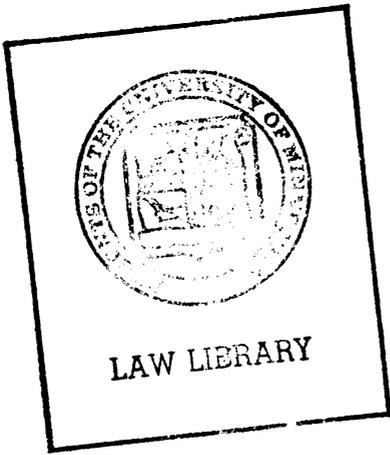

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Savigny, Friedrich Karl von

Jural Relations

1979

JURAL RELATIONS

JURAL RELATIONS;

OR, THE

*ROMAN LAW OF PERSONS AS SUBJECTS OF
JURAL RELATIONS:*

BEING A

TRANSLATION OF THE SECOND BOOK

OF

Sabigny's System of Modern Roman Law.

BY

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PREFACE.



THAT half a century should have elapsed since Savigny's great work on the Roman System of Law, the most remarkable monument, as it has been justly said, of his learning and genius, was first published in Germany, without a complete translation in English having appeared, is scarcely, I think, creditable to us as a nation. A translation of the first volume has, indeed, been published by Mr. Holloway, a learned Judge of the Madras High Court, who has since retired from the service ; and the eighth volume, which forms a complete treatise in itself on Private International Law, has been admirably translated by Mr. Guthrie, an Advocate of the Scotch Bar, and published by Messrs. Clark & Co., Law Publishers, Edinburgh. But the intermediate volumes still lie clothed in their original language, unknown to and unconsulted by far the great majority of English lawyers and law students. It is perhaps beyond the reach of any single person to undertake the task of translating all the remaining six volumes, but the translation of a single volume is a less ambitious labour ; and in these days, when the study of Roman Law has revived in England, an effort at least seems to be called for to render the greatest and most systematic Work which has ever been written on the subject more accessible to English students than it is at present.

MAR 2 1899

I have accordingly ventured to prepare a translation of the second volume of the German work, which treats of Persons as the Subjects of Jural Relations, and which I now offer to the profession. In one sense, this volume, treating as it does of a subject which, for the most part, only possesses a historical interest for us, is the driest and most technical of any of the sister volumes, and consequently affords less inducements to a translator to persevere in his task. But at the same time it deals comprehensively with a branch of the Roman Law which must be thoroughly understood before anyone can hope to acquire a proper knowledge of the other doctrines of that System of Law, which is now rightly regarded as a necessary part of a proper legal education. The volume is also important as containing an exhaustive discussion of many interesting questions touching the Constitution and Rights of Juristical Persons, including the Fiscus, which still possess a practical interest for the Modern reader.

Of the merits or demerits of the translation my readers must, of course, judge; but I can honestly say that I have spared no pains or labour to make it accurate. Translating, however, as I was with the main object of making the volume accessible to students, I have striven, above all things, to produce a faithful translation, and I have, for this reason, not so much studied style and elegance of expression as to convey the meaning of my author as literally as possible into English. Fidelity to the original is what, in fact, I have throughout aimed at, and if my English version is at times crude or obscure, it is due in a great measure to my anxiety to be literal, for I did not deem it within my

province, as it was certainly beyond my ability, to attempt to re-write my author, or to alter his language.

At the same time I am quite sensible that, despite the utmost care, there are imperfections and shortcomings in the translation, for which I can only crave the indulgence of my readers. Written in the farthest province of India, where libraries of reference are few, and composed for the most part of cast-off Novels, a few military and scientific books, with an old history or two, and in odd moments of leisure snatched from the engrossing claims of an arduous profession, it would be surprising if the work were altogether free from errors. But I have at least tried to accomplish the task I undertook to the best of my ability; and if I have succeeded in contributing something towards making the greatest Jurist of modern times better known than he is at present to English students of Law, I will be satisfied.

W. H. R.

6th December, 1883.

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CORRIGENDA.

- Page 48, *for* "the Emancipation and Adoption of a strange child was regarded as a CAP. DEM.," *read*, "Emancipation and the Adoption of a strange child were regarded as CAP. DEM."
- „ 71, note (i), *for* "the text containing the Edict," *read*, "the preserved text of the Edict."
- „ 76, note (f), *for* "a single Action was permitted in each case," *read*, "particular Actions were permitted in any case."
- „ 76, second line from top, *for* "misrepresentation," *read*, "defacement."
- „ 92, note (m), *for* "vi may to some extent be perpetrated against," *read*, "something may be perpetrated vi against."
- „ 193, eighth line from top, *for* "DECURAE," *read*, "DECURIAE."
- „ 221, last line, *for* "the agreeing members," *read*, "some members."
- „ 240, ninth line from bottom, *for* "those Laws," *read*, "these Laws."

CHAPTER SECOND.

PERSONS AS THE SUBJECTS OF JURAL RELATIONS.

SECTION 60.

Natural Jural Capacity and its positive modifications.

EVERY Jural Relation consists in the relation of one person to another person. The first essential element of that relation which requires a closer consideration, is the nature of the persons whose reciprocal relation is capable of producing it. The question, therefore, which has immediately to be answered is this, who can be the Bearer or Subject of a Jural Relation? This question concerns the possible POSSESSION OF RIGHTS, or the JURAL CAPACITY, not the possible ACQUISITION OF SUCH RIGHTS, or the CAPACITY OF ACTION, which will be considered in a subsequent volume (§ 106).

In the Jural Relation, however, a determinate person stands at times in relation to another similarly determinate individual person, and at other times indifferently to all other men (§ 58). The scope of the present inquiry only deals with determinate persons in the relations of Law, since in regard to the purely negative relation, in which All stands opposed to the Individual, for example to an Owner, every one is regarded as capable.

All Law exists for the sake of the moral freedom indwelling in every individual Man (§ 4, 9, 52)(a). Therefore the original idea of a Person, or of the Subject of a Right, must coincide

(a) L. 2 *de statu hom.* (1, 5) "CUM IGITUR *hominum causa omne jus constitutum* SIT; PRIMO DE PERSONARUM STATU . . . DICEMUS."

with the idea of Man, and this original identity of both ideas may be expressed by the following Formula:—Every individual Man, and only the individual Man, is Jurally capable.

Nevertheless this original idea of a person may undergo a twofold modification by Positive Law, as already indicated in the above Formula, by being restricted or expanded. A Jural Capacity may, for instance, in the first place, be either wholly or partially denied to many individual Men; it may, in the second place, be transferred to something external to the individual Man, and thus a Juristical Person may by this means be artificially created.

The present volume must then first of all settle the limits of the Person conceived according to the original or natural idea, next it must specify the twofold modifications by which this natural idea has been developed in our Positive Law. In conclusion there will still remain to be mentioned the different modes in which single Jural Relations may enter into combination with determinate Persons.

SECTION 61.

Limits of the Natural Jural Capacity.

I.—Beginning.

The beginning of the natural Jural Capacity is conditioned by BIRTH, that is to say, by the complete separation of a living Being from the Mother.

This beginning will at present be considered by us in its most important relation, namely, as a condition giving rise to the Jural Capacity for the newly-born Being itself. The most remarkable applications in which this beginning shows itself immediately active in Private Law, even when Life directly afterwards again ceases to exist, are these:—1. An earlier Testament of the Father is vitiated by the birth of a Child for whom it contained no provision; 2. The Intestate Succession of the Father, who died before the birth of a Child, is acquired by the Child at the moment of birth. In consideration of these two effects, it is particularly necessary to carefully distinguish an actually completed Birth from the mere semblance of one. Other juristical consequences will rarely arise for the newly-born Child at this first moment of its existence, but rather at some later period when its genuine human existence is no longer open to doubt. It was not, however, merely for the sake of the Jural Capacity of the Child that the distinction between a real and a simulated Birth was of importance in the early Roman law, but also in the interests of the Mother, to whom many important advantages might arise from the birth of children, and in a twofold manner: partly because she was on that account more favourably treated than was otherwise permitted by the general rules of Law (a), and partly because she was freed from a disability contrary to the rules of the Common Law.

(a) Here therefore the notion of *jus singulare* comes into operation (§ 16).

We may call the former a reward for producing Children, but the latter a freedom from the penalties attaching to Sterility. The following are examples of the former:—

Firstly.—The HEREDITAS in the property of the children according to the SC. TERTULLIANUM: this was a privilege against the hitherto prevailing rule of Intestate Succession, which the Mother could only obtain if she had given birth to three children (a Freed-woman four) (*b*).

Secondly.—The acquisition of the CIVITAS for every Latina who had given birth to three children (*c*). *Finally*, freedom from Tutelage, under which all women, by reason of their sex, were otherwise obliged to remain (*d*). The important rule, according to which women by the birth of three or four children (three in the case of Freeborn women and four in that of Freed-women,) acquired the right of Testamentary Succession, was regarded as an exemption from a penalty—the incapacity which was thereby removed being the penalty; since, prior to the LEX JULIA, the capacity of women in this respect had been subjected, according to the rules of the Common Law, to no restrictions. It might be supposed that the idea of true Birth would everywhere be the same, without discrimination of these effects, which were connected with it. But this was not the fact: uniformity was less closely admitted in regard to exemption from penalties, than with respect to rewards, or the personal Jural Capacity of the Child: doubtless because those penalties were everywhere regarded as something odious, for which reason it was always

(*b*) § 2, 4) *de Sc. Tertull.* (3, 3); Paulus, IV. 9, § 1.

(*c*) Ulpian, III. § 1, in accordance with a *Senatus-consultum*.

(*d*) Gaius, I. § 194, 195; Ulpian, XXIX. § 3. Many cases of such rewards and exemption from penalties cannot be suitably mentioned here, because they presuppose that the Child either still lives, or at least had lived for some time, in which cases the need of distinguishing between a genuine and simulated Birth does not arise. Compare *pr. §. de excus.* (1, 25); Ulpian, III. § 3; XV.; XVI. § 1. Therefore in regard to the Father this question only occurs in rare instances, and has by no means the same importance as it has in regard to the Mother. Such an instance (in regard to the Father) is found in Ulpian, XV. “*Et quandoque liberos habuerint, EJUDEM PARTIS PROPRIETATEM.*”

sought to restrict them within as narrow limits as the words of the law alone would permit.

After this preliminary discussion it is now possible to reduce the idea of true Birth above stated to its elements. To it belongs:—(1) Separation from the Mother, (2) Complete separation, (3) Vitality of the *NASCITURUS* after complete separation, and (4) A human nature.

1. The Child must have been separated from the Mother, and therefore must have existed apart from her. The means employed for this separation were of no consequence, and hence an artificial, forcibly produced Birth was not juristically distinguished from a natural one (*e*). Indeed, for this reason, a law of the ancient Kings expressly prescribed that in the event of

(*e*) As regards the right of the Child thus born there is absolutely no doubt. L. 12 *pr. de liberis* (28, 2) "QUOD DICTUR FILIUM NATUM RUMPERE TESTAMENTUM, NATUM ACCIPE ETSI EXSECTO VENTRE EDITUS SIT: *nam et hic rumpit testamentum, SCILICET SI NASCATUR IN POTESTATE.*" L. 6 *pr. de inoff.* (5, 2); L. 1, § 5 *ad Sc. Tertull.* (38, 17). But was such a Child also reckoned for the benefit of the Mother? Ulpian answers the question affirmatively L. 141 *de V. S.* (50, 16) "ETIAM EA MULIER, CUM MORERETUR, CREDITUR FILIUM HABERE, QUAE EXCISO UTERO EDERE POSSIT." Paulus negatives it L. 132, § 1 *de V. S.* "FALSUM EST EAM PEFERISSE, CUI MORTUAE FILIUS EXSECTUS EST." Probably Ulpian is speaking of the application of penalties, *e. g.* if a mother of two children entered upon a Testamentary Succession, and after her death a third child was cut open from her body and brought into the world, she was then deemed to be the mother of three children, and her entry on the Succession was recognized as valid. Paulus on the other hand is speaking of the case of a reward, *e. g.* a Latina who at her death had two children, could not by a posthumous birth be deemed to have acquired the *CIVITAS* by three children: she could therefore leave no heir. More forced, but still not absolutely inadmissible, appears to me the combination of L. 141, *cit.* with L. 51, § 1 *de leg.* (2, 31), and L. 61 *de cond.* (35, 1). Conf. generally SCHULTING, *NOTAE AD DIGESTA*, in L. 141 *cit.* In the explanation of the here cited and other similar passages from the *Pandects*, undue weight has been attached to the circumstance that they were taken from a Commentary on the *LEX JULIA*, and for this reason it has constantly been assumed that they must refer to a case mentioned in that Law, which it was thereupon sought to discover. This view, however, must be rejected upon two grounds; *firstly*, because our knowledge of the contents of the *LEX JULIA* is very defective, and *secondly*, because the old Commentator might very well discuss other kindred cases along with a rule of the *LEX JULIA*.

the death of a pregnant woman, her body should be opened in order, if possible, to save the life of the Child (*f*).

2. The separation must have been a complete one (*g*).

3. The Being thus born must have lived after separation (*h*). If, therefore, during a protracted Birth the Child showed signs of Vitality, but died before it had actually existed apart from the Mother, it never acquired a Jural Capacity. Still less was it deemed to have acquired such a Capacity, if it had died before the commencement of Birth, whether by reason of premature Birth (ABORTUS) (*i*), or, of having died in the mother's womb, although the full period of gestation may have elapsed (*k*). It is immaterial by what signs the fact of Vitality may be placed beyond doubt. Many of the early Jurists asserted that it was necessary for the Child to have screamed, but Justinian expressly rejected this opinion (*l*). The duration of Vitality is also immaterial, and hence a Child that has died immediately after birth is nevertheless deemed to have acquired Jural Capacity (*m*).

4. Lastly, a Being thus born in a living condition, in order to

(*f*) L. 2 *de mortuo infer.* (11, 8).

(*g*) L. 3, C. *de posthumis* (6, 29) "*Perfekte NATUS . . . AD ORBEM totus processit.*"

(*h*) L. 3, C. *de posthumis* (6, 29) "*vivus . . . NATUS EST.*" Paulus IV. 9, § 1 "*vivus pariant.*" In this last text there is no question of the Jural Capacity of the Child, but only of a reward for the Mother.

(*i*) L. 2, C. *de posthumis* (6, 29) "*UXORIS abortu TESTAMENTUM MARITI NON SOLVI.*"

(*k*) L. 129 *de V. S.* (50, 16) "*QUI mortui nascuntur, NEQUE NATI, NEQUE PROCREATI VIDENTUR: QUIA NUNQUAM LIBERI APPELLARI POTUERUNT.*" This proposition is certainly true as regards the Child's own Jural Capacity, and likewise also with respect to the rewards of the Mother, *e. g.* the right of Succession according to the *Sc. Tertullianum*. Paulus, IV. 9, § 1. Concerning which of these cases the Jurist intended to speak cannot be determined, since the title of the text (Paulus, lib. 1. *ad L. Jul. et Pap.*) affords no certain clue. (Note *e*.) On the other hand the proposition was certainly not admitted in regard to the penalties of Childlessness, which will be made perfectly clear below in treating of the requirement of Human Nature on the part of the Child. Note (*s*).

(*l*) L. 3, C. *de posthumis* (6, 29).

(*m*) L. 3, C. *de posthumis* (6, 29) "*LICET ILLICO POSTQUAM IN TERRA CECIDIT, VEL IN MANIBUS OBSTETRICIS DECESSIT.*" L. 2, C. *ead.*

be Jurally capable, was required to have a Human Nature, which was only admitted in a human form. The Romans expressed this thus: "it must not be a MONSTRUM or a PRODIGIUM." This requirement was necessary for the Jural Capacity of the Child and for rewards, but not for the avoidance of penalties. By observing this distinction the apparent contradictions in our Law Sources are removed. This rule is very clearly expressed in regard to Jural Capacity (*n*), and likewise also with respect to one of the most important cases of rewards, the SC. TERTULLIANUM (*o*). It must, however, be added that mere deviations from the ordinary human form, *e.g.* too many members, or too few, produce no impediment (*p*). The actual limits of the human form are not prescribed by these regulations, but, by the analogy of a provision occurring elsewhere, they may be said to consist in this, that the Head must bear a human shape (*q*).

On the other hand, as regards the avoidance of penalties, a more favourable interpretation was admitted for the benefit of the Mother, and even a Monstrosity might here be reckoned, because the Mother herself is innocent in the matter (*r*). Accord-

(*n*) L. 3, C. *de posthumis* (6, 29) "AD NULLUM DECLINANS MONSTRUM VEL PRODIGIUM."

(*o*) Paulus, IV. 9, § 3; L. 14 *de statu hom.* (1, 5) from Paulus, lib. 4 SENTENT. The latter passage is therefore identical with the former; but the text inserted in the Pandects did not probably maintain its original practical sense, and is rather to be understood in the sense of the Justinian Law as referring to the Jural capacity of the Child.

(*p*) Too many members. Paulus, IV. 9, § 3; L. 14 *de statu hom.* (1, 5). Too few members. L. 12, § 1, *de liberis* (28, 2) "SI NON INTEGRUM ANIMAL EDITUM SIT, CUM SPIRITU TAMEN, AN ADHUC TESTAMENTUM RUMPAT? ET HOC TAMEN RUMPIIT." The expression OSTENTUM embraces this case as well as that of a MONSTRUM. L. 38 *de V. S.* (50, 16).

(*q*) L. 44 *pr. de relig.* (11, 7) "CUM IN DIVERSIS LOCIS SEPULTUM EST, UTERQUE QUIDEM LOCUS RELIGIOSUS NON FIT, QUIA UNA SEPULTURA FLURA SEPULCHRA EFFICERE NON POTEST: MIHI AUTEM VIDETUR, ILLUM RELIGIOSUM ESSE, UBI, QUOD EST PRINCIPALE, CONDITUM EST, *id est caput, cuius imago fit, unde cognoscimur.*"

(*r*) L. 135 *de V. S.* (50, 16); Ulpian, lib. 4 *ad L. Jul. et Pap.* "Et magis est, UT HÆC QUOQUE PARENTIBUS PROSINT, NEC ENIM EST QUOD EIS IMPUTETUR, QUAE, QUALITER POTUERUNT, STATUTIS OBTEMPEAVERUNT, NEQUE ID, QUOD FATALITER ACCESSIT, MATRI DAMNUM INJUNGERE DEBET." By the

ing to the same principle, and in fact from the similarity of the case, it is not to be doubted that even a Child born dead should be computed for the same object (*s*).

These four conditions of natural Jural Capacity are the only ones which can be asserted according to our Positive Law. Our lawyers have, however, frequently added a fifth, the CAPACITY OF LIVING OR VITALITY. They meant by this that a Child who was born alive, but more prematurely than usual, had no Jural Capacity if it died directly after birth, and if the cause of death was its immature condition, which rendered a longer continuance of life impossible. But this assertion has no real basis, and a complete Jural Capacity must be ascribed to every Child who is born alive, without reference to death perhaps having very soon followed, or to the cause of this untimely death (*t*).

word *PROSINT* therefore is to be understood : *AD LEGUM POENAS EVITANDAS*. This most natural solution of the apparent contradiction has long since been recognized. Eckhard, *Hermeneut.* S. 199, ibique Walch.

(*s*) See also note (*k*). In like manner for the avoidance of penalties the birth of three children at one time was allowed (L. 137 *de V. S.* ; Paulus, lib. 2 *ad Jul. et Pap.*), whilst according to the *Sc. Tertullianum* only the birth of children at three different times could enure for the benefit of the Mother. Paulus, IV. 9, § 1, 2, 8.

(*t*) This disputed question is copiously discussed in Appendix III.

SECTION 62.

*Limits of the natural Jural Capacity.*I.—Beginning—(*Continuation*).

The natural beginning of Jural Capacity has been determined down to the point of time of a completed Birth. A not inconsiderable period, however, precedes this point, in which the Child undoubtedly has Vitality, not indeed self-existent, but dependent and closely bound up with the life of the Mother. What is the true juristical mode of treating this preparatory life? Many passages of the Roman law declare quite distinctly that a Child in this condition is still not a Human Being; it has no existence of its own, but must be considered as a portion of the maternal body (*a*). Other passages on the contrary place such a Child in the same position as one actually born (*b*). A closer determination of this last proposition will at once remove the appearance of contradiction, which arises from the expression of the two rules just mentioned.

The first rule expresses properly the true relation of the present time; the second embodies a mere fiction, which is only applicable to Jural relations of a completely special and restricted character. If, therefore, a general question were propounded as to the Jural Capacity of an unborn Child, it must be absolutely denied, because such a Child can neither have Property, nor

(*a*) L. 9, § 1 *ad L. Falc.* (35, 2) "PARTUS NONDUM EDITUS HOMO NON RECTE FUISSE DICITUR;" L. 1, § 1 *de insp. ventre* (25, 4) "PARTUS ENIM, ANTEQUAM EDATUR, MULIERIS PORTIO EST, VEL VISCERUM."

(*b*) L. 26 *de statu hom.* (1, 5) "QUI IN UTERO SUNT, IN TOTÒ PENE JURE CIVILI INTELLIGUNTUR IN RERUM NATURA ESSE;" L. 231 *de V. S.* (50, 16) "QUOD DICIMUS, eum, qui nasci speratur, pro superstite esse, TUNC VERUM EST, CUM DE IPSIUS JURE QUÆRITUR: ALIIS AUTEM NON PRODEST NISI NATUS." The Moderns express this thus:—NASCITURUS HABETUR PRO NATO.

Credits, nor Debts: since, therefore, a Child in this condition is not a Person, who needed and was susceptible of representation, it cannot for the same reason have a Tutor, and cannot itself be called a Pupil (*c*). The fiction on the other hand exhibits a provident care for the pre-existing real life of the Child, and this in a twofold manner: partly by institutions whereby this life will meanwhile be protected from destruction; partly by the attribution of rights, upon which the child can immediately enter on Birth. This fiction is therefore universally restricted for the benefit of the Child, and no one else ought to be permitted to employ it for his own purposes (*d*).

Institutions for the protection of life appertain partly to the Criminal Law, and partly to Police Administration. Criminal penalties were threatened as well against the Mother of the child, who had destroyed its life before birth (*e*), as against the stranger who had aided her in the act (*f*). To the Police institutions for the preservation of life belonged the Regal Law, which prescribed the opening of the body of a woman, who had died during pregnancy, with the view of delivering the Child (*g*); also the later Ordinances, according to which the execution and even the torturing of a pregnant woman, were to be deferred till after her confinement (*h*).

More important, however, for our purpose is the consideration

(*c*) L. 161 *de V. S.* (50, 16) "NON EST PUPILLUS QUI IN UTERO EST; L. 20 *pr. de tutor. et curat.* (26, 5) "VENTRI TUTOR A MAGISTRATIBUS POPULI ROMANI DARI NON POTEST, CURATOR POTEST: NAM DE CURATORE CONSTITUENDO EDICTO COMPREHENSUM EST."

(*d*) L. 231 *de V. S.* (note *b*); L. 7 *de statu hom.* (1, 5) "QUI IN UTERO EST, PERINDE AC SI IN REBUS HUMANIS ESSET, CUSTODITUR, QUOTIES DE COMMODIS IPSIUS PARTUS AGITUR: QUAMQUAM ALII, ANTEQUAM NASCATUR, NEQUAQUAM PROSIT." If, therefore, a woman had two children, and after becoming again pregnant lost one of them, she could not inherit *ex Sc. Terulliano*, which she might have done if she had been permitted to count the unborn child.

(*e*) L. 4 *de extr. crim.* (47, 11); L. 8 *ad L. Corn. de sicar.* (48, 8); L. 39 *de poenis* (48, 19).

(*f*) L. 38, § 5 *de poenis* (48, 19).

(*g*) L. 2 *de mortuo inferendo* (11, 8).

(*h*) L. 18 *de statu hom.* (1, 5); L. 3 *de poenis* (48, 19).

shown by the Private Law for the future Man, whereby his rights are preserved for him as it were till the time of his birth (*i*). This consideration refers partly to his relation of STATUS, and partly to his Right of Inheritance. The STATUS of a Child born in lawful wedlock was regulated with reference to the time of conception, so that the STATUS applicable to him at that time could not be injuriously affected by the modifications which might have taken place in the PERSONA of the Father or Mother during pregnancy (*k*). If, therefore, during this intervening period the Mother lost her Freedom or CIVITAS, the Child was none the less born a Roman Citizen and in the Power of its Father (*l*). In like manner the Son of a Senator conceived in lawful wedlock had all the Rights which were legally assigned to children of Senators, even if his Father had died or had lost his dignity before his birth (*m*). On the other hand, the STATUS of a Child not conceived in lawful wedlock was to be determined with reference to the time of Birth (*n*), so that in such a case the above principle of preserving rights could not effectually display itself. Nevertheless the rule was already early admitted in favour of the Child, that the point of time which was most advantageous to it was to be adopted in the determination of its relations of STATUS, whether this happened to be the time of Conception, or of Birth, or of some intermediate point of time (*o*).

That principle (*i.e.* of preserving rights) is of special importance in the law of Inheritance. If a Succession opens out during pregnancy, which, had the child been born, would have descended to it, the Child's right of Inheritance will be preserved till the time of its birth, and may now be claimed in its

(*i*) L. 3 *si pars* (5, 4) "ANTIQUI LIBERO VENTRI ITA PROSPEXERUNT, UT IN TEMPUS NASCENDI OMNIA EI JURA INTEGRASERVARENT."

(*k*) Gaius, I. (§ 89, 91).

(*l*) L. 18, 26 *de statu hom.* (1, 5).

(*m*) L. 7, § 1 *de senatoribus* (1, 9).

(*n*) Gaius, I. e.

(*o*) *Pr. J. de ingenuis* (1, 4). Thus, for example, if at the time of birth the Mother was a Slave, but was free at the time of conception, or even during the intervening period, the Child was deemed to be free-born.

name (*p*). This important rule prevails as well for the Civil Law as for the Prætorian Law; indeed the Prætor introduced for such a case a peculiar *BONORUM POSSESSIO VENTRIS NOMINE*, whereby the enjoyment of the Succession was meanwhile assigned to the Mother for her own, and indirectly for that of the Child's, maintenance (*q*). Since, however, it was at present uncertain whether one or more children might be born, it was accordingly meanwhile assumed that three children might possibly be born at one time. But this supposition only concerned the provisional treatment of those already born, and not the Jural Capacity of those as yet unborn: thus if at the subsequent birth a fewer or larger number of children were brought into the world than had meanwhile been assumed as possible, that assumption lost its force, and the Succession was divided according to the actual result (*r*).

For the protection of these Rights which were preserved for the Child, a Curator was specially allotted, because, as shown above, a Tutor could not be appointed (*s*).

(*p*) L. 26 *de statu hom.* (1, 5); L. 3 *si pars* (5, 4); L. 7 *pr. de reb. dub.* (34, 5); L. 36 *de solut.* (46, 3). The Father's right of Patronage was similarly treated, though it was not properly an Inheritance but only similar to one. L. 26 *cit.*

(*q*) Tit. Dig. *DE VENTRE IN POSS. MITTENDO ET CURATORE EJUS* (37, 9).

(*r*) L. 3, 4 *si pars* (5, 4); L. 7 *pr. de reb. dub.* (34, 5); L. 36 *de solut.* (46, 3). Roman practice was at length firmly established upon that equitable rule, after it had fluctuated for a long time and had partly been led into error by numerous fabulous tales. The circumstance of a woman having given birth to five children simultaneously in Hadrian's reign caused the greatest sensation, in consequence of which it long remained doubtful whether the assumption should be of three or five children.

(*s*) L. 20 *de tutor. et cur.* note (*c*); tit. Dig. *de ventre in poss.*, note (*g*).

SECTION 63.

Limits of the natural Jural Capacity.

II.—End.

Death, as the limit of natural Jural Capacity, is so purely an event occurring in the ordinary course of nature that it does not need, like Birth, so close a determination of its elements. The difficulty of establishing it by proof has, however, induced some positive rules of law to be framed on the subject.

This difficulty is most frequently felt in the course of sanguinary wars, and in modern times the laws of particular countries have prescribed express rules concerning it. The Roman Law contained no provisions on the subject, nor has any supplementary Custom been introduced into our Common Law for this special case.

Apart, however, from this case, and therefore without any reference to peace or war, the question may arise whether a person unheard of, that is to say such an one of whose existence no intelligence has been received in his last known place of residence for a considerable time, is really still alive. Even in this more general form the question does not occur in the Roman Law, but in point of fact a Customary Law has sprung up with regard to it which has been generally recognised for many centuries past. The Death of the person unheard of is presumed, for instance, upon proof that seventy years have passed away since his Birth, a presumption which is based upon the words of the Psalm: *the days of our life are three score years and ten* (xc. 10) (a). If the person unheard of had reached the

(a) Lauterbach, v. 3, § 24; Leyser, *Spec.* 96; Glück, vol. 7, § 562; vol. 33, § 1397c; Hofacker, 2, § 1682; Heise and Cropp, *Juristische Abhandlungen*, vol. 2, No. 4, p. 118. In these writers many others belonging to different periods are quoted.

age of seventy years at the time of his departure, it is usual to assume his Death to have happened five years afterwards (*b*). This is simply a natural and consistent application of the former rule, because the origin of a presumption and the point of time at which it is to be drawn, should generally completely coincide. Many have without reason endeavoured to separate the two things in such a way, that Death is indeed in the first instance to be presumed after the lapse of the seventieth year of life, but, as regards the date from which that event is to be reckoned, it will be assumed that the person unheard of had in fact not then died, but rather at the moment of his departure, or (according to others) at the time when a Curator was assigned for his property (*c*). Conversely again others will not allow that Death has to be reckoned from the completion of seventy years from proved Birth, but only when the fact of Death has been established by a decision possessing the force of law. They rely upon the fact that the usual Edictal citation in such a proceeding would otherwise have been not only objectless, but even absurd. But this citation was designed with the view that where possible the presumption might be rendered unnecessary by established certainty. If it proved successful the truth thereupon ascertained was decisive, if not full effect had to be given to the presumption. The judicial decree is merely declaratory, and cannot by itself alter the Jural relation: it only serves to place beyond doubt both the fact of the lapse of seventy years as well as the inconsequential result of the Edictal citation. It would, however, have been wholly arbitrary and unreasonable if, in consequence of an accidental or even intentional delay in the judicial declaration of Death, other Heirs had been allowed to come forward than those who had the nearest title at the date of the expiry of the seventy years (*d*). Thus this general presumption is, according

(*b*) Glück, as above cited.

(*c*) Glück, Heise and Cropp, as above cited. The question principally arose in regard to the Inheritance of persons of whom all trace was lost. Hence the opinion here adopted was denoted a *SUCCESSIO EX NUNC*, and the contrary as a *SUCCESSIO EX TUNC*.

(*d*) As regards the view here advocated, conf. Glück and Heise as cited

to the Common Law, the peculiar remedy for the special case of war above-mentioned.

Only one other special case connected with the present subject is dealt with in the Roman Law. If it be certain in regard to two men that they are not only dead, but also that their Deaths occurred on one and the same day, it may yet be doubtful, and therefore (especially in regard to Inheritance) important to be ascertained, how these two cases of Death stand towards each other in relation of time. There are for instance three conceivable cases; that the one may have died before, or after, or simultaneously with the other. If now in such a case none of these three relations of time were capable of proof, and if at the same time the deaths of both persons were due to an external, violent cause (Battle, Shipwreck, the Falling of a House), the Roman Law then drew the following presumptions, which supplied the place of proof:—

(1). It is to be presumed generally that both persons had perished at the same instant (*e*).

(2). An exception is allowed in the case of a simultaneous violent Death of a Child along with its Father or Mother. If the Child were a Minor, its Death must be presumed to have been earlier; if an Adult, later; so that in all cases of this kind the presumption of simultaneous Death is negated (*f*).

3. This exception, however, is again subject to two special exceptions:—

(a) If a Freedman and his Son perish together the general rule

above, also Mittermaier, *Deutsches Privatrecht*, § 448, 5th ed. For the opposite view Eichhorn, *Deutsches Privatrecht*, § 327, 4th ed. Vangerow, *Pandekten*, 1, p. 57. The Prussian A. L. R. II. 18, § 835, looks indeed to the time of the decree, but only when death is asserted before the expiry of seventy years, for in regard to a person who had attained that age no judicial declaration of death is necessary. *Landrecht*, I. 1, § 38.

(*e*) L. 9 *pr.* § 3; L. 16, 17, 18, *de reb. dub.* (31, 5); L. 34 *ad Sc. Trebell.* (36, 1); L. 32, § 14 *de non int. vir.* (24, 1); L. 26 *de mortis causa don.* (39, 6).

(*f*) L. 9, § 1, 4 *de reb. dub.* (34, 5), with the father. L. 22, 23 *eod.*; L. 26 *pr. de pactis dotal.* (23, 4), with the mother. In L. 9, § 1 *cit.* the question was of a death in war, whence it of course followed that the son had to be regarded as of full age.

applies, that is to say Death is presumed to have been simultaneous, and thus the survival of the Son would not be admitted even if he were of age. This was so settled for the benefit of the Patron, whose right of Succession would have been barred by the proved survival of the Son (*g*).

(b) Exactly the same rule is prescribed for the case where a Testator imposes a FIDEICOMMISSUM upon his Heir subject to the condition "SI SINE LIBERIS DECESSERIT." If this Heir happens to perish with his own Son by shipwreck, Death is generally presumed to have been simultaneous, even if the Son were of full age: whence it plainly follows that the Son not having survived the Father, the FIDEICOMMISSUM must consequently be discharged, since its condition (Death without surviving Children), by reason of that presumption, is actually deemed to have been accomplished (*h*).

(*g*) L. 9, § 2 *de reb. dub.* (34, 5) "HOC ENIM REVERENTIA PATRONATUS SUGGERENTE DICIMUS." Here therefore the singularity of this decision is expressly acknowledged.

(*h*) L. 17, § 7 *ad Sc. Treb.* (36, 1). This whole question is treated by Mühlenbruch very fully and with great ingenuity, *Archiv.* bk. 4, No. 27 (Comp. *Doctrina Pand.* § 185). He so far deviates from the exposition given in the text that he assumes that the presumption of the prior Death of persons under age is founded on their greater mortality as a rule, whence it prevailed also in relation to persons other than Parents, and, apart from the case of a violent Death, to the case of Death resulting from a common disaster. Here then it is assumed that both exceptional presumptions (in favour of persons of Full Age and of Minors) are completely dissimilar, and deduced from totally different grounds. But an unbiassed consideration of the Law Sources must entirely convince us on the contrary, that both presumptions were conceived to be wholly similar, and, more especially, that they could only be drawn in cases of the sort mentioned in the text (*vis.* the Death of Parents and Children in a common disaster). Conf. Vangerow, *Pandekten*, 1. p. 58.

SECTION 64.

Restriction of Jural Capacity.

Introduction.

Those cases have now to be mentioned in which the natural Jural Capacity belonging to all Men individually has been restricted by our Positive Law. Such restrictions merely indicate that certain Men are incapable of either all, or, at all events, of certain rights. In order to provide a general expression for these different gradations (of Capacity), we shall denote such a condition as an Impaired Jural Capacity, in which term must also be comprehended a completely extinguished Capacity.

The Roman Law recognises three distinct grounds of Impaired Jural Capacity: Absence of Freedom, Want of CIVITAS, and Dependence on the Family Power of another. To these refer the three following classifications of Men:

- (1) LIBERI, SERVI, with the sub-division of LIBERI into INGENUI and LIBERTINI.
- (2) CIVES, LATINI and PERIGRINI.
- (3) SUI JURIS, ALIENI JURIS.

The peculiarity, however, of these three classifications of Men consists not so much in their general importance, surpassing all other distinctions, but in this, that they serve to settle the distinct degree of Jural Capacity appertaining to each individual Man: in this respect they stand completely unique, and no other classification can be compared with them.

This doctrine (a) has its origin in the oldest period of the Roman Law, and although in the course of centuries it has experienced various modifications, it has nevertheless maintained its fundamental principles to such an extent that, even in the

(a) Of Impaired Jural Capacity. Trans.

latest phase of the Roman Law, we find them interwoven in every direction. A close insight into this doctrine is also important for ourselves, indeed indispensable. Not because there is still much in it which could be directly applied at the present day, but upon two other grounds, each of which embraces the other. The Sources of the Roman Law, for instance, can only be thoroughly comprehended by him, who has himself so completely mastered this doctrine in its fullest development, that in every passage of the Roman Law its connection with that ancient doctrine (where such exists) is constantly present to his mind. This conviction so unconsciously forces itself upon us, that even those amongst our Modern Jurists who disparage Historical Law, and only deem their own labours of any practical value, are not able to avoid mixing up the doctrine in question, and the technical expressions connected with it, with their own speculations. Their one-sidedness, however, involves its own punishment, because that which they scorn to investigate thoroughly, becomes to them a source of endless errors. Such errors, arising out of a misconception of the doctrine of Jural Capacity, occur in our modern legal systems more extensively and more deeply than one might imagine: indeed they have penetrated into modern legislation itself. How then can we free ourselves from the mastery of these confusing errors except by substituting a proper searching investigation in the place of traditions but too poorly authenticated? Herein therefore lies the second ground which renders a closer determination of that old doctrine of the Roman Law indispensable for us.

In order to avoid the precise uncritical influence just mentioned, I shall for the present altogether disregard the hitherto customary mode of treatment of this subject, as well as refrain from using all technical expressions, legitimate or otherwise, and merely state in the first place, the simple rules of law which are given in our Sources: by this means alone will it be possible to critically determine also the technical expressions. The Moderns very commonly denote the three classifications of Men above given by the technical terms *STATUS LIBERTATIS*, *CIVITATIS*, *FAMILIAE*; what is true or false in them

can only be made clear after the concepts and rules of law themselves have been settled beyond doubt. Moreover there exists in inseparable connexion with those three classifications a threefold *CAPITIS DEMINUTIO*, which is mentioned so uniformly by the old Jurists in several passages that it is impossible to doubt that certain primitive legal concepts and technical expressions were indicated thereby. But what was the proper relation between those three grounds of Impaired Jural Capacity and the threefold *CAPITIS DEMINUTIO*, can only be shown in the course of an investigation, which belongs to the most difficult portion of the entire province of Historical Law.

The rules of law, with which we are here concerned, relate to the different degrees of Jural Capacity. In order to be able to comprehend clearly the rules established in regard to this subject it is necessary at the very outset to remember the two points which have already been discussed (*b*). The one is the contrast between the *JUS CIVILE* and the *JUS GENTIUM* (§ 22); the diminution of Jural Capacity may relate to the first only (as the superior and more important), or to both at the same time. Moreover Jural Capacity itself, just as the diminution of it, may have reference to each of the classes of Jural relations above stated (§ 53—57), and thus those relations, as it seems, would be stretched out into comprehensive details in a very embarrassing manner. But two leading notions developed themselves in the Roman Law from a very early time, which were denoted by the technical expressions *CONNUBIUM* and *COMMERCIIUM*, and by means of these a survey of Jural Capacity in its various degrees is much facilitated. *CONNUBIUM* meant, in the first place, the capacity for a valid Roman Marriage, not only absolutely in reference to a particular person, but relatively in regard to the mutual relations of two persons towards each other (*c*). Since, however, upon such a Marriage the possibility of Paternal Power, upon which again Roman Kinship, and upon which finally the ancient Intestate Succes-

(*b*) In the first volume. Trans.

(*c*) Ulpian, tit. 5, § 3, comp. § 4, 5, 6, 8.

sion depended, it is obvious what importance must be ascribed to that technical expression, because according as the **CONNUBIUM** is either imputed or denied to a person, the extent of his Jural Capacity for the most part is determined. In like manner **COMMERCIVM** at first meant only the capacity to buy or sell, nevertheless this expression could not be applied to the customary dealings of daily commerce, but to the symbolical bargain which bore the name of **MANCIPATION** (*d*). Since, however, it was only as the oldest and most usual form of transfer of Roman Ownership that the latter had any signification, so it was properly the capacity for that most complete form of Ownership that was denoted by the term **COMMERCIVM**: therefore also the capacity for **IN JURE CESSIO**, **Usucapion**, and the strict **Vindication**. But a farther development of that expression embraces likewise the capacity for **Servitudes** (which, like Ownership, are **JURIS QUIRITIVM**) as well as for many kinds of **Obligations** (*e*), and finally, and quite specially, for the **TESTAMENTI FACTIO**, that is to say the fundamental condition for the capacity to execute a Testament or Codicil, to be nominated an Heir, Legatee, or **FIDECOMMISSARIUS**, and to witness a Testament (*f*). So that those two technical expressions comprehended the largest and most important portion of Jural Capacity (*g*). Nevertheless all these propositions require to be conceived as subject to an important

(*d*) Ulpian, tit. 19, § 4, 5.

(*e*) Gaius, 111. § 93, 94.

(*f*) Ulpian, tit. 20, § 8, 14; tit. 22, § 1, 2; tit. 25, § 4, 6; Gaius, 11. § 285; L. 3, 8, 9, 11, 13, 19 *qui test.* (28, 1); L. 6, § 3; L. 8 § 2 *de j. codic.* (29, 7); L. 49. § 1 *de her. inst.* (28, 5); § 24 *J de legatis* (2, 20); L. 18 *pr. qui test.* (28, 1); § 6 *J de test. ord.* (2, 10).

(*g*) Generally it may be said that **CONNUBIUM** expressed capacity in the Family, **COMMERCIVM** capacity in regard to Property, except that it is important to bear in mind that those portions of artificial Family-relations which annex themselves to a Property-relation as a consequence thereof (§ 57), must here share the incidents of Property and not of the Family. Thus, for example, the **Latinus** had **COMMERCIVM** without **CONNUBIUM** (§ 66). Nevertheless he was capable of exercising mastery over **Slaves** and over a **MANCIPIVM**, of **Patronage**, of **Testamentary** and **DATIVA Tutelage**, as well as of authority over **COLONI**.

limitation. The capacity which was either ascribed or denied to a person by the application of the above expressions, referred only to the Institutes of law appertaining to the *JUS CIVILE*, so that they had consequently no signification in the province of the *JUS GENTIUM*. If, therefore, *CONNUBIUM* were denied to a person, the capacity for a Marriage and Kinship according to the *JUS GENTIUM* might still very well subsist side by side with the former incapacity. Just as, in like manner, one who did not possess the *COMMERCIVM* might none the less acquire Ownership according to the *JUS GENTIUM* (*h*).

(*h*) The practical application of these principles in regard to particular classes of Jural relations was variously developed according to existing needs. In regard to Ownership the formal principle that only certain classes (*CIVES* and *LATINI*) were capable of Roman Ownership, was maintained till Justinian's time, who abolished it; but the importance of the distinction between Roman and natural Ownership had long before ceased to exist. In regard to Obligations, owing to the needs of extended commerce, permission was very early obliged to be accorded to all classes to enter into them, so that the recollection of the rigour of the old law was only preserved partly in a small residuum of cases, note (*e*), and partly in the mere formalities of procedure. Gaius, IV. § 37. It was most clearly preserved in regard to Testaments, because the freedom of commerce did not involve the necessity of any development of the ancient rules on the subject, so that in this respect the strict principle is maintained in the Justinian law wholly unchanged. Note (*f*).

SECTION 65.

Restriction of Jural Capacity.

I.—Slavery.

All men, say the Romans, are either Free or Slaves (LIBERI AUT SERVI): this classification comes under consideration here solely with reference to its specially important influence upon Jural Capacity (*a*).

A general Incapacity for Rights is ascribed, for instance, to the Slave, not merely for the Institutes properly appertaining to the Civil Law, but also for those of the Praetorian Law and of the *JUS GENTIUM* (*b*). In this last relation, therefore, not only

(*a*) Undoubtedly the law of Slavery furnishes many other important sides, which nevertheless, in accordance with its plan, can find no place in the present work. In that law there is less need of a close determination of the contents and scope of Jural relations which is so important in regard to other laws, since the completely unlimited right of the Master renders any such special determination wholly superfluous. On the other hand it was important to define accurately the origin of the relation itself, and what follows are the only leading principles which need be here specified on the subject. The regular origin was that by birth; every Child was either born Free or a Slave, according as the mother was herself Free or a Slave. But a Freeman might become a Slave, in the first place by being captured in war, and secondly, in certain cases, by punishment. On the other hand it was impossible for him to become so by consent, therefore by contract.

(*b*) L. 20, § 7 *qui testam.* (28, 1) "SERVUS QUOQUE MERITO AD SOLEMNIA ADHIBERI NON POTEST, cum *Juris Civilis* communionem non habeat in totum, ne Praetoris quidem edicti;" L. 32 *de R. J.* (50, 17) "Quod attinet ad *jus civile*, servi pro nullis habentur: NON TAMEN ET JURE NATURALE, QUIA QUOD AD *JUS NATURALE* ATTINET, OMNES HOMINES *aequales* SUNT." For an explanation of the *JUS NATURALE* mentioned in the last text (taken from Ulpian), compare Appendix II. In both the above passages there is no express allusion to the *JUS GENTIUM*, nevertheless the uncontested applications cited in the text leave no doubt that the incapacity was also extended in that direction. In order, however, to avoid misunderstanding, I will add the following observations. The Roman writers unanimously assigned the origin of Slavery generally to the *JUS GENTIUM*, (§ 1, 4,) *de just. et jure.* L. 1, § 1

CONNUBIUM and COMMERCIUM were wanting for the Slave, but even the possibility of Marriage and Kinship, as well as of Ownership of every kind, natural no less than the strict Roman, were generally denied to him (c). Moreover, since the POTESTAS of a Master over his Slave has the effect of making the Slave not only qualified but bound to acquire every kind of property for the Master, so it might almost be said that the Jural Incapacity of a Slave was a mere consequence of this Involuntary Representation, and therefore derived from the POTESTAS. Indeed, several applications of the Jural Incapacity of a Slave may in fact be satisfactorily explained in this way: for when a Slave acquired Rights for his Master by means of Mancipation or Stipulation, he could not himself become thereby either an Owner or a Creditor. This derivation is nevertheless on the whole to be rejected, because the Incapacity for Rights extends much beyond that Representation, and has consequently a completely independent character, which can be incontestably proved in two ways. For, in the first place, the Representation only referred to the acquisition of Rights of Property; it did not, therefore,

de his qui sui; Gaius, I. § 52. The Representation of the Master by his Slave they apparently attributed not to the *JUS GENTIUM* but to the *JUS CIVILE*. *Law of Possession*, § 7, p. 82, 6th ed. There is nothing to show how they derived the Incapacity of Slaves; nevertheless it seems to me very natural to assume that this also, like Representation, was derived from the *JUS CIVILE*, especially since so many completely positive modifications were prescribed by it. If this was really the prevailing view, it should not be objected to as inconsistent, that this incapacity based upon the *JUS CIVILE* retarded the communion of the *JUS GENTIUM*, inasmuch as, for instance, a Slave was not even capable of natural relationship. The admission of this relation was rather justified partly by the common character of the *JUS GENTIUM* (§ 22), and partly confirmed by undoubted analogies, since, for example, a Marriage contracted against a legal prohibition of the *JUS CIVILE* was treated as absolutely no Marriage at all, not even operative according to the *JUS GENTIUM* (§ 12 *J de nuptiis* I, 10).

(c) L. 1, § 2 *unde cogn.* (38, 8) "NEC ENIM FACILE ULLA SERVLIS VIDEATUR ESSE COGNATIO;" L. 10, § 5 *de gradibus* (38, 10) "AD LEGES SERVILES COGNATIONES NON PERTINENT" (it had been previously pointed out that the common non-juristical style of speech also ascribes relationship to Slaves). Justinian was the first who modified this incapacity in its effect upon a Succession which opened out after Emancipation. § 10 *J de grad. cogn.* (3, 6)

prevent the Slave from contracting a Marriage, or having Kindred, as to which, nevertheless, he is entirely incapable. In the second place, there were Ownerless Slaves, who were therefore subject to no *POTESTAS*, and represented no one in acts of Acquisition, and who, notwithstanding, were as completely incapable of Rights as all other Slaves (*d*). According to the phraseology of Modern Jurists, one might have expected that the denomination *PERSONA* would have been altogether denied also to Slaves by reason of their general Outlawry, inasmuch as this expression was regarded as specially denoting a Man having a Jural Capacity. But the Romans commonly employed the expression referred to for every single individual without distinction, notably also for Slaves (*e*).

There still remain the few exceptions to be stated whereby the outlawed condition of Slaves was ameliorated (*f*). The most important of these consisted in the protection afforded to Slaves partly by penal and partly by police regulations against inhuman treatment. Such a protection was completely foreign to the Ancient Law. But as in consequence of the numerous conquests of war the number of Slaves increased beyond all measure, people were taught by a bloody experience how

(*d*) Concerning the cases appertaining hereto, see above § 55, note (*a*). The Jural incapacity of Ownerless Slaves is particularly clearly recognised in L. 36 *de stip. serv.* (45, 3).

(*e*) L. 215 *de V. S.* (50, 16) "IN PERSONA SERVI DOMINIUM;" L. 22 *pr. de R. J.* (50, 17) "IN PERSONAM SERVILEM NULLA CADIT OBLIGATIO;" L. 6, § 2 *de usufr.* (7, 1); Gaius, 1. § 120, 121, 123, 139. It was at a later period that this relation was expressly denied to the Slave. Thus for example *Nov. Theod.* tit. 17, "SERVOS . . . QUASI NEC PERSONAM HABENTES." Conf. Schilling, *Institutionem*, b. 2, § 24. Note (*g*).

(*f*) Among these exceptions are not to be included the capacity of Slaves to receive a Mancipation, to Stipulate, or to be instituted Heirs or Legatees in a Testament, for in such matters they were merely instruments of acquisition on behalf of their Masters, and therefore this form of capacity did not in any way lessen the outlawed condition of Slaves. It was otherwise with respect to the concession conferred upon State Slaves of disposing by Testament of half of their *PECULIUM* (Ulpian, xx. § 16); this was a real anomaly, by which that class of Slaves was almost assimilated to the condition of Freemen.

fraught with danger was a wholly cruel treatment of those who, by their numbers, had become a powerful class. So it came gradually to be held as a firmly established rule, that a cruel Master could not only be compelled to sell his maltreated Slaves, but could also be criminally punished. In particular, the killing even of one's own Slaves, if there were no justifying cause for it, was held to be punishable in the same manner as the killing of a Freeman (*g*). Strictly speaking, all these restrictions on the otherwise limitless power of a Master were not based on any right vested in the Slave; but they operated just as beneficially in improving the condition of Slaves as if such a right had been recognised.

The following exceptions occur in matters of Private Law. Relationship originating during the condition of Slavery was said to be recognised in a state of Freedom subsequently acquired, as the sole effect of a prohibited Marriage (*h*), although a right of Succession could never be based upon it. (Note *c*.) This recognition was doubtless based upon the ground that Relationship resulting from a prohibited Marriage is considered a purely human, and not a juristical relation. The incapacity for Ownership and other 'Things'-Rights was not restricted by any known exceptions. The rule was quite different, however, in regard to Obligations; for since the business of daily life was for the most part transacted by Slaves, who often in such matters acted independently, so it very naturally came about that the rigour of the old principles was softened in this respect. And yet even here a limit of all such possible modifications has to be considered. During the condition of Slavery a CIVILIS OBLIGATIO for the Slave was impossible, because he could never, either as a plaintiff or a defendant, appear before a court of justice; but a

(*g*) Gaius, 1. § 53; § 2 J *de his qui sui* (1, 8); L. 1, § 2; L. 2 *de his qui sui* (1, 6); L. 1, § 8 *de off. præf. urbi* (1, 12); L. 1, § 2 *ad.*; L. *Corn. de sic.* (48, 8); L. *un. C. de emend. servor.* (9, 14); *Coll. LL. Mos. et Rom.* tit. 3, § 2, 3, 4. Conf. Zimmern, *Rechtsgeschichte*, 1. § 180, where several other texts are collected together. Under this principle also fell the rule of L. 15, § 35 *de injur.* (47, 10).

(*h*) L. 8; L. 14, § 2, 3, *de ritu. nupt.* (23, 2); § 10 J *de nupt.* (1, 10).

NATURALIS OBLIGATIO by itself was certainly not impossible. Both **CIVILES** and **NATURALES OBLIGATIONES**, however, were conceivable for a Slave after Emancipation, as the after-effects of acts performed by him during a state of Slavery. The actual rules on the subject were, however, the following:—

I. A Slave could not ordinarily acquire Credits, because he was obliged to acquire, and, in point of fact, did acquire everything for his Master, so that no case remained in which he could himself become a Creditor. This principle, however, led to a very logical exception when a Master himself became his Slave's Debtor: in such a case an **OBLIGATIO** in truth arose but it was only **NATURALIS**. Consequently we must concede the same result for the case where the Slave was Ownerless.

II. A Slave might contract Debts notwithstanding the obstacle mentioned in regard to his own Credits, because, although he was able to acquire unconditional Rights for his Master, he could not as a rule impose Obligations upon him. Hence a Slave might by his contract become a Debtor as well to his Master as to a stranger; but this **OBLIGATIO** was only **NATURALIS** and continued so even after Emancipation. It was different in regard to the **DELICTS** of a Slave: if they were committed against the Master himself, they were less consequential than Contracts, that is to say they gave rise to no Obligation whatever: if a stranger were injured by them, they operated more extensively than Contracts, because the obligation arising from them could be made actionable even after Emancipation (*i*).

The Romans farther divided Freemen into those who were born Free and those who were Emancipated (**INGENUI ET LIBERTINI**), and it may be questioned whether these sub-divisions, in themselves important enough, had a precise significance in regard to Jural Capacity. Some such significance must un-

(*i*) The principal texts for the rules here specified are L. 7, § 18 *de pactis* (2, 14); L. 14 *de O. et A.* (14, 7); L. 64; L. 13 *pr. de cond. indeb.* (12, 6); L. 1, § 18 *depositi* (16, 3); L. 19, § 4 *de don.* (39, 5). The Romans treated this subject with great subtlety. A wider discussion of the principles enunciated above, and an explanation of the most difficult texts, will be found in App. IV.

doubtedly be asserted although in a subordinate degree. For the common relation of Citizenship was certainly decisive for a Freeman in all important matters: he therefore either had or was destitute of **CONNUBIUM** and **COMMERCIIUM** according as he happened to be a **CIVIS**, **LATINUS**, or **PEREGRINUS**, quite irrespective of his being a **LIBERTINUS**, and he consequently stood upon the same footing of Jural Capacity as one who was Free-born. Nevertheless this equality was restricted by the following not unimportant modifications. A *Civis* **LIBERTINUS** certainly enjoyed **CONNUBIUM**, that is the capacity to conclude a valid Civil Marriage, but he was nevertheless restricted in the choice of his wife (*k*). A *Latinus* **LIBERTINUS** (called *Latinus Julianus*) certainly possessed **COMMERCIIUM**, that is the capacity for Roman Ownership and especially for Mancipation, but the most important privileges of this capacity were again specially withdrawn from him by positive written laws. In like manner a *peregrinus* **LIBERTINUS** (*dediticiorum numero*) had generally the capacity for all Jural relations comprehended in the **JUS GENTIUM**, but in special cases, and particularly in relation to Succession, he was occasionally treated as occupying an inferior position as compared with a Free-born Foreigner (*l*).

(*k*) Such restrictions existed in the ancient law, although we do not know sufficient about their precise extent. Thus the *gentis enuptio* was once conferred as a personal privilege upon an individual Freedman at a time when all **LIBERTINI** enjoyed the **CIVITAS**. (Liv. xxxix. 9.) The **LEX JULIA** prohibited the marriage of Emancipated persons of both sexes with Senators and their descendants. Ulpian, XIII. 1; L. 44 *pr. de ritu nupt.* (23, 2). Comp. Appendix VII. II.

(*l*) The most important restrictions on Jural capacity in the case of the two last-mentioned classes may be seen in the following passages. Ulpian, XI. 16; XXI. 14; XXII. 3; Gaius, III. § 55—76.

SECTION 66.

Restriction of Jural Capacity.

II.—Want of Citizenship.

Two classifications of Men, belonging to different periods of time, were based upon the relation of individuals to the State, both of great influence on Jural Capacity.

The older classification ran thus: all Men are either *CIVES* or *PEREGRINI*; as regards Jural Capacity it had this meaning, that the *CIVES* enjoyed *CONNUBIUM* and *COMMERCIVM*, while the *PEREGRINI* had neither. Thus conceived the idea is completely negative, and it embraces also Men who are absolutely devoid of Rights, for instance, Slaves and the Citizens of a State with whom the Roman people have no friendly relations (*a*). But a positive combination may also be given to it, by which it certainly receives a greater usefulness in application. In that sense all those are called *PEREGRINI* who are incapable of rights according to the *JUS CIVILE* but capable according to the *JUS GENTIUM*, and in regard to whom this limited Jural Capacity was also recognized in the Roman Courts (*b*). Among them are included the following classes:—

(1) Before Caracalla the inhabitants of almost all the Provinces, and therefore the greater portion of the population of the Roman kingdom generally.

(2) Citizens of all foreign States who stood in a friendly relation towards the Romans.

(*a*) Therefore not merely after a declaration of war pronounced in accordance with international forms (*JUSTUM BELLUM*), but also when there had never been any mutual recognition between the two peoples. (L. 5, § 2 *de captivis* (49, 15). This explains why in the most ancient form of the language *hostis* denoted at the same time an *enemy* and a *foreigner*. Cicero, *De Officiis*, I. cap. 12; Varro, *De Lingua Lat.* lib. 5, § 3.

(*b*) The proof of this proposition will be found in the next note.

(3) Romans, who, as a result of punishment (e.g., Deportation), had lost their Citizenship (c).

(4) Freedmen, who on account of the special circumstances of their Emancipation, were not allowed to assert a higher Status (DEDITICIORUM NUMERO) (d).

The foreign character of the first two classes depended upon their general relation of Citizenship (to their Provincial Community or to their State), and therefore upon a politico-legal rule; that of the two last upon an anomalous degradation of individuals who were not members of some one Community of Citizens. (Notes (c) (d).) Thus it was that the foreign character of the former was not slighted, but was so in the case of the latter (e).

The Jural Capacity of the PEREGRINI according to the JUS GENTIUM displayed itself in all the forms of Jural relations. Their Marriage was a true MATRIMONIUM (f), only not JUSTUM.

(c) L. 17, § 1 *de poenis* (48, 19) "ITEM QUIDAM *ἀποπέμνται* SUNT, HOC EST SINE CIVITATE: UT SUNT IN OPUS PUBLICUM PERPETUO DATI, ET IN INSULAM DEPORTATI: *ut ea quidem, quae juris civilis sunt, non habeant, quae vero juris gentium sunt, habeant.*" The concluding words were here originally only asserted of Deported persons and others who had been deprived of Citizenship by way of punishment; but it was clearly of nothing peculiar to them, but rather of the common juristical character of all foreigners generally, who were not absolutely outlaws, which was here only mentioned in connection with the employment of PEREGRINI upon works by virtue of a punitive sentence, because the question related to this point alone. Conf. also L. 1, § 2 *de leg.* 3 (32).

(d) Ulpian, xx. 14 " . . . IS QUI DEDITICIORUM NUMERO EST, TESTAMENTUM FACERE NON POTEST . . . QUONIAM NEC QUASI CIVIS ROMANUS TESTARI POTEST, CUM SIT PEREGRINUS, NEC QUASI PEREGRINUS, *quoniam nullius certae civitatis sciens (leg. civitatis civis est), ut adversus leges civitatis suae testetur.*"

(e) These two classes occupied therefore amongst the PEREGRINI very nearly the same position as the SERVI SINE DOMINO amongst persons who were not free, namely, as individuals standing outside the larger connexion of the whole institute of Law.

(f) This was shown in several applications, especially in the relation of the Rule: PATER EST QUEM NUPTIÆ (not JUSTÆ NUPTIÆ) DEMONSTRANT, to such a Marriage. Thus, for example, it was permitted by a SENATUS-CONSULTUM for a Peregrinus, who had clearly no CONNUBIUM (Ulpian, v. 4), if he married a Roman female Citizen in ignorance of her condition, to acquire

Their Ownership was recognised and protected as natural Ownership (*IN BONIS*) (*g*). Their Jural Capacity, however, showed itself specially effective in the matter of Obligations, for they not only had, as might be expected, *NATURALES OBLIGATIONES*, but also *CIVILES*, that is to say Obligations protected by a legal Right of Action. It was probably owing to the very obvious need of an active intercourse with friendly neighbouring peoples that the development of these rules in regard to Obligations was entirely due. The transition to this larger degree of Jural Capacity was effected by the *CIVITAS* being assumed for the *PEREGRINI*, and thus their actions were annexed as *ACTIONES FICTITÆ* to those of the Roman Citizen (*h*).

A more modern classification is composed of the three following components: All men are either *CIVES*, or *LATINI* or *PEREGRINI*; thus a third class is introduced between the two classes of the more ancient classification. Its practical significance as regards Jural Capacity was as follows:—The condition of the *CIVES* and *PEREGRINI* remained unchanged as in the old classification. The *Latini*, however, might have a semi-Citizenship, the *COMMERCIIUM* without the *CONNUBIUM*. By a participation of the *COMMERCIIUM* they are allied to the first class, and by the absence of *CONNUBIUM* to the second. All these rules, however, were subject to the proviso of a special privilege, by means of which individual members of the second or third class could attain a higher Jural Capacity than apper-

CIVITAS by a lawfully begotten child. Ulpian, VII. 4; Gaius, I. § 68. In this Ordinance the marriage of the *Peregrinus* was undoubtedly regarded as an actual marriage, and the child as his actual child, which last proposition was absolutely impossible except by the application of the rule above cited. Here therefore were Roman Magistrates directly instructed by law to recognize the Jural Capacity which belonged to a *PEREGRINUS* in accordance with the *JUS GENTIUM*.

(*g*) This followed from the fact that the *ACTIO FURTI* and *LEGIS AQUILLÆ* were conceded to them (Gaius, IV. 37), which indeed were not available without a right in the stolen or damaged thing.

(*h*) Gaius, IV. § 37.

tained to them according to the strict rules of their own class (*i*). The signification of this privilege is somewhat ambiguous. Ordinarily the term is regarded as a favour shown to those particular persons whom it is intended thereby to honor or reward. But if this was the intention, why was not the much simpler means adopted of conferring the right and name of a higher class itself upon the favored individual? Had Citizenship been conferred upon him, which indeed the Emperors dispensed with no sparing hand, he would have acquired all those rights as a matter of course without a PRIVILEGIUM. The distinction was certainly significant in this respect, that the CONNUBIUM and COMMERCIIUM CONCESSUM were only personal, whilst Citizenship was always transmitted to the children subsequently born. But what was the reason why the enjoyment of the favor conferred upon the father was denied to his successors? As regards CONNUBIUM, we know the reason precisely. A person, in the service of the Roman State, who resided in a Province, could not, so long as that service continued, conclude a Marriage there (*k*). This prohibition also applied to Roman Citizens who were employed there as Soldiers of a Garrison. If, however, the latter had formed some sort of connexion, which after their dismissal from service could be converted into a Marriage, it was usual to confer upon such a Soldier, at the time of his dismissal, the right of CONNUBIUM with a PEREGRINA (or also with more than one, with the view of subsequent marriages), in order that his marriage might be rendered completely valid. Here in reality no consideration for the woman was aimed at, and the grant of the CONNUBIUM satisfied the object in view completely: indeed, it would have been often impossible to confer the right of Citizenship upon the woman, for it might happen that she was

(*i*) Ulpian, v. § 4 "CONNUBIUM HABENT CIVES ROMANI CUM CIVIBUS ROMANIS: Cum Latinis autem et peregrinis ita, si concessum sit;" Ulpian, XIX. § 4 "MANCIPIO LOCUM HABET INTER CIVES ROMANOS, ET LATINOS COLONARIOS, LATINOSQUE JUNIANOS, eosque peregrinos, quibus commercium datum est." Conf. Ulpian, XI. § 16; XX. § 8, 14; XXII. § 1—3; Gaius, I. § 56.

(*k*) L. 38, 63, 65 *de ritu nupt.* (23, 2); L. 6, C. *de nupt.* (5, 4).

unknown at the time of her husband's dismissal(*l*). This explanation is certainly only applicable to the **CONNUBIUM**, and not to the **COMMERCIVM CONCESSVM**. We are not acquainted with any special explanation for the latter; it is quite possible, however, that this concession was regarded as a necessary consequence of the **CONNUBIUM CONCESSVM** without being specially expressed: in which view it would likewise have to be referred to the case just explained, in order to facilitate those agreements which a Soldier was permitted to conclude with the woman or her father regarding property.

Concerning the time and mode of introducing this intermediate class, which led to the substitution of the more modern classification in place of the older one, we have no direct evidence, and thus it is that upon this subject we find no harmony amongst Moderns; in fact, for the most part no precise opinions whatever. During the long period which intervened between the foundation of Rome and her complete supremacy over Italy, the Jural relations existing between Rome and the Italian States were as numerous as they were variable. Thus the Jural condition which Rome conceded to Citizens of the Latin nation was sometimes higher, sometimes lower, according as it was brought about in each period by the vicissitudes of war. During the period referred to there were several intermediate ranks between Citizenship and the **STATUS** of Foreigners, which, however, can

(*l*) Gaius, 1. § 57 "UNDE ET VETERANIS QUIBUSDAM CONCEDI SOLENT PRINCIPALIBUS CONSTITUTIONIBUS CONNUBIVM CVM HIS LATINIS PEREGRINISVE, QUAS PRIMAS POST MISSIONEM UXORES DUXERINT, ET QUI EX EO MATRIMONIO NASCUNTUR, ET CIVES ROMANI, ET IN POTESTATE PARENTVM FIUNT." This law-institute, which completely lost its utility by Citizenship being made universal by Caracalla, has preserved a living appearance for us by a remarkable number of still existing original dismissals which are engraved upon small tables of bronze. Conf. the excellent treatise by Haubold and Platzeu (Haubold, *Opuscula*, vol. 2, p. 783—896), where the same are plainly transcribed. What Ulpian says, note (*l*), of such concessions being conferred not merely upon **PEREGRINI**, but also upon **Latini**, relates to the Legions quartered in Spain, for the whole of Spain obtained *Latinitas* from Vespasian (Pliny, *Hist. Nat.* III. 4), and we are not aware that in this matter any change was introduced before the general extension of Citizenship by Caracalla.

neither be reduced to any common principle, nor had they any permanent duration. Soon after the war of the Confederate States these distinctions vanished throughout Italy, in the old sense of this name (that is to say, excluding Lombardy, which was called GALLIA CISALPINA), because at first the Latins, and then the rest of the Italian States, were admitted to Citizenship. From this period, therefore, the Latin name merely denoted national descent, and no longer a special right. About the same time, however, it was found necessary to establish a new organisation for the Northern half of Lombardy (GALLIA TRANSPADANA), based on quite a new Jural relation, whilst the Southern half (CISPADANA) obtained Citizenship. The right of Latin Colonies was conferred on the Transpadanic towns without sending any fresh Colonists thither, though in a different and restricted sense from that which was understood by the old right of that name: their Citizens might have COMMERCIVM with Romans but not CONNUBIUM, and a person who held a Magistracy in his native city acquired thereby Roman Citizenship. Here, therefore, the term LATINUS received a purely juristical meaning, without any reference to national descent or domicile, and this was the form of LATINITAS which was denoted by the Classical Jurists as an intermediate or subordinate condition of the free inhabitants of the kingdom generally, the last vestiges of which were removed by Justinian (*m*). Indeed the original application of this right was soon discontinued in the Trans-

(*m*) The principal authorities which have been relied upon by Niebuhr for this very ingenious derivation of Latinitas (*Rom. Geschichte*, II. pp. 88, 93) are: Asconius, in *Cicer. in Pisonem init.*, and Gaius, I. § 79, 96; III. § 56. This historical derivation is more completely carried forward in my dissertation on the Tables of Heraclea (*Zeitschrift für geschichtl. Rechtswissenschaft*, vol. 9, pp. 312—321). The prescribed terms for that Jural relation were LATIUM, JUS LATII, LATINITAS. Gaius calls it MINUS LATIUM, in contradistinction to the more advantageous right which the old Latins enjoyed. The most ancient reliable mention of the LATINI and of LATINITAS in a juristical and not in an ethnographical sense, is found in Cicero (*Ad Att.* XIV. 12), and in the LEX JUNIA NORBANA; but the last affords no certain chronological date, inasmuch as the opinions of Moderns concerning its age vary by a full century from one another.

padanic Provinces, inasmuch as Citizenship was conferred upon them—but its name and Jural relation were still maintained to be applied elsewhere. Thus Vespasian conferred this *LATINITAS* upon the whole of Spain (note *(l)*), which was certainly the most extensive and most abiding instance of its general application, for in earlier times this Jural relation was applied to those Freedmen, whose Emancipation, for various reasons, could receive no complete operation (*n*).

The nature of the three classes of Roman political confederation has here been determined solely in accordance with their Private Law qualities, and without respect to the State's Law, which, in the time of the Republic, denied participation in the Assemblies of the People and the capacity for Roman Magistracies (*SUFFRAGIUM ET HONORES*), which belonged to a Citizen, to the Latin and the Peregrinus. These rights were unquestionably amongst the most important of all, and the effort to acquire them was the principal motive which led to the bloody Confederate War. From this it would seem as if these rights must be held to underlie the very notion of Citizenship. But this would be erroneous, both as regards the period of the Republic as well as of the Empire: as regards the former, because in that period there were also exceptionally *CIVES NON OPTIMO JURE*, that is to say, *SINE SUFFRAGIO*, and hence the notion of Citizenship generally was independent of the possession of those rights; as regards the Empire, because in this period those rights soon lost the high value which they had in

(*n*) These were the *LATINI JUNIANI*, who however were again deprived of the most important portions of the ordinary Jural capacity of the *LATINI* by the special provisions of the same *LEX JUNIA* which had raised them to the position of *LATINI*. Nevertheless it was in no empty sport that they were called *LATINI*, for the above anomalous restriction of their rights only affected them personally: their descendants enjoyed the ordinary Jural Capacity of the *LATINI* unrestricted. The *LATINI JUNIANI* and their descendants moreover occupied amongst the *LATINI* somewhat the same position as the *SERVI SINE DOMINO* amongst Slaves, or the *DEPORTATI* and the *DEDITICIORUM NUMERO* amongst the *PEREGRINI*. Note (*e*).

earlier times. On the other hand, the Private Law capacity for the three orders was the same always, and its value remained unchanged also in the completely altered political constitution of the States. It is not to be supposed that in the period of the Republic the possession of Political Rights served at most to distinguish the first class from the two others, but not the latter amongst themselves. If it was, however, solely with respect to the Private Law relation that the general and pervading distinction between the three classes consisted, then this distinction must also be strictly conceived, exactly as it has been represented here, as a distinct capacity of individuals to enter into certain Jural relations. Many indeed have brought the Private Law superiority of Citizenship into a completely erroneous connection with the vast excellence of the Roman Law, and have hence assumed that the efforts of the Confederates before the Italian War were specially directed with the view of securing for themselves the privilege of living in accordance with that excellent Law. This privilege, however, the Romans would never have denied to them, since it could only have been desired if the Confederates had approached them as Subjects in practice as well as in law, and had thus themselves acknowledged the Roman supremacy. The Italian War was not undertaken with the object of securing to the Italians the introduction into their States of the Roman forms of Marriage, Mancipation, and Testament: but what the Confederates claimed was undoubtedly, in the first instance, a participation in those Political Rights which have already been mentioned, though along with it also the possibility of entering into relationship with Roman families, of acquiring property from Romans by Mancipation or Testament, and thus by means of numerous Jural relations of sharing in the splendour and riches which the Romans might still more fully acquire in the steady progress of their State towards universal Sovereignty.

SECTION 67.

Restriction of Jural Capacity.

III.—Dependence on Family Power.

All men, say the Romans, are either *SUI JURIS* or *ALIENI JURIS*. We may denote this classification by the expressions Independent and Dependent.

The power over other Men, to which the notion of this dependence relates, appeared, however, amongst the Romans in entirely different Jural relations, each of which was distinguished from the others by denomination and rights. There were nominally three such relations, but, in point of fact, four. The three names which were originally given to these relations, which were everywhere completely uniform, and which also always maintained the same order unaltered, were: *POTESTAS*, *MANUS*, *MANCIPIUM*. *POTESTAS*, however, embraced two wholly different relations: *PATRIA* and *DOMINICA POTESTAS*. All these relations must here be exhibited in their influence upon Jural Capacity, and with this view it is advisable to deviate from the order just mentioned.

DOMINICA POTESTAS, or the dependence of a Slave upon his Master, does not come into consideration at present, because a Slave as such, and also when Ownerless, had a very distinct and extensive Jural Capacity, in which his dependence, springing out of the personality of a determinate Master, was almost completely lost sight of. Section 65.

Similarly *MANUS*, as the strict form of Marriage, produced no peculiar kind of restricted Jural Capacity; for since the Wife who stood in this form of Power was regarded juristically as the daughter of her husband, so her Jural condition coincided completely with that of a *FILIAFAMILIAS* (a).

(a) Gaius, II. § 159 “*IDEM JURIS EST IN uxoris PERSONA QUAE IN MANU EST, quia filiae loco est.*” Cf. I. § 114, 118; II. § 139; III. § 14. There

Lastly, **MANCIPIUM** was treated in accordance with the analogy of **DOMINICA**, and not of **PATRIA POTESTAS** (*b*).

We must therefore assume that the Jural Incapacity which was inseparably connected with **MANCIPIUM** was the same as in the case of Slaves, at least with regard to rights of Property, and, consequently, that it operated more rigorously and widely than that of children under Paternal Power. (Note *b*.) Hence, therefore, it undoubtedly comprised a special form of restricted Jural Capacity, peculiarly appertaining to the Family relation.

It was distinguished from a condition of Slavery only by this, that while the latter was regarded as a condition in itself, **MANCIPIUM** consisted in dependence upon a determinate, individual Head of a Family. It is also indisputable that during the continuance of the **MANCIPII CAUSA** the exercise of Political Rights was suspended, so that an Emancipated person could neither vote in the Assemblies of the People, nor act as a **JUDEX**, or witness a Testament (*c*). In matters of Family Law,

were undoubtedly two forms of **IN MANUM CONVENTIO**, **MATRIMONII CAUSA** and **FIDUCIAE CAUSA** (Gaius, I. § 114), and the Jural condition of a Daughter, in accordance with the texts cited, was connected with the first form. There still remains therefore the question how the Jural Capacity of a Woman as regards the **IN MANUM CONVENTIO FIDUCIAE CAUSA**, was constituted. We have no information upon this point, but it may be presumed that in this respect the two forms were not different from one another. Moreover this question is not important, because the **COEMPTIO FIDUCIAE CAUSA** was at all events based upon no permanent condition, but was only applied as a wholly temporary formality.

(*b*) Gaius, I. § 123 “**SERVORUM LOCO CONSTITUUNTUR;**” III. § 114 “**IDEM DE EO QUI IN MANCIPIO EST PRAEVALUIT, NAM ET IS SERVI LOCO EST.**” In the last text a direct application of this analogy is apparent. The Adstipulation of persons standing **IN MANCIPIO** is just as void as that of Slaves (**NIHIL AGIT**), and therefore altogether different from that of a **FILIUS-FAMILIAS**.

(*c*) Ulpian, XX. § 3—6, where the cases are accurately specified in which a Son might act as a witness for certain testaments, which presupposes his general capacity of giving evidence, proceeding by the contrast that a person **IN MANCIPIO** was usually incapable, because similar rules would otherwise have been given for his case. The witness of a testament represented, for instance, a class of the Roman people, and in this relation it was said “**TESTAMENTI**

on the other hand, he stood in a different position. His marriage continued to be regarded as a genuine lawful Marriage, and the children who were begotten by him during his dependence sometimes passed into the Power of the Grandfather, at other times into that of the Emancipated person himself after he had gained his freedom; but in no case did the children fall into the *MANCIPII CAUSA* of their father (*d*).

There now only remains to determine that farther restriction of Jural Capacity which arises from the dependence of the Child on Paternal Power, which is also the only one that has been transmitted along with the Roman Law to our own times, and which indeed is still traceable, although in a very modified form, in the most modern Law Codes.

The Paternal Power as a matter of course is one of the most important Jural relations which occupy a proper place in the Family Law, which deals with the origin and dissolution of this Power, as well as of the rights of the Father and of those of the Child, not only as regards rights which concern the Person, but also of those which relate to Property. We are here merely concerned to extract from this relation as a whole, the influence which asserts itself upon the Jural Capacity of a dependent Child.

The Jural Capacity of a Child subject to the Power of its Father may be stated in the following simple propositions:—
The Child was incapable of exercising in matters of Private Law

FACTIO NON PRIVATI SED PUBLICI JURIS EST." L. 3 *qui test.* (28, 1). Opposed to the assertion advanced in the text (regarding suspension of political rights) one might adduce with much force, L. 5, § 2; L. 6 *de cap. min.* (4, 5), according to which political rights could not be lost by any *MINIMA CAP. DEMIN.*, nor therefore by the *MANCIPII CAUSA*. But when these texts were composed the *MANCIPII CAUSA* was almost always purely symbolical and transitory, therefore the suspension was imperceptible. When, however, in ancient times a Roman emancipated his Son through poverty, in such a way that he was to serve the purchaser for a certain period, it is surely inconceivable that during this period of service any political right could have been asserted; after the Son's release to be sure the early right undoubtedly reappeared undiminished, for which reason I have only used the term *SUSPENSION*.

(*d*) Gaius, I. § 135.

any power or authority, in every other relation it was completely capable of Jural rights. Moreover this incapacity was not to be regarded as a defect indwelling in the Child itself, but simply as the result of the Rule of Law, according to which the Father acquired all rights which originated from the dealings of his Child.

It was therefore only in matters of Private Law, and not in those of Public Law, that such a restriction was observed. A Son might consequently, like the Father, vote in the Assemblies of the People, and be employed in the highest posts of honour (e).

In Private Law the Child has **CONNUBIUM** and **COMMERCIIUM**, therefore the highest capacity known to the Institutes of the old **JUS CIVILE**; but this capacity could not procure for the Child any form of present Power, as is shown very plainly in the following applications of the rule.

The Marriage of a Son is a valid Civil Marriage (**JUSTUM MATRIMONIUM**), but when it is contracted in **MANUM CONVENTIO** the Power over the Wife does not vest in her Husband, but in his Father. The Children of such a Marriage are **LEGITIME CONCEPTI**, and pass at birth into the Paternal Power, not indeed of the Father but of the Grandfather. A Child is thoroughly capable of Agnation. Dominion over Slaves cannot be exercised by a Child, because this is a case of Power properly so called. But a Son may hold the office of a Tutor, as it is a Public Office.

The Son has **COMMERCIIUM** and is therefore qualified to appear as a Witness in Mancipations and Testaments, in regard to which a Slave is completely disqualified. But he is neither able to have Ownership nor Servitudes.

The Son cannot become a Creditor, since it invests him with

(e) L. 9 *de his qui* (1, 6) "**FILIUSFAMILIAS IN PUBLICIS CAUSIS LOCO PATRISFAMILIAS HABETUR, VELUTI SI MAGISTRATUM GERAT, VEL TUTOR DETUR;**" L. 13, § 5; L. 14 *pr. ad Sc. Treb.* (36, 1) "**NAM QUOD AD JUS PUBLICUM ATTINET, NON SEQUITUR JUS POTESTATIS.**" Comp. L. 3 *de adopt.* (1, 7); L. 77, 78 *de jud.* (5, 1) and Livius, XXIV. 44; Gellius, II. 2; Valerius Max. II. 2, 4.

a real Power. But he is quite capable of contracting Debts; indeed they at once produce CIVILES OBLIGATIONES, and are therefore actionable (*f*). The principle underlying this distinction is, that a Son may generally enrich his Father, but not make him poor (*g*). These propositions undergo a modification, however, in regard to the reciprocal relation of indebtedness between a Father and Son: thus the latter may have Claims upon the Father, but only as NATURALES OBLIGATIONES. Conversely he may also become the Debtor of his Father, but similarly only in a NATURALIS OBLIGATIO (*h*). What was stated above (§ 65) in regard to Obligations between a Master and his Slave, equally applies therefore here. But in all these rules, which concern the Capacity or Incapacity for Obligatory Relations, no distinction is recognised between a Son and Daughter under Paternal Power, even in the Ancient Law. (Appendix V.)

The Rules just enumerated may, however, be resolved into the simple proposition, that a Child can generally have no active Rights of Property. But since a right of Inheritance, according to its nature and destination, is simply a collective expression for the totality of Property-Rights (although in particular cases a Succession might perhaps consist only of Debts), it farther results from that proposition that a Child, although possessing the TESTAMENTI FACTIO, is nevertheless not qualified to execute

(*f*) L. 39 *de O. et A.* (44, 7) "FILIUSFAMILIAS EX OMNIBUS CAUSIS TANQUAM PATERFAMILIAS OBLIGATUR, ET OB ID AGI CUM EO TANQUAM CUM PATREFAMILIAS POTEST;" L. 57 *de jud.* (5, 1); L. 44, 45 *de peculio* (15, 1); L. 141, § 2 *de V. O.* (45, 1); L. 8, § 4 *de acceptilat.* (46, 4). It is a wholly singular exception that a Son is not bound by a vote without the Father's consent. L. 2, § 1 *de pollic.* (50, 12).

(*g*) This Rule is only expressly declared for Slaves. L. 133 *de R. J.* (50, 17) "MELIOR CONDITIO NOSTRA PER SERVOS FIERI POTEST, DETERIOR FIERI NON POTEST," and in other similar texts. In this respect, however, Slaves and Children stood on the same footing.

(*h*) The possibility of a NATURALIS OBLIGATIO between a Father and Son underlies L. 38, *pr.* § 1, 2 *de cond. indeb.* (12, 6). The impossibility of Actions between them is expressly declared in L. 4, 11 *de jud.* (5, 1); L. 16 *de furtis* (47, 2).

a Testament (*i*): indeed, still farther, that the Child is generally incompetent to have an Heir (*k*).

If the limits of Jural Capacity here stated as regards Children in Paternal Power are compared with those above given (§ 65) in regard to Slaves, there will be found a certain similarity as well as some diversity amongst them. They resemble one another in the involuntary Representation of the Head of the Family in acts of Acquisition, from which again results an almost absolute Incapacity to have a personal Estate. They differ in this, that the incapacity of a Son has no other basis except the involuntary Representation just mentioned, and hence side by side with it he was, nevertheless, quite qualified to contract a Roman Marriage and Relationship, to be a Witness of a Testament, or a Guardian, and to have Actionable Debts; whilst the Slave was incompetent for all these relations, because his Incapacity, quite apart from that involuntary Representation of a determinate person, had a second and totally independent basis, namely, the absolute condition of Slavery in itself (*l*). It was a mere consequence of this difference that the existence of Ownerless Slaves was actually recognised, and indeed in a variety of ways, whilst FILIIFAMILIAS were absolutely incapable of recog-

(*i*) Ulpian, xx. § 10 "FILIUSFAMILIAE TESTAMENTUM FACERE NON POTEST, QUONIAM NIHIL SUUM HABET, UT TESTARI DE EO POSSIT." On the other hand he had the *testamenti factio*, for he might act as a Witness in regard to a Mancipation, and also as a LIBRIPENS and FAMILIAE EMPTOR. *Ibid.* § 3—6.

(*k*) L. 11 *de fidejuss.* (46, 1); L. 18 *de Sc. Maced.* (14, 6).

(*l*) This essential difference between the incapacity of Sons and Slaves nowhere shows itself so plainly as, according to Gaius (III. § 114), in regard to Adstipulations. An Adstipulation had this peculiarity that it was deemed to bind the parties personally; therefore the ADSTIPULATOR, in accordance with the intention of the contract, could acquire no right of action for a third person, but simply for himself or for nobody. Hence it was that with regard to a SERVUS ADSTIPULATOR it was said NIHIL AGIT, and with regard to a FILIUSFAMILIAS, AGIT ALIQUID: but the Son's right of action was suspended during POTESTAS, and was first enforceable on the death of the Father. Concerning CAPTIVUS DEMINUTIO mentioned in connection with this subject, see § 70 (*i*).

dition apart from an actually ascertained Father, upon whom they were dependent.

The restricted Jural Capacity of Children in Paternal Power, as here described, was the primitive form, but in course of time large modifications were introduced. The very first of these occurred in the beginning of the Empire, when a Son was permitted to create a personal Estate for himself by acquisitions made during Military Service (*CASTRENSE PECULIUM*), and indeed with respect to it to be treated, by a fiction, as an independent person (*SUI JURIS*). This new form of Capacity was at a later period extended to acquisitions gained in other branches of the Public Service (*QUASI-CASTRENSE*). Far more important in their scope, but exerting less influence on the Law itself, were the Exceptions introduced by the Emperor Constantine, and extended by Justinian into a general rule, with respect to the so-called *PECULIUM ADVENTITIUM* of the Moderns. From the time of their introduction but little remained of the earlier Incapacity to hold Property; the Child now actually possessed Property to a large extent, except that it was subject to entirely peculiar restrictions. Nevertheless this newly constituted Right must be regarded as simply a development of the earlier condition, without which it cannot be completely understood, and the special form of Jural Capacity described in the present Section cannot therefore be included amongst the antiquated, but only amongst the reformed Institutes, on which account its exposition belongs directly to the Modern Roman Law.

If we embrace under one general point of view what has here been said concerning dependence upon Family Power, we shall be able to distinguish two completely different degrees of restricted Jural Capacity—the one dependent upon Paternal Power, and the other upon *MANCIPIUM*. Everything, however, that has hitherto been asserted will become clearer by being summarised as follows: There are three grounds of restricted Jural Capacity, each of which again regulates three distinct degrees of such Capacity, in such a way that the first degree always denotes the

most favoured condition, or the absence of every restriction springing out of this ground. The degrees themselves are as follows :—

I.—In relation to Freedom.

- | | | |
|---------------|---|---------|
| A. INGENUI. | } | LIBERI. |
| B. LIBERTINI. | | |
| C. SERVI. | | |

II.—In relation to Citizenship.

- A. CIVES.
- B. LATINI.
- C. PEREGRINI.

III.—In relation to Family Power.

- | | | |
|--------------------------|---|---------------|
| A. SUI JURIS. | } | ALIENI JURIS. |
| B. FILII FAMILIAS. | | |
| C. QUI IN MANCIPIO SUNT. | | |

There are indeed still others who are ALIENI JURIS, such as Slaves and Married Women IN MANU: but the former belong to the first classification (I. C.), and the latter to the second grade of the third classification (III. B.); neither therefore constitutes a peculiar degree of Jural Capacity restricted by Family Power.

SECTION 68.

The threefold CAPITIS DEMINUTIO.

Three kinds of restricted Jural Capacity, each resting upon its own peculiar basis, have hitherto been mentioned. Their existence, especially their number (neither more nor less than three), is generally recognised by Moderns, but an attempt has been made by them to denote those three relations by the technical expressions STATUS LIBERTATIS, CIVITATIS, FAMILIAE, whereby the simple theory of the Roman Law has again been somewhat obscured. I have accordingly purposely avoided these expressions, which do not belong to the original Law Sources, and have reserved to myself the task of inquiring, in a suitable place, what is true or false in them.

Again, in those threefold degrees of Jural Capacity, individuals may experience numerous changes, sometimes of an advantageous and at other times of a disadvantageous character, since a Freeman may become a Slave, a Roman Citizen a Foreigner (PEREGRINUS), and the Head of a Family a Dependent Person, or conversely: the one may be called exaltation, the other a lowering, or degradation. Moreover these changes may arise sometimes from a natural, and at other times from a juristical cause; thus, for example, a Son may be freed from the Power of his Father as well by his Death as by Emancipation. The influence of these changes upon Jural Capacity requires no fresh specification, indeed it results as a matter of course from what has already been asserted; thus a Slave, for example, who has fallen from a state of Freedom into a condition of Slavery, has no different Jural Capacity from one who was born in Slavery.

Nevertheless a primitive legal concept underlies the equally

ancient expression *CAPITIS DEMINUTIO* (*a*), and the question arises, what is to be understood by it? It might be supposed that there could be no doubt about the matter, since the old Jurists themselves, in not a few passages, supply the explanation that it is a *STATUS MUTATIO* (*COMMUTATIO*, *PERMUTATIO*) (*b*). But very little is after all gained by this explanation, partly because the definition of *STATUS* again involves the greatest difficulties, and partly because, as the explanation itself suggests, in addition to the *MUTATIO* in each case, many other elements have also to be considered, which the authors of the definition certainly also contemplated but merely omitted to mention. Thus we find that this definition of the old Jurists, like so many others, does not carry us very far.

If we confine ourselves at first to the mere literal meaning of the words, it would appear that we must look for two essential elements in that legal concept: in the first place, a change in the *CONDITION OF A PERSON*; and secondly, such a change as operates to his *DETRIMENT*. This reminds us, however, at once of one half of the changes mentioned in the beginning of the present Section, namely of *DEGRADATIONS* in relation to *Jural Capacity*. And this conjecture obtains again a high degree of probability from the circum-

(*a*) In the manuscripts two forms of writing this word occur, *DEMINUTIO* and *DIMINUTIO*. Hugo asserts a decided preference for the last. *Rechtsgeschichte*, p. 121, 11th ed. The alphabetical arrangement of Festus seems to decide in favour of the former, for the word *DEMINUTI* stands betwixt *DE-MAGIS* and *DEMOK*. But this really proves nothing, because this strict arrangement was introduced by the editor of Festus, whilst in the manuscript all the words ran after one another in tolerable confusion. I see no reason to doubt that the ancients themselves may have actually written the word in both forms, and that therefore both are correct.

(*b*) Pr. J. *de cap. dem.* (1, 16); L. *de cap. min.* (4, 5) of Gaius; Ulpian, xi. § 13; L. 9, § 4 *de minor.* (4, 4) of Ulpian; Paulus, i. 7, § 2; III. 6, § 29; L. 2 *de in int. rest.* (4, 1) of Paulus; L. 28, C. *de liber. causa* (7, 16). In all these passages it is called *STATUS*, and as regards Gaius, i. § 159, it is an illegible text: *PRIORIS . . . PERMUTATIO*, which at my suggestion has been filled up by *capitis*, because a *p* was at least visible. The distinction between *MUTATIO*, *COMMUTATIO*, and *PERMUTATIO* is in itself unimportant; moreover the greatest diversity prevails in the reading of the manuscripts with regard to many of the texts cited, and mostly in regard to those of Justinian.

stance, that there is a threefold **CAPITIS DEMINUTIO**, just as we have seen above that there is a threefold restriction of Jural Capacity. Hence, therefore, we may generally conceive by **CAPITIS DEMINUTIO** some sort of diminution of Jural Capacity, and this undoubtedly, according to the three possible grounds of such changes, in relation to Freedom, Citizenship, and Independence, consequently in comparison with the Tables given at the end of Section 67. But this assumption still remains simply a probable one, and its truth can only be established by comparison with the actual scope which the Roman Jurists assigned to their doctrine of the threefold **CAPITIS DEMINUTIO**, to which comparison I shall now direct my attention (*c*).

The three degrees of **CAPITIS DEMINUTIO** are called, according to the simplest and most certain terminology, **MAXIMA**, **MEDIA**, **MINIMA** (*d*).

1. **MAXIMA**. Consists, according to the texts above cited, in the loss of Liberty, that is to say in the transmutation of a Freeman (**INGENUUS** or **LIBERTINUS**) into a Slave (*e*). The

(*c*) The most important texts are these: Gaius, I. § 159—163; Ulpian, XI. § 10—13, tit. J. *de cap. demin.* (1, 16); L. 11 *de cap. min.* (4, 5) (Paulus); Boethius, *In Ciceronis Top.*, C. 4 (on the whole correct, except that he erroneously includes Deportation in the **MAXIMA**).

(*d*) The following irregular terminology occurs along with that mentioned in the text: (1) The **MEDIA** is called **MINOR** by Gaius and in the Institutes (in both **MEDIA** is named at the same time); (2) The two higher degrees were clubbed together by Gaius under the name *maiores* (I. § 163), and by Callistratus and Ulpian under the name **MAGNA**. L. 5, § 3 *de extr. cogn.* (50, 13); L. 1, § 4 *de suis.* (38, 16); L. 1, § 8 *ad Sc. Tertull.* (38, 17). In contrast to this **MAGNA** Ulpian calls the lowest degree **MINOR**. L. 1, § 4 *cit.* From this it plainly appears that the expression **MINOR** is ambiguous, and ought therefore to be avoided. The expressions used above in our text leave no room whatever for misconception. In the passage quoted from L. 5, § 3 *de extr. cogn.* (50, 13), it is said: "**MAGNA CAP. DEM. . . ID EST CUM LIBERTAS ADIMITUR, VELUTI CUM AQUA ET IGNI INTERDICITUR.**" Here **LIBERTAS** is substituted for **CIVITAS**, in support of which other analogies elsewhere occur. Schilling, *Institutionen*, vol. 2, § 27. Note (*h*).

(*e*) Another case might still perhaps be reckoned, the transmutation of a Freeborn person into a Freedman. This case could only occur in the case of a Woman who married a foreign Slave with the consent of his Master (for if she did so without his consent she became herself a Slave). Tacitus, *Ann.* XII. 53; Paulus, IV. 10, § 2; Gaius, I. § 84; *Fragm. de Jure Fisci*, § 12. That this case was not mentioned in connection with **CAPITIS DEMI-**

opinion above expressed is here therefore completely and indisputably confirmed.

II. **MEDIA.** The following applications of this form occur:—

A.—According to the texts above cited the transmutation of a Citizen into a Foreigner (**PEREGRINUS**), *e.g.*, by Deportation.

B.—The transmutation of a Citizen into a **LATINUS** (*f*).

C.—The transmutation of a **LATINUS** into a **PEREGRINUS** is not indeed mentioned in express terms, but it may well be assumed that **DEPORTATION** produced a **CAPITIS DEMINUTIO** as well in the case of a Latin, as in that of a Roman Citizen (*g*).

So that the opinion we have just expressed is as distinctly verified also in the case of **MEDIA** as in that of the **MAXIMA** form.

III. **MINIMA.** The analogy of the first two cases would consistently lead to the following applications:—

A.—The transmutation of the Head of a Family into a **FILIUS-FAMILIAS**, *e.g.*, by **ARROGATION**, and, in the more Modern Law, by **LEGITIMATION**. That a change of this sort produces a **CAPITIS DEMINUTIO** has never been disputed (*h*).

B.—Degradation of a **FILIUS-FAMILIAS**, or of a Woman **IN MANU**, in the **MANCIPII CAUSA**. That such cases also partook of the character of the **MINIMA CAPITIS DEMINUTIO** seems indubit-

NUTIO may well be explained by its later origin and (probably) its rare occurrence. When it was regarded as a **CAPITIS DEMINUTIO** it was esteemed **MAXIMA**, not **MINIMA**; for, in regard to a Freedman, the condition of the *Libertinus* in itself (similar to that of Slavery) was, of course, in relation to the State, quite different from the relation to a particular Patron, and more important than the latter.

(*f*) Boethius, *In Ciceronis Top.*, C. 4 " **MEDIA VERO, IN QUA CIVITAS AMITTATUR, RETINETUR LIBERTAS, ut in Latinas Colonias transmigratio.**" Gaius (III. § 56) also mentions the same case, and still more distinctly than Boethius, only without employing the term **CAPITIS DEMINUTIO**. Comp. Cicero, *Pro Caecina*, C. 33.

(*g*) According to the law and terminology of a more ancient period the occurrence of Infamy might also be considered a **CAPITIS DEMINUTIO**, by reason of the loss of capacity for Political Rights; but in the period of the Classical Jurists it was regarded otherwise. This will be discussed below in regard to Infamy.

(*h*) L. 2, § 2 *de cap. min.* (4, 5); Gaius, I. § 162. In like manner the change of Jural condition arising to an independent Woman by her marriage **IN MANUM CONVENTIO**.

able, and this was the reason why the Emancipation and Adoption of a strange Child was regarded as a **CAPITIS DEMINUTIO**, because, according to their old forms, they were both always connected with a transfer by the **MANCIPII CAUSA** (*i*). If regard had not been paid to this circumstance, it is remarkable that Emancipation, whereby a Son became Independent, therefore in the end lost nothing with respect to his Jural Capacity, but rather gained by it, should nevertheless have been always, and quite commonly, treated as **CAPITIS DEMINUTIO**.

C.—Finally, the Degradation of the Head of a Family in the **MANCIPII CAUSA** might also be deemed to fall under this category; but such a Degradation was generally impossible, because Emancipation, from which the **MANCIPII CAUSA** could alone arise, could only happen in the case of a **FILIUS-FAMILIAS**, or of a Woman **IN MANU** (*k*).

Thus our opinion would seem, therefore, to be fully confirmed in regard to the **MINIMA** also, and at the same time the confirmatory proof might be completed by its application to all individual cases. That the idea of **CAPITIS DEMINUTIO** here maintained is nevertheless rejected by the prevailing opinion of modern teachers of Law, is partly to be accounted for by certain doubtful individual applications, and still more so by the conflicting explanations of Roman Jurists concerning the notion of **MINIMA CAPITIS DEMINUTIO**. This matter, however, opens out such a comprehensive field of inquiry, that in order not to break the connexion of what has been said here, it must be made the subject of a separate investigation. (App. VI.) In conclusion, it is only necessary to quote the text of a non-juristical writer who mentions the most important cases of **CAPITIS DEMINUTIO**, exactly in the same way as they result from our own hypothesis. Festus says in his lexicon, "**DEMINUTUS CAPITE APPELLATUR QUI CIVITATE MUTATUS EST** (*l*): **ET EX ALIA FAMILIA IN ALIAM**

(*i*) L. 3, § 1 *de cap. min.* (4, 5) "**CUM EMANCIPARI NEMO POSSIT, NISI IN IMAGINARIAM SERVILEM CAUSAM DEDUCTUS.**" Gaius, I. § 162, 1B, 4.

(*k*) Gaius, I. § 117, 118; Ulpian, XI. § 5.

(*l*) Conradi (*Parerga*, p. 174) would here substitute *multatus EST*, and this undoubtedly specious proposal is borrowed from *J. B. Pii Annotationes post C.*

ADOPTATUS: ET QUI LIBER ALTERI MANCIPIO DATUS EST: ET QUI IN HOSTIUM POTESTATEM VENIT: ET CUI AQUA ET IGNI INTERDICTUM EST."

We shall accordingly henceforth employ the expression *CAPITIS DEMINUTIO* to signify every Degradation in relation to Jural Capacity.

If, then, the view of *MINIMA CAPITIS DEMINUTIO* here contended for be accepted as correct, it necessarily follows that in the Justinian Law the only surviving instance of it is Arrogation. This is indeed absolutely indisputable, because *MANUS*, like the *MANCIPII CAUSA*, had long since disappeared as an independent, existing relation. But Emancipation also could no longer be regarded as a *CAPITIS DEMINUTIO*, which, properly speaking, must have logically resulted from the circumstance that the Emancipated person was no longer transferred by a formal *MANCIPII CAUSA*. Indeed Justinian ordained that notwithstanding it the Father could retain his right of Patronage (*m*); but that was merely not to abridge his right of Succession, for which, moreover, according to the law of the Novels, no artificial protection was any longer necessary. On the other hand, Justinian himself had already expressly prescribed that Agnation was not destroyed by Emancipation (*n*); still earlier, however, Agnation had lost all its practical value by the newest legislation concerning Inheritance. In the sense, therefore, of the Justinian Law, Emancipation could no longer be considered as a *CAPITIS DEMINUTIO*.

44. This substitution must nevertheless be rejected for this reason, that the case would otherwise be identical with the *AQUAE ET IGNIS INTERDICTIO*, mentioned at the end of the text; therefore wholly superfluous, and with a very unnatural separation of the two texts. The *CIVITATE MUTATUS* is a Roman who willingly relinquishes his right of Citizenship, in order to become a Citizen in a Foreign State. Comp. Cicero, *Pro Balbo*, C. 13 "NE QUIS INVITUS CIVITATE MUTETUR;" C. 18 "UT ET civitate ILLUM mutatum esse FATERETUR;" Livius, v. 46 "MUTARI FINIBUS;" L. 7 *pr. de cap. min.* (4, 5) "FAMILIA MUTATI." Comp. Gronov, *Obs.* III. 1.

(*m*) L. 6, C. *de emancipat.* (8, 49).

(*n*) L. 11; L. 13, § 1, C. *de leg. hered.* (6, 58).

SECTION 69.

The Effects of CAPITIS DEMINUTIO.

The effects of the very diverse events which are here comprehended together under the general term of *CAPITIS DEMINUTIO*, are for the most part so produced, that they result as a matter of course from the nature of the individual changes. When, for example, a Roman Citizen lost his Freedom (*MAXIMA CAPITIS DEMINUTIO*), it was of course understood that he was thereupon relegated to the very restricted Jural Capacity of a Slave, and that he could therefore no longer preserve either his earlier Marriage and Cognation, or his former Property. In like manner, an Arrogated person lost, not indeed his Marriage and Cognation, but in truth his Property. All this necessarily followed from the restrictions above set forth on the Jural Capacity of Slaves and Children. What therefore happened in such cases with respect to rights of Property was simply what would have happened if those rights had, in the first instance, been acquired subsequent to such a *CAPITIS DEMINUTIO*, consequently similar to what the Romans expressed in regard to a Testament by the natural rule, *QUAE IN EAM CAUSAM PERVENERUNT, A QUAE INCIPERE NON POTERANT, PRO NON SCRIPTIS HABENTUR* (a). But if nothing except this was meant, there was no occasion at all to speak of the special effects of *CAPITIS DEMINUTIO*; indeed, there would have been transmitted to us in that phrase only a useless and inconvenient technical expression. In point of fact, however, the converse of this must be maintained; the ex-

(a) L. 3, § 2 *de his quae pro non scripto* (34, 8). The same rule occurs frequently in other applications. L. 11 *de iud.* (5, 1); L. 11 *de serv.* (8, 1); L. 16 *ad L. Aquil.* (9, 2); § 6J *de nox. act.* (4, 8). Some dispute this rule, but apparently only so far as relates to its unconditional universality, inasmuch as exceptions to it are said to have been admitted. L. 98 *pr.*; L. 140, § 2 *de l. O.* (45, 1); L. 85, § 1 *de R. J.* (50, 17).

pression is to be considered as something quite independent, having its own positive effects, which must now be stated. The idea underlying the whole concept was, in short, apparently this, that every form of *CAPITIS DEMINUTIO* converted, as it were, the person who suffered it into a new man. This distinction of the twofold effects of *CAPITIS DEMINUTIO* lies on the surface of the thing itself, and is also manifested by the otherwise wholly useless technical expression; it is not expressed by the Roman Jurists, who, although they were certainly accustomed to give special prominence to positive effects in particular cases, yet did so in such a way as to largely mix up with them that which, if separately considered, could not be strictly admitted as appertaining to the special incidents of *CAPITIS DEMINUTIO*.

In the *MAXIMA* and *MEDIA CAPITIS DEMINUTIO* those peculiar and entirely positive effects are less evident, because here the largest and most important number of them are already produced, partly by the condition of Slavery and *PEREGRINITAS*, and partly by the confiscation of Property occurring in the most frequent cases, and which again partakes of quite a special character, and is altogether independent of *CAPITIS DEMINUTIO* (*b*).

(*b*) Since this is a point of importance, but one by no means recognised, the following observations may be worthy of attention. Confiscation, like the universal Succession of the *Fiscus* in regard to Property, is a positive development of fixed Criminal Penalties, and not the natural consequence of *CAPITIS DEMINUTIO*: in the first place, because it can only be generally admitted with certainty since the period of Augustus (for before that period wholly different consequences occurred in regard to Property), whilst *CAPITIS DEMINUTIO* is a Primitive Law. In the second place, because it only happens in consequence of a penal Sentence, thus, for example, it is quite certain that it is not imposed on a *CIVIS* who suffers the *MEDIA CAPITIS DEMINUTIO* by entering into a *COLONIA LATINA* (§ 68). In the third place, because from the general character of the change of the Jural condition involved by the *MAXIMA* and *MEDIA CAP. DEM.*, the Succession of the *Fiscus* to the property did not certainly result. For a Deported person (*MEDIA C. D.*) was supposed rather, according to the general character of his new condition, to preserve his former property, inasmuch as a free *PEREGRINUS* is capable of possessing property. And even in regard to the *SERVUS POENAE* (*MAXIMA C. D.*), although the property is no longer deemed to belong to him, as he is wholly incapable of possessing property, it is nevertheless supposed, according to

Only two legal principles call for special notice in this place. The two higher forms of *CAPITIS DEMINUTIO* are often assimilated to Death, and that is what modern Jurists are accustomed to designate as Civil Death (*MORS CIVILIS*). This assimilation prevails not only in the case of the *MAXIMA C. D.*, but also in that of the *MEDIA*, where the latter is the consequence of a punishment (*c*). It was employed to prevent, amongst other things, the many burdensome consequences of Caducity; it was by no means, however, limited to this object (*d*), but prevailed rather much more generally, and notably in order that a Deported person, just as a Deceased person, might not be able to exclude the right of Succession of remote Cognates, or the patronistical Succession of his Children. (Note (*c*.) Moreover, the influence of *MEDIA C. D.* upon Family Relations, especially in the case of Deportation, requires to be more closely defined. It is in regard to the Marriage of a Deported person (man or woman) that a consistent treatment is particularly observable, for that connexion ceases to be recognised as a Civil Marriage, which required Citizenship for both spouses, but continues (when the parties so wish) to be deemed a Marriage according to the *JUS GENTIUM* (*e*).

general principles, to be Ownerless, because the *Fiscus* is not the Master of such a Slave, and therefore has no claim to Succession in regard to his estate.

(*c*) I. In regard to the *MAXIMA*. L. 209 *de R. J.* (50, 17) "*SERVITUTEM MORTALITATI FERRE COMPARAMUS*;" L. 59, § 2 *de condit.* (35, 1) "*SERVITUS MORTI ADSIMILATUR*;" L. 5 *pr. de bonis damn.* (48, 20).

II. In regard to the *MEDIA*. L. 1, § 8 *de B. P. contra tab.* (37, 4) "*DEPORTATOS ENIM MORTUORUM LOCO HABENDOS*;" L. 4, § 2 *de bonis libert.* "*DEPORTATUS . . . MORTUI LOCO HABETUR*." It is here pointed out that at times the *MAXIMA C. D.* might have a more feeble effect, as, for instance, when a Roman fell into captivity, his Patronistic right of Succession remained meanwhile suspended by reason of a possible *POSTLIMINIUM*. L. 13, § 1 *de don. int. v. et ux.* (24, 1); L. 63, § 10 *pro socio* (17, 2) is erroneously cited as an authority where Death rather denotes something different from the *MAXIMA* and *MINIMA C. D.*, and is only placed in juxtaposition with them in regard to a particular effect.

(*d*) The relation to Caducity is exhaustively pointed out, but too narrowly applied, by Cujacius, *Obser.* XVII. 13. Cf. also Schulting, *Notae in Dig.* L. 209 *de R. G.* (50, 17).

(*e*) L. 5, § 1 *de bonis damn.* (48, 20); L. 21, C. *de don. int. v. et ux.* (5, 16); L. 1, C. *de repud.* (5, 17). This was therefore based simply on a consistent

That every tie of Agnation of the Deported person is destroyed is undoubted, because this is not conceivable without Citizenship. On the other hand, it is noteworthy that even his Cognate relationship is said to perish (*f*), although it is expressly admitted that a mere juristical event (so long as Freedom continues) can not destroy the natural tie of blood (*g*). It is certain, however, that the rule concerning the destruction of Cognate relationship is merely an inaccurate expression. Cognation itself continues to exist, but its most important juristical effects are extinguished: thus, in particular, the Deported person can neither himself assert a claim to Cognatic Succession, nor obstruct that of a more remote Kinsman. (Note (*c*.) But that Cognation is not extinguished as an impediment to Marriage, seems to follow as a matter of course, because in this respect the impediment arose even in a condition of Slavery, and continued to operate ever afterwards (§ 65).

It is wholly different in regard to the MINIMA CAPITIS DEMINUTIO (*h*). True certain effects occur in this case also, which must of course be understood according to the character of the particular act; thus, for example, an Arrogated person necessarily loses his Property, because he enters into a condition in which it is alike impossible for him either to possess, or to acquire, such rights of Property (§ 67).

On the other hand, there are many other effects, similar to the

application of general principles: on the other hand it was certainly a *JUS SINGULARE*, and the result of an indulgent treatment, that (according to the same texts) the Dotal rights were allowed to be preserved, for, properly speaking, every Roman *Dos* presupposed a valid Civil Marriage.

(*f*) 6J *de cap. dem.* (1, 16) "SED ET, SI IN INSULAM QUIS DEPORTATUS SIT, COGNATIO SOLVITUR;" L. 4, § 11 *de gradibus* (38, 10). In the passage last quoted Affinity was also stated to be annulled, which is certainly not intelligible according to the explanation given in the text in regard to Cognation. L. 17, §. 5 *ad Sc. Treb.* (36, 1) is not applicable, for it simply relates to the interpretation of a *FIDEICOMMISSUM*, therefore to the probable intention of the Testator.

(*g*) § 3J *de leg. adgn. tut.* (1, 15); L. 8 *de R. J.* (50, 17), and other texts.

(*h*) The distinction between the effects of the lowest and of the highest degree of *C. D.* is generally recognised in L. 2 *pr.*; L. 7, § 2, 3 *de cap. min.* (4, 5).

effects of the **MAXIMA** and **MEDIA CAPITIS DEMINUTIO**, which cannot be explained in this simple manner, and the reason of this distinction is the following:—The higher degrees of **CAPITIS DEMINUTIO** are altogether simple and always uniform events. They comprehend the loss of Freedom and that of Citizenship, neither more nor less. The **MINIMA CAPITIS DEMINUTIO** is not of so simple a nature. If one compares Arrogation with Emancipation, the former will be found to be completely opposed, both in its destination and consequences, to the latter, since Paternal Power is produced by the one and destroyed by the other. Nevertheless, since they bear a common designation, to which certain general effects are also attached, it seems to be clear that, in regard to such effects, **CAPITIS DEMINUTIO** must be conceived as itself an independent cause, without reference to whether, in an individual case, it is connected with subjection to Paternal Power, or conversely, with liberation from that Power.

It will now be expressly shown, in the first place, that the **MINIMA CAPITIS DEMINUTIO** only operated in matters of Private Law. When, therefore, a Magistrate, or a Senator, or a Judge was either Arrogated or Emancipated, this circumstance had no influence upon his public functions (*i*). In matters of Private Law, however, the following effects are visible.

I.—Family-law.

A Civil Marriage, which existed before the **CAPITIS DEMINUTIO**, continues also thereafter unchanged: this is undoubtedly the case as regards Arrogation or a completed Emancipation. In the state of transition, during the **MANCIPII CAUSA**, the point may perhaps be open to some doubt, and yet even in this case the continuous efficacy of Marriage is distinctly recognized (§ 67 (*d*)).

Agnation is, however, completely destroyed by every **MINIMA CAPITIS DEMINUTIO**, whilst Cognation, on the contrary, subsists

(*i*) L. 5, § 2; L. 1 *de cap. min.* (4, 5). With what limitations this proposition was perhaps understood in ancient times has already been stated, § 67. Note (*c*).

unchanged (*k*). This rule prevails under all circumstances, and therefore in regard to Arrogation (*l*), Adoption, and Emancipation. This must, at the same time, be regarded as one of the very special effects: for instance, in the case of an Emancipated person, it is not to be presupposed as a matter of course, for it is quite possible to conceive a release from Paternal Power without the destruction of the Agnatic relation in the Collateral branches. Justinian did not abolish this effect of *CAPITIS DEMINUTIO* generally: for instance, not in the case of Arrogation: he merely ordained that Agnation should not be extinguished by Emancipation (*m*). But by his later legislation Agnation is so largely deprived of every important influence, that this question, as a whole, has lost almost all practical interest.

GENTILITAS was similarly extinguished, that is to say, every *MINIMA CAPITIS DEMINUTIO* necessarily destroyed the relation between the *DEMINUTUS* and his former Gentiles (*n*).

(*k*) Gaius, I. § 158, 163; III. § 27; Ulpian, XXVIII. § 9—§ 3 J *de leg. agn. tut.* (1, 15), § 1 J *de adquis. per adrog.* (3, 10); L. 6 *de cap. min.* (4, 5); L. 8 *de R. J.* (50, 17).

(*l*) In regard to Arrogation, however, there is a restriction to be noticed. The Arrogated person carries his children along with him into the Power of the new Father; their Agnation therefore was not lost to him, but is revived again to a certain extent in the new family.

(*m*) L. 13, § 1, C. *de leg. her.* (6, 58). In the event of the death of the Emancipated person, his *HEREDITAS* passes to the Brothers and Sisters (as Agnates) and not to the Father (as Patron).

(*n*) Cicero, *Top.* § 6 "*GENTILES SUNT QUI INTER SE EODEM NOMINE SUNT . . . Qui capite non sunt deminuti.*" Cicero primarily only had in view an Emancipated person, and he intended to guard against the error of it being supposed that by retaining the *NOMEN* unchanged, such a person would continue in the *GENS* in which he was born. That an Adopted or Arrogated person no longer remained in the *GENS* of his Birth was indisputable by the *NOMEN* being relinquished, but might he not enter into that of the new Father (just as certainly as in his Agnation), whose *NOMEN* he undoubtedly adopted? According to Cicero's language we are obliged to deny this, for he undoubtedly suffered a *CAPITIS DEMINUTIO*; in regard to an Adopted person it might indeed be supposed that the transitory *MANCIPII CAUSA* had rendered him incapable for life of standing in the pure and lofty relation of some *GENS*, but in regard to the Arrogated person even this ground of doubt did not exist,

Patronage perished as well by the CAPITIS DEMINUTIO of the Patron, as by that of the Freedman. This will be farther pointed out below as regards particular rights conditioned thereby (Tutelage, OPERARUM OBLIGATIO, Succession) (*o*).

Tutelage is only cancelled by the MINIMA CAPITIS DEMINUTIO of the Guardian, when it is LEGITIMA, and, in fact, derived from the most Ancient Law (the Twelve Tables); the LEGITIMA derived from the more Modern Law, the Testamentary, and the DATIVA, still continue (*p*). The CESSICIA also terminates in the same manner as the LEGITIMA (*q*). The CAPITIS DEMINUTIO

and it is therefore most natural to assume that Cicero was only thinking of Emancipation.

(*o*) By MAXIMA and MEDIA C. D. the right of Patronage was also naturally destroyed; but by the subsequent pardon of the condemned culprit it might, however, be again revived. L. 1 *de sent. possis.* (48, 23).

(*p*) L. 3, § 9; L. 5, § 5 *de legit. tutor.* (26, 4); § 4 *J quib. modis tut.* (1, 22); L. 11 *de tutelae* (27, 3); L. 7 *pr. de cap. min.* (4, 5) "TUTELAS ETIAM NON AMITTIT CAPITIS DEMINUTIO, *exceptis his, quae in jure alieno personis positae deferuntur.*" The very ambiguously expressed exception in this text has rightly aroused much speculation from early times. Some explain it as a clumsy circumlocution for AGNATIS, so that POSITIS then would be equivalent to REMANENTIBUS USQUE AD MORTEM PATRIS, or, Kinsmen who had not lost their natural Agnation (*i. e.* of Birth). Cf. Conradi, *Parerga*, p. 190; Rudorff, *Vormundschaft*, vol. 3, p. 238. Hence the Scholiast of the *Basilikon* says: notwithstanding the circumstance that the expression was not merely inexcusably ambiguous, but absolutely incorrect. For according to it such Tutors at the time of the transfer of the Tutelage must stand in the Power of a stranger (POSITIS DEFERUNTUR), which, however, was quite impossible. Others restrict the exception to a CAP. DEM. by a DATIO IN ADOPTIONEM. Mühlenbruch, *A. L. Z.* 1835, No. 77, p. 609. By that, however, all logical connexion would be destroyed, inasmuch as at first an exception would be stated as apparently the only one, and then a second and more important one would be specified below. Others read with Haloander: NON DEFERUNTUR, by which a completely simple and satisfactory sense is secured, but which, like all the singular readings of Haloander, as a mere conjecture, ought not to be regarded as decisive. Huschke, *Rhein. Museum*, 7, p. 68. The result is the same according to the first and third explanations, doubtful in itself and incompatible with other texts; according to the second, something new but little probable. Ulpian, XI. 9, speaks too curtly and generally of each of the LEGITIMA TUTELA, without mentioning the exceptions of the NOVAE LEGES.

(*q*) Gaius, I. § 170.

of a Pupil necessarily extinguishes Tutelage in all cases, inasmuch as it cannot be conceived as occurring otherwise than by Arrogation, which at once subjects the Pupil to Paternal Power, and consequently renders him incapable of every form of Tutelage (r).

(r) L. 2 *de leg. tutor.* (26, 4), § 4 J *quib. modis tut.* (1, 22).

SECTION 70.

The Effects of CAPITIS DEMINUTIO—(continuation).

II.—Things'-rights.

Ownership is not destroyed by *CAPITIS DEMINUTIO*. That the Arrogated person ceases to exercise it, because it passes from him to his new Father, is not only no contradiction, but a distinct confirmation of this proposition, because it is obvious that Ownership could not pass to another if it was actually destroyed by *CAPITIS DEMINUTIO* (a). An Emancipated person, however, who had acquired a *CASTRENSE PECULIUM* whilst he was still subject to Paternal Power, certainly remains the owner thereof, notwithstanding the *CAPITIS DEMINUTIO* which he had suffered.

It is wholly different in regard to *PERSONAL SERVITUDES*, such as *USUFRUCTUS* and *USUS*. In order to make this quite clear the following Rule must be premised. If such a Servitude were conferred upon a person subject to Family Power (a Son or a Slave), the Father or Master would acquire it, although it was a matter of controversy whether its duration should be limited to the lifetime of the dependent person, or during the continuance of his dependence: it would seem that according to the prevailing opinion the Servitude ceased when the Son died or was emancipated, or when the Slave died, or was sold, or liberated. Justinian prescribed the contrary, so that a Father or a Master could now preserve a *USUFRUCTUS* which had once been acquired notwithstanding all these changes (b). Along with the above Rule there exists the completely different proposition of the Ancient Law, that the *USUFRUCTUS* is absolutely

(a) In precisely the same way it is explained in Gaius, III. § 83, in contradiction to *Usufructus*.

(b) *Fragm. Vat.* § 57; L. 5, § 1; L. 18 *quib. modis us.* (7, 4); L. 15, 17, *C. de usufr.* (3, 33).

extinguished by every **CAPITIS DEMINUTIO**, even the **MINIMA**; a Rule which was abolished by Justinian as respects the **MINIMA** (c). According to the Ancient Law the destruction of the Servitude happened in the following cases: When a Usufructuary was Arrogated, in which case the **USUFRUCTUS** did not, like absolute Ownership, pass to the new Father (d); and in like manner when a son, who had acquired the **USUFRUCTUS** as a **CASTRENSE PECULIUM**, was Emancipated (e). This destruction of the personal Servitude was altogether the peculiar consequence of the **CAPITIS DEMINUTIO**, and was by no means the necessary result of a mere change of condition, because, as regards the **CASTRENSE PECULIUM**, its continuation in the person of the Usufructuary would have been natural enough, and even in the case of Arrogation it was to be expected that the **USUFRUCTUS** would pass to the new Father, exactly in the same way as if it had been first acquired subsequent to Arrogation. Concerning the special law relating to anomalous Personal Servitudes (**HABITATIO** and **OPERÆ**), the matter will be discussed in Section 72.

III.—Obligations'—rights.

In the matter of **CREDITS** (*forderungen*) the effect of **CAPITIS DEMINUTIO** was not for the most part visible, because in the case of Arrogation they were transferred to the new Father, while in that of Emancipation, they could not have previously existed in favor of the Son. Nevertheless there were certain cases in which the Credits of the person Arrogated were neither transmitted to the Father, nor preserved for himself, but were absolutely destroyed by the mere **CAPITIS DEMINUTIO**. Amongst these was the **OPERARUM OBLIGATIO**, solemnly under-

(c) L. 1 *pr. quib. modis us.* (7, 4), that is to say *Fragm. Vat.* § 61—§ 1 J *de adqu. per arrog.* (3, 10). In this text alone was **USUS** also expressly mentioned. Gaius, III. § 83; Paulus, III. 6, § 29; L. 16, § 2, *C de usufr.* (3, 33); § 3 J *de usufr.* (2, 4); L. 1 *de usu et us. leg.* (33, 2). Here the words **EX MAGNA CAUSA** are interpolated.

(d) Gaius, III. § 83 (**ARROGATIO** and **COEMPTIO**); Paulus, III. 6, § 29. (**ARROGATIO** and **ADOPTIO**): the last appertains to the text cited in note (b).

(e) L. 16, § 2, *C. de usufructu* (3, 33).

taken by a liberated Slave, which it was everywhere allowed could only be combined with a present subsisting right of Patronage (*f*), and must consequently be annulled with the Patronage itself (§ 69) (*g*); probably also the new Claim which arose out of a LITIS CONTESTATIO, when an Arrogated person gained a dispute by a LEGITIMUM JUDICIUM previous to his Arrogation (*h*). To the same class also belonged an anomalous case connected with Emancipation. If a Son concluded an Adstipulation whilst he was subject to Paternal Power, the Right of Action arising thereout was not acquired for the Father but for the Son himself; it was, nevertheless, meanwhile suspended and only became enforceable on the death of the Father: but just as the Paternal Power was terminated by Emancipation, so that Right of Action was wholly destroyed by CAPITIS DEMINUTIO (*i*).

As regards DEBTS, on the other hand, the peculiar influence of CAPITIS DEMINUTIO is brought out very forcibly, because, according to the old Law, Debts were completely cancelled by every MINIMA CAPITIS DEMINUTIO (*k*). Since, moreover, a Son in Paternal Power is able to bind himself just as validly as if he were Independent (§ 67), so it might be expected that a CAPITIS DEMINUTIO would not produce any change in this respect, and thus its destructive force appears here as something entirely distinct (*l*). An Arrogated person, therefore, is freed from his Debts without their being transferred to the Father, and an Emancipated person is freed in like manner, although before

(*f*) L. 56, *pr. de fidej.* (46, 1); L. 7 *pr. de op. libert.* (38, 1).

(*g*) Gaius, III. § 83; L. 1 *J de adqu. per arrog.* (3, 10).

(*h*) Gaius, III. § 83; the text is incomplete. The explanation which Huschke (*Studien*, I. 277) offers of the matter appears to me not to be properly founded.

(*i*) Gaius, III. § 114. Comp. above § 67, notes (*b*) and (*l*); also § 74, note (*h*).

(*k*) Gaius, IV. § 38 and III. § 84; the last text with the very excellent Restitution by Göschen.

(*l*) Donellus, XXI. 5, § 22, and in like manner Glück, VI. p. 26, maintains the IMAGINARIA SERVILIS CAUSA in regard to Emancipation as the sole ground of the destruction, and denies the latter therefore in regard to Arrogation: this opinion is at once refuted by the text of Gaius. Note (*k*).

Emancipation he was not only bound by them, but could also be sued upon them (§ 67).

This important proposition, however, needs to be still more closely defined, and to be restricted by several Exceptions. In the first place, the extinction of the Obligation refers only to the Civil Law element in it, in fact, to its Actionable side, for as a *NATURALIS OBLIGATIO* its existence is continued (*m*). Indeed, the *PRÆTOR* guarded against even the destruction of the *CIVILIS OBLIGATIO* by a Restitution of the lost Right of Action (*n*). By means of this Restitution, therefore, Arrogated and Emancipated persons could be sued upon their former Contracts, which otherwise would not have been possible; it was unconditionally pronounced, because it could only afford protection against a hardship resulting from the literal severity of the old Civil Law. Along with that Restitution, however, another possible form of the same relief is mentioned, namely, when the contract was concluded subsequent to the *CAPITIS DEMINUTIO* (*o*). This sounds somewhat vague, because both an Arrogated and an Emancipated person were anyhow qualified to conclude binding Contracts. It is also expressly added that a Restitution of this kind is only granted occasionally (*INTERDUM*), and, for instance, not to have been needed in the case of an Arrogated person, inasmuch as the latter, like every other *FILIUSFAMILIAS*, and quite apart from it, could legally bind himself by his Con-

(*m*) L. 2, § 1 *de cap. min.* (4, 5). See also note (*o*).

(*n*) L. 2, § 1; L. 7, § 2, 3 *de cap. min.* (4, 5); L. 2 *de in int.* (4, 1); Gaius, III. § 84; IV. 38. That this was a genuine Restitution is expressly declared in the texts quoted, and also by Paulus, I. 7, § 2. But it was of an anomalous sort, very different from that granted in the case of Minors. See also notes (*w*) and (*x*).

(*o*) L. 2, § 2 *de cap. min.* (4, 5) "HI QUI CAPITI MINUUNTUR, EX HIS CAUSIS QUAE CAPITIS DEMINATIONEM PRÆCESSERUNT, MANENT OBLIGATI NATURALITER: CETERUM SI POSTEA, IMPUTARE QUIS SIBI DEBEBIT, CUR CONTRAXERIT, QUANTUM AD VERBA HUIUS EDICTI PERTINET. SED *interdum*, SI CONTRAHATUR CUM HIS POST CAPITIS DEMINATIONEM, DANDA EST ACTIO. ET QUIDEM, SI ADROGATUS SIT, NULLUS LABOR: *nam perinde obligabitur ut filiusfamilias.*"

tracts (*p*): the same rule also certainly prevails for an Emancipated person. The exceptional case, which is alone alluded to in the text cited, must be referred to a Contract concluded during the *MANCIPII CAUSA*, and, therefore, during a condition which, even in a later period, certainly only presented itself as a transitional one. By such a Contract a Son would most certainly not have been bound *CIVILITER* (§ 67); but the other contracting party was obliged to impute the loss to himself, because he could have acquainted himself with the actual legal condition of his Debtor; occasionally (*INTERDUM*), however, there might be ground for excusable ignorance in this matter, and then a Restitution took place (*q*).

There were, nevertheless, also some exceptional cases in which, even according to the Old Law, Debts were not extinguished, so that in such cases there was no need for a Restitution. Among them were included, in the first place, Obligations arising out of Debts (*r*), which even with respect to Slaves pro-

(*p*) See preceding note. In the case of Arrogation another form of action was available against the Father, the *ACTIO DE PECULIO*. L. 42 *de peculio* (15, 1). There is no question, however, of this Action here, but only of the Action against the Arrogated person himself.

(*q*) If it be assumed that the old Jurist expressly referred to this case, and that the Compilers omitted mention of the obsolete law-institutes, the ambiguity of the text will be quite naturally explained. Cujacius, *Obser.* VII. 11, refers the text to a Contract with a married woman *IN MANU*, who could not bind herself, and from which the contracting party who was ignorant of the *MANUS* would be relieved. He assumes therefore that a *FILIUSFAMILIAS* could not ordinarily bind himself according to the Old Law, inasmuch as the *AUCTORITAS TUTORIS* was impossible. This opinion is refuted in Appendix V. and with it falls to the ground at the same time the explanation of our text which has just been mentioned. The entire text in fact has from early times suffered much not only from unsatisfactory interpretation, but also from groundless interpolation; even the words *NULLUS LABOR* ("in regard to the Arrogated person there exists no difficulty") might not be unsuited to the language of Ulpian. Cf. also Plinius, *Hist. Nat.* XXVI. 72 "*PHRENETICOS SOMNUS SANAT . . . E DIVERSO LETHARGICOS excitare labor est, HOC PRAESTANTE . . . PEUCEDANI SUCCO.*"

(*r*) L. 2, § 3 *de cap. min.* (4, 5) "*NEMO DELICTIS EXUITUR, QUAMVIS CAPITATE MINUTUS SIT.*"

duced Actionable Obligations (§ 65). In the next place, a Debt arising out of a Deposit, when the Debtor continues in possession of the thing subsequent to the *CAPITIS DEMINUTIO* (s). Thirdly, Debts arising out of a Succession acquired by an Arrogated person prior to his Arrogation: for the Succession was then transmitted to the adoptive Father, therefore also *IPSO JURE* the Debts which were included in it (t). But the known Exceptions were confined to these matters. There are indeed still many other cases also mentioned in which enforceable Obligations were preserved after the *CAPITIS DEMINUTIO*, some without any closer specification, others with the addition, however, that the *EXCEPTIO SC. MACEDONIANI*, or the so called *BENEFICIUM COMPETENTIE*, might be raised by the person Emancipated (u). But in all these numerous texts we must always presuppose the Prætorian Restitution, which indeed was granted commonly and unconditionally.

What position, however, does this entire doctrine assume in the Justinian Law? It had, indeed, long before lost all practical significance by reason of the Prætorian Restitution. In truth it might be contended that even in other cases, for example, with respect to Minors, there was a great distinction between the validity (or invalidity) of a Jural relation regarded by itself, and when connected with a Restitution. But the importance of this distinction lay in two circumstances: in the first place, the Prætor usually reserved to himself the right to deal with the matter according to a free consideration of the circumstances (v); in the second place, the Restitution was usually subject to a short period of limitation. In the Justinian Law both these matters were treated quite differently: for an

(s) L. 21 *pr. depos.* (16, 3). The connexion of this exception will be made clear below, § 74. See particularly § 74, notes (g) and (r).

(t) Gaius, III. § 84. See also note (k).

(u) L. 2 *pr.*; L. 4, § 1; L. 5 *pr.*; L. 7 *quod cum eo* (14, 5); L. 9, C. *ead.* (4, 26); L. 3, § 4 *de minor.* (4, 4); L. 1, § 2 *de Sc. Mac.* (14, 6); L. 58, § 2 *pro soc.* (17, 2). Cf. as to this last text, § 74, note (c).

(v) L. 1, § 1 *de minoribus* (4, 4) "*Uti quaeque res erit, ANIMADVERTAM.*"

Action for Debt was allowed against the *CAPITE DEMINUTUS* unconditionally, without the proviso of any special inquiry (*w*); and this Action was not subject to any limitation (*x*). Justinian in fact found the ancient rule of law concerning the extinction of Debts by *MINIMA CAPITIS DEMINUTIO* already stripped of all its practical significance, and this condition of things was so little overlooked in his legislation, that the rule in question was remarkably enough not distinctly expressed in it, so that we can only primarily prove its existence, directly and positively, from Gaius. We might certainly infer its existence from the Justinian Law; in truth it was not consistent to admit the Prætorian Restitution, and to pass over with silence the old rule of Law by which alone a Restitution became necessary: but the same procedure was adopted here as in so many other doctrines, because it was desired to abolish as little as possible of the formal contents of the early Law. It was sufficient that the texts of the old Jurists, according to their latest practical phase, which were inserted in the Title *DE CAPITE MINUTIS*, could still prevail as true (which of course was the case), although in a summary of the surviving Law, in the manner in which they were expressed, they might no longer be properly suitable. The *MAXIMA* and *MINIMA CAPITIS DEMINUTIO* had a wholly different effect upon Obligations. Here the former Debtor became freed for ever; on the other hand, the Debt was not extinguished but passed, as if by a Bequest, to whomsoever the Property devolved, which was not unfrequently the *FISCUS*. If the condemned person were subsequently pardoned, and again restored to Citizenship, a Restitution was nevertheless not allowed for the Action upon the old Debt (*y*). It was only when along with his pardon his Property was also restored to him, that the earlier Debt-Actions revived,

(*w*) L. 2, § 1 *de cap. min.* (4, 5) "JUDICIUM DABO," without the addition occurring elsewhere, "CAUSA COGNITA."

(*x*) L. 2, § 5 *eod.* "HOC JUDICIUM *perpetuum* EST," &c.

(*y*) L. 2 *pr.*; L. 7, § 2, 3 *de cap. min.* (4, 5); L. 30 *de O. et A.* (44, 7); L. 47 *pr. de fidejuss.* (46, 1); L. 19 *de duobus reis.* (45, 2). Cf. as to the last text the *Notae in Dig.* by Schulting.

and then they did so immediately without the Praetorian Action of Restitution (s).

IV.—Succession.

A Testament becomes *IRRITUM* when the Testator suffers either *ARROGATION*, or a *MAXIMA* or *MEDIA CAPITIS DEMINUTIO* (a). On the other hand, if a Son in Paternal Power makes a bequest of his *CASTRENSE PECULIUM*, the Testament does not become invalid by Emancipation (b). It cannot, therefore, be said generally and unconditionally, that every *CAPITIS DEMINUTIO* annuls the Testament of the Testator.

Intestate Succession is destroyed by the *MINIMA CAPITIS DEMINUTIO*, in so far as it is based upon the Law of the Twelve Tables, but not, on the other hand, when it is derived from the new Law (c). If, therefore, one of two *AGNATES* suffered such a *CAPITIS DEMINUTIO*, neither could succeed to the other: in the same way a Patron lost his right of Succession, either when he himself or his Freedman underwent a *CAPITIS DEMINUTIO* (d). On the other hand, the mutual *HEREDITAS* between a Mother and her Children, derived from the *SENATUS-CONSULTUM*, is not affected, although the Mother or Child may have suffered a *MINIMA CAPITIS DEMINUTIO*. Still farther, however, was the Praetorian Succession of such persons independent of such a change, with the exception, naturally, of the *B. P. UNDE LEGITIMI*, so far as the same depended upon the Law of the Twelve Tables. The abrogation of that Old Law of Intestate

(s) L. 2, 3 *de sent. passis* (48, 23); L. 4, C. *ead.* (9, 51).

(a) Ulpian, xviii. § 4; Gaius, ii. § 145;—§ 4 J *quib. mod. test.* (2, 17); L. c. § 5—12 *de injusto* (28, 3). This was according to the strict Civil Law. The Praetor upheld the Testament only if the earlier condition was recovered again before death. Ulpian, xxii. § 6.

(b) L. 6, § 13 *de injusto* (28, 3); L. 1, § 8 *de B. P. sec. tab.* (37, 11).

(c) Ulpian, xxvii. § 5; L. 1, § 8 *ad Sc. Tert.* (38, 17); L. 11 *de suis* (38, 16); L. 1 *unde legit.* (38, 7); L. 7 *pr. de cap. min.* (4, 5); § 2 J *de Sc. Orphit.* (3, 4).

(d) Specially as to this case consult Ulpian, xxvii. 5; Gaius, iii. § 51. Comp. also L. 2, § 2; L. 23 *pr. de bon. lib.* (38, 2); L. 3, § 4, 5 *de adsign. lib.* (39, 4).

Succession was the necessary consequence of the rule, which has already been stated above, according to which Agnation itself, and even Patronage, as the conditions of Succession according to the Twelve Tables, were destroyed by every **MINIMA CAPITIS DEMINUTIO**.

If, then, we sum up briefly what has been said above concerning the peculiar effects of **MINIMA CAPITIS DEMINUTIO** as such, it will be seen that the following are to be regarded as the most decisive as well as the most important : the destruction of Agnation, Patronage, Personal Servitudes, and Debts.

SECTION 71.

*Anomalous Rights in relation to JURAL CAPACITY AND
CAPITIS DEMINUTIO.*

There are not a small number of Rights in regard to which the Rules above established concerning Jural Capacity and CAPITIS DEMINUTIO are more or less inapplicable. The ground of this inapplicability lies in this, that those Rights, although similar in their form with other Rights, have nevertheless more to do with Natural or Political, than with Juristical Beings (the Subjects of Private Law relations), so that everything is said to be done by their means which is not affected by the Jural Incapacity already described. These anomalies occur most frequently and completely with respect to Rights of Property; moreover, a Right of Action becomes thereby possible where, in accordance with established Rules, it could not have been predicated; and finally, in relation to the FILIUSFAMILIAS and the MINIMA CAPITIS DEMINUTIO; nevertheless they are not by any means strictly confined within these limits. Above all things we must guard against the possible misconception, that all the cases appertaining hereto stand on the same footing, to such a degree that it is almost impossible to discern the exact limits of Jural Capacity in each instance. A more convenient and common sense view is rather to be taken of this matter, whereby, in regard to individual Rights of this kind (according to their particular needs), sometimes a more, and sometimes a less, divergence from the Rule of Jural Capacity is produced. We must therefore be cautious not to generalize too much here, and we should only recognise this as the one common principle of the Institutes referred to, that they have a less Juristical character than the ordinary Law Institutes. This peculiarity is very strikingly expressed by a Roman Jurist, in a special case apper-

taining to this subject, thus: *IN FACTIO POTIUS QUAM IN JURE CONSISTIT* (a).

In cases of this sort the following peculiarities are likewise observable, which by themselves have no direct relation to Jural Capacity.

(1) Non-transmissibility is a feature common to all these cases (with perhaps a single exception). Only particular Rights, and in fact Rights of Property, are proper subjects of transmission. If therefore the Subject of such an anomalous relation happens to die, the relation itself, which referred to him alone (as an individual), must necessarily perish. It would be quite wrong, however, to reverse this proposition, and to assume a non-juristical nature in regard to all the non-transmissible relations here spoken of. Paternal Power, Usufructus, Juristical Possession, are non-transmissible, but they are nevertheless genuine and proper Jural Relations, and therefore entirely subject to the general rule of Jural Capacity.

(2) Not indeed for all, but for several and important cases of this kind, there was an *ACTIO IN BONUM ET AEQUUM CONCEPTA*, but, on the other hand, wherever we find this form of Action, there must also always be admitted the above anomalies, and particularly the excluded influence of *CAPITIS DEMINUTIO* (§ 72, note (j)). This point, however, requires a closer discussion. From early times the prevailing notion has been that this Action was naught else than one which depended upon the free rules of Equity, therefore upon the *JUS GENTIUM*, and not upon the strict Rules of the Roman *JUS CIVILE*. Moreover, the expression *BONUM ET AEQUUM* itself has no other signification, and when therefore the question simply concerns the fundamental origin of a disputed Right, it should not be otherwise conceived. Thus, for example, it is said of the *CONDICTIO: EX BONO ET AEQUO HABET REPETITIONEM*, and *EX BONO ET AEQUO INTRODUCTA* (b); and no one will doubt that *CONDICTIONES* are pure Rights of Property, transmissible, subject to all the restrictions of Jural Capacity, and,

(a) L. 10 *de cap. min.* (4, 5).

(b) L. 65, § 4; L. 66 *de cond. indeb.* (12, 6).

therefore, wholly unconnected with the anomalies here dealt with. But the rule is otherwise with regard to the Result of an Action, especially when the question relates to the more or less uncontrolled discretion of the Judge in reference to the purport and scope of his decision. Three forms of judicial decisions were known to Roman procedure:—

(a) *STRICTI JURIS JUDICIUM*, when the decision was directed to a *CERTA PECUNIA*. The Praetor fixed a certain sum of money in the Formula, and the *JUDEX* had simply the choice of either awarding that amount, or of absolving the Defendant altogether: he was not at liberty to increase or diminish it.

(b) *BONAE FIDEI* and *ARBITRARIA JUDICIA*. Here the amount for decision was not specified in the Formula, but was left to the discretion of the Judge, which was likewise called a *BONUM ET AEQUUM* discretion (*c*). The arbitrary power of the Judge was however restricted in another manner, namely by a necessary regard to the interests of the Plaintiff, whose real claim could always be ascertained by the known relations of commerce. Since, therefore, the decision was not regulated here by the Praetor, but by the subject matter of the Claim, so it might well be conceived that in such Actions two equally competent Judges would always pronounce judgment for the same sum.

(c) Of an entirely different nature are the Actions appertaining to this class. In them the Judge is controlled neither by the Praetor nor by the subject matter of the Claim, but his discretion is so absolutely unfettered that it would be owing to a purely accidental circumstance if two Judges, equally honest and intelligent, happened to agree upon the same sum (*d*). This unusually

(c) § 30 *J de act.* (4, 6) “*Ex bono et aequo AESTIMANDI;*” § 31 *ead.* “*PERMITTITUR JUDICI Ex bono et aequo . . . AESTIMARE QUEMADMODUM ACTORI SATISFIERI OPORTEAT.*” The same rule prevailed in regard to the *STRICTI JURIS ACTIO* when this was directed against an *INCERTUM* (though perhaps with somewhat less freedom of discretion).

(*d*) This was most evident in regard to the Action for Injury (Gaius, III. § 224), in which undoubtedly the determination of the sum depended upon a subjective sense, therefore upon the determination of the quantum of amends, and had absolutely no similarity, for instance, to a contract of purchase. But

wide judicial discretion is denoted in texts most carefully composed by the expression *ACTIO IN BONUM ET AEQUUM CONCEPTA*. At the first glance one might perhaps be led to doubt if such a distinctive force should be ascribed to the adjective *CONCEPTA*, but such a seemingly subtle conclusion may nevertheless be justified in the following way. By the use of the word *CONCEPTA* it is denoted that the allusion to *BONUM ET AEQUUM* was actually contained in the Formula; for instance, it was conveyed in the words *QUOD AEQUIUS MELIUS*, which were inserted in the Formula relating to the *ACTIO REI UXORIAE* (*e*) (probably the oldest case of this kind), and, in regard to several cases subsequently admitted into the Edict, in the less ancient expressions *QUANTI AEQUUM* or *QUANTI BONUM AEQUUM JUDICI VIDEBITUR* (*f*). This portion of the Formula was intended to express the unusual freedom of judicial discretion, whereby such Actions were distinguished from the regular *BONAE FIDEI ACTIONES* (*g*). When, therefore, an Action is distinctly denominated in the Roman Law as one *IN BONUM ET AEQUUM CONCEPTA*, there is no doubt that the anomaly above stated appertains to it. But this strict phraseology was not always observed by the old Jurists (*h*), who

that the same relation, although less apparent, was also found in many other cases, will be shown below.

(*e*) Cicero, *Top.* C. 17; *De Officiis*, III. 15. A distinct allusion to this expression occurring in the Edict is found in L. 82 *de solut.* (46, 3); L. 66, § 7 *sol. matr.* (24, 3). Concerning the similarity or otherwise of this Action with other like forms of Action, comp. § 72, note (*e*).

(*f*) This expression is found in the following Edictal texts: L. 1 *pr. de his qui effud.* (9, 3); L. 42 *de aed. ed.* (21, 1); L. 3 *pr. de sepulchro viol.* (47, 12).

(*g*) There is therefore no inconsistency if the *ACTIO REI UXORIAE*, which (by reason of the words *AEQUIUS MELIUS*) was *IN BONUM ET AEQUUM CONCEPTA*, is nevertheless also included among the *BONAE FIDEI ACTIONES* (§ 29 *J de act.* 4, 6). For there might prevail in regard to it whatever was generally prescribed for *B. F. ACTIONES*, plus a more extended freedom of judicial discretion.

(*h*) The denomination *ACTIO IN BONUM ET AEQUUM concepta* occurs only in regard to two Actions: (1) the *ACTIO REI UXORIAE*, L. 8 *de cap. min.* (4, 5); (2) the *ACTIO SEPULCHRI VIOLATI*, L. 10, *de sepulchro viol.* (47, 12). Moreover, that every Action which assumed this character was always at the same time free from the operation of *CAPITIS DEMINUTIO*, is expressly stated in L. 8, *de cap. min.* (4, 5). See also § 72, note (*g*).

not unfrequently employed in the same sense the more common and more indefinite expression: *EX BONO ET AEQUO EST ORITUR* (i); and inasmuch as its ambiguity has already been made evident, we should not deduce from it alone the anomalous character of an Action, which is always primarily deducible in such cases upon other grounds (k).

It has already been remarked that the Anomalous Rights which are here spoken of consist for the most part of ACTIONABLE RIGHTS, and, more particularly, of such as a FILIUSFAMILIAS can exceptionally enforce. In order to make this quite clear in individual applications, the Actionable Capacity of a FILIUSFAMILIAS must, as a preparatory step, be more closely determined than it has been described above in the general exposition of his ordinary Jural Capacity (§ 67). The FILIUSFAMILIAS may, for instance, be considered.

I. AS A DEFENDANT, and either—

(a) *In his own name*, in which case there is no difficulty,

(i) As for instance in: (1) the Action for Injury, L. 11, § 1 *de injur.* (47, 10), in which from several allusions there is no doubt that the words *BONUM AEQUUM* occurred in its formula. L. 18 *pr. eod.*; L. 34 *pr. de O. et A.* (44, 7). (2) The *Actio De Effusis*, L. 5, § 5 *de his qui effud.* (9, 3), and in regard to this action we know from the Edictal text itself that those distinctive words stood in the formula. L. 1 *pr. eod.* In this respect the *FUNERARIA ACTIO* was very remarkable. It not only originated *EX BONO ET AEQUO*, but the *judex* exercised in it an extremely wide discretion (L. 14, § 6 *de relig.* (11, 7)); it was nevertheless a customary Property Action, and our anomaly did not prevail with regard to it. Hence, too, it was not *IN BONUM ET AEQUUM concepta*, that is to say, not merely that this denomination was not applied to it (which might even be accidental, as in the case of the Action for Injury), but we know from the text containing the Edict, that those words were not embodied in its formula. L. 12, § 2 *de relig.* (11, 7).

(k) Cujacius has rightly recognised the peculiarity of the *ACTIO IN BONUM ET AEQUUM concepta* as different from the simple *D. F. ACTIONES*, and connected with the formula *AEQUIUS MELIUS*, and he has likewise correctly applied it to four kinds of Actions: *DE DOTE (REI UXORIAE), INJURIARUM, DE EFFUSIS, and SEPULCHRI VIOLATI*. Cujacius, *Obscr.* XXII. 14, and almost verbatim to the same effect in the *Comment. on Paulus, ad Edictum*, in L. 9 *de cap. min.* (Opp. T. 5, p. 161). He has not however given the matter the full scope which belongs to it, and by which alone it can be understood in its true light.

since a *FILIUSFAMILIAS*, just as fully as an Independent person, can stand in a perfectly valid Debt-relation, and be sued upon it (§ 67); or—

(b) *In his father's name.* A Son, like any stranger, can be appointed a Procurator by his Father (*l*), but otherwise, just like any stranger, he is not qualified to represent the latter when sued. For instance, it would be altogether erroneous to admit that a Son could even undertake for his Father, without authority, the *ACTIO DE PECULIO* created by himself. He may, indeed, have brought about the Action, but as soon as it has once arisen he has no more connection with it, and it assumes the same character as any other Debt of the Father.

II. AS A CLAIMANT :

(a) *In his father's name.* In this case also a Son, like any one else, can be appointed a Procurator for his Father (note (*l*)), but otherwise, as a rule, he is not authorized to represent the latter in such a proceeding. This may be illustrated by the case of a *PECULIUM* given to a Son by his Father, which by no means involves the authority to enforce by Action before a Court of Justice the Rights embraced in it (*m*). In exceptional cases, however, a Son may at times bring a *UTILIS ACTIO* as his Father's presumptive Procurator, when the Father is absent and the Action would otherwise be lost, or would at least have to be deferred for a long period. Amongst other cases this is permitted in Actions arising out of Thefts, Personal Injuries, Loans, Deposits, and Mandates, especially when the Injury or other

(*l*) L. 8 *pr. in f.* ; L. 35 *pr. de proc.* (3, 3).

(*m*) A remarkable reminiscence presents itself in L. 8, *pr. C. de bon. quae lib.* (6, 61). In regard to the so-called *ADVENTITIUM EXTRAORDINARIUM* the Son always required, in order to be able to sue, the Father's consent, but the Father could be compelled to grant it, and it was therefore an empty formality in the memorials of the Ancient Law. "*NECESSITATE PER OFFICIUM JUDICIS PATRI IMPONENDA TANTUMMODO FILIO CONSENTIRE, VEL AGENTI, VEL FUGIENTI, ne judicium sine patris voluntate videatur consistere.*" The words *VEL FUGIENTI* (as a Defendant) seem to have crept in through an oversight, caused by a false appearance of consistent completeness: for a Son could certainly be sued according to the Old Law by himself alone, without the Father's knowledge, or even against his will. L. 3, § 4 *de minor.* (4, 4).

question of Right has a personal relation to the Son, and the Right of Action has been acquired by him, as it were, for the Father. In some of these cases the additional reason is added, that otherwise a Son might find himself involved in distress, as, for example, if he has lent his journey-money or has lost it by theft: this, however, is by no means to be regarded as the general foundation or condition of the Rule (*n*). In cases of the last description it is wholly unimportant whether the acquisition of this Action is or is not connected with a Peculium. It was not necessary to define the precise limits for the Actions thus allowed, because the permission accorded to the Son in these cases always depended on the uncontrolled discretion of the Magistrate. Of course the profit derived from these Actions must always be acquired for the Father.

(b) *In his own name.* This is the only case which belongs to our Anomalous Rights, and we have hitherto dealt with kindred cases simply because it is only in this connexion that its peculiarities can be rightly understood. Now as a rule a Son cannot sue in his own name, because he can have no Personal Rights which are capable of being enforced by Action (*o*): he cannot Vindicate because he has no Property, and he cannot institute an Action for Debt because he is not qualified to be a Creditor. The ground of this Incapacity is therefore of a more material kind, and does not even consist in a special exclusion of the Son from Judicial Proceedings: hence it is that he cannot generally sue upon transactions which have occurred whilst he was in Paternal Power, even after its dissolution (*p*). But

(*n*) L. 18, § 1 *de judic.* (5, 1); L. 17 *de reb. cred.* (12, 1).

(*o*) L. 13, § 2 *quod vi* (43, 24) "IDEM AIT, ADVERSUS FILIUMFAMILIAS IN RE PECULIARI NEMINEM CLAM VIDERI FECISSE: NAMQUE SI SCIT EUM FILIUMFAMILIAS ESSE, NON VIDETUR EJUS CELANDI GRATIA FECISSE, quem certum est nullam secum actionem habere."

(*p*) Thus, for example, when a thing is stolen out of the Son's Peculium the Father and not the Son acquires the FURTI ACTIO, because the theft has only injured the Father and not the Son: moreover, Emancipation in regard to this matter makes no difference. Suppose, however, the Son had hired a horse and the animal was afterwards stolen, no right of the Father or Son is violated in such a case; but the Son is bound to compensate the Hirer, and

there are important exceptional cases in which a *FILIUSFAMILIAS* can sue in his own name, and these are just the kind of Anomalous Rights we have referred to, which must now forthwith be separately discussed; in fact it was wholly with this object that the present preliminary inquiry was introduced (*g*). It is specially important to distinguish carefully these exceptional cases from those above mentioned, wherein a Son sues not in his own name but presumably as his Father's Procurator: our writers have constantly confounded the one with the other. A principal point of distinction lies in this, that in the cases in which a Son comes forward in his own name, the discretion of the Magistrate, but more particularly the opposition of the Father, is without influence, while in the more ordinary cases above mentioned, the opposition of the Father certainly ob-

for this reason the *FURTI ACTIO* is vested in him just as in a hirer who is *SUI JURIS* (L. 14, § 16 *de furtis* (47, 2)), and he can avail himself of this Action after the dissolution of Paternal Power quite independently, because his debt towards the Hirer continues to subsist. (During the existence of Paternal Power the action is suspended, because the Father has no interest in it. L. 14, § 10 *de furtis* (47, 2).) In the same way is to be explained L. 58, *de furtis* (47, 2) "SI FILIOFAMILIAS FURTUM FACTUM ESSET, RECTE IS PATERFAMILIAS FACTUS EO NOMINE AGET. SED ET SI RES EI LOCATA SUBREPTA FUIT, PATERFAMILIAS FACTUS IBIDEM AGERE POTERIT." The first case mentioned in this text can only be understood of a *CASTRENSE PECULIUM*, since down to Julian's time it could only be said in such a case that a Theft had been committed against a Son under Power. Perhaps Julian expressed this but the Compilers omitted it, because they remembered that at their time the Son was qualified to possess other Personal Estate as well. Cf. upon this text Cajacius, *Obser.* xxvi. 5, and almost verbatim to the same effect, *Recitat. in Julianum*, Opp. vi. 500.

(*g*) The existence of such exceptions is generally indicated in L. 8, *pr. de proc.* (3, 37) "SI QUAE SIT ACTIO QUA IPSE EXPERIRI POTEST." Far more decidedly, however, speaks L. 9 *de O. et A.* (44, 7) "*FILIUSFAMILIAS suo nomine NULLAM ACTIONEM HABET, NISI INJURIARUM, ET QUOD VI AUT CLAM, ET DEPOSITI, ET COMMODATI, UT JULIANUS PUTAT.*" The words *SUO NOMINE* point to the sharp contrast as compared with the case of a presumptive Mandate in L. 18, § 1 *de judic.* (5, 1). Since there were, however, many others besides the four Actions which the Son could institute *SUO NOMINE*, as will be shown presently, the question arises how this contradiction is to be explained. Probably these four cases were noticed earlier than the others, and were more generally known.

structs the Son's Action (*r*). If therefore by such Actions the acquisition of a Right of Property is effected, for example, by a money-payment, this gain nevertheless always belongs to the Father, although the Son could sue, and may have actually sued, in his own name.

A farther difficulty lying in the old procedure has still however to be mentioned. In most of the old forms of Action, the plaintiff was styled the Possessor of a Right, *e. g.*, *SI PARET HOMINEM EX JURE QUIRITIIUM AULI AGERII ESSE: OR SI PARET N. NEGIDIUM A. AGERIO SS. X. MILIA DARE OPORTERE.*

In the first case, the plaintiff was represented as the Owner, in the second as a Creditor, but a *FILIUSFAMILIAS* could not ordinarily be either. This difficulty was so important that by reason of it a Son could indeed acquire for the Father by means of Mancipation, but not by an *IN JURE CESSIO*, because the latter was based upon a Vindication (although only in a symbolical sense) (*s*). How was this to be avoided in our Anomalous Cases? In two ways. In the first place, by a *FORMULA IN FACTUM CONCEPTA*, wherein, as a condition of judgment, a Right of the Claimant was not expressed as in the Formulas above quoted, but only a mere statement of Fact. It is not improbable that this kind of Formula was expressly introduced for our Anomalous Cases, at least it is noteworthy that several examples mentioned by Gaius of the *FORMULA IN FACTUM CONCEPTA* appertain at the same time to those Anomalous Cases in which a Son can sue *SUO*

(*r*) Certainly it is not expressly stated in L. 18, § 1 *de jud.* (note (*n*)), that the Son sues as the Procurator of his Father, but this must be assumed for the following reasons. In the first place, on account of the contrast of *SUO NOMINE* in L. 9 *de O. et A.*, which is distinctly restricted to a particular case, whilst the Son's right mentioned in L. 18 *cit.* is of so general a character that only single examples are given of it. Secondly, the Son's right according to L. 18 *cit.* is only said to prevail "*SI NON SIT QUI PATRIS NOMINE AGAT;*" by every genuine Procurator, and still more so by the prohibition of the Father, the Son is therefore excluded. Thirdly, this presumptive Mandate is only a solitary application of a similar Mandate in favour of numerous Cognates and relations by Affinity. L. 35 *pr. de proc.* That these Mandates are here more especially mentioned in regard to the Son, and expressly confirmed, proves, therefore, that, as a rule, the *FILIUSFAMILIAS* is absolutely debarred from appearing as a Plaintiff. Note (*o*).

(*s*) Gaius, II. 96.

NOMINE (*t*). In the next place, in a much more effectual manner, when the law suit was decided not by a JUDEX and by means of a FORMULA, but by the EXTRAORDINARIA COGNITIO of a Magistrate (*u*). The first expedient was only applicable to the Anomalous Actionable Rights of a FILIUSFAMILIAS, the second was capable of the most extensive application, and thus also notably supplied the form of procedure for the Anomalous Claims of Slaves, of which we shall presently have to speak.

Everything that has hitherto been said concerning the Actionable Capacity of a FILIUSFAMILIAS prevails without distinction of Sex, therefore for the Son and Daughter indifferently (*x*).

All this, however, has hitherto been considered from the stand point of the Ancient Law; the modifications which were subsequently introduced in regard to the influence of Paternal Power, also produced therein very considerable changes, which will be more fully discussed below.

(*t*) GAIUS, II. 46, 47. This explains L. 13 *de O. et A.* (44, 7) "IN FACTUM ACTIONES ETIAM FILIIFAMILIARUM POSSUNT EXERCERE." This passage has not unfrequently been misconceived as if a Son could institute all ACTIONES IN FACTUM, which would stand in violent contradiction with L. 9 *cod.* See also note (*g*), according to which only a single Action was permitted in each case, however incomplete the enumeration of such Actions might be in L. 9 *cit.* The true sense of L. 13 *cit.*, however, is this. In regard to the formula IN FACTUM CONCEPTA *filiifamilias* are not prohibited from instituting the Action by the form of procedure: they can therefore generally employ this Action, supposing of course they have a material ground for bringing it. Moreover this distinction is also denoted by the contrast involved in the expression IN FACTO POTIUS QUAM IN JURE CONSISTIT (note (*a*)), but not exclusively so.

(*u*) L. 17 *de reb. cred.* (12, 1) "EXTRAORDINARIO JUDICIO." (Note (*n*).)

(*x*) In regard to the like Debt-liability of Sons and Daughters, comp. App. V. Whatever relates to the special application of an Actionable Capacity is mentioned in the same terms in regard to both in L. 8 *pr. de proc.* (3, 3). In like manner also, in regard to the more general treatment in L. 3, § 4 *commat.* (13, 6), in which quite accidentally the second proposition CUM FILIO AUTEM FAMILIAS, &c. is not repeated in regard to the Daughter, there is no doubt that the Jurist assumed that every reader would himself conclude that it was intended to be repeated as a matter of course. If the Jurist had had the distinction of the sexes in his mind, he would certainly have employed another mode of expressing himself. Women could certainly not ordinarily undertake the duties of a Procurator. L. 1, § 5 *de postal.* (3, 1), and only exceptionally even for their Father in a CAUSA COGNITA, when the Father could procure no one else to act for him. L. 41 *de proc.* (3, 3).

SECTION 72.

*Anomalous Rights in relation to JURAL CAPACITY AND
CAPITIS DEMINUTIO (continuation).*

The character of this anomaly having been stated in § 71, I now pass on to the specification of the particular cases falling within it. These may be reduced into four classes.

**I.—RIGHTS CONNECTED WITH THE IMMEDIATE
MAINTENANCE OF LIFE.**

Through Ownership, as through Obligations which give rise to Ownership, we obtain the means of accomplishing our purpose, so nevertheless that in the choice and development of this purpose, just as in the application of the means, our freedom of will must govern unconditionally. When therefore it was said above (§ 53) that Property was an extension of the individual Power, it was meant to express thereby just this mastery of our Wills over the external means to undefined ends. This relation will be most clearly exhibited by the value of Money, into which every right of Property resolves itself, because Money, in itself devoid of use, has only the signification of a means to undefined ends, therefore of an unconditionally extended Freedom. Now there are Rights, however, by which our aims and necessities are protected, but so that the interposing Freedom either entirely vanishes, or is withdrawn, whereby we become subject to a form of Guardianship. In these Rights the ordinary restrictions of Jural Capacity appear at times to vanish entirely, and at other times to be modified. An illustration will make this contrast quite plain. If it were desired to supply free food to a poor Man, this might be effected by arranging to pay a certain sum for him monthly at an Inn, whereupon he would acquire the right to be fed there daily. This would be an instance of such an Anomalous Right, the benefit being controlled by the limita-

tions of Guardianship. With the same object, however, the same sum might be paid to that individual in cash at the beginning of the month, whereby he could obtain the same advantage as in the former case. Except that here no restriction would be placed upon his Freedom, and he could employ the money for other purposes, good or bad, because he might perhaps be satisfied with meaner fare, and prefer to give the greater portion of the money to the Poor, or to waste it in Gaming. In a text of the Roman Law it is forcibly said of those Obligations which bore such an anomalous character: **NATURALEM PRAESTATIONEM HABERE INTELLIGUNTUR** (*a*), that is to say, that they aim at a natural provision for the direct administration of the needs of Life, uncontrolled by our Freedom as it asserts itself in the disposition of sums of Money. Our Jurists are therefore quite wrong when they wish to assign to that expression either a general reference to the **JUS GENTIUM**, to **BONA FIDES**, or indeed to a **NATURALIS OBLIGATIO**: the last meaning in particular is directly contradicted by the text cited, which speaks of an *actionable* Obligation (**CIVILIS OBLIGATIO**.)

The particular Law Institutes appertaining to this class are the following:—

A. A LEGACY OF ALIMONY.

Alimony is here understood in its strict sense as the means of supporting corporeal existence. To it belongs the provision against Hunger and Cold, therefore Food, Clothing, and Habitation: everything else lies beyond this concept, especially the means for Mental Enjoyment, and Mental Improvement (*b*). Moreover, it is only in regard to the former matters that we find something uniform and generally lawful, since the necessaries which must be supplied for those purposes are the same for all Men, however different may be the form and the extent of what is supplied. For this reason the Romans sanctioned the widest departure from the rule of Jural Capacity, because such Rights

(*a*) L. 8 *de cap. min.* (4, 5).

(*b*) L. 6 *de alim. leg.* (34, 1) "**LEGATIS ALIMENTIS CIBARIA, ET VESTITUS, ET HABITATIO DEBEBITUR, quia sine his ali corpus non potest: CETERA, quae ad disciplinam pertinent, LEGATO NON CONTINENTUR.**"

can also exist for Slaves, and are not extinguished by *MAXIMA CAPITIS DEMINUTIO*. This must, however, be understood as not referring to the exceptional case where Alimony is bequeathed to an ordinary Slave, which produces the advantage to the Master of saving him the cost of his maintenance: the Master acquired this right just as he acquired any property bequeathed to the Slave, which also formed no exception to the rule regarding Jural Capacity (*c*). On the other hand, the anomaly we are concerned with comes into application in the following cases:—In the first place, with respect to Ownerless Slaves. A *SERVUS POENAE* might acquire this form of Legacy, and a Free Man who acquired it would not lose it by the *MAXIMA CAPITIS DEMINUTIO*: every other form of Legacy which was given to a *SERVUS POENAE* was absolutely void, because he was himself an incompetent person, and he had no Master for whom he could acquire it (*d*). Moreover that anomaly is visible in many cases in which a Master himself is compelled to provide his Slave with Alimony, instead of leaving him otherwise to starve: this happens whenever the future liberty of the Slave, or his transfer to another person, is already legally secured (*e*). In what form these prin-

(*c*) L. 42 *de condit.* (35, 1) “*SI CIBARIA SERVIS TITII LEGENTUR, PROCL DUBIO DOMINI EST, NON SERVORUM LEGATUM;*” L. 15, § 1 *de alim. leg.* (34, 1).

(*d*) L. 3 *pr. § 1 de his quae pro non scr.* (34, 8) “*SI IN METALLUM DAMNATO QUID extra causam alimentorum RELICTUM FUERIT, pro non scripto est* (the proper provisions for Alimony are therefore valid), *NEC ad FISCUM PERTINET: NAM POENAE SERVUS EST NON CAESARIS ET ITA D. PIUS RESCRIP-SIT,*” &c.; L. 11 *de alim. leg.* (34, 1) “*IS CUI ANNUA ALIMENTA RELICTA FUERANT, IN METALLUM DAMNATUS, INDULGENTIA PRINCIPIS RESTITUTUS EST. RESPONDI, EUM ET praecedentium annorum recte cepisse alimenta, ET SEQUENTIUM DEBERI EI.*” The *PRAECEDENTES ANNI* are those previous to the Restitution, and therefore during the condition of Slavery, not those before the Condemnation, in regard to which at all events there was no conceivable doubt.

(*e*) L. 17 *de alim. leg.* (34, 1); L. 16 *de annuis leg.* (33, 1) “*SERVUS POST DECEM ANNOS LIBER ESSE JUSSUS EST, LEGATUMQUE EI EX DIE MORTIS DOMINI IN ANNOS SINGULOS RELICTUM EST: EORUM QUIDEM ANNORUM, QUIBUS JAM LIBER ERIT, LEGATUM DEBEBITUR: interim autem heres ei alimenta praestare compellitur.*” The last-mentioned case is specially remarkable and illustrative. The Legacy of a yearly rent-charge is a customary one

ciples were enforced is not quite clear; but they were undoubtedly enforced by the Magistrate EXTRAORDINEM, according to the form of FIDEICOMMISSA, and therefore also probably only since the period when FIDEICOMMISSA obtained a legal validity (*f*).

With this case must not be confounded another which had only an external and apparent resemblance with it. A Legacy of a periodical Rent Charge (ANNUUM, MENSTRUUM LEGATUM) had the same character as every other Money Bequest, since it gave the Legatee, quite contrary to the case of Alimony, the freest disposal of the particular sum of money. It did not, therefore, belong to our Anomalous Rights, and a Slave was not competent to receive it (*g*). Nevertheless it is also said of such a Legacy that it is not annulled by CAPITIS DEMINUTIO (*h*). But this was on a totally different ground from that which operated in regard to Alimony. Such a Yearly Rent, for instance, was treated as if it were different from every other independent Legacy, and for this reason, for example, the Emancipation of the Legatee himself did not destroy his claim to a future, nor yet to a deferred, Legacy (*i*). The case, in fact, was treated as

for which a Slave is not qualified; and therefore for the limited period, during which the Legatee is still a Slave, it is converted into a Legacy for Maintenance, for which a Slave is qualified, and for the payment of which the Master himself is bound, quite in accordance with the undoubted intention of the Testator.

(*f*) It is no objection that this proceeding is styled OFFICIO *judicis* in L. 17 *de alim. leg.* (34, 1), for in L. 3, *cod.*, it is also said "SOLENT *judices* EX CAUSA ALIMENTORUM LIBERTOS DIVIDERE," and it is clear as well from the context of the passage as from the inscription, that Consuls are really meant. Comp. § 1 J *de fid. her.* (2, 23). The ordinary term *judex* is perhaps employed here to comprehend the Consul as well as the PRAETOR FIDEICOMMISSARIUS. It is certain at all events that a Slave could not in an ordinary proceeding appear before the PRAETOR URBANUS.

(*g*) According to L. 3 *de his quae pro non scr.* (note *d*), everything is invalid which is bequeathed to a Slave beyond what is fit for Maintenance: therefore also the ANNUUM LEGATUM. In like manner in the case mentioned in L. 16 *de ann. leg.* (note *e*), the ANNUUM LEGATUM had first to be converted into a Legacy for Maintenance, in order to be made applicable to a Slave.

(*h*) L. 10 *de cap. min.* (4, 5); L. 8; L. 4 *de ann. leg.* (33, 1).

(*i*) Whether this distinction has not even at times been overlooked by the Roman Jurists is open to doubt. One might be led to think so from L. 10

exactly similar to that of a *Usufructus*, which was also exceptionally not cancelled by *CAPITIS DEMINUTIO*, when it was to last from year to year, or to continue upon a transfer by *CAPITIS DEMINUTIO*, or when it was bequeathed with a distinct specification of a period of time (for a lifetime, or ten years) (*k*). A *Usufructus* of this sort was certainly no *Anomalous Right*, but was conditioned by the ordinary rule of *Jural Capacity*, except only that a *CAPITIS DEMINUTIO* was not deemed to destroy a future (nor yet a deferred) *Legacy* embraced in the *Usufructus*.

B.—A LEGACY OF A *HABITATIO* OR OF *OPERAE*.

HABITATIO, as the term implies, is the right of residence in a specified house or building, it was therefore one of the elements which constitute the complete notion of *Alimony*. It was accordingly natural that it should assume more a factitious than a juristical character, just in the same way as *Alimony* in the full sense of the expression: therefore also a like independence of *Jural Capacity* and *CAPITIS DEMINUTIO*. Only the last point is expressly affirmed, and indeed precisely with reference to the ground of the factitious character of this institute (*l*). The rule is based in fact upon the following consideration. He who desires to give another the benefit of a *Dwelling-place* can employ various means for that purpose. He can give him money in order either to purchase or to hire a *House*: or he can give him either the *Ownership* or the *Usufruct* of a *House*. In all

de cap. min. (4, 5) "LEGATUM IN ANNOS SINGULOS, VEL MENSES SINGULOS RELICTUM, VEL SI HABITATIO LEGATUR . . . CAPITIS DEMINUTIONE . . . INTERVENIENTE PERSEVERAT, quia tale legatum in facto potius quam in jure consistit." The reason here assigned properly and peculiarly applied to our *Anomalous Rights* (§ 71). It is also applicable, as will presently be shown, to *HABITATIO*, and might even be applied to a *Legacy for Maintenance*, but it is not suitable to an *ANNUUM LEGATUM*. Whether, however, the old Jurists are to be reproached on this account cannot be distinctly asserted, because this semblance may perhaps only have been of a formal kind, as the excerpt was separated from its context.

(*k*) L. 1, § 3; L. 2, § 1; L. 3 *pr.* § 1 *quib. mod. ususfr.* (7, 4); L. 8 *de ann. leg.* (33, 1); *Fragm. Vat.*, § 63, 64.

(*l*) L. 10 *de cap. min.* See also note (*i*). L. 10 *pr. de usu.* (7, 8).

these cases the freedom of the other person maintains a wide scope, since he is competent, even in the case of a *USUFRUCTUS*, to lease out the House and to consume the Rent. The *USUS* also comprises that of the whole House, and the Usufructuary can lease the unoccupied portion. If, however, the right is strictly confined to the benefit of Occupation, which the other may obtain in the House, the case then bears the strongest resemblance to that of an assignment of Free-board above mentioned, and it is then a mere partial provision with rigorous supervision, that is to say, without any scope of freedom whatever on the part of the person entitled, or, in other words, a *NATURALIS PRAESTATIO*, by which *CAPITIS DEMINUTIO* is removed beyond the reach of application (*m*). The circumstance that a Legacy of this sort was at a later period extended farther by a well meaning interpretation, first by the Jurists as regards the extent of the *USUS*, and then by Justinian as regards that of the *USUFRUCTUS* (*n*), does not stand in contradiction with the present explanation; this extension belongs to the later development of the Institutes, along with which it would have been inconsistent to maintain the exclusion proceeding from the more restricted character of *CAPITIS DEMINUTIO* of an earlier period. If *HABITATIO* had always been regarded as a *USUS* or *USUFRUCTUS AEDIUM*, there would have been absolutely no conceivable ground for its being said to be less juristical than any other *USUS* or *USUFRUCTUS*.

A similar condition of things occurred with regard to the *OPERAЕ*, that is, the right to obtain service through a particular Slave. This privilege could also be acquired through Ownership or Usufructus in the Slave, both of which were strictly juristical relations; it might, however, also happen as a *NATUR-*

(*m*) Thibaut (*Abhandlungen*, No. 2) assumes that the term *HABITATIO* was ordinarily employed to denote a Charitable Quarter for the Poor, on which account it was placed on the same footing as Alimony, and from pure benevolence exempted from *CAPITIS DEMINUTIO*. In most cases a *HABITATIO* may well have been given in this sense, but this was a purely accidental coincidence, and the true ground of its juristical peculiarity did not lie there.

(*n*) L. 10 *pr. de usu* (7, 8); L. 13, C. *de usufructu* (3, 33); § 5 *J de usu*. (2, 5).

ALIS PRAESTATIO, similarly to HABITATIO. It is certainly less practicable to define the distinction in this case from a mere USUS in the Slave: moreover such service did not belong like a Dwelling to the actual necessities of life, and therefore not to Alimony. Nevertheless, amongst the Romans, some form of Slave service had become so essentially necessary for every Freeman, that upon the same grounds as in regard to HABITATIO, the annulment by a CAPITIS DEMINUTIO was likewise excluded in the case of OPERAE (o). This right, moreover, like USUFRUCTUS, was subsequently so far extended that it was finally permitted to descend to the Heir, which belongs to the reformations whose grounds are unknown to us (p). Both rights in which this peculiarity occurs were moreover simply mentioned as subjects of Legacies, and hence we have no reason for assigning a different origin to them (q).

C.—THE DOTAL RIGHT OF A MARRIED WOMAN.

The peculiarities of this important law Institute are to be explained for the most part by the anomalous character above mentioned, which equally applies to it; and the errors of Modern Jurists have especially arisen or become more deeply rooted in consequence of their omitting to consider this Institute from this

(o) L. 2 *de op. serv.* (7, 7).

(p) L. 2 *de usu leg.* (33, 2). It appears, moreover, that this is the only one amongst the Rights here grouped together which is transmitted to the Heir, and then certainly only in its new shape, and not according to the notion by which alone it appears in the list of our Anomalous Rights. Others admit in it merely a right of USUS. L. 5 *di op. serv.* (7, 7). Consideration for a Deported person may perhaps be conceived as the practical motive for this change, for in this way such a person might procure or maintain the services of a Slave, although he was neither able to acquire or retain Ownership, nor USUFRUCTUS, nor USUS.

(q) An origin by means of IN JURE CESSIO would not have been adapted to the somewhat non-juristical character of this Institute. When the Owner of a House at the time of alienating it reserved the HABITATIO for himself, what he really retained was the customary USUS, and not the special Right of *habitatio*. L. 32 *de usufr.* (7, 1.) Whether that Right gave rise to an Action is not stated, but there could at most have been an ACTIO IN FACTUM CONCEPTA, e. g. SI PARET HABITATIONEM LEGATAM GAJO ESSE, &c.

point of view. This particular feature of the Institute in question shows itself as well during the continuance of Marriage, as after its dissolution.

During Marriage the DOS is absolutely and wholly in the Property of the Husband, and not by any means in that of the Wife. The Husband possesses the things constituting the Dos in genuine Ownership EX JURE QUIRITIUM and IN BONIS (r); he can enjoy the USUCAPIO thereof PRO DOTE, if the Giver was not the true owner; he can vindicate them, even against the Wife herself, if she has possession of the things (s); he can alienate them, even to the Wife herself (t); and the fact that the alienation of the immoveable portion of the Dos was expressly prohibited to the Husband by Positive Law (the LEX JULIA), affords, from the mere possibility and necessity of such a positive prohibition, the most distinct proof of his genuine Ownership. Nevertheless it is said, on the other hand, that the DOS belongs to the Wife, and is her PATRIMONIUM (u). This seeming contradiction is only to be explained by the recognition of the anomalous condition of the Institute as a whole. The Husband has the DOS in his Property, but he bears the burdens of Marriage, to which especially belongs the maintenance of the Wife. She has therefore the benefit and enjoyment of the DOS, except that it is not protected for her by any present existing Action, but only by the ordinary devices of married life. Thus the benefit consists in a NATURALIS PRAESTATIO, and it may be truly said of her right that it IN FACTO POTIUS QUAM IN JURE CONSISTIT. Justinian once expresses the same view in the following words (v):—"CUM EAEDEM RES ET AB INITIO UXORIS FUERINT, ET NATURALITER IN EJUS PERMANSERINT DOMINIO. NON ENIM, QUOD LEGUM SUBTILITATE TRANSITUS EARUM IN PATRIMONIUM MARITI VIDEATUR FIERI, IDEO REI

(r) L. 75 de *J. dot.* (23, 3) "*QUAMVIS in bonis mariti dos sit, MULIERIS TAMEN EST . . . QUAMVIS apud maritum dominium sit,*" and Gaius, II. § 63.

(s) L. 24 de *act. rer. amot.* (25, 2).

(t) L. 58 *sol. matr.* (24, 3).

(u) L. 75 de *J. dot.* See above note (r). L. 3, § 5 de *minor.* (4, 4).

(v) L. 30 *C. de J. dot.* (5, 12).

VERITAS DELETA VEL CONFUSA EST." There is no contrast here, as many have supposed, between what was held IN BONIS and EX JURE QUIRITUM, or some other newly discovered classification of Ownership, but the passage simply indicates what is elsewhere expressed by the words IN FACTO POTIUS QUAM IN JURE CONSISTIT. Now it is very natural that this factitious benefit which the Wife enjoys should be wholly the same, whether she is in Paternal Power or not, and also that even her CAPITIS DEMINUTIO should not exercise any influence upon it (*w*). Upon the same grounds may be explained the peculiar devolution of the Dotal Estate. For instance, if the Husband stands in Paternal Power, his Father is the true owner of the DOS, but it is by no means treated like the rest of his Property. Because, if the Son were Emancipated or given in Adoption or Disinherited, and in like manner if the Son only obtained a portion of the Inheritance on the Father's death, the DOS was always separated from the property of the Father, and being indissolubly connected with the burdens of Marriage, followed the Husband (*x*).

Upon the dissolution of Marriage Obligations, which formed the subject matter of the old ACTIO REI UXORIAE, occupied the place of that relation, and those earlier peculiarities were also preserved in this Action, and in fact became legally visible here for the first time. Since the subject matter of such an Obligation, according to its destination, might be the foundation of a NATURALIS PRAESTATIO (even after the dissolution of Marriage by reason of the possibility of a new Marriage), so the Action was for the most part independent of the influence of a restricted Jural Capacity and of CAPITIS DEMINUTIO (*y*). This

(*w*) Hence it was necessary also for the Married Woman, who was the SCAHERES of her father, to confer the DOS. L. 1 *pr.* § 8 *de dotis coll.* (37, 7).

(*x*) L. 1, § 9 *de dote praeleg.* (33, 4); L. 46; L. 20, § 2; L. 51 *pr. fum. herc.* (10, 2); L. 45 *de adopt.* (1, 7) in connection with L. 56, § 1, 2 *de f. dot.* (23, 3).

(*y*) L. 8 *de cap. min.* (4, 5) "EAS OBLIGATIONES, QUAE NATURALEM PRAESTATIONEM HABERE INTELLIGUNTUR, PALAM EST CAPITIS DEMINUTIONE NON PERIRE, QUIA CIVILIS RATIO NATURALIA JURA CORRUMPERE

important principle shows itself in the following applications. If the Husband suffers a *CAPITIS DEMINUTIO*, his Dotal-debt should also, properly speaking, perish, in accordance with the rule prevailing for other Debts (§ 70 (*k*)); in point of fact, however, it does not do so, but continues to remain united with the person of the Husband (note (*x*)), so that there was no need in this case for the Restitution prescribed for other Debts. The Wife who stands in Paternal Power cannot, simply by her own interposition, prevent the *ACTIO REI UXORIAE*, which undoubtedly belongs to her Father (*z*), but she can also often employ that Action herself, even in her Father's name, if he is unable to institute it through insanity or other cause (*a*): and, in her own name, even against her Father's wishes, if the Father is leading an objectionable course of life (*b*). If she is Emancipated, her Claim is so little injured by such a *CAPITIS DEMINUTIO*, that, on the contrary, the whole right in it is now transferred to her completely unrestricted (*c*). Indeed even the *MEDIA CAPITIS DEMINUTIO* arising from Deportation did not deprive her, for the later period, of the use of this Action (*d*). At the same time the Action is *IN BONUM ET AEQUUM CONCEPTA* (§ 71 (*e*)), and the Romans themselves regarded this characteristic feature as connected with the anomalous nature just described. (Note (*y*)). The

NON POTEST. Itaque DE DOTE ACTIO, quia in bonum et aequum concepta est, NIHILO MINUS DURAT ETIAM POST CAPITIS DEMINATIONEM." Here the question primarily only relates to *CAPITIS DEMINUTIO*, but it is upon precisely the same grounds that the original Jural Incapacity was often without influence.

(*z*) L. 22, § 1; L. 3 *sol. matr.* (24, 3); Ulpian, vi. § 6; *Fragm. Vat.* § 269.

(*a*) L. 22, § 4, 10, 11 *sol. matr.* (24, 3); L. 8 *pr. de proc.* (3, 3).

(*b*) L. 8 *pr. de proc.* (3, 3).

(*c*) L. 44 *pr.*; L. 22, § 5 *sol. matr.* (24, 3); L. un. § 11, *C. de rei ux. act.* (5, 12); L. 9 *de cap. min.* (4, 5) " *Ut quandoque EMANCIPATA AGAT,*" that is to say, the Emancipation might take place before or after the dissolution of Marriage, which, especially for the last case, was very important to be borne in mind, because the Father here had clearly already acquired the right of Action. The proposition laid down in L. 9 *cit.* is undoubtedly an inference from the preceding L. 8, but it is by no means the only one, and thus it would be altogether wrong to try and restrict the sense of L. 8, by the proposition deduced from it in L. 9.

(*d*) L. 5 *de bonis damn.* (48, 20).

expression *BONUM ET AEQUUM* or *AEQUIUS MELIUS* involves, however, the important signification, that the Judge is allowed a far larger power than in the ordinary *BONÆ FIDEI ACTIONES*, so that he is able and bound, for instance, to prevent the enrichment of one party at the cost of impoverishing the other party, which would not by any means have been excluded in regard to other Obligations (e).

It is specially important to notice that nearly all these peculiarities of Dotal relations have been preserved unchanged by Justinian. The most important change, which he introduced, consisted in the transformation of a previously *non-descendible* Dotal-action into a *transmissible* one, which he expressed by substituting, in place of the (hitherto non-transmissible) *ACTIO REI UXORIAE*, an *ACTIO EX STIPULATA*, which is, as a matter of course, transmissible.

D.—THE ACTION FOR ALIMONY BETWEEN NEAR RELATIVES.

It prevails reciprocally between Ascendants and Descendants. The ordinary rules concerning restricted Jural Capacity and *CAPITIS DEMINUTIO* exercise no influence in such an Action, for the child can assert it against the Father himself, not only during the continuance of Paternal Power, but even also after Emancipation, so that the *CAPITIS DEMINUTIO* can not have destroyed it (f). There is also no doubt that a Father has this Action against his *FILIUSFAMILIAS*, if the latter possesses a *CASTRENSE PECULIUM*, or a so-called *ADVENTITIUM EXTRA-*

(e) L. 6, § 2; L. 12, § 1 *de J. dot.* (23, 3); L. 9 § 1 *de minor.* (4, 4), which unquestionably ought not to be restricted to Women under age, as a comparison with the wholly similar expressions in the preceding text clearly shows. L. *un. C. si adv. dotem* (2, 34). Whilst, however, a larger freedom of judicial discretion is here attributed to this Action than in regard to most other Actions, yet at the same time an absolute freedom must by no means be asserted, nor in particular a complete similarity with other Actions of a like form. In regard to the Action for Injury, for instance, the Judge determines the dispute entirely according to his own uncontrolled discretion, but, in regard to the *ACTIO REI UXORIAE*, he is restricted by the extent of the *DOS* actually received.

(f) L. 5, § 1 *de agnoscendis* (25, 3).

ORDINARIUM. It is not expressly declared that the Action is IN BONUM ET AEQUUM CONCEPTA, but in fact it is so, because the Judge has necessarily to determine, with a much wider discretion than in most other Actions, the extent of the necessity and of the ability to pay (*g*). Moreover it is to be observed that the notion of Alimony here receives a far more liberal extension than in the case of a Legacy for Alimony (note (*b*)), and it specially comprehends within itself mental education (*h*). Hence it is, however, that the anomaly is far more narrowed here, because in this case only Paternal Power and MINIMA CAPITIS DEMINUTIO are said to afford no obstacle to the Right, whereas in the case of a Legacy for Alimony, even the condition of Slavery and the MAXIMA CAPITIS DEMINUTIO, offer no impediments.

E.—THE ACTION ON THE PART OF A DAUGHTER AGAINST HER FATHER FOR DOTATION (*i*).

Here also subjection to Paternal Power presents no obstacle to the Right of Action, because, in fact, it constitutes the condition precedent thereof. Moreover, this Right coincides, according to its nature, with the preceding, because Dotation is, properly speaking, only another form in which a Father tenders Alimony to his Daughter. And in regard to this Right it is quite certain (what, in regard to the claim for Alimony, has only been stated as probable), that it was enforceable EXTRAORDINUM by the Magistrate, and not by means of an ordinary Action.

(*g*) L. 5, § 2, 7, 10 *de agnosc.* (25, 3). It is called here, with a slight variance in expression, EX AEQUITATE HAEC RES DESCENDIT. The free exercise of discretion is very similar here to that in the FUNERARIA ACTIO, which was nevertheless not IN BONUM ET AEQUUM CONCEPTA. Cf. § 71, note (*i*). Probably, however, the Action for Alimony was generally no ORDINARIUM JUDICIUM, but an EXTRAORDINARIA COGNITIO before the Magistrate. *Zeitschrift für geschichtl. Rechtswiss.* vol. 6, p. 238.

(*h*) L. 5, § 12 *de agnosc.* (25, 3).

(*i*) L. 19 *de ritu nupt.* (23, 2).

SECTION 73.

*Anomalous Rights in relation to Jural Capacity and
CAPITIS DEMINUTIO—(continuation).*II.—RIGHTS OF ACTION, THE OBJECT OF WHICH
IS VINDICTA (a).

Rights of Action which arose as legitimate consequences from the infraction of Rights (QUAE POENAE CAUSA DANTUR), appear in various forms. Some are said to merely compensate the Injury itself, like the DOLI ACTIO, which is confined to affording amends to the person defrauded. Others are said to procure a penalty (POENA) for the injured person, sometimes as the only remedy (as in the FURTI ACTIO), and at other times the penalty (POENA) along with compensation (as in the VI BONORUM RAPTORUM ACTIO). Finally, a third class is also primarily based upon a Right of Property, though the latter is not, as in the first class of cases, the object, but only the means: the true object of the action is VINDICTA. By this latter term, however, is not to be understood that which in ordinary life we call *revenge*, the gratification of our feelings by the infliction of pain on another, but rather compensation for the disturbance of our Legal Rights, in regard to which therefore an individual exercises the prerogative which on the part of the State is accomplished by the whole body of the Criminal Law. Moreover, as regards these Rights there were many deviations allowed from the rules appertaining to Jural Capacity and CAPITIS DEMINUTIO, based

(a) In the Law Sources it is said of such an Action: AD ULTIONEM PERTINET, IN SOLA VINDICTA CONSTITUTUM EST, VINDICTAM CONTINET. L. 6, 10, *de sepulchro viol.* (47, 12); L. 20, § 5 *de adqu. vel om. her.* (29, 2). The Moderns say: ACTIONES QUAE VINDICTAM SPIRANT. Cf. as to this Burchardi, *Principles of the Legal System of the Romans*, p. 231, who erroneously rejects the grouping together of these Actions.

upon the ground that the Rights in question related to Natural, and not to Juristical Persons (the Subjects of Property): because they are directly founded upon a moral necessity, just as those of the first class are based upon the necessity of maintaining Life. The following cases belong to this class:—

A.—ACTIO INJURIARUM.

When a wrong is done to a *FILIUSFAMILIAS* two completely distinct injuries are involved in this one act: an injury to the Father, because the Son stands under his protection, and an injury to the Son himself. Each of these injuries gives rise to a separate Action, directed as a rule to money damages: the Action arising from the injury to the Son himself is the one with which we are here concerned. As a rule it is enforced by the Father, because he usually acquires all kinds of Actions through the Son, and the opposition of the latter can not prevent him from asserting it (*b*). In exceptional cases, however, with the permission of the Praetor, the Son himself may sue in his own name, when the Father is absent or is otherwise prevented, and is not represented by a Procurator: and even against the Father's wishes, if his (the Father's) worthlessness shows him to be completely wanting in a sense of honour (*c*). If the Son is Emancipated the Right of Action is unconditionally transferred to him, consequently *CAPITIS DEMINUTIO* does not destroy it (*d*). The damages, however, which a *FILIUSFAMILIAS* sues for in this way, belongs unquestionably to the Father, so that the Son therefore always appears in a mixed relation: *SUO NOMINE* on account of the *VINDICTA*, and as a Representative of his Father with respect to the damages claimed and recovered. It is in short upon this mixed relation that the numerous restrictions under which a Son is permitted to sue are founded. But if the injury is of so grave a character that the Action can be based upon the

(*b*) L. 1, § 5; L. 41 *de injur.* (47, 10); L. 30 *pr. de pactis* (2, 14); L. 39, § 3, 4 *de proc.* (3, 3).

(*c*) L. 17, § 10—14; § 17, 20; L. 11, § 8 *de injur.* (47, 10); L. 9 *de O. et A.* (44, 7); L. 8 *pr. de proc.* (3, 3); L. 30 *pr. de pactis* (2, 14).

(*d*) L. 17, § 22 *de injur.* (47, 10).

LEX CORNELIA, then all those restrictions vanish, and the Son has an unconditional Right of Action (*e*).

The ordinary Action for money damages arising from an injury, which is here spoken of, is IN BONUM ET AEQUUM CONCEPTA (*f*), because the determination of the amount of the Penalty depends upon a subjective estimate, and is therefore in a large degree arbitrary. The Action is also non-transmissible, and is not usually included in Rights of Property. In both these respects, however, a change is effected as soon as the Action has once been actually asserted (*g*).

B.—ACTIO SEPULCHRI VIOLATI.

All those persons have a preferential right to sue for a desecration to a Sepulchre who have a personal interest in it, namely, the Children of the interred person (even if they had been deprived of the Inheritance), or the Heirs. Their Action is merely VINDICTA, to recover a sum of money arbitrarily fixed, and is therefore IN BONUM ET AEQUUM CONCEPTA (*h*). Hence it follows that a CAPITIS DEMINUTIO cannot annul this Action (*i*). If those

(*e*) L. 5, § 6 *de injur.* (47, 10). Moreover this Action "ETSI PRO PUBLICA UTILITATE EXERCETUR PRIVATA TAMEN EST;" L. 42, § 1 *de proc.* (3, 3).

(*f*) L. 11, § 1 *de injur.* (47, 10) merely says: EX BONO ET AEQUO EST, an expression which is in itself ambiguous (§ 71). But the allusion in L. 18 *pr. eod.* and in L. 34 *pr. de O. et A.* (14, 7), make it clear that those words occurred in the Edictal Formula for Actions, and the absolutely arbitrary determination of the penalty confirms this view.

(*g*) L. 13 *pr.*; L. 28 *de injur.* (47, 10). Hence it is also that the relinquishment of this Action is not an alienation or a deminution of Property; precisely in the same way as a relinquishment of the QUERELA INOFFICIOSI. L. 1, § 8 *siquid in fraud. patr.* (38, 5), compared with § 7 *eod.*

(*h*) L. 3 *pr.*; L. 6, 10 *de sep. viol.* (47, 12); L. 20, § 5 *de acquir. hered.* (29, 2).

(*i*) According to the general rule in L. 8 *de cap. min.* (4, 5), which recognises this in regard to every ACTIO IN BONUM ET AEQUUM CONCEPTA. The case must be conceived perhaps in this way:—

The deceased left a bequest to a Son who relinquished it, and allowed himself afterwards to be Arrogated: in such a case the Arrogated person could still always institute the action. If he had not relinquished the bequest, the Adoptive Father through him would have become actually the HERES, and would then have himself had this right of Action (AD QUEM EA RES PERTINET).

persons who are specially entitled do not desire to institute the Action, any Member of the Community may then do so, in which case the claim is limited to 100 AUREI, and has not the above peculiarity.

C.—ACTIO DE EFFUSIS.

If anything is poured or flung out from a House, and a Freeman is injured thereby, an Action is given for an arbitrarily determined sum of money. This Action proceeds upon VINDICTA, it is not transmissible, and is IN BONUM ET AEQUUM CONCEPTA; it is, therefore, as a general rule, exempt from the operation of CAPITIS DEMINUTIO (*j*).

D.—THE ACTION ON ACCOUNT OF INJURIES INFLICTED BY DANGEROUS ANIMALS.

When this Action is based upon the want of care on the part of the Owner, it is similarly IN BONUM ET AEQUUM CONCEPTA, and has therefore the same peculiarity as the preceding Action (*k*).

E.—INTERDICTUM QUOD VI AUT CLAM.

This is included amongst the Actions which a FILIUSFAMILIAS can bring in his own name (*l*). The reason of this is, that it proceeds upon VINDICTA in consequence of an injury to personal rank or dignity by the non-observance of a prohibition (VI FACTUM), an injury indeed which may also be perpetrated against a Son in Paternal Power (*m*). A right of the Claimant in the

(*j*) L. 5, § 5 *de his qui effud.* (9, 3). The general expression in this text EX BONO ET AEQUO *oritur* would prove nothing (§ 71). But in the received texts of the Edict the words stand distinctly: QUANTUM OB EAM REM *aequum* *judicii videbitur.* L. 1 *pr. eod.*

(*k*) L. 42 *de aedil. ed.* (21, 1) "QUANTI BONUM AEQUUM JUDICII VIDEBITUR." Cf. § 1 *J si quadr.* (4, 9).

(*l*) L. 9 *de O. et A.* (44, 7); L. 19; L. 13, § 1 *quod vi* (43, 24).

(*m*) L. 13, § 1, 2 *quod vi* (43, 24). It is expressly noted here that *vi* may to some extent be perpetrated against the Son, but not *clam*, because the Son can have no action, the evasion of which might lead to secrecy: that is to say, therefore, in the form VI FACTUM the Interdict appertains to both Father and Son, and in that of CLAM only to the Father. Undoubtedly also the Son's Right of Action is not annulled by CAPITIS DEMINUTIO.

thing, which a FILIUSFAMILIAS certainly could not possess, is moreover not requisite for such an Action (*n*), and just as little an actual substantial wrong on the part of the Defendant (*o*). Also the direct result of the Interdict, which consists in the Restitution of the change arbitrarily effected (*p*), may be undoubtedly employed for the benefit of the Plaintiff FILIUSFAMILIAS, as, for example, when a Son dwells in a house belonging to his Father, or which is leased from a Friend, and he is disturbed in the convenient use of the dwelling by a building arbitrarily erected by a neighbour. If such a matter is brought to a legal contest, the Restitution finally resolves itself into a condemnation for a specific sum of money, which is determined according to the proved interests of the claimant (*q*), and this sum, as in the case of an Action for an Injury, is also acquired for the Father. The Action is therefore in no wise IN BONUM ET AEQUUM CONCEPTA, because it has a completely distinct subject-matter (Restitution or Interest) (*r*).

(*n*) L. 13, § 5; L. 12 *quod vi* (43, 24). In like manner, therefore, it is altogether erroneous to extend, as many wish to do, this capacity of a FILIUSFAMILIAS also to the Possessory Interdicts, to which the INT. QUOD VI by no means belongs (thus, for example, Burchardi, *Archiv für civil Praxis*, B. 20, p. 33). For Possessory Interdicts are conditional upon juristical POSSESSIO, a relation on the part of the Claimant which, although indeed originally factitious, is yet in its consequences similar to a Right (Savigny, *Possession*, § 5, 6); for such a relation a FILIUSFAMILIAS is wholly incompetent. Upon the ejection of a Son from a FUNDUS PECULIARIS the Father acquires the Interdict, and the Son has no more right to exercise it than he has to employ the paternal Vindication. The reason for this is that the object of the INT. QUOD VI consists in the VINDICTA, while that of the INT. DE VI, on the other hand, in the prosecution of an ordinary private interest, as well as in that of Vindication.

(*o*) L. 1, § 2, 3 *quod vi* (43, 24).

(*p*) L. 1 *pr.* § 1 *quod vi* (43, 24).

(*q*) L. 15, § 12 *quod vi* (43, 24).

(*r*) On the other hand, there is really no doubt, that the Interdict just as the Action for Injury is not transmissible. The apparent contradiction in I. 13, § 5 *quod vi* (43, 24), relates only to the special case where the tortious act has happened after the death of the deceased, but before entry upon the Succession, in which case also the Action for Injury is acquired for the Heir. L. 1, § 6 *de injur.* (47, 10).

F.—THE ACTION AGAINST A FREEDMAN ON ACCOUNT OF AN IN JUS VOCATIO.

A Freedman was prohibited, without the special permission of the Praetor, to institute an IN JUS VOCATIO against the Patron himself or his children: the non-observance of this prohibition gave rise to a Penal Action for 50 AUREI. Now if such a proceeding were commenced against a Son, and the Father were absent, the Action belonged to that class which was available to a Son himself, like the action for an Injury (*s*).

G.—QUERELA INOFFICIOSI.

That this Action also, which certainly aims at a pure Right of Property, belongs to our Anomalous Rights, must be specially demonstrated and explained.

If a Testator had either made no provision at all or very little for his nearest of Kin, who would have been his Heirs in the event of his Intestacy, an impression would of course arise in the minds of other people that the excluded person must have merited such a punishment by some wicked or disrespectful conduct. If, however, this impression were really groundless, as it cast an undeserved slur on his honor (*t*), the following legal means were afforded to the injured person to expurgate it. His proper course was to impeach the Testament as INOFFICIOSUM, and if his assertion were ascertained to be well founded, it was thereupon assumed that the Testament had been made in blind passion, resembling an aberration of mind (*u*), the Testament was set aside, the Intestate Succession was opened out, and thus the innocence of the excluded Heir was acknowledged in a

(*s*) L. 12 *de in jus voc.* (2, 4). The Action proceeded upon VINDICTA and was non-transmissible (L. 24 *eod.*), but it could not be IN BONUM ET AEQUUM CONCEPTA by reason of its strictly defined subject-matter. That a FORMULA IN FACTUM CONCEPTA prevailed for this case (the language of which did not stand in the way of the FILIUSFAMILIAS being a Claimant) is expressly stated by Gaius, IV. § 46.

(*t*) It is called INJURIA L. 4; L. 8 *pr. de inoff. test.* (5, 2). Also INDIGNATIO L. 22 *pr. eod.* "TOTUM *de meritis filii* AGITUR;" L. 22, § 1 *eod.*

(*u*) L. 2, 4, 5 *de inoff. test.* (5, 2).

public and solemn manner. This treatment of the matter however proves that the Action in question, like the Action for Injury, belongs to our Anomalous Legal Remedies. When, for instance, such an injustice befalls a *FILIUSFAMILIAS*, *e.g.* in the Testament of his Mother or of his Maternal Grandfather, it is regarded as a matter of the greatest personal moment to the Son (far more so than the Action for Injury), although he may actually become the Heir by means of an action on the part of the Father. Hence the Father can not institute this Action against the Son's wish, nor even continue it after the Son's death (*v*). Conversely, however, the Son can sue even when the Father has recognised the Testament wherein he was himself provided for, and, therefore, against the Father's will (*w*). There is thus also no doubt that the *CAPITIS DEMINUTIO* of the Son can not annul this Action, based as it is upon purely moral grounds; and it is very natural for such an action not to descend to the Heir (*x*). It could not be *IN BONUM ET AEQUUM CONCEPTA*, because it had a very definite subject-matter; nevertheless an extremely wide judicial discretion prevailed with respect to it, not only as regards the scope of the judgment (just as in Actions denoted by that name), but even in awarding it at all, because the judgment was dependent on proof of the plaintiff's moral character, which was obviously not capable of being determined according to such fixed rules, like judgments in other Actions.

Concerning the nature of the *QUERELA* the matter has been

(*v*) L. 8 *pr. de inoff. test.* (5, 2). Here the right of opposing, on the part of the unjustly excluded Son, the *QUERELA* alleged by his Father is entirely similar to that of the Daughter against the *ACTIO LÆI UXORIAE*, by means of which her Father may sue her Husband or his Heir (§ 72 (*s*)).

(*w*) L. 22 *pr. § 1 de inoff. test.* (5, 2). A Father naturally, however, cannot be compelled to accept the Succession against his will. In such a case, therefore, what happens is that the Intestate Succession, which is opened out once for all, passes to another than the Claimant, as happens moreover in other cases as well. L. 6, § 1 *eod.* The Son nevertheless attains his purpose, inasmuch as his Honor is restored by a public reparation.

(*x*) L. 6, § 2; L. 7; L. 15, § 1 *de inoff. test.* (5, 2). It is not, for instance, generally held *IN BONIS*, and whoever relinquishes it does not diminish thereby his Property, just as in the case of the Action for Injury. See also note (*f*).

the subject of much contention from old times, which has again and again been renewed. Some regard it as an Action IN REM, and particularly as the proper form of the HEREDITATIS PETITIO: others as not by itself constituting a proper independent Action at all, but only as a mere ancillary to one: more recently the tendency has been to consider it as an Action IN PERSONAM (y). A discussion upon this controversy would certainly not be appropriate in this place; but the distinction above insisted upon, between the immediate subject-matter of this Action and its more remote, though none the less essential, aim (wherein in fact its whole peculiarity consists), may well contribute to the reconciliation of these conflicting opinions, because it is in that distinction that what gave rise to the greatest conflict in the opposite opinions finds its true solution. With this view the whole relation must now once more be thus succinctly stated. The disinherited person desires, by the cancellation of the Testament, to become the Intestate Heir, and therefore claims the Succession, which is undoubtedly a pure right of Property. But the special aim of this Action is the solemn, public vindication of the Reputation imperilled by the Testament; the Claimant appears, therefore, in a hostile relation towards the deceased Testator, who had thus brought his Reputation into danger, and the Action is accordingly based upon VINDICTA. In precisely the same way satisfaction for the injured Honor was the object of the Action for Injury, and both Actions have therefore a common object. So also just as in the Action for Injury the remedy employed for that purpose was the enforcement of a pecuniary obligation, in that of the QUERELA INOFFICIOSI it was the prosecution of a right of Succession, which could only be opened out by a judicial act. The peculiarities of both forms of Action show themselves in the difference between those essential objects and the direct juristical subject-matter of the Action itself, which was employed merely as a means to that end.

(y) Cf. Klenze, *Querelae inoff. test. Natura*, Berol. 1820; Mühlenbruch, *Fortis. von Glück*, B. 35, § 1421 e.

H.—POPULAR ACTIONS GENERALLY.

These are actions for the recovery of a penal sum payable to the Claimant, whereby, however, some Public Interest is prosecuted and meant to be protected (*s*); so that the Claimant in such Actions appeared in his Political and not in his Juristical (or Private-Law) Capacity. If in such cases individual persons on account of some Injury sustained by them, have at the same time a more special interest, they are preferred to all other Claimants (*a*): the action then partakes of a mixed character, and no longer presents its full peculiarity (*b*). To this class belong several Obligations which have been separately discussed in this Section, *e. g.*, the *ACTIO SEPULCHRI VIOLATI* (lit. B.). But it is otherwise when persons having such personal interests are either non-existent, or are not willing to sue. Every Member of the Community, as the representative of the general welfare, can then institute this Action by appearing as it were in the capacity of a Procurator of the State, although without undertaking the obligation of a *Cautio* imposed upon a Private Procurator (*c*). It is therefore certain that every *FILIUSFAMILIAS* is entitled to it (*d*), and in like manner no one can be deprived of this privilege by a *MINIMA CAPITIS DEMINUTIO*, because he has clearly not ceased thereby to

(*s*) L. 1 *de pop. act.* (47, 23) "EAM POPULAREM ACTIONEM DICIMUS, QUAE SUUM JUS POPULI TUETUR."

(*a*) L. 3, § 1 *de pop. act.* (47, 23); L. 42 *pr. de proc.* (3, 3); L. 45, § 1 *ead.*

(*b*) See note (*c*).

(*c*) See also note (*s*). L. 43, § 2 *de proc.* (3, 2) "IN POPULARIBUS ACTIONIBUS, UBI QUIS *quasi unus ex populo agit*, DEFENSIONEM UT PROCURATOR PRAESTARE COGENDUS NON EST." Inasmuch as he is himself in the position as it were of a Procurator he is not qualified to appoint another as such (L. 5 *de pop. act.*; L. 42 *pr. de proc.*); for the like reason those persons are incompetent to bring this Action who are generally disqualified to act as Procurators. (L. 4, 6 *de pop. act.*) In both respects, however, the rule is different when the Claimant has at the same time a personal interest in the Action. That is to say, when it is not a pure and simple Popular Action. LL. *citt.* and L. 45, § 1 *de proc.* (3, 3).

(*d*) Just in the same way a *filiusfamilias* can also appear as an Accuser in a Criminal Proceeding. The provisions of L. 6, § 2; L. 37 *ad L. Jul. de adult.* (48, 5), were by no means intended to be restricted to cases of Adultery.

be UNUS EX POPULO. A Right of Action itself is not in its inception a constituent element of Property, but by the LITIS CONTESTATIO it is converted into such, and it now becomes, what it had not been previously, a genuine Obligation (*e*), and this Claim, as well as the Ownership of the Penalty recovered through it, is of course acquired by the litigating FILIUSFAMILIAS for his Father. The Popular Actions properly so-called are not moreover IN BONUM ET AEQUUM CONCEPTA, but are rather generally directed to the recovery of a specific sum of money, which is measured with due regard to the rights of all concerned at the date of their institution.

The INTERDICTA PUBLICA OR POPULARIA (*f*) are similar in character to the POPULARES ACTIONES, and likewise also the OPERIS NOVI NUNCIATIO, which happens PUBLICI JURIS TUENDI GRATIA (*g*), except with this distinction that in them the Legal Remedy is not directed to the payment of a Penalty. But in the unlimited right to employ these Actions, uncontrolled by the ordinary rules relating to Jural Capacity, all these Legal Remedies agree with one another.

(*e*) L. 7, § 1 *de pop. act.* (47, 23); L. 12 *pr. de V. S.* (50, 16); L. 32 *pr. ad L. Falc.* (35, 2); L. 56, § 3 *de fidejuss.* (46, 1).

(*f*) L. 1 *pr.*; L. 2, § 1 *de interd.* (43, 1); L. 2, § 34 *ne quid in loco* (43, 8); L. 1, § 9 *ne quid in flum.* (43, 13).

(*g*) L. 1, § 16, 17; L. 4; L. 5 *pr. de op. novi nunc* (39, 1).

SECTION 74.

Anomalous Rights in relation to Fural Capacity and
CAPITIS DEMINUTIO.—(continuation).

III. A third class of such Anomalous Rights form the following Relations, which in themselves are of a purely factitious character, and only participate in the juristical nature of Rights properly so called, by a close connection with those Rights.

A.—PARTNERSHIP.

Consists in an existing factitious Association for the purposes of a common undertaking, wherein consideration is more particularly paid to the qualities of the natural Man (his Probity and Skill). It is, therefore, according to its general condition, to be distinguished from the Obligations arising out of it, which are enforced by the ACTIO PRO SOCIO.

When, therefore, a FILIUSFAMILIAS enters into a Partnership, he continues in it without any change even after Emancipation, and, in like manner, on the other hand, the Partnership is neither dissolved by Arrogation, nor is it transferred to the new Father (a). Consequently, MINIMA CAPITIS DEMINUTIO exercises no influence upon it, and it is only by the MAXIMA and MEDIA forms of CAPITIS DEMINUTIO, which produce Civil Death (§69), that it is necessarily annulled (b). As regards the ACTIO PRO

(a) L. 58, § 2; L. 65, § 11 *pro socio* (17, 2).

(b) L. 63, § 10 *pro socio* (17, 2); Gaius, III. § 153. When, therefore, L. 4, § 1 *ead.* declares "DISSOCIAMUR RENUNTIATIONE, MORTE, *capitis minutione*, ET EGESTATE," the indefiniteness of the expression is not to be regarded as indicating generality, but is to be restricted by the addition of the words MAXIMA VEL MEDIA. Holoander reads: *maxima* CAPITIS DEMINUTIONE, adopting partially, therefore, the opinion expressed in the text, for which he is censured by Augustin, *Emend.* III. 6. Nevertheless, whether this may not indeed be the genuine *vulgata*, at least so reads the *ed. Jenson*, S. A. and the

SOCIO, however, it is regulated by the ordinary Rules. Consequently, a suit can only be instituted against the Father, subsequent to the Son's Emancipation, upon the earlier transactions of the Son, and then only DE PECULIO: against the Son the suit may be based upon the earlier, as well as the later, dealings (*c*). The Right to the active enforcement of the Action upon the earlier dealings belongs exclusively to the Father, even after the Emancipation of the Son, because the Action had already been absolutely acquired for him: upon the later dealings, to the Son.

A Slave can also enter into Partnership; he is not personally bound by such a contract, but an ACTIO PRO SOCIO based upon his dealings lies against the Master like the ACTIO DE PECULIO or QUOD JUSSU (*d*): the same Action undoubtedly also lies against every third Person, who employed the Slave as an instrument for the purposes of the Partnership, and who is therefore regarded as really acting through him. If the Slave, however, is alienated, the hitherto existing Partnership is terminated, and that which appears externally as a mere continuation thereof, can now only be regarded as a new Partnership (*e*).

By this rigid distinction between Partnership itself and the Obligations arising out of it, can alone be explained why the former is non-transmissible, whilst the latter, like all other Obligations, survives.

B.—MANDATUM AND NEGOTIORUM GESTIO.

Mandate has an exactly similar nature to Partnership, for in regard to it also the factitious, non-transmissible relation of the Commission itself, directed for the most part to the

ed. Koberger, 1482, must be decided upon the Manuscripts. I do not myself, however, accept this reading as correct, but rather that of the Florentine edition, because by the definite specification of MAXIMA the MEDIA would be excluded, quite contrary to the authorities quoted.

(*c*) L. 58, § 2 *pro socio* (17, 2). In regard to the Action against the Son upon the earlier transactions, the Restitution must be naturally presupposed. Cf. § 70 (*u*).

(*d*) L. 18; L. 58, § 3; L. 63, § 2; L. 84 *pro socio* (17, 2).

(*e*) L. 58, § 3 *pro socio* (17, 2).

qualities of the natural Man, is to be distinguished from the Obligation springing out of it, which is enforced by the *MANDATI ACTIO*, and is not different in its conditions from any other Obligation. The *NEGOTIORUM GESTIO* has in this respect the same characteristic features as Mandate.

Hence it follows that a Son can be charged with a genuine Mandate by his Father (*f*), although Obligations clothed with the validity of the Civil Law are not possible between them (§ 67). If a *FILIUSFAMILIAS* has been charged with a Mandate by a stranger, and is subsequently Emancipated, the previous Mandate continues in force, so that *CAPITIS DEMINUTIO* does not in any way affect it (*g*). If the object of the Mandate is to enable the *FILIUSFAMILIAS* to conclude an Adstipulation for the stranger, the Action arising from it is not acquired for the Father, because it was not intended to apply to him personally; the Action is also meanwhile suspended as regards the Son, because otherwise the money sued for would be acquired for the Father. It can thus only be primarily enforced when the Son has passed out of Paternal Power without undergoing a *CAPITIS DEMINUTIO*, because a Stipulatory Action was completely cancelled by the latter circumstance (*h*).

A Slave can also stand in the relation of a *MANDATARIUS* or of a *NEGOTIORUM GESTOR* towards anybody, and this relation continues unaltered after Manumission, except that the Action arising out of it only lay against him with respect to transactions undertaken after he had gained his freedom, and not upon the earlier ones, because the contractual dealings of a Slave are generally non-actionable (§ 65); this restriction is subject to an exception in the case where the earlier business transactions are inseparably connected with the later ones, in which case the Action embraces both the earlier and later dealings (*i*).

(*f*) L. 8 *pr. in f.*; L. 35 *pr. de proc.* (3, 3). See also § 71.

(*g*) L. 61 *mandati* (17, 1).

(*h*) Gaius, III. § 114. See also § 67 (*l*) and § 70 (*i*).

(*i*) L. 17 *de negot. gestis* (3, 5). See also § 65, and App. IV. note (*n*).

C.—ACTIO DEPOSITI.

Ulpian observes that a *FILIUSFAMILIAS* is not unfrequently permitted to sue in the name of his absent Father, as his presumptive Procurator, although never without the special permission of the Praetor: and he mentions as examples of such Actions (without meaning to exclude others) those arising out of Theft, Injury, Mandate, Loan, and the *ACTIO DEPOSITI* (*k*). On the other hand, Paulus enumerates a few Actions which a Son can institute in his own name by way of exception, and, therefore, independently of his father's will or absence, or even of the Praetor's permission, among which he cites the *ACTIO DEPOSITI* (*l*), a statement with which Ulpian expresses his concurrence in another text (*m*). Both these possible contingencies are in themselves completely distinct (§ 71), and since they are both exhibited in relation to the *ACTIO DEPOSITI* on the part of the same old Jurists (which excludes the notion of any controversy among the ancients on the point), there would seem to be an apparent contradiction here which can only be solved by observing the following distinction. If a Son intrusts some thing belonging to his father, *e.g.*, out of the *Peculium*, to another for safety, the Father acquires thereby the *ACTIO DEPOSITI*, because it is his interest either to recover the thing itself again, or to obtain a compensation for it in money. Here the Son can not sue except as the Procurator of the Father, and it is to such a case, which, moreover, is of the most ordinary kind, that the first text of Ulpian refers. The *DEPOSITUM* may, however, be so created that the Father has no lawful interest in it, as when the Son obtains the thing on hire from a stranger, or as a *COMMODATUM* or a *DEPOSITUM*, or when the Son himself has stolen it.

(*k*) L. 18, § 1 *de judic.* (5, 1). See also § 71 (*n*).

(*l*) L. 9 *de O. et A.* (44, 7). See also § 71 (*q*).

(*m*) L. 19 *depositi* (16, 3) "JULIANUS ET MARCELLUS PUTANT, FILIUM-FAMILIAS DEPOSITI RECTE AGERE POSSE." Here *DEPOSITUM* clearly meant something special, and in quite a different sense to what it is mentioned by Ulpian in L. 18, § 1 *de jud.* (note (*k*)), amongst several other Actions, and with these only by way of example.

Here the Son has a twofold interest to institute the Action which does not concern the Father: in the first place, in many instances (as when the Son obtains the thing as a Hirer or a Commo-
dator), because he thereby again acquires the factitious advantage of Detention and of the Use of the thing which is not his property, and can not therefore enure for the benefit of the Father; secondly, in all the cases here specified, because he himself is bound towards other persons, to whom he is obliged to return the thing or a money compensation, an Obligation which does not devolve upon the Father. And since, generally speaking, a Depositor, a Thief, and the like, who has intrusted anything with another for safety, acquires an *ACTIO DEPOSITI* against that person (*n*), so also a Son, in the instances above mentioned, is entitled to the same remedy in his own name, and it is to such cases that the text of Paulus, as well as the second text of Ulpian, which, therefore, does not stand in contradiction with the first text, refers. When indeed the law-suit is not terminated by the restoration of the thing itself (whereby the above-mentioned objects would be clearly attained), but by a compensation in money, this money is undoubtedly acquired for the Father, who can dispose of it as he wishes: if, however, the Son employs the money in order to satisfy those to whom he was bound upon the former *COMMODATUM*, or by reason of the Theft, his liability is thereupon discharged, and the object above mentioned is in that case also accomplished: indeed he can also secure the fulfilment of the same object by not bringing the Action himself, but by ceding it to his Creditor, and thus in this way extinguish his debt. It is also worthy of note that a *FORMULA IN FACTUM* occurs in the *ACTIO DEPOSITI*, which renders it possible for the Son to institute that Action in his own name (*o*). How far now are these relations affected by *CAPITIS DEMINUTIO*, for instance by Mancipation, or by the *DATIO IN ADOPTIONEM*? The Action in favour of the Father certainly ceases to be enforceable, because the ground of a presumptive

(*n*) L. 16; L. 1, § 39; L. 31, § 1 *depos.* (16, 3).

(*o*) Gaius, IV. § 47.

Representation is withdrawn ; but the Action in the Son's own name survives, because the grounds and objects thereof still exist : for instance, the Debt towards a third person, by means of the Restitution against *CAPITIS DEMINUTIO*, above discussed.

All these matters, however, are very differently regulated in regard to a Slave who has placed a thing in deposit : so long as he is a Slave he is not able to institute the Action, because he labours under a general incapacity to sue at all, nor can he do so even after Manumission, because the principal point of interest in the case of a Son (his actionable Obligation towards a third person) is altogether wanting in his case (§ 65). Hence it is that this Action was always reserved for the Master, in whose service the Slave was at the time the Deposit was made (*p*).

Similar considerations to those which occur in regard to the right to the *ACTIO DEPOSITI* present themselves also in connection with the Obligations arising out of a Deposit. If, therefore, a *FILIUSFAMILIAS* accepts a Deposit, and if he continues in possession of the thing deposited after his Emancipation, the Action is available against him (here certainly even without a Restitution), and not like an *ACTIO DE PECULIO* against the Father (*q*) ; because what is aimed at is the complete restoration in fact of the natural possession, which is entirely independent of the juristical relation in regard to the *PECULIUM*. That this was really conceived as something quite special, and wholly upon the ground just stated, appears indisputable from the exactly similar and even still more anomalous manner in which a Deposit given to a Slave is treated : because if the Slave retains possession of the thing after his Manumission, an *ACTIO DEPOSITI* is available against him, although other Contractual Actions arising during a period of Slavery cannot under any circumstances be brought against him (*r*).

(*p*) L. 1, § 30 *depos.* (16, 3).

(*q*) L. 21 *pr. depos.* (16, 3).

(*r*) L. 21, § 1 *depos.* (16, 3). The whole text, of which the first portion has been cited in note (*q*), runs thus :—

“ *SI APUD FILIUMFAMILIAS RES DEPOSITA SIT, ET EMANCIPATUS REM* .

D.—ACTIO COMMODATI.

A COMMODATUM is subject to precisely the same conditions as a Deposit, and we ought certainly to assume that the propositions above established are applicable to this case also. One of the most important of these propositions is indeed expressly recognized, and if the rest are not likewise mentioned the omission can only be regarded as purely accidental. Moreover the ACTIO COMMODATI is distinctly included amongst those Actions which a FILIUSFAMILIAS can institute in his own name (*s*). This is undoubtedly based upon the same grounds, and subject to the same distinctions which have just been stated in regard to the ACTIO DEPOSITI. So also we meet with the FORMULA IN FACTUM CONCEPTA in the present Action just as in that of the DEPOSITUM (*t*).

It might be asked whether a FILIUSFAMILIAS may not also use the ACTIO LOCATI in order to recover a thing hired out by him? If the question referred to a simple reclamation of this kind, the relations would undoubtedly be wholly similar to those which have just been mentioned in regard to the ACTIO DEPOSITI and COMMODATI. But if the question were not put in that connection, it might well be answered that the Action here alluded to is immediately directed to enforce the payment of the Hire, consequently the reclamation is most blended with the prosecution of a pure and complete right of Property.

TENEAT, PATER NEC INTRA ANNUM DE PECULIO DEBET CONVENIRI: SED IPSE FILIUS.—PLUS TREBATIUS EXISTIMAT, ETIAM SI APUD SERVUM DEPOSITUM SIT, ET MANUMISSUS REM TENEAT, *in ipsum dandum actionem, NON IN DOMINUM, licet ex ceteris causis in manumissum actio non datur.*"—This exception has already been considered in another place. Cf. § 70 (*s*), and Append. IV. note (*m*). Suppose the Freedman did not possess the thing, the Action would not lie against him even when he had been guilty of DOLUS as a Slave. L. 1, § 18 *depos.* (16, 3).

(*s*) L. 9 *de O. et A.* (44, 7). Cf. above, § 71 (*g*). Here also the rule prevails that even the Thief can institute the Action, L. 15, 16 *comm.* (13, 6), certainly therefore also a Commodator or Depositor who had made over the thing to another as a COMMODATUM.

(*t*) Gaius, IV. § 47.

E.—NATURAL POSSESSION (OR SIMPLE DETENTION).

Children in Paternal Power, just like Slaves, are incapable of Juristical Possession, but they are capable of Detention, because it is purely factitious (*u*). This Capacity is illustrated in the following applications. If a Father stipulated something for the Son which had a juristical quality, *e. g.*, Ownership, the stipulation was valid, because Ownership given to a Son is likewise given to the Father himself. If, however, the stipulation referred to something purely factitious, *e. g.* to Detention on the part of the Son, or to his right over a particular Way, it is invalid, because this FACTUM can not fall within the Property of the Father, so that it is to be treated like every Stipulation for another person, whom the Stipulator does not represent. On the other hand, if a Son stipulated for the Father to obtain Ownership, or Detention, or permission to use a right of Way, all this is valid, since the Son can ordinarily represent the Father. Finally, if the Son stipulated for Detention or a right of Way on his own behalf, this is also valid, at least in the sense that the Father (not the Son) acquired an Actionable interest against the Debtor in case of his repudiation of the Detention or of the right of Way. All this prevailed in regard to Slaves precisely in the same way as in regard to a Son (*v*).

Another application of the Rule presents itself in connection with the Succession possessed by a FILIUSFAMILIAS, who is obliged to submit himself to the HEREDITATIS PETITIO, like any Independent person, because that Obligation depends upon natural Possession. If then a FILIUSFAMILIAS suffers himself to be Arrogated, the CAPITIS DEMINUTIO does not alter any thing in this respect, and it does not even need a Restitution in order to render the employment of the Action against him at all more practicable (*w*).

(*u*) Savigny, *Recht des Besizes*, § 9, 26.

(*v*) L. 130; L. 37, § 6, 7, 8 *de V. O.* (45, 1); § 2J *de stipul. serv.* (3, 17). Comp. Cujacius in *Lib. 15 Quaest. Pauli* (L. 130 *de V. O.*), Opp. vol. 5, p. 1107.

(*w*) I. 36, § 1 *de her. pet.* (5, 3).

F.—THE COMPULSORY RESTITUTION OF A FIDEI-COMMISSUM OF INHERITANCE.

When a Father, who has been instituted Heir, and is under an obligation to grant a Restitution of the Succession to his Son, finds the Succession onerous, the Son may still compel him to enter upon it and to grant a Restitution, because, as the result of this compulsion, all the liabilities are transferred to the Son, and the Father remains free from all responsibility (x). It is otherwise, however, if a Master is requested to liberate his Slave, and then to restore the Inheritance to him, for since a Slave is not competent to bind himself by actionable legal engagements (§ 65), so he is also not bound by the compulsion employed against the Master to enter upon the Inheritance; therefore, after he has gained his freedom, he might refuse Restitution, in which case the Master remained saddled with the Obligations of the Inheritance (y).

The foundation of this Anomalous Right of Action between a Father and Son lies in this, that the act enforced by Suit is after all a mere formality, therefore something purely factitious, without any legal effect for the Defendant. The form of procedure was no obstacle, since the compulsion was brought about EXTRA ORDINEM by the authority of a FIDEI-COMMISSUM.

IV. Finally, a fourth class of Anomalous Rights relates to the compulsion to do such acts as were intended to produce Changes in Family Relations. As a rule such acts are entirely voluntary; where, however, a legal coercion is applied to them, that is entirely independent of the ordinary Rules concerning Jural Capacity, because a coercion of this kind is expressly directed to modify those rules. To this class appertain the following cases:—

A.—FIDEI-COMMISSARIA-LIBERTAS.

When a Testator gives his Slave the DIRECTA LIBERTAS, it involves no departure from the rules concerning Jural Capacity.

(x) L. 16, § 11, 12 *ad Sc. Treb.* (36, 1).

(y) L. 16, § 13, 14, *ad Sc. Treb.* (36, 1).

The Slave passes immediately into the condition of a Freeman, and there is apparently therefore no need to permit the exercise, during the condition of Slavery, of a Right, *e.g.*, an Action against the Heir. It is otherwise if the Testator bequeaths liberty to his own Slave, or to that of his Heir, or even to that of a third person, by means of a FIDEI-COMMISSUM. For the Slave thereby acquires an Action against his own Master for Manumission, and against the Heir who is not his Master, for Purchase and Manumission. The attainment of this very common and important Jural relation, as it had become amongst the Romans, was rendered possible by the adoption, not of the customary Action, but of an EXTRAORDINARIA COGNITIO of the Magistrate (*z*).

B. When an Heir or Legatee was bound by a FIDEI-COMMISSUM to Emancipate his Children, this obligation was not indeed protected by the ordinary FIDEI-COMMISSARIUM jurisdiction: but the influence of the Emperor might even here, though exceptionally, exert a coercive power over the Father, who had bound himself by the acceptance of the Inheritance or of the Legacy to do an act which he had afterwards repudiated (*a*). Perhaps even, according to the ordinary procedure, Emancipation might be enforced when a Minor was Arrogated, and, upon attaining Majority, a dissolution of the Power was demanded by him (*b*).

C. Still more important, however, was the rule introduced by the LEX JULIA, that a Father might be compelled through the intervention of the Magistrate to consent to the Marriage of his children, if he had refused to give that consent without legitimate grounds (*c*).

(*z*) § 2 J *de sing. reb.* (2, 24); Ulpian, xxv. § 12, 18; tit. *Dig. de fid. libert.* (40, 5).

(*a*) L. 92 *de cond. et demonstr.* (35, 1).

(*b*) L. 32, 33 *de adop.* (1, 7). One could surely also comprehend a MAGISTRATUS under the term JUDEX mentioned in L. 32 *pr. cit.* which the additional words CAUSA COGNITA seem to indicate; it would then be an EXTRAORDINARIA COGNITIO.

(*c*) L. 19 *de ritu nupt.* (23, 2).

SECTION 75.

*The Applicability of the Doctrines of JURAL CAPACITY
and CAPITIS DEMINUTIO to Modern Times.*

It now only remains to inquire what signification the doctrines concerning JURAL CAPACITY and CAPITIS DEMINUTIO, as explained above (§ 64—70), continue to hold in our Modern System of Law.

We have no existing survival of the Roman condition of Unfreedom, therefore there can no longer be any question of the Jural Incapacity of Roman Slaves.

In like manner, there exists just as little amongst us a Status of Citizenship or of Latinity, with its contrast in the Status of the PEREGRINI, and thus the limited Jural Capacity of the latter has also disappeared from amongst us, while that of the Latini had any how previously vanished in consequence of Justinian's legislation.

On the other hand, there undoubtedly still subsists in our Modern Law the dependence upon Paternal Power, and the restricted Jural Capacity founded thereon has also to some extent remained unchanged: indeed, even where it has undergone material modifications by the written Laws of the Christian Emperors, it can still only be correctly understood and practically applied in connection with the Ancient Law.

I pass now to CAPITIS DEMINUTIO. As we have no longer any Slaves or PEREGRINI, both the MAXIMA and MEDIA CAPITIS DEMINUTIO have become impossible, and with them at the same time the Civil Death which the Romans assumed to result therefrom (§ 69).

The MINIMA CAPITIS DEMINUTIO may indeed still happen, because if an Independent person permits himself to be Arrogated by another, he thereupon subjects himself to all the restrictions which usually apply to a FILIUSFAMILIAS, and he

suffers therefore an injurious change in his Jural Capacity. Another question which arises is, whether such a person is still liable to those entirely peculiar and positive effects of *CAPITIS DEMINUTIO* (§ 69), for the sake of which alone that conception with its technical expression had ever any practical value? This question must however be answered in the negative, because *Agnation*, which was annulled thereby, is any how without any practical importance since the latest legislation of Justinian. The relation of *Patronage* certainly exists no longer. Justinian expressly abolished the influence of *MINIMA CAPITIS DEMINUTIO* upon *Personal Servitudes*. Finally, also, the cancellation of *Obligations* by *CAPITIS DEMINUTIO* is no longer found in the Justinian Law as a practical Law, but merely as denoting the law of an earlier period which had long since completely lost its practical influence. We must therefore affirm, that although the doctrine of *CAPITIS DEMINUTIO* is historically and critically important, for practical juristical purposes both the concept and the term have become wholly unnecessary.

The most striking survival of ancient legal views is still traceable in the anomalous Law *Institutes*, which have maintained a complete, or at all events a partial, independence of the positive restrictions of Jural Capacity (§ 71—74). Doubtless much here also has altogether vanished, as, for example, a *Legacy of Alimony to Slaves* (§ 72), and *Emancipation by means of a FIDEL-COMMISSUM* (§ 74). On the other hand, the peculiar quality of *Dotal Rights*, of the *Action for Alimony and for Dotation* (§ 72), of the *Action for Injury*, of the *QUERELA INOFFICIOSI* (so far as this is permitted to prevail after the 115 *Novel*) (§ 73), of *Partnership*, of *Mandate*, and the like (§ 74), has been preserved.

The statements here made concerning the limits of the applicability of the preceding Law Rules, do not, moreover, stand in any contradiction with the opinions of Modern writers. Those writers may not indeed express themselves upon such matters quite so explicitly and fully, but we may still assume with

tolerable certainty that if it came to an exposition concerning most of the propositions above advanced, no material contradiction would be found. Thus even the apparent contradiction of Glück (a) really only serves to confirm my view. He assumes that a *MAXIMA CAPITIS DEMINUTIO* might still take place whenever any one gave himself up as a Bondsman, or was sentenced to incarceration for the term of his life in a Fortress or Prison: similarly a *MEDIA*, by the loss of the right of Citizenship of some particular German State, or even of a common right of German Citizenship. He adds, however, that the principles of the Roman Law could not be applied to such cases. But that is exactly the point we are here alone concerned with, and especially of the cessation or deminution of Jural Capacity in the Roman sense. No one will deny that in all periods of time numerous changes in the condition of men occur: but to treat and designate such changes as *CAPITIS DEMINUTIONES*, can only lead to a vain and perplexing playing with words.

The same thing notably happens also in regard to Civil Death; our writers no doubt set forth the Roman notion on the subject (b), but not with the view of asserting thereby its practical application. In France the matter has for a long period assumed a different complexion, and although this subject does not lie within the limits of our work, I shall nevertheless deal with it in a supplementary manner, because it will serve as a warning example how far the unskilful application of misconceived historical legal notions may lead.

Domat speaks of *MORT CIVILE* in a few lines, which afford him sufficient space however for two great errors. *Mort civile*, he says, was the condition of a person sentenced to Death, or to some other Punishment together with Confiscation of Property, to whom the term was applied because he was a Slave of Punishment (*esclave de la peine*) (c). But in reality Civil Death has

(a) Glück, vol. 2, § 128.

(b) Thus, for example, Mühlenbruch, vol. 1, § 184.

(c) Domat, *Liv. Prélim.* tit. 2, sect. 2, § 12.

no connection whatever with Confiscation, because the Roman who was captured in War suffered it without Confiscation, while the RELEGATUS did not suffer it at all, although in regard to him also Confiscation of Property at times (not always) occurred. Moreover a DEPORTATUS suffered Civil Death without being a Slave of Punishment (*esclave de la peine*). Thus the matter stands in point of theory.

In practice (*d*) the notion of Civil Death was applied to a life-long Punishment on the Gallies, or to perpetual Banishment, but its application was disputed in certain other cases. A law of Louis XIV. regarding religious Emigrants (*refugiés*), which set in motion all kinds of evil passions, introduced the most important application; but as that law stood in direct opposition with public opinion, it was frequently ignored, especially in regard to the Children of Emigrants.

On the breaking out of the Revolution many new and highly important applications were speedily invoked, inasmuch as the Laws of the 28th March and 17th September 1793 imposed Civil Death on Emigrants and Deported persons. The armoury of ancient Jurisprudence had now to yield its weapons for the persecution of the Emigrants.

Finally the CODE was to be framed. Nothing can be more erroneous than that which many people believe, that this work was entirely the creation of the new revolutionary wisdom, by means, as it were, of a kind of inspiration. On the contrary, the first Compilers, as well as at a subsequent period the Members of the Senate, contributed all their knowledge and errors derived from the side of the ancient jurisprudence. The following were now accepted as cases for the application of Civil Death.

1. EMIGRANTS. Although in the eighth Century the laws against Emigration had already been abolished, and most persons who so wished were struck out from the list of Emigrants, and thereby became again freed from Civil Death; there were still many who had not returned, others again who, upon their re-

(*d*) The *Merlin Répertoire*, art. *Mort Civile*, expressly treats of this, where a complement to the succeeding propositions to the text will be found.

admission, neither could nor should have been freed from the operation of their Civil Death, as regards Marriage and Succession which had taken place in the Past (*e*).

On the other hand, it was said that in future the voluntary dissolution of the relations with the Fatherland should no longer be regarded as causing Civil Death, but simply as putting an end to the quality of a Frenchman (Art. 17—21), a change, however, which is absolutely of no importance.

2. PERSONS CONDEMNED TO DEATH: partly with regard to the intervening period till their execution, partly with respect to cases where they had avoided execution by flight (Art. 23).

3. PERSONS CONDEMNED TO CERTAIN OTHER PUNISHMENTS (Art. 24). The CODE CIVIL reserved any more precise definition on this point, while the CODE PENAL (Art. 18) united Civil Death to Penal Servitude for Life (on the Gallies), and to Deportation; the latter case was rightly considered as at once the most remarkable and the most difficult, because the Deported person was intended to live in freedom at the place of banishment.

The most important effects of Civil Death may, however, be set forth in the following principles in accordance with the provisions of Art. 25:—

(1.) The entire existing Estate of a person who becomes Civilly Dead passes, at the very moment of such an occurrence, to his Intestate Heirs.

(2.) He becomes for the future incapable of all Civil Rights (*droits civils*), but capable of all Natural Rights (*droits naturels*) (*f*). This fundamental distinction is applied in the following manner:—

A. He cannot acquire anything by Inheritance, with the exception of Alimony bequeathed to him.

(*e*) The laws concerning Emigrants, cited Merlin, *loc. cit.* p. 373. In the Debates on the Code in the Senate the continuing force and importance of the Emigration laws generally, and especially in relation to the Civil Death of Emigrants, were expressly recognised. *Conférence du Code Civil*, vol. 1, pp. 76, 77 (on Art. 24).

(*f*) This was literally expressed in the *Projet de Code*, liv. 1, tit. 1, Art. 30

B. He can neither leave behind Testamentary nor Intestate Heirs. Whatever he may have acquired during the period of his Civil Death, falls to the State on his Natural Death (Art. 33).

C. He can neither give nor receive Donations, with the exception of those for Alimony (*g*).

D. The Marriage which had hitherto subsisted is dissolved in regard to all Civil Effects.

E. A Marriage which he may hereafter contract is, in regard to the same Effects, invalid.

F. On the other hand he is capable, by means of every other juristical act, except the acts above mentioned, to acquire and to dispose of Property. He is therefore competent to conclude a Purchase, Barter, Lease, Hire, and a Loan, as well as to enforce all Actions arising from Injuries or other Delicts (*h*).

Against these specified restrictions the following objections may now be advanced. The distinction between *droits civils* and *naturels* is obviously derived from the Roman Law, but it has a wholly different meaning in the latter, because the Roman *JUS GENTIUM* constituted likewise within itself a Positive Law (§ 22). Imperceptibly in lieu of the Roman contrast was sub-

“PRIVÉS DES AVANTAGES DU *droit civil proprement dit.*” § 31 “ILS DE MEURENT CAPABLES DE TOUS LES ACTES QUI SONT DU *droit naturel et des gens.*” The Code itself does not contain these formal provisions, but simply (by way of example) an enumeration of the most important individual Rights that were withdrawn, but the sense remains the same, as clearly appears from the Debates in the Senate. Comp. Toullier, *Droit Civil Français*, liv. 1, § 279.

(*g*) It is so expressly stated in Art. 25. Toullier, § 282, says, on the contrary, that a person who is Civilly Dead is capable of acquiring and alienating by *DONATIONS MANUELLES*, that is to say, by Gifts of Moveable things by means of Tradition, but not by Gifts of Immoveables, or of such things as required the execution of a written deed. Thus, therefore, a large amount of Property in ready Money or State Paper could be validly disposed of, which is quite contrary to the Law. The *Projet de Code Civil*, Art. 32, 33, permitted the Acceptance of a Gift of a few moveable things and those for Alimony, and, on the other hand, the Alienation by Gift unconditionally.

(*h*) The *Projet de Code Civil*, § 31, expressly enumerated the remaining allowable transactions, in regard to which the Code itself is silent, but the sense here also is the same. Comp. Toullier, § 280, 283. Also the observations of Tronchet in the Senate. *Conférence*, vol. 1, p. 119.

stituted that which was totally different from it, the contrast of the more positive and arbitrary, or the more natural and self-comprehensive, Law-Institutes. The latter contrast, however, is partly of no importance for practical application, and partly vascillating and indefinite in its prescribed limits, as is clearly shown in the following illustrations. It is wholly inconsistent that a Deported person should be able to acquire Property, but that this Property should fall to the State on his death, which is surely in principle only a partial Confiscation, and therefore a mere half measure. In the Roman Law it is true the same legal principle prevailed (*i*), but then it had the consistent signification of a continuous Confiscation operating from the very beginning, which, however, the French law rejects. Considered simply as a Foreigner, a Deported person was quite competent to leave Heirs, because the State never succeeded to a Foreigner as such. Judged according to the positive nature of all laws of Inheritance the principle of the French Law receives no justification, and yet it would seem that it was solely based on that view. Still more remarkable is the treatment of Donation, than which nothing can be more positive, except Purchase and Hire. Moreover the Code is completely at variance in this matter from the *Projet*, while the Jurists again pursue their own course. (Note (*g*).) The ground which Toullier assigns for the Civil nature of a Donation, that it is subject to a positive form, really decides nothing, because Contracts of Purchase and Hire also, if they exceed 150 francs in value, require to be executed in a prescribed form (Art. 1341), and undoubtedly these contracts are unconditionally available to a Deported person.

But even more important than all the rest is the treatment of Marriage. In this matter the Natural, Civil, and Religious elements are distinguished (*k*); but since Civil Effects (*EFFETS CIVILS*) are denied to it, it is undoubtedly meant to exclude thereby every juristical operation, just as was expressly admitted in the course of the Debates. In relation therefore to the Mar-

(*i*) L. 2, C. *de bonis proscript.* (9, 49). (*k*) *Conférence*, vol. 1, pp. 86, 92, 98.

riage of a Deported person, since it cannot juristically exist, neither Adultery nor Bigamy is possible. The Children of a Deported person are Illegitimate, they are Bastards, they have no Father, and they have no right of Inheritance, not even in regard to the property of their Collateral Kindred (*l*). In both respects, also, it makes no difference whether the Deported person has simply continued his earlier Marriage, or whether he has concluded a Marriage during his Deportation. Let us compare this with the earlier Law.

According to the Roman Law the Marriage of a DEPORTATUS was invalid by the *JUS CIVILE*, and valid by the *JUS GENTIUM*, therefore as completely valid as the Marriages of many millions of Provincial Inhabitants before Caracalla made Citizenship universal (*m*). The results of these principles consisted in this, that the Children of such a union did not stand in the Paternal Power of the Deported Parent, nor in Agnation with his Kindred. On the other hand, they were Legitimate, they had a recognised juristical Father, they stood in true Cognation with their Parents and their Kindred, and they were entitled to Cognatic Succession (except as regards the Father's own Property, which was always Confiscated). All these provisions proceeded from pure juristical consistency, and not from religious motives, because they were recognised long before the prevalence of Christianity. Owing, however, to the fact that in the Compilation of the Code, the effects peculiar to the Roman *JUS CIVILE* were confounded with juristical effects generally, the singular result was imperceptibly reached that the Marriage of a French Exile was not placed (as

(*l*) *Conférence*, pp. 86, 110. Toullier, § 285, 293, asserts the Legitimacy of the Children, because the *VINCULUM MATRIMONII* (the bond) clearly continues. This is plainly in opposition to the Law. What he maintains is what was desired by the Minority of the Senate in order to effect an alteration of the *Projet*: their opinion however fell through, and the *Projet* was passed unaltered. Entirely owing to the foregoing fundamental conflict the real sense of the Law is placed beyond doubt.

(*m*) Indeed even strict principles had to some extent yielded to humanity; the *Dos*, which could only subsist along with a *JUSTUM MATRIMONIUM*, was here permitted to continue, although there was no longer *JUSTUM MATRIMONIUM*.

it should have been naturally) on an equality with that of a Roman *DEPORTATUS*, but with the Marriage of a Roman Mine-worker, which was necessarily annulled by the condemned husband falling into a condition of Slavery. Indeed the Compilers went much farther than the Roman Law in its latest phase, because Justinian had abolished the Slavery of such condemned persons, so that their Marriage could continue (Nov. 22, C. 8), but even this amelioration is denied to the French Exile.

The ancient French Law, and especially the *ordonnance* of 1639, whose severity was always in conflict with public opinion, and was naturally therefore tacitly opposed by Courts of Justice, nevertheless recognised that an earlier concluded Marriage should continue as a Sacrament, and thus the Children who were subsequently born were deemed legitimate, and had a right of Succession towards all their Kindred (*n*).

Moreover the proposal of the new Law provoked the keenest and most thorough opposition: first, on the part of the Court of Appeal at Paris (*o*), then in the Senate on the part of the First Consul (who spoke very sensibly on the subject), the Minister of Justice, and of other Members (*p*); lastly, on the part of the Tribunal to which the Compilation of the Senate was sent for examination (*g*). The proposal was contested partly upon the basis of the Roman and old French Law, partly on grounds of humanity: and Bonaparte especially pointed out how revolting it would be that the Wife of an Exile, whose noble fidelity in sharing his misfortune deserved esteem, should be degraded by the Law to a Concubine. All was in vain. The Law was passed notwithstanding, and the following different grounds combined to bring about this result. In the first place, a rigid notion of consistency based upon historically false premisses, therefore the influence of errors in which most Jurists, from a superficial knowledge of the Roman Law, had been

(*n*) *Conférence*, pp. 89, 90.

(*o*) *Observations des tribunaux d'appel sur le Projet de Code Civil*, p. 38.

(*p*) *Conférence*, pp. 86, 87, 88. Comp. also especially Maleville, *Analyse Raisonnée*, vol. 1, pp. 47, 50.

(*g*) *Conférence*, vol. 1, pp. 174—176.

educated from their youth, and which they could not now overcome (*r*). *Secondly*, the hatred against the Emigrants engendered by the Revolution, although the greater portion of them had been pardoned, and the rest had long since lost their importance and any dangerous influence. *Thirdly*, the anxious effort to rigorously exclude the earlier influence of religious sentiments upon the Law. The result of these triumphant motives was very forcibly summed up in the vindictory speech with which the Tribune Gary recommended the adoption of the *Definitive Projet*, *i. e.*, in the form as it now exists in the Code. He allowed that when a Woman followed the Exile into banishment it was hard that the Children should be pronounced Illegitimate and herself a Concubine; but severity existed in other parts of the Law also, and such a Woman had at all events the consolation of her conscience, of religion, and the respect of mankind, which the Law did not in any way interfere with; but the consistency of the Law had to prevail over everything (*s*). Undoubtedly Public Opinion always weakened the Law, and even the Courts, just as they did in early times, gradually undermined it in application, but its absolute objectionableness is not thereby diminished, on the contrary, it is simply made still more manifest.

If, finally, it is asked what was the ultimate effect of this Law, the question may be answered as follows. In the case of persons condemned to Death or to Penal Servitude for Life, it is almost wholly unimportant, because the very nature of their punishment anyhow renders all those matters impossible in

(*r*) If any one thinks that the influence of the Roman Law (erroneously conceived) is here only arbitrarily assumed by me and not based upon fact, he should certainly read the article *Mort Civile* in Merlin, *Répertoire*, in which the author takes the greatest and most unnecessary trouble with explanations and even with textual criticisms of passages of the Pandects; amongst other instances he drags in the wholly unsuitable *POSTLIMINIUM*, and (at p. 373) the words of L. 4 *de capt.* "AN *qui hostibus deditus*, REVERSUS, NEC A NOBIS RECEPTUS EST," are interpreted as a Deserter, an *enfant ingrat de la patrie*, and placed in connection with Art. 18, 19, 21 of the Code, which certainly goes almost beyond belief.

(*s*) *Code Civil suivi des motifs*, vol. 2, p. 86.

regard to which the recognition of Civil Death might appear questionable: the immediate opening out of the Inheritance is here, therefore, the only remaining effect, and against this the least objection exists. As regards Emigrants the Law is important, owing to the effects of the Jural Relations which arise during Emigration; but this importance must gradually cease. The remaining important consequence is seen in regard to Deportation, out of which it was intended to construct a politically important and systematic Institute, which, however, down to the present day has not yet attained maturity. All the defects which have been indicated above are here in fact brought out very prominently, and the positive justification which is advanced in favor of this provision of the Law, that it is dangerous to secure to the Exile, by means of a more extensive Capacity for Rights, the means of flight or of hostile undertakings (*t*), is altogether groundless: for against such a danger a simple Interdiction, without the infliction of Civil Death, would act as a safeguard, that is to say, the same measure which is actually employed in conjunction with many other punishments, and is found to be amply sufficient (*u*).

No individual application of the principle of Civil Death has obtained such celebrity as the case of the Prince Polignac. He was condemned by the sentence of the House of Peers of the 21st December, 1830, to Incarceration for Life, which was substituted for that of Deportation, which was found to be impracticable; and as a consequence of this punishment he was at the same time expressly pronounced to be Civilly Dead, and subject to all the disqualifications which by law were attached to Deportation and Civil Death. His Marriage has subsisted in Ham, and Children have been born to him, so that this case more especially serves to demonstrate the completely objectionable character of the French Law concerning Civil Death, above asserted.

In the year 1831 a Commission again sat for the amendment of certain provisions of the Penal Code, and through it many

(*t*) *Conférence*, 1, p. 128.

(*u*) *Code Pénal*, Art. 29, 30, 31.

changes were in fact introduced. This Commission fully recognised the objectionable character of the law concerning Civil Death, and described it in the strongest terms. But it abstained from proposing any abolition of that law, because it rightly assumed that any such alteration could not be effected without at the same time introducing many new provisions with regard to kindred matters of Private Law, which lay beyond the province of the Commission (*v*). In this condition the matter has remained down to the present time.

While, however, the errors which underlie the French legislation concerning Civil Death have been thus exhibited in detail, the way has at the same time been cleared for a more comprehensive treatment of this subject, with reference to a possible and suitable application of that doctrine to modern times. Nor will this digression be regarded as altogether superfluous when one considers that this portion of the French Law has also been introduced into the Laws of Germany, and may easily also obtain a still farther extension.

In the Roman Law, with respect to Crimes of the most heinous sort, four results ensued: Criminal Punishments, **MAGNA CAPITIS DEMINUTIO**, Civil Death, and the Confiscation of Property. These four results have been frequently conceived in an erroneous relation towards each other, and herein lies the basis of the most serious misconceptions.

The **MAGNA CAPITIS DEMINUTIO** is not identical with Criminal Punishment, because **RELEGATIO** is an instance of the latter without involving **CAPITIS DEMINUTIO** (*w*). On the other hand, a Roman Citizen who became a Prisoner of War, or who entered into a Latin Colony, suffered a **MAGNA CAPITIS DEMINUTIO**, although no one could regard either one or the other circum-

(*v*) The report of the Commission was presented in the Chamber of Deputies at the sitting of the 11th November, 1831. Comp. *Moniteur* of the 12th November, 1831.

(*w*) L. 7, § 5 *de bonis damn.* (48, 20).

stance a Punishment. Both legal notions were therefore independent of each other, and all we can say is, that *CAPITIS DEMINUTIO* was united to several Criminal Punishments as a direct effect thereof, but it does not follow that this *CAPITIS DEMINUTIO* was itself a Punishment.

The expression Civil Death (*MORS CIVILIS*) first occurs in more modern times, and in order to designate it accurately I shall call it the "Fiction of Death," that is to say the treatment of a living person as if he were dead. This Fiction is always joined as a wholly positive result to every *MAGNA CAPITIS DEMINUTIO*, although it does not necessarily follow from the latter concept (§ 69, page 52). It stands therefore in the same relation as *CAPITIS DEMINUTIO* to Criminal Punishments; a Prisoner of War undergoes the Fiction of Death, while the *RELEGATUS* is free from its effects; so that we can only say of this Fiction also, that it is united as a positive consequence to several Criminal Punishments. Indeed even where it appears in this connection, it is never itself regarded by the Romans as a Punishment, or as the aggravation of another Punishment, or as strengthening the moral influence of the same, but merely as a fair, simple, and convenient expedient for the solution of those difficulties which might otherwise arise in matters of Inheritance. For as the person who was so condemned could not be an Heir himself by reason of his *CAPITIS DEMINUTIO* (*x*), so in order not to prevent another from succeeding to the Inheritance by his mere existence, the Death of the former was assumed, whereupon his existence was completely left out of consideration in regard to it. But precisely for that reason this Fiction was only applied where such a special purpose could be served, therefore only in consideration of the Civil Effects attached to Life, beyond which one took no notice of it, and accordingly in this matter a literal consistency is not to be expected. Thus a Deported person could acquire Property, and contract Marriage, although of course deceased persons are incapable of both: this capacity

(*x*) He was not at one time capable of *BONORUM POSSESSIO* (L. 13 *de B. P.*), therefore still much less of a *HEREDITAS*.

was derived in such cases from the *JUS GENTIUM* and not from the *JUS CIVILE*.

The Confiscation of Property, wherever it takes place, is a genuine Punishment. It is apparently only accidentally and externally united with *MAGNA CAPITIS DEMINUTIO* (§ 69 (b)), so that the two concepts are really wholly independent of each other. During the Republican period, Confiscation, as a general rule, did not take place conjointly with the most heinous punishments (y). Under the Emperors it was certainly the ordinary consequence of every *MAGNA CAPITIS DEMINUTIO* ordained as a Punishment (z), but even then with very mitigating modifications. Portions of the Estate had already been relinquished in favour of the Children of Culprits from an early period, and after various fluctuations of the Law Rules on the subject, Justinian at last enacted, that with the exception of persons guilty of High Treason, the right of the *FISCUS* should completely give way in favour of Descendants, and of the three nearest degrees amongst the Ascendants, of the Culprit (a). Conversely, however, Confiscation might be imposed quite apart from all forms of *CAPITIS DEMINUTIO* (b). Thus Confiscation and the Fiction of Death, although occurring accidentally together, were yet in their conception independent of one another. Indeed, if one adheres to the strict notion of this Fiction, not Confiscation but Succession results from it, inasmuch as the Property of a really deceased person is not Confiscated, but Inherited.

A special application of the principles here stated still needs to be made with respect to the Testamentary capacity of a condemned person. Where a Confiscation of Property takes place, it is quite obvious that every Testament of the condemned per-

(y) A condemned parricide was succeeded to in the ordinary way, and the only doubt was whether he could still make a valid Testament after his condemnation. Cicero, *De Invent.* II. 50; *AUCT. ad Herenn.* I. 13.

(z) L. 1 *pr. de bonis damn.* (48, 20).

(a) L. 1, § 1, 2, 3 *de bonis damn.* (48, 20); L. 10, C. *de bonis proscr.* (9, 49) Nov. 17, C. 12. The newest law in Nov. 131, C. 13, from which *Auth. BONA DAMNATORUM, C. de bonis proscr.* (9, 46), varies to some extent.

(b) L. 7, § 5 *de bonis damn.* (48, 20).

son must remain inoperative, whether it be executed before or after his condemnation. This ground, therefore, disappears in a Modern System of Legislation, when Confiscation is generally not admitted therein.

Amongst the Romans *CAPITIS DEMINUTIO* was the decisive ground which necessarily annulled the earlier Testament of every one who suffered such a penalty, for even the *MINIMA* form of it produced this effect. But if at the time of Death a restoration of the previous Status had occurred, the earlier Testament, which according to the *JUS CIVILE* was and continued invalid, would be upheld by the Praetor (*c*). No Testament could, however, be made subsequent to the condemnation, because no *PEREGRINUS* had the *TESTAMENTI FACTIO* (*d*). This impediment cannot occur in Modern Legislation, because we do not recognise the *MAGNA CAPITIS DEMINUTIO* of the Romans.

Lastly, the Fiction of Death, if rigorously enforced, renders the subsequent execution of a Testament impossible, because a dead person cannot make one. On the other hand, the efficacy of an earlier Testament is not affected, because even natural Death does not invalidate an existing Testament, but rather impresses it for the first time with legal force. This is brought out very clearly in a case in which the Fiction of Death was pronounced by a formal *PLEBISCITUM* (the *LEX CORNELIA*) with special reference to this object. When, for instance, a Roman died in captivity as a Prisoner of War, it was assumed that he had died at the very moment of his captivity; and thus his earlier executed Testament was maintained, which, without the aid of this Fiction, would have been annulled by the *MAXIMA CAPITIS DEMINUTIO* (*e*).

In the Roman Concepts and Rules of Law, therefore, if we applied them consistently to our own altered conditions of Law,

(*c*) Gaius, II. § 145, 147; Ulpian, XXIII. § 4, 6; L. 1, § 8; L. 11, § 2 *de B. P. sec. tab.* (37, 11); L. 8, § 3 *de F. codic.* (29, 7); L. 6, § 5—13 *de injusto* (28, 3).

(*d*) L. 8, § 1—4 *qui test.* (28, 1).

(*e*) L. 6, § 5, 12 *de injusto* (28, 3); L. 12 *qui test.* (28, 1); Ulpian, XXIII. § 5.

there lies absolutely no reason for denying validity to the Testament of a condemned person in Modern Legislation.

These considerations are by no means intended to oppose the admission of the theory of Civil Death into a Penal Code of the present day. All that is intended is to remove the deceptive appearance of a connection with the Concepts and Rules of our traditional Positive Laws, which may induce us to admit wholly groundless consequences. What may be prescribed in this respect is something new; something independent of the hitherto prevailing Law, something which must be justified not upon historical grounds, but from the stand-point of intrinsic suitability. And this will also hold good for the question whether the Testament of a person condemned to a heinous punishment should be recognised as valid.

SECTION 76.

Restriction of Jural Capacity by Infamy.

Introduction.

The restrictions on Jural Capacity which have hitherto been stated must be treated as constituent parts of the Modern Roman Law for two reasons. *Firstly*, because the system of Private Law has been from ancient times till now so intimately connected with them, that a thorough insight into their latest forms without an accurate knowledge of those restrictions is just as little possible as the certain avoidance of the most complicated errors. *Secondly*, because a considerable number of those restrictions have become embodied also into the most recent law, and their peculiar nature cannot be properly understood when separated from their earlier connection.

Neither of the above grounds will be found to exist in regard to some other restrictions, which have never had more than an isolated influence upon Jural Capacity, and which, as I believe, have altogether vanished in the most recent law. I refer to **INFAMY** and **DIFFERENCE OF RELIGION**. So far as they both relate to the Roman Law they must be treated as obsolete Institutes. But as the prevailing opinion on this subject does not wholly coincide with that which is here expressed, whence it happens that those Institutes are still represented as constituent parts of the modern Common Law, a critical exposition of the same, according to the plan of this work, cannot well be excluded.

In order to gain a firm footing for the difficult inquiry concerning **INFAMY**, as the first of the Institutes in question, I will not begin with the origin of that concept and of its various forms, nor yet with a historical account of the same, but with the particular phase in which it appears in the Justinian Law

Sources. It is plain, however, that an inquiry of this kind cannot rest upon an entire misrepresentation of the earlier conditions of Law, because the verbally incorporated Praetorian Edict lies at its basis (*a*), and everything else is either a complement to, or a mere modification of, the same. Our knowledge now chiefly rests upon the following fragmentary Sources:—

TITLE DIGEST, DE HIS NOTANTUR INFAMIA (3, 2).

TITLE CODE, EX QUIBUS CAUSIS INFAMIA IRROGATUR (2, 12).

A large portion of the Roman PLEBISCITUM, which is commonly designated the TABULA HERACLEENSIS, bears a remarkable connection with these passages (*b*), concerning which farther information will be given below.

The following Modern Writers must likewise be noticed in this introduction:—

DONELLUS, lib. 18, C. 6—8.

HAGEMEISTER in Hugo's CIVIL. MAGAZIN, Vol. III., No. VIII. (1803), pages 163—182 of the third vol. of the edition of 1812.

G. CH. BURCHARDI DE INFAMIA. Kilon, 1819 (*c*).

(*a*) The text of the Edict is to be found in L. 1 *de his qui not.* (3, 2). In regard to the cases directly embraced in this text, I shall for the sake of brevity only quote the Edict as a Source, by which therefore must always be understood the text of the Edict contained in L. 1 *de his qui not.* This must be particularly borne in mind, because we partly possess another and very different text, probably taken from the Commentary of Paulus, *Frag. Vat.* § 320 (§ 321 of the Commentary). This question will be considered below, and also in App. VII.

(*b*) *Tab. Heracl. Lin.* 108—141, in Haubold, *Monumenta Legalia*, ed. Spangenberg, Berol. 1830, pp. 122—129. The Law was passed in 709 U. C., and its real title was the LEX JULIA MUNICIPALIS. *Zeitschrift für geschichtl. Rechtswissenschaft*, vol. 9, pp. 348, 371.

(*c*) Burchardi himself says (pp. 5, 11), that his views for the most part are taken from Lectures of mine which were heard by him. If this is actually the case, he has at least repaid the obligation with compound interest, for upon several important points of this inquiry my attention has for the first time been drawn to them by his work. This author has since so far modified his views, that he believes that much of what we compute as Private Law is in point of fact JURIS PUBLICI; therefore is embraced in the consequences of Infamy, for instance, CONNUBIUM, COMMERCIMUM, TESTAMENTI-FACTIO (*Principles of the*

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TH. MAREZOLI ON CIVIL HONOR. Giessen, 1824 (*d*).

(*Concerning the Modern condition of this Institute.*)

FICHHORN, *German Private-Law*, 4th ed. § 83—90.

Legal System of the Romans, p. 272). If this view were correct, such consequences of Infamy would not have been introduced so late, or in so restricted and so disconnected a manner, as he himself asserts with reference to the precepts of the *LEX JULIA* and of Constantine.

(*d*) An uncommonly laborious work, to whose rich materials I generally refer as the complement of my own short exposition, although I do not hold many of the principal opinions expressed in it to be correct. I shall especially omit many small additions from the Imperial Laws, which have exercised no influence upon the essence of the Institute.

SECTION 77.

Individual cases of Infamy.

The individual cases of Infamy, as they have been exhibited in our Law Sources, may be divided into five classes.

1. A CONDEMNATION ON ACCOUNT OF A CRIMINAL OFFENCE.

This case was only gradually developed into a general rule. But the Edict itself only attached Infamy to a CALUMNIA or PRAEVARICATIO committed in the course of a Criminal Proceeding, and this case appears also in the Heracleian Table (LIN. 120, 122).

A SENATUS-CONSULTUM prescribed it as the consequence of a special crime, the VIS PRIVATA (a). Then it was allowed to result from every instance of Capital Punishment; but this was not important, because so long as this Punishment (therefore at any rate the loss of Citizenship) was actually carried out, Infamy was of no consequence: it was therefore first perceptible when the condemned person obtained a remission of his Punishment without at the same time a remission of the Infamy, which in this case it was not usual to grant (b). Finally, however, the general rule was established that every condemnation in a PUBLICUM JUDICIUM produced Infamy (c). Hence a condemnation on account of a CRIMEN EXTRAORDINARIUM was excluded, because it only exceptionally produced Infamy in certain cases, which will presently be mentioned.

(a) L. 1 *pr. ad L. Juliam. de vi priv.* (48, 7).

(b) L. 1, § 6, 9 *de postulando* (3, 1); Marezoll, p. 127.

(c) L. 7 *de publ. jud.* (48, 1); L. 56 *pro socio* (17, 2); *Coll. LL. Mus.* tit. 4, § 3. Comp. with § 12. In the *Tab. Heracl.* Lin. 117, 118, 111, 112, is found still earlier only a partially corresponding precept: the law affects every one who was condemned in this city by some one form of PUBLICUM JUDICIUM, just as every one who was condemned EX L. PRAETORIA in Rome or elsewhere out of Italy and banished.

On the other hand, certain analogous cases were likewise recognised as producing Infamy, by the fiction, as it were, of a Criminal Sentence, which in point of fact had not been pronounced. To this category belonged (as the first case mentioned in the Edict itself) the ignominious expulsion of a Soldier from the Army (*d*): the case of a Woman actually caught in Adultery (not condemned) (*e*): Perjury committed by the violation of a sworn Compromise or Contract of Remission (*f*); and, lastly, a Criminal Accusation (*DELATIO*) preferred to the *Fiscus*, which the author was unable to establish (*g*).

As the most recent extension in this respect of the Roman doctrine of Infamy, we may refer to the AUTH. HABITA of Frederick I., for the protection of Law Students. Whoever wrongs such Students, or, under the pretence of retaliation, robs or injures them, is declared to be Infamous, is obliged to pay a fourfold compensation, and (if he is an Official) is to be dismissed from his Office.

II. Certain Private Delicts, and, according to the Edict itself, Theft, Robbery, Injury, and Deceit. Here the condemnation primarily produced Infamy, but only when it was passed in the name of the accused himself. This restriction had the twofold meaning, that when an accused person had carried on the proceeding by means of a Procurator, neither he nor his Procurator became Infamous (*h*). The natural consequence of such an Exemption was, that owing to the general permission to employ Procurators, this threat of Infamy was considerably weakened, because every accused person could easily avoid it by authorizing a Procurator to act for him.

(*d*) L. 1 *pr. de his qui not.* (3, 2) "QUI AB EXERCITU IGNOMINIAE CAUSA AB IMPERATORE . . . DIMISSUS ERIT." This case is also mentioned in the *Tab. Heracl.* Lin. 121.

(*e*) L. 13, § 12, 13 *de ritu nupt.* (23, 2) "QUAE IN ADULTERIO DEPREHensa EST, QUASI PUBLICO JUDICIO DAMNATA EST."

(*f*) Only such Contracts are referred to, therefore, which are intended to adjust some disputed Jural Relation. L. 41, C. *de transact.* (2, 4).

(*g*) L. 18, § 7; L. 2 *pr. de j. fisci* (49, 14).

(*h*) L. 6, § 2 *de his qui not.* (3, 2); L. 2 *pr. de obsequ.* (37, 15).

The condemnation in these cases was imputed by the Edict itself to the side of the Compromise (*DAMNATUS PACTUSVE ERIT*). This precept, however, was only intended to be understood of a pecuniary Settlement by means of a Private Compromise: therefore neither of a Settlement under Judicial Compulsion, nor of a gratuitous Remission (*i*).

If in the cases of those Private Delicts the private Action were not resorted to, but a *CRIMEN EXTRAORDINARIUM* were launched, Infamy would none the less ensue, and these are the Exceptions above indicated, in which also the *CRIMEN EXTRAORDINARIUM* had the effect of producing Infamy, which as a rule was only reserved to the *PUBLICUM JUDICIUM* (*j*). It also made no difference whether the Delict retained its ordinary name (*FURTUM*, *INJURIA*) (*k*), or whether it became the subject of a Criminal Inquiry under a special denomination (*EXPILATA HEREDITAS*, *STELLIONATUS*) (*l*). In all these cases the exemption from Infamy, which in Private Actions might be effected by the employment of a Procurator, could not occur (*m*).

Amongst Private Delicts producing Infamy we may also to a certain extent include Usury, since, at least in the Ancient Law, it involved a private Punishment. This indeed is no longer recognized in Justinian's legislation, but Infamy is still prescribed therein as the consequence of Usury (*n*).

III. OBLIGATORY RELATIONS OTHER THAN DELICTS.

In some of these likewise a Condemnation produced Infamy. To this category belong, according to the words of the Edict, the following forms of Action: *PRO SOCIO*, *TUTELAE*, *MANDATI*, *DEPOSITI*. This statement agrees for the most part with several

(*i*) L. 6, § 3 *de his qui not.* (3, 2).

(*j*) L. 7 *de publ. jud.* (48, 1).

(*k*) L. 92 *de furtis* (47, 2); L. 45 *de injur.* (47, 10).

(*l*) Marezoll, pp. 134—136, where the apparent contradiction between L. 13, § 8 *de his qui not.* (3, 2), and L. 2 *stellion.* (47, 20), is satisfactorily solved.

(*m*) Marezoll, p. 167.

(*n*) L. 20, C. *ex quib. caus. inf.* (2, 12).

passages of Cicero and the Heracleian Table (*o*), but with the remarkable variation that the latter all omit the *ACTIO DEPOSITI*, while, on the other hand, they admit the *FIDUCIÆ ACTIO*, which naturally enough, as an obsolete Institute, no longer appears in Justinian. It is not improbable that in ancient times a Deposit without *FIDUCIA* was not in point of fact a ground of Infamy, and that later on as the *FIDUCIA* fell into disuse, indeed, even before Justinian's time (L. 10, C. *DEPOS*), Deposit was generally substituted in its stead. Moreover, in these Actions Infamy might be avoided by the nomination of a Procurator (*SUO NOMINE . . . DAMNATUS ERIT*). Again Infamy could only result from the *DIRECTA ACTIO* (*NON CONTRARIO JUDICIO DAMNATUS ERIT*), but exceptionally it might also arise from the *CONTRARIIS ACTIO*, when the accused was charged therein with some special act of dishonesty (*p*). As regards the *DIRECTA ACTIO* our Jurists entertain very different opinions concerning the important question, whether this Action ordinarily produces Infamy, or only under the supposition of *DOLUS*, which here, as elsewhere, has the same effect as *LATA CULPA*. For the former, or more rigorous opinion, the Edictal text has been relied upon, which says generally, without any mention of *DOLUS* as a condition, "*INFAMIA NOTATUR . . . QUI PRO SOCIO, TUTELAE, MANDATI, DEPOSITI . . . DAMNATUS ERIT*;" with which several other texts also agree, in just the same indefinite generality (*q*). On the other hand, however, several other texts dispute this, and expressly point to Dishonesty as the ground, and therefore also as the

(*o*) Cicero, *Pro Roscio*, *Com. C. 6*, *Pro Roscio Amer. C. 38, 39*, *Pro Caecina*, C. 2 (at the end), and C. 3; *Tab. Heracl.* Lin. 111. In regard to a Guardian, Infamy results not merely as a consequence of a condemnation in the *TUTELA ACTIO*, but also by his removal from office as a *SUSPECTUS*. § 6J *de susp.* (1, 26); L. 3, § 18 *eod.* (26, 10); L. 9, C. *eod.* (5, 43). It is also incurred by the Guardian marrying the Ward himself or getting her married to his Son before the prescribed age, because this was looked upon as equivalent to *DOLUS*. L. 66 *pr. de r. n.* (23, 2); L. 7, C. *de interd. matrim.* (5, 6).

(*p*) L. 6, § 5, 7 *de his qui not.* (3, 2).

(*q*) § 2J *de poena temere litig.* (4, 16); *Tab. Heracl.* Lin. 111.

condition of Infamy (*r*). To this it has been replied that surely the circumstance that the Defendant in such an Action allows that to be sued for which he should have paid up voluntarily, is a TEMERITAS LITIGANDI which should be treated as DOLUS, and deserves the penalty of Infamy. This answer leads to the following propositions, in which in truth those conflicting opinions ought to find their readjustment—1. For the case of actual Deceit, Embezzlement, and the like, there is anyhow no contention. 2. This case stood, however, completely on the same footing as the other, where a Guardian or Depository, who had not previously acted dishonestly, absolutely refused to deliver up the Property or other Subject of Trust. 3. Infamy may also be conceded for the case where, in an ARBITRARIA ACTIO, the ARBITER previous to the passing of a decision calls upon the Defendant for the payment of a certain sum of money, and the Defendant nevertheless fails to pay it, but lets the matter go to judgment. Such contumacy (CONTUMACIA) may have been considered here, as in other effects (*s*), equivalent to DOLUS. 4. Beyond this, however, we ought not to go, but should rather deny Infamy in all other cases. Supposing, therefore, a MANDATARIUS was guilty of a LEVIS CULPA, but owing to a wholly excessive demand on the part of the MANDATOR he allowed process to issue against him, and was eventually condemned to pay a moderate sum; in such a case the MANDATARIUS could certainly not be reproached with having willingly sought litigation, and to brand him with Infamy would be contrary to every sound sense of justice (*t*).

Besides the above, however, Insolvency in regard to all Obliga-

(*r*) L. 6, § 5, 6, 7 *de his qui not.* (3, 2) "FIDEM," "MALE VERSATUS," "PERFIDIA;" L. 22, C. *ex quib. caus.* (2, 12) "FIDEM RUMPENS;" Cicero, *Pro Caecina*, C. 3 "FRAUDAVIT."

(*s*) Thus, for example, in regard to the JUSJURANDUM IN LITEM. L. 2, § 1 *de in litem jur.* (12, 3).

(*t*) The milder opinion here adopted is excellently expressed and specially vindicated by Donellus (XVIII. 8, § 8—13), by a thorough searching interpretation, against the objections based on certain individual texts. The more rigorous opinion is expressly defended by Marezoll, pp. 148—155, who erroneously cites Donellus as an advocate of the same opinion.

tions without distinction (BONA POSSESSA, PROSCRIPTA, VENDITA), might be a ground of Infamy, as is expressly declared by many ancient authorities (*u*). An unmistakeable though indirect trace of this doctrine is found in the Justinian Law, because it is said that a CESSIO BONORUM and the sale of Property which followed upon it, did not cause one to be Infamous (*v*), obviously in contrast with actual Insolvency, which it was thus implied was a ground of Infamy. When and under what circumstances that doctrine disappeared, cannot be determined with any certainty. The abolition of the ancient BONORUM VENDITIO only serves to explain the disappearance of Infamy if it be assumed, that it was always in the first instance incurred when the VENDITIO was completed, and not during the preparatory negotiations, for instance, on a simple POSSESSIO BONORUM (*x*).

IV. ACTS IN REFERENCE TO THE RELATIONS OF THE SEXES.

There is here much ambiguity, partly by reason of the insufficiency of our Sources, partly in truth also because many of the law-rules themselves concerning these matters were particularly vague and uncertain. The individual cases of this sort are the following:—

I. VIOLATION OF THE PERIOD OF MOURNING.

The Edict itself (in the form in which we find it in the Digest) says: If a Widow contracts a new Marriage before the expiry of the period of Mourning, the new Husband, if he is a PATER-FAMILIAS, if not his Father, becomes Infamous: likewise the Widow's Father, if she is in his Power, and the new Marriage is rendered possible by his consent. Concerning the Infamy of the Widow herself, which we might above all have expected, nothing whatever is said. As a necessary consequence, however, Infamy should certainly also be attached to the Widow (*y*).

(*u*) Cicero, *Pro Quinctio*, C. 15; *Tab. Heracl.* Lin. 113—117; Gaius, II. § 154.

(*v*) L. 8, C. *qui bon.* (7, 71); L. 11, C. *ex quib. caus. inf.* (2, 12).

(*x*) Gaius certainly only mentions VENDITIO as a ground of Infamy, while the passages from Cicero and from the *Tab. Heracl.* if literally interpreted, express the contrary opinion.

(*y*) L. 11, § 3 *de his qui not.* (3, 2). In this text the Manuscripts vary

In regard to this matter the ancient Jurists remark that the ground of Infamy in such cases was not the violation of the reverence due to the deceased, but solely the danger of a *SANGUINIS TURBATIO*, that is to say of an uncertain Paternity in case two Marriages followed close upon one another: from this principle it naturally resulted that Infamy was also incurred when the deceased, for some special ground, *e. g.* High Treason, was not to be mourned for. On the other hand, however, the confinement of the Widow shortly after the death of her Husband rendered a new Marriage immediately allowable (by reason of the impossibility of a *SANGUINIS TURBATIO*); moreover Infamy did not result from any other instance of neglected Mourning, even for the nearest relatives (*s*). Thus the matter undoubtedly stands in the Justinian Law; but the evidence derived from the Ancient Law is apparently of so conflicting a character, that a certain result is not to be gained without a very exhaustive inquiry. (Cf., App. VII.)

The period of Mourning, moreover, was always fixed at ten months, which entirely coincides with the physiological rule, according to which the longest duration of Pregnancy is ten months (App. III.); by the Laws of the Christian Emperors this period was extended to twelve months (*a*). The Canonical Law abolished Infamy altogether in this case (*b*).

2. DOUBLE MARRIAGE OR DOUBLE ESPOUSALS (*SPONSALIA*).

The Edict declares that a Man who lives at the same time in a condition of double-Marriage or double-Espousals incurs Infamy if he is a *PATERFAMILIAS*, otherwise the Father who permits it. Here also the Edict only spoke of the man (*c*);

between the reading *SI QUIS* and *SI QUA*: the last was required by the context. L. 15, C. *ex quib. caus.* (2, 12); L. 1, 2, C. *de sec. nupt.* (5, 9); L. 4, C. *ad Sc. Tert.* (6, 56).

(*s*) L. 11, § 1, 2, 3; L. 23 *de his qui not.* (3, 2).

(*a*) L. 2, C. *de sec. nupt.* (5, 9).

(*b*) C. 4, 5, X. *de sec. nupt.* (4, 21).

(*c*) In regard to the Year of Mourning, which is so distinctly prescribed, it is clear that the question was only intended to refer to the Husbands concerned; at least this is clear in regard to the case of a double Marriage. If the masculine *QUIVE* had merely stood in the way, it would not exclude a

inferentially, however, it should likewise be extended to the Woman (*d*).

If one of the cotemporary relations happened to be invalid upon some legal ground, Infamy was not for that reason avoided, because regard was only paid to the intention (*e*): besides, had the rule been otherwise, Infamy, by reason of a double Marriage, would have been impossible, because during the existence of a former Marriage a new Marriage was of course an absolute nullity (*f*). It was not merely by contemporaneous Marriages, or contemporaneous SPONSALIA, that Infamy was produced, but also by SPONSALIA co-existing with Marriage (*g*).

3. PROFESSIONAL PROSTITUTION ON THE PART OF WOMEN (CORPORE, also PALAM, or VULGO QUÆSTUM FACIENS).

The Edict preserved in the Digest does not mention this case at all. The LEX JULIA prohibited the Marriage of such Women with Senators and their male Descendants without employing the expression Infamy in connection therewith; in like manner the same Law prohibited the Marriage of all Free-born persons with certain Women, without however referring to this special case in that connection. These distinctions can only be explained by a careful historical inquiry (App. VII.)

4. A man who submits himself to the lust of another (MULIEBRIA PASSUS) is certainly Infamous according to the Edict (*h*), even without reference to pecuniary consideration.

reference to the Woman, because in other cases QUIS applies at the same time to Men and Women. L. 1 *de V. S.* 50, 16. But in this text QUIVE must certainly be exclusively referred to the Man, not merely indeed by way of analogy to the case of the Year of Mourning, but particularly on account of the following words: QUIVE SUO NOMINE . . . EJUSVE NOMINE *quem quamve, IN POTESTATE HABERET, &c.* Since at the end both sexes are mentioned, so in the beginning of the text the second sex is intentionally omitted, because it did not occur to the mind of the Praetor.

(*d*) L. 13, § 3 *de his qui not.* (3, 2).

(*e*) L. 13, § 4 *de his qui not.* (3, 2); L. 18, C. *ad L. Jul. de Adult.* (9, 9).

(*f*) L. 6, 7J *de nupt.* (1, 10).

(*g*) L. 13, § 3 *de his qui not.* (3, 2).

(*h*) L. 1, § 6 *de postulando* (3, 1); L. 31, C. *ad L. Jul. de Adult.* (9, 9). The MULIEBRIA PASSUS did not appear in the general Edict concerning Infamy (L. 1 *de his qui not.* (3, 2)), but was still more unfavourably treated than the

5. So also the profession of keeping Houses of Ill-fame produced Infamy according to the Edict (*QUI LENOCINIUM FECERIT*), with which also the Heracleian Table (Lin. 123) agrees (*i*). How far in such a case Infamy should be assigned to both sexes, is again the subject of a special inquiry (App. VII).

V. Certain professions (other than those mentioned in IV.) likewise produced Infamy, and indeed, according to the Edict, the following persons were said to be Heirless:—

(1). Those who had appeared publicly as Play-Actors (*k*).

(2). Those who had hired themselves out to fight with wild beasts, even when they did not actually appear in the arena: So also those who appeared in the arena at such contests even without a money-reward (*l*).

If we compare these very different grounds of the origin of Infamy with one another, a two-fold agreement will be found to exist therein. In the first place, it is always a personal act to

latter. This distinction will be considered again presently. The *Tab. Heracl.* Lin. 122, 123, regarded this case under the supposition of a money consideration "*QUEIVE CORPORI (CORPORE) quaestum FECIT FECERIT.*"

(*i*) *LENOCINIUM* is to be understood here in a peculiar sense as "professional whoredom." L. 4, § 2, 3 *de his qui not.* (3, 2). Figuratively every encouragement of *ADULTERIUM* or *STUPRUM* was also so called, for example, when a Married man prostituted his wife for the sake of money. These cases, however, did not belong to the class we are referring to, but were dealt with simply as *ADULTERIUM*, and subjected therefore to a *PUBLICUM JUDICIUM*. L. 2, § 2; L. 8 *pr.*; L. 9, § 1, 2 *ad L. Jul. de Adult.* (48, 5).

(*k*) *QUI ARTIS LUDICRAE PRONUNCIANDIVE CAUSA IN SCENAM prodierit.* The *LANISTATURA* was also included (*Tab. Heracl.* Lin. 123), but not *ATHLETAE* and *DESIGNATORES*. L. 4 *pr.* § 1 *de his qui not.* (3, 2). According to a *SENATUS-CONSULTUM*, moreover, Nobles must have been absolutely prohibited from appearing on the stage, for light-headed young men of quality, in order to indulge their passion for Play-acting, first suffered themselves to be condemned in a proceeding involving Infamy, so that they might by this means acquire a capacity therefor. *Suetonii Tiber.* 35.

(*l*) L. 1, § 6 *de postul.* (3, 1). This case again stood not among the ordinary, but among the more heinous cases of Infamy. Cf. also *Tab. Heracl.* Lin. 112, 113.

which Infamy is attached as a consequence (*m*). In the next place, it is the act itself which produces Infamy, never a kind of Punishment, *e. g.* Corporal Chastisement (*n*).

(*m*) From this differs only the very late Law, in which the Sons of persons guilty of High Treason are mentioned as Honourless, which however has also till now aroused the most deserved abhorrence. L. 5, § 1, C. *ad L. ꝑ. majest.* (9, 8).

(*n*) L. 22 *de his qui not.* (3, 2). In Germany this matter has often been otherwise regarded.

SECTION 78.

The Juristical Signification of Infamy.

I will now in the first place sum up in separate propositions, what directly results from the consideration of the individual cases which have been enumerated, in regard to the juristical nature of Infamy.

1. A sharp and definite conception of the same must be capable of being given, because not only does the Edict specify the cases individually, but the ancient Jurists also institute minute inquiries concerning the limits of these individual cases. This is likewise indicated by the expression with which the extension of Infamy to a new case is denoted: *ET VIDELICET OMNI HONORE, QUASI INFAMIS, EX SENATUSCONSULTO CAREBIT (a)*. Here the technical expression for a well-known legal concept was manifestly applied by the Senate to a new case.

2. Hence, however, it follows farther that some distinct effects must be connected with Infamy, because otherwise the exact definition of the concept would have had no interest for the practical sense of the old Jurists.

3. The enumerated cases are of two kinds. In some Infamy is made dependent on a judicial sentence, without which it can never take place; in others, on the contrary, on some extrajudicial matter of fact, which is accordingly presumed to be positively certain or notorious. This heterogeneous character of the conditions of Infamy makes it certainly necessary to settle the requisites of the sentence which is capable of producing it in the first class of cases (*b*). Modern writers have hereupon devised a classification of Infamy into *MEDIATA* and *IMMEDIATA*, which is not only superfluous and profitless, but also

(a) L. 1, *pr. ad L. Jul. de vi priv.* (48, 7).

(b) Marezoll expressly treats of this, pp. 123 *et seq.*

by the use of Latin expressions may lead to the error of it being supposed that these expressions are already existing in the Sources.

4. Along with this juristically defined Infamy there are certain cases in which the moral Judgment of the right minded and intelligent portion of mankind, sometimes on account of particular acts, at other times with reference to the whole mode of life, just as decisively withholds Honor as if the conditions of Infamy were actually existing (c). The Moderns have founded upon this the classification into a JURIS and FACTI INFAMIA. But in point of fact it is only for the first that the term Infamy can be juristically employed, and the technical expressions mentioned are not merely to be rejected because they are not found in the Sources, but because they easily tempt one to the erroneous course of seeking definite conditions and effects for INFAMIA FACTI, which only properly belong to genuine Infamy (INFAMIA JURIS). Indeed all the effects which it has been sought to ascribe to INFAMIA FACTI resolve themselves into the completely unfettered judgment, sometimes of the Sovereign Power and of its Delegates (in regard to the appointment of Officials), sometimes also of the Judge (e. g. in regard to the credibility of Witnesses and the QUERELA INOFFICIOSI of Brothers and Sisters); hence, however, that intermediate notion of INFAMIA FACTI not only seems unnecessary, but also perplexing and misleading. The absolute dissimilarity between the so-called INFAMIA FACTI and genuine Infamy is shown by the utter want of any certain characteristic features of the former, partly because an evil grounded Opinion may appear in the most varying degrees without any fixed limits, partly also because Public Opinion is often in the wrong, since it permits itself to be influenced by prejudice instead of by fixed moral principles, or else by a groundless assumption of facts.

There is still more diversity of opinion when certain social conditions and employments are deemed dishonourable, without

(c) This relation is very clearly expressed in *L. 2 pr. de obsequ.* (37, 15). Comp. upon this point also Donellus, lib. 18, C. 6, § 7.

the prevailing view being capable of justification upon moral grounds: the designation of such conditions is just as vague and uncertain, as their influence upon Jural Relations, which in truth occurs here and there (*d*).

Wherein then consisted amongst the Romans the effect of Infamy, from which alone the definite, practical notion of the same can be formed, which we are entitled to look for from the considerations just stated? If we examine the connection in which this concept directly appears in the Law Sources, everything will appear simple and easy. The Digest contains literally the text of the Edict, in which the cases of Infamy are enumerated, and upon which all subsequent decisions are based. The Praetor, however, was authorized to proclaim Infamous persons in his Edict, because it was not intended to suffer such persons to POSTULATE for others, that is to say, to make applications before his tribunal (*e*). Thus it is that in the Digest the Title DE HIS QUI NOTANTUR INFAMIA stands immediately below the Title DE POSTULANDO. Whether therefore an indefinite notion of Infamy may have always existed, similar to that which our Jurists call INFAMIA FACTI, it seems at all events clear, that the Praetor was the first who conceived it juristically, who gave it fixed limits, and who assigned to it a definite effect. We might, therefore, apparently define the legal notion of Infamy thus: it is the condition of those persons who are generally incapable of postulating for others (*f*).

But on closer consideration this explanation appears to be untenable. Above all it must strike every one that there is in

(*d*) The expressions applied to such conditions are TURPES, VILES, ABJECTAE, HUMILES PERSONAE. Cf. Marezoll, pp. 270 *et seq.*

(*e*) The term *postulare* meant, in the Roman Law, to state or to defend a case before the Magistrate having jurisdiction. It is thus defined by Ulpian:—“*Postulare AUTEM EST, DESIDERIUM SUUM VEL AMICI SUI, IN JURE APUD EUM, QUI JURISDICTIONI PRAEEST EXPONERE: VEL ALTERIUS DESIDERIS CONTRADICERE.*” L. 1, § 2 *de postulando* (3, 1). *Trans.*

(*f*) This is really the opinion of most writers, only more or less clearly expressed. Cf. amongst others Marezoll, pp. 99, 208, 212.

this explanation a great disproportion between the means and the end. The loss of Honor is certainly something very serious and important, quite irrespective of prescribed legal consequences. Was it then intended that this important moral relation should be introduced into the province of Law merely to denote—an incapacity to postulate for another! It might indeed have been a matter of some importance to the Praetor to keep his tribunal uncontaminated by unworthy men; this was certainly moreover his sole motive for speaking of the matter in this passage of the Edict, and indeed in the Edict at all. But he could completely accomplish this object, inasmuch as he had enumerated such persons, without applying the important term Infamy to them. If he meant to assert that he considered moral Infamy should be rightly treated with the same severity as juristical Infamy, because he excluded such persons from postulating for others, it is to be remembered how unimportant even this would be for most persons; for the generality of people would any how have no special need to resort to such a proceeding, and those who might have to do it could yet avoid an appearance before the Praetor unnoticed, therefore without their Infamy becoming thereby at all evident. This disability, therefore, for individuals is in point of fact almost imperceptible, and therein lies that grievous disproportion between the means and the end, above complained of.

But still more decisive against the view above stated is the actual purport of the Edict itself, which must now be set forth. The Praetor distinguishes the persons, to whom he denies the capacity of postulating, according to three classes, for which reason therefore three Edicts were framed upon this topic (*g*).

The first class (or the first Edict) embraces those who are absolutely incapable, therefore not even permitted to postulate for themselves. It includes all Males under seventeen years, and all Deaf persons (*h*); besides the last Mutes were also liable

(*g*) L. 1, § 1, 7, 9 *de postulando* (3, 1) "EAPROPTER TRES FECIT ordines."—
 "TRES ordines PRAETOR FECIT NON POSTULANTIUM."—"SI FUERIT INTER
 EOS, QUI *tertio* Edicto CONTINENTUR."

(*h*) L. 1, § 3 *de postul.* (3, 1).

to be excluded, but their oral utterances were anyhow not to be regarded.

The second class consists of those who are allowed indeed to postulate for themselves, but were absolutely prohibited from doing so on behalf of others. To it belong Women (*i*), the Blind, and certain notoriously disreputable persons (IN TURPITUDE NOTABILES): notably men who submitted themselves to the lust of others, those who were convicted of a Capital Offence, and those who hired themselves out as Gladiators in contests with beasts (*j*).

In the third class, finally, are included those who are competent to appear for themselves, but not as a rule for others, unless indeed exceptionally under the supposition of some special relationship, such as that of Kinship, Affinity by Marriage, Patronage, or by reason of the Infirmary of those whom they represented (*k*). To this class belong:—

(1.) All who are specially degraded into this condition by a PLEBISCITUM, a SENATUS-CONSULTUM, or by the Edict or Decree of the Emperor.

(2.) Besides, however, HOC EDICTO CONTINENTUR ETIAM ALII OMNES, QUI EDICTO PRAETORIS UT INFAMES NOTANTUR (*l*).

It was this last provision which permitted the Praetor, with the view of carrying out the same, to institute a Register for the enrolment of Infamous persons, which therefore undoubtedly constituted an essential part of the third Edict relating to those persons who were incapable of postulating (wholly or partially) (*m*).

(*i*) Women, however, with some exceptions: on behalf of their Father they might carry on a CAUSA COGNITA, if he could procure no other representative (L. 41, *de proc.* (3, 3)): they might also undertake for any stranger a COGNITORIAM OPERAM if it occurred IN REM SUAM. Paulus, I. 2, § 2. Hence it was that the acquisition of a claim by means of CESSIO was not denied to them.

(*j*) L. 1, § 5, 6 *de postl.* (3, 1). These have already been represented above as amongst the most noted INFAMES of all. (§ 77).

(*k*) L. 1, § 8, 11; L. 2—5 *de postul.* (3, 1).

(*l*) L. 1, § 8 *de postul.* (3, 1).

(*m*) Donellus, lib. 18, C. 6, § 1, assumes that the Praetor may probably have treated of INFAMES in a special Edict; it is however far more probable

From this summary of legal principles, not actually expressed in the Law Sources, but lying clearly before us in them, it follows, however, that the derivation of the concepts and technical expressions is completely different from what has been set forth above out of our Modern Writers. The Praetor does not say: "I forbid certain persons to postulate, and I hereby assign to them the name *INFAMES*;" partly because this name would have been completely purposeless, and partly because there was no conceivable ground why this newly-discovered name should not have been equally applied to those enumerated in § 6 as *INTURPITUDINE NOTABILES*, whereby it would, if consistently carried forward, have designated all those who were incapable upon moral grounds. What the Praetor rather says is, that to the third *ORDO* of incapable persons belong, amongst others, all *INFAMES* (so far as they are not individually represented in the second *ORDO*). According to this mode of expression, therefore, the Praetor presupposes the idea of *INFAMY* to be an old recognised legal notion, the limits of whose application were not by any means doubtful to him; in order, however, that no error might prevail or be alleged to exist on the point, he caused a list to be prepared, by way of precaution, of these *INFAMES* who belonged to the third *ORDO NON POSTULANTIUM*. But it was entirely consistent with its practical object not to admit those persons into that list who had already been individually named in the second *ORDO*, although these might on that account be none the less *INFAMES*, and actually styled so (*n*).

that the Edictal text in *L. 1 de his qui not.* is directly connected with that in *L. 1, § 8 de postul.*, and was only intended to serve as an exposition of the *TERTIUM EDICTUM DE NON POSTULANTIBUS*. Donellus appears to have been deceived by the complexion which is given to the matter by the Compilers of the Digest.

(*n*) It might be objected that one who was *CALUMNIAE IN JUDICIO PUBLICO CAUSA JUDICATUS* is included among the *INFAMES* of *L. 1 de his qui not.* and stands therefore also in the *SECUNDUM EDICTUM* of *L. 1, § 6 de postul.* But in the last-mentioned text it is not said that the person condemned on account of *CALUMNIA* belongs to the *SECUNDUS ORDO* (that is to say, he cannot unconditionally postulate for others), but simply, that in regard to him the Senate has especially ordained that he shall not even postulate

The Praetor consequently did not newly develop the idea of Infamy, but having met with an old existing notion, he employed it incidentally for a special purpose connected with his Official functions. Nor does it stand in any contradiction with this view that at one time the old Jurists spoke of Infamy in such a way that it might be thought they meant to ascribe its origin to the Edict (o). For the Edict is certainly the first written record in which Infamy occurs, and it was therefore natural that the Jurists, when they wished to define the legal notion of Infamy with strict accuracy, should have referred to this authentic evidence, and, therefore, owing to its certainty and clearness should also have preferred to employ the new written Law, rather than the old unwritten Law, for the expression of their thoughts.

before the JUDEX PEDANEUS. The CALUMNIAE DAMNATUS is therefore not represented in the two Edicts, but a single remark concerning him is simply inserted, not altogether in the right place, from the Commentaries of the old Jurists.

(o) L. 5, § 2 *de extra cogn.* (50, 13) . . . "VEL CUM PLEBEJUS FUSTIBUS CAEDITUR, VEL IN OPUS PUBLICUM DATUR, VEL CUM IN EAM CAUSAM QUIS INCIDIT, quae Edicto perpetuo infamiae causa enumeratur." L. 2 *pr. de obsequ.* (37, 15) "LICET ENIM verbis Edicti non habeantur infames ITA CONDEMNATI," &c.

SECTION 79.

The Juristical Signification of Infamy.

(Continuation.)

According to the previous inquiry the Praetor did not introduce Infamy as a Law Institute, but merely found it. What signification then had this notion previous to the Edict ?

In our own time we regard it, in the first place, as a means of Punishment, either occurring alone or in aggravation of another Punishment ; it is in this view the very efficacious expression of scorn which the State pronounces against an individual through its constituted Organs. But in order to operate in this manner it must be pronounced in an individual case, for so long as it merely depends upon a general rule, it remains without any real effect. Or, in other words, this view might to some extent be suitable to the so-called **MEDIATA INFAMIA** (since in connection with it the Judge pronounces a Condemnation), but it is not adapted to the **IMMEDIATA**. Indeed, even as regards the **MEDIATA**, it is very doubtful, inasmuch as the Romans clearly only regarded Infamy as the natural consequence of the Condemnation, never expressed in the Sentence itself, which has so very materially strengthened the prevailing impression of Infamy conceived as a Punishment.

A Public Opinion concerning the Honor or Dishonor of individuals everywhere exists, but it becomes doubly important in a Republic like that of Rome, where all Power and Sovereignty proceed from the will of the People. This Opinion from its very nature, like the sense of the multitude generally, is uncertain and fickle ; if one succeeds in guiding and fortifying it a great point is gained. The Romans had two Institutions which were directly

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and especially devised for this object (*a*); both different in their nature, but yet allied to and supplementary of each other: both also subject to the same Magisterial authority. These Institutions were Infamy and the free Power of the Censors. Cicero speaks of both with great clearness in his oration *PRO CLUENTIO*. Infamy depended upon old, settled, and unambiguous Rules handed down by tradition (*MORIBUS*): it was independent of all personal caprice, although in certain cases (not in all) it was conditional on a Judicial Sentence. Since, however, these fixed Rules were insufficient for the practical needs of life, they received a living completion in the free power vested in the Censors of assigning Dishonour in different degrees according to their own consciences. The Censors could, therefore, according to their own pleasure, remove a person from the Senate, or from the Status of Knighthood, transfer him into a lesser Tribe, and in fact exclude him from all the Tribes, whereby the excluded person became an *AERARIUS*, and lost his Right of Suffrage (*b*); they might also content themselves by merely pronouncing Censure, by affixing a *NOTA CENSORIA* to the name of a Roman in the Register of Citizens (*c*). Such Notations were not necessarily based upon a careful inquiry into facts: indeed, they were rather influenced by mere rumour, and even by passing political

(*a*) I say directly, because most Punishments anyhow exercise an indirect influence upon Honor. Hence the explanation of *EXISTIMATIO* as a *DIGNITATIS IN LAESAE STATUS* in L. 5, § 1, 2, 3 *de extr. cogn.* (50, 13). The *EXISTIMATIO* may be sometimes diminished, sometimes extinguished: the first result happens amongst other ways by Infamy, but it also happens in consequence of various Punishments without Infamy: the second by the loss of Freedom or of Citizenship, whereby a former Citizen is completely excluded from the sphere for which Civil Honors exist. Comp. upon those texts, App. VI. Nos. IV. V.

(*b*) "DE SENATU MOVERI . . . IN AERARIOS REFERRI, AUT TRIBU MOVERI;" Cic. *Pro Cluentio*, C. 43 "AERARIUM RELIQUISSENT," *ib.* C. 45.

(*c*) The simple *SUBSCRIPTIO* or *NOTATIO CENSORIA* often occurs, for example, *Pro Cluentio*, C. 42, 43, 44, 46, 47. Particular acts were expressly mentioned, *e. g.* "FURTI ET CAPTARUM PECUNIARUM NOMINE NOTAVERUNT," C. 42; or "CONTRA LEGES PECUNIAS ACCEPISSE SUBSCRIPTUM EST," C. 43.

opinions (*d*). It therefore frequently happened that such a CENSORUM OPINIO was deprived of effect by the opposition of the Censor's Colleague, or by the resolution of succeeding Censors, or by the decision of a Judge, or by a PLEBISCITUM (*e*). It was thus not by any means of a permanent character (*f*), and in this respect it completely differed from Infamy, which continued to operate immutably throughout life (*g*). But if the exercise of Censorial Power over Civic Honor was dangerous by reason of possible caprice and injustice (*h*), it was at least mitigated by the circumstance that every wrong so inflicted was capable of being rectified again in several ways. Infamy was more dangerous by reason of its unalterable permanency, but, on the other hand, it proceeded upon fixed, well-known Rules, and thus every one could avoid it. This comparison of Infamy with the Censorial Power over Honor leads us directly to the desired practical

(*d*) *Pro Cluentio*, C. 45 and C. 47 "IN ISTIS SUBSCRIPTIONIBUS VENTUM QUENDAM POPULAREM ESSE QUAESITUM . . . EX TOTA IPSA SUBSCRIPTIONE RUMOREM QUENDAM, ET PLAUSAM POPULAREM ESSE QUAESITUM."

(*e*) *Pro Cluentio*, C. 43.

(*f*) *Pro Cluentio*, C. 47 "QUID EST, QUAMOBREM QUISQUAM NOSTRUM CENSORIAS SUBSCRIPTIONES OMNES FIXAS, ET IN PERPETUUM RATAS PUTET ESSE OPORTERE?"

(*g*) *Pro Cluentio*, C. 42 "TURPI *judicio damnati*, IN PERPETUUM OMNI HONORE AC DIGNITATE PRIVANTUR." It does not stand in contradiction with this that the Emperor (formerly the People) or the Senate could grant a Restitution; individual Magistrates of their own motion could not do so, and even that solemn Restitution was seldom or never granted during the Republic. The Praetor had not the power of granting it except indirectly, in so far as he might remove, by a customary Restitution, the ground of Infamy, *e. g.* when a Minor was condemned in a FAMOSUM JUDICIUM by reason of the negligent conduct of the case, the Praetor granted him a Restitution, and the new JUDEX then dismissed the Action. L. 1, § 9, 10 *de postul.* (3, 1).

(*h*) Cicero's exposition might lead to the error of it being supposed that instances of injustice of this sort were very customary; it must, however, be borne in mind that Cicero had to invalidate a Censorian decision, and thus it was in the interest of his client that he should represent such decisions as generally open to suspicion. Undoubtedly the Censors exercised their functions in most cases with zealous and prudent severity, otherwise they would not themselves have been held in such great esteem. Abuses, therefore, may indeed have occurred, but certainly only as the rare exception, and yet their possibility lay in the very nature of the Office itself.

notion of Infamy itself. That notion consists in nothing else than the loss of all Political Rights in regard to a subsisting Citizenship. The *INFAMIS* became therefore an *AERARIUS*, he lost both his Right of Suffrage and his eligibility for Office (*SUFFRAGIUM ET HONORES*), and the definition of such a person may be thus completely expressed: That Roman is called *INFAMIS* who, in consequence of a general Rule (not of Censorial caprice), in regard to a subsisting Citizenship, has lost the Political Rights belonging thereto. Before I attempt to adduce the proof in support of this assertion, I shall first state certain propositions which necessarily result from the supposition of its truth, and thus serve for the closer determination of the same.

(1.) Infamy appears then as a form of *CAPITIS DEMINUTIO*, and, indeed, as a half or incomplete *MEDIA CAPITIS DEMINUTIO*, because it destroys Citizenship in its Political sphere, while it leaves it untouched in regard to matters of Private Law. The Capacity for Public Rights is therefore annulled, that for Private Rights is preserved.

(2.) Infamy belongs, therefore, according to its peculiar nature, to the Public Law, although, in a secondary sense, it may also produce effects in Private Law (1).

(3.) The effect of Infamy is the same as that of Censorial Power in its extreme application, and the difference simply lies in this, that it is regulated according to general Rules, and is therefore invariable.

(4.) The Rules regulating Infamy are not founded upon express Laws, but upon old popular Opinion (*MORIBUS*), and their uniform recognition and observance presuppose therefore a constitutional supervision. This supervision was again entrusted to the Censors, who, on the occasion of every fresh registration of the Members of the Senate, or of the Tribes, and the like, had the opportunity of entering Infamous persons among the *AERARII*, and therefore excluded from all the Tribes. The Censors acted

(1) This essentially public character of Infamy is first insisted upon by Burchardi. It had previously been indicated by Hagemeister, inasmuch as in the conclusion of his *Treatise* (p. 181), he assigned to this doctrine its place in the *JUS CIVITATIS*.

in this matter in accordance with a fixed Rule, just as in other cases they were guided by their own will and pleasure, so that they exercised a twofold influence, because, in the first place, they partly enforced the rule of Infamy, and, in the next, supplemented it by their own arbitrary decisions (*k*). But if they proved remiss in the exercise of their functions, it was still open to every Consul or Praetor, who held the *COMITIA*, to reject a person devoid of Honor if he presented himself as a Candidate, and even when he only wished to tender his vote.

(5.) This signification of Infamy must soon have lost its importance under the Emperors, as the Political Rights of Citizenship fell into the background, and the old forms of Tribal and Citizen Registers, &c., were no longer maintained in their purity. From this period, then, Infamy only remained visible in secondary effects, and this accounts for the obscure form in which it appears in our Law Sources.

(*k*) Cf. as to this especially, Niebuhr, vol. 2, pp. 448—451 : (ed. 2nd and 3rd.)

SECTION 80.

The Juristical Signification of Infamy.

(Continuation.)

I will now adduce the proof that in point of fact the essence of Infamy consisted in the loss of all Political Rights of the Roman Citizen; in the first place, with regard to each of the two constituent parts of these Rights (HONORES and SUFFRAGIUM) separately, and next, in regard to them jointly.

(1.) The loss of HONORES. This expression must here be understood in the extended sense of every high Political Position (DIGNITAS), and not merely as referring to the Magistracy. Moreover, it embodies the twofold meaning of a loss of an existing, as well as the incapacity for every future, Distinction.

This portion of my contention is the least open to doubt. Cicero expressly says that Infamy always excludes from HONOR and DIGNITAS (§ 79 (g).) In like manner it is admitted in a SENATUSCONSULTUM that it belongs to the character of an INFAMIS to be excluded from every kind of Honor (§ 78 (a).) The same doctrine was afterwards maintained throughout the whole period of the Empire (a), except that in consequence of the altered form of Government it assumed a very different position. There was now no longer as formerly a sharply defined rule of Law, inflexibly binding upon all executive Authorities, but rather a notification of what the Emperor would do in particular cases, wherein he naturally reserved to himself the power of either restricting or extending, according to circumstances, the notion of Infamy when the question related to the appointment of an Official. It is in this sense that the very ambiguous expressions of an Ordinance of Constantine, which would have been clearly

(a) L. *un C. de infam.* (10, 57); L. 3, C. *de re mil.* (12, 36); L. 8, C. *de decur.* (10, 31).

unsuitable for the earlier Constitution, but were suitable enough at the period of this Law, are to be interpreted (*b*). Moreover, the Heracleian Table confirms that doctrine, as will be shown more clearly below.

(2.) The loss of *SUFFRAGIUM*, or, what was the same thing, Expulsion from all the Tribes—the Transposition amongst the *AERARII* (*c*). This is a proposition which might indeed be doubted at first sight. For although both *SUFFRAGIUM* and *HONORES* were always named together in a complete or incomplete grant of Citizenship to foreign Towns, it is still quite conceivable that in regard to a positive institute like Infamy, the higher right of Eligibility for Office may have been withdrawn from a person devoid of Honor, while the lesser right of Voting was left to him. That this, however, was not the case, but rather that an Infamous person lost the *SUFFRAGIUM* as well, appears from the following Authorities:—

In the first place, Cicero, in the passages already cited (§ 79 (*b*)(*g*),)

(*b*) L. 2, C. *de dign.* (12, 1) “*NEQUE FAMOSIS, ET NOTATIS, ET QUOS SCELUS AUT VITAE TURPITUDO INQUINAT, et quos infamia AB HONESTORUM COETU SEGREGAT, dignitatis portae patebunt.*” Burchardi has rightly observed (p. 58), that the definite notion of juristical Infamy is here abandoned, and that of an indefinite *INFAMIA FACTI* substituted for it. It is not only incorrect to seek in this text a change of the juristical doctrine of Infamy, but there is also still less ground for assuming a Justinian interpolation. The concluding words express indeed very plainly no more than this. “Such wicked men must entertain no hope of obtaining distinction from the Emperor at any time.” There was here no legal principle which either required, or was susceptible of, more definite conditions.

(*c*) The following reasons may serve for the justification of this expression:—As long as three completely distinct *Comitiae* existed in Rome, participation in some one of the Tribes was only a condition of the Right of Voting in the *TRIBUTA COMITIA*, and not in regard to the other *Comitiae*. But this was altered at an early period. The *Curies* disappeared and their recollection was simply preserved in an empty formality: the *Centuries*, however, were brought into such close connection with the Tribes that they were regarded as a portion thereof. Cicero, *Pro Plancio*, C. 20, and several other passages. From this time forth the Capacity of Voting was generally held to be synonymous with Incorporation in some one of the Tribes, and he who was thrust away amongst the *AERARII* lost, with his Tribe, the right of voting, and the capacity as well as the obligation for regular military service. Niebuhr, vol. 1, pp. 492—495, 4th ed. (521—524 of the 3rd ed.); Comp. vol. 3, pp. 346—352, 383, 384.

exhibits the relation of the Censorial deprivation of Honor towards Infamy in such a way, that while the former might, indeed, occur more easily and capriciously, the latter in its effect appears more powerful and injurious. Indeed, as he there represents, the degradation of a citizen to the condition of an **AERARIUS**, as the extreme result of Censorial caprice, it follows that the effect of Infamy cannot possibly be admitted as less grievous than the extreme effect of that caprice.

But the assertion above made is still more directly confirmed by several passages, which agree in saying of Play-Actors, **TRIBU MOVENTUR**. Thus, with reference to the representation of the Atellan Plays, derived from the Oscis, both Livy and Valerius Maximus remark, as something quite special, that it did not, as in the case of ordinary Plays, cause the Actors to be degraded from their Tribe, or to be incapacitated for Service in the Army (*d*). In like manner Augustine says quite generally of Play-Actors, that they were (after their entry into this Profession) expelled from their Tribe by the Censors (*e*). Indeed, since

(*d*) Livius, VII. 2 "QUOD GENUS LUDORUM AB OSCIS ACCEPTUM TENUIT JUVENTUS, NEC AB HISTRIONIBUS POLLUI PASSA EST. EO INSTITUTUM MANET, UT ACTORES ATELLANARUM *nee tribu moveantur, et stipendia, tamquam expertes artis ludicrae, faciant.*" Valer. Max. II. 4, § 4 "NAM NEQUE tribu movetur, NEQUE a militum stipendiis REPELLITUR."

(*e*) Augustinus, *De Civitate Dei*, II. 13 "SED, SICUT APUD CICERONEM IDEM SCIPIO LOQUITUR, CUM ARTEM LUDICRAM SCENAMQUE TOTAM *probroducerent*, GENUS ID HOMINUM NON MODO *honore* CIVIUM RELIQUORUM *carere*, SED ETIAM *tribu moveri notatione censoria* VOLUERUNT." Burchardi (p. 46) looks upon this passage as a ground for the opposite view, inasmuch as, according to it, it was primarily the will of the Censor, and not simply the fact of Infamy, that caused Play-Actors to be removed from the Tribe: he indicates this objection merely to meet it by assuming an error on the part of Augustine, and he explains it by the fact that the Censorship had at that time long since ceased. But if it be considered that the enforcement of the Rules concerning Infamy were incumbent upon the Censors (§ 79), and that it devolved upon them, whenever new Tribal lists had to be prepared, to exclude those Citizens from the same who had become Infamous since the last Census, there will be no contradiction in this passage of our common view, and at the most Augustine can simply be blamed for not having employed, with sufficient precision, an expression which was ordinarily applied to Censorial caprice, and which, moreover, by itself was not unsuitable to Infamy properly so called (of which he was speaking).

Actors were certainly Honorless (§ 77), so nothing is more natural than to assume, that their removal from the order of Citizens entitled to vote was simply a consequence of their Infamy, which again confirms our assertion. Indeed Augustine expresses this connection almost in so many words in the passage already cited, because he directly connects the Infamy of the Actor with his expulsion from his Tribe, and thus in a manner identifies both (*f*),

It is now perhaps possible to indicate the somewhat vague relation of the Heracleian Table towards the Edict, in regard to Infamy. The PLEBISCITUM embodied in that Inscription does not say a word about Infamy, but it groups, with few exceptions, the same cases together which the Praetor enumerates as cases of Infamy. This grouping, however, in the PLEBISCITUM referred to, merely means that the persons therein specified, are disqualified from acting as SENATORES, DECURIONES, and CONSCRIPTI of their cities, from voting in the Municipal Senate, or

(*f*) There is certainly room for doubt from the unquestionable ambiguity of the expression TRIBU MOVERE. Literally construed these words mean "to remove a citizen from the Tribe in which he had hitherto stood." In connection with this, however, two things were conceivable: the Citizen might be transferred into another and lesser Tribe (from a RUSTICA into an URBANA), or placed in no Tribe whatever, and therefore made an AERARIUS (Niebuhr, II. 448). If the expression were employed to denote an arbitrary act of the Censors it might well receive the first sense, and be distinguished from that IN AERARIOS REFERRE. Thus Cicero employs it (§ 79) (*b*), and in the same sense the expression occurs in the most remarkable passage concerning this terminology (Liv. XLV. 15), which will be explained below (§ 81) (*c*). If, on the other hand, TRIBU MOVERE denoted the consequence of a general Rule (as here in regard to Play-Actors), it then becomes undoubtedly synonymous with IN AERARIOS REFERRE: partly because otherwise the statement, by reason of the defective designation of the new lesser Tribe, remains wholly incomplete, partly because generally the simple degradation into a lesser Tribe, although quite suitable to the arbitrary disposition of a Censor, was too subtle and trifling to be conceived as the result of a general Rule, and therefore cannot be accepted as probable. That Livy and Valerius Maximus (note (*d*)), however, understood TRIBU MOVERE to mean an expulsion from all the Tribes, is placed beyond all doubt by the expression being connected with incapacity for Military Service: for such an incapacity could only result from an expulsion from all the Tribes (note (*c*)), and not merely from a degradation into one of less distinction.

from enjoying the honors attached to these positions, and likewise from obtaining Magistracies which give admission to the Senate. All those who are disqualified, and who nevertheless endeavour to intrude themselves, are liable to be punished with a fine of 50,000 sesterces (2,500 Thalers) (Linae, 109—110, 124—141). Here, then, we might be said to have partly a confirmation and partly a refutation of the view propounded by us: a confirmation in so far as almost the same persons whom the Edict enumerates as **INFAMES**, are here also excluded from all Honors and Dignities: a refutation, in so far as the deprivation of the Right of Voting is not at the same time joined to those other characteristics. This objection cannot well be overcome by the presumption, that Municipalities and Colonies anyhow had no longer at that time any Popular Assemblies, for such Assemblies are expressly mentioned in that Law (*g*). The true position rather is this. Participation in the Roman **COMITIA**, which decided the highest affairs of the whole Empire, was immeasurably more important than participation in the **COMITIA** of a single Provincial Town. There was therefore no inconsistency whatever in those who had from olden times been esteemed **INFAMES** in Rome being excluded from the **COMITIA** at Rome, but admitted into that of the Municipalities, although, at the same time, being denied all higher Honors. Moreover this measure involved the first great step towards the conversion of Provincial Towns into Aristocratical Corporations, which was continually being more thoroughly effected under the Emperors (*h*): a measure which was anyhow unavoidable if the enormous extension of Citizenship throughout Italy was not intended to remain altogether without meaning. If then the matter is looked at from this point of view, by which means alone any light can be thrown on that ambiguous **PLEBISCITUM**, we shall find a further confirmation of our general view concerning the essentially public character of every form of Infamy.

(*g*) *Tab. Heracl.* Lin. 132 "NEVE QVIS EJUS RATIONEM comitiis conciliave HABETO."

(*h*) Comp. Savigny, *History of the Roman Law in the Middle Ages*, vol. 1. § 6, 7.

If we now compare the individual cases of Infamy, as they are enumerated on the one hand in the Edict, and, on the other, in the Tabula Heracleensis, we shall find in regard to most of them a complete agreement, as we have already pointed out in each instance (§ 77). That the Tabula Heracleensis at times shows a greater strictness (§ 77) (c), may be naturally enough explained by the fact that it only intended to exclude from the higher Honors, in regard to which one could certainly deal more rigorously. It is even more noteworthy that conversely, the Table omits to mention certain cases which are specified in the Praetorian Edict, for instance, a premature Second Marriage, and a double Marriage; moreover, it only excludes a man who submitted to the lust of another, when he did so for a money consideration (§ 77) (h). It must here be confessed that much stricter views began to be entertained after the period of this Law, and they were incorporated into the Edict with this greater strictness: it was perhaps at the period of the *LEX JULIA* and *PAPIA POPPAEA* that this addition was introduced into the Edict: perhaps also (if indeed those texts of the Edict were older) the Tabula Heracleensis kept in view the variations in Family Law which prevailed in many parts of Italy, and precisely which it was not intended to interfere with by a purely Political Law. The fact of the *ACTIO VI BONORUM RAPTORUM* being omitted from the *PLEBISCITUM* presents less difficulty, for we know that this Action was only introduced in consequence of the Civil Wars (i), and this cause, based as it was upon the mere transitory conditions of the time, may have been the reason why the surviving Law did not mention that Action in connection with Municipalities.

(i) Savigny, in the *Zeitschrift für Geschichtliche Rechtswissenschaft*, vol. 5, pp. 126—130.

SECTION 81.

The Juristical Signification of Infamy.

(Continuation.)

The following Authorities finally confirm my assertion in its entirety, both as regards HONORES and SUFFRAGIUM, because they recognise Infamy as a Capital matter, as a CAPITIS DEMINUTIO, which can only be supported upon the view here set forth of the loss of the Political half of Citizenship.

Speaking of the three Actions which produced Infamy (FIDUCIAE, TUTELAE, SOCIETATIS), Cicero observes in his Speech, PRO ROSCIO (cap. 6), "that they are of supreme importance, and I had almost said, of *capital* importance" (SUMMAE EXISTIMATIONIS, ET PAENE DICAM CAPITIS). Another speech of Cicero's, PRO QUINCTIO, deals with the question whether the goods of his client had been validly seized (POSSESSIO HONORUM), and he refers to this matter repeatedly and in express terms as a CAPITIS CAUSA, which cannot be otherwise properly explained except on the hypothesis that the loss of Honor was involved in the fact of seizure (§ 77). Indeed, in a passage of this Speech (cap. 15), Cicero distinctly designates the hard lot, which he wished to avert from his client, as Infamy, so that from the context of this Speech the identity of Infamy with CAPITIS DEMINUTIO is unmistakably established.

But a passage of Tertullian which ascribes Infamy to Play-Actors is still more directly applicable here, except that this author at the same time calls their condition a CAPITIS MINUTIO, and then describes it more fully as a loss of *all* honor and distinction (a). With this agrees the Rescript of the Emperor

(a) Tertullianus, *De Spectaculis*, C. 22 "QUADRIGARIOS, SCENICOS . . . MANIFESTE DAMNANT *ignominia et capitis minutione*, ARCENTES CURIA, ROSTRIS, SENATU, EQUITE, CETERISQUE HONORIBUS." If we are bound to

Severus cited by Modestinus, according to which a dismissal from the Senate is not to be regarded as *CAPITIS MINUTIO* (*b*). This language can only have been employed with the intention of sharply distinguishing a mere loss of Senatorial dignity from the incapacity underlying Infamy for all dignities generally, and the Emperor, therefore, may properly enough say, the degradation of a Senator does not produce Infamy; moreover, as he expresses this sense by the denial of *CAPITIS MINUTIO*, the identity of the latter with Infamy becomes thereby likewise recognised.

Finally, there stands also in connection with this doctrine a remarkable passage of Livy (XLV. 15) which has already been mentioned above. Already at an earlier period all Freedmen had been from time to time placed in the less esteemed four City Tribes. Sometimes, however, this restriction was mitigated by certain fixed exceptions, and at other times by simply shutting one's eyes, so that Freedmen were found scattered through all the Tribes. In order to root out this evil the Censor Gracchus at last resolved to remove Freedmen from all the Tribes, that is to say, to make them *Aerarii*, or, in other words, to rob them of their Right of Suffrage. But his colleague Claudius opposed this measure, which he characterised as oppressive and illegal. Finally, both Censors agreed upon a compromise, that Freed-

accept every expression of this writer quite strictly, we can still only understand *ROSTRIS*, along with the other lost Rights, to signify the appearance before the *ROSTRIS*; therefore the taking part in the Assembly of the People: thus this passage affords another direct testimony that an Infamous person became *AERARIUS*.

(*b*) L. 3 *de senator.* (1, 9) "*SENATOREM REMOTUM SENATU capite non minui, SED MORARI ROMAE, D. SEVERUS ET ANTONINUS PERMISERUNT.*" That Infamy was here intended to be denied, is shown clearly by the addition of the words *SED MORARI ROMAE*, which is remarkable, seeing that otherwise even the occurrence of *CAPITIS DEMINUTIO* did not prevent a residence in Rome. This addition refers to Soldiers ignominiously discharged (who were actually Infamous), and who were obliged to quit Rome and every other residential town of the Emperors. L. 2, § 4 *de his qui not.*; L. 3, *C. de re mil.* The Rescript means to express, therefore, that one must not be misled by this apparent analogy to believe that the degraded Senator (like those Soldiers) became Infamous, or that he was obliged to leave Rome.

men should not lose their Right of Suffrage, but that they should be brought back into the City Tribes, not distributed indeed into all four, but collected exclusively into one of them, which should be determined by lot. In the Speech in which Claudius opposed the entire exclusion of Freedmen, he observed as follows:—
 “NEGABAT *Suffragii Latationem* INJUSSU POPULI CENSOREM CUIQUAM HOMINI, NEDUM ORDINI UNIVERSO, ADIMERE POSSE. NEQUE ENIM, SI TRIBU MOVERE POSSET, QUOD SIT NIHIL ALIUD, QUAM MUTARE JUBERE TRIBUM, IDEO *omnibus XXXV. tribubus emovere posse, id est civitatem libertatemque eripere*” (c). Here it is plainly said that the deprivation of the Right of Suffrage, or the expulsion from all the Tribes, is a loss of Citizenship (that is to say, the Political half of Citizenship, not of Private Rights). If, now, it can be assumed as proved from the Authorities which have been adduced in § 80, that an infamous person was excluded from all the Tribes, there must also at the same time be ascribed to him, according to the language employed by Claudius in this Speech, a loss of (Political) Citizenship, consequently a *CAPITIS DEMINUTIO*.

Under the Emperors, however, Political Rights of Citizenship soon lost their early importance, and this change introduced in regard to the matter itself did not fail to exercise an influence

(c) Here the mere degradation into a lesser Tribe is more sharply distinguished than elsewhere from an expulsion from the Tribes generally, and the former is, in the first instance, alone designated by the expression *TRIBU MOVERE*: but the latter also exclusively occurred in the case of Censorial notation, and this therefore closely confirms the above defined terminology (§ 80(f)). Entirely to the same effect stands the following passage from the same Chapter, which says of the same Censors that “*PLURES, QUAM A SUPERIORIBUS, ET SENATU EMOTI SUNT, ET EQUOS VENDERE JUSSI. OMNES IIDEM AB UTROQUE et tribu remoti, et aerarii facti.*” Here, as in Cicero (§ 79 (b)), the two things are represented as distinct. When moreover Claudius in his Speech denies to the Censors the right of expelling a Citizen from all the Tribes (or of reducing him to the position of an *Aerarius*), Livy affords him the opportunity of carrying his polemical assertion to its extreme length: for that the Censors had that right in point of fact, is shown not only from the testimony of Cicero (§ 72 (b)), but even by the act of the same Claudius, who had just communicated an enumeration of the expelled Senators and Knights whom he, in conjunction with his colleague, had made *AERARII*.

on the opinions and language of the Jurists. Henceforward the expressions *CAPITIS DEMINUTIO* and *CAPITALIS CAUSA* were no longer applied to cases of simple Infamy, but solely to the loss of the entire, complete Citizenship. The notion of *CAPITIS DEMINUTIO* thereby first received that exclusive reference to the Capacity for Private Rights, which we perceive in our Law Sources (App. VI., No. XIII.). This change of terminology is expressly mentioned in the following remarkable text of Modestinus (L. 103, DE V. S. 50, 16). "*LICET capitalis LATINE LOQUENTIBUS OMNIS CAUSA EXISTIMATIONIS VIDEATUR, TAMEN APPELLATIO capitalis, MORTIS VEL AMISSIONIS CIVITATIS INTELLIGENDA EST.*" That is to say: According to the present prevailing terminology (of Jurists and of Imperial Laws), Death and the loss of Citizenship alone constitute Capital Punishments, although the Classical Writers (*LATINE LOQUENTIBUS*) designated Infamy also as an instance of the same (*d*). What was referred to in this text as the common Juristical terminology will be found to be amply confirmed by the application occurring in several other passages (*e*).

(*d*) Modestinus therefore denotes the contrast of an ancient and modern terminology, which at the same time corresponds with that of the non-juristical and juristical, because he himself had developed the modern in course of a reflexion of the Jurists. Marezoll, pp. 112, 113, erroneously explains *LATINE LOQUENTIBUS* as the language of common life, and assumes the above cited passages of Cicero to be rhetorical exaggerations; in the passage *Pro Roscio* this might to some extent be conceded, but it is altogether impossible to do so in the passage *Pro Quinctio*, where the expression is so frequently employed, and quite as something generally known.

(*e*) § 2 *J de publ. jud.* (4, 18) "*CAPITALIA DICIMUS, QUAE ULTIMO SUPPLICIO AFFICIUNT, VEL AQUAE ET IGNIS INTERDICTIONE, VEL DEPORTATIONE, VEL METALLO. CETERA si quam infamiam irrogant CUM DAMNO PECUNIARIO, HAEC PUBLICA QUIDEM SUNT, non tamen capitalia.*" § 5 *J de cap. dem.* (1, 16); L. 28 *pr. § 1*; L. 2 *pr. de publ. jud.* (48, 19); L. 14, § 3 *de bon. libert.* (38, 2); L. 6, C. *ex quib. caus. inf.* (Concerning this last text comp. Appendix VI. (4)). The Rescript of Severus does not wholly agree with this (note *b*). Nevertheless some wavering in regard to such an undoubtedly gradual change of terminology is not surprising; moreover the Rescript alluded to only negatively, therefore indirectly, points to the ancient terminology, and not because it bases an assertion of its own upon it.

SECTION 82.

Secondary Effects of Infamy.

It has hitherto been shown that Infamy had essentially a Public character; nevertheless it is not the less true that it also exercised a large influence upon Private Rights, which must now be exhibited.

(1.) The first Private-Law effect of Infamy, which has already been mentioned above (§ 18), consists in the restricted capacity to Postulate. The Infamous person, for instance, was only permitted to make applications before the Praetor on his own behalf, or for such persons as were specially connected with him in some close Relationship (§ 78 (1)): as a rule, therefore, not for strangers.

Hence it followed, in the first place, that an Infamous person as a rule (*i. e.* with the exception of the personal Relations mentioned), could not act as a Cognitor (*a*): just as little also could

(a) *Fragm. Vat.* § 324 "OB TURPITUDINEM ET FAMOSITATEM PROHIBENTUR QUIDEM (MS. *quidam*) *cognituram suscipere*, ADSERTIONEM NON, NISI SUSPECTI PRAETORI;" Paulus, I. 2, § 1 "OMNES INFAMES, QUI POSTULARE PROHIBENTUR, *cognitores fieri non possunt*, ETIAM VOLENTIBUS ADVERSARIIS." An attempt might be made to preserve the *quidam* of the Manuscripts in the first text, by regarding it as an indication of the exception in favor of the closely related persons; except that, in the first place, *quidam* may well suit the designation of an exception, but not (as it must be here) a governing Rule. In the next place, a sufficient argument for *quidam* is furnished by the contrast of the assertion against the Cognitor. The Jurist passed over the exception with silence, since he had merely to do with the contrast mentioned. This proposition of the ancient Law has strayed in a singular manner into Gratian's Decree, C. 1, C. 3, Q. 7. "INFAMIS PERSONA NEC PROCURATOR ESSE POTEST NEC COGNITOR." It is here ascribed to a ROMANA SYNODUS, which derived it unquestionably from the Breviarium, except that it certainly does not exist in this verbal form, either in the text of Paulus, or in our *Interpretatio*; probably, however, it may be found in some one of the later Compilations. Savigny, *Gesch. des R. R. im M. A.* 2, § 20.

he act as a Procurator, because the personal disqualifications with regard to Advocacy also applied generally to Procuration (*b*).

Hence also resulted, however, the farther important principle, that no Action could be assigned to an Infamous person (*c*), because such an assignment was always effected under the form of a Commission to a Cognitor or a Procurator (*d*). But this important Private Law effect of Infamy was deprived of all force as soon as an assignment began to be permitted, without the actual nomination of a Cognitor or Procurator, by means of UTILES ACTIONES; because every person to whom such an assignment was made prosecuted the Claim thereafter with a personal interest, of which no Infamous person could be deprived, and it could not now be objected that according to form he was a Procurator, and therefore excluded by the words of the Edict (*e*).

Finally, also, another result of the same proposition was an incapacity on the part of a person devoid of Honor to institute purely Popular Actions, that is to say, those Actions in which a Money Penalty is indeed enforced, but only with the view of securing weight and protection to a matter of Public Interest by means of this Penalty. Because, in Actions of this kind, the Claimant simply appeared as a Procurator of the State (*f*). On

(*b*) *Fragm. Vat.* § 322, 323.

(*c*) Paulus, I. 2, 3 "In rem suam COGNITOR PROCURATORVE ILLE FIERI POTEST, qui pro omnibus postulat." Therefore not those who stood in the second or third Edict DE POSTULANDO. The *Interpretatio* moreover refers the proposition quite rightly to the exclusion of the Infamous person. Literally we might also extend the exclusion to Women, but the immediately preceding § 2 says the exact contrary of this: "FEMINAE IN REM cognitoriam OPERAM SUSCIPERE NON PROHIBENTUR" (therefore also not PROCURATORIAM).

(*d*) Gaius, II. § 39; L. 24 *pr. de minor.* (4, 4); L. 3, § 5 *de in rem verso* (15, 3).

(*e*) L. 9, C. *de her. vel act. vend.* (4, 39) "Utiliter EAM MOVERE SUO NOMINE CONCEDITUR." Namely in so far *suo nomine* as he had not now the special rights and restrictions of a Procurator; the defendant on the other hand was still always subject to the old action of Cessio, therefore also to all the earlier exceptions.

(*f*) L. 4 *de pop. act.* (47, 23) "POPULARIS ACTIO INTEGRÆ PERSONÆ PERMITTITUR: HOC EST, CUI PER EDICTUM POSTULARE LICET." In the

the other hand, if the Claimant had also a personal interest at stake, the Action then assumed a mixed character, and an Infamous person was not debarred from instituting it (*g*).

This whole restriction was established originally out of consideration for the Dignity of the Praetor, in whose presence it was thought that men devoid of Honor should not appear except in case of necessity, or, as a matter of pure discretion, and for this reason, as Paulus expressly says, even the consent of the adversary could make no difference (note (*a*)). Moreover the adversary could not be compelled as a rule to contest an Action with a Cognitor or Procurator who was himself devoid of Honor, and for the vindication of this independent right a PROCURATORIA EXCEPTIO was given to him, which the Praetor could not withhold from him out of mere consideration for the Infamous person concerned. Justinian abolished this Exception by an Ordinance, because in his time it was no longer customary (*h*), that is to say, it was not so much intended that Infamous persons should be permitted for the future to postulate unrestrictedly, which would in fact have been contrary to the plainest provisions of the Digest, but that the Magistrate only should be able to decline to hear such persons, without the opposite party

same way Women were also excluded (L. 6 *ead.*). Comp. concerning these Actions, § 73, lit. H.

(*g*) This was only expressly stated of Women (L. 6 *de pop. act.* (47, 23). It is, however, clearly also applicable to dishonorable persons.

(*h*) § 11 J *de except.* (4, 13) "EAS VERO EXCEPTIONES, QUAE OLIM PROCURATORIBUS PROPTER INFAMIAM, *vel dantis vel ipsius procuratoris*, OPPONEBANTUR: CUM IN JUDICIIS FREQUENTARI NULLO MODO PERSPEXIMUS, CONQUIESCERE SANCIMUS: NE DUM DE HIS ALTERCATUR, IPSIUS NEGOTII DISCEPTIO PROTELETUR." Marezoll (pp. 215—217) rightly enough comprehends the object and effect of this new Ordinance, but he explains the words NULLO MODO in a very forced sense. The natural sense of the passage is really this: "The Exceptions mentioned occur now indeed very rarely, whence it appears plainly that there was no practical need for them: we have therefore legally abolished them, in order that they might not be asserted in individual cases, and misapplied for the purposes of delay." The FREQUENTARI NULLO MODO denotes the rare use of a Law Institute, and is distinguishable from an abolition of the Institute itself by the effect of a Customary Law. Theophilus in truth may easily have been misled to the adoption of this last construction.

being permitted to bring forward such an Exception, or to merely abuse the privilege by using it with the object of prolonging the Action.

It is only from this last-mentioned Ordinance of Justinian (note *h*) that we learn incidentally that a similar Exception also prevented an Infamous person from appointing a Procurator for himself, which restriction likewise Justinian abolished. The reason for such a restriction may have been that a Defendant could plead the untrustworthiness of an Infamous Plaintiff with more success if the latter appeared personally in Court. The Official Dignity of the Magistrate had no concern in the matter, and it was therefore not open to him, as in the preceding restriction, to reject *EX OFFICIO* a Procurator appointed by an Infamous Person. With the abolition therefore of this second *PROCURATORIA EXCEPTIO* the whole legal principle underlying it completely vanished at the same time; and this is the natural reason why in the remaining portion of Justinian's Law Codes no trace of this second restriction is preserved. It was, however, of considerable importance in the Old Law, because an Infamous person was by that means prevented from assigning a Claim due to him, which at that time could only be effected by a formal *CESSIO*, and, therefore, by the appointment of a Procurator or a Cognitor.

(2.) The second Private Law effect of Infamy consisted in a restriction of the capacity for Marriage. This restriction, of which the *LEX JULIA* laid the foundation, was foreign to the Ancient Law, but the interpretations of the Jurists first led to its development (*i*). The course of development of this legal principle was, however, the following.

The *LEX JULIA* prohibited Senators, as well as their male and female descendants, from contracting Marriage with Emancipated persons, and also with certain other contemptible persons specifically named. The Marriage of all Freeborn-men with

(*i*) The complete exposition of this proposition, based upon the authority of the Sources, will be found in Appendix VII. I merely place together here the results of that exposition in a short summary.

certain similarly specified contemptible Women was likewise prohibited. But these two specified classes of cases only partially agreed with one another.

The Jurists developed this prohibition in a twofold manner: in the first place, by transferring the cases of contemptibility from one class to the other; and secondly, by tracing back these cases to a general notion of Infamy, in consequence of which the rule was established that the prohibition in the case of Senators and Freeborn-men applied to all persons who were designated in the Edict as Infamous.

This furnished the first opportunity of ascribing Infamy to Women, and thus widening the ancient conception of Infamy. The newly admitted cases were inserted in the Edict as supplementary.

The prohibition of the *LEX JULIA* had not, however, the meaning that a prohibited Marriage of the kind referred to was absolutely void, but simply that the parties to it could not obtain those privileges which were associated by this Law with the condition of Marriage, or, in other words, that it would not suffice to avoid the penalties of Celibacy.

The operation of this prohibition was indeed extended by a *SENATUS-CONSULTUM* under Marcus Aurelius to the absolute annulment of the Marriage itself, not, however, for Freeborn persons but only for Senators, and in the latter case only in relation to those who had been Emancipated, and to persons who were deemed contemptible by reason of certain professions (as that of Play-Actors), but never in relation to Infamous persons generally.

The Marriage prohibition of the *LEX JULIA*, however, ceased of itself when by the Laws of the Christian Emperors the punishment of Celibacy was universally abolished;* while its extension to Senators was completely abrogated by Justinian.

Infamy moreover had again by this time lost all application

* *Cf. Cod. Theod.* VIII. 16, 1; *Ib.* 17, 2, 3; *Cod. Just.* 58, 1; *Ib.* 59. It is remarkable that the penalties attached to Celibacy should have been enacted by a law (the *LEX PAPIA POPPÆA*) which was introduced by two Consuls, neither of whom was a married man. *Trins.*

to the Female sex. It was therefore a natural result of this circumstance that the Compilers, as they had admitted the Praetorian Edict concerning Infamy into the Digest, should have omitted from it the supplementary inscribed texts relating to dishonorable Women.

The secondary effects above enumerated are the only ones which can be properly ascribed to Infamy, according to the true juristical notion of this term. Many others, however, have been irregularly included therein by our Jurists.

Thus Infamous persons are said to be incompetent to appear as Witnesses, not only before a Court of Justice but in any formal legal transaction (*k*). The Roman Law, however, never sanctioned any such general rule. According to the Ancient Law a person convicted of certain Offences was specially incapacitated from acting as a Witness. At last Justinian ordained that only respectable persons should be admitted as Witnesses, who were alike trustworthy by good reputation and by their social position (*l*). That this Ordinance besides being impracticable, had nothing in common with the fixed legal notion of Infamy, seems obvious: indeed it even went beyond the already very indefinite idea of *INFAMIA FACTI* (*m*) (§ 78). We are thus obliged, in regard to the effects of the most recent legislation, to deny altogether any absolute incapacity on the part of Infamous persons to act as Witnesses (whether judicially or in formal transactions). But as regards their credibility in judicial inquiries, this was a point which had to be left to the unfettered discretion of the Judge in each individual case, and the strict juristical provisions about Infamy did not affect it.

The matter stands pretty much in the same condition with regard to the alleged relation of Infamy to the *QUERELA INOFFICIOSI*. Brothers and Sisters, it is said, who are excluded by a Testament, are only entitled to claim the *QUERELA* if the Heir

(*k*) This opinion is very widespread. Cf. amongst others, Linde, *Lehrbuch des Civilprozesses*, § 258 (4th ed.).

(*l*) Nov. 90.

(*m*) This question is expressly considered by Burchardi, § 6, and by Marzoll, pp. 220—227.

preferred to them is an Infamous Person. But the provision of the Law is quite different. The *QUERELA* is made to depend upon the circumstance, that the preference shown to the instituted Heir has something specially obnoxious about it by reason of his personal qualities. As examples of such qualities causing the preference to be deemed obnoxious with respect to the excluded persons, are mentioned:—Infamy, an evil Reputation (although in a lesser degree), *LIBERTINITAS*, with an exception in favour of such Freedmen who had earned special merit with the deceased (*n*). Clearly, therefore, everything is here also left to the absolute decision of the Judge, and the legal notion of Infamy, with its sharply defined limits, is by no means the decisive element in it.

(*n*) L. 27, C. *de inoff. test.* (3, 28) "SI SCRIPTI HEREDES INFAMIAE, VEL TURPITUDINIS, VEL LEVIS NOTAE MACULA ADSPERGANTUR: VEL LIBERTI QUI PERPERAM ET NON BENE MERENTES . . . INSTITUTI SUNT." This Constitution is based upon two passages of the Theodosian Code (L. 1, 3, C. 7 $\frac{1}{2}$. *de inoff.* (2, 19). Cf. upon this question Marezoll, p. 246, whose views are somewhat different from those here stated.

SECTION 83.

*The Applicability of the Doctrine of Infamy to
Modern Times.*

It has now to be stated which of the above established propositions concerning Infamy are suitable for the modern application of this Law-Institute.

First, therefore, what form has Infamy assumed in the Justinian Law? There is nothing else remaining of it except the restricted capacity of an Infamous person to appear before a Court of Justice for the purpose of postulating for another; and this restriction is only allowed to prevail so far as the Judge himself permits it, and is no longer a personal right vested in the Opposite Party (§ 82). For the Public significance of Infamy had long since disappeared, because even the incapacity of Infamous persons to occupy positions of Honor, although it is still occasionally declared, has quite a different meaning from the old legal principle, and merely embodies in itself a verbal and apparent survival of the same (§ 80). In like manner the restricted capacity for Marriage, which was for a long period closely connected with Infamy, had entirely vanished (§ 82).

But even that remnant of the old Law-Institute (which is maintained in Justinian's legislation) has not been able to preserve itself in the transfer of the Roman Law to Modern Europe, since it was connected with the peculiar constitution of the Roman Courts, and, in point of fact, therefore, also again conditioned by politico-legal relations.

According to the modern constitution of Courts, every judicial representation of another is effected either by a Procurator or by an Advocate, whose Offices are at times united in the same person, and at other times held separately. Both Offices are

moreover (according to the different Laws of Individual States) partly connected with Public functions, and partly independent thereof, therefore purely of a Private character. In the first case they appertain, like other offices, to the Public Law, and are, therefore, according to the more correct opinion, completely independent of the provisions of the Roman Law. In particular, in regard to the incapacity of Infamous persons for employment as Procurators of a Court of Justice, all that has just been said in regard to their incapacity for Public Offices generally, is equally applicable. In the second case, there might possibly be a question as to the application of the Roman Rule. This would then have the meaning (as some persons actually see in it), that Infamous persons were not entitled to draft the Pleadings in an Action for others: for that is usually regarded as included in the business of private Advocacy, or in that of modern Pleading. But even this restricted application would only at most express the verbal, not the true sense, of the Roman Rule. Because what was deemed to be derogatory to Official dignity, in a Roman point of view, was the arbitrary appearance of an Infamous person before the Praetor, which was not justified by the prosecution of his own interests. It is impossible that the composition of written Pleadings could have been regarded as a violation of the respect due to the Judicial Office, whatever may have been the character of the author (who perhaps even remained unknown). If it were meant to assert that a dishonorable draftsman is also open to the suspicion of misrepresenting the law, the matter would then relate to a wholly different province, foreign to the Roman Rule in question, the province of supervising the conduct of Judicial proceedings. Here, however, if the Judge were once to attempt to interfere in such matters, wholly different considerations would have to be regarded, partly moral and partly intellectual, for which especially a certain degree of legal knowledge is requisite. Infamy, with its wholly positive fixed conditions, then becomes of no consequence, and instead of it an undefined notion of personal trustworthiness comes into application.

The reasons here advanced, although they are not usually

accepted in the form and with the precision here given, and are therefore not brought home to one's consciousness so plainly, have nevertheless not remained without influence upon modern writers. This circumstance alone can explain the incredibly wavering opinions of those writers concerning the degree of applicability which ought to be conceded to the fundamental Roman principles regarding Infamy (*a*).

However even in this great multiplicity of opinions some views in common may yet be perceived, in regard to which the majority and most thoughtful of them will be found to harmonize (*b*). To this category belongs, in the first place, a very large restriction of the precepts of the Roman Law, by which the final result of those views is made to assimilate very closely to what has been here advocated. For instance, cases of Infamy which occurred without a Judicial Sentence (*IMMEDIATA*), are said to be no longer applicable; nor, moreover, out of the so called *MEDIATA*, the decisions concerning private Delicts or Contracts. Consequently Infamy, as a Law-Institute (for *INFAMIA FACTI* does not anyhow concern us), simply survives as the consequence of adjudged Criminal Punishments, in connection with which it is still questionable whether the *EXTRAORDINARIA CRIMINA* should be likewise excluded (§ 77 (*c*), p. 128), a restriction which would certainly be no longer suitable to our modern Criminal Law. The *CAROLINA* mentions Infamy particularly as the punishment for Perjurers, as well as for those who carried on the trade of Prostitution through their Wives and Children (*c*). Other Imperial Laws recognise it as the consequence of Injury (*d*), or threaten it as the peculiar newly devised punishment for certain defined Offences (*e*).

(*a*) Comp. Marezoll, pp. 346—349.

(*b*) Eichhorn, *Deutsches Privatrecht*, § 87, 88, 4th edition.

(*c*) C. C. C. Art. 107, 122.

(*d*) Imperial Decrees of 1668, 1670. *Sammlung der Reichsabschiede*, Th. 4, pp. 56, 72.

(*e*) The punishment of a Notary who drew up a Conveyance from a Jew to a Christian. R. A. 1551, § 80. The punishment of a refractory Journeyman, 1731. *Sammlung der Reichsabschiede*, Th. 4, p. 379.

Infamy thus narrowly restricted is still said to produce in the Modern Law the following effects:—

- (1.) Incapacity for Offices of Dignity, including Communal Offices.
- (2.) Incapacity to act as an Advocate, Procurator, or Notary.
- (3.) Incapacity to belong to Guilds and City Corporations.
- (4.) And, lastly, all those effects in regard to Private Rights which are still regulated by the Roman Law, particularly in relation to the *QUERELA INOFFICIOSI*.

I have already expressed my opinion in detail concerning the most important of the above-mentioned subjects, and have particularly pointed out that the effects specified in (4) are, in fact, absolutely non-existent. In the Imperial Laws one of the above results, that of Incapacity for the Office of a Notary, is specially declared (*f*).

It will be seen that the extent of the controversy, so far as it retains a purely practical character, is exceedingly small; and that the most important cases of Roman Infamy are discarded in those doctrines of modern writers which are the most approved of (*g*). But even with this large limitation, I am unable to concede anywhere the application of Roman Infamy, upon the grounds above advanced. What may perhaps be conceded in this direction is simply the following:—

Under the influence of German ideas tolerably uniform Rules concerning Honor, and the deprivation of Honor, have been

(*f*) The Notarial Ordinance, 1512, § 2, "Thus, for that Office, are prohibited by the Laws, for instance, . . . Dishonorable Persons called *INFAMES* . . . and in short all those who are disqualified by the Laws to testify as Witnesses, because they are employed as a substitute for Evidence." Herein clearly lies the basis of the false opinion of several Lawyers that, according to the Roman Law, *INFAMES* were absolutely incapable of giving any evidence.

(*g*) The most remarkable are some cases of so called *INFAMIA IMMEDIATA*, e. g. the case of the *Bina Sponsalia*, that is to say, of a new Betrothal without an express renunciation of the earlier one; also the Marriage of a Guardian or of his son with the Ward before the legal period (§ 77 (*v*)). The two cases may be conceived as wholly harmless transgressions of purely formal precepts, with reference to the apparent absence of guilt in the transaction itself. No Law Institute, however, can so little endure, as that of Infamy, an absolute contradiction with Public Opinion.

developed in different countries since the Middle Ages, which have also partially assumed the character of Law-Institutes, particularly in relation to the possible participation therein by Corporations of a different kind. These Law Rules have been established partly by Laws properly so called, partly by Customary Law, but more especially by the Statutes and Observances of such Corporations themselves. And in their establishment, in which lawyers mostly took part, the provisions of the Roman Law (more or less misunderstood) have exercised no small influence.

Such an indirect influence of the Roman Law upon the modern doctrine of Infamy is not to be mistaken; it is nevertheless based upon a misconception of the true nature of this Law-Institute as above described, and it has besides never been of great importance. Those Imperial Laws which in individual cases partly assume Infamy as lawful, and partly prescribe it anew (§ 83 (c) (d) (e) (f)), fall within the sphere of this misconception, and cannot therefore be relied upon in order to refute the reasons here advanced against the Common-Law applicability of Infamy.

In the remaining cases in which Infamy still occurs in our Criminal Law, whether pronounced as a Punishment, or resulting as the mere consequence of certain forms of Punishment, I cannot admit, upon the grounds here disclosed, the distinct legal effects which are usually attributed to it in particular instances. At the same time I am far from contesting the Reality and Efficacy of Infamy as an important means of punishment. Because when a Judge pronounces Infamy, or when it is regarded as the necessary consequence of an executed Sentence, the undoubted effect which it exercises on Public Opinion is itself a very palpable misfortune, even if particular Juristical consequences do not follow from it.

SECTION 84.

Restriction of Jural Capacity by Religion.

Since the supremacy of the Christian Religion the proposition gradually developed itself in the Roman Law, that certain differences in religious faith should carry with them a restriction of Jural Capacity. The following cases appertain hereto.

I.—PAGANI. The followers of the ancient Religion, whose supremacy and oppression had been for so long a period destructive to the Christians, were now in their turn treated with more or less toleration, indeed the severest Penal Laws were not unfrequently applied to them. It is perfectly clear from the rigour of these punishments that the question of a restriction of Jural Capacity, which always pre-supposes a condition of passive toleration, and is rendered useless by coercive measures, was not directly raised. Against the arbitrary persecution by private individuals the Pagani were at times protected by special laws (*a*).

II.—JUDAEI. As a rule they were said to have the same rights as Christians (*b*), except that a Marriage between a Christian and a Jew was altogether prohibited, and was punishable with the statutory penalties of Adultery (*c*). This provision was entirely of a positive character, and should not by any means be treated as an application of the rule which denied CONNUBIUM to Foreigners (PEREGRINI): because the absence of CONNUBIUM was no prohibition, nor did it drag any punishment after it. Moreover, individual Jews had certainly at all periods acquired Citizenship, and the common Right of Citizenship which Cara-

(*a*) L. 6, C. *de Paganis* (1, 11).

(*b*) L. 8, 15, C. *de Judaeis* (1, 9).

(*c*) L. 6, C. *de Judaeis* (1, 9).

calla conferred upon all Subjects of the Empire, undoubtedly also extended to Jews then existing, and to their descendants.

III.—HAERETICI. Those Christians whose doctrines had been declared heretical by a Council of the Church, were subjected to various, and often harsh, penalties, which at times were applied to particular false doctrines of momentary importance, such as those of the Manichaeans and Donatists, and at other times extended to all Heresies generally. Amongst those penalties were included also restrictions of Jural Capacity. Most frequently the privilege of acquiring Inheritances, or of executing Testaments, was denied to them : besides which there was also the prohibition against Donations and Sales, indeed against all Contracts, Actions, and Juristical transactions (*d*).

IV.—APOSTATAE. Special Laws were promulgated against the secession from the lawful doctrines of the Church to the three specified classes of Errors. These Laws at times punish only one of the specified classes, at other times more or all of them, and thus the term APOSTATA was employed in different significations, according as occasion and necessity required. Here, as in the case of Heresy, the restriction of Jural Capacity frequently occurs, and especially the prohibition against becoming an Heir, or executing a Testament (*e*).

Of all these provisions only one has been preserved in the Modern Roman Law, and notably in the Common Law of Germany, viz. that prohibiting inter-marriages between Jews and Christians. Heathens, just as Heretics in the sense of the Roman Imperial Laws, therefore also Apostates in this relation, no longer exist in our States, so that the possibility of applying those Laws is in itself wanting. Such an impossibility cannot indeed be asserted with respect to Apostacy to Judaism ; nevertheless scarcely anyone will defend the application of the Roman Laws to this case, from the standpoint of the Modern Roman Law.

(*d*) L. 4 ; L. 19 *pr.* ; L. 21 ; L. 22, C. *de haeret.* (1, 5) ; AUTH. *Item*, and AUTH. FRIDERICI *Credientes*, C. *cod.* ; L. 7, 17, 18, 25, 40, 49, 58, C. *Th. de haeret.* (16, 5).

(*e*) L. 2, 3, 4, C. *de apost.* (1, 7) ; L. 1, 2, 4, 7 ; C. *Th. de apost.* (16, 7).

Other contrasts have since the Reformation disunited Europe, and severities and disqualifications similar to those Roman ones have been enforced, according as one party or the other has been triumphant. In Germany alone a certain equilibrium was very early maintained, which was regulated by fixed statutory rules. Since then, according to the Common Law, there was no longer any distinction between the three great religious parties, but so much the greater was this distinction according to the particular law of individual States, and this diversity had its hypothetical foundation in the conditions of the Peace of Westphalia.

It was otherwise after the Act of Confederation of 1815, which established for Christian Religious Sects, in all States belonging to the German Confederation, a complete assimilation of Civil and Political Rights, and this quite unconditionally, without permitting any scope for divergence in the law of individual States(*f*). With respect to Jews their enjoyment of Civil Rights was still reserved for future determination.

(*f*) Act of Confederation, Art. 16. "The distinction of Religious Sects amongst Christians in the States and Provinces of the German Confederacy, constitutes no ground for any distinction in the enjoyment of Civil and Political Rights."

SECTION 85.

Juristical Persons. The Concept.

DIGEST, III. 4, *Quod cujuscunque universitatis nomine vel contra eam agatur.*

DIGEST, XLVII. 22, *De collegiis et corporibus.*

WRITERS :—

(Upon the historical side of the doctrine.)

WASSENAER, *Ad tit. D. de coll. et corp. L. B.*, 1710. (FELLENBERG, JURISPR. ANT. I. p. 397—443.)

DIRKSEN, *The Condition of Juristical Persons according to the Roman Law.* (ABHANDLUNGEN, Vol. II., Berlin, 1820, pp. 1—143.)

(Upon the practical side.)

ZACHARIAE, *Liber quaestionum*, Viteb. 1805-8. *Qu. 10, De jure Universitatis.*

THIBAUT, *Civilistische Abhandlungen*, Heidelberg, 1814. Regarding the legal principles governing the division of things held in common. Compare the *Pandektenrecht* of the same author, § 129—134 of the 8th Edition.

J. L. GAUDLIZ s. HAUBOLD, *De finibus inter jus singulorum et universitatis regundis.* Lips. 1804, in *Hauboldi Opusc.*, Vol. II. Lips. 1829, pp. 546—620, pp. lxiii—lxxix (a).

LOTZ. *Civilistische Abhandlungen*, Coburg and Leipsic, 1820, No. 4, pp. 109—134.

(a) I cite this work under Haubold's name, because in point of fact both are to a certain extent regarded as the authors. *Comp. Opusc.* vol. 1, p. 15.

KORI, *Von Gemeinheits Beschlüssen and Von Pseudo Gemeinheits-Sachen*; in Langenn and Kori, *Erörterungen praktischer Rechtsfragen*, Vol. II. Dresden and Leipsic, 1830, No. 2, pp. 1—39.

Jural Capacity has been established above as coinciding with the notion of the individual Man (§ 60). We have now to consider it as extended to artificial subjects admitted by means of a pure fiction. We designate such a subject a JURISTICAL PERSON, that is to say, a Person who is assumed to be so for purely juristical purposes. In it we find a Bearer of Jural Relations as well as the individual Man.

But in order to give this notion a suitable precision, it is necessary to circumscribe narrowly the province of the Jural Relations to which this Capacity must be referred: the absence of such a boundary line has led to no small confusion in the treatment of this topic.

In the first place, since we have here only to deal generally with the province of Private Law, the artificial Capacity of a Juristical Person ought also to be referred solely to the relations of that department of Law. Moreover in State's-Law there is nothing more frequent than that a branch of the Public Power can only be exercised by several persons jointly, and therefore by a collective Unity; but to designate on this account, for example, a College of Judges as a Juristical Person, would only render the concept ambiguous, because the essential quality of a Juristical Person (the Property-Capacity) is wholly wanting in most of those Colleges, although some amongst them, along with their Judicial Office, may also have obtained the completely different character of a Juristical Person. In the same way it is altogether improper to denote, as many do, the entire line of Kings in a Hereditary Monarchy, as a Juristical Person (*δ*). That such Relations of the Public Law were known to and current amongst the Romans, who lived for so long a period

(*δ*) Hasse, *Archiv.* vol. 5, p. 67.

under Republican forms of Government, is a matter of course. It is in this sense they speak of a College of Consuls, or of the Tribunes of the People (*c*). So in like manner they say the cotemporary *DUUMVIRI* of a Town are to be treated as a Unity, just as if only a single individual were clothed with the Office (*d*). Moreover, when several *JUDICES* are appointed in a law suit, and if some of them, or indeed all, were obliged to be replaced by other persons, the *JUDICIUM* nevertheless continues the same (*e*). All these terms and legal principles, however, prevailed only in the State's-Law, or in regard to legal proceedings, and they were far from being brought into any connection with the Private-Law doctrines relating to Juristical Persons, from which blending together of dissimilar things our modern writers have not kept themselves free. Moreover the Classes, Centuries, and Tribes were all important Political Unities, but they never seem to have been recognised as Juristical Persons, that is to say, as Possessors of Joint Property (*f*).

A second, but no less essential limitation of the notion of a Juristical Person, is that referring to the *PROPERTY RELATION* (*g*), by which therefore the Family is excluded. Every Family relation, for instance, according to primitive ideas, relates to Man in his natural condition, and the juristical

(*c*) Livius, x. 22, 24; Cicero, *In Verrem*, II. 100; *Pro Domo*, 47.

(*d*) L. 25 *ad. municip.* (50, 1) "MAGISTRATUS MUNICIPALES, CUM UNUM MAGISTRATUM ADMINISTRENT, ETIAM UNIUS HOMINIS VICEM SUSTINENT."

(*e*) L. 76 *de judic.* (5, 1). In like manner when Novel 134, C. 6, says, the Rescript addressed to a Provincial functionary is also to be carried out by his successors.

(*f*) I will certainly not assert anything positive on this point. Suetonius (*Aug.* 101) says: Augustus in his Testament bequeathed two million thalers to the people, five thousand to each tribe: "LEGAVIT POPULO ROM. QUADRINGENTIES, TRIBUBUS TRICIES QUINQUIES H. S." (that is to say, as much as 100,000 Sesterces). Nevertheless it may also mean that the two millions were bequeathed to the State Treasury, five thousand being intended to be shared amongst the individual Citizens of each Tribe. Comp. also Averanius, II. 19.

(*g*) It is difficult to express in English the exact signification of the German word *Vermögen*. Judge Holloway translates it Potentiality, but I prefer to render it Property, which is the ordinary meaning of the word. *Trans.*

treatment thereof is something quite derivative and secondary (§ 53, 54); therefore the application thereof to Subjects other than Human Beings is impossible. Property, however, according to its true nature, is a widening of the individual Power (§ 53), therefore the ensuring and elevating of free Activity. Now the latter relation may be just as well applied to Juristical Persons as to individual Men: its objects (upon which the whole need of its admission depends) may be advanced just as well by means of Property as the objects of individual Men. But in regard to the artificial extensions of the Family, these are of two kinds (§ 55, 57): some are united to purely Human conditions, by which they are said to be constituted and protected, and these of course can have no application to Juristical Persons: others are founded upon Property relations, and are, therefore, like them, certainly applicable to Juristical Persons.

Hence it happens that the following Jural Relations may arise with regard to Juristical Persons: Ownership and *JURA IN RE*, Obligations, Acquisition by Inheritance, as well as Power over Slaves, and Patronage: also, in the Modern Law, a Colony. On the other hand, the following are not applicable to them: Marriage, Paternal Power, Kinship; moreover *MANUS, MANCIPII CAUSA*, and *GUARDIANSHIP*. We are now able to define the notion of a Juristical Person still more closely: it is an artificially assumed Subject capable of Property. But because the essence of a Juristical Person has been here stated to consist exclusively in the Private-law quality of a Property Capacity, it must not on that account be asserted that this is the only quality to be found, at least of any importance, in Juristical Persons actually existing. On the contrary, the conception of a Juristical Person always pre-supposes some one independent object different from it, which is even advanced by the Property capacity, and which in itself is often strangely enough regarded as more important than the latter (*h*). Except that in a System of Private-law Juristical

(*h*) Thus, for example, in regard to Towns the foundation of their existence is a political and administrative character, and, on the other hand, their private law character, *i. e.* their existence as Juristical Persons, sinks very much in the

Persons are absolutely nothing else than Subjects with a Property capacity, and every other side of their character lies completely outside the limits of such a System.

I shall therefore exclusively employ the term JURISTICAL PERSON (which is thus opposed to the NATURAL PERSON, that is to say the individual Man), in order to express that it is only through this Juristical object that it has any existence as a Person. Formerly the term MORAL PERSON was very common, which I have rejected upon two grounds: first, because it does not generally touch the essence of the concept, which has no connection with Moral Relations: secondly, because that expression was more adapted to denote, amongst individual Men, the contrast to immorality, so that by that term the thought is carried away to a wholly foreign province. The Romans themselves had no general term for all cases of this sort. Where they wished to express the Juristical character of such Subjects, they merely said that these represented the place of Persons (*i*), which was tantamount to saying that they are FEIGNED PERSONS.

back ground in point of importance. It is as political and administrative entities that Towns are referred to in the Roman Law, *Digest*, lib. 50, tit. 1. 12, which I have therefore not quoted in the commencement of sect. 85 amongst the Sources of the doctrines of the Private Law here considered.

(*i*) L. 22 *de fidejuss.* (46, 1) "HEREDITAS *personae* vice fungitur, SICUTI MUNICIPIUM ET DECURIA ET SOCIETAS." Just in the same way it is said of BONORUM POSSESSIO: VICE HEREDIS, OR LOCO HEREDIS EST. L. 2 *de B. P.* (37, 1); L. 117 *de R. J.* (50, 17); Ulpian, xxviii. 12; "HEREDIS LOCO CONSTITUUNTUR . . . HEREDIS ESSE FINGUNTUR." Just as the BONORUM POSSESSOR is a feigned HERES, so is the Juristical Person a feigned PERSONA.

SECTION 86.

Juristical Persons—Kinds of.

If we consider Juristical Persons as they actually appear in the present condition of our Law, we shall be obliged to recognise the following contrasts amongst them, whose distinction is not without influence upon their Juristical character.

1. We may assign to some of them a natural or even a necessary existence, but to others an artificial or arbitrary one. A natural existence have Communities, Towns and Villages, which are mostly older than the State itself (that is to say in its present Unity and Limitation), and which constitute the fundamental elements of the State. Their Juristical existence can scarcely ever be doubted, although an arbitrary foundation also occasionally presents itself in regard to them, but only by way of exception, and simply as the development of the original Community. The Roman Colonies (in contrast to Municipalities) were thus arbitrarily founded, with whose number and importance no similar case in our modern States can be compared. The Unity of the Community is of a geographical character, since it is based upon the local conditions of Dwelling and Ownership of Land. All Institutions and Societies to which this quality can be specially ascribed, are either artificial or arbitrary Juristical Persons, for it is obvious that such Institutions owe their existence to the arbitrary determination of either a single person or of several persons.

Moreover this contrast does not depend upon any sharp boundary line; indeed there are also Juristical Persons who, in a certain measure, occupy a middle position between the two forms. To them belong Artisan Guilds and other Associations, which at times annex themselves to a Community, and appear as constituent parts of the same.

2. Some Juristical Persons have a visible representation in

a number of individual Members, who, as the collective Whole, constitute the Juristical Person: others on the contrary have no such visible substratum, but a more ideal existence, which rests upon the attainment of a common object by their means.

The first we call, by borrowing a Latin expression, CORPORATIONS, a term which for that reason is too narrow for the designation of Juristical Persons generally. To that category belong, in the first place, all Communities, as well as those Guilds and Associations which are invested with the rights of Juristical Persons. The essential quality of all Corporations, however, consists in this, that the Subject of the Right does not exist in the individual Members thereof (not even in all the Members taken collectively), but in the ideal Whole: a particular, but specially important, result whereof is, that by the change of an individual Member, indeed even of all the Members, the Essence and Unity of a Corporation is not affected (*a*).

The second is usually designated by the general term INSTITUTIONS, the chief objects of which consist in:—The SERVICE OF RELIGION (to which the very numerous Church Institutes belong), EDUCATION, and CHARITY (*b*).

Here also, however, we not unfrequently find variations, which exclude the possibility of confining the two classes within a sharp

(*a*) L. 7, § 2 *quod cuj. un.* (3, 4) "IN DECURIONIBUS VEL ALIIS UNIVERSITATIBUS NIHIL REFERT, UTRUM OMNES *iidem* MANEANT, AN PARS MANEAT, VEL OMNES IMMUTATI SINT." The *IDEM* is a wholly thoughtless emendation of Jensius, *Stricturae*, p. 12, ed. L. B. 1764; the Manuscripts and Editions read *IDEM*. Still more completely developed is the same proposition found in L. 76 *de jud.* (5, 1), although not in application to Juristical Persons, but to certain *JUDICES* appointed for the same law-suit, whose individual nomination can be no ground for maintaining it as a different *JUDICIUM*.

(*b*) How unsuitable it is to employ the term Corporation for all Juristical Persons may be easily seen in regard to some very noteworthy Institutions. If one wished, for instance, to regard a Hospital as a Corporation, who would then be the individual Members, whose collective Unity could be considered as the Subject of the Property? Certainly not the Patients who were supported in the Hospital, for these are merely objects of Charity, not Co-sharers in the Property of the Institution. The true Subject of the Right is therefore a Concept, recognised as a Person, namely, the Object of Benevolence, which must attain this position in a prescribed manner and by prescribed means.

boundary line: indeed even Institutes of the same kind have in different periods been reckoned sometimes in the one and sometimes in the other class. Thus, for example, Cathedral Chapters and Canonries are indeed Church Institutes, but they are at the same time genuine Corporations. The higher Educational Academies were in their origin genuine Corporations, and indeed, according to the difference of countries, sometimes of Teachers, and at other times of Scholars (*c*); in modern times, however, they have become more and more State Schools. They now appear no longer as Corporations, although still always as Juristical Persons, that is to say, as Subjects capable of Property,

3. Amongst Corporations we again find the distinction, that some have an artificially formed Constitution, such as Townships and Universities (where they were or still are Corporations), others are only provided with a necessary organisation for limited purposes, as Village Communities and (at least in the majority of cases) Artisan Guilds. Modern writers denote this contrast by the technical expressions *UNIVERSITAS ORDINATA* and *INORDINATA*.

Quite apart, and outside this contrast, stands the greatest and most important of all Juristical Persons: the *FISCUS*, that is to say the State itself, conceived as a Subject of Private-Law relations. To conceive it also as a Corporation, as the Corporation of all Confederate States, would be a forced view which would easily lead to a confusing assimilation of dissimilar Jural Relations.

(*c*) Savigny, *History of the Roman Law in the Middle Ages*, 3, § 59.

SECTION 87.

Juristical Persons—History.

Amongst the Romans we already find in the most ancient period surviving Confederacies of various kinds, especially Religious and Industrial, also those of subordinate Public-Officers, *e. g.* of the Lictors, which Association later on obtained a large extension in regard to the Officers of Chancery. Nevertheless their existence involved no pressing need for the development of the notion of Juristical Persons, because in regard to them joint Activity, and perhaps Political Position, were alone of importance, while the Property-Capacity was kept more in the back ground: thus, for instance, the Service of God involved no small expenditure, but the cost thereof was defrayed by the State, and therefore a Corporate Property of the Priesthood or of the Temple itself was rendered less necessary (note (*p*)). Moreover the pious intention of those who desired to promote God's Service by Institutions of this kind could be most easily accomplished by the consecration of the things devoted to this object, by which means they would anyhow be withdrawn from the sphere of Ownership, and would neither belong, in a proprietary sense, to the Temple nor to the Priests.

It was in regard to dependent Communities (Municipalities and Colonies), by the expansion of the State, that the notion of Juristical Persons at first obtained a remarkable application, and also a more definite development; because these Communities, like Natural Persons, had, on the one hand, need of Property and the opportunity for its acquisition, but, on the other hand, such a dependent character that they could be arraigned before a Court of Justice. In this last respect they differed from the Roman State, which was not subject to the jurisdiction of any Judge, and whose Property-relations were treated as more of an administrative kind; therefore, also, for this reason, considera-

tion for the Roman Republic and for its Property did not supply the original motive for the recognition of a Juristical Personality and for the development of its Rights, although for the security of the State similar legal forms to those prevailing for the security of private persons were introduced, of which amongst others the *JUS PRAEDIATORUM* offers an example.

As soon, however, as the notion of a Juristical Person had been established for the benefit of dependent Towns, that notion was also gradually extended to such cases, for which alone it could not originally have been easily devised. It was now applied to the above named primitive Associations of Priests and Artisans; then to the State, which now by a sort of artificial reflexion, drawn from within, was permitted to be treated as a Person under the designation of the *Fiscus*, and thus placed under the jurisdiction of a Judge; and finally, to completely ideal subjects, such as Gods and a Temple.

This last application received the widest extension and amplification as Christianity attained supremacy. The Law-Institute thus developed not only received permanence but even a wider extension in the German States, since it here experienced, owing to the free character of the union of those States, a decided inclination of the people to arbitrary confederations of all kinds. In modern times the supremacy of a central Political Power has driven Corporations into the back ground, as has already been pointed out (§ 86) with reference to Universities; nevertheless the quality of a Juristical Person has not thereby been affected.

After this introductory discussion we must now proceed to collect together the most important examples of Juristical Persons occurring in the Roman Law.

(I.) **COMMUNITIES.**

The whole of Italy, from the time it fell under Roman supremacy, was divided into a large number of Provincial Towns, so that for a long period Townships were the only independent Communities. All these Towns were at the same time regarded as actual States, but dependent on Rome; indeed many of them (the Municipalities) in earlier times had been independent, and were only brought under this subjection at a later period. This

view of Townships is foreign to our Modern Law as a whole, and it only occurs in rare exceptions—The following expressions out of the Law Sources relating to Communities require to be noticed.

CIVITAS (*a*).

MUNICIPES (*b*). This is the customary expression, more frequently used than MUNICIPIUM, because, amongst other reasons, it embraced indifferently the Citizens of both Municipalities and Colonies. This expression has become so commonly used, that it even denotes the Town itself, where the latter is referred to in contradistinction to the individual Citizens (*c*).

RESPUBLICA (*d*). During the period of the Free Constitution this expression was used without further addition to denote the Roman State; but with the old Jurists on the contrary it ordinarily signifies a dependent Township.

RESPUBLICA CIVITATIS OR MUNICIPII (*e*).

(*a*) L. 3, 8 *quod cuj. univ.* (3, 4); L. 6, § 1 *de div. rer.* (1, 8); L. 4, C. *de f. reipub.* (11, 29); L. 1, 3, C. *de vend. reb. civ.* (11, 30).

(*b*) L. 2; L. 7 *pr.*; L. 9 *quod cuj. un.* (3, 4); L. 15, § 1 *de dolo* (4, 3) (see note (*f*)); Gaius, III. § 145. In the same sense, however, MUNICIPIUM also undoubtedly occurs, *e. g.* in L. 22 *de fidejuss.* (46, 1).

(*c*) L. 1, § 7 *de quaest.* (48, 18) “SERVUM *municipum* POSSE IN CAPUT *civium* TORQUERI SAEPISSIME RESCRIPTUM EST: QUIA NON SIT *illorum* SERVUS, SED *reipublicae*. IDEMQUE IN CETERIS SERVIS CORPORUM DICENDUM EST: NEC ENIM PLURIUM SERVUS VIDETUR, SED CORPORIS.” Here MUNICIPES is plainly synonymous with RESPUBLICA, and the CIVES (individually) form the contrast, to which accordingly the ILLORUM refers. (Concerning the matter itself, compare L. 6, § 1 *de div. rer.* 1, 8). The phraseology in Ulpian, XX. § 5, is only apparently different: “NEC *municipia*, NEC *municipes* HEREDES INSTITUI POSSUNT, QUONIAM INCERTUM *corpus est*,” &c. His meaning is, that the Institution as Heir is alike invalid whether the Testator may have employed the expression MUNICIPIUM or MUNICIPES. Ulpian himself, therefore, draws no distinction between these expressions, as the reason assigned by him immediately afterwards clearly shows.

(*d*) L. 1, § 1; L. 2 *quod cuj. un.* (3, 4); L. 1, C. *de deb. civ.* (11, 32); *Cod. Just.* lib. ii. tit. 29—32.

(*e*) L. 2, C. *de deb. civ.* (11, 32); L. 31, § 1 *de furtis* (47, 2) “REIPUBLICAE MUNICIPII ALICUJUS . . . IDEMQUE SCRIBIT ET DE CETERIS REBUS PUBLICIS DEQUE SOCIETATIBUS.” THE CETERAE RES PUBLICAE ARE COLONIAE, FORA, CONCILIABULA, and the like.

COMMUNE, COMMUNITAS (*f*). But besides the Towns themselves, as the principal Communities, certain constituent parts thereof appear also as Juristical Persons. To this category belong the following instances:—

CURIAE OR DECURIONES. Ordinarily the DECURIONES either stand simply as individuals, in contradistinction to the Town (*g*), or they stand also for the Town itself, which indeed is wholly governed and represented by them (*h*). Occasionally, however, they also appear as a special Corporate body within the Town, invested with Property of their own (*i*).

VICI. Villages, regarded Politically, have no real independence, since they always appertain to a Township (*k*). Neverthe-

(*f*) Wassenaer, p. 409.

(*g*) L. 15, § 1 *de dolo* (4, 3) "SED, AN IN *municipes* DE DOLO DETUR ACTIO, DUBITATUR. ET PUTO, EX SUO QUIDEM DOLO NON POSSE DARI: *quid enim municipes dolo facere possunt?* SED SI QUID AD EOS PERVENIT EX DOLO EORUM, QUI RES EORUM ADMINISTRANT, PUTO DANDAM. DE DOLO AUTEM *decurionum* IN IPSOS *decuriones* DABITUR DE DOLO ACTIO."

(*h*) L. 3 *quod cuj. un.* (3, 4) "NULLI PERMITTETUR NOMINE *civitatis vel curiae* EXPERIRI, NISI EI CUI LEX PERMITTIT," &c.

(*i*) L. 7, § 2 *quod cuj. un.* (3, 4) "IN *decurionibus vel aliis universitatibus* NIHIL REFERT," &c.; L. 2 C. *de praed. decur.* (10, 33).

(*k*) L. 30 *ad munic.* (50, 1) "QUI EX VICO ORTUS EST, EAM PATRIAM INTELLIGITUR HABERE, *cui reipublicae vicus ille respondet.*" Therefore the VICUS itself is no RESPUBLICA, but a component part of one. This does not contradict Festus (*voc. VICI*) "SED EX VICIS PARTIM HABENT REMPUB: ET JUS DICITUR; PARTIM NIHIL EORUM, ET TAMEN IBI NUNDINAE AGUNT NEGOTII GERENDI CAUSA, ET MAGISTRI VICI, ITEM MAGISTRI PAGI QUOTANNIS FIUNT."

They had therefore simply sometimes more, sometimes less points of a Communal Constitution: the more perfect are precisely those which are elsewhere called FORA and CONCILIABULA (note (*n*)). The JURISDICTIO here mentioned did not extend to the local Courts, but the Municipal MAGISTRATUS resorted to these places in order to hold his Court there. In this respect therefore the Roman condition was completely different from ours: for amongst us Villages (or also Parishes and Farms without Villages) are independent Communities, completely independent of the Towns (comp. Eichhorn, *German Private Law*, § 379, 380); indeed, if in exceptional instances, some Villages are dependent upon Towns, this stands in connection with the Manorial Proprietary relation, which is wholly foreign to the Romans. Moreover at the present day there is likewise another geographical kind of Corporation, unknown to the Romans, the important Land Leagues. Comp. Eichhorn, *German Private Law*, § 168 and 372.

less they are also, as regards themselves, Juristical Persons, and are both capable of acquiring Property of their own (*l*), as well as of carrying on legal Proceedings (*m*).

FORA, CONCILIABULA, CASTELLA. There were Places which stood midway, in point of area and importance, between Towns and Villages; they belonged in like manner to a Township, and had certainly also Corporate Rights of their own (*n*). In a later period whole Provinces were likewise treated as Juristical Persons, and consequently as great Communities (*o*).

In the Land Surveys Communities and particularly Colonies are styled PUBLICÆ PERSONÆ, an expression which well denotes their Political character, as the foundation of their Private-Law personality (*p*).

(*l*) L. 73, § 1 *de leg.* 1 (30 *un.*) "VICIS LEGATA PERINDE LICERE CAPERE ATQUE CIVITATIBUS, RESCRIPTO IMPERATORIS NOSTRI SIGNIFICATUR."

(*m*) L. 2, C. *de jurejur. propter col.* (2, 59) "SIVE PRO ALIQUO CORPORE, VEL VICO, VEL ALIA UNIVERSITATE."

(*n*) It is noteworthy that these Communities were not mentioned in the Justinian Law Sources. They occur in the Heracleian Table, the *Lex de Gallia Cisalpina*, and in Paulus, IV. 6, § 2.

(*o*) *Cod. Theod.* lib. 2, tit. 12; Dirksen, p. 15.

(*p*) Aggenus, *ap. Goes.* p. 56 "QUAEDAM LOCA *feruntur* AD *publicas personas* ATTINERE. NAM *personae publicae* ETIAM COLONIAE VOCANTUR, QUAE HABENT ASSIGNATA IN ALIENIS FINIBUS QUAEDAM LOCA QUAE SOLEMUS PRAEFECTURAS APPELLARE. HARUM PRAEFECTURARUM PROPRIETATES MANIFESTE *ad colonas* PERTINENT," &c. (therefore we have here COLONI for COLONIA, just as MUNICIPES above. Notes (*b*), (*c*), (*g*))—The same almost verbally identical, p. 67—Aggenus, p. 72: "HAEC INSCRIPTIO VIDETUR *ad personam coloniae ipsius* PERTINERE QUAE NULLO MODO ABALIENARI POSSUNT A REPUBLICA: UT SI QUID IN TUTELAM *aut templorum publicorum*, AUT BALNEARUM ADJUNGITUR: HABENT ET RESPUB. LOCA SUBURBANA *inopum funeribus destinata.*"

SECTION 88.

Juristical Persons—History.

(Continuation.)

(II.) ARBITRARILY FORMED ASSOCIATIONS.

A.—*Religious Associations.* To this category belong the Colleges of Pontiffs (also called Temple Colleges) and of Vestal Virgins. Both were capable of acquiring Ownership, and of having a bequest left to them by a last Will (*a*).

B.—*Official Associations.* The subordinate Officials, who were employed by the Authorities for the management of different affairs, appear very early as Corporations (§ 87). The Writers especially, who were employed in every branch of the Public Service, and who, moreover, like our own Notaries, conducted similar matters of business also for private persons, were constantly increasing in point of numbers and importance (*b*). They appear under different names, derived from special employments, as LIBRARIJ, FISCALES, CENSUALES: the most common name for them, however, in early times was SCRIBÆ. They were arranged in particular classes, which were called DECURIAE, and it was quite accidental that this properly speaking generic term (*c*) was

(*a*) Hyginus, p. 206 *ed. Goesii* "VIRGINUM QUOQUE VESTALIJUM ET SACERDOTUM QUIDAM AGRI VECTIGALIBUS REDDITI SUNT ET LOCATI;" L. 38, § 6 *de leg.* 3 (32, *un.*). The following FIDEICOMMISSUM was given: "M. M. SOL. REDDAS collegio cujusdam templi. QUÆSITUM EST CUM ID collegium POSTEA DISSOLUTUM SIT," &c. Comp. Wassenaer, p. 415; Dirksen, pp. 50, 117, 118.

(*b*) Niebuhr, *Römische Geschichte*, vol. 3, pp. 349—353; Savigny, *Geschichte des R. R. im Mittelalter*, vol. 1, § 16, 111, 140. Cf. J. Gothofred in *Cod. Theod.* XIV. 1; Dirksen, pp. 46, 58.

(*c*) DECURIA means properly an Association of Ten Persons, and then generally also a COLLEGIUM without respect to the number of the Members. The expression also occurs in regard to the Senate (in Rome and in the Provincial Towns), and further in regard to the JUDICES; but in none of these applications has it been employed as such a customary, prevailing designation, as in regard to the Scribæ.

employed in their case as a special designation. DECURIAE, therefore, without further addition, already denoted in the Republic, and subsequently always under the Emperors, the Writer Guilds: individual members were styled DECURIATI, and at a later period, DECURIALES. It was natural that the Writer Guilds in Rome, and afterwards also in Constantinople, should have been specially distinguished and privileged (*d*).

C.—COMMERCIAL GUILDS (*e*). To this category belonged at first the primitive Artisan-Guilds, which preserved themselves in all ages, and which were also in some cases (as the Black smiths) invested with special privileges (*f*). Also the more modern Guilds, like that of the Bakers in Rome, and that of the Sailors (*g*) in Rome and in the Provinces. The business of these several Guilds was homogeneous (which formed in fact the basis of their Association), though not common: each individual worked, as with us, on his own account.

Moreover joint Commercial Undertakings appear in the form of Juristical Persons. The general term for such combinations is SOCIETAS, most of which had a purely contractual nature, they produced Obligations, and were subject to dissolution upon notice, as well as by the death of each individual Member. Some of them nevertheless maintained the right of Corporations, without surrendering thereby the name of SOCIETATES (*h*). To

(*d*) The principal texts relating to these DECURIAE are the following: Cicero, *In Verrem*, III. 79; *Ad Quintum fratrem*, II. 3; Tacitus, *Annal.* XIII. 27; Sueton. *August.* 57, *Claudius*, 1; L. 3, § 4 *de B. P.* (37, 1); L. 22 *de fidejuss.* (46, 1); L. 25, § 1 *de adqu. vel om. her.* (29, 2); *Cod. Just.* XI. 13; *Cod. Theod.* XIV. 1. Comp. Averanius, *Interpret.* II. 19, § 1.

(*e*) Niebuhr, vol. 3, p. 349; Dirksen, pp. 34 *et seq.* Concerning modern Guilds as possessors of rights of Property, comp. Eichhorn, *Deutsches Privatrecht*, § 371—373.

(*f*) L. 17, § 2 *de excus.* (27, 1); L. 5, § 12 *de f. immun.* (50, 6).

(*g*) L. 1, *pr. quod cuj. univ.* (3, 4); L. 5, § 13 *de f. immun.* (50, 6). As constituent parts of Municipal Communities themselves, and as the Subjects of Political Rights, neither the old nor the modern Guilds could moreover be considered. In that respect the old Municipal Constitutions were essentially different from those existing in the German States: for in the latter the Guilds may be compared in position and importance to the Roman Tribes.

(*h*) L. 1 *pr. § 1 quod cuj. univ.* (3, 4); L. 3, § 4 *de B. P.* (37, 1); L. 31,

them belonged Partnerships for the working of Mines and Salt-pans, and for the farming of Tolls (*i*).

D.—SOCIAL GUILDS, *Sodalitates Sodalitia, Collegia Sodalitia* (*k*). The elder Cato (according to Cicero) relates their first introduction during his manhood, and describes them with great pleasure as Assemblies for the purpose of dining together, temperately, and yet in a happy sociable spirit:—at the same time, according to the custom of the Ancients, in connection with the common worship of the Gods (*l*). They were therefore what we now call Clubs, and if, at a later period, we find these Assemblies mentioned as less harmless, indeed even as politically dangerous, it must not be concluded that under that expression Institutes of a different character are to be understood, but simply that their constitution was determined with reference to the general dis-

§ 1 *de furtis* (47, 2). See also § 87 (*e*). In L. 1 *pr. cit.* we must read with Holoander "NEQUE SOCIETATEM (FLOR. *societas*), NEQUE COLLEGIUM, NEQUE HUIUS MODI CORPUS PASSIM OMNIBUS HABERE CONCEDITUR," &c. For the purpose of distinguishing these Corporate Societies from the purely Contractual ones, the latter were called *privatæ SOCIETATES*. L. 59 *pr. pro soc.* (17, 2).

(*i*) L. 1 *pr. quod cuj. univ.* (3, 4); L. 59 *pr. pro soc.* (17, 2).

(*k*) This last expression occurs in L. 1 *pr. de coll.* (47, 22). Holoander reads SODALITIA (without COLLEGIA), and this appears also (according to the Gloss) to be the ordinary reading, although some old editions have the Florentine COLLEGIA SODALITIA, *e. g.* *Venet.* 1485; *Lugd. Fradin.* 1511. In my Manuscript the words COLLEGIA SODALITIA NEVE MILITES are wanting, so that it runs NE PUTIANTUR ESSE COLLEGIA IN CASTRIS HABEANT. Hence it is that the immediately recurring repetition of the word COLLEGIA may have given occasion to the erroneous omission. Moreover very old authorities exist in favor of SODALITIA by itself, so that it does not in truth appear in the Law Sources only accidentally.

(*l*) Cicero *de Senect.* C. 13. Cato enumerates here the pleasures of old Age: "SED QUID EGO ALIOS? AD MEIPSUM JAM REVERTAR. PRIMUM HABUI SEMPER SODALES; SODALITATES AUTEM ME QUÆSTORE CONSTITUTÆ SUNT, SACRIS IDÆIS MAGNÆ MATRIS ACCEPTIS; EPULABAR IGITUR CUM SODALIBUS OMNINO MODICE, SED ERAT QUIDAM FERVOR ÆTATIS, QUÆ PROGREDIENTE OMNIA FIENT IN DIES MITIORA; NEQUE ENIM IPSORUM CONVIVIORUM DELECTATIONEM VOLUPTATIBUS CORPORIS MAGIS, QUAM COËTU AMICORUM ET SERMONIBUS METIEBAR." Festus, *voc.* SODALES mentions several etymologies, from which it would appear that these Feasts consisted of dishes contributed by the guests (*picnics*).

position of each Age. The purely social Clubs of an early period become in agitated times (just as it has happened in our days) centres of political factions, indeed new Institutions would then undoubtedly start into existence with this exclusive object. This serves to explain at the same time what is related of the frequent prohibitions of such Clubs. On particular occasions of great excitement, when the Public Places were filled by the Clubs and Colleges of Scribae, the Senate ordered them to disperse, and introduced a proposition to the People in order to give this regulation greater force by the threat of a PUBLICUM JUDICIUM (*m*). Afterwards the COLLEGIA were generally abolished (*n*). Thus also appears in our Law Sources the surviving rule, that no Association should be established without the permission of the Authorities, and this permission was neither lightly nor frequently granted: an unauthorised participation in such Associations was made criminal, and was in fact punishable as an EXTRAORDINARIUM CRIMEN (*o*). All this has not unfre-

(*m*) Cicero, *Ad Quintum fratrem*. II. 3 "SC. FACTUM EST, UT SODALITATES DECURIAEQUE DISCEDERENT; LEXQUE DE HIS FERRETUR, UT, QUI NON DISCESSISSENT, EA POENA QUAE EST DE VI TENERENTUR."

(*n*) Asconius, *In Cornelianam* (p. 75, ed. Orelli) "FREQUENTER TUM ETIAM COETUS FACTIOSORUM HOMINUM SINE PUBLICA AUCTORITATE MALO PUBLICO FIEBANT; PROPTER QUOD POSTEA COLLEGIA SCTO ET PLURIBUS LEGIBUS SUNT SUBLATA, PRAETER PAUCA ATQUE CERTA, QUAE UTILITAS DESIDERASSET QUASI, UT FABRORUM FICTORUMQUE" (or *lictorumque*, which seems better; for FICTOR denotes rather in the abstract a Sculptor, the Potters on the other hand, whose Guild was certainly a very primitive one, were called FIGULI. Comp. Plinius, *Hist. Nat.* xxxv. 12); Asconius, *In Pisonianam* (p. 7, ed. Orelli) "QUI LUDI SUBLATIS COLLEGIIS DISCUSSI SUNT. POST NOVEM DEINDE ANNOS, QUAM SUBLATA ERANT, P. CLODIUS TRIB. PL. LEGE LATA RESTITUIT COLLEGIA."

(*o*) L. 1, 2, 3 *de coll. et corp.* (47, 22); L. 1 *pr. quod cuj. un.* (3, 4). When such an attempted Association is condemned and dissolved, consequently has never existed as a Juristical Person, the Members can naturally reclaim the funds accumulated together, and therefore divide them amongst themselves. L. 3 *de coll. corp.* ". . . PERMITTITUR EIS, CUM DISSOLVUNTUR, PECUNIAS COMMUNES, SI QUAS HABENT, DIVIDERE." Some have erroneously concluded from this, that even when a Corporation may have really existed, its property must always be divisible amongst the Members after its dissolution: in the case referred to in that passage it was simply the factitious Association of individuals that was dissolved: a Corporation had never come into existence. Cf. Marezoll, in *Grolman's and Löhr's Magazin*, vol. 4, p. 207.

quently been understood as involving a general abolition of all Corporations; but no one intended thereby to prohibit, for instance, ancient Handicraft-Guilds or even the College of Pontiffs. The prohibition aimed at factious and politically dangerous Clubs, and perhaps a more precise specification of the prohibited objects was not found necessary, because anyhow every one knew what was intended (*p*). These rules of our Law Sources, however, had a double meaning, which nevertheless is not clearly distinguished in the language employed: in the first place, an Association generally could not, without a public sanction, become a Juristical Person, and this important proposition, still subsisting in the Modern Law, is quite independent of the harmless or suspicious character of the Association: in the next place, unauthorised Associations are prohibited and punishable, but this only refers to Associations which are either actually dangerous, or which by their indefiniteness are capable of becoming so (hence in regard to them the Juristical Personality is merely a secondary matter), and never to purely Commercial Undertakings.

The far more modern COLLEGIA TENUIORUM had, it seems, a character similar to the Clubs of the Republican period, and with regard to them the following mention is made. Such Associations of a small number of persons might indeed be allowed, but only under the condition of holding a single meeting in each month, for which moreover monthly contributions were given. No one could be a Member of several such Associations at one time. Slaves might be admitted into them, but of course only with the permission of their Masters (*q*).

(*p*) Cf. concerning the history of this prohibition, Dirksen, pp. 34—47, According to Asconius (note (*n*)), one might infer that only a few Collegia were expressly exempted from this prohibition, the others all being abolished. This must not however be accepted too literally, for it is scarcely conceivable that any one of the old Handicraft-Guilds could have been prohibited; of the Associations of the Farmers of Tolls it is still more improbable, and of the College of Pontiffs (which would certainly also fall within the words of that statement) it is wholly inconceivable.

(*q*) L. 1 *pr.* § 2; L. 3, § 2 *de coll. et corp.* (47, 22). In connection with these COLLEGIIS TENUIORUM has erroneously been brought the Rule, accord-

With regard to all these arbitrarily formed Corporations the general observation applies, that they were regarded as imitations of Townships, and like the latter had Property and Representatives of their own, which constitute in fact the qualities of a Juristical Person (*r*). Among them the distinction above pointed out (§ 86) is observable, that some, just like Communities, were based upon permanent necessities, as THE COLLEGES OF PONTIFFS, DECURAE, and HANDICRAFT-GUILDS; while others upon temporary exigencies and resolutions of a more arbitrary character, as the SOCIETATES and SODALITATES.

As regards Nomenclature the following observations may be made. Some special Names (DECURIAE, SOCIETATES, SODALITATES) have already been mentioned, but two names are common to all of them, and as such have been used indifferently:—COLLEGIUM and CORPUS—as the COLLEGIA TEMPLORUM, and COLLEGIA SODALITIA, which have already been pointed out above (notes (*a*) and (*k*)). If at times these expressions appear to be distinguished, that is simply because individual Corporations did not employ both names indifferently, but only one exclusively: whichever they adopted, however, the choice was purely accidental. When, therefore, it is said, for instance, NEQUE COLLEGIUM NEQUE CORPUS HABERE CONCEDITUR (note (*k*)), it is tantamount to declaring that the arbitrary formation of Associations is not permitted, whether it is intended they should assume the name COLLEGIUM or CORPUS (*s*). Each of these expressions

ing to which the Immunities, which were conferred upon some Handicraft-Guilds, could only operate for the benefit of the poorer Members (TENUIORIBUS), and not for the rich, who possessed sufficient means of their own (apart from their craft) to bear the Municipal burthens. L. 5, § 12 *de j. immun.* (50, 16).

(*r*) L. 1, § 1 *quod cuj. un.* (3, 4) "QUIBUS AUTEM PERMISSUM EST CORPUS HABERE COLLEGII, SOCIETATIS, SIVE CUJUSQUE ALTERIUS EORUM NOMINE, PROPRIUM EST, *ad exemplum Reipublicae*, HABERE RES COMMUNES, ARCAM COMMUNEM, ET ACTOREM SIVE SYNDICUM, PER QUEM, *tamquam in Republica*, QUOD COMMUNITER AGI FIERIQUE OPORTEAT, AGATUR, FIAT."

(*s*) L. 1, *pr.* § 1 *quod cuj. un.* (3, 4). (See also note (*h*)), RUBR. TIT. DIG. DE COLLEGIIS ET CORPORIBUS (47, 22); L. 1 *pr.* § 1; L. 3, § 1, 2 *ead.*; L. 17, § 3; L. 41, § 3 *de excus.* (27, 1); L. 20 *de reb. dub.* (34, 5). According to Stryk, *Us. Mod.* XLVII. 22, § 1, CORPUS signifies a Corporation formed out of

therefore denotes an arbitrarily formed Corporation, consequently the contrast to a Municipal Community (*l*).

The individual Members are styled, in their mutual relations towards each other, COLLEGAE (*u*), and also SODALES, a term which had therefore a more general signification and a more ancient origin than SODALITAS (*v*); in a more absolute sense they are styled COLLEGIATI and CORPORATI (*w*). In the special forms of such Corporations above mentioned the Members are styled DECURIATI, DECURIALES (note (*d*)), SOCII (note (*h*)).

The common name for all Corporations, Municipal as well as others, is UNIVERSITAS (*x*), and in contrast to them the Natural Person, or the individual Man, is called SINGULARIS PERSONA (*y*).

(3.) PIOUS FOUNDATIONS, OR INVISIBLE JURISTICAL PERSONS.—(§ 86). Ever since the Christian religion obtained supremacy, such Institutions obtained the largest extension and appeared in the greatest variety, and were treated with much favor. They did not bear a common name in the Law Sources, and the Moderns first invented the expression PIA CORPORA for them (*z*).

several COLLEGII; this wholly un-Roman phraseology is based upon the very accidental circumstance, that in our Universities the entire Senate is called the CORPUS ACADEMICUM, the individual Faculties COLLEGIA.

(*l*) L. 1, § 7 *de quaest.* (48, 18).

(*u*) L. 41, § 3 *de excus.* (27, 1); *Fragm. Vatic.* § 158.

(*v*) As the primitive SODALES TITII or TATII, then the SODALES AUGUSTALES and the like. Tacitus, *Ann.* 1, 54. Cf. L. 4 *de coll. et corp.* (47, 22), according to which it appears that the Twelve Tables already contained this expression.

(*w*) L. *un.*, C. *de priv. corporat.* (11, 14); L. 5 *de commerc.* (4, 63).

(*x*) Rubr. *Dig.* lib. 3, tit. 4; L. 1 *pr.* § 1, 3; L. 2; L. 7, § 2 *eod.* (with L. 2 *cit.* Cf. Schulting, *Notae in Dig.*). It is only one amongst the several applications of this expression, which indeed denotes every Community of Persons, Things, or Rights (§ 56 (*u*)), therefore also a wholly different notion to that of a Juristical Person. Thus, for example, in L. 1, C. *de Judaeis* (1, 9) the UNIVERSITAS JUDAEORUM IN ANTIOCHIENSIVM CIVITATE simply signifies the Community of individual Jews (UNIVERSI JUDAEI) dwelling there, and not a Juristical Person; for indeed they could not constitute such a Person even according to the text, and naturally no valid Legacy could be given to them. Cf. Zimmern, *Rechtsgeschichte*, 1, § 130.

(*y*) L. 9, § 1 *quod melius* (4, 2).

(*z*) Many of these are found placed together in L. 23, C. *de SS. eccl.* (1, 2); L. 35, 46, C. *de ep. et cler.* (1, 3). Cf. especially Mühlenbruch, vol. 1, § 201;

In order that their true nature may be brought out more clearly by the contrast, it will be useful to consider the condition of pre-Christian Rome.

In the earlier period such Juristical Persons are exceedingly rare, and the following are the only instances of them which occur, which relate exclusively to Religious Institutions. Certain specified Gods had acquired the special privilege that they might be instituted Heirs (*a*), and this is also what is undoubtedly intended to be referred to when mention is made of lawful FIDEICOMMISSA (*b*) being assigned to a Temple, or of Slaves and Freedmen belonging to a Temple, although the last might perhaps be regarded as a common right of all Temples, quite independent of that Testamentary privilege (*c*).

How then is this distinction in the admission and treatment of such Juristical Persons during different periods to be explained? The Romans in pre-Christian times were certainly not indifferent to their CULTUS; but it was a State CULTUS, and the State Treasury defrayed its large expenditure; and as in

Schilling, *Institutionem*, vol. 2, § 49. Certainly we find in L. 19, C. de SS. eccles. (1, 2) "DONATIONES SUPER piis causis FACTAE;" but this expression denotes the pious object of the Donation, not the Juristical Person as a Donee.

(a) Ulpian, xxii. § 6 "DEOS HEREDES INSTITUERE NON POSSUMUS, PRAETER EOS QUOS SCTO, CONSTITUTIONIBUS PRINCIPUM, INSTITUERE CONCESSUM EST; SICUTI JOVEM TARPEJUM," &c.

(b) L. 20, § 1 de annuis leg. (33, 1). A FIDEICOMMISSUM had been given to the Priest and Servitors of a particular Temple; this was pronounced to be valid, and thus interpreted: "RESPONDIT . . . MINISTERIUM NOMINATORUM DESIGNATUM: CETERUM datum Templo."

(c) Varro de *Lingua Latina*, lib. 8 (likewise 7) C. 41. He endeavours to prove that in the language generally no analogy will be observed, and adduces as an example that many proper names are derived from places, others not so, or at least not in the right way: "ALII NOMINA HABENT AB OPPIDIS; ALII AUT NON HABENT, AUT NON UT DEBENT HABENT. HABENT PLERIQUE LIBERTINI A MUNICIPIO MANUMISSI; IN QUO, UT SOCIETATUM et sanorum servi, NON SERVAVUNT PRO PORTIONE RATIONEM." The remaining no less difficulty of the text does not concern us here. Cf. also Cicero, *Divinat. in Caecil.* C. 17. Indeed, nothing is to be proved with respect to Jural Capacity by the certainly very frequently-mentioned Gifts to the Gods; for that which was so given would for the most part be undoubtedly consecrated, would therefore stand outside the sphere of Ownership, and would not therefore imply the capacity for Ownership of the Gods thus endowed.

Rome, so in every Town of the Empire. A special provision might still, however, be made for it out of certain properties belonging to the State or to the Towns, the income from which was permanently assigned for such pious purposes, whilst the Ownership itself was nevertheless reserved to the State or the Towns (§ 87 (*p*)). That with the introduction of Christianity another view began to prevail may be explained by its Unity and Independence, and especially also by the far greater power which it exercised over men's minds. With regard, however, to Charitable Institutions, these had during the Republican period less a Charitable than a Political character; and thus the enormous expenditure for the support and amusement of the lower classes of the inhabitants, was provided partly by the State Treasury, and partly by individual Executive Authorities. At a later period when Charity was bestowed by several of the Emperors, as, for example, by Trajan by means of his magnificent Endowment for Poor Children in Italy, it depended upon a passing and arbitrary exercise of personal Will. It was reserved for Christianity to elevate the Love of Mankind itself into an important object of Activity, and, as it were, to embody the same in permanent independent Institutions.

Since then, under the Government of Christian Princes, Church Institutions appeared as Juristical Persons, what is the precise point to which we have here to ascribe the Personality, or how are we to form an accurate conception of the Subject-matter of the Rights of Property existing in them? Above all the following contrast to the earlier period is here unmistakable. The ancient Gods were conceived as individual Persons, resembling individual visible Men that one sees around one; and nothing was more natural than that each of them should have his own personal Property, while it was only a farther development of the same thought, when the God who was venerated in a particular Temple, was represented as a special Juristical Person, and indeed even granted personal privileges (*d*). The Christian Church, on the other hand, rests on the belief in One God, and it is united together by this common belief, and by the

(*d*) Ulpian, xxii. § 6.

distinct revelation of that one God to One Church. It was an easy matter therefore to import the same principle of Unity also into Property-relations, and this conception in fact finds expression in wholly different periods of time, as well in the teachings of Writers, as in the sentiments and mode of expression of the individual Founders of Endowments. Thus it happened quite commonly that at times Jesus Christ, at other times the Universal Christian Church, or her visible Head, the Pope, was designated as the Proprietor of the Church Estate. But a closer consideration must lead to the conviction that this conception is wholly inapplicable to the necessarily restricted province of Law, and that the recognition of individual Juristical Persons, even with reference to Church Property, must be substituted for it.

In this sense, in fact, a Law of Justinian contains the following provisions (*e*). If a Testator institutes Jesus Christ as his Heir, the Church of his dwelling-place is to be understood as indicated thereby. If he institutes an Archangel or a Martyr, the Church dedicated to such Archangel or Martyr in his dwelling-place, or (where none such exists) in the chief Town of the Province, is to be deemed the instituted Heir. If, according to these rules, there still remains an uncertainty amongst several Churches (as to which is entitled to the Bequest), that one is allowed the preference for which the Testator in his lifetime had shown a special affection, and if this circumstance was also not decisive, then to the poorest amongst those Churches. The Subject of the Succession is therefore a particular Church Community, that is to say, the Corporation of Christians appertaining to that Church.

The same fundamental principle is maintained by Writers of entirely different centuries, as well before the Reformation (*f*) as after it; by Catholics (*g*), as well as by Protestants (*h*).

(*e*) L. 26, C. *de SS. eccles.* (1, 2); the text is not glossed.

(*f*) Jo. Faber, *In Instit.* § NULLIUS, DE DIVIS. RERUM; a French Jurist of the fourteenth Century.

(*g*) Gonzalez Tellez, *In Decr.* lib. 3, tit. 13, c. 2 "DICENDUM EST DOMINIUM RERUM ECCLESIASTICARUM RESIDERE PENES ECCLESIAM ILLAM PAR-

(*h*) J. H. Böhmer, *Jus eccles. Protest.* lib. 3, tit. 5, § 29, 30; *Jus Parochiale*, sect. 5, c. 3, § 3, 4, 5.

These Writers uniformly recognize the particular Church-Community as the possessor of the Church Property, for instance, therefore, in regard to Parochial Estates, the Totality of the Parishioners (*i*). They wish thereby to reject the opinion of those who either describe all Church Estates generally as the common property of the Church Universal, or the Church Estates situated in every Bishop's Diocese as the common property of the Churches in that Diocese. They urge as a decisive reason against this opinion, that between the Parochial Estates of two Parishes all kinds of Jural Relations may occur, for instance, Acquisition and Loss by Prescription, just as the establishment of Praedial Servitudes, which can only be possible under the hypothesis of two entirely separate bodies of Property. From this it clearly follows that the proposition above stated, concerning the true Possessor of Church Estates, by no means belongs to the distinctive doctrines of Catholics and Protestants; both agree in individualising such Property, and the difference between them merely concerns the conception and constitution, as well of the individual Churches as of the Church at large, and as a whole (*k*).

The case is exactly the same with regard to the so-called Benevolent, as with Church Endowments, that is to say, with respect to Endowments of a purely benevolent character, amongst which belong Asylums for the Poor, the Sick, Pilgrims, the Aged, Children generally, and especially for Orphans (note *g*)).

TICULAREM CUI TALIA BONA APPLICATA SUNT PRO DOTE . . . NEC PERSONA ALIQUA SINGULARIS HABET DOMINIUM, *sed sola communitas*, PERSONA AUTEM SINGULARIS NON UT TALIS, SED UT *pars et membrum communitatis*, HABET IN IPSIS REBUS JUS UTENDI;" Fr. Sarmientus *de ecclesiae redditibus*, P. 1, C. 1, N. 21 "ET HAEC EST OPINIO IN GLOSSIS POSITA;" Sarpi *de materiis beneficiariis s. benef. ecclesiast.* Jenae, 1681, 16, pp. 91—93; Sauter, *Fundam. J. eccles. Catholicorum*, P. 5, Friburgi, 1816, § 854, 855.

(*i*) Concerning the proper notion of Parishes a very searching inquiry will be found in J. H. Böhmer's *Jus Paroch.* § 3, c. 2, § 4, § 9—25.

(*k*) Upon this last distinction is based the interpretation of G. L. Böhmer, *Princi. J. Canon.* § 190, in which, therefore, no contradiction occurs of the agreement mentioned by me in the text between the two Church parties.

As soon as a ground exists in such cases for admitting the quality of a Juristical Person, every single Institution of the kind mentioned must be recognised as such a Person, as in fact happened under the Christian Emperors. Every Hospital therefore and the like is the Possessor of independent Property, just as the individual Man or a Corporation, and it is quite erroneous of many Modern writers to assign the Property of those Institutions to the State, or to a Township, or to a Church. The most common ground of that confusion arises, however, from the following circumstances:—When an individual gives Alms, or in times of great distress when the State itself affords relief from its Treasuries and Magazines, there is an Activity displayed for those purposes, but the special and temporary character of the transaction in each case completely excludes the thought of a Juristical Person. When a State or a Town undertakes permanent measures of this kind, those measures have probably a purely administrative, and by no means a Juristical character: the question then only concerns the Property of the State or of the Town, a portion of which is arbitrarily applied to such purposes, and which can be just as arbitrarily again withdrawn. Again, a legal transaction may be made the basis of such Objects without a Juristical Person coming into existence in consequence: if, for example, a Testator imposed the Obligation on his Heir of distributing as long as he lives a certain sum in Alms on prescribed days of the year, such a provision is enforced like every other Modus (§ 128, 129); a Juristical Person does not appear therein, the question simply concerns the Property of the Heir, and an Obligation imposed upon him. Lastly, however, such Objects may certainly also lie at the basis of the creation of a Juristical Person, and ordinarily a greater degree of certainty will be ensured by this means: upon what this creation depends will be presently stated (§ 89). Now it is usual to apply the expression Endowment to cases of a completely different sort from those here described, and the indefiniteness of this expression has unquestionably added greatly to the confusion of the concept itself. I have myself here used the expression Endowment (*Stiftung*), but only with the view of denoting one class of Juristical Persons, therefore on the distinct

supposition that the Institution has also become at the same time a Juristical Person.

The Constitutions of the Christian Emperors show the greatest solicitude to take those pious objects, in whatever form they might appear, under their protection, and to secure them against any obstruction which they might meet with. This was done by their recognition as Juristical Persons whenever there appeared any occasion for it. How the same thing was effected in other cases may be shown by the following decisive examples. If a Testator nominated the Poor generally to a Succession or Legacy, the provision was invalid according to the old rule of the Roman Law, that no *INCERTA PERSONA* can be conceived; an Ordinance of Valentinian III. abolished the Rule in regard to this special application (*l*). Justinian interpreted such a Testament to mean, that the Succession should pass to the Poor House which the Testator specially intended; in the event of any uncertainty in this respect, to that of his dwelling-place; where there were several Poor-Houses, to the poorest amongst them; and where none whatever existed, to the Church of his dwelling-place, with the obligation of applying it exclusively for the benefit of the Poor. In like manner if Captives were instituted Heirs, the Local Church might acquire the Succession subject to the obligation of applying the entire estate for the redemption of Captives (*m*). Thus the charitable intention would be aided in such cases by the right of Succession being transferred to an already existing Juristical Person. Moreover Justinian also ordained that all charitable dispositions of deceased persons should be placed under the special superintendence of Bishops and Arch-Bishops, to whom, therefore, the duty of carrying them out was generally confided (*n*). This was a consequence of the circumstance that the duty of providing for the Poor was recognised as an essential and important part of Church activity. The same principles are embodied in the provisions of the Canon

(*l*) L. 24, C. *de episc.* (1, 3).

(*m*) L. 49, C. *de episc.* (1, 3).

(*n*) L. 46, C. *de episc.* (1, 3): this text is un glossed.

Law. Hence the opinion was developed that the Property of Charitable Endowments fall under the general designation of Church Goods (BONA ECCLESIASTICA). This designation had the twofold meaning that property included within it is subject to the influence and superintendence of the Superiors of the Church, and that it shares the privileges attached to Church Estates. It was by no means intended, however, to deny thereby the independence of Juristical Persons of this description, and it is a purely Modern misconception which has attributed this meaning to the expression (*o*). The decisive proof of the correctness of this assertion is the same as that which has already been adduced above in support of the individual Personality of particular Churches, especially of Parochial ones. For Charitable Endowments also are thoroughly capable of standing in such numerous Jural relations, as well towards one another as towards the State, Towns, or Churches, as are only conceivable under the supposition of a Juristical independence.

If we glance finally at the Modern Law on this point, we shall find no change in the fundamental principle by which Charitable Endowments are to be regulated; the only difference is that they have assumed far greater variety, and have precisely for that reason also assumed a somewhat altered position towards the State. Instead of, as in the Justinian Law, exclusively appearing as the means of alleviating Poverty in its different aspects, they have for the most part since the Middle Ages been directed to the satisfaction of spiritual and mental (*geistiger*) wants of the most varied kind. Clearly, therefore, the exclusive relation of Charitable Endowments to the Church, as we perceive it in the Justinian Law, must, in consequence, be largely restricted. Moreover, the Poor Laws have furnished an important and developed system of State activity, so that even the portion of such Endowments directed to the like object has assumed an

(*o*) In this way Rosshirt has come to deny completely the quality of Juristical Persons to Charitable Endowments, and to regard their Property as the Property of the Church. *Archiv für Civilistische Praxis*, vol. 10, No. 13, pp. 322—324, 327.

altered position towards the State and the Church than that which appears in the Justinian Legislation.

From all that has preceded it follows, that even in the Modern Law Charitable Endowments are constituted, just as individual Juristical Persons, like Corporations; but it would nevertheless be erroneous to regard them as Corporations, or to wish to apply the rules suitable to Corporations, directly to them.

(4.) **FISCUS.**—In the Republican period the State, as the Possessor of Rights of Property, was designated by the name **AERARIUM**, because all those Rights, in so far as they had an actual application in practical life, finally resolved themselves into the Revenue or Expenditure of the State Treasury. Similarly, at the commencement of the Empire, a division of the Provinces, and likewise of the most important Revenues and Disbursements of the State, was effected between the Senate (as representing the ancient Republic) and the Emperor. The Property of the Senate maintained the ancient name **AERARIUM**, while that of the Emperor (*p*) was called the **FISCUS**, a term which had the following origin. Originally a basket was called **FISCUS**, a receptacle of wicker-work, and since the Romans used these baskets to store away or to transport large sums of money, the name came to be applied to every Treasure Chest, and thus also the Emperor's Treasury was called **CAESARIS FISCUS**. But inasmuch as this **FISCUS** was now more frequently spoken of than any other, so the simple term **FISCUS** soon came to signify the Imperial Treasury. And as in the course of no long time all Power was concentrated in the Emperor, so the Property of the State united again in the hands of the Emperor, was then called the **FISCUS**, that is to say, the expression now assumed the same signification which was originally attached to the term **AERARIUM** (*q*).

(*p*) Namely that Property which he possessed as Emperor, from which his Private Property (*Res Privata Principis*) was quite distinct.

(*q*) The amalgamation of the two Public Treasuries into one probably happened gradually, and is at least not capable of being chronologically strictly indicated. Down to Hadrian's time both the Thing and the Title were closely distinguished. Tacitus, *Annal.* vi. 2; Plinius, *Panegyrr.* C. 42; Spartianus,

Hadrian, C. 7. And yet a Senatus-Consultum under Hadrian clearly names the Fiscus, where we might well have expected the Aerarium, namely, in regard to the Right to the CADUCA. L. 20, § *de pet. her.* (5, 3). Later on both expressions were employed with arbitrary alternation to denote the one Public Treasury, that of the Emperor, § 13 J *de usuc.* (2, 6); L. 13 *pr.* § 1, 3, 4; L. 15, § 5 *de j. fisci* (49, 14); L. 1, § 9 *ad L. Corn. de falsis* (48, 10); L. 3, C. *de quadr. praescr.* (7, 37). The mention of the ancient contrast of *de jure fisci et populi* in the Rubric of Paulus (v. 12) is noteworthy; only it does not follow from this that in his time the two Treasuries had a real separate existence, on the contrary he might have used the above expression simply with reference to the earlier period.

SECTION 89.

Juristical Persons.—Creation and Extinction.

It is not necessary in regard to all Juristical Persons to lay down a positive rule concerning the conditions of their legal creation. Most Communities are as old, and indeed older than the State (§ 86), and later Communities are always established by a political Act (according to the Roman Law by the *COLONIAE DEDUCTIO*), and not in accordance with a rule of Private Law. Even as regards the *FISCUS*, no one seeks to inquire into the nature of its origin.

As regards the rest, however, the Rule is that the character of a Juristical Person cannot be asserted by the mere arbitrary association of several Members, or by the will of an individual Founder; but for this purpose the sanction of the Sovereign Power of the State is necessary, which may be conferred not only expressly but also tacitly, by a conscious toleration or by an actual recognition. It is a general principle that the prohibition and punishableness of an attempt to create unauthorized Juristical Persons do not apply to all, but only to certain kinds of such persons, for instance, not to Trading Partnerships nor to Charitable Endowments (§ 88 (o)). For the *COLLEGIA* in particular, that is to say, for the arbitrarily formed Corporations (§ 88), the Rule prevails that three Members are requisite to constitute them (a). The meaning of this Rule, however, is simply this, that such Corporations can only *commence* their existence under

(a) L. 85 *de V. S.* (50, 16) "*NERATIUS PRISCUS TRES FACERE EXISTIMAT COLLEGIUM: ET HOC MAGIS SEQUENDUM EST.*" There are few expressions in the Roman Law which so often occur even amongst non-Jurists as this one. In like manner also under the term *FAMILIA* as a rule only a number of three Slaves at least was comprehended (L. 40, § 3 *de V. S.* 50, 16); exceptionally, however, in regard to the *Int. de vi* ("*AUT FAMILIA TUA DEJECIT*"), a single Slave was also recognised as *FAMILIA*. L. 1, § 17 *de vi* (43, 16).

the pre-supposition of such a number of Members; but every UNIVERSITAS once established, can be legally *perpetuated* in the person of a single Member (*b*).

The assertion here advanced, that no Juristical Person can be created except with the consenting Will of the State, has, however, in modern times been contested on various sides. It has indeed been admitted with regard to Corporations, partly on account of certain texts of the Roman Law, and partly by reason of the possible danger which might arise to the State by the arbitrary formation of Corporations. On the other hand, it has been denied with respect to Charitable Endowments, upon the following grounds. In the first place, because the Roman Law undoubtedly permits the arbitrary creation of such Institutions by the exercise of private Will, and secondly, because such Institutions are altogether of a praiseworthy and non-dangerous character; indeed, this free Will-power is claimed not merely for Institutions for the Poor, but also with respect to all those Institutions devoted to intellectual improvement (*c*). The Roman Written Law in regard to this matter is not decisive, partly because it has remained unglossed (*d*), and partly because it only deals with Endowments for the Church or for the Poor, and it presupposes the superintendence and approbation of the

(*b*) L. 7, § 2 *quod cuj. un.* (3, 4) "SI UNIVERSITAS AD UNUM REDIT, MAGIS ADMITTITUR, POSSE EUM ET CONVENIRE ET CONVENIRI: CUM JUS OMNIUM IN UNUM RECIDERIT, ET STET NOMEN UNIVERSITATIS." Therefore in such a case the Juristical Person continues to exist and even preserves the name, yet the Property of the Corporation by no means now becomes the Private Property of the sole surviving Member; the peculiarity (to which that text desires to draw attention) lies merely in this, that this individual Member can now appear in Judicial proceedings without any thing further, that is without needing any artificial representation by means of an ACTOR or SYNDICUS.

(*c*) This opinion was specially advanced on the occasion of the law-suit concerning the Municipal Art School in Frankfort-on-the-Maine, by the supporters of that Institution. On the other hand, Mühlenbruch at the same time advocated the correct doctrine of the origin of Juristical Persons. Moreover, this was only one element in the decision of that lawsuit; the other elements concern us just as little as its final result.

(*d*) It is the unglossed, L. 46, C. *de epis.* (1, 3).

Church, whose relation to such Endowments has, however, assumed an entirely different aspect in the Modern Law (§ 88). The second ground for that free exercise of private Will-power finds its justification in the following consideration. The necessity of State sanction for the creation of every Juristical Person has, independent of all Political considerations, a perfect juristical basis. The individual Man clearly carries his claim to Jural Capacity in his corporeal appearance, far more generally indeed than was conceded by the Romans, whose innumerable Slaves constituted an important exception to the rule. By this appearance every one else knows that he has to respect the personal Rights of such a Being, and every Judge that he has to preserve those Rights for him. If, now, the natural Jural Capacity of the individual Man, were transferred by a fiction to an ideal Subject, it would completely lack that natural confirmation; the Will of the Sovereign Power alone can supply this, because it creates artificial Subjects of Rights, and if the same authority were permitted to be exercised by the volition of private Will, the greatest uncertainty of Jural conditions would unquestionably result, quite irrespective of the great abuse which would be rendered possible by a dishonest exercise of such Will. To this purely juristical ground, however, have still to be added certain political and politico-economical grounds. The possible element of danger in Corporations is conceded; but Endowments, in the extension just mentioned, are by no means unconditionally beneficial and indispensable. Were a rich Endowment to be established for the propagation of politically dangerous, irreligious, or immoral doctrines or books, should the State tolerate it? (e) Indeed even the establishment of Institutions for the Poor ought not, under all circumstances, to be left to mere arbitrary volition. For example, if in a Town in which a system

(e) In our own day no one will say that such an Institution is impossible. There are rich people amongst the Holy-Simonists, and why should not one of them form the resolution of establishing a grand Institution for the promotion of their doctrines? Perhaps it was never necessary to contend against such forces by means of Laws or the Judicial Office, but certainly the State should not lend its Power for the advancement of the same.

for providing for the Poor was well ordered and sufficiently endowed, a rich testator out of mistaken benevolence were to found an Endowment for the distribution of Alms, by which the beneficial results of the Public Charities would be either destroyed or injuriously weakened, the State would have no reason at least to give such an Endowment greater consistency by conferring upon it the Rights of a Juristical Person. Moreover, regard must be paid, even with respect to harmless Institutions, to the possible excessive accumulation of wealth in dead hands. To be sure the State may discover such an accumulation also in reference to existing and authorized Endowments, but a control over them would be rendered wholly impracticable if fresh ones were permitted to be unconditionally established by the mere exercise of private Will.

In like manner the dissolution of Juristical Persons once formally constituted is not capable of being determined by the arbitrary volition of the existing Members alone, of whose existence indeed the Juristical Person is independent (§ 86), but the sanction of the Sovereign Power is also necessary for that purpose. On the other hand they can be dissolved by the simple Will of the State, against the Will of the Members, if such a course becomes necessary for the security or welfare of the State. This may happen in regard to entire classes of Corporations, whose activity had taken a dangerous tendency, therefore by means of a legally established general Rule (§ 88): but also, moreover, by a political Act, therefore, in a particular temporary case, apart from any permanent Rule (f). In regard to such Endowments as have the character of State Institutions (§ 88), their dissolution can take place according to a far greater degree of free discretion; for instance, not merely because the existing Institution has been shown, perhaps, to be dangerous or obnoxious, but simply because the common aim may be capable of being more successfully attained in the form of a new Institution.

(f) L. 21 *quid. modis usufr.* (7, 4) "SI USUFRUCTUS CIVITATI LEGATUR, et aratrum in eam inducatur, civitas esse desinit, ut passa est Carthago: IDEOQUE QUASI MORTE DESINIT HABERE USUFRUCTUM."

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From the Rule above established, that every Corporation is capable of being continued in the person of a single Member (note *b*), many have inferred, although erroneously, that the Death of all the Members must necessarily extinguish the Corporation. Where, however, permanent objects of Public interest form the basis of a Corporation (§ 88), this proposition must be absolutely denied. If, for example, during an epidemic in a Town, all the Members of a Handicraft-Guild should die one after another, it would be quite incorrect to maintain that the Guild itself had become extinct, and its Property Heirless, or that it belonged to the State.

The Rules here established concerning the origin and extinction of individual Juristical Persons are certainly not exhaustive, but this incompleteness arises from the very nature of the subject. Everything which concerns mere details is dependent on the constitution and form of Government of particular individual States, and therefore lies beyond the limits of purely Private Law.

SECTION 90.

Juristical Persons—Rights of.

The Rights of Juristical Persons are of two kinds. Some are of an essential character, so that anyhow they only can be deemed Juristical Persons who possess a Capacity for such Rights. Others, of a more accidental and positive kind, consist of special Privileges (*JURA SINGULARIA*) which are granted to many Juristical Persons: at times, indeed, to the Juristical Persons themselves, in consideration of the Rights appertaining to them (*a*), and at other times to the individual Members constituting the same (*b*). To collect these privileges here would afford but little instruction, since they can only be rightly understood in connection with the Law-Institutes, in relation to which they stand as exceptions. On the other hand, this is the only proper, and in fact the only possible, place for the exposition of the ordinary Rights.

The notion of a Juristical Person (§ 85), as a juridical Subject capable of exercising a Right of Property, furnishes however the correct standpoint for these ordinary Rights. Rights of Property,

(*a*) Amongst these are included the numerous privileges of the *Fiscus*, *e. g.* its implied and even privileged general right of Hypothecation; also the placing of the Township with its Credits in the fourth class of a Bankrupt's Creditors, so likewise the claim to a general Restitution, which the Roman Law concedes to a Township, but which the Modern Law extends much further.

(*b*) Thus according to the Roman Law the individual members of several Public Corporations enjoy many Immunities, particularly the *EXCUSATIO* from Guardianship. L. 17, § 2; L. 41, § 3 *de excus.* (27, 1); *Frag. Vatic.* § 124, § 233—237; L. 5, § 12 *de J. immun.* (50, 8); Ulpian, III. § 1, 6. Just as however in the later Empire caste-feeling largely developed itself, so likewise it happened in regard to these Corporations. Participation in them became a hereditary Right, but it involved at the same time also hereditary Obligations, just in the same way as participation in the Municipal Curies. L. 4, *C. Th. de privil. Corp.* (14, 2), tit. *C. Th. de pistor.* (14, 3).

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for instance, cannot, setting aside special Family relations and some other individual cases of a less important character, come into existence spontaneously, but can only be acquired by means of Acts (c). But Acts presuppose a thinking and volitional Being, an individual Man, which is exactly what Juristical Persons, as mere Fictions, are not. Hence there appears here the innate antithesis of a Subject capable of Rights of Property which is nevertheless unable to fulfil the requisite conditions for their acquisition. A similar antithesis (although in a lesser degree) occurs also in the case of many Natural Persons, especially in regard to Minors and Lunatics, inasmuch as these have the widest Jural Capacity along with an absolute Incapacity of Action. Wherever then this antithesis appears it must be solved by means of Representation, as an artificial Institute. This is effected in the case of Natural Persons, who are wanting in the Capacity of Action, by means of Guardianship, and in that of Juristical Persons by their Constitution.

When, however, the Natural Incapacity of Action of Juristical Persons is here asserted as the foundation of an indispensable artificial Substitute, this must be understood quite literally. Many have conceived the matter as if the joint Act of all the individual Members of a Corporation was in fact the Act of the Corporation itself, and that the intervention of a Substitute was merely necessary owing to the great difficulty of getting all the Members to agree upon a common Will and Act. In fact, however, it is not so: the Totality of the Members is rather wholly distinct from the Corporation itself (§ 86), and even when all the individual Members without exception act together, this is not to be regarded as if the Ideal Being, whom we call a

(c) The *NECESSARI HEREDES* acquire the Inheritance, therefore Property, *ipso jure*, without their own accord; all other Inheritances are only acquired by the will of the Heir. In like manner Ownership may indeed be enlarged without the exertion of the Owner (by a so-called *ACCESSIO*), but not created in the first instance. Similarly the regular acquisition, so important for trade, of Debt-claims, is only possible through the Will of the Creditor; where they arise irrespective of the Will, as by suffering a violation of Right, there the acquisition is for the most part doubtful and involuntary.

Juristical Person, had acted (cf. § 91 (*g*), § 93 (*b*) and (*h*)). A Corporation may be likened to a Minor, whose guardianship is exercised, in the *UNIVERSITAS ORDINATA* (§86), by an artificially constituted Authority, and in the *INORDINATA* by the existing Members. The Members are, therefore, as little identical with the Corporation itself, as a Guardian is with his Pupil.

Accordingly the course of the following inquiry must be this:—To speak, in the first place, of the Rights themselves, and then of the Constitution of Juristical Persons. For the last purpose, however, a true point of view must here likewise be established. The Constitution, in so far as it concerns Juristical Persons as such, that is to say, as the Possessors of Private Rights (because it often has completely different, and, to some extent, more important objects), exclusively exists in order to render those Acts which are indispensable for the interchange of Property possible by means of Representation, namely, those which relate to the Acquisition, the Preservation, and the Enjoyment of Property, or to some Change in its constituent parts.

Inasmuch as the peculiar Rights of Property accessible to Juristical Persons must now be demonstrated, it only remains to allude to a still more important general proposition, which although it proceeds in truth from the very notion of a Juristical Person itself, is nevertheless none the less likely to be misunderstood. All these Rights of Property appertain wholly and inseparably to the Juristical Person as a Unit, accordingly (where Corporations are spoken of) by no means separately to the individual Members composing the same. This proposition may be made abundantly clear to the comprehension by its application to individual forms of Jural Relations.

SECTION 91.

Juristical Persons—Rights of.

(Continuation.)

I. OWNERSHIP.—Juristical Persons can possess Ownership in things of all kinds (*a*). They might in fact, even according to the strict Ancient Law, acquire it by ceremonial acts, *e. g.* by means of Mancipation, supposing that they were represented therein by a Slave already standing in their Ownership (*b*). This Ownership appertained, like every other Right belonging to them, inseparably to the Juristical Person as a Unit, and the individual Members had no share in it (*c*). This was shown amongst the Romans in the following remarkable application amongst others. In the case of a Criminal inquiry, in accordance with a general rule, the Slaves of the Accused were not permitted to be examined as Witnesses against him (which in regard to Slaves was always conducted on the rack). If then a Citizen of a Township happened to be involved in a Criminal trial, the Slaves belonging to the Town might be produced against him

(*a*) L. 1, § 1 *quod cuj. un.* (3, 4) "QUIBUS AUTEM PERMISSUM EST CORPUS HABERE . . . PROPRIUM EST, AD EXEMPLUM REIPUBLICAE, HABERE *res communes, arcam communem*" (§ 88 (*r*)).

(*b*) Taciti *Annal.* II. 30 "NEGANTE REO, AGNOSCENTES SERVOS PER TORMENTA INTERROGARI PLACUIT. ET, QUIA VETERE SCTO QUAESTIO IN CAPUT DOMINI PROHIBEBATUR, CALLIDUS ET NOVI JURIS REPETOR TIBERIVS, *mancipari singulos actori publico* JUBET: SCILICET UT IN LIBONUM, SALVO SCTO, QUAEERERETUR." Plinius, *Epist.* VII. 18 "DELIBERAS MECUM, QUEMADMODUM PECUNIA, QUAM MUNICIPIBUS NOSTRIS IN EPULUM OBTULISTI, POST TE QUOQUE SALVA SIT . . . EQUIDEM NIHIL COMMODIUS INVENIO, QUAM QUD IPSE FECI. NAM PRO QUINGENTIS MILLIBUS NUMUM . . . AGRUM EX MEIS LONGE PLURIS *actori publico mancipavi*," &c. In both cases the ACTOR PUBLICUS is a Slave employed for the business, whose Ownership in the first case appertains to the Roman State, and in the second to a Township.

(*c*) L. 6, § 1 *de div. rerum* (1, 8).

as Witnesses, because he had not the slightest share or interest in them (*d*).

If the Ownership related to Slaves these could like all other Slaves be Emancipated, and the Juristical Person thereupon acquired complete Rights of Patronage, notably, for instance, that of a Patron's Succession. These propositions are indisputable for the period of a developed science of Jurisprudence, as well in their application to Townships as to all other forms of Juristical Persons (*e*). But their history is less clear. From Trajan's time a *LEX VECTIBULICI* is cited, the object of which was to permit the Emancipation of their Slaves to Italian Towns, and a *SENATUS CONSULTUM* in Hadrian's reign extended the same law to Provincial Towns (*f*). Marcus Aurelius finally allowed Colleges to Emancipate their Slaves, and to acquire Rights of Patronage (*g*). According to this statement it might be supposed that before Trajan's time Juristical Persons were not able to confer Manumission. But Varro certainly alludes to Freedmen of the Roman State, of Municipalities, of *SOCIETATES*, and of Temples (*FANA*), as something quite common and generally recognized (*h*), so that according to his language the invalidity of such Emancipations cannot possibly be admitted. These apparent contradictory testimonies are only to be reconciled in the following way. Emancipation by *VINDICTA* was a *LEGIS ACTIO*, which could only be accomplished personally, and not by means of a substitute (*i*). A Juristical Person was incapable of accomplishing it, and therefore in earlier times the Freedmen belonging to such a Person could only acquire the factitious possession of Freedom, or, since the *LEX JUNIA*, only the *LATINITAS*. It is to this incomplete condition of Manumis-

(*d*) L. 1, § 7 *de quaest.* (48, 18). See also § 87 (*c*).

(*e*) L. 1, 2, 3 *de manumission. quae servis* (40, 3); L. *un. de libertis univ.* (38, 3); L. 10, § 4 *de in J. voc.*; L. 25, § 2 *de adquir. vel om. her.* (29, 2).

(*f*) L. 3, C. *de servis reipub.* (7, 9); Bach, *Trajanus*, p. 152; Bach, *Illust. Juris.* p. 380, ed. 6.

(*g*) L. 1, 2 *de manumission. quae servis* (40, 3).

(*h*) Varro, *De Lingua Lat.* lib. 8, c. 41. See also § 88 & c.

(*i*) L. 123 *pr. de R. & J.* (50, 17); L. 3, C. *de vindicta* (7, 1).

sion that the text of Varro must be understood to refer. The Laws of Trajan and his successors permitted Juristical Persons, contrary to the old *JUS CIVILE*, to confer full Freedom with Citizenship upon their Slaves (*k*). Moreover, as regards this Right of Patronage, the rule was confirmed that the individual Members of a Corporation could not participate in it. Thus, for example, the Freedmen of a Town were by no means obliged to pay the submissive reverence to individual Citizens, as to a Patron (*l*).

The most important subject of this Ownership consists here, as everywhere, in Immoveable Property, as to which, however, the following distinction is recognized. The Immoveable Estate of a Corporation may be used either for the purposes of the Corporation, by Farming it out or by direct Administration; or for the purposes of the individual Members (*m*); and lastly, a sort of mixed enjoyment of the Estate might also happen, when

(*k*) L. 3, C. *de servis reip.* (7, 9) “. . . SI ITAQUE SECUNDUM LEGEM VECTIBULICI . . . MANUMISSUS, civitatem Romanum consecutus es,” &c.; L. 2 *eod.* This agreement of the passages cited is clearly stated in Bach's *Trajanus*, p. 156. The Decree of the Municipal Senate and the approval of the Præses of the Province, would now be prescribed as a fixed procedure instead of the usually impracticable *VINDICTA*. L. 1, 2, C. *de servis reip.* (7, 9).

(*l*) L. 10, § 4 *de in f. voc.* (2, 4).

(*m*) Eichhorn, *Deutsch Privatr.* § 372. In German Towns the first is frequently called *Kammereivermögen*, and the second *Bürgervermögen*. To this latter category belongs for example the *Bürgerwald*, *i. e.* a Forest in the Ownership of the Town, the timber of which is annually divided amongst the individual citizens. Likewise in Towns and Villages the Common Pasture Grounds. Lastly, also certain Rights other than Ownership. *i. e.* the *Bürgerjagd*, which is used by all the individual citizens, whilst the *Stadtjagd* is farmed out for the benefit of the Municipal Treasury. Similar to our modern *Bürgervermögen* was the old Roman *AGER PUBLICUS*, which was also used by individuals. The user might also merely belong to particular classes of the corporate body, as, for example, that of the *AGER PUBLICUS* of the Romans was originally exclusively restricted to the Patricians, later on to the Optimates. Upon what this Jural relation is really founded may often appear very doubtful, and especially in consequence of changes in the constitution. It was this doubt which principally gave rise to the bitter dispute which lasted for some years between the Horn Men and the Claw Men in the Swiss Cantons.

the individual Members contributed a tax (ordinarily very moderate), in consideration of their enjoyment, to the Corporate treasure chest. In the second of these cases (in regard to the exclusive enjoyment by individual Members) the Ownership certainly seems a Fiction, and is more a Protectorate Right (*Schutzrecht*) for the benefit of the individuals really entitled: it must nevertheless be regarded and treated juristically as Ownership (*n*). From all these cases, however, we must carefully distinguish those in which the Right appertains to particular individuals or to certain classes amongst the Members of the Corporation: for then there is simply Joint Ownership, and no longer the Ownership of the Corporation (*o*).

II. SERVITUDES.

It is in the nature of some Servitudes that the grounds exist whereby they are rendered inapplicable to Juristical Persons.

USUFRUCTUS is completely applicable to them, because the acquisition of Ownership in the Fruits is its predominant feature. It lasts in their case as a rule for a Hundred years, a period which is here intended to represent the longest possible duration of life recognized in the case of Natural Persons (*p*). In exceptional cases, however, it ceases when the Juristical Person itself has perished (*q*). It might be completely acquired for such Persons, in accordance with the Ancient Law, by a Legacy (nevertheless only by a VINDICATIONIS LEGATUM), that is to say, *IPSO JURE*, not by Mancipation, because this procedure does not generally prevail in regard to USUFRUCTUS; just as little by an *IN JURE CESSIO*, because this is absolutely denied to every Slave (by whom alone it could be effected for a Juristical Person) (*r*).

(*n*) Kori, *in loc. cit.* pp. 17, 18.

(*o*) Kori, *in loc. cit.* pp. 33—39, and p. 18 in the Note.

(*p*) L. 56 *de usufr.* (7, 1); L. 8 *de usu et usufr. leg.* (33, 2), and see note (*r*).

(*q*) L. 21 *quib. modis usufr.* (7, 4). See also § 89 (*f*).

(*r*) Gaius, 11. § 96. No USUFRUCTUS JURE CONSTITUTUS could therefore be granted to Juristical Persons, but only a POSSESSIO USUFRUCTUS (comp. as to this proposition, L. 3 *si usufr.* (7, 6)). This also then unmistakably explains L. 56 *de usufr.* (7, 1) "AN usufructus nomine actio municipibus DARI DEBEAT, QUÆSITUM EST. UNDE SEQUENS DUBITATIO ORITUR, QUOS-

In the newest Law Servitudes are generally created in a more natural way (by simple Contract), and for this reason the form of acquisition no longer presents any difficulty.

Usus is not applicable to them, because it consists only in an actual, personal use by the individual entitled, which is inconceivable in regard to a Juristical Person.

Prædial Servitudes of every kind they can have, because these serve merely to widen their Ownership of Landed Property. They could at all times acquire the same by a Legacy; never by means of IN JURE CESSIO (note (r)): on the other hand, most certainly by Mancipation to their Slaves, supposing that the Servitude was a Rural and not an Urban one (s). In the Modern Law this difficulty in regard to the form of acquisition has also disappeared.

III. POSSESSION.

As regards Possession its applicability to Juristical Persons was doubted by reason of its wholly factitious character, which does not appear as capable, as Jural Relations properly so called, of being united with a mere *Fiction*, which the Juristical Person certainly is. For this reason many assume that Possession is here only exceptionally possible by means of Slaves, and indeed only with respect to things appertaining to the Peculium. Others deny even this, because the Juristical Person has no Possession in the Slave himself, and therefore cannot acquire Possession through him (t). When Jurisprudence had advanced to a higher

QUE tuendi essent IN EO USUFRUCTU MUNICIPES? ET PLACUIT CENTUM ANNIS TUENDOS ESSE MUNICIPES, QUIA IS FINIS VITAE LONGÆVI HOMINIS EST." Certainly similar expressions are found in L. 8 *de usu et usufr. leg.* (33, 2), which speaks of a Legacy; probably however a DAMNATIONIS LEGATUM was there intended, which would always again lead to the same incomplete result.

(s) Gaius, II. § 29; Ulpian, XIX. § 1. An unmistakable allusion to this distinction is contained in L. 12 *de serv.* (8, 1) "NON DUBITO QUIN FUNDO MUNICIPIUM *per servum* RECTE SERVITUS ADQUIRATUR." For instance the Slave might acquire for the FUNDUS a Way or a Water-course by means of Mancipation, which was not permitted for the acquisition of a Servitude for a Building.

(t) L. 1, § 22 *de adqu. vel am. poss.* (41, 2) "MUNICIPES *per se* NIHIL POSSIDERE POSSUNT, QUIA universi (al. uni) consentire non possunt." The

state of development, it was decided that Towns and all other Juristical Persons were competent to acquire Possession by their Slaves as well as by free Agents (*u*).

Nevertheless it is not improbable, that the doubt above referred to was from the beginning only raised in theoretical inquiries, but was never acted upon in practice. The reason for this supposition is, that otherwise the acquisition of any single Right of Property for Juristical Persons, according to the strict Ancient Law, would remain completely inexplicable. They could certainly acquire through their Slaves, but how could they ever obtain Ownership over the Slaves in the first instance? There was obviously no other way for this except USUCAPTION; but if without it the beginning of a Property-right was impossible, in practice the Capacity for Possession must also have been always recognised in Juristical Persons, because without Possession no USUCAPTION is possible.

The acquisition of Possession by Juristical Persons was thus brought about in the following way. They could always acquire Rights generally, because the Juristical acts of their representatives were reckoned as their own acts: therein in fact consists their very essence. It was in regard to Possession that the difficulty was experienced, because by reason of its purely factitious character it seems incapable of being united with such a Fiction. This difficulty was overcome by permitting the general Representative or Head of the Juristical Person to appear also in place of the latter in possessory acquisitions. It was therefore necessary that everything should exist in the physical person of the Head that was required to exist, in regard to ordinary Possessory acquisitions, in the person of the Possessor; he must himself

last words do not mean, although it may be difficult to bring all together for this purpose, that is yet not actually the same thing as being impossible; but even when individual Members did accord their consent, it was not the Corporation itself, as an ideal Unit (*Universi*), which willed, therefore the wholly indispensable ANIMUS POSSIDENDI was not found in the Person of the true Possessor (§ 90, § 93 (*b*), (*h*)). Comp. also Gaius, II. § 89, 90.

(*u*) L. 2 *de adqu. vel am. poss.* (41, 2); L. 7, § 3 *ad exhib.* (10, 4). Comp. Savigny, *Recht des Besitzes*, § 21 (at the beginning), § 26, pp. 354, 358, 367, of the 6th edition.

have a consciousness of Possession, and the prehension must take place either through him, or through one of his delegates (amongst the Romans through a Slave). Hence, therefore, there still remains the deviation from the otherwise prevailing rule relating to Possessory acquisitions, that the Possessor himself (here the Juristical Person as such) can possess without a personal consciousness of Possession. The difficulty, as well as its solution, is therefore precisely the same as when a Child is said to acquire possession by his Tutor, or a Madman by his Curator (*v*).

(*v*) Against this doctrine, already substantially advanced in my work on Possession, Warnkoenig has raised objection, *Archiv*, xx. pp. 412—420, inasmuch as he asserts that Juristical, just as Physical Persons, could only acquire Possession consciously. He has obviously not comprehended clearly the quality of a Juristical Person, and that he shares entirely in this matter the misconception of so many other writers is plain from the passage at p. 420:—“The principle that the resolution of the majority constitutes the *will of the Corporation itself*, is a settled principle.” From this standpoint it would indeed remain incomprehensible how the Romans could experience more difficulty as regards the acquisition of Possession by Juristical Persons, than in the case of Physical Persons, or than as regards the acquisition of other Rights.

SECTION 92.

Juristical Persons—Rights of.

(Continuation.)

IV.—OBLIGATIONS.

By the Contracts of their regularly constituted Representatives Juristical Persons can acquire Credits and be burdened with Debts. In the Ancient Roman Law the formal distinction occurs, that a Juristical Person could acquire Credits *IPSO JURE* by the Stipulations of his Slaves, therefore by direct Actions (*a*); but by the Contracts of his free Agents only by means of a *UTILIS ACTIO* (*b*). This restrictive distinction disappeared in the most recent Law. On the other hand, the restriction, not based upon mere form, is maintained, that regularly contracted Debts which depend upon a delivery of something, as a Loan, only so far bind the Juristical Person as the thing delivered may have been actually applied for his benefit (*c*). The less frequent and important Obligations, which also arise irrespective of the Will or Act, are incurred in the case of Juristical Persons precisely in the same way as in that of Natural Persons (*d*).

The greatest difference of opinion prevails, however, in regard to Obligations arising from Delicts, in so far as a Juristical Person becomes a Debtor thereby: for his Credits arising from Delicts are neither doubtful nor can be distinguished from those of Natural Persons. Since, however, this question is inseparably connected with the wholly similar question relating to the per-

(*a*) L. 11, § 1 *de usuris* (22, 1).

(*b*) L. 5, § 7, 9 *de pecunia constit.* (13, 5).

(*c*) L. 27 *de reb. cred.* (12, 1).

(*d*) Thus for example *familiae herciscundae*, *FINIUM REGUNDORUM*, *AQUAE PLUVIAE ACTIO*. L. 9 *quod cuj. un.* (3, 4). In like manner, however, also, according to Roman Law, the Noxal Actions, when the Slave of a Juristical Person committed an Offence.

sonal Offences of the Juristical Person, it must also be treated in connection with the latter (§ 94).

Moreover, in regard to Obligations, the general principle laid down in § 90 receives a further confirmation. The Credits and Debts of Juristical Persons concern them solely as an artificial Whole; the individual Members are not at all affected by them (*e*). It is, however, quite in harmony with this principle, that Corporations can compel their own Members to contribute towards the payment of the Corporate Debts; such a Claim is based upon the intimate relation existing between the Corporation and its Members, and is completely independent of the Debt-relation contracted outside of it.

V.—RIGHT OF SUING.

The Jural Capacity of Juristical Persons would have a very imperfect result if the Capacity of appearing as a Plaintiff or Defendant in a Judicial Proceeding were not conferred upon them. This Capacity is therefore also declared as a general proposition (*f*). The enforcement of it may be effected by the Juristical Person appointing an ACTOR for the individual case, who can then exercise the ordinary Rights of a Procurator. It may, nevertheless, also be enforced by the permanent appointment of such a Representative for all legal disputes in which the Juristical Person may be concerned, who then bears the name of SYNDICUS; this was the form ordinarily employed by Municipal Communities in the Modern Roman Law (*g*). Nor was such a Representation merely permitted in Actions properly so called, but also in all other transactions directed to the prosecution of Rights, as CAUTIONES, OPERIS NOVI NUNTIATIO, and the like (*h*). Such a Representative is therefore not to be regarded as a Procurator nominated by the Members severally, consequently by many persons, but as the Procurator of a single indi-

(*e*) L. 7, § 1 *quod cuj. un.* (3, 4) "SI QUID UNIVERSITATI DEBETUR, SINGULIS NON DEBETUR: NEC, QUOD DEBET UNIVERSITAS, SINGULI DEBENT."

(*f*) L. 7 *pr. quod cuj. un.* (3, 4).

(*g*) L. 1, § 1; L. 6, § 1, 3; L. 3 *quod cuj. un.* (3, 4).

(*h*) L. 10 *quod cuj. un.* (3, 4).

vidual, of the Juristical Person as a Unit (*i*). If all the Members of a Corporation except one perished at the same moment, the survivor could directly undertake the conduct of Judicial Proceedings, not indeed in his own name, but simply as the Representative of the Corporation (*k*). Moreover, every one who wished to do so, could undertake the representation of a Juristical Person (just in the same way as of a Natural Person) as a DEFENSOR (*l*).

If a Juristical Person were condemned in an Action, the execution of the decree was effected by the same means as against a Natural Person : by a *MISSIO IN POSSESSIONEM*, Insolvency, the Sale of the Property of, and the realization of Credits due to, such Person (*m*).

A special difficulty arises when a Juristical Person has to take an Oath in his own lawsuit, because the Oath, properly speaking, is estimated not on the juristical, but on the human personality of the Party (the conscientiousness of the individual Man). The Roman Law does not mention this case of Judicial Oath ; but in the exactly analogous case of an Oath imposed by a Testament, it provides that when the Oath is imposed upon a Municipal Community (therefore upon a Corporation with a developed Constitution), it may be taken by those who conduct its affairs (*n*). Modern practitioners assume that the Oath must always be taken by the agreeing Members of the Corporation ;

(*i*) L. 2 *quod cuj. un.* (3, 4).

(*k*) L. 7, § 2 *quod cuj. un.* (3, 4). See also § 89 *δ*.

(*l*) L. 1, § 3 *quod cuj. un.* (3, 4).

(*m*) L. 7, § 2 ; L. 8 *quod cuj. un.* (3, 4).

(*n*) L. 97 *de condit.* (35, 1) "MUNICIPIBUS, si jurassent, LEGATUM EST: HAEC CONDITIO NON EST IMPOSSIBILIS. PAULUS: QUEMADMODUM ERGO PARERI POTEST? PER EOS ITAQUE JURABANT, PER QUOS MUNICIPII RES GERUNTUR." Quite in the same sense says L. 14 *ad municip.* (50, 1) "MUNICIPES INTELLIGUNTUR scire, QUOD SCIANT HI, QUIBUS SUMMA REIPUBLICAE COMMISSA EST." The *Public Peace* of 1521, VII. 9, ordained, that the Purgation by Oath of a spiritual or temporal Commune must be performed by two-thirds of the Commune Council ; this is substantially the Roman provision, only perhaps somewhat more fully developed.

but the opinions of Writers and the provisions of Modern Written Laws vary as regards the number of such Members, and the mode of their selection (o).

(o) Linde, *Archiv für civil Praxis*, vol. 10, pp. 18—36. He himself assumes that properly speaking (disregarding the distinct contrary practice) all the members of the Corporation must be sworn, or at least those who have voted for the oath; this opinion is connected with very widely diffused views concerning the constitution of Juristical Persons, as to which more will be said below.

SECTION 93.

Juristical Persons—Rights of.

(Continuation.)

VI.—SUCCESSION.

The Institutes of Succession were recognised much later in favour of Juristical Persons than those of the remaining Rights of Property, and this distinction was founded on the general character of the Law of Succession itself, as compared with the quality of Juristical Persons. For every Possessor of Property the Rules according to which he will be succeeded by an Heir are in the highest degree important and essential, because consideration for a future Heir is the only abiding incentive for the accumulation of wealth; Juristical Persons, however, have no Heirs, because they never die. Conversely, an acquisition by the Inheritance of another's Property, except in the case of the nearest Kindred (who, however, have no existence in regard to Juristical Persons), is something so accidental and incalculable, that an absolute need for such a provision can scarcely be said to be necessary for the free and multifarious dealing in Property, nor can a gap be asserted to exist in regard to this matter, although no rules for acquisitions of this sort are any where met with. Since then Juristical Persons generally are only destined to enter into the ordinary every day transactions relating to Property, similar to Natural Persons (§ 85), it becomes quite explainable how it was that Rights in general were for so long a period conceded to them before it was ever thought of conferring upon them the Capacity of Succession. Certainly as regards the most important case (the Testamentary Appointment of an Heir), a formal impediment is chiefly relied upon; but this impediment did not exist with respect to other cases (Legacies), and even with regard to the former it was set aside by a positive Ordinance, when a sufficiently important practical necessity for doing so could be shown.

The several Law Institutes appertaining hereto must now be more particularly explained.

A.—INTESTATE SUCCESSION.

The most important legal foundation for such a Right, *viz.* Kinship, is not conceivable for Juristical Persons. So the Right of Patronage, according to the Rules of the Civil Law, could not be conceded to Juristical Persons upon purely formal grounds; but as soon as it was made available to them by a wholly positive exception to those Rules, the Patronistic Right of Intestate-Succession was also speedily recognised as the natural consequence of Patronage itself: this Right was at first restricted to Towns, and then extended to all other Juristical Persons (§ 91 (e)). Moreover various kinds of Corporations obtained the special privilege of being permitted to succeed to their own Members, but only in default of all other Heirs, therefore only in the case in which, but for this privilege, the Fiscus would have done so (a).

B.—TESTAMENTARY HEREDITAS.

This was impossible even for Municipal Communities, all the more therefore for other Juristical Persons. The reason for this impossibility is declared by Ulpian to be, that the acquisition of an Inheritance can only be effected by the exercise of a personal Will and Act on the part of the Heir, which cannot happen in the case of a Juristical Person, who exists not as a Human Being at all, but simply as a Juristical Fiction (b).

(a) Dirksen, p. 99.

(b) Plinius, *Epist.* v. 7 "NEC HEREDEM INSTITUI NEC PRAECIPERE POSSE REMPUBLICAM CONSTAT." But especially Ulpian, XXII. § 5 "NEC MUNICIPIA, NEC MUNIPES HEREDES INSTITUI POSSUNT: QUONIAM INCERTUM CORPUS EST, UT NEQUE CERNERE UNIVERSI, NEQUE PRO HEREDE GERERE POSSINT, UT HEREDES FIANT." As regards the words NEC MUNICIPIA NEC MUNIPES, see above, § 87 (c). The succeeding words are to be understood thus: In order that a Township might acquire an HEREDITAS, either representation or a personal act is necessary; but representation in regard to the acquisition of an HEREDITAS is not usually permitted, not even by means of a Tutor (L. 65, § 3 *ad Sc. Treit.* (36, 1); L. 5, C. *de J. delib.* (6, 30)); while a personal act is impossible for a Town, because it has generally only a feigned

A SENATUS-CONSULTUM permitted Towns, as an exceptional case, to be instituted Heirs by their Freedmen, and also to acquire this HEREDITAS (without reference to the consideration just mentioned) (*c*). This was only a natural development of the Intestate Succession permitted in such cases, which would have remained altogether illogical without the permission of being instituted Heirs. The Emperor Leo first permitted (in the year 469) Municipal Communities quite generally to be instituted Heirs (*d*).

Other Corporations (COLLEGIA CORPORA) were similarly incapable as a rule of being instituted Heirs, and only some of their number obtained this Right as a special privilege (*e*). A general statutory qualification was nowhere conceded to them. On the other hand, it must be admitted for the same reason as applied to Towns, that such Institutions might be instituted heirs by their Freedmen, as soon as they had acquired the Right of Intestate Succession to their Property. When therefore cases are mentioned in the Digest of Towns, as well as other Corporations, being validly instituted as Heirs, although the Succession was burdened at the same time with Legacies or Fidei-commissarian Restitutions, in all such cases the existence of Testaments

or ideal existence, therefore not the natural capacity of acting of a Man (QUONIAM INCERTUM CORPUS EST), so that the acts essential for the acquisition of an HEREDITAS (CERNERE or GERERE) cannot be performed by it as such an ideal Unity (UNIVERSI). (As regards this explanation of UNIVERSI, comp. § 90, § 91 (*t*) and *post*, note (*h*)). It is generally understood that the INCERTUM CORPUS refers to an INCERTA PERSONA, and the NEQUE . . . UNIVERSI . . . POSSUNT to the impossibility of bringing all the Citizens together for such a purpose. But this explanation must be rejected upon the following grounds. In the first place, Ulpian would then treat two grounds as identical, which yet in point of fact were totally distinct; in the second place, it is not correct to regard Corporations as INCERTAE PERSONAE (see also note (*g*)). Thirdly, the impossibility of collecting all the Citizens together for such an act, in the case of a Town of ordinary circumference, has really no existence, and in the case of Succession of the kind indicated, they might all well appear, without even a solitary individual being absent.

(*c*) Ulpian, XXII. § 5; L. un. § 1 *de libertis univers.* (38, 3).

(*d*) L. 12, C. *de her. inst.* (6, 24).

(*e*) L. 8, C. *de her. inst.* (6, 24).

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on the part of the Freedmen of such Corporations is always to be pre-supposed (*f*).

The Rule was precisely the same in regard to the Gods, for although they were generally incapable of a Right of Succession, this Right was here and there conferred upon them as a special privilege (*g*). In later times a statutory concession in their favor became wholly impossible, because in consequence of the prevalence of Christianity the ancient Gods were themselves swept away.

C.—BONORUM POSSESSIO.

The same difficulty of acquisition was here experienced as in regard to HEREDITAS: but it was here more easily overcome, because BONORUM POSSESSIO could generally also be acquired by means of Middlemen, for example, by a Guardian without the personal co-operation of the Ward (*h*). Moreover several texts expressly declare, that Towns and all other Corporations were quite capable of acquiring a BONORUM POSSESSIO (*i*). Hence one might be induced to admit, that the entire Incapacity of Juristical Persons to be instituted Heirs was practically removed by the introduction of BONORUM POSSESSIO, because the instituted Corporation was now only required to apprehend the BONORUM POSSESSIO; Ulpian's reason against the institution

(*f*) To this category belong L. 66, § 7 *de leg. 2* (31 *un.*); L. 6, § 4; L. 1, § 15 *ad Sc. Treb.* (36, 1). The last of these texts contains again a remarkable confirmation of the Rule that the Rights of Corporations have absolutely no concern with their individual Members; it is said therein that a Corporation instituted Heir may be validly bound to restore the Succession as a FIDEI-COMMISSUM to one of its Members.

(*g*) Ulpian, XXII. § 6.

(*h*) This distinction between HEREDITAS and BONORUM POSSESSIO is sharply denoted in L. 65, § 3 *ad Sc. Treb.* (36, 1). But that at first the same hesitation was felt in this matter as in regard to the HEREDITAS, is expressly stated in L. *un.* § 1 *de libertis univers.* (38, 3). "MOVET ENIM, QUOD CONSENTIRE NON POSSUNT." As regards the signification of these words, compare the entirely analogous passage in § 91 (*l*) and § 93 (*b*), in which we only find "universi . . . NON POSSUNT," but quite in the same sense as here without UNIVERSI. Comp. above, § 90.

(*i*) L. 3, § 4 *de bon. poss.* (37, 1).

of Towns as Heirs (note *b*) seems to favour this view. Nevertheless it must be absolutely rejected, for he says quite distinctly: **NEC MUNICIPIA, NEC MUNICIPES HEREDES INSTITUI POSSUNT.** This unqualified language is irreconcilable with the assertion of an Institution as Heir by means of **BONORUM POSSESSIO**, especially as Ulpian himself immediately adds the exception of Testamentary Bequests on the part of their Freedmen, and the possible evasion of the prohibition by **FIDEICOMMISSA**, without mentioning **BONORUM POSSESSIO**, a silence which could not have been possible here if the latter device had been anyhow capable of avoiding the prohibition. Moreover, the abolition of the prohibition by the Emperor Leo would have been otherwise practically superfluous. In reality, therefore, Ulpian merely intended to state the reason which originally must alone have impeded that form of institution of Heirship, without meaning thereby to assert positively that this reason was the only one. Accordingly those texts, which permitted **BONORUM POSSESSIO** to Corporations (note *i*), are only to be understood, in the sense of their authors, under the supposition of a generally established Right of Inheritance, therefore under the supposition of a Statutory or Testamentary Succession to the Property of a Freedman of such Corporations. By this explanation those apparently contradictory texts will be brought into complete harmony, and a further justification will be found in the fact that one of the texts cited expressly connects the permitted **BONORUM POSSESSIO** of Corporations with the Bequest of a Freedman (*k*). Moreover, since the Ordinance of the Emperor Leo (note *d*), there can no longer be any question of this restriction in regard to Townships.

D.—LEGACIES (including single **FIDEICOMMISSA**).

For a long period these could not be bequeathed to a Juristical Person, although no absolute impediment stood in the way here, as regards the form of acquisition. At a later period Towns

(*k*) L. un. § 1 *de libertis univ.* (38, 3).

were declared competent to acquire Legacies (*l*), and then also Colleges and Temples (*m*). A special Rescript also permitted this acquisition to Villages (*n*). This Capacity may now therefore be assigned generally to all Juristical Persons. The language of the texts cited, and particularly of those of Ulpian (*l*), is so general that the earlier incapacity must be referred to all kinds of Legacies, and ought not perhaps to be limited to the VINDICATIONIS LEGATUM. Certainly valid Legacies to the Roman People appear early enough, except that their validity is not to be explained by the fact of the form PER DAMNATIONEM being selected in such cases (since the same might have been employed to validate other Legacies also), but because the Aerarium generally in its acquisitions was regulated by more administrative considerations, than bound by the restrictive Rules of the strict Civil Law. In like manner, and for the same reason, was it held valid when the Roman People was instituted Heir by Kings, as often happened (*o*).

(*l*) At first by Nerva, and then more fully by Hadrian. Ulpian, XXIV. 2, § 8; L. 117, 122 *pr. de leg. 1* (30, 1). Gaius gives an application of this Capacity, II. § 195. Cf. also further L. 32, § 2 *de leg. 1*; L. 77, § 3 *de leg. 2*; L. 5 *pr. de leg. 3*; L. 6; L. 21, § 3; L. 24 *de ann. leg.* (33, 1); L. 20, § 1 *de alim.* (34, 1); L. 6, § 2 *de auro* (34, 2); L. 8 *de usu leg.* (33, 2); L. 2 *de reb. dub.* (34, 5). Pliny certainly says *NEC præcipere POSSE REMPUBLICAM CONSTAT* (note *b*), and he lived after Nerva. The simplest construction is to accept his text literally as referring to a *præceptionis LEGATUM*, which unquestionably could not be given at that time to a Town, inasmuch as it was inseparably connected with the HEREDIS INSTITUTIO, which was denied to it. Dirksen (p. 134) rejects this explanation (without grounds), and explains Pliny's text as arising from the insufficiency of Nerva's Ordinance.

(*m*) L. 20 *de reb. dub.* (34, 5). A Senatus-consultum under Marcus, with reference to all authorized Colleges. An application to the DECURIONES of a particular Town, L. 23 *de ann. leg.* (33, 1). To the College of a Temple, L. 38, § 6 *de leg. 3*. In like manner also a Legacy to the Temple itself was permitted. L. 20, § 1 *de ann. leg.* (33, 1); L. 38, § 2 *de auro* (34, 2).

(*n*) L. 73, § 1 *de leg. 1* (30 *un.*), a Rescript by Marcus.

(*o*) Dirksen (p. 135) assumes that Legacies PER DAMNATIONEM to Towns were at all times recognised as valid, and he thereupon explains the validity of many Legacies to the Roman State. Nevertheless in regard to the institution of the Roman State as Heir by different Kings, he also assumes that these instances were independent of the Rules of the JUS CIVILE, and were effected in accordance with the JUS GENTIUM. In my opinion the validity of

E.—FIDEICOMMISSA.

A special SENATUS-CONSULTUM permitted Towns to acquire Inheritances by means of a Fideicommissarian Restitution (*p*). Valid FIDEICOMMISSA for the benefit of the College of Pontiffs have already been mentioned (§ 88 (*a*) and 88 (*b*)).

All these restrictions on the Capacity of Juristical Persons to inherit Property have been deduced by many Modern writers from the principle, according to which, before Justinian's time, every INCERTA PERSONA was incapable of acquiring an Inheritance or a Legacy: but this derivation cannot be accepted as correct. INCERTA means such a Person, whom the Testator by no means conceives as a distinct individual, but only designates by some general quality, which may appertain to the most distinct individuals (*q*). This notion is altogether unsuitable to a Juristical Person, whom the Testator knows and recognises in a distinct individuality, without leaving anything to chance. It might be otherwise if, for instance, a Legacy were bequeathed to those Citizens collectively who might happen to belong to a certain Town at the time of the Testator's death: the Legatees in such a case would be INCERTAE PERSONAE, because the Testator cannot know who will be Citizens of that Town at his death. But precisely such a case would not readily occur; hence if MUNICIPES were named in the Testament as Legatees, that meant the same thing as the MUNICIPIUM (§ 87 (*b*)); in like manner if a Legacy were bequeathed to the CIVES of a Town, it was interpreted in favor of the CIVITAS (*r*). An expression of Ulpian has given rise to the opinion here controverted, which

these Testamentary-institutions as Heir, like the Legacies above mentioned, are explainable irrespectively of the Citizenship or Foreign character of the Testator, and simply upon the wholly peculiar condition of the POPULUS (§ 101).

(*p*) Ulpian, XXII. § 5; L. un. § 1 *de libertis univ.* (38, 3); L. 26, 27 *pr. ad Sc. Treb.* (36, 1).

(*q*) Thus, for example, when two persons were named as Heirs or Legatees, upon whichever of them the Consular choice should first fall after the writing of the Testament, § 25 J *de legatis* (2, 20).

(*r*) L. 2 *de rebus dub.* (34, 5).

in fact, however, has quite a different meaning, and ought not to be understood as referring to an INCERTA PERSONA (note (b)).

The rules hitherto stated concerning the Capacity for Inheritance relate to those Juristical Persons who were known as such to the Ancient Law. As soon, however, as Christianity became predominant, entirely new principles were introduced for Church Institutions in the widest sense (PIA CORPORA). The Right of Succession and Legacies could now be bequeathed to all of them in the freest possible manner. Indeed this newly established freedom of Testamentary disposition was not simply restricted to genuine Juristical Persons, but might be validly exercised in favor of all Institutions which were devoted to pious and benevolent purposes, without being in any way obstructed by what was still the prevailing restriction of INCERTAE PERSONAE. If, for example, any one settled a Legacy in favor of the Poor of his Town, it passed to the Poor who were actually existing at the time of his death: these persons certainly did not form a Corporation, and they were really INCERTAE PERSONAE, nevertheless the Legacy was recognised as valid even long before Justinian's new enactment regarding INCERTAE PERSONAE (s). The Canon Law has not only confirmed these favorable enactments of the Christian Emperors, but has even extended them in many ways, inasmuch as it has relieved Testaments of this description of many otherwise prevailing Statutory limitations, and has thereby greatly facilitated their execution (t). Modern Systems of Legislation have not unfrequently farther restricted acquisitions by dead hands; but these restrictions have sprung out of political and politico-economical reasons, and have never become incorporated as constituent parts of the Common Law.

(s) L. 1, 26, C. de SS. eccle. (1, 2); L. 24, 49, C. de epis. (1, 3).

(t) G. L. Böhmer, *Princip. J. Canon*, § 615; Eichhorn, *Kirchenrecht*, vol. 2, p. 765.

SECTION 94.

Juristical Persons—Rights of.
(Continuation.)VII.—CRIMINAL LAW AND OBLIGATIONS ARISING OUT OF
DELICTS.

The question whether Juristical Persons can commit Offences and suffer Punishments has always been a very disputed one.

Many have answered it negatively (*a*), upon the ground that a Juristical Person has only an artificial existence by the privilege of the Supreme Power, which is only conferred, however, for specified purposes. When an Offence is therefore committed by a Juristical Person, the latter is for the time being not regarded as such, and therefore also cannot be subjected to Punishment in that capacity.

Others answer the question affirmatively, because they proceed upon an absolute Capacity for Rights and of Will, which is not restricted by any positive exception in regard to this particular case. It is certain of course that many Offences and Punishments must remain excluded, because no one surely would deliberately charge a Town with Adultery, or a Hospital with Bigamy: in like manner the punishment of Banishment in regard to a Village Commune, or that of Incarceration in regard to a Church or a Poor-House, would present an insurmountable difficulty. Capital Punishment offers less difficulty, inasmuch as it could be enforced here in the form of an extinction of the Juristical Person. It has however been justly observed, that such exceptions to the possible application of a Rule do not exclude its application generally.

It has been rightly objected against the ground urged in support of the first-mentioned opinion, that it proves too much. For if

(*a*) To this category belong amongst Modern Writers, Zachariac, 1. c. p. 88; Haubold, 1. c. 4, § 15; Feuerbach, *Criminalrecht*, § 28, ed. 12.

a Foreigner were admitted into a State upon a promise of submissive obedience to the Laws, on every breach of that promise he would violate the conditions of his admission, nevertheless he would neither lose his Personality in consequence, nor, at all events, his liability to Punishment. It might indeed be inferred from that ground, if strictly applied, that a Juristical Person could not ordinarily be prosecuted, because every proceeding of this kind pre-supposes a violation of a Right by the accused with reference to which, however (according to those who adopt this opinion), the existing privileges of a Juristical Person could not be regulated. Nevertheless this opinion is the true one, and even the ground just disputed merely mixes up a false element with the correct view. The correctness of this opinion is proved by a comparison of the nature of the Criminal Law with that of Juristical Persons.

The Criminal Law has to do with the Natural Man, as a thinking, willing, sensible Being. The Juristical Person, however, is nothing of this sort, but simply a Being having Property, and lies therefore completely outside the reach of the Criminal Law. Its real existence depends upon the representative Will of certain determinate individuals, which is imputed to it, in consequence of a Fiction, as its own Will. Such a representation, however, without the exercise of a personal Will, can usually only be acknowledged in matters of Private, and not of Criminal Law.

The liability of Juristical Persons to be sued does not surely stand in contradiction with the proposition that every Action pre-supposes the violation of a Right. For such an Action, founded on an invasion of Right, has a purely material character, and is in the most numerous and important applications quite independent of the intention. Actions appertaining to the Civil Law are only intended to maintain the true limits of individual Jural Relations, or to re-adjust them by agreement. Such an influence, however, is just as possible in regard to the Property of Juristical as of Natural Persons, indeed is indispensable wherever only Property is intended to be acknowledged. In like manner there is nothing inconsistent (as it has been well

observed) in admitting that although a Juristical Person cannot *commit* a Crime, it may nevertheless be *injured* by the commission of a Crime on the part of another: because the existence of Property, which a Juristical Person undoubtedly possesses, is certainly sufficient for this violability; the power of thinking and willing on the part of the possessor are therefore altogether immaterial in such a case. Indeed even the possible injury to a Juristical Person offers no objection, because it only concerns the injured Personality, and not the injured Feelings.

Everything which one regards as an Offence of a Juristical Person, is, in reality, always that of its Members or of its Representative, and, therefore, of individual Men or of Natural Persons; here it is also immaterial whether the Corporate Relationship may not have been the motive and object of the Offence. If, therefore, an Official of a Town steals money out of mistaken zeal in order to satisfy the exigencies of the Municipal Treasury, he is personally not on that account the less a Thief. To impose then a punishment on the Juristical Person in such a case would be to violate a fundamental axiom of the Criminal Law, that the Offender and the Person punished should be identical.

The error of those who maintain the possibility of Crime on the part of Juristical Persons has a twofold source—the first source consists in the empty abstraction of an absolute Capacity of Will, which is attributed to such Persons without any ground whatever. Their assumed Capacity of Will prevails in fact only within the narrow limits prescribed by their conception, that is to say, only so far as is necessary in order to enable them to participate in dealings relating to Property (§ 85); for that purpose the Capacity of Contracting, of Tradition, and the like are wholly indispensable, while that of committing Crimes is so little necessary that perhaps the entire course of dealings referred to would become far more fruitful if no Crimes whatever were committed. The erroneous admission of an absolute Capacity for Rights and of Will shows itself still more plainly from another point of view. If that theory were really true it would also operate in the creation of Family Relations: a Corporation, for example, would be

able to obtain by Adoption Paternal Power over a Hospital. That this, however, could not occur results plainly enough from the circumstance that the Family Relation lies completely beyond the limits of the sphere for which alone the Fiction of Juristical Persons was devised. And herein also lies the true element which must be assigned as the basis of the opinion above rejected, but admitted by some writers as the correct opinion. The Juristical Person (say those writers) can for this reason commit no Crime, because in regard to the Activity requisite for that purpose, it can no longer be said to be a Juristical Person. That is true, not because this Activity is disallowed, but because it is foreign to the very notion and the exclusive character of the Juristical Person.

The second source of that error lies in completely confounding the Juristical Person with its individual Members, a confusion which the Roman Law most distinctly opposes in numerous applications (§ 86). The effect of this confusion upon that false opinion will become especially evident by bearing in mind that a Capacity for Crimes is certainly not imputed to all Juristical Persons. In fact it is only asserted in regard to Corporations, not in regard to Charitable Institutions, although this distinction is not usually expressed. It is certainly inconsistent to maintain such a distinction, because if Juristical Persons are generally capable of committing Crimes, because they have a general Capacity of Will, then Churches or Asylums for Orphans must also be equally capable of doing so by means of their Representatives. This inconsistency, however, may be explained by the fact, that the acts of the majority of the Citizens of a Town, or of every Head of an Institution, can easily be regarded as if it were the Town or Institution itself which had performed them; or in other words, it may be explained by confounding the individual Members with the Corporation, which has just been objected to.

The following comparison may serve to make the truth of the above assertions still more palpable. Madmen and Minors have this similarity with Juristical Persons that they are Jurally

capable, but at the same time they are destitute of the Natural Capacity of Action, for which reason an artificial Will is procured for them in the person of a Representative. The same ground exists in the one case, as in the other, for giving an unlimited extension to such a fictitious Will, and therefore for punishing a Pupil for the crime of his Guardian, if the latter commits it in his quality as Guardian, because forsooth he steals something or defrauds some body for the benefit of his Pupil. In such a case, to my knowledge, no one has ventured to assert the possibility of a vicarious Crime ; but the inconsistency of adopting a different treatment between Juristical Persons and Minors in such a matter is obvious.

SECTION 95.

Juristical Persons—Rights of.

(Continuation.)

Hitherto the question has related to Crimes and their Penal consequences. Precisely the same may be said, however, of Obligations arising out of Delicts, which, on account of this innate affinity, were for the time passed over in the above general discussion concerning Obligations (§ 92). For every genuine Delict presupposes *DOLUS* or *CULPA*, therefore Intention and Accountability, and consequently can just as little be admitted in regard to Juristical Persons as in the case of Minors and Madmen. The rule is otherwise in the contractual dealings of Juristical Persons, when the *DOLUS* or *CULPA* of their substitutes comes into consideration, because this is a modification inseparable from the principal Obligation, in regard to which the intention of the Juristical Person is just as unimportant as that of a Physical Person, whose authorized Agent is guilty of *DOLUS* or *CULPA* in a Contract.

The inappropriateness of imputing Crimes and Delicts, together with their consequences, to Juristical Persons has now been pointed out; but it must still be noted that, in regard to the Crimes and Delicts of their Representatives or of their Members, a two-fold retroaction upon them may occur, which may easily assume the appearance as if the Crimes or Delicts themselves were imputed to them. The recognition of such indirect effects will perhaps contribute more effectually to avoid the repetition of false assertions concerning this question.

In the first place, in regard to such Corporations as are of a Political character (*e. g.* Communities), something may happen which seems very similar to a Punishment, and has nevertheless an essentially different character. Thus the case may be conceived of a Town being destroyed and ceasing to exist as

a Corporation, in consequence of its treachery to the enemy: or again of its only losing certain privileges or honorific titles. So it may also happen to a Regiment that it is deprived of its colors in a War, until it regains them again by a fresh distribution. But these are all Political acts, acts of the Supreme Power, not of a Judge: they are meant to create a great impression on the Guilty and on Foreigners, and the evil which they inflict will nearly always fall also on innocent individuals, which cannot happen in the case of a genuine Punishment pronounced by a Judge. They have therefore rather an analogous nature to the abolition of a Corporation, which was at first sanctioned, but which subsequently shows itself generally noxious (§ 89); which may indeed happen although no actual Crime has been committed.

Secondly, there often exists along with the OBLIGATIO EX DELICTO another completely different from it, the OBLIGATIO EX RE, EX EO QUOD AD ALIQUEM PERVENIT, and this can just as indisputably bind a Juristical Person as a Minor. If, therefore, the Representatives of a Corporation practise fraud in the conduct of its affairs, they alone are responsible for the DOLUS; if, however, the Corporate funds are enriched by the fraud, this gain must be surrendered. The case is precisely the same in regard to Penal Processes, which are not properly speaking genuine Punishments, but, like the Costs of a Suit and CAUTIONES, are essentially constituent parts of a system of Procedure. To these Processes a Juristical Person must submit itself if it desires to participate generally in the benefits of the result of the process (a).

Touching the question which has hitherto only been considered with respect to the general notion of Juristical Persons, we must now also summarize the special provisions of the Positive Law.

The Roman Law fully confirms the principles which have here been stated. One text declares quite positively that a Municipality cannot be sued by the DOLI ACTIO, because, according to its very nature, it is incapable of DOLUS; if, how-

(a) Haubold, i. c. p. 604.

ever, it is enriched by the fraud of its administrative Officials, it must surrender this gain; but the *DOLI ACTIO* itself lay against the individuals who committed the fraud, *i. e.*, against the individual Decurions (*b*). If anyone forcibly ejects the Possessor of a plot of land, and does so in the name of a Municipality, the Interdict *DE VI* lies against the latter; supposing that it has acquired something in its possession in consequence of that act (*c*). More equivocal is the language of another text. If any one is compelled by threats to enter into a disadvantageous transaction he has an *ACTIO QUOD METUS CAUSA* for the Restitution of his earlier condition. Now Ulpian says (in the same Book of Commentaries on the Edict in which he asserts the Incapacity of a Corporation to commit *DOLUS*), that it makes no difference who employs the threat, an individual or a *POPULUS*, *CURIA*, *COLLEGIUM*, or *CORPUS*, and in confirmation of the statement he adduces the following example from his own practice. The Citizens of Capua had extorted from some one a written promise (*CAUTIO POLLICITATIONIS*): on this account either an Action or an Exception might have been given against the Town of Capua, according as it was demanded by the Person coerced (*d*). Here it is clear that the Corporation, as such, could have been sued, but this was owing to the fact that the Action mentioned proceeds not only against the party employing force, but also against every other Possessor, who is in the position of being able to cause Restitution (*e*). The town of Capua was in this position, because, as a Corporation, it had *IPSO JURE* acquired in point of fact a valid Claim by means of the *POLLICITATIO* (although this may have been obtained by force); the coerced person needed an Exception, in order to protect himself against the Action on the part of the Town, and

(*b*) L. 15, § 1 *de dolo* (4, 3). See also § 87, 9.

(*c*) L. 4 *de vi* (43, 16) "SI VI ME DEJECERIT QUIS NOMINE MUNICIPIUM, in *Municipes* MIHI INTERDICTUM REDDENDUM POMONIUS AIT, si quid ad eos pervenit." It has been shown above that the expression *MUNICIPES* always denotes the Corporation as such. § 87 (*b*), (*c*).

(*d*) L. 9, § 1, 3 *quod metus* (4, 2).

(*e*) L. 9, § 8 *quod metus* (4, 2).

an Action, in order to be freed *IPSO JURE* from his Obligation (*f*). The most positive language, however, is to be found in a Law of the Emperor Majorianus, according to which a Curia as a whole could never be condemned, but only the individual guilty Members (*g*).

In Roman history not a few examples of the harsh treatment of Municipal Communities is to be found. The most remarkable is that of Capua, which deserted Rome in the second Punic War. After its reconquest not only were its principal Citizens executed, but the Town itself was deprived of every vestige of a Municipal constitution (*h*). This was apparently, like other similar instances in Roman History, a purely Political act, and no application of the Criminal Laws by the Judicial Power.

Departing from the principles of the Roman Law, the Emperor Frederick II. ordained that every Community which permits extortion against a Church, shall be compelled to pay triple damages and to undergo Excommunication from the Church; if this extends for a year, the Community then also falls under the Emperor's bann (*i*). Here is a clear instance where both the Offence and its Punishment are erroneously imputed to the Corporation as such.

The Canonical Law has not maintained uniformity in regard to this question. Pope Innocent IV. laid down the Rule, in accordance with the Roman Law, that Church Excommunication should never be directed against a Corporation as a whole, but only against the individual guilty Members (*j*). But Pope

(*f*) Concerning the actionable character of the *POLLICITATIO*, comp. L. 1, 3, 4, 7 *de pollicitat.* (50, 12). That a forced promise is *IPSO JURE* actionable, and is only invalidated *PER EXCEPTIONEM*, comp. § 1 *de except.* (4, 13).

(*g*) *Nov. Majoriani*, lit. 7 (in Hugo's *Jus Civile Antequ.* p. 1380, § 11) "NUNQUAM CURIAE A PROVINCIARUM RECTORIBUS GENERALI CONDEMNATIONE MULCENTUR, CUM UTIQUE HOC ET AEQUITAS SUADEAT ET REGULA JURIS ANTIQUI, UT NOXA TANTUM CAPUT SEQUATUR, NE PROPTER UNUS FORTASSE DELICTUM ALII DISPENDIIS AFFLIGANTUR."

(*h*) Livius, lib. 26, C. 16.

(*i*) Anth. *Item nulla* and *Item quacunq̄ue*, C. DE EPIS (1, 3).

(*j*) C. 5 *de sent. excommunicat. in VI.* (5, 11).

Boniface VIII. later on again departed from this Rule, inasmuch as he threatened an Interdict against Corporations as such, in the case of a particular kind of oppression against Ecclesiastics (*k*).

Moreover, several Laws of the German Empire contain Penal provisions which are directed against Corporations as such: Fines, and the loss of the Franchise or other Privileges (*l*). But they refer exclusively to Offences against the security or peace of the Empire, such as breaches of the Peace and Confederations or Conspiracies. Princes and Towns were therein placed on the same footing. These Laws, therefore, properly speaking, only proclaimed the Political Acts of the State towards its individual Subjects, although these Acts, according to the peculiar constitution of the German Empire, assumed the form of an actual Criminal Punishment, and were pronounced as such by the Imperial Courts of Justice. Moreover those Laws contain no allusion to the general Criminal responsibility of Corporations, apart from that special Political relation.

Lastly, as regards the question here discussed, no decisive practice has at any time prevailed in Germany. The most numerous and important cases which have occurred of this kind, bear apparently a more Political than a Criminal character, and entirely confirm what has been said above concerning the contents of the Imperial Laws appertaining to this subject (*m*).

(*k*) C. 4 *de censibus in vi.* (3, 20).

(*l*) *Aurea Bulla*, C. 15, § 4; *Peace of 1548*, tit. 2; tit. 14; tit. 29, § 4; *Ordinance of the Supreme Court of Judicature of 1555*, II. 10, § 1.

(*m*) Cases which have occurred in Practice will be found collected together by Sintenis, pp. 60 et seq.

SECTION 96.

Juristical Persons—Constitution of.

In order to introduce the notion of Juristical Persons into practical life, it was necessary to devise a regular representation for them, by means of which the Capacity of Acting, which was deficient in them, might be artificially supplied, with the exclusive object of allowing them to deal in Property (§ 90). But inasmuch as such Persons have always many other Relations, often indeed of a far more important kind than their Private-law Personality, for which likewise a definite constitution is necessary, the Organs of this general Constitution suffice at the same time for the accomplishment of these Private-law aims. This Private-law Representation was also partially effected amongst the Romans in another fashion. If, for instance, a Juristical Person had only a single Slave in Ownership, the latter could acquire every Right of Property (Ownership and Credits) for that Person, even according to the strict rules of the ancient Civil Law (§ 65). But the Representation was limited to that extent; it was not applicable to Alienations and Obligations, therefore also not to those numerous and most important of all Legal transactions, which (like Purchase) consist of a reciprocal giving and taking, nor again to Judicial transactions of all kinds; nor finally to the supreme direction of business matters, but only to their completion in matters of detail. Nevertheless this form of Representation was of greater importance, because the direct acquisition of Ownership by means of solemn legal transactions could always be effected thereby, which otherwise would not have been possible for this case.

As regards the extraordinary difference prevailing amongst Juristical Persons *INTER SE*, it would be an absolutely fruitless undertaking to endeavour to establish the positive Constitutional principles which were applicable to them generally. This only

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need be said that the protection and superintendence over all of them belong to the State upon the like grounds as in the case of Minors. In regard to many of them the influence of the State is limited to these purposes, since, apart from its own existence, nothing is more important to the State, than the existence of every Natural Person having a Right of Property; but with respect to many others a higher and more immediate State interest has to be added, inasmuch as they are designed for permanent common objects, or, in truth (like Communities) they form the constituent parts of the State itself. This twofold influence of the State upon Juristical Persons is, however, more distinct and varied in Modern times than in the Roman Law, since the Central Power has become generally more developed and consolidated (a). Quite different again from this positive influence of the State is the negative influence, which aims at the suppression of baneful and dangerous Corporations. This form of interference is traceable in the Roman Law even more vigorously and repeatedly than in Modern times, and an historical retrospect of the Subject has already been given above (§ 88).

After this general discussion it now remains to inquire what were the provisions of the Roman Law regarding the Constitution of Juristical Persons. The Roman Jurists had too much practical sense to endeavour to lay down any general Rules on the subject, seeing that such Rules would after all have had a very limited application owing to the great variety of those Persons. Such Rules as we can extract from them, refer, not to Juristical Persons generally, nor even to all Corporations, but solely to Municipal Communities, that is to say originally to the Municipalities and Colonies in Italy, and afterwards also to Provincial Towns. During the Free Republic Italian Towns had Constitutions which were very similar to that of Rome; the Executive Power was in the one case, as in the other, shared between the Assemblies of the People, the Senate, and individual Magistrates. Under the Emperors the People's Power soon vanished altogether, and all Power was concentrated in the

(a) Eichhorn, *Deutsches Privatrecht*, § 372.

Senate (ORDO or CURIA), even the Magistrates being only regarded as constituent parts of that Assembly (*b*): hence Italian Towns became very similar to Provincial ones. It is this new form of Municipal Constitution which was existing when Jurisprudence reached the stage of a developed System, and which is exhibited to us in the Justinian Law Codes. The following are the fundamental features of this Constitution:—

The whole Executive Power is vested in the ORDO, which however is only deemed to act constitutionally when at least two-thirds of its ordinary existing Members are assembled. If this proportion are present such an Assembly represents the whole ORDO, and the presence of a larger number, or of the whole, is not required, since otherwise the obstruction of several Decurions might impede the transaction of all business: if the prescribed number of Members are not present, the Assembly does not represent the ORDO, and can validly transact no business (*c*). In every such legally constituted Assembly, however, the majority of votes is decisive (*d*). This rule, which is asserted

(*b*) Savigny, *Geschichte des Römischen Rechts im Mittelalter*, b. 1, § 8, 87.

(*c*) L. 2, 3 *de decretis ab ordine faciendis* (50, 9) "ILLA DECRETA, QUAE non legitimo numero decurionum coacto FACTA SUNT, NON VALENT."—"LEGE AUTEM MUNICIPALI CAVETUR, ut ordo non aliter habeatur, quam duabus partibus adhibitis;" L. 46, C. *de decur.* (10, 31); L. 142, C. Th. *de decur.* (12, 1) "NE PAUCORUM ABSENTIA . . . DEBILITET, quod a majore parte ordinis SALUBRITER FUERIT CONSTITUTUM: CUM duae partes ordinis IN URBE POSITAE, totius curiae instar EXHIBEANT." In these last words it is quite unambiguously stated, that every Assembly of two-thirds of the Members should be regarded as the whole Curia, or the whole Ordo.

(*d*) L. 46, C. *de decur.* (note *b*) "A majore parte ORDINIS;" L. 19 *ad municip.* (50, 1) "QUOD major pars curiae EFFECIT, PRO EO HABETUR, AC SI OMNES EGERINT" (Curia, however, means, according to note (*b*), an assembly of at least two-thirds of all the Members); L. 2, 3, C. *de praed. decur.* (10, 33) "TOTIUS vel majoris partis INTERCEDENTE DECRETO," "CURIALIUM vel majoris partis curiae;" L. 19 *pr. de tutor. et curat.* (26, 5) "UBI ABSUNT HI QUI TUTORES DARE POSSUNT, DECURIONES JURENTUR DARE TUTORES: dummodo major pars conveniat, &c." The word *conveniat* is ambiguous; it might be taken in a material sense (as meaning "coming together"), in which case it would stand in contradiction with the rule relating to two-thirds: it must therefore be accepted in the equally general figurative sense (meaning "agreement"), and will then simply embody the rule of decision by the vote of the Majority.

generally in regard to all Public Municipal matters in the texts already cited, prevails especially also in the election of an ACTOR, who is intended to represent the Municipality in Courts of Justice : for such a purpose the presence of at least two-thirds of the Decurions is also necessary, and the election is determined according to the majority of those who are present (*e*).

(*e*) L. 3, 4. *quod cuj. un.* (3, 4) "NISI . . . *ordo* DEDIT, CUM *duae partes* adessent, AUT AMPLIUS QUAM DUAE." Here also the whole *Ordo* is regarded as acting when an Assembly of two-thirds does so. Recently the Rule prescribing two-thirds for all assemblies of DECURIONS has been so interpreted as if it necessarily embraced the resolution of a Majority, not of those present in this Assembly, but of all the DECURIONS generally, along with which, therefore, the necessary presence of two-thirds would have been a mere useless aggravation of the difficulty. (Lotz *in loc. cit.* p. 115—120.) This assumption clearly contradicts the words of the texts quoted ; but apart from this it is to be recollected that here the question relates to a Board of Management, and at the same time to matters of current administration, which must be accomplished in some sort of way : hence any other Majority than that of those present at the Assembly is just as foreign and unnatural, as it would be, for instance, in our own Courts of Justice.

SECTION 97.

Juristical Persons—Constitution of.

(Continuation.)

Modern writers have laid down the following general propositions in regard to the Constitution of Corporations (not of Juristical Persons generally).

A Corporation consists of the Totality of all the existing Members. The unanimous Will of all its Members does not however, merely prevail as the Will of the Corporation, but also that of a Majority: therefore the will of the Majority of all the Members present must be regarded as the proper Subject of the Corporate Rights. This Rule is based on the Natural Law, because if Unanimity were insisted upon the power of Willing and Acting on the part of a Corporation would be rendered impossible. But it may also be justified upon the principles of the Roman Law, in proof of which may be quoted the text relating to the votes of a Majority amongst the Decurions (a).

This general proposition then, founded on Natural Law and recognized in the Roman Law, (it is said) was somewhat modified and its application facilitated by a wholly positive provision of the Roman Law. According to this provision, for instance, the consent of a Majority of all the Members was not needed, but only of those who were actually present at an Assembly properly convened: provided only, that those present did not constitute less than two-thirds of all the Members (b).

(a) Zachariae, pp. 63, 64; Thibaut *in loc. cit.* pp. 389, 390, and *Pandektenrecht*, § 132; Haubold, C. 3, § 2. A particular application of these principles to a Judicial Oath has already been adduced (§ 92 (o)).

(b) Thibaut, *Pandektenrecht*, § 131; Mühlenbruch, § 197.

As this doctrine must now be examined it is necessary to begin with that portion of it to which a relative truth may be ascribed, namely, the alleged power of the Majority. Whenever the decision of a matter depends on the Will of an Assembly, it cannot be said that Unanimity is beyond the possibility of attainment (since, in the English Jury system, for example, it is both requisite and found to be practicable), but in truth it is so difficult and so dependent upon circumstances, that the vital activity of the Assembly must in consequence be greatly hampered, and it has thus been regarded as advisable and proper to ascribe the power of the common Will to any majority. If, however, this is to happen, then the simplest and most natural plan is to recognise a bare Majority, that is to say every Majority in excess of a Moiety, as the mouth-piece of the common Will, because every other proportion, *i. e.* three-fourths or six-sevenths, has such an arbitrary character, that it would never receive a general recognition without a positive provision to that effect. It was in this light that the Roman Law also treated the subject, because it not only permitted a Majority to decide in Decurionian Assemblies (§ 96), but also in Provincial Assemblies (*c*); indeed, a certain text exists which seems to express the power of the Majority as an abstract principle governing all conceivable cases, although the original construction of that text would seem to leave no room for doubt that the author only had a particular application of the Rule in view (*d*).

But we cannot yield more than this partial element of truth to that doctrine, and nothing is gained by this admission for its truth as a whole. For it is precisely the fundamental assumption which is inadmissible, that in the business affairs of the Corporation the true ruling power belongs to the Totality of the Members, the only natural modification whereof is that they must be conducted by the Majority. However strange it may appear

(*c*) L. 5, C. *de Legation.* (10, 63). Other similar applications of the Rule regarding Majority occur in L. 3, C. *de vend. reb. civ.* (11, 31). See also § 100 (*h*), and Nov. 120, C. 6, § 1, 2.

(*d*) L. 160, § 1, *de R. J.* (50, 17) "REFERTUR AD UNIVERSOS, QUOD PUBLICE FIT PER MAJOREM PARTEM." Cf. Haubold, p. 563.

that we should deny to the Totality what, in a certain measure, we concede to the greater Half, it is a principle nevertheless which is based upon good ground, and should by no means be considered as involving any inconsistency. For we allow the Majority of an Assembly to prevail, provided that some sort of right of disposition belongs to the Assembly itself. But that the Assembly of all the Members is itself entitled to exercise, with unlimited power, a right of disposition over the Corporation, is what we dispute.

The advocates of that doctrine contend for Majority against Unanimity quite as if this were the only contrast with which we had to deal, and which must necessarily compel us to choose between one or the other, although there are clearly other and more important contrasts to be considered. The last ground of that doctrine consists, therefore, in confounding the collective Members with the Corporation itself, which is constantly recurring, and against which the Roman Law so frequently protested, first indeed only in connection with the question relating to the true Subject of Corporate Rights (§ 86), but subsequently also in regard to the question relating to the true Subject of Corporate Acts (§ 90, § 91 (*f*), § 93 (*b*) (*h*)). That doctrine depends finally, therefore, upon a tacit and wholly arbitrary supposition of an absolute Democracy in the Constitution of all Corporations. It is consequently in all essential points the Publicist's doctrine of the Sovereignty of the People, transferred to Juristical Persons in the matter of Private Rights.

But the wholly different contrasts which in point of fact call for consideration here, and which by that mode of constating the point at issue (*i. e.*, whether Majority or Unanimity should prevail) are completely lost sight of, are the following:—

The first contrast refers to a distinction already indicated (§ 85) in regard to the condition of Corporations. Many of them have, for instance, for purposes independent of their Private Law Personality (§ 96), a Constitution artificially constructed, and supervised by various Organs of the Executive Power. And since an unlimited power is assigned by the advocates of that doctrine to the Totality of Members (in contradistinction to

those constituted Organs of the Executive Power), they must therefore either ignore these Organs, or merely regard them as subordinate and dependent instruments for the conduct of the current administration: in both cases with a completely groundless arbitrariness. This will become still more evident by the following example of one of the most numerous and important kinds of Corporations. In German Towns from a very ancient period we find a Constitution composed of a Burgomaster and Council, and also along with them very frequently a Burger Parliament (at times still variously regulated). The advocates of that doctrine must now admit, that in the German Towns referred to, the Burgomaster, Council, and Burger Parliament have only limited rights of administration, subordinate to the Supreme Power of the Totality of individual Citizens; and in comparison with this admission the question whether, in regard to the declaration of the Will of this Totality, Unanimity or a Majority shall prevail, is clearly of a secondary character. If it were now desired to give the doctrine alluded to some strength and probability, its application to such Corporations as were provided with developed Constitutions, should have been entirely excluded, and it should have been restricted to the remaining forms of Corporations only. For this distinction there were already at hand the current technical expressions *UNIVERSITAS ORDINATA* and *INORDINATA* (§ 86); but no use was made of them; it was deemed sufficient that they were incidentally mentioned, and yet by the side of them was established the supremacy of individual Members as a principle applicable to all Corporations alike. This application of an erroneous fundamental view was moreover least of all adapted to penetrate into practical life, and thus to destroy the existing practice, because the developed Constitutions here contemplated must have produced, by their own innate energy, a natural and effective opposition. It was otherwise in regard to succeeding applications, to which the mere opinion of the Courts (under the influence of an erroneous theory) was quite sufficient to give vitality.

The second contrast which is overlooked by that doctrine,

indeed wholly ignored by it, is the contrast between the Members generally and the Members belonging to different Classes, and possessing unequal Rights. In a great part of Germany we find in Village Communities Full Peasants (*vollbauern*) and Half-Peasants (*halbbauern*), and along with the Peasants Cottagers (*Kossathen*) and Housemen (*Häusler*).* These important distinctions, whose influence in ascertaining the Will of the Corporation is so natural, must completely vanish if, as a general proposition, we ascribe to the several Members of all Corporations a mere numerical existence, from which the absolute equality of individuals is inseparable.

Finally, a third contrast which remains unnoticed in that doctrine is that between the Totality of (surviving) Members and the Corporation itself, which has an imperishable existence, independent of the change of individuals (§ 86). Here we now find ourselves in a province as to which, in matters of Public as well as of Private Rights, the most vehement dispute is waged, and with one-sided exaggeration by both the contending parties. The living Present has its peculiar claims, and it must neither be conditioned by the Will of the Past, nor sacrificed to the Interests of the Future. But it must exercise its temporary mastery over permanent possessions and objects with wisdom and moderation, and not deprive succeeding generations of the means of a happy existence, from narrow-minded or selfish motives. By that doctrine (*i. e.*, the one above mentioned) a boundless power is conceded to the present existing Members without any consideration for the condition of a later Age. If we try to demonstrate the possible and probable consequences of this doctrine, with reference to the contrasts here stated, they will appear to us more or less dangerous according to accidental circumstances: in regard to Communities, more dangerous than

* In the Duchies of Schleswig and Holstein, for instance, the Full Peasant possesses about one hundred English acres, the Half-Peasant about fifty acres, and the Kathner about fifteen acres only. The Houseman belongs to a still lower class, having a House with a small parcel of land attached to it. See Field's *Landholding and the Relation of Landlord and Tenant* (1883), 76, 99, and 106. *Trans.*

elsewhere, on account of their greater importance for the State generally; less dangerous, because the solicitude for a proper Succession, which almost always enters into the Communal-relation, will serve to avert many injurious resolutions of the Corporation, a guarantee which does not similarly occur, for instance, in the case of Guilds.

Apart from the asserted supremacy of the present Members of a Corporation (with which we have hitherto been concerned), there is however a second and still more pernicious error to be noticed in that doctrine, which consists in the assumption of the necessity, at the same time, however, of the sufficiency of the presence of two-thirds of all the Members, whenever a resolution of a Corporation has to be determined by a Majority. All rely on the texts of the Roman Law above cited (§ 96 (c) (e)) without reflecting that they really, in a two-fold manner, force a meaning upon those texts which is completely foreign to them. For, in the first place, those texts do not speak of Corporations generally, but solely of Municipal Communities: nor, in the second place (which is more important), of two-thirds of the Members of the Corporation, but of the Decurions; therefore, those texts refer to a mere Representative Assembly within a *UNIVERSITAS ORDINATA*, whilst all the Landowners within the Municipal district (*POSSESSORES*), were also genuine Members of the Corporation (e).

Here also it would have been advisable above all things to except the *UNIVERSITAS ORDINATA* from that pretended Rule, and in point of fact actual Practice has itself resisted this false theory. For although the doctrine touching two-thirds of the Members has been everywhere asserted by Writers as unquestionably applicable to all Corporations, it has yet not been applied in German Towns either to the Citizenship or to the Town Council (in regard to which an analogy of true Roman principles may at first sight be asserted). If one looks carefully to see how

(e) Savigny, *Geschichte des R. R. in Mittelalter*, vol. 1, § 21. The first of these two instances of confounding things together is perceived and contested by some modern writers: the second, which is more important, they have not noticed. Lotz, p. 119; Kori, pp. 3—5.

far the principle of two-thirds of the Members has been carried in practice, it will be found to be restricted to the appointment of a Procurator for the purpose of carrying on legal proceedings on the part of Village-Communities, which have always a very imperfect Constitution, and are therefore UNIVERSITATES INORDINATAE. In such matters two-thirds of the Members must be assembled in order to appoint the Procurator, an act which (contrary to true Roman phraseology) is usually called the appointment of a Syndicate (*f*).

(*f*) Concerning the appointment of a Syndicate, the prevailing opinion of modern writers is that two-thirds of the Members must be assembled together in the case of a UNIVERSITAS INORDINATA (Villages, Guilds), not in that of an ORDINATA (Towns, Universities), whose regular Presidents could of themselves appoint a Procurator for judicial purposes. Glück, vol. 5, § 413; Martin, *Process*, § 78, ed. 11. As a matter of practice this rule may have prevailed; but in so far as the Roman Law is adduced in support of it, it is altogether inconsistent, inasmuch as the Decurions (for whom alone the Roman Law prescribed the two-third's rule) distinctly appertained to a UNIVERSITAS ORDINATA. Struben, *Bedenken*, 1. No. 80, asserts that a majority of two-thirds is only required in the appointment of Syndicates, not in regard to other resolutions: according to the Roman Law this is certainly wrong. The term SYNDICUS in the Roman Law is only applied to Municipal Procurators, and in fact only to such as were commonly appointed for *all* the law-suits of a Town: a Municipal Procurator, who was appointed for a particular law-suit, was called ACTOR.

SECTION 98.

Juristical Persons—Constitution of.

(Continuation).

The influence of the contrary opinions above set forth in regard to the Constitution of Juristical Persons will become still more evident by a consideration of the various forms of Activity in which such Persons may take part. This Activity may relate to two kinds of subjects: in the first place to such as appertain to the current affairs of administration; secondly, to others which exercise a varying influence upon the condition of the Juristical Person itself, and on its Property. Between the two classes of subjects, however, no sharp boundary lines can be drawn, as to which numerous deviations would not be observable.

In regard to matters of current administration the above contrast of opinions is less noticeable, partly by reason of their comparatively trifling importance, and partly because for the most part they are of a kind which must be transacted in some way or other, and are also constantly recurring. Therefore a regular procedure for business of this kind has almost everywhere been regulated either by written Laws or by Usage, and by this means the influence of those theories is excluded, or at least diminished (a). To this category belong more especially the management of the current income and expenditure; the farming out afresh of estates which had already been farmed out before; the selection of Representatives and of Office Bearers.

(a) Kori (pp. 23—25) rightly observes, that in regard to transactions of this sort, which must be brought to a final decision, even an absolute majority in an Assembly, convoked for this purpose, is not always to be secured, and in this case it is also not essentially necessary.

To a certain extent also the admission of new Members (*b*), and the conduct of legal proceedings, belong to the same category. These last named matters may, however, also belong, according to circumstances, to the more doubtful and weighty transactions, for which reason, in Village Communities, they have frequently by modern Laws been made to depend on the sanction of the superior Political Authorities (§ 100).

The Rule is otherwise in regard to transactions permanently affecting the condition of such Persons. For through them at times that condition might not only be essentially transformed, but even the existence of the Corporation might be annihilated or imperilled. Moreover they are for the most part of a kind which may well be left wholly untouched, as they do not recur regularly, but only occasionally, in fact they may perhaps only occur once, so that for such transactions neither a Statutory provision nor Usage has established any rule. For all these reasons a prevailing theory is able to exercise a large influence upon transactions of this sort, and this influence is in this place specially important and worthy of notice. The most important cases of this kind are perhaps the following:—

(1). The composition of new Statutes, which indeed may exercise the most dangerous influence upon the welfare and even the very existence of Corporations on the one hand, as well as on the right and security of the individual Members on the other.

(2). Of an entirely similar character is the Taxation of individual Members for the purposes of the Corporation, which, in fact, is only a particular branch of the internal legislation of the Corporation.

(3). The dissolution of the Corporation.—It has already been pointed out (§ 89) that such an event cannot happen without the sanction of the State. But quite independent of it is the question, who can resolve upon the dissolution and propose the

(*b*) The release of the former Members of the Corporation cannot be reckoned therein, because as a rule every individual Member is free to leave, and is only liable perhaps for the satisfaction of those Obligations which had been jointly undertaken.

measure for that sanction, within the Corporation? This case, moreover, which appears to be the most important of all, is for practical purposes precisely the most insignificant. In regard to Communities it can anyhow never arise, but only with respect to arbitrarily formed Corporations, and for the most part to Commercial Partnerships which have obtained the privileges of a Corporation (§ 88), and as to these it is not likely that such a case will be left unprovided for at the time of their creation.

(4). Changes in the Substance of the Corporate Property.—These also may often assume more the nature of current administration, as, for example, when the outstanding Capital has been called in and re-invested in the Name of the Corporation, or when the surplus Funds are lent out or invested in the acquisition of Land. But other cases appertaining to this class of transactions are of a more doubtful character, and, since they frequently occur, are precisely the most important of any which have to be considered here. To this category belong specially the following cases:—

A. A total Alienation of portions of Property by Gift. Towards a stranger such generosity is not likely to occur, but it certainly may towards the Members themselves, when, for example, a portion of the Public Revenues or of the called-up Capital is divided amongst them. The character of such an act as a genuine Donation may easily be overlooked, since, according to a common confusion of ideas, the Ownership of the Corporation is wont to be regarded as that of the Members.

B. The Alienation of such portions to the individual Members, of which the Ownership has hitherto belonged to the Corporation and the enjoyment to the individual Members (§ 91), such as a City Forest and a Common Pasturage. This case only differs from the preceding in degree, since here also, in point of fact, the Ownership is relinquished, although in a very limited manner. And just because the loss to the Corporation is here less apparent, such an alienation has often passed unheeded, although no case arises more frequently, and is therefore of greater practical importance, than this. At times also the true relation of the matter is obscured, partly by views of a heterogeneous, and partly of an

inaccurate, character being mixed up with it. Thus, for instance, a special importance has been rightly attached to the circumstance that the Corporation may have occasionally derived some advantage from such Property, *e. g.*, when any one who desired to enjoy rights of Common Pasturage had to contribute a small tax to the common chest (*c*). But this circumstance is less important, because the diminution of such a source of Income might easily be fully recouped in other ways, *e. g.*, by a Ground Rent being levied upon the partitioned Land. Just as little can the consideration that Ownership, which had hitherto yielded no return to the Corporation, is properly a mere empty name without substance, be held to be decisive (*d*). On the other hand, it must be borne in mind that this unfruitful form of Corporate Ownership may perhaps secure the prosperity of the future Members (in regard to whom the imperishable Corporation has in truth an interest), whilst the divided Property may be dissipated for ever by the thoughtlessness of the existing Members. If, for instance, the Ownership of a City Forest remains vested in the Corporation, it can be better administered by the latter than by private individuals, and succeeding Members will still find Timber in it, whilst after a partition has taken place every particle of Timber will probably disappear, and an arid waste will be left for several generations.

C. A change in the mere Usufruct, which formerly belonged to the Corporation and is now transferred to the individual Members (§ 91). Although in this case the Ownership of the Corporation is preserved, this change is still most important and noteworthy, not merely in consequence of a present diminution of the pecuniary Profits, but also because, as already pointed out in the observations made under *B*, such a change very easily leads to an actual division of the Ownership.

(*c*) Kori, p. 15.

(*d*) Kori (pp. 17, 18), who nevertheless means to respect the Ownership of Corporations in this case also, as based upon a Positive Law. But on the wholly accidental and subordinate circumstance, whether the Community has or has not received a pecuniary advantage, he bases the Rule that in the first case UNANIMITY, and in the second only a Majority, is necessary. I maintain this distinction to be groundless.

D. The converse change (of the Property of the Citizens into that of the Exchequer). This change is one which calls for no hesitation whatever on the part of the Corporation, which only gains thereby, but it is decidedly detrimental to the individual Members, who lose thereby their entire right of Usufruct.

E. Incurring Debt by means of Loans. A Loan is itself an affair of barter, inasmuch as in lieu of the Obligation undertaken an equivalent value in the Ownership of the bare Coin is acquired. Since, however, this Ownership by an improper administration may be irretrievably dissipated, while the Debt Obligation continues, so the business here spoken of must be included in those which involve the eventual deterioration of the Substance of the Property.

SECTION 99.

Juristical Persons—Constitution of.

(Continuation.)

Since the most important transactions have now been discussed (§ 98), in regard to which an application of the theory, which was examined above in a general way (§ 97), is possible and important, this application must next be tested and applied with reference to particular transactions.

In the first place, however, it must be noticed that that theory appears to be treated in varying degrees of strictness by Modern writers. Some assert the omnipotence of the Majority without distinction of the Subjects, and impose a limitation only with reference to the welfare of the State, when perhaps the resolution of the Majority would lead to the ruin of a Community (*a*). Others, on the contrary, in carrying out the principle, introduce a two-fold and large modification of the same; they require Unanimity instead of Majority for the most important affairs mentioned in § 98, and in regard to such matters they take into consideration the difference in the Rights of Participation enjoyed by individuals (§ 97), upon which the classification of the various classes of Members is based (*b*). If this twofold modification is excepted, by which indeed many of the most important consequences of the principle will be avoided, there will still remain the following objectionable sides of that doctrine:—

I. The most negligent inattention to the peculiar nature of

(*a*) Thibaut, *in loc. cit.* pp. 395, 397; *Pandekten*, § 132. The consideration of the various Rights of Participation he expressly rejects (p. 397), and in the case of every complete partition of the Corporate Property, where the exact measure of Shares cannot be agreed upon, he requires equal division *per capita* amongst the Members.

(*b*) Haubold, C. 4, § 4 *et seq.*; Kori, pp. 11, 20, 26.

the *UNIVERSITAS ORDINATA*, as to which the omnipotency of the Majority of Members is wholly unsuitable (§ 97). This point, however, is practically of less importance than the general treatment of the subject, because the advocates of that doctrine, despite their general language, are accustomed to refer only to *UNIVERSITATES INORDINATAE*, for instance, to Village Communities, and because I know of no one who has sought to apply the principle also to Towns, without reference to their peculiar Constitution.

II. The Rule that the Right of the Totality is exerciseable by an Assembly of two-thirds of the Members (§ 97). This Rule also, although completely inadmissible in the extension which is there given to it (*c*), is nevertheless of less practical weight. For in the generality of really important cases, a diversity of opinion will already in point of fact have been pronounced amongst the Members, and then it will not be difficult to bring together the collective Members in an Assembly, which has to determine about matters of such importance to the Corporation, by which means that error will then be deprived of all influence.

III. Finally, as the principal error, there still remains the practically most important assertion, which identifies the *TOTALITY* of the existing Members with the Corporation itself, and thus invests it with an unconditional power over Corporate Rights; an error which, while it is aggravated in many respects by the power of decision conceded to a bare Majority, is much mitigated by the Unanimity required by some writers in many other cases.

From the stand point gained by these considerations we must now examine in detail the matters not appertaining to current

(*c*) It has been pointed out in § 97 that the Rule relating to two-thirds was not applied by the Romans to the Members of Corporations of every sort, but only to the Municipal Senate (Decurions) administering the affairs of the Corporation. Even an extension by analogy would be wholly inadmissible; for the two-thirds Rule was sanctioned in the case of Decurions, because such a concession is actually required for those current matters of business which demand immediate attention, whilst in regard to the disposal of the Substance of Property and other similar matters, which may well be left alone (§ 98), such a concession is neither necessary nor desirable.

administration, just as they have been collected together in section 98.

(1.) New Statutes.

(2.) Taxation.

In these two matters the unconditional power conceded to a Majority is particularly objectionable, inasmuch as it is evident that by this means the most arbitrary and unjust treatment of Individuals or of whole Classes, who happened to be in a Minority, becomes possible without any safeguard whatever. On the other hand, an unanimous resolution of all the Members is, in regard to such matters, little objectionable, because, from the nature of the subject, an irretrievable injury for the future cannot easily arise from it. Still the personal interests of the State may possibly suffer from it, since, for example, the form and measure of Communal Taxes may injuriously affect those of the State. Hence a certain supervision is rendered necessary, which, at the same time, will amply suffice to secure proper attention being paid to any possible injury to the future interests of the Corporation itself, and in arresting the same,

(3.) For the Dissolution of the Corporation the consent of the State is at all events requisite. But along with this consent it is impossible that a Resolution of the Majority should suffice for the purpose, since it is incomprehensible why a Minority of the Corporation should not be able to continue its existence, whilst the Members constituting the Majority would of course be at liberty to withdraw from it individually. If the Majority were not satisfied with this expedient, but preferred a general dissolution, this in most cases would be owing to a desire on their part to obtain a distribution of the Corporate Property; inasmuch, however, as such a Resolution would at once involve the same consequences, it must therefore also be subject to the same considerations as prevail in regard to the carrying out of a general distribution. An unanimous resolution of all the Members in favour of the dissolution of the Corporation nevertheless always requires the consent of the State, because third persons, for example, Creditors, may be prejudiced thereby. Where, however, that consent exists, the validity of such a Resolution cannot

in any way be affected by considerations for the future, inasmuch as the Corporation has then no longer a future whose condition could possibly be injuriously affected by that Resolution.

(4.) Change in the Substance of the Corporate Property. This case is of all others by far the most important, since, on the one hand, the loss, when it occurs, is irremediable, and on the other hand, the desire for gain so easily incites the individual Members to bring the helpless Corporation to ruin.

Here, then, more especially the injustice which proceeds from the unconditional supremacy of a Majority becomes apparent. In regard to many cases doubtless the disposition allowed by Thibaut will afford a guarantee that the interest of the State ought not to be imperilled by the ruin of the Community. But there are still many wrongs which do not produce actual ruin, and there are many Corporations which are not Communities. An example will make this evident. Supposing an Artisan travelled from a German Town to India, acquired riches, and bequeathed a large Capital to the Guild of which he was formerly a Member. If this Guild consists of fifteen Members, then eight of them may, according to Thibaut's Rule, as the governing Majority, divide the money amongst themselves, and leave nothing whatever for the remaining seven. The limitation allowed by Thibaut avails nothing here, for the interest of the State is limited, as regards the Guild in question, to a skilful and honest carrying on of the particular trade, and this is wholly independent of the accidental acquisition of wealth. But the State in the exercise of its judicial function, as the Guardian of all Rights, can here, just as little as elsewhere, allow injustice to be perpetrated. In this relation, however, only a portion of the injustice is averted, even according to the opinion of those who require Unanimity. The seven Members are then no more injured by the eight, than in truth the Corporation by the whole fifteen (*d*). Here also again the analogy above indicated between

(*d*) This is very strikingly shown in the case where all the Masters of a Guild save one happen to perish in an epidemic, and the survivor desires to convert the property of the Guild to his own use (§ 89 (*b*)). Here unanimity is certainly existing.

a Corporation and a Minor will make everything clear. If a Pupil, for instance, has three Guardians, two of them will not be able to divide his property amongst themselves to the exclusion of the third; but if they allowed the third Guardian to share in the distribution, the injury to the Pupil would clearly be none the less.

A special consideration is still required for the case where the Property of Citizens is converted into that of the Exchequer, or individual enjoyment into enjoyment by the Community at large. Here again the Resolution of a Majority is to be completely rejected, since anyhow no Community as such, by whomsoever it may be represented, has to decide anything in regard to the Usufructuary rights of individuals^(e); on the other hand a unanimous Resolution is quite valid, since every individual thereby renounces his personal Usufructuary right, which he is indisputably entitled to do.

(e) Eichhorn, *Deutsches Privatrecht*, pp. 372, 373.

SECTION 100.

Juristical Persons—Constitution of.

(Continuation.)

From the preceding exposition it would seem to follow that, in regard to Corporations, every substantial conversion of their Property must be absolutely avoided. Nevertheless very many cases may occur in which such a conversion is advantageous and advisable, and others in which it is necessary. How is this contradiction to be solved?

In regard to Minors the administration of their Property is confided to trustworthy Guardians: with respect to the most important transactions the Modern Roman Law, but still more so the existing Law of most States, imposes a completely special control; and lastly, the Minor in a few years becomes in the ordinary course legally capable of Action, and can then himself demand a reckoning from the Guardian. Corporations are distinguished from Minors, in the first place, by the fact of their never attaining Majority, but far more essentially by their being constantly brought into collision with the personal interests of their own Representatives in regard to the conversion of their Property, which is precisely the point here in question (*a*); a collision which does not ordinarily exist between a Pupil and his

(*a*) This happens, for instance, on every occasion of the division of Corporate Property amongst the individual Members, and in the most remarkable manner certainly in Village Communities and Guilds, when the division is resolved upon precisely by those persons who would gain something by it; but also (although in a lesser degree) in the case of a *UNIVERSITAS ORDINATA*, for example, a Municipality, because the Members of the Municipal Council, who resolve upon the division, do not stand outside the Community, and are not uninterested in the division in the same way as a Guardian is in the acts undertaken by him on behalf of his Pupil.

Guardian, and even when it does accidentally occur, it occasions immediately the substitution of another representative (*b*).

From this comparison it follows, therefore, that in regard to Corporations, the legal possibility of undertaking transactions of the above description is given by the supreme Right of Tutelary Protection, which the State is required and bound to exercise over all persons needing protection, and, therefore, also over Corporations. The State accordingly appears active here not only with the view of guarding its own interests, which it possesses in many, indeed in all the most important Corporations, but by virtue of a Right which belongs to it over all in an equal degree (§ 96).

Concerning this influence of the State upon Corporations a great deal has been written and contested in Modern times, not only in Germany but also in France, though less from a Private-Law point of view than from a Political standpoint (*c*). The opponents of every such influence are therefore as yet by no means agreed in opinion as to the final result. Some appear to conceive it in a more positive form, so that the ordinary Representatives of Corporations shall be able to do exactly as they please; others in a more negative sense, so that generally every change affecting the Property of Corporations must be simply abstained from. Both shades of opinion proceed upon a distinct desire for the welfare of Corporations, but both, in their strict consequences, are liable to become extremely injurious to them.

An impartial consideration leaves no room for doubt, that by an exaggerated Tutelary influence of the State upon Corporations (especially Communities) considerable harm has been done. At one time it was the Exchequer, at another conversely the inordinate desire for power on the part of State Officials, that caused great injury to the Community, inasmuch as even many current matters of business were subjected to the continuous,

(*b*) § 3 J. *de auctor. tut.* (1, 21).

(*c*) Amongst the most distinguished French works upon this subject are: Fiévée, *Correspondance Politique et Administrative, Lettre Première* (Edited by Schlosser, Frankfort, 1816), and the Speech of Martignac upon the Communal Law delivered in the Chamber of Deputies.

and often specially obstructive, influence of the State, which had been far better left to the independent administration of the Community, subject only to the natural proviso of a general superintendence of the State, little noticeable in the transactions themselves. Such abuses in the exercise of the influence in question cannot be avoided by fixed rules, but only by the sagacity and good will of the Authorities; the propriety of the principle cannot be affected by it. If a conscientious feeling incites the Authorities, the influence of the State upon the more important matters of business above described can only conduce to the greater advantage of Corporations; it will not only serve to keep in view the interests of the future Members, but also of those individuals who might be injured by the selfish Will of the Majority; it will find scope in all Communities, therefore also in Municipalities (*d*), although chiefly and in the most palpable manner, in those which, like Village Communities, have no developed organisation, and in regard to which, therefore, the interests of the Corporation come into direct collision with the selfishness of individual Members.

Amongst all the above specified matters, in regard to which the interference of the State may be deemed advisable, there is none which had acquired such importance by reason of its constant and uniform recurrence, as the Partition of the Community, that is to say the Division of such portions of the Landed Estate of the Corporation amongst the Members, as had been hitherto enjoyed by the individual Members (§ 98, No. 4, B.); several of the more common works which have been quoted above were in the first instance prompted by a consideration of the important interest of this subject. For the unconditional power of the Majority may here, as in other cases, lead to the most crying injustice; but even Unanimity cannot avoid all risks, as has

(*d*) In the Prussian revised Municipal Ordinance of 1831 (§ 117, 123), the consent of the Chief Political Authorities is required in the following matters of Municipal business: Alienation of Land, Division of the Community, Alienation of the Collections, Loans, Investments in Land, Taxes, and the Conversion of the Property of the Citizens into that of the Exchequer. *Gesetz-Sammlung*, 1831, pp. 28, 30.

been shown by the example of a City Forest above quoted. Some Modern writers have therefore pronounced all Partitions of the Community wrongful, and indeed revolutionary, yet certainly with the most one-sided extravagance. If the previous mode of enjoying the Usufruct of the soil satisfied all requirements for centuries, it is equally incontestable that a period has arrived in which the greater energy of all commercial enterprise permits no one to completely exclude himself from it, without the ancient usage proving a stumbling block to him. No one, however, will doubt that Land employed very sparingly for purposes of Pasturage, may be brought by Partition to an unusually high degree of profit. It is only in a general way, therefore, that Governments are to commend the Partition of a Community, although in individual cases very much the converse may seem proper. But the supervision by means of which the State must seek to avert every injury from the individual as well as from the future Members as a whole, may for the most part be reduced to general Rules, and will bear in this form a still greater guarantee of complete impartiality. This is the origin of the Ordinances relating to the Partition of Communities (e).

The carrying on of proceedings for the enforcement of Rights appertaining to Juristical Persons deserves special mention in this place. By itself it belongs to those matters of current administration which permit of no delay (§ 98). Nevertheless two opposite considerations make special precautionary measures necessary, especially in regard to the UNIVERSITATES INORDINATAE, and notably in the case of Village Communities. In the first place, an ill considered prosecution might lead to a fruitless expenditure of money, and thus assume the character of wastefulness. Therefore in practice the appointment of a formal Syndicate has been required (§ 97), and Modern Laws

(e) Upon the same politico-economical grounds, upon which the Ordinances relating to the partition of the Community are based, modern legislation has also interfered very frequently in the Jural relations of individuals, because it has permitted the one-sided privilege of the separation and extinction of Servitudes and real burdens, which is here only incidentally mentioned. Comp. Eichhorn, *Deutsches Privatrecht*, § 373.

frequently impose the necessity of a previous consent on the part of the Government in the case of all Actions instituted on behalf of a Village Community.

Secondly, if the individual Members of a Village Community wish to appropriate to themselves the Common Property and to squander it, they need only as individuals to take it arbitrarily into their possession, and then by the refusal of a Syndicate to obstruct every Petitorian and Possessory Action which might be brought against them as individual wrong-doers on behalf of the Community. Since then it would be absurd if all Rights of protection were withheld from the Community in this indirect fashion, there remains for such cases no other resource except for the Government to appoint some Official to institute the Action in the name of the Community. If the exercise of such a supreme right of Guardianship on the part of the Government were denied, the power would thereupon be yielded to individuals to force the most arbitrary and irregular Partition on the Community (*f*).

The Roman Law contains exceptionally few provisions upon the Subjects which have been here discussed. In Townships during the Empire an almost unlimited power was conceded to the Decurions (§ 96). We nevertheless find also a remarkable restriction embodied in a Constitution of the Emperor Leo. If

(*f*) For the simple case, that in fact all or nearly all the individuals appear in this conflict with the Community, the matter is so clear that the assertion here made cannot be easily gainsaid. But it often appears in the following somewhat more developed form. If, for instance, only a portion of the Members of the Community has had the exclusive use of a common Forest, it may well happen that these Members may even assume individually the possession of this inherited Forest, and then pretend that they cannot be sued, except by means of a Syndicate appointed by the rest of the Members. Moreover, this is illusory; for since the rest have no interest in the matter, they may be easily satisfied by a wholly inadequate money payment, and would then decline to appoint a Syndicate. The case is therefore not essentially different from the first and simplest case. Various cases of this kind have often occurred in modern times in the eastern parts (especially in Nassau) of the Prussian State, and the Rhenish Court of Revision at Berlin has, for a course of years, decided the same in accordance with the principles here laid down.

a Town desired to sell Buildings, Ground-Rents, or Slaves (*g*) the sanction of the Emperor was requisite in Constantinople, and in every other Town that of an Assembly, which was required to be composed of the majority of the Decurions, the HONORATI and the POSSESSORS of the Town, in which every individual Member had to give his vote separately (*h*). With respect to COLLEGIA the Twelve Tables contained the provision (taken from the Laws of Solon), that they might even be empowered to enact Statutes for themselves, but it was not specified therein whether such Statutes could only be resolved upon unanimously, or by a majority of those present (*i*).

(*g*) L. 3, C. *de vend. reb. civ.* (11, 31), "DOMUS, AUT ANNONAE CIVILES, AUT QUAE LIBET AEDIFICIA VEL MANCIPIA." ANNONAE CIVILES are real burdens, which comprise taxes on the produce, which were therefore contributed by the Coloni or the Emphyteuti. Cf. L. 14, C. *de ss. eccl.* (1, 2), and Jac. Gothofredus in L. 19, C. Th. *de paganis* (16, 10). The name denotes the contrast to the MILITARIS ANNONA, or the supplies which landowners were naturally bound to furnish for the maintenance of the Army.

(*h*) L. C. "PRAESENTIBUS OMNIBUS, SEU PLURIMA PARTE, TAM CURIALIUM QUAM HONORATORUM ET POSSESSORUM CIVITATIS." Whether the majority of votes of those present, or that of all the existing members of those classes, has to decide concerning the Sale, the law does not say. As regards the signification of the Classes mentioned, comp. Savigny, *Geschichte des R. R. in Mittelalter*, vol. 1, § 21.

(*i*) L. 4 *de coll. et corp.* (47, 22), taken from Gaius, lib. 4, *ad Leg. XII. Tab.* "SODALES SUNT QUI EJUSDEM COLLEGII SUNT. HIS AUTEM POTESTATEM FACIT LEX, PACTIONEM QUAM VELINT SIBI FERRE, DUM NE QUID EX PUBLICA LEGE CORRUMPANT."

SECTION 101.

Juristical Persons—The Fiscus.

DIGEST, XLIX. 14, DE JURE FISCO; COD. JUST. X. 1, DE JURE FISCO; COD. THEOD. X. 1, DE JURE FISCO; PAULUS, V. 12, DE JURE FISCO ET POPULI.

The form which the State actively assumes in its Private Law relations, that is to say the Constitution of the Fiscus, does not concern us here, but belongs to the domain of Public Law: therefore the regulations framed by the Romans on the subject have simply an historical interest for us.

The Private Law side of the Fiscus consists partly of its very numerous privileges, and partly of its Juristical Personality itself. The exposition of particular privileges has already been declined above as unsuitable for this portion of our System of Law (§ 90). Only a few general observations may here be offered. Among the numerous peculiar acquisitions, to which the Fiscus in consequence of special privileges laid claim, may be included formal Notices (NUNCIATIONES), which could bring many advantages to the person issuing them (*a*). Actions arising out of these peculiar acquisitions were subject as a rule to a twenty-years' prescription (*b*), but in regard to Ownerless Inheritances a four years prescription was exceptionally prescribed (*c*). The Private Property of the Prince is distinguished in all States from the Fiscus (§ 88, page 202); but in the Roman Law the privileges of the Fiscus were extended to the Private Property of the Emperor, and even of the Empress (*d*).

As regards the Juristical Personality of the Fiscus the doubts

(*a*) L. 1 *pr.*; L. 13; L. 15, § 3; L. 16, 42, 49 *de j. fisci* (49, 14).

(*b*) L. 1, § 3, 4, 5 *de j. fisci* (49, 14).

(*c*) L. 1, § 1, 2 *de j. fisci* (49, 14).

(*d*) L. 6, § 1 *de j. fisci* (49, 14).

and errors mentioned in connection with Corporations completely vanish, inasmuch as the Right of Representation of the Fiscus, by means of individual Persons or the entire Body of Officials, is exclusively regulated by its own Constitution, conformably with the Public Law of every State.

A general observation upon this side of the Fiscus must, however, find place here. The Fiscus is distinguished from all other Juristical Persons by a wholly peculiar position (§ 86, 87, 88). In the ancient Roman Law the Jural Capacity, whether of Natural or Juristical Persons, was variously determined according to Subjects and Grades. For instance, a Right of Inheritance was for a long time denied to Corporations, and the ancient Jurists sought to explain this want of Capacity with reference to the special nature of such Institutions. This explanation, however, was just as applicable to the AERARIUM (POPULUS) and to the FISCUS (e); and yet these are neither mentioned on this occasion as afflicted with the same Incapacity as Corporations, nor yet as being originally free of such Incapacity, or as being freed from it at some later period. At the same time, however, we meet with not a few cases in which the AERARIUM actually acquired Inheritances and Legacies, without a shadow of doubt being cast upon the validity of such acquisitions (§ 93 D). These phenomena are to be explained by the special nature of State Property already mentioned. The POPULUS, from whom all Rights generally emanated, could not possibly be destitute of some one form of Jural Capacity. And this must have been so in every period of time, so that there could be no question of a special grant of such a Capacity. The ancient Jurists, however, seemed to regard all this as so natural and necessary that it never occurred to them to frame Rules on the subject, and especially to draw attention to the essential distinction between the Fiscus and Corporations.

(e) Undoubtedly Ulpian's words (XXII. § 5) are quite as suitable to the POPULUS as to every MUNICIPIUM: "QUONIAM INCERTUM CORPUS EST, UT NEQUE CERNERE UNIVERSI, NEQUE PRO HEREDE GERERE POSSINT, UT HEREDET FIANT."

SECTION 102.

Juristical Persons—Inheritances.

According to the customary doctrines of our Lawyers an un-acquired and still suspended Inheritance (HEREDITAS JACENS) must be classed amongst Juristical Persons, and must therefore be placed on the same footing as Corporations. In fact there appears to be a text of Florentinus which also directly confirms this collocation (*a*). We have to ascertain, however, in what sense it may be truly maintained.

In the first place, the matter may be regarded from the point of view that after the institution of the Heir, his control over the property was to be reckoned from the date of his institution, so that between the death of the Testator and the institution of an Heir, a period of time would always exist in which only a Supposititious Owner of the Property, the Inheritance itself, could be acknowledged. But in point of fact this was not so: on the contrary the Right of the Heir who had been instituted was distinctly regarded as having arisen immediately upon the death of the Testator, so that generally speaking no period of time could be conceived in which the estate did not actually stand either under the dominion of the Testator or of the Heir (*b*). When, therefore, many passages are so expressed as if an un-acquired Inheritance was to be deemed Ownerless (*c*), they are

(*a*) L. 22 *de fidejuss.* (46, 1) "MORTUO REO PROMITTENDI, ET ANTE ADITAM HEREDITATEM FIDEJUSSOR ACCIPI POTEST: QUIA *hereditas personae vice fungitur, Sicuti municipium, et decuria, et societas.*" (Cf. § 85 (*h*).)

(*b*) L. 193 *de R. J.* (50, 17) "OMNIA FERE JURA HEREDUM PERINDE HABENTUR, AC SI CONTINUO SUB TEMPORE MORTIS HEREDES EXSTITISSENT;" L. 138 *pr. eod.* "OMNIS HEREDITAS, QUAMVIS POSTEA ADEATUR, TAMEN CUM TEMPORE MORTIS CONTINUATUR;" L. 54 *de adquir. vel omit. her.* (29, 2); L. 28, § 4 *de stip. serv.* (45, 3).

(*c*) L. 13, § 5 *quod vi* (43, 24) "CUM PRAEDIUM INTERIM NULLIUS ESSET

only to be understood in the sense that the actual Owner is not known to us: throughout the whole of that intervening period therefore the Inheritance has indeed an Owner, but his existence is not brought home to our consciousness.

The following may be another explanation of that collocation. That Estate has an unknown Owner, is necessarily therefore without protection. Hence, in the meanwhile, a Curator is appointed for it, who represents it just as a Juristical Person is represented by its Managers. But this explanation must also be rejected. The appointment of a Curator for an unappropriated Inheritance is indeed not inconceivable according to the Roman Law, but it is neither necessary nor customary. The numerous passages in which the special Right of an unappropriated Inheritance is mentioned, so little presuppose the existence of such a Curator, that he is not even alluded to in any of them. According to the exigencies of the case, a Curator may also be nominated on behalf of the Property of an Absentee, but without conceiving that property as a Juristical Person. Neither the Absentee by his absence, nor the future Heir by his temporary concealment, can be reduced to a simple Fiction: both continue to exist as individual Men, as Natural Persons. If the treatment of an unappropriated Inheritance as a Juristical Person were strictly carried forward, the Inheritance must be allowed to enter into Jural Relations of all kinds, and indeed one might go so far as to admit that a foreign Testator directly procured Inheritances or Legacies for an Inheritance in abeyance. All this, however, never entered into the minds of the Roman Jurists.

The simplest and most natural treatment of this case was undoubtedly, from the date of the Testator's death, to regard the Inheritance as the Estate of a still unknown Owner, who would, however, certainly become known at some time or other, and to whom everything would then have to be imputed which might have happened to the Estate during the intervening period. This natural treatment of the matter is that which the

... POSTEA DOMINIO AD ALIQUEM DEVOLUTO . . . UTPUTA HEREDITAS JACEBAT, POSTEA ADIIT HEREDITATEM TITUS . . . QUOD EO TEMPORE NEMO DOMINUS FUERIT."

Roman Law will not allow to prevail, inasmuch as it sets up in its stead a Fiction under two different expressions. At one time it is said that the Inheritance itself represents a Person, and has dominion over the Estate, therefore over itself (*d*); at another, that the Inheritance represents the Deceased, and not the still unknown Heir (*e*). Both expressions, however, are without doubt completely synonymous (*f*), and constitute simply the contrast to the above-mentioned natural relation, according to which the Inheritance already belongs in reality to the unknown Heir, and is consequently identical with him (*g*).

The Romans were led, however, to this Fiction by the following consideration. When Slaves also belonged to an Inheritance (which indeed was rarely deficient in this respect), the Estate, even in its existing condition of abeyance, might nevertheless by their means be improved, because a Slave was generally competent to acquire Property for his Master, even without his knowledge. But there were forms of acquisition in regard to which, on account of their strict Civil character, special attention was paid to the Jural Capacity of the acquirer: if such acquisi-

(*d*) L. 22 *de fidej.* (46, 1, note (*a*)); L. 15 *pr. de usurp.* (41, 3) "NAM HEREDITATEM IN QUIBUSDAM *vice personae* FUNGI RECEPTUM EST;" L. 13, § 5 *quod vi* (43, 24) "DOMINAE LOCUM OBTINET;" L. 15 *pr. de interrog.* (11, 1) "DOMINI LOCO HABETUR;" L. 61 *pr. de acqu. rer. dom.* (41, 1) "PRO DOMINO HABETUR;" L. 31, § 1 *de her. inst.* (28, 5). See also note (*f*).

(*e*) *Pr. J. de stip. serv.* (3, 17) "*Personae defuncti vicem sustinet*," § 2 *J. de her. inst.* (2, 14) "*Personae vicem sustinet non heredis futuri, sed defuncti*;" L. 34 *de acqu. rer. dom.* (41, 1) "*Hereditas enim non heredis personam sed defuncti sustinet*;" L. 33, § 2 *cod.* "*Ex persona defuncti vires assumit*." Some doubt might arise from L. 24 *de nozat.* (46, 2) "*Transit ad heredem cuius personam interam hereditas sustinet*." But the contradiction of this text, according to the Florentine reading here extracted, with the preceding texts is so palpable and insoluble, that on this account the *Vulgata transit ad heredem illius, cuius personam*, avoiding as it does this contradiction, is unquestionably preferable.

(*f*) This identity of the two expressions becomes particularly clear from a text in which both are placed together, so that the one is obviously merely intended to explain and more closely define the other. L. 31, § 1 *de her. inst.* (28, 5) "*Quia creditum est hereditatem dominam esse, (et) defuncti locum obtinere*."

(*g*) This contrast is in two passages (note (*e*)) distinctly expressed.

tions were intended to be effected through a Slave, whose Capacity of Acquisition was generally dependent on that of his Master, a known and Jurally capable Master was pre-supposed, if the acquisition were not to be deemed invalid, or at least if its validity were not to remain questionable. Amongst these strict Civil acquisitions was included the Institution of a Slave as an Heir, inasmuch as the validity of such an Institution depended on whether the Slave had a Master capable of being instituted Heir at the time of setting up the Testament (*h*). Precisely the same thing was maintained with respect to the acquisition of a Credit by the Stipulation of a Slave; certainly also with respect to the acquisition of Ownership, when the Slave himself was permitted to Mancipate a thing, except that this case is no longer met with in the Justinian Law. For the sake of such acquisitions, restricted by strict legal forms, the Romans introduced the above Fiction, which made it possible to determine the validity of the transaction with certainty, since it was now made dependent on the Jural Capacity of a known Testator, whilst the Capacity of a still unknown Heir was uncertain. A few examples will serve to make this practical interest of that Fiction apparent. If a Roman, who was capable of executing a Testament, died without executing one, and a third person now instituted a Slave of this Inheritance in abeyance as Heir, the Institution was deemed valid by force of our Fiction, because it related back to the Capacity of the Deceased; but without the aid of this Fiction its validity would have been doubtful, since the unknown intestate-Heir might turn out to be an *INTESTABILIS*, who was not capable of being instituted Heir (*i*). If a Soldier died leaving a Testament, and this was still unopened and the Inheritance, therefore, still unacquired, any third person could certainly institute a Slave belonging to this Inheritance as Heir, because according to our Fiction the institution was imputed to the Deceased; but apart

(*h*) Ulpianus, XXII. § 9, L. 31 *pr. de her. inst.* (28, 5). This principle is introduced here in direct connection with our Fiction.

(*i*) L. 18, § 1; L. 26 *qui test.* (28, 1). At least according to the ancient law an *Intestabilis* could not be instituted Heir. Cf. Marezoll, *Bürgerliche Ehre*, p. 90.

from the Fiction the institution would have been of doubtful validity, inasmuch as the still unknown Testamentary-Heir of the Soldier might turn out to be a Peregrinus (*k*), who had no *testamenti factio* with that third person. Just the same rule was maintained when, in the like case, a Slave of Inheritance concluded a Stipulation with the formula SPONDES ? SPONDEO : for this was deemed valid by referring the transaction to the deceased, although it would have been invalid if it had been referred to a foreign Testamentary Heir (*l*). Moreover the Fiction in question had also this entirely consistent consequence, that when the Slave of Inheritance who had made the acquisition was himself bequeathed as a Legacy, the acquisition nevertheless belonged to the Inheritance, and did not pass, together with the Slave, to the Legatee: a proposition, however, which was subject to an exception as regards the acquisition of a Usufructus by means of a Legacy (Note (*r*)).

Such were the cases for whose sake alone the Fiction was devised ; and it is of them that the greatest number and the most decisive of the texts already cited, speak (*m*). No doubt there are also some texts to be found in which use was made of that Fiction in regard to certain acquisitions by Slaves which were not subject to the strict rules of the *JUS CIVILE*, as, for example, those obtained by simple Tradition, or by means of a *BONAE FIDEI CONTRACTUS* (*n*); and other texts again in which it was

(*k*) L. 13, § 2 *de test. mil.* (29, 1).

(*l*) Gaius, III. § 93.

(*m*) Concerning the acquisition by Slaves generally, L. 61 *pr. de adqu. rer. dom.* (41, 1) : concerning the stipulation by Slaves, *pr. §. de stip. serv.* (3, 17) ; L. 33, § 2 ; L. 34 *de adqu. de rer. dom.* (41, 1) ; cf. L. 18 *pr. § 2 de stip. serv.* (45, 3) : concerning the institution of Slaves as Heirs, § 2 *J. de her. inst.* (2, 14) ; L. 31, § 1 ; L. 52 *de her. inst.* (28, 5) ; L. 61 *pr. de adqu. rer. dom.* (41, 1). If an Heir was instituted who had indeed the *testamenti factio*, but was either wholly or partially destitute of Capacity (*Coelebs* or *Orbus*), a Slave of the Inheritance might unconditionally acquire the thing bequeathed to him from the Inheritance. Whoever finally obtained this thing, just as the entire Inheritance, must refer it back to the period of entering upon the Inheritance. L. 55, § 1 *de leg.* (2, 31).

(*n*) L. 16 *de O. et A.* (44, 7). Cf. Arndt's *Beiträge* (1, 208) ; L. 33, § 2 *de adqu. rer. dom.* (41, 1) ; L. 1, § 5 *de adqu. poss.* (41, 2) ; L. 29 *de captiv.*

applied without reference to acquisitions by Slaves (o). But these were mere casual applications of a Rule devised for wholly different purposes. This is manifest from the fact that amongst all these cases there is not a single one for which the Fiction had any practical value, that is to say none in which precisely the same result might not have been asserted, if the Deceased had been treated during the period that the Inheritance was in Abeyance), or even the future Heir (who is clearly the best entitled), as the present Owner of the Estate.

As regards the correctness of this assertion, one might perhaps be deceived by those texts in which that Fiction is propounded in such general terms, that the restricted application just mentioned seems but little suitable to it (p). The generality of the Rule indicated by these indefinite expressions is, however, really only apparent; this is proved by certain other more accurately expressed texts which ascribe only a relative, and therefore restricted, activity to the Fiction (q). Indeed even in the cases of acquisition by Slaves, for which the Fiction was properly speaking devised, it does not prevail wholly without exception (r); hence,

(49, 15); L. 15 *pr. de usurp.* (41, 3); L. 11, § 2 *de acceptilat.* (46, 4). Cf. also the following texts, which apply the Rule without expressly saying so:—L. 1, § 6 *de injur.* (47, 10); L. 21, § 1; L. 3, *pr. § 6 de neg. gestis* (3, 5); L. 77 *de l. O.* (45, 1); L. 1, § 29 *de pos.* (16, 3).

(o) L. 22 *de fid. juss.* (see above, note (a)); L. 24 *de novat.* (46, 2); L. 13, § 5 *quod vi* (43, 24), where this ground is only asserted along with others; L. 15 *pr. de interrog.* (11, 1). Cf. also Appendix IV. note (b).

(p) This apparently general expression of the Fiction is found in L. 22 *de fidej.* (note (a)); L. 24 *de novat.* (46, 2); L. 13, § 5 *quod vi* (43, 24); L. 15 *pr. de interrog.* (11, 1); L. 31, § 1 *de her. inst.* (28, 5); L. 34 *de adqu. rev. dom.* (41, 1); § 2, *f. de her. inst.* (2, 14).

(q) *Pr. f. de stip. serv.* (3, 17) "IN PLERISQUE;" L. 61 *pr. de adqu. rev. dom.* (41, 1) "IN MULTIS PARTIBUS JURIS;" L. 15 *pr. de usurp.* (41, 3) "IN QUIBUSDAM."

(r) If a Slave of the Inheritance entered into a Stipulation, it operated only conditionally, and was not acquired till some one entered upon the Inheritance. L. 73, § 1 *de l. O.* (45, 1). If something was bequeathed to a Slave of Inheritance, this Legacy as a rule was acquired from the Inheritance immediately; but if a Usufructus was bequeathed, the acquisition was deferred to such time as the Slave, in consequence of the Inheritance being entered upon, received a distinct Master, whether this Master happened to be the instituted

however, it becomes all the more evident that the general language of the texts above cited (note (*p*)) ought not to be too literally understood.

Doubtless there is still a remarkable and practically important legal principle, outside Slave Law, upon which that Fiction could have exercised some influence in the Ancient Law. If a Testator bequeathed a USUCAPIO which had commenced, but had not been completed, strictly speaking the USUCAPIO must be held to be interrupted, because an Inheritance is not capable of Possession. But inasmuch as this notion had led to grievous results, it was accordingly assumed as a *JUS SINGULARE*, that the USUCAPIO not only continues unbroken, but that it may even be completed before the entry of the Heir upon the Inheritance (*s*). It might perhaps be supposed that this practically important proposition was established on the basis of our Fiction, and this might have been important before Justinian's time in the example of a Soldier's Testament above cited; for if the USUCAPIO was attributed to the Deceased, its completion was quite possible, but if attributed to a foreign Testamentary-Heir (who personally could not have enjoyed the Usucapio), it was impossible. Nevertheless in none of the texts just cited is any assistance derived from that Fiction, but the principle concerning USUCAPIO is rather represented as one completely subsisting by itself: doubtless because the whole Fiction generally had only purely Jural Relations for its subject, and therefore not such Relations as directly pre-suppose a Human consciousness and dealing, to which class Possession correctly belongs (*t*).

Heir himself or the person to whom the Slave was bequeathed, for then the acquisition is never reckoned in the Inheritance. L. 1, § 2 *quando dies usufr.* (7, 3); L. 16, § 1 *quando dies leg.* (36, 2).

(*s*) L. 31, § 5; L. 40; L. 44, § 3 *de usurp.* (41, 3); L. 30; *pr. ex quib. causis Maj.* (4, 5).

(*t*) L. 1, § 15 *si is qui test.* (47, 4); L. 61 *pr. § 1 de adqu. rer. dom.* (41, 1); L. 26 *de stip. serv.* This last text has likewise been found in another place. *Fragm. Vatic.* § 55. It was a consequence of the Inheritance being incapable of possession that it could not be stolen, and therefore also that the *FURTI ACTIO* could not be acquired. L. 68, 69, 70 *de furtis* (47, 2); L. 2 *expil. hered.* (47, 19).

The results of this inquiry, concerning the Inheritance as a Juristical Person, may now be summed up in the following propositions:—

Firstly.—An Inheritance in Abeyance, even from a Roman point of view, was no Juristical Person; and when it is compared in one text with a Corporation (note (a)), the meaning simply is that a Fiction was employed in the one case as in the other. This Fiction, however, in each of the two above-mentioned cases had other grounds and other consequences, and consequently a different character.

Secondly.—The peculiar treatment of an Inheritance in Abeyance by means of a Fiction was restricted amongst the Romans to facilitating certain acquisitions by Slaves belonging to the Inheritance.

Thirdly.—There is therefore no justification for exhibiting that peculiarity of an Inheritance in Abeyance as an essential part of the Modern Law, inasmuch as that Law takes no cognizance generally of acquisitions by means of Slaves.

SECTION 103.

Distinctions in the Combination of Jural Relations with Persons.

Hitherto the inquiry has been as to who may generally be the Subject of a Jural Relation; in the first place, according to the general character of the Jural Relation itself, and next, according to the Positive Rules of Law, whereby that natural Jural Capacity is partly restricted and partly artificially widened. This end having been attained there arises the further question, how Jural Relations may be combined with Subjects in themselves qualified for that purpose. This combination happens in a regular manner by some event affecting the particular individual, therefore by means of human action or suffering. Thus every one may acquire Ownership by Tradition or Occupation; become a Creditor or Debtor by Contract; a Debtor also by the Delicts which he commits, and a Creditor by those which are perpetrated against him. All this is equally true of Juristical Persons, only with this distinction, that the acts of their representatives will be regarded as their own acts. The general character of the facts which lead to this regular combination of Jural Relations with Persons will form the subject of the following Section.

But there is also a different, more artificial, form of combination which is not based upon human action or suffering of a particular specified Person, but upon a general quality compatible with the most distinct individuality. This more unusual form of combination is produced in certain kinds of Jural Relations by their own peculiar nature; in others it may happen by the exercise of individual Will-power in particular cases of application. Such an individual Will-power, however, is seldom met with in contractual Agreements, which, for the most part, are meant to satisfy a clearly conceived and closely defined view of present interests: more frequently it appears in a Testamentary disposition, in

whose nature it moreover lies to operate upon a not very closely determinable future, and which, therefore, easily loses itself in the wholly Indefinite and Boundless. But a Testament which should attach a Right of Succession to general qualities instead of to a definitely conceived Personality (*PERSONA INCERTA*), was prohibited in the older Roman Law, and Justinian was the first who established its validity (§ 93 (g)).

The general quality to which, in these irregular cases, a Jural Relation is at first attached in order through it to appertain to the Person in whom this quality is found, appears more particularly in the following forms:—

I. *As a Political Relation.*—If, for instance, in Rome a Legacy was bequeathed to the Emperor (*QUOD principi RELICTUM EST*), it was interpreted as not referring to the Emperor existing at the time of the execution of the Testament, but to whomsoever might be Emperor at the date of the acquisition of the Legacy. The Legatee was thus, properly speaking, an *INCERTA PERSONA*, and the Legacy was consequently invalid; that it was, nevertheless, allowed to prevail in ancient times may be explained by the fact, that the exemption of the *Fiscus* from all the customary restrictions of the Private Law was transferred to the person of the Emperor (§ 101). Hence, therefore, the Rule was just the reverse in regard to a Legacy bequeathed to the Empress. This was deemed to refer to the Empress existing at the date of the Testament, so that it oftener than a Legacy bequeathed to the Emperor never came into operation: the reason for this was undoubtedly that if the instrument had been interpreted in that freer manner (*) it would have been invalid under the general prohibition relating to an *INCERTA PERSONA* (a). A similar case occurs in regard to a *FIDEICOMMISSUM*, which assigned a rent to the Priest and Servitors of a specified Temple, This was interpreted as a yearly rent in perpetuity, payable to the persons holding those Offices at each period of payment. It was pro-

(*) *I.e.* Applicable to the case of a Legacy bequeathed to the Emperor. *Trans.*

(a) L. 56, 57 *de leg.* (2, 31).

tected against the prohibition of an INCERTA PERSONA, by the Temple itself being regarded as the true Successor, which indeed was a Juristical Person, but as such a "CERTA PERSONA" (§ 93 (*m*)), so that only the mode of appropriation of the money by the persons expressly named (Priest and Servitors), was intended to be denoted (*b*).

The same rule would prevail at the present day if an Annuity were founded by a Public Official, which was intended to be drawn by each of his Successors in Office.

II. *As a Private Law Relation.*—To this class belong Praedial Servitudes, not in accordance with individual Will-power, but according to the general character of the Law Institute itself (*c*); so in like manner, treated according to the same analogy, the AQUA EX CASTELLO, which is no Servitude, because it is not based upon private Will, but upon the Ordinance of a Public Power (*d*). Finally, also, the Right of the Owners of a Colony with respect to the Colonists belonging to it by Birth (§ 54).

Far more frequent and important is this form of combination in the German Law. To it belong most of the Real Servitudes, both with respect to the Persons entitled, as to those who are bound by them (*c*); also the Right of Interdict on the part of those entitled, which is always connected with the Ownership of

(*b*) L. 20, § 1 *de ann. leg.* (33, 1) "RESPONDIT, SECUNDUM EA QUAE PROPONERENTUR, *ministerium nominatorum designatum* (not the individuals living at the date of the Testament), *cacterum datum Templo.*"

(*c*) For instance, the Praedial Servitudes in relation to the persons entitled, because the title exists in the Owner of a parcel of land for the time being as such; not in relation to the persons bound, because the Servitude must be recognised and respected, not merely by the Owner of the PRAEDICUM SERVIENS, but wholly in like manner by every other person.

(*d*) L. 1, § 43 *de qua* (43, 22).

(*e*) The Right to Real Servitudes is for the most part an ANNEXUM of Ownership in land but not always, for there are, for example, many personal Tithe-rights, and, in many countries, personal Service-rights. The Obligation to Real Servitudes is, in like manner, for the most part an obligation connected with the Ownership of land, as, for example, the Ground-rent in money or kind, or service: not so a Tithe, which is rather very commonly a pure JUS IN RE, for instance, the right to take away the tenth sheaf from a particular field, without any positive obligation on the person liable to the Tithe to do anything on his side.

Land; and lastly, the Right of Villeinage. The Prussian Law denotes these as Things' Rights in relation to the Subject, and distinguishes them by this addition from the true Things' Rights, which it calls such in respect of their Subject matter, or Rights in Things (*f*).

But a combination of this kind may also occur by the exercise of the individual Will. Thus, for example, exemption from Land Tax, which may be conferred by special grant upon a particular Estate, or upon a class of Estates; that is to say upon all those who will enjoy the future Ownership of such Estates.

III. *As a mere factitious relation.*—To this category belong in the Roman Law the Obligations of every one who is accidentally in the condition of being able to restore or produce some thing, therefore the relation of a Defendant in the *ACTIONES IN REM SCRIPTÆ* (or *QUOD METUS CAUSA* and *AD EXHIBENDUM*). In the German Law the Right of Interdict on the side of the persons bound by it, which furnishes the negative Obligation for every inhabitant of a specified district (without reference to any one of his Jural Relations in particular) to obtain certain professional services from no other vendor except the person entitled to the Interdict (*). These cases again relate to the common nature of the Law-Institutes here mentioned. But just in the same way may a Right be attached to such a simple factitious relation by individual Will-power, for instance, by means of a privilege granted by the Sovereign Power.

The different forms of combination of Jural Relations with determinate Persons which are here grouped together, have recently been represented as Juristical Persons (*g*), quite erro-

(*) Such rights are not unfamiliar to the student of Indian Law; for barbers, priests, sweepers, and a few other classes claim exclusive privileges of this sort, founded on ancient custom. *Trans.*

(*f*) A. L. R. Th. 1. tit. 11. § 125—130, with the addition that in Laws which speak of Things' Rights without a closer definition, the second meaning of the expression given above (as the more usual) is to be admitted.

(*g*) Heise, *Grundriss*, 1. § 98, note 15. "A Juristical Person is everything apart from the individual Man which is recognised in the State as a proper Subject of Rights. Every such Person must, however, have some one 'substratum' which forms and represents the Juristical Person. This substratum

neously as I believe. For, as regards the Yearly Rent assigned to a certain Official status, or in regard to a Praedial Servitude, the person entitled must always be an individual Man, therefore a Natural Person; except that the manner in which the Possessor of the Right may be ascertained at each period of time, therefore the mode in which one may obtain that Right, is here in a very peculiar and distinct way distinguished from the ordinary Rules. There is no trace here of Representation, which is inseparable from every Juristical Person. The Possessor of a Praedial Servitude, for instance, exercises a power of disposition over it just as he exercises over every other Right of Property, with the most absolute freedom of Will; and he may relinquish it in favour of the neighbour, who is restricted by it, either by gift or sale. In like manner the Official, to whom a Rent is assigned, may freely dispose of it during his period of service, since he does not administer it for a suppositious Person, but possesses it as his own Property, like every other Right. That he cannot relinquish the Rent in favour of his Successors is a very similar limitation to that imposed on a Legatee, that the house bequeathed to him must be restored on his death to a FIDEICOMMISSARIUS. In both cases there is no occasion to regard the Subject of the Right as a Juristical Person.

Connected with the distinctions in regard to the combination of Jural Relations with Persons is the question also as to the possible multiplying of Subjects in one and the same Jural Relation. Here we encounter the greatest diversity. Many Jural

may consist (1) of Men, and, in fact, of one individual at a time (in the case of Public Offices); (2) of Things, namely, Parcels of Land (in regard to Servitudes and our German subjective Things' Rights), and the like. We may accept the established definition while we reject this subsumption of cases, because the Subject of a Praedial Servitude and the like is in point of fact always an individual Man, therefore nothing outside the individual man. Hasse expresses himself to the same effect: "that, for example, the PRINCERS of the Roman Jurists was regarded as a Juristical Person, that is to say, was conceived as perpetual, is evident from L. 56, D. *de legat. 11.*" (*Archiv*, vol. 5, p. 67).

Relations can only be completely referred to a single Person as their Subject, such as Marriage, Usus, and Praedial Servitudes^(h). Others may be referred at will to several, but nevertheless only to a partial extent, such as Ownership, Usufruct, and Emphyteusis. Others again with greater freedom of Will, wholly as well as partially, such as Obligations and Pledges. Such a general statement of the various possible cases must suffice for this place, because a closer explanation of this subject can only be undertaken in a profitable manner by considering each Law-Institute by itself.

END OF VOL. II.

(h) For instance, if several neighbours have a Right of Way over the same piece of land, they are not (separately or collectively) Possessors of one and the same Right, but each individual has his Servitude as a complete Right existing for himself, without any connection with the Servitude of the rest. That these Rights can co-exist with respect to the same Subject, without coming into collision with one another, lies in the mode in which Ways are usually used, therefore in the factitious quality of this particular Servitude.

APPENDIX III.

The Vitality of a Child, as the condition of its Jural Capacity.

(SECTION 61, note (t).)

It is a very general assertion of our Lawyers that the fact of a living Birth is not sufficient for the Jural Capacity of a Child, but that there must still be added thereto the Capacity for Life, or Vitality. By this, however, they mean the following:—There is a certain period of pregnancy, before the expiry of which a living Birth may indeed occasionally occur, but nevertheless with the consequence that such a Child can at most live only some hours or days. By reason of this Incapacity for the longer duration of life, all Jural Capacity must be denied to the Child, even for the short time during which it actually lives. In order to examine this assertion it is necessary, in the first place, to explain a wholly different proposition (a), appertaining to Family Law, which has laid the innocent foundation for that doctrine.

According to the Roman Law a Child entered at Birth into Paternal Power, if its parents, at the period of conception, lived in a Marriage valid according to the Civil Law (b). This factitious condition of Paternal Power, upon which so many other rights depend, resolves itself into the following elements:—(1) Natural Paternity, *i.e.*, the fact that a particular Man is the true progenitor of the Child; (2) Natural Maternity; (3) a valid Marriage between the true Father and the true Mother; (4) the existence of this Marriage at the moment of conception. Of these four elements the second and third present no difficulty: both these facts will be disputed in only the rarest cases, and where they are disputed, there the ordinary proof, just as in regard to every other contested fact, is possible and requisite. It is otherwise maintained in regard to the first and fourth elements. For conception is a secret of Nature which first shows itself after a considerable period in its outward effects, and in regard to which a proper proof is not merely difficult and

(a) It is therefore discussed here, in favour of the inquiry concerning Vitality, to some extent by way of anticipation, although its proper place would have been in the System of Special Laws, and, in fact, in that relating to the origin of Paternal Power.

(b) *Pr. J. de patria pot.* (1, 9); Ulpian, v. § 1.

rare, but is wholly inconceivable (*c*). How was this difficulty then to be treated in the Positive Law? It might perhaps be ordained that something similar to proof is obtained, when a Judge is required to determine, according to all the circumstances, of what Father and at what period the Child might probably have been begotten. This treatment, however, appears for the following reasons to be most questionable. In the first place, on account of its great uncertainty. Cases may well indeed occur in which the external grounds of probability for or against Paternity are so strong, that they must also appear to an impartial mind as almost amounting to certainty. But these are precisely the cases in which the subject of Paternity, as a matter of dispute, is seldom met with, and ordinarily there will remain so great an uncertainty that a decision could not be arrived at without a very free exercise of judicial discretion (*d*). In the second place, however, this discretion becomes here all the more dangerous and unsuitable, because it concerns not only personal interests, but at the same time more general moral interests: the peace of the whole Family, and the honor of the Woman. For this reason the Roman Law has abandoned that mode of individual discovery, in accordance with the balance of probabilities, and on the contrary has struck out the following course. It proceeds upon the possible duration of pregnancy down to the birth of a living Child, in connection with which it must be assumed, according to practical experience, that a Child can certainly be born alive on the 182nd day after conception, but also at a much later period, and even down to the expiry of the tenth month (*e*). In ac-

(*c*) For instance, the acknowledgment by the Father, consequently also the affirmation on oath (*de veritate*), cannot prevail as proof, because even the Father cannot possibly have a personal knowledge of this fact, but only belief and trust, which in a lawsuit receive no consideration.

(*d*) It might be objected that this proves too much, for in regard to the Action for Alimony, recognised in practice, proof of this sort would surely be admissible, and it is quite suitable to it. This assertion, however, would be quite erroneous, for what has to be proved in an Action for Alimony is not the fact of procreation, but the completely different and very easily provicable fact of cohabitation. This fact by itself supplies in that case the basis of the Obligation, and not because it furnishes a presumption of procreation; for if this presumption were drawn, it would be to presume something impossible, and therefore contrary to common sense, namely, that the same Child can in truth be begotten by several fathers.

(*e*) L. 3, § 11, 12 *de sins.* (38, 16) "POST DECEM MENSES MORTIS NATUS, NON ADMITTETUR AD LEGITIMAM HEREDITATEM. DE EO AUTEM, QUI CENTESIMO OCTOGESIMO SECUNDO DIE NATUS EST, HIPPOCRATES SCRIPSIT, ET D. PIUS PONTIFICIBUS RESCRIPTIS, JUSTO TEMPORE VIDERI NATUM: NEC VIDERI IN SERVITUTE CONCEPTUM, CUM MATER IPSIUS ANTE CENTESIMUM OCTOGESIMUM SECUNDUM DIEM ESSET MANUMISSA." The ten months' Rule is founded on the Twelve Tables (Gellius, III. 16), and it has been inserted in the Fourth Table. The 182 days' Rule is confirmed even in the text itself by Hippocrates and a Rescript of Antoninus. The question

cordance with this physiological rule 182 days in the first place, and then ten months, are to be reckoned back from the ascertained date of Birth. There thus arises an interval of four months. If within these four months, or within a portion of the same, the proved Mother of a child has lived in wedlock, the Husband is presumed to be the Father of the Child, otherwise the Child, to speak juristically, has no Father (*f*). This is the true sense of the important rule of law: PATER IS EST QUEM NUPTIÆ DEMONSTRANT (*g*). This presumption prevails both for and against the Father, so that each party can appeal to it who has an interest therein. It is not required to be supported by the probability arising from the antecedent circumstances, but it is also not permitted to be contested with reference thereto. It

has been asked, What had the Pontifices to do with this matter? Cujacius thinks they had the care of legitimate Births (in L. 38 *de V. S. Opp.* VIII. 519), which appears to me to be too modern a view. The text itself, however, says very clearly that the question related to the son of a Slave woman: no doubt it was desired to admit him to a Sacrificial or Priestly Office, for which only Freeborn persons were eligible. Concerning the period of 182 days, compare below, § 181, note (*h*); L. 12 *de statu hom.* (1, 5) "SEPTIMO MENSE NASCI PERFECTUM PARTUM, JAM RECEPTUM EST PROPTER AUCTORITATEM DOCTISSIMI VIRI HIPPOCRATIS: ET IDEO CREDENDUM EST, EUM QUI EX JUSTIS NUPTIIS SEPTIMO MENSE NATUS EST, JUSTUM FILLIUM ESSE." PERFECTUS PARTUS can in this connection only mean an actual living Child, in contradistinction to an ABORTUS. What it might also signify will be mentioned below (note *y*). Lastly, in support of the above Rule, is the old Rule of Law that the Widow should not conclude a new Marriage till ten months after the death of her Husband, because otherwise there would be fear of a SANGUINIS TURBATIO. L. 11, § 1 *de his qui not.* (3, 2); L. 2, C. *de sec. nupt.* (5, 9). An individual application likewise occurs in Nov. 39, C. 2, in which Justinian refers in the severest language to a Widow who bore a Child eleven months after the death of her Husband.

(*f*) For instance, according to the clear rule of the more Ancient Law. The more Modern Law has admitted in this matter two modifications which facilitate legitimacy:—(1) When the Child is born less than 182 days after a concluded Marriage, it will nevertheless be deemed legitimate—that is to say, in this case the recognition by the Husband supplies the deficiency in the period. L. 11, C. *de nat. liberis* (5, 27). (2) Children born in concubinage (NATURALES) were legitimized by a subsequent Marriage; here, therefore, the recognition also supplied the presumption which otherwise was only based on that period. L. 10, 11 C. *natur. liberis* (5, 27).

(*g*) L. 5 *de in Jus Vocando* (2, 4). It does not, therefore, mean, as many quite wrongly express, PATER IS EST QUEM *Justae* NUPTIÆ DEMONSTRANT. One has in this matter confounded a twofold and wholly different influence of Marriage upon the condition of the Children: (1) The Marriage existing at a certain period establishes the factum of Paternity, and therefore it is immaterial whether it is JUSTÆ NUPTIÆ or not, so that, for example, the Roman Citizen also who took a PEREGRINA in Marriage, was regarded as the true Father of his lawful Children. All that was necessary was that the Marriage should not be *prohibited*, e. g. on account of incest, for then it was invalid, that is, it did not exist, and the children were not children of the Husband, § 12 J. *de nupt.* (1, 10). (2) If the Marriage was at the same time a Civil Marriage, the further consequence followed that the children were born in Paternal Power.

prevails rather *per se* as complete proof, and it can only be weakened by the proof of absolute impossibility, such, for instance, as results from a long unbroken absence of the Husband (*h*). Whether the physiological presumptions of that rule are, however, correct, cannot naturally be investigated here. But the avoidance of individual judgment which underlies it must be recognized as salutary in the highest degree, when one regards how vacillating and contradictory are the opinions of physiologists, whether expressed in theoretical writings, or in the decisions of the Medical Faculties (*i*). To be specially praised, moreover, is the important scope of the admitted period. True under its protection many an actually illegitimate Child may obtain the Rights of one born in wedlock; but, in the first place, the danger of an opposite wrong is in itself more important, and, in the next, that danger surely is small in comparison with the danger that, during the existence of a Marriage, children should in point of fact be begotten by a strange Father, and should nevertheless be acknowledged as legitimate; and this last and greater danger cannot and will not be counteracted, because every attempt in that direction would only lead to far greater evil.

(*h*) If, therefore, for example, a Child born on the 182nd day should fully grow up, so that one might assume that its conception had taken place before Marriage, the Child must nevertheless be regarded as the offspring of the Husband; if, on the other hand, the Child were born before that period, it was not recognised as the Husband's, even if the Surgeon, by reason of the Child's immature condition, maintained the possibility of conception having taken place during Marriage. In like manner, if a Child were born nearly ten months after the death of the Husband, the immature condition of the Child would not prevent it from being recognised as legitimate. The prevailing opinion is wholly opposed to these assertions, Hofacker, 1, § 544; Struben, *Rechtl. Bedenken*, 5, No. 86. The proof of the commission of adultery certainly cannot invalidate the above presumption.

(*i*) Amongst other things, we should not suffer ourselves to be deceived by the circumstance that many Medical works fix some one period as the extreme limit before which a vital Birth is not possible; for they nevertheless often admit that there are abnormal cases in which a very immature Child by extraordinary and skilful care may be preserved. Thus *Æltze, De partu vivo vitali*, § 37, quotes from named authors two very remarkable cases, in one of which a woman gave birth to a Child within six months of a former delivery, and the life of the child was preserved, although it was certainly less than 182 days in the mother's womb. Concerning the opinions of Medical men, following mostly each other, cf. Glück, 28, p. 129 *et seq.* It is particularly gratifying to me to find how the views here set forth coincide with the opinion of one of the most esteemed Medical writers—A. Henke, *On Early and Later Births: Treatises on the Province of Medical Jurisprudence*, vol. 3, pp. 241—307. It is true that he lays down the normal limits of possible Pregnancy (pp. 265, 284), but he admits that anomalous cases occur which destroy all certainty of speculation (pp. 271, 292 *et seq.*). His conclusion is that the most decided praise is due to legislation, particularly to that of the Roman Law, for excluding the uncertainty of individual judgment by positive Rules (pp. 271—274, 303, 304). He particularly approves also of the considerable extension of the period admitted in the Roman Law.

All this is now clearly and positively determined in our Law Sources, and our Writers also have never wholly misunderstood it, although it has not unfrequently, owing to the want of separation of the Ideas and Rules interwoven into one another, been made unnecessarily obscure, or else been sought to be weakened by exceptions in individual cases. But these Writers have not been content to abide here, they have actually superadded thereto the following propositions.

If it should at any time occur, say they, that a Child were nevertheless born alive before the 182nd day after its conception, it would be incapable, at least according to the legally recognised physiological rule, of continuing alive for any lengthened period, and we cannot, therefore, assign any Rights to it. Hence, for Jural Capacity, not merely Life but also Caapacity for Life, or Vitality, is requisite, so that the Child not capable of Life, has no Rights, and is treated rather like one born dead, an ABORTUS (*k*). Before this doctrine can be fundamentally examined, it is necessary to mention a still further special modification of it. It has undergone, for instance, at times a wider development, for it has been said that Children who are born in the seventh month are capable of living, while those in the eighth month are not so (*l*). But this new development has in later times, for the most part, been abandoned (*m*).

I will now endeavour to show that the above stated doctrine of Vitality, as a condition of Jural Capacity, has absolutely no foundation in our Law.

It must be rejected according to the general notion of Jural Capacity. For this notion is bound up with the mere existence of every living Being, without reference to its expectation of continuing this existence for a longer or shorter period. What then was the ground for a restriction on this side, and what was its limits?

It is inadmissible if we regard the contents of our Law Sources. The occasion for it was apparently the positive Roman Rule of 182 days, but a justification of that doctrine certainly does not lie in this Rule. For the Romans applied the 182 days Rule exclusively with the view of establishing a presumption in favour of Paternity, but clearly not, as those Lawyers intend, with the object of excluding certain living Beings from the enjoyment of

(*k*) It is thus distinctly stated by Haller, *Vorlesungen über de gerichtl. Arzneiwissenschaft*, vol. 1, Bernæ, 1782, kap. 9, § 3, 7, and by Cöltze, *De partu vivo vitali*, § 15, 19.

(*l*) Cujacius, in *Paulum*, IV. 9, § 5 "QUI ANTE SEPTIMUM, vel octavo mense PRŒDEUNT, IMPERFECTI SUNT nec vitales. NONO AUTEM, ET DECIMO, ET UNDECIMO A CONCEPTIONIS DIE legitimi partus FIUNT." He regards it as a practical Law, and connects it clearly also with Jural Capacity. How this question at one time became the subject of a legal contest will be mentioned below from Gellius.

(*m*) Haller, in *loc. cit.* § 9.

Human Rights. The texts which most closely touch our question are obviously the L. 2, 3, *C. de posthumis* (6, 29). These declare that a Child has a Capacity for Rights immediately upon a completed Birth, even should it die the instant (*illico*) afterwards, for example in the hands of the Midwife. There certainly lay here a ground for very closely distinguishing whether this speedy Death was the consequence of the absence of the innate Power of Life (Vitality), or of some external cause; but we do not find a word of this distinction, and it was certainly, therefore, not in the contemplation of the legislator. The reasons which are adduced by the opponents from the Sources are uncommonly weak, and are involved for the most part in an obvious circle, of which more will be said below in our review of the Writers.

That doctrine is moreover destitute of even the possibility of a true and proper application. The Child is not capable of living, it is said, which is born earlier than 182 days after its conception. But how are we then to ascertain the date of conception? Precisely because we are not able to ascertain it the Romans ordained that the computation should be reckoned back from the known, certain date of Birth. In order to extricate themselves from this obvious circle, those Writers have but one resource, which certainly also underlies their opinion. They are obliged to invoke the aid of the Surgeon, who must declare that the Child appears so immature that it could not have existed in the mother's womb for 182 days, and we are then to conclude from this that the Child is not capable of living. But in this treatment of the matter the number of days is quite uselessly placed in the middle; it merely serves in fact to completely veil the arbitrary character of that treatment, and it would be much more natural to allow the Surgeon to declare at once that the Child appears so immature that owing to this, its visible constitution, it cannot possibly live long; indeed the Medical testimony is irreconcilable with that close determination of the age, and it is impossible, therefore, that it could have formed the basis of the view of the authors of our Law Rule. For what Surgeon could in truth have the audacity to assert, that the Child produced before him had been exactly 181 days in the mother's womb, and neither 182 nor 183? According to this new application, however, it is also quite clear what a dangerous and uncertain individual decision is drawn into the matter wholly without necessity: therefore precisely that evil which, in another relation, by the presumption of Paternity, was rightly and intentionally guarded against in the Roman Law. May it not be objected that, if the fact of the life of the Child, even according to our own assertion, must be established, why not then the Capacity for Life?

But precisely in this matter a distinction is rightly observable.

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Life is for the most part an object for the perception of the senses, and can, therefore, like every other matter of fact be proved without risk by ordinary evidence; the decision as to Capacity for Life, however, must be determined by scientific rules, concerning which Medical men themselves are in the greatest doubt. It is moreover to be noted that those who contend for the opposite view, are yet, in the application of their rule, always compelled to tacitly add the condition, that the Child as a fact has actually died immediately afterwards. For if, for example, immediately after Birth a precise statement of facts were drawn up and sent for opinion to a Medical Faculty, and after several months an opinion were forwarded denying Vitality and Jural Capacity to the Child, but by extraordinary artificial nursing and care the Child had in point of fact been preserved, and subsequently attained a great age, surely no one would wish to push the vindication of that doctrine so far as to pronounce a Human Being devoid of Rights by reason of his want of Capacity for Life, who had actually already established the existence of this Capacity (*n*).

Besides many advocates of the doctrine of Vitality are likewise guilty of the following remarkable inconsistency. Suppose there is a fully mature and properly delivered Child born, and this Child also gives the clearest signs of life, but dies immediately afterwards. On the dissection of the corpse such an organical defect is found which would have rendered the longer continuation of life completely impossible. Here perhaps the want of Vitality is far more certain than in regard to mere immaturity, and yet in such a case the Jural Capacity is not disputed by most of the writers referred to. If, then, for the sake of consistency that doctrine were here also enforced, the danger of arbitrariness, therefore the uncertainty of Law, would undoubtedly be thereby largely increased.

With this inconsistency is finally associated a second, no less remarkable, which refers to the relation of the Civil with the Criminal Law. If one takes a wholly simple view of the matter, those who require a Capacity for Life in the Civil Law, and outside the same treat the newly born Child as dead, must also in the Criminal Law deny the possibility of an offence being committed against it, since no offence can be committed against a dead body. He who, therefore, requires Vitality in the Civil Law, and nevertheless, in regard to the killing of a non-viable Child, suffers a punishment to be incurred (though not the ordinary punishment of Death), is clearly inconsistent. In the Criminal Law the inquiry has taken a special turn for two reasons. In the first place, by reason of the expression "regularly formed" (*Glidmässigkeit*) occurring in the Carolina (Art. 131), which has very frequently

(*n*) Cf. the cases mentioned *ante*, note (*i*).

been understood to refer to Vitality. Secondly, because grounds were believed to exist for distinguishing Child-Murder properly so called (*i. e.* which was perpetrated by the Mother under certain circumstances) from other Murderous Crimes, and of treating it more leniently; hence also the want of Vitality was especially used with the view of warding off punishment from the Mother, but at the same time the question with regard to other cases of Murder of a newly born Child (for example by the Midwife) was omitted to be answered. That recently some Criminal lawyers have desired to make Vitality independent of a definite period of time is not to be considered as anything special, since even in the Civil Law, as above remarked, the period is only the apparent, and the Medical verdict is alone the practical, element of importance.

Proceeding to details the opinions of Criminal lawyers have thus arranged themselves. The one extreme party proceeds upon the assumption that the Capacity for Life is an essential element of the *CORPUS DELICTI*, so that by the want thereof all punishment must cease. So Feuerbach teaches, but only in regard to Child-Murder properly so called, and simply in consequence of the language of the Carolina (*o*): how he would treat other similar cases he does not permit himself to decide. This opinion is carried to its extreme point by Mittermaier (*p*). According to him all are Incapable of Life who are not able to preserve their life for long, whether this arises from premature Birth, or from organical defects; he includes in this category, moreover, such as, in particular cases cited by himself, may have actually survived till the fourth, and even till the tenth day: no Child of this sort can "be called a real living Being," it has simply the "semblance of an apparent Life:" "here it is certain that no Life was robbed from it." To this doctrine, which is by no means restricted to Child-Murder properly so called, is not to be denied a certain innate consistency; but I cannot help doubting whether Mittermaier himself has clearly conceived the very wide-reaching practical consequence of the same. In order to place on one side the indulgent consideration towards Child-Murderesses, whereby the particular question is only rendered obscure, let us assume the case where a Midwife, gained over by avaricious collateral Kindred, may have strangled a completely full-grown, and undoubtedly living child. She would remain, according to the doctrine just expounded, wholly exempt from punishment by the Criminal Judge, immediately as the Surgeon declared that the Child had such an organical defect, that even without the occurrence of that act of her's, the Child could not have lived long; she can at

(*o*) Feuerbach, § 237.

(*p*) Mittermaier, *Neues Archiv des Criminalrechts*, vol. 7, pp. 316—323, especially pp. 318—320.

most be punished by the Medical Authorities as a matter of discipline. Others desire to exclude, in the case of defective Vitality, only the ordinary punishments, and this, moreover, only in the case of Child-Murder properly so called: they are far from conceiving it as unpunishable, and, therefore, from depriving the non-vital Child of all protection of the Laws. Carozov especially belongs to this class, and he only so far permits a gentler treatment for such a case that he would spare a Child-Murderess from so harsh a punishment as that of the Sword (*g*). Others again finally pay no respect to the Capacity for Life, so that they allow the ordinary punishment to operate as regards the killing of even a non-vital Child (*r*). Accordingly the relation of those lawyers who, in the Civil Law, deny a Jural Capacity to a non-vital Child, to these various opinions of Criminal lawyers, is the following:—If they admit the opinion of Mittermaier, they are indeed consistent; if, on the other hand, they allow some sort of punishment, whether the ordinary or an extraordinary one, to be incurred by the act of killing, they are inconsistent, and that is the modern inconsistency to which special attention must be here directed.

If then upon all these grounds the admission of Vitality as a condition of Jural Capacity must be wholly rejected, it might be thought that it was only a discovery of Modern lawyers, and that it had not been conceived by the Romans. But this cannot be asserted; on the contrary, the Romans were well acquainted with this doctrine. This statement may at least appear strange when the non-juristical Roman writers do not always suitably distinguish the questions here propounded, notably the two questions, how many days after conception are necessary in order that a Child born alive may continue to live? and how long pregnancy itself can be generally prolonged? The texts of the

(*g*) Carpöv, *Pract. rer. crim. quæst.* 11, Nos. 37—43. Among the more recent belongs Puttmann, *J. crim.* § 339.

(*r*) To this category belong the following:—Martin, *Criminalrecht*, § 107, 122; Hencke, *Lehrbuch*, § 165; *Jarhe Handbuch*, vol. 3, p. 277; Spangenberg, *Neues Archiv des Criminalrechts*, vol. 3, p. 28. It would seem that in this inquiry one has not always sufficiently distinguished—(1) the condition of fact, (2) the illegal will. If the non-Vital Child is to be treated as a corpse, the opinion of Mittermaier is then correct; and the will is a matter of indifference. If, on the other hand, it is to be regarded as a living Being, the will has to be taken into account. If, for instance, the person doing the act was aware of the Incapacity of Life, his intention certainly assumes a milder character than in the opposite case, where he intentionally destroyed the further development of a living Being. From this point of view, the opinion of Carpöv could be defended against the objection of a mere capricious arbitrariness.

old writers concerning these topics, so far as they deal with the Law, are the following:—

Plinius, *His. Nat.* lib. 7, C. 4 (5):—"ANTE SEPTIMUM MENSEM HAUD UNQUAM *vitalis est*. SEPTIMO *nonnisi* PRIDIE POSTERIORE PLENILUNII DIE AUT INTERLUNIO CONCEPTI NASCUNTUR. TRALATITUM IN AEGYPTO EST ET OCTAVO GIGNI. JAM QUIDEM ET IN ITALIA TALES PARTUS *esse vitales*, CONTRA PRISCORUM OPINIONES. . . . MASURIUS AUCTOR EST, L. PAPIRIUM PRAETOREM, SECUNDO HEREDE LEGE AGENTE, HONORUM POSSESSIONEM CONTRA EUM DEDISSE, QUUM MATER PARTUM SE XIII. MENSIBUS DICERET TULISSE, QUONIAM NULLUM CERTUM TEMPUS PARIENDI STATUM VIDERETUR."

Here the expression VITALIS occurs twice, but I do not believe it is employed in our sense, namely to denote the Capacity of a living Being to continue Life. For the expression is so arbitrarily interchanged with NASCI and GIGNI, that it is certainly more natural to understand it to refer to a living Birth generally (without that finer distinction). Pliny's meaning therefore is: Children can never be born alive before the seventh-month after conception, in the seventh month only when the conception takes place upon certain days, determined by the changes of the moon: whether also in the eighth, is doubtful; in Ægypt it has always been admitted, in Italy only in Modern times. Lastly, the decision of the Praetor Papirius belongs to the wholly different question, how far at longest from the Birth of a Child can one reckon back in order to acknowledge legitimate conception. . . . According to this explanation the entire passage has no concern with our present disputed question.

Gellius, lib. 3, C. 16, "DE PARTU HUMANO. . . HOC QUOQUE VENISSE USU ROMAE COMPERI: FEMINAM BONIS ATQUE HONESTIS MORIBUS, NON AMBIGUA PUDICITIA, IN UNDECIMO MENSE, POST MARITI MORTEM, PEPPERISSE; FACTUMQUE ESSE NEGOTIUM PROPTER RATIONEM TEMPORIS, QUASI MARITO MORTUO POSTEA CONCEPISSET, QUONIAM DECEMVIRI IN DECEM MENSIBUS GIGNI HOMINEM, NON IN UNDECIMO SCRIPSISSENT: SED D. HADRIANUM CAUSA COGNITA, DECREVISSE IN UNDECIMO QUOQUE MENSE PARTUM EDI POSSE; IDQUE IPSUM EJUS REI DECRETUM NOS LEGIMUS. . . . MEMINI EGO ROMAE ACCURATE HOC ATQUE SOLICITE QUAESITUM, NEGOTIO NON REI TUNC PARVAE POSTULANTE, *an octavo mense INFANS EX UTERO vivus editus et statim mortuus jus trium liberorum supplexisset; quum abortio quibusdam, non partus, videretur mensis octavi intempestivitas.*" (Here follows then literally transcribed the passage from Pliny concerning the Praetor L. Papirius.)

The lawsuit again concerning the eleventh month does not touch our question; on the other hand that concerning the eighth is very noteworthy. For here our case is closely designated: a living Child, who had died immediately afterwards, was asserted by one party not to have been capable of living as an

eight months' Child, and for this reason was not to be reckoned as one born alive. The decision is unfortunately not related. But it is an especially noteworthy incident at all events, that the subject matter of the lawsuit was not the Jural Capacity of the Child, but the *JUS LIBERORUM* of the Mother. Indeed we can still further amplify this information with tolerable certainty: the lawsuit did not relate to the avoidance of a penalty by the Mother (for even *MONSTRA* would be reckoned for that purpose, certainly, therefore, also a Child born dead) (*s*), but to a reward attached to the *JUS LIBERORUM*.

Finally, the most important passage is that of Paulus, wherein he enumerates the conditions under which the woman will be entitled by the *JUS LIBERORUM* to the Succession (one of the most important rewards) according to the *Sc. Tertullianum*:—

Paulus, lib. IV. tit. 9, AD *SC. TERTULLIANUM*, § 1. "MATRES TAM INGENUAE, QUAM LIBERTINAE, UT *JUS LIBERORUM* CONSECUAE VIDEANTUR, TER ET QUATER PEPERISSE SUFFICIENT, DUMMODO *vivos, et pleni temporis* PARIANT."

§ 5. "SEPTIMO MENSE NATUS MATRI PRODEST: RATIO ENIM PYTHAGOREI NUMERI HOC VIDETUR ADMITTERE, UT *aut septimo pleno, aut decimo mense* PARTUS MATURIOR (*t*) VIDEATUR."

This passage relates entirely to Vitality, since it requires *VIVOS et PLENI TEMPORIS*, and therefore pre-supposes the possibility of a living and yet immature (non-vital) Child. It cannot moreover be asserted that *PLENI TEMPORIS* signifies that *SUPERSTITES* would be actually required at the time of Succession, for that is elsewhere distinctly denied (*u*); just as little, that legitimate children were requisite, and that the *PLENUM TEMPUS* referred to the presumption of conception having occurred during marriage, or in regard to the *JUS LIBERORUM* of the woman the legitimacy of the children would anyhow not be considered, and particularly not so in regard to the inter-Succession between the mother and her children (*v*). Paulus therefore undoubtedly means that each of the three children must not merely have been born alive, but must also, according to the period of pregnancy, have been vital (*PLENI TEMPORIS*), in order that the mother may be able to rely thereon. He clearly supposes, therefore, that the shorter period of pregnancy will be discovered either by the opinions of experts, or by the personal avowal of the mother, which we must in truth regard as disadvantageous to her. But what then is the period which he prescribes as *PLENUM TEMPUS*? That he declares plainly in section 5:—

(s) See also § 61, note (s).

(t) The edition *princeps* (Paris, 15, 25) reads *maturus*, which is simpler and more natural than *maturior*; but this has no influence upon the question at issue.

(u) Paulus, IV. 9, § 9.

(v) *Ibid.* IV. 10, § 1.

The child must at least have been in the seventh month, that is to say the pregnancy must have continued beyond six full months, and this statement concerning the practical Law completely accords with the shortest period which is assigned by Ulpian and by Paulus himself in other passages (Note (e)) in regard to the presumption of Paternity, namely 182 days. So far everything is clear and consistent; but there arises a great difficulty from the circumstance that Paulus in section 5 wishes to support the statement regarding the seventh month by the authority of Pythagoras; for according to Pythagoras, says Paulus, a mature child will be born **AUT SEPTIMO PLENO AUT DECIMO MENSE**. This does not accord with either the preceding words, nor with the above stated Rule, according to which the commencement of the seventh month is sufficient. For this reason Noodt has proposed the following moderate emendation, which since his time has been still further confirmed by a comparison of old manuscripts: **UT AUT SEPTIMO, AUT PLENO DECIMO MENSE (w)**. By this means an apparent conformity is secured with Ulpian's Rule relating to the intermediate period between 182 and 300 days. But nevertheless only an apparent conformity, since **PLENO DECIMO MENSE** does not mean during the whole course of the tenth month (whether in the beginning, in the middle, or at the end of it), as would be in accordance with Ulpian's Rule, but strictly at the end of the same (in fact equivalent to **COMPLETO DECIMO MENSE**), so that a Child would not be recognised if born in the middle of the tenth month. In point of fact, however, the solution of the difficulty lies in another direction. Paulus does not mention the rule **AUT SEPTIMO PLENO AUT DECIMO MENSE** as a practical Law, but simply as the opinion of Pythagoras. Now fortunately we learn what this opinion was very accurately from another Writer (v). According to him a Child can only be born on two particular days, and absolutely not during the intervening period, namely only on the 210th day after conception (**AUT SEPTIMO PLENO**), and on the 274th day (**AUT DECIMO MENSE**); the one is the **MINOR PARTUS** or **SEPTEMESTRIS**, the other the **MAJOR** or **DECEMESTRIS**. This he proves by a very wonderful and complicated calculation, but which is so accurately stated that it is not possible to misapprehend it. That Paulus also conceived this doctrine in the same way is shown by the agreement of the final results, and especially also from the use of the words **AUT—AUT** by Paulus, which are suitable enough for two alternative valid days, but not for two ultimate points of time with an equally

(w) Noodt, *Ad Pandectas*, lib. 1, tit. 6. The Manuscript reading is given in Bonner's quarto edition, Appendix, p. 187.

(v) Censorinus, *De die natali*, cap. 11. I am indebted for this explanation of the text of Paulus, from the work of Censorinus (who was indeed quoted by Schulting but not made use of), to a communication of my friend Lachmann.

valid long intervening period. But if we now compare the Rule of Pythagoras with that of the Roman Law, also recognised by Paulus, we shall find a complete difference, inasmuch as Pythagoras assumes a living birth to be first possible on the 210th day, whereas the Roman Law (and certainly Paulus himself in the text quoted by us) clearly prescribes a full month earlier, and without any restriction as to any one prescribed day. Hence it follows that the reference to the authority of Pythagoras by Paulus is nothing else than an unnecessary and even absurd exhibition of learning; absurd, because the Rule of the Roman Law and that of Pythagoras are in fact completely different, and even according to the statement of Paulus himself the two Rules have nothing in common with one another, except the homonymous words (but used in a different sense) *SEPTIMO MENSE*.

From this inquiry the following result is obtained. Paulus says, a Child, living indeed but not having a Capacity for Life (*i. e.*, not a seventh month at least), cannot be reckoned amongst the three children by whom the Mother acquires a claim in accordance with the *Sc. Tertullianum*. It might be doubted whether this may not have been simply an opinion of this individual Jurist. I do not believe it to have been so, because Gellius mentions a law-suit which actually related to a Child of eight months: it would rather seem, therefore, that the opinion which was at first wavering but which at last developed into a settled Rule, was, that only Children born before the commencement of the seventh month of pregnancy could not be included in the reckoning. But both with Paulus as well as Gellius that Rule exclusively concerns the establishment of the *JUS LIBERORUM*, and, in fact, with Paulus certainly (in regard to Gellius the matter remains undecided), only with respect to rewards. On the other hand, we have absolutely no ground for assuming that Paulus or any other Jurist applied the condition of Vitality also to the personal Jural Capacity of a child born alive (*y*).

What then results from all that has been said above as regards the general doctrine of Vitality in relation to the Justinian Law? Nothing in the least, except perhaps an additional argument against it. Concerning the *JUS LIBERORUM* anyhow there was no longer any question. In regard to the Jural Capacity of the Child also the condition of Vitality, so far as we know, had not been asserted in early times. Even if some old Jurists had asserted it, it would only be all the more certain that the Compilers had

(*y*) If the same Paulus elsewhere says:—*SEPTIMO MENSE NASCI PERFECTUM PARTUM* (note (c)), so is the *PERFECTUM PARTUM* not only in itself ambiguous, since it might be as well used for *VIVUM* (Capacity for a living Birth) as for *VITALEM* (Capacity for a longer continuation of Life), but it is clear from the succeeding words, that he there states the Rule solely for the Presumption of Paternity, in reference to which no question of Vitality can arise.

intentionally rejected this doctrine, since it is not admitted into our Law books, and it stands in fact entirely opposed to the very general language of the most decisive passages of the Code (2).

To expound the opinions and arguments of Lawyers in regard to this disputed question is difficult, because most of them formed no clear conception of the matter themselves. For instance, they constantly confound Vitality, as a condition of Jural-Capacity, with the Presumption in favour of Paternity, and, therefore, they do not distinguish the two-fold influence which may possibly be conceded to the decision of the Surgeon, in the first place, when the question arises whether a Child which had died immediately after birth has acquired Rights; secondly, when in regard to a surviving Human Being the fact of a legitimate conception is disputed (a). According to our opinion Medical men have not to judge in either case; not in the first, because the Child that has actually lived only a moment after Birth has always Rights; not in the second case, because the positive Law has enacted fixed Rules with regard to it, without doubt in order to exclude the danger of individual decision (b). But whatever opinion one may form in regard to these two questions, it is at least undeniable that unless they are kept quite distinct a thorough insight cannot be gained of them.

In the confounding together of notions, which is here denounced, all other writers are far surpassed by Glück, who, however, here as usual, proves himself very useful by the copious account which he gives of Writers, both Medical as well as Juristical (c).

(2) L. 2, 3, C. *de posthumis* (6, 29).

(a) In regard to a legal contest concerning legitimate conception, the question of Vitality would ordinarily not be raised, because a contest of this kind would for the most part relate to a Child who in point of fact had survived, and perhaps carried on the present suit in his own person. To dispute Vitality in such a case would be somewhat ridiculous. On the other hand, the cases must certainly be rare in which both questions are raised at the same time for decision. Let us suppose that a man marries and dies a few months afterwards, and that his widow is shortly afterwards delivered of a Child, who only lives one day. If now the widow asserts that the inheritance of her husband is acquired *ipso jure* for the Child, and she wishes the Child to be the Heir, the two questions may arise together:—(1) Was the Child Vital, and therefore capable of Rights? (2) With reference to the date of its birth, does the presumption of legitimate conception arise, so as to constitute the Child the Heir to the deceased? Both these questions, however, in such a case are independent of each other, and their solution depends on wholly different grounds.

(b) See above, note (h). Modern writers also certainly in this matter closely follow each other, and for the most part confound this question with that of Vitality.

(c) Glück, vol. 2, § 115, 116; vol. 28, § 1287 e.

As positive advocates of the doctrine of Vitality the following Writers may be named:—

1. ALPH. a. CARANZA, *De partu naturali et legitimo*, cap. 9. He tacitly assumes, without inquiry, that Vitality is a condition of Jural Capacity, and merely concerns himself with the question with what month of pregnancy the Jural Capacity begins. He arbitrarily assumes numerous contradictions amongst the ancient Jurists, and between the more modern and ancient Laws, and after endeavouring to overcome the most troublesome of these self-made difficulties, he arrives finally (Nos. 37, 38) at the astonishing result that Children born in the fifth and sixth months of pregnancy are Viable and Jurally capable, but not those born in the third and fourth months.

2. G. E. OELTZE, *De partu vivo vitali et non vitali*, Jenac, 1769. He distinctly maintains the Rule that the non-Viable Child, *i.e.* one born before the seventh month, has no Rights. We find clear enough notions in his writings, and much valuable literary material. But the proofs in support of his assertion are certainly incredibly weak. I will briefly summarize them:—

(a.)—A non-Viable Child cannot avail himself of the services of his fellow-Beings, is therefore like one born dead (§ 15).

(b.)—L. 12 *de statu hom.* (1, 5). Here he explains SEPTIMO MENSE NASCI *perfectum* PARTUM by *vitalem*, which looking at the mere words would be a possible rendering, but which is completely contradicted by the conclusion of the passage (note *y*). See above. This contradiction he seeks to avoid by understanding the words *justum FILIUM ESSE* at the end to relate to the Jural Capacity of the Son, where nevertheless it can clearly only denote the Legitimacy of the Son, or the Birth EX JUSTIS NUPTIIS (§ 16).

(c.)—L. 2, C. *de posthumis* (6, 29) declares that an ABORTUS has no Rights; hence, as the non-Viable Child is an ABORTUS, he has, therefore, no Rights (§ 19).

(d.)—L. 3, C. *de posthumis* (6, 29) affixes the condition:—SI VIVUS *perfecte* NATUS EST: that is to say a Viable Child (§ 21). But *perfecte* NATUS does not denote the contrast to the immature Child, but to one that died in the course of Birth, before complete separation from the Mother. If this were not clear from the word itself, it would at all events be placed beyond doubt by the repetition which immediately follows in the words: SI VIVUS AD ORBEM *totus* PROCESSIT.

3. HALLER (See note *k*) assumes the condition of Vitality as indisputable, but clearly only upon the assurance of several Jurists that it is so, and, as it seems, with some personal hesitation. At the same time he cites (Page 321, note *g*) a whole host of advocates of the contrary opinion.

4. HOFACKER, vol. 1, § 237, distinctly denies Jural Capacity to the non-Vital Child, and assimilates it completely to one not born.

On the other hand, in different periods, very determined advocates of the correct opinion are also found. If one looks to the purely practical result Caranza, above quoted, must indeed be reckoned as of the contrary opinion, for according to his language he certainly excludes a non-Vital Child from Jural Capacity, but in point of fact he yields the Jural Capacity in every actually disputed case, inasmuch as he pronounces the Child of the fifth and sixth month as Vital. But there are also not wanting such writers who absolutely admit, even in so many words, that for Jural Capacity a living Birth, and by no means Vitality, is solely requisite. To this category belong the following:—

Of the more ancient period—CARPZOV, *Jurisprudentia Forensis*, p. 3, Const. 17, defin. 18.

Of the more modern period—J. A. SEIFFERT, *Erörterungen einzelner Lehren des Römischen Privatrechtes*, Abtheil. 1. Würzburg, 1820, pp. 50—52.—Here the distinction between the presumption of Paternity and the condition of Jural Capacity is rightly pointed out, and Vitality, as such a condition, is distinctly rejected; but this occurs without any exposition of this assertion in his reasons and antitheses, by which it would alone be possible to avoid the constant repetition of the old error.

In the same way Vangerow (*Pandekten*, p. 55) declares himself in favour of the correct opinion.

In Modern Law Codes the following provisions concerning this matter are to be found. The Prussian *Landrecht* does not recognise the notion of Vitality, and, on the contrary, everywhere attaches Jural Capacity exclusively to the Birth of a living Child. So in the *Civilrecht* (I. 1, § 12, 13); but likewise also in the *Criminalrecht*, in regard to the punishment of Infanticide (II. 20, § 965, 968, 969). The *Code-Civil* has admitted Vitality as a condition of Jural Capacity. If a Child is born alive, but not *viable*, it can neither acquire property by Intestate Succession, nor by Donation or Testament (Art. 725, 906). The Husband as a rule can refuse to acknowledge a Child when it is born less than 180 days after a concluded Marriage; this refusal does not prevail “if the Child is not declared *viable*” (Art. 314). The *Code Pénal* pays no heed to Vitality.

Two other questions stand in close connection with those here discussed, which I have not hitherto touched upon, merely

for this reason that it seemed to me advisable not to break the thread of the previous inquiry.

The first question concerns the application of the presumed period of pregnancy, fixed in the Roman Law, to Illegitimate Children. In truth there could be no question of this kind in the Roman Law, because that Law, in a Juristical sense, did not in any way recognise a man's Illegitimate Children, and notably did not in any way treat them as the Cognates of the Father. The Modern Law only in very restricted relations pays any consideration to the offspring of concubinage, and then always under the supposition that the Father himself desires it, and therefore acknowledges such offspring; consequently there is no question of the presumption of Paternity involved therein. But in Modern States practice, departing from the Roman Law, has sanctioned claims on the part of Illegitimate Children against the Father. Now Lawyers have endeavoured to engraft upon this practice also the presumption of the Roman Law, by establishing the following Rule:—If it is proved against a person, either by his own confession or by evidence, that he has had at any time during the four months intervening between the 182nd and 300th day before Birth, familiar intercourse with the Mother, the Child is allowed the same claim against him as against a Father, and to this is annexed at the same time the claims on the part of the Mother. That this Rule was introduced as a makeshift was unavoidable, because no other resource was available. Only one must not deceive oneself that any actual analogy of the Roman Law was here enforced. For the presumption of the Roman Law bases itself upon the sacredness of Marriage, which reflects its honour upon everything that happens during its continuance. Completely different from it is the presumption of a connection between a proved instance of colabitation and a delivery ensuing after 182 and down to 300 days. Indeed, the last named presumption, if consistently carried forward, proves itself wholly untenable, inasmuch as it involves the proposition that a Child may in point of fact be begotten by several fathers (note *d*). It must therefore be simply conceded that that presumption in regard to Illegitimate Children is an arbitrary but unavoidable admission.

The second question concerns the treatment of the same subject in Modern Law Codes. These have, for the most part, admitted the presumption of the Roman Law, only with certain modifications.

The French Code adheres in the closest manner to the Roman Law. It fixes the presumption between 180 and 300 days, and merely suffers it to be rebutted by proof of its impossibility. If a Husband nevertheless asserts the illegitimacy of a Child born before 180 days, he will be estopped from making this assertion if he has previously indicated his recognition by certain earlier acts (Art. 312-315). Illegitimate Children have no claims upon the Father.

The Austrian Code, like the Roman Law, places the presumption between six and ten months, without declaring (which nevertheless is the true view) that proof of impossibility can alone prevail against it. But it also prescribes that in regard to a Child born either before or after that period its legitimacy may be pronounced upon the strength of Medical testimony (§ 138, 155, 157). A similar presumption is also permitted in regard to Illegitimate Children, when the birth has ensued between six and ten months after proved cohabitation (§ 163).

The Prussian *LANDRECHT* departs most of all from the Roman Law, and, as it appears, with respect to the chief point, less from deliberate intention than from a misconception of the Roman Rule. The presumption in favour of the legitimacy of the Child is based upon the fact that the Child "was either conceived or born during a Marriage" (II. 2, § 1). This presumption therefore prevails equally whether the birth has ensued one month or nine months after a completed Marriage (*d*). It is only rebutted by proof that the Husband during the entire period between 302 and 210 days before birth "had not matrimonially cohabited with the Wife," which proof, as the immediately following explanations show, is to be directed to the impossibility of intercourse (*ib.* § 2—6). If a Child is born after the death of the Husband, the Heirs may invalidate the presumption based upon the 302nd day by Medical testimony (§ 21). With respect to two Marriages following quickly after one another, regard is paid to the 270th day (§, 22, 23). Paternity is presumed in the case of Illegitimate Children, when it is proved that cohabitation occurred between 210 and 285 days before birth, and even when it occurred less than 210 days, if Medical testimony is supplemented thereto (II. 1, § 1077, 1078).

(*d*) That this is what is actually intended, and that it is due simply to a misunderstanding of the Roman Law, follows from the following observation of Suarez, vol. 80, fol. 81, *der Materialien*: "The principle *PATER EST QUEM JUSTAE NUPTIAE DEMONSTRANT* is as applicable to the Child born twenty-four hours after Marriage, as to one born six months afterwards." Certainly in connection with this statement the language at the end of section 2 is not carefully chosen, inasmuch as the Husband has to adduce the rebutting evidence against that presumption, "that he has not lawfully cohabited with the Wife, during the interval between the 302nd and the 210th day before the birth of the Child." If the Child were born "twenty-four hours after Marriage," the impossibility of lawful cohabitation before the 210th day, reckoned from the date of the Certificate of Baptism, would clearly follow. What was really intended and meant to be expressed was, that in that period the married couple had not slept together. The Rule of the *LANDRECHT* may perhaps be attempted to be justified on this ground, that in regard to a delivery which occurred soon after Marriage, the Husband must have known of the fact of pregnancy, and, therefore, by concluding a Marriage notwithstanding this knowledge, a recognition of the Child is implied in the act. But this supposition cannot in fact be drawn; on the contrary, very gross deceptions occur in this matter, and such deceptions are easily conceivable when the birth occurs in the fifth or sixth month after a concluded Marriage.

APPENDIX IV.

Concerning the Efficacy of Obligations contracted by Roman Slaves.

(TO SECT. 65, note (i).)

When a Roman Slave undertook such acts, from which Obligations would have arisen in the case of Freemen, their efficacy might come into question under wholly different circumstances: during the condition of Slavery, and after Emancipation. During the condition of Slavery, a CIVILIS OBLIGATIO was clearly impossible, since a Slave could not appear before a Court, either as a Claimant or a Defendant, though a NATURALIS OBLIGATIO was in this condition certainly conceivable. After Emancipation, on the other hand, a CIVILIS OBLIGATIO, just as well as a NATURALIS OBLIGATIO, was conceivable. In order to determine what the Romans actually admitted in regard to this matter it is necessary to distinguish two principal questions. Could the Slave acquire Credits? Could he contract Debts? Or, what is the same thing, could he become a Creditor or a Debtor?

I. CREDITS OF A SLAVE.

These were as a rule for this reason impossible, that the Slave by his juristical acts always acquired Rights for his Master, and was obliged to do so, so that no acquisition could accrue to himself. For this reason he was just as incapable of becoming a Creditor in a NATURALIS (a) as in a CIVILIS OBLIGATIO. Where, however, this reason did not exist, there, as an exceptional case, the Slave might also become a Creditor. Such an exception occurred, in the first place, with respect to an ownerless Slave, and *secondly*, in the case of a Contract with the Master himself, because the latter thereupon became a Debtor, and, therefore, could not at the same time be a Creditor. In both cases the Slave himself acquired a NATURALIS OBLIGATIO, which continued so even after Emancipation and was not converted into a CIVILIS. Of these Exceptions we can only prove the second, which ought, however, without proof to be un-

(a) Certain texts from which a doubt might be raised against this portion of our Rule, which also excludes the NATURALIS OBLIGATIO as the Right of a Slave, will be explained below, note (b).

hesitatingly admitted according to the whole context of the Law Rule here suggested. I will now cite the most important passages in which either the Rule itself, or the Exception mentioned, is recognised.

The Rule is to be found expressed only in a single passage, in which it is applied to the determination of a remarkable lawsuit, namely in L. 7, § 18 *de pactis* (2, 14). A Slave had been conditionally freed in a Testament and instituted Heir. Whilst the condition was still undetermined, and while therefore he still continued a Slave, he concluded a Contract of Remission with the Creditors of the Deceased; now when the condition happened, and he thereupon succeeded to the Inheritance, the question arose could he set up against the Creditors the *EXCEPTIO PACTI* founded upon that Contract? Ulpian denies this on the ground "*QUONIAM NON SOLET EI PROFICERE, SI QUID IN SERVITUTE EGIT, POST LIBERTATEM: QUOD IN PACTI EXCEPTIONE ADMITTENDUM EST.*" Here our Rule is directly expressed, and applied to the acquisition of a mere Exception by means of a *NATURALIS OBLIGATIO*; then follows, however, the remarkable explanation, which, as regards the practical result, establishes quite the reverse: under the plea of *DOLI EXCEPTIO*, after he has acquired his Freedom, the Slave may nevertheless attain his object. This is confirmed by the example of a Son who, during his Father's lifetime, may have concluded a Contract of Release with his Father's Creditors, and who could similarly avail himself of, not indeed the *PACTI* but in truth the *DOLI EXCEPTIO*, when, at a later period, he became his father's Heir. "*IDEM PROBAT, ET SI FILIUS VIVO PATRE CUM CREDITORIBUS PATERNIS PACTUS SIT: NAM ET HUIC DOLI EXCEPTIIONEM PROFUTURAM. IMMO ET IN SERVO DOLI EXCEPTIO NON EST RESPONDA.*" By this it was undoubtedly meant to be asserted that a Slave had the *DOLI EXCEPTIO*, even when he may have concluded the Contract during the lifetime of his Master: all the more, therefore, when this Contract was effected after the death of the Master, but before the happening of the condition relating to his Freedom and his institution as Heir (*b*). Now,

(*b*) That is the purport of the case mentioned in the opening words of the passage, to which the whole of Ulpian's inquiry was directed. "*SED SI SERVUS SIT, QUI PACISCITUR PRIUSQUAM LIBERTATEM ET HEREDITATEM ADIPISCATUR, QUIA SUB CONDITIOE HERES SCRIPTUS FUERAT, NON PROFUTURUM PACTUM VINDICIUS SCRIBIT.*" (The condition must, however, be dependent upon Freedom, because it is afterwards said: "*SED SI QUIS, UT SUPRA RETULIMUS IN SERVITUTE PACTUS EST.*") Since now a Slave instituted in this conditional form, if he was instituted *EX ASSE*, could meanwhile be regarded as an Ownerless Slave, so a doubt might arise against the first Exception mentioned above in the text, that an Ownerless Slave might become a Creditor. This doubt may be met in two ways: (1) Ulpian does not say that the Slave was instituted *EX ASSE*; if there stood along with him a free joint-Heir, the latter was meanwhile the true present Master of the

inasmuch as the Jurist allows the *DOLI EXCEPTIO*, a contradiction of our Rule, or at least an Exception to it, might seem to be perceptible; both conclusions in my opinion would be wrong. For the sole basis of the *PACTI EXCEPTIO* is the *PACTUM* concluded during the condition of Slavery, which must here remain inoperative, because otherwise (contrary to our Rule) the Slave would have acquired a Credit. If the *DOLI EXCEPTIO* were based upon a fraud committed contemporaneously with that Contract, therefore similarly during the condition of Slavery, the *DOLI EXCEPTIO* would also be unavailable, because during that period the Slave could acquire no sort of Right, and therefore also not that which was derived from a *DOLI OBLIGATIO*. But the fraud, upon which the Exception was here intended to be based, consists in the Creditor, who had promised Remission by Contract, nevertheless suing for the entire sum. This latter circumstance, however, happens at a time when the former Slave has become Free, therefore capable of contracting every form of Obligation, but the wrong nevertheless as such, as a fact of a purely immoral character, would not be excluded merely because the earlier Contract had remained Juristically inoperative owing to the wholly positive Incapacity for Rights on the part of the Slave.

The Exception, according to which the Slave is intended to acquire a *NATURALIS OBLIGATIO* when the Master himself appears therein as a Debtor, is exhibited in a two-fold aspect in some remarkable applications. In the first place, even during the condition of Slavery, when the question arises with respect to other Creditors, what is the extent of the *Peculium*? According to a general Rule, prevailing for Children and Slaves, the Debts due by the Master to the Slave should be included in the *Peculium*. But conversely the Debts due by the Slave to the Master should be deducted from it (*c*). In conformity therefore with this Rule the mutual Obligations would be presumed to be completely valid (but merely as *NATURALES OBLIGATIONES*), and the *Peculium* would be computed precisely as if these Debts had already been discharged by simple payment. Hence all arbitrariness on the part of the Master must remain naturally excluded, and the existence and validity of the Debts would be judged, therefore, according to the same Rules as in the case of ordinary Civil Obligations (*d*). In the next place, that Exception

Slave. (2) But even if he were intended to be an Heir *EX ASSE*, the Inheritance itself could meanwhile be regarded as the Master of the Slave, which is the view adopted in regard to Juristical Persons (§ 102).

(*c*) L. 5, § 4; L. 9, § 2 *de peculio* (15, 1). An application of this *deductio* to the *filiusfamilias* lies at the basis of the famous L. *FRATER A FRATRE* (L. 38 *de cond. ind.* (12, 6)). Another application of the same, outside the *ACTIO DE PECULIO*, for instance to the payment of a sum of money which a *STATULIBER* is required to make out of his *Peculium*, in order thereby to acquire Freedom, is found in L. 3, § 2 *de statulib.* (40, 7).

(*d*) L. 49, § 2 *de peculio* (15, 1) "UT DEBITOR VEL SERVUS DOMINO, VEL

shows itself operative after Emancipation, because the payment of such a Debt by the Patron to the Freedman could never be contested as INDEBITUM, even when the Patron might have made it in error (e). Only one Contract in such cases would be wholly null and void, *viz.*, the Sale of a thing by the Master to his Slave (f). For since the Sale of a thing always contemplates delivery, and delivery to the Slave in every instance creates a Right for the Master, it would be equivalent to a Sale of a thing by the Master to himself, which is contrary to the fundamental rules of Purchase (g).

II. DEBTS DUE BY SLAVES.

The consideration above mentioned in favour of Credits fails to operate here, because the Slave by his dealings is only permitted to make the Master richer, and not poorer, and therefore Debts could not be imposed upon the Master unless special grounds (*e.g.* a Peculium held in trust) existed to justify this course. A Slave might therefore by his dealings become a Debtor as well towards his Master as towards a stranger, but in

DOMINUS SERVO INTELLIGATUR, *ex causa civili computandum est*: IDEOQUE SI DOMINUS IN RATIONES SUAS REFERAT, SE DEBERE SERVO SUO, CUM OMNINO NEQUE MUTUUM ACCEPERIT, NEQUE ULLA CAUSA PRAECESSERAT DEBENDI, *nuda ratio non facit eum debitorem.*"

(c) L. 64 *de cond. indeb.* (12, 6) "SI, QUOD DOMINUS SERVO DEBIT MANUMISSO SOLVIT, QUAMVIS EXISTIMANS EI ALIQUA TENERI ACTIONE, TAMEN REPETERE NON POTERIT, QUIA NATURALE AGNOVIT DEBITUM;" L. 14 *de O. et A.* (44, 7) "SERVI EX DELICTIS QUIDEM OBLIGANTUR, ET SI MANUMITTUNTUR OBLIGATI REMANENT: *ex contractibus autem civiliter quidem non obligantur, sed naturaliter et obligantur et obligant.* DENIQUE SI SERVO, QUI MIHI MUTUAM PECUNIAM DEDERAT, MANUMISSO SOLVAM, LIBEROR." In this passage, for the reasons stated in the text, the words ET OBLIGANT must be understood in a narrower application than ET OBLIGANTUR, so that they ought only to be referred to the Claims against the Master himself, and not to those against other Persons (note (a)). In like manner, in the example at the end of the passage, the word *meo* must be added to the words *si servo*. L. 18, 19, 32, 35 *de solut.* (46, 3), according to which the Debtor will be discharged if he pays to the Freedman without knowing of his Manumission, do not appertain to our present subject. The Debtor's discharge is not due to the fact of a NATURALIS OBLIGATIO being vested in the Freedman, but because the Debtor, according to the assumed circumstances, had sufficient reason to believe that the Freedman actually received the payment as a Slave, and, in fact, with the consent of the true and only Creditor. In this matter Zimmern is in error, *Rechtsgeschichte*, 1. § 183, p. 673, cf. note (a).

(f) L. 14, § 3 *de in diem addict.* (18, 2).

(g) L. 16 *pr. de contr. emt.* (18, 1) "SUAE REI EMTIO NON VALET . . . NULLA OBLIGATIO FUIT;" L. 45 *pr. de R. j.* (50, 17). Considered from another point of view, the transaction is also invalid, because anyhow no one can sell to himself; and this rule would render the Purchase invalid, even if the Master who sold were accidentally not the Owner of the thing. L. 10, C. *de distr. pign.* (8, 28). Cf. Paulus, II. 13, § 3, 4.

either case this Debt was only a *NATURALIS OBLIGATIO*, and continued so even after his Emancipation (*h*).

If, therefore, a Slave contracted a Debt towards his Master, it was subject to the *DEDUCTIO* from the *Peculium* already mentioned, and the same rules were to be observed in this as in the converse case. (Notes (*c*) (*d*).)

The same Rule prevailed also when a Slave contracted an Obligation to a stranger. Applications and confirmations of this Rule are to be found in many passages. If the Slave concludes a Contract he cannot be sued upon it after his Emancipation (*i*). On the other hand, all his Debts, whether contracted before or after his Emancipation, are so far efficacious, that payment thereof can never be contested by the *CONDICTIO INDEBITI*, and Securities and Pledges may be validly effected for them (*k*). If the Slave after attaining his Freedom produces such a Debt, this act prevails not indeed as a Donation, but as a true Payment (*l*).

The question might now be asked, why the Debts of Slaves remain *NATURALES* after Emancipation, and do not rather become actionable? The reason unquestionably is, that since a Slave could absolutely have no Property, so his Contracts, by which he bound himself as a Debtor, were certainly concluded with due regard to his condition of Slavery, and, consequently, to his relation to the Property of his Master; it would have been very hard, therefore, if an Action had been allowed against

(*h*) L. 14 *de O. et A.* (44, 7), note (*c*); L. 1, § 18 *depos.* (16, 3). According to the literal meaning of some passages, one might believe that here no *OBLIGATIO*, not even a *NATURALIS*, arose for the Slave. § 6 J. *de inut. stip.* (3, 19); § 6 J. *de nox. act.* (4, 8); L. 43 *de O. et A.* (44, 7); L. 22 *pr. de R. J.* (50, 17). But these passages are capable of complete explanation with reference to the phrasology not unfrequently used elsewhere, according to which the *naturales obligationes* are designated "Imperfect Obligations," so that in their case the existence of an *obligatio* at all may well be denied. L. 7, § 2, 4 *de pactis* (2, 14); L. 16, § 4 *de fidej.* (46, 3). *OBLIGATIO* is thus equivalent to what is *actionable*.

(*i*) Paulus, II. 13, § 9; L. 1, 2, C. *an servus* (4, 14).

(*k*) L. 13 *pr. de cond. indeb.* (12, 6) "*NATURALITER ETIAM SERVUS OBLIGATUR: ET IDEO SI QUIS NOMINE EJUS SOLVAT, VEL IPSE MANUMISSUS, VEL (UT POMPONII SCRIBIT) EX PECULIO CUIUS LIBERAM ADMINISTRATIONEM HABEAT, REPETI NON POTERIT: ET OB ID ET FIDEJUSSOR PRO SERVO ACCEPTUS TENETUR: ET PIGNUS PRO EO DATUM TENEBITUR; ET SI SERVUS, QUI PECULII ADMINISTRATIONEM HABET, REM PIGNORI IN ID QUOD DEBEAT DEDERIT, UTILIS PIGNERATITIA REDDENDA EST.*" The reading here adopted "*VEL (UT POMPONII SCRIBIT)*" is from Haloander: with equally good sense the *Vulgata* reads "*UT POMPONII SCRIBIT, VEL EX PECULIO.*" Both readings point to the two distinct cases, when the Slave pays *after* Manumission, and when he does so *before* from his *Peculium*, over which he had the power of disposition (for otherwise the Master could at least Vindicate the money). The Florentine reading, which omits the *VEL* in both places, and thus blends the two cases together in a wholly inadmissible manner, is devoid of sense. Cf. also L. 24, § 2 *de act. emti.* (19, 1); L. 21, § 2 *de fidej.* (46, 1); L. 81 *de solut.* (46, 3).

(*l*) L. 19, § 4 *de donat.* (39, 5).

him upon the strength thereof: even the consequences of a *NATURALIS OBLIGATIO* could only be pressed against him in very few cases. But precisely this reason both explains and at the same time justifies some remarkable Exceptions, wherein the Freedman might certainly be sued upon his earlier contracted Debts. The first Exception concerned the *ACTIO DEPOSITI*, by which the Freedman could be sued if he had possession of the thing deposited (*m*); for then his former want of Property could afford no ground for denying the promised Restitution. A second Exception concerned the *ACTIO MANDATI* and *NEGOTIORUM GESTORUM*, when such a business had been undertaken during Slavery and continued after Emancipation in such a way, that at the institution of the Action the earlier portion of the dealings could not be separated from the later ones (*n*). More important and of more frequent occurrence was the third Exception. When a Slave committed a Delict, he might be sued upon it after Emancipation (*o*). The reason for this was that he committed the Delict not out of consideration for the transaction of the business of his Master (as it is to be presumed in the case of Contract), but out of turpitude; and he must accordingly be liable to an Action as soon as he becomes generally capable of appearing before a Court of Justice. To this is added another reason, the principle of Noxal-Actions. From the Delict of every Slave there arose a Noxal-Action against the Master: by transfer to a third person this Action was transmitted against the new acquirer. (*NOXA CAPUT SEQUITUR*): by transfer to the injured party, just as by the dereliction of the Slave, it wholly perished (*p*). It was therefore entirely consistent to give an Action against the Freedman after his Emancipation, since he then became his own Master. An application of this Rule occurs in regard to a Theft committed by a Slave: the *ACTIO FURTI*, but not the *CONDICTIO FURTIVA* also, prevailed against the Slave after his Emancipation (*q*); for the former alone arose out of the Delict, while the latter rather from the Possession of the Thing without title, and such a Possession could never be ascribed to a Slave. A wholly converse Exception prevailed very noteworthyly when the Slave committed the Delict against the Master personally; from such a Delict indeed no Obligation ordinarily

(*m*) L. 21, § 1 *depositi* (16, 3). As regards the meaning of this Exception, cf. § 74 (*r*).

(*n*) L. 17 *de neg. gestis* (3, 5). As regards the meaning of this Exception, cf. § 74 (*t*).

(*o*) L. 14 *de O. et A.* (note (*e*)); L. 1, § 18 *depositi* (16, 3); L. 4, C. *an servus* (4, 14); L. 7, § 8 *de dolo* (4, 3). The Exception was strictly limited to Delicts, so that Contractual Actions, even in the case of *DOLUS*, could not be instituted against Freedmen.

(*p*) § 5 J. *de nox. act.* (4, 8); L. 20, 37, 38, § 1; L. 42, § 2; L. 43 *de nox. act.* (9, 4).

(*q*) L. 15 *de cond. furt.* (13, 1).

arose, and therefore also no Action after Emancipation (*r*): undoubtedly because the Master had besides quite a different and far more effectual means of punishing the Delicts of his Slaves then that which the Law of Obligations could at any time have afforded him.

A remarkable Exception to the principles here asserted appears, as it seems, to have been first recognised at a somewhat later period. When the Slave promised the Master money for his release, and afterwards did not wish to pay it, the Master might have an *ACTIO IN FACTUM* against him (*s*). It was undoubtedly treated as an Innominate Contract according to the formula *FACIO UT DES*, and the circumstance that this Stipulation was made during Slavery was disregarded.

(*r*) § 6 J. *de nox. act.* (4, 8); L. 6, C. *an servus* (4, 14).

(*s*) L. 3, C. *an servus* (4, 14). Ulpian still assumes this Action is impossible, and only admits that against the Security founded on the *naturalis obligatio*. L. 7, § 8 *de dolo* (4, 3).

APPENDIX V.

Concerning the Liability of a FILIAFAMILIAS for DEBT.

(TO SECT. 67.)

Ulpian says of Women that they could only contract Debts with the aid of the AUCTORITAS of their Tutors, and Gaius also speaks to the same effect (a). Hence Cujacius concludes that Daughters standing in Paternal Power were anyhow quite incapable of having Debts, inasmuch as the Father could not exercise the AUCTORITAS for them, and, consequently, the necessary condition could never be fulfilled in their case, upon which Ulpian hinges the possibility of Women contracting Debts (b). This assertion is apparently supported by the analogy of a Pupil, who, in like manner, is able to contract Debts by means of the AUCTORITAS of the Tutor, but who, while in Paternal Power, where the very possibility of AUCTORITAS is wanting, is altogether incapable of doing so (c).

But a closer consideration causes the weight of this analogy to vanish altogether. For the Pupil has a natural Incapacity in regard to Juristical acts which would make him poorer. This Incapacity is technically removed by the AUCTORITAS of the Guardian, but only so far as a necessity exists for it. Such a necessity occurs in fact in regard to the independent Pupil, because he has Property of his own, which may often impose the necessity of incurring Debts. This necessity cannot arise in the case of a Minor in Paternal Power, who has no Property, hence, so far as he was concerned, there was no need to aid

(a) Ulpian, XI. § 27 "TUTORIS AUCTORITAS NECESSARIA EST MULIERIBUS QUIDEM IN HIS REBUS, SI LEGE AUT LEGITIMO JUDICIO AGANT, si se obligent," &c. In like manner, Gaius, III. § 107, 108; I, 192.

(b) Cujacius, *Obser.* VII. II. Properly speaking he only refers to a married woman IN MANU, because he was directly led to that point by L. 2, § 2 *de cap. min.* (4, 5), which he immediately wished to explain. Cf. § 70, note (g). But such a woman had no other right except that of a FILIAFAMILIAS; it is therefore beyond doubt that Cujacius meant to assert precisely the same of the Daughter in Paternal Power, to whom, moreover, all his expressions are just as completely applicable as to the married woman IN MANU.

(c) L. 141, § 2 *de V. O.* (45, 1) "PUPILLUS, LICET EX QUO FARI COEPERIT RECTE STIPULARI POTEST, tamen, si in parentis potestate est, ne auctore quidem patre obligatur: PUBES VERO, QUI IN POTESTATE EST, PRONDE AC SI PATERFAMILIAS, OBLIGARI SOLET. QUOD AUTEM IN PUPILLO DICIMUS, IDEM ET IN FILIAFAMILIAS IMPUBERE DICENDUM EST."

the natural Incapacity by an artificial device. The matter is quite different in regard to adult Women. These were also incapable of performing many acts, but their Incapacity was of a purely artificial character, not devised in their own interests, but in the interests of their Agnates or Patrons, in order that a means might be given to them of preventing the deprivation or diminution of the future Intestate Succession in the generality of cases (*d*). So long then as they lived in Paternal Power there was no such ground for an arbitrary limitation; there was, therefore, no occasion to modify the natural condition, according to which adult Daughters were just as capable of having Debts as Sons who had attained Majority. Recently a special turn has been given to the opinion of Cujacius by drawing a distinction between Obligations of a strictly Civil Law character, and other Obligations of a freer kind: the former were connected with AUCTORITAS, and were therefore wholly impossible during the existence of Paternal Power, but the latter not so (*e*). But in support of this distinction no ground whatever exists either in the language of Gaius or Ulpian, who speak generally of every kind of Obligation, or in the nature and object of Sexual Guardianship. The liabilities of a Woman arising out of a Loan or a Contract of Sale were indeed not a whit less dangerous for the future Succession of an Agnate, than those arising out of a Stipulation (*f*). I believe, therefore, that independent Women required the AUCTORITAS for all Debts (whether derived from the old *JUS CIVILE* or not), but that on the other hand, *FILIAEFAMILIAS* might certainly be bound by

(*d*) Gaius, I. § 190—192. From his exposition it clearly follows that the essential significance of Sexual Tutelage was reckoned for the benefit of Agnates and Patrons, and that the remaining forms of this tutelage were only to be deemed as supplementary to, or as modifications of, those two cases (of *LEGITIMA TUTELA*).

(*e*) Rudorff, *Vormundschaftsrecht*, vol. 1, p. 170; vol. 2, pp. 273, 274.

(*f*) Against this assertion that the AUCTORITAS was similarly necessary for all forms of indebtedness (strict or informal) a doubt might perhaps be raised from Gaius, III. § 91, where it is said of the obligation arising out of a receipt of an *INDEBITUM*: "*Quidam putant, PUPILLUM aut mulierum, CUI SINE TUTORIS AUCTORITATE NON DEBITUM PER ERROREM DATUM EST, NON TENERI CONDICTIONE, NON MAGIS QUAM MUTUI DATIONE.*" He himself argues against this opinion afterwards. But in regard to this question it depended, not upon the historical class to which the previous obligation belonged, but upon this that the AUCTORITAS everywhere merely served the purpose of supplementing the will, though here the obligation did not arise *EX VOLUNTATE* but *EX RE*. Anyhow this case, by reason of the *CONDICTIO*, must rather be included amongst strict Obligations, but the analogy with Pupils makes it more especially quite impossible to conceive here any peculiarity of Sexual Tutelage. In this particular case, moreover, Justinian has accepted the contrary opinion to that of Gaius, and while associating himself with the *QUIDAM* has literally maintained the ground taken up by Gaius, so that there is wanting in his case the true consistency of thought which is very manifest in Gaius. § 1 J. *quil. mod. re.* (3, 14).

their own act alone, just as well as Sons could ; that is to say, in both cases only, under the supposition of their being of Full Age. When, therefore, in the passage above cited, Ulpian connects the liability of a Woman with the condition of a Guardian's AUCTORITAS, that is only to be understood of such Women who generally have a Tutor, or are at least qualified to have one (*g*), and therefore, only of those who are Independent. This limitation, however, is so far from being arbitrarily introduced into that passage, that it must in fact be constantly borne in mind throughout the whole of Ulpian's eleventh Title, relating to Minors and Women, although Ulpian did not think it necessary to say this expressly, because it seemed to him to be so plainly a matter of course.

This is how the matter stands from a general point of view. But still more decisive must be those individual applications, from which it results either that the Obligation of a FILIAFAMILIAS was or was not possible. Without doubt we should still have had passages of this kind surviving in such number that the entire question which is here discussed could never have been disputed, if it had not been that the connection of this question with the reason for Sexual Tutelage, which had become obsolete at the time of Justinian, had been, for the most part, overlooked in the texts of the ancient Jurists, which deal with this point. Indeed, there is only a solitary Jural-relation in which that question really directly occurs, but here fortunately in so clear and positive a manner, that the passage which refers to it is alone quite sufficient to remove every doubt. The SC. MACEDONIANUM spoke of the FILIUSFAMILIAS, and employed, therefore, as usual the masculine form of expression (*h*). Thereupon Ulpian makes the following observations (*i*): HOC SC. ET AD FILIAS QUOQUE FAMILIARUM PERTINET. NEC AD REM PERTINET, SI ADFIRMETUR ORNAMENTA EX EA PECUNIA COMPARASSE: NAM ET EI QUOQUE, QUI FILIOFAMILIAS CREDIDIT, DECRETO AMPLISSIMI ORDINIS ACTIO DENEGATUR: NEC INTEREST CONSUMTI SINT NUMI, AN EXSTENT IN PECULIO. MULTO IGITUR MAGIS, SEVERITATE SCII, EJUS CONTRACTUS IMPROBABITUR, QUI FILIAEFAMILIAS MUTUUM DEDIT. If, then, in the case of a Loan of Money to a Daughter, the Exception of the SENATUS CONSULTUM was intended to arise, an Action must have been existing, consequently the Daughter must have been generally capable of contracting a Debt. It seems to me that this passage is decisive of the whole question ; I will nevertheless not pass over in silence the possible objections which might be urged on

(*g*) Gaius, III. § 108 "IDEM JURIS EST IN FEMINIS, quae in tutela sunt."

(*h*) L. 1 *pr. de Sc. Mac.* (14, 6).

(*i*) L. 9, § 2 *de Sc. Mac.* (14, 6). The same, only in some respects more briefly, and in others more copiously, is expressed in § 6, 7 J. *quod cum eo* (4, 7).

the other side. In the first place, it might be said that what we read here does not emanate from Ulpian but from Tribonian, who endeavoured thereby to obliterate every trace of Sexual Tutelage. In truth, however, no one would go so far as to assert that the entire passage above transcribed was invented; but it is not inconceivable that Ulpian may have expressly spoken only of the Exception against the *ACTIO DE PECULIO*, and that this limitation was lost sight of by the Compilers. In the passage from the Institutes (note (i)), it is certainly distinctly declared, that the Exception operated as well for the benefit of the Daughter herself as for the Father, but the Institutes, anyhow, is a modern work. This admission of an interpolation would not be inadmissible if we knew from other evidence that the Daughter could not bind herself personally. But inasmuch as this evidence is wanting, and, on the contrary, general reasons rather support the opposite view, it would surely be a very uncritical proceeding to introduce, without the slightest necessity, the admission of an interpolation in an apparently wholly unsuspected passage, simply in order to confirm a preconceived opinion, not founded upon other texts. In the next place it might be urged that Ulpian had only such Women in view who had been freed from the necessity of every form of Tutelage by the birth of three Children. But, so far as we know, the *JUS LIBERORUM* never referred to Daughters in Paternal Power, and, moreover, in regard to them it would have had neither sense nor object. Independent Women might acquire thereby the Capacity of making Acquisitions in numerous ways, as well as of exercising a free disposition over their Property; a *FILIAFAMILIAS*, however, could anyhow neither acquire anything for herself, nor had she any disposing power over Property (which she never possessed), so that the Right referred to would have simply consisted in her case, of the singular and doubtful privilege of having Debts, for which, moreover, according to the opinion here controverted, she would otherwise not have been capable.

Incidentally the following passages also call for consideration, besides those more important ones already cited:—

(1.) *Val. Frag.* § 99 “*P. RESPONDIT FILIAMFAMILIAS EX DOTIS DICTIONE OBLIGARI NON POTUISSE.*” This proposition might, for instance, be treated as a mere application of the general rule regarding Debt-Incapacity, which would thus be confirmed by it. But when it is borne in mind that the *DOTIS ACTIO* was a most peculiar law-institute, and more especially that no one had the capacity for it except the Woman, her Debtor, her Father and Grandfather (k), that argument must certainly be acknowledged to be wholly inadmissible.

(2.) The concluding words of L. 141, § 2 *de V. O.* (note (c)),

(k) Ulpian, vi. § 2.

pronounce the FILIAFAMILIAS IMPUBES as equally incapable of incurring liability with the PUPILLUS IN PARENTIS POTESTATE. This assimilation is not directly decisive of our question touching adult Women, although it strengthens at all events the existing probability, that between the two Sexes, in cases where no Sexual Tutelage could take place, no distinction was generally traceable. Recently, however, the assertion has been made that the concluding words of the above passage have been interpolated, and that Gaius (the author of the passage) may have written IDEM ET IN FILIAFAMILIAS *pubere* DICENDUM EST (1). In this form the passage would certainly fully prove the opinion which has been here contested, and if we had other evidence in support of it, that admission could with great probability be employed in order to bring the passage here quoted into direct harmony with such other evidence. But so long as evidence of this kind is wanting, and while, on the other hand, the grounds above adduced seem rather to contest it, it cannot be permitted, in the first place, to introduce the allegation of an interpolation into that passage without necessity, and then with the aid of a text thus reconstituted, to advance to historical proof.

(3.) L. 3, § 4 *commodati* (13, 6) "SI FILIOFAMILIAS SERVOVE COMMODATUM SIT, DUMTAXAT DE PECULIO AGENDUM ERIT: CUM FILIO AUTEM FAMILIAS IPSO ET DIRECTO QUIS POTERIT. SED ET SI ANCILLAE *vel filiafamilias* COMMODAVERIT, *dumtaxat de peculio erit agendum.*" The chief object of the passage is not to show that the ACTIO COMMODATI may be employed to a larger extent than other Actions against the Father or Master, but that it should always be confined to the case of a PECULIUM entrusted previously to the Commodatarius. In connection with this proposition it is added, in regard to the Son, that he may also be sued personally. Now since this additional proposition is not again repeated with reference to the Daughter, it might be concluded from this circumstance that she could not be sued. But it is certainly easier and more natural to assume, that Ulpian did not repeat this additional proposition in regard to the Daughter, because he considered that everyone would supply the repetition anyhow as a matter of course. Indeed, had he had any antithesis in his mind, he would scarcely have previously employed precisely the same language in regard to the Daughter as in reference to the Son, and have simply indicated that antithesis by an omission of the proposition in question. It might of course be said that Ulpian

(1) Rudorff, *Vormundschaftsrecht*, vol. I. p. 171. He relies especially upon the argument that otherwise the concluding words concerning the FILIAFAMILIAS would be altogether too trivial. But the same argument may be used to contest the genuineness of innumerable passages of the Pandects, and certainly without any good ground. The L. 9, § 2 *de Sr. Mac.*, quoted in the text, would likewise be included amongst these passages.

may have distinctly expressed the antithesis, and that this addition respecting Sexual Tutelage may have been omitted by the Compilers. But if in point of fact the Compilers had come across such an addition, they would scarcely have contented themselves with merely passing it over, whereby indeed the ambiguity now existing must have arisen; they would rather in that case have declared the complete equality of the two Sexes, which could easily have been brought about by the repetition of Ulpian's proposition introduced in regard to the Son.

Finally, the endeavour might be made to gain a new scope for the opinion here contested, *i.e.*, on the side of Judicial Prosecution. Thus, it might be argued, that although a FILIAFAMILIAS had the Capacity to be a Debtor, she could never at all events be sued, since Ulpian says that a Woman should never appear, otherwise than with a Tutor, in a LEGITIMUM JUDICIUM (*u*), whereas a FILIAFAMILIAS could never have a Tutor. But against this vindication of that opinion from a processual point of view the following observations may be made:—

In the first place, that which has already been said above in regard to Debts. The necessity of AUCTORITAS relates only to those Women who generally had a Tutor or could have one, that is to say to Independent (SUI JURIS) Women, not to those living in Paternal Power.

Secondly, the ancient Jurists would in no case have been able to distinctly assert a general Incapacity of Women out of consideration for the LEGITIMUM JUDICIUM, since in their period by far the greatest number of judicial proceedings in the Roman Empire were not LEGITIMA JUDICIA, but JUDICIA QUÆ IMPERIO CONTINEBANTUR, as to which Ulpian's Rule had no reference. To that category belonged not only all proceedings outside the Roman City and its immediate suburbs, but likewise a great portion of the proceedings in Rome itself (*m*), indeed in many Actions it depended upon each individual party to adopt the less technical form of procedure (*n*), whereby the impediment would also be removed, which alone prevented the application of the strict LEGITIMUM JUDICIUM.

Lastly, in the third place, Ulpian speaks literally of a Woman only as a Claimant, not as a Defendant (SI . . . *agant*, not SI CONVENIANTUR), and it may very well be conceived that she was more restricted in the arbitrary resolution to institute an Action, than in the involuntary defence of the Action of another; for

(*m*) Gaius, IV. § 104, 105.

(*n*) Gaius, IV. § 103—105.

example, in regard to the Debts which had devolved upon her from the Paternal Inheritance. If then the necessity of AUCTORITAS did not generally refer to a Defendant, so no apparent ground could be based on that necessity for denying the relation of a Defendant to the FILIAFAMILIAS. But supposing also that a wider meaning was intended to be assigned to the expression SI AGANT, so as to embrace a Defendant as well as a Plaintiff, it is at least undeniable that a Plaintiff would at all events be comprehended under it. If, therefore, it can be shown that at the time of the ancient Jurists the FILIAFAMILIAS could actually appear as a Plaintiff, then it follows that she was not excluded from a LEGITIMUM JUDICIUM out of any consideration to Rules of Procedure, and this negative proposition should undoubtedly also serve generally to contradict the asserted Incapacity of a Woman to fill the relation of a Defendant. Is then, as a matter of fact, a FILIAFAMILIAS represented as a Plaintiff by the old Jurists? As a rule certainly not, but this was upon a substantial ground, which had no connection with the Sex, but depended directly upon Paternal Power, and therefore operated equally in the case of a Son as in that of a Daughter. Both these persons as a rule were incompetent to appear as Plaintiffs, because they had no Rights which could be enforced by means of an Action, for instance, no Ownership and no Debt-claims (§ 67). In exceptional instances, however, they could institute certain special Actions, and in regard to these the Capacity of the Daughter was in no respect inferior to that of the Son. Thus it is expressly mentioned that in certain cases a Son, who had received an injury, could institute an Action for the injury in his own name, but in the like cases the Daughter could also do the same (*o*). So also it is mentioned that the FILIAFAMILIAS after dissolution of her Marriage could, in many cases, institute the DOTIS ACTIO alone, apart from her Father (*p*). If, then, with respect to these two Actions, the form of the LEGITIMUM JUDICIUM presented no obstacle to the Daughter appearing as a Plaintiff, it follows also that in this form no grounds can exist for asserting her Incapacity to occupy the position of a Defendant in ancient legal proceedings; nay, she was as equally capable in this respect as the Son, and in reality to a larger extent. For the substantial reason which, as a rule, prevented the Son and Daughter from assuming the rôle of a Plaintiff, had no influence in regard to the Defendant—relation, inasmuch as they had Debts, and, like Independent (SCI JURIS) Persons, they could be sued upon them.

(*o*) L. 8 *pr. de procur.* (3, 3). Cf. in regard to this and the immediately following case, § 73.

(*p*) L. 8 *pr. de procur.* (3, 3); L. 22, § 4, 10, 11 *sol. mat.* (24, 3).

If we sum up briefly all the foregoing reasons, it will appear that the asserted distinction between Sons and Daughters, with respect to their Capacity as regards the Defendant-relation, depends upon an erroneous admission, and that in reality a *FILIA-FAMILIAS* was just as fully competent to contract Debts, as her Brother living like herself under Paternal Power.

APPENDIX VI.

STATUS and CAPITIS DEMINUTIO.

(TO SECT. 64—68.)

I.

In the System of Law itself the conditions of Jural Capacity, as well as the gradations thereof, have been stated (§ 64—67), and the doctrine of the threefold CAPITIS DEMINUTIO has been joined thereto (§ 68). The opinions of most Modern writers, however, diverge from the views there set forth in a twofold manner: *Firstly*, by confounding a special doctrine of STATUS, a notion which has found no place in my exposition: *Secondly*, by a wholly different notion of MINIMA CAPITIS DEMINUTIO, whereby at the same time the general notion of CAPITIS DEMINUTIO must receive an altered complexion. I will here give a preliminary summary of the most important Writers upon both these kindred subjects, in order to be able to refer to them more briefly in the following discussion:—

Concerning STATUS.

FEUERRACH, *Civilistische Versuche*, Vol. 1, Giessen, 1803, No. 6, pp. 175—190.

LÖHR *über den Status* in the *Magazin für Rechtswissenschaft*, Vol. 4, No. 1, pp. 1—16, (1820).

Concerning CAPITIS DEMINUTIO.

HOTOMANUS, *Comm. ad Inst. tit. de Capitis Deminutione* (1, 16).

CONRADI, *Parerga*, pp. 163—193 (1737).

GLÜCK, *Pandekten*, Vol. 2, § 128 (1791); DUCAURROY, *Thémis*, Vol. 3, pp. 180—184 (1821); ZIMMERN, *Rechtsgeschichte*, 1, 2, § 229 (1826); SECKENDORF *de Capitis Deminutione Minima*, Colon. (1828).

NIEBUHR, *Römische Geschichte*, Vol. 1, p. 606 (4th ed.); Vol. 2, p. 460 (2nd ed.). Here the question is discussed in relation to the ancient Constitution of the State, and not from the standpoint of the Law Sources.

II.

The customary doctrine of Moderns concerning STATUS runs in this wise (a). STATUS means a Quality, by virtue of which a

(a) The matter is expressly discussed by Hüpfner, *Comment. upon the Institutes*, § 62, and Table VI. a. Cf. also Mühlenbruch, § 182.

man has certain Rights. Such qualities, however, occur in two forms: the *natural* (ST. NATURALES), in unlimited number, as for example, the classification of Mankind into Men and Women, Healthy and Sickly, and the like; the *Moral or Juristical* (ST. CIVILES), of which there are neither more nor less than three descriptions: STATUS LIBERTATIS, CIVITATIS, FAMILIAE. These are also called by some PRINCIPALES, or as denoting STATUS in its proper sense, so that according to this view the *natural* would only improperly bear this name.

Let us consider, in the first place, the STATUS NATURALIS. All that is requisite here is that we should group together in a preliminary general survey all those qualities of Mankind upon which, in any part of the Legal System, special consequences depend. This idea has not yet been carried forward, however, to its logical completeness by any single Writer (*b*). It is also very doubtful whether by such a course the clearness or thoroughness of the exposition could in any way be improved; it appears rather to be more preferable to confine oneself to those notices which are usually collected together under the term *natural* STATUS, whether in those parts of the System where they have a practical signification, or elsewhere where they are supposed to be recognised. But it clearly follows from this way of posing the question, that no historical basis can be assigned to the idea here combated by even its own advocates, and that therefore the question has for its subject-matter not so much the Concepts and Rules of Law, as the suitability of a certain method of scientific exposition.

Entering more into detail, the objection, in regard to the general notion of STATUS above given, must be pointed out. In this notion the Possession of Rights is conceived as a human quality, so that, for example, the STATUS CIVITATIS is described as the compendium of those Rights which appertain to a CIVIS. Now, if this mode of treatment be admitted, it is absolutely incomprehensible why it should not be logically carried forward to its full extent, since all other Rights, as well as those of FREEDOM and CIVITAS, may be included within the notion of qualities of the persons entitled. Then we should also have to admit a STATUS of Husbands, of Proprietors and Usufructuaries, of Cre-

(*b*) Thus, for example, under the *status naturales* (by reason of the Testamentary formula) must also be included the classification of Men into those who can see and those who are blind,—those who are literate and those who are illiterate; further (by reason of the proof in regard to the *cond. indebiti*, L. 25, § 1 *de prob.*), the qualities of *simplicitate gaudentes* and of *desidia dediti*. Finally, it is incomprehensible why these primary considerations should be restricted to human nature. There is much connected with the physiology of Animals and the Vegetable world, besides the distinction between standing and running Water, &c., which is not without influence upon Jural relations, and might also therefore lay claim to notice in an introduction to the doctrine of Status.

ditors, of Heirs, and the like, and the whole Science of Jurisprudence would be embraced in the doctrine of STATUS. But this simply means, in other words, that the doctrine of STATUS generally merges into the doctrine of Rights, and, consequently, should be wholly abandoned as a special independent doctrine (*c*). Thus, then, this doctrine is shown to be untenable by itself upon logical grounds, unless one ascribes to it a wholly different signification than the ordinary one, for it has been referred to Jural Capacity, which will be discussed presently.

III.

But of the greatest importance is the scope which must be given to that doctrine of STATUS (namely, the Civil), and consequently to the notion which must be associated with each of the three specified forms of it. With regard to the two first forms there is a little perplexity. STATUS LIBERTATIS, it is said, denotes the fact that a person is FREE; ST. CIVITATIS that he is a CITIZEN, including all those Rights which he enjoys either as a Freeman or as a Citizen. This explanation appears to be natural, because the terminology leads directly up to it. But it is not on this account quite so true. The name does not convey a similar direct signification in regard to the so called STATUS FAMILIAE: moreover, the explanations of this matter have always proceeded upon two wholly different lines, each of which has again led to numerous ramifications.

The first mode of explanation consists in referring the STATUS FAMILIAE to the Totality of those Persons, who are related to each other as Agnates, therefore to the Agnatic Family, so that the STATUS FAMILIAE of a man would denote his Membership in a specified Family of Agnates, including the Rights springing out of that relation. With reference to this view, however, it cannot fail to strike one that it involves an utter absence of any innate connection between this third form of STATUS and the two

(*c*) Very feeble is the answer of Hüpfner (§ 62, note (*a*)) to this objection: "According to ordinary phraseology, one is not accustomed to reckon Ownership amongst human qualities." For what concern have we, who have to satisfy the claim of logical consistency in Science, with the phraseology of common life? It is well to observe that Hüpfner does not attempt to justify the matter with the view of historically explaining the Roman conception, or of giving it an air of probability. Moreover, to reply to our objection, as if the most important qualities were precisely those which were alone admitted into the doctrine of *status*, would be unmaintainable, because, for example, amongst Minors two qualities may be distinguished: that of one committed to the care of another, and the possessor of Property. The former is usually mentioned in the doctrine of *status*, the latter not so. If now we meant to assert that this was because the first quality was much more important than the second, we would be placing the *means* higher than the *object* to be aimed at.

first, so that it is absolutely incomprehensible why this Jural relation in particular, and no other, should be joined with those two under a common generic designation. That Agnation is the basis of important Rights does not in any way explain this circumstance, for no one will deny the foundation of important Rights also to Marriage, Paternal Power, and Patronage, and yet no one calls any of these conditions a STATUS. It might be sought to get over this objection by retorting that the STATUS FAMILIAE was not intended so much to denote the position in a specified Family of Agnates as the Capacity for Agnation generally. But even this argument can be of no avail, since this Capacity completely coincides with Citizenship, and is therefore unsuited to constitute a personal STATUS distinct from Citizenship.

The second mode of explanation refers the STATUS FAMILIAE to the classification of Men into DEPENDENT (ALIENI JURIS) and INDEPENDENT (SUI JURIS) (§ 67). To determine the STATUS FAMILIAE of a man means, therefore, no more than to specify whether he is SUI JURIS or ALIENI JURIS. Here then we reach at once the possibility of avoiding all the objections previously adduced. The third STATUS has now this element in common with the two first, that it relates just like those to Jural Capacity. That there are at all events three conditions of higher Jural Capacity, Freedom Citizenship and Independence, is beyond all doubt, and for this undisputed doctrine we have now found a suitable expression in the triple STATUS. The STATUS LIBERTATIS, for example, then no longer denotes for us Freedom by itself, but the Jural Capacity conditioned by Freedom: and it now appears no longer illogical to designate Freedom, Citizenship, and Independence (Family) as STATUS, but to exclude from this denomination Ownership, Marriage, Succession, and the like, inasmuch as the acquisition of these Rights secures for us, indeed, important privileges, but produces no change whatever in our Jural Capacity. On the other hand, the threefold CAPITIS DEMINUTIO is embraced in this conception in the simplest and most natural manner. Every CAPITIS DEMINUTIO now appears to us as a Degradation in relation to some one of the three descriptions of STATUS, and thus on all sides a more complete and satisfactory innate connection becomes perceptible, instead of the arbitrariness and inconsistency which are perceived in the other mode of explanation.

This innate connection nevertheless can only operate as a negative justification of the mode of explanation last attempted. The illogical can certainly not be endured, but what is logically faultless is still not for that reason historically true. Thus it will be shown in the following inquiry that, in point of fact, even this last mode of explanation, notwithstanding that it is formally faultless, must nevertheless be abandoned.

IV.

From a just appreciation of the defective character of the ordinary doctrine of STATUS, Hugo has not merely rejected the threefold notion of Status, but he has also denied any technical meaning to the term. In his opinion STATUS signifies, precisely like CONDITIO, a Condition or Quality generally, and although it is occasionally employed by Jurists, just as every other word borrowed from common life, it is nevertheless absolutely not a technical expression (a).

And, in point of fact, this indefinite, non-technical use of the word is frequently found both amongst Jurists, as well as in other writers: this is the case in all those passages in which the expression is placed in connection with a subject other than a Person, although some of them by an apparent relation to Persons, and especially to the above-mentioned threefold STATUS of Persons, may easily serve to mislead.

Thus, for example, when a STATUS FACULTATIUM or PECULII is spoken of (b), nothing more is meant than the quality of the Property or of the Peculium, that is to say, the extent or money-value of the same. So in like manner in the text of Cicero, DE LEGIBUS, I. 7, which has so often been erroneously mixed up with the Juristical doctrine of Status—AGNATIONIBUS FAMILIARUM DISTINGUUNTUR STATUS—the meaning is:—to every Family belong neither more nor less Persons than just those who stand towards each other in an Agnatic relation, so that by means of Agnation the extent, the number of Members, and the condition (STATUS) of each Family, is determined. There is simply a deceptive similitude underlying the words which may tempt us to confound the STATUS FAMILIARUM here spoken of with the STATUS FAMILIAE invented by our Jurists; for Cicero here used STATUS in precisely the same sense which lay at the foundation of the term STATUS PECULII above-mentioned. Lastly, there still appertains to this part of our subject a passage of the Digest which, whenever it has been used, has been found doubtful or has been misunderstood: L. 5, § 1, 2 *de extraord. cogn.* (50, 13) “EXISTIMATIO EST dignitatis inlaesae status . . . MINUITUR EXISTIMATIO, QUOTIENS MANENTE LIBERTATE CIRCA statum dignitatis POENA PLECTIMUR, SICUTI EUM RELEGATUR QUIS, VEL CUM ORDINE MOVETUR,” etc. From this the Moderns have constructed a STATUS EXISTIMATIONIS: literally a STATUS DIGNITATIS is here named, but in point of fact the expression has here simply the same factitious signification, as in the passages already

(a) Hugo, *Rechtsgeschichte*, Ausg. II, p. 118.

(b) L. 2, § 1, 2, 3 *ubi pupillus* (27, 2). Here *modus*, *vires*, and *status facultatiuum* are indifferently spoken of, which must therefore be regarded as synonymous expressions. L. 32, § 1 *de pecul.* (15, 1). Other similar passages are found in Brissonius, v. *Status*, No. II.

cited (c). DIGNITAS is the external position of a Man, wherein his personal worth is manifested, and to which therefore the public esteem is naturally attached (d). So long as the DEGREE or CONDITION of this DIGNITAS which we have once attained remains unviolated, we have a perfect, complete EXISTIMATIO. But the EXISTIMATIO may be either impaired or wholly abrogated by Punishments which involve the loss of Honor, that is to say, by such Punishments which are expressly directed to the degradation of the degree of that DIGNITAS (QUOTIENS *circa statum dignitatis* POENA PLECTIMUR); it is clearly impaired by Banishment in every instance, by expulsion from a high and honorable condition (Senatorian or Decurionian), and by every form of Infamy; it is abrogated by such Punishments as withdraw Freedom or Citizenship from the culprit. Hence it is quite plain that the STATUS DIGNITATIS of this passage has nothing in common with the so-called triple STATUS, for that STATUS may indeed be altered, although Freedom and Citizenship may continue, and it is therefore wholly different from these two forms of STATUS; with the STATUS FAMILIAE, however, it has absolutely no connection whatever. Still more clearly will the purely factitious character of the STATUS DIGNITATIS here mentioned be exhibited below, where it will be shown that the real Juristical STATUS is in every instance placed in direct contrast to DIGNITATIS.

V.

Thus we find that Hugo's explanation of the word STATUS is confirmed in many passages: on the other hand, he certainly goes too far, because he ascribes to it a general applicability. We must rather admit that the old Jurists, when they speak of STATUS as the QUALITY of a person, use it certainly in a technical sense, and this must now be demonstrated by proof.

STATUS, in this technical sense, means with the Roman Jurists the Position or Standpoint which the individual Man assumes in relation to other Men. And since every Man lives in a dual relation, a public and a private relation, so in like manner a two-fold STATUS might well be distinguished, the PUBLICUS and the

(c) Wholly in the same sense is the L. 5 *de extr. cogn.* placed by Brissonius in No. II. v. *Status*, where the purely factitious applications of the word *Status* are collected together. As regards the L. 5 *cit.* cf. also § 79 a.

(d) This signification of the word *dignitas* is made particularly clear by the following applications:—L. 49, § 4 *de lege* 3 (32, 1) "PARVI AUTEM REFERT, UXORI AN CONCUBINAE QUIS LEGET, *quae ejus causa emta parata sunt*: SANE ENIM, NISI DIGNITATE, NIHIL INTEREST" (that is to say, that only the UXOR participates in the rank and position of her Husband, and by this external mark is she most easily and certainly distinguished from a CONCUBINA); L. 14 *pr. de muner.* (50, 4) "HONOR MUNICIPALIS EST ADMINISTRATIO REPUBLICAE CUM DIGNITATIS GRADU" (for instance, because there are also Municipal Offices which confer upon him, who is entrusted with them, no new rank).

PRIVATUS. These expressions were wholly Roman in origin, and it seems to be purely accidental that they do not occur precisely in this form in the passages preserved from the ancient Jurists; for, which is the principal point, the notions themselves are familiar to the Romans, and the particular cases of STATUS (in a technical sense) are also actually embraced within these notions, and exhaust the same: except that where these notions are mentioned generally, and contrasted with one another, those precise expressions are not employed, but instead of them the more common and expressive terms: PUBLICA JURA, CIVITATIS JURA, and by way of contrast to the same: PRIVATA HOMINIS ET FAMILIAE JURA (a).

These fundamental notions then being assumed, we must next inquire what individual relations, by a consistent application, can be embraced within them.

Under political STATUS (PUBLICUS) have to be primarily comprehended above all else Freedom and Citizenship, as the fundamental conditions of every privilege appertaining to the Public Law; but in like manner also, as it seems, very many others, for instance, the position of a Magistrate, a Senator, a Knight, a Judex, and so forth. But it is to be remembered that it is the ancient Jurists who speak on this topic, and who naturally do so only in the interests of their own branch of knowledge. Their knowledge, however, is limited to Private Law, and does not include all that we Moderns are accustomed to reckon in the Science of Jurisprudence. Hence only those personal conditions of the Public Law which exercise an influence upon Private Rights are recognised by them as (PUBLICUS) STATUS. This is the case in regard to Freedom and Citizenship, because the Private Law Jural Capacity is conditioned by these, which is not the case in regard to other Political conditions. Hence it follows that Freedom and Citizenship must indeed be designated as STATUS, but not the conditions of a Magistrate, a Senator, a Knight, or a Judex. That this was really the case, that is to say, that the Romans, from their standpoint, not merely could, but actually did, devise this somewhat subtle distinction in a logical way, must now be proved by evidence.

L. 20 *de statu hom.* (1, 5) "QUI FURERE COEPIT *et statum, et dignitatem*, IN QUA FUIT, ET MAGISTRATUM (b) ET POTESTATEM

(a) L. 5, § 2; L. 6 *de cap. minutis.* (4, 5).

(b) It might be replied that the Magistracy is in fact also a DIGNITAS, and that therefore the conjunction *et* in this passage denotes no real difference. This observation might be pushed still farther, inasmuch as the passage mentions likewise a POTESTAS of the MAGISTRATUS. The idea involved, however, appears to be the following:—The Madman does not lose his STATUS; nor DIGNITAS (distinct from it), which indeed may also consist in a mere honorable distinction; nor even (which one might at first expect) the DIGNITAS of the MAGISTRATUS connected with an Executive Office; nor, lastly, the Private (Paternal) Power. Certainly this doubt could have been

VIDETUR RETINERE, SICUT REI SUAE DOMINIUM RETINET." § 5 J. *de cap. demin.* (1, 16) "QUIBUS AUTEM *dignitas magis, quam status* PERMUTATUR, CAPITE NON MINUUNTUR: ET IDEO SENATUS MOTUM CAPITE NON MINUI CONSTAT."

In both passages STATUS and DIGNITAS are apparently distinguished and contrasted, and the DIGNITY of a Senator is, for instance, explained to be something completely different from STATUS, which is only intelligible upon the basis of the distinction above demonstrated, which thus receives its complete justification. The following passage likewise relates to this topic:—

L. 6, C. *ex quib. caus. inf.* (2, 12) "AD TEMPUS IN OPUS PUBLICUM DAMNATI PRISTINUM QUIDEM *statum retinent*, SED DAMNO INFAMIAE POST IMPLETUM TEMPUS SUBJICIUNTUR."

That Infamy produces an exceptional change in DIGNITAS follows as a matter of course, and it is also expressly remarked in L. 5, § 2 *de extr. cogn.* that the Capacity for all Public Honors and Dignities is wholly lost thereby (c); nevertheless, it can have no influence whatever upon STATUS. Herein then lies at the same time the completion of the proof, that in regard to the STATUS DIGNITATIS of L. 5 *de extr. cogn.* (see also No. IV.), the expression STATUS is not used in a technical, but in an indefinite, factitious sense.

It is therefore well established, that in the PUBLICUS STATUS (where this expression is allowable) Freedom and Citizenship are to be reckoned, but no other personal Political Relation.

VI.

What other Personal Relations then are embraced within Private-Law STATUS?

If the analogy of Political-Rights were strictly followed, only those Relations should be reckoned therein which exercise an influence upon Jural Capacity. But the reason which led to such a restriction in the former case was simply this, that only a few Political conditions had any interest for Jurisprudence (the Province of Private Law); this reason, however, here wholly falls to the ground, since all the Personal Relations occurring here have a Juristical significance directly on account of their own character, and not merely by reason of their influence upon Jural Capacity. Hence it happens that all Private-Law Relations of the Person as such, that is to say, all Relations of the Family-Law (§ 53—55) are to be reckoned without distinction as STATUS. If we compare them with Political STATUS, it will be seen that there lies therein an apparent, but wholly explainable

avoided by the use of more precise language, but in the next passage the ambiguity is not found.

(c) L. 2, C. *de dign.* (12, 1), VII. and many other passages.

inconsistency. Accordingly STATUS means every condition of Man in the individual Relations appertaining to the Family. That the ancient Jurists themselves, in point of fact, actually conceived the matter in this light, and not merely that they could so conceive it, must yet be proved. But for this purpose it is necessary first of all to set forth the notions here asserted (assuming meanwhile their truth), in their full application.

Accordingly, the following Relations must anyhow be recognised as STATUS :

A.—POLITICAL RIGHTS.

- (1.) Freedom.
- (2.) Citizenship.

B.—PRIVATE RIGHTS: all Family Relations, therefore (according to § 54, 55) :

- (1.) Marriage.
- (2.) Paternal Power.
- (3.) Kinship.
- (4.) MANUS.
- (5.) SERVITUS.
- (6.) PATRONATUS.
- (7.) MANICIPII CAUSA.
- (8.) TUTELA and CURATIO.

In this (as yet purely hypothetical) enumeration of every conceivable form of STATUS, one of the forms occurs twice, *i.e.* Freedom (or the absence of Servitude), once as a fundamental condition of all participation in any Public Right, and again as the contrast of Slavery, which constitutes a peculiar form of domestic dependence, therefore a Family Relation. In this condition of things it was natural that one of these two points of view should be considered as outweighing the other. But then a two-fold reason must have led to this preponderance being ascribed to Political rather than to Private STATUS: in the first place, the superior importance of Public Rights generally; in the next place, and more particularly, the consideration that the notion of a condition of Slavery (the contrast of Freedom) is more comprehensive than the notion of a domestic dominion over Slaves (DOMINICA POTESTAS). For the former embraces also Ownerless Slaves (§ 55, a, and § 65), but the DOMINICA POTESTAS only those Slaves who stand absolutely in the ownership of a Master. Hence the political conception of Freedom (with its contrast of Slavery) appears for this reason to be the predominant one, because by it alone the subject is exhausted, whilst the Private-Law conception leads merely to a single and incomplete notion of the condition of Slavery. We shall have to repeat this observation below in dealing with CAPITIS DEMINUTIO.

VII.

We can now proceed to prove that, in point of fact, the Roman Jurists under the term (Private-Law) STATUS understood nothing else than what has here been supposed, namely—the position which the individual Man occupies in the different forms of Family Relations.

I shall begin with the Institutes of Gaius, as the clearest and most complete work which has come down to us from the Juristical literature of the Romans. After a brief introduction on the Law Sources, he gives us in § 8 of the first Book, a summary of the entire body of Private Rights determined by those various Law Sources, of which his work is intended to treat,—thus: DE JURIS DIVISIONE. OMNE AUTEM JUS, QUO UTIMUR, VEL AD PERSONAS PERTINET, VEL AD RES, VEL AD ACTIONES. SED PRIUS VIDEAMUS DE PERSONIS. This JUS QUOD AD PERSONAS PERTINET occupies the entire first Book of the work. Gaius treats this portion of Jurisprudence according to a threefold classification of Men, which runs thus:

§ 9 *De Conditione hominum* (a). ET QUIDEM SUMMA DIVISIO *de jure personarum* HAEC EST, QUOD OMNES HOMINES AUT LIBERI SUNT AUT SERVI.

§ 10. RURSUS LIBERORUM HOMINUM ALII INGENUI SUNT, ALII LIBERTINI.

§ 48. SEQUITUR *de jure personarum* ALIA DIVISIO. NAM QUAE DAM PERSONAE SUI JURIS SUNT, QUAE DAM ALIENO JURI SUNT SUBJECTI.

§ 49. SED RURSUS EARUM PERSONARUM, QUAE ALIENO JURI SUBJECTAE SUNT, ALIAE IN POTESTATE, ALIAE IN MANU, ALIAE IN MANCIPIO SUNT.

§ 50. VIDEAMUS NUNC DE IIS, QUAE ALIENO JURI SUBJECTAE SINT: SI COGNOVERIMUS, QUAE ISTAE PERSONAE SINT, SIMUL INTELLEGEMUS, QUAE SUI JURIS SINT.

§ 142. TRANSEAMUS NUNC AD ALIAM DIVISIONEM. NAM EX HIS PERSONIS . . . QUAE DAM VEL IN TUTELA SUNT, VEL IN CURATIONE, QUAE DAM NEUTRO JURE TENENTUR.

The following idea underlies these passages. The JUS QUOD PERTINET AD PERSONAS has to determine the CONDICIO HOMINUM,

(a) In regard to this Title it must be observed that it is among the few Titles which are found in Gaius, and that in regard to all these Titles their authenticity is doubtful.

or (as it is called in the text) the *JUS PERSONARUM*, that is to say, the position which the individual Man assumes in certain Relations. And what are these Relations? They are comprehended within the three *DIVISIONES*, and will be exhibited and discussed according to their relative position in the following order:

(1.) *PATRONATUS*. This constitutes the entire first *DIVISIO*, for the contrast which it suggests between Freemen and Slaves is only apparent, and must merely serve as an introduction and a conduit to the different kinds of Patronistic Rights. Section 10 clearly indicates this connection, but the whole subsequent mode of treatment renders it indisputable.

(2.) *POTESTAS DOMINORUM* or *SERVITUS*.

(3.) *PATRIA POTESTAS*, and (as embracing the ground and condition thereof),

(4.) Marriage.

(5.) *MANUS*.

(6.) *MANCIPII CAUSA*.

Nos. 2—6 exhaust the second *DIVISIO*.

(7.) *TUTELA* and *CURATIO*, as the purport of the third *DIVISIO*,

It is thus clear that Gaius specifies precisely those Relations as forms of the *JUS PERSONARUM* which I have above enumerated as Private-Law *STATUS*. The only one of the latter Relations which is wanting in his exposition is Kinship (Agnation), and it is worthy enough of note that it is precisely the relation which so many amongst Modern Writers assert to be the only *STATUS FAMILIÆ*. I am far, however, from ascribing any weight to this omission on the part of Gaius, or even from considering it as an indication that Agnation was treated by Gaius, or indeed by the ancient Jurists generally, as something unlike the other Relations here mentioned. It was simply not quite suitable to mention it among the three *DIVISIONES*, which appeared to him so well adapted for the exposition of the *JUS QUOD PERTINET AD PERSONAS*. Moreover, direct proof that Kinship was actually denominated *STATUS* by the ancient Jurists, will presently be adduced (No. IX.).

The Institutes of Justinian follow closely the same arrangement as those of Gaius, and adhere for the most part to the very words of the passages above quoted. Moreover, they treat the entire Law of Persons according to the same triple division, which forms the basis of Gaius's classification. One variance indeed occurs in the terminology, for the superscription which introduces the first *DIVISIO* is entitled by Gaius *DE CONDICIONE HOMINUM*, and by Justinian *DE JURE PERSONARUM*. More important, however, is the very natural variance that two Law Institutes, which had fallen into desuetude, are cast aside by Justinian, namely, *MANUS* and *MANCIPII CAUSA*.

In the first Book of the Digest the superscription of the fifth Title is: *DE STATU HOMINUM*. That this superscription is in-

tended to express the same idea, which was above quoted from Gaius, and simply to carry it farther, is likewise placed beyond doubt by the beginning of the Title. For the first and third texts thereof correspond precisely with the above quoted §§ 8 and 9 of Gaius. Between these two texts there stands another (*i. e.* L. 2), borrowed from Hermogenianus, of which the portion most essential to our present inquiry runs thus:—

CUM IGITUR HOMINUM CAUSA OMNE JUS CONSTITUTUM SIT: PRIMO *de personarum statu* . . . dicemus.

To this, finally, has still to be added the following explanation of the MINIMA CAPITIS DEMINUTIO, wherein several passages literally agree:—

Ulpian, XI. § 13. MINIMA CAPITIS DEMINUTIO EST, PER QUAM, ET CIVITUTE ET LIBERTATE SALVA, *status dumtaxat hominis mutatur.*

§ 3 J. *de cap. dem.* (1, 61) MINIMA CAPITIS DEMINUTIO EST, CUM ET CIVITAS ET LIBERTAS RETINETUR, *sed status hominis commutatur.*

With this last passage Gaius, I, § 162 undoubtedly literally agrees, except that the words here italicised cannot be deciphered in the latter.

VIII.

I will now summarise in separate propositions what is deducible from a comparison of the evidence above quoted, as the general view of the ancient Jurists:—

1. The JUS QUOD PERTINET AD PERSONAS embraces as a whole very numerous Family Relations.

2. The position which each Man occupies in these various Relations is indifferently denoted by the following completely synonymous terms:—

JUS PERSONARUM (Gaius and Justinian).

PERSONARUM STATUS (Hermogenianus).

CONDICIO HOMINUM (Gaius, if indeed this passage is genuine; see also VII. a).

STATUS HOMINUM (Digest).

STATUS HOMINIS (Ulpian, Justinian, and probably Gaius).

3. STATUS HOMINUM or HOMINIS does not, therefore, denote indefinitely a Jural condition of the Man generally, but strictly his position in the Family, and forms consequently the distinct contrast to the position in the State. The STATUS HOMINIS is the Status of the Man (PRIVATA HOMINIS ET FAMILIAE JURA), in contrast to the Status of the Citizen (PUBLICA and CIVITAS JURA).

4. STATUS therefore signifies not indeed the higher position in those different Relations but the position generally, whether high or low. Thus we can also ascribe a STATUS to the Slave, namely, his condition of Slavery. But because the Slave happens

amongst all other Men to be the only one completely devoid of Rights, for which reason his condition is the only purely negative one, so every form of STATUS is rightly enough also denied to him (a).

5. *JUS PERSONARUM* signifies here, therefore, not a division of Jurisprudence, but a certain condition of the individual Man; or (according to the terminology of some Modern Writers) it refers to Law in a subjective, and not in an objective, sense (§ 54 (d)) and § 59).

IX.

The following particular applications occurring in our Law Sources are intended partly to confirm or to clear up the established propositions, and partly to defend them against seeming objections.

The most frequent application of all others is that occurring in the expressions *STATUS QUÆSTIO*, *STATUS CAUSA*, *STATUS CONTROVERSIA*. These expressions occur for instance, when the question regarding Agnation to a particular deceased person, as a condition of Succession, is contested (b), and this circumstance is noteworthy, for two reasons: *firstly*, as a proof that those expressions were really employed in order to denote a dispute concerning the existence of Family Relations; *secondly*, because it thus becomes immediately certain that Kinship was also designated as *STATUS* by the ancient Jurists, which was open to doubt from the contents of the first book of Gaius (No. VII).

But at the same time it is not to be mistaken that many passages have used those expressions in a different sense, in order to denote disputes relative to Freedom or Slavery, *INGENUITAS* or *LIBERTINITAS*, so that in every passage of our Law Sources where the expressions are indefinitely employed, we may assume with probability that the authors have had such disputes distinctly in view. The basis of this more frequently employed terminology lies nevertheless simply in the accidental and factitious circumstance, that a law-suit concerning the existence of Kinship seldom assumes a different aspect from one relating to Freedom. But this matter is also capable of a natural explanation—for, in the first place, more attention would certainly be paid to the recognized Relations of Freemen, than to the factitious Relationship of those who lived either in an actual or apparent condition of Slavery; for which reason the former could more rarely be doubted or disputed; and secondly, the transmission and alienation of Slaves, just as the transmission of the condition of Slavery through the Mother, must have given occasion to numerous disputes, which could scarcely have occurred

(a) L. 3, § 1; L. 4 *de cap. min.* (4, 5); cf. *post*, No. XIII.

(b) L. 3, § 6—11; L. 6, § 3 *de Carbon. edicto* (37, 10).

in regard to Family-Relations of a more individual character. Finally, moreover, a dispute relating to Kinship arose frequently (perhaps mostly) not as an independent STATUS QUÆSTIO, but only as an INCIDENTS QUÆSTIO on the occasion of a disputed Succession (*a*). That there is no question of a dispute concerning Citizenship as a STATUS QUÆSTIO is, however, explainable upon another ground, that it did not usually form the subject of a Private Action.

A remarkable confirmation of this customary terminology is found in the Rule of Law derived from an Edict of Nerva, that no STATUS QUÆSTIO injurious to the deceased should be permitted to be raised after the lapse of five years from his death (*b*). Looking to the generality of the mode of expression this Rule might also be referred to every dispute concerning Family Relations, *e.g.*, to the question whether an Emancipation which had previously taken place was legally valid, or not; it was nevertheless conceded that this application was not within the meaning of the Rule (*c*), so that it was exclusively referable to disputes relating to the Freedom or INGENUITAS of the deceased (*r*). STATUS therefore only signifies in this Rule, what I have called above *political* STATUS, to the exclusion of Private-Law STATUS.

It is to this narrow use of the word, which is sometimes met with, that a certain passage, which has always given rise to considerable doubt, moreover refers:—L. 1, § 8 *ad Sc. Tert.* (38, 17). *CAPITIS MINUTIO salvo statu contingens LIBERIS NIHIL NOCET AD LEGITIMAM HEREDITATEM . . . PROINDE SIVE QUIS . . . CAPITIS MINUATUR, AD LEGITIMAM HEREDITATEM ADMITTETUR: NISI MAGNA CAPITIS DEMINUTIO INTERVENIAT, QUÆ VEL CIVITATEM ADIMIT, UTPUTA SI DEPORTETUR.*

Ulpian here clearly distinguishes between the MAGNA (that is to say, MAXIMA or MEDIA) and MINIMA CAPITIS DEMINUTIO (§ 68 (*d*)), and he calls the latter SALVO STATU CONTINGENS, whilst the other texts are accustomed to say SALVA CIVITATE (*e*). He uses STATUS here, therefore, for PUBLICUS STATUS, that is to say in the same restricted sense in which it is ordinarily employed in connection with QUÆSTIO, but which, apart from this connection (and also in other passages of Ulpian) is not customary. We have consequently in this passage, as in so many others, to do with a special terminology, and we must be content with this observation, and there is no need to resort to any alteration of

(*a*) Cf. L. 1, C. *de ord. Jud.* (3, 8).

(*b*) "NE DE STATU DEFUNCTORUM POST QUINQUENNIIUM QUÆRATUR." *Dig.* XL. 15; *Cod.* VII. 21.

(*c*) L. 5, C. *ne de statu* (7, 21).

(*d*) That disputes concerning Ingenuitas, and not merely those relating to Freedom, were governed by that Rule, is expressly stated in L. 1, § 3 *ne de statu* (40, 15); L. 6, 7, C. *evd.* (7, 21); L. 6, C. *ubi de statu* (3, 22). In this last-cited passage, Justinian abolished the Rule in reference to Ingenuitas.

(*e*) L. 2 *pr.*; L. 5, § 2 *de cap. min.* (4, 5); L. 2 *de leg. tutor.* (26, 4).

the text (*f*). A similar terminology is observable in a Rescript of Severus to which attention has already been directed (No. V.), L. 6, C. *exquib. c. inf.*: for there also it is said STATUS RETINENT: they lose neither Freedom, nor Citizenship.

In several passages the words occur:—DE STATU SUO INCERTI, DUBITANTES, ERRANTES (*g*). This language points to a doubt, partly concerning Freedom and partly concerning independence of Paternal Power, and completely confirms, therefore, our pre-supposed notion.

The most frequent application of the term STATUS, in the extended meaning which I have assigned to it, is found in the explanation of CAPITIS DEMINUTIO as a STATUS MUTATIO, in which STATUS obviously denotes Freedom and Citizenship as well as purely Family-Relations. This will again be more closely considered below.

CONDICIO is also used indifferently with STATUS to denote, INTER ALIA, the social condition with reference to Citizenship (*h*).

Lastly, the following passages might be adduced as supplying an apparent confirmation of the recognition of STATUS NATURALES.

(*a.*) STATUS AETATIS.

L. 77, § 14 *de leg. 2* (31 *un.*) QUAMQUAM IGITUR TESTAMENTO CAUTUM ESSET, *ut cum ad statum suum frater pervenisset: ei demum solveretur, &c.*

L. 5, C. *quando dies* (6—53) EX HIS VERBIS:—DO, LEGO AELIAE QUAE LEGATA ACCIPERE DEBENT, *cum ad legitimum statum pervenerit, &c.*

In both passages STATUS SUUS and LEGITIMUS STATUS mean nothing else than Full Age; but a technical terminology can certainly not be deduced from these expressions, since they are not used in this sense by Jurists or Emperors, but by Testators, whose very unjuristical language often causes great difficulty to the ancient Jurists.

(*b.*) STATUS SEXUS. In the Title of the Digest, DE STATU HOMINUM, LL. 9 and 10 treat of the distinction of Men, Women, and Hermaphrodites, and this, with reference to the superscription of the Title, might be deemed to be a STATUS. But owing to the character of the Digest, as a mere Compilation, this point can certainly prove nothing. Moreover, although some old Jurist in treating of the Family-Relations may have touched upon the distinction of the Sexes, which indeed is not improbable,

(*f*) Noodt (*Obser.* 11. 21) wishes to substitute SALVO STATU C. CONTINGENS, which would then mean SALVO STATU CIVITATIS CONTINGENS. Certainly the letter C. may serve here as the symbol for CIVITAS; but, in the first place, every introduction of such symbols in the Digest is very misleading, and in the next, the combination of STATUS CIVITATIS is without another example. Besides, no necessity compels us at all events to make any emendation.

(*g*) Ulpian, XX. § 11; L. 14, 15 *qui test.* (28, 1).

(*h*) Gaius, I. § 68; Ulpian, V. § 8; VII. § 4.

he could nevertheless not have placed it upon the same footing as the actual Jural Relations which are designated as STATUS. Anyhow in those two passages the word STATUS does not occur: CONDICIO FEMINARUM is certainly mentioned therein, but this expression is precisely the one which is even more frequently employed in an indefinite and purely factitious sense than STATUS.

X.

The preceding inquiry yields the following result in regard to the special notion of STATUS. STATUS denotes two Relations of the Public Law (Freedom and Citizenship), and in the domain of Private Law all the Jural Relations appertaining to the Family.

The individual forms comprehended within this notion may be arranged in the following different ways:—

- (1.) By reducing them to general notions :
 - Political STATUS (Freedom and Citizenship).
 - Private-Law STATUS (all Family Relations).
- (2.) By an enumeration of individual cases :—
 - Freedom.
 - Citizenship.
 - Family (STATUS HOMINIS).

As to which it must, however, be observed that the analogy between these three last named cases is only apparent, inasmuch as the first two are in point of fact single Relations, whilst the third is only the collective expression of a number of single Relations, and therefore embraces within itself several individual cases.

Neither of these two modes of arrangement has obtained any direct expression in the Roman Law, but an indirect recognition of each of them may be shown to exist. To the first mode refer the Roman expressions MAGNA (MAJOR) and MINOR CAPITIS DEMINUTIO (§ 68 (*d*)); to the second, the customary expressions MAXIMA, MEDIA, MINIMA, CAPITIS DEMINUTIO (§ 68).

What then is the doctrine common to the Moderns regarding the triple STATUS? (Nos. II., III.). At the first glance it might seem analogous to the second mode of treatment, but in point of fact it is not so, not even in either of the two forms which has hitherto been attempted to be given to it (No. III.). For the Family of Agnates, which, according to one explanation, must prevail as STATUS FAMILIAE, is after all only one of numerous Family Relations; the classification of Men into SUI JURIS and ALIENI JURIS (according to another explanation), that is properly speaking the Totality of Independent Relations, is indeed more comprehensive than the Family of Agnates, and therefore approaches nearer the truth, but at the same time it nevertheless fails to include several branches of the Family, such as Tutelage, Patronage, Kinship.

The question may now appropriately be raised, what is the Juristical basis of the customary doctrine regarding the triple STATUS?

That in no single passage of the Ancients is the triple STATUS mentioned, must be granted by everyone, and this circumstance is all the more remarkable since allusion to the closely analogous threefold CAPITIS DEMINUTIO frequently occurs.

But even separately the names of the three forms of STATUS, so familiar to Moderns, scarcely ever occur. STATUS CIVITATIS and STATUS FAMILIAE are nowhere found, and I only find STATUS LIBERTATIS in a single passage of quite a late period, in a Constitution of Constantine (a); but even here without any reference whatever to the actual notion of Status, and merely as a wholly useless and unmeaning change of expression for LIBERTAS only.

The doctrine of triple STATUS receives an apparent confirmation by a technical derivation from two propositions contained in our Law Sources, from which alone it was probably deduced.

(a.) From the threefold CAPITIS DEMINUTIO, in conjunction with the definition of CAPITIS DEMINUTIO as a STATUS MUTATIO, whereby the two notions are brought into immediate connection with each other. Of this further mention will be made below when considering the true character of CAPITIS DEMINUTIO.

(b.) From the following text of Paulus:—

L. 11 *de cap. min.* (4, 5) "CAPITIS DEMINUTIONIS TRIA GENERA SUNT: MAXIMA, MEDIA, MINIMA: *tria enim sunt quae habemus libertatem civitatem, familiam,*" &c.

This passage also can only be fully explained with reference to CAPITIS DEMINUTIO. It must be here evident, however, to every impartial person, that the expression STATUS is precisely the one which Paulus has not employed, but the very unusual, and, from no standpoint justifiable phrase, QUAE HABEMUS. A more decisive proof can scarcely be afforded that the Romans were unacquainted with the threefold STATUS, at least under this denomination, otherwise Paulus would certainly not have omitted to employ a positive and convenient technical expression, instead of resorting to a most unsatisfactory circumlocution.

(a) L. 5, C. *Th. ad Sc. Claud.* (4, 11), by Hänel, p. 401 "QUAECUNQUE MULIERUM . . . SERVI CONTUBERNIO SE MISCUERIT . . . *statum libertatis AMITTAT . . .*" One might also refer in this matter to Suetonius, *De illustr. Grammaticis*, cap. 21 "C. MELISSUS INGENUUS, SED OB DISCORDIAM *parentum* EXPOSITUS . . . QUAMQUAM ADSERENTE MATRE, PERMANSIT TAMEN IN *statu servitutis*: *praesentemque conditionem* VERAE ORIGINI PRAEPOSUIT, QUARE CITO MANUMISSUS . . . EST." But STATUS SERVITUTIS clearly means here the factitious condition of Unfreedom resulting from error: the expression is therefore used here in the untechnical sense above mentioned (No. 10). For the actual STATUS of Melissus was in fact that which proceeded from the *VERA ORIGO*.

XI.

In the doctrine relating to the threefold *CAPITIS DEMINUTIO* (§ 68—70) there is much that is simple and almost undisputed. In this category I include the character of the two higher forms of *CAPITIS DEMINUTIO* (*MAXIMA* and *MEDIA*); also the specification of most of the individual cases in which one of these forms is assumed; and, lastly, also their effects.

Some parts of this doctrine, however, belong to the specially difficult and disputed questions of the Ancient Law, and these must now be made the subject of particular inquiry. To this category belong the strict definition of the general concept, the peculiar notion of the lowest form of the same (*MINIMA*), and lastly, a few cases of its application.

The special concept of *CAPITIS DEMINUTIO* is uniformly defined by the ancient Jurists, and merely with a variation in minor expressions, to be a *STATUS MUTATIO* (§ 68 (*b*)). By this definition we are therefore thrown back upon the general idea of *STATUS*, for which three more or less different explanations have been suggested above (Nos. III. and X.). These explanations agreed in this, that Freedom and Citizenship were comprehended in all, but along with these two there was still a third Quality, as to which opinions differed. The above-mentioned definition of *CAPITIS DEMINUTIO* accordingly resolved itself into this, that it was made to consist of a change:—

Either of Freedom (*MAXIMA*);

Or of Citizenship (*MEDIA*);

Or of a third Quality, varying according to those three different explanations (*MINIMA*).

This third Quality then, by a change in which a *CAPITIS DEMINUTIO* (namely the *MINIMA*) might be effected, must be:—

(1.) According to the one explanation: The Agnatic Family.

(2.) According to the other: Independence or Dependence.

(3.) According to the third: Some one Family-relation, in which, therefore, the changes presupposed in the two first explanations were also included amongst others.

In regard to each of these three explanations an important doubt arises, common to all of them, whether, for instance, only a change generally, and not a *disadvantageous* change, was required, so that an advantageous or immaterial change might also be embraced within that concept. This necessary result of the stated definition contradicts:—

(*a*) The expression *DEMINUTIO*, which unquestionably denotes a Degradation, or Loss (*a*).

(*a*) Noodt (*Comm. in Dig. iv. s.*) meets this objection by observing that *MINUERE* may also generally express the same meaning as *MUTARE*. But a diminution or loss is inseparable from the notion of *MINUERE*, and if in particular cases both those expressions may be used in an identical sense, it

(b.) The unambiguous language employed in several applications of the doctrine. For when a Peregrinus or Latinus obtained the Right of Citizenship, an important STATUS MUTATIO certainly happened in his favour, but it would have been impossible for a Roman to call this improvement in his condition a CAPITIS DEMINUTIO.

Moreover, according to the two last explanations, a still further doubt arises. Such a change whereby a person who had hitherto been Dependent becomes Independent, may also be produced in consequence of a natural event (as the Death of the Father). Now since this case can certainly not be regarded as an illustration of CAPITIS DEMINUTIO, the definition must at least be supplemented in this manner:—A change by juristical acts, and not from natural causes. What would tend moreover to remove the first doubt, would at the same time likewise solve the second. For the case just mentioned consists in an advantageous change, and no case of a disadvantageous character can be discovered which could be assigned to purely natural events.

Hence it follows, that according to each of the three explanations of STATUS, that Definition must be amplified thus: STATUS MUTATIO *in deterius*. But even in its original incompleteness it cannot by any means be said to be vain or meaningless. For it at all events requires a change affecting the STATUS, excluding therefore, for instance, the loss of mere DIGNITAS from the notion of CAPITIS DEMINUTIO.

Nevertheless, even this amplification of the Definition does not seem quite satisfactory to me. It would, perhaps, be more complete if it were expressed as follows:—

A change of Status to disadvantage, and exclusively in relation to Jural Capacity.

But inasmuch as every change of Jural Capacity is not conceivable otherwise than by a change affecting STATUS, so the whole Definition may be more briefly, and yet more completely, expressed thus:—CAPITIS DEMINUTIO means every deminution of Jural-Capacity (§ 68).

XII.

The greatest doubt exists in regard to the notion of MINIMA CAPITIS DEMINUTIO, because even the old Jurists themselves define it in two essentially different ways:—

(1.) Paulus says it consists in the change of Family, that is to say, in the passing out of the Agnatic Family in which one was born (a).

is only by reason of the exactly converse supposition that the MUTARE accidentally comprehends a loss. Cf. Conradi, *Parerga*, p. 171.

(a) The *FAMILIA COMMUNI JURE* is therefore here meant, and not *JURE PROPRIO*, in accordance with Ulpian's distinction in L. 195, § 2 *de I. S.* (50, 16).

L. 11 *de cap. min.* (4, 5) . . . CUM ET LIBERTAS ET CIVITAS RETINETUR, *familia tantum mutatur*, MINIMAM ESSE CAPITIS DEMINUTIONEM CONSTAT.

L. 3 *pr. eod.* LIBEROS, QUI ADROGATUM PARENTEM SEQUUNTUR, PLACET MINUI CAPUT . . . *cum familiam mutaverint.*

L. 7 *pr. eod.* TUTELAS ETIAM NON AMITTIT CAPITIS MINUTIO . . . SED LEGITIMAE TUTELAE EX DUODECIM TABULIS INTERVERTUNTUR . . . QUIA AGNATIS DEFERUNTUR, *qui desinunt esse, familia mutati.*

According to this explanation, to which Paulus consistently adheres (*b*), he therefore refers the MINIMA CAPITIS DEMINUTIO to a Private Law STATUS, not indeed to every kind of Status generally, but only to a single one: and it is remarkable that this is precisely the one whose recognition in the series of the Private Law STATUS, according to the contents of the first book of Gaius, could alone be questioned (No. VII.).

(2.) Ulpian and the Institutes, and also undoubtedly Gaius, explain the MINIMA C. D. as an occurrence whereby the Private Law STATUS (ST. HOMINIS) is changed, whilst Freedom and Citizenship remain unaltered.

Ulpian, XI. § 13: MINIMA CAPITIS DEMINUTIO EST, PER QUAM, ET CIVITATE ET LIBERTATE SALVA, *status dumtaxat hominis mutatur.*

§ 3 J *de cap. demin.* (1, 16) MINIMA CAPITIS DEMINUTIO EST CUM ET CIVITAS ET LIBERTAS RETINETUR, SED *status hominis commutatur.*

Gaius, I. § 162: In his work precisely those words have come down to us illegible which are decisive on this point: but from the words which have been preserved, we may assume that the former ran just as we read them in the Institutes of Justinian.

If it could still be doubted whether the words STATUS HOMINIS have really the extended signification here contended for, which is based upon a comparison with several other texts (No. VIII.), this doubt would at least be removed by the following explanatory illustration which directly occurs in the Institutes:—QUOD ACCIDIT IN HIS, QUI CUM SUI JURIS FUERUNT, COEPERNUT ALIENO JURI SUBJECTI ESSE, VEL CONTRA. SERVUS AUTEM MANUMISSUS CAPITE NON MINUITUR, QUIA NULLUM CAPUT HABUIT.

(*b*) It might be thought that in the following passage he wavered towards the other explanation: CAPITIS MINUTIONE AMITTITUR (USUFRUCTUS), SI IN INSULAM FRUCTUARIUS DEPORTETUR, VEL SI EX CAUSA METALLI SERVUS POENA EFFICIATUR, AUT SI *statum* EX ADROGATIONE VEL ADOPTIONE *mutaverit* (Paulus, III. 6, § 29). But the words STATUM MUTAVERIT were not intended to be used in order to specially denote the MINIMA CAP. DEMIN. (otherwise the word HOMINIS must have stood in the passage), but as a tautological expression for CAP. DEM. generally. It is in this sense they occur everywhere amongst the old Jurists, and Paulus did not certainly wish to imply that the phrase STATUM MUTAVERIT was suitable only to the person Adopted, and not to one Deported, or to the Slave employed on the Mines.

In these applications, and especially in the manner in which the application to Slaves is avoided, there is no perceptible trace of a restriction of *MINIMA CAP. DEM.* to the Agnatic Family, and, therefore, of the meaning which Paulus assigns to this technical expression.

For the reasons above stated, the explanation offered by Gaius and Ulpian must be accepted as correct, and need only be amplified in the following manner :

MINIMA CAP. DEM. means a change of Private Law *STATUS* (of the Family-relations), which involves a diminution of Jural Capacity.

If this definition of the concept be correct, we must then recognise the following cases of *MINIMA CAP. DEM.* (§ 68).

(1.) Every change whereby an Independent person (*SUI JURIS*) becomes Dependent (*ALIENI JURIS*).

(2.) Every Degradation of a Child or of a Woman out of *POTESTAS* or *MANUS* into the *MANCIPII CAUSA*.

On the other hand we cannot include within it :—

(a.) The conversion of a Freeman into a Slave, for this operates rather as a *MAXIMA C. D.* (c). The reason for this is, that such a change has two distinct relations: it constitutes, for instance, at the same time the entry into a condition of Slavery, and the foundation of a domestic *POTESTAS*. In the former relation it belongs to Public Law, and in the latter to Private Law. But since the first relation is the preponderating one, it therefore operates generally as *MAXIMA* not as *MINIMA C. D.* (Comp. No. VI. and § 68).

(b.) The conversion of a Free Guardian into one placed under Guardianship, for this certainly changes the *STATUS HOMINIS* but without diminishing the Jural Capacity. A Madman, therefore, who is placed under a Curator, in no way suffers a *CAPITIS DEMINUTIO* (d).

(c) We must assert the same of the conversion of an *INGENUUS* into a *LIBERTINUS*, if this was any how regarded as a *CAP. DEM.* Cf. § 68 (e).

(d) L. 20 *de statu hom.* (1, 5) "*QUI FURERE COEPIIT, ET statum, ET DIGNITATEM . . . VIDETUR RETINERE, SICUT REI SUAE DOMINIUM RETINET.*" By *STATUS* was chiefly meant Freedom and Citizenship, as is shown by its being contrasted with *DIGNITAS*, and hence the words *VIDETUR RETINERE* are quite justifiable. In regard to the *STATUS HOMINIS* a *MUTATIO* may no doubt be asserted, but certainly not a *CAPITIS DEMINUTIO*. The matter is more doubtful with respect to the *COMMERCIIUM INTERDICTUM* of the *PRODIGUS*, since the latter loses the *TESTAMENTI FACTIO*. Ulpian, xx. § 13; L. 18 *pr. qui test.* (28, 1); § 2 J. *quibus non permittitur* (2, 12). But properly speaking in this case also there was only a fiction of Madness, and therefore a natural incapacity of dealing, so that the expression *TESTAMENTI FACTIO* was employed in the factitious sense, which is also found elsewhere. The proof of this lies in the fact that a Testament, executed by the Prodigal before the Interdict, remains perfectly valid (L. 18 *cit.* § 2 J. *cit.*), whilst every

K.

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The Moderns are accustomed either to accept one or other of these two ancient explanations of MINIMA C. DEMINUTIO, or to waiver between them. An attempt is also made to harmonize the two together, so that the MINIMA CAP. DEM. shall embrace two sets of cases: the loss of one's own Family (conversion of a SUI JURIS into an ALIENI JURIS), and of the common bond of unity, that is to say, the Agnatic Family (*c*).

XIII.

We have, therefore, now to decide between two statements of the ancient Jurists, of which one (originating with Paulus) explains the MINIMA CAP. DEM. as a change of the Agnatic Family, and the other as a change of some one Family-relation (according to my supplementary view, in conjunction with a diminished Jural Capacity).

The following reasons are decisive against the explanation of Paulus:—

I. The first is based on the term CAPITIS DEMINUTIO. This primitive term requires explanation. A signification of the word CAPUT must accordingly be devised which will render it intelligible, why this word in particular was employed for the designation of those events which indisputably bore the name CAPITIS DEMINUTIO. What then is the meaning of CAPUT?

According to Paulus it means strictly the Family-bond; but where is even a remote analogy found to support this definition?

It might again be supposed that CAPUT has just the same meaning as STATUS, or that it signifies Jural Capacity; both suppositions would satisfactorily explain the combination of the words CAPITIS DEMINUTIO, but both alike are altogether arbitrary, and are wholly unjustifiable upon any demonstrable signification of the word CAPUT to be found elsewhere.

Since then it is beyond doubt that in this word we have a reference to some old historical notion, it has accordingly been sought from early times to explain our technical term in connection with the Census Tables or the Burgess Registers. This was effected by referring CAPUT to the CAPITA CENSA, whose number is frequently mentioned by Livy. If a person lost the CIVITAS, Roman Citizenship was deemed to have been diminished by a CAPUT, as there occurred in regard to it a CAPUT EXEMPTUM, DELETUM. Hence the MINIMA C. D. might be explained to consist in an Arrogatus losing his Property, and therefore entering into a lower class (*a*). But the forced character of this explana-

CAPITIS DEMINUTIO annuls the Testament, and even the indirect Justinian Restitution only occurs in regard to an incapacity preceding the interval, and not in regard to that which was still in existence at the time of death. Ulpian, XXIII. § 4, 6.

(*c*) Glück, 2, § 128.

(*a*) Heineccii *Antiq. Jur.* 1, 16, § 1, 12.

tion could not be concealed by even its own advocate, and he rightly found it to be questionable in regard to the *CAP. DEM.* of an Emancipated person. One was therefore driven to employ the very special argument that, properly speaking, according to this definition, it was the Roman People in such a case that suffered a *CAPITIS DEMINUTIO*, and not the particular individual.

But these doubts have been dispelled by the very satisfactory explanation of Niebuhr (*b*). According to him *CAPUT* means the Head Note (Rubrick) of every Roman in the Censor's Burgess Lists, together with everything which was noted therein concerning his personal relations; and this definition is confirmed by the more complete development which it has received in later times (*c*). If, then, in those Lists such a change was noted opposite the name of a Roman, whereby he became *JURIS DETRIORIS*, that change was deemed a *CAPITIS DEMINUTIO*. In this category were consequently included, for instance, those cases in which the name of a former Citizen, by reason of his having forfeited Liberty or Citizenship, was entirely struck out; and, in like manner, the case when a *PATERFAMILIAS* was Arrogated, and had thus to be entered as the Son of another. I consider this explanation satisfactory in itself, and it needs only to be supplemented thus: supposing that the disadvantageous change that was noted was coupled with a lessening of the Jural Capacity. At least I must assert this from the stand-point of the Roman Jurists, at a time when Private-Law had assumed so very preponderating a position, and Public Law was placed to a large extent in the back ground; but along with this assertion the admission might very well be made, that during the Republican Period there were many purely Political Degradations which, even when they exercised no influence upon the Private-Law Capacity, might have borne the name of *CAPITIS DEMINUTIO* (*d*).

With this definition of *CAPUT* completely harmonizes the above cited (No. XII.) passage from the Institutes, in which it is said of a Freedman, in relation to his earlier condition of Slavery,

(*b*) Niebuhr, *Römische Geschichte*, vol. 1, p. 606 (4th ed.); vol. 2, p. 460 (2nd ed.).

(*c*) In the system of Taxation of the Imperial period *caput* signifies a taxable hide; that is to say, every parcel of land entered in the Doom-book, from which a *simptum* had to be contributed: therefore also again, as in the most early period, a particular section of the Tax Rolls, for the ancient Roman Burgess-Register was at the same time also a Tax Roll. Cf. *Zeitschrift für geschichtliche Rechtswissenschaft*, vol. 6, pp. 323, 377.

(*d*) Niebuhr mentions, as examples, the transmutation of a Plebeian into an *Aerarius* (the loss of a Tribe), and the removal into a *TRIBUS MINUS HONESTA*. We might add also such a loss of Property whereby a person fell into a lower class. Most specially connected with this subject, however, was Infamy, in regard to which the altered phraseology under the Emperors is capable of direct proof (§ 81). The limitation asserted in the text of *CAPITIS DEMINUTIO* to the lessening of Private-Law Jural Capacity, stands in logical connection with the wholly similar limitation of the expression *Status* (see above, No. V.).

NULLUM CAPUT HABUIT. And very naturally, because Slaves could certainly not appear as Persons in the Censor's Lists. Only superficially similar, but in reality different from it, is the expression which is employed by both Paulus and Modestinus for the same case :—

L. 3, § 1 *de cap. min.* (41, 5) ALITER ATQUE CUM SERVUS MANUMITTITUR : QUIA *servile caput* NULLUM *jus habet*, IDEO NEC MINUI POTEST.

L. 4 *col.* HODIE ENIM INCIPIT *statum habere*.

Thus CAPUT is clearly employed by PAULUS to denote a Man, and by SERVILE CAPUT he means a Man who is a Slave. To the latter he denies the possibility of CAPITIS DEMINUTIO, not because the Slave has no CAPUT (for he applies that term distinctly to a Slave), but because he is devoid of Rights, therefore loses nothing, and cannot be degraded. In the same sense Modestinus in the second passage denies STATUS to the Slave (No. VIII. (a)). It would therefore be quite erroneous if one endeavoured to prove by comparison of these passages with the passage cited from the Institutes, that the word CAPUT signified amongst the Romans the same thing as JUS or STATUS.

XIV.

II. A second objection against the explanation of Paulus lies in the complete absence of a satisfactory logical consistency. The MAXIMA, MEDIA, and MINIMA C. D. are meant to be forms of the same species : they must surely therefore have something in common, wherein alone the essence of this species comprehending them may be sought for. According to our explanation this common element is unmistakable. It is the diminished Jural Capacity which is perceptible in each of these three Jural changes, but nowhere outside of them. The explanation of Paulus cannot point to any such common element. It is true an attempt has been made on this account to treat the position in a particular Agnatic Family as Jural Capacity, because by that means the Capacity for acquiring an Intestate-Succession would be secured. But the confusion of Jural Capacity with the factitious conditions for the acquisition of Rights, lies at the basis of this conception. The JUSTA CAUSA in regard to Tradition, and the Title in regard to Usucaption are, just as Agnation in regard to the HEREDITAS INTESTATI, factitious conditions of the actual, individual acquisition, but none of them really constitutes an element of Jural Capacity. The loss of Agnation is the loss of a particular acquired Right, just as the loss of the Ownership of a House : neither of them, however, injuriously affects the Jural Capacity. In like manner, just as one would now as little think of calling an impoverishment a CAPITIS DEMINUTIO, so the latter term can as little be consistently employed to denote the loss of Agnation, as such.

Thus, on the one hand, there is no ground for treating the

loss of Agnation as analogous to the loss of Freedom or Citizenship, while, on the other hand, it appears to be quite as inconsistent to isolate that circumstance from other events with which it is nevertheless in point of fact wholly similar. For the essence of the loss of Agnation consists in the exclusion from a particular Family-relation, whereby at the same time the acquisition of certain other Rights (especially Succession) may be withdrawn from us. If then this fact affords a ground for calling the annulment of Agnation a *CAPITIS DEMINUTIO*, it is altogether incomprehensible why so many other events should not bear the same name, for which nevertheless no one has claimed it.

Thus, for example, the dissolution of Marriage. The Husband dissevers himself from this important Family-relation, and loses in consequence the expectation (first abolished by Justinian) of uniting for ever by the Wife's death her *Dos* with his own Property. I do not know why this expectation should deserve less consideration than that of the Intestate-Succession of Agnates.

In like manner Emancipation should also be called a *CAPITIS DEMINUTIO* of the Father, for the Father disconnects himself from the former Family-relation, and loses thereby the possibility of acquiring anything by the Son's acts, by which perhaps he might have become much richer than by a wholly uncertain Right of Intestate Succession to all his Agnates.

Our explanation, however, has not to contend with these difficulties, inasmuch as it is obvious that no diminution of Jural Capacity occurs in any of the events of this kind.

I do not, moreover, desire to lay too much stress upon the ground here discussed. *CAPITIS DEMINUTIO* is an historical notion, and it is quite conceivable that it may have been constructed and handed down in a wholly illogical manner, without regard to any innate consistency. But nevertheless we cannot assert this view to be a probable one, and if it is possible to discover an explanation by which consistency in the development of that notion is maintained, it is decidedly entitled to preference over those explanations which do not afford this service.

The weakness of Paulus's explanation, to which attention has here been drawn, is also very noticeable in many Modern treatises on our subject. Thus in both the above (No. 1) cited works of Fuerbach and Löhr, the authors are forced to appear as constantly wavering between the notions of Jural Capacity and Acquired Rights, in order, under the supposition of *MINIMA CAP. DEM.* being a *FAMILIAE MUTATIO*, to be able to treat the three degrees of *CAP. DEM.* as forms of one and the same common species.

XV.

III. A third objection against Paulus lies in the very dubious manner in which he attempts to explain several individual applications of the doctrine. Of this an illustration is furnished by

the following text, to which great weight is attached on all sides:—

L. 3 *pr.* § 1 *de cap. min.* (4, 5). LIBEROS, QUI ADROGATUM PARENTEM SEQUUNTUR, *placet minui caput* (al. *capite*), CUM IN ALIENA POTESTATE SINT, ET CUM FAMILIAM MUTAVERINT—EMANCIPATO FILIO, ET CETERIS PERSONIS, *capitis minutio manifesto accidit*: CUM EMANCIPARI NEMO POSSIT, NISI IN IMAGINARIAM SERVILEM CAUSAM DEDUCTUS. ALITER ATQUE CUM SERVUS MANUMITTITUR, &c. (See also No. XIII.)

Two cases are here placed in juxtaposition, in regard to both of which Paulus asserts a *CAPITIS DEMINUTIO*: namely, with respect to the Children of an *Arrogatus*, and in regard to one who has been *Emancipated*. As to the former Paulus says *PLACET*, and in regard to the second *MANIFESTO ACCIDIT*. Now it is true that generally speaking too much stress should not be laid on the language in which the ancient Jurists are accustomed to clothe their opinions, and undoubtedly the word *PLACET* occurs in numerous passages in which it clearly means an unconditional certainty. But it is employed in a different sense here, where two such different expressions closely following one another seem to have been rightly and intentionally selected in order to express a different degree of certainty in regard to the two specified propositions. This explanation, so natural in itself, is however, still farther strengthened by the fact that Paulus adduces wholly distinct grounds in support of the two cases, although the simple reference to a *FAMILIAE MUTATIO* would have been quite sufficient for both, if that change had been distinctly and generally recognised as the essential feature of the *MINIMA CAP. DEM.* In the first case he certainly mentions the *FAMILIAE MUTATIO* as one ground, but according to his view it is not by itself enough, and he finds it necessary to supplement it by another ground, which oddly enough runs thus:—*CUM IN ALIENA POTESTATE SINT*.

The Children of the *Arrogatus* born before and after the *Arrogation* are indisputably in the Power of another, but precisely because this condition of theirs is not changed, it is incomprehensible how the continuance of an unchanged condition can be adduced as proof of a *CAPITIS DEMINUTIO*, the essential feature of which surely only consists in the change of a previous condition. And when Paulus passes on to the case of one who has been *Emancipated*, it is very evident how pleased he is to be able to dispense with the dubious grounds of proof of the first case: he no longer in fact alludes to them, but relies on the transfer by means of the *IMAGINARIA SERVILIS CAUSA* (a), inasmuch as he adds, for this reason is the *CAP. DEM.*

(a) It is quite possible that Paulus may have written: *NISI IN MANCIPII CAUSAM DEDUCTUS*, and that the Compilers endeavoured to avoid the mention of the old Law-Institute by resorting to circumlocution.

completely manifest (*MANIFESTO ACCIDIT*). This remarkable difference both in the language and reasons makes it probable, that Paulus endeavoured to gain a practical side for that old historical notion by means of a hypothetically assumed ground of *MINIMA CAP. DEM.*, upon which, however, he did not venture to rely with absolute confidence. A more positive ground for this statement will be mentioned hereafter (*b*).

IV. Lastly, a fourth objection against Paulus's explanation lies in some special applications, which, according to that explanation, must be regarded as cases of *MINIMA CAP. DEM.*, whereas we can prove, from other equally competent authorities, that a *CAPITIS DEMINUTIO* was certainly not admitted in them. Such applications are more decisive than the general arguments hitherto advanced. In order to make the matter clear, I will give a summary of all the known cases of *MINIMA CAP. DEM.*

XVI.

A. Arrogation causes a *CAP. DEM.* for the Arrogatus according to both opinions; for he loses the Jural Capacity of an Independent Person, and at the same time passes out of the Agnatic Family of his birth.

B. The Children of the Arrogatus suffer a *CAPITIS DEMINUTIO* according to the opinion of Paulus, because they pass out of their Agnatic Family: but not according to the contrary opinion, because their Jural Capacity continues unaltered (*a*). There is thus in this matter a practical difference between the two opinions (*b*). This case does not indeed lead to a positive

(*b*) The hesitating character of the explanation given by Paulus has already been observed by others. Scheltinga offers a very forced explanation of this in the *Fellenberg Jurispr. Antiqua*, vol. 2, p. 519, upon the following not very felicitous hypothesis. The ancient Jurists disputed whether the *STATUS MUTATIO* resulting from *CAPITIS DEMINUTIO* must be distinctly *IN DETERIUS*. This question was first answered in the negative by means of a *FORI DISPUTATIO*, and hence the hesitation.

(*a*) Some modern Writers, who reject the explanation of *MINIMA CAP. DEM.* as a *FAMILIA MUTATIO*, try nevertheless to justify upon other grounds the particular application of the term to the Children of the Arrogatus, derived by Paulus from that circumstance. Thus, for example, Seckendorf, *De cap. dem. MINIMA*, § 15, who ascribes to the Grandson a *MINUS CAPUT* in comparison with the Son, although their relative Jural condition is completely alike. Likewise also Deiters, *DE CIVILI COGNATIONE*, p. 41, according to whom the Grandson must have a *CAPUT IMPEDITUM*, because he is removed one degree further from Independence; but this refers not to the present condition, but only to the prospect in the future, *i. e.*, to future Independence. Moreover this prospect for the Child of the Arrogatus is only possibly deferred by Arrogation, and not by any means probably so, since in the ordinary course of nature the Arrogator will die before the Arrogatus.

(*b*) This practical difference nevertheless asserts itself only in a limited way. For that the Agnation of Birth is annulled for the Children of the Arrogatus is also conceded from our point of view, only upon other grounds,

decision, because it is not mentioned by any other old Jurist except Paulus, while he himself states his own opinion of it in so dubious a manner (No. XV.).

C. The CAUSAE PROBATIONES of the Ancient, and the Legitimations of the Modern Law involve in every instance, according to both opinions, a CAP. DEM., inasmuch as by them an Independent Person is converted into a Dependent Person, and at the same time a new Agnatic bond is established. These cases, therefore, stand completely on the same footing as that of Arrogation (lit. A.).

D. Mancipation effected in the case of a Child under Paternal Power, or in that of a Woman IN MANU, always involves, according to both opinions, a MINIMA CAP. DEM. of the Mancipated Person (*c*); according to our opinion, because a Degradation is thereby always effected to the MANCIPII CAUSA, and, therefore, to a greater degree of Family Dependence than the existing one: according to the contrary opinion, because the former Agnatic bond is severed thereby. If, on the other hand, the Purchaser again mancipates the person so mancipated to him, there certainly arises no new CAP. DEM., since no further Degradation takes place in consequence thereof, nor is Agnation in any way annulled.

E. Emancipation, that is to say the release of a Child from Paternal Power. That this in fact was a CAP. DEM. (and indeed a MINIMA), is, according to all authorities, amongst the best ascertained facts in the whole of this doctrine, so that it is a matter which, according to both opinions, ought not to be open to doubt, but must be asserted of each of them when the contrary is not distinctly expressed. Cicero, when he mentions CAP. DEM. as an impediment of Gentility, probably merely has in view the CAP. DEM. resulting from Emancipation (§ 69 (*u*)). But upon what ground is it to be so treated?

According to our opinion, because by the formula of Emancipation, a previous Degradation to the MANCIPII CAUSA was unavoidable (*d*). So long then as the peculiarity of the MANCIPII CAUSA, and its essential difference from SERVITUS, had not yet become known through Gaius, our Writers might well doubt whether Emancipation did not involve a MAXIMA CAP. DEM. rather than a MINIMA CAP. DEM. (*e*): through Gaius every doubt on this point has been dispelled (*f*).

namely, because Agnation can only be derived from the Father, so that the Children must always have the same Agnation as the Father. All that remains, therefore, as a practical question of dispute is, whether the Debts and the personal Servitudes are cancelled in favour of the Children of the Arrogatus, which in truth must either be affirmed or denied according as we impute to them or not a CAPITIS DEMINUTIO.

(*c*) Gaius, I. § 117—118 (*a*); § 162; Ulpian, XI. § 5. Cf. also § 67.

(*d*) Gaius, I. § 132; Ulpian, X. § 1.

(*e*) Heineccius, *Antiq.* I. 16, § 12, and the Writers cited there.

(*f*) Gaius, I. § 162.

According to the opinion of Paulus, if consistently applied, there was a *CAPITIS DEMINUTIO* for this reason, that the Emancipated Person passed out of the Agnatic Family in which he was born.

The following expressions occurring in our Sources are noteworthy in regard to this matter. The Justinian Institutes, in the passages above quoted (No. XII.), do not allude to the antiquated *MANICIIPII CAUSA* intentionally, and they, therefore, assign the simple change, that is to say, in this instance, the freedom from *POTESTAS* (therefore a bettering of the condition), as the foundation of the *CAP. DEM.*: hence they are driven to the remarkable admission, that the Manumission of a Slave may also properly be regarded as a *CAP. DEM.*, an effect which is only prevented, because, before his Emancipation, he had absolutely no *CAPUT*.

Paulus, in the passages also quoted above (No. XV.), does not adduce, as might have been expected from his principal doctrine, the *FAMILIA MUTATIO* as the foundation of the *CAP. DEM.*, but, in an inconsistent manner, the *IMAGINARIA SERVILIS CAUSA*, therefore, the true ground.

The most difficult passage, finally, is that of Gaius, partly owing to the language itself being not altogether clear, and partly in consequence of a gap in the text.

Gaius, 1. § 162. *MINIMA (CAPITIS) DEMINUTIO EST . . . ET IN HIS, QUI MANCIPIO DANTUR, QUIQUE EX MANCIPIO MANUMITTUNTUR; ADEO QUIDEM, UT QUOTIENS QUISQUE MANCIPIETUR, A—TUR, TOTIENS CAPITE DEMINUATUR.*

This passage has in truth been understood as if not only each individual Mancipation, but also every Manumission, involved likewise a special *CAP. DEM.*, which last assertion would be devoid of all legal justification. The ambiguity lies in the word *QUIQUE*, which may certainly be interpreted as if it meant: *ET IN HIS, QUI EX MANCIPIO MANUMITTUNTUR*, so that it would then denote new cases. Nevertheless this interpretation is by no means necessary, and *QUIQUE* may just as well stand for the preceding words *IN HIS*, in which view it would mean no more than the simple conjunction *ET*, and embrace simply a closer definition of the cases previously mentioned. The filling up of the succeeding gaps must also at the same time conform to one of these two interpretations. The Editor has substituted *aut MANUMITTATUR*, whereby the Manumission is again made to constitute a new case of *CAP. DEM.* But it is preferable to read *ac* (or *atq.*) *MANUMITTATUR* (*g*), an addition which here again connects Manumission with Mancipation to one and the same case

(*g*) This addition has already been suggested by Deiters, *De civili corporatione*, pp. 41, 42, and approved of by Huschke, *Studien*, vol. 1, p. 222. Schilling expresses himself opposed to the whole of this doctrine, *Institutionem*, vol. 2, § 32, note (3).

of *CAP. DEM.* The whole passage has consequently the following meaning. Gaius intended to explain the notion of *CAP. DEM.* by examples. For that reason he chose amongst other instances a portion of the formula of Emancipation, whose complete exposition lay quite outside his purpose. He thus means to say:—*A MINIMA CAP. DEM.* underlies amongst other cases every Mancipation employed in the release of Children, from which each time a Manumission results (that is strictly speaking on the two first occasions); so that in each of these two Mancipations, involving Manumission, there underlies a special *MINIMA CAP. DEM.*

He could also, however, have still included the third Mancipation, which certainly in like manner comprehended a *CAPITIS DEMINUTIO*, but not the fourth (the *REMANCIPATIO*), which involved no fresh Degradation (see also *lit. D.*). But in order to avoid being too prolix, and yet not to create any misunderstanding by being too brief, he contented himself with mentioning the two first Mancipations, which were sufficient for his purpose, and with the view of designating these more clearly he employed the Manumissions connected with them on each occasion.

But is Emancipation then still to be regarded in the newest Law as a *CAP. DEM.*? Certainly at the period of the compilation of the Institutes and Digest the old Mancipations had long since disappeared, and the customary forms which were then employed no longer contained anything which could be reckoned as a Degradation of the Child. Two considerations might have induced the Legislator at that time to maintain the ancient view of Emancipation as a *CAP. DEM.*: the Right of Patronage on the part of the Father, and the destruction of Agnation. But this last consequence he had already by an earlier Law abolished in regard to Emancipation (§ 69), so that there only remained the Right of Patronage. But this is properly speaking not by any means a result or characteristic of *CAP. DEM.*, and moreover it is wholly set aside by the latest legislation of Justinian. Undoubtedly, therefore, it seems to be wholly inconsistent to wish to regard Emancipation in our Modern Law as a *CAP. DEM.*

F. Adoption in the strict sense presents no difficulty, since it has entirely the same character as Emancipation. For it was also connected with Degradation to the *MANCIPII CAUSA* (*h*), and it indisputably also caused a destruction of the natural Agnation. In the Justinian Law it could still at most operate as a *CAP. DEM.* in the special case when the Adoptive Father was at the same time a natural Ascendant, because in this case the Agnation of Birth was certainly extinguished. But, according to the correct view already stated, this circumstance by itself is anyhow no ground for assuming a *CAP. DEM.*

(*h*) Gaius, I. § 134.

XVII.

G. IN MANUM CONVENTIO.

If the Woman before this act was SUI JURIS, the IN MANUM CONVENTIO was unquestionably a CAPITIS DEMINUTIO, according indeed to both opinions: for such a Woman had her Jural Capacity diminished, and she passed out of her natural Family into that of her Husband (*a*); nor did it make any difference whether the IN MANUM CONVENTIO arose by means of CONFARREATIO, CO-EMTIO, or USUS.

It was otherwise in regard to a Woman who passed out of Paternal Power into MANUS. Here also, according to the opinion of Paulus, a CAPITIS DEMINUTIO must be admitted, because undoubtedly it involved a FAMILIAE MUTATIO. According to our opinion, on the other hand, there was no CAP. DEM., for an actual diminution of the Jural Capacity did not here occur; the Married Woman IN MANU stood rather towards her Husband completely in the relation of a Daughter, and had, therefore, the same Rights as the latter. Moreover, there was nothing in the forms which were employed for the IN MANUM CONVENTIO, as in the case of Emancipation and Adoption, which involved a temporary Degradation. At all events, nothing of the kind can be conceived in regard to the CONFARREATIO and the USUS. In the case of CO-EMTIO there was a similar procedure to that employed in Adoption, and therefore an intermediate MANCIPI CASUA was rightly conceivable: but Gaius, who describes both forms, carefully mentions this intermediate Degradation in the case of Adoption, but is wholly silent on the point in regard to CO-EMTIO (*b*).

If, then, we had positive evidence upon the question whether the CO-EMTIO of a Daughter standing in Paternal Power was or was not a CAP. DEM., it might serve as an element for the decision between the two opinions; but the ancient texts upon this point are very uncertain.

Cicero, *Top.* C. 4. SI EA MULIER TESTAMENTUM FECIT, QUAE SE CAPITE NUNQUAM DEMINUIT, NON VIDETUR EX EDICTO, PRAETORIS SECUNDUM EAS TABULAS POSSESSIO DARI.

This proposition involves at the same time the converse of it, for by means of CAPITIS DEMINUTIO a Woman renders herself capable of executing a Testament. The CAPITIS DEMINUTIO here alluded to is unquestionably, as Boethius also rightly explains, that which is effected by the IN MANUM CONVENTIO. For since Cicero does not in the above passage distinguish between dependent and independent Women, it would seem that both could in the same manner acquire this Capacity of making a

(*a*) Gellius, XVIII. 6. She became the Sister of her own Children and of her step-Children. Gaius, III. § 14.

(*b*) Gaius, I. § 113, 134.

Testament, whence it would further result (which is important for our question) that the term *CAPITIS DEMINUTIO* was applied to the *IN MANUM CONVENTIO* in the case of Women of both classes. But this seeming proof vanishes by comparison with I. § 115 *a* of Gaius, who deals with this question far more accurately than Cicero. He there informs us that the *CO-EMPTIO* alone was not sufficient to make the Testament possible, but that a *Remancipation* and *Manumission* must also be added. It was this *MANCIPII CASUA*, according to all opinions, that indisputably produced a *CAPITIS DEMINUTIO*, so that the passage cited from Cicero thus loses all decisive force for our special question.

Gaius twice adduces *CO-EMPTIO* as an example of *CAPITIS DEMINUTIO* (I. § 162 and IV. § 38), but in both passages only along with other examples, and so vaguely that it is uncertain from them whether he has in view only *Independent*, or also *dependent Women*.

In a similarly indefinite way Ulpian (XI. § 13) mentions *CO-EMPTIO* as an example of *MINIMA CAP. DEM.* There, however, this result happens in consequence of the Rule of Law according to which legal Tutelage is destroyed by every *CAP. DEM.* But as only *independent Women* stood in Tutelage, it may well be assumed that Ulpian also had in view only the *CO-EMPTIO* of *independent Women* in adducing that example.

Of a more certain character is a remarkable passage of Livy in his History of the Bacchanalians. Here the question refers to a freed Woman who is *SUI JURIS*, is subject to a *Dativa Tutelage*, and who has already executed a Testament (*c*). Afterwards this Woman rendered the most signal service to the Republic by the discovery of an extensive and most dangerous conspiracy, and was rewarded by a Resolution of the Senate with the following amongst other privileges:

Livius, XXXIX. 19. *UTIQUE FECENIAE HISPALAE datio, deminutio, GENTIS EMPTIO, TUTORIS OPTIO ITEM ESSET, QUASI EI VIR TESTAMENTO DEDISSET.*

The words *DATIO, DEMINUTIO* yield so little sense that the emendation *CAPITIS DEMINUTIO* is certainly indispensable (*d*), whereby alone moreover an obvious parallel can be traced in the expression of the three conjoint privileges. *CAPITIS DEMINUTIO* would then, unquestionably, mean here the Right to enter into a *CO-EMPTIO*. And as the Woman here, as above remarked, was certainly *SUI JURIS*, there is in this passage still

(c) Livius, XXXIX. 9 "QUIN EO PROCESSERAT CONSUETUDINE CAPTA, UT POST PATRONI MORTEM, QUIA IN NULLIUS MANU ERAT, TUTORE A TRIBUNIS ET PRAETORE PETITO, QUUM TESTAMENTUM FACERET, UNUM AEBUTIUM INSTITUERET HEREDEM."

(d) This emendation has already been suggested by Huschke, *de privil. Feceniae Hispalae*, Goett. 1882, p. 25, who nevertheless introduces unnecessary difficulties into the text.

less doubt than in the others, that the *co-emptio* of an independent Woman was here alone intended to be designated as a *CAPITIS DEMINUTIO*.

XVIII.

H. Finally, the most important cases for establishing a true notion of *CAPITIS DEMINUTIO* generally, and of the *MINIMA* especially, are the dedication of the *FLAMEN DIALIS* and of the Vestal Virgins.

The ancient Jurists speak of the Vestal Virgins as passing out of Paternal Power (*a*). But far more accurate information concerning the change of Jural condition occurring in regard to them is given by Gellius (1, 12), and indeed from the writings of Labeo and Capito, therefore from the most competent authorities. In two different passages of that Chapter, Gellius speaks of this subject in the following manner:—

VIRGO AUTEM VESTALIS SIMUL EST CAPTA . . . EO STATIM TEMPORE SINE EMANCIPATIONE AC SINE CAPITIS MINUTIONE E PATRIS POTESTATE EXIT, ET JUS TESTAMENTI FACIENDI ADIPISCITUR.

PRAETEREA IN COMMENTARIIS LABEONIS QUAE AD XII. TAB. COMPOSUIT, ITA SCRIPTUM EST:—VIRGO VESTALIS NEQUE HERES EST CUIQUAM INTESTATO, NEQUE INTESTATAE QUISQUAM: SED BONA EJUS IN PUBLICUM REDIGI AJUNT. ID QUO JURE FIAT, QUÆRITUR.

According to the latter text it appears to me indisputable that the bond of Agnation was cancelled between the Vestal Virgin and her natural Kindred. Only in this way can the cancellation of the mutual Right of Intestate Succession be naturally explained, inasmuch as the Vestal Virgin was so little divested of Property, that she could even execute a Testament. Moreover the preservation of Agnation, concurrently with the annulment of the Right of Succession, would have had no practical meaning, because Tutelage anyhow (as the second practical result of Agnation) did not exist in the case of the Vestal Virgins even according to the Twelve Tables (*b*). It has on the other hand been objected that if Agnation was actually annulled, why should Labeo have asked at the end: *ID QUO JURE FIAT QUÆRITUR*, since in that case the reason for the annulment of the Right of Succession (the annulled Agnation) must have been palpably evident to him. But this objection seems to me to carry no weight for several reasons. That the words embodying this question are those of Labeo is indeed possible, but not necessarily the fact, since they may just as well be an addition of Gellius. This question, however, for the most part obtains

(*a*) Gaius, I. § 130; Ulpian, x. § 5.

(*b*) Gaius, I. § 145.

the simplest solution if it is referred only to the immediately preceding proposition (the reversion to the State Treasury), for in that respect there was certainly something peculiar, inasmuch as according to the Primitive Law (of which Labeo clearly speaks) Heirless Property was in all other cases regarded as Ownerless, and it was the *LEX JULIA CADUCARIA* which first introduced the general reversion to the State (*c*). If then we assume, according to this passage that the Vestal passed out of the Agnatic line, and if we consider at the same time, as appears from positive evidence, that she did not suffer a *CAPITIS DEMINUTIO*, we shall have a direct contradiction of the opinion of Paulus, who describes every act of passing out of Agnation as a *CAPITIS DEMINUTIO*. This passage serves, however, also more fully to establish my assertion of the incompleteness of the old definition of *CAP. DEM.* as a *STATUS MUTATIO*. For the loss of Agnation certainly involved a change of *STATUS* for the Vestal, as did also (even if the loss of Agnation should not be conceded) the release from Paternal Power: if then she nevertheless suffered no *CAP. DEM.*, something else must be understood by the latter expression than a mere change of *STATUS*. Thus by this valuable testimony of ancient times my opinion is saved from the objection, that I desire to cavil arbitrarily at the definition of the old Jurists.

A similar, only less conclusive, support is afforded to our opinion by what we are told about the Consecration of the *FLAMEN DIALIS*. He also passed out of Paternal Power (*d*), and in regard to him also was this important change of his *STATUS* distinctly not looked upon as a *CAPITIS DEMINUTIO* (*e*). The parallel would be complete if it could be shown that the *FLAMEN* likewise passed out of the line of Agnation; this was probably the fact, not merely by analogy to the case of the Vestal Virgin, which is assimilated with that of the *Flamen* by both Gaius and Ulpian, but also because it would have been illogical to abolish Paternal Power and yet to permit Agnation, which was regulated by it, to continue to subsist. Moreover, it is incomprehensible in what relation the Son would then be conceived to stand towards the Father, for it is scarcely admissible to suppose that he would be more a stranger to the latter than to the Agnates.

In regard to this question, supposing a controversy to exist amongst the ancient Jurists, the authority of Labeo and Capito would stand higher than that of Paulus, not because they were so much greater Jurists, but because the question relates entirely to an ancient Law-Institute, whose genuine and complete

(*c*) Cicero, *De Legibus*, II. 19; Ulpian, XXVIII. 7. Cf. *Zeitschrift für geschichtl. Rechtswissenschaft*, vol. 2, p. 378.

(*d*) Tacitus, *Ann.* IV. 16; Gaius, I. § 130; Ulpian, X. § 5.

(*e*) Gaius, III. § 114.

existence stood far closer to the age of those Jurists than to that of Paulus. Strictly speaking, however, a controversy in the ordinary sense never at any time occurred, as it certainly would have, if, for example, the occurrence of *CAPITIS DEMINUTIO* in regard to the Vestal and the Flamen had been denied by Labeo, and affirmed by Paulus. But the fact was not so; on the contrary, all the Jurists of ancient times appear to have concurred in this denial without the slightest trace of a dispute. Thus Gaius in regard to the Flamen (note (e)), and even so likewise Ulpian in the following passage: L. 3 § 4 *de se Macc.* (14, 6). *SI A FILIOFAMILIAS STIPULATUS SIM, ET PATRIFAMILIAS FACTO CREDIDERIM, SIVE CAPITE DEMINUTUS SIT, SIVE MORTE PATRIS vel alias sui juris sine capitis deminutione fuerit effectus, DEBET DICI CESSARE SENATUSCONSULTUM QUIA MUTUA JAM PATRIFAMILIAS DATA EST.*

The words *VEL ALIAS* &c. cannot possibly be understood otherwise than as referring to the Flamen or the Vestal, or (most probably) to both together. Indeed Ulpian may have distinctly expressed this, and the Compilers may have substituted abstract expressions instead. The contrary view did not, therefore, (like a genuine controversy) directly concern a principle of the practical Law, but rather a scientific attempt to evolve a general notion out of particular recognized Rules of Law, by selecting the more significant elements. Hence in this matter also a larger freedom must be conceded to our logical criticism in relation to the ancient Jurists.

XIX.

I have endeavoured to demonstrate that the explanations of *CAP. DEM.* occurring in the old Jurists are partly inadequate, and partly erroneous. In order to furnish a basis for this statement it is specially important to give a probable explanation of the origin of the alleged defects.

The Romans had a primitive doctrine of three kinds of *CAP. DEMINUTIO*, naturally without definition, but unmistakable in their effects, and likewise also in the most frequent and important applications to individual cases. On the other hand, there were certainly some cases, in which the existence or non-existence of *CAP. DEM.* was not so much disputed as left undetermined, simply because such cases accidentally did not arise, or were not heeded. In the progressive development of knowledge distinct notions were sought to be established for that ancient doctrine, and that in doing so wholly different paths were struck out is not surprising in the case of a purely formal undertaking. Most Writers defined *CAPITIS DEMINUTIO* briefly as a *STATUS MUTATIO*. That we complain of this definition not exactly as being false, but as inadequate, can scarcely be regarded

as an unwarrantable assertion, when it is considered that most of the definitions of the ancient Jurists are exceedingly defective. The chief object was to guard against false applications arising from a consistent enforcement of defective definitions, and yet, on the other hand, to maintain, for the most part, their sound practical sense. If Gaius or Ulpian had been asked whether a Latinus by obtaining Citizenship, or a Son by the death of his Father, suffered a CAP. DEM., they would have been far from answering the question in the affirmative, simply to preserve their definition by a strictly consistent application.

A wholly different path was struck out by Paulus, and the origin of his conception appears to me to have been the following. He considered that the most important effect of MINIMA CAP. DEM., common to such different cases, consists in the loss of the Agnatic Family, for the extinction of the Debts had long since been neutralized by a Restitution, and the conjunction of a Ususfruct with CAP. DEM. in one and the same Person could only rarely and accidentally occur, whilst the expulsion from the Family resulted in every instance. This particular effect then he fixed upon as the essence of CAP. DEM., quite regardless whether the historical connection of the thing itself, as well as of the term, was thereby obscured. The most numerous and ordinary cases of undeniable CAP. DEM. (Arrogation, Emancipation, and the IN MANUM CONVENTIO of an Independent Woman) may indeed be deduced from his notion, evolved in the manner just pointed out, without any practical error. But he followed out that notion in the application of CAP. DEM. to the Children of the Arrogatus, which in truth he could not have found in other Writers, and he therefore put it forward simply as an opinion (PLACET). Fidelity to his definition did not, however, prevent him from occasionally prosecuting a wholly different train of thought, and in seeking as the ground of CAP. DEM. in regard to Emancipation, the Degradation effected by the MANCIPII CAUSA, because he no doubt considered this ground of explanation, by reason of the consensus of all ancient Writers, as less hazardous and hypothetical (MANIFESTO ACCEDIT).

It is now possible to explain fully the passage of Paulus, which has exercised so large an influence on the view of the Moderns concerning the triple STATUS (No. X.).

L. 11 *de cap. min.* (4, 5) CAPITIS DEMINUTIONIS TRIA GENERA SUNT: MAXIMA, MEDIA, MINIMA. *Tria enim sunt quae habemus: libertatem, civitatem, familiam.* IGITUR, CUM OMNIA HAEC AMITTIMUS, HOC EST LIBERTATEM ET CIVITATEM ET FAMILIAM, MAXIMAM ESSE CAPITIS DEMINUTIONEM: CUM VERO AMITTIMUS CIVITATEM, LIBERTATEM RETINEMUS, MEDIAM ESSE CAPITIS DEMINUTIONEM: CUM ET LIBERTAS ET CIVITAS RETINETUR *familia tantum mutatur*, MINIMAM ESSE CAPITIS DEMINUTIONEM CONSTAT.

He was led in the manner above mentioned to explain the

MINIMA CAP. DEM. as a FAMILIAE-MUTATIO; and since three degrees of CAP. DEMINUTIO had been admitted from early times, so he endeavoured to make their threefold unity intelligible by grouping together the positive relations which might be destroyed by each of these three events. These relations must therefore be Freedom, Citizenship, and Family. What then have these very dissimilar relations in common with one another? Nothing, except that *we have them* (TRIA SUNT QUAE HABEMUS). This would be intelligible if they were really the only things which we have. But inasmuch as it is evident that there are still some other things which we have, *e.g.*, Marriage, Paternal Power, Ownership, Servitudes, Credits, and the like, each of which we are similarly liable to lose, so is it in fact quite inappropriate to denominate this combination as the Bond embracing the three degrees, whereby they are reduced to unity. The whole passage of Paulus appears accordingly as nothing but an unsuccessful attempt to place the threefold CAPITIS DEMINUTIO on a rational basis. We have not even the consolation that those three Possessions, as compared with other kinds of Possessions, which are here enumerated as examples, were of special importance. At the same time, however, this otherwise by no means satisfactory explanation has the advantage, that it does not, like the definition of other Roman Jurists, afford scope for the misconception that a grant of Citizenship or the death of a Father should be reckoned as a CAP. DEM.

All these weak points, however, have not succeeded in preventing the text of Paulus from becoming the principal foundation of the Modern doctrine concerning the threefold STATUS. Undoubtedly what co-operated in this direction was the tacit assumption, that what Paulus taught in regard to this matter was the original and general view of the Roman Jurists. But it is exactly against this notion which I must most emphatically protest. If such an assumption were well founded, the view in question, just as the threefold CAP. DEMINUTIO, would bear the mark of a fixed, ancient, technical expression, and not as now be floating in the air with the singular phrase SUNT QUAE HABEMUS. The expression STATUS in particular lay so close at hand that it certainly could not have remained unemployed, if in point of fact the TRIA had been conceived as three existing forms of STATUS. Not only, however, is the supposition of generality here without any real foundation, but that view moreover does not even appear in Paulus as so fixed and deeply rooted a doctrine as it is accustomed to be treated by Moderns on the authority of this passage. It was rather a mere stray thought, a passing attempt to demonstrate the original threefold CAPITIS DEMINUTIO by a comprehensive circumlocution, undoubtedly resulting from the explanation of MINIMA CAP. DEM. as a FAMILIAE MUTATIO. This was peculiar to Paulus; but how little he desired to put it forward as a certain, incontrovertible, and recognised

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view, is clear from the circumstance that in regard to the explanation of CAP. DEMINUTIO underlying Emancipation (L. 3 § 1 *de c. m.*), he made no use whatever of it, but preferred the customary derivation from a SERVILIS CAUSA.

XX.

The criticism here attempted of the doctrine of CAPITIS DEMINUTIO may at the same time enable us to form an estimate of the foreign Works on the same subject, which have been enumerated above (No. I.). Instead, however, of an analysis of their contents, only a few literary comments can be attempted in this place.

Conradi, whose opinions have everywhere demanded special attention, lays down as the positive basis of his explanation of MINIMA CAP. DEM., that it is a FAMILIAE MUTATIO, and seeks upon this assumption to explain everything else. In consequence of this false assumption he is compelled to reject the SERVILIS CAUSA as the ground of CAP. DEMINUTIO in the case of Emancipation (p. 180), and this again leads him to so forced an interpretation as is not readily met with in him elsewhere, namely, that the words MANIFESTO ACCIDIT in L. 3, § *de c. m.* are not intended to mean, *it appears indubitable*, but *it is manifest, it is exhibited to the senses by means of symbolical acts.*

The Work of Seckendorf disputes the doctrine of Paulus, and propounds in all essential respects the doctrine here advanced. It is apparently the first published Work in which this occurs.

At a very early period, however, a more remarkable attempt had been made to infuse light and consistency into the doctrine of Paulus, and this has even in more recent times found favor in many directions. This is the view which will now be stated, and which was first enunciated by Hotomanus.

There are, says Hotomanus, three Corporations of different extent, wherein every individual Man may be enrolled (*a*): the Corporation of all Freemen on the face of the earth; that of the Roman Citizens; that of the Members of a particular Agnatic Family. If any Member withdraws himself from one of these, that Corporation will be diminished by a Head, that is to say, it suffers a CAPITIS DEMINUTIO, which expression, however, has since been transferred to the excluded Member himself. Ever since this phraseology was invented CAPUT denoted the position of a Member in such a Corporation (*b*), and in the same sense

(*a*) He calls them alternately CORPUS, ORDO, COLLEGIUM. This view in all essential respects has been adopted by Ducarroy and Zimmern (see above, No. I.), and afterwards also by Vangerow, *Pandekten*, I, p. 61.

(*b*) Hotomanus, I. C. "SCIRE OPORTET, CAPUT IN HOC IPSO TRACTATU SIGNIFICARE JUS, QUOD ALIQUIS OB EAM CAUSAM HABET, QUIA CAPUT SIVE LOCUM IN ORDINE ALIQUO ILLORUM TRIUM OBTINET."

then must the term STATUS, in the definition of CAP. DEM. as a STATUS MUTATIO, be understood (c), for otherwise a CAP. DEM. would also have to be ascribed, quite erroneously, to a Son on the Death of his Father. By this notion an apparent consistency is introduced into the doctrine of Paulus, but greater praise than this cannot be assigned to the attempt, for a more careful investigation does not tend to support it. In the first place, a Corporation of all Freemen, from which a person may be expelled in the same way as from the exclusive circle of Roman Citizens, is a singular conception, completely foreign to the Romans especially. On the other hand, the Community of Agnates is certainly a legal notion and not an unimportant one, for it is the foundation of Intestate Succession and of LEGITIMA TUTELA. It is nevertheless simply one amongst the various Family ties, whereby several persons are united together within a narrow Whole, and it cannot therefore be in any way called the most important of them, so that there is absolutely no apparent reason why it should be treated, in preference to all other Family Relations, as of such exclusive importance in this doctrine. Lastly, it is also quite an arbitrary proceeding, wanting in all innate probability, to transfer the expression CAPITE MINUI from the actually diminished Corporation to the retiring Members who occasion the diminution. We can therefore see nothing better in the whole of this conception than a mere ingenious idea.

(c) INTELLIGI OPORTET, STATUS VERBO IN HOC TRACTATU SIGNIFICARI A ICTIS, CONDICIONEM PERSONAE IN EORUM ORDINE STANTIS (i. e. NUMERUM EFFICIENTIS), QUI VEL LIBERTATEM, VEL CUM LIBERTATE CIVITATEM, VEL CUM UTRAQUE FAMILIAM OBTINENT.

APPENDIX VII.

Concerning some doubtful Points in the Doctrine of Infamy.

(SECTS. 77 AND 82).

I.

Is the legal doctrine of Infamy applicable also to Women ?

He who regards the exclusion from Postulating for another as the only, or at least as the principal, result of Infamy, must in truth look upon this application not indeed as impossible, but as wholly superfluous. For since the Praetor had already in his second Edict unconditionally prohibited all Women generally to Postulate before him on behalf of others, it was quite unnecessary to repeat the same prohibition—and, in fact, modified by Exceptions (§ 78)—in regard to certain Women (who were Honorless) in the third Edict.

If we regard Infamy, on the other hand, as I have endeavoured to prove, as the loss of all Political Rights (§ 79—81), it has no meaning when applied to Women, because they, at all events, never had any such Rights. Hence is to be directly explained the fact why the Heracleian Table (LEX JULIA MUNICIPALIS), which only deals with the Capacity for certain Political Rights, in its enumeration of those who were Honorless, does not mention Women (§ 80).

What answer then do we find to our question in the Law Sources? The Edict embodied in the Digest concerning Infamous Persons avoids all mention of Women, quite intentionally and in the most significant manner, precisely where we should first of all have expected some allusion to them. If a Widow concludes a second Marriage too soon her Father, if she is still in his Power, and also her new Husband, if he is Independent, otherwise his Father, are said to be Infamous. But of the Widow herself, who surely was most strongly and directly to blame, not a word is said.

Nevertheless if we were content to find in this singular fact a direct confirmation of one or the other of the above mentioned views concerning the practical character of Infamy, everything would again be involved in doubt by a number of passages in which it is stated, as something well known and certain, that such a Widow is nevertheless Infamous (§ 77 (y)). These passages

herefore appear to be in conflict as well with the nature of Infamy as with the specified contents of the Edict.

How then are these perplexing problems to be solved ?

II.

The *LEX JULIA* contains, according to Ulpian (XIII. § 1, 2), the following prohibitions in regard to Marriage, which, for more easy reference, I will designate by numerals.

LEGE JULIA PROHIBENTUR UXORES DUCERE SENATORES QUIDEM LIBERIQUE EORUM (1) LIBERTINAS (2) ET QUAE IPSAE (3) QUARUMVE PATER MATERVE ARTEM LUDICRAM FECERIT, (4) ITEM CORPORE QUAESTUM FACIENTEM.

CETERI AUTEM INGENUI PROHIBENTUR DUCERE (5) LENAM (6) ET A LENONE LENAVE MANUMISSAM, (7) ET IN ADULTERIO DEPREHENSAM, (8) ET JUDICIO PUBLICO DAMNATAM, (9) ET QUAE ARTEM LUDICRAM FECERIT; (10) ADJICIT MAURICIANUS, ET A SENATU DAMNATAM.

The first observation which strikes one in regard to these prohibitions is the existence of no small distinction in the two Classes. Now if the prohibition for Senators had throughout been more rigorous, as, for example, is clearly the case in respect of Marriage with Libertinae, it would have been quite natural, but the converse also actually occurs, for the Marriages numbered 5, 6, 7, 8, and 10 are prohibited to Freeborn persons, not to Senators. This might perhaps be explained by supposing the prohibition to be applicable to Freeborn persons, generally, inclusive of Senators (as Freeborn); but this also would not be strictly accurate, because cases 2 and 9 are expressly mentioned as prohibited in both Classes.

The Jurists improved this defective language of the Law by their interpretations. Not only did they apply particular prohibitions intended for Freeborn persons to Senators also, on the strength of the similarity of the grounds with those on which the prohibitions in the case of Senators were based (*a*), but they laid down precisely on that account the very natural Rule, that every prohibition for Freeborn persons was applicable likewise to Senators (*b*). They went, however, still further in their

(*a*) L. 43, § 6 *de ritu nupt.* (23, 2) "*LENOCINIUM FACERE non minus est, QUAM CORPORE QUAESTUM EXERCERE.*" The whole passage speaks of the prohibitions in regard to Marriage in the case of Senators: inasmuch, therefore, as the *Lex Julia* has here named the *QUAESTUM CORPORE*, but not the *LENOCINIUM*, the Jurist is compelled to prove that the latter technically came within the prohibition. The *LENOCINIUM*, however, is expressly mentioned under the prohibition in regard to the Marriage of Freeborn persons, which did not appear to satisfy him.

(*b*) L. 43, § 8 *de ritu nupt.* (23, 2) "*EAS QUAS INGENUI CETERI PROHIBENTUR DUCERE UXORES, SENATORES NON DUCENT.*"

reflexions on the Law, which did not employ the expression Infamy undoubtedly because, according to the ancient Law, Infamy had no application to Women (No. I.), but something very similar was nevertheless intended in the particular prohibited cases which were specified (c), indeed many of these cases expressly appeared in the Edict as cases of Infamy. Should not then, for example, a Woman condemned for Theft be subject to the Marriage prohibitions of the LEX JULIA? Nothing was more natural than to arrive at the general Rule, that a Marriage is prohibited for Freeborn persons, therefore for Senators also, in every case of Infamy, and likewise for Senators in consequence of the LIBERTINITAS of the other party; it is precisely in this form that the Rule is expressed by Ulpian (d). In like manner also must, on the other hand, the cases of prohibited Marriages expressly named in the LEX JULIA, if they do not appear in the Edict, be treated henceforth as cases of genuine Infamy, with the exception naturally enough of cases of simple LIBERTINITAS, since in the latter the prohibition was not based on moral grounds. The distinction between Senators and other Freeborn persons exhibits itself in two ways; first, in the extension of the prohibition to those who had been Freed, without reference to their individual respectability: secondly, in the application of the prohibition to Infamous Men, between whom and the daughters and grand daughters of Senators, Marriage was denied, whilst the prohibition of Marriage in the case of Freeborn persons could only be applied to Infamous Women.

By this natural process of development the notion of Infamy received the following remarkable extension. Infamy now denoted, in regard to Men, Loss of Political Rights and Incapacity for Marriage with female descendants of Senators; and in regard to Women, Incapacity for Marriage with Freeborn men generally, which Senators and their sons were at all events. In this new extension the notion was just as sharply defined as before (§ 78), and it did not even now resolve itself into the unsettled notion of an Evil Reputation, or INFAMIA FACTI.

(c) This interpretation of the statutory provisions is also recognised by the ancient Jurists in their Commentaries upon that Law, inasmuch as they employ exactly the same expressions in regard to the particular persons enumerated therein as were elsewhere used of the Infamous persons of the Praetorian Edict. L. 43, § 4, 12, 13 *de ritu nupt.* (32, 2) "LEGE notatur," "ERIT notata," "INDIRCIO notetur," "notata ERIT," "QUIA FACTUM LEX, NON SENTENTIAM notaverit," and the like.

(d) Ulpian, xvi. § 2 "ALIQUANDO NIHIL INTER SE CAPIUNT, ID EST SI CONTRA LEGEM IULIAM PAPIAMQUE POPPAEAM CONTRAVERINT MATRIMONIUM: VERHI GRATIA, si famosam quis uxorem duxerit, aut libertinam senator." Si quis, therefore any one, whether a Senator or not, to which we must only still add, INGENUUS. Famosam means distinctly the same thing as INFAMEN, and Ulpian, for instance, employs both expressions as completely synonymous with arbitrary freedom. L. 6, § 1 *de his qui not.* (3, 2).

That this amplification of the cases of Infamy by Jurists and Emperors must now be borne in mind and practically recognised, follows as a matter of course (§ 77 (*y*)); but ought the same also to be admitted in the Praetorian Edict concerning Infamous persons? For most of the cases it was not at all necessary to introduce any change, since the expressions used in the Edict (FURTI, MANDATI DAMNATUS and the like) clearly by themselves could be referred to both Sexes, and it therefore sufficed if the hitherto tacitly understood exclusion of Women was now set aside. But even in those cases where the language of the Edict distinctly excluded Women (§ 77), there was no practical need of change. For the Praetorian Edict concerning Infamous persons referred merely to exclusion from Postulating for others, and in this respect Infamy created no change in regard to Women (No. I.). Nevertheless this change, which was not necessitated by any practical need, was effected, and the Edict was supplemented by the admission of cases specially relating to Women (No. VIII.), no doubt because the Praetorian Edict concerning Infamous persons was generally the only place where a category of Honorless persons was found clothed with legal sanction.

III.

What significance, however, had the Marriage-prohibitions of the LEX JULIA, or, which is the same thing, what practical consequences had Infamy in regard to Women?

According to Ulpian's expression PROHIBENTUR, with which also the language of the Law agrees (*a*), we might expect to find that CONNUBIUM was cancelled in all these cases, that is to say, that a Marriage contracted against the prohibition was invalid, just as from all time was the case with respect to a Marriage between a Brother and Sister. Or perhaps we should assume that the Law permitted the Marriage to subsist with all the effects attached thereto by the earlier Law, and that it only withdrew the advantages which this Law itself attached to the Marriage state as compared with the Honorless condition? Such a distinction appears almost too subtle, and yet we are compelled to acknowledge it as true. The Marriage itself, therefore, was legally valid, and the Children born during it were subject to Paternal Power. But in reference to the conditions of Capacity, the parties to such a union were deemed Unmarried, so that each of them was incapable of acquiring anything by the Testament of the other, or from that of a third person. Hence, whether the bare existence of Children of such

(a) L. 44 *pr. de ritu nupt.* (23, 2) "NE QUIS EORUM SPONSAM UXOREMVE . . . HABETO;" then, "NEVE SENATORIS FILIA . . . SPONSA NUPITAVE ESTO;" finally, "NEVE QUIS EORUM . . . SPONSAM UXOREMVE EAM HABETO."

a Union could produce any advantage to the parents, no absolutely fixed principle prevailed, inasmuch as in certain cases the advantage was allowed to operate, but not in others. All these propositions must now be verified.

(1) Ulpian (xvi. 2) says expressly, in regard to a Marriage concluded contrary to the Rules of the LEX JULIA, that the parties were wholly incapable of bequeathing anything to each other by a last Will (No. 2 (c)). This proposition he must have regarded as something positive, although in other respects the legal existence of this Marriage was recognised: for if he had supposed the general invalidity of the Marriage, the Juristical non-existence of this factitious union would have followed as a matter of course. It was, however, specially unsuitable to assign this individual instance of an invalid Marriage as the ground of Incapacity, and to pass over in silence all the other grounds of invalidity (e.g. Kinship), which surely just as fully belonged to this branch of the subject (b).

(2) He who had three Children could refuse to undertake a Tutelage imposed upon him, but the Children must be JUSTI LIBERI. Hence arose the controversy, whether this expression was to be interpreted according to the ancient JUS CIVILE, or according to the narrow and restrictive provisions of the LEX JULIA. An old Jurist decides in favour of the first, therefore the milder view (c); this decision was based on the express recognition that the LEX JULIA was intended to effect a purely relative inefficacy of the Marriage in relation to certain closely defined objects, and not a general invalidity of the Marriage, under which latter supposition such Children would not, by any means, have been esteemed the Children of their reputed Father (d).

(b) I am nevertheless prepared to admit that Ulpian's proposition properly involves two things—(1) the married couple shall not enjoy the advantages which, except in regard to Capacity, a mere Marriage confers upon them *inter se*; (2) they shall bequeath nothing to each other, even when they have full Capacity towards third persons on other grounds, e.g., because the Woman has given birth to three children. The conclusion which I have deduced in the text from the passage is only true for the first proposition, not for the second.

(c) *Frag. Vaticana*, § 168 "QUIDAM TAMEN JUSTOS secundum has leges PUTANT DICI . . . SED JUSTORUM MENTIO ITA ACCIPIENDA EST, uti secundum jus civile quaesiti sint." That the opposite opinion had also its advocates, is here expressly stated by the Jurist. In another similar case the stricter opinion had the preponderance of authority. A Freedman, for instance, could become discharged from the burdens and services due to the Patron by being the parent of two living children. In this connection, however, it is said, *ex lege AUTEM NATI LIBERI PROSUNT*. L. 37, § 7 *de operis libert.* (38, 1). The *lex* is naturally the LEX JULIA, for it was from that Law that the entire amelioration of Freedmen was derived.

(d) § 12 J. *de nupt.* (1, 10) "SI ADVERSUS EA, QUAE DIXIMUS, ALIQUI COIERINT: NEC VIR, NEC UXOR, NEC NUPTIAE, NEC MATRIMONIUM, NEC DOS INTELLIGITUR. ITAQUE II, QUI EX EO COITU NASCUNTUR, . . . TALES

If, therefore, the LEX JULIA declared the nullity of the Marriage in certain cases (which I dispute), then the milder opinion was wholly impossible in regard to the above exemption. If, on the other hand, (as I assert) it permitted such Marriages to continue to subsist, while denying to them certain advantages, the controversy alluded to in the passage cited might very well arise: for since the Exemption was a privilege depending on a mere arbitrary assertion of the Will, it could without any inconsistency be laid down, that the Exemption was not to be founded on the existence of Children begotten of a Marriage disapproved of by the LEX JULIA (although valid).

(3.) The Widow, who contracts a new Marriage within the year of Mourning, becomes Honorless in consequence (§ 77 (g)). Every Honorless Woman was prohibited by the LEX JULIA and its interpretations from marrying any Freeborn man (No. 2). If this Prohibition then had been intended to annul the Marriage between a Freeborn man and an Infamous woman, the premature second Marriage of such a Widow would likewise have been no Marriage at all, and therefore the Dower given in it would also have been no Dower (note (d)). But precisely the Imperial Laws, which prescribe the penalty for such a premature Marriage, so distinctly presuppose its validity, and especially the juristical existence of a true Dower (e), that a complete contradiction can only be avoided by understanding (as we have done here) the prohibition of certain Marriages in the LEX JULIA to relate to other matters than the invalidity thereof.

(4.) The most complete confirmation, however, of our view of the practical meaning of the LEX JULIA lies in the history of later events. Under Marcus Aurelius a SENATUSCONSULTUM was published in accordance with which inter-Marriages between persons of the Senatorial and Freed classes, or between the latter and the Descendants of the former, were declared to be invalid, and this SENATUSCONSULTUM has ever since been quoted as the origin of the invalidity of such Marriages (f). Hence it incontrovertibly follows:—

(a.) That previously inter-Marriages between persons of the

SUNT . . . QUALES SUNT II, QUOS VULGO MATER CONCEPIT: NAM NEC HI PATREM HABERE INFELLIGUNTUR, CUM HIS ETIAM PATER EST INCERTUS."

(e) L. 1, C. de sec. nupt. (5, 9). It should not be thought that this objection might be overcome by the admission that the Marriage, invalid at its inception, might, after the expiry of the year of Mourning, become valid of itself. The Infamy which attached to the woman was, like every other instance of Infamy, lifelong; and thus, if the Infamy of a woman rendered her Marriage with a Freeborn man impossible, this ground of her incapacity could not be removed by any lapse of time.

(f) L. 16 *pr. de ritu nupt.* (23, 2) "ORATIONE D. MARCI CAVETUR, UT SI SENATORIS FILIA LIBERTINO NUPSISET, nec nuptiae essent: QUAM ET SENATUSCONSULTUM SECUTUM EST;" L. 16 *de spons.* (23, 1) "ORATIO IMP. ANTONINI ET COMMODI, QVAE quasdam nuptias in persona Senatorum inhiabit, DE SPONSALIBUS NIHIL LOCUTA EST: RECTE TAMEN

Senatorial and Freed classes were not by any means null and void.

- (b.) That previously and even afterwards the Marriage between Senators and Infamous persons was just as little null and void; the invalidity was only extended by interpretation to Marriages with Actors and their Children, or with such persons as carried on any other profession generally esteemed immoral (*g*); never to Infamous persons generally (*h*).
- (c.) That previously and even afterwards Marriages between Freeborn men and Honorless women were in no way invalid, but were simply unaccompanied by those advantages which were attached to married life by the LEX JULIA; advantages which referred to the Capacity to acquire Property, more or less, by means of the last Will or Testament of a Deceased person.

IV.

Modern Writers have indeed formed a vague notion of this historical connection of the prohibitions relating to Marriage, to which the frequent allusions to the SENATUSCONSULTUM under Marcus Aurelius almost conclusively point, but they have so little comprehended the matter clearly that even still greater confusion has been the result. Thus Heineccius (*a*) at first observes that the Marriage prohibition of the LEX JULIA was merely a LEX MINUS QUAM PERFECTA, and that it was the SENATUSCONSULTUM under Marcus Aurelius which first reduced the Law to perfection (PERFECTA), and prescribed the dissolution of the Marriage. But he then also goes on to explain the original prohibition as a real and complete annulment of the Marriage, so that no other new or legitimate effect remained for the amending SENATUSCONSULTUM

DICITUR, ETIAM SPONSALIA IN HIS CASIBUS *ipso jure nullius esse momenti: UT SUPPLEATUR QUOD ORATIONI DEEST.*" Cf. L. 3, § 1 *de don. int. vir. et ux.* (24, 1); L. 27; L. 34, § 3 *de ritu nupt.* (23, 2).

(*g*) The extension to Play-actors and their Children was already known to Modestinus. L. 42, § 1 *de ritu nupt.* (23, 2). The principle was more fully developed by Constantine (L. 1, C. *de natur. lib.* (5, 27)), and his Constitution was again more closely defined by Marcianus. L. 7, C. *de incestis* (5, 5).

(*h*) The Laws cited refer the invalidity only to Dishonourable professions, and not to the loss of Honor arising from particular acts. That they did not in fact refer to the latter is evident also from the following text:—L. 43, § 10 *de ritu nupt.* (23, 2) "SENATUS CENSUIT, *non conveniens esse ULLI SENATORI, UXORUM DUCERE AUT RETINERE damnatam publico judicio.*" If a SENATUSCONSULTUM was necessary to declare such a Marriage improper, and thereby to indirectly suppress it, it clearly is impossible to regard it as having been originally null and void.

(*a*) Heineccius, *Ad L. Jul. et P. P.* lib. 2, caps. 2, 6. In all essential respects the same view, only less forcibly expressed, also occurs in Ramos, *Ad L. Jul. et P. P.* lib. 2, cap. 8.

than to separate the spouses by compulsory means, which was certainly never within the conception of the Roman Law.

Connected with these false fundamental views of the Moderns are also some not unimportant false interpretations of particular texts. To the latter category belongs the commencement of the Title of the Institutes DE NUPTIIS: JUSTAS AUTEM NUPTIAS INTER SE CIVES ROMANI CONTRAHUNT, QUI *secundum præcepta legum* COËUNT. Here the PRAECEPTA LEGUM are said to refer to the precepts of the LEX JULIA and PAPIA POPPAEA. But neither Justinian, nor the ancient Jurist from whose writings this text was taken, could have meant this, because, in the first place, the notion of JUSTAE NUPTIAE was in point of fact independent of the observance of those precepts (No. III.); secondly, because, even if it had not been so, the notion of JUSTAE NUPTIAE could not possibly be exhibited as dependent on those precepts alone, and irrespective of the far more important conditions of the ancient JUS CIVILE. Accordingly the PRAECEPTA LEGUM are here the precepts of the Positive Law generally, without any special historical allusion.

To the same category belongs a difficult text of Paulus in the Collatio (xvi. 3), wherein the notion of SUI HEREDES is defined as embracing those Children who are subject to Paternal Power, along with this still closer definition: NEC INTEREST, ADOPTIVI SINT, AN NATURALES *et secundum legem Juliam Papiamve quaesiti.*" That is to say, "that there are included therein Adoptive as well as Natural Children, but the latter only under the supposition that they are begotten in conformity with the precepts of the LEX JULIA." This interpretation, however, must be rejected on precisely the same two grounds which have already been advanced in the case of the text from the Institutes, namely, because Paulus would thus be made to say something that was false, and at the same time to leave unsaid what was true and important. There is moreover this special reason in support of this view, that the conjunction ET points, not indeed to a condition and limitation of the second class of SUI, but rather to the addition of a third class. What Paulus probably wished to say was this: SUI are in the first place Adoptive Children; secondly, those naturally begotten (in a lawful Marriage); thirdly, those who are subject to Paternal Power by a CAUSAE PROBATIO. The development and justification of this interpretation (for which perhaps also a change in the text would be necessary) can only be accomplished with the aid of a very far reaching inquiry concerning the history of the CAUSAE PROBATIO, according to the testimony of Gaius and Ulpian.

V.

Particularly important for our purpose is the later history of these Marriage prohibitions.

The general prohibition, which in the case of Freeborn persons generally, and also in some cases for Senators, merely aimed always at producing certain disabilities in regard to Property, was set aside by several Imperial Laws, which abolished the penalties of Celibacy and of *Orbitas* generally (*a*); for by this abolition that prohibition lost all practical importance.

The special prohibition, which since Marcus Aurelius's time rendered inter-Marriages between Senators and Emancipated persons or Play-actors, and the like, invalid, continued down to the reign of Justinian. He gradually divested it of all force. In the first place he ordained that a Marriage between a Freeborn and a Freed person should not be rendered invalid by the former subsequently attaining Senatorial dignity (*b*).

Next he permitted Senators to marry Actresses, on condition that the latter would withdraw themselves from their former profession (*c*).

Finally, however, he permitted every kind of Marriage to persons of Senatorial rank, on the sole condition that a written form of Marriage Contract was executed (*d*).

With this Law every trace of the Marriage prohibitions introduced by the *LEX JULIA* was wiped away, and at the same time also all practical importance of the doctrine of Infamy as applied to the Female Sex.

VI.

According to the text of the Edict preserved in the Digest (§ 77), if a Widow within the Year of Mourning (at an earlier period, within 10 months) enters into a second Marriage, the stain of Infamy falls upon her Father, if she is in his Power, and also upon her Husband, or, if he is still subject to Paternal Power, upon his Father (§ 77). About the Woman herself there is no question in the Edict, but several texts of Jurists and Emperors ascribe Infamy also to her (77 (*1'*)). If now this difference in the information we possess calls for explanation, the matter gives rise

(*a*) Tit. *de infirmandis poenis coelibatus, &c.*, in the Theodosian Code, VIII. 16, and in the Justinian, VIII. 58.

(*b*) L. 28, C. *de nupt.* (5, 4). According to the words of this text one might believe that the L. Papia itself had already pronounced invalidity in such a case; but the allusion to the L. Papia is a mere loose expression, which embraces also the later additions to that Law.

(*c*) L. 29, C. *de nupt.* (5, 4). This was completely opposed to the L. Julia, which even extended the prohibition to the Children of Play-actors, although they were not themselves such. Justinian's innovation was directly due to the earlier career of the Empress Theodora.

(*d*) Nov. 117, C. 8. The Marriage Contracts were not specially devised for this purpose, but by cap. 4 of the same Novel they were prescribed as a general form for the marriage of *ILLUSTRES*.

also, on a closer consideration of the subject, to the following further questions. If in reality the violation of the period of Mourning is the ground of this Infamy, why should not the same result follow from the violation of Mourning for many other persons besides the Husband, for instance, for Parents and Children? And in like manner, irrespective of the Persons, why should not Infamy be produced also in other cases of violated Mourning besides that of a Marriage contracted during the period of Mourning?

Before I seek for an answer to these questions in our Law Sources I will make a preliminary observation, which may supply a fixed basis for the whole inquiry. Marriage by itself has nothing to do with Mourning, and the latter is not by any means violated by it. For the violation of Mourning generally consists only in acts and signs of rejoicing, which are certainly inconsistent with a genuine respect towards the Deceased (*a*). But a Marriage may be concluded in perfect serenity of mind, and it need not then destroy the remembrance of the Deceased, which is specially manifest in the case of a Marriage which was desired and brought about by the deceased Parents of the woman themselves. A still further confirmation of this view lies in the following circumstances. If the Marriage by itself were deemed to be a violation of the obligation of Mourning, then Women during every occasion of Mourning, for instance, for Parents and Children, must have enjoyed a *VACATIO*, that is to say, the privilege of remaining Unmarried in the meantime, without being subject to the legal penalties of Celibacy, because otherwise it would have been against common sense to have subjected the Woman to some one of the Penalties which threatened her on either side, no matter how she acted. But the death of her Husband alone gave the Woman such a *VACATIO* (*b*), and not that of her Kindred; hence it also follows that the Marriage cannot be regarded as a penal violation of the duty of Mourning for Kindred. Indeed, quite conversely, the Mourning of a Woman is shortened by her betrothing herself (that is to say, it is by way of exception, put an end to) (*c*); when, therefore, in such a case the Marriage itself follows upon the Betrothal, this really may be said to happen at a time when the period of Mourning has already ended, and, therefore, can no longer be violated. Moreover, in the Law concerning this subject which is ascribed to

(*a*) Paulus, I. 21, § 14 "QUI LUGET, ABSTINERE DEBET A CONVIVIIS, ORNAMENTIS, PURPURA, ET ALBA VESTE." The passage is taken from the *Breviarium*, except that the word *PURPURA* is wanting in the ordinary Manuscripts, and is supplied from the *Cod. Vesontinus*, the doubtful character of which will be discussed below.

(*b*) Ulpian, tit. XIV. "FEMINIS LEX JULIA a morte viri anni tribuit vacationem, a DIVORTIO SEX MENSES: LEX AUTEM PAPIA a morte viri biennium, a REPUDIO ANNUM ET SEX MENSES."

(*c*) Festus, s. v. "*Minuitur* POPULO LUCTUS AFDIS DEDICATIONE . . . PRIVATIS AUTEM, CUM LIBERI NATI SUNT . . . cum desponsa est."

Numa, both precepts are prescribed as distinct from one another, namely, to mourn for a definite period for the Deceased, and to avoid for a certain time a second Marriage after the Death of a Husband (*d*). Finally, it is easily explainable how this confusion of ideas arose, for which in fact the cause lay close at hand. The Praetor declared a second premature Marriage to be a ground of infamy, and, with the view of defining the notion of a premature Marriage, he employed the same period which, according to custom, a Widow as a rule had to mourn for her Husband (*e*). It was thus an easy matter to regard that which served here as a provision fixing a period for the case of Infamy, as the ground of the Penalty, although the true ground lay exclusively in the danger of the uncertainty which might result as to who was the real progenitor of a Child born shortly afterwards.

The correctness of this view is placed by Ulpian beyond all doubt by the following observations. He says expressly, that the mention of Mourning occurring in the Edict is a mere provision as to the period (*f*), and he confirms this assertion by two completely decisive results: *firstly*, that Infamy was not averted by the circumstance that the Deceased may have forfeited the honour of Mourning (*e.g.* by High-treason or by Suicide from fear of a Punishment (*g*); *secondly*, that conversely the prohibition and Infamy completely ceased, if the Widow after the Death of her Husband had given birth to a Child, because, although the period of Mourning was still unexpired, the *TURBATIO SANGUINIS* was nevertheless impossible (*h*). It was, however, just as necessary a consequence of that fundamental view, that the Mourning for Parents and Children could never have been regarded as an impediment to Marriage (*i*).

VII.

The result hitherto gained may be supplemented by other trustworthy information in the following manner. According

(*d*) Plutarch, *Numa*, C. 12. Concerning the various attempts to restore the Law of Numa, that is to say, to settle the practical meaning of that text, cf. Dirksen, *Versuche*, p. 331.

(*e*) "*Intra id tempus QUO ELUGERE VIRUM MORIS EST, antequam VIRUM ELUGERET.*"

(*f*) L. II, § 1 *de his qui not.* (3, 2) "*PRAETOR ENIM ad id tempus se retulit, QUO VIR ELUGERETUR QUI SOLET ELUGERI, propter turbationem sanguinis.*"

(*g*) L. II, § 1, 3 *de his qui not.* (3, 2).

(*h*) L. II, § 2 *de his qui not.* "*POMPONIUS EAM, QUAE INTRA LEGITIMUM TEMPUS PARTUM EDIDERIT, PUTAT STATIM POSSE NUPTIIS SE COLLOCARE: QUOD VIRUM PUTO.*"

(*i*) L. II *pr. de his qui not.* (3, 2) "*LIBERORUM AUTEM ET PARENTIUM LUCTUS IMPEDIMENTO NUPTIIS NON EST.*"

to primitive custom, which has been traced back to the Laws of Numa, there were two different, but nevertheless kindred Rules.

(1.) After the Death of a Husband the Widow is obliged to remain for a period of ten Months (first extended by the Emperors to twelve Months) without contracting a new Marriage. If she transgresses this Rule, the Men who assist her in doing so (the new Husband, and, according to circumstances, the Fathers of both parties who give their consent) are said to be Infamous. This transgression was certainly imputed above all to the Widow herself as something wholly dishonorable; but so long as Infamy generally had a mere Political significance, she could not be deemed to be Infamous.

(2.) Near Kindred must be mourned for by the Mourner abstaining from every ornament of dress, as well as from participation in feasts. This mourning was probably from early times only considered strictly obligatory for certain cases, in others it was left to a voluntary sentiment of piety, but the precise limits cannot be fixed with certainty for all periods (a). During the Empire (perhaps even earlier) this obligation was borne generally by Women and not by Men, although in regard to this point a different opinion, but one denoted as singular, is mentioned (b). Moreover during that period Women were obliged to observe Mourning only on the Death of their Husbands, and of all Ascendants and Descendants without distinc-

(a) Perhaps at no time were there any fixed limits, which in fact were not needed so long as the obligation of Mourning was not protected by the penalty of Infamy (which certainly could not be without defined limits), but by the very free discretion of the Censors, which also at a later period might have been supplemented by Infamy. Cf. Niebuhr, vol 2, p. 450, 2nd and 3rd editions.

(b) *Frag. Vatic.* § 321 (probably taken from Paulus, *Ad Edictum*) "PARENTEM INQUIT. HIC OMNES PARENTES ACCIPE UTRIVSQUE SEXUS: NAM LUGENDI EOS *mulieribus* MORIS EST. QUAMQUAM PAPINIANUS LIB. II. QUAESTIONUM ETIAM LIBERIS VIRILIS SEXUS LUGENDOS ESSE DICAT; *quod nescio ubi legerit.*" Perhaps this somewhat remarkable fluctuation of opinion may be explained by the circumstance, that in particular cases Sons also were "noted" by the Censors on account of their violation of the mourning for Parents (note (a)). The text of Papinian here cited and found fault with has been preserved for us in a remarkable way. L. 25 *pr. de his qui not.* (3, 2) PAPINIANUS LIB. II. QUAESTIONUM. EX HEREDITATUM QUOQUE FILIUM LUCTUM HABERE PATRIS MEMORIAE PLACUIT. IDEMQUE ET IN MATRI JURIS EST, CUIUS HEREDITAS AD FILIUM NON PERTINET." Seneca also speaks against the obligation of Mourning for Men, *Epist.* 63 "ANNUM FEMINIS AD LUGENDUM CONSTITUERE, NON UT TAMDIU, SED NE DIUTIUS: *viris nullum legitimum tempus est, quia nullum honestum.*" The last words may appear no more than a mere rhetorical exaggeration, just as the assertion that the year of Mourning was only to be understood as the maximum period. But, as a matter of fact, the distinction of Sex in reference to Mourning undoubtedly underlies this text. Of the same character is L. 9 *pr. de his qui not.* (3, 2) "UXORES VIRI LUGERE NON COMPELLENTUR." Finally also, and quite specially, the words *mulieribus* REMITTUNTUR in L. 15, C. *ex quib. c. inf.* Cf. below, No. IX. (b).

tion (*c*): in earlier times probably also on the Death of near Collateral Kindred (*d*). The violation of this obligation was regarded naturally as impious and very dishonorable, but it could not prevail as Infamy in regard to Women, who were alone bound by that obligation, so long as Infamy was still a mere Political Institute.

But as the *Lex Julia*, fully developed by the interpretation of Jurists, made Infamy also applicable to Women (No. II.), this state of things must have changed, and it thus became very natural that the Widow by a premature Marriage, just as every Woman by the violation of the obligation of Mourning, became Infamous. There was properly speaking no particular need of introducing these new cases of Infamy into the Praetorian Edict, but nevertheless this was done (No. II.).

And as, finally, in consequence of the Justinian legislation Infamy again lost its applicability to Women (No. V.), these new cases must also have again vanished. Thus the fact that on the admission of the Edict concerning Infamy into the Digest, those cases which had been newly added since the publication of the *Lex Julia* were again omitted, is capable of a very natural explanation. Strictly speaking every trace of that legal principle (*i. e.*, Infamy) in the texts of Jurists and in the Imperial Constitutions should also have been wiped out, and that this did not happen, but, on the contrary, that many such traces are still existing (§ 77 (*y*)), is sufficiently explainable from the manner in which our Compilations were made, and, apart from that circumstance, may also be compared with too many analogies to be derived from other legal doctrines, rather than that a doubt should hence arise as to the correctness of our historical comparison.

VIII.

Having made these preliminary observations, it is now possible to give a clear account of the contents of our Law Sources, in relation to the questions last dealt with. We possess, for instance, in two different places, texts of the Edict relating to premature Marriage and violated Mourning. Both texts are in all important respects undoubtedly genuine, literally agreeing with each other in some parts, although in other portions very different: the one, of which constant use has already been made, in the Digest from Julianus, LIB. I, AD EDICTUM (L. I *de his qui non*); the other in the Vatican Fragments from the

(*c*) *Frag. Vat.* § 320 (the words of the Edict) "QUAE VIRUM, PARENTEM, LIBEROSVE SUOS, UTI MOS EST, NON ELUXERIT."

(*d*) Festus, v. *Minuitur* . . . "PRIVATIS (MINUITUR LUCTUS) . . . CUM PROPRIORE QUIS COGNATIONE, quam is qui lugetur, NATUS EST." Cf. Klenze, *Zeitschrift für geschichtliche Rechtswissenschaft.* vol. 6, p. 33. See also below, No. IX. (*c*).

Commentaries of an unknown author, probably Paulus, LIB. V. AD EDICTUM (a). Besides these we have yet another different text ascribed to Paulus. I will now endeavour to explain these contradictions, and with this view I will, in the first instance, place in juxtaposition the two readings of the Edict which have come down to us.

L. 1 de his qui not. inf.

INFAMIA NOTATUR :—

A. QUI EAM, QUAE IN POTESTATE EJUS ESSET, GENERO MORTUO, CUM EUM MORTUUM ESSE SCIRET,

INTRA ID TEMPUS, QUO ELUGERE VIRUM MORIS EST, ANTIQUAM VIRUM ELUGERET,

IN MATRIMONIUM COLLOCVERIT :

B. EAMVE SCIENS QUIS UXOREM DUXERIT,

NON JUSSU EJUS IN CUJUS POTESTATE EST.

C. ET QUI EUM, QUEM IN POTESTATE HABERET, EAM, DE QUA SUPRA COMPREHENSUM EST, UXOREM DUCERE PASSUS FUERIT.

Fragm. Vatican. § 320.

A. ET QUI EAM, QUAM IN POTESTATE HABET, GENERO MORTUO, CUM EUM MORTUUM ESSE SCIRET,

IN MATRIMONIUM COLLOCVERIT :

B. EAMVE SCIENS UXOREM DUXERIT :

C. ET QUI EUM, QUEM IN POTESTATE HABERET, EARUM QUAM UXOREM DUCERE PASSUS FUERIT.

D. QUAE VIRUM, PARENTEM, LIBEROSVE SUOS, UTI MOS EST, NON ELUXERIT ;

E. QUAE CUM IN PARENTIS SUI POTESTATE NON ESSET, VIRO MORTUO, CUM EUM MORTUUM ESSE SCIRET, INTRA ID TEMPUS, QUO ELUGERE VIRUM MORIS EST, NUPSERIT.

I will now, in the first place, deal with those differences which I regard as insignificant, and with respect thereto, as throughout the entire explanation, I will employ the letters by which I have sought to distinguish the individual cases of Infamy from one another.

No one will certainly lay any stress on the circumstance, that in the entire passage of the Vatican Fragments, including the Commentary in the following Section (321), the word INFAMIA does not occur; the Excerpt first begins after the mention of Infamy, and that it is actually taken from the Praetorian catalogue of Infamous persons, is placed beyond all doubt by

(a) The passage is apparently taken from a Commentary on the Edict. Since Papinian is quoted therein and refuted, we have simply to choose between Ulpian and Paulus. I maintain the latter to be the probable author, because Ulpian in L. 23 de his qui not. (3, 2) appears to consider the same question from a different standpoint. Nevertheless I am willing to concede that owing to the fewness of the Excerpts which have come down to us, wherein we lose all the intervening connecting links, that circumstance is not altogether decisive.

its literal agreement for the most part with the text as given in the Digest.

In like manner I hold the circumstance to be unimportant, that in the Vatican Fragments portions of the text under A. and B. are wanting, which are to some extent quite indispensable if the Edict was not intended to contain wholly unmeaning provisions. These portions of the text have not, as I believe, been omitted by the Copyists, but by the Compiler himself, and not so much out of thoughtlessness, as because he wished merely to describe in general terms the ideas embraced under A., B., and C., in order to bring out clearly the connexion of cases D. and E. with the preceding ones. For it is unmistakable that he was chiefly concerned with the purport of these last two cases, since, in the following Section, he simply extracts a passage from the Commentary of the Jurist concerning case D. It is owing to the same intentional abridgment by the Compiler that I would explain, in regard to C., the substitution of the more terse expression *EARUM QUAM* for the more minute but nevertheless indisputably genuine words *EAM DE QUA SUPRA COMPREHENSUM EST*, a substitution which is not strictly suitable, because in the passages under A. and B. there is absolutely no ground for introducing the plural *EARUM*. The sense moreover in both renderings is the same ("such an one"), and it is easily conceivable how the abridgment of the more minute description of the genuine Edictal text was arbitrarily accomplished, whilst a contrary procedure would be wholly inexplicable.

The most important question, however, is this: were the passages C. and D. intended to exhibit, as I believe, two separate independent cases, or do they refer to a single case, so that the words *QUAE VIRUM . . NON ELUXERIT* are merely the elaboration of the preceding words *EARUM QUAM*?

According to my view those who are declared Infamous are: C. the Father of the new husband, D. every Woman violating the obligation of Mourning, so that no thought whatever is paid to the Marriage itself.

According to the opposite view the Infamous person is the Father of the Man who marries a Woman who is guilty of having violated her Mourning (*b*).

(*b*) This opinion occurs in Wenck, *Praef. ad Hauboldi Opuscula*, vol. 1, pp. xxxii, xxxiii. He arrives at it quite consistently, inasmuch as he proceeds upon the supposition that the Edict as we know it (in the Vatican Collection as well as in the Digest) enumerates Men only as Infamous and not Women, because it deals generally only with the Incapacity of Infamous persons to Postulate. He does not venture on an explanation of the great difference between the two texts. Properly speaking, then, this opinion may be regarded from a double aspect, according as one regards the Infamy of the Father-in-law as the consequence, either (1) of a Marriage concluded during the period of Mourning, or (2) of a breach of Mourning which the Woman had at some earlier time, by whatever act it may be, committed. The last

The grounds of my opinion are the following:—

(1.) The contrary view is only possible under the supposition of the words *EARUM QUAM* (because they may be construed as well with reference to the preceding as to the succeeding words), which, however, as I have already shown, are not to be attributed to the Praetor but to the Compiler. According to the genuine text of the Digest this explanation is quite impossible, because the words can then only be understood as referring to the preceding clauses.

(2.) If the words *EARUM QUAM* were actually employed in the genuine text, the "*QUAE . . . ELUXERIT*" must then also refer to *EARUM*, and would therefore require to be expressed in the plural, which is not now the case.

(3.) In the Manuscript there is a blank space before the words *QUAE VIRUM*, which indicates the commencement of an entirely new case, and not the mere continuation of a previous proposition.

(4.) The opposite opinion presupposes that by the mere fact of Marriage the Mourning for Parents and Children is violated, for which there is absolutely no justification (No. VI.).

(5.) Even supposing, moreover, that the violation of Mourning by mere Marriage was true in every instance, the opposite opinion would still have to be abandoned on account of its being entirely wanting in practical consistency. For the Father of a Man, who had married a Woman who had violated her Mourning, would then have to be declared Honorless. Not only was this rigorous construction, however, scarcely conceivable in itself, but it is even still more incomprehensible with reference to the circumstance that the Father of the Woman, and the new Husband himself (in case he was independent of Paternal Power), were not treated with the like rigor: for both of them were pronounced Infamous according to A. and B. only in the case of a Widow who remarried before the expiry of her period of Mourning, and not when the period of Mourning for Parents and Children was violated.

Can anything then so contrary to common sense be maintained as possible?

Precisely the same question may be repeated in regard to case E., which, in my opinion, is a supplement of A., B. and C. In

view rests principally on the words *quae . . . non eluxerit*, which must therefore be understood as follows:—By the breach of Mourning the Woman became Infamous for the remainder of her life, and, if she afterwards married, her Husband or his Father also incurred Infamy. This is actually the opinion of Wenck (p. xxxiii.), but such a contaminating effect of Infamy is absolutely unheard of, is without a single analogy, and is in direct contradiction with all positive testimony. For if, for example, a Senator became Infamous by his Marriage with a stage-Actress (and was therefore expelled from the Senate), why should it have been quite needlessly added that this Marriage was invalid? L. 42, § 1 *de ritu nupt.* (23, 2).

these three Rules the Men who took part in a premature Marriage were pronounced Infamous, while Rule E. extends the Infamy likewise to the Woman herself.

According to the other opinion this Fragment is also to be regarded as simply a closer definition of the words *EARUM QUAM*, consequently as referring again to the Father-in-law of the Woman (c). On the other hand, all the arguments already adduced in regard to D. are, in the first place, opposed to this view. But besides these there is also the additional and wholly decisive ground, that the Father-in-law would in that view only be Infamous if the Woman were free from Paternal Power; but his guilt in permitting his Son to contract a prohibited Marriage is surely the same whether the Daughter-in-law is, or is not, subject to Paternal Power. In short, everything which, according to the opinion here refuted, is obliged to be most laboriously repeated under E., is in fact already expressed in the Edict in the brief and intelligible words, which we read in the Digest under C.: *EAM de qua supra comprehensum est.*

IX.

The difference between the two texts of the Edict concerning Infamy, which have here been placed in juxtaposition, has already, in regard to one part, been explained with reference to the course adopted by the Compiler of the Vatican Fragments. Another, and precisely the more essential difference, consists in the cases of Infamy (D. and E.), which occur in the Fragments but are wholly wanting in the Digest. In regard to this matter the former explanation falls naturally to the ground, inasmuch as the Compiler might, according to his judgment, omit passages, but he could not add to them. A complete exposition of the historical connexion (between the texts) will make that difference quite clear.

So long as Infamy was a mere Political Institute it could not be applied to Women. By the *LEX JULIA* and its interpretations it was made applicable to Women (No. II.), and amongst others those Women were now deemed to be Infamous, who had violated some strict obligation of Mourning, and likewise those who had concluded a new Marriage before the expiry of ten months from the death of their Husbands. These new cases were also introduced into the Edict (No. VII.), and, as new additions, were of course placed after those old Cases with which they bore the closest resemblance. We perceive the form of the Edict, which resulted from these introductions, from the Vatican Frag-

(c) Thus Wenck (p. xxxiii) also interprets it (forced to it by a fundamental view), and for this reason he adds, in regard to the second *quas* (but not in regard to the first), the parenthetical explanation, *i. e., quævis.*

ments (No. VIII.), and it now becomes quite clear why case E. was at first introduced after cases A., B., C., and so much separated from them, when, according to the internal connexion, it should have found its correct place beside those cases, and even before them. And undoubtedly it would have obtained this position if it could have been inserted in the Edict at its first composition.

In the end, however, a very important change occurred in regard to this matter. A SENATUSCONSULTUM of unknown date (*a*) separated the two newly-admitted cases of Infamy relating to Women. The violation of the obligation of Mourning (without being thereby approved) was not henceforth to involve any legal consequences, and therefore no longer to produce Infamy. On the other hand, the Infamy resulting from a premature Marriage, in respect to both the Woman and the new Husband, was confirmed (*b*). The Jural condition resulting from this change is very distinctly expressed in a passage of Ulpian, wherein Mourning generally, and without distinction of Sex, is represented as a mere matter of piety, without any legal consequences, and especially without the consequence of Infamy (*c*). From the complete harmony of this passage with the SENATUSCONSULTUM above mentioned, it is incomprehensible how Modern Writers could yet bring themselves to believe that they perceived therein an interpolation of the Compilers (*d*).

It was now possible also to alter the Edict afresh, and again to strike out case D. That this did not happen is shown from the text preserved in the Vatican Fragments. The SENATUSCONSULTUM was passed without doubt at a time when changes

(*a*) We cannot fix it at too late a period for this reason, that no certain Senatusconsultum is existing subsequent to the period of Severus.

(*b*) L. 15, C. *ex quib. causis inf.* (2, 12) "*Imp. Gordianus. Decreto amplissimi ORDINIS LUCTU foeminarum DEMINUTO, tristior habitus ceteraque hoc genus insignia, mulieribus remittuntur: non etiam INTRA TEMPUS, QUO HIS ELUGERE MARITUM MORIS EST, matrimonium contrahere permittitur; CUM ETIAM, SI NUPTIAS ALIAS INTRA HOC TEMPUS SECUTA EST, tam ed, QUAM is qui sciens eam duxit uxorem, ETIAMSI MILES SIT, perpetuo Edicto labem pudoris contrahat, 239.*" That is to say, in the second case, the Infamy threatened in the Edict (according to its latest supplement) must continue, but it is not intended to prevail any longer in the first case.

(*c*) L. 23 *de his qui not.* (3, 2) "PARENTES, ET LIBERI UTRISQUE SEXUS, NEC NON ET CETERI AGNATI, VEL COGNATI SECUNDUM PIETATIS RATIONEM ET ANIMI SUI PATIENTIAM, PROUT QUISQUE VOLUERIT, LUGENDI SUNT: QUI AUTEM EOS NON ELUKIT, NON NOTATUR INFAMIA." The thought here expressed may be developed and amplified as follows:—In an earlier period Mourning was in certain cases a strict obligation, and at last was even protected by the punishment of Infamy; in other cases it was even at that time a mere matter of conscience, particularly in the case of Men, and in regard to deceased Collaterals. Cf. No. VII. (*d*). Since the latest Senatusconsultum all these distinctions fell to the ground, and Mourning then became, for all the specified cases alike, a mere matter of conscience. There is absolutely no reason for supposing any interpolation to exist in this passage.

(*d*) Thus, for example, Cujacius, *Obscr.* lib. 21, c. 12.

in the text of the Edict were always rare, and which finally ceased altogether; moreover it had itself obtained so much respect and publicity that no misuse was to be feared from the unaltered text of the Edict. But if that antiquated passage was notwithstanding preserved in the Edict, it ought also not to appear strange to us that Paulus, or one of his contemporaries, should still have commented upon it. No doubt he may have remarked afterwards that the Senate had abolished Infamy for this case, although this observation does not accidentally occur in the smaller Excerpt from that Commentary.

The matter assumed a wholly different aspect under Justinian. Under him Infamy again ceased, as in the oldest Law, to have any applicability to Women (No. V.). It was thus natural that those cases, which only affected Women, should again have been expunged from the Edictal text concerning Infamy (L. 1 *de his qui not.*); and so the difference in the two texts which have been transmitted to us is explained in the simplest manner.

X.

The Edictal text, where it is more completely preserved in the Digest (No. VIII.), presents a still more special difficulty, which has hitherto not been touched, in the following words:—

2. QUI EAM, QUAE IN POTESTATE EJUS ESSET, GENERO MORTUO, CUM EUM MORTUUM ESSE SCIRET, *intra id tempus quo elugere virum moris est, antequam virum elugeret*, IN MATRIMONIUM COLLOCAVERIT.

The words here printed in Italics will be connected by every one at the first glance with COLLOCAVERIT, as if the period were defined therein within which a Marriage must be concluded in order to attach Infamy to the Father-in-law. But this explanation must be rejected for two reasons. In the first place, because those words would then involve a completely useless repetition, inasmuch as the words INTRA ID . . . MORIS EST express (so understood) precisely the same thing as the subsequent words ANTEQUAM VIRUM ELUGERET. Secondly, because the preceding words CUM EUM MORTUUM ESSE SCIRET clearly point to the contrast of a case of excusable ignorance, from which Infamy is intended to be averted (a). This excusable case would then have to be conceived that the father believed his former Son-in-law to be still alive. But this belief of the Father would make his act even more wicked, inasmuch as he would then intend his Daughter to commit Bigamy.

These difficulties vanish if we divide the words quoted into two parts, separated alike by sense and construction. The words

(a) L. 8 *de his qui not.* (3, 2) "MERITO ADJECIT PRAETOR, cum eum mortuum ESSE sciret, NE IGNORANTIA PUNIATUR."

ANTEQUAM VIRUM ELUGERET relate in fact to COLLOCAVERIT, and have the meaning above explained. But the preceding words refer, by way of a closer definition, to MORTUUM ESSE, and are meant to express the following notion:—

“The consenting Father will only then become Infamous when he knew that the death of his Son-in-law had happened at a date, since which the period of Mourning had not expired. An error in regard to this point renders his consent excusable.”

Suppose, therefore, that the Son-in-law was called out on War Service, and had since then sent no information about himself. A year and a-half afterwards his death is announced, with the addition that he had been killed a month after his departure; but this addition is erroneous, and his death had really occurred only three months before. If now the Widow upon the receipt of the information concludes a second marriage, neither she nor her Father can incur any blame, because the fact that the period of Mourning had not expired was not known to them. Their action was quite allowable under the supposition of the facts believed by them (b).

This explanation does not strike us at first sight as the correct one, simply because it requires us to refer the words MORTUUM ESSE INTRA ID TEMPUS to the past period, a construction which nevertheless completely harmonizes with the general conception, as well as with the words. Moreover this view has long ago been enunciated in a thoroughly convincing manner (c).

XI.

I come now to a very different kind of testimony from ancient times regarding Infamy arising from the violation of Mourning. It is that passage of Paulus (lib. 1, tit. 21), which runs thus:—

§ 13. PARENTES ET FILII MAJORES SEX ANNIS *anno* LUGERI *possunt*: MINORES *mense*; MARITUS DECEM MENSIBUS; ET *cognati*

(b) L. 8 *de his qui not.* (3, 2) “SED CUM TEMPUS LUCTUS CONTINUUM EST, MERITO ET IGNORANTI CEDIT EX DIE MORTIS MARITI: ET IDEO SI POST LEGITIMUM TEMPUS COGNOVIT, LABEO AIT, IPSA DIE ET SUMMERE EAM LUGUBRIA ET DEPONERE.” What is here said in the first instance in regard to Mourning prevails likewise also in regard to the period within which a new Marriage must be avoided: indeed it is in this latter connection alone that it is quoted by Ulpian. For this explanation as a whole it is certainly necessary to construe the words CUM EAM MORTUUM ESSE SCIRET, in the text of the Commentary just cited, as if the succeeding words INTRA ID TEMPUS . . . MORIS EST were placed still further back (just as if an ETCETERA stood after SCIRET), otherwise the absurdity would follow that the Father would be blameless if he believed at the time of the second marriage that his first Son-in-law was still alive.

(c) Rucker, *Obser.* C. 1 at the end of his *Diss. de civ. et nat. temp. comput.* C. 1, Lugd. Bat. 1749. Wenck also (1, C. pp. xxxiv.—xxxvi.) has rightly understood this point.

PROXIMIORIS GRADUS OCTO : *Qui contra fecerit, infamium numero habetur.*

§ 14. QUI LUGET, OBSTINERE DEBET A CONVIVIIS, ORNAMENTIS, PURPURA, ET ALBA VESTE.

If we at first consider the purport of Section 13, we shall find little in it which does not stand in contradiction with the most positive information we possess, and notably with the Commentary on the Edict (probably by Paulus) excerpted in the Vatican Collection (§ 321), which is all the more remarkable since Section 321 is supported by being in conformity with the Laws of Numa, as quoted by Plutarch. In the first place, the expression *Sex ANNIS*, where the meaning must be *decem*; the emendation *decem* has been suggested, but this would only overcome the objection on one side. Then there is the word *anno*, which, taken in connexion with the words "ten months," afterwards applied to the Husband, can only mean twelve months: Section 321 speaks indeed also of an *ANNUS*, but it explains this immediately afterwards, and upon conclusive grounds, to consist of the ancient ten-months year. Again the word *POSSUNT*, which seems to point to a mere prohibition of a longer period of Mourning, and is not suitable to the subsequent Infamy. Further *mense*, for although Children under ten years of age were to be mourned for during as many months as they numbered years, yet Children of three years and less only with half Mourning (*SUBLUGETUR*), and those under a Year not at all. Then the Cognates, of whom neither Section 321, nor the Edictal text itself (in § 320), says anything. Finally, the unconditional threat of Infamy without distinction of Sex, although Men were never afflicted with Infamy on this account, and Women likewise, at the time of Paulus, were freed from it (No. VII.) (a).

These contradictions would have presented just as many insoluble enigmas if the external authority of the reputed passage of Paulus had been firmly settled: this latter point has therefore now to be investigated. We must then, in the first place, separate Section 13 completely from Section 14 (already made use of above), which, with the exception of the immaterial word *PURPURA*, exists in all Manuscripts of the *BREVIARIUM*, and is undoubtedly genuine. Moreover its purport creates no difficulty, since it only contains certain provisions as to the form

(a) In order to remedy the effect of the very doubtful concluding passage various expedients have been resorted to. Herm. Canngieter (*Obser.* p. 203) wishes to read *NUMERO O HABETUR*, which is said to be equivalent to *NON HABETUR*, instead of *INFAMIUM NUMERO HABETUR*. But the letter O as the symbol for *NON* does not occur anywhere else. Jno. Canngieter (*De Notis*, p. 350) converts *qui CONTRA FECERIT* into *quae*. Bynkershoek (*Obser.* v. 13) thinks that this last proposition is taken from Anian. But that in the Western Gothic Kingdom Infamy should have been again introduced for the breach of Mourning, is above all statements the most improbable.

of Mourning, which might be conveniently mentioned, even after the abolition of Infamy, as a remnant of the old custom. Section 13, however, comes from the obscure CODEX VESONTINUS, a Manuscript of Paulus which Cujacius obtained from the Municipal Library of Besançon (*b*), as to the contents of which he unfortunately does not tell us, whether it merely comprehended the Pauline (which in truth moreover is not easily admitted) or the entire Breviarium. The matter is rendered most suspicious by the fact that the several passages for the first time made known from that Manuscript are altogether wanting in the other numerous Manuscripts of the BREVIARIUM, including some ancient ones.

If we compare these external grounds with the above proved very doubtful purport of Section 13, we shall be fully justified in describing the so-called CODEX VESONTINUS as an old text very largely elaborated and disfigured in some unknown period, the individual passages of which, when they stand in contradiction with other positive evidence, can lay no claim to any authority.

XII.

Regarding the Infamy of Prostitutes (QUAESTUM CORPORE FACIENTES) the following observations may be made. The original Edict naturally enough did not name them, because it named no Women at all. The LEX JULIA named them amongst those who were prohibited from marrying Senators and their male descendants (*a*). It is, however, scarcely to be doubted that their Marriage with simple Freeborn persons was also not permitted, although this is not expressly stated. It speaks in support of this view, in the first place, that the same contempt was felt for this profession as for that of Pandering, in

(*b*) Cujacius first mentions this Manuscript in the 21st book of the *Observations* (1579), wherein he quotes likewise many new passages from it. He says of it in cap. 13 "SUPERIORES SENTENTIAS DEDI EX LIBRO VETUSTISSIMO SENTENTIARIUM PAULI AD ME VESONTIONE PERLATO," and in cap. 16 "IN OPTIMO LIBRO QUEM VESONTIO DEDIT CIVITAS NOBILISSIMA MIHIQUE AMICISSIMA." All these passages were first admitted into the text in the edition of Paulus at the end of the *Codex Theodosianus*, Paris, 1586, fol.

(*a*) Ulpian, XIII. § 1; cf. above, No. II. A doubt might be raised from the passage literally admitted into the Digest from the Law relating to Women whose Marriage with Senators was denied (L. 44 *pr. de ritu nupt.* (23, 2)), for in this passage those Women are not mentioned. But it was in fact only a single Chapter of the Lex Julia, in a subsequent part of which they may have appeared (accidentally also not excerpted). Ulpian, on the other hand, desired to furnish a complete survey of the prohibitions, only not in the actual words of the Law. That the Law actually spoke of such Women, is very evident from L. 43 *de ritu nupt.* (23, 2), which is taken from Ulpian's Commentary on the Lex Julia, wherein the notion of *QUAESTUM FACERE* is expressly discussed.

regard to which that prohibition was directly pronounced (*b*); in the next place, the Exceptions in favour of those Freedwomen who in their earlier condition of Slavery had carried on such a profession (*c*). This Exception could only be intelligible under the supposition that in other cases a Marriage between Prostitutes and Freeborn men was always denied: it could not have referred to Senators, because in their case Marriage with all Freedwomen, even the most honorable, was anyhow prohibited.

Probably those Women were then included in the *Édict*, which contained a category of all Infamous persons, but in the compilation of the *Digest* they would, upon the like grounds as all other Women, be again omitted.

XIII.

The profession of Pandering, when practised by Men, was clearly included in the original *Édict* among the cases of Infamy: Women of the like profession could not be mentioned therein. The *LEX JULIA* denied Marriage to all Freeborn men with Procuresses, likewise with Freedwomen who had been manumitted by a Procurer or Procuress (*a*). In regard to the Marriage of Senators Procuresses were not mentioned, but we may conclude that Marriages with such women were not permitted, on the ground of the similarity of this profession with that of personal Prostitution (*b*). This case was now also probably admitted into the *Edict* regarding Infamous persons.

It is to this case that a story of the time of Tiberius relates, which furnishes evidence of the gross corruption of antiquity (*c*). Noble Women publicly practised Pandering as a profession: "UT AD EVITANDAS LEGUM POENAS JURE AC DIGNITATE MATRONALI EXSOLVERENTUR." What advantages could they expect from this baseness? In the first place, they rendered themselves qualified to marry freed Slaves who pleased them, a Marriage which otherwise would not have conferred upon them the benefits attached by the *LEX JULIA* to a Marriage valid according to the terms of that Law (*d*); but that does not mean

(*b*) L. 43, § 6 *de ritu nupt.* (23, 2) "LENOCINIUM FACERE non minus est, QUAM CORPORE QUÆSTUM EXERCERE." Since the Jurist merely opposes those who regard *LENOCINIUM* as something less disgraceful than *QUÆSTUS* properly so called, he clearly recognises at all events the extreme depravity of this *QUÆSTUS*.

(*c*) L. 24 *de his qui not.* (3, 2) "IMP. SEVERUS RESCRIPTIT, NON OFFUISSE MULIERIS FAMA QUÆSTUM EJUS IN SERVITUTE FACTUM."

(*a*) Ulpian, XIII. § 2, cf. above, No. II. It is remarkable that in this case the freed female Slaves became Infamous, whilst they would not have been so if they had carried on prostitution for their own benefit during their condition of Slavery (No. XII. (*c*)).

(*b*) Cf. No. XII. (*b*).

(*c*) Suetonius, *Tib.* C. 35.

(*d*) That the daughter of a Senator, if she dishonored herself, became

AD EVITANDAS LEGUM POENAS. In the next place, unmarried Women would certainly by that means not be punishable for personal Prostitution according to the LEX JULIA DE ADULTERIIS, for the offence of STUPRUM (although called ADULTERIUM) referred only to such Women, who, until the commission of this act, had not violated their matronly honor (e); this case was undoubtedly meant, for it was found necessary to close this door to crime by a special SENATUSCONSULTUM (f). Thirdly, there was the advantage that they became incapable thereby for the future of contracting a valid Marriage within the meaning of the LEX JULIA, even with a common Freeborn man. From the standpoint of this Law voluntary Celibacy could therefore no longer be imputed against them as an objection, or as involving a penalty, seeing that by the same Law a Marriage in their present condition with all Men (except perhaps with Freedmen) was made impossible. This computation appears almost too extravagantly refined, and yet it must have become practically recognized (so that the passage of Suetonius is also to be referred at the same time to this advantage), since it was even found necessary to introduce preventive measures against it. Sueton. *Domitianus*, C. 8 "PROBROSIS FEMINIS LECTICAE USUM ADEMIT: jusque capiendi legata hereditatesque." These words are certainly most simply to be explained as follows:—"The pretext must no longer be allowed to avail dishonorable Women that they are obliged to live in Celibacy forced upon them by their Infamy, but they must be regarded, like those who voluntarily remain Unmarried, as wholly incapable of acquiring Testamentary Successions and Legacies."

In this connection also there still exist some, for the most part misunderstood, passages in the Digest. As a rule the acquisition by means of the Testament of a Soldier was not affected by the Celibacy of the Heir or Legatee (g).

This Rule remains generally applicable likewise to those Women, who, by reason of their immoral lives, should receive no protection against the penalties of Celibacy in regard to other Testaments. But for the case where such a Woman had lived with the Soldier himself (*i. e.*, the Testator) in an adulterous intercourse, Hadrian ordained that the same Incapacity should be attached in regard to the Testament of the Soldier.

capable of marrying a Freedman, is expressly stated in L. 47 *de ritu nupt.* (23, 2) "*Impune libertino NUBIT*," that is, she thereby became freed from the legal penalties of Celibacy.

(e) L. 13 *pr.* § 2 *ad S. Jul. de adult.* (48, 5).

(f) L. 10, § 2 *ad L. Jul. de adult.* (48, 5) "*Mulier, QUAE evitandae poenae adulterii gratia LENOCINIUM FECERIT, AUT OPERAS SUAS IN SCENAM LOCAVERIT ADULTERII ACCUSARI DAMNARIQUE EX SENATUSCONSULTO POTEST.*"

(g) Gaius, II. § III. (Cf. L. 19, § 2 *de castr. pec.* (49, 17); L. 5, C. *de test. mil.* (6, 21).

L. 41, § 1 *de test. mil.* (29, 1) "MULIER, IN QUAM turpis suspicio cadere potest, NEC EX TESTAMENTO MILITIS aliquid capere potest, UT D. HADRIANUS RESCRIPSIT."

The purport of this Rescript is also recognised in, and placed beyond doubt by, the following passage:—

L. 14 *de his quae ut ind.* (34, 9) "MULIEREM, QUAE STUPRO COGNITA in contubernio militis fuit. NON ADMITTI AD TESTAMENTUM JURE MILITIAE FACTUM, ET ID QUOD RELICTUM EST AD FISCUM PERTINERE, PROXIME TIBI RESPONDI."

Here, therefore, one effect of the ancient principles of Incapacity is still visible in the Justinian Law. Only we must transfer these passages, as is necessary in so many other similar cases (§ 41), from the connexion in which they were originally conceived, to the new connexion of the Justinian Law. What was therefore originally meant as Incapacity, is now to be conceived as Indignity,* so that the original CADUCUM transforms itself naturally into an EREPTORIUM (the Modern EREPTITIUM).

* In the sense of Unworthiness. The cases in which, according to the latest phase of the Justinian Law (1 § 12, C. 6, 51), the Unworthiness of the Heir or Legatee caused a forfeiture (EREPTITIUM) of the Succession or Legacy, which then devolved in some cases to the Fiscus, and in others to the Persons next entitled, are very fully specified by Mackeldey in his *Lehrbuch des heutigen Römischen Rechts*, § 685 (b), page 598, 12th Ausg. TRANS.



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