4] adcrescendi iure habitur*ae* esse*nt*, si in pote*state* fuissent, id ipsum etiam per bonorum possessionem habeant. **127.** Sed siquidem filius a patre exheredetur, nominatim ex*here*dari *deb*et; alioquin non p*rodest eum*[5] exheredari. nominatim
V p. 86 autem *ex*heredari uidetur siue ita exhere/detur: *TITIUS* FILIUS MEUS EXH*ERES ESTO*, *siue ita*: *FILIUS MEUS*[6] EXHERES ESTO, non adiecto proprio nomine. **128.** Ceterae uero liberorum personae, uel feminini sexus uel masculini, satis inter ceteros exheredantur, id est his *uer*b*is*: *CETERI*[7] OMNES EXHEREDES SUNTO, *quae u*erb*a statim post*[8] *in*stitutionem heredum adici solent. sed hoc it*a est iure ciuili*.[9] **129.** Nam praetor omnes uirilis sexus lib*erorum personas*, id est nepotes quoque et pronepotes *nominatim exheredari iubet, feminini uero sexus uel nominatim uel inter ceteros*.[10] . . .

130. Postumi quoque liberi[11] *uel heredes instit*ui debent uel exheredari. **131.**[12] Et i*n* eo par omnium condi*cio est*, *quod et in* filio p*ostumo et in quolibet ex ceteris lib*eris siue *feminini sexus siue*

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[1] Correction of the order of words in V.
[2] So Huschke and generally. *suo* V. [3] So Polenaar-Kübler. *persona* V.
[4] *esset n.* . . V. *est ut nimirum hae*, &c. Kübler.
[5] So Polenaar-Kübler. *psiet* (?) V. *uidetur* Krüger.
[6] Cf. Inst. 2, 13, 1. [7] *ceteri* does not accord with Suppl. xxix.
[8] So Kübler. V illegible. [9] The usual conjecture.
[10] The 2½ illegible lines following *pronepotes* must have contained more. Conjectures vary, but agree on this general sense: cf. 2, 135.
[11] *liberi* Inst. 2, 13, 1. *liberi nominatim* (followed by an illegible half-line) V.
[12] Only the beginnings of lines legible in V. Restorations from Inst.

share of the inheritance if the testamentary heirs are *sui heredes*, for half the inheritance if they are strangers. This means that if, for example, a testator institutes his three sons, but passes over his daughter, the daughter comes in by accretion as heir of a quarter, thus getting what she would have got had her father died intestate; but if the testator institutes strangers as heirs and passes over his daughter, the daughter by accretion comes in as heir of a half. What we have said of a daughter is to be understood to apply equally to a grandson and all other *liberi*, male or female. **125.** But there is more to be said. For though, according to our statement, such persons deprive the testamentary heirs of only half, nevertheless the praetor promises them *bonorum possessio contra tabulas* (possession of the estate against the will), and in this manner the stranger heirs are excluded from the entire inheritance and become heirs only in name (*sine re*). **126.** This law used to be applied to males and females without distinction. But recently the emperor Antoninus has declared by rescript that women *suae* are not to take more by *bonorum possessio* than they would get by their right of accretion. And this ruling is to be applied equally in the case of emancipated females, so that they too get by *bonorum possessio* exactly what they would have got by right of accretion had they been in *potestas*. **127.** But if a son is disinherited by his father, it must be by name; otherwise the disinherison is void. Disinherison is considered to be by name whether it be in the form 'Let my son Titius be disinherited' or in the form 'Let my son be disinherited' without the addition of his proper name. **128.** Other *liberi*, female or male, are sufficiently disinherited by the general clause 'Let all others be disinherited', words which are commonly added immediately after the institution of heirs. But this is so only at civil law. **129.** For the praetor orders all male *liberi*, that is grandsons as well and great-grandsons, to be disinherited by name, females, however, either by name or by the general clause. . . .

130. *Liberi* born after the making of the will (*postumi*) must likewise be either instituted heirs or disinherited. **131.** In this respect all *sui heredes* are in the same position: whether it be a son

§ 126. Cf. Inst. 2, 13, 5. § 127. Cf. G. 2, 123. § 128. Cf. Inst. 2, 13 pr. 5. § 129. Cf. G. 2, 135. §§ 130–2. = Inst. 2, 13, 1.

*ma*sculini praeterito ualet *quidem testamentum, sed postea agnatione postumi si*ue postumae rumpit*ur*, et ea ra*tione totum infir*matur. *ideoq*ue, si mulier ex qua *postumus aut postu*ma sperabat*ur* abor*tum fecerit, nihil impedimento est scriptis heredibus ad hereditatem adeundam.* **132.**[1] *Sed feminini* quidem sexus personae *uel nominatim uel in*ter ceteros *exheredari solent, dum tamen, si inter ceteros exheredentur, aliquid eis legetur, ne uideantur per obliuio*nem praeteritae *esse. masculini uero sexus perso*nas placuit non aliter recte ex*here-*
V p. 87 *dari nisi*[2] *nomina|tim exheredentur, hoc scilicet modo: QUICUMQUE MIHI FILIUS GENITUS FUERIT, EX*HERES ESTO. . . . **133.**[3] *Postumorum autem loco sunt et hi qui in sui heredis locum succedendo quasi agnascendo fiunt parenti*bus sui heredes. ut ecce si filium et *ex eo nepotem ne*ptemue *in* po*testate habeam, quia filius gradu praecedit, is solus iura sui heredis habet, quamuis nepos quo*que et neptis *ex eo in eadem potestate sint; sed si filius meus me uiuo moriatur, aut qualibet ratione exeat de potestate mea, incipit nepos neptisue in eius locum succedere, et* eo modo iura suorum h*eredum quasi agnatio*ne nanciscuntur. **134.** Ne ergo eo modo rumpatur mihi testa*mentum, sicut ipsum filium uel heredem in*stituere uel exheredare[4] debeo, ne n*on iure faciam testamentum, ita et ne*potem neptemue ex eo necesse est mihi u*el heredem instituere uel exheredare, ne forte, me uiuo filio*
V p. 88 *mortuo, succedendo in locum eius nepos neptisue* / quasi agnatione rumpat testamentum; idque lege Iunia Uellaea prouisum est, in qua simul exheredationis modus notatur, ut uirilis sexus ⟨*postumi*⟩ nominatim, feminini uel nominatim uel inter ceteros exheredentur, dum tamen iis qui inter ceteros exheredantur aliquid legetur. **135.** *E*mancipatos liberos iure ciuili neque heredes instituere neque exheredare necesse est, quia non sunt sui heredes; sed praetor omnes tam feminini quam masculini sexus, si heredes non instituantur, exheredari iubet, uirilis sexus *n*ominatim, feminini u*el* nominatim uel inter ceteros. quodsi neque heredes instituti fuerint neque ita ut supra diximus exheredati, praetor promittit eis contra tabulas bonorum possessionem. **135a.** In potestate patr*is* non sunt

[1] Only the beginnings of lines legible in V. Restorations from Inst.

[2] *nisi* Inst. *quam si* Grupe, SZ 1896, 318.

[3] V p. 87 largely illegible. Restorations from Gaius D. 28, 3, 13 and Inst. 2, 13, 2.

[4] So V. *exheredare nominatim* D. *nominatim exheredare* Inst.

§§ 133–4. = Inst. 2, 13, 2 (D.). Cf. Ulp. 23, 3. *lege Iunia Uellaea* (A.D. 26?): Bruns 1, 116. § 135. = Inst. 2, 13, 3. Cf. G. 2, 129; 3, 19. 26. Inst. 2, 13, 4, 3, 1, 12 sq. § 135a. Cf. G. 1, 55. 93. 94; 3, 20.

or any other of the *liberi*, male or female, that is passed over, the will is valid, but it is broken by the subsequent agnation of a *postumus* or *postuma*, and thereby made absolutely void. Thus, if a woman of whom a *postumus* or *postuma* was expected miscarries, there is no obstacle to the succession of the testamentary heirs. **132.** Females (*postumae*) may be disinherited either by name or by the general clause, provided that if it be by the general clause some legacy be left to them, in order that they may not appear to have been passed over through forgetfulness. But it is agreed that males (*postumi*) cannot be validly disinherited except by name, that is in the form 'Let any son that shall be born to me be disinherited'. . . . **133.** Ranked as *postumi* are those who through succeeding to the position of a *suus heres* become *sui heredes* to their ancestor by quasi-agnation. Thus, suppose I have in my *potestas* a son and a grandson and granddaughter by him; the son, being in the nearer degree, alone has the rights of a *suus heres*, although the grandson and granddaughter, his children, are in the same *potestas* as he; but if my son dies during my lifetime or passes out of my *potestas* in any manner, the grandson and granddaughter now succeed to his position and thus, by quasi-agnation, acquire the rights of *sui heredes*. **134.** Therefore, just as in order not to make a void will I am bound either to institute my son *heres* or disinherit him, so, in order to guard against my will being broken in the above manner, I must institute or disinherit any grandson or granddaughter by him, lest it should happen that my son should die in my lifetime and the grandson or granddaughter by succeeding to his position should break my will by quasi-agnation. This was provided for by the *L. Iunia Vellaea*, where also the form of disinherison is notified, namely that for male *postumi* it should be by name, while for female it may be either by name or by the general clause, provided, however, that some legacy be left to those disinherited by the general clause. **135.** At civil law it is unnecessary either to institute or disinherit emancipated *liberi*, because they are not *sui heredes*. But the praetor orders disinherison of all such, whether males or females, who are not instituted heirs, of males by name, of females either by name or by the general clause. To those who have been neither instituted nor disinherited in the manner stated the praetor promises *bonorum possessio contra tabulas*. **135a.** Not in the *potestas* of their father are children who have been granted

qui cum eo ciuitate Romana donati sunt nec in accipienda ciuitate Romana pater *petiit*[1] ut eos in potestate haberet, aut, si petiit, non impetrauit; nam qui ⟨*in*⟩ potestatem patris ab imperatore rediguntur, nihil differunt ab his *qui in potestate patris nati sunt.*[2] **136.** Adoptiui filii quamdiu manent in adoptione, naturalium loco sunt, emancipati uero ⟨*a*⟩ patre adoptiuo neque iure ciuili neque quod ad edictum praetoris pertinet inter liberos numerantur. **137.** Qua ratione accidit ut, ex diuerso, quod ad naturalem parentem pertinet, quamdiu quidem sint in adoptiua familia, extraneorum numero habeantur; si uero emancipati fuerint ab
V p. 89 adoptiuo patre, tunc incipiant / in ea causa esse qua futuri essent si ab ipso naturali patre ⟨*emancipati*⟩ fuissent.

138. Si quis post factum testamentum adoptauerit sibi filium, aut per populum eum qui sui iuris est, aut per praetorem eum qui in potestate parentis fuerit, omni modo testamentum eius rumpitur quasi agnatione sui heredis. **139.** Idem iuris est si cui post factum testamentum uxor in manum conueniat uel quae in manu fuit nubat; nam eo modo filiae loco esse incipit et quasi sua. **140.** Nec prodest siue haec siue ille qui adoptatus est in eo testamento sit institutus institutaue; nam de exheredatione eius superuacuum uidetur quaerere, cum testamenti faciendi tempore suorum heredum numero non fuerit. **141.** Filius quoque qui ex prima secundaue mancipatione manumittitur, quia reuertitur in potestatem patriam, rumpit ante factum testamentum. nec prodest ⟨*si*⟩ in eo[3] testamento heres institutus uel exheredatus fuerit. **142.** Simile ius olim fuit in eius persona cuius nomine ex senatusconsulto erroris causa probatur, quia forte ex peregrina uel Latina, quae per errorem quasi ciuis Romana uxor ducta esset, natus esset. nam siue heres institutus esset a parente siue exheredatus, siue uiuo patre causa
V p. 90 probata siue post mortem eius, omni modo quasi agna/tione rumpebat testamentum. **143.** Nunc uero, ex nouo senatusconsulto quod auctore diuo Hadriano factum est, siquidem uiuo patre causa probatur, aeque ut olim omni modo rumpit testamentum; si uero

[1] So Krüger, but too short for the space. Kübler: *petiit statim a principe ut*, &c.

[2] So Krüger. *athisunit* (?) V. *ab his qui ita nati sunt* Kübler.

[3] So Krüger. *prodeest in eo* V. *prodest ⟨ei si⟩ in eo* Kübler.

§§ 136–7. = Inst. 2, 13, 4. Cf. G. 3, 31. Inst. 3, 1, 10–12. § 138. = Inst. 2, 17, 1. Cf. G. 1, 98 sq. Ulp. 23, 3. § 139. Cf. G. 1, 114, &c.; 2, 159. Ulp. 23, 3. § 141. Cf. G. 1, 132. 135; 3, 6. Ulp. 23, 3. § 142. Cf. G. 1, 67; 3, 5. § 143. Cf. G. 1, 32(?).

Roman citizenship along with him, if he did not, when receiving the grant, ask to have them in his *potestas*, or asked, but unsuccessfully. Children brought under their father's *potestas* by the emperor differ in no respect from those born in his *potestas*. **136.** Adoptive sons are in the same position as natural so long as they remain in adoption, but when emancipated by their adoptive father they take rank as *liberi* neither at civil law nor for the purposes of the praetor's edict. **137.** It is just the reverse in relation to their natural father: so long as they are in their adoptive family they are reckoned strangers to him, but when emancipated by their adoptive father they are placed in the same legal position as they would have occupied if they had been emancipated by their natural father.

138. If after making his will a man adopts as son either a person *sui iuris* through the *comitia* or one who was in *patria potestas* through the praetor, the will is inevitably broken by the quasi-agnation of a *suus heres*. **139.** The same holds where, after the making of a will, the testator's wife comes under his *manus* or one who was in his *manus* becomes his wife; for she thereby becomes in the position of his daughter and is a quasi *sua heres*. **140.** It is of no avail that such a woman or the adopted son has been instituted in the will; it seems idle to discuss their disinherison, seeing that at the time when the will was made they were not of the *sui heredes*. **141.** Further, a son who is manumitted from his first or second mancipation by returning into *patria potestas* breaks a previously made will, and it is of no avail that he has been instituted or disinherited in that will. **142.** Formerly the law was similar regarding one on whose account a case of error is proved under the senatusconsult, say on the ground that he was born of a peregrine or a Latin mother, who had been taken to wife in the mistaken belief that she was a Roman. For even if he had been instituted heir or disinherited by his father, and whether the case was proved before or after his father's death, he used inevitably to break his father's will by quasi-agnation. **143.** But now, by a recent senatusconsult passed on the authority of the late emperor Hadrian, if the case is proved in his father's lifetime, he inevitably breaks the will as under the previous law, but where it is

post mortem patris, praeteritus quidem rumpit testamentum, si uero heres in *eo* scriptus est uel exheredatus, non rumpit testamentum, ne scilicet diligenter facta testamenta rescinderentur *eo* tempore quo renouari non possent.

144. Posteriore quoque testamento quod iure fact*um* est superius rumpitur. nec interest an extiterit aliquis ex eo heres an non extiterit; hoc enim solum spectatur, an existere potuerit. ideoque, si quis ex posteriore testamento quod iure factum est aut noluerit heres esse, aut uiuo testatore aut post mortem eius, antequam hereditatem adiret, decesserit, aut per *cre*tionem exclusus fuerit, aut condicione sub qua heres *in*stitutus est defectus sit, aut propter caelibatum ex lege *I*ulia summotus fuerit ab hereditate: quibus[1] casibus pater familias intestatus moritur. nam et prius testamentum non ualet, ruptum a posteriore, et posterius aeque nullas uires habet, cum ex eo nemo heres extiterit.

145.[2] Alio quoque modo testamenta iure facta infirma*n*tur, uelut ⟨*cum*⟩ is qui fecerit testamentum capite deminutus sit. quod quibus modis accidat primo commentario relatum est. **146.**[2] Hoc autem
V p. 91 casu ir/rita fieri testamenta dicemus, cum alioquin et quae rumpun*tur* irrita fiant, ⟨*et quae statim ab initio non iure fiunt irrita sint; sed et ea quae iure facta sunt et postea propter capitis deminutionem irrita fiunt,*⟩ poss*unt* nihilo minus rupta dici. sed quia sane commodius erat singulas causas singulis appellationibus distingui, ideo quaedam non iure fieri dicuntur, quaedam iure facta rumpi uel irrita fieri.

147. Non tamen per omnia inutilia sunt ea testamenta quae uel ab initio non iure facta sunt uel, iure facta, postea irrita facta *a*ut rupta sunt. nam si septem testium signis signata sint testamenta, potest scriptus heres secundum tabulas bonorum possessionem petere, si modo defunctus testator et ciuis Romanus et suae potestatis mortis tempore fuerit. nam si ideo irritum f*actum sit* testamentum, quod puta ciuitatem uel etiam libertatem testator amisit, *a*ut *quia*[3] in adoptionem se dedit ⟨*et*⟩ mortis te*m*pore in adoptiui patris potestate fuit, non potest scriptus heres secundum tabulas

[1] *in his casibus* Inst. 2, 17, 2, which puts the sentence in order, but for that reason may be a later correction. Kübler accepts Solazzi's view that *quibus—nam* originated as a gloss: cf. 3, 72.

[2] Corrections, &c. from Inst. 2, 17, 5 (4).

[3] So Inst. *uuthis* V. *aut is* Krüger.

§ 144. = Inst. 2, 17, 2. *noluerit heres esse*: G. 2, 167. *per cretionem*: G. 2, 166 sq. *propter caelibatum*: G. 2, 111, &c. § 145. = Inst. 2, 17, 4. *primo commentario*: G. 1, 159 sq. § 146. = Inst. 2, 17, 5 (4). § 147. = Inst. 2, 17, 6 (5). Cf. G. 2, 119, &c.

proved after his father's death, he breaks the will if he is passed over in it, but if he is named as heir or is disinherited in it, he does not break it, clearly in order that wills made with due care should not be set aside when it is no longer possible to remake them.

144. An earlier will is also broken by a subsequent validly made will. It makes no difference whether an heir qualifies under the second will or not, the sole question being whether one could have qualified. Therefore, if the person appointed by a subsequent validly executed will refuses to be heir, or if he dies either in the lifetime of the testator, or after his death but before entering on the inheritance, or if he is shut out by a *cretio* (clause requiring formal acceptance within a definite period), or if he is defeated by the failure of a condition subject to which he was instituted, or if he is debarred from the inheritance under the *L. Iulia* by reason of celibacy—in all these cases the *paterfamilias* dies intestate. For the earlier will is invalid because broken by the second, and the second is of no effect because no one qualifies as heir under it.

145. Yet another way in which validly made wills are invalidated is where the testator afterwards undergoes a *capitis deminutio*; how this may happen has been set out in the first book.

146. In this case we shall speak of the will becoming inoperative, though wills that are broken also become inoperative, and wills improperly executed in the beginning are inoperative; and on the other hand, wills properly executed in the beginning, but subsequently rendered inoperative by the testator's *capitis deminutio*, may equally be said to be broken. But as it is obviously more convenient to distinguish the various cases by special terms, we speak in some cases of wills being improperly executed, in others of properly executed wills being broken or becoming inoperative.

147. But neither wills improperly executed in the beginning nor wills properly executed but subsequently rendered inoperative or broken are entirely worthless. For if a will be sealed with the seals of 7 witnesses, the heir named in it may apply for *bonorum possessio secundum tabulas*, provided only that the deceased testator was both a Roman citizen and *sui iuris* at the time of his death. For if the cause that has rendered the will inoperative is, say, the testator's loss of citizenship or even of liberty, or that he gave himself in adoption and at the time of his death was in his adoptive father's *potestas*, the heir named in his will is not entitled to

bonorum possessionem pet*ere*. **148.** ⟨*Qui autem*⟩[1] secundum tabulas testamenti quae aut statim ab initio non iure factae sint aut, iure factae, postea *r*uptae uel irritae erunt, bonorum possessionem accipiunt, si modo possunt hereditatem optinere, habebunt bonorum possessionem cum re; si uero ab his auocari hereditas potest, habebunt bonorum possessionem sine re. **149.** Nam si quis heres iure ciuili institutus sit uel ex primo uel ex posteriore testamento, uel ab intestato iure legitimo heres sit, is potest ab iis
V p. 92 hereditatem auocare. si uero nemo / sit alius iure ciuili heres, ipsi retinere hereditatem possunt, nec ullum ius aduersus eos habent cognati, *qui* legitimo iure deficiuntur. **149a.**[2] Aliq*uando tamen, sicut su*pra quoque notauimus, etiam legitim*is* quoq*ue heredibus* potio*res* scri*p*ti habentur, u*eluti* si ideo n*on iure* factum sit testamentum, quod familia non uenierit aut nuncupationis uerba testator locutus non sit; *tum enim, si ag*nati petant hereditat*em*, *per exceptio*nem *doli mali* ex con*stitutione imperatoris Antonini summo*ueri po*ssunt*. **150.**[3] *Sane* lege Iulia s*criptis non aufertur hereditas, si bonorum* possessores e*x edicto constituti sint. nam ita demum e*a lege bona caduca fiunt et ad populum deferri iubentur, si defuncto nemo *heres uel bonorum possessor existat.*

151. Potest ut iure facta testamenta *contraria uoluntate* infirmentur. apparet ⟨*autem*⟩ non posse *ex eo so*lo i*nfirma*ri testamentum, quod postea testator id noluerit ualere, usque adeo ut, si linum eius inciderit, nihilo minus iure ciuili ualeat. quin etiam, si deleuerit quoque a*ut* combus*serit* tabulas testamenti, non ideo minus ⟨*non*⟩ desinent ualere *quae* ibi fuerunt scripta, licet eorum probatio difficilis sit. **151a.** Quid ergo est? si quis ab intestato bonorum possessionem petieri*t*, *et* is qui ex eo testamento heres *est*[4] petat
V p. 93 here*d*itatem, *per exceptionem doli mali repelletur*.[5] . . ./ perueniat hereditas. et hoc ita *re*scripto imperatoris Antonini significatur.

[1] So Kübler. Krüger, e.g., *Itaque qui*. Cf. Apogr. xxviii i. f.

[2] In this largely illegible section we have adopted Kübler's conjectures, which differ only slightly from Krüger's.

[3] In this section we have adopted Krüger's conjectures, approved by Kübler. Cf. Ulp. 28, 7.

[4] *cum* V.

[5] This much seems agreed, but for the rest of the 2½ illegible lines conjectures vary. Krüger makes the sense: *per exc. doli mali repelletur; si uero nemo ab intestato bonorum possessionem petierit, populus* (so Girard) *scripto heredi quasi indigno auferet hereditatem, ne ullo modo ad eum quem testator heredem habere noluit perueniat hereditas.*

§ 148. Cf. G. 3, 35 sq. § 149. *cognati*: G. 3, 24. § 149a. *supra*: G. 2, 120. 121. § 150. Cf. Ulp. 28, 7. G. 3, 78. §§ 151–151a. Cf. Inst. 2, 17, 7 (6).

apply for *bonorum possessio secundum tabulas.* **148.** Persons receiving *bonorum possessio* under a will improperly executed from the beginning, or under a will properly executed but afterwards broken or rendered inoperative, will, if they are able to keep the inheritance, have *bonorum possessio cum re* (effectual *bonorum possessio*), but if the inheritance can be taken away from them, they will have *bonorum possessio sine re* (ineffectual *bonorum possessio*). **149.** For anyone who has been instituted heir in accordance with the civil law by a previous or a later will, or who is heir by the civil law of intestacy, can turn them out of the inheritance. But if there be no other person who is heir at civil law, they can keep the inheritance, and the cognates, possessing no title by civil law, have no right against them. **149a.** Sometimes, however, as we have already observed above, the heirs named in an invalid will are preferred even to the heirs by civil law, for example if the defect in the execution of the will was that the *familia* was not sold or that the testator did not utter the words of nuncupation; for in that case, if the agnates bring their suit for the inheritance, they can be defeated by the *exceptio doli mali* under the constitution of the emperor Antoninus. **150.** Clearly, where testamentary heirs have established themselves as *bonorum possessores* under the terms of the Edict, the *L. Iulia* does not deprive them of the inheritance. For by that statute an estate is escheated and must go to the people (*populus*) only where no one appears as heir to the deceased or as *bonorum possessor.*

151. It is possible for duly executed wills to be invalidated by change of intention. It is clear, however, that this cannot happen simply because later the testator desires that the will shall not stand; indeed, it remains valid at civil law even if he cuts its strings; and more than that, even if he effaces it or burns the tablets on which it is written, its contents do not on that account lose their validity, although their proof is difficult. **151a.** But what ensues? If someone applies for *bonorum possessio ab intestato* (by right of intestacy), the testamentary heir, if he brings his suit for the inheritance, will be defeated by the *exceptio doli mali*, [whilst, if no one applies for *bonorum possessio ab intestato*, the people will take the inheritance in preference to the testamentary *heres*, he being considered unmeritorious, so that the succession shall on no account pass to one whom the testator wished to exclude]. So it it is laid down by a rescript of the emperor Antoninus.

152. Heredes autem aut necessarii dicuntur, aut sui et necessarii, aut extranei. **153.** Necessarius heres est seruus cum libertate heres institutus, ideo sic appellatus quia, siue uelit siue nolit, omni modo post mortem testatoris protinus liber et heres est. **154.** Unde qui facultates suas suspectas habet, solet seruum suum primo aut secundo uel etiam ulteriore gradu liberum et heredem instituere, ut, si creditoribus satis non fiat, potius huius heredis quam ipsius testatoris bona ueneant, id est ut ignominia, quae accidit ex uenditione bonorum, hunc potius heredem quam ipsum testatorem contingat; quamquam apud Fufidium Sabino placeat eximendum eum esse ignominia, quia non suo uitio, sed necessitate iuris bonorum uenditionem pateretur: sed alio iure utimur. **155.** Pro hoc tamen incommodo illud ei commodum praestatur, ut ea quae post mortem patroni sibi adquisierit, siue ante bonorum uenditionem siue postea, ipsi reseruentur; et, quamuis pro portione[1] bona uenierint, iterum ex hereditaria causa bona eius non uenient, nisi si quid ei ex here-
V p, 94 ditaria causa fuerit adquisitum, / uelut si ⟨*ex eo quod*⟩[2] Latinus adquisierit locupletior factus sit, cum ceterorum hominum quorum bona uenierint pro portione, si quid postea adquirant, etiam saepius eorum bona uenire solent. **156.** Sui autem et necessarii heredes sunt uelut filius filiaue, nepos neptisue ex filio, ⟨*et*⟩ deinceps ceteri, qui modo in potestate morientis fuerunt. sed uti nepos neptisue suus heres sit, non sufficit eum in potestate aui mortis tempore fuisse, sed opus est ut pater quoque eius uiuo patre suo desierit suus heres esse, aut morte interceptus aut qualibet ratione liberatus potestate; tum enim nepos neptisue in locum sui patris succedunt. **157.** Sed sui quidem heredes ideo appellantur, quia domestici heredes sunt, et uiuo quoque parente quodammodo domini existimantur. unde etiam si quis intestatus mortuus sit, prima causa est in successione liberorum. necessarii uero ideo dicuntur, quia omni modo, ⟨*siue*⟩ uelint siue ⟨*nolint, tam*⟩[3] ab intestato quam ex testamento heredes fiunt. **158.** Sed his praetor permittit abstinere se ab hereditate, ut potius parentis bona ueneant. **159.** Idem

[1] *propter contractione* V.

[2] Savigny, followed by Kübler. But see Krüger's note.

[3] V corrupt. Cf. Inst. 2, 19, 2.

§ 152. = Inst. 2, 19 pr. § 153. = Inst. 2, 19, 1. Cf. G. 2, 186–8. § 154. = Inst. 2, 19, 1. Cf. 1, 6, 1. *primo aut secundo*: G. 2, 174. *bona ueneant*: G. 3, 79; 4, 102. § 155. = Inst. 2, 19, 1. *ex eo quod Latinus*: G. 3, 56 sq. 63 sq. § 156. = Inst. 2, 19, 2. Cf. G. 3, 2 sq. Inst. 3, 1, 2 sq. § 157. = Inst. 2, 19, 2. Cf. G. 3, 154a. Paul D. 28, 2, 11. § 158. = Inst. 2, 19, 2. Cf. G. 2, 163; 3, 67. Edictum §§ 209. 210. § 159. Cf. G. 1, 114; 2, 139, &c.

152. Heirs are termed either *necessarii* or *sui et necessarii* or *extranei*. **153.** A *necessarius heres* is a slave instituted heir with freedom annexed, so called because inevitably, whether he will or not, he is on the testator's death straightway free and heir. **154.** Hence those who doubt their own solvency commonly institute either in the first, second, or a later place one of their slaves as free and heir, so that, if the creditors of the estate are not paid in full, the assets may be sold as belonging to this heir rather than to the testator himself, the object being that the discredit attaching to such a sale should fall on the heir rather than on the testator himself. True we read in Fufidius that Sabinus holds that he ought to be exempted from discredit seeing that the sale is not brought upon him by his own fault, but by operation of law; but the accepted law is not so. **155.** In compensation for this disadvantage he is given the advantage that everything he acquires after his patron's death for himself, whether before or after the sale, is reserved to him; and even if the sale realizes only a fraction of the liabilities, his property will not be subjected to a second sale on account of the hereditary liabilities, except where he acquires something in his capacity of heir, for instance if he is enriched out of property acquired by a (Junian) Latin (a freedman of the testator, who dies), whereas the subsequent acquisitions of all other persons whose property realizes only a fraction of their debts may be subjected to repeated sales. **156.** *Sui et necessarii heredes* are such persons as a son or daughter, grandson or granddaughter by a son, and the rest, provided that they were in the testator's *potestas* when he died. But for a grandson or granddaughter to be a *suus heres* it is not enough that they were in their grandfather's *potestas* at the time of his death; it is also necessary that their father should have ceased to be a *suus heres* in his father's (their grandfather's) lifetime, either by having been cut off by death or by having been freed from *potestas* in some way; for if that happens, the grandson or granddaughter succeeds to their father's position. **157.** They are called *sui heredes* because they are household heirs and even in their father's lifetime are considered in a manner owners. Accordingly, if a man dies intestate, the first right of succession belongs to his *liberi*. They are called *necessarii* because both under a will and by intestacy they inevitably become his *heredes*, whether they will or not. **158.** But the praetor allows them to abstain from the succession, in order that the assets may preferably be sold as the ancestor's. **159.** The law is the same

iuris est et ⟨*in*⟩ uxoris persona quae in manu est, quia filiae loco est, et in nuru quae in manu filii est, quia neptis loco est. **160.** Quin
V p. 95 etiam similiter abstinendi po*te*st/*a*tem facit praetor etiam ei qui in causa [id est mancipato] mancipii est, ⟨*si*⟩ cum liber*tate* heres[1] institutus sit, *quamuis*[2] necessarius, non etiam suus heres sit, tamquam seruus. **161.** Ceteri, qui testatoris iuri subiecti non sunt, extranei heredes appellantur. itaque liberi quoque nostri, qui in potestate nostra non sunt, here*d*es a nobis instituti, sicut[3] extranei uidentur. qua de causa et qui a matre heredes instituuntur eodem numero sunt, quia feminae liberos in potestate non habent. serui quoque, qui cum liber*tate*[4] heredes instituti sunt et postea a domino manumissi, eodem numero habentur. **162.** Extraneis autem heredibus deliberandi potestas data est de adeunda hereditate uel non adeunda. **163.** Sed siue is cui abstinendi potestas est immiscuerit se bonis hereditariis, siue is *c*ui de adeunda ⟨*hereditate*⟩[5] deliberare licet adierit, postea relinquendae hereditatis facultatem non habet, nisi si minor sit annorum XXV. nam huius aetatis hominibus, [permissum est] sicut in ceteris omnibus causis deceptis, ita etiam si temere damnosam hereditatem susceperint, praetor succurrit. scio quidem diuum Hadrianum etiam maiori XXV annorum ueniam dedisse, cum post aditam hereditatem grande aes alienum, quod aditae hereditatis tempore latebat, apparuisset.
V p. 96 **164.** / Extraneis heredibus solet cretio dari, id est finis deliberandi, ut intra certum tempus uel adeant hereditatem uel, si non adeant, temporis fine summoueantur. ideo autem cretio appellata est, quia cernere est quasi decernere et constituere. **165.** Cum ergo ita scriptum sit: HERES TITIUS ESTO, adicere debemus: CERNITOQUE IN CENTUM DIEBUS PROXIMIS QUIBUS SCIES POTERISQUE. QUODNI ITA CREVERIS, EXHERES ESTO. **166.** Et qui ita heres institutus est, si uelit heres esse, debebit intra diem cretionis cernere, id est haec uerba dicere: QUOD ME P. *MEU*IUS[6] TESTAMENTO SUO HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNOQUE. quodsi ita non

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[1] *cum liber et heres* V. But cf. n. 4 below.
[2] *cum* V, kept by Kübler.
[3] [sicut] Mommsen–Krüger.
[4] *cum liberi et heredes* V. Cf. n. 1 above.
[5] Inst. 2, 19, 5. Or [*de adeunda*] Solazzi, cited by Kübler.
[6] *titius* V.

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§ 160. Cf. G. 1, 123. 138; 3, 114. § 161. = Inst. 2, 19, 3. *quia feminae*: G. 1, 104, &c. *serui quoque*: G. 2, 188. § 162–3. = Inst. 2, 19, 5. 6 init. *nisi si minor*: G. 4, 57. § 164. Cf. C. 6, 30, 17 (C.T. 8, 18, 8, 1, A.D. 407). § 165. Cf. G. 2, 171. 174. § 166. Cf. G. 2, 168. 176; 3, 36. 87. Examples: Textes 809. Bruns 1, 319. Riccobono, Fontes 3, 179.

regarding a wife who is in *manus*, as she is in the position of a daughter, and regarding a daughter-in-law in a son's *manus*, as she is in the position of a granddaughter. **160.** Moreover, the praetor extends a similar power of abstaining to a person in *mancipii causa* if he be instituted heir with freedom annexed, though like a slave he is a *necessarius heres* and not also a *suus heres*. **161.** All other heirs, not being subject to the testator's *potestas*, are termed *extranei*. Accordingly, even our children, if not in our *potestas*, are regarded as *extranei heredes* when instituted heirs by us. It follows that those instituted by their mother are also in this same category, because women do not hold their children in *potestas*. In the same category also are slaves instituted as heirs with freedom annexed and afterwards manumitted by their owner. **162.** *Extranei heredes* are allowed a power of deliberating whether to enter on the inheritance or not. **163.** But if an heir who has the power of abstaining meddles with hereditary property, or if one who is allowed to deliberate whether to enter on the inheritance enters on it, he has thereafter no power of abandoning the inheritance, except if he be under the age of 25. For the praetor relieves persons under that age if they rashly take up an insolvent inheritance, just as he does in all other cases where they have been deceived. I am aware, however, that the late emperor Hadrian relieved a person above the age of 25 in a case where after entry on an inheritance a large debt, which was unknown at the time of entry, came to light.

164. *Extranei heredes* are commonly given a *cretio*, that is a limited period for deliberation, so that they must either enter on the inheritance within the appointed period or in default of entry be barred on its expiry. This is called *cretio*, because *cernere* means to decide and determine. **165.** Thus, after writing: 'Be thou Titius my heir', we ought to add 'and do thou make *cretio* within the next hundred days during which thou knowest and canst. If thou dost not so make *cretio*, be thou disinherited'. **166.** One thus instituted heir must, if he wishes to be heir, make *cretio* within the appointed time, that is, he must make the following declaration: 'Whereas Publius Meuius by his will has instituted me his heir, I enter upon and make *cretio* of that inheritance.'

creuerit, finito tempore cretionis excluditur, nec quicquam proficit si pro herede gerat, id est, si rebus hereditariis tamquam heres utatur. **167.** At is qui sine cretione heres instit*ut*us sit, aut qui ab intestato legitimo iure ad hereditatem uocatur, pote*st* aut cernendo aut pro herede gerendo uel etiam nuda uoluntate suscipiendae hereditatis heres fieri, eique liberum est quocumque tempore uoluerit adire hereditatem. ⟨*sed*⟩ solet praetor postulantibus hereditariis creditoribus tempus constituere, intra quod, si uel*i*t, ade*a*t hereditatem; si minus, ut liceat creditoribus bona defuncti uendere.

V p. 97 **168.** Sic*u*t autem ⟨*qui*⟩ cum cretione / heres institutus est, nisi creuerit hereditatem, non fit heres, ita non aliter excluditur quam si non creuerit intra id tempus quo cretio finita *est*.[1] itaque, licet ante diem cretionis constituerit hereditatem non adire, tamen paenitentia actus superante die cretionis cernendo heres esse potest. **169.** At is qui sine cretione heres institutus est, qui*u*e ab intestato per legem uocatur, sicut uoluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur. **170.** Omnis autem cretio certo tempore constringitur. in quam rem tolerabile tempus uisum est centum dierum. potest tamen nihilo minus iure ciuili aut longius aut breuius tempus dari; longius autem in*t*erdum praetor coartat. **171.** Et quamuis omnis cretio certis diebus constringatur, tamen alia cretio uulgaris uocatur, alia certorum dierum: uulgaris illa quam supra exposuimus, id est, in qua *a*dici*u*ntur haec uerba: QUIBUS SCIET POTERITQUE; certorum dierum, in qua detractis his uerbis cetera scribuntur. **172.** Quarum cretionum magna differentia est. nam uulgari cretione data, nulli dies computantur nisi quibus scierit quisque se heredem esse institutum et possit cernere. certorum uero dierum cretio*ne* data, etiam nescient*i* se

V p. 98 heredem institutum esse numerantur dies con/tinui; item ei quoque qui aliqua ex causa cernere prohibetur, et eo amplius ei qui sub condicione heres in*s*titutus est, tempus numeratur. unde melius et aptius est uulgari cretione uti. **173.** Continua haec cretio uocatur, quia continui dies numerantur. sed quia tamen[2] dura est haec cretio, altera *a* in us*u*[3] habetur; unde etiam uulgaris dicta est.

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[1] So Krüger. *si* V. *sit* Kübler.

[2] *tamen*: gloss according to Krüger.

[3] So Krüger. *altera minus* V. *altera magis in usu* Kübler. But there are numerous conjecturcs as regards the present passage, from *unde melius* onwards.

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§ 167. Cf. Inst. 2, 19, 7. G. 3, 87. Edictum § 208. § 168. Cf. G. 2, 144. 170. § 169. Cf. Inst. 2, 19, 7 in fin. § 171. Cf. G. 2, 164–5. § 172. Cf. G. 2, 190.

If he does not do this, he is barred when the time of *cretio* has ended, and it is of no avail that he behave as heir, that is, deal with the hereditary property as if he were heir. **167.** But one instituted heir without *cretio*, or one who is called to the *hereditas* by the statute-law of intestacy, can become heir either by making *cretio*, or by behaving as heir, or even by informal (expression of) intention to take up the inheritance, and is free to enter on the inheritance at whatever time he likes. The praetor, however, on the petition of the hereditary creditors commonly fixes a time within which he may, if he chooses, enter on the inheritance; otherwise, the creditors are to be allowed to sell up the deceased's assets. **168.** But just as a person instituted heir with *cretio* does not become heir unless he makes *cretio* of the inheritance, so he is only debarred from the inheritance by not having done this within the time-limit of the *cretio*. Hence, although he may, before the end of the period, have decided not to enter on the inheritance, he can change his mind and become heir by making *cretio* before the period has expired. **169.** On the other hand, just as a person instituted *heres* without *cretio*, or one entitled by statute on intestacy, becomes heir by informal (expression of) intention, so by a contrary (expression of) intention he is forthwith barred from the inheritance. **170.** *Cretio* is always limited by a definite period. For this purpose the period of 100 days has been found reasonable. Nevertheless, at civil law, a longer or a shorter period may be given; but the praetor sometimes shortens a longer period. **171.** Though *cretio* is always limited by a definite period, there is, nevertheless, one form of *cretio* called ordinary *cretio* and another known as *cretio* of fixed days. The former is that above set out, namely that with the addition of the words 'during which he knows and can'; that of fixed days is the same with these words omitted. **172.** There is a wide difference between the two. For when the ordinary *cretio* is given, only the days during which the man was aware that he had been instituted heir and was able to make *cretio* are counted against him. But where a *cretio* of fixed days is given, the days are counted against him continuously, even though he is not aware that he has been instituted heir, and even against one who for some reason is prevented from making *cretio*; and more than this, time runs against one instituted heir conditionally. Hence it is better and more suitable to employ the ordinary form. **173.** This *cretio* (of fixed days) is called continuous *cretio*, because the days are counted continuously. But since it works hardship, the other is the common form, which is why it is called ordinary *cretio*.

[De substit*uti*onibus.[1]]

174. *I*nterdum duos pluresue gradus heredum facimus, hoc modo: L. TITIUS HERES ESTO CERNITOQUE IN DIEBUS ⟨*CENTUM*⟩ PROXIMIS QUIBUS SCIES POTERISQUE. QUODNI ITA CREUERIS, EXHERES ESTO. TUM MEUIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM et reliqua. et deinceps in quantum uelimus substituere possumus. **175.** Et licet nobis uel unum in *u*nius locum substituere pluresue, et contra in plurium locum uel unum uel plures substituere. **176.** Primo itaque gradu scriptus heres hereditatem cernendo fit heres, et substitutus excluditur; non cernendo summouetur, etiamsi pro herede gerat, et in locum eius substitutus succedit. et deinceps, si plures gradus sint, in singulis simili ratione idem contingit. **177.** Sed si cretio sine exheredatione sit data, id est *in* haec uerba: SI NON CREU*E*RI*S*, TUM P. MEUIUS HERES ESTO, illud diuersum inueni*tur*, qu*od*, si prior omissa cretione pro herede gerat, substi-
V p. 99 tutum in partem admittit, et fiunt ambo aequis partibus / heredes. quodsi neque cernat neque pro herede gerat, tum sane in uniuer*sum* summouetur, et substitutus in totam hereditatem succedit. **178.** Sed Sabino quidem placuit, quamdiu cernere et eo modo heres fieri possit prior, etiamsi pro herede gesserit, non tamen admitti substitutum; cum uero cretio finita sit, tum pro herede gerente admitti[2] substitutum. aliis uero placuit etiam superante cretione posse eum pro herede gerendo in partem substitutum admittere, et amplius ad cretionem reuerti non posse.

179. Liberis nostris impuberibus quos in potestate habemus non solum ita ut supra diximus substitu*ere* poss*u*mus, id est ut, si heredes non extiterint, alius nobis heres sit, sed eo amplius ut, etiamsi heredes nobis extiterint et adhuc impuberes mortui fuerint, *s*it iis aliquis heres; uelut hoc modo: TITIUS FILIUS MEUS MIHI HERES ESTO. SI FILIUS MEUS MIHI ⟨*HERES NON ERIT SIUE HERES*⟩[3] ERIT ET *PRIUS*[4] MORIATUR QUAM IN SUAM TUTELAM UENERIT, TUN*C* SEIUS HERES ESTO. **180.** Quo casu, siquidem non extiterit heres filius, substitutus patris[5] fit her*es*; *si uero* heres extiterit filius et ante pubertatem decesserit, ipsi filio fit heres substitutus. quam ob rem

[1] Principal hand.

[2] So Krüger. *gerente* (*gerento*?) *admittit* V. *gerentem admittere* Kübler, which is easier.

[3] Inst. 2, 16 pr.

[4] So Inst. *hic prius* V. *is prius* Kübler.

[5] So V. *patri* Inst., adopted by Krüger.

§ 174. Cf. Inst. 2, 15 pr. § 175. Cf. Inst. 2, 15, 1. § 176. Cf. G. 2, 166. 168. §§ 177–8. Cf. Ulp. 22, 34. § 179. = Inst. 2, 16 pr. § 180. = Inst. 2, 16 pr. 2.

174. Sometimes we make two or more grades of heirs, as follows: 'Be thou Lucius Titius my heir and do thou make *cretio* within the next 100 days during which thou knowest and canst. If thou dost not so make *cretio*, be thou disinherited. In that case be thou Meuius my heir and do thou make *cretio* within the next 100 days', &c. And we can go on substituting as often as we like. **175.** We may substitute one or more persons for a single heir and vice versa one or more persons for several heirs. **176.** The heir named in the first grade becomes heir by making *cretio*, and the substitute is shut out; by failing to make *cretio* he is himself shut out even if he behaves as heir, and the substitute steps into his place. And if there are further grades, the same results follow at each grade. **177.** But if *cretio* is enjoined without disinherison, that is in these words: 'if thou dost not make *cretio*, then be Publius Meuius my heir', there is this difference, that if the first-named, while omitting to make *cretio*, behaves as heir, he lets in the substitute for a share, and both become heirs in equal shares. But if he neither makes *cretio* nor behaves as heir, then clearly he is altogether shut out, and the substitute comes in for the whole inheritance. **178.** But Sabinus' opinion was that so long as the first person instituted had the right to make *cretio* and so become heir, the substitute was not let in by his merely behaving as heir; but that, once the period of *cretio* had run out, the substitute was let in even if he (the first-named) behaved as heir. But others have held that even if there is still time to make *cretio*, he can by behaving as heir let in the substitute for a share and can no longer fall back on *cretio*.

179. To our children below puberty and in our *potestas* we can institute substitutes not only in the manner we have described, namely to the effect that if they do not qualify as heirs someone else is to be our heir, but we can further appoint someone to be their heir in the event even of their qualifying as our heirs and dying whilst still below puberty, for example thus: 'Be thou my son Titius my heir. If my son shall not be my heir or shall be my heir and die before becoming his own tutor (reaching puberty), be thou Seius heir.' **180.** In this case, if the son does not qualify as heir, the substitute becomes heir to the father, but if he does qualify and dies before puberty, the substitute becomes heir to

V p. 100 duo quodammodo sunt testamenta, / aliud patris, aliud filii, tamquam si ipse filius sibi heredem instituisset; aut certe unum est testamentum duarum hereditatum. **181.** Ceterum, ne post obitum parentis periculo insidiarum subiectus uideretur[1] pupillus, in usu est uulgarem quidem substitutionem palam facere, id est eo loco quo pupillum heredem instituimus: ⟨*nam*⟩ uulgaris substitutio ita uocat ad hereditatem substitutum, si omnino pupillus heres non extiterit; quod accidit cum uiuo parente moritur, quo casu nullum substituti maleficium suspicari possumus, cum scilic*et* uiuo testatore omnia quae in testamento scripta sint ignorentur. illa*m* autem substitutionem, per quam, *etiamsi* heres extiterit pupillus et intra pubertatem decesserit, substitutum uocamus, separatim in inferioribus tabuli*s* scribimus, easque tabulas proprio lino propriaque cera consignamus, et in prioribus tabulis cauemus ne inferiores tabulae uiuo filio et adhuc impubere aperiantur. sed longe *t*utius est utrumque genus substitutionis separatim in inferioribus tabulis consignari, qu*ia* si ita[2] consignatae uel separatae fuerint substitutione*s* ut diximus, e*x* priore potest intellegi in altera [alter] quoque

V p. 101 idem esse substitutus. **182.** / Non solum aut*em* heredibus institutis impuberibus liberis ita substituere poss*u*mus ut, si ante pubertatem mortui fuerint, sit is heres quem nos uoluerimus, sed etiam exhere*d*atis. itaque eo casu, si quid pupillo ex hereditatibus legatisue aut donationibus propinquorum adquisitum fuerit, id o*m*ne a*d* substitutum pertinet. **183.** Quaecumque diximus de substitutione impuberum liber*o*rum uel heredum institutorum uel exheredatorum, eadem etiam de postumis intellegemus. **184.** Extraneo uero heredi[3] instituto ita substituere non possum*us* ut, si heres extiterit et intra aliquod tempus decesserit, alius ei heres sit, sed hoc solum nobis permissum est, ut eum p*er* fideicommissum obligemus, ut hereditatem nostram totam uel ⟨*ex*⟩[4] parte restituat. quod ius quale sit suo loco trademus.

185. Sicut autem liberi homines, ita et serui, tam nostri quam alieni, heredes scribi possunt. **186.** Sed noster seruus simul et liber et heres esse iuberi debet, id est hoc modo: STICHUS SERUUS MEUS

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[1] So V. *uideatur* Krüger.
[2] So Kübler. *quaesita* V. *quod si ita* Krüger.
[3] *extraneo uero uel filio puberi heredi* Inst. 2, 16, 9.
[4] *pro* Krüger. *ex* Kübler.

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§ 181. Cf. Inst. 2, 16, 3. §§ 182–3. = Inst. 2, 16, 4. § 184. = Inst. 2, 16, 9. *suo loco*: G. 2, 277 sq. §§ 185–7. Cf. Inst. 2, 14 pr. G. 2, 153; 1, 21. 123.

the son. This means that there are in a sense two wills, one the father's, the other the son's, just as if the son had instituted an heir for himself; or at any rate there is a single will dealing with two inheritances. **181.** But to guard the ward against foul play after his father's death the practice is to make the ordinary substitution openly, that is in the passage in which the ward is instituted. For the ordinary substitution calls the substitute to the inheritance only in the event of the ward not qualifying as heir at all; and this happens if he dies in his father's lifetime, in which case we cannot suspect malpractice by the substitute, since of course in the testator's lifetime the contents of his will are unknown. But the substitution whereby we appoint a substitute for the event of the ward qualifying as heir and dying before puberty we write separately, on later tablets, which tablets are closed up with strings and wax of their own, and it is provided in the earlier tablets that the later tablets shall not be opened whilst the son is alive and still below puberty. But it is far safer for both kinds of substitution to be closed up separately on later tablets, because if they are closed up and kept separate in the way we have described, it can be inferred from the prior substitution that the same person is substituted in the later. **182.** Not only if we institute our *liberi* below age as heirs is it in our power to appoint substitutes for them, so that if they die before coming of age the person of our choice will be heir, but also if we disinherit them. In such case, all that the ward has acquired by inheritances, legacies, or presents from relatives goes to the substitute. **183.** All we have said of substitution to instituted or disinherited *liberi* below age is to be understood to apply equally to *postumi*. **184.** But to an *extraneus heres* we cannot substitute to the effect that if he qualifies as heir and dies within a certain time someone else shall be his heir; all we can do is by means of a trust to lay him under an obligation to make over, in whole or in part, what he inherits from us. This branch of law will be explained in its proper place.

185. Slaves, whether our own or another's, can be appointed heirs just as well as free men. **186.** But a slave of our own must be declared free as well as heir simultaneously, as thus: 'Be thou

LIBER HERESQUE ESTO, uel HERES LIBERQUE *ESTO*. **187.** Nam si sine libertate heres institutus sit, etiamsi postea manumissus fuerit a domino, heres esse non potest, quia institutio in persona *eius* non constit*it*; ideoque, licet alienatus sit, non potest iussu domini noui
V p. 102 cernere hereditatem. **188.** Cum libertate uero heres / institutus, siquidem in ea*dem* causa durauerit, fit ex testamento liber et inde necessarius heres. si uero ab ipso testatore manumissus fuerit, suo arbitrio hereditatem adire potest. quodsi alienatus sit, iussu noui domin*i* adire hereditatem debet, qua ratione per eum dominus fit heres; nam ips*e* neque heres neque liber esse potest. **189.** Alienus quoque seruus heres institutus, si in eadem causa durauerit, iussu domini hereditatem adire debet; si uero alienatus ab eo fuerit aut uiuo testatore aut post mortem eius, antequam cernat, debet iussu noui domini cernere; si uero manumissus est, suo arbitrio adire hereditatem pote*st*. **190.** Si autem seruus alienus heres institutus est uulgari cretione data, ita i*ntelle*gitur dies cretionis cedere, si ipse seruus scierit se heredem insti*t*utum esse, nec ullum impedimentum sit quominus certiorem dominum faceret, ut illius iussu cernere possit.

191. Post haec uideamus de legatis. quae pars iuris extra propositam quidem materiam uidetur; nam loquimur de his iuris figuris quibus p*er* uniuersitatem res nobis adquiruntur. sed cum omni modo[1] de testamentis deque heredibus qui testamento instituunt*ur*
V p. 103 locuti sumus, non sine causa sequenti loco / poterit haec iuris materia tractari.

[De legatis.[2]]

192. Legatorum itaque genera sunt quattuor: aut enim per uindicationem legamus aut per damnationem aut sinendi modo aut per praeceptionem.

193. Per uindicationem hoc modo legamus: TITIO, uerbi gratia, HOMINEM STICHUM DO LEGO; sed ⟨*et*⟩ si alteru*trum*[3] uerbum positum sit, ueluti DO aut LEGO, aeque per ui*n*dicationem legatum est; item, ut magis *ui*su*m* est, si ita legatum fuerit: SUMITO, uel ita: SIBI HABETO, *uel* ita: CAPITO, aeque per uindicationem legatum est.

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[1] So V. *omnino* most MSS. of Inst. 2, 20 pr.
[2] In capitals, in separate line.
[3] So Krüger. *alteru* . . V. *alterum* Kübler.

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§ 188–9. = Inst. 2, 14, 1. Cf. G. 2, 87. 245. § 190. Cf. G. 2, 172.
§ 191. = Inst. 2, 20 pr. *Post haec*: G. 2, 97. § 192. Cf. Inst. 2, 20, 2. C. 6, 37, 21 (A.D. 339). § 193. *do lego*: G. 2, 104.

my slave Stichus free and my heir' or 'my heir and free'. **187.** For if he be instituted heir without freedom annexed, he cannot become heir even though later manumitted by his owner, because the institution did not hold good in respect of his person; so also, if he have been alienated, he cannot make *cretio* of the inheritance with the sanction of his new owner. **188.** But where he has been instituted heir with freedom annexed, he becomes, if he has remained in the same position, free in virtue of the will and therefore *heres necessarius*. But if he has been manumitted by the testator, he can choose for himself whether or not to enter on the inheritance; and if he has been alienated, he can enter with the sanction of his new owner, who thereby becomes heir through him; for the slave himself can be neither heir nor free. **189.** Again, if another man's slave having been instituted heir remains in the same position, he must enter on the inheritance with his owner's sanction, but if he is alienated by his owner, either in the testator's lifetime or after his death but before he makes *cretio*, he must make it with the sanction of his new owner; if, however, he has been manumitted, he can choose for himself whether or not to enter on the inheritance. **190.** Where another man's slave has been instituted heir subject to the ordinary *cretio*, the period of the *cretio* begins only when the slave himself is aware of his institution and there is nothing to prevent him from informing his master, so that he may be able to make the *cretio* with his sanction.

191. Next let us consider legacies. This branch of the law may appear to lie outside our present subject-matter; for we are dealing with the legal methods of acquiring things *per universitatem*. But seeing that we have spoken fully of wills and of heirs instituted by will, we shall be justified in taking next the law of legacies.

192. There are four kinds of legacies: for we legate either by vindication or by damnation or by way of permission or by preception.

193. By vindication we legate, for example, thus: 'To Titius I give and legate the slave Stichus'; but if only one or other of the words is used, as 'I give' or 'I legate', it is equally a legacy by vindication; so also, according to the prevailing opinion, if the legacy be in the form: 'Let him take', or 'Let him have for him-

194. Ideo *au*tem per uindicationem legatum appellatur, qui*a* post aditam hereditatem statim ex iure Quiritium res legatarii fit, et si eam rem legatarius uel ab herede uel ab alio quocumque qui eam possidet, petat, uindicare debet, id est intendere suam r*em* ex iure Quiritium esse. **195.** In eo solo dissentiunt prudentes, quod Sabinus quidem et Cassius ceterique nostri praeceptores quod ita legatum sit statim post aditam hereditatem putant fieri legatarii, etiamsi ignoret sibi legatum esse [dimissum], *sed*[1] posteaquam scierit et *spreu*erit[2] legatum, p*ro*inde esse atque si legatum non esset; Nerua uero et Proculus ceterique illius scholae auctores non alit*er* putant rem legatarii fieri quam si uoluerit eam ad se pertinere.
V p. 104 sed hodie, ex diui Pii Antonini / constitutione, hoc magis iure uti *u*idemur quod Proculo placuit; nam cum legatus fuisset Latinus p*er* uindicationem coloniae, 'Deliberent' inquit 'decuriones, an ad se uelint pertinere, proinde ac si uni legatus esset'. **196.** *E*ae autem solae res per uindicationem legant*ur* recte, quae ex iure Quiritium ipsius testatoris sunt. sed eas quidem res quae pondere numero mensura constant, placuit sufficere si mortis tempore sint ex iure Quiritium testatoris, ueluti uinum, oleum, frumentum, pecuniam numeratam. ceteras res uero placuit utroque tempore testatoris ex iure Quiritium esse debere, id est et quo facer*et* testamentum et quo moreretur; alioquin inutile est legatum. **197.** Sed sane hoc ita est iure ciuili. postea uero auctore Nerone Caesare senatusconsultum factum est, qu*o* cautum est ut, si eam rem quisque legauerit quae eius numquam fuerit, proinde util*e* sit legatum atque si optimo iure relictum esset; optimum autem ius est per damnationem legat*i*,[3] quo genere etiam aliena res legari potest, sicut inferius apparebit. **198.** Sed si quis rem suam legauerit, deinde post testamentum factum eam alienauerit, plerique putant non solum iure ciuili inutile esse legatum, sed ne*c* ex
V p. 105 senatusconsulto confirmari. quod ideo dictum / est quia, et si per damnationem aliquis rem suam legauerit eamque postea alienauerit, plerique putant, licet ipso iure debeatur legatum, tamen legatarium

[1] So Krüger and Kübler. *dimissum et* V. *sibi legatum demissum esse; posteaquam* Mommsen. Cf. Huschke's preface to his first edition, towards the end; Nordeblad, Gaiusstudien 84.

[2] So Kübler. *omiserit* Mommsen.

[3] *legatum* V. Cf. Ulp. 24, 11a.

§ 194. Cf. G. 2, 204. *intendere suam rem*: G. 4, 41. § 195. Cf. G. 2, 200. 204. Iul. D. 30, 86, 2. *legatus Latinus*: G. 2, 155; 3, 58. § 196. Cf. G. 202. 210. 220. 222. 261. § 197. Cf. G. 2, 212. 218. 220. 222. *inferius*: G. 2, 202. § 198. Cf. Inst. 2, 20, 12.

self', or 'let him seize'. **194.** It is called legacy by vindication because immediately on the inheritance being entered upon the thing becomes the legatee's by Quiritary title, and if he claims it from the heir or anyone else who possesses it, he must vindicate, that is, he must plead that the thing is his by Quiritary title. **195.** On a single point the learned differ. Sabinus, Cassius, and the rest of our teachers hold that a thing legated in this manner becomes the legatee's property immediately on the inheritance being entered upon, even though he is not aware of the legacy, but that if, having learnt of the legacy, he rejects it, it is as though it had not been left. On the other hand, Nerva and Proculus and the other authorities of that school hold that the thing becomes the property of the legatee only if that is his desire. At the present day, however, as the result of a constitution of the late emperor Antoninus Pius, the view taken by Proculus appears to be preferred. For in a case where a Latin (Junian Latin freedman) had been legated by vindication to a colony he said: 'The decurions are to consider whether they wish the Latin to be theirs, just as if he had been legated to an individual.' **196.** Only things belonging to the testator by Quiritary title can properly be legated by vindication. In the case of things reckoned by weight, number, or measure, such as wine, oil, corn, and money, it is held to be sufficient if they belong to the testator by Quiritary title at the time of his death. But all other things, it is held, are required to belong to him by Quiritary title at both times, namely that of his making the will and that of his death; otherwise the legacy is void. **197.** Such at least is the rule at civil law. But more recently a senatusconsult was passed on the authority of the emperor Nero whereby it is provided that, if a man legates a thing which at no time was his, the legacy is to be as valid as if it had been left in the most favourable form, that being legacy by damnation, whereby even another's property can be legated, as will appear below. **198.** If, however, a man legates what does belong to him, but after the execution of the will proceeds to alienate it, most authorities consider that not merely is the legacy void at civil law, but that it is not even validated by the senatusconsult. The ground for this view is that even where a man legates something belonging to him by damnation, yet if he afterwards alienates it, then although, in the view of the majority, by strict law the legacy is due, neverthe-

petentem posse per exceptionem doli mali repelli, quasi contra uoluntatem defuncti petat. **199.** Illud constat, si duobus pluribusue per uindicationem eadem res legata sit, siue coniunctim siue disiunctim, et omnes ueniant ad legatum, partes ad singulos pertinere et deficientis portionem collegatario adcrescere. coniunctim autem ita legatur: TITIO ET SEIO HOMINEM STICHUM DO LEGO; disiunctim ita: L. TITIO HOMINEM STICHUM DO LEGO. SEIO EUNDEM HOMINEM DO LEGO. **200.** Illud quaeritur, quod sub condicione per uindicationem legatum est, pendente condicione cuius *sit*.[1] nostri praeceptor*es* heredis esse putant exemplo statuliberi, id est eius serui qui testamento sub aliqua condicione liber esse iussus est, quem constat interea heredis seruum esse. sed diuers*ae* scholae auctores putant nullius interim ea*m* rem esse; quod multo magis dicunt de eo quod sine condicione[2] pure legatum est, antequam legatarius admittat legatum.

201. Per damnationem hoc modo legamus: HERES MEUS STICHUM
V p. 106 SERUUM MEUM DARE DAMNAS ESTO. sed et si DATO / scriptum fuerit, per damnationem legatum est. **202.** Eo*que* genere legati etiam aliena res legari potest, *i*ta ut heres redimere ⟨*rem*⟩ et praestare aut aestimationem eius dare debeat. **203.** Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, uelut FRUCTUS QUI IN ILLO FUNDO NATI ERUNT, aut QUOD EX ILLA ANCILLA NATUM ERIT. **204.** Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non, ut per uindicationem legatum, continuo legatario adquiritur, sed nihilo minus heredis est. et ideo legatarius in personam agere debet, id est intendere heredem sibi dare oportere; et tum heres ⟨*rem*,⟩[3] si mancipi sit, mancipio dare aut in iure cedere possessione*m*que tradere debet; si nec mancipi sit, sufficit si tradiderit. nam si mancipi rem tantum tradiderit nec mancipauerit, usucapione pleno iure fit legatarii. completur autem usucapio, sicut alio quoque loco diximus, mobilium quidem rerum anno, earum uero quae solo

[1] *esset* V. *sit* Krüger.
[2] *sine condicione*: gloss, Polenaar–Krüger.
[3] So Kübler. *heres si* ⟨*res*⟩ *mancipi* Krüger.

§ 199. Cf. G. 2, 205. 215. 223. *adcrescere*: G. 2, 206 sq. Inst. 2, 20, 8. C. 6, 51, 1, 11 (A.D. 534). § 200. Cf. G. 2, 195. Ulp. 2, 1. 2. § 201. Cf. G. 3, 175. § 202. Cf. G. 2, 196, &c. 197. Inst. 2, 20, 4. § 203. = Inst. 2, 20, 7. § 204. Cf. G. 2, 194. 213. *in personam agere*: G. 2, 282. 283; 4, 9. 171. *si mancipi sit*: G. 2, 22. 41, &c. *possessionemque tradere*: G. 4, 131a. *si nec mancipi sit*: G. 2, 20. *alio loco*: G. 2, 42.

less the legatee's suit can be defeated by the *exceptio doli mali*, as running counter to the deceased's intention. **199.** All agree in this, that where the same thing is legated by vindication, whether conjunctively or disjunctively, to two or more persons, and all accept the legacy, each takes a share, and the share of a legatee who fails to take accrues to the co-legatee. Conjunctively one legates thus: 'To Titius and Seius I give and legate the slave Stichus'; disjunctively thus: 'to Lucius Titius I give and legate the slave Stichus. To Seius I give and legate the same slave.' **200.** Where a thing is legated conditionally by vindication, it is a question whose it is whilst the condition is pending. Our teachers hold it belongs to the heir, on the analogy of the *statuliber*, that is of a slave declared by a will free on condition, who admittedly belongs to the heir during the interim. But the authorities of the other school hold that during the interim the thing belongs to no one, and they maintain the same still more strongly of a thing legated unconditionally, up to when the legatee accepts the legacy.

201. By damnation we legate thus: 'Be my heir specially bound to convey my slave Stichus'; but if the will says 'let my heir convey', it is also a legacy by damnation. **202.** By this kind of legacy even another man's thing can be legated, so that the heir is bound to buy the thing and convey it, or else to pay its value. **203.** Also, a thing which does not exist, provided it will exist, can be legated by damnation, for example 'the coming crops of that land' or 'the child that shall be born of that slave-woman'. **204.** What has been so legated, even if it be unconditionally and immediately, is not acquired by the legatee at once on the inheritance being entered upon, as in the case of a legacy by vindication, but belongs none the less to the heir. Hence the legatee must sue for it by action *in personam*, that is he must plead that the heir is under an obligation to convey it to him; thereupon, if the thing be *mancipi*, the heir must either mancipate or surrender it *in iure*, and deliver possession; if it be *nec mancipi*, it suffices if he delivers it. For if he merely delivers a *res mancipi* without mancipating it, it becomes the legatee's in full right only by usucapion, which, as we have said elsewhere, is completed in one year in the case of movables and in

tenentur[1] biennio. **205.** Est et illa differentia huius ⟨*et*⟩ per uindicationem legati, quod si eadem res duobus pluribusue per damnationem legata sit, siquidem coniunctim, plane singulis partes debentur, sicut in illo ⟨*per*⟩ uindicationem legato *diximus*, *si uero*[2]
V p. 107 disiunctim, singulis solidum debetur.[3] ita fit / ut scilicet heres alteri rem, alteri aestimationem eius praestare debeat. et in coniunctis deficientis portio non ad collegatarium pertinet, sed in hereditate remanet.

206. Quod autem diximus deficientis portionem *in* per damnationem quidem legato in hereditate retineri, in per uindicationem uero collegatario adcrescere, admonendi sumus ante legem Papiam *hoc* iure ciuili ita fuisse; post legem uero Papiam deficientis portio caduca fit et ad eos pertinet qui in eo testamento liberos habent. **207.** Et quamuis prima causa sit in caducis uindicandis heredum liberos habentium, deinde, si heredes liberos non habeant, legatariorum liberos habentium, tamen ipsa lege Papia significatur, ut collegatarius coniunctus, si liberos habeat, potior sit heredibus, etiamsi liberos habebunt. **208.** Sed plerisque placuit, quantum ad hoc ius quod lege Papia coniunctis constituitur, nihil interesse utrum per uindicationem an per damnationem legatum sit.

209. Sinendi modo ita legamus: HERES MEUS DAMNAS ESTO SINERE L. TITIUM HOMINEM STICHUM SUMERE SIBIQUE HABERE. **210.** Quod genus legati plus quidem habet ⟨*quam*⟩ per uindicationem legatum, minus autem quam per damnationem. nam eo
V p. 108 modo non solum suam rem / testator utiliter legare potest, sed etiam heredis sui; cum alioquin per uindicationem nisi suam rem legare non potest, per damnationem autem cuiuslibet extranei rem legare potest. **211.** Sed siquidem mortis testatoris tempore res uel ipsius testatoris sit uel heredis, plane utile legatum est, etiamsi testamenti faciendi tempore neutrius fuerit. **212.** Quodsi post mortem testatoris ea res heredis esse coeperit, quaeritur an utile sit legatum. et plerique putant inutile esse. quid ergo est? licet aliquis eam rem legauerit, quae neque eius umquam fuerit neque postea heredis eius umquam esse coeperit, ex senatusconsulto Neroniano proinde uidetur ac si per damnationem relicta esset.

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[1] So Krüger. *teneantur* V.

[2] So (om. *illo*) Kübler. *sicut in illo uindicaii legat* (9 letters illegible) / *ro* V. *sicut in illo ⟨quod per⟩ uindicationem legatum est. si uero* Krüger.

[3] So Krüger. *solidae deuentur* V. *solida debetur* Kübler.

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§ 205. Cf. G. 2, 199, &c. §§ 206–8. Cf. G. 2, 199, &c. 286. 286a. § 210. Cf. G. 2, 196, &c. § 212. *ex senatusconsulto Neroniano*: G. 2, 197, &c.

two years in the case of landed property. **205.** Another difference between this form of legacy and that by vindication is that where the same thing is legated by damnation to two or more persons, if this is done conjunctively, a share is clearly due to each, as in the case of a legacy by vindication, but if it is done disjunctively, the whole is due to each, with the result, of course, that the heir must give the thing to one legatee and its value to the other. Also, if the legacy is conjunctive, the share of a legatee who fails to take does not go to the co-legatee, but stays in the inheritance.

206. But in regard to our statement that under a legacy by damnation the share of a legatee who fails to take stays in the inheritance, whereas under a legacy by vindication it accrues to the co-legatee, it must be observed that this was so at civil law, before the *L. Papia*; but since that statute it becomes caducous and goes to the beneficiaries under the will who have children. **207.** And though the first place in claiming caducous gifts belongs to heirs having children, and the next, if the heirs are childless, to legatees having children, yet by the *L. Papia* it is expressly declared that a conjoined legatee having children is to be preferred to heirs, even if they have children. **208.** Most authorities hold that in regard to this right conferred by the *L. Papia* on conjoined legatees, it makes no difference whether the legacy be by vindication or damnation.

209. By way of permission we legate thus: 'Be my heir specially bound to permit Lucius Titius to take and have for himself the slave Stichus.' **210.** This kind of legacy has a wider application than that by vindication, but a narrower than that by damnation. For by it a testator can validly legate not only his own thing, but also that of his heir, whereas by vindication he can legate only his own, but by damnation that of any third party. **211.** If, then, at the time of the testator's death the thing belongs either to the testator or to the heir, the legacy is clearly valid, even though at the time of making the will it belonged to neither. **212.** But if the thing first becomes the property of the heir after the testator's death, it is a question whether the legacy is valid. Most authorities pronounce it invalid. But what follows? Even though what a man has legated was at no time his property and at no time afterwards became that of his heir, under the *SC. Neronianum* it is treated as

213. Sicut autem per damnationem legata res non statim post aditam hereditatem legatarii efficitur, sed manet heredis eo usque donec is [heres] tradendo uel mancipando uel in iure cedendo legatarii eam fecerit, ita et in sinendi modo legato iuris est. et ideo huius quoque legati nomine in personam actio est: QUIDQUID HEREDEM EX TESTAMENTO DARE FACERE OPORTET. **214.** Sunt tamen qui putant ex hoc legato non uideri obligatum heredem ut mancipet
V p. 109 aut in iure cedat / aut tradat, sed sufficere ut legatarium rem sumere patiatur, quia nihil ultra ei testator imperauit quam ut sinat, id est patiatur, legatarium rem sibi habere. **215.** Maior illa dissensio in hoc legato interuenit, si eandem rem duobus pluribusue disiunctim legasti: quidam putant utrisque[1] solidam deberi, [sicut per uindicationem];[2] nonnulli occupantis esse meliorem condicionem aestimant, quia, cum eo genere legati damnetur heres patientiam praestare ut legatarius rem habeat, sequitur ut, si priori patientiam praestiterit et is rem sumpserit, securus sit aduersus eum qui postea legatum petierit, quia neque habet rem, ut patiatur eam ab eo sumi, neque dolo malo fecit quominus eam rem haberet.

216. Per praeceptionem hoc modo legamus: L. TITIUS HOMINEM STICHUM PRAECIPITO. **217.** Sed nostri quidem praeceptores nulli alii eo modo legari posse putant nisi ei qui aliqua ex parte heres scriptus esset; praecipere enim esse praecipuum sumere; quod tantum in eius persona procedit, qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecipuum legatum habiturus sit. **218.** Ideoque, si extraneo legatum fuerit, inutile est
V p. 110 legatum; adeo ut Sabinus / existimauerit ne quidem ex ⟨*senatus-*⟩ consulto Neroniano posse conualescere. 'nam eo' inquit 'senatusconsulto ea tantum confirmantur, quae uerborum uitio iure ciuili non ualent, non quae propter ipsam personam legatarii non deberentur'. sed Iuliano et Sexto placuit etiam hoc casu ex senatusconsulto confirmari legatum; nam ex uerbis etiam hoc casu accidere ut iure ciuili inutile sit legatum, inde manifestum esse, quod eidem aliis uerbis recte legaretur,[3] ueluti per uindicationem,

[1] *utrique*? Polenaar.

[2] Gloss according to Polenaar, Krüger, and Beseler. *sicut per damnationem* Goeschen, Huschke, Kübler.

[3] *unde manifestum est . . . recte legatur* V. *inde* and *esse* are generally accepted emendations; Krüger keeps *legatur*. Kübler *legaretur*.

§ 213. Cf. G. 2, 204. Edictum § 170. § 214. Cf. G. 2, 280. § 215. Cf. G. 2, 199, &c. § 218. Cf. G. 2, 197, &c. *Sexto*: Pomponio? Africano? Cf. Mommsen, Jur. Schr. 2, 25. *peregrino*: G. 2, 110. 285.

having been left by damnation. **213.** Just as a thing legated by damnation does not become the legatee's property at once on the *hereditas* being entered upon, but remains that of the *heres* until he has made it the legatee's by delivery, mancipation, or surrender *in iure*, so is the law also in the case of a legacy by way of permission. And consequently the action on account of such a legacy is likewise *in personam*, the claim being 'whatever the heir is under obligation by the will to convey or do'. **214.** Some, however, hold that under this form of legacy the heir is not to be held bound to mancipate or surrender *in iure* or deliver the thing, but that it suffices if he suffer the legatee to take it, because the testator has enjoined on him no more than that he permit, that is suffer, the legatee to have the thing for himself. **215.** A more serious division of opinion regarding this form of legacy arises where you have legated the same thing to two or more persons disjunctively. One view is that the whole is due to each; another that the first taker is preferred, because, seeing that under this form of legacy the heir is put under obligation merely to be passive, it follows that if he has been passive in regard to the first taker and that legatee has taken the thing, he (the heir) is unassailable by one claiming the thing later, because he neither has the thing so as to be able to suffer it to be taken by the second nor has by fraud prevented himself from having it.

216. By preception we legate thus: 'Let Lucius Titius take in advance the slave Stichus.' **217.** Now our teachers hold that a legacy in this form can be made to no one except to one who has been appointed in some part heir; for to precept is to take in advance, and this can only occur in the case of a person instituted heir in some part, because he is to get the legacy in advance, over and above his share of the inheritance. **218.** On this view a legacy by preception to a stranger (non-*heres*) is void; so much so that Sabinus held it was not even validated by the *SC. Neronianum*: 'for', he says, 'by that senatusconsult are validated only those legacies that are invalid at civil law by reason of defective expression, not those which fail because of some disability personal to the legatee'. According to Julian and Sextus, however, the legacy is validated by the senatusconsult in the latter case also; for it is patent that there too it is owing to the words used that the legacy is invalid at civil law, seeing that it would be valid if made to the

[et] per damnationem, sinendi modo; tunc autem uitio personae legatum non ualere, cum ei legatum sit cui nullo modo legari possit, uelut peregrino, cum quo testamenti factio non sit; quo plane casu senatusconsulto locus non est. **219.** Item, nostri praeceptores quod ita legatum est nulla ⟨*alia*⟩ ratione putant posse consequi *e*um cui ita fuer*i*t legatum qu*am* iudicio familiae erciscundae, quod inter heredes de hereditate erciscunda, id est diuidunda, accipi solet; officio enim iudicis id contineri, ut ei quod per praeceptionem legatum est adiudicetur. **220.** Unde intellegimus nihil aliud secundum nostrorum praeceptorum opinionem per praeceptionem legari posse nisi quod testatoris sit; nulla enim alia res quam hereditaria deducitur in hoc iudicium. itaque, si non suam rem
V p. 111 eo modo testator legauerit, / iure quidem ciuili inutile erit legatum, sed ex *s*enatusconsulto confirmabitur. aliqu*o* tamen casu etiam alienam rem ⟨*per*⟩ praeceptionem legari posse fatentur, ueluti si quis eam rem legauerit quam creditori fiduciae causa mancipio dederit; nam officio iudicis coheredes cogi posse existimant solut*a* pecuni*a* *l*uere[1] eam rem, ut possit p*rae*cipere *is* cui ita legatum sit. **221.** Sed diuersae s*cho*l*ae* auctores putant etiam extraneo per praeceptionem legari posse, proinde ac si ita scribatur: TITIUS HOMINEM STICHUM CAPITO, superuacuo adiecta PRAE syllab*a*, ideoque per uindicationem ea*m* *rem* legatam uideri. quae sententia dicitur diui Hadriani constitutio*n*e confirmata esse. **222.** Secundum hanc igitur opinionem, si ea res ex iure Quiritium defuncti ruerit, po*test* a legatario uindicari, siue is unus ex heredibus sit siue extraneus; quodsi in bonis tantum testatoris fuerit, extraneo quidem ex senatusconsulto utile erit legatum, heredi uero familiae erciscundae iudicis officio praestabitur; quodsi nullo iure fuerit testatoris, tam heredi quam extraneo ex senatusconsulto utile erit. **223.** Siue tamen heredibus secundum nostrorum opinionem, siue etiam extraneis secundum illorum opinionem, duobus pluribusue
V p. 112 eadem res coniunctim aut disiunctim legata fuerit, singuli / partes habere debent.

[Ad legem Falcidiam R.][2]

224. Sed ol*i*m quidem licebat totum patrimonium legatis atque

[1] So Lachmann and generally. *solutam pecuniam soluere* V.

[2] Capitals, in separate line.

§ 219. *erciscunda*: G. 3, 154a; 4, 17a. *adiudicetur*: G. 4, 42. § 220. Cf. G. 2, 196–7, &c. *fiduciae causa*: G. 2, 60; 3, 201. § 222. Cf. G. 2, 40. 196–7, &c. § 223. Cf. G. 2, 199, &c. § 224. Cf. Inst. 2, 22 pr. Ulp. 11, 14. XII Tabb. 5, 3 (Textes 14. Bruns 1, 23).

same person in different words, as by vindication or damnation or by way of permission, whereas a legacy is invalid owing to disability of the beneficiary only when it is left to one to whom it cannot be left in any form, as to a peregrine, in respect of whom there is no power of testation: in such a case admittedly the senatusconsult does not apply. **219.** Our teachers also hold that one to whom a legacy in this form has been left can recover it by no other method than an action for division of the inheritance, namely that lying between heirs *de hereditate erciscunda*, that is for its division; for it is in the province of the *iudex* to adjudicate to the legatee what has been left to him by preception. **220.** Hence it is intelligible that according to our teachers nothing can be legated by preception but what belongs to the testator; for nothing but what comes from the deceased is brought within the scope of this action. Consequently, if a testator legates by this method a thing that is not his, the legacy will be void at civil law; but it will be validated by the senatusconsult. Our teachers, however, admit that in a particular case there can be a legacy by preception of another's thing, where a man legates a thing which he has mancipated to his creditor by way of *fiducia*; for they consider that it lies within the powers of the *iudex* to compel the coheirs to redeem the thing by paying the debt, so that the legatee in question can have it in advance. **221.** But the authorities of the other school hold that there can be a legacy by preception even to a stranger, as if it were expressed: 'Let Titius take (*capito*) the slave Stichus', with a superfluous syllable *prae* added, and that therefore the thing appears to have been legated by vindication. This view is said to have been confirmed by a constitution of the late emperor Hadrian. **222.** According to this opinion, therefore, if the thing legated belonged to the deceased by Quiritary title, it can be vindicated by the legatee, whether he be one of the heirs or a stranger; but if it was the testator's by only bonitary title, the legacy will be valid under the senatusconsult if made to a stranger, but if to an heir will be secured to him under the powers of the *iudex* in the action for the division of the inheritance; while if the testator had no title to the thing at all, the legacy will be valid under the senatusconsult, whether made to an heir or to a stranger. **223.** If the same thing is legated conjunctively or disjunctively to two or more persons, each is entitled to a share, where the legatees are heirs according to our school, whether they are heirs or strangers according to the other school.

224. In ancient times it was permissible to exhaust the whole

libertatibus erogare, nec quicquam heredi relinquere praeterquam inane nomen hered*is*. idque lex XII tabularum permittere uidebatur, qua cauetur ut, quod quisque de re sua testatus esset, id ratum haberetur, his uerbis: UTI LEGASS*IT* SUAE REI,[1] ITA IUS ESTO. qua*re*[2] qui scripti heredes erant ab hereditate se abstinebant, et idcirco plerique intestati moricbantur. **225.** Itaque lata est lex Furia, qu*a*, exceptis personis quibusdam, ceteris plus mille assibus legatorum nomine mortisue causa capere permissum non est. sed [et][3] haec lex non perfecit quod uoluit. qui enim uerbi gratia quinque milium acris patrimonium habebat, poterat quinque hominibus singulis millenos asses legando totum patrimonium erogare. **226.** Ideo postea lata est lex Uoconia, qua cautum est ne cui plus legatorum nomine mortisue causa capere licerct quam heredes caperen*t*. ex qua lege plane quidem aliquid utique heredes habere uidebantur; sed tamen fere uitium simile nasceb*a*tur. nam in multas legatariorum personas distributo patrimonio poterat ⟨*testator*⟩ adeo heredi minimum relinquere, ut non expediret her*e*di
V p. 113 huius lucri gra/ti*a* totius hereditatis onera sustinere. **227.** Lata est itaque lex Falcidia, qua cautum est ne plus ei legare liceat quam dodra*n*tem. itaque necesse est ut heres quartam partem hereditatis habeat. et hoc n*un*c iure utimur. **228.** In libertatibus quoque dandis nimiam licentiam compescuit lex Fufia Caninia, sicut in primo commentario rettulimus.

[℞. De inutiliter relictis legatis ℞.[4]]

229. Ante heredis institutionem ⟨*in*⟩utiliter legatur, scilicet quia testamenta uim ex institutione heredis accipiunt, et ob id uelut caput et fundamentum intellegitur totius testamenti heredis institutio. **230.** Pari ratione nec libertas ante heredis institutioncm dari potest. **231.** Nostri praeceptor*es* nec tutor*em* eo loco dari posse existiman*t*, sed Labeo et Proculus tutorem posse dari, quod nihil ex hereditate crogatur tutoris datione. **232.** Post mortem quoque heredis inutiliter legatur, id est hoc modo: CUM HERES MEUS MORTUUS ERIT, DO LEGO, aut DATO. ita autem recte legatur: CUM HERES ⟨*MEUS*⟩ MORI*E*TUR,[5] quia non post mortem here-

[1] *legasset suae res* V. Cf. Inst. 2, 22 pr.
[2] So Krüger. *quaae* V. *qua de causa* Kübler.
[3] So Kübler.
[4] Separate line, principal hand.
[5] *cum heres moriatur* V. Against the usual corrections: Ulp. 24, 16.

§ 225. Cf. G. 4, 23. 24. *lex Furia*: probably after *L. Cincia* of 204 B.C.; certainly before *L. Uoconia* of 169 B.C. § 226. *lex Uoconia*: 169 B.C. Cf. G. 2, 274. § 227. *lex Falcidia*: 40 B.C. Cf. Inst. 2, 22. Bruns 1, 110 (add Gaius

estate by legacies and gifts of liberty, and to leave the heir nothing but the empty title of heir. And the law of the Twelve Tables seemed to allow this, by providing that whatever a man had by his will enjoined regarding his property should hold good, the words of the statute being: 'as a man shall have legated of his property, so let law be'. In consequence, testamentary heirs would abstain from the inheritance, and thus many persons used to die intestate. **225.** Hence was enacted the *L. Furia*, whereby no one except certain persons was allowed to take more than 1,000 *asses* by legacy or gift *mortis causa*. But this statute failed of its purpose. For a man having, for example, an estate worth 5,000 *asses* could exhaust the whole estate by giving a legacy of 1,000 to each of five persons. **226.** Later, therefore, the *L. Voconia* was enacted, providing that no one might by legacy or gift *mortis causa* take more than the heirs. By this statute the heirs would evidently obtain at any rate something; but a similar defect came to light. For by distributing his estate among numerous legatees a testator was able to leave his heir so very little that it was not to the latter's interest to shoulder the burdens of the whole inheritance for so little gain. **227.** Consequently the *L. Falcidia* was enacted, providing that a testator may not legate more than three-quarters of his estate. An heir is thus bound to get a quarter of the inheritance. And this is the law observed to-day. **228.** The *L. Fufia Caninia*, as mentioned in our first book, moderated extravagance in the giving of liberty (by will to slaves).

229. A legacy preceding the institution of an heir is void, for the simple reason that wills derive their whole efficacy from the institution of an heir, and on this account the institution of an heir is reckoned to be, as it were, the source and foundation of the whole will. **230.** On the same ground also liberty cannot be conferred before the institution of an heir. **231.** Our teachers hold that tutors too cannot be appointed in that place. But Labeo and Proculus hold that this can be done, because by the appointment of a tutor nothing is taken out of the inheritance. **232.** Void also is a legacy to take effect after the death of the heir, that is, if made in this way: 'When my heir shall have died, I give and legate' or 'let him give'. But the legacy is good if expressed thus: 'When my heir shall die', because the gift is not after the death of the heir, but

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D. 35, 2, 81, 2). § 228. Cf. G. 1, 42 sq. §§ 229–30. = Inst. 2, 20, 34. Cf. G. 2, 116. 186. 248. § 231. Cf. Inst. 1, 14, 3. G. 2, 237. § 232. Cf. Inst. 2, 20, 35. G. 3, 100.

dis relinquitur, sed ultimo uitae eius tempore. rursum, ita non potest legari: PRIDIE QUAM HERES MEUS MORIETUR; quod non
V p. 114 pretiosa ratione receptum uidetur. **233.** / Eadem et de libertatibus dicta intellegemus. **234.** Tutor uero an post mortem heredis dari possit quaerentibus eadem forsitan poterit esse quaestio quae de ⟨*eo*⟩ agitatur qui ante heredum institutionem datur.

[De poenae causa relictis legatis.[1]]

235. Poenae quoque nomine inutiliter legatur. poenae autem nomine legari uidetur quod coercendi heredis causa relinquitur, quo magis heres aliquid faciat aut non faciat, ueluti quod ita legatur: SI HERES MEUS FILIAM SUAM TITIO IN MATRIMONIUM COLLOCAUERIT, X ⟨*MILIA*⟩ SEIO DATO, uel ita: SI FILIAM TITIO IN MATRIMONIUM NON COLLOCAUERIS, X MILIA TITIO DATO. sed et si here*dem*, ⟨*si*,⟩ uerbis gratia intra biennium monumentum sibi non fecerit, x ⟨*milia*⟩ Titio dare[2] iusserit,[3] poenae nomine legatu*m est*. et denique ex ipsa definitione multas similes species *cir*cumspicere[4] possumus. **236.** Nec libertas quidem poenae nomine dari potest, quamuis de ea re fuerit quaesitum. **237.** De tutore uero nihil possumus quaerere, quia non po*te*st datione tutoris heres compelli quidquam facere aut non facere, ideoque ⟨*etsi secundum mentem testatoris is qui tutor*⟩ datu*s* ⟨*est*⟩[5] poenae no*m*ine tutor datus fuerit, magis sub condicione quam p*oe*nae nomine datus uidebitur.

238. Incertae personae legatum inutiliter relinquitur. incerta
V p. 115 autem uidetur persona quam per incertam opinionem / animo suo testator subici*t*, u*elut cum* ita legatum sit: QUI PRIMUS AD FUNUS MEUM UEN*ERIT*, *EI HERES* MEUS X ⟨*MILIA*⟩ DATO. idem iuris est si generaliter omnibus legauerit: QUICUMQUE AD FUNUS MEUM UENERIT. i*n* eadem causa est quod ita relinquitur: QUICUMQUE FILIO MEO IN MATRIMONIUM FILIAM SUAM COLLOCAUERIT, EI HERES MEUS X MILIA DATO. illud quoque [in eadem causa est][6] quod ita relinquitur: QUI POST *TE*STAMENTUM ⟨*SCRIPTUM PRIMI*⟩[7] CONSULES DESIGNATI ERUNT, aeque incertis personis legari uidetur. et denique aliae multae huiusmodi species sunt. sub certa uero demonstratione incertae personae recte legatur, ueluti: EX COGNATIS MEIS QUI NUNC

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[1] Separate line, principal hand.

[2] *dari* V.

[3] *iusserit* ⟨*testator*⟩ Kübler. Cf. 2, 226.

[4] The word is not quite suitable, and, the reading being doubtful, Krüger leaves a blank.

[5] Mommsen's conjectures made by way of illustration.

[6] Gloss. Or perhaps another example has been omitted: so Kniep, citing C. 6, 48, 1, 27, but with no support from Inst.

[7] Cf. Inst. 2, 20, 25.

at the last moment of his life. But again, one cannot legate thus: 'On the day before my heir dies', though this ruling seems to have been accepted without sufficient reason. **233.** The same remarks are to be taken to apply to gifts of liberty. **234.** The question whether a tutor can be appointed after the death of the heir may perhaps be regarded as raising the same issue as the question which arises as to the appointment of a tutor before the institution of the heir.

235. A legacy by way of penalty is also void. Considered as such is one that is left for the purpose of constraining the heir to do or not to do something, for example the following: 'If my heir gives his daughter in marriage to Titius, let him pay Seius 10,000 sesterces', or this one: 'If thou dost not give thy daughter in marriage to Titius, do thou pay Titius 10,000 sesterces'; and again, if the testator orders the heir, in the event of his not erecting a monument to him (the testator) within, say, two years, to pay Titius 10,000 sesterces. And, to cut matters short, from the very definition one can conceive many similar illustrations. **236.** Neither can liberty be conferred by way of penalty, though on this point there has been question. **237.** But concerning the appointment of a tutor there can be no question, because by the appointment of a tutor the heir cannot be constrained to do or not to do anything, and therefore, even if in the testator's intention an appointment of a tutor was by way of penalty, the appointment will be regarded as conditional rather than penal.

238. A legacy to an uncertain person is void. A person is considered uncertain of whom the testator had no certain conception, as where the legacy runs: 'To the first person who comes to my funeral let my heir pay 10,000 sesterces.' The law is the same if the legacy be to all in general 'whosoever shall come to my funeral'. In the same case is a legacy left thus: 'Let my heir pay 10,000 sesterces to whoever gives his daughter in marriage to my son.' Also, a legacy 'to the first persons designated consuls after the making of this will' is equally considered to be to uncertain persons. And in short there are many other cases of this kind. But a legacy to an uncertain person of a defined class is valid, for

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§ 234. *eadem quaestio*: G. 2, 231. 237. §§ 235–6. Cf. G. 2, 243. 288. Inst. 2, 20, 36. § 237. Cf. G. 2, 231. § 238. Cf. Inst. 2, 20, 25. G. 2, 287.

SUNT QUI PRIMUS AD FUNUS MEUM UENERIT, EI X MILIA HERES MEUS DATO. **239.** Libertas quoque non uidetur incertae personae dari posse, quia lex Fufia Caninia iubet nominat*im* seruos liberari. **240.** Tutor quoque certus dari debet. **241.** Postumo quoque alieno inutiliter legat*ur*. ⟨*est*⟩ autem alienus postumus, qui natus inter suos heredes testatori futurus non est. ideoque ex *e*mancipato *quo*que filio conceptus nepos extraneus post*umus est*;[1] *item qui* in utero est eius quae *i*ure ciuili non intellegitur uxor, extraneus postu-
V p. 116 mus patris intelle/git*ur*. **242.** Ac ne heres quidem potest institui postumus alienus; est enim incerta persona. **243.** Cetera uero quae supra diximus ad legata proprie pertinent. quamquam non immerito quibusdam placeat poenae nomine heredem institui non posse; nihil enim interest utrum legatum dare iubeatur heres, si fecerit aliquid aut non fecerit, an coheres ei adiciatur, quia tam coheredis adiectione quam legati datione compellitur ut aliquid contra propositum suum faciat aut non faciat.

244. An ei qui in potestate sit eius quem heredem instituimus recte le*g*emus, quaeritur. Seruius recte legari putat, sed euanescere legatum si, quo tempore dies legatorum cedere solet, adhuc in pote*state* sit, ideoque, siue pure legatum sit et uiuo testatore in potestate heredis esse desierit, siue sub condicione et ante condicionem id acciderit, deberi legatum. Sabinus et Cassius sub condicione recte legari, pure non recte, putant; licet enim uiuo testatore possit desinere in potestate heredis esse, ideo tamen inutile legatum intellegi oportere, quia, quod nullas uires habiturum foret si statim post testamentum factum decessisset testator, hoc ideo
V p. 117 ualere, quia *ui*tam longius traxerit, absurdum esse*t*. *sed* / diuersae *s*cholae auctores nec sub condicione recte legari, quia, quos in potestate habemus, eis non magis sub condicione quam pure debere possumus. **245.** Ex diuerso constat ab eo qui in potestate ⟨*tua*⟩ est herede instituto recte tibi legari; sed si tu per eum heres extiteris, euanescere legatum, quia ipse tibi legatum debere non possis; si uero filius emancipatus aut seruus manumissus erit uel in alium translatus, et ipse heres extiterit aut alium fecerit, deberi legatum.

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[1] *extraneus erat postumus auo* Inst. 2, 20, 26.

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§ 239. Cf. Inst. 2, 20, 25. G. 1, 46. § 240. Cf. Inst. 2, 20, 25. 27 fin. § 241. Cf. Inst. 2, 20, 26–7. G. 2, 287. § 242. Cf. G. 1, 147; 2, 287. Inst. 2, 20, 28. § 243. Cf. Inst. 2, 20, 36. *supra*: G. 2, 235. § 244. Cf. Inst. 2, 20, 32. Celsus D. 34, 7, 1 pr. § 245. Cf. Inst. 2, 20, 33.

instance: 'To that one of my kindred now living who is the first to come to my funeral let my heir pay 10,000 sesterces.' **239.** It appears to be also impossible to confer liberty on an uncertain person, because the *L. Fufia Caninia* requires slaves to be liberated by name. **240.** Appointment to be tutor must also be of a certain person. **241.** A legacy to an afterborn stranger is likewise void. An afterborn stranger is one who when born will not be of the testator's *sui heredes*. Thus even a grandson begotten by an emancipated son is an afterborn stranger; also a child in the womb of a woman whom the civil law does not regard as a wife is an afterborn stranger in relation to his father. **242.** Nor yet can an afterborn stranger be instituted heir; for he is an uncertain person. **243.** But though in general the rules we have stated apply strictly only to legacies, it is a reasonable opinion held by some that an heir cannot be instituted by way of penalty; for it makes no difference whether an heir be charged with a legacy in the event of his doing or not doing something, or if a coheir be added to him, seeing that he is constrained to do or not to do something against his own desire as much by the addition of a coheir as by the charging of a legacy.

244. It is a question whether we can validly legate to one who is in the *potestas* of him whom we are instituting heir. Servius holds that the legacy is valid, but that it is avoided if, at the time when the legacies vest, the legatee is still in *potestas*, and that therefore the legacy is due alike if it be unconditional and the legatee cease in the testator's lifetime to be in the heir's *potestas*, or if it be conditional and the same happen before the condition is fulfilled. Sabinus and Cassius hold such a legacy to be valid if conditional but invalid if unconditional, arguing that though it is possible that the legatee may cease during the testator's lifetime to be in the *potestas* of the heir, the legacy must nevertheless be considered void, for the reason that it would be absurd that what would be invalid if the testator died immediately after the execution of the will should be valid just because he had a longer span of years. The authorities of the other school hold the legacy invalid even if conditional, on the ground that we can no more be conditionally debtors of those in our *potestas* than we can unconditionally. **245.** On the other hand, it is agreed that a legacy to you can validly be charged upon one in your *potestas* who is instituted heir, but that if you become heir through him, the legacy is avoided, because you cannot owe yourself a legacy; if, however, the person instituted, being a son, is emancipated or, being a slave, is manumitted or transferred to someone else, and either qualifies as heir himself or makes someone else heir, the legacy, it is held, is due.

246. *Nunc*[1] transeamus ad fideicommissa.

247. Et prius de hereditatibus uideamus. **248.** Imprimis igitur sciendum est opus esse ut aliquis heres recto iure instituatur, eiusque fidei committ*a*tur ut eam hereditatem alii restituat; alioquin inutile est testamentum, in quo nemo recto iure heres instituitur. **249.** Uerba autem [utilia][2] fideicommissorum haec [recte][2] maxime in usu esse uidentur: PETO, ROGO, UOLO, FIDEI COMMITTO; quae proinde firma singula sunt atque si omnia in unum congesta sint. **250.** Cum igitur scripserimus: ⟨*L.*⟩ TITIUS HERES ESTO, possumus adicere: ROGO TE L. TITI PETOQUE A TE UT, CUM PRIMUM POSSIS HEREDITATEM MEAM ADIRE, GAIO SEIO REDDAS RES*TI*TUAS. possumus autem et de parte restituenda rogare; et liberum est uel sub condi-
V p. 118 cione uel pure relinquere / fideicommissa, uel ex die certa. **251.** Restituta autem hereditat*e* is qui restituit nihilo minus heres permanet; is uero qui recipit hereditatem aliquando heredis loco est, aliquando legatarii. **252.** Olim autem ne*c* heredis loco erat nec legatarii, sed potius emptoris. tunc enim in *u*su erat ei cui restituebatur hereditas nummo uno eam hereditatem dicis causa uenire, et quae stipulationes ⟨*inter uenditorem hereditatis et emptorem interponi solent, eaedem interponebantur*⟩[3] inter heredem et eum cui restituebatur hereditas, id est hoc modo: heres quidem stipulabatur ab eo cui restituebatur hereditas ut, quidquid hereditario nomine condemnatus fuisset, siue quid alias bona fide dedisse*t*, eo nomine inde*m*nis *es*set, et omnino si quis cum eo hereditario nomine ageret, ut recte defenderetur; ille uero qui recipiebat hereditatem inuicem stipulabatur ut, si quid ex hereditate ad heredem peruenisset, id sibi restitueretur, ut etiam pateretur eum hereditarias actiones procuratorio aut cognitorio nomine exequi. **253.** Sed posterioribus temporibus,[4] Trebellio Maximo et Annaeo Seneca consulibus, senatusconsultum factum est, quo cautum est ut, si cui hereditas ex fideicommissi causa restituta sit, actiones quae iure ciuili heredi et in heredem competerent ⟨*ei*⟩[5] et in eum darentur, cui ex fideicommisso restituta esset hereditas.

[1] *Nunc* Inst. 2, 23 pr. *Hinc.* V. [2] om. Inst. 2, 24, 3—gloss.
[3] Cf. 2, 254; 257, and Autun Gaius 67 (Kübler).
[4] *Et in Neronis quidem temporibus* Inst. 2, 23, 4. [5] So Inst.

§§ 246–7. = Inst. 2, 23 pr. *nunc*: G. 2, 191. § 248. = Inst. 2, 23, 2 init. § 249. = Inst. 2, 24, 3. Cf. C. 6, 37, 21 (A.D. 339). C. 6, 43, 2 (A.D. 531). § 250. = Inst. 2, 23, 2 fin. § 251. = Inst. 2, 23, 3. Cf. G. 2, 253–5. § 252. Cf. G. 2, 257 fin. *procuratorio aut cognitorio*: G. 4, 86. § 253. = Inst. 2, 23, 4. *posterioribus temporibus*: A.D. 56. *senatusconsultum*: Bruns 1, 202. *praetor*: Edictum § 68.

246. Let us now pass on to trusts.

247. And to begin with let us consider their application to inheritances. **248.** In the first place it must be borne in mind that it is necessary that someone be instituted heir directly, and that it be committed to his good faith to make over the inheritance to someone else; for a will in which no one is directly instituted is void. **249.** The following words seem to be the most usual in imposing trusts: 'I beg', 'I request', 'I desire', 'I commit to your good faith'; any one of them by itself is as binding as if all are employed cumulatively. **250.** Thus, after writing: 'Be thou Lucius Titius my heir', we may add: 'I request and beg thee, Lucius Titius, as soon as thou art able to enter upon my inheritance, to render and make it over to Gaius Seius.' We may, however, likewise make the request with regard to a fraction of the inheritance; also it is open to us to leave trusts conditionally or absolutely, or as from a certain date. **251.** After the inheritance has been transferred, the transferor still remains heir, while the transferee is sometimes in the position of an heir, sometimes in that of a legatee. **252.** But in former times he was in the position neither of an heir nor of a legatee, but rather in that of a purchaser. For the practice then was that the inheritance should formally be sold for a nominal sum to him to whom it was being made over, and the same stipulations as are usual between the vendor and the purchaser of an inheritance were entered into between him and the heir, that is to say, the heir would stipulate from the recipient of the inheritance that he (the heir) should be indemnified against any judgment given against him, and in respect of anything he might otherwise part with in good faith, on account of the inheritance, and that in general he should, if sued on account of the inheritance, be properly defended, while on his side the recipient of the inheritance stipulated that whatever should have come to the heir from the inheritance should be made over to him (the recipient), and further that the heir should suffer him to bring the actions belonging to the inheritance as his *procurator* or *cognitor*. **253.** But in more recent times a senatusconsult passed in the consulship of Trebellius Maximus and Annaeus Seneca has provided that where an inheritance has been made over in obedience to a trust, the actions which would lie at civil law in favour of and against the heir should be granted in favour of and against him to whom the inheritance has been made over under the trust. In consequence

per quod senatusconsultum desierunt illae cautiones in usu haberi./
V p. 119 praetor enim utiles actiones ei et in eum qui recepit hereditatem quasi heredi et in heredem dare coepit, *e*aeque in edicto proponuntur. **254.** Sed rursus, quia heredes scripti, cum aut totam hereditatem aut paene totam plerumque restituere rogabantur, adire hereditatem ob nullum aut minimum lucrum recusabant, atque ob id extinguebantur fideicommissa, po*stea*, Pegaso et Pusione ⟨*consulibus*,⟩[1] senatus censuit, ut ei qui rogatus es*set*[2] hereditatem restituere proinde liceret quartam partem retinere atque e lege Falcidia in legatis retine*re*[3] conceditur; ex singulis quoque rebus quae per fideicommissum relincuntur eadem retentio permissa est. per quod senatusconsultum ipse ⟨*heres*⟩[4] onera hereditaria sustinet; ille autem qui ex fideicommisso rel*i*quam partem hereditatis recipit, legatarii partiarii loco est, id est eius legatarii cui pars bonorum legatur; quae species legati partitio uocatur, quia cum herede legatarius partitur hereditatem. unde effectum est ut, quae solent stipulationes inter heredem et partiarium legatarium interponi, ea*e*dem interponantur inter eum qui ex fideicommissi causa recipi*t* hereditatem et heredem, id est ut *e*t lucrum et damnum hereditarium pro rata parte inter eos commune sit. **255.** Ergo,
V p. 120 siquidem non plus qua*m* dodrantem / hereditatis scriptus heres rogatus sit restituere, tum ex Trebelliano senatusconsulto restituitur hereditas, *e*t in utrumque actiones hereditariae pro rata parte dan*tur*, in heredem quidem iure ciuili, in eum uero qui recipit hereditatem ex senatusconsulto Trebelliano; quamquam heres etiam pro ea parte quam restituit heres permane*t*, eique et in eum solidae actiones competunt; sed non ulterius oneratur, nec ulterius illi dantur actiones, quam apud eum commodum hereditatis remanet. **256.** At si quis plus quam dodrantem uel etiam totam hereditatem restituere rogatus sit, locus e*s*t Pegasiano senatusconsulto. **257.** Sed is qui se*m*el adierit hereditatem, si modo sua uoluntate adierit, siue retinuerit quartam partem siue noluerit retinere, ipse uniuersa onera hereditaria sustine*t*; sed quarta quidem retenta quasi partis et pro parte stipulationes interponi debent,

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[1] *postea Uespasiani Augusti temporibus Pegaso et Pusione consulibus* Inst. 2, 23, 5.
[2] So Inst. *est* V.
[3] So Inst. *retinendis* V. *retinendi ius* Kübler (cf. 3, 75). Or gloss (Mommsen)?
[4] So Inst.

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§ 254. = Inst. 2, 23, 5. Cf. G. 2, 227. 256. 286a. *Pegaso et Pusione coss.*: 'Uespasiani temporibus' Inst. *partitio*: Ulp. 24, 25. §§ 255–8. = Inst. 2, 23, 6. Cf. § 7.

of this senatusconsult the stipulations above mentioned have fallen out of use. For the praetor now gives *actiones utiles* in favour of and against the recipient of the inheritance as though in favour of and against the heir, and these actions are published in the Edict. **254.** Another point: seeing that heirs, when requested to make over the whole or almost the whole inheritance, used commonly to refuse to enter on the inheritance for very little or no gain and thereby trusts were being brought to nought, the senate later, in the consulship of Pegasus and Pusio, decided that one who had been requested to make over an inheritance should be permitted to retain a quarter of it, just as he is allowed to do against legacies under the *L. Falcidia*; and the same right to retain a quarter was allowed against trust gifts of individual things. In consequence of this senatusconsult it is the heir who carries the burdens of the inheritance, whilst the recipient of the remaining fraction of the inheritance is in the position of a partiary legatee, that is of a legatee to whom a fraction of the estate is left. This kind of legacy is called a *partitio*, because the legatee shares (*partitur*) the inheriance with the heir. The result is that the stipulations customary between an heir and a partiary legatee are entered into between the recipient of an inheritance on account of a trust and the heir; these stipulations provide that both profit and loss on the inheritance shall be shared between the parties proportionately to their respective fractions. **255.** Accordingly, if a testamentary heir is requested to make over not more than three-quarters of the inheritance, then the transference takes place under the *SC. Trebellianum*, and the actions arising from the inheritance are granted against each proportionately, against the heir by civil law and against the transferee of the inheritance under the *SC. Trebellianum*. It is true the heir remains such in respect also of the fraction which he has made over, and (at civil law) actions arising out of the inheritance lie in favour of and against him in full, but (by the *SC.*) his liability is carried no farther than, and actions in his favour are not granted beyond, the beneficial interest in the inheritance remaining with him. **256.** Where, however, the heir is requested to make over more than three-quarters or even the whole of the inheritance, the *SC. Pegasianum* comes into operation. **257.** Now, once the heir has entered on the inheritance, provided he does so voluntarily, he shoulders the whole of the liabilities of the inheritance, whether he retains his quarter or chooses not to. But if he retains his quarter, stipulations dividing

tamquam inter partiarium legatarium et heredem; si uero totam hereditatem restituerit, ad exemplum emptae et uenditae hereditatis stipulationes interponendae sunt. **258.** Sed si recuset scriptus heres adire hereditatem, ob id quod dicat eam sibi suspectam esse quasi damnosam, cauetur *Pega*siano senatusconsulto
V p. 121 ut, desiderante eo cui restituere rogatus est, iussu / praetoris adeat et restituat, proindeque ei et in eum qui receperit ⟨*hereditatem*⟩[1] actiones dentur ac iuris est ex senatusconsulto Trebelliano. quo casu nullis stipulationibus opus est, quia simul et huic qui restituit securitas datur, et actiones hereditariae ei et in eum transferuntur qui receperit hereditatem. **259.** Nihil autem interest utrum aliquis ex asse heres institu*tus*[2] aut totam hereditatem aut pro parte restituere rogetur, an ex parte heres institutus aut totam eam partem aut partis partem restituere rogetur; nam et hoc casu de quarta parte eius partis ratio ex Pegasi*ano* senatusconsulto haberi solet.

260. Potest autem quisque etiam res singulas per fideicommissum relinquere, uelut fundum, hominem, u*este*m, argentum, pecuniam, et uel ipsum heredem rogare ut alicui restituat, uel legatarium, quamuis a legatario legari non possit. **261.** Item potest non solum propria testatoris res per fideicommissum relinqui, sed etiam heredis aut legatarii aut cuiuslibet alterius. itaque et legatarius non solum de ea re rogari potest, ut eam alicui restituat, quae ei legata sit, sed etiam de alia, siue ipsius legatarii siue aliena sit. [sed][3] hoc solum obseruandum est, ne plus quisquam rogetur aliis restituere quam ipse ex testamento ceperit; nam /
V p. 122 quod amplius est inutiliter relinquitur. **262.** Cum autem aliena res per fideicommissum relinquitur, necesse est ei qui rogatus est aut ips*am* redimere et praestare, aut aestimationem *eius*[4] soluere, s*icut iuris est si* per damnationem aliena res legata sit. sunt tamen qui putant, si rem per fideicommissum relictam dominus non uendat, extingui fideicommissum, sed aliam esse causam per damnationem legati.

263. Libertas quoque seruo per fideicommissum dari potest, ut uel heres rogetur manumittere uel legatarius. **264.** N*ec interest utrum de suo proprio*[5] seruo testator roget, an de eo qui ipsius

[1] *recipit* (or *recepit*) *hereditatem* Inst. 2, 23, 6.
[2] So Inst. 2, 23, 8. *instituatur* V.
[3] Perhaps better omitted, with Inst. 2, 24, 1.
[4] So Inst. V illegible.
[5] Inst. 2, 24, 2. V illegible.

§ 259. = Inst. 2, 23, 8. § 260. = Inst. 2, 24 pr. Cf. G. 2, 271. §§ 261–2. = Inst. 2, 24, 1. §§ 263–7. = Inst. 2, 24, 2. § 264. Cf. G. 2, 272.

the rights and liabilities proportionately as between a partiary legatee and an heir must be entered into. If, however, he makes over the whole inheritance, stipulations on the model of those between a purchaser and vendor of an inheritance must be entered into. **258.** But if a testamentary heir refuses to enter on the inheritance, alleging that he doubts its solvency, it is provided by the *SC. Pegasianum* that if the person to whom he has been requested to transfer so desires, he be ordered by the praetor to enter on and transfer the inheritance, and that actions be granted in favour of and against the transferee as under the system of the *SC. Trebellianum.* In this case no stipulations are required, because the transferor of the inheritance is protected against liability and at the same time the actions arising from the inheritance are carried over in favour of and against the transferee. **259.** It makes no difference whether an heir instituted to the whole inheritance is requested to make over the whole or a fraction of it, or an heir instituted to a share is requested to make over the whole or a fraction of that share; for in the latter case also account is taken under the *SC. Pegasianum* of the quarter of his share.

260. It is also possible to leave individual things, such as land, a slave, a garment, silver, or money, by means of a trust, and the request to make the things over may be addressed either to the heir himself or to a legatee, though a legacy cannot be charged on a legatee. **261.** Further, not only what belongs to the testator, but also what belongs to the heir or legatee or to anyone at all may be left by means of a trust. Thus one may request even a legatee to make over to someone else not only the actual thing legated to him, but also something else, whether belonging to the legatee himself or to a third party. The only point to beware of is that a man be not requested to make over to others more than he himself takes under the will; for beyond that the request is ineffectual. **262.** Where a third party's thing is left by way of trust, the person charged with the trust is bound either to buy the actual thing and make it over, or else to pay its value, as is the law where a third party's thing is legated by damnation. Some, however, hold that if the owner of the thing left by way of trust will not sell it, the trust is avoided, but that in the case of a legacy by damnation it is otherwise.

263. Also, liberty can be conferred on a slave by means of a trust, either the heir or a legatee being requested to manumit him. **264.** It makes no difference whether the request concerns a slave

heredis aut legatarii uel etiam extranei sit. **265.** Itaque et alienus seru*us* redimi et manumitti debet. quodsi dominus eum non uendat, sane extinguitur fideicommissaria libertas, quia hoc *casu* pretii computatio nulla interuenit. **266.** Qui autem ex fideicommisso manumittitur, non testatoris fit libertus, etiamsi testatoris seruus *fuerit*,[1] sed eius qui man*umitt*it. **267.** At qui directo testamento liber esse iubetur, uelut hoc modo: STICHUS SERUUS ⟨*MEUS*⟩ LIBER ESTO, uel hoc: STICHU*M* SERUUM MEUM LIBERUM ESSE IUBEO, hic[2] *ipsius testa*toris fit libertus. nec alius ullus directo ex testamento libertatem habere potest quam qui utroque tempore testatoris ex iur*e Quiritium fuerit, et quo fa*ce*ret*[3] testamentum et quo moreretur./

V p. 123 **268.** Multum autem diff*erunt ea* quae per fideicommissum rel*incun*tur ab his qu*ae* directo iure legantur. **269.** Nam ecce per fideicommissum . . . heredis relinqui potest, cum alioquin legatu*m* . . . inutile sit.[4] **270.** Item, intestatu*s* moriturus potest ab eo ad quem bona eius pertinent fidci*commissum* alicui relinquere, cum alioquin ab eo legari non possit. **270a.** *Item, legatum codicillis*[5] relictum non aliter ualet quam si a testatore confirmati fuerint, id est nisi in testamento caue*rit* testator ut, quidquid in codicillis scripserit, id ratum sit. fideicommissum uero etiam non confirmatis codicillis relinqui potest. **271.** Item, a legatario legari non potest, sed fideicommissum relinqui potest. quin etiam ab eo quoque cui per fideicommissum relinquimus rursus alii per fideicommissum relinquere possumus. **272.** Item, seruo alieno directo libertas dari non potest, sed per fideicommissum potest. **273.** Item, codicillis nemo heres institu*i* potest neque exheredari, quamuis testamento confirmati sint. *a*t is qui testamento heres institutus est potest codicillis rogari ut eam hereditatem alii totam uel ex parte restituat, quamuis testamento codicilli con-
V p. 124 firmati non sint. / **274.** Item mulier, quae ab eo qui centum milia aeris census est per legem Uoconiam here*s* institu*i* non

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[1] *sit* Inst., but too short for the space in V.

[2] Or *is*. *his* V. [3] Cf. Inst.

[4] See Apogr. for Bluhme's unconfirmable readings in these two gaps of about 6 and 14 letters respectively. Krüger: *per f.c. etiam ab herede heredis relinqui potest; cum alioquin legatum ita relictum inutile sit*—cf. Epit. 2, 7, 8. Huschke: *per f.c. etiam ante heredis institutionem relinqui potest, cum alioquin legatum testamenti initio datum inutile sit*—cf. Ulp. 25, 8; supra 2, 229.

[5] Goeschen, generally accepted. Cf. Epit. 2, 7, 8.

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§ 265. *extinguitur fideicommissa libertas*: Inst. 2, 24, 2. §§ 266–7. Cf. G. 2, 272. § 268. Cf. G. 2, 284. Inst. 2, 20, 3. Ulp. D. 30, 1. § 270. Cf.

of the testator himself or one belonging to the heir or the legatee or even a third party. **265.** Thus even a third party's slave must be bought and manumitted. But if his owner will not sell him, clearly the trust for liberation is avoided, because in this case there can be no valuation in money. **266.** A slave manumitted under a trust does not become the testator's freedman, even though he was the testator's own, but becomes the freedman of him who manumits. **267.** He, on the other hand, who is directly ordered to be free by the will, for instance in the form: 'Let my slave Stichus be free', or 'I order that my slave Stichus be free', becomes the freedman of the testator himself. And further, no one can obtain freedom directly under a will but one who belonged to the testator by Quiritary title both when he made his will and when he died.

268. There are many differences between gifts left by way of trust and those left by direct legacy. **269.** Thus, by means of a trust property can be left away from the heir of one's heir, whereas a legacy charged on him is void. **270.** Again, by means of a trust a man about to die intestate can leave things away from the person to whom his property is going, whereas he cannot be charged with a legacy. **270a.** Again, a legacy left by codicil is only valid if the codicil has been confirmed by the testator, that is if he has provided in his will that anything he should have committed to codicils should hold good. But a trust can be left even by unconfirmed codicil. **271.** Again, a legacy cannot be charged on a legatee, but a trust can. Indeed, from one to whom we are leaving something by means of a trust we can by means of a further trust leave something to a further person. **272.** Again, upon a slave belonging to someone else liberty cannot be conferred directly, but it can be by way of trust. **273.** Again, it is impossible for anyone to be instituted heir or disinherited by a codicil, even though it be confirmed by a will. But a person instituted heir by a will may be requested by codicil to make over the inheritance in whole or part to someone else, even though the codicil be not confirmed by the will. **274.** Again, a woman, though prevented by the *L. Voconia* from being instituted heir by a person assessed in the census at more

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Inst. 2, 23, 10. § 270a. Cf. Inst. 2, 25, 1. § 271. Cf. G. 2, 260 fin. Inst. 2, 24 pr., 1. § 272. Cf. G. 2, 264. 267. Inst. 2, 24, 2. § 273. Cf. Inst. 2, 25, 2. 2, 23, 10. § 274. Cf. G. 2, 226.

potest, tamen fideicommisso relictam sibi hereditatem capere potest. **275.** Latini quoque, qui hereditates legataque directo iure lege Iunia capere prohibentur, ex fideicommisso capere possunt. **276.** Item, cum senatusconsulto prohibitum sit proprium seruum minorem annis XXX liberum et heredem instituere, plerisque placet posse nos iubere liberum esse cum annorum XXX erit, et rogare ut tunc illi restituatur hereditas. **277.** Item, quamuis non ⟨*possimus*⟩ post mortem eius qui nobis heres extiterit alium in locum eius heredem instituere, tamen possumus eum rogare ut, cum morietur, alii eam hereditatem totam uel ex parte restituat. et quia post mortem quoque heredis fideicommissum dari potest, idem efficere possumus et si ita scripserimus: CUM TITIUS HERES MEUS MORTUUS ERIT, UOLO HEREDITATEM MEAM AD P. MEUIUM PERTINERE. utroque autem modo, tam hoc quam illo, Titius heredem suum obligatum relinquit de fideicommisso restituendo. **278.** Praeterea, legata ⟨*per*⟩ formulam petimus; fideicommissa uero Romae quidem apud consulem, uel apud eum praetorem qui praecipue de fideicommissis ius dicit, persequimur, in prouinciis uero apud praesidem prouinciae. **279.** Item, de fideicommissis
V p. 125 semper / in urbe ius dicitur; de legatis uero cum res aguntur. **280.** Item, fideicommissorum usurae et fructus debentur, si modo moram solutionis fecerit qui fideicommissum debebit; legatorum uero usurae non debentur; idque rescripto diui Hadriani significatur. scio tamen Iuliano placuisse in eo legato quod sinendi modo relinquitur idem iuris esse quod in fideicommissis; quam sententiam et his temporibus magis optinere uideo. **281.** Item, legata Graece scripta non ualent, fideicommissa uero ualent. **282.** Item, si legatum per damnationem relictum heres infitietur, in duplum cum eo agitur; fideicommissi uero nomine semper in simplum persecutio est. **283.** Item, ⟨*quod*⟩ quisque ex fideicommisso plus debito per errorem soluerit, repetere potest; at id quod ex causa [falsa] per damnationem legati plus debito solutum sit repeti non potest. idem scilicet iuris est de eo [legato] quod non debitum uel ex hac uel ex illa causa per errorem solutum fuerit.[1]

284. Erant etiam aliae differentiae, quae nunc non sunt. **285.** Ut ecce peregrini potcrant fideicommissa capere;[2] et fere haec fuit origo fideicommissorum. sed postea id prohibitum est, et

[1] The section makes sense if, besides expunging *legato* (Savigny), we expunge *falsa* (Beseler): Cf. Dulckeit, Festchr. Koschaker 2, 316. [2] *facere* V.

§ 275. Cf. G. 2, 110, &c. § 276. Cf. G. 1, 18. 21. § 277. Cf. G. 2, 184. Nou.

than 100,000 *asses*, can nevertheless take the inheritance if left to her by means of a trust. **275.** Also Latins, though forbidden by the *L. Iunia* to take inheritances and legacies directly, can take under a trust. **276.** Again, though it is forbidden by senatusconsult to institute free and heir one's slave under 30 years of age, the general opinion is that one can order that he be free when he shall be 30 years old, and can request that the inheritance should then be made over to him. **277.** Again, although we cannot institute from after the death of the heir who succeeds us a further heir in his place, still we can request our heir, when he shall die, to make over our inheritance in whole or part to a further person. Moreover, since a trust can be imposed from after the death of the heir, we can obtain the same result by writing thus: 'When my heir Titius is dead, I wish my inheritance to go to Publius Meuius.' By either method Titius leaves his own heir bound by the trust to transfer the inheritance. **278.** Further, we sue for legacies by *formula*, but claim trust gifts at Rome before a consul or the praetor having special jurisdiction over trusts, in the provinces before the provincial governor. **279.** Again, at Rome jurisdiction over trusts is exercised at all seasons, but over legacies only during term. **280.** Again, interest and mesne profits are due on trust-property where the person owing the trust is late in performance, but there is no liability for interest on legacies; so it is declared by a rescript of the late emperor Hadrian. I am aware, however, that Julian held that in the case of legacies left by way of permission the law was the same as for trusts, and I observe that even to-day this opinion is preferred. **281.** Again, legacies are invalid, but trusts valid, if expressed in Greek. **282.** Again, if an heir denies a legacy left by damnation, the action against him is for double; but on a trust the claim is always for the simple amount. **283.** Again, what has by mistake been paid on a trust beyond what was due can be recovered, but what has been paid in excess on a legacy by damnation cannot be recovered. The law is the same where a payment not due at all has on either account been made by mistake.

284. There used to be further differences, which do not now exist. **285.** Thus peregrines could take under trusts—indeed, this was probably the origin of trusts—but later this was forbidden,

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159 (A.D. 555). § 278. Cf. Inst. 2, 23, 1. § 281. Cf. C. 6, 23, 21, 6 (Nou. Theod. 16, A.D. 439). See Kreller, Erbrechtl. Untersuch. (1919) 331. §§ 282–3. Cf. G. 4, 9. 171. Inst. 3, 27, 7. 2, 20, 25 fin. § 284. Cf. G. 2, 268. § 285. Cf. G. 2, 110, &c. *origo fideicommissorum*: Inst. 2, 23, 1. 12. 2, 25 pr.

nunc, ex oratione diui s*acratissimi*[1] Hadriani, senatusconsultu*m* factum est, ut ea fide*i*commissa fisco uindicarentur. **286.** Caelibes/
V p. 126 quoque, qui per legem Iulia*m* hereditates legataque capere prohibentur, olim fideicommissa uideba*n*tur caperc posse. **286a.** Item orbi, qui per legem Papia*m*, ob id quod liberos non habe*n*t,[2] dimidias partes hereditat*u*m legatorumque perdunt, olim solida fideicommissa uidebantur capere posse. sed postea, senatusconsulto Pegasiano, p*ro*inde fideicommissa quoque ac legat*a* hereditatesque capere posse prohibiti sunt, eaque translata sunt ad eos qui ⟨*in eo*⟩[3] testamento liberos habent, aut, si null*u*s liberos habeb*i*t, ad populum, sicuti iuris est in legatis et in hereditatibus, quae eadem aut simil*i* ex cau⟨*sa caduca fiunt.* **287.** *I*⟩tem[4] olim incertae personae uel[5] postumo alieno per fideicommissum relinqui poterat, quamuis neque heres institui neque legari ei possit.[6] sed senatusconsulto, quod auctore di*u*o Hadriano factum est, id*em* in fideicommissis quod in legatis hereditatibusque constitutum est. **288.** Item, poenae nomine iam non dubitatur nec per fideicommissum quidem relinqui posse.

289. Sed quamuis *in* mult*i*s iuris partibus longe latior causa sit fideicommissorum quam eorum quae directo relinquuntur, in quibusdam tantundem uale*a*nt, tamen tutor non aliter testamento dari potest quam directo, ueluti hoc modo: LIBERIS MEIS TI*TIU*S TUTO*R* ESTO, uel ita: LIBERIS MEIS TITIUM TUTOREM DO. per fideicommissum *uero dari*[7] non potest. /

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[1] *sunt* V. Cf. Apogr. 300.
[2] So Kübler. *habebant* V. *ob id—habebant* gloss, Polenaar–Krüger.
[3] Polenaar and generally: cf. 2, 206.
[4] Polenaar and generally.
[5] *ueluti*? Kübler. [6] *posset* Krüger. [7] *dari uero* V.

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§§ 286–286a. Cf. G. 2, 111, &c. C. 8, 57 (58), 1; 2. *Pegasiano*: G. 2, 254. § 287. *neque heres institui*: G. 2, 242, &c. *neque legari*: G. 2, 238. 241, &c. § 288. Cf. G. 2, 235, &c. § 289. *latior causa*: Inst. 2, 20, 3. *tutor*: G. 1, 149; 2, 231. 237. 240.

and now on the proposition of the late emperor Hadrian a senatusconsult has enacted that such trusts should be claimed for the fisc. **286.** Also, unmarried persons, though forbidden by the *L. Iulia* to take inheritances or legacies, were at one time considered able to take under trusts. **286a.** Again, childless persons, though under the *L. Papia* they forfeit a moiety of inheritances and legacies because they have no children, were at one time considered to take trust gifts in full. But later, by the *SC. Pegasianum*, they have been forbidden to take trust gifts just as much as legacies and inheritances, these being transferred to beneficiaries under the will who have children, or, if none of them have children, to the people, as is the rule in regard to legacies and inheritances, which for the same or like reason become caducous. **287.** Again, at one time a trust could be left in favour of an uncertain person or an afterborn stranger, though such persons can neither be instituted heirs nor be left legacies. But by a senatusconsult made on the authority of the late emperor Hadrian the same rule has been established for trusts as for legacies and inheritances. **288.** Again, there is now no doubt that a penal gift cannot be left even by way of trust.

289. But though in many points of law trusts are far freer than, and in others just as effective as, direct testamentary gifts, still a tutor cannot be appointed by will otherwise than directly, as thus: 'Let Titius be tutor to my children', or thus: 'I appoint Titius tutor to my children.' He cannot be appointed by means of a trust.

CONTENTS OF BOOK III

⟨COMMENTARIUS TERTIUS⟩

V fol. deperd. **1.**[1] *Intestatorum hereditates ⟨ex⟩ lege XII tabularum primum ad suos heredes pertinent.* **2.** *Sui autem heredes existimantur, ⟨ut et supra diximus⟩, liberi qui in potestate morientis fuerunt, ueluti filius filiaue, nepos neptisue ⟨ex filio⟩, pronepos proneptisue ex nepote filio nato prognatus prognataue. nec interest ⟨utrum⟩ naturales ⟨sint⟩ liberi an adoptiui. ita demum tamen nepos neptisue et pronepos proneptisue suorum heredum numero sunt, si praecedens persona desierit ⟨in potestate parentis esse, siue morte id acciderit⟩ siue alia ratione, ueluti emancipatione. nam si per id tempus quo quisque moritur filius in potestate eius sit, nepos ex eo suus heres esse non potest. idem et in ceteris deinceps liberorum personis dictum intellegemus.* **3.** *Uxor quoque quae in manu uiri est ei*[2] *sua heres est, quia filiae loco est. item nurus quae in filii manu est; nam et haec neptis loco est. sed ita demum erit sua heres, ⟨si⟩ filius, cuius in manu fuerit, cum pater moritur, in potestate eius non sit. idemque dicemus et de ea quae in nepotis manu matrimonii causa sit, quia proneptis loco est.* **4.** *Postumi quoque ⟨qui,⟩ si uiuo parente nati essent, in potestate eius futuri forent, sui heredes sunt.* **5.** *Idem iuris est de his quorum nomine ex lege*
V p. 127 *Aelia Sentia uel ex senatusconsulto post* / mortem patris causa probatur. nam et hi uiuo patre causa probata in potestate eius futuri essent. **6.** Quod etiam de eo filio qui ex prima secunda*ue* mancipatio*ne* post mortem patris manumittitur intellegemus. **7.** Igitur, cum filius filiaue et ex altero filio nepotes neptesue extant, pariter ad hereditatem uocant*ur*, nec qui gradu proximior est ulteriorem excludit. aequum enim uidebatur nepotes neptesue in patris sui locum portionemque succedere. pari ratione, et si nepos neptis*ue* sit ex filio et ex nepote pronepos p*r*oneptisue, simul

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[1] A folio is missing between V 126 and 127. Since 126 is full, it is not certain that the conclusion of book 2 is not lacking. It is certain that the beginning of book 3 is missing, and though this can be substantially restored from Coll. 16, 2 (supported by Inst. 3, 1, 1. 2. 2b), it is highly probable that the restoration is not quite complete. The restored text would about fill a normal page of V, but at a junction of books this is of little moment. The persuasive argument is that the transition to intestate succession is extremely abrupt, incredibly so in Gaius. The adoption of Inst. 3, 1 pr. would make it less abrupt, but editors do not include it because there is no proof that the passage is Gaian. Our text as far as the middle of § 5, where V resumes, is taken from Coll. 16, 2, completed from Inst. The accepted corrections of corruptions in Coll. are not noted.

[2] *uiri est ei* Krüger. Coll. corrupt.

BOOK III

1. The inheritances of intestates, by the law of the Twelve Tables, go first to *sui heredes*. **2.** Are reckoned *sui heredes*, as we have said above, children who were in the *potestas* of the deceased when he died, such as a son or daughter, a grandson or granddaughter by a son, a great-grandson or great-granddaughter by a grandson by a son, and it makes no difference whether they are natural or adoptive children. A grandson or granddaughter, however, or a great-grandson or great-granddaughter, is in the class of *sui heredes* only if the preceding person has ceased to be in the ancestor's *potestas*, whether owing to death or in some other way, as by emancipation. For if at the time of a man's death his son is in his *potestas*, his grandson by that son cannot be a *suus heres*. The same must be taken to apply to ulterior descendants. **3.** A wife who is in her husband's *manus* is likewise *sua heres* to him, being in the position of a daughter. So also is a daughter-in-law who is in the *manus* of a son, she being in the position of a granddaughter; but she will be a *sua heres* only if the son in whose *manus* she has been is not, when the father dies, in his *potestas*. The same applies also to a woman who is in the *manus* of a grandson as his wife, she being in the position of a great-granddaughter. **4.** *Sui heredes* also are posthumous children who would have been in the ancestor's *potestas* had they been born in his lifetime. **5.** In the same legal position are those on whose behalf a case under the *L. Aelia Sentia* or the senatusconsult is proved after their father's death; for, had their case been proved in the father's lifetime, they too would have been in his *potestas*. **6.** The same is to be taken to apply to a son manumitted from a first or second mancipation after his father's death. **7.** Accordingly, where a son or daughter and grandsons or granddaughters by another son survive, they are all called to the inheritance simultaneously, and the nearer in degree does not exclude the more remote; for it was considered just that grandsons and granddaughters should succeed to their father's place and share. On the same principle also, if there be a grandson or granddaughter by a son and a great-grandson or great-granddaughter by

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§§ 1–8. = Coll. 16, 2, 1–8. § 1. = Inst. 3, 1, 1. Cf. XII Tabb. 5, 4 (Textes 14. Bruns, 1, 23). § 2. = Inst. 3, 1, 2. 2b. Cf. Inst. 3, 1, 7. G. 1, 127; 2, 156–7; 3, 154a. § 3. Cf. G. 1, 114. 115b. 118. 148; 2, 139. 159. § 4. = Inst. 3, 1, 2b in fin. Cf. G. 1, 147; 2, 130 sq. § 5. Cf. G. 1, 32; 2, 142 sq. § 6. Cf. G. 1, 132; 2, 141. §§ 7–8. = Inst. 3, 1, 6.

omnes uocantur ad hereditatem. **8.** Et quia placebat nepotes neptesue, item pronepotes proneptesue, in parentis sui locum succedere, conueniens esse uisum est non in capita sed ⟨*in*⟩ stirpes hereditate*m* diuidi, ita ut filius partem dimidiam hereditatis ferat, et ex altero filio duo pluresue nepotes alteram dimidiam; item, si ex duobus filiis nepotes extent, ex altero filio unus forte uel duo, ex altero tres aut quattuor, ad un*u*m aut ad duos dimidia pars pertineat, et ad tres aut quattuor altera dimidia.

V p. 128 **9.** Si nullus sit suorum heredum, tunc hereditas pertinet / ex eadem lege XII tabularum ad *a*gnatos. **10.** *U*ocantur autem agnati qui legitima cognatione iuncti sunt. legitima autem cognatio est ea quae p*er* u*i*rilis sexus persona*s coniungitur. itaque eodem p*atre[1] nati fratres agna*ti si*bi *sunt*; *qui etiam consanguinei*[1] uocantur, nec requiritur an etiam matrem eandem habuerint. item patruus fratris filio et inuicem is illi agnatus est. eodem numero sunt fratres patrueles inter se, id est qui ex duobus fratribus progenerati sunt, quos plerique et*iam* consobrinos uocant. qua ratione scilicet etiam ad plures gradus agnationis peruenire poterimus. **11.** Non tamen omnibus simul agnat*i*s dat lex XII tabularum hereditatem, sed his qu*i* tum cum certum est aliquem intestatum decessisse proximo gradu sunt. **12.** Nec in eo iure successio est. ideoque, si agnatus proximus hereditatem omiserit uel, antequam adierit, decesserit, sequentibus nihil iuris ex lege competit. **13.** Ideo autem non mortis tempore quis *proxi*mus *fue*rit requirimus, sed eo tempore quo certum fuerit aliquem intestatum decessisse, quia, si quis *testamento fac*to decesserit, melius esse uisum est tun*c*[2] requiri proximum, cum certum esse coeperit neminem ex eo testamento fore heredem. **14.** Quod ad feminas tamen attinet, in hoc

V p. 129 iure aliud in / ipsarum hereditatibus capiendis placuit, aliud in ceterorum [bonis][3] ab his capiendis. nam feminarum *hereditat*es p*r*oinde ad nos agnationis iure redeunt atque masculorum; nostrae uero hereditates ad feminas ultra consanguineorum gradum non pertinent. itaque soror fratri sororiue legitima heres est, amita

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[1] Restored from Coll. 16, 2, 10.

[2] *tunc* Coll. 16, 2, 13. *tunc* followed by 4 doubtful letters V. *tunc demum* Kübler.

[3] om. Coll. 16, 2, 14.

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§§ 9–16. = Coll. 16, 2, 9–16. § 9. Cf. Inst. 3, 2 pr. XII Tabb. 5, 4 (Textes 14. Bruns 1, 23). § 10. Cf. G. 1, 156. Inst. 3, 2, 1. 3, 5, 4 (3). 5 (4). § 11. = Inst. 3, 2, 1 fin. § 12. Cf. G. 3, 22. 28. Inst. 3, 2, 7. § 13. Cf. Inst. 3, 2, 6. § 14. Cf. G. 3, 23. 29. Paul 4, 8, 16. 20 (22). Inst. 3, 2, 3–3b.

a grandson, they are all called to the inheritance simultaneously. **8.** And, it having been settled that grandsons and granddaughters, and great-grandsons and great-granddaughters, succeed to their parent's place, it has been held consistent that the inheritance should be divided, not by individuals, but by stocks, so that a son takes half the inheritance and two or more grandchildren by another son the other half, and so that, if there survive grandchildren by two sons—say one or two by one of them and three or four by the other—half goes to the one or two and the other half to the three or four.

9. If there be no *suus heres*, then by the same law of the Twelve Tables the inheritance goes to the agnates. **10.** Are termed agnates those related by civil cognation. Now cognation is civil where the connexion is through persons of the male sex. Thus brothers born of the same father (also termed consanguineous) are agnates to each other, and whether they had also the same mother is irrelevant. Again, an uncle is agnate to his brother's son and, conversely, his brother's son to him. Also agnates to each other are *fratres patrueles* (also commonly called *consobrini*), that is the sons of two brothers. And pursuing this principle we can arrive at further degrees of agnation. **11.** But the law of the Twelve Tables does not give the inheritance to all agnates simultaneously, but only to those who are nearest in degree at the moment when it is established that there is an intestacy. **12.** In this title by agnation there is no succession, and therefore, if the nearest agnate abstains from the inheritance or dies before having entered upon it, the next nearest agnates have no right under the statute. **13.** The reason why we inquire who stood nearest at the moment when it was established that there is an intestacy, and not at the time of the death, is that, where a man dies having made a will, it has been found preferable to look for the nearest agnate at the moment when it first becomes certain that no one will be heir under that will. **14.** But as regards women, in this branch of the law one rule has been adopted in respect of the taking of an inheritance from them and another in that of the taking of an inheritance by them. For inheritances left by women come to us by title of agnation on precisely the same principle as those left by males, whereas inheritances left by us do not go to women beyond the degree of sisters by the same father. Thus a sister is a statutory heir of her brother or sister, but a father's sister or a brother's

uero et fratris filia legitima heres esse ⟨*non potest. sororis autem nobis loco est*⟩[1] etiam mater aut nouerca quae per in manum conuentionem apud patrem nostrum iura filiae nacta est. **15.** Si ei qui defunctus erit si*t* frater et alterius fratris filius, sicut ex superioribus intellegitur, frater p*o*tior[2] est, quia gradu praecedit. sed alia facta est iuris interpretatio inter suos heredes. **16.** Quodsi defuncti nullus frater extet, ⟨*sed*⟩[1] sint liberi fratrum, ad omnes quidem hereditas pertinet. sed quaesitum est, si dispari forte numero sint nati, ut ex uno unus uel duo, ex altero tres uel quattuor, utrum in stirpes diuidenda sit hereditas, sicut inter suos heredes iuris est, an potius in capita. iam dudum tamen placuit in capita diuidendam esse hereditatem. itaque quotquot erunt ab utraque parte personae, in tot portiones hereditas diuidetur, ita ut singuli singulas portiones ferant.

17. Si nullus agnatus sit, eadem le*x* XII tabularum gent*i*les ad
V p. 130 hereditatem uoc*a*t. qui sint autem gentiles primo com/mentario rettulimus. et cum illic admonuerimus totum gentilici*u*m ius in desuetudinem abiisse, superuacuum est hoc quoque loco de eadem re *iterum*[3] curiosius tractare.

18. Hactenus lege XII tabularum finitae sunt intestatorum hereditates. quod ius quemadmodum strictum fuerit palam est intellegere. **19.** Statim enim, emancipati liberi nullum ius in hereditatem parentis ex ea lege habent, cum desierint sui heredes esse. **20.** *I*dem iuris est si ideo liberi non sint in potestate patris, quia sint cum eo ciuitate *R*omana donati nec ab imperatore in potestate*m* redacti fuerint. **21.** Item, agnati capite deminuti non admittuntur ex ea lege ad hereditatem, quia nomen agnationis capitis deminutione perimitur. **22.** Item, proximo agnato non adeunte hereditatem, nihilo magis sequens iure legitimo admittitur. **23.** Item, feminae agnatae, quaecumque consanguineorum gradum excedunt, nihil iuris ex lege haben*t*. **24.** Similiter, non admittuntur cognati, qui per feminini sexus personas necessitudine iunguntur, adeo quidem ut nec inter matrem et filium filiamue ultro citroque hereditatis capiendae ius competat, praeterquam si per in

[1] Supplied from Coll. [2] So Coll. 16, 2, 15. *prior* V.
[3] Kübler's conjecture. *tiṅ* V. Krüger om.

§ 15. Cf. Inst. 3, 2, 5. § 16. Cf. Inst. 3, 2, 4. § 17. = Coll. 16, 2, 17. Cf. XII Tabb. 5, 5 (Textes 14. Bruns 1, 23). Cic. top. 6, 29. *primo commentario*: G. 1, 164? § 18. Cf. Inst. 3, 3 pr. 3, 9, 2 fin. § 19. Cf. Inst. 3, 1, 9. § 20. Cf. G. 1, 93, &c. § 21. Cf. G. 1, 158; 3, 27. Inst. 3, 5, 1. 3, 4, 2. § 22. Cf. G. 3, 12. 28. Inst. 3, 2, 7. § 23. Cf. G. 3, 14, &c. § 24. Cf. G. 1, 156. *inter matrem et filium*: G. 3, 14. Inst. 3, 3 pr.

daughter cannot be statutory heir. Also in the position of sister to us is our mother or stepmother, if she has acquired the rights of a daughter in our father's house by coming under his *manus*. **15.** If the deceased leaves a brother and a son of a second brother, the brother, as appears from what has already been said, is preferred, because he is nearer in degree, whereas between *sui heredes* the law has been otherwise interpreted. **16.** If, however, no brother of the deceased survives, but there are children of brothers, the inheritance goes to all of them. But the question has arisen, if the families are of unequal numbers, that is, if there are, say, one or two children by one brother and three or four by the other, whether the inheritance is to be divided by stocks, as is the law between *sui heredes*, or by individuals. It has, however, long been established that the division is to be by individuals. Consequently the inheritance will be divided into as many shares as there are individuals in the two families, each individual getting one share.

17. If there be no agnate, the same law of the Twelve Tables calls the *gentiles* (fellow-clansmen) to the inheritance. Who *gentiles* are we have explained in the first book. And, seeing that, as we there observed, the whole law relating to them has fallen into disuse, it is superfluous at the present point to enter once more into the details of the subject.

18. This is the extent of the regulation of intestate succession by the Twelve Tables. It is obvious how narrow that system was. **19.** Thus to begin with, emancipated children have no rights under the statute to their ancestor's inheritance, since they have ceased to be *sui heredes*. **20.** The same applies where children are not in their father's *potestas* because, when granted Roman citizenship along with him, they were not brought under his *potestas* by the emperor. **21.** Again, under the statute agnates who have undergone *capitis deminutio* are not admitted to the inheritance, because the title of agnation is destroyed by *capitis deminutio*. **22.** Again, if the nearest agnate does not enter on the *hereditas*, that is no reason for the next nearest being let in under the statute. **23.** Again, female agnates more remote than sisters by the same father have no right under the statute. **24.** Similarly, cognates who are related through females are not admitted, so much so that no right of inheriting from each other exists even between a mother and her son or daughter, except where the rights of children

manum conuentionem consanguinitatis iura inter eos constiterint.
V p. 131 **25.** Sed hae iuris iniquitates edicto praetoris emendatae / sunt. **26.** Nam *liberos*[1] omnes qui legitimo iure deficiuntur uocat ad hereditatem, proinde ac si in potestate parentis mortis tempore fuissent, siue soli sint siue etia*m* sui heredes, id est qui in potestate patris fuerunt, concurrant. **27.** Agnatos autem capite deminutos non secundo gradu post suos heredes uocat, id est non eo gradu uocat quo per legem uocarentur si capite minuti non essent, sed tertio, proximitatis nomine. licet enim capitis deminutione ius legitimum perdiderint, certe cognationis iura retinent. itaque, si quis alius sit qui integrum ius agnationis habebit, is potior erit, etiamsi longiore gradu fuerit. **28.** Idem iuris est, ut quidam putant, in eius agnati persona qui, proximo agnato omittente hereditatem, nihilo magis iure legitimo admittitur. sed sunt qui putant hunc eodem gradu a praetore uocari quo etiam per legem agnatis hereditas datur. **29.** Feminae certe agnatae, quae consanguineorum gradum excedunt, tertio gradu uocantur, id est si neque suus heres neque agnatus *u*llus erit. **30.** Eodem grad*u* uocantur etiam *e*ae personae quae per feminini sexus personas copulatae sunt. **31.** Liberi quoque qui in adoptiua familia s*unt* ad naturalium parentum hereditatem hoc eodem gradu uocantur.
V p. 132 **32.**[2] Quos autem / praetor uocat ad hereditatem, hi heredes ipso quidem iure non fiunt. nam praetor heredes facere non p*otest. per legem enim tantum uel similem iuris constitutionem heredes fi*unt, ueluti per senatusconsultum et constitutionem principalem. sed *cum eis* p*raetor* ⟨*dat bonorum possessionem*⟩, loco heredum *con*stituunt*ur.*

33. *Adhuc autem etia*m alios complures gradus p*raetor facit in bonorum possessionibus dandis*, d*um i*d ag*it* n*e quis sine successore moriatur.*[3] de quibus in his commentariis consul*to non agimus*, *cum*[4] hoc ius totum propriis comm*e*ntariis *executi simus.*[4] **33***a*. *Hoc*
V p. 133 solum admonuisse sufficit[5] . . . / . . .

[1] So Krüger. *eos* V. ⟨*liberos*⟩ *eos* Mommsen.
[2] Text completed and corrected from Inst. 3, 9, 2.
[3] Cf. Inst. 3, 9, 2. [4] Conjectural; not in Inst.
[5] The remaining 14 lines of V 132 are largely illegible; 133 is almost entirely so. There are indications on 132 of discussion of the mother's right of intestate succession; indeed Gaius cannot have omitted the *SC. Tertullianum*. And there must have been other topics, such as the edictal clause *Unde decem personae*: Coll. 16, 9, 1; Inst. 3, 9, 3.

§ 25. Cf. Inst. 3, 9 pr. 2 fin. Edictum § 156 sq. § 26. Cf. G. 3, 19. 20. Inst. 3, 1, 9. 3, 9, 3. § 27. Cf. G. 3, 21, &c. Inst. 3, 5, 1. § 28. Cf. G. 3, 12. 22. Inst. 3, 2. 7. § 29. Cf. G. 3, 14, &c. § 30. Cf. G. 3,

by the same father have been created between them by the mother having come under (the father's) *manus*.

25. But these injustices of the law have been amended by the praetor's Edict. **26.** For he calls to the inheritance all children deficient in statutory title exactly as though they had been in the ancestor's *potestas* at the time of his death, whether they stand alone or whether *sui heredes*, that is persons who were in the father's *potestas*, come in with them. **27.** But agnates who have undergone *capitis deminutio* he does not call in the second class, next after the *sui heredes*; in other words, he does not call them in the class in which they would have been called by the statute had they not undergone *capitis deminutio*, but in a third class, as next of kin. For though by *capitis deminutio* they have lost their statutory right, they indubitably retain their rights of cognation. If therefore there be someone else who retains the right of agnation unimpaired, he will be preferred, even if more remote in degree. **28.** The law is the same, as some hold, in the case of an agnate who, on the nearest agnate abstaining from the inheritance, is not thereby let in by statutory right. But there are others who hold that such a one is called by the praetor in the same class as that in which the inheritance is given by the statute to the (nearest) agnates. **29.** Female agnates beyond the degree of sisters by the same father are unquestionably called in the third class, supposing, that is, that there is neither a *suus heres* nor an agnate. **30.** In the same class also are called persons related through females. **31.** Children who are in an adoptive family are also called in this same class to the inheritance of their natural parents.

32. But those whom the praetor calls to an inheritance do not become heirs at civil law. For the praetor cannot make heirs, it being only by a *lex* or some similar enactment, such as a senatus-consult or imperial constitution, that heirs are made. But when the praetor grants them *bonorum possessio*, they are established in the position of heirs.

33. In the granting of *bonorum possessio* the praetor also makes several other classes, his object being that no one shall die without a successor. Of these we deliberately do not treat in the present work, as we have explored the whole subject fully in a special work. **33a.** It suffices to remark only this. . . .

24, &c. Inst. 3, 5, 2 (1). § 31. = Inst. 3, 5, 3 (2). Cf. Inst. 3, 1, 13. G. 2, 136–7. § 32. = Inst. 3, 9, 2. Cf. G. 1, 6; 2, 98; 3, 80; 4, 34. 111. Inst. 4, 12 pr. § 33. = Inst. 3, 9, 2 med. *propriis commentariis*: G. 3, 54. § 33a. Cf. G. 3, 24. Inst. 3, 3.

33b.[1] *Aliquando tamen neque emendandi neque impugnandi ueteris iuris, sed* mag*is confirmandi gratia pollicetur bonorum possessionem. nam illis quoque* qui rec*te facto testamento heredes instituti sunt*, dat
V p. 134 se*cundum tabulas bonorum possessionem.* **34.** *Item ab in*/testa*to* heredes suos et agna*tos* ad bonorum possessionem uocat. quibus casibus beneficium eius in eo solo uidetur aliquam utilitatem habere, ut is qui ita bonorum possessionem petit interdicto cuius principium est QUORUM BONORUM uti possit. cuius interdicti quae sit utilitas suo loco proponemus. alioquin, remota quoque bonorum possessione, ad eos hereditas pertinet iure ciuili.

35. Ceterum saepe quibusdam ita datur bonorum possessio, ut is cui data sit ⟨*non*⟩ optineat hereditatem. quae bonorum possessio dicitur sine re. **36.** Nam si uerbi gratia iure facto testamento heres inst*it*utus creuerit hereditatem, sed bonorum possessionem secundum tabulas testamenti petere noluerit, contentus eo quod iure ciuili heres sit, nihilo minus ii qui nullo facto testamento ad intestati bona uocantur possunt petere bonorum possessionem; sed sine re ad eos [hereditas][2] pertinet, cum testamento scriptus heres euincere hereditatem possit. **37.** Idem iuris est si intestato aliquo mortuo suus heres nolu*erit* petere *bonorum* possessionem, *con*tentus l*egitimo iure: id si fi*et,[3] agnato competit quidem bonorum possessio, sed sine re, quia euinci hereditas *a* suo herede potest, et [illud] conuenienter,[4] si ad agnatum iure ciuili pertinet hereditas et is adierit hereditatem, sed [si] bonorum possessionem petere noluerit, et si quis ex proximis cognat*is*[5] petierit, sine re habebit bonorum possessionem propter eandem rationem. **38.** Sunt et
V p. 135 alii quidam similes casus, quorum aliquos / superiore commentario tradidimus.

39. Nunc de libertorum bonis uideamus. **40.** Olim itaque licebat liberto patronum suum *im*pune testamento praeterire. nam ita demum lex XII tabularum ad hereditatem liberti uocabat patr*on*um, si intestat*us* mortuus esset libertus nullo suo herede

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[1] Cf. Inst. 3, 9, 1.

[2] So Polenaar, generally followed.

[3] *id si fiet* Mommsen. *nam et* Kübler.

[4] So Krüger. *et illud conuenientur* V. *et illud conuenienter dicetur* Kübler.

[5] So Kübler. *cognatus* V. *et* [*si quis ex proximis*] *cognatus* Mommsen–Krüger.

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§ 33b. = Inst. 3, 9, 1. Pap. D. 1, 1, 7, 1. § 34. = Inst. 3, 9, 1. *quorum bonorum*: G. 4, 144. §§ 35–7. Cf. G. 2, 119 sq. 148. 151a.

33b. Sometimes, however, the praetor promises *bonorum possessio* for the purpose rather of supporting the ancient law than of amending or combating it. Thus he grants *bonorum possessio secundum tabulas* equally to persons instituted heirs by a properly executed will. **34.** Again, on an intestacy, he calls the *sui heredes* and the agnates to *bonorum possessio*. In these cases his indulgence appears to be of advantage only in that one who so applies for *bonorum possessio* can use the interdict beginning with the words *Quorum bonorum*, the advantage of which we shall explain in the proper place; for in any case, even apart from *bonorum possessio*, the inheritance belongs to these persons by civil law.

35. Frequently, however, *bonorum possessio* is granted in such circumstances that the grantee does not get the inheritance. Such *bonorum possessio* is called *sine re* (ineffectual). **36.** For instance, if an heir instituted by a properly executed will makes *cretio*, but chooses not to apply for *bonorum possessio secundum tabulas*, being satisfied with being heir at civil law, those called to the succession on intestacy can apply for *bonorum possessio* none the less; but it goes to them *sine re*, since the testamentary heir can evict them from the inheritance. **37.** The law is the same where in a case of intestacy the *suus heres* does not choose to apply for *bonorum possessio*, being satisfied with his statutory right: if this happens, *bonorum possessio* is open to the agnate, but *sine re*, since he can be evicted from the inheritance by the *suus heres*. In like manner, if an inheritance goes to an agnate by civil law and he enters upon it, but does not choose to apply for *bonorum possessio*, and then one of the nearest cognates applies for it, the latter will have a *bonorum possessio sine re*, for the same reason. **38.** And there are other similar cases, some of which we have mentioned in the previous book.

39. Now let us consider the estates of freedmen. **40.** In early days a freedman was allowed to pass over his patron in his will with impunity. For the law of the Twelve Tables called a patron to his freedman's inheritance only if the freedman had died intestate,

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§ 38. *superiore commentario*: G. 2, 119. 148. 149. §§ 39–40. Inst. 3, 7 pr. Cf. G. 1, 165; 3, 46. 49. XII Tabb. 5, 8 (Textes 15. Bruns 1, 24).

*re*licto. itaque, intestato quoque mortuo liberto, si is *su*um heredem reliquerat, nihil in bonis eius patrono iuris erat. et siquidem ex naturalibus liberis aliquem suum heredem reliquisset, nulla uidebatur esse querella; si uero uel adoptiuus filius filiaue uel uxor quae in manu esset ⟨*suus uel*⟩[1] sua heres esse*t*, aperte iniquuum erat nihil iur*is* patrono superesse. **41.** Qua de causa postea praetoris edicto haec iur*is* iniquitas em*e*ndata est. siue enim faciat testamentum libertus, iubetur ita testari ut patrono suo partem dimidiam bonorum suorum relinqua*t*, et si aut nihil aut minus quam partem dimidiam reliquerit, datur patrono contra tabulas testamenti partis dimidiae bonorum possessio; si uero intestatus moriatur suo herede relicto adoptiuo filio, ⟨*uel*⟩ uxore quae in manu ipsius esset, uel nur*u* quae in manu filii eius fuerit, dat*ur* aeque patrono aduersus hos suos heredes partis dimidiae bonorum possessio. prosunt
V p. 136 autem liberto ad ex/cludendum patronum naturales liberi, non solum quos in potestate mortis tempore habet, sed etiam emancipati et in adoptionem dati, si modo aliqua ex parte heredes scripti *sint*, *aut praeteriti con*tra[2] tabulas testamenti bonorum possessionem ex edicto petierint; nam exheredat*i* nullo modo repellunt patronum. **42.** Postea lege Papia aucta sunt iura patronorum, quod ad locupletiores libertos pertinet. cautum est enim ea lege ut, ex bonis eius qui sestertiorum *centu*m mili*um plurisue* patrimonium[3] reli*que*rit et pauciores quam tres liberos habebit, siue is testamento facto siue intestato mortuus erit, uirilis pars patrono debeatur. itaque, cum unum filium unamue filiam heredem reliquerit libertus, proinde pars dimidia patrono debetur ac si sine ullo filio filiaue moreretur; cum uero duos duasue heredes reliquerit, tertia pars debet*ur*; si tres relinquat, repellitur patronus.

43. In bonis libertinarum nullam iniuriam antiquo iure patiebantur patroni. cum enim hae in pat*ro*norum legitima tutela essent, non aliter scilicet testamentum facere poterant quam patrono auctore. itaque, siue auctor ad testamentum faciendum /
V p. 137 factus e*rat*, *aut sibi imputare debebat quod heres ab ea* relic*tus non erat*, *aut ipsum ex testamento*, *si heres ab ea reli*ctus erat, *seque*batur hereditas.[4] si uero auctor ei fac*tus* non erat, et intestata liberta

[1] So Huschke–Kübler. [*sua*] Mommsen. [2] Cf. Inst. 3, 7, 1.
[3] So Krüger. V very doubtful. Inst. 3, 7, 2: *sestertiorum centum milium patrimonium.* [4] Krüger's conjectures. The sense is fairly certain.

§ 41. = Inst. 3, 7, 1. Cf. G. 3, 49. Edictum §§ 150. 152. *contra tabulas*: G. 2, 135 sq. § 42. = Inst. 3, 7, 2. Cf. § 3. § 43. Cf. G. 1, 192; 2, 118. 122. *quia suos heredes*: G. 1, 104, &c.

leaving no *suus heres*. Thus, even if a freedman died intestate but leaving a *suus heres*, the patron had no claim on his estate. And if it was one of his natural children that he left as *suus heres*, no grievance was apparent; but if it was an adoptive son or daughter, or a wife who was in *manus*, that was *suus* or *sua heres*, it was obviously unjust that no right should remain to the patron. **41.** In consequence this legal injustice was corrected by the praetor's Edict. For if a freedman makes a will, he is commanded to make it in such manner as to leave his patron one half of his estate, and if he leaves him nothing or less than the half, the patron is granted *bonorum possessio contra tabulas* in respect of half; or if he dies intestate, leaving as *suus heres* an adoptive son or a wife who was in his own *manus* or a daughter-in-law who had been in his son's, equally the patron is granted *bonorum possessio* in respect of half against these *sui heredes*. But natural children enable a freedman to exclude his patron, and not only those of them whom he holds in *potestas* at the time of his death, but also those emancipated or given in adoption, provided that they are appointed heirs in some part by the will or that, if passed over by it, they apply under the Edict for *bonorum possessio contra tabulas*: for, if disinherited, they in no way exclude the patron. **42.** Later, by the *L. Papia*, the rights of patrons were enlarged in respect of wealthier freedmen. For by that statute it is provided that of the estate of a freedman who leaves a fortune of 100,000 sesterces or more and has fewer than three children, whether he dies testate or intestate, there shall be due to his patron a share proportionate to the number of the children. Thus, where the freedman leaves only one son or daughter as heir, half of his estate is due to his patron, just as if he had died childless; where he leaves two sons or daughters as heirs, a third is due; where three, the patron is shut out.

43. In regard to the estates of their freedwomen patrons suffered no wrong under the ancient law. For a freedwoman, being in her patron's statutory *tutela*, could not make a will except with his *auctoritas*. Thus, if he had given *auctoritas* for the execution of a will, either he had himself to blame if he was not left heir by her, or if he was, the inheritance came to him under the will. If on the other hand he had not given *auctoritas*, so that she died intestate,

moriebatur, ad *eundem, quia suos heredes femina habere non potest, hereditas per*tinebat:[1] nec enim ullus olim *uel heres uel bonorum possessor erat qui*[2] posset patronum a bonis lib*ertae intestatae re*pellere. **44.** Sed postea lex Papia, cum quattuor liberorum iure libertinas tutela patronorum liberaret, et eo modo concederet eis etiam sine tutoris auctoritate *testamentum facere, prospexit*[3] ut, pro numero liberor*um quos liberta mortis tempo*re habuerit, uirilis pars patrono debeatur. ergo ex bonis eius quae omn*es quattuo*r incolum*es* liberos reli*que*rit, *quinta pars patrono debetur; quodsi omnibus liberis superstes fuerit, tota hereditas* ad patronum pertinet.[4]

45. Quae diximus de patrono, eadem intellegemus et de filio patroni, item de ne*pote* ex filio ⟨*et de*⟩ pronepo*te ex nepote fili*o nato prog*nato*. **46.** Filia uero patroni et *neptis* ex filio et pronep*tis ex* nepote filio nat*o* progna*ta* ol*im* quid*em habebant idem ius quod lege*[5] XII tabularum patrono datum est. praetor *autem non nisi uirilis* sex*us* patronorum liber*os uocat; filia uero, ut contra tabulas*[6] testa-/
V p. 138 menti liberti ⟨*aut*⟩ ab intestato contra filium adoptiuum, uel uxorem nurumue quae in manu fuerit, bonorum possessionem petat, trium liberorum iure lege Papia consequitur; aliter hoc ius non habet. **47.** Sed ut ex bonis libertae testatae quattuor liberos habentis uirilis pars ei debeatur, ne liberorum quidem iure consequitur, ut quidam putant. sed tamen, intestata liberta mortua, uerba legis Papiae faciunt ut ei uirilis pars debeatur. si uero testamento facto mortua sit liberta, tale ius ei datur quale datum est contra tabulas testamenti liberti, id est quale et uirili*s* sexus patronor*um* liberi contra tabulas testamenti liberti habent; quamuis parum diligenter ea pars legis scripta sit. **48.** Ex his apparet extraneos heredes patronorum longe remot*os esse* ab om*ni* eo iure quod uel in *in*testatorum bonis uel c*ontra* tabulas testamenti patrono competit.

49. Patronae olim, ante legem Papiam, hoc solum ius habebant in bonis libertorum, quod etiam patronis *ex* lege XII tabularum datum est. nec enim ut contra tabulas te*stam*enti ingrati liberti,

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[1] Huschke–Kübler's conjectures: cf. 3, 51. [2] So Krüger.
[3] So Kübler. *condere testamentum prospexit* Krüger.
[4] Krüger's tentative suggestions, perhaps indicating the general sense, for about 2½ difficult lines: cf. Suppl. xxxi. Not quite in harmony with Studemund's latest readings.
[5] So Kübler. Krüger slightly different.
[6] So Krüger, accepted by Kübler.

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§ 44. Cf. G. 1, 194. § 45. Cf.G. 3, 58. Inst. 3, 8 pr. Edictum § 152. § 47. Cf. G. 3, 44. *quale datum est*: G. 3, 41. § 48. Cf. G. 3, 58. 64. § 49. Cf. G. 3, 40.-41.

again the inheritance went to him, since a woman cannot have *sui heredes*; for in early days there was no one who could, whether as heir or as *bonorum possessor*, keep the patron out of the estate of his intestate freedwoman. **44.** But later the *L. Papia*, in view of the fact that it was liberating freedwomen in right of four children from the *tutela* of their patrons and was thereby permitting them to make a will even without a tutor's *auctoritas*, provided that there shall be due to the patron a share of his freedwoman's estate proportionate to the number of children she had at the time of her death. Thus, if such a freedwoman leaves all four children surviving her, a fifth of her estate is due to her patron, but if she outlives all her children, the whole inheritance goes to him.

45. Our statements regarding a patron must be taken to apply equally to his son, grandson by a son, and great-grandson by a grandson by a son. **46.** On the other hand, while in early days a patron's daughter, granddaughter by a son, and great-granddaughter by a grandson by a son had the same rights as those given to a patron by the Twelve Tables, the praetor calls only male *liberi* of patrons. But under the *L. Papia* a daughter is entitled in right of three children to apply for *bonorum possessio* against the will of her father's freedman, or for *bonorum possessio ab intestato* against the freedman's adoptive son, or his wife or daughter-in-law who was in his *manus*; apart from this *lex* she has not these rights. **47.** But, in the opinion of some, she is not entitled, even in right of children, to a proportionate part of the estate of a freedwoman who, having four children, has left a will. Yet when a freedwoman dies intestate, the express terms of the *L. Papia* entitle her (the patron's daughter) to a proportionate part. If, on the other hand, a freedwoman leaves a will, the patron's daughter is given the same rights as she has against the will of a freedman, that is, the same rights as those possessed by male descendants of a patron against the will of a freedman. This part of the *lex* is, however, drafted with insufficient care. **48.** From all this it is clear that extraneous heirs of a patron are very far from possessing the rights belonging to the patron either over the succession to an intestate freedman or against his will.

49. In early days, before the *L. Papia*, patronesses had over the estates of their freedmen only the same rights as were by the law of the Twelve Tables given to patrons. For the praetor did not, as in the case of a patron and his children, provide for them to apply

uel ab intestato contra filium adoptiuum uel uxorem nurumue, bonorum possessionem partis dimidiae peterent, praetor similiter ut de patrono liberisque eius curabat. **50.** Sed lex Papia duobus
V p. 139 liberis honora*t*ae ingenuae patronae, / libertinae tribus, eadem fere iura dedit quae ex edicto praetoris patroni habent; trium uero liberorum iure honoratae ingenuae patronae ea iura dedit quae per eandem legem patrono data sunt; libertinae autem patronae non idem iuris praestitit. **51.** Quod autem ad libertinarum bona pertinet, siquidem intestatae decesserint, nihil noui patronae liberis honoratae lex Papia praestat. itaque, si neque ipsa patrona neque liberta *capite deminuta*[1] sit, ex lege XII tabularum ad eam hereditas pertinet, et excluduntur libertae liberi. quod iuris est etiam si liberis honorata non sit patrona; numquam enim, sicut supra diximus, feminae suum heredem habere possunt. si uero uel huius uel illius capitis deminutio interueniat, rursus liberi libertae excludunt patronam, quia, legitimo iure *capitis deminutione*[1] perempto, euenit ut liberi libertae cognationis iure potiores habeant*ur*. **52.** Cum autem testamento facto moritur liberta, ea quidem patrona quae liberis honorata non est nihil iuris habet contra liber*tae* testamentum; *ei* uero quae liberis honorata sit[2] hoc ius tribuitur per legem Papiam, quod habet ex edicto patronus contra tabulas liberti.

53. Eadem lex patronae filio liberis honorato *fere*[3] patroni iura
V p. 140 dedit; sed in huius persona etiam unius / filii filiaeue ius sufficit.

54. Hactenus omnia iura quasi per indicem tetigisse satis est. alioquin diligentior interpretatio propriis commentariis exposita est.

55. Sequitur ut de bonis Latinorum libertinorum dispiciamus. **56.** Quae pars iuris ut manifestior fiat, admonendi sumus, id quod alio loco diximus, eos qui nunc Latini Iuniani dicuntur olim ex iure Quiritium seruos fuisse, sed auxilio praetoris in libertatis form*a* seruari solitos; unde etiam res eorum peculii iure ad patronos pertinere solita est; postea uero per legem Iuniam eos omnes quos praetor in libertat*e* tuebatur liberos esse coepisse et appellatos esse Latinos Iunianos: Latinos ideo, quia lex eos liberos perinde esse uoluit atque si essent ciues Romani ingenui[4] qui, ex urbe Roma in

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[1] Abbreviation muddled.
[2] So V. *est* Krüger.
[3] So Krüger. *cre* (?) V.
[4] *si essent—ingenui* gloss according to Mommsen.

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§ 51. *sicut supra*: G. 1, 104, &c. *legitimo iure*, &c.: G. 1, 158; 3, 21, &c. § 52. Cf. G. 3, 47. § 54. *propriis commentariis*: G. 3, 33. § 55. Cf. G. 3, 39. § 56. Cf. G. 1, 22. Dosith. 5. 6. Inst. 3, 7, 4.

for *bonorum possessio* against the will of an ungrateful freedman or, if the freedman died intestate, for *bonorum possessio* against his adoptive son or his wife or daughter-in-law (in *manus*), in respect of half the estate. **50.** But the *L. Papia* has given to a patroness enjoying, if free-born, the privilege of two children, and, if a freedwoman, that of three, pretty well the same rights as patrons possess under the praetor's Edict, while to a free-born patroness enjoying the privilege of three children it has given the rights that it bestows on a patron; to a freedwoman patroness, however, it has not given the same rights. **51.** But in respect of the estates of freedwomen who die intestate the *L. Papia* gives a patroness enjoying the privilege of children no new rights. Hence, if neither the patroness nor the freedwoman has undergone *capitis deminutio*, the inheritance goes to the patroness under the law of the Twelve Tables, and the freedwoman's children are excluded. This rule applies even where the patroness is not privileged by reason of children; for, as observed above, females cannot have a *suus heres*. But if *capitis deminutio* of either patroness or freedwoman has occurred, the freedwoman's children in their turn exclude the patroness, because, the patroness's statutory right having been destroyed by the *capitis deminutio*, the result is that the freedwoman's children are preferred in right of cognation. **52.** On the other hand, where a freedwoman dies testate, a patroness, if not privileged by reason of children, has no right against the freedwoman's will; but if so privileged, she is accorded by the *L. Papia* the same right as under the Edict a patron enjoys against his freedman's will.

53. To a patroness's son privileged by reason of children the same *lex* has given pretty well the rights of a patron; but in his case privilege by reason of a single son or daughter suffices.

54. It is enough to have carried our summary account of the various rights (over the estates of citizen freedmen and freedwomen) thus far; a more detailed exposition has been given in a special work.

55. We proceed to consider the estates of (Junian) Latin freedmen. **56.** In order to make this branch of the law clearer we must call to mind that, as we have said elsewhere, those who are now termed Junian Latins were in earlier times slaves by Quiritary law, but that they were maintained in apparent freedom by the praetor's intervention; and therefore their property used to go to their patrons by title of *peculium*; but that later, owing to the *L. Iunia*, all who used to be protected in a state of freedom by the praetor came to be free and to be styled Junian Latins: Latins because the law made them as free as if they were free-born Roman citizens who,

Latinas colonias deducti, Latini coloniarii esse coeperunt; Iunianos ideo, quia per legem Iuniam liberi facti sunt, etiamsi non essent ciues Romani.[1] legis itaque Iuniae lator, cum intellegeret futurum ut ea fictione res Latinorum defunctorum ad patronos pertinere desinerent, quia scilicet neque ut serui decederent, ut possent iure
V p. 141 peculii res eorum ad patronos pertinere, neque ⟨*ut*⟩ / liberti, [Latini hominis] ⟨*ut*⟩ bon*a* possent[2] manumissionis iure ad patronos pertinere, necessarium existimauit, ne beneficium istis datum in iniuriam patronorum conuerteretur, cauere [uoluit], ut bona eorum proinde ad manumissores pertinerent ac si lex lata non esset. itaque iure quodammodo peculii bona Latinorum ad manumissores ea lege pertinent. **57.** Unde accidit ut longe differant ea iura quae in bonis Latinorum ex lege Iunia constituta sunt ab his quae in hereditat*e* ciuium Romanorum libertorum obseruantur. **58.** Nam ciuis Romani liberti hereditas ad extraneos heredes patroni nullo modo pertinet, ad filium autem patroni nepotesque ex filio et pronepotes ex nepote ⟨*filio nato*⟩ prognatos omni modo pertinet, etiamsi ⟨*a*⟩ parente fuerint exheredati. Latinorum autem bona tamquam peculia seruorum etiam ad extraneos heredes pertinent, et ad liberos manu*missoris* exheredatos non pertinent. **59.** Item *ciuis Romani liberti* hereditas ad duos pluresue patronos aequaliter pertinet, licet dispar in eo seruo dominium habuerint, bona uero Latinorum pro ea parte pertinent, pro qua parte quisque eorum dominus fueri*t*. **60.** Item, in hereditate ciuis Romani liberti patronus alterius patroni filium excludi*t*, et filius patroni
V p. 142 alterius patroni nepotem repellit; bona autem La/tinorum et ad ipsum patronum[3] et ad *a*lterius patroni heredem simul pertinent, pro qua parte ad ipsum manumissorem pertinerent. **61.** Item, si unius patroni tres forte liberi sunt et alterius unus, hereditas ciuis Romani liberti in capita diuiditur, id est tres fratres tres portiones ferunt et unus quarta*m*; bona uero Latinorum pro ea parte ad successores pertinent, pro qua parte ad ipsum manumissorem pertinerent. **62.** Item, si alter ex his patronis suam

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[1] *etiamsi non—Romani* gloss according to Mommsen.

[2] *neque / liberti Latini hominis* $\overline{bp}$ *possent* V. Confusion of *bp* = *bonorum possessio* with $\bar{b}$ (*bona*) *p'sent* (possent). The first *ut* inserted is Buckland's suggestion, the second, in consequence, Kübler's, who also excludes *Latini hominis* as gloss. Cf. Buckland, NRH 1935, 293; Kübler, SZ 1936, 262; Solazzi, Stud. et Doc. 1937, 145.

[3] *et ad ipsum patronum* gloss according to Mommsen.

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§ 58. Cf. G. 3, 45. 48. 64; 2, 155. 195 fin. § 59. Cf. G. 3, 61. 62. §§ 60–1. Cf. Inst. 3, 7, 3. § 62. Cf. G. 2, 150. 189.

by migrating from the city of Rome to Latin colonies, had become colonial Latins, Junian because it was by the *L. Iunia* that they were made free, though not Roman citizens. Now the author of the *L. Iunia*, realizing that as the result of this fiction the estates of deceased Latins would no longer go to their patrons, because of course they would die neither as slaves, whose property would go to their patrons as *peculium*, nor as (citizen) freedmen, whose estates would go to their patrons by right of manumission—(the author of the *L. Iunia*) deemed it necessary, in order to prevent the benefit given to them from being turned to the injury of their patrons, to provide that their estates should go to their manumitters just as if the *lex* had not been passed. Hence under the *lex* the estates of Latins go to their manumitters as it were by right of *peculium*. **57.** The consequence is that the rights created by the *L. Iunia* over the estates of Latins differ widely from those holding good where the inheritances of citizen freedmen are concerned. **58.** For the inheritance of a citizen freedman goes in no case to his patron's extraneous heirs, but always to his patron's son, grandsons by a son, or great-grandsons by a grandson by a son, even though these have been disinherited by their ancestor; whereas the estate of a Latin goes, like a slave's *peculium*, to the heirs, even if extraneous, and not to the disinherited children of his manumitter. **59.** Again, the inheritance of a citizen freedman goes to two or more patrons in equal shares, even though they owned him, when a slave, in unequal shares; whereas the estate of a Latin goes to several patrons in proportion to their former shares as his owners. **60.** Again, in the inheritance of a citizen freedman a patron shuts out the son of a second patron, and the son of a patron the grandson of a second patron; whereas the estates of Latins go to both a patron and the heir of a second (deceased) patron jointly, the latter taking the share that would have gone to the manumitter (whom he represents) himself. **61.** Again, if there are, say, three children of one patron and one of a second, the inheritance of a citizen freedman is divided by the number of persons concerned, that is, the three brothers take three shares and the only child a fourth; whereas the estate of a Latin goes to the successors of a manumitter in the same proportion as that in which it would have gone to the manumitter himself. **62.** Again, if one of two patrons rejects

partem in hereditate ciuis Romani liberti spernat, uel ante moriatur quam cernat, tota hereditas ad alterum pertinet; bona autem Latini pro parte de*ficie*ntis[1] patroni caduca fiunt et ad populum pertinent.

63. Postea, Lupo et Largo consulibus, senatus censuit ut bona Latinorum primum ad eum pertinerent qui eos liberasset; deinde ad liberos eorum non nominatim exheredatos, uti quisque proximus esset; tunc antiquo iure ad heredes eorum qui liberassent pertinerent. **64.** Quo senatusconsulto quidam ⟨*id*⟩ actum esse putant, ut in bonis Latinorum eodem iure utamur quo utimur in hereditate ciuium Romanorum libertinorum; i*d*que maxime Pegaso placuit. quae sententia aperte falsa est. nam ciuis Romani liberti
V p. 143 hereditas numquam ad extraneos patroni heredes / pertinet, bona autem Latinorum etiam[2] ex hoc ipso senatusconsulto, non obstantibus liberis manumissoris, etiam ad extraneos heredes pertine*n*t. item, in hereditate ciuis Romani liberti liberis manumissoris nulla exheredatio nocet, in bonis Latinorum nocere nominatim factam exheredationem ipso senatusconsulto significatur. **64a.** Uerius est ergo hoc solum eo senatusconsulto actum esse, ut manumissoris liberi qui nominatim exheredati non sint praeferantur extraneis heredibus. **65.** Itaque, emancipatus filius patroni praeteritus, quamuis contra tabulas testamenti parenti*s* sui bonorum possessionem non petierit, tam*en* extraneis heredibus in bonis Latinorum poti*or* habetur. **66.** Item, filia ceterique sui heredes, licet iure ciuili inter ceteros exheredati sint et ab omni hereditate patris sui summoueantur, tamen in bonis Latinorum, nisi nominatim a parente fuerint exhere*d*ati, potiores erunt extraneis heredibus. **67.** Item, ad liberos qui ab hereditate parentis se abstinuerunt n*ihi*lo m*inus*[3] *b*ona Latinorum pertinent; *nam hi quoque*[3] exheredati nullo modo dici possunt, non magis quam qui testamento silentio praeteriti sunt. **68.** Ex his omnibus satis illud apparet, si quis
V p. 144 Latinu*m* fecerit . . . / . . .[4] **69.** Item, illud quoque constare uidetur, si solos liberos ex disparibus partibus patron*us heredes instituerit*,

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[1] *decedentis* V. [2] [*etiam*] Krüger.

[3] So Krüger. Kübler slightly different. V illegible.

[4] The last line of V 143 and the first 21 lines of 144 are illegible except for a few phrases and letters.

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§ 63. Cf. Inst. 3, 7, 4. *Lupo et Largo coss.*: A.D. 42. *nominatim*: G. 2, 127. § 64. Cf. G. 3, 48. 58. *Pegaso*: temp. Uespasiani. § 65. *contra tabulas*: G. 2, 135. § 66. *inter ceteros*: G. 2, 128. § 67. *se abstinuerunt*: G. 2, 158.

his share in the inheritance of a citizen freedman, or dies before making *cretio*, the whole inheritance goes to the other patron; whereas the estate of a Latin, in respect of the share of a patron who fails to take, becomes caducous and goes to the people.

63. Later, in the consulship of Lupus and Largus, the senate decreed that the estates of Latins should devolve first on those who had freed them, next on their children, if not expressly disinherited, according to propinquity, and finally, under the old law, on the heirs of those who had freed them. **64.** In the opinion of some the intention of this senatusconsult was that we should apply to the estates of Latins the same rules as we apply to the inheritances of citizen freedmen. The chief exponent of this opinion was Pegasus. But it is clearly erroneous; for the inheritance of a citizen freedman never goes to his patron's extraneous heirs, whereas by this very senatusconsult the estates of Latins go, if no children of the manumitter stand in the way, even to extraneous heirs. Again, in respect of the inheritance of a citizen freedman the manumitter's children are never disabled by disinherison; whereas the terms of the senatusconsult are that in respect of the estates of Latins express disinherison does disable them. **64a.** It is therefore more correct to say that the sole intention of the senatusconsult is that children of the manumitter, if not expressly disinherited, should be preferred to extraneous heirs. **65.** Thus, where an emancipated son of the patron has (merely) been passed over (in his father's will), he is, even though he does not apply for *bonorum possessio contra tabulas* in respect of his father's estate, nevertheless preferred to extraneous heirs in succession to Latins. **66.** Again, a daughter and further *sui heredes*, though disinherited by a general clause and thus barred from the whole inheritance of their ancestor at civil law, will nevertheless, in regard to the estates of Latins, be preferred to extraneous heirs, except if they have been disinherited by name by their ancestor. **67.** Again, the estates of Latins belong to the manumitter's children notwithstanding that they have refrained from their ancestor's inheritance; for no more than those passed over without mention by the will can they be said to have been disinherited. **68.** From all this it is sufficiently clear that one who makes a Latin freedman. . . . **69.** Again, it further appears to be agreed that, if a patron institutes his children

V p. 145 *ex isdem partibus bona Latini, si patri heredes exis*/tant,[1] ad eos pertinere, quia nullo interueniente extraneo herede senatusconsulto locus non est. **70.** *Sed*[2] si cum liberis suis etiam extraneum heredem patronus reliquerit, *Ca*elius Sabinus ait tota bona pro uirilibus partibus ad liberos defuncti pertinere, quia, cum extrane*u*s here*s* interuenit, non habet lex Iunia locum, sed senatusconsultum. Iauolenus autem ait tantum eam partem ex senatusconsulto liberos patroni pro uirilibus partibus habituros esse, quam extranei heredes ante senatusconsultum lege Iunia habituri essent, reliquas uero partes pro hereditariis partibus ad eos pertinere. **71.** Item quaeritur an hoc senatusconsultum ad eos patroni liberos pertineat, qui ex filia nepteue procreantur, id est, ut nepos meus ex filia potior sit in bonis Latini mei quam extraneus heres. item, ⟨*an*⟩ ad maternos Latinos hoc senatusconsultum pertineat quaeritur, id est, ut in bonis Latini materni potior sit patronae filius quam heres extraneus matris. Cassio placuit utroque casu locum esse senatusconsulto. sed huius sententiam plerique improbant, quia senatus de his liberis [patronarum][3] nihil sentiat, qui aliam familiam sequerentur; idque ex eo appare*re*,[4] quod nominatim exheredatos summoueat; nam uidetur de his sentire qui exheredari a parente solent, si heredes non instituantur; neque autem matri filium filiamue,
V p. 146 neque auo / materno n*e*potem neptemue, si eum eamue heredem non instituat, exheredare necesse est, siue de iure ciuili quaeramus, siue de *e*dicto praetoris, quo praeteritis liberis contra tabulas testamenti bonorum possessio promittitur.

72. Aliquando tamen ciuis Romanus libertus tamquam Latinus moritur, uelut si Latinus saluo iure patroni ab imperatore ius Quiritium consecutus fuerit. nam, ut diuus Tr*a*ianus constituit, si Latinus inuito uel ignorante patrono ius Quiritium ab imperatore consecutus sit, [quibus casibus][5] dum uiuit iste libertus, ceteris ciuibus Romanis libertis similis est et iustos liberos procreat, moritur autem Latini iure, nec ei liberi eius herede*s*[6] esse possunt; et in hoc tantum habet testamenti factionem *u*t patronum heredem

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[1] So Krüger, tentatively. [2] *ei* V.
[3] So Krüger. *patronorum* Kübler.
[4] So Polenaar–Kübler. *adparet* V; if kept (Krüger), correct *summoueat* below to *summouet*. [5] Cf. 2, 144.
[6] One would expect: *ab intestato heredes*. Cf. Beseler, SZ 1933, 18.

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§ 70. *L. Iunia*: G. 3, 56, &c. *Caelius Sabinus*: temp. Uespasiani. *Iauolenus*: saec. i–ii. § 71. *Cassio*: saec. i med. *neque matri* = Inst. 2, 13, 7. Cf. G. 1, 104, &c. § 72. Cf. Inst. 3, 7, 4.

as sole heirs, but in unequal shares, the estate of a Latin belongs to them, if they qualify as heirs to their father, in the same shares, because, where no extraneous heir is present, the senatusconsult does not apply. **70.** But where a patron leaves an extraneous person heir along with his children, Caelius Sabinus says that the whole estate (of a deceased Latin) belongs to the children of the deceased in equal shares, because, when an extraneous heir is present, the senatusconsult, and not the *L. Iunia*, applies. But Iavolenus says that the patron's children will share equally under the senatusconsult only that fraction of the Latin's estate which the extraneous heirs would have had under the *L. Iunia*, before the senatusconsult, but that the rest of the estate belongs to them in proportion to their shares in their father's inheritance. **71.** It is also a question whether this senatusconsult applies to a patron's descendants through his daughter or granddaughter, so that my grandson by my daughter will be preferred to my extraneous heir in respect of the estate of my Latin freedman. And a further question is whether the senatusconsult applies to a mother's Latin, so that a patroness's son will be preferred to his mother's extraneous heir in respect of the estate of her Latin. Cassius held that the senatusconsult applied in both cases, but his opinion is generally rejected, on the ground that the senatusconsult does not contemplate the case of children belonging to another family, and this, it is argued, appears from the fact that it bars children expressly disinherited; for the children contemplated would appear to be those who, if not instituted, are customarily disinherited; but there is no need for either a mother to disinherit her son or daughter, or a maternal grandfather his grandson or granddaughter, when not instituting him or her as heir, whether the question be as to the civil law or as to the praetorian Edict, whereby *bonorum possessio contra tabulas* is offered to children simply passed over by a will.

72. Sometimes, however, a citizen freedman dies as a Latin, for instance where a Latin has been granted Roman citizenship by the emperor, with a saving of his patron's rights. For, as the late emperor Trajan laid down, a Latin who obtains Roman citizenship from the emperor against the will or without the knowledge of his patron resembles, so long as he lives, any other citizen freedman, and the children he begets are his by civil law, but he dies under the law of a Latin, and neither can his children be his heirs nor has he any power to make a will, except that he may do so by instituting his

instituat eique, si heres esse noluerit, alium substituere possit. **73.** Et quia hac constitutione uidebatur effectum, ut ne umquam isti homines tamquam ciues Romani morerentur, quamuis eo iure postea usi essent, quo uel ex lege *Aelia* Sentia uel ex senatusconsulto ciues Romani essent, diuus Hadrianus, iniquitate rei motus, auctor fuit senatusconsulti faciendi ut, qui ignorante uel recusante patrono ab imperatore ius Quiritium consecuti essent, si eo iure postea usi essent, quo ex lege Aelia Sentia uel ex senatusconsulto, si Latini mansissent, ciuitatem Romanam consequerentur, proinde ipsi haberentur ac si lege Aelia Sentia uel senatusconsulto ad ciuitatem Romanam peruenissent. /

V p. 147 **74.** Eorum autem, quos lex Aelia Sentia dediticiorum numero facit, bona modo quasi *ciuium Romanorum* libertorum, modo quasi Latinorum ad patronos pertinent. **75.** Nam eorum bona qui, si in aliquo uitio non essent, manumissi ciues Romani futuri essent, quasi ciuium Romanorum patronis eadem lege tribuuntur. non tamen hi[1] habent etiam testamenti factionem; nam id plerisque placuit, nec immerito; nam incredibile uidebatur pessimae condicionis hominibus uoluisse legis latorem testamenti faciendi ius concedere. **76.** Eorum uero bona qui, si non in aliquo uitio essent, manumissi futuri Latini essent, proinde tribuuntur patronis ac si Latini decessissent. nec me praeterit non satis in ea re legis latorem uoluntatem suam uerbis expressisse.

77. Uideamus autem et de ea successione quae nobis ex emptione bonorum competit. **78.** Bona autem ueneunt aut uiuorum aut mortuorum: uiuorum ueluti eorum qui fraudationis causa latitant nec absentes defenduntur;[2] item eorum qui ex lege Iulia bonis cedunt; item iudicatorum post tempus quod eis partim lege XII tabularum, partim edicto praetoris, ad expediendam pecuniam tribuitur. mortuorum bona ueneunt ueluti eorum quibus certum est neque heredes neque bonorum possessores neque ullum alium /

V p. 148 iustum successorem existere. **79.** Siquidem uiui bona ueneant, iubet ea praetor per dies continuos XXX possideri et proscribi, si

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[1] *ui* (?) V. *ut habeant* Polenaar.

[2] Two distinct edictal cases (Edictum 205. 206) are here telescoped. Kübler suggests: *latitant nec ⟨defenduntur; item eorum qui⟩ absentes ⟨non⟩ defenduntur.*

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§ 73. Cf. G. 1, 29 sq. 65 sq. § 74. Cf. G. 1, 13 sq. § 75. Cf. G. 1, 25–6. Ulp. 20, 14. § 76. Cf. G. 3, 56 sq. § 77. Cf. G. 2, 98. Inst. 3, 12 pr. § 78. Cf. Edictum §§ 202 sq. *iudicatorum*: XII Tabb. 3, 1 (Textes 13. Bruns 1, 20). G. 3, 199; 4, 21 sq. *mortuorum*: G. 2, 154. 158. § 79. Cf. Theoph. 3, 12 pr. (Ferrini 314). Val. Prob. 24 (Textes 217).

patron as his heir and substituting someone else for him in the event of his declining to be heir. **73.** And as it seemed to result from this constitution (Trajan's) that such persons could never die as Roman citizens, even though they had afterwards availed themselves of the procedure for becoming citizens under the *L. Aelia Sentia* or the senatusconsult, the late emperor Hadrian, moved by the injustice of the case, caused a senatusconsult to be passed, to the effect that persons who, having obtained Roman citizenship from the emperor without the knowledge or against the opposition of their patrons, afterwards availed themselves of the procedure whereby under the *L. Aelia Sentia* or the senatusconsult they would, had they remained Latins, have obtained Roman citizenship, should be treated exactly as if their citizenship had been obtained under the *L. Aelia Sentia* or the senatusconsult.

74. The estates of freedmen placed by the *L. Aelia Sentia* in the rank of *dediticii* go to their patrons in some cases as if they were those of citizen freedmen, in others as if they were those of Latins. **75.** For the estates of those who, had they not been in some disgrace, would by manumission have become Roman citizens, are by the same statute allotted to their patrons, as though they were the estates of citizen freedmen. Such persons, nevertheless, have no power to make a will, according to the well-grounded general opinion; for it seemed incredible that the legislator should have intended to concede the power of making a will to persons of the lowest status. **76.** On the other hand, the estates of those who, had they not been in some disgrace, would by manumission have become Latins, are allotted to their patrons exactly as though they had died Latins. I am not forgetting that the legislator has not expressed his intention on the point with sufficient particularity.

77. Let us further consider the succession that comes to us by *emptio bonorum* (purchase of an insolvent's estate). **78.** The owner of the estate sold may be living or dead. The estates of living persons are sold if they abscond with intent to defraud and are not defended in their absence, or if they give up their estates under the *L. Iulia*, or if they are judgment-debtors and the period allowed to them partly by the law of the Twelve Tables and partly by the praetor's edict for finding the money has expired. The estates of deceased persons are sold when it is established that they have left neither heirs nor *bonorum possessores* nor any other lawful successor. **79.** Where the estate that is being sold belongs to a living person, the praetor orders that it be held in possession and advertised for 30 successive days; where it is that of a deceased person, for 15

uero mortui, p*er* dies XV. postea iub*et* conuenire creditores et ex eo*rum*[1] numero magistrum creari, id est eum per quem bona ueneant. itaque, si uiui bona ueneant, in diebus ⟨*X bonorum*⟩ u*enditionem* fieri iubet, si mortui, in dimidio.[2] *die*bus ita*que*[3] uiui bona XXX*X*,[4] mortui uero XX, emptori addici iubet. quare autem tardius uiuentium bonorum uenditionem compler*i* iubet, illa ratio est, quia de uiuis curandum erat ne facile bonorum uenditiones paterentur. **80.** Neque autem bonorum possess*orum* neque *bonorum emptorum res* pleno iure fiunt, sed in bonis efficiunt*ur*. *ex iure* Quiritium autem ita demum adquiruntur, si us*u*ceper*u*nt. interdum quidem bonorum emptoribus n*e u*sus quidem capio contingit, ueluti si per eos . . . bonorum emptor . . .[5] **81.** Item, quae debi*ta sunt ei cuius fuerunt bona*,[6] aut ipse debuit, neque bonorum possessor ne*que* bono*r*um emptor ipso iure debe*t aut ipsis debentur*, *et ideo*[7] de omnibus rebus u*tilibus actionibus et agunt et conueniuntur*, *quas*[7] *in* sequenti commentario proponemus. /

V p. 149 **82.** Sunt autem etiam alterius generis successiones, quae neque lege XII tabularum neque praetoris edicto, sed eo iure ⟨*quod*⟩[8] cons*e*nsu receptum est, introductae sunt. **83.** Eteni*m*, cum pater familias se in adoptionem de*dit* mulier*ue* in manum conuenit, omnes eius res incorporales et corporales, quaeque ei debitae sunt, patri adoptiuo coemptionatoriue adquiruntur, exceptis his quae per capitis deminutionem pereunt, quales sunt ususfructus, operarum obligatio *libertorum* quae per iusiurandum contracta est, et *lites contestatae*[9] legitimo iudicio. **84.** Ex diuerso, quod is debu*it qui se in* adoptionem dedit quae*ue* in manu*m* conue*nit*, *non* transit ad coemptionatorem aut ad patrem adoptiuum, nisi si hereditarium aes alienum f*uerit; de eo*[10] enim, quia ipse pater adoptiuus aut coemptionator heres fit, directo tenetur iure; i*s uero qui* se adoptandum dedit quae*ue* in manum conuenit, desinit esse here*s*; de eo

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[1] *eo* V. *eorum* Berger, according to Kübler.

[2] So Krüger. *itaque, si uiui bona ueneant, in diebus u fieri iubet, si mortui, in dimidio* V. Mommsen: *idque, si uiui bona ueneant, in diebus ⟨x, si mortui, in diebus⟩ v fieri iubet.* [*si mortui, in dimidio.*] Huschke–Kübler: *itaque, si uiui bona ueneant, in diebus ⟨x legem bonorum⟩ u⟨endundorum⟩ fieri iubet, si mortui, in dimidio.* Cf. Theoph. 3, 12 pr. (Ferrini 314.)

[3] . . . *bus ita* . . . V. [4] *xxx* V.

[5] The rest of the line before *bonorum emptor* and some two lines following are virtually illegible. The matter discussed is not known.

[6] So Lachmann–Kübler. [7] So Huschke–Kübler.

[8] *quod* Inst. 3, 10 pr. *quod tacito* Kübler.

[9] So Krüger. *lites quae aguntur* Beseler, SZ 1934, 1; cf. Apogr. n. ad v. 10.

[10] So Kübler. *tunc* Krüger.

days. After that he orders the creditors to meet and appoint one of their number as manager, that is as the one to carry out the sale. And so, if the estate that is being sold is that of a living person, he orders this to be done in 10 (?) days, if that of a deceased person, in half that time. Thus he requires adjudgment of the estate to the buyer to take place in the case of a living person in 40 (?) days, in that of a deceased person in 20. The reason why he requires sales of estates of living persons to be completed more slowly is that in their case special care was necessary to save them from inconsiderate sales of their estates. **80.** Full ownership is not acquired by either *bonorum possessores* or *bonorum emptores*, but only bonitary. Quiritary ownership is acquired by them only if they have completed usucapion. Sometimes, however, not even usucapion is open to a *bonorum emptor*, for example if. . . . **81.** Also, debts owed to or by the former owner of the estate are not owed to or by the *bonorum possessor* or *bonorum emptor* at civil law, and therefore on all claims they sue and are sued by *actiones utiles*, which we shall describe in our next book.

82. There are also successions of another kind, brought in neither by the law of the Twelve Tables nor by the praetor's Edict, but by the law received by general consent. **83.** For when a man *sui iuris* has given himself in adoption, or a woman (*sui iuris*) has entered *manus*, all his or her assets, incorporeal as well as corporeal, and debts due to him or her, are acquired by the adoptive father or *coemptionator*, except rights that are destroyed by *capitis deminutio*, such as a usufruct, a freedman's obligation of services contracted by means of an oath, and issues joined in a *iudicium legitimum* (statutory suit). **84.** Contrariwise, what the man who has given himself in adoption, or the woman who has entered *manus*, owed does not become the debt of the *coemptionator* or adoptive father, except if the debt be hereditary; in that case the adoptive father or *coemptionator* is directly liable, because he becomes heir himself, whilst the person who has given himself in adoption or entered

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§§ 80–1. Cf. G. 4, 34. 35. 65 sq. 144. 145. § 82. = Inst. 3, 10 pr. § 83. = Inst. 3, 10, 1. Cf. G. 4, 80. Inst. 3, 10, 2. *res incorporales*: G. 2, 12 sq. *operarum obligatio*: G. 3, 96. *legitimo iudicio*: G. 3, 181; 4, 103–9. § 84. Cf. Inst. 3, 10, 3. G. 4, 38. 80. Edictum § 42.

uero quod proprio nomine ea*e* personae debuerint, licet neque pater adoptiuus teneatur neque coemptionator, *et ne* ipse quidem qui se *in ad*optionem ded*it uel ipsa*[1] quae in manum conuenit maneat obligatus obligata*ue*, quia sc*ilicet* per capitis deminutionem
V p. 150 liberetur, tamen in eum eamue utilis actio datur, rescissa / capitis deminutione; et si aduersus hanc actionem non defenda*n*tur, quae bona eorum futura fuissent si se alieno iuri non subiecissent, uniuersa uendere creditoribus praetor permitti*t*.

85.[2] *Item, si* legitimam h*ereditatem heres, antequam cer*nat aut pro herede gerat, alii in iure cedat, pleno iure fit ille heres cui cessa est hereditas, *proinde ac si ipse per* legem ad hereditatem uocaretur. quodsi posteaquam heres extiterit cesserit, adhuc heres manet, et ob id [a][3] creditoribus ipse tenebitur; sed res corporales transferet proinde ac si singulas in iure cessisset; debita uero pereunt, eoque modo debitores hereditarii lucrum faciunt. **86.** Idem iuris est si testamento scriptus heres, posteaquam heres extiterit, in iure cesserit hereditatem; ante aditam uero hereditatem cedendo nihil agit. **87.** Su*us* autem et necessarius heres an aliquid aga*nt*[4] in iure cedendo, quaeritur. nostri praeceptores nihil eos agere existimant; diuersae scholae auctores idem eos agere putant quod ceteri post adi*t*am hereditatem; nihil enim interest utrum aliquis cernendo aut pro herede gerendo heres fiat, an iuris necessitate hereditati adstringatur. /

V p. 151 **88.** *Nunc transeamus*[5] ad obligationes. quarum summa diuisio in duas species diducitur: omnis enim obligatio uel ex contractu nascitur uel ex delicto.

89. Et prius uideamus de his quae ex contractu nascuntur. harum autem quattuor genera sunt: aut enim re ⟨*con*⟩trahitur obligatio aut uerbis aut litteris aut consensu.

90. Re contrahitur obligatio uelut mutui datione. ⟨*mutui autem datio*⟩[6] proprie in his fere[7] rebus contingit quae pondere numero mensura const*ant*, qualis est pecunia numerata, uinum,

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[1] So Kübler. *quaeue* Krüger.

[2] Prceded by vacant line showing traces of red. What has disappeared from the text seems also to have been written in red. The restorations are pacific.

[3] Cf. 2, 35. [4] *agat* V.

[5] Inst. 3, 13 pr. The words now missing in V were doubtless written in red, as also the rubric in the preceding vacant line.

[6] Cf. Inst. 3, 14 pr. D. 44, 7, 1, 2. [7] *fere*: om. Inst. Gloss?

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§§ 85–7. Cf. G. 2, 35–7. § 87. Cf. G. 2, 153. 156. 166. 167. § 88. Cf. Inst. 3, 13. Gaius D. 44, 7, 1 pr. § 89. = Inst. 3, 13, 2 fin. Cf. Gaius D. 44, 7, 1, 1. § 90. Cf. Inst. 3, 14 pr. Gaius D. 44, 7, 1, 2.

manus ceases to be heir. But for debts owed by such persons on their own account, though neither the adoptive father nor the *coemptionator* is liable, and though even the person himself in adoption or entered *manus* no longer remains liable, because freed by the *capitis deminutio*, still a *utilis actio*, in which the *capitis deminutio* is set aside, is given against him or her, and if they are not defended against this action, the praetor permits the creditors to sell the whole of the property that would have been theirs, had they not subjected themselves to another's power.

85. Again, if an heir, before making *cretio* or behaving as heir, surrenders *in iure* to another person an inheritance coming to him by statute, the surrenderee becomes heir in full right precisely as if he were himself called to the inheritance by the statute. If, however, the heir surrenders after qualifying as heir, heir he remains, and consequently it is he that will be liable to the deceased's creditors; but he will transfer the corporeal things (in the inheritance) just as though he had surrendered them *in iure* one by one, while the debts due (to the inheritance) are destroyed, and in this manner the debtors of the inheritance are gainers. **86.** The law is the same where a testamentary heir surrenders *in iure* the inheritance after he has qualified as heir, but his surrender of the inheritance before entering upon it is void. **87.** It is a question whether surrender *in iure* by a *suus heres* or by a *necessarius heres* has any effect. Our teachers think it has none; the authorities of the other school think it has the same effect as surrender made by other heirs after they have entered on the inheritance; for it makes no difference whether one becomes heir by *cretio* or behaving as heir, or is bound to the inheritance by legal necessity.

88. Let us now proceed to obligations. These are divided into two main species: for every obligation arises either from contract or from delict.

89. First let us consider those that arise from contract. Of such there are four *genera*: for an obligation by contract arises either *re* (by delivery of a *res*: real contract), by words (verbal contract), by writing (literal contract), or by consent (consensual contract).

90. A real obligation is contracted, for instance, by conveyance on loan for consumption. Such a contract takes place properly in the case of things that are reckoned by weight, number, or measure

oleum, frumentum, aes, argentum, aurum. quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non e*ae*dem, sed alia*e* eiusdem naturae reddantur. unde etiam mutuum appellatum est, quia quod ita *ti*bi a me datum est, ex meo tu*um* fit.[1] **91.** Is quoque qui non debitum accepit ab eo qui per errorem soluit, re obligatur. nam proinde ei condici potest: SI PARET EUM DARE OPORTERE, ac si mutuum accepisset. unde quidam putant pupillum aut mulierem, cui sine *tutoris auctoritate* non debitum per errorem datum est, non teneri condictione, non magis quam mutui datione. sed haec species obligationis non uidetur ex contractu consistere, quia is qui soluendi animo dat magis distrahere uult negotium quam contrahere.

V p. 152 **92.** Uerbis / obligatio fit ex interrogatione *et* r*e*sponsione, ueluti: DARI SPONDES? SPONDEO, DABIS? DABO, PROMITTIS? PROMITTO, FIDEPROMITTIS? FIDEPROMITTO, FIDEIUBES? FIDEIUBEO, FACIES? FACIAM. **93.** Sed haec quidem uerborum obligatio, DARI SPONDES? SPONDEO, propria ciuium Romanorum est; ceterae uero iuris gentium sunt, itaque inter omnes homines, siue ciues Romanos siue peregrinos, ualent. et quamuis ad *Graec*am uocem expressae fuerint, ueluti hoc modo: ⟨*Δώσεις; Δώσω· Ὁμολογεῖς; Ὁμολογῶ· Πίστει κελεύεις; Πίστει κελεύω· Ποιήσεις; Ποιήσω*⟩,[2] etiam hae[3] tamen inter ciues Romanos ualent [tamen], si modo Graeci sermonis intellect*u*m habeant. et e contrario, quamuis Latine enuntientur, tamen etiam inter peregrinos ualent, si modo Latini sermonis intellectum habean*t*. at illa uerborum obligatio, DARI SPONDES? SPONDEO, adeo propria ciuium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit, quamuis dicatur a Graeca uoce figurata esse. **94.** Unde dicitur uno casu hoc uerbo peregrinum quoque obligari posse, ueluti si imperator noster principem alicuius peregrini populi de

[1] *fiat* V. Inst.: *quia ita a me tibi datur ut ex meo tuum fiat. ex eo contractu nascitur actio quae uocatur condictio.* Cf. Theoph. ibid. An omission by V? (Huschke).

[2] About ¼ line left vacant in V. Supplied from Theoph. 3, 15, 1 (Ferrini 322). [3] So Kübler. [*etiam haec*] Krüger.

§ 90 *accipientium fiant*: G. 2, 81. § 91. = Inst. 3, 41, 1. Cf. 3, 27, 6. G. 4, 4. 5. 41. *sine tutoris auctoritate*: G. 3, 107. 108. § 92. Cf. Inst. 3, 15 pr. 1. Gaius D. 44, 7, 1, 7; Mod. 52, 2. Paul 5, 7, 1. Isid. Etym. 5, 24, 30 (Bruns 2, 81). § 93. Cf. G. 4, 17a. *propria ciuium Romanorum*: G. 1, 1, &c.; 3, 119. 179 fin. Gell. 4, 4. Inst. 3, 15, 1. C. 8, 37 (38), 10 (A.D. 472). § 94. Cf. Liu. 9, 5, 8. 11, &c.

—such things as money, wine, oil, corn, bronze, silver, gold. We convey these things by counting, measuring, or weighing them out, to the end that they should become the property of the recipients, and that at some future time there should be restored to us not the identical things, but others of the same kind. Hence the term *mutuum*, because what is conveyed in this manner by me to you becomes *ex meo tuum* (from being mine yours). **91.** He too who receives what is not due to him from one who pays in error comes under a real obligation. For the *condictio* with the pleading 'if it appear that the defendant is bound to convey' lies against him precisely as if he had received the payment by way of loan. Hence some hold that a ward or a woman, to whom without their tutor's *auctoritas* payment of what is not due has been made in error, is not liable under the *condictio* any more than under a loan for consumption. This sort of obligation, however, appears not to be founded on contract, because one who gives with intent to pay means to untie rather than to tie a bond.

92. A verbal obligation is created by question and answer in such forms as: 'Do you solemnly promise conveyance? I solemnly promise conveyance'; 'Will you convey? I will convey'; 'Do you promise? I promise'; 'Do you promise on your honour? I promise on my honour'; 'Do you guarantee on your honour? I guarantee on my honour'; 'Will you do? I will do.' **93.** Now the verbal obligation in the form *dari spondes? spondeo* is peculiar to Roman citizens; but the other forms belong to the *ius gentium* and are consequently valid between all men, whether Roman citizens or peregrines. And even though expressed in Greek, in such words as *Δώσεις; Δώσω· Ὁμολογεῖς; Ὁμολογῶ· Πίστει κελεύεις; Πίστει κελεύω· Ποιήσεις; Ποιήσω*, they are still valid between Roman citizens, provided they understand Greek. Conversely, though expressed in Latin, they are still valid even between peregrines, provided they understand Latin. But the verbal obligation *dari spondes? spondeo* is so far peculiar to Roman citizens that it cannot properly be put into Greek, although the word *spondeo* is said to be derived from a Greek word. **94.** Hence we are told that there is one case only in which a peregrine can incur obligation by using this word, namely where our emperor puts to the ruler of a peregrine

pace ita interroget: PACEM FUTURAM SPONDES? uel ipse eodem modo interrogetur. quod nimium subtiliter dictum est, quia, si quid aduersus pactionem fiat, non ex stipulatu agitur, sed iure belli res
V p. 153 uindicatur. **95.** Illud dubitari potest, si quis / . . .[1] **95a.** *Sunt et* aliae obligationes . . .[2] si debitor mulieris iussu eius dum . . .[3] doti dicat quod debet. alius autem obligari *hoc* modo non potest. et ideo, si quis alius *pro muliere dotem promittere uelit, com*muni iure obligare *se debet, id est stipulanti uiro promittere.*[4] **96.** Item uno loquente *et sine interrogatione alii promittente contrahitur obligatio, si libertus patrono aut donum aut munus aut operas se daturum esse iurauit,*[5] etsi haec sola causa *est* ex qua iureiurando contrahitur
V p. 154 obligatio. sane ex alia nulla causa iureiurando homines / obligantur, utique cum quaeritur de iure Romanorum. nam apud peregrinos quid iuris sit, singularum ciuitatium iura requirentes aliud intellegere poterimus *in aliis ualere.*[6]

97. Si id quod dari stipulamur tale sit ut dari non possit, inutilis est stipulatio, uelut si quis hominem liberum quem seruum esse credebat, aut mortuum quem uiuum esse credebat, aut locum sacrum uel religiosum quem putabat humani iuris esse, dari ⟨*stipuletur.* **97a.** *Item, si quis rem quae in rerum natura esse non potest, uelut hippocentaurum,*⟩[7] stipuletur, aeque inutilis est stipulatio. **98.** Item, si quis sub ea condicione stipuletur quae existere non potest, ueluti si digito caelum tetigerit, inutilis est stipulatio. sed legatum sub impossibili condicione relictum nostri

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[1] The first 1½ lines of V 153 are illegible. The doubt discussed may have been as to difference in the language of question and answer, or as to the admissibility of other tongues than Latin and Greek. Cf. Ulp. D. 45, 1, 1, 6. Theoph. 3, 15, 1.

[2] Some 11 almost entirely illegible lines. Epit. 2, 9, 3: *Sunt et aliae obligationes quae nulla praecedente interrogatione contrahi possunt, id est ut si mulier, siue sponso uxor futura, siue iam marito, dotem dicat. quod tam de mobilibus rebus quam de fundis fieri potest. et non solum in hac obligatione ipsa mulier obligatur, sed et pater eius et debitor ipsius mulieris, si pecuniam quam illi debebat sponso creditricis ipse debitor in dotem dixerit. hae tantum tres personae nulla interrogatione praecedente possunt dictione dotis legitime obligari. aliae uero personae, si pro muliere dotem uiro promiserint, communi iure obligari debent, id est, ut et interrogata respondeant et stipulata promittant.* Cf. Ulp. 6, 1. 2.

[3] *dummodo tutore auctore eidem* (conj. Huschke) would about fit the illegible space.

[4] Krüger's conjecture. Cf. Epit. 2, 9, 3 fin. (n. 4).

[5] Huschke's conjecture. Cf. Epit. 2, 9, 4: *Item et alio casu uno loquente et sine interrogatione alii promittente contrahitur obligatio, id est, si libertus patrono aut donum aut munus aut operas se daturum esse iurauit. in qua re supradicti liberti non tam uerborum solemnitate quam iurisiurandi religione tenentur. sed nulla altera persona hoc ordine obligari potest.*

[6] Krüger's conjecture.

[7] Generally supplied from Inst. 3, 19, 1.

people the question of peace in this wise: 'do you solemnly promise that there shall be peace?' or our emperor in turn is interrogated in the same form. But this statement is over-ingenious; for if the treaty is broken, there is no action on the stipulation, but recourse is had to the law of war. **95.** A point on which doubt may arise is . . . **95a.** There are also other cases in which obligations [can be contracted by words spoken without any previous interrogation, as where a woman constitutes a dowry by declaration to her betrothed or to her wedded husband, as can be done whether the property is movable or immovable. And by this form not only can the women herself incur obligation, but also her father; and so can] her debtor, by declaring as dowry, with her authority, what he owes to her. But no other person than these can incur obligation in this form. If therefore another person desires to promise dowry on behalf of a woman, he must engage himself in the ordinary form, that is he must make the promise in answer to a stipulatory question by the husband. **96.** Another case in which a binding contract is formed by the spoken promise of one party without a previous question from the other is where a freedman has taken an oath to make his patron some gift or render him some observance or services. This is the one case of obligation being contracted by oath; in Roman law at least we find no other. As to peregrine law, an examination of the systems of the various States will teach us that the rule varies from place to place.

97. If the thing for conveyance of which we stipulate is one that cannot be conveyed, our stipulation is void, for instance if one were to stipulate for conveyance of a free man whom one believed to be a slave, or of a dead slave whom one believed to be alive, or of sacred or religious land which one thought to be subject to human law. **97a.** Again, if one stipulates for a thing which cannot exist at all, such as a hippocentaur, the stipulation is likewise void. **98.** Again, if one stipulates subject to a condition which cannot happen, for instance on condition that one touches the sky with one's finger, the stipulation is void. Yet a legacy left subject to an

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§ 95a. Cf. Epit. 2, 9, 3. Ulp. 6, 1. C. 5, 11, 6 (A.D. 428). § 96. Cf. Epit. 2, 9, 4. *operae*: G. 3, 83. §§ 97–97a. Cf. Inst. 3, 19 pr.–2. § 98. Cf. Inst. 3, 19, 11. *sed legatum*: Inst. 2, 14, 10.

praeceptores proinde deberi putant ac si sine condicione relictum esset; diuers*ae* scholae auctores n*ihil*o minus legatum inutile existimant quam stipulationem. et sane uix idonea diuersitatis ratio reddi potest. **99.** Praeterea, inutilis est stipulatio, si quis ignorans rem sua*m* esse dari sibi eam stipuletur; quip*pe* quod alicuius est, id ei dari non potest. **100.** Denique, inutilis est talis stipulatio, si quis ita dari stipuletur: POST MORTEM MEAM DARI SPONDES? uel ita: ⟨*POST MORTEM TUAM DARI SPONDES? ualet autem, si quis ita dari stipuletur: CUM MORIAR DARI SPONDES? uel ita:*⟩[1]
V p. 155 CUM MORIERIS DARI / SPONDES? id est, ut in nouissimum uitae tempus stipulatoris aut promissoris obligatio conferatur. nam inelegans esse uisum est ab heredis persona incipere obligationem. rursum, ita stipulari non possumus: PRIDIE QUAM MORIAR aut PRIDIE QUAM MORIERIS DARI SPONDES? quia non potest aliter intellegi 'pridie quam aliquis morietur' quam si mors secuta sit; rursus, morte secuta, in praeteritum reducitur stipulatio, et quodammodo talis est: HEREDI MEO DARI SPONDES? quae sane inutilis est. **101.** Quaecumque de morte diximus, eadem et de capitis deminutione dicta intelleg*e*mus. **102.** Adhuc inutilis est stipulatio, si quis ad id quod interrogatus erit non responderit, ueluti si sestertia X a te dari stipuler et tu *s*estertia *V*[2] promittas, aut si ego pu*r*e stipuler, tu sub condicione p*r*omittas. **103.** Praeterea, inutilis est stipulatio, si ei dari stipulemur cuius iu*r*i subiecti non sumus. unde illud quaesitum est, si quis sibi et ei cuius iuri subiectus non est dari stipuletur, in quantum ualeat stipulatio. nostri praeceptor*es* putant in uniuersum ualere, et proinde ei soli
V p. 156 qui stipulatus sit solidum deberi atque si extranei nomen non adiecisset. sed diuersae scholae auctor*es* / dimidium ei deberi existimant, pro altera uero parte inutile*m* esse stipulationem. **103a.** Alia causa est *si ita stipulatus sim: MIHI AUT TITIO* DARI SPONDES? *quo casu constat mihi* solidum deberi et me sol*um ex ea stipulatione agere posse, quamquam* etiam Titio *soluendo liberaris.*[3] **104.** *Praeter*ea, inutilis est stipulatio, si ab eo stipuler qui iuri meo subiectus est, item si is a me stipuletur. seruus[4] quidem et

[1] Supplied by Huschke and generally accepted.
[2] So Krüger. Cf. Apogr. xxx, n.g.; 285 line 5.
[3] Krüger's excellent restoration. Cf. Inst. 3, 19, 4. [4] ⟨*sed*⟩ *seruus* Krüger.

§ 99. Cf. G. 4, 4. Inst. 3, 19, 2. 22. § 100. Cf. Inst. 3, 19, 13. 15. G. 2, 232. 277; 3, 117. 119. 158. 176. § 101. Cf. G. 3, 153, &c. § 102. = Inst. 3, 19, 5. Cf. Ulp. D. 45, 1, 1, 3. 4. § 103. Cf. Inst. 3, 19, 4. 19. 20. G. 2, 86. 95; 3, 114. 163. § 104. Cf. Inst. 3, 19, 6. G. 2, 244–5.

impossible condition is held by our teachers to be due precisely as though it had been left unconditionally, whereas the authorities of the other school consider a legacy to be as void as a stipulation in such a case. One must admit that it is not easy to give a satisfactory ground for distinguishing. **99.** Further, a stipulation is void in which a man, not knowing that a thing belongs to him, stipulates for its conveyance to himself, obviously because what belongs to a man cannot be conveyed to him. **100.** Then again, a stipulation is void in which a man stipulates for conveyance thus: 'Do you solemnly promise conveyance after my death?' or 'after your death?'. Yet it is valid in the form 'when I am dying' or 'when you are dying', so that the obligation is made to begin at the last moment of the stipulator's or the promisor's life; for it was felt to be against principle that an obligation should start from the heir. But again, we cannot stipulate thus: 'Do you solemnly promise conveyance on the day before I die?' or 'on the day before you die?', because the day before a death cannot be known till the death has taken place, but when that has happened, the obligation is carried back into the past and is something like a stipulation: 'Do you solemnly promise conveyance to my heir?', which is of course void. **101.** Everything we have said about death must be taken to apply also to *capitis deminutio*. **102.** The stipulation is also void if the promisor does not answer the question put to him, for example, if I stipulate for 10,000 sesterces and you promise 5,000, or if I stipulate unconditionally and you promise conditionally. **103.** Further, if we stipulate for conveyance to a person to whose power we are not subject, the stipulation is void. Hence a question has arisen how far a stipulation for conveyance to oneself and to one to whose power one is not subject is valid. Our teachers hold it to be completely valid, and that the whole of what is promised is due to him alone who put the stipulation, just as if he had not added the stranger's name. But the authorities of the other school consider that half is due to the stipulator, but that the stipulation is void as to the other half. **103a.** The case is different if I stipulate thus: 'Do you solemnly promise conveyance to me or Titius?' Here it is agreed that the whole is due to me and that I alone can sue on the stipulation, though you are discharged if you pay Titius. **104.** Further, the stipulation is void if I stipulate from one who is subject to my

qui in mancipio est et *filia familia*s et quae in manu est non solum ipsi cuius iuri subiecti subiectaeue sunt obligari non possunt, sed ne alii quidem ulli. **105.** Mutum neque stipulari neque promittere posse palam est. idem etiam in surdo receptum est, quia et is qui stipulatur uerba promittentis, et qui promittit uerba stipulantis exaudire debet. **106.** Furiosus nullum negotium gere*re* potest, quia non intellegit quid agat. **107.** Pupillus omne negotium recte gerit, ita tamen ut, [tamen][1] sicubi tutoris auctoritas necessaria sit, adhibeatur,[2] ueluti si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest. **108.** Idem iuris est in feminis quae in tutela sunt. **109.** Sed quod diximus de pupillo utique de eo uerum est qui iam aliquem intellectum habet. nam
V p. 157 infans et qui infanti proximus est non multum a furioso / differt, quia huius aetatis pupill*i* nullum intellectum habent. sed in his pupillis p*rop*ter utilitatem benignior iuris interpretatio facta est.

110. Possumus tamen ad id quod stipulamur alium adhibere, qui *i*dem stipul*e*tur; quem uulgo adstipulatorem uocamus. **111.** *Et*[3] huic proinde actio competit proindeque ei recte soluitur ac nobis; sed quidquid consecutus erit, mandati i*u*dicio nobis restituere cogetur. **112.** Ceterum potest etiam aliis uerbis uti adstipulator quam quibus nos usi sumus. itaque, si uerbi gratia ego ita stipulatus sim: DARI SPONDES? ille sic adstipulari potest: IDEM FIDE TUA PROMITTIS? uel: IDEM FIDEIUBES? uel contra. **113.** I*t*em *m*inus[4] adstipulari potest, plus non potest. itaque, si ego sestertia x stipulatus s*i*m, ille sestertia v stipulari potest; contra uero plus non potest. item, si ego pure stipulatus sim, ille sub condicione stipulari potest; contra uero non potest. non solum autem in quantitate, sed etiam in tempore minus et plus intellegitur; plus est enim statim aliquid dare, minus est pos*t* tempus dare. **114.** In hoc autem iure quaedam singulari iure obseruantur. nam adstipu-
V p. 158 latoris heres non habet actionem. item, / seruus adstipulando nihil agit, qu*i*[5] ex ceteris omnibus causis stipulatione domino adquirit.

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[1] So V. *gerit, ut tamen sicubi* Krüger and Kübler.

[2] *adhibeatur* ⟨*tutor*⟩ Krüger, with Inst. 3, 19. 9. But Kübler appositely cites Ulp. D. 26, 8, 2.

[3] *sed* V.

[4] *idem rgimus* V. *rg* = *regula* (Apogr. 299). Cf. 1, 53, &c.

[5] *quia* V. *qui* Kübler. *quamuis . . . adquirat* Krüger.

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§ 105. = Inst. 3, 19, 7. § 106. = Inst. 3, 19, 8. § 107. = Inst. 3, 19, 9. Cf. G. 2, 83; 3, 91. 119. 176. Inst. 1, 21 pr. § 108. Cf. G. 1, 192; 2, 80 sq.; 3, 91. 119. 176. § 109. = Inst. 3, 19, 10. Cf. G. 3, 208. § 111. Cf. G. 3, 117. 215–16. § 112. Cf. G. 3, 116. § 113. Cf. Inst. 3, 20, 5. G. 3, 126; 4, 53a. § 114. Cf. G. 3, 120; 4, 113. *ex ceteris*: G. 2, 87; 3, 163.

power or he from me. Indeed a slave, a person *in mancipio*, a daughter in *patria potestas*, and a woman in *manus* are incapable of incurring obligation not only to him to whose power they are subject, but also to anyone at all. **105.** That a dumb man can neither stipulate or promise is obvious. The same is accepted also in the case of a deaf man, because it is necessary both that the stipulator should hear the words of the promisor and that the promisor should hear those of the stipulator. **106.** A lunatic is incapable of any transaction, because he does not understand what he is doing. **107.** A ward is capable of any transaction, provided that his tutor's *auctoritas* is obtained when it is necessary, as when it is he who is incurring obligation; for he can lay someone else under an obligation to himself even without his tutor's *auctoritas*. **108.** The law is the same for women who are in *tutela*. **109.** But what we have said about a ward is only true of a ward who has attained to some understanding. For an infant or one little more than an infant does not differ much from a lunatic, because at such an age the ward has no understanding. But in their case, for practical reasons, a lenient view of the law has been taken.

110. It is, however, possible for us, when we stipulate, to bring in another person to stipulate for the self-same thing; this person is commonly called an *adstipulator*. **111.** Action can be brought by him and payment can lawfully be made to him exactly as by and to ourselves; but by the *actio mandati* he will be compelled to make over to us whatever he may so obtain. **112.** An *adstipulator* may employ other words than those employed by the principal stipulator. He can, for instance, where the stipulator has used the form 'Do you solemnly promise conveyance?', use the form 'Do you promise the same thing on your honour?' or 'Do you guarantee the same thing on your honour?'; or the variance may be reversed. **113.** Further, he may stipulate for less, though not for more (than the principal stipulator). Thus, where I have stipulated for 10,000 sesterces, he may stipulate for 5,000; but he may not stipulate for more than 10,000. Again, if I have stipulated unconditionally, he may stipulate conditionally; but not the other way about. 'More' or 'less' is not solely a question of amount, but also one of time: for to convey at once is more, to convey after a time is less. **114.** This institution has some peculiar legal features. Thus, the *adstipulator*'s heir has no action. Again, a slave's adstipulation is a nullity, though in all other cases he acquires by stipulation for his owner. The same has been held, according to the better view,

id*em* de eo qui in mancipio est magis placuit; nam et is serui loco est. is autem qui in potestate patris est agit aliquid, sed parenti non adquirit, quamuis ex omnibus ceteris causis stipulando ei adquirat. ac ne ipsi quidem aliter actio ⟨*com*⟩petit quam si sine *capitis* deminutione exierit de potestate parentis, ueluti morte eius aut quod ipse flamen Dialis inauguratus est. eadem de fili*a* familias et quae in manu est dicta intellegemus.

115. Pro eo quoque qui promittit solent alii obligari; quorum alios sponsores, alios fidepromissores, alios fideiussores appellamus. **116.** Sponsor ita interrogatur: IDEM[1] DARI SPONDES? fidepromissor ⟨*ita*⟩: IDEM FIDEPROMITTIS? fideiussor ita: IDEM FIDE TUA ESSE IUBES? uidebimus de his[2] autem, quo nomine possint proprie appellari, qui ita interrogantur: IDEM DABIS? IDEM PROMITTIS? IDEM FACIES? **117.** Sponsores quidem et fidepromissores et fideiussores saepe solemus accipere, dum curamus ut diligentius nobis cautum sit; adstipulatorem uero fere tunc solum adhibemus, cum ita stipulamur, ut aliquid post mortem nostram detur. ⟨*quia enim nobis ut post mortem nostram detur*⟩[3] stipulando nihil agimus, adhibetur a*d*stipulator, ut is post mortem nostram agat; qui si
V p. 159 quid fuerit consecutus, / de r*estitue*ndo eo mandati iudicio heredi meo[4] tenetur.

118. Sponsoris u*ero* et fidepromissoris similis condicio ⟨*est*⟩, fideiussoris ualde dissimilis. **119.** Nam illi quidem nullis obligationibus accedere possunt nisi uerborum, quamuis interdu*m* ipse qu*i* promiserit non fuerit obligatus, uelut si *mulier* aut pupillus sine tutoris auctoritate, aut quilibet pos*t* mortem suam, dari promiserit. at illud quaeritur, si seruus aut peregrinus spoponderit, an pro eo sponsor au*t* fidepromissor obligetur. **119a.** Fideiussor uero omnibus obligationibus, id est siue re siue uerbis siue litteris siue consens*u* contractae fuerint obligationes, adici potest.

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[1] Following Krüger we have corrected *id* to *idem* throughout the section. But *id* may be right at least in the case of *fideiussio*: e.g. Ulp. D. 45, 1, 75, 6, and CIL iii. p. 940 (Bruns 1, 329; Textes 849). Cf. Textes 306 and Girard, Manuel 799, 4.

[2] [*de his*] Krüger. But there may be omission of matter corresponding to Inst. 3, 16. [3] Mommsen. [4] [*meo*] Krüger.

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§ 114 *sine capitis deminutione*: G. 1, 127. 130. § 115. Cf. Inst. 3, 20 pr. Festus v. Adpromissor (Bruns 2, 2. Lindsay 14). § 116. Cf. G. 3, 92; 4, 137. Inst. 3, 20, 7. § 117. Cf. Inst. 3, 20 pr. G. 3, 100. 110 sq. 216. § 119. Cf. G. 3, 176. Inst. 3, 20, 1. *mulier aut pupillus*: G. 3, 107–8. *post mortem*: G. 3, 100. *si seruus*: G. 3, 104. *peregrinus*: G. 3, 93. 179 fin. § 119a. Cf. Inst. 3, 20, 1.

of a person *in mancipio*, he being in the position of a slave. But adstipulation by one in *patria potestas* is not entirely ineffectual: he does not acquire for his father, though he does so in all other cases by stipulating, and even he himself has an action only if he has left his father's *potestas* without undergoing a *capitis deminutio*, for example by his father's dying or his being himself inaugurated priest of Jupiter. The same rules must be understood to apply to a daughter in *patria potestas* or a woman in *manus*.

115. On behalf of the promisor also it is common for other persons to become bound; some of these are termed *sponsores*, others *fidepromissores*, others *fideiussores*. **116.** To a *sponsor* the question put is 'Do you solemnly promise conveyance of the same thing?', to a *fidepromissor* 'Do you promise the same thing on your honour?', to a *fideiussor* 'Do you guarantee the same thing on your honour?' What special name can be applied to those to whom the question put is 'Will you convey the same thing?' or 'Do you promise the same thing?' or 'Will you do the same thing?' we shall see. **117.** We commonly take *sponsores*, *fidepromissores*, and *fideiussores* when seeking to obtain better security, but we bring in an *adstipulator* in general only when we are stipulating for something to be conveyed after our death. For because our stipulation for conveyance to ourselves after our death is a nullity, we bring in an *adstipulator*, in order that he may sue after our death. Whatever he recovers he is liable by the *actio mandati* to make over to our heir.

118. The positions of a *sponsor* and a *fidepromissor* resemble one another and are very different from that of a *fideiussor*. **119.** For *sponsores* and *fidepromissores* can become accessory to none but verbal obligations, though occasionally they are bound when the principal promisor is not, as where conveyance is promised by a woman or a ward without tutor's *auctoritas*, or where anyone promises conveyance after his own death. But it is a doubtful point whether a *sponsor* or *fidepromissor* is bound on behalf of a slave or a peregrine who has promised using the word *spondeo*. **119a.** A *fideiussor*, on the other hand, can become accessory to any kind of obligation, that is whether it arises from real, verbal, literal, or consensual contract. It does not even matter whether the

ac[1] ne illud quidem interest, utrum ciuilis a*n* naturalis obligatio sit cui adiciatur, adeo quidem ut pro seruo quoque obligetur, siue extraneus sit qui a seruo fideiussorem accipi*at*, siue ipse dominus in id quod sibi debeatur. **120.** Praeterea, sponsoris et fidepromissoris heres non tenetur, nisi si de peregrino fidepromissore quaeramus, et alio iure ciuitas eius utatur. fideiussoris autem etiam heres tenetur. **121.** Item, sponsor et fidepromissor ⟨*per*⟩ legem Furiam[2] biennio liberantur, et quotquot erunt numero eo tempore quo pecunia peti potest, in tot partes, d*i*duc*e*tur[3] inter eos obligatio, et singuli ⟨*in*⟩ uiriles partes *u*ocab*u*ntur.[4] fideiussores uero perpetuo tenentur, et quotquot erunt numero, singuli in solidum /
V p. 160 obligantur. itaque liberum est creditori a quo ue*lit so*lidum petere. sed nunc ex epistula diui Hadr*iani compellitur* creditor a singulis, qui modo soluendo sint, par*tes* pete*re*. eo igitur distat haec epistula a lege Furia, quod, si quis ex sponsoribus aut fidepromissoribus soluendo non sit, hoc onus ad ⟨*ceteros non pertinet; sed ex fideiussoribus etsi unus tantum soluendo sit, ad hunc onus*⟩[5] ceterorum quoque pertinet. **121a.** Sed cum lex Furia tantum in Italia locum habeat, euenit ut in ceter*is* pr*o*uinciis sponsores quoque et fidepromissores proinde ac fideiussores in perpetu*um*[6] teneantur et singuli in solid*um* obligentur, nisi ex epistula diui Hadriani hi quo*que* adiuuen*tur* in parte. **122.** Praeterea, inter sponsores et fidepromissores lex Appuleia quandam societatem introduxit. nam si quis horum plus sua portione soluerit, de eo quod amplius dederit aduersus ceteros actiones constituit. quae lex ante legem Furiam lata est, quo tempore in solidum obligabantur. unde quaeritur an post legem Furiam adhuc legis Appuleiae beneficium supersit. et utique extra Italiam superest. nam lex quidem Furia tantum in Italia ualet, Appuleia uero etiam in ceteris prouinciis. sed an etiam ⟨*in*⟩ *Ita*l*ia* beneficium legis Appuleiae supersit, ualde quaeritur. a*d fideiussores autem lex*[7] Appuleia

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[1] *ad* V. *ac* Inst. 3, 20, 1; so Krüger. *at* Kübler.
[2] So Kübler. *lege Furia* Krüger.
[3] So Kübler. *deducitur* V. *diducitur* Krüger.
[4] So Kübler. *hocabentur* V. *obligantur* Krüger.
[5] Mommsen. The sense is clear.
[6] So Kübler. *in perpetuo* V. om. *in* Krüger.
[7] Krüger.

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§ 119a *in id quod sibi*: G. 4, 73. § 120. Cf. G. 3, 114; 4, 113. Inst. 3, 20, 2. *alio iure*: G. 3, 96. § 121. *legem Furiam* (after l. Appuleia, before l. Uallia?): G. 4, 22. 109. Edictum pp. 214. 217. *fideiussores uero*: Inst. 3, 20, 4. Edictum p. 218. § 122. Cf. Inst. 3, 20, 4. *L. Appuleia*: after annexation of Sicily, 241 B.C.

principal obligation be civil or natural; indeed a *fideiussor* becomes bound even on behalf of a slave, whether he who is taking a *fideiussor* from the slave be a stranger, or the slave's own master in respect of what may be due to him. **120.** Further, the heir of a *sponsor* or *fidepromissor* is not bound, except where a peregrine *fidepromissor* is in question and his city follows a different rule. But the heir of a *fideiussor* is bound like the *fideiussor* himself. **121.** Again, *sponsores* and *fidepromissores* are discharged after two years under the *L. Furia*, and, whatever be their number at the time when the debt falls due, the obligation is divided between them into as many parts, and each of them will be called on only for his aliquot part. *Fideiussores*, on the other hand, are bound for all time; and, whatever be their number, each is liable for the whole debt. Therefore the creditor is free to sue whichever he pleases for the whole. However, at the present day he is compelled under an epistle of the late emperor Hadrian to sue each of them, provided they are solvent, for a proportionate part only. This epistle differs therefore from the *L. Furia* in that, if one of several *sponsores* or *fidepromissores* is insolvent, the burden of the others is not thereby increased, whereas if only one of a number of *fideiussores* is solvent, the burden of the others also falls on him. **121a.** As, however, *L. Furia* applies only in Italy, the result is that in the provinces *sponsores* and *fidepromissores* are bound for all time, just like *fideiussores*, and that each is liable for the whole debt, unless it be that they are relieved as to part by the epistle of the late emperor Hadrian. **122.** Furthermore, the *L. Appuleia* introduced a sort of partnership between *sponsores* and *fidepromissores*. For to any one of them who has paid more than his share the statute gives an action against the others for the excess. This statute was passed before the *L. Furia*, at a time when each was liable for the whole. It is therefore asked whether since the *L. Furia* the benefit of the *L. Appuleia* still survives. The answer is that outside Italy it does survive, because the *L. Furia* is in force only in Italy, but the *L. Appuleia* in the provinces in general. It is, however, very questionable whether the benefit of the *L. Appuleia* survives in Italy too. To *fideiussores*, on the other hand, the *L. Appuleia* has

non pertinet. itaque, si creditor ab uno totum *con*secutus fuerit, huius sol*i*us detrimentum er*it*, scilicet si is pro quo fideiussit
V p. 161 soluendo non sit. s*ed*, *ut ex* / supra dicti*s* apparet, *i*s a quo creditor totum petit poterit ex epistula diui Hadriani desiderare ut pro parte in se detur actio. **123.** Praeterea, lege Cicereia cautum est ut is, qui sponsores aut fidepromissores accipiat, praedica*t* palam et declaret, et de qua re satis accipiat, et quot sponsores a*ut* fidepromissores in eam obligationem accepturus sit; et nisi p*rae*dixerit, p*er*mittit*ur* sponsoribus et fidep*ro*missoribus intra diem XXX praeiudicium postulare, quo quaeratur an ex ea lege praedictum sit; et si iudicatum fuerit praedictum n*on* esse, liberantur. qua lege fideiussor*um* mentio nulla fit; sed in us*u* est, etiam si fid*e*iussores accipiamus, praedicere.

124. Sed beneficium leg*is* Corn*e*liae o*m*nibus commune est. qua lege id*em* pro eodem apud eundem eodem anno uetatur in ampliorem summam obligari creditae pecuniae quam in XX mili*a*.[1] et quamuis sponsores uel fidepromissores ⟨*uel fideiussores*⟩[2] in amplam pecuniam, uelut *in*[3] sestertium C milium, ⟨*se obligauerint, tamen dumtaxat in XX milia tenentur*⟩.[4] pecuniam autem creditam dicimus non solum eam quam credendi causa damus, sed omnem quam tu*m* c*um* contrahit*ur* obligatio certum es*t* debitum iri, id est ⟨*quae*⟩ sine ulla condicione deducitur in obligation*em*. itaque et ea pecunia quam in diem certum dari stipulamur eodem numero est, quia certum est *eam* debit*um i*ri, licet post tempus petatur. appellatione autem pecuniae omnes res in ea lege significantur. itaque, si
V p. 162 uinum uel frumentum, *aut* si fundum / uel hominem stipulemur, haec lex obseruanda est. **125.** Ex quibusdam tamen causis permittit ea lex in infinitum satis accipere, ueluti si dotis nomine, uel eius quod ex testamento tibi debeatur, aut iussu iudicis satis accipiatur. et adhuc lege uicesima hereditatium cauetur, ut ad eas satisdationes quae ex ea lege proponuntur lex Cornelia non pertineat. **126.** In e*o* quoque iure par condicio est omnium, sponsorum fidepromissorum fideiuss*orum*, quod ita obligari non pos*sunt*, u*t* plus[5] debeant quam debe*t*[6] is pro quo obliga*n*tur.[6] at ex diuerso, ut minus debeant, obligari possunt, sicut in adstipulatoris

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[1] *milibus* V. [2] Huschke. [3] *si* V. *in* Kübler.
[4] Huschke. [5] *possit* (?) *ut regula plus* V. Cf. 1, 53, &c.
[6] So Inst. 3, 20, 5. *deberet . . . obligaretur* V.

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§ 123. *lege Cicereia*: presumably of same period. Cf. G. 4, 44. Edictum pp. 215. 217–18. § 124. *legis Corneliae* (81 B.C.?): Edictum p. 218. § 126. Cf. Inst. 3, 20, 5. G. 3, 113.

no application, and therefore, if a creditor has recovered the whole debt from one *fideiussor*, the loss is solely his, assuming of course that the principal debtor is insolvent. But, as is clear from what has already been said, a *fideiussor* sued by the creditor for the whole will be entitled, under the epistle of the late emperor Hadrian, to demand that the action should be granted against him only for a rateable share. **123.** Further, it is provided by the *L. Cicereia* that one who is taking *sponsores* or *fidepromissores* shall publicly notify in advance and declare both the matter in respect of which he is securing himself and how many *sponsores* or *fidepromissores* he is taking in respect of it; if he fails to give this notice, the *sponsores* and *fidepromissores* are allowed within 30 days to ask for a prejudicial action to determine whether notice has been given in accordance with the statute, and if the decision is in the negative, they are discharged. No mention is made of *fideiussores* in this statute, but the practice is to give the notice also when we are taking *fideiussores*.

124. The benefit of the *L. Cornelia*, on the other hand, is common to them all. This statute forbids the same person to become surety for the same debtor to the same creditor in the same year for a larger sum of *pecunia credita* than 20,000 sesterces. And though *sponsores* or *fidepromissores* or *fideiussores* should have undertaken obligation for so large a sum, as say, 100,000 sesterces, they are nevertheless liable only up to 20,000. By *pecunia credita* we mean not only money advanced on loan, but any money which, at the time when the obligation is contracted, is certain to become due, that is, any money that is brought unconditionally into obligation. Consequently money stipulated to be paid at a fixed date is in this category, because it is certain to become due, though action for it is deferred. The term *pecunia* in this statute covers every kind of thing, so that whether what we stipulate for be wine or corn or land or a slave, the statute must be complied with. **125.** In certain cases, however, the statute allows security to be taken without limit, as where it is taken on account of *dos*, or of a debt under a will, or by order of a *iudex*. Further, the statute concerning the 5 per cent. duty on inheritances enacts that to the securities for which it provides the *L. Cornelia* shall not apply. **126.** In yet another point the position of all—*sponsores*, *fidepromissores*, and *fideiussores*—is identical, namely that they cannot incur a greater obligation than that of their principal. On the other hand, they can incur a lesser obligation: we made the same remark with regard

persona diximus. nam ut adstipulatoris, ita et horum obligatio accessio est principalis obligationis, nec plus in accessione esse potest quam in principali re. **127.** In eo quoque par omnium causa est, quod, si quid pro reo[1] soluerint, eius reciperandi causa habent cum eo mandati iudicium. et hoc amplius, sponsores ex lege Publilia propriam habent actionem in duplum, quae appellatur depensi.

128. Litteris obligatio fit ueluti in nominibus transscripticiis. fit autem nomen transscripticium duplici modo: uel a re in personam uel a persona in personam. **129.** ⟨*A re in personam trans*⟩scriptio fit, ueluti si id quod *tu*[2] ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero. **130.** A persona in personam transscriptio fit, ueluti si id quod mihi Titius
V p. 163 debet, tibi id ex/pensum tulero, id est, si Titius te ⟨*pro*⟩ se[3] delegauerit mihi. **131.** Alia causa est eorum nominum quae arcaria uocantur. in his enim rei, non litterarum obligatio consistit; quippe non aliter ualent quam si numerata sit pecunia; numeratio autem pecuniae rei[4] facit obligationem. qua de causa recte dicemus arcaria nomina nullam facere obligationem, sed obligationis factae testimonium praebere. **132.** Unde ⟨*non*⟩ proprie[5] dicitur arcariis nominibus etiam peregrinos obligari, quia non ipso nomine, sed numeratione pecuniae obligantur; quod genus obligationis iuris gentium est. **133.** Transscripticiis uero nominibus an obligentur peregrini merito quaeritur, quia quodammodo iuris ciuilis est talis obligatio: quod Neruae placuit. Sabino autem et Cassio uisum est, si a re in personam fiat nomen transscripticium, etiam peregrinos obligari; si uero a persona in personam, non obligari. **134.** Praeterea, litterarum obligatio fieri uidetur chirografis et syngrafis, id est, si quis debere se aut daturum se scribat, ita scilicet si eo nomine stipulatio non fiat. quod genus obligationis proprium peregrinorum est.

135. Consensu fiunt obligationes in emptionibus[6] uenditionibus, locationibus conductionibus, societatibus, mandatis. **136.** Ideo

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[1] So Inst. *eo* V.
[2] *m* (*mihi*?) V.
[3] So Huschke–Kübler. Krüger om. *se*.
[4] So Kübler. *rein* V. *re* Krüger.
[5] So generally. Mommsen *perperam* for *proprie*.
[6] So Inst. 3, 22 and D. 44, 7, 2. *emptionibus et* V.

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§ 127. Cf. Inst. 3, 20, 6. *mandati iudicium*: G. 3, 216. *ex lege Publilia* (presumably early): G. 4, 9. 22. 25. 102. 171. 186. Edictum p. 214. § 128. Cf. G. 3, 137–8. Inst. 3, 21. Cic. p. Rosc. com. 5, 14. Pomp. D. 39, 5, 26. Val.

to an *adstipulator*. For in their case, as in that of an *adstipulator*, the obligation is accessory to a principal obligation, and the accessory cannot contain more than the principal. **127.** The position of all is identical also in this, that they have an *actio mandati* against their principal for the recovery of anything they have paid on his behalf. More than this, *sponsores* have under the *L. Publilia* an action of their own, called *actio depensi*, for double the amount.

128. A literal obligation is created by transcriptive entries. A transcriptive entry is made in two ways: *a re in personam* or *a persona in personam*. **129.** It is made *a re in personam* where, for instance, I enter to your debit what you owe me on account of a purchase, a hiring, or a partnership. **130.** It is made *a persona in personam* where, for instance, I enter to your debit what Titius owes me, provided, that is, that Titius has assigned you to me as debtor in his place. **131.** The entries known as cash-entries are of a different nature. For in their case the obligation is real, not literal, since their validity depends on the money having been paid, and payment of money creates a real obligation. This is why it is right to say that cash-entries create no obligation, but merely afford proof of an existing obligation. **132.** It is therefore incorrect to say that even peregrines are bound by cash-entries, because what they are bound by is not the entry itself, but the payment of money; the latter form of obligation is *iuris gentium*. **133.** But whether peregrines can be bound by transcriptive entries is questioned with good reason, because this kind of obligation is in a way *iuris civilis*. Nerva held accordingly, but Sabinus and Cassius considered that peregrines as well as citizens are bound if the transcriptive entry is *a re in personam*, but not if it is *a persona in personam*. **134.** Furthermore, literal obligation appears to be created by chirographs and syngraphs, that is to say documents acknowledging a debt or promising a payment, of course on the assumption that a stipulation is not made in the matter. This form of obligation is special to peregrines.

135. Obligations are created by consent in sale, hire, partnership, and mandate. **136.** The reason why we say that in these

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Max. 8, 2, 2. § 129. Cf. Cic. de off. 3, 14, 59. §§ 130. 133. Cf. Liu. 35, 7, 2. § 134. Cf. Ps. Asc. in Verr. ii, 1, 60. 91 (Bruns 2, 72). Jolowicz, Introd. 424 ff. *stipulatio non fiat*: Inst. 3, 21.

autem *i*stis modis consensu dicimus obligationes contrahi, qu*ia*[1]
V p. 164 neque uerborum / neque scripturae ulla proprietas desiderat*ur*, sed sufficit eos qui negotium gerunt consensisse. unde inter absentes quoque talia negotia contrahuntur, ueluti per epistulam aut per internuntium, cum alioquin uerborum obligatio inter absentes fieri non possit. **137.** Item, in his contractibus alter alteri obligatur de eo quod alterum alteri ex bono et aequo praestare oportet, cum alioquin in uerborum obligationibus alius stipuletur, alius promittat, et in nominibus alius expensum ferendo obligе*t*, alius obligetur. **138.** Sed absenti expensum ferri potest, etsi uerborum obligatio cum absente contrahi non possit.[2]

[De em*ptione et uenditione.*]

139. *E*mptio *uenditio contrahitur*[3] cum de pretio conuenerit, quamuis nondum pretium numeratum sit, ac ne arra quidem data fuerit. nam quod arrae nomine datur, argumentum est emptionis et uenditionis contractae. **140.** Pretium autem certum esse debet. nam alioquin, si ita inter nos conuenerit, ut quanti Titius rem aestimauerit, tanti sit empta, Labeo negauit ullam uim hoc negotium habere; cuius opinionem Cassius probat. Ofilius et eam emptionem et uenditionem ⟨*esse existimauit*⟩;[4] cuius opinionem Proculus secutus est. **141.** Item, pretium in numerata pecunia
V p. 165 con/sistere debet. *nam* in ceteris rebus an pretium esse possit, ueluti h*o*mo aut toga aut fundus alterius rei ⟨*pretium esse possit*⟩, ualde quaerit*ur*. nostri praeceptores putant etiam in alia re posse consistere pretium. unde illud est quod uulgo putant, per permutationem rerum emptionem et uenditionem contrahi, eamque speciem emption*i*s uenditionisque uetustissimam esse; argumentoque utuntur Graeco poeta Homero, qui aliqua parte sic ait:

> ‹ἔνθεν ἄρ' οἰνίζοντο καρηκομόωντες Ἀχαιοί,
> ἄλλοι μὲν χαλκῷ, ἄλλοι δ' αἴθωνι σιδήρῳ,
> ἄλλοι δὲ ῥινοῖς, ἄλλοι δ' αὐτῇσι βόεσσιν,
> ἄλλοι δ' ἀνδραπόδεσσι›,[5]

[et reliqua.] diuersae scholae auctores dissentiunt, aliudque esse existimant permutationem rerum, aliud em*p*tionem et uenditionem;

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[1] So Inst. and D. *quo* V. *quod* Kübler.

[2] The section is expunged as gloss by Krüger; his view is widely shared, e.g. by Kübler, but not by Mommsen.

[3] The title (separate line) and the first four words of text were written in red; the illegible letters can be restored from Inst. 3, 23.

[4] Krüger regards the supplement as not quite necessary.

[5] Iliad 7, 472–5. Supplied from Inst.

cases the obligations are contracted by consent is that no formality whether of words or writing is required, but it is enough that the persons dealing have consented. Hence such contracts can be formed between parties at a distance, say by letter or messenger, whereas a verbal obligation cannot be formed between parties at a distance. **137.** Further, in these contracts the parties are reciprocally liable for what each is bound in fairness and equity to perform for the other, whereas in verbal obligations the one party puts and the other gives the stipulatory promise, and in literal contracts the one party by entering the debit imposes and the other incurs the obligation. **138.** It is, however, possible to make a transcriptive entry against an absent person, though a verbal obligation cannot be contracted with such a one.

139. A contract of sale is concluded when the price has been agreed, although it have not yet been paid and even no earnest have been given. For what is given by way of earnest is evidence of a contract of sale having been concluded. **140.** The price must be definite. Thus, if we agree that the thing be bought at the value to be put on it by Titius, Labeo said that this transaction was of no effect, and Cassius approves his view. But Ofilius thought it was a sale, and Proculus followed his view. **141.** Also, the price must be in money. There is, however, much question whether the price can consist of other things, for example whether a slave or a robe or land can be the price of something else. Our teachers hold that the price can consist of another thing. Hence their opinion commonly is that by exchange of things a sale is contracted and that this is the most ancient form of sale. They argue from the Greek poet Homer, who somewhere says: 'Thence the long-haired Achaeans bought wine, some for copper, some for gleaming steel, some for hides, some for the cattle themselves, and some for slaves.' The other school dissent, holding that exchange or barter is one thing and sale another; for if not, so they argue,

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§§ 135–7. = Inst. 3, 22. § 137. *alterum alteri . . . ex bono et aequo*: G. 3, 155; 4, 61. 114. § 138. Cf. G. 3, 128 sq. *etsi uerbis obligatio*: Inst. 3, 19, 12. G. 3, 105. § 139. = Inst. 3, 23 pr. Cf. § 1. init. C. 4, 21, 17 (A.D. 528). § 140. Cf. Inst. 3, 23, 1. G. 3, 142–3. C. 4, 38, 15 (A.D. 530). *Ofilius*: pupil of Servius Sulpicius. § 141. = Inst. 3, 23, 2. Cf. Paul D. 19, 4, 1 pr.

alioqu*in non posse* rem expediri permutatis rebus, quae uideatur res uenisse et quae pretii nomine dat*a* esse, sed rursus utramque rem uideri et uenisse et utramque pretii nomine datam esse absurdum uideri. sed ait Caelius Sabinus, si rem tibi uenalem habenti, ueluti fundum, [acceperim et] pretii nomine hominem forte dederim, fundum quidem uideri uenisse, hominem autem pretii nomine datum esse, ut fundus acciperetur.

142. Locatio autem et conductio similibus regulis constituitur;[1] nisi enim merces certa statuta sit, non uidetur locatio et conductio contrahi. **143.** Unde, si alieno arbitrio merces permissa sit, uelut
V p. 166 qua*nti* Titius aestimauerit, / quaeritur an locatio et conductio contrahatur. qua de causa, si fullo*ni* polienda curandaue, sarcinatori sarcienda uestimenta dederi*m*, nulla statim mercede constituta, postea tantum daturus quanti inter nos conuenerit, quaeritur an locatio et conductio contrahatur. **144.** *Item*,[2] si rem tibi utendam dederim et inuicem aliam rem utendam acceperim, quaeritur an locatio et conductio contrahatur. **145.** Adeo autem emptio et uenditio et locatio et conductio familiaritatem aliquam inter se habere uidentur, ut in quibusdam causis quaeri soleat utrum emptio et uenditio contrahatur an locatio et conductio, ueluti si qua res in perpetuum locata sit, quod *e*uenit in praediis municipum, quae ea lege locantur ut, quamdiu [id][3] uectigal praestetur, neque ipsi conductori neque heredi eius praedium a*u*feratur. sed magis placuit locationem conductionemque esse. **146.** Item, [quaeritur] si gladiatores ea lege tibi tradiderim, ut in singulos qui integri exierint pro sudore denarii xx mihi darentur, in eos uero singulos qui occisi aut debilitati fuerint denari*i* mille, quaeritur utrum emptio et uenditio an locatio et conductio contrahatur. et magis placuit eorum qui integri exierint locationem et conductionem contractam uideri, at eorum qui occisi aut debilitati sunt emptionem et uenditionem esse; idque ex accidentibus apparet, tamquam sub condicione /
V p. 167 facta cuiusque uenditione *aut*[4] locatione. iam enim non dubitatur quin sub condicione res uenire aut locari possint. **147.** Item quaeritur, si cum aurifice mihi conuenerit, ut is ex auro suo certi ponderis certaeque formae anulos mihi faceret, et acciperet uerbi gratia denarios CC, utrum emptio et uenditio an locatio et conductio contrahatur. Cassius ait materiae quidem emptionem uenditionem-

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[1] *constituuntur* V. *conductio* ⟨*et emptio et uenditio*⟩ Huschke.

[2] *uel* V, not impossible, but the correction (Polenaar) is slight.

[3] Generally expunged, but possibly a reminiscence of the common form of contract.

[4] *aut* Kübler. *an* V.

one cannot, when things are exchanged, determine which is the thing sold and which that given as price, while on the other hand it seems absurd that both things should be considered as both sold and given as price. Caelius Sabinus, however, says that if I give you a slave as the price of something, for instance land, which you are offering for sale, then the land is to be considered as having been sold and the slave as having been given as price for the land.

142. Hire is governed by rules similar to those of sale; for unless a definite reward be fixed, there is held to be no contract of hire. **143.** Hence, if the reward is remitted to the arbitrament of a third party, say 'for as much as Titius thinks reasonable', it is a question whether a contract of hire is formed. Accordingly, if I give clothes to a cleaner to be cleaned or furbished or to a tailor to be mended, but no reward is fixed at the time, the understanding being that I am to pay later what we may agree, it is a question whether a contract of hire is formed. **144.** Again, if I lend you something for your use and receive in return another thing for my use, it is a question whether a contract of hire is formed. **145.** The affinity between sale and hire goes so far that in certain cases there is a standing question whether the contract is one of sale or of hire, for example where a thing is let in perpetuity. This is the practice with the lands of municipalities: they are let upon the terms that, so long as the rent is paid, the land shall not be taken away from either the tenant or his heir. But the prevailing opinion is that this is a letting. **146.** Again, if I supply you with gladiators upon the terms that for each man who comes out scatheless I shall be paid 20 *denarii* in return for his exertions, but for each one who is killed or disabled 1,000, the question arises whether the contract is one of sale or of hire. The prevailing opinion is that it is one of hire of those who come out scatheless, but of sale of those who are killed or disabled: which it is, the events declare, there being understood to be a conditional sale or hire of each gladiator. For there is no longer any doubt that things can be sold or hired conditionally. **147.** The question whether the contract is one of sale or hire is also raised where I agree with a goldsmith for him to make me rings of a certain weight and pattern out of gold of his, he receiving, say, 200 *denarii*. Cassius says that the contract is one

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§ 141 *Caelius Sabinus*: G. 3, 70. §§ 142–3. Cf. Inst. 3, 24 pr. 1. 3, 23, 1. G. 3, 140. 162. 205. C. 4, 38, 15, 3 (A.D. 530). § 144. Cf. Inst. 3, 24, 2. § 145. Cf. Inst. 3, 24, 3. § 146. *gladiatores*: G. 1, 13; 3, 199. § 147. = Inst. 3, 24, 4.

que contrahi, operarum autem locationem et conductionem. sed plerisque placuit emptionem et uenditionem contrahi. atqui, si meum aurum ei dedero, mercede pro opera constituta, conuenit locationem conductionem contrahi.

148. Societatem coire solemus aut totorum bonorum aut unius alicuius negotii, ueluti mancipiorum emendorum aut uendendorum. **149.** Magna autem quaestio fuit an ita coiri possit societas, ut quis maiorem partem lucretur, minorem damni praestet. quod Q. Mucius ⟨*contra naturam societatis esse existimauit. sed Seruius Sulpicius, cuius*⟩[1] etiam praeualuit sententia, adeo ita coiri posse societatem existimauit, ut dixerit illo quoque modo coiri posse, ut quis nihil omnino damni praestet, sed lucri partem capiat, si modo opera eius tam pretiosa uideatur ut aequum sit eum cum hac pactione in societatem admitti. nam et ita posse coiri societatem con-
V p. 168 stat, ut unus pecuniam conferat, alter non conferat, / et tamen lucrum inter eos commune sit; saepe enim opera alicuius pro pecunia ualet. **150.** Et[2] illud certum est, si de partibus lucri et damni nihil inter eos conuenerit, tamen[3] aequis ex partibus commodum et incommodum inter eos commune esse. sed si in altero partes expressae fuerint, uelut in lucro, in altero uero omissae, in eo quoque quod omissum est similes partes erunt. **151.** Manet autem societas eo usque donec in eodem sensu[4] perseuerant; at cum aliquis renuntiauerit societati, societas soluitur. sed plane si quis in hoc renuntiauerit societati, ut obueniens aliquod lucrum solus habeat, ueluti si mihi totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiauerit societati, ut hereditatem solus lucri faciat, cogetur hoc lucrum communicare. si quid uero aliud lucri fecerit quod non captauerit, ad ipsum solum pertinet. mihi uero, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur. **152.** Soluitur adhuc societas etiam morte socii, quia qui societatem contrahit certam personam sibi eligit. **153.** Dicitur etiam capitis deminutione solui societatem, quia
F p. A ciuili ratione capitis deminutio[5] morti coaequatur; sed utique, si

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[1] Inst. 3, 25, 2. But some prefer to avoid *natura societatis*: cf. Paul D. 17, 2, 30.

[2] [*Et*] Krüger. [3] [*tamen*] Krüger.

[4] *sensu* V. *consensu* Inst., adopted by Krüger, not by Kübler.

[5] At *-tio* F begins. Cf. Arangio-Ruiz, BIDR 1935, 571.

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§ 148. = Inst. 3, 25 pr. § 149. Cf. Inst. 3, 25, 2. Paul D. 17, 2, 30. C. 4, 37, 1 (A.D. 293). § 150. Cf. Inst. 3, 25, 1. 3. § 151. = Inst. 3, 25, 4. § 152. = Inst. 3. 25, 5 init. § 153. Cf. G. 1, 159 sq.; 3, 101.

of sale of the material, but hire of the work. But most jurists hold that it is a contract of sale. It is agreed, however, that if I supply the gold, a reward for the work being settled, the contract is one of hire.

148. We enter into a partnership either in respect of our entire fortunes or for some particular business, such as the buying and selling of slaves. **149.** There has been a great dispute as to whether a partnership is possible on the terms that one of the partners should have a larger share in profits than in losses. Q. Mucius considered this to be against the nature of partnership, but Servius Sulpicius, whose opinion has prevailed, held that not only is partnership possible on these terms, but even on the terms that one partner shall bear no share of losses and yet have a share in profits, on the supposition that his services are considered so valuable that it is fair that he should be admitted to partnership on such terms. For it is settled law that a partnership agreement may provide that one partner should, and the other should not, bring in money, and yet that the profits should be shared; for a man's services are often as valuable as money. **150.** What is certain is that, if no express agreement has been made between the parties as to their shares in profit and loss, their shares in either will be equal. But if their shares in, say, profits have been expressly agreed, but their shares in losses have not been mentioned, their shares in what has not been mentioned will be in the same proportion. **151.** A partnership lasts as long as the parties remain of the same mind, but when one of them renounces the partnership, it is dissolved. But of course if one of the partners renounces for the purpose of profiting alone by some coming gain, for example, if my partner in a universal partnership, having been left heir by someone, renounces the partnership in order to gain the inheritance for himself alone, he will be compelled to share this gain. If, however, he makes other gain which he has not sought for, this belongs to him alone. I, on the other hand, have the sole right to anything whatever that I acquire after his renunciation of the partnership. **152.** Partnership is also dissolved by the death of a partner, because one who enters into a partnership selects a particular person. **153.** A partnership is also held to be dissolved by *capitis deminutio*, because in the conception of civil law *capitis deminutio*

adhuc consentiant in societatem,[1] noua uidetur incipere societas. **154.** Item, si cuius ex sociis bona publice aut priuatim uenierint, soluitur societas.

V p. 169 Sed haec quidem[2] / societas de qua loquimur, id est quae nudo consensu contrahitur, iuris gentium est;[3] itaque inter omnes homines naturali ratione consistit. **154a.**[4] Est autem aliud genus societatis proprium ciuium Romanor*um*. olim enim, mortuo patre familias, inter suos heredes quaedam[5] erat legitima[6] simul et naturalis socie*tas*, quae appell*abatur ercto non cito, id est dominio* /

F p. B *non diuiso. erct*um enim do*minium est, un*de[7] eru*s* dominus dicitur; ciere au*tem* diuidere est; unde c*a*edere[8] et secare[9] dicimus. **154b.** Alii quoque, qui uolebant eandem habere societatem, poterant id consequi apud praetorem certa[10] legis actione. in hac autem societate fratrum ceterorumue[11] qui ad exemplum fratrum suorum societatem coierint, illud proprium *erat*,[12] quod u*el* unus[13] ex sociis communem seruum manumittendo liberum faciebat, et omnibus libertum adquirebat; item unus *rem co*mmunem ma*ncipando eius faciebat qui mancipio accipiebat.*[14]

155. Mandatum consistit siue nostra gratia mandemus siue aliena, itaque, siue ut mea negotia geras, siue ut alterius, mandauerim, contrahitur mandati obligatio, et inuicem alter alteri tenebimur *in id* quod uel me tibi uel te mihi bona fide praestare oporte*t*. **156.** Nam si tua gratia tibi mandem, superuacuum est mandatum; quod enim tu tua gratia facturus sis, id de tua sententia, non ex meo mandatu, facere debes. itaque, si otiosam pecuniam domi te habentem hortatus fuerim ut eam faenerares, qu*amuis* eam ei mutuam dederis a quo seruare non potueris, non tamen habebis mecum man*dati* actionem. item, si hortatus sim *ut rem* aliquam

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[1] So F and Inst. *societate* V. [2] *haec quoque* (?) V. *ea quidem* F.

[3] So F, with *ψιλ*[*ῶ*] interlined above *nudo. consensu contrahitur nudo iuris cogentium est* V.

[4] At this point, leaving half a line blank, V goes on to § 155; §§ 154a and b thus depend on F alone.

[5] *τίσποτε* interlined. [6] *ἔννομος* interlined.

[7] Arangio-Ruiz's restorations, with E. Levy's *ercto non cito* for *erctum non citum* of ed. pr. [8] *cedere* F.

[9] *μερίζειν* interlined above *secare*, which is followed by *et diuidere* (cancelled, however). [10] At first misread *cepta*.

[11] Between *fratruum* (so F) and *ceterorumue* traces of 3 or 4 letters, perhaps *suorum*. Above *ceterorumue*: *ν(όησον) τῶν ἐξωτικῶν*.

[12] *proprium* is followed by a cancelled *i*. The previous *coierint* would seem to suggest *est*.

[13] *uunus quod uunus* F, the first *uunus* cancelled.

[14] So Arangio-Ruiz. End of F p. B. Next fragment at 3, 167.

is equivalent to death; nevertheless if the parties still consent to be partners, a new partnership is held to begin. **154.** Again, a partnership is dissolved if the property of one of the partners is sold up for public or private indebtedness.

The partnership of which we are speaking, namely that which is formed by simple consent, is *iuris gentium* and thus obtains by natural reason among all men. **154a.** But there is another kind of partnership peculiar to Roman citizens. For at one time, when a *paterfamilias* died, there was between his *sui heredes* a certain partnership at once of positive and of natural law, which was called *ercto non cito*, meaning undivided ownership: for *erctum* means ownership, whence the term *erus* for owner, while *ciere* means to divide, whence the words *caedere* and *secare*. **154b.** Other persons too, who desired to set up a partnership of the same kind, could effect this by means of a definite *legis actio* before the praetor. Now in this form of partnership, whether between brothers succeeding as *sui heredes* or between other persons who contracted a partnership on the model of such brothers, there was this peculiarity, that even one of its members by manumitting a slave held in common made him free and acquired a freedman for all the members, and also that one member by mancipating a thing held in common made it the property of the person receiving in mancipation.

155. There is a contract of mandate when we give a commission either in our own interest or in that of another. Thus, whether I commission you to conduct affairs of my own or those of a third party, a binding contract of mandate is formed, and we shall be liable to one another for whatever each ought as a matter of good faith to perform for the other. **156.** For if I give you a commission only on your own behalf, the mandate is superfluous, because anything that you have to do on your own behalf you should do on your own judgment, and not under a mandate from me. Thus, if I urge you to put out at interest money that you have lying idle at home, then, even though you lend it to someone from whom you are unable to recover it, you will not have the *actio mandati* against

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§ 154. Cf. Inst. 3, 25, 7. 8. G. 3, 78–81. *iuris gentium*: G. 1, 1 &c. § 154a. *suos heredes*: G. 2, 157 &c. *ercto non cito*: G. 2, 219. 4, 17a. Festus vv. *Erctum. Disertiones. Sors* (Bruns 2, 8. 7. 40. Lindsay 72. 63. 380–1). v. *Inercta* (Lindsay 97). Seru. in Aen. 8, 642 (Bruns 2, 77). § 154b. *legis actione*: G. 2, 24. *liberum faciebat*: Inst. 2, 7, 4. § 155. Cf. Inst. 3, 26 pr. 6 (Gaius D.). G. 3, 127. 216. § 156. Cf. Inst. 3, 26 pr. (Gaius D.).

emeres, quam*uis* non expedierit tibi eam emisse, non tamen tibi mandati tene*bor*.[1] et adeo haec ita sunt, ut quaeratur an mandati tene*a*tur qui mandauit tibi ut Titio pecuniam faenerares. [sed] Seruius negauit, n*ec* magis hoc casu obligat*ione*m consistere putauit quam si generaliter alicui mandetur uti pecuniam suam faeneraret. ⟨*sed*⟩ sequimur Sabini opinionem con*tra* sentientis,[2] qu*ia* non aliter Titio credidisses quam si tibi mandatum esset. **157.** Illud constat,
V p. 170 si quis de ea re mand*ct* quae contra bonos mores / est, non co*n*trahi obligationem, ueluti *si t*ibi mande*m* ut Titio furtum au*t* iniuriam facias. **158.** Item, si quis ⟨*quid*⟩[3] pos*t* mortem meam faciendum ⟨*mihi*⟩ mandet, inutile mandatum est, quia generaliter placuit ab heredis persona obligationem incipere non posse. **159.** Sed recte quoque con*tractum*[4] mandatum, si, dum adhuc integra res sit, reuocatum fuerit, euanescit. **160.** Item, si adhuc integro mandat*o* mors alterutrius [alicuius] interueniat, id est uel eius qui mandarit uel eius *q*ui mandatum susceperit, soluitur mandatum. sed utilitatis causa receptum est ut, si mortuo eo qui mihi mandauerit, ignorans eum decessisse, executus fu*e*ro mandatum, posse me[5] agere mandati actione; alioquin iusta et probabilis ignorantia damnum mihi [non] adferet. et huic simile est quod plerisque placuit, si debitor meus manumisso dispensatori meo per ignorantiam soluerit, liberari eum, cum alioquin stricta iuris ratione non poss*e*t liberari, eo quod alii soluisset quam cui soluere deberet. **161.** Cum autem is cui recte mandauerim egressus fuerit mandatum, ego quid*em* eatenus cum eo habeo mandati actionem, quatenus mea interest implesse eum mandatum, si modo implere potuerit; at ille mecum agere non potest. itaque, si mandauerim tibi ut, uerbi gratia, fundum mihi sestertiis C emeres, tu ses*tertiis*
V p. 171 CL emeris, non habebis mecum / mandati actionem, etiamsi tanti uelis mihi dar*e* fundum, quanti emendum tibi mandassem; idque maxime Sabino et Cassio placuit.[6] quodsi minoris emeris, habebis mec*um* scilicet actionem, quia qui mandat ut C milibus emeretur, is utique mandar*e* intellegitur uti minoris, si posset, emeret*ur*.

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[1] *teneri* V.

[2] So Mommsen. *consentientis* V.

[3] So Kübler. *si quid . . . mandetur* Krüger (V *mandet*).

[4] So Kübler. *consummatur* V. *consummatum* Krüger. Cf. Inst. 3, 26, 11.

[5] *posse me* V and Inst., some MSS. of Inst. omitting the previous *ut*. *possem* Gradenwitz. Cf. 4, 61.

[6] It is highly probable that after *placuit* V has omitted: *diuersae scholae auctores (recte?) te usque ad C acturum existimant*, or the like. So Pringsheim, Studi Besta 1 (Milan, n.d.), 328. But see also Riccobono, Festschr. Koschaker 2, 381.

me. Again, if I urge you to buy something, then, even though you had better not have bought it, I shall not be liable to you in mandate. This principle is carried so far that it is questioned whether one who tells you to lend at interest to a particular person (Titius) is liable in mandate. Servius said not, there being no more an obligation in this case than where general advice is given to a man to put out his money at interest. But we follow Sabinus' contrary opinion, because you would not have lent to the particular person if you had not received a mandate. **157.** An unquestionable rule is that if a commission is given which offends against morality, no obligation is contracted—if, for instance, I give you a commission to steal from Titius or to insult him. **158.** Again, if a man gives me a commission to be executed after my death, the mandate is void, it being a general principle that an obligation cannot begin in the person of an heir. **159.** A contract of mandate, though validly formed, is dissolved if revoked before it has been acted on. **160.** A contract of mandate is also dissolved if, before it has been acted on, death of either party, the giver or the receiver of the mandate, occurs. But on practical grounds it has become established that if I carry out a mandate after its giver's death, but in ignorance of that fact, I can sue by *actio mandati*; otherwise my justifiable and natural ignorance will cause me loss. Similarly, according to most authorities, a debtor of mine, who pays my cashier in ignorance of the fact that he has been manumitted, is discharged from the debt, though on strict legal principle he could not be discharged by a payment made to a wrong person. **161.** If he to whom I have given a valid mandate exceeds his instructions I have, on my side, an *actio mandati* against him up to the amount I have lost by his not having carried out the mandate, provided that was possible; but he has no action against me. Thus if, for example, I give you a mandate to buy an estate for me for 100,000 sesterces, and you buy for 150,000, you will have no *actio mandati* against me, even supposing you to be willing to convey to me for the sum at which I commissioned you to buy; this was the view preferred by Sabinus and Cassius. But if you buy for less than 100,000, you will of course have an action against me, because a man who gives a mandate to buy for 100,000 is naturally taken to authorize

§ 157. Cf. Inst. 3, 26, 7. § 158. Cf. G. 3, 100 &c. § 159. = Inst. 3, 26, 9. § 160. = Inst. 3, 26, 10. *dispensatori*: G. 1, 122 in fin. § 161. Cf. Inst. 3, 26, 8. Gaius D. 17, 1, 4; 41.

162. In summa sciendum ⟨*est, quotiens faciendum*⟩[1] aliquid gratis dederim, quo nomine, si mercedem statuissem, locatio et conductio contraheretur, mandati esse actionem, ueluti si fulloni polienda curandaue uestimenta ⟨*dederim*⟩ aut sarcinatori sarcienda.

163. Expositis generibus obligationum quae ex contractu nascuntur, admonendi sumus adquiri nobis non solum per nosmet ipsos, sed etiam per eas personas quae in nostra potestate manu mancipioue sunt. **164.** Per liberos quoque homines et alienos seruos quos bona fide possidemus adquiritur nobis, sed tantum ex duabus causis, id est, si quid ex operis suis uel ex re nostra adquirant. **165.** Per eum quoque seruum in quo usumfructum habemus similiter ex duabus istis causis nobis adquiritur. **166.** Sed qui nudum ius Quiritium in seruo habet, licet dominus sit, minus tamen iuris in ea re habere intellegitur quam usufructuarius et bonae fidei possessor. nam placet ex nulla causa [alia] ei adquiri posse, adeo ut, etsi nominatim ei dari stipulatus fuerit seruus manci-
V p. 172 pioue nomine eius acceperit, / quidam existiment nihil ei adquiri.

167. Communem seruum pro dominica parte dominis adquirere
F p. C certum est, excepto[2] eo quod uni nominatim stipulando aut mancipio accipiendo illi soli adquirit,[3] uelut cum ita stipuletur: TITIO DOMINO MEO DARI SPONDES? aut cum ita mancipio accipiat: HANC REM EX IURE QUIRITIUM LUCII TITII DOMINI MEI ESSE AIO, EAQUE EI EMPTA ESTO HOC AERE[4] *A*ENEAQUE LIBRA.[5] **167a.** Illud quaeritur, an quod nomen domini adiectum efficit,[6] idem faciat unius ex dominis iussum intercedens. nostri praeceptores proinde ei qui iusserit soli adquiri existimant atque si nominatim ei soli[7] stipulatus esset seruus mancipioue quid accepisset.[8] diuersae scholae auctores proinde utrisque adquiri putant[9] ac si nullius iussum
F p. D interuenisset.

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[1] Kübler's version of the usual supplement.

[2] F p. C begins: *-cepto eo*; pp. C–F (not entirely legible) carry us to nearly the end of § 174.

[3] Two minor editorial corrections of V are now confirmed by F.

[4] So V. F *empta est oc aere*, with traces of an *o* erased after *est*. Cf. Boeth., in top. 5, 28.

[5] *ieneaque libra* V. om. F. Cf. 2, 104.

[6] Editorial corrections of V again confirmed by F.

[7] *soli* om. F.

[8] So F. *accipisset*, om. *quid*, V.

[9] Rest of section illegible in F (p. C last line; p. D l. 1).

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§ 162. Cf. Inst. 3, 26, 13. G. 3, 142. 143. 205. § 163. = Inst. 3, 28 pr. Cf. 3, 17, 1. G. 2, 86; 4, 134–5. § 164. = Inst. 3, 28, 1. Cf. G. 2, 86. 92. § 165. = Inst. 3, 28, 2. Cf. G. 2, 86. 91. § 166. Cf. G. 2, 88 &c. § 167. = Inst. 3, 28, 3. Cf. 3, 17, 3. G. 1, 119 &c. § 167a. Cf. Inst. 3, 28, 3 fin. C. 4, 27, 2 (3) (A.D. 530).

purchase at a lower price, if possible. **162.** In conclusion it should be noted that if I commission the doing of something without reward, where, had I fixed a reward, there would have been a hiring, the *actio mandati* lies: if, for example, I give clothes to a cleaner to be cleaned or furbished or to a tailor to be mended.

163. Having explained the various *genera* of obligations arising from contract we must now observe that there is acquisition for us not only through our own contracts, but also through those of persons who are in our *potestas*, *manus*, or *mancipium*. **164.** There is acquisition for us also through the contracts of free men and slaves of other persons whom we possess in good faith, but this only in two cases, namely where they make an acquisition through their own work or in connexion with our affairs. **165.** The acquisition is likewise for us in these two cases through slaves in whom we have a usufruct. **166.** But one who has only a bare Quiritary title to a slave, though he is owner, is considered to have less right in this respect than a usufructuary or a *bona fide* possessor. For it is settled law that in no case can there be acquisition for him, not even, in the opinion of some, if the slave stipulates for conveyance to him by name or takes by mancipation in his name. **167.** That a slave of several owners acquires for them each in proportion to their respective shares in him is beyond doubt, except that, if he stipulates or receives by mancipation for one of them by name, he acquires for that one alone, for example if he stipulates thus: 'Do you solemnly promise conveyance to my master Titius?' or receives by mancipation thus: 'I affirm that this thing is the property of my master Lucius Titius by Quiritary title and be it bought for him by this bronze ingot and bronze scale.' **167a.** It is a disputed point whether authorization of the contract by one of the owners has the same effect as his being expressly named. Our teachers hold that there is acquisition for the giver of authorization exactly as though the slave had stipulated or taken by mancipation naming him alone. The authorities of the other school consider that the acquisition is for both the owners, just as though there had been no authorization.

168.[1] Tollitur autem obligatio praecipue solutione eius quod debeatur.[2] unde quaeritur, si quis consentiente[3] creditore aliud pro alio soluerit, utrum ipso iure liberetur, quod nostris praeceptoribus placuit,[4] an ipso iure maneat obligatus, sed aduersus petentem per exceptionem[5] doli mali defendi debeat, quod diuersae scholae auctoribus uisum est.

169.[6] *Item*[7] per acceptilationem tollitur obligatio. acceptilatio autem est uelut imaginaria solutio. quod enim[8] ex uerborum
F p. E obligatione tibi debeam,[9] id si uelis mihi remittere, poterit sic fieri,
V p. 173 ut patiaris haec uerba m/e dicere: QUOD EGO TIBI[10] PROMISI, HABESNE ACCEPTUM? et tu respondeas: HABEO. **170.** Quo genere, ut diximus, *tollu*ntu*r illae obli*ga*tiones* quae in *uerbis consistunt*,[11] non etiam ceterae. consentaneum enim uisum est[12] uerbis factam obligationem posse aliis uerbis dissolui. sed id quod ex alia causa debeatur[13] potest in stipulationem deduci et per acceptilationem *dissol*ui.[14] **171.** Quamuis *autem fiat acceptilatio* imaginaria solutione, tamen[15] mulier sine tutore auctore[16] acceptilationem[17] facere
F p. F non potest, cum alioquin[18] solui ei sine tutore auctore[19] possit. **172.** Item, quod debetur, pro parte recte soluitur;[20] an autem in partem acceptilatio[17] fieri possit, quaesitum *est*.[21]

173.[22] Est et[23] alia species imaginariae solutionis per aes et[24] libram, quod et ipsum genus certis ex[25] causis recept*um*[26] est, ueluti

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[1] In F preceded by the partly legible rubric: *Quibus modis soluuntur obligationes*. F has 3 marginal glosses on this section, one of which is entirely and another almost entirely illegible. The third, which appears to have been part of the original copying, runs: ὡς αὐτὸ τὸ χρεωστούμενον καταβαλλόμενον λύει τὴν ἐνοχήν· εἰ δὲ ἕτερα ἀνθ' ἑτέρων καταβληθῇ, ζητεῖται εἰ λύεται ἡ ἐνοχή.

[2] *debeatur* VF. *debetur* Inst. 3, 29 pr., previously adopted by editors.

[3] *consentiente*: F, interl. gl.: ἀπαιτοῦντος.

[4] *placet* V. *placuit* F, and previously editors.

[5] *per exceptionem* F. *exceptione* V.

[6] Preceded in F by a late insertion, partly marginal: R *de acceptellatione* R. On § 169 F has a partly illegible Greek gloss, which in all probability refers to Paul 65 *Ad ed.* preserved D. 50, 17, 153, as Arangio-Ruiz has well observed.

[7] *Item* Inst. 3, 29, 1. *fit* V. Only *I* legible in F.

[8] So V and Inst. *nam quod* F.

[9] F p. E begins: *-beam.*

[10] So Inst. *quia ego tibi* V. *quod tibi ego* F.

[11] *quod genere ut diximus* V, which then jumps to *non etiam ceterae*. F, though not entirely legible, makes the old restoration from Inst. (*tantum eae obligationes soluuntur quae ex uerbis consistunt*) verbally incorrect. Our text follows Arangio-Ruiz, except that it adopts *consistunt*, which he rejects.

[12] So V and Inst. *est uisum* F.

[13] So V. F illegible. *debetur* Inst.

[14] *dissolui* Inst. and F (?). om. V, which jumps to *imaginaria* in the next section.

[15] *Quamuis—acceptilatio* om. V. F, according to Arangio-Ruiz, BIDR 1935, 580: *Quamuis* [*autem acceptilatio i*]*magi*[*naria solutio sit, t*]*amen.*

168. Obligations are discharged principally by payment or performance[1] of what is due. On this the question arises whether one who, with his creditor's consent, pays or performs something else instead of what is due, is discharged at law, as our teachers have held, or whether he remains under the obligation at law, but may resist an action brought on it by means of the *exceptio doli mali*, as the authorities of the other school have thought.

169. Obligations are also discharged by *acceptilatio*. This is a sort of imaginary payment: if you wish to release me from what I owe you under a verbal obligation, it can be done by your allowing me to say, 'What I promised you, have you received?' and replying yourself 'I have'. **170.** By this method, as we have said, obligations resting on verbal contract are extinguished, but others are not. For it has been held appropriate that an obligation created by words should be discharged by other words. However, what is due on some other ground can be thrown into a stipulation and then be discharged by *acceptilatio*. **171.** But although *acceptilatio* takes the form of an imaginary payment, still a woman cannot release her debtor by *acceptilatio* without her tutor's *auctoritas*, though a real payment can be made to her without it. **172.** And again, a debt can be validly paid in part, but whether a partial *acceptilatio* is possible has been questioned.

173. There is also another kind of imaginary payment, namely *per aes et libram*, which likewise is admitted only in certain cases,

[1] Cf. Buckland, Textbook 568.

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[16] The abbreviation in V (F illegible) might equally be extended: *sine tutoris auctoritate*; but cf. n. 19. [17] So F. *acceptum* V.

[18] F p. F begins: [*al*]*ioquin*. [19] In full F, abbrev. V. Cf. n. 16.

[20] V corrupt. F confirms the editors.

[21] *est* om. V. Not legible and not certainly once present in F.

[22] F continues to nearly the end of the formula in s. 174, but in a very fragmentary condition.

[23] *et* F. *etiam* V. [24] *etiam* V. F illegible. [25] *ex* F. *in* V.

[26] *receptisum* V. F illegible.

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§ 168. Cf. Inst. 3, 29 pr. Ulp. D. 50, 16, 176. § 169. = Inst. 3, 29, 1. § 170. = Inst. 3, 29, 1. *consentaneum*: Ulp. D. 50, 17, 35. *in stipulationem deduci*: Inst. 3, 29, 2. § 171. Cf. G. 2, 85. § 172. Cf. Inst. 3, 29, 1 in fin. § 173. Cf. Festus v. Nexum (Bruns 2, 17. Lindsay 160). Varro, de l. lat. 7, 105 (Bruns 2, 60).

si quid eo nomine debeat*ur* quod per aes et libram gestum *sit*,[1] siue qu*id*[2] ex iudicati causa deb*eatur*.[3] **174.** Adhiben*t*ur[4] non minus quam quinque testes et libripens. deinde is qui liberat*ur* ita oportet loquatur:[5] QUOD EGO TIBI TOT MILIBUS SESTERTIORUM[6] CONDEMNAT*US* SUM, ME *EO* N*OMINE A* TE SOLUO LIBEROQU*E*[7] HOC AERE AENEAQUE LIBRA.[8] HANC TIBI LIBRAM PRIMAM POSTREMA*M*QU*E* EXPENDO[9] ⟨*SECUNDUM*⟩ LEGEM PUBLICAM. deinde asse percutit libram eumque d*at ei*[10] a qu*o* liberatur,[11] ueluti soluendi causa. **175.** Similiter legatarius heredem eodem modo liberat de legato quod per damnationem relictum est, ut tamen scilicet, sicut iudicatus condemnat*um*[12] se esse significat, ita heres *testamento*[13] se dare damnatum esse dicat. de eo tamen tantum potest heres eo modo liberari quod pondere numero constet, et ita si certum sit. quidam
V p. 174 et de eo / quod mensura constat id*em* existimant.

176. Praeterea nouatione tollitur obligatio, ueluti si quod tu mihi debeas a Titio dari stipulatus sim. nam interuentu nouae personae noua nascitur obligatio et prima tollit*ur*, translata in posteriorem, adeo ut in*ter*dum, licet posterior stipulatio inutilis sit, tamen prima nouationis iure tollatur; ueluti si quod mihi debes a Titio post mortem eius, uel a muliere pupilloue sine tutoris auctoritate, stipulatus fuero. qu*o* casu rem amitto; nam et prior debitor liberatur, et posterior obligatio nulla est. non id*em*[14] iuris est si a seruo stipulatus fuero; nam tunc ⟨*prior*⟩[14] proinde adhuc obligatus tenetur ac si postea a nullo stipulatus fuissem. **177.** Sed si eadem persona sit a qua postea stipuler, ita demum nouatio fit, si quid in posteriore stipulatione noui sit, forte si condicio uel *dies aut sponsor*[15] adiciatur aut *de*trahatur. **178.** Sed quo*d* de sponsore dixi*mus*[16] non constat; nam diuersae scholae auctoribus placuit

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[1] *esset* (?) V. F illegible. [2] *quodt* V. F illegible.

[3] *debit* V. F illegible, but its space does not permit of Krüger's conjecture: *deb⟨eatur. Eaque res ita ag⟩it⟨ur:⟩ adhibentur* &c.

[4] *athibemur* V. F illegible.

[5] So V. F, illegible, seems to have been briefer.

[6] *sestertiorum* F. om. V.

[7] *condemnatus—liberoque*: V reads: *condemnat* 4 letters *meconmen* (?) *.cte soluo liueroquam.* F reads: *iudicio* 9 letters *sum eo* 16 letters *libero* 3 letters. The *editio princeps* gave only *iudic* as read, which provoked from Levy the tempting conjecture: *iudicatus uel damnatus* (cf. 4, 21). But see now BIDR 1935, 582. If *iudicio* is correctly read, it must be gloss, being both superfluous and objectionable, and absent from V both here and in s. 175.

[8] Here F breaks off. [9] *postremanquam expende* V.

[10] *dat ei: detel* V. [11] *quod liberatum* V. [12] *condemnati* V.

[13] Illegible. [14] Cf. Inst. 3, 29, 3.

[15] *uel sponsor aut dies* V. *aut dies aut fideiussor* Inst. [16] *dixi* V.

as where something is owing on a transaction *per aes et libram* or under a judgment. **174.** Not less than 5 witnesses and a *libripens* are obtained. Then the party who is being released must say as follows: 'Whereas I have been condemned to pay you so many thousand sesterces, in respect thereof I loose and free myself from you by this bronze ingot and bronze scale. I weigh out to you this pound as the first and last in compliance with the public statute.' He then strikes the scale with the coin and gives it to him by whom he is being released in token of payment. **175.** Similarly a legatee by the same process sets the heir free from a legacy left by damnation, with this difference, that where the judgment debtor declares himself to have been *condemnatus*, the heir states that he has been *testamento damnatus*. An heir can, however, be released by this method only from a debt of things reckoned by weight or number, and then only if the debt be certain. Some hold the same of things reckoned by measure.

176. Furthermore, obligations are discharged by novation, for instance if I stipulate from Titius for payment of what you owe me; for by a new party coming in a new obligation arises and the previous obligation is discharged, being transformed into the later one. Indeed, sometimes the prior obligation is discharged by novation in spite of the later stipulation being void, for instance if I stipulate for what you owe me from Titius as from after his death, or from a woman or a ward without tutor's *auctoritas*; in such a case I lose my right, for both the former debtor is freed and the later obligation is void. The law is different if I take the stipulation from a slave: in this case the former debtor remains under obligation just as if I had not stipulated from anyone. **177.** But where the person from whom I take the later stipulation is the same, there is novation only if there is something new in the later stipulation, for example if a condition or a date or a *sponsor* is added or omitted. **178.** Our statement regarding a *sponsor* is not universally accepted; for the authorities of the other school hold that the addition or

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§ 174. Cf. G. 1, 119; 2, 104; 4, 21. § 175. *per damnationem*: G. 2, 201 sq. Cf. Cic. de leg. 2, 20, 51. *sicut iudicatus*: G. 4, 9. 21. 171. § 176. = Inst. 3, 29, 3. Cf. G. 2, 38. *post mortem*: G. 3, 100. *a muliere pupilloue*: G. 3, 107. 108. 119. *a seruo*: G. 3, 104. 119a. 179. § 177. = Inst. 3, 29, 3. Cf. G. 3, 170. C. 8, 41 (42), 8 (A.D. 530).

nihil ad nouationem proficere sponsoris adiectionem aut detractionem. **179.** Quod autem diximus, si condicio adiciatur nouationem fieri, sic intellegi *oportet*,[1] ut ita dicamus factam nouationem, si condicio extiterit; alioquin, si defecerit, durat prior obligatio. sed uideamus num is qui eo nomine agat doli mali aut pacti conuenti exceptione possit summoueri, quia uidetur inter eos id
V p. 175 actum, ut ita ea res peteretur, si posterioris / stipulationis extiterit condicio. Seruius tamen Sulpicius existimauit statim et pendente condicione nouationem fieri, et, si defecerit condicio, ex neutra causa agi posse, ⟨*et*⟩ eo modo rem perire. qui consequenter et illud respondit, si quis id quod sibi L. Titius deberet a seruo fuerit stipulatus, nouationem fieri et rem perire, quia cum seruo agi non posset. ⟨*sed*⟩ in utroque casu alio iure utimur, nec magis his casibus nouatio fit, quam si id quod tu mihi debeas a peregrino, cum quo sponsus[2] communio non est, SPONDES uerbo stipulatus sim.

180. Tollitur adhuc obligatio litis contestatione, si modo legitimo iudicio fuerit actum. nam tunc obligatio quidem principalis dissoluitur, incipit autem teneri reus litis contestatione. sed si condemnatus sit, sublata litis contestatione incipit ex causa iudicati teneri. et hoc ⟨*est*⟩ quod apud ueteres scriptum est: ante litem contestatam dare debitorem oportere, post litem contestatam condemnari oportere, post condemnationem iudicatum facere oportere. **181.** Unde fit ut, si legitimo iudicio debitum petiero, postea de eo ipso iure agere non possim, quia inutiliter intendo DARI MIHI OPORTERE, quia litis contestatione dari oportere desiit; aliter atque si imperio continenti iudicio egerim; tunc enim nihilo minus obligatio durat, et ideo ipso iure postea agere possum, sed debeo per exceptionem rei iudicatae uel in iudicium deductae summoueri. quae autem legitima/
V p. 176 iudicia et quae imperio continentia ⟨*sint*⟩,[3] sequenti commentario referemus.

182. Transeamus nunc ad obligationes quae ex delicto nascuntur, ueluti si quis furtum fecerit, bona rapuerit, damnum dederit, iniuriam commiserit; quarum omnium rerum uno genere consistit obligatio, cum ex contractu obligationes in IIII genera diducantur, sicut supra exposuimus.

[1] Cf. Inst. 3, 29, 3.
[2] So Savigny. *sponsio* V.
[3] So Mommsen. V not clear.

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§ 179. = Inst. 3, 29, 3. *a seruo*: G. 3, 176 &c. *sponsus communio*: G. 3, 93. 119. §§ 180–1. Cf. G. 3, 83; 4, 103 sq. 114. 123. 131. 131a. Inst. 4, 13, 10. Pap. F.V. 263. § 182. Cf. G. 3, 88. 89. Inst. 4, 1 pr.

omission of a *sponsor* does not produce novation. **179.** Our statement that there is novation if a condition is added must be understood as meaning that there is novation only if the condition is realized; for if it fails, the previous obligation continues. But let us consider whether one who sues on it cannot be defeated by the *exceptio doli mali* or the *exceptio pacti conventi*, because the intention of the parties appears to have been that an action should lie on it only if the condition in the later stipulation were realized. Servius Sulpicius thought that novation takes place at once, even during the pendency of the condition, and that if it fails, no action lies on either ground, so that all claim is lost. Consistently he further advised that, if a man stipulates from a slave for what he is owed by Lucius Titius, novation takes place and the claim is lost, because action cannot be brought against a slave. But in both cases we follow a different rule: in such cases novation does not take place any more than where, in stipulating for what you owe me from a peregrine who is outside the communion of *sponsio*, I use the word *spondes*.

180. Yet again, obligations are discharged by joinder of issue, if the action be by *iudicium legitimum*. For thereupon the original obligation is dissolved and the defendant becomes bound by the joinder of issue. Then, if he is condemned, the joinder of issue is discharged and he becomes bound by the judgment. Hence the saying in ancient writers, that before joinder of issue a debtor ought to pay, after joinder he ought to be condemned, and after condemnation he ought to satisfy judgment. **181.** The result is that if I claim a debt by a *iudicium legitimum*, I am debarred by mere operation of law from suing for it afresh, because my pleading that payment is due to me is vain, seeing that it ceased to be due on issue being joined (in the first action). But it is otherwise if I sue by a *iudicium imperio continens*; for in this case the existing obligation continues, and therefore I am not debarred by mere operation of law from suing afresh, but I must be defeated by means of the *exceptio rei iudicatae uel in iudicium deductae*. What proceedings are *iudicia legitima* and what *iudicia imperio continentia* we shall state in our next book.[1]

182. Now let us pass on to obligations arising from delict, as where theft or robbery is committed, or damage to property is done, or injury to the person. Obligations from these sources all belong to one *genus*, whereas, as we have already explained, obligations from contract are distributed among four *genera*.

[1] Cf. 4, 103 sq.

183. Furtorum autem genera Seruius Sulpicius et Masurius Sabinus IIII esse dixerunt, manifestum et nec manifestum, conceptum et ob*l*atum; Labeo duo, manifestum ⟨*et*⟩ nec manifestum; nam conceptum et oblatum species potius actionis esse furto cohaerentes quam genera furtorum; quod sane uerius uidetur, sicut inferius apparebit. **184.** M*anifes*tum *fur*tum[1] quidam id esse dixerunt, quo*d* dum fit deprehenditur; alii uero ulterius, quod eo loco deprehendit*ur* ubi fit, ueluti si in *o*liueto oliuarum, in uineto uuarum furtum factum est,[2] quamdiu in eo oliueto aut uineto fu*r* sit, a*ut* si in domo furtum factum sit, quamdiu in ea domo fur sit. alii adhuc ulterius eo usq*ue* manifestum furtum esse dixerunt, donec perferret eo quo perferre fur destinasset; alii adhuc ulterius, quandoque eam rem fur tenens uisus fuerit; quae sententia non optinuit. sed et illorum sententia, qui existimauerunt, donec perferret eo quo fur destinasset, deprehensum furtum manifestum esse, ideo non uidetur probari, qu*ia* magnam recipit
V p. 177 dubitation*em* utr*um* / unius diei an etiam plurium dierum spatio id terminandum sit. quod eo pertinet, quia saepe in aliis ciuitatibus subrept*as* re*s* in alias ciuitates uel in alias prouincias destinant fur*es* p*er*ferre. ex duabus itaque superioribus opinionibus alterutra adprobat*ur*; magis tamen plerique posteriorem probant. **185.** N*ec* manifestum furtum qu*id* sit, ex iis quae diximus intellegitur. nam qu*od* manifestum non est, id nec manifestum est. **186.** Conceptum furtum dicitur, cum apud aliquem testibus praesentibus furt*iu*a res quaesita et inuenta est.[3] nam in eum propria a*ctio* constituta est, quamuis fur non sit, quae appellatur concepti. **187.** Oblatum furtum dicitur, cum res furtiua tibi ab aliquo oblata sit eaque apud te concepta sit, *u*tique si ea mente data tibi fuerit, ut apud te, potius qua*m* *apud* eum qui dederit, conciperetur. nam tibi, apud quem concepta est, propria aduersus eum qui optulit, quamuis fur non sit, constituta est actio, ⟨*quae*⟩[4] appellatur obl*a*ti. **188.** Est et*iam* prohibiti furti ⟨*actio*⟩[4] aduersus eum qui furtum quaerere uolentem prohibuerit.

189. Poena manifesti furti ex lege XII tabularum capitalis erat.

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[1] *metum* (?) *fructum* V.
[2] *sit?* Polenaar.
[3] *sit* Inst. 4, 1, 4. So Krüger.
[4] Cf. Inst. 4, 1, 4.

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§ 183. Cf. Inst. 4, 1, 3. *Sabinus*: Gell. 11, 18, 11 sq. *inferius*: G. 3, 186 sq. §§ 184–5. Cf. Inst. 4, 1, 3. D. 47, 2, 3–8. Festus v. Nec (Bruns 2, 16. Lindsay 158). Gell. 11, 18, 11. §§ 186–8. = Inst. 4, 1, 4. Cf. G. 3, 191. 192. § 189. Cf. G. 4, 8. 76. 111. 112. 173. 182. Inst. 4, 1, 5. 4, 2 pr. Gell. 11, 18, 8. XII Tabb. 8, 14 (Textes 19. Bruns 1, 32).

183. According to Servius Sulpicius and Masurius Sabinus there are four *genera* of theft—manifest, non-manifest, *conceptum*, and *oblatum*; according to Labeo there are two—manifest and non-manifest, *conceptum* and *oblatum* being rather *species* of actions connected with theft than *genera* of thefts. The latter seems clearly the better view, as will appear below. **184.** Manifest theft, according to some, is theft detected whilst being committed. Others extend it to theft detected in the place where it is committed, holding, for example, that a theft of olives committed in an olive-grove, or of grapes committed in a vineyard, is manifest if detected whilst the thief is still in the olive-grove or vineyard, or, where there is theft in a house, whilst the thief is still in the house. Others, going further, have maintained that a theft remains manifest up to when the thief has carried the thing to the place he intended. And others go so far as to say that it is manifest if the thief is seen at any time with the thing in his hands. This last opinion has not been accepted, nor does the opinion that the theft is manifest if detected before the thief has carried the thing to where he intended, seem to be approved, because it raises a considerable doubt as to whether this is to be limited to one day or extends to several, the point being that thieves often intend to carry off what they have stolen to another town or province. Either of the first two opinions is tenable, but the second is generally preferred. **185.** What non-manifest theft is can be gathered from what we have said. For what is not manifest is non-manifest. **186.** There is what is called *furtum conceptum*, when a stolen thing has been sought and found on a man's premises in the presence of witnesses. Against him, even if he be not the thief, a special action called *concepti* has been established. **187.** There is what is called *furtum oblatum*, when a stolen thing has been passed off to you by someone and has been found on your premises, at any rate if he gave it to you with the intention that it should be found on your premises rather than on his own. A special action called *oblati* has been established in favour of you, on whose premises the thing has been found, against him who passed it off to you, even if he be not the thief. **188.** There is also an action *prohibiti furti* against one who prevents another who wishes to search for a stolen thing from doing so.

189. Under the law of the Twelve Tables the penalty for

nam liber uerberatus addicebatur ei cui furtum fecerat; utrum autem seruus efficeretur ex addictione an adiudicati[1] loco constitueretur, ueteres quaerebant. in *seruum* aeque uerberat*um animad-uertebatur. sed*[2] postea improbata est asperitas poenae, et tam ex serui persona quam ex liberi quadrupli actio praetoris edicto
V p. 178 constituta est. **190.** / Nec manifesti furti poena per legem ⟨*XII*⟩ tabularum dupli inrogatur, eamque etiam praetor conseruat. **191.** Concepti et oblati poena ex lege XII tabularum tripli es*t*, *ea*que similiter a praetore seruatur. **192.** Prohibiti actio quadrupli est ex e*dicto* praetoris *in*troducta; lex autem eo nomine nullam poen*am* constituit. hoc solum praec*i*pit,[3] ut qui quaerere uelit nudus quaerat, li*cio*[4] cinctus, lancem habens; qui si quid inuenerit, iubet id lex furtum manifestum esse. **193.** Quid sit autem li*ci*um[5] quaesitum est. sed uerius *est* consuti genus esse, quo necessariae partes tegerent*ur*. quae res [lex tota][6] ridicula est. nam qui uestitum quaerere p*ro*hibet, is et nudum quaerere prohibit*ur*us est, eo magis quod ita quaesita re ⟨*et*⟩ inuenta maiori poenae subiciatur. deinde, quod lancem siue ideo haberi iubeat, ut manibus occup*a*tis nihil subiciat, siue ideo, ut quod inuener*it* ibi imponat, neutrum eorum procedit, si id quod *quae*ratur eius magnitudinis aut naturae sit, ut neque subici neque ib*i* imponi possit. certe non dubitatur, cuiuscumque materiae sit ea lanx, satis legi fieri. **194.** Propter hoc tamen quod lex ex ea causa manifestum furtum esse iubet, sunt qui scribunt furtum manifestum aut lege ⟨*intellegi*⟩ aut natura: lege id ipsum de quo loquimur, natura illud de quo superius exposuimus. sed uerius est natura tantum manifestum furtum intellegi; neque enim lex facere potest ut, qui manifestus fur non si*t*, manifestus sit, non magis quam qui omnino fur non sit, fur sit, et qui adulter a*ut* homicida non sit, adulter uel /
V p. 179 homicida sit. at illud sane lex facere potest, ut proinde aliquis poena tenea*tur* atque si furtum uel adulterium uel homicidium admi*si*sset, quamuis nihil eorum admiserit.

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[1] *iudicati* Kübler.
[2] Huschke. Generally adopted.
[3] *praecepit* V. Not impossible.
[4] *linteo* V.
[5] *linteum* V.
[6] So Krüger. [*res*] *lex tota* Kübler. Perhaps *res* [*lex*] *tota*.

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§ 189. *praetoris edicto*: Edictum § 128. § 190. Cf. G. 4, 8 &c. Inst. 4, 1, 5. XII Tabb. 8, 16 (Textes 19. Bruns 1, 33). *praetor:* Edictum § 128. § 191. Cf. G. 3, 186–7; 4, 173. Inst. 4, 1, 4. Gell. 11, 18, 12. XII Tabb. 8, 15a (Textes 19. Bruns 1, 32). Edictum p. 322. §§ 192–3. Cf. G. 3, 188. Gell. 11, 18, 9. 16, 10, 8. XII Tabb. 8, 15b (Textes 19. Bruns 1, 32).

manifest theft used to be capital. A free man was scourged and then solemnly assigned by the magistrate (*addictio*) to him from whom he had stolen; whether by the *addictio* the thief was made a slave, or was placed in the position of a judgment debtor, used to be disputed by the early lawyers. A slave, after being similarly scourged, was put to death. But in later times the ferocity of the penalty was reprobated, and in the case of both a slave and a free man an action for fourfold was established by the praetor's Edict. **190.** For non-manifest theft a penalty of double is imposed by the law of the Twelve Tables, and this is preserved by the praetor. **191.** For *conceptum* and *oblatum* the penalty under the law of the Twelve Tables is threefold, and this is likewise preserved by the praetor. **192.** An action for preventing search (*prohibiti furti*) for fourfold has been introduced by the praetor's Edict. The law of the Twelve Tables provides no penalty for this, but merely ordains that one wishing to search must do so naked, girt with a *licium* and holding a platter; if he finds anything, the law says it is to be manifest theft. **193.** What, it has been asked, is the *licium*? Probably it is some sort of cloth for covering the privy parts. The whole thing is ridiculous; for one who will not let you search with your clothes on is not going to let you do so with them off, especially when, if you search and find in this manner, he is brought under a heavier penalty. Again, of the two explanations of the requirement of a platter in the hands—namely, that the object is to engage the searcher's hands and so prevent him from palming anything off, or else that it is for him to place on it what he finds—neither will serve, if we suppose the thing sought for to be of such a size or nature that it can neither be palmed off nor be placed on the platter. At any rate there is no doubt that the statute is complied with whatever the platter is made of. **194.** The fact that the statute enacts that in such case there is manifest theft causes some writers to say that theft may be manifest by statute or in fact: by statute in the case we are now discussing, in fact in the circumstances described previously. But the truth is that manifest theft means manifest in fact; for statute can no more turn a thief who is not manifest into a manifest thief than it can turn into a thief one who is not a thief at all, or into an adulterer or homicide one who is neither the one nor the other. What statute can do is simply this: it can make a man liable to a penalty as if he had committed theft, adultery, or manslaughter, though he has committed none of these crimes.

195.[1] Furtum autem fit non solum cum quis intercipiendi causa rem alienam amouet, *sed* generaliter cum quis rem alienam inuito domino contrectat. **196.** Itaque, si quis re[1] quae apud eum deposita sit utatur, furtum committit. et si quis utendam rem acceperit eamque in alium usum transtulerit, furti obligatur, ueluti si quis argentum utendum acceperit, quasi amicos ad cenam inuitaturus [rogauerit],[1] et id peregre secum tulerit, aut si quis equum gestandi gratia commodatum longius [cum][1] aliquo duxerit, quod ueteres scripserunt de eo qui in aciem perduxisset. **197.** Placuit tamen eos qui rebus commodatis aliter uterentur quam utendas accepissent, ita furtum committere, si intellegant id se inuito domino facere, eumque, si intellexisset, non permissurum; at[2] si permissurum credant, extra furti crimen uideri; optima sane distinctione, quod furtum sine dolo malo non committitur. **198.** Sed et si credat aliquis inuito domino se rem ⟨con⟩trectare, domino autem uolente id fiat, dicitur furtum non fieri. unde illud quaesitum [et probatum] est: cum Titius seruum meum sollicitauerit ut
V p. 180 quasdam res mihi subriperet et ad eum perferret, ⟨et seruus⟩[3] / id ad me pertulerit, ego, dum uolo Titium in ipso delicto deprehendere, permiserim seruo quasdam res ad eum perferre, utrum furti an serui corrupti iudicio teneatur Titius mihi, an neutro. responsum neutro eum teneri, furti ideo quod non inuito me res contrectarit, serui corrupti ideo quod deterior seruus factus non est.[4] **199.** Interdum autem etiam liberorum hominum furtum fit, ueluti si quis liberorum nostrorum qui in potestate nostra sint, siue etiam uxor quae in manu nostra sit, siue etiam iudicatus uel auctoratus meus subreptus fuerit. **200.** Aliquando etiam suae rei quisque furtum committit, ueluti si debitor rem quam creditori pignori dedit subtraxerit, uel si bonae fidei possessori rem meam possidenti subripuerim. unde placuit eum qui seruum suum, quem alius bona fide possidebat, ad se reuersum celauerit, furtum committere. **201.** Rursus ex diuerso, interdum alienas res occupare et usucapere concessum est nec creditur furtum fieri, ueluti res here-

[1] Cf. Inst. 4, 1, 6.
[2] *ut* V. *ac* Inst.
[3] Cf. Inst. 4, 1, 8.
[4] *sit* Huschke–Kübler.

§ 195. = Inst. 4, 1, 6. Cf. Gell. 11, 18, 20. Paul 2, 31, 1. Inst. 4, 11, 1 (Paul D. 47, 2, 1, 3). *rem alienam*: G. 3, 200. *inuito domino*: G. 3, 197–8. § 196. Cf. Inst. 4, 1, 6. § 197. = Inst. 4, 1, 7. Cf. 4, 1, 1. *sine dolo malo*: G. 2, 50; 3, 202. 208; 4, 178. § 198. Cf. Inst. 4, 1, 8. C. 6. 2, 20 (A.D. 530). § 199. Inst. 4, 1, 9. *liberorum*: G. 1, 134. *iudicatus*: G. 3, 189; 4, 21. § 200. = Inst. 4, 1, 10. Cf. G. 3, 195. 204. Inst. 4, 1, 1. § 201. Cf. G. 2, 52–61.

195. Theft is committed not only by removing another's property with intent to appropriate it, but also by any handling whatsoever of another's property against his will. **196.** Accordingly, one who makes use of a thing left in his custody commits theft. Again, one who turns to some other use a thing lent to him for a particular use is liable for theft, for example one who obtains a loan of silver on the plea that he is giving a party and then takes it abroad, or one who borrows a horse for a ride and takes it further than was meant; the old writers laid this down of the man who took a borrowed horse into battle. **197.** It is, however, agreed that those who use borrowed things for purposes outside the agreement commit theft only if they are aware that their act is against the owner's will, and that, had he known of it, he would not have allowed it; but if they believe that he would have allowed it, they are not guilty of theft. This is a thoroughly sound distinction, because theft is not committed without dishonest intention. **198.** But even though one believes that one is handling the thing against its owner's will, still, if in fact he is willing, no theft is held to be committed. Hence the following problem: Titius having solicited my slave to steal certain things from me and bring them to himself, the slave reports the matter to me; I, wishing to catch Titius in the very act of stealing, allow the slave to take certain things to him: is Titius liable to me in the action for theft, or in that for corrupting a slave, or in neither? It has been held that he is liable in neither; not in the action for theft, because his handling of the things was not against my will, not in that for corrupting a slave, because the slave was not corrupted. **199.** Sometimes there is theft even of free persons, for instance where a child in my *potestas* or my wife in *manus* or my judgment debtor or my sworn gladiator is stolen. **200.** Sometimes a man actually commits theft of his own property, for example, if a debtor purloins a thing he has pledged to a creditor, or if I steal my own thing from its *bona fide* possessor. Accordingly it has been held to constitute theft if an owner hides his slave who has escaped from a *bona fide* possessor and returned to himself. **201.** On the other hand, it is sometimes possible, without its being considered theft, to take and acquire by usucapion things belonging to another, for example

ditarias quarum heres non est nactus possessionem, nisi necessarius heres extet; nam necessario herede extante placuit nihil pro herede usucapi posse. item debitor rem quam fiduciae causa creditori mancipauerit aut in iure cesserit, ⟨secun⟩dum ea quae in superiore commentario rettulimus, sine furto possidere et usucapere potest.

202. Interdum furti tenetur *qui*[1] ipse furtum non fecerit, qualis /
V p. 181 est cuius ope consilio furtum factum est. in quo numero est qui nummos tibi excussit ut eos alius subriperet, uel obstitit tibi ut alius subriperet, aut oues aut boues tuas fugauit ut alius eas exciperet. et hoc ueteres scripserunt de eo qui [eo] panno rubro fugauit armentum. sed si quid[2] per lasciuiam, et non data opera ut furtum committeretur, factum sit, uidebimus an utilis actio dari debeat, cum per legem Aquiliam, quae de damno lata ⟨est⟩, etiam culpa puniatur.

203.[3] Furti autem actio ei competit cuius interest rem saluam esse, licet dominus non sit. itaque nec domino aliter competit quam si eius interest rem non perire. **204.** Unde constat creditorem de pignore subrepto furti agere posse, adeo quidem ut quamuis ipse dominus, id est ipse debitor,[4] eam rem subripuerit nihilo minus creditori competat actio furti. **205.** Item, si fullo polienda curandaue aut sarcinator sarcienda uestimenta mercede certa acceperit eaque furto amiserit, ipse furti habet actionem, non dominus, quia domini nihil interest ea[5] non periisse, cum iudicio locati a fullone aut sarcinatore suum ⟨con⟩sequi possit,[6] si modo is fullo aut sarcinator rei praestandae[7] sufficiat; nam si soluendo non est, tunc quia ab eo dominus suum consequi non potest, ipsi furti actio competit, quia hoc casu ipsius interest rem saluam esse.
V p. 182 **206.** Quae de[8] fullone / aut sarcinatore diximus, eadem transferemus et ad cum cui rem commodauimus. nam ut illi mercedem capiendo custodiam praestant, ita hic[9] quoque utendi commodum percipiendo similiter necesse habet[9] custodiam praestare. **207.**[10] Sed is apud quem res deposita est custodiam non praestat, tantumque

[1] So Inst. 4, 1, 11. *cum* V.
[2] *quis* V. *quid eorum* Inst. 4, 1, 11.
[3] Cf. Inst. 4, 1, 13.
[4] *quamuis ipse debitor* Inst. 4, 1, 14. [*id . . . debitor*] Kübler.
[5] Cf. Inst. 4, 1, 15.
[6] *suum sequi posset* V. *rem suam persequi potest* Inst.
[7] *rem praestande* followed by three illegible letters (*plene*? Huschke) V.
[8] Inst. 4, 1, 16. *deque* V.
[9] *hi . . . habent* V. *is . . . habet* Inst.
[10] Inst. 4, 1, 17.

§ 202. = Inst. 4, 1, 11. *ope consilio*: G. 4, 37 &c. *utilis actio*: G. 3, 219. § 203. = Inst. 4, 1, 13. Cf. Ulp., Paul D. 47, 2, 10 sq. § 204. = Inst. 4,

hereditary things of which the heir has not yet taken possession, except where there is a *heres necessarius*; for if there is, it is settled law that usucapion *pro herede* is impossible. Or again, a debtor may without theft take possession of and acquire by usucapion a thing that he has mancipated, or surrendered *in iure*, by way of trust to a creditor, as we have related in the preceding book. **202.** Sometimes a man is liable for a theft of which he is not the actual perpetrator; we refer to one by whose aid and counsel the theft has been carried out, for instance a man who knocks coins out of your hands, or obstructs you, for another to make off with them, or who stampedes your sheep or cattle for another to catch them. So the old lawyers wrote of one who stampeded a herd with a red rag. But if it is a mere prank, without intention of furthering a theft, the question will be whether an *actio utilis* ought not to be given, since even negligence is punished by the *L. Aquilia*, which governs damage to property.

203. The action of theft lies at the suit of one who has an interest in the safety of the thing, though he be not its owner. Therefore it is not open even to an owner except if he is interested in its not being lost. **204.** Consequently it is clear that a creditor can sue in theft if his pledge has been stolen from him; indeed he can do so even if it has been taken by its owner, that is, the debtor. **205.** Again, if for a definite reward a fuller has received clothes to be cleaned or furbished, or a tailor clothes to be mended, and loses them by theft, it is he, and not their owner, who has the action of theft, because the owner has no interest in their not being lost, seeing that he can recover his damages from the fuller or tailor by *actio locati*, provided that the fuller or tailor is able to meet the damages; for if he is insolvent, then the owner, not being able to recover his damages from him, has the action of theft himself, because in this case he has an interest in the safety of the thing. **206.** What we have stated of a fuller or tailor will apply equally to one to whom we have lent a thing for use. For just as the former by accepting a reward make themselves responsible for safe-keeping, so likewise a borrower, in consideration of the benefit he gets by using the thing, must take the same responsibility. **207.** On the other hand, one with whom a thing is

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1, 14. Cf. G. 3, 200. § 205. = Inst. 4, 1, 15. *mercede certa*: G. 3, 143–4 &c. § 206. = Inst. 4, 1, 16. Cf. Inst. 3, 14, 2. 4, 2, 2. C. 6, 2, 22 (A.D. 530). § 207. = Inst. 4, 1, 17. Cf. 3, 14, 3. 4, 2, 2.

in eo obnoxius est, si quid ipse dolo ⟨*malo*⟩ fecerit. qua de *causa* ⟨*si*⟩ res ei subrepta fuerit, qu*ia* restituendae eius no*mine* depositi non tenetur nec ob id eius interest rem saluam esse, furti [itaque] agere non potest, *sed* ea actio domino competit.

208. In summa seiendum est quaesitum esse an impubes rem alien*am am*ouendo[1] furtum faciat. plerisque placet, quia furtum ex ad*fectu*[1] consistit, ita demum obligari eo crimine impuberem, si proximus pubertati sit et ob id intellegat se delinquere.

209. Qui res alienas rapit, tenetur et*iam*[2] furti. quis enim magis alienam rem inuito domino ⟨*con*⟩trectat[3] quam qui ⟨*ui*⟩[3] rapit? itaque recte *dictum*[3] est eum improbum furem esse. sed propriam actionem eius *del*icti nomine[3] praetor introduxit, quae appellatur ui bonorum raptorum, et est intra annum quadrupli [aetio],[3] post annum simpli. quae actio utilis est, etsi[4] quis unam rem, licet minimam, rapuerit.

210. Damni iniuriae actio constituit*ur* per legem Aquiliam, euius primo capite cautum est ⟨*ut*⟩, si quis hominem alienum /
V p. 183 *alien*amue[5] quadrupedem quae pecudum[6] numero sit iniuria occiderit, quanti ea res in eo anno plurimi fuit,[7] tantum domino dare damnetur. **211.** [Is][8] Iniuria autem occidere intellegitur, cuius dolo a*ut* culpa id aceiderit; nec ulla alia lege damnum quod sine iniuria dat*ur* reprehendit*ur*; itaque impunitus est qui sine culpa et dolo malo casu quodam damnum committit. **212.** Nec solum corpus in actione huius legis aestimatur, sed sane si seruo occiso plus dominus capiat damni quam pretium serui s*it*, id quoque aestimatur, ueluti si seruus meus ab aliquo heres institutus, antequam iussu meo hereditatem cerneret, occis*us* fuerit; non enim tantum ipsius pretium aestimatur, sed et hereditatis amissae quantitas. item, si ex gemellis uel ex comoedis uel ex symphoniacis unus occisus fuerit, non solum occisi fit aestimatio, sed eo amplius ⟨*id*⟩

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[1] So Inst. 4, 1, 18. V corrupt.
[2] *et* V. *quidem etiam* Inst. 4, 2 pr.
[3] So Inst.
[4] *set si* V. *etiamsi* Inst.
[5] So Inst. 4, 3 pr. *eamue* V. Cf. Bruns 1, 45.
[6] So Inst. V corrupt.
[7] *fuit* V (but cf. Apogr. 269). *fuit* Inst. *fuerit* editors.
[8] om. Inst.

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§ 208. = Inst. 4, 1, 18. Cf. G. 3, 109. 197 etc. XII Tabb. 8, 14 (Textes 19. Bruns 1, 32). § 209. = Inst. 4, 2 pr. Cf. 4, 6, 19. G. 4, 8. 76. 112. 182. Edictum § 187. § 210. = Inst. 4, 3 pr. Cf. G. 4, 9. 37 fin. 76. 171. *l. Aquiliam*: a plebiscite; poor authority for 287 B.C. Cf. Bruns 1, 45. *pecudum numero*: G. 3, 217. Inst. 4, 3, 1. § 211. Cf. Inst. 4, 3, 2–8. 14. G. 3, 202 fin. § 212. Cf. Inst. 4, 3, 10.

deposited is not answerable for its safe-keeping, but is liable only for his own wilful fault. Therefore, if the thing deposited is stolen from him, not being liable in the action of deposit for its restitution and having therefore no interest in its not being lost, he cannot sue in theft, but the action goes to the thing's owner.

208. Finally be it noted that it has been a question whether a person below puberty commits theft by removing another's thing. Most lawyers hold that, since theft depends on intention, the child is only liable on such a charge if he is approaching puberty and so understands that he is doing wrong.

209. He who takes another's property by violence is also liable in theft. For who more truly handles another's property against the will of its owner than one who robs him with violence? Thus he has rightly been described as an outrageous thief. However, the praetor has introduced a special action on this delict, called *ui bonorum raptorum*, which lies for fourfold within a year, and after that for simple value. This action is available even if the robbery is of but a single thing of insignificant value.

210. An action for wrongful damage exists under the *L. Aquilia*, the first chapter of which provides that one who has wrongfully killed another's slave, or his four-footed beast of the class of cattle, shall be condemned to pay the owner the highest value thereof in that year. **211.** He is deemed to kill wrongfully, by whose malice or negligence the death is caused. There being no other statute which visits damage caused without fault, it follows that a man who, without negligence or malice, but by some accident, causes damage, goes unpunished. **212.** In an action under this statute it is not only the value of the thing damaged in itself that is assessed, but also if by the killing of his slave an owner suffers loss exceeding the value of the slave, this too is assessed. Suppose, for example, that my slave has been killed after he has been instituted heir by someone, but before he has by my authority formally accepted the inheritance; in that case not only the personal value of the slave, but also the amount of the lost inheritance is assessed. Again, if one of twins, or a member of a troupe of actors or musicians, has been killed, account is taken not only of

quoque[1] computatur, quod ceteri qui supersunt depretiati sunt. idem iuris est etiam si ex pari mularum unam uel etiam ex quadrigis equorum unum occiderit. **213.** Cuius autem seruus occisus est, is liberum arbitrium habet uel capitali crimine reum facere eum qui occiderit, uel hac lege damnum persequi. **214.** Quod autem adiectum est in hac lege: QUANTI IN EO ANNO PLURIMI EA RES FUERIT, illud efficit, si clodum puta aut luscum seruum occiderit qui in eo anno integer fuit,[2] ⟨*ut non quanti fuerit cum occideretur, sed quanti in eo anno plurimi fuerit*⟩,[3] aestimatio fiat. quo fit ut quis plus
V p. 184 interdum ⟨*con*⟩sequatur quam ei damnum / datum est.

215. Capite secundo ⟨*aduersus*⟩ adstipulatorem qui pecuniam in fraudem stipulatoris acceptam fecerit, quanti ea res est, tanti actio constituitur. **216.** Qua et ipsa parte legis damni nomine actionem introduci manifestum[4] est. sed id caueri non fuit necessarium, cum actio mandati ad eam rem sufficeret, nisi quod ea lege aduersus infitiantem in duplum agitur.

217. Capite tertio de omni cetero damno cauetur. Itaque, si quis seruum uel eam quadrupedem quae pecudum numero *est* ⟨*uulnerauerit, siue eam quadrupedem quae pecudum numero non est,*⟩ ueluti[5] canem, aut feram bestiam, ueluti ursum leonem, uulnerauerit uel occiderit, hoc[6] capite actio constituitur. in ceteris quoque animalibus, item in omnibus rebus quae anima carent, damnum iniuria datum hac parte uindicatur. si quid enim ustum aut ruptum aut fractum ⟨*fuerit*⟩,[7] actio hoc capite constituitur, quamquam[8] potuerit sola rupti appellatio in omnes istas causas sufficere. Ruptum ⟨*enim intellegitur quod quoquo modo corruptum*⟩[7] est. unde non solum usta [aut rupta][9] aut fracta, sed etiam scissa et collisa et effusa et quoquo modo uitiata aut[10] perempta atque deteriora facta hoc uerbo continentur. **218.** Hoc tamen capite non quanti in eo anno, sed quanti in diebus XXX proximis ea res fuerit, damnatur is qui damnum dederit. ac ne PLURIMI quidem uerbum adicitur. et ideo quidam putauerunt liberum esse iudici uel ad id

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[1] *id quoque* Inst. 4, 3, 10. *qui* V.
[2] *fuit* V. *fuerit* editors.
[3] Krüger's supplement, based on Inst. 4, 3, 9.
[4] Savigny. V corrupt.
[5] So Inst. 4, 3, 13. *quadrupedem quae pecudum numero de ueluti* V.
[6] *ca* or *ea hoc* V.
[7] Supplied from Inst.
[8] *quamquam* Inst. *quoque* V.
[9] om. Inst, rightly.
[10] *uitiata aut* om. Inst., perhaps rightly.

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§ 213. Cf. Inst. 4, 3, 11. G. 1. 53. § 214. Cf. G. 3, 210. Inst. 4, 3, 9. 4, 6, 19. § 215. Cf. G. 3, 110 sq. Inst. 4, 3, 12. § 216. Cf. G. 3, 111;

the value of the person killed, but also of the depreciation of the survivors. It is the same if one of a pair of mules or of a team of chariot-horses is killed. **213.** The owner of a slave who has been killed has the option between prosecuting the killer on a capital charge and suing under the present statute for his damages. **214.** The effect of the words in the statute 'the highest value thereof in that year' is that if, for instance, a slave is killed who is lame or one-eyed, but had been free from defect within the year, the measure of the condemnation is his highest value in the year, not his value at the time of his being killed. This means that sometimes an owner recovers more than the loss that has been inflicted on him.

215. The second chapter provides, against an *adstipulator* who has released the debtor in fraud of his principal, an action for the amount in question. **216.** This part of the statute, like the rest, obviously introduces a remedy for damage; but the provision was unnecessary, as the action of mandate would meet the case, except that the statutory action is for double against a defendant who denies liability.

217. The third chapter deals with all other damage to property. Accordingly, it provides an action if a slave or a four-footed beast of the class of cattle is wounded, or if a four-footed animal other than cattle, such as a dog, or a wild beast like a bear or a lion, is either wounded or killed. It also gives a remedy for wrongful damage to all other animals and to any inanimate things. For it provides an action if anything is 'burnt, destroyed (*ruptum*), or broken', though the single term *ruptum* would have covered all the cases. For by *ruptum* we understand physically damaged (*corruptum*) in any way at all. Thus not only burning and breaking, but also cutting, bruising, spilling, and all kinds of damage, destruction, or spoiling are covered by the word *ruptum*. **218.** Under this chapter, however, the person doing the damage is condemned to pay the value not in that year, but in the last 30 days. Indeed the word *plurimi* (highest) is not inserted, and consequently some jurists have thought that the *iudex* is free to assess the value in the

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4, 9. 171; 3, 127. § 217. = Inst. 4, 3, 13. Bruns 1, 46, with Jolowicz, LQR 1922, 220. Lenel, SZ 1922, 575. § 218. Cf. Inst. 4, 3, 14 fin. 15. Jolowicz l.c.

V p. 185 tempus ex diebus XXX aestimationem redigere quo plurimi / res fuit,[1] uel ad id quo minoris fuit.[1] sed Sabino placuit proinde habendum ac si etiam hac parte PLURIMI uerbum adiectum esset; nam legis latorem contentum fuisse ⟨*quod prima parte eo uerbo usus esset.* **219.** *Ceterum*⟩[2] placuit ita demum ex ista lege actionem esse, si quis corpore suo damnum dederit; *ideo*que alio modo damno dato utiles actiones dantur, ueluti si quis alienum hominem aut pecudem incluserit et fame necauerit, aut iumentum tam vehementer egerit ut rumperetur; item si quis alieno seruo persuaserit ut in arborem ascenderet uel in puteum descenderet, et *is* ascendendo aut descendendo ceciderit ⟨*et*⟩[3] aut mortuus fuerit aut aliqua parte corporis laesus sit; item[4] si quis alienum seruum de ponte aut ripa in flumen proiecerit et is suffocatus fuerit; quamquam hic[5] corpore suo damnum dedisse eo quod proiecerit non difficiliter intellegi potest.

220. Iniuria autem committitur non solum cum quis pugno puta aut fuste percussus uel etiam uerberatus erit, sed etiam si cui conuicium factum fuerit, siue quis bona alicuius quasi debitoris, sciens eum nihil sibi debere, proscripserit, siue quis ad infamiam alicuius libellum aut carmen scripserit, siue quis matrem familias aut praetextatum adsectatus fuerit, et denique aliis pluribus modis.

221. Pati autem iniuriam uidemur non solum per nosmet ipsos,
V p. 186 sed etiam per liberos nostros quos in potestate habemus; / item per uxores nostras [eum in manu nostra sint].[6] itaque si filiae[7] meae quae Titio nupta est iniuriam feceris, non solum filiae nomine tecum agi iniuriarum potest, uerum etiam meo quoque et Titii nomine. **222.** Seruo autem ipsi quidem nulla iniuria intellegitur fieri, sed domino per eum fieri uidetur, non tamen isdem modis quibus etiam per liberos nostros uel uxores iniuriam pati uidemur, sed ita cum quid atrocius commissum fuerit, quod aperte in ⟨con⟩tumeliam domini fieri uidetur, ueluti si quis alienum seruum uerberauerit; et in hunc casum formula proponitur. at si quis

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[1] *fuerit* Krüger.

[2] Cf. Inst. 4, 3, 15–16.

[3] So editors, but it might be better (cf. Inst.) to omit *ceciderit* as gloss.

[4] *itemp* V. *item contra* Kübler. *sed* Krüger, with Inst.

[5] *quamquam hic*: *quoque hic* or *quamquis hic* V. Cf. p. 224, n. 8 supra. *hic quoque* Kübler. om. Krüger.

[6] Gloss according to Mommsen and Girard. *quamuis in manu nostra* ⟨*non*⟩ *sint* Krüger and Kübler. Inst. 4, 4, 2: *item per uxorem suam; id enim magis praeualuit*, whence Pellat: *immo etiam per uxores nostras, quamuis in manu nostra* ⟨*non*⟩ *sint;* ⟨*id enim magis praeualuit.*⟩

[7] So Krüger. *ueltiae filiae* V. *ueluti filiae* Kübler.

last 30 days at its highest or when it was less. But Sabinus held that we must interpret as if here too the word *plurimi* had been inserted, the legislator having thought it sufficient to have used the word in the first chapter. **219.** It has been decided that there is an action under the statute only where a man has done damage with his own body; consequently actions on the case are granted if the damage has been caused in some other way, for example, if one shuts up and starves to death another man's slave or cattle, or drives his beast so hard that it founders, or if one persuades another's slave to climb a tree or to go down a well and he falls and is killed or physically injured in climbing up or down, or if one throws another's slave into a river from a bridge or bank and he is drowned, though in this case there would be no difficulty in seeing an infliction of damage with the defendant's body in the act of throwing.

220. Outrage is committed not only by striking a man with the fist or a stick or by flogging him, but also by raising a clamour against him, or if, knowing that he owes one nothing, one advertises his property for sale as a debtor's, or by writing defamatory matter in prose or verse against him, or by following about a matron or a youth, and in short in many other ways. **221.** A man is deemed to suffer outrage not only in his own person, but also in the persons of his children in *potestas* and his wife. Accordingly, if you commit an outrage on my daughter (in *potestas*) who is married to Titius, an *actio iniuriarum* lies against you not only in her name, but also in mine and Titius'. **222.** A slave is not considered personally to suffer outrage, but an outrage is held to be committed through him on his owner, though not in all the ways in which it is held to be committed on us through our children or wives, but only if the act is specially shocking and obviously intended as an insult to his owner, as where one flogs another's slave—a case for which a *formula* is published in the Edict. But for raising a clamour against a slave or striking him

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§ 219. Cf. Inst. 4, 3, 16. G. 3, 202. § 220. = Inst. 4, 4, 1. Cf. Paul. Coll. 2, 5. Edictum tit. xxxv. *proscripsit*: G. 3, 78; 4, 102. § 221. = Inst. 4, 4, 2. § 222. = Inst. 4, 4, 3. *formula*: Edictum § 194.

seruo conuicium fecerit uel pugno eum percusserit, non proponit*ur* ulla formula, nec temere petenti datur.

223. Poena autem iniuriarum ex lege XII tabular*um* propter membrum quidem ruptum talio erat; propter os uero fractum aut collisum trecentorum assium poena era*t*, si libero os fractum erat; at si seruo, CL; propter ceteras uero iniurias XXV assium poena er*a*t constituta. et uidebantur illis temporibus in magna paupertate satis idoneae istae pecuni*ari*ae poenae. **224.** Sed nunc alio iure utimur. p*er*mittit*ur* enim nobis a praetore *ipsi*s iniuriam aestimare, et iudex uel tanti condemnat quanti nos aestimauerimus, uel minoris, pro*ut* ill*i* uisum fuerit. sed cum atrocem iniuriam prae-
V p. 187 tor / aestimare soleat, si simul constituerit quantae pecuniae eo nomine fieri debeat uadimonium, hac ipsa quantitate taxamus formulam, et iudex, qu*amuis*[1] possit uel minoris damnare, plerumque tamen propter ipsius praetoris auctoritatem non audet minuere condemnationem. **225.** Atrox autem iniuria aestimatur uel ex facto, ueluti si quis ab aliquo uulneratus aut uerberatus fustibusue caesus fuerit, uel ex loco, ueluti si cui in theatro aut in foro iniuria facta sit, uel ex persona, ueluti si magistratus iniuriam passus fuerit, uel senator*i* ab humili persona facta sit iniuria. /

[LIB· III· EXPLIC[2].]

[1] So Krüger. *qui* V, kept by Kübler.
[2] In capitals, in the vacant half-page. The next page, 188, is vacant.

§ 223. = Inst. 4, 4, 7. XII Tabb. 8, 2–4 (Textes 17. Bruns 1, 29). § 224. Cf. Inst. 4, 4, 7. G. 4, 51. 60. 76. 112. 177. 184 sq. Edictum tit. xxxv. § 225. = Inst. 4, 4, 9.

with the fist there is no *formula* published in the Edict, nor is one lightly granted to a plaintiff.

223. Under the Twelve Tables the penalties for outrage used to be: for destroying a limb retaliation, for breaking or bruising a bone 300 *asses* if the sufferer was a free man, 150 if a slave; for all other outrages 25 *asses*. These penal sums were considered sufficient in those days of extreme poverty. **224.** But the system now in force is different. For the praetor allows us to make our own assessment of the outrage, and the *iudex* may, at his discretion, condemn in the amount of our assessment or in a lesser sum. But as it is customary for the praetor impliedly to assess an aggravated outrage himself, when he determines in what sum the defendant must give security for reappearance, the plaintiff limits the claim in his *formula* to the same amount, and the *iudex*, though he has power to condemn in a lesser sum, generally out of deference to the praetor does not venture to reduce it. **225.** An outrage is regarded as aggravated either by the actual deed, for example wounding or flogging or cudgelling a man, or by the place, for example if an outrage is inflicted in the theatre or the market-place, or by the person, for example if an outrage is inflicted on a magistrate, or on a senator by a person of low degree.

CONTENTS OF BOOK IV

⟨COMMENTARIUS QUARTUS⟩

V p. 189 **1.** *Superest ut de actionibus loquamur. et si quaeramus*[1] quot genera actionum sint, uerius uidetur duo esse, in rem et in personam. nam qui IIII esse dixer*unt* ex sponsion*um* generibus, non animaduerterunt quasdam species actionum inter genera se rettulisse. **2.** In personam actio est qua agimus quotiens ⟨*litigamus*⟩[2] cum aliquo qui nobis uel ex contractu uel ex delict*o* obligatus est, id est, cum intendimus DARE FACERE PRAESTAR*E* OPORTER*E*. **3.** In r*em* actio est cum aut corporalem rem intendimus nostram esse *aut* *i*us aliquod nobis competere, ueluti utend*i* aut utendi fruend*i*, *e*undi agendi aquamue ducendi, uel altius tollendi *pr*ospiciendiue. actio[3] ex diuerso aduersario est negatiua. **4.** Sic itaque discretis actionibus, certum est non posse nos rem nostram ab alio ita petere: SI PARET EUM DARE OPORTERE. nec enim quod nostrum est nobis dari potest, cum scilicet id dari nobis intellegatur quod ⟨*ita datur ut*⟩[4] nostrum fiat, nec res quae ⟨*nostra iam est*⟩[4] nostra ampli*u*s fieri potest. plane odio furum, quo magis pluribus actionibus teneant*ur*, receptum est ut, extra poenam dupli aut quadrupli, rei recipiendae nomine fures e*tiam*[4] hac action*e* teneantur: SI PARET EOS DARE OPORTERE, quamuis sit etiam aduersus eos haec actio qua rem nostram esse petimus. **5.** Appellantur autem in rem quidem actiones uindicationes, in personam uero actiones, quibus DARI FIERIUE OPORTERE intendimus, condictiones.

V p. 190 **6.** Agimus autem interdum ut rem tantum con/sequamur, interdum ut poenam ta*n*tum, alias ut rem et poena*m*. **7.** Rem ta*n*tum persequimur uelut actionibus ⟨*quibus*⟩ ex contractu agimus. **8.** Poenam tantum *per*sequimur[5] uelut actione furti et iniuriarum et, secundum quorundam opinionem, actione ui bonorum raptorum; nam ipsius rei et uindicatio et condictio nobis competit.

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[1] Based on Inst. 4, 6 pr. The first and the beginning of the second line of V 189 are now vacant.

[2] So Kübler. Krüger simply om. *quotiens*.

[3] ⟨*aut cum*⟩ *actio* Krüger and Kübler. [*actio—negatiua*] Beseler, SZ 1926, 268.

[4] Cf. Inst. 4, 6, 14. [5] *consequimur* V. [*consequimur*] Polenaar.

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§ 1. Cf. Inst. 4, 6 pr. 1. *genera*: G. 1, 183; 3, 88–9. 182–3. *quattuor*: Huschke: '(1) personalis actio, (2) petitoria formula, (3) in rem actio per sponsionem, cuius summa per formulam, et (4) per sponsionem, cuius summa sacramenti actione petitur. Cf. 4, 91. 95.' § 2. Cf. Inst. 4, 6, 1. G. 3, 88; 4, 5. 41. 86–7. Ulp. D. 50, 16, 178, 2. § 3. Cf. Inst. 4, 6, 1. 2. G. 4, 5. 16. 41. 91 sq. *actio negatiua*: Ulp. D. 8, 5, 2 pr. § 4. = Inst. 4, 6, 14. Cf. G. 2, 79 in

BOOK IV

1. It remains to speak of actions. Now, to the question how many *genera* of actions there are the more correct answer appears to be that there are two, *in rem* and *in personam*. For those who have maintained that there are four, counting the *genera* of *sponsiones* (i.e. of actions *per sponsionem*?), have inadvertently classed as *genera* certain *species* of actions. **2.** An action *in personam* is one in which we proceed against someone who is under contractual or delictual obligation to us, an action, that is, in which we claim 'that he ought to convey, do, or answer for' something. **3.** An action *in rem* is one in which we claim either that some corporeal thing is ours, or that we are entitled to some right, such as that of use or usufruct, of foot- or carriage-way, of aqueduct, of raising a building or of view. On the other hand, an action (*in rem*) denying such rights is open to our opponent. **4.** Having thus distinguished actions we see that we cannot sue another for a thing belonging to us using the form of claim 'if it appears that the defendant ought to convey (*dare*)'. For what is ours cannot be conveyed (*dari*) to us, since obviously *dari* means the giving of a thing to us with the effect of making it ours; but a thing which is already ours cannot be made more so. It is true that out of hatred of thieves, in order to multiply the actions in which they are liable, it has become accepted that, in addition to the penalty of double or quadruple, they are liable also in an action for the recovery of the thing in the form 'if it appears that they ought to convey', notwithstanding that the action claiming ownership of the thing lies against them as well. **5.** Actions *in rem* are called vindications; actions *in personam*, claiming that there is a duty to convey or do, are called condictions.

6. We sue in some cases in order to obtain only our right, in others in order to obtain only a penalty, and in others in order to obtain both the one and the other. **7.** We sue only for our right in, for example, actions founded on contract. **8.** We sue only for a penalty in, for example, actions of theft and outrage and, in the opinion of some, in the action for robbery with violence; for we are entitled to both a vindication and a condiction in respect

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fin.; 3, 99. *odio furum*: Inst. 4, 1, 19. § 5. = Inst. 4, 6, 15. Cf. Ulp. cit. above § 2. *condictiones*: G. 4, 18. § 6. Cf. Inst. 4, 6, 16. § 7. Cf. Inst. 4, 6, 17. § 8. Cf. Inst. 4, 6, 18. *ui bonorum raptorum*: Inst. 4, 2 pr. 4, 6, 19.

9. Rem uero et poenam persequimur uelut ex his causis ex quibus aduersus infitiantem in duplum agimus; quod accidit per actionem iudicati, depensi, damni iniuriae *legis* Aquiliae, aut legatorum nomine quae per damnationem certa relicta sunt.

10. Quaedam praeterea sunt actiones quae ad legis actionem[1] exprimuntur, quaedam sua ui ac potestate constant. quod ut manifestum fiat, opus est ut prius de legis actionibus loquamur.

11. Actiones quas in usu ueteres habuerunt legis actiones appellabantur, uel ideo quod legibus proditae erant (quippe tunc edicta praetoris,[2] quibus complures actiones introductae sunt, nondum in usu habebantur), uel ideo quia ipsarum legum uerbis accommodatae erant, et ideo immutabiles proinde atque leges obseruabantur. unde eum qui de uitibus succisis ita egisset, ut in actione uites nominaret, responsum est[3] rem perdidisse, quia[4] debuisset arbores nominare, eo quod lex XII tabularum, ex qua de uitibus succisis actio competeret, generaliter de arboribus succisis
V p. 191 loqueretur. **12.** Lege autem agebatur modis / quinque: sacramento, per iudicis postulationem, per condictionem, per manus iniectionem, per pignoris capionem.

13. Sacramenti actio generalis erat. *de* quibus enim rebus ut aliter ageretur lege cautum non erat, de his sacramento agebatur. eaque actio proinde periculosa erat falsi *damnatis*[5] atque hoc tempore periculosa est actio certae creditae pecuniae propter sponsionem qua periclitatur reus, si temere neget, ⟨*et*⟩ restipulationem qua periclitatur actor, si non debitum petat. nam qui uictus erat, summam sacramenti praestabat poenae nomine, eaque in publicum cedebat, praedesque eo nomine praetori dabantur, non ut nunc sponsionis et restipulationis poena lucro cedit aduersarii qui uicerit. **14.** Poena autem sacramenti aut quingenaria erat aut quinquagenaria. nam de rebus mille aeris plurisue quingentis

[1] *ad legis actionis fictionem*? d'Ablaing. Cf. 4, 33.
[2] Some correct to *praetorum* (*praetoria*?). But cf. Wlassak, SZ 1888, 387.
[3] *eum* V.
[4] *cum quia* V. *cum* Krüger. *quia* Kübler.
[5] *damnatis* or *conuictis* coni. Mommsen. V very corrupt.

§ 9. Cf. Inst. 4, 6, 19. G. 4, 171. *iudicati*: G. 4, 25. *depensi*: G. 3, 127; 4, 25. *damni iniuriae*: G. 3, 216. *legatorum nomine*: G. 2, 282. § 10. Cf. G. 4, 32. 33. § 11. Cf. Pomp. D. 1, 2, 2, 6 sq. 12, 38. *legis actiones*: G. 2, 24; 3, 154b. *de arboribus succisis*: XII Tabb. 8, 11 (Textes 19. Bruns 1, 31). §§ 13–14. Cf. Varro, de l. lat. 5, 180 (Bruns 2, 54). Festus vv. Sacramento. Sacramentum (Bruns 2, 33–4. Lindsay 466–8). Val. Prob. 4 (Textes 216). § 13. *generalis erat*: G. 4, 20. *propter sponsionem*: G. 4, 171. 180. *praedes*: G. 4, 16.

of our property. **9.** We sue for our right and a penalty together in, for example, those cases in which we sue for double against a defendant who denies liability; this occurs in an action on a judgment debt, an *actio depensi* (by a *sponsor* against his principal), an action under the *L. Aquilia* for wrongful damage, and an action for a legacy of a definite amount left by damnation.

10. Furthermore, there are some actions that are framed on (the fiction of?) a *legis actio*, and others that stand by their own force and efficacy. To explain this we must begin by speaking of the *legis actiones*.

11. The actions of the practice of older times were called *legis actiones*, either because they were the creation of statutes (of course in those days the praetorian edicts, whereby a large number of actions have been introduced, were not yet in use), or because they were framed in the very words of statutes and were consequently treated as no less immutable than statutes. Hence it was held that a man who, when suing for the cutting down of his vines, had used the word 'vines', had lost his claim, because he ought to have said 'trees', seeing that the law of the Twelve Tables, on which his action for the cutting down of his vines lay, spoke of cutting down trees in general. **12.** Procedure by *legis actio* was in five forms: *sacramentum*, *iudicis postulatio*, *condictio*, *manus iniectio*, and *pignoris capio*.

13. Procedure by *sacramentum* was of general application: one proceeded by it in any cases for which another procedure had not been prescribed by statute. It involved, for parties found guilty of falsehood, the same sort of risk as is involved at the present day by the *actio certae creditae pecuniae* owing to the *sponsio* which the defendant risks, in case he is denying the debt rashly, and to the counter-*stipulatio* which the plaintiff risks, in case he is suing for what is not due. For the defeated party forfeited the amount of the *sacramentum* by way of penalty, and this went to the public treasury, sureties for it being given to the praetor, instead of going into the pocket of the successful party, as the penalty of the *sponsio* or the counter-*stipulatio* now does. **14.** The penal sum of the *sacramentum* was either 500 or 50 *asses*: concerning matters worth

assibus, de minoris uero quinquaginta assibus sacramento contendebatur; nam ita lege XII tabularum cautum erat. ⟨*at*⟩ si de liber*tate* hominis controuersia erat, etiamsi pretiosissimus homo esset, tamen ut L assibus sacramento contenderet*ur* eadem lege
V p. 192 cautum est, fauor*e* scilicet libertatis, ne o*ne*rarentur adsertor*es* / . . .
V p. 193 **15.** . . .[1] ad iudicem accipiundum / uenirent; postea u*ero*[2] reuersis dabatur. ut autem ⟨*die*⟩ XXX iudex d*ar*etur[3] per legem Pinariam factum est; ante eam autem lege*m stat*im dabatur iudex. illud ex superioribus intellegimus, si de re minoris qua*m* ⟨*M*⟩ aeris agebatur, quinquagenario sacramento, non quingenario, eos contendere solitos fuisse. postea tamen quam iudex datus esset, comperendinum diem, ut ad iudicem uenirent, denuntiabant. deinde, cum ad iudicem uenerant, antequam apud eum *causam*[4] perorarent, solebant breuiter ei et quasi per indicem rem exponere; quae dicebatur causae co*n*iectio,[5] quasi causae suae in breue coactio.

16. Si in rem agebatur, mobilia quidem et mouentia, quae modo in ius adferri adduciue possent, in iure uindicabantur ad hunc modum. qui uindicabat *f*estucam tenebat; deinde ipsam rem adprehendebat, ueluti hominem, et ita dicebat: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM. SICUT DIXI, ECCE TIBI, UINDICTAM IMPOSUI; et simul homini festucam imponebat. aduersarius eadem similiter dicebat et faciebat. cum uterque uindicasset, praetor dicebat: MIT*TITE*[6] AMBO HOMINEM. illi mittebant. qui prior uindica⟨*uerat ita alterum interroga*⟩bat:[7] POSTULO ANNE DICAS QUA EX CAUSA UINDICAUERIS. ille respondebat: IUS FEC*I* SICUT UINDICTAM IMPOSUI. deinde qui prior uindicauerat
V p. 194– F p. G dicebat: QUANDO TU INIURIA UINDICAUISTI, / *QUINGEN*TIS ASSIBU*S*[8] SACRAMENTO TE P*RO*UOCO;[9] aduersarius quoque dicebat similiter: ET EGO TE;[10] aut si res infra mille asses erat, quinquagenarium scilicet sacramentum nominabant.[11] deinde eadem[12] sequebantur

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[1] Except for the last three words V 192 is practically illegible. Most of the account of the *actio in personam* is thus missing.

[2] *ū.* (= *uel* or *quinto*) V. [3] So Krüger. *detur* V.

[4] *g.* V. Cf. 3, 207. Apogr. 259.

[5] *collectio* V, which may be right (Auct. ad Her. 2, 21, 3), but most editors prefer the correction (Ps. Asc., ad Cic. in Verr. ii, 1, 9, 26—Bruns 2, 71).

[6] *mitte* V. [7] Goeschen's generally accepted supplement.

[8] *-tis assibus*: so F p. G begins. *D̄ aeris* V.

[9] *peruoco* V. *puoco* F.

[10] *aduersarius—ego te* om. F.

[11] So F, except *nominabat* (?). V *et ego te scilicet l asses sacramenti nominabant*, om. *aut si res— erat*. The old editorial supplement was not far out.

[12] *eadem* F. *ad* V.

1,000 *asses* or more one proceeded by a *sacramentum* of 500 *asses*, but concerning matters of lower value by a *sacramentum* of 50 *asses*. For so the law of the Twelve Tables had provided. But where the dispute was as to a man's freedom, it was provided by the same law that the contest should be with a *sacramentum* of 50 *asses*, however great the value of the man might be, obviously in order to favour freedom by not burdening assertors of freedom.

15. . . . should come to receive a *iudex*; on their subsequent reappearance a *iudex* was appointed. That he was appointed on the thirtieth day was due to the *L. Pinaria*; but before that statute he was appointed at once. As we know from what has already been said, if the action concerned a matter of less value than 1,000 *asses*, proceedings were by *sacramentum* of 50, not 500 *asses*. After the appointment of the *iudex* the parties gave each other notice to appear before him on the next day but one. Then, on their appearance before him, previously to arguing their case in detail, they stated it to him in summary outline; this was called *causae coniectio*, as being a gathering up of their case into an epitome.

16. If the action was *in rem*, movables, inanimate and animate, provided they could be carried or led into court, were claimed in court in the following manner. The claimant, holding a rod and laying hold of the actual thing—let us say a slave—said: 'I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him', and at that moment he laid his rod on the man. His opponent spoke and did the selfsame things. Both parties having thus laid claim, the praetor said: 'Unhand the man, both of you.' They did so. The first claimant then put the following question to the other: 'I ask, will you declare on what title you have laid claim?' and he answered: 'By laying on my staff I have exercised my right.' Thereupon the first claimant said: 'Seeing that you have laid claim unrightfully, I challenge you by a *sacramentum* of 500 *asses*.' And his opponent likewise said: 'And I you.' (Of course, if the thing was worth less than 1,000 *asses* they named a *sacramentum* of 50 *asses*.) Next followed the same proceedings as in an action *in*

§ 14. *si de libertate*: Liu. 3, 44 sq. § 15. Cf. Val. Prob. 4 (Textes 216). Ps. Asc. in Verr. ii, 1, 9, 26 (Bruns 2, 71). *ad iudicem accipiundum*: G. 4, 18. *l. Pinariam*: date unknown. *comperendinum diem*: Val. Prob. 4, 9. Cic. p. Mur. 12, 27. Ps. Asc. l.c. Festus v. *Res comperendinata* (Bruns 2, 32. Lindsay 354). § 16. Cf. Cic. p. Mur. 12, 26. Gell. 20, 10. *mobilis*: G. 1, 121. *secundum suam causam*: Val. Prob. 4, 6. *uindiciae*: Festus v. Uindiciae (Bruns 2, 46. Lindsay 516).

quae si[1] in personam ageretur. postea praetor secundum alterum eorum uindicias dicebat, id est interim aliquem possessorem constituebat, eumque iubebat praedes[2] aduersario dare litis et uindiciarum, id est[3] rei et fructuum. alios autem praedes ipse praetor ab utroque accipiebat sacramenti causa, quia[4] id in publicum cedebat. festuca autem utebantur quasi hastae loco, signo
F p. H quodam iusti dominii, quando iusto dominio ea maxime[5] sua esse credebant, quae ex hostibus cepissent; unde in centumuiralibus iudiciis hasta proponitur.[6] **17.** Si qua res talis erat ut sine incommodo non posset[7] in ius adferri uel adduci, uerbi gratia[8] si columna aut nauis[9] aut grex[10] alicuius pecoris esset, pars aliqua inde sumebatur, eaque in ius adferebatur;[11] deinde in eam partem quasi in totam rem praesentem fiebat uindicatio. itaque ex grege[12] uel una ouis siue[13] capra in ius adducebatur, uel etiam pilus inde[14] sume-
F fol. de- perditum batur et[15] in ius adferebatur; ex naue uero et columna aliqua pars defringebatur. similiter, si de fundo uel de aedibus siue de hereditate controuersia erat, pars aliqua inde sumebatur et in ius adferebatur, et in eam partem perinde atque in totam rem praesentem fiebat uindicatio, ueluti ex fundo gleba sumebatur et ex
V fol. de- perditum aedibus tegula, et si de hereditate controuersia erat, aeque / *res*
F p. I *aliqua inde sumebatur.*[16] . . . . . que leg*is* act*ione re*stitu*tum* est.[17]

17a.[18] Per iudici*s* *p*ostulat*ionem* ageba*tur si* q*ua* de re ut ita agere*t*ur lex iuss*isse*t, sicu*ti* lex XII *t*abularum de *eo* quod ex stipu*la*t*i*one petitur. eaque res talis fere erat: qui agebat sic dicebat: EX SPONSIONE TE MI*HI* X MILIA SESTERTIORUM DARE OPORTERE AIO. ID POSTULO AI*AS* AN NEGE*S*.[19] aduersarius dicebat non oportere. actor[20] dicebat: QUA*N*DO[21] TU NEGAS, TE PRAETOR IUDICEM SIUE ARBITRUM[22] POSTULO UTI DE*S*.[23] itaque in eo genere actionis sine poena quisque negabat.[24] item de hereditate diuidenda inter coheredes eadem lex

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[1] *quae si* F. *quaecumque* V. *quae cum* generally.
[2] *praedes* F. *praesides* V.
[3] *id est* V. *idem* F.
[4] *causa quia* F. *quod* V.
[5] So F. V *signo quodam iusti dominio* $\overline{xxi}$. *me.*
[6] *p.oponitur* F. *praeponitur* V.
[7] *posset* V. *possit* F.
[8] *uerbi gratia* F. *ueluti* V.
[9] *aut nauis* F. om. V.
[10] *grex* V. *conrex* F.
[11] *eaque—adferebatur* F. om. V.
[12] *ex grege* F. *uel ex grecae* V.
[13] *siue* F. *aut* V.
[14] *et pilus ide* V. *inde* om. F.
[15] Here a folio of F is missing.
[16] Probable sense of the beginning of the next folio of V, which is missing.
[17] F resumes, before V. Except for these five doubtfully read words, neither MS. gives the end of the account of *sacramentum*. The subject is perhaps execution of judgment.

personam. Thereafter the praetor declared *uindiciae* in favour of one of the parties, that is, he established him as interim possessor, and ordered him to give his opponent sureties *litis et uindiciarum*, that is, for the thing and its profits. Other sureties were taken from both parties for the *sacramentum* by the praetor himself, because this went to the public treasury. The rod was employed to represent a spear, the symbol of lawful ownership, because they considered things they had captured from the enemy to be pre-eminently theirs by lawful ownership; and this is why in centumviral cases a spear is displayed. **17.** If the thing was such as could not be carried or led into court without inconvenience—for example, if it was a column or a ship or a flock or herd—some part was taken from it and brought into court, and claim was laid on that part as representing the whole thing. Thus from a flock a single sheep or goat would be led into court or just a hair was detached and brought in, while from a ship or a column some bit would be broken off. Similarly, if the dispute was over land or a house or an inheritance, some part of it was taken and brought to court, and claim was made on this part as representing the whole: thus a clod would be taken from the land or a tile from the house, or, where the dispute was as to an inheritance, some article was similarly taken from it. . . .

17a. One proceeded by *iudicis postulatio* in any case in which statute had authorized such procedure: thus the law of the Twelve Tables authorized it in a claim arising out of a stipulation. The procedure was somewhat as follows. The plaintiff said: 'I affirm that under a *sponsio* you ought to pay me 10,000 sesterces. I ask whether you affirm or deny this.' The defendant denied the debt. The plaintiff said: 'Since you deny, I ask you, Praetor, to grant a *iudex* or *arbiter*.' Thus in this kind of action one denied without penalty. The same law authorized procedure by *iudicis postulatio* likewise

[18] This section depends on F alone. Letters in italics, but without note, are illegible.
[19] *aies an negas* F.
[20] *auctor* F.
[21] *quamdo* F.
[22] Or: (*siue ARBITRUM*). So Arangio-Ruiz. Cf. Val. Prob. 4, 8.
[23] *dest* F.
[24] Error for *agebat*?

§ 16. *praedes*: G. 4, 13. 91. 94. Varro, de l. lat. 6, 74 (Bruns 2, 57). Festus v. Praes (Bruns 2, 26. Lindsay 249). *maxime sua*: G. 2, 69. § 17. Cf. Cic. p. Mur. 12, 26. Gell. 20, 10. § 17a. Cf. Val. Prob. 4, 8 (Textes 216). G. 4, 20. *lex iussisset*: G. 4, 13. 17a. 19. 21. 26. *sine poena*: G. 4, 13. *de hereditate*: G. 2, 219; 3, 154a. Gaius D. 10, 2, 1 pr.

F p. K per iudicis postulationem agi iussit. idem fecit lex Licin/nia,[1] si de aliqua re communi diuidenda ageretur. itaque nominata causa ex qua agebatur statim arbiter petebatur.

17b. Per condictionem ita agebatur: AIO TE MIHI SESTERTIORUM X MILIA DARE OPORTERE. ID POSTULO AIAS AN[2] NEGES. aduersarius dicebat non oportere. actor dicebat: QUANDO TU NEGAS, IN DIEM TRICENSIMUM TIBI IUDICIS CAPIENDI CAUSA CONDICO. deinde die
V p. 195 tricensimo[3] ad iudicem capiendum praesto esse debebant. **18.** Condicere autem denuntiare est prisca[4] lingua. itaque haec quidem actio proprie condictio uocabatur;[5] nam actor[6] aduersario denuntiabat ut[7] ad accipiendum[8] iudicem die XXX adesset. nunc uero non proprie condictionem dicimus actionem in personam ⟨*esse qua*⟩[9] intendimus *DARI*[10] NOBIS OPORTERE; nulla enim hoc tempore eo nomine denuntiatio fit. **19.** Haec autem legis actio constituta est per legem Siliam et Calpurniam, lege quidem Silia certae pecuniae, lege uero Calpurnia de omni certa re. **20.** Quare autem haec actio desiderata sit, cum de eo quod nobis dari oportet potuerimus[11] aut sacramento aut per iudicis postulationem agere, ualde quaeritur.

21. Per manus iniectionem aeque ⟨*de*⟩ his rebus agebatur, de quibus ut ita ageretur lege aliqua cautum est, ueluti iudicati lege XII tabularum. quae actio talis erat: qui agebat sic dicebat: QUOD TU MIHI IUDICATUS (siue DAMNATUS) ES SESTERTIUM X MILIA, QUANDOC[12] NON SOLUISTI, OB EAM REM EGO TIBI SESTERTIUM X MILIUM IUDICATI MANUM INICIO; et simul aliquam partem corporis eius prendebat. nec licebat iudicato manum sibi depellere et pro se lege agere, sed uindicem dabat, qui pro se causam agere solebat. qui uindicem non dabat, domum ducebatur ab actore et uinciebatur. **22.** Postea
V p. 196 quaedam leges ex aliis quibusdam causis / pro iudicato manus

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[1] Cf. Marcian D. 4, 7, 12. [2] *aies aut* F. Cf. 4, 17a.
[3] V 195 begins to be legible in l. 2, with the words *die xx* (?).
[4] *prisca* V. *pristina* F. [5] So V. *uocatur* F. [6] So F. *auctor* V.
[7] *denuntiebat ut* V. *demuntiabat ut ut* F.
[8] F ends here. *iudicem capiendum* V.
[9] Inst. 4, 6, 15. [10] *dari* Inst. 4, 6, 15. *id* V.
[11] *potuerit* V. *potuerimus* Krüger. *potuerit . . . agi* Kübler.
[12] *quandoc*: *quando te?* Eisele, Beitr. 22. Cf. 3, 174.

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§ 17a. *l. Licinnia*: date unknown; cf. Marcian D. 4, 7, 12. G. 4, 42. § 17b. Cf. G. 4, 33. *condicere autem* sq.: = Inst. 4, 6, 15. *iudicis capiendi causa*: G. 4, 15. § 18. Cf. G. 4, 5. Inst. 4, 6, 15. § 19. Dates of *leges* unknown. § 20. Cf. G. 4, 13. 17a. § 21. Cf. XII Tabb. 3 (Textes 13. Bruns 1, 20). *iudicatus siue damnatus*: G. 3, 173–5. *siue*: G. 4, 17a. *uindicem dabat*: G. 4, 25. 46. XII Tabb. 1, 4 (Textes 12. Bruns 1, 18). § 22. *pro iudicato*: Lex Lucerina (Bruns 1, 283).

in suits for the partition of an inheritance between coheirs. The *L. Licinnia* did the same in suits for the partition of any common property. Thus, after the declaration of the cause of action, an *arbiter* was at once demanded.

17b. One proceeded by *condictio* as follows: 'I affirm that you ought to pay me 10,000 sesterces: I ask whether you affirm or deny this.' The defendant denied the debt. The plaintiff said: 'Since you deny, I give you notice (*condico*) to appear on the thirtieth day in order to take a *iudex*.' Thereafter they had to appear on the thirtieth day in order to take a *iudex*. **18.** *Condicere* (the word used by the plaintiff), in primitive language, means to give notice. Thus this action was properly called *condictio*; for the plaintiff gave notice to his opponent to appear on the thirtieth day in order to receive a *iudex*. But in modern terminology a condiction is an action *in personam* in which we claim that something ought to be conveyed to us—an improper usage, since nowadays no such notice is given. **19.** This *legis actio* was established by the *L. Silia* and the *L. Calpurnia*, by the former when the debt claimed was of a definite sum of money, by the latter when of any definite thing. **20.** But there is much question why this action was needed, seeing that it was possible to proceed either by *sacramentum* or by *iudicis postulatio* on a claim for something to be conveyed to one.

21. One proceeded by *manus iniectio* likewise in those cases in which such procedure was prescribed by some statute, for example, under the law of the Twelve Tables for a judgment debt. The proceedings were as follows: the plaintiff spoke thus: 'Whereas you are indebted to me by judgment' (or 'by damnation') 'in 10,000 sesterces, seeing that you have not paid, on that account I lay my hand on you for 10,000 sesterces of judgment debt'; and at the same time he laid hold of some part of the debtor's body. The judgment debtor was not allowed to throw off the hand himself and to conduct the *legis actio* on his own behalf, but gave a *uindex* who conducted it for him. One who did not give a *uindex* was led off by the plaintiff to his house and put in fetters. **22.** Various subsequent statutes granted *manus iniectio* as for a judgment debt on a

iniectionem in quosdam dederunt, sicut lex Publilia in eum pro quo sponsor dependisset, *si* in sex mensibus proximis quam pro eo depensum esset non soluisset sponsori pecuniam; item lex Furia de sponsu aduersus eum qui a sponsore plus quam uirilem partem exegisset; et denique complures aliae leges in multis causis talem actionem dederunt. **23.** Sed aliae leges *ex quibusdam causis*[1] constituerunt quasdam actiones per manus iniectionem, sed puram, id est non pro iudicato, ueluti lex ⟨*Furia*⟩[2] testamentaria aduersus eum qui legatorum nomine mortisue causa plus *M*[3] assibus cepisset, cum ea lege non esset exceptus, ut ei plus capere liceret; item lex Marcia aduersus faeneratores, ut si usuras exegissent, de his reddendis per manus iniectionem cum eis ageretur. **24.** Ex quibus legibus et si quae aliae similes essent cum agebatur, ⟨*reo licebat*⟩ manum sibi depellere et pro se lege agere. nam et actor in ipsa legis actione non adiciebat hoc uerbum PRO IUDICATO, sed nominata causa ex qua agebat ita dicebat: OB EAM REM EGO TIBI MANUM INICIO; cum hi quibus pro iudicato actio data erat, nominata causa ex qua agebant, ita inferebant: OB EAM REM EGO TIBI PRO IUDICATO MANUM INICIO. nec me praeterit in forma legis Furiae testamentariae PRO IUDICATO uerbum inseri, cum in ipsa lege non sit; quod
V p. 197 uidetur / nulla ratione factum. **25.** Sed postea lege Uallia, excepto iudicato et eo pro quo depensum est, ceteris omnibus cum quibus per manus iniectionem agebatur permissum est sibi manum depellere et pro se agere. itaque iudicatus et is pro quo depensum est etiam post hanc legem uindicem dare debebant et, nisi darent, domum ducebantur. istaque,[4] quamdiu legis actiones in usu erant, semper ita obseruabantur; unde nostris temporibus is cum quo iudicati depensiue agitur iudicatum solui satisdare cogitur.

26. Per pignoris capionem lege agebatur de quibusdam rebus moribus, ⟨*de quibusdam rebus*⟩ lege. **27.** Introducta est moribus rei[5] militaris. nam et[6] propter stipendium licebat militi ab eo qui aes tribuebat,[7] nisi daret, pignus capere; dicebatur autem ea pecunia

[1] *in multis causis ex quibusdam si* V.
[2] Cf. 4, 24. [3] c V.
[4] So Kübler. *itaque* V. *idque . . . obseruabatur* Krüger.
[5] *rei*: *aeris* Naber, Studi Bonfante 3, 200.
[6] [*et*] Kübler. [7] So Niebuhr. *distruebat* V.

§ 22. *l. Publilia*: G. 3, 127; 4, 9. 25. 102. 171. 186. *l. Furia*: G. 3, 121; 4, 109. § 23. *l. Furia*: G. 2, 225. *l. Marcia* (date unknown): Liu. 7, 21. Cato, de agri cult. praef. init. § 24. *forma*: G. 1, 160; 4, 32. § 25. *lege Uallia*: otherwise unknown. *uindicem*: G. 4, 21 &c. *iudicatum solui*: G. 4, 102. § 26. *moribus*: G. 1, 111; 3, 17. 82. *lege*: G. 4, 13. 17a. 19. 21.

number of other grounds against certain persons. Thus, the *L. Publilia* granted it against one on whose behalf his *sponsor* had paid, if he had not repaid the *sponsor* within the next 6 months. Again, the *L. Furia de sponsu* granted it against a creditor who had exacted from a *sponsor* more than his rateable part of the debt. And, in short, numerous other statutes authorized this procedure on many accounts. **23.** Other statutes, however, set up procedure by *manus iniectio* on various accounts, but in the form called *pura*, that is to say not as for a judgment debt. For example, the *L. Furia testamentaria* authorized it against one who had taken by way of legacy or gift *mortis causa* more than 1,000 *asses*, he not being privileged by that statute to take more; and again, the *L. Marcia* against usurers provided that if they had exacted interest, proceedings by *manus iniectio* for repayment should lie against them. **24.** In proceedings under these last-mentioned statutes and any like them the defendant was allowed to throw off the hand himself and to conduct the *legis actio* on his own behalf. For in his formal claim the plaintiff did not use the phrase 'as for a judgment debt', but after stating his cause of action said: 'on that account I lay my hand on you', whereas a plaintiff permitted to proceed by *manus iniectio* as for a judgment debt, after naming his cause of action, concluded thus: 'on that account I lay my hand on you as for a judgment debt.' I am aware that in the scheme of claim under the *L. Furia testamentaria* the phrase 'as for a judgment debt' is inserted, though it is not in the statute itself; the insertion appears to be unwarranted. **25.** But later, by the *L. Vallia*, all persons subjected to *manus iniectio*, except judgment debtors and those on whose behalf their *sponsor* had paid, were allowed to throw off the hand themselves and to conduct the action on their own behalf. Thus even after the *L. Vallia* a judgment debtor and one on whose behalf his *sponsor* had paid were bound to give a *uindex*; in default of doing so they were led off to the creditor's house. And, so long as the *legis actiones* were in use, these rules continued to be observed, which is why at the present day a party sued upon a judgment debt or on account of payment by his *sponsor* is obliged to give security for the satisfaction of the judgment (which may be given against him).

26. *Legis actio* by *pignoris capio* rested in some cases on custom, in others on statute. **27.** By custom it was established in the military sphere. For a soldier was allowed to distrain for his pay on the person responsible for paying it, if he defaulted; money

quae stipendii nomine dabatur aes militare. item propter eam pecuniam licebat pignus capere, ex qua *equus* emendus erat; quae pecunia dicebatur aes equestre. item propter eam pecuniam ex qu*a* hordeum equis erat comparandum; quae pecunia dicebatur aes hordiarium. **28.** Lege autem introducta est pignoris capio ueluti lege XII tabularum aduersus eum qui hostiam emisset nec pretium redderet; i*tem* aduersus eum qui mercedem non redderet pro eo iumento, quod quis ideo locasset, ut inde pecuniam acceptam in
V p. 198 da*p*em,[1] id est in sacrificium, impenderet. / item lege censoria data est pignoris ca*p*io publicanis uectigalium publicorum populi Romani aduersus eos qui aliqua lege uectigalia deberent. **29.** Ex omnibus autem istis causis certis uerbis pignus capiebatur, et ob id plerisque placebat hanc quoque actionem legis actionem esse; quibusdam autem placebat ⟨*legis actionem non esse*⟩,[2] primum quod pignoris ca*p*io extra ius peragebatur, id est non apud pr*aetorem*, plerumque etiam absente aduersario, cum alioquin ceteris actionibus non aliter uti ⟨*quis*⟩[3] posset quam apud praetorem praesente aduersario; praeterea quod nefasto quoque die, id est quo non licebat lege agere, pignus capi poterat.

30. Sed istae omnes legis actiones paulatim in odium uenerunt. namque ex nimia subtilitate ueterum qui tunc iura condiderunt eo res perducta e*st*, ut uel qui minimum errasset *litem*[4] perderet. itaque per legem Aebutiam et duas Iulias sublatae sunt istae legis actiones, effectumque est ut per concepta uerba, id est per formulas, litigaremus.[5] **31.** Tantum ex duabus causis permissum est [id legis actionem facere] lege agere: damni infecti et si centumuirale iudicium fu*tu*rum *est*. sane qu*idem*, cum ad centumuiros it*ur*, ante lege agitur sacramento apud praetorem urbanum uel peregrinum [praetorem]. damni uero infecti nemo uult lege agere, sed potius stipulatione quae in edicto proposita est obligat aduersarium suum, i*d*que[6] et commodius ius et plenius est. per pignoris /
V p. 199 *capionem*.[7] . . .

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[1] So Savigny. *darem* V.

[2] So Huschke–Kübler. ⟨*contra*⟩ *placebat* Krüger. Cf. supra 2, 78.

[3] So Huschke. *possent* Krüger.

[4] *it* V.

[5] So Kübler. Corrected in V from *litigatores*. *litigemus* Krüger.

[6] *itaque* V.

[7] Conjectured first word of V 199, which is entirely illegible. After finishing with *pignoris capio* Gaius presumably passed on to *formulae quae ad legis actionem exprimuntur*. Cf. 4, 10.

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§ 28. *l. xii tabularum*: XII Tabb. 12. 1 (Textes 22. Bruns 1, 39). *dapem*: Festus v. Daps (Lindsay 59). Cato, de agri cult. 131–2. *publicanis*: G. 4, 32.

given to a soldier by way of pay was called *aes militare*. He might also distrain for money assigned for the buying of his horse, this being called *aes equestre*; likewise for money assigned for buying barley for the horses, this being called *aes hordiarium*. **28.** By statute it was established, for instance, by the law of the Twelve Tables against one who had bought a sacrificial victim, but failed to pay for it; likewise against one who failed to pay the reward for a beast of burden which another had hired to him in order to raise money for a sacrificial feast. Again, by the censorial conditions farmers of public taxes of the Roman people were allowed to distrain upon anyone who owed taxes under some statute. **29.** In all these cases the levy of distress was accompanied by a set form of words, and for this reason it was generally held that *pignoris capio* was a further *legis actio*; some, however, held that it was not, first because the seizure was performed outside court, that is, not before the praetor, and usually when the other party was absent, whereas it was not possible to perform the other *legis actiones* except before the praetor and in the presence of the other party; and further because *pignoris capio* could be performed on a *dies nefastus*, that is, on a day on which a *legis actio* was not allowed.

30. But all these *legis actiones* gradually became unpopular. For the excessive technicality of the early makers of the law was carried so far that a party who made the slightest mistake lost his case. Consequently by the *L. Aebutia* and the two *Ll. Iuliae* they were abolished, and litigation by means of adapted pleadings, that is by *formulae*, was established. **31.** In two cases only may one proceed by *legis actio*, namely for *damnum infectum* and where the trial is to be before the centumviral court. But though, when one is going before the centumvirs, a *legis actio* by *sacramentum* is previously enacted before the urban or the peregrine praetor, one never wishes to proceed by *legis actio* for *damnum infectum*, but prefers to bind the other party by the stipulation published in the Edict, this being a more convenient and a fuller remedy. By *pignoris capio*. . . .

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§ 29. *extra ius*: G. 4, 16. 164. *nefasto die*: Varro, de l. lat. 6, 30 (Bruns 2, 55). Ovid, fast. 1, 47. § 30. *legis actiones*: G. 1, 184; 4, 11 sq. 48. 82. 108. *qui minimum errasset*: G. 4, 11. *l. Aebutiam*: date unknown; ca. 150 B.C.? *duas Iulias*: 20–19 B.C. Cf. Girard, SZ 1913, 295. § 31. *permissum est*: G. 4, 162 sq. 171. *centumuirale*: G. 4, 16 in fin. 95. *stipulatione*: Ulp. D. 39, 2, 7 pr. Edictum § 175.

V p. 200 . . . / apparet. **32.** Contra[1] in ea forma quae publicano proponitur talis fictio est, ut quanta pecunia olim, si pignus captum esset, id pignus is a quo captum erat luere deberet, tantam pecuniam condemnetur. **33.** Nulla autem formula ad condictionis fictionem exprimitur. siue enim pecuniam siue rem aliquam certam debitam nobis petamus, eam ipsam DARI NOBIS OPORTERE intendimus, nec ullam adiungimus condictionis fictionem. itaque simul intellegimus eas formulas, quibus pecuniam aut rem aliquam nobis dari oportere intendimus, sua ui ac potestate ualere. eiusdem naturae sunt actiones commodati, fiduciae, negotiorum gestorum et aliae innumerabiles.

34. Habemus adhuc alterius generis fictiones in quibusdam formulis, ueluti cum is qui ex edicto bonorum possessionem petiit ficto se herede agit. cum enim praetorio iure is,[2] non legitimo, succedat in locum defuncti, non habet directas actiones, et neque id quod defuncti fuit potest intendere SUUM ESSE, *neque id quod ei* debebatur potest intendere ⟨*DARI*⟩ SIBI OPORTERE. itaque ficto se herede intendit, uelut hoc modo: IUDEX ESTO. SI AULUS AGERIUS (id est, si ipse actor) *LUCIO TITIO* HERES *ESSET, TUM SI EUM* FUNDUM DE QUO AGITUR EX IURE QUIRITIUM *EIUS* ESSE *OPORTERET.*[3] et sic *de* debito cum praeposita simili *fictione heredis*[4] ita subicitur: TUM SI PARERET[5] NUMERIUM NEGIDIUM AULO ⟨*AGERIO*⟩ SESTERTIUM X MILIA DARE OPORTERE. **35.** Similiter et bonorum emptor ficto se
V p. 201 herede agit; sed interdum et alio modo agere solet. / nam ex persona eius cuius bona emerit sumpta intentione conuertit condemnationem in suam personam, id est ut, quod illius esset uel illi dari oporteret, eo nomine aduersarius huic condemnetur; quae species actionis appellatur Rutiliana, quia a praetore Publio Rutilio, qui et bonorum uenditionem introduxisse dicitur, comparata est. superior autem species actionis, qua ficto se herede bonorum emptor agit, Seruiana uocatur. **36.** ⟨*Item usucapio fingitur in ea actione quae Publiciana uocatur.*⟩[6] datur autem haec actio ei qui ex iusta causa traditam sibi rem nondum usucepit eamque amissa

[1] *cont* V. *contra* Huschke–Kübler. *item* Krüger.
[2] *es* V. *is* Polenaar–Kübler. om. Krüger.
[3] The usual restorations of an illegible passage; a little long; Kübler om. *eum*.
[4] *et sic—heredis*: Mommsen's restoration by way of example.
[5] *pareret* editors. *paret* V; cf. Theoph. 4, 6, 6 (Ferrini 420).
[6] Krüger's generally accepted supplement.

§ 32. Cf. G. 4, 10. 28. *forma*: G. 1, 160; 4, 24. § 33. Cf. G. 4, 10. 17b sq. § 34. Cf. G. 3, 32. 80. 81; 4, 111. § 35. Cf. G. 3, 80. 81; 4, 65. 111. *conuertit*

32. (On the other hand?) in the scheme laid down for a tax-farmer there is a fiction to the effect that the debtor be condemned in the sum for which in former times, where distress had been levied, the person distrained upon would have had to redeem.

33. But no *formula* is framed on the fiction of a *condictio* having taken place. For when we claim a sum of money or some other thing as owing to us, we simply declare that it ought to be conveyed to us and add no fiction of a *condictio*. This implies that *formulae* in which we declare that a sum of money or some other thing is owing to us stand on their own strength and efficacy. The *actiones commodati*, *fiduciae*, *negotiorum gestorum*, and innumerable others are of the same character.

34. Further, in certain *formulae* we find fictions of another kind, as where one who has applied for *bonorum possessio* under the Edict sues with the fiction that he is heir. For as he succeeds to the deceased by praetorian, not civil law, he has no straightforward actions, and cannot claim either that what belonged to the deceased is his or that what was due to the deceased ought to be paid to him. His statement of claim, therefore, contains the fiction that he is heir, as thus: 'Be *X iudex*. If, supposing that Aulus Agerius' (i.e. the plaintiff) 'were heir to Lucius Titius, the land, the subject of this action, would be his by Quiritary right.' Similarly, in a suit for a debt, first comes the same fiction and then: 'if on that supposition it appears that Numerius Negidius ought to pay Aulus Agerius 10,000 sesterces.' **35.** In the same way a *bonorum emptor* also sues with the fiction that he is heir; sometimes, however, he sues in another form; that is to say, he frames the claim in the name of the person whose estate he has bought, but transfers the condemnation into his own name, demanding that the defendant be condemned to himself in what belonged or was owed to the insolvent. This latter form of action is called *Rutiliana*, having been devised by the praetor Publius Rutilius, who also is said to have introduced *bonorum uenditio*. The previously mentioned form of action, in which the *bonorum emptor* sues with the fiction that he is heir, is called *Seruiana*. **36.** In the action called *Publiciana* there is a fiction of usucapion. This action is granted to one who has been delivered a thing on lawful title, but has not yet completed usu-

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in suam personam: G. 4, 86. *Publio Rutilio*: probably the consul of 105 B.C. *Seruiana*: Servius Sulpicius? § 36. Cf. G. 2, 40. 41. Inst. 4, 6, 3. 4. 31. Edictum § 60 (59).

possessione petit. nam quia non potest eam EX IURE QUIRITIUM SUAM ESSE intendere, fingitur rem usucepisse, et ita quasi ex iure Quiritium dominus factus esset intendit, uelut hoc modo: IUDEX ESTO. SI QUEM HOMINEM AULUS AGERIUS EMIT ⟨*ET*⟩ IS EI TRADITUS EST ANNO POSSEDISSET, TUM SI EUM HOMINEM DE QUO AGITUR EIUS EX IURE QUIRITIUM ESSE OPORTERET, et reliqua. **37.** Item ciuitas Romana peregrino fingitur, si eo nomine agat aut cum eo agatur, quo nomine nostris legibus actio constituta est, si modo iustum sit eam actionem etiam ad peregrinum extendi, ueluti si furti agat peregrinus aut cum eo agatur. ⟨*nam si cum peregrino agatur,*⟩[1] formula[2] ita concipitur: IUDEX ESTO. SI PARET ⟨*LUCIO TITIO A DIONE HERMAEI FILIO OPEUE*⟩ CONSILIO DIONIS HERMAEI FILII[3] FURTUM FACTUM ESSE PATERAE AUREAE, QUAM OB REM EUM, SI CIUIS ROMANUS ESSET, PRO FURE DAMNUM DECIDERE OPORTERET, et reliqua. item, si peregrinus furti agat, ciuitas ei Romana fingitur. similiter,
V p. 202 si ex lege Aquilia peregrinus damni / iniuriae agat aut cum eo agatur, ficta ciuitate Romana iudicium datur. **38.** Praeterea aliquando fingimus aduersarium nostrum capite deminutum non esse. nam si ex contractu nobis obligatus obligataue sit, et capite deminutus deminutaue fuerit, uelut mulier per coemptionem, masculus per adrogationem, desinit iure ciuili debere nobis, nec directo intendi potest sibi dare eum eamue oportere. sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamue actio utilis rescissa capitis deminutione, id est in qua fingitur capite deminutus deminutaue non esse.

39. Partes autem formularum hae sunt: demonstratio, intentio, adiudicatio, condemnatio. **40.** Demonstratio est ea pars formulae quae principio ideo inseritur[4] ut demonstretur res de qua agitur, uelut haec pars formulae: QUOD AULUS AGERIUS NUMERIO NEGIDIO HOMINEM UENDIDIT; item haec: QUOD AULUS AGERIUS ⟨*APUD*⟩ NUMERIUM NEGIDIUM HOMINEM DEPOSUIT. **41.** Intentio est ea pars formulae qua actor desiderium suum concludit, uelut haec pars

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[1] Added by Krüger, but with doubt. om. Kübler.

[2] *in formula* V.

[3] *si paret consilioue dihoniser·mei filio* V. Cf. Lenel, Edict. 324 ff. Krüger supplies only *Lucio Titio ope.*

[4] Krüger's suggestion, adopted by Kübler. V *praecipue ideo inseritur*, but from *praecip* the readings are very doubtful. Mommsen: *praecipit* (cf. 4, 63) *id quod geritur.*

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§ 37. Cf. Cic. de nat. deor. 3, 30, 74. Edictum § 128. *ope consilio*: G. 3, 202. *pro fure*: G. 4. 45. § 38. Cf. G. 1, 162; 3, 84; 4, 80. Edictum § 42. § 40. Cf. G. 4, 44. 47. 58 sq. 136. § 41. Cf. G. 4, 44. 47 sq. 131.

capion of it, and who, having lost possession, sues for it. Since he cannot claim that it is his by Quiritary right, he is feigned to have completed the period of usucapion, and so claims as though he had become its owner by Quiritary right, as thus: 'Be *X iudex*. If, supposing that Aulus Agerius had possessed for a year the slave bought by and delivered to him, that slave, the subject of this action, would be his by Quiritary right', &c. **37.** Again, if a peregrine sues or is sued on a cause for which an action has been established by Roman statutes, there is a fiction that he is a Roman citizen, provided that it is equitable that the action should be extended to a peregrine, for example, if a peregrine sues or is sued by the *actio furti*. Thus, if he is being sued by that action, the *formula* is framed as follows: 'Be *X iudex*. If it appears that a golden cup has been stolen from Lucius Titius by Dio the son of Hermaeus or by his aid and counsel, on which account, if he were a Roman citizen, he would be bound to compound for the wrong as a thief,' &c. Likewise if a peregrine is plaintiff in the *actio furti*, Roman citizenship is fictitiously attributed to him. Similarly an action with the fiction of Roman citizenship is granted if a peregrine sues or is sued for wrongful damage under the *L. Aquilia*. **38.** And again, in some cases we sue with the fiction that our opponent has not undergone a *capitis deminutio*. For if our opponent, being contractually bound to us, has undergone a *capitis deminutio*—a woman by *coemptio;* a male by adrogation—he or she ceases to be our debtor at civil law, and we cannot make a straightforward claim that he or she ought to convey to us. But, in order that it may not be in his or her power to destroy our right, a *utilis actio*, with rescission of the *capitis deminutio*, has been introduced against him or her, that is, an action in which the *capitis deminutio* is feigned not to have taken place.

39. The following are the parts or clauses of *formulae: demonstratio, intentio, adiudicatio, condemnatio*. **40.** A *demonstratio* is the part of a *formula* which is placed at the beginning, in order to make known the subject-matter of the action. Here is an example: 'Whereas Aulus Agerius sold the slave to Numerius Negidius', or 'Whereas Aulus Agerius deposited the slave with Numerius Negidius'. **41.** An *intentio* is the part of a *formula* in which the plaintiff expresses what he claims, for example the clause: 'if it

formulae: SI PARET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA DARE OPORTERE; item haec: QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE ⟨*OPORTERE*⟩; item haec: SI PARET HOMIN*EM* EX IURE QUIRITIUM AULI AGERII ESSE. **42.** Adiudicatio est ea pars formulae qua permittitur iudici rem alicui ex litigatoribus adiudicare, uelut si inter coheredes familiae erciscundae agatur, aut inter socios communi diuidundo, aut inter uicinos finium regundorum. nam illic ita est: QUANT*UM* ADIUDICARI OPORTET IUDEX TITIO[1] ADIUDICATO. **43.** Condemnatio est ea pars formulae qua iudici con-
V p. 203 demnandi / absoluendiue potestas p*er*mittitur, uelut haec pars formulae: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET, ABSOLUE; item haec: IUDEX NUMERIUM NEGIDIUM AULO AGERIO DUMTAX*AT* ⟨*X MILIA*⟩ CONDEMNA. SI N*ON* PARET, ABSOLUITO; item haec: IUDEX NUMERIUM NEGIDIUM AULO AGERIO [*X MILIA*] CONDEMNATO et reliqua, ut non adiciatur DUMTAXAT ⟨*X MILIA*⟩. **44.** Non tamen istae omn*es* partes simul inueniuntur, sed[2] quaedam inueniuntur, quaedam non inueniunt*ur*. certe intentio aliquando sola inueni*tur*, sicut in praeiudicialibus formulis, qualis est qua quaeritur aliquis[3] libertus sit, uel quanta dos sit, et aliae complures. demonstratio autem et adiudicatio et condemnatio numquam solae inueniuntur; nihil enim omnino ⟨*demonstratio*⟩ sine intentione uel condemnatione ualet; item condemnatio sine demonstratione uel intentione, uel adiudica⟨*tio sine demonstra*⟩-tione[4] nullas uires habet, ⟨*et*⟩ ob id numquam solae inueniuntur.

45. Sed eas quid*em* formulas in quibus de iure quaeritur in ius conceptas uocamus, quales sunt quibus intendimus NOSTRUM ESSE ALIQUID EX IURE QUIRITIUM au*t* NOBIS DARI OPORTERE aut PRO FURE DAMNUM ⟨*DECIDI OPORTERE*; *sunt et aliae in*⟩[5] quibus iuris ciuilis intentio est. **46.** Ceteras uero in factum conceptas uocamus, id est, in quibus nulla talis intentionis concept*io* est, ⟨*sed*⟩ initio[6] formulae, nominato eo quod factum est, adici*un*tur ea uerba per quae iudici damnandi absoluendiue potestas datur, qualis est

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[1] *Titio* can hardly be right. *Titio Seioue?* Kübler.

[2] *sed* ⟨*abesse potest una aliaue; item solae*⟩ *quaedam* &c. Mommsen.

[3] *an quis?* Kübler.

[4] So Kübler. *adiudicatio* ⟨*sine demonstratione uel inten*⟩*tione* Krüger; but we know of no *adiudicatio* with an *intentio*: cf. Edictum 206 ff.; Buckland, Jurid. Rev. 1936, 359 ff.

[5] Usually supplied, from 4, 37 supra and Autun Gaius § 80.

[6] So Lenel, SZ 1928, 15. *intentionis concepta est initio* V. *intentio* for *intentionis* Krüger and Kübler. ⟨*sed*⟩ generally.

appears that Numerius Negidius ought to pay Aulus Agerius 10,000 sesterces', or again: 'whatever it appears that Numerius Negidius ought to pay to or do for Aulus Agerius', or again: 'if it appears that the slave belongs to Aulus Agerius by Quiritary right'. **42.** An *adiudicatio* is the part of a *formula* empowering the *iudex* to assign property to one among the litigants, as where the action is for the division of an inheritance between coheirs, or of partition between co-owners, or for the determination of boundaries between neighbours. Here we find the clause: 'let the *iudex* assign to Titius so much as ought to be assigned.' **43.** A *condemnatio* is the part of a *formula* empowering the *iudex* to condemn or absolve the defendant, for example the formulary clause: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in 10,000 sesterces. If it does not appear, absolve', or this one: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in a sum not exceeding 10,000 sesterces. If it does not appear, absolve', or again this: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius', &c., without the addition of the words 'not exceeding 10,000'. **44.** These clauses are not, however, found all together in one and the same *formula*, but some are present and others not. An *intentio* indeed is sometimes found by itself; so in prejudicial *formulae*, such as that raising the question whether a man is a freedman or what is the amount of a *dos*, and various others. But neither *demonstratio* nor *adiudicatio* nor *condemnatio* is ever found by itself; for a *demonstratio* without an *intentio* or a *condemnatio* is quite ineffectual, and equally a *condemnatio* without a *demonstratio* or an *intentio*, or an *adiudicatio* without a *demonstratio*; hence these clauses are never found by themselves.

45. *Formulae* raising a question of law are described as framed *in ius*. Examples are *formulae* with *intentio* to the effect that something belongs to us by Quiritary right, or that something ought to be conveyed to us, or that the defendant ought to compound for the wrong as a thief. Further examples could be given of *formulae* with *intentio* of civil law. **46.** But other *formulae* are described as framed *in factum*, those namely in which there is no *intentio* framed in the above manner, but in which, after an initial statement of what has happened, words are added empowering the

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§ 42. Cf. Inst. 4, 6, 20. 4, 17, 4. § 43. Cf. G. 4. 48–52. 57. 68. § 44. *praeiudicialibus*: G. 3, 123. Inst. 4, 6, 13. § 45. Cf. G. 4, 41. 47. 60. 107. *pro fure*: G. 4, 37 &c. § 46. Cf. G. 4, 47. 60. 106.

formula qua utitur patron*u*s contra libertum qui eum contra edictum
V p. 204 praetoris in ius *u*ocauit.[1] / nam in ea ita est: RECUPERATORE*S* SUNT*O*. SI PARET ILLUM PATRONUM AB ILLO LIBERTO[2] CONTRA EDICTUM ILLIUS PRAETORIS IN IUS UOCATUM ESSE, RECUPERATORES ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA[3] CONDEMNATE. SI NON PARET, ABSOLUITE. ceterae quoque formulae quae sub titulo DE IN IUS UOCANDO propositae sunt, in factum conceptae sunt, uelut aduersus eum qui in ius uocatus neque uenerit neque uindicem dederit; item contra eum qui ui exemerit eum quì in ius uocaretur;[4] et denique innumerabiles eius modi aliae formulae in albo proponuntur. **47.** Sed ex quibusdam causis praetor et in ius et in factum conceptas formulas proponit, uel*u*ti depositi et commodati. illa enim formula quae ita concepta est: IUDEX ESTO. QUOD AULUS AGERIUS APUD NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUI*T*,[5] QUA DE RE *AGITUR*, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET EX FIDE BONA, EIUS *I*UDEX[6] NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO.[7] SI NON PARET, ABSOLU*ITO*, in ius concepta est. at illa formula quae ita concepta est: IUDEX ESTO. SI PARET AULUM AGERIUM APUD NUMERIUM NEGIDIUM MENSAM ARGENTEAM DEPOSUISSE EAMQUE DOLO MALO NUMERII NEGIDII AULO AGERIO REDDITA*M* NON ESSE, QUANTI EA RES ERIT, TANTAM PECUNIAM IUDEX NUMERIUM NEGIDIUM AULO AGERIO CONDEMNATO. SI NON PARET, ABSOLU*ITO*, in factum concepta est. similes etiam commodati formulae sunt.

48. Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnatio[8] concepta est. itaque,
V p. 205 et si corpus aliquod petamu*s*, / ueluti fundum, hominem, uestem, ⟨*aurum*⟩, argentum,[9] iudex non ipsam rem condemnat *e*um cum quo actum est, sicut olim fieri solebat, ⟨*sed*⟩[10] aestimata re pecuniam eum condemnat. **49.** Condemnatio autem uel certae pecuniae in formula proponitur uel incertae. **50.** Certae pecuniae uelut in ea formula qua certam pecuniam petimus. nam illic ima parte

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[1] *euocauit* V. [2] *patrono liberto* V.

[3] *quinquaginta aureorum* Ulp. D. 2, 4, 24, which suggests emending *x* to *l* in the present passage (Lenel, Edictum 69).

[4] So V. *uocatur* Krüger. [5] *deposuisset* V. [6] *iudex: id · iud* · V.

[7] *condemnato n.r.* V. *condemnato nisi restituat* Krüger, but see Lenel, Edictum 288.

[8] *condemnationem* V. *condemnatio nunc* Muirhead.

[9] *uestem argumentum* V. ⟨*aurum*⟩: cf. 2, 13. *argentum*: cf. 2, 79.

[10] So Krüger, and generally. But Nicolau–Collinet, RH 1936, 751, place the ⟨*sed*⟩ between *actum est* and *sicut*.

iudex to condemn or absolve. An example is the *formula* employed by a patron against a freedman who has summoned him to court in contravention of the praetor's Edict, where we find: '*XYZ* be *recuperatores*. If it appears that such and such a patron has been summoned to court by such and such a freedman in contravention of the Edict of such and such a praetor, do ye, *recuperatores*, condemn the said freedman to the said patron in 10,000 sesterces. If it does not appear, absolve.' The other *formulae* which appear in the edictal title *De in ius uocando* are likewise framed *in factum*, for instance that against one who, having been summoned to court, has neither appeared nor given a *uindex*, and that against one who has forcibly rescued another who was being summoned to court; in short, countless other *formulae* of this kind are published in the Edict. **47.** But for certain cases the praetor publishes both a *formula* framed *in ius* and a *formula* framed *in factum*, for example, for *depositum* and *commodatum*. Thus the following *formula* is framed *in ius*: '*X* be *iudex*. Whereas Aulus Agerius deposited with Numerius Negidius the silver table which is the subject of this action, in whatever Numerius Negidius ought on that account in good faith to give to or do for Aulus Agerius, in that do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius. If it does not appear, absolve.' On the other hand, the following *formula* is framed *in factum*: '*X* be *iudex*. If it appears that Aulus Agerius deposited the silver table with Numerius Negidius and that by the fraud of Numerius Negidius it has not been returned to Aulus Agerius, do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in as much money as the thing shall be worth. If it does not appear, absolve.' The *formulae* on *commodatum* are similar.

48. The *condemnatio*, in all *formulae* containing one, is framed in terms of valuation in money. Accordingly, even where the suit is for a corporeal thing, such as land, a slave, a garment, gold, or silver, the *iudex* condemns the defendant not in the actual thing, as was the practice in early days, but in the amount of money at which he values it. **49.** The *condemnatio* in a *formula* may be in terms of a definite or of an indefinite sum of money. **50.** A definite sum is named in, for instance, the *formula* by which a sum certain is claimed. There, at the end of the *formula*, we find this: 'do thou,

§ 46. *de in ius uocando*: G. 4, 183. 187. Inst. 4, 6, 12. 4. 16, 3. *uindicem*: G. 4, 21 &c. § 47. Cf. 4, 60. Edictum §§ 106. 98. § 48. Cf. G. 4, 43. 44. 57. Inst. 4, 6, 32. § 49. Cf. G. 4, 43. § 50. Cf. Cic. p. Rosc. com. 5, 14.

formulae ita est: IUDEX NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA CONDEMNA. SI NON PARET, ABSOLUE. **51.** Incertae uero condemnatio pecuniae duplicem significationem habet. est enim una *cum* aliqua praefinitionc, quae uulgo dicitur cum taxatione, uelut si incertum aliquid petamus. nam illic ima parte formulae ita est: IUDEX NUMERIUM NEGIDIUM AULO AGERIO DUMTAXAT SESTERTIUM X MILIA CONDEMN*A*.[1] SI NON PARET, ABSOLU*E*. uel incerta es*t* et infinita, *uel*ut si rem aliquam a possidente nostram esse petamus, id est, si in rem agam*us* uel ad exhibendum. nam illic ita est: QUANTI E*A* RES ERIT, TANTAM PECUNIAM IUDEX NUMERIUM NEGIDIUM *AULO AGERIO* CONDEMNA. SI NON PARET, ABSOLUITO. quid er*go* est? iudex, si condemnet, certam pecuniam condemnare debet, etsi certa pecunia in condemnatione posita non sit. **52.** Debet autem iudex attendere *ut*, cum certae pecuniae condemnatio posita sit, neque maioris neque minoris summa posit*a* condemnet; alioquin litem suam facit; item, si taxatio posita sit, ne plur*is* condcmnet quam taxat*um* sit; alias enim simil*i*ter litem suam faci*t*. minoris autem damnare /
V p. 206 ei permissum est. at si etiam . . .[2] qui formulam ac*cipit* intendere debet, nec am*plius*[3] . . . certa condemnatione constringi . . .[4] usque uelit.[5]

53.[6] Si quis intentione p*lus* complexus fu*erit*, *causa cadit*, id est, rem perdit, nec a praetore in integr*um* restituit*ur*, except*is* quibusdam casibus in q*uibus* . . .[7] *p*raetor non patitur . . . **53a.** *Plus autem quattuor*[8] modis petitur: re, tempore, loco, causa. re, u*eluti si quis pro X* milibus quae ei debentur XX milia petierit, *aut* si *is cuius* ex parte res est totam eam aut maiore ex part*e suam* esse intender*it*. **53*b*.** *Tempore, ueluti si quis ante diem uel* ante *condicionem petierit*. **53c.** *Loco, ueluti si, quod certo loco*[9] dari promissum est, id *alio loco sine commemoratio*ne eius loci petatur, uelut si *quis ita stipulatus fuerit:* EPHESI DARE SPONDES? d*einde* Romae p*ure*

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[1] *condemnet* V. *condemnato* Wlassak (and similarly *absoluito*) here and elsewhere.

[2] 1½ lines illegible.

[3] About 7 letters illegible.

[4] 2 lines practically illegible.

[5] Krüger conjectures that the illegible text, having first dealt with the precautions which the parties themselves ought to take in the matter of the *condemnatio* (cf. 4, 57), ended with the case of *condemnatio infinita*, e.g. thus: *potest iudex tali formula datus condemnare quo | usque uelit.*

[6] V 206 continues to be largely illegible, but restoration is assisted by Inst. 4, 6, 33.

[7] 12–13 illegible letters.

[8] The last words of 2 illegible lines restored from Inst.

[9] From Inst., as improved by Kübler.

iudex, condemn Numerius Negidius to Aulus Agerius in 10,000 sesterces. If it does not appear, absolve.' **51.** By a *condemnatio* naming an indefinite sum either of two things is meant. One such clause sets a preliminary limitation on the amount, commonly called a *taxatio*, as where what is claimed is unliquidated. There, at the end of the *formula*, we find this: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in not more than 10,000 sesterces. If it does not appear, absolve.' Or the amount may be both uncertain and unlimited, as where one claims property from a possessor of it, that is, when one sues by action *in rem* or by action *ad exhibendum* (for production). There we find this: 'do thou, *iudex*, condemn Numerius Negidius to Aulus Agerius in as much money as the thing shall be worth. If it does not appear, absolve.' But, when all is said, the *iudex*, if he condemns, is bound to condemn in a definite sum of money, even though a definite sum is not named by the clause of *condemnatio*. **52.** But the *iudex* must see to it that, where the *condemnatio* names a definite sum, he condemns in neither more nor less than the sum named; otherwise he becomes liable himself. He must also see that, where there is a *taxatio*, he does not condemn in a higher sum than that named by it, else similarly he becomes liable himself, though he is free to condemn in a lower sum. . . .

53. A plaintiff who overclaims in his *intentio* fails in his case, in fact loses his right; nor is he restored by the praetor to his original position, except in certain cases in which . . . **53a.** There is overclaim in four ways: in amount, time, place, and *causa* (nature of the claim). There is overclaim in amount where, for instance, the *intentio* demands 20,000 sesterces instead of the 10,000 that are due to the plaintiff, or where a co-owner pleads that the whole thing or too great a part belongs to him. **53b.** There is overclaim in time where suit is brought before the claim falls due. **53c.** There is overclaim in place where, for instance, the promise was of conveyance at a certain place and claim is made elsewhere without mention of that place, for example where one who has been promised by stipulation conveyance at

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§ 51. *cum taxatione*: G. 3, 224; 4, 43. § 52. *litem suam*: Inst. 4, 5 pr. *constringi*: G. 4, 57. §§ 53–53d. Cf. G. 4, 56. 68. 131. Inst. 4, 6, 33–33e. C. 3, 10. Cic. p. Rosc. com. 4, 10. 11. § 53. *quibusdam casibus*: G. 2, 163; 4, 57. 125. Edictum § 45.

intendat DARI SIBI OPORTERE. . . .[1] dare mihi oportere . . .[2] /
V p. 207 petere, id es*t* non adiecto loco. **53d.** Causa plus petitur, uelut si quis in intentione tollat electionem debitoris, quam *is* habet obligationis iure, uelut si quis ita stipulatus sit: SESTERTIUM X MILIA AUT HOMINEM STICHUM DARE SPONDES?, deinde alterutrum [eorum] ex his[3] petat. nam quamuis petat quod minus est, plus tamen petere uidetur, quia potest aduersarius interdum facilius id praestare quod non petitur. similiter, si quis genus stipulatus sit, deinde speciem petat, ueluti si quis purpuram stipulatus sit generaliter, deinde Tyriam specialiter petat; quin etiam, licet uilissimam petat, idem iuris est p*ropter* eam rationem quam proxime diximus. idem iuris est si quis generaliter hominem stipulatus sit, deinde nominatim aliquem petat, uelut Stichum, quamuis uilissimum. itaque, sicut ipsa stipulatio concepta est, ita et intentio formulae concipi debet.

54. Illud satis apparet, in incertis formulis plus peti non posse, quia, cum certa quantitas non petatur, sed QUIDQUID ⟨*paret*⟩ aduersarium DARE FACERE OPORTERE[4] intendat*ur*, nemo potest plus intendere. idem iuris est et si in rem incertae partis actio data sit, uelut tal*is*: QUANTAM PARTEM PARET IN EO FUNDO QUO *DE* AGITUR actoris ESSE; quod genus actionis in paucissimis causis dari solet.

55. Item palam est, si quis aliud pro alio intenderit, nihil eum perielitari, eumque ex integro agere posse, quia nihil ante uidetur
V p. 208 egisse, ueluti si is, qui hominem Stichum / petere deberet, Erotem petierit, aut si quis EX TESTAMENTO DAR*I* sibi OPORTERE intenderit, cui ex stipulatu debebatur, aut si cognitor aut procurator intenderit si*b*i DARI OPORTERE. **56.** Sed plus quidem intendere, sicut supra diximus, periculosum est; minus autem intendere licet, sed de reliquo intra eiusdem praeturam agere non permittitur. n*am* qui ita agit per exceptionem excluditur, quae exceptio appellatur litis diuiduae.

57. At si in condemnatione plus po*s*itum[5] sit quam oportet, actoris qui*dem* periculum nullum est, sed ⟨*reus*, *cum*⟩ iniqua*m*

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[1] About 1½ illegible lines.

[2] Some 2½ illegible lines, which probably said that on *Ephesi dare spondes* one would properly sue *pure* at Epheseus. Cf. Inst. 4, 6, 33c fin.

[3] Some omit *ex his*, some *eorum*. Inst. *alterutrum* simply.

[4] *quidquid—oportere*: so Kübler; cf. 4, 41. *quidquid adu. dare facere oportet* Krüger, merely correcting V's *oporteret*.

[5] *petitum* V.

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§ 55. Cf. Inst. 4, 6, 35. *si cognitor*: G. 4, 86. *supra*: G. 4, 53. *exceptio litis diuiduae*: G. 4, 122.

§ 56. Cf. Inst. 4, 6, 34.

§ 57. Cf. G. 4, 52. 68.

Ephesus sues at Rome for conveyance without qualification . . .

53d. There is overclaim *causa* where, for instance, a plaintiff in his *intentio* deprives his debtor of an option to which he is entitled under the obligation, as where one who has received by *sponsio* a promise of '10,000 sesterces or the slave Stichus' sues for one or other only of the alternatives. For even if he sues for the less valuable alternative, he is held to overclaim, because it may be that the defendant could more easily render the alternative not claimed. The same holds if on a *stipulatio* for goods described generically suit is brought for a special kind of such goods, for example, if on a *stipulatio* for purple in general suit is brought specifically for Tyrian purple; indeed, even if the variety claimed is the cheapest, the same rule holds, for the reason we have just given. It holds also where one who has been promised by *stipulatio* an unspecified slave sues for a specific slave, naming, say, Stichus, however little Stichus may be worth. In fact, the *intentio* should be framed in the very terms of the *stipulatio*.

54. It is clear without more that in *formulae* making unliquidated claims there cannot be overclaim, because where no definite amount is claimed, but 'whatever it appear that the defendant ought to convey or do', an excessive *intentio* is impossible. The same holds also where an action claiming ownership of an indeterminate part of a thing is allowed, for instance, 'such part of the land the subject of the action as appears to belong to the plaintiff'—a kind of action allowed only in very few cases. **55.** It is also obvious that a plaintiff whose *inteutio* claims the wrong thing risks nothing, but can bring a fresh suit, because he is held not to have sued at all. Examples are a man suing for Eros when he ought to have sued for Stichus, or an *intentio* claiming some conveyance to be due under a will when really it was due under a *stipulatio*, or a *cognitor* or *procurator* claiming conveyance as due to himself. **56.** But though overclaim in the *intentio* is, as we have already said, hazardous, underclaim in the *iuteutio* is permitted; only one is not allowed to sue for the rest during the same praetor's term of office. For if one does, one is debarred by the exception called *exceptio litis diuiduae*.

57. On the other hand, overstatement in the *condeumatio* does not put the plaintiff in jeopardy; the defendant, however, since he

formulam acceperit, in integrum restituitur, ut minuatur condemnatio. si uero minus positum fuerit quam oportet, hoc solum consequitur ⟨*actor*⟩ quod posuit; nam tota quidem res in iudicium deducitur, constringitur autem condemnationis fine, qua*m* iudex egredi non potest. nec ex ea parte praetor in integrum[1] restituit; facilius enim reis praetor succurrit quam actoribus. loquimur autem exceptis minoribus XXV annorum; nam huius aetatis hominibus in omnibus rebus lapsis praetor succurrit.

58. Si in demonstratione plus aut minus positum sit, nihil in iudicium deducitur, et ideo res in integro manet; et hoc est quod dicitur, falsa demonstratione rem non perimi. **59.** Sed sunt qui putant minus recte comprehendi, ut qui forte Stichum et Erot*em* emerit, recte uide*a*tur ita demonstrare: QUOD EGO DE TE HOMINEM EROTEM EMI, et, si uelit, de Sticho alia formula i*terum*[2] agat, quia
V p. 209 uerum est eum / qui duos emerit singulos quoque emisse; idque ita maxime La*be*oni uisum est. sed si is qui unum emerit de duobus egerit, falsum demonstrat. idem et in aliis actionibus est, ueluti commodati et depositi. **60.** Sed nos apud quosdam scriptum inuenimus, in actione depositi et denique in ceteris omnibus ex quibus damnatus unusquisque ignominia notatur, eum qui plus quam oporteret demonstrauerit litem perdere: ueluti si quis una re deposita duas pluresue ⟨*se de*⟩posuisse demonstrauerit, aut si is cui pugno mala percussa est in actione iniuriarum etiam aliam partem corporis percussam sibi demonstrauerit. quod an debeamus credere uerius esse, diligentius requiremus. certe, cum duae sint depositi formulae, alia in ius concepta, alia in factum, sicut supra quoque notauimus, et in ea quidem formula q*u*ae i*n* ius concepta est initio res de q*u*a agitur demonstratorio modo designetur, deinde inferatur iuris conte*n*tio[3] his uerbis: QUIDQUID OB EAM REM ILLUM ILLI DARE FACERE OPORTET, in e*a* uero quae in factum concep*ta est* st*at*im initio i*nt*entionis alio modo res de qua agitur designetur his uerbis: SI PARET ILLUM APUD ⟨*ILLUM REM*⟩ ILLA*M* DEPOSUISSE, dubitare non debemus quin, si quis in formula quae in factum

[1] At this point a few letters are read in P. Oxy. 2103 fr. 1.
[2] So Huschke–Kübler. *formula id* V. *id* om. Krüger.
[3] *intentio* Boecking–Kübler.

§ 57. *in integrum restituit*: G. 4, 53 &c. § 58. Cf. G. 4, 40. § 59. Cf. Ulp. D. 19, 1, 33. § 60. *ex quibus . . . ignominia*: G. 4, 182. *in actione iniuriarum*: G. 3, 220 sq. Paul Coll. 2, 6. *depositi formulae*: G. 4, 47.

has accepted an unjust *formula*, is restored to his original position, in order that the *condemnatio* may be reduced. But if there is understatement in the *condemnatio*, the plaintiff will get only the amount he stated; for though his whole right is brought to trial, it is confined within the limit set by the *condemnatio*, which limit the *iudex* is unable to overstep. Nor on a plaintiff's behalf does the praetor grant restoration of the original position; for he is readier to relieve defendants than plaintiffs. From this statement we except persons below 25; for to persons of such age he grants relief in any matter in which they have made a false step.

58. If there is over- or understatement in the *demonstratio*, nothing is brought into the issue, and consequently the plaintiff's right is unimpaired; this is expressed by the saying that a right is not destroyed by an untrue *demonstratio*. **59.** Some, however, hold that understatement in the *demonstratio* is in order, so that if, for example, I have bought Stichus and Eros, the *demonstratio* 'whereas I bought the slave Eros of you' is deemed correct, and I may, if I choose, go on to sue in regard to Stichus by a second *formula*, it being true that a man who has bought two slaves has bought each of them; so held by Labeo in particular. But if a man who has bought only one slave sues in respect of two, his *demonstratio* is untrue. The same holds in other actions, such as the *actiones commodati* and *depositi*. **60.** For our part, we find it laid down by certain writers that in the *actio depositi*, and generally in actions in which a defendant, if condemned, incurs infamy, a plaintiff who makes an overstatement in his *demonstratio* loses his claim, for example, if, having deposited only one thing, he states in his *demonstratio* that he deposited two or more, or if, having been struck with the fist in the face, he states in the *demonstratio* of his *actio iniuriarum* that he was struck in some other part of the body as well. Whether this is to be accepted as the better view we must seriously consider. Now, as noted above, there are two *formulae depositi*, one framed *in ius* and the other *in factum*; and the *formula in ius* begins by indicating, in the manner of a *demonstratio*, the matter in question, and goes on to make the resulting claim in law in the words 'whatever on that account the defendant ought to convey to or do for the plaintiff', whereas in the *formula in factum* the matter in question is otherwise indicated, at the beginning of the *intentio*, in the words 'if it appears that the plaintiff deposited the thing in question with the defendant'. Thus we may not doubt that a plaintiff, who in a *formula in factum*

composita est plures res designauerit quam deposuerit, litem per-
V p. 210 dat, quia in intentione plus po*suisse* / *uidetur.*[1]

V p. 211 . . . / . . .

61. *In bonae fidei autem iudiciis libera potestas permitti uidetur iudici ex bono et aequo aestimandi quantum actori restitui debeat. in*
V p. 212 *quo et illud*[2] / continetur ut, habita ratione eius quod inuicem actorem ex eadem causa praestare oporteret, in reliquum eum cum quo actum est condemnare.[3] **62.** Sunt autem bonae fidei iudicia haec: ex empto uendito, locato conducto, negotiorum gestorum, mandati, depositi, fiduciae, pro socio, tutelae, rei uxoriae.[4] **63.** Liberum est tamen iudici nullam omnino inuicem compensationis rationem habere; nec enim aperte formulae ue*r*bis praecipitur, sed quia id bonae fidei iudicio conueniens uidetur, id*eo*[5] officio eius contineri creditur. **64.** Alia causa est illius actionis qua argentarius expcritur. nam is cogitur cum compensatione agere, et ea compensatio uerbis formulae exprimitur, adeo quidem ut *statim*[6] ab initio compensatione facta minus intendat sibi dar*i* oportere. ecce enim si s*estertium* X milia debeat Titio atque ei XX debeantur, sic intendit: SI PARET TITIUM SIBI X MILIA DARE OPORTERE AMPLIUS QUAM I*P*SE TITIO DEBET. **65.** Item *b*onorum emptor cum deductione agere iube*tur*, *id est ut* in hoc solum aducrsarius eius condemnetur quod superest, deducto eo quod inuicem ei bonorum emptor defraudatoris nomin*e* debet. **66.** Inter compensationem autem quae argentario opponitur et deductionem quae obicitur bonorum emptori ill*a* differentia est, quod in compensation*em* hoc solum uocatur, quod eiusdem generis et naturae est: ueluti pecunia cum pecunia
V p. 213 compens*a*tur, triticum cum tritico, uinum cum uino; adeo / ut quibusdam place*a*t no*n* omni modo uinum cum uino aut triticum cum tritico compensandum, sed ita si eiusdem naturae qualitatisque sit. in deductionem autem uocatur et quod non est eiusdem

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[1] Generally supplied. The next folio, V 210 and 211, is illegible. V 212 begins in the middle of the treatment of *compensatio* (Inst. 4, 6, 39; cf. 30). Before that, the lost text may have dealt with the subject of Inst. 4, 6, 36–8—*actiones quibus non semper solidum quod debetur nobis persequimur.* Cf. 4, 69 init.

[2] From Inst. 4, 6, 30 (cf. 39), which, however, may not be from Gaius' Institutes (Ferrini, Opere 2, 408).

[3] Same construction (or corruption) 3, 160. In Inst. 4, 6, 39 the MSS. vary. 4, 6, 30 does not help.

[4] *mandati—uxoriae* written twice in V. Cf. Capocci, BIDR 1928, 138–43. Krüger adds: ⟨*commodati, pigneraticium, familiae erciscundae, communi diuidundo*⟩, from Inst. 4, 6, 28, but *fam. erc.* and *com. diu.* are more than doubtful.

[5] *id* V.

[6] So Huschke–Kübler. *ut itaque* V. *itaque* om. Krüger.

indicates that he deposited more things than he really did, loses his suit, because he is held to have made an overstatement in his *intentio*. . . .

61. In *bonae fidei* actions the *iudex* appears to be allowed complete discretion in assessing, on the basis of justice and equity, how much ought to be made good to the plaintiff, and this involves that he may take into account any counter-obligation due from the plaintiff under the same transaction, and may condemn the defendant only in the difference. **62.** The *bonae fidei* actions are those on sale, hiring, unauthorized agency, mandate, deposit, *fiducia*, partnership, tutorship, and wife's dowry. **63.** It is nevertheless open to the *iudex* (in such actions) to take no account of any counter-obligation; for this is not enjoined expressly by the *formula*, but is considered to lie within his office as being consonant with a *bonae fidei* action. **64.** It is otherwise in the action used by bankers. For a banker is obliged to include *compensatio* or set-off in his claim, and this *compensatio* is expressly mentioned by the *formula*. In fact, from the outset a banker in his *intentio* takes *compensatio* into account and reduces the amount claimed. For example, if a banker owes Titius 10,000 sesterces and Titius owes him 20,000, the banker's *intentio* will run: 'if it appears that Titius ought to pay the plaintiff 10,000 sesterces more than the plaintiff owes Titius.' **65.** It is also the rule that a *bonorum emptor* must sue subject to *deductio*, which means that his opponent is to be condemned only in the amount remaining after deduction of what on his side the *bonorum emptor*, as representing the insolvent, owes him. **66.** Between *compensatio* against a banker and *deductio* against a *bonorum emptor* there is the following difference. In *compensatio* only things of the same kind and nature as those claimed are set off, for example money against money, wheat against wheat, wine against wine; indeed, it is even held by some that not every kind of wine or wheat can be set off, but only wine or wheat of the same kind and quality as that claimed. In *deductio*, on the other hand, things of a different kind are set off. Thus,

§ 61. = Inst. 4, 6, 39. Cf. § 30. C. 4, 31, 14 (A.D. 531). § 62. Cf. Inst. 4, 6, 28. Cic. de off. 3, 17, 70 &c. § 64. Cf. Edictum § 100. § 65. Cf. G. 3, 78 sq.; 4, 35.

generis. itaque, ⟨*si* . . .⟩;[1] si uero pecuniam petat bonorum emptor et inuicem frumentum aut uinum is debeat, deducto quanti id erit, in reliquum experitur. **67.** Item, uocatur in deductionem et id quod in diem debetur, compensatur autem hoc solum quod praesenti die debetur. **68.** Praeterea, compensationis quidem ratio in intentione ponitur; quo fit ut, si facta compensatione plus nummo uno intendat argentarius, causa cadat et ob id rem perdat. deductio[2] uero ad condemnationem ponitur, quo loco plus petenti[3] periculum non interuenit, utique bonorum emptore agente, qui licet de certa pecunia agat, incerti tamen condemnationem concipit.

69. Quia tamen superius mentionem habuimus de actione qua in peculium filiorum familias seruorumque ageretur,[4] opus est ut de hac actione et de ceteris quae eorundem[5] nomine in parentes dominosue dari solent diligentius[6] admoneamus. **70.** In primis itaque, si iussu patris dominiue negotium gestum erit, in solidum praetor actionem in patrem dominumue comparauit; et recte, quia, qui ita negotium gerit, magis patris[7] dominiue quam filii seruiue
V p. 214 fidem sequitur. **71.** Eadem ratione / comparauit duas alias actiones, exercitoriam et institoriam.[8] tunc autem exercitoria locum habet, cum pater dominusue filium seruumue magistrum naui[9] praeposuerit, et quid cum eo eius rei gratia cui praepositus[10] fuerit negotium[11] gestum erit. cum enim ea quoque res ex uoluntate patris dominiue contrahi uideatur, aequissimum esse uisum est in solidum actionem[12] dari. quin etiam, licet extraneum quisque[13] magistrum naui[14] praeposuerit, siue seruum siue liberum, tamen ea praetoria[15] actio in eum redditur. ideo autem exercitoria[16] actio appellatur, quia exercitor uocatur is ad quem cottidianus nauis quaestus peruenit. institoria[17] uero formula tum locum habet, cum

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[1] Krüger supposes omission of a contrasted hypothesis. Kübler om. *uero.*

[2] P. Oxy. 2103, frs. 2+3, begins: *-ductum ve* / . . . *quo loco plus* / rell. Cf. E. Levy, SZ 1928, 532; Studi Bonfante 2, 277; Zulueta, LQR 1928, 198. The frs. extend into § 73, but up to nearly the end of § 71 only the endings of lines survive and from about the middle of § 72a only occasional letters. Levy and Kübler prefer O's *deductum* to V's *deductio.*

[3] *petendi* Beseler, Beitr. 4, 116.

[4] *ageretur* O. *agatur* V. *agitur* Inst. 4, 7 pr.

[5] *in eorundem* O.

[6] *solent diligentius: licet deligentius* O

[7] *patros* O.

[8] *institutoriam* V. O deficient.

[9] *nauis* V. O deficient.

[10] *praepositum post* V. O deficient.

[11] *negotium* V. om. Inst. Gloss according to Mommsen, but the space in O indicates that *negotium* was there.

[12] So O. *actio* V.

[13] . . . *que* O. *quisqua s* V.

if a *bonorum emptor* suing for money owes on his side corn or wine, he claims only the amount remaining after the value of what he owes has been deducted. **67.** Again, in *deductio* even debts falling due in the future are brought into account, but in *compensatio* only those already due. **68.** Furthermore, account is taken of *compensatio* in the *intentio*, with the result that, if a banker's *intentio* claims a farthing too much after allowing for *compensatio*, he loses his case and consequently forfeits all claim. But of *deductio* account is taken in the *condemnatio*, where excessive claim is not hazardous, at any rate when the plaintiff is a *bonorum emptor*; for a *bonorum emptor*, even though suing for a definite sum of money, couches the *condemnatio* as for an uncertain amount.

69. Having previously mentioned the action whereby one proceeds against the *peculium* of sons in *potestas* and of slaves, we must discuss more in detail this and the other actions which are granted in respect of such persons against their parents and masters. **70.** Firstly, where the transaction with the son or slave has been entered into with the authorization of the father or master, the praetor has provided an action enforcing the full liability against the father or master; and this is right, because a party entering into a transaction in such circumstances gives credit to the father or master rather than to the son or slave. **71.** On the same principle the praetor has provided two other actions, the *exercitoria* and the *institoria*. The *exercitoria* applies when the father or master has put his son or slave in charge of a ship, and there has been some transaction with the son or slave arising out of the business over which he has been put. For since in this case too the transaction appears to be effected in accordance with the father's or master's desire, it has been considered entirely equitable that an action enforcing full liability should be allowed. Furthermore, this praetorian action is allowed against one who has put even a stranger, whether slave or free, in charge of his ship. It is called *exercitoria* because the person to whom the current earnings of a ship go is called the *exercitor*. The *formula institoria* applies when a man

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[14] *nauis* V. *naui* O probably.
[15] *tamen ea praetoria* V. *exercitoria* O.
[16] *exercitoria autem* O.
[17] *institutoria* VO.

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§ 68. Cf. G. 4, 53. 56. 57. § 69. = Inst. 4, 7 pr. init. Cf. Edictum tit. xviii. *superius*: between §§ 60 and 61? Cf. Inst. 4, 6, 36 sq. § 70. Cf. Inst. 4, 7, 1. § 71. Cf. Inst. 4, 7, 2.

quis tabernae aut cuilibet negotiationi filium seruumue aut quemlibet[1] extraneum, siue seruum siue liberum, praeposuerit, et quid[2] cum eo eius rei gratia cui praepositus est contractum fuerit. ideo autem insti*toria*[3] uocat*ur*, quia qui tabernae praeponitur institor[4] appellat*ur*. quae[5] et ipsa formula in solidum est. **72.** Praeterea, tributoria quoque actio in patrem dominumue constituta est, cum filius seruusue in peculiari merce[6] sciente patre dominoue[7] negotietur. nam si quid[8] eius rei gratia cum eo contractum fuerit, ita praetor[9]
V p. 215 ius dicit, ut quidquid in *his*[10] mercibus / erit[11] quod*que*[12] inde receptum erit, i*d*[13] p*ater d*ominusue inter s*e*, si quid[14] debebitur, et ceteros c*re*ditores pro rata portione distribu*ant*,[15] et si cre*dito*res querantur minus sibi distributum quam opor*te*ret, in id quod deest hanc eis actionem pollicetur, *quae, u*t diximus, tributoria uocatur. **72a.**[16] Est / etiam de p*eculio e*t de in rem uerso actio a praetore / constitu*ta*. *lic*et enim[17] negotium ita gestum sit cu*m* / filio se*ruoue ut* neque uoluntas neque consens*us* / p*atris dominiue inte*ruenerit, si quid tam*en ex* / *e*a re q*uae cum illis gest*a[18] est in rem patris dom*iniue* / *u*ersu*m* (*about* 20 *letters*) uersum fuerit, eaten*us* / (*about* 35 *letters*) ena in (5 *letters*) / (3 *letters*) r (*about* 22 *letters*) *praeto*r dat action*em* / (*about* 32 *letters*) itur his uer*bis* / (8½ *almost illegible lines*). **73.**[19] *Cum autem quaeritur quantum in peculio sit, ante de*/
V p. 216 ducitur[20] quod patri dominoue quique in eius potestate sit a filio seruoue debet*ur*, et quod superest, hoc solum peculium esse intellegitur. aliquando tamen id quod ei debet filius seruusue qui in potestate patris dominiue sit, non deducitur ex peculio, uelut si

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[1] So V. . . . *ue quemlibet* O. [2] *quid*: *quis* O.

[3] *institutoria* VO. From this point O (Col. ii) becomes more complete.

[4] *institor* O. *institutor* V. [5] . . . *ae* O. *qua* V.

[6] *seruus in peculiari merce* Inst. *seruosque ex peculiari merce* O. *seruusue in peculiari quioptio merce* V.

[7] *dominoue* V. *dominoq.e* O. [8] *quid*: *quis* O.

[9] *ita praetor* V and Inst. *praetor ita* O.

[10] *his* Inst. VO deficient.

[11] V 215 being illegible, the rest of § 72 depends on O and Inst.

[12] *quodque* Inst. *quod* O, kept by Kübler, but cf. § 74a.

[13] *id* Inst. *ita* O.

[14] *quid ei* Inst., where only *dominus* is in question. *ei* om. O.

[15] *distribuunt* O. *distribuatur* Inst. (paraphrasing).

[16] This section is entirely illegible in V. In O it begins with the last word of l. 52 Col. ii and ends almost certainly in the middle of l. 70; but for practical purposes only the first 8–9 lines count: cf. Hunt, P. Oxy. xvii, p. 177. Kübler reproduces Levy's highly ingenious reconstruction (SZ 1928, 537–8), adding Inst. 4, 7, 4b from *licet enim una*, but for reasons of space (Zulueta, LQR 1928, 204–5; Levy, St. Bonfante 2, 278) this cannot be accepted. Probably the missing end of § 72a illustrated from the *formula* the double-barrelled *condemnatio* (*duae*

has put his son or slave, or a stranger whether slave or free, in charge of a shop or other business, and some transaction arising out of the business over which he has been put has been entered into with that person. It is called *institoria* because a person put in charge of a shop is called the *institor*. This *formula* too enforces full liability. **72.** Besides these actions there has also been created against a father or master an *actio tributoria*, which applies when a son or slave, to the knowledge of his father or master, carries on business with capital belonging to his *peculium*. For in regard to transactions entered into in the course of that business the praetor lays down that the father or master shall distribute between himself, if anything is due to him, and the other creditors proportionately, any capital embarked in the business and profits therefrom; and, should the creditors complain that less than was right has been distributed to them, the praetor offers them the present action, called, as we have said, *tributoria*, for the deficiency. **72a.** The praetor has also established an *actio de peculio et de in rem uerso* (in respect of the *peculium* and of what has been applied to the uses of the father or master). For notwithstanding that the transaction in question has been entered into with the son or slave without the will or consent of his father or master, the praetor grants against the father or master an action which, in respect of anything resulting from the transaction that has been applied to the uses of the father or master, is for the full liability, and in respect of what has not been so applied is up to the limit of what the *peculium* allows. . . . **73.** In ascertaining the amount of the *peculium* liabilities of the son or slave to the father or master or to a person in his *potestas* are first deducted, and only the balance is reckoned as *peculium*. Sometimes, however, there is no deduction of what is due from the son or slave to a person in the *potestas* of the father or master, for instance where the creditor is in the

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condemnationes Inst. 4, 7, 4b; cf. infra § 74 i.f.) of the *actio de peculio et de in rem uerso*, but Justinian is not here a safe guide to the text.

[17] *licet enim* Levy. *etsi etenim* Hunt.

[18] So Levy. *quae inter eos gesta* Hunt.

[19] At l. 70 O seems to have reached § 73, but in the subsequent lines only the initial letter has been read.

[20] Supplied from Inst. 4, 7, 4c. Thereafter V is once more legible.

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§ 72. Cf. Inst. 4, 7, 3. G. 4, 74a. § 72a. Cf. Inst. 4, 7, 4. § 73. = Inst. 4, 7, 4c. *quod . . . a filio seruoue debetur*: G. 3, 119a.

is cui debet in huius ipsius peculio sit. **74.** Ceterum dubium non est quin et is, qui iussu patris dominiue contraxit, cuique exercitoria uel institoria[1] formula competit, de peculio aut de in rem uerso agere possit. sed nemo tam stultus erit ut, qui aliqua illarum actionum sine dubio solidum consequi possit, in difficultatem se deducat probandi habere peculium eum cum quo contraxerit exque eo peculio posse sibi satisfieri, uel id quod persequitur in rem patris dominiue uersum esse. **74a.** Is quoque cui tributoria actio competit de peculio uel de in rem uerso agere potest. sed huic sane plerumque expedit hac potius actione uti quam tributoria. nam in tributoria eius solius peculii ratio habetur, quod in his mercibus est in[2] quibus negotiatur filius seruusue quodque inde receptum erit; at in actione ⟨*de peculio*⟩[3] peculii totius. et potest quisque tertia forte aut quarta uel etiam minore parte peculii negotiari, maximam uero partem peculii in aliis rebus habere. longe magis, si potest adprobari id quod ⟨*dederit is qui cum filio seruoue*⟩[4] contraxit in rem patris dominiue uersum esse, ad hanc
V p. 217 actionem transire debet; nam, ut supra diximus, / eadem formula et de peculio et de in rem uerso agitur.

75. Ex maleficio[5] filiorum familias seruorumque, ueluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominoue aut litis aestimationem sufferre aut noxae dedere. erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisue damnosam esse. **76.** Constitutae sunt autem noxales actiones aut legibus aut edicto praetoris: legibus, uelut furti lege XII tabularum, damni iniuriae [uelut] lege Aquilia; edicto praetoris, uelut iniuriarum et ui bonorum raptorum. **77.** Omnes autem noxales actiones caput sequuntur. nam si filius tuus seruusue noxam commiserit, quamdiu in tua potestate est, tecum est actio; si in alterius potestatem peruenerit, cum illo incipit actio esse; si sui iuris coeperit esse, directa actio cum ipso est, et noxae deditio extinguitur. ex diuerso quoque directa actio noxalis esse incipit. nam si pater familias noxam commiserit, et is se in adrogationem tibi dederit aut seruus tuus esse coeperit,

[1] *institutoria* V. [2] *in* om. Krüger.
[3] Supplied by Krüger. Or ⟨*hac*⟩ actione. Cf. Gaius D. 14, 4, 11.
[4] Krüger's supplement.
[5] *maleficiis* Krüger, adopting Inst. 4, 8 pr., but cf. 4, 80.

§ 74. Cf. Inst. 4, 7, 5. § 74a. Cf. Inst. 4, 7, 5a. *ut supra diximus*: G. 4, 72a? § 75. = Inst. 4, 8 pr. 2 fin. Cf. G. 1, 140. Pap. Coll. 2, 3, 1. § 76. = Inst. 4, 8, 4. § 77. = Inst. 4, 8, 5. *primo commentario*: G. 1, 160.

peculium of the son or slave. **74.** That one who has contracted on the authority of the father or master, or who is entitled to a *formula exercitoria* or *institoria*, may proceed by *actio de peculio* or *de in rem uerso*, is beyond doubt. But no one, having it in his power to recover with certainty in full by one of the first-mentioned actions, will be so foolish as to put himself to the trouble of proving that the person with whom he contracted possesses *peculium* and that his claim can be satisfied out of it, or else that what he is claiming has been applied to the uses of the father or master. **74a.** He likewise who is entitled to an *actio tributoria* may proceed *de peculio* or *de in rem uerso*. But he on the contrary will often do better to use this action in preference to the *tributoria*. For in the *tributoria* account is taken only of *peculium* which forms the capital with which the son or slave trades or has been produced therefrom, whereas in the *actio de peculio* account is taken of the whole *peculium*, and a man may trade with only a third or a fourth or even a smaller part of his *peculium*, keeping the most of it in other things. Still more ought one who has contracted with a son or slave to prefer this action to the *tributoria* where it can be proved that what he gave the son or slave has been applied to the uses of the father or master; for, as we have said above, one proceeds *de peculio* and *de in rem uerso* under one and the same *formula*.

75. Wrongdoing by sons or slaves, as where they have been guilty of theft or outrage, has given rise to noxal actions, the nature of which is that the father or master is allowed either to bear the damages awarded or to surrender the offender. For it would be inequitable that their misconduct should involve their parents or masters in loss beyond that of their persons. **76.** Noxal actions have been established in some cases by statute, in others by the praetor's Edict: by statute, for example for theft by the law of the Twelve Tables and for wrongful damage to property by the *L. Aquilia*; by the praetor's Edict, for example for outrage and violent robbery. **77.** Noxal actions always follow the person of the offender. Thus, if your son or slave commits a wrong, the action lies against you so long as he is in your *potestas*; if he passes into another person's *potestas*, the action now lies against that person; if he becomes *sui iuris*, there is a direct action against the offender himself, and noxal surrender is ruled out. Conversely, the direct action may become noxal. For if a *paterfamilias* commits a wrong, and then gives himself in adrogation to you or becomes your slave (this happens in some cases, as stated in our first book), the

⟨*quod*⟩ quibusdam casibus accidere primo commentario tradidimus, incipit tecum noxalis actio esse quae ante directa fuit. **78.** Sed si filius patri aut seruus domino noxam commiserit, nulla actio nascitur; nulla enim omnino inter me et eum qui in potestate mea
V p. 218 est obligatio nasci potest. ideoque, etsi in alienam / potestatem peruenerit aut sui iuris esse coeperit, neque cum ipso neque cum eo cuius nunc in potestate est agi potest. unde quaeritur, si alienus seruus filiusue noxam commiserit mihi, et is postea in mea esse coeperit potestate, utrum intercidat actio an quiescat. nostri praeceptores intercidere putant, quia in eum casum deducta sit, in quo *ab initio*[1] consistere non potuerit, ideoque, licet exierit de mea potestate, agere me non posse. diuersae scholae auctores, quamdiu in mea potestate sit, quiescere actionem putant, quia ipse mecum agere non possum, cum uero exierit de mea potestate, tunc eam resuscitari. **79.** Cum autem filius familias ex noxali causa mancipio datur, diuersae scholae auctores putant ter eum mancipio dari debere, quia lege XII tabularum cautum sit ⟨*ne aliter filius de potestate patris*⟩ exeat quam si ter fuerit mancipatus. Sabinus et Cassius ceterique nostrae scholae auctores sufficere unam mancipationem crediderunt, et illas tres legis XII tabularum ad uoluntarias mancipationes pertinere.

80. Haec ita de his personis quae in potestate ⟨*sunt*⟩, siue ex contractu siue ex maleficio earum controuersia sit.[2] quod uero ad eas personas quae in manu mancipioue sunt,[3] ita ius dicitur, ut, cum ex contractu earum agatur, nisi ab eo cuius iuri subiectae sint in solidum defendantur, bona quae earum futura forent, si eius iuri subiectae non essent, ueneant. sed cum rescissa *capitis deminu-*
V p. 219 *tione cum iis*[4] imperio continenti iudicio / agitur[5] . . .
V p. 220 . . .[6] **81.** *Quid* / ergo *est*? . . . diximus . . . non permissum[7] fuerit

[1] So Kübler, citing D. 5, 1, 11. 13, 6, 1, 2. 30, 41, 2. 47, 2, 17, 1. *quem* (or *quo*) *actio* (?) *consistere* V. *quo consistere* Inst., adopted by Krüger.

[2] So Huschke. V now illegible.

[3] Seeing that what follows *sunt* in V appears to refer only to the contractual obligations of a woman *in manu* incurred before her entry into *manus*, Krüger conjectures the omission after *sunt* of a considerable passage dealing with the other topics indicated by what precedes.

[4] Huschke's conjecture, generally adopted.

[5] V 219 is virtually illegible. Huschke completes the unfinished sentence thus: *si aduersus eam actionem non defendantur, etiam cum ipsa muliere, dum in manu est, agi potest, quia tum tutoris auctoritas necessaria non est.* Cf. Ulp. 11, 27.

[6] The illegible p. 219 almost certainly dealt with the *actio de pauperie*: Inst. 4, 9; Autun Gaius 81 sq. To judge by the beginning of p. 220 and the Autun Gaius, it concluded with the question of the effect of the death of the offending

action which was previously direct becomes a noxal action against you. **78.** But if a son does wrong to his father or a slave to his master, no action arises, because no obligation at all can arise between me and a person in my *potestas*. Consequently, even if he passes into someone else's *potestas* or becomes *sui iuris*, no action lies either against the offender himself or against the person in whose *potestas* he now is. Hence the question whether, if another's slave or son has done me a wrong and he afterwards comes under my *potestas*, the action is extinguished or is merely dormant. Our teachers hold that it is extinguished, because in the circumstances that have come about it could never have arisen at all, and that therefore I can have no action, even if he passes out of my *potestas*. The authorities of the other school hold that so long as he is in my *potestas* the action is dormant, because I cannot bring an action against myself, but that it revives when he has passed out of my *potestas*. **79.** When a son in *potestas* is mancipated on account of wrongdoing, the authorities of the other school hold that he must be mancipated thrice, because the law of the Twelve Tables provides that a son is to pass out of paternal *potestas* only if mancipated thrice. Sabinus and Cassius and the other authorities of our school have held that a single mancipation suffices and that the three mancipations of the Twelve Tables mean voluntary mancipations.

80. So much for suits arising out of the contract or wrongdoing of a person in *potestas*. But with regard to persons in *manus* or *mancipium* the praetor's practice is that if, when action is brought upon their contract, they are not defended up to the full liability by the person to whose power they have been subjected, all the property that would have been theirs, had they not been subjected to that person's power, shall be put up for sale. But when their *capitis deminutio* has been rescinded and an action *imperio continens* is brought against them. . . .

81. . . . What does this come to? Although, as we have just

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person or animal, according as it occurred before or after *litis contestatio*. Cf. Ulp. D. 9, 1, 1, 13 sq. Iau. D. 9, 2, 37, 1. Ulp. D. 9, 4, 39, 4. What § 81 seems to be discussing is the possibility of surrendering the body of an offender who has died from natural causes after *litis cont.* The whole matter is obscure.

[7] The reading of nearly all the first line of V 220 (as far as *permis*) is extremely doubtful.

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§ 78. Cf. Inst. 4, 8, 6. § 79. Cf. G. 1, 132. 135. 140. Pap. Coll. 2, 3, 1. Inst. 4, 8, 7. § 80. Cf. G. 3, 84; 4, 38. *imperio continenti*: G. 4, 103 sq. § 81. Cf. Autun Gaius 81–7. Liu. 8, 39, 14.

ei mortuos homines dedere, tamen, etsi quis eum dederit qui fato suo uita excesserit, aeque liberat*ur*.

82. Nunc admonendi sumus ag*er*e nos aut nostro nomine aut alieno, ueluti cognitorio, procuratorio, tutorio, curatorio, cum olim, quo tempore legis actiones in usu fuissent, alieno nomine agere non liceret, pr*aeter*quam ex ce*r*tis causis. **83.** Cognitor autem certis uerbis in litem cora*m* aduersario substituitur. nam actor i*ta* cognitore*m* dat: QUOD EGO A TE, uerbi gratia, FUNDUM PETO, IN EAM REM LUCIUM TITIUM TIBI COGNITOREM DO; aduersarius ita: QUIA TU A ME FUNDUM PETIS, IN EAM ⟨*REM*⟩ TIBI PUBLIUM MEUIUM COGNITOREM DO. potest ut actor ita dicat: QUOD EGO TECUM AGERE UOLO, IN EAM REM COGNITOREM DO; aduersarius ita: QUIA TU MECUM AGERE UIS, IN EAM REM COGNITOREM DO. nec interest praesens an absens cognitor detur; sed si absens datus fuerit, cognitor ita erit, si cognouerit et susceperit officium cognitoris. **84.** Procurator uero nullis certis uerbis in litem substituitur, sed ex solo mandato et absente et ignorante aduersario constituitur. quin etiam sunt qui putant eum quoque procuratorem uideri, cui non sit mandatum, si modo bona fide accedat ad negotium et caueat ratam rem dominum habitur*um*; qu*am*qu*am* et ille cui
V p. 221 mandatum ⟨*est*⟩ plerumque satisdare debet, / quia saepe mandatum initio litis in obscuro es*t* et postea apud iudicem ostenditur. **85.** Tutores autem et curatores quemadmodum constituantur primo commentario rettulimus. **86.** Qui autem alieno nomine agit, intentionem quidem ex persona domini sumit, condemnationem autem in suam personam conuertit. nam si uerbi gratia L. Titius ⟨*pro*⟩ P. Meuio agat, ita formula concipitur: SI PARET NUMERIUM NEGIDIUM PUBLIO MEUIO SESTERTIUM X MILIA DARE OPORTERE, IUDEX NUMERIUM NEGIDIUM LUCIO TITIO SESTERTIUM X MILIA CONDEMN*A*. SI NON PARET, ABSOLU*E*. in rem quoque si agat, intendit P. *MEUI* REM ESSE EX IURE QUIRITIUM, et condemnationem in suam personam conuertit. **87.** Ab aduersarii quoque parte si interueniat aliquis cum quo actio constituitur, intenditur dominum DARE OPORTERE, condemnatio autem in eius persona*m* conuertitur qui iudicium acceperit.[1] sed cum in rem agitur, nihil

[1] So V. *accipit* Wlassak–Krüger.

§ 82. Cf. Inst. 4, 10 pr. § 83. Cf. G. 4, 97. 101. 124. § 84. Cf. G. 4, 98. 101. Inst. 4, 10, 1. § 85. = Inst. 4, 10, 2. Cf. G. 4, 99. 101. *primo commentario*: G. 1, 142 sq. §§ 86–7. Cf. G. 4. 35. 55 in fin.; 2, 252 in fin.

said, one is not allowed to surrender the dead, still one who surrenders a person who has died a natural death is equally cleared of liability.

82. We must next observe that a man may take proceedings either in his own right or in that of another person, as his *cognitor*, *procurator*, tutor or curator, whereas in former times, when the *legis actiones* were in use, one was not allowed to take proceedings on another's behalf, except in certain cases. **83.** A *cognitor* is substituted as party to an action by special words being uttered in the presence of the opposing party. Thus a plaintiff appoints a *cognitor* by the words: 'whereas I am claiming' for example 'certain lands from you, I give you Lucius Titius as my *cognitor* in that behalf', and a defendant does so by the words: 'seeing that you are claiming certain lands from me, I give you P. Mevius as my *cognitor* in that behalf'. Or the plaintiff may express it thus: 'whereas I desire to sue you, I give you so and so as my *cognitor* in that behalf', and the defendant thus: 'seeing that you desire to sue me, I give you so and so as my *cognitor* in that behalf.' And it makes no difference whether the *cognitor* is present or absent when appointed, but if he is absent, he will be *cognitor* only if he is informed of the appointment and accepts the office. **84.** A *procurator*, on the other hand, can be substituted as a party without any special words, by simple mandate, and without the presence or the knowledge of the opposing party. Indeed, there are some who hold that a man is to be deemed *procurator* even if he has received no mandate, provided that he comes into the case in good faith and gives security for the future ratification of his acts by the principal; though (as far as that goes) even one who has received a mandate is usually bound to give security, because at the beginning of a suit a mandate is often uncertain and is only made clear later, before the *iudex*. **85.** We have related in the first book how tutors and curators are appointed. **86.** A man suing in right of another person frames the *intentio* in the name of his principal, but transfers the *condemnatio* into his own name. For example, if L. Titius is suing on behalf of P. Mevius, the *formula* is framed thus: 'If it appears that Numerius Negidius ought to pay Publius Mevius 10,000 sesterces, do thou, *iudex*, condemn Numerius Negidius to Lucius Titius in 10,000 sesterces. If it does not appear, absolve', or if he is suing *in rem*, he claims in the *intentio* that the thing belongs to P. Mevius by Quiritary title and transfers the *condemnatio* into his own name. **87.** Also, if someone appears on behalf of a defendant, and the pleadings are being settled with him, the *intentio* claims that the principal ought to pay, while the *condemnatio* is transferred into the name of the person who accepts

⟨*in*⟩ intentione facit eius persona cum quo agitur, siue suo nomine siue alieno aliquis iudicio interueniat; tantum enim intenditur REM ACTORIS ESSE.

88. Uideamus nunc quibus ex causis is cum quo agitur uel hic qui a*git co*gat*ur* satisdare. **89.** Igitur, si uerbi gratia in rem tecum aga*m*, satis mihi dar*e* debes; a*equum* enim uisum est ⟨*te*⟩, *ideo* quod interea tibi rem, quae an ad te pertineat dubium e*st*, possidere conceditur, cum satisdatione[1] cauere, ut, si uictus sis, *nec rem* ipsam restituas nec litis aestimationem suffe*r*as, sit mihi potestas
V p. 222 aut tecum agendi aut cum sponsoribus / tuis. **90.** Multoque magis debes satisdare mihi si alieno nomine iudicium accipias. **91.** Ceterum, cum in rem actio duplex sit (aut enim per formulam petitoriam agit*ur* aut per sponsionem), siquidem per formulam petitoriam agitur, illa stipulatio locum habet quae appellatur IUDICATUM SOLUI, si uero p*er* sponsionem, illa quae appellatur PRO PRAEDE LITIS ET UINDICIARUM. **92.** Petitoria autem formula haec est, qua actor intendit REM SUAM ESSE. **93.** Per sponsionem uero hoc modo agimus: prouocamus aduersarium tali sponsione: SI IIOMO QUO DE AGITUR EX IURE QUIRITIUM MEUS EST, SESTERTIOS XXV NUMMO*S* DARE SPONDES? deinde formulam edimus qu*a* intendimus sponsionis summam nobis dar*i* oportere; qua formula ita demum uincimus, si probauerimus rem nostra*m* esse. **94.** Non tamen haec summa sponsionis exigitur. non enim poenalis est, sed praeiudicialis, et propter hoc solum fit, ut per eam de re iudicetur. unde etiam is cum quo agit*ur* non restipulat*ur*. ideo autem appellata est PRO PRAEDE LITIS UINDICIARUM stipulatio, quia in locum praedium successit qui[2] olim, cum lege agebatur, pro lite et u*in*diciis, id est pro re et fructibus, a possessor*e* petitori dabantu*r*.[3] **95.** Ceterum, si apud centumuiros agitur, summam sponsionis non per formulam petimus, sed per legis actionem. sacramento enim re*um* prouo-
V p. 223 ca*mus*; eaque sponsio sestertium cxxv nummum fi*eri* solet[4] / propter

[1] So Krüger. *satisdationem* V. *satisdatione mihi* Kübler.
[2] *qui* V. *quia* Kübler.
dabantur praedes V. Krüger om. *praedes*. Kübler keeps: cf. n. 2.
[4] So Kübler. *fit solet* (?) V. *fit scilicet* Krüger.

§ 88. Cf. Edictum p. 139. §§ 88. 89. Cf. Inst. 4, 11 pr. §§ 91–4. *per formulam petitoriam*: G. 4, 34. 36. 41. 45. 51 ad fin. 86. Cic. in Verr. ii, 2, 12, 31. Inst. 4, 15, 4. *per sponsionem*: G. 4, 165. *iudicatum solui*: Inst. 4, 11 pr. *pro praede*: G. 4, 16 &c. § 95. *apud centumuiros*: G. 4, 31. *legem Crepereiam*: otherwise unknown. Cf. Berger, PW Sup. vii, 384.

the suit. When, however, the action is *in rem*, the *intentio* pays no regard to the identity of the defendant, whether he is appearing for himself or for another, but simply claims that the thing belongs to the plaintiff.

88. Next let us see in what cases a defendant or a plaintiff is obliged to give security. **89.** If then I bring an action *in rem* against you, you are bound to give me security; for, as you are being conceded interim possession of a thing your title to which is doubtful, it has been held equitable that you should make me a promise with sureties, so that, if you are defeated, but fail either to give me back the thing itself or to pay me its assessed value, it may be in my power to sue either yourself or your *sponsores*. **90.** All the more are you bound to give me security if it is on another's behalf that you are defending. **91.** But an *actio in rem* may take one of two forms—it may be by *formula petitoria* or by *sponsio*. If it is by *formula petitoria*, the *stipulatio* employed is that known as *iudicatum solui*; if by *sponsio*, that known as *pro praede litis et uindiciarum*. **92.** The *formula petitoria* is that in which the plaintiff's *intentio* claims that the thing is his. **93.** By *sponsio* we proceed as follows: we challenge our opponent by a *sponsio* such as this: 'If the slave the subject of this action is mine by Quiritary title, do you solemnly promise to pay me 25 sesterces?' and we then issue a *formula* claiming that the sum named in the *sponsio* ought to be paid to us, and we succeed under that *formula* precisely if we prove the thing is ours. **94.** The sum named in the *sponsio* is not, however, exacted. For the *sponsio* is not penal but prejudicial, being entered into solely in order to bring the question of ownership to trial. This also explains why the defendant does not put a counter-*stipulatio*. The *stipulatio pro praede litis uindiciarum* is so called because it has taken the place of the *praedes* (personal sureties) who formerly, when the procedure was by *legis actio*, were given by the possessor to the claimant *pro lite et uindiciis*, that is for the disputed thing and its profits. **95.** But when the action is before the *centumuiri*, we claim the sum named in the *sponsio* by *legis actio*, not by *formula*. For we challenge the defendant by *sacramentum*. And the *sponsio* in this case is for 125

legem Crepereiam.[1] **96.** Ipse autem qui in rem agit, si suo nomine agat, satis non dat. **97.** Ac nec si per cognitorem quidem agat, *u*lla[2] satisdatio uel ab ipso uel a domino desideratur. cum enim certis et quasi sollemnibus uerbis in locum domini substituatur cognitor, merito domini loco habetur. **98.** Procurator uero si agat, satisdare iubet*ur* rat*a*m rem dominum habiturum. periculum enim est ne iterum dominus de eadem re experiatur. quod periculum ⟨*non*⟩ interuenit si per cognitorem actum fu*e*rit, quia de qua re quisque per cognitorem egerit, de ea non magis amplius actionem habet quam si ipse egerit. **99.** Tutores et curatores eo modo quo et procuratores satisdare debere uerba edicti faciunt; sed aliquando illis satisdatio remittitur. **100.** Haec ita si in rem agatur; si uero in personam, ab actoris quidem parte quando satisdari debeat quaerentes, eadem repetemus quae diximus in actione qua in rem agitur. **101.** Ab eius uero parte cum quo agitur, siquidem alieno nom*i*ne aliquis interueniat, omni modo satisdari debet, quia nemo alienae rei sine satisdatione defensor idoneus intellegitur. sed siquidem cum cognitore agatur, dominus satisdare iubetur; si uero cum procuratore, ipse procurator. idem et de tutore et de curatore iuris est. **102.** Quodsi proprio nomine aliquis iudicium [aliquid][3]
V p. 224 accipiat / in personam, certis ex causis satisdare solet, quas ipse praetor significat. quarum satisdationum duplex causa est: nam aut propter genus actionis satisd*a*tur, aut pro*pter* person*am*, quia suspecta sit: propter genus actionis ueluti iudicati depensiue, aut cum de moribus mulieris ag*i*tur; propter personam ueluti si cum eo agitur qui decoxerit, cuiusue bona⟨*a*⟩ creditoribus possessa proscriptaue sunt, siue cum eo herede agatur quem praetor suspectum aestimauerit.

103. Omnia autem iudicia aut legitimo iure consistunt aut imperio contin*entur*. **104.** Legitima sunt iudicia, quae in urbe Roma uel int*ra* primum urbis Romae miliarium inter omnes ciues Romanos sub uno iudice accipiuntur; eaque ⟨*e*⟩ lege Iulia iudi-

[1] *Creperiam* (?) V.
[2] So Kübler. *agat nulla* V. *agatur ulla* Krüger.
[3] *aliquid* om. Krüger, with Inst.

§ 96. = Inst. 4, 11 pr. med. § 97. Cf. G. 4, 83. § 98. Cf. Inst. 4, 11 pr. G. 4, 84. § 99. = Inst. 4, 11 pr. fin. *uerba edicti*: Ulp. D. 3, 3, 33, 3. § 100. = Inst. 4, 11, 1. init. Cf. G. 4, 96. § 101. = Inst. 4, 11, 1. Cf. § 5. § 102. Cf. Inst. 4, 11, 1 in fin. *iudicati depensiue*: G. 4, 9. 22. 25. 186. *de moribus mulieris*: Edictum § 116. *cuiusue bona*: G. 3, 79. *cum eo herede*: Edictum § 211. § 103. Cf. G. 1, 184; 3, 83. 181; 4, 80. § 104. Cf. G. 4, 109. *e lege Iulia*: G. 4, 30.

sesterces, because of the *L. Crepereia*. **96.** On the other hand, the plaintiff in an action *in rem*, who sues in his own right, does not give security. **97.** Nor, even where he sues through a *cognitor*, is any security required either of the *cognitor* himself or of his principal. For a *cognitor*, being substituted for the principal by special and as it were solemn words, is rightly regarded as taking his place. **98.** But a *procurator* bringing an action is required to give security for the future ratification of his acts by his principal. For there is a risk that the principal may sue afresh on the same claim, a risk which does not exist where it is a *cognitor* who has brought the action, because on any claim on which one has sued through a *cognitor* one has no more a further action than where one has brought the action oneself. **99.** Tutors and curators are expressly required by the Edict to give security in the same manner as *procuratores*, but are sometimes excused. **100.** So much for actions *in rem*. As to actions *in personam*, we must, to the question when security is due from the plaintiff's side, give the same answer as we have given in the case of actions *in rem*. **101.** But from the defendant's side security is due whenever a man appears on behalf of another, since without security one is never regarded as an adequate defender of another's cause. The security, when the defence is conducted by a *cognitor*, is required from his principal; where by a *procurator*, from the *procurator* himself. The same rule applies to tutors and curators. **102.** But where a man defends an action *in personam* on his own behalf, he has to give security only in certain cases specified by the praetor himself. The grounds for requiring security are twofold; it is given either because of the nature of the action or because the character of the defendant is suspect—the former when the action is on a judgment-debt or on a payment by a *sponsor*, or when a wife's behaviour is in issue, the latter when the defendant is one who has been guilty of malversation or whose property has been seized and advertised for sale by his creditors, or when the defendant is an heir whom the praetor considers suspect.

103. Actions are either statutable or dependent on the magistrate's *imperium*. **104.** An action is statutable if it takes place at Rome or within the first milestone of the city, between parties who are all Roman citizens and before a single *iudex*. By the *L. Iulia*

cia*ria*, nisi in anno et sex mensibus iudicata fuerint, expirant. et hoc est quod uulgo dicitur, e lege Iulia litem anno et sex mensibus mor*i*. **105.** Imperio uero continentur recuperatori*a*, et quae sub uno iudice accipiuntur interueniente peregrini persona iudicis aut litigatoris. in ea*dem* causa sunt quaecumque extra primum urbis Romae miliarium tam inter ciue*s* Roman*os* quam inter peregrinos accipiuntur. ideo autem imperio contineri iudicia dicuntur, quia tamdiu ualent quamdiu is qui ea praecepit imperium habebit. **106.** Et siquidem imperio continenti iudicio *a*ctum fuerit, siue in rem siue
V p. 225 in personam, siue ea formula quae in fa/ctum concepta est siue ea quae in ius habet intentionem, postea nihilo minus ipso iure de eadem re agi potest, et ideo necessaria est exceptio rei iudicatae uel in iudicium deductae. **107.** *Si* uero legitimo iudicio in personam actum sit ea formula quae iuris ciuilis habet intentionem, postea ipso iure de eadem re agi non potest, et ob id exceptio superuacua est; si uero uel in rem uel in factum actum fuerit, ipso iure nihilo minus postea agi potest, et ob id exceptio necessaria est rei iudicatae uel in iudicium deductae. **108.** Alia causa fuit olim legis actionum. nam qua de re actum semel erat, de ea postea ipso iure agi non poterat; nec omnino ita ut nunc usus erat illis temporibus exceptionum. **109.** Ceterum potest ex lege quidem esse iudicium, sed legitimum non esse, et contra ex lege non esse, sed legitimum esse. nam si uerb*i* gratia ex lege Aquilia uel Ollinia[1] uel Furia in prouinciis agatur, imperio continebitur iudicium; idemque iuris est et si Romae apud recuperatores agamus, uel apud unum iudicem interueniente peregrini persona; et ex diuerso, si ex ea causa, ex qua nobis edicto praetoris datur actio, Romae sub uno iudice inter omnes ciues Roman*os* accipiatur iudicium, legitimum est.

110. Quo loco admonendi sumus eas quidem actiones quae ex lege senatusue consultis proficiscuntur perpetuo solere praetorem
V p. 226 accomodare, / eas uero quae ex propria ipsius iurisdictione pendent pleru*m*que intra annum dare. **111.** Aliquando tamen *et perpetuo eas dat, scilicet cum*[2] imitat*ur* ius legitimum: quales sunt eae quas

[1] Unknown. Probably a corruption.

[2] V illegible. Huschke–Mommsen's restoration.

§ 105. Cf. G. 4, 109. *recuperatoria*: G. 4, 46. 109. 141. 185. §§ 106–7. Cf. G. 3, 180. 181; 4, 121. 123. Inst. 4, 13, 5. § 108. Cf. G. 4, 11. 30. *exceptionum*: G. 4, 115 sq. § 109. *ex lege Aquilia*: G. 3, 210 sq.; 4, 37. *Ollinia*: unknown. *Furia*: G. 3, 121. 121a. §§ 110–11. Cf. Inst. 4, 12 pr. *ex lege* &c.: G. 1, 2 sq.; 3, 32? 4, 118.

iudiciaria such actions lapse if they have not been carried to judgment within a year and 6 months. This is expressed in the common saying that under the *L. Iulia* a suit dies in a year and six months. **105.** An action is dependent on the magistrate's *imperium* if it is tried by *recuperatores*, or if, though it is before a single *iudex*, he or either of the parties is a peregrine. To the same category belong all actions that take place outside the first milestone of Rome, whether between citizen or peregrine parties. They are said to depend on the *imperium* owing to the fact that they remain effective only so long as the magistrate who has authorized them retains *imperium*. **106.** After proceedings have been taken by *iudicium imperio continens*, whether they be *in rem* or *in personam*, and whether under a *formula* framed *in factum* or one having an *intentio* framed *in ius*, it is still possible in point of civil law to sue again later on the same cause, and on this account the *exceptio rei iudicatae uel in iudicium deductae* is required. **107.** But where proceedings *in personam* have been taken by *iudicium legitimum*, under a *formula* having an *intentio* framed *in ius*, a subsequent action on the same cause is impossible at civil law, and consequently the *exceptio* is superfluous; but if there have been proceedings *in rem* or under a *formula* framed *in factum*, a subsequent action is still possible in point of civil law, and consequently the *exceptio rei iudicatae uel in iudicium deductae* is required. **108.** It was otherwise formerly under the system of *legis actiones*. For then it was impossible at civil law to sue on a cause that had once been preferred; nor in those times were any *exceptiones* in use, as they are to-day. **109.** Now an action may be based on a statute (*lex*) and yet not be statutable (*legitimum*), and vice versa may not be based on a statute and yet be statutable. For example, an action brought in the provinces under the *L. Aquilia* or *Ollinia* or *Furia* will depend on the magistrate's *imperium*, and so will it if it is brought even at Rome before *recuperatores*, or, though before a single *iudex*, if he or one of the parties is a peregrine. On the other hand, an action on a cause rendered actionable by the praetor's Edict is statutable if it takes place at Rome, before a single *index* and between parties all of whom are Roman citizens.

110. Here it must be observed that the praetor allows actions founded on statute or senatusconsult without limitation of time, but grants actions founded on his own jurisdiction usually only within a year. **111.** Sometimes, however, he grants the latter actions without limitation of time, namely where he is copying the civil law: instances are the actions he provides for *bonorum*

bonorum possessoribus[1] ceterisque qui heredis loco *sunt accommodat. furti*[1] quoque manifesti actio, quamuis ex ipsius praetoris iurisdictione proficiscatur, perpetuo datur; et merito, cum pro capitali poena pecuniaria constituta *sit*.

112. Non omnes actiones quae in aliquem aut ipso iure *competunt* aut a praetore dantur etiam in heredem *aeque* competunt aut dari solent. est enim certissima iuris regula, ex *maleficiis* poenales actiones in heredem nec competere nec dari *solere*, ueluti furti, ui bonorum raptorum, iniuriarum, damni iniuriae. sed *heredibus* [uidelicet actoris] huiusmodi actiones[2] competunt nec denegantur, excepta iniuriarum actione et si qua alia similis inueniatur actio. **113.** Aliquando tamen ex[3] contractu actio neque heredi neque in heredem competit. nam adstipulatoris heres non habet actionem, *et*[4] *spo*nsoris et fidepromissoris heres non tenetur.

114. Superest ut *d*ispiciamus, si ante rem iudicatam is cum quo agitur post acceptum iudicium satisfaciat actori, quid officio iudicis conueniat, utrum absoluere, an ideo potius damnare quia iudicii accipiendi tempore in ea causa fuerit ut damnari debeat. nostri praeceptores absoluere eum debere existimant, nec *interesse*[5] cuius
V p. 227 generis *s*it iudicium; et / hoc est quod uulgo dicitur, Sabino et Cassio placere omnia iudicia absolutoria esse. *diuersae scholae auctoribus de strictis iudiciis contra placuit*,[6] de bonae fide*i* iudiciis autem idem sentiunt, quia in eiusmodi iudiciis liberum est officium iudicis. tantumdem e*t* de *in* rem actionibus putant, quia *formulae uerb*is id ip*s*um exp*rimatur*, *ita demum reum condemnandum esse, nisi arbitratu iudicis rem restituerit*.[7] . . . sunt etia*m* in personam tales actiones in quibus *exprimitur ut arbitretur iudex quomodo reus satisfacere debeat* actori quo*minus condemnetur*.[8] . . . actum fuit.

115. Sequitur ut de exceptionibus dispiciamus. **116.** Com-
V p. 228 paratae / sunt autem exceptiones defendendorum *e*orum[9] gratia cum quibus agitur. saepe enim accidit ut quis iure ciuili teneatur,

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[1] Inst. 4, 12 pr.

[2] *heredibus huiusmodi actiones* Inst. 4, 12, 1. V corrupt.

[3] *tamen etiam ex* Inst., adopted by Krüger and Kübler.

[4] *set* (?) V. *sed et* Huschke–Kübler.

[5] *interest* V.

[6] The sense, according to Krüger–Kübler.

[7] The sense, according to Krüger, of the beginning of about 7 illegible lines. For the rest, cf. Inst. 4, 17, 2.

[8] The sense, according to Krüger, of the beginning of about 8 further illegible lines. Cf. Inst. 4, 17, 3.

[9] Inst. 4, 13 pr. *reorum* V.

possessores and others who are in the position of heir, or the *actio furti manifesti*, which, though founded on the praetor's own jurisdiction, is allowed without limitation of time—properly, since it replaces capital punishment by a money penalty.

112. Not all actions that lie at civil law or are granted by the praetor against a man lie or are granted by the praetor equally against his heir. For there is no more certain rule of law than that penal actions based on wrongdoing, such as for theft, robbery with violence, outrage, or wrongful damage to property, neither lie nor are granted against the wrongdoer's heir. But in favour of heirs such actions lie and are granted, except the *actio iniuriarum* and any like action that may be found. **113.** But there are cases in which an action founded on contract does not lie in favour of an heir or against one. Thus the heir of an *adstipulator* cannot sue, and the heir of a *sponsor* or a *fidepromissor* cannot be sued.

114. It remains to consider what course befits the office of the *iudex* in a case where the defendant satisfies the plaintiff after joinder of issue, but before judgment—whether he should absolve the defendant, or rather condemn him on the ground that at the time of joinder of issue his position required his condemnation. Our teachers hold that he ought to absolve, irrespectively of the nature of the action; and this is expressed by the common saying that according to Sabinus and Cassius all actions contain the possibility of an absolution. The authorities of the other school dissent in regard to strict actions, but agree in regard to *bonae fidei* actions, because in these the discretion of the *iudex* is unfettered. They hold the like of actions *in rem*, on the ground that the *formula* expressly orders that the defendant be condemned only if he does not give up the thing according to the arbitral finding of the *iudex*. . . . There are also actions *in personam* of the same kind, which expressly order the *iudex* to give an arbitral finding as to how the defendant must satisfy the plaintiff, if he is to avoid being condemned. . . .

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§ 111 *bonorum possessoribus*: G. 4, 34–5 &c. *furti manifesti*: G. 3, 189. § 112. = Inst. 4, 12, 1. *poenales*: G. 4, 8. Inst. 4, 6, 18. 19. *excepta iniuriarum*: Inst. 4, 4, 12. § 113. Cf. Inst. 4, 12, 1. G. 3, 114. 120. § 114. Cf. Inst. 4, 12, 2. 4, 6, 31. G. 3, 180. *formulae uerbis*: 'neque ea res arbitrio iudicis Aulo Agerio restituetur' Edictum § 69.

sed iniquum sit eum iudicio condemnari. **116a.** Ueluti ⟨*si*⟩ stipulatus sim *a* te pecuniam tamquam credendi causa numeraturus, nec numerauerim; nam eam pecuniam a te peti posse certum est, dare enim te oportet, cum ex stipulatu tenearis;[1] sed quia iniquum est te eo nomine condemnari, placet per exceptionem doli mali te defendi debere. **116b.** Item, si pactus fuero tecum ne id quod mihi debeas a te petam, nihilo minus id ipsum[2] a te petere possum dari mihi oportere, quia obligatio pacto conuento non tollitur; sed placet debere me petentem per exceptionem pacti conuenti repelli. **117.** In his quoque actionibus quae ⟨*non*⟩ in personam sunt exceptiones locum habent, ueluti si metu me coegeris aut dolo induxeris ut tibi rem aliquam mancipio darem. nam si eam[3] rem a me petas, datur mihi exceptio, per quam, si metus causa te fecisse uel dolo malo arguero, repelleris. **117a.** Item si fundum litigiosum sciens *a* non possidente emeris eumque a possidente petas, opponitur tibi exceptio, per quam omni modo summoueris. **118.** Exceptiones autem alias in edicto praetor habet propositas, alias causa cognita accommodat. quae omnes uel ex legibus uel ex his quae legis uicem optinent substantiam capiunt, uel ex iurisdictione praetoris
V p. 229 proditae sunt. / **119.** Omnes autem exceptiones in contrarium concipiuntur quam adfirmat is cum quo agitur. nam si uerbi gratia reus dolo malo aliquid actorem facere dicat, qui forte pecuniam petit quam non numerauit, sic exceptio concipitur: SI IN EA RE NIHIL DOLO MALO AULI AGERII FACTUM SIT NEQUE FIAT; item, si dicat contra pactionem pecuniam peti, ita concipitur exceptio: SI INTER AULUM AGERIUM ET NUMERIUM NEGIDIUM NON CONUENIT NE EA PECUNIA PETERETUR; et denique in ceteris causis similiter concipi solet, ideo scilicet quia omnis exceptio obicitur quidem a reo, sed ita formulae inseritur ut condicionalem faciat condemnationem, id est, ne aliter iudex eum cum quo agitur condemnet, quam si nihil in ea re qua de agitur dolo actoris factum sit; item, ne aliter iudex eum condemnet quam si nullum pactum conuentum de non petenda pecunia factum fuerit.

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[1] So Kübler. *teneris* V, kept by Krüger.
[2] [*id ipsum*] Mommsen–Krüger. *ipso iure* Huschke.
[3] So Krüger. *aliquam mancipio dem, tua est; sin eam* Kübler. V corrupt.

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§§ 115–16. = Inst. 4, 13 pr. § 116a. Cf. Inst. 4, 13, 2. G. 4, 119. 121. § 116b. Cf. Inst. 4, 13, 3. G. 4, 119. 121–2. 126; 3, 179. § 117. Cf. Inst. 4, 13, 1. 4. § 117a. Cf. fr. de iure fisci (Textes 500). C. 8, 36 (37), 5, 4 (A.D. 532). Nou. 112, 1 (A.D. 534). § 118. Cf. Inst. 4, 13, 7. G. 4. 110. § 119. Cf. Ulp. D. 44, 1, 2.

115. Next we have to consider exceptions. **116.** These have been provided for the protection of defendants, since it is often the case that, though a man is liable at civil law, his condemnation in an action would be inequitable. **116a.** Thus, if I have taken a stipulatory promise from you of a sum of money, on the understanding that I will advance you the amount on loan, and then I do not advance it, it is undeniable that an action lies against you for the money; for you are legally liable to pay it, being bound by the stipulation; but, because it is inequitable that you should be condemned on this account, it is settled that you must be protected by an *exceptio doli mali*. **116b.** Again, if I have informally agreed with you not to sue you for what you owe me, I can none the less bring an action claiming that you are bound to pay, because the obligation is not discharged by informal agreement; but it is settled that if I sue I am to be defeated by an *exceptio pacti conuenti*. **117.** Exceptions are not confined to actions *in personam*. Thus, if you force me by duress or induce me by fraud to convey something to you by mancipation, then, if you sue me for that thing, I am granted an exception under which you will be defeated if I make out duress or fraud on your part. **117a.** Again, if you buy lands which to your knowledge are the subject of litigation from one not in possession and sue the possessor for them, you are met by an exception which is absolutely conclusive against you. **118.** Some exceptions are published by the praetor in his Edict, others are granted by him after inquiry into the case. All of them either derive their force from statute or some equivalent of statute, or else owe their origin to the praetor's jurisdiction. **119.** The formulation of exceptions is invariably negative of the defendant's assertion. Thus if, for example, the defendant asserts fraud on the part of the plaintiff—say he is suing for money that he never advanced—the formulation of the exception is: 'if in this matter nothing has been or is being done *dolo malo* by Aulus Agerius'. Or again, if the defendant asserts that money is being sued for in contravention of an informal agreement, the exception is formulated thus: 'if it has not been agreed between Aulus Agerius and Numerius Negidius that the money should not be sued for'. And, in short, the formulation is similar in all other cases, because, though an exception is raised by the defendant, it is incorporated into the *formula* so as to make the *condemnatio* conditional, in the sense that the *iudex* is not to condemn the defendant unless there has been no fraud in the matter in question on the part of the plaintiff, or (in the second example) unless there has been no informal agreement against the money being sued for.

120. Dicuntur autem exceptiones aut peremptoriae aut dilatoriae. **121.** Peremptoriae sunt quae perpetuo ualent nec euitari possunt, ueluti quod metus causa aut dolo malo, aut quod contra legem senatusue consult*um* factum est, aut quod res iudicata est uel in iudicium deducta est; item pacti conuenti quod *f*actum est ne omnino pecunia peteretur. **122.** Dilatoriae sunt exceptiones quae ad tempus ualent, uelut*i* illius pacti conuenti quod factum est, uerbi gratia, ne intra quinquennium peteretur; finito *enim* eo tem-
V p. 230 pore / non habet locum exceptio. cui similis exceptio est litis diuiduae et rei residuae. nam si quis partem rei petierit, et intra eiusdem praeturam reliquam partem petat, hac exceptione summoue*t*ur quae appellatur litis diuiduae; item si is, qui cum eodem plures lites habebat, de quibusdam egerit, de quibusdam distulerit, ut ad alios iudices *e*ant, si intra eiusdem praeturam de his qua*s* distulerit agat, per hanc exceptionem quae appellatur rei residuae summouet*ur*. **123.** Obseruandum est autem ei cui dilatoria obicitur exceptio, ut differat actionem; alioquin, si obiecta exceptione egerit, rem perdit; non enim post illud tempus, quo integra re ⟨*eam*⟩ euitare poterat, adhuc ei potestas agendi super*est*, re in iudicium deduct*a* et per exceptionem perempt*a*. **124.** Non solum autem ex tempore, s*ed* etiam ex persona dilatoriae exceptiones intelleguntur, quales sunt cognitoriae: ueluti si is qui per edictum cognitorem dare non potest per cognitorem agat, uel dandi quidem cognitoris ius habeat, sed eum det cui non licet cognituram suscipere. nam si obiciatur exceptio cognitoria, si ipse talis er*i*t ut ei non liceat cognitorem dare, ipse agere potest; si uero cognitori non liceat cognituram suscipere, per alium cognitorem aut per semet ipsum liberam habet agendi potestatem, et tam hoc quam
V p. 231 illo modo euitare ⟨*potest*⟩ exceptionem. quodsi dissi/mulauerit ea*m*, et per cognitorem egerit, rem perdit. **125.** S*ed* peremptoria quidem exceptione si reus per error*em* non fu*e*rit usus, in integrum restituitur adiciendae exceptionis gratia; dilatoria uero si non fu*e*rit usus, an in integrum restitu*a*tur quaeritur.

126. Interdum euenit ut exceptio, quae prima facie iusta

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§ 120. = Inst. 4, 13, 8 (7). § 121. Cf. Inst. 4, 13, 9 (8). *quod metus causa uel dolo malo*: G. 4, 117 &c. *contra legem*: Edictum § 279. *res iudicata*: G. 3, 180; 4, 106–7. *pacti conuenti*: G. 4, 116b, &c. § 122. Cf. Inst. 4, 13, 10 (9). *litis diuiduae et rei residuae*: Buckland, RH 1932, 301. G. 4, 56. § 123. Cf. Inst. 4, 13, 10 (9). § 124. Cf. Inst. 4, 13, 11 (10). G. 4, 82 sq. &c. § 125. Cf. G. 4, 53 sq. 57 &c. C. 7, 50, 2 (A.D. 294). § 126. = Inst. 4, 14 pr.

120. Exceptions are termed either peremptory or dilatory. **121.** Those exceptions are peremptory that are available at any time and cannot be evaded: examples are the exceptions based on duress or fraud or contravention of statute or senatusconsult, or on the matter having been previously judged or brought to trial; also the defence of pact, if the pact was that the money should never be sued for. **122.** Those exceptions are dilatory that are available only for a time, for instance an exception based on a pact against suing within, say, 5 years; for when the time has expired, the exception ceases to be available. The exceptions *litis diuiduae* and *rei residuae* are similar. For if a man sues for part of a claim, and then, within the same praetor's term of office, sues for the remainder, he is defeated by the exception known as *litis diuiduae*; and if a man who had several suits with the same defendant has proceeded in some of them, but deferred others in order that they should come before other *iudices*, he will, if he proceeds in the suits deferred within the same praetor's term of office, be defeated by the exception known as *rei residuae*. **123.** A plaintiff met by a dilatory exception must be careful to postpone his suit; otherwise, if he goes to trial in the face of the exception, he loses his right; for once it has been brought to trial and defeated by the exception, he no longer has the power to sue after the date when, if proceedings had not been taken, he would have avoided the exception. **124.** Exceptions may be dilatory in respect not only of time but of persons; take for example the *exceptiones cognitoriae*. Suppose, for instance, that a person who is disabled by the Edict from appointing a *cognitor* nevertheless sues through one, or that a person, having capacity to appoint a *cognitor*, appoints as *cognitor* one who cannot lawfully undertake the office: on an *exceptio cognitoria* being raised, if the plaintiff is himself one who is not allowed to appoint a *cognitor*, he can proceed in person, or if it is the *cognitor* who is disqualified from undertaking the office, the plaintiff is at liberty to proceed either through another *cognitor* or in person, and thus, by one means or the other, he can avoid the exception. But if he closes his eyes to it and proceeds by the *cognitor*, he forfeits his claim. **125.** A defendant who by mistake has failed to make use of a peremptory exception, is restored to his original position, in order that the exception may be added, but it is questionable whether one who has failed to make use of a dilatory exception can be restored.

126. Sometimes it happens that an exception, which *prima*

uideatur, inique noceat actori. quod cum accidat,[1] alia adiectione opus est, adiuuandi actoris gratia; quae adiectio replicatio uocatur, quia per eam replicatur atque resoluitur uis exceptionis. nam si uerbi gratia pactus sum tecum ne pecuniam quam mihi debes a te peterem, deinde postea in contrarium pacti sumus, id est ut petere mihi liceat, et, si agam tecum, excipias tu, ut ita demum mihi condemneris SI NON CONUENERIT NE EAM PECUNIAM PETEREM, nocet mihi exceptio pacti conuenti; namqu*e* nihilo minus hoc uerum manet, etiamsi postea in contrarium pacti sumus. sed qu*ia* iniquum est me excludi exceptione, replicatio mihi datur ex posteriore pacto hoc modo: SI NON[2] POSTEA CONUENIT UT MIHI EAM PECUNIAM PETERE LICERET. **126a.** Item, si argentarius pretium rei quae in auctionem uenerit persequatur, obicitur ei exceptio, ut ita demum emptor damnetur, si ei res quam emerit tradita est, *et est* iusta exceptio. sed si in auctione praedictum est, ne ant*e*
V p. 232 emptori ⟨*res*⟩ traderetur quam si pretium soluerit, replicatione / tali argentarius adiuuatur: AUT SI PRAEDICTUM EST NE ALITER EMPTORI RES TRADERETUR QUAM SI PRETIUM EMPTOR SOLUERIT. **127.** Interdum autem euenit ut rursus replicatio, quae prima facie iusta sit, inique reo noceat. quod cum accidat,[1] adiectione opus est adiuuandi rei gratia, quae duplicatio uocatur. **128.** Et si rursu*s* ea prima facie iusta uideatur, sed propter aliquam causa*m* inique actori noceat, rursus *a*diectione opus est qua actor adiuuetur, qu*ae* dicitur triplicatio. **129.** Quarum omnium adiectionum usum interdum etiam ulterius quam diximus uarietas negotiorum introduxit.

130. Uideamus etiam de praescriptionibus quae receptae sunt pro actore. **131.** Saepe enim ex una eademque obligatione aliquid iam praestari oportet, aliquid in futura praestatione est, ueluti cum in singulos annos uel menses certam pecuniam stipulati fuerimus; n*am*, finitis quibusdam annis aut mensibus, huius quidem temporis pecuniam praestari oportet, futurorum autem annorum sane quidem obligatio contracta intellegitur, praestatio uero adhuc nulla est. si ergo uelimus id quidem quod praestari oportet petere et in iudicium deducere, futuram uero obligationis praestationem in integro relinquere, necesse est ut cum hac praescriptione agamus:

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[1] *accidit* Inst. 4, 14 pr. 1. So Kübler.

[2] *si non*: *aut si* Kübler. Cf. G. 4, 126a. Iul. D. 27, 10, 7, 1. 2; Pomp. D. 16, 1, 32, 2; Gaius D. 3, 3, 48; Ulp. D. 50, 17, 154.

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§ 126a. *exceptio*: Iul. D. 19, 1, 25. Edictum § 272. §§ 127–9. = Inst. 4, 14, 1–3. § 130. Cf. G. 4, 133. § 131. Cf. Paul D. 45, 1, 76, 1. *ea scilicet formula*: G. 4, 41. 54.

facie appears just, prejudices the plaintiff unfairly. When this occurs, a further addition to the *formula* is required, for the plaintiff's benefit. Such an addition is known as a replication, because by it the force of the exception is rolled back and undone. Suppose, for example, that I have informally agreed with you not to sue you for a sum of money you owe me, and then later we have informally agreed to the contrary, that is, that I shall be at liberty to sue; in such case if, when I sue you, you take the exception that you are to be condemned to me only if it has not been agreed that I should not sue you, I am prejudiced by this *exceptio pacti conuenti*, since the first agreement remains a fact in spite of our subsequent agreement to the contrary. But as it is unfair that I should be defeated by the exception, I am allowed a replication based on the subsequent agreement, to the following effect: 'if it has not subsequently been agreed that I might sue for the money'. **126a.** Again, suppose that a banker sues for the price of a thing sold by auction, and that he is met by the exception that the buyer is to be condemned only if the thing he bought has been delivered to him: this is a just exception. But if at the auction it was a condition of sale that the thing should not be delivered to the buyer until he should have paid the price, the banker has the benefit of the following replication: 'or if it was announced in advance that the thing should not be delivered to the buyer unless he should have paid the price'. **127.** But sometimes it happens that a replication, in its turn, prejudices the defendant unfairly. When this occurs, an addition to the *formula* is required, for his benefit; this is called a duplication. **128.** And again, if the duplication, though *prima facie* just, for some reason prejudices the plaintiff unfairly, once more an addition is required, for his benefit; this is called a triplication. **129.** The varying circumstances of business transactions may on occasion cause additions of these kinds to be carried even further.

130. Let us, further, consider prescriptions; these have been allowed for the benefit of plaintiffs. **131.** Frequently, under one and the same obligation, some performance is already due and some further performance will become due in the future, as where we have made a *stipulatio* for a certain sum to be paid yearly or monthly: on any years or months that have expired payment is due, but on future years of course, although the obligation is considered as already contracted, no payment is due as yet. If then we desire, whilst suing for and bringing to trial the payment already due, to preserve the obligation of future payments intact, we must sue with the following

EA RES AGATUR CUIUS REI DIES FUIT; alioquin, si sine hac praescrip-
V p. 233 tione egerimus, ea scilicet formula qua incertum petimus, / cuius intentio his uerbis concepta est: QUIDQUID PARET NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTERE, totam obligationem, id est etiam futuram, in hoc iudicium deducimus, et quae ante tempus obligat*ione comprehensum in iudicium deducitur, ex ea condemnatio fieri non potest neque iterum de ea agi potest.*[1] **131a.** Item, si uerbi gratia ex empto agamus *ut* nobis fundus mancipio detur, debemus *hoc modo*[2] praescribere: EA RES AGATUR DE FUNDO MANCIPANDO, ut postea, si uelimus uacuam possessionem nobis tradi, *con*tra de*bitorem eadem actione uti possimus. alioquin, si minus diligentes in ea*[3] re sumus, totius illius iuris obligatio illa incerta actione: QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET, *per intent*ionem consumitur, ut postea nobis agere uolentibus de uacua possessione tradenda nulla supersit actio. **132.** Praescriptiones *sic*[4] appellatas esse ab eo quod *a*nte formulas praescrib*u*ntur plus quam manifestum est. **133.** S*ed h*is quidem temporibus, sicut supra quoque notauimus, omnes praescriptiones ab actore proficiscuntur. olim autem quaedam et pro reo opponebantur, qualis illa erat praescriptio: EA RES AGATUR *SI IN EA RE PRAEIU*DICIUM HEREDITATI NON FIAT; quae nunc in speciem exceptionis deducta est, et locum habet cum petitor hereditatis alio genere iudicii praeiudicium hereditati faciat, ueluti cum singulas
V p. 234 res pet*at*. est enim iniquum p*er* unius *rei* / *petitionem uniuersae*
V p. 235 *hereditati praeiudicium fieri.*[5] . . . **134.** . . . *in inten*/tione formulae de *iure quaeritur, id* est,[6] cui dar*i* oporte*at*. et sane domino dar*i* oportet quod seruus stipulatur; at in praescriptione de *f*acto[7] quaeritur, quod secundu*m* naturalem significationem uerum esse debet. **135.** Quaecumque autem diximus de seruis, eadem de ceteris quoque personis quae nostro iuri subiectae sunt dicta intellegemus. **136.** Item admonendi sumus, si cum ipso agamus qui incertum

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[1] Krüger's conjecture, for the sense of nearly 2 illegible lines.

[2] Polenaar, generally adopted. See Apogr.

[3] Rather more than 1 line illegible. Kübler's improvement of Polenaar. Krüger: *tradi, uel tradita ea de euictione nobis caueri, iterum ex empto agere possimus. alioquin si praescribere (obliti) sumus.*

[4] *siq* (?) V. *sic* Huschke. *scilicet* Kübler. *autem* Krüger.

[5] Krüger. V 234 is entirely illegible. What followed? Perhaps more about *praescr. pro reo* before returning to *praescr. pro actore.*

[6] So Kübler. Krüger: *et siquidem ex contractu seruorum agatur, ex inten*/*tione formulae desumendum est cui dari oporteat.* V 235–6 is a non-palimpsest folio discovered and published before the rest of V.

[7] *pacto* V. Cf. Kniep, Präscriptio und Pactum (1891) 60.

prescription: 'Let the action be confined to what has already fallen due'; otherwise, if we sue without this prescription, using the *formula* for claims of an indefinite amount having the *intentio*: 'whatever it appears that Numerius Negidius ought to convey to or do for Aulus Agerius', we bring the whole obligation, including its future incidence, to present trial, and on what is brought to trial before the time provided by the obligation condemnation is impossible, nor can an action be brought for it again. **131a.** Another example: if I sue *ex empto* for the mancipation to me of land I have bought, I must prescribe thus: 'Let the action be confined to the mancipation of the land', so that if I afterwards desire delivery of vacant possession, I may be able to employ the same action against the seller. Otherwise, if I have been careless on this point, the whole obligation under the contract is used up by the indefinite *intentio*: 'whatever on that account Numerius Negidius ought to convey to or do for Aulus Agerius', with the result that, when later I wish to sue for delivery of vacant possession, no action remains to me. **132.** As anyone can see, prescriptions are so called because they are written in front of the *formulae*. **133.** At the present day, as we have indicated above, all prescriptions come from the plaintiff's side. But formerly they used also to be raised on behalf of defendants. An example was the prescription: 'Let the matter be tried only on condition that the question of the inheritance be not prejudged.' This, at the present day, has been transferred into a kind of exception, which is employed where the claimant of an inheritance prejudices the question by bringing some other action, as by suing for individual things (in the inheritance). For it is unjust that the question of the whole inheritance should be prejudged in an action for a single thing. . . . **134.** . . . the *intentio* of the *formula* raises as a matter of law the question to whom conveyance is legally due; and clearly it is to the master that what a slave has been promised by stipulation is due; but the prescription raises it as a question of fact, which must be verified according to the natural meaning of the words. **135.** All that we have said about slaves is to be taken as said equally about every other person subject to our power. **136.** It is further to be observed that, where we are suing the actual promisor by stipulation

§ 131a. Cf. G. 2, 204. § 133. Cf. G. 4, 130. §§ 134–5. Cf. G. 3, 163 sq. Inst. 3, 17, 2. Gaius D. 45, 1, 141 pr. §§ 136–7. Cf. Edictum § 55.

promiserit, ita nobis formulam esse propositam, ut praescriptio inserta sit formulae loco demonstrationis, hoc modo: IUDEX ESTO. QUOD AULUS AGERIUS DE NUMERIO NEGIDIO INCERTUM STIPULATUS EST, CUIUS REI DIES FUIT, QUIDQUID OB EAM REM NUMERIUM NEGIDIUM AULO AGERIO DARE FACERE OPORTET et reliqua.[1] **137.** *At* si cum sponsore aut fideiussore agatur, praescribi solet in persona quidem sponsoris hoc modo: EA RES AGATUR QUOD AULUS AGERIUS DE LUCIO TITIO INCERTUM STIPULATUS EST, QUO NOMINE NUMERIUS NEGIDIUS SPONSOR EST, CUIUS REI DIES FUIT, in persona uero fideiussoris: EA RES AGATUR QUOD NUMERIUS NEGIDIUS PRO LUCIO TITIO INCERTUM FIDE SUA ESSE IUSSIT, CUIUS REI DIES FUIT; deinde formula subicitur.

138. Superest ut de interdictis dispiciamus.

139. Certis igitur ex causis praetor aut proconsul principaliter auctoritatem suam finiendis controuersiis interponit.[2] quod tum maxime facit cum de possessione aut quasi possessione inter aliquos contenditur. et in summa aut iubet aliquid fieri aut fieri prohibet. formulae autem *et uerborum*[3] conceptiones quibus in /[4] ea
V p. 236 re utitur interdicta decretaue ⟨uocantur⟩. **140.** Uocantur autem decreta cum fieri aliquid iubet, ueluti cum praecipit ut aliquid exhibeatur aut restituatur, interdicta uero cum prohibet fieri, ueluti cum praecipit ne sine uitio possidenti uis fiat, neue in loco sacro aliquid fiat. unde omnia interdicta aut restitutoria aut exhibitoria aut prohibitoria uocantur. **141.** Nec tamen, cum quid iusserit fieri aut fieri prohibuerit, statim peractum est negotium, sed ad iudicem recuperatoresue itur, et ibi editis formulis quaeritur, an aliquid aduersus praetoris edictum factum sit, uel an factum non sit quod is fieri iusserit. et modo cum poena agitur, modo sine poena: cum poena ueluti cum per sponsionem agitur, sine poena ueluti cum arbiter petitur. et quidem ex prohibitoriis interdictis semper per sponsionem agi solet, ex restitutoriis uero uel exhibitoriis modo per sponsionem, modo per formulam agitur quae arbitraria uocatur.

142. Principalis igitur diuisio in eo est, quod aut prohibitoria sunt interdicta aut restitutoria aut exhibitoria. **143.** Sequens in

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[1] *reliq ā* V. *reliqua* Krüger. *reliqua.At* (miswritten *aut*) Polenaar–Kübler.
[2] *proponit* V. [3] *uerborum et* V.
[4] There is a photograph of this page at the end of Apogr.

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§ 138. Cf. Inst. 4, 15 pr. § 139. Cf. Inst. 4, 15 pr. *quasi possessione*: F.V. 90. 92. § 140. Cf. Inst. 4, 15, 1. *ne sine uitio possidenti*: G. 4, 148 sq. *neue in loco sacro*: D. 43, 6. § 141. Cf. G. 4, 161 sq. § 142. = Inst. 4, 15, 1 init. § 143. = Inst. 4, 15, 2.

of something uncertain, the *formula* offered to us by the Edict has inserted in it, in place of a *demonstratio*, a prescription in the following terms: 'Be *X iudex*. Whereas Aulus Agerius has taken from Numerius Negidius a stipulatory promise of something uncertain, but only in so far as the obligation has already fallen due, whatever on that account Numerius Negidius ought to convey to or do for Aulus Agerius', &c. **137.** But in an action against a *sponsor* or a *fideiussor* the prescription will take, in the case of a *sponsor*, this form: 'Let the subject of this action be that Aulus Agerius has taken from L. Titius a stipulatory promise of something uncertain, for which Numerius Negidius is *sponsor*, but be confined to what has already fallen due', and, in the case of a *fideiussor*: 'Let the subject of the action be that Numerius Negidius has given a guarantee on his honour on behalf of L. Titius for an uncertain liability, but be confined to what has already fallen due'; then comes the *formula*.

138. It remains to consider interdicts.

139. In certain cases the praetor or proconsul interposes his authority from above for the ending of disputes. He does this mainly when parties are contending about possession or quasi-possession. To put it shortly, he either orders or forbids something to be done. The *formulae* or verbal schemes that he employs for this purpose are termed interdicts or decrees. **140.** They are termed decrees when he orders something to be done, for instance that some thing be produced or restored, interdicts when he forbids the doing of something, such as of violence to one in viceless possession, or of some act on sacred land. Hence interdicts are termed either restitutory or exhibitory or prohibitory. **141.** But when the praetor has issued his order for something to be done or not to be done, the case is not straightway ended, but goes before a *iudex* or *recuperatores*; there, *formulae* having first been issued, the question is examined whether anything has been done that the praetor's Edict forbids, or anything has not been done that he has ordered to be done. The proceedings are sometimes with and sometimes without penalty. They are with penalty when they are by *sponsio*, without penalty when an *arbiter* is asked for. On prohibitory interdicts proceedings are always by *sponsio*, but on restitutory or exhibitory they are sometimes by *sponsio* and sometimes by the *formula* known as *arbitraria*.

142. Thus the leading division is that interdicts are either prohibitory or restitutory or exhibitory. **143.** Next comes a division

eo est diuisio, quod uel adipiscendae possessionis causa comparata sunt uel retinendae uel reciperandae. **144.** Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, cuius principium est: QUORUM BONORUM, eiusq*ue* uis et potestas haec est, ut, quod quisque ex his bonis quorum possessio alicui data es*t*
V p. 237 pro herede aut pro possessore / ⟨*possidet doloue fecit quo minus*⟩ possideret,[1] id ei cui bonorum possessio data est restituatur. pro herede autem possidere uidetur tam is qui heres est qua*m* is qui putat se heredem esse; pro possessore is possidet qui sine causa aliqua*m* rem hereditariam uel etiam totam hereditatem, sciens ad se non pertinere, possidet. ideo autem adipiscendae possessionis uocatur,[2] qu*ia* ei tantum utile est qui nunc primum conatur adipisc*i* rei possessionem. itaque, si quis adeptus possessionem amiserit, desinit ei id *inter*dictum utile esse. **145.** Bonorum quoque emptori similiter proponit*ur* interdictum, quod quidam possessorium uocant. **146.** Item, ei qui publica bona emerit eiusdem condicionis interdictum proponitur, quod appellatur sectorium, quod sectores uocantur qui publice bona mercantu*r*. **147.** Interdictum quoque quod appellatur Saluianum apiscendae[3] possessionis ⟨*causa*⟩ comparatum est, eoque utitur dominus fundi de rebus coloni quas *is pro* mercedibus fundi pignori futuras pepigisset.

148. Retinendae possessionis causa solet interdictum reddi cum ab utr*a*que parte de proprietate alicuius rei controuersia est, et ante quaeritur uter ex litigatoribus possidere et uter petere debeat. cuius rei gratia comparata sunt UTI POSSIDETIS et UTRUBI. **149.** Et quidem UT*I* POSSIDETIS interdictum de fundi uel aedium possessio*ne* redditur, UTRUBI uero de re*r*um mobilium possessione.
V p. 238 **150.** Et siquidem de fundo uel aedibus / interdicitur, eum potiorem esse praetor iubet, qui eo tempore quo interdictum redditur nec ui nec clam nec precario ab aduersario possideat; si uero de re mobil*i*, eum potiorem esse iubet, qui maiore parte eius anni nec ui nec clam nec precario ab aduersario posse*der*i*t*; idque

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[1] So Huschke–Kübler. Inst. 4, 15, 3 om. the insertion and reads *possideat*. Krüger follows Inst.

[2] *uocatur interdictum* Inst., followed by Krüger.

[3] *adipiscendae* Inst., followed by Krüger; but cf. 4, 153.

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§ 144. = Inst. 4, 15, 3. *bonorum possessori*: G. 4, 34 &c. *quorum bonorum*: G. 3, 34. Ulp. D. 43, 2, 1 pr. §§ 145–6. Cf. G. 3, 80; 4, 35–6. § 147. = Inst. 4, 15, 3 fin. Cf. 4, 6, 7. §§ 148–9. Cf. Inst. 4, 15, 4. G. 4, 160. *uter ex litigantibus*: G. 4, 16. 91. 94. Gaius D. 6, 1, 24. § 150. Cf. Inst. 4, 15, 4a. *ab aduersario*: Venuleius D. 41, 2, 53.

into interdicts for the purpose of acquiring possession or of retaining it or of recovering it. **144.** For acquiring possession *bonorum possessores* are provided with an interdict beginning *Quorum bonorum*, the force and effect of which is that any thing belonging to the estate of which *bonorum possessio* has been granted which someone holds *pro herede* or *pro possessore*, or has fraudulently ceased so to hold, must be given up to the grantee of *bonorum possessio*. A man is considered to hold *pro herede* alike when he is the heir and when he merely believes he is; a man holds *pro possessore* who holds some thing belonging to an inheritance or, maybe, the entire inheritance, without title and knowing that it does not belong to him. The interdict is classed as being for the acquisition of possession because it is only available to one who is now for the first time seeking to obtain possession. Hence, if a man has lost a possession which he had previously obtained, this interdict is no longer available to him. **145.** *Bonorum emptores* are offered a similar interdict, which some call *possessorium*. **146.** Purchasers of confiscated property likewise are offered an interdict of the same kind, called *sectorium* because purchasers of confiscated property are called *sectores*. **147.** Another interdict, called *Saluianum*, is provided for the purpose of acquiring possession; it is used by a landlord in respect of the goods of his farmer, which the latter has agreed shall be security for the rent.

148. An interdict for retaining possession is ordinarily issued when two parties are disputing as to the ownership of some thing, and the previous question, which of the litigants is to be in possession and which to be plaintiff, arises. For this purpose the interdicts *Uti possidetis* and *Utrubi* have been provided. **149.** The interdict *Uti possidetis* is issued in respect of the possession of lands or houses, the interdict *Utrubi* in respect of the possession of movable property. **150.** When the interdict concerns land or a house, the praetor's order is that that party is to be preferred who, at the moment when the interdict is issued, has possession, such possession having been obtained neither by force nor clandestinely nor by licence from the other party. When, however, the interdict concerns a movable thing, his order is that preference be given to the party who has been in possession for the greater part of that year, such possession having been obtained neither by force nor clandestinely nor by licence from the other party. All this is

satis ipsis uerbis interdictorum significatur. **151.** Sed in UTRUBI interdicto non solum sua cuique possessio prodest, sed etiam alterius quam iustum est ei accedere, ueluti eius cui heres extiterit, eiusque a quo emerit uel ex donatione aut dotis nomine acceperit. itaque, si nostrae possessioni iuncta alterius iusta possessio exsuperat aduersarii possessionem, nos eo interdicto uincimus. nullam autem propriam possessionem habenti accessio temporis nec datur nec dari potest; nam ei quod nullum est nihil accedere potest. sed et si uitiosam habeat possessionem, id est aut ui aut clam aut precario ab aduersario adquisitam, non datur accessio; nam ei ⟨*possessio*⟩ sua nihil prodest. **152.** Annus autem retrorsus numeratur. itaque, si tu uerbi gratia VIII mensibus possederis prioribus, et ego VII posterioribus, ego potior ero, quod trium priorum mensium possessio nihil tibi in hoc interdicto prodest, quod alterius anni possessio est. **153.** Possidere autem uidemur non solum si ipsi possideamus, sed etiam si nostro nomine aliquis in possessione sit, licet is nostro iuri subiectus non sit, qualis est colonus et inquilinus. per eos quoque apud quos deposuerimus,
V p. 239 aut quibus commodauerimus, aut quibus gratuitam habita/tionem praestiterimus, ipsi[1] possidere uidemur. et hoc est quod uulgo dicitur, retineri possessionem posse per quemlibet qui nostro nomine sit in possessione. quin etiam plerique putant animo quoque retineri possessionem, *id est, ut quamuis neque ipsi simus in possessione*⟩[2] neque nostro nomine alius, tamen, si non relinquendae possessionis animo, sed postea reuersuri inde discesserimus, retinere possessionem uideamur. apisci[3] uero possessionem per quos possimus secundo commentario rettulimus. nec ulla dubitatio est quin animo possessionem apisci[3] non possimus.

154. Reciperandae possessionis causa solet interdictum dari, si quis ex possessione ui deiectus sit. nam ei proponitur interdictum cuius principium est: UNDE TU ILLUM UI DEIECISTI, per quod is qui deiecit cogitur ei restituere rei possessionem, si modo is qui deiectus est nec ui nec clam nec precario ⟨*ab eo*⟩ *possideat*.[4] namque eum qui

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[1] *habitationem restituerimus aut quibus gratuitam habitationem ipsi* V. Huschke: *hab. praestiterimus aut quibus usumfructum uel usum constituerimus ipsi.*

[2] So Inst. 4, 15, 5. [3] *adipisci* Krüger, but cf. 4, 147.

[4] The reading of V for this and the next 2 words is very doubtful. *possederit* Krüger.

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§ 153. Inst. 4, 15, 5. *in possessione*: Ulp. D. 41, 2, 10, 1. *secundo commentario*: G. 2, 89 sq. *nec ulla dubitatio*: Paul D. 41, 2, 3, 1. § 154. Inst. 4, 15, 6. Edictum § 245.

sufficiently indicated by the terms of the interdicts. **151.** Under the interdict *Utrubi* a man is credited not only with his own possession, but also with that of a third party which can justly be added to his, such as the possession of one whose heir he has become, or one from whom he has bought or received by gift or on account of dowry. Thus, if the lawful possession of the third party added to our own exceeds that of our opponent, we win on this interdict. But one who has no possession of his own is not and cannot be allowed any such addition of time; for there can be no addition to what does not exist. Also, if one has possession, but it is vicious, that is, has been acquired from the other party by force or clandestinely or by licence, addition to it is not allowed; for in such case one's own possession does not count. **152.** The year in question is that immediately preceding. Thus, if you have been in possession for 8 months before me, but I for the next 7 months, I shall be preferred, because for the purpose of this interdict your possession during 3 of the previous months does not count, since it belongs to another year. **153.** We are deemed to possess not only if we personally possess, but also if anyone is in possession in our name, even if he be not subject to our power, for example if he is tenant of our land or house. We are also deemed to possess through those with whom we have deposited or to whom we have lent a thing, or to whom we have granted free habitation. This is the meaning of the common saying that we can retain possession through anyone who is in possession on our behalf. Indeed it is generally held that we can retain possession by mere intention, that is that, in spite of neither ourselves, nor anyone else on our behalf, being in possession, we are considered to retain possession if we left the property with no intention of abandoning possession, but meaning to return later. The persons through whom we can acquire possession have been stated in the second book. That we cannot acquire possession by mere intention is beyond doubt.

154. An interdict for the recovery of possession is granted when a man has been ejected by force. For to him the Edict offers an interdict beginning: *Unde tu illum ui deiecisti*, which obliges the ejector to restore his possession, provided that the possession of the ejected party was not obtained by force, clandestinely, or by licence from the ejector. For I can eject one who has a possession

a me ui aut clam aut precario possidet impune deicio. **155.** Interdum tamen, etsi eum ui deiecerim qui a me ui aut clam aut precario possideret,[1] cogor ei restituere possessionem, ueluti si armis eum ui deiecerim. nam propter atrocitatem delicti in tantum patior actionem,[2] ut omni modo debeam ei restituere possessionem. armorum autem appellatione non solum scuta et gladios et galeas significari intellegemus, sed et fustes et lapides.

156. Tertia diuisio interdictorum in hoc est, quod aut simplicia sunt aut duplicia. **157.** Simplicia *sunt* ueluti in quibus alter actor, alter reus est, qualia sunt omnia restitutoria aut exhibitoria; nam-
V p. 240 que actor / est qui desiderat aut exhiberi aut restitui, reus is est a quo desideratur ut exhibeat aut restituat. **158.** Prohibitoriorum autem interdictorum alia duplicia, alia simplicia sunt. **159.** Simplicia sunt ueluti quibus prohibet praetor in loco sacro aut in flumine publico ripaue eius aliquid facere reum;[3] nam actor est qui desiderat ne quid fiat, reus is qui aliquid facere conatur. **160.** Duplicia sunt ueluti UTI POSSIDETIS interdictum et UTRUBI. ideo autem duplicia uocantur, quod par utriusque litigatoris in his condicio est, nec quisquam praecipue reus uel actor intellegitur, sed unusquisque tam rei quam actoris partes sustinet; quippe praetor pari sermone cum utroque loquitur. nam summa conceptio eorum interdictorum haec est: UTI NUNC[4] POSSIDETIS, QUOMINUS ITA POSSIDEATIS, UIM FIERI UETO; item alterius: UTRUBI HIC HOMO DE QUO AGITUR [APUD QUEM][5] MAIORE PARTE[6] HUIUS ANNI FUIT, QUOMINUS IS EUM DUCAT, UIM FIERI UETO.

161. Expositis generibus interdictorum, sequitur ut de ordine et de exitu eorum dispiciamus. et incipiamus a simplicibus. **162.** ⟨*Si*⟩ igitur restitutorium uel exhibitorium interdictum redditur, ueluti ut restituatur ei possessio qui ui deiectus est, aut exhibeatur libertus cui patronus operas indicere uellet, modo sine periculo res ad exitum perducitur, modo cum periculo. **163.** Namque si arbitrum postulauerit is cum quo agitur, accipit formulam

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[1] *possederit*, Krüger.

[2] *actionem*: reading very doubtful. *interdictum*? Cf. Riccobono, Festschr. Koschaker 2, 372. 379.

[3] *eum* V.

[4] *n* V. om. Theoph. 4, 15, 7a (Ferrini 481).

[5] Gloss according to Mommsen, and generally; disputed, but cf. Fraenkel, SZ 1934, 312.

[6] So Theoph. *maiores partes* V.

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§§ 156–9. = Inst. 4, 15, 7. § 160. = Inst. 4, 15, 7. G. 4, 150. Inst. 4, 15, 4a. *uti possidetis*: Festus v. Possessio (Bruns 2, 24. Lindsay 260). Ulp. D. 43, 17, 1 pr. Edictum § 247. *utrubi*: Edictum § 264, but see note to text. § 161. Cf. Inst. 4, 15 pr. init. 8. Edictum pp. 447 ff. *simplicibus*: G. 4, 156 sq.

obtained from me by force, clandestinely, or by licence, with impunity. **155.** Sometimes, however, even though the person whom I forcibly eject is one who obtained possession from me by force, clandestinely, or by licence, I am compelled to restore his possession, namely where I have ejected him by force of arms; for the outrageous character of my misdeed renders me, without qualification, legally compellable to restore his possession. By 'arms' we must understand not only shields, swords, and helmets, but also sticks and stones.

156. A third division of interdicts is into simple and double. **157.** Simple interdicts are those in which one party is plaintiff and the other defendant. Such are all restitutory and exhibitory interdicts, the party demanding exhibition or restitution being plaintiff and the party upon whom the demand is made being defendant. **158.** But of prohibitory interdicts some are double and others simple. **159.** Examples of simple prohibitory interdicts are those whereby the praetor forbids a defendant to do something on sacred land or in a public river or on its bank; for he who wishes it not to be done is plaintiff, and he who is seeking to do it is defendant. **160.** Examples of double prohibitory interdicts are the interdicts *Uti possidetis* and *Utrubi.* They are called double because in them the two litigants are on the same footing and neither is specially defendant or plaintiff, but both play both parts; indeed the praetor addresses each of them in identical terms. For the general scheme of these interdicts is: 'I forbid force to be used to prevent you from possessing as you now possess', and, in the second case: 'I forbid force to be used to prevent the party with whom the slave, the subject of these proceedings, has been for the greater part of this year from leading him off.'

161. After this exposition of the various kinds of interdicts our next task is to consider their procedure and outcome. Let us begin with simple interdicts. **162.** When a restitutory or an exhibitory interdict is issued, for instance one ordering restitution of possession to someone forcibly dispossessed, or production of a freedman upon whom his patron wishes to impose services, the case is carried to its conclusion sometimes without and sometimes with risk. **163.** For if the defendant has demanded an *arbiter*, he

§ 162. Cf. G. 4, 141. *ui deiectus*: G. 4, 154. *exhibeatur libertus*: Inst. 4, 15, 1.
§ 163. Cf. G. 4, 141. 114 &c. *Calumniae iudicium*: G. 4, 174 sq.

V p. 241 quae appellatur / arbitraria, et iudicis arbitrio si quid restitui uel exhiberi debeat, id sine periculo exhibet aut restituit, et ita absoluitur; quodsi nec restituat neque exhibeat, quanti ea res est condemnatur. sed et actor sine poena experitur cum eo quem neque exhibere neque restituere quicquam oportet, praeterquam si calumniae iudicium ei oppositum fuerit decimae partis. quamquam Proculo placuit *non esse permittendum*[1] calumniae iudicio *uti ei*[2] qui arbitrum postulauerit, quasi hoc ipso confessus uideatur restituere se uel exhibere debere. sed alio iure utimur, et recte; potius enim ut modestiore uia litiget arbitrum quisque petit quam quia confitetur. **164.** Obseruare ⟨*autem*⟩ debet is qui uult arbitrum petere ut statim petat, antequam ex iure exeat, id est antequam a praetore *dis*cedat;[3] sero enim petentibus non indulgetur. **165.** Itaque, si arbitrum non petierit, sed tacitus de iure exierit, cum periculo res ad exitum perducitur. nam actor prouocat aduersarium sponsione, ⟨*quod*⟩[4] contra edictum praetoris non exhibuerit aut non restituerit; ille autem aduersus sponsionem aduersarii restipulatur. deinde actor quidem sponsionis formulam edit aduersario, ille huic inuicem restipulationis. sed actor sponsionis *formulae subicit*[5] et aliud iudicium de re restituenda uel exhibenda, ut, si sponsione
V p. 242 uicerit, nisi ei res exhibeatur aut restituatur, / *quanti ea res erit*
V p. 243 *aduersarius ei condemnetur*.[6] . . . / . . .

V p. 244 **166.** . . . / *et qui superauerit*[7] fructus licitando, is tantisper in possessione constituitur, si modo aduersario suo fructuaria stipulatione cauerit, cuius uis et potestas haec est, ut, si contra eum *de possessione* pronuntiatum fuerit, eam summam aduersario soluat. haec autem licendi contentio fructus licitatio uocatur, scilicet quia *de eo inter se certant, uter eorum fructus interim percipiat*.[8] postea alter alterum sponsione prouocat, quod aduersus edictum praetoris possidenti sibi uis facta *sit*,[9] et inuicem ambo restipulantur

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[1] So Goudsmit–Kübler. *placuit denegandum* Krüger.
[2] So Goudsmit–Kübler. *iudicio . . . eia* (?) V. *iudicium ei* Krüger.
[3] *id est—discedat*: gloss according to Kübler.
[4] So Krüger and Kübler. *sponsionem* V. *sponsione ni* Huschke.
[5] Huschke and generally.
[6] So Bethmann-Hollweg. V 242, 243 are almost entirely illegible. Presumably Gaius completed his account of procedure under simple interdicts, and then began on that of double interdicts, with which we find him engaged at the beginning of 244.
[7] Krüger's conjecture. Equally Lenel: *et uter eorum uicerit*.
[8] Krüger's conjecture. [9] *est* V

receives a *formula* known as *arbitraria*, and if in obedience to the arbitral pronouncement of the *iudex* he produces or restores anything, he produces or restores it without penalty, and is then absolved; if he does not so produce or restore, he is condemned in the value of the thing. Likewise the plaintiff incurs no penalty by proceeding against one who is under no duty of production or restoration, except that of one-tenth of the value at stake if an action for vexatious suit (*calumniae iudicium*) is raised against him. However, Proculus held that a defendant who demands an *arbiter* should be refused the *iudicium calumniae*, on the ground that his very demand for an *arbiter* implies an admission of a duty to restore or produce. But present practice is to the contrary, and rightly so, since a man who demands an *arbiter* does so rather in order to litigate at less risk than because he admits liability. **164.** A defendant who intends to demand an *arbiter* must be careful to do so at once, before leaving court, that is, before departing from the praetor; for no indulgence is shown to a late demand. **165.** Thus where he does not demand an *arbiter*, but leaves court in silence, the case is carried to its conclusion at a risk. For the plaintiff challenges the defendant by a *sponsio* to the effect that by not producing or restoring the thing the defendant has contravened the praetor's Edict, and the defendant in turn puts a counter-*stipulatio* to the plaintiff. Then the plaintiff presents the defendant with a *formula* on the *sponsio* and the defendant presents the plaintiff with one on the counter-*stipulatio*. But the plaintiff subjoins to the *formula* on the *sponsio* a further *formula* for the restoration or production of the thing, so that, if he wins on the *sponsio*, the defendant may be condemned to him in the value of the thing, if it is not produced or restored. . . .

166. . . . and the winner in the auction of the mesne profits is for the time being established in possession, provided that he gives his opponent security by the *fructuaria stipulatio*, the effect of which is that, should the question of possession be decided against him, he is to pay the other party the amount of his bid. This rival bidding is known as *fructus licitatio* because it is a contest between the parties as to which of them is to take the profits during the proceedings. Next, each party challenges the other by a *sponsio* to the effect that the promisee, being in possession, has suffered

§ 164. Cf. Val. Prob. Einsidl. 70 (Textes 219, n. 55). § 165. Cf. G. 4, 141. *aliud iudicium*: G. 4, 166a in fin. 169. §§ 166–6a. Cf. Edictum pp. 471–2.

aduersus sponsionem . . .[1] una inter eos sponsio item*que re*stipulatio u*na tantum*[2] ad eam fit. . . . **166a.** *Deinde, editis formulis sponsionum et restipulationum,*[3] iudex apud quem de ea re agitur illud scilicet requirit, ⟨*quod*⟩ praetor interdicto complexus est, id est uter eorum eum fundum easue aedes per id tempus quo interdict*um* redditur nec ui nec clam nec precario possideret. cum iudex id explorauerit, et forte secundum me iudicatum sit, aduersarium mihi et sponsionis et restipulationis summas quas cum eo feci condemnat, et conuenienter me sponsion*is* et restipulationis quae mecum factae sunt absoluit. et hoc amplius, si apud aduersarium meum possessio est, qu*ia* is fructus licitatione uicit, nisi
V p. 245 restituat mihi possessionem, Cascelliano siue / secutorio iudicio condemnatur. **167.** Ergo, is qui fructus licitatione uicit, si non probat ad se pertinere possessionem, sponsionis et restipulationis et fructus licitationis summam poenae nomine soluere et praeterea possessionem restituere iubetur; et hoc amplius, fructus quos interea percepit reddit. summa enim fructu*s* licitationis non pretium est fructuum, sed poenae nomine soluitur, quod quis alie*n*am possessionem per hoc te*m*pus retinere et facultatem fruendi na*n*cisci conatus est. **168.** Ille autem qui fructus licitatione uictus est, si non probauerit ad se pertinere possessionem, tantum sponsionis et restipulationis summam poenae nomine debet. **169.** Admonendi tamen sumus liberum esse ei qui fructus licitatione uictus erit, omissa fructuaria stipulatione, sicut Cascelliano siue secutorio iudicio de p*ossessi*one reciperand*a* experitur, ita s*imiliter* de fructus licitatione agere. in quam rem proprium iudicium comparatum est, quod appellatur fructuarium, quo nomine actor iudicatum solui[4] satis accip*it*. dicitur autem et hoc iudicium secutorium, quod sequitur sponsionis uictoriam, sed non aeque Cascellianum uocat*ur*. **170.** Sed quia nonnulli, interdicto reddito, cetera ex interdicto facere nolebant, atque ob id non poterat res
V p. 246 expediri, praetor / in eam rem prospexit, et comparauit interdicta quae secundaria appellamus, quod secundo loco redduntur. quor*um uis et potest*as haec est, ut, qui cetera ex interdicto non

[1] For the illegible half-line Krüger mentions A. Schmidt's conjecture: *uel si unus tantum sponsione prouocauit alterum*, and Huschke's: *uel stipulationibus iunctis duabus.* [2] Krüger's conjecture.

[3] Krüger's conjecture (based on Huschke's) for the end of about 2½ illegible lines. [4] *iudicatum solui*: *is* V.

§ 166a. *Cascelliano*: G. 4, 165 in fin. 169. § 169. Cf. G. 4, 166. *iudicatum solui*: G. 4, 91. § 170. Cf. Edictum p. 473.

violence in contravention of the praetor's Edict, and each puts to the other a counter-*stipulatio* to the opposite effect.... **166a.** Then, after *formulae* on the *sponsiones* and counter-*stipulationes* have been issued, the *iudex* trying the case proceeds to examine the question raised by the praetor's interdict, namely which of the two, at the time when the interdict was issued, was in possession of the land or house, having obtained it neither by force nor clandestinely nor by licence from the other. When the *iudex* has considered the matter, and judgment has gone, let us say, in my favour, he condemns my opponent to pay me the sums of the *sponsio* and counter-*stipulatio* which I put to him and, as is consistent, absolves me from the sums of the *sponsio* and counter-*stipulatio* which he put to me. Moreover my opponent, if possession is with him owing to his having won the auction of mesne profits, is condemned in the Cascellian or consequential action, if he does not restore possession to me. **167.** Therefore, the winner in the auction of profits, if he fails to prove that he is entitled to possession, is ordered to pay by way of penalty the sums of the *sponsio* and counter-*stipulatio* and of his bid in the auction, and further to restore possession, in addition to which he gives back the profits he has taken meanwhile. For the amount of the auction-bid is not a price given for the mesne profits, but is paid as a penalty for having sought to retain another man's possession during the interval and to have the power of taking the profits of the thing. **168.** But the loser in the auction of profits, if he fails to prove that he is entitled to possession, is liable merely for the sums of the *sponsio* and counter-*stipulatio*, by way of penalty. **169.** We should, however, observe that the loser in the auction of profits is free to waive the *stipulatio fructuaria* and to proceed on the auction-bid by an action, in the same way as, by the Cascellian or consequential action, he proceeds for the recovery of possession. For this a special action, called *iudicium fructuarium*, is provided, in which the plaintiff is given security for the satisfaction of judgment. This action too is termed consequential, because it is a sequel to success on the *sponsio*, but not also Cascellian. **170.** But as persons were found who, after an interdict had been issued, refused to take the further steps under it, and consequently matters could not be brought to a head, the praetor has met the difficulty by providing interdicts known as secondary, because issued in the second instance. Their effect is that a party who will not take the further steps under the interdict—for

faci*at*, ueluti qui uim non faciat aut fructus non lice*at*ur, aut qui fructus licitationis sat*is* non de*t*, aut si sponsione*s* non faci*at*, sponsion*um*ue iudicia non accipiat, siue possidea*t*, restituat aduersario possessionem, s*iue non* possidea*t*, uim illi possidenti non faciat. itaque, etsi alias potue*rit* interdicto UTI POSSIDETIS uincere, si cetera ex interdicto *fecisset*, *si non fecit* tamen, per interdictum secundarium u*incitur*.[1] . . . / . . .

V p. 247 **171.** *Temeritas tam agentium quam eorum cum quibus agitur modo*[2] pecuniaria poena, modo iurisiurandi religione, ⟨*modo metu infamiae*⟩[3] *coercetur* eaque praetor . . . ideo[4] . . . aduersus in*fitiantes*

V p. 248 *ex quibusdam* / causis dupli actio constituitur, ueluti si iudicati aut depensi aut damni iniuriae aut legatorum per damnationem relictorum nomine agitur; ex quibusdam causis sponsionem facere permittitur, ueluti de pecunia certa credita et pecunia constituta; sed certae quidem creditae pecuniae tertiae partis, constitutae uero pecuniae partis dimidiae. **172.** Quodsi neque sponsionis neque dupli actionis periculum ei cum quo agitur iniungatur, ac ne statim quidem ab initio pluris quam simpli sit actio, permittit praetor iusiurandum exigere NON CALUMNIAE CAUSA INFITIAS IRE. unde quamuis heredes uel qui heredum loco habentur . . .[5] obligati sint, item feminis pupillisque ex*cusatio sit a*[6] periculo sponsionis, iubet tamen eos iurare. **173.** Statim aut*em* ab initio pluris quam simpli actio est ueluti furti manifesti quadrupli, nec manifesti dupli, concepti et oblati tripli. nam ex his causis et aliis quibusdam, siue quis neget siue fateatur, pluris quam simpli est actio.

174. Actoris quoque calumnia coercetur modo calumniae iudicio, modo contrario, modo iureiurando, modo restipulatione. **175.** Et quidem calumniae iudicium aduersus omnes actiones

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[1] Huschke's conjectures. The remaining 14 lines of V 246 are illegible except for a few words, notably: *quamuis hanc opinion(em) . . . (Sabi)nus et Cassius secuti fuerint*. The first 21 lines of V 247 are in an even worse state. The evidence does not seem to permit of even a conjectural restoration.

[2] So Krüger, from Inst. 4, 16 pr.

[3] So Inst., but if Gaian, apparently omitted by V.

[4] *ueideo* (?), preceded by 2 and followed by space for some 25 illegible letters.

[5] Studemund thought *simplo tenus* possible.

[6] So Mommsen. Krüger, Girard, and Kübler: *eximantur*, emending to *feminae pupillique*.

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§ 171. Cf. Inst. 4, 16 pr. 1. *aduersus infitiantem*: G. 4, 9 &c. *sponsionem facere*: G. 4, 13. 180. 181. Cic. p. Rosc. com. 4, 10; 5, 14. § 172. Cf. Inst. 4, 16, 1. C. 2, 58 (59), 2 pr. (A.D. 531). Nou. 49, c. 3 (A.D. 537). § 173. Cf. Inst. 4, 16, 1. 4, 6, 21. G. 3, 189–91. § 174. Cf. Inst. 4, 16, 1. *calumniae*

example, one who will not do an act of violence, or bid for the mesne profits, or give security for his successful bid, or enter into the *sponsiones*, or take part in the actions on them—must, if in possession, give up possession to his opponent, or, if not in possession, abstain from doing violence to his opponent who is in possession. The result is that, though he might have succeeded under the interdict *Uti possidetis* if he had taken the further steps under it, yet, if he does not take them, he is defeated under a secondary interdict. . . .

171. Rash litigation on the part of both plaintiffs and defendants is restrained in some cases by a pecuniary penalty, in some by the sanctity of an oath, and in some by fear of infamy. . . . Restraint by pecuniary penalty is exercised on defendants in certain cases by the liability in the action being doubled if liability is denied: examples are an action on a judgment debt, or on a payment by a *sponsor*, or for wrongful damage to property, or on a legacy left by damnation. In certain other cases there is permission to enter into a *sponsio*, as in the *actio certae creditae pecuniae* and the *actio de pecunia constituta*, *sponsio* being in the former action for one third and in the latter for one half. **172.** But where the defendant is subjected to the risk neither of a *sponsio* nor of double damages, and the action is not one which from the very outset is for more than simple damages, the praetor permits an oath to be exacted from him to the effect that he is not denying liability vexatiously. Hence, though heirs and those standing in the place of heirs are liable to no pecuniary penalty (?), and women and pupils are excused from the risk of *sponsio*, the praetor nevertheless requires them to take the oath. **173.** Actions which from the outset are for more than simple damages are, for example, the *actio furti manifesti* for fourfold, that for *furtum nec manifestum* for twofold, those for *furtum conceptum* and *furtum oblatum* for threefold. For in these cases and in some others the action is for more than simple damages, whether the defendant denies or admits liability.

174. Vexatious litigation on the part of plaintiffs is also subject to restraint, sometimes by a *iudicium calumniae*, sometimes by a *iudicium contrarium*, sometimes by an oath, sometimes by a counter-*stipulatio*. **175.** The *iudicium calumniae* is allowed in response to

iudicium: G. 4, 163. 181. *contrario iudicio*: G. 4, 177 sq. 181. *restipulatione*: G. 4, 13. 180. 165. 166.

locum habet, et est decimae partis, p*raeterquam quod*[1] aduersus adsertorem tertiae partis est. **176.** Liberum est autem ei cum quo agitur aut calumniae iudicium opponere aut iusiurandum exigere NON CALUMNIAE CAUSA AGERE. **177.** Contrarium autem iudicium
V p. 249 ex certis causis constitui*tur*, / ueluti si iniuriarum agatur, et si cum muliere eo nomine agatur, quod dic*a*tur uentris nomine in possessionem missa dolo malo ad alium possessionem transtulisse, et si quis eo nomine agat, quod dicat se a praetore in possessionem missum ab alio quo admissum non esse. sed aduersus iniuriarum quidem action*em* decimae partis datur, aduersus uero duas istas quintae. **178.** Seuerior autem coerc*i*tio est per contrarium iudicium. n*am* calumniae iudicio decimae partis nemo damn*a*tur nisi qui intellegit non recte se agere, sed uexandi aduersarii gratia actionem instituit, potiusque ex iudicis errore uel *i*niquitate uictoriam sperat quam ex causa ueritatis. calumnia enim in adfect*u* est, sicut furti crimen. contrario uero iudicio omni modo damnatur actor si causam non tenuerit, licet alia[2] opinione inductus crediderit se recte agere. **179.** Utique autem ex quibus causis contrario iudicio ag*i* potest, etiam calumniae iudicium locum habet; sed alterutro t*antum* iudicio agere permittitur. qua ratione, si iusiurandum de calumni*a* exactum fuerit, quemadmodum calumniae iudicium non datur, ita et contrarium non dari[3] debet. **180.** Restipulationis quoque poena ex certis causis fieri solet, et quemadmodum contrario iudicio omni modo condemnatur actor, si causam non tenuerit, nec requiritur an scierit non recte se agere,
V p. 250 ita etiam restipulationis poena omni / modo damnatur actor, si uincere non potuerit. **181.** Qui autem restipulationis poenam patitur, ei neque calumniae iudicium opponitur, neque iurisiurandi religio *in*iungitur. n*am* contrarium iudicium ex his causis locum non habere palam est.

182. Quibusdam iudiciis damnati ignominiosi fiunt, ueluti furti, ui bonorum raptorum, iniuriarum; item, pro socio, fiduciae, tutelae, mandati, depositi. sed furti aut ui ⟨*bonorum*⟩ raptorum aut iniuriarum non solum damnati notantur ignominia, sed etiam

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[1] Cf. Suppl. xxxiv.

[2] *alia* V. *aliqua* Krüger and Kübler.

[3] *dari non* Krüger.

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§ 176. Cf. G. 4, 172. 179. § 178. *sicut furti crimen*: G. 2, 50; 3, 197. 208. § 179. Cf. G. 4, 176. § 180. Cf. G. 4, 13. 171. 174. § 181. Cf. G. 4, 171. 172. 174. § 182. Cf. Inst. 4, 16, 2. G. 4, 60. Edictum § 16.

any kind of action; it is for a tenth of the amount claimed, except that against an assertor of another's liberty it is for a third. **176.** Defendants are free to choose between retorting with a *iudicium calumniae* and exacting an oath that the action is not being brought vexatiously. **177.** A *iudicium contrarium* exists only in certain cases—where the action is an *actio iniuriarum*, or where a woman is sued on the allegation that, having been put in possession on behalf of her child *in utero*, she has fraudulently transferred possession to someone else, or when an action is based on the allegation that the plaintiff was sent into possession by the praetor, but was not admitted by the defendant. The action is for a tenth when it is in face of an *actio iniuriarum*, but for a fifth in face of the two other actions mentioned. **178.** The restraint exercised by a *iudicium contrarium* is the more severe. For in the *iudicium calumniae* a man is not condemned in the tenth unless he knows he is suing unjustifiably and has brought the action merely in order to annoy the other party, trusting for success to some mistake or injustice on the part of the *iudex* rather than to the true merits of his case. For *calumnia*, like *furtum*, depends on intention. On the other hand, in a *iudicium contrarium* a plaintiff who has lost his action is condemned in all cases, even if he mistakenly believed his suit to be justifiable. **179.** Naturally in those cases in which a *iudicium contrarium* is possible a *iudicium calumniae* is also open; but one may bring only one or other. Upon the same principle, if an oath disclaiming *calumnia* has been exacted, just as a *iudicium calumniae* is not allowed, so the *iudicium contrarium* ought not to be. **180.** In some cases a penal counter-*stipulatio* is entered into; and just as in a *contrarium iudicium* a plaintiff who has lost his case is invariably condemned, without inquiry as to whether he was aware that his suit was unjustified, so here, if he has failed in his suit, he is invariably condemned in the penal sum of the counter-*stipulatio*. **181.** A plaintiff who incurs the penalty of a counter-*stipulatio* is not faced with a *calumniae iudicium*, nor is he required to take the oath. And in such a case a *contrarium iudicium* is clearly inapplicable.

182. In some actions, such as those on theft, robbery with violence, outrage, and again those on partnership, *fiducia*, tutorship, mandate, and deposit, a defendant who is condemned becomes infamous. Indeed in the actions of theft, robbery, and outrage he is branded with infamy not only if he is condemned, but also if he

pacti, *u*t in edicto praetoris scriptum est; et recte: plurimum enim interest utrum ex delicto aliquis an ex contractu debitor sit. n*ec tamen*[1] ulla parte edicti id ipsum nominatim exprimitur, ut aliquis ignominiosus *sit*,[2] s*ed* q*ui*[3] prohibet*ur* et pro alio postulare *et cognitorem* dare procuratoremue habere, item ⟨*pro*⟩curatorio aut cogni*to*rio nomine iudicio interuenire, ignominiosus esse *dicitur*.[3]

183. In summa sciendum est eum qui cum aliquo consistere uelit ⟨*in ius uocare*⟩[4] oportere, et eum qui uocatus est, si non uenerit, poenam ex edicto praetoris committere. quasdam tamen personas si*ne* permissu praetoris in ius uocare non licet, ueluti parentes patron*os* patron*as*, item liberos et parentes patroni patronaeue, et in e*um* qui aduersus ea egerit poena constituitur. **184.** Cum autem in ius uocatus fuerit aduersarius, neque *e*o die[5] finiri potuerit negotium, uadimonium ei faciendum est, id est, ut promittat se certo die sisti. **185.** Fiunt aut*em* uadimonia quibusdam ex causis pura, id est sine satisdatione, quibusdam cum satisdatio*ne*, /
V p. 251 quibusdam iureiurando, quibusdam recuperatoribus suppositis, id est, ut qui non steterit, is protinus a recuperatoribus in summa*m* uadimonii condemnetur. eaque singula diligenter praetoris edicto significantur. **186.** Et siquidem iudicati depensiue agetur, tanti f*it* uadimonium quanti ea res erit; si uero ex ceteris causis, quanti actor iurauerit n*on* calumniae causa postulare sibi uadimonium promitti. nec tamen ⟨*pluris quam partis dimidiae, nec*⟩[4] pluribus quam sestertium CM fit uadimonium. itaque, si centum milium res erit, nec iudicati depensiue ag*e*tur, non plus quam sestertium quinquaginta mili*um* fit uadimonium. **187.** Q*u*as autem personas sine permissu praetoris impune in ius uocare non possumus, easdem n*ec* uadimonio inui*t*as obligare *p*ossumus,[6] praeterqua*m* si praetor aditus p*er*mittat.

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[1] *nec tamen* Krüger. *nam* (?) V.
[2] *esset* V.
[3] Cf. Suppl.
[4] So Huschke and generally.
[5] *eo die*: *odie* V.
[6] So Krüger. *n possumus* V. *nobis possumus* Huschke–Kübler.

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§ 183. Cf. G. 4, 46. 187. §§ 184–7. Cf. Edictum §§ 17–24. 280. § 186. *iudicati depensiue*: G. 4, 9 &c. *tanti fit uadimonium*: G. 3, 224. § 187. Cf. G. 4, 46. 183.

compromises, as we read in the praetor's Edict; this is right, because there is a very great difference between being liable for delict and under contract. In no part of the Edict, however, is it expressly stated that anyone is to become infamous; but infamous is the current term for anyone who is forbidden to appear in court on another's behalf, or to appoint a *cognitor* or have a *procurator* on his own, or to intervene in a suit as someone else's *procurator* or *cognitor*.

183. Finally, it is to be noted that one who desires to take proceedings against another must summon him to court, and that the person summoned incurs a penalty under the praetor's Edict if he does not come. It is, however, unlawful to summon certain persons to court without the praetor's leave, for example one's parents, one's patron or patroness, and the children and parents of one's patron or patroness; and there is a penalty for disobeying these rules. **184.** When a defendant has been summoned to court, but the proceedings cannot be finished on the same day, he has to give bail (*uadimonium*), that is, he must enter into an undertaking to appear on a certain day. **185.** Bail is taken in some cases simply, that is without security, in some with security; in some cases it is accompanied by an oath; in some it is taken with *recuperatores* annexed, so that, if the defendant fails to appear, he may forthwith be condemned by the *recuperatores* in the amount of the bail. These several matters are carefully set out in the praetor's Edict. **186.** When the action is for a judgment debt or on a payment made by a *sponsor*, bail is taken for a sum equal to that being claimed, but in other cases for the amount sworn to by the plaintiff as demanded with no vexatious intent, subject to this, that bail is not taken for a sum exceeding half the amount of the claim or for more than 100,000 sesterces. Thus where the action is not for a judgment debt or on a payment by a *sponsor*, if the matter in dispute is worth 100,000 sesterces, bail is not taken for more than 50,000. **187.** But persons whom one may not with impunity summon to court without the praetor's leave may similarly not be compelled to give bail, save if the praetor on application gives permission.

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