INTRODUCTION TO ROMAN LAW

BY THE LATE
WILLIAM A. HUNTER. M.A. LL.D

NINTH EDITION

SWEET & MAXWELL, LIMITED
LONDON

INTRODUCTION
TO
ROMAN LAW

BY THE LATE
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Roman Law, in the Order of a Code

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EDITOR'S NOTE

EXTENSIVE alterations have been made in this edition, principally on pp. 49-50, 52-55, 83-84, 99-100, 101-102, 110-111, 112-113, 181, 182, 183. I have also ventured to return to the order used by Gaius and Justinian in their treatment of the particular contracts. The account of ownership and possession may perhaps be found difficult, but the difficulty is inherent in the subjects themselves, and could not have been avoided except at the cost of superficiality and inaccuracy. As some compensation, I have omitted detail which appeared to be out of place in an introductory book. I hope the changes have not detracted too much from the ease and clarity which were such outstanding qualities of Dr Hunter's work.

MERTON COLLEGE
OXFORD, *March* 1934

PREFACE TO FIRST EDITION

THIS book is intended to serve as an introduction to the study of Roman Law, and to give adequate information to those who require a mere elementary knowledge of the subject. On the points of leading importance, a comparison is instituted between the English and Roman Law.

The matter of this book is to a large extent the same as the Institutes of Justinian, but with two exceptions. I have omitted many particulars that were useful to the persons for whom the Institutes were written but are of little value to a student of modern law. On the other hand—especially in the Law of Property and Contract—the glaring deficiencies of the Institutes are largely supplemented. The object that has been kept in view is to put the student in possession of such information and legal principles as will enable him to acquire a more intelligent comprehension of modern law.

The arrangement follows the order of the Roman Institutional writers. They arranged law in three groups: (1) law concerning persons; (2) law concerning things; and (3) law concerning actions. Practically they sub-divided " things " into : (1) pro-

perty; (2) obligation; (3) inheritance. "Inheritance" is discussed in the Institutes after "property," and before "obligation"; but it is more convenient to take it after "obligation."

As the present work is intended to serve as a companion to the Institutes of Justinian, the arrangement of Justinian has been, with that exception, substantially followed.

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INTRODUCTION TO ROMAN LAW

CHAPTER I

HISTORY OF ROMAN LAW

Historical value of Roman Law

THE Roman Law presents two aspects, each deserving the attention of the student of Jurisprudence. It furnishes the basis of much of the law of Europe, and has long proved an almost inexhaustible storehouse of legal principles. In the history of legal conceptions, again, it occupies a position of unique value. It forms a connecting link between the institutions of our Aryan forefathers and the complex organisation of modern society. Its ancient records carry us back to the dawn of civil jurisdiction; and, as we trace its course for more than a thousand years, there is exhibited a panorama of legal development such as cannot be matched in the history of the laws of any other people.

The Priest and the Jurisconsult

At a relatively early stage the Romans made a great advance as compared with some other ancient peoples: they separated law from religious rites and moral rules. The Babylonian code of Hammurabi, indeed, by more than a thousand years the oldest of known codes, is occupied exclusively with civil law; but the laws ascribed to Manu and to Moses have not emerged from the confusion of legal and religious conceptions. Though there are not wanting indications of the influence of religious conceptions on

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Roman Law, yet at an early stage the practical Roman mind had drawn a clear line between the office of the priest and the office of the jurisconsult. On the establishment of the Republic it was not possible for the consuls, owing to the technical character of the law, to dispense with the assistance of the College of Pontiffs. The institution of the censorship, however, in 443 B.C., marked definitively the separation of morals from law, and may not have been without practical influence on the relations of religion and law in the legal work of the Pontiffs. The formal severance of the Pontiffs from the legal administration did not take place till shortly after the middle of the fifth century of the City (289 B.C.); while their influence on the law continued to be felt down to the time of Cicero. Yet the release of the law from the direct influence of the Pontiffs—influence inevitable and most valuable in its time—and the freer operation of popular influences, and especially the opening of a legal career to persons outside the privileged corporation of Pontiffs, proved a most important development. To this reform may be ascribed in no slight degree the relatively early and rapid progress of the legal institutions of Rome.

Law of Nature

The Roman genius was essentially practical; to the speculative or theoretical side of Jurisprudence it made no contribution; indeed, such was its poverty in this respect that it was constrained to import from Greece elementary notions in respect to the foundations of law. The Stoics said the whole duty of man was summed up in one sentence—to act according to nature. By nature they meant a some-

what vague notion of the universe as governed by law, on the moral as well as on the physical side. In looking for such a law, men sought what was common or universal, and not what was peculiar to different communities. It happened that in Rome, when the Stoic philosophy was first introduced (about the middle of the second century before Christ), the distinction between the law peculiar to Roman citizens (*jus civile*) and the law in general use among civilised peoples (*jus gentium*) was sharply accentuated. The jurists seized the notion of a law of nature and proceeded to identify it with the *jus gentium*, so that the two phrases become convertible, with but one exception: the Stoic morality affirmed that slavery could not be attributed to Nature, although it was unquestionably a part of the *jus gentium*. [The law of nature appears in the legal writings of the Romans as a sort of intellectual garnish, which had no real connection with the Roman Law. It is an idea that explains nothing and illuminates nothing.]

Leges regiae

The Roman writers were in the habit of ascribing to the Kings such fragments of apparently very ancient law as they found in their researches. A number of these fragments have been collected from various authors by the diligence of modern inquirers.

Jus Civile Papirianum

The compilation known as *Jus Civile Papirianum*, consisting mainly of religious rules, is attributed by Pomponius (a great jurist of the time of Hadrian: D. 1. 2. 2. 2.) to Sextus Papirius, who is said to have lived in the time of the last King, Tarquinius Superbus; but it is now assigned to a date not

earlier than the third century before Christ. We have no authentic documents of the law from the period of the Kings.

XII Tables

After a prolonged agitation, a commission of ten (*Decemviri*) was appointed in place of consuls for the year 451 B.C., charged specially to draw up laws (*legibus scribendis*); and they drew up ten "Tables." The commission was reconstituted for next year, and added two Tables. If it be true that a delegation of three members had been despatched to Greece (or to Magna Graecia) to obtain suggestions, especially from the legislation of Solon, there remain but very scanty and doubtful traces of Greek law in the fragments that have come down to us. The XII Tables, as we possess them, have been pieced together from passages gathered from the remaining literature, especially from the writings of jurisconsults and grammarians, the order being determined by various indications. The law they contain is usually considered to be the *customary* law of the time, though some scholars maintain that it was the *existing* law generally, and others hold that they were framed with the view of giving a system of law really consonant with the nominally achieved Republican constitution. If new laws were to be accepted from Greek States, and if (as Pomponius says) the Decemvirs received full power not only to interpret but also to amend the laws (*datumque est iis jus eo anno in civitate summum uti leges et corrigerent, si opus esset, et interpretarentur*), it seems rather unlikely that they restricted themselves to a mere codification of existing customs. Cicero calls the XII Tables "legum fontes

et capita," and says that down to his time they were learned as lessons in the schools. Recent attempts to bring down their date a century and a half, and even two centuries and a half, have been strongly resisted.

Though the XII Tables undoubtedly consist of law mainly, if not absolutely, of indigenous growth, yet they do not give us the oldest law of Rome. Three centuries intervene between the reputed founding of the city and the XII Tables. During this period, perhaps even earlier, the fundamental institutions of Rome were already undergoing a process of decay. The autonomy of the family, and the absolute authority of its head, were, in the middle of the fifth century before Christ, already shaken. The XII Tables contain provisions enabling a wife or a child to escape from that domestic thraldom upon which society in ancient Rome was based.

Ancient conservatism

One of the most striking features of ancient society is the extreme tenacity with which it adheres to its usages. In some cases the immobility of ancient law may be ascribed to the religious sanction with which it was clothed. The laws are attributed to some divine being, from whose statutes and ordinances it were impiety to depart. But, even when laws are attributed to a mere human legislator, there is still a profound dread of change. The attitude of primitive man towards the customs he has been taught to observe is the counterpart of his timidity in the presence of nature. Man is timid where a being of less intelligence would be calm, because he perceives countless possibilities of suffering and calamity from

the movement of the forces of nature, while yet his experience is too narrow to enable him to tell where evil will arise, and how it may be prevented. Thus, in a backward state of society, any change in the law is both feared and disliked. But in a progressive community an expansion and growth of law is essential. How that is to be accomplished is the problem of vital interest.

Agencies of Development

The agencies whereby the Roman law was developed—whereby the scanty rules of the early age of the Republic grew into the *Corpus Juris Civilis* as it was left by Justinian—were three in number: Interpretation by the jurisconsults, Equity by the Praetor, and Legislation. In these three agencies there may be remarked a progressive openness in effecting changes in the law. The interpretation of the Pontiffs, if of wide scope, had but narrow publicity; and the later jurisconsults, while ostensibly they did not "make," but only "interpreted," the law, yet in numerous cases by their process of interpretation extracted out of the XII Tables a good deal that was never in them. The fact is that "interpretation" meant not merely the explanation of the contents of the law but also the adaptation of the law to the changing circumstances of the times. The Praetor, in succession to the Pontiffs, obtained the right to supplement, to develop, and even to amend the law, but his power was admitted within circumscribed, although somewhat indefinite, limits. Legislation, involving the direct and open change of law on account of its unfitness, although not unknown in early times, is the last to reach maturity. Under

Interpretation

Equity

Legislation

the Empire, this came to supersede both the other modes. It is worthy of remark that England affords a somewhat parallel case of development. Customary law, as exhibited in decided cases, Equity, and Legislation have appeared in the same order and fulfilled similar functions in England and in Rome.

Interpretation: The Jurisconsults

Jurisconsults

The College of Pontiffs was the repository of the law: the Pontiffs were the lawyers. Pomponius, in his brief account of the history of Roman Law, informs us that the custody of the XII Tables, the exclusive knowledge of the forms of procedure (*legis actiones*), and the right of interpreting the law, belonged to the College of Pontiffs. He goes on to say that this continued for a century and a half after the publication of the XII Tables, until Gnaeus Flavius, a clerk of Appius Claudius, who had written down the forms of actions, abstracted his master's book and published it (304 B.C.). This publication was known as the *Jus Flavianum*. It was received with very great satisfaction by the people; and 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 (300 B.C.), and with the formal severance of the College from the practical administration of the law (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 to profess publicly to give information on law.

Jus Flavianum

Writings of Jurisconsults

The first writer of an important law book seems to have been Sextus Aelius (consul, 198 B.C.). His work was entitled *Tripertita*, as consisting of three parts: the text of the XII Tables, and under each clause the interpretation of it and the form of procedure under it (*legis actio*). Half a century later Pomponius places three jurists (Publius Mucius, Brutus, and Manilius) whose writings were of such original importance that he says *fundaverunt jus civile*. Q. Mucius Scaevola (son of Publius Mucius; consul, 95 B.C., and Pontifex Maximus) was the first to digest the results of interpretation into a comprehensive and methodical system (*jus civile primus constituit*). C. Aquilius Gallus (colleague of Cicero in the praetorship, 66 B.C.) was a pupil of Scaevola; and Servius Sulpicius Rufus (*vir aetatis suae doctissimus*), whose writings exercised a long-abiding influence, was a pupil of Aquilius: both are mentioned in the Institutes of Justinian.

Responsa Prudentium

During the Republic it was entirely voluntary for a magistrate to receive, or for anyone to give, advice on law. Nevertheless the Praetor and the *judices* naturally welcomed such assistance as it was in the power of the jurisconsults to offer. But Augustus made a very important change: he introduced the principle of investing certain jurisconsults with the power to advise with the Emperor's authority (*ex auctoritate eius, publice* or *populo, respondere*). The first of these official, "licensed," or "patented" jurisconsults was Masurius Sabinus, who would seem to have been appointed by Tiberius when he was "Cæsar" (A.D. 4–14). This *jus respondendi* appears

to have been conferred very sparingly. But the imperial authority came to be extended to the writings of the jurisconsults, and hence an extraordinary impetus was given to the production of legal literature: the activity that followed during the first two and a half centuries of the Christian era evolved the rich store of juridical reasoning that constitutes the permanent value of the mature Roman law.

Law of Citations

The system begun under Augustus had one drawback. Jurisconsults might give different opinions, and how was the person hearing a cause to determine which was right? So marked became the divisions among jurisconsults that soon two rival schools grew up (called respectively Sabinians and Proculians), giving conflicting opinions on a considerable number of points of law. It was thus in the power of a Praetor or a *judex* in many cases to determine his judgment, either for plaintiff or for defendant, according as he chose to follow the Sabinians or the Proculians. Gaius refers to a partial remedy introduced by Hadrian (A.D. 117–138): where the licensed jurists were unanimous, their opinion had the force of statute (*legis vicem optinet*), and the *judex* was bound to follow it; but, if they were not unanimous, he was left, as before, to follow which opinion he chose. At a later period (A.D. 426) Theodosius II enacted a law, commonly called "The Law of Citations," providing that the writings of five jurists, Papinian, Paulus, Gaius (who had never possessed the *jus respondendi*), Ulpian, and Modestinus, as well as of earlier jurists of whom their works contained

citations (these to be verified by collation of manuscripts), should be quoted as authorities. If a majority of these held one opinion, that was to bind the judge ; if they were equally divided, the opinion of the illustrious Papinian was to be adopted.

Importance of Jurisconsults

From the manner in which the jurisconsults modified the law, it is extremely difficult to specify the changes that ought to be ascribed to them. By extensive and restrictive interpretation, by revision of earlier interpretations, and even by suggestions contrary to the terms of the existing law, they laboured to bring the older law into closer correspondence with the changing needs of their time. They supplemented the laws by numberless new doctrines. The Digest illustrates on every page how they cast the law into general statements or rules of remarkable precision and clearness (*jura condere, leges conscribere*). The more 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 : a glance at the Collections of Statutes and Constitutions shows how little relatively was the amount contributed by direct legislation.

Equity : The Praetor

The Praetor Urbanus

When the consulship was thrown open to plebeians by the Licinian laws of 367 B.C., the administration of justice was separated from the office and retained in the hands of the patricians. The new administrator

was elected under the same auspices and had the same *imperium* (except in military command) as the consuls, and he was called by the name that the consuls originally bore—the Praetor. His special function was to administer justice in the City (*qui jus in urbe diceret*), and hence he was designated Praetor Urbanus. Until the formal withdrawal of the Pontiffs from the legal administration, the Praetor, like the consuls before him, had the legal assistance of a member of the College, who may have even continued for some time to sit on the bench; and, even after the Pontiffs were confined to their purely religious duties, and the Praetor was invested with all the legal powers they had exercised, he no doubt had frequently to resort to their expert knowledge for advice.

The Praetor Peregrinus

With the growth of foreign trade the Praetor's work became too much for one man, and so about the year 242 B.C., a second Praetor was appointed to deal with cases between citizens and aliens, or between aliens alone. He became known later as the Praetor Peregrinus, or foreign Praetor. Subsequently other Praetors were appointed for various purposes, such as, to enforce trusts; but these Praetors of later creation were merely additional judges, and are not important for the development of Roman Law. It was otherwise with the Praetor Peregrinus, for whilst exercising the same indefinite powers as the Urban Praetor, he was less bound by tradition or strict law, and so was able to experiment with innovations which were later adopted by his colleague.

Praetor's Edict

The Praetor administered the law: he disclaimed making law. Yet his powers of interpretation and

amendment had a qualified or limited legislative effect. With him all legal proceedings commenced. His approval was necessary for the validity of the *formula*, in which the questions at issue between the parties were put into shape for investigation and decision by the *judex*. He conferred on the *judex* chosen by the parties that portion of the State's power which enabled him to give a binding decision between them. As the remedies or defences existing at civil law proved to be insufficient, he from time to time granted new ones, just as in the formative period of the English Common Law the Chancery gave new writs to intending suitors; and, as in English Law, the creation of new remedies meant the creation of new rights and new law. In a progressive community, where the wants of the people continually tended to go beyond the provisions of the law, it was inevitable that the Praetor should exercise on the growth of Roman Law an immediate influence far more powerful, as it was more direct and authoritative, than the influence of the jurisconsults. Being an officer invested with the *imperium*, he issued at the time of his taking office a Proclamation or Edict stating the rules by which he would guide himself in granting or refusing legal remedies. This Proclamation was called *Edictum Perpetuum*, as running on through the Praetor's year of office, and in contrast to temporary or occasional Proclamations, which were known as *Edicta Repentina*. Naturally each successive Praetor was content in the main to follow in the footsteps of his predecessors, and the portion of their Edict that he transferred to his own was called

Edictum tralaticium; and so the Edict became "perpetuum" as running on through the terms of successive Praetors. Until 67 B.C. there was no guarantee, except constitutional usage, that a Praetor would adhere during his term of office to the rules laid down in his own proclamation; but in that year a statute (*lex Cornelia de Edictis*) was passed, declaring it illegal for a Praetor to depart from his Edict. The growth of this *Edictum Perpetuum* continued vigorously for a century and a half after the Empire was established. Under Hadrian (A.D. 125–128), the great jurist Salvius Julianus revised it and consolidated it (possibly with the edicts of the *praetores peregrini* and of the provincial governors); then it was confirmed as law by a *senatusconsultum*, which further provided that, in case the Edict contained no remedy for a particular grievance, the principles of it should be followed in finding one. The Edict was now "perpetual" in the sense of being permanently fixed. This work of Julian may be taken to mark the end of Praetorian legal reform.

Jurisdiction of Praetor

The Praetor stands midway between the jurisconsults and the Legislature. His right to supplement and to amend the law was statutory, but practically it was not unlimited. He was girt round by a firm, although invisible and somewhat elastic, band. He may be viewed as the keeper of the conscience of the Roman people, as the person who was to determine in what cases the strict law was to give way to natural justice (*naturalis aequitas*). But even a wider authority than this was ascribed to him, for he was allowed to entertain general considerations of utility (*publica*

utilitas). A single example, however, may suffice to show that the Praetor's edict was confined within real, although indefinable, limits. The civil law traced succession exclusively through males, taking no account of emancipated children or of persons related to the deceased through females; it also prescribed a cumbrous form of will-making. The Praetor, though he gave possession of the estate (*bonorum possessio*) in proper cases to persons who could not take at civil law, could not make them heirs. It was only gradually, and probably only as he saw that public opinion was ripe for the change, that he protected them in their possession against the civil law heirs.

Results of Praetorian action

The chief results of the work of the Praetor may be summed up under three heads. It was the Praetor chiefly that admitted aliens within the pale of Roman Law. To him mainly is due the change by which the formalism of Roman Law was superseded by well-conceived rules giving effect to the real intentions of parties. And he took the first and most active share 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*.

Legislation

To give a full account of Roman legislation would be to write the constitutional history of Rome: suffice it here to mark a few distinctions that are of importance in looking at the historical development of Roman Law.

Legislation

During the Republic, the Popular Assembly was the fountain of legislation;[1] during the earlier history 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 Emperor.

Republican Assemblies

Comitia Curiata

During the Republic four Assemblies of the Roman people existed. The oldest was the *Comitia Curiata*. In the regal period this assembly consisted of the *populus Romanus* in its thirty curies (or family groups): it could meet only by summons of the King; it merely accepted or rejected the proposals submitted by him, without the right of discussion or of amendment; nor was any decision by it valid without the authorisation of the Senate. Under the Republic it rapidly fell into the background, though it formally existed, represented by thirty lictors, down into Imperial times: for the private law its main importance lay in its meetings under pontifical presidency to deal with matters of religious signifi-

[1] A statute (*lex*) is what the Roman people (*populus*) ordered, when asked by a senatorial magistrate—a Consul for instance.

A decree of the commons (*plebiscitum*) is what the commons (*plebs*) ordered, when asked by a magistrate of the commons—a Tribune for instance. The commons (*plebs*) differ from the people (*populus*), as species does from kind (genus); for the name "people" means the whole of the citizens, reckoning the patricians and senators as well, while the name "commons" means the rest of the citizens without the patricians and senators.

A *senatusconsultum* (decree of the Senate) is what the Senate orders and settles. After the Roman people grew so big that it was difficult to bring them together on one spot in order to ratify a law, it seemed reasonable that the Senate should be consulted instead of the people.

Comitia Centuriata

cance, such as adrogations and wills. The *Comitia Centuriata*, said to have been originated by the sixth King, Seruius Tullius, included the whole Roman people arranged in classes according to their wealth, so as to give the preponderating power to the richest. During the regal period it was a military organisation on the basis of property: under the Republic it became a legislative body, ousting the *Comitia Curiata*. The *Comitia Tributa* was the assembly of the whole Roman people in their tribes—a regional classification. In this assembly the influence of numbers predominated. The pressure of plebeian agitation had led to the creation of tribunes of the *plebs* (494 B.C.) for the protection of individual citizens from oppression, with the right to hold meetings of an assembly called the *Concilium Plebis*, which eventually became identical with the *Comitia Tributa*, except that it comprised only the plebeian members of the Roman people, without the patricians. The resolutions of this assembly (*plebiscita*) at first bound the plebeians only, but by an obscure development culminating in the passing of the *Lex Hortensia* of 287 B.C., they came to be binding as laws on the whole people, patricians and plebeians alike. Henceforth, then, *plebiscita* had precisely the same force as laws passed in the *Comitia*, and they are very often called by the same name *leges* (*e.g.*, *Lex Aquilia*). The legislation of these assemblies, however, was directed mainly to matters other than private law.

Comitia Tributa

Concilium Plebis

Senatus-consulta

The Senate was properly an advisory and administrative, not a legislative, body. Its influence on legislation in early times, appears to have been

restrictive rather than positive; and in later Republican times it occasionally dispensed with the observance of existing laws, an encroachment on the powers of the *Comitia* for which it usually sought indemnity. Occasionally, too, it would invite a tribune or a praetor to introduce a reform that it judged desirable. The change of law would then come into operation by way of legislation in the popular assemblies or through the edict. Even this indirect legislative activity of the Senate is of little account till the Empire, when it became prolific mainly from the reign of Claudius (A.D. 41) to the reign of Septimius Severus (A.D. 193–211). From about A.D. 150 *senatusconsulta* were employed to effect direct alterations in the law. But throughout the period of the early Empire they were essentially Imperial laws under a thin Republican disguise. The Emperor controlled the membership of the Senate and could force it to do his will. He naturally preferred it as a legislative instrument to the unwieldy and sometimes refractory popular assemblies.

Imperial legislation

The sovereign power in law-making was exercised by the Emperors in three ways: (1) by direct legislation (*edicta*), (2) by judgments in their capacity as the Supreme Tribunal (*decreta*), and (3) by *epistolae* or *rescripta*, giving advice on questions of law in answer to inferior judges (from provincial governors downwards) and to private inquirers. Imperial legislative acts of all kinds are included under the general name of *constitutiones*. Both Gaius and Justinian say that the Emperor's authority to make law was conferred on him by statute (*lex regia, quae*

de imperio eius lata est) at the beginning of each reign; but there are serious difficulties in the way of accepting this theory, and it seems more satisfactory to hold that his legislative power was derived from mere usage and from the fact there was no one else to dispute it.

Codification

Earlier Codes

Collections of records of the law were made at different times. The Twelve Tables are often loosely designated a Code. The Praetor's Edict, though not itself a "codex," nevertheless suggested the arrangement of subsequent codes. Julius Cæsar is said to have formed a project for codifying the law, but it was frustrated by his death. The first collection of Imperial statutes (of the Divi Fratres, Marcus Aurelius, and Commodus: A.D. 161–193) was made in twenty books by the jurist Papirius Justus towards the end of the second century. The *Codex Gregorianus*, which contained constitutions probably from Hadrian (though its earliest authentic constitution dates A.D. 196) down to A.D. 295, was compiled under Diocletian. The *Codex Hermogenianus* was probably a supplement to the *Codex Gregorianus*: its constitutions date from 291 to 365. The first edition appeared between 314 and 324; the last probably in 365. Only about 100 constitutions of these two Codes have come down to us; yet they no doubt furnished the Code of Justinian with the constitutions earlier than Constantine. The *Codex Theodosianus* was promulgated in 438 by Theodosius II in the Eastern Empire and in 439 by Valentinian III in the Western

Empire. It contained the constitutions from the time of Constantine onwards, disposed in sixteen books divided into titles, the constitutions being given in chronological order in each title. It is estimated that some 450 constitutions of the first five books are lost. The Code was intended to cover "the whole field of law, private and public, civil and criminal, fiscal and municipal, military and ecclesiastical." The private law is treated in Books II to V.

Justinian's Codification

The reign of Justinian marks the culminating period of Roman Law. By a very remarkable series of enactments, Justinian accomplished a marvellous work of consolidation and amendment in cutting away anomalies and giving completeness and symmetry to the body of the law. The chief minister in these reforms was Tribonian, Quaestor of the Palace, who died A.D. 545. Justinian was scarcely seated on the throne at Constantinople when he began the work that has given him such renown. On the 15th Feb. 528, he appointed a commission of ten members to draw up a Code of the existing constitutions. In little more than a year (7th April 529) the work was done. A second edition (*Codex repetitae praelectionis*) was issued on 16th Nov. 534. The first edition, called *Codex Vetus*, has been entirely lost. The Code that we have is the second edition.

Digest or Pandects

On the 15th Dec. 530, a commission of sixteen members with Tribonian at their head was appointed for a new task—nothing less than to bring within a moderate compass and to arrange in order the vast accumulation of law that had grown up under the hands of Jurisconsults and Praetors. The commission

proceeded to deal with the works of some forty jurists, consisting of nearly 2000 books, and more than 3,000,000 lines. In the course of only three years this pile of material was sifted and reduced to about one-twentieth of its original bulk. The scraps or fragments of the jurists were placed under titles, and these were collected in fifty divisions or books. The titles are arranged in the order of the topics of the *Edictum Perpetuum* as it was shaped by Salvius Julianus. The arrangement of the fragments under the titles seems to have been mechanical. The commission divided the writings of the jurists into three classes, and assigned each class to a separate sub-committee. The first class, called Sabinian, embraced all the systematic treatises on *jus civile*; the second, called Edictal, consisted of commentaries on the edicts of the Praetor and the Aediles; the third, called Papinian, was formed of the writings of Papinian and the record of cases. Each sub-committee arranged its collections independently, and when they came together to arrange the titles, they took for the first group that which had the most numerous, and for the last that which had the least numerous, fragments. Such at least is the conclusion that has been drawn with much ingenuity by a German jurist (Bluhme) from the distribution of the fragments. The finished work was called *Digesta* or *Pandectae*, and on the 30th Dec. 533 it obtained the force of law.

Bluhme's discovery

Institutes

In the beginning of 533, a new commission was appointed of law-professors and advocates to prepare an elementary or preparatory text-book. The commission adopted the Institutes of Gaius as a ground-

work, and the Institutes of Justinian are little more than a new edition of Gaius, with such omissions and additions as were necessitated by the lapse of more than three and a half centuries. The Institutes of Gaius were recovered in 1816 by Niebuhr. Of Gaius himself hardly anything is known. Even his name is lost, Gaius being merely a praenomen. Notwithstanding the *lacunae* that still exist, his work is valuable in reference to the antiquities of Roman Law.

In the preparation of the Digest, many controverted points of the old law turned up, some of which were referred to Justinian for decision. The decisions upon them, fifty in number, appear to have been collected separately, and called the *Quinquaginta Decisiones*. They were incorporated in the second edition of the Code.

Justinian found his zeal for law reform by no means stifled by these great works, and some of the most important enactments, especially relating to intestate succession, were published afterwards. These subsequent laws are called *Novellae*. Novels

For the present purpose it is not necessary to go beyond the legislation of Justinian. But it is not to be forgotten that a government continuously descended from that of ancient Rome was carried on at Constantinople, and that the Roman Law was observed and taught and practised there, down to 1453, when that city was captured and held by the Turks; that the Roman Law passed with the Roman arms over the whole of western and southern Europe,

and, with the colonists of Latin race, to the continent of America; and that even at the present day it lies at the foundation of the law in most of the European nations. Its influence on English and American Law, though not so predominant, has nevertheless been appreciable.

CHAPTER II

THE LAW OF PERSONS

SECTION I—SLAVES AND FREEDMEN

General Character of Ancient Slavery

THE institution of slavery is ancient and world-wide, but it varied greatly in character and oppressiveness. In the simple life of primitive communities, East and West alike, the slave was practically an inferior servant: there was no reason, except the cruel spirit of a master, why he should be treated otherwise. The practice approximated to the later Stoic view as expressed by Chrysippus, that the slave is a labourer hired for life (*perpetuus mercenarius*). But the growth of commercial interests, the increase of luxury, and the stress of life, tended to mar the humaner relations of a less strenuous time; and, though many masters and their stewards might be personally not unkind, yet even the commercial interest in a slave needed to be reinforced by a strong public sense of humanity. The indulgence shown to the slave by Hindu law and in Egyptian practice contrasts strikingly with the harsh theory and practice of the Roman people. Yet Roman slavery, at its worst, was a humane institution compared with the slavery of some countries in mediæval and even in modern times. In Rome the difference between master and slave was not embittered by prejudices of race or of colour. Slaves were largely of the same race as their masters—

not seldom well educated, and filling posts of a high and confidential nature. Slavery was regarded as an accident or misfortune that might befall any man, not as the natural and indelible condition of an inferior race.

Legal position of Slave

Ancient law makes little difference between sons, wives, and slaves; and in the olden times, when Rome consisted of a small colony of peasant proprietors, few of whom would be rich enough to possess slaves, slavery was a domestic institution, and the slave, in no trivial sense, a member of the family. The children, the wife, and the slaves of a Roman head of a house (*paterfamilias*) were equally subject to his unrestricted power (*vitæ necisque potestas*), and equally outside the jurisdiction of the State. If any of them did wrong, not they, but the head of their house, had to answer for it in the Courts of the State. In compensation for this liability, he had the power to surrender the offending person in satisfaction to the complainant (*noxalis deditio*).

Amelioration of Slavery

The rise of the imperial power in Rome and the spread of luxury and demoralisation were largely counterbalanced in favour of the slave by the extended knowledge and practice of Stoic ethical doctrines, which actuated all the great lawyers from the early part of the last century of the Republic and inspired the legislation of the Antonines. Before the end of the Republic, a statute (*Lex Cornelia*, 81 B.C.) was passed, making it murder for a person other than the owner to kill a slave, but it was reserved for the Emperor Claudius (A.D. 41–54) to make the crime equally murder when it was committed by the

master. Antoninus Pius signalised his reign by a law providing that masters that ill-used their slaves should be forced to sell them; it was even, he said, for the interest of masters themselves that relief should not be denied to the victims of cruelty, or starvation, or unbearable ill-usage. But, although thus protected from ill-treatment, slaves were not entitled to the privilege of family life or to rights of property. A union between a male and a female slave (*contubernium*) was not a marriage; but the offspring, if they afterwards acquired their freedom, were recognised by the law as related in blood. The philosopher Seneca, one of the advisers of Nero, had expressed the view that in public auctions of slaves brother ought not to be separated from brother; and Constantine enacted the humane principle of keeping together children and parents, brothers and brothers, wives and husbands. Under the title of *peculium*, a slave, with his master's permission, might have the enjoyment of property. Whatever a slave might have as *peculium*, whether the savings from exceptional industry, or gifts as a reward of extraordinary services, was protected by custom and public opinion, although not by law. This protection seems to have sufficed, for the cases were not rare in which the slave was able to buy his freedom out of the accumulations of his *peculium*.

Peculium

Persons were sometimes made slaves as a punishment for crimes or for civil wrongs; but some of these cases had become obsolete before Justinian, some were abolished by him, and only two were left by him—the case where a freedman showed ingrati-

Captives in War

tude to his patron, and the case where a freedman over twenty years of age fraudulently allowed himself to be sold in order to share the price. But the two chief sources of the supply of slaves were capture in war, and birth. According to the barbarous law of war in ancient times, every prisoner of war was made a slave.[1] This was justified on the ground that it was an improvement upon the still more ancient practice of putting all prisoners of war to death.

Slavery by Birth

Again, slavery was hereditary. The children of a female slave were the slaves of her master. It was immaterial whether the father was free or a slave. But though hereditary, slavery was not indelible. Slaves might be manumitted by their masters, and admitted as citizens of Rome.

Formal Manumission

During the Republic, manumission was a formal act (*publica, sollemnis, legitima, justa*), having the two-fold effect of releasing a slave from servitude and enrolling him among the citizens. It required the concurrence of the master and of a magistrate as

Censu

representing the State. The inscription of the slave's name, by his master's direction, on the roll of citizens by the Censor at the quinquennial census was a mode that ceased early in the Empire, practically with the cessation of the censorship as a separate magistrature

[1] A Roman captured by the enemy was considered by the Roman Law to be lawfully a slave. But if he effected his escape, and returned to his own country, he was placed, according to the fiction of *postliminium*, as far as possible in the same position as if he had never been captured. If a *paterfamilias*, he recovered the *potestas* over his family, and the episode of slavery was for the purposes of law obliterated. The doctrine of *postliminium* was also applied to property taken by an enemy, when recovered.

(22 B.C.). It presupposed the freedom of the slave, and gave validity to the expressed will of the master. But the principal modes were two—one by which the slave was freed in the lifetime of the master, the other whereby freedom was bequeathed as a legacy. The first was called manumission *vindictâ*, a fictitious suit (*causa liberalis*), in which a person (*adsertor libertatis*) claimed that the slave was freeborn by laying on him a rod (*vindicta* or *festuca*), the symbol of ownership. The master did not dispute the claim, the magistrate made a decree establishing the freedom of the slave, and then the master touched the slave with the rod, and, turning him round three times, let him go. The formalities were gradually curtailed; and in the time of Gaius manumission could take place, not only in court, but wherever the magistrate happened to be. Originally testaments were made in the Comitia Calata, probably by the authorisation of the people in the usual form of legislation. In this case the consent of the master and the authority of the people combined to enable a testator to confer freedom and citizenship on his slave. This privilege was continued when the testament was not made in the Comitia, but became a private act. A fourth formal mode appears in an enactment of Constantine (A.D. 316) as already in use—manumission in church (*in sacrosanctis ecclesiis*). The master declared to the bishop in presence of the congregation his desire that the slave should be free.

Vindictâ

Testamento

In sacrosanctis ecclesiis

At first no other mode of manumission than the three Republican modes was allowed. The clearest expression of a master's intention to liberate his

Non-formal Manumission

slave had no effect unless it was clothed with the proper legal formalities. This led to inconvenient results. If there were a flaw in the manumission, or if the manumission were non-formal, a master might respect his own intention and allow his slave to live in freedom, but his heir, standing on the strict technicality of law, might reclaim him into slavery. At some time not precisely known the Praetor interfered to protect the liberated slave in the enjoyment of his personal freedom, although not of his property. In A.D. 19 (if not earlier) the *Lex Junia Norbana* declared that persons so imperfectly manumitted should enjoy some further rights—almost, but not quite the same as *Latini coloniarii*. They were henceforth called *Latini Juniani*. They were free, but not full citizens: they were allowed a limited *commercium*; but they could neither make a valid Roman will nor take under such a will; nor could they be appointed guardians by will. They might, however, eventually attain full citizenship, by various forms of public service. If the slave had before manumission been put in chains as a punishment, or otherwise dealt with as a debased person, the *Lex Aelia Sentia* (A.D. 4) provided that when manumitted he should be subject to the disabilities of *peregrini dediticii* (foreigners that had fought against the Romans and had surrendered), and be incapable of ever becoming a citizen. Before the time of Justinian, however, this portion of the Lex Aelia Sentia had fallen into disuse, and the name of Latins was rarely heard. Justinian formally abolished both Latini Juniani and Dediticii, and enacted that whenever a

Latini Juniani

Dediticii

master desired to give freedom to his slave, whether the old forms were observed or not, the slave should become a citizen as well as free.

Restraints on Manumission

In the time of Justinian a master was not restricted in the number of slaves he might manumit, unless, as had been provided by the Lex Aelia Sentia, he released them with both the intention and the effect of defrauding his creditors. The other provisions of the same statute requiring a master to be twenty and the slave thirty years of age, unless for special reasons manumission was allowed by an official board (*concilium*), were repealed by him; and he allowed a man to dispose of his slaves (as of his other property) *by will*, first at the age of seventeen, and afterwards at the age of fourteen. The *Lex Fufia Caninia* (A.D. 8), which prohibited a master from manumitting by will (though not from manumitting in any other manner) more than a certain proportion of his slaves, was also swept away by Justinian (A.D. 528).

Patron's Rights

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 patron (*patronus*) and freedman (*libertus*). The freedman could not sue his patron without first obtaining the consent of the Praetor. The freedman, if he had the means, was bound to support his patron if he fell into poverty. If the freedman had no children of his own, he was bound to leave a portion of his property to his patron; and if he died without a will and without children, his patron inherited all his estate. Besides, it was usual, as the price of the slave's freedom, that

the master should stipulate for a certain amount of work from the freedman. Generally, the freedman worked so many hours in each day. If the patron did not find him food and clothes, he must allow him sufficient time to procure a maintenance for himself. The kind of work was the same as the freedman had been accustomed to as a slave, or any trade he might afterwards learn.

Section II—Parent and Child

Powers of Paterfamilias

The powers enjoyed by the head of a household in Rome over his children (*patria potestas*) are scarcely, if we look to the earlier period of the Republic, distinguishable from the rights he exercised over a slave. The paterfamilias had, to use the language of the old law, the power of life and death (*jus vitae necisque*). While his father lived, a son, however mature his age, and however high his official position, could neither hold property nor marry without his father's consent. But the father could not interfere with his son in the sphere of his public duties; indeed, the father might be under the son's jurisdiction as general or magistrate. In early times the father could sell his children; and a provision of the XII Tables, declaring the paternal power to be forfeited if the father sold his son thrice, was turned by the ingenuity of the jurisconsults into a means of emancipation. While the Republic lasted, the paternal power was restrained only by public opinion; but under the Empire, it was curbed by the stronger hand of the law.

Thus, under Trajan a father guilty of gross cruelty

to his son was compelled to emancipate him. Under Hadrian a father who killed his son under the severest provocation was banished. Ulpian lays it down that a father may not kill his son, but must bring his case into court; and about the same time the Emperor Alexander (A.D. 227) treated the father's powers as no more than a simple flogging, unless with judicial concurrence. Constantine enacted (A.D. 318), that if a father slew his son he should suffer the death of a parricide, that is, be tied up in a sack with a viper, a cock, and an ape, and be thrown into water and drowned. A statute of A.D. 374 made the exposure of infants a crime.

Separate Property of Children

Considerable progress also was made under the Empire in conferring upon children under the father's power partial rights of property. Thus a son was allowed to keep as his separate property whatever he acquired as a soldier (*peculium castrense*); and a similar privilege, under the name of *peculium quasi-castrense*, was extended by Constantine (A.D. 320) and by succeeding Emperors to officials of the civil service in respect of their salaries, and eventually to the incomes of the clergy. Finally, Justinian enacted that the father should take only a life interest in respect of every acquisition of a child from other sources, except what the child obtained through using his father's property (*peculium profecticium*). Acquisitions from such other sources were called *bona adventicia*.

Constitution of Roman Family

The Roman family, in the eye of the law, was based on the paternal power. It formed an *imperium in imperio* older than the State. The Roman's house

was, in the strictest sense, his castle. The officers of the State did not dare to cross his threshold, and assumed no power to interfere within his doors. The head of the family was its sole representative; he alone had a *locus standi* in the tribunals of the State. If a wrong was done by or to any member of the family, he and not they must answer for it, or demand compensation; if property gained by them were appropriated by another, he, and not they, could reclaim it; if a contract was made with one of them, he alone could sue upon it. The family lived under one roof, had one purse, one altar and one worship. It was this common life and jurisdiction that constituted in the eyes of the early Roman the very essence of the family. A daughter marrying in such a way as to come into the *manus* of her husband, and thus becoming subject to a different authority, was no longer regarded (for legal purposes) as a member of the family in which she was born. In any event, whether her marriage was accompanied by *manus* or not, her children were strangers to her father's hearth, and not legally of kin to those that continued under his roof. Again, sons released from their father's power by emancipation ceased to be members of his family. On the other hand, grandchildren descended from sons unemancipated were in the power of their grandfather, while he lived, and fell on his death under the power of their own father. Even strangers by birth could become members of the family by adoption, and the law originally recognised no difference between them and the offspring of the head of the house.

The paternal power was acquired—(1) by birth, (2) by legitimation, and (3) by adoption. The offspring of a legal marriage were in the power of their father. To this union only citizens, or specially privileged aliens who had received a grant of *conubium*, could be parties; otherwise the union was recognised as a marriage for many purposes, but not for giving the *patria potestas* to the father. From time to time multifarious public services were admitted as grounds for the advance of Latini Juniani to the full citizenship, and thus to the rights contained in the *patria potestas*; and elaborate rules were applied for the rectification of such mistakes about the status of either party to a marriage as prevented the husband from enjoying the *patria potestas* over his children. Caracalla (A.D. 212) extended Roman citizenship to all the free subjects of Rome, and accordingly, in the later Roman Law, questions as to citizenship rarely arose. Constantine introduced *legitimatio per subsequens matrimonium*, by which children born in concubinage (*concubinatus*) fell under the power of their father by his subsequent marriage with their mother. Owing to various causes a species of morganatic marriage had grown up in Rome. The legal marriage of the Romans was impeded at different periods by arbitrary restrictions, within which the impulses of human affection could not always be confined. A son or daughter could never marry without their father's consent; and at one time marriage was forbidden between the freeborn and freedmen or freedwomen. Such restrictions did not apply to concubinage, which was, like marriage, a permanent union of one man with one woman,

Acquisition of *potestas*

Legitimation

although considered not so honourable, especially on the part of the woman. Under Justinian, there must have been no legal obstacles to their marrying, if they had chosen to marry. It was to children born of such a union, and to them only, that this legitimation applied. By the subsequent marriage of their parents, they fell under the power of their father.

Adoption

Until Justinian altered the law, adoption was a mode of acquiring *potestas*. He enacted that it should continue to have that effect only when a father adopted a child, or a grandfather adopted a grandchild; and that in all other cases adoption should no longer confer the *potestas*, but give the adopted child merely a right of succession in case the adopter died without leaving a will. In the time of Justinian adoption was nearly as much out of harmony with the requirements of social life as it is now. But adoption occupies an interesting place in the history of law. It formed an intermediate stage of progress between the ancient law, which recognised nothing but intestate succession, and the later law, which possessed in the Will a more perfect instrument to settle the devolution of an inheritance. The oldest form of adoption (*adrogatio*) was effected at first by the legislative authority of the Comitia Calata. Only persons that were not under any one's power (*sui juris*) could be adopted in this way. By taking advantage of the provision of the XII Tables declaring a forfeiture of the *potestas* if the father thrice sold a son, and by calling in aid a fictitious suit (*cessio in jure*), persons were enabled to adopt those that were *alieni juris*, that is, under some one's power. In later

times, arrogation was effected by rescript of the Emperor (from A.D. 293 the only mode), and simple adoption by a declaration in the presence of a magistrate.

Emancipation

The paternal power was dissolved by the death of the paterfamilias, or by any event that deprived either father or child of the status of a Roman citizen. It could also be terminated at the will of the father, by a declaration before a magistrate. This simple act replaced the elaborate proceedings that anciently were required for the emancipation of a child. Here it may be sufficient to observe, without going into somewhat intricate detail, that the last stage in the process of emancipating a son was precisely the same as occurred in the manumission of a slave. From this a singular consequence followed. The duties and rights of an emancipated son were identical, except in one point, with those of a freedman: the father could not exact a promise of work from his son; the son owed his father reverence, said the Praetor, not menial work. The emancipated son could not sue his father, except in a fit case, and with the leave of the Praetor; he was bound to maintain an indigent father. The father, in like manner, was bound to support an indigent son. The relation of a father to an emancipated son governed the wider relation of parent and child. The obligations between a parent and child, where the *potestas* did not exist, were the same as the obligations between a father and his emancipated child.[1]

[1] *Capitis deminutio.*—*Caput* included three elements, freedom, citizenship, and family rights. The loss of freedom, as when a

Section III—Husband and Wife

Wives *in manu*

While the powers of the Roman father over his children appeared even to the Romans themselves as singular, the relation that subsisted between husband and wife during the greater portion of the Republic and the whole of the Empire presents in a different way an equally conspicuous contrast with the laws generally prevailing in Christendom. There was, indeed, a stage in the history of Rome when the position of a wife was almost identical with that of a slave or of a child under the paternal power. A wife *in manu viri* could enjoy no rights of property (beyond a *peculium*), and she was described, not inaccurately, from a technical point of view, as the daughter of her husband (*filiae loco*). There is no specific example of the husband's legal exercise of the *jus* (or *potestas*) *vitae necisque*: Papinian, indeed, is reported as laying it down that the husband had no such right: in case of a serious charge (infidelity or drunkenness), the wrath of the husband was tempered by the advice of a family council. Nor is there any record of the sale of a wife, except by way of fiction in a form of release from the *manus*.

Creation of *manus*

The marital power (*manus*) appears under two aspects. On the one hand it had a reverential and religious aspect. It might be created by a very

person was captured by an enemy, was *maxima deminutio capitis*. The loss of citizenship, as by the punishment of deportation to an island, was *media* or *minor deminutio capitis*. A change of family, by adoption, or arrogation, or emancipation, was *minima deminutio capitis*.

solemn religious ceremony (*confarreatio*) before the Pontifex Maximus and the Priest of Jupiter (*Flamen Dialis*); and only the offspring of such a union were eligible for the higher priestly offices. Here the subjection and dependence of the wife were hallowed by religious associations. On the other hand, the Roman *manus* shows also a baser, and perhaps more intelligible, origin. The woman was nominally sold to the husband (*coemptio*), and conveyed by the same forms as if she were a slave, the only difference lying in the spoken words of the conveyance. So strictly was the wife assimilated to property, that if she were delivered to the husband without the proper forms of conveyance, she did not fall under his *manus* until the usual period of prescription (*usus*) had passed. *Usus* was thus a third way of creating *manus*.

Confarreatio

Coemptio

Usus

However, a title by prescription could not be acquired unless the possession were continuous; and accordingly, if a wife absented herself, and returned to her father's house before the year of prescription had run out, the prescription was broken. So early as the XII Tables, this mode of avoiding the *manus* had acquired the constancy of a custom. They contain a provision fixing three consecutive nights (*trinoctium*) as the extent of absence that prevented the husband from acquiring *manus* by prescription. The *manus* had almost disappeared before the end of the Republic, and under the early emperors it was looked upon as a mere antiquarian curiosity. It is quite certain that by their time the normal marriage was without *manus*, and that such a marriage was a valid Roman marriage in the fullest sense of the

Manus and free Marriage

term, while *manus* was usually employed by a woman, with no intention of marriage but merely as part of a fictitious procedure by which she could change her agnatic family or tutor. In all probability *manus* and marriage rarely coincided in the time of Gaius. All that two persons possessing *conubium* had to do if they wished to marry was to obtain the consent of their *patresfamilias*, if any, and then to consent to live together as husband and wife.

Wives not *in manu*

If the wife was not *in manu mariti*, she remained in the same status as before, that is, either independent (*sui juris*) or in the power of her father—in law a member of her father's family—and wholly free from the power of the husband. Thus the only important legal consequence of a marriage was that the offspring were under their father's power and enjoyed rights of inheritance: between husband and wife there was no bond of legal duty. The wife could not compel her husband to maintain her; the husband had no rights to the wife's property, except such as were given him by prenuptial contract.

Divorce

If the husband or the wife were not satisfied, the remedy was divorce. It was not necessary to obtain the authority of any tribunal for the dissolution of the marriage; by a simple formal intimation either party could at once terminate the union. But the *Lex Julia de Adulteriis* (18 B.C.) required a written bill of divorce (*libellus repudii*) to be delivered in the presence of seven Roman citizens above the age of puberty as witnesses; though eventually delivery was not necessary. While the Roman jurists gloried in the ancient maxim of their law that

marriage should be a free union (*matrimonia esse libera*), the ecclesiastics, who acquired an influence over legislation by the conversion of the Emperor Constantine, set themselves with inflexible resolution to uproot the ancient freedom. They succeeded in obtaining from successive emperors a mass of fluctuating legislation the effect of which is not easily stated in a few words. At first both divorce by mutual consent and unilateral repudiation retained their validity, but penalties, such as forfeiture of *dos* and *donatio propter nuptias*, to the unoffending party, were imposed where the one repudiated the other except for certain well-defined forms of gross misconduct. But Justinian seems to have ended by rendering repudiation without just cause, and even divorce by mutual consent, not merely punishable but also inoperative.

Custody of Children

If neither party was in fault, the general rule seems to have been that the father took the custody of the boys, and the mother of the girls; if the divorce was owing to the fault of the father, the wife 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 obtained the charge of the children.

Dos.

The peculiar conflict that emerges in the Roman Law between the rights of the father and of the husband is connected with an institution that has exercised a vast social and economical influence. Marriage *sine manu* gave the husband no claim of any sort upon the wife's property. But he was under no obligation to maintain her. The Roman

point of view seems to have been that it was 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 under her husband's roof, the father once for all compounded with the husband by giving him a sum down. This sum was called *dos*. By the *Lex Julia de Adulteriis* (18 B.C.) every father was compelled, on the marriage of his daughter, to give her a *dos* if he had the means. The husband enjoyed the use of the property during the marriage, but on its dissolution, whether by death or divorce, the property reverted to the wife's father. If the *dos* was given by a paternal ancestor, it was said to be *profecticia*; if it was given by the wife herself, or by any other person not a male ascendant, it was called *adventicia*. A *dos adventicia* was understood to be a present to the wife after the dissolution of the marriage, unless it was specially agreed that it should revert to the donor, in which case it was called *recepticia*. There are distinct signs that in the beginning the hubsand's rights over the *dos* were more extensive than they afterwards became, and the tendency of the later law was to restrict the husband rigorously to the income of the property, and not to give him power of disposing of the capital. Thus he could not sell or mortgage his wife's lands even with her consent.

Donatio propter Nuptias

The *dos* was usually the subject of a prenuptial contract; but it might be commenced or increased after the marriage. By the middle of the fifth century (A.D. 449), a settlement might be made on

the wife by the husband of a nature corresponding to the *dos*: it was called *donatio ante nuptias*. Justin, the predecessor of Justinian, allowed such gifts to be increased after marriage, thus breaking in upon a rule very jealously guarded by the older law, that no gifts were binding between husband and wife. Justinian allowed such a gift not only to be increased, but to be first given, after the marriage; and, in correspondence with this, he changed the name to *donatio propter nuptias*. A gift by a husband to a wife, or by a wife to a husband, could be revoked by the donor at any time during life. The provisions of the Roman Law thus furnish a singular contrast to the leading characteristics of an English marriage settlement. A settlement usually gives an interest in the property to the offspring of the marriage; but in Rome the children had no interest in the *dos*. By the clause in restraint of alienation, a wife is prevented from giving away the capital of her property to the husband, but it is only by depriving her of the power of alienation in regard to everybody else; while the English law makes no provision to protect feeble husbands from avaricious or extravagant wives.

English Marriage Settlement

Section IV—Tutors and Curators

The office of *tutor* in the Roman Law approaches nearly to that of a trustee. The tutor was appointed to act on behalf of children *sui juris* (that is, not in the power of anyone) under the age of puberty, but his duties differed considerably from the duties of an English guardian of children. The tutor did not

Functions of Tutor

himself undertake the custody and education of the pupil (*pupillus, pupilla*) entrusted to his care. If the will appointing the tutor did not name any person for that duty, the mother of the children was entitled to the custody of them so long as she remained unmarried, unless the Praetor decided otherwise. The tutor was bound to make his pupil a proper allowance for maintenance; but, as a general rule, unless the amount were fixed by the will, the sanction of the Praetor must be obtained. The main duties of the tutor were to manage the property of the pupil, and to authorise him to bind himself by contract (*et negotia gerunt et auctoritatem interponunt*, Ulp. *Reg.* 11, 25). In dealing with the property of the pupil, the tutor was subject to rules such as now govern trustees. He was bound to make good all loss sustained by his neglect or wilful wrong; he was bound to take such care and so manage the property as a good head of a family would manage his household affairs; he could charge nothing for his services, and he was not allowed to obtain any advantages for himself, but must exercise all his power for the sole benefit of the pupil.

Disabilities of Pupil

Even if a pupil had no property, he nevertheless had need of a tutor. A child could not bind himself by contract; and there were some legal transactions, as acquiring an inheritance, which, although in a particular case they might be wholly beneficial to him, yet required the authority of a tutor. The simplest course would have been to hold that no person under the age of puberty could enter into any legal transaction, and to make the tutor a statutory

agent whose acts within the scope of his authority should bind the pupil's estate. But that was not the theory of the Roman Law. The theory was as far as possible to make the child the actual contracting party, but not to bind him unless the tutor was present and gave his sanction (*auctoritas*). Until the child passed his seventh year, he was not considered capable of so binding himself, even with his tutor's authority; accordingly, if any action were brought by or against the *pupillus* up to that age, the tutor acted for him in his own name. But if he were above seven, the suit went on in the name of the pupil, the tutor merely giving his sanction. The rule prohibiting a tutor from getting any advantages from his trust equally prevented the validity of any contract whereby he authorised an obligation beneficial to himself (*Regula est juris civilis in rem suam auctorem tutorem fieri non posse*).

Contracts of Pupil

The general rule determining the incapacity of a child was that he might better his condition, even without the authority of the tutor, but he could not make it worse, unless he had his tutor's authority. In such contracts as create obligations for both contracting parties, as sale or letting on hire, if the tutor did not give his authority, those that contracted with the pupil were themselves bound, but he was not in turn bound to them. This rule was subject, however, to equitable restrictions in favour of the contracting party: a pupil 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.

Appointment of Tutors

Tutors were appointed (1) by will; (2) failing an appointment by will, by operation of law; (3) failing both these modes, by the magistrate. At first testamentary tutors (*tutores testamentarii*) could be nominated only by a *paterfamilias* to those under his power; but the Praetor confirmed, either as of course or upon inquiry as to the fitness of the tutor, the appointment by a father that had not the paternal power, or by a mother. Failing testamentary tutors, the kin were obliged to undertake the duty to the children (*tutores legitimi*). In the ancient law, the nearest agnates, that is, relatives who would have been in the same *patria potestas* had the common ancestor still been alive, thus succeeded; but Justinian left it to the next of kin, whether agnatic or cognatic. In default of kin, the appointment of tutors was at last vested in certain magistrates by statute. The *Lex Atilia* (between 366 and 186 B.C.; possibly 294) gave the urban Praetor and a majority of the tribunes of the Plebs the power of appointing tutors, and the *Lex Julia et Titia* (31 B.C.) gave a similar power to Governors of Provinces. Appointments under those statutes fell into disuse, and in the time of Justinian the Prefect of the city of Rome, or the Praetor, and, in the Provinces, the Governors, after inquiry, or the magistrates, by order of the Governors, appointed tutors (*tutores dativi*).

Exemptions from Tutela

The office of tutor was obligatory on those that were duly nominated. But the inconvenience arising from that rule led to the establishment of numerous exceptions (*excusationes tutorum*), which are minutely described by Justinian, but are of little interest at the

present day. Before entering upon the discharge of his duties, the tutor was in certain cases required to give security against misconduct (*rem salvam fore pupillo*). Testamentary tutors were exempt from giving security, "because their honour and diligence had been approved by the testator himself." Statutory (*legitimi*) tutors must give security, as they came in by relationship, which was no guarantee of honour and diligence. Tutors appointed by the higher magistrates, after inquiry, were not burdened with security, "because only fit persons were chosen"; but those appointed by the inferior magistrates must give security.

End of Tutela

The tutela ended with puberty, which was fixed at twelve for girls and fourteen for boys. But even before that, tutors could be removed by the Court for misconduct or unfitness.

Minors Curators

The old law, which made puberty the age of legal majority, was obviously defective. Accordingly, while in strictness every legal act by a person above the age of puberty was valid, a practice grew up of rescinding any bargains or conveyances made by persons above puberty, but under twenty-five, if the contract was an imprudent one for the minor. This practice arose after, and perhaps out of, the *Lex Plaetoria* (326 B.C.). It was called *restitutio in integrum*, as the Praetor restored the defrauded or indiscreet minor to the position existing before the unfortunate transaction took place: it blotted out the transaction. This remedy might have been worse than the disease, had it not been that a minor could obtain the appointment of a Curator, whose duty it

was to see that the minor was not overreached by another or prejudiced by his own foolish acts, and whose approval (*consensus*; not *auctoritas*) of the transaction made it unimpeachable. We are told that no minor could be forced to accept a curator against his will except for purposes of litigation, but it was practically impossible for him to do business without one; and so from about the middle of the second century A.D. curators, who had originally been appointed for particular transactions, regularly acted throughout the minority and whenever necessary. In course of time their functions became scarcely distinguishable from those of tutors. From very early times curators, with very much the same functions as tutors, could be appointed to lunatics and spendthrifts, and later to incurables. Spendthrifts (*prodigi*) were those who, in consequence of wasting their property, were prohibited by the Praetor from the management of it. The mode of appointment of curators was very much the same as in the case of tutors. A curator was not, however, appointed by will, but a suggestion in a father's will would be followed by the Praetor or Governor of the province. *Curatores legitimi* were such as were appointed to spendthrifts and insane persons (*furiosi*) under the law of the XII Tables: as in the case of tutors, these were the nearest agnates. Where there was no curator by will or by statutory provision, *curatores dativi* were given by the same magistrates as gave *tutores dativi*. With regard to security, exemptions, and most other matters, the same rules as applied to tutors applied also to curators. With all the

similarities between tutors and curators, there is this special distinction, that while the tutor was said to be *personae, non rei, datus*, the curator was *non personae, sed rei datus*, and so could be appointed for a single transaction.

CHAPTER III

THE LAW OF PROPERTY

SECTION I—OWNERSHIP

Origin of Property

THERE is no point on which theoretical speculations have been more completely falsified than the question of the origin of property. The suggestion that ownership arose when men began to respect the rights of the first occupier of what had previously been appropriated by no one is curiously the reverse of the truth. When ownership is first recognised, it is not ownership by individuals, but ownership by groups—the family, the village or commune, the tribe or clan. Individual property arose from the breaking up of such groups, and the distribution of the rights of the whole among the members. In some cases this process was hastened by wars. There are distinct traces that individual property was pre-eminently that which the warrior had seized as the spoil of victory; among the Romans, for example, the spear was the highest symbol of property.

Ancient Communism

But the student of Roman Law will learn nothing of this widespread primeval communism directly from the works of the Roman jurists. From the earliest times of which we have a record, the institution of private property was completely developed in Rome, and hence the singular influence it has exerted on the destinies of European nations.

Res mancipi and *res nec mancipi*

The law of property in Rome was in the beginning dominated by a fundamental distinction between *res mancipi* and *res nec mancipi*. Few articles of any importance in ancient times could be conveyed without mancipation,[1] a ceremony thus described by Gaius (I. 119) :—

Mancipation

Mancipatio is a fictitious sale ; and the right is peculiar to Roman citizens. The process is this :—There are summoned as witnesses not less than five Roman citizens above the age of puberty, and another besides, of the same condition, to hold a balance of bronze, who is called the *libripens*. The alienee, holding a piece of bronze (*aes*), speaks thus :—" I say this slave is mine *ex jure Quiritium*, and let him be bought for me with this piece of bronze and balance of bronze." Then with the piece of bronze he strikes the balance, and gives the piece of bronze, as if it were the price to be paid, to the mancipator.

The objects that required mancipation (*res mancipi*) included not merely land and houses (in Italy), but also free persons (in the formalities of emancipation), slaves, beasts of draught and burden, and rural (but not urban) servitudes.

Delivery

The objects that did not require mancipation (*res nec mancipi*) could be validly conveyed by delivery (*traditio*), a process which, as will presently be described, eventually became sufficient for the transfer of *res mancipi* also. Delivery, however, did not always transfer ownership ; of itself it merely transferred physical control. Obviously when one

[1] Both *res mancipi* and *res nec mancipi* could be conveyed by surrender in court (*cessio in jure*), but this was an even more cumbrous procedure than *mancipatio*, and was generally employed for other purposes (see p. 70).

person hands a thing to another, the effect may be, not to transfer ownership, but merely to make a loan, or to arrange for its safe custody whilst he is away from home, or to provide security for a debt. Some other element is needed to determine the effect of the delivery. Roman Law required two such elements, the relation between which has not yet been settled with any degree of certainty. If a delivery were to transfer ownership, the parties had to have the requisite intention, the one to transfer, the other to acquire ownership. At the same time, the delivery had to be supported by what was known as a *justa causa traditionis*, that is, some ground which would justify a change of ownership, some arrangement between the parties which would show that what was passing was ownership, and not something short of ownership, such as possession or detention. Thus, if the arrangement was to sell something, or to make a gift, or to constitute a *dos*, or to pay a debt, or to make a loan of money or any other *res fungibilis* (p. 105), then the ownership passed, for the whole point of these transactions was to pass the ownership. On the other hand, if it was pledge, or the loan of a thing for use (*commodatum*), or a deposit, the ownership did not pass, but in the first case possession, in the others mere detention. It is not clear whether we ought to treat this *justa causa traditionis* as conclusive external evidence of an intention to transfer and acquire ownership, or the required intention as a subjective abstraction from the *justa causa*. There seems to be no need for both ; either would suffice.

Intention

Justa causa traditionis

Sale

In the case of sale, something more was required :

the buyer did not become owner even by delivery, unless the price was paid or the vendor gave the buyer credit. The English law of sale offers a conspicuous contrast upon this point to the Roman Law. Delivery is not necessary in the English law to transfer the ownership of the thing sold. Whether upon a contract of sale the goods pass to the buyer with or without delivery is a question solely of the intention of the parties. If that intention is expressed, there can be no controversy. Generally speaking, however, no intention is expressed, and then certain presumptions of law come in. If specific ascertained goods are sold unconditionally, the property immediately vests in the buyer, unless it can be shown that such was not the intention of the parties.

English Law

Actual delivery might prove inconvenient: the thing to be delivered might be too heavy, or it might be land, or it might be at a distance. Accordingly it was admitted that delivery might take place in such cases even without actual transfer of physical control. Thus, it might be effected by placing the person to whom a thing was meant to be transferred in view of it, and declaring that he was free to take control of it: this was called delivery *longa manu*. Delivery of the keys of a house or of a warehouse was sufficient to transfer the property either in the house itself or in its contents. Putting marks, as upon logs of wood, was another way of effecting legal delivery, where it would have been difficult to have an actual dealing with the physical control. To deliver a thing at a man's house was considered the same thing as delivery to himself. If the person to whom it was sought to

Traditio longa manu

transfer the ownership was already in actual control, the ownership could be transferred by a mere expression of a wish to that effect by the owner. That was called delivery *brevi manu*.

Traditio brevi manu

Constitutum possessorium

Conversely, if a person who had actual control of a thing wished to transfer the ownership of it, whilst retaining the physical control, for example, by way of loan, the ownership could be transferred by intention (*constitutum possessorium*), without actual delivery. But apart from these two cases, mere agreement was not sufficient to transfer the ownership. (*Traditionibus et usucapionibus dominia rerum, non nudis pactis, transferuntur.*)

Dominium ex jure Quiritium

If a Roman citizen acquired ownership of a *res mancipi* by *mancipatio*, or of a *res nec mancipi* by *traditio*, he was said to be *dominus* and his ownership *dominium ex jure Quiritium*, and he could assert his title against anyone by an action called a *vindicatio*. None of these statements are true of a citizen who acquired a *res mancipi* by *traditio* (though, as will be seen later, he could acquire *dominium* in course of time by the process known as *usucapio*), or in any event if the person acquiring was an alien, or the thing acquired provincial land, whether the acquirer was a citizen or an alien. *Dominium* was an institution of strict civil law, and so was not open to aliens. No private person could be *dominus* of provincial land, for it belonged in theory to the Emperor or the Roman people as a whole. This exclusive system was inconsistent with the world-wide dominion Rome was destined to achieve ; and in nothing is the legal genius of the Roman people more conspicuous than the skill

Aliens

Provincial Land

with which they made the narrow principles of the ancient law yield to the necessities of progress. Although no *vindicatio* was available to protect ownership by aliens or ownership of provincial land, the Praetor provided other remedies, by which they were protected as effectually as true *dominium*. Of course, when the edict of Caracalla made almost all free subjects of the Empire Roman citizens, ownership by aliens ceased to have much importance.

Possession

The Praetor also introduced certain remedies known as interdicts for the protection of possession, as distinguished from ownership. Possession is one of the most difficult topics of the Roman, as of other legal systems. In essence, possession is mere physical control, irrespective of title, but when used technically in Roman Law, the term was applied only to such possession as was protected by the interdicts, or interdict possession, as it is often called. To acquire possession of a thing, the texts say that a person must take control physically (*corpore*) and intentionally (*animo*). Thus an unconscious assumption of physical control does not confer possession, and it may be, as Jhering held, that the intention required is no more than an intention to assume physical control. On the other hand, certain texts support Savigny's interpretation that the intention required must normally be an intention to acquire and to hold as an owner, in other words, that no one who recognises the ownership of another can be a possessor. Thus a thief is a possessor, whereas a tenant farmer (*colonus*) is not. Much has been done to reconcile these conflicting theories, each of which is admitted by its author to be subject

to considerable exceptions, but it is now generally recognised that no single theory will fit all the texts; and the most recent codes based on Roman Law have discarded the peculiarities that cause most difficulty.

If we consider only cases where the physical control has been delivered by one person to another, the *causa traditionis* determined whether true possession passed or only detention, in which latter case the transferee would not be protected by an interdict. Thus a person who received a thing by way of pledge acquired possession, and so did a stakeholder and a tenant on a perpetual lease (*emphyteuta*). On the other hand, a person who received a thing on loan for use (*commodatum*), on deposit, on hire (*locatio conductio*), or by way of usufruct, had only detention, and the transferor was held to possess through them. He had the interdict, not they. This all seems to show that various Praetors, in their piecemeal development of the remedies, considered some *causae* as justifying protection and others not, that they were guided by purely practical reasons, and that it was only later that the jurists tried to find a systematic justification for the resulting law. Interdict possession therefore is no mere matter of fact, but depends to some extent on title, or rather, since a thief possesses, it ought properly to be said that certain titles excluded the possibility of possession.

Importance of Interdicts

The importance of the possessory interdicts is best understood in relation to the *vindicatio*, or real action, to succeed in which the plaintiff had to prove that he was owner, the defendant in possession contenting himself with a bare denial, and being under no duty

to set up title in himself. The plaintiff had to discharge a very serious burden of proof, for it is often very difficult to prove title, and if he failed in the slightest degree, the defendant succeeded. This is what is meant by the saying that possession is nine points of the law. It was accordingly of the utmost importance to secure the position of defendant in a real action, and it may easily be imagined that a person who had a weak title would not be slow to dispossess his opponent by force, so as to put him to proof of his title. With the introduction of the interdicts this ceased to give him any advantage, for all that the plaintiff in an interdict had to do was to prove that he had been in possession, and that his possession had been disturbed. Even if the dispossessor had a good title, he was not allowed to set up that title in defence to the interdict. He must fail in the interdict and then bring his real action. It will also be observed that the interdicts played a great part in suppressing violent self-help and forcing parties to have recourse to legal proceedings.

Long possession based on a just title of acquisition was also a means of acquiring ownership.

Quiritarian and Bonitarian Ownership

When a *res mancipi* was delivered to a buyer by *traditio*, the civil law ownership still remained with the seller: the thing had not passed with the form necessary for conveyance of the ownership. But according to the old law, this evil was not without a remedy. For it was held that where a man had received a thing in good faith (*bona fide*) and in a way that would have made him owner but for some external defect (*ex justa causa*)—conditions, however,

that were not required in the earliest law—and had possessed it for two years in the case of land or houses, or for one year in the case of other things, he became owner by usucapion (*usucapio*). Lapse of time thus served to cure defective titles in all cases where a mere informality stood between a man and the ownership to which he was entitled. One difficulty alone remained. If the possessor lost possession of the thing before the time of *usucapio* had run out, he could not, on discovering the thing in possession of someone else, sue as owner, because his title was not yet complete. This defect was removed by a Praetor of the name of Publicius, who may have been the Quintus Publicius said by Cicero in 66 B.C. to have been lately (*nuper*) Praetor. Publicius gave an action (hence called *actio Publiciana*) to a possessor under those circumstances. Henceforth the position of a possessor of a *res mancipi* delivered without mancipation was for all practical purposes as good as ownership. Even before his title was perfected by *usucapio*, he was secured in the practical enjoyment of the ownership. This form of ownership is called by Theophilus—the first commentator on the Institutes of Justinian—Bonitarian ownership (the possessor was said *rem in bonis habere*), to distinguish it from Quiritarian ownership (*dominium ex jure Quiritium*). When at length Justinian formally abolished the distinction between *res mancipi* and *res nec mancipi*, all kinds of property, moveable or immoveable, were transferred by simple delivery.

Usucapion and Prescription

The same remedies were applied where the person delivering a thing was not the owner. If the person

who delivered a thing was really the owner, then the delivery at once operated to give the ownership to the transferee. If he was not owner, the delivery had not that effect, because no one can transfer to another greater rights than he has himself (*nemo plus juris ad alium transferre potest quam ipse haberet*). The defect was curable by usucapion, or, if the object was provincial land, by prescription. If a person at the time when any thing was delivered to him did not know any defect in the title of the transferor, and acquired in a way which would have transferred ownership if the transferor had been the owner, he was said to be a *bona fide possessor*, and was in a condition to become owner if he continued in possession for the time required by law. Justinian fixed the period of usucapion at three years for moveables; for immoveables he adopted the periods of prescription already applicable to provincial land, namely, ten years if both the possessor and the person claiming adversely lived in the same province during the whole time (*inter praesentes*), and twenty years if during the same period they lived in different provinces (*inter absentes*). But the possession must be uninterrupted. This did not mean that the articles should not change hands: each person that took the [illegible] in ignorance of any defect in the title could add to his own time of possession (*accessio possessionis*) [illegible] possession of all his predecessors who had been in the same blissful ignorance. The *actio Publiciana* was also available to a *bona fide possessor* who was in process of acquiring a thing by usucapion, but he could not by this action succeed against the true

owner. This was the only application of the action in the time of Justinian.

Stolen Goods

In the case of moveables, however, it was but rare that a possessor got any benefit from his innocence. If the thing had been stolen—and, where a thing belonging to one man was found in the possession of another, most likely it had been stolen—it could not be acquired by prescription by any length of time. Under the *Lex Atinia* (? 198 B.C.), the taint thus attaching to stolen goods (*res furtivae*) could not be removed until they got back to the possession of the true owner. Land was not an object of theft (though Gaius tells us that some of the old writers thought it was); but a similar taint attached to land or houses from which the owners had been driven by violence (*res vi possessae*): even a subsequent *bona fide* possessor in that case did not acquire by prescription.

Positive and Negative Prescription

The rules just stated illustrate the nature of positive prescription as distinct from statutes of limitation or negative prescription. In the case of positive prescription, the conditions of ownership depend upon the mental state of the possessor, limited by the stringent rule that goods stolen and lands seized by force are incapable of being so acquired. The dominating purpose of the old *usucapio* was in fact merely to cure informalities in the mode of acquisition. Negative prescription means that the true owner is debarred of his legal remedy if he neglects to seek the aid of the tribunals for a given time. Here the law contemplates distinctly divesting the true owner of his rights, but without giving the possessor any positive title. It is unimportant what was the state

of mind of the possessor, or whether there was any taint in the article. At first, Roman Law had no statute of limitation, but in the time of Justinian the period for actions generally was thirty years.

Another important mode of acquiring ownership was *Occupatio*, or the taking possession of a thing belonging to nobody (*res nullius*), but capable, nevertheless, of being held in ownership. In the eyes of the Romans, all untamed living creatures, whether their habitat is the air, the land, or the sea, were *res nullius*, and became the property of the person by whom they were captured. Rome had no game laws. A man might be forbidden to go upon another's land to hunt or snare birds; but if he went and actually caught any bird or beast, they became his property. A bird or beast that was wounded belonged to him that actually took it, and not to him that merely struck the blow. If a wild creature after being caught escaped either out of sight or practically out of reach, it was again considered *res nullius*, and open to the first captor. Domesticated and tamed animals were not *res nullius*, and any appropriation of them without the will of their owner was theft. Pigeons and peacocks and birds might go beyond the reach of their owner, but yet return. So long as they did not lose the habit of returning (*animus revertendi*), they were considered as domesticated animals. When bees hived, the young swarm belonged to the owner of the bees so long as he kept them in view and could follow them up; otherwise they became the property of the first person that hived them. Precious stones found in a state of nature also became the property

Occupatio

Game Laws

Tame Animals

Pigeons

Bees

Precious Stones

Treasure-trove

of the first taker. Treasure-trove (*thesaurus*)—that is, treasure, or valuable things generally, left in the earth by persons unknown for a long time (*condita ab ignotis dominis*), belonged—at least after the time of Hadrian—half to the finder and half to the owner of the ground; but it must be found by chance, not by prospecting. Lastly, the property of an enemy was *res nullius*. To this barbarous doctrine the Roman Law recognised no limitation. Lands, houses, moveables, wife and children—the enemy himself if alive—all, when taken in war, became the spoil of the victor; while immoveables went to the Fiscus, moveables went to the captors, subject to the rules of prize. The individual soldier kept what he gained by individual enterprise and not as a sharer in a common movement officially ordered or sanctioned.

Enemy's Property

Accession

The last mode of acquisition is Accession. Accession is of three kinds: (1) of land to land; (2) of moveables to land; and (3) of moveables to moveables. The first case, the accession of land to land, arose from the action of streams and rivers in altering the distribution of land. In its higher reaches a river impetuously sweeps off patches of land, which, as its velocity diminishes, or as intercepting abutments occur, it gradually deposits. Such an increase of land, so gradual as to be at each moment imperceptible, was called *alluvio*, and the increase belonged to the owner of the lands enriched by the accretion. If, however, the part detached was large enough to be followed up and recognised by the owner, he still retained his ownership. If the deposit takes place in the bed of the river, an island is gradually formed.

Alluvion

Islands formed in Rivers

The ownership of such an island was determined by its position in the stream. If it lay wholly to one side of a line drawn longitudinally along the middle of the stream, it belonged to the owner of the land on that side of the river; if there were more than one such owner, it was divided among them according to the extent of their lands along the bank, the island being supposed to be cut across by lines drawn from their respective boundaries at right angles to the median line of the stream. If the island lay in mid-stream, partly on one side and partly on the other of the median line, then it belonged to the owners on the two banks, their shares being determined by lines drawn as aforesaid. If an island were formed by a river changing its course, forking into two branches and uniting lower down, the ownership of the land so surrounded was not changed. If a river permanently alters its course, leaving its old bed dry, that bed belongs to the landowners on both banks of the river, divided in the way already stated when an island arises in mid-stream.

Old Beds of Rivers

Moveables accede to land when one man sows, plants, or builds on another's land. The maxim of the Roman Law was that every thing fixed into the land upon its surface became the property of the owner of the soil (*Superficies solo cedit. Omne quod inaedificatur solo cedit*). The owner of the principal was the owner of the accessory. In its primary aspect, the notion of principal and accessory is arbitrary, although not illogical. A gold setting is used to show off a stone on a ring: the gold is the accessory, even though it may be more valuable, simply because it is

Moveables accessory to land

there, not for itself, but for the purpose of the stone. The ground upon which a pillar rests is the principal, because it can exist without the pillar, while the pillar cannot exist without the ground. This arbitrary idea was used to determine a difficult technical question. When land was built upon, and the land did not belong to the person that built, a conflicting claim of ownership arose. It would have been impossible to consider the land-owner and the house-owner jointly owners, for who was to determine their respective shares? Hence in all cases where the materials of different persons got so intermixed that it was inexpedient to separate them, the question of ownership was determined by the rule that the owner of the principal should have the accessory. At first the law was content to let the question rest there: whatever was built on the land belonged to the owner of the land.

Compensation

But a question of equity remained behind. Suppose the owner of the land built with material belonging to another. The XII Tables provided that the land-owner should, in that case, pay double the worth of the material to the owner of the material (*actio de tigno iuncto*): they did not allow the building to be dismantled in order that the material should be restored. Suppose the owner of the material built on land not belonging to him. He either knew that, or he did not. If he knew it, he acted with his eyes open, and lost his property: he was assumed to have intended to make a present of the building to the owner of the land. Severus and Antoninus, indeed, allowed him (A.D. 213) to recover his material if the building was demolished, provided it was shown that

he actually had no *donandi animus*; but Justinian did not accept this view. If, on the other hand, the owner of the material thought he was building on his own land, the Praetor protected him from ejection, unless the owner of the land offered compensation. If, however, he accidentally lost possession, and the owner recovered the land without the necessity of a lawsuit, he had no remedy. To this rule the Roman Law admitted one just and politic exception. A tenant of a house could remove the fixtures that he had placed for his use, provided he did no damage to the house. And a tenant of land was entitled to compensation for unexhausted improvements (except such as he had specially agreed to execute in consideration of a lower rent), the amount being fixed with regard to the increased value they gave to the land, but not exceeding the actual outlay.

Unexhausted Improvements

The idea of accession was also employed in the case of addition of moveables to moveables; such, for example, as writing a book on another man's parchment, or putting gold letters on paper belonging to someone else; but in the case of pictures, it was thought too strong to say that the ownership of the canvas or wood should determine the ownership of the painting. In this case the logical idea succumbed to the test of value. The rules as to compensation came in as before to redress the balance of unfairness.

Books

Pictures

The working up of raw materials belonging to another into a new form (*nova species*) received the name of *Specificatio*. Its effect was disputed by the two schools. The Sabinians, following the philosophical doctrine of the Stoics that the essence of a thing is

Manufactured Articles

determined by the materials of which it is composed, held that the owner of the materials remained the owner of the finished product; whereas the Proculians, who accepted Aristotle's view that the form was the determining factor, were of opinion that a new thing had come into existence, and that the maker acquired it by *occupatio*. The controversy was finally settled as follows:—If any part of the material employed belonged to the workman, the workman was the owner of the new article; if not, the question was whether the article could be resolved into its raw material. If it could, the owner of the materials was held to be the owner of the whole; if not, the workman was the owner. Thus a vessel of gold, silver, or other metal would be the property of the owner of the metal however exquisite and valuable the workmanship; but a person who had made wine out of another's grapes, or flour out of another's wheat, was the owner of the product, because it could not be resolved into its original material.

But things belonging to different owners might be mixed, in circumstances which pointed neither to specification nor to accession. Thus, where materials whether of the same kind (as lumps of gold) or of different kinds (as your wine and my honey), were mixed by consent of the owners or by chance in such manner that they ceased to retain their individuality, the mixture was the common property of the owners of the materials. This was called *Confusio*—a chemical compound. Again, where the materials retained their individuality (as grains of wheat) and had been mixed by consent, the mixture was the common

Confusio

Commixtio

property of the owners; but, if they had been mixed by accident or by one owner without the consent of the other, they remained the property of their several owners, and, if the owners could not agree about a division, the Praetor would decide. This was called *Commixtio*—a mechanical mixture.

Res extra nostrum patrimonium

The institution of private property did not extend to all the material objects of the universe. The atmosphere, for example, or the ocean, is not susceptible of the exclusive possession that lies at the foundation of proprietary rights. But many things that were not the objects of ownership might be partially appropriated, and rights falling short of ownership might be exercised over them. Such of these rights as the Praetors recognised they protected by Interdicts.

Seashore

Res communes were things whereof no one was owner, and that all men might use. Such were the air, running water, the sea, and the seashore. The seashore extended to the highest point reached by the waves in winter storms. The right of fishing in the sea belonged to all men. Any one could haul up his nets on the shore, or spread them out to dry, or build a hut for himself. So long as the structure existed it was private property; but when it fell into ruins the soil again became common. Every one had the right to prevent any construction on the shore that would interfere with his access to the sea or the beach; and so, where there was any risk of question, it was prudent to get the Praetor's consent before proceeding to erection.

Res Publicae

Res Publicae were, in a sense, the property of the Roman people, and the use of them was free to all.

The State's ownership was hardly more than supervision or jurisdiction: it was not such ownership as private persons possessed, and as the State itself possessed, like private persons, in many *res publicae* of another kind, such as slaves, mines, lands. The chief examples were public roads, harbours, and rivers, and the banks of rivers. In Rome itself the roads were specially under the jurisdiction of the Curule Aediles. Every river that flowed in summer and winter was public. The banks also, measured to the highest point of the winter flood, could be used by the public, even when they belonged to private proprietors, for the purpose of landing goods or making fast boats to the trees. The right of fishing, like the right of navigation, was free to all.

Fishing in Rivers

Res Universitatis were such things belonging to a municipality or corporation as were free to the use of the public; for instance, race-courses and theatres.

Res divini juris

Res divini juris consisted of three classes—*sacrae*, originally devoted formally by the Pontiffs under statutory authority to the gods above, as religious edifices and gifts; *religiosae*, devoted at one's will, without any authority, to the deified *manes*, the chief example being ground devoted to the reception of the dead; *sanctae*, such as the walls of cities, so called because a capital penalty was fixed for those that violated them.

Section II—Personal Servitudes

Nature of Servitudes

Ownership, in the full sense of the term, consists of the most extensive rights to things—rights so

numerous that they cannot be precisely limited—rights that endure for ever, and are the subjects of unrestricted alienation. When some portion of the rights of full ownership is given to a person other than the owner to be exercised by such person to the exclusion of the owner, such detached rights were called in Roman Law *jura in re aliena*; for example, servitudes, emphyteusis, mortgage. If the rights of ownership are limited in duration—as an estate for life in land—there emerges a class that is differently described in different systems of law. In England a life-interest is generally spoken of as limited ownership: in Rome, a life-interest was regarded not as a form of ownership, but as the antithesis of ownership, as a subtraction from the ownership or a burden upon it—in a word, a servitude (*servitus*). The same term was applied not only to the indefinite use of land—for example, the Roman *ususfructus* or estate for life—but to the class of rights strictly definite, as rights of way or rights of pasture, which in English Law are known as easements or *profits à prendre*. The servitudes proper, such as rights of way—the praedial servitudes (*servitutes praediorum*)—were attached to the things (land or house) over which they were exercised and belonged to persons only as owners of adjoining land or an adjoining house; while usufruct and some similar interests were called personal servitudes (*servitutes personarum*), as being attached to the person that exercised the right, without regard to his owning or not owning adjoining property. If, as sometimes happened, a right that was ordinarily a praedial servitude (as the right of pasturing cattle)

Estates for Life

was given to a person not an adjoining owner, then it was not a praedial, but a personal, servitude, provided, that is, that it was capable of being created as a personal servitude; otherwise it could be a contractual right, and as such binding only between the original parties.

Incorporeal Things

Here may be noticed a fallacious distinction introduced by the Roman writers, and followed by their English copyists. Some things, we are told, are corporeal, others incorporeal. Corporeal things can be touched, as a farm, a slave, gold, or wheat. Incorporeal things cannot be touched; they consist of rights, as an inheritance, a usufruct, or an obligation. This means that the right of inheritance or the right of usufruct is incorporeal. Corporeal things, we are told, can be possessed and delivered; incorporeal things do not admit of possession or delivery. But with all this subtlety the jurists overlooked the fact that they were making a distinction without a difference. The right of ownership, which was transferred by the delivery of the thing, is just as incorporeal as the right of usufruct. So arbitrary is the division that a life-interest in land is a corporeal thing in English Law, and a life-interest in land was incorporeal in the Roman Law. The meaning is simply that delivery was confined in Roman Law to the transfer of ownership, whereas in English Law the delivery of land might be for an estate for life, or in fee-simple, according to the intention of the parties. The true distinction is between the groups of rights transferred by delivery, and those transferred in other ways: in the Roman Law the first group

consisted of ownership only; all other rights to things were transferred in a different manner. By a figure of speech, the rights transferred by delivery were said to constitute corporeal things.

Usufruct

A usufruct is the right of using and taking the fruits of something belonging to another. It was understood to be given for the life of the receiver—the usufructuary—unless a shorter period was expressed; and then it was to be restored to the owner in as good condition as when it was given, except for ordinary wear and tear. It might exist in land, houses, slaves, beasts, and in short everything except what is consumed by use—an exception obviously necessary because the thing had to be restored at the end of the period of enjoyment. By a senatus-consultum, however, it was determined (perhaps within the half-century before Christ) that a legacy of things consumed by use (such as money, wine, oil, wheat, garments), by way of usufruct, should not be void. On the legatee's giving security to return to the heirs of the testator on his death the articles so bequeathed, or to pay their value in money, they were given to him. Such a legacy was merely a loan without interest. As it bore a certain analogy to usufruct, it was called quasi-usufruct.

Quasi-usufruct

Rights of *Fructuarius*

The usufructuary of land became owner of the crops as soon as they were gathered (*percepti*), but not before. Consequently, if he died before that event, the crops belonged to the owner of the land. Generally speaking, but with one exception, the rights at common law of an English tenant for life of land were the same as the rights of the usufructuary. An

English tenant might work mines or quarries that had been opened, but could not open new mines or quarries. The usufructuary was free from this restriction. But he could not cut timber: trees that were dead or overthrown by the wind he could take to repair the house, but not usually for fuel; and he could take branches to stake his vines, and he could lop pollards.

Usufruct of House

The usufructuary of a house must not alter the character of the building. He must not divide one room into two, or throw two into one, or turn a private dwelling-house into a shop. He was not allowed even to put a roof on bare walls. He could not put up a new building, unless required for strictly agricultural purposes; and he could not pull down any building, even one he had himself put up. Thus we learn where Coke got his idea that if the life-tenant put up a house, it was waste, and if he pulled it down again, that was double waste. The usufructuary must always use the property, whatever it was, with the care of a *bonus paterfamilias*—the highest diligence known to the law.

Creation and Extinction of Usufruct

In ancient times, usufruct was established by surrender in court (*cessio in jure*), a fictitious suit, which may be compared with the obsolete Fines and Recoveries of English Law. It could not be created directly by mancipation, because it was incorporeal; but, when the thing was mancipated, the usufruct could be reserved (*usufructu deducto*). In the time of Justinian, however, a usufruct was created either by legacy or by agreement and stipulation. The usufruct was extinguished if the usufruct and ownership merged

in the same person; if the usufructuary neglected to exercise his right for the usual period of prescription; or if the thing perished, or its essential character was altered. The usufructuary could not transfer his right so as to make the transferee usufructuary in his place; but (under the Empire, if not earlier) he could allow another person (by gift, sale, lease, etc.) to enjoy his right, in whole or in part, provided the transferee enjoyed it in his (the usufructuary's) name and on his account. No transfer

Use (*usus*) meant use without the fruits. One that had the use of a farm could take only such vegetables, fruits, flowers, etc., as were required for his daily needs. He must not hinder the farm-work. He that had the use of a house could use it for himself and family—he could not let it, and it was doubted if he could receive a guest; and he could not transfer his right to another. Use was established or extinguished in the same ways as usufruct. *Usus*

Habitatio (the right of dwelling in a house) and *operae servorum* (use of slaves' services) were distinguished from usufruct or use by technicalities that need not be noticed here. *Habitatio*

Section III—Praedial Servitudes

A praedial servitude is a definite right of enjoyment of one man's land by the owner of adjoining land. The land in favour of which the right is created is called *praedium dominans*; the land subject to the right is called *praedium serviens*. Servitudes were for the benefit of land in this sense, that the necessities Nature of a Praedial Servitude

of the dominant land constituted the measure of the enjoyment allowed. A right to lead water to a farm was restricted to the amount of water necessary for the use of that farm. So if the right was to take sand or lime from adjoining land, then no more could be taken than was wanted for the farm to which the right was attached.

Nulli res sua servit

From the nature of servitude it followed that an owner could not have a servitude over his own land (*Nulli res sua servit*). An owner, who, as such, is entitled to every possible use of his land, has no need of a right to one particular mode of enjoyment.

Servitudes are Negative or Permissive, but cannot bind to positive acts

Again, the duty imposed by a servitude on the owner of the servient land might be either a duty not to do something on the servient land (as, not to build in a way that shuts out his neighbour's light), or a duty to allow the owner of the dominant land to do something on the servient land (as, to walk or drive across it), but, except in one case, the servient owner could not be obliged to do any positive act. (*Servitutum non ea natura est ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat.*) The one exception was in the case where a man's walls or pillars were used to support another's building (*servitus oneris ferendi*)—where the agreement to support involved the duty to repair in case of need.

Servitudes perpetual

Servitudes were subject to certain other rules of a technical character. Thus, it was said that all servitudes ought to be capable of enduring as long as the land to which they were attached; but exceptions were allowed, and a right of water even from an artificial reservoir might be granted. Again, it was

said that a servitude was indivisible. Thus, if the owner of land dies, leaving several heirs, each heir is entitled to the enjoyment of the servitudes. But perhaps the most technical rule of all was that there could not be a servitude of a servitude. Thus, if Titius has a right of leading water through two or three neighbouring farms, neither the owners of these farms nor any other neighbour can have a servitude of drawing water from the aqueduct. But, notwithstanding the rule, an agreement to permit them to draw water bound Titius, although it was not a servitude.

Servitudes indivisible

Servitus servitutis

Praedial servitudes were of two kinds, RURAL (*jura rusticorum praediorum*) and URBAN (*jura urbanorum praediorum*). Rural servitudes affect chiefly or only the soil, and could exist if no houses were built; urban servitudes affect chiefly or only houses and could not exist apart from houses. The distinction does not depend on the situation of the property affected, for a right of way, which is a rural servitude, may exist in a town, and a right to rest a beam or joist on a neighbour's wall, which is an urban servitude, may exist in the country. So long as mancipation was in use, rural servitudes in Italy were *res mancipi*, and could be conveyed only by *mancipatio* or *cessio in jure*; but rural servitudes in the provinces beyond Italy, and urban servitudes in or out of Italy, were *res nec mancipi*.

Division of Servitudes

Among rural servitudes, the most usual were— (1) Rights of way: *iter*, a right for a man to walk but not to drive a beast or a carriage; *actus*, the right to walk and drive a beast or a carriage; *via*,

Rights of Way

Rights of Water

more extensive, including the right to draw stones and wood and heavily laden waggons. (2) Rights of water; as, the leading of water through another's land (*aquae ductus*). Usually the water must be conveyed in pipes, although, if so arranged, stone channels might be used. In the absence of agreement, the quantity of water to be taken was fixed by custom; but unless by special agreement or by custom the water could not be used for irrigation. *Aquae haustus* is the right of drawing water from a well or fountain on another man's land. The right of taking cattle to water on another's land was called *pecoris ad aquam appulsus*. Again, one might have the right to put cattle to pasture on the land of another (*jus pascendi*), or to quarry for stones, or to dig for sand or chalk, or to cut stakes for vines, and many similar rights.

Other Rights

Urban Servitudes

The principal urban servitudes included support to another's building (*oneris ferendi*); inserting beams (*tigni immittendi*) in the wall of another's house for security, or for covering to a walk along the wall; the right to receive, or the right to discharge, the droppings of water from the tiles of a house (*stillicidium*), or the rain water from a gutter (*flumen*); the right against a neighbour to prevent an increase to the height of his house (*altius non tollendi*); the right to prohibit any construction that would shut out light from a house or the general view (*ne luminibus officiatur, et ne prospectui offendatur*); the right of passing a sewer through another's ground (*ex aedificio eius in tuum aedificium*).

Creation of Servitudes

A servitude, involving a burden upon the ownership of land, could of course be created only by owners.

An owner could burden his land with a servitude by agreement and stipulation; and such an agreement would be implied if the owner of the dominant land had enjoyed a servitude for the full period of prescription applicable to land. Again, by will an owner could impose the burden of a servitude upon any person to whom he bequeathed the land. Once established, a servitude continued until it was surrendered by agreement, or merged, when the person to whom a servitude was due became owner of the land upon which the servitude was imposed. In this case, even if the lands were afterwards separated, the servitude was not restored, except by special agreement. If a person entitled to an affirmative servitude did not exercise his right for the period of prescription, he lost it; so, if the person entitled to a negative servitude allowed that period to elapse after the owner of the servient land had violated the servitude (as, for example, by shutting out his lights) without making any complaint, he in like manner lost his right also.

Extinction of Servitudes

Section IV—Emphyteusis

Emphyteusis is a grant of land for ever, or for a long period, on the condition that an annual rent (*canon*) shall be paid to the grantor and his successors, and that, if the rent be not paid, the grant shall be forfeited. This tenure may be traced to the long or perpetual leases granted by the Roman State of lands taken in war. The rent given for such land was called *vectigal*, and the land itself *ager vectigalis*.

Perpetual Leases

The advantages of this perpetual lease were appreciated by corporations, ecclesiastical and municipal. A tenure that relieved the owners from all concern in the management of their lands and gave them in exchange a perpetual right to rent seems to be specially beneficial, or at any rate very convenient, for corporate bodies. The same tenure was adopted by private individuals, under the name of Emphyteusis. In the time of Gaius a controversy was maintained as to whether Emphyteusis was a sale or a letting to hire of land. It resembled sale, inasmuch as it gave a right for ever to the land, but it differed from sale in that, instead of price, there was an annual payment of a sum down. It resembled hire in respect of the rent; it differed from hire in respect of the perpetual interest of the tenant. The Emperor Zeno terminated the discussion, by declaring that the incidents of Emphyteusis should be governed by the agreement of the parties, and in the absence of such agreement, that the total destruction of the land or houses should terminate the tenure, but that for a partial loss the tenant should have no claim to an abatement of the rent.

Law of Zeno

Rights of *Emphyteuta*

The rights of the tenant (*emphyteuta*) were almost unrestricted, except that he must not destroy the property so as to impair the security for the rent. He paid all the taxes, and he could be ejected from the land if for three years he failed to pay his rent or to produce the receipts for the public burdens. He could sell his right, but was bound to give notice to the owner of the sum offered to him, and the owner had the option of buying it at that amount.

If the owner did not exercise his right of pre-emption, the tenant could sell to any fit and proper person without the consent of the owner. The owner was bound to admit the purchaser into possession, and was entitled to a fine not exceeding two per cent of the purchase money for his trouble.

Section V—Mortgage

Pactum Fiduciae

The earliest mortgage of the Roman Law was an actual conveyance by *mancipatio*, executed by the borrower to the lender, upon an agreement (*pactum fiduciae*) that if the purchase-money were repaid by a day named, the lender would reconvey the property to the borrower. If by the day named the borrower had not paid off the loan, his property was entirely gone. But that was not the worst. The borrower might be willing to repay the money, but in the meantime the lender might have sold the property, and the borrower could not follow it in the hands of the purchaser. This grave defect of the law it was sought to remedy by declaring the lender, under these circumstances, to be infamous. Clamant as these evils were, it required even a sharper sting of injustice to goad the Praetor into action. It would seem that, where the conveyance was not made by *mancipatio*, even the solemn promise to return the property on repayment of the loan had no legal effect; and the lender could refuse to accept payment and keep the property, although its value might greatly exceed the loan. At this point the Praetor interfered, and issued an edict to the effect that, where a lender got possession

of his debtor's property, he should be compelled to give it up on the debtor making a tender of the loan. To the borrower he gave for this purpose an *actio pigneraticia*, such an informal pledge being known as *pignus*. The object of the Praetor was merely to redress a flagrant wrong and prevent an unjust creditor from taking advantage of a mere absence of formality to rob his debtor of his property; but the result of his intervention was practically to endow the Roman law with a simpler and more convenient form of mortgage. The mere delivery of a thing was enough to give the creditor full security, while at the same time the ownership remained with the debtor, and thus the creditor was disabled from fraudulently conveying the property. The creditor, not being owner, could not give a buyer the ownership that he himself did not possess.

Pignus

Hypotheca

But the *pignus*, although a great improvement, fell short of the requirements of a satisfactory form of mortgage. The creditor did not obtain any security, unless the possession of the property was given to him. Thus, in order to obtain a loan, an owner was subject to the great inconvenience of parting with the possession of his property. In some cases where a security was desiderated, this condition could not be complied with. Thus when a landlord let a holding to a tenant for the usual period of five years, he naturally desired to have a special claim on the stock and implements of the farmer as a security for his rent. But as it was essential that these things should remain in the possession of the farmer, the landlord was disabled from enjoying the security of a *pignus*.

Some time before Cicero, a Praetor of the name of Servius introduced an action by which he gave the landlord of a farm a right to take possession of the stock of his tenant for rent due, when the tenant had agreed that the stock should be a security for the rent. Such a security, though known by the Greek name *hypotheca*, was probably of native Roman origin. It was not long, however, before the advantages of such a security were appreciated in other cases, and at length the action introduced by Servius was extended, under the name of *quasi-Serviana*, to all cases where an owner retained possession but agreed that his property should be a security for a debt. Thus in the result, a mere agreement, which need not even be in writing—and without any transfer of possession to the mortgagee—enabled an owner to borrow money and give ample security to the creditor without subjecting himself to any inconvenience. Practically in the later law no distinction (beyond the difference with regard to possession) was made between *pignus* and *hypotheca*.

Actio Serviana

Actio Quasi-Serviana

If the mortgagee was not in possession, he could sue for the property in the hands of any person possessing it. He could then exercise the power of sale, which became an inherent right of the mortgagee. Under Justinian, if the parties had agreed as to the manner, time, etc., of the sale, their agreement was to be observed; if not, the creditor must give the debtor formal notice of his intention to sell; and thereafter two years must elapse before the sale could be made. If the creditor sold, he must hand over the surplus, after paying himself, to the debtor. Justinian allowed foreclosure only when the creditor

Power of Sale

Fore-closure

was unable to find a buyer at an adequate price. But the debtor must have due notice, and if within a specified time he did not pay, the creditor obtained the ownership on petition to the emperor. Even then a debtor was allowed two years' grace; but if he did not pay all principal and interest within that time, his claim was absolutely foreclosed (*plenissime habeat rem creditor idemque dominus jam irrevocabilem factam*).

Priority

If the same thing were mortgaged to several persons, and the property was not sufficient to pay them all, the question of preference or priority arose. Except in the case of a small number of privileged mortgages, the question of priority was determined by two principal rules. First, a mortgage made by a public deed, that is a deed prepared by a notary (*tabellio*), and sealed in the presence of witnesses, or even by a private writing signed by three witnesses, was preferred to an earlier mortgage not executed with these solemnities. Secondly, mortgages unwritten, or, though written, unattested by witnesses, took effect according to priority of time. When the same thing was hypothecated at different times to different persons, he that has the first hypothec excludes all others; in like manner, the second excludes the third, and the third the fourth. But at what moment does a hypothec take effect? When possession is obtained, or, if the debt is future or conditional, when the sum becomes due? These times were immaterial; priority was determined by the date when the agreement of mortgage was made.

Implied Mort-gages

Usually no hypothec existed except by agreement; but in some cases the law set up an implied mortgage.

Thus at Rome the landlord of a dwelling-house had an hypothec, in the absence of express agreement, over the furniture (*invecta et illata, i.e.* whatever was brought for personal use by the tenant) in the house hired from him, as security for the rent, and for other claims he might have under the tenancy. Justinian extended this law to the provinces. In the case of farms the landlord had an implied hypothec over the crops from the moment they were gathered; but he had no hypothec over the agricultural implements, cattle, or slaves, or household furniture, except by special agreement.

Precarium was holding land or a moveable at the will of the grantor. This tenure has a certain historical interest. The tenant, although his interest was so slight, had possessory rights protected by interdicts. *Precarium*

CHAPTER IV

THE LAW OF OBLIGATIONS

SECTION I—GENERAL PRINCIPLES OF THE LAW OF CONTRACT

Convey-ance dis-tinguished from Con-tract

To determine the true place of contract in a proper classification of law, it is necessary to apprehend, in the first instance, the difference between Conveyance and Contract. Conveyance is the transfer of ownership or of rights partaking of the nature of ownership (rights *in rem*); contract creates obligations or rights *in personam*. A right *in rem* is a right availing against all men generally, and is a right to forbearances; a right *in personam* is a right availing against a specified individual or specified individuals, and is a right either to acts or to forbearances. The right of a master over his slave is a right *in rem*; it is a right against all men that they shall forbear from depriving the master of the possession or services of his slave. The right of a patron to maintenance from his freedman is a right *in personam*; it is a right against the freedman alone, and it is a right to an act or service. Ownership, again, is an aggregate of rights *in rem*. An owner has a right as against all men generally that they shall not deprive him of the possession or use of the thing belonging to him. Contract is the antithesis of ownership. It creates duties binding the promisor or promisors, and no other persons; and those duties

Rights *in rem* and *in personam*

are generally to render services, and not merely to exercise forbearances. " The essence of an *obligatio*," says the jurist Paulus, " does not consist in this, that it makes a thing ours, or a servitude ours (*jus in rem*), but that it binds another to give something to us or to do something for us (*jus in personam*)."

Right and duty are correlative terms. A cannot have a right unless B or C owes a duty to him. Partly from the circumstance that *jus* had other meanings besides " a right," and that no other Latin term conveniently renders that idea, and partly from the fact that the forms of actions were framed upon an allegation of duty, the Roman jurists did not speak of rights *in personam*, but of the correlative *obligatio*. An obligation was defined to be the legal bond that ties us down to do something according to law (*Obligatio est juris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis jura*). Right and Duty correlative

It is clear that for the Romans the legal bond, and not the duty to perform, was the most prominent aspect of an obligation, and it has been conjectured that in very early times the subjection of one party to the other was not merely legal, but physical. The person liable was actually a hostage. This way of looking at the matter explains why the Romans included under the head of obligations, not only contractual obligations, which arise from the consent of the parties, but also delicts. It is true that a person committing a delict is under a duty to compensate the injured party, but for the Romans the true parallel was not between this duty and the corre- Contract and Delict

sponding duty of compensation for breach of contract. The *making* of the contract, no less than the commission of the delict, was considered to subject one party in some measure to the power of the other, and the word used for the performance of a contract (*solutio*) literally means the loosing, or freeing of one party from the other.

Quasi-contract

Contract and delict do not exhaust the sources of obligation. In certain circumstances a person may be bound to another, although he has neither agreed to be so bound nor committed a wrong towards him. If one person pays money to another whilst labouring under a mistake of fact, the recipient is under an obligation to return it; he cannot be said, in the absence of fraud, to have committed a wrong in receiving it, and he certainly does not agree to repay it. The obligation in this and in other cases is imposed by law, and from the identity or similarity between the actions used to enforce it and certain contractual actions, is said to arise *quasi ex contractu*.

Proposal and Acceptance

A contract, then, arises from the agreement of the parties; but what is "an agreement"? An agreement involves two elements, a proposal and an acceptance. A person makes a proposal when he signifies to another his willingness to do or not to do something, with a view to obtaining the assent of that other to such an act or forbearance. The proposal is said to be accepted when the person to whom the proposal is made signifies his assent thereto.[1] In

[1] Such an agreement is a *conventio*.
Contractus is a *conventio* to which the law attaches a *juris vinculum*.
Pactum or *pactio* is an agreement not clothed with an action,

the chief contract of the Roman Law, the *stipulatio*, the proposal was made not by the promisor but by the promisee. "Will you give me 100 *aurei*?" "I will." Here the question is put by the creditor, and the debtor accepts the proposal by his answer. In order to make a valid agreement, it is necessary that the answer should agree with the terms of the question; in other words, that the proposal made should be accepted, and not something else. Thus, if the proposal is unconditional and the acceptance conditional, or *vice versa*, there is no agreement. So if the proposal is for something to be done on a future day, and the acceptance is for a different day, there is no agreement. So again, if the stipulator asks, "Will you give me Stichus or Pamphilus?" and the answer is, "I will give Stichus," there is no agreement, because the proposal is disjunctive and the acceptance is not.

The main points common to all contracts may be considered under the following heads:—

I. Consent—Error.
II. Time, Place, Condition.
III. Force, Fraud, and Bad Consideration.

but available by way of defence to an action. In later times certain pacts (*pacta legitima*, *pacta praetoria*) were enforced by action, but did not obtain the name of *contractus*.

Pollicitatio is a proposal merely; for example, a vow.

Civilis obligatio rests on statute or on custom.

Honoraria obligatio is established by the Praetor in the exercise of his jurisdiction.

Naturalis obligatio cannot be enforced by action, but may be used by way of defence or set-off, and will support a mortgage or suretyship.

IV. Illegal Promises.
V. Incapacity to Contract.
VI. Agency.

Essential Error

I. Consent—Error.—The parties to a contract are said to consent when they agree upon the same thing in the same sense. Their intentions can be expressed only through the medium of language, and this medium is a source of error. Error is essential when it is such as prevents any agreement from being made; it is non-essential when it does not prevent an agreement from arising. Essential error is such as prevents the contracting parties from agreeing upon the same thing in the same sense. This may occur in three ways: in the *corpus*, or thing promised (error *in corpore*); in the nature of the obligation (error *in negotio*); or in the person of a party (error *in persona*). Thus:

(1) I may intend to sell you one slave, you to buy another—as, if I sold Stichus, and you intended to buy Pamphilus, whom you misnamed Stichus. If both had meant the same thing, although they knew it by different names, the contract would have been good. (2) I intend to let you a farm; you think you are buying it. Here again, as the understanding affects the nature of the rights created, the error is fatal, and there is no contract. (3) I intend to lend money to Cornelius; Aulus, falsely representing himself to be Cornelius, gets the money. Here again there is no contract of loan, as I did not intend to bind myself to Aulus; and Aulus may be proceeded against for theft.

Non-essential Error

In all other cases error was non-essential (error *in substantia*), and the general rule was that non-essential error did not vitiate the contract. The subject is not free from difficulty. Savigny, who examined the

cases very minutely, arrived at the conclusion that in sale even non-essential error vitiated the contract where the difference between the thing bought and the thing that the purchaser intended to buy was such as to put the one into a different category of merchandise from the other. Thus, if I buy a ring, thinking it to be gold when it is copper, or silver when it is lead, the contract is void. Again, if I buy wine, and what is sold is vinegar, or I buy a female slave, and a male slave is sold, or *vice versa*, the contract is void.

II. Time.—When an agreement was made to pay money or to do anything on a particular day, performance could not be demanded before that day; and not even on that day, because the whole of the day must be allowed the debtor for payment at his discretion. So if the payment is to be made in a given year or month, the whole of the year or month must elapse before an action can be brought. If the contract is to be performed within a limited time—say, to build a house in two years—the question arose whether an action could be brought before the whole period had expired, if so much time had elapsed that it was impossible the works could be constructed within the time. Upon this question the jurists were hopelessly divided, but the preponderance of authority seems to favour the view that in such a case the whole time must elapse before an action could be safely brought for breach of contract. If no time was named in the agreement, money promised became due at once; and other promises must be performed within a reasonable time. Time

Dies cedit — venit

A notable distinction was drawn between the inception of the obligation and the time for performance. When an obligation begins to exist, it was said *dies cedit*; when performance may be demanded, it was said *dies venit*. If I agree to give a sum to Maevius, at one and the same moment the debt exists (*dies cedit*) and payment may be demanded (*dies venit*). If I agree to pay Maevius a sum of money a year hence, then at once the debt exists (*dies cedit*), but payment cannot be demanded before the end of the year (*dies non venit*). If I agree to pay a sum to Maevius if the ship "Flora" arrives from Carthage, then until that event happens there is no obligation (*dies non cedit*); but when the event happens, at once the obligation exists, and performance may be demanded (both *dies cedit* and *dies venit*).

Place of Performance

PLACE.—If a promise is made to pay at Ephesus, the debtor could not be sued in Rome, without allowing for any advantage he might have in paying at Ephesus. Generally speaking, if a debtor promised to pay or do something at a particular place, the creditor could not demand performance elsewhere; but the Praetor had a discretion to allow the creditor to do so, taking care that the debtor was not put to a disadvantage. If nothing was said in the contract as to the place of performance, frequently that was determined by the nature of the promise. A promise to deliver a farm must be performed at the farm; a promise to repair a house must be performed where the house is. When that indication was wanting, the general rule was that the creditor could demand performance in the place where he

could sue—that is, within the jurisdiction to which the defendant was subject. This rule was subject to a certain qualification. A defendant was not obliged to carry a moveable from the place where it happened to be at the time fixed for delivery, except at the risk and cost of the plaintiff, unless he had purposely caused the moveable to be kept in an inconvenient place.

Condition defined

CONDITION.—A condition exists when the performance of a promise is made to depend upon an event *future* and *uncertain*. If the event is past or present, the obligation is not suspended at all, but either at once takes effect, or is wholly nugatory. If a stipulation is made, "Do you undertake to give it if Titius was consul, or if Maevius is alive?" and neither of these is so, the stipulation is not valid; but if they are so, it is valid at once. But when an obligation depends on an event future and uncertain, it remains to be seen whether the event does or does not happen before the obligation can arise. The event must be uncertain as well as future. A promise to pay money on the death of Titius is a promise that one day will certainly have to be performed, but the day itself is uncertain. Consequently, such a promise was construed as a certain promise to pay, as an existing obligation, only the time for performance being uncertain. The jurists called this *incertus dies*, as distinguished from *condicio*.

Conditions in Contracts and Wills

In the Roman Law a somewhat arbitrary line was drawn between conditions in contracts and conditions in legacies or wills. Although in a conditional con-

tract the obligation did not exist until the condition was fulfilled, yet, even if the creditor died before the event, his heir got the benefit of the contract if the event afterwards occurred. A conditional promise gave rise to a hope only (*tantum spes*) that there would be a debt, and that hope was transmitted by the creditor to his heir if he died before the event happened. But if a legacy or an inheritance were given conditionally, and the legatee or the heir died before the event happened, he transmitted nothing to his heir. Again, if the event upon which a promise was made to depend was one that could not or ought not to occur (*i.e.* was impossible or illegal), then the contract was held to be altogether null and void. But in the case of a will, if a legacy or an inheritance were left subject to an illegal or impossible condition, the legacy or inheritance was held to be validly given, and the condition was simply wholly disregarded. "If I touch the sky with my finger," is a condition physically impossible; "If you kill Titius, I will give you 100 *aurei*," is a condition illegal.

Illegal Conditions

III. Force, Fraud, and Bad Consideration.—Force (*vis*) is when a promise is made in consequence of the actual exercise of superior force. Intimidation (*metus*) is a threat of such present immediate evil as would shake the constancy of a man of ordinary firmness. Whether the force or intimidation was applied by the party benefiting by the promise, or by a third party, the contract was technically valid, but the victim could claim to be put in the same position as if it had never existed, and could even recover

Vis

Metus

IV. Impossible and Illegal Promises.—*Impossibilium nulla obligatio est.* A person may undertake to do what he cannot perform. That is not impossibility within the meaning of the maxim. A thing is impossible, within the meaning of the maxim, when it is something that no human being can do. If I sell a man whom I suppose to be my slave, whereas he is really free, the contract is one that cannot be carried out. Again, if I agree to buy what is really, without my knowledge, my own, the contract is manifestly nugatory. Equally so a contract treating as private property something that is not capable of being so dealt with (as a church, or grave, or theatre, or forum belonging to the public) is void. Such contracts are invalid even if afterwards the things dealt with become private property and capable of being bought and sold. A sale of a freeman as a slave is not made valid even if the freeman should afterwards be reduced to slavery. But in such agreements an important distinction is to be observed. The impossibility of performing the contract may be known to both parties to the contract, or only to one of them. If a person, knowing that he could not perform his promise, sold a public thing or a freeman to a buyer ignorant of the impossibility, an action for breach of contract, on the ground of fraud, could be successfully maintained against the vendor. The measure of damages was the loss sustained in consequence of the false representation. Even if a promisor did not know that what he was promising was impossible, it was not necessarily equitable that he should go scot-free. It might well be held that he warranted its

Legal Impossibility

possibility; and it seems that in later law he was in certain cases bound to compensate the promisee.

Illegality

Again, a contract was void if it contravened some statute, or public morality, or public policy. A contract to steal, or to commit sacrilege, or to hurt or injure anyone, was void. In the Digest many instances exhibiting the Roman notions of public policy will be found. One alone may be given as an example —the *pactum de quota litis*. This meant an agreement whereby a person undertook to conduct a lawsuit for another, receiving a definite share of the proceeds. This was void; but an agreement to support litigation by a loan for interest was valid.

Infants, Minors, Madmen

V. Incapacity.—The presumption that an agreement freely entered into is for the benefit of the parties entirely fails when one of the parties is, by reason of disease or immaturity of mind, incapable of properly judging his own interests. A madman, accordingly, could not bind himself, except during a lucid interval. The case of infants and minors has been already considered (pp. 42, 43).

Slaves

But, in addition to these grounds of incapacity, which occur in all systems of law, the domestic institutions of the Romans gave rise to special disabilities. Thus slaves, who had no *locus standi* in a Roman court, and who had no property, could not make contracts for themselves. An agreement made by a slave, so far as regards himself, could not have any higher validity than a mere *naturalis obligatio*, upon which he could neither sue nor be sued. But that broad rule of law requires qualification. To the

extent to which a slave, by the indulgence of his master, could have property, he had a capacity to contract, and to bind that property (*peculium*) in the hands of his master. An action could not be brought against the slave himself, but his master was liable to an action (*actio de peculio*) to enforce payment to the extent of the *peculium*. The master had a right first, after adding to the *peculium* any debts owed to it by himself or others, to deduct all claims he had against his slave, unless indeed the *peculium* was employed by the slave, with the knowledge of his master, in trade; in which case the master might be compelled to distribute among the creditors the part of the *peculium* invested in the particular business, ranking himself only as an ordinary creditor. If any of the other creditors suspected him of distributing too little to him he could bring the *actio tributoria* for the balance. The master, again, was not liable if the slave, without valuable consideration, undertook to answer for the debt of another. Thus, by granting a *peculium* to a slave, the Roman could invest in trade upon a basis of limited liability, knowing that he could never lose more than the *peculium* and the profits which had accrued to it. This is the nearest parallel in Roman Law to the modern English law of limited companies.

Persons under the power of a *paterfamilias* were subject to similar, but not identical disabilities. If they had a *peculium profecticium* allowed them by the *paterfamilias*, or if they engaged in trade on his behalf, he was liable to the same extent and by the same actions as on the similar contracts of his slaves. A

Filii-familias

filiusfamilias, indeed, though not a *filia*, was capable of contractual obligation, but this was of little practical importance except where he contracted in relation to his *peculium castrense* or other separate property over which he had exclusive control. In such cases he could sue or be sued as a principal. Otherwise, he could be sued personally upon his contracts; but he could not sue his debtors, inasmuch as the benefit, although not the burden, of his contracts accrued to his *paterfamilias*.

Agency unknown to Early Law

VI. AGENCY.—An all-pervading, all-important conception of modern law is Agency or Representation, by which the power of creating legal obligations can be almost indefinitely multiplied. The early Roman Law admitted agency in not a single department, neither in lawsuits, nor in the conveyance of property, nor in the making of contracts: the actual person that intervened in a legal act could benefit by it, and no other. This is to be connected with the strict formalism of the old law. Every legal act involved elaborate ceremonies, and possessed in the eyes of the Romans a species of sacramental efficacy. It appears to have been absolutely inconceivable to them that the benefit of these forms could be given to a person who had not recited the solemn words, nor partaken in their ceremonies.

Perfect Agency

A perfect type of agency implies three things: (1) that the authority of the agent is derived from the consent of the principal; (2) that the agent can neither sue nor be sued in respect of the contracts he makes on behalf of his principal and within the authority

given by him; and (3) that the principal alone can sue or be sued. Agency rests upon the authority given by the principal, and it is more or less imperfect, unless the agent is wholly irresponsible, and the principal alone can sue and be sued. The agent does his work most completely when, as soon as the transaction is complete, he drops out of view, and the principal and the third party are brought face to face.

Acquisition through persons *alieni juris*

The old law, although it recognised no representation of one free man by another, possessed in the ancient constitution of the family no contemptible substitute. Slaves, sons, and others under the power of a *paterfamilias* could acquire for him, or rather they could acquire only for him and not for themselves. This was not agency—for the slave could acquire for the master not merely without his consent, but in opposition to his express command—but so far it served practically the same purpose as agency. The slave, however, could not subject his master to any burdens. "Our slaves can better our condition, but cannot make it worse." Thus the slave could act only in unilateral engagements: he could not buy or sell, or make any other contract involving reciprocal duties between the parties. This defect, however, was remedied by the Praetor, who gave an action (*actio quod jussu*) against the *paterfamilias* where, by his express authority (*jussu*), the son or slave had made a contract with a third party. He even went further, and gave an action against the *paterfamilias* when, without express authority, the son or slave had made a contract for the benefit of the master's property (*actio de in rem verso*, usually combined with

Slaves as Agents

the *actio de peculio*). This included all necessary or beneficial expenditure; such as cultivating the master's land, repairing his house, clothing slaves, or paying the master's debts. The ratification of the *paterfamilias* was not necessary; for the son or slave had, in virtue of the Praetorian action, an implied authority to make contracts for the benefit of his estate. The result, therefore, of the old principle of the civil law, eked out by the Praetor's actions, was, that sons or slaves under the power of a *paterfamilias* could act as agents for him, though not for any other person.

Agency of Ship Captain

In two instances where the necessities of commerce made themselves felt, an approach was made to agency in the case of free persons as well as of slaves and others *in potestate*. (1) The owner or charterer of a vessel (*exercitor*) was bound by all contracts made by the captain of the ship relating to the ship, its seaworthiness, and freight. The authority of the captain went to that extent, unless it were limited by his instructions. The captain was personally liable upon his contracts, as well as the owner, and in this respect did not enjoy the immunity of a true agent. Again, the owner could not sue the third parties directly; he had no direct remedy, except against his own agent; and thus his rights fell short of those of a true principal.

Shopmen as Agents

(2) A servant or manager of a shop or business (*institor*) could bind his principal by all contracts made in relation to the business. Here again, however, the servant or manager was himself liable personally for his contracts; and as a general rule, the principal could not sue the debtors of his manager, but could only require his manager to allow

him to sue in his name. In extreme cases, however, where it was necessary to avoid loss, the principal could, by leave of the Praetor, sue third parties directly. The Romans appear eventually to have granted an *actio quasi-institoria* against a principal who had appointed a person to act, not as a general manager, but as his agent in an isolated transaction; and, in a few cases, not strictly falling within the description of the *actio institoria*, a principal was allowed to sue directly persons who had made contracts with his agents. But beyond that the Roman Law did not go in establishing a law of agency for contracts.

Actio quasi-institoria

Section II—Classification of Contracts

Contracts are divided in the Institutes of Gaius and of Justinian into four classes, according to the manner in which they are made: (1) by the delivery of a thing (*re*); (2) by spoken words (*verbis*); (3) by writing (*litteris*); and (4) by consent. This division is incomplete and neither logically nor historically sound, but it seems more convenient to maintain it for purposes of exposition.

Arrangement in the Institutes

Both Roman and English Law make an important distinction between contracts and bare agreements. In neither system is it sufficient for a plaintiff to allege that there has been an agreement between the parties. Both require some other element before they will clothe an agreement with actionability. Otherwise it is said to be *nudum pactum*, and for Roman Law only a ground of defence, while English Law takes no

English and Roman Principles of Contract

account of it at all. It is not easy to give a satisfactory reason for this aversion which both systems show towards nude pacts, but it is clear that if full efficacy is given to them, difficulties of evidence are apt to arise, and there is a danger that persons may be made liable on mere unconsidered declarations of intention. It is against public policy that the law should be made an instrument of victimisation. But Roman and English Law do not agree in requiring the same additional elements if an agreement is to be made actionable. The English Law does not enforce gratuitous promises, or, in technical language, promises made without valuable consideration. The exception is the Formal contract of the English Law—the Deed, by which is meant a writing sealed and delivered. Thus a contract, to be binding, must in England be made by deed, or else be supported by a valuable consideration, and as contracting by deed is a cumbrous procedure, the latter alternative is by far the more important in practice. But the very idea of "valuable consideration" seems at first sight wholly wanting in Roman Law. It does not appear in Justinian's classification, and, in truth, although in some cases a valuable consideration was essential to a contract, yet the Romans did not perceive the fact, or at any rate did not lay stress on it, and thus fell short of a generalisation that would have assisted them marvellously to clear up the confusion that darkens their system of contract. The Romans started, we need scarcely with our present knowledge hesitate to affirm, with only formal contracts; that is, contracts in which the legal validity of the promise

consensual contracts, because they were made by mere consent. They were only four in number, namely, sale (*emptio venditio*), hire (*locatio conductio*), partnership (*societas*), and mandate (*mandatum*). All were enforced for the simple reason that they were essential to trade, and especially with aliens. The first three were supported by consideration, but mandate was, at least in theory, gratuitous, and so would not be enforced as a contract by English Law. But the Romans clearly had no horror of a gratuitous agreement as such, even if it was informal.

Pacts

At this point, strictly speaking, the contracts of the Roman Law are ended. There remains to be noticed the class of PACTS. The Romans were fortunate in the possession of two words that sharply distinguished agreements enforceable by law (*contractus*) from agreements that did not support actions (*pacta*). But in a few instances the Praetors, and in others certain Emperors, gave actions to enforce pacts. Two of those introduced by the Praetor (*pacta praetoria*) were *hypotheca*, already considered (p. 79), and the *pactum de constituto*, to be hereafter explained (p. 136). Theodosius and Valentinian (A.D. 428) enacted that a mere agreement to give a dowry should be binding without any *stipulatio*. Thus henceforth the *pactum de constituenda dote* supported an action. Again, Justinian sanctioned the greatest change of all—that a mere promise to give without any consideration (*pactum donationis*) should be enforceable by action. This decision, so strangely at variance with the traditions of Roman law, was dictated by the growing desire of the clergy to

Pacta Praetoria

Pacta Legitima

encourage gifts to religious persons or for pious uses. Yet even so, certain forms were required, and the promisor had to evince a deliberate intention to make a gift. Even in Justinian's time a mere formless and gratuitous promise did not necessarily create an obligation. These imperial pacts were called *pacta legitima*.

Nudum Pactum

Except in those instances, the term *pactum* was strictly applied to an agreement not enforceable by action. But from an early period the Praetors allowed such agreements to be used by way of defence (*Nuda pactio obligationem non parit, sed parit exceptionem*). In English text-books this maxim is often quoted, but in an entirely different sense. In English Law, *nuda pactio* means an agreement not supported by valuable consideration, an idea that, as we have seen, the Romans did not attain to or did not utilise.

Naturalis obligatio

An agreement that could not be enforced by action, if it was recognised by law for any purpose, created a *naturalis obligatio*. No action could be maintained upon a mere natural obligation; but it was available by way of defence or set off; if it was voluntarily performed, the debtor could not demand back his money on the ground that it was not due and was paid by mistake. Again, if a person became surety for a *naturalis debitor*, he could be sued as surety, although the principal debtor could not be sued. A *naturalis obligatio* also was sufficient to support a mortgage; and it could be the foundation of the novation of a contract.

Section III—Real Contracts

In the contracts said to be made *re* (by delivery of the thing), the legal obligation depended not upon the observance of any forms, but upon the fact that one party had delivered a thing to the other. Contracts *re*

Mutuum was the giving of any *res fungibiles* to another as his property, with the intention that at some future time we shall have returned to us, not the same things, but others of the same nature, quality, and quantity. *Res fungibiles* are things dealt with by weight, number, or measure, as silver, gold, bronze, money, corn, wine, oil: one *aureus*, or one bottle of Falernian wine, is as good as another and serves the purpose (*fungitur vice*) equally well. *Mutuum* was thus a gratuitous loan. It carried no interest, unless an independent obligation was created by *stipulatio* for that purpose. A promise to lend could not be enforced; but if the things were actually lent, it would have been manifestly unjust not to compel the debtor to repay according to his promise. *Mutuum*

Pecunia trajectitia, or *fenus nauticum*, was a commercial loan partaking of the nature of insurance. It was money lent to buy merchandise that was to be shipped and to be at the risk of the lender until the goods arrived at the port of destination. Marine Insurance

By a statute passed (A.D. 69–79) in the reign of Vespasian (*Senatusconsultum Macedonianum*), extending a similar enactment of Claudius (A.D. 47), an action was refused to any person lending money to a son in his father's power on the strength of his Loans to Sons

expectations on his father's death, unless it was made to procure necessaries.

Commodatum

Commodatum was the gratuitous loan of anything not consumed in the use, and was thus the complement of *mutuum* (the loan of things consumed by use). As a return for the gratuitous benefit of the loan, the borrower was bound to take all reasonable care (*exacta diligentia*) of the thing lent—that is, such care as would be taken by a prudent *paterfamilias*, and not merely such care as the borrower was accustomed to take of his own property. If, however, the borrower used the thing in a different way from that bargained for, he was liable if the thing was lost, even without his fault; and might, indeed, expose himself to an action for theft. Thus, if Titius borrows plate from Gaius to use at supper, and takes it on a journey, and it is stolen by robbers, he is liable to repay it. The lender, on his part, having once given the thing to the borrower, but not before, is bound to suffer the borrower to enjoy the use of the thing according to the terms of the agreement. He must pay extraordinary expenses to which the borrower may be put, such as money spent on a sick slave, or to catch a runaway slave; the borrower paid ordinary expenses, as, for food, and even medical expenses, if they were slight in amount. Although the contract was gratuitous, yet good faith required that the lender should not knowingly give things for a use for which they were unsuited. If a man lent vessels to hold wine or oil, knowing that they leaked or would spoil the liquor, he was required to pay the value of the oil or wine thereby destroyed.

Duties of Borrower

Duties of Lender

Depositum was a contract in which a person agreed to keep a thing for another gratuitously, and to return it on demand. The depositor must pay all expenses incident to the custody of the thing, and make good any damage caused by it, if he knew that it was likely to cause damage. The depositee was not allowed to use the thing, and for that reason he was not answerable for mere negligence, but only for gross negligence or wilful default. He might, of course, if he pleased, agree to answer for negligence as well, or even for accidental loss. When a thing was deposited under distress, as from a riot, or fire, or fall of a house, or shipwreck (*depositum miserabile* or *necessarium*), the depositee, if he proved false to his trust, was liable like a thief to an action for double the value of the goods deposited. Deposit

Pignus was reckoned by the jurists in the class of contracts. It has already been described under the head of Mortgage (p. 78). *Pignus*

Section IV—Formal Contracts

The form of *mancipatio*, so extensively employed in the transfer of proprietary rights, was in certain cases, under the name of *Nexum*, employed as a mode of creating contractual obligations. In what cases it was used we do not certainly know: it applied undoubtedly to things that were dealt with by weight or by number, if the weight or the number was definite; and some jurists thought it applied to things that were dealt with by measure. In any case, it seems to have been narrow in its *Nexum*

application. It was obsolete long before the time of Justinian.

Stipulatio

The *Stipulatio* was the chief Formal Contract. It may be traced back to a hoary antiquity; it survived to the dissolution of the Roman Empire. It was an oral contract, and its peculiarity—its *form*—consisted merely in this, that the promise made must be in answer to a question, "Do you promise to give 10 *aurei*?" "I promise"—this constituted a binding contract. "I promise to pay you 10 *aurei*" created no legal obligation whatever. The original form "Spondesne? Spondeo," was regarded as so peculiarly Roman that only Roman citizens could use it, and Gaius tells us that it could not properly be even translated into Greek. But other forms were found for the use of aliens (Fidepromittisne? Fidepromitto; Fidejubesne? Fidejubeo; Dabisne? Dabo; Faciesne? Faciam); and after Léo (A.D. 472) it was enough if the parties agreed in their understanding of the contract, whatever the words they used. Nor need the answer follow the precise terms of the question: it sufficed if there was substantial agreement. The *stipulator* was he that asked the question; the promiser (*promissor*) was the person bound by the answer. Thus to stipulate, in the Roman Law, does not mean to make a promise, but to ask for a promise: the stipulator was always the creditor.

Although the validity of a stipulation depended upon its being made orally, there was nothing to prevent, and much to recommend, the practice of recording the terms of the stipulation in writing (*Cautio*). The Roman Law established two legal pre-

sumptions in favour of such a writing: (1) that it afforded *prima facie* proof that the parties were present; and (2) conclusive evidence that the form of question and answer had been observed. The two weak points in the stipulation—the treacherous character of memory and all disputes as to the observance of the proper form of question and answer—were thus fortified. On the other hand, as the *stipulatio* was a contract necessarily unilateral it was not adapted for agreements involving reciprocal promises; but the parties might invert the rôle, and make reciprocal stipulations. *Stipulations reduced to Writing*

During the Republic there existed a true literal contract, made by an entry in the ledger (*codex*) of the creditor. This entry constituted the contract—not merely evidence of it. It was most usually a novation of an obligation already existing (whence it was called *nomen transscripticium*): the debtor owes a number of payments (on sale, hire, etc.), and he allows his creditor to enter the total sum as money paid out to him (*a re in personam*); or else he may offer another person as debtor in his room, and then the creditor enters the amount of the debt as money paid out to the new debtor (*a persona in personam*). From this fictitious paying out the literal contract was called *expensilatio*. If, however, the entry recorded an actual paying out, it was called *nomen arcarium*, and did not create a contract; it was merely evidence of a real contract of *mutuum*, or of a payment made in discharge of an obligation. Long before Justinian the *codex* had passed out of use (except among bankers). Gaius mentions the *chirographum*, a writing *Expensilatio*

Chirographa

Syngraphae

sealed by the debtor only, and the *syngrapha*, a writing executed in duplicate and sealed by both parties, as documents that were deemed to create a *litterarum obligatio*; but they were peculiar to aliens.

Later History

When the constitution of Caracalla made almost all free subjects of the Emperor Roman citizens, these forms no longer retained in theory their full efficacy, but it is a very difficult question on the solution of which authorities are not yet agreed, how far the strict rules of Roman Law were able to prevail in practice over the settled habits of the Eastern Provinces of the Empire. Probably the former aliens still used their old methods, and attempted to preserve their efficacy by making considerable concessions to Roman institutions in point of form; in the majority of cases they appended an allegation of a stipulation to their own native documents. Whether the truth of such an allegation could be questioned, on the ground, for example, that the parties had not been present together at the time of the agreement, is uncertain, though the requirements of a valid stipulation were in some respects relaxed. Justinian appears to have established a compromise by enacting that the only way of rebutting an allegation of this kind was to prove by the clearest evidence that the parties had not been present in the same city during the whole of the day on which the stipulation was alleged to have taken place. If on the other hand the allegation was not of a stipulation but of an informal money loan—which might in certain cases be fictitious, like the Roman *expensilatio*—the debtor could compel the creditor to prove that he had

actually advanced the money, but after a period, fixed by Justinian at two years, he could no longer attack the document. Justinian naturally enough says that thereafter he was bound by a literal obligation. But some authorities doubt whether any of Justinian's law relating to written contracts was in conformity with actual practice, and are of opinion that in every case the writing possessed binding force.

Section V—Sale (*Emptio Venditio*)

Sale is a consensual contract—a contract formed by mere consent of the parties: delivery was not necessary (as in contracts *re*), nor a prescribed form (as in contracts *verbis* and *litteris*). This is by no means the oldest form of the transaction. Paulus remarks that sale followed upon exchange (*permutatio*): first, a man gave one thing and received another thing for it; by and by he received for it an equivalent in crude metal, later still in coined money, and the transfer of ownership was effected by the form of *mancipatio*. But a transaction of this sort gave rise to no obligations on either side—though obligations might arise otherwise in connection with it. It required a long period of development before obligations *bonae fidei* were recognised to arise on sale by mere consent: probably this did occur before the Lex Aebutia (p. 181).

Sale a consensual contract

Older expedients

Sale (*emptio venditio*) is a contract in which one person agrees to give to another for a price (*pretium*) the exclusive possession (*vacuam possessionem tradere*) of some thing (*merx*). This agreement might be made

Sale how formed

by the parties if present together, or by letter. It was held binding as soon as the subject-matter of the sale and the price were determined: the price need not yet have been paid, nor need earnest have been given. Writing was not essential to the validity of the contract; but, if it was contemplated by the parties that the negotiations for a sale should be finally reduced to writing, Justinian enacted that either party should be free to withdraw before the contract was written out. If the instrument was not written by the parties, it must be signed by the parties. If it was to be drawn up by a notary (*tabellio*), the contract was not complete until the documents were fully finished in every part. But one of the parties could not withdraw without penalty if earnest (*arra*) had been given to bind the bargain, whether the contract was in writing or not: if the buyer refused to proceed, he forfeited the earnest; if the vendor, he had to restore the earnest and its equivalent in value.

Arra

Some authorities are of opinion that this rule relating to the forfeiture of *arra* applied only to uncompleted contracts, that it was, in short, only a penalty for refusing to carry the negotiations to such a stage that a contract came into existence. It would be against principle that either party should be allowed to refuse to perform a completed contract without paying damages as well. But in all probability the *arra* to which Justinian alludes is not, as in earlier Roman Law, a small object, the giving of which merely furnished evidence of a completed contract, but, as in certain parts of the eastern provinces, a considerable sum of money, perhaps more than half the

price. Accordingly a defaulting party would not get off lightly by forfeiting the *arra*, and the other party might well be satisfied, even if he could not sue for damages for breach of contract. But the language of Justinian is too obscure to admit of any certain interpretation.

The Price

There must be a real price, and it must be coined money, and (except in part) no other species of valuable consideration. If a thing were sold for a nominal price (*uno nummo*), which the vendor did not mean to exact, there was no sale; but the price might validly be made less by way of favour to the buyer. Mere inadequacy of price did not vitiate the contract, unless it fell short of half the value, in which case, under a constitution of the Emperors Diocletian and Maximian, the vendor could refuse to carry out the contract. It is a moot point whether, if the price were twice as much as the value, the buyer had a similar right to throw up the contract. If no price were fixed by the parties, but they agreed to allow a third person to determine the price, then if that person fixed a price, the contract was complete; but if he did not, the sale went for nothing, no price having been determined upon.

Vacua Possessio

In the definition of the contract, it is said that the vendor agreed to give the exclusive possession (*vacuam possessionem tradere*), which is to be distinguished from ownership. A man had exclusive possession when he was actually, by himself or his representative, in physical possession, and when no one was in a position to eject him by an interdict. If the vendor was owner, he in fact transferred ownership. If he

was not, the buyer was liable to be evicted by the true owner, though, having acquired possession by a *justus titulus*, he would in due course become owner by usucapion, provided that the thing sold was neither stolen nor possessed by force on some previous occasion. Accordingly, the vendor was bound not only to give exclusive possession, but also (eventually, the buyer being originally left to protect himself by stipulation) to warrant against eviction (*habere licere*), that is, to compensate the buyer in the event of his being evicted by law from a part or the whole of the thing sold, for any ground (*causa evictionis*) existing at the time of the sale. The duty to transfer the ownership is thus split up into two parts—the duty to give present possession, and the duty to give compensation in the event of future disturbance. The two parts were not quite equal to the whole, because a buyer might be compelled to accept a property with a defective title, and before the eviction took place, the vendor might be bankrupt, and an action against him for compensation be thus wholly worthless. On the other hand, this curiously cumbrous procedure had certain advantages which would have been absent if the vendor had been directly bound to transfer ownership. The vendor might otherwise have been bound to prove his title, often a costly business. Actually he was relieved of this necessity unless the buyer was evicted. Moreover, owing to the narrow scope of civil law ownership (*dominium*), it might very well happen that the vendor, whilst enjoying exclusive and indefeasible possession of a thing, was not owner. He might be

Warranty against Eviction

only bonitary owner or an alien, or the thing might be provincial land. Or again, he might be unable to make the buyer owner because the buyer was an alien. In a contract which was necessary for foreign trade, this would have been a fatal disadvantage. With the simplification of ownership, most of the reasons for the Roman rule disappeared, and in the modern systems derived from Roman Law, as in English Law, the vendor is under an obligation to transfer ownership.

Delivery of thing sold

The effect of a completed contract of sale was, not to transfer the possession to the buyer, but to give the buyer the right to require the possession to be transferred. In the language of jurisprudence, it gave the buyer a right *in personam* as against the vendor, but no right *in rem* to the thing as against the world. If the vendor, in breach of his contract, kept the thing or transferred it to another person, the buyer could sue him for damages, but he could not recover the thing itself. Nor did even the delivery of the possession, in the case where the vendor was owner, vest the ownership in the buyer. The buyer became owner only when he had paid the price or given security for it, unless the vendor had waived his right to immediate payment or security and given the buyer credit. In that case the buyer acquired the ownership as soon as the thing was delivered to him.

Periculum rei

After the contract of sale and prior to delivery, it was the duty of the vendor to take good care of the thing sold, but the profit and the loss (*commodum* and *incommodum*) arising from it during this period were with the buyer. The interest of the buyer as owner

thus really dated from the time of the contract of sale. If a mare foaled after the contract, the foal belonged to the buyer; if an inheritance were left to a slave after the price was fixed, the buyer had the benefit of it. On the other hand, if the property were accidentally destroyed or injured, the loss fell upon the buyer, and the vendor was entitled to the full price.

Except *res fungibiles*

In three cases, however, the risk remained with the vendor. (1) Things sold by number, weight, or measure remained at the risk of the vendor until they were set apart, numbered, weighed, or measured respectively—until they were "appropriated" to the buyer. The risk, however, was thrown on the buyer if these things were sold in lots (*per aversionem*), as, for example, "all that lot of corn, or oil, or wine." This was in fact the same as the sale of specific ascertained goods. (2) If the sale were conditional, the rule was more complex. Of course, if the conditions were not fulfilled, there was no sale, and all loss or damage fell on the vendor. If the conditions were fulfilled, but before that event the thing was destroyed or damaged, the rule was that a total loss fell on the vendor, and a partial loss on the buyer. The reason was that, if the thing perished, the vendor was not in a position to deliver anything to the buyer when the condition happened and the obligation took effect; but if he could deliver the thing, although damaged or mutilated, he acquitted himself of his promise. (3) If the agreement were that the buyer had the choice of two things, and one perished, he took the other; but if both perished, the loss fell upon him, and he had to pay the price.

Except Conditional Sale

Except Alternative Sale

If the vendor did not deliver at the time he ought, he was responsible, not merely for negligence, but for accidental loss. On the other hand, if the buyer did not remove the goods at the time he ought, the vendor was answerable only for wilful misconduct, or for extreme negligence. *Mora*

The duties of the vendor are these :—(1) To deliver exclusive possession ; (2) to warrant against eviction ; (3) prior to delivery, to take as much care of the thing as a good *paterfamilias* (*exacta diligentia*). There remains another and characteristic obligation, (4) the vendor must suffer the sale to be rescinded, or give compensation, in the option of the buyer, if the thing sold has undisclosed faults that interfere with the proper enjoyment of it. This duty depended upon the edict of the Curule Aedile, a magistrate who (amongst other functions) was charged with the superintendence of markets. His edict applied to slaves and animals, moveables and immoveables. In the case of slaves, the edict applied if the slave had any disease or vice—was in the habit of wandering (*erro*), or was given to running away (*fugitivus*), or had committed a delict or a capital crime, or had attempted suicide, or been sent to the amphitheatre to fight with wild beasts as a punishment ; and, unless any fault of that description was told to the buyer, he had the option of rescinding the sale (*actio redhibitoria*) within six months, or of keeping the slave and demanding a deduction from the price within a year (*actio aestimatoria seu quanti minoris*). In the case of animals, every disease or vice, as biting or kicking in a horse, or a disposition to gore in an ox, had to be disclosed. Duties of Vendor

Warranty against Secret Faults

By analogy it was held that on the sale of a ship there was an implied warranty of soundness, and generally that, when an instrument was sold for a purpose, it was not so defective as to be unfit for that purpose. The buyer of land that produced poisonous herbs or grass could rescind the sale, unless the fault had been disclosed to him. The ignorance of the vendor was no excuse; and, if he was not ignorant, he was guilty of bad faith and liable even for consequential damage.

English Law

The rule of the Roman Law is exactly the reverse of that embodied in the maxim "*Caveat emptor.*" If both buyer and vendor were ignorant of a fault, the loss fell in Rome on the vendor, in England on the buyer. The origin of the Roman rule is to be sought in the slave market. The faults of slaves usually were or might be known to their owners, but could easily be concealed from buyers. It would have been a serious impediment to business if it had been as dangerous to buy a slave in Rome as a horse in England. Accordingly, long before the edict of the Aedile, a practice grew up of requiring from the vendors of slaves and cattle formal guarantees expressed in stipulations; and the Aedile simply extended that idea by creating an implied warranty against all serious faults that were not expressly disclosed at the time of the sale.

Duties of Buyer

The duties of the buyer in a contract of sale were simple. He must pay the price, he must accept delivery of the goods, and he must pay the expenses the vendor incurs in keeping the thing prior to delivery.

Section VI—Hire (*Locatio Conductio*)

Hire (*locatio conductio*) is a contract in which one person (*locator*) agrees to give to another (*conductor*) the use of something, or to do some work, in return for a fixed sum (*merces*). This contract is analogous to, but distinguishable from, several other contracts. It agrees with *commodatum* in being a contract for the use of a thing; but *commodatum* is gratuitous, while hire is for a remuneration. If a deposit is made gratuitously, or a service is to be rendered gratuitously, the contract is either deposit or mandate; but if payment is to be given, it is *locatio conductio*. Again, if there be a valuable consideration other than money, the contract is not *locatio conductio*. If, for instance, a man has an ox, and his neighbour too has one, and they mutually agree that each shall lend the other his ox free ten days in turn, then it is not a *locatio conductio*; but if one has lent his ox, he can claim the use of his neighbour's ox upon the ground of part performance by the *actio in factum praescriptis verbis*. Although hire is very distinct from sale, yet there were cases in which a difficulty arose. Where Titius agreed with a goldsmith that the goldsmith should, out of his own gold, make rings, and receive 10 *aurei*, it was disputed whether this was a contract of sale or of hire. One view was that it was a compound contract—of sale as regards the material, and of hire as regards the services of the goldsmith. But it was finally settled that where the workman supplied the material, it was a simple contract of sale; if he supplied only labour, it was a contract of hire.

Hire defined

Distinguished from other Contracts

Hire of Things

The contract of hire relates to land and other things, or to services. And first of the hire of things.

Tenant had no Right *in rem*

A tenant of a house or farm had no right *in rem* to the house or farm, but only a right *in personam* against the landlord. In other words, if evicted by his landlord or even by a stranger, he could not invoke the aid of the interdicts by which possession was restored; he could only bring an action for damages against his landlord for breach of contract. The landlord alone could sue the disturbers, but, if he failed to do so, he committed a breach of contract.

Duties of Landlord

The duties of the landlord (*locator*) were—(1) To deliver the thing to the tenant (*conductor*), and permit him to keep it for the time agreed upon. If the landlord by his own fault deprived the tenant of his holding before the end of the lease, he must pay full compensation (*id quod interest*); but if the tenant was evicted through no fault of the landlord, the tenant could claim only a remission of the rent, and not damages. Thus if the house was burned down, or the thing let was carried off by robbers, or the farm was confiscated, the tenant was released from rent, but was not entitled to compensation. (2) The landlord was bound to keep the thing in such a state that the hirer could enjoy the use agreed upon. If the thing deteriorated and was not repaired, the tenant could demand a reduction of the rent, or a release from the contract. Trifling repairs were to be executed by the hirer. (3) The landlord was responsible if the thing let had such faults as were likely to cause damage. If a landlord let a farm along with the vats or jars used in wine-making, and

Landlord bound to Repair

Warranty of Fitness

the vats were rotten, and the tenant lost his wine, the landlord must pay the value of the wine. (4) The landlord must permit the tenant to carry away not only moveables but even fixtures placed by the tenant, provided the tenant did not thereby injure the house. A tenant of land was entitled to compensation for unexhausted improvements, except such as he had specially agreed to execute in consideration of a lower rent. The measure of compensation was the increased value of the land.

Removal of Fixtures

Unexhausted Improvements

The tenant was bound—(1) To pay the rent, with interest if it was in arrear. If rent of a house or farm were in arrear for two years, the tenant could be evicted. In certain cases the landlord was obliged to remit the whole or a part of the rent on account of loss or damage to the crops. (2) The tenant must occupy during the term agreed upon, or at all events pay the rent. (3) The tenant or hirer must exercise the highest degree of care. (4) The tenant or hirer must give up the thing upon the expiration of the term agreed upon.

Duties of Tenant

In the hire of services the jurists, misled by a false analogy, fell into confusion. The hirer pays the price, the letter gives his services. If the services were not rendered in respect of a particular thing, as the services of a messenger or secretary or domestic servant, the employer was correctly described as *conductor operarum*, and the servant as *locator operarum*. But if the work was to be done in respect of a particular thing, as by a jeweller, or builder, or tailor, or carrier of goods, the jurists called the employer the *locator operis faciendi*—that is, of the

Hire of Services

job to be done—and the workman the *conductor operis faciendi*.

Duties of Workman

The servant or workman was bound—(1) to do the work properly in the manner agreed upon; (2) to take good care of the things entrusted to him, and to pay their value if they were lost or injured through his negligence or unskilfulness. It appears as though persons who received clothes to be cleaned or mended were responsible even if the clothes were stolen without their fault, but not if they were carried away by robbers. The employer, on the other hand, was bound to pay the wages agreed upon.

Jettison

JETTISON (*Lex Rhodia de Jactu*).—An interesting case of hire was that of a carrier of goods in ships. The customs known as the maritime law of Rhodes were accepted as law by the Romans when they did not conflict with special legislation. Jettison was where, in order to save a ship, a portion of the cargo was thrown overboard. The loss was divided between the owners of the goods lost and the owners of the vessel and of the cargo saved. The owner of the vessel was also entitled to contribution when a mast was cut to save the vessel, but not for repairs of damage done in a storm in the course of the voyage, although the repairs were necessary to enable the vessel to continue the voyage. The owners of the goods lost had no direct action against the owners of the goods saved; but they could sue the shipmaster on the contract of hire for the purpose of requiring him to keep the goods until the contribution was paid; or, if these had been delivered, to allow them to sue the owners of the goods in the shipmaster's name.

Section VII—Partnership (*Societas*)

Partnership (*societas*) is a contract in which two or more persons combine their property, or one contributes property and another labour, with the object of sharing amongst themselves the gains. There cannot be a partnership in which one partner contributes nothing—neither property nor labour. A partner might share in the profit and not in the loss, but a partner could not share in the loss only and not in the profit. Such a partnership (*leonina societas*) could be made only from a charitable motive; and it was necessary in this contract that there should be a valuable consideration moving from each of the partners. Partnership defined

A profound difference is to be remarked between partnership in the Roman Law and partnership in modern systems of law. The most important aspect of partnership is the relation between the partnership and third parties that enter into transactions with any of the partners. In modern systems every partner within the scope of the business is an implied agent of the other partners, and can bind the assets of the partnership. In Rome this was wholly wanting. The Roman law of partnership deals only with the claims of partners as between themselves. The *actio pro socio* has no wider scope; and third parties had no direct remedy except against the individual partner with whom they contracted. Roman and Modern Law. Partners not implied Agents

Partnership was formed by the simple consent of the parties. If nothing was said as to the shares of the partners, they took equal shares. If the share Shares of Partners

was expressed in one case only, whether of profit or loss, but omitted in the other, then in the other case that had been passed over the same share must be kept to. By express agreement, however, the shares of loss might be different: thus one partner might have two-thirds of the profit and one-third of the loss, and the other partner one-third of the profit and two-thirds of the loss. As in the case of Sale and Hire, the determination of the shares might be left to a third party.

Dissolution of Partnership

Partnership was ended—(1) By renunciation. Any partner might dissolve the partnership if no time was fixed for its duration, and if he did not act with a view to appropriate to himself what would otherwise have fallen into the partnership estate. A partner who withdrew without justification divested himself of all his rights as a partner, but remained liable for all existing obligations (*socium a se, non se a socio, liberat*). (2) By the death of a partner; because, in entering into a contract of partnership, a man chooses for himself determinate persons as his associates. Even if the partnership was formed by more than two persons, the death of one dissolved it although several survived, unless it was otherwise agreed when they joined in partnership: in a *societas vectigalium* (p. 125) it was often specially arranged that the heir of a partner should succeed him. (3) By the loss of liberty or citizenship by any partner. (4) The bankruptcy of one of the partners, or the confiscation of all his property, dissolved the partnership. But in this case, if the members agree to go on as partners, a new partnership is begun. (5) A partnership is at

an end when it was formed for some special business, and that business is finished. Again, a partnership is terminated—(6) By the loss of the partnership property; (7) By the lapse of time for which it was formed; and (8) By one of the partners commencing an action to enforce his rights.

Kinds of Partnership

Five kinds of partnership were distinguished—

1. Trade Partnership (*Societas universorum quae ex quaestu veniunt*); such as that of bankers or money-lenders. This was the partnership understood to be made, if no other form was specially agreed upon. The partners contribute definite property, and they divide the profits arising from it according to their shares.

2. Partnership for a single transaction (*Societas negotiationis alicuius*), as when one person contributes three horses to a team and another one, in order by selling them together to realise a higher price.

3. *Societas vectigalium* — a partnership between persons farming the taxes.

4. *Societas unius rei vel certarum rerum*, or joint-ownership, is not a partnership, but was considered under that category, because where joint-ownership had originated by agreement between two persons (but not otherwise, *e.g.* by inheritance or legacy), they could employ the *actio pro socio* for an account as between them.

5. *Societas omnium bonorum* resembles the Hindu institution of the joint family, and is probably descended from the *consortium*, an early institution which resulted from co-heirs keeping an inheritance undivided and enjoying it in common. It means that

two persons agree to have a common purse. All that they have and all that they acquire, from whatever source, becomes joint-property, and they are entitled to have all their debts and expenses paid out of the common fund.

Duties of Partners

The reciprocal rights and duties of partners were few and simple. (1) Each must contribute what has been agreed upon, and whatever he gains in respect of partnership transactions. (2) Each is entitled to be reimbursed all expenses properly incurred, and to be indemnified in respect of all the obligations he undertakes on behalf of the partnership. (3) Each partner is liable for wilful default (*dolus*), but not for negligence in the ordinary sense. It was enough that a partner displayed such diligence and care in regard to the partnership concerns as he usually did in regard to his own. This was decided on a ground that would equally apply to all contracts whatever—that a man who takes to himself a partner lacking in diligence has nobody to complain of but himself.

Culpa

Section VIII—Mandate

Mandate defined

Mandatum is a contract in which one person (*is qui mandatum suscipit, mandatarius*) promises to do or to give something, without remuneration, at the request of another (*mandans* or *mandator*), who, on his part, undertakes to save him harmless from all loss. A mandate might be for the benefit of the *mandans* or of a third person, but not exclusively, say the Institutes, for the *mandatarius* himself. Thus if Titius advised Gaius to invest his money in land

For good of Mandatary alone

rather than to put it out at interest, and Gaius, acting on the advice, lost by the investment, he had no claim for an indemnity against Titius. Justinian says this is a piece of advice that Gaius was free to accept or not, rather than a mandate. The decision in this case is right, although the ground upon which it is put is not quite satisfactory. The true question is whether Gaius acted at the request of Titius, and Titius, in consideration of his doing so, promised him an indemnity. It would be contrary to common sense to suppose in such a case that Titius meant to indemnify him. When a man at the request of another acted for the benefit of some third person, it was reasonable to infer a promise of indemnity; but where a man was advised to do something solely for his own benefit, such an inference would be unreasonable. Nevertheless, if in such a case a person expressly promised an indemnity, a contract of mandate was established.

Examples of Mandate

A mandate might be for the sake of the mandator, as when a man gives you a mandate to manage his business, or to buy a farm for him, or to become surety for him. It might be for the sake of a third person only, as when a man gives you a mandate to manage the business of Titius, or to buy a farm for him, or become surety for him, or lend him money without interest. It might be for the sake of the *mandatarius* and a third person, as when a mandate is given you to lend money to Titius at interest. It might be for the sake of the mandator and a third person, as when a man gives you a mandate to act in business common to himself and Titius, or to buy a

farm for himself and Titius, or to become surety for him and Titius. It might be again for the benefit of the mandator and the *mandatarius*, as when a man gives you a mandate to lend money to Titius for the good of the mandator's property ; or, when you wish to bring an action against him as surety, gives you a mandate to bring the action against the principal at his risk. In all those and similar cases, where some person other than the *mandatarius* had an interest in the performance of the contract, it was considered that the request by the mandator implied a promise of indemnity, if the *mandatarius* should suffer any loss by acting upon the request.

The duties imposed upon the *mandatarius* may be reckoned as four :

Renunciation of Mandate

1. He must do what he undertakes. This duty was not, however, absolute. He might renounce the mandate, provided there was time for the mandator to act himself. If I undertake to go to an auction to bid for a farm for another, by giving reasonable notice before the auction I can relieve myself of the obligation. It must be borne in mind that the *mandatarius* acted gratuitously ; he might be promised pay, but such pay (*honorarium*, *salarium*) was no element of the contract, and if it were, the contract was not mandate. Again, at the last moment, a *mandatarius* was excused from performing his engagement for good reason shown, as if he were suddenly taken ill, or compelled to leave home on business, or if the mandator became insolvent, or bad feeling arose between the mandator and the *mandatarius*. If the *mandatarius* failed without sufficient reason to perform his

promise, he was made liable in damages, on the ground that the mandator had in consequence of the promise of the *mandatarius* not done something he would otherwise have done, and had thereby incurred loss.

Performance of Mandate

2. The *mandatarius* must conform to his instructions, on pain of forfeiting his indemnity, and exposing himself to an action for damages for any loss thereby falling on the mandator. Many nice questions arose as to what constituted a substantial fulfilment of a mandate, though not complying with its literal terms. In the early Empire Sabinus and Cassius had held that, if a mandate were given to buy a farm for 100 *aurei*, and 110 were given, the mandator could refuse to accept the farm even at 100 *aurei*; but the Proculians thought he could not. Justinian took the view of the Proculians—that the *mandatarius* could compel the mandator to take the farm off his hands at 100. Of course a mandate to buy at 100 was fulfilled by buying at a less sum. A mandate to buy a farm was considered fulfilled by the purchase of one-half of it, unless the mandator expressly stated that he would accept nothing less than the whole.

Diligence

3. A *mandatarius* must take as much care of any property he receives as a man of ordinary prudence (*bonus paterfamilias*). This forms a remarkable contrast to the contract of deposit, which, like mandate, was gratuitous; and it is an exception to the general rule that a gratuitous promisor is liable only for wilful default. This rule, it is not surprising, was not reached without a conflict of opinion.

4. The *mandatarius* must give up to the mandator

everything he acquires by the performance of the mandate, including all rights of action against third parties, and must permit the mandator to sue in his name. In this circuitous way the mandator was brought into relation with the third parties with whom contracts were made at his request; if he could have passed by the *mandatarius* and directly sued such parties as principal, the Romans would have enjoyed a true law of agency. In the absence of such, the contract of mandate afforded a very useful substitute.

Duties of Mandator

The duties of the mandator are: (1) to pay the *mandatarius* what he has properly expended in executing the mandate; (2) to accept what the *mandatarius* has acquired or done for him, and to indemnify him against all obligations that he has incurred in the execution of the mandate. As the *mandatarius* was to gain nothing, so he ought to lose nothing, provided always he properly performed the mandate.

Termination of Mandate

A mandate might be revoked, or, as we have seen, renounced. It was also put an end to by the death of either mandator or *mandatarius*, subject to this qualification, that if the *mandatarius*, in ignorance of the death of the mandator, carried out the mandate, he was entitled to indemnification. It was not considered right that unavoidable ignorance should bring loss to the *mandatarius*.

Section IX—Extinction of Contracts: Novation

Contracts were extinguished (1) by actual performance (*solutio*) or its equivalents; (2) by release;

(3) by prescription ; (4) by suit (*litis contestatio*) ; and (5) by merger (*confusio*).

Performance

1. *Solutio.*—Every obligation may be discharged by the giving of what is due, or, if the creditor consents, of something else in its place. It matters not who discharges it, whether the debtor or someone else for him ; for he is freed even if someone else discharges it, and that whether the debtor knew it or not, and even if it was done against his will. If, without the fault of the promisor, it becomes impossible to fulfil the promise, generally the promisor was discharged. X promises by stipulation to give a small plot of land, not his own, to another. Before doing so, the owner of the ground buries a dead body in it, and so makes it *res religiosa* and *extra commercium*. X cannot be compelled to pay damages for non-performance.

Formal Release

2. Release is of two kinds—formal and non-formal. The Roman Law started with the idea that no debtor could be released except by a reverse application of the proceeding by which he bound himself (*Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est.*—D. 50, 17, 35). Hence a contract of *nexum* made by a ceremony *per aes et libram* must be dissolved by a similar ceremony ; a contract by stipulation must be dissolved by a verbal release corresponding in form to stipulation (*acceptilatio*) ; a contract formed by writing (*expensum ferre*), by written release (*acceptum ferre*). This rule was inconvenient; and an ingenious device was introduced by Aquilius Gallus, a colleague of Cicero's in the Praetorship, 66 B.C. If by an existing contract a person was bound to do or give anything, and he afterwards by stipula-

Aquilian Stipulation

tion promised to do or to give the same thing, then the original contract was considered at an end, and its place taken by the stipulation, upon which alone henceforth the promisor could be sued. Taking advantage of this peculiarity, Aquilius introduced a general form (*stipulatio Aquiliana*) embracing every kind of obligation, and converted all these obligations into a single stipulation. Then, by *acceptilatio*, the creditor released this obligation, and thus all the obligations of one person to another could be discharged at a single stroke.

By a formal release, the legal tie (*vinculum juris*) was broken. If there were sureties, they were *ipso facto* released; if the release was made to one of several co-debtors, all were immediately free. At first the Roman Law recognised no release from a formal contract except a formal release. But at length the Praetor interfered to protect a debtor whom his creditor had agreed to acquit, but without observing the appropriate formalities. If a creditor agreed not to sue, it was against good conscience to allow him afterwards to molest the debtor. The Praetor gave effect to such an agreement (*pactum de non petendo*) by refusing to the creditor his legal remedy. This was not quite the same thing as a release. A formal release wholly extinguished the obligation for every purpose; an agreement not to sue might operate in favour of some of the parties and not of others; it might be subject to conditions; everything depended on the terms of the agreement. Thus, in the case of a suretyship, a release by *acceptilatio* of either principal or surety put an end to the

Non-formal Release

Pact not to sue

suretyship ; but an agreement made with a surety did not create even a presumption in favour of the release of the principal, although an agreement not to sue the principal was *prima facie* an acquittance of the surety. The reason was that, if the surety were called on to pay, he would have his indemnity from the principal, who would thus in the end derive no benefit from his acquittance.

3. *Statutes of Limitation.*—No general statute of limitations for obligations was introduced until far down in the Empire, by Theodosius, in A.D. 424. Actions derived from the *jus civile* were perpetual, and so strong was the idea of an obligation as a chain (*vinculum*) that the Romans had some difficulty in conceiving the possibility of its being unloosed except by the proper legal key. No such difficulty affected the Praetor. When he interfered in derogation of the civil law, his action was always regarded as an extraordinary stretch of power, fully justified and required by natural justice, but still anomalous. Penal actions created by the Praetor must be brought within one year ; but actions brought for the recovery of property were perpetual. In the latter, as in most other cases, the statutory period of limitation in the time of Justinian was thirty years. Prescription

4. In certain cases, when an action was commenced and had gone so far as to be referred to an *arbiter* or *judex* (*litis contestatio*), the obligation was gone. *Litis contestatio*

5. Before the change in the law introduced by Justinian, if an heir was either debtor or creditor to the person he succeeded, then as the heir and the *Confusio*

deceased were in law regarded as one person, the debt was extinguished (*confusio*).

Novation defined

NOVATION.—*Novatio* is the extinction of an obligation by the substitution for it of another obligation. After the disappearance of the old literal contract, it could be done only by stipulation. Novation introduced some change in the form or contents or in the parties to an obligation. Thus if A owes 10 *aurei* to B, we may have three principal changes :

(1) B may transfer his right to C. A will then be debtor to C.

Or (2) B may accept D as his debtor in place of A. D will then owe the 10 *aurei* to B.

Or (3) while A and B remain the same, the simple debt of 10 *aurei*, arising, for example, from a sale or loan, may be changed into a sum due by stipulation.

Or (4) the change might be in the contents of the obligation, *e.g.* a surety might be added or taken away. If the original obligation was created by stipulation, there had to be some change in its terms.

Transfer of Claims

A creditor could, with the consent of the debtor, transfer his right to a third party. The third party stipulated with the debtor for payment of the debt, and this stipulation novated the original obligation. It was also possible to obtain the same effect without the consent of the debtor, by the creditor giving the third party a mandate to sue the debtor in the creditor's name, and to keep the proceeds for himself (*procuratio in rem suam*). But here there was no novation of the original debt ; and the debtor could set up against the third party whatever defence he

had against the original creditor. To prevent debtors from being too much harassed, the law, in the time of Justinian, was that a transferee of a claim could not receive more than he paid for it with interest.

Delegation

When, by the consent of the creditor, a new debtor was substituted for the old, *delegatio* was said to take place. The creditor stipulated with the new debtor for the debt, by which means the old obligation was taken away.

Change by Justinian

Justinian made a very important change in the law of novation. The principle of the Roman Law was, that it depended entirely upon the intention of the parties whether a new stipulation for the same object as an existing obligation took away that obligation or not. But a number of presumptions were introduced as to the circumstances in which such an intention was to be inferred. Justinian removed all doubts by enacting that there should be no novation unless it was expressly declared by the contracting parties that such was the aim of their agreement. If not, both the original and the new obligation remained in force.

Section X—Suretyship

Contracts of Suretyship

When one person undertook to answer for the debt or obligation of another, whether as his substitute by novation (*expromissor*), or in addition to him (*adpromissor*), he was said to be an *intercessor*. The contract of suretyship could be made by stipulation (in three forms), by mandate, and by the *pactum de constituto*. Earliest in point of time are the forms of suretyship by stipulation. The oldest of all (*Sponsio*)

Sponsio

Fidepromissio

could be made only by Roman citizens, and only as ancillary to a debt created by stipulation. *Fidepromissio* (so called from the words used, *Fidepromittis? Fidepromitto*) was likewise ancillary to stipulations, but it could be made by aliens as well as by citizens. Both forms were obsolete in the time of Justinian: they had been long replaced by *fidejussio* (from the words *Fidejubes? Fidejubeo*), which could be annexed not merely to stipulations but to every species of obligation, whether natural or civil. By mandate also, without *stipulatio*, a suretyship could be constituted. Thus, if Titius, at the request of Gaius, lent money to Maevius, an obligation upon Gaius was implied to make good the amount if Maevius failed to repay it. Thus Gaius was a surety. Necessarily, however, such a liability could arise only in respect of future debts, incurred by the creditor on the faith of the mandate. If the debt actually existed, and the creditor pressed for payment, anyone who promised to see the debt paid, in consideration of the creditor's forbearing to sue, became a surety. Such an agreement was called a *pactum de constituto*.

Fidejussio

Mandate

Pactum de Constituto

Women not Sureties

Women were prohibited by the *Senatusconsultum Velleianum* (A.D. 46) from undertaking to answer for the debt of others, whether as sureties or as substitutes (*expromissores*). Custom refused to women not only offices of state, but business duties, which imply their going into the company of men away from their own homes. They were therefore prohibited from undertaking gratuitous responsibilities, and exposing their property to danger. The terms of the enactment were sweeping: it forbade every

woman to make any contract or give any of her property as security on behalf of any person (even a husband, son, or father) to any creditor. An *intercessio* by a woman was wholly void.

Debtor to be sued before Surety

According to the law as it stood in the time of Justinian, the surety could not be sued until the principal debtor had made default (*beneficium ordinis*), except in the case of debts due to bankers, who had the option of suing the surety first. If the principal debtor was beyond the jurisdiction, and could not be sued, the surety was allowed a reasonable time to bring him into court, and, if he failed, could himself be sued in the first instance. The creditor, if he compelled the surety to pay, must surrender to him every mortgage or pledge that he had in respect of the debt. In the event of the surety being required to pay, he was entitled to sue the principal debtor to repay him the amount. His remedy was the *actio mandati*.

Contribution between Co-Sureties

Co-Sureties.—Before the time of the Emperor Hadrian there existed no kind of right to contribution between co-sureties (*fidejussores*), where one only had been sued for the whole of the debt. A surety when sued could object to pay unless the creditor first transferred to him his rights of action against the other sureties (*beneficium cedendarum actionum*). But Hadrian introduced a species of contribution (*beneficium divisionis*). The surety who was sued could require the creditor to divide his claim among the sureties that were solvent at the time issue was joined in the action. If any of the sureties were

insolvent, the burden upon the rest was increased. But if the surety neglected to claim the privilege of division, and the creditor obtained the whole amount from him, there was no right of contribution against the co-sureties.

Section XI—Quasi-Contract

Implied Contracts

English lawyers distinguish between express and implied contracts. Under the name of implied contracts are included many true contracts, when the consent of the parties has not been expressed but may be reasonably inferred; but other obligations are included that are not based on the consent of the parties, and are not contracts at all. The term "quasi-contract" is sometimes borrowed from the Roman Law as a name for those obligations, or rights *in personam*, that are not derived from the consent of the parties, but are imposed by law regardless of their assent or dissent. The chief examples in the Roman Law are the *condictio indebiti* to recover money paid by mistake, and the *actio negotiorum gestorum*.

Money paid by Mistake

Money not due paid under a mistake of fact could be recovered, but, as a rule, not money paid under a mistake of law. If the money were a debt of honour (*naturalis obligatio*) and voluntarily paid, it could not be demanded back. Money paid by order of a court is not money paid by mistake, even when the order is wrong. So money paid to avoid the risk of a penalty is not considered as paid by mistake. The general rule was that a person was to suffer from

Ignorance of Law and Fact

ignorance of law, but not from ignorance of fact. The reason assigned was, that the law is, or ought to be, knowable; but the most prudent man cannot know everything. The ground upon which the Roman jurists placed the distinction seems to rest upon the idea of negligence, so that a man could not plead ignorance of a fact that was well known to everybody but himself. Minors under twenty-five, women, soldiers, peasants, and some others were not made responsible even for ignorance of law.

Negotiorum gestio

Negotiorum gestio is to be compared with mandate. To act on behalf of another at his request was mandate; to act for him without his knowledge or request was *negotiorum gestio*. This was introduced for public convenience, lest when men were forced to hurry away suddenly, and went from home without giving any one a mandate to look after their affairs, their business should be neglected. No one, under such circumstances, would attend to the interests of the absent if he had no action to recover what he spent. The *negotiorum gestor*, although he acted gratuitously, yet interfered voluntarily, and was bound to act with the care of a good *paterfamilias*; it was not enough to use the diligence he ordinarily displayed in his own affairs.

Section XII—Delicts

Division of Delicts

Delicts or wrongs may be against the person or against property. In the Roman Law this distinction is very emphatic. A wrong to the person was an *injuria*; harm done to property was *damnum*

injuria datum, and a wrong to a person's interests by carrying off his property was *furtum*, or, if violence was used, *rapina* (or *vi bona rapta*).

Injuria

Injuria is when a person, either intentionally or by negligence, violates any right that a free man has in respect of his own person. It thus includes a multifarious variety of wrongs, as striking or whipping a man; kidnapping or falsely imprisoning him; reviling a man in public (*convicium facere*); defaming a man either by words or writing, or even by acts. Thus it was defamation to take possession of a man's goods as if he were insolvent, when in fact he owed nothing. Again, it was an *injuria* to enter a man's house against his will, even to serve a summons. Attempts directed against chastity, and the administration of love-philtres, were *injuriae*.

Self-Defence

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

Aggravated Injury

An *injuria* was held to be aggravated (*atrox*) by considerations—(1) of the nature of the act, as when a man is wounded, or scourged, or beaten with sticks; (2) of the place, as when the assault is in a public

assembly; (3) of the person, as when parents are struck by children, or patrons by freedmen; (4) or of the part wounded, as a blow in the eye. In these cases heavier damages were given.

Slaves and *Injuria*

There could be no *injuria* to a slave. A slave was susceptible of damage, of depreciation as a money-making machine (*damnum injuria*), but not of *injuria*. In two ways, however, a more humane doctrine was established. First, it was held that whipping a slave was a constructive insult to the master, whose exclusive privilege it was to flog his own slave; and thus, although the slave was not injured, the master could sue for the insult to himself. Again, when the injury was severe, the Praetor granted an action to the master, even when from the circumstances there could have been no intention to insult the master.

Filii-familias

In the case of persons under *potestas*, the rule was that they could suffer *injuria*, but only their *paterfamilias* could, except in certain rare cases, sue for the injury. The *paterfamilias* sued both on his own account and his son's, and was entitled to damages on both grounds.

Wives

In like manner, for *injuria* done to a married woman, both husband and wife could sue.

Division of Wrongs to Property

Wrongs to property are to be distinguished in the Roman Law in the case of moveables and immoveables by the nature of the respective remedies. A right to a moveable may be violated in several ways: first, by depriving the owner of possession, and that either by stealth (*furtum*) or by violence (*vi bona rapta*); and, secondly, without depriving the owner of possession, by damaging his property, and impairing its usefulness (*damnum injuria datum*).

Theft : its Kinds

Theft is defined in the Institutes of Justinian to be the dealing with an object, or with its use, or with its possession, with intent to defraud. To deal fraudulently with the use or possession of a thing in a manner not permitted by the owner was theft. Thus if a creditor, who is entitled merely to the possession of the thing pledged, used it; or if a person with whom a thing was deposited merely for custody, used it; or if a person borrowed a thing for one purpose and used it for another—in all those cases the parties were guilty of stealing the use (*furtum usus*), unless they believed honestly that the owner would not object to what they did, or unless, even if they did not so believe, the owner in fact did not object. If an owner who had pledged a thing carried it off secretly from the creditor, or if an owner, finding his own lost property in the lawful possession of another, surreptitiously took it away, the owner was said to steal the possession of the thing (*furtum possessionis*). When a person attempted to seduce a slave to steal his master's property, and, in order to catch the tempter, the master allowed the slave to carry some goods to him, the old jurists were in great perplexity whether an *actio furti* could be brought against the tempter or even an *actio servi corrupti*. For the owner had consented to the removal of the goods, and one cannot steal what the owner is willing for one to take; and the slave had not been corrupted, for he went straight and told his master. Justinian brushed aside "such subtlety," and declared that both actions should be brought against the tempter.

Theft from Persons interested

An action for theft could be brought not merely by owners, but by any one who, in consequence of being responsible for the loss of anything, was interested in its safe custody. Thus, if a fuller or tailor takes clothes to be cleaned and done up or to be mended for a fixed price, and they are stolen from him, it is he, and not the owner, that can bring the action for theft. The owner had no interest, as he could sue the fuller or tailor for the value of the things stolen. But if the fuller or tailor were insolvent, the owner was allowed to sue the thief. A similar rule prevailed in the case of gratuitous loan (*commodatum*) till Justinian altered the law. Justinian gave the owner an option of proceeding either against the borrower or against the thief. If the owner knew that the thing was stolen, and commenced an action against one, he was not allowed to stop that action and sue the other. He had made his election. If, however, he began an action against the borrower in ignorance of the theft, he was allowed to give up his claim against the borrower and to proceed against the thief. If the thief were solvent, there was an advantage in suing him, as he was liable to a penalty of double the value of the thing stolen. In the case of a gratuitous deposit, the person with whom the thing was deposited was not answerable for negligence, and therefore not for loss by theft. Accordingly in this case the owner, and not the depositee, had the action against the thief.

Hirers

Borrowers

Depositees

Criminal Thefts

In the Roman Law, theft was treated primarily as a civil wrong subjecting the culprit to an action for penalties; but it later became punishable as a crime,

and there is no doubt that eventually prosecutions became more common than actions; for thieves are usually impecunious persons. The civil action dates from a period when there was no clear distinction between crimes and civil wrongs, and the State, so far from directly intervening to suppress crime, was concerned mainly to prevent injured parties from disturbing public order by taking the law into their own hands. This is shown by the scale of the penalties which had to be allowed to persuade the wronged party from executing vengeance. Thus if the thief was caught in the act (*furtum manifestum*), so that his victim might have been tempted to slay him on the spot, the penalty was fourfold the value of the thing stolen; if he were not (*furtum nec manifestum*), and the victim had therefore had time for his temper to cool, the penalty was twofold—besides, in either case, restitution of the stolen property. Many subtle questions were raised upon this distinction: Justinian decided that it was manifest theft so long as the thief was seen or taken in possession of the stolen goods by any one before he reached the place where he meant to carry them and lay them down.

Civil Penalties

Not only the thief, but any one that aided and advised the thief (*ope et consilio*), was liable to an *actio furti*. Mere advice and encouragement was not enough: there must be some overt act of assistance, as placing a ladder under a window for the thief to enter, or lending him tools to break open the house.

Aiding and Abetting

In the case of robbery (*actio vi bonorum raptorum*) the penalty was fourfold if the action was brought within a year; after a year, only the single value

Robbery

could be recovered. The fourfold penalty included the recovery of the thing taken. The rules relating to robbery are but a repetition of the rules applicable to theft. But at this point Justinian notices the distinction between robbery and the violent seizure of goods under a claim of right. By statute (A.D. 389) it was established that if an owner forcibly reclaimed his property, whether moveable or immoveable, he should forfeit it to the person from whom he took it; and that, if a person, not owner, but thinking himself owner, did so, he should restore the property, and then pay its value. This rule was maintained by Justinian.

Claim of Right

The law relating to wrongful damage to property (*damnum injuria datum*) rests on the provisions of a plebiscite, known as the *Lex Aquilia*, carried by Aquilius, a tribune of the plebs, perhaps *circ.* 286 B.C. This law abrogated and superseded the provisions of the earlier law, including the XII Tables. It was not a scientific enactment; it distinguished only two classes of injuries, each characterised by a distinct and arbitrary measure of damages. The first class was the killing of a slave or four-footed beast reckoned among cattle. The penalty was the highest value that the property bore within the year preceding. All other damage to slaves, animals, moveables or even immoveables, was included in the second category, and the measure of damages was the highest value within the thirty days preceding the injury. If the defendant denied his liability, and was condemned, he had to pay double damages. The enactment, as it was drawn, made no provision for indirect

Damnum injuria datum

First Chapter

Third Chapter

injuries. Thus to throw a stone at a horse and hurt him entailed liability; but to lay down a stone and trip a horse was not visited with damages. This defect was remedied by the Praetor. The statute gave an action only when the damage was done to a body by a body (*corpore corpori*); but the Praetor after the analogy of the statute gave a remedy when the damage was done not directly by the body (*non corpore sed corpori*), and even when no damage was done to the thing itself (*nec corpore nec corpori*). Thus if I shut up another man's slave or cattle, and starve them to death, or drive a beast so furiously as to founder it, or terrify cattle to rush over a cliff, or persuade another's slave to climb a tree or go down a well, and he in climbing or going down is either killed or injured in some part of his body, then the damage is done *non corpore sed corpori*, and a praetorian action must be brought against me. If, on the other hand, a man thrusts another's slave from a bridge into a river, and the slave is drowned, then he is directly liable within the words of the statute, as it is with his body he did the damage. If, again, a man moved by pity frees another's slave from his fetters to release him, he damages the master's interests, but not the body of the slave; this is damage *nec corpore nec corpori*, and for such cases provision was made by a praetorian action.

Direct and Indirect Damage

Negligence

To support an action under the *Lex Aquilia*, however, it was essential that there should be not merely harm (*damnum*) but wrong (*injuria*). The damage, to be actionable, must be done either intentionally or by negligence. What constituted negligence de-

pended upon circumstances. Two cases are cited in the Institutes. A man playing with javelins kills a slave passing by. Is he liable? If he was a soldier practising in the Campus Martius, or in any other place set apart for soldiers' practice, that did not imply negligence; but if any one else, or a soldier elsewhere, did so, the striking would *prima facie* amount to negligence. Again, if a pruner, by breaking down a branch from a tree, kills your slave as he passes, near a public road or path used by neighbours, and he did not first shout and warn the slave, he was guilty of negligence. If, on the other hand, the place was quite off the road, or in the middle of a field, he was not liable for negligence, even if he did not shout. If a man undertook a task requiring special skill, then want of skill was considered equivalent to negligence as, for instance, when a doctor kills a slave by bad surgery or by giving him wrong drugs. So if a rider or a muleteer runs over a slave, he is chargeable with negligence if the damage resulted from want of skill, or even from want of the strength of an ordinary man.

Want of Skill

In estimating the compensation due to the owner, it was not the present value of the slave or thing killed or damaged that was taken as the basis of calculation, but the highest value within the preceding year or month; and so it might be more than the present value. Again, the actual value of the object by itself merely might not represent the loss accruing to the owner from its deterioration or destruction. Thus, if one of a pair of mules or of a team of horses was killed, or one slave out of a band of comedians

Measure of Damages

or singers, the reckoning includes not merely the animal or person killed, but in addition the depreciation in value of the rest. So, if a slave that is killed has been appointed heir to a man whose estate is worth 1000 *aurei*, and by his death the inheritance is lost to his master, then the damages include, in addition to the value of the slave, 1000 *aurei*. On the other hand, it is probable that for damage falling under the third chapter of the *Lex Aquilia* the defendant was liable to the extent of the highest value within the preceding month, only after deducting the value of the thing after it had been damaged. Otherwise he might have been liable to pay the same damages as if he had killed, *e.g.*, the slave.

Wrongs in relation to Land

Immoveables, in regard to wrongs, are in a different position from moveables. Immoveables cannot be stolen; and, if a possessor is wrongfully ejected, the law can actually restore his property, and not merely give him an equivalent in damages. In the Roman Law, the remedy for wrongful ejectment was not technically called an action, but an interdict (*Interdictum de vi et vi armata*). Every injurious act done to an immoveable without the consent (*clam*) or against the will (*vi*) of the owner, exposed the offending party to the interdict *Quod vi aut clam*, by which he was compelled to pay the expenses of undoing the mischief.

Clam, vi

Quasi-Delict

QUASI-DELICTS.—The wrongs above enumerated alone were called delicts; other wrongs were said to arise *quasi ex delicto*. In this case the prefix *quasi* indicates merely that the wrongs so described did not

attract the attention of the law until a comparatively late period, when the denotation of "*delictum*" was fixed by usage. Between a delict, therefore, and a quasi-delict there was no real distinction. The quasi-delicts mentioned in the Institutes may be briefly noticed.

If a *judex* gave a corrupt decision, or gave a decision beyond the terms of the reference, he was liable to an action for damages at the suit of the injured party. *Wrong Judgment*

The occupier of a house was liable (*dupli quanti damnum datum sit actio*) for damages done to any one by anything thrown out or poured down from the house, although the mischief was done not by the occupier himself, but by someone else. *Dejectum Effusumve*

Persons who kept anything so placed or hung that it might, if it fell, do harm to a person passing by, were subject to a penalty of 10 *aurei*, even if no one was hurt. *Positum suspensumve*

A master of a ship was liable for any loss by theft or damage to any goods in the ship through the misconduct of the sailors employed in the ship. The same responsibility attached to innkeepers and livery stable-keepers for goods left in the inn or in the stables. *Edict Nautae, Cauponae, etc.*