CHAPTER—V

THE LAW OF THINGS

1. Res :—In Roman law *res* signifies things or property. It includes not merely physical things but also abstract rights such as servitude and *dominium.* Buckland defined *res* in economic sense as any economic interest guaranteed by law, any right or rights having a money value, any interest expressible in terms of money which the law will protect. In general *res* comprehends everything that can be the object of a right.

2. Classification of res :—*Res* have been classified in the following ways :—

(1) *Res corporales* and *res incorporales.—Res corporales* are tangible objects that can be felt or touched; such things have a physical existence, (e.g. land, house, gold, money, slave, wheat, etc.) and can be possessed and delivered. *Res incorporales* are those things which are intangible and have no actual existence. They cannot be touched or perceived by the senses and exist only in the eye of law. They consist of rights such as (a) servitude e.g. a man's right to walk on the land of another, (b) *hereditas* e. g. the right of inheritance, (c) 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 to another. Incorporeal things do not admit of possession or delivery.

(2) *Res mancipi* and *res nec mancipi,—*The real distinction between the two lay in the mode of transfer. *Res mancipi* were those things which could only be legally conveyed by the ceremony of *mancipatio.* If it was conveyed in any other way, no title passed to the transferee. 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. Lands and houses in Italy, slaves, oxen, mules, horses, asses, rustic servitude were designated as *res mancipi.* All other *res* were *res nec mancipi* which could be

transferred by *traditio* or delivery of possession, provided the *res* in question was capable of physical delivery. After the time of Gaius *mancipatio* gradually lost its importance and in the time of Justinian *mancipatio* was entirely superseded by *traditio* and the division into *res mancipi* and *res nec mancipi* was accordingly obsolete.

(3) *Res mobiles* (movable) and *res immobiles* (immovable).—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)*. *Res mobiles* in its nature are not stationary and as such can be appropriated and taken away and so it can be owned absolutely, but the land cannot be so owned. An immovable property cannot be taken away and stolen. It is of greater value and importance than the movable property. It takes longer time to acquire ownership in immovable property by possession without title.

(4) *Res extra patrimonium* (or *res extra commercium)* and *res in patrimonio* (or *res in commercio)*, —A *res extra patrimonium* is a thing which is incapable of being owned by a private person but the use of it is common to all, whereas a *res in patrimonio* can be so owned by a private person. There are four classes of *res extra patrimonium*, viz.—

(a) *Res communes* (common) are things common to all and may be enjoyed by all the world but not capable of appropriation by any body, such as air, running water, the sea, and the sea-shore.

(b) *Res publicae* (public) are the property of the state, such as public roads, harbours, rivers, the banks of the river.

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

(d) *Res nullius* are things which belong to nobody e.g. wild animals, treasure trove, things abandoned, etc, but it may be the object of private property when found and occupied by an individual. *Res nullius* include not merely *humani juris* but

also *res divini juris* (sacred or religious). Res *divini juris* were the following :_

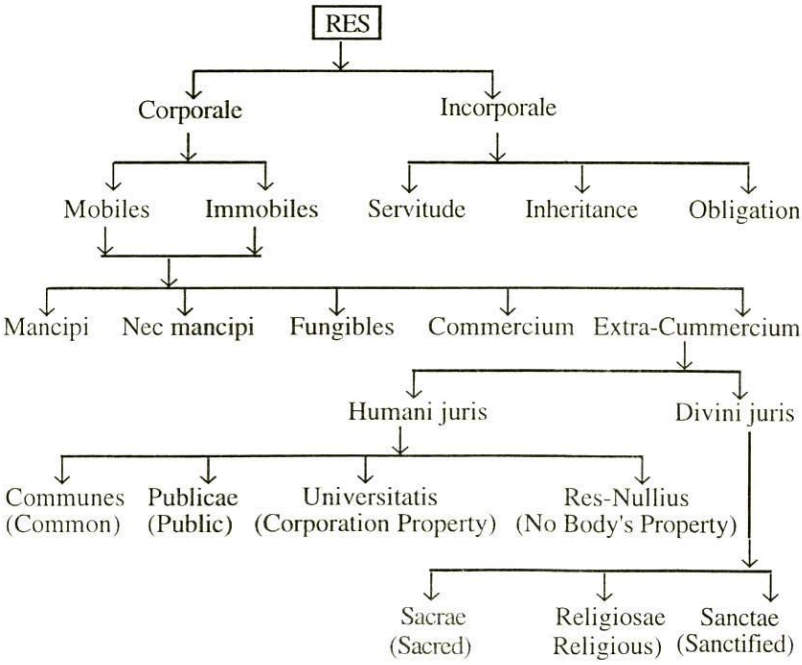
(i) *Res sacrae* are things dedicated to the gods above, e.g. temple, church and their contents.

(ii) *Res religiosae* are things dedicated to the gods below, e.g. burial ground.

(iii) *Res sanctae* are things which are specially protected by gods, such as the gates and walls of the city.

(5) *Res fungibles* and *res non fungibles.—Res fungibles* are things which are dealt with by weight, number or measure such as money, silver, gold, oil, wine and grain which are usually regarded collectively, whereas *res non fungibles* are things such as horse or piece of land which are regarded as individual units. The division is of minor importance. One instance of its application is that there could not be a loan for consumption *(mutuum)* of *res non fungibles.*

The following table will indicate the classification of *res* under the Roman law :—



3. Dominium (ownership):—Ownership constitutes a bundle of rights by virtue of which a person may enjoy all the advantages that an object may bestow and such rights are available against the world at large. According to the Roman jurists the advantages may be grouped under the following heads :—(1) *Jus utendi* (uses) i.e. the right of using the thing in every possible way. (2) *Jus fruendi* (fructus) i.e. the right of enjoying the fruits or the produce of a thing. (3) *Jus abutendi* (abuses), i.e. the right of waste. (4) *Jus dispondendi* i.e the right of alienating the thing. In other words ownership is a right to the absolute use, enjoyment, and disposal of a thing, without any restraint, except what is imposed on the owner by law. Thus the unlimited proprietor of a house may use it as a place of residence, or let it to another or dispose of it by sale, or gift, or even destroy it, if he chooses to do so. But the right of the owner must not be abused and the fact of ownership will not justify the owner to enjoy his property to the injury or detriment of another.

Originally the Roman civil law recognised only one kind of ownership which was known as *dominium ex jure quiritium (quiritary ownership).* It was confined to the Roman citizens and could be acquired by a proper method of conveyance, e.g. *res mancipi* could be acquired by *mancipatio* or *in jure cessio.* The owner could assert his title against anyone by an action called a *vindicatio.*

Provincial lands *(solum provinciale)* were not susceptible of *quiritary* ownership. No private person could be the owner of provincial lands, for it belonged in theory to the emperor or the Roman people as a whole. The praetor could not confer ownership in such land in violation of the *jus civile* but he protected by equitable actions the possession of provincial lands whether in the hands of a citizen or a foreigner. He also protected the possession by a foreigner of any sort of property which they could not own. Such protection of possession given by the praetor was called *'dominium ex jure gentium'* as

it was derived from the *jus gentium* as distinguished from *dominium ex jure quiritium.*

The praetor introduced another species of ownership known as *bonitary ownership.* A person acquiring a *res mancipi* by *tranditio* obtained no title at all at the civil law. Therefore if the property got out of his possession he could not sue for its recovery for the *dominium ex jure quiritium* remained, inspite of the transfer, in the original owner. If the transfer rested on *bonafides* and there was 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 and gave him all the rights and remedies which were available to a civil law owner. If the original owner sued for the recovery of the object, the praetor allowed the transferee, if there was *justa causa* for the transfer, to plead an *exceptio* and so defeated the civil law owner. The ownership of the original owner under such circumstances was known as *'nudum jus quiritium'* as opposed to equitable or *bonitary* ownership of the transferee. Further the praetor granted the transferee, even before the period of *usucapio* was complete, the *actio publiciana in rem,* by means of which he could sue third persons into whose hands the property had passed. When this development of the *jus honorarium* (equity) was complete the cumbrous proceedings of *mancipatio* and *in jure cessio* had fallen into disuse and Justinian removed the distinction between the *quiritary* and *bonitary* ownership. The *quiritary* ownership was merged into the equitable principle of *bonitary* ownership. In his time all lands were practically provincial lands *(solum provinciale) and every free subject of the Emprire was a citizen.* Hence there was only one kind of ownership for every body and for every kind of property.

4. Possession :—The ownership and possession may be vested in the same person. In such cases the owner has the right to possess. If he is in actual enjoyment of his property he

has the actual possession of it as well. But if the actual possession remains with another, the ownership and possession are separated. Thus the lessee *(emphyteuta)* is in possession without ownership and his possession may be protected as ownership.

Possession is evidence of ownership. The possessor of a thing is presumed to be the owner of it and may put all other claimants to prove their title. Long possession is a sufficient title to property which originally belonged to another. The transfer of possession is one of the methods of transferring ownership. The first possession of a thing belonged to none confers a good title of right. A person who has obtained possession by fair and justifiable means is entitled to continue it, till the question of ownership is finally settled. If he has been dispossessed by force or stealth, he has a right to be restored to possession without waiting for the decision of the cause. In respect of poroperty wrongfully owned, the wrongful possession of it is a good title for the wrongdoer against all the world except the true owner.

According to Jharings, possession is the objective realisation of ownership and *de facto* exercise of a claim; ownership is the *de jure* recognition of one. The law of *usucapio* and *prescriptio* determine the process by which possession without title ripens into ownership and ownership without possession withers away and dies.

Possession involves two elements; one of which is *animus* (mental or subjective) and the other is *corpus* (physical or objective). The *animus* consists in the intention of the possessor to exclude others from interfering the use of the thing. Mere possession without the intention to claim possession over it is ineffectual. Thus a person does not possess a field because he is walking over it unless he has the intention of excluding others from the use of it. The *corpus* consists in actual control of the thing i.e. to obtain and retain possession. Possession is acquired whenever the two elements *corpus* and *animus* come into co-existence.

Roman law distinguishes *detentio* and possession. In *detentio* the right of the possessor is limited by the outstanding right of the owner which the possessor admits. The transferee's interest would not be protected by an interdict. Thus a person who received a thing on loan for use *(commodatum)*, on deposit *(depositum)*, on hire *(locatio conductio)* or by way of usufruct, had only *detentio* and the transferor was regarded to be in possession through them. The possession of the transferor was protected by interdict. Possession may be taken either upon a good or a bad title. In this respect the law distinguishes between a *bona fide* possessor and a *mala fide* possessor. A *bona fide possessor is he who possesses another's property in the honest belief that he has a right to it, and a mala fide* possessor. is he who possesses another's property knowing that he has no right to it. *A bona fide* possessor is entitled to the fruits, so long as he has reason to think that he has a good title. When the true owner brings an action to recover his property, the *bona fide* possessor is bound to restore the property together with such fruits as are in being at the moment the action is brought, not those which he has gathered in good faith. *A mala fide* possessor is obliged to restore all the fruits from the time he entered into possession whether consumed or not.

In early Roman law only ownership was protected and not possession. This led to great hardship and to avoid the difficulty the praetor granted possessory interdicts to those who could not acquire *quiritary* ownership. The effect of this interdictal possession was that the possessor had all the advantages of a real owner. In the Imperial period when the civil law was merged in the equitable principles of *jus gentium* the interdictal possession lost its importance.

5. Modes of acquiring ownership of res singulae :— There were two modes of acquring ownership of single item of tangible property, viz.,

(A) Natural mode.

(B) Civil mode.

(A) Natural mode :—A natural mode is sometines called an original mode in the sense that property is acquired for the first time in a thing which was without an owner. All natural modes are not, however, original modes. The following are the examples of natural mode of acquisition of ownership :-

(1) *Occupatio.*

(2) *Accessio.*

(3) *Specificatio.*

(4) *Fructuum perceptio.*

(5) *Traditio.*

(1) Occupatio.—*Occupatio* is taking possession, with an intention to become an owner, of something which at the moment belongs to nobody. It may be either *res nullius* (ownerless thing) e.g. a lion in the forest or *res derelicta.* Things wilfully abandoned by the former owner are called *derelicta,* e.g. where a man throws away his old shoe. In the case of *res derelicta* there must be an internation 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. Occupation differs according to the different classes of things. The things to which the principle of *occupatio* applies fall under the following heads :—

(i) The capture of wild animals.—Here the animal must be actually captured and it belongs to the person who catches it. An injured or wounded animal belongs to the person who catches it and not to him who wounds it. It is not enough to wound it for acquisition of ownership; if it escapes it becomes *res nullius* again. The animal must be wild by nature, such as a beast in the forest, bees, peacocks, pigeons and deer, but not fowls and geese. Wild animals in the enclosure belongs to the owner of the enclosure, e.g. rabbits in a warren but so long as they are there, they belong to the owner of the warren but once they

regain their liberty they can be acquired by *occupatio.* The domestic animals viz., horses, sheep, peacocks, pigeons, deer etc., remain the property of the owner, though they are strayed and not confined. The rule is that mere temporary absence does not destroy ownership so long as they have the intention to return.

(ii) Prize of war.—Things taken from the enemy are left to the disposal of the state.

(iii) Precious stones and other treasure trove, (hidden treasure) found on the sea shore become the property of the finder.

(iv) *'Insula nata'.*—If an island is formed in the sea it is considered a *res nullius* and it belongs to the first occupant.

(2) Accessior :—*Accessio* is where a thing becomes the property of man by accruing or adding or uniting to something which is already owned by him. The property so gained may have been previously either a *res nullius,* or a *res aliena* (thing belongs to another). Accession is of three kinds : (a) of land to land, (b) of movable to land, (c) of movable to movable.

(a) Accessio of land to land.—Accession of land to land arises from the action of streams and rivers, e.g.

(i) *Alluvio.*—When land is gradually gained from the sea or the river by imperceptible deposit of sand or earth, the land so gained or added becomes the property of owner of the land by *accessio.*

(ii) *'Insula nata'*—Where an island is formed in the middle of the river, it belongs to the owner 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.

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

(iv) *Avulsio.*—When land of one person is swept away by the violence of the stream and united to the land of another, the case is *avulsio.* It does not at once cease to belong to the former owner, but it will cease to be his property when the trees will take roots in the land of another to which it is attached.

(b) Accession of movable to land.—Movables accede to land in the following cases :—viz.,

(1) *Inaedificatio.*—Of this there are two main instances :

(i) A with B's materials builds a house upon his own ground. Thereupon on the principle of *"superficies solo cedit"* (accessory follows the principal) A becomes the owner of the building, and so long as the building stands B can not claim his materials. But B is not without remedy. He can recover double damages from A, and when the building is destroyed he can claim the materials if he has not already obtained damages.

(ii) A builds a house with his own materials upon B's ground. On the principles of *"superficies solo cedit,"* B becomes owner of the house by *accessio.* If A knows that the land belongs to B when he builds, he has no remedy. He must be taken to have made B a present. If, however, he builds in the honest belief that the land belongs to him and is still in possession, B can not compel him to give up possession without making compensation.

(2) *Plantatio* and *satio* (sowing).—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. Similarly grains of wheat sown in land belong to the

owner of the land. But in either case if the owner of the land is out of possession and seeking to recover it from a *bona fide* possessor, he can be defeated by the *exceptio doli mali* unless he makes compensation.

(c) Accession of movable to movable.—The following are the instances of such an accession.—

(i) *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.

(ii) *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 defeated by the *exceptio.*

(iii) A weaves B's purple into his own garment. The product belongs to A. But if the purple is stolen from B, the latter has the *actio furit.*

(iv) *Confusio* and *commixtio.*—Where materials whether of the same kind of solids as lumps of gold or of different kinds of liquids as wine and honey are mixed together in such a way that they loose their individual characteristics, the result is turned *confusio* or a chemical compound. When such a mixture is made by consent of the owners or by chance, the mixture is the common property of the owners of the materials. When the mixture is made by the act of one of the parties, the mixture, according to the commentators, belongs to the person who makes the mixture. Whenever the

owners of the materials are deprived of any share in the new product they have to be compensated for the loss they sustain.

Where the different materials are mixed together but they can be separated even after the mixture, the process of mixing is called *commixtio*—a mechanical mixture e.g. when grains of wheat are mixed with grains of barley. In this case the mixture becomes the common property of both, if the mixture has taken place by consent of the parties. If the mixture is made by accident each can claim his original property (not the mixture) 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 various properties.

(3) Specificatio :—When a new thing was made by one man by skill and labour from raw materials belonging to another, it was called *specificatio* e.g., flour from corn, wine from grapes, sugar from sugar-cane, ornaments from gold etc. When the labour and materials did not come from one and the same person, the question of ownership was unsettled. There was a dispute in this respect between the two schools. The Sabines held that the raw materials were the thing to be considered and that the owner of the materials was the owner of the finished product. The Proculians were of opinion that the maker acquired it by *occupatio.* The controversy was finally settled as follows :—If any part of the materials employed belonged to the workman, the workman was the owner of the new article. If not, the question' was whether the article could be reduced to its former raw materials. If it could be reduced or resolved to its original state, the owner of the materials was the owner of the new thing but he must pay for the labour and skill. If on the other hand, such reconversion was impossible as in the case of sugar, wine, flour, then the new thing belonged to the maker, but he must pay for the materials.

(4) Fructuum perceptio :—*It* means the gathering or taking the fruit of things. The owner of land or animals gets their

fruit or offspring as *dominus* (owner). Not only the owner but also persons having limited interests (e.g. for a term of years) acquire the fruits of the property by actual gathering *(perceptio).* The examples of persons who acquire by this title are the lessee, 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. So long as their interest continues, they are the owners of the fruits that are gathered. Therefore, if the *usufructuarius* or life tenant dies before harvest, the fruits, since they have not been gathered, do not belong to his heir but to the *dominus* (owner) or the reversioner. When the true owner brings an action to recover his property from the *bona fide* possessor, the latter is bound to restore the property itself together with such fruits as are in being at the moment the 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 to give compensation for everything, whether consumed or not. According to Justinian, the term 'fruit' includes they young of animals. So the lambs become the property of the *usufructuarius* but the 'fruits' does not include the offspring of a female slave and they belong to the reversioner and not to the life tenant.

(5) Traditio :—*Traditio* (delivery) was formerly applicable to the transfer of *res nec mancipi* but in the time of Justinian it became the, common method of alienation for *res corporales.* To constitute good title by *traditio,* the following elements must concur :—

(1) The transferor must either be the owner or his agent (e.g. tutor or mortgage with the right to sell).

(2) He must intend to transfer and the other person must accept the ownership of thing. The intention to confer ownership need not always be in 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 wlio picks it up shall keep it.

(3) The thing must not be *res extra commercium.*

(4) There must be some good legal reason to support the delivery. The reason is that the purchaser had paid the price or satisfied the seller in some other way, or the donor gave tlie *res* by way of dowry or gift.

(5) Actual delivery may not be possible in all cases. The thing to be delivered may be too heavy, or it may be land, or may be at a distance. In such cases delivery may take place without actual transfer of physical control.

Delivery may be actual or constructive. Constructive delivery was of the following kinds :—

(1) *Traditio bravi manu.*—If the person to whom ownership was sought to be transferred was already in actual control, the ownership could be transferred by mere expression of a wish to that effect by the owner. Thus A delivered a thing to B for safe custody and afterwards sold or made a present of it to B, while it was in B's possession. Here no fresh delivery was necessary and mere declaration of intention was enough. Similarly the delivery of the keys of a house of a ware-house was sufficient to transfer the property either in the house itself or its contents. Putting marks, as upon logs of wood, was another way of effecting legal delivery, where it would have been difficult to have an actual dealing with the physical control.

(2) *Traditio longa manu.*—It occurred when the *res* or thing was pointed out to the transferee and it was declared that he was free to take control of it.

(3) *Constitutum possessorium.*—It occurred if an owner in possession sold the *res* agreeing to hold it for the vendee, the making of this agreement was a valid *traditio.* The possession and with it the ownership,

passed to vendee without any actual displacement. Thus A, an owner in possession, sold his land to B and at the same time agreed to be the tenant of B.

(B) Civil modes :—Justinian only mentioned two methods of acquiring property at civil law, viz., *usucapio* and *donatio.* There were, in fact, two other ways in his time, viz., *lege* and *adjudication.* Under the old law there were also two other methods viz. *mancipatio* and *in jure cessio.* In all, the following were the civil modes of acquiring property :—

(1) Mancipatio.

(2) In jure cessio.

(3) Usucapio.

(4) Donatio.

(5) Lege.

(6) Adjudicatio.

(1) Mancipatio :—The earliest form of conveyance or transfer of *res mancipi* at Rome was the *mancipatio* which was confined to Roman citizen. The process of conveyance was as follows :—Before five citizens above the age of puberty and a *libripens* (another citizen to hold a balance), the alienee holding a piece of bronze *(aes),* touched either the object or a representative part of it and said, "I declare that this slave (or thing) is mine *ex jure quiritium,* and let it be bought for me with this piece of bronze and balance of bronze." After this declaration he stroke the balance with the piece of bronze, and gave it (bronze), as if it was the price to be paid, to the mancipator or seller. At the close of the ceremony the ownership was automatically transferred to the alienee (transferee). This formal transaction was called *per aes et libram.*

Mancipatio was applicable not only as a means of transferring property but to the ceremonies of adoption, emancipation, marriage, and testament, *Mancipatio* disappeared under the law of Justinian, when the distinction

between *res mancipi* and res nec mancipi *was abolished and all things were conveyed by traditio.*

(2) In jure cessio :—*In jure cessio* was a fictitious law suit in the court of law. It was used not merely as a means of conveying property but also in *manumissio vindicta,* adoptions, creation of servitudes, and transfer of a *hereditas.* As a method of conveyance it involved a claim before the praetor by the intended alienee that the property in question always belonged to him. If the ownership of a slave was to be transferred, the alienee taking hold of him said a special set of words called the *'nuncupatio.'* The owner made no defence and the praetor awarded the slave to the new master. In Justinian's time it was altogether obsolete and unnecessary as a means of conveyance as *traditio* applied to all *res corporales.*

(3) Usucapio :—It was a means of acquiring *dominium* (ownership) by possession for the period fixed by law. According to the Twelve Tables, the period of possession was one year for movables and two years for immovables. *Usucapio* was utilised mainly in two cases : (1) when *quiritary* property was transferred by a non-*quiritary,* method, i.e. when *res mancipi* was transferred by *traditio,* and (2) when the thing was alienated by a non owner. *Usucapio* served to cure defective titles in all cases where a mere informality stood on the way to acquire ownership according to law. Before the title was perfected by *usucapio,* the possessor was secured in the enjoyment of the ownership by the praetor. This form of ownership was called *bonitary* (equitable) ownership as distinguished from *quirtary* (legal) ownership. In order to get the benefit of *usucapio* the following conditions had to be satisfied :—

(i) The claimant must actually possess the thing in question. He must have *possessio civilis* as distinguished from mere *detentio.* Possession coupled with other factors which enabled the holder

to get the benefit of *usucapio* was known in classical law as *possessio civilis.* A person to whom goods had been entrusted for safe custody had only *detentio* and therefore, however long he might hold them he could never, by *usucapio,* acquire *dominium.*

(ii) The claimant must have the *jus commercii;* hence no peregrinus could acqurie by *usucapio.*

(iii) The claimant must possess the property for the full period but if he was an heir, suppose of B, he could count the period of possession B had in his favour. B was in possession of a movable property for three months, it was sufficient for his heir to remain in possession of the property for nine months only to claim the benefit of *usucapio.*

(iv) The possession must have been continuous and uninterrupted for the full period required by law. Thus A was usucapating a slave who ran away, he must begin over again without counting his previous possession when he regained the slave.

(v) Certain properties could not be acquired by *usucapio* e.g. *res extra commercium,* land in the provinces and stolen property.

(vi) The person in possession must have *bona fides*(good faith), that is, he must not know that the property belonged to another and he must have *justa causa,* that is, there must be some ground recognised by the law for *usucapio* to operate. It was a *justa causa* if A bought a *res mancipi* by *traditio* and failed to observe the formalities and ceremonies.

Prescriptio,—Before the time of Justinian *usucapio* was distinguished from *prescriptio... Prescriptio* was a mode of acquisition of property by lapse of time as introduced by the praetors for the for-eigners. It was a praetorian defence *(exceptio)* which barred the remedy of the owner against the possessor when the latter remained in possession for a

definite period. In the earliest period of Roman law the period of *prescriptio* was same as *usucapio* i.e. a prescriptive title to movables was acquired by possession for one year and immovables for two years. When a person remained in possession for the prescriptive period and afterwards lost it, he was allowed by the praetorian law an *actio utilis* to vindicate his right.

The essential elements or *prescriptio* were the following :—(1) The possession should be *bona fide*, i.e. acquired in the honest belief that the vendor was the owner. (2) The possession must be uninterrupted and continuous for the full statutory period. (3) The property should not be tainted with any vice, i.e. it should not have come by clandestine or forcible manner.

Prescription was positive or negative. It was positive when the possessor remained in possession of the property for the prescriptive period which cured his defective title into a perfect one. By negative prescription the true owner was debarred from his legal remedy if he neglected to seek the aid of the tribunals for a given time. Hence rights were acquired in favour of the possessor by positive prescription and the rights of the true owner were extinguished by negative prescription.

Inapplicability of *prescriptio.*—Certain special kinds of property were withdrawn from the operation of prescriptio, viz, (1) *res extra commercium*, (2) stolen property and property taken by violence, and (3) property whose alienation was forbidden by statute.

The difference between usucapio and prescriptio :—

(i) *Usucapio* was introduced by the Twelve Tables, while *prescriptio* by the praetor.

(ii) *Usucapio* gave an *actio* (action) as well as *exceptio* (defence) i.e. it gave both active and passive right,

while *prescriptio* gave only an *exceptio* i.e. it was available only as a defence.

(iii) *By usucapio* property was acquired subject to incumbrances, if any, but by *prescriptio* it was acquired free from all in cumbrances.

(iv) *Usucapio* was interrupted only by the judgement in action, while *prescriptio*, being merely a defence, was interrupted by the joinder of issue *(litis contestatio).*

(v) *Usucapio* applied only to *res mancipi* whereas *prescriptio* applied both to *res mancipi* and *res nec mancipi.*

(vi) Both by *prescriptio* and *usucapio* a non-owner became an owner through efflux of time.

Justinian's changes in usucapio and prescriptio :— Justinian amended both the civil law of *usucapio* and *prescriptio* and embodied the two ideas into one system. He introduced the following changes :

(i) Title to movable property should be acquired by three years' undisturbed possession.

(ii) Title to immovable property should be acquired by ten years' possession if the parties (owner and possessor) lived in the same province (inter presentes) and by twenty years' possession if the parties lived in different provinces (inter absentes).

(iii) Undisturbed possession for 30 years in general gave good defence even when the possessor came in under no title or the thing belonged to a class excepted from ordinary prescription. It was also provided that ownership could be acquired by extraordinary prescription of 40 years whatever was the origin of possession. The acquisition of ownership by possession for 30 years or 40 years was called *prescriptio longissimi temporis.*

Usurpatio (interruption) and its effects :— *Prescriptio* was interrupted by any act whereby the proprietor or creditor exercised his right. The interruption was natural when the possessor was deprived of possession by the true owner.The interruption was civil when judicial proceedings were brought by the owner to vindicate his right before the period of prescriptio was complete. The effect of interruption was that the possessor had to begin a new course of possession from the day of interruption. The person prescribing could not avail himself of his previous possession but he must begin a new course from the date of interruption.

(4) Donatio :—*Donatio* (gift) is the giving of something to another voluntarily and gratuitously and without any previous obligation. The subject of gift may be movable or immovable property or anything having a pecuniary value. There must be an intention to give on the part of the donor and acceptance on the part of the donee. Acceptance may also be presumed.

An agreement to make a donation was a natural obligation and gave no right to the donee to sue for performance of delivery but it might be enforced when it was clothed with the form of *stipulatio*. Justinian allowed the donee to bring an action for delivery, when the donor declared his intention to give a thing, either orally or in writing, even though the form of *stipulatio* had not been observed.

Justinian speaks of *donatio* as a mode of acquisition but it was not treated as such by Gaius. Gift is a *justa causa* for *traditio*. According to Justinian there were three distinct cases of *donatio*. viz.,

(1) Donatio mortis causa.

(2) Donatio inter vivos.

(3) Donatio propter nuptias.

(1) Donatio mortis causa :—This was a gift made in anticipation of death. Such a gift was made to the donee or to

any one on his behalf on condition that it should be his property if the donor died but if the donor survived the anticipated peril, he should get his property back, Such a gift might take one of the 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. A *donatio mortis causa* was revocable at any time before death and it was rescrinded by the insolvency of the donor, or by the death of the donee before the donor. It was unlike a *donatio inter vivos*, which could not be revoked. Justinian required that such gifts had to be made in presence of five witnesses whether the gift was in writing or not and registration was not necessary. It resembled legacy and the rules applicable to both were practically the same. It *differed* from legacy, mainly in two ways :—

(a) A *donatio mortis causa* took effect, at any rate in possession, at once whereas a legacy did not take effect until the donor had died and the heir had entered.

(b) A *filiasfamilias* (son under *paterfamilias)* could, with his pater's assent, make a good *donatio mortis causa* out of his own *peculium profecticium* but he could not bequeath it.

(2) *Donatio inter vivos.*—This was merely a gratuitous conveyance made by the donor to the donee. Under the old law there were only three ways in which a gift *inter vivos* could be made :

(a) The donor might make over the gift by a *mancipatio* or an *in jure cessio*, or later by *traditio*, or

(b) The donor might bind himself to make the gift by the formal verbal contract of *stipulatio*, or

(c) The creditor might release the debt by *acceptilatio.*

(3) *Donatio propter nuptias* (see p. 82)

The *lex Cincia* (204 B.C.) prohibited all donations beyond a certain maximum. But gifts in favour of near relatives and patrons were exempted from the restriction. This law required all gifts to be actually transferred by *mancipatio* or tlie like, otherwise they were revocable by the donor. Antoninus Pius provided that, as between parents and children, a mere informal agreement should be actionable. Constantine directed that gifts exceedig 200 *solidi* were required to be registered and delivered in the presence of witnesses.

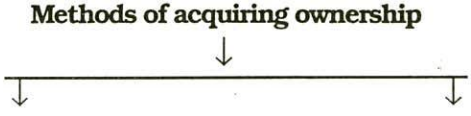
Justinian made the following modification :—(i) He required gift exceeding 500 *solidi* to be registered, otherwise the gift was void as to the excess over that amount. But certain gifts, even though of greater amount, were valid without registration, e.g. to redeem captives, or in case of gift made by or to the Emperor. (ii) He also simplified the law as to revocation. Originally gifts *intervivos* were not as a rule revocable, except those made by the father or patron to a child or freedman which were revocable on the ground of ingratitude. Justinian permitted all donor without distinction to revoke on the ground of gross ingratitude or for non-compliance of the condition upon which the gift was made.

(5) Lege (or title by statute) :—The property in a lapsed or forfeited testamentary bequest might be acquired by virtue of the *lex Papia Poppaea.* Similarly a person might acquire property by law *(lege),* e.g. certain legatees acquired the legacy by force of law as embodied in the Twelve Tables.

(6) Adjudicatio :—*Adjudicatio* was the award of a judge in a suit for partition. The co-owner of the property could amicably divide the joint property. If they did not agree or were under disability, the assistance of the law court was necessary and the judge would decide how the property was to be equitably divided between them. He would by his award *(adjudication)* give the sharers without any conveyance the

share which he should receive. *Adjudicatio* was, therefore, a mode of acquiring property because the award gave each sharer the sole ownership in his share of the property what previously belonged to all the co-owners.

For recapitulation the methods of acquiring ownership are given in a tabular form :



Natural	**Civil**
(1) Occupatio	*(1) Mancipatio.*
(2) Accessio.	*(2) In jure cessio.*
(3) Specificatio.	*(3) Usucapio.*
(4) Fructuum perceptio.	*(4) Donatio.*
(5) Traditio.	*(5) Lege.*
	(6) Adjudicatio.

6. Jura in re aliena **:—**Ownership gives innumerable rights of enjoyment over a thing. Any one or more of the innumerable rights involved in the right of enjoyment may be vested in some person other than the owner. That person has a right, entitling him to some advantage from, or use of the property of the owner. When a portion of such rights of ownership is given to that person to be exercised by him to the exclusion of the owner, such detached rights were called in Roman law *jura in re aliena.* It is a limited right of a person on the property of the owner. Thus A is the owner of a piece of land and B has a right of way over it. here A's ownership is curtailed by B's right of way. B's right over A's property is *jura in re aliena.* In Roman law there were four classes of *jura in re aliena,* viz.,

(A) Servitude.

(B) Emphyteusis.

(C) Superficies.

(D) Pledge.

They are rights *in rem* i.e. rights which are available against the whole world. These rights are enforceable not only against the owner but against any one who interferes with it. These rights are less than complete ownership. They confer limited rights and are subordinate to and curbed or detached out of ownership.

(A) Servitude :—A servitude is a right of an owner of an adjoining land to enjoy certain advantages on the land of another person. Thus A has the right of walking over B's land; A's right is a servitude. It is an incorporeal right. According to the Roman jurists a servitude was a real right, vested in or annexed to a definite person or piece of land, over some object belonging to another and limiting the enjoyment of that object in a definite manner. According to Salmond, a servitude is a right to the limited use of a piece of land unaccompanied either by the ownership or by the possession of it.

A servitued may be positive or negative. If it is a positive servitude, the holder of the servitude may do something in relation to it upon another's land e.g. right to walk over another man's land. If it is negative, he may restrain the owner from exercising some rights which, but for the survitude, the owner could avail. Thus an owner of land can build to any height he pleases, but if any person has the servitude, the owner can not build so high as to obstruct that person's right of light or air. Whether it is a positive or negative servitude the owner of the thing subject to the servitude can not be compelled to do anything. But there is an exception to this rule. The exception happens in the case where a man's walls or pillars are used to support another's building. The agreement to support involved the duty to repair in case of need. Thus A is bound to support B's beam by A's

wall. The wall is ruinous, A is bound to repair. From the nature of servitude it follows that an owner could not have servitude over his own land. The Romans divided servitudes into (i) praedial and (ii) personal.

Praedial servitude :—A praedial servitude occurred where the owner of one property had the right to take some advantage from the adjoining property belonging to another person. Such a servitude was granted in favour of the proprietor of a particular estate, so that all owners of that estate had a right to enjoy them. It was a burden imposed on a particular land in favour of another land. Therefore, the praedial servitude implied the existence of two properties. One was called *praedium dominans* (dominant tenement) and the other *praedium serviens* (servient tenement). The land, which enjoyed the right or which was benefited, was called the *praedium dominans* or dominant tenement. The land which carried the burden was called the *praedium serviens* or servient tenement. In other words the land in favour of which the right was created was *praedium dominans* and the land subject to the right was *praedium serviens.* Praedial servitude was perpetual and would be enjoyed or borne by all subsequent owners of the two properties. It was indivisible, and inseparable from the land to which they were attached. Praedial servitudes were divided into (a) rural and (b) urban.

(a) Rural servitude.—A rural or rustic servitude was related to land wherever situated and the urban servitude was related to building whether in town or in country. The distinction did not depend on the situation of the property affected. It might be in the town or in the country. The chief rural servitudes were the following :—

(i) *Iter.*—It was a right of a man to pass over the property of another either on foot or horseback or in a litter.

(ii) *Actus.*—It was a right to use a road for carriages, and for driving cattle and other beasts of burden.

(iii) *Via.*—It was the most extensive right of passage, comprehending not only the first two but also the right of using the road for all sorts of carriages, and for dragging stones, wood and building materials.

(iv) *Aquae ductus.*—It was a servitude to lead water by canals or pipes through another's ground.

(v) *Aquae haustus.*—It was the right of drawing water from a well or fountain of another for domestic purposes.

(vi) *Pecoris ad aquam appulsus.*—It was a right of taking cattle to water on another's land.

(vii) *Pascendi pecoris.*—It was a right of feeding cattle or sheep on another's ground.

(viii) *Calcis coquendae.*—It was a right of burning chalk or lime on the land of the servient tenement.

(ix) *Other rights.*—There were many other servitudes which gave the right to take stones, lime, sand, chalk, props for vines and many similar rights.

(b) *Urban servitudes.*—The urban servitude was related to building whether in town or country. The chief urban servitudes were the following :-

(i) *Oneris ferendi* (right of support).—This was the right to rest the whole or part of a building on the land or the housewall or property of the servient owner. It was an incumbent on the owner of the servient property to keep it in repair, so as to make it sufficient to bear the burden. This was an only exception where an active duty was cast on the servient tenant.

(ii) *Tigni immitendi.*—This was the right of fixing a beam in the neighbour's wall for security.

(iii) *Stilliciadi vel fluminis recipiendi servitus.*—This was the right of a man that his neighbour should

permit rain-water from the former's house to flow into or over his premises. (The word *stillicidium* means rain in drops; when the water is collected in a flowing body, it is termed flumen).

(iv) *Altius non tollendi.*—This was the right against a neighbour to restrain from raising the houses or other buildings beyond a certain height.

(v) *Ne luminibus officiatur.*—This was a right to prohibit construction in such a manner that would shut out light from a house or the general view.

Creation of praedial servitude.—The old rural servitudes were created by *mancipatio conventio* (pacts and stipulations), testament and prescription. Servitudes in Italian soil were constituted generally by *In jure cessio* as well as by *adjudication* and in provincial soil by *conventio* i.e. pacts and stipulations. In the time of Justinian the distinction between Italian and provincial soil was abolished and servitudes were frequently constituted by pacts and stipulations.

Extinction of praedial servitude :—Though praedial servitudes were normally perpetual, still they were terminated in the following ways :—

(i) *By confusio* (merger).—When the dominant and servient tenements came into the hands of the same proprietor, the lesser right (servitude) was merged into the greater right (ownership) and consequently extinguished.

(ii) By renunciation of ownership of the dominant tenement the servitude was lost.

(iii) Sometimes servitudes were extinguished by natural circumstances e.g. when the dominant or the servient tenement was destroyed by an earthquake.

(iv) By non-user for 10 years inter presentes and 20 years inter absentes.

Personal servitude :—A personal servitude arose when the use of a thing was allowed to a particular individual other than the proprietor. The person entitled to the right enjoyed it, not as an owner of property, but because he had acquired it in his private capacity. Personal servitude existed not on one land for the benefit of another land but on a definite thing for the benefit of a definite person or a class of persons. The personal servitudes were divided into :—

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

(1) Usufruct :— Usufruct was the right to use and enjoy the property belonging to another without impairing its substance. The right was granted to a man personally for his life or for a fixed period or until *capitis deminutio.* The property was to revert intact to the *dominus* or his heir after the termination of the usufruct. The right might be conferred by contract or testament, either for the life of the grantee or for a fixed period. The objects of the usufruct might be in land, houses or buildings, slaves or beasts of burden, and in anything except things which were destroyed by use, the reason being that it was impossible to restore such things at the end of the usufruct intact. But the senate permitted a *quasi-usufruct* to be created by will even in regard to things which were consumed in use, e.g. money, wine, oil, wheat etc. In such a case the *usufructuarius* (the holder of the usufruct) could not undertake to restore them but he had to give security to restore as much in quantity and value as he had received or to pay and equivalent in money as compensation on the expiry of his right to the testator's heir on his death. *Quasiusufruct* was a loan without interest.

Usufruct corresponds to a certain extent to the life interest in English law. Usufruct included possession, use and fruit. Like servitude it was inalienable.

Rights of the *usufructuarius*.—He was entitled to the possession and enjoyment of the property. Although he could not legally transfer the usufruct to another, he could, as a fact, permit another to have the use and enjoyment of it. He was not liable for accidental loss or damage. If the property in question was a farm, he was entitled to its ordinary produce, and acquired by *fructium perceptio* the fruits, which included the young of animals, but not the children of a female slave. If the property was a slave the *usufructuarius* was entitled to his services. His title to the fruits of land did not accrue till they were reaped. If he died before this, no right passed to his representatives.

Duties of the *usufructuarius*.—In all cases *usufructuarius* was bound to show the same degree of care in the management of the property as a *bonus paterfamilias* and was, therefore, liable for waste. He could not use the property for any purpose other than the agreed one, nor alter the character of the property. If the usufruct was of a house he was to do all necessary repairs. In the case of cattle or sheep he should keep up the usual number of the herd or flock. He was to replace any of the flock which died out of the young which belonged to him. He was bound to restore the property uninjured. He could not change the character of the thing. To guard against waste or encroachment, he might b; compelled to give security for the restoration of the property in its original condition.

Creation of usufruct.—Usufruct was created in the following ways :—

(1) By contract.

(2) By testament or will either for life or for a fixed period.

(3) By *adjudicatio*.

(4) By *mancipatio* usufruct was created by way of reservation *(deductio)* e.g., the land was mancipated with the condition that the usufruct would belong to

a person other than the mancipatee. The latter in such a case had the bare ownership called *nuda proprietas.*

(5) By statute e.g. the father's usufruct in half of the *peculium adventicium* of his son after emancipation.

Extinction of usufruct.—Usufruct came to an end in the following ways :—

(a) By natural or civil death of the usufructuary.

(b) By expiry of the period of usufruct.

(c) By consolidation or merger i.e where the usufruct and ownership were united in the same person.

(d) By the total destruction of the subject.

(e) By non-use for ten years when the parties were present in the same province and twenty years when they were in different provinces.

(f) When the usufruct was created for another's life, it ceased on the death of that person.

(g) By *capitis deminutio maximan, media* and *minima* before the time of Justinian. But Justinian enacted that only *capitis deminutio maxima* and media would destroy the usufruct.

(h) By forfeiture for breach of some conditions or waste.

(2) Usus : —*Usus* in Roman law was a right to use a thing belonging to another without wasting its substance, and without being entitled to the produce beyond what was necessary to supply the daily wants and necessaries of the user and his family. A person having the use of a farm could take only such vegetables, fruits, etc., as were necessary for his daily needs. The *usuarius* of cattle or sheep could not take the lambs or the wool but could take only the milk. He could use the animals to manure his land. He was entitled to use the thing personally but could not let, sell or give it to another. So

a person having the use of a house could live himself in it, but could not permit another to occupy it in his place. There was thus much less benefit or emolument in *usus* (the use of the thing) than in the usufruct. *Usus* was constituted and terminated in the same way as usufruct.

(3) Habitatio : —It was a right to reside gratuitously in a house belonging to another. Originally it was a personal privilege but Justinian permitted the grantee either to live in the house or to let it as a place of residence to another. *Habitatio* was not lost by nonuser nor by *capitis deminutio minima* even before Justinian.

(4) Operae servorum :—It was a personal right to the services of the slaves of another. When such a right was created by legacy it did not terminate by the death of the legatee, but passed to his heirs who enjoyed the services during the life of the slave. A similar right existed in respect of the labour of animals, and this was called *operae animalium.* The differences between the servitudes and an usufruct are that neither death, nor *capitis deminutio minima,* nor non-user operated to extinguish the right.

Creation of servitude.—According to the civil law the normal way of creating a servitude was the following :—

(1) By *in jure cessio* i.e. the fictitious law-suit in which the plaintiff claimed that he had the right of walking over the defendant's land and the defendant acquiesced.

(2) By *mancipatio.*—A rustic servitude, being a *res mancipi,* could be created by *mancipatio.*

(3) By *deductio* (reservation) i.e. by reserving a right at the time of transfer by *mancipatio* or in *jure cessio.*

(4) By testament (will).

(5) By *adjudicatio.*

(6) By agreement of the parties in a solemn form of *stipulation.*

(7) By *prescriptio longi temporis*.—By uninterrupted exercise of the right for 10 years inter presentes and 20 years inter absentes.

In the time of Justinian the difference between Italian and provincial lands was abolished, and *in jure cessio* and *mancipatio* had become obsolete as methods of conveyance. In his time, therefore, servitudes were created in the following ways :—

(1) By agreement and *stipulatio*.

(2) By *deductio*. The right of servitude was reserved when property was conveyed to another by *traditio*.

(3) By *prescriptio longi temporis* i.e. by continuous user for 10 years inter presentes and 20 years inter absentes.

(4) By testament.

(5 By *adjudicatio*.

(6) By statute e.g. the father's usufruct in half of his son's *peculium adventicium* after emancipation.

Termination of servitude.—Servitude terminated in the following ways :—

(1) By death.—If the servitude was a personal one, by death or *capitis deminutio* of the person entitled. *Capitis deminutio minima* 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 usufruct, by the *usufructuarius* want only abusing his rights.

(3) In the case of praedial servitude, by the permanent destruction of the *praedium dominans*.

(4) by destruction of the thing subject to the servitude.

(5) Merger.—When the dominant tenement and servient tenement came into the hands of the same person.

(6) Non-user :—*Habitatio* and *operae servorum* were never lost by non-user. Under the old law usufruct or *usus* were extinguished by non-user for one year in the case of movables, and two years in the case of immovables; non-user for two years extinguished praedial servitudes. If the servitudes affected provincial soil, non-user for 10 years inter presentes and 20 years inter absentes extinguished servitudes. This period was adopted by Justinian for all cases.

(7) By renunciation :—Servitudes were extinguished by renunciation or voluntary surrender.

(B) Emphyteusis :—*Emphyteusis* was a grant of land for ever or for a long period at an annual rent payable to the grantor or his successors. If the rent was not paid, the grant would be forfeited. It was a sort of perpetual lease and the ownership remained with the grantor. The grant was heritable. It had its origin in the long or perpetual leases, granted by the Roman state, of lands taken in war. The rent paid for such land was called *vectigal* and the land *ager vectigalis.*

The advantages of this perpetual lease were appreciated by corporations, ecclesiastical and municipal bodies. This tenure relieved the owners in the management of their lands and gave them in exchange a perpetual right to rent. From this standpoint this tenure was beneficial and convenient for corporate bodies. The same tenure was adopted by private individuals under the name of *emphyteusis.* In the time of Gaius a controversy arose as to whether *emphyteusis* was a sale or a lease of land. It resembled sale as it gave a right for ever to the grantee in the land but it differed from sale as there was an annual payment of rent. It resembled hire in respect of the rent but it differed from hire in respect of the perpetual interest of the tenant. Emperor Zeno settled the dispute by declaring that it should be considered neither a sale nor a hire but a particular contract standing by itself and governed by the agreement of the parties.

Emphyteusis occupies an important place in the history of land tenure. It was pointed out by Sir Henry Maine that it marks a stage in the history of ideas which led ultimately to feudalism. The double ownership of the feudal system is found in this tenure.

Rights and duties of *emphyteuta* (lessee).—His rights were far greater than those of an usufructuary and resembled those of an absolute owner. His rights were almost unrestricted except that he must not destroy the property so as to impair the security for the rent. He could possess lands, reap the fruits, make changes in the substance provided he did not injure the property. He could be ejected from the land if he failed to pay rent for three years. He could sell his rights but was bound to give notice to the landlord (owner) of his intention to sell the property and of the sum ottered to him by the proposed purchaser. The owner had the option of buying it at that moment and if he did not exercise his right of preemption the tenant could sell to any person without the consent of the owner who was bound to admit the purchaser into possession and was entitled to a fine called *Iandemium* not exceeding two percent of the purchase money.

Creation of emphyteusis :— *Emphyteusis* was created either by a convention or by a testament.

Termination of emphyteusis :—The right was extinguished by (1) consent of parties, (2) non-payment of rent for two years in case of church property and three years in other cases, (3) total destruction of the object, (4) expiry of the period when the grant was for a fixed period, (5) death of the grantee without heirs.

(C) Superficies :—*Superficies*, a real right, was created by the praetor. It was a lease of land either in perpetuity or for a long term for building purposes at a fixed rent. According to *jus civile* the house became the property of the owner of the land on the maxim *"superficies solo cedit."* In such a case the praetor enforced that the builder had a real righ to the full

possession and enjoyment of the house so long as the rent was paid. The right of the builder was heritable as well as alienable. It was constituted by contract which regulated the incidents of the right. The lessee acquired rights in *rem* to the extent of his interest. It was protected by a special interdict by the praetor.

The difference between *emphyteusis* and *superficies* is that the former was a lease of land for agricultural purposes and the latter for building purposes. *Superficies* was created and extinguished in the same way as *emphyteusis.*

(D) Pledge (mortgage) :—Pledge is the delivery of a thing to a creditor as a security for the loan, on condition of his restoring it to the owner after payment of the debt, and with a power of sale of the property if the debt was not paid. In modern law the term pledge is generally confined to movables and the pledge of immovable property is called a mortgage. But the Romans applied the term both to movable and immovable property. A pledge is a *jura in re aliena;* it creates not only a right in *personam* but a right in *rem.* The law of pledge in Roman law passed through three stages at various times :

(1) Fiducia.

(2) Pignus.

(3) Hypotheca.

(1) Fiducia :—The earliest form of pledge was to convey the property absolutely by the borrower to the lender as a security for the loan by *mancipatio* or in *jure cessio* and thereby the lender became the owner of the property. The lender them undertook by a *pactum fiducia* (an agreement of trust) to make reconveyance when the principal and interest were repaid. Since he was the owner he could at law realise his security by selling the property; in case of sale he would hand over the balance, if any, to the borrower, If he could not pay oft' the loan in time, he would lose his property for ever. The

borrower might be willing to repay the money, but in the meantime the lender might have sold the property and the borrower could not follow it in the hands of the purchaser. But the free exercise of the power of sale was defeated in equity by the *fiducia* which bound him to return his property on repayment. If he would sell the property and thereby the borrower suffered damage, he could compel the lender by the *actio fiduciae* to make compensation. In this form of mortgage the mortgagee acquired right of wide orbit. He became, in fact, more than a person with a *jus in re aliena* as he was owner at law. As this form of mortgage was carried out by means of conveyance at civil law it had no application to *peregrini* or to land in the provinces. This form of mortgage placed the debtor at the mercy of the creditor. Although he could get compensation under the *fiducia* from the creditor in case of sale of the property, he could not follow the property at the hand, of the transferee of the creditor.

(2) Pignus :—The disadvantages of *fiducia* led to the creation of another form of mortgage known as *pignus* (a real contract). Under this form the ownership remained with the debtor but the possession was transferred to the creditor. If the borrower failed to pay on the appointed day, his property was lost. He was not allowed to recover it, as the lender was at liberty to sell it after the expiry of the time fixed for payment. This caused great hardship and injustice. At this point the praetor interfered and issued an edict to the effect that where a lender got possession of the debtor's property, he should be compelled to restore it to the debtor on his making a tender of the loan. He gave the borrower for this purpose an action called *actio pigneraticia* and this informal pledge was known as *pignus.*

(3) Hypotheca :—*Hypotheca* was a form of mortgage resting merely on agreement. Under this form neither the *dominium* nor the possession was given to the creditor. Servius, a praetor, introduced between landlord and tenant an

action *(actio serviana)* by which tlie tenant could mortgage his property and crops to secure his rent. This action gave the landlord of a farm a right to take possession of the stock of his tenant for rent due, when the tenant agreed that the stock should be a security for the rent. Such a security was called *hypotheca.* Subsequently the action was extended under the name of *quasi-serviana* to all cases where an owner retained possession of the property but agreed that his property should be a security for a debt. Thus in the result the owner could borrow money, simply by offering sufficient security to the creditor, without giving possession of the property to him. The creditor could get the property from the debtor, if necessary, by an interdict. He could assert his rights by an action in *rem* against third parties and had a right of sale. The chief advantages of *hypotheca* were—(i) the property remained in the possession of the borrower and at the same time the lender was adequately secured; (ii) many more objects could be pledged, e.g. a slave child yet unborn; (iii) a general lien could be created over the whole of a person's property and was sometimes implied by law although tliere was no express agreement, e.g. the landlord had an implied *hypotheca* over the crops from the moment they were gathered.

In the time of Justinian the mortgage by way of *fiducia* had entirely disappeared but the other two forms of mortgages remained. There was no distinction between *pignus* and *hypotheca* except the difference with regard to possession. In *pignus* possession was given to the creditor and in *hypotheca* it remained iwth the borrower.

Duties of creditor :—As the contract was for the benefit of both parties, the creditor was bound to take ordinary care and diligence on the property given by way of security and was responsible for *culpa levis* (slight negligence). If it was destroyed by unavoidable accident or any intrinsic defect, he was not liable, but he must show how it was lost and that it was beyond his power to prevent it. He could neither use, nor

take profit unless specially agreed upon, and was bound to render accounts. He was entitled to be indemnified for all necessary expenses.

Power of sale :—Both in *pignus* and *hypotheca*, the power of sale was an inherent right of the mortgagee in the Roman law. He had the right to realise his debt by selling the mortgaged property, if he was not paid during the time agreed upon. The debtor was entitled to the surplus sale proceeds, if any. If the price was not sufficient, he had a personal action for the amount remaining due. The power of sale was to be exercised according to the terms of the agreement, and no judicial authority was necessary. In the absence of any agreement Justinian declared that the sale would not proceed till two years had elapsed from the date of the notice to the debtor or of a judicial decree against him before the power of sale could be exercised.

Justinian allowed foreclosure when the creditor was unable to find a buyer at an adequate price. But the debtor must be given due notice, and if within the specified time he did not pay, the creditor obtained the ownership on petition to the Emperor. In case of foreclosure the debtor was allowed two years' grace. If he did not pay all the principal with interest within that time, his claim was absolutely foreclosed.

Priority.—If the same thing was mortgaged to several persons and the property was not sufficient to pay them all, the question of preference or priority arose. Except in the case of a small number of privileged mortgages, the question of priority was determined by two principal rules. First, a mortgage made by a public deed, that is a deed prepared by a notary and sealed in the presence of witnesses, or by a private writing signed by three witnesses, was prefereed to an earlier mortgage executed without those solemnities. Secondly, unwritten mortgages, or, though written but unattested by witnesses, took effect according to priority of time.

Tacit hypothecs (implied mortgages) :—*Tacit hypothecs* were recognised by the Roman law, of which the following may be mentioned :—

(1) The public treasury had a preference by *tacit hypothec* over all the property of a person indebted to the treasury.

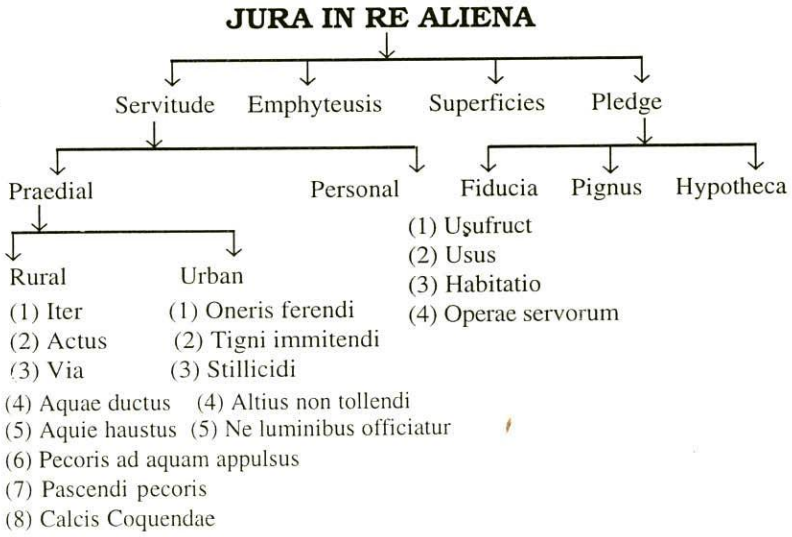
(2) If money was lent for repair of a house, the building was hypothecated to the creditor for the debt.

(3) In the case of farms, the landlord had an implied *hypothec* over the crops from the moment they were gathered.

(4) The landlord of a house or shop or warehouse, had a similar *hypothec* over the movables brought into them by the tenant.

(5) Pupil had a *tacit hypothec* over his tutor's property.

The classification of *"jura in re aliena'* is shown thus in a tabular form :—



CHAPTER—VI

THE LAW OF SUCCESSION

1. Character of succession :—Under the Roman law succession was universal. A universal succession means the succession to a *universitas juris* (bundle of rights and duties) i.e. the succession of all the rights and liabilities of the dead man. When a Roman died, the heir succeeded to all his property and liabilities and this was called *hereditas* (inheritance). The inheritance was not merely an inheritance of property, it was also the transfer of the personality of the deceased to the heir on the death of the *paterfamilias.* Both his property and personality descended to the heir. The legal clothing of the deceased dropped from him and fell upon the heir. He was the universal successor. He stepped into the shoes of the deceased. He was entitled not only to the assets but he was also responsible to pay all the debts of the deceased. If the *paterfamilias* died a bankrupt and his liability was greater than his assets, the heir had to pay off the debts from his own pocket. It was immaterial whether the liabilities were disproportionate to the assets. The heir could not raise any ground that the deceased had left no funds to discharge his debts. Until the alteration of the law by Justinian, the heir was bound to pay all the debts of the deceased, even if he obtained no property from him whatever.

Justinian's benefit of inventory.— Justinian altered the law and relieved the heir from unlimited liability by introducing the principle of limited representation by the benefit of inventory. The heir was given an option to make an inventory of all the property of the deceased. If he did so, his liability was limited by tlie amount of the property received i.e. he was not bound to pay the debts of the deceased beyond the assets that came into his hands. But if he made no inventory, his liability remained absolute as before and he

was liable not only for the debts of the deceased, but in addition, was compelled to pay all the legacies, even if the assets proved insufficient.

Heir and modern executor.- It is said that Justinian converted the heir into an executor, a mere official appointed by the testator for the purpose of winding up his affairs and distributing his property. It is true that the heir, like an executor, had no personal liability for the debts of the deceased and like an executor he had to distribute the legacies and pay off the debts. Here the similarity ends. An executor has no personal interest in the estate he administers, unless something has been expressly given to him by the testator. But the case is otherwise with the Roman heir who took the estate subject to debts and legacies. He could claim his right to a fourth (*quartafalcidia)* but an executor has no such claim.

2. Kinds of succession :—There were two kinds of succession recognised in the Roman law, viz., testamentary and intestate. Testamentary succession arose when a person by testament (will) appointed an heir to succeed to his estate after his death. Intestate succession arose when the deceased left no will and his estate devolved upon his relations in certain orders according to the law of the land.

3. Classes of heirs :—A Roman inheritance descended as a matter of right to the following three classes *of* heirs :—

(1) *Necessarii heredes* (necessary heirs);

(2) *Sui et necessarii heredes* (proper and necessary heirs);

(3) *Extranei heredes* (strangers).

(1) *Necessarii heredes* :— A necessary or compulsory heir was a slave of the deceased. When a slave was instituted by his master as his heir, he became free at the testator's death and was compelled to take up the inheritance. Hence he was called a necessary heir. He could not refuse the inheritance at all. When the property of an insolvent person was sold by his

creditors after his death for payment of their debts, his memory was covered with infamy. To avoid this disgrace it was common for one who suspected his solvency to institute his slave as heir as a last resort, so that if he did not leave enough to pay his debts, the goods were sold and divided among his creditors, not in his masters name but as being the property of his heir.

(2) *Sui et necessarii heredes* :— They were the sons and daughters or other descendants in the direct line who were under the paternal power of the *paterfamilias* at the time of his death and who, by his death, became *sui juris*. At first they, like the slaves, could not decline the inheritance, whatever might be the amount of the debts and engagements of the ancestor. But this worked very hard, as when the *hereditas* was *damnosa* (i.e. when the liabilities exceeded the assets) the heir might be ruined. Subsequently the praetor permitted the children and grand children to reject the inheritance to relieve themselves from loss when the debts exceeded the value of the estate. This right was confirmed by the perpetual edict. After the praetorian innovation they ceased to be the necessary heirs.

(3) *Extranei heredes* :— They embraced all other persons. They were the persons who were not under the testator's power at the time of his death. They were at liberty to accept or reject the inheritance. But if they once accepted the inheritance, they could not afterwards renounce. Anyone entitled to the succession either under a testament or by law was accountable as heir as soon as he declared his acceptance. By the praetorian law the heir was allowed a certain time to deliberate whether he would accept the inheritance and this was fixed by Justinian not to exceed nine months if granted by the magistrates, and a year if granted by the Emperor.

4. Horror of intestacy :—According to Maine, the horror of intestacy led the Romans to dispose of property by means of testament. The rules of intestate succession account

for the vehement distaste for an intestacy. The order of succession was this : On the death of a Roman citizen, having no will or no valid will, his unemancipated children became his heirs. He emancipated sons had no share in the inheritance. If he left no direct descendants living at his death, the nearest grade of the agnatic kindred succeeded, but no part of the inheritance was given to any relative related however closely with the dead man through a female. Failing children and nearest agnates, the inheritance devolved on the *gentiles*, or the entire body of the Roman citizens bearing the same name with the deceased. Therefore on failing to execute an operative testament, a Roman left his emancipated children absolutely without provision. If he died childless there was an imminent risk that his possession would escape from the family altogether and devolve on a number of persons with whom he had no connection except the fictitious assumption that all members of the same *gens* descended from a common ancestor. It was unfortunate that his emancipated children were deprived of the right of inheritance according to law. The very object of emancipation was frustrated. Whereas enfranchisement from the father's power was a demonstration rather than a severance of affection-a mark of grace and favour accorded to the best beloved and most esteemed of the children. It was these sons, thus honoured above the rest who were absolutely deprived of their heritage by intestacy. It was the moral injustice entailed by the rules of intestate succession that generated the passion for testacy among the Romans.

5. Nature of Roman will :—Under the Roman law a testament (will) was primarily a document or declaration in the prescribed form by which the testator nominated a successor or successors on whom all his property rights and liabilities devolved. It was simply the instrument by which the intention of the testator was declared.

The essence of a Roman testament was (1) the institution of an heir (a universal successor) to a deceased person and (2)

the devolution of inheritance. If a will failed in the institution of an heir, it was wholly and absolutely worthless. If it accomplished that object, it could effect other purposes, such as the gift of legacies or the appointment of tutors. So the legacy given in the will before the appointment of the heir was void. Similarly if none of the heirs named in the will could or would accept the inheritance, the will was void and the legacies failed.

6. Essentials of Roman will:—In order that a will should operate effectually, it must comply with the following sets of conditions :—

(A) Certain forms or formalities must be observed.

(B) Certain persons, if not made heirs, must be formally disinherited.

(C) An heir must be properly instituted.

(D) The testator, the witnesses and the heir must be severally capable by law of taking the part assigned to them.

(E) A definite portion of the testator's property must be left to certain persons.

Even when a will complied with all these conditions it might ultimately fail, owing to circumstances arising beyond the testator's control. The will might remain perfectly good and yet if the heir named for any reason refused to accept, the whole fell to the ground. We shall now consider the essentials of Roman will in order :—

(A) Forms o will (different kinds of wills) :—In anti-justinian law there were four modes of making wills :—

(i) Wills made in *comitis calatis.*- la the earliest times wills were made before the general assembly of the people called *comitia calata* which were held twice a year for the purpose under the presidency of the chief pontiff. The *comitia calata* was the name given to the *comitia curiata* when it met twice a year for special

purposes, e.g. for validating *adrogation*, for matters affecting religion, for sanctioning wills etc. The will made in that assembly was called a testament in *comitis calatis*. In the *comitia calata* the populus voted on the will which was a patrician will. It was not available for the plebeians. A will, being a departure from the rule of intestate succession, required the assent of the *gentiles*, whose interest was involved, and since the *sacra* might be affected, it required the sanction of the college of pontiffs. Writing was then almost unknown and the will was made orally and heard by witnesses. It was completely public. The will was an ordinary legislative act. This form of will had become obsolete very early, perhaps with the disappearance of the *comitia curiata* in the Republican period.

(ii) Wills in *procinctu.*— It was the soldier's will and made on the eve of the battle (in *procinctu)*, when the army was ready to fight in presence of their companions in arms. Three or four comrades sufficed as witness. This was also declared orally. This form of will was obsolete in Cicero's time.

(iii) Will *per aes et libram* or mancipatory will. —The next will, the old will of Republication Rome, was originally a conveyance *inter vivos (per aes et libram).* The will *per aes et libran* was an imaginary sale of the inheritance by the testator to the intended successor in presence of the balance holder and five witnesses.

There were three stages in the development of the mancipatory will or will *per aes et libram.* In its initial stage the *hereditas* was conveyed out and out to a person who is described as the *familiae emptor* or purchaser of the family. The *familiae, emptor* was the heir. He took the conveyance of the whole *hereditas* in presence of five witnesses and the

balance holder. It took effect immediately and was public and irrevocable. During the second stage the mancipatory will was irrevocable and public just as in the first stage but the *familiae emptor* became the heir after the death of the testator. So in the second stage the will became effective on the death of the testator. In the third and the final stage the *familiae emptor* and *heres* were not the same person. He *(familiae emptor)* used to hold the property for the unknown heir. In this stage will was secret, revocable and opened on death. He undertook to distribute the property to the persons named in the will after the death of the testator.

Difference between mancipatory will and modern will :—The following were the differences between the ancient Roman mancipatory will and modern will :—

(1) The former was a conveyance *inter vivos* was made openly in the presence of a number of witnesses, whereas the latter is a secret document. (2) The former took effect at once, whereas the latter takes effect after the death of the testator.

(3) The former was irrevocable, whereas the latter is revocable during the life of the testator.

(4) The primary purpose of a Roman will even in the time of Justinian was to appoint an heir who was a universal successor to the deceased. If it failed in that, it was wholly worthless. From the legal standpoint the nomination of the heir was the sole object of the will, whereas the purpose of a modern will is to divide the property of the testator and an executor is appointed merely for convenience in winding up the estate. In other words the first and paramount object of the modern will is the distribution of the property which was, in the eye of the ancient Roman law, a secondary and subsidiary point.

(5) The formalities, so essential to the former, are altogether omitted in the latter.

(iv) Praetorian will.—Gradually the above forms of wills were superseded by the written wills introduced by the praetor

who avoided the formalities of the mancipatory will. These wills were recognised by the edicts of the praetors and hence the name. They were subsequently regulated by the constitutions of the Emperors. The will was required to be signed by the testator, or some person for him, in the presence of seven witnesses called for the purpose, who attested the same under their hands and seals. The praetor set forth in his edict that when a written will was sealed with the seals of seven witnesses, he (praetor) would give the person named as heir in the will the possession of the inheritance, even though no formal sale took place. This did not make him heir, but he gradually came to be protected in his possession *(bonorum possessio)* as effectually as if he had been instituted in a valid will.

In Justinian's law the principal kinds of wills were the following :—

(1) *Tripartite will :—* This was a will in writing signed by the testator and attested and sealed by seven witnesses. It was called *tripartite* will because it had threefold origin viz., (1) The making of the will and the presence of witnesses at the ceremony were derived from the *jus civile.* (2) The seals and the number of witnesses came from the praetor's edict. (3) The signatures of the testator and of the witnesses at the foot of the will were derived from the Imperial constitutions.

(2) The *nuncupative* will :—It was an oral declaration by a testator of his last wishes in the presence of seven witnesses. It was made without writing, such wills were made by illiterate and blind persons.

(3) Privileged wills :—Among the Romans, wills could be made without formalities in the following case :—

(a) Soldiers could make their wills when they were engaged in active service. All that was required was the evidence of their intention regarding the disposal of their property after death. This privilege was enjoyed by soldiers only during the time of

actual service in the field, and testaments so made without the usual solemnities were valid only for one year after their discharge from the army. The soldier's will was called privileged will, because it was free from the formalities of every kind. He was not bound by the rules of *testamenti factio,* the *querela* and the *falcidia.* It could be revoked by any expression. A soldier could die, partly testate and partly intestate.

(b) During the prevalence of a pestilence or contigious disease, the presence of seven witnesses at one time and place was dispensed with. It was sufficient if each in succession attached his signature and seal to the will.

(c) In rural districts, when seven qualified witnesses could not be found the number might be reduced to five, and one witness might sign for those who could not write.

(d) If a will was made by a parent for distributing his property solely among his children or other descendant's no witnesses were required, provided the testator wrote the will himself, or filled up in his own handwriting the date of its execution with the names and portions of the children. But a legacy left to a stranger in such a will was ineffectual.

Among the Romans the testament was opened in presence of the witnesses, or the major number of them, who had signed it, and after they had acknowledged their seals, it was read, and a copy was made. Thereafter the original was deposited in the public archives and from the original a fresh copy might be obtained if required.

(B) Disinherison :—The next condition of a valid will was disinherison. If the father of a family wished to deprive his children of the succession he was to declare his intention by formally disinheriting them in his will. At first, sons

under the father's power were disinherited by name, but daughters and grand-children might be disinherited in general terms. These distinctions were abolished by a constitution of Justinian, which declared that all children, whether emancipated or not, and all other descendants in the male line, entitled by law to be called to the immediate succession of the testator, should either be instituted heirs or disinherited by name. As regards children adopted by an ascendant, they passed into his family and he was bound either to institute or disinherit them. But children adopted by a stranger retained all their legal rights against natural parent, and had only a right to the succession of the stranger who adopted them if he died intestate.

If the person *sui juris* died without descendants, he was bound in his will to institute or disinherit his ascendants, without distinguishing between the paternal line and the maternal line.

The necessity of disinheriting was at first nothing but a simple form to protect children against the forgetfulness of their ascendants in the paternal line, and the head of the family could, from pure caprice and without any sufficient reason, entirely exclude his descendants from the succession. But before the age of Cicero the law only allowed disinherison for grave reasons, without which the testament might be annulled by an action called *querela inofficiosi testamenti* (the plaint of an unduteous will). For a long time it was left to the judge to decide what should be held sufficient reasons for excluding the lawful heirs. Justinian fixed the grounds of exclusion, such as attempting the life of the deceased, grievously injuring him in his person, character, or feelings, and other immoral or disgraceful acts and required that one or more of these reasons should be indicated in the testament.

(C) Institution of heirs :—The appointment of heir was called the institution of an heir. According to the strict rule of the Roman law, no will was valid, unless one or more persons

were appointed heirs to represent the deceased. The testator might appoint one or any number of heirs. No one, except a soldier, could die partly testate, partly intestate. If a testator appointed an heir for any portion of his property without naming heirs for the remainder, such heir became entitled to the whole inheritance. When several heirs were instituted, the properly would be divided among them in such proportion as the testator distributed in the will. If there was no distribution all would participate equally in the inheritance. If the shares of some of the heirs were expressed in the testament, and nothing was said as to the shares of the other heirs, they would be entitled to the remainder of the property undisposed of by the testator.

The heir could be appointed simply or under a condition. Various obligations could be imposed on him, such as to pay legacies, to enfranchise slaves to erect a monument or public edifice, and the like. All conditions which were impossible, or contrary to law or good morals were rejected as if they had never been written, without affecting the validity of the testament in other respects. Accretion among co-heirs:— Among co-heirs, in testamentary succession there was a right of accretion, so that if one of them could not, or would not, take his portion, it fell to the other heirs according to their shares in the inheritance to the exclusion of the heirs at law who were not called by the testament. Thus, where two testamentary heirs were appointed, who were not heirs of blood, and one of them declined to take his portion, or became incapable of doing so, by his predeceasing the testator, or other supervening incapacity, then the other heir, who was instituted only for a part, became heir to the wliole estate.

Substitution :—Substitution was one of the means by which successive *hereditas* could be given to persons other than those mentioned in the first instance. In case the person first named might die or decline to act, it was usual to add another to take in such an event. This was called substitution.

Substitution was divided into three kinds as mentioned by Justinian in the Institutes :—

(1) *Substitutio vulgaris* (ordinary or common substitution):—It was a simple substitution and simply a conditional institution of a second or a third heir in case the first heir died or refused to accept the inheritancs. This was only to come into operation if the first institution failed to take effect. If he once accepted, the substitution was at an end. Thus "let A be heir and decide within 100 days, if not, let him be disinherited and let B be heir." Another instance is "Let my son Bablus be heir and if he fails to become so let Maevius be heir."

(2) *Substitutio pupilaris* (pupilary substitution).—A person having a child under his power could appoint him as heir and also name another person as substitute in case the child should become heir but die before puberty. This was called pupilary substitution. In effect such a substitution was an appointment of an heir to the child until he arrived at the age of puberty when he could name one heir for himself. If the child attained puberty, the substitution became ineffectual. This substitution involved two wills; *paterfamilias* made one for himself and another for the child. He was concerned, however, more with the will or succession of his child under power than with the will of himself. The pupilary substitution for children was only effectual when the father made a valid testament of his own.

The difference between *substitutio vulgaris* and *pupilaris* is that the former takes place if the first heir dies or refuses to accept the inheritance and the latter takes effect when the first heir accepts the inheritance but dies before attaining the age of puberty.

(3) *Substitutio examplaris* or *Quasi-pupilary.*—Justinian extended the privilege of pupilary substitution to parents of insane children. This was called *substitutio exemplaris* or *quasi-pupilary.* Here a man who had children or other descendants, who were insane, might make a substitution to them in the manner of a pupilary substitution, even though they had arrived at the age of puberty. But the substitution became ineffectual, if the heirs first called were restored to a sound mind, so as to be able to make a will for themselves.

(D) Testamenti factio :—This expression has three meanings:—(1) Capacity to make a will *(testamenti factio activa).*—Among the Romans the power of making a testament only belonged to citizens above puberty who were *sui juris*-a rule which excluded a great number of persons. Only persons who had the *jus commercii* and were under no disability could make a will. They had to possess the right not only at the date of executing the will, but also at death. A *filius* (child under paternal power) generally could not make a will. but he could dispose of his *peculium castrense* and *quasi-castrense* because he had independent proprietary right in relation to them. Males above fourteen and females above twelve, when not under power or otherwise specially disqualified, could make will with-out the authority of their guardians. An *impubes* (infant) was incpable because, although he might be *sui juris,* his tender years disable him. The lunatics and prodigals had no capacity to make wills as they were forbidden by the praetor to manage their affairs. The prisoners of war during their captivity, criminals con-demned to death or other punishments inferring confiscation of property were incapable of making a will. If a Roman citizen was 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 he returned or

not. In the time of Gaius a person who was deaf or dumb was incapable of making will, but Justinian removed the incapacity except in the case of those who had been deaf and dumb from birth. A blind man could always make a will, but in Justinian's time special formalities were necessary; for besides the usual seven witnesses, a notary, or in the absence of a notary, an eighth witness was necessary and the will had to be read aloud, A married woman was as capable of making a will as one who was single.

(2) Capacity to take under a will *(testamenti factio passiva),*—The right to take under a will was not confined to Roman citizens alone but it was extended to slaves as well. Every one who was either a citizen or subject to the potestas of *paterfamilias* could take under a will though they were incapable to make wills. Thus the lunatics, impubes, etc., could take under a will. The *peregrini, latini juniani, dediticii* could take benefit under a will. It was necessary that the person in question should possess the capacity to take not only at the date of the will and at the time of the testator's death but also at the date when the heir entered into the inheritance. Consequently an unborn parson could not take under a will although he could be disinherited.

(3) Capacity to witness a will.—The capacity to witness a will was only required at the time of making the will. In the time of Gaius only those persons could be witnesses who were capable of taking part in mancipation. 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 competent witnesses. Under Justinian, no person instituted heir, nor any one in his *potestas,* nor his *paterfamilias.* nor his brother under the same *potestas,* could be a witness. But however, the legatees and *fidei-commissarius* (beneficiary) could witness the will. Under Justinian though the will was made no longer by means of a

fictitious sale, a witness had still to have *jus commercii* and to be free from incapacity. Under the law of Justinian women, children under puberty, slaves, deaf, dumb and blind persons, madmen, prodigals, etc., were incompetent witnesses.

(E) Limitation of testamentary power :—The following were the limitations of testamentary power of a Roman testator :—

(1) Falcidian portion :—According to the law of the Twelve Tables, the power of a testator in disposing of his property was unlimited, In progress of time, various laws were enacted to restrain his power. The most important was the Falcidian law passed in 40 B. C. It was enacted by this law that no one should dispose in legacies more than three fourth parts of his estate, so as to secure to the heir at least one fourth of the succession. This fourth was called the *Falcidian portion or quarta Falcidia.* The fourth part was estimated according to the value of the estate at the testator's death, after deducting debts and the necessary expenses of succession. If the legacies exceeded three fourths of the estate, they suffered a proportional abatement in favour of the heir. Thus the value of the estate is 400 *aurei* net. A is heir, and B, C, D and E each has a legacy of 100 *aurei,* thus exhausting the estate. The *tex Falcidia* automatically reduces each legacy to 75 *aurei* making 300 *aurei* in all and A accordingly gets 100 *aurei,* being his *quarta. Falcidia* of the *hereditas.* The *lex Falcidia* never applied to the will of a soldier.

(2) *Legitim* :— Another limitation of the power of a testator arose from *legitim (legitima portio* i.e. legitimate portion) which enjoined parents to leave a fourth of their estate to the children, and children to leave a fourth of their estate to their parents. *Legitim* was due to (1) the descendants of the deceased who would have succeeded if he died intestate, (2) failing descendants the ascendants of the testator, provided they would have inherited *abintestato.* Brothers and sisters had no right to claim *legitim,* except when the testator had appointed

an infamous person to be an heir. If there were both children and parents of the deceased, *legitim* was only due to the children because they excluded parents from the succession. All the children, without distinction as to sex, had a right to *legitim.* When there were only children of the first degree, the *legitim* was divided among them in equal shares. But if there were at the same time children of the first degree alive and grand children descended from others deceased, the *legitim* was divided according to the number of the children of the first degree who were alive and of those who, being dead, had left issue to represent them. These grand-children got the legal portion which the person whom they represented would have had if he had survived the testator. The second order of persons to whom *legitim* was due, failing descendants, were the nearest agnates. If there were paternal and maternal ascendants in the nearest degree, the *legitim* was divided into two parts, one for the ascendants on the father's side, and the other for the ascendants on the mother's side.

At first the *legitim* after the analogy of the *Falcidian portion* was, in all cases, a fourth of the estate which would have fallen to the heirs at-law *ab intestato,* whatever might be their number. But Justinian raised the amount of the *legitim* for descendants at least to one-third of he succession, if there were four or a less number, and to one-half when there were than four.

Legitim was only due after the death of Ihe testator, and those who claimed it must bring into account whatever they received under the testament, whether in the character of heirs or by legacy, or *donatio mortis causa.* Generally *donatio inter vivos* was not reckoned, unless they were given expressly under that condition. Justinian ordained that the *legitim* should be left to children in the character of heirs only and not as legatees or donees. But if any part of the inheritance, however small, was left to them, they were only entitled to recover by action what was necessary to make up the legitim.

7. Querela inofficiosi testamenti (The plaint of an unduteous will) :—This was an action by which some near relatives could challenge the validity of the testament as being contrary to natural duty *(inofficiosum)* and get it set aside. When such relatives were unjustly disinherited in a testament, it could be challenged by them as undutiful by the action of law called the *querela inofficiosi testamenti* on the supposition that the testator must be presumed to be insane when he drew up the will and on this ground the testament was set aside. It did not mean that the testator was really insane but it was presumed that he was insane at the time of making the will. The *querela* (plaint) was brought before the *centumviral* court by those persons who were entitled on intestacy, such as descendants, ascendants, brothers and sisters.

The following conditions had to be satisfied for a successful *querela* :—

(1) There must be an heir against whom the action was brought, so that the *querela* did not lie until *aditio* (entry of the heir).

(2) The claimant must show that under the will he failed to obtain one-fourth part of his share on an intestacy.

(3) That lie could not get his rights in any other way. If, for example, being *praeteritus* (heir not disinherited in the will) he could get *bonorum possessio* from the praetor, the *querela* was not available.

(4) That he did not deserve to be disinherited or omitted. A claimant, therefore, would be defeated if the instituted heir could prove that the disinherison was due to gross ingratitude towards the testator.

(5) That he had not acquiesced the testator's decision, e.g. by accepting a legacy.

(6) Not more than five years had elapsed since the death of the testator.

The effect of the *querela*, if successful, was in the ordinary case to upset the will altogether and the claimant got his share as on an intestacy. Under the law of Justinian, if it was successful, the will was not wholly void. The institution of the heir was rescinded but the legacies, *fidei-commissa*, appointment of guardians and other provisions of the will remained valid. If it was unsuccessful, any benefit given to the claimant lapsed to the *fiscus* (treasury). But if a tutor brought the *querela* in his ward's name or on behalf of tlie ward (because the father of the ward left nothing for him) and failed, the tutor would not forfeit any legacy given to him by the will.

Under the law of Justinian as provided in his Institutes the *querela* should only be brought where the claimant had received nothing at all under the will. If the claimant had obtained anything under the will, however small, he could only bring an *actio ad supplendan legitimam* against the heir, which did not upset the will but enabled the claimant to recover the balance that make up one-fourth of the share which he would have taken on an intestacy. By the 18th *Novel*, Justinian enacted that a testator with four children or less must leave for them at least one-third of his estate. If he had more than four he must leave at least a half. Finally by his 115th *Novel*, Justinian provided that an ascendant was bound the institute as heirs those descendants who would have taken on an intestacy, and vice versa. unless one of the definite legal grounds to justify the disinherison was stated in the will and could be proved.

8. How a will became invalid :—When a will was void *ab initio*, it was called *injustum* or *non jure factum*. This might happen because (1) the testator had not the *testamenti. factio activa*, (2) the will was not made in accordance with the requirements of law e.g. some of the witnesses were not lawful witnesses, or the testator failed to institute or disinherit a son in his *potestas*. In such cases the testament might be rescinded

and declared null by judicial sentence for non-compliance with the rules indispensable to its validity. A will could become invalid by some after event in the following circumstances :—

(1) The testator could revoke a will. By the Roman law, a will was revoked making a new one, even though it made no express mention of the first. Two testaments could not subsist together. So the second will annulled the first but in order to have this effect, the second testament required to be complete. Without making a new will, the testator could revoke a will by cancelling or destroying it with that intention.

(2) *Ruptum* :—A will became invalid by the birth of a posthumous child or by adoption of a child after making of the will. In such a case the will was said to be *ruptum.* But in the time of Justinian, a will was not invalid by the birth of a posthumous child, because such person could be instituted or disinherited in anticipation. In his time if a testator arrogated a person or adopted in *plena,* his will was revoked by the quasi-agnation of such heir.

(3) *Irritum* :—A will became invalid when a testator suffered *capitis deminutio* before his death. In such a case the will was said to be *irritum.* But if the testator recovered his status before his death, the praetor might sustain the testament by granting *bonorum possessio secundum tabulas* to the instituted heir.

(4) *Destitutum* :—A will became invalid, when the heir instituted did not or could not accept the will. In such a case the will was said to be *destitutum.* But under the law of Justinian legacies and trusts could not be defeated by non-acceptance.

(5) *Querela inofficiosi testamenti* : A will became invalid by a successful *querela inofficiosi testamenti.* It was said to be *inofficiosum* when the will did not give a share to those who should have had definite share of the *hereditas.*

9. Codicil :—In modern law a codicil is a supplement to a will. It is made after the execution of a will in the same way as a will is made.

In Roman law codicils were first introduced and enforced by Emperor Augustus and they continued down to the time of Justinian. They were made in the form of requests to heirs to give to others either some specific articles or a fraction or even the whole of the inheritance. There was no particular form to make a codicil but by the time of Theodosius II all codicils were required to be witnessed as wills by seven witnesses. Justinian reduced the number to five and also enacted that if a codicil had been made with no formality, the person for whom it was made might sue but would fail if the heir denied the fact on oath. By codicil a legal heir could not be appointed or disinherited, nor did the validity of codicil depend upon proving *legitim.* If there was no testament, codicil operated on the heir by way of trust. But if there was a testament, a codicil was considered a charge upon the testamentary heir, and was made to stand or fall with the will. If a codicil was made before a testament, it was presumed to be cancelled, unless the contrary was proved. It was usual, therefore, in a will to confirm a codicil previously made, if the testator wished them to be carried out.

Under the Roman law a codicil had no connection with a will. A codicil might be annexed to a will or it might be independent of any will. But a practice arose of adding a codicillary clause to wills, by which the testator declared that if his will failed to take effect, it was to be construed as a request made by codicil and so it was binding on the heirs *ab intestato.* The codicillary clause healed every defect in a will. If the beneficiaries could not sue under the will, they could compel the heir *ab intestato* to execute the provision of the instrument as trusts.

10. Legacy :—A legacy was the gift of some specific thing or things to a person named in the will or codicil. Usually the

thing was a *res corporales*, e.g. a horse or furniture but not necessarily so. It might be the release to a debtor of a debt owed to the testator, or it might be a gift of the right the testator had to receive payment from a third person, or it might consist of an obligation to do something imposed upon the heirs, e.g. to build a house for the legatee.

A legacy was not an instance of universal succession. It was a means of acquiring *res singulae*. The legatee was not an heir. He did not stand in the shoes of his predecessor but got specified rights with regard to a specific thing. A singular succession, therefore, never transferred the persona from one individual to another. Legacies and *fidei-commissa* are the chief instances of singular succession. The subject may be considered under the following heads

(A) How a legacy could be given.

(B) What could be given as a legacy.

(C) The construction of legacies.

(D) Restrictions upon the amount of legacies.

(E) Lapse of legacy.

(A) How a legacy could be given :—There were four forms in which legacy could be bequeathed :—

(1) *Per vindicationem* (by vindication) :—A *legatum per vindicationem* was created by the use of the words *"do lego"* (I give and bequeath). This form of legacy was a direct gift to the legatee and did not require the heir to hand over the legacy to the legatee. So the legatee became owner immediately the heir entered into succession. The legatee could bring a real action *(vindicatio)* for the legacy, whether in the hands of the heir or of some third person. By this method a testator could only bequeath things which belonged to him. *ex jure quiritium* both at the time of making the will and at the moment of his death. The only exception was made in case of *res fungibles*. In this case the ownership at death was enough. Where the same thing was given in this form to two or more persons, each took

a share, and if any one failed to take, his share accrued to the other legatees.

(2) *Per damnationem* (by condemnation).—A *legatum per damnationem* began with *'Heres meus damnas esto'* (Let my heir be condemned to give). This was not a direct gift of the thing to the legatee, but a personal obligation was imposed on the heir to do something for tlic legatee. Tlic legatee had an action not to claim the thing but an action would lie against the heir to compelhim to carry out the duty which the testator had imposed. The duty of the heir was to transfer the things to the legatee. If it was a *res mancipi*, it was transferred by *mancipatio* or *in jure cessio;* if it was a *res nec mancipi* by *traditio.* If the thing was *res mancipi* and the heir transferred it by *traditio,* the legatee ultimately acquired *dominium* by means of *usucapio.*

The advantage of this form of bequest was that the testator could give by this method his own property as well as property belonging to third person. When the property belonged to others, the heir was bound to buy and convey it to the legatee. Under this form a future property could be bequeathed e.g. future crops, a child to be born of a slave woman. The testator might not merely direct the heir to hand over something to the legatee but to do some act for him, e.g. to build a house for him.

If the same thing was given under this form to two or more persons, each was entitled to a share, but if any one failed to take, his share did not accrue to others. The lapsed share belonged to the heir.

(3) *Sinendi modo* (by permission) :—A *legatum sinendi modo* began with *"sinendi modo"* e.g. "Let my heir be condemned to allow Lucius Titius to take and have for himself the slave Stichus." The form was a modification of *legatum per damnationem* and instead of obliging the heir to give, it permitted the legatee of take. The heir could not be compelled to make a formal transfer to the legatee by *mancipatio* but it was enough if he allowed the legatee to take it.

Gaius tells us that a legacy of this sort was better than one given by *vindicationem* because by this method a testator could give not only his own property but also the property of the heir which was not possible *per vindicationem.* He could not bequeath a *res aliena* as he could do by *damnationem.* So it is less advantageous to *damnationem.*

(4) *Per praeceptionem* (by perception):—A *legatum per praeceptionem* was created by the word *'praecipito'* which means "let him take before" i.e. before the division of the inheritance. The form of that legacy was "Let Lucius Titius pick out first *(praecipito)* the slave Stichus. "The Sabinians held that a legacy could only be given in this form to coheirs. The legatee was to take some specific item of the inheritance before the division of the estate. According to this school a legacy given to any person other than a co-heir was invalid. The Proculians, on the other hand, held that a legacy given in this way was in effect a legacy *per vindicationem.* So it was possible to give even to a third person whose remedy was a real action for the recovery of the thing. According to Gaius the Proculian view was confirmed by Hadrian. According to both the schools a legacy given under this form to two or more persons entitled each to an equal share as in the case of a legacy *per vindicationem.*

Changes made by Justinian.—All the four forms mentioned above were subsequently abolished by Justinian and he placed all legacies on the same footing in order to give effect to the wishes of the testator. He enacted that all advantages enjoyed by *fideicommissa* should be enjoyed by legacies and all legacies might be left either in a testament or codicil. The legatee could sue for the legacy whether it was in the hands of the heir or of a third person. The rights of the legatee were 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 :—The following could be given as a legacy :—

(1) Any *res* which was not *extra commercium*, whether *corporales* or *incorporales*, could be given as a legacy. If the testator was aware of the fact that the thing bequeathed belonged to another the heir was bound either to purchase the thing for the legatee or to pay its value to him. But if the testator bequeathed the thing belonging to another under the mistaken belief that it was his own property, the legatee could not claim the thing or its value from the heir. In such a case it was to be presumed that he would not have bequeathed the thing had he known that it belonged to another.

(2) Bequest of debt by creditor :—A testator could bequeath a debt due to him by a stranger, but the legacy was only effectual if any sum could be recovered Irom the alleged debtor. When the creditor bequeathed to a debtor the amount due from him, it amounted to a discharge of the debt and the heir could not sue the debtor or his representatives for its recovery.

(3) Legacy of mortgaged property :—A testator could bequeath a property which was mortgaged. In such a case, the heir was bound to pay off the mortgage, unless he could prove either that the testator was not aware of the mortgage, or that the testator expressly charged the legatee to pay it off.

(C) The Construction of legacies :—(1) Errors in name or description.—An error in the name of the legatee would not vitiate the legacy. So also a mistake or false description *(falsa demonstratio)* of the thing bequeathed did not annul a legacy. When a part of the description was sufficient to identify the object or person and the remainder of the description was unnecessary for the purpose, the superfluous addition was immaterial. But if the whole of the description was necessary and part of it was erroneous the legacy failed. Thus a testator had two slaves, X, a baker, and Y, a washerman. He bequeathed to his wife Y, the baker. If the testator knew the

names of the slaves, Y would be the legacy. If he knew them by their occupations and not by their names, X would be given. On the contrary, if A bequeathed to B the sum Titius owed to A, and Titius owed nothing, the legacy must fail, as there was nothing to determine the legacy except the amount due by Titius. Similarlya mistaken inducement *(falsa causa)* did not vitiate a legacy. Thus when a testator said "To Titius, because in my absence he looked after my business, I give and leave Stichus," or "To Titius, because by his advocacy I was cleared of a capital charge, I give and leave Stichus." The legacy took effect, although Titius never managed any business for the testator, and although his advocacy never cleared him. But if the heir could prove that the testator would not have left the legacy but for his erroneous belief, he could defeat the legatee on the ground that his claim was against good conscience.

(2) Vesting of legacies :—The legatee's power to dispose of the bequeathed property depended upon the particular terms of the bequest. Whatever might be the nature of the legacy, no right accrued if the legatee died before the testator. If the legacy was pure and simple without any condition attached, the right to it vested in the legatee and would transmit to his representatives by his surviving the testator, even though it should not be payable till a future period and the legatee should die before the term. When the legacy was conditional and if its efficacy depended upon an event or contingency, the legatee acquired no right to the legacy, if he died before the fulfilment of the condition. If no time was mentioned, the legacy became due immediately after the heir accepted the inheritance. The estate of the testator was primarily liable for his debts but if he died insolvent, the legacies were. not due.

(3) Accretion among legatees :—If the same thing was bequeathed to two or more persons, either jointly or separately, each took an equal share, and if any of them pre-deceased the testator, or failed to take his portion, it fell by accretion to the rest. But if one of the co-legatees only failed after he had acquired right to the legacy, it descended to his heirs.

(4) General bequest :—When a testator made a general bequest of his jewels, pictures, statues, etc., the legacy might be increased by the testator by adding to the things bequeathed or diminished by his selling or otherwise disposing of a part of them. In either case the bequest subsisted for what remained. Similarly the legacy of a herd of cattle or flock of sheep might be increased or lessened by supervening changes after the testament. The legatee was entitled to get what remained at the time when the bequest fell due, although all the animals composing the original flock might be different from what they were at first. If the flock was increased after the date of the testament, the legatee got the benefit of it; on the other hand, if the flock was reduced to a single sheep, he was entitled to claim it. But if the thing bequeathed was so completely changed in its nature or condition from any cause that it did not agree with the original description, the bequest became ineffectual. Thus if after leaving a legacy of a flock of sheep, none of the animals remaind alive at the testator's death, the legatee had no right to claim the hides or the wools. Similarly if the testator bequeathed the ship which was broken into pieces before his death, the legatee could not claim the materials.

(5) Specific legacy.— When a testator bequeathed a determinate or specific thing (e.g. my black horse), then upon the entry of the heir the legatee became owner. If a testator bequeathed simply a horse to be taken from many horses in his stable, how the selection was to be made. This might vary according to circumstances. If the right of selection was given to the legatee, he could choose the horse which he considered most valuable. If the choice was left to the heir, he could exercise his discretion with due regard to the will. If no choice was given to either, the heir could not be compelled to give the best thing nor the legatee could be compelled to accept the worst. If a quantity of anything was bequeathed, the legatee was simply a creditor of the heir for the amount. By a legacy of

20 *aurei*, the relation merely of debtor and creditor was established, but a legacy of all the *aurei* in a chest made the legatee owner of the particular coins.

(6) Restraints on alienation and marriage.—A testator could not bequeath property and at the same time forbade the legatee to alienate it. But according to a rescript of Antonius, although a general prohibition to alienate was void, yet, if the restriction was made in the interest of a limited class such as children, freedman, heirs, or any specified person, it was upheld without prejudice to the creditors of the testator. Similar rule applied to conditions in restraint of marriage. If the legatee or heir was forbidden to marry anybody at all, the legacy or testament was perfectly good, and the restriction was null and void. But a condition that the heir or legatee should not marry a particular person or persons was good.

(D) Restriction upon the amount of legacies.—If a testator left so many legacies leaving nothing for the heir, the heir would refuse to enter into inheritance and in such a case the legacies fell to the ground. While the heir (if e.g. a *suns heres)* might be entitled to the property as on an intestacy, and took it free from legacies. To prevent a catastrophe of the sort, three several legislative Acts were passed, of which the *lex Falcidia* (40 B.C.) only succeeded in its object. It required that the legacy must not exceed three-fourth of the estate and at least one-fourth must be left for the heir.

(E) Lapse of legacy.— A legacy might fail in the following circumstances :—

(1) When the will became void or inoperative. Thus when the heir refused to accept the will the legacy failed.

(2) By revocation.—A legacy might be revoked either expressly or impliedly. A legacy might be revoked expressly by a will or codicil, by a declaration that the legacy was not to take effect. At the time when the

old formula was necessary to give a legacy, such legacy had to be revoked in an equally formal manner, e.g. *non do lego.* But long before Justinian the revocation could be made informally. It was implied revocation if the testator sold the thing or made a gift of it to another afterwards, or when a serious enmity arose subsequently between the testator and the legatee.

(3) By the destruction of the legacy.

(4) If the legatee died before the testator.

11. Fidei-commissa.—*Fidei-commissa* (trust) owed their origin to the stringency of the ancient law of wills. The disposition of property by will was a matter of extreme formalities. The strict rules of capacity to take under a will excluded many persons whom a testator might wish to benefit. As a result many persons, like the foreigners, exiles, etc., could not take under a will. So *fidei-commissa* was introduced to 'evade the strict rules of the civil law and to give property to those who could not take under a will. In such circumstances it was a common practice for a testator to direct the heir in the will to hand over the property to some other person who was the real object of the testator's bounty and who, although prohibited from being made heir, was not prohibited from receiving a transfer of property from a living person by way of gift. Such directions were made to the heir by a request in the will, sometimes by a separate document (codicil), and sometimes by word of mouth. The testator hoped that the heir would in honour feel bound to carry his wishes. He committed the matter to the good faith of the trustee. Hence the name *fidei-commissa,* whatever the form chosen such gifts were not originally enforceable at law. It was Augustus who ordered the consuls to enforce these informal gifts. When the measure proved popular, a regular Jurisdiction was established over these informal gifts and a special praetor was appointed to deal with them. He was called the praetor

fidei-commissarius. The person who made the trust was called *fidei-committens,* the person upon whom the trust was imposed was called the *fiduciarius* (fiduciary), and the person to be benefited was called the *fidei-commissarius* or *fidei-commissary* (beneficiary).

As the direct heir was free to accept or reject the succession, there were reasons to apprehend that he would always repudiate it when he was required to restore the whole estate without deriving any benefit from it. To obviate this difficulty and to incite the trustee to enter into the inheritance *senatus consultum Pegasianum* (73 A. D.) was passed. Under this law the trustee was allowed to retain a fourth part of the inheritance, but on the other hand he was bound to accept the succession in order to discharge the trust. All the debts affecting succession were divided between the trustee who retained the Pagasian portion, and the beneficiary according to their respective interests.

12. Difference between a legacy and a fidei-commissa,—The following were the chief points of original difference between legacy and *fidei-commissa.*

(1) A legacy might be given in a formal manner, whereas any informal declaration of intention, even a nod might be enough to constitute a trust.

(2) A legacy was bequeathed in imperative terms whereas a trust was created in the form of request to the trustee.

(3) A legacy could not exist apart from a will whereas a trust could be imposed upon a man's intestate heir.

(4) A legacy could be claimed by an action at law; whereas the action allowed for trust was an equitable one and was given by the praetor in the exercise of his extraordinary jurisdiction.

(5) Any one might be the beneficiary under a trust; while a legatee might be disqualified as not having

testamenti factio with the testator or might be disqualified under the *lex Voconia* or the *leges Julia et Papia Poppaea.*

(6) The *lex Falcidia* applied to legacies only, whereas it did not apply to trust. The whole succession might be the object of trust, so that the heir could get nothing.

These distinctions disappeared in the later law when the forms of legacy were abolished and the true intention of the testator was given effect to. The principle of the Falcidian law was extended to trusts by the *senatus. consultum Pagasianum.* In Justinian's time trusts and legacies were placed exactly on the same footing and were given exactly the same remedies.

13. Intestate Succession.—The intestate succession is a more ancient institution than the testamentary succession. Intestate succession is a succession to the estate of a person who died without a will or left a will but it failed to take effect. The law appoints the heir to succeed to his property according to certain rules under the Twelve Tables; succession *ab intestato* was based on *patria potestas* and agnation. It was confined to those persons who could trace their relationship through the male line. The law of intestate succession may be conveniently considered under three divisions :—

(1) The order of succession according to the Twelve Tables or the *jus civile,*

(2) The order of succession according to praetor.

(3) The order of succession under Justinian.

(1) The order of succession under Twelve Tables.— The order of succession under the Twelve Tables was as follows :—

(a) *Sui heredes.*— On a man's death the first class of persons entitled to succeed to his *hereditas* were his *sui heredes.* They were the persons who were in his *potestas* at his death, and became *suijuris* after his death. They inherited according to the doctrine of representation. The children of a

pre-deceased son took his place and took the share what their ancestor would have taken. Thus if A died leaving a son B, and two grandchildren X and Y by a pre deceased son C, the property would be equally divided between B on the one hand and X and Y on the other. X and Y represented their father C. The daughters under power succeeded like males, and they took an equal share. The adopted children inherited with the natural children. The wife in *manus* would inherit the property of her husband along with her children. *Sui heredes* took equal shares and there was no distinction in shares between males and females. The emancipated children and daughters under the *manus* of their husbands were excluded from inheritance.

(b) *Agnati.*—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 deceased at the time of his death or at the time of failing of the will, e.g. brothers, sisters and uncles. In other words the agnates were those who would have been subjected to the same *potestas* if the common ancestor was still alive. Among agnates the nearest in degree excluded the more remote. If there were several agnates of equal degree, they took equal shares.

(c) Gentiles.—Failing *Sui heredes* and *agnati proximi,* the succession devolved on the *gentiles.* They were the persons who bore the same name with the deceased. They must have descended from free persons, and not from slaves. They must not have passed by adoption into another family. If they did so, they took the name of the *gens* to which they had emigrated; they remained no longer in their original *gens.* Thus community of name and purity of blood were the essential characteristics of Roman *gentiles.* The right of the *gens* to succeed had become obsolete in the time of Gaius and the persons connected by the tie of blood were preferred.

Defects of intestate succession under Twelve Tables.—Gaius has pointed out the following defects of the rule of intestate succession under Twelve Tables :—

(1) An emancipated son could not succeed because he was not a member of the family.

(2) Agnates undergoing change of status lost agnation and along with it the right of succession.

(3) If the *agnati proximi* failed to take, the more remote had no claim.

(4) Female agnates, other than sisters, could not succeed.

(5) Cognates or relations by women were wholly excluded, so tliat even the mother, who was not married in *manu*, had no right of succession to her children and vice versa.

Bonorum possessio.—The second division of intestate succession before Justinian comprises the innovations introduced by the praetor who relaxed the severity and defects of the civil law rules of intestate succession by giving *bonorum possessio* (possession of estate) through his edict to those persons who were excluded from inheritance by the strict rules of *jus civile*. The praetor altered the whole law of succession by the doctrine of *bonorum possessio*. He called to succession (1) all the children without distinction, whether emancipated or not by the edict *unde liberi*, (2) the wife not in *manu* and the husband by the edict *unde vir et uxor*, (3) the more remote agnates, though emancipated, by the edict *unde legitimi*, (4) the cognates by the edict *unde cognati*, and so forth. The *bonorum possessio* was a universal succession in equity. It was the equitable remedy by which the praetor gave the beneficial enjoyment of the estate to persons coming within the several classes whether such persons were the legal heirs or not. The *bonorum* possessor had no status in the eye of the law. The person to whom the possession of the estate of the deceased was given by the praetor was called the *bonorum* possessor (possessor of estate. The various persons called to succession were not the heirs because the praetor could not directly legislate and make them heirs against the civil law

but he could give possession of the succession of a deceased person to those who could not take at civil law and allow action to retain that possession as if they had been heirs. After the expiry of the definite time the *bonorum* possessor acquired *quiritary* ownership of the hereditas by *usucapio.*

The formal application for possession of the property of the deceased was made by a petition to the praetor. The ascendants and descendants of the deceased were allowed one year and all other persons 100 days, within which the claim must be made. They lost their right if the application was not made within the limited time. 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; it was *sine re* when he was liable to be ejected in the long run by the claim of the *heres.*

The praetor allowed the following remedies to the *bonorum* possessor :—

(i) The interdict *quorum bonorum.*—By means of this action he could enforce his right and retain possession of the estate.

(ii) *Hereditatis petitio possessorio.*—This was an action analogous to the *hereditatis petitio* of the civil law heir. It was available against the true heir and it would be effective only if the *bonorum possessio* was *cum re* (permanent).

(iii) He could sue the holders of property of *hereditas* by an *actio fictitiae,* as if he was the heir.

(iv) He could sue debtors and be sued by creditors by actions with a similar fiction.

(2) The order of succession according to praetors.—The praetorian edict called persons to the succession in the following order :—

(a) *Bonorum possessio unde liberi.*—By this edict, all children whether under *potestas* or emancipated, were

allowed to succeed. When the praetor called emancipated children to the possession of goods, he obliged them to throw into the succession all the separate property they had acquired since their emancipation except their *peculium castrense* and *quasi-castrense*. This was called *collatio bonorum*. The object of this rule was to secure an equitable distribution of property among the heirs of the same class. The same principle was afterwards extended to daughters, who were bound to bring into account the marriage portions they received from their *paterfamilias*. Emperor Leo extended this obligation to the *donatio propter nuptias*.

(b) *Unde legitimi.*—If the children failed to take, the possession went to the *agnati proximi* and those to whom possession would have been given along with the agnates in accordance with the rules of the *jus civile*.

(c) *Unde cognati.*— If agnates failed, the praetor gave possession of goods to the blood relations of the deceased that were not included in the above classes. This class included (1) all children who were given in adoption, (2) agnates who had suffered *capitis deminutio*, (3) more remote agnates excluded by the *agnati proximi*, and (4) other relatives through females. All these persons could not claim at once. The rule was that those who were nearest in blood to the deceased shared equally, and there was no representation. There was one limitation that a cognate beyond the sixth degree had no claim in the succession.

(d) *Vir et uxor.*—Failing the cognates, the praetor granted *bonorum possessio* to the surviving widow or widower i.e. the husband had the right to succeed to the property of his wife and vice versa.

Imperial changes in intestate succession before Justinian.—Some changes were made in the law of succession before Justinian by the following statutes :—

(a) *Sc. Tertullianum.*—A mother, not in *manu*, had no claim to succeed to the estate of her children either in civil

law or in praetorian law; she was only a cognate. To cure this defect *sc. Ter-tullianum* was passed in 158 A.D. during the reign of Hadrian. Under this Act, freeborn women having three children or freed women having four, were entitled to succeed to the estate of their children. This enactment established an order of succession as follows:—(1) children, (2) the father if not in another family, (3) brothers and sisters, (4) mother and sister, the mother taking half, or all if there were no sisters. Thus while brothers excluded the mother, sisters alone did not. The child might be illegitimate and *capitis deminutio minima* of the mother was no bar.

(b) *Sc. Orfitianum.*—Under the old civil law children of a woman had no claim to succeed to the estate of their mother but they were cognates at praetorian law. This enactment, passed in 178 A.D., gave them the first claim to succeed to her estate in preference to all agnates, even if they were illegitimate, and even though they had suffered *capitis deminutio.*

(3) The order of succession under Justinian.— Justinian remodelled the rules of succession and made them simpler by the 118th and 127th *Novels.* Consanguinity being the basis of Justinian's law, blood relations succeeded *ab intestato.* Except in the instance of the surviving spouse of the intestate, affinity or relationship by marriage gave no right of succession. There was no difference between agnates and cognates, the nearest in degree excluded the more remote. Certain persons not connected with blood, were allowed to succeed no special grounds. Justinian regulated succession among three classes :

(1) Descendants.

(2) Ascendants along with collaterals i.e. brothers and sisters.

(3) Collaterals.

(1) Descendants.—Descendants excluded all others. If a person died intestate leaving lawful children, they all

succeeded to him by equal share without distinction of sex, and if there was only one child, he took the whole estate. A descendant of either sex or any degree, was preferred to all ascendants and collaterals. An adopted child was counted as a natural child. The descendants in the first degree, i. c, sons and daughters, excluded their own issue. But if a descendant in the first degree died before the intestate there was representation. The children of the descendant took per stirpes the share their parent would have taken had he survived. For example, A dies leaving a son B and two grandchildren by a predeceased son C, B takes half the estate and the grandchildren the other half per stirpes, as representing their deceased father.

(2) Ascendants with collaterals.—Failing descendants, ascendants took along with brothers and sisters of the whole blood. If there were no descendants, the father and mother and other ascendants excluded all collaterals from the succession, except brothers and sisters of the whole blood, and the children of deceased brothers and sisters, who might succeed concurrently with ascendants. There were three cases affecting succession in the ascending line, viz.—(a) The succession of ascendants alone, when there were no collaterals falling within the favoured category, (b) The concurrence of ascendants with brothers and sisters of the whole blood, (c) The concurrence of ascendants with brothers and sisters of the whole blood and also with the children of deceased brothers and sisters.

(a) Succession of ascendants alone.—When ascendants stood alone, the father and mother succeeded in equal portions, and if one of them survived, he or she succeeded to whole estate. There was no representation among ascendants, and the nearest in degree excluded the more remote so that the father alone or the mother alone, would exclude grandparents. When several ascendants occurred in the same degree, some on the father's side and some on the mother's

side the succession was divided in two equal parts, one of which was given to the paternal ascendants and the other to the maternal ascendants per lineage, though the number of individuals should be less on one side than on the other.

(b) Succession of ascendants with brothers and sisters.--If there were brothers and sisters of the whole blood, they were called to the succession along with the father and mother or other ascendants, and the estate was divided among them in capita (equally), that is, according to the number of persons. Thus where the deceased left father and mother, and a brother and a sister, each was entitled to a fourth of the succession.

(c) Succession of ascendants with brothers and sisters and also with children of deceased brother or sister.—By the 118th *Novels* the children of a deceased brother or sister were not admitted to succession along, with ascendants or surviving brothers and sisters. But this was corrected by the 127th *Novels,* which allowed them to succeed along with ascendants and surviving brothers or sisters, so as to take by representation the share which would have fallen to their parent had he or she been alive. This privilege of representation did not extend beyond the sons and daughters of brothers and sisters. It was a doubtful question, whether these nephews were entitled to succeed along with ascendants alone, when there were no surviving brothers of the deceased. By the 118th *Novels* these nephews were excluded by ascendants, and by the 127th *Novels* they were only expressly called when brothers succeeded along with ascendants, from which it is inferred that they were not admitted with ascendants alone.

(3) Succession of collaterals.—As a general rule, collaterals who were nearest in degree to the deceased were called together to his succession, and excluded those who were more remote.

Brothers and sisters of full blood.—If a person died leaving neither descendants nor a cendants, his brothers and sisters

of the full blood succeeded to his estate in equal shares. But if the intestate left brothers or sisters and also nephews or nieces by a deceased brother or sister, the latter persons would succeed, along with their uncles and aunts, to the share which their parent would have taken if alive. Among collaterals the right of representation did not extend beyond the sons and daughters of brothers and sisters,

Nephews.—If the intestate's brothers and sisters were dead, and nephews alone succeeded, it was a question how the estate was to be divided. Some contended that it must be divided in capita, and others in stirpes.

Half brothers and sisters.—On the failure of brothers and sisters of the full blood and their children, the brothers and sisters of the half blood succeeded, whether they were by the same father or by the same mother. And if any of these brothers or sisters of the half blood died leaving children, the right of representation was extended to them, so as to enable them to succeed to the share which would have fallen to their parent if alive.

Other relations nearest in degree.—Failing these, the next of kin were called to the succession according to their proximity in degree. The nearer relations excluded the more remote. If there were many persons found in the same degree, whether on the father's side or on the mother's, the estate was divided among them in equal shares, according to the number of persons.

Husband and wife.—In the last resort, when one of the married persons died without leaving any relations, the surviving spouse was called to the succession under the edict of the praetor under *vir et uxor*, which was confirmed by Imperial Constitutions. They came in after all the collateral relations and saved the estate from lapsing to the *fiscus* (treasury).

A question arose why a widow was excluded in favour of remote blood relations. The answer was probably that the

institutions of *dos* and *donatio propter nuptias* provided sufficiently for her.

Widow's right of succession.—In the law of Justinian a widow who was poor and unprovided (i.e. had no dowry) had a right to share in the succession to the extent of one-fourth of her husband's estate in full ownership if there were no children or less than three children. If there were more than three children, she was entitled to participate with them per capita i.e. in equal shares but she enjoyed a life-interest in her share and was bound to preserve it for the children.

Natural children.—If a man had no lawful descendants or as cendants, he might by will give his whole inheritance to his natural children i.e. those born of a concubine or to their mother. But if he had lawful children, he could only leave one-twelfth to the natural children and their mother. If the father died intestate, without leaving a lawful wife or lawful issue, his natural children and their mother were entitled to receive one-sixth of the succession, and the remainder would go to the lawful heirs.

Treasury ultimate heir.—On the failure of all heirs and successors, the succession devolved on the treasury, subject to payment of the debts of the deceased to the extent of the value of the estate.

Succession to freedman.—According to Twelve Tables, a slave properly freed *(civis libertus)* had full power to dispose of his property by will without giving anything to his patron. The Twelve Tables called the patron to the inheritance if the *libertus* died intestate without leaving any *suns heres* (natural heir).

Under the praetor's scheme of *bonorum possessio,* the patron's position was improved. 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 of 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 made by the *lex Papia Poppaea* (9 A. D). The rights of succession under this law varied according to the number of children. If the *libertus* left two children as heirs, the patron and each child obtained one-third of the *hereditas*. If there was 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 was worth 100 *aurei* and the freedman left issue and made them heirs, the patron had no claim. If there was no issue or there was issue but they were disinherited, the patron could claim a third. If there was 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, (iv) collateral relations of the patron to the fifth degree.

Succession to Latini Juniani and dediticii.—Here there was no question of succession. The Latini was said to become a slave at his death. So his property reverted to his patron or his heirs. The children of a Latini had no claim. A *senatus consultum Largianum* (42 A. D) provided that if the patron was dead, his children not expressly disinherited could take the property of a Latin to the exclusion of *'extranei heredes;* The estates of *dediticii* belonged in all cases to their patrons. Their child could never have a claim.

Succession to a filius familias.—*A filius* might die either in his ancestor's power or as *sui juris* through emancipation. If the son died in *potestas*, his father, under the early law, took all his property. When the *peculium castrense* was introduced, the son could dispose of it by will and under

Justinian he could also dispose of his *peculium quasi-castrense.* But if he died intestate, his father took both the *peculium* in the ordinary way. Justinian, however, postponed the right of the father in this respect to the sons' children, and his brothers and sisters. The son was unable to dispose of the *peculium profecticium* even in Justinian's time, and his father accordingly acquired it on his death in any event. The father would succeed to the *peculium castrense* and *quasicastrense* if the son died intestate, and even then after the children and brothers and sisters of the *filius.* In the *peculium adventicium* he took a life interest and failing children, brothers and sisters of the deceased he became the owner of the properly.

If the son was emancipated he had full testamentary capacity. If he died intestate, his property belonged to his *sui heredes,.* failing them to his actual manittor (whether *parens* or *extraneus* unless there had been a *fiducia* in favour of the father. In the time of Justinian, however, a *fiducia* was implied in favour of the father in every emancipation and the order of succession was first, the children of the deceased, then the father, subject to certain rights in favour of the mother, brothers and sisters of the deceased.

CHAPTER —VII

THE LAW OF OBLIGATION

1. Obligation.—Justinian defined an obligation as the *vinculum juris* (legal tie) between two or more persons which binds some or one of them to do or not to do something for the benefit of the other or others. The obligation is the bond or chain with which the law enjoins together persons or groups of persons in consequence of some voluntary acts. It is the law which annexes the obligation which signifies a right as well as a duty. The law of obligation defines right in *personam* as distinguished from right in *rem*. A right in *personam* is available against a determinate individual or individuals, whereas a right in *rem* is available against the whole world.

Source of obligation.—Under the Roman law the following were the sources of obligation :—

(1) Contract.

(2) Quasi-Contract.

(3) Delict.

(4) Quasi-delict.

2. Contract.—A contract is a bilateral convention or agreement; it creates an obligation which is enforceable at law. A convention is a pact between two or more parties regarding a matter in which they are interested. A contract is a species of the genus pact. Every contract is a pact but every pact is not a contract. An agreement enforceable at civil law is called a pact; an agreement not enforceable at all, is called *nuda pacta* which is unclothed with obligation,

According to Maine the origin of Roman contract can be traced to *nexum* which was the earliest form of contract. The *nexum*, like the *mancipatio*, was a transaction *per aes et libram*. The *mancipatio* was a sale and the *nexum* was a money loan. The parties to the contract were said to be *nexi*.

The *nexum* dates back to the time when there was no coined money. The lender and borrower met in presence of five Roman citizens above the age of puberty and a *libripens* (holder of the balance). The lender put into the scale the metal to be lent and the *libripens* weighed it and handed over to the borrower. The lender declared that the borrower had become his debtor. 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. The creditor could enforce payment by *manus injectio* (bodily seizure) and make the debtor a slave in satisfaction of the debt. After the introduction of the coined money the metal was no longer weighed out. The money loan was paid directly by the lender to the borrower, but the formal part of the *nexum* was retained. The lender merely touched the scale with a coin and the formality continued to confer upon the lender the right to subject the debtor to *manus injectio.* The *nexum* had fallen into disuse when a *lex Poetelia* of about 300 B. C, 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 *mutuum.* The *nexum* became obsolete in the time of Justinian.

Elements of contract.—The essential elements of Roman contract are the following :—(1) Capacity of the party, (2) consensus of minds, (3) legality of object, and (4) causa.

(1) Capacity of the party.—The parties to a contract must have the contractual capacities. The incapacities arose from minority, insanity, sex, etc. In Roman law a minor was not competent to contract without the *auctoritas* of the tutor. Insane persons were absolutely incapable of making a contract. Prodigals had limited contractual capacity. A woman could not enter into a contract of suretyship. A person under potestas could not enter into a contract with the *paterfamilias.* A person above the age of 14 had full contractual capacity, but if the contract did not relate to

peculium castrense or *quasi-castrense* the right under the contract vested in the *paterfamilias.*

(2) Consensus of mind.—The minds of the two parties must meet without which no agreement was possible. The consent of the parlies must be free, there must not be any mistake or fraud *(dolus), metus* (duress or intimidation) or violence in the formation of a contract. According to *jus civile,* an agreement induced by fraud was valid, but later the praetor allowed the plea of fraud *(exceptio(doli)* to be raised by the defendant to resist the plaintiff's claim under a fraudulent agreement. Similar was the case with *metus.* Mistake as to the subject matter of the contract made the contract void.

(3) Legality of object.—The object of a valid contract must not be illegal or immoral. The object must be possible and legal. Thus an agreement to kill a person was illegal and void. The object must be determinate and useful to the promisee ; as for example an agreement to sell a slave to the owner of the slave was bad.

(4) Causa.—The causa was the source of contract. It might be (a) *naturalis* and (b) *civilis.* A *causa naturalis* was the motive which induced a party to enter into a contract : as for example, in a contract of sale the *causa naturalis* was the gain of the price by the seller. A *causa civilis* was the form that made an agreement binding in law ; in a stipulation the *causa civilis* consisted of the words pronounced.

3. Classification of contract.—In (the Roman law there were four kinds of contract :—

(A) Contract *re* (real contract).

(B) Contract *verbis* (verbal contract).

(C) Contract *literis* (literal contract).

(D) Consensual contract.

(A) Contract re or real contract.—When an obligation was created by delivery of thing *(res),* it was called contract *re.* The essence of such a contract was that, at the time the

agreement was made, one party to the contract did all that he was bound to do under the contract by transferring something belonging to him to the other party. The binding force of this contract was created by delivery of property. The contract was executed by one party by part-performance and it left an outstanding obligation on the other party to perform his share of the promise.

Real contracts were of two kinds : (1) nominate and (2) inno-mi-nate. The nominate real contracts meant those contracts which had recognised names. The innominate real contracts were those which had no such special names. They were classed by Paulus under four general heads : (1) *Do ut des*, e.g., A gives something to B in order that B may give something in return to A. (2) *Do ut facias*, e.g.. A gives something to B in order that B may do something for A. (3) *Facio ut des*, e.g., A does something for B in order that R may do something to A. (4) *Facio ut facias*, e.g., A does something in order that B may do something in return.

In all cases it was essential that something should be actually given or performed by one of the parties in order to constitute an obligation against the other. The first one *"Do ut des"* was an exchange *(permutatio)*, which was perfected when one of the parties had given a thing, in order that he who received it might give another thing. In all such cases the person who performed his part, had an option either to sue the other party for performance by an action *praescriptis verbis* or to renounce the contract and recover back the thing given by him by the *condictio causa data causa non secuta.*

Classification of nominate real contract.—The nominate real contracts were grouped under the following heads :—

(1) *Mutuum* or loan for consumption.

(2) *Commodatum* or loan for use.

(3) *Depositum* or loan bailment.

(4) *Pignus* or mortgage.

(1) *Mutuum.—Mutuum* was a gratuitous loan without interest for consumption of *res fungibles* i.e. things which were dealt with by weight, number or measure e.g. money, silver, gold. oil, wine, grain, etc. It was a contract whereby one person transferred to another the ownership in a definite quantity of *res fungibles* on condition that the borrower will return to the lender the thing of the same nature, quantity and quality. In *mutuum* the borrower became the owner of the property; if it perished from any cause, the loss fell on him. In a loan of corn, wine and other articles of the like nature, the borrower must restore as much of the same kind and quality as he received, whether the price of the commodity had risen or fallen in the market. Should he fail to satisfy his obligation he would be responsible to the lender for the value of the article, having regard to the time and place when it should have been delivered. The action under which the lender established his claim against the borrower was called condictio certi. By the *sc Macedonianum*, it was ordained that any one who should lend money to a son under the power of his father without the father's consent, should have no action for its recovery.

In a loan of money under *mutuum*, the borrower was not obliged to pay interest on the sum received. If it was intended that interest should be paid, a special engagement to that effect by the debtor was indispensable. The rate of interest was 12 p.c. per annum at the end of the Republic. After many changes, Justinian at last regulated the rates of interest by a scale, which varied according to the condition of the creditors. Persons of illustrious rank could lend money at 4 p.c., ordinary persons at 6 p.c. merchants at 8 p.c. and for maritime risks the interest was fixed at 12 p.c. where money was lent to buy merchandise that was to be shipped at the risk of the lenders until the goods arrived at the port of destination. Roman law did not allow compound interest.

(2)*Commodatum.—Cmmodatum* was the loan of a thing for use. It was a contract whereby one person gratuitously transferred to another the custody and use of a thing on condition that the thing was to be returned in specie. The loan was gratuitous i.e. the lender received no reward for the loan. If any thing was paid for use the transaction would be one of hiring *(locatio conductio)* and would not be *commodatum.* Under *commodatum* the borrower *(commodatarius)* did not get juristic possession of the thing. He had merely *de facto* possession or *detentio* of the thing. There were important differences between the liability of the person who received goods under a *mutuum* and the *commodatarius.* The former being *dominus* was liable to return the equivalent in value, even though the goods were destroyed by pure accident. The borrower on the other hand, though bound to show as much diligence as a *bonus paterfamilias.* was not liable for accident not arising from any fault on his part.

The lender *(commodans)* could enforce his rights against the borrower by the *actio commodati directa,* These rights were—(1) to get back the thing when the time for which it was lent had expired and (2) that the borrower should display as much diligence as a *bonus paterfamilias* and he should keep the thing in fair repair and should not use it for any purpose other than that specified. If he did so use it, he was liable *for tur tum usus* (theft for use).

The borrower had the *actio commodati contraria* against the lender in two cases : (1) if he had been put to extraordinary expense in relation to the thing lent; (2) if through the wilful wrong or negligence of the lender the thing injured the borrower.

(3) *Depositum.— Depositum* was a contract by which the owner entrusted a thing to another to keep it gratuitously and to restore it on demand. The property and the risk remained with the depositor. If the thing perished accidentally the loss fell on him. The depositary was bound to preserve the thing

with reasonable care, and to exercise the same vigilance as he did in his own affairs. He could not use the thing unless expressly or tacitly authorised to do so. If he used the thing without any consent of the depositor, he was guilty of *furtum usus* (theft for use). As a general rule, he was liable only for gross neglect because he derived no benefit from the transaction. The depositary was bound to restore the thing with all its fruits and accessories. On the other hand he was entitled to be reimbursed of all necessary charges. He could not set it off against any debt due from the owner. The depositary, as in *commodatum*, got merely *detentio* of the object. As in *commodatum* the contract had to be gratuitous, i.e. the depositary would not get any payment, otherwise the transaction would be *locatio-coductio operis*. The depositor had the *actio depositi directa* to enforce the return of the object on demand. This action was also available if the depositary was guilty of *dolus* (fraud) or *culpa lata* (gross negligence) in relation to the contract. The depositary, on the other hand, had the *actio depositi contraria*-(1) if the depositor failed to display *exacta diligentia*, e.g. made a deposit of something with a latent defect, (2) to recover any expenses he might be put to in keeping the thing.

There were three exceptional cases of *depositum* :—

(i) *Depositum miserabile.*—This was a deposit made under urgent necessity. Thus sufferers from fire, shipwreck or other calamity, might be compelled by circumstances to leave their goods in the hands of persons wholly unknown to them. In those cases the depositary who proved unfaithful to his trust was liable to be sued under a praetorian action for double the value of the articles embezzled.

(ii) *Depositum irregulare.*—This was a deposit of *res fungibles* (e.g. money). Generally money was entrusted by one man to another on the understanding that the depositary was 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. He had the ownership and possession of the money and he could use it. This form of deposit resembled *mutuum* but the transaction differed from *mutuum* in this that (1) in *depositum irregulare*, the deposit was made chiefly in the interest of the depositor, though the depositary had the right to use the money, (2) if the money were not returned at the proper time, interest could be claimed by the *actio depositi directa*, whereas in the case of a loan by *mutuum*, interest was never recoverable in the absence of an express stipulation.

(iii) Deposit with a sequester.—It was a deposit in neutral custody of a thing which formed the object of litigation between two or more parties. The things could remain with him pending the determination of right in the litigation. It might be either voluntary or judicial and the condition of every such deposit was that the depositee called the sequester should deliver the thing to the winning party.

(4) *Pignus.—Pignus* was a contract by which a debtor delivered possession of a thing to a creditor by way of security for money borrowed with the condition that the creditor was to return the thing when the debt could be satisfied, (see page 133)

(B) Contract verbis or verbal contract.—There were four kinds of verbal contract; of them *stipulatio* is important :

(i) *Dotis dictio.*— It was an ancient form of oral promise made at the time of settlement of *dos* (dowry). The promise might be made by the wife or by her ascendant.

(ii) *Jurata promissio liberti.*—It was an oath taken by a freedman at the time of manumission.

(iii) *Votum.*—It was a promise to give property for religious purposes.

(iv) *Stipulatio.—Stipulatio* may be defined as that species of contract, which imposed an obligation upon a person because he answered in set terms a formal question put to him by the promisee, which contained a statement of the subject matter of the promise. In other words *stipulatio* was entered into by uttering certain formal words in the form of questions and answers. Its peculiarity consisted in this that the promise must be made in answer to a question and the binding force of the agreement was derived from those questions and answers. The usual form of the question asked by the intending creditor was 'Do you promise to give me 10 *aurei*"? The debtor replied "I promise." This created a binding contract. If one simply said, "I promise to pay you 10 *aurei,*" there was no contract. For a proper stipulation, the creditor must ask the question, and the debtor must answer *"spondeo"* (I do promise). The stipulator was he that asked the question, the promiser (promissor) was the person bound by the answer. The stipulator was always the creditor. Originally the question could only be put and answered by means of the particular words, *"spondes" ? "spondeo."* Only the Roman citizens were allowed to use this form. A strict adherence to these forms was necessary to uphold a contract. Any other words though they might express exactly the same meaning could not create an obligation. Gaius tells us that it was so formed that it could not even be translated into Greek. There were other forms for the use of aliens like *Fidepromittisne? Fidepromitto ; Fidejubesne ? Fidejubeo; Debisne ? Dabo : Faciesne ? Faciam.* In later times the rigour was relaxed and 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 and a contract might be entered into by any words which clearly expressed the intention of the parties. In Justinian's time the stipulation might be in any words and in any language.

Stipulation served two purposes in Roman law : (1) It created every sort of obligation, viz, to pay money, to give property, to do or not do an act, and (2) it was also used to substitute an existing obligation by novation. Novation implies the extinction of a former obligation and the substitution of a new one.

Stipulations were either voluntary or involuntary. Voluntary stipulations were contracts proper. Involuntary stipulations were made under compulsion. There were three kinds of involuntary stipulations under the law of Justinian :(1) Judicial, (2) praetorian, and (3) conventional or common. The judicial stipulations arose when the *judex* compelled the parties to a dispute to make a stipulation. The *"cautio de dolo"* was an example of judicial stipulations, 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 do nothing before delivery to lessen its value. The praetorian stipulations were made on the authority of the praetor. The *"cautio damni infecti"* was as example of praetorian stipulation, 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. The conventional or common stipulation was made on the authority, sometimes of the praetor, and sometimes of the judge. *"Rem salvam fore pupilli"* (safety of the pupil and his property) was an example of common stipulation, which was sometimes taken by the praetor and sometimes by the *judex.*

A stipulation taken by a *paterfamilias* from his *filius* or by a master from a slave was not actionable, but gave rise to a natural obligation. Persons deaf, dumb or mad could not be parties to a stipulation, and a pupil could not bind himself by a stipulation without his tutor's authority. A stipulation was void if an impossible or immoral condition was added to it.

Joint debtors and creditors.—We have considered *stipulatio* as a transaction between two persons. There might be more than one person on each side of the contract and the case of joint obligation occurred in (1) *adstipulatio* and (2) *adpromissio.*

(1) *An adstipulator* was a person who had associated himself with the creditor promising to do the same thing which the creditor was bound to do. He was one of two or more principal creditors and could sue the debtor in his own name. Any payment made to the adstipulator by the debtor extinguished the claim of the creditor in respect of the same debt. *Adstipulatio* was chiefly used for the purpose of agency. (2) An adpromissor was a person who promised on behalf of the principal debtor. He was a surety and the creditor could recover the debt from him if the debtor failed to pay. In the time of Justinian the only manner of constituting suretyship by a verbal *stipulatio* was *fidejussio.*

Fidejussio (the law of surety).—*Fidejussio* was a contract by which a person bound himself as surety to fulfil the obligation of another in case of failure of the principal debtor. The obligation of the surety was usually entered into by stipulation and might be reduced to writing. It was extended not only to the surety but to his heirs. A surety might be interposed in natural as well as in civil obligations. He could not be bound to pay more than the principal debtor although he might be liable for less. Where there were several sureties each surety was liable to the creditor as if he had been the sole debtor. Under the law of Justinian a surety could demand that the creditor should sue the principal debtor

before proceeding against him and he could not be sued unless the creditor could show that it would be useless to do so in consequence of insolvency or absence of the principal debtor. A surety could recover from the principal debtor by the *actio mandati* whatever he lawfull paid. A surety called upon to pay the whole debt might require the creditor upon payment to hand over to him all his remedies and he could sue the principal debtor for the amount paid or other sureties for their share. By the *sc. Velleianum* (46 A.D.) women were prohibited from undertaking the duties of a surety and such an obligation of a woman was ineffectual. A female surety could plead the *exceptio* by virtue of *sc. Velleiani,* if she was sued on her promise. But the statute did not apply 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 a surety by a woman should be in writing and executed before three witnesses, unless given for value received or to provide a dowry, otherwise it was absolutely void.

Co-sureties.—Before the time of Emperor Hadrian there was no right of contribution between co-sureties, where one surety only had been sued for the whole of the debt. A surety when sued could object to pay unless the creditor first transferred to him his rights of action against the other sureties. But Hadrian introduced a species of contribution. The surety who was sued could require the creditor to divide his claim among the solvent sureties at the time issue was joined in the action. But if the sureties were insolvent, the burden increased upon the rest. But if the surety neglected to claim the privilege of division, and the creditor obtained the whole amount from him, there was no right of contribution against the co-sureties.

(C) Contract literis or literal contract.—The literal contracts as described by Gaius, may be defined as a means of creating obligation to pay money by a fictitious entry

(expensilatio) in the creditor's ledger, with the consent of the intended debtor. Thus A, with B's consent, enters the fact that B is indebted to him for 50 *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 *'literis'* arose. The entry was merely evidence of the debt lent.

(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 *obligation literis* arose.

(D) Consensual contract.—The consensual contracts, like the real contracts, were formless. They derived their validity from the consent of the parties and were based upon the *jus gentium*. They were of great commercial importance to the Romans ; that was probably the reason for making them formless. There were four kinds of consensual contracts :—

(1) *Emptio venditio* (purchase and sale).

(2) *Locatio conductio* (hire).

(3) *Societas* (partnership).

(4) *Mandatum* (agency).

(1) *Emptio-venditio.*—It was a contract of sale. The vendor (seller) agreed to sell and the emptor (purchaser) to buy some object of property for a definite price. 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. When one commodity was given in return for another, this constituted exchange, not sale. Writing was not essential to the validity of the contract. Justinian made certain changes in the law as to the formation of the contract. He enacted that if it was contemplated by the parties that the

negotiations for sale should be reduced to writing, the sale was not to be complete until the terms were written and either party should be free to withdraw before the contract was written.

Elements of sale.—Apart from the personal capacity to contract, the following were the elements of sale:—(1) object, (2) price and (3) the consent of the parties.

The object of sale.—All things adapted to commerce and susceptible of appropriation could be sold, unless the sale of them was prohibited by law. The sale of a thing which was not in existence at the date of the contract, was valid, e.g. the future produce of an estate. The following things could not be the object of a contract of sale:—(a) *Res extra commercium.* (b) Things which both parties knew to be stolen, (c) Things already belonged absolutely to the purchaser.

Price.—There must be a real price and it must be coined money. If a thing was sold for a nominal price which the seller did not mean to get, there was no sale, but the price might validly be made less by way of favour to the buyer. The contract was not vitiated for mere inadequacy of price, unless it fell short of half the value, in which case, under a constitution of the Emperors Diocletian and Maximian, the seller could refuse to carry out the contract. It is a moot point whether the buyer had a similar right to throw up the contract when the price was double the value. If no price was fixed by the parties, it could be fixed by a reference to a third person. If the third person fixed a price, the contract was complete.

Earnest money.—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 an evidence that the contract had in fact been made. If the buyer refused to proceed, he forfeited the earnest money. If the seller wanted to withdraw, he had to restore double the amount of the earnest money.

The duties of the vendor (seller).—The following were the duties of the seller:—

(1) Until delivery *(traditio)* the seller was to take much care of the thing as a good *paterfamilias.*

(2) It was his duty to deliver exclusive possession of the thing to the purchaser when the price was paid.

(3) He was bound to guarantee to the purchaser the undisturbed possession of the thing. He had, therefore, to compensate the purchaser if he was evicted by the true owner or some one claiming by a better title than that of the purchaser.

(4) The seller was bound to give warranty that the thing sold was free from defects. If the subject did not answer this implied warranty the purchaser could rescind the contract and recover his purchase money with interest by the *actio redhibitoria.* But this action had to be brought within six months from the date of the contract. Alternatively, the purchaser might by the *actio quanti minoris* or *aestimatoria* have the purchase money reduced in proportion to the defects discovered and this action might be brought within one year.

Duties of purchaser.—He must pay the price and on default of punctual payment he must pay interest. He must accept delivery of the goods and pay the expenses the seller incurred in keeping the things prior to delivery.

Risk of things sold prior to delivery (*periculum rei*).—After the contract of sale and prior to delivery, it was the duty of the seller to take good care of the thing sold, but the profit and the loss arising from it during this period were with the buyer, though the thing was not deliverd to him. In order that the risk might pass to the buyer before delivery, the sale must be of specific ascertained goods. The interest of the buyer as owner dated from the time of the contract of sale. Thus if a mare foaled after the contract, the foal belonged to the buyer.

On the other hand, if the property was accidentally destroyed or injured, the loss fell upon the buyer, and the seller was entitled to the full price.

The general rule, that the subject was at the risk of the buyer from the time of sale, was subject to some exceptions. The risk remained with the seller in the following cases:—(a) Things sold by number, weight or measure remained at the risk of the seller until they were set apart, numbered, weighed or measured respectively The risk, however, passed to the buyer if these things were sold in lots, e.g. all that lot of corn, or oil or wine. (b) When the loss happened by the fault of the seller, by his improper delay in giving delivery, or by neglect of due care and diligence, (c) When by special agreement the risk was laid on the seller.

(2) *Locatio conductio* (hire).—*Locatio conductio* was a contract in which one person (locator) agreed to give to another (conductor) the use of a thing or to lend his services or to do a particular work for a fixed sum of money. *Locatio conductio* was of three kinds :—

(a) *Locatio conductio rei* (hiring of things).

(b) *Locatio conductio operarum* (hiring of services).

(c) *Locatio conductio operis* (hiring of works).

(a) *Locatio conductio rei* (hiring of things).—It was a contract by which one party to the contract (locator) agreed to let the other party (conductor) the use of a thing for a limited time in return for a fixed sum. The locator had the *actio locati*, the conductor the *actio conducti* and the contract was complete when the price was fixed. All things which were the subject of commerce, whether movable or immovable, might be let for hire. But things consumed in use such as money, coin, wine and the like were not suitable for hire. The terms of lease of lands and houses depended on the agreement of the parties, but usually they were for five years. The lessee might sublet to another and on the death of the parties the contract passed to their representatives.

A tenant of a house or farm had no right in *rem* to the house or farm but only a right in *personam* against the landlord. If he was evicted by his landlord or even by a stranger, he could not ask for the interdicts by which possession was restored. He could only bring an action for damages against his landlord for breach of contract.

Duties of landlord or lessor (locator).—The duties of the land lord were the following:—

(1) To put the lessee in possession of the subject.

(2) To keep the thing in such a state that it might be fit for the purpose for which it was let. If the thing deteriorated and was not repaired, the tenant could demand a reduction of the rent, or a release from the contract. Trifling repairs were to be done by the hirer.

(3) To guarantee the peaceable enjoyment of the thing during the currency of the term agreed upon. If the tenant was deprived of the holding by the landlord before the expiry of the lease, he was entitled to full compensation. But if the tenant was evicted through no fault of the landlord, the tenant could claim only a remission of the rent, and not damages. Thus if the house was burnt down, or the thing let was carried off by robbers, or the farm was confiscated, the tenant was released from rent, but was not entitled to compensation.

(4) The landlord must permit the tenant to remove not only the movables, but even fixtures placed by the tenant provided the tenant did not thereby injure the house.

(5) The landlord was responsible if the thing let had such faults as were likely to cause damage. If a landlord let a farm along with the vats or jars used in wine-making, and the vats were rotten, the tenant lost his wine, the landlord must pay the value of the wine.

Duties of tenant.—The duties of the tenant were the following :—

(1) The tenant must pay the rent at the stipulated period and to pay with interest in case he was in arrear. The tenant could be ejected if rent of a house or farm was in arrear for two years. The tenant of a farm was entitled to a remission of his rent on account of loss or damage to the crops.

(2) He must occupy during the term agreed upon.

(3) He must exercise the highest degree of care in preserving the thing in good condition.

(4) He must not use the thing other than that for which it was let.

(5) He was answerable for *culpa levis* (slight negligence) but not for accidental loss.

(6) He must restore the thing upon the expiration of the term.

(b) *Locatio conductio operarum* (hiring of services).—It was where one party *(locator)* let out his services to the other *(conductor)* in return for a money payment. It was a contract of service. The employer was called *conductor operarum* and the servant *locator operarum.* The contract was perfected by consent. In the hiring of services, a distinction was made by the Romans between (1) *operae liberales* i.e. the services of the educated classes, and (2) *operae illiberales* i.e. the services of the uneducated classes. The former belonged to the members of the liberal profession, viz., orators, advocates, physicians, teachers and other skilled professional men. The Roman theory was that their services were gratuitous, and therefore they were liable only for *culpa lata* (gross negligence). The services of educated or skilled class could not be hired at all. The latter consisted in supplying another with labour, e.g., the contract of service between a master and a servant. The rights and obligations of servants were regulated by custom or by agreement.

(c) *Locatio conductio operis* (hiring of works).—It was where one party *(conductor)* agreed to make something out of, or to do a job, in relation to materials belonging to the other *(locator)* for a money payment. If the work was to be done in respect of a particular things, as by a jeweller or builder, or tailor, or carrier of goods, the employer was called the *locator* and the workman the *conductor.* Thus A agreed to build a ship for B out of B's wood. A was the *conductor* and B was the *locator.*

Duties of workman and employer :—(1) The workman was bound to do the work properly in the manner agreed upon and (2) to take good care of the thing entrusted to him and to pay their value if they were lost or injured through his negligence or unskilfulness. The employer, on the other hand, was bound to pay the wages agreed upon.

Hire distinguished from sale **and other contracts.** Hire is analogous to but distinguishable from several other contracts. Hire resembles *commodatum* as both are contracts for the use of a thing. But *commodatum* is gratuitous, while hire is for a price. It is also distinguishable from deposit which is also gratuitous or from mandate i.e. a service rendered gratuitously. In hire the price must be money. If the consideration was something other than money, it was not hire. Although hire was very distinct from sale, yet there were cases in which a difficulty arose as to whether a certain transaction was a hire or sale, where one person contracted that the goldsmith should, out of his own gold, make ring, and receive 10 *durei,* it was disputed whether this was a contract of sale or of hire. One view was that it was a compound contract of sale as regards the material, and of hire as regards the services of the goldsmith. It was finally settled by Justinian that where the workman supplied the material, it was a contract of sale. But if the material was supplied to him and workman supplied the labour, it was a contract of hire.

(3) *Societas* (partnership).—*Societas* was a contract in which two or more persons agreed to combine property or labour in a common stock with the object of sharing the gain among themselves.

Share of partners.—Partnership was formed by the simple consent of the parties. If nothing was said as to the shares of the partners, they took equal shares. By express agreement, however, the shares might be different. One partner might agree to contribute all the capital and to get equal share of the profit 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 *"leonia societas"* and the agreement was void. As in the case of sale and hire, the determination of the shares might be left to a third party.

Difference between partnership in Roman law and modern law.—A profound difference is to be remarked between partnership in the Roman law and partnership in modern system of law. In modern system every partner within the scope of the business is an implied agent of the other partner's and can bind the assets of the partnership. In Rome this was wholly wanting. The Roman law of partnership dealt only with the claims of partners as between themselves. The third parties had no direct remedy except against the individual partner with whom they contracted.

Kinds of Partnership,—Partnership might take one of the following forms :—

(1) *Societas omnium bonorum* (partnership in joint ownership).—It was a partnership which excluded the idea of any partner possessing private property. The agreement was that all the 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. They were entitled to have all their debts and expenses paid out of the common fund.

(2) *Societas universorum quae ex quaestu veniunt* (trade partnership).—It was the ordinary form of trade partnership. The partners contributed definite property and divided the profits arising from it according to their shares. Each partner might own private property, e.g. property which he acquired as heir, or by way of donation or legacy.

(3) *Societas alicujus negotiationis* (partnership for a single transaction).—Under this form the partnership was limited to gain in some particular business. As for example when one person contributed three horses to a team and another one in order to realise a higher price by selling them together.

(4) *Societas unius rei.*—It was a partnership which was formed for a single transaction, e.g. the ownership of a race course or of a theatre. The object of the formation of such a partnership was to prevent competition.

(5) *Societas vectigalium.*--It was a partnership for farming taxes. Tn Rome the right to collect the taxes was sold by public auction and generally for five years. It was the peculiarity of such a partnership that it was not dissolved by death. The heirs of a deceased partner could get the right to enter into an agreement along with others.

Obligation of partners.—

(a) The partners must contribute their shares in money or in labour as agreed upon.

(b) They should share the loss when it occurred in partnership business.

(c) They must act in concert. They were responsible for loss due to negligence but not for accidental loss.

(d) If one of the partners advanced money or entered into some engagement, on account of the partnership

business, for which lie was bound to indemnify a third party, each of the partners must rateably contribute to the indemnity. If any partner became insolvent, the solvent members must by rateable contribution make up the deficiency.

(e) Each partner was bound to show good faith and due diligence towards the others, but the degree of diligence was not the highest. It was enough if the partner showed the same care as in his own affairs.

The rights and obligations of the partners were enforced by *actio prosocio.*

Relation of partner to a third party.—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 unless the partnership was in joint ownership *(omnium bonorum).* When one partner made a contract on behalf of the firm, the firm could not sue one such a contract but it could secure the benefit. Conversely the firm could not be made liable but the partners might be sued as individuals. The reason was that the firm had no distinct legal identity.

Dissolution of partnership.—Under the Roman law partnership was dissolved in one of the following ways :—

(i) By death of a partner, unless it was otherwise provided for in the contract of partnership.

(ii) By *Capitis deminutio maxima* and *media* of any partner.

(iii) By the bankruptcy of one of the partners or the confiscation of all his property.

(iv) By expiry of time when the partnership was formed for a fixed time.

(v) By completion of the 'business when the partnership was formed for carrying out a particular business.

(vi) By loss of the partnership capital.

(vii) By renunciation.—Any partner might retire even before the expiration of the term. But in such case, there had to be a serious and reasonable ground. In any case the retiring party had to compensate others for withdrawal which unfairly prejudiced their interest. A partner who withdrea without justification divested himself of all his rights as a partner, but remained liable for all existing obligations.

(viii) Partnership could be dissolved by the court on the application of a partner.

(4) Mandatum (Agency).—Mandate was a contract in which one person *(mandatary* or *mandatarius* or agent) undertook to do some act without remuneration at the request of another *(mandant* or principal), who promised to indemnify him against all loss. The person who gave the work was called the *mandant* or *mandator* (principal) and the person who undertook it was called *mandatary* or *mandatarius* (agent). It was a sort of agency. It was essential to this contract that it should be gratuitous because if any remuneration was given to the agent for his service, the contract was not *mandate,* but *locatio operarum.* A *mandate* might be for the benefit of the *mandant* (principal) or of a third person, but not exclusively for the *mandatarius* (agent) himself.

How a *mandate* was constituted.—A *mandate* might be constituted either verbally or by letter or it might be inferred from the actions of the parties, e.g. where one permitted another to transact his business for him. The essential elements of *mandate* were (1) good faith, (2) interest of the principal or a third party, (3) without remuneration, and (4) consent of both the parties. Justinian stated that a mandate might take one of the five forms:—

(i) *Mandatum sua.*—It was an agency for the benefit of the principal alone, e.g. a request that the agent should conduct the business of the principal or by an estate for him.

(ii) *Tua et sua.*—It was an agency for the benefit of both the principal and the agent, e.g. a request made by the principal that the agent should lend money, at interest to a friend, who was building for the principal. Here the principal was benefited by the works of the building and the agent was benefited by getting interest on his money.

(iii) *Aliena.*—It was an agency for the benefit of a third person, e.g. where the request was to manage the affairs of a friend of the principal.

(iv) *Sua et aliena.*—It was an agency for the benefit of the principal and a third person, e.g. the principal asked the agent to manage property belonging jointly to the principal and a third person.

(v) *Tua et aliena.*—It was an agency 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.

Powers of mandatary (agent).—The powers of an agent varied according as the mandate was general or special. He might be given general or special powers. When he was given general powers e.g. the management of a person's entire affairs, he must exercise a sound discretion within the scope of his employment. When the orders were special and limited, he must strictly follow them. The agent might better the condition of the employer, but he could not make it worse. Thus he could buy at a lower price than what he was empowered to give. If he purchased at a higher rate, he could not recover the excess from his principal. The agent could claim compensation for loss when acting within the limits of his authority. He had *actio mandati contraria*, while the *mandant* (principal) had *actio mandati directa* for enforcing their respective claims.

Duties of mandatary (agent).—

(1) He was not bound to accept the business, but if he did accept, he must do it. But this duty was not absolute and he might renounce the *mandate* provided there was time for the *mandator* to act himself. He was also excused from performance, if good reasons were shown, e.g. serious illness. If he failed to perform his promise without sufficient reason, he was liable for damages.

(2) He must property execute his commission and conform to the instructions given, failing which he would forfeit his indemnity and be liable for damages for loss to the *mandator* (principal).

(3) He was answerable not only for fraud or gross negligence but also for slight faults. He must take as much care of any property as a man of ordinary prudence. Generally in gratuitous contracts one was liable for *culpa lata* (gross negligence) but *mandate* was an exception to the general rule. The *mandatary* (agent) was liable for *culpa levis* (slight negligence). This forms a strong contrast to the contract of deposit which was also gratuitous.

(4) The *mandatary* must make over to the *mandator* (principal) all that he acquired in the discharge of his duties with fruits and interests.

(5) He must give full accounts to the *mandator* (principal) and allow the latter to exercise all rights of action which he had acquired against third parties.

Duties of mandant (principal).—

(1) He must ratify what was done by the agent within the scope of his instructions.

(2) He must accept what the agent had acquired or done for him.

(3) He must indemnify him against all expenses and liabilities that he had properly incurred in the execution of the commission.

Termination of mandate.—The *mandate* ended in the following ways:—

(1) When the object was accomplished or became impossible.

(2) By revocation of authority by the principal.

(3) By the mutual agreement of the parties, even in course of performance.

(4) By one party repudiating before performance.

(5) By the death of either party before the *mandate* had been executed, but if the agert executed the *mandate* after the death of the *mandator* (principal) and in ignorance of his death, he was entitled to be indemnified by the heirs of the principal. If the agency was for an act to be done after the principal's death (e.g. the agent was to manumit one of his slaves), it remained good inspite of the death of the principal.

4. Quasi-contract.—There are certain obligations which arise not by the consent of the prarties, but are imposed by law on equitable grounds. They are formed by implication from circumstances regardless of the assent or dissent of parties. They are called quasi-contracts. The following are the examples of quasi-contractual obligations under the Roman law :

(1) *Negotiorum gestio.*—When a person managed the affairs of another in his absence and without his authority, it was called *negotiorum gestio,* 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. It is akin to *mandatum* but differs from it in that he was acting on behalf of another without his authority In *negotiorum gestio,* the person who was 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 *negotiourm gestio* arose unless (a) the work was really urgent; (b) it was done in the interest of the owner 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 to show exacta diligentia. It was not enough to use diligence which he ordinarily displayed in his own affairs.

(2) Tutor and ward.—The tutor's action *(actio tutelae contraria)* against his ward, and the ward's action *(actio tutelae directa)* against the tutor arose from quasi-contractual obligation.

(3) Joint ownership.—Two or more persons without being partners, held something in common, such as a house which came to them jointly as a legacy, and one of them alone enjoyed the property or had been put to necessary expense in relation thereto. The obligation to give an account of the profits or to share the expense was considered as arising from quasi-contract and could be given effect to in an action *"commun dividundu"* or if the persons were co-heirs the obligation for the portion of the inheritance could be enforced by the *actio familiae erciscundae.*

(4) The heir and legatee.—The heir, on entering into the inheritance, was bound to satisfy the claims of the legatees. This obligation arose from quasi-contracts.

(5) Payment by mistake.—When a person paid a sum of money to another under a mistake of fact, he could recover that money by an action, called *condictio indebiti solutio.* Thus if a legacy was paid under a testament supposed to be genuine, but which after-wards turned out to be forget, the person who received the money could be compelled to restore it.

(6) Jettison *(lex Rhodia de Jactu).*—The *lex Rhodia,* the maritime law of the Eastern Mediterranean, was adopted by the Romans and other commercial nations. Under this law, when a portion of the cargo was thrown overboard to save a ship, the owner of the ship and goods saved were obliged to compensate those whose properties were sacrificed. Each had to contribute rateably for his own share. The obligation to compensate arose from quasi contract. To establish this claim for contribution it was essential that (a) some part of the cargo or of the ship should have been voluntarily sacrificed for the common safety; (b) the sacrifice so made had the effect of saving the property of those concerned. If the ship perished, inspite of the jettison, no contribution was due.

5. Transfer of contractual rights and liabilities.—Under the Roman law the liability under a contract could only be transferred by novation It was the extinction of an obligation by the substitution of another obligation.Thus A owes ten *aurei* to B; with the consent of the creditor B, a new debtor is substituted in the place of debtor A. This involves the extinction of the original debt between A and B and the novation of a new debt between B and C.

Originally the benefit of a contract could only be transferred by novation. The person to whom the right was to be transferred made a new stipulation from the debtor at the request of the original creditor and the new stipulation operated to discharge the obligation owed to the original creditor and it created a new obligation in favour of the transferee. Under the formulary procedure the creditor intending to transfer an obligation to another gave him a mandate to recover the debt as agent for the creditor and to retain the debt for him when it was recovered. This operated as an assignment, not of the benefit under the contract but of the right to sue for it. The assignment of a right of action was defective because the assignment became void if the original creditor revoked his mandate or if the creditor of transferee

died before the recovery of the debt. So it was enacted that from the moment the transferee gave notice to the debtor of the transfer of the debt, the original creditor lost his right of revocation. Finally, under the influence of the praetor, assignment of the benefit of a contract was 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 on a sale or by way of gift, the transferee 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.

The effects of transfer.—

(1) The claims of the original creditor were transferred to the assignee with all accessory rights and privileges attached to it.

(2) The assignee was bound by all defences *(exceptio)* which would have been competent to the debtor against the original creditor and also to those personal to the assignee him self.

(3) The original creditor generally guaranteed the existence of the debt assigned, but not the solvency of the debtor.

Anastasian law.—To put a stop to the practice of purchasing debts at low prices and thus harassing the debtors, the Emperor Anastasius ordained that the assignee should not realise from the debtor more than what he paid to acquire the debt with interest. This rule was adopted and confirmed by Justinian.

6. Extinction of contractual obligation.—An obligation arising from a contract might be extinguished in one of the following ways :—

(1) By performance or payment *(solutio).*—Justinian tells us that every obligation was discharged by giving of the thing due, or if the creditor agreed, something else could be given in

its place. It made no difference whether the debtor himself performed the contract or some one else in his place, or whether it was paid with or without the debtor's knowledge or against his will. In case of suretyship, payment either by principal or surety extinguished the obligation as against all parties, ten cases where skill and ability of a person were relied on, the creditor could insist that the contract should be performed by the person specified and by no one else.

(2) *Contrarius actus* or release.—An obligation was extinguished by release which was a voluntary discharge of an obligation without performance. Release was of two kinds : (1) formal and (2) non-formal. The Roman law started with the principle that obligations must be discharged in the form in which they were created. Hence a contract of *nexum* made by a ceremony *per aes et libram* must be dissolved by a similar ceremony; a contract by stipulation must be dissolved by a verbal release *(acceptilatio);* a contract formed by writing, by written release *(expensilatio).* When an obligation was discharged by the creditor without payment or performance by the debtor, it was called in the Roman law *acceptilatio.* It was a solemn declaration made by the creditor to the debtor in the form of stipulation that the obligation was satisfied. The rule, that obligation must be discharged in the from in which they were created, was inconvenient. So an ingenious device called the *Aquiliana stipulatio* was introduced by Aquilius Gallus, a colleague of Cicero's time in the praetorship, in 66 B.C. By means of this device any number of obligations, of whatever kind, due from one person to another could be converted by novation into a single obligation.

At first the Roman law recognised a formal release for a formal contract. But at length the praetor interfered to protect a debtor whom his creditor had agreed to acquit, and allowed release without observing the appropriate formalities. Sometimes instead of going through the formalities of release, the creditor agreed not to sue the debtor. In order that

the creditor may not afterwards molest the debtor. the praetor gave effect to such an agreement *(pactum de non petendo)* by refusing to the creditor his legal remedy. This was not quite the same thing as a release.

(3) By Novation.—Novation was the substitution of one obligation by another. When the new obligation was created in place of old one, the latter was extinguished. After the disappearance of the old literal contract it could be done by stipulation. Novation operated in two ways : (a) When the debtor granted a new obligation to the creditor in lieu of an old one which was extinguished, (b) When a new debtor was substituted for an old one who was discharged by the creditor e.g. B might accept C as his debtor in A's place. This last method of extinction was called delegation, and the new debtor thus substituted was in the Roman law styled expromissor.

Novation was not to be presumed. Justinian declared that three should be no novation unless it was expressly declared by the contracting parties that such was the aim of their agreement. If not, both the original and the new obligation remained in force.

(4) By subsequent impossibility.—An obligation was dissolved where its performance had become impossible without the fault of the debtor. Thus a contract to sell a house came to an end when the house was accidentally destroyed.

(5) By operation of law.—An obligation was extinguished by the operation of law in the following ways :—

(a) By suit *(litis contestation).*—In the time of Gaius an obligation was extinguished when an action to enforce it was commenced and reached the stage of *litis contestatio* i.e. refereed to an arbiter or *judex.* Thereupon a new obligation arose, viz., that the debtor should be condemned if he was found in the wrong and after judgement his obligation was to satisfy the claim.

(b) *Capitis deminutio.*—The obligation to pay the debts was extinguished when the party suffered *capitis deminutio* as it destroyed the *persona* of the party to the obligation. But the praetor gave relief to the creditor by granting him actions against the *capite minutus.*

(c) Prescription.—Prescription might have the effect of extinguishing an obligation. No general statute of limitation for obligation was introduced until by Theodosius in425 A.D. Actions derived from the *jus civile* were perpetual but the praetor interfered in derogation of the civil law and his action was regarded as extraordinary, fully justified and required by natural justice. Penal actions created by the praetor must be brought within one year but the actions brought for the recovery of property were perpetual. In the latter case the statutory period of limitation in the time of Justinian was 30 years.

(d) Merger or *confusio.*—Obligations were extinguished by merger i.e. when the same person became both the creditor and debtor, either by succession or singular title. As for instance, when the debtor succeeded to the creditor or the creditor to the debtor, or a stranger to both, the obligation was extinguished on the principle that no one can be both the creditor and debtor to himself at the same time.

(6) By death.—In some cases the death of a party might extinguish a contractual obligation. Thus a contract for personal service *(e.g. location conductio operarum)* was extinguished by the death of the person who was under an obligation to render service. In *mandatum* the obligation was extinguished by the death of either party before the mandate had been executed. Similar was the case in *societas (partnership).*

7. Delict.—Delict means an offence or wrong wilfully committed in violation of law. It is an infringement of a right in *rem*. The wrongdoer is bound to make reparation to everyone, suffering from his wrongful act and this responsibility extends to damage caused not only by positive acts, but also by negligence or imprudence.

Delict may be against things or persons. The principal delicts enumerated in the Institutes of Justinian are four in number : (1) *furtum* or theft, (2) *rapina* or robbery with violence, (3) *damnum injuria datum* or damage to property, and (4) *injuria* or wrong to the person. The first three are violations of those rights in *rem* which are connected with the ownership or possession of property and 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.

(1) *Furtum (theft).*—*Furtum* or theft is defined in the Institutes of Justinian as the appropriation of another's property or of its use or possession with intent to defraud. The thing stolen must be movable and there cannot be theft of inmovable property such as land. To deal fraudulently with the use and possession of a thing in a manner not permitted by the owner was theft. Thus (1) if a creditor, who was entitled merely to the possession of the thing pledged, used it; or (2) if a person, with whom a thing was deposited merely for custody, used it; or (3) if a person borrowed a thing for one purpose and used it for another. In all these cases the parties were guilty of stealing the use *(furtum usus)*. If an owner who had pledged a thing carried it off secretly from the creditor, or if an owner finding his own lost property in the lawful possession of another, secretly took it away, the owner was said to steal the possession of the thing *(furtum* possession).

Who could bring action for theft._An action for theft could be brought not merely by owners, but by any one who was interested in the safety of the thing, Thus a washerman took

clothes for cleaning at a fixed price, and the clothes were stolen form him. It was he and not the owner that could bring the action for theft. The owner had no interest, as he could sue the washerman for the value of the things stolen. But if the washerman was insolvent, the owner was allowed to sue the thief. A similar rule prevailed in the case of gratuitous loan for use *(commodatum)* till Justinian altered the law. Justinian gave the owner an option of proceeding either against the borrower or against the thief. In the case of a gratuitous deposit, the person with whom the thing was deposited was not answerable for negligence and therefore not liable for loss by theft. Accordingly in this case the owner, and not the depositee, had the action against the thief.

Distinction between modern law and Roman law.—In modern system of law theft is a crime and not a tort (delict). In the Roman law it was at first a civil wrong and the thief was liable to penalties but later it became punishable as a crime when the Romans made a clear distinction between crimes and civil-wrongs.

Kinds of theft.—In the law of the Twelve Tables theft was divided into two classes : (1) *Furtum manifestum* and (2) *Furtum necmanifestum.* This distinction continued down to Justinian's time. The former was where the thief was either caught in the act or in the place where he had committed the act. If he once took it to its destination the theft was *nec manifestum,* although the thing was found with the wrongdoer. The distinction was fo practical importance, because the penalty varied according as the theft was manifest or non-manifest. In the former case the thief had to pay four times the value of the thing stolen while in the latter case the penalty was twice the value of the thing and these penalties continued to be the same in Justinian's time.

Aiding and abetting.—Not only the thief, but any one that aided and adivsed the thief was liable to an action for theft *(actio furti).* Mere advice and encouragement was not enough.

There must be some overt act of assistance, such as placing a ladder under a window for the thief to enter, or lending him tools to break open the house.

(2) Rapina or vi bona rapta (robbery).—*Rapina* or robbery was theft of movables, committed with violence When a person committed robbery, he was liable to a praetorian action called *vi bono rum raptorum.* The penalty for robbery was four times the value of the thing stolen, if the action was brought within a year. If the action was brought after the lapse of a year, only the simple value could be recovered. The four-fold penalty included the recovery of the thing stolen and consequently the penalty was only for three times the value of the thing plus the restitution of the thing. There was not, as in theft, a separate action for the thing. The action *(actio vi bonorum)* did not apply where a man used violence under a mistaken belief that the thing really belonged to him and the law in such case allowed him to use violence.

(3) Damnum injuria datum (wrongful damage to property).—*Damnum injuria datum* was the damage sustained from the wrongful destruction of, or injury to, property. The law relating to wrongful damage to, property rested on the provisions of famous *lex Aquilia* which was a *plebiscitum* proposed by Aquilius, a tribune of the plebs, in 287 B.C. This law abrogated and superseded the provisions of the eariler law, including the Twelve Tables.

Provisions of *lex A juilia.*—The first Chapter of the *lex Aquilia* provided that if any one wrongfully killed a slave or a four-footed beast belonging to another he should be compelled to pay the owner the highest value that the slave or animal possessed at any time whithin 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 second Chapter of the *lex Aquilia* was in disuse in Justinian's time.

The third Chapter covered all kinds of damage done to every kind of property, animate or inanimate. It embraced injury (short of death) to slaves and cattles, 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 that the thing possessd, not within the last year but within 30 days prior to the date of injury. If the defendant denied his liability and was condemned, he had to pay double damages. If the damage was caused by more than one person, the whole sum could be recovered from any offender.

Negligence.—To contribute *damnum* or loss under the *lex Aquilia*, it was essential that there should be not merely harm *(damnum)* but wrong *(injuria)*. A loss without a wrongful act *(damnum sine injuria)* created no legal consequence. The damage to be actionable must be done either intentionally or by negligence *(culpa)*. What constituted negligence depended upon circumstances. Two cases are cited in the Institutes. A man playing with javelins killed a slave passing by. Was he liable? If he was a soldier, practising in some place set apart for soldiers' practice, the act was accidental. If he was not a soldier, the mere fact that he was doing a dangerous act in the public place was itself proof of negligence. Again if a pruner, by breaking down a branch from a tree, killed B's slave as he passed near a public road or path used by neighbours, and he did not first shout and warn the slave, he was guilty of negligence. If on the other hand, the place was quite off the road, or in the middle of a field, he was not liable for negligence, even if he did not shout.

Want of skill.—If a man undertook a task requiring special skill, then want of skill was considered equivalent to negligence as for instance, when a doctor killed a slave by bad surgery or by giving him wrong drugs. In the same way a driver, who from want of skill or physical inability could not control his horses and caused damage, was liable.

Extended scope of lex Aquilia.—The provisions of the *lex Aquilia* were extended by the interpretation of the jurists and by the praetor's practice of granting an *action utilis* or *in factum*. An *action* was said to be *utilis* when it was allowed by the exercise of the equitable discretion of the praetor, in cases to which it was not strictly applicable. The object of *actio utilis* was attained by a modification of the terms of the formula so as to make it apply to the particular case. When the cases could not be brought within the scope of the statute or *actio utilis*, the praetor introduced the *actio in factum* which was adopted to meet the special circumstances of the particular case. Under *actio in factum* the praetor directed the judex to pronounce in a particular way without any reference to the authority of the statute, if the fact was found to be so and so. The extension of the scope of the statute may be considered under three heads : (a) The persons entitled to sue under the statute, (b) the nature of the wrongful act for which compensation was granted, and (c) the measure of damages.

(a) Persons entitled to sue.—As to the persons entitled to sue, the statute provided that the action for wrongful damages to property could only be brought by the owner *(dominus)*. But the praetor allowed (1) the *bona fide* possessor, (2) the usufructuary, (3) the pledgee, and (4) other persons having *jura in re aliena* to bring actions under the *lex Aquilia*. The praetorian actions gave the *paterfamilias* the right to sue for damages to the person of the *filiusfamilias* though the former was not supposed to be the owner of the latter.

(b) Direct and indirect damage.—As regards the wrongful acts for which the redress was given the statute applied when the killing or damage was direct i.e. when the damage was done to a body by a body *(corpore corpori)*. But the praetor after the analogy of the statute gave a remedy when the damage was done not directly by the body and even

when no damage was done to the thing itself. Thus in each of the following cases an action might be brought under the *lex Aquilia* :—

(1) A shuts up B's slave and causes him to die of hunger, or (2) A drives B's horse so hard as to cause it to founder, or (3) A persuades B's slave to mount a tree or descend a wall and the slave is killed or hurt in so doing. If on the other hand a man moved by pity frees another's slave from his fetters to release him, he damages the master's interest, but not the body of the slave. This is damage *nec corpore nec corpori.* In such cases the *actio in factum* was granted by the praetor.

(c) Measure of damages.—As to the measure of damages, the statute provided 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. Under the *lex Aquilia* it was only the greatest value of the thing, standing alone, which could be considered. But the interpretation of the jurists, however, enabled consequential damage to be included in the sum recovered. Thus if a slave that was killed had been appointed heir to a man whose estate was worth 1000 *aurei* and by his death the inheritance was lost to his master, then the damages included 1000 *aurei* in addition to the value of the slave. Similarly if one of a pair of horses, or of a band of slave actors was killed, compensation could be claimed not only for the loss of the thing in question but for the diminished value of the rest. We have considered that a right to a movable might be violated firstly by depriving the owner of possession either by theft *(furtum)* or by violence (*vi bona rapta)* and secondly without depriving the owner of possession by damaging his property *(damnum injuria datum).*

Wrongs to land.—In regard to wrongs, immovables were in a different position from movables. Immovables could not be stolen and if a possessor was wrongfully ejected the property could be restored to him. In Roman law the remedy for wrongful ejectment was available not by an action, but by an interdict. Every injurious act done to an immovable without the consent or against the will of the owner, exposed the offending party to the interdict *quod vi autclam*, by which he was compelled to pay the expenses of undoring the mischief.

(4) Injuria.—*Injuria* was wrong to the person or reputation of a freeman, e.g. whipping, kidnapping, false imprisonment, defamation, attempt against chastity etc. It was optional for the injured person to proceed against the offender either civilly or criminally and he was allowed such compensation as the nature of the case required. Heavier damages were given when the injury was aggravated. An injury was held to be aggravated (atrox) (1) from the nature of the case, e.g. when a man was wounded, or scourged, or beaten with sticks, (2) from the nature of the place e.g. when the assault was in a public assembly, (3) from the rank of the person, e.g. when parents were struck by children, or patrons by freedmen, (4) from the consideration of the part wounded, e.g. a blow in the eye.

Slaves and *injuria*.—There could be no *injuria* to a slave. A slave was susceptible of damage but not of *injuria*. In two ways, however, a more human doctrine was established. First, it was held that whipping a slave was a constructive insult to the master, and it was the exclusive privilege of the master to flog his own slave. Although the slave was not injured, the master could sue for the insult to himself. Again when the injury was severe, the praetor granted an action to the master, even when there was no intention to insult the master.

Filiusfamilias.—When the persons under *potestas* suffered *injuria*, only their *paterfamilias* could sue for the injury. For *injuria* done to a married woman, both husband and wife could sue.

Self defence.—An assault was not an *injuria* if committed in self defence. When one's life or limb was threatened, any amount offcroe reasonably necessary to repel the injury was lawful but no more. A man put in fear of his life could with impunity kill his assailant. There was no necessity to kill him if he could have caught the man. Even a burglar could not be lawfully killed, if the householder could spare his life without peril to himself. Any less violence, however, was justifiable in defence of property.

8. Quasi-delict.—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 and that obligation was said to arise from quasi-delict. In other words a quasi-delict was an actionable wrong arising from circumstances resembling a delict but which did not fall within the class of delict. It might be committed without any wrongful intention or negligence, or without the knowledge or will. Justinian gave the following examples of quasi-delicts :—

(1) Wrong judgement.—A judge could be sued for damages if he gave an unjust judgement by negligence or bad faith, or failed to appear on the day appointed for judgement.

(2) Vicarious liability.—The occupier of a house was liable for damages done to any one by anything thrown out or poured down from the house, although the mischief was done not by the occupier himself, but by some one else.

(3) Liablility for keeping anything to the injury of others.—Persons who kept anything so placed or hung that it might, if it fell, do harm to a person passing by, were subject to a penalty of 10 *aurei*, even if no one was hurt.

(4) Liability of ship master, innkeeper and stablekeeper.—A master of a ship was liable for any

loss occurred by theft or damage to any goods in the ship through the misconduct of the sailors employed in the ship. The same responsibility was attached to innkeepers and livery stable keepers for goods left in the inn or in the stables.

9. Transfer of delictual rights and liabilities.—The wrongdoer could never escape liability by attempting to assign his obligations to another. Obviously a capital penalty (e.g. for *furtum manifestum)* could 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 (wrongdoer) to substitute some other person who promised to make payment and then take a stipulation from him. Whereupon the liablility of the wrongdoer might be extinguished and transferred by novation. Conversely, the right to receive a money payment for a wrong might be transferred by the person wronged to another, subject to the same limitation as in the case of the transfer of the benefit under a contract.

10. Discharge of delict.—An obligation arisig from delict could be discharged in the following ways :—

(1) Pardon.—In the case of an obligation arising from *injuria,* a pardon might be implied by dissimulation. In other cases it had to be express, though a mere *pactum* was enough in the case of *actio furti* and *actio injuriarum.* A formal pardon would be eiTected by novating the obligation by a stipulation, and then releasing it by *acceptilatio.*

(2) Performance.—Payment of the penalty and compensation discharged the wrongdoer from his liability in delict.

(3) Novation.—It was the common method of dissolving obligation arising from agreement and from wrong.

(4) Operation of law.—(a) by *litis contestation* in the time of Gaius. (b) By lapse of time. The *actio injuriarum* was barred if not brought within a year; so also was the case of all the praetorian actions for delict except the *actio furti* which was perpetual. The *actio bonorum raptorum* was also barred by a year in respect of the fourfold penalty but it survived for single damages after the expiration of that period, (c) By merger of *confusio.*

(5) Death.—Death had a much wider effect of extinguishing obligation from wrong. Gaius stated that one of the 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. But a rule was introduced at the beginning of the Empire that the estate of the wrong-doer could be made liable for his wrongful acts. The personal action for the recovery of the stolen property *(condictio furtiva)* could 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, his heir could bring an action unless the delict in question was *injuria.*

(6) Ope exceptionis.—Where there was an agreement between the person wronged and the wrong-doer (having several claims against each other) that the former would not exact payment, the delictual liability of the latter was discharged. The defendant, in such cases, when sued for the delictual obligation, could defeat the claim by the exceptio pactum de non potendo (a pact not to sue).

11. Source of obligation.—The source of obligation is surveyed in a tabular form :