Art. I.—OPINION OF JUDGE DANIEL, IN THE CASE OF DRED SCOTT.

Our readers, we are sure, will not blame us, if we admit into the present number of the New Englander two articles suggested by the decisions of the Supreme Court in the case of Dred Scott. The vast and gloomy importance of these decisions naturally invites examination. If the case were one simply of technical and subtle law, the 'lay' public would leave such examination to the lawyers, content to rely upon a profession, in which the predominant voice is almost sure to be right, and which, in this very decision of the supreme court, has earned for itself unfading laurels and unfading gratitude by the opinion of one true lawyer, Mr. Justice Curtis. But the case runs far outside of the exclusive domain of the lawyer, into a field where the student of history and of politics can walk by his side, and weigh his arguments, and, if necessary, judge over him. For it can happen that when a man of forms and of some reputation for legal learning is obliged to

rise into a higher sphere of principles, he may find himself in a strange place, and betray the slenderness of his qualifications, while the unprofessional man, who has been familiar with the subjects involved in a point of law, may be better able to pass an opinion upon it.

In respect to the decision in the Dred Scott case, it has been shown on various sides how utterly uninformed and even reckless the Chief Justice is in regard to his statement of facts. We propose to ourselves a humbler task,—one more remote from the gist of that case, and confined to a small portion of the decision of another of the Judges. Mr. Justice Daniel, in his opinion has seen fit to examine the argument that the emancipation of a slave, with or against his master's will, produces such a change in his status as to transform him into a citizen. The argument he affirms to be wholly untenable and unsustained by the direct authority or the analogies of history. He then proceeds to consider Roman law and usage, in a passage, to an examination of which we intend to confine ourselves, and which, as it is not long, we will transfer to our pages.

"The institution of slavery, as it exists and has existed from the period of its introduction into the United States, though more humane and mitigated in character than was the same institution, either under the republic or the empire of Rome, bears, both in its tenure and in the simplicity incident to the mode of its exercise, a closer resemblance to Roman slavery than it does to the condition of *villeinage*, as it formerly existed in England. Connected with the latter, there were peculiarities, from custom or positive regulation, which varied it materially from the slavery of the Romans, or from slavery at any period within the United States.

"But with regard to slavery amongst the Romans, it is by no means true that emancipation, either during the republic or the empire, conferred, by the act itself, or implied, the *status* or the rights of citizenship.

"The proud title of Roman citizen, with the immunities and rights incident thereto, and as contradistinguished alike from the condition of conquered subjects or of the lower grades of native domestic residents, was maintained throughout the duration of the republic, and until a late period of the eastern empire, and at last was in *effect* destroyed less by an elevation of the inferior classes than by the degradation of the free, and the previous possessors of rights and immunities civil and political, to the indiscriminate abasement incident to absolute and simple despotism.

"By the learned and elegant historian of the Decline and Fall of the Roman Empire, we are told that 'In the *decline* of the Roman empire, the proud dis-

tinctions of the republic were gradually abolished; and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors. He delighted to honor with titles and emoluments his generals, magistrates, and senators, and his precarious indulgence communicated some rays of their glory to their wives and children. But in the eye of the law all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was *degraded* to an obsolete and empty name. The voice of a Roman could no longer enact his laws, or create the annual ministers of his powers; his constitutional rights might have checked the arbitrary will of a master; and the bold adventurer from Germany or Arabia was admitted with equal favor to the civil and military command which the *citizen* alone had been once entitled to assume over the conquests of his fathers. The first Cæsars had scrupulously guarded the distinction of an *ingenuous* and *servile* birth, which was decided by the condition of the mother. The slaves who were liberated by a generous master immediately entered into the middle class of *libertini* or freedmen; but they could never be enfranchised from the duties of obedience and gratitude; whatever were the fruits of their industry, their patron and his family inherited the third part, or even the whole of their fortune, if they died without children and without a testament. Justinian respected the rights of patrons, but his indulgence removed the badge of disgrace from the two inferior orders of freedmen; whoever ceased to be a slave, obtained without reserve or delay the station of a citizen; and at length the dignity of an ingenuous birth *was created* or *supposed* by the omnipotence of the emperor.'

"The above account of slavery and its modifications will be found in strictest conformity with the Institutes of Justinian. Thus, book 1st, title 3d, it is said: 'The first general division of persons in respect to their rights is into freemen and slaves.' The same title, sec. 4th: 'Slaves are born such, or become so. They are born such of bondwomen; they become so either by *the law of nations*, as by capture, or by the civil law. Section 5th: 'In the condition of slaves there is no diversity; but among free persons there are many. Thus some are *ingenui* or freemen, others *libertini* or freedmen.'

"Tit. 4th. De Ingenuis.—'A freeman is one who is born free by being born in matrimony, of parents who both are free, or both freed; or of parents one free and the other freed. But one born of a free mother, although the father be a slave or unknown, is free.'

"Tit. 5th. De Libertinis.—'Freedmen are those who have been manumitted from just servitude.'

"Section third of the same title states that 'freedmen were formerly distinguished by a threefold division.' But the emperor proceeds to say: 'Our *piety* leading us to reduce all things into a better state, we have amended our laws, and re established the ancient usage; for anciently liberty was simple and undivided—that is, was conferred upon the slave as his manumittor possessed it, admitting this single difference, that the person manumitted became only a *freed man*, although his manumittor was a *free* man.' And he further declares: 'We have made all freed men in general become citizens of Rome, regarding

neither the age of the manumitted, nor the manumittor, nor the ancient forms of manumission. We have also introduced many new methods by which *slaves* may become Roman citizens.'

"By the references above given it is shown, from the nature and objects of civil and political associations, and upon the direct authority of history, that citizenship was not conferred by the simple fact of emancipation, but that such a result was deduced therefrom in violation of the fundamental principles of free political association; by the exertion of despotic will to establish, under a false and misapplied denomination, one equal and universal slavery; and to effect this result required the exertions of absolute power—of a power both in theory and practice, being in its most plenary acceptation the SOVEREIGNTY, THE STATE ITSELF—it could not be produced by a less or inferior authority, much less by the will or the act of one who, with reference to civil and political rights, was himself a slave."

How is this? Were Roman law and usage as Judge Daniel represents them, or were they not? We undertake to show that they were not—that the manumission of a slave by the will of his master did immediately exalt him, through the whole period of the Republic, into the privileges of citizenship, and that restrictions on liberation, as well as on the possession of full civic rights by the freeman, began under the Empire.

But before entering upon this enquiry, we must look for a moment at the passages which Judge Daniel has cited from the Institutions of Justinian. We do not know whether the translation he has given is his own or that of another: he is at least responsible for it. Will it now be believed that he has corrupted the sense, as far as lay in his power, by a most enormous blunder in Latin, a blunder which, we doubt not, many persons "whose ancestors were of pure African blood" in this country are able to point out? He has represented the Latin word *ingenuus* by *free*, making it thus the opposite of *slave*, and implying that a *libertinus* or freedman, who was certainly not an *ingenuus* and never could become one, was not in the full sense a freeman. But every boy ought to know that *ingenuus* means *freeborn*. This blunder is repeated over and over again, although the sense makes it absurd, and although the word *liber*, which occurs as the genus of which the ingenuus and the libertinus are the species, ought to force upon any thinking man the suspicion that all could not be right in the translation. If some freemen are *ingenui* and others *libertini*,

how absurd is the translation "and some [i. e some freemen] are *ingenuit* or freemen, others libertini or freedmen"! We doubt whether, among all the persons who have referred to Roman law, such a mistake was ever before committed. The learned Judge deserves credit for his originality. What the law says is simply this: Some freemen are born such, others made such. An *ingenuus* is one who is born such, whether the issue in matrimony of two freeborn persons, or of two freed persons, or of one free and one freeborn. As there could be no *matrimonium* between a freeman and a slave woman, it is here assumed that their issue has the servile condition. On the other hand, it is expressly stated, in the sequel of the passage mistranslated by the Judge, that the issue of a free woman and a slave, and the issue of a free woman and uncertain father, born in prostitution, nay, even the issue of a woman who was a slave at the conception of her child, and became free before its birth, is freeborn.

This passage from the fourth title of the first book of the Institutions ought to have been enough to show the Judge with what facility the Romans conferred citizenship on the children at least of freedmen. There was no higher or better condition at Rome than that of *ingenuus*. Now the passage tells him that the child of freed persons is an *ingenuus*. To such a person, therefore, all the rights in the State were open. The Apostle Paul declares himself to have been a born Roman. How this happened he does not tell. But if his grandfather—for instance—had been a Jew enslaved in war and carried to Rome and there manumitted, his son might have been freeborn, and on removing to Tarsus would have carried his citizenship with him as an inheritance of his family. And for aught that appears, the apostle, on removing to Rome, would be a *civis optimo jure*.

The passage, again, from the fifth title should have taught the Judge that just the opposite of what he contends for is true. The emperor is there made by his lawyers to say that his piety or *grace* reëstablished the ancient usage;—we give a more correct translation, which our readers may compare with that of Judge Daniel—"for in the earliest times of Rome

only a single and simple kind of liberty subsisted, i. e. the same which the manumitter had, except that he who is manumitted is a freedman, although the manumitter were a free born man." In other words, in early Rome there was but one kind of freedmen, and they had the same liberty which the citizens who freed them enjoyed, saving that it was an impossibility in the nature of the case for the man who was not born free to become freeborn. Of course, then, in those early times, if the manumitter was a citizen of Rome, the freedman became such. Else how could Justinian *rëestablish* an ancient usage, and make all freedmen in general become citizens of Rome, as the title declares. This is just the opposite of what the Judge affirms with this title staring him in the face. Slaves in old republican times became citizens in full, and afterwards restrictions were imposed upon their right. There is no doubt here as to the sense. But we add ex abundanti the comment of Theophilus, one of the lawyers who drew up the Institutions and afterwards lectured on them at Constantinople; and whose Greek paragraph of them, still preserved, is an important contemporary interpretation.* "For at the beginning," he says, "the Roman empire knew of but a simple condition of freedmen, that is that they should have the same freedom which their manumitter also possessed, and that both should be *citizens of Rome*, the difference lying in this only that the manumitted person was a freedman, although the manumitting person was freeborn." From the former relations of the patron to the freedman, a personal tie resembling that of filial piety lay on the latter, of which we shall have occasion to speak hereafter; but we do not believe that this is referred to in the passage before us, where it is said that the manumitted man is a freedman and not an ingenuus.

The only other point in the passage from the Institutions to which we call attention is that in which we read, (Title 3rd, section 4th,) that "Slaves become such either by *the law of nations*, as by capture, or by the civil law." We are at a loss to know why the Judge printed the words "the law of nations"

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* Theoph Paraphr. ed. Reitz. Vol. I, p. 56.

in italics. Is he aware what this phrase denotes in Roman law, and that, for instance, it may be said with equal justice that *manumission* is by the law of nations, which the great lawyer Ulpian affirms in so many words ?*

It thus appears that the passages cited by Judge Daniel ought to have taught him that Justinian established no new usage, but went back to the received custom of old republican times. "A primis urbis Romae cunabulis una atque simplex libertas conpetebat," says the passage which both he and we have translated, "id est eadem quam habebat manumissor." The truth of this assertion, and whatever qualifications ought to be attached to it, will appear by a brief historical sketch of the relations of freedmen to the Roman state, reaching as far back as our knowledge extends, and embracing the leading principles of the legislation of the empire. As the point at issue is simply the civil status of libertini, we dismiss all other points from our consideration. It might be instructive to look at the forms of legal manumission. It might be instructive to look at the social estimation in which freedmen were held. But these matters are aside from the question. We only say that their social position was low, not so much because they had been slaves, but because they were, for the most part, operatives, and it was one of the diseases of ancient Roman as well as Greek society, as it will be of all societies where slavery exists, to hold manual labor and the mechanic arts in contempt.

* Digest 1. 1. § 4. "Manumissiones quoque juris gentium sunt."—Ulpian then adds a little after, "this relation took its origin from the jus gentium, since by jus naturale all were born free, and manumission was not known, whilst slavery was unknown. But after slavery came in by the jus gentium the benefit of manumission followed; and whereas by one natural name we are called men, by the jus gentium three classes of persons began to exist, the free and the slave his opposite, and a third class, freedmen, i. e., those who have ceased to be slaves." So the theologian could say that the introduction of sin makes a distinction between innocent, sanctified and unsanctified persons possible. Ulpian's *jus naturale*, of which he is supposed to be the author, is of no value in Roman law, although it is introduced into the institutions of Justinian. It does not come up to our natural right. The passage cited from him is of value, because it shows how a sense of the unnaturalness of slavery acted on a Roman lawyer. Savigny supposes (System, vol. 1, p. 414, seq) that Ulpian was led o this distinction by reflecting on the condition of slavery.

If we could trust Dionysius of Halicarnassus, we should begin our historical sketch at a very early epoch. He says that before the reforms under Servius Tullius, manumission gave no claim to citizenship. Of this he could know nothing whatever, but it is quite probable in itself, since even the plebeians can be said to have had at that time only an inferior kind of citizenship, and next to no political safeguards. Of the Servian legislation in regard to freedmen, the same author informs us, (iv, § 22, 23, p. 226 ed. Sylburg,) that manumitted slaves had their choice between going back to their own towns and remaining at Rome in the enjoyment of equal political rights with the former citizens. They had the right to be enregistered, and were included in the four city tribes, where, says he, they continue until now. The historian then adds, that this policy of the king was quite distasteful to the patricians, and puts a speech into his mouth in defense of his measures, to the effect that Rome's true interest lay in increasing the number of her citizens, and that the populace, the more numerous it became, could be managed the more easily by the upper class.

This passage of Dionysius is important, and may contain some truth, but cannot be in all respects deserving of credit. For, 1. It is now generally admitted by the best archæologists, that under the Servian constitution there were but four tribes in all, and no distinction between city and rustic tribes.* This in fact the historian elsewhere asserts, and seems to have forgotten himself in the present passage. 2. There is reason to believe that long after Servius the right of suffrage was confined to those who held real estate, and that the money estimates, which we find in our books, of the property which admitted citizens into the several classes of the comitia centuriata, were estimates of the worth of land, not at the original value of the *as*, but at one-fifth of its value.†

* See Theodor Mommsen, Die Röm. Tribus, p. 4, (Altona, 1844,) Niebuhr's opinion in regard to the tribes is now generally abandoned.

† We believe that since Bœckh published his metrological enquiries, in 1838, and Mommsen his work on the Roman tribes, in 1844, this opinion has been generally followed. Thus Schwegler, in his recent history of Rome, vol. 2, and Lange, in his Antiquities, published last year, accede to this opinion.

But notwithstanding this inaccuracy, there is no reason to doubt that freedmen obtained at a very early day a citizenship of as good a kind as any born freeman could possess. Mommsen, who is perhaps the best authority in Roman antiquities now living, expresses it as his opinion, that "originally the difference between the free-born and the freed, was one of fact only, so that if a freedman once obtained possession of a piece of land, he voted like any other landholder in the tribes."

Coming down now to the time of the twelve tables, we find freedmen exercising the right of a Roman citizen in making a testament. Gaius and Ulpian* inform us that according to that code a freedman might pass his patron by in his will, or if he made no will and left heirs, (*sui heredes*, i. e. children who were still a part of his family, and a wife who was in *his hand*,) these heirs, were they even a wife or an adopted child, would inherit. If, however, he died intestate without heirs, his property devolved by right upon his patron, as being his next of kin according to the Roman idea of the family union. This provision of the twelve tables was, however, at some later period of Roman law, altered by the prætor's edict in favor of the patron. Notwithstanding this obligation, the freedman had a greater independence of his patron than the unemancipated son had of his father, since the latter could not make a will, although he were himself a prætor, or a consul.

We pass on now to the censorship of Appius Claudius, the blind, in the year 442 of the city, about half a century before the first Punic war. This innovator, the most thorough-going in all Roman history, made use of his censorial powers to effect, as it would seem, an important change in the right of suffrage. We derive three accounts of his proceedings, from Livy, Diodorus Siculus, and Plutarch. From these accounts, which to some extent supply each other's deficiencies, and yet leave the subject not without obscurity, it appears probable that Appius, for the first time, allowed citizens who had no landed property, to be enregistered in any of the tribes, which were then thirty-one in number. This, which involved the right of suffrage, gave considerable influence to the freedmen

* Gaii inst. 3 § 40. Ulp. frag. ed. Böcking, Tit. 29, § 1.

and others belonging to what Livy calls the *forensis factio*, who in the use of that power, chose a freedman's son, Cnaeus Flavius, to the office of curule ædile. Flavius made his magistracy memorable by publishing the forms and times of action of the civil law, which had been laid up before in the penetralia of the pontiffs, and known to patricians only. Appius went so far as to elect into the senate some freedmen's sons, to the great vexation of the other senators, a considerable part of whom still belonged to the patrician families. But no one, says Livy, regarded this election as of validity.

A few years afterwards, in the year 450 of the city, a reaction came on, which, however, stopped short of excluding citizens without property from the right of voting. In the censorship of Fabius and Decius, the former of the two adopted the measure of separating the *turba forensis*, or citizens living in the city, and engaged in mean employments, from the tribes through which Appius had distributed them, and of confining them to four tribes, which thenceforth were called the city tribes. This measure, which had the nature of a compromise between the new and old citizens, and which brought back a sort of concord, earned for its author the title of Maximus. As for those freedmen who owned landed estates large enough to bring them into the second class of the comitia centuriata, the innovations of Claudius and the reforms of Fabius seem not to have touched them; they were enrolled as before, in any of the tribes. The freedmen without property, although registered in the tribes, seem not to have belonged to the centuries, and therefore not to have voted at the comitia of the centuries, at least until Marius, in the year 665, called them into the legionary service.

The question may now be asked, what were the rights of Roman freedmen under the Republic? That they were more than merely citizens, that they had the right of *suffrage*, which a citizen did not necessarily enjoy, has appeared in the foregoing examination. Had they the *jus honorum* also, or the right of holding honorable public offices? Some writers on Roman antiquities have affirmed that they and their children were not invested with this right, but no satisfactory proof of this has met our eye, nor will the undoubted fact, that public feeling

was against it, constitute any argument. If a new man like Marius or Cicero was seldom raised to a high office in the State, how much more should we expect this of persons of servile extraction. And yet we find mention in Cicero* of a freedman's son who was a senator, and was tried for *ambitus*, or improper electioneering to procure office. Some time afterwards we find the censor Appius Claudius Pulcher thrusting out of the senate all the freedmen,† (or, as perhaps the sense of our authority is, sons of freedmen,) who were members, together with some other persons, among whom, on account of his character, was the historian Sallust. Soon after this, Julius Cæsar, when Dictator, admitted freedmen's sons into the senate without scruple; but his motive was to abridge the power and honor of that body. From all this it is probable that no positive law excluded these descriptions of persons from public offices or from the senate.

Whether any *connubium* was allowed between free-born and liberated persons, is an enquiry touching not more the rights of the latter of these classes than of the former. The probability is that such marriage would not have been regarded *matrimonium justum;* and this may have been the case from the time of the Twelve Tables onward. The principal passage of Roman history bearing on this point is one in Livy, (39, 19,) relating to a freedwoman who disclosed to the Consul the profligate secret society of the Bacchanals. As a reward for her revelations, she obtained from the senate and people among other privileges, "uti ei ingenuo nubere liceret, and that to him who should marry her no harm nor ignominy should attach on that account." This passage seems to show the unlawfulness of a marriage between these two classes, and yet the character of the woman, who was the mistress of a young Roman, may have contributed to the vote. This took place in the year 567 of the city. In the next century we find that Mark Antony's first wife was the daughter of a wealthy freedman,‡ and for aught that appears, the marriage *was a legal one*, although frowned upon by the opinion of the aristocracy.

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* Pro Cluent, 47. † Dio Cass., 40, 63. ‡ Cicero Philip, 2, 2.

This subject of intermarriage between citizens of different conditions, received the earnest attention of Augustus. By a law called after him, (a lex Julia of the year 726, as it seems probable,) and renewed with modifications in 762, (A. D. 9,) from the Consuls of which year it is called the lex Papia Poppæa,—marriage was prohibited between a senator, his children, and descendants of the third and fourth degree, on the male side, upon the one hand; and a freed person, a play actor, or child of a play actor, on the other. Such is the substance of one clause of the law, as preserved by the lawyer Paullus in the Digest.* From other sources we learn that citizens who were not senators were permitted to marry freedwomen, but not play actresses or women of bad character. Thus, after this legislation, even a senator might marry the *child* of a freed person, and any other citizen who should marry a freed person, would enter into the best kind of marriage known to Roman law. As Augustus was anxious to keep the senate pure, it is probable that these regulations were a restriction on previous custom, if not on previous law.

From the middle of the sixth century the freedmen became an increasingly numerous and important class. A number of attempts were made by them to gain the privilege of being assessed and of voting in any of the tribes, and several of the leading demagogues of the later republic brought forward laws with this object in view. To enter into the history of these attempts, would be tedious, and uncalled for. It is enough to say, that the freedmen continued to vote in the four city tribes, until the empire was established, and indeed as long as voting and the tribes were of any importance.†

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* Digest Lib. 23, Tit. 2. 44—Comp. Ulpian Frag. Tit. 13.

† It has been said by some learned men, that the freedmen stood outside of the tribes, on the ground that among the vast multitude of Roman names with these tribes attached, which have come down to us, no names of freedmen appear upon genuine inscriptions. If this were so, it could not contradict or render suspicious the positive testimony of history. But Mommsen, in his work on the Tribes, has shown the contrary. (p. 178.) This learned antiquary and able historian, who is now professor at Breslau, is said to be engaged on a collection of Latin inscriptions, having already published about 15,000 in his work on the Inscriptions of the Kingdom of Naples.

With the establishment of the empire, a new era begins in the history of Roman freedmen. Restrictions unknown before on the right of manumission, kept their numbers down. Other laws brought them into a closer relation with their patrons than they had sustained during the republic. But especially a system was now commenced by which they were divided into classes with different rights, some being excluded from citizenship, others forming a rank between citizens and aliens, and others still having as full civic rights as under the republic.

The motives for this change in legislation, are not hard to be found. With the immense increase of slavery in the sixth and seventh centuries of Rome, an immense frequency of emancipations corresponded. The populace of Rome uneasy and tumultuous, consisted, to a considerable extent, of that class of persons. As the blighting influence of slavery made the free-born Romans feel that labor was dishonorable, this class especially had in its hands those employments which are one step above manual labor. Without good habits, without education, pliable, insinuating, they were ready for any agency in evil, by which they could advance their interests. Dionysius, a contemporary, draws a gloomy sketch of this lower stratum of the Roman people. (iv, 24.) Some, says he, having earned money by all kinds of crimes, with their money buy their freedom, and straightway are Romans. Others, privy to the crimes of their masters, have their freedom given them as the reward of their assistance. Others, again, are liberated that they may receive the monthly grain and any other donative granted by the prince to the poor, and may pay it over to their former masters. Some liberate their slaves out of vanity, by testament, that they may be called beneficent after their death, and may be followed to their sepulchers by many, with the pileus on their heads in token of emancipation, among whom, he affirms, might be found malefactors bought out of the prisons, who had done deeds deserving many deaths.

Besides this motive, arising from the character of many of the freedmen, a financial motive must have had some influence in bringing about the change of which we have spoken. The practice of "frumentation," or granting corn below the market price

and sometimes gratuitously, to the citizens resident at Rome, was an inheritance from the latter days of the Republic. The emperors could not abolish,—could scarcely mitigate this heavy burden on the treasury. Every citizen had his right to the benefits of the distribution, and thus it became expedient to diminish the number of liberations as far as possible. That this motive must have been operative is shown by the vigorous measures of Julius Cæsar in the year 708, (46 B. C.) He caused lists to be prepared of those who were entitled by their citizenship to receive supplies of corn, and in this way excluded 170,000 men, who, owing to the disorders of the previous times, had stolen into the enjoyment of citizenship.

Such were the motives for a change in the Roman policy as it respects freedmen. The principle of the change was suggested to the lawyers of the empire by the old division of persons under Roman law into citizens, Latins and *peregrini* or aliens. The citizens of the Latin States at one time formed a middle term between Romans and strangers. The Latin colonies or colonies with Latin right, had more restricted privileges than these States, but still stood on their middle ground. When citizenship was extended to all the Italians in the year 664 of the city, this measure was immediately followed by a grant of the same privilege to the Gauls on the south side of the Po; and the towns of Gallia Transpadana received the Latin right at the same period. Forty years afterwards they too received the rights of citizenship; so that thenceforth the towns with the rights of Latin colonies were all outside of the peninsula. Those persons at this period who had this status, possessed the *jus commercii* with Romans without the *jus connubii*, whilst the aliens enjoyed neither.

This threefold division was introduced into the condition of freedmen chiefly by two laws of the empire,—the lex Aelia Sentia, passed in the year 757, (A. D. 4,) under Augustus, and the lex Junia Norbana, passed most probably in the year 772, (A. D. 19,) under Tiberius. From the Consul whose name stands first in this latter law, the freedmen with Latin right were called Latini Juniani. A passage of the Institutions just preceding one quoted by Judge Daniel, refers to these laws

in the following terms: "they who were manumitted obtained in some cases complete and legitimate freedom, and became Roman citizens; in other cases, an incomplete freedom, (minorem,) and became Latins by the lex Junia Norbana; in other cases still, an inferior, (or limited, inferiorem,) and by the lex Aelia Sentia were ranked in the class of subjects or dedititii."

We possess, especially in the remains of the Roman lawyers, pretty full accounts of the contents of these laws, and numberless references are made to them. Avoiding all unnecessary details we give a brief statement of their substance, so far as they affect the condition of freedmen. The lex Aelia Sentia created a class of freedmen without citizenship, who had the status of 'peregrini dedititii,' or aliens that had given themselves up in war, but were not enslaved. This class comprised such as, when slaves, had been unruly or dangerous characters. Those who had been put into bonds by their masters, or had been branded, or handed over to fight as gladiators or with wild beasts, and were afterwards manumitted by the same or by another master, belonged to this class. They had what Gaius (inst. i, § 13) calls *pessima libertas*, that is, they were almost slaves, and in some respects, worse off than the slaves themselves. They could not inherit by will, nor, according to the opinion of most lawyers, make a will, nor did any law, decree of the senate, or constitution of the emperor, open to them Roman citizenship. They were prohibited from dwelling in the city or within a hundred miles of it. If they violated this enactment, they and their goods were to be sold on the condition that they could not be kept as slaves at Rome, or within a hundred miles of the city, nor be manumitted; and if manumitted, they were to pass from their masters, and become slaves of the Roman people. Such was the severity with which this 'classe dangereuse' was treated by the laws of the empire.

The same laws prescribed that the freedman who was under thirty years of age could acquire citizenship only by a certain process, in default of which, if not belonging to the class named above, he became in his civil status a Latin. The

lex Junia Norbana followed up this idea, and determined the condition of this class of freedmen more fully. Gaius discriminates them from the highest kind of freedmen, who became Roman citizens, as follows: "he in whose person these three circumstances concur, that he is over thirty years old, belongs to his master ex jure Quiritium, and is freed in a regular and legal way of manumission, i. e., by the vindicta, by census, or by will, becomes a Roman citizen, but if any one of these requisites is wanting, he will be a Latin." To explain the latter part of this passage, we need to remark that besides the old and formal modes of manumission, it would frequently happen in the later times of the republic, that a master declared his slave free in an informal way, before his friends, or by letter, or at the table. Such a kind of manumission took away the master's power over the slave, but did not make him a freeman. The master could not revoke the act, but the person liberated, was still, in the eyes of the law, a slave, though a slave of nobody. This must have been the principal source from which freedmen with Latin rights were drawn, and hence the Junian law is said to have given liberty to them, whilst they had been regarded as slaves before. (Gaius i, § 13.) As for persons not yet thirty years old, it may be added that they could attain to complete liberty and citizenship, by the form called vindicta, provided the reason for the manumission was approved by a council called by the manumitter. Such a council by the lex Aelia Sentia, should consist at Rome of five senators and five grown up equites. Such a slave could also attain to Roman citizenship by testament, if the master being insolvent declared him free, and left him his heir, in which case he would assume the debts of the deceased. Slaves thirty years of age or over, were freed and became citizens with much less formality.

The freemen with Latin rights, are expressly declared by one of the principal authorities (Gaius iii, § 56) to be as free as if they had been free-born Roman citizens, who had joined a Latin colony and become incorporated into it. And yet from the same authority, we learn (i, § 23) that they could not make a will, nor inherit by the will of another, nor be appointed by

a will to the office of guardian. It would seem from this that their jural condition was somewhat inferior to that of colonists with Latin rights.

The most favorable circumstances attending the position of this kind of freedmen, was the facility with which they could emerge into Roman citizenship. The ways in which this privilege could be obtained are described in a fragment of Ulpian, (Tit. 3.) The emperor could grant it by special favor. The laws bestowed it for a variety of reasons; thus, a Latin freedman, having married a Roman or Latin wife and raised up a child a year old, could with his family acquire citizenship on an application to the president of the province; or he could gain the same boon for himself and his children, if over thirty at his first liberation, by another and a formal manumission; or the privilege would follow a certain period of service in the Roman night police, (vigiles,) or the construction of a ship of a certain size, and the transportation of grain to Rome during a certain number of years.

Such, then, were the three classes of freedmen constituted by the laws of the empire. These laws continued in force until the times of Justinian, but we have reason to believe that they had long before become very unimportant, and a mere incumbrance to the statute book. Thus when the Emperor Caracalla, for financial purposes, gave citizenship to all the existing inhabitants of the empire, there is no doubt that the two inferior classes of freedmen, of which we have spoken, must have been included in the decree. These classes then, for the time, wholly ceased, and could never afterwards have attained to any considerable numbers. It was then, we suppose, because this part of the law had lost its practical importance, that it was formally abolished by Justinian.

Our brief and necessarily imperfect sketch would be quite incomplete, did we not say a word upon two points involved in Roman manumissions,—the restrictions on the right of manumission, and the hold which the patron still had upon the freedman.

1. We are not aware that manumission was restricted by any law under the republic, but as soon as the empire began, this

policy seems to have influenced legislation. The lex Aelia Sentia forbade a master under the age of twenty to set a slave free, unless by the advice of a council and in a formal way. But the most important restriction was contained in the lex Furia Caninia, passed four years after the law above mentioned, by which the number that could be liberated by testament was minutely defined. If the deceased owned more than two and less than ten, he could set free one half of them, if between ten and thirty, a third, between thirty and a hundred, a quarter, between one and five hundred, a fifth part, and never more than one hundred. The emperor Tacitus,—in violation of the law, it would seem,—freed all his slaves at Rome, amounting to within one hundred. Upon the other modes of liberation, excepting that by testament, no restriction was imposed.

2. In regard to the obligations of the freedman towards his patron a very long chapter might be written, but it is not here called for, since nearly the whole of this part of Roman law grew up under the empire. We will content ourselves with as few words as will suffice to make this apparent. The rights of the patron grew out of the prior very close connection between the master and his *family*. These rights may be arranged under two heads,—the patron's right to be treated with respect and kindness, and his right to be one of the freedman's heirs. These rights generally devolved on the patron's children, but did not affect the posterity of the freedman.

First, then, during the republic, it has not been made to appear that the law prescribed any penalty for neglect or insults offered by a freedman to his former master. The relation seems to have been left to the good feeling of the parties, although its sacredness was acknowledged. Instances from inscriptions can be produced of ungrateful freedmen being excluded from the family sepulcher, to which others, guilty of no such wrong, were admitted. In the early times of the empire, a patron, as it seems, could banish a freedman who had injured him to the distance of a hundred miles from Rome.* And

*Tacitus, Annal. xiii, 26.

afterwards corporal punishment could be inflicted on such offenders by order of the president of the province; nay, by a constitution of Commodus, they might be reduced again, in an extreme case, to slavery.*

In the second place, as to the patron's right of being an heir of his deceased freedman, we have already seen that the twelve Tables conceded this only in case the freedman died intestate, without an heir of his own, (*a suus haeres.*) Afterwards the praetor's edict altered this injustice, as Gaius calls it, and when the freedman left no children of his body, assigned half of his estate to his patron. The legislation of the empire enlarged in some degree the rights of the patron, particularly by the noted lex Papia Poppaea, of which we have already spoken. Thus, if the freedman died worth one hundred thousand sesterces or over, and left not more than two children, his patron came in for a child's portion. As a Junian freedman could make no will, his patron was of course his heir.†

What has been said, although by no means pretending to give a complete view of the status of freedmen, is enough to establish the following points:

1. That the power of a Roman citizen to confer on a slave the privilege of freedom, involving the rights of citizenship, was unrestricted until the end of the republic. Just what Judge Daniel denies is true—that emancipation then conferred, as a matter of course, the status of citizenship. Judge Daniel (p. 477 of the report of the decisions) thinks it "difficult to conceive by what magic the mere surcease or renunciation of an interest in a subject of property by an individual possessing that interest, can alter the essential character of that property with respect to persons or communities unconnected with such renunciation." But any Roman master's renunciation of interest in his slave, who was his property, made him a citizen, until

* The amount of assistance which the freedman owed to his former master personally,—not to his heirs,—called *operae officiales*, was often determined by the oath or stipulation of the freedman, and if not, by custom or the nature of the case. The refusal to render due assistance gave rise to a suit called operarum actio. See the Digest, 38, Title 1.

† Compare Gaius, 113, § 55, seq. for succession to the estate of a freedman with Latin right, and for the general subject Dig. 38, Tit. 2, de bonis libertorum.

the end of the republic, and in many cases for centuries afterward. Judge Daniel asks whether "it can be pretended that any individual in any state, by his single act, can create a citizen of that state." If we comprehend his meaning, the Roman manumitter constantly created a citizen of Rome. On turning to the excellent work of Prof. Lange, of Prague, upon Roman antiquities, published but a few months ago, we find him speaking of "three forms in which the pater familias could give the slave freedom, and at the same time citizenship,"—as if he had provided beforehand against Judge Daniel's opinion.

2. It appears that the person thus liberated, if he possessed landed property, could vote from very early times, and that for two centuries and a half before the end of the republic, all regularly manumitted persons had the right of suffrage in the tribes.

3. It appears that restrictions on manumission, the enlargement of a patron's rights, and the bestowment of an inferior kind of liberty on certain descriptions of freedmen, were measures of the empire after Roman liberty was nearly extinct.

4. It appears that the legislation of Justinian in bringing all freedmen to one level, only abrogated laws and overturned a complicated system of decisions founded on them, which had become of little or no practical importance.

5. It is beyond question that the sons of freedmen (that is of freedmen who were citizens) were free-born. In fact, these were the stock from which many of the principal citizens of Rome, under the empire, originated. Tacitus (Annal. 13, 27) puts into the mouth of Senators the assertion, that "plurimis Equitum plerisque Senatoribus non aliunde [i. e. from no other than freedmen] originem trahi."

Thus it is evident that the "proud title of Roman citizen, as contradistinguished from lower grades of domestic residents, was" *not* "maintained throughout the republic, and until a late period of the eastern empire." Judge Daniel has misunderstood Gibbon, as he has misunderstood the Institutions of Justinian. Gibbon, in the passage extracted at the beginning

of our Article, can mean nothing more than that the distinctions in the class of freedmen were obliterated by the legislation of Justinian. He compared not the republic and the empire, but the dawn of the empire with its decline. Gibbon had the remains of the lawyers on his table, and could read Latin, and must have known that some freedmen were called *cives Romani* by writers who flourished centuries before Justinian was born.

We should not have pursued this subject at so great a length, nor laid bare the ignorance of a Judge of our highest Court on a subject where he ought to speak *ex cathedra*, did we not believe, that the authority of one who has given his sanction to a most flagrantly wrong decision, deserves to be weakened. He has appealed to Roman institutions as an analogy in support of what we believe to be bad law. We have shown that the analogy fails entirely,—in fact, that it is against him. We wish that he and all other judges as well as statesmen, would study both ancient and mediæval slavery, and the transition from it into freedom, with thoroughness and candor: we should have no fear what would be the result.