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STUDENT'S "AUXILIUM"

TO THE

Institutes of Justinian,

BEING A COMPLETE SYNOPSIS THEREOF IN THE FORM OF QUESTION AND ANSWER.

BY

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LONDON:

STEVENS & SONS, 119, CHANCERY LANE,

Law Publishers and Booksellers.

1879.

PREFACE.

THE questions which compose this small work were originally collected for the assistance of my pupils.

Having been requested to publish them, I desire that my object in so doing may not be misunderstood.

The book is intended neither as a cram-book, nor to serve as a substitute for the study of the Institutes themselves; and if used for either of these purposes, will inevitably and righteously disappoint the expectation of the user.

To the student who adopts the plan of self-preparation for the Civil Law Examination, I venture to think these questions may be useful, as helping him to bring back to a condition of order and intelligence that perplexed and chaotic state of mind, to which even the student who has zealously read his Justinian, so often finds himself reduced.

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March, 1879.

BOOK I.

SUMMARY.

IN this book Justinian after defining Justice and Jurisprudence, and after stating the maxims of law to be these:—To live honestly.—To hurt no one.—To give to every one his due,—proceeds to an examination of private law, of which alone the Institutes treat. Private law is then stated to have a threefold origin, and to be composed of the Law of Nature, the Law of Nations, and the Civil Law. Speaking of the particular Civil Law of Rome, Justinian states that the whole thereof relates either to persons, to things, or to actions, and from this title (Title 3), to the end of the book, the law relating to persons is alone treated of. In Titles 4 and 5, the difference between persons born free (*Ingenui*), and persons who having been slaves were made free by manumission (*Libertini*), is noticed, and this is followed by an account of the restrictions imposed upon manumission by the *Lex Ælia Sentia* and *Fusia Caninia*. Title 8 states that some persons are *sui juris* (of independent will), some *alieni juris* (subject to the power of others), and in Title 10 the *patria potestas* is first noticed. This is stated to arise through marriage, legitimation, or adoption, and naturally leads to an examination of the Roman forms of marriage,

justæ nuptiæ, legitimation, the various kinds of adoption with its incidents and restrictions. The dissolution of the *patria potestas*, which includes the history of emancipation, is treated of in Title 12. In Title 13 the disqualification of those under the authority of Tutors is introduced, and in this and the following titles, Justinian, (breaking off only in Title 16 to speak of the various kinds of *Capitis Deminutio*, or lessening of civil *status*) discusses what persons may appoint tutors; who are eligible for the office; legitimate tutors, viz., the *agnati*, parents, and patrons; the fiduciary tutelage of the fictitious purchaser, and of brothers; and of tutors appointed by the *Lex Atilia* and *Junia et Plautia* for such as had no testamentary or legitimate tutors.

The authority and duties of a tutor and the modes in which his office may be determined occupy the next two titles. Title 23 deals with Curators, and Title 24 with the security to be given by both Tutors and Curators, and shows that this obligation chiefly attaches to Tutors, who were the *agnati* of their pupils, and to those Tutors and Curators appointed without inquiry, by inferior magistrates, under the *Lex Atilia* and *Junia et Plautia*.

The reasons which are regarded by law as sufficient to excuse Tutors and Curators from accepting the duties of the office, and the actions which may be brought against those who, having accepted the duties, do not faithfully and diligently perform the same, occupy the last titles, and bring Book No. 1 to an end.

THE STUDENT'S "AUXILIUM"

TO THE

INSTITUTES OF JUSTINIAN.

1. *What were the component parts of the municipal law of Rome?*

It was composed of—

1st. **Public Law**, *i.e.*, the law relating to and regulating religious worship, and the laws relating to and regulating civil procedure.

2nd. **Private Law**, consisting of (*a*) the law of nature (*Jus naturale*), which may be described as the inward conviction of rights and obligations implanted by nature in man and beast alike. (*b*) The law of nations (*Jus gentium*), or the law which was believed to prevail amongst such civilised States as were known to the Romans. (*c*) The civil law (*Jus civile*), or the particular law of Rome composed of *leges*, *plebiscita*, *jus honorarium*, *senatus-consulta*, Imperial constitutions, *responsa prudentium*, and custom (*see* Ques. No. 10).

2. *Give a short account of Justinian's legislation.*

Two years after Justinian's accession, viz., in A.D.

529, was published, by his authority, "**The First Code,**" founded on the code of the Emperor Theodosius, A.D. 438, and the codes of the jurists Gregorianus and Hermogenianus, A.D. 306 and 365.

In the year 533 was published "**The Digest,**" or Pandects, in fifty books, compiled by Tribonian and others from the writings of the ancient jurists. The same year was published "**The Institutes,**" compiled by Tribonian, Theophilus, and Dorotheus, chiefly from the Institutes of Gaius, intended as an elementary exposition of the law for the use of students. In the year 534 was published the "**Second Code,**" which is the code now extant, and which was really but the code of the year 529, supplemented by "the fifty decisions" upon doubtful points of law decided by Justinian.

Laws upon particular subjects were afterwards promulgated until the year 564, and were called "Novels."

The whole of Justinian's legislation thus consisted of "**The Digest,**" "**The Code,**" "**The Institutes,**" and "**The Novels.**"

3. *What were the schools of the Proculians and the Sabinians?*

The schools of the Proculians and the Sabinians took their names from two learned jurists, Labeo and Capito.

Labeo hesitated not to introduce innovations into the existing law, if justice and equity so demanded. Capito professed to be guided by the letter of the law as it actually existed, and would introduce no innovations therein. The adherents of Labeo were called "Proculians," from Proculus, a follower of Labeo; and

those of Capito, "Sabinians," from Sabinus, a follower of Capito.

These two schools of thought may now not improperly be described respectively as representing the liberal and conservative opinions of Roman jurisprudence.

4. *Give a brief description of early Roman society, and trace the fundamental changes therein.*

Roman society in early times was composed of two classes—the patricians and the plebeians.

The patricians alone possessed legislative or executive power, and each patrician was a member of a "*gens*" or tribe which possessed distinct religious rites and ceremonies.

The plebeians possessed no public rights and belonged to no "*gens*," neither could they hold any public office. The position of the plebeians was improved in the following ways:—

1st. **The creation of Tribunes**, magistrates appointed about A.U.C. 260, to defend plebeian interests.

2nd. **The Lex Valeria**, A.U.C. 304, giving plebeians the right of appeal to the *Comitia Centuriata* against every sentence of capital punishment.

3rd. **The Lex Canuleia**, A.U.C. 309, giving plebeians the right to marry among the patricians.

4th. **The Lex Publilia**, A.U.C. 414, declaring that the laws of the *comitia tributa* called *plebiscita* should have legal force.

5th. **The Lex Hortensia**, A.U.C. 467, establishing the validity of *plebiscita* and giving full privileges of citizenship to plebeians, thus practically removing all distinction between the two classes.

5. *What was the Jus Sacrum?*

Certain religious services and ceremonies which were in early times only open to the patricians. Each *gens* was under the protection of its own particular tutelary deity, and had its own sacred law in which none but its own members could participate.

6. *Describe and give the history of the various Roman assemblies entrusted with legislative power.*

The first assembly exercising legislative power was

(*a*) **The Comitia Curiata,** composed of the heads of the patrician *gentes.* Laws were introduced to this *Comitia* by a small body presided over by the King and called the Senate, but the ordinances of the Senate had not themselves the force of law until the beginning of the Christian era, from which time however the Senate absorbed the whole law-making power.

(*b*) **The Comitia Centuriata,** which included plebeians and patricians arranged according to their wealth, and which presently usurped the whole legislative functions of the *Comitia Curiata.*

(*c*) **The Comitia Tributa,** a legislative assembly composed of members elected by the people in which assembly the votes of all the members were of equal efficacy and effect; notwithstanding any difference in their wealth. The laws of this *Comitia* called *plebiscita* were made binding upon the whole people by the *Lex Hortensia,* A.U.C. 467.

(*d*) **The King** is supposed in early times to have published laws for the regulation of religious services (*leges regiæ*).

7. *Trace historically the position and duties of those to whom the executive power was entrusted.*

The King was the first and sole judge both in civil and criminal cases, but the *Comitia Curiata*—afterwards *Centuriata*—exercised appellate jurisdiction in criminal cases.

In the early times of the empire **Senators** were appointed to act as judges, and continued so to act until the year A.U.C. 632, when the *Lex Sempronia* took this power from then and gave it to the Knights. It was afterwards shared by the two classes.

During the fifth century of Rome was appointed a magistrate called "**Prætor Urbanus**," who may be said to have had legislative as well as executive power. His chief duty was to ascertain the facts in issue between the parties and then to send a concise state ment of such facts (*formula*) to a judge to be tried. The *Prætor Urbanus* sometimes also gave actions to such as strictly had no legal right.

In the year A.U.C. 507 was appointed the "**Prætor Peregrinus**," whose duty was to decide disputes between foreigners, not according to the strict civil law of Rome, but in accordance with the *Jus gentium*.

There were also the "**Recuperatores**," judges who sat three or more together to decide urgent matters in dispute between *peregrini*, and lastly

The **Centumviri**, one hundred men taken from different tribes, who decided cases of *status*—disputes as to Roman property—and testamentary and intestate succession.

8. ***Who were the Decemvirs? For what object were***

they appointed, and how long did they retain their authority?

The Decemvirs were a body of ten men, five of whom were patricians, and five plebeians, to whom during their existence the whole magisterial power was entrusted.

They were appointed A.U.C. 303 for the purpose of reducing to form and publishing for the benefit of all the citizens, but especially for the benefit of the plebeians, the customary law of the land. They only retained authority during two years, being dissolved A.U.C. 305.

9. *Give shortly the substance of the legislation of the Decemvirs.*

The Decemvirs published (A.U.C. 304) ten tables of law, to which two other tables were afterwards added, and the name "Twelve Tables" given to the whole.

Table 1. Civil procedure before magistrates.
„ 2. Wager actions.
„ 3. The forms to be gone through by a creditor before the debtor became his absolute property, which if the debt was not paid he eventually did.
„ 4. Patria potestas and emancipation.
„ 5. Testaments and intestate succession and tutorships.
„ 6. Mancipation and usucaption.
„ 7. Width of roads, and overhanging trees, &c.
„ 8. Crimes.
„ 9. All laws were to be binding upon every class.
10. Forbidding gorgeous and expensive funerals.

Table 11. Forbidding the marriage of plebeians with patricians.

„ 12. Miscellaneous (see Intro. to Sandar's Justinian, p. 12).

10. *What were the components of the Jus Civile?*

The *Jus Civile*, or particular law of Rome, was composed of—

(*a*) **Leges**—laws passed by the *Comitia Curiata*, or *Centuriata*, upon the recommendation of the Senate.

(*b*) **Plebiscita**—laws of the *Comitia Tributa* binding on all the people after the *Lex Hortensia*, A.U.C. 467.

(*c*) **Senatus Consulta**—decrees of the Senate; not at first of legal force, but made binding as laws about the time of the early Emperors.

(*d*) **Imperial Constitutions**—announcements of the good pleasure or the opinions of the Emperors, consisted of "*Edicta*," magisterial promulgations of law; "*Mandata*," orders given to his officers; "*Decreta*," judicial decisions; "*Rescripta*," answers to such as requested his opinion upon doubtful questions of law.

(*e*) **Jus Honorarium**—annual edicts issued by the prætors containing the principles of law to which during their year of office they would conform. After some time the prætors became accustomed to adopt the edicts of their predecessors, and thus one code of law came into use by the prætors and was called "*Edictum perpetuum*."

(*f*) **Responsa Prudentium**—the opinions of jurists of

eminence; first made legally binding on the judge by Hadrian, but only in cases where the opinions expressed by all were unanimous.

The Emperor Theodosius II. constituted the works of the jurists Gaius, Papinian, Ulpian. Paulus, and Modestinus a source of law.

(*g*) **Custom.**

11. *Who were Latini? By what laws were they affected, and what was their position at various times of the Empire?*

Latini were the inhabitants of certain towns in Italy upon which had been conferred the *Jus Latinum*, and who in consequence occupied an intermediate position between the citizen and the *peregrinus* (stranger). They had usually the power of trading with Roman citizens (*commercium*), but not the right of marrying amongst them (*connubium*), nor the power of exercising the franchise, or of holding offices of honour.

The Lex Junia and the Lex Plautia, A.U.C. 663—4, abolished *Latini* by giving full rights of citizenship to the whole of Italy.

(There were also *Latini Juniani*—slaves imperfectly manumitted and who by express provision of the *Lex Junia Norbana*, A.D. 19, did not become citizens, but only *Latini*. *Latini Juniani* could become citizens by marrying a Roman wife and having a son who attained the age of one year, by military or naval services, by building a bake-shop, and in other ways).

Justinian made every emancipated slave a Roman citizen, no matter in what way the manumission had been effected.

12. *Give succinctly the meaning ascribed by the Romans to the word "persona."*

Whoever or whatever was capable of possessing rights and being liable to obligations was called in Roman law a "*persona.*" Slaves as they could possess no rights were not "*personæ.*" A "*persona*" need not have physical existence, thus the State, the fiscus or treasury, corporations, and certain ecclesiastical bodies, were, as being capable of exercising rights, all regarded as "*personæ.*"

13. *Give a description of the mode of transfer of property by* (*a*) *Mancipatio,* (*b*) *In jure Cessio. When did these forms become obsolete?*

Formerly *mancipatio* and *in jure cessio* were the only forms used to effect the transfer of property.

(*a*) **Mancipatio** was effected in the presence of five witnesses, and of a person holding a pair of scales (*libripens*). The purchaser then claimed the thing *ex jure Quiritium,* and after striking the scales with a piece of copper, tendered the copper as payment.

(The term very often employed for this species of contract was "*nexum.*")

This form could be used for the transfer of all kinds of property, but Italian estates and any servitudes over such estates in the country, slaves, and four-footed tamed animals, could only be transferred by mancipation.

(*b*) **In jure Cessio** was really an undefended action at law. The transferor and transferee of the property appeared before a magistrate, and the transferee laying hold of the thing to be trans-

ferred claimed it as his by Quiritary (Roman) title (*ex jure Quiritium*). The magistrate then asked the surrenderor if he had any counter-claim, and he making no reply, the property was declared to be in the transferee.

The forms of *mancipatio*, and *cessio in jure*, were both abolished by Justinian.

14. *What was the Patria Potestas? How did it arise, and how was it dissolved?*

The *patria potestas* was a distinctive feature in Roman law. It indicates the power at first almost unlimited but afterwards much modified which the father of a "*familia*" (*paterfamilias*) exercised over those who composed it. The *familia* included not only the wife and children of the *paterfamilias*, but his grandchildren, great-grandchildren, and all his descendants; also arrogated and in early times adopted children.

Patria potestas might arise—

1st. **By marriage.**

In order that marriage should give rise to *patria potestas*, the *nuptiæ* must be *justæ* (*see* Ques. No. 23).

2nd. **By legitimation.**

Illegitimate children could be made legitimate by being enrolled in the *Curia*, by subsequent marriage of their parents, by Imperial rescript.

3rd. **By Adoption.** (*See* Ques. No. 16.)

Dissolved—

1st. **By death of Parent.**—But a grandson whose father was living passed into his power at the death of the grandfather.

2nd. **By any Capitis Deminutio** of the father or son.
3rd. **By the Son attaining high honours** in the State.
4th. **By emancipation** (see next Ques.); and in the case of a daughter, by her marriage, *i.e.*, if she passed *in manum viri*, which she did if the *nuptiæ* were *justæ*.

15. *Give an historical account of the various ways in which emancipation was effected.*

The twelve tables declared that if a father sold his son three times the son should be free. These imaginary sales were the form generally used up to the time of Justinian, although for some centuries before this a son could be emancipated by Imperial rescript. The form of emancipation was for the father to sell his son to a fictitious purchaser, who each time re-sold him to the father. The father then manumitted the son himself and thus became his patron, and if the son had not attained puberty, his tutor also. In the time of Justinian emancipation was effected by the father signifying a wish to emancipate his son before a magistrate.

A daughter could always be emancipated by one sale.

16. *What do you know of the law relating to adoption, and of the alteration made therein by Justinian?*

Adoption was formerly effected by the natural father selling the child by "*Mancipatio*" to the adoptive father and then yielding him up to him by process of "*In jure Cessio.*"

The natural father thus lost his *potestas* and all

other rights over his child and these rights passed in their entirety to the adoptive father.

Tempore Justiniani adoption was effected by the execution of a deed before a magistrate, but at this time its results were very different.

Justinian enacted that unless the adoptive father was an ascendant relative, the adopted child should lose none of his rights upon his natural father; the adoptive father should have no *patria potestas*, nor any rights to or over the child's property. Virtually the only right gained on either side by adoption in the time of Justinian was the right of the child to succeed his adoptive father in an intestate succession.

Such an adoption was called "*Adoptio minus plena.*"

17. *What was the Dominica Potestas? How did it arise, and how was it dissolved?*

"**Dominica Potestas**" signified the power possessed by a master over his slaves—

It might arise

(*a*) *By birth.*—The children of a female slave were themselves slaves.

(*b*) *By capture.*—The Romans accounted all prisoners of war as slaves.

(*c*) *In consequence of crime.*—Persons convicted of crimes of a serious nature were reduced to a state of slavery and called "*servi pœnæ.*"

(*d*) *By the Senatus Consultum Claudianum*, which declared that if a free woman had illicit intercourse with a slave she should be given over with all her goods to the slave's master. (Abolished by Justinian.)

(*e*) *In consequence of ingratitude.*—A manumitted

slave might be again reduced to slavery for gross misbehaviour towards his patron (his manumittor).

It was dissolved

(*a*) *By manumission,* which could be effected in many ways, as *Censu, Vindicta, testamento* (see next Ques.), in the presence of the Church, in the presence of friends, or by letter from the master to the slave declaring him a free man.

18. *What do you understand by legitimate manumission, and what was its distinctive effect?*

Before Justinian's reign legitimate manumission was effected—

(*a*) **Censu.**—A master voluntarily enrolling his slave as a freeman, at the time of the census of freemen being taken.

(*b*) **Vindicta.**—A ceremony replete with formalities which took the form of a fictitious suit (*causa liberalis*), and in which a person called *Assertor libertatis* claimed the slave from his master by touching him with a wand (*hasta*). The master as signifying his assent turned the slave round, and the magistrate declared him free.

(*c*) **Testamento.**—By will.

Formerly it was only by legitimate manumission that a slave could become a Roman citizen. Justinian declared that every slave who had been emancipated, no matter what the form, should at once become a Roman citizen.

19. *Give, with dates and chief provisions, the laws affecting the manumission of slaves.*

The Lex Ælia Sentia, A.D. 4, declared that manumissions in fraud of creditors should be void; save that a master, although insolvent, could manumit one slave if he wished him to be his heir. No one under twenty years could manumit, except by *Vindicta*, and for reasons to be approved by the Council, and no one under the age of thirty could be manumitted without the like requisites being complied with.

(Justinian in the Institutes alters this and allows a master who had entered upon his eighteenth year to manumit by testament, and later on by the 119th Novel allowed a master to manumit at the age of sixteen years.)

The Lex Junia Norbana, A.D. 19, placed all slaves whose manumission had been defective in the same position as Latini, *i.e.*, they had the *commercium*, but not generally the *connubium* or the *suffragium et honores*.

The Lex Fusia Caninia, A.D. 8, restricted the number of slaves that could be manumitted by testament. In no case could the number exceed 100.

20. *Give the history of the acquisition of the right to possess property by those in (a) Patria, (b) Dominica potestas.*

(*a*) Theoretically neither slaves nor *filii-familiarum* could possess property. In early times a father sometimes allowed his son to have a certain amount of property under his own control called in those times "**peculium**," and in later times "**peculium profectitium**," but such property was

always regarded by law as belonging to the father.

Towards the end of the Republic was instituted, probably by Julius Cæsar, the **Castrense peculium**—property given to a son on setting out for battle, or gained by him in arms. Over this *peculium* the son had absolute proprietary rights.

At a later time was introduced the "**quasi castrense peculium**," which in analogy to the *castrense peculium* was property acquired by those who held high civil offices in the State.

The Emperor Constantine introduced the "**peculium adventitium**," which consisted of property coming to the *filius-familias* from his mother, and later on was made to include property from any source save from the father. The father had the usufruct of this *peculium adventitium*.

(*b*) A slave, not being a *persona*, could never possess a legal title to any property, but by the indulgence of his master he was often allowed to have a *peculium*, with which he sometimes purchased his liberty.

21.* *Give the history of the acquisition of the right to dispose of property, inter vivos, and by testament by those in potestate.*

Filii-familiarum could from the time of its institution dispose absolutely *inter vivos* or by testament of their **peculium castrense**. They could dispose of the **quasi castrense** absolutely *inter vivos*, but not, until the reign of Justinian, by testament.

In the **peculium adventitium** the father possessed a life estate (*usufruct*). The son could not therefore dispose of this *inter vivos*, but by testament he could dispose of it. (A father who emancipated his son was formerly allowed to retain one-third part of the *peculium adventitium*, Justinian altered this by giving him the *usufruct* of one-half.)

Of the **peculium profectitium** the son had no power to dispose *inter vivos* or by testament.

Slaves, as they never could have legal ownership, it follows, had no power to dispose of property in any way whatever.

22. *Describe the forms of marriage called* (*a*) "*Confarreatio*," (*b*) "*Coemptio*," (*c*) "*Usus*."

(*a*) **Confarreatio** was a ceremonious marriage, open to those only to whom the *Jus Sacrum* was open. Ten witnesses were present, and before them, with certain formalities, the contracting parties broke and ate a cake of spelt. Certain sacerdotal offices were only open to those whose parents had been married by confarreation.

(*b*) **Coemptio**.—A fictitious form of sale by mancipation, generally used by plebeians, in which the wife was sold by her father to the husband.

(*c*) **Usus**.—A husband and wife living together for a year without the wife absenting herself as many as three nights during that period.

The distinctive effect of each of the above forms of marriage was that the wife passed *in manum viri* (into the power of her husband). Marriages where the wife passed *in manum viri* were unusual in the time of Gaius, and quite obsolete in the time of Justinian.

23. *What do you understand by Justæ nuptiæ? What was requisite to constitute it?*

Justæ nuptiæ signified amongst the Romans forms of marriage in which such legal requisites were complied with, as were necessary, in order that the father should possess *potestas* over the children, the issue of the marriage.

The requisites of *Justæ nuptiæ* were—

1st. **Consent of the parties** themselves.

2nd. **The parties must have attained the age of puberty** —*i.e.*, the man must be fourteen and the woman twelve years of age.

3rd. **The parties must have the connubium,** *i.e.*, must not be within prohibited relationship (see next Ques.) nor restricted by law from intermarriage, and if *in potestate* must have obtained consent of those in whose power they were.

24. *Give an account of the chief restrictions imposed upon marriage.*

Marriage between ascendants and descendants was absolutely forbidden, although the relationship between them had arisen through adoption only, and had been dissolved.

Collateral relations in the second, and generally in the third degree, were forbidden to marry. Collaterals in the fourth degree (as cousins) were allowed to marry. Marriage between parents and their step-children was forbidden. Marriage with deceased wife's sister is not noticed in the Institutes. Marriage with slaves was forbidden.

Marriage between patricians and plebeians first allowed by the *Lex Canuleia,* A.D. 9, and between

Ingenui and *Libertini* by the *Lex Papia Poppæa* B.C. 13 and A.D. 9.

Marriage of a guardian with his ward was forbidden unless she was twenty-six years of age, or was given to him by her father. A governor of a province could not marry a native of the province, nor a Jew a Christian. Until the *Lex Julia et Plautia*, 663—4 a *Latinus* could not legally marry a Citizen.

25. *Define* (*a*) *Stuprum*, (*b*) *Concubinage*, (*c*) *Contubernium. In what ways could illegitimate children become legitimatised?*

(*a*) **Stuprum** was the term employed by the Romans to denote the illicit union of a man and woman whom the law would not permit to contract a legal marriage.

(*b*) **Concubinage** was the permanent cohabitation of a man and woman to whose lawful marriage no impediment existed.

(*c*) **Contubernium** was the term used to express the union of slaves, which, under no circumstances, was regarded as marriage at all.

Natural children, the offspring of concubinage, could be made legitimate in three ways—

1st. By rescript of the emperor.

2nd. By subsequent marriage of the parents.

3rd. By enrolment in the *Curia*, by which the children became liable to perform the onerous duties of provincial magistrates.

26. *What meaning did the Romans give to the word "Caput?" Describe "Capitis Deminutio."*

The word "*Caput*" was used by the Romans almost

as synonymous with *Status*. A person to have a perfect "*Caput*" or *Status* must have liberty—citizenship —and family rights.

Capitis Deminutio, or lessening of the *Status*, was of three kinds—

(*a*) **Capitis Deminutio Maxima.** Loss of liberty, including also the loss of citizenship and of family rights. (A person who had been taken captive, and afterwards regained his freedom, was restored to his former *status* by "*Jus post liminii.*")

(*b*) **Capitis Deminutio Media.** Loss of citizenship, involving also loss of family rights. (Banishment unaccompanied by imprisonment, or transportation to a penal settlement, involved loss of citizenship; but a person merely forbidden to leave a certain spot (*relegatus*) did not suffer *Capitis Deminutio.*)

(*c*) **Capitis Deminutio Minima.** Change or loss of family rights, as by Arrogation—adoption—emancipation—becoming *sui juris*, and, in the case of a woman marrying *in manu.*

27. *Distinguish historically between Agnati, Gentiles and Cognati.*

All those persons and their descendants who were, or had been under the power of the same *paterfamilias*, were regarded as related by Agnation, and were called *Agnati* to each other. Agnation is said to be relation through males, and continued notwithstanding the death of the *paterfamilias*. Agnation could, of course be dissolved by *Capitis Deminutio* of any kind.

Next in degree after the *Agnati* the patrician had the members of his own *gens*, or those connected with him by being, as it were, members of the same tribe, and using the same religious rites.

Cognation was relationship by blood, and all those who, not being *Agnati*, were thus related, were *Cognati* to one another.

Anciently the *Gentiles* occupied to a patrician a nearer relationship than did the *Cognates*, and succeeded him in an intestate succession to their exclusion; but in later times relationship by blood gained its proper place, and the *Cognati* took rank immediately after the *Agnati*.

28. *Distinguish between* (*a*) *Ingenui and* (*b*) *Libertini.* (*c*) *If an Ingenuus should be taken captive, or be reduced to a state of slavery, and afterwards attain freedom a second time, what would be his status in either event respectively.*

(*a*) *Ingenui* are such persons as are born free, whether their parents are freemen or freedmen, or if the mother is free and the father a slave.

(*b*) *Libertini* are persons that by manumission have been set free from lawful slavery.

(*c*) His position would be that of an *Ingenuus*; for the fact of the temporary reduction into slavery would not be allowed to affect his original *Status*.

29. *How many kinds of freedmen were there? and what was their respective condition at various times of the empire?*

During the Republic all freedmen were Roman

citizens, but the *Lex Ælia Sentia*, A.D. 4, and *Junia Norbana*, A.D. 19, established two other classes of inferior position—*Latini Juniani* and *Dediticii*.

Latini Juniani were those whose manumission was imperfectly effected, the requirements of the *Lex Ælia Sentia* not having been attended to. They had the *Commercium* but not the *Connubium*, nor the *suffragium et honores*, but could easily become Roman citizens with full rights. (*See* Ans. to *post* Ques. No. 11.)

Dediticii were slaves who had, before their manumission, been guilty of great crimes. They could never become citizens. (*Dediticii* were originally enemies conquered in war.)

Thus freedmen might be either **Citizens, Latini Juniani,** or **Dediticii.**

Justinian abolished all these differences, and made every emancipated slave a Roman citizen, retaining however the *jus patronatus*, or the rights of the patron over his *libertus* (freedman).

30. *State some of the ways, and the laws by which, during the reigns of the Emperors, the condition of slaves was improved.*

During the Republic the power of a master over his own slaves appears to have been unlimited, although a law, the **Lex Cornelia de Sicariis**, B.C. 82, made the killing the slave of another punishable as homicide.

(This law may be regarded more as a law for the protection of property than of life.)

The **Emperor Antonius Pius** first ameliorated the condition of slaves by subjecting any one who killed his own slave to the penalties of the *Lex Cornelia*.

The **Lex Petronia**, A.D. 61, forbade masters to exp their slaves to gladiatorial contests.

The **Emperor Hadrian** abolished the private priso (*ergastula*) which masters kept for the purpose of i prisoning their slaves.

The **Emperor Constantine**, who was followed as this by Justinian, only allowed a master to infli moderate corporal punishment upon his slaves.

31. *Explain the terms "Infanti proximus," "Pub tati Proximus," "Perfecta Ætas."*

A child under the age of seven years was spoken as **Infanti Proximus**, and could do no legal act by h own authority. Between the age of seven and fourte years the child was called **Pubertati Proximus**, a during these years he could, without the "*Auctoritas* of his tutor, perform such legal acts as were for his ow benefit: that is, his contracts were not void, but voi able at his discretion, although the party who co tracted with him was bound by the contract. (Exce tion—No person under puberty could, without h tutor's authority, enter upon an inheritance.)

When a person attained the age of twenty-five yea he was said to have arrived at the **Perfecta Ætas**, the age when he was esteemed fully competent manage his own affairs. A Curator was no long necessary.

32. *State the distinction between Adoption a Arrogation, and the ways in which they were bo effected.*

Adoption and arrogation are often classed togeth under the one term adoption. Strictly, adoption w

the receiving into a family, children, who thus left the *potestas* of one *paterfamilias* and became subject to the *potestas* of another. **Arrogation** was when a person *sui juris*, *i.e.*, not subject to any *potestas*, voluntarily entered the family of another and subjected himself to the *potestas* of the *paterfamilias*.

Adoption was formerly effected by *mancipatio*, three several sales to destroy the old *patria potestas*, and then a *Cessio in jure* (*See* Ques. No. 13) to the new *paterfamilias*.

Arrogation partook of a public character, and was made in early times before the *Curia*, the Council of the *Gentes*, and then before *lictors*, magistrates representing the *Curia*.

Justinian declared that adoption of those *alieni juris* should be effected by executing a deed to that effect before a magistrate, and that Arrogation should be accomplished by a rescript of the Emperor.

33. (*a*) *What persons were allowed to adopt?* (*b*) *Could a child under the age of puberty be arrogated?*

(*a*) Generally, all persons *sui juris* who were older by eighteen years than the person to be adopted, and not physically incapable of ever having natural children could adopt. Women, save by special indulgence of the Emperor, could not adopt.

(*b*) Yes, by Imperial rescript, but always after inquiry as to the advisability of the arrogation, and subject to the following restrictions :—

1st. If the arrogated child died before puberty, the arrogator had to give up his property to his natural heirs.

2nd. If the arrogated son was emancipated before puberty, or disinherited without good reason, he got back his own property, and also one fourth of the property of the arrogator, called *Quarta Antonina.*

3rd. If the arrogated son was emancipated before puberty for good reasons, he received back all his own property.

4th. If the arrogated son on attaining puberty wished to rescind the arrogation he could do so.

34. *How many kinds of Tutelage were there, and what were they called?*

There were four kinds of tutelage, viz:—

1st. Testamentary, appointed by will of the *paterfamilias.*

2nd. Legitimate. *See* next Ques.

3rd. Fiduciary. *See* next Ques.

4th. Legal, *i.e.*, when tutors were appointed by the magistrates under the *Lex Atilia* and *Julia et Titia.*

35. *Describe* (*a*) *legitimate and* (*b*) *fiduciary tutelage.*

(*a*) **Legitimate tutors** were those upon whom, in the case of no testamentary tutor being appointed, the tutorship divolved by law. They were—

1st. The **Agnati,** who were nearest in degree to the pupil, but in the time of the later Emperors a mother or even grandmother could become legitimate tutor.

(By 118th Novel, Justinian enacted that in case of

there being no testamentary tutor, the nearest in blood should become the legitimate tutor.)

2nd. **Patrons,** who by the Twelve Tables were made the legitimate tutors of the slaves they had manumitted.

3rd. **Parents,** who in imitation of the tutelage of patrons, became the legitimate tutors of such of the children or grandchildren as being in their power were emancipated by them under the age of puberty.

(*b*) Fiduciary tutors were of two kinds—

1st. If, in the old form of sale by mancipation (*See post*, Ques. No. 13), the fictitious purchaser should after the third sale himself emancipate the son, instead of re-selling him for that purpose to his father, he would thus become his patron and his tutor, but in such a case was called "Fiduciary tutor."

2nd. If a parent should emancipate a son, and then die before the child arrived at the age of puberty, leaving other sons who became *sui juris* at his death, such other sons succeeding to the rights of their father would thus become tutors to their own brother, but in such case were also called Fiduciary tutors, *i.e.*, bound by a trust.

36. *State what persons holding fiduciary positions were liable to give security, and the chief rules relating thereto.*

Tutors and curators, all of whom were held to occupy fiduciary positions towards those pupils and adolescents

whose interests they were appointed to protect, were generally bound to give security. Testamentary tutors, and tutors and curators appointed by the higher magistrates after inquiry under the *Lex Atilia* and *Julia et Titia*, were exempted. Fathers and patrons were generally excused, but other legitimate tutors, as the *Agnati*, were not. Tutors and curators appointed by the inferior magistrates always gave security.

37. *What were the chief duties of* (*a*) *Tutors* (*b*) *Curators? To what persons were they given, and in what ways could they be appointed?*

(*a*) The chief duty of tutors was to supply by their "*Auctoritas*" the capacity to perform legal acts, which their pupils through their tender age were not permitted by law to do for themselves. Tutors also had to protect the persons and property of their pupils.

(*b*) Curators were appointed to manage the property and protect the pecuniary interests only of adolescents, or of those who, for sundry reasons, had not capacity to transact business.

Tutors were given to children under the age of puberty (*i.e.*, fourteen years for males, and twelve years for females) and in early times to women. Curators to such as had attained the age of puberty, but were under twenty-five years of age, to women, to madmen, to prodigals.

Tutors could be appointed—

(*a*) **By testament.**

(*b*) **By the Twelve Tables,** which in the absence of testamentary tutors appointed as such the

nearest *Agnati*. The *Agnati* were thus called legitimate *tutors*.

(*c*) **By the Lex Atilia and Julia et Titia.**—In case of there being no testamentary or legitimate tutor, the magistrates could appoint a tutor by these laws, both at Rome and in the provinces, and a tutor so appointed was called "*Tutor Dativus.*"

Curators could be appointed by the same magistrates ho appointed tutors, but an adolescent (person under wenty-five years of age) could not be compelled to ccept a curator against his will.

38. *In what cases could Tutors and Curators when ppointed refuse to act ?*

Tutors and Curators could refuse to accept office on ny of the following grounds :—

(*a*) Under the *Lex Papia Poppœa*, having a certain number of children living, viz., three at Rome, four in Italy, five in the provinces. Children killed in military service were allowed to be reckoned, but adopted children could not be reckoned.

(*b*) Being a magistrate, a soldier, or a member of a learned profession.

(*c*) Being in the State service.

(*d*) Being a creditor or debtor of the pupil, or having been his father's bitter enemy.

(*e*) Being in extreme poverty, in ill-health, illiterate, or over seventy years of age.

(*f*) Having previously held three similar offices.

39. *To whom could a paterfamilias give Tutors by his will? Could he give a Tutor to an emancipated son?*

To all such children as, being under his power at the time of his death, became by his death *sui juris.*

Strictly a father was not allowed to give a tutor to an emancipated child, but if in his will he named a person for such office, the prætor would confirm the selection without inquiry as to the fitness of the person selected to fill the office.

40. *Give some account of the various actions that could be brought by and against Tutors and Curators.*

At the termination of the office of tutor, the pupil could bring the "**Actio directa tutelæ**" to make the tutor account for the property which during the continuance of the tutorship he had received on the pupil's account. The tutor himself could bring the "**Actio contraria tutelæ**" to obtain re-payment of necessary expenses undertaken and indemnification for losses incurred.

There were similar actions by and against curators, the "**Actio Negotiorum gestorum directa**" brought by the adolescent, and the "**Actio negotiorum gestorum contraria**" brought by the curator.

The Actio Suspecti Cognitio, which was of a *quasi* public nature, was an action brought for the removal of the tutor or curator from office.

Any one actuated by feelings of affection towards a pupil could institute this action against his tutor, although the pupil himself could not. Adolescents could, with the advice of their friends, bring this action

against their curators. It is doubtful whether this action could be brought against tutors who were also the patrons of their pupils, at all events their reputation was not allowed to be injured thereby, *i.e.*, they could not be found guilty of *infamia*.

BOOK II.

SUMMARY.

THE whole of this book is occupied by explanations concerning the chief divisions of things (*res*), and the various ways in which things capable of being acquired, are acquired.

In Title 1 is discussed the classes of things which cannot be taken possession of, and acquired, by private individuals (*res extra-patrimonium*), and also the three modes—known as natural modes—of acquisition, *Occupatio*, *Accessio* and *Traditio*.

Title 2 treats of property which being intangible and consisting only in a right is called "Incorporeal." The next three titles are occupied with an explanation of the chief kind of Incorporeal property, noticed by Justinian, viz., "*Servitudes*."

These are treated of in order—first, *Prædial Servitudes*, both rural and urban, and then the personal servitudes *Usufruct*, *Usus* and *Habitatio*.

Title 6 describes Usucaption—a mode of acquisition introduced by the Civil law—which was in reality acquisition by means of quiet enjoyment.

The last method of acquiring particular things—

viz., by gift, is introduced in the next title. Gifts *(Donationes)* are either—*mortis causa*, made in expectation of death—*inter vivos* made between living persons; or, *ante nuptias* made in consideration of marriage.

Persons who although owners of property cannot alienate it, and persons who, although not owners, have yet the power of alienation are noticed in Title 8.

Title 9 discusses certain classes of persons who acquire, not for themselves but for others, and Title 10 introduces the subject of the Testament, which is the first way mentioned in the Institutes by which an aggregate of things *(universitas)* can be acquired.

The subject of testaments or matters nearly related thereto is continued to Title 20. These titles include —the history and formation of the testament in force in Justinian's time—military testaments and their many privileges—the institution and disinheriting of children, natural, posthumous, or adopted—the causes which invalidate testaments—the institution of the heir—the mode of calculation of the parts of an inheritance—the substitution, either common, pupillary or *quasi*-pupillary, of heirs—the three different kinds of heirs—and lastly a description of the *Actio De inofficioso testamento*, an action which could be brought by near relations of the testator, to set aside the testament, on the ground that they had been entirely omitted therein.

In Title 20 the subject of legacies is historically treated of, and this includes an examination of those persons, who, either by express law, or otherwise, are forbidden to accept legacies; and also a capitulation of those things which the law prohibits being given as legacies.

The *Lex Falcidia*—the law passed for the benefit of the heir—is next treated of, and is followed by an account of the mode in which both inheritances, and single things, may be acquired by *fideicommissa*, and by an explanation concerning the *Senatus-Consulta Trebellianum* and *Pegasianum*.

A brief account of Codicils, their history and uses, closes the book.

BOOK II.

41. *What is the main division of things (res) noticed in the Institutes?*

Things *(res)* are either—

In Patrimonium—able to be acquired; or—

Extra Patrimonium—not able to be acquired.

All things are "*in patrimonium*" save such things as are "*extra patrimonium.*"

Things *Extra Patrimonium* are—

(*a*) **Res Communes**—as the air, the sea, and the sea-shores.

(*b*) **Res Publicæ**—as the rivers of a state, and the shores adjacent to its territory, and under its control.

(*c*) **Res Universitatis**—things belonging to public bodies, as to corporations.

(*d*) **Res Nullius**—as *Res sacræ*—things dedicated to the Superior Gods, *Res religiosæ*—things invested with a religious character such as graveyards, *Res sanctæ*—things invested with inviolable character as the gates or walls of a city.

42. *State shortly particulars of the Incorporeal property mentioned in the Institutes and the divisions of the same?*

Incorporeal property consists in a right to or over a

thing. As opposed to Corporeal, Incorporeal things are such as are not tangible.

Justinian notices—

(*a*) **An Inheritance.**

(*b*) **An Obligation.**

(*c*) **Servitudes**—which are either personal or prædial.

Personal Servitudes are fragmentary rights over property, the *Dominium*, or absolute ownership of which property belongs to another.

Prædial Servitudes are fragmentary rights possessed over one immoveable thing, in virtue of the possession of another immoveable thing.

Prædial Servitudes are called "*Rural*" when relating to the soil itself, and "*Urban*" when relating to buildings erected upon the soil.

43. *Give a list of the Personal and Prædial Servitudes.*

Personal Servitudes.

(*a*) **Usufruct.**

(*b*) **Usus.**

(*c*) **Habitatio.**

"*Usufruct*" was the right of using and taking the fruits of a thing, the ownership of which belonged to another. "*Usus*" was the right to the use only of a thing, the ownership of which belonged to another, and unlike the case of a Usufruct, this right could not be alienated. "*Habitatio*" was the right of using a dwelling-house. It was of more value than the Servitude "*Usus*," as the right to let the house to others, and to take the profit thus arising

pertained of right to the owner of the Servitude "*Habitatio.*"

Rural Prædial Servitudes.

(*a*) **Iter.**

(*b*) **Actus.**

(*c*) **Via.**

(*d*) **Aquæductus.**

"*Iter*" was the personal right of going over the land of another. "*Actus*" was the right of driving vehicles, or beasts, over the land of another. "*Via*" involved the other two rights, and included in addition the right of using the land in any way whatever. "*Aquæductus*" was the right of drawing water across the land of another.

Urban Prædial Servitudes.

(*a*) **Oneris ferendi.**

(*b*) **Tigni immittendi.**

(*c*) **Stillicidii recipiendi vel non recipiendi.**

(*d*) **Altius non tollendi vel altius tollendi.**

(*e*) **Ne luminibus et ne prospectui officiatur.**

"*Oneris ferendi*" was a right given to a man to use his neighbour's edifice or wall as a support for his own. "*Tigni immittendi*" was the right given to a man to plant a beam in or upon his neighbour's wall. "*Stillicidii recipiendi*" was the right a man had to let his rain water (*stillicidium*) fall upon his neighbour's house or premises, but if the owner of such a servitude released the *res serviens* from its obligation to receive the rain water, then the owner of the *res serviens* was said to have acquired the servitude "*Stillicidii non recipiendi.*" "*Altius non tollendi*" was the right a man had to oblige his neighbour not to raise his house above a certain height, but in the same way as with

the servitude "*Stillicidium*"—if he voluntarily deprived himself of this right, his neighbour acquired an adverse right and became possessed of the servitude "*Altius tollendi.*" The servitude "*Ne luminibus et ne prospectui officiatur*" was the right given to a man to oblige his neighbours not to interfere with, or obstruct his light, or his prospect.

44. *In what way were Prædial Servitudes created? In what way were they extinguished?*

Rural Prædial Servitudes when they related to land in Italy (*solum Italicum*) were reckoned amongst those things that were *Res Mancipi*, and could only be constituted by "*Mancipatio.*"

Urban Prædial Servitudes could be constituted by process of *in jure Cessio.*

In the time of Justinian Prædial servitudes were created—

1st. **By pacts and stipulations followed by quasi-iladitio,** *i.e.* the parties entered into an agreement (*pactum*) to constitute the Servitude, and then the owner of the thing over which the Servitude was constituted (*res serviens*) bound himself, by a stipulation, with a penalty to allow the right to be freely exercised.

2nd. **By testament.**

3rd. **By Adjudicatione**—as when a judge awarded a servitude to one of the parties to the action *familiæ erciscundæ*, or *communi dividundo.*

4th. **By reservation** of the Servitude to himself by the owner when making a *traditio* of the rest of the property.

5th. **By Prætorian Edict.**—The usucaption of servitudes was expressly forbidden by the *Lex Scribonia*, A.U.C. 720, but a long *bonâ fide* possession thereof was protected by the prætor. A servitude also which had been lost could be regained by the former owner by two years' usucaption.

They were extinguished—

1st. **By Process of In jure Cessio**—which after having been long obsolete was abolished by Justinian.

2nd. **By Consolidatio**—*i.e.* the ownership of the *res dominans* and the *res serviens* vesting in the same person.

3rd. **By Non-usage**—formerly for two years, but in the time of Justinian for ten years, if the parties during that time resided in the same province, otherwise for twenty years.

4th. **By destruction of the thing itself**—*i.e.* either the destruction of the *res dominans*, the immoveable in virtue of which the right was possessed, or the *res serviens*, the immoveable subject to the right.

45. *How was the Personal Servitude Usufruct created? How was it extinguished?*

It was created in the same ways as Prædial servitudes, viz.:—**By pacts and stipulations with quasi traditio, by testament, by adjudication, by reservation of the servitude**, and **by prætorian Interdict** (see last Ques.). Also in one other manner, viz.:

"**Lege**," by express law, as where by Justinian's enactment the father got the *usufruct* of

half the *peculium adventitium* of his son upon his son's emancipation.

Extinguished—

1st. **By process of In jure Cessio** (abolished).

2nd. **By Consolidatio,** *i.e.* by the ownership of the dominium and the usufruct vesting in the same person.

3rd. **By non-user** (see last Ques.).

4th. **By not using the usufruct according to the terms agreed on.**

5th. **By the death, or Capitis Deminutio maxima or media of the usufructuary** (the owner of the usufruct).

The other personal servitudes "**Usus** and **Habitatio**" arose and were extinguished in the same way as *usufruct;* but the servitude **Habitatio** was not extinguished by mere non-user, nor by any *Capitis Deminutio* suffered by its owner.

46. *Explain the meaning of Jus Emphyteuticarium, Jus Superficiarium, and Jus Pignoris.*

The **Jus Emphyteuticarium,** and the **Jus Superficiarium,** were rights *in rem,* very much akin to personal servitudes.

Emphyteusis was the right of enjoying, and disposing of, the use and fruits of the lands, or buildings of another, for a long period of time, in consideration of a yearly rent (*pensio*).

The *duty* of the **Emphyteuta** — the person possessing the **Jus Emphyteuticarium**—was, to use the property in such a way that its value was not reduced, and also to pay the rent.

Superficies was a right almost identical with *Emphyteusis*, but was applicable only to things built on the land of another, whilst *Emphyteusis* related to the land itself.

The duties of the **Superficiarius**—the person possessing the **Jus Superficiarium**—were the same as those of the *Emphyteuta*.

The Jus pignoris expressed the rights given to a creditor over the property which had been pledged to him.

These rights were—

1st. **The right of selling, or pledging,** the thing pledged to him, and satisfying his own claim out of the proceeds thus obtained.

2nd. **Of having himself declared owner,** if the property was unsaleable.

3rd. **Of bringing a real action.**—*Actio quasi Serviana*—against any one wrongfully detaining the property from him.

Justinian enacted that the creditor should give two years' notice of his intention to sell, and after two years had expired, allowed him to be declared the owner of the property.

47. *State all the ways mentioned in the Institutes by which particular things (res singulæ) could be acquired.*

There are eight ways noticed—the first three being ways of acquiring by natural law (*jure naturali*) the others by the civil law (*jure civili*).

(*a*) **Occupatio.**
(*b*) **Accessio.**
(*c*) **Traditio.**
(*d*) **Gift.**

(*e*) **Usucaption**
(*f*) **Prescription.**
(*g*) **Adjudicatione.**
(*h*) **Lege**

Occupatio was acquisition by seizing upon and taking into possession a *Res nullius* capable of being acquired.

Accessio was acquisition by the increase, either natural or artificial, of something already one's own property (see next Ques.).

Traditio was acquisition by delivery, *i.e.* by the actual handing over of the property to be transferred by the transferror to the transferee (see Ques. No. 49).

Gift was also acquisition by delivery, but always implied as well that there was a particular motive for the transfer (see Ques. No. 50). Justinian enacted that a person who had agreed to give could be forced to make a *traditio.*

Usucaption and **Prescription.** Both modes of acquisition by length of time (see Ques. 54).

Adjudicatione. Acquisition by judicial authority, as when a judge in the action *Familiæ erciscundæ,* or *communi dividundo,* adjudged particular property to particular individuals.

Lege. When by express law a person acquired property, as the father the usufruct of his son's *peculium.*

48. *Give some description of Acquisition by "Accessio."*

Accessio was of two chief kinds—

1st. **Accessio by natural increment—**

The owner of property gains the natural in-

crease in the following cases :—The young of his animals.—Alluvial soil carried to his soil.—A large quantity of soil carried away by a river, and borne against his soil, and there remaining until the roots of any trees thereon take root in his soil.

2nd. **Accessio in favour of one of two joint owners**—the governing rule being, that the accessory thing acceded to and became the property of the owner of the principal thing.

In a case of materials belonging to two persons becoming mixed, either by design or accident, and a new article being thus created; if the compound article was capable of being again divided and reduced to its components, the owner of each part still remained owner; if this was impossible, the person who mixed the materials, and thus created a *nova species*, was considered by law as the owner thereof.

"Everything on the soil accedes thereto," so if one builds with his own materials on the soil of another, the building becomes the property of the owner of the soil; but if this happened through a *bonâ fide* mistake on the part of the owner of the materials, he being still in possession, the owner of the soil would be obliged to make him compensation,

Trees, shrubs, and seeds, when they have taken root, accede to and become the property of the owner of the soil, subject to the like exception, in case of the planter being in possession, and acting under a *bonâ fide* mistake.

Exception—

If a painter paints upon the canvas of another, the picture does not become the property of the owner of the canvas; the painter must, however, compensate the owner of the canvas for the same.

49. *What were the requisites that an attempted transfer of property by "traditio" should be valid?*

They were three:—

1st. The transferor must be the owner of the property.

2nd. He, or some one on his behalf, must make a *traditio* of the property, *i.e.*, actually hand it over, and with the intention also of passing the property therein.

3rd. The transferee must actually receive the property, meaning thereby to acquire the ownership.

NOTE.—If a person had handed the possession of a thing to another, not intending to pass the property therein; as, for example, in the case of a loan; and afterwards wished to transfer the property, no second *traditio* was necessary; but this wish or intention was held to unite itself with the previous act of delivery, and the *traditio* was thus perfected.

50. *State the different forms noticed in the Institutes of acquisition by donatio, and describe each form.*

There are three different kinds of *donationes* noticed by Justinian—

1st. **Donatio mortis causa.**
2nd. **Donatio inter vivos.**
3rd. **Donatio ante nuptias.**

The Donatio mortis causa was a gift made in the presence of five witnesses by a donor, in contemplation of death, and only to take effect if death ensued. *Traditio* was necessary.

The Donatio inter vivos was a gift manifested by *traditio,* and had no reference to the death of the donor. Constantine required *donationes inter vivos,* exceeding in amount 200 solidi (altered by Justinian to 500 solidi), to be registered. As a rule, gifts *inter vivos* were irrevocable; but Justinian allowed a donor towards whom his donee had shown great ingratitude to revoke the gift.

The Donatio ante nuptias was the gift made by the husband to the intended wife before marriage. It was the inalienable property of the wife, and could be increased during the continuance of the marriage (see next Quest.).

51. *What alteration was made by Justinian in the donatio called ante nuptias?*

Justinian allowed this *donatio,* which, as its name expresses, was an *ante-nuptial* gift, not only to be increased, but to be made after marriage, and altered the name from *donatio ante nuptias* to *donatio propter nuptias.*

If the wife survived her husband she received a portion of this *donatio* equal in value to that, which, if the husband had survived, he would have received out of the dowry brought to him by his wife (*Dos*).

52. *Gift inter vivos of* 600 *solidi without registration. Did the intended beneficiary take?*

He took 500 *solidi*, for, under Justinian's legislation, a gift up to this amount was good without registration, and the gift would be treated as a gift of 500 solidi only.

53. *"A" being ill gives to "B" a field which he is to restore to him should he recover. "A" dies. Has the heir any right over the field? What law do you know that bears on the subject?*

This was a *donatio mortis causâ*, and the event in expectation of which it was made, viz., the death of "A" having occurred, the gift took effect.

The heir could retain a fourth part of the property, being so empowered by *rescript* of the Emperor Severus, which extended the *Lex Falcidia* to "*donationes mortis causâ.*

54. *Trace historically acquisition by Usucaption and longi temporis possessio.*

By the twelve tables it was provided that moveables should be acquired by one year's usucaption, and immoveables by two years' usucaption.

The provincial lands (*solum provinciale*) being in theory the property either of the state (*prædia stipendiaria*), or the property of the people (*prædia tributaria*), were not capable of being acquired by usucaption; but the prætor protected the interest of a party who had been in possession a long time, by allowing him to repel any action brought for his eviction, by using the plea of "*longi temporis possessio.*"

The time necessary to have passed in order to enable him to use such a plea was *ten years*, if the parties were domiciled in the same province, and *twenty years* if they were not.

Justinian abolished all difference between the "*solum Italicum*" and the "*solum provinciale*, and gave the name of "*usucaption*" to the acquisition of moveables only; and the name "*longi temporis possessio*" to the acquisition of land, wherever situated.

He also enlarged the time for the acquisition of both moveables and immoveables, declaring *three years* to be the necessary time for the usucaption of moveables and *ten or twenty years* for acquisition by *longi temporis possessio*, according as the parties had, or had not, lived in the same province.

NOTE.—The interruption or breaking of "*usucapio*" was called "*usurpatio*."

55. *Could all kinds of property be acquired by "usucapio?"*

No.

1st. It was only property *in patrimonium* (see *post*, Ques. No. 41) that was capable in any event of being so acquired, and even then it was essential that the thing should not have any *vitium* in it, *i.e.*, the possessor must hold the property *bonâ fide*, and must have acquired it "*ex justâ causâ;*" or, in other words, it must have come into his possession by a legal mode of transfer.

The Lex Atinia, A.U.C., 557, forbade the usucaption of stolen property, although the possessor thereof held it *bonâ fide* and *ex justâ causâ*.

The Lex Julia et Plautia, A.U.C. 665, forbade the usucaption of goods seized by force (*vi bona rapta*), although possessed *bonâ fide* and *ex justâ causâ*.

The Lex Scribonia, A.U.C. 720, forbade the usucaption of servitudes.

Uninterrupted possession, however, for *thirty years*, or of ecclesiastical property for *forty years*, called **possessio longissimi temporis** enabled the possessor, before Justinian, to repel all actions, and in the time of Justinian, to become owner of the thing possessed.

56. *Through what persons, or agents, were other persons able to acquire property?*

As a general rule all persons "*in potestate*" acquired for those in whose "*potestas*" they were, thus :—

(*a*) **Filii-familiarum** acquired for their *pater-familias* (subject to what has been said as to the *peculium* of the *filius-familias*) (see Book 1, Ques. No. 20).

(*b*) **Slaves** always acquired for their masters, but could not contract to their masters' injury. A slave instituted heir by will enters on the inheritance for his master; but could not enter without such master's consent.

(*c*) **Slaves of whom the usufruct belongs to one person, and the ownership to another.** Everything acquired by their own labour, or by means of anything belonging to the usufruct, goes to the owner of the usufruct; everything else—such as an inheritance or a legacy—goes to the owner.

(*d*) **Freemen and slaves of others possessed bona**

fide by mistake. Everything acquired by their own labour, or through anything belonging to the supposed owner, became the property of such supposed owner.

(*e*) **Procurators.** In early times no stranger (*extraneus*) could acquire for another person. The Emperor Severus allowed persons to acquire by agents, called "*procurators*," even without authority shown from the principal.

57. *Was the power of alienating property in all cases attached to the ownership thereof?*

No—in some cases a person although the legal owner of property was prohibited by law from alienating it, whilst in other cases a person not owner had the power of alienation.

Examples:—

(*a*) **The husband**—was esteemed in law the absolute owner of his wife's *Dos*, but was forbidden by the *Lex Julia de Adulteriis*, A.D. 5, from alienating any part thereof without the wife's consent; and under Justinian even with her consent.

(*b*) **Pupil**—scould not alienate their own property without the authorization of their tutor.

On the other hand—

Pledgees—although they only had the possession of the property pledged and not the ownership, could nevertheless sell the same subject to certain restrictions (for which see Ques. No. 46).

58. *Give all the modes mentioned in the Institutes by which an aggregate of things (Universitas) could be acquired.*

There are five modes of acquiring a "*Universitas*" noticed by Justinian.

1st. **Testament.**
2nd. **Arrogation.**
3rd. **Bonorum Addictio.**
4th. **Bonorum Venditio.**
5th. **Ex Senatus-Consultum Claudiano.**

1st. It was necessary in every testament that a person should be instituted as "*heir.*" To such "*heir*" the whole "*persona*" of the testator descended, and this included all his property, rights, and obligations. The heir was thus said to have acquired a "*Universitas rerum.*"

2nd. When a person *sui juris* arrogated himself all his property of whatsoever description passed to the arrogator (the adopter) who thus acquired a "*Universitas rerum*" (*see* Bk. 1, Ques. No. 33, as to arrogation of person under puberty).

3rd. A testament was invalid if no heir was appointed or if the appointed heir refused to take. In such a case, however, if in the testament there had been a gift of liberty to a slave which would otherwise have been inoperative, the inheritance after being offered to the *heredes ab intestato* (*i.e.*, those who, had there been no testament, would have had a right thereto) could be given over to such slave, upon his undertaking to satisfy the creditors in full, or, in the time of Justinian, making a satisfactory

composition. This process was called "*Bonorum Addictio.*" The slave acquired freedom, and a "*Universitas rerum*" passed to him thereby.

4th. *Bonorum venditio* was the transfer of the whole of the property of a debtor to such one of the creditors or such other person as would undertake to pay the largest proportion of the debts. This is the fourth way noticed by which a "*Universitas rerum*" could be acquired.

(Obsolete under Justinian.)

5th. By the *Senatus-Consultum Claudianum*, A.D. 52, it was enacted that if a free woman should have illicit intercourse with a slave she should together with all her goods, be given over to the slave's master. The master thus acquired a "*Universitas rerum.*"

(Abolished by Justinian.)

59. *What do you know of the history of Testaments? Why was the Testament of Justinian's time said to have a threefold origin?*

In the earliest times testaments were either made in the presence of the "*Comitia Curiata*" summoned twice a-year especially for this purpose, and hence called "*Comitia calata*" or "*In Procinctu,*" a method unaccompanied by ceremony and used only by military persons at a time when the army was setting out for battle.

In later times the testator during his lifetime sold the inheritance to the heir, who was called "*familiæ emptor,*" by "*mancipatio.*" This process was called "*per æs et libram,*" and was effected in the presence

of five witnesses and a person who held a pair of scales (*libripens*).

The "*familiæ emptor*" struck the scales with a piece of copper and then gave it to the testator as the price of the inheritance. The testator then either read aloud the terms of his will, or, if they were not written, declared the same orally. In later times the heir was not necessarily the "*familiæ emptor.*"

The prætors abolished the form of sale and enacted that the will, which was thus necessarily in writing, should be attested by the seals of seven witnesses (really the same number as previously required if we reckon the "*libripens*" and the "*familiæ emptor.*")

The Emperors Theodosius and Valentinian imposed the additional formality that the witnesses should sign as well as seal the testament.

(Justinian enacted that the name of the heir should be in the handwriting of the testator, but afterwards abolished this additional formality.)

The testament was said to have a triple origin, in consequence of its being derived in part from the Civil law, in part from the edicts of the prætors, and in part from the constitutions of the emperors.

60. *In what way could testaments become revoked? Distinguish between a testament "non jure factum," "Ruptum," and "Irritum."*

A testament if originally valid was held revoked by becoming "*Ruptum*" or "*Irritum.*"

A testament "*non jure factum*" was really no testament at all, the formalities requisite in its construction, or some of them, not having been complied with (see last Ques.).

A testament was "*Ruptum*" in each of the following events:—

(*a*) By the arrogation or adoption (unless *tempore Justiniani* by an ascendant) of a new "*suus heres.*"

(*b*) By a second testament.

(*c*) By a codicil.

(*d*) By the testator destroying or defacing the will, or if the will was ten years old, in the presence of three witnesses having declared that he wished it to be considered revoked.

(*e*) If the testator had in a subsequent testament instituted the heir for particular things only, yet this entirely revoked the first testament.

A testament was "*Irritum*":—

(*a*) In the event of no one entering upon the inheritance (sometimes called *Destitutum*).

(*b*) By *Capitis Deminutio* of the testator. (Note: If before death the testator should have regained his *status* the prætor would still allow the instituted heir to take the goods according to the testament. Called "*possessio bonorum secundum tabulas.*")

61. *A person not a soldier is severely injured and in expectation of death. In the presence of seven witnesses he hands over a valuable work of art to a friend telling him to keep it should he (the injured person) not recover, and also orally declares that he wishes the same friend to have all his property after his death. The injured person dies. Were either or both of these*

bequests valid? Would the time such events took place make any difference?

The first bequest was valid as a "*Donatio mortis causâ*," as it was made in presence of witnesses by tradition, and also when the donor was in expectation of death.

The second bequest would have been invalid before Justinian, but Justinian expressly enacted that a will could be made orally in the presence of seven witnesses; therefore, during or after the reign of Justinian, such a bequest would be valid.

62. *Give some account of military testaments, and the advantages attached thereto.*

The military testament, *i.e.*, a testament made by soldiers when in the camp, was exempted from many if not all the formalities required in other cases.

The military testament was first introduced by Julius Cæsar, and fully established in the first century by the Emperor Nerva.

The chief privileges attached thereto were as follows:—

(*a*) If written it required no witness.

(*b*) It could be made orally and (probably) required one witness.

(*c*) It could be made by a person deaf or dumb.

(*d*) It was not revoked by *Capitis Deminutio* either *maxima* or *media* if such loss was the result of punishment for a violation of military law only, nor was it ever affected by *Capitis Deminutio minima.*

(*e*) It could not be set aside as Inofficious (see Ques. No. 78).

(*f*) The *Lex Falcidia* did not extend to it, *i.e.*, the testator need not leave a fourth of his property to his heir.

(*g*) Persons, such as *peregrini*, generally incapable of acting as heirs could yet be instituted therein.

(*h*) The children in the power of the testator need not be disinherited.

(*i*) It need not include the whole inheritance, *i.e.*, testator who was a soldier could die partly testate and partly intestate.

(*j*) Unlike the rule applying to inheritances generally, a military inheritance could be disposed of by codicils alone.

A military testament remained in force for one year after the testator had left the army, provided he had not been discharged in disgrace (*causâ ignominiæ*).

63. *Which of the following persons were capable and which incapable of witnessing a will—(a) a person in the power of the testator; (b) a woman; (c) the heir; (d) a legatee; (e) a slave?*

A legatee was capable of witnessing a will; all the other persons mentioned in the question were incapable.

64. *What persons were by law regarded as unable to make a testament?*

The following persons were regarded by law as unable to exercise testamentary power:

(*a*) Persons *in potestate*, subject to what has been said as to the son's *peculium* (see Book 1, Ques. 21).

(*b*) Persons under the age of puberty.
(*c*) Madmen (save during lucid intervals).
(*d*) Prodigals, *i.e.*, persons of such reckless behaviour as to be esteemed by law incapable of managing their own property.
(*e*) Deaf and dumb persons.
(*f*) Blind persons (save with an additional witness or a notary).
(*g*) Captives (a will, however, made before captivity was valid if the captive returned, by *jus postliminii*, or if he died in captivity by the *Beneficium legis Corneliæ* (see next Ques.).
(*h*) Some other persons who had not the *testamenti factio*, as *peregrini* or heretics.

65. *What was the "beneficium Legis Corneliæ?"*

The *Lex Cornelia De falsis*, A.U.C. 686, enacted *inter alia* that the same penalty should attach to one forging the will of a person in captivity as to forgery generally.

The "*beneficium legis Corneliæ*," was a deduction from this statute, and was used to express the fiction of law by which the will of a person dying in captivity was declared to be good, it being assumed that the testator must have died the moment he was taken prisoner.

66. *What was the "Lex Falcidia?" What attempts to attain the same object had been previously made, and why were they not successful?*

The **Lex Falcidia** (A.U.C. 714) was a law passed by the *Comitia Centuriata* forbidding a testator to leave more than three-fourths of his property in legacies, in

order that one clear fourth of the inheritance should remain to the heir.

(The *inheritance* for the purposes of the *Lex Falcidia* was the whole of the property of the testator after the payment of his debts, funeral expenses, and cost of the manumission of his slaves.)

It was preceded by the *Lex Furia testamentaria* and the *Lex Voconia* (*plebiscita*) passed respectively in the years A.U.C. 571 and A.U.C. 585.

The *Lex Furia* forbade a testator to leave in one legacy more than 1000 *asses*. The object of the *Lex* was that some part of the inheritance should remain to the heir, but as the number of legacies was not limited, the object for which the law was passed was easily defeated. The *Lex Voconia*, passed with a like object, forbade a testator to give any legacy exceeding the amount left to the heir, or, if there was more than one heir, exceeding that given to each. This law was evaded with equal ease as the testator could multiply the number of legacies to any extent, and thus reduce the amount due to the heir to utter insignificance.

67. *What were the rules ante et tempore Justiniani relating to the disinheriting of posthumous children? What were the "Postumi Velleiani" and "quasi Velleiani?"*

In early times posthumous children were regarded as "*Uncertæ personæ*," and as they could not be instituted in a testament, so it was unnecessary that they should be disinherited.

In time, by relaxation of the Civil law and by the prætorian edicts, posthumous children, *sui heredes* of the testator, were allowed to be instituted, and Justinian allowed all uncertain persons to be instituted.

After the time from which posthumous *sui heredes* could be instituted in a testament, it became necessary to disinherit them by name, *i.e.*, the sons must be especially alluded to, and specifically disinherited in the testament; and the daughters could be disinherited by the testator using what was called the Ceteri clause (*Ceteri exheredes sunto*).

Justinian enacted that all posthumous children, whether male or female, should be disinherited by name (thus abolishing the *Ceteri* clause), and that any omission in this respect should render the testament invalid.

Children born after the making a testament but before the testator's death were called *postumi Velleiani* as being in a somewhat analogous position to posthumous children. The *Lex Junia Velleia* allowed them to be instituted or excluded by a testator, and the same law also allowed a testator to exclude his grandchildren whose fathers were living, to meet the event of their becoming his *sui heredes* in consequence of the death of the father.

Such grandchildren were instituted under the name "*quasi postumi Velleiani.*"

68. *What were the rules ante et tempore Justiniani as to the mode of disinheriting adopted children?*

Before the time of Justinian the effect of adoption was that the child adopted was held to have entirely quitted the family of his natural father and was reckoned in every respect as a member of the family of the adoptive father.

As a consequence it was necessary, prior to Jus-

tinian's time, that if a testator wished to disinherit his adopted children he must adopt the same means as were necessary to disinherit his natural children; *i.e.*, the adopted children, if sons, must be expressly disinherited by name; if daughters, they could be disinherited under the general term *Ceteri exheredes sunto.*

Justinian radically changed the law of adoption by enacting that in no case, save where the adoptive father was an ascendant relative, should the child, in consequence of such adoption, lose any of his rights upon his natural father, and should only have a claim on the goods of his adoptive father in case such father died intestate.

It therefore naturally followed (*tempore Justiniani*) that a testator need not make any mention whatever of his adopted children in his testament, except he was an ascendant relative of such children, in which event they must be disinherited by name, or the testament would be invalid.

69. (*a*) *Was there any difference prior to the time of Justinian in the words necessary to be used to disinherit sons and daughters?* (*b*) *Need a father disinherit his emancipated son?*

(*a*) Prior to the time of Justinian, sons to be disinherited had to be each specifically named or referred to, daughters could be disinherited by the testator making use of the general term "*Ceteri exheredes sunto,*" but in the case of posthumous daughters so disinherited some trifling legacy was always left to them to show they were not excluded from mere forgetfulness. (Justinian

enacted that every child should be disinherited by name).

(*b*) By the Civil law it was not necessary for a father to disinherit his emancipated son, but under the prætor if an emancipated son was passed over in his father's testament he could claim, and would receive, possession of such share of his father's goods as he would have got had his father died intestate (*possessio bonorum contra tabulas*).

Justinian enacted that all emancipated children must be disinherited by name.

70. *Explain the meaning of the phrase "Institution of the heir."*

By the phrase "institution of the heir" is meant the declaration by a testator, in his testament, of the person who was to succeed to his inheritance and carry on his "*persona.*" It was "*Veluti caput atque fundamentum totius testamenti*" as the head and foundation of the whole testament.

In early times it was necessary that the name of the heir should be the first thing written in the testament, and any legacy written above it had no effect, and up to the year A.D. 389 it was necessary that the heir should be instituted by a particular form of words.

Justinian enacted that, so long as the name of the heir appeared in some part of the testament, it was immaterial in what part it appeared.

71. *What persons were incapable of being instituted as "heirs"?*

Generally any person who had what was called

"*testamenti factio*" with the testator, *i. e.*, the power of joining with him in the ceremonies of the *Jus Quiritium*, could be instituted as heir.

Peregrini, Latini Juniani, Dediticii, Heretics, Deportati, the children of persons convicted of treason, natural children (save when there were no legitimate children), **and uncertain persons**, were all at various times incapable of being instituted as heirs.

Many of these exceptions had fallen into disuse before Justinian's time, and Justinian himself abolished the rule by which uncertain persons were excluded. *Peregrini* (strangers), *Deportati*, *Heretics*, and the children of persons convicted of treason, were practically the only persons excluded from being instituted as heirs in the time of Justinian.

A slave could be instituted as heir, but the appointment carried with it the gift of his liberty, and a slave belonging to another could be instituted as heir, even after his master's death, and before his inheritance was entered on.

Women, by the *Lex Voconia*, A.U.C. 585, could not be instituted heirs to an inheritance which exceeded in value 100,000 *asses*.

(Previously to the reign of Constantine unmarried persons (*Cœlibes*) and childless persons (*Orbi*), although both classes could be instituted, yet the former could not take any part of what was given them unless they were too young to be married, or were near relations of the testator; the latter could only take one-half of what was given them. The *Lex Papia Poppœa* under which these disqualifications arose was abolished by Constantine.)

72. *What was the technical name given by the Romans to "an inheritance"? Of how many parts was it usually composed? Could it under any, and if so, what circumstances be taken to be composed of more than the usual number of parts?*

The Romans called the "inheritance" the "*As*," and regarded it as composed of twelve parts, called ounces.

A testator could always divide his inheritance (*as*) into any number of ounces he chose so long as the number was defined. In case several heirs were instituted and a fixed number of ounces given to some, and another simply instituted as co-heir without a specified share being allotted to him, then if the number of ounces given was less than twelve the co-heir had as many ounces as would make up that number; if the number of ounces given was twelve or more, then the instituted co-heir took such number as sufficed to make up twenty-four ounces and the inheritance was held to be composed of that number, and was called (*Dupondius*).

In like manner if the ounces reached, or exceeded, twenty-four and a co-heir without defined share was instituted, the inheritance was held to be composed of thirty-six ounces (*Tripondius*).

The names given to the parts of the "*As*" were as follows:—*Uncia, sextans, quadrans, triens, quincunx, semis, septunx, bes, dodrans, dextans, deunx.*

73. *A testator institutes "A," "B," & "C" as heirs and gives to "A" quadrans uncia, to "B" septunx uncia, and to "C" triens uncia. Into how many ounces was the "As" divided and what was it called?*

It was divided into fourteen ounces and called "*As.*"

The testator could make the "*As*" consist of as many ounces as he chose, and if the exact number of ounces could be ascertained it always received the name "*As.*"

74. *Explain* (*a*) "*Vulgar,*" (*b*) "*Pupillary,*" (*c*) "*quasi pupillaris*" *substitution.*

(*a*) **Vulgar or ordinary substitution** was the naming in the testament one or more persons who were to take the inheritance in case the instituted heir refused or was incapable of taking.

Several heirs could be substituted in place of one, or one in the place of several; as, "Let 'A' be my heir, and if 'A' is unable or unwilling to enter, then let 'B,C,& D' be my heirs"; or, "Let 'B,C,& D' be my heirs, and if they are, or either of them is, unable or unwilling to enter, I then appoint 'A' either to the whole or such part of my inheritance as may be undisposed of."

(*b*) **Pupillary substitution** was the naming in the testament of some person, or persons, who were substituted to the unemancipated child of the testator; the distinguishing feature of pupillary substitution being that the substituted heir took, not only in the case of the child not entering upon the inheritance at all, but also in the case of his entering upon the inheritance and dying before attaining the age of puberty; in which event the substituted heir entered not only on the father's, but also on the son's inheritance. The testament of the father so substituting to his children was said to act upon two inheritances. A testator could not make his son's testament without making his own. (To prevent *mala fides* in the case of pupillary substitution, that part of the testament in which the substituted heir

was named was often sealed up by the testator, with directions that it should not be opened until rendered necessary.)

(c) **Quasi Pupillary substitution**, in analogy to pupillary substitution, was a power given to the ascendant relatives of a person of unsound mind to substitute heirs to the inheritance of such person, provided that the substituted heirs should be if possible either descendants or brothers of the person of unsound mind.

75. *Explain and illustrate the maxim "Substitutus substituto censetur substitutus instituto."*

"A person substituted to a substitute is considered as a person substituted to the instituted heir."

This was a rule of law established by the Emperor Severus and provided—in a case where a co-heir was substituted to an instituted heir and a third person to the co-heir—for the event in which neither the co-heir nor the instituted heir entered. The person substituted to the co-heir would take the whole inheritance.

Ex. gr.—"A and B are co-heirs, B is substituted to A in case A should not take, C is also substituted to B in case he should not take. Neither A nor B take. What, then, does C take? Of course, he takes the share of B, for so it was expressly provided, but he also, by virtue of the application of the above maxim, takes the share of A, although it had never come into the possession of B and had not even been entered upon by A."

76. *A testator institutes as his heir "B" (a slave) supposed by the testator to be sui juris, and substitutes*

another person to "B." What was the effect of the testator's mistake as to the status of "B"?

In such a case, by a rule of law, apparently founded on no solid reason, the master of "B" (the slave) and the substituted heir would each be entitled to half of the inheritance, the testator being held in some degree responsible for his mistake, but being by law relieved from incurring its full consequences.

77. *In the case of a testator appointing several co-heirs, was there any advantage in his substituting them reciprocally one to another?*

Such a course might be of considerable advantage to the heirs themselves, or some of them, for although, in any case, if the share of a co-heir should lapse, it devolved by operation of law (*Jus accrescendi*) upon the remaining co-heirs, yet if the co-heirs were by the testator himself substituted to one another, they had these further advantages:—

1st. They could refuse to take the part thus offered to them. Co-heirs could not refuse to take what devolved on them by *Jus accrescendi.*

2nd. Persons who by the *Lex Papia Poppæa* were unable to enter on an inheritance, or to take all the property given to them, could yet take any share, in its entirety, coming to them as substituted heirs.

3rd. Substitution being a personal right, it was only allowed to those heirs who were alive at the time of the share of a co-heir becoming vacant to accept or reject the same; but if the co-heirs were not substituted to one another, the representatives of a deceased heir, who had entered

on the inheritance, could claim anything which would have devolved upon such deceased heir by *Jus accrescendi.*

78. *Who could attack a will as inofficious? and under what circumstances?*

The children, or if there were no children, the parents, or if there were no parents, the brothers and sisters of a testator, who had been entirely passed over in his testament, could attack it as "**Inofficious,**" *i.e.*, made without regard to natural feeling and affection. The ostensible ground for attacking a will as "*Inofficious*" was, that the testator must have been insane at the time of making it, otherwise he would not so have neglected the claims of his near relations. No one, if a legacy even of the most trifling amount was given to him by the will, could attack it as "inofficious," but in such a case he could bring another action called "*Actio in supplementum legitimæ*" (see Ques. No. 80).

79. *How did a person lose the right to bring the action "De inofficioso"?*

A person who had the right to bring the action "*De Inofficioso*" could lose his right in the following ways:—

1st. By acquiescence, *i.e.*, acknowledging the validity of the will; but a Tutor could accept a legacy on behalf of his pupil, and yet on his own account attack the will as "*inofficious,*" or conversely, could himself accept a legacy and yet on his pupil's account attack the will as "*inofficious.*"

2nd. By allowing five years to elapse before he brought his action.

3rd. By dying before he had commenced his action; but if before death he had clearly declared his intention to dispute the will, the action could be brought by the heir.

80. *What was the "Actio in supplementum legitimæ?" In analogy to what law was it first introduced?*

An action which was open to every person who was near enough in blood to the testator to bring the *Actio de Inofficioso*, but who could not bring that action in consequence of not having been *entirely* passed over in the testament. The *Actio in supplementum legitimæ* was brought for the purpose of obtaining the *legitimæ portio*, or a fourth part of what the applicant would have received if the testator had died intestate.

It was introduced in analogy to the *Lex Falcidia*, a law by which a clear fourth part of every inheritance was secured to the heir, the testator being restricted from giving more than three-fourths in legacies.

81. *How many kinds of heirs were there? In what main respects did they differ from one another?*

There were three kinds of heirs known to the Roman law, **Necessarii, Sui et Necessarii and Extranei.** A necessary heir (*heres necessarius*) was one of the slaves belonging to the testator, and who upon being appointed heir *ipso facto* acquired his freedom. He was so called because the option of accepting or rejecting the inheritance was not given to him.

"*Sui et Necessarii*" heirs were the *sui heredes* of

the testator, *i.e.*, those persons who by the fact of his death became *sui juris*. They were so called because they would have been the heirs of the testator in an intestate succession, and were also regarded by law as having such a claim on the inheritance that even if the testator made a will it was necessary that they should be expressly disinherited by name therein.

Extranei heredes included all persons who did not fall within the other classes, and who had the *testamenti factio* with the testator, at the times respectively, of the making the testament, of the testator's death, and of the inheritance being entered upon. All persons had the *testamenti factio*, for the purpose of being appointed *extranei heredes*, if they had the capacity to take legacies given by testament (see Ques. No. 90).

82. *What was the "Beneficium separationis," the "Beneficium abstinendi," and the "Beneficium Inventarii?"*

The Beneficium separationis was the privilege given to necessary heirs (slaves) of having their own property separated from that of the testator, by which means it was reserved to themselves and secured against the testator's creditors.

The Beneficium abstinendi was the right of refusing to enter upon an inheritance. This *beneficium* was enjoyed both by *Sui et Necessarii heredes* and by *Extranei heredes*, and lasted until the heir expressly declared that he accepted the inheritance, or unless by interfering with the property, and practically taking upon himself the duties of heir, he deprived himself of the privilege.

The Beneficium Inventarii, introduced by Justinian,

was a right, given both to *Sui et Necessarii* and *Extranei heredes*, to have an inventory made of all the property comprised in the inheritance to the extent of which, and of which only, were they to be held liable to the creditors.

It was necessary that the heir who availed himself of this privilege should have the inventory commenced within thirty days, and finished within ninety days, and should also have it witnessed by a notary, or by three witnesses.

83. *Eplain the meaning of the term "Cretio."*

"**Cretio**" was the term used to express a particular mode of entering upon the inheritance, *viz.*, when by the testator himself a maximum time was mentioned in the testament, within which time the heir should either enter upon, or reject it.

It was of two kinds :—

Cretio Vulgaris.—When the testator declared that the time within which the heir could deliberate, should commence no sooner than the time at which he first learned his rights as heir.

Cretio Continua.—When the testator declared that the time of deliberation given to the heir, should begin as soon as the rights devolved upon him, irrespective of the time when he first became acquainted therewith.

The heir who entered upon the inheritance by "*Cretio*" could, if he had not interfered with the inheritance, alter his decision, provided he did so within the allowed time.

The mode of entering upon an inheritance by

"*Cretio*" was abolished by Imperial Constitution in the year A.U.C. 407.

84. *"A" by testament institutes the slave of "B" as his heir. "B's" death occurs before the death of "A." Applying the rule that a slave only enters upon an inheritance on behalf of his master, give your opinion as to what became of "A's" inheritance.*

It was entered upon by the slave either for the benefit of his new master, or if "B's" inheritance had not been entered upon, then for the benefit of the inheritance itself; for between the time of death and the inheritance being accepted, the inheritance itself was held by the law to represent the "*persona*" of the deceased.

85. *What do you know of the history and uses of Fideicommissa?*

Fideicommissa were trusts imposed either upon the instituted heirs, the *heredes ab intestato*, or in some cases upon the *fideicommissarius*—the person benefited by the *fideicommissum*—himself (*a*).

A *fideicommissum* could embrace the whole inheritance, or any part or parts thereof.

In early times, persons although incapable of taking legacies (see Ques. No. 90), could yet take under a *fideicommissum*, but these advantages were by Imperial Constitutions gradually taken away.

The **Senatus-Consultum Trebellianum**, A.D. 62, protected the heir who had been compelled to hand over the inheritance to another person by *fideicommissum* against actions which might have been brought against him as heir, and the **Senatus-Consultum Pegasianum,**

(*a*) They were first made binding by Augustus.

A.D. 73 (under which enactment the heir could be compelled to enter on the inheritance, and to transfer it as desired), also permitted him, in handing over the inheritance, to retain a fourth part for himself in analogy to the *Lex Falcidia*.

When the heir deducted the fourth part of the inheritance, and retained it under the *Senatus-Consultum Pegasianum* he was liable *pro tanto* for the debts of the testator.

Justinian united these two *Senatus-Consulta* into one, to which he gave the name *Senatus-Consultum Trebellianum*, but which combined the advantages of both.

86. *What were the different forms in which a legacy could be given?*

There were four ways:

1st. **Per Vindicationem.**

2nd. **Per Damnationem.**

3rd. **Sinendi modo.**

4th. **Per Praeceptionem.**

The expression used in the will decided in which of the above ways the legacy was given.

If the testator gave the subject of the legacy directly to the legatee (*Hominem, Stichum do*), this was a legacy **Per Vindicationem**. Immediately on the testator's death the property passed to the legatee, who could claim the same by real action (**Vindicatio**).

If the testator commanded his heir to give the legacy to the legatee (*meum heredem dare jubeo*), then such legatee could not claim the subject of the legacy by real action, but must bring a personal action against the heir. Such a legacy was said to be given **Per Damnationem.**

If the testator declared that the heir was to permit the legatee to take the subject of the legacy himself (*Heres meus damnas esto sinere Lucium Titium sumere illam rem sibique habere*), the legatee had no right in the property, but only a personal action against the heir. Such a legacy was said to be given **Sinendi modo.**

A legacy **Per Praeceptionem** could strictly only be given to one already instituted heir, the subject of it being something that the heir was to have before, and in addition to, receiving his share of the inheritance.

The **Senatus-Consultum Neronianum**, A.D. 60, declared that all legacies given *Per Praeceptionem* to persons not heirs, should be regarded as though they had been given *Per Damnationem.*

In A.D. 342, an Imperial Constitution abolished the use of formulæ in wills and all other legal acts.

87. *What, if any, was the difference between a legacy and a fideicommissum in the time of Justinian?*

There was no practical difference between a legacy and a *fideicommissum* in the time of Justinian.

Justinian enacted that if a legacy wanted any formality, without which it would not be valid, it should be regarded as a trust imposed upon the heir.

The general rule was that if the expressions used in the testament were peremptory, they were treated as creating legacies, if precatory, they were treated as creating *fideicommissa.*

NOTE.—A slave, however, even in the time of Justinian, whose liberty was given to him by *fideicommissum*, was not the freedman (*libertus*) of the testator, but of the *fideicommissarius.*

88. (*a*) *Could a testator bequeath the right to dwell in his house, or the right of passing over his land, by his will?* (*b*) *What would be the effect of a wrong description of either the house or the land above mentioned?*

(*a*) All incorporeal property could be bequeathed by will, and this would of course include the Servitudes mentioned in the question.

(*b*) A wrong description of either the subject, or the object, of a legacy, was never treated as material, so long as the intention of the testator was obvious.

89. (*a*) "*A*" *gives a legacy to* "*B*" *of a house, thinking it belonged to* "*C*," *while in reality it belonged to* "*A*" *himself.* (*b*) "*A*" *gives a legacy to* "*B*" *of an estate which* "*B*" *afterwards purchases.* (*c*) "*A*" *gives a legacy to* "*B*" *of an estate, and* "*B*" *afterwards acquires the usufruct.* (*d*) "*A*" *gives a legacy to* "*B*" *of a house, and afterwards pulls it down. Could* "*B*" *take in all or any of these cases?*

(*a*) In this case the legacy would be invalid, for although a testator could give as a legacy the property of others, yet he could only do this if he was, at the time of giving it, aware of the fact that it was not his own.

(*b*) In this case the legacy would be valid, and "B" would be entitled to receive from the heir the price of the estate.

If "B" had obtained the estate by gift, or in any other way than by giving consideration for it, *causa lucrativa*, the case would have been different, the rule being that "two modes of acquiring, each being one of

clear gain, can never meet in the same person with regard to the same thing."

(*c*) In this case, as in the last, if "B" purchased the usufruct he could claim the estate and the value of the usufruct from the heir, if he obtained the usufruct *causa lucrativa* he could still claim the estate, but the judge would award to him the value of the estate, having first deducted the value of the usufruct.

(*d*) If a testator during his lifetime chooses to destroy the subject of his gift, then, in the absence of proof to the contrary, he would be assumed to have intended to revoke his gift, but, as the gift of a house simply would include the land upon which it stood, it is probable in the case put that the legatee could claim the land from the heir.

90. *What persons were either wholly or partially incapacitated by law from taking legacies?*

The following were incapable of taking legacies to the extent noticed below:—

(*a*) **Deportati**—Wholly incapable.

(*b*) **Peregrini**—Wholly incapable.

(*c*) **Latini Juniani**—Unless within a fixed time from the legacy being left, they became citizens by one of the ways mentioned in Book 1, Ques. 11.

(*d*) **Cœlibes**—Under the Lex Papia—a *cœlebs* was a man between the ages of 20 and 60 years, or a woman between the ages of 20 and 50 years, unmarried.

Men were allowed one hundred days from the time of the testator's death, within which time they might marry and avoid the consequences of the *Lex*. Women were allowed two years from the death of a former husband, or 18 months from the time of divorce, in which to remarry.

The *Lex Papia* was abolished by Constantine.

(*e*) **Orbi**—An "*Orbus*" was a man between the ages of 25 and 60 years, or a woman between 20 and 50 years, who had not a child living at the time of the accrual of the right to take under the testament. The "*Orbus*" by the *Lex Papia* did not lose the whole, but only half the legacy that was given him. (Abolished by Constantine).

(*f*) **Hereties**—Under the Christian Emperors.

(*g*) **Uncertain Persons**—Previously to Justinian.

91. *What were "Caduca?" What were the chief differences between the devolution of "Caduca" and of ordinary lapsed legacies?"*

Strictly speaking "*Caduca*" were legacies lapsed in consequence of the legatees being restricted by the *Lex Papia Poppœa* from accepting them.

Legacies which had been valid at the time of the making of the testament, but were invalid before the date of the testator's death, were spoken of as "*in causa Caduci*," and were also affected by the *Lex Papia*.

"*Caduca*" and things "*in causa Caduci*" devolved upon certain persons called "*Patres*," who were said to have the "*Jus Caduca Vindicandi.*"

The "*Patres*" were those persons mentioned in the testament who were married and had one child living. In case of failure of such persons "*Caduca*" went to the "*Ærarium*," or people's treasury.

NOTE.—It must be borne in mind that ascendants and descendants of the testator, to the third degree, were not affected by the *Lex Papia* at all.

Ordinary lapsed legacies given to heirs, accrued to their co-heirs by *Jus Accrescendi;* if given to ordinary legatees they fell into and became part of the inheritance.

92. *Could a testator give as a legacy that which already belonged to the legatee? Would it make any difference that before the testator's death the legatee had parted with the property?*

No. Such a gift would be useless, and the fact that the legatee had parted with the property before the testator's death would make no difference, for by the *Regula Catoniana* (rule of Cato) a legacy invalid at the time the testament was made could never become valid.

(The apparent exception to the rule in the case of the husband being allowed to give the *Dos* to his wife by legacy is more imaginary than real; for although at the husband's death the *Dos* would *ipso jure* revert to the wife, yet when the will was made the *Dos* was rightly regarded as part of the husband's property.)

93. *What was a legacy of "Liberatio?" Give an illustration of its effect?*

A legacy of "*Liberatio*" was a gift from a creditor

to his debtor of a discharge from his debt. This could be done by the testator in express words cancelling the debt, or by his leaving to the debtor as a legacy the legal recognition, or bond, which he held as security for the debt.

The debt was not actually extinguished by a legacy of *Liberatio*, but if the heir sued the debtor he could be repelled by a plea of fraud (*Exceptio doli mali*).

94. *"A" institutes Maevius as his heir, and imposes a fideicommissum upon him to transfer the inheritance to Seius, and also requests Seius to hand on the inheritance to Titius. Could this be done, and if so, how was it affected by the "Senatus-Consultum Pegasianum"?*

Yes, it could be done, for a person who received property in virtue of a *fideicommissum* could himself be charged with a *fideicommissum* to transfer it to some other person. In the case put only Maevius would be entitled to retain the fourth part secured to the heir by the *Senatus-consultum Pegasianum*, and Seius would be merely a conduit pipe for passing on the inheritance, and would derive no personal benefit.

95. (*a*) *What do you know of the history of Codicils?* (*b*) *If a codicil wanted formality, what course was open to the person intended to be benefited thereby?*

(*a*) Codicils, which were at first merely directions to or later, trusts imposed upon, the heir, or upon the *heredes ab intestato*, were first made of legal force by Augustus, B.C. 30.

Codicils were required to be made *uno contextu*—

in one piece, and in the presence of five witnesses, who were to subscribe them.

(*b*) He could put the heir upon his oath to prove that the testator had or had not intended to give complete legal validity to the codicil.

The *Centumviri* heard and decided the case.

BOOK III.

SUMMARY.

THE first part of this book continues the examination of the various ways of acquiring an aggregate of things (*Universitas*), the first eight titles being devoted to intestate succession.

These titles include an account of the succession of *Sui heredes*, and of those permitted by the prætor to rank as *Sui heredes*—of *Agnati* before and in Justinian's time—and of *Cognati*.

They also include an explanation of the *Senatusconsulta Tertullianum* and *Orphitianum*—laws permitting mothers to succeed to their children and children to their mothers, in an intestate succession; likewise the rights of patrons in the goods of their freedmen, and as appertaining thereto the right of *Assignation*,—*i.e.*, the right enjoyed by the patron to assign his *Jus patronatus* over his freedmen, to any one of his children.

Title 9 gives a full description of the various *Bonorum possessiones*, applicable both to testate and intestate successions, given by the prætors to relations whose just claims had been disregarded, either through

the action of the testator or intestate himself, or by reason of the strictness of the civil law.

The various other ways of acquiring a *Universitas*, viz. by *Arrogation—Bonorum addictio—Bonorum Venditio*—and *Ex Senatus-consultum Claudiano*, are treated of shortly in the next three titles.

Justinian having finished the enquiry into the different modes of acquiring things, begins in Title 13 to treat of obligations, which are stated to arise either—from Contract or *quasi*-Contract or from Delict (wrong) or *quasi*-Delict.

(The subject of "Obligations" occupies the whole of the remainder of this book, and the first four titles of Book 4.)

Title 14 treats of contracts made *re*, *i.e.*, by the delivery of the thing, the subject of the contract. Such contracts are of four kinds, *Mutuum*, *Commodatum*, *Depositum*, *Pignus*.

Title 15 discusses obligations made *Verbis*, *i.e.*, by question and answer (*Stipulatio*), and Title 16 declares that the parties on either side to a stipulation may be either one, or several.

The power which a slave possessed to stipulate for his master is then noticed, and is followed in Title 17, by an account of the four kinds of stipulations, *Judicial*, *Prætorian*, *Conventional*, *Common*.

Things not the subject of stipulations are next noticed, and Title 20 examines the various duties and obligations of those joined with the stipulator (*adstipulatores*) or of those joined with the promissor (*Sponsores* or *Fidepromissores*), also the greater duties and obligations of *Fidejussors*, who might be sureties not

merely in stipulations, but in obligations however contracted.

Obligations contracted by writing (*Literis*), and the four *consensual* obligations—*Emptio-Venditio, Locatio-Conductio, Societas* and *Mandatum*—occupy to Title 27.

Title 28 treats of obligations which, as they do not arise from express contract, are said to arise *as if* (*quasi*) from contract.

The capacity of persons *in potestate* to enter into obligations on behalf of the persons in whose *potestas* they are, and generally the power which one person has to acquire an obligation for the benefit of another, with the various modes in which an obligation having been legally entered into, may be dissolved, are fully discussed in the last titles.

BOOK III.

96. (*a*) *By what laws was the devolution of the inheritance of Intestates regulated ?* (*b*) *What persons fell within this category ?*

(*a*) By the laws of the **Twelve Tables,** A.U.C. 304 (Table 5), which declared that if a person died without making a will his inheritance should devolve—

1st. **Upon his Sui heredes,** *i.e.*, all children whether natural, adoptive, or legitimated, who being in the power of the intestate became *sui juris* by his death.

A wife *in manu* was a *Suus heres* of her husband.

NOTE.—If a son of the intestate, being a captive at the time of his father's death, should afterwards regain freedom, he became a *suus heres* by virtue of the *Jus postliminii*, although he was not *in potestate* at the time of his father's death.

A person who after his death was adjudged to have been guilty of treason during his lifetime, could have no *Sui heredes*, as the sentence had a retrospective operation.

2nd. **Upon the Agnati** nearest in degree at the time of his death. All those persons were *Agnati* to one another, who had one common male ancestor, in whose *potestas*, in case he was still living, they would each be.

Adoption gave rise to the tie of agnation.

3rd. **Upon the Members of his "gens."**—If the intestate was not a member of a "*gens*," then the devolution was to the *Cognati, i.e.*, all the blood relations, whether the relationship arose through males or females.

The nearest *Cognati* were preferred to those more remote.

(*b*) Amongst the number of intestates must be reckoned not only those who made no will at all, but those also whose will was *non jure factum*, or had become *Ruptum* or *Irritum* (see Book II. Ques. No. 60).

97. *What was the great change made in the succession to Intestates as regulated by the Twelve Tables?*

During the later time of the republic the system which divided the patricians into "*gentes*" fell into disuse, and the *Cognati*, or blood relations, succeeded next after the *Agnati*, and to the exclusion of the "*Gentes*."

The *Cognati* in the nearest degree succeeded in equal shares, but only if there were no *Sui heredes* or *Agnati*. If there were *Sui heredes* or *Agnati* the *Cognati* were always postponed to such, irrespective of the degree in which they stood to the intestate.

The degrees of Cognation are reckoned upwards,

downwards and collaterally. In the first degree there are ascendants—a father, a mother, descendants a son or daughter.

In the second degree are—ascendants, a grandfather and grandmother—descendants, a grandson or granddaughter—collaterals, a brother or sister.

(And so with more remote degrees.)

98. *Could an emancipated son or a daughter married, in manu, succeed their father as heredes ab intestato?*

They could not succeed as "*Sui heredes*," not being in the father's *potestas* at the time of his death; but, after the time of the early republic, practically the same effect was attained by their admission by the prætor to what would have been their share of the inheritance, given to them under the name "*possessio bonorum unde liberi.*"

The emancipated son, however, would have been required to bring into, and add to the inheritance, all his own property acquired since emancipation (*Collatio bonorum*); and the married daughter would also have been required to add to the inheritance her marriage dowry (*Collatio Dotis*).

99. *What were the chief changes made by the Prætor in the succession of Sui heredes?*

All those persons in the power of the intestate at the time of his death, and who became by his death *sui juris*, still continued *sui heredes.*

The prætor by giving them the *possessio bonorum unde liberi*, allowed the following classes of persons

who would not have been accounted *sui heredes* by the *jus civile*, to succeed as such—

1st. **Emancipated Children.**—Subject to the *Collatio bonorum* (see last Ques.).

2nd. **Grandchildren.**—Being the children of a deceased emancipated son, conceived after his emancipation, who were thus necessarily *sui juris* at the time of their grandfather's death.

3rd. **Certain children.**—*Viz.*, such as in consequence of their father's emancipation after their conception, were not in his power, but in the power of the grandfather, or if the grandfather was dead were *sui juris*.

4th. **Sui Heredes having suffered Capitis Deminutio,** and who were afterwards *Restituti in Integrum*, *i.e.*, restored to their civil rights.

The civil law permitted the children of the son of an intestate to represent their father (if dead) in their grandfather's succession as *sui heredes;* but did not give the same right to the children of the intestate's daughter.

A law of Theodosius II. allowed the children of deceased daughters to represent their mother, and succeed to her share, subject to a deduction of one-third to be given up to the other *sui heredes*. If there were no other *sui heredes*, then subject to a deduction of one-fourth to be given up to the *Agnati*.

Justinian allowed such children to succeed to the whole of what would have been their mother's share, without deduction.

100. *What were the chief changes made by the Prætors, and by Justinian, in the legal succession of the Agnati?*

Agnati (as stated) were such *cognati* as were related through males, *i.e.*, who had one common male ancestor (see Ques. No. 96).

The nearest *Agnati* only were admitted to the succession, next after the *Sui heredes*. The nearest *Agnati* were those nearest at the time of death, if the deceased had made no testament; if he had made a testament which had become inoperative, then the nearest *Agnati* were such as were nearest, at the time when it was first known that the inheritance would not be entered upon.

The jurisprudents by an extension of the principle of the *Lex Voconia* decided that no female *Agnati* further removed than the second degree should succeed as such. The prætor, however, would give them *possessio bonorum unde legitimi*, and **Justinian allowed them equal rights with male Agnati**, no matter how remote the degree.

In A.D. 498 the rights of Agnation were given to **emancipated brothers and sisters**, subject to a deduction of one-fourth part (one year after the publication of the Institutes they were admitted without any deduction).

In A.D. 528 Justinian gave the rights of Agnation to **half-brothers and sisters** related through their mother, and shortly afterwards to the children of such half-brothers and sisters.

By the *Senatus Consultum Tertullianum*, A.D. 158, **a mother** was allowed to succeed her children among the *Agnati*, and in the time of Justinian to the exclu-

sion of all the *Agnati* except brothers and sisters (see Ques. No. 101).

By the *Senatus Consultum Orphitianum*, A.D. 178, children were allowed to succeed their mother as *Agnati* (see Ques. No. 101).

An emancipated child in strictness had no *Agnati*, his inheritance, therefore, if there were no *sui heredes* went to his patron, *i.e.*, either the ascendant relative, or the fictitious purchaser (see *post*, Ques. No. 15), if he had himself emancipated. In the absence of an express contract (*contracta fiducia*) that the fictitious purchaser should hold these rights for the benefit of the ascendant, Justinian declared that such a contract should always be implied.

Justinian gave the rights of Agnation to the **brothers and sisters of an emancipated child**, and postponed the claim of the patron to theirs.

Justinian first allowed **devolution** amongst *Agnati*, so that if a person called to inherit as *Agnatus*, either died before entering, or refused to take his share, such share would pass to his heirs, whereas before Justinian's time it would have passed on to the *Cognati*.

Lastly, **Justinian transferred one whole degree of relatives from the position of Cognati to that of Agnati** by allowing the children of the sisters of an intestate, who were not *Agnati* at all, to succeed as such.

NOTE.—*Agnati* were called "*legitimi heredes*," because they derived their succession from the Twelve Tables.

101. *State shortly the provisions of the two Senatus Consulta "Tertullianum" and "Orphitianum."*

The **Senatus Consultum Tertullianum**, A.D. 158, gave to mothers being free women with three, or freed women with four children, the right of succeeding to their deceased children in an intestate succession; a defined position amongst the *Agnati* being allotted to her.

Justinian enlarged the operation of the law by extending its operation to mothers who had less than three or four children, and preferred the mother to all legal heirs except the brothers and sisters of the deceased.

The **Senatus Consultum Orphitianum**, A.D. 178, gave to children (extended afterwards to grandchildren) the right to succeed their mother in an intestate succession, to the exclusion of her *Agnati*, and the rest of her *Cognati*.

Inheritances under these laws were not affected by *Capitis Deminutio minima*.

102. *How would you proceed to discover the heirs of "A" who died intestate in the year* A.D. 534?

First it would be necessary to inquire whether "A" had left any **Sui heredes** or persons permitted to rank as such.

In the year A.D. 534 **Sui heredes** would include, not only "A's" descendants who became *Sui juris* by his death, but also **emancipated children, grandchildren,** whose deceased father had been emancipated before their conception—the **children of an emancipated person** con-

ceived before emancipation—**descendants of deceased daughters.**

Sui heredes in the first degree from the intestate took the inheritance in equal shares, if in the second or any subsequent degree they took by representation the share which would have gone to their predecessor.

If "A" left no descendants who could inherit as *Sui heredes* it would become necessary to discover who were his **nearest Agnati.**

If "A" was an emancipated son his inheritance would descend to his brothers and sisters, or, in case there were none, to the ascendant relative by whom he was emancipated, who would take by virtue of the *Jus patronatus.*

If "A" had not been emancipated, of course assuming his father and grandfather to be dead, his nearest *Agnati* would be **his mother and his brothers and sisters,** whether of the whole or the half-blood, or adopted or emancipated, the mother succeeding by the *Senatus Consultum Tertullianum.*

If there were only sisters and a mother, the mother would take half the inheritance, the sisters the other half between them; if there were brothers and sisters, and a mother, they shared the inheritance equally (*in Capita*).

If there was no mother or brothers or sisters we should inquire whether "A" left any *Agnati* in the third degree, as **paternal uncles,** or any **children of brothers or sisters** (children of sisters, although not *Agnati,* were allowed by Justinian to rank as such).

NOTE.—The degrees of Agnation could be continued as long as it was possible to trace persons connected with "A" through males.

If "A" left no *Agnati* it would become necessary to discover his **Cognati.**

Cognati include all **those who are connected by blood, whether through males or females.** *Cognati* include *Sui heredes* and *Agnati* who, however succeed under their higher title.

The *Cognati* in the nearest degree succeeded, but the prætor would not give *possessio bonorum unde Cognati* to any *Cognati* further removed than the **seventh** degree.

The degree in which a *Cognatus* stood was ascertained by counting the number of steps between him and the intestate, if such *Cognatus* was an ascendant or descendant; or, by counting the steps from the intestate to the common ancestor, and then from the common ancestor down to the *Cognatus*, if he was a collateral relation.

If "A" left no *Cognati* his property would go to the **Fiscus** (Public Treasury).

103. *"A" dies intestate, leaving one son, one daughter and two grandchildren by a deceased daughter. How was the inheritance divided?*

The son and the daughter of "A" would be his *Sui heredes*, and of course inherit as such.

The position of the grandchildren would be different at different epochs.

In very early times they would only have been reckoned amongst *Cognati*, and would not have succeeded at all, whilst there were any *Sui heredes* or *Agnati*.

In the times of the prætors they could have claimed the

possessio bonorum unde liberi, and have taken their place amongst *Sui heredes*, giving up however one-third part of what they would have received had they been *Sui heredes* by the Civil Law.

In the time of Justinian they would have been admitted as *Sui heredes*, without any deduction, therefore if the question refers to such a time, the son would have received one third of the inheritance, the daughter one third, and the children of the deceased daughter the other third between them.

104. "*A*" *dies intestate in* 534 A.D., *leaving no descendants, and having relations, viz., one sister, nephews, and nieces, the children of deceased brothers and sisters, and a mother. How did the inheritance descend?*

At the date above stated the inheritance would descend to the mother and sister in equal moieties, and the nephews and nieces would be entirely excluded.

Previously to Justinian the mother would have succeeded under the *Senatus Consultum Tertullianum*, but in this case only, if she had three children.

Before the time of the *Senatus consultum*, save by special Imperial Rescript, the mother would only have been admitted amongst the *Cognati*.

NOTE.—In Justinian's time the mother ranked next to the *Sui heredes*, but brothers and sisters of the intestate, whether of the whole or of the half-blood, were admitted with her.

105. "*A*" *dies intestate, leaving one brother who had*

been emancipated before their "father's" death, and also a grandfather. Upon whom did "A's" inheritance devolve?

By the law as laid down in the Institutes, the brother and the grandfather both being *Agnati* in the second degree would succeed jointly, except that the emancipated son would only receive three-fourths of what he would have received had he not left the father's family.

In and after the year A.D. 534 (subsequent to the publication of the Institutes), the emancipated son and the grandfather would have taken the inheritance in equal moieties, the share of the emancipated son being subject to no deduction.

106. *"A" dies intestate, leaving brothers and sisters and nephews and nieces, the children of a deceased sister. How does the inheritance descend?*

The brothers and sisters would inherit the whole inheritance equally, as *Agnati* in the second degree, to the entire exclusion of the children of the deceased sister.

NOTE.—Previously to Justinian's time the children of a deceased sister would have been *Cognati* only to their maternal uncle. Justinian, it is true, made them *Agnati* (see *post*, Ques. No. 100), but only allowed them to succeed as such in case there were no brothers and sisters living, or, in other words, did not permit them to take their mother's share by representation.

107. *Explain fully the rights which a patron possessed*

in the goods of his freedman, in case such freedman died testate or intestate.

The Twelve Tables gave the succession of freedmen in case they died intestate, and without *Sui heredes* to their patron. If they made a will they could entirely exclude their patrons, and if they died intestate, leaving *Sui heredes*, the patron was equally excluded.

(A female slave could not exclude her patron, for, as on the one hand, she could not make a testament; so, on the other hand, she could not exercise *potestas*, and therefore had no *Sui heredes*.)

By the Prætor's Edict, every freedman having no children was compelled to leave one-half of his property to his patron.

If he had children, natural or adoptive, then, if they were instituted heirs in the testament, or being omitted therein had demanded *possessio bonorum contra tabulas*, the patron was excluded; but disinherited children did not exclude the patron.

The Lex Papia, A.D. 9, enacted that every freedman whose fortune exceeded 100 *Aurei* should be compelled to leave his patron one-half, unless such freedman had three children, in which case the patron was wholly excluded.

If the freedman had two children, the patron shared the inheritance with them, *i.e.*, each had a third.

Justinian allowed a freedman, whose fortune was less than 100 *Aurei*, whether he had children or not, to make a testament, and entirely exclude his patron, but reserved the rights of the patron in case the freedman died intestate. If his fortune was more than 100 *Aurei* then, if he had children, they entirely excluded the patron.

If he had no children, but made a testament omitting the patron, Justinian gave the patron a third share in the inheritance, and not a half as before.

If he died intestate, without children, the patron still took the whole inheritance by virtue of the *Twelve Tables.*

108. *What do you understand by the term "Assignation of freedmen"? By what law was it permitted?*

The words "*Assignation of freedmen*" are used to express the right which a master who had emancipated a slave, and thus become his patron, possessed, to assign his rights of patronage to one of his descendants in his power.

The right was only possessed by those fathers who had two or more children in their power; and if a father, after assigning a freedman to his son, should emancipate that son, or if the son should die without issue, the assignation would be destroyed.

The assignation of freedmen was first permitted by a *Senatus-Consultum* of Claudian, A.D. 45. Before that law, and afterwards, unless the patron had availed himself thereof, the inheritance of freedmen belonged to all the children of the patron in equal shares.

Assignation could be effected by testament or in any way *inter vivos*, provided the intention was clearly shown.

109. *State the various kinds of Bonorum possessiones under which the prætor gave admission to the goods of an inheritance.*

When there was a testament the *Bonorum possessiones* used by the prætor were two:

1st. **Possessio bonorum secundum tabulas.**

2nd. „ „ **contra tabulas.**

Possessio secundum tabulas was given in conformity with the terms of a will to those named therein as *heredes*, when there was no person entitled to make a claim against the will, or none who chose to make such a claim. It was also given when the will lacked some legal formality, provided it had the proper number of witnesses (seven).

Possessio contra tabulas was given to descendants improperly passed over in the testament.

If there was no testament the *Bonorum possessiones* used by the praetor were eight:

1st. **Possessio bonorum unde liberi,**

2nd. „ „ **unde legitimi,**

3rd. „ „ **unde decem personæ,**

4th. „ „ **unde cognati,**

5th. „ „ **tum quem ex familia,**

6th. „ „ **unde liberi patroni patronæque et parentes eorum,**

7th. „ „ **unde vir et uxor,**

8th. „ „ **unde Cognati manumissoris.**

Possessio unde liberi was given to *Sui heredes*, and those permitted by the prætor to rank with them (see *post*, Ques. No. 99).

Possessio unde legitimi was given to the *Agnati* and those placed amongst *Agnati* (see *post*, Ques. No. 100).

Possessio unde decem personæ was given to ten persons, *viz.*, the parents, grandparents, son, daughter, grandson, granddaughter, brother, or sister of the intestate, being a freedman, to the exclusion of the

person who had acquired the rights of patronage over him, by having been the fictitious purchaser before his emancipation, and having himself emancipated.

Possessio unde Cognati was given to the blood relations of the intestate so far as the sixth, and in one case the seventh degree.

Possessio tum quem ex familia gave the inheritance of a freedman to the nearest relation in the family of his patron, in case the *sui heredes* of the patron had not claimed as legitimate heirs.

Possessio unde liberi patroni patronæque et parentes eorum (probably) gave the inheritance of freedmen to the descendants and ascendants of the patron although they were not in his family, but only related as *Cognati.*

Possessio unde vir et uxor gave husbands and wives reciprocal succession to each others' inheritance, but only after the *Cognati.*

Possessio unde Cognati manumissoris given to any of the blood relations of the patron, allowing them to succeed to the goods of his freedmen.

Note.—Each of the *Bonorum possessiones* had to be demanded by parents and children within one year, and by such others as had a right to demand them, within one hundred days from the time when they first became aware of their rights.

110. *Which of the Bonorum possessiones used by the Prætor were abolished by Justinian? and why?*

Justinian abolished the **Possessio unde decem personæ,**

it having been first rendered unnecessary, from the fact that under his legislation every fictitious purchaser who himself emancipated acquired no rights of patronage, but only held such rights in trust for the master —the real manumittor.

The alteration made in the law of patronage (see Ques. No. 107) rendered the **possessio tum quem ex familia**, the **Possessio liberi patroni patronæque et parentes eorum**, and the **possessio unde Cognati manumissoris** useless, and they were conseqently uannulled by Justinian.

The *Bonorum possessiones* used by Justinian were therefore—

Relating to testate succession.

1st. **Possessio secundum tabulas.**

2nd. **Possessio contra tabulas.**

Relating to intestate succession.

1st. **Possessio unde liberi.**

2nd. **Possessio unde legitimi.**

3rd. **Possessio unde Cognati.**

4th. **Possessio unde vir et uxor.**

111. *Give a description of the mode of acquiring a "universitas" by Arrogation.*

Arrogation was the act of a person *sui juris* voluntarily entering another family, and subjecting himself to the *potestas* of the *paterfamilias* thereof.

All the property, whether in possession or not, of the arrogated person passed to the *Arrogator*. The *Arrogator* was not bound to pay the debts of the arrogated, but creditors were allowed by the prætor to proceed against any property which belonged to the

arrogated, at the time of the arrogation, as if it still belonged to him.

Justinian enacted that the *usufruct* only, of property (except property coming from the arrogator) acquired by the arrogated after the arrogation, should go to the *Arrogator* and that the arrogated person himself should have the *Dominium*, and moreover, that if the arrogated person died, both his children and his brothers and sisters should succeed thereto before the *Arrogator*.

112. *What is the legal meaning of the term "Obligatio"?*

Obligatio in its strict sense means the tie imposed by the law, which binds the person who owes a duty to another (*Debitor*) to the person to whom that duty is due (*Creditor*).

All the duties which a *Debitor* could owe to a *Creditor* were summed up by the Roman jurists in the three words *dare, facere, præstare*—to give, to do, to make good to.

113. *Give the four great sources of Obligations treated of by Justinian, and the subdivision of the same.*

The sources of Obligations are—

1st. **Contract.**
2nd. **Quasi Contract.**
3rd. **Delicts** (wrongs).
4th. **Quasi Delicts.**

Obligations arising from **Contract** are of four kinds—

1st. **Re**—Arising from the delivery of the thing, the subject of the contract.

2nd. **Verbis**—Arising from a particular form of words (*stipulation*).

3rd. **Literis**—Arising from entries or writings in ledgers (*codices*).

4th. **Consensu**—Arising from mere consent.

Four kinds of obligations made "*Re*," and four kinds of obligations made "*Consensu*," are noticed by Justinian—thus making, with obligations "*Verbis*" and "*Literis*," *ten* heads of obligations arising from contract (see Ques Nos. 116 and 119).

114. *Define a contract and a pact, and state which of the ten heads of contract recognized by the Romans gave rise to Unilateral, and which to Bilateral obligations.*

A contract is an agreement (*conventio*) between two parties, manifested by an offer (*pollicitatio*) on one side and acceptance of the offer on the other. To this offer and acceptance is added a third element, viz., the "*Vinculum juris*," or the tie of law, which binds the parties to their agreement, and prevents retractation.

A *pact* is an agreement not coming under either of the ten heads of contract, nor binding as an innominate contract by having been executed on one side. Its distinguishing characteristic was that it could not be enforced by action, although it gave rise to a natural obligation.

A pact, however, could be used as a defence

(*Exceptio*) to an action; and in late times an action was attached to some few pacts, as *e.g.* in the time of Justinian, the agreement to give.

Contracts made "*Verbis*" and "*Literis*" were always *Unilateral*, or binding only on one party.

Contracts made "*Consensu*" were always *bilateral*, or binding on both parties.

Contracts made "*Re*," although primarily *unilateral*, were *bilateral* in so far that under some circumstances the receiver of the thing had an action for any extraordinary trouble or expense which he had been occasioned.

115. *Explain actions* (*a*) "*Stricti juris*," (*b*) "*bonæ fidei*," (*c*) "*Arbitrariæ*," *and state to which kind of action each of the ten heads of contract gave rise.*

(*a*) Actions *Stricti juris* were such personal actions as sprang from the civil law, and in which the Judge was compelled to decide in strict conformity with the terms of the law.

(Sometimes in *Stricti juris Actiones* the Judge was, in express terms, commanded by the prætor to treat the action as though belonging to *bonæ fidei Actiones*.)

(*b*) *Bonæ fidei* actions were those personal actions in which a latitude was given to the Judge, to decide according to equity and good faith. In such actions the Judge was not bound by the restrictions of the *Jus civile*, but could take notice of custom, and usage, allow sets-off (*compensationes*), and take cognizance of fraud (*Dolus*), although such defences were not pleaded in the *formula*.

(*c*) Actions *Arbitrariæ* were real actions, in which the Judge had a latitude given to him to punish in damages the defendant who would not restore (*nisi restituat*) the thing, the subject of the action.

Contracts made *Verbis* and *Literis* were enforced by actions *Stricti juris.*

The four contracts made *Consensu* were enforced by *bonæ fidei* actions.

Of the four contracts made "*Re*" three were *bonæ fidei;* viz. *Commodatum, Depositum* and *Pignus;* the fourth, *i.e.*, the contract of *Mutuum,* was enforced by the *Condictio ex Mutuo,* which was an action *Stricti juris.*

116. *Describe the four contracts made "Re."*

The contracts made "**Re,**" *i.e.* by the actual delivery and receipt of a thing, were as follows:—

(*a*) **Mutuum.**
(*b*) **Commodatum.**
(*c*) **Depositum.**
(*d*) **Pignus.**

(*a*) Only things which could be weighed, measured, or counted could form the subject of a "*Mutuum.*"

The obligation of "**Mutuum**" arose when a person gave to another a thing, or quantity of things, upon the condition that he received back, not the same things, but others of like nature, quantity and quality.

A person who received a payment by mistake was

bound to the person making such payment, as though he had received a *mutuum*, *i.e.*, he need not give back the particular pieces of money, but could be forced by the *Actio condictitia* to give back money of like value.

(*b*) A contract of "**Commodatum**" arose when one person delivered over a thing to another to be used by the party to whom it was delivered.

In this case the ownership did not pass to the receiver (*Commodatarius*), but the possession only. The thing itself had to be given back, and it would not do that another thing of the like nature and value was tendered.

A *Commodatum* was always gratuitous.

(*c*) A contract of "**Depositum**" arose when a person, for his own convenience and benefit, placed his property in the possession of another person for safe keeping. A *Depositum*, like a *Commodatum*, was necessarily gratuitous.

(*d*) A contract of **Pignus** arose when one person pledged property to another, and delivered the property over.

NOTE.—All contracts made "*Re*" (as stated) were *bonæ fidei*, except that arising from *mutuum*. They all, moreover (save *mutuum*), gave rise, indirectly, to *bilateral* obligations (see *post*, Ques. No. 114).

117. *To what actions did each of the ten heads of contract give rise?*

(*a*) The contract of **Mutuum** gave rise to the **Condictio ex mutuo** or **Actio mutui**, which was an action *Stricti juris*.

(*b*) The contract of **Commodatum** gave rise to the **Actio Commodati Directa** or **Contraria. Directa,** if brought by the owner of the thing lent to recover it, or to recover its value. **Contraria,** if brought by the receiver of the thing (*commodatarius*) against the lender (*commodans*) for any expense he had been necessarily put to.

(*c*) The contract of **Depositum** gave rise to the **Actio Depositi,** which was **directa** and **contraria** in the same way as the *Actio commodati.*

(*d*) The contract of **Pignus** (pledge) gave rise to the **Actio pigneratitia, Directa,** and **Contraria; Directa** when brought by the pledgor to recover the thing from the pledgee; **Contraria** when brought by the pledgee against the pledgor to recover any expenses he had been necessarily put to in keeping the pledge safe.

(The Actions **Commodati, Depositi,** and **Pignus** were all *bonæ fidei.*)

(*e*) A contract made **Verbis** (*i.e.,* by stipulation) gave rise to the **Condictio certi** when the thing stipulated for was something certain; to the **Condictio incerti,** or as it was sometimes called the **Actio ex stipulatu,** when the thing stipulated for was uncertain.

Both Actions were *Stricti juris,* and belonged to the stipulator only.

(*f*) A contract made "**Literis**" (by writing) was enforced by a **Condictio certi.**

(*g*) The four consensual contracts—

(*a*) **Sale,**

(*b*) **Letting and hiring,**

(*c*) **Partnership,**

(*d*) **Mandate,**

were enforced respectively by the following actions:—

(*a*) **Actio Venditi—Actio Empti,**

(*b*) **Actio locati—Actio conducti,**

(*c*) **Actio pro socio,**

(*d*) **Actio Mandati directa** and **contraria.**

(*a*) The **Actio Venditi** was brought by the seller against the buyer to compel him to pay the price or receive the goods. The **Actio Empti** was brought by the buyer to compel the seller to deliver up the goods.

(*b*) The **Actio locati** was brought by the letter to recover from the hirer the price of the hiring. The **Actio conducti** was brought by the hirer to recover any necessary expense he may have been caused.

(*c*) The **Actio pro socio** could be brought by one partner against another, either to enforce division of profits, or to dissolve the partnership.

(*d*) The **Actio Mandati Directa** was brought by the *Mandator* to recover from the *Mandatarius* the benefits resulting from the mandate. The **Actio contraria** was brought by the *Mandatarius* to obtain repayment of any expenses necessarily incurred.

(All the Actions arising from consensual contracts were *bonæ fidei.*)

118. *What were the different degrees of Culpa and*

Diligentia? Distinguish between persons who had to use different degrees of diligence.

There were three degrees of *Culpa*, and three degrees of *Diligentia*.

The three degrees of *Culpa* were—

(*a*) **Culpa lata**—very gross negligence.

(*b*) **Culpa levis**—slight negligence.

(*c*) **Culpa levissima**—very slight negligence.

The three degrees of *Diligentia* were—

(*a*) **Diligentia maxima**—that shown by a *bonus paterfamilias*.

(*b*) **Diligentia media**—that which ordinary persons generally manifest in their own affairs (*quanta in suis rebus*).

(*c*) **Diligentia minima**—that which the *particular* person under consideration usually manifested in his own affairs.

A person responsible for very slight negligence (*culpa levissima*) had to exercise the greatest diligence, *i.e.*, that of a *bonus paterfamilias*. A person responsible for slight negligences (*culpa levis*) had to exercise the diligence of ordinary business persons (*quanta in suis rebus*). A person only responsible for gross negligence (*culpa lata*) had only to exercise the same diligence that he usually exercised over his own matters, although this might be far short of the diligence of an ordinary man of business.

All persons who had a beneficial interest in the thing delivered to them (*e.g.* a *commodatarius*), or who had any duty entrusted to them to perform, were bound to use the diligence of a *bonus paterfamilias*; in other words, were liable for *culpa levissima*.

Depositaries, as they derived no personal advantage,

were only required to use the diligence which they employed in their own affairs; in other words, were only answerable for *culpa lata*. The same rule applied to partners.

NOTE.—If the deposit was at the request of the depositary, or rendered necessary by an occasion of urgency, as, *e.g.* a fire, the depositary would be liable for *culpa levissima*, and if he denied that he had received the deposit, was also liable to pay double its value.

Pledgees, as they were not alone benefited by the contract, but only equally with the pledgors, were required to use *media diligentia* for the preservation of the property; in other words, could be made liable for *culpa levis*, but not for *culpa levissima*.

119. *State the various Contracts which could be entered into by consent only, and give a description of such contracts.*

The Contracts which could be entered into by consent only were—

(*a*) **Emptio venditio,**	**Sale and purchase.**
(*b*) **Locatio conductio,**	**Letting and hiring.**
(*c*) **Societas,**	**Partnership.**
(*d*) **Mandatum,**	**Mandate.**

(*a*) The contract of sale was complete as soon as the price was agreed upon, but if the terms of the sale were to be in writing the contract was not complete until the writing was drawn up and signed. The price was necessarily a sum of money, otherwise the contract would not be one of sale. As soon as the contract was

complete, although the thing bought remained in the possession of the seller, the buyer took all risks. The seller, however, had to use for the preservation of the thing, the diligence of a *bonus paterfamilias*.

(*b*) The Contract of letting and hiring was complete as soon as the price of the hiring was agreed on. The price of the hiring was bound to be a sum of money.

The *conductor* (hirer) was bound to use the diligence of a *bonus paterfamilias* for the preservation of the thing hired. If having done this, the thing was nevertheless lost or destroyed, the loss fell upon the *locator* (letter).

(*c*) The Contract of partnership could embrace either the whole or a part of the goods of the partners (see Ques. No. 125). In the absence of arrangement the partners shared loss and profit equally; but there could not be a *leonina societas*, *i.e.*, a partnership in which one partner took all the profits. One partner could only act as agent for another if he was expressly authorized.

(*d*) The Contract of mandate (introduced in consequence of the rule of law that one person could not represent another) was entered into between the *Mandator* and the *Mandatarius*, to the end that the *Mandatarius* should in his own name enter into a contract with a third party, the benefit of which contract should accrue to the *Mandator*, either solely, or jointly with the *Mandatarius* or others, or to some third party.

A mandate was always gratuitous, and although a *Mandatarius* could benefit with the *Mandator*, or with others, by the mandate, yet a mandate for the benefit of the *Mandatarius* alone was void.

120. *When a contract of sale had been entered into, what were the duties of the buyer (emptor) and seller (venditor) respectively?*

The duties of the buyer were :—

1st. To pay the price, and make the seller owner of the money paid by making a proper *traditio* thereof.

2nd. In case the purchase money was not at once paid, to pay interest thereon from the day of the purchase.

The duties of the seller were :—

1st. To hand over the thing purchased to the buyer, and give him undisturbed and lawful possession.

2nd. To recompense the buyer if he was evicted, *i.e.*, deprived of the property by some one having a better title.

3rd. To secure the buyer against secret faults.

NOTE.—In late times if the buyer was evicted he could bring against the seller the "*Actio ex empto*," and recover double the value of the thing, whether a stipulation to this effect had been made or not.

121. *What alterations were made by Justinian in the contract of sale?*

Justinian enacted that where the parties to a contract of sale had mutually agreed that the terms thereof should be reduced into writing, the contract should not be complete, although the price was agreed on, until such terms were reduced into writing.

Where after a contract of sale had been made, the buyer had given to the seller, either a part of the price

or something as earnest (*arræ*), Justinian permitted the buyer to refuse to carry out the contract. In such a case he lost the earnest that he had deposited but nothing more. The seller could also, in a case in which earnest had been given, retract, upon payment to the buyer of double the value of the earnest.

122. *In what ways could the contract of "Mandate" be extinguished?*

A mandate validly made could be extinguished—

1st. If it was revoked by the *Mandator* before execution.

2nd. If before its execution either the *Mandator* or the *Mandatarius* should die. (If in ignorance of the death of the *Mandator*, the *Mandatarius* executed the mandate, it would neverthe less be good.)

123. *In what ways could the contract of "societas" be ended?*

A contract of *Societas* (partnership) could be dissolved—

1st. By both parties agreeing to dissolve it, or by one party renouncing, provided he renounces with no fraudulent object.

2nd. By the natural, or civil, death of either of the parties to the partnership.

3rd. When the purpose, or purposes, for which the partnership was established is, or are, accomplished.

4th. By efflux of time, *i.e.*, when a certain time for the continuance of the partnership has been agreed on.

5th. By compulsion, as when one partner compels a dissolution of the partnership by action.

6th. By the bankruptcy of a partner, or by his making a *cessio bonorum*.

124. *In what ways could the contract of "Locatio-conductio" be ended?*

The contract of *Locatio-conductio* was ended—

1st. If the *Locator* (letter) who had contracted to do a particular work died before he completed it.

2nd. If the letter sold the thing which he had let on hire. (This he had a right to do, being still regarded as the *Dominus* of the thing.)

3rd. If the money due from the *Conductor* as the price of the hiring was two years in arrear.

4th. If the *Locator* prevented the *Conductor* from enjoying full benefit from the thing hired, or if the *Conductor* grossly misused the thing.

5th. (Probably.) If the *Locator* had very urgent need of the thing which he had let on hire.

125. *Distinguish between* (*a*) "*Locatio conductio rerum;*" (*b*) "*Locatio conductio operarum;*" (*c*) "*Locatio conductio operis faciendi.*" *What were the duties of the Locator and the Conductor?*

(*a*) **Locatio conductio rerum** was the ordinary case of one person letting to another, in consideration of a sum of money, a particular thing.

(*b*) **Locatio conductio operarum** was where one person let to another his services in consideration of a sum of money.

(*c*) **Locatio conductio operis faciendi** was where one person undertook, in consideration of a sum of money, to do some particular piece of work for another.

The duties of the *Locator* (letter) were :—

1st. To guarantee the *Conductor* against eviction.

2nd. To compensate him for any necessary expense that he may have been put to.

The duties of the *Conductor* (hirer) were :—

1st. To take of the thing hired the care of a *bonus paterfamilias.*

2nd. To pay the price agreed on.

3rd. To restore the thing to the *Locator*, when the time for which it was hired had expired.

126. *What were Innominate contracts? State why they were so called, and whether they could be enforced by action.*

If an agreement had been made between two parties which did not belong to any one of the ten recognized heads of contract, *i.e.*, had not been made either "*Re*," "*Verbis*," "*Literis*," or "*Consensu*," yet if it had been executed by one of the parties, the prætor would force the other party to execute it also.

Such contracts were called "Innominate Contracts," because they had no special name.

The action permitted by the prætor for their enforcement was called "*Actio in factum præscriptis verbis*," because the *formula* was framed to meet the particular

circumstances, and a few words explaining the circumstances were placed in the *formula*.

Innominate contracts might arise between parties in one of the following ways:—

Do tibi ut des—I give to you that you may give something to me.

Do ut facias—I give to you that you may do something for me.

Facio ut des—I do for you that you may give something for me.

Facio ut facias—I do for you that you may do something for me.

127. *In what way could a contract be entered into by words? What were the incidents of such a contract?*

Contracts made by words were called "**Stipulations,**" and took the form of a question and answer.

The question was asked by the stipulator, for whose benefit the contract was intended; the answer to the question was given by the promissor, who was the party bound.

When the parties were both Roman citizens, the following were the necessary words to be employed—*Ques.—Spondes?* Do you engage yourself? *Ans.—Spondeo.* I do engage myself.

If the parties were not Roman citizens, other words, such as *Promittis? Promitto.—Fidepromittis? Fidepromitto,* could be used. After the year 469 A.D. no express form of words was necessary.

A stipulation could be made either "*simply*," in which case the thing stipulated for was at once due, and could be at once demanded, or "*in diem*," in which case, although the thing was still due, yet it could not be demanded until the expiration of the time upon which it was dependent, or "*conditionally*," in which case the thing stipulated for was not even due until the condition on which it depended happened.

Everything capable of being held *In patrimonium* could be the subject of a stipulation. An impossible condition attached to a stipulation rendered the stipulation void, and until the time of Justinian a person could not validly stipulate for something to be given him after his death. Stipulations *contra boni mores*, or stipulations for things which could not exist, and generally all absurd stipulations, were void.

128. *Describe the rights and liabilities of accessory parties to stipulations.*

The accessory parties to stipulations were—

(*a*) **Adstipulatores,**
(*b*) **Co-promissores,**
(*c*) **Sponsores,**
(*d*) **Fidepromissores,**
(*e*) **Fidejussors.**

(*a*) **Adstipulatores** were persons joined with the stipulator, who received the same promise from the promissor.

They were only made use of when the stipulation was for something to be done after the stipulator's death.

If the adstipulator sued on the stipulation, the stipulator himself could not; and if one co-promissor was sued, all the rest were *ipso facto* released. The co-promissor could protect himself by recovering from the other co-promissors, or he could have the actions which the stipulator possessed against the other co-promissors given up to him (*beneficium cedendarum actionum*).

(*b*) **Co-promissores** are perhaps more rightly regarded as each being a principal, for although one need not take so great an obligation upon himself as the others—*ex-gr.*, one could stipulate simply, the other conditionally—yet they were all equally bound by the promise.

(*c.d.*) **Sponsores** and **Fidepromissores** were guarantors for the promissor. *Sponsores* were guarantors who were Roman citizens. *Fidepromissores* were guarantors who were not citizens but *peregrini*. Their rights and obligations were almost exactly identical. They could not be bound for more than the principal, could only be added in obligations arising from stipulations, and did not transmit their liability to their heirs.

By a **Lex Furia**, B.C. 95, their obligation was not to be binding on them after two years from the time at which it could have been enforced, and the amount of liability was divided between all the *Sponsores* and *Fidepromissores* living at the time the action was brought.

A **Lex Apuleia**, B.C. 102, allowed a *Sponsor* or *Fidepromissor*, who had paid the whole debt,

to recover from his *co-sponsores*, or *co-fidepromissores*, their respective shares.

A **Lex Cornelia**, B.C. 82, forbade any one, under any name, to bind himself as guarantor for the same debtor to the same creditor in one year, for more than 20,000 sesterces.

(*e*) **Fidejussors** were guarantors, who could be added, not only in stipulations, but in every kind of contract. Their heirs were bound by their engagement; they could be added after the obligation had been entered into, but could not be bound for more than the principal.

Each *Fidejussor* was bound for the whole debt, but they could use either of the following privileges:—

(*a*) **Beneficium divisionis**, established by Hadrian, giving a *Fidejussor* power to insist that the claim should be brought against all the *Fidejussors* proportionately.

(*b*) **Beneficium cedendarum actionum**, by which he could insist that the creditor should give to him the actions which he (the creditor) had against the principal debtor.

(*c*) **Beneficium Ordinis**, established by Justinian, by which the creditor was bound to sue the principal debtor before he could sue the *Fidejussors*.

129. *How many kinds of stipulations were there? Give an instance of each kind.*

Stipulations could be of four kinds:—

1st. **Judicial,**
2nd. **Prætorian,**
3rd. **Conventional,**
4th. **Common.**

A **Judicial** stipulation was one entered into before a judge, at or previously to a trial, for some purpose connected with the trial.

Ex. gr.—A judge might order a defendant to stipulate that he would carry out the sentence if adverse to him, without any attempt at fraud. (*De dolo cautio*).

A **Prætorian** stipulation was one entered into before the prætor when the parties were *in jure*.

Ex. gr.—A prætor might, upon application to him, insist that one person should enter into a stipulation to secure another person against apprehended injury or loss (*damnum infectum*); as, if a person's house was in imminent peril of falling, the consequence of its falling necessarily being to injure the property of some other person.

A **Conventional** stipulation was the ordinary case of one person stipulating with another. Consent of the parties, and a thing capable of being stipulated for were the only requisites.

A **Common** stipulation was one which was entered into, sometimes before the judex, and sometimes before the prætor.

Ex. gr.—If in an action by a tutor, suing on behalf of his pupil, the defendant objected to pay the claim on the ground that the tutor had not given the usual security that he would account for the pupil's property, it became the duty of the judge (*judex*) to require the

tutor to give such security by means of a stipulation, to be entered into before himself.

The duty of taking security from tutors usually pertained to the prætor.

130. (*a*) "*A.*" *stipulates with* "*B.*" *for the sale of a horned horse.* (*b*) "*A.*" *stipulates with* "*B.*" *for the gates of the city.* (*c*) "*A.*" *stipulates with* "*B.*" *that* "*C.*" *shall give him* 100 *aurei.* (*d*) "*A.*" *stipulates with* "*B.*" *that he* (*B.*) *shall give to* "*C.*" 100 *aurei.* (*e*) "*A.*" *stipulates with* "*B.*" *and attaches to the stipulation an impossible condition.* (*f*) "*A.*" *stipulates with* "*B.*" *for* 100 *aurei after his* (*A.'s*) *death. Which of these stipulations were valid? which invalid?*

All the above stipulations would be invalid except the last.

(*a*) Invalid because the subject of the stipulation could not possibly exist.

(*b*) Invalid because the gates of the city were *Extra-patrimonium, i.e.*, not capable of being possessed by private individuals.

(*c*) Invalid because two parties could not enter into a stipulation to bind a third party.

(*d*) Invalid because two parties could not enter into a stipulation for the benefit of a third party.

(*e*) Invalid, as were all stipulations founded upon impossible conditions, or to which impossible conditions were attached.

(*f*) Invalid previously to Justinian's reign, but expressly permitted by him.

131. (*a*) "*A.*" (*a slave*) *stipulates with* "*B.*," *that* "*B.*" *shall pay him* 100 *aurei.* (*b*) "*A.*" *stipulates with* "*B.*" (*a slave*) *that* "*B.*" *shall pay him* 100 *aurei. Were these stipulations good?*

(*a*) This was a valid stipulation, and binding upon "B.;" the benefit thereof, however, did not accrue to "A." but to his master, the law being, that in whatever way a slave entered into a stipulation the master reaped the benefit.

(If "A.'s" master was dead, the benefit of the stipulation went to the inheritance, and thus ultimately to the heir.)

(*b*) This stipulation was invalid, for the slave not having a "*persona*" could not be held personally liable, and the law would not permit him to bind his master.

132. *What do you understand by the* "*Exceptio non numeratæ pecuniæ*"? *When could the plea be used?*

The exception "*non numeratæ pecuniæ*" was the plea which, within a certain time, could be made use of by a defendant against whom an action for money received was brought. It was in effect a denial that the money had ever been received by him.

The time within which this plea could be used was formerly five years, but was reduced by Justinian to two years.

This plea was used in actions brought on contracts made "*literis*," when the plaintiff brought forward

against the debtor as evidence of the debt, his (the plaintiff's) *codex*, or ledger, in which was an entry of the debt. If the plaintiff could prove that this entry was inserted with the debtor's consent, or if the debtor had made a corresponding entry in his own ledger, the law declared that an irrevocable contract was thus created between the parties. Even if the consent could not be proved, and there was no entry in the debtor's ledger, yet if the entry was in the ledger of the creditor, the plea "*Non numeratæ pecuniæ*" could only be used within the time above stated. If the debtor had suffered this time to elapse, then, whether his consent was proved or not, and notwithstanding that the money had never been received by him, the creditor could recover.

133. *Could persons other than Roman citizens enter into a contract by writing?*

It was only Roman citizens who kept ledgers or *Codices*.

Strangers (*peregrini*) had, however, the right to make contracts in writing, upon which writing an action could be brought.

Such a writing if signed by both the parties to the contract was called "*Syngraphæ*;" if signed by the party to be charged only "*Chirographa*."

Syngraphæ and *Chirographa* were of more value than the entry in the *Codex* of the Roman citizen, as an action could be brought directly upon these writings, whereas the entry in a ledger was only admissible proof of a contract having been made.

134. *Explain the meaning of "quasi" Contracts, and give instances of obligations thus arising.*

Quasi Contracts were such as arose from no express agreement, and from no delict, but from one person being in such a situation, or having done such acts, as placed him in the eye of the law under an obligation to another.

(Such contracts in English law would be spoken of as implied contracts.)

The action which a person has against another who, unsolicited, has taken upon himself the business of the former, and managed his affairs during his absence (*Actio negotiorum gestorum directa*), and, conversely, the action which the latter has against that person whose affairs he has managed, for necessary expenses thus incurred (*actio negotiorum gestorum contraria*) are instances of actions arising from obligations contracted *quasi ex contractu.*

The actions which can be brought by and against Tutors and Curators (*Actio Tutelæ directa or Contraria*, and *Actio negotiorum gestorum directa or contraria*), arise *quasi ex contractu.*

The *Actio Communi dividundo*, by which each of several legatees who have received a thing in common is bound to the others to properly divide the same, arises *quasi ex contractu.*

There were many other actions which arose from obligations contracted *quasi ex contractu.*

135. *When money was paid under a mistake, did*

this always give rise to an implied quasi contract enabling the payor to recover back the money from the payee?

As a rule, when money was paid by mistake, it could be recovered back by an action founded upon an obligation, *quasi ex contractu;* but this was not always so.

Before Justinian's time, if the heir denied the right of a legatee to receive a legacy left to him *per damnationem,* he was liable to pay double the amount of the legacy. If he paid a legacy so left, by mistake, he could not recover the money by an action *quasi contractu,* as the law presumed he so paid, to avoid becoming liable for the penalty.

Justinian put all legacies on the same footing, but enacted that, only in the case of legacies left to churches, or other holy places, should the effect of denial be to make the heir liable to pay double the amount.

By the *Lex Aquilia,* A.U.C., 468, certain penalties were imposed on persons guilty of injury to property. If a person paid money to satisfy an obligation which he supposed he had contracted under this *Lex,* although, as a fact, no obligation ever existed, he could not recover the money, as in this case also the law presumed that he had only paid to avoid the penalty.

136. *What were the modes in which obligations, arising from contract either express or implied, could be ended?*

The obligations arising from contract, in whatever

way made, could be ended by the fulfilment of the contract, according to the terms thereof.

To each form of formation of Contracts, which arose from the civil law, there was a corresponding form of dissolution.

Contracts made *per Æs et libram* were dissolved with the same ceremony with which they were formed, *i.e.* five witnesses and a *libripens* were called together, and in their presence the debtor, having struck the scales with a piece of money, tendered it as satisfaction of the debt.

Contracts made *Re* could be dissolved by this imaginary form of payment, as well as by the return of the thing, or its equivalent.

Contracts made "*Verbis*" could be dissolved by question and answer—*Acceptilatio* (see next Ques.).

Contracts made *Literis* could (probably) be dissolved by an entry in the *Codex*, or ledger of the debtor, made with the consent of the creditor, to the effect that the debt had been paid.

Contracts made "*Consensu*" could be dissolved by mutual consent without any formalities.

(This was only so if each party could be placed "*in statu quo.*")

Contracts were also regarded by law as dissolved if, without fault on either side, the subject of the contract perished.

In some cases—*ex. gr.*, where the contracts did not give rise to actions *Stricti juris*—contracts were regarded as dissolved when the debtor had a counterclaim against the creditor, of equal value with the claim of the creditor against him (*compensatio*).

137. *Explain the meaning of dissolution by Acceptilation, and state what you know of the Aquilian stipulation.*

Acceptilation was strictly a form used to dissolve obligations that had been made "*Verbis.*"

The *Acceptilatio*, like the stipulations themselves, consisted of a question and answer, thus:—

Ques. *Quod ego tibi promisi habesne acceptum?* Ans. *Habeo.*

A contract made in any other way than *Verbis*, although it could not actually be dissolved by *Acceptilatio*, yet if this form had been gone through, the debtor had a good defence to any action brought on the contract.

The **Aquilian Stipulation** was a form by which all contracts, no matter in what way they had been entered into, could be altered into contracts made *Verbis*, and could then be dissolved by *Acceptilatio.*

It was, in fact, a form by which a debtor obtained a universal relief from all the obligations which he owed to the creditor with whom he made the stipulation.

The **Aquilian Stipulation** was in these words:—

Ques. by the stipulator. "*Whatever you are, or shall be bound to give or do for me, everything for which I have any claim against you at law, all the property of mine which you possess, or which, but for your own fault, you should possess, whatever shall be the value of all these things, do you engage to give me for the same one hundred aurei?*"

Ans. by the promissor.—"*I do engage*" (*Spondeo*).

This stipulation, necessarily including all the obligations which a debtor could be under to a creditor, was

then dissolved by *Acceptilatio*, in the form above stated, and the release of the debtor was complete.

NOTE.—The *Aquilian stipulation* was introduced by the prætor Aquilius Gallus, who was a contemporary of Cicero.

—138. *Explain the meaning of "Dissolution by Novatio."*

Dissolution by **Novatio** was the changing of an existing duty into another kind of obligation, the former obligation by such change being dissolved.

It was in truth nothing more than the dissolution of one obligation by the formation of another. It was necessary that the second obligation, which produced the *Novatio*, should be made either *Verbis* or *Literis*. (It was generally made *Verbis*.)

Novatio could be produced, either by the creditor stipulating with a new debtor with respect to the subject matter of the old contract, and thus releasing his former debtor, or, in some cases, by his stipulating with the original debtor for the thing already due from him. A stipulation between the contracting parties to the original contract only had the effect of a *Novatio* if some new term or condition was introduced into the second contract, and, in the time of Justinian, if the intention of the parties to dissolve the former contract was obvious.

NOTE.—Even if the second contract—assuming it was made between parties capable of entering into a stipulation—was for some reason incapable of being enforced,

it had nevertheless the effect of a *Novatio*, and dissolved the former contract.

139. *Titius, the part owner of a slave, sends him to stipulate on his behalf with a third person for the purchase of a horse, belonging to Titius. Could this be legally done?*

Yes, and the benefit of the stipulation would result to Titius.

A slave could stipulate for his master, although he could not bind his master by a promise.

A slave held in common acquired for all his masters equally, unless he entered into the stipulation at the command of one master, and unless the property, the subject of the stipulation, belonged to one master; in either of which events, the benefit of the stipulation accrued to the one master only.

140. *"A." sells to "B." a horse and cart. "B." pays for the horse, but leaves both horse and cart on "A.'s" premises. A fire breaks out and destroys the cart. The horse also is stolen from "A.'s" possession. On whom does the loss fall and why?*

As soon as "A." and "B." had agreed as to the price to be paid for the horse and cart, the contract of sale was complete, and the property thenceforth was at the risk of "B."

The horse having been paid for, the *Dominium* or

absolute ownership was in "B." The cart not having been paid for, the *Dominium* of the property still continued in "A.," but this was of small importance, as all the risk attached to "B."

It was necessary that "A." should exercise the diligence of a *bonus paterfamilias* in order to preserve the property left in his charge. If "A." had exercised this diligence, and the fire and theft occurred in despite thereof, the whole loss fell upon "B."

"A." would have been entitled to bring the *Actio Furti* against the thief.

141. *A slave stipulates for the licence to pass over the farm of Seius. Was any right thus acquired? if so, who acquired the right?*

Yes, such a right could be acquired in such a manner, but the benefit did not accrue to the master, but was personal to the slave; the rule being, that where a licence to do a thing is stipulated for, the benefit of the stipulation is personal.

142. *What obligations arise in each of the following cases?—*

(a) *"A." promises "B." to manage his estates gratuitously during his absence abroad.*

(b) *"A." being absent, certain necessary expenses are incurred in connection with his estate, which expenses are paid by "B."*

(c) *"A." and "B." agree to change horses.*

(d) *"A." and "B." agree to buy a load of corn, and*

to resell it by retail. The purchase money is paid by them equally, but the profit is not to be divided equally.

(*a*) This was a *mandatum* for the benefit of "B." It gave rise to the *Actio negotiorum gestorum—directa* if brought by "B." to compel "A." to account for his stewardship—*contraria*, if brought by "A." to compel "B." to reimburse him for necessary expenses.

(*b*) This gave rise to a *quasi* contract, which "B." could enforce by bringing the *Actio negotiorum gestorum contraria.*

(*c*) This was a contract of exchange, and would not fall under either of the ten recognized heads of contract. If neither party had acted upon the agreement, the agreement would be incapable of enforcement (*pactum*). If it had been executed by one party, the prætor would compel the other party to execute it, by giving the *Actio in factum præscriptis verbis.*

(*d*) This was a partnership for a particular purpose (*societas rei unius*). The fact that the profit was not to be equally divided was immaterial, so long as all the profit was not given to one party.

The mutual obligation under which both "A." and "B." would lie to divide the profits could be enforced on either side by the *Actio pro socio.*

143. *What obligations, if any, arise in each of the following cases?—*

(*a*) *"A." and "B." are partners. "B." in managing a branch of the business abroad lends* £1000 *to "C.," who is insolvent.*

(*b*) *"A" lends his watch to "B" from whom it is stolen by a slave.*

(*c*) *"A" hires a farm of "B" but becomes hopelessly in arrear with the rent. He advertises a sale by auction of his farm implements, intending, it is supposed, to emigrate with the proceeds of the sale.*

(*a*) "A" would be able to recover the £1000 from "B" by action *pro socio*, for one partner never had any implied authority to bind another, except for purely administrative acts necessarily incident to the partnership.

(*b*) This was a contract of *Commodatum*, and, assuming that "B" (*the commodatarius*) had exercised the diligence of a *bonus paterfamilias* in the preservation of the watch, the loss occasioned by the theft would fall upon "A." "A" could bring an action against the master of the slave to recover the value of the stolen property, and the master would have the option either of paying the money or of giving up the slave to "A."

(*c*) Farm implements were regarded by law as subject to a tacit hypothec for the payment of the rent of the farm. "B" could bring the *Actio Serviana*, which was a real prætorian action, and have the farm implements declared to be his.

BOOK IV.

SUMMARY.

In Titles 1 to 5 of this book, Justinian speaks of obligations arising from *Delicts, i.e.*, acts expressly declared by law to be wrongs entitling the party injured thereby to reparation; also of *quasi Delicts, i.e.*, acts not declared to be delicts, but which were yet esteemed to be wrongful acts, entitling the party injured to sue the wrongdoer, as if (*quasi*) he had committed a delict.

These Titles include an account of the different kinds of theft, and the penalties attached thereto by law; of theft with violence (*vi bona rapta*); of injuries, the punishment for which was declared by the *Lex Aquilia;* and of injuries generally.

The whole subject of Obligations is brought to a close in Title 5 with some illustrations of obligations arising *quasi ex delicto.*

Almost the whole of the remainder of the Institutes is occupied with a detailed account of the various forms of actions which could be brought to recover property, or to enforce obligations.

In Title 6 Justinian—after declaring that all actions are either real or personal, and mentioning some real actions arising from the *Jus Civile*—discusses various real and personal actions which were originated by the prætor.

Actions to recover a thing, to recover a penalty, or to recover both a thing and a penalty—called mixed actions—are next treated of.

The actions which may be brought by third parties against parents and masters, to obtain ratification, or fulfilment, of contracts entered into with those in their *potestas*, and the actions—called noxal actions—in which a person could rid himself of any liability which he had incurred through the delicts of those in his *potestas*, by giving up the wrong-doer to the party injured, are discussed in Titles 7 and 8.

Title 10 states that persons who are entitled to bring actions, may do so, if they are *Sui juris*, in person or through procurators; if they are *alieni juris*, through their Tutors or Curators.

The rules as to the security to be given by parties to actions, or their procurators, with an account of the alterations made by Justinian in the system of giving security, are discussed in Title 11.

Title 12 treats of the distinction between actions which can be brought at any length of time after the cause of action has accrued (*perpetuæ*), and actions which must be brought within a fixed time (*temporales*); also of actions which either do or do not pass to or against the heir.

Titles 13 and 14 are occupied with an account of the pleas which could be used in an action, viz., the *Exceptio*, the defence; the *Replicatio*, the reply to the defence; the *Duplicatio*, the answer to the reply, and further pleas.

Title 15 introduces the subject of the Interdict. Interdicts were a kind of *formulæ* issued by the prætor (generally) forbidding something to be done. They were

divided according as they were prohibitory, restitutory, or exhibitory, and again divided according as their object was to acquire, to retain, or to recover possession.

The penalties incurred by those who without just cause enter into litigation, and the powers and duties of the judge to whom a matter in litigation is referred for decision and judgment, are discussed in Titles 16 and 17.

A brief sketch of public offences, a subject foreign to those with which the Institutes profess to deal, occupies the last Title.

BOOK IV.

144. *Define a delict, and mention the various kinds of delicts, noticed by Justinian.*

A *delict* was an act committed in violation, either of the rights of property, or of the ingredients of status, and which gave rise to a civil action *ex delicto*. No act could be a *delict* unless declared to be so by law. Evil intent was not an indispensable requisite of a *delict*.

The following are the *delicts* noticed by Justinian :—

1st. **Furtum**, or theft (see next Ques).

2nd. **Vi bona rapta.**—Theft accompanied by violence. Reparation for this delict could be obtained by means of the action *vi bonorum raptorum* which could be brought by the owner or by the person who had the custody only of the thing stolen. The penalty was quadruple the value of the thing, if the action was brought within a year from the time of the theft; if after the expiration of a year, the single value only could be recovered. Only in a case where the thief had parted with the thing stolen could quadruple the value be recovered ; if this were not so, then the thing itself and three times its estimated value could be recovered.

3rd. **Damnum injuria.**—Under this *delict* was included injuries to property of every description, which injuries were provided for, and the punishment thereof expressly stated in the *Lex Aquilia* (see Ques. No. 147).

4th. **Injuria.**—Injury to the person; or, injury, arising through any contumelious act affecting deleteriously the respect, honour, or reputation of the person injured (see Ques. No. 149).

145. *Give the legal definition of "Furtum" (theft). How many kinds of "furtum" were there, and what was the penalty attached to each kind?*

Furtum is the fraudulent dealing with a moveable thing, with its use, or with its possession, in violation of the law of nature.

There must be an evil intent, but this alone is not sufficient, for there must be an actual seizing upon, or handling of the thing (*contrectatio rei*).

Four kinds of furtum are noticed by Justinian :—

1st. **Furtum manifestum.**—Where the thief was taken red-handed, or with the stolen property in his possession, before he had reached the place were he intended to conceal it. The penalty, by the Twelve Tables, for a slave, was death; for a freeman, to be given over as a slave to the owner of the stolen property. Penalty in the time of Justinian, quadruple the value of the thing stolen, whether the thief was a slave or a freeman.

2nd. **Furtum nec manifestum.**—Where the thief was not taken red handed. Penalty by the Twelve Tables, double the value of the thing stolen. Penalty in the time of Justinian, the same.

3rd. **Furtum Conceptum.**—Where stolen property was found upon the premises of any person, whether such person was the thief or an entirely innocent party, he was held by law to have been guilty of *furtum conceptum* and was liable to the *actio concepti*. Penalty by the Twelve Tables, triple the value of the thing stolen. (The action was obsolete in Justinian's time.)

4th. **Furtum Oblatum.**—Where stolen property was deposited upon the premises of an innocent person in order to throw suspicion upon him, the person depositing the property, whether he was the actual thief or no, was guilty of *Furtum Oblatum*, and liable to the *Actio Oblati*, at the suit of the person on whose premises the goods were placed. Penalty by the Twelve Tables, triple the value of the thing stolen. (The action was obsolete in Justinian's time.)

In addition to the actions which could be brought upon the four kinds of *furtum* noticed, there were two other actions of somewhat similar nature, viz., the "*actio Prohibiti*," and the "*Actio non exhibiti*." The former of these actions, to which a penalty of quadruple the value was attached, could be brought where a person, by force, prevented another, who wished in the presence of witnesses to search upon his premises for stolen property, from doing so. The latter action could be

brought against a person who had not produced stolen property which had been found upon his premises. The penalty was (probably) quadruple the value of the thing.

These actions had become obsolete in Justinian's time, for every receiver, or concealer, of stolen property was liable to the action "*furti nec manifesti.*"

146. (*a*) *Could a person be guilty of theft with respect to his own property? or,* (*b*) *a borrower with respect to the property lent to him?*

(*a*) Yes; as, for example, when a man had pledged a thing, and then fraudulently took it out of the possession of the pledgee, he was guilty of theft, although the *Dominium* of the property was in him, and not in the pledgee.

(*b*) A borrower could be guilty of stealing the thing entrusted to him. The law even went further, and declared, that if a borrower used the subject of the loan for a different purpose to that for which it was lent, he was guilty of theft.

(This was only so when the borrower knew he was using the thing for a wrongful purpose, and knew that this was against the consent of the owner. If, as a fact, the owner approved of the borrower using the thing for the purpose for which he did use it, then, although this fact was not known to the borrower, he was not guilty of theft.)

147. *Give some account of the provisions of the "Lex Aquilia."*

The "*Lex Aquilia*" was a plebeian law (*plebiscitum*) passed about the year A.U.C. 468.

It related, chiefly, to injuries to property of every description, and probably repealed all existing laws relating to the same subject.

The first head of this law provided that whoever killed a slave, or a four-footed animal reckoned amongst cattle, belonging to another, should pay the owner the greatest value the thing had possessed at any time within a year previously. The killing must be wilful. If it was the result of accident (unless there had been criminal carelessness) or was done in self-defence, the law did not apply.

The second head of the law was unimportant, and obsolete in Justinian's time.

The third head related to injury to property of any kind not mentioned under the first head, and included injury as well to inanimate, as to animate things. The penalty for any injury falling under the third head, was the greatest value the thing had possessed, at any time within thirty days next preceding.

148. *How would you ascertain whether certain injuries fell within the "Lex Aquilia?"*

The "*Lex Aquilia*" only applied in cases where the injury had been done directly by a person to a slave, animal, or inanimate thing, *i.e.*, by the body to the body (*corpore corpori*). If the injury had been done directly to the body, or thing (*corpori*), but not directly by the body (*corpore*), the *Lex Aquilia* in strictness did not apply, but the prætor gave an *utilis actio* in conformity with the *Lex* (*actio utilis Aquiliæ*.

If the injury had been done neither directly by the

body (*corpore*), nor directly to the body (*corpori*), the *Lex Aquilia* would not apply at all. In such a case the remedy would be by application to the prætor for an "*actio in factum præscriptis verbis.*"

NOTE.—If there were more than one offender, in respect of the same transaction, the whole penalty under the *Lex Aquilia* could be recovered against each. And if any defendant denied his liability under this law, and was afterwards condemned, the penalty was doubled.

149. *Explain the distinction between "Simple Injuria," and "Atrox Injuria" and give illustrations of each kind of injury.*

"**Injuria**," in its broad sense meant any act contrary to law, entitling the party affected thereby to an action *ex delicto.*

In a restricted sense it meant any act injuriously affecting the personal rights, either of liberty, reputation, or honour.

"**Atrox Injuria**" was injury which was regarded by law as of a graver character than *simple injuria.* It was so regarded either from the nature of the act itself, from the place in which the act was committed, or from the position of the person injured.

Instances of "*Simple injuria*":—

(*a*) Common assaults committed either on the plaintiff himself, or upon some one in his *potestas.*

(*b*) Indecent assaults committed either on the plaintiff himself, or some one in his *potestas.*

(*c*) Libels.

(*d*) Public insults, &c.

Instances of "*Atrox injuria*":—

(*a*) Aggravated assaults, *ex. gr.*, an assault with a sword or club.

(*b*) Assaults committed in the forum, or before the prætor.

(*c*) Assaults upon magistrates, upon a parent by a child, or upon a patron by his *libertus*.

In actions for *Atrox injuria* the prætor himself fixed the penalty in the *formula*, and the judge could not condemn in a less sum.

150. *Give illustrations of actions arising "quasi ex delicto."*

(*a*) The action which could be brought, at the suit of the injured party, against a judge who either through favour or ignorance, gave a decision directly in violation of law, was regarded as arising *quasi ex delicto*.

(*b*) The action which could be brought by the injured person, or his heir, against the occupier of an apartment from which anything had been thrown, or poured, which had occasioned injury, arose *quasi ex delicto*.

(*c*) The action which could be brought against the master of an inn, or the captain of a ship, by the owner of property which had been stolen by the servants attached to the ship, or the inn, arose *quasi ex delicto*. In this case double the value of the property stolen could be recovered.

151. (*a*) *"A" by the advice of "B" steals a horse from "C."*

(*b*) *"A" lends "B" a ladder with which to enter a house for the purpose of theft.*

(*c*) *"A" meeting "B" and "C," who are both slaves, kills "B" and seriously beats "C."*

(*d*) *"A" whilst walking past the house of "B" is injured by a jar thrown out of the window of "B's" house.*

What remedies, in each of the above cases, are open to the person injured?

(*a*) The "*Actio furti*" could be brought against "A" but not against "B," as the person who had advised the commission of a theft was not esteemed by law as an accomplice.

(*b*) The "*Actio furti*" could be brought against both "A" and "B," for "A" being an accessory before the fact, was equally guilty with the perpetrator of the offence.

(*c*) The master of "B" would have an action against "A" under the *Lex Aquilia*, and could recover the greatest value the slave had possessed at any time within a year preceding.

The master of "C" would have an action under the third head of the "*Lex Aquilia*" for the injury caused to the slave, and could recover the greatest value the slave had possessed at any time during the preceding thirty days.

As the injury was severe, the master might also recover damages for the insult which had been inflicted upon him through his slave.

(*d*) "A" would have against "B" an action to

obtain full compensation for the loss he had been occasioned by the injury.

If "B" was a *filius-familias* the action must be brought against him personally, and not against his father.

This action arose *quasi ex delicto.*

152. *A garment is stolen from "A," and sold by the thief to "B," who purchases bonâ fide, and ex justâ causâ. After four years the thief comes to "A" and confesses. What action has "A" against the thief, or against "B."? Do you know any law affecting "A's" position?*

"A" would have an action "*furti nec manifesti*" against the thief to recover double the value of the garment; and a "*Vindictio*" or real action against "B" to recover the garment itself.

In the ordinary way "B" would, before the four years had elapsed, have acquired the garment by *usucaption,* but the *Lex Atinia,* A.U.C. 557, expressly forbade the acquisition of stolen goods by usucaption.

NOTE.—In the time of Justinian stolen property could be acquired by *usucaption* by thirty years *bonâ fide* possession (*possessio longissimi temporis*).

153. (*a*) "*A*" *steals a watch from "B" and to escape detection hides it in the house of "C."*

(*b*) "*A*" *meeting "B" in the street, knocks him down and robs him of a watch, which had been left with him for safe custody.*

(c) "*A*" *receives property from* "*B*" *knowing it to have been stolen.*

What actions did each of the above cases give rise to?

(*a*) "B" could bring the *actio furti nec manifesti* against "A" and the *actio concepti* against "C" if the watch was found on "C's" premises. "C" would have against "A," for having hidden the watch on his premises, the "*Actio oblati,*" and could recover from him three times the value of the watch.

(In the time of Justinian the actions *concepti* and *oblati* had fallen into disuse, and probably the action "*furti nec manifesti*" would have been resorted to instead.)

(*b*) "B" would have an action against "A" for robbery with violence (*vi bona rapta*), and could recover quadruple the value of the watch, or the watch itself together with three times its value. The owner of the watch could bring the same action against "A."

(*c*) "A" would be liable to the "*Actio furti nec manifesti,*" and liable to pay double the value of the property.

(Before the "*Actio concepti*" fell into disuse "A" would have been liable to this action, the penalty attached to which was three times the value of the property.)

154. *Give a short account of the three systems of judicial procedure which flourished at various epochs in Roman history.*

In very early times the system of Judicial proce-

dure was that of the *Legis Actiones*, or *Legitimæ actiones*, which continued until virtually abolished by the *Lex Æbutia*, A.U.C. 573. (See Ques. No. 160.)

The *legis actiones* were actions founded upon particular laws, in which actions the letter of the law was strictly adhered to. Such were the *Actiones-sacramentum*, *condictio*, *judicio postulatio*, *pignoris capio*, *manus injectionem*.

The second system of Judicial procedure was the **Formulary system**, which, after having gradually dropped into disuse, was abolished by Diocletian, A.D. 294.

During the formulary period the parties first appeared before the magistrate (*in jure*), and procured from him a *formula*, or statement of the facts in dispute between them. This *formula* contained not only the claim, but the penalty which the defendant was to suffer in case the issue was decided against him, which penalty always consisted of a sum of money.

The *formula* having been obtained was then sent to a judge, or arbiter, who had to decide the matter, and condemn in accordance with his instructions.

Before the Judge the parties were said to be *in judicium*.

Actions under the formulary system were not marked by so strict an adherence to the terms of a law as during the system of the *Legis actiones*. Equitable claims and defences were also allowed.

The formulary system was succeeded by that of the **Extraordinaria judicia**. Some actions of this description arose during the formulary epoch, in cases relating to *restitutiones in integrum*, and *fidei-commissa*, where the magistrate, instead of sending the matter to a judge to be decided, decided it himself. In these cases

the proceedings were called "*extraordinem*," because they were outside the system in general use. The name still clung to them after they became ordinary forms of action, and when the distinction between the magistrate and the judge had entirely ceased.

155. *Define an "Action," and state shortly the main divisions of actions laid down in the Institutes.*

An "Action" is "the right of suing before a judge for what is one's due."

The first and main division is into **Real** and **Personal** actions.

A real action is one in which the plaintiff claims that, as against all the world, a certain corporeal, or incorporeal thing is his.

Real actions were called "*Vindicationes*."

A personal action was one in which the plaintiff claimed that the defendant should either give, or do, or make good something to him (*Dare, facere, præstare*).

Personal actions were called "*Condictiones*." (See next Ques.)

Actions were again sub-divided, according as their object was to recover a thing, a penalty, or both a thing and a penalty.

An action to recover a thing was called "*Persecutoria*"; to recover a penalty, "*Pœnalis*"; to recover both a thing and a penalty, "*Mixta*."

Actions were also divided, according to the latitude given to the judge, into actions *Stricti juris*, *Bonæ fidei*, and *Arbitrariæ*. (See Ques. No. 115.)

NOTE.—As the formulary system had fallen into disuse before Justinian's time, he does not notice as a division of actions those which arose from the civil law, and those which arose from, or were extended by, the prætors' jurisdiction; such as *actiones in factum, utiles actiones, fictitiæ actiones,* and *actiones in factum præscriptis verbis.*

156. (*a*) *What were "Condictiones?"* (*b*) *By what laws were they introduced?*

(*a*) "**Condictiones**" were, at first, personal actions which could be brought to obtain anything certain. They were, after a time, extended to things uncertain.

In process of time "*Condictiones*," when the term was used in opposition to "*Vindicationes*," came to mean personal actions generally.

The *Condictio Certi* was often called simply "*Condictio*"; the *Condictio Incerti* always received a special name.

(*b*) They were first introduced by the *Lex Silia*, A.U.C. 510, and the *Lex Calpurnia*, A.U.C. 520.

The *Lex Silia* allowed the action to be brought when the claim was for a definite sum of money, and the *Lex Calpurnia* extended the *Lex Silia*, by allowing an action when the claim was for anything definite, whether a sum of money or anything else.

157. *Give a description of the various real actions which arose from the Civil law.*

The real actions noticed in the Institutes as arising from the Civil law were the following :—

(*a*) **Vindicatio.**
(*b*) **Confessoria.**
(*c*) **Negativa.**
(*d*) **Causa liberalis.**
(*e*) **Petitio hereditatis.**

(*a*) "**Vindicatio**" in its special sense was an action in which the plaintiff claimed, not as against a particular person, but as against all the world, a particular corporeal thing.

(In its general sense it meant a real, as opposed to a personal action.)

(*b*) "**Confessoria**" was an action brought by a person claiming a prædial servitude whether he was or was not in possession of the servitude, *i.e.*, whether his possession was only threatened, or where he had lost the possession but still retained the right to the servitude.

(*c*) "**Negativa**" was an affirmative action brought by the owner of an immoveable, over which another person claimed a servitude, for the purpose of having it judicially declared, that his immoveable was subject to no servitude whatever.

(*d*) "**Causa liberalis**" was a præjudicial action brought for the purpose of ascertaining whether a person was or was not free. (See Ques. No. 161.)

(*e*) "**Petitio hereditatis**"—an action brought to claim an inheritance, and which, unlike most real actions, was *bonæ fidei*.

158. *Give a description of the various real actions which arose from the Jus honorarium.*

Five real actions arose from the Jus honorarium, or prætors' jurisdiction :—

(*a*) **Actio Publiciana.**
(*b*) **Actio quasi Publiciana.**
(*c*) **Actio Pauliana.**
(*d*) **Actio Serviana.**
(*e*) **Actio quasi Serviana.**

(*a*) **The Actio Publiciana** — a fictitious action in which the prætor allowed a person who had lost property of which he was the possessor but not the Dominus, to sue for its recovery, and to allege that he had acquired the *Dominium* by usucaption. This allegation, although untrue, could not be denied.

(*b*) **The actio quasi Publiciana** (sometimes called "*Rescissoria*")—a fictitious action, in which the prætor allowed a person against whom usucaption had run, at a time when for some legal or other legitimate reason he had been unable to interrupt the usucaption, to allege, falsely, that the usucaption had not been perfected, and by this means to recover the property.

(*c*) **The Actio Pauliana**—a fictitious action given by the prætor to the creditors of a person who had made a fraudulent alienation of any part of his goods by *traditio* (delivery); in which action the creditors were allowed to assert, and could not be contradicted, that the delivery had not been made.

(*d*) **The Actio Serviana**—an action given by the prætor to landlords, enabling them to obtain the farm

implements of those of their tenants whose rent was in arrear. (Even in the absence of arrangement all implements of husbandry were regarded by law as hypothecated to the landlord to secure the rent.)

(*e*) **The Actio quasi Serviana** was an extension of the *Actio Serviana*. By means of this action any mortgagee or pledgee could recover, either from the mortgagee or pledgee himself, or from a third party, the property pledged or hypothecated to him.

159. *What personal actions, arising from the prætor's jurisdiction, are noticed in the Institutes?*

Three actions of this description are noticed, but they are only meant as illustrations of other actions of the same kind.

(*a*) **Actio de constituta pecunia.**

(*b*) **Actio receptitia** (abolished by Justinian).

(*c*) **Actiones de peculio.**

(*a*) The **Actio de constituta pecunia** was given by the prætor to enforce a mere pact, or agreement, by which a person promised to pay what he already owed.

The action could only be brought in respect of things which could be the subject of a *mutuum, i.e.,* things which could be weighed, numbered, or measured, and was bound to be brought within a year.

(*b*) The **Actio receptitia** was a particular action at first allowed by the civil law against a banker (*Argentarius*) who had promised to pay the creditors of one

of his customers on a fixed day. This action was afterwards given by the prætor not only against bankers, but against any person who, having money belonging to another in his hands, promised to pay it over on a certain day, and neglected to do so.

(Justinian abolished this action, and transferred all the benefits which creditors could have derived therefrom to the *Actio de constituta pecunia*, which action he allowed to be brought at any distance of time from the arising of the cause of action.)

(*c*) **Actiones de peculio** were actions given by the prætor against fathers, and masters, to enforce fulfilment of the contracts of those in their *potestas*, to the extent of their *peculium*. (See Ques. No. 164.)

160. *What alteration in Judicial procedure was made by the Lex Æbutia and the Leges Juliæ?*

The system of procedure by *Legis actiones* or *Legitimæ actiones* was abolished by the above laws (*circa* A.U.C. 570) save in matters relating to *Damnum Infectum* and matters falling under the jurisdiction of the *Centumviri*.

The system of *Legitimæ actiones* was always characterised by greater formalities, and a stricter adherence to form, than to equity or justice.

An action of this description could only be brought by Roman citizens against Roman citizens, and was obliged to be brought and defended in person.

If a *legitima actio* was once commenced, the claim

in respect of which the action was brought, was immediately extinguished.

(The system of *Legitimæ actiones* was succeeded by the system of *Formulæ*, see Ques. No. 154.)

161. *What do you understand by a "præjudicial" action? Give an illustration of such an action.*

A "præjudicial" action was one which, although not conforming in every respect to a real action, partook strongly of the nature of such an action. A præjudicial action was so called because its object was to decide some preliminary fact necessary to be decided before further judicial proceedings could be proceeded with.

The object of præjudicial actions was generally to decide questions concerning status, paternity, or affiliation.

The best known præjudicial action was that called "*Causa liberalis*," which was brought to discover the *status* of a person held in slavery. A person called the "*Assertor libertatis*" claimed the subject of the suit as a free man. The master defended. This question if decided against the person whose *status* was in dispute, could be tried three times, provided there was a new *Assertor libertatis* in each action.

Justinian allowed the reputed slave himself to bring the action, but only permitted one action to be brought instead of three.

162. *What do you understand by Actiones Conceptæ,*

(*a*) *in Simplum*, (*b*) *in duplum*, (*c*) *in triplum*, (*d*) *in quadruplum? Give instances of each kind of action.*

(*a*) An **Actio concepta in simplum,** was one in which a single thing, or its value, was claimed.

Actions upon stipulations, loans, mandates, sales, and letting and hiring, were *in simplum.*

(*b*) An **Actio concepta in duplum** was one in which double the value of the thing was claimed.

Actions for theft not manifest; for wrongful injury by the *Lex Aquilia* (if liability was denied); for legacies left to churches or other holy places (if liability was denied); and also actions upon deposits when the deposit was occasioned by an event of urgency (if liability was denied) were *in duplum.*

(*c*) An **Actio concepta in triplum** was one in which three times the value of the thing was claimed.

Actions against persons who in their statement of claim (*Intentio*) had demanded more than was due to them, were *in triplum,* as three times the amount of the over-claim could be recovered.

(The old actions *furti concepti* and *furti oblati* were *in triplum.* These actions, however, had become obsolete.)

(*d*) An **Actio concepta in quadruplum** was one in which four times the value of the thing was claimed.

Actions for manifest theft; against officers of the Courts who had made unjust demands upon a defendant; against a person who by duress had compelled another to give something up to him; were *in quadruplum.*

NOTE. In actions *Conceptæ in duplum, triplum,*

or quadruplum, only the single value of the thing was inserted in that part of the *formula* in which the claim was made (*Intentio*) and this amount was then doubled, trebled, or quadrupled, in the later part of the *formula,* called the *condemnatio.*

163. *What was the consequence, both ante et tempore Justiniani, of a plaintiff claiming in his "Intentio" from the defendant, either more, or less, than was due to him?*

Before the time of Justinian if the plaintiff claimed more than was due to him (unless his mistake was such a one as even the most careful man might make) he lost his entire claim.

This over-claim (*plus-petitio*) might be either in respect of *the thing* itself, as when a person claimed more money than was due to him; in respect of *the time,* as when a person claimed something that would become due to him, before it was due; in respect of *the place,* as where a person claimed in one place, that which it was agreed should be given at another place; in respect *of cause,* as where a person claimed from another some particular thing, when the person against whom the claim was made, had an option of giving either that thing, or something else: *ex. gr.,* if a person promised to give a slave, or 20 Aurei, and a demand was made for the slave only, this would be an over-claim in respect of *cause.*

The Emperor Zeno enacted that whoever claimed more than was due to him in respect of time, should be forced to wait double the time he would originally have waited, and also to re-imburse the defendant for necessary expenses.

Justinian preserved the constitution of Zeno as to over-claim in respect to time, but enacted that if an over-claim was made either in respect of the thing, the place, or the cause, the plaintiff should not, as formerly, lose his entire claim, but should be liable to pay to the defendant triple the amount of loss he may have sustained thereby.

If a plaintiff claimed less than was due to him, he was not prejudiced, for the prætor would allow him to bring another action to obtain the remainder; and the Emperor Zeno allowed the judge to condemn the defendant in whatever he found to be due, whether the whole thereof had been claimed or not.

164. *In what cases could an action be brought against a person to enforce contracts made with those in his potestas?*

In four cases the master or *paterfamilias* could be made liable on contracts entered into with those in his "*potestas*."

1st. Where the slave or the *filius-familias* contracted under the direction of the person in whose power he was.

2nd. Where the slave or *filius-familias* made a contract as an *Exercitor* or *Institor*. (See next Ques.)

3rd. Where the slave or *filius-familias*, with the knowledge of the master or *paterfamilias*, contracted with his *peculium*. (See Ques. No. 166.)

4th. Where the master or *paterfamilias* benefited by the contract. (See Ques. No. 166.)

NOTE.—A *paterfamilias* could not be sued for money

lent to any one in his *potestas*, as this was expressly forbidden by the *Senatus-consultum Macedonianum* passed in the reign of Claudius.

165. *What were the Actiones "Exercitoria" and "Institoria"?*

The Actio Exercitoria could be brought against the master who had appointed his slave captain of a vessel, for the purpose of enforcing any contracts made with the slave in such capacity. In such cases the law assumed that the master authorised his slave to contract, from his having placed him in such a position.

The Actio Institoria was an action given for similar reasons, and for a similar object, against a master who had appointed one of his slaves to be the keeper of a shop.

These actions were so called from the terms "*Exercitor*"—the recipient of the daily profits of a vessel; and "*Institor*,"—the manager or conductor of any business.

166. *What were the Actiones "Tributoria" and "De peculio et in rem verso"?*

The Actio Tributoria was a prætorian action allowed to be brought by the creditors of a slave against the slave's master, in the following event—

If the slave, unknown to his master, contracted with his *peculium* and thus acquired profit, such profit was divided by the master between himself, (if a creditor) and al other creditors of the slave. If any creditor

complained that the division of the profit had not been fairly made, his remedy was by the *Actio Tributoria.*

The Actio de peculio et in rem verso.—This was really one action containing two condemnation clauses. It could be brought against the master of a slave who had, without authority from such master, entered into contracts. By it the master was liable to pay, first to the extent of the slave's *peculium*, and secondly, to the extent of any advantage or profit that he may have derived from the contract.

If the master had not reaped any advantage the action *de peculio* only was brought; if the master had reaped advantage, but the slave had no *peculium*, the action would be that "*De in rem verso.*"

NOTE.—The above actions could also under like circumstances be brought in respect of *Filii-familiarum.*

167. *To what extent were fathers and masters answerable for the* delicts *of those in their power?*

All delicts of persons *in potestate* gave rise to actions called "**Noxal actions.**" (*Noxales actiones.*)

A noxal action was not a distinct form of action, but the ordinary action attached to the particular delict committed by the person *in potestate*, brought against the master; the distinction being, that in the *condemnatio* the option was given to the master, either of paying the estimated penalty, or of giving up the wrong-doer (*noxa*) to the person whom he had injured.

If the *Dominus* chose to avail himself of the opportunity offered him of giving up the wrong-doer, he was *ipso facto* released from all further liability.

It was only in very early times that a child was permitted to be given up in a noxal action.

Even before the time of the Empire noxal actions applied exclusively to slaves.

NOTE.—Noxal actions were also permitted where injury was done by irrational animals, acting contrary to their nature.

168. *Trace the growth of the privilege which permitted plaintiffs and defendants to bring and defend actions by means of third parties.*

A well established principle during the whole period of the *legis actiones* was that one person could not represent another. The only exceptions to this rule being, where one person conducted an action for the benefit either of the people, of a pupil, or of freedom.

During the formulary system a party to an action was allowed to appoint, in the presence of a magistrate and with the consent of his adversary, a **Cognitor** who should appear for him.

In later times a person was allowed to appoint by mandate a **Procurator**, who conducted, or defended the action in his own name.

In the time of Justinian it had become customary for procurators to bring, or defend actions, in the names of the real parties thereto.

No particular form of words was necessary in the appointment of procurators.

169. *What were the rules as to giving security in an action which the parties thereto conducted in person?*

Formerly in a Real action, the defendant had to give security that he would, if judgment was given against him, return the subject of the suit in an unimpaired condition, or pay the penalty. The plaintiff suing in person in a real action, had not to give security.

In a personal action neither the plaintiff, nor defendant, was compellable to give security.

In the time of Justinian the same rules prevailed, save that a defendant, who appeared in person in a real action, was not compellable to give security for the payment of the value of the thing, but only that he would come up for judgment at the conclusion of the action.

170. *What were the rules as to giving security, in an action in which the parties appeared by procurators?*

It was always necessary in both real and personal actions, if the parties appeared by procurators, that security should be given.

A procurator who appeared to conduct a case on behalf of a plaintiff had to give security that his acts would be ratified by his principal. (The plaintiff himself did not give security.)

In Justinian's time a procurator who appeared for a plaintiff could either give security that his acts would be ratified, or register a mandate of his appointment.

A defendant who appeared by a procurator had to give security both to secure the payment of damages, and for his own appearance at the time of judgment.

171. *What was the general rule for deciding whether a cause of action was extinguished by the death of one of the parties thereto?*

The general rule was that if the action arose from contract it passed both to and against the heirs of the contracting parties. If the action arose from delict it passed to the heir of the person injured by the delict, but not against the heir of the delinquent.

(The *Actio Injuriarum* did not pass to the heir of the person injured.)

172. *What length of time was allowed after a cause of action had arisen, within which a person could sue thereon?*

Actions founded upon the old *Jus Civile* were perpetual, *i.e.*, could be brought at any distance of time after the cause of action had arisen.

Prætorian actions, or such as arose from the prætor's jurisdiction, could not generally be brought after the elapse of more than a year from the time at which the cause of action arose.

The following prætorian actions were, however, perpetual—actions to obtain any *Possessio Bonorum*—actions for manifest theft—actions to recover a thing (*Persecutoria*).

NOTE.—It was only if an *Actio persecutoria*, *i.e.*, an action to recover a thing, did not abrogate or destroy the effect of some provision of the *Jus Civile* that it was allowed to be brought at any time.

Certain limitations as to time were imposed upon various actions from time to time by imperial constitu-

tion, and finally Theodosius II. enacted that no action, either real or personal, should be brought after thirty years from the time when it could first have been brought.

(In one or two actions the time was afterwards extended to forty years.)

173. *Give shortly an account of the defences to actions called "Exceptiones."*

"**Exceptiones**" were of prætorian origin. They were defences which could be used in order to repel an action.

The peculiarity of the *Exceptio* was that the facts, or reasons forming it, had to be laid before the magistrate, who inserted them in the *formula* before sending the matter to a *Judex*.

The *Exceptio* was only used in actions, *stricti juris*, *arbitrariæ*, or *penal*, and during the formulary period. In *bonæ fidei* actions, and in all actions during the period of *extraordinaria judicia*, the judge would take cognizance of defences, both legal and equitable, without such defences being inserted in the *formula*.

Examples :—

Exceptio metus Causa. Defence, that the defendant had been forced into the contract, upon which the plaintiff sued, by duress.

Exceptio Doli mali. Defence that the contract sued upon had been induced by the fraud of the defendant. Under the general plea of fraud, any fact which if

proved would bar the action would be taken notice of.

Exceptio in factum Composita. Any defence which raised the question whether or not a particular fact was or was not true. Such were the following. *Exceptio pecuniæ non numeratæ*—defence that money sued for had not ever been told out to the defendant. *Exceptio pacti conventi*—defence that the plaintiff had agreed to give the defendant time in which to pay a sum of money due from him. *Exceptio jurisjurandi*—defence that the defendant had taken an oath that he was not liable to the plaintiff upon the contract sued upon. *Exceptio rei judicatæ*—defence that the subject of the present action had already been judicially decided between the parties.

NOTE.—Another distinction existed between exceptions. They were either *perpetual and peremptory*, or *temporary and dilatory*.

Perpetual and peremptory exceptions, such as that *Doli mali*, destroyed the plaintiff's right at once and for ever; temporary and dilatory exceptions, as that *pacti conventi*, only opposed an obstacle to the plaintiff's bringing his action at once, but did not destroy the right of action.

174. *What was an "Interdict" as used in Roman law?*

An Interdict was an order issued by the prætor, either commanding, or prohibiting, the doing of some particular act.

The object of Interdicts was generally to protect a

person in the actual possession of some corporeal or incorporeal thing. They were (probably) first granted as a protection to the occupant of the *Solum provinciale; i.e.*, land which, as before stated, was by law regarded as incapable of being held by private individuals.

In nearly all cases Interdicts were employed to protect rights that could be vindicated in no other way.

Interdicts were quite obsolete in Justinian's time, as in cases where parties would formerly have proceeded by Interdicts, they were allowed to bring actions.

175. *State the three principal kinds of Interdicts, and the subdivisions of the same.*

The three chief kinds of Interdicts were :—

1st. **Prohibitory interdicts.**

2nd. **Restitutory interdicts.**

3rd. **Exhibitory interdicts.**

A **prohibitory** interdict was one in which the prætor forbade the doing of some apprehended wrong.

A **restitutory** interdict was sometimes, one in which the prætor ordered a thing to be restored, or property to be replaced *in statu quo ;* sometimes, one in which the prætor ordered possession of a thing to be given up to one who had never previously had it in his *possession*, thus giving a wide meaning to the term "*Restitutory.*"

An **exhibitory** interdict was one in which the prætor ordered something to be produced, *ex. gr.*, a slave whose freedom was in question.

Interdicts were subdivided according as their object was *to gain, to retain,* or *to recover* possession. These really fell under those already cited above, for interdicts to retain possession were prohibitory, interdicts to gain or to recover possession were restitutory. (See next Ques.).

176. *What were the Interdicts; (a) Quorum bonorum; (b) Interdictum Salvianum; (c) Uti possidetis; (d) Utrubi; (e) Unde vi?*

(*a*). **The Interdict Quorum bonorum** was given to the person who had obtained from the prætor possession of the goods of an inheritance (*possessio bonorum*), for the purpose of compelling the heir, or any other person who might be in possession of the whole, or part, of the goods belonging to the inheritance, to give them up to him.

This interdict being given to acquire, was a *Restitutory* interdict.

(*b*) **The Interdictum Salvianum** was given to the owner of a rural estate, to enable him to obtain the implements of husbandry, which had been expressly pledged to him by the tenant to secure the rent.

This interdict, like that *Quorum bonorum*, being given to acquire, was also *Restitutory.*

(*c-d*) **The two Interdicts, Uti possidetis and Utrubi,** were given for a like object, save that the former related to immoveables, the latter to moveables.

The object of both these interdicts was to decide, in the case of a dispute concerning which litigation was pending, which of the parties thereto should appear before the Court in the character of claimant, which

in the character of possessor; or, in other words, which should be plaintiff, and which defendant.

Formerly if the subject of the dispute was an immoveable thing, the interdict *Uti possidetis* was given to the party who was in possession of the thing at the time of the interdict being granted; if the dispute was as to a moveable thing, the Interdict *Utrubi* was given to the party who had been in possession of the thing for the greater part of the preceding year.

In the time of Justinian both interdicts were alike given to the party who was in possession at the time of the interdict being granted.

(There was a considerable advantage in being defendant in an action brought for the recovery of a thing, chiefly from the fact that the *onus* of proof lay upon the plaintiff.)

Both these interdicts being given to retain possession, were therefore *Prohibitory;* they were also called "*double*" interdicts, because in them each party was at once plaintiff and defendant.

(*e*) **The Interdict Unde vi** related only to immoveables, and was given to the owner or possessor of such property, who had, by force, been ejected therefrom.

This interdict being given to recover possession was therefore *Restitutory.*

177. *What were the restrictions which in Justinian's time were imposed on persons who wished either to bring or defend actions?*

Before either plaintiffs were allowed to bring, or defendants to defend, any action, an oath was exacted from them that they were actuated in the course which

they were pursuing by a belief in the righteousness of their claim or defence, and not by feelings of malice, or desire to cause their opponent inconvenience.

The advocates also of either party took an oath, that their conviction was sincere in the justice of their contention.

Defendants were also indirectly restrained from rashly defending, by their being liable in certain actions to a penalty of more than the sum due, if they denied liability, which of course they did if they defended the action.

Plaintiffs and defendants, moreover, whose claim was frivolous were liable to have to reimburse their adversaries for all expenses they had been put to.

NOTE.—In the time of Gaius there were other restraints upon rash litigation, chief among which was the *Actio calumnia*, which could be brought by a defendant against a plaintiff who had sued him dishonestly. By this action the plaintiff could recover either a tenth, or a fourth, part of what the plaintiff had claimed from him, according as the claim had been made by action or interdict.

THE END.

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