THE DEVELOPMENT OF THE LEGAL STATUS OF THE DEAF: A COMPARATIVE STUDY OF THE RIGHTS AND RESPONSIBILITIES OF DEAF-MUTES IN THE LAWS OF ROME, FRANCE, ENGLAND, AND AMERICA.—II

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THE DEVELOPMENT OF THE LEGAL STATUS OF THE DEAF: A COMPARATIVE STUDY OF THE RIGHTS AND RESPONSIBILITIES OF DEAF-MUTES IN THE LAWS OF ROME, FRANCE, ENGLAND, AND AMERICA.*—II.

PART I.—THE LEGAL STATUS OF THE DEAF IN THE ROMAN EMPIRE.

Chapter I.—Ante-Justinian Legislation.

THERE has been little or no serious attempt made in this country or in England to discover what was the legal status of the deaf prior to the time of the Justinian Code. With the exception of the chapter on Roman Law in the Latin treatise of Guyot,† no extensive effort seems to have been made in Europe to ascertain the legal condition

*Continued from the September number of the *Annals*, page 275.

†"Dissertatio Iuridica Inauguralis de Surdo-Mutorum," etc., Rembt T. Guyot, Groninganus, 1824. This volume deserves much more careful consideration than has heretofore been given to it. Evidently Guyot made careful research through the *Corpus Juris Civilis* for the provisions to be found therein relating to the deaf and dumb. The hasty review of the work of Guyot made by De Gerando in his note upon the civil rights of deaf-mutes under Roman law* has given rise to a number of errors regarding the legal status of the deaf in

in the early Roman Empire of those deprived of speech and hearing.

Since Roman law has served as the basis for the legal systems of nearly all those nations which have been formed within the boundaries of what was once the Roman Empire, and has exerted, either directly or indirectly, a profound influence upon the laws of almost the whole civilized world, it seems proper to begin a study of the development of deaf-mute status by inquiring what provisions are to be found in the law of Rome regarding the deaf. There is, of course, no means of ascertaining what was the legal condition of the deaf in Rome prior to the establishment of the Republic, since regarding this point no reference is to be found in later times. In the laws of the Twelve Tables the deaf as such are not referred to, but in that first attempt at a compilation and publication of Roman law is found a provision relating to the care of the insane and the prodigal, as well as one relating to the care of infants. Reasoning by analogy, it seems but natural to believe the Romans would hardly have been less careful of the property interests of the deaf, even when they had been so born.

The customary law in Greece, as quoted by Aristotle, with respect to the bringing up and exposing of children was that none that were imperfect should be brought

the Roman Empire. Unfortunately the statements of De Gerando have been much more widely circulated in France, England, and America than the treatise of Guyot; hence, the Roman law as applied to the deaf has been unintentionally misrepresented. Even the law of Justinian's time has been only partly stated, for De Gerando gives only the Roman law applying to testamentary acts, whereas Guyot makes it perfectly clear that the Romans during practically the whole period of the Empire admitted the deaf and dumb possessed of the necessary intelligence to many legal privileges which did not require a knowledge of speech and writing. De Gerando also makes the statement, which has been widely quoted in France, England, and America, that the Roman law until the time of Justinian maintains an absolute

up.* In Sparta especially every citizen belonged to the State, and children who at birth were plainly defective physically were ruthlessly ordered to be exposed. It has been supposed by many educators of the deaf that because of the foregoing custom, which also prevailed to some extent in early Rome, all congenitally deaf children were destroyed, but there are some who have taken the ground that even in Sparta, where the custom of exposing defective infants was perhaps more rigidly adhered to than in any other ancient city-state, the congenitally deaf child would hardly have been exposed ordinarily, for the simple reason that to all outward appearances the deaf infant shows no signs of infirmity until he has passed the age at which exposure would have been probable. It is improbable that the Greeks and Romans, even in the early centuries of their history, exposed children who had reached the age of three or even two years, and prior to the latter age it would be rare that the parents would discover the deafness of the child unless there were some special reason for suspecting the infirmity. So it seems probable that Arnold overstated the case when he said that the Spartan law consigned them to the great pit in Taygetus and that the Tiber at Rome received them.† Had deafness been

silence regarding deaf-mutes. This too is an error, as will hereinafter be shown. The great lawyers and jurisconsults of the early Empire did not leave the congenitally deaf unprovided for, but on the contrary granted to them the exercise of their rights to greater extent than was generally done in the early history of French, German, and English law. (*"De l'Education des Sourds-Muets de Naissance," par M. De Gerando, Paris, 1827: 2 vols. See Note A. vol. i., pp. 24-31. On page 24, De Gerando says: "Les lois romaines, jusqu'à Justinien, gardent un silence absolu sur les sourds-muets. Elles parlent souvent des individus qui sont sourds sans être muets, ou qui sont muets sans être sourds, mais jamais de ceux chez lesquels ces deux infirmités se trouvent à la fois réunies.")

*Aristotle's Politics, vii, 16.

†"Education of Deaf-Mutes," by Thomas Arnold, p. 1.

suspected when exposure was practicable, it is not unlikely that many deaf and dumb children would have been destroyed, but there is more reason to believe that the deaf and dumb in Greece and Rome during the early centuries of their history were accorded treatment not unlike that given them before the establishment of schools for their instruction in Europe and America.* If the practice of exposure was ever followed with regard to deaf children in Rome, it is evident that it early fell into disuse, for the laws of the later Republic and the early Empire show that even the congenitally deaf had curators appointed to look after their property interests.

In order the better to appreciate the condition of deaf-mutes in Rome, the question of status in general must be borne in mind. This question involves practically the whole law of persons, and in a certain sense all law is reducible to the law of persons. To have a status in the *jus civile* a man must have a recognized legal capacity.† Therefore, a slave had, strictly speaking, no *status, caput,* or *persona* in Roman law. Only on the day of his manumission did he begin to have status.‡ Before his manumission a slave had no civil existence.§ Therefore, a deaf slave would of necessity be without civil status in Roman law. The status of a Roman citizen was composed of three elements: *civitas, libertas, et familia*: the rights of citizenship, liberty, and family. The citizen had his position as a *civis*, he was free, he had his place in the family. The privileges of full citizenship were long only for the few. It was not until about two centuries after the establishment of the Republic

*Report Fourth Convention, pp. 22-23. Also, *Annals*, xlvi. pp. 473-476.

†Holland: "Elements of Jurisprudence," p. 83; Campbell: "Roman Law," pp. 12–16, and p. 278.

‡Modestinus in the Digest: iv. 5, 4.

§Institutes: i, 16, 4.

that the plebeians succeeded in obtaining even nominally equal rights with the patricians, and the free inhabitants of Italy were not granted the privileges of full citizenship until the close of the Social War (B. C. 91-89). The entire free population of the Empire had the nominal privileges of citizenship bestowed by the wholesale act of Caracalla,* before whose reign only particular classes of subjects, or the inhabitants of some particular city or province, had as a mark of special favor been admitted to the privileges of full citizenship.

Now when the status of the deaf in Roman law is inquired into, it is first necessary to distinguish as to the rights and privileges granted to different classes at various periods of Roman history. Since slaves had no recognized status in Roman law, we may reasonably conclude that a deaf-mute slave might fare even worse among the Romans than would a slave possessing all his faculties. Then, too, it seems natural to suppose that in the early days of the Republic a plebeian who had the misfortune to be deaf would find it impossible to obtain as liberal recognition of his rights as would the hearing members of his class. A deaf *Latinus* would enjoy at least no more privileges than would those people who were accorded Latin rights. On the other hand, it is not unreasonable to suppose that even in the earliest days of the Republic the deaf son of a patrician would, in a certain measure at least, enjoy the greater freedom and wider privileges of the patricians. During the early centuries of the growth of Roman law there is reason to suppose that there was a gradual development of the legal status of the deaf until the stage was reached in which it is found in the codification of Justinian. Nevertheless, since during the whole period of the Republic and the first two centuries of the Empire a large proportion of the

*Constitutio Antoniana, A. D. 212.

inhabitants of the Empire did not enjoy the full privileges of Roman citizenship and the protection of Roman law, there can be little doubt that the lot of the majority of the deaf from birth must have been deplorable.

In the early law of Rome the deaf-mute from birth was considered incapable; he was classed with the madman and the infant; he was unable to perform without assistance any legal act in his own behalf. Study of the passages to be found in the fragments of the writings of the jurisconsults bearing upon the deaf, and of the allusions to this class that are made in the various codifications of Roman law, reveals the fact that the jurists of the Empire made distinctions regarding the mental capacity of the deaf. Since the real nature of deaf-mutism was not understood and the fact that dumbness is but the necessary natural consequence of deafness from birth or early infancy was not comprehended, it was generally accepted that those deaf and dumb from birth were necessarily more or less deficient in intelligence, and were not possessed of the requisite judgment and discretion necessary for the transaction of legal business. Thus, Paulus,* in speaking of the class of deaf-mutes which would to-day be called uneducated congenital (or quasi-congenital) deaf-mutes, uses the term "*surdus mutus*" and places such persons in the same category with "*impubes et perpetuo furiosus*" as deficient in judgment or of incomplete understanding. Thus it is evident that Paulus knew that class of the deaf regarding which the chief problems of legal status arise. There is no doubt that Paulus realized that all the deaf were not to be classed as deficient in intelligence and judgment, for in a number of other passages in the fragments of his writings which we possess he admits those of the deaf who are not lacking in intelligence to

*Paulus in the Digest: "de Iudiciis," v, 1, 12, 2.

various business transactions.* The numerous passages in the fragments of the writings of Paulus which relate to the deaf show that he was familiar with the two principal classes of the deaf: the deaf from birth or early infancy, who in that day were supposed to be incapable of literate instruction; and the deaf who had become so after acquiring some education and who retained the ability either to speak or to write, or both. Although the term "*surdus mutus*" is not found often in the writings of the jurisconsults, the expression "*surdus et mutus*" is quite common in the fragments that have come down to us.†

According to the opinions of Paulus, Ulpianus, Pomponius, and Mæcianus, the deaf and mute who were lacking in judgment or deficient in intelligence, and were therefore unable to manage properly their own affairs, could, should, and ought to be given tutors or curators as the circumstances of the case seemed to require.‡ Ulpian also mentions the fact that the deaf and dumb are in the same position legally as prodigals and infants.§ Cicero tells us that the laws of the Twelve Tables provided for the appointment of curators for the insane and the prodigal.¶ Though it is perhaps impossible to assign any particular date when tutors and curators were first provided for the deaf and dumb, the fact that the jurists just mentioned classed the deaf-mute

*Digest: "de Reg. Iur.," l, 17, 124; Digest: "de acq. vel omitt. hered.," xxix, 2, 93, 1-2; Paulus: "Recep. Sent." iii, tit. 4.

†Since Paulus and the jurisconsults here referred to lived several centuries before the time of Justinian, it is evident that De Gerando erred when he stated that Roman law maintained an absolute silence regarding deaf-mutes prior to Justinian's time.

‡Digest: iii, 1, 3, 3; Digest: xxxvi, 5, 8, 3; Digest: xxvii, 10, 16; Digest: xxxvi, 1, 65, 3; Digest: l, 4, 1, 5.

§Ulpianus: "Frag." tit. xii, 1, 2; Digest: iii, 1, 3, 3; Digest: xxvi, 5, 8, 3.

¶Cicero: "de Invent." ii, 50.

with the insane, the prodigal, and infants, without any discussion as to the propriety of the classification, seems to indicate that the deaf had in all probability been so classed at a much earlier date. It is certain that even the deaf and dumb from birth were granted legal protection in the time of Paulus and Ulpian.* With the assistance of their curators they were permitted the enjoyment of practically the same legal privileges which were accorded pupils. Naturally the degree of liberty of action granted the deaf-mute varied according to the amount of intelligence manifested, but even when little intelligence was apparent, his interests were by no means left unguarded by the law. The deaf and dumb who gave sufficient evidence of intelligence were allowed to act without curators. Especially was this true of the adventitiously deaf, for they were generally conceded to be possessed of sufficient intelligence for the management of their own affairs if they knew how to write or retained their speech. Several passages in the writings of Gaius, Paulus, and Ulpian show that the deaf and dumb even when so born were in the time of these famous jurists permitted not only to acquire and inherit property, but when they manifested the necessary intelligence and comprehended the nature and import of their acts, they were allowed the management of it. Still it is easy to understand that at that early time the deaf and dumb from birth would generally as a matter of precaution have curators provided for them to assist in the management of their property, very much in the same way and for similar reasons as did infants and prodigals.

Prior to the classification of Justinian there was perhaps no definite classification of the deaf by the Roman jurists, but it is a mistake to say that deaf-mutes are not men-

*Digest: xliv, 7, 52, 9; Digest: l, 17, 124; Digest: xxix, 2, 93, 1 and 2; Digest: xlii, 5, 19-23; Digest: xxxvi, 1, 65, 3.

tioned in ante-Justinian legislation.* In commenting upon De Gerando's statement heretofore cited, Dr. Peet suggests that in all probability those who were both deaf and dumb were in those early times left to be treated according to the discretion of the judge in view of the intelligence manifested.† This seems to have been exactly the course pursued with regard to the deaf and dumb, as is proved by citations from the writings of the great jurists already mentioned, but the law provided even for those who were deficient in intelligence. Numerous provisions in the fragments remaining of the writings of the great jurists show that the deaf and dumb received much more careful consideration during the time of the middle Empire than has generally been supposed. No positive provision has been found debarring the deaf-mute from birth as such from the exercise of his rights prior to the testamentary enactment of Justinian. His intelligence determined his legal capacity, and the provisions remaining to us regarding the deaf show that the jurists did not wish to deprive any deaf man of the exercise of his legal rights, provided only that he possessed intelligence sufficient to act for himself. Hence, it appears that the first great distinction made was as regards the mental capacity of the deaf person whose rights were affected. Since this seems to have been the case, it is evident that a deaf-mute from birth would naturally have been granted as liberal exercise of the privileges of citizenship as he was able to prove himself entitled to. Unfortunately, however, education for the congenitally deaf was unheard of, and without the ability to write or speak, many formal legal acts could not be performed. But it is not improbable that

*Ulpian: Digest: xxviii, 5, 1, 2; Paulus: Digest: v, 1, 12, 2; also other citations already made.

†Peet: Report Fourth Convention, p. 24.

a deaf-mute giving evidence of intelligence and judgment would have been accorded more privileges in ante-Justinian times than after the classification of the deaf by the Emperor. The basis for the classification of Justinian can be found in the writings of the jurists whose works were so largely drawn upon by Tribonian and his associates in the compilation of the Digest. It is evident that Paulus and Ulpian were acquainted with the chief classes mentioned by Justinian, and reference is also made in one of the extracts from an early jurist by Ulpian to the class of which Paulus makes no mention.*

The question naturally arises as to what legal transactions deaf-mutes should be excluded from and to what negotiations they should be admitted by Roman law. When the formulary spirit of the Roman law is taken into consideration, it would naturally appear to be in accordance with the principles involved, to say that from those transactions which required the oral repetition of particular formulæ of words, the deaf and dumb would

*The classes of the deaf with which ante-Justinian jurists seem to have been more or less acquainted were: (1) The deaf and dumb who were deficient in intelligence. The point to be especially noted in this connection is that the jurists of the time of Paulus and Ulpian did not say that all the deaf and dumb from birth were deficient in intelligence; they left the way open to grant to each deaf-mute as liberal exercise of his rights as his capacity would warrant. Furthermore, it should be noted that deaf-mutes of this class were granted legal protection, even without any action on their own part.

(2) The deaf and dumb who were able to write: in other words, those who had lost their hearing after having acquired some literate education.

(3) The deaf who retained their speech: such were naturally granted a more liberal exercise of their legal rights, especially in the Roman Empire, because of the formulary nature of the law. The ability to speak made compliance with formulary requirements possible.

(4) The mute who were not deaf: frequent reference is made to such persons. They were early permitted the exercise of their rights as far as the formulary nature of the law would admit of, when they were not lacking in intelligence, but the early jurists seem to have

be excluded because of the physical impossibility of their compliance with the formulary requirements. But on the other hand it would seem natural and just that they should be admitted to those negotiations which could be entered upon by mere consensual agreement without the oral pronunciation of any verbal formula.* One of the important things to be noted in this connection is the fact that mere consensual agreement came to be recognized more and more as the law developed, and the possibility of valid, legal consent being given by a mere nod, sign, or gesture was distinctly recognized.† Modestinus is authority for the statement that even obligations might be formed by silent consent and that even a nod would answer. Ulpian refers to the fact that Celsus went even so far as to maintain that a person born deaf might be permitted to manumit, but undoubt-

discovered that there was very frequently some mental defect when a person was possessed of normal hearing, and was mute without apparent physical cause.

(5) The basis for the remaining class mentioned in Justinian's famous constitution is found in a statement quoted in the Digest from the writings of Celsus. According to Ulpian, Celsus maintained that even persons deaf from birth should possess the right of manumission, which most writers seem to have disputed. Further reference will be made to this particular class when considering Justinian's constitution, Code vi, 22, 10, 3, as concerning the possible existence even of such a class there has been much controversy. (See Guyot: pp. 61-63 and pp. 76-80; De Gerando: vol. i, pp. 27-31; Peet: Fourth Convention, pp. 24-26; Bonnefoy: pp. 77-78; Arnold: p. 8; Tillinghast: *Annals*, xlvii, pp. 149-151.).

*Guyot: p. 57: "Ab iis negotiis surdos et mutos arcendos esse, quae VERBA postulant; ad haec eos admittendos esse, quae NUDO CONSENSU, sine verbis ore prolatis, exitum sortiantur."

†Digest: "de Obl. et Act.," xliv, 7, 52, 9. In referring to this fact Guyot remarks that he is not aware whether others have noted it or not, but that to him it seems very significant, especially since its application to the deaf and dumb in the matter of consensual agreements and contracts was such a simple matter. (Guyot: p. 58.)

edly in so holding Celsus took a stand far in advance of his time.*

It is evident that the deaf and dumb would naturally be debarred from engaging in such formal and solemn acts as the making of stipulations, testaments, codicils, executory trusts, and donations *mortis causa*, at least so long as the ability to speak or to understand speech was requisite for the performance of these acts. In like manner, the deaf and dumb would be unable to take part in adoptions, emancipations, solemn manumissions, and would be excused from the duties of guardianship as long as verbal formalities were required to give validity to these acts. Also because of their inability to speak and hear they would not be chosen to act as judges, arbiters, witnesses, or procurators. They would also be barred from solemn entrance upon an inheritance because of the necessity of repeating the prescribed formula at the time of entry, which for a person both deaf and dumb would be physically impossible. Even for persons adventitiously deaf who retained their speech some of the above named acts were prohibited, as a person who could not hear was held to be unable to carry out the letter of the law as to the repetition of the formulæ made imperative on pain of nullity. The solemn forms of marriage, *confarreatio et coemptio*, could not be complied with by persons who were deaf and dumb; neither could a deaf-mute buy and sell by the formal *emptio venditio* or *mancipatio*. But with the gradual elimination of many of the arbitrary forms once required and the substitution of simpler methods of procedure, the rights of deaf persons possessing a literate education had come to be recognized, and they were before the time of Justinian able to exercise their rights. Thus the deaf and dumb who gave evidence of appreciation of the nature and

*Digest: xl. 9, 1.

import of their acts were admitted to be competent to exercise those of their rights for which no special verbal formula was necessary, though of necessity they were debarred from such as required on pain of nullity the oral repetition of certain prescribed words.

Examining some of these matters a little more in detail one finds that from the formal *stipulatio* not only deaf-mutes but the deaf who were able to speak and the mute who were able to hear were debarred in the times of Paulus, Gaius, and Ulpian, and such appears to have been the case even in the time of Justinian.* The reason assigned for the exclusion of the deaf is that he who stipulates ought to hear the words of the promissor and he who promises should hear the words of the stipulator; but it was specially stated that the hard-of-hearing and those having some impediment of speech were not to be included in this provision. And even the deaf were not entirely prohibited from the formal *stipulatio*, for as early as the time of Ulpian it was possible for them when they understood the nature and import of their acts to stipulate or promise through an agent or servant. Thus the difficulty was in a measure overcome and the barrier removed.†

All deaf persons were barred from the exercise of testamentary rights in the early civil law when testaments were solemn oral acts. Even later, when the making of a testament assumed the form of a fictitious sale, the deaf could not comply with the formulary requirements. Thus in the times of Gaius and Ulpian the deaf did not possess the *testamenti factio activa* because they could not hear the words of the family *emptor*; the mute were deprived of the right to make testaments because they

*Gaius in Digest: xliv, 7, 1, 14-15; Institutes of Gaius: iii, 105; Institutes of Justinian: iii, 19, 7.

†Ulpian in Digest: xlv, 1, 1, "pr. de Verb. Obl."

could not speak the formal words of nuncupation.* However, this is not at all surprising when the strict formality of the civil law with regard to the exercise of testamentary privileges is borne in mind. But there is in the Digest a quotation from the writings of Aemilius Macer which proves that not long after the time of Paulus and Ulpian provision was made for giving validity to the testaments of the deaf and dumb.† At first it was necessary to seek the special favor of the Emperor in order for a deaf person to avail himself of the privilege. It is uncertain when the permission was first granted, but it is practically certain that a deaf person able to speak or write was given the right to make a testament at least three centuries before the time of Justinian's constitution.‡

When serving as soldiers the deaf and dumb were permitted to make military testaments, for the soldier's testament was valid, however made, this special privilege

*Rules of Ulpian: "Frag." xx, 9-13.

†Digest: "qui test. fac. poss.," xxviii, 1, 7. Aemilius Macer wrote during the reign of Alexander Severus, A. D. 222-235.

‡The civil law seems to make no special recognition of any other mode for expressing one's testamentary wishes than by the spoken or the written word: hence, the signs of one unable either to speak or to write would hardly have been accepted as satisfactory evidence of one's intentions in so formal a matter as a testament. However, it is true that the statements of Paulus, Gaius, and Ulpian prove that *fideicommissa* could in their time be left by a nod or gesture. And in the writings of these great jurists there is to be found no special discrimination against the deaf and dumb from birth, for with them the only question seems to have been whether the deaf person involved was possessed of sufficient judgment and understanding.

The blind were much better off in the matter of testamentary capacity in Roman law than were the deaf, for by the use of an additional witness to the number ordinarily required, a blind man could make a valid will.* This, however, was very natural, for it was a much simpler matter to introduce an extra witness to serve as eyes for the blind than it was to appreciate the innate intellectual capacity of a deaf and dumb person whose only means of communicating with his fellowmen was an improvised language of gestures. There seems

having been granted by imperial constitutions.* A rescript of the Emperor Trajan provides that so long as a soldier making a military testament made it clear just what his wishes were, they were to be executed. A soldier who had become deaf and dumb through accident or disease would before obtaining his discharge have logically been permitted to make a testament in any manner in which he could do so, and provided the witnesses present had understood him, his testament would under the special law governing military testaments have been held to be valid. Even a deaf-mute from birth serving as a soldier would under the law have been granted the privilege of making a military testament, if able to express his wishes in a manner sufficiently clear to leave no doubt in the minds of the witnesses as to his intentions. There is no evidence, however, that such a case was ever considered in Roman law.

A deaf-mute from birth could not leave a legacy or trust to be executed, neither could he make a codicil nor a donation *mortis causa*, for to do these acts it was necessary that one possess the *testamenti factio activa*.† Although it was held in practice that a fideicommissary gift might be left by a mere nod or gesture and, although Gaius says that every one can leave particular objects, such as a slave, a vestment, or money, by *fideicommissa*, a deaf-mute from birth could not have done so since he did not possess the right to make a testament, being unable either to speak or write.‡ But according to the

to be no evidence that recourse was had to sworn interpreters in dealing with the deaf. Still, ash as been stated, in some cases deaf persons were permitted to act through agents or servants in other formal matters. (*Paulus: "Sent. Recep." iii, tit. iv, 4.)

*Rules of Ulpian: "Frag." xxiii, 10; Digest: xxix, 1, 4; Inst. Just.: ii, tit. xi, 1-2; Sandars: pp. 244-246.

†Ulpian: "Frag." xxv, 4; also in Digest: "de Legat." xxx, 1, 2.

‡Gaius: Inst. ii, 260 and 268; Digest: xxxii, 3, 21; Paulus: "Recep. Sent." iv, tit. 1.

later law a deaf and dumb person able to make a testament in writing would have been permitted to make fideicommissary gifts by means of gestures, and would also have been able to make donations *mortis causa* and to make a codicil even though he had not already made a testament. Mute codicils could be added to testaments already made, the codicil receiving life and force from the testament.* Even the deaf who were able to speak were unable to make a testament *per aes et libram* in the time of Gaius, but when the right of testament was granted by special favor of the Emperor, the privilege of making codicils, donations *mortis causa*, and fideicommissary gifts naturally accompanied it.

When adoption, emancipation, and manumission were solemn acts, the deaf and dumb, whether by nature or accident, could not take any active part in these ceremonies. In fact, either total deafness or mutism would prevent one from participating in the formal ceremonies required by the old law in order to adopt or to emancipate any one.† However, there is a passage in the Digest showing that a person who was mute from natural causes could nevertheless give his son in adoption if in some other manner than by speech he could make clear his intention, and in such a case the adoption was to be confirmed just as if it had been made in strict legal form.‡ Regarding manumission Paulus says that though a deaf and dumb man could not liberate a slave by the *vindicta* yet it was not prohibited that he do so through a letter or in the presence of friends.§ Marcianus states that a father having a deaf or dumb son might manumit him by the *vindicta*, but he adds that madmen could not

*Digest: "de Iure Codic." xxix, 7, 8, 3.
†Gaius: i, 98 and 132; Just. Inst.: i, tit. xi and xii.
‡Calistratus in Digest: "de Adopt. et Emancip." i, 7, 29.
§Paulus: "Recep. Sent." iv, tit. 12, 2.

manumit their sons.* It may well be doubted whether one deaf and dumb from birth would have been permitted to manumit by the *vindicta*, although the provision of Celsus referred to by Ulpian shows that he took the opposite view. At any rate after the provision made by Constantine, the deaf and dumb were given permission to manumit without speaking the solemn formula usually required.†

The deaf and dumb were barred from formal solemn entrance upon an inheritance, although they could be instituted heirs by testament or inherit by intestate succession. In the time of Gaius the heir had to make a formal statement of his decision to accept the inheritance within the period allowed for *cretio*; it was of no advantage to him if he used the goods of the inheritance as if he were heir unless he had pronounced the required verbal formula.‡ Hence it was impossible for the deaf and dumb to make formal entry. Even one able to write could not have complied with the necessary formality; however, the curators provided by law for the deaf and dumb who were more or less deficient were authorized to accept for those unable to act for themselves. Even later when the *bonorum possessio* came to be given by the prætors, the repetition of a precise verbal formula was at first required, but in the course of time the emperors wisely provided that an express demand for the possession of the property need not be made, and that if the person entitled to possession signified in any manner within the appointed time his wish to accept the succes-

*Digest: xii, 2, 10.

†Hermogenianus: Digest: xl, 2, 23. However, this provision could hardly be held to apply to deaf-mutes from birth, who in that day would have been unable either to speak or to write. (See Gaius: ii, 18-37; Rules of Ulpian: "Frag." xix, 2.)

‡Gaius: ii, 165-166.

sion, he should have the full benefit of it.* The formal request was necessary until a constitution of Constantius† permitted the application to be made in any terms and before any magistrate, and another constitution‡ excused those whom absence or ignorance of the proper course prevented from making application. Even in the time of Ulpian the deaf and dumb were admitted to the *bonorum possessio* provided they knew how to manage their affairs.§ By the time of Justinian no application at all was required, any act manifesting the wish to have possession being deemed sufficient; therefore, even deaf-mutes from birth who were entitled to and manifested a desire for possession could obtain it by informal entry.¶

The deaf and dumb from birth were naturally excluded from acting as tutors, judges, arbiters, solemn witnesses, and procurators. Even the adventitiously deaf who could speak and write could be excused from acting in those cases where they were not by law excluded. From Hermogenianus comes the statement that the deaf and dumb could not advantageously be tutors by operation of law, or by testament, or by any other mode.** The word "*utiliter*" in the passage seems to indicate, however, that a deaf and dumb person knowing how to write may have been permitted to act, though it was recognized to be a distinct disadvantage to have a tutor unable to speak or hear. The same would be true to some extent of a tutor able to speak and write but unable to hear. Paulus states that for the accommodation of the pupil a person who became deaf and dumb after appointment

*Sandars: pp. 380-388.

†Code of Justinian: vi, 9, 9.

‡Code of Justinian: vi, 9, 8.

§Ulpianus in Digest: "de bonorum possessione furioso, infanti, muto, surdo, cæco competente," xxxvii, 3.

¶Just. Code: vi, 9, 8-9.

**Digest: "de legit. tut.," xxvi, 4, 10, 1.

as tutor could be excused from acting as such and be replaced.* Paulus and Pomponius agree that a deaf man cannot be appointed tutor, giving as their reasons that a tutor should be able not only to speak but also to hear.† Since the deaf were debarred from appointment as tutors, it seems probable that they would not have been made curators, though of course in the former case the *auctoritas* was required, while in the latter *nudus consensus* was ordinarily sufficient.

The reasons for excluding the deaf from acting as judges and arbiters are practically the same as those given for their exclusion from positions of guardianship. Paulus, Ulpianus, and Pomponius agree that the deaf and dumb cannot act in the capacity of judge or arbiter.‡ They were also excluded from acting as procurators in formal legal matters,§ but they were permitted to perform such acts of administration as could naturally be entrusted to them.¶ The deaf were also excluded from acting as witnesses to testamentary acts in the civil law. Even after the deaf who were able to speak or write had been given the right to make a testament, the law seems to have prohibited them from acting as witnesses to the testaments of others, but women, legal infants, slaves, and prodigals were also held to be incompetent.**

However, from the foregoing instances cited one is led to the conclusion that in the majority of cases the deaf do not seem to have been deprived of their rights by the Roman law but rather to have been excused

*Paulus in Digest: "de excusationibus," xxvii, 1, 40; Digest: xxvi, 1, 17; Digest: xxvi, 1, 8, 3.

†Digest: xxvi, 1, 1, 2-3.

‡Digest: v, 1, 12, 2; Digest: iv, 8, 9, 1.

§Paulus: "Recep. Sent.," i, 3, 1.

¶Paulus in Digest: iii, 3, 43.

**Ulpian: "Frag." xx, 7; Inst. Just: ii, 10, 6; Sandars: pp. 239-241; T. and L. Gaius: p. 312.

from the assumption of responsibilities. Their interests seem to have been cared for and protected by the law as far as the understanding of their condition admitted of. The formal nature of the early law made compliance with its requirements by one unable to speak impossible in many instances, yet the law was not utterly unmindful of the unfortunate. As time went on and by a process of evolution the law of the City became the law of the World, the deaf were gradually permitted to share in that legal development as far as their inherent capabilities seemed to warrant.

The question regarding the exercise of those rights to which the deaf and dumb were admitted by Roman law in ante-Justinian times has already been answered in a general way. It remains to enumerate more specifically the various privileges which a deaf-mute might enjoy without the intervention of his curator. It has been said already that deaf-mutes giving evidence of intelligence were able to perform such acts as could be performed *solo consensu* and without the use of verbal formulæ. The totally illiterate deaf-mute, even when he gave evidence of more than average intelligence, could be admitted only to such negotiations as did not require words, either spoken or written. And since many deaf-mutes without any knowledge of spoken or written language would have seemed even more deficient in intelligence than they really were, it may be assumed that such deaf-mutes did not enjoy a very liberal exercise of legal rights. Nevertheless they were not barred from such acts as they gave evidence of ability to understand and perform. The deaf and dumb who could read and write were admitted to all acts that could be performed by simple consent and were held competent to exercise all those rights which did not require speech and hearing.

Thus deaf-mutes could contract marriage in Roman

law provided only the conditions of *justæ nuptiæ* were fulfilled. Though from the nature of the case they were barred from the two most ancient and formal modes of forming the marriage tie, the solemn *confarreatio* and the *coemptio*, both of which had long since fallen into disuse, before the time of Paulus it was recognized that they were competent to form a marriage by *usus*. Provided therefore the contracting parties were of lawful age, possessed the *connubium*, and manifested consent and intention, the marriage even of deaf-mutes from birth would have been legal, since the real tie of marriage was the consent of the parties manifested by the woman passing into the husband's possession.* Paulus says that because deaf-mutes can contract marriage, they are competent to make dotal obligations.† This statement therefore is proof both that the deaf did marry in his time, and that they made marriage contracts that were held to be legal.

With regard to contracts in general it may be said that deaf-mutes could make pacts and agreements, make informal obligations, buy, sell, give, let, hire, form partnerships, lend, deposit, and form contracts of mandate: they could do all those things which could be done by consensual agreement, even when not understanding verbal language, and those who had learned verbal language before becoming deaf and dumb were debarred from only the very formal acts which required special oral formulæ.‡ In the Digest and in the fragments re-

*Sandars: pp. 93-95.

†Paulus: Digest: "de iure dotium," xxiii, 3, 73.

‡Guyot: p. 95. The summary made by Guyot in this connection is so plain and so much to the point that it is strange that it should have escaped attention. He says: "Possunt pacisci, possunt se obligare, possunt emere, vendere, donare, possunt locare, conducere, societatem contrahere, mandare; possunt commodare, deponere; possunt omnia quae nudo consensu sine verbis fiant."

maining of the writings of the jurists of ante-Justinian times are found numerous provisions indicating that the deaf and dumb could take an active part in informal negotiations provided they had sufficient intelligence.* The general provisions relating to consensual contracts and obligations indicate also that writing was not necessary nor was speech; nor was it necessary that anything other than consent between the parties be given; furthermore, in such contracts each was bound to render to the other all that equity demanded.† When it is remembered that these privileges were granted to the deaf and dumb in most instances prior to the middle of the third century, one cannot but be impressed with the great care with which the Roman jurists considered the rights and interests of a class of persons generally supposed to have been almost utterly disregarded in classical times.

Another important privilege that must not be overlooked is the matter of succession. Deaf-mutes were not barred from the succession whether testate or intestate. When unable to manage the succession because of incomplete intelligence, the law provided that curators be appointed for them, if not named by testament. Thus even the deaf-mute from birth could succeed to the inheritance without a will; or he might be instituted heir in the will. He could himself acquire the inheritance and act as heir; he could be provided for by *fideicommissa, legata,* and donations *mortis causa*; he could be admitted to *bonorum possessio.* As long as formal entry upon the inheritance was required by law, a deaf-mute could not act as heir without the assistance of a curator, but when

*Paulus: "de pactis," Digest: ii, 14, 4; Paulus: "Recep. Sent." ii, 17, 10; Hermogenianus: "de donationibus," Digest, xxix, 5, 33, 2; Digest: "de proc. mun." iii, 3, 43; Digest: "Paulus et Pomp. in communi dividundo," x, 3, 29, 1.

†Gaius: iii, 135-137; Inst. iii, 22.

informal entry became possible, there was no reason why the deaf-mute could not act for himself if he knew what to do. It is probable that deaf-mutes were not often (in early times) made heirs by testament, for a substitution may generally have been made similar to that cited in the writings of Paulus.* However, it is a noteworthy fact that the aim of the substitution was not to deprive the mute of the inheritance, and in this particular instance when an heir was born to the mute son, the substitution was held to be void. Such substitution did not invariably occur, for we have the statement of Ulpian that a deaf and dumb person could rightly be instituted heir.† Before the time of Justinian it had become customary for a deaf and dumb person, even when so born, to act as heir and to acquire the inheritance when he was appointed by testament or when he succeeded by intestate succession, and he did not require the assistance of a curator unless he was unable to act without one.‡ Such then was the status of the deaf and dumb in the Roman Empire in ante-Justinian times.

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[TO BE CONTINUED.]

*Digest: "Vulg. et pupill. substit.," xxviii, 6, 43.

†Ulpian in Digest: "de hered. instit.," xxviii, 5, 1, 2; "de acquir vel omitt. hered.," xxix, 2, 5.

‡Institutes: ii, 19, 7; Code vi, 9, 8-9.