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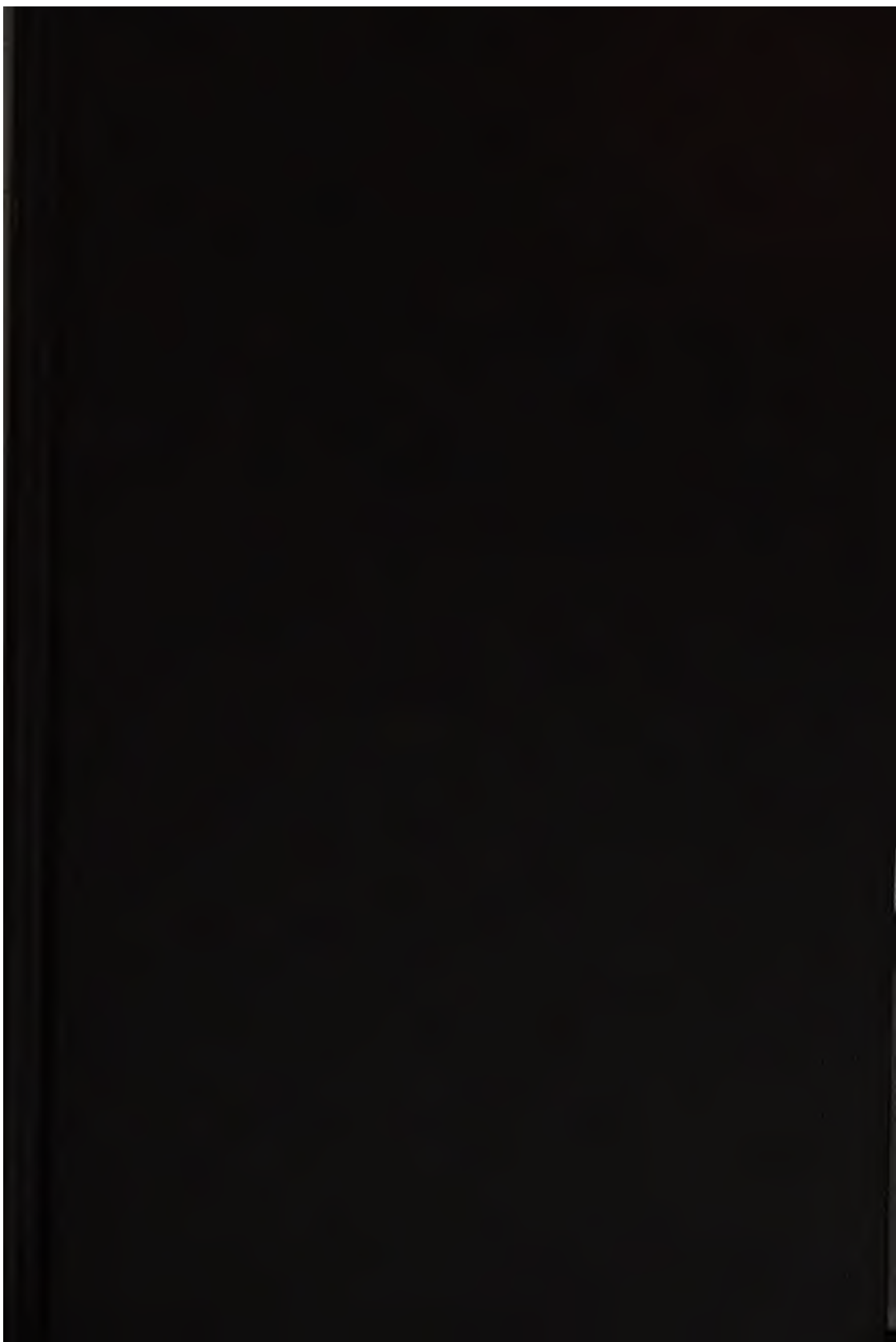
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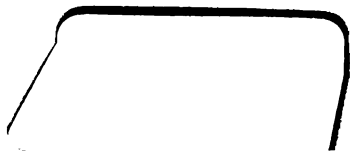
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LAW

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A COMPENDIUM OF ROMAN LAW.





A
COMPENDIUM OF ROMAN LAW

FOUNDED ON THE INSTITUTES
OF JUSTINIAN

TOGETHER WITH EXAMINATION QUESTIONS SET IN THE
UNIVERSITY AND BAR EXAMINATIONS
(WITH SOLUTIONS)

AND DEFINITIONS OF LEADING TERMS IN THE WORDS OF
THE PRINCIPAL AUTHORITIES

BY

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THE PHILOSOPHY OF POSITIVE LAW."



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PREFACE.



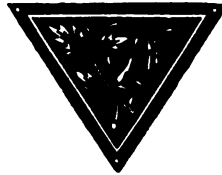
THE following pages are intended for those students at the Universities and the Inns of Court, who have to pass an examination in Roman Law. In the preparation of this little volume, free use has been made of such as Sandars Justinian, Poste's Gaius, Maine's Ancient Law, Austin's Jurisprudence, and other standard works. Occasional reference has also been made to the excellent treatises of Messrs. Whitcombe Greene and Seymour Harris, and to the translation of Ortolan, by Messrs. Nasmith and Prichard.

The examination questions in the first appendix are inserted through the kindness and by special permission of the authorities of the various Universities and of the Inns of Court.

The occasional repetitions of important quotations have been made advisedly and it is hoped that at any rate those who have to teach will not urge this as a serious defect in the book.


TRINITY COLLEGE, CAMBRIDGE.

January, 1878.





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ROMAN LAW.



INTRODUCTION.

Definitions.

Book I. Tit. i.



JUSTICE is the constant and perpetual wish to render every one his due."

"Jurisprudence is the knowledge of things divine and human, the science of justice and injustice."

These definitions are taken from Ulpian.

Objections.

They would embrace not only law but positive morality and the test to which both are to be referred. (Austin, Lect. v. p. 216. Analysis of Austin, p. 25.)

LAW. JUS.

Definition of Jus.

"The body of rules received as the Roman law on any given subject."

Austin's definition of Law.

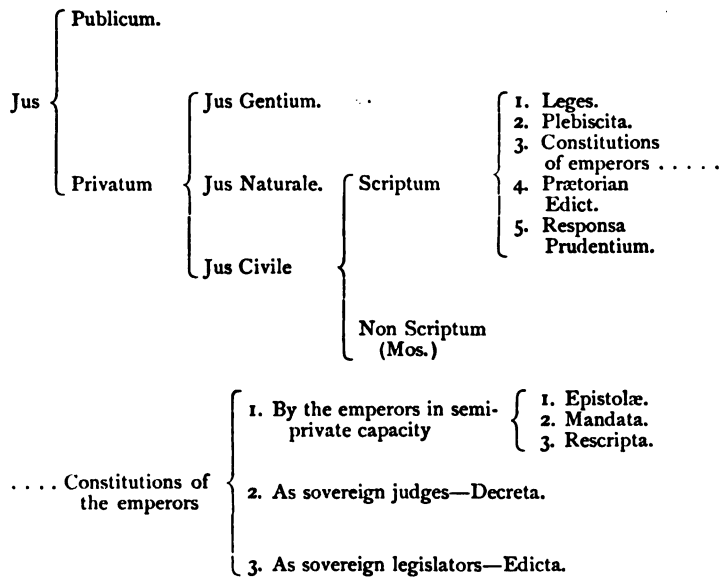
“ Law (Positive) is set by a sovereign one or number, to a person or persons in a state of subjection to its author. Some positive laws are set immediately, others mediately by subordinate political superiors.”

Maxims of Law.

To live honestly, to hurt nobody, to give every one his due.

Divisions of Law.

Table illustrating the various divisions of law :—



The law of a particular state consists of :

1. *Jus publicum*, or public law.
2. *Jus privatum*, or private law : regarding the rights and duties of individuals.

[The Institutes discuss Roman private law.]

Tit. ii.—DISTINCTION BETWEEN THE *JUS GENTIUM* AND THE *JUS CIVILE*.

[Justinian gives three sources for the precepts of private law :—1. *Jus naturale*, 2. *Jus gentium*, 3, *Jus civile*. The *jus naturale* he defines as the law taught by nature to all animals, borrowing the idea from Ulpian ; but the threefold division is afterwards discarded, and that of Gaius into *jus naturale* and *jus civile* is adopted.]

The *jus civile* is the law which is peculiar to a given community, and is opposed to the law obtaining equally among all nations called the *jus gentium*.

[The distinction is speculative rather than practical, very few legal inferences being drawn from it in the Institutes.—v. Austin, Lect. xxxi.]

Maine, A. L., p. 49.

“*Jus gentium* was, in fact, the sum of all the common ingredients in the customs of the old Italian tribes, for they were all the nations whom the Romans had the means of observing. . . . The circumstances of the origin of the *jus gentium* are probably a sufficient safeguard against the mistake of supposing that the Romans had any particular regard for it.”

Justinian seems to confuse this *jus gentium*, or law obtaining generally among nations, with the “*jus naturale*,” a term almost equivalent to the *φυσικὸν δίκαιον* of the Greek philosophers (see p. 8).

DISTINCTION BETWEEN WRITTEN AND UNWRITTEN LAW.

The words are here taken in their literal sense. Written law is that which is committed to writing at its origin ; unwritten law, that which is not so committed.

In the juridical sense written law is that which is made

immediately and directly by the supreme legislature ; and unwritten law, that which is not so made. (Austin, Lect. xxviii. Analysis of Austin, pp. 95, 96.)

Forms of written law.

1. *Leges*, enacted by the people, and proposed by a senatorial magistrate.
2. *Plebiscita*, enacted by the plebs and proposed by a plebeian magistrate. After the passing of the *lex Hortensia* (467 A.U.C.), *plebiscita* had the force of *leges*.
3. *Senatus consulta* were ordinances of the Senate. In the times of the Cæsars they became the prevailing form of legislation.
4. *Imperial constitutions*, which, under Hadrian, superseded in reality all other sources of law. They consisted of :
 - (α) *Epistolæ, rescripta, mandata*, or letters addressed to officers and others, giving the Emperor's advice on doubtful points.
 - (β) *Decreta*, or judicial sentences.
 - (γ) *Edicta*, or laws generally binding.
5. The Prætorian Edict, or *jus honorarium*.
6. The *responsa prudentium*, or decisions and opinions of persons *authorized* to interpret the law.

Unwritten law, according to Justinian, is that which is established by usage.

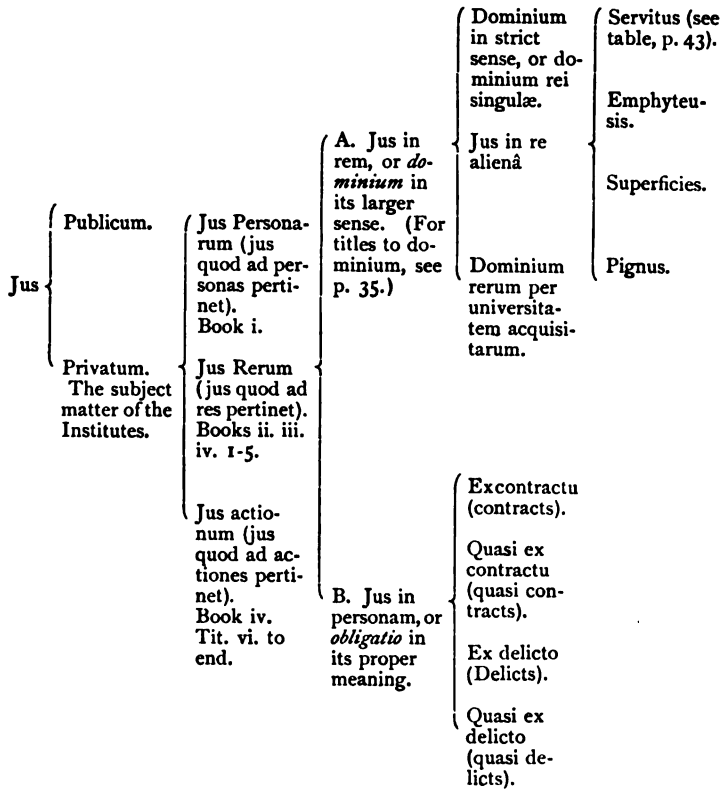
DIVISION OF THE INSTITUTES.

Justinian divides the Institutes into

1. THE LAW OF PERSONS.
2. THE LAW OF THINGS.
3. THE LAW OF ACTIONS.

Obligations being included under the head of Things.

Table illustrating the arrangement of the Institutes:—



[Austin's criticism on this arrangement.

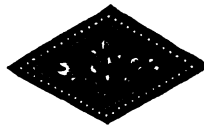
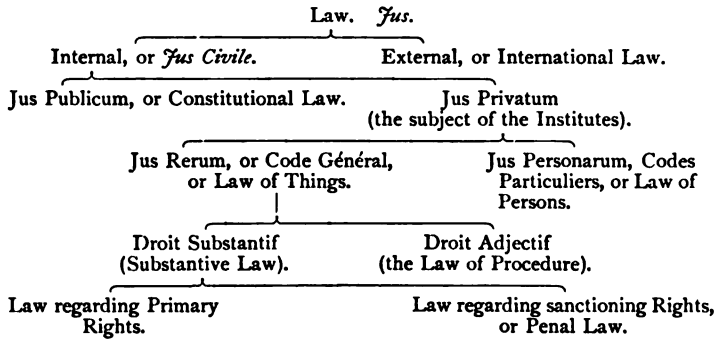
It involves a logical blunder. The Law of Actions, instead of being co-ordinated with the Law of Things and the Law of Persons, should be distributed among those divisions; the two-fold divisions into Law of Things and Law of Persons is commodious though not essential, the Law of Things being the *corpus juris* minus the Law of *Status* or Conditions (*i. e.* the Law of Persons), which is detached for purposes of convenience from the body of the law.]

[Poste's Gaius, § 8, p. 39.

In reference to this division of the Institutes the following passage occurs :

“By *Jus ad actiones pertinens* . . . there is no doubt that the inventor of the division intended to designate the law of procedure as opposed to the law of rights, the adjective code, to use Bentham's phraseology, as opposed to the substantive code. There is as little doubt that . . . this design is not executed with precision, and that instead of the law of procedure the last portion of his treatise rather contains the law of sanctioning rights as opposed to the law of primary rights.”

Bentham's division of the *Corpus Juris*, referred to above, may be thus illustrated. The table is taken from the Analysis of Austin's Jurisprudence, p. 175.





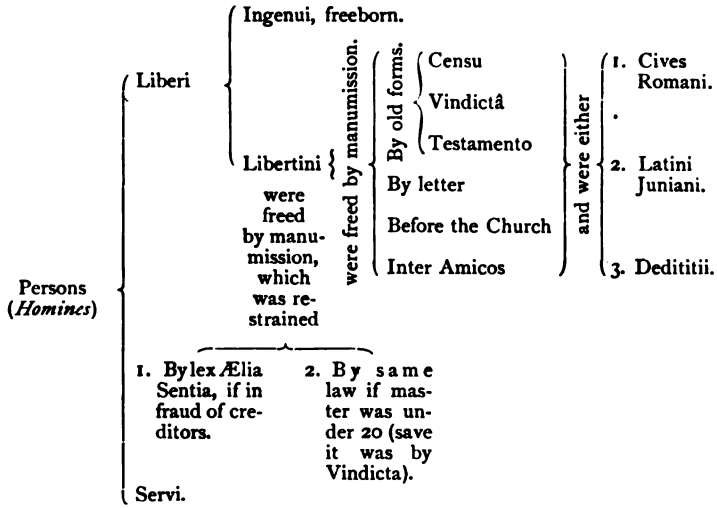
Tit. iii.

I. THE LAW OF PERSONS.

INST. BOOK I.

Jus personarum.

Classification of Persons (Homines).



PERSONS.

Persons are of two classes, (α) Physical, and (β) Legal persons.

(α) By "person," simply a physical person is meant here, "human being" in the widest sense of the term.

The modern civilians have narrowed down the import

of the term to "*a human being invested with a condition or status*" (using the word *status* as including those conditions which comprise rights), so their definition may be thus stated :—

"*A person is a human being invested with or capable of rights.*"

But this was not the opinion of the Roman classical jurists. In all their divisions of persons slaves are ranked as persons, and *status* is ascribed to them.

Origin of the mistake.

A person was defined by the modern civilians as "a person bearing a *status*," and *status* was taken as equivalent to *caput*, a word denoting conditions which do comprise rights ; whereas *status* was applied to various conditions of persons considered merely with regard to their incapacities.

The term "person" is sometimes used as synonymous with "status" or "condition." In this sense every human being who has rights and duties bears a number of persons. "*Unus homo sustinet plures personas.*" The word is in this sense equivalent to "character." Analysis of Austin, pp. 57, 58.

Men are either free or slaves.

[Slavery was said to be an institution of the law of nations, but contrary to the law of nature.] (See page 3.)

Slaves become so, 1. by birth, when their mother is a slave ; 2. by being captured in war ; or 3. by permitting themselves to be sold in order to share the proceeds of the sale.

Tit. iv.—Free men are either *Ingenui*, free by birth, or *Libertini*, freedmen.

Ingenui, or freeborn, are those whose parents are free ; if the mother alone be free, the children are free.

Libertini, or freedmen, are those who by manumission, *i.e.*, freeing from the hand, *manus*, or power of another, become free.

The three modes of manumission recognized by the old law were :

1. *Censu*, *i.e.* enrolment of the slave's name as a freedman on the census list. This mode was obsolete in the time of the empire.
2. *Vindictâ*, by the rod, a ceremony which was thus performed : the slave was touched on the head by a man called '*assertor libertatis*,' and the master turned him round in token of giving up his rights.
3. *Testamento*, by will. The bequest of freedom might be made directly to the slave, or indirectly through the heir being charged with obtaining his freedom.

These forms of manumission were styled *Legitima*.

There were also other methods, such as that established by Constantine (*viz.*, in the presence of the Church) by letter, or by declaration in the presence of friends.

Tit. v.—*Classes of freedmen.*

Before the time of Justinian, there were three classes of freedmen :

1. *Cives Romani*, or those who had obtained full rights of citizenship.
2. *Latini Juniani*, or those who, under the *lex Junia Norbana*, acquired only the status of Latins through defects in mode of manumission.
3. *Dedititii* under the *lex Ælia Sentia*, or those who had been reduced to slavery for a crime ; these on manumission obtained personal liberty but no other privilege.

The *Latini* could not vote nor could they fill public offices, nor become heirs, legatees, or guardians ; at their death their property reverted to their former owners.

The *dedititii* could never become citizens ; their masters took all their property at their death ; they might not live within one hundred miles of Rome.

All distinctions between freedmen and citizens were abolished by Justinian.

Tit. vi.—*Restrictions on enfranchisement.*

(*a*) The *lex Ælia Sentia* rendered void a manumission made in fraud of creditors by an insolvent, but a slave might be appointed “*hæres solus et necessarius*,” and would thus obtain his liberty.

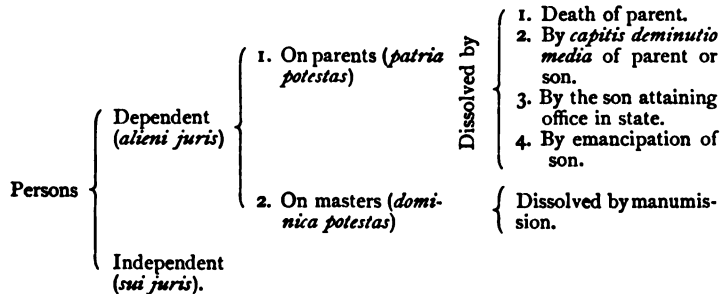
(*β*) The same law prohibited manumission by a master less than twenty years of age, unless the enfranchisement was *vindictâ*, and for reasons approved by a council appointed to consider these cases.

Justinian enabled a master if he had attained the age of seventeen years to enfranchise his slaves by testament.

Tit. vii.—[The *lex Fufia Caninia*, A.D. 8, had enabled a master to manumit a certain proportion only of his slaves by testament. Justinian repealed this law.]

Tit. viii.—DIVISIONS OF PERSONS.

Classification of persons according to their dependence on others.



Persons are either independent (sui juris) or dependent (alieni juris).

Persons are dependent on parents (*in potestate parentum*) or on masters (*in potestate dominorum*).

Independent persons, or those who were *sui juris*, were capable of being heads of families (*patres familias*). The members of the *familia* were all subject to the *paterfamilias*, and were *alieni juris*.

[In the time of Gaius, persons might be in the power of another by being "*in manu*" (as a wife who had gone through the ceremony of *confarreatio*), "*in mancipio*," as persons sold by the head of their family under the form of *mancipatio*, or thirdly "*in potestate*," which form alone remained in the time of Justinian.]

POWER OF MASTERS OVER SLAVES. DOMINICA POTESTAS.

By the law of nations (*jus gentium*) the master had power of life and death over the slave, but by a constitution of Antoninus Pius, a master killing his slave was liable to the same punishment as if he had killed the slave of another. The master was also compelled to sell the slave if he had been guilty of cruelty towards him.

[The *peculium*, in fact the property of the slave, was in law the property of the master, though the former often purchased his liberty with it.]

Tit. ix.—THE "PATRIA POTESTAS."

All children begotten in lawful marriage are under the paternal power (*patria potestas*) of the *paterfamilias*. The *patria potestas* resembled the *dominica potestas*, but its limitations were due probably to natural feeling rather than law.

The punishment for killing a son was the same as that of a parricide, according to Constantine, who also allowed

the son to have ownership of his property acquired in war (*castrense peculium*).

The power of a father over a son was terminated by emancipation alone.

The husband only acquired rights over the property of his wife when she passed "*in manum*."

A man's children, son's children, grandson's children, and so on, were in his power, but a daughter's child was in the power of its own father.

[At the earliest periods of Roman law the powers of the father over the person of the son were almost unlimited, which powers in the later ages were practically reduced within very narrow limits. But it is sufficiently clear that the father's rights over the property of the son were always exercised to their full limit even in the later periods of Roman jurisprudence. See Maine, A. L. pp. 138, 141.]

Tit. x.—MARRIAGE.

Marriage, or the binding together of a man and woman in an indivisible union, could take place between any man and woman of marriageable age; it being also necessary that they should have the consent of the heads of their respective families if they were not *sui juris*.

The old forms of marriage were the

Confarreatio, a religious ceremony in which those only could take part who had the *jus sacrum*.

Coemptio, or fictitious sale of the wife to the husband, and

Usus, cohabitation with the intention of forming a marriage.

By these forms the wife came "*in manum viri*." The *usus* in the last case was usually broken to prevent the husband obtaining this power. All these ceremonies merely settled the position of the wife, the real tie

being the civil contract formed by the mutual consent of both parties.

The parties must have possessed the *connubium*, have been without the prescribed limits of relationship, and have obtained the consent of those under whose power they were ; otherwise a marriage was void. Marriage between ascendants and descendants was prohibited, also between persons of or within the third degree of relationship. If a person had through *agnatio* occupied the position of collateral to another, these persons could marry on the dissolution of the *agnatio*.

First cousins were allowed to marry by Arcadius and Honorius.

Marriage between a brother and sister-in-law was permitted till the time of Constantine.

[*Sponsalia* constituted no binding tie, and were an engagement which could be renounced by either party.

Contubernium, or the union of slaves, was not recognized in law as a marriage.]

There were restrictions also on the marriage of certain classes.

The *Patres* and *plebs*, freeborn and freedmen, guardians and wards (under 26 years of age), Jews and Christians, were forbidden to intermarry.

LEGITIMATIO.

Constantine first permitted the legitimation of children born *in concubinato*, if there were no legal obstacles to the marriage of the parents.

This was effected in one of the following ways :—

1. By oblation to the *curia*.
2. By marriage of the parents.
3. By a rescript of the emperor.

In a legal marriage when the wife did not pass "*in manum viri*," the *dos* or wife's marriage portion belonged

to the husband during the subsistence of the marriage tie ; the *donatio propter nuptias* or husband's settlement belonged during marriage to the wife, but was under the management of the husband.

[The subordination of women to the *father* or head of the family was a characteristic phenomenon in ancient law ; the subordination to the *husband* is the noticeable feature in modern jurisprudence. When the wife came under the power of her husband (in manum), it was in the fictitious position of a father that the husband acquired his rights.

The gradual disuse of the strict forms above mentioned, and the employment of the device above mentioned to prevent the "*conventio in manum*," rendered the prevalent form of marriage merely a deposit of a wife with the husband by her family. The loss of the power of the wife's relations over her, and the consequent assumption of these powers by the husband, are almost contemporaneous with the growth of Christianity. (See Maine, *Anc. Law*, pp. 154-158.)]

Tit. xi.—ADOPTION.

Adoptio	{	Of persons not sui juris, <i>Adoptio</i> .	{	1. <i>Minus Plena</i> .
		Of a person sui juris, <i>Arrogatio</i> .		Under Justinian.

There were two forms of adoption :—

1. *Arrogatio*, or the adoption of a person sui juris. This was effected by an imperial rescript.
2. *Adoptio*, in the limited sense, was the adoption of a person not sui juris, effected by a fictitious sale. In

the former case only the consent of the parties had to be asked, hence the word "*arrogatio*."

The effect of adoption before the time of Justinian was to put the adoptive son precisely in the same position as if he had been born the son of his adoptive father ; Justinian, to prevent the son losing the succession to his natural father on being adopted, enacted that the adoptive son should remain in the same position as before to his own father, but should gain the succession to his adoptive father if intestate ; the latter not being bound to provide for the son. This was styled *adoptio minus plena*. If the adoptive father was an ascendant, *e.g.* a maternal grandfather, the adoption was styled *plena*, and the son entered the family of the adoptive father.

Arrogation of children below the age of puberty was first permitted by Antoninus Pius, who provided that if the arrogated son died before puberty his property was to be restored to his natural heirs, and if he was emancipated or disinherited without good reason before puberty, he received his own property and one-fourth of the arrogator's, called the *Quarta Antonina*.

The adoptor must have been eighteen years older than the adopted son, as adoption is said to follow nature, but a person might be adopted as a grandson or great-grandson, although the adoptor had no son.

A grandson if adopted *generally* became *sui juris* on the grandfather's death ; and if adopted specially, *i.e.* as the son of a particular son, he became under the son's power on the death of the grandfather.

Before Justinian's time the adoptive son might be given in adoption to another family, but by Justinian's legislation the adoptor, unless he were an ascendant, acquired no *potestas*.

Women were allowed by a constitution of Diocletian

and Maximian to adopt as a consolation for the loss of their own children, but could not acquire any *potestas*.

By *arrogatio* those who were in the power of the adopted person came under the power of the arrogator. In adoption of a person not *sui juris* this could not of course take place.

Slaves adopted by their masters became free, though they do not appear to have become sons of the adoptor.

“Adverting to Rome, we perceive that the primary group, the family, was being constantly adulterated by the practice of adoption. . . . The composition of the state uniformly assumed to be natural was nevertheless known to be in great measure artificial The expedient which in those times commanded favour was that the incoming population should *feign themselves* to be descended from the same stock as the people on whom they were engrafted.”—MAINE, *Anc. Law*, pp. 130, 131.

Tit. xii.—METHODS OF LIBERATION FROM POWER.

The *dominica potestas* was dissolved by manumission.

The *patria potestas* was dissolved :

1. *By the death of the parent.*

If, however, there is an intermediate ancestor alive, and under the power of the ancestor, the descendants come under his power ; thus, if a man dies leaving a son and grandsons, the grandsons would come under the power of the son, if unemancipated. If the son were dead the grandsons would become *sui juris*.

2. *By the parent or son undergoing the media capitis diminutio*, or loss of citizenship, the *patria potestas* was destroyed. Relegation, however, did not cause this loss of citizenship.

3. *By the son attaining the honours of the patriciate*, and thus becoming *sui juris*, though he still retained all rights of succession and agnation in his family.

This privilege was conferred by Justinian.

Jus postliminii.

The *patria potestas* was suspended during the time which a parent or son passed as a prisoner of war. By the *jus postliminii* the rights and duties of the *patria potestas* were resumed on the return from captivity. In case the captive died, his death was in law considered to take place at the moment of the commencement of his captivity.]

4. *By Emancipation.*

- (α) Under the old law.

In the Twelve Tables it is laid down that if a man sell his son three times the latter is free. This was taken advantage of for the purpose of giving freedom to those under power. The father sold the son three times to a fictitious purchaser, who after each sale, except the last, manumitted the son ; after the last sale he resold the son to the father, who then manumitted him and became his patron, with the right of succession in case his son died intestate and childless.

One sale was sufficient in the case of a daughter or grandchild, as the Twelve Tables only spoke of the three sales with regard to a son.

- (β) Under Justinian.

Justinian permitted the object of emancipation to be effected by a simple process before a magistrate.

A parent might emancipate his grandchildren while retaining his power over their father, and he might also

emancipate the son and retain the grandchildren under power.

If a son is given in adoption to an ascendant the paternal power of the father is extinguished.

[When a child followed the condition of his father, as when born in *justo matrimonio*, his rights were determined by reference to the time of conception, if he followed the status of his mother, by reference to the time of birth. By the later law his rights were determined by reference to the time of conception or to any intermediate time, as was most favourable to him.]

Tit. xiii.—GUARDIANSHIP.

Guardianship (*tutela*) is an authority and power over a free person, *i.e.* one *sui juris*, in order to protect one whose tender years prevent him defending himself.

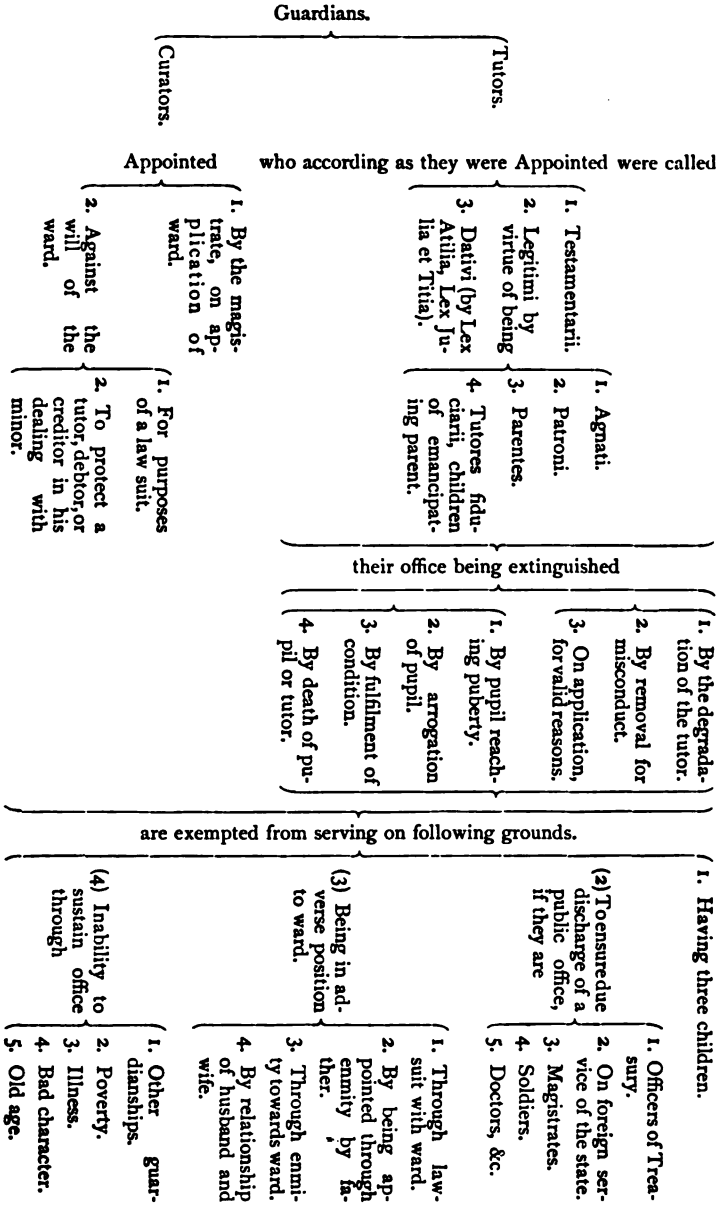
Maine's criticism on this definition.

Maine (Ancient Law, p. 161) argues thus:—The guardianship of male orphans was not designed for this purpose, but to keep alive the semblance of subordination to the family until the child was supposed to be capable of becoming a parent himself. It was a prolongation of the *patria potestas* up to the time of bare physical manhood. The system of tutelage was therefore unequal to the purposes of general convenience, and for this reason the institution of curators sprang up to secure the due supervision of the ward till the age of majority (25).

Tutors were given to protect both the person and property of wards.

[Up to the age of 7 years the authority of the tutor was exclusive of that of the ward, between 7 and 14 the tutor's authority was concurrent.]

Classification of Guardians.



(A.) TUTELA TESTAMENTARIA.

Tutors were appointed by the head of the family, by testament, for descendants in his power, who would become *sui juris* on his death.

For the purposes of the *tutela* posthumous children are considered as being born in the father's lifetime.

If the father appointed a tutor for his *emancipated* son, the appointment was usually carried out by the magistrate without inquiry into the circumstances of the case, if there was only this technical objection.

Tit. xiv.—*Who may be appointed by will as guardians.*

The office of the tutor was to complete the *persona* or legal status of the ward; it was regarded as a quasi public function, and so might be held by a *filius familias*.

A slave might be appointed tutor and become free by such appointment.

Another person's slave could be appointed tutor with the proviso, "when he shall be free," and he began to act when he obtained his freedom.

A madman begins to act on becoming sane, and a minor on attaining majority, the magistrate appointing an *interim* tutor.

[In the time of Justinian a tutor might be appointed to act from or until a certain time, or conditionally, or before the institution of an heir.]

The tutor's office being to complete the *persona* of the ward, he could not be appointed for a particular thing or business.

An appointment to "*liberi*" (or "children") will include grandchildren; while an appointment to "*fili*" (sons or daughters) will include a posthumous child, but not grandchildren.

Tit. xv.—(B.) TUTELA LEGITIMA.

In default of the appointment of a guardian by testament the *agnati* fulfil this duty, according to the law of the Twelve Tables.

Agnati are those who are related to one another through males ; persons related through females are *cognati* by natural relationship. Justinian by his 118th Novel abolished the legal distinction between *cognati* and *agnati*, and the nearest in blood became the *tutor legitimus*. It is stated expressly that if a person died intestate only as regarded the appointment of a tutor, the law remedied the defect, and that the testament was good as far as it went : this is so stated because a man could not die partly testate, partly intestate.

Agnation being a tie created by law could be dissolved by law, as in the case of *maxima capitis deminutio*.

[Tit. xvi.—*Capitis deminutio*.

A citizen with the fullest rights of citizenship possessed the *status familiæ*, *status civitatis*, and *status libertatis*.

1. The loss of all these constituted *maxima capitis deminutio*.

For example. A man who becomes "*servus pœnæ*" for a crime undergoes this *maxima deminutio*.

2. The loss of the *status civitatis*, involving that of the "*status familiæ*," was termed *minor capitis deminutio*.

This may be illustrated by the case of a man "*deportatus in insulam*."

3. The change of *status* consequent on the alteration of the family position of a citizen (as when a person "*sui juris*" becomes independent) causes the *minima capitis deminutio*.

A slave having no civil existence can undergo no "*capitis deminutio*."

Rights of cognation are destroyed by the greater and the lesser, but not by the least *capitis deminutio*.]

The nearest agnate alone has the right to be tutor : but if there are more than one of the nearest degree, all had an equal right and were called together.

Tit. xvii.—*Right of the patron to the tutelage of the freedman.*

As the patron and his children had by the laws of the Twelve Tables the right of succession to a deceased intestate freedman, and as a similar right in the case of the agnates was coupled with a right to the tutelage, so the patron by analogy had also the right of tutelage.

Tit. xviii.—*Right of the parent to the tutelage of the emancipated son.*

The fictitious sales in mancipation merely destroyed the father's power ; when the son was freed by the father after resale by the fictitious purchaser, the father became the patronus and consequently the *tutor legitimus* of the son.

Tit. xix.—*Fiduciaria Tutela.*

If a parent emancipate a descendant who is below the age of puberty he becomes his *tutor legitimus* ; if this parent dies, his sons, if above the age of puberty, become the *tutores fiduciarii* of the emancipated descendant ; so called because they were bound to the father by a trust to undertake the tutelage. If there were no sons of the proper age the nearest agnate became *tutor fiduciarius*.

Tit. xx.—(C.) TUTELA DATIVA.

- | | | |
|------------------|---|---|
| Tutors appointed | { | <ol style="list-style-type: none"> 1. By testament. 2. In default of which the following exercised their rights : <ol style="list-style-type: none"> 1. Agnates. 2. Patrons. 3. Parents. 4. Children of emancipating parent, tutela fiduciaria. 3. By the Lex Atilia and Lex Julia Titia (Tutela dativa). |
|------------------|---|---|

The lex Atilia and the lex Julia et Titia.

In default of the appointment of tutors by the foregoing methods the *lex Atilia* (196 B.C.) provided that one should be appointed in Rome by the *prætor urbanus*, and a majority of the tribunes of the *plebs*; the *lex Julia et Titia* provided that in the provinces the tutor should be chosen by the *præsides*.

[A tutor so appointed was termed *dativus*.]

In case a tutor had been appointed from a fixed future time, or was at the time a prisoner of war, or in case a delay had occurred in the acceptance of the inheritance by the heir, a tutor might be appointed for the interval by the magistrate.

Any expression of intention on the part of the testator with regard to appointing a tutor was sufficient to exclude the *tutores legitimi*, and any deficiency was remedied by the magistrate.

In the time of Justinian the "*præfectus urbi*" appointed the tutor when the pupils were of high rank or fortune, and the *prætor* acted in less important cases.

Justinian also permitted the "*defensores civitatis*" to appoint tutors in the provinces: a money security was taken from the tutor, thus doing away with the necessity for the *inquisitio*.

In the 6th section of Title xx. there occurs a quotation from Gaius to the effect that, agreeably to the law of nature, persons under the age of puberty were under tutelage, that persons of tender years may be under the guardianship of another. Gaius, after this passage, declares that the tutelage of women was founded on no reasonable basis.

The *lex Claudia*, A. D. 45, had suppressed the tutelage of the *agnati* over women of free birth, and even the modified tutelage of women had fallen into disuse in the time of Justinian.

[D. MULIEBRIS TUTELA.

The tutorship of women, treated in Gaius i. 189-193, is not here considered, having fallen into disuse in Justinian's time. For the causes of this, see Poste's Gaius, 189-193, Greene's Roman Law, p. 76, Maine, A. L. p. 153.]

Tit. xxi.—THE AUTHORITY OF TUTORS.

The general rule is, that the pupil acting without the authorization of his tutor, can make his position better but not worse : thus, a promise made to a pupil is binding, but one made by him is not. But in acts of a highly solemn nature the authority of the tutor is necessary to complete the legal status of the pupil as a contracting party.

When the pupil was less than eight years old, the interposition of the authority of the tutor could very rarely give validity to the acts and words of the pupil, who was *infanti proximus* ; i.e. capable of speech, but barely capable of intelligent speech ; between the ages of 8 and 14 the child was presumed to understand the meaning of words, but not to have power of forming a judgment, and this judgment being supplied by the tutor made the pupil's acts valid.

A solemn act, such as accepting an inheritance, *bonorum possessio*, or inheritance given on trust, could not be performed without the authorization of the tutor ; such act being considered of too great solemnity.

The tutor's authorization must be given at once ; if subsequent to the act it is of no effect. In case of a suit between a pupil and tutor, the former has a *curator* given him, who, being appointed for the purposes of the suit, is not a tutor, but is properly termed a curator.

Tit. xxii.—MODES IN WHICH TUTELAGE IS
EXTINGUISHED.

1. By the pupil attaining the age of puberty, which was fixed at 14 for boys and 12 for girls.
2. By the pupil being arrogated, suffering deportation, or being made a prisoner or slave, or suffering any *capitis deminutio*.
3. By the fulfilment of the condition subject to which the appointment is made.
4. By the death of the pupil or tutor.

The tutelage is also extinguished :

1. By the tutor undergoing *maxima* or *media capitis deminutio*, or, in case of a *tutor legitimus*, *minima capitis deminutio*.
2. By removal for misconduct, or on the tutor's own application upon valid grounds.

Tit. xxiii.—CURATORSHIP.

Males over 14 and females over 12 received curators to protect their interests until they attained the age of 25 years. The Twelve Tables had provided for the appointment of curators to look after madmen and prodigals ; the first legislation, probably, in the interests of minors was the *lex Lætoria* (mentioned by Plautus), which ordered a "*restitutio in integrum*" in the case of a fraud practised on a person less than 25 years old. Marcus Antoninus ordered that curators should be appointed on the application of the minor.

Appointment of curators.

They could not be appointed by testament, but if so nominated, the prætor or *præses*, as the case might be, would usually carry out the testator's wishes.

Appointment of curators against the will of the minor could only be made :

1. For the purpose of a law-suit.
2. To protect the tutor or a debtor from suspicion in paying debts due to the minor ; for in case of suspicion of fraud the prætor would, if the minor had no curator to aid him, order a *restitutio in integrum*.

[Madmen, deaf or dumb people, or those subject to any perpetual disease so as to be unable to manage their affairs, have curators, even after the age of twenty-five years.]

The agnates' right to curatorship.

The nearest agnate was the curator if the minor's father had died intestate ; in default, the magistrate appointed, as he did also if the minor was heir under the father's testament, it being presumed that the testator wished to exclude the *agnati* by making his son heir.

If the tutor is unfit permanently or temporarily to discharge his duties he may have a curator appointed to act with him.

If the tutor is prevented from administering the affairs of the pupil, and if the latter is either absent or an infant, then an "*actor*" or agent may be appointed by the magistrate at the tutor's risk to act for him. If the pupil were present and past infancy he could, with the aid of the tutor, appoint the agent himself.

[The guardians of madmen were termed "*curators*," on account of the uncertain duration of the charge. These were capable of going through legal forms, but, unless the curator gave his assent, the prætor would give relief against any prejudicial consequences.]

Tit. xxiv.—*Securities for the performance of duties by curators and tutors.*

1. The prætor sees that the guardians give security for the due performance of their duties.

Exceptions to this rule :—

(*a*) A tutor appointed by testament, being chosen presumably for his fitness.

(*β*) A tutor or curator appointed after inquisition, which is also a sufficient test of fitness.

The security given was generally that of the guarantee of a third person.

If two or more tutors or curators are appointed by testament or after inquisition, any of them who offers security will be preferred to the others ; in default of security being offered, the person appointed by the testator to manage the property will act ; in default of this appointment the majority select a manager ; in default of agreement, the prætor selects one.

2. A subsidiary action might be taken against the magistrate for taking insufficient security or omitting to take any ; this action lies also against the magistrate's heirs.

3. In case the tutors or curators do not give security, their goods may be seized as pledges.

4. Tutors may be compelled by the *actio tutelæ* to account to their pupils when they arrive at puberty.

Tit. xxv.—*Grounds of exemption from the office of curator or tutor.*

A. By the lex Papia Poppæa any one at Rome who had three children living, in Italy four, or in the provinces five, was exempt from liability to serve as tutor or curator. Grandchildren by a son when they succeed to the position of their father count as children. Sons killed in battle were counted as if living.

B. To ensure the due discharge of public offices the following persons were exempt :—

(*a*) Those engaged in the management of the treasury.

- (β) Persons absent in the service of the state ; those appointed before departure are excused during absence. If called to a new tutelage on their return they might claim a year's vacation.
 - (γ) All persons holding magisterial rank.
 - (δ) Military persons, who cannot on any grounds be admitted.
 - (ε) Grammarians, rhetoricians, and physicians who were authorized to practise by the state ; philosophers, priests who were councillors, and all clerici.
- C. The guardian is exempt if he is in an adverse position to the ward.
1. In case of the guardian having a lawsuit with the ward if the suit regard the whole property of the ward.
[Justinian subsequently decided that no debtor or creditor of the ward could act as curator or tutor.]
 2. Appointment by the father through enmity. On the other hand a man who has promised the father to serve as tutor cannot be excused.
 3. Enmity on the part of the guardian against the parent of the ward. A man whose status has been called in question by the ward's father is also exempt.
 4. A husband could not by Justinian's legislation serve if appointed curator to his wife.
- D. Inability to sustain the burden of the office was a ground of exemption.
1. The performance of the duties of three guardianships (curatorships or tutorships).
 2. Poverty, if such as to render a man incapable of bearing the burden of the office.
 3. Illness, if it prevent a man from attending to his own affairs.
 4. Inability to read is usually a valid excuse.
 5. Persons over 70 years of age ; minors (under 25) were also prohibited from serving.

A person who has served as tutor can refuse the office of curator.

A person wishing to excuse himself might offer his excuses within fifty days, and if one failed he might resort to another. A proportionate extension of time was made if the person was at a distance. Tutors are appointed for the whole of the patrimony, but other tutors might be appointed to act if the property was in very different localities.

Tit. xxvi.—SUSPECTED TUTORS AND CURATORS.

The prætor at Rome, or the *præses* in the provinces had the power of removing suspected guardians, either tutors or curators, even a *tutor legitimus*. If the tutor was a *patronus* or an ascendant, the *libertus* or descendant, as the case might be, might not bring an action involving infamy to the accused, but could only invoke the protective power of the law.

Who might accuse.

The action was a quasi public one ; it might be brought by a woman if interested in the ward.

An *impubes* could not accuse his tutor, but a minor might accuse his curator.

A tutor might, if suspected, be forbidden to even enter upon his office (according to Justinian), or might be removed during its continuance : and if fraud was proved he became " infamous."

Before the accusation was proved, the tutor's functions were suspended : if he died before the process was completed, the action fell to the ground.

[If the tutor makes no provision for the maintenance of the pupil his goods may be seized and perishable things sold, and he will be removed as if he was suspected.

If the tutor makes a false allegation of the insufficiency

of the pupil's means to support him, he is to be handed over to the *præfectus urbi* for punishment.]

A freedman guilty of fraud when tutor to the son or grandson of the patron, is also to be punished by the *præfectus urbi*.

The offer of sufficient security will not prevent a tutor's removal for fraud.

Poverty of the guardian is not to be a sufficient cause of removal.





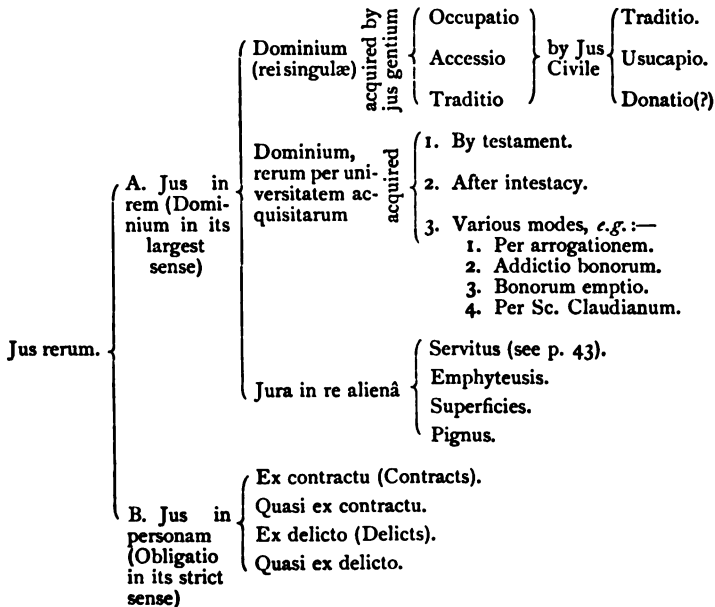
II. THE LAW OF THINGS.

INST. BOOK II. BOOK III. i.-xii.

Jus rerum.

(A.) DOMINIA. JURA IN REM : RIGHTS OVER THINGS.

Table showing the arrangement of the second and third books of the Institutes.



“The distinction between the Law of Things and the Law of Persons rests upon the notion of *status* or condition. The Law of Persons is that part of the law which relates to status or condition. The Law of Things is *the* law—the *Corpus Juris* minus the law of *status* or condition.

“The Law of Persons is the law of *status* or conditions, detached for the sake of convenience from the body of the legal system.”

(Student's Austin, p. 347; G. Campbell's Analysis, pp. 136, 137.)

The advantages gained by the division of a legal system into the Law of Persons and the Law of Things are :

1. Brevity is attained by what can be stated generally of rights and duties being stated in a detached form from everything relating to those rights and duties as regarding particular classes of persons.
2. The law regarding classes of persons is rendered more knowable, through being arranged under separate heads.
(See Analysis of Austin's Jurisprudence, p. 137.)

Tit. i.—DIVISIONS OF THINGS (*RES*).

Definition of the word Thing (*Res*) in the strict sense.—

“A thing is such a permanent object, not being a person, as is sensible or perceptible through the senses.”

Austin, G. Campbell's Analysis, p. 59.

RES.

1. The word *Res* is employed by the Roman lawyers to denote not only Things in the above sense, but also acts and forbearances, and sometimes even persons, considered as the subjects or objects of rights and obligations.
2. The word also has an extended meaning (as below, p. 34), and is taken to include, not only the above meanings, but rights and obligations themselves. See Austin, Student's ed., p. 168, Lect. xiii.

The best method of dealing with the law of things would be to consider

- (1) The principal divisions of things themselves ;
 - (2) The distinctions between rights in things according to the extent of the right ; and
 - (3) To consider the modes of acquiring those rights.
- (Sandars' Justinian, p. 87.)

First division of Things, by Justinian.

Things are divided into

- (A) Things *in nostro patrimonio*, subjects of rights of property of individuals.
- (B) Those "*extra nostrum patrimonium*," not capable of being the subjects of rights of individuals. This second class is subdivided into
 1. *Res communes*, belonging to all men, who may use them at pleasure. For example, the sea or the air.
 2. *Res publicæ*, the property of a particular people ; for instance, rivers, ports, roads and public places.

The use of the banks of a river was considered incidental to the right of using the river, though the banks themselves were the property of the adjoining land-owner.

3. *Res universitatis*, or the property of corporate bodies ; for instance, buildings, race-courses, theatres, &c., belonging in common to a city or corporation.

Res universitatis can be used by every member of the universitas.

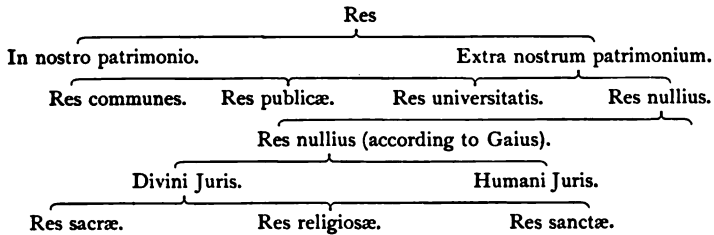
4. *Res nullius*. These are either unappropriated, unoccupied, and ownerless, or are things to which from their sacred character no right of property can attach. Examples of *res nullius* are undiscovered land, or sacred buildings.

In the old pagan law "*res divini juris*," which form

a portion of the class of "*res nullius*," were further divided as follows, in the time of Justinian :—

1. *Res sacræ*. Things duly consecrated by the pontiff ; for instance, temples and sacred buildings. In the old law *res sacræ* were those dedicated to the celestial gods, *res religiosæ* those dedicated to the infernal gods.
2. *Res religiosæ*. Things or places dedicated informally by individuals, as sepulchres or burying-places ; the mere burial of a body in any placemade it *religiosus*, if the person burying was the owner or had the owner's consent.
3. *Res sanctæ*. Things which without being sacred were protected from injury by penalties for the violation of their security ; for example, the walls of cities.

The foregoing divisions will be made clear by the following table :—



Things were further divided by Gaius into :

1. *Res Mancipi*, or those capable of alienation by *mancipatio*.
2. *Res nec Mancipi*, or things not so alienable. This distinction was obsolete in the time of the Institutes.

Other divisions of things are into :

1. *Moveable* and *immoveable*.
2. *Fungible* and *not fungible*.
3. *Consumptibles* and *non consumptibles*.
4. *Corporeal* and *incorporeal*. See Inst. Just., ii. 2.

The division into things corporeal and incorporeal implies an extension of the meaning of the word Thing

to include rights and duties themselves; the purpose of the division was probably to distinguish between such objects as were capable of *traditio* and such as were not. All corporeal things were capable of *traditio*, but such incorporeal things as could be transferred were the subject of *quasi traditio*.

MODES OF ACQUIRING PROPERTY IN PARTICULAR THINGS.

[Definitions of Property or dominium.

Austin's, Lect. xiv.—Ownership or dominium is a species of *jus in rem* residing in a person over or to a person or thing, and availing against other persons universally or generally; a right to use or deal with the subject in a manner or to an extent which though not unlimited is indefinite.

Sandars' Justinian.—The rights of the *dominus*, or owner, are summed up in the *jus utendi*, the right of using, *jus fruendi*, the right of enjoying the produce of, and *jus abutendi*, the right of consuming the thing if capable of consumption.]

A.—BY THE JUS GENTIUM. OCCUPATIO, ACCESSIO, TRADITIO.

Modes of acquiring property in particular things	{	A. By the Jus Gentium	{	Occupatio, p. 36. Accessio, p. 37. Traditio, p. 40.
		B. By the Jus Civile	{	Mancipatio, p. 48. Obsolete temp. Just. In jure cessio. Obsolete temp. Just. Traditio, p. 40. Usucapio. Donatio?

I.—OCCUPATIO.

Two things are essential for acquisition of ownership by *occupatio*.

(α) The thing must be "*res nullius*."

(β) The person acquiring it must bring it into his own possession with the intention of keeping it as his own.

Things that may be acquired by *occupatio* are wild beasts, birds, fishes, &c. If a thing of this description escape and regain its natural liberty so as to be out of the power of the occupant, all property in it is lost.

Bees are considered wild by nature ; any man may hive another's swarm if on his own land.

Animals that are in the habit of going and returning are considered as private property as long as they retain this habit.

Fowls, ducks and geese are not capable of being acquired by *occupatio*, if out of the owner's possession.

Possessions of an enemy were considered "*res nullius*," and belonged to the captor or first occupant. Certain things, such as land, slaves, and horses, by "*jus post-liminii*" revert to their original owners on recapture from the enemy. Precious stones, gems, &c., found on the sea shore can be acquired by *occupatio*.

The theory of *occupatio* is thus briefly described :—
 " *Quod ante nullius est id naturali ratione occupanti conceditur.*"—INST. 2, i. 12.

Occupatio is thus described by Austin, Lect. liv. (sub fin.) :
 " The acquisition of *jus in rem* by occupancy is effected by the apprehension of a thing which has no owner, with the purpose of acquiring it as one's own."

Sir Henry Maine on Occupancy :—" The Roman principle of occupancy, and the rules into which the jurists expanded it, are the source of all modern international law on the subject of capture in war, and

of the acquisition of sovereign rights in newly-discovered countries. They have also supplied a theory of the origin of property which . . . in one form or another, is acquiesced in by the great majority of speculative jurists. . . . It was once universally believed that the proceeding implied in occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. . . . I venture to state my opinion that the popular impression in reference to the part played by occupancy in the first stages of civilization directly reverses the truth. . . . The notion of occupancy conferring a title to '*res nullius*,' so far from being characteristic of very early societies, is, in all probability, the growth of a refined jurisprudence and of a settled condition of the laws."—*Anc. Law*, pp. 245-256.

2.—ACCESSIO.

The word *accessio* means properly an increase or addition, *sc.* to something formerly belonging to us. It is also used to denote the mode in which this increase or addition becomes our property.

Examples of accessio :—

The general rule is that the produce of land and the young of animals belong to the owner of the land or animals.

(a.) *Alluvio.*

The alluvial land added by a river to the bank became the property of the neighbouring land-owner ; but a piece of land detached and carried away by the river still belonged to the original owner, unless it remained unclaimed long enough for the trees to take root.

An island formed in the middle of a river becomes the property of the adjacent land-owners equally ; if formed

nearer one of the banks it belongs to the owner of the bank.

In case a river changes its course, the old bed belongs to the persons whose land adjoins the river, in proportion to the extent of their estates on the bank.

Mere inundation does not make any alteration in the ownership of the land.

(b.) *Specificatio.*

If a man has made anything with the materials of another the general rule is, that if the thing can be reduced to its former material, then it belongs to the owner of the material ; if this is impossible, then the maker becomes the owner. In each case the person who took by *accessio* had to compensate the other for the labour or materials. The owner could recover the object by a *vindicatio*, or real action, while the other could obtain compensation by a *condictio*, or personal action.

The Proculians held that the maker of a thing out of another's materials was the owner, for it was a new thing that he made ; the Sabinians held that there was merely a change of form, and that the thing made belonged to the owner of the materials. The opinion of Justinian, as above stated, was in effect a compromise between these two views.

If the materials are partly the property of the maker the thing made belongs to him, unless some of the materials are accessory, when all would belong to the owner of the principal thing.

Confusio, commixtio.

If two persons' materials are mixed together the mixture is their common property. If such a thing as wheat belonging to two different persons is mixed together by accident, or without the consent of either owner, then it was not owned in common but was divided by

the judge; or if one keeps the whole the other can claim compensation. Mixture of things not liquid is called *commixtio*; of liquids, *confusio*.

(c.) If a person builds on his own ground with the materials of another unwittingly, he is the proprietor of the building. The owner of the materials can (1) recover double value by the action "*de tigno injuncto*;" or (2) in case of the destruction of the building, he can reclaim the materials, if he has not obtained the double value as compensation.

If the person building had used another's materials knowingly, he could be compelled, when sued in an action "*ad exhibendum*," to pay whatever sum the judge thought fit, in default of returning the materials.

If anyone builds on the ground of another with his own materials the building belongs to the land-owner, the builder being supposed to part willingly with his materials.

If, however, the builder believes *bonâ fide* that the land is his own, he can refuse to deliver up the building until indemnified by the owner of the land for the labour and materials expended.

(d.) A tree planted and taking root in the land of another person belongs by *accessio* to the owner of the land, whoever may have planted the tree. If planted by a *bonâ fide*-possessor compensation is payable, as in the similar case of a building.

(e.) Written characters belong by accession to the owner of the parchment or paper on which they are written.

But in case of a picture painted on the tablet of another the owner of the tablet may, by a *utilis actio*, recover the *value of the tablet*; the painter may claim the tablet and picture by a "*vindicatio recta*." This rule prevails on account of the disparity in value between the tablet and the picture.

(f.) A *bonâ fide* possessor of a thing which he had received in a legal method from one (whom he believed to be the owner) was entitled, as against every one except the owner, to the fructus or fruits; and if these had been consumed the owner could not recover. A *malâ fide* possessor was bound to give full compensation.

The usufructuary owns the produce of the land when it is gathered; till then it belongs to the owner of the soil.

[The young of animals are counted as *fructus*, but the child of a slave is not so reckoned, and belongs to the owner of the slave.]

(g.) Treasure found on a man's land by himself belongs to the finder (by *accessio*): if found on another's land, half to the finder, half to the owner of the land.

The mode of acquisition by *accessio* is most forcibly illustrated by the rules of English law regarding fixtures, the maxim of "*quidquid plantatur solo, solo cedit*," answering nearly to the maxim of Roman Law, "*Omne quod inædificatur solo, solo cedit*." See Brown's Law Dict. sub tit. *Accessio*.

3.—TRADITIO.

All corporeal property might be transferred by this mode of alienation, which was the prevailing one in the time of Justinian.

There were three essentials to tradition :—

1. The transferor must be the owner.
2. The transferee must be placed in *legal possession*.
3. The transferor must intend to pass the property, and the transferee to receive the thing as owner.

The subject of the transfer must be within the power and possession of the transferee.

"Although delivery of possession, like the solemnities of mancipation and surrender, is, as compared with the will or intention of the parties, only an evidentiary and

symbolic part of the title, yet both parcels, the external as well as the internal act, are indispensable in the transfer of dominion.

“*Traditionibus et usucapionibus dominia rerum non nudis pactis transferuntur.*”—Cod. 2, 3, 23. Tradition and usucapion, not naked convention, operate a transfer of dominion.

Again, “*Nunquam nuda traditio transfert dominium sed ita si venditio vel aliqua justa causa præcesserit propter quam traditio sequeretur.*”—Dig. xli. 1, 31. “Mere delivery does not transfer property, but must be based on contract of sale or some other sufficient inducement.”—Poste’s Gaius, § 65.

The property does not pass in a thing sold till the price is paid, unless the seller accept the buyer’s credit, security, or pledge.

The agent of the transferor, if he has full powers of management, is able to make a *traditio* for his principal.

The possession of the transferee might precede the intention of the transferor to pass the right of ownership, and the *traditio* was complete if, when the transferee was in possession, the transferor expressed his intention of making the *traditio* and the other concurred.

The *traditio* may be symbolical, as by the transfer of the key of a granary where corn is stored, but in such a case the transferee must be at the spot and in a position to exercise power over the subject matter of the transfer.

Can *traditio* be to an uncertain person?

In the case of money distributed to be scrambled for by a crowd, is the ownership acquired by *traditio*, or is the money regarded as *res nullius* on abandonment by the owner, and acquired by *occupatio*?

The latter is the view of Justinian.

[Things thrown overboard in a storm are still the pro-

perty of the owners, for they do not wish to lose the ownership. In all such cases the intention of the owner to cease to be the owner is necessary to make the object a "*res nullius*."]]

Tit. ii.—The distinction between corporeal and incorporeal things is given by Justinian here as an introduction to the consideration of Servitudes. (See p. 34.)

Tit. iii.—SERVITUDES.¹

A servitude is a *jus in re aliend*, and is a definite fraction of property or dominion in the given subject which resides in another or others. (See Austin, Lect. xlix.)

Savigny's definition of servitude is "a single or particular exception (accruing to the benefit of the party in whom the right resides) from the general power of user and exclusion residing in the owner of the thing."

Dominium and servitus compared.

Both are *jus in rem*. The right of dealing with the subject in the case of dominium is larger and *indefinite*; in the case of servitus the right is narrower and *determinate*.—Austin, Lect. xlix., Campbell's Analysis, p. 150.

Servitudes are either positive or negative.

Positive servitudes give the person entitled the right to use the subject, and are said (with regard to the owner of the subject) to consist "*in patiendo*."

Negative servitudes give the owner of the servitude a right to a *forbearance* on the part of the owner of the subject, and are said to consist (with regard to the owner) *in non faciendo*.

The words *positive* and *negative* are applied to servitudes not as they affect the owner of the subject, but as they affect the person entitled to the servitude.

¹ Justinian, after treating of titles to particular things according to natural law, gives an account of servitudes before discussing titles "*Jure civili*"; servitudes are considered from pp. 42-48.



The following tables will serve as an introduction to the consideration of servitudes:—

Jus in Re Alienâ	{ Servitutes. (Emphyteusis) not mentioned in the Institutes. (Superficies) not mentioned in the Institutes. (Pignus) not mentioned in the Institutes.																		
Servitutes	<table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Real</td> <td style="border-left: 1px solid black; padding-left: 10px;"> <table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Prædiorum Rusticorum</td> <td style="border-left: 1px solid black; padding-left: 10px;"> <table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Iter.</td> </tr> <tr> <td style="padding-right: 20px;">Actus.</td> </tr> <tr> <td style="padding-right: 20px;">Via.</td> </tr> <tr> <td style="padding-right: 20px;">Aquæductus.</td> </tr> </table> </td> </tr> <tr> <td style="padding-right: 20px;">Prædiorum Urbanorum</td> <td style="border-left: 1px solid black; padding-left: 10px;"> <table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Various, <i>e. g.</i></td> </tr> <tr> <td style="padding-right: 20px;">Tigni immittendi.</td> </tr> <tr> <td style="padding-right: 20px;">Altius non tollendi.</td> </tr> </table> </td> </tr> </table> </td> </tr> <tr> <td style="padding-right: 20px;">Personal</td> <td style="border-left: 1px solid black; padding-left: 10px;"> <table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Usufructus.</td> </tr> <tr> <td style="padding-right: 20px;">Usus.</td> </tr> <tr> <td style="padding-right: 20px;">Habitatio.</td> </tr> </table> </td> </tr> </table>	Real	<table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Prædiorum Rusticorum</td> <td style="border-left: 1px solid black; padding-left: 10px;"> <table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Iter.</td> </tr> <tr> <td style="padding-right: 20px;">Actus.</td> </tr> <tr> <td style="padding-right: 20px;">Via.</td> </tr> <tr> <td style="padding-right: 20px;">Aquæductus.</td> </tr> </table> </td> </tr> <tr> <td style="padding-right: 20px;">Prædiorum Urbanorum</td> <td style="border-left: 1px solid black; padding-left: 10px;"> <table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Various, <i>e. g.</i></td> </tr> <tr> <td style="padding-right: 20px;">Tigni immittendi.</td> </tr> <tr> <td style="padding-right: 20px;">Altius non tollendi.</td> </tr> </table> </td> </tr> </table>	Prædiorum Rusticorum	<table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Iter.</td> </tr> <tr> <td style="padding-right: 20px;">Actus.</td> </tr> <tr> <td style="padding-right: 20px;">Via.</td> </tr> <tr> <td style="padding-right: 20px;">Aquæductus.</td> </tr> </table>	Iter.	Actus.	Via.	Aquæductus.	Prædiorum Urbanorum	<table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Various, <i>e. g.</i></td> </tr> <tr> <td style="padding-right: 20px;">Tigni immittendi.</td> </tr> <tr> <td style="padding-right: 20px;">Altius non tollendi.</td> </tr> </table>	Various, <i>e. g.</i>	Tigni immittendi.	Altius non tollendi.	Personal	<table style="border-collapse: collapse;"> <tr> <td style="padding-right: 20px;">Usufructus.</td> </tr> <tr> <td style="padding-right: 20px;">Usus.</td> </tr> <tr> <td style="padding-right: 20px;">Habitatio.</td> </tr> </table>	Usufructus.	Usus.	Habitatio.
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Servitudes were called *real* when they were associated with the ownership of some *prædium*, or immoveable, so that the owner of this immoveable, called the "*res dominans*," possessed the benefit of the servitude over the subject termed the "*res serviens*."

A servitude given to a particular person was termed a personal servitude, and was not attached to the ownership of any particular thing.

Real and personal servitudes ; the nature of the distinction.

Real servitudes are so called because they are said by an ellipsis to reside in the *prædia* or things with which they are associated.

The expression *personal* is merely a negative term as applied to servitudes, signifying that the right does *not* reside in the person entitled as being the owner or occupier of a determinate thing other than the subject of the servitude or *res serviens*.

REAL SERVITUDES.

There are two classes of real servitudes, those of *rural immoveables* and *urban immoveables*.

Servitudes were said to be of rural immoveables when they affected the soil, of urban immoveables when they affected the superficies or anything raised upon the superficies, for example, buildings.

The former are :

1. *Iter*, or right of way for persons.
2. *Actus*, or right of driving beasts or vehicles over the land of another.
3. *Via*, or right of driving any sort of vehicle, and of using the way in any manner (*e.g.* for drawing timber).

The width of road required for a *via* was eight feet where the road was straight, and sixteen feet at the turnings ; it was compulsory on the owner to keep the *via* this width.

4. *Aquæductus*, or right of conducting water over the land of another.

The servitudes of urban immoveables were chiefly attached to buildings.

The principal were :

1. *Oneris sustinendi*. When a wall or pillar of the *res serviens* had to support the weight of some part of the *res dominans*.
2. *Tigni immittendi*. When support had to be given to a beam of the dominant tenement.
3. *Altius non tollendi*. When the owner of the *res serviens* was bound not to build higher, so as to interfere with the lights, &c. of the *res dominans*.
4. *Stillicidii recipiendi*. When the *res serviens* was subject to the right of the owner of the *res dominans* to receive rain water coming from the other.

The servitude *non recipiendi* is the converse, and is the extinguishment of the other.

5. *Ne luminibus officiatur.* When the *res serviens* was not to be so dealt with as to injure the lights of the *res dominans* (whether by building, planting, or otherwise). Servitudes of rural immoveables were, from their nature, used at times only, those of urban immoveables (*sc. tigni immittendi*) continuously. In these latter, possessory rights could be acquired. Real servitudes could, in the time of Justinian, be created by agreements and stipulations or by will : in the time of Gaius, real servitudes *rusticorum prædiorum* could be created by mancipatio or *in jure cessio*, and real servitudes *urbanorum prædiorum* by *in jure cessio* only.

PERSONAL SERVITUDES.

1. *Ususfructus.*

[*Ususfructus*, *Usus*, and *Habitatio*, here classed with servitudes, do not appear to be servitudes properly so called, for in each case the person entitled to the servitude has an indefinite power or liberty of dealing with, or using the object. The right, therefore, is not a definite subtraction from the indefinite power of user or exclusion residing in the owner of the subject. It is not a servitude properly so called, but a mode of property or dominion. (Austin, lect. 1.)]

“Usufruct is the right of reaping and using the fruits of things belonging to others without destroying their substance.” “*Jus alienis rebus utendi fruendi salvâ rerum substantia.*”

The right of usufruct consisted of two distinct parts:

1. The *jus utendi*, or right of making every possible use of the thing without consuming it or taking the fruits of it, and
2. The *jus fruendi*, or right of taking the fruits of the thing subject to the servitude.

[The words "*salvâ rerum substantia*" above, are sometimes taken to be equivalent to "while the subject of the servitude exists," as upon the destruction of the thing the servitude ended.]

Methods of creating the servitude "Ususfructus."

1. By testament, as when the bare ownership is given to the heir and the usufruct to the legatee, or conversely, the usufruct to the heir, and the bare ownership to the legatee.
2. By agreements and stipulations, followed by quasi-tradition.
3. By reservation upon an alienation of the subject.
4. By "*adjudicatio*" and "*lex*."

A usufruct may exist, not only with regard to immovables, but also in moveables, such as cattle or slaves.

A quasi-usufruct may be established even in things *quæ usu consumuntur*, the usufructuary having to give security to return a similar thing to what he had received, or its value.

Usufruct was terminated :

1. By the death of the usufructuary.
2. By the *maxima* or *media capitis deminutio* of the usufructuary (previously to Justinian also by the *minima capitis deminutio*).
3. By non-usage in the prescribed manner.
By Justinian's legislation, non-usage for three years extinguished usufruct of moveables, ten years destroyed that of immovables if the usufructuary was present, twenty years if he was absent.
4. By surrender to the owner of the *nuda proprietas*.

[A usufruct could not be transferred to a stranger, being personal in its nature.]

5. By *consolidatio*, which took place when the same person became the owner of the *res dominans* and *res serviens*. Cf. Merger in English Law.
6. By the destruction of the thing.

When the usufruct is extinguished, the rights of the usufructuary revert to the owner of the *nuda proprietas*. But if two persons had a joint interest in a usufruct and one died, his share went to the other usufructuary, and did not revert to the *nuda proprietas*.

Tit. v.—2. *Usus*.

The *jus utendi* was a portion of usufruct, which was the *jus utendi* and the *jus fruendi*.

The person entitled could make any use of the thing, but had none of the produce for himself.

The usuary could not let, sell, or allow another to exercise his rights.

In cases where the mere use would give no advantage, such as that of land, the usuary was allowed to take enough of the produce to satisfy his daily wants.

Usus was created and extinguished by the same methods as usufructus.

The "*jus utendi*" was a right to exclusive use, even against the owner of the subject. It was purely personal and indivisible.

3. *Habitatio*.

Habitatio, or the right of dwelling in the house of another, was expressly ranked among servitudes by Justinian, who allowed the person entitled to let the house to a stranger. Before this enactment it was rather a form of *usus*, and consisted rather "*in facto quam in jure*," according to Modestinus, and it did not cease by non-usage or by *capitis deminutio minima*.

Rights of servitude were protected by possessory interdicts and also by the real action "*In rem confessoria*," to protect the owner of the servitude in his quasi-possession.

[The *Actio negatoria* enabled an owner to have his property proclaimed free from a servitude.]

[OTHER JURA IN RE ALIEN, NOTÂ MENTIONED BY
JUSTINIAN.

1. *Emphyteusis* was the right of enjoying all the fruits of the land of another and also of disposing of it, in consideration of the payment of a fixed annual sum. Both lands and buildings were subjects of this tenure.
2. *Superficies* was a right almost similar to *Emphyteusis*, except that it related to the surface, *i. e.*, buildings on the land.
3. *Pignus* was a right of the creditor in the thing pledged as security for a debt: if this thing remained in the hands of the debtor the right was styled *hypotheca*.

In case of a thing being pledged to more than one person the rule was, *prior tempore, potior jure*. Some hypothecæ were specially favoured: the *fiscus* or treasury had a first claim for taxes, and the wife had a claim for her dowry.]

MODES OF ACQUIRING PROPERTY IN PARTICULAR THINGS.

See table, p. 35.

B. BY THE CIVIL LAW.

MANCIPIATIO, IN JURE CESSIO, USUCAPIO.

1. *Mancipatio*.

Obsolete in the time of Justinian, the distinction between *res Mancipi* and *res nec Mancipi* being abolished, *res Mancipi* were susceptible of *traditio*.

2. *In jure cessio*. Also abolished by Justinian and superseded by *traditio*.

3. *Usucapio*.

This was a method of acquiring property by undisturbed possession. The time fixed by the old law was one year in case of a moveable, or two in the case of an immoveable. Justinian altered the periods to three years in case of moveables, and *possessio longi temporis* (i. e., ten years in the case of persons present and twenty years if absent) in case of immoveables.

The essentials of *usucapio* were as follows :—

1. *The thing must have been susceptible of usucapion.*

The following things were incapable of being subjects of it :

(a.) Consecrated things (*res sacræ* and *religiosæ*).

(b.) Free men.

(c.) Things stolen (*res furtivæ*).

No length of possession avails in the case of stolen articles, according to the law of the Twelve Tables and the *lex Atinia*.

If a thing was made over by any one who knew himself not to be the owner, it was presumed that the thing was stolen.

If, however, the heir sold or gave away a thing which had been lent to or deposited with the ancestor believing it to be part of the inheritance, in this case the person receiving the thing *bond fide* could acquire by usucapion.

If the usufructuary of a female slave sold or gave away her child, believing he had the right to do so, the alienee might take by usucapion.

In the case of immoveables a *bond fide* purchaser from a *malâ fide* possessor was allowed to acquire by usucapion.

If the owner had recovered the thing, a subsequent *bond fide* possessor could acquire by usucapion.

(d.) Things belonging to the *fiscus* were not susceptible of usucapion. Before being reported to the treasury *bona vacantia* could be so acquired, according to Papinian.

2. *The possessor must come into possession ex justâ causâ or by a legal title.* For example, by *donatio, dos, derelictio, or solutio.*
3. The commencement of the possession must be *bonâ fide.*
4. There must be legal possession, which consists of physical detention and the animus or intention of exercising over it the rights of ownership.
5. There must have been the period of possession, three, ten, or twenty years, according to the circumstances of the case (see p. 49).

The *bonorum possessor* may count with his own possession that of the deceased person if it is *bonâ fide*, adding the two together; if the latter possession is *malâ fide* there can be no usucapion at all.

A *bonâ fide* purchaser from a seller whose possession was *bonâ fide*, could add the two periods of possession together and count them towards usucapion.

By the legislation of Justinian a prescription or possession *longissimi temporis* of thirty years (or forty in the case of ecclesiastical property) gave the legal ownership.

Things acquired from the State were secure against attack, by a constitution of Zeno; an owner of anything alienated by the treasury could bring his action within four years.

[The interruption of *usucapio* was termed *usurpatio.*] Usucapion, more especially in the form known as *longissimi temporis præscriptio* (or usucapion which was not vitiated by any flaw, such as the res being "*furtiva*" or "*violenta*," and was complete after thirty years),

requires to be carefully distinguished from the limitations of actions with which it has been co-ordinated by some civilians under the name of Acquisitive, as opposed to Extinctive, Prescription. Actions styled "*temporales*" (as opposed to *perpetuae*) were such as could only be brought within a certain period from the time when the right of action accrued. Subsequently they were limited so that no action could be brought after thirty years from the nativity of the action, or the time when the right of action accrued.

Usucapion and the limitation of real actions, which in some respects resemble, may be thus distinguished. Limitation is the extinction of a right by neglect of the person entitled, by his omission to enforce his remedy. Usucapion is the acquisition of a right by something positive on the part of the acquirer, his strictly defined possession during a certain number of years. Poste's Gaius, p. 193.

[Forms of Usucapion only mentioned by Gaius :—

1. *Usucapio pro herede. Or lucrativa*—

If any one obtained portion of an inheritance of which the heir had not taken possession, he might acquire it by usucapion in one year. The object of this was that the inheritance should be entered upon without delay, so that the sacred rites might be duly performed, and that the creditors might know to whom they had to look for the satisfaction of their claims.

2. *Usureceptio*.

After the owner of a thing had transferred it to another as security *fiduciae causa*, he might, after getting it back into his own possession, obtain the *dominium* in it, by usucapion of one year. But if the object was security for a debt, the period of usucapion would not begin to run till the money was paid.

The owner of pledges forfeited to the State may acquire

by usucapion of two years as against a purchaser from the State.]

Tit. vii.—DONATIO.

Donatio or gift was not a peculiar mode of acquisition, but an acquisition by delivery with a particular motive for the transfer.

Donatio is of two sorts—

1. *Donatio mortis causâ.* 2. *Donatio inter vivos.*

1. *Donatio mortis causâ* is a gift made upon condition that upon the death of the donor, the donee shall have it as his own, but in case the donee predecease the donor the property remains with the latter.

Every kind of thing could be given in this way.

There are two essentials of *donatio mortis causâ* :—

1. It must be made with a view of meeting the case of death, and
2. It must take effect only if death occurs, and must be revocable at any time previous to the donor's decease.

The condition might take two forms :—

1. *The gift might be to the donee on the happening of the event, i.e.* death, and not till then ; for example,—A gift of a horse to a person if the donor dies in a certain undertaking. On the death of the donor the donee takes *ipso jure*, and in this case *donatio* is a special mode of acquisition.
2. *The delivery of the thing might be made at once*, subject to a conditional redelivery in case of the non-fulfilment of the condition, as in the case of a gift to a person subject to redelivery, if the donor survive in a certain enterprise. In this case by the old law, the *dominium* passed to the donee, and the donor only had a personal action against him in case of non-return of the

gift. The opinion of the later jurists was that the *dominium* resulted *ipso jure*, and that the donor had a real action for the recovery of the gift.

Justinian made *donatio* nearly equivalent to "*legatio*," ordering that "*per omnia fere legatis connumeretur.*"

The heir could keep one-fourth of the *donatio* in the same way as that of the *legatum* by the *lex Falcidia* (according to a constitution of Severus).

2. *Donatio inter vivos.*

Gifts by this form differ from those made *mortis causa* in not being made in consideration of death. When complete they are irrevocable. Completion is thus defined by Justinian : "*Perficiuntur autem quum donator suam voluntatem scriptis aut sine scriptis manifestaverit.*"

The *donatio* was complete without tradition, which however might follow.

Revocation of a *donatio* might take place if the recipient of the gift was ungrateful.

Before the time of Justinian an agreement to make a *donatio* was invalid unless made by *stipulatio*, and the effect of Justinian's legislation was only to make the donor carry out the *traditio* which he had promised, and it was by this *traditio* that the ownership passed.

Donations had to be registered if above a certain amount (500 solidi); they were void for the excess if above that amount.

Donatio ante nuptias.

This was a form of donation introduced under the later emperors; it is a settlement on the wife made by the husband on the condition that it took effect upon the marriage. The wife had the *dominium* of the settlement, but the husband managed it; it was a set-off to the *dos* brought by the wife.

In the time of Justinian this *donatio* or settlement might be increased or even first made after marriage, and hence the name of *donatio propter nuptias* was applied to it.

Dos.

The wife contributed the *dos* as her share towards the expenses of matrimony. It was given before marriage, and belonged to the husband during marriage. The husband, however, had generally to restore to the wife's representatives the immoveables comprised in the *dos*, and in the time of Justinian he was made accountable for the value of the moveables also. Justinian provided by one of the Novels that the wife, if survivor, should receive an equal value from the *donatio propter nuptias*, as the husband would from the *dos* if he survived the wife.

In the time of Augustus, immoveables forming part of the *dos* could be sold with the wife's consent, but could not be mortgaged; by the legislation of Justinian they could neither be sold nor hypothecated.

Influence of the Church on the principle of dower.

"The provision for the widow was attributable to the exertions of the Church, which never relaxed its solicitude for the interest of wives surviving their husbands—winning, perhaps, one of the most arduous of its triumphs, when after exacting for two or three centuries an express promise from the husband at marriage to endow his wife, it at length succeeded in engrafting the principle of dower on the customary law of all western Europe."—MAINE, *Anc. Law*, p. 224.

The Jus accrescendi.

This was, before the time of Justinian, a mode of acquiring property under the Civil Law. If one of several masters of a slave enfranchised him his share

in the slave was lost to him and accrued to the other masters. Justinian, however, enacted that the slave should be free, and that the other masters should be indemnified.

Tit. viii.—ALIENATION.

“By a right being alienable is meant that the person immediately entitled under the concession (by the State) shall have the power to assign, convey, or dispose of the aggregate of rights in the subject to another, and that the State will continue the concession in favour of such assignee.”—Austin : G. Campbell’s *Analysis*, p. 156.

Who could alienate?

(A.) *As a general rule, the owner*, with certain exceptions.

1. *The husband* cannot alienate the “*dotale prædium*” of the wife, *i. e.* the land that he received as “*dos*.” The *lex Julia*, which forbade such alienation, was extended by Justinian so as to include mortgages as well as alienations made even with the consent of the wife, and this enactment related to lands in the provinces as well as in Italy.

[Under the old law the *dos* was the property of the husband, and his rights over it were unrestricted, but as the laxity of the marriage tie increased the power of the husband over the *dos* was restricted.]

2. *The pupil under tutelage* could not alienate or lend without the tutor’s authority. The rule was that he could make his condition better but not worse. Things so alienated might be recovered by a real action if not consumed, or their value by a personal action if they were consumed.

[Payments made by debtors to the ward under tutelage do not free the debtors, though the ward

acquires the money. If, however, the money be again demanded by the ward he may be repelled by an *exception doli mali* if he still has the money in his possession, or has been made richer by it. If the ward has spent the money or lost it the debtor has to refund it.]

(16.) Besides the owner of the thing the creditor had a right of alienating the thing pledged. But this alienation is supposed to take place with the intention of the debtor as expressed in the contract. This power of sale could not be taken away from the creditor even by express agreement.

(17.) The agent who had uncontrolled authority over the property and affairs of the principal.

III. 18. *Through whom can we acquire?*

1. Through ourselves.
2. Through children under power.
3. Through slaves, our own property.
4. Through slaves or freemen whom we possess *bond fide*.
5. Through slaves of whom we have the usufruct.

The rule was that the usufructuary of slaves took all that the slaves acquired by their own labour, or by anything belonging to the usufructuary. Things acquired in any other way go to the *dominus*.

The old rule of law was that no one could acquire *per extraneam personam*. Possession, however, might be acquired by a stranger for a person, e.g. by a procurator. Slaves and children under power could acquire possession also, and thus become the channels for acquisition of the dominium by usucapion.

Patrimonium.

Patrimonium, or separate property of the filius familias.

By the old strict law the son under power could have no

property of his own, but whatever he acquired became the property of his father. The first exception to this rule was made in favour of the *castrense peculium*, *i. e.* property acquired in military service, or given at its commencement. This belonged to the son as if he had been *sui juris*.

The same privilege was extended to civil officers under the name of the *quasi castrense peculium*; Justinian allowed this peculium to be freely alienated even by testament.

Constantine introduced the *peculium adventitium*, or property received by the son on succeeding his mother; this was extended by Justinian to include all that came to the son from any other source than the father; all that came through the father being styled *peculium profectitium*.

The son had the ownership of the *peculium adventitium*, while the father had the usufruct.

On emancipation the father took the usufruct of one-half instead of the *dominium* of one-third of the *peculium adventitium*, the son retaining the ownership. By the old law the father took the ownership of one-third as compensation for losing all the usufruct.

Peculium of Slaves.

Whatever a slave acquires, whether by tradition or stipulation, becomes the property of the master. The slave could not make his master's condition worse. He was only allowed to have a *peculium* by the indulgence of his master. The slave acquired a legacy for the master to whom he belonged when the deceased died, but acquired an inheritance for the benefit of the master to whom he belonged when he entered on the inheritance.

A manumitted slave did not take his *peculium* unless it was expressly granted him.

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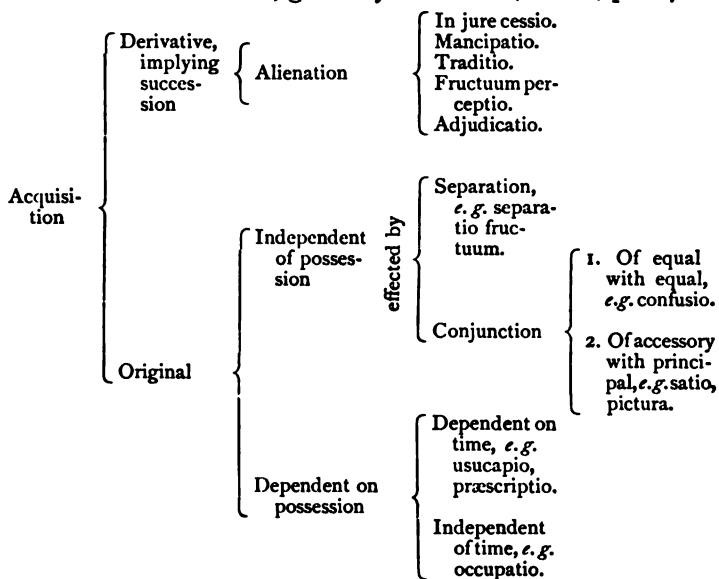
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A manumitted slave did not take his *peculium* unless it was expressly granted him.

“No innovation of any kind (on the proprietary privileges of the parent) was attempted till the first years of the empire, when the acquisitions of soldiers on service were withdrawn from the operation of the *patria potestas*. . . Three centuries after the same immunity was extended to the earnings of persons who were in the civil employment of the State. Both changes . . . were so contrived in legal form as to interfere as little as possible with the principle of *patria potestas*. A certain qualified and dependent ownership had always been recognized in the perquisites and earnings of slaves, and this special name *peculium* was applied to the acquisitions newly relieved from *patria potestas*, which were called in the case of soldiers *castrense peculium*, and *quasi castrense peculium* in the case of civil servants.”—
MAINE, *Anc. Law*, p. 142.

The following is an arrangement in a tabular form of the classification of titles to dominion with reference to the time of Gaius, given by Mr. Poste, Gaius, p. 207.



ACQUISITION OF A UNIVERSITAS RERUM OR AGGREGATE
OF RIGHTS.

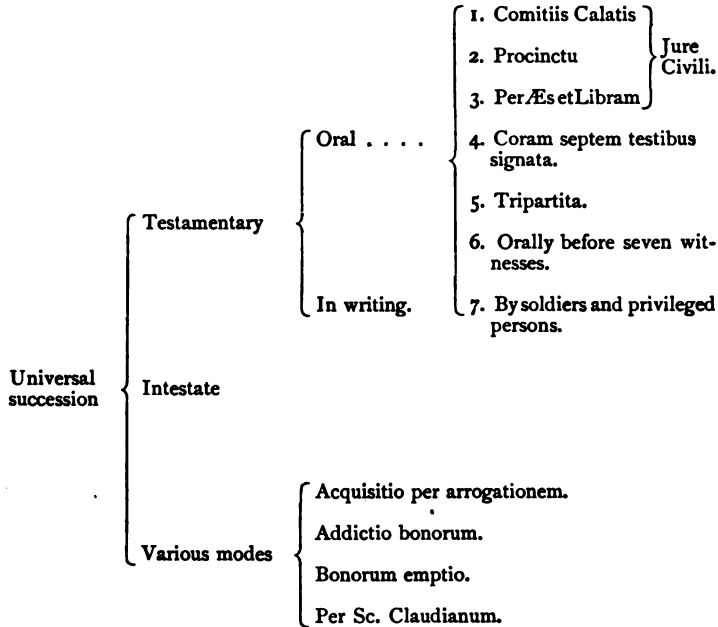
Definition of a *universitas juris*.—Sir H. Maine, *Anc. Law*, p. 178.

A *universitas juris* is a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person. It is as it were the legal clothing of some given individual. The tie which connects all these legal privileges and duties together so as to constitute them a *universitas juris* is the fact of their having attached to some individual capable of exercising them.

A *universal* succession is a succession to a *universitas juris*. It occurs when one man is invested with the legal clothing of another, becoming at the same moment subject to all his liabilities and entitled to all his rights. . . . The Roman definition of an inheritance is, "*Hæreditas est successio in universum jus quod defunctus habuit*" ("an inheritance is a succession to the entire legal position of a deceased man"). The notion was that though the physical person of the deceased had perished, his legal personality survived and descended on his heirs or co-heirs in whom his legal identity was continued.

The individual citizen occupied for testamentary purposes in the Roman law a position analogous to that of a corporation sole in English law; the Roman family corresponding for purposes of comparison with the corporation aggregate.

Universal succession might take place either through the medium of a will, or on intestacy, or through various other modes. The following table will illustrate the subject.



Tit. x.—ON UNIVERSAL SUCCESSION BY TESTAMENT.

“The original will or testament . . . was a mode of declaring who was to have the chieftainship in succession to the testator.”—*A. L.* p. 191.

“What passed from the testator to the heir was the family, *i.e.* the aggregate of rights and duties contained in the *patria potestas*.”—*A. L.* pp. 190, 191.

The theory that testamentary is less ancient than intestate succession seems to receive confirmation from the history of the earliest testaments, those made in the *Comitia Calata*. The origin of the practice of executing wills in the *Comitia* is probably to be found in the facts: 1. That anciently a testament could only be made when the testator had no *gentiles* discoverable, and 2. That the testament was originally submitted to the *comitia* in order that if it did injustice to any of the *gentiles*, these latter might veto it, or pass it if they

- wished to renounce their reversion. Testamentary rights therefore appear to have grown up in derogation from the more ancient rights of those who would have taken as relatives of the deceased.—See *A. L.* p. 200.
- The oldest forms of testament were those made “*comitiis calatis*” and “*procinctu*.”
1. Wills were originally passed by the *comitia curiata* assembled (*calata*) for private business. The Twelve Tables ordained that “*Uti legassit super pecunia tutelæve rei ita jus esto*,” *i.e.* that testaments should always be carried into effect; this was probably enacted to protect the *plebs*, the patrician *gentes* alone being represented in the *Comitia curiata*.
 2. *In procinctu*. Testaments made *in procinctu* (*i.e.* by persons going in military service) were not in use probably after the time of Cicero. This form and the preceding one were not in use in Justinian’s time.
 3. *Per æs et libram*. This was a fictitious sale of the inheritance by *mancipatio* to the purchaser, who was originally the heir. Afterwards a third person became the *familiæ emptor*, and the testator announced his wishes with regard to the disposal of his property; these as a matter of fact were generally embodied in writing, and the mention of the written document containing these wishes was regarded as a brief method of declaring the testator’s intentions orally.
- In the time of Justinian the sale was a mere form, and the real testament was what the testator wrote.
4. The prætor gave “*bonorum possessio*” to the heir if the testament was sealed in the presence of seven witnesses; this *bonorum possessio* gave the heir all the advantages of ownership, and he soon acquired full dominium by usucapion.
 5. *The tripartite will* was a modification of existing forms. There were three essentials to its validity:—
 1. It must be made (α) all at one time; (β) in the

presence of seven witnesses. These two points were required by the Civil Law. 2. The prætorian edict required the sealing by the seven witnesses, and (3) the imperial constitutions required that the will should be signed by the witnesses. The word *tripartitum* refers to the triple source whence this form of will derived its validity.

6. Oral wills might be made by declaration of the testator's wishes in the presence of seven witnesses.
7. Wills by soldiers and privileged persons (see p. 63).

CAPACITY OF WITNESSES (IN THE TIME OF JUSTINIAN).

1. Only those persons who have *testamenti factio* with the testator could be witnesses.

By this rule were excluded women, children under the age of puberty, slaves, madmen, deaf and dumb persons, prodigals under restraint and persons declared by the law to be worthless. Regard was only had to the status of the witnesses at the time of witnessing, and not at the death of testator. So a slave, if considered at the time to be free, was a legal witness.

2. No one under the power of the testator can be a witness, nor can any member of the same family with either the testator or heir.

In the case of a son making a will of *castrense peculium* the father and those in his power could not be witnesses.

But legatees could be witnesses, as could also persons who received *fidei commissa*.

Incidental Rules as to Wills.

1. A testament may be written on a tablet, paper, parchment, or any other substance.
2. Any number of duplicates may be made of a will, but each must be executed with the prescribed forms.

3. When a will has to be signed by witnesses it is immaterial whether they use the same seal or different ones.

Tit. xi.—WILLS MADE BY SOLDIERS.

Testamentum Militare.

Soldiers on service were first granted the privilege of making valid wills without any formality by Julius Cæsar.

In the time of Justinian, soldiers living at home had to comply with the usual formalities, but when on service a mere oral declaration in the presence of witnesses was sufficient. The intention of the testator was always carried out. "*Quoquo enim modo voluntas ejus suprema inveniatur, sive scripta sive sine scripturâ valet testamentum ex voluntate ejus.*"

A testament made orally is valid for one year after the testator has left the service.

A soldier in the power of his father could dispose of his *castrense peculium* in the ways above mentioned.

A rescript of the Emperor Trajan lays down that especial care is to be taken to discover the real intention of the testator if the will is made orally.

A soldier, even though deaf and dumb, may make a "*testamentum militare.*"

If a soldier make a military testament while on service, containing a condition as to the institution of the heir, which was not fulfilled within one year after the testator had left the service, the will would be valid, though the rule was that the operation of testaments dated from the accomplishment of the condition and not from the death of the testator.

The *minima capitis deminutio* did not affect the validity of a previously made *testamentum militare.*

Quasi-castrense peculium.

Those who had the right of disposing of *quasi-castrense peculium* by testament had to use the regular formalities.

Other testamentary privileges of soldiers.

1. They could institute as heirs persons who were generally incapacitated.
2. Their wills were not set aside as inofficious.
3. They could die partly testate and partly intestate.
4. They could give more than three-fourths of their property in legacies.

Tit. xii.—PERSONS WHO COULD NOT MAKE WILLS.

1. *Persons alieni juris.*

Except in the case of soldiers, who could bequeath their *castrense peculium*, and those who had analogous privileges with respect to *quasi-castrense peculium*.

If a soldier die intestate his *castrense peculium* will go to the *paterfamilias* (unless the deceased leaves brothers or children).

2. *Persons under the age of puberty.*

The reason given is "*quia nullum eorum animi iudicium est.*"

The capacity of the person at the time of making the testament determines the validity of the will, and a will made during incapacity is not rendered valid by the testator subsequently becoming capable, nor is a will made by a capable person made void by subsequent incapacity.

3. *A prodigal while under restraint*; a testament made before restraint is imposed is valid.
4. *Deaf and dumb persons, i. e.* persons entirely deaf and entirely dumb, physically incapable of going through testamentary forms.

5. *Blind men* could not make a testament unless they observed the form appointed by Justin ; *i. e.* employed a *tabularius* or eight witnesses.
6. *Captives* while in captivity could not make a testament, but their testaments made previous to captivity were valid on their release, by the *jus postliminii*, or, if they died in captivity, by the *lex Cornelia*.

Tit. xiii.—DISINHERISON OF CHILDREN.

“ It is remarkable that a will never seems to have been regarded by the Romans as a means of disinheriting a family, or of effecting the unequal distribution of a patrimony. The rules of law preventing its being turned to such a purpose increase in number and stringency as the jurisprudence unfolds itself. . . . It would rather seem as if the testamentary power were chiefly valued for the assistance it gave in making provision for a family, and in dividing the inheritance more evenly and fairly than the law of intestate succession would have divided it.”—*Anc. Law*, pp. 217, 218.

I. *Sons*.

Sons must be instituted as heirs or disinherited by name, otherwise the will was void. Daughters and descendants other than sons might be disinherited collectively, *e. g.* by the use of the word *ceteri*. If a person was passed over whom it was necessary to name, the will was bad, but if persons whom it was only necessary to mention collectively were not so disinherited then the will was good, and any such person took his share of the inheritance with the heir if the latter was a *suus heres*, and one-half the inheritance if the heir was a stranger.

Justinian enacted that all *sui heredes* must be disinherited by name or instituted as heirs, otherwise the will was void.

2. *Posthumous children.* These also must either be disinherited or instituted heirs. In case neither is done the testament is valid, but by a subsequent agnation of a child of either sex the force of the testament is broken, and it becomes entirely void.

If a posthumous female child is disinherited by the use of the general term *ceteri*, something must be given as a legacy, to show that the omission was not through forgetfulness.

N.B.—Posthumous children, according to the Roman Law, were those born after the making of the will.

Justinian enacted that *all* posthumous *sui heredes* should be instituted or disinherited by name, otherwise the will was void.

Descendants, grandchildren for example, who become *sui heredes* of the testator otherwise than by birth, as by the death of their father, had to be disinherited or instituted heirs in the same way as posthumous children, according to the provisions of the *lex Junia Velleia*. In default of such "*quasi-postumi Velleiani*" being either disinherited or excluded, the will was void.

3. *Emancipated children.*

By the civil law these need not be excluded by name nor instituted heirs, but in the time of Gaius the prætor required that they should be, and in default would give them *bonorum possessio contra tabulas*. Justinian required the exclusion by name or the institution of all who but for their emancipation would have been *sui heredes*, in default of which the will was to be void.

Antonine enacted that a female emancipated descendant should only have the share she would have taken if not emancipated.

4. *Adoptive children.*

These, while under power, were in the same position as

natural children (see preceding paragraphs). On emancipation, however, they lost all rights of succession to their adoptive father.

Exceptions.

1. If a soldier on actual service does not institute or disinherit by name his children or posthumous children, but passes them over in silence, this is considered equivalent to disinheriting *nominatim*.
2. A mother, or a maternal grandfather, is allowed the same privilege (for the persons referred to could never be their *sui heredes*). The children in this case, however, have another remedy, *i.e.* setting aside the testament as inofficious, *i.e.* contrary to natural affection.

Tit. xiv.—ON THE INSTITUTION OF THE HEIR.

The appointment of the heir was the important part of a Roman testament; the heir was the person who carried on the legal existence of the deceased, and all dispositions, beside the appointment of the heir, were accessories to it, and were conditions or laws imposed upon the heir.

“*Hereditas est successio in universum jus quod defunctus habuit.*” “An inheritance is a succession to the entire legal position of a deceased man. The notion was that though the physical person of the deceased had perished his legal personality survived, and descended unimpaired on his heir or co-heirs, in whom his identity, as far as the law was concerned, was continued.”—MAINE, *A. L.*, pp. 181, 182.

“Inheritance was a universal succession occurring at death. The universal successor was *heres* or heir. He stepped at once into all the rights and all the duties of the dead man. He was instantly clothed with his entire legal person. . . . The term *heres* is no more used of the intestate than the testamentary heir, for

the manner in which a man became *heres* has nothing to do with the legal character he sustained.

Who might be instituted heirs.

Anyone with whom the testator had the *testamenti factio*, whether freemen or slaves. The following were accordingly excluded—*peregrini* and *deportati*, persons convicted of treason, heretics, and the offspring of prohibited marriages.

Slaves could be instituted heirs. A slave of the testator if instituted became free. A stranger's slave took the inheritance for his master if the latter had the *testamenti factio* with the testator.

An enfranchised slave may accept or reject the inheritance at his pleasure; unenfranchised, he is "*heres necessarius*."

An alienated slave acquires for the new master.

The person who had the "*nuda proprietas*" could not before the time of Justinian enfranchise the slave; under Justinian the slave became free and could take as heir, but had to serve the usufructuary as long as the usufruct continued.

A slave whose master is dead may be instituted heir, for the inheritance not yet entered upon represents the person of the deceased.

If a slave belonging to several masters was instituted heir by a stranger, the masters had the benefit of the inheritance according to their shares in the slave.

If a slave was instituted heir by one of several masters with a gift of freedom, he became the *heres necessarius* of the master who freed him, and a proportion of his value was paid to the other masters.

Division of the inheritance.

The testator might appoint one heir or more than one, and might, in the latter case, divide the inheritance

among the heirs in any proportion he thought fit. The testator's intentions, as regarded the proportions, were usually expressed by the "*as*" and its subdivisions. The "*as*" was divided into twelfths or *uncia*, and these twelfths were distributed as the testator thought proper. The following were the names of the various fractions of the *as* :

One ounce,	<i>uncia</i>	=	$\frac{1}{12}$
Two ounces,	<i>sextans</i>	=	$\frac{2}{12} = \frac{1}{6}$
Three	„ <i>quadrans</i>	=	$\frac{3}{12} = \frac{1}{4}$
Four	„ <i>triens</i>	=	$\frac{4}{12} = \frac{1}{3}$
Five	„ <i>quincunx</i>	=	$\frac{5}{12}$
Six	„ <i>semis</i>	=	$\frac{6}{12} = \frac{1}{2}$
Seven	„ <i>septunx</i>	=	$\frac{7}{12}$
Eight	„ <i>bes</i>	=	$\frac{8}{12} = \frac{2}{3}$
Nine	„ <i>dodrans</i>	=	$\frac{9}{12} = \frac{3}{4}$
Ten	„ <i>dextans</i>	=	$\frac{10}{12} = \frac{5}{6}$
Eleven	„ <i>deunx</i>	=	$\frac{11}{12}$
Twelve	„ <i>as</i>	=	1 = the whole.

The *as* represented the inheritance : the testator gave so many ounces or twelfths to each. He might, however, make an "*as*" of any number of ounces ; thus, if he gave 5 shares to one, 4 to another, and 2 to another, then the "*as*" would consist of $5 + 4 + 2 = 11$ *uncia*. If another person had been joined as co-heir without any specified share, it would have been taken that the *as* of 12 *uncia* was meant, and this co-heir would have taken $\frac{1}{12}$. If the *uncia* in this case had amounted to more than 12, or one *as*, the *dupondius*, or double *as*, would have been counted as the unit : if to more than 24, then the *treble as*, and so on.

If one heir only was appointed as heir of one-half or six parts, the *as* was considered as 6 *uncia*, the rule being

that no one could die partly testate and partly intestate.

If the number of ounces assigned to the heirs amounted to 12, and there was one more heir without any part assigned, then this last took half the inheritance, and the others the remaining half.

In case all the heirs had specified shares given them, and these shares exceeded or were less than the as, then the shares were abated or increased proportionately to make the whole equal to the as.

Conditions.

An heir cannot be instituted from or to any fixed time; such a condition is void, and the institution is treated as if it were unconditional. When the institution is conditional, the heir enters upon the inheritance on the fulfilment of the condition, and upon and through the fact of his entry, his rights attach from the time of the testator's death.

The institution of an heir from a fixed time violated the maxims :

1. That no one could die partly testate and partly intestate, and
2. *Semel heres, semper heres.*

For such an institution would leave the inheritance vacant till the fixed time, so that the *heredes ab intestato* would have to take till then. When the fixed time arrived, the *heredes ab intestato* would cease to be heirs, which would violate the second maxim.

Impossible conditions.

These were treated exactly as if they did not exist. An immoral condition was deemed impossible. In the English law a bequest of personal property subject to

an impossible condition is valid. A stipulation, however, in Roman, and a contract generally speaking in English law, would both be void if conditions known by the parties to be impossible were annexed. See also Brown's Law Dict., sub tit. Conditions.

Tit. xv.—SUBSTITUTIO VULGARIS.

Substitution was a conditional institution, one heir or group of heirs being named to succeed an heir or group of heirs, who by any chance might not succeed to the inheritance.

The object of this substitution was to prevent the action of the *lex Julia et Papia*, which gave the shares of those instituted but legally incapable of taking, to the treasury.

If an instituted heir died or refused to take his share of the inheritance, this share was divided amongst the other heirs in proportion to the amount of their original shares ; this was called the *jus accrescendi*. The testator might produce nearly the same result by substituting the heirs who entered on the inheritance for those who did not. The difference was, that in this latter case, the substituted heirs might refuse this additional part, whereas the instituted heirs, if they had once entered upon the inheritance, could not refuse the part accruing by the *jus accrescendi*.

If several heirs have been instituted with unequal shares and are substituted reciprocally (*invicem*) to one another, they take the same shares in the substitution as they did in the institution, if no mention was made of any other distribution of shares.

If a substitute was appointed to a substitute, the last substitute takes the portions of the instituted heir and the substitute without distinction. The rule is, "*substitutus substituto censetur substitutus instituto.*" Thus,

if A institutes two heirs B and C, and substitutes C to B and D to C, then, in case neither B nor C take the inheritance, D takes the part of each without distinction. If a testator, thinking a slave to be *sui juris*, instituted him and substituted another person to him if he did not take the inheritance, it was enacted by Tiberius that in case of the slave entering on the inheritance, the substituted person and the slave each took half.

Number of substitutions.

There was no limit to the number of substitutions that might be made.

Tit. xvi.—SUBSTITUTIO PUPILLARIS.

A testator might substitute an heir in place of his children under the age of puberty and in his power, the substitution taking effect if the children did not become the testator's heirs, or if they died under the age of puberty after becoming his heirs. If the son becomes heir and dies under the age of puberty, the substituted heir is then heir to the son. The object of this was to prevent the son dying intestate, as he would do if he died before the age of puberty.

In a similar manner, children, grandchildren, or other descendants, if out of their mind, may have substitutes appointed for them as heirs in their place, although they have attained the age of puberty. On their regaining their reason, the substitution is void. This is termed *substitutio quasi pupillaris*.

The person appointed must be a descendant or brother, if such existed ; if not, the testator had a free choice.

In order to guard against fraud caused by an open substitution to a son under the age of puberty, it was permitted the testator to write the second substitution (*i.e.*, to the son if he should die under the age of

puberty) in the lower part of the will, to be sealed up and kept secret during the life of the son.

Parents may also substitute to their disinherited children. In every case of pupillary substitution, the substituted heir took all that the pupil would have had to dispose of by testament.

A parent may only make a testament for his children when he can do so for himself.

Substitutio pupillaris comes to an end in the case of males at fourteen, and females at twelve.

A testator cannot substitute another heir after having instituted a stranger or son of full age, but can oblige the person instituted by a *fideicommissum* or trust to give up the inheritance to a third person.

[*Substitution in Scotch law.* A grant to A and his heirs, and if A shall die intestate and without alienating, to B, would mean that A should have full power of alienation, but if he did not exercise it, the estate will go to B and his heirs. It would be expressed as a "grant to A, whom failing, to B."—Analysis of Austin, p. 157.]

Tit. xvii.—MODES IN WHICH WILLS ARE INVALIDATED.

A will legally made might be :—

A. *Ruptum* or revoked, as by agnation of a *suus heres*, or by a subsequent testament, or,

B. *Irritum*, rendered useless by the testator undergoing a change of status, or by no one taking the inheritance under it.

A. A testament becomes "*ruptum*" as above : 1. By the agnation of a new *suus heres*—unless the heres had been instituted in anticipation. 2. A subsequent testament acts as a revocation of a former one, if there could have been an heir under the latter one; thus if an heir is instituted by the second testament and renounces,

the testator dies intestate, for the first testament is invalidated by the second, and in the hypothetical case there would be no heir under the second testament.

[Wills might also be revoked voluntarily by tearing, defacing, or the signification of an intention to revoke before witnesses.]

The subsequent will acts as a revocation of the first, even though the heir in the latter be only instituted for certain particular things: he will be under a *fideicommissum*, the terms of which are contained in the first testament, if it is expressed in the second that the first is to be valid.

B. A testament becomes *irritum* or ineffectual: 1. By the testator undergoing a *capitis deminutio* after making his will: if, however, he was subsequently restored to his former position, the prætor would grant *bonorum possessio secundum tabulas*, in other words, he would order that possession of the property should be given to the persons and in the manner intended by the testator.

A testament was said to be "*destitutum*," when no one entered on the inheritance.

Tit. xviii.—The "*testamentum inofficiosum*."

A testament was said to be "*inofficiosum*" when it was contrary to the dictates of natural affection. If children or other near relations were unreasonably set aside, they might have the testament declared null and void on bringing the action *de inofficioso testamento*. This action could be brought among others by a father, son, brother, or sister of the testator. This action will not lie if the person can get a share of the inheritance by any other means.

The *lex Falcidia* enacted that the heir should have one clear fourth of the inheritance, and that legacies and fideicommissa could only affect one-fourth. If the

testator gave anything at all, the action could only be brought for the amount necessary to make up the "Falcidian fourth," or *quarta Falcidia*. Before the time of Justinian the whole testament could be set aside.

As a general rule, if any one accepted a legacy under a testament, he was supposed to acquiesce in its validity. This, however, does not apply to a tutor who accepts a legacy in the name of his pupil and on his behalf. A tutor, who in the name of his pupil attacks a will, does not, if unsuccessful, forfeit anything he may have taken under the will for himself.

A person is debarred from the action *de inofficioso testamento* if he obtain the fourth of the inheritance in any of various ways, such as by legacy, *fideicommissum*, *donatio mortis causæ*, or *donatio inter vivos* (if this latter was expressly intended to be counted as part of the *quarta Falcidia*).

Whatever was the number of the persons who could bring the action, they took but one quarter, and this was divided amongst them. Justinian, in his Novels, made the amount one-half instead of a quarter, and settled that if the testament was declared inofficious, the trusts, legacies and appointments of tutors were to remain valid, only the institution of the heir being set aside. The testator had also to state his exact reason for disinheriting his ascendants or descendants.

Tit. xix.—*Classes of Heirs.*

1. *Necessarii.* A slave instituted heir was styled "*necessarius heres*," because he was obliged to take the inheritance, whether he desired it or not. The object of appointing a slave as *necessarius heres* was that, if the testator's property was insufficient to satisfy his liabilities, there might be no infamy attached to his name owing to the sale of his effects. The *heres* was legally

responsible for the testator's debts, but the prætor allowed the heir the "*beneficium separationis*" or right to have his own goods separated from those belonging to the inheritance, and the creditors could only recover from the heir the amount that came to him from the testator. If the heir's debts exceeded his assets, the creditors of the testator had the *beneficium separationis* to prevent the heir's creditors obtaining the property of the testator, by keeping the inheritance distinct from the heir's property.

2. *Sui et necessarii*. Heirs *sui et necessarii* are those descendants of the testator who are in his power and become *sui juris* at his death. They are called *sui* because they are family heirs, and even in the father's lifetime are considered in some degree to own the inheritance, or according to another view because they are persons in the power of the testator (*sui* as regarded him). They were styled *necessarii* because they were obliged to take the inheritance as if from an intestate until they were relieved by the prætor, who allowed them the *beneficium abstinendi* or right of declining to enter upon the inheritance, if they had not intermeddled with it. This right accrued to the *suus et necessarius heres* without any express demand, and it was not assumed that he would take the inheritance unless he expressed an intention to do so.
3. *Extranei*. Those heirs who are not in the power of the testator are termed *extranei*. These heirs must have the *testamenti factio*, 1. At the time of making the testament: 2. At the testator's death: 3. At the time of entering on the inheritance. A change of status in the intervals between the first and second of these points of time is not regarded.

[*Testamenti factio* was not possessed fully by insane persons, the dumb, posthumous children, sons in the

power of a stranger, and slaves belonging to others. These can acquire by a testament although they cannot make nor witness one.]

The necessity for the heirs having the *testamenti factio* with the testator, had its origin in the period when the testamentary proceedings were carried on in the *Comitia Calata*; in these proceedings none but those who had rights of citizenship implied in the *testamenti factio* could take part.

Extranei heredes have the right of taking time to decide whether they will enter on the inheritance or not; if they once enter on it, however, they cannot renounce it unless they can get relief from the prætor on the grounds of minority.

The usual time allowed for deliberation was not less than 100 days nor more than nine months. On an action to compel an *extraneus* to decide, he was presumed to have declined the inheritance, if the action was brought by a substituted heir or by a *heres ab intestato*, and to have accepted it if the action was brought by legatees or creditors. (See Sandars, ii. 19, 5.)

The *beneficium inventarii* was a privilege granted by Justinian. The heir, by making an inventory of the property of the deceased, keeping his own property distinct, was only liable for the testator's debts as far as the inheritance would pay them; if there was a surplus it went to the heir.

Any act of ownership done by the heir towards the inheritance was taken as a proof of his intention to enter upon the inheritance. A mere wish to accept the inheritance is said to be sufficient.

[The method of "*cretio*" was abolished by Justinian. The heir had a fixed time given by the testator in which he had to declare his intention of accepting or rejecting the inheritance.]

Tit. xx.—LEGACIES.

[Legacies are here considered somewhat out of place among modes of acquiring a *universitas rerum*, but as they are so closely connected with the subject of testaments it is better to discuss them here.]

A legacy was a charge on the heir to pay over a certain portion of the inheritance to the legatee. If there was no heir there could therefore be no legacy.

[The forms of legacy *per vindicationem*, *per damnationem*, *sinendi modo* and *per præceptionem* were abolished in the time of Justinian, by whose legislation all legatees might bring a real or a personal action to recover what was left to them. The old forms were—

1. *Per vindicationem*—made thus: "*hominem Stichum do lego;*" the thing became the property of the legatee, who could recover it by *vindicatio*.

2. *Per damnationem*: the formula was, "Heres meus damnas esto dare." The legatee had a personal action to oblige the heir to pay or make over what the bequest ordered.

3. *Sinendi modo*: the heir had to allow the legatee to take the thing bequeathed. The legatee did not acquire the ownership till he obtained possession. His remedy if he failed to get possession was a personal action against the heir.

4. *Per præceptionem*. A form of legacy to the heir to take the specific thing before receiving his share of the inheritance. The heir could bring the action "*familie erciscunde*" to enforce his right.]

Justinian placed all legacies on the same footing, and allowed the rights of legatees to be enforced either by real or personal actions: *fideicommissa* were also assimilated very nearly to legacies, the practice being that if the gift was not sufficiently valid as a legacy it was enforced as a trust or *fideicommissum*.

What might be bequeathed by legacy.

As a general rule not only the property of the testator, but things that belonged to a stranger, if the testator knew that the things were another's. The heir had either to give the thing or its value to the legatee ; the *onus* of proof, however, rested with the latter, who had to show that the testator knew the thing bequeathed to be the property of another.

If a thing in pawn were given as a legacy the heir was bound to redeem it, if the testator knew that it was pledged. If, however, the legatee acquired the thing by any method of clear gain (such as by gift), then he could not recover the value from the heir ; he could do so, however, if he had acquired the thing by purchase. This rule was founded on the maxim that two modes of acquiring, each being one of clear gain, could not meet in the same person, "*duas lucrativas causas in eundem hominem concurrere non posse.*"

Things not yet in existence, as the future produce of land, may be given by legacy.

Co-legatees.

If the same thing be given to two persons conjointly, as by the formula *Seio et Titio hominem Stichum do lego*, or separately, as by the formulas *Titio hominem Stichum do lego*, *Seio hominem Stichum do lego*, in both these cases the legacy is divided between the legatees, and if one dies or fails to take, the whole goes to the co-legatee.

Justinian enacted that when a gift to a co-legatee failed, the legacy accrued to the other co-legatees.

Co-legation might be effected in three ways :—

1. *Re*, equivalent to separately (*v. supra*).
2. *Re et verbis*, equivalent to conjointly (*v. supra*).
3. *Verbis*. This only nominally effected a co-legation.

The gift was made to two or more, but their respective shares were assigned to the legatees.

Justinian removed the restrictions imposed by the *lex Papia Poppæa* as to legacies lapsing (*caduca*) when left to unmarried or childless persons.

If a legatee has a legacy of landed estate left him, of which he has previously acquired the bare ownership by purchase and the usufruct by gift, he can recover the value of the *nuda proprietas* from the heir.

If a testator bequeath a thing which belongs to him, thinking it does not, the gift is valid: if he bequeaths a thing which does not belong to the legatee, thinking it does, the legacy is also valid.

Subsequent alienation or hypothecation by the testator of the subject of a legacy does not make it void, if he made it without any intention of revoking the legacy.

A discharge (*liberatio*) of a debt due to the testator can also be the subject of a legacy, and the legatee can, by suing on the testament, compel the heir to extinguish the debt. A debt could also be postponed by a legacy, and if the heir sued, he could be repelled by an *exceptio doli mali*.

A legacy of a debt from the debtor to the creditor is not effectual, unless the debtor were to bequeath absolutely what was due conditionally or at a future time, for in this case the creditor would take some advantage.

The rules of English law as to satisfaction of debts by legacies are somewhat similar. (See *Brown's Law Dict.*, sub tit. Satisfaction of debts.)

“ The general rule is, that a legacy equal to or greater than the debt is a satisfaction, but that a legacy less than the debt is not even a satisfaction of it *pro tanto*, and in determining what is less, that may be either in amount, or in time of payment, or in certainty of payment. And as the leaning of the Court in this case is against

satisfaction, very slight circumstances are allowed to rebut the doctrine of satisfaction so that the creditor will take cumulatively both his debt and the legacy."

By the same analogy a husband could give a wife her *dos* by way of legacy; he was said *prælegare dotem*, *i.e.* to give back at once what the wife could only recover after certain delays allowed by law.

[So the English law as to the satisfaction of portions by legacies and legacies by portions is that the legatee or portionist shall take one only and not both.

What is due under a settlement is recoverable as a debt, while that which is due under the will, in excess of the amount of the settlement, is voluntary bounty and is liable to abatement. See Brown's L. Dict., under "Satisfaction."]

If the subject of a legacy is destroyed without the instrumentality of the heir, the loss falls on the legatee. If, however, the subject of the legacy is the heir's slave, and this slave is manumitted, the heir is responsible whether he knew of the legacy or not.

If the testator bequeathed female slaves and their offspring the latter went to the legatee if the former died, and if ordinary slaves and vicarial ones were bequeathed together and the former died, the latter became the property of the legatee. It was otherwise in the bequest of a slave with his *peculium*; if the slave died, the legatee took nothing; and if a farm with its stock and implements was bequeathed and the land was alienated, the legatee did not get the implements.

If a flock is given as a legacy, any sheep added to it after the making of the testament pass to the legatee, who can claim the remnant of the flock if only one sheep is left.

Any increase or decrease in the *peculium* of a slave left to him is so much gain or loss to the legatee. If the *peculium* be left to the slave himself, the additions to

the *peculium* between the making of the testament and the heir's entering upon the inheritance go to the legatee ; if the legacy be to a stranger, only that which is acquired by means of the *peculium* goes with the *peculium* itself.

[The vesting of an interest is expressed in the phraseology of the Roman law by the expression *dies cedit* ; the expression *dies venit* being used to denote the fact of the interest becoming a present one.]

A debt due to the testator may be left as a legacy, and the heir is obliged to recover the money by the usual actions for the legatee.

In case the testator describes the gift generically, thus, "a sheep," "a slave," the choice of the particular thing rested with the legatee unless the testator expressed a contrary intention ; before the time of Justinian, if the legacy was *per vindicationem* the legatee had the same privilege, but if it was *per damnationem* the heir might exercise his choice as to the thing with which he would fulfil the obligation put upon him.

If the testator expressly gave a legacy of selecting one from among certain things, called *legatum optionis*, and the legatee does not exercise his choice, the heir might. Before the time of Justinian the right if not exercised by the legatee was lost.

Who could be legatees.

The general rule is that those only who have the *testamenti factio* with the testator can be legatees. In the time of Justinian the only persons who had not the *testamenti factio* were *barbari*, *deportati*, and heretics. The restrictions as to the *Latini Juniani*, and as to unmarried and childless persons, were abolished by Justinian.

A legacy could not be left to an uncertain person ; a de-

scription such as "the person who will be consul next year" was held to be not sufficiently definite. A legacy to an uncertain person among a certain definite number was valid, as to one of the testator's *cognati* who should marry his daughter.

The posthumous children of a stranger were never allowed by the civil law to take either as heirs or legatees, but the prætor gave them *bonorum possessio*, and Justinian permitted their institution as heirs.

[A mere mistake in naming a legatee is immaterial, provided the description points out the person meant; and neither a false description of the thing bequeathed nor a false reason for the legacy itself will invalidate the bequest.]

A legacy to the slave of the testator's heir is entirely void: subsequent manumission of the slave will not make it valid, even if it takes place in the testator's lifetime. On the other hand, if a slave is appointed heir a legacy may be given to the slave's master; if the slave enters upon the inheritance at the command of this master the legacy is void, but in such a case as the slave being transferred to another master, the legacy to the former master is good.

Before the legislation of Justinian all legacies placed in the testament before the institution of the heir were invalid; he enacted that the intention of the testator alone should be considered. A legacy to take effect after the death of the heir or legatee was void, but one to take effect from (say) the day before their death would be upheld, as in this case there would be a vested interest to be transmitted.

Penal legacies, *i. e.*, legacies which were to take effect as a punishment of the heir for not fulfilling the wishes of the testator, were void before Justinian's time. Justinian, however, treated them as other conditional

legacies, and consequently they were only void when the condition was immoral or impossible.

Tit. xxi.—*Revocation of Legacies.*

Revocation of a legacy might be effected by the expression of the testator's wish to revoke, and need not be in terms directly the opposite of those in which the legacy was given.

[When the formulæ were used to give a legacy, the exactly opposite forms were used to revoke them. Thus a legacy given by the formula *do lego* would be revoked by the words *non do non lego*.]

A legacy might in the same way be transferred from one person to another, the transfer operating as a revocation of the gift to the first legatee as well as a gift to the second.

Tit. xxii.—The "*Lex Falcidia*."

Limitations as to amount of legacies.

By the law of the Twelve Tables no restriction was set as to the amount that might be left in legacies; the *lex Falcidia* forbade more than three-quarters of the inheritance being so left; the other quarter, under the name of the *quarta Falcidia*, being reserved for the heir or heirs.

If two heirs are instituted, each has the benefit of the *lex Falcidia*, so that each is entitled to a clear fourth of his own moiety unburdened by legacies.

The value of the estate at the death of the testator was that upon which the calculation was made.

If the inheritance became less than would support the legacies after giving the heir the quarter allotted him by the testament, the legacies would nevertheless be due; the heir, however, would be at liberty to refuse the inheritance, and the legatees would in such a case compromise with the heir, lest by his refusal to enter

upon the inheritance the whole should be lost to them.

If nothing was left to the heir he would, even if the inheritance increased in value up to the time it was entered upon, still take a clear quarter of the whole.

Before the calculation of the value of the inheritance was made, the testator's debts, funeral expenses, and the price of the manumission of slaves had to be deducted.

An heir who carried out a secret trust for the benefit of a person who could not otherwise have taken, lost his right to the Falcidian fourth.

See Ulpian, 25, 17, quoted by Poste, p. 274.

"Siquis in fraudem tacitam fidem accommodaverit ut non capienti fideicommissum restituat nec quadrantem eum deducere senatus censuit, nec caducum vindicare ex eo testamento si liberos habeat." "An heir who lends his assistance to the evasion of the law by the acceptance of a secret trust in favour of a disqualified beneficiary, loses by decree of the senate his right under the *lex Falcidia* to retain one-fourth of his inheritance, and to claim the escheated legacies to which (by the *lex Papia*) he would have been entitled as a father of children."

Tit. xxiii.—FIDEICOMMISSA.

A *fideicommissum*, or testamentary trust, might relate to the whole inheritance, in which case it was analogous to the institution of an heir, and it might relate to a part of the inheritance only, in which case it was analogous to a legacy.

Ulpian's definition (Poste's Gaius, p. 287) of the difference between a legacy and a *fideicommissum* is as follows:—"*Legatum est quod legis modo, id est, imperative, testamento relinquitur, nam ea quæ precativo modo relinquuntur fideicommissa vocantur.*"—Ulp. xxiv. 1. "A

legacy is a legislative or imperative testamentary disposition ; a precative disposition (a disposition in the form of entreaty) is a trust."

Origin of testamentary trusts.

When testators wished to leave legacies to persons who were not qualified to take them by the strict law of Rome, they entrusted the legacy to some person capable of taking by testament, relying on his honesty to carry out the trust. *Fideicommissa* gradually came under the jurisdiction of the prætor, who interposed his authority to compel their enforcement.

Sir H. Maine (Anc. Law, p. 223) says :—" I regard the Roman horror of intestacy as a monument of a very early conflict between ancient law and slowly changing ancient sentiment on the subject of the family. Some passages in the Roman Statute Law, and one statute in particular which limited the capacity for inheritance possessed by women, must have contributed to keep alive the feeling, and it is the general belief that the system of creating *fideicommissa*, or bequests in trust, was devised to evade the disabilities imposed by those statutes."

I. *Hereditates Fideicommissariæ. Trusts of inheritances.*
A legal heir must first be instituted, and this heir may be bound by a *fideicommissum* to transfer the inheritance to another person. This was generally effected by a fictitious sale of the inheritance. In the reign of Nero the prætor first allowed equitable actions to be brought and defended by the person to whom the inheritance had been sold (the *fideicommissarius*), as if he was the heir.

By the *Sc. Trebellianum*, A.D. 62, the *fideicommissarius* was put exactly in the place of the instituted heir.

As the instituted heir would gain nothing by such a

transaction as is described above, and would probably refuse the inheritance, the *Sc. Pegasianum* (A.D. 70) gave the heir a fourth part of the inheritance in the same way as the *lex Falcidia* had settled in the case of legacies.

The person who took the inheritance under a *fideicommissum* entered into agreements with the heir so that they shared the losses and gains that might arise, just as if the *fideicommissarius* had been a partary legatee, *i. e.*, a legatee to whom a share of the whole inheritance had been left as a legacy.

By the *Sc. Trebellianum*, if an heir had a quarter reserved and restored the rest to the *fideicommissarius*, then all actions might be brought against each according to their respective shares.

By the *Sc. Pegasianum*, when the fourth part was not reserved for the heir he might take this fourth part, and the *fideicommissarius* would be in the position of a legatee. If he made over the inheritance entire he might protect himself by stipulations "*emptæ et venditæ hereditatis.*"

The prætor could compel the fiduciary heir to enter if he refused to do so, and in this case all actions would pass at once to the *fideicommissarius*.

Justinian consolidated the provisions of the *Sc. Pegasianum* and *Trebellianum*, and enacted that the heir could retain the fourth and the *fideicommissarius* would be *in loco heredis*.

If a particular thing is given to the heir equal to or greater in value than one-fourth of the inheritance, the *fideicommissarius* took all except this part and had all the actions transferred to him.

Fideicommissa may be established otherwise than by testament; thus, a person to whom an estate will descend ab intestato may be commanded verbally to make a

certain disposition of part of the inheritance, and such a disposition would be enforced.

A *fideicommissarius* may also be enjoined to make over the *fideicommissum*, and could not retain a fourth.

Fideicommissa were first made obligatory by Augustus. In case the trust could not be proved either as existing in writing, or by the oaths of five witnesses, the heir might be put on his oath and compelled to deny the existence of the trust or to fulfil it. The *fideicommissarius* must first, however, make oath that he is acting *bond fide*.

Tit. xxiv.

2. (See p. 86.) *Fideicommissa rerum singularum. Testamentary trusts of particular things.*

A testator may bequeath any particular thing by *fideicommissum*, and this may be a charge either on an heir, legatee, or *fideicommissarius*. The property of any person may be so given, and the only rule is that no one can be compelled to restore, in the shape of a *fideicommissum*, a greater value than he received under the testament. If, however, the subject of the *fideicommissum* belonged to the *fideicommissarius*, he had to give it, whatever was its value, if he accepted what was given him in the testament, as he might exercise his discretion of refusing what he would receive under the testament.

An heir, legatee, or *fideicommissarius*, may be requested to enfranchise a slave, and if the slave is not the property of the testator, he must be bought and enfranchised; upon which he becomes the freedman of the enfranchisor. If the master of the slave refused to sell him, the operation of the *fideicommissum* was only delayed.

The form in which a *fideicommissum* was created was immaterial, provided the testator's intention was ascertainable.

Tit. xxv.—CODICILS.

Codicils were in the form of directions to the heirs under a testament, or the *heredes ab intestato*, and were enforced as *fideicommissa*; if there was a testament they were treated as additions to it, if there was no testament they were valid as *fideicommissa*.

A testament might have a clause annexed to it, providing that if it failed to take effect as a testament it should operate as a codicil.

A codicil made before a will is valid, if no intention is expressed in the will of revoking the provisions of the codicil. The provisions of codicils actually confirmed in a testament took effect as legacies.

An inheritance may be given away directly by means of a *fideicommissum*, though no condition can be imposed nor heir substituted in a codicil.

Justinian enacted in the Code that codicils were to be made *uno contextu*, verbally or in writing, in the presence of five witnesses.

See Ortolan, Nasmith and Prichard's Translation, p. 314:—"Every wish of the deceased was also void if it had not been legally expressed in the will, approximate formalities having been observed. Written down without any solemnity, these *codicilli* were only a prayer addressed to the heir, who was left free to accede to it or not as he pleased. However, in proportion as it was left optional by the law, the more public opinion was brought to bear on the man who wished to take advantage of his freedom . . . Augustus ordered even the consuls to exert their authority to protect the wishes of the testator whenever equity and good faith should require it. It became necessary at last to create two fresh prætors for the special purpose of dealing with these matters, who decided each case extraordinarily, *i.e.* extra ordinem, without sending it before a judge, upon its merits."

Book iii., Tit. i.—INTESTATE SUCCESSION. Book iii. (i.—xii.).
 See table, p. 60.

The preference of the Romans for Testacy is thus explained by Sir Henry Maine, *Anc. Law*, p. 222 :—
 “ If (emancipated) sons were deprived of their inheritance by an intestacy, the reluctance to incur it requires no further explanation Every dominant sentiment of the primitive Romans was enlivened with the relations of the family. But what was the family? The law defined it one way, natural affection another. In the conflict between the two the feeling we would analyze grew up, leaving the form of an enthusiasm for the institution by which the dictates of affection were permitted to determine the fortunes of its objects.”

A. *Before the time of the Novels of Justinian.*

A person dies intestate if he has made no will, or one that is not valid.

Before the time of the Novels the succession to the inheritances of intestates was given first to the *sui heredes*, next to the *agnati*, and next to the *cognati*.

1. The “*sui heredes*.”

Upon these the inheritance first devolved according to the laws of the Twelve Tables: those persons were *sui heredes* who were under the power of the testator, and became *sui juris* at his death.

[*Exceptions*.—1. Posthumous children who would, if born during the lifetime of their father, have been in his power, are counted among the *sui heredes*, as also are posthumous grandchildren if conceived within the lifetime of the grandfather.

2. Children who were in captivity when the father died, and returned afterwards, became *sui heredes* by the *Jus postliminii*.

3. On the other hand, if the parent is convicted of treason, he can have no *suus heres* and his property goes to the *fiscus*.]

The *sui heredes* may become heirs without their knowledge, no act of their own being necessary for the acquisition of the inheritance.

Division of the inheritance among the sui heredes.

They took *per stirpes* and not *per capita*, that is, children were allowed to represent and take the share of a deceased parent; for example, if a man died leaving three sons, A, B, C, and two grandchildren E and F by a deceased son D, then A, B, and C take one-fourth each, while E and F take the share that would have been their father's if he had been living. In taking *per capita*, A, B, C, E, and F would all have taken equally.

Emancipated children or other descendants were admitted by the prætor to the "*bonorum possessio*" of the portion of the inheritance to which they would have been entitled had they remained in the ancestor's power. They had, however, to bring into the common fund all that they had acquired since emancipation, for such acquisition (if emancipation had not taken place) would have belonged to the *pater familias*. This was termed *collatio bonorum*.

Rights of adopted children.

Before the time of Justinian, adoptive children succeeded as *sui heredes* to their adoptive parent, but had no rights of succession to their natural parents: if, however, they had left their adoptive family *before the death of their natural parent*, they were called by the prætor to the inheritance of their natural parent; if they had

left the adoptive family after the death of the natural father, they do not gain anything by inheritance from the latter. Adoptive children, however, whether emancipated or not, came in with the *cognati* (after the *sui heredes* and *agnati* had been exhausted) in the succession to their natural parent.

Changes made by Justinian in the law as to adoptive children.

Justinian changed the law completely by enacting that children adopted by a stranger should have full rights of succession to their natural parents; the adoptive children also had the right of succeeding as *sui heredes* on the intestacy of the adoptive father, but they had no remedy if disinherited in the testament. The case of adoption by an ascendant, however, formed an exception: this was termed *adoptio plena* (see p. 15), and the adoptive child had exactly the same rights as a natural one.

The children of daughters and granddaughters, who by the ancient law came in only with the *cognati*, were permitted by the constitutions of the Emperors Theodosius, Valentinian, and Arcadius to take the share of their parent, subject to the deduction of one-third. Justinian allowed them to succeed to the whole of such share.

Tit. ii.—In default of *sui heredes* the next class of heirs who were called to the inheritance were the *agnati*, or rather such of the *agnati* as were not *sui heredes* (see p. 90).

2. *The Agnates.*

The distinction between agnatic and cognatic relationship.

Sir Henry Maine (*Anc. Law*, p. 59) says:—"The old Roman law established a fundamental difference be-

tween agnatic and cognatic relationship, that is, between the family considered as based upon common subjection to patriarchal authority, and the family considered (in conformity with modern ideas) united as through the mere fact of a common descent."

Agnati were those *cognati* who were related through males, and who would, if the common ancestor was alive, have been in his power. On the failure of the *sui heredes* the agnates were called to the inheritance, the nearer degree excluding the more remote: in the time of Gaius, female agnates, except daughters, were not included in the agnatic succession, though the prætor gave them *bonorum possessio (unde cognati)* after the other agnates had been exhausted.

Justinian admitted female agnates on the same footing as males.

Adopted children are in the same position as natural ones, and rank as agnates.

Justinian also admitted a sister's sons and daughters with the agnates, whether of the half or whole blood.

When the agnates are called to the inheritance, those of the nearest degree take to the exclusion of the others: if there are several in the same degree, they all take together, and equally. Representation was not allowed, so that children did not take the share of their deceased parent.

In case the nearest of the agnates refused the inheritance, then, by the old law, the prætors called the *cognati* to the inheritance. Justinian, however, allowed the *agnati* of the next degree to take, in case of the refusal or failure of those of the nearest degree. This enactment was, probably, due to the consideration of the fact that the agnates of the second degree had all the burdens of tutelage if those of the first refused.

An ascendant who had emancipated a descendant under

a fiduciary agreement (*contractâ fiduciâ*), retained similar rights to those of a patron. This fiduciary agreement was presumed to exist in every emancipation according to Justinian's legislation. The ancestor would thus naturally succeed after the *sui heredes*, but Justinian postponed his rights to those of the brothers and sisters of the deceased.

Tit. iii.—*The Senatus Consultum Tertullianum.*

By the law of the Twelve Tables, mothers and children had no reciprocal rights of succession.

The prætors, however, admitted such persons in their position of *cognati* to the *possessio bonorum unde cognati*.

The Emperor Claudius first allowed a mother to be counted among the *legitimi heredes*.

The *Sc. Tertullianum* enacted that a mother (though in the power of a parent), having the *jus trium liberorum*, should be allowed to succeed her intestate children.

Mothers were excluded by :

1. The *sui heredes*—for example, by the children of a deceased son.
2. (α) The son or daughter of a daughter *sui juris*.
(β) The brothers of the deceased.

The mother, however, divided the inheritance with the sisters if there were no brothers.

All other agnates were excluded by the mother.

3. The grandfather if the father was living, but not if the father was dead.

The condition of having the *jus liberorum* was abolished by Justinian.

Changes effected by Justinian.

Justinian enacted that the mother should be preferred before all "legal" heirs except the brothers and sisters.

If there were no brothers the mother took half, and the sisters the other half ; if there were brothers and sisters they all took equally, *per capita*.

If a mother failed to demand the appointment of a tutor for her infant children for a twelvemonth, she lost her rights of succession. If the paternity of a child was uncertain, provisions of the *Sc. Tertullianum* still took effect.

Tit. iv.—*The Senatus Consultum Orphitianum.*

This enactment provided that children should be reckoned as legitimi heredes of their mother, and should be preferred to all other agnati. Until the repeal of the *Sc. Tertullianum* the mother of the deceased shared the inheritance with the deceased's children. This privilege was extended to grandchildren by a constitution of Theodosius.

These privileges were not forfeited by the *minima capitis deminutio*.

Right of accrual among heredes legitimi.

The share of an heir who was called to the inheritance but did not actually enter, went by accrual to the heirs who did enter ; the shares accruing to an heir who entered but did not obtain his portion of the inheritance, went to his heirs.

Summary of the changes in the Law as to the succession of Agnates.

Agnati originally included only those related through males, and as opposed to the narrower term *sui heredes* the agnati were collaterals in the same civil family.

1. Emancipated brothers and sisters were included by

Justinian, who allowed uterine brothers and sisters to rank with consanguinei.

2. Mothers and children were allowed reciprocal rights of succession by the *Sec. Tertullianum* and *Orphitianum*, a privilege extended to grandmothers and grandchildren by a later constitution.
3. Justinian allowed males and females to be on the same footing, restoring the rules of the Twelve Tables.
4. Justinian permitted devolution among the *agnati*, so that if those of the nearest degree refused those of the next were called to the inheritance.

Tit. v.—3. *The succession of Cognates.*

After the *sui heredes* and the *agnati* had been exhausted, the old law gave the inheritance to the *gentiles* or members of the same "*gens*." Gentile succession had long been extinct, even in the time of Gaius, and, instead of the inheritance lapsing to the state, the prætors had instituted the custom of calling the *cognati* or blood relations, *i.e.* those related either through males or females.

The following are called among the cognates :

1. *Agnates* who could not take as such, owing to a *minima capitis deminutio*.
2. Collateral relations united through females.
[Children in an adoptive family also succeeded as *cognati* in their natural family. But Justinian's legislation left the adoptive son in his natural family.]
3. Illegitimate children, as having no legal father, could have no *agnates*, but succeeded as *cognates*.

Tit. vi.—*Degrees of Cognation.*

The *cognates* were admitted to the inheritance if they were within the sixth degree of relationship, except in

the case of children of second cousins, who were admitted up to the seventh degree.

Every step of relationship between an ascendant and a descendant was counted as one degree. The relationship of two persons to one another was computed by counting the steps from one of the persons up to the common ancestor and down to the other person. Thus, brothers were in the second, and brothers' children (or first cousins) in the fourth.

The old law recognized no relationship, either *agnatio* or *cognatio*, between slaves, but Justinian allowed the children of slaves, if emancipated or born after their parents' emancipation, to succeed their parents, if these had been emancipated also.

In such cases, the children had also mutual rights of succession to one another.

The cognates were admitted (after the *sui heredes* and agnates had been exhausted) in order, according to their degrees of relationship, the nearer degree excluding the more remote.

Succession to freedmen's property.

1. By the law of the Twelve Tables, the freedman was not required to mention the patron in his will, but if he left no *sui heredes* the patron succeeded.
2. The prætors obliged every freedman to leave half of his property to his patron, in default of which the prætor would grant *bonorum possessio contra tabulas*.
If the freedman left a natural child the patron was excluded, otherwise he took half on the freedman's intestacy.
3. The *lex Papia Poppæa* provided that if the freedman left a fortune of more than 100,000 sesterces and one child, the patron took half the property, if two children, one-third, if three children, nothing.

4. A constitution of Justinian's orders that if a freed man or woman dies intestate, and without children, the patron takes all the inheritance; if there are any children they exclude the patron.

If the freedman dies testate without children, leaving more than 100,000 sesterces (100 *aurei*), the patron is entitled to a third, clear of all burdens or incumbrances. If the property of the deceased was less than 100 *aurei*, the patron took nothing against the will.

Patrons and their cognates up to the fifth degree are called to the inheritance of freedmen.

[All freedmen in the time of Justinian had the rights of Roman citizens, the distinction of *Latini* and *Dedititii* being abolished. The *peculium* of *Latini* and *Dedititii* formerly reverted to the patrons on the death of the freedmen.]

Tit. viii.—*Assignment of freedmen.*

A patron may assign his freedman to any of his children under power to the exclusion of the others. If the child died or was emancipated, the assignment was rendered null.

Any expression of the assignor's intention was sufficient to create an assignment.

Tit. ix.—BONORUM POSSESSIO.

In the strictness of the old law no other mode of succession was recognized than that of the "*heredes.*" The prætors, however, often placed the heirs in possession of the inheritance (which was the readiest mode for the heir to get such possession) by means of the interdict, "*quorum bonorum.*"

By degrees the prætors gave "*possessio bonorum*" to those as to whose claims the law was silent, having regard to natural equity in their decisions rather than to

inferences from the civil law. The persons to whom the prætors gave the *possessio bonorum* were not thereby created *heredes*, but stood in their places, and obtained all the advantages that an heir would have had.

“The prætor could not confer an inheritance on anybody. He could not place the heir or co-heir in that very relation in which the testator had himself stood to his own rights and obligations. All he could do was to confer on the person designated as heir the practical enjoyment of the property bequeathed, and to give the force of legal acquittances to the payment of the testator’s debts. When he executed his powers to these ends the prætor was technically said to communicate the *bonorum possessio*.”—*Anc. Law*, p. 211.

A. *Bonorum possessiones ex testamento.*

If there was a testament the prætor gave :

1. *Possessio contra tabulas* to children passed over in the testament. Or,
2. *Possessio secundum tabulas*, if the testament was defective so as not to satisfy the requirements of the civil law.

B. *Bonorum possessiones ab intestato.*

[(α) Forms applicable to persons of free birth.

(β) Forms applicable only to freedmen.]

- (α) 1. *Unde liberi*, whereby possession was given to the *sui heredes* and those called with them.
- (α) 2. *Unde legitimi*, for those entitled to be heirs by the laws of the Twelve Tables and subsequent legislation.
- (β) [3. *Unde decem personæ*: for the ten persons who might be called before the emancipating patron. This form was abolished by Justinian.]
4. *Unde cognati*. For the cognates. They had no claim to the succession, except under the edict of the prætor.

[(β) 5. *Tum quem ex familiâ.* For the nearest member of the patron's family, in default of the *sui heredes* taking under the "*unde legitimi*."

(β) 6. *Unde liberi patroni patronæve et parentes eorum.* This form and the preceding one were abolished by Justinian, the alteration of the law as to patronage rendering them needless.]

(α) 7. *Unde vir et uxor.* This gave the husband and wife reciprocal rights of succession.

[(β) 8. *Unde cognati manumissoris.* For the cognates of the manumittor. This was also abolished in Justinian's time.]

9. *Uti ex legibus.* This form was for giving the possession to those to whom the law expressly said it should be granted. It was instituted by Justinian.

There were certain times fixed within which the persons entitled had to claim the *possessio bonorum*. Parents and children were allowed one year; *agnates* and *cognates* one hundred days. Only *dies utiles*, working days, were counted. Till the time of Constantius a formal demand of the *possessio* before the *prætor* in Rome, or the *præses* in the province, was necessary; from then till the time of Justinian application could be made to any magistrate, and Justinian allowed the applicant to express his intention in any manner. If the first person entitled refuses, those of the same degree are called, and after them those of the next degree.

[Changes in the law of intestate succession effected by the 118th and 127th Novels.

All distinctions between the *hereditas* and *bonorum possessio* were abolished, and the following order of succession instituted:—

1. *Descendants*, without distinction of sex or degree, taking *per capita* in the first degree, and *per stirpes* in the second.

2. *Ascendants* (sharing with brothers and sisters if any).
If there were ascendants on both sides each side took half the inheritance.
3. *Collaterals*. In the first place brothers and sisters of the whole blood, who were represented by their children if dead, next brothers and sisters of the half blood. In default of these, the nearest relation succeeded.]

Tit. x.—*Arrogation as a mode of acquisition per universitatem.*

In the time of Justinian the arrogator merely acquired the usufruct of property coming to the arrogated person from an extraneous source, the dominium remaining with the son.

If the arrogated son dies in the adoptive family, the arrogator succeeds if there are no persons who would be preferred to a father.

The property of the arrogated son was answerable for his debts, but the arrogator was not liable to be sued except on behalf of the son, though he could sue for a debt due to the son.

[Before the time of Justinian usus and usufruct, as well as personal obligations, had been extinguished by the *minima capitis deminutio consequent* on arrogation.]

Tit. xi.—*Addictio bonorum libertatis causa.*

In case the heirs of all classes and the *fiscus* refused an inheritance, then, if there had been a gift of freedom to slaves by will or codicil, the inheritance might be adjudged to an applicant who would take the full liabilities of it and satisfy the creditors. This was, therefore, a mode of succession *per universitatem*; it was introduced first by Marcus Aurelius, with the object of preventing the failure of a gift of liberty to slaves, and of sparing the reputation of the deceased by preventing the sale of the inheritance.

If the *addictio* takes place, the gift of freedom made to slaves in consequence cannot be revoked by the *restitutio in integrum* of the heir.

Tit. xii.—There were other modes of succession *per universitatem*, such as the *bonorum venditio* by creditors of the debtor's goods ; these were done away with by Justinian, as was also the mode of acquisition under the *Sc. Claudianum*, which gave to the master of a slave the property of a freed woman with whom the slave cohabited.





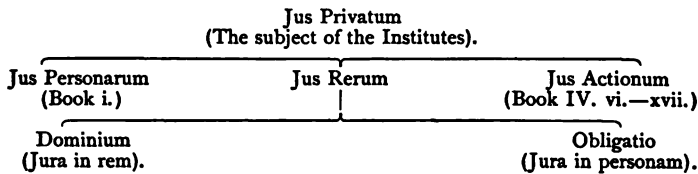
Tit. xiii.

OBLIGATIONS.

Book III. xiii.—Book IV. v.

(B.)—JURA IN PERSONAM : RIGHTS OVER PERSONS.

The plan upon which the Institutes are constructed may be illustrated by the accompanying table :—



The second book of the Institutes and part of the third is taken up with that portion of the Law of Things which relates to *jura in rem*, or rights availing against the world at large. We now pass to *obligationes* or rights *in personam*, those availing against a particular person.

Definitions of obligatio.

Justinian's :—

“Obligatio est juris vinculum quo necessitate astringimur alicujus solvendæ rei secundum nostræ civitatis jura.”

Obligation is a bond of law by which we are necessarily bound to pay (*i.e.* pay, perform, or procure to be done) something according to the rules of the civil law.

Sir H. Maine's Criticism :—

“ This definition connects the obligation with the nexum through the common metaphor on which they are founded, and shows us with much clearness the pedigree of a peculiar conception. The obligation is the ‘ bond,’ or ‘ chain,’ with which the law joins together persons or groups of persons in consequence of certain voluntary acts. The acts which have the effect of attracting an obligation are chiefly those classed under the heads of contract and delict, of agreement and wrong, but a variety of other acts have a similar consequence which are not capable of being comprised in an exact classification.”

The word obligation is used in the Institutes in the narrower sense of obligation correlating with rights availing against persons certain and determinate.

The two great classes of rights and obligations are thus distinguished by Austin (Lect. xiv.). See also “ Analysis,” page 66.

1. (α) Rights available against persons generally or universally may be termed *rights in rem*.
- (β) Obligations incumbent upon persons generally and universally, offices or duties.
2. (α) Rights availing against persons certain and determinate, *rights in personam*.
- (β) Obligations incumbent upon persons certain and determinate would receive the proper name of *obligations*.

It is in this narrow sense that the word is employed in the Institutes, *i.e.* to refer to duties correlating with rights *in personam*.

Savigny's theory of the nature of obligations, as given in

Brown's "Analysis of Savigny on Obligations," pp. 2, 3, is to this effect:—"The idea of the obligation consists in the control of one person (*domination*) over another person (*sur une personne étrangère*) to the extent of certain isolated acts of the latter (*sur des actes isolées*)."

The elements in the idea of the obligatio are—

1. Two persons, namely :

(α) The debtor, his aspect of the obligation being the principal one.

(β) The creditor, his aspect being the secondary one.

2. Two qualities of acts :

(α) Isolated, as opposed to acts absorbing the entirety of the person.

(β) Restrictive, as being limitations on natural liberty.

Further, a bond or tie is the figure lying at the root of the conception and phrase obligatio; upon which figure are based the ideas of *nexum, nectere, contractus, contrahere, solutio, solvere*.

Natural obligations, *i. e.* those not enforced by an action, are not alluded to in the definition given above, but such obligations were not entirely without the scope of the Roman law, for they might form the subject of an "*exceptio*" or equitable defence.

The word *solvere*, used in the definition, includes three primary notions expressed by the words *dare, facere, præstare*; one or other of these three terms will adequately express the mode of fulfilling any obligation.

Savigny, "Brown's Analysis," p. 11:—

"The *naturalis obligatio*, meaning thereby the non-actionable obligation, may be so on one or other of the following four grounds :

1. On account of the absence of the formalities required by the civil law.

2. On account of the defect in the capacity of the

contracting parties, who may be unable to contract a *civil* obligation.

3. On account of the disregard of the *jus gentium* for the consequences of the strict *jus civile*.
4. On account of the disregard in particular of certain consequences of the strict civil law which were relative to procedure.

A parallel to the *naturalis obligatio* is found in the imperfect obligations of English law; for example, debts contracted in infancy, barred by a statute of limitations or discharged by adjudication of bankruptcy. See Poste's Gaius, sect. 88, 89.

Obligations which are enforced by actions may be so enforced either by,

1. *Civiles actiones*, actions known to the civil law strictly so called.
2. *Actiones prætorizæ*, those given by the prætor; such were often styled *honorariæ*.

Obligations arise in the following ways:—

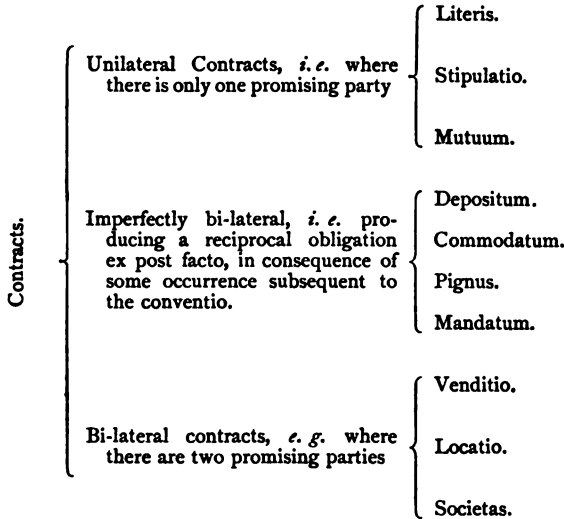
1. *Ex contractu*. (See pp. 106-125.)
2. *Quasi ex contractu*. (p. 125.)
3. *Ex delicto* (or *ex maleficio*). (p. 128.)
4. *Quasi ex delicto* (or *quasi ex maleficio*). (p. 135.)

(A.) OBLIGATIONS EX CONTRACTU: CONTRACTS.

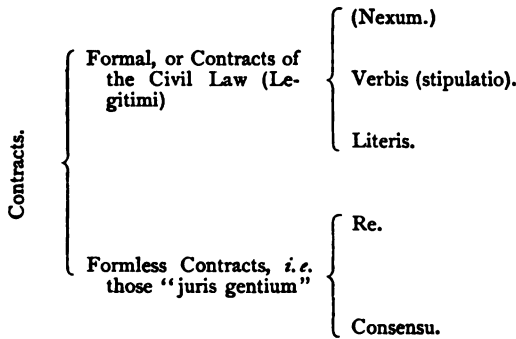
Classification of contracts as treated in the Institutes:—

Contracts.	{	1. Re	{	Mutuum.	
		2. Verbis (stipulatio).		Commodatum.	
		3. Literis.		Depositum.	
		4. Consensu		Pignus.	
				{	Emptio venditio.
					Locatio-conductio.
					Societas.
					Mandatum.

Classification of contracts according to the liability of the respective parties :—



Classification of contracts (Savigny and Poste) according to their historical origin :—



A contract consists of two elements : (1.) The *conventio* or agreement of the parties which precedes ; (2.) the incidence of the "*obligatio*" itself, which follows upon the agreement of the parties being expressed in certain definite forms.

Sir Henry Maine on Contract, A. L. pp. 322, *et al.*

“The analysis of agreement effected by the Roman juriconsults is based upon the theoretical separation of the obligation from the convention or pact. Bentham and Austin have laid down that the two main essentials of a contract are these: first, a signification by the promising party of his intention to do the acts or to observe the forbearances which he promises to do or to observe. Secondly, a signification by the promisee that he expects the promising party will fulfil the proffered promise. The result of these significations (according to the Roman jurists) was not a contract, but a convention or pact. It distinctly fell short of a contract. Whether it ultimately became a contract depended on the question whether the law annexed an obligation to it. A contract was a pact (or convention), *plus* an obligation. So long as the pact remained unclothed with the obligation it was called *nude* or *naked*.”

Obligations were enforced in later times by personal actions to which the name *condictio* was applied. They might either be *certi* or *incerti*, the former being to enforce payment of a definite sum, the other of an amount left to the discretion of the judge.

As distinguished from *condictiones*, which were derived from the civil law, we should notice actions *bonæ fidei*, in which the prætor had to take the whole circumstances of the case into consideration, and determine according to natural equity. To this class all prætorian actions belonged.

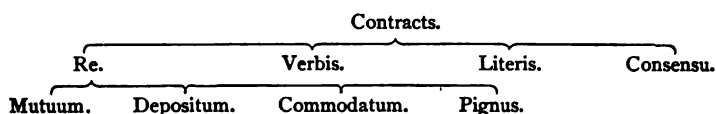
The old method of transferring *res mancipi* was by the “*nexum*,” which was also used for the purpose of effecting contracts of deposit and pledge. The *nexum* was used in later times, chiefly as the mode of transferring “*res mancipi*,” contracts of deposit and pledge being made *re*.

The notion of persons under a contractual engagement being connected by a bond or tie, is probably derived from the idea of the *nexum*, which was at once the conveyance and the contract of the primitive Romans. See Maine's *A. L.*, pp. 48, 314.

There were four forms of contract recognized by the civil law, made :

1. *Re.* 2. *Verbis.* 3. *Literis.* 4. *Consensu.*

The historical order of these contracts would be as follows :—*Verbis, literis, re, consensu.*



I. CONTRACTS MADE RE, OR REAL CONTRACTS.

These were created by the actual delivery of the thing which was the subject matter of the agreement.

Real contracts were of four kinds :—

A. MUTUUM, OR LOAN FOR CONSUMPTION.

The subject matter of this contract consisted of something which might be weighed, numbered, or measured, things "*quæ pondere, numero, mensurâve constant.*" *Mutuum* was a contract of loan, the thing lent becoming the property of the borrower, who had to return an equivalent to the lender. Things were styled *fungibiles* which were capable of being the subjects of *mutuum*.

The remedy for the lender was a *condictio certi*.

A person to whom payment of money has been made by mistake, is in the same position as the borrower in the contract of *mutuum*.

Mutuum was a gratuitous loan ; if interest was intended, it had to be stipulated for in another contract.

We should here take notice of the *Sc. Macedonianum* (so

called either after a parricide or a usurer of that name), which prohibited lending money to a *filius familias* without the consent of the parent.

B. COMMODATUM, OR GRATUITOUS LOAN FOR USE.

The property in the thing lent by *commodatum* remains with the lender, and the borrower is bound to restore the actual subject *in specie*, and not *in genere* as in the case of *mutuum*.

The borrower, in consideration of the fact that he was the person benefited, had to take the greatest care of the thing lent, and was responsible for the least neglect in keeping the object. He was not, however, answerable for loss caused by superior force or extraordinary accident.

The lender's remedy was the *actio commodati directa*; the *actio commodati contraria* was the borrower's remedy in case the preservation of the object had caused him expense, or if the lender required the thing back before the stipulated time.

"The Roman jurists have failed to point out to what extent real rights attach to the position of hirer or bailee, with the right of user (*commodatum*), and have confined their attention respecting them to the consideration of the personal rights they create as contracts."—ORTOLAN'S *Roman Law*, Nasmith and Pritchard's translation, p. 670.

C. DEPOSITUM, OR DEPOSIT.

Here the thing is deposited for the benefit of the depositor, whose duty it is to select a person who is trustworthy. The depositary or bailee was only liable for fraud or gross negligence, and was entitled to be repaid any expenses incidental to the safe keeping of the *depositum*.

If the deposit had been rendered necessary by a sudden calamity, such as shipwreck or fire, the owner could recover double the value of the deposit if the bailee lost it through negligence.

The *actio depositi directa* was the depositor's remedy, and the *actio depositi indirecta* that of the depositary.

D. PIGNUS, OR PLEDGE.

The *pignus* was a pledge or security held by the creditor for a debt due from the debtor : the creditor was bound to take the utmost care of the thing pledged, in the same way as the holder of a *commodatum*.

The debtor had recourse to the *actio pigneratitia* to recover the thing pledged on payment of the debt for which it was security, while the creditor had the *actio pigneratitia contraria* to recover any expenses he might have incurred in keeping the thing pledged.

When the debtor retains possession of the thing pledged, it is styled "*hypotheca*."

Hypothecation was effected by mere convention without delivery of possession. It was pure alienation of a *jus in re* imposing no obligation.—Poste's Gaius, p. 371.

Student's Austin, p. 415.

"In Roman law the right of the pledgee or *hypothecarius* was merely a right to sell the obliged thing in case his debt is not duly satisfied, and to repay, from the proceeds of the sale, his debt with the interest and all incidental costs. It was much like the right which could be acquired in English law by a mortgage with a power of sale, provided the mortgagee could not foreclose."

Tit. xv.—II. CONTRACTS MADE VERBIS, OR VERBAL CONTRACTS.

Verbal contracts were created by the use of a solemn

form of words. The term *stipulatio* was applied to this form. It consisted of a question and answer. The words usually employed were " *Spondes ?*" " *Spondeo ;*" " *Promittis ?*" " *Promitto ;*" " *Fide promittis ?*" " *Fide promitto ;*" " *Dabis ?*" " *Dabo :*" " *Facies ?*" " *Faciam.*"

A stipulation for something certain was enforced by *condictio*, for something uncertain by the *actio ex stipulatu*.

Stipulations belonged to the class of unilateral as opposed to bilateral obligations, *i.e.* they only bound one party, the promissor, who had himself to receive a promise if he wished to be entitled to any benefit under the contract.

Stipulations might be made to take effect immediately, or upon the fulfilment of a condition. A stipulation might, however, refer to an act to be done at a fixed future date; in this case the promise was binding at once, though performance could not be claimed till the fixed day.

In conditional stipulations the interest in the thing stipulated for did not attach to the promise till the accomplishment of the condition; in the technical language of the Roman lawyers, " *dies nondum cessit.*"

[Stipulations made without any mention of time or condition, were said to be made *purè* (*dies et cessit et venit*, the interest of the promise was vested, and the time had come for performance). If there was a time fixed for performance, then *dies cessit sed nondum venit*; the stipulator's interest attached, but time had not come for performance.]

If the condition was not accomplished before the death of the stipulator, his heirs obtained the benefit of the contract.

[A promise to pay a certain sum if the stipulator did not do a certain act would be a *conditional* one, the

payment becoming due on the stipulator's death unless the conditional act was done ; a promise to pay a sum of money on the stipulator's death would not be conditional, as his death was certain to happen.]

If a place is fixed for the performance of a stipulatio made *purè*, it is implied that there shall be a reasonable time allowed for performance : such a stipulation as, "Do you promise to give me *to-day*, at Carthage, a certain sum?" the parties being at Rome, would be impossible, and therefore invalid.

Conditions referring to past or present facts make the stipulation void if the thing mentioned is not the case, and valid if the fact is as stated. Thus, in the case, "If Mœvius has been consul, do you promise to pay a certain sum?" if Mœvius had been consul the contract would be valid, if not, void.

If an act was stipulated for, it was usual to subjoin a penalty as an alternative for performance, in order to determine the value of the stipulator's interest.

Tit. xvi.—*The parties to a stipulation.*

There may be two or more persons on either side of the contract, each promissor being liable to each promisee if there are more than one in each case. If the terms of the stipulation are carried out by any one of the parties, this acts as a discharge for all.

If, however, one of several compromissors was sued, the others could not be sued also, unless it appeared that redress could not be had otherwise, and if one co-stipulator sued the promissor, the others could not.

Tit. xvii.—*Slaves as stipulators.*

Slaves, though they could not bind their masters, could stipulate, *i.e.* receive promises on their behalf ; whatever benefits the slave received by stipulation attached to

the master, unless the advantage was a purely personal one, such as a right of passage for the slave himself.

If the slave is held in common he acquires a share for each master according to the interest of each in him, unless he stipulates for, or at the command of one particular joint-owner.

Tit. xviii.—*Classes of stipulations.*

1. *Judicial.*

These consisted of stipulations originating out of judicial proceedings ; they were ordered by the judge.

Examples :

The defendant might be compelled to promise by stipulation that the sentence should be carried into effect without any fraud on his part. This was called "*de dolo cautio.*"

2. *Prætorian.*

These were ordered by the prætor in the exercise of his authority ; for example, the owner of a house which was a probable source of danger to another, might be compelled to give security for indemnifying the owner of the property that might be injured. This was called "*cautio damni infecti.*"

3. *Common.*

These were sometimes ordered by the judex, and sometimes by the prætor, hence termed Common. For example, security might be given in this manner by a tutor for the property of a pupil.

4. *Conventional.*

These arise by the agreement of parties, and admit of infinite variety.

Tit. xix.—*Invalid Stipulations*.¹

Stipulations might be invalid :

1. *On account of their object.* As for example :—

(α) If the thing does not or cannot exist.

(β) If the thing is a *res sacra religiosa* or *publici juris*, even though the fact of its being so is unknown to the parties. Stipulations regarding such things as the above are void *ab initio*.

(γ) If a man stipulate for a thing, *if it become his*; for upon the object becoming his, the contract would have nothing on which to take effect.

(δ) If the object of the stipulation is the performance of an illegal or immoral act.

2. *On account of the persons by whom made.*

Valid stipulations could not be made by deaf and dumb persons and madmen (except in lucid intervals), since they could not utter or understand the words of the *stipulatio*.

Children, if they had any understanding, could be stipulators and bind others, but could not promise so as to bind themselves without the authorization of their tutors. An infant in the power of his father could not enter into a stipulation at all.

Stipulations could not be made between a *paterfamilias* and those in his power, and a slave could not even bind himself to a stranger.

As stipulations could not be made between absent persons, Justinian, in order to prevent persons fraudulently denying their engagements, enacted by a constitution, that, if there was evidence in writing of the contract (*instrumentum*), such evidence of the presence of both parties must be considered indisputable unless satisfactorily disproved by the person liable under the contract.

¹ For the arrangement of these causes of invalidity, see Sandars' Just. (*sub loc.*)

3. *On account of the persons for whom made.*

A stipulation made for the benefit of a third person is invalid, unless it is for a person in whose power the stipulator is.

The effect of a person stipulating for another was produced by such a method as the promissor agreeing to pay something to the third person, or in default a penalty to the stipulator.

A promise to pay a sum to a stipulator and a third person, according to Justinian, would entitle the stipulator to receive one-half the sum stipulated for.

On the other hand, a person who answers for the *performance* of an act by another is not liable, unless he bind himself by a penalty in case of default.

[Persons could stipulate for their heirs, and *patres-familias* for those under their power ; other exceptions were allowed in the later law.]

If, however, the stipulator had an interest in the performance of the promise he could stipulate for another person.

4. *On account of the manner in which they were made.*

The stipulation was void :

(a) If the promise and the stipulation, *i.e.* the question and answer, did not agree. Thus, if the stipulator demanded ten *aurei* and the promissor agreed to give five, the contract would be void, or if a conditional demand was made, and an unconditional promise given.

If the stipulator makes a demand for several things and the promissor only agrees as to one of the things, he is not bound as to the others.

If the stipulator intend one thing, and the promissor another, the contract is void.

5. *On account of the time with respect to which they were made.*

(a) Before the time of Justinian, a valid stipulation could

not be made to be performed immediately after the death of the promissor or stipulator ; nor could one be created for a payment to be made immediately in case a future condition was fulfilled. Justinian legalized both such forms ; in the latter case the contract was binding at once, but could not be enforced till the condition was fulfilled.

Promises to pay at the death of either party to the stipulation, or at the death of a third person, were valid.

A thing promised for a fixed future time cannot legally be demanded before.

6. *On account of the condition.*

An impossible condition, *i. e.* one that could not be fulfilled, made a stipulation void.

[Such a condition as this, "if I do not touch the sky," is not an impossible condition.]

If the condition is accomplished after the death of the stipulator, his heir can claim performance, and the heir of the promissor can be sued on the agreement.

In a testament an impossible condition is taken as if not written, and the disposition is accordingly regarded as unconditional. See Poste's Gaius, p. 383.

The history of stipulatio.

Maine, A. L., p. 327.

"As, then, the question and answer of the stipulation were unquestionably the nexum in a simplified shape, we are prepared to find that they long partook of the nature of a technical form." Again, p. 329 :—"With us a verbal promise is, generally speaking, to be gathered exclusively from the words of the promissor. In old Roman law another step was absolutely required ; it was necessary for the *promisee*, after the agreement had

been made, to sum up all its terms in a solemn interrogation, and it was of this interrogation, and of the assent to it, that proof had to be given at the trial, *not* of the promise, which was not in itself binding."

Savigny (Brown's Analysis, p. 115) sketches the stages in the development of *stipulatio* thus:—

Originally the *Verbis obligatio* consisted in the union of two juridical facts.

(*α*) The *nexum*.

(*β*) An oral question and answer.

In 326 B.C. the *lex Pœtelia* abolished the *nexum*, after which the oral question and answer alone remained, becoming in fact the contract by *stipulatio*.

The successive stages in the history of the contract were:—

1. The words required to be in Latin, but latterly they might be in any tongue.
2. The words of the question and of the answer required to correspond with literal exactness; latterly, however, the correspondence of sense and intelligence sufficed: Leo's constitution upon this matter, 469 A. D., was only a timely recognition of a law which had already changed.
3. The *Presence* of the parties remained indispensable.
4. The *Continuity* of the act remained indispensable. Cf. Digest 45, 1. 137.
5. Writing, mentioning the presence of the parties, came into use. See Just. Inst., iii. 19, 12

Tit. xx.—*Fide jussors*.

Before the time of Justinian the stipulator and the promissor could have respectively *adstipulators* and *adpromissores* joined with them in a stipulation, the former acting as procurators of the promisee, the latter as sureties for the promissor, either for the whole extent of the promise or only for a part. Justinian, by

enabling a man to stipulate for the performance of a thing after his own death, rendered adstipulators unnecessary, this being the only purpose for which they had been needed.

Fidejussors were the usual form of surety in the time of Justinian ; they could bind themselves by every kind of obligation, and their heirs were liable for their agreements ; they could be added after an obligation was entered upon. Each *fide jussor*, if there were several, was answerable for the performance of the contract, but if any individual surety was sued, he could take advantage of a rescript of Hadrian and have the *beneficium divisionis*, so that he would only be answerable for his proportion of the debt.

Fidejussors cannot bind themselves for more than their principal, but they can for less.

If the fidejussor has to pay for the debtor, he can recover from the latter by the *actio mandati*.

III. LITERAL CONTRACTS.¹ OBLIGATIONES LITERIS.

Literal contracts were formed by entry of a debt in the books of the creditor, by or with the consent of the debtor. The obligation originated in the consent of the debtor, and conclusive evidence of the debt was given by an entry made by the debtor in his own books. After two years the debtor could not plead that he had not received the original sum of money ; up to that time the burden of proof would lie with the creditor to prove payment, afterwards the debtor had to prove that he had actually not received payment.

Maine, A. L., p. 330. The explanation of this contract turns on a point of Roman domestic manners, the systematic character and exceeding regularity of book-keeping in ancient times.

¹ See table, p. 106.

IV. CONSENSUAL CONTRACTS. OBLIGATIO CONSENSU.

These were formed by the mere consent of the parties, there being no necessity for any writing or formalities, nor even for the presence of the parties. Such contracts (1.) were bilateral, *i.e.* binding both parties to them.

(2.) They depended upon the *jus gentium* for their validity, and,

(3.) They were enforced by prætorian actions, *bonæ fidei*, and not by actions *stricti juris*, as were the contracts which depended upon the old civil law of Rome.

The term consensual does not mean that the consent of the parties is more emphatically given than in other forms of agreement, but it indicates that the obligation is annexed at once to the *consensus*, in the contracts of which we are speaking. Vide Maine, A. L., p. 333.

A. *Emptio venditio.* Contract of sale.

This contract derives its force from the consent of the parties; if, however, they agree to reduce the terms of the contract to writing, then the contract is not complete till it is fully committed to writing. If an earnest had been given, this was forfeited to the vendor if the vendee refused to carry out the contract, and double the value of the earnest was forfeited by the vendor if he did not carry it out. The earnest was considered only as evidence of the contract.

There must be a price fixed and certain for every sale, and this price must consist of a sum of money.

Observation 1. A sale of a thing at a price to be fixed by a third person, is valid if the person fix a price.

2. The price must be in money, otherwise the contract is one of *permutatio*; this was the view held by the Proculians, the Sabinians considering it to be *venditio*.

The vendor in a contract of sale had to guarantee the

vendee free, undisturbed and lawful possession of the thing sold, and to secure him against latent faults.

The vendee was bound to put the vendor in legal possession of the purchase money.

The contract of sale is completed by the consent of the parties ; after this, the thing sold is at the risk of the vendee, who also obtained the advantage of any increase to the object.

The actual transfer of the *dominium* in the thing, *i.e.* the conveyance, as distinguished from the contract, was completed by the delivery of the thing to the vendee.

A sale might be made absolutely or subject to a condition. Accessory contracts modifying the principal one were termed "*pacts.*"

If the vendor dispose of a thing that was not *in commercio*, such as a temple or religious place, he was liable to the vendee for any loss that the latter might have incurred by the error. A stipulator in a similar case would have had no remedy.

Confusion of contract and conveyance.

Austin, Lect. xiv. (Stud. ed. p. 181.)

"Rights *in rem* sometimes arise from an instrument which is called a contract, and are, therefore, said to arise from a contract ; the instrument, in these cases, wears a double aspect or has a twofold effect, to one purpose it gives *jus in personam* and is a contract, to another purpose it gives *jus in rem* and is a conveyance."

For example, by the English law the sale of a specific moveable is a conveyance and transfers the right *in rem*.

B. *Locatio conductio. Letting to hire.*

This contract closely resembles that of *emptio venditio* : it was complete by the mere consent of the parties,

after which the letter had an *actio locati* for the hire, while the hirer's remedy was the *actio conducti*.

The *locatio conductio* might be :

1. *Rerum*. When one person let, and another hired a thing.
2. *Operarum*. When one let his services, and another hired them.
3. *Operis*. Where one (*locator*) contracted for a piece of work being done, and the other (*conductor*) undertook to do the work.

In case of land let to hire, the landlord could take farm implements and other property of the hirer by the *actio Serviana*.

The following contracts cannot properly be ranked as examples of *locatio conductio*.

If the price of the hiring is not fixed, the contract is not *locatio conductio*, but affords grounds for an action *præscriptis verbis*.

If the consideration for the hiring was not a sum of money, but a loan for use granted to the *locator*, then this was regarded not as a *locatio* but as a transaction involving two loans, and an *actio præscriptis verbis* would be the remedy of either party.

[The contract of *emphyteusis*, or perpetual lease at a fixed rent, which resembles both *locatio conductio* and *venditio*, was placed by Zeno in a class by itself.]

If a man agrees to make certain objects for another, this amounts to *venditio* if he provide the materials, but if the materials are provided by the other, then the contract is a *locatio*.

Rule as to the liability of a hirer.

The hirer was bound to take the greatest care of the thing hired, the same care as the most prudent *paterfamilias* would of his property.

The heir succeeds to all the rights of a deceased hirer; the sale of the object, however, ended the contract, and the remedy of the hirer or his heir was only a *personal* action against the letter, and not, as in the case of his having the usufruct, a *real* action.

3. *Societas. Partnership.*

A partnership may be formed either—

1. Universally, when all the goods of the contracting parties are included in the partnership. Or,
2. For a particular undertaking.

Partners share the gains and losses equally, unless there is an agreement to the contrary: such an agreement would be valid.

Partnership is ended (i.) By the withdrawal of any one of the partners. If, however, in the case of a universal partnership, a partner withdrew for the purpose of taking an inheritance or other gain in fraud of his co-partners, he would have to divide this with the others.

(ii.) By the death of one of the partners. If there are more than two partners the death of one dissolves the whole partnership, unless an agreement to the contrary is made previously.

(iii.) By the accomplishment of the business for which the partnership was formed.

(iv.) By the confiscation or forced sale (*publicatio* or *cessio bonorum*) of the goods of one of the partners.

Liability of partners among themselves.

A partner was bound to use the same care in dealing with the goods belonging to the partnership as he used in the management of his own affairs. The remedy between partners was the *actio pro socio*, for all cases

which did not fall within the actions, such as those *furti*, *vi bonorum raptorum*, &c.

Partnerships were limited to gains in commerce, unless there was an agreement to the contrary.

A partnership in which one partner took all the gains was styled *leonina*, and was deemed invalid. See Poste's Gaius, p. 426.

Tit. xxvi.—4. *Mandatum, or gratuitous agency.*

By the old and strict Roman law one person could not in theory represent another; the contract of *mandatum* obviated this difficulty. The execution of a *mandatum* was the *gratuitous* performance of an act for another, the rights of both the mandator and the mandatory being amply protected by the prætors.

(1.) A mandate might be for the benefit of the mandator only.

For example: A mandate given by A. to B. to buy an estate or transact business for A.

Or (2.) For the benefit of the mandatory and the mandator.

For example: A mandate from a debtor to a creditor, enabling the latter to stipulate for a debt due to the former. The debtor thus gets what is due to him collected, and the creditor has two persons to whom to apply for his money.

Or (3.) For the benefit of a third person; as, for example, if A. manage the affairs of B. in pursuance of a mandate from C.

Or (4.) For the benefit of the mandatory and a third person; for example, if A. lends money to B. at interest in pursuance of a mandate from C.

But (5.) A mandate made for the benefit of the mandatory only is considered merely as a piece of advice from the mandator. "*Magis consilium est quam mandatum.*"

A mandate contrary to *boni mores* is not obligatory.

If the terms of the mandate are exceeded, the mandator is only responsible for what is authorized by the mandate.

1. A mandate can be revoked before it has been carried into effect.
2. It is extinguished by the death of the mandator or mandatory; but if the death of the former is unknown to the latter he can still bring the *actio mandati*.

A mandate once accepted must be executed, unless some just cause supervene to release the mandatory.

A mandate may be made conditionally, or so as to take effect from a future time.

Though the services were performed gratuitously under the contract, it was open to the party benefited to present the other with an *honorarium*, or present, for his services.

Tit. xxvii.—OBLIGATIONS QUASI EX CONTRACTU.¹

“A quasi-contract is not a contract at all . . . inasmuch as the convention, the most essential ingredient of contract, is wanting. This word ‘*quasi*’ prefixed to a term of Roman law, implies that the conception to which it serves as an index is connected with the conception with which the comparison is instituted by a *strong superficial* analogy or resemblance. It does not denote that the two conceptions are the same, or that they belong to the same genus. On the contrary, it negatives the notion of an identity between them.”—MAINE'S *Anc. Law*, p. 344.

[We must distinguish between implied contracts, which are true contracts, and quasi contracts, which are not contracts at all.]

The obligations to which the term quasi ex contractu is conveniently applied are in their effects similar to

¹ See p. 106.

contracts, though different in their origin, the obligee being placed in a similar position to that in which he would be if he had entered into a contract.

Examples:—

1. If a person manage the affairs of an absent person without the knowledge of the absentee, both parties are under obligations to one another, "*quasi ex contractu.*"
2. Tutors and pupils are under obligations *quasi ex contractu* to one another, as are also—
3. Persons who are joint owners of the same thing.
4. The heir and the legatees.
5. The person who has received money by mistake. If money has been paid merely to escape a penalty it cannot be recovered, although the payment really was not due.

Tit. xxviii.—*Persons by whom obligations are acquired for us.*

The benefits secured by an obligation are obtained—

1. Through those in our power, children and slaves. What is acquired by slaves is entirely the property of the master; of that which is acquired by the children the father will have the usufruct and the son the ownership. The father alone, however, will be able to bring the necessary actions.
2. Through freemen and slaves of another possessed bonâ fide, if they acquire through their own labours, or something belonging to the bonâ fide possessor.
3. Through a slave of whom we have the usufruct or use.
4. Through a slave held in common; a slave so held, however, if he stipulates expressly on behalf of one master, acquires for him only.

Tit. xxix.—*Dissolution of obligations ex contractu.*

Obligations *ex contractu* are dissolved :

1. By *Solutio* or payment of the thing due, by performance of the act required to be done, or by the payment of something substituted (with the consent of the creditor).

The civil law, which imposed forms on the formation of a contract, imposed corresponding forms on its dissolution. In cases of non-performance, where the forms had not been gone through but equity demanded that the debtor should be set free, the prætor allowed the debtor to repel the creditor by an exception ; hence the expression :—*obligatio aut ipso jure aut per exceptionem tollitur*.

2. By *acceptilatio*, or fictitious repayment : this originally only applied to contracts made *verbis*, but being considered as a stipulation which operated as a novation of the former contract, it did away with the original contract, and substituted the fictitious one.

The required results were attained with certainty by the use of the *stipulatio Aquiliana*, which acted as a novation of all obligations.

3. By *novatio*. *Novatio* was the dissolution of an old contract, by its being merged in a new one formed for the purpose of superseding it. In a case where the second obligation is invalid (as where a slave stipulates) the first obligation is nevertheless dissolved by *novatio*.

The stipulation was the form of contract which was required to effect *novatio*.

If the new contract was not meant to supersede the old, then both will remain in full force and effect.

4. By *mere expression of intention*. Contracts formed *consensu* could be dissolved by the expression of a wish to dissolve the contract by either party.



Lib. iv. i.

OBLIGATIONS (*continued*).

OBLIGATIONS EX DELICTO ; DELICTS.

BOOK IV. i.-v.



OBLIGATIONS *ex delicto* are said to originate from the injury or wrong itself : "*nascuntur ex re, id est, ex ipso maleficio.*"

Maine, Anc. L., page 370, says : "The penal law of ancient communities is not the law of crimes, it is the law of wrongs, or to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money damages if he succeeds." The principal delicts giving rise to obligations mentioned in the Institutes are *Furtum, vi bona rapta, damni injuria, and injuriæ.*

I. FURTUM. THEFT.

Definition. The fraudulent dealing with a thing itself, its use or possession. *Contractatio rei fraudulosa vel ipsius rei vel etiam usus ejus possessionis ve.*

There must be, 1. evil intention as implied by *fraudulosa*;
2. actual handling or dealing with the thing, implied
in *contractatio*.

Moveables alone could be subjects of *furtum*. *Furtum*
was either *manifestum* or *nec manifestum*.

Furtum manifestum.

If the thief was taken in the act or before he had reached
the destination he intended for the thing, with it in his
possession, this constituted *furtum manifestum*.

Furtum if not *manifestum* was *nec manifestum*. The
penalty for the former was four times the value of the
thing stolen, for the latter twice the value.

Maine, Anc. Law, p. 379 :—

“The ancient lawgiver doubtless considered that the
injured proprietor if left to himself would inflict a very
different punishment when his blood was hot, from that
with which he would be satisfied when the thief was
detected after a considerable interval; and to this
calculation the legal scale of penalties was adjusted.
The principle is precisely the same as that followed in
the Anglo-Saxon and other Germanic codes.”

There were two forms of theft to which before the time
of Justinian distinguishing names were applied.

Furtum conceptum. If a stolen article was found after a
search in the presence of witnesses in a person's house
he was liable to an *actio concepti furti*.

Furtum oblatum. If a person had a stolen article placed
in his possession by the thief, he had an action *furti*
oblati against the latter.

A person who did not allow search for a stolen article to
be made was liable to an *actio prohibiti furti*; if he
did not produce the stolen article he was liable to the
actio furti non exhibiti. These forms, *furti concepti*,
oblati, *prohibiti*, and *non exhibiti* were obsolete in the
time of Justinian.

[The *furtum lance licioque conceptum* is mentioned in the Twelve Tables. If a searcher, after entering the house with no clothing but a cincture, and holding a platter in his hands, found the stolen article, the householder was punished as for *furtum manifestum*.]

Under the head of *furtum* would be included all fraudulent dealing with the property of another contrary to the wishes of the owner. "*Generaliter cum quis alienam rem invito domino contractat.*" Thus theft can be committed by a depositary of the thing deposited.

Generally if a man use a thing in a way that he believes the owner would not permit, this is theft, although if the owner actually does approve of the use there is no theft.

[If Titius persuades a slave of Mævius to steal a thing from his master and the slave informs his master, then if Mævius, in order to catch Titius, allows the slave to take the thing, in this case it was formerly held that Titius was not liable either for theft or for an action *servi corrupti*. Justinian enacted that Titius was liable to both actions.]

The following things were capable of being stolen :—1. Moveables ; 2. Free persons, *e.g.* children under power ; 3. The thief's own property, as when a man steals what he has pledged.

Accessories.

Persons are liable as accessories if they actually assist in the crime, but are only liable to an *actio in factum* if they merely plan the theft. Though a child under power or a slave cannot be liable for theft committed from those under whose power they are, yet their accessories can be punished as for any other theft.

Who could bring the actio furti.

Anyone who is interested in the preservation of the object stolen. Conversely the owner cannot bring the action unless he has actually suffered damage.

- (1.) Thus a creditor may bring the action if a thing pledged to him is stolen, for though the debtor be solvent, yet the possession of the thing itself might be more advantageous than the discharge of the obligation.
- (2.) The depositary of materials for work (as under a contract of *locatio-conductio*) could bring the *actio furti* against the thief (provided the depositary were solvent), the owner having the *actio locati* against the depositary.
- (3.) In the case of a *commodatum*, the lender has his choice of bringing the *actio commodati* against the borrower or the *actio furti* against the thief, but he can only bring one of the actions.
- (4.) In the case of a *depositum* the depositor alone can bring the *actio furti*, the depositary not being answerable except for wilful wrong, and therefore not possessing sufficient interest to enable him to bring the action. The *actio furti* had for its object merely the recovery of the penalty; the thing stolen could be recovered by a *vindicatio*, or, if the thing was not in the thief's possession, its value (with interest) could be obtained by a *condictio*.

If a child committed a theft it would be liable if "*proximus pubertati*," *i.e.* near the age at which legal liability was presumed.

2. *Vi bona rapta. Robbery with violence.*

For theft of any kind the remedy was the *actio furti*; if, however, violence was employed by the thief he was liable to an *actio de vi bonorum raptorum* (instituted by the prætor). By this action, if brought within a year, quadruple the value of the thing stolen might be recovered (including the value of the thing, so that the penalty was really but threefold the value).

If a person seized by force a thing which he believed to be his own he was not liable to the penalties of this *actio bonorum vi raptorum*, but forfeited the article if it was his own, and its value if it did not belong to him.

The action could be brought by a person who had the slightest interest in the thing stolen.

Criminal intention, *dolus malus*, is a necessary element in the crime of robbery by violence. See Poste's Gaius, sect. 209.

3. *Damnum Injuria. Damage arising from wrong.*

The action *damni injuriæ* was established by the *lex Aquilia* (probably about 285 B.C.).

The first chapter of this law related to offences which resulted in the death of a slave or head of cattle belonging to another, and the third related to injury of other descriptions.

The second chapter was obsolete in Justinian's time.

1. A person killing the slave or beast of another unlawfully (*i.e. nullo jure*).

Liability would not attach,

(α) For killing a thief if the person could not otherwise avoid the threatened danger.

(β) For any act due entirely to unavoidable accident.

But if there was a *fault* on the part of the agent then liability would attach, as in the following cases :

(α) A soldier practises with a javelin in a public road and wounds a passer-by.

(β) A man pruning a tree near a public road omits to call out to passers-by, and consequently kills a person.

(γ) A physician neglects to use proper care after performing an operation.

The penalty to be paid was the highest value that the

subject had possessed during the preceding twelve-month, which often far exceeded the actual value at the time of the injury. Consequential damages could also be claimed.

The master of a slave who has been killed can bring a capital accusation against the wrong-doer as well as the action under the *lex Aquilia* for damages.

2. The second chapter of the *lex Aquilia* (obsolete in Justinian's time) gave an action to the stipulator against the adstipulator who had released the debtor by *acceptilatio*.
3. The third chapter of the *lex Aquilia* provides for all kinds of wrongful damage not mentioned in the first chapter, whether to persons or things.

The wrong-doer in this case was compelled to pay the highest value the thing had in the thirty days immediately preceding the injury. If the injury was done by direct physical force (*corpore corpori*) the *actio directa* was used; if indirectly and not actually *corpore* the *actio utilis* was used; and if the injury were neither done directly to the body nor by direct bodily force the *actio* was *in factum*.

If there were more wrong-doers than one the penalty could be recovered from each.

If the injured party also had a right of action under a contract (as of partnership or mandate) he could bring his action under the contract, and if he would have been able to recover more by action under the *lex Aquilia* he could bring this action for the difference.

Tit. iv.—4. *Injuria. Injury or outrage.*

Injuria in its widest sense signifies every action contrary to law, "*omne quod non jure fit.*" *Injuria* in its technical sense as a delict means an outrage or affront, which may be committed in such a form as that of a violent

attack upon the person, or a scurrilous libel on the character of a person.

A man might receive an injury in the person of some one in his power, and each person injured had an action.

If the person injured is a slave the master can only recover damages if there has been an intention to insult himself, or when the outrage has been of such a flagrant character as to affect him.

The slave had no remedy on his own account.

If an outrage was committed upon a slave held in common the damages are not estimated according to the owners' share, but according to their respective positions, the injury being done to them.

The proprietor and not the usufructuary was presumed to be the injured party if a slave suffered outrage.

If a freeman, or the slave of a stranger, is injured merely to insult another person, the latter can bring his action for damages.

Penalties.

By the law of the Twelve Tables the punishment for outrage was "an eye for an eye," &c. But if a bone only was broken pecuniary compensation was exacted. The prætors established pecuniary punishments varying according to the character of the outrage and the position of the injured party; if these considerations combined to make the injury of a grave character it was said to be "*atrox*."

The *lex Cornelia* established the *actio injuriarum*. The injured party might bring either a civil or a criminal action. In the latter case if the prosecutor or defendant were "*illustris*," the proceedings might be carried on for the party by a procurator.

The accessory or instigator could be punished as well as the actual delinquent.

If the person injured manifested no intention of resenting the injury, or took no steps within a year, he lost his rights of action.

Tit. v.—OBLIGATIONS QUASI EX DELICTO.

Certain wrongful acts were not classed by the Romans among delicts, but were styled quasi delicts. Austin argues (Lect. 27) that the distinction between obligations *ex delicto* and *quasi ex delicto* was illogical and purely arbitrary.

Examples of liability for quasi delicts.

1. If a judge made a cause his own he was liable to the person injured by the decision.
2. The occupier of a house was liable for damage done by anything being thrown out or falling out of a window.
If the offender was a *filius familias* living apart from his father he was liable, not the parent.
3. A person who left anything suspended over a road was responsible for the damage resulting from its fall.
4. The master of a ship or the keeper of an inn was liable for damage caused by theft committed by persons in his employ.

Poste's explanation of the distinction is that quasi-delicts, so called, are "apparently only excluded in Roman law from the category of delicts, because they fall under no certain statute, or because they are recent additions to the code, not from any idea of inferior degree of culpability."—v. Sect. 220-225.



Tit. vi.

III. THE LAW OF PROCEDURE.

JUS ACTIONUM.

Actions.



AN action is defined by Justinian as "*jus persequendi judicio quod sibi debetur*," i.e. the right of suing before a judge for what is one's due.

"Rights of action with all other rights founded upon injuries are *jura in personam*, for they answer to obligations attaching upon the *determinate* persons from whom the injuries have proceeded, or from whom they are apprehended."—*Student's AUSTIN*, p. 179, Lect. xiv.

In the time of Justinian the system of procedure by *formulae* had fallen into disuse, and the functions of the *judex* and the magistrate were exercised by the same person, who decided questions both of law and fact.

Divisions of Actions.

Actions	{	1. According to the nature of the right violated	{	In rem (real actions).
				In personam (personal).
				Mixed.
		2. According to their juridical origin	{	Civil.
				Prætorian.
		3. According to the object sought to be recovered	{	1. For the recovery of an object.
				2. For a penalty.
				3. For a penalty and an object.
		4. According to the amount of the condemnation	{	1. For single value.
		2. For double value.		
		3. For treble value.		
		4. For quadruple value.		
5. As to the jurisdiction of the judge	{	1. Bonæ fidei.		
		2. Stricti juris.		
		3. Arbitrariæ.		
6. According to the amount sued for	{	For the whole of the debt.		
		For part only of the debt.		
7. According to their source (only given by Gaius)	{	1. Quæ legitimo jure consistunt (statutory).		
		2. Quæ imperio continentur (originating from a magistrate's jurisdiction).		
8. According to the time within which they might be brought	{	1. Perpetual.		
		2. Temporary.		
9. According to their transmissibility to and against heirs	{	1. Transmissible to and against heirs.		
		2. Not transmissible		
		{		
		To heirs.		
		Against heirs.		

1. *First division of Actions.*

Actions *in rem* and actions *in personam*. The expression *actio in rem* is misleading. All rights of action are *jura in personam*, as they answer to obligations attaching upon determinate persons.

The distinction between real and personal actions is grounded upon the difference between the violated rights for which these actions provide a remedy. The ground of an *actio in rem* is the violation of a right *in rem*, that of a personal action the violation of a right *in personam*.

A personal action is one which enforces an obligation arising out of a contract or delict, or rather a right *in personam*.

A real action was the remedy for the violation of a right *in rem*, and was in fact a claim of ownership in some or other of its forms, as usufructs, uses, and servitudes.

A real action took the form of *vindicatio* or *petitio*; the generic name given by Ulpian to all actions *in personam* was *condictio*.

2. *Second division of actions.*

Civil actions and Prætorian actions.

(a) The former class were established by particular enactments, or generally were founded on the civil law.

(β) Prætorian actions were those granted by the prætor in virtue of his jurisdiction.

The method by which the prætor gave remedies when the civil law failed, was either by the use of *formulae* founded on hypotheses fictitiously regarded as true, or by giving an *actio in factum concepta*.

Examples of Prætorian Actions in rem.

1. *The actio Publiciana.*

If the "*bonâ fide possessor ex justâ causâ*" wished to recover a thing of which he was not the actual *dominus* or

legal owner, he could not employ the *vindicatio*, but was enabled by the prætor to make a fictitious averment that he had gained the thing by usucapion and could recover accordingly by the *actio Publiciana*.

2. The *actio Publiciana rescissoria*, on the other hand, enabled a person whose property another had acquired by usucapion to make a fictitious averment that usucapion had not taken place. This was granted if the person seeking the remedy had through his own absence or that of the possessor been unable to defeat the usucapion.
3. The *actio Pauliana* enabled creditors to seize property that had been fraudulently conveyed to a third person by the debtor, the fictitious averment being that delivery of the thing had not taken place.
4. The *actio Serviana* enabled a landlord to obtain possession of the implements of the tenant on which he had a lien for his rent, it not being considered that the landlord had sufficient interest to support a *vindicatio*.
5. The principle of the *actio Serviana* was extended, and by the *actio quasi-Serviana* all creditors could enforce their right to the thing pledged as security for the debt.

Of Personal Actions, the following may be given as examples:—

1. The *actio de constituta pecunia*. To enforce the payment of money due under a promise (other than a stipulation).
2. The *actio de peculio*. This was given to enable persons to enforce liability of fathers to the extent of their sons' peculium for the liabilities of the latter.

Other actions are granted in the following cases:—

- (a) If a person when challenged by his adversary makes oath that a payment is due the prætor grants an action,

and only inquires whether the oath has been made, upon which judgment follows.

- (β) *Penal actions* were introduced by the prætor for such offences as injuring the prætor's notices in the forum, carrying off witnesses and similar acts.
- (γ) *Prejudicial actions* were preliminary inquiries as to a material fact in an action, the ascertaining of which fact was essential to the carrying out of the suit. Questions of status were most frequently subjects of such actions.

3. *Third division of Actions.*

According to the object sought to be obtained, actions were divided into—

1. Those intended to recover a thing.
2. Those intended to recover a penalty.
3. Those intended to recover both. Such actions were styled mixed.

1. *For the recovery of a thing.*

In this class were all real actions, and most personal actions arising from contracts, such as *mutuum, commodatum*, deposit, partnership, or letting to hire.

2. *For a penalty only.*

In the *actio furti*, what is recovered is in the nature of a penalty, the delinquent being liable to another action for compensation to the injured party.

3. *For the recovery of a thing and a penalty (mixed actions).*

An action for goods taken by force (*vi*), is an example of a mixed action, the fourfold value paid by the delinquent including the value of the thing itself.

The actions *familix erciscundæ, finium regundorum* and *de communi dividundo* were also considered as mixed actions, the judge having the power not only to award a particular thing to a party in the suit, but also to condemn such party to make compensation to another party.

4. *Fourth division of Actions.*

According to the amount of the condemnation : whether it was for single, double, treble, or quadruple value.

(α) *For single value* in the case of a stipulation, loan or mandate.

(β) *For double value.* An example is the *actio Aquiliæ* for unlawful damage.

(γ) *For treble value.* Example : in the time of Gaius the actions *furti concepti* and *furti oblati*. In the time of Justinian a defendant might recover triple the value of the loss he had sustained by payment to the officers of the law courts of a larger fee owing to an excessive demand by the plaintiff.

(δ) *For quadruple value.* Example : the *actio furti manifesti*. In the case of the action "*quod metus causa*," if the defendant restores the thing taken at the command of the judge, he does not pay the fourfold value of it, as he otherwise would pay on conviction.

5. *Fifth division of Actions.*

Actions *bonæ fidei*, actions *stricti juris*, and *actiones arbitrariæ*. In actions *stricti juris*, the judge was obliged to decide according to the letter of the civil law ; in actions *bonæ fidei* he could take into account considerations of natural equity ; a set-off could be allowed in case of a claim by the defendant against the plaintiff. The principal of these actions were *empti et venditi, locati et conducti, negotiorum gestorum, mandati, depositi, pro socio, tutelæ, commodati, pigneratitia, familiæ eriscundæ, communi dividundo, hereditatis petitio, &c.* When the action *ex stipulatio* was employed for the purpose of recovering a wife's marriage portion, it assumed the character of an action *bonæ fidei*.

Actiones arbitrariæ. In these the judge, on ascertaining that the plaintiff's claim was valid, issued an order

(*arbitrium*) to the defendant to satisfy the demands of the plaintiff, or in default to make compensation by paying the sum fixed in the *condemnatio*; the prætor, however, enforced compliance with the *arbitrium*. Actions *in rem* were enforced by being made *arbitrariæ*.

[Closely connected with the subject of arbitrary actions is that of *pluris petitio*.

A *pluris petitio* or excessive demand may be—

1. *Re*, in regard to the thing, as if a man demanded ten *aurei* when nine were due, or if he claimed the whole of a thing when only entitled to half.

2. *Tempore*, in respect of time, as when a creditor demanded payment before it was due.

3. *Loco*, in respect of the place where payment was demanded, as if money was demanded at Rome which was due at Ephesus. In such a case the action would be *arbitraria*, and allowance would be made for the advantage the debtor would gain from paying at the spot agreed on.

4. *Causâ*, in respect of cause. If a man had promised to give one of two things (the choice being left to the promissor) and the other party required one of the two chosen by himself, this would be a *pluris petitio*, as depriving the promissor of his election. So if a man promises a thing generically, as a book or a horse, and the promisee requires some particular book or horse, this is also a *pluris petitio*. By the enactment of Justinian, a *pluris petitio, re, loco, or causa* was punished by a payment to the defendant of triple the loss he had sustained; if *tempore*, the plaintiff had to pay the defendant's expenses and wait twice the time he would have had to wait otherwise. This was enacted by a constitution of Zeno.

If a *pluris petitio* was made by a minor, the defect

was remedied by the prætor, so that the minor did not suffer for his ignorance.

If a plaintiff demands less than his due the *condemnatio* may nevertheless be for the full amount.

If a thing was demanded other than that due, the plaintiff did not suffer, in the time of Justinian; in the time of Gaius he lost his action, but could bring a fresh one for the thing.]

6. *Sixth division of Actions.*

According as the whole of what was due was sued for or only a part.

For example: (a) In actions when claims are brought against the *peculium* of a son or slave, the *paterfamilias* is bound only to the extent of such *peculium*, and if the claim is for more than such amount, it can only be partially met. A similar case is a wife's demand for the restitution of her marriage portion, the husband being only bound to repay to the extent of his means. This was called the *beneficium competentiæ*. It was also allowed in the case of an action brought by a partner, a master, or a father.

(β) In cases where compensatio or set-off was allowed the actions fell under the second head, *i.e.*, of those in which part only is obtained of that which is demanded. The judge in all actions *bonæ fidei* could set off anything due from the plaintiff against what the defendant owed him, but the two debts were looked upon as subsisting separately before the time of Justinian. Under Justinian the debts were held to extinguish one another *ipso jure*, and the balance only could be sued for.

(γ) The *beneficium competentiæ* was also allowed to a debtor (who had made a *cessio bonorum* of his

goods), when required to satisfy his creditors, out of after-acquired property.

[7. A seventh division of actions is given by Gaius into those which *legitimo jure consistunt* (statutable), and those *quæ imperio continentur, i.e.*, originating from the jurisdiction of a magistrate. The former were those which were instituted within the limits of the city, and before a single judge, between Roman citizens. The other class of actions must be carried through during the prætorship of the person under whom they were commenced; they were so called if either party was an alien, if the action was instituted away from home.]

Tit. xii.—*Eighth division of Actions.*

Perpetual and temporary Actions.

Under the old law rights of action founded on a law, on a *senatus consultum* or on imperial constitutions, could be exercised at any length of time. The actions derived from the prætor's authority generally lasted but one year, *i.e.*, during one prætorship, except actions given to the *bonorum possessor*, or the *actio furti manifesti*. Theodosius limited the time within which *perpetuæ actiones* could be brought to thirty years.

related to us.

9. *Ninth division of Actions.*

Those transmissible to and against heirs, and those not so transmissible.

Transmissible to heirs. Actions arising from delicts (except the *actio injuriarum*), and actions founded on contract generally.

delictual.
actions
fidejuss.

Transmissible against heirs. Some actions arising on contract. Penal actions after the time of *litis contestatio*, or joinder of issue.

In the time of Justinian if the defendant satisfied the plaintiff he was absolved. This was the view held by the Sabinians, and confirmed by Justinian.

Tit. vii.—*Liability of fathers and masters for their sons and slaves.*

(a) *With regard to Contracts.*

According to the strictness of the civil law the *paterfamilias* was not liable in any way for the act of a child or slave. The prætor, however, gave actions :

1. When the persons *alieni juris* acted by the order of the *paterfamilias*.
2. When the latter profited by such acts.

1. The master is liable for the whole of what is due if the person contracting with the slave does so relying on the faith of the master ; so, if a slave is master of a ship, or manager of a business for the master, the latter is responsible for all contracts entered into by the slave acting in the capacities mentioned, his liability, in such cases, being enforced by the *actio exercitoria* and the *actio institoria* respectively.

The *actio tributoria* could be brought against the master if he allowed the slave to trade with his *peculium*, and withheld from the creditors their proper share of such *peculium*.

If a slave trades even without the consent of his master, the latter is liable to the extent of the profit he has made from the transaction, and also to the extent of the *peculium*. An action to enforce this liability was termed *de peculio et in rem verso*.

If the creditor could bring the actions *exercitoria* or *institoria*, he might also bring that *de peculio* or *in rem verso*, but as by the former two he could recover the whole debt, one of them would naturally be chosen ; if the creditor could bring the *actio tributoria*, or the action *de peculio*, he might find either the more advantageous, according to circumstances.

In the above, what has been said of the slave refers also to a son, or any other person under power.

The *Senatus Consultum Macedonianum*.

This *Sc.* refuses an action to any creditor who lends money to children under power.

When the father was liable to the actions above mentioned, he was also liable to a *condictio*, which the creditor could bring against him directly.

Tit. viii.—(β) *With regard to delicts.*

Actions brought to recover damages for delicts of a slave were styled *noxal*. The master might either abandon the slave or pay the estimated damage done. The slave became the property of the injured person, but if he could satisfy the damages he could obtain his manumission.

Noxal actions follow the delinquent; *i.e.*, they must be brought against the person who is owner of the slave when they are instituted. If a freeman commit an offence, and become a slave, the action lies against the new master; if a slave is manumitted after he has committed a delict, the action is brought directly against him.

A master cannot recover against a slave for injuries done by the latter.

In the time of Gaius, a child, as well as a slave, might be the subject of a *noxal* action, and might be given up in the same way.

Tit. ix.

Noxal actions could, in the same way, be brought for damage done by an animal. Such damage was termed *pauperies*. If, however, the animal was one of natural ferocity, *e.g.*, a lion or tiger, the action would not lie. But persons keeping dangerous animals too near a public thoroughfare were liable to pay double damages in case of injury.

Tit. x.—*Representation in Actions.*

The old rule of the civil law was that one person could not represent another. This rule was first broken through in the following cases :

1. When a person brought an *actio popularis*, *i.e.*, "*pro populo*."
2. Or became *assertor libertatis* on behalf of a slave, "*pro libertate*."
3. Or brought an action for a pupil, "*pro tutela*."

Under the system of the *formulae cognitors* were appointed solemnly in court and in presence of the adversary: the next change was to appoint *procurators*; these, however, sued in their own names, and they had to give security for the ratification of their acts by their principals.

In the time of Justinian anyone might be appointed procurator, and no particular mode of appointment was prescribed.

Tit. xi.—*Security in Actions. Satisfatio.*

The law in the time of Gaius was :

1. In real actions the possessor, *i.e.*, the defendant, had to give security *cautio judicatum solvi*, which included three points :
 1. That the defendant would pay the sum fixed as an alternative on the condemnatio for the non-delivery of the thing in dispute.
 2. That he would appear for sentence.
 3. That he would not employ fraud in obeying the order of the judge.

If the plaintiff sued in person in a real action he had to give no security, but if by a procurator he had to do so.

2. In *personal* actions the defendant was not obliged to give security, but if either the plaintiff or defendant

appeared by procurator he had to give security as in real actions.

In the time of Justinian the rule was that the defendant in any action should pledge himself to abide by the decision of the judge ; if required he made this promise on oath ; it was then called *cautio juratoria*, if not on oath, *satisdatio*.

If he appeared by a procurator, he had to appear and give the *cautio judicatum solvi*, or become fidei jussor to his procurator, and in either case his property was subject to a hypotheca for his liabilities in the suit.

If the defendant does not appear, and another person is willing to defend the action, he can do so on giving the *cautio judicatum solvi*.

The person acting on behalf of a *plaintiff* must, unless his mandate of appointment is registered or his appointment made in court, give security that his principal will ratify his proceedings.

Tit. xiii.—EXCEPTIONS.

Exceptions were equitable defences to actions which admitted of no other defence : they were so called because they excepted or took away the power of the action. They had their origin in the formulary period of Roman jurisprudence, and in time of the *extraordinaria judicia*, an exception came to mean any defence other than the denial of the existence of the right of action.

The nature of exceptions will appear from the following principal examples of them :

1. "*Quod metus causa*." This exception was a defence to an action on a contract to which the promissor's consent had been obtained by force or intimidation ; if fraud had been used the exception "*doli mali*" was used, or if the truth of some particular fact was in question, the *exceptio in factum composita*.

2. "*Pecuniæ non numeratæ.*" This was the defendant's remedy if sued for money borrowed under security of a stipulation, but never paid over by the lender.
3. "*Pacti conventi.*" If a creditor make a mere agreement with the debtor that payment due under a contract *re* or *verbis* shall not be demanded, the debtor on being sued can plead the agreement by means of an *exceptio*.
4. "*Juris jurandi.*" If the defendant has been called upon by the plaintiff to make oath as to the matter in dispute, and if the defendant has denied his liability, he can plead having denied it on oath by means of this *exceptio*.
5. "*Rei judicatæ.*" If a cause had once been decided, though in strictness of law the obligation still existed, the plaintiff, if he sued again, could be met by this exception.

Classification of Exceptions.

According to the time within which they might be brought, exceptions were :

1. Perpetual and peremptory, or
2. Temporary and dilatory.

The former class of exceptions were those in which the facts alleged might be used for ever as an exception. For example, if a contract had been obtained by fraud or force, an exception stating that fact would be valid whenever the action was brought on the contract (*i.e.*, it would be *perpetua*), and inasmuch as it would at once cut away the ground under the plaintiff's feet it would be peremptory.

Temporary and dilatory exceptions were those which alleged that the plaintiff's claim was not due ; for example, if the plaintiff had agreed not to sue within a certain period, he would be met with the temporary and

dilatory exception of *pacti conventi*. A constitution of Zeno ordered that a plaintiff making a *plus petitio tempore* had to wait twice the time he would otherwise have had to. Before the time of Zeno he would have lost his right of action altogether.

Again, the object of a dilatory exception may be to object to a procurator, and upon the removal of the cause of complaint the suit proceeds.

Tit. xiv.—REPLICATIONS.

The answer to an *exceptio* was termed a *replicatio*: it could with accuracy be styled an *exceptio* to an *exceptio*: the defendant might reply with a *duplicatio*, the plaintiff might reply again with a *triplicatio*.

Exceptions that are given in behalf of the debtor are also given for the *fidejussores*, but an exception, such as that *nisi bonis cesserit* (*i. e.*, which would protect the debtor after he had made a *cessio bonorum*), would not protect the fidejussors, as it would rob the plaintiff of the very security he had required.

Tit. xv.—INTERDICTS.

Interdicts were decrees or edicts of the prætor issued as a speedy and safe remedy to prevent impending injury; they were generally granted on quasi-public grounds.

“In certain cases the prætor at the outset gave provisional or conditional judgments, or issued provisional commands on an *ex parte* statement by the plaintiff, a process like an injunction obtained *ex parte* in Chancery, or a rule for a *mandamus* at Common Law.”—*Student's AUSTIN*, p. 298, Lect. xxxiv.

Classification of Interdicts.

1. According as they are *prohibitory*, *restitutory*, or *exhibitory*.

- (α) *Prohibitory* interdicts are those forbidding some act to be done, as that a person should not build on a sacred place.
- (β) *Restitutory* interdicts command that something should be restored, as, for instance, land to the owner who has been violently and unlawfully dispossessed.
- (γ) *Exhibitory*, commanding a person to produce, as, for example, a freedman whose services are claimed by another.

2. *Second division of Interdicts.*

According as they are given for the acquisition, retention, or recovery of possession (*adipiscendæ retinendæ vel recuperandæ possessionis*).

- (α) For acquiring possession (*adipiscendæ possessionis*), the interdict *quorum bonorum* is given : the effect of it being to compel the possessor to make restitution to the *bonorum possessor*.

The *interdictum Salvianum* enabled a landowner to enforce his right over the implements of the tenant which were hypothecated for rent.

- (β) For retaining possession (*retinendæ possessionis*) the interdict *uti possidetis* was given in the case of land, and that "*utrubi*" in the case of moveables. These interdicts were necessary at the commencement of a real action when each party claimed the thing in dispute ; the possessor would endeavour to get his possession confirmed by these interdicts, having only to prove that his title was better than his adversary's, and that he had not deprived the adversary of the thing by force or fraud.

In the case of immoveables, the possessor only had to prove that he had not acquired *vi, clam,* or *precario*, from the adversary ; in the case of

moveables he only had to prove that he had had possession the greater part of a year, and had not obtained his possession *vi*, *clam*, or *precario* from his adversary. The advantage of being declared the possessor was that the possessor was the defendant in a real action, and the plaintiff could not prevail by merely proving as good a title.

Possession may be retained by one person for another, as, for instance, by a tenant for a landlord. It was also held that the absence of an intention to abandon possession was equivalent to retaining possession.

(γ) For recovering possession, *recuperandæ possessionis*, the interdict *unde vi*, was given to anyone who had been forcibly expelled from his land or building; the wrong-doer also being liable for an action under the *lex Julia* for violence.

3. *Third division of Interdicts.*

According as they are simple (*simplex*), or double (*duplex*).

If they are given in a case where one party is defendant, and the other is plaintiff, they are styled Simple; under this head, for example, comes the interdict *quorum bonorum*.

An interdict given in a case where both parties bear at the same time the character of plaintiff and defendant is styled double (*duplex*): for example, the interdicts *utrubi* and *uti possidetis*.

As the formulary system had been superseded in the time of Justinian by the *extraordinaria judicia*, interdicts were no longer needed, but judgment was given without them, as if a *utilis actio* had been given in pursuance of an interdict.

Tit. xvi.—PENALTIES INCURRED BY RASH LITIGATION.

Rash litigation was checked by :

1. *Furejurando.*

The plaintiff was obliged, in the time of Justinian, to take an oath that he had a *bonâ fide* defence to the action. The plaintiff also had to take an oath as to the goodness of his claim, but the real penalty in the case of a groundless action was the expense to which the plaintiff was put in re-imbursing the defendant all *his* expenses.

2. *By fear of infamy.*

A person became infamous if he was condemned in *direct* actions *furti, vi bonorum raptorum, injuriarum, tutelæ, mandati depositi*, or in the *actio pro socio*, which, from its nature, was always direct. The person condemned in these actions suffered *infamia*.

3. *By pecuniary penalties.*

If a patron, ascendant, or the descendant of either were summoned before the magistrate by a freedman or descendant without the prætor's leave having been first obtained, the person so proceeding was liable to a fine of 50 *solidi*.

Further, in particular actions the defendant could bring a contrary action to recover one-tenth of the sum claimed from him, even though the plaintiff had brought the action with no *mala fides*.

Tit. xvii.—THE DUTY OF A JUDGE.

His duty is to judge according to the laws, the constitutions, and customary usage (*mores*). If the judge (*judex*) gave a sentence manifestly wrong, as if he had condemned the defendant in a different sum to that authorized by the prætor, the sentence was void *ab initio*. If the judge was mistaken as to some fact, an appeal could be made within ten days, in the first place

to the prætor, then to the council of the emperor with the prætorian prefect as chief judge, finally to the Emperor.

In a real action the judge, if he decides against the defendant, may grant him a delay before he compels him to give up the thing, if security is given for it. In an action for an inheritance, as in one for a particular thing, the bonâ fide possessor had not to account for the fruits gathered and consumed; after the time of Hadrian he had to do so.

In an action *ad exhibendum* the judge might take security from the defendant if he could not produce the thing or person at once; in default of production and security he must condemn the defendant in the amount lost by the plaintiff in not having the thing produced.

In the action *familiæ erciscundæ* he must allot the several objects among the co-heirs, condemning each to make compensation if his share was more valuable than the others.

So in the actions *communi dividundo* and *finium regundorum* for the division of common property, he must allot the various shares, awarding compensation if necessary.

CRIMINAL LAW. PUBLICA JUDICIA.

Criminal law does not fall within the plan of the Institutes, which are a treatise on *private* law.

In the later times the *extraordinaria judicia* were the means by which the penalties fixed by the laws to be presently enumerated were imposed, nothing of the special laws being retained except the amount of the penalty. v. Sandars' Justinian, iv. 18.

Publica judicia were so called because anybody might bring the actions.

Those *judicia* which involved the punishment of death or interdiction from fire and water were styled capital, those involving infamy or a pecuniary fine were not capital, but were styled *publica*.

The following are the chief laws relating to *publica judicia* :

The *lex Julia majestatis*, which awarded the punishment of death, and perpetual infamy for the crime of treason.

The *lex Julia de adulteriis* punished adultery with death ; seduction was punished with the confiscation of half the offender's property if he were of honourable condition, and also with corporal punishment and banishment.

The *lex Cornelia de sicariis* punished poisoners and assassins with death.

The *lex Pompeia de parricidiis* punished parricides by ordering that they should be tied up in a sack with a dog, a cock, a viper, and an ape, and then drowned. A person who killed a cognate was punished by the *lex Cornelia de sicariis*.

The *lex Cornelia de falsis* punished forgers with death if they were slaves, and with banishment if of honourable condition.

The *lex Julia de vi publica vel privata* punished violence (with armed force) by deportation, and violence without armed force by confiscation of one-third of the offender's goods. Rape was punished with death.

The *lex Julia de peculatu* punished embezzlement of the public money by a magistrate with death. Other offenders suffered deportation.

The *lex Fabia de plagiariis* inflicted the punishment of death for the offence of *plagiarism*, *i.e.* keeping in chains, buying or selling a freeman or the slave of another ; in some cases the punishment was lighter.

The *lex Julia de Ambitu* prohibited corrupt canvassing

for public offices; the *lex Julia repetundarum* fixed punishments for magistrates who took bribes; the *lex Julia de annona* forbade combinations made to raise the price of corn and supplies; the *lex Julia de residuis* punished those who misappropriated public moneys.

Austin on the position of criminal law in Justinian's system.

“ ‘Public wrongs’ as applied to crimes acquired this name from a mere accident, from the fact that crimes were originally tried by the sovereign Roman People. The original reason ceased when the jurisdiction in criminal causes was removed from the people and vested in subordinate judges. . . . Inasmuch as crimes were, however, supposed to affect more directly the interests of the whole community, and inasmuch as the law of political status does really in a peculiar manner regard the whole community, criminal law and the law of political conditions were placed by the classical jurists together and were opposed to all the rest of the *corpus juris*. They style criminal law and the law of political conditions *jus publicum*, for, say they, ‘*ad statum rei Romanæ, ad publice utilia spectat.*’

“They style the opposed department of the *corpus juris* ‘*jus privatum*,’ for, say they, ‘*ad singulorum utilitatem, ad privatim utilia spectat.*’

“This explains the order of Justinian's Institutes. It is merely a treatise on private law. Criminal law is not comprised by it, the classical jurists having thought that public law was not a fit subject for an institutional or elementary treatise. The very short title ‘*De publicis judiciis*’ is the only part of this treatise which relates to crimes.”—*Student's edition*, pp. 370, 371.



APPENDICES.





APPENDIX I.

EXAMINATION QUESTIONS IN ROMAN LAW, WITH ANSWERS.¹

INTRODUCTORY.

Q.



GIVE the date of Justinian's reign. For what purpose were his Institutes intended?

A. Justinian succeeded his uncle Justin, A.D. 527, and reigned till A.D. 565. The Institutes were intended

to be an elementary work for students, and an introduction to the study of the Digest and Code.

Q. When and by whom were the Institutes of Justinian compiled? Compare them as briefly as possible with the Commentaries of Gaius in the matter of style of composition and value as elementary works on law.

A. The Institutes were compiled by Tribonian (who

¹ The questions are mainly taken from papers set at the Universities of Oxford, Cambridge, Edinburgh, Glasgow, and Dublin, and in the Bar Examination.

had taken the leading part in the formation of the Digest); he was assisted by Theophilus, professor of law at Constantinople, and Dorotheus, professor at Berytus.

The date of publication was 22nd of November, A.D. 533.

The Commentaries of Gaius and Justinian's Institutes compared :—

Greene, R. L., page 18.

“ The terseness of the style of Gaius and the purity of his language contrasts favourably with the more profuse sentences and the debased Latin of Justinian's compilers, who, nevertheless, followed closely his method and arrangement. . . . The Commentaries were intended for purposes of actual practice, while the Emperor's treatise, although declared to have the binding force of law, was primarily composed for academical instruction. . . . It should be remembered in the present comparison that the commentaries proceeded from the pen of Gaius alone, and were the first of a series of introductory treatises, while Justinian's Institutes were not only prepared by two authors, under the superintendence of a third, but were also drawn from various independent sources. This will account for certain inconsistencies occurring in the latter, such as the distinction between the Law of Nations and the Law of Nature.”

The work of Gaius is somewhat deficient in definitions of leading terms, while it describes institutions and forms which had become obsolete in the time of Justinian, and were consequently disregarded in the Institutes.

Q. What were the causes which made codification a necessity in the time of Justinian?

A. See Greene's R. L., p. 9.

"When the Empire of the West perished in A.D. 476, there existed four practical sources of law :—

1. The works of the jurists, subject to the rule laid down in the Constitution of Valentinian III. (By this rule the works of Papinian, Paul, Gaius, Ulpian, and Modestinus received legal authority; when these jurists were not unanimous, the opinion of the majority was to obtain; if there was an equality of opinions, that of Papinian was decisive; if Papinian was silent the question was left to the judge.)

2. The Gregorian and Hermogenian Collections. (Gregorianus was a private lawyer, whose work contained Imperial constitutions from Hadrian to Constantine the Great. Hermogenianus, also a private practitioner, made a supplementary collection in the reign of Constantine.)

3. The Theodosian Code (published in 438). This work was contained in sixteen books, and comprised edicts and rescripts of the emperors, extending over a period of 126 years.

4. The *Novellæ*, or new and supplementary Constitutions of Theodosius.

The barbarous invaders of the West allowed their Roman subjects to preserve their separate manners and laws, and from this state of society arose that condition of civil rights denominated Personal Rights, or Personal Laws in opposition to Territorial Laws. Hence it might be said that five men, each under a different law, might be found sitting and walking together.

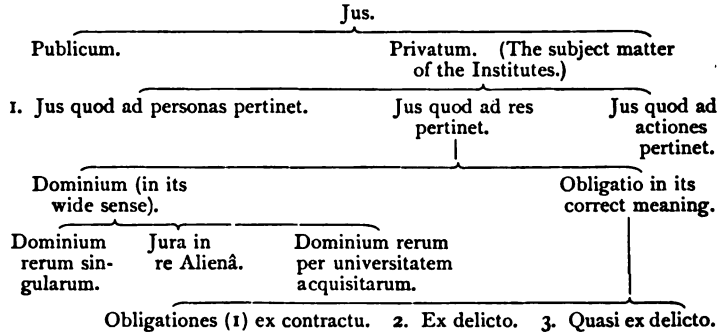
The main object of Justinian's plan was to abridge in two separate works, 1. the Imperial Constitutions,

and 2. the works of the jurists, with a view to destroying all inconsistencies, uncertainties, and repetitions, and thus facilitating the use and popularizing the study of Law."

The first object was attained by the publication of the Code, A.D. 529, the latter by that of the Digest, A.D. 534. Greene's R. L., pp. 9-13.

Q. What defects may be remarked in the method of Justinian's Institutes?

A. The arrangement of the Corpus Juris adopted by Justinian may be expressed in a tabular form thus:—



(This table is taken from the Analysis of Austin's Jurisprudence, p. 172.)

The defects of this method of arrangement are as follows:—

(a) It disregards the purpose of the division into *jura rerum* and *jura personarum*, the reason of which division may be stated thus:—The Law of Persons (being that part of the body of law which relates to condition or *status*, and regards men as bearing or invested with *status* or condition) is conveniently detached from the rest of the *corpus juris*, which opposed part receives the name of the Law of Things. By this division the law specially affecting various classes is rendered

accessible and cognoscible. The fault of Justinian consists in his inserting in some cases only the events engendering and destroying the status, while in others he inserted the rights and duties constituting the status.

- (β) The division into *jus personarum*, *jus rerum*, *jus actionum* involves a logical blunder: the generalia of the *jus actionum* should be placed under the *jus rerum*, while the parts relating to special classes should be placed under the heads of the *jus personarum* to which they belong. (G. Campbell's Analysis of Austin's Jurisprudence, Lects. xl. xliii.)
- (γ) Obligations *ex contractu*, which are primary rights, are opposed to obligations *ex delicto*, which are secondary, and arise from violations of rights *in rem*. The obligations arising from the breach of obligations *ex contractu* are therefore attached to obligations *ex contractu*, and if the logical arrangement were followed, breaches of rights *in rem* would be similarly considered with rights *in rem* themselves. (Anal. Austin, p. 146.)
- (δ) The Law of Things is treated in a confused manner. The natural order would be:—1. To enumerate the divisions of things themselves. 2. To divide rights in things according to the extent of the right. 3. To treat of the modes of acquiring rights in things. But this order is not clearly traceable in the Institutes.

Q. (α) *What is the meaning of the term Institutes?*

(β) *What other legal works were published by the Emperor Justinian?*

A. (α) The Institutes purported to be elementary treatises for the instruction of students. See Q. p. 160.

(β) The other legal works of Justinian were :—

1. *The Code (Codex Vetus)*, prepared by a commission of ten jurists chosen by the Emperor in 528. The work was completed in 529.
2. *The fifty decisions*. These were probably supplementary to the Code, and were amalgamated with the second Code and the Digest.
3. *The Digest or Pandects*. The constitution ordering the publication of the Digest appeared in December, 530 A.D. The work itself appeared in December, 533 A.D. Tribonian had charge of the compilation, and he was assisted by ten jurists.
4. *The Institutes*, or elementary book for students.
5. *The second Code, Codex repetitæ prælectionis*. This was a new and revised edition of the Code, published in 534 A.D.
6. *The Novels, Novellæ constitutiones*. These were about 150 in number ; they were published separately at intervals from 535 A.D. to the end of Justinian's reign.

See also Gibbon's *Decline and Fall*, cap. xliv. ; Ortolan's *Histoire de la Législation Romaine*, sects. cv.-cx.

Q. Distinguish the *jus scriptum* from the *jus non scriptum*, and mention the sources of each.

A. Law considered with reference to its sources is usually distinguished into law written (*jus scriptum*) and law unwritten (*jus non scriptum*).

(a) According to the modern civilians:—Written law is made immediately and directly by the supreme authority. Unwritten law is not so made, but derives its validity to the authority of the supreme authority. This may be called the *judicial* meaning

(β) According to the Roman lawyers :—Written law was that which was committed to writing at the outset. Unwritten law was law not so committed to writing. This may be called the *grammatical* meaning of the phrase.

As examples of written law we may mention the following, appending the sources from which they spring; the word source being here taken to mean the direct or immediate author.

1. *Leges*, enacted by the *people*, proposed by a senatorial magistrate.
2. *Plebiscita*, enacted by the *plebs*.
3. *Senatus consulta*, ordinances of the *senate*.
4. Imperial constitutions, or enactments of the *Emperors*. These were in the various forms of *epistolæ*, *rescripta*, *mandata*, *decreta*, and *edicta*.
5. The *jus honorarium*, or law established by the *prætor* in virtue of his office.
6. The *responsa prudentium*, or decisions of *jurists* authorized to interpret the law.

Unwritten law is that (according to Justinian) which is established by usage.

Q. Explain the difference between jus naturale and jus gentium. Does Justinian always adhere to the same definitions of them?

A. The *jus gentium* of the Romans was a collection of rules and principles determined by observation to be common to the institutions which prevailed among the Italian tribes; it was opposed to the *jus civile*, or the particular law of the Roman state. . . . There did come a time when from an ignoble appendage of the *jus civile* the *jus gentium* came to be considered a great though as yet imperfectly developed model, to which all law ought, as far as possible, to conform.

This crisis arrived when the Greek theory of a Law of Nature was applied to the practical Roman administration of the law common to all nations.

The *jus naturale*, or law of nature, is simply the *jus gentium*, or law of nations, seen in the light of a peculiar theory.—Maine, A. L., cap. iii. At the commencement of the Institutes there is placed a definition of *jus naturale*, taken from Ulpian:—“*Jus naturale est quod natura omnia animalia docuit;*” while in the same title the *jus gentium* is defined thus: “*Quod naturalis ratio inter omnes homines constituit vocatur jus gentium quasi quo jure omnes gentes utuntur.*”

There is no attempt made in the body of the Institutes to apply Ulpian's definition of *jus naturale*. In one passage, however, the distinction between the *jus naturale* and *jus gentium* (as above described) seems to be retained. It is Book i., 3, 2, where slavery is described as, “*constitutio juris gentium qua quis dominio alieno contra naturam subjicitur.*”

Austin's criticism on Ulpian's *jus naturale* is that he falls into two mistakes:—

1. He confounds the instincts of animals with laws.
2. He confounds laws with certain motives or affections which are among the ultimate causes of laws. (Analysis of Austin's Jurisprudence, Lect. xxxi. p. 112.)

Q. Criticise the definition of jurisprudence given at the commencement of the Institutes?

A. The definition is as follows: “Jurisprudentia est divinarum atque humanarum rerum notitia justi atque injusti scientia.”

Austin, Lect. v., Student's Ed., p. 75.

“Jurisprudence, if it is anything, is the science of

law, or at most the science of law combined with the art of applying it."

What is here given as a definition of jurisprudence embraces not only law, but positive morality, and even the test to which both these are to be referred.

It, therefore, confuses the science of legislation and deontology. Furthermore, it affirms that law is the creature of justice, which is as much as to say that it is the child of its own offspring.

I.—THE LAW OF PERSONS. (Inst. Book i.)

Jus personarum.

Q. What is the origin assigned to slavery in the Institutes?

A. In Lib. i., 3, 2, slavery is said to be an institution of the *jus gentium*.

Slavery is founded on :

(α) The *jus gentium*, as in the case of captives in war ; or,

(β) On the *jus civile*, as in the case of a person more than 20 years of age becoming a slave, and selling himself to share the price.

Q. Classify persons according to the Institutes. What are the peculiarities in the account given of slaves?

A. Persons are divided :

(α) According to whether free or not.

Persons	{	Liberi	{	Ingenui, freeborn.
		Libertini		{
		Servi.		{
				Dedititii.

This classification ranks slaves among "*persons*." Now the modern civilians have narrowed the meaning

of the term from "a human being," "*homo*" in its widest sense, and as understood by the Roman jurists, to "*a human being invested with a condition or status*," "*status*" being taken as equivalent to "*caput*," a word denoting conditions which comprise *rights*. Slaves would by this view be excluded from the class of persons. *Status*, however, is applied to various conditions of persons merely with reference to their incapacities, and accordingly the Roman jurists rightly ascribed status to slaves and ranked them among persons.

The term person is also used sometimes as synonymous with *status* or condition. In this sense every human being who has rights and duties bears a number of persons. "*Unus homo sustinet plures personas.*" The word in this sense is, in fact, equivalent to "character." Austin, Lect. xii., G. Campbell's Analysis, p. 58.

Persons are also classified in the Institutes according as they are *sui juris* or not, thus—

Persons	{	Sui Juris	{	1. Patres familias.
		Alieni Juris	{	2. Those under { Curators. Tutors.
			{	Those under patria potestas.
			{	Wives "in manu."
			{	Servi.

Q. Enumerate the classes of persons not possessed of full citizenship in the time of Tiberius. What changes had been made before the date of the Institutes?

A. 1. Latini Juniani. Freedmen under the lex Junia Norbana (made in A.D. 19). These were on the footing of Latin colonists, and not that of cives, through defects in their emancipation.

2. The dedititii ex lege Ælia Sentia (A.D. 4). These enjoyed an inferior status.

Those who had been reduced to slavery for crime were raised to this class only by emancipation.

3. *Servi*, or slaves.

Justinian, before the publication of the Institutes, abolished all distinctions between freedmen, and slaves on emancipation attained full citizenship.

Q. Give the chief definitions of status in Roman law, and what was the effect of capitis deminutio in its three degrees?

A. Status.

Sanders' definition. "The legal capacity of a 'persona.'" Lib. i., Tit. iii., p.

Austin's (Campbell's Analysis, p. 137). "The rights, duties, capacities, or incapacities which determine a person to a given class."

See Austin, Lect. xl., also Poste's Gaius, i. 8.

Erroneous definitions of status examined by Austin.

1. *That of the civilians* that status was an occult quality: "*Status est qualitas cujus ratione homines diverso jure utuntur.*"

Objection: this *qualitas* will not distinguish a status or condition from any other collection of rights and duties.

2. Bentham's. "Consequences of the same investigative fact."

Objection: this definition also does not distinguish status from other rights and duties which are matter for the Law of Things; for example, these properties belong to the aggregates of rights, termed *universitates juris*, and also to particular rights, such as *dominium rei singulæ*.

3. "*Status* is constituted by *jus in rem* in the complexion or aggregate of rights." Objection: in purely onerous conditions this mark is not found.

Capitis deminutio.

There were three pre-eminent *status* which received the name of *capita* from the Roman lawyers.

1. The *status familiæ*, or condition of being a member of a given family, and as such enjoying certain rights and capacities.
2. The *status civitatis*, or condition of a Roman citizen.
3. The *status libertatis*, or condition of the freeman.

The loss of all these was termed *maxima capitis deminutio*; this would be exemplified by a man becoming "*servus pœnæ*." The loss of the *status civitatis*, involving that of the *status familiæ*, was termed *media capitis deminutio*, as happened in the case of a man being *deportatus in insulam*. The loss of the *status familiæ* only was styled *minima capitis deminutio*. It took place as a consequence of emancipation or arrogation.

Q. Distinguish between deportatio and relegatio. Did the latter affect civil status? Explain the phrase "servus pœnæ."

A. Deportatio in insulam consisted in the condemned being confined within certain local bounds, and being considered civilly dead. He thus underwent the *media capitis deminutio*.

The *relegatus in insulam* was merely forbidden to leave a certain spot, and his civil status was in no way altered. Sandars, i. xii. 2.

A person condemned to slavery as a punishment for crime, having no master, was said to be *servus pœnæ*, slave of the punishment. Sandars, i. xii. 3.

Q. State the provisions of the lex Ælia Sentia and lex Junia Norbana concerning manumission.

A. The lex Ælia Sentia (A. D. 4) provided, 1. that manumission in fraudem creditorum was void, 2. that one of the requisites of manumission in order to make the slave a citizen was to be that he should be thirty years of age ; if he were under that age the ceremony was to be performed by vindicta after the reason of emancipation had been approved by a concilium appointed for the purpose. The two other requisites of a complete emancipation were that the owner should have quiritary ownership, and that the ceremony should be public.

The lex Junia Norbana, passed A. D. 19, enacted that on the failure of any one of these conditions the freedman should only rank as a Latinus and not as a civis. The lex Ælia Sentia further provided that persons reduced to slavery for crimes should by emancipation only be raised to the position of dedititii, i. e. of captives taken in war. Sandars' Just., i. v. 3. See also Poste's Gaius, i. §§ 18, 22. Greene's R. L., pp. 35, 36 ; supra, pp. 9, 10.

Q. What were the peculium profectitium and the peculium adventitium, and what rights had the paterfamilias over them respectively under the legislation of Justinian ?

A. The peculium adventitium in the time of Justinian included everything that came to the son from any other source than from the father ; in the time of Constantine the term had only been applied to peculium derived from the mother.

Peculium profectitium was that which was derived from the father, " quia proficiscitur a patre." This belonged to the father, who only had the usufruct of the peculium adventitium, while the son had as full

power over the *castrense* and *quasi-castrense peculium* as if he had been *sui juris*.

By Justinian's legislation the father took the usufruct of one-half of the *peculium adventitium* when the son was emancipated, the previous rule having been that the father should take the ownership of one-third.

Q. In what cases did a child take, 1. its mother's, 2. its father's status?

A. "Children followed the condition of the mother except

"(α) When born in civil wedlock.

"(β) When born of a Roman mother and an alien father.

"In these cases they followed the condition of the father."—S. HARRIS, *R. L.*, p. 40.

Q. If a Roman citizen pretended to be a slave, and allowed himself to be sold in order to share the price, was the sale valid?

A. It was enacted by the *Sc. Claudianum* that, if a freeman of more than twenty years of age allowed himself fraudulently to be sold as a slave, in order to share the price, he should be bound by his statement if he afterwards claimed his freedom. Sandars, i. iii. 5.

Q. What were liberi legitimi, naturales, and spurii respectively?

Explain the modes of subsequent legitimation.

A. The offspring of a legal marriage (*justæ nuptiæ*) were said to be *liberi legitimi*.

Spurii or bastards are those whose parents have not contracted *justum matrimonium*.

Liberi naturales were the offspring of a mother living in a state of concubinage.

In the Inst. i. x. 13, *naturalis* is opposed to *legitimus*; whereas in the next title the word is opposed to *adoptivus*.

Subsequent legitimation was effected in three ways :

1. *Per oblationem curiæ*, i.e. by making the *naturalis liber* a member of the curia, or class from which the magistrates were chosen. This was considered a distinction, but as the expenses were very heavy, the honour was not much sought after.

This mode of legitimation was introduced by Theodosius and Valentinian.

2. *Per subsequens matrimonium*, by the subsequent marriage of the parents, accompanied by the drawing up of the *dotalia instrumenta*, or marriage settlements. (Inst. i. x. 13.)
3. By rescript of the Emperor, a method introduced by Justinian in the 74th Novel. (Sandars, i. x. 13.)

Q. (α) Define *connubium*. (β) What was or might be the result of a marriage between persons who did not possess it where they believed they did?

A. (α) "*Connubium est uxoris jure ducendæ facultas.*" (Ulpian, 5. 3.) *Connubium* is the capacity of marriage, valid by civil law. The possession of the *connubium* is one of the elements of full Roman citizenship. Only citizens and specially privileged Latins and aliens possessed this right. Previous to the *lex Papia Poppæa*, a freeborn citizen might not marry a citizen by manumission (*libertina*).

(β) In this case if children are born, the parties are allowed to prove their error, and if the effect of the mistake is to prevent the children coming under the father's power, this is rectified, and practically the offspring gets all the advantages that would have accrued if its parents had possessed the *connubium*.

Q. What was the law at different times as to marriage, (1) between first cousins, (2) between a man and his deceased wife's sister?

A. 1. The marriage of first cousins was legalized by Arcadius and Honorius, and was permitted by Justinian.

2. Marriage with a deceased wife's sister was permitted till the time of Constantine, who forbade it. Valentinian, Theodosius, and Arcadius renewed the prohibition. (Sandars' Justinian, i. x. 7.)

Q. Trace the successive limitations of the dominica potestas with reference to the person of the slave before the legislation of Justinian.

A. The authority of the master over the slave (*dominica potestas*) was of the most unlimited character in the early law, extending even to a power of life and death. The first check on the master's authority was given by a constitution of Antoninus Pius, which punished a man who killed his own slave equally with one who has killed another man's. The same Emperor also ordered that in cases of gross ill-treatment the master might be compelled to make a forced sale of his slave.

The *lex Cornelia*, B. C. 82, punished the killing of a slave with death or exile.

The *lex Petronia* forbade masters to expose their slaves to contests with wild beasts.

Hadrian required the consent of a magistrate before the punishment of death was inflicted, and

Constantine (followed by Justinian) only permitted moderate chastisement to be inflicted.

Q. (α) Explain the gradual improvement in the condition of slaves. (β) State particularly what Emperor restrained the unlimited power of the masters, and gave redress to the slaves in case of cruelty. (γ) What were the restraints placed on manumission by the *lex Fusia Caninia*?

A. (α) "In the earliest times the notion of slavery existed in its sternest form. Later on, when under the influence of Stoicism law had passed into the condition of a philosophical system, Roman jurists recognized and proclaimed in the very definition which they gave of it, that liberty was the condition of nature, and servitude (slavery) an institution against nature, but which was established by human law, by the general custom of nations. The law, however, mitigated its severity, and brought it more into accordance with the dictates of humanity.

"We shall find Christianity subsequently coming in with its holy doctrine of equality of all men, further modifying the rigour of the institution, and gradually accomplishing its abolition."—*Nasmith and Pritchard's Ortolan, Gen. R. L.*, sect. 26.

(β) See answer to last question.

(γ) The *lex Fusia Caninia* was passed (A. D. 8), to prevent the gratification of the vanity of deceased testators by the enfranchisement of a large number of slaves to the detriment of the interests of the heir.

It provided that the owner of two slaves might enfranchise both; the owner of from two to ten, half; of from ten to thirty, one-third; of from thirty to one hundred, a fourth, and of a larger number, one-fifth.

It was necessary that the slaves should be mentioned by name. (*Sandars' Just.*, i. vii.)

Q. Describe briefly confarreatio, coemptio and usus, as modes of marriage. What were their legal effects? What were the requisites for justum matrimonium in the time of Justinian?

A. Confarreatio was the highest and most solemn form of marriage; it could only be celebrated between those who possessed the *jus sacrum*; it made the children eligible for high offices in the priesthood.

The form of divorce corresponding to *confarreatio* was *diffarreatio*, which was almost impossible to be effected. This was probably one of the chief reasons why *confarreatio* dropped out of use.

Coemptio. A fictitious sale of the wife to the husband, and probably also of the husband to the wife, as appears from what is probably a fragment of Ulpian, quoted in Servius on Georgics, i. 34, and Isidorus, v. 24. (Poste's Gaius, i. sect. 108-115.)

"*Antiquus nuptiarum erat ritus quo se maritus et uxor invicem emebant ne videretur ancilla uxor.*"

Usus consisted of cohabitation with a view to marriage. The effect of *usus*, as also of *confarreatio* and *coemptio*, was to bring the wife under the *manus* of her husband. To prevent this result taking place, the *usus* was broken by the wife absenting herself from her husband's house for three nights in the year, so that she still remained a member of her own *familia*. (Poste's Gaius, Book i., sect. 56-64.)

"The forms above described did not form part of the real tie of marriage; they only decided, when the tie of marriage was formed, what should be the position of the wife. Neither were the religious ceremonies nor the nuptial rites anything more than accessories of that which created the binding rela-

tion between the parties. The tie itself was a civil contract, depending upon, and formed by, the mutual consent of the husband and the wife. Whenever two persons, capable of entering into the contract, mutually consented to do so, and evidenced their consent by any mode recognized by law, the legal tie was formed and *justæ nuptiæ* were complete."—SANDARS' *Just.*, i. x.

The following were the requisites for *justæ nuptiæ*:—

1. The contracting parties must have the *connubium*, see p. 27.
2. They must not stand within the prohibited degrees of relationship.
3. They must have attained the age of puberty—14 for men, and 12 for women.
4. If under the power of any one, they must have obtained that person's consent. (Sandars' *Just.*, i. x.)

Q. To what extent had a son or a slave a legal existence at Rome?

A. (α) A son under "*potestas*" could not, in strictness of law, hold any property of his own, but this theory was broken in upon by statutory enactments as to the son's enjoyment of his *peculium*.

But as regards the state, in all matters connected with public law, the *filius familias* had no incapacities; he could serve any public office, and had all the other privileges of a citizen; he could contract a valid marriage, having the *connubium*; he had the *commercium*, and could, therefore, be a witness to the *mancipatio*, a privilege only belonging to citizens; but he could not make a will, having no property to dispose of except the *peculium*, in later times, over which he possessed modified rights of disposition. Sandars' *Just.*, Introduction, § 41.

(β) The slave, on the other hand, had no rights even against his master; his person was protected by various enactments (see Q. p. 174), but his *peculium* belonged to his master in fact as well as in law; his personality was entirely absorbed by that of the master, and he could not by any means in his power better his condition, being entirely dependent on the goodwill of his owner. He was entirely without rights, both as regards public and private law.

Q. What changes did Justinian make in the Law of Adoption?

A. Before the time of Justinian the effect of adoption was to put the adopted person in precisely the same position as he would have been if he had been born a son of the adoptor; the adopted son might thus lose his rights of succession to his adoptive father on emancipation by him, as he had previously on adoption lost his rights in his natural family.

Justinian enacted that a son given in adoption to a stranger should not lose the rights of succession in his own family, but should acquire rights of succession to his adoptive father if the latter died intestate; the son thus remained in the family of his natural father. This was styled *adoptio minus plena*.

Adoptio plena took place when a son was adopted by an ascendant. In this case the provisions of the old law took effect, and the son entered the family of the adoptive parent.

Q. Translate: "Cum autem ingenuus aliquis natus est, non officit illi in servitute fuisse et postea manumissum esse. Sæpissimè enim constitutum est natalibus non officere manumissionem."

After manumission would his status be that of an ingenuus or a libertinus?

A. "When a man has been born free, he is not

prejudiced by having been in the position of a slave and subsequently manumitted, for it has been very often enacted that manumission does not prejudice rights of birth."

In servitute fuisse="to have been in the position of a slave," not "to have been a slave." So a freeborn child who is erroneously deemed a slave, and is enfranchised, has the status not of a *libertinus*, but of an *ingenuus*. (Sandars, i. iv.)

Q. Distinguish the conception of tutela from that of potestas, showing the nature of the limitations on legal capacity involved in each.

A. The juridical system of ancient Rome regarded the state as a collection of *patres familias*, in whose persons were absorbed their respective *familia*; this process of absorption had for its result the representation of the family rights in the person of the head of the family. Between the head and the members of the family there was a difference of *status*, and the fact was expressed in the form that the *filius familias* was in the power (*potestas*) of the *paterfamilias*.

The son under power had no independent will, and all manifestations of such will being only expressed through the head of the family, he was not *sui juris*, and, in strict theory of law, only exercised rights through the *paterfamilias*.

In *tutela* the case was otherwise; here the person under guardianship was *sui juris*; he was in possession of all his rights, but was deemed physically unable to exercise them.

The tutor was appointed to supplement the deficiencies in the legal persona of the pupil, and so enable him to exercise the rights which belonged to him. This function of "filling up" the measure of

the pupil's persona is illustrated by the word *auctoritas*, as applied to the tutor. (Sandars, Just., § 43, note. "The derivation of auctoritas should never be lost sight of. When one person increased, *augebat*, what another had, so as to fill up a deficiency, this increasing, or filling up, was called *auctoritas*.")

Poste (p. 119, §§ 142-154) alludes to the *filius familias* possessing inferiority of status, *i.e.*, incapacity of right, while the ward or person under *tutela* merely lies under incapacities of disposition.

Maine, A. L., p. 161. "The guardianship of male orphans was a contrivance for keeping alive the semblance of subordination to the family of the parent up to the time when the child was supposed capable of becoming a parent himself. It was a prolongation of the *patria potestas* up to the period of bare physical manhood."

This, however, appears to be inconsistent with the view that the tutor's function is to supplement defects in the capacity of the ward considered as a *paterfamilias*. It would appear, also, that the function of the tutor was rather to promote the judicious exercise of the pupil's rights for his own benefit, than to repress his power of exercising such rights in order that they might be more profitably exercised on his behalf by others.

The former notion, *i.e.*, that of promoting the exercise of rights by supplementing the deficiencies in the pupil's capacity, appears to be characteristic of *tutela*, while the promotion of the exercise of rights by another, for the benefit of the person under power, seems to be one of the leading features in the primitive conception of *patria potestas*.

Q. (α) *What varieties of tutela exist in the legislation of Justinian?* (β) *What other forms of tutela had ceased to exist?* (γ) *By what events was tutela terminated?*

A. (α) 1. *By testament.*

The *paterfamilias* could appoint a tutor for those children or descendants in his power who being under age became *sui juris* at his death.

Any person over 25 years of age and of sound mind, with whom the testator had *testamenti factio*, could be appointed testamentary tutor.

2. *Tutela legitima.*

In default of a tutor being appointed by testament the nearest blood-relation took the guardianship. Before the time of Justinian's 118th Novel the office of guardian had devolved upon the agnates, but Justinian, abolishing the distinction between the *agnati* and *cognati*, made the rule as it is given above.

3. *Tutela fiduciaria.*

In the time of Justinian, if an ascendant emancipated a descendant below the age of puberty and died, then the sons of this ascendant, if of age, became fiduciary tutors to the emancipated descendant.

(See i. xix. *supra*, pp. 22, 23.)

4. *Tutela Dativa.*

In default of the appointment of tutors by above methods, to prevent the non-appointment of any tutor, the magistrates would appoint under the *lex Atilia* and the *lex Julia et Titia*.

(β) [5. *Tutela Muliebris.* Guardianship of women.

This had fallen into disuse in the time of Justinian. See Gaius, i. 189-193; Maine's A. L., p. 153; Greene's R. L., p. 61; v. also Q. p. 179, *supra*.]

(γ) *Tutela* was extinguished:

1. By pupil attaining age of puberty.

2. By arrogation, derogation, or slavery of pupil.

3. By fulfilment of condition under which tutor is appointed.

4. By death of tutor or pupil.

5. By *maxima* or *media capitis deminutio* of tutor, or by *minima capitis deminutio* in the case of a *tutor legitimus*.

6. By removal of tutor for misconduct, or at his own request on valid grounds.

See Sandars' Just., i. xxii. ; Greene's R. L., p. 64; Poste's Gaius, p. 143, sect. 196; S. Harris, R. L., p. 57.

Q. Was it possible for a pupillus to be party to any legal transaction without the authority of his tutor?

A. The authority of the tutor was not needed if the pupil stipulated for something to be given him, though it would be necessary where a promise was made by the pupil.

And, generally, in all bilateral contracts (for instance, in *emptio venditio*, *locatio conductio*, *mandatum*, *depositum*) the minor took all the benefit if he acted without authorization, and could enforce the contract while the other contracting party could not. The pupil, however, could not enter upon an inheritance, take the *bonorum possessio*, or enter upon an inheritance by *fideicommissum* without the tutor's *auctoritas*. The reason of this was that the forms required by the law being so solemn, and implying the exercise of such a degree of *intellectus* and *judicium* on the part of the pupil, could not properly be gone through by the pupil without the tutor's authority to supplement his supposed deficiencies.

Q. State the duties of a curator, the cases in which and the authority by which he is appointed.

A. Curators were appointed for the purpose of looking after the property of the ward.

“A person might be *sui juris* and of an age to exercise his rights (*i.e.* over the age of puberty), and yet it might be necessary to ensure that he did not hurt himself and his family by the mode in which he exercised them. In such cases a curator was appointed whose duty it was to look after his property. This curator had a perfectly different office from a tutor; in technical language the tutor was said to be appointed to the person, the curator to the property. The curator was only appointed as a check to prevent pecuniary loss. Curators were, for instance, appointed to watch over the interests of insane persons, of persons notoriously prodigal, and of those who had attained the age of puberty but were under the age of twenty-five.”—SANDARS' *Justinian*, Introduction, sect. 43.

Curators were appointed :

1. At the request of the minor, to take charge of his property generally. Or, 2. Against his will: (α) to protect an adversary in a law-suit; (β) to protect the tutor or a debtor in paying debts to the minor.

Madmen and deaf-and-dumb persons, as well as those subject to any perpetual disease, could have curators even after twenty-five years of age.

Curators were appointed by the same magistrates as tutors; in the city by the *præfectus urbi* or the prætor, in the provinces by the præses or municipal magistrate. A curator could not be appointed in a testament, but if a person was recommended in one the magistrate would generally carry out the testator's wishes. (Sandars, i. xxiii.)

Q. Translate: "Si inter tutorem pupillumve judicium agendum sit, quia ipse tutor in rem suam auctor esse non potest, non prætorius tutor, ut olim, constituitur sed curator in locum ejus datur quo interveniente judicium peragitur et eo peracto curator esse desinit."—*Inst.*, i. xxi. 3.

What was this curator called?

A. If a law-suit has to be carried on between the pupil and tutor, then (on account of the tutor not being able to exercise his authority in a cause wherein he is concerned) there is appointed, not as formerly, a prætorian tutor, but a curator, to take the tutor's place, and this person ceases to be curator on the completion of the suit.

The curator is styled in the Institutes, *curator "ad causam,"* or "*ad litem.*"

Q. Compare the legal capacity of infans, impubes, filius familias, servus, furiosus, minor xxv. annorum.

A. Infans.

By a constitution of Theodosius it was settled that a child was *infans* up to the age of seven years. Up to this age it was presumed not to have "*intellectus,*" and could only act through its tutor if *sui juris*.

Impubes.

From seven to fourteen the child was said to be *impubes*, and was presumed to have *intellectus*, but not *judicium*; so that it was able to go through legal forms but not to determine whether it would do so or not, that *judicium* being supplied by the tutor (if the child was *sui juris*).

Filius familias; Servus. See *Q.* p. 177.

Furiosus.

Madmen, even after the *perfecta ætas* of twenty-five years, had *curators* appointed to take charge of

their property: the reason that a tutor was not appointed was that the duration of the mental incapacity was deemed uncertain.

Minor xxv. annorum.

A minor under this age was capable, if *sui juris*, of transacting his affairs, and only in exceptional cases (see p. 183) was it compulsory on the minor to have a *curator* appointed; such appointment, however, was usually made at the minor's request.

II.—THE LAW OF THINGS.

Jus rerum.

A.—DOMINIA JURA IN REM. (Inst., Book ii., §§ 1-9.)

Q. What are the various meanings attached to the word "res" in the writings of the Roman Jurists?

A. Austin's definition of "*res*" is as follows:—"Things are such permanent objects, not being persons, as are sensible or perceptible through the senses."

The Roman jurists, however, took a wider view: with them *res* denotes "things, acts, and forbearances, and sometimes even persons considered as the subjects or objects of rights and obligations." Moreover, the division of things into corporeal and incorporeal shows that they included in the latter class rights and obligations themselves. In this sense, then, *res* included—

(1) Things. (2) Persons regarded as subjects of rights or duties residing in others. (3) Acts and forbearances considered as the objects of rights and obligations, and also rights and obligations themselves.

In this sense *res* embraces the whole matter with which law is conversant.

It is in this sense that the word is used in the opposition of *Jus rerum* (or the Law of Things, *i. e.*, the whole law) to the *Jus Personarum*, or law of *status* (*i. e.* the Law of Persons considered as invested with *status*). Campbell's Analysis of Austin, pp. 59, 60, 136.

Q. State the different senses in which the word dominium is used, and compare it with proprietas.

Distinguish between quiritarian and bonitarian ownership.

A. 1. (α) The Roman jurists attached to dominium the meaning of jus in rem, and included under this head dominium in the strict sense, i. e. proprietas, jura in re aliend (e. g. servitus, jus pignoris, &c.), and juris universitates, or in other words all rights not included under obligationes.

(β) They also attached to the word the meaning of "a right indefinite in point of user over a thing."

2. In its strict sense, dominium is a right indefinite in point of user, unrestricted in point of disposition, and not restricted by rights of others whose enjoyment is postponed.

3. It also is taken to mean a right indefinite in point of user, but limited by regard to rights of persons entitled in remainder or reversion (e. g. a life interest in land).

4. It is taken to mean the right of property (proprietas) as opposed to possession, and in this sense it includes servitus. (C. A., Lect. xlvii.)

Dominium Quiritarium and Bonitarium.

Sanders' Just., Introd., § 62.—"Ownership was in Roman law expressed by the word dominium, sometimes by proprietas. The dominus was entitled to the use of the thing (usus), to the perception of all

its products (*fructus*), or to the consumption of the thing if it were capable of consumption (*abusus*). He could also dispose of it or alienate it at will. In the ancient system of private law the owner was said to be owner '*ex jure Quiritium*.' Nor did the old law recognize any *dominium* other than that which was enjoyed '*ex jure Quiritium*.' But the prætors found occasions when they wished to give all the advantages of ownership, but were prevented by the civil law from giving the legal *dominium*. . . . The term '*in bonis habere*' was used to express an ownership which was practically absolute, because it was protected by the prætor's authority, but which was not technically the same as ownership '*ex jure Quiritium*.' The distinction between these forms had disappeared under Justinian."

Q. Give the chief classifications of things as intended by Justinian. What are the two most convenient principles for the division of things?

A. The chief principles of classification are as follows :
 A. According to inherent qualities in things themselves. B. According to the extent of the interest possessed in the things by persons.

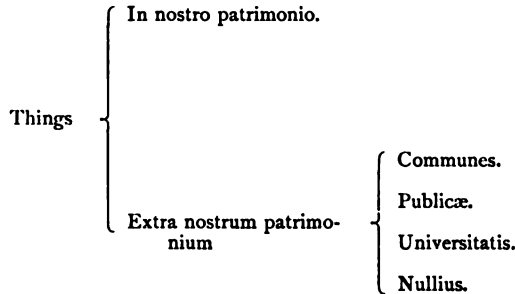
The following classifications can accordingly be made.

A. According to the nature of the things.

Res	{	Corporeal	}	{	Moveable	}	{	Divisible	}
		Incorporeal			Immoveable			Indivisible	

{	Principal	}	{	Generally determined	}	{	Res singulares.
	Accessory			Specifically determined			Rerum Universitates.

B. As objects of rights possessed over them by persons.



See Sanders' Introduction, §§ 51-60.

Q. What are res fungibiles, and of what real contract are they the subject?

A. "When the subject of the obligation (*i.e.* of the contract of *mutuum*) is a thing of a given class, the thing is said to be *fungible, i.e.*, the delivery of any object which answers to the generic description will satisfy the obligation. When a thing which is the subject of an obligation is of such a character that it must be delivered in specie (*i.e.* that the very individual thing and not another member of the same class must be delivered) then it is called not fungible." —*Analysis of Austin*, p. 61, Lect. xiii. Cf. Austin, Lect. xiii.

Q. (α) Enumerate and classify the modes of acquiring ownership mentioned in the Institutes. (β) What is meant by saying that some of them are jure naturali? (γ) Criticise the distinction between titles to which allusion is here made.

A. (α) See Table, p. 31.

(β) The modes of acquiring *dominium jure naturali* are so called either because (1) they were common to all nations, or (2) they had no formalities attached to them by the civil law.

(γ) Austin (Fragment, Lect. lvii.) says that "the division of titles by Gaius and Justinian into titles *ex jure gentium* and *ex jure civili* is liable to the objection, that modes of acquisition *jure civili* commonly consist of facts which are not of the essence of the right but are merely accidental; peculiar formalities presented by the law as necessary to the acquisition."—*Student's Edition*, p. 441.

Q. (α) *What distinction was drawn between res sacræ and religiosæ in the older pagan law?* (β) *Under what circumstances were things consecrated alienable?* (γ) *Could there be property in a place which was 'res nullius?'*

A. (α) "The distinction between *res sacræ* and *religiosæ* in the older pagan law was, that the former were things dedicated to the celestial gods, the latter were things abandoned to the infernal—*relictæ diis manibus*."—SANDARS' *Just.*, ii. i. 8.

(β) "Things consecrated were by law inalienable. The support of the poor in a time of famine, and afterwards the payment of the debts of the Church sufficed, as well as the release of captives, as reasons for the sale of consecrated moveables, but immovables were always inalienable."—*Ibid.*

(γ) "Although the place was a *res nullius*, yet there could be a special kind of property in it. There were tombs and burial-places in which none but certain persons, as, for instance, members of the same family could be buried, and this kind of interest in a *locus religiosus* was transmissible to heirs, or even to purchasers of a property if the right of burying in a particular place was attached, as it might be, to the ownership of that property."—*Ibid.*

Q. Sempronius wounds a stag, and is interrupted while pursuing it, so that it eventually escapes, while one of his slaves lands a salmon after playing it for an hour, and another going on to Titius's land kills a pigeon there, and carries off a swarm of bees and some geese. What right does Sempronius acquire to each or any of these animals, and when does such right begin?

A. (α) According to Justinian's legislation Sempronius would have acquired no right over the stag till he had captured it; the opinion of Trebatius, as stated in the Digest, is that he acquired the ownership on wounding the stag, and lost it when interrupted in his pursuit.

(β) The slave acquires the salmon for his master when he kills it; the case is analogous to the last one.

(γ) The slave can acquire the ownership of the bees and the pigeon for his master, but Titius would have an action against him for the trespass of the slave.

(δ) No property could be acquired by Sempronius in the geese, which belong to Titius.

Q. What rule is approved of in the Institutes for determining the ownership of a subject made by one man with materials belonging to another?

A. "In this case the Proculians had held that the product of the labour is a new thing, and the maker the owner; the Sabinians said, the materials remain although their form is changed, and their proprietor is owner of the thing made. The distinction sanctioned by Justinian decided the question according to the fact of there being or not being a really new thing made. If there was, then the reasoning of the Proculians held good, and the maker becomes

the owner by a species of occupation, '*quia quod factum est antea nullius fuerat.*' If the thing made was only the old material in a new form, then it belonged to the owner of the materials, in accordance with the opinions of the Sabinians. The opinion of each school, therefore, was admitted where the facts were in accordance with it."—SANDARS' *Just.*, ii. i. 25.

Q. Translate, explaining the legal principles involved in the first part of the passage, and the cumulative remedies mentioned in the second. "Si tamen alienam purpuram quis intexuit suo vestimento licet pretiosior est purpura accessionis vice cedit vestimento, et qui dominus fuit purpuræ adversus eum qui subripuit habet furti actionem et condictionem sive ipse est qui vestimentum fecit sive alius. Nam extinctæ res licet vindicari non possint, condici tamen a furibus et a quibusdam aliis possessoribus possunt."

A. "If, however, any one has woven purple belonging to another man in his own vestment, the purple, although the more valuable, goes by accession with the vestment, and the owner of the purple has an action for theft against the person who stole the purple from him, and a *condictio*, whether he himself made the garment or another. For although things that are destroyed cannot be recovered by *vindicatio*, yet they may be the subject of a *condictio* against the thief or against some other possessors."

(a) If the purple and vestment were separable, the original owner of the purple could recover it by an action *ad exhibendum*. (See Digest x. 4, 7, 2, mentioned by Sandars, ii. 1, 2, 6.) Here it must be presumed that the purple is not separable.

This form of *accessio* is called *adjunctio*.

(β) Against a *bonâ fide* possessor of the *res extincta* a *condictio* only could be brought.

Against a thief both an *actio furti* and a *condictio* could be brought.

Q. A. builds a house knowingly on B's ground, with materials belonging to C. What were the respective rights of the parties?

A. The materials remain C.'s property, but his right of claiming them from B. was suspended till the building was destroyed.

C. would probably recover the value from A.

B. would be the owner of the building till it was destroyed.

Sandars, however, quotes D. v. 3, 38, Cod. iii. 32, 2, C. iii. 32, 5, to show that if the owner of the materials could prove that it was not his intention to part with them, he could recover them or their value.

Q. What were the requisites for transferring property in a thing from one person to another? Was mere agreement valid to transfer dominium?

A. (α) "When the property in a thing was to be transferred from one person to another, it was necessary that the process should be complete in four points:—

"1. The person who transferred it must be the owner.

"2. He must place the person to whom he transferred it in legal possession of the thing.

"3. He must transfer the thing with intention to pass the property in it.

"4. The person to whom it was transferred must receive it with intention to become the owner."

—SANDARS' *Just.*, ii. 1, 40.

(β) "Property could not be transferred by mere agreement. '*Traditionibus et usucapionibus non nudis pactis dominia transferuntur.*'—C. ii. 3, 20. The agreement was but the expression of the intention of the parties, and this was ineffectual unless it was accompanied by the party being placed in possession to whom the thing was to be transferred."—*Ibid.* cf. Austin, Campbell's *Analysis*, Lect. xiv. p. 66.—*Contract and Conveyance.*

Q. (α) *Explain:* "Rusticorum prædiorum jura sunt hæc : iter, actus, via, aquæductus. Iter est jus eundi ambulandi hominis, non etiam jumentum agendi vel vehiculum ; actus est jus agendi vel jumentum vel vehiculum. Itaque qui iter habet actum non habet, qui actum habet et iter habet eoque uti potest etiam sine jumento. Via est jus eundi et agendi et ambulandi : nam et iter et actum in se via continet. Aquæductus est jus aquæ ducendæ per fundum alienum."

(β) *What other rural servitudes were there ?*

(γ) *Mention also the chief prædial urban servitudes.*

A. (α) *Iter* was simply the right of passing along the path.

Actus was a right of driving cattle or vehicles and included "*iter.*"

Via enabled the owner of the right to make any use of the road, such as drawing stones or timber over it. *Via* included *actus* and *iter*. In this case the owner of the right could require the owner of the land to make the road 8 feet wide, and 16 at the turnings.

Aquæductus was simply the right of conducting water over another's land.

(β) Other rural servitudes mentioned in the Institutes are *aquæ haustum*, *pecoris ad aquam adpulsum*, *jus pascendi*, *calcis coquendæ*, *arenæ fodiendæ*, i.e., the

rights of drawing water, of watering cattle, of pasture, of burning lime and of digging sand.

(γ) The chief prædial urban servitudes were, *Oneris sustinendi, stillicidii recipiendi, altius non tollendi*, and *jus tigni immittendi*. See Sandars' Just., ii. iii. 1.; Greene's R. L., pp. 74, 75; G. Campbell's Analysis of Austin, pp. 151-153.

Q. Define accurately the conception of a jus in re alienâ. Mention the principal classes of rights named jura in re alienâ in Roman law.

A. G. Campbell's Analysis of Austin, p. 158, Lects. li., lii. :—

“*Jura in re alienâ* are fractions or particles residing in one party of *dominium* strictly so called residing in another, and they may be either definite or indefinite subtractions from the owner's power of user and exclusion.”

[Absolute property or *dominium* in the strict sense is thus defined, p. 157 :—

“It is a right imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition in favour of such persons as he may choose with the like powers and capacities as he had himself, and under such conditions as the municipal law attaches to the dispositions of private persons.”]

The principal classes of *jura in re alienâ* usually considered in Roman law are :—

1. Servitudes properly so called, definite subtractions from the owner's right of user and exclusion.

[Servitudes improperly so called (*usus, usufructus*, and *habitatio*) were rather forms of property modified by regard to the rights of the person

entitled to enjoyment in expectancy, whose right was commonly called *proprietas*, not *dominium*.]

2. *Emphyteusis*, or perpetual lease, which was *jus in re aliend* on account of the reversion to the corporate body granting the concession. This reversion could not be defeated by the tenant.

3. *Superficies*. Though this originally only gave *jus in personam* against the lessor, yet the prætor gave an action *quasi in rem* against all who had not a better title than the possessor of the *solum* himself. Thus the *superficies* became practically *jus in rem*.

4. *Jus in rem* of the creditor under a pledge or mortgage. The creditor has *jus in personam* in respect of the rights secured by the pledge, and *jus in rem* over the thing pledged ; by the Roman law the creditor could not acquire property in the thing pledged. (C. A., pp. 157, 158.)

Q. (α) *Distinguish briefly between dominium and servitus.*
 (β) *What is the ground of distinction between positive and negative, real and personal servitudes ?*

A. (α) Property, or *dominium*, gives to the entitled party the power of applying the subject to all purposes, except such as are inconsistent with his relative or absolute duties.

Servitus gives the power of applying to exactly determined purposes.

(β) *Positive and negative servitudes.*

The terms positive and negative are applied as affecting the person entitled to the servitude, *i.e.* a positive servitude gives him a right to do acts over a given subject belonging to another ; but a negative

one merely gives him rights to forbearances on the part of the owner.

Real and personal servitudes.

A real servitude resides in a person as the owner or occupier of a given "*prædium*," called the *prædium dominans*, the *prædium* against which the adverse right is exercised being styled the *prædium serviens*; these rights are said to reside in the given things and not in the persons holding them, hence the expression "*servitutes rerum*." A personal servitude resides in a given person without respect to the ownership or occupation of a *prædium*. The expression personal, as here used, means simply "not real."

Q. (α) Show the different points of view indicated by the Roman term servitus and its nearest English equivalent.

(β) What legal consequence follows from the idea expressed in the phrase servitus rei ?

A. (α) The term easement is never extended to any such rights in rem as fall properly within the category of property, but it is not applied to certain rights in rem which fall properly within the category of servitudes. Thus a right to predial tithes is never styled an easement, and is assumed to be a servitude.

(β) Servitus rei. All servitudes are real in the sense of being jus in rem, but a real servitude is said to reside in a person as the owner or occupier of a given prædium. (See preceding question.)

The rights of servitude, which are inseparable from the occupation of *prædia*, are said to reside in those given or determinate things, and not in the physical persons owning or occupying them. (Campbell's Analysis of Austin, p. 152.)

Q. State the principal modes by which servitudes might be acquired in the time of Justinian.

- A.* 1. *Pactis et stipulationibus*, by agreements and stipulations, which had most probably to be followed by quasi-traditio of the servitude.
2. By testament.
3. By *adjudicatio*, in a suit *familiæ erciscundæ* or *de communi dividundo*.
4. By reservation of the servitude, in making traditio of the rest of the property.
5. By usucapion and prescription.

Q. (α) Explain the distinction between usufructus and usus.

(β) On what ground was it that a usufructus could not be restricted by the proprietor, even with the consent of the fructuarius?

- A. (α)* Usufruct is the right of *using* and *enjoying* the produce of things belonging to others, as long as their substance remains undestroyed.

" Jus alienis rebus utendi fruendi salvâ rerum substantiâ."

Usus is the right to use the property of another without destroying its substance. It was, however, allowed a *usuarius* to take sufficient of certain descriptions of produce, such as milk of a flock, hay, and straw, to supply his daily wants.

(β) The usufruct could only have been restricted by the proprietor if he had the usufructus ceded to him by the *fructuarius*, and this would have operated as an extinguishment of the latter's rights. Moreover, the right of the *fructuarius* was purely personal; it could not be transferred to another, as it was to terminate by the natural or civil death of the usufructuary alone, and not by that of a stranger. A stranger might be allowed to exercise the rights of

the usufructuary, but this would not make him the owner of the usufruct. (Sandars, ii. 4, 3.)

Q. Show the nature and origin of "usufructus rerum quæ in abusu consistunt."

A. Things which are consumed in use cannot properly be the subjects of usufructus. A *senatus consultum* (probably of the time of Augustus) permitted a quasi-usufruct of things "*quæ usu consumuntur*:" the things might be consumed at once, and on the happening of any event upon which a usufruct would have determined, the quasi-usufruct also came to an end, and the usufructuary had to return similar things to those of which he had enjoyed the use, or their pecuniary value.

Q. What was the length of time required to render a title by usucapio or prescription good in different parts of the Empire, and according to the nature of the property; and what changes took place in these respects?

A. By the old law, full ownership was acquired by usucapion of one year in the case of moveables, and of two years for immoveables, provided they were *in Italico solo*.

Justinian enacted that moveables could be acquired in three years, and immoveables in ten years "*inter præsentēs*," or twenty years "*inter absentes*." In the time of Justinian, all distinctions between the *solum Italicum* and *solum provinciale* had been done away with.

Q. (α) How far was *donatio mortis causâ* a special mode of acquisition? (β) What was the effect of a mere agreement on the part of a person to make a *donatio* in favour of another?

A. (α) A *donatio mortis causâ* might be either in the form of delivery, subject to a conditional redelivery, or the delivery itself might be conditional; as for example, if a donor was to say to a donee, "If I die in this undertaking I will give you my horse." In this case the thing was acquired *ipso jure* on the death of the donor, and the *donatio* was a special form of acquisition.

(β) Mere agreements to make gifts were made binding by Justinian (Code viii. 54, 35, 5), that is to say, such agreements gave the donee a *jus in personam* against the donor, obliging the latter to make *traditio* of the thing, the actual property being passed thereby. (Sandars' Just., ii. vii. 2.)

Q. Translate: "Accidit aliquando ut qui dominus sit alienare non possit, et contra qui dominus non sit alienandæ rei potestatem habeat."

Illustrate this statement.

A. (α) Sometimes it happens that the owner of a thing cannot alienate it, and (β) on the other hand, it happens sometimes he who is not the owner has the power of alienation.

(α) 1. Immoveables forming part of a *dos* could not, in the time of Justinian, be alienated by the husband, even with the wife's consent.

2. Pupils under the age of puberty could not alienate without the authority of their tutors.

(β) A creditor had the power of alienating the thing pledged, a right which could not be taken from him even by express agreement.

UNIVERSAL SUCCESSION.

(A.) Testamentary.

Q. (α) What grounds have we for believing that the conception of testamentary succession is less ancient than that of intestate succession at Rome? (β) State briefly the successive forms of will prevalent at different periods of Roman history.

(α) See Maine, A. L., pp. 195-200. Summarized at p. 60.

- (β) 1. *Testamentum calatis comitiis*. Extinct before time of Gaius.
2. *Testamentum in procinctu factum*. Extinct before time of Gaius.
3. *Testamentum per æs et libram*. In use in time of Gaius.
4. *Testamentum prætorium*. See p. 61, *supra*.
5. *Testamentum tripartitum*. This form of will was in general use in the time of Justinian.
6. Testators in the time of Justinian could also dispense with writing if they made their wills before seven witnesses.

For full particulars of these forms of wills v. *supra*, pp. 61, 62.

Q. "Hoc jus (testamentarium) tripartitum esse videtur." Explain this statement.

A. The tripartite will was so called on account of the nature of its origin.

1. The *Civil Law* required that the testament should be made all at one time in the presence of seven witnesses.

2. The *Imperial Constitutions* (Valentinian and Theodosius, 439 A. D.) required that the testator and witnesses should subscribe their names.

3. The *Prætorian Edict* required that the witnesses, seven in number, should append their seals to the testament.

Q. Show that the statement in the Institutes that those persons were competent witnesses to a testament with whom the testator had testamenti factio, is necessarily subject to exception.

A. Testamenti factio expresses the capacity :

1. Of making a will.
2. Of taking a benefit under a will.
3. Of being a witness to a will.

“After the heir had ceased to take a part in the ceremony of mancipation, there was no longer any necessity for his having those qualifications which enabled him to join in the ancient ceremony. Accordingly, any one who could take under a testament, or acquire for another, though unable to make a testament (*i.e.* not having *testamenti factio* in the first sense) was then said to have the *testamenti factio*. So an infant, a madman, or a child born after the testator's death had the *testamenti factio* in one character and not in another. He could be heir and yet be unable to be a testator or a witness.”—SANDARS, ii. x. 6.

Q. What was the law as to testamentum militare?

A. This is given in full at p. 63.

Q. What was necessary and sufficient for the exheredatio of a son, and of other offspring respectively, prior to Justinian, and what change in the law did Justinian introduce?

A. (α) Before the time of Justinian sons had to be instituted heirs or disinherited by name; other descendants might be disinherited collectively by a general expression of the testator's intention to that effect.

The prætor, however, would give *bonorum possessio contra tabulas* to a male descendant, or to an emancipated child if not instituted or disinherited by name.

(β) Justinian required that all *sui heredes*, all who but for emancipation would have been *sui heredes*, and all descendants (including females) in the male line must be instituted or disinherited by name, otherwise the will is void.

Q. Explain the distinction of heirs as necessarii, sui et necessarii, and extranei.

A. Given at length at pp. 75, 76 *supra*. Sandars' Just., ii. 19.

Q. Was the institution of a slave valid to any, and what effects?

A. Slaves of the testator might be instituted heirs, and because they could not refuse the inheritance were styled *necessarii heredes*; they became free on the testator's death, and were allowed the *beneficium separationis*, or right of keeping their own possessions distinct from the inheritance. Slaves were usually instituted when the testator was insolvent, the latter thus avoiding the disgrace of having his own estate sold.

The slave of a stranger could take for his master if the latter had *testamenti factio* with the testator; slaves always took for the benefit of the person who was the slave's master at the time of his entering upon the inheritance.

The owner of a slave instituted heir was not obliged to accept the inheritance, and a slave was not made free by being instituted in this manner. If a slave had several masters he acquired for them in proportion to their respective shares in him.

Q. (α) *What were substitutio vulgaris and substitutio pupillaris respectively?* (β) *What distinction is observable between the meaning of the word "substitute" as used in the Roman law and as used in the law of Scotland?* (γ) *Could a parent substitute pupillariter to his disinherited child?*

A. (α) For *vulgaris substitutio*, v. *supra*, pp. 71, 72; Just., ii. xvi. For *pupillaris substitutio*, *supra*, pp. 72, 73.

(β) An illustration of substitution in Scotch law is given, p. 73, quoted from Austin, Campbell's Analysis, p. 157.

(γ) A parent could substitute *pupillariter* to his disinherited child. See Just. Inst., ii. xvi. 4.

Q. (α) *Explain the nature* (a) *of legatum liberationis;* (b) *of legatum debiti;* (c) *of prælegatum dotis.*

(β) *Give a summary of the English law as to the satisfaction of a debt by a legacy.*

A. (α) *Legatum liberationis.* This form of legacy was used by a creditor in bequeathing to his debtor a discharge of his debt. Inst., ii. xx. 13.

Legatum debiti. This was a legacy to the creditor of the amount of his claim; it was necessary, however, that the creditor should take some advantage, or the legacy would not take effect: for example, if a conditional payment was made absolute.

Prælegatum dotis. By the same analogy as in the above cases the husband could bequeath to his wife the *dos*; he was said "*prælegare dotem*," *i. e.* to give at once what could only be recovered after certain delays.

(β) For the English rules as to satisfaction of debts by legacies, see Brown's Law Dict., sub loc., quoted at p. 80.

Q. (α) *If a testator bequeathed a res aliena, was the bequest valid in any and what circumstances, and to what effect?*
 (β) *If the res aliena became the property of the legatee himself, by purchase out of his own funds or by gift from the owner, what was the effect of the legacy?*

A. (α) A *res aliena* can be bequeathed as a legacy. The heir is obliged to purchase and deliver it, or if he cannot get it to give the value to the legatee. If, however, the subject of the legacy is *extra commercium*, then the heir is not bound to pay the value.

Legacies of this character were only valid when the testator knew that the thing bequeathed was a "*res aliena*," and it is incumbent upon the legatee to prove this fact. Inst., ii. xx. 4.

(β) If the legatee acquires the *res* by purchase out of his own funds, he can recover the value by an action founded on the testament; if he has had the *res* given to him he cannot bring an action, the rule being, "*duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse*."—Inst., ii. xx. 6.

Q. *Explain the expressions "dies cedit" and "dies venit" in regard to a legacy; and show the importance of the distinction in the case of a legatum universitatis?*

A. (α) "*Dies cedit*" = the day begins: "*dies venit*" = the thing may be demanded. The former of these expressions is used to denote the vesting of an interest, the latter to signify that the interest has become a present one. (Sandars' Just., ii. xx. 20.)

(β) In legacies, the legatee's rights were fixed from the moment of the testator's death (*dies cedit*); as soon as the heir entered upon the inheritance (*dies venit*) the legacy could be demanded. In the case of a *legatum universitatis*—for example, of a flock of sheep—all increase or decrease between the making of the

testament and the testator's death would be so much gain or loss to the legatee, who could claim the "res" exactly as it was at the time of the vesting of the right (*dies cedit*).

Q. Show in what precise points the introduction of fideicommissa enlarged the previously existing power of giving legacies?

A. "In the time of Gaius, unlike a legacy (1) a *fideicommissum* could be given by a nod; (2) it could be charged on heredes ab intestato; (3) it could be contained in unconfirmed codicils; (4) it could be charged on a legatee or on a first *fideicommissarius*; (5) it could confer liberty on another man's slave; (6) it could charge an heir, even in an unconfirmed codicil, to give up the whole or part of an inheritance; (7) it could pass an inheritance to a woman contrary to the terms of the *lex Voconia*; (8) it could pass inheritances or legacies to *Latini* (contrary to the *lex Junia*); (9) contrary to a Sc. it enabled a slave less than thirty years old to be instituted heir and enfranchised, and on reaching that age to claim his liberty and the inheritance; (10) it could charge an heir on the day of his death (*cum morietur*) to give up the inheritance in whole or part to another; (11) it could be given after the death of the heir. . . . (12) it could be recovered at Rome throughout the year and only on days "*cum res aguntur*" (of which there were but 230 in the year); (13) it carried interest and accumulations in case of delay; (14) it was valid though written in Greek.

"Justinian placed legacies on the same footing as *fideicommissa* except as regards (5) *supra*."—GREENE'S *R. L.*, pp. 121, 122.

Q. Describe briefly the nature and effects of a codicil. What formalities were required by Justinian for the validity of codicils? By what judicial machinery were they carried into effect?

[Fully answered *supra*, lib. ii. tit. xxii. p. 89.]

Q. Distinguish between the quarta legitima, quarta Falcidia, quarta Trebelliana.

A. (α) When near relations of the testator had been disinherited or omitted from a will, they could bring an action "*de inofficioso testamento*," if the person bringing the action had received less than one-fourth of the amount he would have had in case of intestacy, *i.e.* the *quarta legitima*. Before Justinian's time if the action was successful the will was set aside; he enacted that if there was anything left to the claimant the *quarta legitima* should be made up to him. See Harris's R. L., p. 96; Inst., ii. xvii. 3, 6.

(β) The *quarta Falcidia* was the fourth part of the inheritance secured to the heir (or heirs); if more than three-fourths of the inheritance was left in legacies these were proportionately reduced. Harris, R. L., p. 104; Inst., ii. xxii. 1-3.

(γ) A legal heir, when obliged by a *fideicommissum* to hand over an inheritance to a *fideicommissarius*, might retain a fourth, called the quarta Trebelliana, from the Sc. Trebellianum (which was compounded of an older Sc. of that name and the Sc. Pegasianum). All actions were divided proportionately between the *fiduciarius* and the *fideicommissarius*.

UNIVERSAL SUCCESSION.

(B.) *Ab intestato.*

Q. "Intestatus decedit qui aut omnino testamentum non fecit aut qui non jure fecit aut id quod fecerat ruptum irritumve factum est." *Mention the ways in which a will might be "non jure factum," "ruptum," or "irritum."*

A. "A will was *non jure factum*, *imperfectum*, or *injustum ab initio*, if some formality or technicality was wanting.

"If it was valid when made, but subsequently lost its effect, it was said to be *ruptum*, *i.e.* broken or revoked. This was caused, for example, by the agnation of a *suius heres* or by a subsequent testament. It was said to be *irritum* if it was rendered useless by the testator undergoing a change of status, or by no one entering under it on the inheritance. In this latter case it was specially said to be *destitutum*, but the general expression *irritum* was applied as well as the more particular term *destitutum* to a testament that had been abandoned."—SANDARS' *Just.*, ii. xvii.

The passage quoted above comes from *Inst.*, iii. 1.

Q. *What was the original law of inheritance ab intestato, and what was the tendency of the modifications introduced into it before the time of Justinian?*

A. The order of succession to the property of intestates was fixed by the law of the Twelve Tables thus: 1. *Sui heredes*; 2. *Agnati*; 3. *Gentiles*. These classes were called to the inheritance in turn, the *agnati* in default of *sui heredes*, and the *gentiles* in the absence of *agnati*. (For definition of *sui heredes* v. *supra*, p. 75; *Inst.*, iii. i. v.; *Inst.*, iii. 2; *Cognati*, v. p. 93; *Inst.*, iii. v.)

The prætor modified this order of succession by granting rights of succession through the medium of the *bonorum possessiones* to the *cognati* in default of the *agnati*. The old system of rules regarding intestate succession simply took notice of the civil as opposed to the natural family, and this the prætor remedied by his interference (v. under *bonorum possessiones*).

In the time of Gaius the order of succession may be said to have been: 1. *Sui heredes*; 2. *Agnati*; 3. *Cognati*; but the classes of *sui heredes* and *agnati* were in effect being continually reinforced by additions to those who were only excluded by the technicalities of the strict civil law. In the time of Justinian the change was still going on towards the recognition of a physical basis of relationship in the succession of intestates, but nominally the classes were as above. The alterations made in the 118th and 125th Novels completed the work that had been going on since the time of the Twelve Tables. See Maine, A. L., cap. vii.; Greene, R. L., pp. 123-132; Harris, R. L., pp. 111-120; *supra*, pp. 100, 101.

Q. What were the patron's rights over the property of a deceased freedman, and in what direction was the progress of the law on this subject?

A. (α) The law of the Twelve Tables only called the patron to the inheritance of a deceased intestate freedman, in case the latter had no *sui heredes*.

(β) The prætor required the freedman to leave one-half of his property to the patron, who, however, was excluded by natural (in the sense of not-adoptive) children of the freedman.

(γ) Justinian enacted by a Constitution that the *patronus* and *patrona*, as well as the *libertus* and

liberta, should be on the same footing. If a freedman died intestate and without children, the patron was to take all the inheritance ; if there were children, they took to the exclusion of the patron and his issue. If the freedman made a testament, he could exclude the patron, but only if his fortune was less than 100 *aurei* ; if it was above this sum the patron took a clear third, not liable to deductions for legacies. See Inst. iii. vii. 1, 2, 3 ; Harris's R. L., 121-123 ; Sandars' Just. *sub loco* ; *supra*, pp. 97, 98.

Q. (α) Explain the nature of and classify the bonorum possessiones. (β) In what cases would those *contra tabulas* and *secundum tabulas* be given?

A. (α) See pp. 98-100, *supra*.

(β) *Possessio contra tabulas* was given to children who were passed over in the testament.

The *possessio secundum tabulas* was given (when it was certain that there were no children passed over) both when the testament was technically valid according to the civil law, and when it had no such validity, as in the following cases :

1. When the testament was defective technically ; for example, if there was no *familiæ mancipatio*.
2. When the testator had been incapable of making a testament at some time between the actual making of his testament and his death.
3. When the posthumous child of a stranger was instituted. See Sandars' Just., iii. ix. 3.

Q. What, under Justinian's legislation, are the claims of (α) *plene adoptatus*, and (β) *minus plene adoptatus*, to the succession of (α) their natural, and (β) their adoptive father?

A. The *minus plene adoptatus* succeeded his adoptive father as *suus heres* in case of intestacy, if he was still

remaining in his adoptive family, and retained his rights of succession to his natural father. v. *supra*, pp. 91, 92.

The *plene adoptatus* acquired the rights of a natural child to the succession of his adoptive father. He could obtain the *bonorum possessio* to his natural father's property, if emancipated in his lifetime. On emancipation, however, he ceased to have any claim to the inheritance of his adoptive father. Harris's R. L., pp. 112, 113.

Q. (α) *What were the provisions of the Sc. Orphitianum and Tertullianum respectively? What were their dates?*

(β) *How far did these enactments apply to children of uncertain parentage?*

A. (α) These *Sc.* are fully described at pp. 94, 95, *supra*. Their dates are *Sc. Tertullianum*, 158 A.D., and *Sc. Orphitianum*, 178 A.D.

(β) The mother was, by the *Sc. Tertullianum*, permitted to have the succession to a child by an uncertain father, but such children were not allowed to succeed to the inheritance of the mother if she had legitimate children, or if she was of high rank (*illustris*). Sandars, iii. iv. 3, iii. iii. 7.

BOOK II. B.—OBLIGATIONS.

Jura in personam.

I. OBLIGATIONS EX CONTRACTU (CONTRACTS).

Q. *Explain the classification of Contracts in the Institutes.*

A. The classification intended by Justinian is given at p. 106.

See also Maine, A. L., cap. ix., p. 325, 3rd edition. "The convention, as soon as it was completed, was in almost all cases at once crowned with the obliga-

tion, and so became a contract. The meaning of the fourfold distribution (of contracts) is readily understood as soon as we apprehend the theory which severed the obligation from the convention. Each class of contracts was in fact named from certain formalities which were required over and above the mere agreement of the contracting parties.

“ In the verbal contract, as soon as the convention was effected a form of words had to be gone through before the *vinculum juris* was attached to it. In the literal contract, an entry in a ledger or table book had the effect of clothing the convention with the obligation, and the same result followed in the case of the real contract from the delivery of the *res* or thing which was the subject of the preliminary engagement.” In consensual contracts the name merely implies that the obligation is annexed at once to the *consensus* of the parties. Maine, A. L., pp. 325, 6; 333.

Q. Explain and illustrate the difference between (1) a contract and pact, (2) a contract and quasi-contract.

A. An analysis of the conception of contract shows us that the idea is made up of the three following essential parts :

1. The *pollicitatio*, or signification by the promissor of his intention to do certain acts or observe certain forbearances,

2. The *conventio*, or agreement, arising from the signification by the promisee of his expectation that the promissor will fulfil his promise.

3. The *obligatio*, or *vinculum juris*, the bond imposed by the law to compel the parties to act as they have promised.

The absence of the last of these three essentials cha-

racterizes the *pact* as distinguished from the *contract*. The pact may be described as a non-actionable obligation. The *vinculum juris* or binding force attached only on the completion of certain formalities prescribed by law, as, for example, on the handing over of the *res* in a contract of *mutuum*.

An example of a pact which lacks the force of the full obligatio owing to the absence of the formalities required by the civil law, is as follows : The contract of *usura* was required to be made by stipulation ; in default the agreement was *nudum pactum*, producing no action. (Savigny, *Brown's Analysis*, p. 11.) A *nudum pactum* could, however, be pleaded as an equitable defence.

(See also Pollock on Contracts, cap. i. ; Sandars' *Just.*, iii. xiii. 2 ; Maine, *A. L.*, pp. 322, 323.)

A quasi-contract, as compared with a contract, lacks the second essential above mentioned, *i.e.* the *conventio* or agreement of the parties. The word "*quasi*" negatives the notion of identity between contracts and quasi-contracts, while implying that they are connected by a strong superficial analogy. Quasi-contracts are therefore not contracts at all. An instance of one would be that of the relation between two persons, one of whom has paid money by mistake. The law requires the payee to refund, but as there is no *conventio* this result cannot be derived from contract. Maine, *A. L.*, p. 343, 344.

Q. In what historical order were the various kinds of contracts introduced ?

A. The order of priority among the four classes of contracts is as follows : 1. Verbal ; 2. Literal ; 3. Real ; 4. Consensual.

The contract *verbis*, as exemplified in its important form of *stipulatio*, was the eldest known descendant

of the primitive *nexum*, the peculiar and solemn form of words being the best proof of the fact that it was only on the completion of rigid formalities that the law allowed obligations to attach. The next in historical order was the contract *literis* (see p. 119); here formalities of a peculiar character had to be observed. The contract *re* shows a still further advance in ethical conceptions; here the obligation was drawn down as soon as the thing was delivered. Lastly, in the consensual contract no formalities whatever are required to attract the *juris vinculum*, the consensus or ascertained agreement of the parties is the only thing necessary to draw down the *obligatio*. Maine, A. L., pp. 326-333.

Q. (α) State the principal causes which prevent pacts being clothed with the *obligatio*. (β) Has the natural or non-actionable obligation any parallel in English law?

A. (α) The causes are stated fully in Brown's Analysis of Savigny, quoted *supra*, pp. 105, 106.

(β) V. *supra*, pp. 105, 106, and Pollock on Contracts, cc. i. ii.

Q. (α) By what class of actions were obligations equally enforced? (β) Distinguish between *condictiones* and actions *bonæ fidei*.

A. (α) *Supra*, p. 108.

(β) *Supra*, p. 108.

Q. A. is the possessor of a granary in which is stored corn, some of which he has received as a *mutuum* from B., some as a *depositum* from C., and some as a *pignus* from D. How far is A. answerable if the corn is destroyed by fire, (1) without any fault on his part; (2) through his slight negligence (*culpa levis*); (3) through his gross negligence (*culpa gravis*)?

A. If A. is entirely without fault he is nevertheless fully answerable to B., for, by the contract of *mutuum*, the

property passes to the borrower, who has to restore an equal quantity only.

If A. commits a *culpa levis* he is not liable to C. for the *depositum*, unless the deposit be made at the wish and request of the depositary, but he is liable to D. for the *pignus*, as he would also have been for a *commodatum*.

If A. commits a *culpa gravis*, he is liable to C. and D. for the *depositum* and the *pignus* respectively.

Q. Describe the several rights, real and personal, of the parties to a pignoratitia.

A. The creditor's right over the thing pledged only extended to the amount of his debt; to secure this, however, he had the right of selling the thing pledged, or of again pledging it, and of satisfying his own debt before any other. He also could cause himself to be constituted owner of the thing if no other owner could be found, and had the *actio quasi Serviana* against any one unlawfully detaining the pledge.

He, moreover, had the *actio pignoratitia contraria* against the debtor to recover any expenses to which he might have been put in keeping the subject of the pledge.

The *actio pignoratitia directa* was the debtor's remedy to recover the thing pledged when the debt was paid, or the surplus after a sale by the creditor.

Q. What change was made by the Emperor Leo in the law as to the form of stipulations? What mode of dissolving an obligation was peculiar to stipulations?

A. By the old law it was necessary that the question and answer of the stipulation should be of precisely similar character to one another. Thus the question

"*spondes?*" required the answer "*spondeo*," and so on. A constitution of Leo, published in 469 A.D., made this exact correspondence between the forms of question and answer unnecessary, and provided that the contract might be formed by expressions of any kind as long as the intentions of the contracting parties were clearly expressed.

Stipulations were dissolved by *acceptilatio*, a mode peculiar to obligations made *verbis*. The creditor was asked if he had received payment and acknowledged that he had; the obligation was then extinguished. In other cases *acceptilatio* was held as an agreement not to sue, and formed a ground of equitable defence. v. Inst., iii. xxix. 1, Sandars' Edition.

Q. What was the stipulatio Aquiliana? Give the reason for its introduction.

A. The stipulatio Aquiliana, an example of which is given in the Institutes, acted as a novatio of all previous obligations: these obligations being thus expressed in a stipulation could be dissolved by acceptilatio.

The cause of its introduction was the facility which it afforded for the extinction of all obligations. See Inst., iii. xxix.

Q. To what extent could a slave validly stipulate on behalf of his master?

A. Vide supra, iii. xvii., pp. 113, 114.

Q. Give a brief sketch of the history of the stipulation at Rome, showing by what changes it assumed the form in which we find it under Justinian.

A. See Savigny on Obligations, Brown's Analysis, p. 115, quoted above, p. 118.

Q. (α) Classify the causes which invalidate stipulations.
 (β) What is the effect of an impossible condition, (1) in a stipulation, (2) in a testament.

A. (α) Vide *supra*, pp. 115-117.

(β) An impossible condition, such as "if I touch the sky with my hand," *i.e.* a condition which can never be fulfilled, invalidates a stipulation, but in the case of a testament is taken as if it were not written at all.

Q. Discuss the general principle, "alteri stipulari nemo potest," as applied to the cases where I stipulate, (a) *Seio dari*, (b) *mihi aut Seio dari*, (c) *mihi et Seio dari*, showing how the rule of law may be modified in all or any of these cases by the circumstances under which I stand either with respect to *Seius* or otherwise.

A. The general effect of the rule above stated was that no one who was not a party to the contract could gain or lose by it: the third person not being a party to the contract could not enforce it by action, and the stipulator could not enforce it because he had no interest in it.

(a) A stipulation "*Seio dari*" would be invalid unless the stipulator had an interest in the fulfilment of the promise. Such relations as those of debtor and creditor, *pater familias* and *filius familias*, existing between the stipulator and the third person, would be sufficient to create this interest.

(b) In a stipulation "*mihi aut Seio dari*" the stipulator alone acquires the benefit of the contract, but the payment may be made to *Seius* and the promissor will be freed, the stipulator having an *actio mandati* against the payee.

(c) In a stipulation "*mihi et Seio dari*," the stipulator would only take half the amount if the relation of *pater* and *filius familias* did not exist between

him and Seius. The Sabinians had been of opinion that the stipulator took the whole amount ; Justinian decided the question as it is stated above.

Q. Define and distinguish between the liabilities of a fide jussor, fide promissor, and a sponsor.

A. Fide jussor, v. supra, iii. xx., pp. 118, 119.

Sponsores were Roman citizens who acted as guarantees, while *fide promissores* were *peregrini* who acted in the same capacity ; they might bind themselves for a part or for the whole of what their principal promised, but not to a greater extent. Their heirs were not bound, and they could recover by an *actio mandati* from their principal what they had advanced on his account.

The *fide jussores*, who superseded the above forms of sureties, could bind themselves in every form of obligation and not only in verbal contracts (as *sponsores* and *fide promissores*) ; they also could transmit their obligations to their heirs.

Q. What was the beneficium divisionis, and by what Emperor was it introduced ? Of what other beneficia could the fide jussor avail himself ?

A. The beneficium divisionis, introduced by the Emperor Hadrian, was a privilege of which a surety might avail himself to recover from the other co-sureties (fide jussores) a proportionate part of the sums paid over to the creditor.

The *fide jussor* had also the *beneficium cedendarum actionum* to compel the creditor to make over to him all actions belonging to the stipulator, and the *beneficium ordinis* to compel the creditor to sue the principal debtor first, and only to recover from the sureties what he failed to get from the principal. Sandars' Just., iii. xx. 4.

Q. Explain the technical meaning of satisdare, satis accipere, intercedere.

A. Satisdare = to give surety for the obligation of a principal.

Satis accipere = to receive such surety.

Intercedere = to become surety for the debt of another.

Sandars' Just., iii. xx. p.

Q. In the reign of Justinian A. enters into negotiations with B. for the loan of a sum of money, which sum is never paid over to A., though a contract literis is formed by the entry of the debt in B.'s books. A year after this B. brings his action. Advise A. as to his rights. What would have been the result if B. had brought the action after four years?

A. A. could repel the action of B. by the *exceptio pecuniæ non numeratæ*, and at any time within two years (five before the time of Justinian) the burden lay on the creditor to prove that the money had actually been paid: after two years the *onus probandi* lay on the debtor to show that he had not received the money.

Q. (α) What are the duties required of a vendor in Roman law? (β) What advantage does the vendee take by having his rights guaranteed by a stipulatio?

(γ) A. and B. agree to an exchange of certain things. A. has delivered possession and B. refuses to deliver. What are A.'s remedies?

(α) A vendor in Roman law is obliged to deliver the thing sold and to give the vendee free and lawful possession, to guarantee him against disturbance

by the real owner, and also to indemnify him against latent faults.

(β) If the buyer's rights had been secured by *stipulatio* he could require the vendor to make him *dominus*, or legal owner of the thing sold.

(γ) A. has a *condictio* to get the thing back, or an *actio præscriptis verbis* to recover all that he had lost by delivering it. Sandars' Just., iii. xxiii. 2.

Q. What were the principal changes introduced into the law of sale by Justinian?

A. (1.) Justinian provided that when the parties to a contract of sale agreed to reduce the terms of the contract to writing, the mutual consent of the parties was not to be considered as given till the terms were so reduced to writing.

(2.) He also enacted that when a deposit (*arræ*) had been made in a contract of sale, the vendee might withdraw by forfeiting the deposit, and the vendor by paying twice its value.

Q. (a) Describe the contract of locatio conductio. (β) With what transactions does it deal, and what are the respective duties of the parties in each case?

A. This contract was complete by the consent of the parties. By it one person (*locator*) gave out work and another (*conductor*) undertook to perform it, or one offered his personal services and another hired them.

The *locator* had to indemnify the *conductor* or hirer against all necessary expenses to which he was put, and the hirer had to take care of the thing, return it at the proper time, and pay the sum agreed on for the hiring. Sandars' Just., iii. xxiv. p.

Q. (α) *What different kinds of transaction are included under the term locatio conductio? (β) Give instances of contracts as to which the jurists doubted whether to class them under this head or not.*

A. (α) *Locatio conductio* included transactions wherein

- (1.) One person let and another hired a thing ;
- (2.) One person let his services and another hired them ;
- (3.) One person contracted for a piece of work to be done and another undertook to do it.

These were respectively styled *locatio conductio rerum, operarum, operis.*

(β) *Vide supra*, p. 122.

Q. *Enumerate the various forms assumed by societas in the Roman law.*

A. Sandars (Just., iii. xxv.) gives the following as the division found in the Digest (xvii. 2, i. 1).

1. *Societas universorum bonorum*, in which everything belonging or accruing in any way to each partner is held in common.

2. *Societas universorum quæ ex quæstu veniunt*, a partnership as to all things acquired by modes contemplated in the formation of the contract, but not of things accruing otherwise (*e.g.* legacies or inheritances).

3. *Societas negotiationis alicujus*, to carry on a particular business.

4. *Societas vectigalis*, to carry on the farming of the public lands. Such a partnership was subject to special rules.

5. *Societas rei unius*, when one or more particular things are held in common.

Q. "Societas solvitur ex personis, ex rebus, ex voluntate, ex actione, ex tempore." *Explain this statement.*

A. "Partnership is dissolved *ex personis*, when one of the parties is dead or incapacitated; *ex rebus* when the purpose of the partnership is effected or its subject matter has ceased to exist; *ex voluntate* when one partner wishes to withdraw, and *ex actione* when one partner compels a dissolution of the partnership by action; *ex tempore*, if the partnership was only temporary."—SANDARS' *Just.*, iii. xxv. 4.

Q. *State the rules laid down in the Institutes: (α) as to the right of recourse of a mandatory against the mandant for the consequences of executing an illegal mandate; (β) as to the position of a mandatory proceeding in the execution of a mandate in ignorance of the mandant's death.*

A. (α) The mandatory who executes an illegal mandate, *i.e.* one *contra bonos mores*, cannot recover from the mandant, although he pay the penalty of the illegal act. *Inst.*, iii. xxvi. 7.

(β) A mandatory executing a mandate after the death of the mandant, and in ignorance of his decease, may recover by the *actio mandati*. *Inst.*, iii. xxvi. 10.

Q. *A. gives B. a mandate to buy a piece of land for 200 aurei. B. buys it for 250 aurei. How far can B. recover from A. what he has paid as purchase money? What differences of opinion on this subject had prevailed among the jurists before Justinian?*

A. The mandatory should not exceed the limits of his mandate. The Sabinians held that in the above case B. could recover nothing whatever from the mandant; the Proculians, however, were of opinion that 200 *aurei*, *i.e.*, the amount mentioned in

the mandate, could be recovered. Justinian (Inst., iii. xxvi. 8) adopts the latter view.

Q. Distinguish between culpa levis in abstracto and culpa levis in concreto, and give an instance in which the latter fell to be regarded.

A. Culpa levis in abstracto consisted in falling short of the highest standard of carefulness that could be found.

Culpa levis in concreto consisted in falling short of the care which the person was accustomed to show in the management of his own affairs. It accordingly varied in different individuals.

In the case of *societas* each partner was required to be as careful with regard to the affairs of the partnership as he was with regard to his own; each was liable for *culpa levis in concreto*, and this might vary between *culpa lata* and *culpa levis*, according to the character of the individual.

Q. What is the reason given in Justinian's Institutes for the classification of obligations quasi ex contractu under that head? Specify the principal instances cited of this form of obligation.

A. Obligations quasi ex contractu are so classified in the Institutes for the reason that they do not fall properly within either of the classes of obligations, *ex contractu* or *ex delicto*.

An *obligatio quasi ex contractu* is not founded on a contract, but on a fact or event through which the person obliged is in the same position as he would have been if he had entered into a contract. The fact generating an *obligatio quasi ex contractu*, however, has the same effect as a contract, *i.e.* it gives a *jus in personam*.

For the principal instances of obligations *quasi ex contractu*, vide *supra*, pp. 125, 126.

II.—OBLIGATIONS EX DELICTO.

Q. What is the cause of the very prominent position taken by the law of wrongs or torts in the early history of any community? Illustrate by the case of Rome.

A. See Maine, A. L., cap. x.

In the infancy of any society the redress of wrongs is naturally thrown upon private individuals, owing to the weakness of the central authority. "The citizen depends for protection against violence or fraud not on the law of crime but on the law of tort." (A. L., p. 371, third edition.) The distinction between offences said to be against the state (crimes) and offences against individuals (civil wrongs) exists in all systems of jurisprudence, though the real distinction is grounded upon the mode in which redress is obtained, and not upon the nature of the offence.

All offences are offences against individuals, and all offences are equally offences against the state; some, however, are deemed the proper subject for state prosecution, and these receive the name of crimes.

In the Roman law, crimes were prosecuted in a manner exactly analogical to a prosecution by an individual, and the state avenged itself by a single act on the wrong-doer, by a special law or *privilegium*. A. L., pp. 372, 373, third edition.

The Institutes, being a treatise on private law, allotted a prominent place to delicts as the ground of civil actions, but only make a passing reference to crimes, which did not come within the scope of the work.

Q. Describe the nature of obligationes ex delicto. What kinds of injury were not covered by them?

A. Certain wrongs, such as theft, robbery with violence, and wrongful damage were called delicts in the Roman law system, and these gave rise to obligations said to be "*ex delicto*." These obligations were enforced by actions, and obligations attaching to acts which did not fall within the scope of a specified action were styled *obligationes quasi ex delicto*.

Q. Explain the early Roman law as to the manifest and non-manifest thief. State analogous principles of Anglo-Saxon law.

A. The punishment for *furtum manifestum* was, by the Twelve Tables, death if the theft was committed by a slave, and slavery if committed by a freeman.

A furtum nec manifestum was punished by a penalty of twice the value of the thing stolen.

In the time of Gaius the punishment of the manifest thief was reduced to a penalty of four times the value of the thing stolen.

Maine, *A. L.*, pp. 378-380, *passim*.

"The earliest administrators of justice simulated the probable acts of persons engaged in a private quarrel. In settling the damages to be awarded, they took as their guide the measure of vengeance likely to be enacted by an aggrieved person under the circumstances of the case. . . . The ancient lawgiver doubtless considered that the injured proprietor, if left to himself, would inflict a very different punishment when his blood was hot from that with which he would be satisfied when the thief was detected after a considerable interval, and to this calculation the legal scale of penalties was adjusted. . . . The principle is precisely the same as that followed in

the Anglo-Saxon and other Germanic codes, when they suffer a thief chased down and caught with the booty to be hanged or decapitated on the spot ; while they exact the full penalties of homicide from anybody who kills him after the pursuit has been intermitted."

Q. What are the principal rules as to the person by whom the actio furti can be brought ?

A. Vide supra, pp. 130, 131.

Q. What is the effect of a theft from a paterfamilias by a son under power ?

A. From the relation of the parties no action can arise between them ; the actio furti cannot therefore be brought, but the thing stolen becomes a res furtiva, and cannot be acquired by usucapion until it has returned to its lawful owner.

Q. (α) State the law as to robbery with violence as it is found in the Institutes. (β) Could the actio vi bonorum raptorum be brought if the thing taken was not a moveable ?

A. (α) Vide supra, pp. 131, 132.

(β) This action could only be brought if moveables had been the subject of the robbery with violence.

Q. (α) What are the provisions of the lex Aquilia as mentioned in the Institutes ?

(β) (1) Titius beats the slave of Sempronius so violently that he dies ; (2) injures a horse belonging to Caius by over-driving it ; (3) assists a slave of Cassius to escape by removing his fetters ; (4) kills a dog of Octavius. By what actions could Sempronius, Caius, Cassius, and Octavius recover against Titius ?

A. (α) For the provisions of the lex Aquilia v. supra, pp. 132, 133 ; Justinian, Inst., iv. iii.

(β) Sempronius had the *actio directa Aquiliæ*, and could recover the greatest value the slave had at any time within the previous year.

Caius had the *actio utilis Aquiliæ*, and could recover the greatest value the horse had had within the previous thirty days.

Cassius has an *actio in factum*, and can recover the greatest value the slave had within the previous thirty days.

Octavius has an *actio directa Aquiliæ*, and can also recover the greatest value the dog had within the previous thirty days.

Q. (α) Define *Injuria* in its general and special sense. (β) In whose name might the action be brought?

A. *Injuria* in its general sense is defined thus in the Institutes: "*generaliter injuria dicitur omne quod non jure fit,*" i.e., every unlawful action.

Injuria also has the technical meaning of a wrong done to a person by the unjust decision of a judge.

In the special sense, as alluded to in the Inst., iv. 4, *injuria* means insult or outrage.

The *actio injuriarum* could be brought in the name of each person injured, and it was held that a man might receive an "*injuria*" in the person of his children under power, of his wife, or of his slaves. Thus in the case of an *injuria* done to a woman married but under the power of her father, an *actio injuriarum* might be brought in the name of the wife, the husband, and the father. v. Inst., iv. 4, 2, and *supra*, pp. 133, 134.

Q. What is the nature of the obligation, and how would it be enforced in the following cases?—(1) Titius has libelled the wife of Sempronius. (2) Caius has lent Seius £100 for a year. (3) Mævius has stolen Bavius' coat from the shop of Titus, who was mending it.

*A. (1) There is an *obligatio ex delicto* enforceable against Titius by an *actio injuriarum*, which can be brought both by Sempronius in his own and also in his wife's name.*

*(2) Seius is bound by an *obligatio ex contractu* (the contract being a *mutuum*), and can enforce his rights by a *condictio certi*.*

*(3) Bavius has an *actio locati* to enforce the *obligatio ex contractu* against Titus, who has an *actio furti* against the thief to enforce the obligation *ex delicto*. Bavius, though he cannot recover the penalty in an *actio furti* against Mævius, can nevertheless bring an *actio ad exhibendum*, a *vindicatio* or a *condictio* to recover the thing or its value from the thief. If, however, Titus was insolvent, Bavius could bring the *actio furti*. Inst., iv. 1, 15.*

Q. What are the grounds of the distinction between delicts and quasi-delicts? To what objection is this distinction open?

A. The technical term delict was only applied to those forms of wrong-doing which came within the scope of certain actions mentioned in the Institutes, lib. iv. 1-4.

As there was the strongest analogy, or rather an exact similarity between the wrongs technically termed delicts and those not so called, the term quasi-delicts was applied to the latter.

Austin objects that the distinction is illogical and absurd, the grounds of liability in the case of a delict

and a quasi-delict being precisely the same, *i. e.*, the violation of a right *in rem*.

The probable explanation of the distinction made in Roman law is that historically the division of wrongs, according as they did or did not come within the bounds of certain actions, was precedent to and generative of the apparently illogical and certainly inconvenient division into delicts and quasi-delicts.

III.—LAW OF PROCEDURE.

Jus actionum.

Q. Explain vindicatio and condictio in the law of actions. What was the ground of distinction between actions in rem and actions in personam?

A. Vide supra, pp. 138, 139, under "Actions in rem."

Q. (α) In a vindicatio what was the chief point which the actor was bound to prove? (β) Why is it that "actio Publiciana semper requirit rem usucapioni habilem?"

A. (α) To recover by vindicatio the actor had to prove that he was the full and legal owner of the thing in dispute.

(β) A bonâ fide possessor, who had not yet acquired the full dominium over the thing, on losing possession of the thing was allowed in bringing the actio Publiciana to state that the usucapion was complete, and that he was the dominus of the res, so that he might recover it from any one who had a worse title than himself.

Q. (α) *On what principle does Justinian divide actions into classes?* (β) *Enumerate the classes themselves.*

A. (α) The divisions of actions which appear in the Institutes take their origin in the formulary period of Roman law, and depend upon the form in which the right given by the magistrate was conferred.

(β) The classes are fully given *supra*, pp. 137 to 144.

Q. "Omnes actiones, vel in simplum conceptæ sunt, vel in duplum, vel in triplum, vel in quadruplum." *Give instances of actions which fall under each of the above heads.*

A. 1. *In simplum. Actio mandati, commodati.*

2. *In duplum. Actio damni injuriæ (ex lege Aquilia).*

3. *In triplum.* An action given by Justinian enabled a defendant to recover three times the amount of what he had been wrongfully forced to pay in fees on account of the over demand of the plaintiff. The amount recovered, however, included the amount wrongfully paid.

4. *In quadruplum.* The *actio furti (manifesti)*.

Q. *Distinguish between* (1) *actio in rem and in personam,* (2) *Actiones bonæ fidei and stricti juris,* (3) *Jurisdictio and imperium.*

A. 1. For actions *in rem* and *in personam*, vide *supra*, pp. 138, 139.

2. For actions *bonæ fidei* and *stricti juris*, vide *supra*, pp. 141, 144.

3. *Jurisdictio and imperium.*

"Imperium and jurisdictio were the two component parts of *officium jus dicentis*, i.e., the power of the magistrate charged with the administration of civil justice. Jurisdictio denoted the power of administering the civil law in the ordinary course

of procedure. It consisted chiefly in presiding over the preliminary stages of litigation." —POSTE'S *Gaius*, p. 571.

The *imperium* of certain magistrates was the authority exercised by them in virtue of their office ; this authority included the power of issuing commands and enforcing obedience in various ways. Also the origin of various actions is to be referred to the prætor's *imperium*, these actions being invented by the prætor in exercise of the power conferred on him by the law creating his *imperium*. See also Nasmith and Prichard's translation of Ortolan, § 248.

"*Jurisdictio* is the function of declaring the law and of conferring the public power (*imperium*) upon the person charged with its execution. This power was lodged in the hands of the magistrate, who might also assume the functions of the *judex*."

Q. Give an account of the actions exercitoria, institoria, tributoria, de peculio.

A. These actions are fully described *supra*, p. 145.

Q. Explain the nature of the following actions : Actio personalis, in personam, utilis, noxalis, præjudicialis, stricti juris, de in rem verso.

A. *Actio personalis, in personam*, vide *supra*, pp. 138-140. Inst., iv. vi. 1.

Actio utilis. "An action founded on the text of a law was called *actio directa* ; an action not founded on the very text of the law, but granted by the prætor in the exercise of his judicial authority in circumstances which, though different, are similar to those which founded the direct action, was called *actio utilis*." —POSTE'S *Gaius*, p. 472.

The derivation of the word *utilis* may be either from "*uti*" in sense of "analogous," or from the adjective *utilis* in the sense of advantageous or beneficial.

Either theory would agree with the scope and nature of *actiones utiles*, but the objection to the first view is that *uti* would hardly be used to express analogy, but rather exact similarity. v. R. Campbell's Student's Austin, p. 304 n.

Actio noxalis, v. *supra*, p. 146. Inst., iv. viii. 1, 2.

Actio præjudicialis, v. *supra*, p. 140. Inst., iv. vi. xiii.

Actiones stricti juris, v. *supra*, pp. 141, 142. Inst., iv. vi. 28, *et seqq.*

Actio de in rem verso, v. *supra*, p. 145. Inst., iv. xii.

Q. Trace briefly the course of proceedings in an action (under Justinian's legislation) from the commencement to the final settlement.

A. "In the time of Justinian an action was begun by the plaintiff announcing to a magistrate that he wished to bring an action, a proceeding which was termed *denuntiatio actionis*, and furnishing a short statement of his case; this statement, called the *libellus conventionis*, the magistrate sent by a bailiff of the court (*executor*) to the defendant. The parties or their procurators appeared before the magistrate, and the magistrate decided the case.

"*Exceptio* was still used as the term to express the plea of the defendant, which he generally, of course, reduced to writing, but not only was he not obliged to do so, but apparently it was not even necessary in all cases for the plaintiff to put his plaint into writing; if he did not, the *executor* would merely tell the defendant by word of mouth

that an action had been brought against him, perhaps adding a general statement of the object for which it was brought.

“The *litis contestatio* took place the moment the magistrate began to hear the cause.

“The *condemnatio* was no longer merely a pecuniary one, but the system of execution was not materially different from what it had been under the Prætorian system.”—SANDARS' *Just.*, Introduction.

Q. Titius lends his horse to Seius, from whom it is stolen by Davus, the slave of Mævius. What remedies have Titius or Seius, or either of them?

A. Titius may bring either an *actio commodati* against Seius, or an *actio furti* against Davus. If he sues Davus, Seius is freed from responsibility: in this case Titius may also bring an *actio noxalis* against Mævius, who must either surrender Davus or satisfy Titius.

If Titius brings the *actio commodati*, Seius can bring the *actio furti*.

The person who sues the thief can also bring a *vindicatio* for the recovery of the thing, or a *condictio* for its value.

Q. In what cases were the following forms employed: actio communi dividundo, actio mandati contraria, actio Publiciana, exceptio non numeratæ pecuniæ, interdictum quorum bonorum?

A. The *actio communi dividundo* was used to enforce division in the case of property being held by two or more persons in common, there being no partnership, e.g. a joint legacy. See Harris, R. L., p. 146.

The *actio mandati contraria* was the remedy of the *mandatarius* to recover from the *mandator* all

expenses, losses, &c., incidental to the execution of the mandate.

For the *actio Publiciana*, v. Inst., iv. vi. 4, and *supra*, p. 139.

For the *exceptio pecuniæ non numeratæ*, Inst., iv. xiii. 2, and *supra*, p. 149.

For *interdictum quorum bonorum*, Inst., iv. xv. 3 (and iii. ix. 1), *supra*, p. 151.

Q. What were the dates and the purport of each of the following laws: lex Fusia Caninia, lex Pompeia, Sc. Velleianum, and the series of leges Juliae dealing with crime?

A. Lex Fusia Caninia (date A.D. 8), v. Inst., i. vii., *supra*, p. 10.

Lex Pompeia (date B.C. 52), v. Inst., iv. xviii. 6, *supra*, p. 155.

The *Sc. Velleianum* (date A.D. 46) rendered women legally incapable of being sureties.

For the *leges Juliae*, v. Inst., iv. xviii. 3, 4, 8, 9, 11, *supra*, pp. 155, 156.

The dates, as far as ascertainable, are as follows :

Lex Julia Majestatis, temp. Julius Cæsar.

Lex Julia de Adulteriis, circa B.C. 167.

Lex Julia de vi publica, date uncertain, probably temp. Julius Cæsar or Augustus.

Lex Julia de peculatu, date uncertain.

Lex Julia de ambitu, temp. Augustus.

Lex Julia repetundarum, temp. Julius Cæsar.

Lex Julia de annonâ, temp. Julius Cæsar or Augustus.

Lex Julia de residuis, temp. Julius Cæsar or Augustus.

Q. (α) What is the classification of excessive claims given in the Institutes? (β) What remedy for a plus petitio tempore was introduced by the constitution of Zeno?

A. (α) v. Inst., iv. vi. 33, supra, p. 153.

(β) If the plaintiff claimed anything before it was due, he was condemned to wait double the time that would originally have been necessary.

Q. Summarize the law as to giving security in actions (α) in the time of Gaius, (β) in the time of Justinian.

A. The law at these two periods is given supra, pp. 147, 148.

Q. Explain the use of the following legal remedies: Actio Publiciana, condictio furtiva, actio quasi-Serviana, interdictum utrubi.

A. Actio Publiciana, supra, p. 139.

Condictio furtiva. In addition to the penalty recoverable by the *actio furti*, the thief was also liable to have brought against him either (α) a *vindicatio* for the thing stolen, or (β) a *condictio furtiva* compelling him to restore the value of the thing with interest. Either of these actions could be enforced at the option of the injured party.

Actio quasi-Serviana, v. Inst., iv. vi. 7, supra, p. 139.

Interdictum utrubi, v. Inst., iv. xv. 4, supra, p. 151.

Q. (α) What is an interdict? For what other purposes were they used besides retaining possession? (β) Distinguish between utrubi and uti possidetis. Were they both, strictly speaking, interdicta retinendæ possessionis?

A. (α) "An interdict was an order issued by the prætor, and was, in fact, an edict addressed to a particular

individual with reference to a particular thing."—
SANDARS' *Just.*, Introd. and *supra*, pp. 150-152.

Interdicts were granted, 1. For acquiring; 2. For retaining; 3. For recovering possession.

(β) For distinction between *utrubi* and *uti possidetis*, v. *supra*, p. 151, and Inst., iv. xv. 4.

In the time of Justinian, both were rightly called *interdicta retinendæ possessionis*; before Justinian the interdict *utrubi* was granted to a person who had possessed the thing for the greater part of the previous year, although he might not have been in possession at the time of the *litis contestatio*; in such a case the interdict would have been *adipiscendæ possessionis*.

Q. (α) Define *exceptio* and illustrate its working. (β) What defences could be raised in the following cases?

1. A. sues B. for money due under a stipulation but, in fact, never advanced to B.
2. A. has advanced money to B., and after promising not to sue him for the debt within a fixed period, takes action against B. before the proper time.
3. A. induces B. by fraud to make a promise, and sues him in default of performance.

A. (α) V. *supra*, pp. 148, 149; Inst., iv. xiii.

- (β) 1. *Exceptio pecuniæ non numeratæ*.
2. *Exceptio pacti conventi*.
3. *Exceptio doli mali*.

Q. What were the principal checks on rash litigation, (α) in the time of Gaius, (β) in the time of Justinian?

A. The principal checks in the time of Gaius were:

1. The *actio calumniæ*, available against a plaintiff or defendant groundlessly bringing or defending an action.

2. *Sponsiones* and *restipulationes*, binding the parties to forfeit a certain sum if the action went against them.

3. Either party might be required to swear that he had good grounds for bringing or defending the action.

4. Pecuniary loss and infamy were incurred by rash defences in certain cases.

5. The defendant could bring the *contrarium iudicium*, and if the plaintiff had been reckless in his demands, he might be compelled to pay a fine varying from one-fifth to one-tenth of the sum claimed.

In the time of Justinian, the plaintiff and defendant had both to take an oath that their claim or defence was not vexatious. In certain actions, such as that *pro socio*, the condemned party suffered infamy. The *actio calumniæ* had fallen into disuse before the time of Justinian.

Q. A slave of Mævius robs Bavius of a ring. At the time that Bavius brings the actio furti (nec manifesti) the slave has passed into the possession of Sempronius. The ring is worth 100 aurei, Sempronius considers the slave worth 150 aurei. What course will Sempronius probably take?

A. The rule "*noxa caput sequitur*" makes Sempronius liable for the delict of the slave; he would therefore have to pay 200 aurei if he did not wish to give up the slave, thus being a loser of 50 aurei. It would be his advantage therefore to renounce the slave.

Q. (α) Enumerate the chief Roman criminal statutes. (β) Why was this branch of Roman law inferior to the civil code?

A. (α) Vide supra, pp. 154-156.

(β) Vide Q. supra, p. 156.

MISCELLANEA.

Q. Distinguish between :—

1. Usucapio *and* præscriptio longi temporis.
2. Furtum *and* rapina.
3. Res nullius *and* res communes.
4. Sponsor *and* fide jussor.
5. Adoptio *and* arrogatio.

- A.*
1. *Supra*, pp. 74-76. Inst. ii. vi. p.
 2. *Supra*, pp. 128-131. Inst., iv. i. and ii.
 3. *Supra*, pp. 33, 34. Inst., ii. i. 1, 3, 5, 7.
 4. *Supra*, pp. 118, 119. Inst., iii. xx.
 5. *Supra*, pp. 14-16. Inst., i. xi. 1.

Q. Define accessio, agnati, caput, vindicatio, dos, emphyteusis, hypotheca, novatio, postliminium.

- A.*
1. *Accessio, infra*, p. 247. Inst., ii. i. 19, 35.
 2. *Agnati, infra*, p. 248. Inst., iii. iv. 1, 2.
 3. *Caput, infra*, p. 249. Austin, Analysis, pp. 58, 141.
 4. *Vindicatio, supra*, p. 138. Inst., iv. vi. 15.
 3. *Dos, supra*, p. 54. Austin, Analysis, p. 158.
 6. *Emphyteusis, supra*, p. 48. Inst., iii. xxiv. 3 ; Austin, Analysis, p. 159.
 7. *Hypotheca, supra*, p. 48. Inst., iv. vi. 7.
 8. *Novatio, supra*, p. 127. Inst., iii. xxix. 3.
 9. *Postliminium, supra*, pp. 17, 36. Inst., ii. i. 17, i. xii. 5.

(The translations of the following passages are mostly taken without alteration from Sandars' Justinian.)

Q. Translate with short explanations :

(1.) Præterea quasdam actiones arbitrarias id est ex arbitrio judicis pendentes appellamus in quibus, nisi arbitrio judicis is cum quo agitur, actori satisfaciatur veluti rem restituat vel exhibeat vel solvat vel ex noxali causa servum dedat condemnari debeat.

(2.) Quum autem emptio et venditio contracta sit (quod effici diximus simul atque de pretio convenerit cum sine scripturâ res agitur) periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit.

(3.) Certæ autem rei vel causæ tutor dari non potest ; quia personæ non causæ vel rei tutor datur.

A. (1.) Inst., iv. vi. 31.—“ Some actions again are called arbitrary as depending upon the *arbitrium* of the judge. In these if the defendant do not on the order of the judge give the satisfaction awarded by the judge, and either restore, exhibit, or pay the thing, or give up a slave that has committed an injury, he ought to be condemned.”

In *actiones arbitrariæ* the judge condemned the defendant to satisfy the plaintiff, or as an alternative to pay a certain sum of money. As a matter of fact, compliance with the *arbitrium* of the judge directing the defendant to make satisfaction was usually enforced by the strong arm of the law. Sometimes the *condemnatio* was exacted. Actions *in rem* were enforced by being made *arbitrariæ*. (Sandars' Just., iv. vi. 31.)

(2.) Inst., iii. xxiii. 3.—“ As soon as the sale is contracted, that is, in the case of a sale made without writing, when the parties have agreed on the price, all risk attaching to the thing sold falls upon the purchaser, although the thing has not yet been delivered to him.”

The rights of the parties respectively were as



follows :—Till delivery the thing remained the property of the seller, who was bound to take the utmost care of it ; he was also bound to deliver it in exactly the state it might happen to be in at the moment of such delivery, and if the thing had suffered diminution through no fault of the seller the loss fell upon the purchaser, who was bound to pay the price even if the thing were destroyed, his obligation being a distinct and separate one.

- (3.) Inst., i. ~~xv.~~ 4.—“ A tutor cannot be appointed for a particular thing or business, as it is to a person and not for a business or thing that a tutor is appointed.”

A tutor's functions were to look after all the interests of his pupil, and consequently an appointment of a tutor to take charge of a special subject would have been void, as being inconsistent with the character and scope of a tutor's duties.

Q. Comment on the following sentences :—

1. Aliquando etiam suæ rei furtum quisque committit.
2. Olim scriptura fiebat obligatio.
3. Noxa caput sequitur.
4. Post mortem suam dari sibi nemo stipulari poterat.

A. 1. A man might commit a theft of his own property by stealing a thing pledged by him to his creditor. See Inst., iv. i. 10, and for definition of *furtum*, iv. i. 1.

2. This alludes to the obligation formed *nominibus*, *i.e.*, by entry of the debtor's name in the ledger of the creditor. These *nomina* were not in use in the time of Justinian. Inst., iii. xxi. p.

3. Vide *supra*, p. 146.

4. Before the time of Justinian a man could neither promise nor stipulate for anything to be done after

his death. Justinian enabled him to do so, and so rendered *adstipulatores* unnecessary for this purpose.

iii/ (Inst., *iv.* xix. 13.)

Q. Explain :—

1. Servitus autem est constitutio juris gentium.
2. Si ab hostibus captus fuerit parens quamvis servus hostium fiat tamen pendet jus liberorum.
3. Extraneis autem heredibus deliberandi potestas est de adeundâ hereditate vel non adeundâ.

A. 1. Slavery is said to be an institution of the law of nations, *jus gentium*, whereby, contrary to natural right (*contra naturam*), one man is made the property of another. The *jus gentium* here alluded to is that portion of positive law which is a constituent part of all positive systems, and the natural right is that standard to which all laws should conform.

2. "If a parent is taken prisoner, although he becomes the slave of the enemy, yet his paternal power is only suspended owing to the *jus postliminii*."

Vide *supra*, p. 17. The time of captivity was, on the prisoner's return, entirely effaced, so that he was in precisely the same position as if he had not been a captive.

3. *Extranei heredes, i.e.*, those neither *sui* nor *sui et necessarii*, had the right of exercising their own discretion as to whether they would enter upon the proffered inheritance or not. Justinian provided that the time of deliberation allowed the *heredes extranei* by the prætor should not exceed nine months.

Q. Explain : (1.) *exceptio litis dividuæ*, (2.) *peculium profectitium*, (3.) *beneficium inventarii*, (4.) *cretio vulgaris*, (5.) *pignoris capio*.

A. (1.) Gaius, *iv.* 122, gives *Exceptio litis dividuæ* as an instance of a dilatory exception. It was used as a

defence to an action brought by a plaintiff who sued in two actions during the same prætorship for what he might have obtained in one.

(2.) *Peculium profectitium*, *supra*, p. 57. Inst., ii. ix. 1.

(3.) *Supra*, p. 77. Inst., ii. xix. 6.

(4.) The declaration of a person's intention of entering upon the inheritance within a period fixed to commence from the time of the accrual of the rights of inheritance.

(5.) For *pignoris capio*, see Gaius, ii. 26-31.

Q. Explain :

(1.) *Minima capitis deminutione legitima tantum tutela perit ; cæteræ non pereunt.*

(2.) *Aliquando etiã suæ rei quisque furtum committit.*

(3.) *Stipulatio Aquiliana novat omnes obligationes.*

(4.) *Et venit et cessit dies.*

A. (1.) By *minima capitis deminutio* only the *tutela legitima* ends, other forms do not end. By *minima capitis deminutio* of the *tutor legitimus* his *tutela* is ended, as his appointment belongs to him in virtue of his position as a member of a certain family, a position he loses on his *capitis deminutio*.

(2.) Sometimes also a man commits a theft of his own property.

Vide *supra*, p. 130, *Q.* p. 131, and Inst., iv. i. 10.

(3.) Vide *supra*, p. 127. Inst., iii. xxix. 1, 2.

(4.) Vide *supra*, p. 82. Inst., ii. xx. 20.

Q. Explain :—

- (1.) Libertinorum status tripartitus antea fuerat.
- (2.) Si plures sint fidejussores quotquot erunt numero, singuli in solidum tenentur.
- (3.) Quædam naturali jure communia sunt omnium, quædam publica, quædam universitatis, quædam nullius, pleraque singulorum.

A. (1.) Inst., i. v. 3, *supra*, p. 9.

(2.) Inst., iii. xx. 4, *supra*, p. 113.

(3.) Inst., ii. i. p., *supra*, p. 33.

Q. Upon what points did the doctrines of the Proculians differ from those of the Sabinians?

A. (1.) *Age of puberty.*

The Proculians held that fourteen should be fixed as the age of puberty, the Sabinians were of opinion that physical capacity should be the test. (Gaius, i. 196.)

(2.) *Mancipation of animals.*

Certain animals were held by the Proculians to be mancipable as soon as born, but the Sabinians considered that they were not *res mancipi* until they were tamed, or of an age when animals of their class were usually tamed. (Gaius, ii. 15.)

(3.) *Specificatio.*

If a man made a thing with materials belonging to another it was held by the Sabinians that the product belonged to the owner of the materials, and by the Proculians that it belonged to the creator of the thing. Justinian decided that if the article made is really a new thing it belongs to the maker by a species of *occupatio*; if, however, the thing merely consisted of the old materials in a different form the opinion of the Sabinians prevails, and the owner of

the materials is owner also of the manufactured article.

(4.) *Disinherison of children.*

If a son under power, neither instituted heir nor disinherited by name, died in the testator's lifetime, it was held by the Sabinians that the will was void ; the Proculians, however, considered that it was not. (Gaius, ii. 123.)

(5.) *Legatum per vindicationem.*

(α) The Sabinians held that in the case of a legacy of this kind the property passed to the legatee immediately the inheritance is entered upon. The Proculians were of opinion that the *dominium* did not pass until the legacy had been accepted by the legatee. (Gaius, ii. 195.)

(β) When a condition was annexed to a legacy *per vindicationem*, the Sabinians were of opinion that until the fulfilment of the condition the heir was *dominus* of the thing bequeathed, the Proculians holding the view that the thing is as it were a *res nullius*. (Gaius, ii. 200.)

(6.) *Legatum per præceptionem.*

By this form of legacy the legacy was properly made to none but instituted heirs, to one of whom it gave a preference with regard to the subject of the legacy. The Proculians made it equivalent to a *legatum per vindicationem*, while the Sabinians, adopting the strict view, considered that the only remedy for the legatee was the *actio familiæ eriscundæ*. (Gaius, ii. 217-223.)

(7.) *Appointment of tutores.*

The Sabinians held that a tutor cannot be nominated before the appointment of the heir ; the Proculians were of a contrary opinion. (Gaius, ii. 231.)

(8.) *Legacy to person in the power of the heir.*

The Sabinians held that a conditional bequest to a person in the power of the heir was valid, but that an unconditional one was not. The Proculians were of opinion that a conditional bequest was invalid in such a case. (Gaius, ii. 244.)

(9.) *Hereditatis in jure cessio.*

The Sabinians thought that the *sui heredes* and *necessarii heredes* had not the power to pass the succession by *in jure cessio* to a fictitious vindicator. The Proculians thought that this was within their power. (Gaius, iii. 87.)

(10.) *Impossible conditions.*

An impossible condition in a devise is, according to the Sabinians, taken as if not written; the Proculians thought that the devise was made void. (Gaius, iii. 98; Inst., iii. xix. 11.)

(11.) *Stipulation for the stipulator and a stranger.*

According to the Sabinians a man who stipulated for payment of a sum to himself and a stranger should receive the whole sum. The Proculians thought he should only receive a half. (Gaius, iii. 103.)

(12.) *Nomina transcriptitia.*

The Sabinians considered that *nomina transcriptitia a re in personam* formed contracts binding on aliens. Nerva (a Proculian) was of the contrary opinion. (Gaius, iii. 133.)

(13.) *Emptio venditio.*

(α) An agreement to purchase at a price to be fixed by a third person was counted as valid by the Proculians, invalid by the Sabinians. (Gaius, iii. 140.)

(β) The Proculians held that the price in *emptio venditio* must be in money, otherwise the contract was *permutatio* or barter. (Inst., iii. xxiii. 2.)

(14.) *Acquisition by a slave held in common.*

If a slave enters into an obligation at the order of one of several masters, he acquires the benefits of the obligation for that master. This was the view of the Sabinians upheld by Justinian. (Gaius, iii. 167 ; Inst., iii. xxviii. 13.)

(15.) *Novatio.*

It was held by the Proculians that the addition or omission of a sponsor in a second stipulation made by a debtor, was not sufficient to cause *novatio* to take place. The contrary view, that of the Sabinians, was upheld by Justinian with regard to *fidejussores*. (Inst., iii. xxix. 3 ; Gaius, iii. 178.)

(16.) *Delict of person under power.*

The Sabinians held, that if another person's slave injures a man and then comes under his power, the action is extinguished which might be brought against the slave.

The other school were of opinion that the action was only in abeyance. (Gaius, iv. 78.)

(17.) *Noxal actions against filius familias.*

When a son was surrendered in satisfaction of judgment in a noxal action, the Proculians required that he should be mancipated three times. The Sabinians held that once was sufficient. (Gaius, iv. 79.)

(18.) *Judicia absolutoria.*

The Sabinians, disagreeing with the Proculians, were of opinion that it was in the power of the *judex* to absolve the defendant in all actions if he satisfied the plaintiff. (Gaius, iv. 114.)

(8.)

*... jurists of the Sabinian and
... negatively?*

Proculians.

*Marcus Sabinus
Gaius Cassius Longinus
Caelius Sabinus
Priscus Javolenus
Alburnus Valens
Tuscianus Fuscianus
Salvius Julianus
Gaius.*

Labeo.
Nerva the elder.
Proculus.
Nerva the younger.
Pegasus.
Juventius Celsus the elder.
Celsus the younger.
Neratius Priscus.

Taken from Ortolan, Nasmith and Prichard's translation, § 366.

The following passages have been set for translation in the special examination in law for the ordinary B.A. degree at Cambridge from 1872 to 1877.

- Book i. tit. ii. From "*Responsa*" to "*est constitutum.*"
 ? Book i. tit. ii. From "*Jus autem*" to "*locis propinquiis.*"
 Book i. tit. ii. From "*Jus autem*" to "*nascebantur.*"
 Book i. tit. v. From "*Libertini sunt*" to "*esse servi.*"
 Book i. tit. xi. From "*Si vero pater*" to "*adoptivi sit.*"
 Book i. tit. xi. From "*Sed si*" to "*consentire.*"
 Book i. tit. xii. From "*Cum autem*" to "*subjiciuntur.*"
 Book i. tit. xiii. From "*Permissum est*" to "*recasuri sunt.*"
 Book i. tit. xv. From "*Sed agnationis*" to "*non utique.*"
 Book i. tit. xix. From "*Est et alia*" to "*futurus esset.*"
 Book i. tit. xix. From "*Atqui*" to "*futurus esset.*"
 Book i. tit. xxi. From "*Auctoritas autem*" to "*obligantur.*"
 Book i. tit. xxiii. 5, 6. From "*Interdum*" to "*constituet.*"
 Book i. tit. xxv. From "*Excusantur*" to "*dierum.*"
 Book i. tit. xxvi. From "*Siquis tutor*" to "*alimenta.*"
 Book ii. tit. i. From "*Venditæ vero*" to "*emptoris fieri.*"

- Book ii. tit. i. From "*Nullius autem*" to "*licet inferre.*"
- Book ii. tit. iii. From "*Prædiorum urbanorum*" to "*officiatur.*"
- Book ii. tit. iv. From "*Finitur autem*" to "*usufructum deberi.*"
- Book ii. tit. vi. From "*Jure civili*" to "*acquirantur.*"
- Book ii. tit. vii. From "*Erat olim*" to "*accipiente.*"
- Book ii. tit. x. From "*Sed ut nihil*" to "*esse desiit.*"
- Book ii. tit. xiii. From "*Sed qui filium*" to "*non extet.*"
- Book ii. tit. xiv. From "*Hereditas plerumque*" to "*dividere.*"
- Book ii. tit. xvi. From "*Liberis autem*" to "*valebit.*"
- Book ii. tit. xx. 2. From "*Sed olim*" to "*hypothecariam.*"
- Book ii. tit. xx. From "*Sed et*" to "*luere.*"
- Book ii. tit. xx. From "*Divus Pius*" to "*qui agit.*"
- Book ii. tit. xxiii. From "*Si quis una*" to "*restituere.*"
- Book iii. tit. xiv. From "*Re contrahitur*" to "*tuum fiat.*"
- Book iii. tit. xix. From "*Si quis alium*" to "*obligatur.*"
- Book iii. tit. xxiv. From "*Locatio et conductio*" to "*conducti.*"
- xxiii / Book iii. tit. xxiv. From "*Sed Proculi*" to "*significatur.*"
- Book iii. tit. xxv. From "*Socius socio*" to "*queri debet.*"
- Book iii. tit. xxvi. From "*Tuâ gratiâ*" to "*consilium.*"
- Book iii. tit. xxix. From "*Stipulatio enim*" to "*Negidius.*"
- Book iv. tit. vi. 18. From "*Ex maleficiis vero*" to "*triplici est.*"
- Book iv. tit. vi. 37. From "*Item si de dote*" to "*cognoscere licet.*"
- Book iv. tit. vi. From "*Præjudicialis actiones*" to "*quis esse petit.*"
- Book iv. tit. vii. From "*Illud proprie*" to "*insidiabantur.*"
- Book iv. tit. vii. From "*Illud in summa*" to "*intelligitur.*"
- Book iv. tit. xv. From "*Summa autem divisio*" to "*duos dicuntur.*"
- Book iv. tit. xv. From "*Retinendæ possessionis*" to "*possidente petat.*"



APPENDIX II.

DEFINITIONS AND DESCRIPTIONS OF SOME LEADING TERMS.¹

Abbreviations used in the following pages.

- S. J. = Sandars' Justinian.
- I. = Institutes of Justinian.
- S. A. = R. Campbell's Student's Edition of Austin's Jurisprudence.
- C. A. = G. Campbell's Analysis of Austin.
- A. = Austin's Jurisprudence, 4th Edition.
- A. L. = Maine's Ancient Law.
- P. G. = Poste's Gaius, 2nd Edition.
- G. = Commentaries of Gaius.
- B. L. D. = Brown's Law Dictionary.

Accessio.

A mode of acquiring whereby an accessory thing when annexed to (as it naturally is annexed to) a principal thing becomes part and parcel of the latter, and thereupon and thereby becomes the property of the owner of the principal thing. B. L. D., p. 6.

Action.

"Fus persequendi iudicio quod sibi debetur."—*Inst.*, iv. vi. p.

¹ It is suggested that these definitions and descriptions should be committed to memory.

Acts.

Acts (properly so called) are such desires as are immediately followed by the bodily movements desired. The term is also used in an extended sense to mean "*acts with certain of their consequences.*"—C. A., p. 74.

Actus.

"*Fus agendi vel jumentum vel vehiculum.*"—*Inst.*, ii. iii. p.

Aditio hereditatis.

"*Extraneus potest aut pro herede gerendo aut etiam nuda voluntate suscipiendæ hereditatis heres fieri.*"—*Inst.*, ii. xix. 7.

Agnati.

"Agnates are those cognates who trace their connexion exclusively through males. Cognates are all those persons who can trace their blood to a single ancestor and ancestress."—A. L., pp. 147, 148.

Analogy expresses the relation between two objects when one has some and the other all the properties of a class referred to.

In common parlance, it marks the resemblance between natural objects which do not belong to the same *species* (or narrow division), but which do belong to the same *genus* (or larger division). C. A., p. 17.

Arræ.

(1.) Signs of a bargain having been struck, or (2.) An advance of a portion of the purchase money. S. J., iii. xxiii. p.

Arrogatio.

The adoption of a person *sui juris*.

Beneficium competentiæ.

A defendant's privilege of being condemned only in an amount which he could pay without being reduced to a state of destitution. S. J., iv. vi. 37.

Bonitarian ownership. Dominium bonitarium. In bonis habere.

The term *in bonis habere* was used to express an ownership which was practically absolute, because it was protected by the authority of the prætor in cases where, wishing to give all the advantages of ownership, he was prevented by the civil law from giving the legal (Quiritarian) *dominium*.

Caput, capitis deminutio.

"The capability of exercising all the rights implied in a perfect *status* was frequently spoken of as a man's *caput*. And the change in each of those component parts was said to be a *deminutio capitis*, a lessening or impairing of the *caput*." S. J., Int., § 47.

Cognates.

All those persons who can trace their blood to a single ancestor and ancestress.

Contract, essentials of.

"First, a signification by the promising party of his *intention* to do the acts or observe the forbearances which he promises to do or to observe. Secondly, a signification by the promisee that he *expects* the promising party will fulfil the proffered promise."—AUSTIN, quoted by Maine, A. L., p. 323.

Brief description of contract, Indian Contract Act, 1872.

Every promise and every set of promises forming the consideration for each other is an agreement: an agreement enforceable by law is a contract.

Convention.

Savigny's definition :

(1.) In its general sense.

“The agreement of several persons, who by a common act of the will determine their legal relations, and that either (α) for the purpose of creating an obligation, or (β) for the purpose of extinguishing one.”

(2.) In the narrower sense.

“The agreement of several persons in one and the same act of will resulting in an obligation between them.”—BROWN'S *Analysis of Savigny*, § 52.

Culpa.

Culpa lata is fault such as any man in his senses would have scrupled to commit.

Culpa levis consisted in falling short of that degree of carefulness which would be expected of a “*bonus paterfamilias*.”

Culpa levis in concreto consisted in falling short of that standard of carefulness which a man used in the conduct of his own affairs. S. J., iii. xxv. 9.

Dolus.

As opposed to *dolus*, *culpa* imports negligence, heedlessness, or temerity, as well as indirect intention (*i.e.* of consequences intended but not desired). C. A., p. 78.

Dominium, as opposed to *servitus*.

Dominium gives to the entitled party the power of applying the subject to all purposes, except such as are inconsistent with his relative or absolute duties. *Servitus* gives the power of applying the subject to exactly determined purposes. C. A., p. 148.

Edicts.

Edicts were of two kinds, general and special, and it was by the former that the prætors mostly introduced new law.

A *general edict* was a statute made by the author as a subordinate legislator.

A *special edict* was an order in a specific case issued by its author as a judge. C. A., p. 118.

Emphyteusis.

Emphyteusis arose when land, the absolute property of some corporate body such as a *municipium*, was let out to a person and his heirs (that is, for an unlimited duration), on condition of his cultivating it and paying a rent. It was *jus in re aliend* on account of the reversion or *spes successionis* in the corporate body under the concession of the state, which the *emphyteuta* could not defeat. C. A., p. 158.

Equity.

“Any body of rules existing by the side of the original civil law founded on distinct principles, and claiming incidentally to supersede the civil law in virtue of a superior sanctity inherent in those principles.”—A. L., p. 28.

Fideicommissa.

“*Quod non civilibus verbis sed precativè relinquitur ; nec ex rigore juris civilis proficiscitur sed ex voluntate datur relinquentis.*”—ULPIAN, *Reg.* 25, 1, quoted by Sandars, ii. xxiii.

Fungible things.

When the subject of the obligation is a thing of a given class, the thing is said to be fungible, *i.e.*, the delivery of any object which answers to the *generic* description will satisfy the obligation. C. A., p. 61.

Furtum.

“*Contrectatio rei fraudulosa vel ipsius rei vel etiam usus ejus possessionis ve.*”—*Inst.*, iv. i. 1.

Hæreditas.

Hæreditas est successio in universum jus quod defunctus habuit. "An inheritance is a succession to the entire legal position of a deceased man." The notion was that, though the physical person of the deceased had perished, his legal personality survived, and descended unimpaired on his heirs or co-heirs, in whom his identity (so far as the law was concerned) was continued. A. L., pp. 181, 182.

Honorarium (Jus).

All magistrates of elevated rank possessed the power of legislating, "*jus edicendi*," with regard to such matters as fell within their jurisdiction, and the body of rules so established was termed *jus honorarium*. But as the *jus prætorium* forms so important a part of it, the term *jus honorarium* is often restricted to the *jus prætorium*.

Interdict.

An edict or decree of the prætor to meet the circumstances of a particular case, granted usually from considerations of a public character.

Jura in re suâ. Absolute property.

Austin's definition: "A right, imparting to the owner a power of indefinite user, capable of being transmitted to universal successors by way of descent, and imparting to the owner the power of disposition in favour of such persons as he may choose with the like powers and capacities as he had himself, and under such conditions as the municipal law attaches to the dispositions of private persons."—G. CAMPBELL'S *Analysis*, pp. 157, 158.

Jura in re aliendâ.

Austin's definition: "Fractions or particles residing in one party of *dominium* strictly so called residing in

another, and they may be either definite or indefinite subtractions from the owner's power of user and exclusion."—G. CAMPBELL'S *Analysis*, p. 158.

Jurisprudence.

Erroneous definition in the Institutes: "*Jurisprudentia est divinarum atque humanarum rerum notitia justi atque injusti scientia.*"—*Inst.*, I, i. 1.

Austin's definition: The science concerned with the exposition of the principles, notions, and distinctions which are common to systems of law. C. A., p. 52.

Jus Gentium.

"*Quod vero naturalis ratio inter omnes homines constituit id apud omnes peræque custoditur vocaturque jus gentium quasi quo jure omnes gentes utuntur.*"—*Institutes*, Lib. I, ii. 1.

Jus Naturale.

The *jus naturale*, or law of nature, is simply the *jus gentium*, or law of nations, seen in the light of a peculiar theory. Maine, A. L., p. 52.

Definition in the Institutes: "*Jus naturale est quod natura omnia animalia docuit.*"—Lib. i. 11, p. Cf. C. A., pp. 111, 112.

Jus in rem, in personam.

Austin's definition: Rights *in rem* are those which avail against persons generally (the expression *in rem* denoting not the subject but the compass of the right); rights *in personam* are those which avail exclusively against certain or determinate persons. C. A., pp. 63, 64.

Jus Publicum.

Public law (as treated by the Roman jurists) is the law

of political conditions and of crimes (with that of criminal procedure.) G. Campbell's Analysis of Austin, p. 143.

"*Publicum jus in sacris, in sacerdotibus, in magistratibus consistit.*"—D., I, i. 2.

Jus Scriptum, non Scriptum.

According to the Roman lawyers, written law was that which was committed to writing at the outset. Unwritten law was law not so committed to writing. According to the modern Civilians, written law is made directly and immediately by the supreme legislature. Unwritten law is not so made, but owes its validity to the supreme power. C. A., pp. 95, 96.

Justitia.

Definition in Institutes: "*Justitia est constans et perpetua voluntas jus suum cuique tribuendi.*"

Legatum.

"*Quod legis modo, id est imperative, testamento relinquitur.*"
—ULP., *Reg.*, 24, 1.

Lex.

"*Lex est quod populus Romanus senatorio magistratu interrogante, veluti consule, constituebat.*"

Mora.

The non-performance of an obligation is in Roman law styled "*mora*," for the debtor delays performance. The predicament in which the debtor is placed in consequence of his delay is also called *mora*. C. A., p. 87.

Natural Law. V. sub *Jus naturale.*

Nexum.

The generic term for the sale *per æs et libram* was *nexum*, "*Nexum est quodcumque per æs et libram geritur idque necti dicitur.*"—FESTUS. Sandars' Just., Int., § 81.

Obligation.

Justinian's definition: "*Obligatio est juris vinculum quo necessitate adstringimur alicujus solvendæ rei secundum nostræ civitatis jura.*"—*Inst.*, iii. xiii. p.

Maine's: The obligation is the bond or chain with which the law joins together persons or groups of persons in consequence of certain voluntary acts. The acts which have the effect of attracting an obligation are chiefly those classed under the heads of Contract and Delict, of agreement and crime. A. L., pp. 323, 324.

The idea of obligation (Savigny): "The control of one person (the creditor) over another person (the debtor) to the extent of certain isolated acts of the latter; furthermore the obligation enures to render certain and necessary acts which were before uncertain and accidental."—BROWN'S *Analysis, Savigny on Obligations*, p. 2.

Austin's analysis of obligation or duty is as follows: "A command is an expression of desire enforced by a sanction. Whenever a command is signified a duty (or obligation) is imposed. The sanction is the evil that will probably be incurred if the command be disobeyed."—C. A., p. 4.

Occupatio, Occupancy.

"The advisedly taking possession of that which is at the moment the property of no man, with the view of acquiring property in it for yourself."—A. L., p. 245.

The advised assumption of physical possession. A. L., p. 256.

“ Quod ante nullius est, id naturali ratione occupanti conceditur.”

Pactum (nudum).

A mere agreement to which the law did not attach an obligation. See under *Conventio*.

Persona.

According to modern Civilians, a person is a human being invested with or capable of rights ; but with the Roman classical jurists *persona* and *homo* are equivalent expressions, the slave being ranked with persons.

Res.

The word has two widely different meanings in Roman law.

1. It denotes things, acts, and forbearances, and sometimes even persons considered as the subjects or objects of rights and obligations.
2. It also has a meaning which includes beyond these rights and obligations themselves. In this widest sense the word “*res*” embraces the whole matter with which law is conversant. C. A., p. 60.

Austin’s definition : Things (in the strict sense) are such permanent objects, not being persons, as are sensible or perceptible through the senses.

Rights. v. Jus.

Servitus.

Savigny’s definition is : “ A single or particular exception (accruing to the benefit of the party in whom the right resides) from the general power of user and exclusion residing in the owner of the thing.”

Austin's : "When the person entitled can only use the subject to an extent (in one direction) exactly circumscribed, the right may be called *servitus*."—C. A., p. 148.

"*Servitutum non ea est natura ut aliquid faciat quis sed ut aliquid patiatur vel non faciat.*"—D., viii. i. 151.

Status.

Austin's definition : "The rights, duties, capacities, or incapacities which determine a person to a given class, constitute his status."—C. A., p. 137.

Definition of the Civilians : "*Status est qualitas cujus ratione homines diverso jure utuntur.*"

Bentham's : "Consequences of the same investitive fact."

Thibaut's : "Status is a capacity or ability to take or acquire a right and to incur a duty."

For criticisms on the three last definitions, cf. Austin, Lect. xli., xlii.

Sandars, i. iii. p. : "Status is the correlative of *persona*. Status is the legal capacity of a *persona*."

Superficies.

By contract, originally, the owner might carve out of the subject of his ownership a *superficies*, and under this contract the lessee originally acquired only a *jus in personam* against the lessor, but the prætor allowed the lessee a *quasi in rem actio* against all, except the person who had a better title than the possessor of the *solum* himself, who could therefore evict both. Thus the superficies became in effect a *jus in rem*.

Testamentary succession. V. sub *Inheritance*.

Titles.

Titles are the facts or events of which the rights (*in rem*)

are the legal consequences, and also the facts or events on which, by the dispositions of the law, they terminate or are extinguished.

Traditio.

Placing another in legal possession of a thing was termed *traditio*. Sandars' Just., ii. 1, 40.

Universal succession.

"A succession to a *universitas juris*. It occurs when one man is invested with the legal clothing of another, becoming at the same moment subject to all his liabilities and entitled to all his rights."—A. L., p. 179.

Universitas juris.

A *universitas juris* is a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person. It is, as it were, the legal clothing of some given individual. A. L., p. 178.

Ususfructus.

"*Jus alienis rebus utendi fruendi salva earum substantiâ.*"
—Inst., ii. iv. p.

Written Law. See *Jus Scriptum*.







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"It is rarely that we find a book fulfilling the requirements of both classes; full and precise enough for the lawyer, and at the same time intelligible to the non-legal understanding. Yet the two volumes by Mr. Kay on the law relating to ship-

masters and seamen will, we venture to say, be of equal service to the captain, the lawyer, and the Consul, in their respective capacities, and even of interest to the public generally, written as it is in a clear and interesting style, and treating of a subject of such vast importance as the rights and liabilities and relative duties of all, passengers included, who venture upon the ocean; more than that, we think that any able-seaman might read that chapter on the crew with the certainty of acquiring a clearer notion of his own position on board ship.

"We can make no charge of redundancy or omission against our author; but if we were called upon to select any one out of the fifteen parts into which the two volumes are divided as being especially valuable, we should not hesitate to choose

THE LAW RELATING TO SHIPMASTERS AND SEA

REVIEWS OF THE WORK—*continued.*

that numbered three, and entitled 'The Voyage.' There the master will find a succinct and compendious statement of the law respecting his duties, general and particular, with regard to the ship and its freight from the moment when, on taking command, he is bound to look to the seaworthiness of the ship, and to the delivery of her log at the final port of destination. In Part IV. his duties are considered with respect to the cargo, this being a distinct side of his duplicate character, inasmuch as he is agent of the owner of the cargo just as much as the owner of the ship.

"Next in order of position come 'Bills of Lading' and 'Stoppage in Transitu.' We confess that on first perusal we were somewhat surprised to find the subject of the delivery of goods by the master given priority over that of bills of lading; the logical sequence, however, of these matters was evidently sacrificed, and we think with advantage to the author's desire for unity in his above-mentioned chapters on 'The Voyage.' That this is so is evidenced by the fact that after his seventh chapter on the latter subject he has left a blank chapter with the heading of the former and a reference *ante*. 'The power of the master to bind the owner by his personal contracts,' 'Hypothecation,' and 'The Crew,' form the remainder of the contents of the first volume, of which we should be glad to have made more mention, but it is obviously impossible to criticize in detail a work in which the bare list of cited cases occupies forty-four pages.

"The question of compulsory pilotage is full of difficulties, which are well summed up by Mr. Kay in his note to page 763:—'In the United States no ship is bound to take on board a pilot either going in or coming out of the harbour, but if a pilot offers and is ready, the ship must pay pilotage fees whether he is taken on board or not.' Ships do not exist for pilots, but pilots for ships, so that this option in the use of the pilot, and obligation in the matter of fees, appears to us to be exactly that solution of the difficulty which should not have been arrived at; and, moreover, it is open to the first objection urged by Mr. Kay against the compulsory system of pilotage, which is, that it obliges many ships which do not require pilots to pay for keeping up a staff for those who do. Seven other cogent reasons, for which we must refer the reader to the book itself, though most of them, indeed, will instantly present themselves to the minds of sailors without even an effort of memory, are noted. Section 338 of the Merchant Shipping Act provides that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship within any district where the employment of a pilot is compulsory by law. If he interferes to correct the pilot in the handling of a ship, with the peculiarities of which the latter cannot generally be acquainted, he may render himself and the owners liable in case of accident, and so a premium is offered to his indifference, proof being always required that the damage was occasioned solely by the pilot's neglect or fault, to entitle the owners to the benefit of this section. The decision in the case

of the *General de Caen* well illustrates difficulties surrounding the subject.

French ship upon the Thames, when ment of a pilot is compulsory, and a took on board a pilot as well as a wat the wheel in consequence of none of t able to understand English. The w her helm up instead of luffing as the whereby a barge was run into and da French owner claimed under Section : 18 Vic., c. 104. It was held that the answerable for the waterman's incapa that the pilot gave the proper orders; be contrary to justice to say that solely liable for the collision; that t was the servant of the owners, and th fore, were liable. The real question s to have been whether the English p have spoken French or the French had on board a helmsman who coul English, and the corollary, when the been given in favour of the former, th ment officer, when engaging the he acting merely as the agent of the Frer

"The master has a large autho passengers on board his ship, equal i emergency to that which he posses crew. Lord Ellenborough has det comfort intending travellers by sea t cially if this country should again bec in a war with a nation which, unlike Abyssinia, possesses a navy—that : ceeded the limits of his authority passenger who refused to fight on the willing to do so elsewhere, in iron that particular part of the ship to w objected.

"It is for the interest and security and navigation that it should be get that the amount of service rendered i or proper test by which the amount c ward is estimated, but the Court will cessful salvage an amount which mu mere remuneration for work and lal that the salvors should be encouraged t of such enterprises and go promptly t of lives or vessels in distress, though t care that they do not by their subsequ forfeit their claims to such reward.

"That it should be necessary to e money to save the lives of their fello not a matter for congratulation; s doubt to some extent anomalous t whilst large proportionate sums wer recovery of property, for the rescu life unless associated with property, s ward could be recovered. But by S the Merchant Shipping Act the p human life is made a distinct groun ward, with priority over all other clai where the property is insufficient, an of the property is not adequate to t the claim for life-salvage alone, the B is empowered to award to the salvor it deems fit, either in part or whole as "There is, perhaps, no species of s

THE LAW RELATING TO SHIPMASTERS AND SEAMEN.

REVIEWS OF THE WORK—*continued.*

a greater variety of circumstances under which it can be performed than salvage. Consequently we cannot be surprised that questions of this kind frequently come before the Courts, and that the number of decided cases is very large; but Mr. Kay has succeeded in an admirable way in extracting the main points connected with each case, and in presenting them in as few words as possible. Of course fuller information may sometimes be required, but the reader will then know where to find it.

"In conclusion, we can heartily congratulate

Mr. Kay upon his success. His work everywhere bears traces of a solicitude to avoid anything like an obtrusive display of his own powers at the expense of the solid matter pertaining to the subject, whilst those observations which he permits himself to make are always of importance and to the point; and in face of the legislation which must soon take place, whether beneficially or otherwise, we think his book, looking at it in other than a professional light, could scarcely have made its appearance at a more opportune moment."

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