The relation of guardian and ward, or in Roman words of tutor and pupil, which covers so many titles of the Institutes and Pandects, [136] is of a very simple and uniform nature. The person and property of an orphan must always be trusted to the custody of some discreet friend. If the deceased father had not signified his choice, the agnats, or paternal kindred of the nearest degree, were compelled to act as the natural guardians: the Athenians were apprehensive of exposing the infant to the power of those most interested in his death; but an axiom of Roman jurisprudence has pronounced, that the charge of tutelage should constantly attend the emolument of succession. If the choice of the father, and the line of consanguinity, afforded no efficient guardian, the failure was supplied by the nomination of the praetor of the city, or the president of the province. But the person whom they named to this public office might be legally excused by insanity or blindness, by ignorance or inability, by previous enmity or adverse interest, by the number of children or guardianships with which he was already burdened, and by the immunities which were granted to the useful labors of magistrates, lawyers, physicians, and professors. Till the infant could speak, and think, he was represented by the tutor, whose authority was finally determined by the age of puberty. Without his consent, no act of the pupil could bind himself to his own prejudice, though it might oblige others for his personal benefit. It is needless to observe, that the tutor often gave security, and always rendered an account, and that the want of diligence or integrity exposed him to a civil and almost

criminal action for the violation of his sacred trust. The age of puberty had been rashly fixed by the civilians at fourteen; [1361] but as the faculties of the mind ripen more slowly than those of the body, a curator was interposed to guard the fortunes of a Roman youth from his own inexperience and headstrong passions. Such a trustee had been first instituted by the praetor, to save a family from the blind havoc of a prodigal or madman; and the minor was compelled, by the laws, to solicit the same protection, to give validity to his acts till he accomplished the full period of twenty-five years. Women were condemned to the perpetual tutelage of parents, husbands, or guardians; a sex created to please and obey was never supposed to have attained the age of reason and experience. Such, at least, was the stern and haughty spirit of the ancient law, which had been insensibly mollified before the time of Justinian.

[Footnote 136: See the article of guardians and wards in the Institutes, (l. i. tit. xiii.--xxvi.,) the Pandects, (l. xxvi. xxvii.,) and the Code, (l. v. tit. xxviii.--lxx.)]

[Footnote 1361: Gibbon accuses the civilians of having "rashly fixed the age of puberty at twelve or fourteen years." It was not so; before Justinian, no law existed on this subject. Ulpian relates the discussions which took place on this point among the different sects of civilians. See the Institutes, l. i. tit. 22, and the fragments of Ulpian. Nor was the curatorship obligatory for all minors.--W.]

II. The original right of property can only be justified by the accident or merit of prior occupancy; and on this foundation it is wisely established by the philosophy of the civilians. [137] The savage who hollows a tree, inserts a sharp stone into a wooden handle, or applies a string to an elastic branch, becomes in a state of nature the just proprietor of the canoe, the bow, or the hatchet. The materials were common to all, the new form, the produce of his time and simple industry, belongs solely to himself. His hungry brethren cannot, without a sense of their own injustice, extort from the hunter the game of the forest overtaken or slain by his personal strength and dexterity. If his provident care preserves and multiplies the tame animals, whose nature is tractable to the arts of education, he acquires a perpetual title to the use and service of their numerous progeny, which derives its existence from him alone. If he encloses and cultivates a field for their sustenance and his own, a barren waste is converted into a fertile soil; the seed, the manure, the labor, create a new value, and the rewards of harvest are painfully earned by the fatigues of the revolving year. In the successive states of society, the hunter, the shepherd, the husbandman, may defend their possessions by two reasons which forcibly appeal to the feelings of the human mind: that whatever they enjoy is the fruit of their own industry; and that every man who envies their felicity, may purchase similar acquisitions by the exercise of similar diligence. Such, in truth, may be the freedom and plenty of a small colony cast on a fruitful island. But the colony multiplies, while the space still continues the same; the common rights, the equal inheritance of mankind. are engrossed by the bold and crafty; each field and forest

is circumscribed by the landmarks of a jealous master; and it is the peculiar praise of the Roman jurisprudence, that i asserts the claim of the first occupant to the wild animals of the earth, the air, and the waters. In the progress from primitive equity to final injustice, the steps are silent, the shades are almost imperceptible, and the absolute monopoly is guarded by positive laws and artificial reason. The active, insatiate principle of self-love can alone supply the arts of life and the wages of industry; and as soon as civil government and exclusive property have been introduced, they become necessary to the existence of the human race. Except in the singular institutions of Sparta, the wisest legislators have disapproved an agrarian law as a false and dangerous innovation. Among the Romans, the enormous disproportion of wealth surmounted the ideal restraints of a doubtful tradition, and an obsolete statute; a tradition that the poorest follower of Romulus had been endowed with the perpetual inheritance of two jugera; [138] a statute which confined the richest citizen to the measure of five hundred jugera, or three hundred and twelve acres of land. The original territory of Rome consisted only of some miles of wood and meadow along the banks of the Tyber; and domestic exchange could add nothing to the national stock. But the goods of an alien or enemy were lawfully exposed to the first hostile occupier; the city was enriched by the profitable trade of war; and the blood of her sons was the only price that was paid for the Volscian sheep, the slaves of Briton, or the gems and gold of Asiatic kingdoms. In the language of ancient jurisprudence, which was corrupted and forgotten before the age of Justinian, these spoils were distinguished by the name of manceps or manicipium, taken with the hand;

and whenever they were sold or emancipated, the purchaser required some assurance that they had been the property of an enemy, and not of a fellow-citizen. [139] A citizen could only forfeit his rights by apparent dereliction, and such dereliction of a valuable interest could not easily be presumed. Yet, according to the Twelve Tables, a prescription of one year for movables, and of two years for immovables, abolished the claim of the ancient master, if the actual possessor had acquired them by a fair transaction from the person whom he believed to be the lawful proprietor. [140] Such conscientious injustice, without any mixture of fraud or force could seldom injure the members of a small republic; but the various periods of three, of ten, or of twenty years, determined by Justinian, are more suitable to the latitude of a great empire. It is only in the term of prescription that the distinction of real and personal fortune has been remarked by the civilians; and their general idea of property is that of simple, uniform, and absolute dominion. The subordinate exceptions of use, of usufruct, [141] of servitude, [142] imposed for the benefit of a neighbor on lands and houses, are abundantly explained by the professors of jurisprudence. The claims of property, as far as they are altered by the mixture, the division, or the transformation of substances, are investigated with metaphysical subtilty by the same civilians.

[Footnote 137: Institut. l. ii. tit i. ii. Compare the pure and precise reasoning of Caius and Heineccius (l. ii. tit. i. p. 69-91) with the loose prolixity of Theophilus, (p. 207--265.) The opinions of Ulpian are preserved in the Pandects, (l. i. tit. viii. leg. 41, No. 1.)]

[Footnote 138: The heredium of the first Romans is defined by Varro, (de Re Rustica, l. i. c. ii. p. 141, c. x. p. 160, 161, edit. Gesner,) and clouded by Pliny's declamation, (Hist. Natur. xviii. 2.) A just and learned comment is given in the Administration des Terres chez les Romains, (p. 12--66.) Note: On the duo jugera, compare Niebuhr, vol. i. p. 337.--M.]

[Footnote 139: The res mancipi is explained from faint and remote lights by Ulpian (Fragment. tit. xviii. p. 618, 619) and Bynkershoek, (Opp tom. i. p. 306--315.) The definition is somewhat arbitrary; and as none except myself have assigned a reason, I am diffident of my own.]

[Footnote 140: From this short prescription, Hume (Essays, vol. i. p. 423) infers that there could not then be more order and settlement in Italy than now amongst the Tartars. By the civilian of his adversary Wallace, he is reproached, and not without reason, for overlooking the conditions, (Institut. l. ii. tit. vi.) * Note: Gibbon acknowledges, in the former note, the obscurity of his views with regard to the res mancipi. The interpreters, who preceded him, are not agreed on this point, one of the most difficult in the ancient Roman law. The conclusions of Hume, of which the author here speaks, are grounded on false assumptions. Gibbon had conceived very inaccurate notions of Property among the Romans, and those of many authors in the present day are not less erroneous. We think it right, in this place, to develop the system of property among the Romans, as the result of the study of

the extant original authorities on the ancient law, and as it has been demonstrated, recognized, and adopted by the most learned expositors of the Roman law. Besides the authorities formerly known, such as the Fragments of Ulpian, t. xix. and t. i. 16. Theoph. Paraph. i. 5, 4, may be consulted the Institutes of Gaius, i. 54, and ii. 40, et seq.

The Roman laws protected all property acquired in a lawful manner. They imposed on those who had invaded it, the obligation of making restitution and reparation of all damage caused by that invasion; they punished it moreover, in many cases, by a pecuniary fine. But they did not always grant a recovery against the third person, who had become bona fide possessed of the property. He who had obtained possession of a thing belonging to another, knowing nothing of the prior rights of that person, maintained the possession. The law had expressly determined those cases, in which it permitted property to be reclaimed from an innocent possessor. In these cases possession had the characters of absolute proprietorship, called mancipium, jus Quiritium. To possess this right, it was not sufficient to have entered into possession of the thing in any manner; the acquisition was bound to have that character of publicity, which was given by the observation of solemn forms, prescribed by the laws, or the uninterrupted exercise of proprietorship during a certain time: the Roman citizen alone could acquire this proprietorship. Every other kind of possession, which might be named imperfect proprietorship, was called "in bonis habere." It was not till after the time of Cicero that the general name of Dominium was given to all proprietorship.

It was then the publicity which constituted the distinctive character

of absolute dominion. This publicity was grounded on the mode of acquisition, which the moderns have called Civil, (Modi adquirendi Civiles.) These modes of acquisition were,

1. Mancipium or mancipatio, which was nothing but the solemn delivering over of the thing in the presence of a determinate number of witnesses and a public officer; it was from this probably that proprietorship was named, 2. In jure cessio, which was a solemn delivering over before the praetor. 3. Adjudicatio, made by a judge, in a case of partition.

4. Lex, which comprehended modes of acquiring in particular cases determined by law; probably the law of the xii. tables; for instance, the sub corona emptio and the legatum.

5. Usna, called afterwards usacapio, and by the moderns prescription. This was only a year for movables; two years for things not movable. Its primary object was altogether different from that of prescription in the present day. It was originally introduced in order to transform the simple possession of a thing (in bonis habere) into Roman proprietorship. The public and uninterrupted possession of a thing, enjoyed for the space of one or two years, was sufficient to make known to the inhabitants of the city of Rome to whom the thing belonged. This last mode of acquisition completed the system of civil acquisitions. by legalizing. as it were, every other kind of acquisition which was not conferred, from the commencement, by the Jus Quiritium. V. Ulpian. Fragm. i. 16. Gaius, ii. 14. We believe, according to Gaius, 43, that this usucaption was extended to the case where a thing had been acquired from a person not the real proprietor; and that according to the time prescribed, it gave to the possessor the Roman proprietorship. But this

does not appear to have been the original design of this Institution.
Caeterum etiam earum rerum usucapio nobis competit, quae non a domino nobis tradita fuerint, si modo eas bona fide acceperimus Gaius, l ii.
43. As to things of smaller value, or those which it was difficult to distinguish from each other, the solemnities of which we speak were not requisite to obtain legal proprietorship.
In this case simple delivery was sufficient.
In proportion to the aggrandizement of the Republic, this latter principle became more important from the increase of the commerce and wealth of the state. It was necessary to know what were those things of which absolute property might be acquired by simple delivery, and what, on the contrary, those, the acquisition of which must be sanctioned by these solemnities. This question was necessarily to be decided by a general rule; and it is this rule which establishes the distinction between res mancipi and nec mancipi, a distinction about which the opinions of modern civilians differ so much that there are above ten conflicting systems on the subject. The system which accords best with a sound interpretation of the Roman laws, is that proposed by M. Trekel of Hamburg, and still further developed by M. Hugo, who has extracted it in the Magazine of Civil Law, vol. ii. p. 7.
This is the system now almost universally adopted. Res mancipi (by contraction for mancipii) were things of which the absolute property (Jus Quiritium) might be acquired only by the solemnities mentioned above, at least by that of mancipation, which was, without doubt, the most easy and the most usual. Gaius, ii. 25. As for other things, the acquisition of which was not subject to these forms, in order to confer

absolute right, they were called res nec mancipi. See Ulpian, Fragm. xix. 1. 3, 7.

Ulpian and Varro enumerate the different kinds of res mancipi. Their enumerations do not quite agree; and various methods of reconciling them have been attempted. The authority of Ulpian, however, who wrote as a civilian, ought to have the greater weight on this subject.

But why are these things alone res mancipi? This is one of the questions which have been most frequently agitated, and on which the opinions of civilians are most divided. M. Hugo has resolved it in the most natural and satisfactory manner. "All things which were easily known individually, which were of great value, with which the Romans were acquainted, and which they highly appreciated, were res mancipi. Of old mancipation or some other solemn form was required for the acquisition of these things, an account of their importance. Mancipation served to prove their acquisition, because they were easily distinguished one from the other." On this great historical discussion consult the Magazine of Civil Law by M. Hugo, vol. ii. p. 37, 38; the dissertation of M. J. M. Zachariae, de Rebus Mancipi et nec Mancipi Conjecturae, p. 11. Lipsiae, 1807; the History of Civil Law by M. Hugo; and my Institutiones Juris Romani Privati p. 108, 110.

As a general rule, it may be said that all things are res nec mancipi; the res mancipi are the exception to this principle.

The praetors changed the system of property by allowing a person, who had a thing in bonis, the right to recover before the prescribed term of usucaption had conferred absolute proprietorship. (Pauliana in rem actio.) Justinian went still further, in times when there was no longer

any distinction between a Roman citizen and a stranger. He granted the right of recovering all things which had been acquired, whether by what were called civil or natural modes of acquisition, Cod. l. vii. t. 25, 31. And he so altered the theory of Gaius in his Institutes, ii. 1, that no trace remains of the doctrine taught by that civilian.--W.]

[Footnote 141: See the Institutes (l. i. tit. iv. v.) and the Pandects, (l. vii.) Noodt has composed a learned and distinct treatise de Usufructu, (Opp. tom. i. p. 387--478.)]

[Footnote 142: The questions de Servitutibus are discussed in the Institutes (l. ii. tit. iii.) and Pandects, (l. viii.) Cicero (pro Murena, c. 9) and Lactantius (Institut. Divin. l. i. c. i.) affect to laugh at the insignificant doctrine, de aqua de pluvia arcenda, &c. Yet it might be of frequent use among litigious neighbors, both in town and country.]

The personal title of the first proprietor must be determined by his death: but the possession, without any appearance of change, is peaceably continued in his children, the associates of his toil, and the partners of his wealth. This natural inheritance has been protected by the legislators of every climate and age, and the father is encouraged to persevere in slow and distant improvements, by the tender hope, that a long posterity will enjoy the fruits of his labor. The principle of hereditary succession is universal; but the order has been variously established by convenience or caprice, by the spirit of national

institutions, or by some partial example which was originally decided by fraud or violence. The jurisprudence of the Romans appear to have deviated from the inequality of nature much less than the Jewish, [143] the Athenian, [144] or the English institutions. [145] On the death of a citizen, all his descendants, unless they were already freed from his paternal power, were called to the inheritance of his possessions. The insolent prerogative of primogeniture was unknown; the two sexes were placed on a just level; all the sons and daughters were entitled to an equal portion of the patrimonial estate; and if any of the sons had been intercepted by a premature death, his person was represented, and his share was divided, by his surviving children. On the failure of the direct line, the right of succession must diverge to the collateral branches. The degrees of kindred [146] are numbered by the civilians, ascending from the last possessor to a common parent, and descending from the common parent to the next heir: my father stands in the first degree, my brother in the second, his children in the third, and the remainder of the series may be conceived by a fancy, or pictured in a genealogical table. In this computation, a distinction was made, essential to the laws and even the constitution of Rome; the agnats, or persons connected by a line of males, were called, as they stood in the nearest degree, to an equal partition; but a female was incapable of transmitting any legal claims; and the cognats of every rank, without excepting the dear relation of a mother and a son, were disinherited by the Twelve Tables, as strangers and aliens. Among the Romans agens or lineage was united by a common name and domestic rites; the various cognomens or surnames of Scipio, or Marcellus, distinguished from each

other the subordinate branches or families of the Cornelian or Claudian race: the default of the agnats, of the same surname, was supplied by the larger denomination of gentiles; and the vigilance of the laws maintained, in the same name, the perpetual descent of religion and property. A similar principle dictated the Voconian law, [147] which abolished the right of female inheritance. As long as virgins were given or sold in marriage, the adoption of the wife extinguished the hopes of the daughter. But the equal succession of independent matrons supported their pride and luxury, and might transport into a foreign house the riches of their fathers.

While the maxims of Cato [148] were revered, they tended to perpetuate in each family a just and virtuous mediocrity: till female blandishments insensibly triumphed; and every salutary restraint was lost in the dissolute greatness of the republic. The rigor of the decemvirs was tempered by the equity of the praetors. Their edicts restored and emancipated posthumous children to the rights of nature; and upon the failure of the agnats, they preferred the blood of the cognats to the name of the gentiles whose title and character were insensibly covered with oblivion. The reciprocal inheritance of mothers and sons was established in the Tertullian and Orphitian decrees by the humanity of the senate. A new and more impartial order was introduced by the Novels of Justinian, who affected to revive the jurisprudence of the Twelve Tables. The lines of masculine and female kindred were confounded: the descending, ascending, and collateral series was accurately defined; and each degree, according tot he proximity of blood and affection,

succeeded to the vacant possessions of a Roman citizen. [149]

[Footnote 143: Among the patriarchs, the first-born enjoyed a mystic and spiritual primogeniture, (Genesis, xxv. 31.) In the land of Canaan, he was entitled to a double portion of inheritance, (Deuteronomy, xxi. 17, with Le Clerc's judicious Commentary.)]

[Footnote 144: At Athens, the sons were equal; but the poor daughters were endowed at the discretion of their brothers. See the pleadings of Isaeus, (in the viith volume of the Greek Orators,) illustrated by the version and comment of Sir William Jones, a scholar, a lawyer, and a man of genius.]

[Footnote 145: In England, the eldest son also inherits all the land; a law, says the orthodox Judge Blackstone, (Commentaries on the Laws of England, vol. ii. p. 215,) unjust only in the opinion of younger brothers. It may be of some political use in sharpening their industry.]

[Footnote 146: Blackstone's Tables (vol. ii. p. 202) represent and compare the decrees of the civil with those of the canon and common law. A separate tract of Julius Paulus, de gradibus et affinibus, is inserted or abridged in the Pandects, (l. xxxviii. tit. x.) In the viith degrees he computes (No. 18) 1024 persons.]

[Footnote 147: The Voconian law was enacted in the year of Rome 584. The younger Scipio, who was then 17 years of age, (Frenshemius, Supplement.

Livian. xlvi. 40,) found an occasion of exercising his generosity to his mother, sisters, &c. (Polybius, tom. ii. l. xxxi. p. 1453--1464, edit Gronov., a domestic witness.)]

[Footnote 148: Legem Voconiam (Ernesti, Clavis Ciceroniana) magna voce bonis lateribus (at lxv. years of age) suasissem, says old Cato, (de Senectute, c. 5,) Aulus Gellius (vii. 13, xvii. 6) has saved some passages.]

[Footnote 149: See the law of succession in the Institutes of Caius, (l. ii. tit. viii. p. 130--144,) and Justinian, (l. iii. tit. i.--vi., with the Greek version of Theophilus, p. 515-575, 588--600,) the Pandects, (l. xxxviii. tit. vi.--xvii.,) the Code, (l. vi. tit. lv.--lx.,) and the Novels, (cxviii.)]

The order of succession is regulated by nature, or at least by the general and permanent reason of the lawgiver: but this order is frequently violated by the arbitrary and partial wills, which prolong the dominion of the testator beyond the grave. [150] In the simple state of society, this last use or abuse of the right of property is seldom indulged: it was introduced at Athens by the laws of Solon; and the private testaments of the father of a family are authorized by the Twelve Tables. Before the time of the decemvirs, [151] a Roman citizen exposed his wishes and motives to the assembly of the thirty curiae or parishes, and the general law of inheritance was suspended by an occasional act of the legislature. After the permission of the

decemvirs, each private lawgiver promulgated his verbal or written testament in the presence of five citizens, who represented the five classes of the Roman people; a sixth witness attested their concurrence; a seventh weighed the copper money, which was paid by an imaginary purchaser; and the estate was emancipated by a fictitious sale and immediate release. This singular ceremony, [152] which excited the wonder of the Greeks, was still practised in the age of Severus; but the praetors had already approved a more simple testament, for which they required the seals and signatures of seven witnesses, free from all legal exception, and purposely summoned for the execution of that important act. A domestic monarch, who reigned over the lives and fortunes of his children, might distribute their respective shares according to the degrees of their merit or his affection; his arbitrary displeasure chastised an unworthy son by the loss of his inheritance, and the mortifying preference of a stranger. But the experience of unnatural parents recommended some limitations of their testamentary powers. A son, or, by the laws of Justinian, even a daughter, could no longer be disinherited by their silence: they were compelled to name the criminal, and to specify the offence; and the justice of the emperor enumerated the sole causes that could justify such a violation of the first principles of nature and society. [153] Unless a legitimate portion, a fourth part, had been reserved for the children, they were entitled to institute an action or complaint of inofficious testament; to suppose that their father's understanding was impaired by sickness or age; and respectfully to appeal from his rigorous sentence to the deliberate wisdom of the magistrate. In the Roman jurisprudence, an

essential distinction was admitted between the inheritance and the legacies. The heirs who succeeded to the entire unity, or to any of the twelve fractions of the substance of the testator, represented his civil and religious character, asserted his rights, fulfilled his obligations, and discharged the gifts of friendship or liberality, which his last will had bequeathed under the name of legacies. But as the imprudence or prodigality of a dying man might exhaust the inheritance, and leave only risk and labor to his successor, he was empowered to retain the Falcidian portion; to deduct, before the payment of the legacies, a clear fourth for his own emolument. A reasonable time was allowed to examine the proportion between the debts and the estate, to decide whether he should accept or refuse the testament; and if he used the benefit of an inventory, the demands of the creditors could not exceed the valuation of the effects. The last will of a citizen might be altered during his life, or rescinded after his death: the persons whom he named might die before him, or reject the inheritance, or be exposed to some legal disqualification. In the contemplation of these events, he was permitted to substitute second and third heirs, to replace each other according to the order of the testament; and the incapacity of a madman or an infant to bequeath his property might be supplied by a similar substitution. [154] But the power of the testator expired with the acceptance of the testament: each Roman of mature age and discretion acquired the absolute dominion of his inheritance, and the simplicity of the civil law was never clouded by the long and intricate entails which confine the happiness and freedom of unborn generations.

[Footnote 150: That succession was the rule, testament the exception, is proved by Taylor, (Elements of Civil Law, p. 519-527,) a learned, rambling, spirited writer. In the iid and iiid books, the method of the Institutes is doubtless preposterous; and the Chancellor Daguesseau (Oeuvres, tom. i. p. 275) wishes his countryman Domat in the place of Tribonian. Yet covenants before successions is not surely the natural order of civil laws.]

[Footnote 151: Prior examples of testaments are perhaps fabulous. At Athens a childless father only could make a will, (Plutarch, in Solone, tom. i. p. 164. See Isaeus and Jones.)]

[Footnote 152: The testament of Augustus is specified by Suetonius, (in August, c. 101, in Neron. c. 4,) who may be studied as a code of Roman antiquities. Plutarch (Opuscul. tom. ii. p. 976) is surprised. The language of Ulpian (Fragment. tit. xx. p. 627, edit. Schulting) is almost too exclusive--solum in usu est.]

[Footnote 153: Justinian (Novell. cxv. No. 3, 4) enumerates only the public and private crimes, for which a son might likewise disinherit his father. Note: Gibbon has singular notions on the provisions of Novell. cxv. 3, 4, which probably he did not clearly understand.--W]

[Footnote 154: The substitutions of fidei-commissaires of the modern civil law is a feudal idea grafted on the Roman jurisprudence, and bears scarcely any resemblance to the ancient fidei-commissa, (Institutions

du Droit Francois, tom. i. p. 347-383. Denissart, Decisions de Jurisprudence, tom. iv. p. 577-604.) They were stretched to the fourth degree by an abuse of the clixth Novel; a partial, perplexed, declamatory law.]

Conquest and the formalities of law established the use of codicils. If a Roman was surprised by death in a remote province of the empire, he addressed a short epistle to his legitimate or testamentary heir; who fulfilled with honor, or neglected with impunity, this last request, which the judges before the age of Augustus were not authorized to enforce. A codicil might be expressed in any mode, or in any language; but the subscription of five witnesses must declare that it was the genuine composition of the author. His intention, however laudable, was sometimes illegal; and the invention of fidei-commissa, or trusts, arose form the struggle between natural justice and positive jurisprudence. A stranger of Greece or Africa might be the friend or benefactor of a childless Roman, but none, except a fellow-citizen, could act as his heir. The Voconian law, which abolished female succession, restrained the legacy or inheritance of a woman to the sum of one hundred thousand sesterces; [155] and an only daughter was condemned almost as an alien in her father's house. The zeal of friendship, and parental affection, suggested a liberal artifice: a qualified citizen was named in the testament, with a prayer or injunction that he would restore the inheritance to the person for whom it was truly intended. Various was the conduct of the trustees in this painful situation: they had sworn to observe the laws of their country, but honor prompted them to violate

their oath; and if they preferred their interest under the mask of patriotism, they forfeited the esteem of every virtuous mind. The declaration of Augustus relieved their doubts, gave a legal sanction to confidential testaments and codicils, and gently unravelled the forms and restraints of the republican jurisprudence. [156] But as the new practice of trusts degenerated into some abuse, the trustee was enabled, by the Trebellian and Pegasian decrees, to reserve one fourth of the estate, or to transfer on the head of the real heir all the debts and actions of the succession. The interpretation of testaments was strict and literal; but the language of trusts and codicils was delivered from the minute and technical accuracy of the civilians. [157]

[Footnote 155: Dion Cassius (tom. ii. l. lvi. p. 814, with Reimar's Notes) specifies in Greek money the sum of 25,000 drachms.]

[Footnote 156: The revolutions of the Roman laws of inheritance are finely, though sometimes fancifully, deduced by Montesquieu, (Esprit des Loix, l. xxvii.)]

[Footnote 157: Of the civil jurisprudence of successions, testaments, codicils, legacies, and trusts, the principles are ascertained in the Institutes of Caius, (l. ii. tit. ii.--ix. p. 91--144,) Justinian, (l. ii. tit. x.--xxv.,) and Theophilus, (p. 328--514;) and the immense detail occupies twelve books (xxviii.--xxxix.) of the Pandects.] III. The general duties of mankind are imposed by their public and private relations: but their specific obligations to each other can only be the

effect of, 1. a promise, 2. a benefit, or 3. an injury: and when these obligations are ratified by law, the interested party may compel the performance by a judicial action. On this principle, the civilians of every country have erected a similar jurisprudence, the fair conclusion of universal reason and justice. [158]

[Footnote 158: The Institutes of Caius, (l. ii. tit. ix. x. p. 144--214,) of Justinian, (l. iii. tit. xiv.--xxx. l. iv. tit. i.--vi.,) and of Theophilus, (p. 616--837,) distinguish four sorts of obligations--aut re, aut verbis, aut literis aut consensu: but I confess myself partial to my own division. Note: It is not at all applicable to the Roman system of contracts, even if I were allowed to be good.--M.]