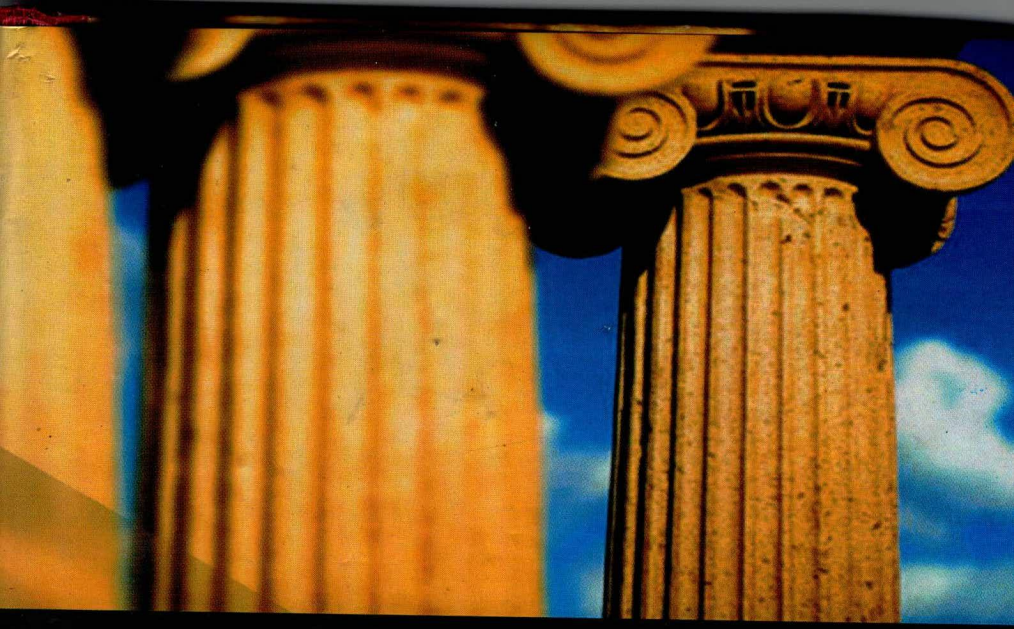

ROMAN LAW

Dr. L. Kabir

Ain Prokashan ▪ Dhaka

Roman Law

By

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FOREWORD

by

Professor Georg Dahm, LL.D.

Dean of the Faculty of Law, University of Dhaka.

DHAKA

The 27th January 1963

The Roman Law, down to our present days, is one of the fundamentals of legal thinking all over the world. There are many systems of law, which, directly or indirectly, derive from Roman Law, which cannot be properly studied and understood without the knowledge of Roman Law. But apart from its significance as source and origin of positive laws Roman Law enshrines an exhaustible wealth of experience and practical wisdom rooted in the nature of man and in the essence of things. So far it will always keep its importance as ratio scripta whenever and wherever man submits to the Rule of law. Roman Law can be studied in different ways. It may be treated as a unique phenomenon of history in its connection with contemporary ancient culture and life. But it is also one of the objects to be achieved by legal education to reduce Roman Law to its essentials and to disclose those features of Roman Law which enable it to serve as an introduction into the knowledge of civil law, even independently of its historical background.

Mr. Kabir's book is a remarkable approach to this pedagogic ideal. Written in a simple and transparent language it gives a very useful introductory survey of the subject explaining with lucidity the basic concepts and maxims of Roman Law and making them understandable to beginners and to advanced students as well. I have no doubt that it will attract the interest and admiration of students and teachers, and that it will help to promote and deepen the understanding of Roman Law, wherever the English language is used as a means of introduction.

Dr. Georg Dahm

PREFACE

This book is primarily intended for the students of law, especially for those who begin their study of Roman Law without any acquaintance of Latin language. There are many standard works on the subject, but I have a feeling, as a teacher on the subject, that our students need a book of this nature with translation of Latin terms and expressions.

As it is a book for the beginners all minute details and discussions have been left out. For convenience of study the work has been split up into ten Chapters. The first Chapter deals with introduction showing the superiority of the Romans in law and the value of Roman law; the second Chapter with the history of Roman law down to Justinian; the third with the division of Roman law; the fourth with the law of persons; the fifth with the law of things; the sixth with the law of succession, both testamentary and intestate; the seventh with the law of obligation; the eighth with the magistrates and the judges; the nineth with the law of actions and procedure in civil suits; and finally the tenth Chapter with the criminal courts and procedure.

I claim no originality in preparing this book. I have consulted standard books on the subject freely and made use of their materials. For facility of reading and continuity of discussion it has not been possible to quote all sources. I take this opportunity to acknowledge my debt to such standard works as Myers' Rome : its Rise and Fall: How and Leigh's History of Rome; Shuekburgh's History of Rome; Girard's Roman Law; Lee's Historical Conception of Roman Law; Sherman's Roman, Law in the modern world; Mackenzie's Studies in Roman Law; Hunter's Introduction to Roman Law; Sir Henry Main's Ancient Law; Jolowicz's Historical Introduction of the study of Roman Law; Leage's Roman Private Law; Buckland's Manual of Roman Private Law; Bagchi's Roman Private Law: Chalmer's Students' guide to Roman Law; Kelke's Primer of Roman Law; Walton's Historical Introduction to the Roman Law; Salmond's Jurisprudence; and many others.

This book was rushed through the press to meet the urgent demands of the students. Consequently some printing mistakes have escaped the vigilant eyes of the proof readers and certainly caused some damage to the accuracy. I offer my regret for this inconvenience. Readers are requested to kindly refer to the errata provided at the end of the book.

I express my sincere thanks and regards to my publisher whose keen interest has made this publication possible.

My thanks are also due to the printer, and the proof readers for their sincere co-operation with my publisher.

I am particularly grateful to Dr. Georg Dahm, Professor of Law of the University of Kiel (Germany), now the Dean of the Faculty of Law of the University of Dhaka for sparing his valuable time to go through this book and for the favour of writing a foreword to my humble work.

L. KABIR

Dhaka,
January 27,
1963

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CHAPTER—1

INTRODUCTION

1. Superiority of the Romans in Law :—In various departments like philosophy, poetry, oratory and fine arts, the Greeks could not be surpassed but they contributed almost nothing to the science of jurisprudence. In philosophy they greatly excelled the Romans but in the cultivation of law, the Romans were far ahead not only of the Greeks but all other nations of antiquity. The Romans were eminently a practical people and they were the first nation who successfully cultivated law as a science. Apart from their general ability in the business of legislation, their judicial system was far more favourable than that of the Greeks to the improvement of jurisprudence and to the gradual formation of a body of legal and equitable laws. For several centuries, under the Republic and the Empire, the praetors who were changed annually, exercised the civil jurisdiction at Rome. It became the practice for every new praetor on; his accession to office, to publish, in the form of edicts, the rules which he intended to observe in administering justice during the tenure of his office. These rules were handed down by the praetors to their successors, and were modified and improved in the course of time to suit the exigencies of the community. It was chiefly by these edicts, by the decisions of the judges and by the scientific works of eminent lawyers, aided by the direct action of the legislature, that the ancient institutions were refined and the general, body of the Roman law was gradually moulded into a system and brought to that state of perfection which it ultimately attained.

2. The value of Roman law and the causes of its success :—

The Roman law is valuable at the present day on the following grounds :—

(1) Its intrinsic merit.—"Roman law is valuable as a substantive part of our knowledge of law. The discussion of the great Roman jurists will always remain models of legal reasoning which helps a lawyer in discovering the general principles which ought to be applied to a particular set of facts. Roman law has a direct professional utility for lawyers by reasons of the materials it supplies for the practical understanding of modern laws. It is the key to the understanding in a general way of all the modern systems of law which have a Roman background. The study of Roman law greatly assists the acquisition of a correct style of legal expression which is useful to a lawyer. It possesses a practical utility for modern jurists, not as giving an immediate knowledge of existing laws but because by perfecting the juridical intelligence it gives a better comprehension of all laws whatsoever. The analysis of the discussions of Roman jurisconsults is an excellent school of juridical reasoning and the controversies turn on a point which is foreign to ordinary environments. The style of the Roman jurists is simple, clear, brief and precise. No law is more fitted for intellectual training than the Roman law.

(2) As an introduction to legal terminology and method.—The terms and classification of the Roman law have been retained by the modern Droit civil. We learn in the Roman law the precise meaning of legal terms current in many countries. The Roman law, it has been said, tends to become the *lingua franca* of universal jurisprudence.

(3) As a study of legal history.—This is the greatest merit of the Roman law to a student of the present day. The law of the *corpus juris* is the outcome of a history of more than thousand years. During the long period from B.C. 450, when "the Twelve Tables were published to A.D. 565, when Justinian's *Novels* appeared, we are able to follow the slow growth of the law. We find how the rude customary law of a primitive pastoral people was shaped and moulded to fit the needs of a great Imperial nation whose mission it was to civilise the western

world. No other study is so well calculated to teach us that legal rules are permanent and universal in their nature, and what are temporary and local. The modern law is fully understood when we study its roots in the ancient world and trace its development down to the present time. In other words our study of historical jurisprudence is incomplete' unless we study ancient institutions and laws and compare those with the modern laws. Roman law is an incomparable instrument of historical education and at the present time there is no system of law which affords a more favourable field for research than that of Rome.

(4) Connection of Roman law with modern law.—Roman law has given to the modern law much of its substance and a form, an arrangement and a method which will last as long as society exists. It has become, as Jhering Said, an element of civilisation. The Romans law is the greatest single legacy which the ancient world has be-queathed to the modern. It is not incorrect to say that the modern civil law is the Roman law, so modified and adapted. Roman law is found in its close affinity with many of the modern systems of law and with the whole structure of international law. Grotius, the founder of modern international law, based his postulates directly from the Romans that there is a determinable law of nature which is binding on states *inter se* and the states *inter se* are related to each other like the members of a group of Roman proprietors. Hunter observed that the Roman law furnishes the basis of much of the law of Europe and has proved an almost inexhaustible storehouse of legal principles. In the history of legal conceptions it occupies a position of unique value. It forms a connecting link between the institutions of the Aryan forefathers and the complex organisation of modern society. Its ancient records carry us back to the dawn of civil jurisdiction and there is exhibited a panorama of legal development such as can not be matched in the history of the laws of any other people.

(5) Use of Roman law in the absence of any authority.—The Roman law is useful in the decision of questions which are not settled by statute, precedent or usage. In *Acton v. Blundell* (12 M.W. 253), Chief Justice Tindall observed that in deciding a cause upon principle', where no direct authority can be cited, it affords the soundness of the conclusion, if it is supported by Roman law. Similarly in *Taylor v. Caldwell* (fire case of 1881) the *Digest* was cited in support of the defendant's contention in the absence of any English precedent and the court accepted the contention of the advocate in arriving at its decision.

Causes of success or Roman law :—The extra-ordinary success of the Roman law is due mainly to merit but partly to opportunity. No other nation of antiquity built up a legal system which, except in the unchanging East, would have had the chance of surviving. The following among others are the causes of success of Roman law :

(1) Its universal character.—The great problem which, the Roman lawyers had to solve was how to make their ancient local law applicable to a great Empire. They had to examine what customs and rules were local and too peculiar to be extended, and to substitute for those rules by which no reasonable and fair minded man could object to be bound. They had to take the rude laws and customs inherited from their primitive ancestors, and to create out of them law which should be applied throughout the civilised world. It was a great task, and it was performed with wonderful success. Rome had, for example, very ancient formal rules about sale but these were not suitable for the Roman Empire or for the Romans to use in dealing with the foreign trader. They must, therefore, lay down rules as to sale which should have no local colour in them, which should be suitable for *every trader* to whatever country he belonged. All the laws of obligations and contracts were in this way denationalised.

(2) Its fulness and refinement.—Next to its universality it was the fulness and refinement of the Roman law which led

the European people to adopt it. Rome had lived through centuries of refinement and civilisation.

(3) The prestige of Rome.—The prestige still attached to the great fallen Empire helped to win acceptance for her laws. Rome had been the great centre of civilisation for ages, and the traditions of her wonderful organisation had never died away.

(4) The support of the Church.—The immense influence of the mediaeval Church was cast at the crucial moment in favour of the Roman law. In the confused period when each race had its own laws and a jude had to decide each case not by the territorial law but by the personal law of the defendant, the Church found it best to adopt the Roman law. Questions affecting the property or the priests of the Church were governed by the Roman Law.

CHAPTER—II

HISTORY OF ROMAN LAW DOWN TO JUSTINIAN

1. Division of Roman history :—The history of Rome is commonly treated into three periods : (1) The Regal period (753 B.C-510 B.C.), (2) the Republican periods (510 B.C.—31 B.C.) and (3) the Imperial period (31 B.C.—565 A.D.)

The Regal period begins from the foundation of the city of Rome. During the Government of the kings the history of Rome is obscured by doubtful traditions. Nothing is definitely known about the origin of the Romans and the earliest history of the city. The legendary date of the foundation of the city is 753 B.C. About the middle of the eighth century B.C., a band of colonists settled on the northern frontier of Latium, choosing the central height as the site of their new home in a group of hills on the left bank of the Tiber, about 15 miles from the river mouth.

It is said that Rome was governed by seven kings during the period from 753 B.C. to 510 B.C,: (1) Romulus (753-716 B.C.), (2)-Numa Pompilius (715-673 B.C.), (3) Tullus Hostilius (763-642 B.C.), (4) Ancus Marcius (642-617 B.C), (5) Lucius Tarquinius Priscus (616-579 B.,C), (6) Servius Tullius (578-535 B.C.), and (7) Tarquinius Superbus (535-510 B.C). Romulus was the founder and the first king of Rome. He divided the population into two classes : patricians and plebeians. He established the senate and the *comtia curiala*

2. The Roman people :—According to the legend the Roman people was divided into three tribes : the Tities, the Ramnes and the Luceres. The writers connected the Ramnes with Romulus (the chief of the Latins), the Tities with Titus Tatius (the chief of the Sabines), and Luceres with Lucumon (the chief of the Etruscans), Many modern, historians believe that the legendary division of the people into three tribes points to tile fact that these three tribes were three different

races, *viz*, Latins, Sabines and Etruccans, which united to form the infant city. It is probable that the three tribes were ancient divisions of the people which existed long before the foundation of Rome. It is also probable that the tribes (like most of the groups into which we find the Aryans divided at various periods) were, in their origin, groups of persons bound together by a political bond.—

Curiae : —Each of the three tribes was divided into ten *curiae* and there were in all thirty *curiae*. The curiae were division of the people based on kinship real or supposed. Each *curiae* in all probability occupied a definite territory. The mere fact of residence or owning land in the territory of a *curiae* would not have made a Roman a member of it. In order to be a member of the *curiae* he must belong to one of the families of which the *curiae* was composed. The *curiae* had its priest, called a *curio*, and its chapel or place of meeting was also called *curiae*. One of the priests or *curiones* was elected at curio maximus, to preside over the *curiones*, who formed a college of thirty priests. The free men of full age who belonged to the *curiae* had a right to vote at the meeting of the *curiae* called comitia curiata *lield in the market place. A* curiae was divided into *gentes*.

The *gentes* or *gentiles*.—The gens or clan was an association of families related through males, bearing the same family name, and claiming descent from a common ancestor. According to Twelve Tables the succession of an intestate would go to *sui*, failing the *sui* to agnates, and failing agnates to *gentiles*. The-*gentiless* are distinguished from the agnates. Now the question is at what degree of relationship the class of agnates is to close and the class of *gentiles* is to open. No satisfactory answer has been suggested by the authorities. According to Mommsen, any one who had been able to prove his relationship in the male line with the deceased could claim as an agnate, failing any such person the estate went to the *gens* or clan to which the dead man

belonged. But many of the *gentiles* were so far removed in blood from the deceased that it was difficult to trace out the relationship. For succession a line had to be drawn. It a *gentile* who were unable to bring such evidence. He was an agnate in a narrow sense.

According to another theory the line was drawn at a fixed degree of relationship. Agnates were all relations on the father's side upto and including to sixth degree and the rest were *gentiles*. This theory is supported by an analogy from Hindu law where a similar line is drawn between *sapinda* relations through males upto the sixth degree inclusive and *samanodaka* or all those persons who bear the same family name. All relations through males within the sixth degree inclusive were agnates and those of the seventh degree or more remote were *gentiles*.

We, therefore, find that a group of families constituted the *gens*, a certain number of gentes *constituted the* curiae, and a group of *curiae* constituted the tribe and several tribes made up the state.

3. Classes of people in early Rome :—There were different classes of people in early Rome, viz. (1) patricians, (2) plebeians, (3) clients and (4) slaves.

(1) The patricians (children of the fathers),—The patricians were probably the descendants of the original Latin settlers of Rome. They belonged to nobler and aristocratic families and claimed to be the dominant class. They enjoyed a monopoly of civil, political and religious rights, all rights and privileges of citizenship, *viz, jus commerce* (the right to trade), *jus connubii* (the right to marry according to the civil law or Rome), *jus suffragium* (right to vote in the public assemblies), *jus honorum* (the right to hold office) and *jus provocation's* (the right of appeal) from the decision of a magistrate to the people. They were the citizens proper in ancient Rome. The *comitia curiata* was composed of the patricians alone. The priests of the state

religion belonged to these privileged families. They alone possessed the knowledge regarding auspices, portents and days sacred and profane, on the due attention to which the safety of the community depended. The early senate and the *comitia curiata* had been formed from this privileged class.

(2) The plebeians (multitudes or the masses).—The plebeians were of varied origin. They came to Rome as settlers or traders or perhaps sometimes as captives who were not made slaves. They included a considerable number of the conquered aborigines of the country. They were excluded from all privileges : they had no civil rights' and duties', "nor the power to Vote in the *curiae*, they could not hold any office or marry among the citizens. They could, however, trade and perhaps farm the land under the citizens. They were considered by the patricians as an inferior class. Their position was very anomalous; they were neither admitted to the rights nor to the law's of the citizens. After the Servias reform they acquired the status of Roma citizenship. A large part of the early history of Rome is made up of the struggles of the plebeians to secure the economic, political and social equality with the patricians.

(3) The clients.—The world clients means hearers or dependants. Their origin is ascribed, partly to the manumission of slaves whose descendants were clients, partly to the admission to the city of homeless wanderers who placed themselves under the protection of a patrician, partly to members of neighbouring communities who were conquered and allowed to come into the city on condition of attaching themselves as clients. The conquered people in some cases became clients of the Commander of the Army to whom they surrendered and hereditary clients of the *gens* to which they belonged. Members of outlying communities who had made this kind of surrender were, perhaps, allowed to remain on their own lands, no longer as owners in the strict" sense of the term, but upon a precarious tenure as clients of a

Roman patrician. The clients were free persons but no citizens. They had in 'law no civil rights, but was obliged to look to his patron to protect him against wrong. If he was' allowed to go to the *comitia* he would go not as a member but as an attendant of his patron. He stood to his patron in a relation which; in many of its incidents, resembles that of a vassal to a feudal lord. He was bound to perform certain services for his patron, he must attend him in war, and many cases he farmed lands which belonged to the 'patron,. In return, the' patron was bound to protect the client. In the Regal period it is said that a large number of 'clients'had been settled on public lands as clients' of the king and the downfall of the monarchy set them free and they' gradually acquired ownership in land.

(4) The slaves.—There was a fourth class of people called servior slaves who formed no part of the state and enjoyed no rights. They were rightless and dutiless people. The Romans considered them as chattels and they formed a part of property of the Romans. They were purchased and sold like any other property and they were heritable by the heirs of their masters.

4. Government of Rome during the Regal period :— The Government consisted of (1) an elected king, (2) a senate and (3) a general assembly of the people called the *comitia curiata*

(1) King.—The king was not hereditary but elected for life by the *comitia* upon the proposition of senator. He was the head and the ruler of the Roman community. He governed the city either personally or through his representatives and he had the power of life and death over the citizens. To him belonged the command of the Army, the administration of justice. (civil and criminal) and the general superintendent of religion. He declared war and made peace; acted as supreme judge and law-giver. He was responsible for the state worship being the *pontifex maximus* (chief priest) of his people. All

religious colleges were under his control and he took cognisance of all religious offences. He summoned the *comitia* and only he could initiate legislation, although, the *comitia curiata* could reject measures proposed by him. He occasionally consulted the senate but he was not bound to follow their counsel. On the death of a king an *interrex* (a king for the interval) was chosen by a council of the people and the nominee of the *interrex* generally became the king.

Leges regiae :—In the infancy of the Roman state, the people were governed by the absolute authority of their kings. The laws given by the kings were nothing but the customs consisted mainly of religious rules. These laws of early kings, known as *leges regiae*, were the first rudiments of jurisprudence. When legislation was resorted to, it was generally to confirm, add to, or modify, rather than to supersede, these primitive usages. During the Regal government at Rome, the laws were prepared by the king with the approbation of the senate and confirmed by the people, at first in the *comitia curiata* and after the reforms of Servius Tullius, in the *comitia centuriata*. These laws were collected into a body by Sextus Papirius, a Roman lawyer, who is said to have lived in the time of the last king, Tarquinius Superbus. These laws of religious rules were called after his name as *jus civile Papirianunm*.

(2) Senate.—The senate was an administrative and deliberative council of nobles or persons distinguished by their rank, wealth and talents. It was composed originally of 100 and afterwards extended to 300 members nominated by the king for life from patricians. It was an advisory council but its views not legally binding on the king. But the experience and social influence of members of the senate added to their advice a peculiar weight. It was difficult for the king to neglect their advices. In important affairs the king was not permitted to determine on a course of action without first asking the senate. Usually the king did not take any important decision without consulting the senate.

Functions of senate :—The first special function of the senate was the election of a king in case the king died without mentioning a successor. This was done in the following way : one of the senators was chosen as a "between king" or "king for an interval" On or before the expiration of five days this temporary king chose another of his colleagues as an *interrex.* And thus the kingly office continued to be filled by this system of rotation until the permanent king was nominated. The second important function of the senate was to examine carefully every law or resolution passed in the public assembly. If it was found to violate the constitution of the state, or any treaty Rome had entered into with another city, or the rights of a citizen, it had the power to nulify it by refusing to give to the measure the vote of ratification required to render it legal and binding. The third "function of the senate was to give counsel to the measure the vote of ratification required to render it legal and binding. The third "function of the senate was to give counsel to the measure the vote of ratification required to render it legal and binding. The third "function of the senate was to give counsel to the king whenever he desired it. The opinion of the senators was specially sought by the king on resolutions which he was proposing to lay before the assembly of citizens. The king thus learnt beforehand whether they were likely to ratify the proposal after its approval by the people. So we find that the real legislative body during the early monarchical period was not the king himself but the king acting in combination with the *comitia curiata* and the senate.

(3) *Comitia curiata.*—This was the most ancient legislative assembly in Rome, composed exclusively of patricians. The Roman people were originally divided into three tribes and each tribe was composed of ten *curiae.* Hence their assembly was called *comitia curiata.* The male members of these *cariae* who were capable of carrying arms formed the *comitia curiata.* This body had no power of initiating legislation. It met only when called together by the king and could merely

assent to or negative such proposals as laid before it by him but it had no right of discussion or amendment. Its decision was not valid without the authorisation of the senate. The real power of the *comitia curiata* lay in the fact that no change affecting any public or private law could be made without its consent. Thus it was necessary for the king to obtain the consent of the *comitia curiata* if, for example, he wished to break a treaty by declaring war. For private law it met under pontificial presidency, such as for confirmation of wills and *adrogation* (adoption of one *paterfamilias* by another). When it met for validation of *adrogation* or for sanctioning of wills, it was called the '*comitia calata.*' It was the *comitia curiata* that, acting upon proposals laid before it by the king, enacted the laws of the state. Its final vote was needed to confer *imperium* (authority) on the elected magistrates. The senate, whose function was to nominate the king and tenderhim advice, was an inner body of the *comitia curiata.* After nomination by the senate, the king was elected by this body.

Method of voting in *comitia cariata.*—The method of voting in the *comitia cariata* was not by individuals, but by *curies,* that is, each *curiae* had on vote, and the measure was carried or lost according to the rule whether the majority of the *curies* voted for or against it. The method of voting was like this : Let us suppose that three *curiae* C1, C2, C3, were present in the *comitia* and C1 had 150 men, C2 200 men, and C3 240 men. Now according to group method of voting the result may thus be tabulated :

	Yes	No	Result.
C1	78	72	+1
C2	40	160	-1
C3	121	119	+1

Here + 1 means I vote for the proposed measure and—1 means 1 vote against it. The result is 2 votes for and one vote against the measure. Therefore the measure is carried.

5. Reforms of Servius Tullius :—To the end of the Regal period, Servius Tullius, the sixth king, introduced far reaching changes in the constitution of the Roman state. He divided the entire population—patricians and plebeians—mainly for fiscal and military purposes into five classes according to their wealth. Each class was sub-divided into centuries. The first class had 80 centuries, the second, third and fourth classes 20 centuries each, and the fifty 30 centuries. With 5 additional centuries of musicians and others, and 18 centuries of knights or cavalry there were in all 193 centuries. The first class comprised of those who had at least 20 acres of land, the second class 15 acres, the third class 10 acres, the fourth class 5 acres and the fifty class 2 acres. The first class was bound to supply 80 centuries of soldiers, the second class 20 centuries, the third class 20 centuries, the fourth class 20 centuries, and the fifth class 30 centuries of soldiers. Besides these the army was completed by 18 centuries of cavalry made up of richest patrician land owners and 5 centuries of musicians, working men and complementary men. In this way the whole people were recognised and organised for military and fiscal purposes.

The military divisions were also employed as voting units in the assembly of the people known as *comitia centuriata* or the assembly of hundreds, which became the great constitutional body during the Republican period made up of patricians and plebeians, this new assembly in course of time absorbed most of the powers of the *comitia curiata* and the old meeting of the *curies* ceased to have any real importance. Each of the century had one vote in the new assembly. The *comitia centuriata* was called together to pass laws, to elect magistrates, to decide on peace and war, and to act as the supreme Court of appeal in questions involving capital sentences, such as death or loss of *caput* (status) of the Roman citizen, Every citizen had the right of appeal against a capital sentence to this Assembly *(provocation ad populum).*

Manner of voting in *comitia centuriata*.—The manner of voting in the *comitia centuriata* gave the rich a higher voting power than the poor. For the first class had 80 centuries and the knights had 18, and the two together made up more than half of the whole number of 193. In the voting the knights voted first, and then class I and both the classes belonged to the patricians. The voting was stopped when the majority of 97 votes had been obtained. If they agreed that there was a majority, it was unnecessary for the other classes to vote at all. The last centuries scarcely ever received a chance to vote. The grouping of centuries was adjusted in such a way that rich people, who were the patricians, had a majority of votes and preponderating weight. Consequently the plebeians had very rare occasions to exercise their franchise.

The Servian reform could not very much improve the condition of the plebeians. The arrangement simply give them the status of Roman citizenship but not the whole of the civil rights. Still this reform was an important step towards the establishment of social and political, equality between the two great orders of the state—the patricians and plebeians. The reform assigned to the plebeians duties only and not rights. But being called upon to discharge, the most important duties of citizens, it was not long before they demanded all the rights of citizens, and as the bearers of arms they were able to discharge their demands. Indeed their position in the state was readically changed. They gradually demanded from the patricians one concession after another until they gained all the rights of full citizenship.

6. The Republic (510 B.C. —31 B.C.) : —A revolution took place by the expulsion of Tarquin, the 7th and last king of Rome and the Royal authority was abolished with the overthrow of the monarchy in 510 B.C. The Romans for ever hated the name of king and found it necessary to introduce certain changes in the constitution.

To supply the place of the king two consuls (lit, colleagues) were elected from the order or patricians by the *comitia centuriata* in which the plebeians had a vote. These magistrates were to remain in office for a year and to exercise most of the powers previously enjoyed by the kings. Each of them had equal authority and had the power to obstruct the acts or veto the commands of the other. This was called the "*right of intercession*" which was a check upon the other. They were changed annually to prevent them from abusing their powers. The two consuls held the highest place in the Republic. All other magistrates and officers except the *tribunes*, were subordinate to them. They presided in the senate and executed its decrees; they levied the troops and enforced military discipline. It was their duty to assemble the senate and the *comitia* and to command the armies in times of war.

In times of crisis or great public danger one special officer bearing the title of *dictator* was appointed to supersede the consuls. His term of office was limited to six months, but during this time his power was unlimited as that of the king. The *dictator* was nominated by one of the consuls acting under an order of the senate which must be obeyed and was clothed with *imperium* (sovereign authority) by the *comitia curiata.* Sometimes a *dictator* was appointed merely to hold an election or to perform some religious ceremonial acts.

As Rome was constantly engaged in war and the consuls who commanded the armies were frequently absent from the city, some important duties of administration formerly entrusted to them were distributed among other magistrates. Thus the praetors (lit. leaders) were appointed to exercise jurisdiction in civil causes, the censors, to jurisdiction in civil causes, the censors, to take the census every five years and to superintend the manners and morals of the people, etc., the *ediles* took care of the public buildings, games and were in charge of the internal police of the city, etc., and the *quaestors*

acted under the directions of the senate as collectors of revenue and had different duties as public prosecutors in capital charges.

Predominance of patricians :—In the early period of the Republic, the Roman constitution, which bore the external appearance of a democracy. was in reality an aristocratic government, Although the plebeians were permitted ostensibly to take part in the deliberations of the assembly of the centuries, the patricians could always command an overwhelming majority in the assembly as well as in the senate, and with the exception of the tribunate they engrossed all the important offices of the state. All political power was thus placed substantially in the hands of the aristocracy who frequently abused it by oppressing the poorer classes.

Fall of Republic :—The free Republic which succeeded the king endured, according to common reckoning, 479 years, during which the political constitution underwent frequent changes. Montesquieu has pointed out the causes which led to the overthrow of the Republic. When the Roman legions crossed the Alps, or passed to distant countries beyond seas, and remained absent for years in the conquered states, the troops lost by degrees the spirit of citizens, and the generals, who disposed of armies and kingdoms, became so powerful that they yielded a very reluctant obedience to the central authority at Rome. The fall of Carthage, and the brilliant conquests of Greece, Egypt and the Asiatic kingdoms, brought about a revolution in the manners and government of the Romans. The arts and customs, and the enormous riches of the conquered nations, familiarised the Romans with luxury, which opened the way to many vices. As the love of country and the zeal for free dom declined, corruption attained more pernicious influence; powerful and ambitious men fomented internal troubles, and popular tumults were followed by an exhausting series of civil wars, which terminated in the ruin of public liberty.

7. The Senate under the Republic :—The abolition of the monarchy left the legal position of the senate unaltered. The consuls called the senate together, presided over its debates and enforced its resolutions just as the king had done in the past. As time went on the power of the consult came to be greatly limited by the increased strength of the senate. The senate, which was in theory a mere body of advisers who might counsel but not compel, got the complete control of the public finances, and by their power over the pursestrings obtained a commanding control over all the magistrates. A permanent body like the senate could exert much more authority over the annually elected consuls than it had possessed over the divided consuls and enabled to dictate the policy of Rome. It is probable that the plebeians were at this period first admitted into the ranks of the senate but the inclusion of the plebeians did not alter the character of the council, which remained at the hands of the old patrician aristocracy. The most important privileges i.e. the right to ratify or reject all proceedings of the centuries, the election of magistrates as well as the passing of laws, were reserved for its patrician members. By withholding their sanction the heads of the old burgess houses could make the decisions of assembly void, and so keep the commons in subjection to the will of the patricians.

8. The struggle between the patricians and the plebeians (494-287 B.C.) :—The patricians enjoyed a monopoly of all rights and privileges which were absolutely denied to the plebeians who had many grievances against the patrician government. Their grievances may be grouped under three heads : economic, political and social. The economic grievance related to the demands for the abolition of the law of debt and for public lands; the political grievances related to the demand for written laws, share in the government and priestly offices; the social grievances related to the right of inter-marriage between the two orders, the claim for taking

part in religious rites and ceremonies, and demand for recognition of *plebiscita* as laws. We shall now consider how their grievances were gradually redressed after a long struggle extending over two centuries.

(1) Demand for abolition of the law of debt.—The first endeavour of the plebs was to get the severe law of debt abolished as this law, regulating the relation of the debtor and the creditor, pressed the plebeians hard. The poor plebs during the period of disorder and war fell in debt to the patrician money-lenders and payment was exacted with heartless severity. The law of debt made the defaulter practically the property of his creditor. The creditor might arrest and load him with chains and after a certain period of time sell him as a slave or cut his body into pieces. The poor plebs demanded that this unfair and unjust law should be repealed but the patricians gave only the promise of relief. When they were more than once deceived as to this promise, in 494 B.C. the whole armed force of the plebs instead of returning to their homes at the end of the campaign, marched in good order to a hill called the Sacred Mount where they resolved to build a new city. This incident is known as the "first secession of the plebs." They refused to return to the service of the state. The patricians were thereby alarmed, because being surrounded by enemies they could not afford to be without them. So they opened negotiations and came to a compromise. It was agreed with most solemn oaths and vows before the gods that the debts of the poor plebs were to be cancelled and those debtors held in slavery set free; and two plebeian magistrates (the number was soon increased to ten), called *tribunes* were to be chosen in an assembly of the plebs. Their duty should be to watch over the plebeians and to protect them against the injustice, harshness and partiality of the patrician magistrates. The *tribunes* were invested with an extra-ordinary power known as "the right to aid" and they were given the right to annual the acts or stop the proceedings of patrician magistrates, even of a consul in case of their

attempt to deal wrongfully with a plebeian by the exercise of their right of *intercessio* (veto). The persons of the *tribunes* were made inviolable, Anyone interrupting a *tribune* in the discharge of his duties, or doing him any violence, was declared an outlaw, whom anyone might kill. Their houses were to remain open night and day so that any plebeian unjustly dealt with might flee to that place for protection and refuge. The *tribunes* were attended and aided by officers called *aediles*, who were elected from the plebeian order and invested with a sacrosanct character like the *tribunes*. Their duties were to take care of the streets, markets and the public archives.

(2) Demand for public land :—The next grievance of the plebeians was for a share in the public lands. The patricians claimed for themselves the exclusive right to occupy the unsold or unleased public lands. The plebs naturally complained because of their exclusion from these common lands, since it was their sacrifices and their blood that had helped to get it. In 487 B.C., a patrician consul named Spurious Cassius, with a view to relieving the distress of the poor plebs brought forward the proposale that (1) lands acquired by the state, instead of being sold or leased, be allotted to needy Romans and the Latins; (2) the amount of land for such distribution be increased by taking away from the rich patricians those public lands which they occupied as tenants at will. As a consequence. Spurious Cassious had to sufer death on a charge of aiming at Royal power upon the expiration of his term as consul. The agitation was not ended by his death. The *tribunes* demanded the execution of his measures or atleast some distribution of lands to the poor. At length their efforts were crowned with partial success. In 467 B.C., by the foundation of the Latin coloney at Autium a number of poor Romans were provided with lands and in 456 B.C. a law was passed under the tribunicaian pressure which distributed the land on the Aventine Hill to poor citizens.

(3) Demand for written laws :—One of the greatest defeats of the Roman system of administration was the absence of written laws. The plebs suffered greatly from the uncertainty of customary laws. This uncertainty about the law enabled the patrician magistrates to deliver unjust and arbitrary judgements. The plebs were the worst sufferers. They, therefore, demanded that the law should be codified and published for general information. The patricians refused to comply with this demand but after a long struggle extending over eight years, according to tradition a commission was sent to the Greek cities of southern Italy and to Athens to study the Grecian laws and customs. On their return, a commission of 10 magistrates, who were known as *decemvirs*, was appointed in 451 B, C., to frame a code of law. This board drew up ten tables within a year. After the expiration of their term of office a new board was appointed to complete the work. Thus a systematic code consisting of Twelve Tables was compiled and passed by the *comitia centuriata*.

Provisions of the Twelve Tables :— The provisions of the Twelve Tables may be grouped under two heads, *viz*, public law and private law. Under the first head fall the rules regarding the sovereignty of the popular assembly and matters of criminal and administrative law. Under the second head fall provisions regarding paternal power, nexal debt, intestate succession, etc. Some of the important provisions of the Twelve Tables are given below :—

(a) On rights of creditor :—Insolvent debtors could be treated with great severity. They were liable to be siezed and imprisoned by their creditors and after being kept loaded in chains for 60 days, might be sold into foreign slavery.

(b) On marriage :—The old law or custom that prohibited all marriages between patricians and plebeians was confirmed.

(c) On crime :—In bodily injuries the barbarous principle of retaliation was sanctioned—an eye for an eye, a limb for a limb.

(d) On defamation :—Any person who wrote lampoons or libels on his neighbours was liable to be deprived of civil rights.

(e) On right of appeal :—An appeal might be made to the people from the sentence of every magistrate, and no citizen was to be tried for his life except before the *comitia* of the centuries.

(f) On summons :—In case of any dispute, it was the duty of the plaintiff to take the defendant before the magistrate. If he attempted evasion or was unwilling to go, the plaintiff could arrest him after calling witnesses. If he was sick or very old the plaintiff would arrange his conveyance.

(g) On father's right :—The father had absolute right over his children and he could imprison, sell or kill them though they held high official rank. If the father sold his son three times, the son should be free from *patria potestas.*

(h) On succession :—The father could dispose of his property by testament. In the event of his death intestate and without *suus heres* his nearest agnates succeeded. In default of agnates the proerty went to the *gentiles.*

(i) On possession :—Ownership was acquired by possession for two years in respect of land and one year in respect of movable property But the foreigners could not acquire the property of the Roman citizens by adverse possession.

Significance of Twelve Tables :—The Twelve Tables, the celebrated code was the foundation of Roman law, which was the most highly developed legal system in the ancient world.

The twelve Tables though immensely improved and enlarged, was never wholly superseded by subsequent legislation, but continued to be, in theory, the ancient source from which all law flowed until the time of Justinian himself. They were not new laws; they were a collection of old laws and customs. The codification of law was a distinct advantage to the plebs. The patrician magistrates could no longer utilise the uncertainty of law to pass arbitrary decisions. The Twelve Tables, to some extent improved the position of the plebs, for the two orders were placed on a footing of equality in their relations of private life.

Overthrow of decemvirs (450 B.C.) :—The *decemvirs* were appointed not only to codify the law but also to carry on the Government of the city and were invested with the supreme power of the state. The first *decemvirs* used the power with justice and prudence, but the second board, under the leadership of Appius Claudius, a member of the old board, instituted a most infamous and tyrannical rule. Appius Claudius desiring to gain possession of Virginia, a beautiful daughter of a plebeian, pronounced her a slave. The father of the maiden, preferring the death of his daughter to her dishonour, killed her with his own hand. Then, drawing the weapon from her breast, he hastened to the Army, which was resisting an united invasion of the Sabines and Aequians, and exhibiting the bloody knife, told the story of the outrage. The soldiers rose as a single man and hurried to the city. They protested against this conduct by migrating to the Sacred Mount for the second time. This was known as "the second secession of the plebs." The situation was so critical that the patricians were compelled to yield and the *decemvirs* were forced to resign. The consulate and the *tribunate* were restord. Eight of the *decemvirs* were forced to go into exile; Appius claudius and one other were imprisoned and they ultimately committed suicide.

(4) Demand for removal of marriage restriction:—The plebeians next demanded for the removal of marriage restriction that prevented the fusion of the two orders. They had no right to marry the patricians. This concession was secured as a result of the third secession of the plebs. *Lex Conuleia* was passed in 445 B.C., which sanctioned inter-marriage between the two orders. This law established the social equality between the two orders.

(5) Demand for share in Government :—The plebeians now demanded that they should be entitled to hold the highest executive office in the Republic. The patricians were unable to confront this demand with a straight refusal. They abolished the consulship and appointed military *tribunes* enjoying consular authority. Their number varied from three to six and they could be chosen equally from the two orders. This concession to the plebs was subject to one serious limitation. The military *tribunes* were not invested with some of the duties and powers which were conferred upon newly created officers called the censors who could be chosen from the ranks of the patricians alone. They took the census of the citizens and their property and arranged them in accordance with their rank and property. They could, for immorality or any improper conduct, degrade a knight from his rank, expel a member from the senate or deprive any citizen of his vote by striking his name from the roll of the tribes. They were also allowed to nominate, the members of the senate. Thus the patricians kept for themselves a monopoly of some important political power. The plebs understood that no substantial improvement of their position could be effected unless they could hold the consulship. In 376 B. C. the *tribunes* (Licinius Stalo and L. Sextious) introduced some legislative measures which are known as *Licinian Rogation.* It provided (1) that the office of military *tribunes* should be abolished and the consulship be revived, (2) that one of the two consuls must be a plebeian, (3) that no citizen should be allowed to hold more

than 500 *jugera* of the public lands (2 *jugera* = $1\frac{1}{4}$ acres) and the plebs should enjoy with the patricians the right to occupy the public lands, (4) that the interest already paid by the debtor should be deducted from the principal and the remainder of the principal should be repaid in three annual instalments. The patricians violently opposed these measures but they were compelled to yield when the *tribunes* suspended all public business by exercising the right of *intercessio.* After a bitter struggel for 10 years the *Licinian Rogation* became law in 367 B.C.

(6) Demand for priestly office :—The plebeians now demanded that they should be entitled to hold priestly offices. The patricians could not resist this demand for long. The *lex Ogulnia* was passed in 300 B.C., under the provision of which the plebs were authorised to become pontiffs and augurs and the number of the priestly offices was increased.

(7) Demand for recognition of *plebiscita* as laws :—At last the plebeians demanded that the *plebiscita* (resolutions of the *concilium plebis)* should be recognised as laws for all the citizens. This concession was secured as a result of the fourth secession of the plebs. The *plebiscita* came to be recognised as laws after the passing of *lex Hortensia* in 287 B.C. This act provided that the resolutions of the *concilium plebis (plebiscita)* should be of the same efficacy as those of the *comitia centuriata,* and be binding upon the plebeians and patricians alike. After that time the *concilium plebis* became in fact another assembly and the *plebiscita* were commonly called *leges.* Thus the plebeians secured complete legislative independence.

Character of the struggle :—After a long struggle extending over two centuries the plebeians succeeded in having all their grievances redressed and in securing a position of equality with the patricians. Rome attained internal unity and it became easy for her to launch upon a career of conquest and expansion. The constitution became democratic. One of the

significant features of this long struggle was that it was carried on without violence. Al-though the plebs were denied the monopoly of rights enjoyed by the patricians, they did not rise in armed rebellion nor did they refuse to fight for Rome when she was threatened by external enemies. The patricians also did not push things to the extreme. The reconciliation of both the parties made the armies of Rome triumphant througout Italy.

9. Agencies of the development of Roman Law :— The agencies whereby the Roman law was developed were three in number :

(1) Legal fiction or interpretation by the jurisconsults.

(2) Equity by the praetors.

(3) Legislation.

(1) Legal fiction or interpretation :—Legal fiction signifies any assumption which conceals or affects to conceal the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. The fact is that the law has been wholly changed, the fiction is that it remains always what it was. The English case law and the Roman *responsa prudentium* are illustrations of legal fiction. In each of them there is a legal presumption that the laws are interpreted but as a matter of fact in the process of interpretation new laws are created.

With the growth of society and new social needs, the Romans faced new problems. Their old laws were found to be wholly inadequate, but it was not easy to create new laws. People did not like any interference with the existing law of the land, because they regarded their law as divine and unchangeable. So they at first resorted to legal fiction to remove the rigidity and inadequacy of the old laws without giving any shock to the conservative idea of the people by open and direct change. In rome, laws were at first interpreted by the pontiffs; later the jurisconsults, a body of men, well

versed in law, expounded it to meet the exigencies of the time. They were consulted on legal matters and they were giving opinions on those matters. Their opinions *(responsa)* were known as the responsa prudentum or the answers of the learned in law. The authors of the *responsa* said that they were merely explaining the laws and bringing out its full meaning, but in reality they extracted out of the Twelve Tables a good deal more than what was in them. In this way Roman law was considerable improved by use of legal fiction or interpretation of laws by the jurisconsults. Thus by interpreting the law of sale the Romans developed the law of gift and mortgage and considerable improvement had also been made on the law of property and obligation.

Modern law :—In modern law also an extensive use of legal fictions are found. In Hindu law, an adopted son is regarded as a son born into the family. So also a child in the mother's womb is regarded as a child born for many purposes, *e.g.* to take an estate as a legatee. In English law, the relation of master and servant is supposed to be the ground of action for damages when a father brings an action against the seducer of his daughter. In this action the daughter is alleged to be the servant of the plaintiff and the cause of action is based upon the consequential loss of service.

The old law can be interpreted to cover new cases when there are some similarities between the new case and the old law. But when the case is totally new, or when there is no provision in the old law, legal fiction is of no help. At this stage equity makes its appearance.

(2) Equity :—Equity means a body of rules existing by the side of the original civil law, founded on distinct principles and claiming incidentally to supersede the civil law by virtue of a superior sanctity inherent in those principles. Such a body of rules was worked into the Roman system by the praetors (magistrates) to develop the existing law of the land. the original civil law of Rome contained many arbitrary

distinctions, anomalies and inconsistencies, which not only resulted in injusstice and oppression, but rendered the administration of justice difficult. The defects in the Roman law were removed by the application of equity. It was through equity that the aliens received protection in Roman law, that conveyance of property was freed from the formalities and ceremonies, that the arbitrary distinction between classes of persons and kinds of property disappeared, and that the artificial relation based on *potestas* gave way before the natural bond of consanguinity. Roman equity begins and ends with the praetor. The topic now leads us to trance the history of equity in Rome.

History of Roman equity.—When in the Republican period a large number of foreigners came to Rome for commerce or for permanent habitation, the Roman state was faced with a new problem. These foreigners could not claim the benefit of the Roman civil law, for it was applicable to the citizens alone. Yet these foreigners had to be protected by law, otherwise the Roman commerce and trade would suffer and even the very safety of the Roman state might be threatened. Here the legal fiction could not help the Romans because there was no question of the application of civil law to the foreigners. To meet the situation the Romans appointed a new praetor, who was called the *praetor peregrinus*, whose function was to take cognisance of all the suits between a Roman citizen and a foreigner or between the foreigners themselves. The *praetor peregrinus* by issuing edicts created what is known as the *jus gentium* for the foreigners.

At first the Romans hated the *jus gentum* as they hated the foreigners. But under the influence of the Greek theory of the law of Nature their angle of vision towards the *jus gentium* was changed. According to sir Henry Maine, There was a confusion between the Roman *jus gentium* and the law of Nature. The romans regarded the *jus gentium*, which was originally meant as a law for the foreigners as a concrete

embodiment of the law of Nature. When this stage was reached the Roman attitude of hatred towards *jus gentium* was changed, and they regarded *jus gentium* as an ideal system of law to which all law should approximate in order to be perfect. From this onward the formalism and rigidity of Roman law were removed by the adoption of the principles of *jus gentium*. When the *jus gentium* acquired such a philosophical and ethical significance through the influence of Greek philosophy, the development of Roman law was astonishingly rapid and the principles of *jus gentium* were allowed to supplement and supersede the civil law of Rome. The code of Justinian made a permanent fusion of the principles of *jus civile* and *jus gentium*.

(3) Legislation :—The last agency of the development of law is legislation or the enactment of the legislature. In Roman history we find that laws were passed by the popular assemblies, the senate and the Emperors. The *comitia curiata* was the only assembly in the Regal period and it continued for sometime in the Republic along with the *comitia centuriata*.

During the Republic there were four assemblies; (1) *comitia curiata ; (2) comitia centuriata ; (3) comitia tributa ; (4) concilium plebis*. During the early days of the Empire, the place of the popular assembly was gradually taken by the senate, acting as the mouthpiece of the Emperor. Finally even this form was dropped. and all enactments flowed directly from the Emperors.

Legislation is the only agency in modern times which is extensively used for the purpose of developing laws of any country.

10. The jurisconsult :—The jurisconsults were a body of men in Rome, who made it their business to study the law and to expound it for the benefit of the people. They were consulted on legal matters, and accordingly they got the opportunity to develop the Roman law by their interpretations, writings and *responsa*. The jurists at Rome fall into three main classes,

viz., (1) the pontiffs and earlier lay jurists whose chief work was *interpretatio,* (2) the jurists who came after the period of *interpretatio,* and before the time of classical jurisprudence, and (3) the classical jurists.

(1) The interpretation of the pontiffs.—Originally Roman law was nothing but unwritten customs. The college of pontiffs were the repository of the law and they were the lawyers. The custody of the Twelve tables, the exclusive knowledge of the forms of procedure *(legis actiones),* and the right of interpretation and practice of law belonged to the college of pontiffs This continued for a contury and a half after the publication of the Twelve Tables In theory, tuey merely expounded the law as set out in the Twelve Tables, but in fact they created a considerable body of new rules of laws. The development of Roman law by means of interpretation came to an end by the time when the praetorian jurisdiction was sufficiently established.

(2) The jurists who came after the period of interpretation and before the time of classical jurisprudence. Appius Claudius (censor, 312 B.C.) drew up a record of the *legis actiones.* Gnaeus Flavius, the son of a freedman, who acted as secretary to Appius Claudius, had stolen and abstracted his master's book and published it to the world in 304 B.C. This publication was known as the *jus Flavianum.* It was received with great satisfaction by the people. The effect of this disclosure of a specially important part of the technical legal knowledge of the pontiffs may be connected with the admission of plebeians to the college of pontiffs in 300 B,C. and with the formal severance of the college from the practical administration of the law in 289 B.C. Tiberius Coruncanius (consul, 280 B.C.) was the first plebeian *pontifex maximus* (252 B.C.) and is said to have been the first man to profess publicly to give Information on law. the first writer of an important law book was Sextas Aelius (consul, 198 B.C.). The Flavian collections being imperfect he published for the

second time a supplement thereto in 204 B.C. which was named after his name as *jus Aelianum*. His work is also called *tripertita*, as it consisted of three parts, *viz.* (1) the laws of the Twelve Tables, (2) their interpretations and (3) the forms of procedure *(legis actiones)*. Hence—, forth the monopoly of the pontiffs came to an end. There were many lay jurists like M. Porcius Cato (consul, 195 B.C.), M. Manillus (consul, 149 B.C), Cato the younger. M. Junius Brutus and P. Rutilius Rufus (consul, 105 B.C.) whose writings were of importance. But systematic legal writing was started from Scaevola (consul, 95 B.C.) who was the first person to write the *jus civile* in eighteen books. He wrote the principles of Roman law in a comprehensive and logical order and arrangement. Scaevola was followed by Aquilius Gallus (praetor, 66 B.C.) the author of the Stipulatio Aquiliana, and Servius Sulpicius (consul, 51 B.C.), the author of the first commentary on the praetor's edict.

(3) The classical jurists,—The classical period of Roman law is generally considered as beginning with the reign of Hadrian. Among the civilians who flourished between the reign of Hadrian and the death of Alexander Severus, we find the distinguished names of Pomponius, Scasvola, Gaius, Papinian, Ulpian and Paulus. The brilliant series of classical jurists end with modestinus. These men were the great lights of jurisprudence for all time. During this golden age of Roman jurisprudence, many law books were written, *viz*, commentaries on the Twelve Tables, on the perpetual edict, the laws of the People, the Decrees of the senate; elaborate books on the general body of the law called Digests; elementary books under the titles of *Institutiones, Regulae, Sententiae*, and the like; notes or commentaries on the writing of the earlier lawyers; and a great mass of treaties on special subjects in every department of law. After Modestinus the development of law was carried on almost entirely by Imperial Constitutions.

Importance of jurisconsults.—The jurisconsults contributed a good deal to the development of Roman law by their interpretation and suggestions. They supplemented the laws by numberless new doctrines. *Digest* illustrates on every page how they cast the law into general statements or rules of remarkable precision and clearness. The eminent jurisconsults, as members of the Emperor's Privy Council, contributed materially to the shaping of Imperial legislation. The great bulk of Roman law and all that is most valuable in it, is due to the jurisconsults.

11. The Praetor :—When the consulship was open to the plebeians by the *Licinian laws* of 367 B.C., the administration of justice was separated from the hands of the consuls and transferred to a patrician magistrate who was called praetor. At first one praetor was appointed in 366 B.C.; he was known as *praetor urbanus*. His special function was to decide all disputes arising between the citizens in the city and hence he was designated as *praetor urbanus*. He was appointed annually under the same auspices and had the same imperium as the consuls. He was a jurisconsult himself, or a person entirely in the hands of advisers who were jurisconsults. He was appointed not to reform the law but as a magistrate for Rome. He administered the law in particular cases. The law he administered was the *jus civile* of Rome as found in the Twelve Tables which was applicable only to the Roman citizens.

With the influx of foreigners and growth of foreign trade during the Republican period, it was unmanageable for one praetor to deal with all cases. So about the year 242 B.C., a second praetor was appointed to decide all disputes arising between citizens and foreigners or between foreigners themselves. He was known as *praetor peregrinus* or foreign praetor, Subsequently other praetors were appointed for various purposes, *viz.* (1) the censors who were in charge of census, valuation roll, and preparation of the annual budget;

(2) the *curule aediles*, who looked after public health, sanitation, management of streets and public buildings, ordering of markets, etc.; (3) the *quaestors* with their duties of collecting revenues and different duties as public prosecutors in capital charges; (4) *praetor fideicommissarius* whose duty was to enforce trust.

The *praetor peregrinus* was exercising the same indefinite powers as *urban praetor*, But he was less bound by tradition or strict law. The *jus civile* of Rome being in applicable to the foreigners, the question arose by what law the disputes between foreigners were to be decided. Sir Henry Maine observed that the law, the *praetor peregrinus* administered, was that which he found by observation to be common to all the people who lived around or who came to Rome and also common to the *jus civile* of Rome. In applying the rules of *jus civile* he avoided the native formalites and ceremonials. He created laws for the foreigners what is known as the *jus gentium.*

Praetor's Edict.—The praetor had the *jus edicendi i.e.* the right to issue edict if he liked. On assuming office he used to issue edicts. An edict was a proclamation or statement of rules and principles by which the praetor would be guided in the administration of justice during the tenure of his office. It was written on wood and hung up in the court of the praetor at the beginning of his year of office. Edicts were of the following kinds :—

(1) *Edictum perpetuum* :—It was the edict which each praetor issued on assumption of his office every year. If was probably called '*perpetuum*' because it was intended to be binding upon him during the tenure of his office. Any flagrant departure from it was regarded as unconstitutional,

(2) *Edictum repentinum* :—It was the edict issued by the praetor during the year of office to meet some sudden and unexpected emergency.

(3) *Edictum tralaticium* : —The praetor was not bound to issue wholly new edicts of his own. He used to follow the edicts of his predecessors which had been found beneficial and the portion of their edict that he transferred to his own was called *edictum tralaticium.*

(4) *Edictum nova* :—The new praetor might add a clause or two of his own; and the part newly added by him was called *edictum nova.*

(5) *Edictum provinciale* :—In the provinces the functions of the praetors were exercised by the local governors, and their proclamations or edicts had the same force of law as those of the praetor at Rome.

(6) *Edicts* of the curule aediles :—The *jus edicendi* was not the exclusive right of the praetors. It was possessed by every superior magistrate, but the only edicts of importance, besides those mentioned, were those of the *curule aediles,* form whose proclamations certain legal rules evolved, *e.g.* implied warranty in the law of sale *(emptio-venditio).*

The praetor administered the law, he never claimed to make laws. Yet his power of interpretation and amendment had a qualified and limited legislative effect. Where on the facts before the praetor, there was no remedy provided in the civil law, but equity demanded that the plaintiff should not be denied relief, he devised other method to ensure justice. The earlier method employed by him was the use of legal fiction. Later he administered justice by applying equitable principles and remedies. In this way he granted new remedies and defences, just as in the formative period of the English common law the Chancery gave new writs to intending suitors. The creation of new remedies meant the creation of new rights and new laws. The new body of laws that arose through the edicts of successive praetors came to be known as the *jus honorarium or jus praetorium.* It was a sort of equity which gave relief when the *jus civile* was rigid and inadequate. This law exercised a powerful influence on the

development of Roman law than the influence of the jurisconsults as it was direct and authoritative.

Jurisdiction of praetor :—The praetor stands midway between the jurisconsults and the legislature. The earliest conception of law was that it was fixed and immutable. As the society progressed, changes were essential. But it was not easy to change the law because the people regarded their law as divine and unchangeable. Any open change at the outset would naturally shock to the conservative idea of the people. So the jurisconsults introduced slight modifications under the garb of interpretation. When this practice was going on for some time, people were prepared for change but not to the extent of direct and open innovation. At this juncture the praetor intervened and started to change the law directly and openly by the introduction of equity which gained popular favour on account of its superior sanctity and excellence. The praetor was the keeper of conscience of the Roman people and he was the person to determine in what cases the strict law was to give way to natural justice, for example, the civil law traced succession exclusively through males, taking no account of emancipated children or of persons related to the deceased through females. The civil lawa also prescribed a cumbrous form of will-making. The praetor gave possession of the estate (*bonorum possessio)* in proper cases to persons who could not take at civil law, but he could not make them heirs. When the public opinion was ripe for the change the praetor protected them in their possession against the civil law heirs. He was the exponent of Roman equity. Hence it is said that he holds a middle position between the jurisconsults and the legislature, just as in English law, equity follows the law but precedes legislation.

End of praetor's edict :—The development of Roman law by praetorian edict came to an end towards the end of the last century of the Republic. the *lex Cornelia* passed in 67 B.C., made it unlawful to depart from the edict once issued. In the

early part of the Empire some rules were framed which regulated the actions of ten praetors. The Eperor could disallow any reform of which he disapproved. The result was, as Shom pointed out, that the edict became stereotyped and barren. The Emperor Hadrian commissioned the famous jurist Salvius Julianus (A.D. 125-128) to go through and codify the edicts or *praetor urbanus, praetor perigrinus,* and certain parts of the edicts of the *curule aediles,* together with the edicts of the provincial Governors. The resulting code, known as the *edictum Hadrianum or edictum Salvianum* was ratified by a *senatus consultum* and thenceforth it became an *edictum perpetuum* in a new sense. These edicts were intended to be binding and unalterable for ever. The work of Julianus may be taken to mark the end of the praetorian legal reform. Henceforth the development of Roman law was effected by the writings of later jurists and the Imperial Constitutions. (Results of praetor's work.—The chief results of the praetor's work may be summed up under three heads :

(1) It was the praetor chiefly that admitted the foreigners within the pale of Roman law.

(2) The praetor changed the law by which the formalism of Roman law was superseded by well conceived rules giving effect to the real intention of the parties.

(3) He took the first lead in transforming the law of intestate succession, so that for the purpose of inheritance, the family came to be based on the natural tie of blood instead of the artificial relation of *potestas.*

12. Comparison between English and Praetorian equity :—

(1) Both attempted to remedy the defects in the existing legal system. The object of the praetorian edicts (Roman equity) was to cure the defects of the *jus civile* (civil law) of Rome and also to supplement the civil law where it was

inadequate. Whereas the object of the rules of Chancery (English equity) was to improve and supplement the common law.

(2) Both were unsystematic in form, and were the result of gradual innovations.

(3) Both were based on a false assumption. The Roman jurisconsults, in order to account for the improvement of their jurisprudence by the praetor, borrowed the Greek doctrine of the law of Nature and claimed that the *jus gentium* was a concrete embodiment of the law of Nature. Similarly, in England the claim of the equity to override the common law was based on the assumption that a general right to superintend the administration of justice was vested in the king in his paternal authority.

(4) Just as in Rome, Justinian's legislation incorporated the praetorian law into the civil law, so also in England the Judicature Act of 1873 made a fusion of equity and common law inasmuch as both the remedies could be claimed from the same court.

Contrast between Praetorian and English equity :—

(1) Roman civil law and equity were both administered by the same tribunal whereas in England the common law and equity were administered by separate tribunals till the Judicature Act of 1873.

(2) Praetorian equity after a time became a statute law, whereas English equity was, for a long time, almost entirely judgemade law.

(3) English equity followed the law, whereas praetorian equity ran counter to the law.

13. The Legislative Assemblies under the Republic :— There were four legislatures during the Republic :

(1) comitia curiata,

(2) comitia centuriata,

(3) comitia tributa, and

(4) concilium plebis.

(1) comitia curiata.—See p11

(2) *Comita centuriata.*—It was an assembly composed of all the citizens, both patricians and plebeians. Servius Tullius divided the people into five classes according to their fortune. Each class was sub-divided into centuries. In all there were 193 centuries. The division was made so that men should vote according to their wealth and order of the army in the field. The military organisation devised by Servius was intended to replace the old *comitia curiata* where birth and not wealth counted. This assembly enjoyed the same powers as the *comitia curiata.* The patricians as well as the plebeians could sit and vote in the *comitia centuriata.* The *comitia curiata* and the *comitia centuriata* existed side by side for some time but afterwards the latter usurped the functions of the former. The *comitia centuriata* had no power of initiating legislation, for no measure could be proposed there except by a consul, and he could bring forward nothing without the previous sanction of the senate. All measures which required a religious sanction had to be confirmed by the *comitia curiata.* The most important piece of legislation passed by the *comitia centuriata* was the law of the Twelve Tables, the celebrated code which was the foundation of Roman Law and which, though immensely improved and enlarged, was never wholly superseded by subsequent legislation but continued to be the ancient source from which all law flowed until the time of Justinian. This assembly had many functions. It passed laws and elected the magistrates but the *imperium* on them was subsequently conferred by the *comitia curiata.* It decided the question of peace and war and acted as the supreme court of appeal in question involving capital sentences. Much legislation in the earlier part of the Republic was due to the comitia centuriata, But it was and unsatisfactory body from the point of view of the plebeians since the voting strengty was

with the wealthier classes, in which they were little represented.

(3) *Comitia tributa* :—The *comitia tributa* was an assembly of the people based on a division of the Roman people according to local division or district and hence the title *tributa (tribus* means districts and not tribes). This assembly included the patricians and the plebeians. This grouping was devised for fiscal and administrative purposes and also assigned by tradition to Servius Tullius, Nothing is definitely known about the legislative methods of the *comitia tributa.*

(4) *Concilium plebis.*—The *concilium plebis* was an assembly purely of the plebeians where their grievances were discussed. It was convoked by a tribune. It could pass resolutions, in that assembly determining the policy of the plebeians, which were at first binding on the plebeians alone. The resolutions passed at the *concilium plebis* were known as the *plebiscita.* After the passing of *lex Hortensia,* 287 B.C. the *plebiscita* were binding both upon patricians and plebeians. After that time the *concilium plebis* became in fact another assembly, and the *plebiscita* were commonly called *leges.*

According to Jolowicz, in the later Republic there were three sovereign legislatures viz, *comitia centuriata, comitia tributa* and *concilium plebis.* All were equally capable of passing binding statutes. Which of these assemblies was summoned in any particular instance depended on the magistrates who wished to put a proposal before the people. The normal president of the *comitia centuriata* was the consuls, both for legislation and for election. The *comitia tributa* could only be summoned by partician magistrates, usually the consuls or praetors and the *concilium plebis* could only meet under the presidency of a magistrate of the plebs.

14. Lex :—Lex is a term wide enough to include not only the whole of the statute law, but every species of legal rules. In this sense it includes the laws of (1) the early kings, (2) the

comitia curiata, (3) the *comitia centuriata* and (4) the *comitia tributa*. In the Regal period measures were proposed by the king in the *comitia curiata* which passed laws. Similarly in the Republican period laws were passed by the *comitia centuriata* under the presidency of a consul. the Twelve Tables, which was the foundation of Roman law, was passed in this assembly. Likewise laws were passed in the *comitia tributa* which was summoned by consuls or praetors.

15. Jus :—*Jus* means non-staute law and includes the body of rules received as law by the Romans or any large section of such body, such as *jus civile, jus gentium, jus naturale, jus privatum, jus publicum, jus praetorianum*, etc.

16. Fas :—*Fas* means religious law or the rules of morality. *Fas* is the sum of the duties owed by man to the gods, whereas *jus* is the sum of the duties owed by man to man.

All primitive people mixed up law and religion. In early Rome pontiffs were the lawyers who were the custodians and interpretors of all laws. At that time both morality and law *(fas* and *jus)* were mixed up and found in custom which was based on religion. What was right and lawful was *fax;* what was unlawful was *nefas*. At this stage there was no distinction between *fas* and *jus*. But the Romans perceived earlier than most peoples that the field of law was not coextensive with that of moral rules. So they distinguished very early between *fas* and *jus*. *Jus* or law was enforced by the machinery of the state whereas *fas* was left purely to religious sanction and public opinion. The moral rules *(fas)* were not enforced by the machinery of the state. In case of violation of those rules there was no penal consequences. These religious rules were collected into a body by Sextus Papirius, a Roman lawyer who is said to have lived in the time of the last king, Tarquinius Superbus. These laws of religion were called after his name as *jus civile Papirianum*.

In a developed civilisation the notion of law and morality are clearly distinguished. Law consists of those rules of conduct which the state will enforce by its judicial machinery and morality consists of those rules of conduct which are habitually observed by well conducted people but are not necessarily enforced by anything except public opinion. This does not mean that the two sets of rules are opposed or even distinct. One of the chief functions of the law is the maintenance of morality, and from this point of view law may be described as that part of morality which in any community it is thought desirable to make compulsory. The relation between law and morality is so close that in any self-governing community, when views change on any point of morality, the trend of legislation changes too.

17. Jus civile :—*Jus civile* (civil law) according to the Institutes, is that protion of a legal system which is peculiar to a given community. It was the law peculiar to Rome and was regarded as the exclusive privilege of the Roman citizens and no one but a citizen could claim its protections. It contained the body of rules by which the people of Rome were guided in respect of their rights and obligations. It was full of formalities and ceremonials and administered by *praetor urbanus* in the Republican period as found in the Twelve Tables. Originally *jus civil* was the unwritten law which was subsequently passed by the *comitia centuriata* in the Republican period. These laws were extremely primitive, narrow and inelastic.

18. Jus gentium :— With the influx of foreigners and growth of foreign trade during the Republican period, there was a necessity for the creation of a new body of rules for determination of disputes between the Romans and the foreigners or between the foreigners *inter se* and for taking judicial recognition of the informal transactions which were taking place among the Romans and the foreigners. This new body of reules was known as the *jus gentium.* These rules were

partly derived from the common customs of the Romans and the neighbouring Italian tribes and partly from the *jus civile* leaving aside its formalities and ceremonials. These laws were administered by the *praetor peregrinus* in dealing with disputes arising between the Romans on the one hand and the foreigners on the other or between the foreigners *inter se*. These laws were in force side by side with the *jus civile* throughout the Republic and down to the Imperial period when it was merged into one law for the entire population of Rome.

Roman attitude to *jus gentium*.—Sir Henry Maine observed that the *jus gentium* was not at first in the good grance of the Romans. They had no liking for it but accepted it as a political necessity. But later under the influence of the Greek conception of law of Nature, their angle of vision towards *jus gentium* was changed. The *jus gentium*, then, came to be regarded as the concrete embodiment of the *jus naturale*, an ideal system, to which all law should approximate in order to be perfect.

19. Jus naturale :—*Jus naturale*, or the law of Nature, was the law peculiar to the Stoic School of Greek philosophy and was introduced into Rome after the subjugation of Greece. Soon after its introduction the Roman jurists took up the idea that the *jus gentium* was nothing but the *jus naturale*, and the result was an identification and blending of the two systems. The contact between them was brought about through equity, and the praetor while basing his principles on the *jus gentium*, always kept before him the law of Nature as an ideal system to which law should approach as far as possible.

Greek conception of law of Nature.—The *jus naturale* or the law of Nature was associated with the Greek philosophy. The Greek philosophers meant by Nature the physical world. The earlier Greek philosophers believed that this visible universe with all its manifold objects was the manifestation of some single principle which they variously asserted to be

movement, fire, moisture or generation. The later Greek philosophers especially the Stoics (school of Philosophy) further developed this conception of Nature by extending it to the realm of human thoughts. Nature then came to mean not only the visible thing but also the invisible world of thought, observations and aspirations of mankind. And underlying these diverse objects there was one principle of which the different objects were but the visible manifestations. This underlying principles was reason. the law of Nature ultimately came to mean the law of reason or rational principle. But the notion that the multifarious objects of Nature are but the different manifestations of one principles, gradually led the Stoics to believe that underlying all the complex rules of human conduct, conflict of interests and mad longings of our tempestuous life, there were some simpler principles of life and that to live according to those principles would be the *summum bonum* of life. To live according to Nature came to be considered as the end for which man was created. To live according to Nature meant to live in an unostentatious way, to live above disorderly habits and gross indulgence to senses. "Life according to Nature" was the teaching of the Stoics.

Roman application of Greek theory.—This peculiar view of Nature made a strong appeal to the Romans and their attitude towards *jus gentium* was changed when they came in touch with Hellenic culture after the conquest of Greece. After some time when Nature had become a household word in the mouths of the Romans, the belief gradually prevailed among the Roman lawyers that their old *jus*gentium was in fact the lost code of Nature and that the praetor in framing an edictal jurisprudence on the principles of the *jus gentium* was gradually restoring a type from which law had only departed to deteriorate.

According to Sir Henry maine this confusion was primarily due to the following causes :—(1) the levelling

tendency and (2) universality of the *jus gentium*. The *jus gentium* hardly made any distinction between classes of things *(e.g. res mancipl* and *rec mancipi)*, or classes of people *(e.g.* citizens and aliens) or kinds of relations *(e.g.* agnatic and cognatic). It treated all alike. In the law of Nature also there was no such arbitrary distinctions. Roman law was a local or national law, but the *jus gentium*, like the *jus naturale*, was not confined to any particular locality or to any particular race. It had an air of universality. When the *jus gentium* acquired such a philosophical and ethical significance through the influence of Greek philosophy. the Roman attitude of hatred towards *jus gentium* was changed, and they regarded *jus gentium* as an ideal system of law to which all law should approximate in order to be perfect. From this onward the formalism and rigidity of Roman civil law were removed by the adoption of the principles of *jus gentium*. Thus the law of Nature, on account of its confusion with *jus gentium*, brought about an astonishing development in Roman law.

20. The Empire (31 B.C. to. 565 A.D.) :— Octavious, the grand nephew of Julius Caesar, established the Empire in 31 B.C. The government was a Monarchy in fact but a Republic in form. He did not take the title of king. He knew how hateful to the people that name had been since the expulsion of the Tarquins. He did not take the title of dictator, a name that since the time of Sulla had been almost as intolerable to the people as that of king. He adopted the title of Imperator (Emperor), a title which carried with it the absolute authority of the Commander of the legions. He also received from the senate the honorary surname of Augeustus, a title that had been sacred to the gods.

He was careful not to wound the sensibilities of the lovers of the old Republic by assuming any title that in any way suggested regal authority and prerogative. He was careful not to arouse their opposition by abolishing any of the

Republican offices or assemblies. He allowed all the old magistracies to exist as before, but he himself absorbed and exercised the most important part of their powers and functions. All the Republican magistrates were elected as before, but they were simply the nominees of the Emperor. Likewise all the popular assemblies remained and were convened as usual to hold elections and to vote on measures laid before them. But Octavius, having been invested with the consular and tribunician power, had the right to summon them, to place persons by nomination for the various offices, and to initiate legislation.

The senate still existed but it was shorn of all real independence, since Augustus had been armed with the censorial power for the purpose of revising its list. He reduced the number of senators from one thousand to six hundred and struck off from the rolls the names of unworthy members and obstinate republicans. All the powers of the state were concentrated in his person. he was consul, tribune, praetor, censor, pontifex, imperator, and with the title of Augustus his commands were obeyed throughout the wide exient of the Roman dominions, which then comprehended the most beautiful countries of Europe and Asia, with Egypt and the northern part of Africa.

Augustus gathered round his court the wits and poets, and learned men who made his reign illustrious. he used his powers with great moderation and preferred to govern the Roman state according to the ancient forms of the Republic. But legislation by the popular assemblies though not wholly discontinued, fell gradually into disuse, and the ordinances of the senate were the usual form in which laws were promulgated. After the experience of two centuries under the Empire it was, declared that the decrees of the senate had the force of law. The power of electing magistrates was transferred by Tiberius from the *comitia* to the senate. Under Septimus Severus and Caracalla the legislative action of the

senate entirely disappeared. By gradual usurpation the power of the Emperor became absolute and the forms of ancient liberty disappeared. Under Hadrian the organisation of the Empire was openly despotic and about the beginning of the third century his successors frequently issued *rescripts*, in which they asserted that they were not subject to the laws.

On the death of the first Theodosius, A.D. 395, the Roman Empire was divided between his two sons,—the provinces of the East being allotted to Arcadius, those of the West to Honorius; and the two parts were never united, except for a short time under Justinian. Notwithstanding this division, however, the two parts were still considered as forming one Empire. The laws were promulgated in the name of the two emperors.

After having been repeatedly invaded by the barbarians, the Western Empire was at last destroyed by Odoacer, King of the Heruline, in the year 476 A.D. This event marks the fall of the Roman Empire of the West. Odoacer, in his turn, was dethroned by Theodoric, the founder of the kingdom of the Ostrogoths in Italy. The line of Eastern Emperors lasted over one thousand years until the capture of Constantinople by the Turks, in 1453 A.D., when the Ottoman Turks, whose power had been growing for a long time, took Constantinople and made it the capital of the Turkish Empire and the political centre of the Muslim World.

21. Senatusconsulta :—The, *senatusconsulta* were the decrees or the opinions of the senate relating to law, justice and the affairs of the state. The powers of the senate were different in different times.

In the Regal period it was no advisory council of the king and had the authority to grant or refuse its sanction to laws voted by the people. The members of the senate were nominated by the king from the patriians. In the Republican period they were nominated by the consuls both from the patricians and plebeians. The senate continued to act as an

advisory council to the magistrates with increasing control of them. It had no legislative power but in fact issued instructions to the magistrates in the form of advice and these instructions were taken as administrative orders for enforcement as laws. Though it did not legislate, it had many means of influencing legislation. It was usual to consult that body on measures of legislation. It could declare a law void for informality or for disregard of the auspices. It could dispense or suspend a law by directing the magistrates not to apply it in a given case or for a certain time. At first it required the confirmation of the *comitia* but this rule was subsequently disregarded from 150 B.C. on wards.

Under the Empire, when the *comitia* disappeared, the senate had the authority to make decrees or resolutions which had the force of law. By the time of Augustus the *auctoritas* (authority) of the senate was essential for every law. It was the policy of Augustus to encourage the senate. The real power was with him. He presided over the senate and thus determined what questions should be considered. There was an annual revision of the list of senators and the Emperor could stike off members who were not liked by him. Under Domitian (A.D. 81-96) the powers of the censor were transferred to the Emperor and he always nominated the senators. In this way the Emperor controlled the membership of the senate and could force it to do his will. The senate, encourated by the Emperor, began to give instructions to the magistrates as before. They did not dare to disobey the directions, for behind the senate was the Emperor, The resolutions of the senate acquired full legislative force and had the force of law by the time of Hadrian (A.D. 117-138).

The legislative power of the senate gradually declined during the time of later Emperors by their direct legislative enactments. The Emperors introduced all the measures by *oratio i.e.* a proposal made by him for the consideration of the senate. The request gradually tranformed into a direction to

vote on it. The vote became a mere form. The senate was ultimately regarded as having nothing to do with the matter than to record the decision of the Emperors. It was a passive instrument in the hands of the Emperors to give effect to their wishes.

22. Imperial Constitutions :—The Imperial constitutions were the source of written law-both public and private. The term constitution means all the acts of the Emperors i.e. the laws, decrees, *rescripts*, etc., passed by them. The most general word for such laws is *constitutions*. The Emperors made laws by issuing proclamations. Each constitution began with the name of the Emperor who issued it and that of the official or other persons to whom it was addressed. It was under Hadrian that the Imperial constitutions though known in the time of previous Emperors first became the ordinary method of legislation. The Sovereign power in lawmaking was exercised by the Emperors in the following ways :—

(1) *Oratio.*— An *edictum* was an ordinance issued by the Emperor as the highest magistrate.

(2) Edictum.—An edictum was an ordinance issued by the Emperor as the highest magistrate.

(3) *Mandatum.*— A. *mandatum* was the instruction given to some particular individual, such as a provincial Governor with regard to some administrative difficulty.

(4) *Decretum.*— A *decretum* was the decision of the Emperor in law suits brough before him as supreme magistrate either in the first instance or by way of appeal. It was binding upon all judges and magistrates.

(5) *Rescript.*— A *rescript* was the answer of the Emperor on point of law to those who consulted him either as public functionaries or as private persons.

(6) *Epistola.*—An *epistola* was an opinion of the Emperor given to a private individual or a corporation.

As the *rescripts* and decrees were confined to particular cases, they had not the force of general laws but were made use of as precedents for the determination of similar questions. All the constitutions inserted in the Theodosian code and in the code of Justinian became general laws for the whole Empire.

23. Responsa prudentium (opinions of the learned in law):—Under Republic the jurists were in the habit of giving opinions *(responsa)* to the pupils, litigants and the judges. The judge was a private citizen agreed upon by the parties without any special legal knowledge. At first the *responsa* would not bind any body; it was voluntary for the judge to recevie or for the jurists to give advice on law. The judge was absolutely free to decide in the opposite sense if he thought right. But Augustus made an important change. He gave certain distinguished jurists a sort of patent or licence called the *jus respondendi.* The effect of this patent or licence was that if after being consulted a jurist gave a written and sealed opinion, such opinion would bind the judge unless another privileged jurist gave an opinion in the opposite sense.

Schools of law.—As soon as Augustus licensed certain jurisconsults to give opinions on law, two rival schools of law appeared during his time the Proculians and the Sabinians. The Proculian school was founded by Labeo and the Sabinian school by Captio. Labeo was an ardent Republican and the chief of the Proculians. Capito was an adherent of the court party and the chief of the Sabinians. The two schools differed in opinion upon various questions of law but little is known regarding the character of their differences. Pomponius said, Labeo (Proculians) introduced innovations, while Capito (Sabinians) firmly adhered to ancient precedents. According

to Buckland the Proculians sought to make the law more logical, while the Sabinians rested on authority. Karlowa said that the Proculians clung to the ancient forms of the *jus civile*, while the Sabinians preferred the modifications which the *jus genhum* and the *jus naturale* suggested. The Proculians probably represented the conservative school and the Sabinians were in favour of interpreting law according to the spirit. Little is heard of these school, as existing institutions, after the time of Hadrian.

The system introduced by Augustus had one drawback. Jurisconsults might give different opinions and the rival schools were giving conflicting opinions on point of law. In such circumstances how the judge would determine the correctness of the opinions. Hadrian introduced a partial remedy that if the jurists were unanimous, their opinions had the force of statute and the judge was bound to follow it but if they were not unanimous, the judge was at liberty to exercise his own judgement.

Law of Citations.—At a later period (426 A. D.) Theodosius II and Valentinian III devised a more effective remedy by enacting a law, called *"The law of Citations"* which introduced the system of a majority of votes. Under this law pre-eminent authority was given to the writings of Gains, Ulpian, Paulus, Papinian and Modestinus. If they were unanimous on a particular point of law, the judge was bound to follow their opinions. If they differed unequally, the judge was to follow the opinion of the majority. If they were equally divided, Papinian had the casting vote. If he was silent the judge might form his own judgement.

Decay of *responsa.*— During the later half of the Republic the *responsa* assumed a form which was fatal to their future expansion. They became systematised and reduced into compendia. In the meantime the edicts of the praetors became the principal engine of the law reform. Improvement was also effected by direct legislation. The final blow to the *responsa*

was given by Emperor Augustus who limited the right of giving binding legal opinions to a few leading jurisconsults who obtained Imperial sanction.

24. The responsa prudentium and the English case-law :—The *responsa prudentium* or the answers of the learned in law bears a close resemblance to the English case-law or judicial decisions. The *responsa* were collections of opinions on the interpretation of the Twelve Tables. Here the assumption, as in case-law, was that the text of the old code remained unchanged. The authors of the *responsa* professed that they were merely explaining the law and bringing out its real meaning. Yet in numerous cases they under the garb of interpretation extracted out of the Twelve Tables a good deal of law that were never in them. Similarly an English judge never admits that he is legislating; he professes that he is merely applying known rules to the different sets of circumstances. But whenever he determines a case to which no existing custom, statute or precedent applies he creates a new precedent which is followed by other judges in like circumstances and so form a new law.

Books of *responsa*, bearing the name of the leading jurisconsults, obtained an authority equal to that of the English reported cases, and in fact the *responsa* constantly modified, extended, or overruled the provisions of the codes. The Roman law was developed by the *responsa* of the jurisconsults. Similarly the English law was highly developed by the case-law or the decisions of the judges.

Both *responsa prudentium* and English case-law clearly illustrate the fact that the development of law was made by use of legal fiction. But the source of authority by which the law was expounded was different in the two countries. The difference is that the *responsa* proceeded from the Bar, whereas the English case-law emanated from the Bench. the result was that the former was higher in principles than the latter owing to the competition among the expounders.

25. Roman jurisprudence :—According to Professor Girard, Roman jurisprudence passed through three stages, viz., (1) The stage when the law was kept secret; (2) the stage of pupularisation, during which the knowledge of law was spread abroad in a practical manner, without care for theoretical order of exposition and (3) the stage of systematisation.

(1) Secrecy of law.—The first stage of Roman jurisprudence began from the institution of the college of pantiffs during the Regal period. They were the repositary of the law. In addition to their sacreed duties as priests, they acted as skilled legal advisers at first in the court of the kings, then of the consuls after the abolition of the monarchy and at a later date to the praetors, when the judicial function of the consuls was transferred to them. The custody of the Twelve Tables, the exclusive knowledge of the forms of procedure *(legis actiones)* and the right of interpreting the law belonged to the college of pontiffs. They gave opinions on point of law to the judges as well as to those private persons who were parties to an action before the court and these opinions *(responsa)* were in point of fact binding on the judges. In giving their opinions on legal questions, the pontiffs indirectly developed the law by means of interpretation of the written law.

(2) Stage of popularisation.—The second stage was the stage of popularisation of law when the knowledge of law was imparted to any and every body without any care for systematic exposition. This stage began with the publication of *jus Flavianum.* Gnaeus Flavius was a Secretary of Appius Claudius, a pontiff. He had stolen and written down the forms of actions *(legis actines),* abstracted his master's book and published it under the name of *jus Flavianum* for the general information of the people. It was received with great satisfaction by the people. Thus the secret of law was out. Tiberius Coruncanius (consul 280 B.C.) was the first plebeian *pontifex maximus* (252 B.C.) and is said to have been the first

man to profess publicly to give information on law. The first writer of an important law book was Sextus Aelius (consul 198 B.C), The Flavian collections being imperfect he published for the second time a supplement thereto in 204 B.C. which was named after his name as *jus Aelianum.* His work is also called *tripertita* as it consisted of three parts : the laws of the Twelve Tables, their interpretations and the forms of procedure *(legis actiones).* There were many other jurists who played important role in the spread of legal knowledge.

(3) Stage of systematisation.—The third stage of Roman jurisprudence was the stage of systematisation. This period began with Scaevola, a consul in 95 B.C., who exposed the results of interpretations into a comprehensive and methodical system in eighteen books. The principles of Roman law as exposed by him were frequently cited and commented during the Empire. He was followed by Aquiliud Gallus (praetor, 66 B.C.), the author of Stipulatio Aquiliana and Servius Sulpicius (consul 51 B.C.), the author of the first commentary on the praetor's edict. On the establishment of the Empire in 31 B.C., the Emperor Augustus conferred on some of these jurists the privilege of delivering authoritative *responsa* binding on the judges. Henceforth the pontiffs ceased to play any part in the development of Roman law and the jurists took the lead in the matter. The opinions of the privileged jurists *(responsa prudentium)* became a source of law. In the first century of the Empire, the jurists were divided into two rival schools of law—the Sabinians and the Proculians, the former being the follower of Capito and the latter of Labeo, the two great jurists during the reign of Augustus. Labeo was replaced by Julianus who flourished early in the second century of the Imperial period. He was a Sabinian and his contributions to the juristic literature gained the day for the Sabinians. The result was that henceforth there was only one school of jurisprudence. The second century of the Empire closed with Papinian, the prince

of Roman jurists whom Sohm characterised as the brightest luminary of Roman jurisprudence. From the third century onward, the period of decline sets in. Papinian was followed by other jurists of whom Ulpian, Paulus and Modestinus were famous, These classical jurists reduced the confusing mass of praetorian edicts into a systematic whole. After Modestinus the development of Roman law was carried on almost entirely by Imperial constitutions. Emperor Justinian codified the Roman law by compiling the writings of eminent jurists and the Imperial constitutions. His compilation is known as the *corpus juris civilis* in which form the Roman law has been given to the modern world.

26. Earlier codification :—As the constitutions of the Emperors became numerous, various attempts had been made to simplify the statute law, of which the most important were the following :—

(1) *The Codex Gregorianus.*—It was a private and unofficial work which was published about 300 A.D. and consisted of a collection of Imperial enactments from the time of Hadrian to Diocletian. It was a comprehensive work and was divided into books and titles.

(2) *The Codex Hermogenianus.*—It was another private collections of Imperial constitutions dating from the year 294 A.D. to 324 A.D. and was probably a supplement to the *Codex Gregorianus.*

(3) *The Codex Theodosianus.*—It contained the constitutions from Constantined onwards for a period of 126 years, during which 16 Emperors succeeded to the throne. This collection was made under the authority of Theodosius II, who ordered certain lawyers to collect and arrange the constitutions from Constantine I down to his time. The work was divided into 16 books and each book into titles. The constitutions were arranged in chronological order in each title. It was intended to cover the whole field of law, private

and public, civil and criminal, fiscal and municipal, military and ecclesiastical. The Theodosian code was promulgated in 438 A. D. by Theodosius II as law in the Eastern Empire and in the same year it was adopted in the Western Empire by Valentinian III. This code had much more success in the West than in the East, where it was soon superseded by Justinian's legislation. In the West it was held in high esteem by the various tribes who overran the Roman Empire.

27. Justinian's codification :—The reign of justinian (527 A.D. to 565 A. D.) marked the culminating period of Roman law and was chiefly remarkable for his great reform of jurisprudence. When Justinian came to the throne (527 A.D.) , roman law was in a chaotic condition. There were on the one hand various kinds of statute law *(leges, plebiscita, senatusconsulta* and constitutions) from the Twelve Tables downwards and on the other, the edicts of the praetors and the whole mass of juristic literature. Almost immediately upon his succession Justinian conceived the idea of codifying the whole of Roman law. His compilations consisted of the following parts :—

(1) *The Codex.* —The code is a collection of decrees and laws enacted by the Emperors and *rescripts* issued by them. On the 15th February, 528 A. D., Justinian appointed ten jurisconsults, among whom was Tribonian, to select and arrange the Imperial constitutions that were in force, with large discretionary power to retrench what was obsolete or objectionable and to make such changes as might appear to them to be necessary to adapt these laws to the existing state of society. The first edition of the code was completed in 14 months and published in April, 529 A.D. and received the legislative sanction of the Emperor who abolished all preceding constitutions. The aim was that the *Codex Justinianus* should thenceforward be the sole source of Roman statute law for all time. This code did not remain long in use and was superseded by the second edition compiled

after the *Digest*. The first edition, called *Codex Vetus*, was entirely lost. The code that we have is the second edition.

After the publication of the *Digest*, Justinian in 534 A.D. appointed a new commission of four jurists, under the direction of Tribonian, to revise the earlier code and to place it in harmony with the *Digest*. This was necessary, chiefly in consequence of numerous constitutions issued by the Emperor after the year 529, the most important of which were 50 remarkable decisions given by Justinian to settle a series of practical contoversies among the ancient lawyers. The revised code was divided into 12 books, each book into titles, each title was composed of a number of Imperial constitutions arranged in chronological order. Different matters were treated separately. The new code called on account of this revision *'Codex repetitae praelectionis'* was published with the force of law on the 16th November, 534 A.D.

(2) *The Digest or Pandects.*—After the publication of the first edition of the code, Justinian, in December, 530 A.D. authorised Tribonian, with the aid of 16 commissioners, to prepare a collection of extracts from the writings of the most eminent Roman jurists, so as to from a body of law for the government of the Empire, suited to the wants of the age. Full power was given to this commission to select only what was useful, to omit what was antiquated or superfluous, to avoid contradictions, and to make such alterations or corrections on the original works as they might think expedient. Ten years were allowed by the Emperor for this immense work but it was completed in three years. The commission proceeded to deal with the works of 39 jurists, consisting of nearly 2,000 books and more than three million lines. In course of only three years this pile of material was reduced to about one-twentieth of its original bulk. More than a third of the whole *Pandects* was taken from Ulpian who was the largest contributor. The *Digest* was divided into 50 books. Each book with the exception of the 30th, 31st and 32nd, was divided into

titles. Each title was sub-divided into sections. It was published under the title of *Digest* or *Pandects* on the 16th December, 533 A.D. and declared to have the force of law form the 30th of that month.

(3) *The Institutes.*—The *Institutes* is a brief manual of the whole law. By order of Justinian it was compiled by a commission of three members : Tribonian, Theophilius and Dorothens. Theophilius and Dorothens, both of whom were professors of law, did all the work of compilation and Tribonian acted as chairman and decided doubtful points. This work was intended to be a text-book for students and was chiefly founded on the Institutes of Gaius but the topics were retouched, so as to place them in harmony with the changes which the law had undergone. The *Institutes* of Justinian consisted of four books, each of which was divided into titles and the total number of titles were 99. This abridgement was limited almost exclusively to matters of private law, which is considered under the three-fold divisions of persons, things and actions, For accuracy, lucidity and usefulness, this work stands unparalleled. The *Institutes* though intended for use as a text book for students was binding law and had the statutory force as the *Digest* or other parts of the corpus and was published on the 21st November, 533 A.D.

(4) *Novels.*—Justinian's legislation did not terminate with the publication of the revised code in 534 A.D. In the subsequent years, of his reign, from A.D. 535 to 565, the Emperor issued many ordinances which made important changes on the law, though their number became less after the death of Tribonian in 545 A.D. These new constitutions were written partly in Greek and partly in Latin. They were in fact a supplement to the code, consisting of laws made by Justinian after the issue of the code. They were called *Novellae constitutions or more shortly,* Novels. They were officially published after Justinian's death. The whole number of *Novellae* was 168, of which 154 were ascribed to

Justinian and the rest to his successors. The *Novels* contained admirable rules or private law specially with regard to intestate succession devised by Justinian.

In modern times Justinian's various compilations are called collectively the *corpus juris civilis.*

28. Bluhme's discovery :—One young and ingenious German civilian named Friedrich Bluhme discovered, in his learned thesis (published in 1820) for his degree at the age of 23, the clue or method which the compliers of the *Digest* followed in arranging the fragment under different titles. According to him, the commission divided the writings of the jurists into three groups or masses viz. *Sabinian, Edictal* and *Papinian* masses.

(1) The first group embraced all the systematic treatises on *jus civile.* In this group most important work was a voluminous treaties of Sabinus, upon which Ulpian had written a commentary. After this book, the group or mass was called by Bluhme as the Sabinian mass.

(2) The second group consisted of the works on the praetor's edicts and the Aediles with commentaries thereon. This group was called by Bluhme as the Edictal mass.

(3) The third was formed of the writings of Papinian and the record of cases specially where the difficult questions of law were raised and discussed. After the name of Papinian this group was called by Bluhme as the Papinian mass.

Tribonian assigned each of these masses or groups of work to a separate sub-committee and their individual collections, when brought together and compared, were arranged in order. This has obtained the name of Bluhme's discovery.

29. Justinian's achievements in Roman law :— Roman law had by successive stages "of development, and by a long series of additions and alterations no doubt attained a definite shape, but it was still anomalous and imperfect, and it was left to Justinian to give it completeness and symmetry.

Legislation is the greatest achievement of Justinian's reign, and Roman law received its finishing tocuch at his hands. His object was to recast the ancient legislation by uniting all the rules of law into one body and thus to provide a complete system of written legislation for all his dominions. To this end he codified the whole of Roman law. His compilation consisted of four parts, viz. *Codex, Digest, Institutes* and *Novels.* (1) The *Codex* contained all the most valuable and useful Imperial constitutions. (2) The *Digest* or *Pandects* was a compilation of the writings of eminent jurists. (3) The *Institutes* was an elementary work on law intended for use as a text book for the students. (4) The *Novels* contained laws enacted by Justinian and some later Emperors. These various compilations are collectively called the *corpus juris civilis* or the body of the civil laws of Rome. These works, despite their faults and defects, deserve the highest praise and have furnished the basis of a large portion of the jurisprudence of Europe. The *Digest* is of incalculable value not only as having preserved the works of the leading jurists of the day, but also as illustrative of the history of the times and as affording specimen of legal reasoning and expression.

Among the other greatest reform of Justinian in the field of law, the following deserves attention :—

(1) *Adoptio minus plena.*—Justinian invented the *adoptio minus plena* i.e. adoption by a stranger. Under this Institution, there was no dissolution of the paternal power and the adoptive father did not acquire that power. The child acquired the right of intestate succession to the natural as well as adoptive father.

(2) Delivery *(traditio).* —Justinian made *traditio* (delivery) as the common method of conveyance. Under the old law there was a distinction in the method of conveyance of things *(res). Res mancipi* was transferred by *mancipatio* and *res nec mancipi* by *traditio.* In the time of Justinian *tradition* became the common method of alienation for *res corporales*

and the old distinction of things and modes of conveyance disappeared.

(3) Introduction of private ownership in provincial lands *(solum provinciale).*—Under the old law there was a distinction between provincial lands and Italian soil. No private person could be owner of provincial lands, for it belonged in theory to the Emperor. The Italian soil was subject to private ownership. Justinian introduced private ownership in provincial lands.

(4) Assimilation of *usucapio* and *prescriptio.*—Under the old law there were distinctions between *usucapio* and *prescription.* The former being an introduction of Twelve Tables applied. to objects susceptible of *quiritary* ownership (e. g. *res mancipi)* and confined to Roman citizens. The latter was a praetorian defence and applied to *non-quiritary* objects (e. g. provincial lands), where *usucapio* had no application. It was applied to both Roman citizens and foreigners. Justinian abolished the old distinction between *usucapio* and *prescriptio* and assimilated the two modes of acquisition of ownership into one.

(5) Removal of distinction between *quiritary* and *bonitary* ownership.—Originally the civil law of Rome recognised only one kind of ownership known as *quiritary* (legal) ownership which was confined to the Roman citizens. Such ownership could be acquired by a proper method of conveyance. e.g. *res mancipi* by *mancipatio.* The praetor introduced another kind of ownership known as *bonitary* ownership. In Justinian's law, the formal distinction between a *quiritary* and *bonitary* owner disappeared. The *quiritary* owership was merged into the equitable principle of *bonitary* ownership.

(6) Option to make inventory.—Under the old law an heir had unlimited liability to pay the debts of the deceased though he had not received any asset from him. Justinian relieved the heris from this unlimitcd liability by giving him option to make an inventory of the property of the deceased. When such

an inventory was made the heir's liability was limited to the proportion of the assets that came in his hands.

(7) Substitutions of congnation for agnation as the guiding rule of succession.—Under the old law agnation was the basis of succession. Justinian by his two *Novels*, 118th and 127th, completely remodelled the order of intestate succession. Consanguinity was the basis of Justinian's law and blood relations succeeded *ab intestato.* The old distinction between agnates and cognates was entirely removed. He regulated succession in three classes : (1) descendants (2) ascendants, and (3) collaterals.

The services rendered by Justinian to the Roman law, may be compared to that of a gardener, who after uprooting the weeds and thorns, plants trees in their stead, which bear the most delicious fruits, and serve as a nursery for generations to come.

30. Sources of Roman law :—The sources of Roman law have been discussed in detail in the foregoing topics. We may now recapitulate the sources : (1) *leges regiae* (the laws of the early kings) and customs, *(2) comitia curiata, (3) comitia centuriata, (4) comitia tributa, (5) concilium plebis, (6) edicts of the praetors, (7) writings of the jurisconsults* and *responsa prudentium, (8) senatusconsulta* and *(9) imperial constitutions.*

CHAPTER—III

DIVISION OF ROMAN LAW

Division of Roman Law :—Roman law is divided into public and private.

Public Roman law deals with administrative and legislative functions exercised by various parts of the Roman state. It deals with the constitution of the state and the relation between the Government and the individual members of the community. It also includes the judicial organisation, military and naval establishments, finance and other departments under the charge of public officers employed, by the Government. Criminal law is treated as a part of public law.

Roman private law deals with the rights, duties, capacities and incapacities of private individuals. It treats of the relation of the individuals infer. se. It is the law of private status. According to the *Institutes* of Justinian private law may be classed under the three heads viz., the law of persons, the law of things and the law of actions. It is convenient to discuss Roman private law under the following heads :—

(1) The law of persons.—It considers the rights, duties, capacities and incapacities of individuals and their relation to the family group. The family group consists of individuals connected by a real of fictitious tie of common descent. Persons are divided into natural and artificial. A natural person is a human being and an artificial person is an association of persons invested by law with a personality. In the Roman law an artificial person is called *universitas persona;* a corporation is an example of artificial person. The following topics may be considered under the law of persons viz. citizens and aliens, freedman and slaves, Roman family and *patria potestas*, marriage, adoption, legitimation, tutors and curators.

(2) The law of property.—It includes ownership, possession and *jura in realiena.*

(3) The law of succession.—It may be intestate or testamentary, Intestate succession deals with the nature of succession which is universal, the classes of heirs and the order of succession. Testamentary succession deals with different forms of wills, essentials of Roman will, the rules of institution and substitution, trusts, codicilli and legacies.

(4) The law of obligation.—It deals with the different sources of obligation viz. contract, quasi-contract, delict and quasi-delict.

(5) The law of procedure.—It deals with the adjective law. The earlier form of procedure is the *legis actio.* The praetor introduced the formulary procedure which superseded the *legis actio.* The formulary system is again superseded in the Imperial period by a new system known as the extraordinary procedure.

CHAPTER—IV

THE LAW OF PERSONS

1. Person :—According to Roman law a person was one clothed with rights and obligations. In Rome a slave had no rights and obligations and was therefore regarded not as a person but a thing. Persons were divided into natural and artificial. A natural person may be considered under the following divisions :—(A) Is the person free *(libertas)* or unfree (slave)? In case he is free, whether he is born free *(ingenui)* or made free *(libertini)?* (B) "Is he a citizen *(civitas)* or a non-citizen? (C) Is he *sui juris* (independent) or *alieni juris* (dependent)? (D) If *sui juris*, is he fully independent or is he under a guardian (tutor) or a care-taker (curator).

(A) First Division of the Law of Persons. Slavery :—

2. The causes of Slavery :—Slavery arose in the following ways :—

(1) By birth.—According to the civil law the condition of the child was entirely determined by the condition of the mother. If the mother was a slave at the moment of birth, the child was a slave.

(2) By capture in war.—The prisoners of war were considered the absolute property of the captor and were either retained for the service of the state and employed in public works or were sold by auction as part of the plunder.

(3) By collusive sale.—If a free person allowed himself to be sold as a slave in order to share the purchase money and to defraud the purchaser by declaring after sale his true status, he was reduced to slavery and could not afterwards recover his freedom.

(4) By judicial sentence.—By judicial sentence Roman citizens might be condemned to slavery as a

punishment for heinous offences. Persons condemned to death or to work in mimes or to fight with wild beasts became *servi poenae* (slaves of penalty).

(5) For gross ingratitude.—A freed man guilty of gross ingratitude to his late master might be recalled into slavery.

(6) For evasion of census etc.—Under the old law citizens who evaded the census or military service might be sold as slaves.

(7) By *manus injectio*.—The debtor who suffered *manus injectio* (bodily siezure of the person of the debtor) became one who was ultimately sold by his creditor as a slave.

(8) For theft.—A thief caught red handed might be reduced to slavery.

3. The legal condition of a Slave :—According to the *jus civile* a slave was a *res* (property) or a chattel and not a person. Slaves were sold in the open market; a large portion of the wealth of the Romans consisted of slaves. They were under the power of their master who had absolute control over their actions, their industry and their labour. The slave could own no property. Whatever they acquired belonged to the master. He could transfer them like his goods and chattels by sale, gift or legacy to any one he pleased. They had no political or civil rights. They were neither legally bound by obligation nor could they bind others. The master had the absolute power of life and death over his slaves who could be killed or toutured at his master's caprice. The power of the master over his slave was spoken of as the *dominica potestas*.

Though originally the master had an absolute right over his slave, it is impossible to suppose that in early Rome their right was either generally exercised or abused. Slaves were few in number and they were probably well treated by their

masters. But with the growth of Rome as a world power the conception of slavery changed. During the later part of the Republic and under the Empire the number of slaves became immensely increased, chiefly owing to the number of prisoners taken in war and it was not at all uncommon for an ordinary citizen to possess 200 slaves. Necessarily the old domestic relation disappeared and the increase of wealth and luxury with the resulting corruption and cruelty led to the abuse of the master's rights. Under the Empire, therefore, legislation was found necessary for the protection of the slaves, and the following laws were passed to ameliorate the condition of slaves :—

(1) By the *lex Petronia* (passed before 79 A.D.) masters were forbidden to deliver their slaves to the beasts without an order of a magistrate.

(2) By an edict of Claudius, slaves whom their masters abandoned as old or infirm thereby acquired their freedom.

(3) Hadrian required the consent of the magistrate in all cases before death was inflicted to a slave.

(4) Antoninus Pius made it obligatory upon masters who had been guilty of excessive severity towards their slaves to sell them to more considerate persons.

(5) The same Emperor brought the killing of a slave without cause within the scope of the *lex Cornelia de sicariis* which made the killing a homicide, the punishment of which was death or exile.

(6) Antoninus by a rescript directed the provincial Governors to enquire into the complaints of all slaves who took refuge at the statues of the Emperor or in the temples due to illtreatment of the masters and if it appeared that they had been treated with unreasonable severity, they should be sold by public

authority on equitable terms, so that they might never return again under the domain of their former masters.

Proprietary right of a slave.—A slave had no rights of property under the Roman law. Whatever he acquired was for his master's benefit. The only exception to this rule was the *peculium* which consisted of the slave's savings from industry or gifts as a reward for extraordinary services. This was regarded as a favour rather than a right as the *peculium* belonged in law, like the slave him-self, to the master, who could resume possession at any moment. But masters had not largely exercised their right to resume possession and the slaves purchased their freedom from their masters with their *peculium.* On being freed a slave took his *peculium* in the absence of any express agreement to the contrary.

Contractual capacity of a slave.—A salve being a human being might as a fact make an agreement either with his master or some third person. In neither case did the agreement amount to a contract in the strict sense, because the slave could neither sue nor be sued upon it. But if a slave made an agreement with a third person, the later incurred a civil obligation, which the slave's master could enforce, and so secure the benefit of the promise. In certain cases the master might be liable on such contract. In any case the slaves' contract gave rise to natural obligations, which though not enforceable at law, were not without legal consequence. Suppose a master took loan from his slave, the obligation to pay was natural but could not be sued on. But if the master freed the slave and paid the debt and afterwards repenting, tried to get it back, the natural obligation sufficed to defeat him. And the case would be the same had the debt been contracted and paid by a third person.

Liability of slave in delict.—A slave might be wronged either by his master or by a third person. If he was wronged by his master, he had no legal redress, though the state might

interfere under the enacted laws mentioned above and punish the master on his behalf. If the injury was the act of a third person, the slave had no remedy which he could personally enforce; the wrong was regarded as done to the master. Thus if it resulted in actual damage to the slave, the master could sue under the *lex Aquilia.* If, on the other hand, the act was intended primarily as an insult to the master, he could sue by the *actio injurianum.* If the slave had been wilfully killed, the master could prosecute the offender under tile *lex Cornelia dc sicariis.*

With regard to wrongs done by a slave to his master, no legal obligation arose, though the master might take the law into his own hands subject to protective legislation mentioned above and could be his own judge and executioner. If the slave had wronged a third person, the master was at first bound to give him up to the vengeance of the person 'wronged, Later he had the option of either surrendering him or paying damages.

4. The way in which a slave could become free (termination of slavery) :—This might happen in one of the following three ways :—

(1) By the doctrine of postliminium (recrossing the border into the Empire). If a Roman citizen was captured in war by the enemy, he thereupon became a slave and lost all his legal rights. If how ever, he escaped from the slavery and returned to Rome, he thereby became not merely a free man again, but by the fiction of opstiliminium his freedom dated back to the moment of capture. He got back his old position and legal rights as if he had never been away.

(2) By Statute e.g. under the *edictum claudianum.*

(3) By manumission (emancipation).—Manumission was either formal or informal. The chief formal manumissions were the following :—(a) manumission by *vindicta* (rod), (b) manumission by *censu* (census), (c) manumission by testament (will) and (d) manumission in *ecclesiis* (Churches).

(a) Manumission by *vindicta.*—Manumission *vindicta* was eflected by means of an *in jure cessio* (fictitious law-suit.) The master, his friend (called *adsector libertatis)* and the slave used to come before the praetor. The friend was the plaintiff in the action; holding a rod in his hand, he clamimed that the slave was a freeman and touched him with the rod. The master did not dispute the claim but rather admitted his freedom. The praetor thereafter pronounced the slave to be free.

(b) Manumission by *censu.*—When the slave's name was inserted with his master's consent on the census roll of citizens by the censor at the quinquennial census, the slave was declared manumitted.

(c) Manumission by testament.—Manumission by testament was the bestowal of freedom by the master's last will and he might either give the slave his freedom directly or might give it indirectly by requesting the heir or lagatee to manumit. In the former case the slave became *libertas orcinus* (god of the grave) because the person who had given him his freedom was dead and in the latter case he was the *libertas* of the heir or legatee as the case might be.

(d) Manumission in *ecclesiis.*—During the time of the Christian Emperors, slaves could be manumitted in the presence of the congregation.

Before the close of the Republic, there were several forms of informal manumissions :—

(1) Manumission by letter *(per espistolam),* This was effected when a master wrote to a slave that he wished to confer freedom on him. The letter was regarded as sufficient evidence of the master's intention to manumit the slave.

(2) Manumission among friends *(inter amicos).*—When a master declared before his friends that he wanted to manumit a certain slave, that slave was considered manumitted.

(3) Manumission at funeral *(pileo)*. If a slave followed the burial procession of his master, according to the terms of his will, wearing the cap of liberty he was considered manumitted. (The cap was called *pileus*, hence the name *manumission pileo)*.

In the time of Justinian slaves could be set at liberty by their masters at any time they liked, for example when a magistrate was passing along a street or a praetor was going to the bath or when a magistrate was on his way to a theatre, a slave could be taken before him and declared free then and there.

5. Laws restricting manumission :—At the beginning of the Christian era three important enactments were passed with regard to manumission, viz.

(1) *Lex Aelia Sentia* (4 A.D.),

(2) *Lex Fufia Caninia* (8 A.D.) and

(3) *Lex Junia Norbana* (19 A.D.)

(1) *Lex Aelia Sentia* (4 A.D.).—*The provisions of the lex Aelia Sentia* may be stated as follows :—

(a) All manumission in fraud of creditors was void and a manumission was fraudulent where the master was either insolvent at the time of manumission or became so by the manumission itself.

(b) When a slave was less than 30 years of age, he could not be manumitted unless it was effected by *vindicta* and there were sufficient cause (e.g. intent to marry a woman so freed or for meritorious service rendered and so forth) approved by a councial appointed to consider these cases. If a slave was manumitted under 30 years of age in any other manner he became a person in *'libertate'* merely.

(c) A master under 20 years of age could manumit his slave by *vindicta* after a good cause, shown to the council. Manumission in any other manner was void.

(d) Slaves who before manumission had been subjected to degrading punishment (e.g. had been made to fight in the arena) became a *dediticii* on manumission.

(2) *Lex Fufia Caninia* (8 A.D.).—*Lex Fufia Caninia* was passed to prevent excessive manumission of slaves by will. It became common for testators to set free inordinate number of their slaves to secure their presence at their funeral as living witnesses to their kindness. This law set limits to the number of slaves who might be freed by will, and provided that a master of one or two slaves could free all but if he had more, he could manumit only a certain proportion. The proportion was decreasing as the total number increased. Thus the owner of ten, thirty and one hundred slaves could manumit half, one-third and one quarter respectively and over that number, one fifty. The number could in no case exceed one hundred and the slaves to be manumitted had to be expressly named.

(3) *Lex Junia Norbana* (19 A.D.).—*Lex Junia Norbana* is of uncertain date. The date commonly assigned is 19 A.D. It provided that the imperfectly manumitted slaves should be regarded as *latini juniant.* They were free but not citizens of Rome.

6. Classes of persons at the beginning of the Empire :—The following classes of persons are found at the beginning of the Empire :—

(1) *Ingenui.*—They were persons bron free and were citizens with full rights and obligations. A free-born person did not cease to be *ingenuus* if he was reduced to slavery and afterwards he recovered his liberty.

(2) *Libertini or liberti.*—They were ex-slaves who on gaining their freedom became citizens. They were subject to political disabilities which did not prevent them from rising to high of fire and amassing wealth. The only limitation was that during the Republic they could not marry *ingenui* (free born) or under the Empire they could not be persons of

senatorial rank. They might not be adopted by any *ingenuus* other than their patron, They could not wear the gold ring which was the mark of a free born citizen. At length when all freedmen without distinction became Roman citizens, Justinian conferred on them the right of wearing the gold ring.

(3) *Latini Juniani.*—They were ex-slaves who, by reason of imperfect or defective manumission, became something short of full citizens. They were free but not full citizens. They had no public rights and the *connubium* (right to marry according to civil law). But they had part of the *commercium* i.e. they could acquire proprietary and other rights *inter vivos*, but not *mortis causa.* They could neither take under a will nor make wills, nor be appointed upon their patron just as if they had always been slaves. Subject to these disabilities, a *latinus junianus* was a free man and his children, though not under his *potestas*, were full citizens. A *latinus junianus*, unlike a *dediticius*, could improve his position and become a citizen in many ways, of which the following are examples :—(a) *Iteratio* (by repetition) i.e. the first manumission being defective, he was freed again in a strictly legal manner, (b) By Imperial decree, (c) By bearing three children in case of a woman, (d) By military service, (e) By building a ship and importing corn for six years, (f) By making a building or by establishing a bake shop.

(4) *Dediticiii.*—They were ex-slaves; they consisted of manumitted slaves who had been guilty of some infamous crime. They could never become citizens, though they were free they could not be citizens under any circumstances and were not allowed to live within 100 miles on Rome. If they broke this provision they became slaves again and could never be subsequently free. They could not make any will as they were not members of any community. On their death their goods passed to their old masters.

(5) Slaves (see section 3 ante).

7. Justinian's changes relating to libertas :— Justinian made the following changes in the law relating to *libertas* : (1) He abolished altogether the *latini juniant* and *dediticii*, and made all manumitted slaves citizens. (2) He entirely repealed the *lex Fufia Caninia*. (3) He repealed the provision of the *lex Aelia Sentia* with regard to the manumission of slaves under 30 years of age. (4) He retained the provision of the *lex Aelia Sentia* that a master under 20 years of age could only manumit by *vindicta* after a good cause shown to the council but modified it so as to enable a master to manumit by will at 18 and later by a novel at 14 years of age. (5) The provision of the *lex Aelia Sentia*, that made manumission in fraud of creditors void, was retained. (6) When a slave was instituted as an heir, he got his liberty by implication whether his master was insolvent or not. (7) A manumission in *ecclesiis* was no longer required for a valid grant of freedom. Any declaration of intention, however informally expressed, was sufficient.

8. Patron's right :—The freedman was called *libertas* in relation to his former master who was called his patron or *patronus*. After manumission his patron retained certain rights over his freedman. Manumission did not wholly break the bond that united the slave to his master. The relation of master and slave was replaced by the relation between the patron and freedman. The freedman was bound to treat him with the same respect as a child of his parent. He could not sue his patron without first obtaining the consent of the praetor. He was bound to support a poor patron or patron's family according to his means, conversely the patron who failed to support his freedman when he became poor, was deprived of the right of patronage. He was under a moral duty to perform certain reasonable services for his patron. Generally, the freedman worked so many hours everyday. When a freedman died intestate and without heirs, the patron succeded to his effects.

9. Quasi slaves :—The following persons were in a position more or less akin to slavery :—

(1) *Statu liber.*—He was a slave made free by will on the fulfilment of some condition e.g. "Let my slave X be free if he pays my *heres* 100 aurei." Until the condition was fulfilled he was the slave of the testator's heir.

(2) *Client.*—A client was a plebeian who in early Rome was attached himself for protection of his life and property to a patrician who was called his patron and to whom he stood in the same relationship as a *filiusfamilias* to his *pater*, but he was protected against rough treatment of his patron by a religious sanction.

(3) *Coloni.*—They were the 'villeins' of the later Empire. They were free in the eye of law but were inseparably attached to the soil and were transferred with the land. They could not leave the land without their lord's consent and were in many respects like ordinary slaves. They could contract marriage and they enjoyed certain rights but in other respects they resembled the slaves.

(4) *Bona fide serviens.*—He was a free man who acted as a slave for a master under a genuine mistake as to his status. So long he remained in this condition, everything he made by his labour or by means of the goods of his supposed master, belonged to the master.

(5) *Auctorati.*—They were free men who hired themselves out as gladiators. They retained their freedom but were like slaves in that if they were enticed away from their hirer, the hirer could bring an *actio furti* (action for theft).

(6) *Redempti,*—They were men who having been taken prisoners in war had regained their liberty on condition that ransom money was paid and until

this condition was fulfilled their late captor was regarded as having a lien on them to secure payment.

(7) *Judicati nexi.* —Under the old law a man who suffered *manus injectio* might be adjudged by the magistrate to the creditor, who at the end of 60 days and after certain formalities had the right to sell him as a slave across the Tiber. After being adjudged by the magistrate and before being sold, the status of such a person was a kind of *de facto* slavery.

(8) Persons in *mancipii causa,* (see section 31 post)

(B) Second division of the law of persons. *Civitas* :—

10. Civitas (citizenship) :—In early Rome people were divided into citizens and the *peregrini* (foreigners). A man's public and private rights entirely depended upon whether he was a citizen or not. A citizen enjoyed the following rights :—

(1) *Jus suffragii* i.e. the right to vote.

(2) *Jus honorum* i. e. the right to hold public office i.e. a magistracy.

(3) *Jus connubii* i.e. the right to contract a marriage according to the *jus civile,* giving rise to *patria potestas* over the issue.

(4) *Jus commercii* i.e. the capacity to acquire and dispose of property, to make a contract, to make or take under a will according to the forms of Roman law.

Acquisition of citizenship.—Citizenship could be acquired in the following ways :(1) By birth.—The child of a lawful marriage followed the condition of father and became a citizen provided the father was a citizen at the time of conception. If the child was not the issue of the lawful marriage, he followed the condition of the mother. (2) By manumission (emancipation).—By manumission a slave could become a citizen if the master had manumitted him according to the formalities prescribed by law. (3) By grant.—

Citizenship could also be granted to an individual or to a community as a favour by the senate or by the King or by the Emperor. This was equivalent to what is called naturalization.

Loss of citizenship.—Citizenship was lost in one of the following ways :—

(1) By loss of liberty i.e. when a Roman citizen became a prisoner of war.

(2) By judicial sentence.—When a Roman citizen was punished with deportation for crime.

(3) By voluntary act.—When a Roman citizen renounced his rights of Roman citizenship and became a citizen of another state.

Peregrini.—The *Peregrini* (foreigners) were the non-citizens of Rome. They were the members of the foreign communities with which Rome had friendly relations. These communities were gradually incorporated in the Roman state. Originally the foreigners had no claim to the civil law of Rome which was meant for the Romans. They were governed by the rules of *jus gentium* as administered by the *praetor peregrinus*, and could not get the benefit of the *jus civile.* They had neither political nor civil rights nor *jus connubium.* Their marriages though valid were not regarded as *justae nuptiae.* They could not use the formal Roman modes of transfer of property, but the simple method of *traditio* (delivery) was available to them. In the Republican period some of the foreigners who had commercial treaties with the Romans were allowed to enjoy *jus commercium.* With the progress and vast expansion of Roman territory during the Republic, new allies eager to participate in the privileges of citizenship flocked to Rome. The refusal to these privileges led to a social war at the end of which in 89 B.C., full citizenship was conferred upon all the inhabitants of Italy. The importance of *civitas* declined in the Imperial period. After

Caracalla its significance was almost wholly lost and citizenship was granted to all the inhabitants of the Empire; under Justinian every free subject of the Roman Empire was *ipso facto* a citizen.

The Latins formed an important class of non-citizen. Originally the name Latin denoted an inhabitant of Latioum and then it was applied to any member of the Latin league, finally it signified an inhabitant of Italy who was not a Roman citizen. The Latins had enjoyed *jus commercium* but not *jus conmubium*. Under the Empire the distinction between the various classes of non-citizens disappeared.

11. Capitis deminutio :— *Caput* means status or personality of a person. The expression *capitis deminutio* means a change in status. It, therefore, implies that the individual to whom it happens loses altogether his former status, his old position in the eye of law, and begins an entirely new legal existence. The *caput* was made up of three elements, viz.,

(1) *libertas* (liberty);

(2) *civitas* (citizenship) ; and

(3) *familia* (family). Any change in one of these elements brought about a *capitis deminutio* which did not necessarily mean a lessening of status but simply meant a change in status.

***Capitis deminutio* were of three kinds :—**

(1) *Capitis deminutio maxima.* When a person lost his liberty, he suffered a *capitis deminutio maxima.* This was the greatest calamity that could befall upon a Roman, because it involed the loss of liberty, citizenship and family. This happend when a Roman citizen was taken as prisoner of war or condemned to slavery.

(2) *Capitis deminutio media.*—When a person remained free but lost his citizenship the *capitis deminutio media* took place. This occurred when a roman became a member of

another state. It involved the loss of citizenship and family rights without any forfeiture of personal liberty.

(3) *Capitis deminutic minima.*—When one ceased to belong to a particular family, he is said to suffer *capitis deminutio minima.* It took place in the following cases :—(i) Where a woman pased in *'manum'* (control) on her marriage, (ii) Where a woman made a *coemptio fiduciae causa,* (iii) Where a person in *patria potestas* was given in adoption, provided that in Justinian's time, the adoption was in *plena,* (iv) Where a person in *patria potestas* was given in *noxae dedition* (surrender), (v) Where a person *sui juris* (independent) became *alient juris* (dependent) by arrogation or by being placed under *potestas* by legitimation, (vi) Where a person *alieni juris* became *sui juris* by emancipation.

Effect of *capitis deminutio.*—The *capite minutus* (the person who had undergone a change in status) was a new man in the eye of law. When a Roman suffered *capitis deminutio,* he ceased to be a member of the family and became a stranger. He lost his agnatic and cognatic tie with the family. Gaius compared him with a man who suffered civil death. The praetorian law modified the civil law regarding *capitis deminutio.* According to *jus civile* a *capite minutus* was freed from the obligation he owed before the *capitis deminutio.* But the praetor gave action against the *capite minutus* for the benefit of his former creditors. From the time of praetorian change the *capite minutus* could no be regarded as civilly dead for all purposes. Under the praetorian law the emancipated son was an heir along with *sui heredes,* though he suffered *capitis deminutio minima* on his being emancipated.

(C) Third division of the law of persons. Familiae :—

12. The Roman family :—In primitive Rome the family was the unit of society; the individuals counted nothing. It was the primary cell out of which the state evolved. It was like a corporation which never dies. It was an *imperium in imperio* (a kingdom within a kingdom).

Constitution of family :—The family consisted of the *paterfamilias*, his wife, children and slaves. It was governed by the *paterfamilias* who was the eldest male member of the family. All the members of his family, the farm house, the flocks and the herds were under his absolute control. He represented all the subordinate members of the family for all purposes. He alone was *sui juris* (independent) and all others were *alieni juris* (dependent). The family was artificial and it included not only the members born into it but also the strangers by adopition. The membership of the family was determined by *patria potestas*. Whoever was under his power, was within the family and whoever was freed, ceased to belong to the family. Hence an adopted son was taken as a member of the family, on the other hand an emancipated son was a stranger to the family. After the death of the *paterfamilias* each of his sons became *sui juris* and *paterfamilias*. The original family was broken up into as many families as there were sons who were capable of starting independent families of their own. But the daughters could not be the heads of the families with subordinate members.

The Roman family had three aspects., viz., religious, political and proprietary.

(1) Religious.—In this aspect the family was greatly concerned with the *sacra* (religious rites) which was the link between the dead and the living members of the family. The hearth was the altar of the private cult, and the *paterfamilias* was the priest. The early Roman family rested upon ancestral worship as in ancient Greece and India. The ancient Romans regarded the family as the great instrument for keeping up the peculiar rites upon the due observance of which depended the happiness both of the dead and the living. To neglect them was to commit an abominable cruelty to his ancestors, and to bring down a curse upon his house. The future happiness of the son would depend upon the due performance of the family *sacra*. The extinction of the family was regarded with horror.

(2) Political.—In this aspect the *paterfamilias* framed laws for the government of the family. He had the power of life and death over its members. He was absolute within the family circle and the law of the state did not extend there. The *paterfamilias* was in a sense the king of the family.

(3) Proprietary.—In this aspect every person and everything in the family belonged to the *paterfamilias*. He was the owner of the family.

The early Roman law recognised only one kind of relationship known as agnation i.e. the relationship was always traced through the male line; cognatic or blood relationship was not recognised. This was also due to the influence of *patria potestas*.

13. Agnation :—The bond that united the members of a family through *patria potestas* was called agnation. In early Rome the legal relationship was agnatic i.e. the relationship was traced through males. The rights of family and succession were enjoyed by agnates only i.e. persons who were related to each other through males.

The foundation of agnation was not the marriage of father and mother but the authority of the father (patria potestas). *The relationship was limited to and determined by patria potestas*. Where the *potestas* began kinship began and therefore the adopted child was the kindred; where the *potestas* ended kinship ended and accordingly a son emancipated by his father lost all rights of agnation. So also the descendants of females were outside the limit of kinship. A mother was considered to be related to her children upon a fiction that she had altogether given up her own family and passed into the family of her husband. She was looked upon as a quasi-daughter of her husband. She was not related to her children as a mother but was looked upon as their sister. On the basis of this notion she was allowed to take a daughter's share in the succession of her husband. Her children were related to her only on the theory that she was their sister and

they were not related to her family at all. A paternal uncle was a near relation but a maternal uncle was a stranger in blood. This theory of relationship was called agnation.

Who were agnates.—According to Sir Henry Maine, "Agnates are those persons who are under the same *potestas* or would have been under the same *potestas* had the original ancestor been alive." The Roman family in ancient times was a collection of individuals and it recognised the power of a single chief Whoever was under this power was within the family. If the great grandfather happened to be alive, a grandfather of sixty years was as much a son and as much subject to his control as the youngest infant in the family. All persons subject to the *potestas* were agnates to each other and they remained as agnates even after the common ancestor had died.

In the Institutes of Justinian agnates are defined as those cognates (blood relations) who are related through males. But this definition is inaccurate because although agnates are primarily cognates and traced through males, the agnatic household might be artificially diminished or increased. It would be diminished by the marriage of a daughter into another family, by emancipation of any descendant in power, and by giving in adoption into another family Conversely it would be increased by the accession of a woman by marriage into the family and by adoption or arrogation of a stranger into the family. Agnates, therefore, may be described as (1) blood relations (*cognati)* traced solely through males, excluding such cognates as have left the family by emancipation or otherwise, and in addition to these blood relations, (2) such persons, unrelated by blood, as have been brought artificially by adoption or otherwise into the family. In other words, all persons related to a male or a female by male descent, natural or fictitious, are his or her agnates, unless the tie of relationship has been broken by *capitis deminutio.*

14. Cognation :—Cognation means blood relationship whether on the father's side or on the mother's side. Cognates are those relations who trace their common descent from the same pair of married persons. The relation of cognates is connected by the interposition of one or more females. Thus a brother's son is his uncle's agnate; a sister's son is his cognate, because a female is interposed in that relation. Justinian abolished the distinction of the old Roman law between agnates and cognates and admitted both to the legal succession.

15. Patria potestas and its effects :—The *paterfamilias* exercised *patria potestas.* It was' the power which he had exercised over the person and property of all the members of his family. It conveys a collective idea of the sum total of the powers wielded by a Roman father as the supreme ruler of his household. The person or persons over whom these powers were exercised are called *filiusfamilias* or *filiifamilias.* According to the strict theory of *juscivile,* his power was supreme within the family and he had the power of life and death over the members of his family. He could expose his children in his power, chastise them, sell them as a slave or kill them. He determined who should belong to the family. He could expel a member from the family. No member could marry without his consent and even if they were married he could divorce them. He could give them in adoption, dispose of their Property and surrender them as slaves to the complainant in an action of delict.

Limitation of paternal power—The absolute power of the *paterfamilias* continued down to the end of the Republic. Afterwards the extent of this power was considerably limited through the legislation of the Emperors. Hadrian punished with deportation a father who had killed his son. Alexander Severus limited the right of the father to simple correction. Constantine enacted that the father who killed his son should be guilty of murder and should suffer the consequences of

death of a parricide. The sale of sons as slaves was practically obsolete in the time of the classical jurists though even in the time of Justinian a father might sell his new born children in case of extreme poverty. The right of the *pater* to give the child in adoption was limited by the consent of the child in question. In Justinian's time the *paterfamilias* had the right to inflict moderate chastisement and the right to veto the children's marriage. Justinian restricted the noxal actions to slaves only and the child could not be surrendered in satisfaction to the accuser.

Proprietary right of *filiasfamilias* (son).—In early law the son could not own any property. All that the acquired went to the head of the family. Until the Empire, the only sort of property a son had was the *peculium*. It was the property which his father allowed him to use, administer or trade upon but 'the father could take it back at any time. In the early Empire a series of changes began and a son came to acquire a distinct proprietary right. *Peculium* was of several kinds :—

(1) *Peculium castrense.*—Augustus introduced the *peculium castrense*, which embraced whatever the son acquired on military service. This *peculium* was withdrawn from the *potestas* of the *pater* and the son could dispose of it *inter vivos* and by will. If the son died in the lifetime of his father without having disposed of it by will, the father took the property as if it was his own. After Justinian's legislation he took it by inheritance.

(2) *Peculium quasi-castrense.*— Under Constantine came the *peculium quasi-castrense*. Whatever the son earned as a civil servant was his own property but he could not dispose of it by will. The privilege of disposal by will was afterwards conferred by Justinian. Subsequently this *peculium* came to embrace everything the son earned in his professional capacity.

(3) *Peculium adventicium.*— Under Constantine also arose the *peculium adventicium*. All property which the children

inherited from the mother or received from the strangers, and all acquisitions not coming from the father, and not falling under the description of *peculium castrense* or *quasi-castrense* were called *peculium adventicium.* The father was merely to have a life interest in it and the dominium or reversion remained in the son. In the time of Gaius a father, on emancipating a son, retained absolutely one-third of the *peculium adventicium.* Justinian altered the law and the father was allowed to take a life interest, in half of this *peculium* and the son got the income of the remaining half during rest of the father's life time and on the father's death he was the owner of the whole.

(4) *Peculium profecticium.*—When the son received from his father a particular fund for the purpose of administration, it was called *peculium profecticium,* and as a general rule, this remained the property of the father. But the son retained this fund when he ceased to be under power by his nomination to a high office in the state, or when his father emancipated him without withdrawing the *peculium.*

Contractual capacity of a son.—A son's contract with a third person gave rise to a civil obligation, though originally any benefit accruing under such a contract accrued to the *paterfamilias,* who could not be detrimentally affected by it. In theory a son could enter into as many legally binding contracts as he liked but people would not be willing to deal with him except in two cases:—(1) Where he was contracting on his own behalf in relation to his *peculium* which he acquired under the Empire, (2) where the son was acting as his father's agent.

Liability of a son in delict.—A son wronged by his father had no legal redress. If he was wronged by a third person, it was normally the father and not the son who could sue, though the son could bring the *actio injurianum* (action for injury). If the son injured his father, the father could inflict such punishment as he pleased. But in the latter period of

Roman law serious punishment could only be ordered by the magistrate. If the wrong was done by the son to a third person, the father was bound originally to give the son as a quasislave *(in mancipii cause)* to the vengeance of the other person. Later on, he was allowed either to surrender the son or to pay damages. By the time of Papinian when a son was given in *noxae deditio* (surrender) he would not remain for ever in the position of slave to the person wronged but he would remain there until he had 'worked off' by his labour the amount payable as compensation. Finally Justinian abolished the noxal surrender altogether in case of a son.

The position of a son in public law.—*Patria potestas* was confined to the *limits* of the family. It had no application to the public law. In all public *affairs* the son was as free as his father and was entitled to receive the honours of the state, to hold the magistracy or tutorship. The father and son voted together in the popular assemblies and fought side by side in the field. The son could command an army in the field and as a general might command the father or as a magistrate decide on his contracts and punish his delinquencies. He was eligible to win the highest position in the state. In later times, when the son was elevated to the consular dignity and other high offices of the state, he ceased to be under paternal power but retained his right of succession.

Causes of survival of *patria potestas.*—A question arises why *patria potestas* lasted log. Leage holds that the exclusion of public law from the incidents of *potestas*, coupled with the growth of the various *peculium*, mitigation of the father's power of life and death over the children and the fact that emancipation was always possible, probably account for the survival of *patria potestas* through the whole history of Roman law.

16. Origin of patria potestas :—The paternal power was acquired by

(1) *justiae nuptiae* (marriage),

(2) legitimation,

(3) adoption, and

(4) *arrogation.* We may now consider the topics in order.

17. Justiae nuptiae (marriage) :—*Justiae nuptiae* is defined by Justinian as the lawful union of men and women whereby they consented to lead an undivided life. Marriage, according to Roman law, was a contract by which a man and woman entered into a mutual engagement in the form prescribed by law to live together as husband and wife during the remainder of their lives. The husband was called *vir* and the wife *uxor.*

Forms of marriage.—In early Rome there were two forms of marriage widely different in their effects upon the position and property of the wife : (1) marriage with *manus* and (2) marriage without *manus.* The former occurred when both the parties to the marriage had the *jus connubi* (the capacity to enter into a lawful marriage). It brought the wife, the children and her property under the control of her husband's ascendant. It severed the agnatic connection of the wife with her father's family. She became her husband's agnate. Originally it was strictly confined to Roman citizens. This form of marriage was also called *matrimonium justum.* In the latter form of marriage the *jus connubi* was wanting with the parties to the marriage. It was confined to the aliens and it did not affect the status of the wife. She remained in the family of her father and her agnatic relationship with the members of her family of origin remained in tact. She had the power to dispose of her property freely. This form of marriage was also called *matrimonium nonjustum.* In ancient times marriage was restricted within the classes to which the parties belonged. Thus the plebs could not marry patricians. This restriction was removed by *lex Canuleia* (445 B.C.) which allowed inter marriage between the patricians and plebeians. The marriage with *manus* had almost disappeared before the end of the Republic. Under the Empire the normal marriage

was without *manus* and such a marriage was a valid marriage in the fullest sense of the term.

As distinguished from *justiae nuptiae*, there were two kinds of unions : (1) *concubinatus* and (2) *contubernium.*

Concubinatus.—Concubinatus was a permanent union between a free man and a woman without marriage. The man who had a lawful wife could not take a concubine. A man was neither permitted to take as a concubine the wife of another man, nor to have more than one concubine at the same time. In later times concubine was called *amica*. It was not uncommon between persons of unequal rank and sometimes it was resorted to by widowers who had already lawful children and did not wish to contract another legal marriage. An unmarried person could have a concubine. The children born in concubinage were neither under the power of their father nor entitled to succeed as children by a legal marriage. But they could demand support from him and succeed from their mother. Under the Christian Emperors concubinage was not favoured, but it subsisted as a legal institution in the time of Justinian. At last Leo, the philosopher, Emperor of the East, in A.D. 887, abolished concubinatus, as being contrary to religion and public decency. He said "why should you prefer a muddy pool when you can drink at a purer fountain?" The existence of this custom, however, was prolonged in the west among the Franks, Lombards, and Germans.

Contubernium.—Contubernium was the union between a male and a female slave with their master's consent. It did not produce any of the legal consequences of marriage proper. The slave husband had no *manus* over the slave wife nor any *potestas* over the issue. It had the effect of creating blood ties among the issue. The rules regarding prohibited degrees were observed. The husband could be separated from the wife by the master of the slave and even the union could be dissolved by the master at his will. The children of such union followed the condition of of their parents and were the property of their masters.

18. Essential conditions of justiae nuptiae :—The following conditions had to be satisfied for a marriage to amount to *justiae nuptiae* : (1) Each party must have *connubium* which was a capacity to contract a legally valid marriage. (2) The parties must not be near relations either by natural or artificial ties. Those in the direct line of descent from a common ancestor could not contract *justiae nuptiae* among themselves. Persons in *loco parentis* (in the position of parents) could not enter into marriage with those in *loco filii* (in the position of children). By a special law marriage was not allowed between the Governor of a country and the members of a community under his charge. (3) Each party must give consent to the marriage. (4) If either party were *alieni juris*, the consent of the *paterfamilias* was necessary. (5) Each party must have attained puberty. Puberty was determined at 14 years of age for males and 12 years for females, when they were quite competent to enter into marital relationship. (6) Marriage was disallowed in early law between the patricians and the plebeians. A senator might not marry a freed woman or an actress.

19. Kinds of marriage with manus (how manus was created) :—*Manus* was acquired in ancient law by one or other of the following modes of marriage recognised as *justiae* nuptiae :—(1) *Confarreation.*—It was a religious ceremony performed in the presence of the chief priests of the state religion and accompanied by usages which were of great antiquity, Originally only patricians could avail themselves of this form of marriage. A cake was offered to the Jupiter and ecertain sacramental words were spoken before ten witnesses representing perhaps the ten curiae, the *Pontifex maximus* (chief priest) and the priest of Jupiter. The *Pontifex maximus* and the priest of Jupiter assisted in the ceremony.

(2) *Coempto.*—It was the civil marriage. This form of marriage was meant for the plebeians and existing side by side with the *confarreation* form of marriage. It was a sort of

symbolic sale of the wife to the husband. *per* aes *et libram*, in presence of five witnesses and the balance holder.

(3). *Usus.*—The third form in which *manus* was created was *usus*, that is a sort of *usucapio* or *prescriptio*. Usus was the acquisition of a wife by possession and bore the same relation to *coemptio* as *usucapio* to a *mancipation*. A Roman citizen who bought some object of property and got possession of it, but not ownership, because he neglected to go through the forms prescribed by *jus civile*, might be owners by *usucapio* i.e. lapse of time. Similarly if a man lived for one year with a woman whom he treated as his wife but whom he had not married by *conferreatio* or *coemption*, then at the end of that period the man acquired ownership of the woman as his wife. She passed herself in *manum* and the marriage was treated as *justiae nuptiae*. If she was delivered to the husband without proper forms, she did not fall under his *manus* until the usula period of *usucapio* or *prescriptio* had passed. A title by *prescriptio* or *usucapio* could not be acquired unless possession was continuous. Accordingly if a wife absented herself and returned to her father's house before the period of *prescriptio* had run out the *prescriptio* was broken. So it was fixed that if she absented herself for three nights in succession it prevented the husband from acquiring possession by *prescription*. The discontinuity in the possession was called *usurpation trinocti* and *manus* could not be acquired in such a case.

20. Effects of marriage :—In marriage with *manus* the wife ceased to be a member of her old family and became a member of her husband's agnatic family. If the husband was under the *potestas* of the *paterfamilias*, she would fall under him. If the husband was *sui juris* or himself a *paterfamilias*, she would go under his manus (control). In other words she suffered a complete change of legal status of the kind which the Romans called the capitis *deminutio*. She ceased to be one of the heirs of her *paterfamilias*, and if he dies intestate she

will not be entitled to share with her brothers and sisters. As between the spouses the relationship of father and daughter was established. The husband acquired the same rights over her as a *pater* acquired over a *filiusfamilias*. The husband or the *paterfamilias* (in case the husband was *alieni juris)* had the complete dominion over the person and the property of the wife. Whatever fortune she had at the time of marriage or acquired afterwards went to the husband or to his *paterfamilias*. But she acquired the important right to inherit the property of her husband and she was entitled to a daughter's share in his property at his death. The husband also could inherit from the wife. All the children born of a lawful marriage fell under the paternal power of the husband. As regards the effect on person of spouses, the wife followed the domicile of the husband and was entitled to protection and support from him. She took his name and rank, and retained them even after his death, so long as she did not enter into a second marriage, The husband was not liable for obligations contracted by the wife before the marriage. The wife also was not originally liable for such obligations but the praetor allowed process and passed judgement against her for satisfaction of the obligations out of the property which her husband took through her on marriage.

In marriage without *manus* her agnatic relationship remained unchanged and she did not pass out of her original family, but retained her position as one of the heirs of her *paterfamilias*. After the disappearance of the *tutela perpetua* the woman, although married had a complete legal status of her own, and could acquire property, enter into obligations and bring actions just as a man could. Having this independent *persona*, her property was necessarily her separate property and her husband had no right to it apart from private management. Her *paterfamilias*, if he liked, could take her away from her husband and put and end to the marriage. If she had no *paterfamilias* when she married, or if

her *paterfamilias* died during the marriage, she would remain under the tutor of her agnates. If she had any property at the time of the marriage it did not pass to the husband who had no rights to her property which remained her own. Whatever she acquired during the marriage belonged to herself and her husband had no control even over the administration of her separate property. She acquired no rights of succession to her husband, though at a later period the praetor gave her a right to succeed to the husband's estate if he left no relations. There was no bond of legal duty between the husband and the wife. The wife could not compel him to maintain her. The children were under their father's power and enjoyed rights of inheritance from him. But there was no right of succession as between herself and her own children before the law as modified by *sc.* Orfitianum *(178 A.D.)* which gave the children a right to succeed to her estate in preference to all agnates.

21. Dos :—*Dos* was the property made over to the husband by or on behalf of the wife as a kind of contribution towards the expenses of the new household. It was considered to be the duty of a father to maintain his daughter notwithstanding that she was married. But as it would have been practically impossible to perform this duty day by day and week by week when the daughter lived with her husband, the father once for all gave a marriage portion of dowry for his daughter in proportion to his means. *Dos* was usually the subject of prenuptial contract; but it might be commenced or increased after the marriage. However, the constitution of *dos* was not essential to the validity of marriage. The *dos* in no way resembles our dower or dowry.

Kinds of *dos*.—There were three kinds of *dos* viz.,

(1) *dos profecticia*.—When the marriage portion was provided by the father or other paternal ancestor, who were under a legal duty to the woman to provide dowry, it was called *dos profecticia*.

(2) *Dos adventicia.*—When the marriage portion was given by the wife from her own property, or by any third person, it was called *dos adventicia.*

(3) *Dos recepticia.*—When the marriage portion was given by a third party on the understanding that it was to be returned to him on the dissolution of the marriage, it was called *dos recepticia.*

Constitution of dos—A *dos* might be constituted in one of the three ways : (1) It might be handed over to the husband at the time the agreement was made. (2) The bride or her paternal ascendant might bind themselves to give. (3) It might simply rest on a solemn promise.

Management of *dos.*—The husband had the sole management of the *dos* and he enjoyed its usufruct and income during the continuance of the marriage. He had no right to interfere with the corpus. Though the husband was owner, he was under a liability to account and after the passing of *lex Julia de adulteriis* (18 B.C) he could neither sell the immovable property in Italy forming part of the *dos* without his wife's consent, nor mortgage it even with her consent. The provision of this law was extended by Justinian who prohibited any kind of alienation of the immovable part of the *dos* even with her consent, whether the property was situated in Italy or in the province.

Dos on the termination of the marriage.—If the *dos* was *recepticia,* i.e. if it was given to the husband by a verbal contract or stipulation on condition for its return, the donor or his heirs could compel its restoration on the termination of the marriage. If there had been no such stipulation the husband, according to the strict view of the civil law, was entitled to keep the whole of the *dos* for himself, though no doubt the wife had a moral claim which was often or usually recognised for its return. About the year 200 B.C., a new action appeared which was called the *actio rei uxoriae,* which lay for the recovery of the *dos* at the end of marriage, even though

there was no express agreement for its return. In the time of Justinian the husband was bound to restore the dowry except when the wife was divorced for misconduct. He could only claim a rebate which was actually necessary for its preservation. He was obliged to make compensation for any movable property which he alienated or for any damage which had been done to the *dos* through his negligence. As a further protection, Justinian gave the wife a *tacita hypotheca* (implied mortgage) over her husband's whole estate. In Justinian's time if the wife survived her husband, or there was a divorce for any reason save her own misconduct, the wife was entitled to have the dowry returned in the absence of some express agreement to the contrary. If the wife died before her husband, her heir might, by an action *ex stipulatu* recover *dos adventicia*, but not necessarily the *dos profecticia* because if a father or other paternal ascendant had given such a dowry and survived the wife, he had a right to its return to the exclusion of her heir.

Parapherna.—The part of the property which was not brought into settlement on marriage as part of the *dos* was known as parapherna. The wife remained its proprietor, and the husband had no right over it beyond those which she might relinquish in his favour.

22. The donatio propter nuptias :—the expression means a donation after marriage. It was a gift on the part of the husband as a kind equivalent to the *dos*. The object of *donatio propter nuptias* was to secure a provision for the wife in the event of her surviving the husband or in the event of the marriage ending by a divorce through husband's misconduct. The husband's ancestors were placed by statute under the same obligation to provide *donatio* as the bride's ancestors were to provide the *dos*. By a constitution of Justinian the amount of the *donatio* had to be equal to the amount of the *dos*. The actual control and management of it belonged to the husband during the marriage. Under Justinian the husband

could not alienate the immovable part of the *donatio*, even with his wife's consent and the wife was given a *tacita hypotheca* to secure it. On the termination of the marriage by the husband's death or misconduct, the wife would get it, but if she predeceased him, it was retained by the husband as his own absolute property. Originally it was known as *donatio ante nuptias*. As it was against the policy of Roman law to allow gifts between husband and wife before marriage Justinian allowed such a gift to be given and increased after marriage and in correspondence with this, he changed the name to *donatio propter nuptias*.

23. Termination of marriage :—Marriage came to an end in the following ways :—(1) By death of either party. (2) By either party becoming a slave or ceasing to be a citizen. (3) In case of marriage in *manum*, by either party undergoing *capitis deminutio minima*. (4) By divorce.

24. The law of divorce :—Divorce existed in Rome from the earliest times. It did not require the sentence of a Judge and no judicial proceedings were necessary. It was considered a private act. Under the old law a marriage celebrated by *confarreatio* could be dissolved by an equally formal act of *diffareatio* i.e. another sacrifice to the Jupiter in the presence of pontiffs. If the marriage was celebrated by *coemptio* or *usus*, it could be dissolved by emancipating the wife i.e. by a fictitious sale to a person who manumitted the wife. One sale was enough to break the tie.

When marriage in *manum* had become obsolete, marriage could be dissolved in two ways : (a) by *divortium* and (b) by *repudium*. The former occurred at the will of both the parties who could dissolve the marriage voluntarily and by mutual consent. The latter occurred by either party giving notice to the other. No form was necessary. A declaration of intention to dissolve the marriage was sufficient, expressions like "manage your own affairs," keep your own things to yourself," etc., were sufficient to break the tie. But the *lex Julia de*

adulteriis (18 B.C.) required a written bill of divorce to be delivered in the presence of seven Roman citizens above the age of puberty as witnesses, though eventually delivery was not necessary.

Divorce was at first not abused, but at the close of the Republic and the commencement of the Empire, when the manners of men were corrupted, there was a gross abuse of divorce. Marriage was thoughtlessly entered upon and dissolved at pleasure. To check this deplorable corruption, laws were passed inflicting severe penalties on those whose bad conduct led to divorce and there were Imperial constitutions which enumerated the just causes of divorce and gave the innocent party some claims over the property of the other. Under Justinian divorce without just cause was not allowed. He penalised for groundless divorce by forfeiture of property. If the wife divorced the husband without just cause she could not claim her *dos;* on the other hand if the husband divorced the wife without just cause he had to forfeit *donatio propter nuptias* which would go to his wife. Yet, notwithstanding these penal enactment's, divorce was in all cases left entirely to the free will of the parties.

Remarriage after dissolution.—When the marriage was dissolved by the death of the husband or by divorce, the wife was bound to wait a year before entering into a new marriage; in case, of violation of this rule she incurred infamy besides other penalties.

Custody of children. —If the divorce was owing to the fault of the father, the mother was entitled to the custody of the children, and the father was obliged to maintain them. If the mother was in the wrong, the father took charge of the children. If neither party was in fault and the dissolution of marriage resulted from mutual consent, the father took the custody of the boys, and mother of the girls.

25. Legitimation :— Legitimation was a method of introducing into the family the children who were born out of wedlock. Under the Roman law a child born out of lawful wedlock could be made legitimate in the following ways :—

(1) *Oblatio curiae.*—Theodosius and Valentinian provided that citizens might legitimate their natural children by making them members of the *curiae* (i.e. the order from which magistrates were chosen in the provincial towns). As the duties of a *decurio* were very onerous and accompanied with risk, natural son who undertook the office was thereby rendered legitimate. A natural daughter who married a *decurio* had the same privilege. A child made legitimate by *oblatio curiae* acquired no right of succession to any member of the family except his own father.

(2) *Per subsequens matrimonium.*—Legitimation by the subsequent marriage of the parents originated from a constitution of Constantine. He provided that persons living in concubinage could legitimate their children by subsequent marriage, provided (a) the mother was *ingenua* (free born) and (b) the father had no children by a lawful wife. The object of this law was to encourage persons living in concubinage to enter into marriage. Justinian extended the law of Constantine by removing the above restrictions. In the law of Justinian three conditions were necessary to make the children legitmate, viz., (a) The marriage must have been possible when the child was conceived and therefore the children of an incestuous marriage, or born in adultery or born from the union of a citizen and a slave would not have their position improved by a subsequent marriage between the parties, (b) There must be a proper marriage settlement, (c) The child must not object. The reason was that, being born out of wedlock, the child was-*sui juris* and was under nobody's control. Therefore he ought not to be brought under *potestas* and made alieni juris against his will.

The privilege of legitimation by the subsequent marriage of the parents was strictly confined to the children of a concubine, and did not extend to bastards.

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

26. Adoption :—Among the Romans the relation of father and child arose either from marriage or adoption. Adoption was common at Rome and was considered to be an useful institution. Many powerful patrician families on the verge of extinction by the failure of children were revived by adoption. But it was always considered more honourable to be the actual father of children born in lawful marriage than to have recourse to fictitious paternity. There were two kinds of adoption, viz., (1) Adoption and (2) *Arrogation* or *adrogation.*

Adoption.—Adoption was the ceremony by which a person under one *potestas* was transferred to another *potestas.* In the process of adoption two acts were necessary : (i) The extinction of agnatic tie in relation to the original family and (ii) the creation of a new agnatic tie in relation to the acquired family. The original agnatic tie was destroyed by triple sale as provided in the Twelve Tables that if the father sold his son three times, the son should be free from *patria potestas.* The second act i.e. the creation of a new agnatic tie was created by *in jure cessio* (fictitious law-suit). The process of adoption was as follows :—The father sold his son *per aes et libram* to a nominal purchaser who resold the son to the father. The sale by the father was followed by a resale by the purchaser. In this way there were three sales by the father and two resales by the purchaser. After the third sale the paternal power was extinguished, and the first act of adoption was complete. But

the son did not forthwith fall under the power of his adoptive father. The second act was necessary for establishing the new *potestas*. It was done by a fictitious law suit *(in jure cessio)*. The adoptive father declared before the praetor that the adoptee was his own son, the natural father did not object and a judgement was given against the natural father and the son fell under the power of the adoptive father. At the time of Justinian adoption was made in a much simpler way. All that was necessary to make a valid adoption was that the real father, the adoptive father and the person to be adopted should go before the magistrate and make a declaration of their intention which was entered in the records of the court.

According to the rigour of the ancient law, a son under power might be given in adoption without his consent, but in later times the son had a right to object and he could not be given in adoption without his consent.

Conditions of adoption.—Every man, whether married or not, could adopt provided he had the capacity to contract marriage. In ancient times this privilege was denied to women, because they could have no one under their power. But the law was altered about the period of Diocletian, and women were allowed to adopt in order to console them for the loss of their children, but they could not acquire *patria potestas* over them, but the adoptee acquired rights of succession from the adoptive mother. No person could adopt one who was older than himself, because adoption should imitate nature and it seemed unnatural that a son should be older than his father. It was, therefore, required that the adopter should be older than the person adopted by 18 years which was the age of full puberty. A person having no child could adopt a grandson but one having a son was not permitted to adopt a grandson without the son's consent.

Effects of adoption.—Under the Roman law adoption created the relation of father and son. for ail practical purposes, as if the adopted son was born of the blood of the

adoptive father in lawful marriage. Adoption severed the agnatic tie completely. The adopted child left his original family and passed into the new family under the paternal power of his new father. An adopted child added to his own name that of his adopter, modifying it by the termination 'ianus,' e.g. Scipio adopted by Emilus was called Scipio Emilianus. lie lost all rights of intestate succession to the natural father but acquired a new right of succession to the adoptive father. But in practice serious inconveniences arose when he was emancipated by the adoptive father after adoption. In that case he could neither inherit from his natural father nor from his adoptive father. To obviate this difficulty, Justinian made a distinction between (1) *adoptio plena* (adoption by an ascendant) and (2) *adoptio minus plena* (adoption by a stranger). *In adoptio plena* i.e. when adoption was made by an ascendant such as grandfather, the effect was the same as under the old law. The son passed under the *potestas* of the adoptive father. In such a case it was presumed that affection springing from the ties of blood would refrain him from emancipating the adopted child, so as to prejudice his rights, of succession. In *adoptio minus plena* i.e. when adoption was made by a stranger, there was no dissolution of the paternal power and the adoptive father did not acqutre that power. The adopted child, as a fact, passed into the physical control of the person adopting, but as a matter of law remained a member of his old agnatic family. The child also acquired the right of intestate succession to the person making the adoption.

27. Arrogation.—*Arrogation* took place when a person who was *sui juris* became *alieni juris* by placing himself under the *potestas* of another citizen. Since it involved the extinction of a Roman family an Act of the supreme legislature was necessary. The proceedings took place originally in the *comitia calata* (the *comitia curiata* was called *comitia calata* when it met for special purposes like

arrogation). After an enquiry into the expediency of the act had been made by the pontiffs, the person making the *arrogation,* the person to be arrogated and the citizens present were asked if they respectively consented to the *arrogation.* If they did, an Act was passed making the person arrogated a member of his new family and putting an end to his old family. He passed into the *potestas* of the person arrogating him, to whom he stood as a *filiusfamilias* and lost his ancient religious rites *(sacra).* His descendants, if any, and the whole of his property passed with him into the new family. With regard to obligations owed by the person arrogated there was a distinction. If the obligations were due from him as heir of some third person deceased, they passed to and bound the person making the *arrogation.* If it was merely personal, they became extinguished altogether at strict law. Later the praetor gave the creditors the right to be satisfied out of the property which, but for the *arrogation,* would have belonged to the person arrogated. It was not until Diocletian that the form changed, when the act of the *comitia* was substituted by a *rescript* of the Emperor. This form continued down to, and in the time of, Justinian himself. The only change made by that Emperor was that he reduced the interest of the person making the *arrogation* to a life interest (usufruct) merely in the porperty of the person arrogated.

Originally, since the act took place in the *comitia, arrogation* could only be effected at Rome. When the vote of the *comitia* was replaced by Imperial *rescript, arrogation* became possible in the provinces. A woman could neither arrogate nor be arrogated. Under Diocletian it was recognised that women could be arrogated. An *impubes* (infant) could not be arrogated because a man might, by arrogating a boy one day and emancipating him on the next day, acquire and retain all his property without incurring any obligation in respect of him. Under Antoninus Pius an *impubes* could be arrogated after satisfying the following conditions :—

(1) Liberty was reserved for the person arrogated to put an end to the arrogation, if he so wished on attaining the age of 14.

(2) The *arrogator* gave security to restore all the property to the boy if he'emancipated him with good cause before the age of 14, or if the boy died under that age.

(3) If he disinherited the boy or emancipated him under the age of 14 without good cause, he would restore not only the boy's own property, but give him one-fourth of his own property.

Effect of *arrogation.*—The effect of *arrogation* may be considered with reference to (1) the person and (2) property of the *arrogatus.* The *arrogatus* passed under the *potestas* of the *arrogator* and his descendants, if any, also passed with him under the same *potestas.* As a compensation for the loss of his rights he acquired the rights of intestate succession to the property of the *arrogator.* In civil law the property of the *arrogatus* in consequence of *capitis deminutio minima* became merged into the property of the *arrogator.* Therefore if after arrogation he was emancipated for sufficient reason he did not get back his own property. Moreover, the debts due to the *arrogatus* passed to the *arrogator* who could sue for the debts but the debts due by the *arrogatus* ceased to exist after *arrogation.* The praetor, however modified this rule and gave the creditors the right to satisfy themselves out of the property of the *arrogatus.*

28. Comparison between adoption and arrogation :—Adoption and *arrogation* are alike in the following respects :—

(1) In each case, except in *adoptio minus plena* (adoption by strangers) of Justinian, a person changed his family.

(2) On the principle of *adoptio naturam imitatur* (adoption to imitate nature), the *arrogator* or adopter

had to be at least 18 years older than the person adopted or arrogated and they could not adopt or arrogate if this condition was unfulfilled.

(3) A woman could neither adopt nor arrogate; later she was allowed to "quasi-adopt" as a solace for the loss of her children but she did not thereby gain *patria potestas.*

Contrast between adoption and *arrogation.*—The following are the differences in the two institutions :—

(1) In adoption a person *alieni juris* changed his family while in *arrogation* a person *sui juris* changed his family.

(2) In adoption the person adopted passed into the *potestas* of the adopter while in *arrogation* not only the person arrogated but his descendants if any, also passed into the *potestas of the arrogator.*

(3) So long as *arrogation* was '*populi auctoritate*' i.e. made in *comitia calata,* it could only take place at Rome, where as adoption could take place, anywhere within the country.

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

(5) An *impubes* could always be adopted, but could not be arrogated until it was made possible by Antoninus Pius.

29. Termination of patria potestas :—*Patria potestas* terminated in the following ways :—(1) By death of the father or son. (2) By adoption. In Justinian's time *adoption plena* would terminate *patria potestas* of the natural father. (3) By marriage in *manum* in case of females. (4) By the child attaining signal public distinction e.g. when he became a bishop or prefect. (5) A father exposing his children or giving his daughter in prostitution, lost his rights over them. (6) By either father or child becoming a slave or losing citizenship.

(7) If the father gave himself in *arrogation* to another citizen, the *arrogator* acquired *patria potestas* over the children and the father lost *potestas* over them. (8) When the child was sold as a slave, the *patria potestas* over him was lost. In the case of a son three sales were necessary. (9) By emancipation.

30. Law of emancipation :—Emancipation in relation to a son means the freeing of the son by the father from his *potestas*. The object of emancipation was to put an end to the agnatic tie. In its ancient form it had to be done by three sales followed by a manumission. The first part of the ceremony of emancipation was exactly like that of an adoption. The son was sold according to the Twelve Tables by means of a fictitious mancipation for three times to a stranger and followed by a manumission by *uindicta*. In case of a daughter or grandson, one sale was enough to destroy *patria potestas*. Emancipation could be effected by the puchaser simply by manumitting the child (by *vindicta)* who was *'servi loco'* (in the position of slave) to him, after the sale by the father. But this was not the usual course, because in such a case the purchaser would acquire a right of succession to the child which properly belonged to the real father. The usual course, therefore, was that the purchaser would resell the son to the father, who would himself manumit him by *vindicta* and the father as *"paren manumissor"* would acquire the right of succession from the son.

Emperor Anastasius abolished this round about process and allowed emancipation to be effected by Imperial *rescript*. This course was usually adopted when the son was away from home and it was not possible to go through the ordinary ceremony. Finally under Justinian, emancipation was effected by a simple declaration made by the father and the son in the presence of the magistrate. The son's consent was necessary in the proceeding.

Effect of emancipation.—Emancipation completely cut off a son from the family. The *patria potestas* was destroyed and

it gave him freedom. The emancipated son became *sui juris*. He left his original family and lost the right of agnation. Lawful sons having no separate means to meet their demands were entitled to get support from the father, and the sons too were bound to maintain an indigent father. Under the old law the son after emancipation lost his right of succession and found himself without any property. But later in the Imperial period the emancipated son was allowed *peculium castrense* and *quasi-castrense* which were the absolute property of the son. The praetor again gave him right of intestate succession from the father along with the unemancipated children. The father also succeeded to the property of the emancipated son if he died intestate and without issue, provided that the father was his patron.

Rights and duties of emancipated son.—The rights and duties of an emancipated son was identical with that of a freedman with the exception that the father could exact no promise of work from the son. The emancipated son could not sue his father, except in a fit case and with the leave of the praetor.

31. Persons in mancipii causa or servorum loco (in the position of slaves) :—The free persons in the position of slaves were called persons *in mancipii causa*. A free person might become in *mancipii causa* in the following ways : (1) When under the ancient law, his *paterfamilias* sold him into slavery at Rome, he was reduced to this status. If he was sold across the Tiber he would be a slave proper. The status in *mancipii causa* was peculiar to Rome. (2) By being fictitiously sold as a slave during the process of adoption or emancipation. (3) When a son was given in noxal surrender in satisfaction of debt by his *paterfamilias*. (4) When a woman was sold by means of a fictitious sale by her coemptionator e.g. as a preliminary to divorce.

Differences between a slave proper and a person in *mancipii causa* were—(1) That the person in *mancipii causa*

retained full civic rights and the *jus commercii* in a latent form. (2) On being freed he became *"ingenuus"* and not *"libertinus."* (3) Neither the *lex Aelia Sentia* nor the *lex Fufia Caninia* restricted the manumission of such a person. (4) In the time of Gaius a master who subjected a person in *mancipii causa* to insulting treatment was liable to action for injury.

Similarity between a person in *mancipii' causa* and a slave.—(1) He was incapable of entering into legal obligations. (2) His acquisitions accrued to his master. (3) His children were probably in ancient times also quasi-slaves, although the law was modified in this respect by the time of Gaius. (4) His master could alienate him as a quasi-slave to another either *inter vivos or mortis causa.* If the person in *mancipii causa* was unlawfully taken away from him, he could reclaim him by a *vindicatio* (a real action) and in a proper case he could bring the *actio furti* (an action for theft). (5) The same means were necessary to free him as in the case of a slave proper.

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

(D) Fourth division of the law of persons. Guardianship :—

32. The law of guardianship :—A person although a freeman, a citizen and *sui juris* might lack full legal capacity to conclude juristic acts because of his extreme youth or of lunacy. Such a person, according to law, was placed under a guardian. Roman law recognised two kinds of guardians viz., (1) Tutor and (2) Curator. Again tutorship was of two kinds :— (1) *Tutela impuberum* (guardianship for infant), and (2) *Tutela mulierum* (guardianship for woman).

33. Tutela impuberum :—*Tutela impuberum means* the guardianship for infant. Every boy or girl who was *sui juris* and under the age of puberty was placed under the guardianship of a tutor because of their immaturity of understanding. The age of puberty was fixed at 14 years for males and 12 years for females. A person above 14 but below 25 was an adolescent. Full age was 25 years complete for both the sexes.

Tutela impuberum were of four kinds :

(1) *Tutela testamentaria,*

(2) Tutela legitima,

(3) Tutela fiduciaria and

(4) *Tutela dativa.*

(1) *Tutela testamentaria* (testamentary guardian).—A tutor was appointed to a person *sui juris* under puberty by the will of the *paterfamilias.* A grandfather could only appoint a tutor by his will for the grandson if his father had died or undergone *capitis deminutio.* If the grandson on the death of the grandfather fell under his father's *potestas* there was no need for a tutor, because the boy would not be *sui juris* but *alieni juris.* A testator might appoint as tutor any one who possessed *testamentifactio.* Since a tutorship was considered a public office, even a *filiusfamilias* was capable of holding it. A testator might appoint his slave to be a tutor. In such case the slave became free.

(2) *Tutela legitima* (statutory tutor or tutor-at-law).—An *impubes* (infant) to whom no tutor had been appointed by will would usually have a *legitimus* or statutory tutor. The *tutela legitima* was either (i) *agnatorum* or (ii) *patronorum,* or (iii) *parentum tutela.*

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

tutor *legitimus*. If there were several agnates in the same degree, they all became tutors. The reason why these agnates were appointed tutors by the Twelve Tables was that they would succeed as heirs to the ward's property on his death intestate and without issue. If there were no agnates, the tutorship originally passed, like the property to the nearest *gentiles*. Later when the distinction between agnates and cognates were abolished by Justinian both as regards legal succession and the office of tutor-at-law, the mother or grand-mother of the pupil was appointed tutor-at-law, even preferably to the agnates.

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

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

(3) *Tutela fiduciaria*.—In Justinian's time, *tutela fiduciaria* arose when *pater familias* died after emancipating a person in his *potestas* under the age of puberty. Thereupon the unemancipated male children of the deceased became fiduciary tutors to the emancipated person. For example A had two sons, B and C in his *potestas;* he emancipated B under puberty and became B's tutor *ligitimus*. When A died, C became his brother's fiduciary tutor B unitl he attained 14.

(4) *Tutela dativa.*—In default of any other tutor, a tutor could be appointed by the court and that appointed tutor was called a tutor *dativa.* The *lex Atilia* gave the urban praetor and a majority of the *tribunes* of the plebs the power of appointing tutors. The *lex Juliaet Titia* (31 B.C.) gave a similar power to the Governors of provinces, but appointments under those statutes fell into disuse. In the time of Justinian the prefect of the city of Rome, or the praetor, and the Governors in the provinces or the magistrates, by orders of the Governors, appointed tutors *dativa.*

34. The powers and functions of the tutor :—The tutor's power extended generally over the person and property of the pupil. His duties were three fold :—

(1) To take proper care of the person and to supervise the education and wellbeing of the ward.

(2) To administer the ward's property to his best advantage. The tutor was liable not merely for fraud, but for failure to show the same amount of care as he displayed in the conduct of his own affairs.

(3) To remove the legal incapacity of the pupil when any juristic act had to be done. The tutor could remove the legal incapacity of the minor by his *auctoritas* (authority) which enabled him to enter into transactions which he could not do because of his minority. Such an authority of the tutor was called *auctoritas interpositio.*

A tutor had to manage the estate of the pupil like a good father of a family and would bee liable for loss occasioned by bad management. He was entitled to recover debts, levy rents and interests; he could sell the movable property in case of necessity, but he could not sell the immovable property without the authority of the court. It was the tutor's duty to employ the pupil's funds profitably, and being a trustee he could not acquire any portion of the estate or do any act

connected with it for his own personal benefit. He could bring and defend actions on behalf of the pupil or represent him in the litigation.

Before entering upon the discharge of his duties, the tutor was in certain cases required to give security against misconduct Testamentary tutors were exempted from giving security, because their honour and diligence had been approved by the testator himself. The statutory tutors had to give security as they came in by relationship, which was no guarantee of honour and diligence. Tutors appointed by the higher magistrates, after enquiry, were not burdened with security, because only fit persons were chosen, but those appointed by the inferior magistrates had to give security. Under the law of Justinian the tutor had to make an inventory of all the property of the ward on assumption of his office.

35. The rights and liabilities of a minor under Roman law :—The rights and liabilities of a minor in Roman law varied during the successive stages of minority. An infant below seven years of age could neither acquire any right nor subject himself to any obligation, even with his tutor's consent. But a minor above seven years could enter into contracts without the authority of the tutor. In contracts where there were mutual obligations arising from sales, leases or other engagements, a person of full age who contracted with the minor was bound by the contract, but the minor was not bound unless the tutor had authorised it. The rule of the Roman law was that the minor might better his condition but could not make it worse. But this rule was subject to equitable restrictions. The minor was not allowed to take an undue advantage of his minority. He was compelled to give up any advantage that he might have obtained under the contract. Thus he could throw up a purchase, but he could not keep what he had bought and refuse payment, or demand back what he had sold without restoring the price. If a minor

ratified his contract on attaining majority, he was bound by it. On the whole a contract of a minor in Roman law was viodable, but not void.

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

(1) *Accusatio suspecti.*—A tutor might be removed from office for misconduct by the *accusatio suspecti* mentioned in the Twelve Tables, and if *dolus* (fraud) was proved, the tutor was removed from office with *infamia.*

(2) Satisdatio rem pupilli salvam fore (Security for the safety of the pupil and his property).—On entry into office and agnatic tutor and a tutor appointed by an inferior magistrate had to give security coupled with a guarantee by three persons for the safety of the pupil and his property.

(3) Action on quasi-contract.—If the tutor in the management of the ward's property failed to show proper diligentia, he was liable in damages under quasi-contract in which he stood to wards the pupil.

(4) *Actio de rationibus distrahendis.*—If the tutor converted the ward's property to his own use, the ward had the *actio rationibus distrahendis* which provided to pay double damages. This action lay for actual embezzlement of the ward's property.

(5) *Actio tutela directa.*—At the end of the guardianship the pupil could compel his tutor to render an account and to hand over his estate under this action.

(6) *Action for alienation.*—The tutor was prohibited, from alienating the property of the pupil without the leave of the magistrate.

(7) *Tacita hypotheca.*—By a constitution of Constantine the ward was given a statutory mortgage *(tacita*

hypotheca) over the tutor's property in respect of any claims the ward might have against him.

(8) *Actio subsidiaria.*—Lastly in addition to his remedy against his tutor, a pupil might bring a subsidiary action for damage against a magistrate who had wholly omitted or failed to take sufficient security from the tutor on appointment.

37. Who could be a tutor : —No one could fill the office of *tutela* except a Roman citizen of full age of twenty five. Since *tutela* was a public office, a *filiusfamilias* could be a tutor. As a general rule, females could not be tutors but later an exception was made in favour of mother and grandmother of the pupil.

Excuse for tutela :—The *tutela* was a burden imposed on Roman citizens. People were generally anxious not to have this burden put on them. A tutor was bound to serve unless he could prove a ground of excuse. The grounds were numerous. The following persons were exempted from *tutela* :—

(1) Persons holding high offices in the state, clergymen and professors, men employed in the army or men absent on the public service.

(2) Those who had a certain number of lawful children still living (three at Rome, four in Italy and five in the provinces).

(3) Those who were upwards of seventy years of age.

(4) Deaf and dumb persons.

(5) Debtors and creditors of minors were prohibited from acting as their tutors or curators.

(6) Poverty or illness was also good ground of excuse.

(7) Three burdens of tutela at one and the same time.

38. Termination of tutela impuberum :—The *tutela ended in the following circumstances :—*

(1) By the pupil attaining puberty.

(2) By the death of the pupil or tutor.

(3) By the removal of the tutor from office for misconduct or unfitness.

(4) By the retirement of the tutor from office. But a specific ground recognised by law had to be adduced e. g. being over seventy or ill health. These were good grounds for refusing a tutorship *abinitio* and for retirement.

(5) In the case of a tutor appointed until a condition was accomplished or for a fixed period, the fulfilment of the condition or the expiration of the period brought his tutorship to an end.

(6) By the pupil suffering from any kind of *capitis deminutio.*

(7) By the tutor suffering *capitis deminutio maxima or media,* or in the case of the legitimus tutor, even *capitis deminutio minima.*

The reason was that *capitis deminutio minima* meant the break of the agnatic tie, and on this the *legitima tutela* depended.

39. Tutela mulierum (guardianship for women) :— The *tutela perpetua mulierum* did not exist in the law of Justinian. Till the time of Diocletian a woman was throughout her life under the guardian of her agnates.The theory of the old law was that a woman was never wholly independent. She was either *alieni juris* (dependent) under the *potestas* of her ancestor before marriage, or in *manum,* (control) to her husband or the head of his family during her marriage, or if she was *sui juris* or became a widow she was placed under a tutor to protect her. Without the tutor's consent she could alienate her *res nec mancipi* and enter into any obligation by which her condition was improved. She could lend and recover money. If her debtor paid her money, she could give a valid receipt, but if she gave a release

(acceptilatio) without receiving money, her acts had no effect. The authority of her tutor was necessary in certain cases e.g. in case of alienation of *res mancipi,* manumission of slave, making a will, acceptance of inheritance, bringing of *legis action* (legal actions), etc. Gaius tells us that women of full age could manage their own "affairs and the tutor's authority was merely formal in some cases. By the time of Gaius the *tutela* of women of full age became less important. By the famous *lex Papia Pappoea* a free woman who had three children and a freed woman who had four children escaped tutelage. This privilege was called the *jus liberorum.* The guardianship of women disappeared when Theodosius and Honorius granted *jus liberorum* to all the women of the Empire. *Lex Claudia* (47A. D) abolished the agnatic tutelage of women.

40. Curator :—Curators were appointed to manage the property and protect the interest of the following four kinds of persons :—

(1) *furiosi* (mad men),

(2) *prodigals* (spendthrifts),

(3) *cura minoris* (adolescents) i.e. persons of either sex above the age of puberty but below the age of twenty five,

(4) deaf and dumb persons.

Persons competent for the office of tutor might be appointed to work as curators. But the mother and grandmother though they might be tutors, were not qualified to act as curators to their children or grand-children. The tutor of a pupil on the expiry of the tutorship was not bound to be the curator of the same person. A father might name a curator to his children in his testament but it required confirmation by the magistrate. If no one was named in the testament, the magistrate appointed the curator having regard to the claims of the nearest relations.

(1) *Cura of furiosi.*—A *furiosus* is a lunatic. The Twelve Tables placed such persons under the care of their nearest

agnates and if there were no agnates, under the *cura* of their *gentiles*. The curator had the custody of the person as well as the property of the lunatic. As the lunatic was incapable of giving his consent, the curator transacted all business in his own name. In his lucid intervals the curator ceased to act but on relapse the *cura* survived. The praetor extended a similar *cura* to other cases of mental desease or incapacity and to some forms of physical disorder. For maladministration an *actio negotiorum gestorum* lay against the curator.

(2) *Cura* for prodigals.—A *prodigi* is a spendthrift person. The Twelve Tables placed such a person under *cura*, so that he could not waste the property received on intestacy. After a preliminary enquiry by the magistrate, the *prodigi* was prohibited from the management of his affairs. The magistrate appointed a curator for him on the petition of his relatives. He administered all the affairs. Usually one of his relatives was appointed in the post. The remedy for maladministration by the curator was an *actio negotiorum gestorum.*

(3) *Cura minoris (adolescents).*—The adolescent were *sui juris* who attained puberty but they being under twenty five were regarded as still entitled to protection. In early law there was no provision to place them under guardians but later such a provision was made. According to civil law they had full legal capacity to conclude juristic act without the consensus of curator. Even down to the time of Justinian the law did not require them to have a curator except in a law suit. When the minor was involved in a law suit, a curator *ad litem* (for the suit) was appointed by the judge. In fact, however, they had curators to look after their interests by reason of the *lex Plaetoria.* This law provided that any person who would comit fraud or exercise undue influence against persons under twenty five would be subjected to criminal prosecution and later an *exceptio* or equitable plea was allowed as a defence by the statute (*exceptio legis plaetoriae)* which enabled a minor

to defend with success an action to enforce a transaction into which the minor had entered through the undue influence of the other party. The praetor also introduced a new machinery known as *restitutio in integrum* by which he allowed transactions to be set aside by minors merely on the ground of minority, provided an application for setting aside the transaction was made within one year from the cause of action. The tradesmen naturally became unwilling to enter into any dealings with such 'favourites of the law' unless they were represented by some elder person, whose consensus or approval was an absolute protection to the tradesmen and a complete answer to any subsequent charge. For these reasons, most minors had curators who were forced upon them if they wished to enter into commercial relations. Marcus Aurelius enacted that a minor might on mere application to the magistrate obtain a permanent curator of his property. The curator served till the minor attained twenty five.

(4) Cura for dumb and other persons.—By the time of Justinian the following classes of persons were able to obtain a curator on application to the court, for some infirmity peculiar to themselves :—

(i) Deaf,

(ii) dumb,

(iii) persons of weak mind,

(iv) persons subject to incurable malady, and

(v) idiots.

41. Comparison between tutor and curator :—The two institutions had the following points of similarity in Justinian's time :—

(1) Tutors and curators were appointed by the same magistrates.

(2) Both were obliged to take an inventory on entering into office.

(3) Both were bound to accept and continue in office unless some good ground of excuse could be shown.

(4) Like a tutor, a curator had to give security in certain cases e.g. a curator *legitimus*, but not one appointed after proper inquiry.

(5) Both were liable to account for wrong doing or negligence.

(6) Both might be removed for misconduct by the *accusatio suspecti.*

(7) A curator was unable, without the leave of the magistrate, to alienate the ward's property of any considerable value, and his own property was subject to a statutory mortgage inthe same manner as in the case of a tutor.

Contrast between tutor and curator.—The two institutions differed in the following :—

(1) The tutors were appointed for *impubes* (infants) upto the age of puberty, whereas the curators were appointed for minors upto the age of 25.

(2) The tutors removed the pupil's legal incapacity by *auctoritatis interpositio* when any juristic act had to be done, whereas the curators had no such *auctoritatis interpositio.*

(3) The tutor had the custody of both the person and the property of the minor whereas the curator at most was concerned with the ward's proprietary rights, but in case of a lunatic both his person and property were placed under the charge of a curator.

(4) A tutor could be appointed by testament but a curator could never validly be appointed by testament. If a curator was appointed by a testament, it required confirmation by the magistrate.

(5) A mother or a grandmother could bes a tutor, but not a curator.

42. Restitutio in integram :—This was the technical name of the discretionary power exercised by the praetor. In exercise of this power he would, on the application of the aggrieved party, set aside a transaction on the ground of minority, fraud *(dolus)*, duress *(metus)*, mistake or absence and would place the party in the position in which he would have been if the transaction had not been carried out.
