ROMAN PRIVATE LAW

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ROMAN PRIVATE LAW

FOUNDED ON THE 'INSTITUTES' OF GAIUS AND JUSTINIAN

BY

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AD MATREM

PREFACE

THIS is an attempt to meet a want which I have felt in teaching Roman Law at Oxford, viz. some book which is content to give, as simply as possible, the subject-matter of the *Institutes* of Gaius and Justinian, following, in the main, the original order of treatment. It has proved impossible to keep strictly within these limits, and while I have sometimes judged it expedient to omit minor details of little practical importance, such as some of the degrees of cognatic relationship, I have also found it necessary, in order to make a coherent statement, to add information not contained in the *Institutes*, but derived from the *Digest*, *Code*, *Novels*, or from modern Civilians. In some cases, where the evidence is weak or controversy rages, I have ventured to state dogmatically what in a more pretentious work would require qualification. The Historical Introduction presupposes a knowledge of the elements of Roman Constitutional History.

I have to acknowledge my obligations to the works below mentioned.

R. W. LEAGE.

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Lincoln's Inn.

Imperatoris Justiniani Institutiones, Moyle, 4th ed.; *Roman Private Law in the Times of Cicero and the Antonines*, Roby; *An Introduction to the Study of Justinian's Digest*, Roby; *Gai Institutiones*, Poste, 4th ed.; *Historical Introduction to the Private Law of Rome*, Muirhead, 2nd ed.; *The Institutes of Gaius and Rules of Ulpian*, Muirhead; *The Institutes of Justinian*, Sandars; various Articles on legal topics, Smith's *Dictionary of Greek and Roman Antiquities*; *Manuel Élémentaire de Droit Romain*, Girard, 3rd ed.; *The Institutes*, Sohm, edited by Ledlie, 2nd English ed.; *Römische Processgesetze*, Wlassak.

References to Roby and Muirhead denote *Roman Private Law* and the *Historical Introduction* respectively, where it is not otherwise expressly stated.

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[1] Some of these dates are conjectural.

[2] For discussion as to probable date, see Girard, p. 987.

INTRODUCTION

To appreciate Roman Law it is necessary to understand not only the substance of the law, but also the *sources* from which it came.

The sources of the law of any civilised country may be—

1. The Sovereign Legislature, *e.g.* in England the King in Parliament.

2. Some person or body to whom the Legislature has delegated the right to make law. The Judges, *e.g.*, in England are sometimes a source of law, though here the delegation is tacit, *i.e.* no Act of Parliament has ever in so many terms given them this right, and, in theory, they only administer and interpret the existing law. Examples of express delegation are seen in regulations and by-laws made by such bodies as the London County Council or the Great Western Railway Company.

3. Custom, *e.g.* in England the 'Common Law.'

Gaius tells us that the laws of the Roman people consisted of Leges, Plebiscita, Senatus Consulta, Imperial Constitutions, the Edicts of the Magistrates, and the Responsa Prudentium,[1] and to these Justinian adds Usus.[2] This list includes law of all

[1] G. i. 2. [2] J. i. 2. 9.

three kinds above mentioned. Leges, Plebiscita, Senatus Consulta,[1] and Imperial Constitutions are all examples of laws set by a Sovereign Legislature, and may be termed Statute Law; the Edicts and the Responsa are examples of law made by some delegated authority; while Usus is 'the unwritten law which Custom has established.'[2] The object of this introduction is to explain each of these sources in detail, beginning with the oldest of all, Custom, dealing next with Statute Law, and then with the Edicts and Responsa; finally, an account will be given of Justinian's work of Codification, *i.e.* how he embodied the law derived from all these origins in one harmonious system.

Section I. Custom, or Usus

A custom may be explained as follows: Where an act is capable of being performed in more ways than one, but is almost invariably done in some particular manner, a custom exists that the act shall be so performed. Whether this custom is a *customary law* as distinguished from a custom simply, depends upon whether, if brought up in a Court of Law, the custom would be approved. This is always a question of fact. If the custom is universal, reasonable, and not opposed to any definite rule of law, it will nearly always be treated as law proper, *i.e.* not as a rule which the citizens *may* obey, but as one which they must.

Sir Henry Maine found the earliest conception of

[1] Henceforth called for brevity S.C.C.

[2] J. i. 2. 9.

law in the Themistes, or divinely inspired judgments of the early kings, but it is probable that at Rome, at any rate, the earliest law was custom, springing unconsciously from the habits and life of the people themselves. This customary law soon became fixed and inelastic, chiefly, perhaps, because at an early date it was embodied by the Legislature in a code drawn up by the Decemviri, and known as the XII. Tables, of which the traditional date is 451-448 B.C.[1] It would be a mistake, however, to think that after this early code 'usus' finally ceased to be a source of law, both because it is improbable that the whole of the existing customary law was embodied in it, and also because Justinian,[2] more than a thousand years afterwards, expressly states, 'ex non scripto jus venit quod usus comprobavit. Nam diuturni mores consensu utentium comprobati legem imitantur.'[3] What is more remarkable to an English lawyer is that the Romans took the view that an existing statute might even be repealed by adverse usage, 'ea vero' (*i.e.* jura) 'quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel *tacito consensu populi* vel alia postea lege lata.'[4]

Examples of laws resting on custom and dating from a period prior to the XII. Tables are the rules as

[1] For other views see Lambert, *L'histoire traditionnelle des XII. Tables.*

[2] In the time of Gaius 'usus' was overshadowed by the writings of the Jurists and statute law, which may account for his omission of custom as a source of law.

[3] J. i. 2. 9.

[4] J. i. 2. 11. And again in the *Digest*: 'Quare rectissime illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.' But the statute might by anticipation provide against this effect, *cf.* Moyle, 108.

to 'patria potestas' and the right of 'sui heredes' and the 'gens' in relation to intestate succession; at a much later period fidei-commissa, codicils and, probably, the literal contract, may be traced to the same origin.

Section II. Statute Law:—Leges, Plebiscita, S.C.C., Imperial Constitutions

Subsect. 1. *Leges and Plebiscita*

Lex is a term wide enough to include not only the whole of statute law, but every species of legal rule. Used, however, in the above sense, viz., as something different from Plebiscita, S.C.C. and Constitutions, it includes the laws of—

(i.) the early kings,
(ii.) the Comitia Curiata,
(iii.) the Comitia Centuriata, and
(iv.) the Comitia Tributa.

A plebiscitum, on the other hand, was a law passed by the Concilium plebis.

(i.) *Laws of the early kings—the so-called* 'Leges regiae.'

At the beginning of Roman history the Roman people were governed by kings. The evidence with regard to these times is almost wholly legendary, but that there was such a period is proved by the survival in republican times of institutions such as the 'rex sacrorum' and the 'interrex,' which presuppose that there was a regal epoch before the Republic. A well-known passage in the *Digest* is sometimes cited to prove that these kings themselves legislated: 'Et ita leges quasdam et ipse' (*i.e.* Romulus) 'curiatas

ad populum tulit, tulerunt et sequentes reges quae omnes conscriptae exstant in libro Sexti Papirii qui fuit illis temporibus.' But it seems probable that the laws made by the legendary kings were little more than isolated decisions given to meet particular cases, and although there is a work known as the *Jus Civile Papirianum*, made up of rules largely relating to matters of religion (fas), which probably date back to the regal period, the work itself seems to have been written not, as the passage from the *Digest* suggests, contemporaneously with the laws themselves, but about the time of Augustus.

The real legislative body during the early regal period was not the king himself but the king acting in combination with the Comitia Curiata and the Senate.

(ii.) *The Comitia Curiata.*

The Roman people were originally divided into three tribes, each tribe being composed of ten curiae, and the male members of these curiae who were capable of bearing arms formed the Comitia Curiata. This body had no power of initiating legislation. It met only when called together by the King, and could merely assent to or negative such proposals as he chose to lay before it. The real power of the Comitia Curiata lay in the fact that no change affecting any important department of public or private law could be made save with its consent. It was just as necessary for the King to obtain such consent, if, for example, he wished to break a treaty by declaring war, as it was for a private individual who wished to change his family (Adrogatio) or to break the rules of intestate succession by providing

for himself some heir other than the person who would naturally succeed him (Testamentum Calatis Comitiis).[1] When the Comitia Curiata met for the convenience of individuals, as in the cases last instanced, it was called the 'Comitia Calata,' and in this form it survived in republican times long after it had lost its power of legislation. The Senate, whose function was to nominate the King and tender him counsel, was an inner body of the Comitia Curiata, and is said to have been formed of the heads of the Roman gentes.[2] After his nomination by the Senate the King was elected by the Comitia Curiata, who by a lex regia conferred his 'imperium' upon him, a practice revived under the Empire.[3]

(iii.) *The Comitia Centuriata.*

For Rome in its earlier stages the Comitia Curiata was a sufficient legislature, but it ceased to be so as soon as a numerous body of persons came to live on Roman soil who were not Roman citizens. These people, who were soon known as the 'plebs,' being liable to taxation and to military service,[4] naturally desired a voice in the making of law, a voice which was necessarily denied them in the Comitia Curiata, since the plebs were not members of any Roman family. The reforms attributed to Servius Tullius paved the way for the creation of two new Comitia which, at any rate partially, remedied this grievance.

[1] Girard, p. 14.

[2] The gens, a subdivision of the Curia, seems to have been a kind of clan consisting of families united by the peculiar Roman tie of agnation.

[3] J. i. 2. 6.

[4] Some civilians, however, consider that the plebs were not originally liable to military service, and that the object of the Servian census was to create such liability.

The first of these Comitia was the Comitia Centuriata, which, though based in theory upon the arrangement of the Roman people from a military point of view, was in fact organised on the principle of wealth, and accordingly any one, patrician or plebeian, could, if of sufficient substance, attend it. This Comitia had, however, no power of initiating legislation, for no measure could be proposed there except by a consul, and he could bring forward nothing without the previous sanction of the Senate. Further, all measures which required a religious sanction had to be confirmed by the Comitia Curiata. The most important piece of legislation passed by the Comitia Centuriata was the law of the XII. Tables, the celebrated code which was the foundation of Roman law and which, though immensely improved and enlarged, was never wholly superseded by subsequent legislation, but continued to be, in theory, the ancient source from which all law flowed until the time of Justinian himself.[1]

(iv.) *The Comitia Tributa and the Concilium Plebis.*

The other Comitia which is said to have sprung from the reforms of Servius Tullius is the Comitia

[1] The chief grievances of the plebs which led to the passing of the XII. Tables were—

(i.) Their inability to hold ager publicus.

(ii.) Their exclusion from marriage with patricians.

(iii.) The fact that the knowledge and administration of the law was wholly in the hands of the pontiffs, who were themselves patricians.

(iv.) The power of the magistrates to exact arbitrary fines. But the XII. Tables did little directly to remedy these matters, the chief value of the code being that henceforth the plebs knew the main outlines of the law under which they lived. For the provisions of the XII. Tables see Index.

Tributa. This assembly was based not, like the Comitia Curiata, on kinship, nor, like the Comitia Centuriata, on the possession of property, but on a division of the Roman people according to districts. Being so based this assembly included the plebs as well as the patricians.

Until comparatively recent times it was thought that the resolutions of the Comitia Tributa had originally no binding force, but were merely statements of what the plebs considered ought to be law (plebiscita), and it was also supposed that a series of laws ending in the lex Hortensia (287 B.C.) gave to these plebiscita the force of leges in the strict sense. But it was always difficult to make this account fit in with the definition of plebiscita in the *Institutes*. 'Plebiscitum,' Justinian[1] says, 'est, quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat,' and he goes on to state that the plebs differs from the populus as a species from a genus, because while the term 'populus' includes all the citizens, the term 'plebs' means merely the citizens other than patricians and senators. It is, therefore, hard to suppose that in this place Justinian can refer to the resolutions of the Comitia Tributa, since, though it is likely enough that the patricians at first held aloof from it, that assembly in point of fact included the whole populus.

Mommsen is probably right, therefore, in holding—

(1) that as soon as the Comitia Tributa acquired legislative power it acquired full legislative power, its laws being *leges* in the strict sense, and

(2) that the body which really passed plebiscita

[1] J. i. 2. 4.

was the Concilium plebis, a body which can be shown to have existed apart from the Comitia Tributa, and to have consisted entirely of plebeians. On this theory the lex Hortensia gave the force of law not to the laws of the Comitia Tributa, since they did not need it, but to the informal resolutions of the Concilium plebis. It is important to bear in mind, therefore, that after the date of the lex Hortensia there were at Rome three independent legislative bodies, the Comitia Centuriata and the Comitia Tributa with power to make leges, and the Concilium plebis, whose resolutions, though technically known as plebiscita, had the same force as leges proper: 'Sed et plebiscita, lege Hortensia lata, non minus valere quam leges coeperunt.'[1] It is obvious that on either theory the political grievances of the plebs must have been wholly at an end after the date of the last-mentioned law.

Subsect. 2. *Senatus Consulta*

Just as in the course of time the Comitia Curiata was superseded by these later legislative bodies, so they, in turn, had to make way, towards the close of the Republic, for a new legislature, and the last recorded *lex* was passed in the reign of Nerva. The reason for the decline of these assemblies was partly because they had become too large[2] and unruly for the delicate work of legislation, partly because from the time of Augustus onwards republican institutions tended insensibly towards a natural extinction. Even during the republic, when Gaius says the

[1] J. i. 2. 4. [2] J. i. 2. 5.

legislative power of the Senate was questioned, we find S.C.C. dealing with matters of administration which are difficult to distinguish from laws proper, and by the time of Augustus the auctoritas of the Senate had come to be regarded as essential for every law. Very soon, accordingly, these S.C.C. became the sole source of law until they were themselves replaced by the direct legislative enactments of the Emperor. This change, however, was one of form rather than of substance, since the Senate may be regarded as a passive instrument in the hands of the Emperor to give effect to his wishes; the Emperor would recommend a measure, it would then be proposed by the consul who convened the Senate, and finally voted by them as a matter of course.

Subsect. 3. *Imperial Constitutions*

It was under Hadrian that the Imperial constitutions, though known in the time of previous Emperors, first became the ordinary method of legislation. The term constitution is a general one, and includes the following kinds of enactments:—

(*a*) An oration, *i.e.* a proposal made by the Emperor for the consideration of the Senate.

(*b*) An edictum, *i.e.* an ordinance issued by him as highest magistrate.

(*c*) A mandatum, *i.e.* an instruction given to some particular individual, such as a provincial governor, with regard to some administrative difficulty. Mandata are not mentioned by Gaius or Justinian, probably because they dealt with public rather than private law.

(*d*) A decretum was the decision of the Emperor,

as the supreme judicial officer, settling some case which had been referred to him.

(*e*) A rescriptum—or epistola—was where an appeal had been made to the Emperor in some dispute, but instead of settling the whole matter in a decretum, he merely stated the legal principles applicable to the case. It is a matter of doubt how far rescripta can be regarded as sources of law, since law in the modern sense is not a particular command dealing with an individual, but a general command prescribing a course of conduct for the citizens generally.

Section III. Law enacted by some Person or Body of Persons to whom the Supreme Legislature has delegated Power in that behalf.

A. *The Edicts of the Magistrates.*
B. *The Responsa Prudentium.*

A. *The Edicts of the Magistrates.*

1. *What the edict was.*

Every superior magistrate at Rome had the 'jus edicendi,' *i.e.* the right of issuing a proclamation or statement defining by what principles he would be guided in carrying out the duties incident to his office. The most important magistrates, from the lawyer's point of view, were the two praetors, the Praetor Urbanus and the Praetor Peregrinus, and the edict was originally a proclamation written on wood and hung up in their courts at the beginning of their year of office; edicts were of the following kinds:—

(*a*) The Edictum Perpetuum, *i.e.* the edict which each praetor issued at the beginning of his year; probably called 'perpetuum' because it was intended to be binding upon him during the tenure of his office, any flagrant departure from it being regarded as unconstitutional.

(*b*) The Edictum Repentinum, *i.e.* an edict issued during the year of office to meet some sudden and unexpected emergency.

(*c*) The Edictum Tralaticium. It was not customary for a praetor in issuing his edict to devise a wholly new one; he was content to take over from his predecessors everything which custom had established, or which, though new, had proved of real use; the part so adopted was called 'Tralaticium,' as distinguished from the praetor's own innovations, which would usually be quite insignificant, at any rate in amount.

(*d*) The Edictum Provinciale. In the provinces the functions of the praetors were exercised by the local governors, and their proclamations or edicts had as much the force of law as those of the praetors at Rome.[1]

(*e*) The Edicts of the Curule Aediles. The jus edicendi was not the exclusive right of the praetors; it was, as above stated, possessed by every superior magistrate, but the only edicts of importance, besides those mentioned, were those of the Curule Aediles, from whose proclamations a certain quantity of legal rules became evolved, *e.g.* the implied warranty in the law of sale (emptio-venditio).

2. *The influence of the praetors on Roman law.*

The history of the praetors begins with the

[1] *I.e.* within their jurisdiction.

appointment of the Praetor Urbanus 366 B.C. He was appointed not in any way to reform the law but as a magistrate for Rome, and the law he administered was the 'jus civile' of Rome as found in the XII. Tables, a law which was only available for Roman citizens, and which was extremely primitive and narrow, since practically it only accorded recognition to such rights as could be enforced by certain scanty and extremely inelastic legal proceedings known as 'legis actiones.' Being appointed merely as a judicial officer, it is improbable that at first the praetor issued any edict; he had merely to apply the law of Rome as it appeared in the XII. Tables to particular cases; but, at the same time, it is important to remember that the praetor had the technical right to issue an edict if he wished, and that he was regarded as invested with the ancient judicial power of the king; in other words, he had a certain discretion in deciding a case unless bound by the fetter of some statute, or ancient custom. It is, therefore, reasonable to suppose, that at a comparatively early date the Praetor Urbanus began to issue his edict defining the principles he would follow in exercising his discretionary power or 'imperium.' It is impossible, however, to imagine that had the matter rested here the Praetorian Edict could have exercised its undoubted influence upon the ancient civil law, since so long as the method of procedure known as the 'legis actio' system prevailed, the most the praetor could do would be to disallow an action which lay at jus civile because of the inequitable conduct of the plaintiff, or to assist a man who had been wronged, but to whom no legis actio was open, by compelling

the offender to enter into a wager (sponsio) on the merits of the case, which could then be tried in the ordinary manner; since a 'legis actio' was always possible where a definite sum of money was claimed. The real reason for the success of the Praetorian edict as a reforming agent is attributable partly to the appointment of the Praetor Peregrinus 242 B.C., partly to the lex Aebutia (*circa* 150 B.C.).

Political causes had from the earliest times much to do with the development of Roman legal institutions. The differences with regard to political representation between the patricians and the plebs were finally settled, as above stated, by the lex Hortensia; and the position of the plebs as regards private law (a position which had originally been as unsatisfactory as was their political status) had by degrees —notably by the enactment of the XII. Tables and the lex Canuleia, 445 B.C.[1]—become by the date of the Hortensian law as good as that of the Patricians for all practical purposes. In later times this distinction between the populus and the plebs is paralleled by the distinction between Roman citizens on the one hand and peregrini on the other.

From an early date the presence of foreigners (peregrini) had caused a difficulty. The jus civile of Rome was regarded as the exclusive privilege of Roman citizens, and no one but a citizen could claim its protection. A peregrinus, accordingly, had no sort of legal status. If, for example, he wished to purchase cattle, he could, as a fact, agree to buy them, pay the price and take the cattle home; but the cattle would not be his, and the late owner could

[1] Which permitted marriage between the two orders.

successfully reclaim them; since the only method by which a legal title could be acquired was by going through certain solemn forms (a 'mancipatio' or an 'in jure cessio'), to which a foreigner could by no possibility be a party. At first, it is true, this difficulty was not so apparent, because up to about the third century B.C. the Romans were in the habit of inserting a clause in their treaties with foreign nations, providing that disputes between the citizens of those nations and Roman citizens should be tried by a special tribunal of 'recuperatores'; but as Rome grew in power she became intolerant, and by the middle of the century in question this practice ceased. Nevertheless disputes between foreigners, or between foreigners and citizens, were bound to occur, and with the growth of Rome's commercial power to become more and more frequent; and no State, especially a young one, can long afford to permit disputes within its borders free from the control of the law.

Accordingly in the year 242 B.C. a second praetor, the Praetor Peregrinus, was appointed to deal with disputes in which peregrini were concerned. The jus civile of Rome being inapplicable, the question arose by what law the quarrel was to be settled. Sir Henry Maine says that the law the Praetor Peregrinus administered was that which he found by observation to be common to all the people who lived around or who came to Rome, and also common to the jus civile of Rome. By observation of the neighbouring tribes, for example, the praetor would find that the essential thing in the transfer of ownership of property was traditio, or the actual handing over of the thing in question, coupled with some good reason for the

traditio, such as a sale and the price paid. Traditio was also a part, though a small part, of the peculiar method (mancipatio) of transferring property at Rome, and so, according to Sir Henry Maine, the praetor seized upon traditio as a title to property common to the law of all nations ('jus gentium'), and used it as a test to decide the ownership of property where peregrini, or a peregrinus and a civis were concerned. Sir Henry Maine proceeds to state that at first the Romans regarded the jus gentium, not with the respect a modern lawyer would feel for principles of conduct found in all societies, but as a disagreeable expedient forced upon them by political necessity; and that a change of feeling came upon the conquest of Greece, when, as he says, the doctrines of Stoic philosophy at once gained acceptance among the cultured Romans, more especially among the Roman lawyers. The teaching of the Stoics is summed up in the expression 'Life according to Nature,' and Sir Henry Maine states that although the Stoic philosophy was never worked out in detail in relation to legal institutions, so as to form an ideal code ('jus naturale'),[1] yet the Roman lawyers at once perceived that were it so worked out it would correspond in nearly every detail with the principles of jus gentium; and this is what he means by the proposition that jus naturale is simply jus gentium seen in the light of a particular theory, viz. in the light of Stoic philosophy. The principles of the jus gentium having gained recognition in this way, their adoption by the Praetor Urbanus, as well as by the Praetor Pere-

[1] Ulpian's definition of jus naturale as 'quod natura omnia animalia docuit' may perhaps be disregarded as due to a lawyer's temptation to over-refinement.

grinus followed, according to Sir Henry Maine, as a matter of course; and, accordingly, the reform of the ancient law was only a question of time.

Sir Henry Maine's theory is open to criticism. In the first place, it is tolerably clear that the Praetor Peregrinus did as a fact, in deciding cases where aliens were concerned, take a body of law known as 'jus gentium' as his guide, but it is unlikely that he consciously went through the comparative process above described. The mistake (as Dr. Moyle points out) seems to lie in attributing modern scientific ideas to what, after all, was a rather primitive state of society. The jus gentium which the Praetor Peregrinus administered was, probably, little more at first than the customs of the particular foreigners who were at the moment before him. As time went on, no doubt, the praetor would get together a very large body of customs in this way, and it is extremely likely that where a conflict occurred he would prefer that custom which was most common and therefore, possibly, most reasonable. But it is improbable that his excursions in comparative jurisprudence went much further. Again, it is true that in the end the simple principles of the jus gentium came to be adopted for citizens also, but it is unlikely that the critical moment was the time of the conquest of Greece; since, so far from the Romans at once accepting the philosophy of Greece, it was at first the object of extreme dislike. In the year 161 B.C. its teachers were expelled from the city, and Stoicism gained no definite hold upon the Romans until about the time of Scaevola, who was consul in the year 95 B.C.[1] The

[1] Cf. Moyle, p. 37.

truth would seem to be that even at a comparatively early period the Praetor Urbanus adopted some, at any rate, of the principles of the jus gentium, because of their intrinsic reasonableness and simplicity, a thing he would have the less difficulty in doing after the lex Aebutia, since from that time the old system of legis actio was gradually replaced by another method of procedure—the formulary system, which gave the praetor the greatest possible latitude in administering justice. In the end, doubtless, the triumph of jus gentium over the ancient narrow code of Rome was completed by the identification of jus gentium with the jus naturale of Stoic philosophy, but probably the influence of Stoicism is rather to be traced in the writings of the jurists who completed the work the praetors had begun than in the edicts of the praetors themselves.

A word seems necessary here to explain the method by which the praetors, in their edicts, were able to take their share in the development of the Roman legal system. An action at Rome was sharply divided into two parts, 'in jure' and 'in judicio.' In the first stage, 'in jure,' the litigants appeared in person before the praetor and stated the substance of their quarrel. From their statements the praetor would gather the issue, or the legal point actually involved, and then proceed to draw up his formula, *i.e.* the instructions for the judex who was ultimately to try the case. In constructing his formula the praetor had very great freedom: where, on the facts before him, no action lay at law, but equity demanded that the plaintiff should not be denied relief, the praetor was able so to mould the instructions to the judex who was to try the case as to ensure that

justice should be done. The earlier method employed by the praetor to effect this object was the use of fictions. He required the judex to assume (contrary to fact) that x was y; if x were y, an action lay at jus civile, and so the desired improvement was effected in a simple way, and the conservative instinct, which is said to be so strong in early societies, was unshocked. When the case came on 'in judicio,' the judex, who was usually a private person, accepted the fiction and therefore, in appearance, really tried nothing more than whether a right which was already sanctioned by the civil law had been violated or not. Later the praetor came to act in cases of this sort without disguise, and granted formulæ without resorting to any fiction, in cases where no kind of strict legal right existed. Now law is simply a collection of rights, and the best test of a right is its remedy. The terms are in fact synonymous, and inasmuch as the praetor was able to devise remedies which had not before existed, it follows that he, necessarily, at the same time created new rights and, since law is made up of rights, new law. It is the edict and not the formula which is spoken of as the source of law by the writers of the *Institutes*, because it was in the edict that the principles upon which the formula would be drafted appeared.

It would be wrong to suppose that there was anything revolutionary in the reforms which the edict effected, or that any change was made until public opinion and professional feeling were ready for it. However anxious for reform any given praetor may have been, he was, after all, a member

of a class, and subject to the influence of his fellows; and, in any case, his capacity for doing harm was limited to his year of office, for the mischief done could be removed by a stroke of his successor's pen. Further, it can rarely have happened that the praetor, in drawing up his edict, acted entirely on his own responsibility. A large part of it custom required him to adopt from his predecessors (tralaticium), and such novelties as it contained were in most cases probably only adopted after consultation with some of the trained jurists. Finally, although the lex Cornelia, 67 B.C., was passed to prohibit a departure by the praetor from his edictum perpetuum, such action had always been looked upon as unconstitutional.

Mr. Bagehot has remarked that for a society to win in the struggle for existence two things are necessary; of which the first is, that it shall acquire a legal fibre, a jus strictum, some set of rules, however elementary, to give it cohesion and strength. This requirement the Romans satisfied when the Law of the XII. Tables put into writing, and so made more rigid, the already fixed customary law of the people. The other requirement, the same author says, is that when this law has become too rigid and too elementary for its possessor, owing to the increasing complexities of civilised life, some method of escape shall be found, so that what was rigid may become elastic, what was primitive may be levelled up to meet more advanced wants. This means of escape the Romans found to some extent, as will be seen later, in the 'interpretatio' put upon the XII. Tables by the pontiffs and the earlier jurists, but

infinitely more in the work of the praetors, to whom they owed the growth of a second set of legal institutions founded upon the jus gentium, which grew up side by side with and reacted upon the rules of the older civil law.[1] Thus we find the idea of cognatio, *i.e.* blood-relationship, growing up side by side with the old agnatic, or, as it may be called, fictitious relationship, and in time almost superseding it; 'natural' titles to property, parallel with the jus civile 'civil' titles; the growth of the idea of possession to be protected as such, *i.e.* whether incident to the civil law ownership or not; the bonorum possessor as distinguished from the civil law heir; and, most important of all, a large body of 'contract' law evolved to meet the wants of a people whose commerce was always increasing, but whose own narrow code supplied no adequate rules to decide the complex questions arising therefrom.

This new body of law, 'jus honorarium,' was practically complete towards the end of the last century of the Republic, but even had this not been the case, there was small further chance of improvement so far as the Praetorian Edict was concerned. The edict owed its strength to the imperium of the ancient republican magistrates, and the Emperors, as their power grew, naturally became jealous of anything which seemed to compete with it. The lex

[1] To this so-called 'duplication of Institutions' a parallel exists arising out of the early conflict between the patricians and the plebs; the marriage of a patrician, *e.g.* was performed by confarreatio, that of a plebeian by coemptio or usus, and it is possible that the will per aes et libram was originally for plebeians, as opposed to the patrician's testamentum calatis comitiis.

Cornelia, 67 B.C., already mentioned, made unlawful any departure from the edict once issued; a series of S.C.C., in effect, prescribed the contents of the edicts of several successive praetors, and by virtue of his 'jus intercedendi' the Emperor could disallow any reform of which he disapproved. The result was, as Sohm points out, that the edict became 'stereotyped and barren,' and Hadrian accordingly determined that the time had come to prescribe the contents of the edicts of the praetor for all time.[1] He accordingly commissioned Salvius Julianus to go through and codify the edicts of the Praetor Urbanus, the Praetor Peregrinus, and certain parts of the edicts of the Curule Aediles, together with the edicts of the Provincial Governors. The resulting code, known as the Edictum Hadrianum or Edictum Salvianum, was ratified by a senatus consultum (circa 129 A.D.), and thenceforth became an Edictum 'perpetuum' in a new sense—one intended to be binding and unalterable for ever. Henceforth, therefore, the improvement of Roman law could only be effected by other means; these were the writings of the later jurists, noticed below, and the Imperial Constitutions.

B. *The Responsa Prudentium.*

The jurists at Rome fall into three main classes.

1. The pontiffs and earlier lay jurists, whose chief work was 'interpretatio.'

2. The jurists (called here for convenience 'the veteres'), who came after the period of 'interpretatio' and before the time of the classical jurisprudence.

3. The classical jurists.

[1] Sohm, p. 88.

I. *The interpretatio of the pontiffs.*

The close relation between law and religion, which seems characteristic of early society, renders easy of belief the fact that originally the knowledge and practice of the law at Rome was entirely confined to the College of Pontiffs, who appointed one of their number every year to superintend disputes between citizens, 'ex quibus' (*i.e.* the College), 'constituebatur quis quoquo anno præesset privatis.' It is, however, surprising that this monopoly should have continued for more than a hundred years after the publication of the XII. Tables. Up to that time, of course, Roman law was nothing but unwritten custom, and that the sacred College should have treasured it orally is natural enough. But the promulgation of the XII. Tables and the open manner of their application would seem to have precluded any further secrecy. The explanation of the difficulty probably is that it is one thing to know the principles of legal theory, another to apply them to concrete cases. Most laymen in England to-day, for example, know that it is a rule of English law that no citizen shall be imprisoned without legal justification, comparatively few know that this rule is enforced by a writ of Habeas Corpus, fewer still would be able to take the practical steps necessary to secure the release of a wrongfully imprisoned person. Further, it is impossible to imagine that Roman law remained for long exactly as defined within the limits of its early code; as a fact it seems almost at once to have been amended and expanded, and the first means of reform is to be found in the 'interpretation' put upon the XII. Tables by the Pontifical College.

When Gaius and Justinian speak of the jurists as the makers of law, they refer, as will be seen hereafter, to a much later class of lawyers in the time of the Empire, but as a fact these early ecclesiastical lawyers are equally entitled to be considered as exercising legislative power; since, though, in theory, they merely expounded the law as set out in the XII. Tables, in fact, by the construction they placed upon this law, a considerable body of entirely new legal rules was evolved. Case law in England rests on much the same fiction. As Sir Henry Maine has shown, an English judge never admits that he is legislating; he is merely applying known rules to different sets of circumstances; but whenever he determines a case to which no existing custom, statute, or precedent applies, he creates a new precedent which, save in the comparatively rare case of reversal on appeal, will be followed by other judges in the like circumstances, and so form a new law.

It is instructive to consider in detail some of the ways in which this work of construction or interpretation was carried on, and two typical examples may be given.[1]

(*a*) *The mancipatio nummo uno.*—The earliest form of conveyance (*i.e.* means of making B the owner of what previously was A's property) at Rome was the mancipatio. This process, which applied to a very limited list of things, and originally only to the case of a ready-money sale, was as follows. Before five Roman citizens and a libripens (*i.e.* another citizen who was provided with weighing scales) B, the purchaser, grasping the thing to

[1] See on the subject of interpretatio generally, Sohm, pp. 55-66.

be transferred in his hand,[1] used a special set of words (called the Nuncupatio). Gaius gives us the nuncupatio where the object of the sale is a slave: 'Hunc ego hominem ex jure Quiritium meum esse aio isque mihi emptus esto hoc aere aeneaque libra.[2] Then B, it would seem, placed the purchase money in the scales, at first uncoined copper (for the mancipatio goes back to the time when coined money did not exist), and it was weighed out by the libripens, and handed over to A, the vendor.

Coined money is said to have come into use at Rome at about the date of the XII. Tables, and as there would be no point in weighing it out in the manner the copper had necessarily been weighed, there would be some danger that the actual price would not be paid. The XII. Tables accordingly enacted that the mancipatio should not transfer the ownership of the thing sold unless full payment were made or, at any rate, proper security were given. Accordingly after the XII. Tables the mancipatio (the sole means of conveying property) was, as in its earliest stage, only applicable to making a purchaser owner on a sale for cash. In other words, there was no means of vesting property in another as a gift, or by way of mortgage, for safe custody or for any other purpose. This the pontifical 'interpretatio' accomplished. By the law of the XII. Tables the conveyance made by the mancipatio was to take effect solely as defined in the terms of the nuncupatio, or set speech made by B, the alienee.[3] The pontiffs held,

[1] 'In manu,' hence the term mancipatio, but see Muirhead, p. 59.

[2] G. i. 119.

[3] 'Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto.'

therefore, that the terms of the Statute were satisfied provided the parties to the mancipatio named, in the nuncupatio, some price, however small, and this were actually paid. Henceforth, therefore, the mancipatio became, as Gaius names it, a fictitious sale (imaginaria vendito).[1] Suppose A wishes to sell a slave to B on credit. The five witnesses and the libripens are got together as before, B announces that he is buying the slave for a single *as*, he strikes the scales with it, hands it over to A, and the ownership has changed, the real price being paid at the subsequent date the parties have arranged. By this means the interpretatio of the early jurists abrogated the spirit of the XII. Tables while keeping within the letter of the law, and devised a method of conveyance applicable to every sort of transfer, since, obviously, the 'mancipatio nummo uno' would be available not merely to make B owner on a sale by credit, but, for example, as a donee, in which case there would be nothing left outstanding after the mancipatio; or as a mortgagee, when B by the mancipatio nummo uno gets ownership of A's property as security for money he is lending to him, and undertakes by a *fiducia*, or declaration of trust, to make A owner again by a remancipatio when the money lent and interest have been repaid.

(*b*) *The emancipation of a filius.*—It would seem that at the date of the XII. Tables there was no method by which a paterfamilias could, by his own act, release his son from his power ('patria potestas'). The XII. Tables, however, probably by way of penalty, enacted that if a father sold his son three

[1] It was obviously fictitious in a double sense, the weighing was unnecessary, and the whole price need not be paid.

times as a slave the son was to be free from potestas ('si pater filium ter venum duuit, filius a patre liber esto'). The jurists held that three wholly fictitious sales to a friendly purchaser satisfied this law, and on this construction the ceremony of emancipation (the voluntary freeing of a filius), as described by Gaius, was entirely based.

These two examples show exactly how the work of interpretation proceeded, and at the same time suggest its defects, viz. that it rested far too much on false assumptions or fictions, which, useful enough in reconciling people to needful though hardly welcomed improvements, obviously must have some limit. The development of the law, accordingly, by this method had come to a natural end by the time when the praetorian jurisdiction was sufficiently established to effect openly what had hitherto been carried out by stealth.

II. *The veteres.*

About the year 300 B.C. Appius Claudius Caecus drew up a record of the legis actiones which Flavius, the son of a freedman, who acted as secretary to Claudius, stole and published to the world in 304 B.C. as the *Jus Flavianum.* About fifty years later Tiberius Coruncanius, pontifex maximus, took to giving publicly oral expositions of the law to any one who cared to attend ('publice profiteri'). In the year 204 B.C. the legal formulae for actions were made public property for a second time by Sextus Aelius in the *Jus Aelianum.* Henceforth, therefore, the monopoly of the pontiffs was at an end, and a knowledge of the law was made possible for priest or layman, and so we get almost at once the school of the early

lay jurists, the 'veteres,' as opposed to their juniors the later 'classical' lawyers.

The work of a Roman jurist is summed up in four words: 'scribere, agere, respondere, cavere.' *Scribere* probably denotes the compilation of legal treatises (though Krüger thinks it means *written* responsa, *i.e.* advice given in particular cases); *agere*, the conduct of a suit in Court; *respondere*, giving answers to questions on matters of law; *cavere*, safe-guarding the interests of a client in the preliminary stages of a case, especially in the composition of a formula. Probably the veteres were more concerned in the works implied by the last three words than in written systematic exposition; were, in fact, rather lawyers than jurists; but they may be regarded, nevertheless, as starting the juristic literature which their successors, the classical jurists, brought to such perfection. The above-named Sextus Aelius (consul, 198 B.C.), M. Porcius Cato (consul, 195 B.C.), M. Manilius (consul, 149 B.C.), Cato the younger, M. Junius Brutus and P. Rutilius Rufus (consul, 105 B.C.), were among the earliest lay jurists, but systematic legal writing cannot be regarded as definitely beginning until the time of Q. Mucius Scaevola (consul, 95 B.C.), whose work, the *Jus Civile*, in eighteen books, represents the first real attempt to set out the principles of Roman law in logical order and arrangement: 'Jus civile primus constituit generatim in libros decem et octo redigendo.' Scaevola was followed by Aquilius Gallus (praetor, 66 B.C.), the author of the *Stipulatio Aquiliana*, and Servius Sulpicius (consul, 51 B.C.), the author of the first Commentary on the praetor's edict.

Two important developments are to be found in the time of Augustus; first, the placing of the more distinguished jurists in a position of pre-eminence by means of the jus respondendi;[1] secondly, a division of the jurists themselves into rival schools—the Proculians, who had for their master Labeo, and the Sabinians, who were the followers of Capito. The division lasted to the time of Gaius, who is usually spoken of as the last of the Sabinians. 'It is difficult,' says Mr. Roby,[2] 'to trace any clear principle lying at the root of the division. Whether the succession was merely intellectual, or, as has been not improbably suggested, referred to the occupancy of professorial or other posts, is not known.' Karlowa's opinion, that the Proculians clung to the ancient forms of the jus civile, while the Sabinians preferred the modifications which the jus gentium and jus naturale suggested, is opposed to many of the records of the disputes between them. At any rate, after the time of Gaius the controversy came to an end.

III. *The period of classical jurisprudence.*

The classical period of Roman law is generally considered as beginning with the reign of Hadrian; but the date must be put somewhat earlier if, as seems not unfair, P. Juventius Celsus is to be included among the writers of 'the golden age.' Celsus, who was a Proculian, took part in a conspiracy against Domitian (94 A.D.), was praetor in 106, and consul in 129. His chief work was a *Digesta* in thirty-nine books. After Celsus come Salvius Julianus and Gaius in the time of the Antonines, the first of whom is

[1] *Vide infra.* [2] Roby, i. p. 15.

known by his 'Edictum perpetuum,' and his *Digest* in ninety books, the latter chiefly by his *Institutes*, which for more than three centuries performed the same service for Roman law students as Blackstone's *Commentaries* did for successive generations of young English lawyers.[1] They are followed by Q. Cervidius Scaevola, who had for his pupil Papinian, the greatest of all the Roman jurists, whose most important works were nineteen 'libri responsorum' and thirty-seven 'quaestionum libri.' He was murdered by the servants of Caracalla.

Three other jurists remain to be mentioned. Domitius Ulpianus, a contemporary of Papinian, whose writings are represented in Justinian's *Digest* to a greater extent than any other jurist's;[2] Julius Paulus, who lived in the same period, and whose chief work was a commentary on the edict in eighty books; and Modestinus, a pupil of Ulpian's, who died after 244 A.D., and from whose writings there are three hundred and forty-four extracts in the *Digest*.

The period of classical jurisprudence, then, began early in the second century, reached its climax with Papinian, and ended abruptly in the middle of the third century; for after Modestinus the development of Roman law was carried on almost entirely by Imperial Constitutions.

The influence of classical jurists may be summed up as follows: their work was fourfold.

(1) After the 'interpretatio' of the early ecclesi-

[1] For an account of Gaius and the discovery of the MSS. of the *Institutes*, see Note I., and for a detailed account of the jurists see Roby's *Introduction to the Digest*.

[2] About one-third of the *Digest* consists of extracts from Ulpian.

astical lawyers had come to an end, the development of Roman law was carried on, as has been seen, mainly by means of the reforms effected by the praetor's edict; for although the 'veteres jurisprudentes' undoubtedly did improve the law, it was probably less by their writings than by the indirect influence which they brought to bear upon the praetors. The growth of the Praetorian law, however, came to an end with the Edictum perpetuum in Hadrian's time, and the first task of the later jurists was to take the law as stated in the edict, where it had grown up bit by bit, and reduce it to some sort of order and symmetry.

(2) The edict had resulted in a 'duplication of institutions.' A given transaction might be governed by one set of rules at jus civile, by another at jus honorarium. The classical jurists, to some extent, but by no means finally, reconciled these divergencies.

(3) The division of jurists into the schools of Proculians and Sabinians had given rise to endless differences in points of detail. Here, again, the jurists did something by way of reconciliation, though many of the disputes were settled only by Justinian himself.

(4) The law contained in edict was not final. Political reasons had rendered it impossible to effect further improvements in the law by its means, but there were new legal problems awaiting solution. These the jurists solved by what Sohm happily calls a 'new interpretatio.' Just as, at an earlier date, the XII. Tables had to be 'interpreted,' so now was it necessary to subject the Praetorian edict to a similar process. And in the result, especially in the domain of *obligations*, the classical jurists built up

a body of law which, alike in substance and form, remains a model for all time.

The writings of the Jurists as a source of law.

Under the Republic the jurists were in the habit of giving opinions (responsa) both on hypothetical cases put by their pupils and also when consulted by the litigants or the judge in actual litigation, for the judge during the formulary period was almost invariably a private citizen agreed upon by the parties, and without any special legal knowledge. But although the responsa were sought and forthcoming, they bound nobody; they had as much weight as, and no more than, that attaching to the opinion of an English barrister of to-day. If the jurist consulted were of great eminence and skill, and the facts had been properly stated to and grasped by him, his opinion probably represented the legal position, but only probably; for the judge was absolutely free to decide in the opposite sense if he thought right. The change came with Augustus, who instituted a practice which was continued by later Emperors, under which certain of the more distinguished were given a sort of *patent*, called the jus respondendi, the effect of which was that if, after being consulted, a jurist invested with this peculiar right gave a written and sealed opinion, such opinion was to be deemed 'ex auctoritate' of the Emperor, and accordingly to bind the judge, unless another jurist having also the special privilegium gave an opinion in the opposite sense, a result which, possibly, professional esprit-de-corps would not allow to happen too frequently. The chief difficulty in connection with the subject of the jus respondendi is caused by

a passage of Gaius (i. 7): 'Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est jura condere, quorum omnium si in unum sententiae concurrunt id quod ita sentiunt legis vicem obtinet: si vero dissentiunt, judici licet, quam velit sententiam sequi, idque rescripto divi Hadriani significatur.' It is obvious that it is consistent with this that not only was the judge bound by the opinion delivered 'ad hoc' by some living jurist, but by the opinions ('sententiae') found in the written works of jurists living or dead. The better opinion seems to be that Hadrian's rescript merely confirmed the existing practice, viz. that the judge was to be bound only by the opinions of living jurists who had given their responsa with regard to the particular case in actual litigation.

The practice of conferring the jus respondendi ceased after the close of the third century, and the classical jurists had come to an abrupt end with Modestinus in the middle of the same epoch. But though the great jurists were dead their works lived after them, and gradually the idea seems to have been evolved (probably about the time of Constantine) that the writings of a few of the greater jurists had a kind of special sanctity as 'quotable authorities,' and the difficulty must have presented itself as to what was to be done when, as was often the case, they differed. A partial remedy was found by Constantine, who (321 A.D.) abolished the notes of Paulus and Ulpian on Papinian, so as to restore Papinian 'uncorrupted,' and at the same time confirmed the authority of the 'Sententiae' of Paulus. About a century later (426 A.D.) Theodosius II. and

Valentinian III. devised a more effective expedient in the 'Law of Citations,' which introduced the system of a *majority* of votes. Pre-eminent authority is given to the writings of Gaius, Ulpian, Paulus, Papinian and Modestinus, and jurists quoted by them (provided the quotation can be verified with the original): if they agree the judex is bound; if they differ unequally the majority decides; if they differ and are equally divided Papinian has the casting vote; if he is silent the judge decides unaided. Obviously the remedy was as nearly perfect as can be imagined, and not the less so because every jurist subsequent to Modestinus is necessarily excluded.

Section IV. Justinian's Codification

When the Emperor Justinian came to the throne (527 A.D.) Roman law was in almost as chaotic a state as the law of England is at the present day. In England, in order to find what legal rule governs a given set of facts, it may be necessary to search the Statutes of the Realm one by one, back to feudal times, and to thread one's way through countless cases and text-books; for text-books, though never an actual source of law with us, are sometimes the only place where undoubted rules of the common law, which have never been expressed in a judicial decision, are to be found. At Rome the possible field was even wider. There were, on the one hand, the various kinds of statute law (Leges, Plebiscita, S.C.C., and Constitutions), from the XII. Tables downwards; on the other, the edicts of the praetors and the whole mass of juristic literature.

There had, however, already been some attempts towards codification for, as above pointed out, the edict had been systematised under Hadrian, and the Law of Citations had provided a means by which the skilled lawyer might reconcile the countless responsa prudentium. So, too, various attempts had been made to simplify statute law, of which the most important were—

(i.) The *Codex Gregorianus*, a private work which was published about 300 A.D., and consisted of a collection of Imperial rescripts from the time of Hadrian to 294 A.D.

(ii.) The *Codex Hermogenianus* (of uncertain date), which was another private collection of Imperial Constitutions dating from the year 294 A.D. to 324 A.D.; and

(iii.) The *Codex Theodosianus*, which was published by Theodosius II. in 438 A.D., and contained the Constitutions of Constantine I. (306-337 A.D.) and his successors.

Almost immediately upon his succession Justinian conceived the idea of codifying the whole of Roman law in two great divisions,—statute law (lex) and non-statute law (jus), and in 528 A.D. he gave instructions for the compilation of a work which should embody every existing statute. In theory, of course, it would be necessary, if such a task was to be adequately performed, to go through the laws passed by all the various legislative bodies at Rome from the kings and the Comitia Curiata to the legislation of Justinian himself. In fact, all legislative enactments prior to the Imperial Constitutions would seem, by Justinian's time, either to

have become obsolete or to have become embodied in later Imperial Constitutions or the writings of the jurists, and the *Codex* which resulted from Justinian's instructions was founded merely upon the three Codes already named, especially the *Codex Theodosianus*, and Imperial Constitutions passed since Theodosius (the 'post-Theodosian Novels'). The work was done by a commission of ten persons (including Theophilus, professor of law at Constantinople, and Tribonian), and they were authorised by Justinian not only to omit what they considered superfluous but to reconcile laws which seemed inconsistent with one another. The *Codex* was finished in the next year (529 A.D.), and thereupon received the legislative sanction of the Emperor, who abolished all preceding constitutions, whether considered singly or in any of the above-mentioned compilations; the aim, obviously, being that the *Codex Justinianus* should thenceforth be the *sole* source of Roman statute law for all time.

Justinian's next task was to systematise *jus*, which by this time meant nothing more than the writings of the jurists, who would seem to have embodied all the material parts of the early statute and edictal law into their own commentaries. Accordingly, in December 530 A.D., another commission (with Tribonian at its head) was appointed, whose object was to be the reduction of juristic literature to order in a *Digest*, just as the statutes had been systematised in the *Code*; and since, in spite of the labours of the classical jurists, there were still differences of opinion between the jurists themselves, dating back to the old division into

Proculians and Sabinians, Justinian as a preliminary measure passed his *quinquaginta decisiones* to settle such disputes. The *Digest* (or, as it is sometimes called, the *Pandectae*) was published and became law in December 533 A.D. The jurists from whose writings extracts are therein made are not confined to those mentioned in the Law of Citations, but number thirty-nine; the writings of Ulpian and Paulus together constitute about one-half of the entire work. Henceforth the *Digest* was to be the sole source of non-statute law, as the *Codex* was of legislative enactments, and, with this object, Justinian forbade the original works of the jurists even to be cited by way of explaining ambiguities in the text.

In the same year as the *Digest*, were published the *Institutes* of Justinian, drawn up, on his instructions, by Tribonian, Theophilus, and Dorotheus. The *Institutes* are founded upon the earlier work of Gaius, and are really less an original work than a new edition of Gaius brought up to date. They were intended as an elementary work to introduce students to the principles of Roman private law, and to be studied as a preliminary to the more serious task of perusing the *Digest*.

By the time when the *Digest* and *Institutes* had been completed it was obvious that the *Codex*, published little more than four years earlier, was incomplete, since in the interval Justinian, besides the quinquaginta decisiones already referred to, had promulgated other new constitutions. Tribonian, therefore, was appointed to revise the Code, so as to bring it fully up to date, and at the end of the year

534 A.D., this new Code, known as the *Codex repetitae praelectionis*, was promulgated, and is the only Code which survives to the present day. This Code provided that any future legislative measures which might be enacted should be published as *Novellae Constitutiones* ('Novels'), and subsequently about 170 such novels were passed, but they were never, as Justinian seems to have intended, cast into formal shape.

In modern times Justinian's various compilations came to be called collectively the *Corpus Juris Civilis*: the Corpus being regarded as a single work, made up of Institutes, the Digest, the Codex repetitae praelectionis, and the Novels.

Section V. The Plan of the 'Institutes'

All law is either public or private. Where both parties to a dispute before the Courts are ordinary citizens, a question of *private* law has arisen; where either party is the State, or any branch of it, the question is one of *public* law. This distinction is expressed by Justinian: 'Publicum jus est, quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem pertinet.'[1] The *Institutes* treat, in the main, of private rather than public law, though Justinian, in the last title of his fourth book, gives a brief account of public prosecutions (de publicis judiciis), which is of course part of jus publicum. Private law is divided, both in Gaius and Justinian, into the law which relates (1) to persons; (2) to things; (3) to actions.

[1] J. i. 1. 4.

The private law of a country is nothing more or less than the aggregate of rights which the Courts of that country are prepared to enforce. These rights may vary, according to the status of the person who exercises them or is subject to them. An infant and a madman, for example, have not the same legal capacity as an ordinary citizen. And, accordingly, one part of private law will be devoted to describing the effect an abnormal status has upon rights, and may, for convenience, be called 'the law of abnormal persons.' Turning next to the rights which the normal citizen enjoys, these may be incident to the ownership or possession of some piece of property (such as the right that strangers shall not trespass upon one's land), or they may not be so incident (for example, the right one has not to be held up to public contempt or not to be beaten). Another section of private law must, therefore, describe these rights which the normal citizen enjoys, and how they are acquired and lost. Finally, it must be shown how, if any right is infringed, the offender can be made to give satisfaction, *i.e.* the law of procedure.

The plan adopted by Gaius and Justinian in their *Institutes* is roughly [1] this:—

The law 'quod ad personas pertinet' (G. and J. book i.) corresponds, on the whole, with the law of abnormal persons.

The law 'quod ad res pertinet' (G. books ii. and iii.; J. books ii. iii. and iv. 5) is a statement of all the rights (whether incident to property or not) which the ordinary citizen enjoys, and of the

[1] The reason for this qualification appears later.

means by which these rights are created, transferred, or lost.

The law 'quod ad actiones pertinet' (G. book iv.; J. book iv. 6-17) corresponds to the law of procedure.

NOTE I

The Discovery of the 'Institutes' of Gaius

That a jurist called Gaius had, in the time of Antonines, written an elementary text-book on Roman law was a fact always known to students of Roman law; it was not, however, until the beginning of the nineteenth century that a copy of the work was discovered.

In the year 1816 the historian Niebuhr, who was visiting Verona, found in the library of the Cathedral Chapter a palimpsest manuscript which, upon examination, seemed to contain beneath certain writings of Saint Jerome, and in some places beneath other intermediate writing, a legal treatise. After consultation with Savigny, the conclusion was reached that the treatise in question was a copy of the *Institutes* of Gaius. In the following year the work of making a transcript was begun, and the result published in 1820.

The work so published was far from complete, partly because three folios were missing altogether, partly because much of the original copy of Gaius had been erased with pumice stone when the surface was prepared for the works of St. Jerome. About one-tenth of the whole was wanting, but, as part could be supplied from Justinian's *Institutes*, only about one-thirteenth is now missing, one-half of which relates to the fourth book. Since the first edition of 1820 the patient labour of many distinguished German scholars has done much to purify the text, and an apograph (*i.e.* fac-simile edition) of the Veronese manuscript was published by Studemund in 1874.

The Date of Gaius

The exact date of the birth and death of Gaius are unknown. He himself mentions that he lived under Hadrian (117-138 A.D.), and from the fact that he wrote a work upon an enactment of

the Senate[1] passed under Commodus, it may be inferred that he survived to that Emperor's time. Internal evidence points to his *Institutes* having been written partly in the reign of Antoninus Pius (138-161 A.D.), partly in that of Marcus Aurelius (161-180 A.D.).

The Life and Works of Gaius[2]

Of the personal affairs of Gaius there is very little record. His family name (cognomen) and his gentile name (nomen) are both lost. 'Gaius,' of course, is merely an individual name (praenomen). It was sometimes pronounced as if containing three syllables, sometimes as if containing two.

That he was a jurist, in the broad sense that he devoted his life to the law, is certain; and it is also beyond doubt that of the two Schools—the Sabinians and Proculians—he belonged to the former. Whether in his lifetime he enjoyed the jus respondendi is more than doubtful, but, at any rate, his writings were, many years after his death, given a pre-eminent place by Valentinian's Law of Citations. Besides his *Institutes* and his treatise on the S.C. Orphitianum, Gaius wrote many other works. He composed, for example, a treatise upon the S.C. Tertullianum, another entitled Res Quotidianae, another upon the Edictum Urbicum, and commentaries on the works of Quintus Mucius and the XII. Tables.

[1] The S.C. Orphitianum.

[2] For a full account see Roby, *Introduction to the Digest*, p. 174.

PART I

THE LAW WHICH RELATES TO PERSONS

THE law 'quod ad personas pertinet' does not entirely fit in with the modern division of the law of abnormal persons. If it did, we should expect to find on the one hand a *complete* account of the rights of persons under disability, on the other a rigorous exclusion of the rights which the ordinary citizen enjoys. The Roman division fails to fulfil both these expectations, for some matters relating to abnormal persons are left for other parts of the *Institutes* (*e.g.* acquisitions by a slave and other 'abnormals' are dealt with under the law 'quod ad res pertinet,' J. ii. 9; G. ii. 86 *seq.*); and in dealing in book i. with the disabilities of those subject, as slaves, to a dominus, or, as filii, to a paterfamilias, it was impossible for the writers of the *Institutes* wholly to avoid mention of the corresponding rights of the dominus or pater, *i.e.* the rights of the normal citizen, which logically belong to the jus quod ad res pertinet.[1] But, subject to these qualifications, the student who approaches the first book of the *Institutes* on the assumption that he will find there a description of the various persons at Rome who by reason of some *personal*

[1] *E.g.* G. i. 52; J. i. 8. 1 and 2.

disability did not possess a full legal *persona*—a full capacity for exercising and being subject to rights—will not be far wrong. 'Parum est jus nosse,' says Justinian, 'si personae, quarum causa statutum est, ignorentur.' And when the list of 'abnormals' is complete, there only remains the normal citizen, whose *unqualified* rights are to appear in the law relating to 'res.'[1]

To ascertain, at Rome, whether a man was or was not under disability, four questions had to be asked:—

I. Is he free or a slave?

II. Is he a citizen or a non-citizen?

III. Is he sui juris or alieni juris?

IV. Is he, though answering to all the above requirements, under 'tutela' or 'cura'?

It is the free man who is also a citizen, sui juris, and subject neither to cura nor tutela, who alone has a complete legal *persona*.

Modern civilians use the expressions 'Libertas,' 'Civitas,' and 'Familia' to denote the topics denoted by the first three questions respectively.

Section I. Libertas

Under this head must be considered—

Subsect. 1. The causes of slavery.

Subsect. 2. The legal condition of a slave.

Subsect. 3. The ways in which a slave could become free.

[1] The law of 'persons' is sometimes (especially by the followers of Savigny) treated as 'family' law, but this is open to many objections (inter alia); it is unreasonable, in an account of the family, to mention the ways in which citizenship can be acquired.

Subsect. 1. *The Causes of Slavery*

Slavery arises either—

(a) By birth, or

(b) By reason of some after event.

(a) *Birth.*—According to the civil law the condition of the child was entirely determined by the condition of the mother.[1] Accordingly, if the mother were a slave at the moment of birth, the child was a slave. And, further, birth being the vital moment, it made no difference if the mother had been a free woman when the child was conceived or at any period between conception and birth. The harshness of this application of the rule, however, was early relaxed, and by Justinian's time the child was free if the mother had been free at any of the times mentioned: 'quia non debet calamitas matris ei nocere qui in utero est.'

To the rule itself certain exceptions were made by the S.C. Claudianum, which provided that—

(i.) If a freeman had a son by a slave woman whom he believed free, the son should be free. This was repealed by Vespasian.

(ii.) If a free woman cohabited with the slave of another with the master's consent, her issue became slaves. A provision repealed by Hadrian; and

(iii.) If a free woman cohabited with a servus alienus and the master objected and denounced her three times to the magistrate, the woman, and her issue, were to be awarded as slaves to the master, who also was to take the whole of her property. This was not repealed until the time of Justinian himself.

[1] Unless the marriage amounted to justae nuptiae, *infra*.

(*b*) *Slavery by reason of an after event.*—A person born free might become a slave in the following ways. In Justinian's time—

(i.) By capture in war—said to be jure gentium, as opposed to jure civili.

(ii.) By collusive sale, *i.e.* a free person might allow himself to be sold as a slave in order to share the price and then defraud the purchaser by declaring his true status, but the practice early arose for the praetor to refuse him (if old enough to know better, *i.e.* over twenty years) his proclamatio in libertatem, and so in effect he became a slave. This praetorian rule seems subsequently to have been confirmed by a S.C.

(iii.) Persons condemned to death, or to the mines, or to fight with gladiators or wild beasts, became *servi poenae*; and

(iv.) A freedman guilty of gross ingratitude to his late master might be recalled into slavery (*revocatus in servitutem*).

Under the old law citizens who evaded the census or military service might be sold 'trans Tiberim' as slaves; the debtor who suffered manus injectio (*infra*) became one when ultimately sold by his creditor, as did the thief caught in the act[1] (fur manifestus). Finally, a free woman might become a slave under the S.C. Claudianum, *supra* (*a*) iii.

Subsect. 2. *The Legal Condition of a Slave*

According to the *jus civile* a slave was a *res* and not a *persona*. Like any other *res* he could be

[1] But see G. iii. 189.

owned by several masters or one, or one man might have a life estate (usufruct) in the slave, the reversion (dominium) being in another. Being a thing, the slave had no sort of right;[1] he could be killed or tortured at his master's caprice, he could own no sort of property, nor could he be regarded as capable of being legally bound by or of legally binding others by obligations. The only qualifications to this strict view, which, however, serve to show that even according to the civil law the slave was not absolutely on the same level with the other animals, are—

(i.) The fact that the master exercised *potestas* over him, for 'potestas' is a term only applied in relation to *human* beings.

(ii.) The capacity the slave possessed of being made, by proper methods, a *free* man.

(iii.) The fact that the slave could act as his master's agent, not in the modern sense that he could affect his master with liability, but in the sense that the master might *benefit* by acquiring proprietary rights through his slave, or by taking any profit there might be under his slave's contracts ('melior condicio nostra per servos fieri potest, deterior fieri non potest').

In course of time this, the strict theory, became materially modified.

Though originally the master possessed absolute rights over his slave's body (jus vitae necisque), it is impossible to suppose that in early Rome these, or the minor rights they implied, were either generally

[1] 'In servorum conditione nulla differentia est.' However much the social condition of slaves might differ, and there were great differences, *e.g.* between a favourite domestic slave and a servus poenae, all were alike in the eye of the law, and enjoyed merely the capacity to become free.

exercised or abused. Slaves were few in number and corresponded rather to our domestic servants and farm labourers than to slaves in the modern sense, and they were probably well enough treated by their masters. But with the growth of Rome as a world power the conception of slavery changed. During the late Republic and under the Empire the number of slaves became immensely increased, chiefly owing to the number of prisoners taken in war, and it was not at all uncommon in the time of Horace for an ordinary citizen to possess 200 slaves. Necessarily the old domestic relations disappeared and the increase of wealth and luxury, with the resulting corruption and cruelty, led to the abuse of the master's strict rights. Under the Empire, therefore, legislation was found necessary for the protection of slaves. By a lex Petronia (passed some time before 79 A.D.) masters were forbidden to deliver their slaves to the beasts without a magistrate's order; by an edict of Claudius slaves whom their masters abandoned as old or infirm thereby acquired their freedom; Hadrian required the consent of the magistrate in all cases before death was inflicted; Antoninus Pius made it obligatory upon masters who had been guilty of excessive severity (intolerabilis saevitia) towards their slaves to sell them to some more considerate person, and the same Emperor provided that the provisions of the lex Cornelia de Sicariis (81 B.C.), which made the killing of a servus alienus homicide, should be extended to meet the case of a master who killed his own slave without cause ('qui sine causa servum suum occiderit, non minus puniri jubetur quam qui servum alienum occiderit'). But though the slave came thus to

acquire the right not to be killed or grossly ill-treated, he could never personally assert such right or any other; for while it was recognised from quite early times that a slave might have a peculium, *i.e.* certain property such as clothes or furniture, which he was allowed to enjoy personally, the enjoyment was de facto merely; for the peculium belonged, in law, like the slave himself, to the master, who could resume possession at any moment. Under the Empire this peculium was extended to earnings made by and gifts to the slave, who might so acquire considerable sums, the peculium remaining, like the earlier kind, in strict law the property of the master. But masters do not seem to have largely exercised their right to resume possession, and we find slaves purchasing their freedom from their masters with their peculium. On being freed a slave took his peculium in the absence of express agreement to the contrary. Subject to what may be called the slave's *moral* right to his peculium, everything the slave acquired he acquired for his master. Accordingly if on a sale, for example, a horse or land is legally transferred to the slave of Maevius, the ownership at once vests in Maevius: 'Item vobis adquiritur, quod servi vestri . . . nanciscuntur . . . Hoc etiam vobis et ignorantibus et invitis obvenit.' And the principle is not confined to things transferred to the slave on a change of *ownership*, *e.g.* on a sale, but extends to things merely in his *possession*, so that if the possession ultimately ripens into *ownership* under the rules of *usucapio*,[1] the master benefits by the *mere possession* of his slave.

[1] *Infra.*

In the case where a slave belongs to one master by a bare legal title, to another in equity, the latter only profits. Further, if the master were entitled merely to an usufruct or life estate in the slave, only what the slave acquired by means of anything belonging to the master ('ex re nostra') or by the slave's own labour ('ex operis suis') belonged to the master.[1] So, *e.g.* if Titius has an usufruct in a slave, and Maevius the dominium or reversion, and Balbus leaves the slave a legacy, Maevius takes and not Titius; for the legacy accrued to the slave neither by means of anything belonging to Titius nor by the labours of the slave.

A slave, being a human being, might, as a fact, make an agreement either with his master or some third person. In neither case did the agreement amount to a contract in the strict sense, because the slave could neither sue or be sued upon it; but—

(i.) If made with a third person, the latter incurred a civil obligation, which the slave's master could enforce, and so secure the benefit of the promise.

(ii.) In certain cases the master might be liable on such contract, viz. by means of an actio adjectitiae qualitatis;[2] and

(iii.) In any case a slave's contract gave rise to 'natural' obligations, which, like our 'contracts of imperfect obligation,' though not *enforceable* by law, were not without legal consequence. Suppose, *e.g.* a master contracted an obligation with, resulting in a debt due to, his slave; the obligation to pay was

[1] The rule was the same with a bona-fide serviens (p. 63) and a servus alienus whom the master thought was his own slave.

[2] P. 395.

naturalis, and could not be sued on. But if the master freed the slave and paid the debt, and, afterwards repenting, tried to get it back, the 'natural' obligation sufficed to defeat him. And the case would be the same had the debt been contracted and paid by a third person.

With regard to wrongs or delicts, a slave might be wronged either by his master or a third person. If by his master, he had no legal redress, though the State might, under the legislation already noticed, interfere and punish the master on his behalf. If the injury were the act of a third person, the slave, again, never himself had a remedy which he could personally enforce, the wrong was regarded as done to the master; so, for example, if it resulted in actual damage to the slave, the master could sue under the lex Aquilia;[1] if, on the other hand, the act were intended primarily as an insult to the master, he could sue by the actio injuriarum. That the wrong was wholly regarded as done to the master is shown by the fact that where a slave owned in common by two or more persons had suffered 'injuria,' the damages were estimated, not according to the respective shares of the masters in the slave, but according to their respective positions ('ex dominorum persona quia ipsis fit injuria'). Finally, if the slave had been wilfully killed, the master could prosecute the offender under the lex Cornelia de sicariis; a prosecution, as we have seen, to which the master himself was made liable, if he killed his slave without cause, by Antoninus Pius.

With regard to wrongs done by a slave, if to the

[1] P. 331.

master, no legal obligation arose, though the master might (subject to the protective legislation above noticed) take the law into his own hands, and be his own judge and executioner. If the slave had wronged a third person, the master was at first bound to give him up to the vengeance of the person wronged; later, he had the option of either so surrendering him, or, alternatively, paying damages or compensation.

Subsect. 3. *The Manner in which a Slave could become Free*

This might happen in one of three ways :—

(i.) By the doctrine of *Postliminium.*

If a Roman citizen were captured in war by the enemy, he thereupon became a slave and lost all his legal rights. If, however, he escaped from the enemy and got back to Rome, he thereby not merely became a free man again, but by the fiction of postliminium his freedom 'dated back' to the moment of capture; so that, with some limitations, he got back his old position and old legal rights, as if he had never been away.

(ii.) By statute, *e.g.* under the Edictum Claudianum.[1]

(iii.) By manumission, *i.e.* the master himself frees the slave, and this method by which freedom could be gained was at once the most common and most important. Originally, the only way in which manumission could be effected was by means of an *in jure cessio* or fictitious law-suit (*manumissio vindicta*). In early times nothing is so distasteful as a change of status, and there was almost certainly once a period when a man who was born a slave necessarily so

[1] P. 48.

remained until the day of his death; it was unthinkable that he could ever become a freeman. In time, however, it must, however dimly, have become recognised that unless people were, at any rate exceptionally, allowed to better their condition, society would stagnate. And so a method is adopted which, while it effects the desired improvement, reconciles the conservative instinct by pretending that, in fact, there has been no change at all. The proceedings in manumissio vindicta were as follows. The master, a friend of his who is to be the plaintiff in the ensuing action, and is called the *adsertor libertatis*, and the slave come before the praetor. The adsertor libertatis, holding a rod (vindicta—whence the name of the action) in his hand, claims—not that the slave ought to be freed, but that he is, *i.e.* always has been, a freeman: 'Hunc ego hominem ex jure Quiritium liberum esse aio,' and thereupon touches him with the rod. The master makes no defence, and probably taking hold of the slave, at once releases him (*manu mittere*), and so admits his freedom. Whereupon the praetor gives judgment: 'Quandoque,' the dominus, 'non contra vindicat hunc ego hominem ex jure Quiritium liberum esse dico.'[1] Very soon these proceedings become simplified; first, the part of the adsertor libertatis is taken by the praetor's lictor; then the master ceases to play even the small part assigned to him in the comedy; the presence even of the lictor becomes unnecessary; and, probably even before Justinian's time, it was a valid manumissio vindicta if the master declared his intention (that the slave should be free) before the magistrate in an informal way, and even

[1] The above account is largely conjectural. See Roby, i. 26, note.

out of Court ('servi vero a dominis semper manumitti solent, adeo ut vel in transitu manumittantur, veluti cum praetor . . . in balneum vel in theatrum eat,' J. i. 5. 2).

But although manumissio vindicta was the oldest, we very soon find along with it two equally effective methods of conferring freedom, viz. manumission *censu*, and *testamento*, which, together with manumissio vindicta, are sometimes known as the *manumissiones legitimae*.

Manumission censu rested, like the older form, vindicta, on a fiction; the slave, with his master's consent, is inscribed on the list of free citizens, on the supposition not that he is being freed, but that he is already a free man. This method of manumission became, with the census itself, obsolete during the Empire.

Manumission testamento was the bestowal of freedom by the master's last will, and he might either give the slave his freedom directly (in which case the slave became *libertus orcinus*, because the person who had given him his freedom was dead), or might give it indirectly by requesting the heir or legatee to manumit,[1] in which case the slave was not libertus orcinus, but the libertus of the heir or legatee, as the case might be.

These three 'legitimae' methods of manumission were, according to the civil law, the only methods by which a slave could be freed so as to become a citizen, and in addition the master manumitting had to possess full Quiritary ownership of the slave.[2]

[1] If they refused, the praetor would compel them to manumit.

[2] If a slave belonged to several masters, and one manumitted with-

Before the close of the Republic, however, several forms of manumission of a less formal and public character (known as the *manumissiones minus solemnes*) had come into use; thus a master might attempt to manumit his slave by declaring him free before friends ('inter amicos'), or by inviting him to dinner, or by letter. But slaves so manumitted remained (as did slaves formally manumitted by a master who was equitable owner merely) de jure slaves still, but were known as persons 'in libertate,' since the praetor refused his assistance to a master who went back upon his declared intention to free his slaves.

At the beginning of the Christian era three important enactments were passed with regard to manumission—the lex Aelia Sentia, 4 A.D.; the lex Fufia Caninia, 8 A.D.; and the lex Junia Norbana, 19 A.D.; of which the first two were distinctly retrogressive, in that they imposed restrictions on manumission at a time when one would have expected an exactly opposite policy. Probably there were three main reasons for the legislation in question—

(*a*) The interest of the creditors of the master that valuable property (*i.e.* his slaves) should not be fraudulently put out of their reach (by manumission);

(*b*) Of the heir, where the manumission was by will;

(*c*) Of the State, which found in freed slaves a dangerous class of citizens.

out the consent of the rest, the slave originally remained so still, the share of the master manumitting lapsing to the others. Justinian provided that the dissenting masters should be compelled to join in the manumission on receiving their share of the slave's value.

The provisions of the first of these laws—the lex Aelia Sentia, may be stated as follows:—

1. All manumissions in fraud of creditors are void, and a manumission is fraudulent where the master is either insolvent at the time or becomes so by the manumission itself. But—

(*a*) The manumission must not only as a fact be fraudulent, the master must also have a fraudulent intention; and

(*b*) Notwithstanding the provision, a *testator* who is insolvent may, by his will, institute his slave his heir, at the same time giving him his freedom: 'ut . . . creditores res hereditarias servi nomine vendant, nec injuria defunctus afficiatur' (J. i. 6. 1).

2. A slave under thirty years of age could only be freed so as to become a *civis* by the proceedings *vindicta*, and then only after a good legal reason (*e.g.* wishing to marry a female slave) had been shown before a council, which, at Rome, was composed of five equites and five senators, in the provinces of twenty recuperatores. A slave under thirty manumitted in any other manner became a person 'in libertate' merely. This provision of the lex Aelia Sentia did not, however, prevent a slave getting his freedom by being instituted heir to, and given his liberty by, an insolvent master.

3. A master under twenty years of age could only manumit his slaves in a similar manner; *i.e.* by vindicta, after good cause shown to the council (*causae probatio*). Manumission by such a master in any other manner was void.

4. Slaves who before manumission had been subjected to degrading punishment (*e.g.* had been

branded or made to fight in the arena), were given, on manumission, a special status, viz. that of enemies surrendered at discretion (*dediticii*). A dediticius, though free and not a slave, had none of the rights of a citizen, could never under any circumstances better his position (*e.g.* become a citizen), and was not allowed to live within 100 miles of Rome. If he broke this last provision he became a slave again, and could never be subsequently freed, so as even to become a dediticius: 'pessima itaque libertas eorum est' (G. i. 26).

5. A means was provided by which a slave who had been manumitted before the age of thirty otherwise than by *vindicta* after *causae probatio* could become a Roman citizen. This is sometimes called '*anniculi probatio*,' and was as follows: if a slave so imperfectly manumitted, married a woman who was a civis, or a Latin colonist, or of the same class as himself, in the presence of seven Roman citizens of full age, and a son was born of the marriage, who attained the age of one year (anniculus), then on proof of these facts to the praetor at Rome, or the governor in the provinces, the ex-slave, his wife (if not already a citizen), and the child[1] all become Roman citizens.

The second law of the series, the lex Fufia Caninia, 8 A.D., was passed to prevent excessive manumission of slaves by *will*, it having become common for testators to set free inordinate numbers of their slaves in order to secure their presence, as living witnesses to their kindness, at their funeral. The actual numbers are unimportant: the owner of from two to ten slaves might only manumit half; of ten to thirty, one-third; and so on. The slaves to be manumitted

[1] Exceptionally the child might be already a citizen (G. i. 30).

had to be expressly named, and in no case might the number exceed one hundred.

The last law of the series, the lex Junia Norbana, 19 A.D., created, like the lex Aelia Sentia, a new status. At the date when it was passed, manumitted persons (apart from dediticii) were of two kinds, either free citizens, *i.e.* if manumitted by a manumissio solemnis, and in compliance with the lex Aelia Sentia, or 'in libertate,' *i.e.* de jure slaves still, but protected by the praetor; such were—

(*a*) Persons manumitted by a manumissio minus solemnis, *e.g.* inter amicos.

(*b*) Persons manumitted by a master who was only equitable owner, *in bonis*; and

(*c*) Slaves manumitted under the age of thirty, otherwise than by *vindicta*, after *causae probatio.*

Upon all these persons, hitherto only 'in libertate,' a new and definite status was conferred; they were henceforth to be known as *Latini Juniani*, their position being based upon Latinitas, a status which had been enjoyed by certain Latin colonists. A Latinus Junianus had no public rights, nor had he the *connubium.*[1] But he had part of the *commercium, i.e.* he could acquire proprietary and other rights *inter vivos*, but not *mortis causâ.* A Latinus Junianus, therefore, could neither take under a will (save by way of fidei commissum[2]) nor could he make one, and so on his death all his property devolved upon his late master (or 'patron'), just as if he had always been a slave: 'ipso ultimo spiritu simul animam atque libertatem amittebant.' But, subject to

[1] *I.e.* the right to make a marriage, giving rise to patria potestas over the children. [2] P. 224.

these disabilities, a Latinus Junianus was a free man, and his children, though not, like the children of citizens, under his potestas, were *full citizens*. A Latinus Junianus, unlike a dediticius, could improve his position and become a citizen in many ways, of which the following are examples:—

(*a*) Iteratio, *i.e.* the first manumission being defective, being freed again in a strictly legal manner.

(*b*) By imperial decree.

(*c*) By the 'anniculi probatio' of the lex Aelia Sentia; a method which, though confined by that law to slaves under thirty who had been imperfectly freed, was afterwards extended to all those persons who before 19 A.D. had been known as 'in libertate,' and who afterwards became Latini Juniani.

(*d*) Erroris causae probatio, *i.e.* a Latinus Junianus meaning to avail himself of the anniculi probatio method, marries a peregrina by mistake. On proof of the mistake, the marriage and the year-old child, he can take advantage of the provision of the lex Aelia Sentia in spite of the mistake.[1]

(*e*) If a woman, by bearing three children.

(*f*) *Militia*, *i.e.* by military service (G. i. 32*b*); *nave*, *i.e.* building a ship and importing corn for six years (G. i. 32*c*) *aedificio*, *i.e.* making a building (G. i. 33); *pistrino*, *i.e.* establishing a bakeshop (G. i. 34).

After the lex Junia Norbana, we find the following classes of persons, under the division of the law of persons into free men or slaves:—

1. Ingenui or persons born free.

[1] The principle of erroris causae probatio was applicable to other cases, *e.g.* a citizen marrying a Latin by mistake. See Gaius, i. 67.

2. Libertini or Liberti, *i.e.* ex-slaves who, on gaining their freedom, became cives.

3. Latini Juniani (before 19 A.D. 'in libertate') *i.e.* ex-slaves who, on manumission and by reason of some defect therein, become something short of full citizens.

4. Dediticii, *i.e.* ex-slaves who, having suffered ignominious punishment for crime, on manumission become, under the lex Aelia Sentia, the possessors of 'pessima libertas.'

5. Slaves proper. The position of the third, fourth, and fifth classes has been already described, the ingenuus is the citizen with full or normal rights, and therefore it merely remains to notice how the position of the libertinus differed from that of a man born free.[1]

It was chiefly[2] his duties and obligations with regard to his late master which distinguished a libertinus from an ingenuus. These obligations (which descended on the patron's death to his children) were of three kinds:—

1. *Bona*, the patron had certain rights of intestate succession on the death of the freedman without issue.

2. *Obsequium*, the freedman was bound to treat his late master with the same respect as a child his parent; he could not bring any action against him without the praetor's permission. If his patron or patron's family fell upon evil days, the freedman was bound to provide them with subsistence. As already seen, if the freedman were guilty of gross ingratitude

[1] The children of libertini were 'ingenui.'

[2] Originally a libertinus could not marry an ingenua, a restriction later cut down to a veto on marriage with a person of senatorial rank. Justinian abolished it altogether.

(and bringing an actio famosa, even with consent, was classed as such), he could be 'in servitudinem revocatus.'

3. *Operae*, the freedman was under a moral duty to perform certain reasonable services (operae officiales) for his patron; a moral duty which was usually strengthened by an oath (jurata promissio liberti), taken by the freedman at the moment of manumission.

These jura patronatus the patron might lose by his own act, *e.g.* if without justification he brought a capital charge against the freedman, or by the act of the Emperor, who by a decree (*restitutio natalium*) might put the libertinus in the same position as an ingenuus both in relation to his patron and at public law (where he suffered from certain disabilities[1] which an ingenuus did not share). These public disabilities could also be removed by the Emperor granting the freedman the *jus anulorum aureorum*, but this had no effect on the patron's rights.

Justinian's changes in the law relating to *Libertas* were, mainly, as follows:—

1. He abolished altogether the Latini Juniani and dediticii, and made all manumitted slaves Roman citizens.

2. He entirely repealed the lex Fufia Caninia.

3. He repealed the provision of the lex Aelia Sentia with regard to the manumission of slaves under thirty years of age.

4. He retained the provision of the same lex that a master under twenty years of age could only manumit *vindicta* after *causae probatio*, but modified

[1] He could not, *e.g.*, be a magistrate or a senator.

it so as to enable a master to manumit by *will* at eighteen, and later still, by a novel, at fourteen years of age.

5. The provision of the lex Aelia Sentia making manumission in fraud of creditors void was retained.

6. A slave instituted heir gets his liberty by implication 'ex ipsa scriptura institutionis,' whether his master is insolvent or not.

7. The distinction between legal (quiritary) and equitable (bonitary) ownership is abolished.

8. A manumissio solemnis[1] is no longer requisite for a valid grant of freedom, practically any declaration of intention, however informally expressed, is sufficient.

9. By his 78th Novel Justinian gave restitutio natalium and the jus anulorum aureorum to all freedmen, but provided that this was not to affect the jura patronatus without the patron's consent; they thus became, save in relation to their patron, in exactly the same position as ingenui.

Before we leave the division of men as slaves or free, the position of the following persons in positions more or less akin to slavery requires notice.

1. *Statu Liber* was a slave made free by will, but not until some condition had been fulfilled, *e.g.* 'Let my slave Maevius be free if he pays my heres 100 aurei.' Until it was fulfilled he was the slave of the testator's heir. If sold by the heres to a stranger, or if some third person got possession of the slave and subsequently acquired ownership by usucapio,

[1] Manumissio in ecclesiis had before Justinian's time been established by the Church as a lawful means of granting freedom, and was sanctioned by Constantine.

the benefit of acquiring freedom when the condition was fulfilled nevertheless remained with the slave.

2. *Cliens* denotes a plebeian who, in early Rome, before the plebs had become part of the State, had attached himself to a patrician, who was called his patronus, and to whom he stood in much the same relationship as a filiusfamilias to his pater, but he was protected against too harsh an exercise of his patron's authority by a religious sanction merely: 'patronus si clienti fraudem faxit sacer esto' (XII. Tables).

3. *Coloni* are the 'villeins' of the later Empire;[1] they were in the eye of the law free, but they were inseparably attached to the soil (glebae adscripti); they could not leave it without their lord's consent, and were in many respects like ordinary slaves: 'licet conditione videantur ingenui, servi tamen terrae ipsius, cui nati sunt, existimentur.'[2]

4. *Bona-fide serviens* is the free man who acts as slave for a master under a genuine mistake as to his status; so long as he remains in this condition, everything he makes by his labour (ex operis suis), or by means of the goods of his supposed master, belong to the master.

5. *Auctorati* were free men who hired themselves out as gladiators; they retained their freedom, but were like slaves in that if they were enticed away from their hirer he could bring an actio furti.

6. *Redempti* were men who having been taken

[1] Sohm, p. 179.

[2] The term 'colonus' is also used, in a wholly different sense, to denote a *free* person holding land under a contract of 'locatio-conductio.'

prisoners in war had regained their liberty on condition that ransom money was paid, and until this condition was fulfilled their late captor was regarded as having a lien on them to secure payment.

7. *Judicati, nexi*; under the old law a man who suffered manus injectio (*e.g.* because he was 'judicatus,' *i.e.* condemned as a debtor by the Court or 'nexus,' *i.e.* liable on a contract to this process) might be adjudged (*addictus*) by the magistrate to the creditor, who at the end of sixty days, and after certain formalities, had the right to sell him as a slave 'trans Tiberim.' After becoming 'addictus' and before being sold, the status of such a person was a kind of de facto slavery, as is proved by the fact that he might be the object of 'furtum,' but de jure he remained a free man, and so might make a valid legal agreement with his creditor, *e.g.* to work off the debt by his labour.

8. *Persons in mancipii causa*, vide infra '*Familia*.'

Section II. Civitas

Though adopted by modern civilians, this division is not clearly made either by Gaius or Justinian. This, in the case of Justinian, is not strange, because in his time every subject of the Empire, unless a slave, was a citizen. But in the time of Gaius citizenship was still, to some extent, the cherished privilege of the Romans themselves, and there were very many peregrini occupying a status wholly different from that of citizens of Rome; it might have been expected, therefore, that Gaius, after stating that all men are either slaves or free, should have gone on: 'and,

again, all men are either citizens or non-citizens.' In fact, however, Gaius only notices citizenship indirectly, *e.g.* in enumerating the various ways by which a Latinus Junianus might attain to the dignity.

In early Rome a man's public and private rights entirely depended upon whether he was a citizen or not, and even after the peregrinus had acquired some sort of position in the eye of the law by having his transactions regulated by the rules of jus gentium as administered by the praetor peregrinus, he still could not effect any single legal result by virtue of the rules of the civil law. The citizen, on the other hand, not only had the public rights implied by the *jus suffragii*, *i.e.* the right to vote, and the *jus honorum*, the right to hold public office (*e.g.* a magistracy), but he also possessed the *jus connubii*, the right to contract a marriage, giving rise to patria potestas over the issue, and the *jus commercii*, the right to have his legal relations (other than marriage) defined and sanctioned by the civil law; *e.g.* his capacity to acquire property, to make a contract, to make or take under a will.

Midway between the civis and the peregrinus was the Latin. Prior to the leges Julia and Plautia Papiria, passed at the end of the Social War, *Latinitas* denoted the status of the free inhabitants of Latium or of certain Roman colonies, who, though possessed of no public rights, had the jus commercii and, in certain cases, the jus connubii as well. By the last-mentioned laws full civitas was given to all the inhabitants of Italy, so that thenceforth *Latinitas* is no longer a word having any geographical signification, but becomes a legal term applied either to the

Latini Juniani, whose status was based upon it (though in their case the commercium, as above stated, was limited to acts *inter vivos*), or to the inhabitants of towns or countries outside Rome (*Latini Coloniarii*).

The importance of civitas began to decline when, under Marcus Aurelius, it became a mere question of purchase, and after Caracalla its significance was almost wholly lost, for that Emperor extended it not merely to the Latini Coloniarii, but to all peregrini subject to the rule of Rome, so that thenceforth the only free persons who were not cives were Latini Juniani and Dediticii. Justinian, as already stated, abolished both these classes, and in his time, therefore, every free subject of the Roman Empire was, ipso facto, a citizen too.

Section III. Familia[1]

This division of the law of persons is based upon all men being either 'sui juris,' *i.e.* independent of the control of some other private person, or 'alieni juris,' *i.e.* subject to such control or 'potestas.' A slave, of course, is alieni juris, being under *dominica potestas*, but, since slavery has been discussed already under the division 'Libertas,' the *Institutes* deal here only with *free persons* under potestas.

Inasmuch as the legal relationship known as *agnatio* is at the root of this branch of the law, it

[1] A man's 'familia' is sometimes opposed to his 'pecunia.' In this sense there is some ground for thinking that it included everything which he could sell by a mancipation, viz.: originally his children in power, his wife in manu, and free persons given him as noxae ('in mancipii causa'), as well as those objects which are specifically called 'res mancipi' (p. 120).

seems best to describe it before explaining the law of 'familia' in detail.

The modern conception of kinship would have been described by the Romans as 'cognatio.' It is the natural tie of *blood*. A man is 'related' to his brother, his sister, father, aunt, cousin, and so on by this bond and no other, and perhaps its most important *legal* result is that the relationship may give rise to certain rights of succession on the death of such relative without leaving a valid will. At Rome, the relationship which the law recognises and, at first, exclusively recognises, is that which the Romans expressed by the term 'agnatio'; a man's legal relatives are not his 'cognates' as such, but his 'agnates.'

Agnates are those persons who are regarded as related to each other, either because they are in the common potestas of some ancestor, or because they would have been in such potestas were the ancestor still alive.[1] Roman private law was based upon the idea that each family had a head; the head being the eldest living male ancestor. In his potestas were all his descendants through males; so that if the great-grandfather happened to be alive, a grandfather of sixty was as much a filiusfamilias, and as much subject to the control called patria potestas, as the youngest infant in the family in question. All persons subject to the potestas were agnati to each other, and they so remained even after the common ancestor had died. Since the only person who could exercise potestas was a male, and since most people were under potestas because *born* in potestas, the

[1] *Cf.* Maine, *Ancient Law*, p. 149.

writers of the *Institutes* define agnates as 'cognati per virilis sexus personas cognatione juncti, quasi a patre cognati' (J. iii. 2. 1), but this definition is inaccurate because, although agnates are primarily cognates traced through males, the agnatic household might be *artificially* diminished or increased. It would be diminished by the marriage of a daughter into another family, by the release (emancipation) by the ancestor of any descendant in power, and by the ancestor giving a descendant by adoption into another family. Conversely it would be increased by the accession of a woman who 'married into' the family and a stranger brought into it by adoption or arrogation. Agnates, therefore, may be particularly described as (*a*) 'blood relations' (cognati), traced solely through males, excluding such cognates as have left the family by emancipation or otherwise, and, in addition to these blood relations, (*b*) such persons, unrelated by blood, as have been brought artificially (by adoption or otherwise) into the family.[1]

The law comprised under the division falls into three parts. The head of the family (paterfamilias) has rights over—

1. Descendants through males (patria potestas).
2. Free persons in the position of slaves (persons in mancipii causa).
3. His wife (manus).

[1] Other relationships known to the Romans need brief mention: *Gentilitas* was the relationship subsisting between members of the same gens or clan; the gens being an aggregate of agnatic families bearing a common name. The gens originally succeeded to a man's property upon his death intestate, and the failure of his 'sui heredes' and, after the XII. Tables, his 'nearer agnates.' *Affines*, the cognati of each party to a marriage, were affines to the other party (*cf.* the English 'brother-in-law').

Subsect. 1. *Patria Potestas*

Patria potestas may be considered in three aspects :—

A. Its creation.
B. Its effect.
C. Its termination.

A. *Its origin.*

Patria potestas arises (i.) by justae nuptiae, (ii.) by legitimation, (iii.) by adoption, (iv.) by arrogation.

(i.) The children of a lawful marriage are in the potestas of their father ('in potestate nostra sunt liberi nostri quos ex justis nuptiis procreaverimus'),[1] provided that he himself was not a filiusfamilias, in which case the children fall under the same potestas as their father. And not only do the children of the marriage fall under potestas, but all remoter issue through males. Thus if Titius, not being subject to potestas, marries and begets a son A and a daughter B, both fall under his potestas. If A marries and begets children, these also are subject to Titius's power; but if B marries, these children do not come under the potestas of Titius but, if the marriage was 'in manum,' under the potestas of her husband or the head of his family. If a woman not being subject to potestas or to manus begot children, they were, nevertheless, not regarded as in her potestas; and, therefore, her family ended with herself: 'mulier familiae suae et caput et finis est.' For the requisites for justae nuptiae, see Manus, *infra.*

(ii.) *Legitimation.*—'Aliquando autem evenit ut

[1] J. i. 9 *pr.*

liberi quidem statim ut nati sunt, in potestate parentum non fiant, postea autem redigantur in potestatem' (J. i. 10. 13).

Legitimation dates solely from the Christian era; the chief instances given of it by Gaius being in connection with 'anniculi probatio' and 'erroris causae probatio,' *supra*. In the time of Justinian a child born 'out of lawful wedlock' could be made legitimate and so brought under patria potestas in one of three ways:—

(*a*) *Oblatio curiae.*—Theodosius and Valentinian provided that citizens might legitimate their natural children by making them members of the *curia* (*i.e.* the order from which magistrates were chosen in provincial towns). The reason for this exceptional piece of legislation was that to be a member of a curia was a costly distinction, and that the order was in danger of decaying owing to the unwillingness of the citizens to bear the burden. Legitimation effected in this manner had, up to a certain point, the same effect as if made in the two ways next mentioned. The child, in all three cases, becomes legitimate, subject to patria potestas, and acquires the right of succeeding his father. But whereas children made legitimate by either of the two other methods enter their father's family for all purposes, and so get possible rights of succession to other members of the family, a child made legitimate by oblatio curiae acquired no succession rights to any member of the family save his own father.

(*b*) *Per subsequens matrimonium.*—Legitimation by the subsequent marriage of the parents seems to have been first introduced by Constantine. In the

developed law of Justinian three conditions were necessary: the marriage must have been possible when the child was conceived (and therefore the children of an incestuous marriage, or born in adultery, or born from the union of a citizen and a slave, would not have their position improved by a subsequent marriage between the parties), there must be a proper marriage settlement, and the child must not object; the reason for this last requirement was that, being born out of wedlock, the child was sui juris and under no control, and therefore ought not to be brought under potestas and made alieni juris against his will.

(*c*) *By Imperial rescript.*—Justinian provided that if legitimation per subsequens matrimonium were impossible (*e.g.* the mother were dead or already married to some person), and if there were no legitimate child, natural children might by a rescript, given either on the application of the father or after his death, be put in the same legal position as if born legitimate.

(iii). *Adoption.*—Both Gaius and Justinian use the word adoptio to include the *adoptio* of a person alieni juris and the *arrogation* of a person sui juris. Here the word is confined to the former.

Adoptio was where a person under one potestas was given into another potestas. It therefore involved two great acts: the extinction of the agnatic tie in relation to the original family,[1] the creation of an agnatic tie in relation to the acquired

[1] This was the only thing needed in emancipation (*infra*); hence the likeness in the proceedings in emancipation and the first part of adoption.

family, and originally, no doubt, an adoption was regarded as just as impossible as the freeing of a slave. Adoption is thought to have been first made feasible by reason of a construction put by the jurists upon the provision of the XII. Tables which aimed merely at punishing too callous fathers. This (as above stated) was to the effect that a father who sold his son as a slave three times should thereby for ever lose his patria potestas over such son, and is the basis of the first part of the ceremony of adoption as described by Gaius, which has for its object the breaking of the old agnatic tie, and succeeds in so doing by means of three solemn conveyances or sales and two lawsuits. The process is as follows: A, the natural father, procures the attendance of his son B (to be given in adoption), five Roman citizens above the age of puberty, a libripens (*i.e.* another citizen holding a pair of scales), and a friend C. C buys B from A for a nominal sum, using the appropriate words and forms. Thereupon B becomes in the position of a slave (in mancipii causa) to A, B, and C thereupon go before the praetor, A claims that B is really a free man, C does not deny it, and the praetor decides that B is free. In other words, C has manumitted B *vindicta*, and thereupon, since only three sales can destroy patria potestas over a son,[1] B reverts into the potestas of A. Accordingly, the same sale and the same fictitious lawsuit are gone through a second time, and for a second time B, after being 'in mancipii causa' to C, falls backs into A's potestas; apparently a small result for so much trouble, for he was in A's potestas ab

[1] One is enough for a daughter or grandson.

initio. Then for a third time B is sold to C, and for a third time stands to him 'servi loco,' but the provision of the XII. Tables has been called into operation, and A's patria potestas, the old agnatic tie not only between A and B, but between A and all the members of his family on the one hand, and B on the other, has disappeared for ever, and the first part of the ceremony of adoption is complete.

The object of the second half of the proceedings, viz., the creation of a new agnatic relation between B and D, the intended adopter, might have been attained by D claiming, in a fictitious suit, that A, whom C asserts is 'in mancipii causa,' to him, is really D's filius, C making no defence; but usually C makes a mancipation or sale of B back again to A, his natural father, to whom B will now stand not as a son but 'in mancipii causa,' and then by a fictitious lawsuit (in jure cessio) B, A making no defence, will be adjudged D's filiusfamilias. The object of this re-sale to the natural father was, probably, merely a matter of sentiment, viz., that the boy might remain with his natural father until the last moment.

The effect of adoption was that the child broke away from its old family in every respect, in particular losing all right of intestate succession to the natural father, but acquiring a new right of succession to the adoptive father.

There were two important changes in adoption in Justinian's time.

(*a*) As a matter of form all that was necessary was that the real father, the adoptive father, and the person to be adopted should go before the magistrate

and make a declaration, which was thereupon entered in the Records (acta) of the Court.

(β) Justinian drew a distinction between *adoptio plena* and *adoptio minus plena.* Adoptio plena was only to take place where the adoption was by an ascendant, *e.g.* a maternal grandfather, and in such case the effect was as under the old law. In every other case (*i.e.* adoption by strangers or any person but an ascendant) the adoption was *minus plena*; the child, as a fact, passed into the physical control of the person adopting, but as a matter of law remained a member of its old agnatic family, and the only legal effect of such an adoption was that the child acquired a chance of intestate succession to the person making the adoption.[1]

(iv.) *Arrogation* took place when a person who was *sui juris* became *alieni juris* by placing himself under the potestas of another citizen, and since this involved the extinction of a Roman family, an Act of the Supreme Legislature was necessary. the proceedings took place originally in the Comitia Calata. There (after an inquiry into the expediency of the act had been made by the pontiffs) the person making the arrogation, the person to be arrogated, and the citizens present were asked if they respectively consented to the arrogation. If they did, an act was passed making the person arrogated a member of his new, and putting an end to his old, family. He thereupon passed into the potestas of the person arrogating him, to whom he

[1] The so-called 'adoptio by will' seems to have been the institution of an heir under the condition that he should assume the name of the testator. But see Girard, pp. 171-172.

stood as a filiusfamilias, and lost his ancient religious rites (*sacra*). And there also passed with him into the new potestas his descendants (if any), and the whole of his property, *i.e.* all his corporeal property and his rights, save such purely personal rights[1] as were extinguished by the *capitis deminutio*[2] which took place. With regard to obligations owed by the person arrogated there was a distinction; if due from him as heir of some third person deceased, they passed to and bound the person making the arrogation; if merely personal, they became extinguished altogether at strict law. Later the praetor gave creditors the right to be satisfied out of property which, but for the arrogation, would have belonged to the person arrogated (G. iii. 84). After the Comitia Curiata lost its legislative power and the citizens were represented by thirty lictors, arrogation still took place there, and the proceedings were, even then, not purely formal, since a judicial inquiry was still held, and the consents of the parties were as necessary as before. It was not until Diocletian that the form changed, when for the act of the Comitia was substituted a *Rescript* of the Emperor, a form which continued down to, and in the time of, Justinian himself. The only change made by that Emperor was that he reduced the interest of the person making the arrogation to a *life interest* (usufruct) merely in the property of the person arrogated.[3]

[1] *E.g.* services due to him by a freedman. Formerly usufructus and usus also, but Justinian amended the law in this respect.

[2] See p. 113.

[3] As above stated, Gaius and Justinian use the word adoptio to cover both arrogation and adoptio. Adoptio in the strict sense they

Originally, since the act took place in the Comitia, arrogation could only be effected at Rome. A woman could neither arrogate nor be arrogated, nor could an impubes be arrogated, the reason for this last restriction being that a man might by arrogating a small boy one day and emancipating him the next, acquire and retain all his property without incurring any obligations in respect of him. When the vote of the Comitia was replaced by Imperial rescript, arrogation became possible in the provinces; under Diocletian it was recognised that women could be arrogated, and the arrogation of an impubes was made possible under certain stringent conditions by Antoninus Pius. Besides inquiring as to the age of the parties, the motives of the persons making the arrogation, the possible injury to his family, and the advantages to the other party ('Exquiritur causa adrogationis, an honesta sit expediatque pupillo'), certain further conditions had to be fulfilled ('cum quibusdam condicionibus adrogatio fit'), *i.e.*—

(1) Liberty was reserved for the person arrogated to put an end to the arrogation, if he so wished, on attaining the age of fourteen.

(2) The arrogator gave security that if, with good cause, he emancipated the boy before the age of fourteen, or if the boy died under that age, he would restore the property in the one case to the boy, in the other to his heirs.

(3) Further, that if he disinherited the boy or emancipated him under the age of fourteen without good cause, he would restore not only the boy's own

both refer to as 'adoptio imperio magistratus.' Arrogation Gaius calls 'adoptio populi auctoritate,' Justinian 'principali rescripto.'

property, but give him one quarter of his own (called *Quarta Antonina* or *Quarta Divi Pii*).

Adoptio and arrogation are alike in the following respects:—

(1) In each case (save in the adoptio minus plena of Justinian) a person changed his family.

(2) On the principle 'adoptio naturam imitatur' the arrogator or adopter had to be at least eighteen years older than the other person, and could not arrogate or adopt if castrated.

(3) Since 'mulier caput et finis familiae est,' a woman could not adopt in either sense of the word, though, later, ex indulgentia principis,[1] a woman, as a solace for the loss of her own children, was allowed to 'quasi-adopt,' though she did not thereby gain patria potestas. The institutions differ—

(1) Because in adoptio a person *alieni juris*, in arrogation a person *sui juris*, changed his family.

(2) Not only the person arrogated, but his descendants also passed into the potestas of the arrogator.

(3) So long as arrogation was 'populi auctoritate,' it could only take place at Rome.

(4) Women, though they could always be adopted, could not be arrogated until the time of Diocletian.

(5) An impubes could always be adopted, but could not be arrogated[2] until it was made possible, as above stated, by Antoninus Pius.

B. *The effect of Patria potestas.*

According to the strict theory of *jus civile*, a paterfamilias might expose the children or issue in his power, chastise them, sell them as slaves, or kill

[1] Diocletian and Maximian.

[2] Save as a special privilege from the Emperor.

them. If a filius were sold as a slave trans Tiberim, he became a slave simply; if at Rome, he became 'in mancipii causa' to the purchaser; if manumitted by him, the filius fell back into the potestas of the pater, and therefore was, in this respect, in a worse position than a slave proper, for a slave on manumission became free. Among other instances of the actual exercise of the father's rights are (α) the fact that L. Junius Brutus put his sons to death; (β) that Augustus exiled his daughter Julia for immorality.

In early times the only provision of law which restrained the abuse of these powers was the above-cited provision of the XII. Tables with regard to sale. By the time of the Empire the patria potestas, like the dominica potestas, seems to have become liable to abuse, and accordingly the pater's rights over his filii come to be restricted by express legislation, and the killing of a filius was first made parricide by Constantine. The sale of filii as slaves was practically obsolete in the time of the classical jurists, though even in the time of Justinian a father might sell his new-born children ('sanguinolenti' in case of extreme poverty. This right, the right to inflict moderate chastisement, and the right to veto the child's marriage, seem to be the only survivals of the jus vitae necisque in Justinian's time.

Originally a filius could own no property, because, like a slave, whatever he acquired he acquired for his paterfamilias. And until the Empire the only sort of property a filius had was the peculium (which came to be known as profecticium), or property which his father allowed him the use of, but which the father might take back at any moment.

In the early Empire a series of changes began, and a filiusfamilias came to acquire a distinct proprietary position, in much the same way as married women in England under the doctrine of separate estate. Augustus introduced the *peculium castrense*, which embraced whatever the filius acquired on military service. The peculium was withdrawn from the potestas of the pater, and the filius could dispose of it (just as if he were really sui juris) inter vivos and by will, though until the time of Hadrian to dispose of it by will the son had to be on active service. It was only if the son died in the lifetime of his father without having disposed of it by will that the father took the property as if it were his own (*jure peculii*). After Justinian's legislation, however, he took it by inheritance (*jure hereditario*). Under Constantine came the *peculium quasi-castrense*: whatever the son made as a civil servant was his own property, except that he could not dispose of it by will, a privilege only conferred by Justinian. Subsequently this peculium came to embrace everything the son earned in a professional capacity. Under Constantine also arose the *peculium adventicium*; everything which the filius acquired as heir to his mother (*bona materna*) constituted this peculium, and the father was merely to have a life interest (usufruct) in it, the dominium or reversion remaining in the filius. Later this peculium was extended to cover all property coming to the filius through the maternal line (*bona materni generis*), and property gained through marriage (*lucra nuptialia*), and by Justinian to all property of every kind except the peculium castrense and quasi-castrense, and property (peculium profec-

ticium) derived from the father himself (*ex re patris*). In the time of Gaius a father, on emancipating a filius, retained absolutely one-third of the peculium adventicium. Justinian altered the law; the father was to take a life interest (usufruct) in half this peculium, and the filius accordingly got the income of the remaining half during the rest of the father's lifetime, and on the father's death dominium of the whole.

A contract between a filiusfamilias and his pater gave rise to a *natural* obligation merely. Unlike the case of a slave, however, a son's contract with a third person gave rise to a civil obligation (*i.e.* both the son and the third person were bound civiliter), though originally any benefit accruing under such a contract accrued to the pater, who could not be detrimentally affected by it. As a matter of fact, though, in theory, a filius could enter into as many legally-binding contracts as he pleased, it is improbable that people would be willing to deal with him save in two cases: (i.) where he was contracting (as he might) on his own behalf in relation to the peculia which he acquired under the Empire; (ii.) where the son was acting as his father's agent, and there was a reasonable prospect of making the father liable by means of an actio adjectitiae qualitatis (p. 395).

A filius wronged by his father had (apart from express legislation protecting him) no legal redress. If wronged by a third person, it was normally the father and not the filius who could sue, though the filius could bring the actio injuriarum and apply for the interdictum quod vi aut clam in his own name.

If the filius injured his father, the latter inflicted such punishment as he pleased, though in the later

period of Roman law serious punishment could only be ordered by the magistrate. If the wrong was to a third person, originally, as in the case of a slave, the father was bound to give the son up as a quasi-slave (in mancipii causa) to the vengeance of the other person; very soon he was allowed the alternative of this *noxae deditio* or paying damages; and by the time of Papinian a son, even though given in noxae deditio, did not remain for ever, as formerly, *servi loco* to the person wronged, but only until he had 'worked off' by his labour the amount payable as compensation. Finally, Justinian abolished the noxal surrender altogether.

Besides being allowed to bring the actio injuriarum and the interdictum quod vi aut clam, the son could also in his own name sustain the *querela inofficiosi testamenti*, the *actio depositi*, and the *actio commodati*.[1] He was probably allowed other actions in factum, *e.g.* to enforce such contracts as he made by virtue of the independent proprietary position given him by the peculium castrense and the peculium quasi-castrense.

Patria potestas had no application to public law: 'Quod ad jus publicum attinet non sequitur jus potestatis.' Thus a filius could vote, could hold public offices (such as a magistracy or a tutorship), and might even preside as a magistrate over his own adoption. The exclusion of public law from the incidents of potestas, coupled with the growth of the various peculia, the mitigation of the father's jus vitae necisque, and the fact that emancipation was always possible, probably account for the survival of

[1] See Poste, pp. 41-43.

patria potestas through the whole history of Roman law.

C. *Patria potestas terminated*—

(i.) By the death of either party, provided that, upon the death of the person in whose potestas the filius was, he did not fall under the power of some other ascendant; *e.g.* A, a grandfather, has in his potestas B his son and C his grandson. A dies, C is not sui juris, but falls under the potestas of his father B.

(ii.) By adoption, provided, in Justinian's time, that the adoptio were plena.

(iii.) In the case of females, by marriage in manum (so long as that system lasted) into another family.

(iv.) By the child attaining signal public distinction; *e.g.* in the time of Gaius becoming a Flamen Dialis or a Vestal Virgin, or, in the time of Justinian, a Bishop or Prefect.

(v.) In the later law a father exposing his children, or giving his daughter in prostitution, lost his rights over them.

(vi.) By either father or child becoming a slave[1] or losing 'civitas.'

(vii.) If the father gave himself in arrogation to another citizen, the last-mentioned acquired patria potestas over the children also, *supra*.

(viii.) The sale of the child as a slave, but in the case of a son three sales were necessary.

(ix.) The most common case of all, emancipation or the voluntary freeing of the child by the father.

[1] But the rights of the father might revive by the fiction of postliminium.

This, in the time of Gaius, was effected as follows: The object, as in the first stage of adoption, being to put an end to the agnatic tie, the first part of the ceremony of emancipation is exactly like that in an adoption; *i.e.* the child (if a son) is sold by means of a fictitious mancipation three times to a stranger, being manumitted vindicta after the first and second sale. (If the child were not a son, but *e.g.* a daughter or grandson, one sale was enough.) The child is then 'in mancipii causa' to the purchaser, and the second stage of mancipation is the freeing of the child from this quasi-slavery, so that he may not only escape from the patria potestas of his father, but become a freeman. Obviously this might have been effected simply, by the purchaser manumitting the child who was 'servi loco' to him *vindicta*. But this was not the usual course, because in such case the purchaser, as 'extraneus manumissor,' would acquire a right of succession to the child, which more properly belonged to the real father. The usual course, therefore, was for the third sale to be made under a trust (*fiducia*)[1] that the purchaser would resell the child to the father, who would himself manumit him, and so, as 'parens manumissor,' acquire the succession rights. The form of emancipation was first simplified by Anastasius, who allowed it to be effected by *Imperial rescript* (emancipatio Anastasiana), a course usually adopted where the child was away from home, and so incapable of going through the ordinary ceremony. Finally, under Justinian, emancipation was effected by

[1] In the developed law, even though there were no express fiducia and the purchaser manumitted, he was regarded as a *trustee* for the father of the succession rights.

a declaration by the father and son in the presence of the magistrate (emancipatio Justinianea).

Subsect. 2. *Persons 'in mancipii causa' or 'servorum loco'*

A free person might become 'in mancipii causa'—

(i.) If, under the ancient law, his paterfamilias sold him into slavery at Rome; if 'trans Tiberim' he would seem to have been a servus proper, because the status 'in mancipii causa' was peculiar to Rome.

(ii.) By being fictitiously sold as a slave during the process of adoption or emancipation.

(iii.) By being given up in noxae deditio by his paterfamilias.

(iv.) If a woman, by means of a fictitious sale by her coemptionator, *e.g.* as a preliminary to divorce (*cf.* G. i. 118; *vide infra*, coemptio).

The chief differences between a slave proper and a person in mancipii causa were—

(i.) That the latter retained, though in a latent form, full civic rights and the jus commercii. (ii.) On being freed he became 'ingenuus' and not 'libertinus.' (iii.) Neither the lex Aelia Sentia nor the lex Fufia Caninia restricted the manumission of such a person. (iv.) In the time of Gaius a master who subjected a person in mancipii causa to insulting treatment was liable to the actio injuriarum.

On the other, a person in mancipii causa was like a slave, because—

(i.) He was incapable of entering into legal obligations. (ii.) His acquisitions accrued to his master. (iii.) His children were probably in ancient times also quasi-slaves, though the law had become

modified in this respect by the time of Gaius.[1] (iv.) His master could alienate him as a quasi-slave to another either inter vivos or mortis causa, and could, if the person in mancipii causa were unlawfully taken away from him, reclaim him by a *vindicatio* (a *real* action) and, in a proper case, bring the actio furti; and (v.) to free him the same means were necessary as in the case of a servus proper.

In the time of Gaius this status seems only to have been important—(*a*) where the child had committed a delict and been given in noxal surrender; (*b*) where the father had sold under a fiducia for re-sale to himself, since Gaius tells us that except in these cases a person in mancipii causa could acquire his freedom even against the will of his master by getting his name inscribed on the census.

Long before Justinian, parents had lost their right to sell their children into slavery, and in his time the fictitious sales in adoptions and the like were no longer used. When, therefore, Justinian abolished the noxal surrender of free persons, the status of persons in mancipii causa entirely disappeared.

Subsect. 3. *Manus. Justae Nuptiae*

Manus was the relationship under the old law between husband and wife by virtue of which the

[1] Gaius states that a child begotten by a son after the first or second mancipation of the son, though not actually born till after the third, was in the potestas of his grandfather; but that if begotten after the third sale, the child was not in such potestas. According to Labeo, the child was in mancipii causa to his father's master; but the rule is, Gaius says, that while his father is in mancipii causa, the child's status is in suspense. If the father is manumitted, the child falls under his potestas: if the father dies in mancipii causa, the child becomes sui juris (G. i. 135).

wife on marriage left her old agnatic family and became a member of her husband's agnatic family, so as to pass under the potestas of the head of that family, thus standing to her husband, if he happened to be himself the head of his family, in the position of a daughter. Manus, therefore, being but an incident of marriage, may conveniently be considered under that heading.

A. *Justae nuptiae—how created.*

For a marriage to amount to *justae nuptiae, i.e.* such a marriage as would give rise to patria potestas over the children and other issue through males of such marriage, the following conditions had to be satisfied :—

(i.) Each party must have connubium, otherwise the marriage could at the best be but *matrimonium jure gentium,* the children being legitimate but not 'in potestate.' After Caracalla had bestowed civitas, which, of course, included connubium, on all free subjects of the Empire, this condition became of small importance.

(ii.) Some persons were absolutely disqualified, *e.g.* those already married, slaves, and castrati ; some partially disqualified, *e.g.* a senator might not marry a freed woman or an actress.

(iii.) The parties must not be nearly related, either by natural or artificial ties (*e.g.* by adoption) (see G. i. 58-64 ; J. i. 10. 1-11).

(iv.) Each party must consent.

(v.) If either party were alieni juris, the consent of the paterfamilias was necessary.

(vi.) Each must be pubes (*i.e.* fourteen, males ; twelve, females).

(vii.) Under the old law only such a marriage as gave rise to manus was recognised as justae nuptiae, and to create manus the marriage had to be celebrated either by *confarreatio* or *coemptio*, or to arise by *usus*.

Confarreatio was a religious ceremony, and originally only *patricians* could avail themselves of it. A cake of spelt (farreus panis) was offered to Jupiter,[1] and certain sacramental words ('cum certis et sollemnibus verbis') were spoken before ten witnesses; the Pontifex Maximus and the Flamen Dialis assisted in the ceremony.

Coemptio was the civil and *plebeian* marriage, and consisted of a fictitious sale (per mancipationem, id est per quandam imaginariam venditionem')[2] before five Roman citizens as witnesses, and a libripens.

It would appear from the account given by Gaius that the husband bought the wife 'emit is mulierem cujus in manum convenit,'[3] either from her paterfamilias or her tutor, but it has been contended that each bought the other.

Usus is the acquisition of a wife by *possession* and bears the same relation to coemptio as usucapion to a mancipation. A Roman citizen who bought some object of property and got possession of it, but not ownership, because he neglected to go through the forms prescribed by jus civile, might nevertheless become owner by usucapion, *i.e.* lapse of time; thus if the object was a movable, continuous possession for one year made him dominus. In like manner, if a man lived with a woman whom he treated as his

[1] 'Farreo in manum conveniunt per quoddam genus sacrificii quod Jovi farreo fit, in quo farreus panis adhibetur; unde etiam confarreatio dicitur' (G. i. 112).

[2] G. i. 113.

[3] G. *loc. cit.*

wife, but whom he had not married by coemptio (or confarreatio), and the cohabitation lasted without interruption for a year, then at the end of that period the man acquired ownership of the woman as his wife, she passed to him 'in manum,' and the marriage was treated as justae nuptiae.

As above stated, in early times only a marriage contracted in one of these three ways, and so producing manus, was treated as a marriage in the true sense. But as early as the XII. Tables an informal marriage was, as a fact, possible, for a provision of that law in effect declared that although a man lived with a woman whom he treated as his wife, and so lived for a year, nevertheless manus should not arise if the wife were absent from home for three consecutive nights (trinoctii absentia). It is unlikely that in recognising this principle the framers of the XII. Tables were introducing any novelty, since it was always regarded as of the essence of usucapion that there should be no break (usurpatio) in the possession, *i.e.* that it should be uninterrupted. The XII. Tables, it would seem, at most definitely settled what constituted a break, and some arbitrary period must sooner or later have been fixed upon, otherwise it might have been argued that the woman's absence from the house in order to go to market constituted 'usurpatio.' But whether the provision of the XII. Tables is to be regarded as a novelty or not, it is clear that from that time a woman had only to take care to be away from her husband's house for the stated period in *every* year of the marriage to avoid passing under his power, in which case she remained in the potestas, or, if sui juris, under

the tutela, to which she was subject before the marriage. An informal marriage of this sort came to be known as matrimonium jure gentium, and was possible even for aliens. But the wife was known as uxor merely, and not, as in a proper marriage, materfamilias, and the children followed the mother, *i.e.* they did not pass under the potestas of their father, although, in fact, his children.

Gaius tells us that the law regarding usus and the trinoctii absentia was entirely obsolete in his time: 'hoc totum jus partim legibus sublatum est, partim ipsa desuetudine oblitteratum est' (G. i. 111); that confarreatio existed ('quod jus etiam nostris temporibus in usu est,' G. i. 112), and he speaks of coemptio in the present tense ('coemptione vero in manum conveniunt,' 113). But confarreatio only survived in the time of Gaius for a special purpose and with a limited effect. The *special purpose* was to qualify a person to be a rex sacrorum or one of the greater flamens; for these offices could only be held by persons born of parents who had been married in this way (confarreati parentes), and they had themselves to be married by the same ceremony. The *effect* was *limited*, since by a S.C., Tiberias had, in order to induce people to so qualify, restricted the operation of confarreatio; it was no longer to produce manus save to give the wife her husband's 'sacra'; for all secular purposes she was to remain a member of her old agnatic family. Usus then was obsolete in Gaius' time, confarreatio had an extremely limited application, coemptio remained as the sole means of producing manus, but there is reason to believe that it existed in theory merely.

The fact is, that when Gaius wrote manus had become practically obsolete. By a gradual and obscure development, which was probably complete by the time of Cicero, the informal marriage without manus, originally merely matrimonium jure gentium, had come not only to be the normal form of marriage but to be recognised as *justum* matrimonium, *i.e.* a valid legal marriage, by which, although the wife did not come under her husband's power, the children and other issue of the marriage through males did.

Under Justinian, therefore, and for centuries earlier, any declaration of consent, in whatever form given, sufficed for a legal marriage ('consensus facit nuptias'), provided, of course, that conditions i. ii. iii. v. and vi. (supra) were also satisfied, and provided also that the parties intended immediately beginning cohabitation, an intention usually evidenced by the 'deductio in domum,' *i.e.* bringing the bride from her father's to her husband's house.

As distinguished from 'justae nuptiae,' *concubinatus* was the term applied to a permanent union without marriage between a free man and woman. The concubine was not called 'uxor,' nor were the issue of the marriage under the patria potestas of the husband. *Contubernium* denoted the marriage of slaves, and was without legal result. *Matrimonium jure gentium* was a term used to describe (*a*), under the ancient law, a marriage not producing 'manus,' because not contracted by one of the three means above described, and (*b*), later, a lawful marriage between persons who did not possess the connubium. Such a marriage did not produce 'patria potestas.' The distinction between justae nuptiae and this form

of marriage had, chiefly by reason of Caracalla's edict, become practically obsolete in Justinian's time.

B. *The effect of marriage on husband and wife.*

(i.) *Marriage in manum.*—Here, as already stated, the wife ceased to be a member of her old family, and, unless she came under the potestas of the person in whose power her husband was, fell under the potestas or manus of her husband *filiae loco*, and, speaking generally, he acquired the same rights as a pater over a filiusfamilias.[1] With the woman herself passed the whole of her property (if, being sui juris, she had any, or if, being alieni juris, her paterfamilias had given her a dowry) by a successio per universitatem, and during marriage, whatever she acquired was acquired for the person in whose manus she was. For obligations contracted before the marriage the husband (or his ancestor) was not liable, nor, originally, was the woman herself; but one of the reforms of the praetors allowed process against her and judgment to be satisfied out of the property which her husband took through her on marriage.

(ii.) *Marriage without manus.*—In this case the consequences were wholly dissimilar. If at the time of the marriage the woman were subject to potestas, she, after the marriage, continued in the eye of the law under that potestas; if she were sui juris (*e.g.* all male ancestors had died), but under tutela, she remained under that tutela until the time when the tutela perpetua became obsolete; after the disappearance of that tutela the woman, although married, had a complete legal status of her own,

[1] But it would seem that, before subjecting her to the graver punishments, it was usual to consult a family council.

and could acquire property, enter into obligations, and bring actions just as a man could. Having this independent persona, her property was necessarily, as we should say, her separate property, and her husband had no right in regard to it apart from private agreement. This fact led to the institution of a marriage settlement (*dos*) which, together with the corresponding *donatio propter nuptias*, may be briefly described in this place.

Dos was property made over to the husband, as a kind of contribution towards the expenses of the new household (onera matrimonii); he enjoyed the income while the marriage lasted, and was technically owner (dominus) of the whole dos, capital as well as income. That part of the property which, on marriage, was not brought into settlement as part of the dos was known as parapherna (*παράφερνα*), and of course in relation to this the husband had no rights of any kind. Of dos there were three kinds :—

(1) *Dos profecticia* was that provided by the father or other paternal ancestor, who were under a legal duty to the woman to provide dowry; (2) *dos adventicia* was dowry coming from any other source (aliunde quam ex re patris); (3) *dos recepticia* was a species of dos adventicia, given on the understanding that it was to be returned to the donor on the wife's death.

A dos might be constituted in three ways :[1]

(1) '*Aut datur*,' it might be handed over at the time the agreement was made; (2) '*aut dicitur*,' an ancient form of verbal contract, which became

[1] These were the usual, but not the only ways ; a dowry might, *e.g.*, be constituted by acceptilatio.

obsolete, by which the bride herself, or her paternal ascendant, or her debtor might informally engage to give it; (3) '*aut promittitur*,' this was the ordinary course, when the dos was not actually handed over at the time; the person agreeing to give it binding himself to do so by a solemn *stipulation* (*i.e.* the ordinary verbal contract, *infra*). From the time of Theodosius and Valentinian a mere promise (though not expressed as a stipulation or otherwise made legally binding) to give a dowry became actionable as a *pactum legitimum*.

The husband being the legal owner of the whole dos, had not merely the right to manage it and enjoy the income, but might aliene the capital. To prevent an improvident disposition it was provided by the *lex Julia de fundo dotali*, 18 B.C., that the husband should not sell *immovable property in Italy* forming part of the dos without his wife's consent, or mortgage it even with such consent, and this provision was extended by Justinian so as to prohibit any kind of alienation of the immovable part of the dos, even though not in Italy, but in the provinces, and though the wife consented. It must also be borne in mind that a fundus dotalis was one of the things to which no title could be gained by usucapion.

Dos on the termination of the marriage. If the dos were recepticia, *i.e.* if the donor had made the husband, at the time of the marriage, engage by a verbal contract or stipulation (*cautio rei uxoriae*) to restore the dos, the donor or his heir could compel restoration of the dowry on the termination of the marriage. If there had been no such stipulation, the

husband, according to the strict view of the civil law, was entitled to keep the whole of the dos for himself, though no doubt the wife had a moral claim, which was often or usually recognised, for its return. About the year 200 B.C., however, a new action appeared called the *actio rei uxoriae*, which lay for the recovery of the dos at the end of the marriage, even although there had been no express agreement for its return. This action differed from the actio ex stipulatu (arising from express agreement) in two main particulars. (*a*) While the actio ex stipulatu was stricti juris, the actio rei uxoriae was bonae-fidei, in other words, the judge who had tried the action was not bound unconditionally to order a return of the dos, but had an absolute discretion to enforce such 'equities' as he thought fit, *e.g.* to make an allowance to the husband for expenses on the property which he had been put to, or, if the termination of the marriage were due to the adultery of the wife, to make a reduction ('propter mores graviores') from the dowry which the husband had to return;[1] conversely, where the husband's misconduct had led to the marriage being terminated, the wife might recover a sum greater than the original amount brought into settlement. (*β*) Unlike the actio ex stipulatu, the actio rei uxoriae did not pass to the heir, and therefore if the wife died first, and there had been no stipulation (cautio rei uxoriae), the husband was, as in early times, entitled in strict law to keep the whole of the dowry, save only the *dos profecticia*, to recover which, if the wife died

[1] Or the deduction might be 'propter liberos,' *i.e.* one-sixth for each child.

before the husband, the actio rei uxoriae, by way of exception, was available for her father or other paternal ancestor who had originally provided the dowry. Justinian materially changed the law, and, except when the wife was divorced for misconduct, the husband was bound to restore the dowry in every case, and while he could only claim a rebate in respect of outlay upon the dotal property which was actually necessary for its preservation, he was obliged to make compensation for any movable property which he had alienated or for any damage which had been done to the dos through his negligence; and, as a further protection, Justinian gave the wife a *tacita hypotheca* (implied mortgage) over her husband's whole estate. If, therefore, in Justinian's time the wife survived her husband, or there was a divorce for any reason save her own misconduct, the wife was entitled to have the dowry returned in the absence of some express agreement to the contrary in the original settlement. If the wife died before her husband, her heir might, by an actio ex stipulatu,[1] recover dos adventicia, but not necessarily the dos profecticia, because if a father or other paternal ascendant had given such a dowry and survived the wife, he had a right to its return to the exclusion of her heir.

Donatio propter nuptias was a gift on the part of the husband, as a kind of equivalent for the dos. Originally it was known as *donatio ante nuptias*, and could only be constituted before marriage, since

[1] Justinian abolished the actio rei uxoriae and provided that the actio ex stipulatu should be applicable to all cases, and that when brought in this connection the actio should be bonae-fidei. See for further information of the subject of the dos, Sohm, pp. 486-491.

it was against the policy of Roman law to allow gifts between husband and wife, but Justin I. provided that it might be increased after marriage, and Justinian that it might even be constituted after marriage, wherefore the old name, 'ante nuptias,' became inappropriate, and 'propter nuptias,' was substituted for it. The object seems to have been to secure a provision for the wife in the event of her surviving the husband, or in the event of the marriage ending by a divorce through the husband's misconduct. Ultimately the husband's ancestors were by statute placed under the same obligation to provide this donation as the bride's ancestors were to provide the dos, and by a constitution of Justinian the amount of the donatio had to be equal to the amount of the dos which the husband took. The actual control and management of the donatio during the marriage belonged to the husband, but under Justinian the husband could not alienate the immovable part of the donatio, even with his wife's consent, and the wife was given a tacita hypotheca to secure it. On the termination of the marriage by the husband's death or misconduct, the wife, if there were issue of the marriage, took a life estate in the property, sharing the dominium with the issue.

C. *The termination of marriage.*

Marriage came to an end—

1. By the death of either party.[1]

2. By either party becoming a slave, or ceasing to be a civis.

3. If the marriage were under the old law, and in

[1] For the effect of 'incestus superveniens,' see Moyle, p. 129.

manum, by either party undergoing capitis deminutio minima.

4. By divorce. Under the old law a marriage celebrated by confarreatio could only be put an end to by an equally formal act, viz. diffareatio, *i.e.* another sacrifice to Jupiter in the presence of the pontiffs with 'contraria verba.' If arising by coemptio or usus, the marriage could only be dissolved by the husband emancipating his wife, though, as she stood to him as a filia merely, one sale was enough to break the tie. After marriage in manum had become obsolete, marriage, resting as it did merely on consent, could be dissolved either at the will of both parties (divortium), or by either party giving notice (repudium).[1] This freedom of divorce was not abolished by the legislation of the Christian Empire, though one party to the marriage unjustly divorcing the other came to be penalised in a pecuniary sense, *e.g.* the wife might forfeit her rights in respect of the dos.

Section IV. Tutela and Cura

A person, although a freeman, a citizen, and sui juris, might still lack full legal capacity, viz. if subject to the control of a tutor because of extreme youth, or to the control of a curator because, for example, of lunacy. To complete 'the law which concerns persons,' therefore, an account of each of these institutions must be given.

[1] The lex Julia de adulteriis required the presence of seven witnesses.

Subsect. 1. *Tutela*

Tutela is of two kinds—

A. Tutela impuberum.
B. Tutela perpetua mulierum.

A. *Tutela impuberum.*

Every boy and girl who was sui juris and under the age of puberty had to have a tutor whose 'auctoritas' supplied the want of capacity in the pupil, and tutela is accordingly defined as 'jus ac potestas in capite libero ad tuendum eum qui propter aetatem se defendere nequit' (J. i. 13. 1). The subject may be considered under three heads — its origin, extent, and termination.

(*a*) *How tutela originates.*

1. *Tutela testamentaria.*—The normal tutor to a person sui juris but under puberty was the person appointed to be such tutor by the will of the paterfamilias, by whose death the boy or girl in question became sui juris. Hence a grandfather could only appoint by his will a tutor for his grandson if the father had died or undergone capitis deminutio; for if the grandson on the death of the grandfather fell under his father's potestas there was, of course, no need for a tutor, because the boy would not be sui but alieni juris. In ordinary cases the appointment by will was enough in itself to make the person nominated tutor on the death of the testator, but in certain exceptional cases confirmation by the magistrate was necessary, *e.g.* if the boy to whom a tutor was given had been emancipated. A testator might appoint as tutor any one who possessed testamenti

factio,[1] and since a tutorship was considered a public office, even a filiusfamilias[2] was capable of holding it. A testator might appoint his slave to be tutor, at the same time giving him his freedom, and in Justinian's time the mere appointment carried freedom with it, unless the testator appointed his slave 'cum liber erit,' in which case the appointment was void, because the testator showed by the use of these words that although he had the power to free the slave, he did not intend to do so. On the other hand, the appointment of another person's slave as tutor was invalid, if unconditional;[3] valid if made subject to the condition 'when he shall be free'; and the heir was bound, if possible, to purchase the slave and free him; until, in this or some other way, the servus alienus acquired his freedom he could not be tutor.

2. *Tutela legitima.*—An impubes to whom no tutor had been appointed by will would usually have a legitimus or statutory tutor; the statute in question being the XII. Tables as interpreted by the Jurists. The tutela legitima is either agnatorum, or patronorum, or parentum tutela.

(i.) *Legitima agnatorum tutela.*—A person becoming sui juris under the age of puberty, and having no testamentary tutor, had, under the provisions of the XII. Tables, as his tutor legitimus his nearest agnate or

[1] *Vide* p. 232. Aliens, women, and persons themselves under guardianship could not be appointed guardians in any manner, although ultimately an exception was made by which a widow might be appointed guardian of her infant children.

[2] But if under twenty-five he could not begin to act until attaining that age.

[3] 'Servus autem alienus pure inutiliter datur testamento tutor' (J. i. 14. 1).

agnates, for if there were several agnates in the same degree, they all became tutors. The reason why these agnates were appointed tutors by the XII. Tables was that they would succeed as heirs to the ward's property on death intestate and without issue, and 'ubi successionis est emolumentum ibi et tutelae onus esse debet' (J. i. 17. *pr.*). If there were no agnates, the tutorship originally passed, like the property, to the nearest gentiles. After the 118th Novel of Justinian this tutela devolved on the nearest *cognate* capable of acting as guardian instead of, as theretofore, upon the nearest agnate.

(ii.) *Legitima patronorum tutela.*—If a master manumitted a slave under the age of puberty, he (and his children after his death) became that slave's patron and tutor legitimus; 'legitimus' not because the XII. Tables expressly gave such tutela to the patron and his children, but by means of the interpretation of the jurists, who held that since the patron and his children acquired certain rights of succession to the freedman (emolumentum successionis), it was only fair that the onus tutelae should accompany the benefit.

(iii.) *Legitima parentum tutela.*—On a like analogy, a paterfamilias who emancipated a person in potestas under the age of puberty not only acquired a right of succession but became his tutor legitimus.

3. *Tutela fiduciaria.*—In the time of Gaius this term denoted two kinds of tutela (*α*) that next mentioned as surviving under Justinian, and (*β*) that which arose when in the emancipation of a child under puberty the ultimate manumission was made by the 'extraneus manumissor' (*supra*), who thereupon

became the child's tutor fiduciarius. This was obsolete in Justinian's time, when tutela fiduciaria only arose where a paterfamilias emancipated a person in his potestas under the age of puberty, and then himself died. Thereupon the unemancipated male children of the deceased became fiduciary tutors to the person who had been emancipated. For example, A has two sons, B and C, in his potestas, he emancipates B, *aetat* eleven, and thereupon becomes B's tutor legitimus (*supra*). Next A dies, and then C becomes his brother's fiduciary tutor until B attains fourteen.[1]

4. *Tutela dativa.* — In default of any other tutor, a tutor may be appointed by the Court (tutor dativus). Formerly the appointment was made at Rome, under the lex Atilia, by the praetor urbanus and a majority of the tribunes of the plebs; in the provinces by the praesides, under the lex Julia et Titia (31 B.C.). But before Justinian's time tutors had ceased to be appointed under those laws (because, among other reasons, they contained no provisions to secure that the tutor did not waste the ward's property), and in his time the appointment was at Rome by the praefectus urbi or praetor, in the provinces by the praesides, after inquiry, or, if the property of the pupil did not exceed 500 solidi, by the defensores of the city acting in conjunction with the bishop, or some other public person.

(*b*) *The effect of tutela.*

The tutor's duties are threefold :—

[1] But note that on the death of a *patron* who is tutor to his freedman under puberty, the tutela passes to the patron's children as tutela *legitima*. For the reason see J. i. 19.

(i.) To supervise the education and well-being of the ward.

(ii.) To administer his property to the best advantage (*rem gerere*); and he was liable not merely for fraud (*dolus*), but for failure to show the same amount of care as he displayed in the conduct of his own affairs ('diligentia quam suis rebus'); and

(iii.) *Auctoritatem interponere*, to supplement the pupil's legal incapacity when any juristic act had to be done; and it is this last aspect of tutela which is its essence. The position in this respect may be summed up by saying that without his tutor's auctoritas the ward could do nothing to his detriment: 'Namque placuit meliorem quidem suam conditionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore' (J. i. 21. *pr.*). A ward, therefore, could not legally enter upon or accept a hereditas (for it might be insolvent, 'damnosa'), or apply for bonorum possessio, or bind himself by any contract which imposed obligations upon him. But the pupil was not allowed to take an unfair advantage of this state of things. If, for example, a pupil was owed money and, being paid, gave a receipt to the creditor without *auctoritas*, the receipt would be invalid at law, as it did not make the ward's position better; but if the pupil retained the money and afterwards sued for the debt, he could be defeated by the equitable plea of fraud (exceptio doli). J. ii. 8. 2.

It must be borne in mind that in giving his auctoritas the tutor was merely supplementing the pupil's own act. If, therefore, the pupil were himself incapable of acting (*i.e.* was 'infans,' under seven

years), and the act were a civil law act (actus legitimus), which could not be performed by another, the act in question could not be done at all.[1]

The ward was protected against possible abuse by the tutor of his large powers in the following ways :—

(1) Under the law of Justinian an inventory of the goods of the ward had to be made before the tutor could act. (2) On entry into office an agnatic tutor and a tutor appointed by an inferior magistrate[2] had to give security (satisdatio), 'rem pupilli salvam fore,' and this was done by means of the guarantee of three persons who entered into the verbal contract 'fidejussio.' (3) A tutor might be removed from office for misconduct by the *accusatio suspecti* mentioned in the XII. Tables, and if dolus were proved removal involved infamia. (4) If the tutor in the management of the ward's property failed to show 'diligentia quam suis rebus,' he was liable in damages on the quasi-contractual relation in which he stood towards the pupil. (5) If the tutor converted the ward's property to his own use, the ward had the actio rationibus distrahendis for double damage, an action which seems to date from the XII. Tables. (6) At the end of the guardianship the pupil could compel his tutor to render an account and to hand over his estate by means of the *actio tutelae directa*,[3] condemnation in which involved

[1] But this principle was relaxed in the developed law, *e.g.* Theodosius and Valentinian allowed a tutor to enter upon a hereditas in the name of the infant.

[2] A tutor testamentarius and one appointed by the higher magistrates were exempt from giving security, as were, usually, an ascendant and a patron.

[3] The guardian had the actio tutelae contraria to compel his late ward to indemnify him for necessary expenditure.

infamia. (7) By a constitution of Septimius Severus the tutor was prohibited, except with the magistrate's leave, from alienating the praedia rustica and suburbana belonging to the pupil, a rule subsequently extended to all property of the pupil of any considerable value. (8) By a constitution of Constantine the ward was given a statutory mortgage (tacita hypotheca) over the tutor's property in respect of any claims he might have against him. Lastly, in addition to his remedy against his tutor, a pupil might bring a 'subsidiaria actio' for damage sustained against a magistrate who had wholly omitted or failed to take sufficient security from the tutor on appointment.

(*c*) *Tutela impuberum ended.*

1. By the removal of the tutor from office by the Court. The accusatio suspecti was a quasi-public action and could be brought by a 'common informer' and even by a woman; it lay against any sort of tutor, even a testamentarius or a legitimus, but in the case of a patron his reputation was spared ('dummodo meminerimus famae patroni parcendum,' J. i. 26. 2) by the grounds for his removal not being made public.

2. By the death of pupil or tutor.

3. By the pupil attaining puberty.

4. By the retirement of the tutor from office (*abdicatio tutelae*). But a specific ground recognised by the law[1] had to be adduced (*e.g.* being over seventy or ill) both as a ground for refusing a tutorship ab initio and for retirement (see J. i. 25).

5. In the case of a tutor appointed until a condition is accomplished or 'ad certum tempus,' the

[1] Originally a tutor testamentarius could resign his office at will.

fulfilment of the condition or the expiration of the period brings his tutorship to an end.

6. By the pupil suffering any kind of capitis deminutio.

7. By the tutor suffering capitis deminutio maxima or media, or in the case of the legitimus tutor, even capitis deminutio minima; the reason being, that capitis deminutio minima (as will appear later) meant the break of the agnatic tie, and on this the legitima tutela (at any rate of the agnates and parents) depended.

B. *Perpetua tutela mulierum.*

Justinian only describes the tutela impuberum, for it was the only kind of tutela which existed in his time. In the time of Gaius, however, there was another kind of tutela, although even then the institution was almost obsolete, viz. the tutela of free-women of whatever age (*i.e.* although over puberty), whether born or made free (libertinae). The theory of the old law was that a woman was never wholly independent; she was either alieni juris, *i.e.* in the potestas of her ancestor, or in manum to her husband or the head of his family, or if sui juris, under tutela perpetua. Her tutors might be one of the following kinds:—

1. Testamentarii, *i.e.* a tutor appointed by the will of her father or husband. Her husband, instead of appointing a definite tutor, might give his widow a choice, in which case the tutor had the special name of *optivus.*

2. Legitimi tutores. The woman might, by the law of the XII. Tables, or the interpretation put upon it, be under the legitima tutela of—(*a*) her parens

manumissor, or (*b*) of her agnates, *i.e.* if there were no testamentary tutor, or (*c*) if a freed woman, of her patron or his children.

3. Fiduciarii tutores. This kind of tutor arose from a device adopted by women to escape the control of their agnatic tutor, but, probably, only with his consent. The woman sold herself in fictitious marriage (called coemptio fiduciae causa,[1] as distinguished from coemptio matrimonii causa) to a fictitious husband upon trust (*fiducia*) that he would sell her to some person of her choice, to whom the woman thereupon stood in mancipii causa. This last person manumitted the woman, and thereupon became her tutor fiduciarius (G. i. 115).

4. Cessicii tutores. A legitimus tutor might transfer his tutorship to another by a fictitious lawsuit, in which case the new tutor was known as tutor cessicius, but on his death, or ceasing to be tutor in some other way (*e.g.* by capitis minutio), the tutela reverted to the original tutor (G. i. 168-170).

5. Atiliani or Dativi were tutors appointed in the absence of any other tutor by the court under the lex Atilia or other statutory authority.

The extent of the tutor's authority.—It was not the duty of a tutor of a woman of full age to manage her property (rem gerere), as in the case of an impubes, but merely to authorise and give validity to her acts (auctoritatem interponere) in certain cases, *e.g.* if the woman was bringing a legis actio, was a party to a judicium legitimum, wished to alienate

[1] Coemptio fiduciae causa was of three kinds:—
(1) As here, tutelae evitandae causa.
(2) Testamenti faciendi causa (*vide infra*).
(3) Interimendorum sacrorum causa (see Cicero pro Mur. xii. 27).

a res mancipi, to manumit a slave, to burden herself by an obligation. Without the tutor's consent, however, she could alienate her res nec mancipi and enter into any obligation by which her condition was improved. She could lend money and recover, as on a *mutuum*. If her debtor paid her money due, she could give a valid receipt; but if, without receiving the money, she gave a release (acceptilatio), which in the case of a man would have extinguished the debt, her act had no effect.

A woman who was sui juris, but subject to tutela, could make a valid will subject to two qualifications: (*a*) the consent of her tutor had to be obtained; (*b*) the woman had to *change her agnatic family*. Anciently, therefore, the woman had to choose some friend with whom she bargained that if and when he became her tutor he would agree to her making a will. She then, with the consent of her former tutor, sold herself by coemptio[1] to a fictitious husband, upon trust that he would resell her to the friend in question, who manumitted her, and so became her tutor fiduciarius and gave his consent to her will as stipulated.

By the time of Gaius the tutela of women of full age (from which the vestals had always been exempt) had become of small importance; by the *lex Julia et Papia Poppaea* women with the *jus liberorum*[2] were freed from the perpetua tutela altogether; the *lex Claudia* (47 A.D.) abolished the *legitima tutela agnatorum* (which was, of course, the commonest

[1] Coemptio testamenti faciendi causa (G. i. 115*a*).

[2] A woman of free birth escaped from tutela in right of having three children; a freed woman in right of four.

and most important tutela of all), and Hadrian made unnecessary the coemptio testamenti faciendi causa. The effect seems to be that when Gaius wrote, tutors, though their consent still remained formally necessary, could be compelled to give such consent unless the tutela was the legitima tutela either of a patron or a parens manumissor, and that even in these cases consent could only be withheld when the woman desired—(*a*) to alienate her res mancipi; (*b*) incur an obligation; or (*c*) make a will (G. i. 192).[1] The reason, of course, why the patron or the parens manumissor was allowed to withhold his consent was that, in the absence of alienation by the ward in her lifetime, or by her will, these persons were the ward's heirs, and as such entitled to her property.

Gaius accordingly tells us that women of full age manage their own affairs,[2] that in some cases the giving of the tutor's authority is merely pro formâ; that not unfrequently the tutor is compelled to give it whether he will or not, and that this is the reason why at the end of the tutorship the woman of full age has no actio tutelae against her late guardian. The further statement in Gaius that 'women seem to be better off than men in regard to will-making, since they can make a will at twelve, whereas a boy must wait until fourteen,' seems to require qualification, because—(*a*) in theory women under any kind of tutela required their tutor's auctoritas to make a will, and without it the will was invalid jure civile,

[1] In cases (*a*) and (*b*) a patron or parent could, exceptionally, be compelled to give his consent if there were a weighty reason (G. i. 192).

[2] This was always the case; the tutor of a woman of full age never had the right 'rem gerere' on behalf of the woman (*vide supra*).

though the praetor might grant 'bonorum possessio' under it (G. ii. 122); and (*b*), as above stated, the consent of the patron or parens manumissor was absolutely essential to the validity of the ward's will, and the heres named in a will made without such consent was neither heres jure civili nor could he obtain bonorum possessio from the praetor ('alioquin parentem et patronum sine auctoritate ejus facto testamento non summoveri palam est' (G. *loc. cit.*).

After the time of Gaius the perpetua tutela seems to have steadily decayed; it survived, in theory, at any rate, to the time of Diocletian, but there is no mention of it in the *Codex Theodosianus* or in Justinian's compilations.

Subsect. 2. *Cura*

There are four main kinds of 'cura' as a species of guardianship in Roman law—the cura of furiosi, of prodigi, of adolescentes, and lastly, the later extension to special cases, *e.g.* dumb persons.

From the time of the XII. Tables the cura of furiosi, and of prodigi, was recognised, a furiosus (madman) being placed under the guardianship (cura) of his nearest agnates (*cura legitima*), and if there were no agnates, under the cura of his gentiles; while in the case of a spendthrift (prodigus) the magistrate might subject the administration of his affairs, on the petition of relatives, to some person whom he appointed curator, usually one of the relatives themselves, at the same time prohibiting the prodigus from the management of his own property. Though not so ancient as the two former, a new kind of cura

soon arose, viz. the cura of those persons (*adolescentes*) who were sui juris, and had attained puberty, but who, being under twenty-five, were regarded as still entitled to protection. Such persons had, according to the strict theory of the civil law, an absolute legal capacity, and even down to the time of Justinian the law did not require them to have a curator save in one single instance, viz. when a party to a lawsuit ('Inviti adolescentes curatores non accipiunt praeterquam in litem,' J. i. 23. 2).[1] In fact, however, most minors[2] had a curator to look after their interests, partly by reason of the lex Plaetoria (of uncertain date but mentioned by Plautus), partly because of the praetor's practice of *in integrum restitutio.* The lex Plaetoria subjected to a *criminal prosecution* (involving a penalty and infamia) any person who could be proved to have taken an undue advantage of a minor, and later an exceptio (or equitable plea) was framed on the statute (exceptio legis Plaetoriae), which enabled a minor to defend with success an action to enforce a transaction into which the minor had entered through the undue influence of the other party. The praetor went further: a minor could, on application to him, provided it were made within a year, get any transaction which occasioned damage to him set aside (in integrum restitutio) *merely* on the ground of minority, *i.e.* although fraud or undue influence could not be proved, thus ensuring a more stringent remedy than that obtainable in English law, where dealings between an older and experienced

[1] Sometimes even an impubes might have a curator to represent him in a lawsuit, viz.: where he had a dispute with his own tutor who could not, therefore, represent him (J. i. 21. 3).

[2] Minor is here, for brevity, used as equivalent to adolescens.

person and a youth merely give rise to a *presumption* of undue influence, which can be rebutted. Since at Rome the presumption was irrebutable, tradesmen naturally became unwilling to enter into any dealings with such 'favourites of the law' unless the minors were represented by some elder person, whose 'consensus' was an absolute protection to the tradesman and a complete answer to any subsequent charge. For these reasons, therefore, most minors had curators, so to speak, forced upon them if they wished to enter into commercial relations, and Marcus Aurelius enacted that a minor might on mere application[1] to the magistrate obtain a permanent curator of his property. Finally, special regulations came to be imposed by statute on the alienation of the minor's property, even with the curator's consent, the leave of the magistrate being in most cases necessary.

Inasmuch as (apart from special statutory provision) a minor had full legal capacity, he was capable of validly performing any juristic act without the consensus of his curator, whereas a ward under tutela usually required not merely the consensus but the *auctoritas* of his guardian; when the curator's consensus was necessary, it was merely in order that an act prima facie valid might not be treated as voidable, and so liable to be set aside by the praetor, or to be treated as having no effect by reason of the exceptio legis Plaetoriae.

By the time of Justinian other classes of persons were able to obtain a curator on application to the Court, when, for some infirmity peculiar to themselves

[1] A minor applying under the lex Plaetoria had to show special ground for the appointment of a curator.

(*e.g.* the fact that the applicant was of weak mind, or deaf, dumb, or subject to an incurable malady), such a course seemed desirable.

In essence the same idea is at the root of the conception both of tutela and cura, viz. the protection of persons who, though sui juris, are physically or mentally unable to look after their own interests, and in Justinian's time the two institutions had the following points of likeness :—

(1) Tutors and curators were appointed by the same magistrates.[1] (2) Both were obliged to take an inventory on entering into office. (3) Both were bound to accept and continue in office unless some good ground of excuse could be shown. (4) Like a tutor, a curator had to give security in certain cases (*e.g.* a curator legitimus, but not one appointed after proper inquiry). (5) A curator as well as a tutor might be removed for misconduct by the accusatio suspecti. (6) A curator was liable by action[2] to account for wrong-doing or negligence (there being also an actio subsidiaria against a magistrate who appointed without taking due security); and (7) a curator was unable, without the leave of the magistrate, to aliene the ward's property of any considerable value, and his own property was subject to a statutory mortgage in the same manner as a tutor's.

On the other hand, the two institutions differ— (1) in the classes of persons whom they were designed to protect; (2) in the degree of authority possessed by the curator and tutor respectively; (3) in the

[1] A curator could not legally be appointed by will, but if, in fact, so appointed, the magistrate had a discretion to confirm the appointment.

[2] The actio was the actio negotiorum gestorum.

fact that whereas the whole well-being of the pupil was entrusted to the tutor, the curator at most was concerned with the ward's proprietary rights. (4) Whereas a tutor was necessarily 'generalis,' *i.e.* appointed for the whole period of non-age, a curator might be appointed 'ad hoc,' *e.g.* merely to watch over the interests of a youth who was going through the final accounts with his late tutor, and (5) as already noticed, a curator could never be validly appointed 'testamento.'

NOTE II

Capitis Deminutio

The *Institutes* define capitis minutio as a *change of status* ('est autem capitis deminutio prioris status commutatio' J. i. 16. *pr.*; *cf.* G. i. 159). Capitis deminutio, therefore, implies that the individual to whom it happens loses altogether his former *persona*, his old position in the eye of the law, and begins an entirely new legal existence.

Capitis deminutio was of three kinds—maxima, media, or minima.

1. *Maxima* was the loss of 'libertas,' 'civitas,' and 'familia'; from having formerly been a free or freed man the person in question became a slave, as was the case, *e.g.* in Justinian's time when a freeman collusively sold himself as a slave, or when a freedman was condemned to slavery for ingratitude towards his patron.

2. *Media* was where 'civitas' and 'familia' were lost, though 'libertas' was retained, as was the case where a man was sentenced to deportatio in insulam (mere *relegatio* had not this effect).

3. *Minima* was where 'familia' was lost, 'libertas' and 'civitas' being retained.[1] It took place:—

[1] Note that though capitis deminutio minima destroyed the agnatic tie involved in familia, it left the natural tie based on cognatio untouched, though the two greater kinds of capitis deminutio put an end to this also (J. i. 16. 6).

(1) Where a woman passed in 'manum' on her marriage.

(2) Where a woman made a coemptio fiduciae causa (*supra*).

(3) Where a person in patria potestas was given in adoption, provided, in Justinian's time, the adoptio were plena.

(4) Where a person in patria potestas was given in noxae deditio.

(5) Where, having been sui juris, a person became alieni juris by giving himself in arrogation, or by being placed under potestas by legitimatio. It does not, however, seem clear whether the children of a person arrogated or made legitimate suffered capitis deminutio minima with their father.

(6) Where a person alieni juris became sui juris by emancipation.[1]

NOTE III

Existimationis Minutio. Infamia

'Existimationis minutio' is a phrase which denotes the loss of certain rights which the normal citizen enjoyed, on the ground that the individual in question had acted dishonourably (whether or not he had acted illegally as well). The earliest statutory example of anything of the kind occurs in the XII. Tables,[2] but the idea of existimationis minutio seems to be due less to the Legislature than to the censor who, in registering the names of the citizens, excluded from the public services, and also from certain public rights, persons who had acted disgracefully or who were employed in some disgraceful trade or business, by means of a notatio, *i.e.* putting a nota under the name of the person affected. Later the principle was adopted by the praetor, who in his edict gave a list of persons to whom, by reason of some dishonourable conduct, he denied certain rights in judicial proceedings (*e.g.* the right to act as agent for another), and these persons came to be known as infames. A person might become infamis at once (*infamia immediata*), for example, on becoming an actor or being expelled from the army

[1] Justinian's statement that capitis deminutio minima takes place when a person alieni juris becomes sui juris (J. i. 16. 3) is too wide. A son who became sui juris on his ancestor's death did not change his family or suffer capitis deminutio. For criticism of Savigny's view that capitis deminutio minima involved more than a mere change of family (see Muirhead, pp. 123 and 422).

[2] 'Qui se sierit testarier libripensve fuerit, ni testimonium fariatur improbus intestabilisque esto.'

for misconduct, or only after sentence (*infamia mediata*), not only for a crime (judicium publicum), but sometimes even in civil cases, *e.g.* in the actio pro socio (as a partner) and the actio tutelae.

In the developed law existimationis minutio seems to have included not only 'infamia' but *turpitudo*, the latter being the case where, though the dishonourable conduct was not expressly declared infamia by a statute or in the edict, the judge visited it with some mark of displeasure in the exercise of his judicial discretion, *e.g.* he might refuse to appoint the turpis a guardian.

Before Justinian the results of infamia were as follows :—

(1) The infamis lost the jus suffragii and the jus honorum.

(2) His jus connubii was restricted by the lex Julia et Papia Poppaea, 9 A.D.; and

(3) The infamis also forfeited the *jus postulandi*—right to make application to the court.[1]

As Professor Sohm points out, these special disqualifications had ceased to exist in Justinian's time, and it would seem that the only legal result, whether of *infamia* or turpitudo, was that the judge in his discretion might attach certain disabilities to the individual, *e.g.* he might refuse, as above stated, to appoint him a guardian or to admit him as a witness, and, if instituted as heres in a will might deprive him of the benefit by granting the querela inofficiosi testamenti to the relatives of the testator.[2]

NOTE IV

In Integrum restitutio

The Praetor, in the exercise of his imperium, would sometimes upset a transaction which was legally valid, provided the person aggrieved (1) could prove damage (*laesio*), and (2) could adduce a *justa causa*, *i.e.* either (*a*) minoritas, (*b*) dolus, (*c*) metus, (*d*) error, or (*e*) absentia. The application had to be made within an annus utilis, extended by Justinian to a quadriennium continuum.

[1] G. iv. 182.

[2] See p. 187.

PART II

THE LAW 'QUOD AD RES PERTINET'

It is difficult to make this subject fit in with any modern classification. Most modern systems regard law as an aggregate of *rights* with corresponding *obligations*, and rights are divided into rights in rem and rights in personam; the former being those which a man can assert against the world, viz.: (*a*) His 'primordial' rights as a freeman that no wrong should be done to him (or to those of his household) in mind or body; and (*b*) that no trespass or other injury shall happen to his property; in other words, rights in rem are either personal or proprietary.

Rights in personam, *i.e.* those available against some definite person or persons, are also of two kinds, arising either from agreement (contract) or because a right in rem has been infringed, whereupon a new right springs up,—that the wrong-doer shall make satisfaction (tort or delict). Further, rights of all kinds are regarded as capable of passing from one person to another, either singly or *en bloc*, as on death or bankruptcy.

In the *Institutes* rights (and their analogous obligations) are only dealt with in relation to contract, delict, and kindred relations (quasi-contract and quasi-

delict); no account is given of personal rights in rem as such, and the law of property is not treated from the point of view of right and obligation.

Speaking generally, the plan of the writers of the *Institutes* seems to have been to explain the different kinds of property which were found at Rome, and then to give an account of the means of acquiring or transferring single items of tangible property. whether the 'res' in question implied full ownership or merely limited rights in the property of another (jura in re aliena, *e.g.* servitudes). Next, universal succession is considered, *i.e.* how by a single event (*e.g.* death) one man's legal persona may pass from him to another, the transferee acquiring not merely his property rights, but the whole of his rights and obligations; finally, rights and obligations are described as arising from contract, delict, and the like. It is obvious that the chief defect of the arrangement lies in the fact that universal succession is treated out of its logical order.

Following, substantially, the Roman arrangement, the order here adopted in treating the subject is as follows:—

1. Classification of 'res.' The various kinds of property and rights.

2. Methods of acquiring or transferring the ownership of single items of tangible property.

3. Rights in the property of another. Servitudes, how acquired, transferred, and lost. Other jura in re aliena.

4. Universal succession.

5. Obligations from contract, delict, and analogous relations.

Section I. Classification and Description of 'Res'[1]

1. The most important division of res is into 'res corporales' and 'res incorporales.' A res corporalis is a thing which can be felt or touched (quae tangi potest), such as land, a slave, and money; and this is, of course, the way in which the word 'thing' is used in ordinary conversation. A 'res incorporalis,' on the other hand, is one which has no actual existence, which cannot be touched, and which merely exists in the eye of the law ('incorporales sunt quae tangi non possunt qualia sunt ea quae in jure consistunt,' G. ii. 14). Examples of res incorporales are—

(i.) A servitude, *e.g.* a man's *right* to walk across another man's field.

(ii.) A hereditas, *i.e.* an individual's *estate* at any given moment, *e.g.* at death, for though the estate may consist partly of res corporales, such as land and money, it is regarded, as a whole, as a single res incorporalis, and

(iii.) An obligation, *e.g.* a man's duty to perform some promise which the law regards as binding, or to make compensation for some wrong he has done another.

The importance of the distinction is that if *res* had not included res incorporales (merely legal things), the 'jus quod ad res pertinet' would have been confined to rights directly concerning property (res corporales) merely, whereas it includes all *rights*, whether relating to property or not.

[1] The divisions given below are not all expressly made by Gaius and Justinian in their classification of res, but existed in Roman law.

2. Next in importance (which is, however, historical merely) comes the division into res mancipi and res nec mancipi. Res mancipi were those things which could only be legally conveyed by the ceremony of mancipation; if conveyed in any other way[1] no title passed, *i.e.* the property in the thing, the ownership of it, remained in the transferor, notwithstanding his attempted alienation, and although he had actually handed it over to another. Res mancipi were land and houses in *Italico solo*, slaves, oxen, mules, horses, asses, and rustic servitudes (G. ii. 15. 15*a*). It will be noticed that all these things were res corporales except rustic servitudes, and, though these are mentioned by Gaius as res mancipi, it is possible that in the early law they were excluded from the list of things which were alienated by a mancipation, the essence of which was the actual physical grasping of the thing to be conveyed ('mancipatio dicitur quia manu res capitur,' G. i. 121).[2] In the case of land the taking hold of something to represent it was no longer necessary in the time of Gaius ('praedia vero absentia solent mancipari,' G. i. 121), but the actual apprehension of the thing to be transferred was imperative even when he wrote in the other cases, *e.g.* slaves, freemen, and animals. All other res were *res nec mancipi*,[3] and in Gaius's time the property in them passed, if there was a good ground for it, *e.g.* the thing had been sold, by delivery (traditio), pro-

[1] Save by an in jure cessio, which, however, was probably later in origin than a mancipation.

[2] But see Muirhead, pp. 59-60.

[3] Sir Henry Maine has suggested that in early Roman law res mancipi were the only objects of property recognised (*Ancient Law*, p. 274). Another theory is that res mancipi constituted a man's 'familia,' as distinguished from his 'pecunia.'

vided, of course, the res in question were capable of physical delivery; traditio could be made, *e.g.* of a slave or a horse, but neither of an obligation nor of its corresponding right.[1] After the time of Gaius mancipatio gradually lost its importance, and in the time of Justinian was entirely superseded by traditio, and this division into res mancipi and res nec mancipi was accordingly then obsolete.

Other divisions of res requiring notice are—

3. Res mobiles and res immobiles. This division is found in most systems of law, and is based upon the fundamental distinction which exists between land and things attached to it (res immobiles), and all other property (res mobiles) which in its nature is not stationary, can be appropriated and taken away, and so owned absolutely in a way in which land cannot be. The division does not exactly correspond with the English division of property into real and personal, since some interests in land are personal property in England (*e.g.* leaseholds), and some things which are not land (*e.g.* title deeds) are governed by the law of realty. At Rome the distinction between movable and immovable property did not lead to so many differences as is the case in England, where the law of real estate has still many, and in the near past had many more, peculiarities, founded, as it still is, in theory, on the old feudal system. At Rome differences in the rules relating to each kind of property were based rather

[1] In private law every obligation implies a right, *e.g.* A agrees to sell B a watch for £5. There are here two obligations and two rights. A's right is to receive £5, B's corresponding obligation is to pay it. B's right is to have the watch transferred to him, A's obligation is to transfer it.

on the differences in the nature of the two classes of things, *e.g.* an immovable, since it cannot as a fact be taken away, could not be stolen, and since it is, prima facie, of greater value and importance[1] than movable property, took longer to acquire by possession without title.

4. Things in patrimonio and extra patrimonium, or in commercio and extra commercium (Justinian's chief division).

A res extra patrimonium is a thing which is incapable of being owned by a private person, a res in patrimonio one which can be so owned. Of res extra patrimonium there are four classes :—

(*a*) Res omnium communes, things which all the world may enjoy, viz. the air, running water, the sea, and the sea-shore.

(*b*) Res publicae, the property of the State, such as public roads and harbours.[2]

(*c*) Res universitatis, the property of a corporation, *e.g.* a theatre in some Roman city.

(*d*) Res nullius, *i.e.* res divini juris as opposed to res humani juris (which Gaius makes his principal division). Res divini juris were—

(i.) Res sacrae, things dedicated to the gods above, *e.g.* a temple.

(ii.) Res religiosae, things dedicated to the gods below, *i.e.* burial-grounds (wherefore, though a special consecration was necessary to make a thing sacred,

[1] This was especially the case in early times, when land had a far greater importance than it has in these days of stocks and shares.

[2] Originally everything belonging to the populus Romanus was 'res publicae' and extra commercium, but in Justinian's time only such State property as *directly* benefited the community, as in the instances given in the text, was extra commercium ; *e.g.* public slaves, though they belonged to the State, were in commercio.

any one could make ground 'religiosum' by burying a corpse in it, provided he was the person charged with the duty.

(iii.) Res sanctae, things which were specially protected by the gods, such as city walls. It must be borne in mind, however, that though res nullius is treated by Justinian in this passage[1] as equivalent to res divini juris, the more usual meaning of res nullius is a thing without an owner at the moment (*e.g.* a wild beast), and so, in a sense, extra commercium, but which can be bought 'in commercio' by being effectively appropriated.

5. Res fungibiles and res non fungibiles. Res fungibiles are things such as money, wine, and grain, which are usually regarded not as individual units (such as a horse or a piece of land), but collectively, or, as the Roman lawyers said, quae pondere, numero mensurave constant. The division is of very minor importance; one instance of its application is that there could not be a loan (mutuum) of res non fungibiles.

6. Res 'quae usu consumuntur' and other res. This, again, is an unimportant distinction. A thing which was lost by use, *e.g.* wine and food, could not be the object of a true usufruct (or life estate).

Section II. Methods of Acquiring or Transferring[2] the Ownership of Single Items of Tangible Property

In describing the various means of acquiring ownership, Gaius and Justinian point out the methods by

[1] J. ii. 1. 7.

[2] No separate account is given of the loss or extinction of property

which one or more items of property could be acquired or transferred at Rome; but the methods (for the most part) only apply to tangible property (*i.e.* to res corporales — quae tangi possunt), and have no reference to a res incorporalis, such as an obligation; further, the acquisition is in all cases of a single object or of single objects, as distinguished from 'universal succession,' *i.e.* the acquisition of an estate (juris universitas) which is made up of an *aggregate* of res singulae, both corporales (*e.g.* a deceased person's land and furniture) and incorporales (*e.g.* the debts owed by and to him).

Res singulae may be acquired—

(i.) By methods common to all nations (naturales modi).

(ii.) By methods peculiar to Rome (civiles modi). Justinian remarks that the naturales modi were by far the oldest,[1] but this is, of course, quite untrue; the civiles modi were the first in date, and originally the only methods by which property could be gained.[2]

Subsect. 1. *Naturales modi*

I. Occupatio is taking effective possession, with intent to become owner, of something which at the moment belongs to nobody, *i.e.* is either res nullius (*e.g.* a lion in the forest) or res derelicta, the former owner having definitely abandoned ownership of his property, as where a man throws away an old shoe. In the case of res derelicta there must be an intention

rights; property as such rarely comes to an absolute end, for when, on a transfer, the present owner's right is extinguished, a new right to the thing springs up in the transferee.

[1] J. ii. 1. 11.

[2] *Cf.* Maine, *Ancient Law*, c. viii.

to abandon on the part of the previous owner; hence a person who appropriates things thrown overboard in a storm to lighten the ship, or accidentally dropped from a carriage, is guilty of theft. The chief cases of occupatio are—

(*a*) The capture of wild animals; here the animal must be actually captured; it is not enough to wound it,[1] and if it escapes it becomes res nullius once more. The animal must be wild by nature, such as a beast in the forest, bees, peacocks, pigeons and deer, but not fowls and geese. With regard to peacocks and pigeons and deer, which, though naturally wild,[2] sometimes come back after flying away, the rule was adopted that a mere temporary absence did not destroy ownership, so long as they had the intention to return (revertendi animus), and they are to be taken to have abandoned that intention, Justinian says, when they abandon the habit of returning.

(*b*) Things taken from the enemy, 'so that even freemen become the slaves of their captors.'

(*c*) Precious stones and other 'treasure trove' found upon the sea-shore become the property of the finder.[3]

(*d*) 'Insula nata.' If an island is formed in the sea[4] (but not if formed in a river) it is considered a res nullius and belongs to the first occupant.

II. Accessio is where a thing becomes one's property by *accruing* to something which one already owns. The property so gained may have been previously either a res nullius, or a res aliena.

[1] J. ii. 1. 13.

[2] 'Pavonum et columbarum fera natura est' (J. ii. 1. 15).

[3] See J. ii. 1. 39, as to claims by the State.

[4] Quod raro accidit (J. ii. 1. 22).

Instances of accrual of a res nullius are—

(1) Alluvio. Where land adjoins a river and the action of the stream imperceptibly deposits earth upon or adds it to the land in question, the earth so deposited or added becomes the property of the owner of the land by accessio.[1]

(2) Insula nata. Where an island is formed in a river, then, if in the middle of the river, it belongs to the owners of the land on the banks in proportion to their interest along the banks, if it is nearer to one side than another the island belongs to the owner of the nearer bank.[2]

(3) Alveus derelictus. If a river forsakes its old course and flows in another direction, the old bed of the river belongs to the owners of the banks in proportion to their interests along the banks.

The following are instances of accessio where the thing accruing is res aliena :—

(1) Avulsio. A's land is swept away by the violence of the stream and united to B's. It does not at once cease to belong to A, but it will (and so become B's by accession) when it has been united long enough for A's trees (which were swept away with the land) to take root in B's ground.

(2) Confusio and commixtio ; the former is when liquids, the latter when solids belonging to different people are mixed together; if liquids, the result

[1] Justinian gives as an instance of accessio the offspring of animals of which one is the owner (J. ii. 1. 19), but one would seem to have a title to the offspring as the dominus of the mother, and it seems unnecessary, therefore, to claim by accessio.

[2] But if an island is formed by a river dividing itself at a given point and joining again lower down, so as to give A's land the appearance of an island, his land still belongs to him. And mere temporary inundation of land had no effect (J. ii. 1. 22 and 24).

becomes the common property of both, and each can compel the other to make over to him his part by the action 'communi dividundo'; if solids are mixed together by consent, again the product is common to both; if, by accident, then each can claim his original property by a real action, but the judge has a discretion to decide how the separation is to be made in case there is difficulty in ascertaining the identity of the various properties, *e.g.* two mixed lots of wheat can as a fact be severed, but it would in practice be very difficult to make an exact division (J. ii. 1. 27, 28).

(3) Inaedificatio; of this there are two main instances—

(*a*) A with B's materials builds a house upon his own ground. Thereupon, since 'superficies solo cedit,' A becomes owner of the building, and so long as the building stands B cannot claim his materials, because the XII. Tables provide that no one is to be compelled to take out of his building 'tignum' or material, even though it belongs to another. But B is not without remedy, for by means of the action de tigno juncto[1] he can recover double damages from A, and when the building is destroyed can bring an *actio ad exhibendum* and claim the materials if he has not already obtained damages.

(*b*) A builds a house with his own materials upon B's ground. Again, on the principle 'superficies solo cedit,' B becomes owner of the house by accessio. If when A built he knew the land was B's, he has no remedy, he must be taken to have made B a present;

[1] There is authority for saying that this action only lay when the materials had been actually stolen.

if, however, he built in the honest belief that the land was his and *is still in possession*, B cannot oblige him to give up possession without making compensation, for if B refuses to do so his action is defeated by the exceptio doli mali.

(4) Plantatio and satio. If A plants B's tree in his own ground, or if A plants his own tree in B's ground, then, as soon as the tree takes root, it belongs to the owner of the ground (plantatio). Similarly, grains of wheat (whoever the owner) sown in land belong to the owner of the land (satio). But in either case the owner of the land, if out of possession and seeking to recover it from a bona-fide possessor, can be defeated by the exceptio doli mali unless he is ready to make compensation (J. ii. 1. 31, 32; G. ii. 74-76).

(5) Scriptura. A writes a poem or a treatise upon B's paper. The whole belongs to B. But if the paper is in A's possession and B brings an action to recover it and refuses to pay the cost of writing, he can be defeated by the exceptio doli, provided A got possession of the paper innocently.

(6) Pictura. A paints a picture upon B's tablet. The picture is here considered the principal thing and the tablet the accessory, and so the result belongs to A. But if B is in possession, A must pay compensation for the tablet, or be defeated by the exceptio doli. If A is in possession, B may bring an actio utilis for the tablet, but must be prepared to pay for the picture, or himself be defeated by the exceptio; that is, if A got the tablet honestly; if A stole it, B has the actio furti.

(7) A weaves B's purple into his own garment.

The product belongs to A. But if the purple was stolen from B, the latter has the actio furti and a condictio against the thief, whoever it was (J. ii. 1. 26). The examples (3)-(7) inclusive are sometimes classed together as adjunctio.

III. SPECIFICATIO is where one man by his skill and labour converts another's property into a new form, *e.g.* A makes a ship with B's wood. The Sabinians thought that the raw material was the thing to be considered, and that the owner of the material was the owner of the product; the Proculians that the product belonged to the maker (G. ii. 79). Justinian took a middle course (media sententia). If the thing could be reduced to its former state (as a statuette made by A out of B's brass), it belonged to the owner of the materials, if it could not be so reduced (*e.g.* A has made wine out of B's grapes), the maker became owner, paying compensation.[1]

IV. FRUCTUUM PERCEPTIO.—The dominus of land or animals gets their fruit or offspring as dominus. Persons having limited interests (*e.g.* for a term of years) acquire the fruits of the property they so enjoy by actual separation (perceptio). The chief examples of persons who acquired by this title are the lessee (colonus), the life tenant (usufructuarius), and the bona-fide possessor (*i.e.* the person who possesses another's property in the honest belief that he has a right to it). To these persons, therefore, belong such fruits as are gathered, so long as their interest continues. Therefore if the usufructuarius (or

[1] But if A makes a new product partly by means of B's, and partly by means of his own materials, it belongs to A (making compensation) in any case (J. ii. 1. 25).

life tenant) dies before harvest the fruits, since they have not been gathered, do not belong to his heir but to the dominus or, as we should say, the reversioner. The bona-fide possessor, when the true owner brings an action to recover his property, is bound to restore the property itself, together with such fruits as are in being at the moment action is brought, not those which he has gathered in good faith. The mala-fide possessor, on the other hand, is bound to restore or give compensation for everything, whether consumed or not. The term 'fruit' includes the young of animals, Justinian tells us,[1] so that lambs, *e.g.*, immediately become the property of the usufructuarius, but it does not include the offspring of a female slave, which, accordingly, belong to the reversioner and not to the life tenant.[2]

V. TRADITIO. — Delivery, though formerly only applicable to the transfer of res nec mancipi, became, in the time of Justinian, the common method of alienation for res corporales. For traditio to constitute a good title the following elements must concur:—

(i.) The transferor must either be the dominus[3] or his agent (*e.g.* tutor or a mortgagee with the right to sell).

(ii.) He must intend to transfer, and the other person to accept, the ownership of the thing; but the intention to confer ownership need not always be in

[1] J. ii. 1. 37.

[2] 'Absurdum enim videbatur, hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit' (J. *loc. cit.*).

[3] Sometimes even the dominus cannot alienate; *e.g.* a husband could not alienate part of the dos under the lex Julia de fundo dotali (*supra*).

favour of a *definite* individual, *e.g.* when the praetor throws money to the mob there is a good traditio, though the praetor merely intends that the first person who picks it up shall keep it.

(iii.) The thing must not be res extra commercium.

(iv.) There must be some good legal reason (justa causa) to support the delivery: 'nunquam nuda traditio transfert dominium, sed ita, si venditio vel aliqua justa causa praecesserit propter quam traditio sequeretur.' Such a causa would be, *e.g.*, that the thing had been sold to a purchaser, provided he paid the price or satisfied the vendor in some other way, or that the donor gave the res by way of dowry or gift; it would, obviously, not be a justa causa for transferring dominium that traditio of an object had been made to another for safe custody; and

(v.) There must be actual or constructive delivery; 'traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur.'[1] It is a good constructive delivery (sometimes called 'brevi manu traditio') if A, who has delivered a thing to B for safe custody (and therefore not conferred dominium), afterwards sells or makes a present of it to him, and consents to his acquiring dominium ('interdum etiam sine traditione nuda voluntas sufficit domini ad rem transferendam,' J. ii. 1. 44). So, too, if A's goods are in a warehouse and he sells them to B, he makes a valid traditio by giving B the key of the warehouse.

[1] The chief exception was that in a societas omnium bonorum the partnership agreement gave, without traditio, each partner an interest in the property of the others.

Subsect. 2. Civiles modi

Justinian only mentions two methods of acquiring property at civil law, viz. usucapio and donatio. There were, however, in fact, two other ways in his time, viz. 'lege' and adjudicatio, and under the old law there were also the methods of mancipatio and in jure cessio. In all, therefore, it is necessary to consider—

(1) Mancipatio.
(2) In jure cessio.
(3) Usucapio.
(4) Donatio.
(5) Lege.
(6) Adjudicatio.

I. *Mancipatio.*—This method of conveying 'res mancipi' has been described already. It is well to bear in mind, however, that it was applicable not only as a means of conveying property but to the ceremonies of adoption, emancipation, marriage, coemptio fiduciae causa, and will-making. It disappeared under the law of Justinian, for the distinction between res mancipi and res nec mancipi was abolished (so that even res mancipi could be conveyed by traditio), and the ceremonies in question were then either obsolete or performed by simple methods, which did not involve the '*imaginaria venditio.*'

II. *In jure cessio* has also been described, viz. as a means of freeing a slave (manumissio vindicta). As a method of conveyance it involved a claim before the praetor (in jure) by the intended alienee that the property in question was already his; if, *e.g.*, the ownership of a slave were to be transferred, the

alienee taking hold of him said: 'Hunc ego hominem ex jure Quiritium meum esse aio'; the owner made no defence, and the praetor thereupon awarded the slave to his new master (G. ii. 24). This fictitious law-suit had, like mancipatio, other uses at Rome besides being a means of conveying property. It appears, for example, as already stated, in manumissio vindicta, in adoptions, in the creation of servitudes, in the transfer of tutela legitima in the case of women of full age, and in the transfer of a hereditas. Gaius tells us that in his time in jure cessio was not often used as a means of conveyance, since it was easier in the case of res mancipi to use a mancipatio which only involved the presence of a few friends, whereas an in jure cessio implied a public law-suit;[1] and, of course, res nec mancipi could always be conveyed by traditio merely.[2] But in jure cessio was in use under the Antonines for some of the other purposes above mentioned (*e.g.* adoptions), and seems also to have been an existing method of creating a mortgage.[3] In Justinian's time it was altogether obsolete; it was unnecessary as a means of conveyance, since traditio applied to all res corporales and was infinitely simpler, and its other objects were either obsolete (as the legitima tutela of women of full age) or were accomplished in a manner which did not involve its use.

III. *Usucapio* is a means of acquiring dominium by long possession; the original periods, as fixed by the XII. Tables, being in the case of immovable property two years, in the case of 'ceterae res' one year. For usucapio to operate in favour of any given person (A) the following conditions had to be satisfied:—

[1] G. ii. 25. [2] G. ii. 19. [3] G. ii. 59.

(1) A must actually possess the thing in question; he must have 'possessio civilis' as distinguished from mere detentio;[1] a person to whom goods had been entrusted for safe custody, *e.g.*, had only detentio, and therefore, however long he might hold them he could never, by usucapio, acquire dominium.

(2) A must have the jus commercii, hence no peregrinus could acquire by usucapio.

(3) A must possess for the full period, but if he is B's heir,[2] and B had been in possession say for three months, A can count this in his favour, and so, *e.g.*, in the case of a movable complete usucapio in nine months, and this privilege of 'accessio temporis' or 'possessionis' was extended by Severus and Antoninus to a purchaser, who could count his vendor's time.

(4) There must have been no interruption (usurpatio), *e.g.* if A is usucapting a slave who runs away, or a garment which he loses, he must begin over again without counting his former possession, when he regains the slave or garment.

(5) Some things could not be usucapted. Examples are:—

(*a*) Res extra commercium, such as land in the provinces ('provincialia praedia'), for they belonged to the Roman people or the Emperor,[3] free persons (even though bona-fide believed to be slaves), and things sacred and religious.

(*b*) Anciently, says Gaius,[4] res mancipi belonging

[1] *Infra*: Note on ownership and possession.
[2] Either heres (civil heir) or 'bonorum possessor' (heir at equity).
[3] G. ii. 7. [4] G. ii. 47.

to a woman under her agnate's tutela, unless they had been delivered with her tutor's auctoritas.

(*c*) Under the XII. Tables and the lex Atinia 'res furtiva' (stolen property), and under the lex Julia et Plautia 'res vi possessa' (property taken by violence). Of course the original wrong-doer could not usucapt even apart from these statutes, for he had not the 'bona-fides' which was necessary for usucapion; the statutes, therefore, aim at some subsequent possessor and deprive of the advantage of usucapio even a person who has purchased from the thief for full value and without any knowledge of the defect in his title.[1] And, therefore, Gaius tells us, it is not often that usucapio operates in the case of movables, for in Roman law everybody who, knowing a thing is not his own, sells or gives it to another commits a theft.[2] There are, however, he tells us, exceptions, *e.g.*—

(i.) C lends or deposits a horse with B, B dies and D, his heir, sells or gives the horse to A. D has not committed 'furtum,' and A can, if ignorant of the circumstances, usucapt.

(ii.) B has a life estate, and C the reversion (dominium) in a female slave. Her offspring, as already stated, belong legally to C. B, under a genuine mistake of law, thinks the child is his, and sells or gives it to A. B has not stolen the child,[3] and A can usucapt.

Further examples of property which could not be

[1] The defect (vitium) attaching to a thing once 'furtiva' or 'vi possessa' could only be cured by the thing getting back to the power of its former owner (J. ii. 6. 8).

[2] G. ii. 50.

[3] Furtum enim sine adfectu furandi non committitur (G. ii. 50).

acquired by usucapio are: (*d*) immovables in Italy forming part of a dos; (*e*) the property of the fiscus;[1] (*f*) bribes taken by public officials under the lex Julia repetundarum: and under the later law, (*g*) the property of minors; (*h*) the property of the Emperor; (*i*) immovables vested in churches or pious foundations.

(6) A must have *bona-fides*, that is, he must not know that the property really belongs to another, and *iustus titulus*, *i.e.* there must be some ground recognised by the law for usucapio to operate, *e.g.* it is a justus titulus if A has bought a res mancipi but has failed to have it conveyed to him by an appropriate method. If A is in the wrong, and thinks there is a justa causa when, in fact, there is not, *e.g.* gets possession of a thing which he thinks he has bought, whereas he has not, usucapio does not operate: 'Error autem falsae causae usucapionem non parit. Veluti si quis, cum non emerit, emisse se existimans possideat' (J. ii. 6. 11). But this doctrine is subject to qualification, and where 'the facts are such as to justify the belief in the existence of a title,' usucapio may sometimes be based, as Professor Sohm points out, upon bona-fides alone.[2] Nevertheless if A's title is bad at the beginning of his possession his mere intention cannot change it so as to make it good for usucapio, for 'ipsum sibi causam possessionis mutare non posse.' So, *e.g.*, a man entrusted with a horse for safe custody cannot change his mere 'detentio' into 'possessio civilis' by stating without foundation that he is the lender's heir; but the rule does not prevent him from altering his possession in

[1] J. ii. 6. 9; and see J. ii. 6. 14. [2] Sohm, p. 339.

a legitimate manner, so that if, having something deposited with him, he afterwards buys it from the depositor, his detentio will change into true possession, and usucapio will operate to cure any technical defect, *e.g.* that the thing has not been conveyed to him in an appropriate manner.

Whatever may have been the case in the early law, in the time of Gaius usucapio seems to have had a comparatively limited application. Its main object, then, was not so much to enable dominium to be acquired as to *add* the element of legal ownership to a possession which was already dominium in everything but name; in other words, the ordinary object of usucapio was to cure the technical flaw which arose when a res mancipi has been transferred for some valid reason (*e.g.* a gift or sale), but the form of a mancipatio or in jure cessio had not been gone through, and therefore the bare legal ownership was left in the transferor; this ownership (nudum jus Quiritium) was, by usucapio, divested from the transferor and vested in the transferee. But although this was the normal object of usucapio as described by Gaius, there were cases where it did more—where it cured a substantial and not a mere technical flaw in the possessor's title, viz. where he had acquired from a person who was neither dominus of the thing in question nor a person (such as a mortgagee with power of sale) who, though not dominus, had a right to convey. This kind of usucapio rarely occurred, as already stated, in the case of movable property, because conveyance by a non-owner usually implied theft, but to this there were exceptions, as in the cases already put of the heir and the usufructuarius. And in the case of

immovable property usucapio, more frequently than with movables, served to cure a substantial blot in possession. C, as Gaius tells us,[1] is the owner of land, and by his negligence or absence, or by his death without leaving a successor, leaves it unoccupied, B enters and, of course, cannot usucapt because he has not 'bona-fides,' he knows it is the property of another; but if B[2] transfers the land to A (*e.g.* sells it to him), and A has no knowledge of the facts, A can usucapt, although he bought from a non-owner, and so cure the substantial flaw in his title.[3]

Gaius also describes three cases where a man can usucapt although he himself knows the property belongs to another, a species of usucapio which is called *usucapio lucrativa*: 'nam sciens quisque rem alienam lucrifacit,'[4] *i.e.* because, knowing the property is not his own, a man makes himself richer (by usucapio) at another's expense. The cases in question are :—

(*a*) *Usucapio pro herede.*—B dies, leaving no necessarius heres.[5] A may enter upon the possession of his estate or any part of it, and after possessing it for a year may become owner.[6] The period is only a year, even if the estate comprises immovable property, which usually required two years, for the lawyers in considering an estate (hereditas) did not regard its constituent parts but looked at it as an abstract legal

[1] G. ii. 51. [2] Land cannot be stolen.

[3] Justinian altered the law: unless all the facts were known to the owner thirty years were to be necessary to give A dominium; if they were known ten years (the ordinary period in Justinian's time) were enough. [4] G. ii. 56. [5] P. 190.

[6] *Cf.* the general occupant in English law.

conception, *i.e.* a res incorporalis ; it was not therefore a 'res soli,' requiring under the XII. Tables the longer period, but one of the 'res ceterae,' for which one year was enough. For the existence of usucapio pro herede the following reason may be gathered from Gaius. A necessarius heres was so called because the law gave him no option ; there could be no question of his refusing to act, and accordingly he had to perform the sacra and to answer to the creditors of the deceased in any event. In such a case there was no necessity for usucapio pro herede, which, in fact, had no application. If, however, the heres were not necessarius, but an extraneus,[1] he did not become heir until he signified assent, and usucapio pro herede, accordingly, afforded a reason why he should hasten to accept the heirship, so that there might be some person at the earliest possible moment to carry on the religion of the family and to pay the debts Gaius tells us, however, that in his time this kind of usucapio was no longer lucrative (sed hoc tempore jam non est lucrativa[2]) ; which is accounted for by the fact that soon after the time of Cicero the lawyers refused to sanction the theory that a hereditas as a whole could be acquired in this way, although individual items of it (such as a slave or a horse) might, and by the further fact that by the S.C. Juventianum in the time of Hadrian,[3] it was provided that even after the usucapio was complete the real heir might recover the hereditas or any item of it from the 'squatter,' whose title, however, remained

[1] P. 191. [2] G. ii. 57.

[3] Gaius says that the S.C. in question was passed in Hadrian's time, but it is not absolutely clear whether it was the S.C. Juventianum.

good against third persons, *i.e.* any person except the heir, who tried to eject him.

(*b*) The second kind of usucapio lucrativa was *usureceptio, i.e.* getting back property which one once owned by usus or usucapio.[1] A has transferred property either by a mancipatio or an in jure cessio to B, so that B becomes legal owner or dominus, but the transfer is coupled with a trust (fiducia) in A's favour, either—(*a*) that B, to whom the property has been conveyed as security for a loan, will reconvey to A when the loan is repaid, or (*β*) there being no loan, that B, to whom the property has been conveyed for safe custody, will reconvey on request. Then, in either case, if A happens to get possession of his property again, he will become owner in a year (even though the property is land) by usucapio; but in case (*a*)—of the loan—this will only happen (i.) if A has paid the debt, or (ii.) if, not having paid the debt, A has got possession in some way which does not involve either having taken the property from B, the creditor, or having obtained it from him at A's request and during B's pleasure.[2]

(*c*) The last case of usucapio lucrativa is another species of *usureceptio*, viz. *usureceptio ex praediatura.*[3] A's land has been mortgaged to the State, and the State has sold the land to B. If A regains possession of the land he becomes owner again in *two* years. This usureceptio is called 'ex praediatura,' because B (the purchaser from the State) was called a 'praediator' (nam qui mercatur a populo praediator appellatur, G. ii. 61).

[1] Under the old law usus had the same meaning as usucapio.
[2] G. ii. 59-60. [3] See Roby, i. 478, for a very full explanation.

Inasmuch as land in the provinces was a res extra commercium, and therefore unprotected by usucapio, the provincial governors (praesides) were driven to devise an analogous means of securing long possession against disturbance, by means of what was known as '*longi temporis praescriptio* or *possessio*,' a method which was extended so as to embrace movable property as well,[1] and to include peregrini who, not enjoying the jus commercii, could not benefit by the jus civile institution—usucapio.[2] Praescriptio longi temporis, though it had the same object as usucapio, effected it in a different manner. In the latter possession for the given period confers dominium. Praescriptio longi temporis, in its early form, did not; the possessor remains possessor, but the true owner's right of ejectment or of recovering his property becomes barred. Suppose, *e.g.*, that A was in possession, and could show that he had bona-fides and justus titulus, that there was nothing against his possessing the thing in question (*e.g.* it was not a res furtiva), and that he had been in possession for a sufficient time. Then, if sued by B, a person claiming the land, A could insist upon having a 'praescriptio' placed at the head of the *formula* by which the action was tried, to the effect that B was not to succeed if it were proved that A had, in fact, enjoyed the property for the necessary period—the period being ten years *inter presentes* (*i.e.* if both A and B lived in the same province), twenty *inter absentes* (*i.e.* if they lived in different provinces).[3]

[1] By Caracalla.

[2] The extension to peregrini was probably the work of the praetor peregrinus.

[3] In its later development longi temporis praescriptio or possessio

In Justinian's time the old usucapio in two years of immovables had become practically obsolete, because almost all land was solum provinciale, and he accordingly amended both the civil law of usucapio and also the law of possessio longi temporis, embodying the two ideas in one system; he enacted—

(i.) That usucapio of movables should continue as theretofore; the necessary period, however, being three years instead of one year.

(ii.) That all land, whether a fundus Italicus or provincialis (for he abolished the distinction), should be acquired, no longer by usucapio, but by longi temporis praescriptio, the periods being ten or twenty years, as above stated.

(iii.) That thirty years' possession (longissimi temporis praescriptio) of property (whether movable or immovable) was to give dominium to a bona-fide possessor, although he had no justus titulus, and even though the thing had been originally stolen, provided violence had not been used.

IV. *Donation.*—Donatio or gift is not treated as a mode of acquisition by Gaius, and Justinian would have been more logical had he omitted it. A gift has two aspects: where the intention to give and the gift are simultaneous the gift is, obviously, not a modus acquirendi but a justa causa for traditio; if the case is merely one of a promise of bounty it would, so far as actionable, be more properly treated under the law of contract. Further, as Dr. Moyle points out,[1] a gift does not necessarily take the form of trans-

came to mean more than barring the late owner's remedy, the new owner acquired an *action in rem* for the recovery of the thing, and in this aspect possessio longi temporis may be regarded, like usucapio, as conferring dominium.

[1] Moyle, p. 232.

ferring dominium, it may, *e.g.*, consist in the release by a creditor of a debt owing to him.

Under this title (J. ii. 7.) Justinian discusses three distinct forms of donation: donatio mortis causa, donatio inter vivos, and donatio propter nuptias, the last of which has been described already.

A donatio mortis causa was a gift in anticipation of and conditional upon death, and in the time of Justinian it had to be made in the presence of five witnesses.[1] A man (A) who thinks he is dying wishes himself rather to keep some piece of property than that the donee (B) shall have it, but prefers that B shall have it rather than the heir.[2] Such a gift might take one of two forms: A may give the dominium of the object to B at once, subject to the condition that the dominium is to be retransferred to A if he does not die, or A may merely give B the possession of the object, B's acquisition of the dominium being conditional on A's death. Inasmuch as a donatio mortis causa was revocable at any time before death, it was unlike a donatio inter vivos, which, as a general rule, could not be revoked; and since a donatio mortis causa took effect, at any rate in possession, at once, it was unlike a legacy, which did not take effect until the donor had died and the heir had entered. Formerly there were many differences in the way in which donations of this sort and a legacy were treated, *e.g.* they were not subject to the lex Falcidia, or to the leges Julia et Papia Poppaea; but these differences were gradually

[1] See, for the details of Justinian's enactment, Cod. viii. 57. 4.

[2] 'Cum magis se quis velit habere, quam eum, cui donatur, magisque eum cui donat, quam heredem suum' (J. ii. 7. 1).

removed, donations being made subject to the same rules as legacies, and in Justinian's time so few were left that he was led to state 'hae mortis causa donationes ad exemplum legatorum redactae sunt *per omnia*' (J. ii. 7. 1), a statement which needs qualification, since some differences still existed, *e.g.*— (*a*) The essential distinction that whereas a donatio took effect at once a legacy did not until the heir entered. (*β*) A filiusfamilias could, with his pater's assent, make a good donatio mortis causa out of his peculium profectitium, though he could not bequeath it.

Donatio inter vivos.—It would seem that under the old law there were only three ways in which a gift of this sort could be made. A wishing to benefit B—

(i.) Might make over the gift by a mancipatio or an in jure cessio, or, later by traditio, for all of which donatio was a justa causa, or

(ii.) A might bind himself to make the gift by the formal verbal contract stipulatio, or

(iii.) If B were his debtor A might release the debt by acceptilatio.

In other words, a mere informal agreement to give had no more effect in early Roman law than it has in England to-day. The lex Cincia (204 B.C.) prohibited (except in the case of gifts in favour of near relatives and patrons) all gifts beyond a certain (but unknown) amount, and required all gifts to be actually transferred (by mancipatio or the like), otherwise they were to be revocable by the donor, but there was no other penalty, so that the law has been described as of imperfect obligation (lex imperfecta). Antoninus Pius provided that, as between parents and children, a

mere informal agreement should be actionable. Gifts exceeding 200 solidi were required to be registered in the *acta* by Constantius Chlorus unless made in favour of people excepted from the lex Cincia,[1] but these too were brought under the ordinary rule by Constantine. Justinian considerably modified the law.

(1) Traditio was not to be essential, and therefore a mere informal agreement to give was effectual in the sense that it placed the donor under the necessity of making traditio ('traditionis necessitas incumbat donatori,' J. ii. 7. 2).

(2) The gift was only to require registration if it exceeded 500 solidi, and certain gifts, even though of greater amount, were valid without registration, *e.g.* to redeem captives, or made by or to the Emperor. Gifts requiring registration and not fulfilling the requirement were only void as to the excess.

(3) He simplified the law as to revocation (which had previously been exceptionally allowed) by providing that any donor might revoke, but only for the legal reasons Justinian specified, *e.g.* where the person to whom a gift had been made on condition failed to comply with it, or where he was guilty of gross ingratitude.[2]

V. *Lege*—or title by statute. Ulpian (*Reg.* xix. 17) states that we acquire property in a lapsed (caducum) or forfeited (ereptorium) testamentary

[1] But see Girard, p. 932, note 5.

[2] At the end of this title Justinian mentions what he terms another mode of acquisition under the old civil law, viz. 'per jus adcrescendi.' He refers to the old rule, that if one of several masters manumitted a slave without the consent of the rest he lost his share in the slave. The subject seems hardly important enough to deserve separate mention as a modus acquirendi.

bequest by virtue of the *lex Papia Poppaea;* in a legacy by the XII. Tables. These subjects will be considered later, in discussing universal succession by will.

VI. *Adjudicatio* is the award of a judge in a suit for partition. If two or more persons are co-owners of property (*e.g.* as heirs or partners) they may, if sui juris and competent to act, agree how the property is to be divided up, so that each may, instead of being co-owner of the whole, become sole owner of part, and having come to this agreement they will carry it out by each conveying (*e.g.* by mancipatio) to the others the shares respectively allotted to them. But if they cannot agree, or are under disability, the assistance of the law court is necessary and the judge will decide how the property ought equitably to be divided, and will then by his award (adjudicatio) vest in each, without any conveyance, the share which it is decreed he shall receive. Adjudicatio is, therefore, a mode of acquiring property, because the award gives A what previously belonged to A, B and C.

Section III.—Rights amounting to less than full ownership in the Property of another—Servitudes, how Acquired, Transferred, and Lost—Other Jura in Re Aliena

Up to this point the acquisition of res singulae has been discussed from the point of view of acquiring the ownership of the entire thing; if land, the whole of it, and so with other objects of property. We have now to consider how a man may have a right in property less than full ownership, the dominium

being, in fact, vested in another; in other words, we have to deal with jura in re aliena.

These rights in another's property, though they may arise from contract, must be distinguished from rights *resting merely on contract*, for if the right is of this latter kind, as where B borrows a book from A, it confers only a right in personam, *i.e.* against the lender, whereas the jura in re aliena now under consideration imply that the ownership itself is in a sense split up. Though the full dominium remains in the person whose property is subject to the right, the person in whom the right is vested has, to the extent of his right, the powers of an owner and so a jus, not merely in personam, but *in rem*, *i.e.* which he can assert against all the world. If, *e.g.*, A has the right (jus in re aliena) of walking over B's field, though the field remains in the ownership of B, his full rights as owner are diminished, pro tanto, by A's right, and for any violation of such right A can sue not merely in personam (*i.e.* B), but in rem (*i.e.* anybody). The jura in re aliena recognised by Roman law are—

(1) Servitudes.
(2) Emphyteusis.
(3) Superficies.
(4) Pignus and hypotheca.

Subsect. 1. *Servitudes*

A servitude is a res incorporalis, and is the *right* which a man, who is not the owner of some piece of property, has of deriving some advantage from it.[1] If

[1] A servitude can only be imposed upon, or rather, carved out of, ownership; it cannot be carved out of another servitude: 'Servitus servitutis esse non potest.'

it is a *positive* servitude he may do something in relation to it, *e.g.* walk over another man's land; if *negative*, he may restrain the owner from exercising some right which, but for the servitude, the owner might avail himself of; *e.g.*, an owner of land can, prima facie, build to any height he pleases, but if another has the servitude known as the jus ne luminibus officiatur, the owner cannot build so as to obstruct his lights. Whether positive or negative, the owner of the thing subject to the servitude cannot be compelled to do anything: 'Servitutum non ea natura est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat.' There seems to be only one exception to this. A is bound to support B's beam by A's wall. The wall is ruinous, A is bound to repair.[1]

Besides being classified as positive and negative, servitudes may be divided into praedial and personal, and praedial servitudes are subdivided into rustic and urban.

A praedial servitude occurs where the owner of one property (called the praedium dominans) has the right to require some advantage from the adjoining property (the praedium serviens) of some other person.[2] In the case of these praedial servitudes the servitude is regarded, not as annexed to the person enjoying or subject to it, but as annexed to the two properties, hence 'omnes servitutes praediorum *perpetuas causas* habere debent'; *e.g.*, praedium X has the right of being supported by praedium Y; A

[1] See Girard, p. 354, note 1.

[2] The properties must be neighbouring properties, but need not actually adjoin.

happens to be the owner for the time being of X, and B of Y, and therefore A enjoys and B is subject to the servitude. But after they have died or parted with their estates the servitude will go on (for it has 'perpetuae causae,' being attached to the praedia and not to A and B merely), and will be enjoyed or borne by all subsequent owners of the two properties.

A praedial urban servitude is not necessarily, as the name would suggest, one where the properties are in a town; it is where the servitude is attached to *a building* as opposed to a praedial *rustic* servitude where the servitude is attached to *land.* Examples of urban servitudes are—

(*a*) Right of support 'servitus oneris ferendi.'

(*b*) Right of inserting a beam into a neighbour's wall ('tigni immitendi').

(*c*) The right that a man has that his neighbour shall permit rain-water from the former's house to flow into or over his premises (stillicidii avertendi) and the right of 'ancient lights' (altius non tollendi, or ne luminibus officiatur). Justinian speaks also[1] of a right a man has *not* to receive his neighbour's water and in the *Digest* a jus altius tollendi is mentioned. It is not clear what is meant; prima facie, unless subject to a servitude a man has a right (which is not itself a servitude, but an ordinary right of property) that his neighbour shall not cause him damage by inundating him, and, in the same way, the owner of property has, as such, unless subject to a servitude, a clear right to build as high as he pleases. Possibly the writers of the passages mentioned, when they

[1] J. ii. 3. 1.

spoke of the right of not receiving water and the right altius tollendi, were confounding what may be called the natural rights of an owner of property with servitudes in the strict sense.

Examples of praedial rustic servitudes are—

(*a*) Jus itineris, the right a man may have of passing on foot or horseback over another's land.

(*b*) Jus actus, the right of driving beasts, with or without carts or carriages.

(*c*) Jus viae, which includes the two former and authorises the use of the road for all purposes (so that no injury, *e.g.* to trees, be done); even for dragging heavy vehicles along it, which the person having the jus actus could not do. Further, the person who enjoyed jus viae could, in the absense of express agreement, insist upon having the road of the width provided by the XII. Tables, viz. eight feet on the straight and sixteen feet where it turned (flexum) and changed its direction.

(*d*) Aquaeductus, the right of conducting water through the land of another.

(*e*) Aquaehaustus, of drawing water from another's land.

(*f*) Pecoris ad aquam appulsus, the right of watering cattle on another's land.

(*g*) Pascendi, of feeding cattle on another's land.

(*h*) Calcis coquendae, of burning lime, and

(*i*) Harenae fodiendae, of digging sand.

A personal servitude is where the person entitled to the right enjoys it, not as owner of property, but because he, the individual in question, has acquired it in his private capacity. Of personal servitudes there were four kinds—

(1) Usufruct.
(2) Usus.
(3) Habitatio.
(4) Operae servorum.

1. *Usufruct* is defined as 'jus alienis rebus utendi fruendi, salva rerum substantia' (J. ii. 4 *pr.*), the right of using and enjoying property belonging to others provided the substance of the property remained uninjured. More exactly, a usufruct was the right granted to a man personally to use and enjoy for his life or until capitis deminutio[1] the property of another which, when the usufruct ended, was to revert intact to the dominus or his heir. A usufruct might be in land or buildings, a slave or beast of burden, and in fact in anything except things which were destroyed by use (quae ipso usu consumuntur), the reason, of course, being that it was impossible to restore such things at the end of the usufruct intact (salva rerum substantia). But the Senate[2] permitted a quasi-usufruct to be created by will even in regard to things of this kind; the usufructuarius could not undertake to restore them, but he was made to give security and to undertake (by a *cautio*) that when the usufruct ended he or his heir would make compensation (equal in value to the things comprised in the usufruct) to the testator's heir.

Duties of the usufructuarius.—In all cases the usufructuarius was bound to show the same degree of care in relation to the property as a bonus paterfamilias, and was therefore liable, as we should say,

[1] Until Justinian 'any' kind of capitis deminutio destroyed the usufruct. Justinian provided that capitis deminutio minima was not to have this effect.

[2] Probably about the time of Augustus.

for 'waste';[1] he could not use the property for any purpose other than the agreed one, nor alter the character of the property; if the usufruct were of a house the usufructuarius had to keep it in ordinary repair, if of a flock to replace any of the flock which chanced to die, out of the young, which otherwise belonged to him; and he was bound to restore the property, whatever it was, uninjured. These duties were usually secured by a cautio usufructuaria, the cautio in the case of a quasi-usufruct being limited, as already stated, to an undertaking to restore goods of equal value.

Rights of the usufructuarius.—He was entitled to the possession and enjoyment of the property and, although he could not, legally, transfer the usufruct to another, he could, as a fact, permit another (if he did not himself use the property) to have the use and enjoyment of it. He was not liable for accidental loss or damage. If the property in question were a farm he was entitled to its ordinary produce, and acquired by fructuum perceptio the fruits, in which were included the young of animals, but not the children of a female slave. If the property were a slave the usufructuarius was entitled to his services, provided they were the slave's usual work, and, as already pointed out, the usufructuarius acquired whatever the slave made by his own work (ex operis suis) or by the property of the usufructuarius (ex re nostra).

2. *Usus* was a personal servitude like usufruct, but it implied merely the usus or bare enjoyment of

[1] But not to the extent of having to rebuild what was ruinous and had fallen down from age.

the property apart from the fructus or fruits. The usuarius of cattle or sheep, *e.g.*, could not take the lambs or the wool and only exceptionally the milk, but he might use the animals to manure his land. The usuarius was also distinguished from the usufructuarius in that he could not even let the enjoyment of the property to another. So if the usus were of a house the usuarius might live in it himself, but could not permit another to occupy it in his place; a principle which was carried so far that it was at one time doubted whether the usuarius could have his wife and children and guests to stay with him.[1]

3. *Habitatio.* — It was at one time doubted whether this and the next personal servitude (operae servorum) were to be treated as distinct species of servitudes, but by Justinian's time it was established that they were so distinct. Habitatio implied the use of a house, together with the right to let it, and (unlike usufruct and usus) it was never lost by capitis deminutio minima or non-user.

4. *Operae servorum vel animalium* (though not mentioned in the text) constituted another kind of personal servitude, and the expression implies that the person who enjoyed the servitude had the right (like a usufructuarius) to the service of a slave or animal, but the differences between this servitude and an usufruct are that neither—(*a*) death,[2] nor (*b*) capitis deminutio minima, nor (*c*) non-user operated to extinguish the right.

Servitudes: how created.—According to the civil law the normal way of creating a servitude was by—

[1] J. ii. 5. 2.

[2] *I.e.* of the person entitled; but authority on this point is scanty.

(1) *In jure cessio*, the fictitious law-suit in which the plaintiff claimed that he had, *e.g.*, the right of walking over the defendant's land, and the defendant acquiesced, but (2) a rustic servitude being a res mancipi, could be created by *a mancipation*. A servitude might also be created at jus civile by (3) *deductio*, *i.e.* A makes a mancipation or an in jure cessio of his land or house to B, and at the same time reserves to himself (deductio) a servitude in relation to it. Probably from a comparatively early date a servitude might also be created (4) by will (*testamento*), *e.g.* a testator leaves his slave (Stichus) to B, subject to a usufruct in favour of A, and this seems to have been the common way in which personal servitudes arose; (5) a servitude might also arise from a partition suit (*adjudicatio*). A and B are co-owners of two neighbouring houses, the judge awards one to each in severalty, and gives each a right of support against the other. It is doubtful whether (6) *usucapio* was ever a means of acquiring a servitude, for it seems to have been considered impossible to possess, in the way required for usucapio, a res incorporalis, *quae in jure consistit*: 'hoc jure utimur ut servitutes per se nusquam longo tempore capi possint, cum aedificiis possint'; but, as the passage suggests, the acquisition of a building by usucapio carried with it any servitudes affecting it. Any doubts there may have been on the subject, however, were set at rest by a lex Scribonia,[1] which practically prohibited the acquisition of any servitude (as such) by usucapio.

Land in the provinces being res extra commercium,

[1] Date uncertain.

the old methods of in jure cessio and mancipatio were obviously incapable of being used to create servitudes therein, and no peregrinus could acquire any servitude by a jus civile method. To cure these defects a new method of acquiring servitudes arose, which was probably invented by the provincial governors, and was adopted and developed by the praetor's edict; it thus became possible to create a servitude by *pact and stipulation, i.e.* by agreement of the parties (pactum) put into a solemn form (stipulatio);[1] whether the agreement had to be followed by a quasi-traditio of the servitude is a disputed point. We also find another method of acquiring servitudes jure praetorio, viz. *praescriptio longi temporis, i.e.* uninterrupted exercise of the right (quasi-possessio) for ten years (inter presentes), twenty (inter absentes); a method, like pacts and stipulations, at first confined to provincial lands, and afterwards extended to Italy and Rome.

In the time of Justinian the difference between solum Italicum and solum provinciale was abolished, and in jure cessio and mancipatio had become obsolete methods of conveyance. The ordinary methods therefore, of creating servitudes were—

(1) By pact and stipulation; but a servitude might also arise (2) by deductio, *i.e.* being reserved when property was conveyed to another by the then common method, traditio. (3) By praescriptio longi

[1] At first a servitude so created probably did not, like a true praedial servitude, constitute a jus in re aliena; like most rights created by contract, it merely conferred a jus in personam, but under praetorian influence it had come, by the time of Gaius, to confer rights in rem, for Gaius treats it as undoubtedly creating a servitude in the ordinary sense (G. ii. 31).

temporis, the period being the same as under the praetorian law. (4) Testamento. (5) Adjudicatione, and (6) exceptionally, by statute, *e.g.* the father's usufruct of half his son's peculium adventicium after emancipation.

No *transfer* of a servitude to a third person was possible. This has already been pointed out in the case of personal servitudes, but it is equally true of praedial servitudes; they passed, of course, on alienation of the praedium dominans, as the liability passed on the transfer of the praedium serviens, but never per se.

Servitudes end—

1. If the servitude is a personal one, by the death or capitis deminutio of the person entitled. Capitis deminutio minima, however, never produced this result in the case of habitatio and operae servorum, and under Justinian it had no effect in the case of any servitude.

2. In the case of a usufruct by the usufructuarius wantonly abusing his rights (non utendo per modum).

3. In the case of praedial servitudes by the permanent destruction of the praedium dominans.

4. By destruction of the thing subject to the servitude: 'est enim jus in corpore: quo sublato et ipsum tolli necesse est'; and though Justinian is here speaking of usufruct only, the statement is true of all servitudes, whether praedial or personal.

5. Merger, *i.e.* the servitude and the property subject to it become vested in the same man, the servitude is at an end, for 'nemini res sua servit.' Examples of merger are—

(*a*) The person entitled to the servitude (A)

releases his right to B, the owner of the property subject to it.

(*b*) A buys or otherwise acquires the dominium of the property from B (consolidatio);[1] and

(*c*) A or B succeeds as heres to the property of the other.

6. Non-user. Habitatio and operae servorum were never lost in this way.[2] Under the old law non-user of a thing in usufruct or in usu extinguished the right in one year in the case of a movable, two in the case of immovable property, and two years non-user extinguished praedial servitudes, subject to this, that in regard to praedial urban servitudes time did not run until the person subject to the servitude had done some act clearly showing that he treated the servitude as at an end, *e.g.*, raised his house higher than the servitude permitted (*usucapio libertatis*). If the servitudes affected provincial soil the periods were ten and twenty years. These last-mentioned periods were adopted by Justinian for all cases, but in the case of urban servitudes usucapio libertatis was still necessary.

Subsect. 2. *Emphyteusis*

Emphyteusis[3] and the two following jura in re aliena (superficies and pignus) are not dealt with in the text in this place (*i.e.* after servitudes), but since

[1] J. ii. 4. 3.

[2] The reason for their peculiarities is said to be that they were granted for maintenance.

[3] For Emphyteusis, see J. iii. 24. 3 ; G. iii. 145. Superficies in this sense is not dealt with by either writer. For Pignus, see J. iii. 14. 4 ; G. ii. 60. 64 ; iii. 200. 204 ; iv. 62.

all three are undoubtedly rights in other people's property it is convenient to mention them here.

Gaius, in dealing with the contracts of sale (emptio-venditio) and hire (locatio-conductio), remarks that they have so much in common that it is sometimes difficult to see the distinction between them; as, *e.g.*, when a thing is hired in perpetuity, as where lands are granted on condition that so long as the lessee and his heir pay the rent they shall retain the land; and Gaius adds that the better opinion is (magis placuit) that the contract is one of hire (locatio-conductio). A constitution of Zeno (lex Zenoniana), however, determined that this method of letting land was neither sale nor hire, but a special juristic transaction standing by itself, and it is known as Emphyteusis.

In the time of Gaius this kind of letting would occur when a municipal corporation or a college of priests granted perpetual leases to husbandmen, reserving a rent, but later, in the Eastern Empire, this method came to be adopted by landowners generally, and the right of the emphyteuta, from being only a contractual right, giving merely a jus in personam against the landlord, gradually became a right in rem, entitling him to defend his possession against all the world. The grantor or landlord retained the dominium (or reversion) of the property, which gave him the right to receive the rent (canon or pensio) from the tenant, and in certain events to forfeit the lease (*e.g.* if the rent were unpaid for three years).[1] The tenant (emphyteuta) could only assign with

[1] Two years in the case of the landlord being an ecclesiastical or charitable body.

consent, and the landlords in such case had the right of pre-emption, *i.e.* he had the right to buy the lease from the tenant at the price he was prepared to sell it to the third person. The emphyteuta became entitled to the profits of the land by fructuum perceptio, and his rights passed to his heir or testamentary devisee.[1]

Subsect. 3. *Superficies*

Superficies, which owes its origin to the praetor, stands to houses as emphyteusis to agricultural land, and represents the Roman long lease (either in perpetuity or for a long term) of land for building purposes. The lessee built the house, which thereupon (since 'superficies solo cedit') became the lessor's property. But the lessee acquired rights in rem to the extent of his interest, and in return for the use of the land and house paid a rent.

Subsect. 4. *Pignus and Hypotheca*

Pignus is the Roman mortgage, and in its early form (pignus cum fiducia) bears great likeness to the old English mortgage of real property, where the debtor, by a feoffment (or symbolical delivery of the land), made the creditor owner of it, subject to a condition that he would reconvey, *i.e.* make a new feoffment to the debtor if he repaid the money lent (principal) and interest on a day named.

At Rome a mortgage, whether of movable or immovable property, was originally effected by the

[1] In ordinary cases writing was not required for the grant of the lease.

borrower conveying to the lender the property which was to secure the debt, by an in jure cessio or a mancipatio, so as to make the lender dominus. The lender then undertook by a fiducia to make reconveyance when principal and interest were repaid. Since he was dominus the lender could at law realise his security (*i.e.* sell it), pay himself out of the proceeds, and hand over the balance (if any) to the borrower; but the free exercise of this power was impeded, in equity, by the fiducia, which bound him, on repayment, to give the debtor his property back; he might legally sell, but if the debtor suffered damage thereby he could compel the creditor by the actio fiduciae (condemnation in which carried infamia) to make compensation. It follows that the debtor's right of redemption (*i.e.* getting his property back on repayment of everything due) was not limited in point of time, and this and the fact that pignus applied to movable as well as immovable property, are the chief differences between the Roman pignus and the old English mortgage, which only applied to realty, and in which, if the day named for repayment passed, the land originally became the absolute property of the creditor (mortgagee). A similar effect with respect to redemption, however, might be produced at Rome by special agreement (lex commissoria), providing that the fiducia was to become void in default of payment at an agreed date. It is obvious that in this form of pignus the mortgagee acquired rights of wide orbit; he became, in fact, more than a person with a jus in re aliena, for he was dominus, save so far as the fiducia limited his ownership. But in spite of the one clear advantage, that the debtor

could not deal with his property to the detriment of the lender (*e.g.* by fraudulently creating a second or third mortgage), there were many defects attaching to pignus as a form of security. Since it was carried out by means of the civil law conveyances it had no application to peregrini or to land in the provinces; further, pignus, at any rate at law, placed the debtor very much at his creditor's mercy, for although he could get compensation under the fiducia from the creditor who, *e.g.*, unfairly sold, he could not 'follow the property,' *i.e.* get it back from a third person who had bought it; and, in strict law, he became, at best, from the moment of conveyance tenant at will (precario) to his creditor.[1]

The next form of mortgage is *pignus proper*, *i.e.* a real contract.[2] Here the borrower made traditio of the thing pledged, and the creditor so acquired not, as before, dominium, but juristic possession of the object in question, and the usual interdicts to protect such possession. Probably the older form was replaced by this, when by the introduction of interdicts in the praetor's edict, possession came to be recognised and protected as such, *i.e.* apart from the element of dominium. This kind of mortgage was less formal and cumbrous than the older method, and though clearly to the advantage of the debtor (for he retained the dominium of his property) was not very favourable to the lender, who was not entitled to the use[3]

[1] A mortgagor in England, where the mortgage is a *legal* mortgage, is in exactly the same position.

[2] From the fact that Gaius does not enumerate it among the real contracts (to which it belongs), it may perhaps be inferred that the older form had not been displaced in his day.

[3] 'Antichresis' was a form of pignus where the lender might take the fruits and profits, their value going in reduction of the debt.

of the property in mortgage (itaque si . . creditor pignore . . utatur . . furtum committit, J. iv. 1. 6), and had no right of sale in the absence of agreement; so that it was sometime specially agreed—(*a*) that the creditor might sell, in which case he could convey the dominium as the debtor's agent,[1] the debtor receiving any surplus money there might be; or (*b*) by a lex commissoria, that the property (*i.e.* the dominium of it) was to become the creditor's if the loan was not punctually repaid. A further defect of this kind of security was that though some things might be mortgaged in this way (*e.g.* land in the provinces) which could not have been mortgaged by the old fiducia, yet it was still impossible to give as security anything which was incapable of physical delivery, and it was equally impossible to mortgage the same thing to two different persons (plures eandem rem in solidum possidere non possunt). In this form the creditor's right may be described as a qualified jus in re aliena; it was not a strict right in rem, because he had not the actio in rem against third persons, but he had juristic possession and the ordinary interdicts.

Hypotheca (which was a pactum praetorium[2]) was a form of mortgage resting merely on agreement, neither the dominium nor the possession passing to the creditor, and first introduced as between landlord and tenant (as a means by which the latter could mortgage his property and crops to secure his rent) was subsequently extended to all cases. Its essence is that the creditor can get the property from the

[1] An instance of a person who, though not dominus, could alienate.
[2] P. 309.

debtor if necessary by an interdict; can assert his rights by an action in rem against third parties,[1] and has a right of sale. The chief advantages of hypotheca as opposed to the older forms were—(α) the borrower kept possession of his property, but the lender was adequately secured; (β) many more objects could be pledged, *e.g.* a slave-child yet unborn; (γ) a general 'lien' could be created, *i.e.* over the whole of a person's property, and was sometimes implied (*i.e.* although there was no express agreement) by law (tacita), *e.g.* in the case of the pupil and the married woman in respect of her dowry. Such a lien was also implied in favour of the landlord of a house, who had a tacita hypotheca to secure his rent over things 'invecta et illata'; and the landlord of a farm had a like lien over his tenant's crops. On the other hand, this method of creating security made frauds on the part of the borrower (an objection which applies equally to pignus proper) far easier than under the ancient method of pignus cum fiducia.

Hypotheca having thus many advantages over pignus its rules came gradually to be applied to that kind of security also. In the time of Justinian the mortgage by way of fiducia had entirely disappeared, and the relation created by pignus and hypotheca was exactly the same, save that in the former possession passed, whereas in the latter it remained with the borrower. The borrower's action to enforce his rights was the actio pigneraticia; the lender had—(1) the interdicts Salvianum and quasi-Salvianum to get possession of the property; (2) the actio Serviana and quasi-Serviana to enforce his security

[1] So that the creditor had a true jus in re aliena.

at law. The interdictum Salvianum and the actio Serviana were applicable only to landlords; the interdictum quasi-Salvianum and the actio quasi-Serviana availed any kind of creditor. By the time of Ulpian the right of sale had become implied in every mortgage (instead of resting on express agreement), and, in Justinian's time, could be exercised—(*α*) provided the agreed day had passed and notice requiring repayment had been given, followed by two years' default, and (*β*) the sale must be bona-fide, and no interested person must bid. Any surplus belonged to the borrower. It remains to notice that the old lex commissoria providing for foreclosure, *i.e.* that the borrower was to lose his right to redeem on failing to make punctual payment, after being declared void by Constantine, was reintroduced in a modified form by Justinian, *e.g.* where a sale was impossible.

NOTE V

Ownership and Possession

Ownership or dominium.—Ownership is the exclusive right to the control of a definite thing, and the only limitation upon the right of an owner is that imposed by the maxim 'Sic utere tuo ut alienum non laedas.' The owner of a horse, *e.g.*, may use it in every possible manner, and may sell it or give it away, and his right, apart from alienation,[1] never ends, for even when he dies the horse will descend to the person to whom he has bequeathed it by will, or on an intestacy to his relatives. But these rights must not be abused, and the fact of ownership will not justify the owner if he wilfully or negligently rides his horse to the injury or detriment of another.

[1] Which, however, includes involuntary alienation on bankruptcy, but here the horse, when taken by the creditors, may be regarded as given in exchange for the property the owner acquired upon credit.

The only kind of ownership known to the Roman civil law was *dominium ex jure Quiritium*, and existed solely in favour of cives who acquired things capable of such ownership by a proper method of conveyance (*e.g.* if res mancipi by a mancipatio or in jure cessio).

Since solum provinciale was not susceptible of Quiritary ownership, and most peregrini[1] could not acquire any property jure civili, the praetor in time, though he could not confer ownership in such cases, protected, by equitable actions, the possession of solum provinciale whether in the hands of a civis or peregrinus, and also the possession by peregrini of any sort of property, and this protection of possession, as distinguished from ownership, being derived from the jus gentium, came to be called '*dominium ex jure gentium*.'

Owing, again, to the praetor's influence, yet a third species of dominium was developed, viz. *bonitary dominium*, or 'in bonis.' As already pointed out, a person acquiring a res mancipi by mere traditio obtained no title at all at the civil law, and therefore if the property in question got out of his possession, could not sue for it, for the dominium ex jure Quiritium remained, in spite of the transfer, in the late owner. Of course, if the transfer rested on bona-fides, and there were a justa causa, the transferee would by keeping undisturbed possession for the required time become Quiritary owner by usucapio. But in the meantime the praetor helped him. If the late owner, the dominus ex jure Quiritium, sued for the recovery of the object, the praetor allowed the transferee, if there were a justa causa for the transfer, to plead an exceptio, *e.g.* if the transfer had been on a sale the exceptio rei venditae et traditae, and so defeat the civil law owner, whose ownership under such circumstances was known as 'nudum jus Quiritium,' as opposed to the equitable or bonitary ownership of the transferee. And further, the praetor granted the transferee, even before the period of usucapion was complete, the actio Publiciana in rem, by means of which he could, though not strictly owner, sue third persons into whose hands the property had passed. It is obvious, therefore, that when this development of the jus honorarium was complete the cumbrous proceedings of mancipatio and in jure cessio must have soon fallen into disuse, and that Justinian's formal abolition of Quiritary ownership was a reform rather of name than substance. In his time all land being practically solum provinciale and every free subject of the Empire a citizen, there was one kind

[1] *I.e.* all peregrini save those to whom the commercium had been specially granted.

of ownership only, viz. that founded on the Praetorian law, for everybody and for every kind of property.

Jure in re aliena.—These, as above stated, are servitudes, emphyteusis, superficies, and pignus. The person who enjoys a right in relation to his neighbour's property (*e.g.* a servitude) is to the extent of his right quasi-owner of that property, and can assert his right by an actio in rem,[1] *i.e.* a real action available against all the world as distinguished from an action in personam only, *i.e.* an action against the particular individual whose property is subject to the right. The lessee for a long term (*i.e.* the emphyteuta and superficiarius), though not the owner,[2] has, so long as his lease subsists, a right to protection not merely against the reversioner (in personam), but against all the world (utilis rei vindicatio).[3] When a mortgage (pignus) was made by a mancipatio cum fiducia, the mortgagee (creditor pignoris) was owner, subject to the fiducia; in the later forms of pignus and hypotheca when ownership remained in the mortgagor, the creditor, though only having a right in re aliena (*i.e.* in the mortgagor's property), was still granted an owner's remedies (by interdict and action) so far as necessary to enable him to protect his security. It follows, therefore, that all these jura in re aliena, though not strictly ownership, were protected as such.

Possession.—As may be gathered from what has already been stated, though ownership and possession may exist side by side (*i.e.* be vested in the same person), this is by no means necessarily the case. The owner as such has the right to possess (jus possidendi), and if he is in actual enjoyment of his property he has the actual possession of it as well. But if the actual possession be, as a fact, with his filiusfamilias, his slave, or lessee, the ownership and the possession have been severed. Conversely, a man may have possession without ownership, and the possession may (as in the case of the emphyteuta) be protected as ownership (in which case the possessor has jus possessionis), or it may not be protected at all (*e.g.* in the case of the filiusfamilias).

Possession as such, *i.e.* apart from the question of ownership, involves two elements—

(*a*) *corpus* or de facto possession (sometimes called 'detentio'), and (*b*) *animus*, *i.e.* the intention of keeping the thing as against all

[1] Actio confessoria in rem.

[2] The lessor or reversioner is the owner.

[3] The superficiarius was also specially given the interdictum de superficie.

the world, quite apart from the right so to do, *i.e.* without necessarily the jus possidendi of an owner, and this kind of possession (*i.e.* otherwise than as owner) was protected at Rome, more especially by interdicts (possessio ad interdictum), but only in the following cases :—

(i.) Where the possession was that of a person who had a jus in re aliena (and so to the extent of his right had the animus domini), the possession carried with it both real actions and interdicts (*vide supra*).

(ii.) The person who wrongfully or without title acquired property (*e.g.* the thief), and had the animus domini (*i.e.* meant to keep it), had juristic possession (*i.e.* corpus and animus), and so could claim the interdict, but, of course, his possession did not prevail against the true owner.

(~~ii.~~) The stakeholder, sequester, had also interdict possession. The sequester, being a person with whom a thing had been deposited by two rival claimants pending a law-suit to decide who the true owner was, obviously had not the animus domini, but the law, exceptionally, granted him juristic possession and protected it by interdict. The reason for the sequester being so granted juristic possession was that otherwise it would have remained with one of the claimants, who might by usucapion acquire an absolute title as dominus before the dispute could be decided. Lastly—

(iv.) The precario tenens, the person *allowed* (precario) possession of a thing by another who owned or claimed to own it was also exceptionally regarded as having juristic possession with its protecting interdict.[1] But no *derivative* possessor,[2] other than those above mentioned,[3] had the interdicts. If the person through whom he derived possession were his superior, *e.g.* paterfamilias or slave owner, the possessor had no legal rights in relation to the thing at all, but held it merely on behalf of such superior; if the derivative possessor acquired possession under a contract, *e.g.* had hired it (locatio-conductio), his right at most was a jus in personam against the other party to the contract; never (save in the special cases i. iii. and iv.) a jus in rem against third persons.

To some extent the jus possessionis (possession apart from the element of ownership) was also protected by the operation of usucapion (possessio ad usucapionem). But, as already

[1] See Sohm, p. 354.

[2] *I.e.* persons having the possession by virtue of some express or tacit agreement with the true owner.

[3] *I.e.* (i.) (iii.) and (iv.).

stated, in nearly all cases the possessor who was in a position to usucapt was owner, subject to some mere technical flaw in his ownership, so that the operation of usucapion in this respect was very limited. Possession, however, as such, was protected in a more substantial manner by the rules of prescription,[1] *i.e.* limitation of the time within which actions might be brought; for if the true owner could not assert his jus possidendi (his action being barred by lapse of time) the title of the mere possessor became for all practical purposes as good as ownership; for while the owner's own action was thus barred, third persons were excluded by the maxim 'adversus extraneos vitiosa possessio prodesse solet.'[2]

Section IV. Universal Succession

Universal, as opposed to singular, succession means that one acquires, not a single res, whether corporeal (as a slave) or incorporeal (as a servitude), but an aggregate of rights and liabilities called a *juris universitas*. One man's legal clothing drops from him, and falls upon another. To put the case more fully, suppose that A will die in two minutes, and consider what his legal persona will consist of at the moment of his death: it may include rights and liabilities of every kind; his property (res singulae), jura in re aliena, debts, and other obligations (such as damages for breach of contract) owing to him, and the debts and obligations which he himself owes. All these considered at the given moment make up the juris universitas (which is viewed as an abstract legal thing, a res incorporalis) to which B, his heir, will succeed, save that some few rights and obligations are so personal to A that they become

[1] *Vide infra.*

[2] For a discussion of the theories in regard to the original reason for the protection of possession apart from ownership, see Moyle, pp. 338-340.

extinguished altogether. Gaius tells us that universal succession takes place if we have become heirs to any one (which may be under a will or on an intestacy), or if we have applied for a grant of bonorum possessio, or have bought the estate of an insolvent, or have taken anybody in arrogation, or married a woman in manum.[1] As a matter of fact the universitas juris passed whether the woman were married really, or merely fictitiously by a coemptio fiduciae causa. There was also another kind of universal succession in the time of Gaius, though he does not here enumerate it, viz. in jure cessio hereditatis.

Finally, as Justinian points out, a new kind of successio per universitatem was introduced by Marcus Aurelius, viz. Addictio bonorum libertatis causa; and Justinian also notices as obsolete the ancient form under the S.C. Claudianum.

All these forms of universal succession will be considered or mentioned in the following order:—

1. Testate succession.
2. Intestate succession.
3. Bonorum possessio.
4. Addictio bonorum libertatis causa.
5. In jure cessio hereditatis.
6. (*a*) Bankruptcy.
   (*b*) Arrogation, marriage, and coemption.
   (*c*) The S.C. Claudianum.

[1] G. ii. 98.

Subsect. 1. *Testate Succession*

It is necessary to consider under this head—

A. (i.) How wills were made; (ii.) What was a codicil.

B. The contents of wills, and rules to be observed in drawing them up.

C. Who could make, witness, or take benefits under them—testamenti factio.

D. How a will might become invalid.

A. (i.) *How a will was made.*

There can be little doubt that the earliest form of succession on death was not testate, but intestate succession. Early law knew nothing of the *individual*, it was concerned with the group, whether the horde, the tribe, the gens, or the family. In early Roman law the unit of the State was the family (earlier still it was, possibly, the gens). Of each family the paterfamilias was the head; he represented what Sir Henry Maine termed the small corporation, and managed its property and affairs. But although he managed the property, it *belonged* to the corporation, the family, and it would not only have been opposed to the ideas, but would have destroyed the very organisation of early society had the paterfamilias been able at his death to give the property of the corporation away to another family or group. As Sir Henry Maine shows, however, a time must come when these ideas weaken, when the individual begins to get his own status apart from his family; and, accordingly, the old conception at a comparatively early date became qualified. The property, instead of being considered as vested in the family, with the

paterfamilias as manager, is treated as belonging to the paterfamilias, subject to certain claims on the part of the family which he can with difficulty defeat. It is not a matter for surprise, accordingly, to find that at Rome the earliest form of will was one sanctioned, as we should say, by Act of Parliament—the *testamentum calatis comitiis*. Twice every year the Roman people met in the Comitia Curiata for the purpose (inter alia) of giving assent and validity to the wills of the citizens.

The will was made orally, and when one remembers that an essential part of every will was the express disinherison[1] of those persons who, but for the will, would have taken the property; that those persons would almost certainly be present; and that men's passions in early times were very much on the surface, it is unlikely that the making of a will in the Comitia Curiata was anything but exceptional, or that it occurred if there were any near relatives. At first, probably, the term 'will' for the proceedings is a misnomer; in fact, they amounted, not to a testament, but to an arrogation.[2] A is an old man with no descendants in his power (*i.e.* no sui heredes);[3] if he dies his property will go to his agnates, or, failing them, to his gens. He, accordingly, takes, by arrogation, B into his family as his filiusfamilias. On his death B, in the ordinary course of things, will become A's suus heres, and succeed him to the exclusion of A's agnates and of his gens. What has been done, therefore, is not the making of a will instituting an heir,

[1] P. 180.

[2] It will be remembered that arrogation was also effected in this Comitia.

[3] P. 191.

but the making of a relative to succeed on an intestacy. The other form of will, in early times, was the *testamentum in procinctu*, the will made orally before the populus, no longer assembled in Parliament, but drawn up in battle array, a form of testament probably as limited in its operation as that made calatis comitiis.

In course of time a third kind of will became evolved, which was the ordinary form when Gaius wrote, and which, like a will in its modern conception, was *secret* and *revocable*; this was the *will per aes et libram*, the will made by means of a mancipation or fictitious sale.

In its earliest form, the proceedings were as follows: A, who is about to die,[1] sells for a nominal consideration his 'familia,' *i.e.* all his property, to B, the familiae emptor, or heir, and charges B to carry out his last wishes, which he orally communicates, *e.g.* with regard to the legacies;[2] these oral directions being known as the nuncupative part of the will.[3] In this stage, of course, the will is neither secret nor revocable; and, what is more striking still, it operates, not on A's death (as a modern will), but at once. B has by a sale inter vivos bought A's *estate*, and A, if he recovers, will live for the rest of his life upon B's bounty.[4] In its next development, though the will is still public, and, probably, irrevocable, it does not operate until A's death, when B, the familiae

[1] 'Si subita morte urguebatur' (G. ii. 102).

[2] Gifts of specific items of property to relatives and friends.

[3] Every will made per aes et libram consists of two distinct parts: the *mancipatio* or fictitious sale, and the *nuncupatio* or oral directions: 'Nuncupare est enim palam nominare.'

[4] But *cf.* Muirhead, p. 160.

emptor, becomes his heir, and carries out such directions as to legacies and the like which A, the testator, had charged upon him in the nuncupatio. But by the time of Gaius (when the two early kinds of will were already out of date) a great change had taken place in the mancipatory will (sane nunc aliter ordinatur quam olim solebat, G. ii. 103), the familiae emptor is no longer the heir, but a mere figure,[1] to enable the mancipation to be carried out; the real heir, upon whom the legacies are charged, being the person named by the testator, either orally in the nuncupatio, or, as was nearly always the case, in the written will. Accordingly, in classical times, the will per aes et libram might be secret; as a fact, it could be revoked, and it did not operate until death.

The actual proceedings, as may be gathered from Gaius, were as follows: First,[2] the testator had his will drawn up on tablets, often by a skilled lawyer, and in it the heres was instituted, legacies bequeathed, and the other customary directions given. This in England to-day would amount to a legal will if duly signed by the testator as his last will in the presence, and with the signatures, of two witnesses. At Rome, however, a document so executed would, as a will, have been void. In order to make the will effective, to make it a *legal* will, the whole ceremony of a mancipation had to be solemnly performed. Accordingly, the tablets having been prepared, the testator, A, must get together five Roman citizens above puberty as witnesses, a libripens, and some friend (C) to act as

[1] Alius dicis gratia propter veteris juris imitationem familiae emptor adhibetur (G. ii. 103).

[2] Of course in the (unusual) case of an oral will this part was omitted.

familiae emptor. A then, pro forma,[1] sells (or mancipates) his estate (familia[2]) to C, the familiae emptor. C, holding a piece of bronze in his hand, says to A, in effect, 'Let your estate be mine (but only as a trustee for your heir) by purchase with this piece of bronze and these bronze scales,[3] so that you may lawfully be able to make your will according to the statute.'[4] C then strikes the scales with the bronze which, as forming the nominal purchase money,[5] he hands to A, and the mancipatio familiae—the fictitious sale of A's estate—is at an end. All that remains is the nuncupatio, *i.e.* the public declaration of the purposes for which C holds the property as trustee. A, therefore, holding the tablets upon which the will is written in his hand, declares, 'According as it is written in these tablets, so do I declare my will, and so do you, citizens, bear witness.'[6] The business is then at an end, C is never heard of again; when A dies the will, unless he has duly revoked it or altered it (in which case the whole proceedings must be gone through again), will be produced and opened, and the heir who is found to be named in it will become A's legal heir. Mr. Roby sums up the proceedings in a very happy expression. 'In short (to employ the terms of English law) the mancipation is a formal conveyance of the whole

[1] Dicis gratia.

[2] Familia, id est patrimonium.

[3] *I.e.* the scales held by the libripens.

[4] See for the exact words G. ii. 104. The statute referred to is the XII. Tables, and the particular provision probably is 'Cum nexum faciet mancipiumque uti lingua nuncupassit, ita jus est.' The testator has just made a mancipium or mancipation, its effect will be according to the nuncupation he is about to make, viz. the publication of his will.

[5] Est enim mancipatio . . . imaginaria quaedam venditio (G. i. 119).

[6] G. ii. 104.

estate of the testator to the uses of his will, and the nuncupation is the declaration of uses.'[1]

The so-called Praetorian will.—Two facts strike one about the will per aes et libram. First, the form is extremely technical and cumbrous. Every system of law requires a will to be executed with some sort of formality as a proof, not merely that the testator is serious, but that the document really is his will, and this is the essence of the transaction. But any reasonable man would be satisfied in these particulars by a form involving far less detail than that required in the classical law; there can be little doubt, *e.g.*, that a will is a real signification of serious intention if it satifies the simple requirements of English law. Secondly, in spite of the many formalities involved in the will per aes et libram, there was nothing to identify the will, wheu ultimately produced, with the tablets which the testator had held at the sale, for a brief moment, in his hand. To meet this second objection the practice seems to have grown up for the five witnesses, the libripens, and the familiae emptor (*i.e.* seven persons altogether) to seal up the will with their seals, which, of course, identified the document beyond doubt. The first objection (the unnecessary formalities) was, after a time, met by the praetor, who seems to have realised that the vital thing was that the will should be duly witnessed, and that the rest of the proceedings were really superfluous. The praetor, accordingly, if a will could be produced sealed with the seals of seven witnesses, granted bonorum possessio (*i.e.* the beneficial enjoyment of

[1] Roby, i. 178. *Cf.* the feoffment to the uses of the will before the Statute of Uses.

the property) to the person named in the will (secundum tabulas). The praetor could not declare such person heres, 'nam praetor heredem facere non potest,' but he did the next best thing by giving him the property and protecting him in the possession of it; and accordingly, although the mancipation had been defective or absent altogether, the praetor granted bonorum possessio to the person named heres in a properly sealed will. At first, however, this only amounted to *complete* and *final* possession where the mancipation was in due form, and the heir, therefore, heres jure civili;[1] for, originally, this grant of bonorum possessio was 'juris civilis adjuvandi gratia' merely, *i.e.* an additional remedy given by the praetor to the jus civile heres; and being only 'adjuvandi gratia,' if the mancipation had been absent or defective the testamentary heir who applied for and obtained bonorum possessio (because there was a duly sealed will) had no answer to the intestate heir who treated the will as invalid at law (as it was), and brought an action (hereditatis petitio) against the bonorum possessor claiming the estate. Marcus Aurelius, however, altered the law and made bonorum possessio secundum tabulas 'juris civilis corrigendi gratia'; if, after his rescript, a properly sealed will could be produced appointing B heres, B could not be deprived of the bonorum possessio he had obtained from the praetor by A, the intestate heir, even though there had been no mancipation. B therefore became and remained heir in equity, with all the practical advantages of heirship (in spite of the fact that, the will

[1] Or, of course, where the intestate heir did not choose to eject the bonorum possessor, *e.g.* because the hereditas was damnosa.

being invalid at jus civile, A was the legal heir); for B could defeat A's petitio hereditatis by the plea of fraud (exceptio doli).[1]

In the time of Gaius, therefore, the civil law will was the will per aes et libram, and this was the only method of constituting a heres jure civili, but a written will sealed with the seals of seven witnesses, though the heir therein named only became bonorum possessor, was valid in equity, and possession under it, being abundantly protected by interdict and otherwise, was good for all purposes.

Wills under Justinian.—In the time of Justinian the will per aes et libram becomes replaced by the *testamentum tripertitum.* It was called 'tripertitum' because it involved three essential elements. The will had to be made at one and the same time as a single act (uno contextu), in the presence of seven witnesses (a provision surviving from the jus civile), sealed with their seven seals (from the jus honorarium of the praetor), and signed with their seven signatures[2] (as provided by an Imperial constitution, viz. of Theodosius II.). This was the ordinary form of will under Justinian, but there were besides three other forms:—

(*a*) *The nuncupative will, i.e.* an oral declaration by a testator of his last wishes in the presence of seven witnesses.

(*b*) A will might be formally entrusted to the Emperor (*testamentum principi oblatum*); or

[1] Bonorum possessio secundum tabulas being granted when some formality had been omitted, suppose a woman of full age under tutela made a will without her tutor's auctoritas, instituting X heres and X got bonorum possessio. It would appear, after Marcus Aurelius, to have been final and not merely provisional, unless the tutor whose authority had not been obtained were the woman's parent or patron (G. ii. 121-122).

[2] Subscriptiones.

(*c*) Entered upon the records of a Law Court (*testamentum apud acta conditum*); the two last being obviously public acts.

A. (ii.) *Codicilli.*[1]

A codicil in England is a supplement to a will, made after its execution, and itself executed in the same way as the will. At Rome 'codicilli' had no necessary connection with a testament; they were small tables used for writing memoranda or letters. Justinian tells us that Lucius Lentulus, when dying in Africa, wrote codicilli (which were confirmed by his will), in which he requested Augustus to perform something by way of trust (fideicommissum) for him. Augustus seems to have doubted whether this was legal (as a will ought to be made 'at one and the same' time), and he consulted Trebatius on the point. Trebatius, on the ground of convenience, advised the Emperor to admit the codicils, and Augustus performed the trust, as did others upon whom trusts had been imposed by Lentulus, and his daughter paid some legacies which she was not legally bound to pay. Codicilli having thus obtained recognition continued in force down to and in Justinian's time. At first no particular form was required, but by the time of Theodosius II. all codicils were required to be witnessed as wills (by seven witnesses, though Justinian reduced the number to five). Justinian also provided that if a codicil had been made with no formality, the person in whose favour it was made might sue, but would fail if the heir denied the fact on oath. A codicil might be

[1] G. ii. 270 *a*, 273; J. ii. 25.

annexed to a will[1] (codicilli testamentarii), and either confirmed by it (codicilli confirmati) or not (codicilli non confirmati); or it might be independent of any will (codicilli ab intestato). Accordingly, a practice arose of adding a 'clausula codicillaris' to wills, by which the testator declared that if his will failed to take effect, it was to be construed as a series of requests made by codicilli. At no period was it possible, however, to accomplish everything by means of codicilli which could be done by a will. In the time of Gaius their chief use was to impose fideicommissa, and Gaius tells us that though a fideicommissum might be imposed by an unconfirmed codicil, a legacy bequeathed by codicil was invalid unless confirmed, *i.e.* unless the testator in his will had expressly declared that any gift made by him by any codicil should be given effect to,[2] and Gaius further states that no one could be instituted heir, or disinherited even by a confirmed codicil, though the same effect as institution could be produced by requiring in a codicil the heir instituted by will to hand over the hereditas or part of it by way of fideicommissum.[3] In Justinian's time the distinction between confirmed and unconfirmed codicils was of little practical importance, but he tells us that where codicils are made before the will they only take effect if specially confirmed by the will, adding, however, that Severus and Antoninus had decided that persons to whom things were given by way of fideicommissa by a codicil made before a will might take

[1] In which case its fate usually depended on the fate of the will, *i.e.* if the will were for any reason invalid the codicil failed too.

[2] G. ii. 270 *a*.

[3] G. ii. 273.

them if it appeared that the donor had not abandoned his intention in their favour. Justinian confirms the statement made by Gaius with regard to the institution of heir and the like,[1] and adds that a condition cannot by a codicil be put upon the testamentary heir, nor can a direct substitution[2] be made.

B. *The contents of the will and rules thereto relating.*

1. Rules for the protection of the family—

(*a*) Praeteritio.

(*b*) Querela inofficiosi testamenti.

(*a*) *Praeteritio.*—On the death of a person intestate those persons (called 'sui heredes') succeeded to him who were in his power at his death, and who by his death became sui juris. But traces of the old conception, that the property belonged to the family and not to the paterfamilias, remained even in the developed law, and Gaius tells us that sui heredes were regarded, even in their parents' lifetime, as in a sense owners of the family property ('sed sui quidem heredes ideo appellantur quia domestici heredes sunt et vivo quoque parente quodammodo domini existimantur,' G. ii. 157). This conception gave rise to the rule that the first duty of a testator at Rome was, not to appoint a successor, but to disinherit those persons who but for the will would have taken the property. If not so disinherited they were known as 'praeteriti,' and the whole will might fall to the ground, in which case, of course, they took the property as on an intestacy. A woman, however, was not obliged to disinherit, because she could have no sui heredes. According to the ancient jus civile, if a son in potestas

[1] J. ii. 25. 2. [2] P. 200.

were not to be instituted heres it was necessary to disinherit him by name,[1] and failure to comply with this rule made the whole will void.[2] Other sui heredes (*e.g.* a daughter or grandson, the father being dead or disqualified, *e.g.* by emancipation) had also to be disinherited; but a general clause (inter ceteros) was enough, *e.g.* 'Ceteri omnes exheredes sunto.' And failure to disinherit them had not the same consequence as with a son; the will was good,[3] but the praeteriti came in with the heirs instituted in the will and shared with them by 'accretion'; if the instituted heres was a suus the praeteriti shared with him equally,[4] if a stranger (extraneus) the praeteriti took half the inheritance. For example:—

(i.) Titius has three sons and a daughter Julia By his will he institutes his three sons heirs and fails to disinherit Julia. Julia takes an equal share (pars virilis) by accretion, and so gets exactly what she would have obtained on an intestacy, viz. one-fourth part of the estate.

(ii.) Titius has no sui heredes save one daughter, Julia. By his will he institutes a stranger (extraneus), Balbus, heir, and fails to disinherit Julia. Balbus and Julia each take half the inheritance, and Julia would have taken half even though two or more extranei had been instituted.

The praetor amended the law; he required all

[1] 'Nominatim,' but his actual name need not be mentioned if the intention was clear, *e.g.* 'filius meus exheres esto,' the testator having only one son (*cf.* G. ii. 127).

[2] 'Inutiliter testabitur' (G. ii. 123).

[3] 'Ceteras vero liberorum personas si praeterierit testator valet testamentum' (G. ii. 124).

[4] Called technically 'in virilem' (G. ii. 124).

male descendants (*e.g.* a grandson not less than a son), if not instituted, to be disinherited by name, though females could still be disinherited by an 'inter ceteros' clause.[1] If these requirements were not fulfilled the praetor did not upset the will, but granted bonorum possessio contra tabulas to the praeteriti; if the institutus were a suus heres the praeteriti, by bonorum possessio, shared equally with him as on an intestacy; if, however, the person instituted were an extraneus, the praetor went further than the civil law, he granted the praeteriti bonorum possessio, not merely, as at jus civile, of half the estate, but of the *whole*, so that the extraneus got nothing; he remained legally and technically heres,[2] but his heirship was worthless ('qua ratione extranei heredes a *tota hereditate* repelluntur et efficiuntur *sine re heredes*,' G. ii. 125). Marcus Aurelius, however, amended the law; if the persons who were not disinherited were females (suae praeteritae) they were only to get by bonorum possessio what they would have taken at jus civile, *i.e.* half, instead of the whole of the estate.

Emancipated 'liberi.'—According to the civil law it was unnecessary to disinherit a person who would have succeeded the testator had he not been emancipated, *e.g.* A has two sons, X and Y, he emancipates X in his lifetime; on A's death Y is his sole heir. X is not suus heres, because he did not become 'sui juris' on his father's death (as sui heredes must), but earlier, viz. on emancipation; it is unnecessary, therefore, either to institute or to disinherit him. The

[1] G. ii. 129.

[2] Unless the praeteritus was a filius, in which case the will was, as above stated, invalid altogether by the civil law rules.

praetor, however, mitigated the law by providing that such persons must be either instituted or disinherited, males by name, females 'inter ceteros.'

Adoptivi, so long as in the potestas of the adopter, were in the same position as natural children, and therefore had to be instituted or disinherited according to the rules of the civil law. Conversely, to their real father they were strangers so long as they were members of their new family, and disinherison was unnecessary. If an adoptive child were emancipated by his adoptive father the child had no claim, either by jus civile or jus honorarium, in regard to his adopter's estate, and originally no claim in regard to his real father's estate; but the praetor amended the law and gave him bonorum possessio to his natural father, unless such father had disinherited him (G. ii. 136-137).

Postumi[1] are persons who, though not heirs at the date of the will, become so afterwards. Such postumi are of two main kinds:—

(i.) Postumi in the strict sense, *i.e.* sons and daughters of the testator who become his sui by being born to him after the date of the will.

(ii.) Persons 'postumorum loco,' *e.g.*—

(*a*) A person bought under potestas by marriage in manum, adoption, arrogation, or by being made legitimate.

(*b*) Descendants who become postumorum loco by quasi-agnation;[2] *e.g.* A has a son B, and C, a grandson by B, in his potestas. B is A's suus heres to the exclusion of C, but if B ceases to be in A's power

[1] The student is advised, at a first reading, not to attempt to master the details of the various kinds of postumi. [2] G. ii. 133.

during A's lifetime (*e.g.* dies or is emancipated), C will by quasi-agnation succeed to his father's place and become A's heir. C, therefore, is said to be 'postumi loco.'

The ancient civil law in its requirements with regard to praeteritio made no distinction between persons already sui and persons who might become so (postumi), but a postumus being necessarily an 'incerta persona,'[1] was incapable of being instituted or disinherited. Nevertheless, although a testator was, in the nature of things, unable to comply with the rule 'postumi quoque liberi institui debent vel exheredari,' the fact that a person became his postumus suus after the date of the will totally invalidated the will.[2] Very soon, however, it came to be possible, even according to jus civile, to institute or disinherit (although incertae personae) children born after the death of the testator; though still, if a person became 'postumus' after the will but before the death of the testator, the will became invalid, the theory being that the testator could make a new will. This relaxation of the strict law was made applicable (by means of a formula introduced by the praetor and jurist, Gallus Aquilius, in the time of Cicero) to the case of *postumi Aquiliani*, *i.e.* grandchildren born after the date of their grandfather's death, their father having died in the interval between the will and the death of the grandfather. Next came the lex Junia Vellaea (*circa* 27 A.D.), which

[1] Except in the case of a grandchild already born at the date of his grandfather's will, his grandfather and father being alive.

[2] *I.e.* not merely if the postumus were a son, but even if a daughter or grandchild. The rule seems rather illogical, because the omission to disinherit only destroyed the will in the case of a son.

permitted a testator to institute or disinherit: (i.) *Postumi Vellaeani primi capitis, i.e.* children born after the will, but before the testator's death, or grandchildren so born, their father having died before their birth and before the testator's death. (ii.) *Postumi Vellaeani secundi capitis, i.e.* grandchildren born at the date of the will, but becoming, by 'quasi-agnation,' sui heredes after the date of the will by their father's death.[1] These last-mentioned grandchildren were, of course, not incertae personae, but inasmuch as they were not sui heredes at the date of the will, it was impossible originally to disinherit them in that character. Salvius Julianus extended the doctrine to grandchildren born in their father's lifetime after the date of the will, who became by quasi-agnation heirs of their grandfather (*postumi Salviani* or *Juliani*). Thus the difficulty with regard to postumi who were descendants of the testator was, in the end, removed, whether postumi sui or postumorum loco by quasi-agnation. There remained persons postumorum loco by marriage in manum, by adoption, arrogation, and by being made legitimate. Marriage in manum was practically obsolete in the time of Gaius, but in the other three cases it would seem that even in Justinian's time such persons could not be disinherited, as a general rule, by anticipation, and that therefore when a person acquired a new suus heres in this way his will became invalid.[2] With regard to a postum us alienus, *i.e.* an afterborn child of some

[1] Or, by a later interpretation, their father having ceased (*e.g.* by emancipation) to be a member of the family.

[2] G. ii. 138 *et seq.*; J. xvii. 1.

third person, the civil law rule was that such person (being as much an incerta persona as a postumus suus) could not be instituted,[1] but the praetor granted such a person, if instituted, bonorum possessio, and Justinian provided that he might even be made legal heir.[2]

So far as it was possible to disinherit postumi the rule was that male postumi had to be disinherited nominatim,[3] females 'inter ceteros'; but if the clause were quite general, *e.g.* 'ceteri exheredes sunto,' *i.e.* with no mention of postumi, it was not a good disinherison unless the testator gave legacies to the disinherited postumae, so as to show that in framing the general clause he had them in mind.

Justinian tells us in his *Institutes* that he made certain changes in the law of praeteritio :—

(i.) He abolished the distinction between males being disinherited nominatim and females inter ceteros, all descendants who might succeed had to be disinherited nominatim ; otherwise, if the praeteritus was a suus heres (whether male or female) the will was void ; if the praeteritus had been emancipated the will was not upset, but the praeteritus got bonorum possessio contra tabulas.

(ii.) A child, even though given in adoptio (unless the adoptio were plena), had to be instituted or disinherited by his natural father.

Justinian's wider changes, by means of the 115th

[1] G. ii. 242. [2] J. iii. 9. *pr.* ('recte heres instituitur').

[3] Of course this cannot mean by name ; it was a sufficient disinherison 'nominatim' to say 'Quicumque mihi filius genitus fuerit, exheres esto' (G. ii. 132).

Novel, will be noticed in connection with the next topic dealt with.

(*b*) *The querela inofficiosi testamenti.*[1]

As a protection to the heirs the principle of praeteritio, involved as it was, was imperfect. It had, as has been stated, no application to a woman's will, and even in the case of a man's testament, his heirs, provided he took care to disinherit them properly, had no legal ground of complaint. Soon after the time of Cicero, however, a new protection was devised, based less upon the ancient idea of family ownership than upon the more modern conception, that a testator is under a duty to provide after his death for those related to him by near kinship.[2] This protection received the name 'querela inofficiosi testamenti,' 'the plaint of an unduteous will,' the will being attacked on the supposition that a testator who, without any ground, failed to provide for his relatives must be presumed to be more or less insane, and his will, accordingly, invalid (quasi non sanae mentis).[3] The querela was brought before the 'Centumviri,' and was open to those persons, whether disinherited in the will or simply praeteriti, who, had the testator died intestate, would have been his nearest heirs, *e.g.* to children[4] against the will of their father or mother, parents against the will of their children, and to a brother or sister if the person

[1] J. ii. 18. The querela is not dealt with by Gaius, though it would seem to have existed in his time.

[2] Which is, however, unrecognised by English law, which permits a testator to 'endow a college or a cat,' and to throw his wife and children destitute upon the world.

[3] Of course, if the testator were actually mad, 'furiosus,' his will was void ab initio.

[4] Including postumi and adoptivi (where the adoptio was plena).

instituted heir were 'turpis.' The following conditions had to be satisfied :—

(1) There must be an heir against whom the action is brought, so that the querela does not lie until aditio ;

(2) The claimant must show that under the will he fails to obtain one-fourth part of his share on an intestacy ;

(3) That he cannot get his rights in any other way ; if, for example, being praeteritus he could get bonorum possessio from the praetor, the querela is not available ;

(4) That he has not deserved to be disinherited or omitted ; a claimant, therefore, would be defeated if the instituted heir proved, *e.g.*, that the disinherison was due to gross ingratitude towards the testator ;

(5) That he has not acquiesced in the testator's decision, *e.g.* by accepting a legacy ; [1]

(6) Not more than five years must have elapsed since the death of the testator.

The effect of the querela, if successful, was, in the ordinary case, to upset the will altogether ; when, of course, the claimant got his share as on an intestacy. But it might, exceptionally, produce only a partial intestacy, *e.g.*, where there were several heirs, and the querela was only brought against one, or where there was a compromise. If the claimant fails, any benefit given him by the will lapses to the fiscus, but if a tutor brings the querela in his ward's name (because the ward's father left his son nothing), and

[1] But where a tutor's father by his will gives the ward a legacy and omits the tutor, the latter's right to the querela is not barred by accepting the legacy in the name of the ward (J. ii. 18. 4).

fails, the tutor will not forfeit any legacy given to himself by the will.[1]

Justinian altered the law, for, as he tells us in his *Institutes*,[2] he provided that the querela should only be brought where the claimant had received nothing at all under the will. If the claimant had obtained under it anything, however small, he could only bring an *actio ad supplendam legitimam* against the heir, which did not upset the will, but enabled the claimant to get what was left him made up to one-fourth of the share which he would have taken on an intestacy. Next, by his 18th Novel, Justinian enacted that a testator with four children or less must leave them equally, at least one-third of his estate; if he had more than four, at least a half. Finally, by his 115th Novel, Justinian provided that an ascendant was bound to institute as heirs those descendants who would have taken on an intestacy, and *vice versa*, unless one of the definite legal grounds (which he specified) to justify the disherison was stated in the will, and could be proved. If a testator failed without due cause to institute a person who had a claim to be instituted under the above provision, the actual institution was void and the praeteritus became heir as on an intestacy; the will, however, was not wholly avoided, but only to the extent of the institution, *e.g.* legacies, fideicommissa and appointments of guardians (*supra*) remained valid. If, on the other hand, the testator had instituted a person whom he was bound to institute heir, but had given him less than his lawful share in the estate, the will, in this case also, remained valid, but the claimant

[1] J. ii. 18. 5.

[2] J. ii. 18. 3.

had an actio against the heir 'ad supplendam legitimam.' The rights of brothers and sisters, however, were not altered by this Novel. If the share they obtained under the will were less than their lawful share, they could bring the actio ad supplendam legitimam; if they received nothing and the instituted heir were 'turpis,' they could bring the querela inofficiosi testamenti for their intestate portion. As between ascendants and descendants, however, the querela, after this Novel, became unnecessary, and as regards all heirs, the importance of praeteritio was considerably modified, since it was of no avail to disinherit the heres unless a statutory ground could be adduced for it.

2. Heirs and their institution.

(*a*) *Classes of heirs.*

There were at Rome three possible classes of heirs under a will: necessarii, sui et necessarii, and extranei.

A *necessarius* heres was a slave of the testator whom he appointed heir, at the same time giving him his freedom.[1] The usual object was, of course, that if the estate were insolvent it might be taken in execution as the slave's, and not in the name of the testator or his relatives. A slave appointed heir was called necessarius because he had no option. He therefore became heir without any formal act from the moment of the testator's death, continuing the testator's 'persona'; so that, according to the civil law, he must satisfy the testator's debts, if necessary, out of his own peculium and his future acquisitions.

[1] In Justinian's time, as already stated, the mere institution as heres carried freedom with it by implication.

The praetor, however, allowed him the '*beneficium separationis*,' *i.e.* he might keep all property made by his own exertions[1] since the death of the testator.

A *suus and necessarius heres* was a person who was in the potestas[2] of the testator at his death, and who by his death became sui juris. Such person was 'suus,' because a family (domesticus) heir; necessarius, because he too, like a slave, had no option; he became heir, without any need for assent, from the moment of the death, and so liable for his ancestor's debts out of his own property. But these heirs came also to be protected by the praetor, viz. by the '*jus*' or '*beneficium abstinendi*.' Provided they took care not to act as heir in any kind of way,[3] then, whether they formally demanded the privilege or not, their own property could not be made liable for their ancestor's debts.

An extraneus heres is any person other than the above with whom the testator has testamentifactio. Since a mother did not enjoy patria potestas, and, therefore, had no sui heredes, her own children appointed heirs by her will were extranei. An extraneus heres, however, was not at once heir upon the testator's death (as was the case with a slave or a suus heres); he had in some way to show that he accepted the position (acceptance being technically known as 'aditio'), and until he accepted the hereditas was known as *hereditas jacens*, and could

[1] But he could not keep acquisitions obtained in right of his late master, *e.g.* if as representing the testator he succeeds to the property of one of his late master's freedmen, it can be sold to satisfy the creditors (*cf.* G. ii. 155).

[2] Not, of course, dominica potestas.

[3] But if a minor, even acting as heir did not matter.

acquire rights (*e.g.* to offspring born of slaves comprised in the estate) and incur liabilities (*e.g.* because one of the slaves committed a delict against some third person).[1] Ulpian tells us that the hereditas jacens 'non heredis personam, sed defuncti sustinet'; Pomponius that it sustained the persona of the heir. These apparently contradictory statements may, perhaps, be reconciled on the theory that until the heir accepts, the hereditas sustains the persona of the testator, but that once the heir enters, all the rights and liabilities which have accrued to the hereditas between death and entry pass to the heir, whose acceptance may therefore be looked upon as retrospective; and in this sense it is true that the hereditas does, after entry, sustain the heir's persona, whereas before entry it sustained the testator's.[2]

Since until the heir entered there was no person who could legally be answerable to creditors and to legatees, or perform the sacra, the practice arose, Gaius tells us, for the testator in appointing an extraneus heres to limit the time within which he might make up his mind. The clause in question was called a 'cretio,' from 'cernere' or 'decernere,' 'to come to a decision,' and ran as follows: 'Let Titius be heres and accept within 100 days, otherwise let Titius be disinherited and let Maevius be heres.' This kind of cretio was called 'continua' or 'certorum dierum,' and time began to run immediately from the testator's death; the more common form, however, was the cretio vulgaris, in which, after the words '100 days,' were added 'quibus scies poterisque,' so that time did not necessarily run from the testator's

[1] Until the heir made 'aditio' the hereditas was said to be 'delata' to him.

[2] *Cf.* Sohm, pp. 536-538.

death, but from the time when Titius first knew that he had been made heir and was in a position to accept. Whatever the form of the cretio, Titius had within the time specified solemnly to signify acceptance in these words: 'Balbus having instituted me heir by his will I enter upon and accept the inheritance.' If he failed to do this the clause operated automatically to disinherit him at the end of the period. But as during the period nothing short of a formal acceptance made him heir, so an informal renunciation did not bind him; he was free to make a proper acceptance on the very last day, although in the interim he formed the intention of disclaiming.[1] Where the testator omitted to insert a cretio, the heir might accept either by acting as heir (pro herede gestio), or by a declaration of acceptance, though informally made,[2] and he might informally decline, but he was not bound to make up his mind within any definite period. Accordingly, the custom arose for the praetor, on the application of the creditors of the estate, to fix a time (tempus ad deliberandum) within which the heir must decide, and the praetor would even 'cut down' the time specified in the cretio if he considered it too long. If the heir failed to accept within the limit so set, the praetor might allow the creditors to sell the estate. The fixing of a time by the praetor being obviously more simple than the formal cretiones, the latter seem to have fallen into disuse after Gaius, and were abolished by Arcadius and Theodosius. In the time of Justinian, therefore, an extraneus heres (as other heirs) was appointed with-

[1] G. ii. 168.

[2] *I.e.* in the time of Gaius.

out any cretio, and might accept or repudiate the inheritance by any sufficient declaration of intention, though made informally; he might accept, *e.g.*, by pro herede gestio, *i.e.* doing any act in relation to the hereditas, which could only be done legally in his capacity as heres. If he delayed to enter, not more than nine months[1] were allowed him; if he did nothing in that time he forfeited his right to accept.

Justinian, however, made a still more important reform in the introduction of the *beneficium inventarii*. Hitherto, upon the principle 'semel heres, semper heres,' the heir once constituted was identified with his testator or ancestor; 'confusio' of the property of the deceased and the heir took place, so that not only did the hereditas become answerable for the obligations of the heir, the heir was for ever liable for the obligations of the deceased, as has been said, out of his own pocket.[2] Even before Justinian, however, the strictness of the civil law rule had been relaxed. If the creditors of the hereditas feared that the heir's personal debts (being greater than his assets) might exhaust the deceased's estate, the praetor allowed such creditors to apply for 'separatio bonorum,' *i.e.* to have the two estates, the ancestor's and the heir's, strictly kept apart, provided—(α) the application were made within five years; (β) that separation were still possible; and (γ) that the creditors had not treated the heir as their debtor. If the separatio were granted the creditors had the right to pay themselves out of the hereditas in priority

[1] Or, by special permission of the Emperor, a year.

[2] A hereditas where the liabilities exceeded the value of the assets was known as 'damnosa.'

to any claims on the part of the creditors of the heir. There was some doubt whether the creditors of the hereditas, if they took this course, and the estate proved insufficient, could still claim the balance from the heir. Papinian thought they might be admitted to sue him after his own creditors had been satisfied out of his property, but in the end it was settled that by obtaining separatio bonorum the creditors lost all right against the heir. Conversely, the strictness of the civil law rule was soon modified in favour of the heir by means of the analogous separatio bonorum granted to the slave who became necessarius heres, and the jus abstinendi accorded to the suus, while the extraneus always had the right to decline. Nevertheless before Justinian's change the rule (semel heres, semper heres) might operate harshly. Once a suus of full age, for example, intermeddled with the estate, and the moment the extraneus accepted, they became heirs and answerable for ever, the only possible cases of revocation being—(*α*) where the praetor set the acceptance aside on the ground that it had been made by an adolescens, *i.e.* a person under twenty-five years; (*β*) where the person accepting was a soldier (but only after the time of the Emperor Gordian, who introduced the privilege).[1] In all other cases, after acceptance, the heir was personally liable, and might, if the estate proved insolvent, be reduced to absolute ruin.

Justinian, accordingly, remedied the hardship and

[1] Justinian, in the same passage (ii. 19. 6), says that Hadrian once allowed revocation by a person over twenty-five years, when it turned out that the estate was subject to an unknown debt of great amount, but he makes it clear that this was not a law but a special privilegium to the individual in question.

applied the principle underlying the praetorian grant of separatio bonorum to creditors, in favour of the heir. He enacted that the liability of the heres (of whatever kind he might be, and whether testamentary or intestate) should be confined to the assets of the deceased, provided—(i.) that he did not ask for a spatium deliberandi; (ii.) that he made an inventory of the deceased's estate and effects; this inventory had to be taken in the presence of witnesses,[1] and begun within a month and finished within two months from the time the heir first knew that he had become so. If, instead of making an inventory at once, the heir asked for a spatium deliberandi the position was as under the old law, but if the heir ultimately accepted the hereditas and failed to make an inventory, he forfeited his right to the quarta Falcidia, and was bound, therefore, to discharge all bequests made by the testator in full. This beneficium inventarii, for all practical purposes, destroyed the maxim 'semel heres, semper heres,' as applied to the heir's personal liability to creditors;[2] but the statement sometimes made, that the effect of Justinian's amendment in the law was to convert the heir into a mere executor, seems too wide. The heir, it is true, thenceforth, like the personal representative in England, was able to limit his liability to the assets of the estate he received, and a further point of likeness between the two is that through them the other beneficiaries

[1] *I.e.* the creditors and legatees or persons representing them.

[2] The other consequence of 'semel heres, semper heres' was that a heres could not legally transfer his position as heres to another, but this had been almost entirely destroyed by the S.C. Trebellianum, before the time of Gaius, see *infra*, p. 229.

under a will (*e.g.* legatees) receive what is due. But there the likeness stops. In England, the executor, or, on an intestacy, the administrator, has, as such, no sort of beneficial interest in the property; the executor or administrator may, it is true, personally benefit, but only if, there being a will, the testator expressly gives his executor something, or if, on an intestacy, the administrator happens to be one of the next of kin. The heres, on the other hand, always took the estate *beneficially*, subject to debts, legacies, and other benefits conferred on third persons, and, of course, it was the exception and not the rule for an estate to be insolvent; and he might also have the right, if there was a danger of legacies exhausting the estate, to insist upon his quarta Falcidia. Lastly, whereas the whole estate of the deceased (movables and immovables) vested in the Roman heres, the personal representative (until the Land Transfer Act of 1897 changed the law) only took personal estate and leaseholds. The proposition in question, however, is nearly true of an *executor* to whom the testator gives beneficially the whole residue of his real and personal property, in which case the only point of substantial distinction is that whereas in England the whole estate may be exhausted in legacies, at Rome the heres might receive protection under the lex Falcidia.

(*b*) *The institution of heirs.*

The institution of an heir or heirs, Gaius tells us, is the foundation of the entire will ('caput et fundamentum totius testamenti');[1] and, therefore, according to the civil law, such institution must precede all

[1] G. ii. 229.

other dispositions made by the will except disinherisons. Therefore, Gaius says, before an heir is instituted it is useless to give legacies, or to make a bequest of freedom, or, according to the Sabinians, even to appoint a tutor.[1] Justinian, however, considered that it was unjust that the mere order of words should operate to defeat the intention of the testator, and allowed all these three things to be validly done before the heir was instituted.[2] Further, the institution of the heir originally had to be made in a formal manner (solemni more).[3] Instances of an institutio solemnis are, 'Titius heres esto,' 'Titium heredem esse jubeo'; on the other hand, 'Titium heredem esse volo' was not orthodox, nor, according to most lawyers, were 'Titium heredem instituo' or 'heredem facio.' The law on this point was altered in 339 A.D. by Constantine II., who enacted that a solemnis institutio was unnecessary, provided the intention of the testator to make the person in question heir was clear, however informally it might be expressed.

A testator might institute one heir or several, and, if several, their shares were presumed to be equal, but the testator could make them unequal (*e.g.* A one-fourth, B three-fourths) by showing that such was his intention. If he only instituted one heir and gave him merely a share of the hereditas, such heir took the whole; for a citizen had to die either with a will or without one; the devolution of his property after his death could not be governed partly by the law of testate, partly by the law of intestate succession: 'neque enim idem ex parte testatus et ex parte intestatus decedere

[1] G. ii. 229, 230, 231. [2] J. i. 14. 3; ii. 20. 34. [3] G. ii. 116.

potest.'[1] The Romans regarded the whole hereditas as an 'as,' divided into twelve 'unciae.' A sole heir was 'heres ex asse,' an heir to a half 'heres ex semisse,' and so on. If the testator gave in shares more than twelve unciae the as was regarded as made up, not of twelve unciae, but of the total number given. If he gave in shares less than twelve unciae, the remaining unciae went to the heirs in the same proportion as their original shares. If several heirs were instituted, the shares of some being specified, and of another or others unspecified, then—

(α) If the specified shares did not exhaust the as, the heir or heirs whose shares were not specified took what was left, if more than one, equally.

(β) If the specified shares exactly amounted to the whole as, each set of heirs took half the inheritance between them.

(γ) If the specified shares exceeded the as, the as was considered as consisting of 24, or if necessary 36 unciae, and the heirs whose shares were unspecified took the difference, *e.g.* between 13 and 24 or 25 and 36, as the case might be.

Owing to the maxim 'semel heres, semper heres,' an heir could not be appointed 'ex certo tempore' (*e.g.* 'let Titius become my heir five years after my death') or 'ad certum tempus' (*e.g.* 'let Titius be my heir until the Ides of March next after my death'). In such a case the clause was treated as redundant (pro non scripto). Justinian tells us, however, that an heir might be appointed subject to a condition

[1] But this rule was often infringed by the rules of positive law, *e.g.* by bonorum possessio contra tabulas, sometimes by the querela inofficiosi testamenti, and by Justinian's 115th Novel.

('heres et pure et sub condicione institui potest,' J. ii. 14. 9), but this needs some qualification. (i.) If the condition were impossible, illegal, or immoral, it was taken 'pro non scripto.' (ii.) If the instituted heir were a filius of the testator, and the condition one which he could not fulfil, the will was void, because the filius was, in effect, praeteritus. (iii.) A condition subsequent, *i.e.* one which, in a given event, took the hereditas away from the heir, was taken 'pro non scripto,' for the same reason as a clause 'ad certum tempus.' (iv.) A condition precedent was good (*e.g.* 'let Titius be my heir on condition that he marries Julia'), but the heir did not in strict law become so until the condition was fulfilled. The praetor, however, in such a case granted bonorum possessio secundum tabulas to the heir on his undertaking (by a cautio) to restore the hereditas if he failed to satisfy the condition; and, in the case of a negative condition which could not be fulfilled until death (*e.g.* never to go to Naples), it became possible after the time of Mucius Scaevola for the heir, even according to the civil law, to accept the hereditas immediately after the testator's death, undertaking by the *cautio Muciana* to restore the property if he broke the condition. If the institution were subject to several conditions, and they were 'conjunctim' (*e.g.* 'if conditions x and y are performed'), all had to be performed, if 'separatim' (*e.g.* 'if x or y is performed') it was enough to fulfil one.[1]

3. Substitutions.[2]

A substitution may be one of three kinds—(*a*) vulgaris; (*b*) pupillaris; (*c*) quasi-pupillaris.

[1] J. ii. 14. 11. [2] G. ii. 174-184; J. ii. 15.-16.

(*a*) *Substitutio vulgaris* is the alternative appointment of an heir, *i.e.* the appointment of an heir to take the place of an heir instituted before him, in the event of the prior heir failing to take, *e.g.* because of—(i.) his death before the testator, or (ii.) his refusal or failure (within the time limited) to accept, or (iii.) his inability to accept owing to some provision of law.[1]

An instance of substitution is that given above in connection with the 'cretio': 'let A be heir and decide within 100 days, if not, let him be disinherited and let B be heir.'[2] Another would be, 'let my son Balbus be heir, and if he fail to become so' (*i.e.* by reason of any of the events above mentioned) 'let Maevius be heir.[3] As a final substitution a testator often appointed one of his slaves 'necessarius heres,' to provide against all the preceding heirs refusing to accept because the hereditas was damnosa.

A testator might substitute one for several heirs,

[1] *E.g.* the lex Julia et Papia Poppaea.

[2] Gaius tells us that if the cretio were in this form, A must formally accept within the time limited, or B becomes heir; it was not enough for A to informally accept by acting as heir (pro herede gerere). But if the cretio were 'imperfecta,' *i.e.* if the words 'let him be disinherited' were omitted, and A did not formally accept but 'acted as heir,' A and B shared equally; though if A did neither, of course B was sole heir by substitution. According to the Sabinians, A did not let in B for his half-share by 'acting as heir' until the time had expired within which he might, by a formal acceptance, become sole heir. The Proculians held that even while the creto was running, A, by 'pro herede gestio,' let in B, and could not afterwards by a formal acceptance, though in due time, displace him (G. ii. 176-178). It was provided, however, by Marcus Aurelius, that even although A merely informally accepted within the time (*i.e.* by acting as heir) it should be a good acceptance, and exclude the substitute.

[3] After Marcus Aurelius this implied a substitutio pupillaris also; *vide infra.*

or several for one. If a testator originally appointed two co-heirs, A and B, he often substituted them reciprocally one to another, so that if A failed to become heir B became sole heir, and *vice versa.* Where several heirs were substituted the share they acquired by substitution originally went to them equally, unless the testator expressly provided otherwise; but Antoninus Pius enacted that if the substituted heirs were already heirs in unequal shares they were to take what came to them by substitution in the same proportion, *e.g.* the testator appoints A heir to half the hereditas, B and C to one-fourth each, and they are reciprocally substituted. C fails to take. A will take two-thirds of the estate, B one-third.

Suppose A and B are instituted heirs, and B is substituted to A, and C to B. If A fails to take and B acquires his share, and then the dispositions in his favour fail, C obviously takes the whole hereditas as substitutus to B, who had it. But C would have taken even though B died before A, because C is, by implication, considered as substituted not only to B but to A also: 'substitutus substituto censetur substitutus instituto.'

Suppose a testator instituted as heir A, who was really X's slave, but whom the testator believed to be a freeman sui juris, and made Maevius substitute. Then, if the testator died and A entered by X's order, X acquired the inheritance, and the substitution in favour of Maevius failed. But this was not what the testator meant, he intended Maevius to take if A failed to take the inheritance *in his own right.* Obviously A has not acquired it in his own

right, but on behalf of his master, X. As a rough settlement, Tiberius decided that Maevius and the master should each take half.[1] But it appears from Justinian's *Code* that Maevius took the whole inheritance if it were proved that, had the testator known that A was not a freeman, he would not have instituted him.

(*b*) *Substitutio pupillaris* was where a paterfamilias provided against his infant child[2] surviving him, but dying under puberty, and so incapable of making a will himself. A testator might provide a substitute for each of his children who should die under the age of puberty, or to the last who should die under that age (J. ii. 16. 6), and the substitution might be in favour of a named person or be general, 'quisquis mihi heres erit idem impuberi filio heres esto,' in which case all the heirs of the father took by substitution in proportion to their shares in the inheritance (J. ii. 16. 7).

A substitutio pupillaris involved two wills, the father making, in effect, one for himself, another for the infant; and the ordinary form was: 'let my son Titius be my heir, but if he fail to become my heir,[3] or if he becomes my heir and dies before he becomes his own guardian,[4] then let Seius be my heir.' But the father need not institute Titius heir, he might disinherit him, and, by the less common form of pupillaris substitutio, provide that if Titius died under puberty Seius was to succeed to any

[1] J. xv. 4.

[2] Or grandchild, if on the testator's death the grandchild would not fall under the potestas of its own paterfamilias.

[3] *E.g.* dies before the testator.

[4] 'Priusquam in suam tutelam venerit,' *i.e.* under puberty.

property the child might have of its own, *e.g.* bequests and gifts from relatives other than the father. But a substitutio pupillaris in every case terminated, *i.e.* the gift by substitution failed—(i.) when the child attained the age of puberty; (ii.) if the father's own will in any way failed to take affect, *e.g.* because no heir would enter; for the will for the son made by the substitution entirely depended on the father's own will. (iii.) It is sometimes said that the substitutio pupillaris also failed if the son died in his father's lifetime, or underwent capitis deminutio. But this depended upon the terms used. If the substitution were 'double,' *i.e.* as above, 'if my son—(*a*) fail to become heir, or (*b*) become heir and die under puberty,' obviously the words of the testator covered the case, *e.g.* if the son died in his father's lifetime he would fail to become heir, and the substitute would take under the very words of the will[1]; if, however, the substitution were simple, *i.e.* limited to the son becoming heir and dying impubes, then if for any reason, *e.g.* death, he failed to become heir, the gift of substitution would necessarily fail also. By much the same reasoning, if the substitution were to a postumus child ('if a son is born to me let him be heir, and if he becomes heir and dies under puberty, let Seius be heir'), and if such son was ultimately born but died in his father's lifetime, the substitution failed, for the condition on which Seius had been appointed heir could not be fulfilled. After Marcus Aurelius, unless the testator expressly provided otherwise, every pupillaris substitutio was double, *i.e.* both vulgaris (*i.e.* if my son fail to become heir) and

[1] Viz. by the substitutio vulgaris which the substitutio pupillaris contained.

pupillaris (*i.e.* if he become heir and die impubes), for that Emperor enacted that one should imply the other.

Suppose that by a substitutio pupillaris Seius has been appointed heir as substitute to the testator's infant son Balbus. It was obviously to the interest of Seius that Balbus should die under fourteen, and it was therefore usual to take measures to guard against treachery. If Seius were substituted to Balbus—(*a*) if Balbus failed to become his father's heir, or (*b*) if he became heir and died under puberty, there would be, at first sight, no objection to substituting Seius on the first event in that part of the will which would be opened at the father's death, for then and not before would it be known whether Balbus were heir and Seius substitute. When this course was adopted the other substitution, *i.e.* of Seius to Balbus if Balbus, having become heir, died under fourteen, would be written in later tablets, annexed to the will, but tied up and sealed as a separate document, and the earlier part of the will would contain a direction that the later tablets were not to be opened so long as Balbus was alive and under age. But Gaius tells us that it was much safer to make both substitutions in the later tablets, because Seius would probably guess that if he was appointed substitute in the one event he was also substitute in the other. There would be no practical inconvenience in this course, because if at the testator's death Balbus had already died, and so failed to become heir, the later tablets could be opened at once without danger.

(*c*) *Substitutio quasi-pupillaris.*—Justinian enabled an ancestor having any insane descendants

(although over puberty) to substitute persons as heirs to them. This kind of substitution differs from substitutio pupillaris in that—(i.) the right is not confined merely to a paterfamilias, but belongs even to a maternal ancestor; and (ii.) the substitution can only be made in favour of 'certae personae,' *i.e.* it must be in favour of near relatives of the insane person. On the analogy of the substitutio pupillaris such substitution became void when (if ever) the person in question recovered his mental capacity. If a descendant were incapable of making a will for any reason other than insanity, the ancestor could only make a quasi-pupillaris substitutio for him by special licence from the Emperor.

It is hardly necessary to add that no pupillaris or quasi-pupillaris substitutio could be made in the case of an extraneus or in the case of a child of full age, unless the child were insane. The utmost a testator could do would be to impose a fideicommissum.

4. Legacies.

An ordinary will at Rome after the disinherisons, the institutions, and the substitutions, would contain the appointment of guardians for infant children (and, under the old law, for the testator's wife),[1] and such legacies and fideicommissa as the testator imposed upon his heir or heirs. Legacies are, therefore, here dealt with, and are followed by a description of fideicommissa in order to complete the account of the contents of a normal testamentum. A legacy differs from the institution of an heir or heirs, inasmuch as an heir is appointed to succeed to the whole estate (hereditas) of the testator or some definite part of it,

[1] These appointments have been already discussed.

e.g. to one-third of all the rights and of the obligations of the testator. A legacy, on the other hand, is not an instance of universal succession, it is a means (like traditio and donatio) of acquiring res singulae (as both Gaius and Justinian admit); and is only discussed in this place, instead of with the other methods of acquiring res singulae, on the ground of convenience, *i.e.* because legacies are only found in connection with wills.[1] A legacy, accordingly, is the gift to a person named in the will (or codicil) of some specific thing or things. Usually the thing is a res corporalis, *e.g.* a horse or furniture, but not necessarily so, for it may be the release to a debtor of a debt owed to the testator, or it may be a gift of the right the testator had to receive payment from a third person, or it may consist of an obligation to do something (*e.g.* to build a house for the legatee) imposed upon the heres. Justinian defines a legacy in general terms: 'Legatum itaque est donatio quaedam a defuncto relicta.' Ulpian adds that it must be imperative in form, if precative it will amount only to a fideicommissum. The subject may be considered under the following heads:—

(*a*) How a legacy was given.
(*b*) What could be so given.
(*c*) The construction of legacies.
(*d*) Restrictions upon the total amount a testator could so bequeath.
(*e*) How a legacy might fail.

(*a*) *How a legacy could be given.*—Gaius tells us that originally a legacy was only valid if given in one of four ways, either—

[1] G. ii. 191; J. ii. 20 *pr.*

(i.) Per vindicationem, or
(ii.) Per damnationem, or
(iii.) Sinendi modo, or
(iv.) Per praeceptionem.

(i.) A *legatum per vindicationem* was created by the use of the words '*do lego*' ('I give and bequeath') or either of them,[1] the full form being, if, *e.g.*, the legatee is Titius and the legacy is of a slave: 'Titio hominem Stichum do lego.' This form of legacy operated as a direct gift to the legatee, *i.e.* did not involve the heir handing it over to the legatee, and therefore, immediately the will came into operation by the heir's entry, the legatee as owner could bring a real action (vindicatio) for the legacy, whether in the hands of the heir or of some third person.[2] By this method, however, a testator could only bequeath things which belonged to him ex jure Quiritium, both when he made the will and at the moment of his death; the only exception being in favour of res fungibiles, in the case of which ownership at death was enough. Where the same thing was given in this way to two or more persons, whether conjunctim[3] or dis-

[1] Or, according to the better opinion, 'sumito,' 'capito,' or 'sibi habeto.'

[2] There was a dispute between the two schools as to the necessity for the legatee's consent. The Sabinians thought that immediately upon entry the legacy vested in the donee, even though he knew nothing about it, though it became void if, after hearing of it, he refused to accept. The Proculians held that the legacy only became the legatee's property if he assented. Antoninus Pius confirmed the latter view (G. ii. 195). Another point at issue between the schools was in connection with a conditional legacy given in this way. The Sabinians held that until the condition was fulfilled the ownership of the thing given remained in the heir, the Proculians that the thing belonged to no one (G. ii. 200).

[3] *E.g.* Titio et Seio hominem Stichum do lego.

junctim,[1] each takes a share, and if any fail to take[2] his share accrues to the other legatees.

(ii.) A *legatum per damnationem* was where the words used were '*damnas esto*,' *e.g.* 'Titio heres meus Stichum dare damnas esto,' and, as the expression suggests, this implied not a direct gift[3] of the thing to the legatee, but a personal obligation which was cast upon the heir to do something for the legatee's benefit. The legatee, accordingly, had an action, not to claim the thing, but against the heir, to make him carry out the duty which the testator had imposed. To discharge his obligation the heir had, if the thing were a res mancipi, to transfer it to the legatee by a mancipatio or in jure cessio, if a res nec mancipi, by traditio, though, of course, if the res were res mancipi and the heir merely made traditio, the legatee ultimately acquired dominium by means of usucapio in the usual manner. The peculiar advantage of this form of bequest was that the testator could give by it not merely his own property, but (*a*) what belonged to the heir or a third person (res aliena); in which latter case the heir was bound to buy and convey it to the legatee; (*b*) what would only come into existence at some future time, *e.g.* future crops, or a child to be born of some slave woman; or (*c*) the testator might not merely direct the heir to hand over something to the legatee but to do some act for him, *e.g.* build him a house. If the same thing were given per damnationem to two or

[1] Titio hominem Stichum do lego. Seio eundem hominem do lego.

[2] *E.g.* by death before the legacy is due.

[3] As in the legatum per vindicationem.

more persons conjunctim, each was entitled to a share, but if the gift to one failed there was no accruer to the others; the share lapsed, and, before the lex Papia,[1] continued to be the heir's property. If the same thing were given disjunctim the whole legacy belonged to each legatee, so that the heir was bound to give the thing to one and its value to the other or to each of the others.

(iii.) A *legatum sinendi modo* was a modification of the last form, the words being *damnas esto sinere*,[2] *e.g.* 'Heres meus damnas esto sinere Lucium Titium hominem Stichum sumere sibique habere,' and here, also, the remedy of the legatee was a personal action against the heir, the claim being for 'whatever the heir ought to give or do under the will' ('quidquid heredem ex testamento dare facere oportet'). Gaius tells us that a legacy of this sort was better than one given by vindication, but not so good as one by damnation; for by this method a testator could give not only his own property but his heir's (which was impossible per vindicationem), but could not (as he might per damnationem) bequeath a res aliena. Since the heir was not bound 'dare' but only 'sinere,' some jurists thought that the heir could not be compelled to make a formal transfer to the legatee (*e.g.* by a mancipatio), but that it was enough if he allowed the legatee to take it. If a legacy were given sinendi modo to two or more persons disjunctim, some jurists thought that the whole belonged to each legatee, as in a legatum per damnationem, but

[1] P. 235.

[2] *I.e.* to 'permit' the legatee to take instead of obliging the heir to *give*.

others considered that once one legatee had been allowed to take the thing the obligation of the heir was at an end; the heir, it was argued, was only bound to 'permit,' therefore, if, after one legatee has obtained the legacy some other makes a claim, the heir can answer that he neither has the thing, so as to be able to 'let' the claimant 'take it,' nor is it by reason of anything like fraud on the heir's part that the claimant cannot get what was left him.

(iv.) A *legatum per praeceptionem* was created by the word 'praecipito,' *e.g.* 'Lucius Titius hominem Stichum praecipito.' Since 'praecipito' means literally 'let him take before,' the Sabinians held that a legacy could only be given in this way to one of two or more co-heirs, who was to take some specific item of the hereditas before dividing the estate up. The Sabinians, therefore, considered that a legacy given per praeceptionem to any person but a co-heir was invalid, and not even cured by the S.C. Neronianum,[1] further, that a co-heir to whom such a legacy was given could only obtain it by the heir's action, 'judicium familiae erciscundae'; and that, since nothing save what belonged to the hereditas could be sued for by this action, a testator could not bequeath per praeceptionem anything save his own property, the only exception being where the thing bequeathed had originally been the testator's, but had been mortgaged to a creditor by a mancipatio fiduciae causa. The Sabinians held that in such a case a legatum per praeceptionem gave the legatee a right to require the other heirs to pay the creditor, who would then mancipate the property to the legatee.

[1] *Infra*, but Julian held otherwise (G. ii. 218).

The Proculians, on the other hand, held that 'prae' was superfluous, and that, therefore, a legacy given in this way was, in effect, a legacy per vindicationem, and so possible even to a third person, whose remedy would be a real action for its recovery (vindicatio) and, according to Gaius, the Proculian view was confirmed by Hadrian.[1] According to both schools a legacy per praeceptionem to two or more persons, whether conjunctim or disjunctim, entitled each to an equal share, as in the case of a legacy per vindicationem.

Even in the time of Gaius these formulae had lost much of their former importance by virtue of the S.C. Neronianum, 64 A.D., the exact meaning of which is doubtful, but which seems to have enacted that if a legacy were in danger of failing because the testator had used inappropriate words,[2] it should be treated as if given 'optimo jure,' *i.e.* per damnationem. If, therefore, to take an example, a testator gave a res aliena per vindicationem, the S.C. saved the legatee, because it was regarded as given per damnationem; another instance (given by Julian) is of a legacy given per praeceptionem to a stranger. On the other hand, if the legacy was in danger of failing because of some personal defect in the legatee (*e.g.* he was a Latinus Junianus or a peregrinus), the S.C. had no application,[3] and it would seem that even after the S.C. the Latin language was necessary. Constantius, however, enacted (339 A.D.) that any words should thenceforth suffice, whether Latin or Greek, and Justinian placed all legacies, however given, on the

[1] Gaius, however, is doubtful about this (G. ii. 221).
[2] *Cf.* G. ii. 218. [3] *Ibid.*

same footing,[1] and enacted that all advantages enjoyed by fidei-commissa should be thenceforth enjoyed by legacies.[2] If the property belonged to the testator the legatee could sue for it by a real action, whether it was in the hands of the heir or of a third person; and whether the legacy belonged to the testator or not the legatee had his personal action against the heir; the rights of the legatee being further secured by an implied mortgage (tacita hypotheca) over all the property which the heir himself received from the inheritance.

(*b*) *What could be given as a legacy.*

Speaking generally, any res which was not extra commercium,[3] whether corporalis (as a slave) or incorporalis (as a release from debt or a grant of freedom to one of the testator's slaves), could be given as a legacy, but the following cases require special notice—

(i.) A legacy might be of a portion of the hereditas itself, *e.g.* one-eighth of all the rights and obligations of the testator. A legacy of this sort was called 'partitio,' because the legatee shares (partitur) with the heres, and the legatee himself was known as legatarius partiarius. According to the theory of the jus civile it was impossible to carry out the intention of the testator literally, because the only legal manner by which a share of the hereditas can be given to a person is by making him heir. The result which the testator wished therefore could not, at law, be effected, and what was done was (in effect)

[1] 'Ut omnibus legatis una sit natura' (J. ii. 20. 2).

[2] And *vice versa*.

[3] If the testator gave such a legacy, *e.g.* the Campus Martius or a temple, it was invalid (nullius momenti) (J. ii. 20. 4).

as follows: A calculation was made and, in the case supposed, it would be ascertained what constituted an eighth part of the testator's corporeal property (land, slaves, furniture, etc.), and what an eighth of his incorporeal rights (*e.g.* to have debts or damages paid to him), and what an eighth of his liabilities (*e.g.* for debts or damages). Then the heir transferred (by mancipatio or traditio) the eighth part of the land, etc., to the legatarius partiarius, and covenants were entered into between the heir and legatee (stipulationes partis et pro parte); the heir engaged to make over to the legatee one-eighth part of debts and damages due to the testator, the legatee to indemnify the heir against the same proportion of the liabilities.

(ii.) Originally, as above stated, a testator could impose upon his heir (per damnationem)[1] the obligation to transfer to a legatee the property of a third person (res aliena) or, if the heir could not buy it, to pay the legatee its value, but by Justinian's time this had been modified, for a rescript of Antoninus Pius provided that the legacy of a res aliena had no effect unless the testator knew that the thing was not his own property,[2] and the burden of proof was upon the legatee.

(iii.) If the legacy were of some property mortgaged to a third person at the date of the will, the heir had to redeem the mortgage for the benefit of the legatee, but after a rescript of Severus and Antoninus, only if the testator was aware of the mortgage (J. ii. 20. 5).

[1] Under Justinian, of course, a legacy of a res aliena could be given in any form (*vide supra*).

[2] J. ii. 20. 4.

(iv.) A gives a legacy (*e.g.* of land) to B, and afterwards sells or mortgages it. The effect was disputed in the time of Gaius, some jurists thought that though the legacy was still due the legatee could be defeated by the exceptio doli (G. ii. 198). Celsus, however, considered the legacy ought to be paid if the testator when he sold or mortgaged did not intend to revoke the legacy, and this opinion was confirmed by a rescript of Severus and Antoninus (J. ii. 20. 12).

(v.) A gives a res aliena belonging to C as a legacy to B. By the time when the legacy becomes due B has already obtained the res. If B bought the thing he can claim the value from the heir, but he cannot if he obtained it gratuitously (causa lucrativa), *e.g.* by a gift inter vivos from C or under C's will: 'nam traditum est duas lucrativas causas in eundem hominem et in eandem rem concurrere non posse' (J. ii. 20. 6). In like manner, if A leaves C's farm to B and B before the legacy is due acquires a usufruct in the farm by way of gift, and buys the reversion, he can sue the heir for the farm (*i.e.* both the usufruct and the reversion), but will only recover what he gave for the reversion.

(vi.) A legacy of what already belongs to the legatee is invalid (inutile) and remains so though he parts with it before the legacy becomes due, for, by the *regula Catoniana*, a legacy which was invalid when the will was made cannot be cured by after events ('quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum quandocumque decesserit non valere').

(vii.) A gives B a legacy of A's own property,

thinking, by mistake, either that it is a res aliena or that it belongs to B. The legacy is good.

(viii.) If the legacy is a release from a debt the heir cannot recover the money from the debtor, who, if he wishes, can compel the heir to release him formally, *e.g.* by acceptilatio.

(ix.) Conversely, A, who owes B fifty aurei, gives B the money by his will. The legacy is invalid, for B gets no benefit by the legacy; he can sue the heir as a creditor of the estate. But if A owing the money conditionally gives it absolutely, or before it is due, the legacy is good (J. ii. 20. 14).

(x.) A gives his wife B her dowry (dos) as a legacy.[1] If A has actually received the dowry the legacy is good, because B has a better remedy for its recovery as a legacy than she would by an action founded on the dos. If he has never received it, then if the dos is bequeathed in general terms the legacy is void for uncertainty, but if A said, 'I give my wife fifty aurei which she brought me as dowry,' or 'the house I live in, which is mentioned in our marriage settlement,' the legacy is good, although no dowry or marriage settlement had in fact been given or executed.

(xi.) If the legacy is of a debt due to the testator (legatum nominis) the heir must sue for the benefit of the legatee, unless the legacy has become void, because the testator received payment in his lifetime (J. ii. 20. 21).

(xii.) Legatum generis was where the testator gave a res non fungibilis without specifying it in definite terms, *e.g.* I give Titius a slave. If the

[1] 'Dos praelegare'—'prae,' because the wife obtains the dos so given earlier than by the ordinary action.

estate comprised such an object the legacy was valid, and Titius had the choice, but he could not choose the best.

(xiii.) Legatum optionis is akin to the legatum generis, but the legatee is expressly given the right to make a choice (*e.g.* 'I give Titius any one of my slaves he may choose'), and he may choose the best of the genus. Formerly, if Titius died before making the choice the legacy failed, but Justinian extended the right to his heir. Also before Justinian, if there were several legatees to whom a legatum optionis was given, or several heirs of one legatee and they were unable to agree, the legacy was void. Justinian provided 'ne pereat legatum . . . fortunam esse hujus optionis judicem,' *i.e.* they drew lots.

(*c*) *The construction of legacies.*

(i.) A legacy could only be given to a person with whom the testator had testamentifactio,[1] and in the time of Gaius[2] could not be made in favour of an incerta persona,[3] *e.g.* 'whoever shall come to my funeral'; among incertae personae were reckoned postumi alieni, *i.e.* all postumi except persons who on birth become sui heredes of the testator, *e.g.* a grandchild begotten to a son who has been emancipated would be a postumus alienus in this sense.[4]

(ii.) A gives a legacy to B, who is under the potestas of C, A's heir, *e.g.* is his slave. The Sabinians considered this a valid legacy if given conditionally upon the slave being free when the legacy was due, invalid if unconditional. The

[1] P. 232. [2] For Justinian's changes see ii. 20. 27.

[3] But a gift to one of an ascertained class was good *e.g.* 'to any one of my cognati now alive who shall marry my daughter.'

[4] G. ii. 241.

Proculians considered it bad in either case, because of the regula Catoniana (*vide supra*). In Justinian's time the Sabinian view was the accepted one,[1] on the ground that the regula Catoniana did not apply to conditional legacies.

(iii.) Conversely, if A appoints B's slave C heir and gives B a legacy, then if C remains in B's power and enters upon the hereditas on his behalf, the legacy fails, because B cannot owe a legacy to himself. But if C is emancipated or sold to another master in A's lifetime, B's legacy is valid.

(iv.) A mere mistake by the testator as to the legatee's nomen, cognomen, or praenomen has no effect if it is clear whom he meant.

(v.) 'Falsa demonstratio non nocet,' *e.g.* 'I give as a legacy to Stichus, my slave whom I bought of Seius'; this is a good legacy, though the demonstratio or description is inaccurate, because the testator, in fact, bought the slave from Titius. Another example is given above in connection with the legatum dotis.

(vi.) 'Falsa causa non nocet,' *e.g.* 'I give a legacy to Titius because he managed my business in my absence.' Titius never did so, but takes the legacy in spite of the testator's mistake as to the reason (causa) for it, unless the reason amounts to an actual condition, *e.g.* 'I give my slave to Titius *if* he shall have managed my affairs.'

(vii.) Gaius says that a legacy given 'when my heir shall die,' or 'on the day before my heir shall die,' or 'poenae nomine' (*e.g.* 'if my heir gives his daughter in marriage to Balbus, then let him give 1000 aurei to Seius'), was in each case invalid.

[1] J. ii. 20. 32.

Justinian made all these kinds of legacy possible, but in the case of a legatum poenae nomine only if there were nothing impossible, illegal, or immoral about it (J. ii. 20. 35, 36).

(viii.) If the thing which is given as a legacy is lost or destroyed the loss falls upon the legatee, unless it was occasioned by the fault of the heir, so if A gives D's slave as a legacy to B, and D manumits the slave before the legacy is due the legacy fails, unless D was persuaded to manumit the slave by A's heir, when, of course, the heir must compensate B. If A makes C his heir and gives C's slave to B as a legacy, and C manumits the slave, he must compensate B.

(ix.) A gives as a legacy to B 'a female slave with her offspring,' if the former die B still takes the offspring. So, too, if the legacy is of 'a principal slave and his assistants' (vicarii) and the principal slave dies.

(x.) A bequeaths to B, A's slave Stichus 'with his peculium'; the legacy of the peculium fails with the legacy of the slave, *e.g.* if the slave die before the testator.

(xi.) Land is given as a legacy 'with its accessories,' *e.g.* farm implements. If the land is sold and the testator intended thereby to revoke the legacy, B does not take the accessories.

(xii.) If the legacy is of a flock which afterwards is reduced to a single sheep, *e.g.* by death, the legatee can claim it, although, of course, it is no longer a flock.

(xiii.) Any additions to a flock or a building after the date of the will belong to the legatee.

(xiv.) If a slave is given his freedom as a legacy,

this does not of itself carry with it the gift of his peculium, although had the slave been manumitted by his master in his lifetime he would have taken his peculium unless the master expressly deprived him of it. But on manumission by will the slave may take his peculium if it appears, either expressly or by implication, that the master so intended. If the slave is given his peculium as a legacy, together with his freedom, he takes not only the peculium as it stood at the testator's death but all additions to it between the death and the heir's entry.

(xv.) If the peculium is given as a legacy to C, a third person, C takes it as it stood at the death of the testator, but with regard to additions made between the death and the heir's entry C only gets acquisitions made by means of something forming part of the peculium (ex rebus peculiaribus).[1]

(xvi.) The law with regard to a legacy of the same thing being made to two or more persons has been stated already as it stood in the time of Gaius. Justinian states the law in his time as follows: 'If the same thing be given as a legacy to two persons either conjunctim or disjunctim, and both take the legacy, it is divided between them. If the legacy to either fails the whole goes to the co-legatee.'[2]

(xvii.) 'Dies cedit'—'Dies venit.' The former is the name given to the time when the legatee's right to the legacy comes into existence, the latter (dies venit) when the right can be first enforced by action. Originally 'dies cedit,' on the death of the testator, if the legacy were unconditional; and though the lex Papia Poppaea made the date the opening of the will

[1] J. ii. 20. 20. [2] J. ii. 20. 8.

Justinian restored the old date. If the legacy were conditional 'dies cedit' when the condition was fulfilled. 'Dies venit' when the heir made aditio as a general rule, but the date might be later, *e.g.* if the testator so declared, or if there were a condition to the legacy which was still unfulfilled.

(*d*) *Restrictions on the amount of legacies.*

The generosity of a Roman testator in the matter of legacies[1] might easily prejudice the legatees rather than the heir, because if a testator left so many legacies as to render the estate (or rather the residue) worthless, the heir would refuse to enter, and in such case the legacies fell to the ground; while the heir, if, *e.g.*, a suus heres, might be entitled to the property as on an intestacy, taking it, of course, free from legacies. To prevent a catastrophe of this sort, three several legislative Acts were passed, of which the last only succeeded in its object. The first law, the *lex Furia*,[2] enacted that no legatee (save near relatives) could claim more than 1000 asses as a legacy, the second, the *lex Voconia* (169 B.C.), that no legatee should take more as a legacy than the heir got out of the estate. But obviously, a testator could satisfy the provisions of either law, and yet, by leaving a sufficient number of legacies, render the estate in the hands of the heir practically worthless. Finally, the difficulty was solved by the *lex Falcidia*, 40 B.C., which required that the total amount given in legacies should never exceed such a sum as would allow the heir to keep at least a fourth part of the

[1] Which was unrestrained by the civil law, since the XII. Tables provided 'uti legassit suae rei ita jus esto.'

[2] Of uncertain date, but before Cicero.

hereditas. In other words, whatever the amount given in legacies, the heir must get at least his fourth (*quarta Falcidia*), and, if necessary, the legacies diminish. If there are two or more heirs each gets a fourth of his share of the hereditas, whatever it may be, and the calculation is made for each heir separately (in singulis heredibus ratio legis Falcidiae ponenda est[1]), *e.g.* A institutes B heir to half of his estate, C to the other half. A imposes no legacies on B, but so many on C as to exhaust or nearly exhaust his share. As to B, the lex Falcidia is unnecessary; it applies, however, to C, who will get one-fourth of his half, and the legatees will get less in legacies than three-fourths of the whole estate.

In order to ascertain the value of the hereditas, an estimate was made of it *as at the testator's death.* From the gross value of the estate, deductions were made in respect of—(i.) the expenses of winding up the estate; (ii.) the debts of the testator; (iii.) the price of slaves who had been freed; (iv.) the funeral expenses. What was left was the 'net' hereditas, and of this the heir must get at least one-fourth, the remaining three-fourths being divided up among the legatees, if the testator had given them as much. If he had given less, of course there was no need for the lex Falcidia, for the heir obtained more than one-fourth under the will. When the legacies had to be reduced the reduction was proportionate, *e.g.* the estate is worth 400 aurei net. A is heir, and B, C, D, and E each has a legacy of 100 aurei, thus exhausting the estate. The lex Falcidia automatically reduces each legacy to 75 aurei,

[1] J. ii. 22. 1.

making 300 aurei in all, and A, accordingly, gets 100 aurei, being his *quarta Falcidia* of the hereditas.

Since the value is fixed at the testator's death, it is the heir who benefits or loses by the estate subsequently increasing or diminishing in value, *e.g.* X makes A heir and gives 100 aurei to B as a legacy. The net value of the estate at X's death is 100 aurei, and B's legacy is cut down to 75 aurei. If, however, the estate is worth 500 aurei when A enters (*e.g.* by the birth of slaves and cattle), A benefits, B's legacy remaining at 75 aurei. Conversely, A is heir, B is legatee of 75 aurei, and the net estate at death is ascertained at 100 aurei. B will be entitled to his 75 aurei, although before A enters the value of the estate falls to 75 aurei or less (*e.g.* by the death of a slave). But, of course, B will not get his legacy at all unless A enters, and B will probably, therefore, come to some arrangement with A, so as to make it worth his while to do so.

The lex Falcidia never applied to the will of a soldier,[1] and Justinian enacted that it should have no application where the testator himself expressly so provided, thus almost abrogating the principle of the lex, for henceforth it would practically only help the heir to secure his fair portion where the testator over-estimated the value of the hereditas by accident. Further, in Justinian's time, the benefit of the lex was lost to the heir when he renounced the right or was deprived of it for neglecting to make an inventory according to Justinian's provisions, or for attempting to defraud the legatees, or where he accepted only

[1] For the privilege of soldiers generally in the matter of wills, *vide infra.*

under compulsion. Finally, certain kinds of legacies were, exceptionally, unaffected by the lex Falcidia, *e.g.* gifts to charities and bequests of freedom to slaves.

(*e*) *How a legacy might fail.*

(i.) By the will which bequeathed it being void or failing to take effect, *e.g.* the heres refuses to enter.

(ii.) By express revocation. In the time when the old formulae were necessary to give a legacy, such legacy had to be revoked in an equally formal manner, *i.e.* contrariis verbis (*e.g. non* do lego). But long before Justinian the revocation could be informal, *e.g.* by the disposition being erased from the will, or by any declaration (by will or codicil) that the legacy was not to take effect.

(iii.) By implied revocation, *e.g.*—(*a*) alienation of the thing, unless the legatee could prove that the testator did not by alienation intend to revoke the legacy; (*b*) a great enmity subsequently arising between the testator and legatee.

(iv.) By the destruction of the legacy.

(v.) If the legatee lost the right to take, *e.g.* died before 'dies cessit.'

(vi.) 'Translatio,' *i.e.* if the testator, by will or codicil, transferred the legacy from one person to another, *e.g.* 'hominem Stichum quem Titio legavi, Seio do lego.'[1]

5. *Fidei-commissa.*

The many formalities with regard to the institution of heirs and the bequest of legacies, coupled with the fact that many persons were incapable of being instituted heirs, or being given a legacy, led, in the late Republic, to testators leaving directions to their

[1] J. ii. 21. 1.

heirs in favour of given individuals, which, though not binding at law, they hoped their heirs would, in honour, feel bound to carry out. The beginning of *fidei-commissa*, therefore, was very like the early practice with regard to trusts in English law, and, as in the case of trusts, a time came when trusts were made binding legally as well as morally. Justinian[1] tells us that the Emperor Augustus ordered the consuls, in certain cases, to interpose their authority in order to enforce fidei-commissa, and that since this measure proved popular, a regular jurisdiction soon came to be established over these hitherto informal bequests, and a special praetor was appointed to deal with them, who was called the praetor fidei commissarius. For brevity, the *fidei-commissum* will here be called 'the trust,' the person upon whom it was imposed (*fiduciarius*) 'the trustee,' and the person in whose favour it was imposed (*fidei-commissarius*) 'the beneficiary.'

The following were the chief points of original difference between legacies and trusts :—

(i.) A legacy must be given in a formal manner; any informal declaration of intention, even a nod, might be enough to constitute a trust.

(ii.) A legacy could not exist apart from a will; a trust could be imposed by will, but might be placed upon a man's intestate heir.

(iii.) A legacy could be claimed by an action at law; whereas even when trusts gained recognition, the action was an equitable one only, given by the praetor in the exercise of his extraordinaria cognitio.

(iv.) Any one might be the beneficiary under a

[1] J. ii. 23. 1.

trust; while a legatee might be disqualified as not having testamenti factio with the testator, or under the lex Voconia,[1] or the leges Julia et Papia Poppaea.[2]

(v.) Since the lex Falcidia applied only to legacies, a testator (once trusts were enforced by the praetor) could, by a series of such trusts, instead of legacies, once more make his estate worthless in the hands of his heir.

In the course of time, however, while the strict rules of legacies became, as has been shown, relaxed in favour of the principle of giving effect to the intention of the testator,[3] the rules relating to trusts lost much of their elasticity. The S.C. Pegasianum (70 A.D.) not only extended the principle of the lex Falcidia to trusts, but enacted that coelibes and orbi who were disqualified from taking legacies by the leges Julia et Papia Poppaea should be incapable of taking by way of trust, and under Hadrian peregrini and incertae personae who could not take legacies were declared also incapable of benefiting by trusts. Finally, under Justinian's legislation, trusts and legacies were placed upon exactly the same footing, and were given exactly the same remedies, even the informality in the manner of bequest disappearing, for a trust to be legally enforceable had to be duly witnessed.[4] If, however, the bequest had been by a mere declaration[5] (*i.e.* not duly witnessed), the rule was the same as that above stated with regard to codicils; the beneficiary might sue the person upon whom he alleged the trust to have been

[1] P. 234. [2] P. 235. [3] *E.g.* by the S.C. Neronianum.
[4] By five witnesses, as in the case of codicils.
[5] 'Fidei-commissum orale.'

placed, but failed if such person denied the fact on oath.

A trust might be either of one or more res singulae, or of the whole hereditas or part of it.

A trust of res singulae.—A man might request his heir (under his will or on an intestacy) or a legatee to give or do something for the use of the beneficiary, but no one could be so obliged to give more than he himself received; and where the trustee was the heir, he was entitled, after the S.C. Pegasianum, to keep, whatever the amount of legacies and trusts imposed upon him, at least a quarter of the hereditas, or (if one of several co-heirs) a quarter of his share of it, If the trust took the form of a direction to liberate a slave, if the slave were the slave of a third person, the trustee would be bound to buy and manumit him. If the master refused to sell, as he might if he himself had received no benefit from the person creating the trust, the gift of liberty was not extinguished but suspended,[1] because it might become possible in the future for the slave to be bought and freed. Even where the slave was the slave of the person creating the trust, the slave did not become his libertus, but the libertus of the trustee who freed him, who thereupon became his patron. This was the sole important point of difference in Justinian's time between a legacy and a trust; for a slave unconditionally freed by a legacy became 'orcinus,' *i.e.* the freedman of a deceased person, the testator, not of the heir.

A trust of the hereditas.—Fidei-commissum hereditatis.

[1] Otherwise in the time of Gaius (G. ii. 265).

This sort of trust arose when a man directed his heir (whether testamentary or intestate) to hold the hereditas in trust (*i.e.* by way of fidei-commissum) for some third person, so that really this third person (the beneficiary) was to succeed to the whole hereditas, the heir being merely a figure. The device was specially useful, and perhaps was first resorted to where the beneficiary could not be the jus civile heres, *e.g.* was a peregrinus. At first, however, even when the legal validity of trusts came to be recognised, the transaction could not be exactly and literally carried out, since the heir, though made trustee and though willing to execute the trust, could not divest himself of his heirship. The maxim 'semel heres, semper heres' prevented any one but the heir himself suing the debtors of the estate and so realising it, and he was also the only person whom the creditors of the estate could sue. Accordingly a plan was adopted under which the beneficiary (B) was known as 'emptoris loco,' *i.e.* in the position of a purchaser of the estate. The heir (H), by a fictitious mancipatio (*i.e.* for a single coin), sold the hereditas to the beneficiary, and, since mancipatio was inoperative to convey obligations, the sale merely vested in B, the res corporales of the hereditas. H and B, therefore, entered into mutual covenants (stipulations quasi emptae et venditae hereditatis), H to hand over to B the assets of the estate as and when he received them, and that, if necessary, B might sue the debtors of the estate in H's name; B that he would reimburse H against claims made by creditors of the deceased. If the heir were asked to hand over part of the hereditas only, the transaction was like the proceedings

where part of the estate was given as a legacy (partitio); the sale (mancipation) would be limited, *e.g.* to half the hereditas, and the stipulations entered into would be partis et pro parte. Obviously the above plan might prove much to H's disadvantage. Suppose H is asked to transfer to B the whole hereditas, and that, *e.g.* the corporeal items (land, etc.) of the estate are worth 50 aurei, the debts due to it 100 aurei, and the debts owed by it 90 aurei. H transfers the land and other corporeal property to B, and gets in and pays to him the debts due. B thus receives 150 aurei, and may lose them at once and the rest of his property in rash speculation. When, therefore, the creditors of the estate compel H to pay them he will be 90 aurei out of pocket, together with the money he spends in trying to enforce B's covenant of indemnity.

To remedy this possibility, and to abolish the clumsy process above described, the S.C. Trebellianum was passed (57 A.D.), and this S.C. (as modified by the S.C. Pegasianum, 70 A.D.) governed the proceedings in the time of Gaius, when B was sometimes 'heredis loco' (viz. when the S.C. Trebellianum applied), sometimes 'legatarii loco' (viz. when the S.C. Pegasianum was invoked). The S.C. Trebellianum provided that, as soon as H assented to the hereditas vesting in B, all actions which might have been brought by or against H should be allowed to and against B, and thenceforth the praetor, acting on the S.C., permitted B to sue and be sued[1] as if he were heir; hence he is termed by Gaius 'heredis loco.' B, it is true, was only heir in equity, but he

[1] By an actio utilis.

had all the practical advantages of heirship; and although the S.C. did not repeal the letter of the maxim 'semel heres, semper heres,' it destroyed its reality, for if A were sued by the creditors after the transfer, he could defeat them by pleading the 'exceptio restitutae hereditatis,' or, as it was sometimes called, the 'exceptio S.C. Trebelliani.'

Since, however, a trust depended as much as a legacy on the heir making aditio, it is obvious that, where H was asked to transfer the whole or the greater part of the hereditas, he might well refuse, as himself receiving no benefit, and the trust accordingly might wholly fail. To remedy this the S.C. Pegasianum was passed, which allowed the heir (as under the lex Falcidia with regard to legacies) to retain a fourth part of the hereditas, and the principle was extended also to cases where the heir was only one of several, where, of course, he retained one-fourth, not of the whole hereditas, but of the share to which he had been instituted. The S.C. further provided that if H declined to make aditio (*e.g.* because he thought the hereditas was damnosa), B, the beneficiary, might obtain an order from the praetor to compel him, and in such case H neither gained nor lost; the transfer was deemed as governed by the S.C. Trebellianum, B could sue and be sued, heredis loco, H could plead the exceptio restitutae hereditatis when sued.

The S.C. Pegasianum did not repeal the earlier statute, but modified it, and it was only when less than a quarter of the estate was left to H that the S.C. Trebellianum had no application, and in this case the relations between H B, and the debtors and

creditors of the estate was as under the old system[1] before the S.C. Trebellianum. The statement made by Gaius, therefore, that B, formerly emptoris loco, was in his time aliquando heredis loco, aliquando legatarii, becomes intelligible. B was heredis loco when the S.C. Trebellianum gave actions to and against him, and protected H by the exceptio restitutae hereditatis, viz. — (i.) when H was not requested to transfer more than three-quarters of the hereditas; (ii.) when H refused to enter and the praetor compelled him. B was legatarii loco when less than a quarter of the hereditas was left to H. Then if H entered and relied upon the S.C. Pegasianum to secure his fourth, there was a mock sale of the part transferred to B, and stipulations partis et pro parte, as in the case of that sort of legatum known as partitio; if H did not rely upon S.C. Pegasianum, there was a sale of the whole estate, and stipulations quasi emptae et venditae hereditatis. It will be noticed that, though B is spoken of as legatarii loco in both cases, the expression is more applicable to the first case, viz. where H relied on the S.C. for his fourth; B's position being then exactly 'legatarii loco,' viz. a legatee to whom a share of the hereditas had been bequeathed. In the second case (where the stipulations were quasi emptae et venditae hereditatis) B's position, though more like that of a legatee than that of an heir, might equally well be described 'emptoris loco,' as under the system prior to the S.C. Trebellianum.

One more point in relation to the S.C.C. must be noticed before passing to Justinian's changes. H

[1] Viz. a fictitious sale with stipulations.

might be asked to hand the hereditas to B after reserving in his own favour, not a definite part of the hereditas, but some specific thing or things, *e.g.* land or slaves. In this case, however valuable the specific gifts might be, and even though they amounted to the greater part of the estate, all the actions passed to and against B when H assented to the transfer of the hereditas, and H escaped liability.[1]

Justinian embodied the two S.C.C. into one, retaining the advantages of each. The heir was to be entitled to at least his fourth, if he wished to retain it, in every case, and the mock sale and stipulations were to be in every case unnecessary. The actions were to pass to and against the beneficiary in proportion to the share of the estate transferred to him, who was thus always made 'heredis loco' so far as his share was concerned, and the heir remained heir in proportion to the part he retained, *i.e.* to that extent actions lay for and against him. Finally, as under the S.C. Pegasianum, the heir refusing to enter could be compelled to do so, but at the same time he escaped all liability.

C. *Testamenti factio.*

Testamenti factio has three aspects. Testamenti factio *activa* denotes the power to make a will, *passiva* the capacity to receive benefits under one, while a third kind of testamenti factio is the capacity to witness a will.

Testamenti factio activa.—Only persons who had the jus commercii and were under no disability could make a will, and, in ordinary cases, they had to possess

[1] *Cf.* J. ii. 23. 9. The law in this respect seems to have been unchanged by Justinian's legislation.

the right not only at the date of their will, but also at death. A slave[1] and a filiusfamilias were incapable, being alieni juris, except that a filius could so dispose of his peculium castrense or quasi-castrense, for in relation to them he was regarded as an independent proprietor. An impubes was incapable, because, although he might be sui juris, his tender years disabled him, and the same lack of capacity attached to a furiosus and to a prodigus who had been forbidden by the praetor to manage his affairs. A Latinus Junianus, not having the jus commercii mortis causa, a Dediticius having no commercium of any kind, and a person made 'intestabilis' by the Senate's decree (*e.g.* because condemned 'ob carmen famosum'), were equally incapable of testamentary disposition. If a Roman citizen were captured in war, and so became a slave, he lost capacity, and any will made during captivity was invalid, even though afterwards he escaped and returned to Rome. But if he had already made a will before capture, it remained good, whether the citizen returned or not. If he returned, it was good by the jus postliminii, *i.e.* by the fiction that he had never been captured; if he did not return, but died in captivity, by the *fictio legis Corneliae*, which assumed that a Roman citizen dying in captivity had never been taken prisoner at all, but had died at the moment of capture.

In the time of Gaius a person who was deaf or dumb was incapable of will-making, the former because he could not hear, and the latter because he could not utter the nuncupative part of the mancipa-

[1] But a public slave of the Roman people might dispose by will of half his peculium.

tion, but Justinian removed the incapacity except in the case of those who had been deaf and dumb from birth. A blind man, it would seem, could always make a will, but in Justinian's time special formalities were necessary ; for besides the usual seven witnesses, a notary, or if one could not be found, an eighth witness was necessary, and the will had to be read aloud. The position of women under perpetua tutela with regard to will-making has been discussed above.[1]

Testamenti factio passiva is the right to be instituted heir by or to take a legacy under a will,[2] and it was necessary that the person in question should possess it, not only at the date of the will and the time of the testator's death, but also at the date of the entry (aditio). Testamenti factio passiva, however, was possessed by many persons to whom the right to make a will was denied, for every one who was either a citizen, or subject to the potestas of one, could take under a will, even though under incapacity, *e.g.* in spite of being a furiosus, impubes, etc. The chief examples of those unable to benefit by a will, therefore, were peregrini, Latini Juniani,[3] Dediticii, persons pronounced intestabiles, incertae personae,[4] and persons disqualified by statute on the ground of public policy, *e.g.* in the time of Justinian heretics, apostates, and the children of persons convicted of treason. By the lex Voconia a woman could not be instituted heir by a testator whose fortune amounted to or exceeded 100,000 asses, but

[1] P. 107.

[2] As already pointed out, originally many persons could benefit by fidei-commissa who had not testamenti factio passiva.

[3] Unless they acquired 'civitas' within 100 days.

[4] As to postumi, *vide supra*, p. 184.

this disqualification was obsolete in the time of Justinian. Another example of a statutory disqualification is afforded by the leges Julia et Papia Poppaea. The lex Julia took from the coelebs (*i.e.* an unmarried person) the capacity to receive benefits under a will unless the testator were related to him within the sixth degree, or unless the coelebs married within 100 days from the date when the contents of the will were known. Under the lex Papia Poppaea orbi (childless persons) [1] were only permitted to take half the benefits conferred upon them by will, unless the testator were, as in the case of the lex Julia, a near relative. But the effect of these two laws differs from that of ordinary disqualification. The coelebs and the orbus are not deprived of testamenti factio; they may be instituted or left legacies (*i.e.* the institution or legacy is not void), but they are incapacitated (in whole or part) from actually receiving the benefit so conferred, which becomes *caducum*,[2] and passes—

(*a*) To children or parents of the testator (if any) whom he has appointed heirs by his will; in default of these—

(*b*) To heirs or legatees (as the case may be) having children.

[1] *I.e.* persons who, though married, had no children living.

[2] *I.e.* 'lapsed'—'veluti ceciderit ab eo.' Caducum was a term applied to gifts under a will which, though valid by the civil law, were either avoided by some special prohibition (*e.g.* as here, one imposed by statute) or lapsed for some other reason, *e.g.* failure of some condition. To be distinguished from 'caduca' are gifts treated 'pro non scriptis,' such as a legacy to a person who was dead at the time, though the testator thought otherwise. 'Caducum' implies lapse after the testator's death, 'in causa caduci' denotes a legacy which fails between the date of the will and the death of the testator (see Roby, i. 382-383).

(*c*) In default of both classes, to the fiscus.

But if the legacy is joint (to A, B, and C), and one share lapses, the other legatees having children take before the heir. Under Caracalla class (*b*) lost their claim, so that either heirs who were children or parents of the testator, or the fiscus took, and the disqualification imposed upon coelibes and orbi by the above *leges caducariae* was altogether obsolete in Justinian's time, having been abolished by Constantine.

As already stated, the right to benefit under a will belonged not only to citizens, but to those in the power of a citizen. If the superior were the testator himself, the person under potestas might acquire for his own benefit, *e.g.* a filiusfamilias made heir by his father, or a slave instituted heir with freedom.[1] If the superior were some one other than the testator, the benefit given to the person in potestas accrues in the ordinary course to the paterfamilias or master;[2] *e.g.* A makes B's slave C his heir. This is a valid appointment if B has testamenti factio with A, and valid even though B is dead, for his hereditas jacens sustains his personality; but of course when C enters upon A's hereditas at the command of B or B's heir it will be as agent for his master, who will thus get all the benefit accruing from heirship, and none of its disadvantages.

Testamenti factio as meaning the capacity to witness a will.—The capacity to witness a will was only required at the time of the making of the will,

[1] Implied by the institution in Justinian's time.

[2] An exception would be the appointment of a servus alienus 'cum liber erit,' the condition being fulfilled.

and in the time of Gaius only those persons could be witnesses who were capable of taking part in the mancipation upon which the will was founded. Since no person could participate in the ceremony who was not a citizen above the age of puberty and under no incapacity, it follows that persons who were deaf, dumb, mad, slaves, women, or children under tutela, were not good witnesses. Further, when Gaius wrote, since in theory the whole business was between the testator and the familiae emptor, no person in the postestas of either of those persons, or under the same potestas, was a valid witness.[1] But the real heir, the legatees and their relatives were proper witnesses, though Gaius tells us that the heir himself, his paterfamilias, and those subject to his potestas ought not to be witnesses.[2] Under Justinian, though the will was made no longer by means of a fictitious sale, a witness had still to have jus commercii and be free from incapacity; and Justinian tells us that neither women, children under puberty, slaves, dumb and deaf persons, madmen, prodigals, nor persons declared intestabiles, were competent witnesses. The familiae emptor had, of course, disappeared, but, as under the old law, no person under the potestas of, or subject to the same potestas, as the testator, could be a witness; and the custom of which Gaius disapproved, viz. that the heir and his relations were good witnesses, was pronounced illegal by Justinian. Under his law, therefore, no person instituted heir, nor any one in his potestas, nor his paterfamilias, nor his brother under the same potestas, could be a witness. Even under

[1] Reprobatum est in ea re domesticum testimonium(G. ii. 105).

[2] Minime hoc jure uti debemus (G. ii. 108).

Justinian, however, legatees and fidei-commissarii[1] could witness the will, though they benefited under it.

D. *How a will might be or become invalid.*

A will which was invalid ab initio was called *injustum* or *non jure factum*; a will which, valid when made, was invalidated by some after event, was known as *ruptum.*

Testamentum injustum.—A will might be void and ineffective from the moment it was made, because

(*a*) The testator had not testamenti factio, *e.g.* was a Latinus Junianus;

(*b*) The will was improperly made, *e.g.* some of the witnesses were not lawful witnesses, or the testator failed to institute or disinherit a son in his potestas.

Testamentum ruptum.—A valid will might become void, because—

(*a*) The testator revoked it, which he could do by making a new will valid at jus civile; but even an invalid second will revoked the first, when the intestate heirs of the testator were passed over in the first and instituted in the second. And the second will, though validly made, and so revoking the prior will, might, if the heir under it were only instituted heir to certain particular things, be construed as imposing a fidei-commissum upon him, to restore the rest of the hereditas to the heir named in the earlier will; though if the particular things were not equal in value to a fourth of the hereditas, the heir instituted by the second will might keep, in addition to the things given him, such further part of the estate as would make up the fourth, which the S.C.

[1] And, of course, their relatives.

Pegasianum secured him.[1] A will was also revoked after an enactment of Theodosius by the lapse of ten years, but under Justinian mere lapse of time had no effect unless after ten years the testator showed his intention to revoke it (*e.g.* by oral declaration before three witnesses), or the declaration were registered in the acta. Mere intention to revoke was not enough (J. ii. 17. 7), but it was a good revocation if the will were destroyed, *e.g.* torn up, or the institution of heir erased.

(*b*) A will was also ruptum by the birth of a postumus suus or by a person becoming intestate heir after the date of the will in some other way, *e.g.* by marriage in manum or by arrogation; but, in the time of Justinian, a will was no longer necessarily broken by the birth of a postumus, because, as above stated, such persons might be instituted or disinherited by anticipation, and marriage in manum was obsolete; but Justinian tells us that even in his time, if a testator arrogated a person or took one in adoptio plena, his will was revoked by the quasi-agnation of a suus heres.

(*c*) A will became ruptum (or, as this species of 'ruptum' was sometimes called, *irritum*) when after the date of the will the testator suffered capitis deminutio. But—(i.) if the capitis deminutio was the result of the testator being taken captive by the enemy, his will was not irritum; for, as above stated, it was upheld either by the jus postliminii or the fictio legis Corneliae; and—(ii.) if the capitis deminutio were minima, and nevertheless the testator was a citizen and sui juris at death (*e.g.* having

[1] Not the lex Falcidia as stated by Justinian (J. ii. 17. 3).

been arrogated had been afterwards emancipated), the praetor granted bonorum possessio secundum tabulas to the heir named in the will, which was, however, sine re[1] unless, after regaining his former status, the testator expressly declared that he wished the will to stand.[2]

(*d*) Another instance of a will becoming ruptum (or as it was here specially described, *destitutum* or *desertum*) was where, there being no substitute, the heir failed to take, *e.g.* died before the testator, or lost testamenti factio, or refused.

(*e*) Finally, a will might become ruptum by a successful querela inofficiosi testamenti.

Subsect. 2. *Intestate Succession*

If a man died without a will, or left a will which failed to take effect, those persons were his heirs whom the law provided, and in ascertaining the heir the guiding principle, until Justinian's Novels, was that of agnatio, though this was modified by the reforms of the praetors, by other changes prior to Justinian, and by Justinian himself, both prior to and by his Novels. The subject, therefore, falls under the following heads :—

A. The position at jus civile.
B. The praetorian reforms.
C. The law prior to and as defined by Justinian's early legislation.
D. The Novels.
E. Succession to freedmen and filii requires separate treatment.

[1] *I.e.* the bonorum possessor would be ejected by the intestate heir.
[2] *Cf.* G. ii. 147-149.

A. *The position at jus civile.*

As already stated, on a man's death intestate the first class of persons entitled to succeed to his hereditas were his sui heredes, those persons who were in his potestas at his death, and who by his death became sui juris. There was representation, *i.e.* children of a deceased suus heres took his place, and when such representation happened the succession was per stirpes, *i.e.* the children took between them the share their ancestor would have taken. An example will make this clearer. Balbus dies, leaving a son, Maevius, whom he has given in adoption; another son, Stichus, whom he has emancipated; a daughter, Julia, who has married in manum; another son, Sempronius, who is married and has a son, Marcus; and two grandchildren by a deceased son, Gaius. Maevius, Stichus, and Julia were not in the power of Balbus at his death, Marcus was, but does not become sui juris on the death of Balbus; none of these persons, therefore, can be sui heredes of Balbus. Sempronius and the two grandchildren, were, however, in the potestas of Balbus at his death and become sui juris; Sempronius is, accordingly, heir to half the estate, and the two grandchildren to the other half, representing their deceased father, and taking, per stirpes, his share. Had the representation been per capita instead of per stirpes, Sempronius and each of the grandchildren would have been heirs to a third of the estate.

Failing sui heredes, the hereditas went to the 'agnati proximi,' *i.e.* those agnates (other than sui heredes) who were nearest in degree to the testator at the time of his death or at the time of the will failing,

e.g. brothers born of the same father as the deceased,[1] an uncle on the father's side. The rules in the case of agnates differ from those with regard to sui heredes, because—

(*a*) The nearest in degree exclude all other agnates, *i.e.* there is no representation, so that if Balbus died leaving no sui heredes, but Titius a brother and Maevius the son by another deceased brother, Titius is sole heir, as being nearer in degree, and excludes Maevius, who is more remote.

(*b*) In the case above given, Maevius has not even a contingent right of succession if Titius dies before entry, or refuses the hereditas, 'nec in eo jure successio est.'[2]

(*c*) If there are several agnates of equal degree, the succession is per capita and not per stirpes; if, therefore, Balbus dies with no sui heredes and no brothers or sisters, but leaving Titius, the son of a deceased brother, and Marcus and Stichus, the sons of another deceased brother, Titius, Marcus, and Stichus will each be heirs to a third of the estate.

(*d*) The effect of the lex Voconia was to exclude all women save consanguineae from succession as agnates; therefore, an aunt or a niece had no claim.

Failing sui heredes and agnati proximi, the hereditas lapsed to the gens; but the right of the gens to succeed had become obsolete in the time of Gaius, and he does not discuss the topic in detail.[3]

[1] Agnate brothers and sisters, *i.e.* brothers and sisters of the same father as the deceased, were the nearest in degree, and were specially known as 'consanguinei.' Both sui heredes and agnates are sometimes described as legitimi heredes, because called to the hereditas by the law of the XII. Tables.

[2] G. iii. 12.

[3] G. iii. 17.

B. *The praetorian reforms.*

Gaius[1] summarises the defects[2] of the civil law of intestate succession as follows:—

(i.) Emancipated children had no claim, nor, as he might have justly added, have children who have been given in adoption or have married in manum.

(ii.) Children made citizens along with their father did not fall under his potestas unless the Emperor so decreed,[3] and were not, therefore, his sui heredes.

(iii.) Agnates who had suffered capitis deminutio were not admitted; because, although the capitis deminutio were minima only, they lost the very name of agnates.

(iv.) If the agnati proximi failed to take, the more remote had no claim.

(v.) No female agnates save consanguineae (sisters by the same father) could succeed, and—

(vi.) Cognates who were not agnates had no claim at all; so that persons tracing relationship through females were altogether excluded, and, therefore, a mother had no right of succession to her children (and *vice versa*), unless she had been married in manum, so as to become a quasi-sister by agnation to her own children.[4]

All these inequalities, Gaius says, the praetor

[1] G. iii. 18-24.

[2] Which account for the dread a Roman had of dying intestate.

[3] *Cf.* G i. 94.

[4] A further hardship was that while the natural claim of blood-relations was so largely disregarded, agnatic relationship could subsist between the deceased and an absolute stranger, *e.g.* a person whom he had arrogated, and who would, therefore, exclude a natural son who had been given his freedom.

amended by his edict, not in the sense of making the excluded persons heirs at jus civile (nam praetor heredes facere non potest), but by giving them bonorum possessio ab intestato. His principal reforms were as follows: he established a certain order, according to which bonorum possessio was granted, and gave the beneficial enjoyment of the estate to persons coming within the several classes, whether such persons were the legal heirs or those whom, being excluded by the civil law, he (the praetor) alone assisted. In so far as the grant was to the heirs by the jus civile it was, obviously, 'juris civilis adjuvandi gratia,' in the other cases 'corrigendi gratia.' The four principal grades or classes were 'unde liberi,' 'unde legitimi,' 'unde cognati,' and 'unde vir et uxor.'

Bonorum possessio unde liberi.—In this part of his edict[1] the praetor promised bonorum possessio not only to the sui heredes entitled at jus civile, but—(i.) to an emancipated filiusfamilias, and (ii.) a child who had been given in adoption and afterwards emancipated.[2] An emancipated filiusfamilias had, however, to make 'collatio bonorum' with the other heirs, *i.e.* before sharing the estate with them, he had to bring into hotchpot (or the common fund) everything he had acquired since his emancipation save his peculium castrense and quasi-castrense. The reason is best seen by an example. A has three sons, B, C, and D. He emancipates B, and four years later dies. C and D become his sui

[1] 'Ea pars edicti unde liberi vocantur.'

[2] If a child given in adoption were emancipated after the death of his natural father, he lost, before Justinian, all right of succession both to his natural and adoptive father, save as a cognate to the former.

heredes, and B is admitted to bonorum possessio with them by the praetor. But inasmuch as B may have acquired considerable property in the interval between his emancipation and his father's death, while C and D could acquire nothing save their peculium castrense and quasi-castrense,[1] B is only permitted to share on making collatio bonorum, as above described. If a son were emancipated, and his children born before the emancipation remained in the potestas of their paterfamilias, they became sui heredes of the latter to the exclusion of their own father at jus civile, but the praetor granted bonorum possessio to the father of half the estate and of the other half to his children. Of course, if there were several heirs, the father and the children each took not one half of the hereditas, but half of one share of it. An emancipated child who afterwards gave himself in arrogation did not get bonorum possessio to his natural father unless the person arrogating him emancipated him in his father's lifetime.

Unde legitimi.—This species of bonorum possessio seems to have been solely juris civilis adjuvandi gratia, for it was only open to sui heredes at jus civile, who had failed to claim *unde liberi*,[2] and to the agnati proximi, as above defined. The praetor, it is true, helped agnates who were cut out at jus civile, but it was not in this degree but the next.

Unde cognati.—Failing a claim by persons entitled under the first two classes, the praetor gave bonorum

[1] They acquired everything else, of course, for their father.

[2] *I.e.* had neglected to claim bonorum possessio within a year, and so became obliged to fall back upon the second chance given them by the praetor, viz. to claim as 'legitimi.'

possessio 'unde cognati'[1] to the kindred in blood of the deceased. This class included all descendants, whether emancipated or given in adoption or not, and although the child was still in the potestas of the adoptive father; agnates who had suffered capitis deminutio; more remote agnates excluded by the agnati proximi; women who were agnates (though not consanguineae) and other relatives, although the tie was only through women, so that a child could succeed to his mother, and *vice versa*. All these persons, of course, could not claim at once. The rule was that those who were nearest in blood to the deceased when the bonorum possessio came to this class,[2] shared equally, and there was no representation.

Unde vir et uxor.—If no grant were made under the above classes, *e.g.* because all entitled failed to claim, the praetor granted bonorum possessio to the deceased widow or widower, as the case might be.

C. *The law prior to and as defined by Justinian's early legislation.*

The changes in the law made prior to Justinian display a gradual recognition of the principle of cognatio at the expense of agnatio, a development which was finally completed by Justinian himself.

The S.C. Tertullianum, passed under Hadrian, gave a better position to a mother who, unless married in manum, had hitherto at best the right to bonorum possessio of the estate of her children in the third degree, *i.e.* unde cognati. If, being an ingenua, she

[1] But cognates were only admitted to the sixth or, in the case of children of a second cousin (sobrino sobrinave nati), the seventh degree.

[2] *I.e.* not at the death of the deceased.

had the jus trium liberorum, or, being a libertina, the jus quatuor liberorum,[1] the mother acquired under the statute a civil law right to succeed to her children after their children (liberi), their father and their agnatic brother. If, therefore, a child died leaving no issue, no father and no agnatic brother, the mother became the legal heir, though if the child left sisters the mother took half the estate. Conversely, the S.C. Orphitianum, 178 A.D., gave children a right of succession to their mother's estate. Hitherto children could only claim bonorum possessio to their mother unde cognati; the effect of the S.C. was to raise them to the first degree. A constitution of Valentinian and Theodosius remedied an omission from the S.C. Orphitianum by calling grandchildren to the legal succession of their grandparents on their mother's side or their grandmother on the father's.[2] Finally, Anastasius enacted (498 A.D.) that emancipated brothers and sisters of the deceased, who formerly had only been admitted in the third degree (unde cognati), should succeed concurrently with agnatic (*i.e.* unemancipated) brothers and sisters in the second degree, but they were only to take half the share taken by true agnates.

The position under Justinian, taking into consideration the changes he made prior to the 118th Novel, was as follows:—

In the first class came the sui heredes of the civil law, the liberi of the praetor's edict, the children of a deceased mother under the S.C. Orphitianum, and

[1] *I.e.* three or four children born alive.

[2] Their share, however, was diminished by one-third in favour of 'liberi' of the ancestor, or, if there were no liberi, one-fourth in favour of agnates.

grandchildren under the law of Valentinian and Theodosius.[1] A son given in adoption remained heir to his natural father unless the adoption were plena.

The second class (the old 'agnati proximi') was composed of—

(i.) The mother[2] and brothers and sisters of the whole blood, whether agnates or not.[3]

(ii.) Brothers and sisters of the half blood.[4]

(iii.) Agnates in the next degree after brothers and sisters, and the sons and daughters of deceased brothers and sisters.

(iv.) More remote agnates according to nearness of degree.[5]

The third class consisted of the 'unde cognati' of the praetor's edict, excluding such persons (such as emancipated brothers) as had been promoted to a higher degree, as pointed out above.

D. *The Novels.*

This scheme was very complicated, for it depended upon first ascertaining who were sui heredes and agnati proximi respectively, and then expanding the two classes in the light of the edict and legislation, and adding the 'unde cognati' grade; and there was still the dual system of heirship, the heres of the civil law and the bonorum possessor at equity. Justinian, therefore, determined to simplify the whole matter and to carry to a logical conclusion the reforms initiated by the praetors, by substituting the

[1] Justinian abolished the deduction.

[2] Although she did not enjoy the jus liberorum.

[3] Justinian allowed emancipated brothers and sisters to share without the deduction provided by the law of Anastasius.

[4] Justinian postponed the half to the whole blood.

[5] Justinian introduced a successio ordinum among agnates.

principle of blood-relationship for the fictitious relationship of agnatio in practically every case. His final reform, as defined in the 118th and 127th Novels, was as follows :—

There are four classes of heirs on intestacy, arranged in the following order :—

1. In the first class come descendants, whether the deceased were a man or woman, and these descendants are determined by blood-relationship, save that a child taken in adoption counts as a natural child.[1] Descendants in the first degree, *i.e.* sons and daughters, take equally 'per capita,' and they exclude their own issue. But if a descendant in the first degree dies before the intestate there is representation; the descendant's children take, per stirpes, the share their parent would have taken had he survived. For example, A dies leaving a son B and a grandson by B, C. B excludes C. A dies leaving a son B and two grandchildren by a deceased son, C; B takes half the estate and the grandchildren the other half per stirpes, as representing their deceased father.

2. The second class is solely determined by cognatio, and consists of ascendants, brothers and sisters of the whole blood, and the children of such brothers and sisters who died before the intestate. Among ascendants the nearer only succeed; thus, if the father and mother of the deceased were alive, they excluded the grandparents.

3. Brothers and sisters of the half blood, and children of such brothers and sisters who died before the intestate.

[1] The last relic of the agnatic principle.

4. All the remaining collaterals, according to nearness of degree, the praetorian restriction with regard to the sixth or seventh degree being abolished.

These reforms abolished the distinction between heirship and bonorum possessio, except in one case, viz. as between husband and wife, for it will have been noticed that the above scheme makes no provision for such relationship, so that a husband could only claim bonorum possessio unde vir et uxor to his wife, and *vice versa*, *i.e.* they came in after all the collateral relations and only saved the estate lapsing to the fiscus. Justinian, however, allowed a widow who was very poor and had no dowry one-fourth of her husband's estate; if, however, there were more than three children, the widow was only to take a usufruct in a 'portio virilis.'

E. *Succession to* (*a*) *freedmen and* (*b*) *filii.*

(*a*) *Succession to freedmen.*—According to the XII. Tables a slave properly freed, *i.e.* a civis libertus, had full power to dispose of his property by will, and might omit all mention of his patron, for the XII. Tables only called the patron to the inheritance if the libertus died intestate without leaving any suus heres. The first restriction was imposed by the praetor; in the event of the libertus dying leaving natural children whom he had not disinherited, no change was made, they were in equity entitled to priority to the patron; but if there were no children or they had been disinherited, the praetor granted the patron bonorum possessio of half the estate, whether the libertus had left a will giving him nothing or less than half, or had died intestate. And if the libertus left no sui heredes at all, the patron's civil

law claim to the whole hereditas remained. The next change was by the lex Papia, which only applied to cases where the estate of the freedman amounted to 100,000 sesterces or more. Where the property was of this value then, unless the libertus left three or more natural children heirs, the patron was secured a portio virilis, *i.e.* an equal share with each child; *i.e.* if the libertus left two children heirs, the patron and each child obtained one-third of the hereditas, if one heir, the heir and the patron each took one-half. Justinian amended the law in the following manner. A freedman with less than a hundred aurei might dispose of it as he wished by will. If the estate were worth 100 aurei and the freedman left issue and made them heirs, the patron had still no claim; if there were no issue, or, there being issue, they were disinherited, the patron could claim a third whether left it or not. If there were no issue and the libertus left no will, the patron took the whole. Finally the rules with regard to intestate succession, as settled by Justinian, were as follows :—

(i.) Natural descendants of the libertus.

(ii.) Patron.

(iii.) Patron's children.[1]

(iv.) Collateral relations of the patron to the fifth degree.[2]

Succession to Latini Juniani and Dediticii.— Since a Latinus Junianus had not the right to make a will, his property passed on his death to his patron

[1] By a S.C. in the time of Claudius a paterfamilias might assign a freedman to one particular child (J. iii. 8.).

[2] For a more detailed account of the succession to freedmen, see Roby, i. 270; Moyle, p. 372.

in any event, who took not jure hereditario, as in the case of a libertus, but 'jure quodammodo peculii.'[1] Hence there were important differences between the patron's right to succeed a civil libertus and a Latinus Junianus. For example :—

(i.) A Latinus Junianus had no possible 'sui heredes.'

(ii). The property of a civis libertus could in no case pass to his patron's extranei heredes, whereas the estate of a Latinus could so pass.[2]

(iii.) If there were two or more patrons, the property of a civis libertus belonged to them equally, although they may have owned him as a slave in unequal shares; but co-patrons succeeded to the estates of Latini Juniani in the same shares in which they formerly owned him as a slave.[3] The estates of *Dediticii* belonged in all cases to their patrons, who sometimes took, as in the case of succession to cives liberti (*i.e.* where, if the slave had been of good character, he would have become on manumission a libertus), sometimes as in the case of succession to Latini Juniani (*i.e.* where, had the slave been of good character, he would have become a Latinus).[4]

(*b*) *Succession to a filiusfamilias.*—A filius might die either in his ancestor's power or be sui juris through emancipation.

1. If the son died in potestas, his father, under the early law, took all his property jure communi. When the peculium castrense was introduced, the son could

[1] G. iii. 56.

[2] A S.C. Largianum gave the patron's children not expressly disinherited a preference over 'extranei' in regard to the property of a Latinus Junianus.

[3] For further differences see G. iii. 60-67. [4] G. iii. 74-76.

dispose of it by will, and under Justinian he could so dispose of his peculium quasi-castrense also; but if he died intestate, his father took both peculia in the ordinary way; Justinian, however, postponed the right of the father in this respect to the son's children, and his brothers and sisters.[1] Of the peculium profectitium the son was unable to dispose, even in Justinian's time, and his father accordingly acquired it on his death in any event. Originally the father took the peculium adventitium also; but Theodosius and Valentinian enacted that while this peculium, so far as made up of bona materna, was to go to the father as before, so far as it consisted of lucra nuptialia, the father was to take only a usufruct, subject to which the children of the filius took the dominium; if there were no children, the father was to take the dominium as well. Under Leo the father was postponed to brothers and sisters of the filius as well as his children. Justinian made these rules applicable not only to bona materna, but to every sort of peculium adventitium. So that in Justinian's time the father succeeded to the peculium profectitium in any event, to the peculium castrense and quasi-castrense only if the son died intestate, and even then after the children and brothers and sisters of the filius; in the peculium adventitium he took a usufruct, and, failing children and brothers and sisters of the deceased, the dominium of the property.

2. If the son were emancipated he had full testamentary capacity; if he died intestate, his property belonged to his sui heredes, failing them to his actual

[1] J. ii. 12. *pr.*

manumittor (whether parens or extraneus),[1] unless there had been a fiducia in favour of the father. In the time of Justinian, however, a fiducia was implied in every emancipation,[2] and the order of succession was, first, the children of the deceased; then the father, subject, however, to certain rights in favour of the mother, brothers, and sisters (if any) of the deceased.[3]

Subsect. 3. *Bonorum Possessio*

Bonorum possessio, many of the details of which have been already described, was a universal succession in equity; for the bonorum possessor had, as such, no status in the eye of the law, though he was amply protected by the praetor. As already appears, bonorum possessio was granted on three grounds: it might be—

(i.) Secundum tabulas, *i.e.* where there was a will duly sealed.

(ii.) Contra tabulas, *i.e.* where the praetor wholly or in part upset the will. A will (*e.g.*) would be wholly upset where a filius suus was praeteritus, and such son applied for possession; because, being a filius suus, the will fell to the ground, even according to the civil law, *i.e.* apart altogether from praetorian requirements; an example of a will being partly upset would be where some person was praeteritus (other than a filius suus) whom the praetor required to be instituted or disinherited, in which case the prae-

[1] *Vide supra.* Ten persons were preferred by the praetor to the extraneus manumissor, 'illa parte edicti unde *decem personae* vocantur' (see Roby, i. 260).

[2] J. iii. 2. 8.

[3] See Moyle, p. 357.

teritus could obtain bonorum possessio, but would be bound by some of the provisions of the will, *e.g.* the appointments of guardians.

(iii.) Ab intestato, when the bonorum possessio might either be granted to the civil law heir 'adjuvandi causa,' as affording him more effective remedies, or, 'corrigendi causa,' to some person whom the civil law excluded, *e.g.* an emancipated son, or a husband or wife.

The formal application for possession of the property of the deceased was made by a petition, known as '*agnitio*,' to the praetor, and ascendants and descendants were allowed a year (annus utilis), all other persons 100 days (centum dies utiles), in which to make their request. By failure to make the request in the time limited, they lost their right. The grant carried with it what may be called equitable heirship, which might be permanent (cum re) or temporary (sine re). It was cum re when the bonorum possessor was not liable to be ejected by a person with a better title, sine re when he was. For example, Balbus, the scriptus heres, failing to demand bonorum possessio, it is granted to Titius, the intestate heres. The bonorum possessio will be sine re if the will was properly made, and fulfils all the requirements above mentioned, since Balbus can, by his civil law action (hereditatis petitio), evict Titius, whose possession was merely 'juris civilis supplendi causa.' On the other hand, possession granted to the jus civile heir, 'juris civilis adjuvandi causa,' or to some person to whom the praetor makes a grant in preference to the civil law heir[1] (juris civilis corri-

[1] *I.e.* after the praetor's power in this respect was recognised.

gendi causa), is final, and therefore cum re. The remedies of a bonorum possessor were—

(*a*) The interdictum quorum bonorum, by means of which the right to corporeal property belonging to the estate could be enforced.

(*b*) The petitio hereditatis possessoria, analogous to the hereditatis petitio of the civil law heir.

(*c*) An actio against the debtors to the estate based on the fiction, which could not be traversed, that the bonorum possessor was, in fact, the civil law heir (ficto se herede).[1]

The origin of bonorum possessio is obscure. In its earliest form it was solely juris civilis adjuvandi gratia, viz. secundum tabulas to the scriptus heres under a proper will, or ab intestato to the agnati proximi. The most probable suggestion is, that inasmuch as a suus heres obtained possession ipso jure, while others, such as an extraneus (scriptus) heres and an agnate, could acquire undisputed possession only by the praetor's decree,[2] bonorum possessio was first introduced where, there being no suus heres, there was a contest between the testamentary and intestate heirs. So that a grant of bonorum possessio not only settled the dispute but prevented any third person acquiring the hereditas by usucapio pre herede. Next, bonorum possessio became juris civilis supplendi gratia, being granted when a scriptus heres failed to apply for bonorum possessio in due time (though it

[1] Conversely, the creditors of the estate were granted an action against the bonorum possessio on the same fiction.

[2] The XII. Tables provided that the 'suus' was to be 'heir,' failing him the agnates or gens are not made heirs, they are merely to take the estate, 'familia' (see, on the origin of bonorum possessio, Sohm, pp. 538-550; Moyle, pp. 469-473).

might not, in this case, be lasting possession, since it was open to the scriptus heres to subsequently bring a petitio hereditatis); finally, the grant appeared corrigendi gratia, *i.e.* when, from Cicero's time onwards, the praetor promised it to persons not entitled in any sense at jus civile.

Subsect. 4. *Addictio bonorum libertatis causa*

This addictio bonorum was introduced by Marcus Aurelius, and the fact that it is not mentioned by Gaius helps us to fix the date of his *Institutes*.

If a man, by his will, gave freedom to some of his slaves, and the hereditas was refused by the heir under the will, the intestate heirs, and the fiscus, it would be adjudged to the creditors, who would sell it to satisfy their claims, and the gifts of freedom might, accordingly, fail. Marcus Aurelius provided that in such case the estate should, instead of being granted to the creditors, be adjudged (addictio bonorum) to any of the slaves to whom liberty had been given, on the application of such slave, he giving security that the creditors would be paid in full. The 'addictio bonorum' was 'libertatis causa,' because thereupon all the slaves, to whom freedom had been given directly, became free; those slaves whom the heir was ordered to manumit being granted their freedom by the slave to whom the goods were adjudged.[1] Marcus Aurelius further provided that, if the addictio

[1] But the slave to whom the goods were adjudged, and who thereby, of course, became himself free, might stipulate for the grant being made on condition that he should manumit all the slaves (*i.e.* even those to whom freedom was given directly by the will), and if the slaves in question agreed the grant would be so made, the advantage being that the slave manumitting his fellows became their patron (J. iii. 11. 1).

could not take place because the fiscus accepted the inheritance, the slaves should nevertheless receive their freedom. The Emperor Gordian permitted the addictio bonorum to be made even to a stranger if he gave proper security.

Justinian points out that the rescript of Marcus Aurelius, which introduced the addictio, was not only beneficial to the slaves but to the deceased testator, for it saved him the disgrace of a sale of his goods after his death by his creditors; and the Emperor adds that the rescript applies not only where there is a will giving liberty to slaves, but where the master dies intestate, having given liberty to slaves by a codicil, and the inheritance is refused by those entitled ab intestato; and, further, that, in his judgment, the rescript must be taken to include even cases where the gifts of freedom were made by the master, inter vivos, or by a donatio mortis causa, so as to prevent any question as to whether creditors have been defrauded.[1] The grant could not be made until it was certain that no one would accept the inheritance, and a person under twenty-five was not bound either by his acceptance or rejection until that age.[2] If, therefore, A, the intestate heir, were aged twenty, no valid addictio could logically be made for five years; but Justinian states that, even in that case, it might be granted, and that if A had declined the hereditas before twenty-five, the grant had been made and the slaves freed; then, even if he changed his mind at twenty-five, and applied for 'in integrum

[1] J. iii. 11. 6, *i.e.* under the lex Aelia Sentia.

[2] *I.e.* because the praetor might grant 'in integrum restitutio.'

restitutio,' thus rescinding the addictio, the gifts of liberty were still upheld.

The above four forms of universal succession were subsisting in the time of Justinian; those about to be mentioned were either obsolete or no longer had the same effect.

Subsect. 5. *In jure cessio hereditatis*[1]

This species of universal succession consisted of the transfer of the hereditas by the heres to a stranger by means of a fictitious law-suit (in jure cessio), so as to make the stranger heres in place of the real heir.

The only kind of heir who could so transfer the hereditas was an agnatic heir (legitimus heres) on an intestacy, and then only before he made aditio. This was not strictly a breach of the rule, 'semel heres, semper heres,' because the legitimus heres, unlike the suus, was not heir at all until entry; what he transferred therefore was not his heirship but his right of entry. If such a person made an in jure cessio after entry, though he validly transferred the corporeal property of the hereditas, he still remained 'heres,' and liable to the creditors of the estate, while debts due to the estate were extinguished, and the deceased's debtors were the gainers.

If the scriptus heres (extraneus) in a will made an in jure cessio before aditio nothing resulted ('nihil agit'), for his right to the hereditas (*i.e.* upon making entry) was contingent merely, and not, as in the case of the legitimus heres, a vested right, which could be transferred. If the extraneus scriptus made the

[1] G. ii. 34-37, *cf.* iii. 85-87.

transfer after entry, the result was the same as where the legitimus heres transferred after aditio.

With regard to a transfer by the suus heres, who was, of course, heir without aditio, there was a dispute between the two schools. The Sabinians held the transfer to be absolutely without effect ('nihil agere'); the Proculians thought that the effect was the same as where a legitimus or extraneus made a transfer after entry.

This kind of succession being obsolete in the time of Justinian he omits any notice of it.

Subsect. 6. (*a*) *Bankruptcy.* (*b*) *Arrogation, marriage, and Coemptio.* (*c*) *The S.C. Claudianum.*

(*a*) *Bankruptcy.*—This subject will be discussed at length in the law relating to actions.[1]

(*b*) *Arrogation, marriage, and coemptio,* as modes of universal succession, have been dealt with already. In the time of Justinian marriage in manum and coemptio fiduciae causa were altogether obsolete, and arrogation no longer operated as universal succession, since it merely gave the arrogator the usufruct of the property of the person arrogated.

(*c*) *The S.C. Claudianum.*—This 'miserabilis per universitatem adquisitio,' which took place when a free woman gave way to her passion for a slave, and forfeited her freedom and her estate at the same time to the slave's master, was abolished by Justinian.[2]

[1] P. 411. [2] P. 45.

NOTE VI

Specially Privileged Wills

Soldiers enjoyed special privileges with regard to will-making from the time of Julius Caesar onwards. On account of their inexperience (propter nimiam imperitiam) they were allowed, while on active service (J. ii. 11. *pr.*), to make a valid will without any formality; if the will were written, no witnesses were required; and even in the case of an oral will the usual number were unnecessary, one or two to prove what the soldier said, and that he spoke seriously,[1] were sufficient. Such a will in Justinian's time remained valid for a year after his discharge, even although the heir was instituted on a condition which was not fulfilled until after the year. If, however, the soldier were discharged in disgrace within the year, the will failed. A soldier's will was also privileged in that it could be made even by a deaf and dumb person, and might only dispose of part of his property, for the rule 'nemo pro parte testatus, pro parte intestatus decedere potest' did not apply; further, the hereditas might be exhausted by legacies or fidei-commissa, for the lex Falcidia and the S.C. Pegasianum had also no application. Peregrini and Latini Juniani could be made heirs or legatees, but not incertae personae.[2] It was unnecessary for a soldier to disinherit his children, for his silence was a tacit disinherison, unless it was because he was ignorant that he had children.[3] Finally, a soldier's will remained valid in spite of his undergoing capitis deminutio.[4]

Other examples of specially favoured wills in Justinian's time were—

(i.) Testamentum parentum inter liberos, *i.e.* if a man bequeathed his estate solely to his own issue, his will was valid without any witnesses.

(ii.) Testamentum tempore pestis, where the testator was suffering from a contagious disease, the witnesses need not be actually present.

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[1] *I.e.* not lightly or jestingly in the course of conversation (J. ii. 11. 1).

[2] J. ii. 20. 25.

[3] J. ii. 13. 6.

[4] The peculium castrense is another instance of special favour to soldiers; if a filiusfamilias disposed of this by will on active service, the will might be informal; if not made on service it had to be made in accordance with the ordinary forms.

(iii.) Testamentum ruri conditum; for a will made in the country five witnesses were enough (instead of the normal seven), and if some of the witnesses could not write, their signatures were dispensed with.

Section V. Obligations

Obligations have already been mentioned as forming part of the estate which passes on a successio per universitatem; it remains to consider how they arise, are transferred (other than by universal succession), and how they may be extinguished.

Justinian defines an obligation as follows: 'Obligatio est juris vinculum, quo necessitate adstringimur alicujus solvendae rei, secundum nostrae civitatis jura' (J. iii. 13. *pr.*), *i.e.* as the legal tie between two persons which binds one of them to do or forbear from doing something for the benefit of the other.[1] The person entitled to the benefit has thus a legal *right* to it, so that every obligation implies a right, and *vice versa*; and, as already stated, the law of obligations as treated in the *Institutes* may be regarded as the law which defines rights not directly connected with property. In other words, the law of obligations defines rights in personam (*i.e.* against some definite individual) as opposed to the law of property, which confers rights in rem—against all the world.[2] A is the owner of a slave, and has, as such, a right in rem that no person in the world shall take the slave from him; A has been promised £5 by B, or B has

[1] At least two persons are involved, but there may be more, *e.g.* A may owe B £5, or A and B may owe C £5, or A may owe B and C £5, so that the more accurate definition is 'the legal tie between two or more persons which binds some or one of them to do or forbear from doing something for the benefit of the other or others.'

[2] Cf. p. 117.

slandered A; A has a right in personam against B only, that B shall pay the £5 or make compensation for the damage A sustains by the slander. Obligations arise from—

1. Contract.
2. Quasi-contract.
3. Delict.
4. Quasi-delict.[1]

Subsect. 1. *Obligations arising from Contract*

The Roman, like the English contract, is an agreement which creates an obligation which the law will

[1] J. iii. 13. 2. As already pointed out, Gaius describes the obligations which Justinian calls 'quasi-contractual' and 'quasi-delictual' as arising 'ex variis causarum figuris.' Obligations may also be classified as—

(i.) Civiles, *i.e.* actionable at civil law *e.g.* from a stipulation, as opposed to praetoriae or honorariae, *i.e.* those which became enforceable owing to the praetor's edict (*e.g.*), pactum constitutae pecuniae.

(ii.) Civiles as opposed to naturales. A civil as opposed to a natural obligation means that the civil obligation is one which either the civil law or the praetor's edict will enforce in the ordinary manner. A natural obligation, on the other hand, is one on which no action can be brought, usually owing to incapacity in one of the parties, *e.g.* a contract made between a pater and filiusfamilias. Like the agreements of imperfect obligation in England (*e.g.* contracts which do not satisfy sec. 4 of the Statute of Frauds), a natural obligation, though it could not be directly enforced by action, was not void; it might have legal consequences. At Rome a natural obligation had the following effects—

(*a*) It was a defence to a condictio indebiti soluti, *i.e.* money paid by mistake, if owed 'naturaliter' could not be recovered by this action.

(*b*) A natural obligation could be used as a 'set off' in an action brought on a legal obligation, *e.g.* B owes A fifty aurei 'civiliter,' A owes B the same amount 'naturaliter.' If A sues B on the civil obligation B can plead the natural obligation by way of counter-claim.

(*c*) A natural obligation formed a good ground for a mortgage, suretyship, and novation (*vide infra*).

(*d*) If the relation between the parties were that of father and son, master and slave, the natural obligation operated automatically to decrease or increase the peculium of the son or slave in question (*cf.* Sohm, p. 444).

enforce. But in both countries something more than the agreement of the parties (pactum) is necessary to produce an actionable obligation; there must be some 'causa' or legal reason why the law should enforce it, otherwise the pactum is nudum and ineffective. In England this 'causa' or legal reason may be one of two things: that the agreement is made under seal is one, the other being the presence of consideration. In other words, if A sues B on a promise to pay A £5, A will only succeed if he can show that B promised the £5 by a deed under his hand and seal, or, alternatively, that he, A, gave B some consideration, some quid pro quo for B's promise, *e.g.* did or promised something by which B benefited.

At Rome the matter was less simple. There were four main *causae* by reason of which an agreement was regarded as producing an actionable obligation, and some of these were subdivided and extended. The four causae were that the agreement or contract was concluded—

(*a*) Re.
(*b*) Verbis.
(*c*) Litteris, or
(*d*) Consensu.

(*a*) *Contracts made 're'*

The essence of the contracts made 're,' or, as they are called, *the real contracts*, was that, at the time the agreement was made, one party did all that he was bound to do under the contract by transferring something belonging to him to the other party to the contract. In the terms of English law, there was *consideration executed on one side*; or, as the

Roman lawyers expressed it, the contractual obligation was created by something being handed over—'*ex re tradita* initium obligationi praebet.' Justinian tells us that there were four classes of real contracts—

(A) The mutuum or loan for consumption.[1]

(B) The commodatum or loan for use.

(C) The depositum or bailment, *e.g.* A gives B his watch for safe custody.

(D) Pignus or mortgage.

But before discussing these an older form of real contract requires notice, viz. the nexum, which had long become obsolete in the time of Justinian, and which had, for all practical purposes, fallen into disuse in the time of Gaius, who only refers to it in connection with the means of discharging an obligation so created (nexi liberatio).[2]

The nexum, like the mancipatio, was a proceeding per aes et libram, but whereas the mancipatio was a sale, the nexum was a money loan.[3] The lender and borrower get together five Roman citizens above the age of puberty and a libripens. The lender puts into the scales the metal to be lent,[4] and this the libripens weighs out and hands over to the borrower, while

[1] This is the only real contract described by Gaius, but the others were known in his time as legal transactions, and he frequently refers to them.

[2] G. iii. 173.

[3] Nexum is, however, sometimes used to denote—

(i.) A legal tie or bond,—juris vinculum.

(ii.) Imprisonment for debt, and

(iii.) As a general term to include all proceedings (including mancipations) per aes et libram,—'omne quod geritur per aes et libram.'

[4] For, like the earliest form of mancipatio, the nexum dates back to the time when there was no coined money.

the lender declares that the borrower has become his debtor (dare damnas esto). Thereupon the debtor was regarded as 'nexus' to his creditor, *i.e.* bound in his own person to the creditor until the loan was repaid; so that, just as in the case of a judgment debtor, the creditor could enforce payment by 'manus injectio,' and make the debtor a slave in satisfaction of the debt. The introduction of coined money had the same effect here as in the case of the mancipation; the metal was no longer weighed out, the money loan being paid directly by the lender to the borrower; but the formal part of the nexum was retained, the borrower striking the scales with a single coin, and the formality continued to confer upon the borrower the right to subject the debtor to manus injectio.[1] The nexum, however, must have fallen into disuse when a lex Poetelia of uncertain date[2] mitigated the severity of its remedy by substituting execution on the borrower's goods for execution on his person, and in the time of the classical jurists a money loan would ordinarily be made by means of the mutuum, the first of the real contracts Justinian describes.[3]

A. The *mutuum* was a loan for consumption of res fungibiles (*e.g.* money, wine, or grain).[4] Necessarily, therefore, the borrower became dominus or owner,[5] and his obligation is to restore not the thing

[1] Which, of course, accounts for the survival of the nexum after coined money had been introduced, when there was no actual need to weigh out the metal.

[2] For suggested dates see Girard, p. 479.

[3] On the whole subject see Roby, ii. 296-310; Sohm, pp. 52 and 392.

[4] See p. 123.

[5] Unde etiam mutuum appellatum sit, quia ita a me tibi datur, ut et *meo tuum* fiat (J. iii. 14. *pr.*).

lent but its equivalent in value. The mutuum being the descendant of the ancient civil law nexum was a contract stricti juris;[1] hence the borrower was, by virtue of the contract itself, only bound to return the exact equivalent of what he received without interest, even though he was in default (mora), *i.e.* had failed to repay at the proper time. The only means of securing interest was to get the borrower to promise it by a separate contract, the verbal contract known as stipulatio.[2] Finally, the remedy of the lender was the most stringent under the classical law, viz. the condictio certi or triticaria, by means of which not only could the value of the things lent be recovered but an additional third by way of penalty.

It only remains to notice that the S.C. Macedonianum,[3] passed under Vespasian, forbade money loans to be made to a filiusfamilias; after that statute, accordingly, when a filius was sued on such a loan he could defeat the action by pleading the exceptio S.C. Macedoniani.

B. *Commodatum* was the loan of a thing for some specified use (*e.g.* a horse for a day's riding). The essence of the transaction was that it should be gratuitous, *i.e.* that the lender received no reward for the loan, otherwise the contract would not be governed by the rules of commodatum but by those of locatio-conductio rei, one of the consensual contracts. The borrower (commodatarius), so far from

[1] A contract or negotium stricti juris was one where the liability of the parties was measured exactly by their promises, as opposed to a contract bonae-fidei (*e.g.* the consensual contracts), where 'equities' could be taken into account.

[2] P. 272.

[3] Passed on the ground of public policy, lest expectant heirs might be tempted to parricide.

acquiring dominium of the thing, did not get juristic possession; he had merely de facto possession, detentio. Hence an important difference between the liability of the person who received goods under a mutuum and the commodatarius. The former being dominus was liable (on the maxim, 'res perit domino'), to return the equivalent in value, even though the goods were destroyed by pure accident (*e.g.* fire or shipwreck); the commodatarius, on the other hand, though bound to show exacta diligentia (*i.e.* the case of a bonus paterfamilias), was not liable for accident not arising from any fault on his part.[1] The lender (commodans) could enforce his rights against the borrower by the actio commodati directa; these rights were—

(i.) To have the thing itself delivered back when the time for which it was lent had expired; and

(ii.) That the borrower should display exacta diligentia, especially that he should keep the thing in fair repair, and not use it for any purpose other than that specified. If the commodatarius did so use it he committed theft—furtum usus.

The borrower had the actio commodati contraria against the commodans if—

(i.) He had of necessity been put to extraordinary expense in relation to the thing lent.

(ii.) If through the wilful wrong (dolus) or negligence (culpa lata) of the commodans the thing lent injured the commodatarius (*e.g.* was infected to the knowledge of the commodans and communicated the

[1] But if the commodatarius took the thing lent on a journey, and lost it through robbery or shipwreck, he was liable (J. iii. 14. 2), probably because he had no right to risk taking the object away from home.

disease to the borrower). The actions (directa and contraria) were bonae-fidei actions, for the contract (like all the real contracts, save the mutuum) was a negotium bonae-fidei.

C. *Depositum* was where one man entrusted to another some object for safe custody, the latter, as in commodatum, getting merely 'detentio' of the object. As in commodatum the contract had to be gratuitous, *i.e.* the depositary must receive no payment, otherwise the transaction became locatio-conductio operis. The depositor had the actio depositi directa to enforce the return of the object on demand[1] and also if the depositary was guilty of dolus or culpa lata in relation to the contract. The depositary who used the thing left with him was guilty of furtum usus unless he acted bona-fide, when he was bound to restore all profit which had accrued from the use. The depositary had the actio depositi contraria—(i.) if the depositor failed to display exacta diligentia, *e.g.* made a deposit of something with a latent defect; (ii.) to recover *any* expenses he might be put to in keeping the thing.

The following were three exceptional cases of depositum—

(*a*) *Depositum miserabile* was where the deposit was made under urgent necessity, *e.g.* by reason of a fire or shipwreck. Here the depositary who failed to show due diligence was liable in double damages.

(*b*) *Depositum irregulare* was where a res fungibilis (*e.g.* money) was entrusted by one man to another on the understanding that the depositary was

[1] A depositary who, having refused to give up the thing, was condemned in the actio depositi directa suffered infamia.

to become owner, and was only to be bound to restore its equivalent in value. In this case the depositary, becoming dominus, was liable even for loss by mere accident, but the transaction differed from mutuum because—(i.) it was chiefly in the interest of the depositor, though the depositary had the right to use the money; (ii.) if the money were not returned at the proper time (mora) interest could be claimed by the actio depositi directa, which was bonae-fidei, whereas in the case of a loan by mutuum, interest was, as above stated, never recoverable in the absence of an express stipulation.

(*c*) *Deposit with a sequester* has been already noticed as one of the exceptional cases where a person with a mere derivative title under a contract acquired juristic possession with the possessory interdicts.

D. *Pignus.*—This contract, which resulted in a mortgage, has been already described. The creditor obtained, in Justinian's time, either possession of (pignus) or a right of sale over (hypotheca) some specific piece of his debtor's property, and was therefore entitled to a jus in re aliena.

The extension of the real contracts.

It has been seen that the principle of the real contracts was performance on one side, provided, however, that the performance was of such a kind as to constitute a loan for consumption or use, a deposit or a mortgage. There was, of course, no essential reason why the conception should be confined to these particular contracts and, accordingly, the general principle, that whatever might be the act done or thing given in return for a promise to do

or give,[1] such act or thing should furnish a causa for the enforcement of the promise, gradually came to be recognised during the early Empire under the influence of the jurists, and especially of Labeo. The agreements so enforced are called by modern writers 'the innominate real contracts,' as distinguished from the four real contracts with special names (nominate). Examples of the innominate contracts are—

(i.) Permutatio or exchange, *e.g.* A gives a sword in return for B's promise to give a horse.

(ii.) Aestimatum, *e.g.* A gives B a horse valued at fifty aurei in return for B's promise either to return it or pay the price, and

(iii.) Precarium, *e.g.* A gives possession of land to B, which B promises to give up on demand.

If A gave something in return for a promise which B refused to carry out, A could get back his property by a *condictio causa data causa non secuta*, and whatever the nature of A's performance (*i.e.* whether giving or doing something), he could enforce B's promise by the *actio in factum praescriptis verbis*,[2] or actio in factum civilis.

(*b*) *Contracts made verbis*

The real and the innominate contracts[3] of Roman law may be compared with the simple contracts of English law, since they did not, in any sense, derive

[1] 'Aut enim do tibi ut des, aut do ut facias, aut facio ut des, aut facio ut facias' (D. xix. 5. 5 *pr.*).

[2] *I.e.* where the formula was drafted not with the assertion of a recognised general legal right, but with special reference to the circumstances of the particular case in question.

[3] As also the consensual contracts and pacta vestita, *infra*.

their efficacy from their form. The verbal and literal contracts, on the other hand, are more akin to the English contract under seal; they were enforced solely by reason of the method by which they were concluded.[1] Of verbal contracts there were four kinds:—

(i.) Dotis dictio.[2]

(ii.) Jurata promissio liberti.

(iii.) Votum or promise in favour of some religious foundation; and lastly, by far the most important, the stipulation.

(*a*) *The nature and form of a stipulation.*—A stipulation may be defined as that species of contract which imposes an obligation upon a person because he has answered in set terms a formal question put to him by the promisee, which contains a statement of the subject matter of the promise. An example makes this clearer. Titius means to promise to give Maevius his slave Stichus: if he merely says to Maevius, 'I promise to give you Stichus,' there is no contract. For a proper stipulation Maevius must ask Titius, 'Spondesne mihi hominem Stichum dare'? and Titius must answer, 'Spondeo.'[3] Originally the question could only be put and answered by means of the particular words, 'Spondes? Spondeo'; any other, though they might express exactly the

[1] But, as stated below, the literal contract seems chiefly to have served the purpose of 'novation,' and so, perhaps, may be regarded as resting on something more than mere *form*.

[2] This and the next verbal contract have been described already, see pp. 92 and 61.

[3] It will be observed that the obligation in a verbal contract is unilateral, *i.e.* only one side (Titius) is bound. A contract is bilateral where both parties are bound, *e.g.* in sale (emptio-venditio) the vendor is bound to transfer the thing bought, the purchaser to pay the price.

same meaning, was useless to create the obligation,[1] but in the time of Gaius, 'Dabis? Dabo'; 'Promittis? Promitto'; 'Fidejubes? Fidejubeo,' and the like, even though expressed in Greek (*δώσεις; δώσω*), were valid, though the form 'Spondes? Spondeo' was still regarded as peculiar to Roman citizens. Leo enacted (472 A.D.) that a stipulation should be valid even though the question and answer were not couched in the ancient special terms (solemnia verba), and in Justinian's time, therefore, provided the answer agreed with the question, the stipulation might be in any words and in any language.[2] If the subject matter of a stipulation were reduced to writing, it became established, as early as the third century A.D., that this raised a presumption that the promise was the result of a proper stipulation by question and answer, though this could be rebutted, by proving *e.g.* that what the parties had written out was a mere informal understanding, *i.e.* a pactum (*cf.* J. iii. 19. 17). Stipulations were a means of creating every sort of obligation,—to pay money, to give property, to do or not to do an act, and to perform an existing obligation created in some other way (novation); the reason for this last-mentioned use of stipulation being

[1] It has been thought that the formality of a stipulation was due to the fact that this means of creating an obligation was derived from an ancient promise by oath (jus jurandum). A engages to give or do something for B, and at the same time makes a libation to the gods and calls down their vengeance if he breaks his engagement. At first the obligation would be enforced by a religious or moral sanction only, then by a legal one, and finally the oath (save in the case of the jurata promissio liberti) drops out, and the promisee puts by way of question to the promisor what originally was contained in his oath. See for theories on this subject, Muirhead, p. 213.

[2] J. iii. 15. 1.

that the remedy on a stipulation (condictio with its penalty of one-third) was a more stringent one than that on any contract save the mutuum and the literal contracts (where the remedy was the same). Novation implies the extinction of a former obligation and the substitution of a new one. A, *e.g.* owes B ten aurei on a contract of sale (emptio venditio). The obligation to pay can be novated if B asks A, 'Spondesne mihi decem aureos dare'? and A answers 'Spondeo'; whereupon B obtains a better remedy to enforce payment, and, as a matter of evidence, need only prove that the stipulation was made; *i.e.* is not forced, if A questions it, to prove that the sale really took place. A novation may even involve a change of parties: A, *e.g.* owes B ten aurei, C engages to pay the money, and B agrees to accept C as his debtor. B asks C if he will pay the ten aurei owed by A, and C engages to pay it (expromissio); whereupon A's old obligation to pay is extinguished, being replaced by the new obligation imposed on C.

A stipulation might be made simply (pure), or with a time named for performance (ex die), or conditionally. If made simply, 'Do you promise to give me five aurei?' the obligation to pay the money and the right of the creditor to demand it arose at once. If made 'ex die,' *e.g.* 'Do you promise to give me five aurei on the Ides of March?' the obligation to perform on the day named arose at once, but the creditor could not demand it until the day arrived, and the whole of the day was allowed for payment.[1] A stipulation, 'Do you promise to give me five aurei every year as long as I live?' was

[1] J. iii. 15. 2.

construed as being made simply, and the liability to pay remains even after the death of the promisee, for, in stipulations, 'ad diem deberi non potest';[1] but no substantial injustice was occasioned by the technical rule, for if the heir sued he could be met with the exceptio doli.[2] A stipulation made subject to a suspensive condition (*e.g.* 'Do you promise to give me five aurei if Titius is made Consul?')[3] did not give rise to an actionable obligation, but only to a hope (spes) that the promise would become effective by the condition being fulfilled, but this hope passed to the heirs of the promisee if the condition was not satisfied until after his death.[4] If a condition related to some event which had taken place, *e.g.* 'if Maevius is dead,' but which was unknown to the parties, it did not delay the formation of the obligation; the stipulation in such case amounted to a kind of bet. If Maevius were alive the stipulation was void, otherwise the stipulation became at once effective. Where a stipulation was not that a definite thing should be given or payment made but for some act (*e.g.* to teach Greek) or forbearance (*e.g.* not to go to Rome), it was usual to add a penalty, *i.e.* to fix a sum as liquidated damages,[5] *e.g.* 'Do you promise

[1] *I.e.* lapse of time could not extinguish a debt, so that if a thing were owed at all, it was owed for ever, although, as here, the parties fixed a limit.

[2] J. iii. 15. 3.

[3] If the condition were negative, *e.g.* 'if I do not go up to the Capitol,' it could not be definitely ascertained until death, and Justinian says that a promise based on such a condition was the same as a promise to perform at death (J. iii. 15. 4).

[4] It was otherwise in the case of a legacy given on a suspensive condition.

[5] There was no rule in Roman law by which liquidated damages could, as in England, be treated as an unfair penalty, and so reduced by the Court.

to go to Rome?' 'I promise'; 'And if you do not go do you promise to pay me ten aurei by way of penalty?' 'I promise.'[1] This practice not only had the advantage of making it unnecessary for the plaintiff to prove the value to him of the promise, it also enabled him to sue by condictio certi instead of ex stipulatu.[2]

Justinian tells us that stipulations were either judicial, praetorian, conventional, or common, *i.e.* both praetorian and judicial. Judicial, praetorian, and common stipulations are instances of stipulations made under compulsion; if judicial, on the authority of a judge (judex); if praetorian, on the authority of the praetor; if common, on the authority sometimes of the praetor, sometimes of the judge, and all three kinds are analogous to the English practice of requiring persons to 'enter into recognisances,' *e.g.* to come up for judgment or to keep the peace.

The examples given by Justinian of judicial stipulations are—

(*a*) The cautio de dolo, by which a defendant who was ordered to restore to the plaintiff some piece of the property of the latter, was obliged to undertake that he would yield it up without fraud, *i.e.* do nothing before delivery to lessen its value.

(*b*) The cautio de persequendo servo qui in fuga est, restituendove pretio was entered into by a defendant who had possession of the plaintiff's slave prior to the slave's escape, and the object of the cautio or stipulation was that the defendant should follow and

[1] There is ground for the view that originally stipulation only applied in the case of a promise to pay a definite sum of money, and, therefore, that when it had for its object anything other than a money payment, the promise had to be made conditional on a money penalty.

[2] P. 282.

reclaim the slave from any third party, or pay to the plaintiff the slave's value.

The examples given of the praetorian stipulations[1] are—

(*a*) The cautio damni infecti, by which a man whose property was likely to injure a neighbour by reason of its defective condition was compelled to give security to indemnify his neighbour against any ensuing damage; if the cautio were not duly entered into the praetor might give possession of the property to the person whom it seemed likely to injure, which, after an interval, might become permanent if the owner of the dangerous property continued recalcitrant.

(*b*) The cautio legatorum was that which the heir was compelled to enter into when a legacy was not at once payable, *e.g.* had been given conditionally; the legatee being entitled to have its future payment duly secured by the promise not only of the heir but of sureties. If the security were not forthcoming the legatee could claim possession of the legacy at once.

Justinian's examples of common stipulations are—

(*a*) Rem salvam fore pupilli, which was sometimes taken by the praetor and sometimes by the judex.

(*b*) Rem ratam haberi, which was the stipulation entered into by an agent (procurator) who was conducting a lawsuit for another, and its object was that the principal should ratify the agent's acts.

Finally, conventional stipulations were those not imposed by the praetor or judex, but entered into

[1] These comprise stipulations which the aediles imposed (J. iii. 18. 2).

by agreement of the parties. Of these, the common form of stipulation, sufficient examples have been given.

(β) *Useless stipulations*—'Inutiles stipulationes.'[1] —A stipulation was void in the following cases :—

(i.) If impossible ab initio, *e.g.* to give a slave Stichus, who was dead; a hippocentaur, which cannot exist; a thing which is divini juris or otherwise extra commercium; a freeman wrongly considered a slave;[2] or something which already belonged to the promisee. And if void ab initio the stipulation cannot become valid, because its object subsequently becomes possible,[2] *e.g.* the freeman becomes the slave of the promisor. Conversely, although the stipulation was originally possible it is avoided by subsequent impossibility, unless the impossibility is attributable to the fault of the promisor.

(ii.) If A promised B that C should do something for B's benefit the stipulation was in strict law void: 'res inter alios acta aliis neque nocere neque prodesse potest'; but, exceptionally, A would be liable—(α) if he promised that he would be personally responsible that C should do the act; (β) if A's promise was that if C did not perform the act A would pay a penalty; and C might be liable (α) in certain cases by an actio adjectitiae qualitatis;[3] (β) under Justinian's law if he were A's heir.

(iii.) Another consequence of the last-mentioned

[1] G. iii. 97-109, 117, 119; J. iii. 19.

[2] Even if the stipulation was in the form, 'Do you promise to give Titius (a freeman) when he shall become a slave,' it was void: 'quod initio vitiosum est, non potest tractu temporis convalescere.' So too a promise to give after acquired property was void (J. iii. 19. 22).

[3] P. 395.

maxim was that a promise made by A to B that he would benefit C was void, but, exceptionally, B could enforce the promise—(*α*) if B had an interest in the performance, *e.g.* C was his creditor;[1] and (*β*) if A engaged either to do the act or pay the penalty; so also C might exceptionally enforce A's promise, *e.g.* (*α*) if he were B's paterfamilias or dominus; (*β*) if, under Justinian, the promise was in favour of B's heir, and C filled that position; and (*γ*) if B had taken the stipulation with reference to the property of C (his ward), C might have an actio utilis.[2]

(iv.) In the case of a stipulation 'mihi *aut* Seio dare spondes?' the stipulator alone had the right to sue, but payment might be lawfully made to Seius even against his will, and the obligation of the debtor thereby ceased, while the stipulator could recover from Seius by an actio mandati.

(v.) A stipulation 'mihi *et* Seio,' Seius being the paterfamilias or dominus of the promisee, was for the benefit of Seius; if Seius were a stranger there was a dispute between the schools; the Sabinians held that the whole was due to the stipulator, the Proculians that he was entitled to half only, the stipulation being void as to the other half. Justinian confirmed the latter view.

(vi.) A stipulation was void where the parties were not in exact agreement in the question and answer: *e.g.* (*α*) 'Do you promise ten aurei?' 'I promise five aurei,'[3]

[1] J. iii. 19. 20.

[2] Conversely, an actio utilis might be granted against a pupil on attaining puberty on a contract made by his guardian.

[3] Ulpian thought that such a stipulation was valid as to five aurei.

or (*b*) where the answer was only given conditionally.[1]

(vii.) A stipulation taken by a paterfamilias or a dominus from his filius or servus[2] was not actionable, but gave rise to a natural obligation.

(viii.) Persons dumb, quite deaf, or mad (furiosi) could not be parties to a stipulation, and a pupil could not bind himself by a stipulation without his tutor's authority, nor even with such authority if an 'infans,'[3] *i.e.* under seven years of age; a pupil, however, who was over seven years could be the promisee in a stipulation without his tutor's authority, because it was for his benefit. So long as the status of in mancipii causa and that of in manu lasted persons in those conditions could not be parties to a stipulation.[4] A woman under perpetua tutela was in the same position as a pupil over seven.[5]

(ix.) A stipulation was void if an impossible condition were added to it, *e.g.* 'Do you promise me ten aurei if I touch the sky with my finger?' but if the stipulation were, 'Do you promise me ten aurei if I do not touch the sky with my finger?' the condition was disregarded and the stipulation valid.

(x.) A stipulation 'inter absentes' was void, but, under a constitution of Justinian, if the contract had

[1] So, in English law the acceptance of an offer must be absolute, without the introduction of any new term.

[2] A stipulation between a filius and a third party, however, gave rise to a civil obligation; if between a slave and a third person the obligation was still naturalis only, though the master could sue civiliter for any advantage under the contract.

[3] Cf. J. iii. 19. 9 and 10. Children were said to be infantiae proximi during their eighth year, and pubertati proximi during their thirteenth. But see Moyle, p. 414.

[4] G. iii. 104.

[5] G. iii. 108.

been reduced to writing, and the writing stated that the stipulation had been made by the contracting parties in the presence of each other, this raised a presumption that they had been present, which could only be rebutted by the clearest proof that the parties were in different places during the whole day on which the contract was alleged to have been made.

(xi.) In the time of Gaius the following stipulations were void—

(*a*) 'Post mortem meam' (or 'tuam') 'dari spondes?'

(*b*) 'Post mortem patris' (or 'domini') 'mei dari spondes?'

(*c*) 'Pridie quam moriar,' or, 'Pridie quam morieris dari spondes?' And Gaius says that the objection to (*a*) and (*c*) was that it was improper to enter into a contract which could not be performed until after death: 'nam inelegans esse visum est ab heredis persona incipere obligationem.'[1] Justinian made all three stipulations valid.

(xii.) But, rather illogically, a stipulation 'cum moriar,' or 'cum morieris dari spondes?' was valid even in the time of Gaius.[2]

(xiii.) Formerly also a stipulation 'praepostere concepta' was void, *e.g.* 'If the ship *Barbara* arrives next Monday from Asia do you promise me five aurei to-day?' Justinian made such a contract valid, but performance could not be demanded until the condition was fulfilled.

[1] G. iii. 100.

[2] A stipulation to take effect after the death of a third person was valid (J. iii. 19. 16).

(xiv.) A means to promise B his slave Pamphilus, but by mistake promises Stichus; the stipulation is void.

(xv.) So too a stipulation 'ex turpi causa,' *i.e.* tainted by illegality or immorality, *e.g.* a promise to commit homicide.

(γ) *Actions.*—The stipulation was enforced by one of three actions, according to the nature of the case. Where the object of the stipulation was a definite sum of money the remedy was *condictio certi*; where the object was the delivery of a definite thing (certa res) the remedy was *condictio triticaria*;[1] and where the object was the doing of an act there was a *condictio incerti*, or, as it was more commonly called, an *actio ex stipulatu*. If there was a penal stipulation for the non-performance of the act a condictio certi could be brought upon it. The actions upon a stipulation, like the contract itself, were stricti juris.

(δ) *Joint debtors and creditors—Suretyship.*—A promise could be made by means of a stipulation to two or more persons (*adstipulatores*),[2] and two or more persons could jointly make a promise, by stipulatio, to another (*adpromissores*). In each case the whole thing promised was due to each stipulator and from each stipulator. But in each obligation there was only one thing due, so that if either of the joint parties received or gave the thing due the obligation was at an end (J. iii. 16. 1).

Adstipulatio was chiefly used for the purpose of agency. A is making a contract with B, and wishes

[1] From triticum, grain, which would be a common object of a stipulatio in early times with an agricultural race.

[2] The right of an adstipulator did not pass to his heir.

to guard against not being able to see it carried out, *e.g.* because he is going abroad. Instead, therefore, of merely taking the stipulation himself from B he gets B to promise the act to himself and C. A asks B, 'Do do you promise, etc.,' then C asks the same question, and B replies 'Spondeo.' C is, of course, more than an agent; he is one of two principal creditors, and can sue B in his own name, but C is bound, as regards A, not to abuse his rights, and he must make over to A whatever he recovers from B. Another use of adstipulatio was to evade the rule which, prior to Justinian, prohibited a stipulation taking effect after the death of the parties. If, *e.g.* A wished that B should promise payment after A's death to his heir, A and C would jointly take a stipulation from B to pay after A's death. Then if C survived he could sue on the stipulation and hand what he recovered to A's heir (G. iii. 117).

Adpromissio or joinder of debtors was chiefly used for the purpose of suretyship or guarantee, the essence of which, according to the modern conception, is that C (the surety) promises to pay or perform A's debt or other obligation to B if A does not. In the time of Justinian the only manner of constituting suretyship by a verbal stipulation was fidejussio;[1] the two earlier forms, *sponsio* and *fidepromissio*, mentioned by Gaius, having become obsolete in Justinian's time.

Sponsio, which only applied where all the parties were cives, was formed by the use of the words 'Spondes, Spondeo.' *Fidepromissio* was not confined to citizens, and the words used were 'Fidepromittis? Fidepromitto'; both forms were only

[1] J. iii. 20.

applicable where the debt which was being guaranteed was itself created by stipulatio, and in neither case was the heir of the surety liable. The following laws applied to these two forms of suretyship, the first to sponsio only :—

(i.) A lex Publilia provided that a surety by sponsio who has been compelled to pay the debt, could recover from the principal debtor, who failed to repay him within six months, twice the amount of the debt by the action depensi.

(ii.) A lex Apuleia provided that if, there being several sureties, one had been obliged to pay more than his fair share, he might by an actio pro socio [1] recover the excess from his co-sureties.

(iii.) A lex Furia, which did not apply outside Italy, limited the liability of sureties to two years from the date of the contract, and provided that each should be liable only for his own share.

(iv.) A lex Cicereia [2] required the creditor to inform an intending surety of the amount of the debt and the number of sureties, and a lex Cornelia, 81 B.C. (which, unlike the above laws, also applied to fidejussores), provided that no one should become surety for the same debtor to the same creditor in the same year (idem pro eodem, apud eundem, eodem anno) for more than 20,000 sesterces, the excess only being void.

Fidejussio, which was the sole means of creating suretyship by stipulation in Justinian's time, and which must have dated back at least to 81 B.C., since the lex Cornelia of that year applied to it, was formed by the use of the words 'Fides-jubes? Fide-jubeo,'

[1] *I.e.* as if all were partners.

[2] The dates of all these laws are unknown.

and not only was the surety bound, but his heirs also. An obligation could be guaranteed by this method whatever its nature, *i.e.* though it arose from some other form of contract than a stipulation, and even though it arose from delict. Further, the main obligation might be a naturalis obligatio merely, and might even be guaranteed by anticipation.[1] Each surety (fidejussor) was liable for the whole debt, and the creditor might, therefore, demand it from any one of the sureties he pleased; and, before Justinian, there was no necessity for the creditor to sue the principal debtor (*i.e.* the person whose debt had been guaranteed) before the sureties; but Justinian, by a Novel, introduced the *beneficium ordinis* (or *excussionis* or *discussionis*), by which a surety could demand that the creditor should sue the principal debtor before proceeding against him. A surety who had been compelled to pay could recover from the principal debtor by the actio mandati. As between the sureties themselves a rescript by Hadrian introduced the *beneficium divisionis*, which enabled one of several sureties when sued for the whole debt to demand that the claim should be divided between himself and the other solvent sureties.[2] Further, a surety called upon to pay the whole debt might avail himself of the *beneficium cedendarum actionum*, *i.e.* require the creditor upon payment[3] to hand

[1] J. iii. 20. 3.

[2] A remedy which was not so favourable as that given to sureties by sponsio or fidepromissio by the lex Furia, since under that law the liability was automatically divided among all sureties, whether solvent or not. A fidejussor, on the other hand, had to expressly claim the beneficium divisionis, and was affected by the fact that some might be bankrupt.

[3] After payment this could not be done, as payment extinguished all actions.

over to him all his remedies (including mortgages to secure the debt), and so, standing in the place of the creditor, sue the principal debtor for the amount paid, or the other sureties for their fair share.[1]

A fidejussor could in no case be bound to pay more than the principal debtor, but might engage to pay less or to pay conditionally. Finally, by virtue of a S.C. Velleianum (46 A.D.), suretyship or other 'intercessio'[2] by women was forbidden, and a female surety if sued on her promise could, accordingly, plead the exceptio S.C. Velleiani. But the statute did not apply, among other cases, where the woman had been guilty of fraud, or where the object of the main stipulation was to provide a dowry. Justinian retained these provisions, but required, in addition, that an intercessio by a woman should be in writing, executed before three witnesses, unless given for value received, or to provide a dowry; otherwise it was to be absolutely void.[3]

(c) *Contracts made Litteris*

Though an obligation could be created by a literal contract in the time of Gaius, the so-called literal contract of Justinian was not, in itself, a means of *creating* an obligation, but was the *evidence* of an obligation,

[1] Besides being constituted by verbal contract, suretyship might arise from (i.) mandatum qualificatum (p. 305); and (ii.) constitutum debiti alieni (p. 309).

[2] Suretyship was one species of intercessio (*i.e.* becoming liable on behalf of another); another kind of intercessio would be novating the debt of another by stipulatio *i.e.* A stipulates with B (by way of novation) to pay the debt of C in consideration of C being discharged.

[3] *I.e.* incapable of even being sued upon, so that there would be no need to plead the exceptio of the S.C.

though this evidence might, by a kind of estoppel, become conclusive. Justinian is, therefore, rather illogical in classifying contracts litteris as a means of creating an original obligation; the obligation, if any, in his time was due not to the writing (litterae) but to a rule of evidence.

The true literal contract, as described by Gaius, may be defined[1] as a means of creating an obligation to pay money by a fictitious entry (expensilatio) in the creditor's ledger, with the consent of the intended debtor. A, with B's consent, enters the fact that B is indebted to him in fifty aurei, and thereupon B is under an obligation to pay, though no money has passed between them.

An entry in a ledger might be one of two kinds:—

(i.) Nomen arcarium, *i.e.* a statement that money had actually passed between the creditor and the debtor, in which case no obligation 'litteris' arose; the entry was merely evidence of the debt, but, being true, sufficient in itself to create an obligation, with the very adequate remedy of a condictio, and—

(ii.) Nomen transcripticium.

An entry by nomen transcripticium was where a creditor closed one account in his ledger (acceptilatio) and opened a new one (expensilatio), and it was only under these circumstances that an obligatio litteris arose.

The subject will, perhaps, become clearer by examples:—

(i.) A advances B money by way of loan (*i.e.* on

[1] As will appear later, this definition needs qualification, but, with our present information, it seems impossible to frame a short and accurate definition.

a mutuum), and enters the loan in his ledger. The obligation on B's part to repay arises on the mutuum, and is enforced by the condictio which that contract gives rise to; the ledger entry is merely nomen arcarium, *i.e.* evidence of the real contract upon which alone the obligation depends.

(ii.) A has in the past had dealings by way of sale, exchange, etc., with B, of which an account appears in his ledger showing a balance against B for 500 aurei. A closes this account by a statement on the opposite page (contrary to fact) that B has paid the aurei (acceptilatio), and opens a new account with the statement (contrary to strict fact) that he has advanced to B the sum of 500 aurei. Hence the expensilatio represents a nomen transcripticium; a nomen (debt) has been transferred from one account to another, and, if the transaction was with B's express or tacit consent, B is, by virtue of the new entry merely (ipso nomine), bound to pay the money. In effect the old contracts between A and B have been novated, *i.e.* extinguished, one single obligation having been substituted in their place; obviously a course which offered many advantages to both parties, as it simplified the accounts,[1] and saved disputes about the previous transactions. And if the previous transactions had been contracts bonae-fidei (*e.g.* emptio venditio), the creditor acquired a far better remedy in the condictio by which the literal contract, which was stricti juris, was enforced.

(iii.) A has an account with B, the result of which is that B is indebted to him in 1000 aurei; he is

[1] Often, but not necessarily, B would make corresponding entries in his own ledger.

unwilling to give B further credit, but will accept C as creditor in lieu of B, and C at B's request agrees. A makes an acceptilatio to B's account, and transfers the unpaid debt (nomen) to the opposite side of his ledger by means of an expensilatio, which states (contrary to the strict fact) that C is indebted to him in 1000 aurei, whereupon C becomes bound *ipso nomine*.

The technical name for the transcription in case (ii.) was transcriptio a re in personam, in case (iii.) a persona in personam. These last examples (ii.) and (iii.) are the only instances of the true literal contract which Gaius gives.[1]

It would appear, therefore, that the normal use of the literal contract was for the purpose, not of creating a new, but of novating an existing obligation, as in the two cases cited, and it is not quite accurate to say that the essence of the transaction is that the obligation springs from the entry of a fictitious loan. It is true that if there were an actual present loan the transaction was a nomen arcarium (*i.e.* evidence of a mutuum), and not a literal contract at all. But in neither of the cases (ii.) and (iii.) above cited was the entry fictitious, in the sense that the person upon whom the obligation was imposed received no benefit. If it were a transcriptio a re in personam he (*i.e.* B in case ii.) had, in the past, received abundant consideration from the creditor (A); while in the case of the transcriptio a persona in personam the benefit C received was a present one, viz. the release of his

[1] The chirographa and syngraphae which Gaius mentions were written promises to pay, and, in that they raised an obligation though a stipulation had not been gone through, were peculiar to peregrini (G. iii. 134).

friend B from liability. That the literal contract was not, or was very rarely, used to create an original obligation is the less surprising when it is remembered that a gratuitous obligation to pay money could always be created by a simple question and answer (stipulatio), and that after (about) the year 200 A.D. a mere written promise to pay raised a presumption that a stipulation to that effect had been duly made. Of course, if a man wished to benefit a friend or relative there was no reason why he should not instruct him to make a fictitious acceptilatio and expensilatio, and promise not to dispute the entries, in which case the entries would be wholly fictitious, and nevertheless binding; but, obviously, this was so much more cumbrous than a stipulation that it would be rarely, if ever, resorted to.

The literal contract was wholly obsolete in the time of Justinian, and for this there were three main reasons. In the first place, the formal contracts (verbal and literal) lost much of their efficacy[1] when Gallus Aquilius, in Cicero's time, first allowed a man who was sued upon such a contract to plead the exceptio doli (*i.e.* the defence of fraud or other substantial injustice).[2] Secondly, a new praetorian agreement, constitutum (which was a pactum vestitum[3]), was developed, which enabled an actionable obligation to be added to an existing obligation (which was kept

[1] Though the stipulation survived under Justinian.

[2] It has been suggested that, after this, the two formal contracts (*i.e.* the verbal and literal) entirely changed their character, and thenceforth, though ostensibly based on form, in reality depended upon what, in England, would be called consideration. But even in Justinian's time a stipulation, though gratuitous, was actionable.

[3] P. 309.

alive), and gave the creditor an even better remedy than the condictio;[1] and thirdly, as will be seen immediately, under the latter law, a mere written promise to pay might, by the rules of evidence, result in an actionable obligation.[2]

The so-called literal contract of Justinian.

It has been stated already that after about 200 A.D. a promise to pay money which was in writing ('cautio') raised a presumption that the promise was the result and evidence of a proper stipulation, though this presumption could be rebutted by the person who had given the written promise; for, if sued, he was allowed to show that no stipulation had in fact been made. As time went on, however, it seems to have become customary for debtors to give what we should call I.O.U.'s (cautiones) without any suggestion of a preceding stipulation; this usage arose, partly from the above-mentioned practice of committing stipulations to writing, partly in imitation of the Greek syngraphae and chirographa. These cautiones, though not based in any sense on a stipulation, came in time to be regarded as raising a presumption that the money was legally due, but this could be rebutted by the exceptio non numeratae pecuniae, which cast upon the plaintiff the burden of proving that the money had been advanced. If the cautio, however, were in fact based upon a stipulation, this would only be so if the person who gave the promise had really given it on the understanding that he was to get something in return (*cf.* J. iv. 13. 2). Diocletian provided that the exceptio must be pleaded

[1] G. iv. 171.

[2] For the literal contract generally, see Roby, ii. 279.

within five years from the date of the contract, a period which Justinian reduced to two, after which time the writing (cautio) raised (by a sort of estoppel) a conclusive or irrebuttable presumption[1] that the money was due, unless in the meantime the defendant had entered a formal protest in the acta of a Court, or had made the exceptio perpetual by giving written notice to the creditor of his objection, or had sued for the redelivery of the cautio.

(*d*) *Contracts made 'Consensu'*

The consensual contracts, like the real contracts, were formless. They derived their validity not from the fact that they were executed in some particular manner, but because the transaction between the parties was a reasonable one, and therefore treated by the law as worthy of being enforced. In the real contracts, this element of reasonableness was 're tradita,' performance on one side; in the verbal contracts, according to Justinian, it was the agreement of the parties (sufficit eos qui negotium gerunt consentire). But an agreement, per se, is merely a pactum, some causa is necessary, and this causa, at Rome, was, in the case of the consensual contracts, that each party gave the other some 'quid pro quo'; in other words, the 'causa' of the consensual contracts was practically the same thing as consideration in English law.[2]

[1] Dr. Moyle thinks that the effect of the lapse of time was merely to shift the burden of proof (p. 495), but Justinian's language seems to suggest more than this (J. iii. 21).

[2] It must be admitted, however, that it is not easy to reconcile gratuitous agency (mandatum) with the doctrine of consideration, either in English or Roman law (*cf.* Wilkinson *v.* Coverdale, 1 Esp. 74).

The consensual contracts (which were based upon the jus gentium,[1] were negotia bonae-fidei, and could be made inter absentes) were four in number—emptio venditio, locatio conductio, societas, and mandatum.

1. *Emptio venditio.*

Emptio venditio was the contract of sale. The vendor agreed to sell, the purchaser to buy, some object of property for a definite price, and the contract was complete at the moment the price was fixed, although the thing had not been handed over, and the price had not been paid, or anything given as 'earnest.' If the price were to be fixed by a third person, Labeo thought there was no sale, Proculus that there was.[2] Justinian decided that if the third person in fact fixed the price, the contract was valid, if he failed to do so it was void. Formerly also it was doubted whether the price need necessarily consist of a sum of money. The Sabinians thought that the price might be a slave, a piece of land, or a toga, while the Proculians pointed out that if the price were anything else save money, the contract was really exchange, and that the contract of exchange was one thing (*i.e.* an innominate contract), emptio venditio another. In the end the opinion of the Proculians prevailed.[3] In the absence of fraud (dolus) the Courts would not inquire into the adequacy of the price, but Diocletian provided that if the price represented less than half the real value of the thing sold (laesio enormis), the vendor might rescind the contract unless the purchaser agreed to pay an

[1] The real contracts were also said to be juris gentium, but it may be doubted whether this is true of the mutuum, which was stricti juris and enforced by the condictio.

[2] G. iii. 140.

[3] J. iii. 23. 2.

additional sum, so as to make the price a fair one.[1] It was often the custom, on entering into the contract, to pay something by way of earnest (arra); this was not an essential part of the contract, but merely evidence that the contract had in fact been made.

Justinian made certain changes in the law as to the formation of the contract. It would appear that in his time it was usual for some contracts of sale to be in writing (venditiones cum scriptura), probably because the parties made it a condition precedent that the contract in question should be so evidenced, while others could be made without written evidence (venditiones sine scriptura).[2] Justinian provided that where the sale was one 'cum scriptura,' the sale was not to be complete unless the written contract (instrumentum emptionis) had been drawn up and written, or at least signed, by the contracting parties, or if drawn up by a notary (tabellio) the document must contain all the terms of the agreement and be complete in every way. Failing this there was a 'locus poenitentiae,' and either party might retract without loss, that is, if nothing had been given as earnest. If, however, earnest had been given, then, whether the contract was cum or sine scriptura, the purchaser who refused to complete

[1] There is no such rule in English law. Inadequacy of consideration (unless so startling as to shock the conscience, and so itself enough, in Chancery, to raise a presumption of fraud or undue influence) is at most *evidence* which, with proof of other facts (*e.g.* fraud or misrepresentation), may lead to the contract being set aside.

[2] An analogous distinction obtains in English law. An agreement for the sale of land, *e.g.*, is 'cum scriptura,' *i.e.* cannot be enforced by action unless in writing, signed by the party to be charged (sect. 4, Statute of Frauds), while some agreements for sale may be good without written or other evidence (sine scriptura), *e.g.* goods under £10 in value.

forfeited his earnest, while if it was the vendor who refused he was bound to restore double. If, of course, the sale was a 'venditio sine scriptura,' and so complete, each party, though thus punished, had also to answer for breach of contract in the ordinary manner.[1]

Though the contract was complete when the price was fixed, or, in Justinian's time, if the contract were 'cum scriptura' when the writing was complete, and so gave each party rights in personam against the other, the property did not pass, *i.e.* the purchaser did not acquire the ownership of the thing sold (and so rights in rem) until delivery (traditio), and the vendor was not bound to deliver the thing until he had been paid the purchase-money in full. If, in the interval between the completed agreement and delivery the thing perished without fault on the part of the vendor, the loss (periculum rei) fell on the purchaser (who had still to pay the price), contrary to the ordinary rule *res perit domino*. And, in the same way, if the property unexpectedly increased or decreased in value, the purchaser gained or lost, as the case might be, 'cujus periculum, ejus et commodum esse debet.'

All property (res corporales or incorporales) could be the object of a contract of sale except—

(i.) Res extra commercium. But if a man bought a res extra commercium, *e.g.* a temple or a freeman in ignorance, *i.e.* was deceived by the vendor, the sale was valid; it could not be specifically enforced,

[1] Justinian's provisions are not very clear. See further Girard, pp. 538-539, and on the subject generally, Moyle, 'Contract of Sale in the Civil Law.'

but the vendor could be compelled by the actio empti to pay the purchaser the supposed value of his bargain (quod sua interest deceptum eum non esse).

(ii.) Things which both parties knew to be stolen, and—

(iii.) Things already belonging absolutely to the purchaser (suae rei emptio non valet).

A sale could be made subject to a condition, *e.g.* as above, that it should be reduced to writing, or, to take Justinian's instance, 'If Stichus suits you within a certain time, he shall be yours at so many aurei.'

The duties of the vendor were—

(i.) Until traditio to show the care of a bonus paterfamilias in the custody of the thing.

(ii.) To make delivery on payment.

But this obligation was limited to '*tradere*,' it was not 'rem *dare*,' and therefore the vendor was not bound to make the purchaser owner or dominus, nor could the purchaser rescind merely because it turned out that the vendor was not owner, and so unable to grant dominium to him.

(iii.) But the vendor was bound, besides making traditio, to guarantee to the purchaser the undisturbed possession of the thing (rem habere licere), and therefore to compensate him if evicted by the true owner or some one claiming by a better legal title than the purchaser had acquired from his vendor.

(iv.) At common law (jus civile) the vendor, in the absence of dolus, was not liable for defects in the quantity or quality of the property sold. But the curule aediles introduced two new actions (aedilician), by means of which a *general warranty* was implied

where slaves, horses, or cattle were sold in open market (over which, of course, the aediles had control); and, subsequently, these remedies were, by the interpretation of the jurists, extended to all sales. The actions in question were :—

(*a*) The actio redhibitoria, and

(*b*) The actio quanti minoris or aestimatoria.

The first action enabled the purchaser who had been deceived by some latent defect in the thing sold to rescind the contract, and recover his purchase-money with interest; but the action had to be brought within six months (menses utiles) from the date of the contract. Alternatively, the purchaser might by the other action (aestimatoria) have the purchase-money reduced in proportion to the defects discovered, and this action could be brought within one year (annus utilis). Apart from the two last-mentioned special actions, the ordinary action by which the purchaser enforced his rights was the actio empti.

The duties of the purchaser were :—

(i.) To pay the price, and

(ii.) On default of punctual payment (the contract being 'bonae-fidei') to pay interest; and the vendor's action to enforce his corresponding rights was the actio venditi. Further, as above stated, if the purchaser had bargained for a thing at a price which was less than half its real value, the vendor might rescind or have the price increased (laesio enormis).

2. *Locatio conductio.*

The contract of letting and hire had three forms—locatio conductio rei, locatio conductio operarum, locatio conductio operis.

(i.) *Locatio conductio rei* was where one party to the contract (locator) agreed to let the other party (conductor) the use of a thing for a money payment. The locator had the actio locati, the conductor the actio conducti, and the contract (as in the two other forms) was complete when the price was fixed. The price had to be in money, and therefore if A lent B his ox for ten days, in return for a loan by B to A of B's horse for a like period, and A's ox died while so lent to B, by B's negligence, A could not sue B by the actio locati, for there was no money price, nor by the actio commodati, for the loan was not gratuitous; his action was on an innominate contract, *i.e.* actio in factum praescriptis verbis. If the thing let were a house, the conductor was called inquilinus, if a farm, colonus.[1]

Sometimes, according to Gaius, whether a given contract was locatio conductio or not could only be determined by the event ('ex accidentibus'). A lets to B a band of slaves as gladiators, B is to pay twenty denarii for each uninjured slave, and one thousand for each killed or disabled. Gaius says it was disputed whether the contract was sale or hire, but that the better opinion was (magis placuit) that it was locatio conductio in relation to the slaves uninjured,[2] but emptio venditio as regards those killed or disabled. The transaction could therefore be regarded as a conditional sale or hire of each slave.[3]

With regard to periculum rei, there was a

[1] This kind of colonus must be distinguished from the colonus who was akin to a servus, as being glebae ascriptus.

[2] For the locator got them back again after they had been hired for the exhibition.

[3] G. iii. 146.

difference from the law of sale. The risk of loss remained with the locator rei, and therefore, if by accident the thing let were destroyed before the hirer got it, or if while in his possession, and without his fault, it became useless, the hirer was released.

(ii.) *Locatio conductio operarum* was where one party (locator) let out his services to the other (conductor) in return for a money payment. The services so let could only be 'operae illiberales' and therefore advocates and physicians, teachers, and other skilled professional men could not conclude this contract.

(iii.) *Locatio conductio operis* was where one party (conductor) [1] agreed to make something out of, or to do a job in relation to, materials belonging to the other (locator) [2] for a money payment, *e.g.* A agrees to build B a ship out of B's wood. As in the other cases, the price must be fixed, so if A agrees to clean or mend B's garments, and no definite price is fixed at the time, the implied reasonable price will not make the contract one of locatio conductio. It is an innominate contract, and can only be enforced 'praescriptis verbis.' Where X, a goldsmith, agreed with Y to make him a ring for twenty aurei, X finding the material, Cassius thought that there was emptio venditio of the gold, locatio and conductio of the work in making a ring out of it; but Gaius tells us that the better opinion was that there was only one contract, viz. emptio venditio, and this was approved by Justinian.[3] Of course, if Y provided the gold, there was never

[1] With the actio conducti.

[2] Actio locati; it will be observed that in this case the person who did the work was called the conductor, in locatio conductio operarum he was called the locator.

[3] J. iii. 24. 4.

any question, the contract was clearly locatio conductio.

In all three cases of locatio conductio each party was bound by exacta diligentia (*i.e.* the care of a bonus paterfamilias). Finally, though in the case of locatio rei death did not terminate the contract, in the other cases it might, *e.g.* if the contract were for personal services (operarum), or where a particular person had been selected to do the job (opus).[1]

3. *Societas.*

Societas was a contract by which two or more persons bound themselves 'to the mutual performance of certain acts with a view to a common purpose,'[2] *e.g.* to carry on a tavern. The contract might take one of four main forms:—

(i.) Omnium bonorum.

(ii.) Universorum quae ex quaestu veniunt.

(iii.) Alicujus negotiationis.

(iv.) Unius rei.

(i.) A *societas omnium bonorum* was a partnership which excluded the idea of any partner possessing private property; for the agreement was that all property of the partners which they had previously owned in separate ownership, or which they might acquire during the partnership, was to become the joint property of all.[3] Debts due from one partner only could be recovered by the creditor out of the partnership property, but damages occasioned by a partner's delict or wrong only so far as the partnership had been enriched thereby.

[1] For a full account of the incidents of the contract see Moyle, pp. 438-440.

[2] Sohm, p. 421.

[3] This is one of the rare cases in which dominium passed by 'nuda voluntas,' *i.e.* by the partnership agreement.

(ii.) *Societas universorum quae ex quaestu veniunt* was the ordinary form of commercial partnership, the partnership property being limited to property acquired by the partners in business transactions. Each partner might, therefore, have private property, *e.g.* property which he acquired as heres, or by way of donation or legacy.

(iii.) A *societas alicujus negotiationis* was where the partnership was limited to gain in some particular business, *e.g.* slave-merchants, and a species of this form of partnership was societas vectigalis, *i.e.* a partnership for farming taxes, which had the peculiarity that it was not dissolved by death.

(iv.) A *societas unius rei* was one which had as its object some single transaction, *e.g.* the ownership of a race-horse.

The share of each partner in the partnership property and in gain and loss was presumed to be equal. But this might be varied by agreement. One partner might, *e.g.* agree to contribute all the capital, though the profits were to be equal, 'for a man's skill or labour is often equivalent to money'; and a partner might even, by special agreement, share the profits but not be liable for loss; but the converse case, *i.e.* where one partner shared loss but was wholly excluded from gain, amounted to a 'leonina societas,' and the agreement was void. Each partner was bound to show good faith and due diligence towards the others, but the degree of diligence was not the highest (exacta diligentia); it was enough if the partner showed the same care as in his own affairs. A partner called upon by creditors of the firm (for the firm had not a distinct legal persona of

its own) to pay more than his fair share had a right of contribution (jus regressus) against the rest, and was bound himself to bring into the common fund whatever he acquired as a partner. The action by which a partner enforced his rights was the actio pro socio, and a partner who defended and was condemned in this action incurred infamia; while at the end of the partnership, the actio communi dividundo lay to enforce the proper division of the partnership property.

The rights and liabilities with regard to third persons were as follows. If all the parties entered into the contract, all could sue and be sued on it. If, on the other hand, one partner made a contract in his individual and private capacity, he alone was affected.[1] A more difficult case was where one partner made a contract on behalf of the firm. The firm, having no distinct legal identity, could not sue on such a contract; but, nevertheless, it could secure the benefit, for the partner who had entered into the contract could be compelled to cede his right of action to his co-partners. Conversely, the firm, as such, could not be made liable, but the other partners might, as individuals, be sued—(i.) if the contracting partner was their 'magister'; (ii.) if they had taken benefits under the contract; and (iii.) if they subsequently expressly agreed with the creditor to pay, or, as we should say, expressly ratified the contract.

Ulpian tells us that a partnership might be dissolved ex personis, ex rebus, ex voluntate, ex actione.

(i.) It was dissolved *ex personis*—(*a*) when one partner died,[2] and even if two or more were left the

[1] Unless the societas was omnium bonorum.

[2] Unless the societas was vectigalis.

partnership was determined between them, as well as in relation to the deceased partner, unless the partnership articles otherwise provided. (*b*) Capitis deminutio had the same effect as death, save that under Justinian only maxima or media so operated. (*c*) Where one partner forfeited his property to the fiscus (publicatio), or on bankruptcy made a cessio bonorum,[1] or, in the time of Gaius, was sold up in bankruptcy (venditio bonorum).

(ii.) *Ex rebus* when the purpose for which it had been formed had been accomplished or become impossible; where the term fixed for the partnership has expired,[2] or where, the societas being unius rei, the thing in question had ceased to exist (*e.g.* the horse).

(iii.) *Ex voluntate.*—'In societatem nemo compellitur invitus detineri,' and therefore a partner could retire even though a term was fixed for the continuance of the partnership and had not expired, but, in such case, there had to be a serious and reasonable ground; in any case the retiring party had to compensate the others for a withdrawal which unfairly prejudiced their interests, and if the partner retired from some secret motive, *e.g.* to secure for himself a prospective gain, his 'callida renunciatio' did not avail him, for he was obliged to share the profit, when it accrued, with his co-partners. For example, A, who is a partner in a societas omnium bonorum, hears that he is about to become heres to B, a rich

[1] But in this case the parties might, if they wished, agree to continue, and so constitute a new partnership (J. iii. 25. 8). It would be more logical, perhaps, to classify dissolution by cessio bonorum under a distinct head, as the debtor's persona was not thereby affected.

[2] This might be classed separately as 'ex tempore.'

man who is dying. He at once retires, and after the partnership has been so determined B dies and A becomes heir. A is bound to share the advantages with his former partners. Lastly—

(iv.) *Ex actione.*—A societas may be dissolved by the Court on the application of a partner. The action was 'communi dividundo.'

4. *Mandatum.*

A mandate was a contract by which one person (mandatarius) gratuitously undertook to do some act at the request of another. The act had to be a future one, and could not have an unlawful or immoral object. If the service were to be paid for, and the amount fixed, the case was one of locatio conductio; if the price were not fixed the transaction might amount to an innominate contract. A mandatum required no special form, and might be made conditionally, or to take effect from some future time. The contract was formed when the mandatarius (agent) undertook the business (he was, of course, free to refuse), and from that moment the mandator had the actio mandati directa, the agent the actio mandati contraria. But though the agreement was thus a complete one it was, in a sense, inchoate only, for until the agent began the work ('re integra'), either party could determine the contract. If, however, it were the agent who renounced, he was bound to do so as soon as possible (quam primum), so as to enable the mandator to get the business carried through in some other way, and if the renunciation were too late for this to be possible the mandator had his actio mandati against the agent unless the agent had some good legal excuse (*e.g.* the mandator had become

bankrupt, or the agent was suddenly overtaken by a serious illness).

Justinian states that a mandate might take one of five forms :—

(i.) Mandatum *sua*, or mandantis gratia, for the benefit of the mandator alone, *e.g.* a request that the agent should conduct his (the mandator's) business or buy an estate for him.

(ii.) *Tua et sua*, for the benefit both of the agent and the mandator, *e.g.* a request that the agent should lend money at interest to a friend, who was the mere nominee of the mandator ; the mandator benefits by the loan, the agent by getting interest on his money.

(iii.) *Aliena*, for the benefit of a third person, *e.g.* where the request was to manage the affairs of Titius, a friend of the mandator.

(iv.) *Sua et aliena*, for the benefit of the mandator and a third person, *e.g.* the mandator asked the agent to manage property belonging jointly to the mandator and Titius.

(v.) *Tua et aliena*,[1] for the benefit of the agent and a third party, *e.g.* where the request was to lend money at interest to a third person.

A request for such a loan was called *mandatum qualificatum*, and was a form of suretyship, being usually associated in the *Digest* with fidejussio ; for a man who requested another to lend money to a third person was held to, himself, promise repayment, if the third person made default. But a contract of suretyship by mandatum qualificatum, though it

[1] As Dr. Moyle points out (p. 447), another possible form would be in the interest of all three (sua, tua et aliena), as where A asked B to lend money at interest to C to enable C to repay a loan owing to A.

closely resembled one formed by fidejussio, had certain minor distinctive features, *e.g.* the principal debtor and fidejussor being liable for the *same* debt, the fidejussor was originally released if the creditor sued the debtor, and the action reached 'litis contestatio,'[1] whereas the mandator, being liable on a separate contract, could be sued, although the agent had first sued the third person, to whom, at the mandator's request, he had lent money;[2] further, the mandator, even after paying the agent,[3] could demand that the actions should be transferred to him.

A mandatum *tua gratia*, *i.e.* merely for the benefit of the agent, created no obligation 'quia nemo ex consilio mandati obligatur.' If, therefore, one merely advised another to do something which concerned him alone, the contract of mandatum was not formed: *e.g.* B is doubtful whether to invest his money in the funds or to buy land with it. A suggests the former course. B follows his advice and suffers loss. B cannot recover the loss by the actio mandati contraria, or, indeed, by any other action.

The duties of the agent who had accepted a mandatum were as follows—(i.) to execute it (unless he promptly disclaimed);[4] (ii.) to show exacta diligentia;[5] (iii.) to make over to the mandator any-

[1] P. 375.

[2] Justinian, however, placed the fidejussor in the same position as the mandator in this respect.

[3] See p. 285.

[4] *Vide supra.*

[5] He must, therefore, not exceed his instructions (J. iii. 26. 8). If being instructed to buy at 100 aurei the agent bought at 150, the Sabinians thought that he could not even sue the mandator for 100 aurei. The Proculians held that the action would lie for the less amount, and this opinion prevailed (quae sententia sane benignior est). The agent could, of course, buy for less than the sum authorised.

thing he acquired in the execution of the mandate (*e.g.* the horse, if the mandate was to buy one), and also any actions relating to the transaction; (iv.) to render a proper account.

These duties could be enforced by the actio mandati directa, condemnation in which carried infamy. The mandator, on the other hand, could be compelled by the actio mandati contraria to reimburse the agent and indemnify him against all expenses and liabilities properly incurred in the execution of the commission. The contract ended—

(i.) Where the object was accomplished or became impossible.

(ii.) By the mutual agreement of the parties, even in course of performance.

(iii.) By one party repudiating before performance;[1] and

(iv.) By the death of either party *before* the mandate had been executed, but—(*a*) if the agent executed the mandate after the death of the mandator and in ignorance of his death, he was allowed, nevertheless, 'utilitatis causa,' to bring the actio mandati against his principal's heirs; (*b*) if the mandatum were for an act to be done after the mandator's death (*e.g.* the agent was to manumit one of his slaves), it remained good in spite of the death of the principal.[2]

The classification in the *Institutes* of contractual obligations as arising either re, verbis, litteris, or consensu is not exhaustive. Such an obligation might

[1] *Vide supra.*

[2] A mandate that something should be done after the death of the agent, *i.e.* by his heirs, was void in the time of Gaius (G. iii. 158).

also arise from an innominate contract (*supra*) and from a pactum vestitum. It remains, therefore, to consider this last-mentioned source of obligation ex contractu, before dealing with obligations quasi ex contractu and the means by which contractual rights and liabilities could be transferred (otherwise than by a successio per universitatem) and terminated.

Pacta vestita.

It has been pointed out already that, according to the theory of Roman law, before a true contract could arise two elements were necessary; the agreement of the parties (pactum) and some legal reason (causa) why the agreement should be regarded as one which the law ought to enforce. If there were an agreement but no causa, the pactum was nudum, *i.e.* unenforceable by action, though in certain cases it was not without legal consequences, for—(i.) a pactum might produce a naturalis obligatio, and so afford a defence to an action to recover money paid under it, and (ii.) if a pactum were added (pactum adjectum) to a contract which was a negotium bonae-fidei (*e.g.* one of the consensual contracts), then, if added at the time, the pactum was regarded as part of the main agreement and equally enforceable; if added afterwards it gave rise to an exceptio merely.[1] Further, though a pactum, as such, never became actionable, certain agreements (pacta), though not coming within any of the classes above mentioned, and though not adjecta, were enforced on their own merits, sometimes by the praetor, sometimes by virtue of express statutory provision. Where a pactum was enforced (whether adjectum or otherwise)

[1] *Cf.* Sohm, pp. 429-430.

it was known as pactum vestitum. An example of pacta which became vestita by virtue of the praetorian influence (pacta praetoria) is afforded by the 'constitutum debiti,'[1] which was an informal promise[2] to discharge some subsisting liability, either the promisor's own liability (constitutum debiti proprii), or the liability of a third person (constitutum debiti alieni), the remedy being the actio de pecunia constituta. It is obvious that the constitutum debiti alieni was a third method of constituting suretyship,[3] and in some ways the suretyship so constituted was more stringent than where created by fidejussio, since, *e.g.* the surety by constitutum remained liable even after the debt had been barred as against the principal debtor by lapse of time, whereas the fidejussor's liability, in such case, was also terminated. An example of pacta made actionable by statute (pacta legitima) is afforded by a promise to give a dowry, or, if made with proper formalities, by way of evidence, a promise of mere bounty. Resting, as they did, on agreement only, the pacta vestita may be regarded as an extension of the principle of the consensual contracts, as the innominate contracts were an extension of the principle of those formed re.

Subsect 2. *Obligations arising Quasi ex Contractu*

In the case of the quasi-contracts the obligation was produced by 'causa' alone; the parties had not

[1] Another example is the 'receptum,' *e.g.* argentariorum or arbitrii, see Girard, pp. 600-603.

[2] *I.e.* not made by a stipulation.

[3] The others being fidejussio and mandatum qualificatum, *vide supra.*

in fact agreed, but an obligation was imposed upon them by law on equitable grounds; and since the relation between them seemed to be more akin to contract than to delict and quasi-delict,[1] the obligation was said to spring, not from contract, for there was no pactum, but from an origin analogous to contract, *i.e.* to arise quasi ex contractu.[2] The following are the examples which Justinian gives of these obligations:—

(1) Negotiorum gestio was where one person managed the affairs of another without the authority of the latter, *e.g.* the negotiorum gestor repaired his friend's house during the absence of the latter from Rome to prevent the property from falling down. The relationship is akin to mandatum, but differs in that the mandatarius had *previous* authority. In a proper case of negotiorum gestio, however, the person who benefited by the act done was liable, although he had neither authorised nor ratified the act, and could be sued by the actio negotiorum gestorum contraria for the expenses or other liabilities which the negotiorum gestor had incurred in doing the work. But no case of negotiorum gestio arose unless—(*a*) the work were really urgent; (*b*) it has been done with the intention of creating a case of negotiorum gestio; and (*c*) the negotiorum gestor had not been previously forbidden by the owner to undertake the business. The remedy of the principal was the actio negotiorum gestorum directa, by which the negotiorum gestor could be sued if in the conduct of the work he failed

[1] The chief sources (other than contract) of obligations in personam.

[2] The English 'contracts implied by law' rest on much the same basis.

to show exacta diligentia. Practically the only recognition of the principle of negotiorum gestio in English law is in the case of salvage in the Admiralty Court.

(2) The tutor's action against his ward, actio tutelae contraria, and the ward's actio tutelae directa arose quasi ex contractu.

(3) Two or more persons, without being partners, hold something in common, *e.g.* a house which has come to them as a legacy, and one of them has alone enjoyed the property or has been put to necessary expense in relation thereto; here the obligation to give an account of the profits or to share the expense was considered as arising quasi ex contractu, and could be given effect to in an action 'communi dividundo'; or if the persons were co-heirs, by the actio familiae erciscundae.

(4) The heir, on entering the inheritance, was bound to satisfy the claims of the legatees 'quasi ex contractu.'

(5) A person who received money not really due to him, but paid by another through mistake, was bound to repay it by an obligation arising 'quasi ex contractu,' the action being the condictio indebiti soluti. Exceptionally, however, money paid by mistake could not be recovered, *e.g.* in the case of a lis crescens, *i.e.* where amount recovered was increased if the liability were denied, as in an action under the lex Aquilia; or where, in the time of Gaius, a specific legacy had been given per damnationem; or, in the time of Justinian, a legacy or fideicommissum had been bequeathed to some pious foundation. In other words, if a person paid a

claim which he thought was due on a lis crescens, and then found that he had been mistaken, and the money was not due at all, he could not recover, because by payment he had really obtained a kind of advantage, *i.e.* he got rid of possible liability, if the facts had turned out otherwise, of having to pay an increased amount. Further, as Dr. Moyle points out, had the rule been otherwise, a person while in doubt as to whether something were due on a lis crescens or not, might have guarded himself by payment, and have then sued by a condictio indebiti, thus, in effect, denying liability; yet, if he failed, he would not incur the penalty of the increased sum, since he was himself suing on the condictio, not being sued on a lis crescens.

The Transfer of Contractual Rights and Liabilities

Since every obligation implies a right, the subject of the transfer or assignment of obligations has two aspects. How, if at all, could—(*a*) the liability under, and (*b*) the benefit of, a contract[1] be transferred by the act of the parties.[2]

In describing the methods by which single items of tangible property (res singulae corporales) could be transferred by one man to another (*e.g.* in jure cessio and traditio), Gaius[3] remarks that these methods of transfer have no application to obliga-

[1] Or quasi-contract, but the term contract is used as including both.

[2] On a successio per universitatem (*supra*) obligations were transferred, not by act of the parties, but by operation of law.

[3] G. ii. 38.

tions; which, of course, were not only res *incorporales* but were regarded by the Romans as personal to the contracting parties and, in some cases, so personal as not even to be capable of passing with the rest of the juris universitas to the heir.

The only manner in which liability under a contract could be transferred was by novation, *i.e.* the person to whom the obligation was due had to consent. A, *e.g.* owes B fifty aurei; the only method by which A's liability can be transferred to C, so as to make C B's debtor in lieu of A, is for all three to agree; B either taking a stipulation from C at A's request (expromissio), or, with the consent of A and C, making a transcriptio a persona in personam. The same rule, that liability under a contract can only be transferred (by act of the parties) with the creditor's consent, obtains in English law, and, obviously, the principle is a sound one. It would be inequitable that one's debtor should have the right to escape further liability on his contract by substituting some man of straw to perform it.

Originally also the benefit[1] of a contract could only be transferred by novation, the person to whom the right was to be transferred taking, at the request of the original creditor, a new stipulation from the debtor, which operated to discharge the obligation owed to the original creditor, and to create a new one in favour of the transferee.[2] Under the formulary procedure, however, the practice arose for the creditor to give the transferee a mandate to recover the debt, nominally as agent (procurator) for the

[1] *I.e.* the right to enforce the obligation which a contract created.

[2] G. ii. 38

creditor, but really on his own behalf (*i.e.* the transferee was to retain the debt when recovered). This species of mandate was known as mandatum in rem suam, and the formula in the action ran: 'If it appears that the debtor owes the original creditor fifty aurei, then condemn him to pay the said sum to the transferee.' This of course, operated as an assignment, not of the benefit under the contract, as such, but of the right to sue for it, and even as an assignment of a right of action was defective, for, until the transferee sued and litis contestatio[1] was reached, the assignment became void if the original creditor revoked his mandate, or if the creditor or transferee died.[2] Later, however, the principle became admitted, even at jus civile,[3] that from the moment when the transferee gave the debtor notice of the mandate, the original creditor lost his right of revocation. Finally, under the influence of the praetor, assignment of the benefit of a contract became possible without the necessity of a mandate from the creditor to the transferee. Once the original creditor manifested a clear intention that the benefit of the contract should vest in the transferee (*e.g.* on a sale or by way of gift), the latter became entitled to sue the debtor by an actio utilis *in his own name*, and the transfer could not be determined either by revocation or death.

Thus Roman law reached much the same conclusion as English law in the matter of the assignability of the benefit of contractual rights, for the

[1] P. 375.

[2] In other words, the mandate was governed by the ordinary rules.

[3] Sohm, p. 442.

English Court of Chancery,[1] like the praetor, permitted the rights under a contract to be transferred by the original creditor to another, and in two points there is an almost exact parallel, for—(i.) neither at Rome nor in England was the debtor bound by the assignment until he had received notice from the transferee; (ii.) just as in England the assignee takes 'subject to equities,' so, at Rome, any defences which could have been set up by the debtor against the original creditor (*e.g.* exceptio doli) could be pleaded against the assignee. But the systems in other respects differ because—(i.) whereas in England a certain form (*i.e.* writing) is required for the assignment, at Rome none was necessary; (ii.) a lex Anastasiana disabled an assignee, in certain cases, from recovering a greater sum for a debt he had bought than the consideration paid by him to the original creditor for the transfer; whereas, in English law, as between the assignee and the debtor, the question of the consideration for the assignment is immaterial; and (iii.) in England, since 1873, a valid assignment of a debt or chose in action may be made *at law*, while Rome never advanced beyond the equitable assignment by means of the actio utilis.[2]

The Discharge of a Contract

An obligation arising from a contract might be extinguished or destroyed—

[1] Assignability of a debt or chose in action is recognised, under certain conditions, also at law, under the Judicature Act 1873.

[2] Roman law never seems to have attained to the conception of a negotiable instrument (*e.g.* a cheque) which passes by delivery, or delivery and endorsement; is good without notice to the person liable on it; and may give the assignee a better title than the assignor.

(1) By contrarius actus.
(2) By performance.
(3) By novation.
(4) By subsequent impossibility.
(5) By operation of law.
(6) In some few cases by death.
(7) Ope exceptionis.[1]

(1) '*Contrarius actus.*'—According to the theory of the civil law, the juris vinculum, of which an obligation consisted, having been attached or tied to the parties when the contract was created, had to be untied by reversing the process. Thus a debt created by nexum had to be released by nexi solutio, and probably, at first, this process of discharge was necessary even though the debtor had morally discharged himself by payment in full. As described by Gaius, however, nexi solutio seems to be a form of discharge when actual payment had not been made, for he describes it as 'alia species *imaginariae* solutionis,' the process being as follows: The debtor, in the presence of five witnesses and a libripens, holds a piece of copper in his hand and says, in effect, to his creditor,[2] 'I weigh out to you this first and last pound of the money I stand bound to pay you, and so release myself by means of this copper and these copper scales from my obligation.' He then struck the scales with the copper and gave it to his creditor, as if in full payment (veluti solvendi causa).[3] So an

[1] Sometimes also 'set off' (compensatio) might operate to discharge an obligation (see p. 390).

[2] G. iii. 174.

[3] Gaius says that this method of release was also employed in the case of a judgment debtor and an heir bound to a legatee per damnationem.

obligation formed 're' would be dissolved by the thing being returned (or, in the case of pignus, redelivery after due payment made); whence it seems that in the real contracts the 'contrarius actus' was in fact performance of the obligation which the contract created. In the case of a verbal contract, however, the contrarius actus was not performance but a release by solemn words (contrariis verbis), without payment actually taking place, in which case the acceptilatio,[1] as it was called, amounted to an 'imaginaria solutio,' *i.e.* a legal, though not necessarily a moral discharge. The usual form of acceptilatio was 'quod ego tibi promisi, habesne acceptum? Habeo'; and, of course, only applied to discharge an obligation created 'verbis'; and therefore, if a debt arose in any other manner (*e.g.* on a mutuum), it could only be discharged in this way by novation, *i.e.* the debt was first novated by being made the object of a stipulatio, and then discharged by acceptilatio. Gallus Aquilius invented a general form of stipulation (stipulatio Aquiliana), by means of which any number of obligations, of whatever kind, due from one person to another could be turned (by novation) into a single obligation, being summed up in one comprehensive stipulation, and then, if it were so desired, extinguished by acceptilatio.[2] In the case of the literal contracts, in the time of Gaius, the contrarius actus was accepti relatio, *i.e.* an entry on the opposite side to the expensilatio, that payment had been made, and this also might be an imaginaria solutio, for it

[1] Acceptilatio, as above stated, was a term also used to denote the entry of payment (in a literal contract) upon which the expensilatio was founded.

[2] See J. iii. 29. 2.

was valid even though payment was not in fact made, *e.g.* when the creditor desired to make his debtor a release of the debt. Lastly, in relation to the consensual contracts, contrarius actus meant that, having taken their origin in consent or agreement,[1] such contracts could, so long as neither party had begun performance, be dissolved in the same way.

(2) *Performance*, or solutio in the strict sense, is not only the natural manner of discharging a contract but, usually, the sole manner actually contemplated by the parties. When, *e.g.* A agrees to sell and B to buy a horse for fifty aurei, the only method of discharge in their contemplation is that A shall deliver the horse and B duly pay the price. This method is accordingly enumerated in the *Institutes*, though probably in early times a formal release (*e.g.* by nexi solutio) might also, in some cases, be necessary. Gaius tells us that an obligation was extinguished by payment (or performance) of what was due, though if the creditor accepted something other than what was actually due there was a dispute. The Sabinians maintained that the obligation was, ipso jure, extinguished, the Proculians that at law the obligation remained, but that the debtor could defeat an action brought upon it by the exceptio doli. Justinian adopted the former opinion, for he tells us that in his time all obligations were extinguished by payment of the thing due or, if the creditor agreed, by something else being given in its place, and he adds that it made no difference whether the debtor himself performed the contract or some one else in his place, and this though the performance by the third

[1] Though, as above pointed out, this needs qualification.

person was without the debtor's knowledge, or even against his will. Justinian adds that in cases of suretyship, payment either by principal or surety extinguishes the obligation as against all parties.

(3) *Novation.*—Here an existing obligation was destroyed by the fact that a new one was substituted for it, and, since the literal contract was obsolete in Justinian's time, the only method of novation dealt with in his *Institutes* is a novation by means of a stipulatio. Novation might take three possible forms—(i.) the substitution of a new creditor for the former creditor; (ii.) of a new debtor for the former debtor (delegatio, expromissio); or (iii.) the conversion of an existing obligation between the same parties into a stipulation; but in this case novation could not take place, if the original obligation arose from a verbal contract, unless the new stipulation contained some new term (ita demum novatio fit, si quid in posteriore stipulatione novi sit), as, *e.g.* the addition of a surety or a condition. If, however, the new element consisted of a condition, the novation only took place when the condition was fulfilled; until then the old obligation subsisted, but if before fulfilment the creditor sued upon the old contract, he could be defeated by the exceptio doli. For a novation to be valid the old obligation might even be a natural one, and, conversely, even though the new obligation were natural, merely the old obligation was extinguished, so that in such case the creditor could not sue on either obligation. So if a pupil, X, stipulated with A, without his tutor's authority, to pay B's debt to A, there was a good novation, and since this extinguished the debt from B

to A, and the new obligation between A and X was natural only (being made without consent), A had no right of action on either obligation. But if the novating stipulation was by a slave, the old debt was not extinguished,[1] which seems illogical, for the promise of a slave was capable of creating a natural obligation. Justinian tells us that formerly difficulty was caused in consequence of the rule that the stipulatio only operated as a novation when the parties so intended, and not when they meant to create a second independent obligation, and that many (artificial) criteria were laid down to determine what the intention of the parties had been. He therefore provided that a stipulation should only operate as a novation where the parties expressly declared that their object in making the new contract was to extinguish the old one.

(4) *Subsequent impossibility.*—An obligation was dissolved where its object became impossible without the fault of the debtor,[2] *e.g.* when the thing in question was absolutely destroyed.

(5) *Operation of law.*

(*a*) In the time of Gaius an obligation was extinguished (by novatio necessaria) when an action[3] to enforce it reached the stage of litis contestatio. Thereupon a new obligation arose, viz. that the debtor should be condemned if found in the wrong, 'post litem contestatem condemnari oportere'; just as after judgment his obligation was to satisfy it, 'post condemnationem judicatum facere oportere.'[4]

[1] J. iii. 29. 3.

[2] The term debtor, strictly applicable only to a money debt, is often, for convenience, used generally to denote the person bound to perform an obligation, of whatever nature it may be.

[3] If a judicium legitimum in personam. [4] G. iii. 180.

(*b*) Capitis deminutio, by destroying the persona of the party to the obligation, also extinguished his debts, but the praetor relieved against this by granting 'in integrum restitutio,' or an actio utilis 'in eos ad quos bona ejus pervenerunt.'

(*c*) Prescription (lapse of time) might have the effect of extinguishing an obligation (*vide infra*).

(*d*) The last instance of the dissolution of an obligation by operation of law is merger or confusio, viz. where the right to enforce the obligation and the liability to perform it became vested absolutely in one and the same individual.

(6) *Exceptionally*, the death of a party might extinguish a contractual obligation, *e.g.* in societas (except vectigalis) mandatum, a contract for personal service (*e.g.* locatio conductio operarum). The general rule, however, was that contractual rights and liabilities passed on death to the heir.

(7) *Ope exceptionis.*—In all the above cases the obligation became altogether extinguished (ipso jure), *i.e.* by operation of the jus civile upon a given set of facts. Where, however, an obligatio was met by an exceptio, *i.e.* a defence inserted in the formula, the obligation was not destroyed; if the exceptio were proved the action on the obligation failed but the obligation itself remained. If the exceptio were one which the defendant could always plead, the obligation remained for ever incapable of being sued upon with success; if, however, the exceptio were limited, *e.g.* was based upon an agreement on the part of the plaintiff not to sue within six months, then the limit having expired the exceptio could no longer be pleaded in answer to a new action.

Subsect. 3. *Obligations arising ex delicto*

Rights are of two main kinds: in rem, available against all the world; in personam, available against a particular individual. Some rights in rem have been described already, *i.e.* rights directly connected with the ownership or possession of property,[1] but there are other rights in rem, viz. those which a man enjoys to safety and reputation. The Roman lawyers, however, did not regard these rights in the abstract; for, as abstractions, they are comparatively unimportant; such a right becomes a reality only when a wrong has been done to it, *i.e.* at the moment when the person entitled to the right in rem acquires, by reason of its infringement by some definite individual, a right in personam against that individual. The infringement of a right in rem was at Rome called a delict, which, therefore, bound the offender to the person wronged by the same kind of juris vinculum as that to which contract gave rise, viz. an obligation; but the obligation was not to perform an agreement, it was to make satisfaction for an unlawful act.

The delicts at Rome were four[2] in number: furtum or theft; rapina or robbery with violence; damnum injuria datum or damage to property; and injuria or wrong to the person. Of these the first three are violations of those rights in rem which are connected

[1] Res singulae, servitudes, etc.

[2] But there were other wrongs which the law punished (chiefly by means of the praetor's edict) which were delicts in everything but name, *e.g.* metus or 'duress,' with the actio quod metus causa and the exceptio metus; dolus—actio doli, exceptio doli; fraus creditorum; the corruption of a slave—actio servi corrupti (see Girard, pp. 413-428; Roby, ii. 228-237).

with the ownership or possession of property (but only indirectly, since the rights in question do not come into existence until the property right has been infringed); the last represents the violation of those rights in rem which a man enjoys wholly apart from property, *i.e.* the 'primordial' rights of the normal citizen to safety and reputation.

A. *Furtum.*

Justinian[1] defines furtum as follows: 'Furtum est contrectatio rei fraudulosa vel ipsius rei vel etiam usus ejus possessionisve'; 'theft is the appropriation with a wrongful intention (fraudulosa) of another's property, or of its use or possession.' To make this definition complete it is necessary to add that the thing stolen must be a res mobilis, and that the motive of the thief must be to secure some advantage to himself (lucri faciendi causa); that the appropriation must be without the consent of the real owner is sufficiently indicated by the word 'fraudulosa.' Since 'intention' was a necessary element in theft ('quia furtum ex affectu consistit'), a person of tender age was only liable if 'pubertati proximus.'

Consistently with the above definition furtum took place not only when A appropriated B's property, but—

(i.) When A having possession of B's property, *e.g.* on the contract of depositum, used it in an unauthorised manner (furtum usus),[2] or made away with it altogether, *e.g.* sold it (furtum rei ipsius). Therefore it was theft (furtum usus) to borrow a horse from

[1] J. iv. 1. 1.

[2] Hence 'contrectatio' is not necessarily actual seizure from the owner, but any unlawful act of appropriation.

a friend for a ride and take it into battle. But in these cases there was no theft if A honestly thought that B would permit the act, 'quia furtum sine affectu furandi non committitur,' or where B really approved, even though A thought he was acting wrongfully, for there could be no theft with the consent of the real owner. Hence a curious result. A tells C, the slave of B, to steal B's mare for him (A). C tells his master B, who, wishing to convict A, allows the slave to take the mare to A. B cannot have the actio furti against A, because B was willing that the mare should be taken, and he cannot have an action against A for corrupting his slave (actio servi corrupti), because the slave has not been in fact corrupted.[1] But Justinian provided that the attempt should be enough to found both actions.

(ii.) Since furtum included furtum possessionis it might happen that a man might steal his own property, *i.e.* property of which he had dominium, the possession being vested in another, as where a debtor fraudulently took away from his creditor something he had given by way of mortgage to secure the debt.[2]

(iii.) A finds property on the sea-shore cast away in a shipwreck, or on the road, having been dropped by accident. The inference in such case is that the late owner did not intend to abandon dominium, and if A appropriates the property 'lucrandi animo,' he commits theft.

(iv.) The appropriation need not be a personal act, for a person who assists another to steal is equally

[1] G. iii. 198. Of course the owner could recover the mare by a vindicatio.

[2] It was also furtum if the mortgagee (creditor pignoris) sold the mortgaged property to realise his security without the debtor's consent.

guilty; so if A knocks money out of B's hand that C may steal it, or obstructs B so that C may carry off something belonging to him, or drives away B's cattle, *e.g.* by frightening them with a red rag, that C may steal them, or puts a ladder under B's window, or breaks a window or a door for C to enter by, or, knowing the purpose to which the tools or ladders will be put, lends such things to C, who uses them to carry out a theft, in every case A is liable to the actio furti. A person, however, who did not assist but merely advised the commission of the act was not liable to the actio furti, and where an act which helped another to commit theft did not amount to intentional assistance, but arose from recklessness or folly (per lasciviam), the actio was in factum concepta.[1]

(v.) Sometimes there may be theft of free persons, as where A steals B's filiusfamilias, or, formerly, his wife in manu, or his debitor addictus.

There was a distinction, which continued down to Justinian's time, between *furtum manifestum* and *nec manifestum*. The former was where the thief was either caught in the act (in ipso furto) or in the place where he had committed the act, *e.g.* in a house where he had stolen property, or a vineyard where he had been stealing fruit, or when he had been seized still holding the res furtiva before reaching the place where he meant to take it. If, however, he once took it to its destination the theft was, and thenceforth continued, nec manifestum, although the thing were found on the wrong-doer.[2] The importance of

[1] P. 384.

[2] There was a dispute about those distinctions in the time of Gaius (G. iii. 184).

these rather subtle distinctions lies in the fact that under the XII. Tables the penalty for furtum manifestum was capital. A freeman, convicted of the charge, was scourged and then adjudged as a slave[1] (addictus) to the person he had wronged; a slave, scourged and hurled from the Tarpeian rock. Subsequently, however, the penalty was considered excessive, and reduced by the praetor; thenceforth the penalty recoverable by an actio furti manifesti was four times the value of the thing stolen, whether the thief was a freeman or a slave. The penalty for furtum nec manifestum was always twice the value of the thing; with this the praetor did not interfere, and these penalties continued to be the same in Justinian's time.[2]

Formerly there were also four special actions for exceptional cases of theft, viz. furti concepti, oblati, prohibiti, and non-exhibiti. The *actio furti concepti* was an action against the 'receiver' of stolen property. When, after a search in the presence of witnesses, stolen property was found on a man's premises he was liable, though innocent of the theft, to the actio concepti, by which a penalty of triple value could be obtained both by the XII. Tables and the praetor's edict. The *actio oblati*, also for three times the value, lay where one person placed stolen property on another's premises, that the property might

[1] Some lawyers thought, however, that the addictio did not make him an actual slave, but placed him in the same position as a debitor addictus (G. iii. 189).

[2] The disproportion between the penalty for furtum manifestum and nec manifestum is a striking proof of the fact that at Rome, at any rate, there was a period when the State was not strong enough to suppress crime without 'buying off' the vengeance of the person wronged.

rather be discovered there than in his own house. The action was in favour of the person upon whom the goods had been 'passed off' against the other, whether the latter were the actual thief or not. The *actio furti prohibiti* was the outcome of a provision of the XII. Tables (furtum lance licioque conceptum), which enacted that if a person (suspecting another) wished to search a suspect's house, he must be naked save for a girdle, and carry a platter in his hands. If anything was so discovered the case was one of furtum manifestum.[1] The XII. Tables did not impose any penalty upon the occupier who prevented search, and to meet this the praetor provided a penalty of four times the value, for which, Gaius says, the actio furti prohibiti could be brought against a man who prevented another from searching his premises for stolen property; the particular method of search, however, was not strictly observed in Gaius's time. Finally, by means of the *actio furti non exhibiti*,[2] a penalty could be obtained, under the praetor's edict, from a man who failed to produce a res furtiva which, after search, had been found on his premises. Justinian says these four actions had fallen into disuse in his time; where persons knowingly received and concealed stolen property they were liable to the action for furtum nec manifestum.

In Justinian's time, accordingly, the owner of stolen property had—

[1] For criticism see Gaius iii. 193. Gaius adds that in consequence of the enactment furtum manifestum was said to be of two species: 'aut lege,' *i.e.* by the XII. Tables; 'aut natura,' *i.e.* the ordinary kind. But, as Gaius remarks, whether a furtum is manifestum or not is a question of fact, all that the law can do is to provide that a case of nec manifestum shall carry the same penalty as manifestum (G. iii. 194).

[2] J. iv. 1. 4.

(1) The actio furti manifesti for four times the value, or—

(2) The actio furti nec manifesti for double value, according to circumstances; and he had, in addition,—

(3) A vindicatio to recover the thing itself, which might be brought against the thief or any one else, or alternatively a condictio (for the recovery of the thing or its value), which might be brought against the thief or his heirs, though not in possession of the thing stolen, or—

(4) An actio ad exhibendum against any one who had possession of the thing or had fraudulently parted with it; if it were not produced the defendant had to pay the 'interest' which the plaintiff had in not losing the property.

It was an anomaly to allow the owner a personal action (condictio) to claim his property, for the property (*i.e.* the dominium) was his already; the only logical action open, therefore, was the vindicatio to recover its actual possession; but the choice of either action was granted by reason of the detestation in which thieves were held (odio furum).[1]

The actio furti (as distinguished from the other remedies) could be brought not merely by the owner but, according to Justinian, by any one interested in the safety of the thing ('cujus interest rem salvam esse, licet dominus non sit') and, conversely, the owner could not bring it unless it was to his interest that the thing should not perish. For example, a person to whom a thing had been mortgaged (creditor pignoris) could bring the action, and so could the usufructuarius. But Justinian's statement that any

[1] G. iv. 4; J. iv. 6. 14.

one with an interest had the action is a little loose, for the hirer, under a contract of locatio conductio, could only bring the action if solvent. If the conductor were insolvent the owner (locator) would not be able to get the value of the thing from him; the locator, therefore, was allowed to bring the action himself. So also, in Justinian's time, the borrower in 'commodatum' had a right to sue the thief, only if the owner elected not to do so, but to rely on his remedy against the commodatarius.[1] A person with whom a thing had been placed by way of 'depositum' could in no case sue the thief, since he was not liable for the safe custody of the thing and so not prejudiced.

B. *Rapina or vi bona rapta.*

Originally the fact that a theft was accompanied by violence made no difference to the penalty, but a special remedy for such cases was found, about the time of Cicero, by the praetor's edict. This was the actio vi bonorum raptorum for four times the value of the thing, if brought within a year, otherwise for the simple value merely. The action was a 'mixed' action, *i.e.* not merely for a penalty, but for a penalty and compensation, since the value of the thing was included, so that the penalty was only three times the value.[2] There was no need to take the thief in the actual commission of the crime, and the action was open to any one with an interest in the property, even to a person who merely had

[1] J. iv. 1. 16.

[2] Otherwise in furtum manifestum, where by a vindicatio or condictio, the thing or its value might be recovered in addition to the fourfold penalty.

detention of a thing on depositum.[1] The action, however, did not apply where a man used violence under a mistaken impression that the thing really belonged to him, and that the law, in such case, allowed him to use violence.[2] But such a case was covered by a constitution of Valentinian, Theodosius, and Arcadius, which provided that no one, even the owner, might take away from another a movable thing by force, or, in the case of land, make forcible entry. If he did so he was, if owner, to lose his ownership, if not owner, to restore the thing taken, together with its value.

Having regard to the fact that rapina necessarily included furtum, and to the penalties attached to furtum alone, it would seem that the only practical advantage of the praetor's remedy for 'vi bona rapta' was in the case of a furtum nec manifestum accompanied by violence, the actio being brought within the year; for then the injured person could recover three times the value by way of penalty, instead of double the value by the actio furti nec manifesti. For furtum manifestum, or for nec manifestum when more than a year elapsed before action, the remedies for theft simply were obviously more advantageous. Finally, the same set of circumstances which gave rise to the actio vi bonorum raptorum might also afford ground for a public prosecution under the lex Julia de vi.[1]

C. *Damnum injuria datum.*

The law of wilful or negligent damage to property

[1] Provided he had an interest in the thing not being taken away by force (J. iv. 2. 2).

[2] J. iv. 2. 1. [3] P. 420.

rested on the lex Aquilia, which was a plebiscitum proposed by Aquilius, a tribune of the plebs, 287 B.C.[1]

The first chapter of the lex provided that if any one wrongfully killed a slave or a four-footed beast (being a beast reckoned among cattle) belonging to another, he should be compelled to pay the owner the greatest value of the thing at any time within the previous year. This section did not apply to wild animals or dogs, but only to animals which could properly be said to graze, as horses, mules, asses, sheep, oxen, goats, and swine. The third chapter[2] provided for every other kind of damage to property, so that it embraced injury (short of death) to slaves and beasts of cattle, the death or injury of dogs or wild animals, and injury to inanimate property (*e.g.* furniture); the offender was to pay the highest value[3] of the thing, not within the last year but within the last thirty days.

In order for a damnum, or loss, to fall within the statute, it had to be accompanied by injuria, for a loss without a wrongful act (damnum sine injuria) created no legal consequences.[4] Injuria implied that the loss (damnum) was caused either wilfully (dolus) or by negligence (culpa).[5] So if A, in self-

[1] But see Girard, p. 409.

[2] The second chapter dealt with adstipulators.

[3] In this chapter the word 'plurimi' had been left out, but the opinion of the Sabinians that it was implied was adopted (G. iii. 218).

[4] Though it might sometimes, in other cases, *e.g.* the quasi-delicts (p. 338).

[5] The fact that culpa was sufficient to give rise to the actio legis Aquiliae distinguished this delict from the others, where culpa was never sufficient; wrong-doing (dolus) had to be proved. On the other hand, damnum injuria datum has two features in common with furtum, rapina, and injuria; it implies the violation of a right in rem and imposes a penalty upon the offender. An obligation from

defence, kills B's slave, who is trying to rob him, no action will lie; nor will it if an injury is done by A, by mere accident. A is practising with a javelin and kills or injures B's slave as the slave is passing by. Here the act may be an accident, and A may therefore escape liability, or A may be negligent and liable. If A, being a soldier, practising in some place devoted to military exercise, used due care, the act is accidental. If A is not a soldier, the mere fact that he is doing a dangerous act in a public place is itself proof of negligence, and even though A is a soldier he will be liable if negligence is proved. Again, A in pruning a tree lets a bough fall and kills B's slave, who is going by. If the place is a remote one, far from the public highway, *e.g.* in the middle of A's own field, the result is a mere accident. If the place is a public one and A gives proper warning by calling out, there is still no liability, but if he neglects to call out he is negligent and the action lies. Sometimes it may be negligence to do nothing, as where a surgeon performs an operation upon a slave and neglects to attend to the case, so that the slave dies; and it is negligence to profess ability in some profession or business and prove unskilled, 'imperitia quoque culpae adnumeratur'; so a physician who causes the death of a slave by ignorantly giving him the wrong medicine is liable. In the same way a driver who, from want of skill or

contract, on the other hand, arises, not from the violation of a right in rem but from agreement of the parties, and its object is not a penalty (or a penalty and compensation), but that the person bound shall perform it or make compensation. It is only exceptionally, as in the condictio certi, that a penalty is imposed for non-performance.

physical inability,[1] cannot control his horses and causes damage is liable.

The provisions of the lex Aquilia were much extended both by the interpretation of the jurists and by the praetor's practice of granting an actio utilis or in factum where the case fell within the spirit, though not within the letter, of the law. The following are instances—

(i.) The statute provided as a penalty that the sum to be recovered was not necessarily the value of the object when the wrong was done, but the greatest value at any time within the year or thirty days preceding, according as the wrong fell within the first or third chapter. So that if a slave had been blind and worthless at the moment of injury, but had only lost his sight within the period mentioned, the greater value could be recovered. But under the lex Aquilia it was only the greatest value of the thing standing alone which could be considered. The interpretation of the jurists, however, enabled consequential damage to be included in the sum recovered; so, *e.g.*, if a slave to whom an inheritance had been left was killed before making aditio at his master's order, the value of the lost inheritance could be taken into account. So, too, if one of a pair of horses, or of a band of slave actors were killed, compensation not only for the loss of the thing in question but for the diminished value of what was left could be claimed.

(ii.) The words denoting the wrongful act in the

[1] A man is not to blame for physical weakness alone, but a person who undertakes a trade which implies a certain bodily strength may reasonably be expected to possess it.

third chapter of the lex, 'quod usserit, fregerit, ruperit,' were liberally construed, the word 'ruperit,' *e.g.*, being taken to mean 'corruperit,' and, accordingly, the wrong included cutting, bruising, emptying out, and spoiling of every kind.[1]

(iii.) The actio damni injuria (or actio legis Aquiliae) was only given by the statute to the dominus (or owner). The praetor enabled the bona-fide possessor, the usufructuarius, and sometimes the creditor pignoris, to sue by an actio utilis or in factum.

(iv.) Strictly, the actio legis Aquiliae had no application unless the damage were done 'corpore corpori,' *i.e.* by direct bodily force to the actual object. The praetor, however, granted a parallel action (utilis or in factum) in other cases; *e.g.* where A shuts up B's slave and causes him to die of hunger, or drives B's horse so hard as to cause it to founder, or scares his cattle so that they rush over a precipice, or persuades B's slave to mount a tree or descend a wall and the slave is killed or hurt in so doing. In one case the actio in factum was granted though A did no damage by his body (corpore) and the object itself was not harmed (corpori), viz. where A, through compassion, broke off the fetters of B's slave so as to enable him to escape.

Sometimes the act which gave rise to the actio legis Aquiliae might also bring the wrong-doer within the range of the criminal law; *e.g.* the master of a slave who was killed might bring a capital charge against the murderer under the lex Cornelia.

When in the action the defendant denied his

[1] G. iii. 217.

liability and failed, he was liable in double damages, 'lis infitiando crescit in duplum'; and as the action was penal, if the damage were caused by more persons than one, the whole sum could be recovered separately against each offender.

D. *Injuria.*

Justinian says that the term injuria has several meanings—

(i.) Any illegal act (omne quod non jure fit).

(ii.) The wrong done by a judge who pronounces an unjust sentence.

(iii.) An act or omission implying dolus or culpa, as in the last-mentioned delict; and

(iv.) As equivalent to the Greek ὕβρις, *i.e.* any insulting act.

It is in the last sense that the word is used as denoting the delict injuria. Injuria, as a specific wrong, was, in fact, any wilful violation of the right of a freeman to safety and reputation. The possible wrongs covered are very wide, for injuria includes not merely assault, but libel and slander, which, with us, are separate torts. The essence of the delict appears to be that the wrong-doer should wilfully (dolo) act in such a way as to hurt another free person in mind or body. The following examples of injuria are found in the *Institutes*: wounding or beating with the fist or a club; taking a man's goods in execution for a debt which does not exist, *i.e.* suggesting that he is insolvent; composing or publishing defamatory writing or verses; following a woman of honest character or a young person (so as to imply that they are persons of frail character); and an attempt upon chastity.

Sometimes the actio injuriarum could be brought by several persons in respect of the same act. A insults B, who is the wife of C, and the daughter and under the power of D. All three might bring the action: B because the action was one of the few actions which persons in potestas could bring in their own names; C because, though B is not in manu, an intention to insult him is presumed; and D because he has been insulted in the person of some one in his power. A slave, however, could never bring the actio injuriarum, and his master only when the act was of so grave a character as to show that an insult to the master was intended, as where one man flogged another's favourite slave;[1] if the slave were held in common, the injury was estimated not in accordance with the shares of the masters, but having regard to their respective positions. Where a slave was in usufruct the insult was presumed to be intended for the dominus, not the usufructuarius; but the presumption might be rebutted, *i.e.* the latter might be able to show that the wrong had, in fact, been aimed at him. Where the injuria was done to a bona-fide serviens the supposed master had no action unless he could prove that the wrong was solely to insult him, but, in any case, the bona-fide serviens could sue in his own name.

The remedies given by the XII. Tables for acts amounting to injuria were: for broken limbs, retaliation; for broken bones a penalty of 300 asses, if the person injured was a freeman, 150 if a slave; for other injuries 25 asses. It followed that the grossest

[1] But if the injuria diminished the value of the slave the master could sue under the lex Aquilia.

insult could be atoned for by a small money payment, and there is a story of one L. Veratius whose recreation took the form of walking about the streets and striking people's faces; he was followed by a slave with a tray full of asses, which he distributed, according to the law of the XII. Tables, among his master's victims. The praetor, accordingly, introduced the actio injuriarum, under which the plaintiff was allowed to fix his own damages, the judge having power to reduce them if he thought them excessive, and this continued to be the practice in the time of Justinian, the damages being calculated after considering the nature of the injura, the character of the person injured, and the surrounding circumstances generally; so the master of a slave who was employed as a steward would get more than if the slave were a menial servant or one condemned to wear fetters. In particular, the damages might be greatly augmented if the wrong amounted to that species of injuria which was known as atrox.[1] An insult (injuria) might be atrox—

(1) Ex facto, by reason of the nature of the act, as where a man was beaten with clubs.

(2) Ex loco, by reason of the place where the injury was done, as in the forum or a theatre, or in the presence of the praetor.

(3) Ex loco vulneris, because of the part of the body injured, *e.g.* the eye; or—

[1] In the time of Gaius it often happened, in the case of atrox injuria, that the praetor indirectly decided the amount of the penalty when he fixed the bail (vadimonium); for the plaintiff usually took this as the sum to claim, and the judex, though not bound to allow the full amount, usually did so in deference to the praetor (G. iii. 224).

(4) Ex persona, by reason of the dignity of the person subjected to the injury, *e.g.* when a magistrate or senator was attacked, or where an ascendant or patron was wronged by a child or freedman.

The actio injuriarum lay not only against principals but accessories to the act;[1] it was an 'actio vindictam spirans,' *i.e.* its object was to secure personal satisfaction, and being also 'poenalis,' it did not pass to the heirs of either party. It was extinguished by 'dissimulatio,' *i.e.* a man who failed to show immediate resentment was taken to acquiesce in the wrong done him, and could not afterwards bring the action. And in any case the praetorian actio injuriarum had to be brought within a year.

Finally, in every case of injuria the person wronged could elect between the civil action or a criminal prosecution; *e.g.* under the lex Cornelia, 81 B.C., and under this law a distinct civil remedy came to be developed (in addition to the praetorian actio injuriarum), which was not barred in a year.[2] A constitution of Zeno allowed men of high rank (illustres) to bring or defend the criminal action by an agent (procurator).

Subsect. 4. *Obligations arising quasi ex delicto*

In certain exceptional cases, where a set of facts showed a likeness to some delict without actually amounting to a recognised wrong, the law imposed an obligation to make satisfaction, which was said to

[1] J. iv. 4. 11.

[2] J. iv. 4. 8. This action could be brought by any one struck or beaten, or whose house had been broken into.

arise quasi ex delictu. Justinian gives the following examples :—

(1) '*Judex qui litem suam fecerit.*'—A judge could be sued for damages (the amount to be decided by the judge at the subsequent trial) if the former 'made the cause his own,' *i.e.* gave an unjust sentence by negligence or bad faith, or failed to appear on the day appointed for judgment.[1]

(2) *Actio de effusis vel dejectis.*—Under this, a praetorian action, the occupier of a room could be rendered liable for anything thrown or poured out from the room to the injury of another, though the act had been done without his knowledge or consent. The action was for double the amount of the damage done, and if a freeman had been killed there was a penalty of fifty aurei ; if, however, the freeman were not killed, but merely hurt, the judge assessed the damages, taking into account the doctor's bill, loss of employment, etc. The action, if a freeman had been killed, was 'popularis,' *i.e.* could be brought by a common informer.

(3) The *actio de positis vel suspensis*, also of praetorian origin, lay against a person who kept something placed or suspended from his room over a public way, which fell, to the injury of a passer-by. The action was popularis, the penalty being ten aurei.[2]

(4) The master (exercitor) of a ship, or an inn, or

[1] In England a judge of the High Court cannot be sued for anything done in his judicial capacity, though mala-fides is expressly alleged.

[2] If a filius, living apart from his father, came within the principle of these three quasi-delicts, action could not be brought against the father, but only against the filius. But in the case of a quasi-delict committed by a slave a noxal action lay against his master.

a stable, was liable, by a praetorian action, in double damages for any damage occasioned on the premises by the theft or fraud (dolus) of any one in his service.

It is obvious that the first of these quasi-delicts rests upon a different principle from the others. The judge who is guilty of dolus malus or negligence has really committed an actual wrong, and his obligation is termed quasi-delictual merely because the case does not exactly resemble one of the recognised delicts. In the other cases, however, the obligation may arise without any kind of fault (culpa) on the part of the person liable. However carefully he may fix something to his window, he is liable if it falls, as he is liable for the acts of his servants and of those who gain access to his rooms. Justinian justifies the rule in the case of servants by saying that the master is in fault in employing bad servants, but it does not appear that he could escape liability by proving that he had used every care to select the best. The truth seems to be that cases must always arise[1] where there is a damnum, or loss, to one person, without a definite wrong (injuria) on the part of another, to make the loss actionable. Sometimes the loss remains without redress; sometimes liability may be imposed and justified on the maxim that a man 'acts at his peril'; *i.e.* the question which of two innocent persons is to suffer may be decided by making liable the person who, for his own convenience, has brought about the state of facts which have resulted in the injury. The law does not compel a man to hire a room, employ a servant, or carry on a given trade; if he chooses to

[1] As in questions of employers' liability in English law.

do so he must take the risks. But this theory would seem to have more logical justification if it were confined to cases where a man has brought about a state of affairs which may easily constitute a danger, *e.g.* a hanging sign over the road (as in 'depositis vel suspensis'), or the construction of a large reservoir.[1]

The Transfer and Discharge[2] of Delictual Rights and Liabilities

Transfer of delictual rights and liabilities.— What has been said already with regard to the transfer of the rights and liabilities of a contract is, for the most part, applicable here also. The wrong-doer could never escape liability by attempting to assign his obligation to another, while a capital penalty (*e.g.* for furtum manifestum) could, obviously, not be assigned, even with the consent of the person wronged. In cases, however, where a delict had conferred upon the injured person a right to receive some definite money payment, he might, if he wished, allow the debtor to substitute some other person who promised to make payment, and then take a stipulation from him; whereupon the liability of the wrong-doer would be extinguished and transferred by novation. Conversely, the right to receive a money payment for a wrong might be transferred by the

[1] *Cf.* Rylands *v.* Fletcher, L.R. 3 H.L. 330.

[2] It is not clear whether Gaius and Justinian, in describing the methods by which obligations are extinguished, aim at explaining how all obligations may be discharged, or intend to confine their remarks to contractual obligations. The latter view seems probable, both because some of the methods of extinction (*e.g.* contrarius actus) can only apply to contract, and also because the subject is dealt with immediately after contract and before delict.

person wronged to another, subject to the same limitation as in the case of the transfer of the benefit under a contract.

The discharge of delict.—The above description of the methods of discharging contract applies also, to some extent, to the extinction of obligations arising out of wrong. Discharge by pardon may, however, be regarded as a method of discharge peculiar to delict, while, on the other hand, there could be no question of the obligation being extinguished by 'contrarius actus,' by subsequent impossibility, or by capitis deminutio (nemo delictis exuitur quamvis capite minutus sit). It may be said, therefore, that an obligation arising ex delicto ended by pardon, performance, novation, operation of law, death, and ope exceptionis.

(1) *Pardon.*—In the case of an obligation arising from injuria, a pardon might be implied by 'dissimulatio.' In other cases it had to be express, though a mere pactum was enough in the case of the actio furti and the actio injuriarum. A formal pardon would be effected by novating the obligation by a stipulation, and then releasing it by acceptilatio.

(2) *Performance, i.e.* payment of the penalty, or of the penalty and compensation, and

(3) *Novation* seem to be methods of dissolving obligation common both to those springing from agreement and from wrong.

(4) A delictual obligation might end *by operation of law*—(*a*) by litis contestatio in the time of Gaius; (*b*) by lapse of time, and this far more easily than in the case of contractual obligations; the actio injuriarum, *e.g.*, was barred if not brought within a

year, as were all the praetorian actions for delict, save that the actio furti was perpetual, and the actio bonorum raptorum, though barred by a year in respect of the fourhold penalty, survived after that period for single damages; (*c*) *merger* or *confusio*.[1]

(5) *Death* has a much wider effect in extinguishing obligation from wrong. Gaius states that one of the most settled rules of law was that penal actions springing from delict, such as those arising from furtum, rapina, damnum injuria datum and injuria, were not granted against the heir of the person who committed the delict;[2] but a rule became introduced about the beginning of the Empire that the estate of the wrong-doer could be made liable so far as enriched by the delict; and the condictio furtiva, not being an action for a penalty, could, in any case, be brought against the heirs of the thief. On the other hand, a delictual obligation was not extinguished by the death of the person injured, for, as stated in the *Institutes*,[3] his heir could bring an action unless the delict in question were injuria.[4]

(6) *Ope exceptionis*: an example would be where the person wronged and the wrong-doer, having several claims (some *e.g.* from contract and some from delict) against each other, had agreed to a compromise (transactio) which had been duly carried out. The defendant, in such case, when sued for the delictual obligation, could defeat the claim by the exceptio pacti de non petendo.

[1] P. 321. [2] G. iv. 112. [3] G. *loc. cit.*; J. iv. 12. 1.

[4] A claim by an ascendant or patron against his child or freedman who had sued him without the praetor's leave, also lapsed by the death of the person injured, and the case was the same, as a rule, with the querela inofficiosi testamenti.

NOTE VII

Dolus and Culpa

A. *In Relation to Delict*

Dolus, wilful wrong-doing, and culpa, negligence, present little difficulty in relation to the delicts and quasi-delicts. In the case of all delicts, save damnum injuria datum, actual dolus had to be proved, *e.g.* that the offender meaning to steal something did so; in the excepted case culpa was enough, *i.e.* although the offender had done no *wilful* wrong, he was yet liable for failure to take ordinary care, *e.g.* a man would be liable if, in shooting at a target in a public place, he killed a slave, although he did not intend so to do; and the degree of negligence, once negligence was in fact established, was immaterial; 'in lege Aquilia et levissima culpa venit.' The quasi-delicts, on the other hand, depend neither on dolus nor culpa, save in the instance of the unjust judge. In the other cases, a man may be liable for damnum without anything in the nature of moral guilt or negligence on his part. As a general rule, however, mere accident (casus) created no liability: "itaque inpunitus est qui sine culpa et dolo malo, casu quodam damnum committit.'[1]

B. *In Relation to Contract*

Every party to a contract was liable for wilful misdoing (dolus)[2] in the execution of the contract, and such liability could not be excluded by the terms of the agreement. Further, each party was liable if guilty of gross negligence (culpa lata), *i.e.* failure to foresee what all the world might have foreseen: 'lata culpa est nimia negligentia, id est non intellegere quod omnes intellegunt.' But usually more was required than such diligence as even the most improvident display. In some contracts an individual was bound by 'exacta diligentia,' *i.e.* to show the same care in the conduct of the agreement as a good citizen takes in the conduct of his affairs; such was the

[1] G. iii. 211. Besides the quasi-delicts last mentioned, noxae deditio and pauperies (p. 397) may, possibly, be regarded as exceptions to the rule.

[2] Every contract induced by dolus or metus, was, in the developed law, voidable, *i.e.* if sued upon, the exceptio doli or the exceptio metus could be set up as an answer to the claim.

case with (inter alios) the commodatarius, the depositor, and the negotiorum gestor, and failure to comply with this standard is called by modern civilians culpa levis in abstracto; in other contracts, only such diligence was required as the person in question was in the habit of taking in his own affairs: 'talem praestare diligentiam qualem in suis rebus adhibere solet,' and failure to comply is termed 'culpa levis in concreto.' Examples of persons from whom the lower standard was expected are the man with whom a thing was entrusted by way of depositum, partners, tenants in common, and co-heirs. There does not seem to be any very logical basis for requiring exacta diligentia from some contracting parties, and the lower degree from others. The suggestion that the amount of care expected depended upon whether the person was benefited or not,[1] does not explain why the negotiorum gestor (who could make no profit) was obliged to display exacta diligentia, or why partners, tenants in common, and co-heirs need only satisfy the lower standard, for they mutually benefited by the relationship between them.

NOTE VIII

Cumulative and other Liability (Correality and Solidarity)

If two or more persons were entitled to the benefit of an obligation (*e.g.* as creditors), or were liable upon it (*e.g.* debtors), the legal effect was not always the same.

1. The rights and the liabilities might be *cumulative.* B, C, and D suffer injuria from A; *e.g.* A publishes a libel about B, who is the wife of C, and the filiafamilias of D. Each has an independent right against A, and can bring the actio injuriarum, and one action does not bar the others, *i.e.* A, after paying damages to B, can still be compelled to pay them to C and D. Conversely, A's property is injured (damnum injuria datum) by the joint act of B, C, and D, and the damages are assessed under the lex Aquilia at 100 aurei. B, C, and D are each liable for the whole sum, exactly as if each had been the sole wrongdoer, and A can, therefore, obtain 300 aurei in all.

2. The creditors may be entitled or the debtors liable, not cumulatively, but either *in solidum* or as *correi.*

Inasmuch as these forms were more common in the case of

[1] Poste, pp. 429-430.

debtors than creditors, it is proposed to deal only with the liability of debtors in this note.[1]

When debtors were liable in *solidum*, each was liable by a distinct obligation for one and the same object, and for the whole object, though (as was not the case in cumulative liability) when one debtor satisfied the creditor the others were released.

When debtors were liable as *correi* each was liable for the same object, and for the whole object,[2] but the case was distinguished from solidarity, since each debtor was not bound by a separate obligation to the creditor, but all the debtors were bound by one and the same tie. Like solidarity, correality differed from cumulative liability in that the creditor having been once satisfied by one debtor could not proceed against the others.

The fact that there were several obligations in solidarity and only one in correality had the important result that, if the obligations were in solidum they could only be terminated by something amounting to actual performance. If, *e.g.*, B, C, and D each owe A 100 aurei in solidum, payment by B extinguishes all the obligations, but if A sues B and fails,[3] the others (C and D) still remain liable, and the result was the same though A released B by acceptilatio. Since, on the other hand, correality involved one obligation only, such obligation was extinguished against all the debtors, not merely by performance by one debtor, but by the obligation being extinguished in any other way; *e.g.* if, in the time of Gaius, the creditor sued one debtor and the action reached litis contestatio, or if the creditor released one debtor by acceptilatio, or the obligation was novated. Examples of persons liable in solidum are joint wrong-doers in respect of their liability to pay compensation (but not for the penalty), co-tutors and co-agents; examples of persons liable as correi are fidejussors, persons who by a pactum adjectum agreed to be so bound, and heirs upon whom a legacy had been charged alternatively, *e.g.* 'Maevius heres meus aut Balbus heres meus xx aureos Titio dare damnas esto.'

One of several debtors in solidum, who had been called upon to pay the whole debt, had a right of contribution (jus regressus) against the others, but this was not so with debtors who were

[1] Solidarity or correality in the case of creditors is called 'active'; in the case of debtors, 'passive.'

[2] Therefore correality in a sense, contained the idea of solidarity, *i.e.* liability 'in solidum'—'for the whole.'

[3] *E.g.* through some technical defect.

correi, save that such a debtor had the right so far as the others had benefited by the payment, and also, always, in the case of partnership.[1]

3. The last possible form of joint liability was when it was *proportionate*; *e.g.* B, C, and D agree to pay A thirty aurei in all, but the liability of each is limited to ten aurei. This was, in effect, the position of sponsors after the lex Furia.

NOTE IX

The Earliest Contract in Roman Law

Sir Henry Maine's theory, that the stipulation was derived from the nexum,[2] is now generally discredited, but there is little general agreement among modern civilians as to the manner in which the conception was reached among the Romans that some promises ought to be enforced by law. Probably in the earliest times there were only two cases in which a promise was enforced, viz. where made by a solemn oath (jus jurandum), though the sanction in such case was a religious rather than a legal one, or where the promise was to repay money lent by means of a nexum. The mancipatio itself was, in a sense, a contract, viz. of sale, but it was an executed contract, for the price was paid and the thing delivered at the time; there was, therefore, no outstanding obligation. From the jus jurandum it is probable that the stipulation was derived, while the mutuum may be regarded as the child of the nexum; accordingly, the verbal contract, and that particular form of real contract (the mutuum) which was concluded by the delivery of money or other res fungibiles, would seem to be among the oldest methods of producing an obligation from agreement in Roman Law.

Obviously, the introduction of the doctrine of a fictitious mancipation fiduciae causa must, at a very early date, have rendered possible, as *legal transactions*, not merely a gratuitous loan, a gratuitous deposit, and a mortgage, but also an executory contract of sale and a contract of hire for reward. As time went on it would be seen, no doubt, that there was a moral and equitable basis for imposing an obligation upon the parties

[1] By special enactment some correi debendi were, in effect, relieved of the liability (always involved in correality) to pay the whole (in solidum), *e.g.* Hadrian, as above stated, gave the beneficium divisionis to fidejussors.

[2] *Ancient Law*, p. 326.

in these transactions, apart from the formal mancipatio cum fiducia.

This moral basis was that the parties had seriously agreed to be bound; but the Roman lawyers, somewhat artificially, recognised this, in terms, in regard to the so-called 'consensual' contracts only; for in the case of the real contracts the obligation in the developed law (when the mancipatio had disappeared) springs 'ex re tradita.' The point of vital importance, however, is that at a comparatively early date the conception was reached that the mere agreement of the parties might, apart from form, produce a vinculum juris; for the subsequent expansion of the Roman contractual system was rendered not only easy but inevitable.

That the literal contracts were of comparatively late date is apparent from the fact that they imply a somewhat advanced system of book-keeping. The objection to placing contracts 'litteris' after the verbal contracts, in historical order, is that it would appear to have been unnecessary to invent a rather formal method for creating obligations which were confined to money payments, when by a simple question and answer any sort of obligation could be created, for which an exceptionally good remedy was available. The answer probably is, that the normal purpose of the literal contract was not to create a new, but to novate an existing obligation, and that among commercial men such purpose could in no way be so simply and well fulfilled as by a ledger-entry.

The Roman and the English law of contract have certain points of resemblance. Both in the case of the stipulatio and the contract under seal a promise is enforced, not by reason of its inherent reasonableness, but because it has been expressed in a certain formal manner; if, in England, a promise is not made binding by reason of its form, consideration must be proved, and something very like consideration is found in many of the Roman formless contracts, *e.g.* in the consensual contracts (save 'mandatum') and pignus. The point of difference, however, is that at Rome a contract, which was neither formal nor based in any sense on consideration, could sometimes be enforced, *e.g.* the mutuum where, since interest was not payable, the lender obtained no advantage of any sort.

PART III

ACTIONS

THOUGH it is impossible to trace any very scientific plan in the treatment by Gaius and Justinian of the law of actions, it is clear that they use the term action in two distinct senses, sometimes to denote the right a man has to the assistance of the Courts when an existing right has been infringed, and at others to describe the procedure by which the remedial right is enforced.[1] It is proposed to deal with the subject as follows :—

1. General view.
2. Division of actions.
3. Compensatio and deductio. Plus petitio.
4. Actiones adjectitiae qualitatis, noxal actions, and pauperies.
5. Exceptions.
6. Interdicts.
7. Modes of execution.

[1] A right, as such, *i.e.* apart from infringement, whether in rem or in personam, is sometimes called a substantive right, which, after infringement, gives rise to another or *remedial* right, viz. to the assistance of the law. In so far as remedial rights are described in the law of actions, and in so far as the corresponding substantive rights are not dealt with in the earlier part of the *Institutes*, the law of actions may be regarded as indirectly explaining some substantive law, *e.g.* that part of agency which depends upon the actiones adjectitiae qualitatis.

8. Restraints on vexatious litigation. Satisdatio.

9. Criminal law; and finally, a note on agency both in relation to actions and generally.

Section I. General View

The manner in which a trial was conducted at Rome varied from time to time; originally the trial was by means of a legis actio; in the time of Gaius it was conducted under the formulary system, which, in turn, was replaced by the system of extra ordinaria judicia. The three methods will be considered in detail.

Subsect. 1. *The Legis Actiones*

There is a time in nearly every community when there are no courts, when there is no settled law; when might is right, and the remedy an individual has for a wrong done to him, or to his family or goods, is that which he can secure for himself, *e.g.* by killing or otherwise injuring the offender, or, by a foray, depriving him of his possessions, *e.g.* his wife or his cattle. In a progressive society this period is followed by a time when self-redress still prevails, but has come to some extent within the control of the State; private vengeance is still seen, but it is taken under State regulation. This jurisdiction the State (as at Rome) may obtain, either by offering to the injured party (as in the actio furti manifesti) at least as great an amount of revenge as he could himself obtain, or by inducing him to submit the dispute to some indifferent third person.[1] Later

[1] This may account for the fact that for so many centuries the judge at Rome was not a magistrate or State official, but a private individual.

comes the period when the State asserts sole jurisdiction, and punishes a wrong (whether arising from delict or consisting in mere breach of contract), without any regard to the consideration that if the person injured is not satisfied he may take the law into his own hands; for the State has become strong enough to punish him if he tries to do so. This period had been reached at Rome, for all practical purposes,[1] many years before the time of Gaius; but with a lawyer's regard for antiquity, Gaius describes an older procedure, which consisted of five methods (legis actiones),[2] by means of which a dispute could be withdrawn by the magistrate (in jure) from the possibility of violent settlement, and submitted to the decision of a private individual (in judicio); and of these forms two, though they might in their developed form result in a proper trial, were, at first, methods by which an individual, under State assistance and regulation, redressed his own wrongs. The legis actiones are five in number:—

(*a*) Sacramentum.
(*b*) Judicis postulatio.
(*c*) Condictio.
(*d*) Manus injectio.
(*e*) Pignoris capio.

(*a*) *Legis actio sacramenti.*

A legis actio generally may be described as a proceeding in jure,[3] authorised by statute or custom, with

[1] Though some forms of private violence were only finally abolished by the constitution of Theodosius, Valentian, and Arcadius, 389 A.D.

[2] Gaius uses the term 'legis actio' in two senses—(*a*) as above, to denote a method of procedure; (*b*) as denoting a particular remedy, *e.g* the actio arborum furtim caesarum (*cf.* Muirhead, Gaius, p. 269).

[3] *I.e.* before the magistrate.

the object of securing a trial in judicio;[1] and the method employed in this particular case was the wager from which the action took its name. The legis actio sacramenti was applicable where no other form was appointed by statute both to claims in rem and in personam. Where it took the form of an action in rem, the proceedings were as follows: the plaintiff secured the presence of the defendant in court, the XII. Tables entitling him, if the defendant refused to come, to bring him by force, and the object in dispute (*e.g.* the slave) had also to be there.[2] The plaintiff then, holding a wand (festuca) in one hand, seized the object with the other and claimed ownership: 'hunc ego hominem ex jure Quiritium meum esse aio secundum suam causam sicut dixi; ecce tibi vindictam imposui,' 'I claim this man in Quiritary right, according to the claim I have already explained,[3] behold, I have laid my wand upon him'; and the plaintiff accordingly placed his wand upon the slave in token of ownership. Thereupon the defendant went through exactly the same ceremony, and used the same words, and then the praetor ordered them both to release the slave: 'mittite ambo hominem,' which they did.[4] The plaintiff next asked for the defendant's title: 'postulo anne dicas qua ex causa vindicaveris,' the defendant's reply being a general assertion of owner-

[1] *I.e.* before a private judex.

[2] If this was impossible, *e.g.* the object were land or a house, some part of it, such as a clod, was brought by way of symbol.

[3] *I.e.* before the appearance in court. But see Muirhead, Gaius, p. 274

[4] Sir H. Maine (*Ancient Law*, p. 376) secs in this the dramatisation of the origin of justice. In the earliest times two men are disputing ownership, armed not with wands but with spears (hastae), which the wands in a later period represented. A 'vir pietate gravis' passing by, 'regit dictis animos et pectora mulcet,' and induces them to make a bet on the dispute, and submit the question to an arbitrator.

ship, 'Jus feci sicut vindictam imposui,' 'I did right as I laid my wand upon the object.' Whereupon the plaintiff denied the right, and challenged the defendant to a bet, 'Quando tu injuria vindicavisti, D aeris[1] sacramento te provoco,' and the defendant made a like challenge, 'Et ego te.' The praetor then[2]—

(*a*) Awarded possession of the slave to one of the parties pending the trial ('vindicias dicebat').

(*b*) Required the person so given possession to give security to his adversary that if he lost the case he would restore the thing and its profits to him ('praedes litis et vindiciarum'); and

(*c*) required both parties to give security (by sureties) for the amount of the bet. The person who, in the result, lost the bet forfeited it, at first, to the priests, later to the State; and originally, it seems, the wagers were actually deposited with the pontifex, so that security for payment was then unnecessary. The amount of the wager was 500 asses, unless the thing in dispute were of less value than 1000 asses, or the action was to determine whether a man was free or a slave, in both of which cases it was fifty asses only.

Ultimately the trial before the judex, which it was the sole object of the above cumbrous proceedings to secure, took place. A lex Pinaria allowed an interval of thirty days before he was appointed. On his appointment the parties (whether the action was real or personal)[3] gave notice of trial for the next day, and at the trial each first explained shortly the

[1] 500 of bronze. But see Muirhead, Gaius, 275, iv. 7.

[2] Some further proceeding, as in a personal action, seems to have taken place before the praetor's award (G. iv. 16).

[3] Nothing is known of the early proceedings in the legis actio sacramenti in personam.

main points of his case (causae conjectio), then the evidence was gone into, and finally the judge determined who was the real owner; though this was only implied by his judgment, the apparent question being merely which litigant had forfeited his wager.[1]

(*b*) *Judicis postulatio.*

Of the legis actio per judicis postulationem nothing is really known, for that part of the MSS. of Gaius which related to it is lost. It is conjectured that where the plaintiff came exactly within the terms of some statute, and his right had been infringed, with the result that he claimed unliquidated damages, he could obtain a judicium by affirming the state of facts which gave rise to his right before the magistrate (in jure), and then claiming to have a judge appointed: 'te praetor judicem arbitrumve postulo uti des.' The term 'unliquidated damages' means that the plaintiff claims not an ascertained (liquidated) sum, such as fifty aurei promised by a stipulation, but an unascertained sum, such as compensation and expenses of illness in 'injuria.'

(*c*) *Condictio.*

The legis actio per condictionem was that form of process (legis actio) under which the plaintiff obtained a judicium by giving notice[2] to the defendant, requir-

[1] Though a single judex is here (and elsewhere) spoken of, proceedings in judicio might take place before several judges. In certain real actions (*e.g.* hereditatis vindicatio) the trial was before the court of centumviri; and the praetor, by virtue of his imperium, might appoint a small committee of citizens as judges, the committee usually consisting of three or five members, who were known as 'recuperatores.'

[2] Hence the name; 'Condicere est denuntiare . . . itaque haec quidem actio proprie condictio vocabatur; nam actor' (the plaintiff), 'adversario denuntiabat ut ad judicem capiendum die xxx adesset' (G. iv 18).

ing the defendant to appear before the magistrate on the thirtieth day from the notice, to have a judex appointed. The account given by Gaius is not at all detailed, but it appears that it was a personal action introduced by a lex Silia in the case of claims for a definite money payment, and that the lex Calpurnia extended it to the recovery of any other certain thing, 'lege quidem Silia certae pecuniae, lege vero Calpurnia de omni certa re.'

The proceedings, probably, were as follows: The plaintiff obtained the presence of the defendant before the magistrate, stated his claim, which was denied by the defendant, and then the parties, at the plaintiff's suggestion, mutually agreed[1] that the person whose claim proved unfounded should give the other not merely the sum or thing in dispute, but one-third of its value as well. In other words, there was a wager, as in the case of the sacramentum, but the wager went to the party who proved successful and not to the State. After this the plaintiff founded his right to a trial by requiring the defendant to appear on the thirtieth day to have a judge appointed.[2] At the end of the time the plaintiff became absolutely entitled on application to the magistrate to have the judex appointed, and the trial proceeded in the ordinary manner.

Gaius remarks that it is not very clear why it should have been necessary to establish this particular legis actio, because a claim could equally well have been enforced by the two other methods. The

[1] By a sponsio poenalis on the part of the defendant, followed by a restipulatio by the plaintiff.

[2] It is possible that, at a later period, the wagers and the condictio took place out of court.

most probable explanation is that it afforded creditors a simpler remedy than that given them by the sacramentum, and a more effective one than that provided either by this last-named actio or the judicis postulatio, viz. the amount of their claim together with a third as penalty.

When the legis actiones had become fully developed it is not unlikely, as Mr. Poste suggests,[1] that the sacramentum was practically confined to real actions before the centumviri; condictio applied to claims on a mutuum, a stipulation for some definite sum or thing and to money due on a literal contract; while the judicis postulatio would be the personal action for unliquidated claims, *e.g.* on a stipulation of uncertain value, such as one to perform services.

(*d*) *Manus injectio.*

Originally *manus injectio* had no necessary connection with an action; it was a method of execution upon the person, *i.e.* the creditor took the body of the debtor in satisfaction of his claim, as authorised by the XII. Tables; which in effect provided that a man who either had admitted that he owed another money (confessus debitor), or had been adjudged liable to pay by the court (judicatus), should have thirty days in which to pay. At the end of that time the creditor might lay hands (manus injectio) upon the debtor and take him before the magistrate. If the debtor did not pay the debt and no one opposed the claim on his behalf,[2] the plaintiff took him away, put him

[1] P. 463.

[2] The debtor could not personally defend, being reduced by manus injectio to quasi-slavery; if he had any answer it had to be made by another (vindex).

in fetters, and provided him with corn daily, unless the defendant preferred to find his own food. This continued for sixty days, and on three consecutive market days the plaintiff had to produce the debtor publicly before the praetor and proclaim the amount due. Failing satisfaction the debtor, on the last of these days, could be killed (capite poenas dabat) or sold as a slave 'trans Tiberim.' If there were several creditors they could cut the debtor up and divide him between them.[1]

This method of execution was practically obsolete in the time of Gaius, but he gives a brief account of what looks like its developed form. The plaintiff, according to Gaius, after stating that the defendant was condemned to pay him so much money, announced that he arrested him for it, at the same time seizing his body.[2] The debtor was not allowed to resist arrest or to personally defend the claim, and, if he failed to secure a 'vindex' to defend the action for him (or to pay the debt), he became 'debitor addictus' to the creditor, who took him home and put him in chains. Gaius gives no description of the subsequent proceedings, and his statement, so far as it goes, corresponds substantially with the provision of the XII. Tables; but it is obvious both from the above statement with regard to the vindex and his account of the other forms of manus injectio, in some of which the

[1] Another form of 'manus injectio' under the XII. Tables was where a plaintiff, before witnesses, arrested a defendant in order to secure his presence before the magistrate.

[2] Possibly before the magistrate, but Gaius does not expressly affirm this, and there is some ground for thinking that manus injectio took place out of court, and that the debtor was adjudged to the creditor by the magistrate subsequently.

debtor could personally defend,[1] that in its developed form manus injectio was regarded rather as a means of founding a judicium by a legis actio per manus injectionem than as a mode of execution. For Gaius tells us that manus injectio, at first confined to the 'confessus' and 'judicatus,' was afterwards extended not only to persons placed by law in the position of judgment debtors (pro judicatis), but to other cases (manus injectio pura). The lex Publilia, *e.g.*, gave manus injectio to a surety who had paid the debt, against the principal debtor unless repaid by him in six months, and the lex Furia de sponsu allowed it against a creditor who had exacted more than a proportionate share of his debt from one of several sponsors. Similarly, manus injectio pura (*i.e.* in cases other than where given against 'pro judicatis') was granted under the lex Furia testamentaria against legatees who received more than 1000 asses from a testator, and by the lex Marcia against usurers who had exacted interest on a loan. If manus injectio had continued as a mere form of execution, it is extremely unlikely that so barbarous a remedy (even as modified by the lex Poetelia) would have been extended to cases not already covered by it, and it is almost inconceivable that a legislative body should have been at once so humane as to come to the assistance of the sponsor whose bad bargain had placed him in an unlucky position, but in no sort of vital danger, and yet so heartless as to find a remedy for him by subjecting the other party to one of the most savage legal institutions on record. Moreover, Gaius not only

[1] *Vide infra*, and Gaius iv. 22-25.

describes manus injectio as a means of proceeding by legis actio, but expressly states that after the lex Vallia every person so sued ('cum quibus per manus injectionem agebatur') could resist arrest and personally defend the action, except the judgment debtor and the principal indebted to his sponsor. The irresistible conclusion, therefore, is that in its developed form manus injectio was an alternative remedy.[1] If the debtor had no defence and could not satisfy the creditor, it was execution; if he had a defence manus injectio was a legis actio which (like the three last described processes) enabled the creditor to have the case tried before a judex, the action being defended by the debtor in person in all save the two excepted cases.

(*e*) *Pignoris capio.*

There is more room for doubt whether the so-called legis actio per pignoris capionem ever amounted to a legis actio proper, *i.e.* a means of obtaining a trial before a judex. As described by Gaius (though it was obsolete in his time), pignoris capio was execution, not on the debtor's person, but upon his property; the nearest English term being 'distress.' Gaius says it was employed in some cases by custom, in others by statute.[2] By custom, pignoris capio was granted to soldiers against the persons liable to provide either their pay (aes militare), or money to buy a horse (aes equestre), or money to buy barley for the horse (aes hordiarium). By statute, the remedy lay in default of payment, against (i.) the purchaser of

[1] Even under the XII. Tables the debtor could only be taken away if no one opposed on his behalf; hence it is possible that from the earliest times manus injectio might lead to some sort of trial.

[2] *I.e.* the XII. Tables.

a victim for sacrifice; and (ii.) the hirer of a beast (jumentum), which had been let to him to raise money for an offering to Jupiter Dapalis. Further, the censor allowed a farmer of the public revenue to use pignoris capio against persons who failed to pay their taxes.

Since, in all these cases, the person who made the distress had to use a set form of words ('certis verbis pignus capiebatur'), Gaius says the proceeding was generally considered a form of legis actio; but that others thought that it was not so, being performed in the absence of the praetor and often of the other party, whereas a legis actio proper took place in the presence both of the praetor and the defendant;[1] and, further, because pignoris capio could be made even on a dies nefastus, when a legis actio was impossible.

It will be noticed that pignoris capio means literally 'the taking of a pledge,' *i.e.* security for payment, and Gaius does not state what was to happen on failure of payment. Probably the pledge thereupon became the absolute property of the distrainor, *i.e.* free from any right on the part of the debtor to redeem the pledge by subsequent payment. But it is at least possible that, where the debtor disputed his liability, the distrainor applied to the magistrate for a judge to decide the case, in which case pignoris capio might become a legis actio in the true sense; and inasmuch as the act necessarily took place out of Court, the objections, which Gaius mentions, would not have much weight; for the application to the magistrate for the appointment of a judex, to which

[1] A statement which supports the theory that the developed form of manus injectio took place in Court.

the plaintiff was entitled by his extra-judicial legis actio, could be made on a subsequent dies fastus, and in the presence of all parties. This conjecture is, to some extent, supported—(i.) by the fact that, under the later (formulary) system, a farmer of revenue sued on the fiction of a distress having been made, for whatever sum the debtor would have had to pay for redemption, had such distress in fact taken place;[1] and (ii.) by the analogy of the English action of 'replevin,' which is founded on a distress; in England, however, it is the person subjected to distress who appears as plaintiff.

Subsect. 2. *The Formulary System*

(*a*) *The introduction of the system.*

The chief defects of the legis actio system were as follows—

(1) Its extreme technicality (nimia subtilitas): a litigant, however strong the merits of his case might be, failed altogether by making even the slightest mistake in procedure. It was, as Gaius points out,[2] necessary for him to keep exactly within the terms of the law which gave him the right he was asserting; so, if the precise legal right were to proceed against another for cutting down trees (arbores), the plaintiff who sued a man for cutting down his vines (vites) failed, if he so termed them in his pleading. The jurists held that vines came within the spirit of the XII. Tables, which gave the action 'de arboribus succisis'; but the letter of the law must be adhered to, and to successfully claim the benefit

[1] G. iv. 32. [2] G. iv. 11.

of the interpretation, 'vites' must be described as 'arbores.'

(2) Once the solemn words of the legis actio had been pronounced in jure, and the issue between the parties so formulated, the proceedings reached what was called 'litis contestatio,'[1] which had the effect of wholly destroying the plaintiff's original right of action; thenceforth he could rely solely on his new right, that the trial should be undertaken by a judex, and the defendant, if in the wrong, condemned. From this it followed that failure to keep within the letter of the law during the procedure in jure, meant not only that the particular action must fail, but that the right to sue at all had gone for ever. The original right was extinguished by litis contestatio, and the new right to have a trial failed, being based on a defective legis actio.

(3) The system was incapable of adequate expansion. In theory no right could be enforced by a legis actio unless it came within the letter of some existing law; and though the early jurists did something to remedy this, it was, obviously, only possible by interpretation to deal with cases that were in some sense analogous; so that no right which was substantially a new right could obtain any sort of recognition, however much such recognition might be desirable, having regard to the increasing complexity of affairs.

Hence, Gaius says, legis actiones were, save in two cases, abolished by the lex Aebutia and two leges Juliae, in favour of litigation by certain set forms of words or 'formulæ,' 'per concepta verba, id est per formulas,' and he states that the excepted cases

[1] *Cf.* the English term 'joinder of issue.'

were damnum infectum and cases before the centumviri. This is a somewhat bare account of a lengthy and interesting development.

The essence of a proceeding by legis actio was that by means of the words and acts of a legis actio an issue (litis contestatio) was arrived at before the praetor (in jure); which issue the plaintiff was entitled to have tried, in judicio, by a judex. In the formulary period the distinction between in jure and in judicio remained, but 'litis contestatio' was reached, and the subsequent judicium obtained, not because the forms of a legis actio had been complied with, but because the praetor, on the application of the plaintiff and after hearing both parties, had drawn up a written instrument (formula or concepta verba), naming a judex, and briefly describing the point to be tried, and the allegations of the parties. In other words, the trial arose from the composition of a written document on the part of a magistrate, not from a dramatic exhibition.

The most probable theory with regard to the source of this second system of procedure is, that it was originated by the praetor peregrinus in relation to foreigners. A suit by legis actio was a judicium legitimum, and, as such, only available for and against Roman citizens. When, therefore, the praetor peregrinus (242 B.C.) began to evolve his rules drawn from jus gentium for cases where one or both parties were peregrini, it was necessary for him to find some procedure by which the actions could be tried. He might, of course, by virtue of his imperium, have anticipated the later extraordinaria judicia by trying the case outright himself. A more obvious and conservative course, however, was adopted; for, modelling

his procedure on that of the praetor urbanus, the praetor peregrinus appointed, not, it is true, a single judge, as was usual at jus civile, but several recuperatores to try the issue; which, as it could not rest on any lex, the praetor, on his own authority defined for them at the time of their appointment. If, after hearing the evidence, the judges held that the facts alleged by the plaintiff (*e.g.* that he had been struck without cause by the defendant) were proved, the defendant was to be condemned, otherwise he was to be acquitted. The order appointing the judges, and stating the issue for them to try, was soon termed the formula, being drawn up in accordance with the set forms (concepta verba) which the praetor had announced in his edict, and a trial conducted in this way was known as a judicium imperio continens (resting on the authority of the praetor), as distinguished from a judicium legitimum, *i.e.* one for citizens, and resting on a lex.

The obvious advantage of starting an action by a simple formula, capable of adaptation to any set of circumstances, must have been apparent enough to the praetor urbanus, and would probably have been adopted in his Court at a much earlier stage than it was but for the fact that such a course would have produced strong opposition from the Pontifical College, who had always been closely associated with the earlier procedure. In the end, however, the Legislature interfered, with the result, as Gaius says, that the legis actio system became displaced by its more scientific rival. The first lex,[1] the lex Aebutia (about

[1] There is no certainty about the actual provisions of any of the three laws. See generally on the subject Wlassak, *Processgesetze.*

150 B.C.), allowed litigants before the praetor urbanus to proceed at their option either by means of a legis actio or by formula. So that thenceforth a judicium, even though produced by formula only, might be a judicium legitimum, provided the other requirements of such a trial (viz. that there was one judex only, that the parties were citizens, and that the trial took place within the first milestone from Rome) were satisfied. The first lex Julia[1] abolished the alternative procedure, and made action by formula compulsory in all cases, except those before the centumviri and damnum infectum, while the second lex Julia made the same reform for municipalities outside Rome.

After the leges Juliae, therefore, the formulary system was absolutely established, save in the two cases mentioned by Gaius, and save in what is called the praetor's 'voluntary jurisdiction.' The legis actio survived in centumviral cases (*e.g.* vindicatio hereditatis) because, there being already a Court (*i.e.* the centumviri) to try such actions, it would be unnecessary and improper for the praetor to appoint a judex or devise a formula; and actions were still tried by sacramentum before the centumviri as late as Diocletian. In the other two cases,[2] the appointment of a judex and the use of formulæ were also unnecessary. Damnum infectum, under the legis actio system, secured protection to a person threatened with damage, by means of pignoris capio, so that it usually did not involve any trial. Hence a formula was not required and damnum infectum in theory survived as a

[1] Both were probably passed about 17 A.D.

[2] *I.e.* damnum infectum and the voluntary jurisdiction.

legis actio; though, as Gaius says, no one thought of proceeding in this way in his time (when the formulary system was in full vigour), for it was infinitely better to require the person from whose property danger was feared to enter into a stipulation before the praetor. Finally, the 'voluntary jurisdiction' of the praetor, which chiefly consisted in being present at adoptions, manumissions, emancipations, and in jure cessio generally, never involved a real trial. In all these cases of fictitious law-suits, one party admitted the right of the other in jure, and there the proceedings came to an end. As in damnum infectum, therefore, since there was no trial, there could be neither a judex nor a formula; and, therefore, the legis actio procedure survived here also, long after the formulary system had become the sole means of trying ordinary actions.

(*b*) *The development of the formula.*

It has been stated already that there was nothing revolutionary in the praetorian reforms, and it is not to be supposed that, capable as the formula was of securing a trial for a violation of any sort of right, the praetor granted such remedy without discrimination. At first, probably, the formula existed (so far as the praetor urbanus was concerned) as a novel means of enforcing a right already recognised by the civil law; as time went on and the reasonable nature of the institutions of jus gentium, as administered by the praetor peregrinus, came to be appreciated at their true value, new remedies, based upon this law, might be announced by the praetor urbanus in his edict upon which the formulæ depended. But so tentatively was the work of reform undertaken that

the praetor, when a new set of facts came up for decision, would only grant a formula on the fictitious assumption that certain facts, which were not present, really existed, and that, therefore, a right already recognised by jus civile had been infringed. Thus a bonorum possessor and the purchaser of a bankrupt's estate (bonorum emptor) sued on the fiction (ficto se herede) that the former was the heir at jus civile of the deceased, the latter of the bankrupt. The actio Publiciana was of the same nature, the fiction being that the plaintiff had obtained dominium by means of usucapion. So too, the false assumption might be that a peregrinus was a Roman citizen (*e.g.* to enable him to sue or be sued by the actio furti [1]), or that a capite minutus (*e.g.* a person arrogated) was in fact sui juris, so that his creditors might sue. Later the praetor, feeling more certain of his ground, proceeded directly,[2] by virtue of his imperium, to grant an action (in factum concepta), where there was no civil remedy, without resorting to any fiction. Another means, besides fictions, by which the formula was developed, was the *actio per sponsionem*, which was, probably, the only method at first by which the formula could be made applicable to a real action. The actio per sponsionem, which closely resembles the legis actio sacramenti, depended on a bet, which the parties entered into in order to enable the ownership of the thing to be incidentally determined. On the bet a formula 'in personam' ('if it appears that the defendant ought to pay') could be drafted and, as in the sacramentum, the decision incidentally determined the disputed question of ownership. Since the bet

[1] G. iv. 37. [2] *I.e.* without resorting to a fiction in any sense.

was merely intended to enable this, the real question, to be tried, it was not within the contemplation of the parties that it should be really paid; the sponsio, therefore, was called *praejudicialis*, as distinguished from the wager in the condictio which was paid, and therefore called *poenalis*. In the developed law, however, a *formula petitoria* was devised, whereby the dispute as to ownership could be directly submitted to the judge. 'If it appears that A is owner, then, unless B restores the object in dispute, condemn him in a money payment.' This formula is the most common example of the *actio arbitraria*. There was an arbitrium or alternative, because if the plaintiff succeeded, the defendant might elect, under the terms of the condemnatio, either to return the thing or to be condemned to pay the sum at which the plaintiff on oath (jus jurandum in litem) estimated its value.

(*c*) *The formula.*

In order to obtain the formula the plaintiff had to summon the defendant before the praetor (in jus vocatio). If the defendant failed to obey the summons, or to come to terms with the plaintiff, or to furnish a vindex to answer for him, the praetor provided a penalty in his edict (G. iv. 46), and if the defendant lay concealed to avoid summons, the praetor gave the plaintiff possession of his estate.

If the hearing in jure could not be finished on the day of appearance, the defendant had to enter into recognizances (vadimonium), *i.e.* to promise, in answer to a stipulation, to appear on the day appointed. When the defendant was only required to do this, the vadimonium was 'purum'; but in certain cases he

had to be supported by sureties, in others to make the promise on oath, in others recuperatores might be appointed to condemn the defendant in the amount of his vadimonium if he failed to appear (G. iv. 184-185). In the case of the actio judicati[1] and the actio depensi the vadimonium was for the whole sum sued for; in other cases fixed by the plaintiff's oath, but could not exceed half the value of the thing in dispute, or 100,000 sesterces.

A formula always began with the appointment of the judge who had been agreed upon by the parties: 'Titius judex esto'; it usually contained also (i.) a demonstratio, (ii.) an intentio, and (iii.) a condemnatio, and these may be regarded as the most essential clauses. An example of a formula containing all three is as follows: Balbus claims from Stichus the purchase money, 10,000 sesterces, of a slave, and Titius is judge: the pleading runs: 'Titius judex esto. Quod Balbus Sticho hominem vendidit' (the demonstratio), 'Si paret Stichum Balbo sestertium x milia dare oportere' (the intentio), 'Judex Stichum Balbo sestertium x milia condemna. Si non paret, absolve' (condemnatio). 'Let Titius be judge. Whereas Balbus sold a slave to Stichus. If it appears that Stichus ought to give 10,000 sesterces to Balbus, do you, O judge, condemn Stichus to Balbus in 10,000 sesterces. If it does not so appear, absolve him.'

(i.) The *demonstratio*, Gaius says, was that part of the formula inserted at the very beginning to show

[1] An action on a judgment 'in duplum' against a defendant who denied liability and leading up to execution, *i.e.* venditio bonorum (*infra*, p. 411), could be founded on it.

what was the matter in dispute. It was, therefore, a short recital of the material facts of the case, and always began with 'Quod,' 'Whereas.' Sometimes it was unnecessary, as where Balbus sued *in rem* to recover his slave, in the possession of Stichus,[1] in which case the intentio would come after the nomination of the judge: 'Si paret hominem quo de agitur ex jure Quiritium Balbi esse,' and the condemnatio would leave the amount of compensation to be settled by the judge: 'Quanti homo est, tantam pecuniam, judex, Stichum Balbo condemna. Si non paret absolve.'

(ii.) The *intentio* was that clause of the formula which contained the plaintiff's *statement of claim*, and in the intentio the plaintiff either alleged a civil law right (when the intentio was 'in jus concepta') or a state of facts which the praetor considered ought, in equity, to constitute a right ('in factum concepta'). The word 'paret' is the mark of this clause which, in addition to the nomination of the judex, was the one thing absolutely necessary in every action; for, obviously, there can be no suit without a statement of claim. Sometimes the formula might consist solely of the judge's nomination and the intentio; *e.g.* where some preliminary issue had to be determined, such as whether a given person were a freedman or not; a question of fact which, since it involved no liability on the part of any third person, did not require a condemnatio. As will appear later, in discussing the division of actions, it was upon the wording of the intentio that the form of action depended (*e.g.* whether in rem or in personam).

[1] It was also unnecessary in a condictio certi.

(iii.) The *condemnatio*, which appeared in nearly every case, but never alone, was the clause which empowered the judge to condemn or absolve according to whether the plaintiff proved his case or not. The condemnatio was 'certa' where, the claim being for a liquidated amount (*e.g.* fifty aurei), the judge was told to condemn in that amount;[1] it was 'incerta' where the damages were left to the judge; and his right to assess damages might be unfettered (*e.g.* as above: 'Quanti homo est, tantam pecuniam . . . condemna'), or such right might be limited by the formula (*e.g.* 'condemn in what you consider the value, but not beyond (dumtaxat) ten thousand sesterces'), in which case the condemnatio was 'incerta cum taxatione.' The condemnation clause (whether certa or incerta) was always framed so as to authorise the ultimate judgment being given for a sum of money. Hence specific performance or restitution could not be decreed in an action for the recovery of corporeal property: 'judex non ipsam rem condemnat eum cum quo actum est, sicut olim fieri solebat, sed aestimata re pecuniam eum condemnat' (G. iv. 48). But, as above pointed out, specific restitution was practically obtained by means of the formula petitoria. Gaius seems to imply ('sicut olim') that under the legis actio system, specific restitution could be ordered.[2]

Besides the above three clauses the following (or some of them) might be met with: (iv.) praescriptio, (v.) exceptio, (vi.) replicatio, (vii.) adjudicatio.

(iv.) The *praescriptio*, when inserted, came at the

[1] If he gave more, 'litem suam fecit.'

[2] But see Poste, p. 498.

head of the formula,[1] after the appointment of the judex, and might be required either in the interest of the plaintiff (pro actore) or of the defendant (pro reo). When 'pro actore' the object of the praescriptio was to limit the effect of the action. If, *e.g.*, a plaintiff had a right to a series of acts from the defendant (such as the yearly payment of money), and suing for one of such acts only, his claim was a general one ('whatever it appears[2] the defendant ought to give the plaintiff'), the whole obligation of the defendant was submitted to the judge, and, therefore, acts which were not yet due were included. Such acts, obviously, could not be embraced in the condemnation, nor could they be made the subject of a new action when the time came;[3] hence the plaintiff would be unfairly prejudiced unless the action were expressly confined by a praescriptio to the present act: 'Ea res agatur cujus rei dies fuit,' 'The action is to relate solely to what is now due.' When the praescriptio was 'pro reo' it represented some plea, by way of defence, which was considered important enough to be gone into at once; *e.g.* Balbus sues Stichus for a slave. At the hearing in jure to settle the formula, Stichus alleges that the sole claim of Balbus to the slave is as heir to Titius, and that he, Stichus, also claims to be heir. The praetor considers it unfair that the question of heirship should be settled in this indirect manner. Balbus, however, claims his action, and the praetor, to protect Stichus, limits the action: 'Ea res agatur si in ea re praejudicium hereditati non fiat,' 'Let the

[1] Hence its name: 'praescriptiones sic appellatas esse ab eo quod ante formulas praescribuntur plus quam manifestum est' (G. iv. 132).

[2] 'Quidquid paret.'

[3] G. iv. 131.

action proceed if it does not prejudice the question of heirship.' Then, if it turns out that Balbus has no other title than that of heir, the whole action falls to the ground. Gaius tells us that in his time the only kind of praescriptio was that 'pro actore,' for it had become customary to raise the pleas, formerly made at once by praescriptio pro reo, later in the formula, *i.e.* by way of defence (exceptio) to the plaintiff's intentio.

(v.) The *exceptio* was a special defence raised immediately after the intentio. If the defence was the common one, that the facts did not justify the plaintiff's claim in his intentio, an exceptio was unnecessary; the fact that the defendant denied the claim was implied, for, otherwise, an action was unnecessary. Instead, however, of adopting this course, the defendant might, though unable to dispute the claim, rely upon certain facts, not stated by the plaintiff, which, if proved, made the action either inequitable or otherwise improper, *e.g.* that the stipulation sued on had been obtained by fraud (exceptio doli), or that the plaintiff had promised to release the debt (exceptio pacti de non petendo). The burden of proving the exceptio fell upon the defendant, 'in exceptionibus reus actor est,' save that if the exceptio were 'non numeratae pecuniae' the onus was shifted to the plaintiff, who had to show that the advance had in fact been made. A defendant who relied upon an exceptio as a special defence could not raise it before the judge (in judicio) unless it had been urged previously in jure and the appropriate exceptio inserted in the formula; the only qualification being that if the defence were an equitable

one merely,[1] and the trial a bonae-fidei judicium,[2] the express insertion of an exceptio embodying the defence was unnecessary, for 'doli exceptio[3] bonae-fidei judiciis inest.' The exceptio began with the words, 'Si non' or some equivalent.

(vi.) A *replicatio* was a clause which might be inserted after the exceptio for the plaintiff's benefit, because, if proved, it destroyed the force of the exceptio. A, *e.g.*, claims fifty aurei from B in his intentio; exceptio, by B, in answer, 'pacti de non petendo,' *i.e.* an informal release by A; replicatio, by A, 'pacti de petendo,' *i.e.* that although A had promised to release B, B subsequently undertook to pay the debt in spite of the release. This, if proved, destroys the value of the exceptio, and if A makes out his original claim (intentio) he succeeds.[4] This process of pleading might be carried further by a duplicatio in answer to the replication, and a triplicatio to the duplicatio.[5]

(vii.) The *adjudicatio* only occurred in the case of judicia divisoria (partition suits), and was the clause which enabled the judge to divide the property among the various parties to the suit (*e.g.* co-heirs). The form given by Gaius is 'Quantum adjudicari oportet, judex Titio adjudicato.' Since it rarely happens that property can be divided with absolute equality, the adjudicatio was combined with a condemnatio empowering the judge to order those persons who obtained more than their fair share to pay monetary compensation to the others.

[1] As distinguished from an exceptio founded on jus civile, or relating to procedure. [2] *I.e.* a trial founded upon a negotium bonae-fidei.
[3] And all other *equitable* defences.
[4] G. iv. 126. [5] G. iv. 127-129.

(*d*) *Litis contestatio, the trial, appeals.*

When the formula was complete and delivered to the parties by the magistrate, *litis contestatio* took place, and the proceedings 'in jure' came to an end, Litis contestatio had the following effects:—

(i.) If the proceedings took the form of a judicium legitimum in personam depending upon a question of law,[1] litis contestatio operated as novatio necessaria; the plaintiff's right of action was at an end and replaced by his right, if the trial ended in his favour, that the defendant should be condemned. This effect, however, was not produced by a judicium imperio continens, or by a judicium legitimum if in rem, or if the issue were one of fact.[2] In these cases the plaintiff might bring a fresh action, but if the former action had really covered the same point, the defendant could defeat it by means of 'exceptio rei judicatae,' or 'in judicium deductae';[3] so that the maxim 'de eadem re bis experiri non licet' was absolutely true in the first class of cases, relatively in the second.

(ii.) In a judicium stricti juris the value of the property in question was ascertained at this stage, instead of at the date of the judgment, which was the case where the judicium was bonae-fidei.

(iii.) In all cases the thing in dispute became *res litigiosa*, and could not be alienated.

(iv.) Thenceforth the action was good against heirs, even though originally it could not have been brought against them (*e.g.* actio injuriarum).

(v.) In cases of delict, where the heir was suable so

[1] Formula in jus concepta.

[2] In factum concepta. [3] G. iii. 181

far as enriched, the question was determined at this moment.[1]

(vi.) The action became a 'lis pendens,' and so stopped prescription, *i.e.* the plaintiff could no longer be barred, because he failed to bring his action in due time.

(vii.) From this moment the defendant, if he subsequently failed, was bound to account to the plaintiff for all profits or fruits arising from the object in dispute, and became liable, whether originally so bound or not, for exacta diligentia in the custody of such object.

(viii.) The Proculians held that in an action stricti juris the liability of the defendant was determined at the moment of litis contestatio, and that if he proved, at the trial, to have been in the wrong then, no subsequent event, *e.g.* the accidental destruction of the object, or even payment of everything due, could save him from condemnation. The Sabinians adopted the opposite and more lenient view, on the maxim 'omnia judicia esse absolutoria,' and their opinion was subsequently confirmed.[2]

(ix.) Each party became bound, quasi ex contractu, to abide the result of the trial.

In certain cases the proceedings might never get beyond the hearing in jure. This would be the case—

(i.) Where the object was to obtain security rather than redress, *e.g.* the defendant was required to enter into a stipulation to indemnify the plaintiff in respect of apprehended damage.

(ii.) Where, in lieu of evidence, the matter was decided by the oath of the parties. This could

[1] Poste, p. 400. [2] J. iv. 12. 2.

always be done by agreement of the parties, in which case one had to formally tender an oath (jus jurandum) to the other, and, if accepted, the matter was concluded. If, *e.g.*, the plaintiff tendered an oath to the defendant requiring him to swear that he was not liable, and the defendant accepted the challenge, such oath was final and, the case ending, no trial was required. In certain cases (*e.g.* actio furti) the plaintiff had the right to require the defendant to make oath, when the defendant might retort by demanding that the plaintiff should swear to his own bona-fides (de calumnia jurare); or the defendant might, instead of taking the oath himself, require the plaintiff to swear to the justice of his claim, and if the plaintiff refused the praetor would not grant a trial.[1]

(iii.) A trial was unnecessary where the defendant admitted his liability before the praetor (confessio in jure).

(iv). Sometimes a plaintiff, before asking for a formula, might ask a possible defendant for information (interrogatio in jure), *e.g.* whether the defendant was the heir of Balbus, against whose estate the plaintiff had a claim. If the answer was in the negative, there would be no point in proceeding with the action.

The subsequent trial (judicium)[2] took place on a day fixed by the praetor or the judge himself. The trial was public, the parties appeared personally or by agents,[3] and, in important cases, might have their cause pleaded by orators who, at first, acted

[1] See Roby, ii. 394-397.
[2] See Roby, ii. 407-419.
[3] See p. 422.

gratuitously. Evidence was taken on oath, and, in lieu of evidence, the parties might agree that one should tender the other an oath, as before the praetor,[1] or the judge might himself suggest this method. Finally, judgment was pronounced, which might be interlocutory or final. An example of an interlocutory judgment would be where A sues B in respect of a contract made by B's slave C. The judge first ascertains whether B has benefited by the contract. If the benefit amounts to the whole sum due the judgment is final. Otherwise it is interlocutory, for the judge proceeds to inquire whether the slave has a peculium, and gives a final judgment on that footing.

The judgment was technically called 'sententia,' *i.e.* the opinion of the private individual on the facts, as distinguished from a 'decretum' on the part of a magistrate; and once the sententia had been given the judex was 'functus officio,' *i.e.* he had no power to vary or discharge his decision.[2]

Appeals.—Originally there was no right of appeal from the sententia of a judge, though in exceptional cases the judgment might be, in effect, annulled by the praetor granting 'in integrum restitutio.' But a system of appeals began upon the fall of the Republic and was complete by the time of Marcus Aurelius, and a litigant might take his case from the judex to the praetor who appointed him, from the praetor to the praefectus urbi (or, in the provinces a vir consularis), thence to Caesar.

[1] *Supra.*

[2] For modes of executing a judgment, *vide infra*, p. 411.

Subsect. 3. *The System of Extraordinaria Judicia*[1]

Though the fact was unperceived by Gaius, the way had been prepared for the downfall of the formulary system when Hadrian finally deprived the praetorian edict of its former effect. For the whole procedure by way of formula depended upon the authority of the praetor, and when it was no longer possible for Roman law to keep pace with the needs of the times by means of the edict, the formula, which had no real existence apart from it, could hardly escape from becoming as technical and stereotyped as the legis actiones which it had replaced. It is not surprising, therefore, to find that by another gradual development, the formulary system was overturned in favour of a procedure under which the time-honoured distinction between proceedings in jure and in judicio entirely disappeared, the trial being conducted throughout before a State official.

Even under the older system the public mind had become familiar with the idea that the magistrate might, as in modern times, dispose of the whole matter; for this was, in fact, the case not only in the instances above mentioned, where for some reason the cause came to an end before the praetor, but whenever the praetor acted 'extra ordinem,' *i.e.* outside the regular procedure as he might—

(*a*) By interdict,[2] especially in matters of administration, where the public interest was involved, *e.g.* questions concerning temples, roads, burial-grounds.

[1] *I.e.* extra ordinem judiciorum privatorum. [2] P. 401.

(*b*) In granting in integrum restitutio.

(*c*) In enforcing fidei-commissa, and

(*d*) Where, from the position of the parties, *e.g.* father and son, patron and freedman, a judicium was unsuitable.

Further, from the establishment of the Empire not only were the appeals (which then became more and more customary) conducted entirely without formulae, but whenever the Emperor himself decided a case the delegation was, not to a private judex, but to some officer, such as a praetor or praeses. The first general change was in the provinces, when towards the end of the third century provincial governors acquired the habit of hearing cases 'extra ordinem,' either in person or by deputy (judex pedaneus), without, in either case, employing formulae. Diocletian (294 A.D.) prohibited such delegation to the 'pedanei' save in exceptional cases (which under Julian were confined to 'negotia humiliora'); and since under Diocletian the administration of the law at Rome passed from the praetor to the praefectus urbi, it is, perhaps, safe to conclude that after the time of that Emperor the new system had everywhere definitely displaced the older procedure. It only remained for a constitution of 342 A.D. to abolish the formulae in their entirety.[1]

The system of extraordinaria judicia as developed under Justinian was as follows: In the first place, it was no longer requisite or proper for the plaintiff personally to secure the attendance of the other party before the magistrate. The magistrate himself

[1] 'Juris formulae, aucupatione syllabarum insidiantes, cunctorum actibus radicitus amputentur' (Cod. ii. 58. 1).

summoned the defendant to appear on the plaintiff's written petition (libellus conventionis), and this request was served by the magistrate's agent, who might arrest the defendant if he refused to undertake to appear (cautio judicio sisti). The libellus conventionis was very like the intentio of the formulary system, and the modern statement of claim, since it set forth in a succinct manner the nature of the plaintiff's right and the circumstances attending its alleged violation. It had to be signed by the plaintiff or his agent, and, in addition, the plaintiff undertook, by a cautio (which, like the libellus conventionis, was registered in the acta), to duly pursue his action and to pay the costs of the defendant if unsuccessful. The statement of defence which the defendant was called upon to put in, in answer, was called the libellus contradictionis. Though the whole trial took place before the same magistrate there might be a preliminary stage, corresponding roughly to the old hearing 'in jure,' for, as under the formulary system, there might be an interrogatio in jure; which, however, could be made at any stage of the proceedings and by either party. Similarly, a confessio in jure might take place, and the plaintiff might require an oath from the defendant, even against his will, not only in exceptional but in all cases. Litis contestatio still took place, viz. at the moment when the issue had been definitely arrived at, each party having sufficiently put forward the matters on which he relied; but, although some of its ancient effects remained,[1] litis contestatio no longer operated as

[1] *E.g.* it still prevented the plaintiff's action being barred by lapse of time.

novatio necessaria, nor did it give rise in every case to the exceptio rei judicatae; the exceptio was not available, *e.g.*, where the plaintiff had lost on some technical ground merely; and where an action against one of several correal debtors had reached 'joinder of issue,' the result, under Justinian, was no longer to prejudice the creditor's claim against the rest.

Finally, after hearing the evidence and arguments the magistrate settled the whole matter, no longer by a sententia, but by a decretum, by which any sort of order which the circumstances demanded could be made, since the magistrate was no longer bound by a formula directing condemnation in a sum of money; so, *e.g.*, where the object of the action was the recovery of property, the magistrate might decree specific performance, *i.e.* actual restitution, in lieu of the old practice by way of formula petitoria; in other words, the defendant no longer had the option, in such case, of either paying damages or restoring the object.

Section II. The Division of Actions

Actions may be classified as follows:—

1. *In rem—in personam—mixed.*

An action in rem is one brought in respect of a right which the plaintiff enjoys against all the world, though only one particular individual has infringed it, *e.g.* the ownership of a thing or a servitude. An action in personam is brought to enforce an obligation due only from the defendant (*i.e.* not from all the world) arising from contract or quasi-contract, delict or quasi-delict.[1]

[1] A delict is a violation of a right in rem, but the obligation it gives rise to is a personal one.

The great type of real action was the vindicatio, for the recovery of specific property, as the condictio [1] was the type of personal action. For servitudes the appropriate actions were the actio confessoria, claiming a servitude; the actio negatoria, denying a servitude.

A mixed action was regarded as both real and personal, as it might result in the award of property and condemnation in a money sum; the examples given are the actio familiae erciscundae (among coheirs), the actio de communi dividundo (between partners), and the actio finium regundorum (between owners of adjoining estates).[2]

Prejudicial actions (praejudiciales), to determine a preliminary issue, *e.g.* whether a man was born free, were regarded as real actions.[3]

2. *Actiones civiles or legitimae—actiones honorariae.*

Of the former the vindicatio and the condictio are examples, being founded on the civil law. The latter were those which arose by virtue of the praetor's jurisdiction.

Examples of praetorian real actions are—(i.) the actio Publiciana, which protected a person in possession (which was about to become dominium by usucapion) by allowing the fiction that the period of usucapion was complete; but this action, though it could be brought against third persons whose title was not equal to the plaintiff's, did not lie against the real owner unless the possessor had a good equitable answer to any actio he might bring (*e.g.* exceptio rei

[1] The name survived from the legis actio period (J. iv. 6. 15).
[2] J. iv. 6. 20. [3] J. iv. 6. 13; Moyle, 548.

venditae et traditae);[1] (ii.) actio Pauliana, which lay when a debtor had made a 'fraudulent preference,' *i.e.* given some specific piece of property to a third person to defraud his creditors in bankruptcy, who, by this action, could rescind the delivery and get the property back; (iii.) actio Serviana, which enabled a landlord to enforce his mortgage or lien over his tenant-farmer's goods; and (iv.) actio quasi-Serviana, by which any mortgagee could enforce his rights.

Examples of praetorian personal actions are — (i.) actio de pecunia constituta, to enforce a 'constitutum'; (ii.) actio receptitia, which was an action against a banker based on his undertaking (receptum) to pay or hand over property or money lent or entrusted to him; (iii.) de peculio;[2] (iv.) the action to determine whether an oath had been taken 'an juraverit.' This lay where the procedure was by oath. If, *e.g.*, the plaintiff swore that the money in dispute was due to him, and the defendant refused to pay, the praetor granted a new action, in which the question was no longer on the old issue, but whether or not the oath had been taken. (v.) Actio de albo corrupto, a penal action against any one who tampered with the praetor's album; and (vi.) actions against freedmen or children who proceeded against their patron or ascendant without the praetor's permission.

3. *Actio in jus concepta—actio in factum concepta.*[3]

[1] Conversely, usucapion completed against a man in his absence might be rescinded by an in integrum restitutio (J. iv. 6. 5).

[2] P. 396.

[3] This and the following division were closely connected with the formulary system, and of little interest in Justinian's time.

An action in jus concepta was where the intentio alleged a civil law right either alone, or as extended by the praetor by means of a modified intentio (actio utilis). An actio was in factum concepta when the intentio set out certain facts, which were clothed with a right by the edict only.

4. *Actio utilis—directa—in factum praescriptis verbis.*

Actio utilis.—The praetor, instead of introducing a new right by an actio in factum, might retain the formula applicable to a civil law right, or to an existing praetorian right, and modify it to suit the new facts. An action of this kind was called an 'utilis actio,' *i.e.* an actio utilised to meet new cases; the modification might, but need not, be by means of a fiction (hence the *actio fictitia*, a form of utilis actio).

An *actio directa*, on the other hand, was where the intentio was unmodified, following exactly the words of the civil law or the edict.

An actio utilis might obviously be founded not merely on an existing actio in jus, but on an actio in factum concepta. The praetor, *e.g.* grants in his edict an action (directa), because certain facts exist (in factum concepta), *e.g.* actio Serviana (to a farmer). Subsequently, finding it necessary to protect other mortgagees, besides farmers, he modifies the intentio and so creates a new (utilis) action (quasi-Serviana). Actions both in factum and utiles were praetorian. An actio in jus concepta might be either civil or praetorian, the former where the intentio was shaped on a civil law right, the latter where the intentio depended upon such right as modified by the praetor

(actio utilis in jus concepta). Similarly, with an actio directa, it was civil where the intentio depended on statute or custom, praetorian when given in so many words by the edict.[1]

An *actio in factum praescriptis verbis* (the remedy on the innominate contracts) must be distinguished from an ordinary actio in factum; for the former was an actio in factum *civilis,* with an intentio in jus concepta; the *facts* being set out in the *demonstratio.*

5. *Stricti juris—bonae-fidei—arbitrariae.*

An action *stricti juris* was one brought on a negotium stricti juris, *e.g.* a condictio brought on a stipulation, as opposed to an action founded on a *bonae-fidei* negotium, *e.g.* contracts where the parties were bound not necessarily to the exact performance of their engagements, but (as in all the consensual contracts) where it was the duty of the judge to determine what was fair and reasonable between them, and to give effect to equitable defences, though not expressly authorised by the formula so to do. Hence the intentio in a *bonae-fidei actio* never imposed a fixed limit upon the claim by naming a definite sum (certa), but was always general in its terms, *i.e.* incerta ('quidquid Balbum Seio dare facere oportet ex bona-fide').[2] An *actio arbitraria* was where the judge in the condemnatio was instructed only to condemn in damages if the defendant failed to do some act (*e.g.* restore the plaintiff's property).[3]

[1] See Sohm, pp. 271-276.

[2] For a summary of the points of difference between an action stricti juris and one bonae fidei, see Moyle, pp. 554-555.

[3] J. iv. 6. 31. Here, as elsewhere, the compilers of Justinian's *Institutes* cling closely to the terms of the older formulary procedure. In Justinian's time the judge had full power to decree specific restitution without giving the defendant an alternative.

6. *Perpetuae—temporales.* The terms are used in two senses, viz.: as denoting (i.) how long *a right* of action lasts; (ii.) how long the action itself is allowed to continue.

(i.) Originally all actions founded upon the civil law were perpetuae, for no lapse of time was sufficient to bar them; praetorian actions, on the other hand, were usually temporales, and were lost if not brought within a year; exceptionally, however, a praetorian action, if modelled on the civil law, might be perpetua, *e.g.* that given to a bonorum possessor and the actio furti manifesti. Conversely, even a civil law claim to specific property in the hands of another might be lost by the operation of usucapion; and the querela inofficiosi testamenti was expressly limited to five years. But the old distinction between actiones perpetuae (*i.e.* most civil law actions, those granted to 'equitable heirs,' and the actio furti) and actiones temporales (*i.e.* most praetorian actions, the querela, and claims to specific property) continued down to the time of Constantine, who provided that forty (subsequently reduced to thirty) years' delay should give rise to an exceptio in all real actions, and Theodosius extended this thirty years' limit to practically all perpetuae actiones.' Under Justinian the same principle obtained, though very exceptionally an actio might still be perpetua, *e.g.* a vindicatio in libertatem.

(ii.) The action itself[1] was always 'temporalis,' and, in the time of Gaius, expired (if the action were not pursued to an end previously) in eighteen months if the judicium were legitimum, while if 'imperio

[1] Unless 'extra ordinem,' or before the centumviri (*cf.* Poste, p. 538).

continens' it ended with the term of office of the magistrate who granted it. Under Justinian the action might 'sleep,' with the consent of both parties, for forty years, otherwise it came to an end in three.

7. *Actions for the recovery of a thing—for a penalty—mixed.*

An action 'rei persequendae causa' was a term which covered every action, whether real or personal, of which the object was redress merely, as distinguished from an action for redress and a penalty (mixed), or for a penalty merely. A vindicatio, actions on commodatum, mandatum, societas, sale and hire, were all rei persequendae causa. So, too, an action on a depositum, unless the case was one of 'depositum miserabile,' when the action might be 'mixed,' as it would lie for double damages against a depositary, or his heir if personally guilty of fraud.[1] Another instance of a mixed action in this sense[2] was the actio vi bonorum raptorum; an action under the lex Aquilia might be rei persecutoria merely (*e.g.* if the defendant admitted liability, and the object had not been of greater value during the preceding period), or mixed, according to circumstances. The actio furti was purely penal (poenae persequendae causa), as in addition to the damages recoverable the owner could get the thing itself by a separate action.[3]

8. *Actions in simplum, in duplum, in triplum vel in quadruplum.*[4]

[1] J. iv. 6. 17.

[2] *I.e.* as distinguished from one regarded as partly real and partly personal, *supra*.

[3] J. iv. 6. 18.

[4] It will be observed that many of these divisions are 'cross divisions.'

An action was in simplum where the value of the object in dispute only was sued for, *e.g.* in the contract of sale; in duplum for twice the value (*e.g.* actio furti nec manifesti, actio servi corrupti); in triplum for thrice the value, *e.g.* where the plaintiff claimed in his libellus conventionis a greater sum than that due, so that the officer who served it (viator) claimed an excessive fee;[1] in quadruplum for four times the value, *e.g.* the actio furti manifesti and the actio quod metus causa.[2]

9. *Actions to recover the whole of what is due—for less.*

An action was, of course, normally for the whole loss sustained, but, under exceptional circumstances the plaintiff was allowed to recover part only, *e.g.*—(i.) in the actio de peculio the father or master was only liable to pay the whole debt of a son or slave where the peculium, after answering his own claims, was sufficient; (ii.) where an action lay against a husband for the dos,[3] or against a person who had promised a gift, or was brought by a person against his ascendant, patron or partner; the defendant, in each case, could not be condemned beyond his means, *i.e.* the condemnation was not allowed to be of such an amount as to reduce him to actual

[1] The viator was entitled to a fee (sportulae) in proportion to the value of the demand.

[2] Metus, duress, was more commonly a ground of defence (exceptio metus) or for in integrum restitutio, than a reason for bringing an action; but an action (quod metus causa) lay 'in quadruplum' for damage resulting from an act done by the plaintiff under compulsion, provided the threat were seriously aimed at the life or security of the plaintiff or his relatives. But the defendant was entitled to acquittal if he restored the advantage so obtained (J. iv. 6. 27).

[3] The claim to the dos might also be lessened by claims allowed to the husband, *e.g.* 'propter impensas.'

destitution;[1] (iii.) less might also be recovered by reason of a set off (compensatio).[2]

10. Actions might also be regarded as based upon an obligation created by contract, quasi-contract, delict, or quasi-delict, but this division is not expressly made in the *Institutes*.

Lastly, an action might be either in respect of the defendant's own obligations, or in respect of those created by means of his agent (actiones adjectitiae qualitatis).[3]

Section III. Compensatio and Deductio. Plus Petitio

(*a*) *Compensatio and deductio.*

In England, if the defendant has no answer to the plaintiff's claim but that he himself is owed by the plaintiff a greater, equal, or less sum, such plea can, as a rule, be raised by counter claim: the defendant admits the case of the plaintiff, and then, in the same action, sets up his own case, and if he proves it, judgment follows for the difference between the two claims; for the defendant, if the sum due to him on the whole transaction exceeds that due to the plaintiff; otherwise for the plaintiff, though not necessarily for the whole sum originally demanded.

Much the same result was gradually arrived at among the Romans by the doctrine of compensatio, which was defined as 'debiti et crediti inter se contributio.' According to the civil law, if an obligation were created by some negotium stricti juris (*e.g.* a stipulation), and action were brought upon it, the plaintiff

[1] The privilege of the defendant in such cases is called 'beneficium competentiae.' [2] *Infra.* [3] P. 395.

must succeed, although the defendant owed him an equal or greater amount on some other transaction. If, *e.g.* A promised B 500 aurei by stipulation, the unilateral objection so imposed on A could not be met with a plea that B owed A 500 aurei for the purchase-money of a horse (emptio-venditio). The two transactions were wholly unlike, and each party must enforce his claim independently. A negotium bonae-fidei, on the other hand, implied mutual obligations, *i.e.* obligations ex eadem causa (from the same transaction), and the judge was allowed, therefore, in such cases (*i.e.* in judicia bonae-fidei), to 'set off' the mutual claims of the parties, if, in his discretion, he thought right, though there was nothing in the formula expressly authorising him so to do. In the case of a banker (argentarius) and of the purchaser of a bankrupt's estate (bonorum emptor) a different course prevailed: the formula itself was modified. If an argentarius sued a customer, the modification was in the intentio, and he was said, therefore, to be compelled to sue after allowing for compensation ('cogitur cum compensatione agere'), the intentio being framed as a demand for the balance only. The bonorum emptor, on the other hand, when suing some person who, though indebted to the bankrupt (whom the plaintiff represented), had a claim against him, sued 'cum deductione'; the intentio was for the full amount demanded, but the judge was instructed in the condemnatio to give judgment 'cum deductione,' *i.e.* for the balance actually due.[1]

[1] G. iv. 63-65. For minor differences between the argentarius and bonorum emptor, see G. iv. 66-68.

As time went on the praetor seems to have interfered even when a claim was made by an actio stricti juris. From the nature of the case he could not allow 'compensatio'; but since the plaintiff, in insisting upon his common law right, though aware that he himself owed the defendant money on another transaction, was acting inequitably, the practice arose of granting the defendant the exceptio doli, which resulted, not in a set off, but in the dismissal of the plaintiff's claim altogether. The injustice which might so result was remedied by Marcus Aurelius, who enacted that in such case the plaintiff's action should not wholly fail, but that the exceptio doli should operate as a set off, the judge giving judgment for the balance (*i.e.* 'cum deductione,' as in the case of the bonorum emptor).[1]

Justinian abolished the difference between the procedure in bonae-fidei actions (where compensation was in the discretion of the judge) and in those stricti juris (where the exceptio doli had to be expressly inserted in jure), and allowed compensation in all cases,[2] without any express plea, whatever the nature of the judicium, or of the action, save that—(*α*) the counter-claim must be easy of proof, and (*β*) it could not be made at all in an action on a depositium.[3]

Justinian says that where the claims were easy of proof ('compensationes quae aperto jure nituntur') the claims were automatically (ipso jure) reduced.

[1] See Sohm, pp. 459-460.

[2] Even 'ex dispari causa' and in real actions. It is disputed whether Justinian was the first to bring these actions within the scope of the doctrine of 'set off.'

[3] J. iv. 6. 30.

But these words are not to be taken as meaning that the two claims extinguished one another (wholly or pro tanto) at the moment the 'set off' arose; but that when the judge decided that the counter-claim was a valid one, his judgment acted retrospectively, *i.e.* the claims were then deemed to have cancelled one another from the first. The practical effect is especially shown where the plaintiff's debt carries interest; the set off is not established until judgment, but since it then dates back to the time when it actually arose, the plaintiff's claim to interest, as from that date, is only good as to the balance (if any).[1]

(*b*) *Plus petitio.*

A plaintiff might claim too much—

(i.) Re, as 500 aurei instead of five.

(ii.) Tempore, as where he sued in March for a debt due in June.

(iii.) Loco, as where the promise was to pay at Ephesus and the action was brought at Rome; or

(iv.) Causa, as where the promise was to give either fifty aurei or a slave, and the plaintiff sues only for one, so depriving the defendant of his option. Conversely, the plaintiff may claim too little.

The effect, in the time of Gaius, was as follows: A mistake in the demonstratio was harmless ('falsa demonstratione rem non perimi');[2] a mistake amounting to plus petitio, if made in the intentio,[3] was fatal; if, on the other hand, the plaintiff claimed less than his due, the intentio was so far good, but the balance

[1] *Cf.* Sohm, pp. 461-463.

[2] G. iv. 58.

[3] Where the intentio was incerta ('quidquid paret') such a mistake was impossible.

could not be claimed in the same praetorship; if it were so claimed, the defendant could raise the exceptio litis dividuae (that the plaintiff had no right to split up his demand). Plus petitio in the condemnatio did no harm, for the defendant could get 'in integrum restitutio,' but if the plantiff claimed less he lost the balance altogether. It was never fatal to claim, even in the intentio, one thing for another by mistake, *e.g.* 'Eros' instead of 'Stichus,' for in the time of Gaius the plaintiff could bring a new action, and under Justinian the mistake could be corrected in the same proceeding.

Even under the formulary system, however, relief was given in respect of plus petitio 'loco,' for a praetorian action could be brought, called 'de eo quod certo loco dari oportet,' by which on non-payment at a particular place the creditor could sue elsewhere, and the judgment would take into consideration any loss the debtor sustained by reason of the change of locality. Zeno provided—(*a*) that where the plus petitio was 'tempore' the plaintiff might sue again, on payment of the defendant's costs, and after waiting twice the time which would have been necessary otherwise; and (*β*) that where the plaintiff claimed less than his due (*e.g.* five aurei for ten) judgment might nevertheless be given for the whole. These modifications remained in Justinian's time, and that Emperor provided that if the over-claim were in any other way than tempore (*e.g.* re) the plaintiff was not to lose his case, but to be punished by being obliged to pay the defendant three times the amount of loss sustained by reason of the over-claim, *e.g.* in

respect of excess paid by way of 'sportulae' to the 'viator.'

Section IV. Actiones Adjectitiae Qualitatis. Noxal Actions. Pauperies.

(α) *Actiones adjectitiae qualitatis.*

Both Gaius and Justinian describe six actions by which a master or paterfamilias could be made liable on a contract entered into by some one in potestas (*e.g.* a slave or son); by two of them (exercitoria and institoria) a man might even become liable on a contract made by some one not in his potestas, *e.g.* some free third person. The actions, which were of praetorian origin, were called adjectitiae qualitatis, because, except in the case of a slave (who could never be sued), the actions offered an 'added' remedy; the contract in these cases being regarded as giving rise to two distinct obligations, one against the agent, the other against the principal. The actions in question were as follows: 'quod jussu,' 'exercitoria,' 'institoria,' 'tributoria,' 'de in rem verso,' and 'de peculio.'

The actio *quod jussu* lay where the superior had expressly authorised his slave or son to enter into a contract, or had subsequently ratified a contract entered into by such persons. The actio *exercitoria* applied where a man (exercitor) had put his slave, son, or even a free third person in command of a ship, and the agent made a contract incidental to the affairs thereof; the actio *institoria* lay where a man had constituted a slave, son, or third person his 'institor,' *i.e.* had entrusted to such agent the management of a shop or of some

piece of business, and the agent made a contract relating to it. In all these three actions there was, obviously, express or tacit authority on the part of the principal, and the other party to the contract, therefore, could always recover from him in full. The actio *tributoria* lay where, with his superior's knowledge, a son or slave traded with his peculium and entered into contracts in the course of his business; in such case the rule was that so much of the peculium as was applied to the business should, if insufficient to meet all the debts, be divided between the superior and the rest of the creditors, in proportion to their claims. The master himself made the distribution, and if any creditor found that he made it unfairly, the praetor allowed him to enforce his rights by this action. The actio *de in rem verso* and that *de peculio* were usually combined in the same formula, and lay where a son or slave had made a contract without the consent of the superior. If the superior had benfited by it, the other party could, by the actio de in rem verso, claim to be paid in full or, if the benefit gained by the superior did not amount to the full claim, as far as the benefit went. So far as the superior received no profit the creditor had to proceed by the actio de peculio, for payment out of the agent's peculium merely, and then only after the superior had deducted his own claims.

Which particular actio adjectitiae qualitatis the other party ought to bring depended, of course, upon circumstances. Obviously, if the facts gave rise to 'quod jussu,' 'exercitoria' or 'institoria,' such would be the remedy to choose, as payment in full could

be secured. As between the actio 'tributoria' and the 'de peculio,' the advantage of the former was that the superior could not, as in 'de peculio,' first deduct his own claim, while the actio 'de peculio' might be more advantageous than 'tributoria,' because in the former the slave's whole peculium (after satisfying the master's claim) could be taken, whereas in the latter only that specific part was affected which was employed in the particular business.[1]

(*b*) *Noxal actions.*

Even by the time of the XII. Tables the principle of noxae deditio had reached its second stage. A third person injured by another's son or slave had no longer the right to demand that the wrong-doer should be given up; his right was limited to an action claiming in the alternative that the superior should either pay damages or surrender the offender.[2] In the time of Gaius noxal surrender existed in the case of slaves; in theory at any rate, in the case of sons; and in a modified form was applicable to persons in mancipii causa and a wife in manu.[3] The status of in manu and in mancipii causa had long been obsolete in Justinian's time, and the noxal surrender of sons had fallen wholly into disuse. A noxal action, therefore, only applied in the case of slaves, and a slave so surrendered, if he could find sufficient money to compensate for all the damage he had caused, could compel his new master to free him.[4]

[1] *I.e.* the slave might trade only with part of his peculium, or might employ different parts of it in different trades.

[2] If a slave committed a wrong by his master's order, it was the master's own act, and he could be sued by direct action.

[3] *Cf.* G. iv. 80.

[4] J. iv. 8. 3.

Noxal actions were established either by statute or by the praetor. By statute in the case of theft (viz. by the XII. Tables), and damnum injuria datum (lex Aquilia); by the praetor in the case of injuria and vi bona rapta.[1]

The action always followed the person of the wrong-doer. 'Noxa caput sequitur.' If, therefore, A's slave X wronged B, B could sue A only so long as A owned X; if X were sold to C, the action lay no longer against A, but against C; if X were manumitted, there was no possibility of a noxal action, but X could be sued personally by a direct action. Conversely, a direct action might become noxal, as where X, a free man sui juris, wronged B, and afterwards by arrogation passed into C's potestas or became C's slave. B's direct action against X became converted into a noxal action against C.[2]

A wrong done by A, a slave, to B, his own master, had no legal effect, because there could not be a civil obligation between a man and a person in his potestas. On the same principle, if A, who is B's slave, wronged C and was then bought by C, C's action became extinguished by merger (confusio).[3]

(*c*) *Pauperies.*—The XII. Tables gave a species of noxal action against the owner of a four-footed animal which had caused damage without provocation. As in noxae deditio proper, it was the owner at the time of action brought who was liable, not necessarily the owner at the time of the wrong (noxa caput sequitur), and the defendant was obliged either to pay

[1] G. iv. 76.

[2] But arrogation would not have this effect in Justinian's time, since it made X filii loco, and there was no surrender of sons.

[3] The Proculians thought it was merely suspended (G. iv. 78).

compensation or give up the animal. The action only lay where the animal acted 'contra naturam,' *i.e.* viciously; and wholly wild animals were not within the principle, because, as soon as they escaped and so did damage, they ceased to have a master.[1]

The Aediles' edict provided a special remedy where a man kept a dog, boar, wild boar, bear, or lion in a place where persons passed by ('qua vulgo iter fit'). If harm resulted and a freeman were hurt, the owner of the beast could be condemned as the judge thought fit; for other damage the penalty was double the damage done. The actio de pauperie, and that under the edict, could be brought concurrently, both being penal.

Section V. Exceptions

The general nature of an exceptio, which, even under the system of extraordinaria judicia, indicated the 'special defence,' has been explained above: the following are the principal classifications:—

1. Some exceptions were due to statute law, some to the praetor. Examples of the former are the exceptiones S.C. Trebelliani and S.C. Macedoniani; of the latter, exceptio metus; doli mali. As already stated, a person induced to confer some benefit by threats (metus) or inequitable conduct (dolus malus) might either proceed by action (quod metus causa, or doli), obtain in integrum restitutio, or rely upon such conduct as a defence by raising an exceptio in jure.[2] The plea 'dolus malus' in Roman law seems

[1] J. iv. 9 *pr.*

[2] As above stated, it was unnecessary to expressly raise such defence in a judicium bonae-fidei.

to have included not merely what is known to English lawyers as fraud, misrepresentation, and undue influence, but inequitable conduct generally, *e.g.* claiming the whole sum due in a stricti juris action, where the defendant, owing to technical rules, could not claim a set off.

2. Some exceptions could always be pleaded (peremptoriae or perpetuae), others were valid only for a time (dilatoriae or temporales). Examples of the former are exceptio metus causa, doli and pacti conventi, if the creditor agreed never to sue; of the latter, pacti conventi, where the agreement was not to sue for a certain time, *e.g.* five years, litis dividuae and rei residuae. The exceptio litis dividuae was where the plaintiff claimed too little; if he claimed the rest by another action, the exceptio lay, but was dilatoria merely, because it could only be raised during the same praetorship. Where a man having several causes of action against the same defendant proceeded in some only, an action on the others could be defeated in the same praetorship by the exceptio rei residuae.[1] It is obvious, therefore, that a peremptory exceptio always defeated the plaintiff's claim, a dilatory one only for a limited period. In the time of Gaius, however, if a dilatory exception were pleaded and the plaintiff went on, he lost his case for ever, having 'used up' his right of action. In the time of Justinian a man who brought his action before the agreed time of performance could be still met with a dilatory exceptio, and so lose his action but he might proceed again, though he was sub-

[1] G. iv. 121-122. The pleas 'litis dividuae' and 'rei residuae' were obsolete in Justinian's time.

jected to the penalties provided by Zeno for plus petitio tempore.[1]

3. An exception 'rei coherens' could be used not only by the particular defendant but by persons having the same interest, *e.g.* his heirs and sureties for his debt; an exceptio 'personae coherens' only availed the defendant himself. The majority of exceptions were 'rei coherentes,' *e.g.* dolus and metus; examples of exceptions 'personae coherentes' are the exceptio pacti conventi, when the agreement was expressly confined to the individual defendant, and 'nisi bonis cesserit.'[2]

4. Conversely, an exceptio in rem could be pleaded against any plaintiff, *e.g.* metus; an exceptio in personam only against one particular plaintiff, *e.g.* exceptio doli.

Section VI. Interdicts

Originally the term interdictum or decretum signified an order by the magistrate, issued by virtue of his imperium,[3] directing an individual to do (decretum) or abstain from doing (interdictum) some act; and the order was usually issued in the interest of the public, rather than for the convenience of private individuals. The object, for example, might be either to prevent or punish offences against property extra commercium (temples, burial-grounds, etc.), or to protect the *possession* of private property (res in commercio); for the disturbance of the possession of individual citizens easily leads to a breach of the public peace. At first such orders were

[1] J. iv. 13. 10.

[2] See J. iv. 14. 4.

[3] *I.e.* a proceeding 'extra ordinem.'

probably made after the merits of the case had been fully considered, and were, therefore, final. The magistrate, as representing and in the interest of the State, arbitrarily settled the dispute once for all. In the time of Gaius, however, this was not the general rule, for an interdict, in most cases, was an order made without entering into the question of the strict rights of the parties, and the merits of the case had to be tried subsequently in an ordinary judicium based on the interdict. Under the formulary system, therefore, an interdict was, usually, an extraordinary way of founding a trial before a judex; the judicium depending not on the customary proceedings 'in jure,' but on an order issued, in a summary way, by the praetor in his administrative capacity.

Interdicts may be classified as follows:—

1. An interdict might be 'populare' (*i.e.* open to any one) as opposed to private (*i.e.* only available for some definite individual), though most interdicts were of the latter class. An example of the former is the interdictum *de homine libero exhibendo*, by which any one (even a woman or impubes) might, as by the English writ of Habeas Corpus, compel the production of any person confined against his will.

2. An interdict might be either prohibitorium, restitutorium, or exhibitorium. The first class (prohibitoria) forbade the doing of some act (*e.g.* disturbing possession, as in *uti possidetis* and *utrubi*);[1] those termed restitutoria (as *unde vi*)[1] ordered a person to restore something wrongfully taken from another's possession; while 'exhibitoria' aimed at the production of some object wrongly detained, *e.g.* the

[1] *Infra.*

interdict de homine libero exhibendo, or that by which a paterfamilias compelled the production of a person under his potestas, but wrongfully detained by another.

3. An interdict might pass to the heirs or not: 'unde vi' is an example of the former, 'uti possidetis' of the latter class.[1]

4. Some interdicts were concerned with the possession of property (possessory), *e.g.* uti possidetis, utrubi, unde vi; others not, *e.g.* for the production of an individual.

5. Those concerned with possession were either 'adipiscendae,' 'retinendae,' or 'recuperandae causa.'

Examples of interdicts for acquiring possession were the interdictum *quorum bonorum* and the interdictum *Salvianum*; for retaining possession, uti possidetis and utrubi; for recovering possession, unde vi.[2]

6. An interdict might be 'single' or 'double.' Interdicts were single (simplicia) where in the subsequent proceedings the person who obtained the interdict was plaintiff and his adversary defendant (as in all the interdicts restitutoria and exhibitoria), double (duplicia) where each party was at once plaintiff and defendant (*e.g.* uti possidetis and utrubi).

7. Lastly, an interdict might be either primary or secondary, *i.e.* where the first interdict proved insufficient to enable justice to be done between the parties, another, *e.g.* interdictum *secundarium*, might follow.

[1] Conversely, some passed against the heirs, *e.g.* 'quod vi aut clam,' some not, *e.g.* 'uti possidetis.'

[2] Sometimes an interdict might be 'tam adipiscendae quam recuperandae' (Girard, p. 1041).

Procedure in interdicts.—The trial on the interdict, in the time of Gaius, took place sometimes by means of a formula arbitraria, sometimes 'per sponsionem.' The former was the case when the interdict was either exhibitorium or restitutorium, and the defendant at the time when the order was granted chose arbitration (*i.e.* asked for a trial, based on a formula arbitraria, before a judex). The proceedings were 'per sponsionem' whenever the interdictum was prohibitorium; or the interdictum being of the other kinds, the defendant elected to have the matter tried otherwise than by the formula arbitraria, *e.g.* failed to ask for it when the interdict was granted.

1. *By formula arbitraria.*—By way of illustration, suppose A asks the praetor for that species of interdictum restitutorium known as 'unde vi,' against B, whom he alleges to have forcibly ousted him from possession of his land. The interdict addressed to B began with the words, 'Unde tu illum vi dejecisti,' 'From the place you (B) forcibly ejected A,' and commanded B to restore possession to A, provided that A had been in possession 'nec vi, nec clam, nec precario,' *i.e.* had not obtained it originally from B by force, or clandestinely, or by B's permission.[1] If B obeyed the order, the proceedings ended; if, as was usual, there was a dispute, B had the option (the interdict not being prohibitorium) to demand a judge, and if he did so, a formula (arbitraria) was granted to try the questions of fact involved in the interdict. The proceedings in judicio would be

[1] Where arms had been used there was an interdictum 'unde vi armata' which differed from that unde vi (where the 'vis' was 'quotidiana'), for it was not limited to a year, and the words 'nec vi,' etc. were omitted.

in the ordinary form, and if the judge found that A, having been in possession nec vi, nec clam, nec precario, had been violently ejected by B, he would, alternatively, order B to restore possession or be condemned in damages. This procedure (by the formula arbitraria) is described by Gaius as without risk (sine periculo) to either party, as opposed to the procedure per sponsionem, which, as will be seen, was 'cum periculo.' For if, in the actio arbitraria, the judge found against B, and he complied with the order, he did so without incurring any penalty. If, on the other hand, A failed to make out his case, he also suffered no detriment, unless the defendant had challenged him to a judicium calumniae for a tenth of the value of the thing in dispute by way of penalty.[1]

2. *Per sponsionem* (i.) in single interdicts, *e.g.* unde vi; (ii.) in double interdicts, *e.g.* uti possidetis, utrubi.

(i). *Procedure per sponsionem in single interdicts.* —If B in the above case left the Court when the interdict was granted without demanding a judge and failed to restore possession, A challenged him to a wager (sponsio), and B in return challenged A to a wager (restipulatio), the question at issue being whether or not B's continued possession constituted a violation of the interdict, *e.g.* whether A's possession when B ejected him was 'nec vi, nec clam, nec precario' in relation to B. Upon these wagers formulae were drafted and tried in an ordinary judicium. If the judge found in favour of A, B would have to

[1] The Proculians thought the judicium calumniae inapplicable in such case (G. iv. 163).

restore or pay damages,[1] and in any case the unsuccessful party forfeited to the other the amount of the wager. Hence the proceedings were 'cum periculo.'

(ii.) *Procedure per sponsionem in double interdicts, i.e.* where both parties were at once plaintiff and defendant, *e.g.* uti possidetis and utrubi.

Both interdicts were prohibitory (and so could only be tried per sponsionem), and applied where two persons were disputing about the ownership of property.[2] The interdict uti possidetis applied when the question was about immovable property, utrubi when it concerned movables. The interdict uti possidetis prohibited the disturbance of the possession of that party who, in fact, held the land when the interdict was issued, provided it was nec vi, nec clam, nec precario in relation to his opponent. In the interdict utrubi, on the other hand, it was not necessarily the party in possession at the grant of the interdict nec vi, etc. who prevailed, but he who had possessed the movable nec vi, etc. *for the greater part of the past year.*

The procedure was as follows: the interdict (*e.g.* uti possidetis) was issued, in effect prohibiting the person not in possession at the date of the interdict from disturbing the possession of the person who then held the land nec vi, nec clam, nec precario in relation to him. Matters, obviously, would go no further (since the order was purely negative) until some act was done in violation of the interdict. Both parties, accordingly, made a formal trespass

[1] By virtue of a judicium de re restituenda, which was added to the formula at A's request (G. iv. 165). [2] G. iv. 148.

upon the land (vis ex conventu), and the ultimate trial was to ascertain which party had been justified in so doing, and which party in the wrong, *i.e.* which had been in actual possession when the interdict was granted nec vi, etc.

The parties then appeared before the praetor, whose first duty necessarily was to award interim possession of the land until the question could be tried between the parties (A and B), and this was settled by awarding possession to the person who made the highest bid (*e.g.* B) for the profits and fruits which would accrue from the land until the main issue was settled at the trial.[1] B, however, was required to promise A by a stipulatio that if he lost the trial he would pay as a penalty the sum he offered for the profits to A. Next A challenged B to a wager (sponsio) as to which of them did right in the apparent act of trespass, which B accepted on A promising by a restipulation to pay the amount of the bet if in the wrong. Similarly B challenged A, and there was a like restipulation, so that in all there were two bets,[2] which, having been put into the shape of formulae, were sent for trial. The judge then heard the evidence and decided who had won his wager and restipulatio, *i.e.* which party, as a fact, when the interdict had been granted held the land, nec vi, nec clam, nec precario in relation to the other.

[1] The auction before the praetor was called 'fructus licitatio.'

[2] A bet in England is regarded as one transaction, the parties mutually promise to pay if the event turns out against them; at Rome a bet was made up of two parts, a sponsio and a restipulatio. A, *e.g.*, asked B: If Balbus builds the wall, do you promise me five aurei? B answered 'Spondeo.' This was the sponsio. Then the parts being reversed, A at B's request promised (restipulatio to pay B five aurei if Balbus did not build.

If the judgment were in favour of B, A had to pay B the amount due on the wagers only. If, on the other hand, it were in favour of A, A was acquitted from his obligation on his bet to B, and B was condemned—

(α) To pay A the amount of the bet due to A; and

(β) To pay A, as a penalty, the sum due from B on his bidding for the interim profits.

Further, B became liable, as a natural consequence of the judgment—

(γ) To pay A, in addition, compensation for the profits he actually got from the land; and

(δ) To give up possession to A.

But to enforce these latter rights (γ and δ) a subsequent trial (judicium Cascellianum or secutorium) might become necessary, *i.e.* if B refused to do the acts in question voluntarily; and a similar trial (judicium fructuarium) might also take place if, at the fructuum licitatio, A, instead of taking a stipulation from B for the amount of his penal bid for the interim profits, had elected to rely on such judicium to recover the penalty, in which case B would be required at the time of the preliminary proceedings to give security 'judicatum solvi.'[1]

It is obvious that the above proceedings could not be brought to a successful issue unless both parties were willing to go through certain forms, and it would, therefore, be in the power of one party to render the interdict useless as a means of determining the right to possession by refusing to take the necessary steps. The praetor, accordingly, devised a

[1] G. iv. 169.

remedy. If one litigant refused duly to proceed, *e.g.* failed to make vis ex conventu, to bid for the fruits, to enter into the wagers, or to go on with the trial, he thereupon became liable to a secondary interdict (interdictum secundarium), by which he was compelled, if in possession, to restore it to the other party; if not, to abstain from forcibly disturbing his opponent. In other words, the party in default was treated as having admitted his opponent's case.

Gaius says (iv. 148) that the interdicts uti possidetis and utrubi were devised where persons were disputing about the *ownership* of a thing (de proprietate), and to decide who ought to be regarded as in possession, and who should be plaintiff in the action. It is obvious that the action referred to cannot be the judicia on the interdicts themselves, for there both parties are plaintiffs, and the trials are not to decide a question of ownership but of possession merely. The fact is, that the judicium on an interdict (at any rate on the possessory interdicts) was not necessarily final. Usually, no doubt, it was, because if A is claiming property from B, and can prove that he enjoys it as a fact, and that he neither obtained it from B by force, stealth, or permission, the chances are that A has a better title than B. It might, however, sometimes happen that even when A won on the interdict, *i.e.* proved actual possession under the required conditions, B could show, in spite of it, that he nevertheless was dominus; for the trial on the interdict did not go into the question of ownership at all, and in such case a subsequent action was necessary, for which

the interdict had cleared the way; for it had decided that A (who had proved actual possession nec vi, etc.) ought to be regarded as in possession, and that therefore B (the person who lost on the interdict) was the proper plaintiff.

Of the four possessory interdicts described by Gaius only the two last-mentioned (uti possidetis and utrubi) survived for any practical purpose in Justinian's time, the interdict unde vi armata having become obsolete, and the interdict unde vi unnecessary, in consequence of the constitution of 389 A.D., above referred to. After that date a man who forcibly took property, if he were owner, forfeited not merely possession but the ownership itself, and if not owner, was condemned to restore the property and pay its value. Under Justinian the two surviving interdicts had the same effect, so that whether the dispute concerned an immovable (uti possidetis) or movable (utrubi), he prevailed who, *at the time of litis contestatio*, was in possession nec vi, nec clam, nec precario in relation to his adversary.

But Justinian's treatment of interdicts as judicial proceedings, distinct from actions, is illogical, and arose from too closely following the text of Gaius as a model for his own book. The whole complicated procedure, depending as it did on the formulary system, had long ceased to be a reality, and as Justinian himself confesses, there was, under the extra ordinaria judicia, no necessity for interdicts, and judgment was given without them;[1] accordingly, though the name survived, it was only to denote actions which were formerly begun in a special

[1] J. iv. 15. 8.

manner, and which, perhaps, were still considered as deserving a speedier trial than other actions.

Section VII. Modes of Execution

In England if a defendant refuses to comply with a judgment it is usually given effect to (*i.e.* executed) by some officer of the State seizing the debtor's property, or some part of it, selling it, and paying the amount due to the plaintiff on the judgment out of the proceeds. If the person against whom judgment has been given is insolvent, he may be made a bankrupt; his property passes by a kind of universal succession to his trustee in bankruptcy, who converts it into money and pays the creditors pro rata.

At Rome these conceptions were for a long time unknown, and the earliest form of execution was execution on the *person* of the debtor by *manus injectio*,[1] which has been already described in another aspect, viz. as a legis actio. Though by a lex Poetelia (313 B.C.) the severity of this form of execution was mitigated (the creditor's right to sell or kill his debtor being abolished),[2] manus injectio survived even under the formulary system, its practical effect being what would now be called 'imprisonment for debt.' By the time of Gaius, however, a new method of execution against the *property* of the debtor, devised by the jus honorarium, had become common, being known as *venditio bonorum*. The praetor, on the petition of the creditors or some of them, granted

[1] Pignoris capio, in its normal form, was not execution of a judgment, but a means by which certain special creditors could satisfy themselves without legal process at all.

[2] The date and effect of this law are much disputed.

'missio in bona,' *i.e.* made an order authorising them to take possession of all the debtor's estate. After an interval of thirty days from the time the property had been seized, during which other creditors[1] could 'come in,' *i.e.* join in the possession, the creditors met and elected a manager (magister) to conduct the sale, which, at the end of ten days more, took place by public auction. At the auction the estate of the debtor was sold as a whole to the highest bidder (emptor bonorum), who was bound to pay the other creditors the dividend he promised them by his bid, and who thereupon became entitled in equity to the 'universitas juris' of the debtor. The emptor, being regarded as quasi-heir, could sue for debts owing to the estate by a formula based on such fiction (actio Serviana), or, if he wished, by the formula Rutiliana, where the intentio was in name of the person whose estate he had purchased, the condemnatio in his own;[2] conversely creditors of the estate could sue him by the like fiction, *i.e.* of heirship. To get in the corporeal property belonging to the estate the emptor had the interdictum possessorium.[3]

This praetorian mode of execution was probably modelled upon the earlier *sectio bonorum*, which, however, was hardly execution properly so called, since it only applied where the State sold confiscated property (*e.g.* taken in war or from a citizen on a criminal conviction). The sale was made by the quaestors, and the highest bidder (sector bonorum)

[1] *I.e.* those who had not originally applied.

[2] The whole procedure of venditio bonorum and this formula was introduced by the praetor Publius Rutilius (G. iv. 35), 105 B.C.

[3] G. iv. 145.

became not merely equitable owner, but owner ex jure Quiritium, though to assist him in getting in the property he was granted (juris civilis adjuvandi causa) the interdictum sectorium.[1]

Venditio bonorum, though akin to the modern conception of execution in so far as confined to the debtor's property, presents three fundamental differences: (i.) it involved the sale of the debtor's *whole* estate; (ii.) it rendered him infamis (whereas in England bankruptcy may or may not imply moral turpitude and so disgrace); and (iii.) when the proceedings were over, the debtor was not released; for since bonorum venditio was not one of the means of extinguishing obligations, the creditors could subsequently sue him, and so attack his after-acquired property.

A more merciful method of execution, however, is mentioned by Gaius[2] (*cessio bonorum*) as sometimes taking place in his time under the Julian law. This law, probably passed under Augustus, enabled a debtor to make a voluntary cession of his goods to his creditors, who sold them in satisfaction, pro tanto, of their claims. A debtor adopting this method avoided infamy and was allowed a beneficium competentiae, *i.e.* his creditors, though they might proceed against his after-acquired property, could not thereby deprive him of the bare necessaries of life.

Finally, the modern idea that execution for a debt does not necessarily involve the necessity of selling the debtor's whole property[3] was arrived at by means of an adaptation (possibly by the praetor) of the old idea of pignoris capio, which, formerly existing as a

[1] G. iv. 146. [2] G. iii. 78. [3] Since he may not be insolvent.

means by which a specially privileged creditor sought his own redress, came, after Antoninus Pius, to be a means whereby the magistrate who had appointed a judge executed that judge's sentence, viz.: by directing a distress of so much of the debtor's property as was sufficient to satisfy the judgment; a sale under the direction of the magistrate being made after two months.[1]

In the time of Justinian manus injectio and venditio bonorum were obsolete. In the case of ordinary execution (*i.e.* where the debtor was not insolvent) the procedure was as last described, viz. by seizure and sale of part of the debtor's property under the order of the Court; when the execution was in bankruptcy, the procedure (unless the debtor made a voluntary cessio bonorum) was by *distractio bonorum*, which had displaced the venditio bonorum, and under which a successio per universitatem no longer took place. The magistrate, on the application of the creditors, appointed a curator, who, after an interval of two or four years,[2] sold the debtor's property in lots, the proceeds being divided up among the creditors. But even under this system the after-acquired property of the bankrupt could be seized by the creditors until they obtained payment in full.

Section VIII. (*a*) Restraints on Vexatious Litigation

Gaius tells us that vexatious conduct (calumnia) on the part of a *plaintiff* might be restrained by a

[1] *Cf.* Roby, ii. 440.

[2] Creditors within the same province had two years, those in different provinces four, within which to 'come in.'

judicium calumniae, by a *judicium contrarium*, by *oath*, or a *restipulation*. The calumniae judicium was an order given to the judge to inquire, in the event of the defendant being absolved, whether the plaintiff's action was in fact merely vexatious; if it was, the plaintiff might be condemned in one-tenth of the value of the matter in dispute, save in the case of an adsertor libertatis, when the penalty was increased to one-third. This applied to all actions, and the defendant had the option either to have this remedy or to insist that the plaintiff should swear on oath (jus jurandum) that he had good ground for his action (non calumniae causa agere). The contrarium judicium only lay in exceptional cases (*e.g.* in the actio injuriarum) for a tenth or a fifth part of the value; but it was a more stringent remedy than the judicium calumniae, for the defendant was not required to prove mala fides on the part of the plaintiff, as in the latter proceeding; he was entitled to judgment merely on the ground that the plaintiff had lost his action, although the plaintiff brought it under a genuine misapprehension. When entitled to a judicium contrarium the defendant might, alternatively, demand a judicium calumniae or require the plaintiff's oath, but the remedies were not cumulative. A fourth alternative to a defendant, under certain circumstances (*i.e.* where he was required, as in a condictio, to enter into a sponsio poenalis), was to demand that the plaintiff should promise a like sum if he failed, by restipulatio, and to this, upon acquittal, he was entitled without proof of malice.

In the time of Justinian all this had become obsolete; in certain cases no action could be brought

without the praetor's permission (*e.g.* against a parent or patron,[1] and in all cases the plaintiff was obliged—(i.) to swear on oath that he had good ground of action (pro calumnia jurare), a proceeding modelled on the old jus jurandum; and (ii.) if he failed to pay his opponent's costs.

A *defendant* in the time of Gaius was restrained from setting up a frivolous defence (i.) because condemnation in some actions (*e.g.* actio furti, injuriarum, vi bonorum raptorum, pro socio) made the defendant infamis;[2] (ii.) in certain cases defence increased the amount of his liability (lis crescens, *e.g.* actio damni injuria); (iii.) in certain cases, as in a condictio and an actio de constituta pecunia, the defendant could be made to promise (by a sponsio) a penalty if he failed, viz. a third of the value in a condictio, and a half in the other action; failing other restraint, the praetor might require an oath that the defendant had a good cause of defence ('non calumniae causa infitias ire').

Under Justinian the sponsio poenalis was obsolete, but a defendant had in all cases to swear that he had a good defence, and might still be liable to infamy in actions which involved it, and also to pay increased damages in a lis crescens. The fact, which both Gaius and Justinian mention, that some actions (*e.g.* furti) were for more than single damages ab initio, would rather act as a restraint on a person contemplating the wrong involved than as an inducement not to defend.

[1] This was also the case in the time of Gaius.

[2] In the first three even a compromise was sufficient (G. iv. 182).

Section VIII. (*b*) Satisdatio

In certain cases security (satisdatio) had to be given by suitors, *e.g.*—

(*a*) 'Rem ratam dominum habiturum,' that the principal would ratify the conduct of an agent (procurator) who appeared for him.

(*b*) 'Judicatum solvi,' that the amount to be found due on the judgment should be paid.

(*c*) 'Pro praede litis vindiciarum,' viz.—when an action in rem was tried per sponsionem, *i.e.* to restore the thing in dispute and interim profits, or a money equivalent. The security was always constituted by stipulations, the promises being given by the party and third persons who were willing to be sureties for him.

In the time of Gaius a plaintiff, whether appearing in person or by a cognitor, was not required to give security, but if he were represented by a procurator the latter had to engage 'ratam rem dominum habiturum.' The defendant of an action in rem had always to give security, so that if when defeated he failed to satisfy the judgment, the plaintiff might proceed against the sureties as well as the defendant, and security had equally to be given if the defendant appeared by an agent. In an action in personam the defendant had always to give security if represented by a cognitor; while if represented by a procurator, the latter engaged 'judicatum solvi'; if, however, the defendant personally defended the action, security was only required in certain special cases, *e.g.* if the action were on a judgment, or the defendant had bankruptcy proceedings pending against him.

Under Justinian the law was modified. Where the plaintiff appeared by a procurator,[1] the latter was only required to give security for due ratification, if the mandate appointing him were unregistered and the plaintiff failed to appear to confirm his appointment before the judge. A defendant who appeared in his own name, whether the action were real or personal, was not obliged to give security for the value of the thing but for his own person ('pro sua tantum persona'), *i.e.* to abide the result of the judgment, and this was done either by the oath of the party (cautio juratoria), or by his mere promise, or by a satisdatio (*i.e.* with sureties), according to the quality of the defendant.[2] If represented by a procurator whom he appointed in court, the defendant had personally to give security 'judicatum solvi'; to subject his property to a hypotheca, and to undertake to appear for judgment.[3]

If the defendant did not appear, and a volunteer undertook the defence in his absence, such person had to give security 'judicatum solvi' to the value of the thing in dispute (pro litis aestimatione).

Section IX. Criminal Law. Publica Judicia

Justinian in his last title gives a brief account of prosecutions and criminal law, topics which belong not to 'private' but to 'public' law, the law 'quod ad statum rei Romanae spectat' as opposed

[1] The 'cognitor' was obsolete in Justinian's time.

[2] J. iv. 11. 2.

[3] If the procurator were appointed out of Court, he himself, as under the old system, had to give security, in which case the defendant gave security out of court, and so became the fidejussor of his own procurator (J. iv. 11. 4).

to the law already dealt with, 'quod ad singulorum utilitatem pertinet.'

A judicium publicum (public prosecution) was so called because generally any person might bring a criminal charge. Such prosecutions might be capital or not. Those were capital which involved death, interdiction from fire and water, deportation or the mines. A judicium which involved infamy and a pecuniary penalty was public but not capital.

The following statutes are mentioned—

The *lex Julia majestatis*, passed in the time of Julius Caesar, dealt with *treason, i.e.* attempting anything against the Emperor or the State. The penalty[1] was death, and even afterwards the memory of the person was condemned, the practical effect being that the criminal's property was forfeited to the State (bonorum publicatio).

The *lex Julia de adulteriis*, passed under Augustus, dealt with *adultery, unnatural offences, and seduction.* The penalty for the first two offences was death; for seduction, if the offender were of honourable condition, the confiscation (publicatio) of half his estate, if not, corporal punishment and relegation.

The *lex Cornelia de sicariis*, 81 B.C., dealt with *murder.* The extreme punishment was death. Persons who used poison or magic to kill men, or publicly sold harmful drugs, were within its provisions.[2]

The *lex Pompeia de parricidiis*, 52 B.C., dealt with *parricide, i.e.* the murder of a father or a very

[1] Justinian frequently states the penalty, not as originally provided by the law in question, but as altered by subsequent legislation.

[2] J. iv. 18. 5.

near relative.[1] Accomplices were equally guilty. The penalty was that the criminal should be sewn up in a sack with a dog, a cock, a viper, and an ape, and so thrown into the sea or a river, 'ut ei coelum superstiti, terra mortuo auferatur.'

The *lex Cornelia de falsis*,[2] 81 B.C., dealt with *forgery*. The penalty for a slave was death, for a freeman deportation.

The *lex Julia de vi publica seu privata*, passed about the time of Augustus, dealt with *assaults to the person*, whether with or without arms. For violence with arms the penalty was deportation; without arms, the confiscation of a third of the offender's property. But if the case amounted to the rape of a virgin, a widow, a nun, or a lady devoted to religion, the guilty person and accessories were punished capitally.

The *lex Julia peculatus*, of uncertain date, but probably passed under Augustus, punished those who stole public, sacred, or religious property. Magistrates who stole the public money in the course of their office were punished capitally, as were their accessories and receivers. In the other cases the penalty was deportation.

Other statutes which Justinian briefly notices are the lex Fabia de plagiariis, which dealt with kidnapping; the lex Julia ambitus (against seeking public office by illegal means); the lex Julia repetundarum (bribery); the lex Julia de annona (against unlawful conspiracy to heighten the price of provisions); and the lex Julia de residuis (embezzlement of public money).[3]

[1] But the murder of a son by his father was not made parricide until Constantine.

[2] Sometimes known as the lex Cornelia testamentaria.

[3] J. iv. 18. 10-11.

NOTE X

AGENCY

The modern idea of agency is that if P (the principal) authorises A (the agent) to make an agreement on his (P's) behalf with X, a third person, and A enters into the contract, P and X are bound together by a vinculum juris, and A entirely drops out of the transaction, neither receiving any benefit nor incurring any liability upon it; provided, of course, that A kept within the limit of his authority.

Roman law never attained to this conception. Under the early law the only approach to it is to be found in the fact that, if A were in P's potestas, any benefit upon A's own contracts accrued to P, on the same principle as that which enabled P to acquire ownership of property through his dependant or to benefit by his possession. If, therefore, P wished to make an agreement which was purely unilateral with X, in the sense that X only was bound by it (*e.g.* a promise by stipulation), A could enter into the contract (*i.e.* take the stipulation), and the right to enforce it passed automatically to P.

A considerable advance was made when the praetorian actions adjectitiae qualitatis were evolved, since in certain cases, as already described, P not merely took the benefit of A's contract but became liable upon it, and this sometimes even where A was in no sense in P's potestas, but a free third person (actio exercitoria, institoria). But even this system fell short of the modern idea, since A was never regarded as a mere instrument so as to escape personal liability; for P's liability was not in lieu of but 'added to' his own, and it was only in certain special cases, falling within one or other of the actions, that P could be rendered liable at all.

An indirect method, however, was found by means of which P might employ A, though a free person, and not under his potestas, to make a contract for him with X so as to enable P to claim the benefit of it. P gave A a mandatum to contract with X. A made the contract in his own name, and then appointed P his (A's) agent (procurator) to enforce the contract; whereupon P was entitled to sue X as 'procurator in rem suam.' Later A could make an equitable assignment to P, who might then, by an actio utilis, sue X in his own name. But since the liability on a contract was never assignable, even in equity, the only manner in which A's liability on his contract with X could be made P's liability was by a novation with X's consent. Though, of course, even without a novation P was

indirectly liable, because if X sued A, the latter was entitled to be indemnified by P; a right which he could, if necessary, enforce by the actio mandati contraria.

With regard to litigation, under the legis actio system agency was impossible ('nemo alieno nomine lege agere potest'), and the only exceptions were in cases 'pro populo, pro libertate, pro tutela,' *i.e.* on behalf of the people (*e.g.* crimes); in suits relating to liberty (the vindex in manumissio vindicta), and a guardian on behalf of a ward. On the introduction of the formulary system, however, representation became possible, and could be effected either by means of a cognitor or a procurator. A cognitor was a person appointed for the particular action by the use of formal words (certis verbis), in the presence of the other party. The plaintiff said, *e.g.* 'Whereas I am claiming a farm from you, I give Maevius to you as my cognitor'; the defendant, 'Because you are claiming from me a farm, I give Seius to you as my cognitor in the matter.' The cognitor need not be present at the time, but the person named did not become cognitor until acceptance. The cognitor really stood in the place of his principal, so that if he represented the plaintiff, no second action could be brought. The procurator, on the other hand, was regarded as personally conducting the suit, and could personally sue and be sued upon the judgment. No special words, therefore, were necessary for his appointment, and a mandate was enough, though given without the knowledge of the other party. He might even act without a mandate,[1] provided he acted in good faith and (like other procurators) gave security 'ratam rem dominum habiturum.'

By the time of Justinian the procurator, when acting with authority, had come to be regarded as really representing his principal, and not as having personal conduct of the suit, and the cognitor had, accordingly, disappeared. Hence in Justinian's time, though a procurator could be appointed informally (J. iv. 10. 1), he was usually, in fact, appointed in a manner which admitted no doubt (*e.g.* the appointment was registered in the acta), for his right to represent the principal being so made clear, the latter could sue or be sued by the actio judicati.[2]

[1] This was disputed (G. iv. 84).

[2] For the security to be given, see p. 417.

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