# THE INSTITUTES

OF

# JUSTINIAN

WITH

ENGLISH INTRODUCTION, TRANSLATION, AND NOTES

BY THE LATE

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# PREFACE

TO

## THE SEVENTH EDITION.

THIS EDITION of the 'Institutes' has been carefully revised and corrected, but scarcely any additions have been made beyond that of giving at the end of the Introduction a chronological list of the chief laws and legal changes noticed in the 'Institutes'.

The object of the work is to aid those who desire to use the 'Institutes' as an introduction to the study of Roman law, or who wish to find in one volume the means of gaining a general acquaintance with the history, principles, and contents of Roman law.

In the Introduction I have endeavoured to give such a general sketch of Roman law and its history as will prepare readers for the details of the work itself. The translation aims at rendering the text in language intelligible to those who have not, as well as to those who have, a long acquaintance with Latin. The notes are intended to embody such information as is necessary to elucidate the text, or to give the results of successive legal changes. In the Summary at the end of the volume I have attempted to arrange in a methodical form the principal contents of the text and the notes.

The value of the 'Institutes' is that of an elementary work, and the value of an elementary work is destroyed if it is made too long and difficult. I have, therefore,

avoided controverted points of law and history as much as possible, and where it was not possible to avoid them, I have stated what seemed to me the soundest conclusion, without attempting to defend it.

The original edition was in the main founded on the works of Ortolan, Ducaurroy, and Puchta. In subsequent editions I was greatly aided by the elaborate commentaries of Demangeat, to which those who wish to find in the 'Institutes' something more than an elementary work may be confidently referred. Lastly, I have derived assistance, which it is impossible to acknowledge too freely, from Mr. Poste's learned edition of 'Gaius,' and from Mr. Hunter's admirable and exhaustive work on 'Roman Law'; while in revising the translation, I have had the great advantage of consulting the careful and accurate translation of Messrs. Abdy and Walker.

The text adopted is, with few variations, that of Huschke (Leipzig, 1868).

# INTRODUCTION.

1. THE legislation of Justinian belongs to the latest period of the history of Roman law. During the long space of preceding centuries the law had undergone as many changes as the State itself. The Institutes of Justinian embody principles and ideas of law which had been the slow growth of ages, and which, dating their origin back to the first beginning of the Roman people, had been only gradually unfolded, modified, and matured. It is as impossible to understand the Institutes, without having a slight knowledge of the position the work occupies in the history of Roman law, as it is to understand the history of the Eastern Empire without having studied that of the Western Empire and of the Republic. Many, also, of the leading principles of Roman law contained in the Institutes are unfamiliar to the English reader, and though they may be learned by a perusal of the work itself, the reader, to whom the subject is new, may be glad to anticipate the study of details by having placed before him a general sketch of the part of law on which he is about to enter. It is proposed, therefore, in this Introduction, to give first an outline of the history of Roman law, and then an outline of Roman private law. Each, however, will only be given with the very moderate degree of fulness proper to a sketch intended to be merely a preliminary to the study of the Institutes. *Object of the Introduction.*

## HISTORY OF ROMAN LAW.

2. However obscure may be the history of early Rome, we cannot doubt that Roman citizens were, from a very early period, composed of two distinct bodies, the *populus* and the *plebs*, of which the first alone originally possessed all political power, and the members of which *History of early Rome. The Populus.*

were bound together by peculiar religious ties. Nor can we have any reasonable doubt about the general features of the constitution of the *populus*. Whatever may have been their origin, it consisted of three tribes. Each tribe was divided into ten *curiæ*, and each *curia* into ten *decuriæ;* another name for a *decuria* was a *gens*, and it included a great number of distinct families, united by having common sacred rites, and bearing a common name. In theory, at least, the members of the same *gens* were descended from a common ancestor, and the families of the *gens* were subdivisions of the same ancestral stock, but both individuals and groups were occasionally admitted from outside. A pure unspotted pedigree was claimed by every member of a *gens*,* and there was a theoretical equality among all the members of the whole tribe. The heads of the different families in these *gentes* met together in a great council, called the council of the curies (*comitia curiata*). A smaller body of three hundred, answering in number to the *gentes* in each of the three tribes, and called the Senate, was charged with the office of initiating the more important questions submitted to the great council; and a king, nominated by the senate, but chosen by the curies,† presided over the whole body, and was charged with the functions of executive government.

*Religious System.*

3. The *populus* was also bound together by strong religious ties. The religion of Rome was intimately connected with the civil polity. The heads of religion were not a priestly caste, but were citizens, in all other respects like their fellows, except that they were invested with peculiar sacred offices. The king was at the head of the religious body; and beneath him were augurs and other functionaries of the ceremonies of religion. The whole body of the *populus* had a place in the religious system of the State. The mere fact of birth in one of the *familiæ* forming part of a *gens* gave admittance to a sacred circle which was closed to all besides. Those in this circle were surrounded by religious ceremonies from their cradle to their grave. Every important act of their life was sanctioned by solemn rites. Every division and subdivision of the State to which they belonged had

* *Gentiles sunt, qui inter se eodem nomine sunt; non est satis: qui ab ingenuis oriundi sunt; ne id quidem satis est: quorum majorum nemo servitutem servivit: abest etiam nunc: qui capite non sunt deminuti.*—Cicero, *Topic.* 6.

† *Quirites, regem create; ita Patribus visum est.*—Liv. i. 17. Mommsen argues from the analogy of the mode in which the magistrates who replaced the king were appointed, that the king must have been nominated by his predecessor (*Hist. Rome*, Dickson's Trans., i. 65).



its own peculiar sacred ceremonies. The individual, the family, the *gens*, were all under the guardianship of their respective tutelary deities. Every locality with which they were familiar was sacred to some patron god. The calendar was marked out by the services of religion; the pleasure of the gods arranged the times of business and leisure; and a constantly superintending Providence watched over the councils of the State, and showed, by signs which the wise could understand, approval of, or displeasure at, all that was undertaken.

*The Plebs.*

4. By the side of this associated body there was another element of the State, occupying a position very different from that which was occupied by this privileged community. The *plebs* was probably formed by the inhabitants of conquered towns being brought to Rome, by the influx of voluntary settlers, and by freedom being accorded to slaves.* The plebeians were in a position of dependence on the king or on members of the *populus*, and were, as strangers, outside the political circle of members of the *gentes*. They belonged to no *gens*, had no place in the *comitia*, no share in the legislative or executive government: as little had they any share in the *jus sacrum*. They were as much excluded from the pale of the peculiar divine law as from that of the peculiar public law of the ruling body. Even the Servian constitution, and the formation of the thirty local tribes, laid the foundation of future change, rather than altered in early times the basis on which existing institutions were founded. The centuries opened to the *plebs* a door to political power by making the two orders meet on the common ground of a graduated scale of property; and the constitution of the thirty tribes marked off the inhabitants of the town and country into small local divisions, in the *comitia* of which the *plebs* had of course the preponderance, if it is to be supposed that the tribes had any recognised *comitia* before the institution of tribunes at the beginning of the Republican period. But though the *comitia centuriata* took away ultimately almost all political power from the *comitia curiata*, still the old relations of the different members of the body politic remained, in theory at least, long unimpaired. The curies alone could give the religious sanction which was indispensable to the validity of the resolutions of the centuries, and the *plebs* was as much as ever excluded from admission into the body of the *popu-*

* Mommsen considers that the plebeians were simply the *clientes*, looked at as deprived of political rights (*Hist. Rome*, Dickson's Trans., i. 90).

*lus*, fenced round with its impassable wall of religious privileges, although the *plebs* and the *populus* were governed for the most part by the same rules of private law.

*Legislation in early Rome.*

5. There could be very little direct law-making, except to meet temporary emergencies, in such a community as early Rome. What laws were made, were first proposed, arranged, and determined on by the Senate, under the guidance of its chief magistrate, the king, and then submitted to the highest source of power, the *comitia curiata*. After the institution of the centuries, the *comitia centuriata* gradually succeeded to the political power of the *curiata*, and the curies only met to give a formal religious sanction to the resolutions of the centuries. The king published regulations on matters that fell exclusively within his province as *pontifex maximus*, and a collection of these *leges regiæ*, which were probably nothing more than by-laws for the conduct of religious ceremonies, was made, or said to be made, by Papirius, who lived in the time of Tarquinius Superbus.*

*Judges.*

6. The king was the supreme judge in all cases. But if, in a criminal trial, the accused was a member of the *populus*, he could appeal from the king to the *comitia curiata*. If the accused was a plebeian, he had no tribunal to which he could appeal, until, shortly after the expulsion of the kings, the Valerian laws (B.C. 508) transferred appeals to the *comitia centuriata*, of which the *plebs* formed a part. Civil causes were decided by the king in his quality of *pontifex maximus* or by the subordinate *pontifices* acting under him, as all the private law of the *populus* was so mixed up with the sacred law, that it was part of the duty of a *pontifex* to know and guard its provisions.†

*Position of the Plebs after the expulsion of the Kings.*

7. After the expulsion of the kings the plebeians were admitted to the *comitia curiata* and the Senate, and were allowed, within limits which practically were very narrow, to form *gentes* of their own.‡ But the old antagonism remained, and the struggle between the *plebs* and the *populus* became gradually more and more serious. Besides the right of appeal to the centuries secured by the *lex*

* There is no reason to doubt that Papirius was a real person (DIONYS. ii. 36). But when Pomponius speaks of his collection as the *jus civile Papirianum* (D. i. 2. 2. 2), he probably uses the term not with reference to the real work of Papirius, but to a work composed towards the end of the republic by Granius Flaccus, *De Jure Papiriano* (D. l. 16. 144).

† D. i. 2. 2. 6.

‡ Mommsen, *Hist. Rome* (Dickson's Trans.), i. 267.



*Valeria* in every case when a citizen was condemned to death, the secession to the Aventine in B.C. 493 wrung from the *patres* the extinction of existing debts, and the creation of tribunes, at first two in number, then five, and afterwards ten, to defend the *plebs*. These champions of the lower order of the State gave great additional importance and a new character, or perhaps a beginning, to the *comitia tributa*, which now had to elect magistrates, who were protected themselves by a sacred character, and were specially commissioned to maintain the interest of their fellow-tribesmen. But the *plebs* had to struggle with an evil which no partial remedies could meet. There was no body of laws to which they could appeal in case they were wronged. The whole administration of the laws was in the hands of the patricians, and there was no appeal from the decision of the magistrate except in cases where life was at stake, or unless the injury, inflicted by wilful perversion of the law, was great enough, as in the memorable instance of Virginia, to rouse the wronged to the redress of physical force. Many of the rights which theoretically belonged to the plebeians as having the same private law with the *populus*, were practically denied them. At last, a successful revolution enabled the *plebs* to insist on a changed form of political government, which might open the door of power and office to the members of their own body, and supply a machinery for the preparation of a fixed and permanent body of law. The Decemvirate, superseding and incorporating into itself every other magistracy, and composed of an equal number of patricians and plebeians, was formed (B.C. 451) for the purpose of collecting and embodying in the shape of written law all those portions of the customary law which it was most essential for the due administration of justice to place on an indisputable footing, and publish for the benefit of the whole body of citizens.

*The Twelve Tables.* B.C. 450.

8. The lavish praises bestowed on the laws of the Twelve Tables by the later writers of Rome, and the story of the deputation sent to learn the laws of Greece, would give us an idea of a very different body of laws from that which these Tables actually presented. We should expect to find a systematic exposition of Roman public and private law as it existed in the times previous to the Gallic invasion; and to find, also, that the whole body of law was at least coloured by the infusion of a foreign element. We should naturally think that there was something new and original in a legislation which

Cicero considers as almost the perfection of human wisdom.* The fragments of the Twelve Tables which remain to us show how erroneous are these conceptions of their contents. There is nothing whatsoever which we can decidedly pronounce to be borrowed from a foreign origin, except possibly some provisions respecting the law of funerals, taken from the laws of Solon. These Tables contained, for the most part, short enunciations of those points of law which the conduct of the affairs of daily life required to be settled and publicly announced. The law had existed before, but in a floating, vague, traditionary shape, only some very few laws having been engraved on tablets and publicly displayed. The Twelve Tables left to the decision of the magistrate, and the interpretation of those skilled in law, the application and exposition of these principles; they also left many parts of the customary law wholly untouched on. But what the exigencies of the time required deciding, they decided; and they laid a firm foundation on which the structure of private law would rest for the future. It is not difficult to understand how this was esteemed so great a gain to the large body of the citizens, that these laws were spoken of by the ancients as the creations of a new legislation.

The following are the chief provisions of the Twelve Tables, so far as they are known.†—1. The First Table related to the proceedings in a civil suit. If the person summoned before the magistrate would not come, he was to be forced to go, but for an old or sick man a beast of burden was to be provided. If the adversaries could agree on the way, they were to be allowed to do so. If not, the statements of both were to be heard before midday in the Comitium or the Forum, and then, after midday, the magistrate was to adjudge the thing, but every process was to be stopped at sunset. 2. The Second Table fixed the amount to be deposited in the action by wager, and provided that the affair might be put off if necessary, as if, among other things, the judge or arbiter appointed by the magistrate was ill; and pointed out how witnesses might be summoned. 3. The Third Table was apparently made in favour of debtors, for though it left them ultimately at the mercy of the creditor, it gave them new means of averting their

* See especially *De Orat.* i. 43, 44.

† This summary is taken from the arrangement of the supposed contents of the Twelve Tables adopted by Ortolan; but in many points, and especially in the assignment to a particular Table of a fragment, this arrangement is necessarily conjectural.



fate. They were to have thirty days before any steps could be taken against them on a debt confessed or decided to be due. They might then be brought before a magistrate, and unless payment was made or a surety (*vindex*) found, the creditor might put them in irons, but not of more than fifteen pounds weight, and must give them a pound of flour a day. This could last for sixty days only, and the debtor had meanwhile to be produced before the magistrate to show he was alive; and notice of the amount of the debt must be given on three market-days by the creditor, so that an opportunity of ransoming the debtor might be given. Then, but not till then, the debtor was at the mercy of the creditor, who could sell him as a slave beyond the Tiber or kill him, and if there were several creditors, they might hew him in pieces, and although any of them took a part of his body larger in proportion than his claim, he was not to be punished. 4. The Fourth Table referred to the father of the family, who was bidden to destroy deformed children, and whose absolute power over the life and liberty of his children was established, while it was provided that if he sold his son three times, the son should be freed from his power. 5. The Fifth Table related to inheritances and tutorships. Women were to be in perpetual tutorship, except the vestal virgins. As a man disposed by testament, so was the law to be; but if he died intestate, and without a *suus heres*, his nearest *agnati*, or, in default of *agnati*, the *gentiles*, were to take. In default of appointment by testament, the *agnati* were to be tutors, and have the custody of madmen who had no curators. 6. The Sixth Table referred to ownership, and provided that the words spoken in the solemn form of transfer, a *nexum* or *mancipium*, should be held binding; that he who denied them should pay double; that two years' possession for immoveables, and one for moveables, should be the time necessary for usucapion, and that a year should suffice for the usucapion of a wife by her husband, unless she absented herself for three consecutive nights in the time; that no one not a Roman citizen should acquire by usucapion; and that materials built into a house should not be reclaimed by their owner, at least until the building was taken or fell down. The property in a thing sold was not to pass to the purchaser until the vendor was satisfied. The fictitious suit for the transfer of property called *in jure cessio*, and mancipation were confirmed. 7. The Seventh Table contained provisions as to buildings and plots of land, as to the width of way to be left,

as to overhanging trees, and so forth; and in case of disputes as to boundaries, the magistrate was to appoint arbitrators. 8. The Eighth Table dealt with delicts. It prescribed capital punishment for libellous songs and outrages. A limb was to be given for a limb, three hundred *asses* for the breaking of a bone of a free man, and one hundred and fifty for the breaking of a bone of a slave; for an injury or minor outrage, twenty-five *asses;* a four-footed beast doing injury might be given up to whomsoever it injured, in lieu of compensation. The nocturnal devastation of crops or the incendiarism of a building was punished with death. Theft, if the thief was caught red-handed, was to be punished by the thief, if a freeman, being beaten and given over to the person robbed, and, if a slave, by his being beaten and thrown from the Tarpeian Rock; while various other provisions were made as to theft, fixing minor penalties, where the circumstances were not so grave. The rate of interest was fixed at one per cent. per month (*centesimæ usuræ*), and the usurer who exceeded this was to be fined quadruple. The false witness was to be thrown from the Rock, and the witness in a solemn form who refused his testimony was to be infamous; and the enchanter and poisoner were to be punished capitally. 9. The Ninth Table related to public law, and provided that there were to be no *privilegia*, or laws affecting individuals only; that the centuries alone could pronounce capital sentence; that the judge or arbiter taking a bribe should be punishable capitally; that there should be an appeal to the people from every penal sentence; and that death should be the punishment of leaguing with, or handing over a citizen to, the enemy. 10. The Tenth Table related to funerals, limiting the ceremonies and display attending them. 11. The Eleventh Table prohibited the marriage of patricians and plebeians; and 12. The Twelfth Table had reference to some miscellaneous matters; as that a slave who had done an injury might be abandoned to the person injured, in lieu of compensation. The seizure of anything belonging to the debtor (*pignoris capio*) was permitted when the debt had been contracted, or the sum due was to be expended, for sacrificial purposes.

It will be observed that the Twelve Tables recognise four of the actions of law, the nature of which will be noticed in a later part of the Introduction, viz., *sacramentum, judicis postulatio* (in the shape of the arbitration to be given to settle boundaries), *manus injectio*, and *pignoris capio*. They further recognise the



distinction between the magistrate and the *judex*, which was the characteristic feature of Roman procedure; and probably these actions of law and this distinction between the judge and the magistrate date from a time much earlier than the Twelve Tables. Most, too, of the characteristic points of Roman civil law are to be found in the Twelve Tables. The *patria potestas*, usucapion, tutelage, testamentary and intestate succession, the *nexum, mancipatio*, all are enforced, and evidently formed part of the ancient customary law of Rome.

*The attainment of political equality by the Plebs.*

9. The Decemvirate was nominally intended to be a means of removing, as far as was then thought possible, the political distinction between the orders. How little the object was really accomplished is notorious. Although half the decemvirs were plebeians, the suppression of the meetings of the *comitia tributa*, and the loss of tribunes, were poorly compensated by the presence of magistrates who acted in conjunction with patricians, and readily yielded deference to their colleagues. Besides, the Two Tables added in the year of the second Decemvirate contained provisions which later writers considered manifestly unjust;* and we have seen that, among other things, they expressly refused the *connubium* to the *plebs*. The Twelve Tables, as fixing and proclaiming the law, were undoubtedly a source of great strength to the plebeians, and enabled them to maintain a much more secure position in their future struggles; but the Decemvirate, regarded as a crisis in their political history, was certainly unfavourable to them. Nothing shows more completely that this was so than the progress they made immediately after the downfall of Appius Claudius and his colleagues. The laws of Horatius and Valerius not only forbad the constitution of any magistracy from which there should be no appeal, but provided that the ordinances of the *comitia tributa* should, if sanctioned by the senate and the curies, be binding on all Roman citizens; and in B.C. 444, only four years after the abolition of the Decemvirate, the Canuleian law gave the *connubium* to the *plebs*, and the marriage of a patrician with a plebeian was no longer forbidden by law. This change was important, not only as removing a distinction mortifying to many individuals and embarrassing many of the relations of private life, but as breaking through one of the barriers which the *jus sacrum* had hitherto

* Cic. *De Rep.* ii. 37

interposed in the way of the *plebs*.* The obstacle of a religious disqualification was the reason generally assigned by the *populus* for the exclusion of plebeians from public offices;† and it was a great step towards political equality that the objection urged to marriages between the two orders—that it would disturb the *sacra* of the *gentes*—should be overcome. The advance of the *plebs* to political equality was, however, very slow; and it was not until a century and a half had elapsed from the passing of the Canuleian law that the two orders were placed on an equal footing. We may take the year B.C. 287, the date of the *lex Hortensia*, as the period when we can first pronounce that the distinction of the two orders was really done away. When that law had been passed, the plebeian had a full share in the *jus publicum* and the *jus sacrum*. The ordinances of the *comitia tributa* required no confirmation of the curies, no sanction of the senate; they were binding on the whole Roman people directly they were passed. The equality between the two orders was so complete that the plebeian could become consul, censor, prætor, curule ædile; he could enter the senate, he could administer justice; he was excluded from none of the privileges of the *jus sacrum*; he could become pontifex and augur; and though he could not of course take part in any of the *sacra* belonging to particular *gentes*, go through certain religious ceremonies, or be engaged in the service of particular gods, these exceptions did not lower his political position. As far as the history of law is concerned, we may henceforward lose sight of the distinction between plebeian and patrician.

*The jus civile.*

10. From the writings of the later jurists, and especially from those of Gaius and Cicero, and from the fragments of the Twelve Tables that have come down to us, we can collect the essential features of the private law of Rome in its earliest period, before a general advance in civilisation had modified it. This early law, which rested on custom as its foundation, and the elements of which, except so far as appeared in the laws of the Twelve Tables, were only known by tradition, was called in subsequent times the *jus civile*, the peculiar law of the Roman State. The history of Roman law is the history of the changes introduced

* *Ideoque decemviros connubium diremisse, ne incerta prole auspicia turbarentur.*—Liv. iv. 6.

† *Interroganti tribuno, cur plebeium consulem fieri non oporteret? . . . respondit, quod nemo plebeius auspicia haberet.*—Liv. iv. 6.



into this law, of the additions made to it, and of the method adopted in the process. The notion of a body of customary law, in part unwritten, which was not abrogated, but was evaded or amplified by persons acting under the ideas of later times, is the notion which, above all others, must be embraced clearly by any one who wishes to understand Roman law. The *jus civile* must always be taken as the starting point, and in tracing the history of the later law we have always to trace how, while the *jus civile* still remained in force, the law was made to suit the requirements of different periods by evading or adding to the *jus civile*. It was only in the later days of the Empire that the *jus civile* began to be swept away. When we come to speak of the contents of Roman private law, we shall have occasion to notice what were the leading features of the *jus civile*. We need not at present do more than say that, when a student of Roman law has made himself acquainted with its elementary doctrines, he will find that the chief of these peculiar principles, dating from an unknown antiquity, and affecting the whole body of later jurisprudence, are those which determine the position of a father of a family, the succession to his estate, and the contracts and actions relating to the chief possessions of an agricultural proprietor.

*Conquest of Italy.*

11. The conquest of Italy and the gradual spread of Roman conquest materially altered the character of the legal system. A branch of law almost entirely new sprang up, which determined the different relations in which the conquered cities and nations were to stand with reference to Rome itself. As a general rule, and as compared with other nations of antiquity, Rome governed those whom she had vanquished with wisdom and moderation. Particular governors, indeed, abused their power; but the policy of the State was not a severe one, and Rome connected herself with her subject allies by conceding them privileges proportionate to their importance or their services. The *jus Latinum* and the *jus Italicum* are terms familiar to all readers of Roman history. The first expressed that, with various degrees of completeness, the rights of Roman citizenship were accorded to the inhabitants of different towns, some having the *commercium* only, some also the *connubium*; but after the Social War (B.C. 90), the *lex Julia* (B.C. 90) and the *lex Plautia* (B.C. 89) gave the full rights of citizenship to Italy below the Po, and the Italians were distributed among the thirty-five tribes. The *jus Italicum* expressed a certain amount of

municipal independence and exemption from taxation, attached to the different places on which the right was bestowed. The citizens of some particular places in Italy above the Po and in the provinces possessed what was termed *Latinitas*, i.e. the *status* of being a Latin, and those possessing *Latinitas* were termed *Latini coloniarii*. They had the *commercium*, but not the *connubium*, and therefore their children were not in their power, and they could not vote for or fill public offices; and the *jus Italicum* was attached to certain privileged cities; but the provinces generally had no participation in either right. They were subject to a proconsul or proprætor, paid taxes to the treasury of Rome, and had as much of the law of Rome imposed upon them, and were made to conform as nearly to Roman political notions, as their conquerors considered expedient.*

*Change in Roman Law under the Prætors.*

12. But the contact of Rome with foreign nations produced a much more remarkable effect on Roman law than the introduction of a new branch of law regulating the position of subject nations. It wrought, or at least contributed largely to work, a revolution in the legal notions of the Roman people. It forced them to compare other systems with their own. In the language of the jurists, it brought the *jus gentium*, that is, the law ascertained to obtain generally in other nations, side by side with the *jus civile*, the old law of Rome. The *prætor peregrinus*, who was appointed (B.C. 246) to adjudge suits in which persons who were not citizens were parties, could not bind strangers within the narrow and technical limits in which Romans were accustomed to move. Many of the most important parts of Roman law were such that their provisions could not be extended to any but citizens. No one, for instance, except a citizen, could have the peculiar ownership termed *dominium ex jure Quiritium*. But when justice and reason pronounced a stranger to be an owner, it was impossible for a prætor not to recognise an ownership different from that which a citizen would claim; and what magistrates were obliged to do in the case of strangers, the requirements of advancing civilisation soon induced them to do in the case of citizens. They recognised and gave effect to principles different from those of the municipal law of Rome. This municipal law remained in force wherever its provisions could give all that was required to do substantial justice; but when they could not, the prætor appealed to a wider law, and

* See WARNKŒNIG, *Hist. du droit romain externe*, p. 70. SAVIGNY, *Geschichte d. röm. Rechts*, vol. i. ch. 2.



sought in the principles of equity a remedy for the deficiencies of the *jus civile*. He pronounced decrees (*edicta*), laying down the law as he conceived it ought to be, if it was to regulate aright the case before him. In process of time it became the custom for the prætor to collect into one *edictum* the rules on which he intended to act during his tenure of office, and to publish them on a tablet (*in albo*) at the commencement of his official year. The edict, put forward at the beginning of the year of office, and running on from one prætor to another, was termed the *edictum perpetuum*. How much the prætor was aided in the formation of a broader and more comprehensive system of law by a change in the form of actions, will appear when we come to speak of the system of civil process. By degrees such a system was introduced and fully established, and the *jus honorarium*, the law of the prætors * (*qui honores gerebant*), was spoken of as having a distinct place by the side, and as the complement, of the *jus civile*.

The prætors gave the formula of an action to the judge. For many centuries senators alone were judges until the *lex Sempronia* (B.C. 123) took away the right of being judges from the senators, and gave it to the knights. After a series of contests the right was shared by the two orders, and extended even to persons of inferior rank, so that the 300 of the senatorial times had become 4000 by the time of Augustus. Besides the judges placed on the annual list (*in albo relati*) there were the *recuperatores*, who at first were appointed to determine causes to which *peregrini* were parties, but at a later period had jurisdiction in the causes of citizens. They were taken from every rank for the special occasion, sat three or more together, and were used in cases requiring despatch. And there were also the *centumviri*, taken so many from each tribe, and who judged of cases of *status*, Quiritary property, and testamentary and intestate succession.

*The judges.*

13. The progress of law was also much facilitated by the growth of a body of men termed *juris consulti* or *juris prudentes*, men who studied the forms and, in time, the principles of law, and expounded them for the benefit of their friends and dependents. They were generally among the first men of the State, and the employment was considered a natural part of a life of public service and magisterial honours.

*The juris prudentes.*

* The term also included the edicts of the ædiles, who issued decrees in matters that came specially within their province.

In the earlier times of the republic the patricians alone knew the days on which it was or was not lawful to transact legal business, and the forms in which actions were to be brought. The story of the publishing of a collection of these forms, and of a list of the days on which business could be transacted, by Cneius Flavius, is familiar to all readers of Livy.* But although to a certain extent the study of the law became open to all, whether patricians or plebeians, yet it does not seem to have been ever undertaken except by men of eminence. Such men used to instruct and protect the persons who sought their advice, explain the steps necessary for the successful conduct of an action, and write out the necessary forms.† They gave answers when asked as to the law on a particular point; and though they professed only to interpret the Twelve Tables, not to make laws, their notion of interpretation was so wide that it included whatever could be brought within the spirit of anything which the Twelve Tables enacted. Such answers (*responsa*) were of course of no legal authority; but as the sage would frequently accompany his client‡ (as the questioner was called) before the magistrate, and announce his opinion, it had frequently all the effect upon the magistrate which a positive enactment would have had, and thus the *responsa prudentum* came to be enumerated among the direct sources of law. The names of some of these sages have been handed down to us. Cato the censor, and Severus Sulpicius, the contemporary of Cicero, are those otherwise best known to us.§ In the latter days of the republic the *juris prudentes* were men acquainted with some portion at least of Greek philosophy, men of learning and general cultivation; and it is not difficult to understand how powerfully their authority, acting almost directly on judicial decisions, must have contributed to the change which the law underwent towards the end of the republic.

*The law of nature.*

14. By far the most important addition to the system of Roman law which the jurists introduced from Greek philosophy, was the conception of the *lex naturæ*. We learn from the writings of Cicero whence this conception

* Liv. ix. 46.

† The duty of a jurisprudent was *respondere, agere, cavere.*—Cic. *de Orat.* i. 48.

‡ *Clienti promere jura.*—Hor. *Epist.* Bk. ii. Ep. i. 104. *Cliens* means literally 'a listener'.

§ Gibbon, viii. 81.



came, and what was understood by it.* It came from the Stoics, and especially from Chrysippus. By *natura*, for which Cicero sometimes substitutes *mundus*, was meant the universe of things, and this universe the Stoics declared to be guided by reason. But as reason is thus a directive power, forbidding and enjoining, it is called law (*lex est ratio summa insita in natura, quæ jubet ea quæ facienda sunt, prohibetque contraria*). But nature is with the Stoics both an active and a passive principle, and there is no source of the law of nature beyond nature itself. By *lex naturæ*, therefore, was meant primarily the determining force of the universe, a force inherent in the universe by its constitution (*lex est naturæ vis*). But man has reason, and as reason cannot be twofold, the *ratio* of the universe must be the same as the *ratio* of man, and the *lex naturæ* will be the law by which the actions of man are to be guided, as well as the law directing the universe. Virtue, or moral excellence, may be described as living in accordance with reason, or with the law of the universe. These notions worked themselves into Roman law, and the practical shape they took was that morality, so far as it could come within the scope of judges, was regarded as enjoined by law. The jurists did not draw any sharp line between law and morality. As the *lex naturæ* was a *lex*, it must have a place in the law of Rome. The prætor considered himself bound to arrange his decisions so that no strong moral claims should be disregarded. He had to give effect to the *lex naturæ*, not only because it was morally right to do so, but also because the *lex naturæ* was a *lex*. When a rigid adherence to the doctrines of the *jus civile* threatened to do a moral wrong, and produce a result that was not equitable, there the *lex naturæ* was supposed to operate, and the prætor, in accordance with its dictates, provided a remedy by means of the pliant forms of the prætorian actions. Gradually the cases, as well as the modes in which he would thus interfere, grew more and more certain and recognised, and thus a body of equitable principles was introduced into Roman law. The two great agents in modifying and extending the old, rigid, narrow system of the *jus civile* were thus the *jus gentium* and the *lex naturæ*; that is, generalisations from the legal systems of other nations, and morality looked on according to the philosophy of the Stoics as sanctioned by a law.

* The most important passages in Cicero with reference to the *lex naturæ* are *De Leg.* i. 6-12; *De Nat. Deor.* i. 14, ii. 14. 31; *De Fin.* iv. 7. The expressions used in the text are from *De Leg.* i. 6.

But as, on the one hand, the generalisations from experience had in themselves no binding force, and as, on the other, the best index to ascertain what morality commanded was to examine the contents of other legal systems, the *jus gentium* and the *lex naturæ* were each the complement of the other, and were often looked on by the jurists as making one whole, to which the term *jus gentium* was generally applied.*

*Sources of legislation.*

15. The centuries met to decide questions of war and peace, and to choose the higher magistrates; but the laws which, after the *lex Hortensia*, were passed to effect any real change in the body of Roman law, were almost all *plebiscita*. The *comitia tributa* were recognised as almost the exclusive centre of legislative power; but in the later times of the republic a continually increasing importance was attached to the ordinances of the senate. Gaius says that it had been questioned whether the *senatusconsulta* had the force of law.† Perhaps they had not exactly the force of law at any time under the republic, excepting when they related to matters which it was the peculiar province of the senate to regulate; but they were probably of little less weight than enactments recognised as constitutionally binding. The senate successfully maintained a claim‡ to exercise a dispensing power, and to release individuals from obedience to particular laws. It was generally able to reject a law, either wholly or partly, by calling in the aid of religious scruples; and if it added a clause to a law, the new portion of the law was as binding as the old.§ In the shape of directions to particular magistrates, it issued injunctions, of which the force was felt by all those who were subject to the magistrate's power; and it made, we have reason to think, independent enactments in matters belonging to religion, police, and civil administration, and perhaps even in matters of private law.‖ The senate comprised the richest and most influential men in the State; the disruption of society attending the civil wars strengthened their influence; and the Romans of the days of Cicero were quite prepared for the place which the senate held, as a legislative body, under the early Cæsars.

*Plebiscita.*

*The Senate.*

* See AUSTIN, *Jurisprudence*, Lect. XXX. and XXXI.

† Cicero mentions them among the sources of law.—*Topic.* 5.

‡ ASCON. *Argum. in Cornel.* (Orell. p. 57).

§ ASCON. *Enarratio Cornel.* (Orell. p. 67).

‖ PUCHTA, *Instit.* sec. 75.



The growth of law during the time that elapsed between the promulgation of the Twelve Tables and the commencement of the empire is marked not only by the abolition of the actions of law and the institution of prætorian actions, but by the development of the law of obligations, the old conveyance of *nexum* having expanded into, or been replaced by, verbal and literal contracts, and real contracts being recognised where no form but the delivery of the thing was required; and four forms of purely consensual contracts being admitted as part of the civil law; to all which the prætor constantly added cases in which he announced that he would recognise and enforce an obligation. The prætor, too, protected and regulated possession as apart from ownership; and his attention was bestowed on the ties of blood, the father being to some extent restrained from disinheriting his children, and *cognati* taking the place of *gentiles* in intestate succession.

*The Emperor.*

16. The first emperors were only the chief magistrates of the republic. Augustus and his immediate successors united in their own persons all the highest offices of the State. The *imperium*, or supreme command, was conferred on them by the *lex regia* passed as a matter of form at the beginning of their reign, and by which the later jurists supposed that the people devolved on the emperor all their own right to govern and to legislate.* The assumption of despotism was veiled under an adherence to republican forms; and, at any rate during the first century of our era, the emperor always affected to consider himself as nothing more than the *princeps reipublicæ*. Although we have instances, even in the time of Augustus, of edicts intended to be binding by the mere authority of the emperor, yet the people at first, and the senate afterwards, was recognised as the primary source of law. By degrees the emperor usurped the sole legislative authority, either dictating to the senate what it was to enact, or, in later times, enacting it himself. The will of the prince came to have the force of law.† Sometimes this will decided what the law should be by the publication of *edicta* pronounced by the emperor in his magisterial capacity, or *mandata*, orders directed to particular officers, or *epistolæ*, addressed to individuals, or public bodies; sometimes by *decreta*, or judicial sentences given by the emperor, which served as precedents; at other times by *rescripta*, that is, answers given

* D. i. 4. 1.

† *Inst.* i. 2. 6: *Quod principi placuit legis habet vigorem.*

by the emperor to magistrates who requested his assistance in the decision of doubtful points.

*Laws.*

17. The people did not cease to make laws for a considerable time after the commencement of the empire.* These laws were, of course, really the creations of the emperor's will. Augustus, for instance, procured the sanction of legislation to a series of measures which made a considerable innovation in private law. These measures were designed to repress and discourage the excesses and corruption of a demoralised society. The *lex Julia et Papia Poppæa* (A.D. 9), and others of a similar character, attempted to restore virtue to private life by a system of rewards and penalties, attached to the fulfilment or neglect of family duties, and consisting chiefly in the taking away of testamentary benefits from the unmarried and childless, and giving them to those married with children, and, in default, to the treasury. They failed in their object; but the portion of law to which they belonged, and especially that of testaments and legacies, was considerably modified by their provisions. To the time of Augustus also belongs the introduction of *fideicommissa* and codicils.

*The Senate.*

18. After the middle of the first century of our era, all legislative enactments of which we know are *senatusconsulta*. The election of magistrates was transferred to the senate from the *comitia*,† and the senate was entrusted with the cognisance of offences against the emperor and the State, and the decision of appeals from inferior tribunals.‡ The later jurists said that the senate was made to represent the whole people, because the number of the citizens became too great to permit of their acting as a political body.§ However historically false this may be, it yet is so far true that the senate was, in the earlier times of the empire, a body distinct from, and, in a certain very limited degree, opposed to, the emperor. We have some few memorable instances in Tacitus of senators who dared to speak what they thought,‖ and who showed that the senate was, in more than name, a remnant of the republic. Gradually the very notion of independent action died away, and the senate met merely to adopt the will of its master.

* GAIUS mentions a *lex Claudia*.—GAIUS, i. 157.

† TACIT. *Annal.* i. 15.

‡ SUET. *Calig.* 2. *Nero*, 17. TACIT. *Annal.* xiii. 44.

§ *Inst.* i. 2. 5. POMPONIUS in *Dig.* i. 2. 2. 9. PUCHTA, *Inst.* sec. 106.

‖ TACIT. *Hist.* iv. 8.



*The Prætor's edict.*

19. The *edictum perpetuum*, the annual edict of the prætor, as being the written exposition of the *jus honorarium*, was the subject of many of the treatises of the Roman jurists. In the time of Hadrian, a jurist of great eminence, Salvius Julianus, was appointed by the emperor to draw up an edict, partly from existing edicts, partly according to his own opinion of what was necessary, which should serve as the guide and rule of all succeeding prætors. The edict which he drew up, and to which the sanction of Hadrian gave the force of law, was itself termed the *edictum perpetuum*, the word *perpetuum*, instead of meaning, as before, that the edict ran on from year to year, being used to express that the edict was permanent and unchangeable. The different magistrates, who had to apply the edict, would thenceforward use their own discretion only when the edict drawn up by Julianus did not serve as an express authority.

*The jurists.*

20. The writings of the jurists, the authority attached to their decisions, and the admirable manner in which they developed and arranged the law, formed the most marked feature of the legal history of this period. Augustus found the position which the great sages of the law held in public opinion too important a one to be overlooked in his scheme of government. He formally gave to their decisions the weight which usage had in many instances given them already; and it was enacted that their answers should be solicited and announced in a formal manner, and given under the sanction of the emperor. Hadrian decided that they should have the force of law, provided the respondents all agreed in their answer; but, if they differed, the judge was at liberty to adhere to whichever opinion he preferred.* Among the eminent jurists of the days of Augustus was Trebatius, whose opinion, as the Institutes tell us, was specially asked by Augustus as to the propriety of admitting codicils. Two others, of even higher authority,

*Schools of Labeo and Capito.*

Antistius Labeo and Ateius Capito, represented in the same period two opposite modes of regarding law, and were the founders of schools which maintained and handed down their respective opinions. Labeo, in whom a wider culture had instilled a love of general principles, did not hesitate to make such innovations as he conceived reason and philosophy to require: Capito was distinguished by the fidelity with which

* GAIUS, i. 7.

he adhered to the law as he had himself received it.* A succession of jurists of greater or less renown divided themselves under the banners of these rival authorities. But the schools of which Labeo and Capito were the first authors did not derive their names from their founders. The one school was termed Proculians, after Proculus, a distinguished follower of Labeo; the other Sabinians, after Sabinus, a follower of Capito. Gaius, who informs us that he was a Sabinian, gives the differing opinions of the two schools on many subtle questions of law. By the labours of this succession of jurists, the law was moulded and prepared until it came into the hands of the five great luminaries of Roman jurisprudence—Gaius, Papinian, Paul, Ulpian, and Modestinus, whose writings, as we shall see, were subsequently made a distinct and special source of law.

*Gaius.*

21. Gaius, or Caius, as the name is sometimes written, was probably born in the time of Hadrian, and wrote under the Antonines. Of his personal history nothing is known. He himself tells us that he was an adherent of the school of Sabinus. Besides other works which he is known or supposed to have written, he composed a treatise on the *edictum provinciale* (the edict of the proconsul in the provinces) and a commentary on the Twelve Tables. But the work by which he is best known to us is his Institutes. The discovery of the manuscript of this work by Niebuhr in 1816 has contributed greatly to the modern knowledge of Roman law. The manuscript had been written over with the letters of St. Jerome, and its existence was almost entirely unknown until Niebuhr brought it to light while examining the contents of the library of the Chapter at Verona. The Institutes of Gaius formed the basis of those of Justinian, who has followed the order in which Gaius treats his subject, and adopted his exposition of law, so far as it was applicable to the times in which the Institutes of Justinian were composed. The work of Gaius, therefore, showing us what was common to the two periods, and also where the law had changed, enables us to understand what the change was, and what the law had really been at the time when its system was most perfect.

22. Æmilianus Papinianus was the intimate friend of the

* *Ateius Capito in his, quæ ei tradita fuerant, perseverabat. Labeo ingenii qualitate et fiducia doctrinæ, qui et cæteris operis sapientiæ operam dederat, plurima innovare instituit.*—*Dig.* i. 2. 2. 47.



Emperor Septimius Severus, and held under him the office of prætorian præfect, which had now become equivalent to that of supreme judge. He probably accompanied Severus into Britain, and was present at the emperor's death at York in A.D. 211. Severus commended his two sons, Geta and Caracalla, to his care. Caracalla dismissed Papinian from his office; and, after his murder of Geta, is said to have required Papinian to compose his vindication. Papinian refused, and was executed by the orders of Caracalla. He was considered the first and greatest of jurists, and every epithet which succeeding writers could devise to express wisdom, learning, and eloquence, was heaped on him in profusion. We know, from the Digest, of his Books of Questions, Books of Answers, and Books of Definitions. The fragments of his works which we possess amply justify his eminent reputation.

*Papinian.*

23. Paul, Ulpian, and Modestinus are all said to have been pupils of Papinian. Julius Paulus was a member of the imperial council and prætorian præfect under Alexander Severus (A.D. 222). Besides numerous fragments in the Digest, we possess his *Receptæ Sententiæ*, which was long the chief source of law among the Visigoths in Spain. The most celebrated of his works, which were very numerous,* was that *Ad Edictum* in eighty books.

*Paul.*

24. Domitius Ulpianus derived his origin, as he himself tells us, from Tyre in Phœnicia.† He wrote several works during the reigns of Septimius Severus and Caracalla, and perished (A.D. 228) by the hands of the soldiers, who killed him in the presence of the emperor, Alexander Severus. He was prætorian præfect at the time of his death, but the exact time when he was first appointed to the office is unknown. The Digest contains a greater number of extracts from his writings than from those of any jurist. Besides these extracts, we also possess fragments of his composition in twenty-nine titles, known by the name of the *Fragmenta Ulpiani*.

*Ulpian.*

25. Herennius Modestinus was the pupil of Ulpian as well as of Papinian. He was a member of the imperial council in the time of Alexander Severus, but hardly anything is known of his history. One of the best known of his writings is the *Excusationum Libri*. We have nothing remaining

*Modestinus.*

* We know the names of more than seventy, embracing an extraordinary variety of subjects.

† D. l. 15. 1. pr.

of his composition except the extracts from his works given in the Digest.

*Influence of Christianity.*

26. The influence of Christianity on Roman law was partly direct, partly indirect. The establishment of a hierarchical rank, the power granted to religious corporations to hold property, the distinction between Christians and heretics, affecting the civil position of the latter, the creation of episcopal courts, and many other similar innovations, gave rise to direct specific changes in the law. But its influence is even more remarkable in the changes which were suggested by its spirit, rather than introduced as a necessary part of its system. To the community which citizenship had bound together* succeeded another bound by the ties of a common religion. The tendency of the change was to remove the barriers which had formed a part of the older condition of society. If we compare the Institutes of Justinian with those of Gaius, we find changes in the law of marriage, in that of succession, and in many other branches of law, in which it is not difficult to recognise the spirit of humanity and reverence for natural ties, which Christianity had inspired. The disposition to get rid of many of the more peculiar features of the old Roman law, observable in the later legislation, was partly indeed the fruit of secular causes; but it was also in a great measure due to the alteration of thought and feeling to which the new religion had given birth. But it was not only the substance of the law that was changed under the emperor. The forms of procedure became different. Even under the formulary system the magistrate had occasionally, instead of sending the trial of an action to the *judex*, disposed of it himself (*cognitio extraordinaria*). The practice grew more frequent as the empire went on, and in A.D. 294 Diocletian ordered the presidents of the provinces themselves to try all cases. The formulary system and the exposition of the law by the prætors became a thing of the past, and the law was altered by the enactments of the emperor, and administered directly by the magistrates.

*Theodosius II.*

27. Before we pass to the legislation of Justinian, we must bestow a cursory notice on the efforts made by Theodosius II. to determine and arrange the law, and to

* The value of citizenship was greatly lessened by the recklessness with which it was extended. Caracalla (A.D. 212) gave the citizenship to all persons not slaves, who were then subjects of the empire, leaving it, however, possible, that slaves imperfectly manumitted after this date should hold the place of *Latini*, not of *cives*.



promote its study. With a view to keep alive and increase the knowledge of law, he founded (in A.D. 425) a school of jurisprudence at Constantinople. He and Valentinian also constituted the works of the five great writers, Gaius, Papinian, Ulpian, Paul, and Modestinus, into a source of law of the highest authority, enacting by a constitution ('the Law of Citations'), published A.D. 426, that the judge should always be bound by the opinion expressed by the majority of these writers; if those among them who expressed an opinion on the point were equally divided, the opinion of Papinian was to prevail: if he was silent, the judge could use his own discretion. In A.D. 438, Theodosius published his Code, containing a collection of the constitutions of the emperors from the time of Constantine. It was made on the model of two earlier collections compiled by the jurists Gregorianus (A.D. 306) and Hermogenianus (A.D. 365).

*Justinian.*

28. The emperor Justinian was of Gothic origin. His native name was Uprauda, a word said to mean upright, and thus to have found an equivalent in the Latin Justinianus. He was born at Taurisium in Bulgaria, about the year A.D. 482, and having been adopted by his uncle, the Emperor Justin, succeeded him as sole emperor in the year A.D. 527. He died in A.D. 565, after an eventful reign of thirty-eight years. Procopius, the secretary of his general Belisarius, has left us a secret memoir of the times, which, if we may rely upon his accuracy, would make us believe Justinian to have been a weak, avaricious, rapacious tyrant. His court, wholly under the influence of his wife Theodora, a degraded woman, whom he had raised from the theatre to share his throne, was as corrupt as was customary in the empire of the East. Justinian would never have been distinguished from among the long list of eastern emperors had it not been for the victories of his generals and the legislation to which he gave his name. The successes of Belisarius and Narses have shed the splendour of military glory over his reign. But his principal claim to be remembered by posterity is his having directed the execution of an undertaking which gave to Roman law a form that fitted it to descend to the modern world.

*The first Code.*

29. In the year A.D. 528, Justinian issued instructions for the compilation of a new code, which, founded on that of Theodosius, and on the earlier codes on which that code was based,* should embrace the imperial constitutions down

* Shortly before the time of Justinian, three attempts had been made to

to the date of its promulgation. The task was entrusted to a body of ten commissioners, who completed their labours in the following year, and in the month of April, A.D. 529, the emperor gave it his sanction, and abolished all preceding collections.

*The Digest.*

30. In the December of the following year, Tribonian, who had been one of the commission appointed to draw up the code, and who had recommended himself to the emperor by the energy and ability he had shown, was instructed, in conjunction with a body of coadjutors whom he selected to the number of sixteen, to make a selection from the writings of the elder jurists, which should comprehend all that was most valuable in them, and should form a compendious exposition of the law. In spite of the foundation of schools of jurisprudence, of which those of Rome, Constantinople, and Berytus were the most famous, the knowledge which the lawyers of the time had of the writings of the old jurists was exceedingly limited. Justinian wished not only to promulgate a body of law which should not be too bulky and voluminous for general use, but also to provide a work, the study of which should form a necessary part of legal education. The commissioners performed their task in the short space of three years, and on the 30th of December, A.D. 533, the emperor gave to the result of their labours the force of law. The compilation, termed Digesta, or Pandectæ, from its comprehensive character, was divided into fifty books, and was arranged on the model of the perpetual edict. Ulpian's work on the edict had been a text-book in the schools of jurisprudence, and probably it was this that determined the commissioners to adopt a model * which has prevented their work having anything like a scientific arrangement. There are thirty-nine jurists from whose writings the Digest contains literal extracts, those from Ulpian and Paul constituting about one half of the whole work.

*The Institutes.*

31. The Digest was too vast a work, and also required for its comprehension too great a previous knowledge of law, to admit of its being made the opening of a course of

draw up a body of law for the use of the western barbarians and their Roman subjects. These were—the edict of Theodoric, king of the Ostrogoths (A.D. 500); the *Lex Romana Burgundiorum* (A.D. 500); and the *Lex Romana Visigothorum* (A.D. 506). These names are so well known that it is perhaps hardly proper to pass them over altogether; but, as their assistance was not employed in the construction of Justinian's legislation, a detailed account of them is unnecessary here.

* WARNKŒNIG, *Hist. du droit romain*, p. 182.



legal study. Justinian, therefore, determined to have an elementary work composed. He had declared his intention in the constitution of December, A.D. 530, in which he directed the compilation of the Digest; and Tribonian, in conjunction with Theophilus and Dorotheus, respectively professors in the schools of Constantinople and Berytus, were appointed to draw it up, and like the Digest it became law on the 30th of December, A.D. 533. This elementary work is the Institutes. It was formed on the basis of the Institutes of Gaius, alterations being made to bring it into harmony with the Digest and Code. Theophilus, shortly after the promulgation of the Institutes, published a Greek paraphrase of the work, which throws much light on many passages in the Latin, and which became the sole form in which the Institutes were known to the Greeks of the East.

In the Eastern Empire the works compiled by order of Justinian were only known by Greek paraphrases and abridgments. From these there were made from time to time compilations in which the constitutions of successive emperors were inserted. Otherwise the knowledge of Roman law may be said to have died out of the East altogether. In the West its fate was different. Justinian in 554 ordered that his different works should be observed as the law of Italy. The inroads of the Lombards, however, soon confined the sphere in which the provisions of an emperor of the East could take effect to Rome, Ravenna, and some districts of the south and centre. Here the knowledge of the legislation of Justinian never died out, until in the twelfth century there was established at Bologna a school of commentators (*glossatores*), who brought much learning, ingenuity, and industry to the study of the old law, and whose labours formed the beginning of modern researches into the subject.*

*The Fifty Decisions.*

32. There were still some points which had been debated by the old jurists, and to which the legislation of Justinian did not as yet furnish any answer. To determine these, Justinian published a book of Fifty Decisions; and as the Code of the year A.D. 529 was a very imperfect work, it was determined to revise that Code, and to incorporate the Fifty Decisions in the revised edition. Tribonian was appointed to superintend

* Of the Digest there is one manuscript of unknown antiquity, but certainly prior to the *glossatores*, which was found at Pisa, and was brought thence to Florence, where it now is. Of the Institutes there is no manuscript of an earlier date than one of the tenth century, known as the *codex Bambergensis*.

the undertaking, and in December, A.D. 534, the new code, called the code *repetitæ prælectionis*, received the force of law. This is the code we now have; the former code, that of A.D. 529, was carefully suppressed, and no trace of it remains. The Code, which is divided into twelve books, is arranged nearly in the same manner as the Digest.

*The second Code.*

33. But Justinian could not endure that his having systematised the law should exclude him from law-making. He announced in the Code * that any legislative reforms he might at any future time see fit to make should be published in the form of *Novellæ Constitutiones*. Many such *Novellæ* were afterwards published; the first in January, A.D. 535, the last in November, A.D. 564. Altogether they amount to 165; but no collection of them seems to have been made in the lifetime of Justinian. Few of them bear a later date than A.D. 545, the year of Tribonian's death.

*The Novels.*

34. The Institutes of Justinian, after a few general observations on the nature, the divisions, and the sources of law, proceed to treat, first of persons, then of things, then of successions to deceased persons, then of obligations, and lastly of actions. An arrangement as nearly similar as possible will be observed in the following outline of Roman private law.

*Arrangement of the Institutes.*

## ROMAN PRIVATE LAW.

The reader of Mr. Austin's Treatise on the Province of Jurisprudence will remember that he proposes, in the outline given in the Appendix, to treat the subject of Law, by examining, first, the science of General Jurisprudence, that is, of the legal notions and principles which enter into every system of law; and secondly, the science of Particular Law, that is, as he explains it, 'The science of any such system of Positive Law as now actually obtains, or once actually obtained in a specifically determined nation'; and he carefully distinguishes between the sciences of general and particular jurisprudence and the science or sciences which would tell us, not what law is, but what law ought to be.

The Roman jurists made no approach to a division of the subject so accurate and so exhaustive. It is their great merit, the real source of their value to modern Europe, that they apprehended and elucidated the great leading principles and notions of general

* *Const. de Emend. Cod.* 4.



jurisprudence; but they did not clearly distinguish between general jurisprudence and the municipal law of Rome, or between law and morality. As we have said before, they assumed, on the authority of Greek philosophy, that there was a *lex naturæ* binding on them because it was a *lex*, and they endeavoured to work up the dictates of this law and of the *jus gentium* together with the provisions of the old *jus civile* into a whole. The Institutes of Gaius open with a declaration that every system of law must contain the two elements of general and municipal law; but in the Institutes of Justinian there are prefixed two definitions taken from the writings of Ulpian; and, while the definitions themselves illustrate the inexactness with which the jurists determined the province of jurisprudence, the place assigned to them in this compilation shows the utter want of anything like philosophy in the age when the Institutes were written. The first definition defines the moral virtue of justice by reference to a legal term (*jus*), which it leaves unexplained: the second pronounces jurisprudence to be the 'knowledge of things human and divine,' a phrase which, originally referring, perhaps, to the distinction between pontifical and secular law, has no general meaning, except as a summary of the philosophy which thought that law was the expression of a reason common to the universe and to man. We can only treat the Roman notions of law and jurisprudence historically, and ascertain what they were and whence they came; we cannot make them fit into the more accurate shapes assigned to these general terms by the modern philosophy of law.

*Definitions of justice and jurisprudence.*

35. The preceding historical sketch will have sufficed to show what were the sources of Roman law: (1) There was the old *jus civile*, which mainly depended on custom as its basis. (2) There were the judicial decisions of the *prætors*, and the opinions of the *juris prudentes*, supplementing the *jus civile* from the dictates of the *lex naturæ* and the *jus gentium*; and (3) There were positive enactments, which may be divided into *leges*, *plebiscita*, *senatusconsulta*, and announcements of the will of the emperor.

*Sources of law.*

36. The main legal term with which we have to start in approaching Roman law is *jus*. The word is used to signify both the sum of rights and their corresponding duties, sanctioned by law, and also any group, or any single one of these rights. The law prescribes different relations in which the members of a State are to stand to things and to each other.

*Jus, jura.*

*Rights.*

The claim, protected by legal remedies, which each man has to have any of these relations observed in his own case is a right; and as the right must be conceived to belong to or reside in a person, we speak of a right being the right of a person, e.g. my right to have that book, your right to have that house (*jus meum, jus tuum*). When we examine the different rights established by law in a State, we find some of a public character, affecting individuals as members of a body politic; others of a private character, affecting individuals directly. It is only of the private rights established by Roman law that we now propose to speak; and as rights are either rights which persons have over things, or rights which persons have against some other person or persons, we shall treat, first, of the mode in which the Roman law regarded persons; then of the mode in which it regarded things; then of the rights it gave to persons against persons; and, lastly, of the method by which the State enforced private rights when disputed or disregarded, that is, the system of civil process.

*Division of the subject.*

## I. PERSONS.

*Meaning of the word persona.*

37. The word *persona* had, in the usage of Roman law, a different meaning from that which we ordinarily attach to the word person. Whoever or whatever was capable of having, and being subject to, rights was a *persona*. Slaves were *personæ* in the sense that they were not merely things, and they could go through some legal forms and were entitled in later times to a certain amount of legal protection; but although they are thus treated of under the law of persons, it is chiefly their want of legal capacities that attracts attention. Many *personæ*, however, had no physical existence. The law clothed certain abstract conceptions with an existence, and attached to them the capability of having, and being subject to, rights. The law, for instance, treated the State as a *persona*, capable, for example, of owning land or slaves (*ager publicus, servi publici*). So, a corporation, or an ecclesiastical institution, was a *persona*, quite apart from the individual *personæ* who formed the one and administered the other. Even the *fiscus*, or imperial treasury, as being the symbol of the abstract conception of the emperor's claims, was spoken of as a *persona*.

38. The technical term for the position of an individual regarded as a legal person was *status*, and the constitutive elements of his *status* were liberty, citizenship, and membership in a family. First, he must be free. A slave had no rights. In the earlier days of Roman law, no one would have conceived this to be unnatural. But philosophy, and the study of morality, taught the later jurists that the condition of a slave was a violation of natural law. It was not, however, necessary that the person should have been born free (*ingenuus*); for the process of manumission placed the slave in some degree on a level with the *ingenuus* by making him a freedman (*libertinus*, or, if spoken of with reference to his patron, *libertus**). It depended on the mode and circumstance of his manumission whether he became at once a Roman citizen; but in whatever way he was enfranchised he still owed certain duties to his patron, and in certain cases his patron was his heir.

*Status.*

*Freedom.*



39. The second element of the *status* was citizenship. The Roman notion of the State was that of a compact privileged body separated off from the rest of the world by the exclusive possession of certain public and private rights. In the early times of Rome the *cives*, or members of the State, were divided into two bodies of *patres* and plebeians, the former of whom had a public and sacred law peculiar to themselves, while they shared with the latter the system of private law. Beyond the State all were *hostes* and *barbari*. But as civilisation advanced, the number of foreigners who resorted to Rome for trade, or were otherwise brought into friendly relations with citizens, was so great that they were looked upon as a distinct class, that of *peregrini*. To be a citizen was thenceforward not to be a *peregrinus*, the force of the one idea being brought out by the prominence of its opposite. A *peregrinus* was subject to the *jus gentium*; citizens alone could claim the privileges of the *jus Quiritium*. But when her conquests placed Rome in new and varying relations with the nations of Italy, an intermediate position between the citizen and the *peregrinus* was accorded to the more privileged of the vanquished. Some of the rights of the citizen were given to them, and some were withheld. These peculiar rights of the citizen were summed up in the familiar term *suffragium et honores*, the right of voting and the capacity of holding magisterial offices, and in the terms *connubium* and *commercium*.

*Citizenship.*

* The Latin for a freedman was *libertinus*; but *libertus Titii* is the Latin for the freedman of Titius.

*Connubium* is a term which explains itself. The foundation of the Roman family was a marriage according to the *jus Quiritium*, and not to have the *connubium* was to be incapable of entering into the Roman family system. In the word *commercium* were included the power of holding property and making contracts according to the Roman law, and also the *testamenti factio*, or the power to make or witness a will, and to accept property under one. By the *jus Latinum* and the *jus Italicum* various modifications of the different rights implied in the *civitas* were granted. The *jus Latinum* gave private rights to individuals, the *jus Italicum* gave public rights to towns. In some cases the *jus Latinum* gave the *connubium* and *commercium;* in some only the latter, in many only a portion of the latter, the *testamenti factio*, the power of making, or taking under, a testament, being withheld. The *jus Italicum* gave certain favoured towns a free municipal constitution, an immunity from direct taxation, and made the soil subject to Quiritarian ownership (see sec. 58). In the course of time other shades between the *civis* and the *peregrinus* were introduced, but all distinction between them was gradually swept away by the increasing recklessness with which the rights of citizenship were bestowed. At last Caracalla made all the free subjects of the empire citizens; and thenceforward the class of *peregrini*, properly speaking, ceased to exist. All the free inhabitants of the civilised world were *cives*, and beyond were nothing but *barbari* and *hostes*.

*The family.*

40. The Roman family, in the peculiar shape it assumed under the *jus Quiritium*, was modelled on a civil rather than on a natural basis. The tie which bound members of the same family was not that of blood; it was their common position in the midst of a peculiar system. For the formation of such a family, a legal marriage was an indispensable preliminary; but it was only a preliminary, and the peculiar character of the family did not in any way flow from the tie. The head of the family was all in all. He did not so much represent as absorb in himself the subordinate members. He alone was *sui juris*, i.e. had an independent will; all the other members were *alieni juris*, their wills were not independent, but were only expressed through their chief. The *paterfamilias*, the head of the family, was said to have all the other members of his family in his power; and this power (*patria potestas*) was the foundation of all that peculiarly characterised the Roman family. At the head of the family stood



the *paterfamilias* alone. Beneath him came his children, sons and daughters, and his wife, who, in order to preserve the symmetry of the system, was treated by law as a daughter.* If a daughter married, she left this family, and passed into the family of her husband, but if a son married, all his children were as much in the power of the *paterfamilias* as the son himself. Thus all the descendants through the male line were in the power of the same person. And it was this that constituted the link of family relationship between them, not the natural tie of blood. When the *paterfamilias* died, each of the sons became in his turn a *paterfamilias;* he was now *sui juris*, and all his own descendants through the male line were in his power. Each of the daughters, as long as she remained unmarried, was also *sui juris;* but directly she formed a legal marriage, and thereby entered into her husband's family, she passed into the power of another. Hence it was said that a woman was at once the beginning and end of her family, *caput et finis familiæ suæ*, for directly she attempted to continue it, she passed into another family.

*Position of persons in potestate.*

41. Persons who were under the power of another could not hold or acquire any property of their own. All belonged to the *paterfamilias;* and whatever the son acquired was acquired for the father. In matters of public law the *filiusfamilias* laboured under no incapacities; he could vote or hold a magistracy, but in all the relations of private law he was absolutely in his father's power. He could not make a will, for he had no property to dispose of; nor bring an action, for nothing was owing to him. But in all public relations, whenever this incapability of possessing property was not in question, the *filiusfamilias* had all the privileges of a citizen; he had, for instance, the *connubium*, and could contract a legal marriage; and the *commercium*, and could, therefore, be a witness in a sale by mancipation, to which none except citizens could be witnesses. The indulgence of later times permitted the *filiusfamilias* to hold certain property apart from the *paterfamilias*, an indulgence first accorded as an encouragement to military service. But this was always treated as a notable departure from the strict theory of law.

42. The distinction between the legal and the natural family

* She was technically said to be in the *manus* of her husband; and perhaps *manus* is the old word signifying the power of the *paterfamilias*, and *potestas* is only an expression of later Latin.

is illustrated by its being possible for a member of the legal family to quit it and become an entire stranger to it, and for an entire stranger to be admitted to it, and be as completely a member as if he were a son of the *paterfamilias*. The mode by which the change in either case was accomplished was by a fictitious sale. Every Roman citizen could sell himself to another by the peculiar form of sale called *mancipatio;* and as the father possessed over the son the rights which a person *sui juris* possessed over himself, he sold the *filiusfamilias* to a nominal purchaser, who was supposed to buy the son. It was declared by the law of the Twelve Tables, that a son thrice sold by his father should be free from his power, and the ceremony was therefore repeated three times, and the son was then *emancipatus*, or sold out of the family. When a stranger, being himself *alieni juris*, wished or was compelled to enter a family, the process was effected by adoption. Here, again, then, was another sale, the *paterfamilias* of the family he quitted being the seller, and the *paterfamilias* of that he entered being the purchaser. If the stranger was *sui juris*, he entered his new family by arrogation, which in ancient times could only be effected by a vote in the *comitia curiata*, it being considered a matter of public policy to keep a watch over such a proceeding, lest the last of his *gens* should arrogate himself, and its *sacra* be lost. Much simpler modes for effecting arrogation, as well as for effecting emancipation and adoption, were employed in later times; and one of the most important changes in law introduced by Justinian was that by which he altered the character of adoption, and decreed that, unless the adopter was an ascendant, the person adopted should not pass out of his natural family.

*Emancipation.*

43. A person might be *sui juris*, and be in possession of every right, and yet be unable, through some imperfection, to exercise the rights he possessed. A child, for instance, was not only not able to conduct his affairs with discretion, but he was unable to understand, perhaps to speak, the forms necessary to be expressly pronounced in almost every legal transaction. A tutor was therefore appointed, who, until the child attained the age of puberty, supplied this defect of his ward, or, as he was called, his pupil. And this is the Roman notion of a tutor: he was a person who supplied something that was wanting, who filled up the measure of his pupil's *persona*.* He of course

*Tutors and curators.*

*Persona* had in Roman law a double signification. It meant a person in the sense used above in sec. 37. It also meant all or some of the capacities attaching to a person. The *persona* (taken generally) of a person was thus the sum total of all his legal capacities, and the same person as a husband or father had the *persona mariti* or *patris*.



took care of the person and property of the child; but this was only an accessory of his position; his primary office was to supply by his *auctoritas* * what the pupil fell short of. So, too, in the old law, unmarried women, of whatever age, remained in the tutelage of their relations. Further, a person might be *sui juris*, and be of an age to exercise his rights, and yet it might be necessary to insure that he did not hurt himself and his family by the mode in which he exercised them. In such cases, a curator was appointed, whose duty it was to look after his property. This curator had a perfectly different office from a tutor; in technical language, the tutor was said to be appointed to the person, the curator to the property. The curator was only appointed as a check to prevent pecuniary loss. Curators were also appointed to watch over the interests of insane persons, and of persons notoriously prodigal, as well as of those who had attained the age of puberty, but were under the age of twenty-five.

44. While the head of a family lived, all those who were in his power were connected together by the tie of subjection to the power of the same person. The tie was called *agnatio*, and the persons so mutually connected were *agnati* to each other. When the *paterfamilias* died, the tie of *agnatio* still subsisted. Each of those who, by his death, became *sui juris*, became the head of a new family; but still they and their descendants were *agnati* to each other so long as they did not by emancipation or by adoption, or, in the case of women, by marriage, leave their original family. All those, in short, who would have been *agnati* to each other if the life of the original *paterfamilias* had been prolonged, were *agnati* at any distance of time, however great, after his death. A number of distinct families might thus, when looked on as connected by *agnatio*, be spoken of as one family; for they were all portions of the family of a deceased *paterfamilias*.

*Agnati.*

45. Beyond the circle of the *agnati*, the ancient patrician had that of the *gens*. They were nearer to him than those who were only related to him by blood. If a patrician died intestate, in

* The derivation of *auctoritas* should never be lost sight of. When one person increased, *augebat*, what another had, so as to fill up a deficiency, this increasing or filling up was called *auctoritas*.

default of *agnati*, his *gentiles*, the men of his *gens*, were his heirs. He was placed in the midst of two artificial circles, shutting out the natural circle of blood relations; while the plebeian, unless he happened to belong to one of the few plebeian *gentes*, and, when the system of *gentes* had faded away, the patrician also, acknowledged the ties of blood as next to that of *agnatio*. All those who were connected together by the ties of blood were *cognati*. It was the tendency of the later Roman legislation to give greater and greater weight to the ties of blood, and to substitute a natural, for an artificial, system of family relationship. Lastly, the *cognati* of each of the parties to a marriage were said to be *affines* to the other party.

*Gentiles.*

*Cognati.*

*Affines.*

46. We have spoken as if the wife had been always in the *manus*, or power, of her husband. And this was so, probably, in the strict theory of the Roman family, and in the practice of early times. The tie of marriage was formed among the patricians by the ceremony of *confarreatio*, in which none could partake except those who had the privileges of the *jus sacrum*; and apparently the mere fact of going through the ceremony placed a wife in the *manus* of her husband. The plebeians had no corresponding ceremony; and in order that, when two persons came together in marriage, the wife should be in the power of the husband, she was sold to the husband by the father, a process which was termed *coemptio*, or if she remained with her husband a year, then the power over her was acquired by *usus*, that is, by the uninterrupted lapse of time. If, however, she absented herself for three consecutive nights in the year, this prevented her falling into the husband's power. Perhaps, at all times, at least in plebeian families, a woman could so marry as not to fall into the *manus* of her husband; and in later times such marriages formed the rule. It made no difference in other relations of the family whether the wife was in the power of the husband or not. Supposing she and her husband had the *connubium*, that is, were capable of intermarrying, all the usual incidents of a marriage, such as the *patria potestas*, attached to the connection. If a man and a woman entered into a permanent connection without marriage (*concubinatus*), their children were *naturales liberi*, and were so far favoured by the later law as to be capable of being placed in the position of children sprung from a legal marriage, by the process

*Position of the wife.*

*Concubinage.*



of *legitimatio*. After the time of Constantine they might be made legitimate by the subsequent marriage of their parents. In all unions of the sexes, other than a legal marriage, the children followed the condition of their mother: being free, that is, if she was free, and slaves if she was a slave. The union of slaves was called *contubernium;* but however solemnly entered into, and however faithfully its natural tie acknowledged, it was never in the eye of the law regarded as anything better than promiscuous intercourse.

47. It was possible that any one who possessed a complete *status* should undergo a change of *status*, and this change might happen in any one of the three component parts of the *status*. The capability of exercising all those rights implied in a perfect *status* was frequently spoken of as a man's *caput*, and the change in each of these component parts was said to be a *deminutio capitis*, a lessening or impairing of the *caput*. First, a man might lose his freedom; he might be taken prisoner by an enemy, or undergo a very severe criminal sentence. The loss of this element of the *status*, called *capitis deminutio maxima*, involved the loss of the remaining two, the person who ceased to be free ceasing also to have the rights of citizenship or family rights. Secondly, he might lose his rights of citizenship, and this loss, called *capitis deminutio media*, involved the loss of family rights, but still left him free. Thirdly, by what was called *capitis deminutio minima*, he might lose his position in his family by emancipation or arrogation. In early times there were rights, principally those forming part of the *jus sacrum*, which a person who passed out of his family really lost; but in later times, as in every case the person who underwent this *capitis deminutio* either entered another family, or became the head of his own family, his *status* was really not made at all less perfect by the change. Of course this *capitis deminutio* involved the loss of neither of the two other component parts of the *status*.

*Deminutio capitis.*

48. When a person was possessed of a perfect *status*, he was considered to enjoy a high dignity and reputation in the eyes of others. This reputation (*existimatio*) the Romans considered as one of the chief possessions of a person. It was even to a certain extent regulated by law. If a person ceased to be free, his *existimatio* was gone. Certain offences were treated by law as impairing it. If the offence was so grave as to

*Existimatio.*

impair the *existimatio* very seriously, its diminution was said to amount to *infamia*. For example, a partner, or a mandatary, condemned in an action *pro socio* or *mandato*, was stamped with infamy. The consequences of infamy were, that the guilty person could not vote, could not receive public honours, and could not bring a public prosecution. If the offence was rather less grave, the consequence was *turpitudo*; and if the person was in some inferior position, as, for instance, an actor, he was said to be marked with a *levis nota*, a slight brand of disgrace.

*End of the existence of persons.*

49. It only remains to be observed that, although persons that were the mere creations of law, as corporations, ceased to exist when the law in any way put an end to their existence, as by the dissolution of the corporation, yet the person of individuals, that is, their legal, as opposed to their natural being, did not become extinct by their death. At the moment of death it was shifted to those who represented them. The son was clothed with the person of the father, the heir with that of the testator. What we mean by saying that the deceased is represented, that is, again made present and brought before us, the Roman jurists expressed by saying that his person had been shifted to those who succeeded in his place.

## II. THINGS.

*Use of the word res.*

50. The word thing (*res*) has, in Roman law, a sense as artificial and as wide as the word person. As person comprehends every legal being that has rights and is subject to them, so thing comprehends all that can be considered as the object * of a right. The object of a right may be incorporeal, or the pure creation of law, and need not be limited to things corporeal and visible. The law can separate the right to possess a field and the right to walk in it, and the object of each right is called indifferently a thing. When we attempt to classify these objects of rights, we are unable to select any one principle of division according to which we may distribute them. The aspects in which we may view them are too various to admit of a simple arrangement; we may, however, make a division approximately accurate by considering, first, those heads of things which we arrive at by examining the nature of the things themselves; and secondly, those which we arrive at by inquiring into the interest which persons have in them.

* This word is here used in the sense of the German writers and corresponds with Austin's 'subject'.



*Division of things. Corporeal and incorporeal.*

51. First, then, things may be corporeal or incorporeal; or, as the jurists expressed it, *tangi possunt* or *tangi non possunt*. We see a house or a field; we do not see a right to inhabit the one or reap the fruits of the other. The physical tangible object of sense is a corporeal thing; the intangible abstraction of the mind is an incorporeal thing. Incorporeal things always consist in a right; if we see a stream flowing, or a path winding through a field, the mind sees, as something distinct from the object of sense, the power of using the water or of following the path. This power is, in the language of the law, an incorporeal thing; and a person may have a right to possess it just as he may have a right to possess a house or field. Strictly speaking, the right to own a field, and not the field itself, is what the law takes cognisance of, and this is as much incorporeal as the right to walk over it. But Roman law has adopted or introduced the popular way of speaking, according to which we say, 'I have a field'; 'I have a right of way over a field'.

*Things moveable and immoveable.*

52. We may again speak of corporeal things as moveable and immoveable (*res mobiles, se moventes*, and *res soli, res immobiles*), a distinction so obvious that it needs no other remark than that some moveable things are so incorporated with immoveables, or so constantly associated with their use, that the law treats them as immoveables, as for instance a house, each brick of which is a moveable, is itself an immoveable, because attached to the soil.

*Things divisible and indivisible.*

53. Things are also either divisible or indivisible. We cannot divide a slave or a horse so that the several parts have the same value which they had when they were parts of a whole; but if we divide a field into four, we have four small fields.

*Things principal and accessory.*

54. They are also principal or accessory; that is, they are the direct object of rights, or are only so as forming a portion of, or being intimately connected with, something that is; thus a tree is a principal thing, its fruit an accessory.

*Genus and species.*

55. Another distinction relating to things familiar to the Roman jurists was that between the *genus* and the *species*. By the *genus* was meant a whole class of objects, such as horses, or the general name for an object, such as wine, oil, wheat. *Species* was the particular member of the

class, or particular portion of the object comprehended under the *genus*, as *this* horse, or the wine in *this* bottle. If a purchaser bought a horse, or a certain quantity of oil, the thing bought was said to be determined *genere;* if he bought a particular horse or the oil in a certain vase, the thing bought was said to be determined *specie*. All things which are included under a general name, such as oil or wheat, are commonly divided by being weighed, numbered, or measured, and were therefore spoken of by the jurists as being those things *quæ pondere, numero, mensurave constant*.

*Res singulares and rerum universitates.*

56. We may, lastly, regard things as particular, or as collected under some head, when the whole collection is a thing in law. Thus a sheep is a particular thing (*res singularis*); a flock, composed *ex distantibus uni nomini subjectis*, is a collection of things, or, as the jurists expressed it, is a *rerum universitas* (or simply *universitas*). As also, of course, are such comprehensive things as an inheritance, a marriage portion, the *peculium* of a slave.

*Res sacræ.*

57. In proceeding to the second division of things according to the persons who have rights over them, and to the extent of those rights, we must first notice the distinction in things caused by certain things having a sacred character (*res divini juris*). These were *res sacræ*, consecrated to the superior gods; or *res religiosæ*, such as tombs or burial-grounds, consecrated to the infernal gods; or, lastly, *res sanctæ* (hallowed), things human, but having a sort of sacredness attaching to them, such as the walls and gates of cities.

*Ager Romanus.*

58. The State, again, impressed on some things a peculiar character. All things which were held by the *peregrini* and not by citizens were *peregrina*. The soil which was included in the territories of the early State, the *ager Romanus*, was distinguished from all other land by being alone capable of being the subject of sale by mancipation and being alone held by the special tenure of the *jus Quiritium*.* In later times a greater portion of the soil of Italy was placed on the same footing with the soil of the *ager Romanus*, and *solum Italicum* came to be the name of all soil wherever situated to which the privileges of the old *ager Romanus* were accorded, as opposed to *solum provinciale*, which always remained, at least in theory, the

* Dion. Halicarn. iv. 13.



property of the State, and of which a perfect ownership could not be acquired.* This difference in the tenure of the soil, which had in reality disappeared by the time of Diocletian, was formally abolished by Justinian.

*Res mancipi.*

59. In the older law there also prevailed a distinction, abolished by Justinian, between *res mancipi* and *res nec mancipi*. We know from a fragment of Ulpian,† what things were *res mancipi*. They were *prædia in Italico solo*, whether in the country or the city, servitudes (a term to be explained presently) over these *prædia*, when in the country, slaves and four-footed animals, as oxen and horses, tamed for the service of man. All other things were *nec mancipi*. We also know that property in *res mancipi* could only be transferred by *in jure cessio* (see sec. 73), and by *mancipatio*, that is, by a form of sale, in which the purchaser took hold with his hand of the thing purchased, and, claiming it to be his, struck the scales with a piece of copper, which he then tendered to the seller.‡ The list of *res mancipi* is evidently a list of the possessions of an early agricultural community, and there can be scarcely any doubt that the form of sale required to transfer the property in them was the ordinary form of sale in such a community. At some period, and in some manner of which we have no knowledge, these possessions of an early agricultural community were contrasted with other forms of wealth, and the mode of transfer customary in the one case was found not to be customary in the other. The law, sanctioning and embodying the custom, made the form of *mancipatio* necessary to pass *res mancipi*, and declared it not to be necessary to pass other things. *Manus*, as signifying power,§ is, probably, the root of the phrases *mancipi* and *mancipatio*. Thus *res mancipi* meant originally things in the hand, or taken by the hand, of the owner, and the taking by the hand in the form of transfer was symbolic of the purchaser holding or acquiring the thing in the way in which the seller had held or acquired it.

60. If we look at things according to the persons by whom they are owned, we have a division into *res communes*, as the sea

* Ulp. *Reg.* xix. 1; Cicero, *Pro Flacco*, 32; Gaius, ii. 27.

† Ulp. *Reg.* xix. 1.

‡ The form of *mancipatio* will be more fully noticed in sec. 81.

§ How *manus* signifies power is a further question; it may be that the hand is merely a metaphor, as we say 'in the hands' for 'in the power' of a person; or it may mean the hand of a conqueror or plunderer, and thus originally things *manu capta* would be the booty of plunderers.

and the air, which cannot be appropriated by any particular individuals; *res publicæ*, things which belong to the State, as the State land (*ager publicus*), navigable rivers, roads, &c.; *res universitatis*, things which belong to aggregate bodies, as to corporations; and *res privatæ*, things which belong to individuals; and these were said to be *in nostro patrimonio*, i.e. we could, in one way or another, have a property in them: whereas things common, or public, or dedicated to the gods, were *extra patrimonium*, i.e. could not become the subject of private property. Lastly, there were *res nullius*, things of which no one has acquired the ownership, as wild animals, or unoccupied islands in the sea.

*Res communes.* *Res publicæ.* *Res privatæ.* *In nostro patrimonio.* *Res nullius.*

61. Having thus given a sketch of the position of persons in Roman law, as also of the divisions of things, we now proceed to speak of that connection between persons and things with what are termed rights express. The necessities of his physical position oblige man to exert his power over the world of things. At first property is held by the tribe or community, then by the family, and lastly by the individual; and when society has reached this last stage, which it had reached in the earliest known times of Roman law,* his special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim sanctioned by law is urged directly: the owner, as he is said to be, of the thing publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing can confer. Sometimes the claim is more indirect; the claimant insists that there are one or more particular individuals who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal expressed by writers of the middle ages,† on the

*Rights.* *How divided.*

* We have, however, such expressions as *sui heredes* applied to children who, after the death of the *paterfamilias*, took the inheritance as something belonging to themselves, and this is obviously a survival from the times when the family rather than the individual was regarded as the owner of property.

† The term *jus in re* appears in the summary of law bearing the name of the Brachylogus, which belongs to the twelfth century; both phrases occur in the pontifical constitutions of the thirteenth century. (See *Lib. Sextus Decret.* iii. 7, 8, *in quibus jus non esset quæsitum in re, licet ad rem.*)



analogy of terms found in the writings of the Roman jurists, by the phrases *jura in re* and *jura ad rem*. A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*,* is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or, to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of the right, as well as a thing as its object, a right which gives its possessor a power to oblige another person to give or procure, or do or not do something. It is true that in a real right the notion of persons is involved, for no one could claim a thing if there were no other persons against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done, or not done. But the leading principle of the distinction is simple and intelligible; and though it has not been formally adopted in the system of the Institutes or of the leading jurists, yet the classifications of the different relations of persons and things which they actually employed are so capable of being assimilated to that which this distinction suggests that we need not hesitate to adopt it.

### III. RIGHTS OVER THINGS.

62. The most complete right over a thing is of course that possessed by the absolute owner of the thing, the person who has power to dispose of it as he likes, and who holds it by a title recognised as valid by law. This ownership was in Roman law expressed by the word *dominium*, sometimes by *proprietas*. The *dominus* was entitled to use the thing (*usus*), to enjoy all its products (*fructus*), and to consume the thing entirely if it was capable of consumption (*abusus*). He could also dispose of or alienate it at will. In the ancient system of private law, the owner was said to be owner *ex jure Quiritium*.

*Dominium.*

* The objection to using the term *jus in re* is that the expression occurs in the classical jurists as meaning an interest in a thing short of ownership, as the interest of a mortgagee in the thing pledged, and on this ground the term *jus in rem*, which in this sense is not found in the classical jurists, but is supported by the analogy of the familiar term *actio in rem*, seems preferable.

Nor did the old law recognise any *dominium* other than that which was enjoyed *ex jure Quiritium*. But the prætors found occasions when they wished to give all the advantages of ownership but were prevented by the civil law from giving the legal *dominium*. Another kind of *dominium* came therefore to be spoken of; and the term *in bonis habere* was used to express an ownership which was practically absolute because it was protected by the prætor's authority, but which was not technically the same as ownership *ex jure Quiritium*. Commentators have called this ownership the *dominium bonitarium*, a term not, however, used by the jurists. The distinction between the *dominium bonitarium* and that *ex jure Quiritium* entirely disappeared under Justinian.

63. To the notion of *dominium* was opposed that of *possessio*. A person might be owner of a thing and yet not possess it, or possess it without being the owner. Possession implied actual physical occupation, or *detention*, to use the technical term, of the thing; but it also implied something more in the sense in which it was used by the Roman lawyers. It implied not only a fact, but an intention; not only the fact of the thing being under the control of the possessor, but also the intention on the part of the possessor to hold it so as to reap exactly the same benefit from it as the real owner would, and to exercise the same rights over it, even though he might be well aware that he was not the real owner, and had no claim to be so. The possessor was entitled to have his possession protected against every one but the true owner, and length of possession would, under certain conditions fixed by law, make the possessor really become the owner of the thing possessed.

*Possessio.*

64. As the rights over a thing may be very numerous, it is perfectly possible to separate them, and to give some to one person and some to another. We can, for instance, separate the right of walking in a field from the right of digging under the surface, and give the right of doing the one to this person and of doing the other to that. In this way each right that is separated off may be considered as a fragment of the whole *dominium* capable of being given away from the proprietor. These fragmentary rights, these portions of the whole right comprised in the absolute ownership, were termed *servitutes*, because the thing was under a kind of slavery for the benefit of the person entitled to exercise over it this separate right. In

*Servitutes.*



some servitudes, the right over the thing subject to the servitude, *res serviens*, was attached to the ownership of another thing (*res dominans*): the servitudes were then spoken of as *servitutes rerum* or *prædiorum*, and a distinction was made in these servitudes according as the right given by them referred to the soil itself, as the right to go or to drive over it, when the servitudes were said to be *rusticorum prædiorum*, or to the soil as supporting some superstructure, as a house, when the servitudes were said to be *urbanorum prædiorum*. In other servitudes, the right was given to particular persons; and the servitudes were then termed *servitutes personarum*. The most important of these latter servitudes were *ususfructus* and *usus*. *Ususfructus* was the right to enjoy a thing belonging to another person so as to reap all the produce derivable from it, as, for instance, all the fruits of the soil; *usus* was the right to use and enjoy a thing belonging to another person, only without reaping any, or only a small portion, of its produce. Only immoveable property was subject to the *servitutes prædiorum*; both moveable and immoveable to the *servitutes personarum*.

65. There were two other rights over things which had something of the nature of servitudes, but which received a particular name. These were *emphyteusis* and *superficies*. The former was an alienation of all rights except that of the bare ownership for a long term, in consideration of the proprietor receiving a yearly rent (*pensio*); the latter was the alienation by the owner of the surface of the soil of all rights necessary for building on the surface, a yearly rent being generally reserved.

*Emphyteusis and superficies.*

66. Lastly, there was the right given over a thing by pledge or mortgage, *pignus, hypotheca*; the former term being used to express the case of the thing, over which the right was given, being placed in the possession of the creditor, the latter to express the case of it being left in the possession of the debtor. The right was given to secure a creditor the payment of his debt; and he ultimately had power to sell the thing, and to satisfy his claim out of the proceeds, or, if he could find no purchaser, to have himself made owner of the thing.

*Jus pignoris.*

67. We may now proceed to speak of the mode in which rights over things are acquired. We find at the outset an obvious difference between acquiring rights over a particular thing and

acquiring rights over the entirety of a number of things comprised in such a term as an inheritance, which includes the entirety of the rights belonging to a deceased person, both over things and against persons. We may thus divide the subject of the acquisition of rights into two parts: the first comprising the modes in which rights are acquired over particular things; the second comprising the modes in which an entirety (*universitas*) of rights, both over things and against persons, passed from one person to another.

*Acquisition of rights over things.*

68. We may mention, as the first of the modes of acquiring particular things, occupation, i.e. the seizing on a thing which is a *res nullius*, i.e. without an owner: land in an unoccupied country is a *res nullius*, so is a wild animal; if we seize on, or, as we should say, occupy the land, or catch the wild animal, we gain our right over the soil or the animal by having been the first to seize it.

*Acquisition of rights over particular things. Occupatio.*

69. Accession is the general term for the acquisition of rights either over things which are added by the forces of nature to, and become an inseparable part of, another thing regarded as the principal thing, or over things which by the operation of man are united with other things so as to form an indivisible product. The owner of the principal thing, by virtue of his being owner, is the owner also of the accessory thing.

*Accessio.*

70. A contract or gift, by which one person promised to give a thing to another, did not make that other the owner of the thing. A further step was necessary. The thing must be handed over to the person who was, under the terms of the contract, to become the owner of it. This handing over was called *traditio* and a perfect *traditio* implied, first, that it was a real absolute owner, capable of alienating the thing, and having the intention of passing the property in it, who transferred it; secondly, that he placed the transferee in actual possession of the thing; and thirdly, that the transferee received it with the intention of holding it as owner.

*Tradition.*

71. The above are termed natural modes of acquisition; but there are some which are said to derive their force only from the civil law. One is acquisition by gift. Strictly speaking, gift is not a peculiar mode of acquisition, but an acquisition by delivery with a particular motive for the transfer. Probably it was on account of the solemnities with

*Gifts.*



which under Justinian gifts had to be made that gifts are treated in the Institutes as a special mode of acquisition. One special kind of gift was a *donatio mortis causa*, a gift made in contemplation of death, and to take effect in case of the death of the donor in the lifetime of the recipient.

72. The law also gave the ownership of a thing by *usucapio*, that is, by quiet possession, *bona fide*, and founded on some mode of acquisition, recognised by law, which sufficed, under the civil law, to transfer the *dominium*, or legal ownership, if maintained during one year over moveable things, or during two years over immoveable. The operation of *usucapio* was of great importance in Roman law; for by it the interest of a person to whom a *res mancipi* was transferred otherwise than by mancipation and the interests of all persons who held things *in bonis* (see sec. 62) were, after a short lapse of time, converted into full Quiritarian ownership. Prescription, before the time of Justinian, was not a means of acquiring rights: it merely gave a means of repelling actions brought to regain rights which had long been held by another than the absolute owner. It was applicable to immoveables in the provinces, they being not affected by *usucapio*, which regarded all moveables, but only such immoveables as were in Italy. Justinian made considerable alterations in the law with respect to acquisition of ownership by length of possession. The same law was made to prevail throughout the empire, and possession during three years gave the ownership of moveables, and possession during ten years, if the parties had inhabited the same province during the time, or possession during twenty years if they had not, gave the ownership of immoveables.

*Usucapio.*

*Prescription.*

73. The ownership was also transferred when things were surrendered by the fictitious process of *in jure cessio*, that is, a suit in which the defendant gave up to the plaintiff all he claimed, or when things were adjudged (*adjudicatio*) in certain actions, such as those for assigning boundaries, and dividing a family estate, when the judge had a power to assign the respective portions to the different parties.

*In jure cessio.*

74. The entirety of rights was acquired when one person succeeded to the *persona*, or legal existence, of another, and thereby succeeded to all his rights, whether over things or against persons. The cases in which this most naturally occurred were that of arrogation

*Acquisition of an entirety of rights.*

(for when a person was arrogated, he, of course, transferred all that he had to the person whose family he entered), and that of succession to the inheritance of testators and intestates. *Arrogation.*

75. Testaments were originally made by being proclaimed in the *comitia curiata*, or by a fictitious sale, in which testators transferred their property to a purchaser (*familiæ emptor*) who was himself heir, or who was, after their death, to distribute it according to their wishes. In later times a testament was made in the presence of seven witnesses, who affixed their seals to it, and the witnesses and the testator subscribed the testament. In order to make a testament, it was necessary to have the *testamenti factio*, a term implying such a participation in the law of private Roman citizens as to make a person be considered capable of making, taking under, or being witness to, a testament. *Testaments.*

76. The testator was obliged to disinherit by name every one who, being among those in his own power, had a natural claim on his property; and if he failed to do so, the whole testament was set aside. The great peculiarity of a Roman testament was the institution of the heir, that is, of the person who was to succeed to the *persona* of the testator. Unless there was such a person, no other disposition of the testament could take effect, for there was no continuation of the testator's legal existence. The heir was, therefore, properly appointed at the beginning of the testament; in case of the heir accepting, he placed himself exactly in the position of the testator, received all his property, and was answerable for all his debts; in receiving his property he was, however, bound to give effect to the subsequent dispositions of the testament. Various provisions were made at different times to protect the heir, and especially he was secured by the *lex Falcidia* (B.C. 40) in a clear fourth of the inheritance; and under Justinian his position was altogether altered, and he could take the property of the testator apart from his own. In order that the testament might not fail because the heir was not willing to enter on the inheritance, it was customary to name one or more persons to whom in succession it might be open to take upon them the office of heir (*substitutio*). And a testator could always secure an heir by naming, as the last of the list, one of his own slaves, whom the law did not permit to refuse the office (*heres necessarius*). When some of the conditions *Disinheriting.* *Institution of the heir.*



necessary to create an heir, or give a legacy, were wanting in a will, still the expressions of the testator's wishes were binding as trusts upon the heir under the will, or heir *ab intestato*. Such trusts (*fideicommissa*) were first made obligatory by Augustus, who also first gave effect to codicils, that is, writings purporting to deal with property in the manner of a testamentary disposition, but not executed with the solemnities which were required to make a testament valid. *Fideicommissa.* *Codicils.*

77. If there was no testament to determine the succession to the particular property, the law prescribed the order in which it was to devolve. The first claimants were the *sui heredes*, that is, all persons in the power of the deceased, and who, on his death, became themselves *sui juris*. Thus, a son *in potestate* was a *suus heres* of the deceased, but not a grandson until the son was dead. These persons were termed *sui heredes* as having an interest of their own in the family property. If there were no *sui heredes*, the next heirs were the *agnati*, i.e. all members of the same civil family; and then, in default of *agnati*, the law of the Twelve Tables gave the inheritance to the members of the same *gens*, an enactment which could of course only take effect when the deceased was a member of a *gens*. What was the course of devolution beyond the *agnati* under the old civil law, when the deceased was not a member of a *gens*, we do not know; but probably the blood-relations succeeded. In default of *agnati*, under the prætorian legislation, the claims of the natural family were attended to, and the *cognati*, or blood-relations, succeeded to the inheritance. In the later times of the Roman law the claims of blood-relations were more and more favoured, and in many important points were gradually preferred to those of merely civil kinship. *Succession to intestates.*

The Institutes also notice three other modes of minor importance by which *universitates rerum* were acquired. (1) *Bonorum addictio*, the giving over of the property of a deceased person to a slave to whom the deceased had given his freedom. (2) *Bonorum venditio*, the compulsory sale of the whole property of an insolvent to a person who would undertake to pay most to the creditors. (3) *Ex senatusconsulto Claudiano*, which gave over a woman with all her property, who had cohabited with a slave, to the slave's master. *Other modes of acquiring universitates rerum.*

## IV. RIGHTS AGAINST PERSONS.

78. A personal right is, as we have said before, a right which one person has against another; a right to constrain that other to give something to, or do something for, or make something good to, the possessor of the right. The person to whom the right belonged, and the person against whom it existed, were said in Roman law to be bound by an obligation, the notion of an obligation being that of a tie between two parties of such a nature as to confer on the one a power of compelling by action the other to give, do, or make good something. The obligation did not give any interest in a thing, to get which might be the ultimate object of the proceeding, but only gave a means of acquiring it, or, under the prætorian system, its value.

*Rights against persons.*

79. The three words, *dare*, *facere*, *præstare*, were used to embrace all the possible duties an obligation could create. Either the person bound by the obligation was obliged *dare*, i.e. to give the absolute ownership or the possession of a thing; or *facere*, that is, to do or not to do some act; or *præstare*, that is, to make good something, as to make good a loss, or to furnish any advantage or thing, the yielding of which could not be included in the limited sense of the word '*dare*'. Every person who possessed a personal right against another was termed a *creditor*, and every one who owed the satisfaction of a claim, or was the subject of a personal right, was a *debitor*. The word *creditor*, of course, points to those transactions in which the possessor of the right trusted the person who was the subject of it; but the application of the terms was perfectly general, and must not be confounded with the English usage of the words creditor and debtor.

*Dare, facere, præstare.*

80. According to the theory of Roman law, all obligations owed their origin either to the consent of the parties (*contractus*), or to injuries (*delicta*) done by one person to another, which gave the injured party a right to recompense. Contracts did not, however, include all cases, when an obligation arose from the mutual consent of the parties. The general name for such an obligation was *conventio*, *pactum*, *conventum*. A contract was properly an obligation arising by

*Division of obligations.*



mutual consent, and made in one of the forms recognised by the civil law; but all obligations arising from mutual consent are spoken of as arising from contracts, because in the old law no other mode of expressing mutual consent was recognised, and mere agreements were not binding.

81. The mode of transferring *res mancipi* was, as we have said in sec. 59, called *mancipatio*. Gaius (i. 119) thus describes the form of transfer of a slave: 'Mancipation is effected in the presence of not less than five witnesses, who must be Roman citizens of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of scales, and hence is called *libripens*. The purchaser, holding in his hand a piece of copper, says: "This slave is mine *ex jure Quiritium*, and he is purchased by me with this piece of copper and these scales" He then strikes the scales with the piece of money, and gives it to the seller as a symbol of the price.' But the generic term for this mode of sale was not *mancipatio*, but *nexum*,* for this form was used not only when a sale was its real object, but when under the form of a sale the parties intended to effect a contract of deposit or pledge. The purchaser took the thing handed over to him upon the condition of restoring it under certain specified circumstances, and thus a form of transfer came to be a form of contract where part of the contract was still to be executed.

*Nexum.*

82. In the time when the civil law had assumed its full shape, and apart from the alterations it received from the prætorian system, the *nexum* was used chiefly as the mode of transferring *res mancipi*, as contracts of deposit and pledge were ordinarily made, as it was termed *re*. That is, by the mere delivery of the thing, the person to whom it was delivered, and who accepted it, was bound by an obligation to hold it for the purposes for which it had been delivered. There were four heads of contracts recognised by the civil law, and this of contracts made *re* is the first noticed in the Institutes, although historically the recognition of such contracts was probably posterior to that of the more formal contracts *verbis* and *litteris*. Under contracts *re* were classed four kinds of contract, namely, the contracts of *mutuum* when the receiver had to return as much of the same kind of the thing he received, *commodatum* when he

*Contracts made re.*

* *Nexum est, quodcumque per æs et libram geritur, idque necti dicitur.*—FESTUS.

had to return the specific thing itself, *depositum* when the receiver was bound to keep safe a thing committed to his charge, and *pignus* when the receiver took a thing in pledge.

83. The second head of contract under the civil law was that of contracts made *verbis*, of executory contracts, that is, made in a prescribed form of solemn words. One of the parties put to the other a formal question (*stipulatio*), to which the other gave a formal answer (*responsio, promissio*). To the validity of the contract it was necessary that the question should be couched in the form '*spondes?*' and the answer in that of '*spondeo*'. Do you engage? I do engage. It was long before equivalent words, such as *promitto* or *dabo*, were admitted as substitutes. A contract made by the pronunciation of these solemn words was said to be made *verbis*.

*Contracts made verbis.*

84. A third head of contract under the civil law was that of contracts made *litteris*. An engagement having been made to give a definite amount, the parties agreed to make a memorandum of the terms of the contract. The creditor placed in his book of domestic accounts (*tabulæ* or *codex*) the name of the debtor, and the sum as *pecunia expensa lata*, weighed out and given to the debtor; and the debtor entered in his *tabulæ* the same sum as *pecunia accepta relata*. Either party could call on the other to produce his *tabulæ*, which it was considered so incumbent on a Roman citizen to keep carefully and accurately, that any wilful error was discoverable without much difficulty. The debtor, in fact, furnished the creditor with a means of proving that the debtor had on a certain day received the money, and even if the debtor had not set the sum down in his *tabulæ*, the creditor could show his own *tabulæ* as a proof of the contract. These contracts were peculiar to Roman citizens. *Peregrini* had as a substitute *syngraphæ*, signed by both parties, or *chirographa*, signed only by the debtor; and on these documents an action could be brought.

*Contracts made litteris.*

85. There were, also, four particular contracts, for the formation of which the civil law required no formalities whatever, but which were made merely *consensu*, by the consent of the parties. These four contracts were—sale (*emptio-venditio*), hiring (*locatio-conductio*), partnership (*societas*) and bailment (*mandatum*). The four modes, then, in which contracts might be entered into under the civil law, were —*re*, *verbis*, *litteris*, and *consensu*.

*Contracts made consensu.*



86. When, however, the old law of contracts fell under the manipulation of the prætors, many changes were introduced. The ten forms of contract recognised by the civil law, that is, the four heads of contract made *re*, the four heads of contract made *consensu*, and contracts made *verbis* and *litteris*, still remained the basis of the whole law of contracts; but the prætors, while nominally adhering to the civil law, introduced changes that had a great practical effect. The nature of this change can only be understood by studying the details of the Roman law of contracts, and it would be out of place in a general introduction to attempt to notice them. But there are three ways in which the prætors wrought a change, which were so important that they may be briefly stated here. By an extension of the theory of the civil law contract *re*, the prætors permitted an action to be brought to enforce every contract that was in part executed; secondly, agreements (*pacta*) that would not furnish a cause of action were permitted to be set up by way of defence to an action with which they were inconsistent; and thirdly, there were a few specified particular cases in which the prætor permitted pacts to be enforced by action.

*Prætorian innovations.*

87. Obligations might, however, very well arise, without any fault on the part of any one, and yet without having their origin in mutual consent. The mere fact of occupying a certain position will sometimes involve duties, the performance of which may be enforced by an action, and which give rise to a personal right which the person interested in their performance has against the person bound to perform them. An heir, for instance, was, by the mere fact of accepting the inheritance, bound to pay the legacies given by the testament. Such obligations were said to be *quasi ex contractu*, not that they really rested on any contract, but there was an analogy between the obligation thus arising and that arising from the formation of a contract.*

*Obligations quasi ex contractu.*

88. It was not every wrong deed for which compensation could be obtained that gave rise to an obligation *ex delicto*; there were certain particular wrong deeds, such as theft and robbery with violence, which the law expressly characterised as *delicta*, and to procure reparation for which the law provided a special action. It was only when a person suffered by one of these wrong deeds that an obligation *ex delicto* arose.

*Obligations ex delicto.*

* See AUSTIN, *Jurisprudence* (ed. 1869), p. 944.

When any wrong deed was done not thus expressly designated by law as a *delictum*, and when no particular and appropriate form of action was provided, the obligation was said to arise *quasi ex delicto*. Among the instances given in the Institutes is that of dangerous things being placed so as to fall into a public way. If any one was hurt by the fall, the author of the injury would be bound to make reparation by an obligation *quasi ex delicto*, there being this point of analogy between this obligation and that in the case of a delict, that the person liable to be sued had done harm to the person or property of another. The division of obligations adopted in the Institutes is therefore into those *ex contractu*, those *quasi ex contractu*, those *ex delicto*, and those *quasi ex delicto*.

*Obligations quasi ex delicto.*

89. The ancient law considered an obligation as existing until the tie of law, the *vinculum juris*, was loosed by the thing being given, furnished, or done, or by a new tie being formed in place of the old; this loosening of the tie was termed *solutio*. If payment was made, i.e. if the contract was carried out, this at once put an end to the contract. But it might happen that the parties wished to put an end to the contract before it was carried out. Each mode of forming a contract by the civil law was accompanied by a corresponding mode of dissolving it. When the contract had been formed *re*, it was enough that the thing should be restored; when it had been formed *verbis*, a question and answer again furnished the means of accomplishing the desired object. *Habesne acceptum? Habeo*, sufficed to put an end to the contract. The parties made an entry of payment in their *codices*, if the contract had been *litteris;* and mutual consent dissolved those contracts which it had sufficed to form. The *solutio verbis* was most frequently employed, and it was easy to employ it on every occasion: for in whatever way the contract might originally have been entered into, its terms could be repeated in the form of a stipulation, and then this stipulation could be dissolved by a *solutio verbis*. The stipulation extinguished the original contract. For contracts were extinguished not only by payment, but by what was called *novatio:* that is, by making a new contract, and substituting it in the place of the original one. The law required that the new contract should be always made *verbis* or *litteris*. When strict adherence to the rule of law, requiring a particular mode of payment, would work injustice, the prætor would always provide a remedy by means of his equitable jurisdiction.

*Dissolution of obligations.*

*Novatio.*



## V. SYSTEM OF CIVIL PROCESS.

90. An action is the process by which a right is enforced. Unless a means of enforcing it was provided, the right would be a mere inoperative abstraction. Directly it was disputed, it would cease to have any real existence; but in order that it may have a real existence, the State uses its powers to insure a free exercise of it, as soon as it is made certain to the magistrate, who is entrusted with the authority of the State, that the right claimed does really belong to the claimant. The proceeding by which this is made evident to the magistrate, and the machinery set in motion by which the State exerts its power of compulsion, is called an action. The word 'action' is not, however, always used exactly in this sense; for it is also employed to mean sometimes the right* to institute such a proceeding, and sometimes the form which the proceeding takes.

*Meaning of the word action.*

91. There are three great epochs in the history of the Roman system of civil process. First, that of the system of the *legis actiones*, certain hard, sharply defined forms which a rude civilisation prescribed for all proceedings. Secondly, that of the system of *formulæ*, by which the prætor, adopting a most flexible form of organising the proceedings, was enabled to give a means of enforcing every right which the more enlarged views of an advancing civilisation pronounced to be founded on equity; and thirdly, that of the *extraordinaria judicia*, by which, under the later emperors, the supreme authority took the whole conduct of the proceeding into its own hands, and arrived at what seemed to it to be just in as direct and speedy a manner as it found possible.

*Epochs in the history of Roman system of civil process.*

92. In enforcing rights two very different functions have to be exercised by those to whom the powers of the State are delegated. First, there must be some one invested with magisterial authority, giving the sanction and solemnity of his position to the whole proceeding, who shall represent the law and say what the law is, and who shall have power to employ the force which the State places at the disposal of those it selects to administer justice. Secondly, an inquiry has

*The magistrate and the judge.*

* *Inst.* iv. 6. pr.

only form of action; and every species of right could be enforced by it. When it was employed to enforce a right over things, the proceedings opened by the thing being brought before the magistrate (*in jure*); the claimants appeared, each touched it with a rod (*vindicta* or *festuca*), and said, '*Hunc ego hominem* (the instance given in Gaius is that of a claim to a slave) *ex jure Quiritium meum esse aio secundum suam causam, sicut dixi. Ecce tibi vindictam imposui.*' His adversary repeated the same words. At the same time that the words were spoken each party seized hold of the thing claimed; this was termed the *manuum consertio*, representing a combat which was supposed to take place in the presence of the magistrate before he would interpose, and the imposing the rod was termed *vindicatio*. If the thing was one that could not be brought into court, a portion of it was brought to represent the whole. A piece of turf, a twig, a brick, or one sheep, stood in place of a field, a house, or a flock.* When the *vindicatio* and *manuum consertio* were over, the magistrate said to the parties, *mittite ambo hominem;* both were to place their claims in his hands. Then came the wager, the *sacramentum*, each party challenging his adversary to deposit a certain sum, which the loser of the cause was to forfeit to the treasury of the people (*ærarium*), to be applied to the expenses of sacrifices. The law of the Twelve Tables fixed the amount of the wager at 500 or 50 *asses*, according as the value of the thing contested fell above or below 1000 *asses*. The formal words by which this was done are thus given by Gaius He who had first gone through the *vindicatio* asked his adversary why he claimed it. *Postulo anne dicas, qua ex causa vindicaveris.* The other replied that it was in conformity with right and law that he had made his claim. *Jus peregi sicut vindictam imposui:* the first answered, *Quando tu injuria vindicasti, D. æris sacramento te provoco,* 'I challenge you to a deposit of 500 *asses*'; and the other accepted the challenge by saying, *Similiter ego te.* The magistrate then awarded the possession of the thing contested, until a decision was pronounced, to the party that appeared to have the best right to it, requiring him to furnish security that it would be forthcoming at the proper time. These sureties were

* If the thing was an immoveable, there appears to have been an old ceremony of the parties going to the land or other immoveable thing, and one expelling the other from it, and leading him before a magistrate (*deductio*). See AULUS GELLIUS, *Noct. Att.* xx. 10; CICERO. *Pro Muræna*, c. 12.



called *prædes litis et vindiciarum*—*lis* signifying the thing contested itself, and *vindiciæ* the fruits or profits which might arise from it before the final sentence was given. After a certain delay, a judge was appointed to examine the facts; he informed the magistrate what his decision was, and the magistrate gave effect to this decision by using the force placed at his disposal. When the right to be tried was a personal one, there was of course nothing that could be claimed by *vindicatio*, and the action began at once with the wager.

*Actio per judicis postulationem.*

95. The details of the *actio sacramenti* furnish so lively a picture of the actual working of early Roman law, that it is worth while to set them fully before us; but the other actions of law may be passed over with a much more cursory notice;* indeed, our knowledge of them is very deficient, as the portion of the manuscript of Gaius which contained a sketch of the proceedings is imperfect. Perhaps the action called *judicis postulatio* was employed in complicated cases, e.g. where the rights of several persons to a common object had to be settled, as in the settlement of boundaries (see sec. 103); the machinery of the *actio sacramenti* being obviously but very ill adapted for enforcing rights of this kind. We know little more than that the magistrate was asked to allow the appointment of a judge, or *arbiter*, to decide the matter in question; and that the form of action was probably adopted, not where some certain thing was asked for as the fulfilment of the engagement, but where a greater uncertainty in the circumstances of the case allowed a greater latitude of opinion, and where an appearance of good or bad faith would naturally colour the whole cause.† In the year B.C. 243 (as it is conjectured) the *lex Silia* instituted a new form of action where the obligation was for the giving a definite sum of money, and a *lex Calpurnia* (B.C. 233) extended the scope of the action to all obligations for any certain definite thing.‡ This action was called *condictio*, because the plaintiff gave notice (*condicere*) to the defendant that he must appear before the magistrate, at an interval of thirty days, to receive a judge. Probably its institution completed the withdrawal of the enforcement of obligations from the scope of the

*Condictio.*

* GAIUS, iv. 12.

† *Præclarum a majoribus accepimus morem rogandi judicis, si eum teneremus, quæ salva fide facere posset.*—CICERO. *De Off.* iii. 10.

‡ GAIUS, iv. 19.

*actio sacramenti*. The *judicis postulatio* may have left to the sphere of the *actio sacramenti* the demand for things *certi*, and then the *condictio* took that also away.

*Actio per manus injectionem.*

96. There were two other actions of law, that *per manus injectionem*, and that *per pignoris capionem*.* These were, however, not really actions so much as methods of obtaining execution. If it was a right over a thing that was claimed, then, if the sentence was in favour of the claimant, the magistrate at once put the claimant in possession of the thing, having recourse to force, *manus militaris*, if necessary. But when a right against a person had to be enforced, there was nothing which could be thus handed over; the remedy was against the person, the liberty of the defeated adversary, and the action *per manus injectionem* was the means by which the successful litigant exerted his power. He laid hands on him, *manus injecit*, and brought him before a magistrate, stating that he had been cast in the previous suit; if this was denied, a *judex* was appointed, and inquiry made whether judgment had really been given against him as alleged. If this was found to be the case, he was *adjudicatus* to the claimant, who kept him prisoner, and then being brought, after sixty days, before the magistrate, was *addictus*, or assigned over, and became the slave of his creditor.

To the principle that the person, and not the property, of the debtor was bound, an exception was made when the debt was due to a soldier for military service, to the fund for sacrifices, or the public treasury.† The creditor, in such cases, might seize on anything belonging to the debtor, and take it as a pledge for the payment of a debt. This *pignoris capio* was only spoken of as an *actio* because it was conducted with certain solemnities, and accompanied by the repetition of a peculiar form of words.

*Actio per pignoris capionem.*

The following are some of the marked features of actions of law, in respect of which great differences were gradually introduced under the later systems. (1) The procedure in the actions of law was one open only to Roman citizens. (2) The parties were almost always obliged to appear personally, but an *assertor libertatis* could appear to claim the freedom of a person wrongly treated as a slave. (3) So rigid was the necessity of adherence to the prescribed forms, as Gaius informs us (iv. 11), that if, in an action

* Gaius, iv. 21-25.

† Gaius, iv. 26-29. (See also ante, sec. 8.)



for damage to a vineyard, the plaintiff used the word *vites* instead of the general word *arbores*, employed in the law of the Twelve Tables, he lost his action. (4) If the action was once brought, it was exhausted, or if it failed, even on the most technical ground, the plaintiff had no further remedy. (5) The sentence was ordinarily to give the thing demanded, not a pecuniary equivalent.

*Suppression of the actions of law.*

97. The *legis actiones* were necessarily replaced by other forms of actions more convenient as Rome advanced in civilisation. They were in a great measure suppressed by the *lex Ebutia* (about B.C. 180), and afterwards, in the time of Augustus, by the *leges Juliæ*. They were, however, long retained in cases where the *centumviri* were the proper *judices*, that is, in questions of *status*, Quiritian ownership, and disputed succession, the *prætor* presiding personally over the deliberations of the *centumviri*, and not instructing them by a formula; and a fictitious process, termed *in jure cessio*, which was nothing else than an undefended action at law, in which a disputant gave up (*cessit*) before the magistrate (*in jure*) the thing in dispute, was retained as a ready means of many legal changes, such as manumission or adoption, long after the actions of law had fallen into disuse. Before the actions of law were suppressed, the *prætor peregrinus* had for years been administering justice through forms of action devised by him where *peregrini* were concerned.

*Second epoch. The system of formulæ.*

98. The changes wrought by intercourse with foreign nations, the new duties of extended dominion, and the stimulus given to the national mind by the long internal struggles which had now subsided, produced by degrees a general change in the mode in which justice was administered. A new system succeeded the old *legis actiones*; the magistrate was more strongly marked off from the *judex*, and it was the directions which the former gave the latter that constituted the important feature of the new system of procedure. At home the prætors, of whom there were eighteen in the days of Pomponius,* and one or two other magistrates; and in the provinces the *præsides* or præfects, who held *conventus* or assizes in the principal towns at stated intervals, sat as magistrates. At Rome the long struggle between the senate and the *equites* for the exclusive right to furnish the judges ended, as has been already

*Judges in the second period.*

* D. i. 2. 2. 34.

said (sec. 12), in the judges ceasing to be taken entirely either from the senate or the *equites;* and two, at least, out of the five decuries of judges appearing in the *album* were taken from a comparatively humble class. The *recuperatores* and *centumviri* still continued to act in the cases which properly fell within their province.

*Formulæ.*

99. The directions which the magistrate sent to the judge were always conveyed in a formal shape, and the word *formulæ* was used to express the different forms in which directions were given. These *formulæ* were preserved and collected, and it became the great object of the contending parties that the right *formula* should be used in their case, the judge not being allowed to depart from the instructions he received. As there was no legal form to bind the magistrate, he could easily vary the formula so as to render substantial justice, and had thus a ready means of availing himself of any equitable doctrine, which a more refined jurisprudence or his own sense of what was right suggested to him. These *formulæ*, so flexible in their general character, yet couched in terms always precise and simple, furnish one of the many admirable instances of the power of the Romans to express correctly the subtlest legal ideas; and it was by this machinery that the prætors principally introduced their great legal changes. But it may be observed that, although the old actions of law became obsolete, traces of them are to be found in the prætorian system. Thus, in certain actions the parties entered into a wager, *sponsio pœnalis*, evidently a relic of the old *actio sacramenti*, by which each stipulated with the other for a sum of money to be paid as a penalty by the loser in the action to the successful party.

*Example of a formula.*

100. To show what these *formulæ* were, it will perhaps be best to give at length one of those we find in Gaius, and then to explain its different parts. One which we may collect from different sections of the Fourth Book runs thus:—

*Judex esto: Quod Aulus Agerius Numerio Negidio hominem vendidit; si paret Numerium Negidium Aulo Agerio sestertium X. millia dare oportere, judex Numerium Negidium Aulo Agerio sestertium X. millia condemna; si non paret, absolve.**

*Judex esto* is merely the order for the appointment of the

* Gaius, iv. 40-43



judge, and is not, strictly speaking, a part of the *formula.* From '*quod*' to '*vendidit*' is what is called the *demonstratio;* from '*si paret*' to '*dare oportere*' is the *intentio;* and from '*judex*' to the end is the *condemnatio.* The *formula* ordinarily consisted of these three parts—the *demonstratio,* the *intentio,* and the *condemnatio.*

*Demonstratio.*

101. The *demonstratio* is the statement of the fact or facts which the plaintiff alleges as the ground of his case.* Aulus Agerius, the plaintiff, says that he has sold a slave to Numerius Negidius. The *demonstratio* varied, of course, with each particular case.

*Intentio.*

102. The *intentio* was the really important part of the *formula.*† It was a precise statement of the demand which the plaintiff made against (*tendebat in*) his adversary. It was necessary that it should exactly meet the law which would govern the facts alleged by the plaintiff, if true. Whether Aulus Agerius has sold this slave to Numerius Negidius at the price he alleges, and whether the debt is still owing, this is what the *judex* has to determine; if the judge thinks he has (*si paret*), then the judge is instructed to pronounce his judgment against him; if he thinks he has not (*si non paret*), he is to be absolved.

*Condemnatio.*

103. The *condemnatio* is the direction to condemn or absolve according to the true circumstances of the case.‡ The *judex* was only a private citizen, and, unless specially authorised by a magistrate, could have no power to pronounce a judicial sentence. It is to be observed that the *condemnatio* was, under the formulary system, always pecuniary; the judge was always directed to condemn to a payment of money, never to do or give a particular thing. In three particular actions, however, and perhaps in more, the judge was directed to 'adjudicate' a thing, in the sense of dividing it out among several litigants. These three actions were those brought to divide a family inheritance, to divide property held in common, and to settle boundaries. In these actions there was a part of the *formula* running thus: *quantum adjudicari oportet, judex Titio adjudicato.* This was called the *adjudicatio;* so that in these actions the parts of the *formulæ* might be four—*demonstratio, intentio, adjudicatio,* and *condemnatio.*§ Of course when a thing, and not a sum of money,

* Gaius, iv. 40. † Gaius, iv. 41. ‡ Gaius, iv. 43.

§ The judge might think it right, in order to equalise the division, to

was claimed, it was not possible for the magistrate always to fix a precise sum in which the defendant was to be condemned. Sometimes, therefore, the *condemnatio* merely fixed a maximum sum, and ran *duntaxat X. millia condemna.* Sometimes the direction was still more indefinite, and the sum was left to the discretion of the judge. *Quanti ea res erit, tantam pecuniam, &c., condemna.* Sometimes, too, as when the action was real, i.e. brought to claim a thing, the *actio* was *arbitraria*, and the words *nisi restituat* were inserted in the *condemnatio.* The defendant was ordered to give up the thing, and then was condemned to pay the money if he did not restore the thing, in accordance with the order (*arbitrium*) of the judge, or if the thing was in his possession, he was forced to give it up.

*Præjudicialis formula.*

104. The *intentio* sometimes stood quite alone, as in what was called a *præjudicialis formula;** when the object of the action was merely to establish a point which it was necessary to have settled with a view to a future action. The decision of such a preliminary point was called a *præjudicium.* Of course the *intentio* took any form that best suited the case; and accordingly it was the *intentiones* that were so carefully preserved as precedents, and so keenly debated by the contending parties. Sometimes the grounds of the defence made part of the *intentio.* The defendant might admit the plaintiff's statement, but say that there were special circumstances to take this particular case out of the general rule of law under which it would naturally fall. He might own, for instance, that he had bought a slave at the price alleged, but say that he had been induced to do so by fraud. This plea was called an *exceptio* (i.e. a taking out), and was made to form part of the *intentio*, some such words as these being added: *si in ea re nihil dolo malo Auli Agerii factum sit neque fiat.* The plaintiff, again, might have something to urge as an exception in reply to this plea: his answer was called *replicatio;* if the defendant had a further answer, it was called a *duplicatio*, the plaintiff's further reply a *triplicatio*, and so on. There was also sometimes an accessory part of the *formula* called the *præscriptio*, placed, as its name denotes, at the beginning of the whole *formula* for the purpose of limiting the inquiry. As employed by the defendant, it answered the purpose of the *exceptio*, and belongs, probably, to

*Exceptio.*

*Replicatio.*

order that some of the parties should, in receiving their share, make a money payment to others, and for this there would be a *condemnatio.*

*Gaius, iv. 44, 133.



a time before the *exceptio* had its regular place in the *formula.* A well-known example of its use is that by which the defendant stopped an action for the possession of provincial lands, by raising the question whether he had not been in possession for a particular period, which is the origin of the familiar term 'prescription'. (See sec. 72.) But the plaintiff also might, in the early days of the formulary system, have occasion to resort to a *præscriptio.* He might, for instance, wish that, in enforcing a security on which payments were due from time to time, the action brought to try whether this security was valid should only affect his claim to payments already due, so that if he failed he might have a further action for future payments. In such a case some such words as *ea res agatur cujus rei dies fuit* (let the inquiry only be made as to the sum for the payment of which the time has arrived) were prefixed to the *formula.* Gradually, however, the *præscriptio* fell into disuse, and the *intentio* and *exceptio* were so constructed as to serve every purpose for which it had been employed.

*Litis contestatio.*

105. In the Roman system of civil process the time when a contested right was to be considered as really made the subject of litigation, was very carefully marked. It was very necessary that this should be clearly ascertained. The claimant in whose favour the ultimate decision was given was entitled to all that accrued to the thing claimed from this moment; and when once a point had been submitted to litigation, it could not be again litigated, both parties surrendering all their interest into the hands of the court, which assigned to the successful claimant such a fresh interest in the thing claimed as might appear to be due to him. This time, was marked by each party, at the end of the proceedings before the magistrate, calling bystanders to witness that they submitted the matter to the decision of the judge.* This was called the *litis contestatio*, as has been said. (See sec. 93.) In process of time the ceremony might be omitted, or at any rate become a mere form, but the conclusion of the proceedings before the magistrate (*in jure*), i.e. in the formulary system, the time when the prætor delivered the *formula*, still formed the crisis at which the claims of the different parties were considered to be finally submitted to the decision of the law. Up to the *litis contestatio*, the proceedings in an action under the formulary system were as follows. The plaintiff applied to the prætor for a summons to make the

* Festus, *sub voce Contestari.*

defendant appear (*in jus vocatio*). If the defendant on appearing would not come to any compromise (*transactio*), the plaintiff announced that he would go on with legal proceedings. This was termed *edere actionem*. He had to announce the kind of action to which he proposed to resort. He then called on the defendant to give bail (*vadari*) that he would appear in court. The plaintiff on the day fixed submitted the *formula* as he thought it ought to be drawn up; the defendant proposed the exceptions on which he relied, and the prætor settled it. The plaintiff then asked for a judge (*postulatio judicis*), and when the prætor gave the judge the *litis contestatio* took place, and the proceedings *in jure* were finished.*

106. *Actio* meant, under the system of the actions of law, a particular form of procedure; under that of the *formulæ*, it meant the right granted to a plaintiff by the magistrate to seek what was due to him before a judge. Sometimes, however, the *formula* by which the judge was to determine the right, and sometimes the *judicium*, the proceedings by which the judge determined the right, were spoken of as if *formula*, *judicium*, and *actio* were synonymous terms. Of the divisions under which the formulary actions may be grouped, the following were the most important. 1. The first division turns on the difference in the nature of the thing claimed, and, according to this division, actions were *in rem* and *in personam*. If the object of the proceedings was to enforce a right to a thing, then the *formula* ran *si paret hominem Auli Agerii esse;* if to enforce an obligation, then the *formula* ran *si paret Numerium Negidium Aulo Agerio dare, facere, præstare oportere;* and it was according to this difference in the *intentio* that actions were said to be *in rem* or *in personam*. *Vindicatio* came to be used as a generic term for actions *in rem*, and *condictio* for actions *in personam*. 2. Another division of action refers to the modes in which the prætor extended or modified the law by the shape he gave to the *formula*. In shaping actions, the prætor introduced changes of two kinds: First, he gave actions for the enforcement of rights outside the old civil law, and this he principally effected by giving an *actio in factum concepta*, in which the *demonstratio* and *intentio* were blended, and the prætor directed that, if a given state of facts was found to be true, the defendant was to be con-

*Meaning of the word action under the system of formulæ.*

*Divisions of actions.*

* See note in Appendix (page 453) to Abdy and Walker's *Gaius*.



demned, the action being thus contrasted with one *in jus concepta*, i.e. given to try an issue by the rules of law. Secondly, the prætor extended existing actions (*actiones directæ*) by giving actions (*actiones utiles*) to suit cases and persons outside the limits of the direct actions; and this he did either by means of actions *in factum*, which could be used for these purposes equally well as to give new remedies, or by giving a fictitious action, i.e. an action in which the plaintiff was allowed to feign that he was within the scope of the unextended action. When there was a contract not falling under the old heads, but executed on one side, the prætor enforced it by an action *in factum præscriptis verbis*, an action to meet the case with the circumstances set forth at the beginning; but such an action, as it was to try an issue according to known rules of law, was *in jus concepta*. 3. A further division depended on the varying amount of latitude given to the judge. The actions depending on the old civil law were *stricti juris*, and the judge had merely to decide the question submitted to him, without taking into account considerations of equity. Other actions were *bonæ fidei*, i.e. the judges were allowed to take such considerations into account. In real actions, and in some few special actions, the judge had always a particular kind of latitude given him, as the action was *arbitraria* (see sec. 103), i.e. he could order the thing claimed to be given up, and, if it was not, could condemn the defendant in as much as he thought equitable; and if the thing was in the possession of the defendant, he was made to give it up. Among personal actions which were *arbitrariæ* was one termed *ad exhibendum*, which was used in order to make a person in possession of a thing produce it, so that its existence in his hands and the state in which it was might be ascertained, or pay damages for not so producing it.

107. In connection with actions under the system of *formulæ* we have to notice the interdicts of the prætor.* An interdict was an order issued by the prætor, and was in fact an edict addressed to some person or persons with reference to a particular thing. *Vim fieri veto, exhibeas, restituas*, 'I forbid you to have recourse to violence; you are to produce, you are to restore;' such were the forms in which these commands were couched. Interdicts were granted where some danger was apprehended, or some injury was being done to something to which a public character attached, as, for instance, if a road was stopped

*Interdicts.*

* Gaius, iv. 138-170.

up; but they were also granted to protect private interests, and especially to protect or regulate possession. If the person to whom the interdict was addressed acquiesced and obeyed the prætor's injunction, nothing remained to be done; but if he refused to obey, the magistrate then referred to the decision of a judge, whether the terms of the interdict ought to be complied with. For instance, an interdict ordering a thing to be restored might have been issued; but the person to whom it was directed might deny that by law he was bound to restore the thing. On his stating this to the magistrate, the magistrate would give an action to try the question, shaping the terms of the interdict into the *intentio* of the formula, *si paret A. A. rem restituere oportere*, &c. And it is thus that interdicts are connected with actions, as their validity depended on no action being brought to contest them, or the result of an action being to support them. Gradually the action superseded the interdict, which was no longer used as a preliminary step, and, by the time of Justinian, the interdict had become obsolete.

*Extraordinaria judicia.*

108. There were under the system of *formulæ* certain cases which the magistrate decided without sending to a judge. In these cases the magistrate was said *extra ordinem cognoscere*, and the proceedings were termed *extra ordinem cognitiones, judicia*, or *actiones*. Among the cases in which the magistrate proceeded in a summary way, were *restitutiones in integrum* (that is, certain cases in which he restored a person suffering from something from which he ought not by law to suffer, to the same position as he had occupied before the injury was sustained), and cases relating to *fideicommissa*. But he was called upon most frequently to proceed in this way in order to give

*Execution.*

execution to the sentence of a judge. The proper remedy of the creditors was still against the person of the debtor until a *lex Julia*, probably of the time of Augustus,* permitted a debtor to avoid arrest by giving up all his goods (*cessio bonorum*). If, however, the debtor could not be found, then the prætor protected the creditors by what was termed a *venditio bonorum* or compulsory sale. The creditors were placed in full possession of all that the debtor had belonging to him; his *persona* was, in fact, transferred to them. This was termed the *missio in bonorum possessionem*. After a certain delay, the creditors sold their interest in the debtor's property to the person

* Gaius, iii. 78.



who would offer to pay the largest proportion of the sums they claimed. He became the purchaser, and this *emptio bonorum* transferred to him the *persona*, or legal existence, of the debtor, who thereby suffered a *capitis deminutio*, and became, in the language of the law, 'infamous'. It was in the exercise of his 'extraordinary' jurisdiction that the magistrate gave this mode of execution.

*Appeals.*

In the times of the Republic there was no fixed tribunal of appeal, but the authority of one magistrate might be suspended by the veto of another magistrate. Under the empire the emperor acted as a supreme judge whenever he chose to interfere; but Hadrian ordered that appeals might be brought to the Senate, and that the decision of the Senate should be final.

*Third period of the Roman system of civil process.*

*The extraordinaria judicia.*

109. In the third period of the Roman system of civil process, the period of *extraordinaria judicia*, his summary jurisdiction was the only jurisdiction the magistrate exercised. There was no longer any distinction between *jus* and *judicium*; the magistrate and the judge were the same person, so that in the language of the Institutes *judex* means a magistrate deciding a cause. By a constitution published A.D. 294, Diocletian directed all magistrates in the provinces to decide causes themselves. The practice was, in course of time, extended throughout the whole of the empire; and in the days of Justinian it was possible to speak of the *ordinaria judicia* as quite obsolete.*

*Judges.*

110. In the days of the later emperors, the provinces were classed together into præfectures. Over each province was a *præses*, who had a *vicarius*, or vice-president, under him, and who, either himself or by his *vicarius*, tried all cases above a certain amount, fixed by Justinian at 300 *solidi*; cases below that amount were tried by inferior judges, called *judices pedanei*, or by the *defensores* of provincial towns. The great cities, such as Constantinople and Alexandria, were under a separate jurisdiction. The prætorian præfect was the head judge of appeal.

*Mode of procedure.*

111. Under the system of *extraordinaria judicia*, an action was begun by the plaintiff announcing to a magistrate that he wished to bring an action, and furnishing a short statement of his case. No written statement was necessary,

* *Inst.* iv. 15. 8.

but one was often made, and then this statement, called the *libellus conventionis*, was sent by a bailiff of the court (*viator*, *executor*) to the defendant. The parties or their procurators appeared before the magistrate, and the magistrate decided the case. *Exceptio* was still used as the term to express the plea of the defendant, which he often, but not necessarily, reduced to writing. There was no marked stage in the proceedings, like the conclusion of the proceedings *in jure* under the formulary system, to show when the action had really begun. But the beginning of the action, to describe which the term *litis contestatio* was still used, was said to take place when the magistrate had heard the plaintiff open his case, at the time when, all preliminaries having been gone through, the real hearing began. The condemnation was no longer merely a pecuniary one, and the judge gave sentence for the thing asked for, and not for its equivalent. Constantine had abolished imprisonment for debt unless the debtor could pay, but would not. But already, before the system of *extraordinaria judicia* began, in the time of Antoninus Pius, the simple process of levying executions on so much of the debtor's property as was requisite had been introduced.

*Evidence.*

So many of the rules of Roman law relating to evidence which are known to us, date from the period in which the *extraordinaria judicia* prevailed, that it may be convenient to give here a brief statement of what the chief of these rules were. Written evidence was not, as a rule, necessary, but when existing was alone admissible, unless the writing was lost. Two witnesses were necessary to prove a fact, and among those who could be witnesses great consideration was paid to the relative character and position of witnesses. But many persons could not be witnesses, such as persons below the age of puberty, criminals, women guilty of adultery, and, under Justinian, pagans, and some heretics. Slaves could only be admitted to complete other testimony. The parties to the suit and their near relations were excluded. The burden of proof rested, as a rule, on him who would fail if no evidence was given, and therefore on him who affirms, not on him who denies. Legal presumptions (*præsumptiones juris*) were recognised, such as that a formal transaction like emancipation has been properly carried through. Witnesses were made to appear by summons from the judge, and were put on their oath. The torture of slaves, even in civil cases, if they were supposed to be keeping back material evidence, was a very ancient practice, and appears to have



been recognised in the time of Justinian. Each of the parties was put on his oath that he was not bringing or defending the action except on grounds that he believed to be good, and in the last resort either party could, as it were, compromise the action by challenging the other to swear to the true state of the facts, and was then bound by what was so deposed. Justinian also enacted that the costs, according to a fixed scale, should be determined by the oath of the successful litigant; and the advocates of the parties had to take a preliminary oath that they would not pervert justice.*

*Oaths.*

112. Although the subject of crimes and criminal procedure does not fall properly within the scope of the Institutes, which is a treatise on Private Law, yet as the subject is slightly noticed at the end of the Institutes and is connected with the general history of Roman law, it may be convenient to give some slight account of it here. Criminal jurisdiction was under the kings an attribute of the king himself; but there was an appeal in capital cases to the *comitia curiata*. After the establishment of the republic the *comitia centuriata* alone could judge capital cases. The *comitia tributa* exercised a criminal jurisdiction (but without the power of inflicting death) for political offences, such as those committed by a magistrate during his year of office. Before both these *comitia* the accusation had to be made by the presiding magistrate. The senate also exercised a special power of judging offenders in times of public danger, and sometimes under such circumstances inflicted death as punishment, but it did not properly belong to the senate to deal with capital cases, and the senate also exercised an ordinary jurisdiction and dealt with such crimes as it thought proper to notice. But all these authorities, the king, the *comitia*, and the senate, while they sometimes discharged themselves the functions of the judge, were in the habit of delegating their powers to others charged to make an investigation (*quæstio*) of the crime. At first each *delegatio* was made to try one particular offence, and when the case had been tried the *quæstio* was at an end. These *quæstiones*, the term being transferred from the inquiry to the persons making it, were subsequently appointed to try all offences of a particular kind that it might be necessary to inquire into, while the delegated persons held their authority. Lastly, the *quæstiones* began to be made *perpetuæ* the first of these being probably the *quæstio pecuniæ repetundæ*

*Crimes.*

* Hunter, 844, 858, 869, 889.

established by the *lex Calpurnia* (B.C. 233), and this change was accompanied by the introduction of something like a body of criminal law. When a *quæstio* was made *perpetua*, the crimes it was to try were in some degree defined, and the punishment prescribed; whereas previously, the body exercising criminal jurisdiction or its delegates had been bound by no rules of law as to the nature of the crime or its punishment, except that the *comitia centuriata* could alone inflict death. Each *quæstio* consisted of a number of judges varying according to the regulations laid down in the law creating it; sometimes of thirty-two, or of fifty, or of a hundred—the judges being appointed for a year and taken from the same list as that from which judges in civil suits were selected, so that the history of the contests between the senatorial and equestrian orders for the right of being judges already referred to (see sec. 12) applies to criminal and civil judges equally. Before the *quæstiones perpetuæ* any citizen might be an accuser. He had to swear that his charge was not false, and he had to prove the guilt of the accused—so that the system under which a criminal trial is regarded as a suit between parties was thus introduced into Roman law. Private persons had from an early time of Roman law recovered penalties in a civil action for delicts committed to their injury, and so, too, the criminal proceeding took the form of an action between the private person accusing and the accused. The judges were under the guidance of a president (*prætor*), and each judge pronounced that he condemned, absolved, or that there was not proof either way, by dropping into an urn one of three tablets, bearing respectively the words *condemno*, *absolvo*, *non liquet*. If the accused was condemned, he received the precise punishment provided by the law creating the *quæstio perpetua*. During the last century of the republic, and in the early days of the empire, a great number of laws, each handing over a special head of offence to a *quæstio perpetua*, were passed, and thus something like a system of criminal law and criminal procedure was established. Under the empire, as time went on, exactly what happened in civil suits happened in criminal proceedings. The magistrates had exercised a power of dealing with some offences in a summary manner (*extra ordinem*), and the sphere of their authority was gradually enlarged until it superseded the *quæstiones perpetuæ* altogether, as the formulary system of actions was superseded by the extraordinary jurisdiction of the magistrate in civil suits.

# LIST OF THE CHIEF LAWS, EVENTS, ETC.,

## REFERRED TO IN THIS WORK.

NOTE.—*Most of the dates both here and throughout the work are merely approximate.*

B.C.

*Leges regiæ.*

508 *Lex Valeria.*
495 *Leges sacræ.*

450 The Twelve Tables.
449 *Lex Valeria Horatia.*
444 *Lex Canuleia.*

341 *Lex Genucia.*
339 *Lex Publilia.*
326 *Lex Pætelia Papiria.*

287 *Lex Hortensia.*
286 *Lex Aquilia.*

243 *Lex Silia.*
233 *Lex Calpurnia.*
197 *Lex Atinia.*
196 *Lex Atilia.*
193 *Lex Cincia.*
183 *Lex Plætoria.*
182 *Lex Furia (testamentaria).*
180 *Lex Æbutia.*
169 *Lex Voconia.*
123 *Lex Sempronia.*
102 *Lex Apuleia.*
95 *Lex Furia (de sponsu).*
89 *Lex Plautia.*
81 *Leges Corneliæ.*
52 *Lex Pompeia (de parricidiis).*

40 *Lex Falcidia.*
*Lex Hostilia.*
*Lex Publilia (de sponsu)*

B.C.

753–509 THE REGAL PERIOD.
*Comitia curiata* and the Senate the earliest legislative bodies.
Division of the people into classes and centuries; *comitia centuriata.*
*Jus Papirianum.*

509–30 THE REPUBLIC.

493 Recognition of tribunes of the *plebs.*
488 First meeting of *comitia tributa.*

*Legis actiones.*

366 A plebeian appointed consul.

303 *Jus Flavianum.*
284 Distinction between *populus* and *plebs* disappears.
246 *Prætor peregrinus.*

*Jus Ælianum* or *tripertitum.*

The formulary system.
Influence of Greek philosophy.
148 *Quæstiones perpetuæ.*

Quintus Mucius Scævola.
Cajus Aquilius Galla.
Servius Sulpicius.

B.C.
33 *Lex Scribonia.*
*Leges Juliæ.*
Legal effect given to *fideicommissa* and codicils.
A.D.
4 *Lex Ælia Sentia.*
8 *Lex Furia Caninia.*
9 *Lex Papia Poppæa.*
11 *Lex Junia Velleia.*
16 *Sc. Libonianum.*
19 *Lex Junia Norbana.*
42 *Sc. Largianum.*
45 *Lex Claudia.*
46 *Sc. Macedonianum.*
*Sc. Velleianum.*
52 *Sc. Claudianum.*
60 *Sc. Neronianum.*
61 *Lex Petronia.*
62 *Sc. Trebellianum.*
73 *Sc. Pegasianum.*
*Beneficium divisionis* (Rescript of Hadrian).

158 *Sc. Tertullianum.*
*Addictio bonorum libertatis causa* (Rescript of Marcus Aurelius).
178 *Sc. Orphitianum.*

291 Women allowed to adopt.
339 Formal words no longer necessary for appointment of heirs.

470 Formal words no longer necessary in stipulations.
*Lex Zenoniana (emphyteusis).*
JUSTINIAN:—
Change in law of adoption.
Changes in laws of succession.
*Beneficium inventarii.*
Abolition of *Latini Juniani* and *deditirii.*
*Beneficium ordinis.*
Changes in law of *peculium.*
*Donatio propter nuptias.*
Repeal of *lex Ælia Sentia, lex Furia Caninia,* and *sc. Claudianum.*

B.C.
30 THE EMPIRE.
The *jus respondendi* conferred by Augustus (*ut ex auctoritate ejus responderent*).
Trebatius.
Antistius Labeo.
Ateius Capito.

Proculus.
Masurius Sabinus.

A.D.
117 *Edictum perpetuum.*
Hadrian's rescript: *quibus permissum est jura condere* (GAL. i. 7).
Celsus.
Salvius Julianus.

Gaius.
Pomponius.

Papinian.
Paul.
Ulpian.
Modestinus.
212 Roman citizenship conferred upon the whole empire.
296 *Extraordinaria judicia* become the regular mode of trial.
306 *Codex Gregorianus.*
330 Seat of empire transferred to Constantinople.
365 *Codex Hermogenianus.*
426 *Lex citationis.*
438 *Codex Theodosianus.*
476 Fall of Western Empire.

JUSTINIAN (482-565):—
529 *Codex vetus* (not extant).
*Quinquaginta decisiones.*
533 The Digest.
The Institutes.
534 *Codex repetitæ prælectionis.*
535 564 The Novels.

# INSTITUTIONUM JUSTINIANI

## PROŒMIUM.

IN NOMINE DOMINI NOSTRI JESU CHRISTI.

IMPERATOR CÆSAR FLAVIUS JUSTINIANUS ALAMANNICUS GOTHICUS FRANCICUS GERMANICUS ANTICUS ALANICUS VANDALICUS AFRICANUS PIUS FELIX INCLYTUS VICTOR AC TRIUMPHATOR SEMPER AUGUSTUS CUPIDÆ LEGUM JUVENTUTI.

Imperatoriam *majestatem* non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte possit gubernari et princeps Romanus victor existat non solum in hostilibus prœliis, sed etiam per legitimos tramites calumniantium iniquitates expellens, et fiat tam juris religiosissimus quam victis hostibus triumphator.

1. Quorum utramque viam cum summis vigiliis et summa providentia adnuente Deo perfecimus. Et bellicos quidem sudores nostros barbaricæ gentes sub juga nostra deductæ cognoscunt et tam Africa quam aliæ innumerosæ provinciæ post tanta temporum spatia nostris victoriis a cælesti numine præstitis iterum *dicioni Romanæ* nostroque additæ imperio protestantur. Omnes vero populi legibus jam a nobis promulgatis vel compositis reguntur.

2. Et cum sacratissimas constitutiones antea confusas in luculentam ereximus consonantiam, tunc nostram extendimus curam et ad im-

IN THE NAME OF OUR LORD JESUS CHRIST.

THE EMPEROR CÆSAR FLAVIUS JUSTINIANUS, VANQUISHER OF THE ALAMANI, GOTHS, FRANCS, GERMANS, ANTES, ALANI, VANDALS, AFRICANS, PIOUS, HAPPY, GLORIOUS, TRIUMPHANT CONQUEROR, EVER AUGUST, TO THE YOUTH DESIROUS OF STUDYING THE LAW, GREETING.

The imperial majesty should be not only made glorious by arms, but also strengthened by laws, that, alike in time of peace and in time of war, the state may be well governed, and that the emperor may not only be victorious in the field of battle, but also may by every legal means repel the iniquities of men who abuse the laws, and may at once religiously uphold justice and triumph over his conquered enemies.

1. By our incessant labours and great care, with the blessing of God, we have attained this double end. The barbarian nations reduced under our yoke know our efforts in war; to which also Africa and very many other provinces bear witness, which, after so long an interval, have been restored to the dominion of Rome and our empire, by our victories gained through the favour of heaven. All nations moreover are governed by laws which we have already either promulgated or compiled.

2. When we had arranged and brought into perfect harmony the hitherto confused mass of imperial constitutions, we then extended our

mensa prudentiæ veteris volumina et opus desperatum, quasi per medium profundum euntes, cælesti favore jam adimplevimus.

3. Cumque hoc Deo propitio peractum est, Triboniano, viro magnifico, magistro et ex quæstore sacri palatii nostri, nec non Theophilo et Dorotheo, viris illustribus, antecessoribus, quorum omnium sollertiam et legum scientiam et circa nostras jussiones fidem jam ex multis rerum argumentis accepimus, convocatis, specialiter mandavimus, ut nostra auctoritate nostrisque orationibus componant institutiones: ut hæc vobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere, et tam aures quam animæ vestræ nihil inutile nihilque perperam positum, sed quod in ipsis rerum optinet argumentis, accipiant et quod in priore tempore vix post triennium inferioribus contingebat, ut tunc constitutiones imperatorias legerent, hoc vos a primordio ingrediamini, digni tanto honore tantaque reperti felicitate, ut et initium vobis et finis legum eruditionis a voce principali procedat.

4. Igitur post libros quinquaginta digestorum seu pandectarum, in quos omne jus antiquum collatum est (quos per eundem virum excelsum Tribonianum nec non ceteros viros illustres et facundissimos confecimus), in hos quattuor libros easdem institutiones partiri jussimus, ut sint totius legitimæ scientiæ prima elementa.

5. Quibus breviter expositum est et quod antea optinebat, et quod postea desuetudine inumbratum ab imperiali remedio illuminatum est.

6. Quas ex omnibus antiquorum institutionibus et præcipue ex commentariis Gaii nostri tam institutionum quam rerum cottidianarum, aliisque multis commentariis compositas cum tres prædicti viri prudentes nobis optulerunt, et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accommodavimus.

care to the vast volumes of ancient law; and, sailing as it were across the mid-ocean, have now completed, through the favour of heaven, a work that once seemed beyond hope.

3. When by the blessing of God this task was accomplished, we summoned the most eminent Tribonian, master and ex-quæstor of our palace, together with the illustrious Theophilus and Dorotheus, professors of law, all of whom have on many occasions proved to us their ability, legal knowledge, and obedience to our orders; and we have specially charged them to compose, under our authority and advice, Institutes, so that you may **no more learn the first elements of law from old and erroneous sources, but apprehend them by the clear light of imperial wisdom; and that your minds and ears may receive nothing that is useless or misplaced, but only what obtains in actual practice. So that, whereas, formerly, the junior students could scarcely, after three years' study, read the imperial constitutions, you may now commence your studies by reading them, you who have been thought worthy of an honour and a happiness so great as that the first and last lessons in the knowledge of** the law should issue for you from the mouth of the emperor.

4. When, therefore, by the assistance of the same eminent person Tribonian and that of other illustrious and learned men, we had compiled the fifty books, called Digests or Pandects, in which is collected the whole ancient law, we directed that these Institutes should be divided into four books, which might serve as the first elements of the whole science of law.

5. In these books a brief exposition is given of the ancient laws, and of those also which, overshadowed by disuse, have been again brought to light by our imperial authority.

6. These four books of Institutes thus compiled, from all the Institutes left us by the ancients, and chiefly from the commentaries of our Gaius, both in his Institutes, and in his work on daily affairs, and also from many other commentaries, were presented to us by the three learned men we have above named. We have read and examined them and have accorded to them all the force of our constitutions.



7. Summa itaque ope et alacri studio has leges nostras accipite et vosmet ipsos sic eruditos ostendite, ut spes vos pulcherrima foveat, toto legitimo opere perfecto, posse etiam nostram rem publicam in partibus ejus vobis credendis gubernare.

Data undecimo kalendas Decembres Constantinopoli domino nostro Justiniano perpetuo Augusto tertium consule.

7. Receive, therefore, with eagerness, and study with cheerful diligence, these our laws, and show yourselves persons of such learning that you may conceive the flattering hope of yourselves being able, when your course of legal study is completed, to govern our empire in the different portions that may be entrusted to your care.

Given at Constantinople on the eleventh day of the calends of December, in the third consulate of the Emperor Justinian, ever August (533).

# LIBER PRIMUS.

## TIT. I. DE JUSTITIA ET JURE.

JUSTITIA est constans et perpetua voluntas jus suum cuique tribuens.

Justice is the constant and perpetual wish to render every one his due.

D. i. 1. 10.

The term *jus*, in its most extended sense, was taken by the Roman jurists to include all the commands laid upon me that they are bound to fulfil, both the commands of morality and of law. The distinction between commands which are only enforced by the sanction of public or private opinion, and those enforced by positive legal sanctions, may seem clear to us; but the Roman jurists, in speaking of the elementary principles and divisions of jurisprudence, did not keep law and morality distinct. Celsus defines *jus* as *ars boni et æqui*. (D. i. 1. 1.) This extension of the term would sink positive law in morality; that only would be supposed to be commanded which ought to be commanded. The confusion arose principally from the view of the law of nature, borrowed from Greek philosophy by the jurists. (See Introd. sec. 14.)

*Jus*, used in its strictly legal sense, has two principal meanings. It either signifies *law*, that is, the whole mass of rights and duties protected and enforced by legal remedies, or it means any single right, that is, any faculty or privilege accorded by law to one man accompanied by a correlative duty imposed on another man. *Jus itineris*, for instance, is the right given to one man of going through the land of another who is placed under a duty to let him pass. Neither a right nor a duty, at any rate in the sphere of private law with which alone the Institutes deal, can exist without the other. (See Introd. sec. 36.)

1. Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.

1. Jurisprudence is the knowledge of things divine and human; the science of the just and the unjust.

D. i. 1. 10. 2.

*Jurisprudentia* is the knowledge of what is *jus*, and *jus*, according to the theory of the law of nature, laid down what is commanded by right reason, this right reason being common to the divine scheme of things and to man. On this ground, and also because public law has to deal with religious worship, the knowledge of divine things was necessary, as well as the knowledge of human things, to say what were the contents of *jus*. Both this and the preceding definition are taken at random out of the writings of Ulpian. (See Introd. sec. 24.)

2. His generaliter cognitis et incipientibus nobis exponere jura populi Romani ita maxime videntur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. Alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore ejus, sæpe etiam cum diffidentia, quæ plerumque juvenes avertit, serius ad id perducemus, ad quod leniore via ductus sine magno labore et sine ulla diffidentia maturius perduci potuisset.

2. Having explained these general terms, we think we shall commence our exposition of the law of the Roman people most advantageously, if our explanation is at first plain and easy, and is then carried on into details with the utmost care and exactness. For, if at the outset we overload the mind of the student, while yet new to the subject and unable to bear much, with a multitude and variety of topics, one of two things will happen—we shall either cause him wholly to abandon his studies, or, after great toil, and often after great distrust of himself (the most frequent stumbling-block in the way of youth), we shall at last conduct him to the point, to which, if he had been led by a smoother road, he might, without great labour, and without any distrust of his own powers, have been sooner conducted.

3. Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.

3. The maxims of law are these: to live honestly, to hurt no one, to give every one his due.

4. Hujus studii duæ sunt positiones, publicum et privatum. Publicum jus est, quod ad statum rei Romanæ spectat, privatum, quod ad singulorum utilitatem pertinet. Dicendum est igitur de jure privato, quod tripertitum est; collectum est enim ex naturalibus præceptis aut gentium aut civilibus.

4. The study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman Empire: private law, that which concerns the interests of individuals. We are now to treat of the latter, which is composed of three elements, and consists of precepts belonging to natural law, to the law of nations, and to the civil law.

D. 1. 1. 1. 2.

Both the *jus publicum* and the *jus privatum* fall under municipal law, that is, the law of a particular state. *Publicum jus in sacris, in sacerdotibus, in magistratibus consistit.* (D. i. 1. 1. 2.) Public law regulates religious worship and civil administration; private law determines the rights and duties of individuals. The threefold division of private law given in the text is discussed in the next section



## TIT. II. DE JURE NATURALI, GENTIUM ET CIVILI.

Jus naturale est, quod natura omnia animalia docuit. Nam jus istud non humani generis proprium est, sed omnium animalium, quæ in cælo, quæ in terra, quæ in mari nascuntur. Hinc descendit maris atque feminæ conjugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio: videmus etenim cetera quoque animalia istius juris peritia censeri.

The law of nature is that law which nature teaches to all animals. For this law does not belong exclusively to the human race, but belongs to all animals, whether of the air, the earth, or the sea. Hence comes that yoking together of male and female, which we term matrimony; hence the procreation and bringing up of children. We see, indeed, that all the other animals besides man are considered as having knowledge of this law.

D. i. 1. 1. 3.

In the Introduction (sec. 14) a sketch has been given of what the jurists meant by the *lex naturæ*. It was the expression of right reason inherent in nature and man, and having a binding force as a law. It was contrasted with the *jus civile*, the old strict law of Rome (Introd. sec. 10), and also with the *jus gentium*, the sum, that is, of the law found to obtain in other nations besides the Romans, as well as in Roman law. (Introd. sec. 12.) There thus arose the threefold division of law adopted in the last paragraph of the last title; but the *jus gentium* and the *jus naturale* were often placed in the same head of division, for the law common to all nations was but the embodiment and indication of what right reason was supposed to command to all men. Thus while the threefold division of law was adopted by some jurists, a twofold division was adopted by others, and is adopted in the next and the eleventh paragraphs of this title, Justinian first borrowing from Ulpian, who adopted the threefold division, and then from Gaius, who adopted the twofold.

Unfortunately, in order to give a notion of *jus naturale*, Justinian has borrowed a passage from Ulpian, in which that jurist runs off into a subsidiary and divergent line of thought. It is easy to see that if we begin to make inherent reason the foundation of law, we may find it necessary to take into account the community of actions which, in some of the primary features of physical life, reason or instinct suggests to man and animals. If *jus* is that which nature commands, nature may be said to command the propagation of the species in animals as much as in man, and thus there would be a *jus* common to animals and to men. A jurist to whom the theory of the *lex naturæ* was familiar, might easily pursue the subject to a point in which men and animals seemed to meet. But the main theory had nothing to do with animals, as it looked only to the reason inherent in the universe and in man, and in considering what the Roman jurists meant by *jus naturale* this fragment of Ulpian may be dismissed almost entirely from our notice.

cultrum. Eadem lege et venefici capite damnantur, qui artibus odiosis, tam venenis quam susurris magicis homines occiderunt vel mala medicamenta publice vendiderunt.

By the same law, poisoners are capitally condemned who by hateful arts use poisons or magic charms to kill men, or publicly sell hurtful drugs.

D. xlviii. 8. 1. pr. and 1; D. l. 16. 233. 2.

*Lex Cornelia de sicariis*, passed during the dictatorship of Sylla, B.C. 81.

6. Alia deinde lex asperrimum crimen nova pœna persequitur, quæ Pompeia de parricidiis vocatur. Qua cavetur, ut, si quis parentis aut filii aut omnino adfectionis ejus, quæ nuncupatione parricidii continetur, fata properaverit, sive clam sive palam id ausus fuerit, nec non is, cujus dolo malo id factum est, vel conscius criminis existit, licet extraneus sit, pœna parricidii puniatur et neque gladio neque ignibus neque ulli alii solemni pœnæ subjugetur, sed insutus culeo cum cane et gallo gallinaceo et vipera et simia et inter ejus ferales angustias comprehensus, secundum quod regionis qualitas tulerit, vel in vicinum mare vel in amnem projiciatur, ut omni elementorum usu vivus carere incipiat, et ei cælum superstiti, terra mortuo auferatur. Si quis autem alias cognatione vel adfinitate conjunctas personas necaverit, pœnam legis Corneliæ de sicariis sustinebit.

6. Another law, the *lex Pompeia de parricidiis*, inflicts on the most horrible of crimes a strange punishment. It provides, that any one who has hastened the death of a parent or child, or of any other relation whose murder is legally termed parricide, whether he acts openly or secretly, and whoever instigates or is an accomplice in the commission of the crime, although a stranger, shall undergo the penalty of parricide. He will be punished, not by the sword, nor by fire, nor by any ordinary mode of punishment, but he is to be sewed up in a sack with a dog, a cock, a viper, and an ape, and enclosed in this horrible prison he is to be, according to the nature of the place, thrown into the sea, or into a river, that even in his lifetime he may begin to be deprived of the use of the elements, and that the air may be denied to him while he lives, and the earth when he dies. He who kills persons allied to him by cognation or alliance, other than those we have mentioned, shall undergo the penalty of the *lex Cornelia de sicariis*.

D. xlviii. 9. 1, 9; C. ix. 17.

*Lex Pompeia de parricidiis*, passed in the consulship of Pompeius, B.C. 52. The punishment mentioned in the text is borrowed from the legislation of the Twelve Tables. The *lex Pompeia*, under the term *parricidium*, embraced the murder of any ascendant, of a brother or sister, of a husband or wife, of *consobrini*, of a step-father, step-mother, father-in-law, mother-in-law, &c., of a patron, and of a child if killed by the mother or grandfather, but not if killed by the father. (D. xlviii. 9. 1.) If there was no river at hand, the offender was torn to pieces by wild beasts. (D. xlviii. 9. 9. pr.)

7. Item lex Cornelia de falsis, quæ etiam testamentaria vocatur, pœnam irrogat ei, qui testamentum vel aliud instrumentum falsum scripserit, signaverit, recitaverit, subjecerit, quive signum adulterinum fecerit, sculpserit, expresserit sciens dolo malo. Ejusque legis pœna in

7. Also the *lex Cornelia de falsis*, otherwise called *testamentaria*, punishes any one who shall have written, sealed, read, or substituted a false testament, or any other instrument, or shall have made, cut, or impressed a false seal, knowingly and maliciously. The penalty is, upon a slave, the extreme punishment of the law, as is pronounced by the *lex Cornelia* upon assassins and poisoners; that upon freemen is deportation.



servos ultimum supplicium est, quod et in lege de sicariis et veneficis servatur, in liberos vero deportatio.

D. xlviii. 10. 1. 4, 13; D. xlviii. 10. 16. 1.

*Lex Cornelia de falsis*, or *Cornelia testamentaria*, was passed under the dictatorship of Sylla, B.C. 81.

8. Item lex Julia de vi publica seu privata adversus eos exoritur, qui vim vel armatam vel sine armis commiserint. Sed si quidem armata vis arguatur, deportatio ei ex lege Julia de vi publica irrogatur: si vero sine armis, in tertiam partem bonorum publicatio imponitur. Sin autem per vim raptus virginis vel viduæ vel sanctimonialis, velatæ vel aliæ, fuerit perpetratus, tunc et peccatores et ei, qui opem flagitio dederunt, capite puniuntur secundum nostræ constitutionis definitionem, ex qua hæc apertius possibile est scire.

8. Also the *lex Julia de vi publica seu privata* punishes those who are guilty of violence, whether with armed force or without. For violence with armed force the penalty inflicted by the *lex Julia de vi publica* is deportation. For violence without arms, it is the confiscation of a third of the offender's property. But in case of the rape of a virgin, a widow, a person devoted to religion, whether wearing the veil or not, both the ravishers and all who have aided in the commission of the crime are punished capitally, according to the provisions of our constitution, in which may be found fuller information on this head.

D. xlviii. 6. 10. 2; C. ix. 13. 1.

*Lex Julia de vi*, passed in the time of Julius Cæsar or Augustus, but its exact date is not known.

9. Lex Julia peculatus eos punit, qui pecuniam vel rem publicam vel sacram vel religiosam furati fuerint. Sed si quidem ipsi judices tempore administrationis publicas pecunias subtraxerunt, capitali animadversione puniuntur, et non solum hi, sed etiam qui ministerium eis ad hoc adhibuerunt vel qui subtracta ab his scientes susceperunt: alii vero, qui in hanc legem inciderint, pœnæ deportationis subjugantur.

9. Also the *lex Julia peculatus* punishes those who have stolen public money or property, or anything sacred or religious. Magistrates, who, during the time of their administration, have stolen the public money, are punishable capitally, as also are all who aid them in their robbery, or who knowingly receive their plunder from them. Other persons who offend against this law are subject to the penalty of deportation.

D. xlviii. 13. 1, 3; C. ix. 28.

*Lex Julia peculatus*. The exact date of this law is also unknown. It probably belongs to the same epoch as the *lex Julia de vi*.

10. Est et inter publica judicia lex Fabia de plagiariis, quæ interdum capitis pœnam ex sacris constitutionibus irrogat, interdum leviorem.

10. There is also among the laws giving rise to public prosecutions the *lex Fabia de plagiariis*, which inflicts, in certain cases, capital punishment according to the constitutions, sometimes a lighter punishment.

C. ix. 20. 7.

Cicero refers to this law (*pro Rabirio*, 3), but nothing more is