THE INSTITUTES
OF
JUSTINIAN
WITH
ENGLISH INTRODUCTION, TRANSLATION, AND NOTES

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PREFACE

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, Ducarroy, 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. Postle'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 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.

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
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 *curiae*, and each *curia* into ten *decuriae*; 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.

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 *gentes* was a part of a *gens* gave admittance to a sacred circle which was closed to all besides. Those in this circle were called *fellows*, except that they were invested with peculiar sacred offices.

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 *ius 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 *populas*

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*Geniales sunt, qui inter se colentes nomine sunt; non est satia, qui ab ingeniosis oriundi sunt; ne tid quem satia est: quorum majorum non servitutem servivit; abest etiam nume: qui capitale non sunt desinenti.* — Cicero. Topice, 8.

*Quirites, regem creare; ita Patribas vim in. — 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. 90).

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

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

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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 explication 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 paid 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 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 immovable, and one for moveable, 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; 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 jus 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.

* 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.
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 delicta. It prescribed capital punishment for libellous songs and outrages. A limb was to be given for a limb, three hundred assess 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 assess; 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 incendiaryism 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 (centesima usura), and the usurer who exceeded this was to be fined quadruplo. 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 capitaly. 9. The Ninth Table related to public law, and provided that there were to be no privilega, or laws affecting individuals only; that the centuries alone could pronounce capital sentence; that the judge or arbiter taking a bribe should be punishable capitaly; 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, judicio postulatio (in the shape of the arbitration to be given to settle boundaries), manus injetric, and pignoris capio. They further recognise the distinction between the magistrate and the judge, 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 patris potestas, usucapio, tutejage, testamentary and intestate succession, the nexum, mancipatio, all are enforced, and evidently formed part of the ancient customary law of Rome.

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 Decemvire contained provisions which later writers considered manifestly unjust:* and we have seen that, among other things, they expressly refused the consulship 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 forbade the constitution of any magistrates 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 Carthaginian law gave the consulship 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 suerum had hitherto

* See De Rep. ii. 37
interpolated 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 saecra 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, praetor, curule aedile; 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 saecra 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.

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 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.

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 Latium 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 consubrium; 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

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* Ideoque decemviro consulis dimissae, ne incertae proie auspicia turcaretur.—Lav. iv. 8.
1 Interrogantibus tribuno, cur plebeium consularem non aperiet ? . . . respondit, quod non plebe jus auspicia haberet.—Lav. iv. 8.
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 Latin colonarii. They had the commercium, but not the conubium, 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 praetor, 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.\footnote{See \textit{Warnecke, Hist. du droit romain exteme}, p. 70. \textit{Savigny, Geschichte d. röm. Rechts}, vol. 1. ch. 2.}

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 \textit{jus gentium}, that is, the law ascertained to obtain generally in other nations, side by side with the \textit{jus civile}, the old law of Rome. The \textit{praetor 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 \textit{dominium ex jure Quiritium}. But when justice and reason pronounced a stranger to be an owner, it was impossible for a praetor not to recognize 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 civilization soon induced them to do in the case of citizens. They recognized 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 praetor appealed to a wider law, and

sought in the principles of equity a remedy for the deficiencies of the \textit{jus civile}. He pronounced edicts (\textit{edita}), 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 praetor to collect into one \textit{edictum} the rules on which he intended to act during his tenure of office, and to publish them on a tablet (\textit{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 praetor to another, was termed the \textit{edictum perpetuum}. How much the praetor 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 \textit{jus honorarium}, the law of the praetors\footnote{The term also included the edicts of the ediles, who issued decrees in matters that came specially within their province.} (\textit{qui honoris gerbant}), was spoken of as having a distinct place by the side, and as the complement, of the \textit{jus civile}.

The praetors gave the formula of an action to the judge. For many centuries senators alone were judges until the \textit{Lex Semproniana} (B.C. 125) 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 (\textit{in albo relatis}) there were the \textit{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 dispatch. And there were also the \textit{centuriae}, taken so many from each tribe, and who judged of cases of \textit{status}, Quirittary property, and testamentary and intestate succession.

13. The progress of law was also much facilitated by the growth of a body of men termed \textit{juris consulti} or \textit{juris prisci 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.
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
foms.† They gave answers when asked as to the law on a par-
ticular 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 prudentem
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 Paulus, the contemporary of Cicero, are
those otherwise best known to us.§ In the latter days of the
republic the jurisprudentes 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.

14. By far the most important addition to the system of
the law 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
came, and what was understood by it. It came from the Stoics,
and especially from Chrysippus. By naturæ, 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 in natura, quae jure ea
que faciendi 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 uni-
verse, a force inherent in the universe by its constitution (lex est
naturæ vis). But man has reason, and as reason cannot be two-
fold, 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 accord-
ance 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 praetor
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 adher-
ence 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 praetor, in accordance
with its dictates, provided a remedy by means of the pliant forms
of the pratorian actions. Gradually the cases, as well as the
modes in which he would thus interfere, grew more and more cer-
tain and recognised, and thus a body of equitable principles was
introduced into Roman law. The two great agents in modify-
ing 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.

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* Liv. i. 48.
† The duty of a jurisprudent was responsus, aergo, caverere.—Cic. de Orat. 1. 48.
‡ Clienti promitter jura.—Hom. Epist. ii. Ep. i. 104. Clientis means literally 'a listener'.
§ Gnaea, viii. 81.

* 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.
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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 praetorian actions, but by the development of the law of obligations, the old conveyance of necum 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 praetor constantly added cases in which he announced that he would recognize and enforce an obligation. The praetor, 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.

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 reipublicae. 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 dietating 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 epistole, addressed to individuals, or public bodies; sometimes by decretal, or judicial sentences given by the emperor, which served as precedents; at other times by rescripta, that is, answers given

* See Austin, Jurisprudence, Lect. xxx. and xxxi.
† Cicero mentions them among the sources of law.—Topic. 8.
‡ Ascon. Argum. in Cornel. (Orell. p. 57).
§ Ascon. Evacratii Cornel. (Orell. p. 87).
¶ Pufata, Instit. sec. 76.

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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 naturae 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. * 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 Caesars.

* D. i. 4. 1.
† Just. i. 2. 6: Quod principi placuit legis habet vigorem.
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Emperor Septimius Severus, and held under him the office of praetorian prefect, 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 epitaph 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.

23. Paul, Ulpian, and Modestinus are all said to have been pupils of Papinian. Julius Paulus was a member of the imperial council and praetorian prefect under Alexander Severus (A.D. 222). Besides numerous fragments in the Digest, we possess his Recepta Sententiarum, 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.

24. Domitius Ulpianus derived his origin, as he himself tells us, from Tyre in Phoenicia. 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 praetorian prefect 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 Ulpianae.

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 Excerpta Minor Libri. We have nothing remaining

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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 Sabinius, after Sabinius, a follower of Capito. Gaius, who informs us that he was a Sabinius, 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.

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 Sabinius. Besides other works which he is known or supposed to have written, he composed a treatise on the exictum provinciale (the effect of the process 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. Aquilius Papinianus was the intimate friend of the

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*Atius Capito in his, qua si tradita fuerant, persueratbat. Labco inspexit qualitate et felicis doctrinae; qui et cetera opusia sapientiis operum debuit, plurima tamen instituit.—Dig. i. 2. § 47.

*We know the names of more than seventy, embracing an extraordinary variety of subjects.† D. i. 15. 1 pr.
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of his composition except the extracts from his works given in the Digest.

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, affording 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 bond 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 formula system the magistrates 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 formula 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.

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

28. The emperor Justinian was of Gothic origin. His native name was Upurad, 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.

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

* The value of citizenship was greatly lessened by the recklessness with which it was extended. Cassiodorus (A.D. 530) 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 cities.

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The Digest.

The Institutes.

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 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 Theophilius and Dorotheus, respectively professors in the schools of Constantinople and Berytus, were appointed to draw it up, and like the Digest 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. Theophilius, 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.*

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 Bologna, and brought thence to Florence, where it now is. Of the Institutes there is no manuscript earlier than one of the tenth century, known as the codex Bambergensis.

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the undertaking, and in December, A.D. 534, the new code, called

*The second* the code *repertus protectionis*, 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.

33. But Justinian could not endure that his having systematized 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 *Novella Constitutioe*. Many such *Novellae* 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.

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.

**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 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 natura* 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 *Definitions of 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.

35. The preceding historical sketch will have sufficed to show what were the sources of Roman law: (1) There was *Source of Law*. the old *jus civile*, which mainly depended on custom as its basis. (2) There were the judicial decisions of the *prexors*, and the opinions of the *juris prudentes*, supplementing the *jus civile* from the dictates of the *lex natura* 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.

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.
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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.

I. PERSONS.

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 persona 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 persona, 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, servii publici). So, a corporation, or an ecclesiastical institution, was a persona, quite apart from the individual persona 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.

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 sufragium et honores, the right of voting and the capacity of holding magisterial offices, and in the term commercium.

* The Latin for a freedman was libertinus; but libertus Titius is the Latin for the freedman of Titus.
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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 aliiens 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 (patricia 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 familias sua, for directly she attempted to continue it, she passed into another family.

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 incapacies; 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 comnubium, and could contract a legal marriage; and the commercium, and could, therefore, be a witness in a sale by manumission, 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 fill 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 \textit{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 \textit{mancipatio}; and as
the father possessed over the son the rights which a person \textit{sui
juris} possessed over himself, he sold the \textit{filiusfamilias} to a nomi-
nal 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 \textit{emancipatus}, or sold
out of the family. When a stranger, being himself \textit{aleni juris},
wished or was compelled to enter a family, the process was effected
by adoption. Here, again, then, was another sale, the \textit{pater-
familias} of the family he quitted being the seller, and the \textit{pater-
familias} of that he entered being the purchaser. If the stranger
was \textit{sui juris}, he entered his new family by arrogation, which in
ancient times could only be effected by a vote in the \textit{comitia
curiata}, it being considered a matter of public policy to keep a
watch over such a proceeding, lest the last of his
power were connected together by the tie of
\textit{agnatio}, and the persons so mutually connected
were \textit{agnati} to each other. When the \textit{paterfamilias} died, the tie
of \textit{agnatio} still subsisted. Each of those who, by his death, be-
came \textit{sui juris}, became the head of a new family; but still they
and their descendants were \textit{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 \textit{agnati} to each other if the life of the original
\textit{paterfamilias} had been prolonged, were \textit{agnati} at any distance
of time, however great, after his death. A number of distinct
families might thus, when looked on as connected by \textit{agnatio},
be spoken of as one family; for they were all portions of the
family of a deceased \textit{paterfamilias}.

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

45. Beyond the circle of the \textit{agnati}, the ancient patrician had
that of the \textit{gens}. They were nearer to him than those who were
only related to him by blood. If a patrician died intestate, in
in the sense used above in sec. 37. It also meant all or some of the capacities
attaching to a person. The \textit{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 \textit{persona maritii} or \textit{patris}.

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

* \textit{Persona} had in Roman law a double signification. It meant a person

\textit{who filled up the measure of his pupil's \textit{persona}.} He of course

\textit{was called \textit{auctoritas}.}
default of agnati, his gentiles, the men of his gens, were his heirs.

Gentiles. 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 agnati. 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.

46. We have spoken as if the wife had been always in the position of children sprung from a legal marriage, by the process of legitimation. 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 faithfulness 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 capit, and the change in each of these component parts was said to be a diminutio capit, a lessening or impairing of the capit. 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 capit diminutio 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 capit diminutio media, involved the loss of family rights, but still left him free. Thirdly, by what was called capit diminutio 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 capit diminutio 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 capit diminutio involved the loss of neither of the two other component parts of the status.

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 Romanus 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
impair the _existimatio_ very seriously, its diminution was said to
amount to _infamia_. For example, a partner, or a voluntary,
condemned in an action _pro socio_ or _mandato_, was stamped with
infamy. The consequences of infamy were, that the guilty per-
son could not vote, could not receive public honours, and could
not bring a public prosecution. If the offence was rather less
great, the consequence was _turpitudine_; and if the person was in
some inferior position, as, for instance, an actor, he was said to be
marked with a _levia nota_, a slight brand of disgrace.

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 corpo-
ration, 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, is that, 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.

50. The word thing (_res_), in Roman law, a sense as arti-

ficial and as wide as the word person. As person com-

prehends every legal being that has rights and is sub-

ject 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 cor-

poreal 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 corre-
sponds with Austin's 'subject'.

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 in-
corporeal 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 pos-
sess 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'.

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 immove-
able, because attached to the soil.

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.

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.

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 deter-
mined *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 *qua ponere, numero, mensur-
atum constant*.

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 singulares*); a flock, composed *ex distantiis uni-
nominis subjectis*, is a collection of things, or, as the
jurists expressed it, is a *verum universitas* (or simply *universitas*).
As also, of course, are such comprehensive things as an inheritance,
a marriage portion, the *peculium* of a slave.

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 sacrae*, consecrated to the
superior gods; or *res religiosa*, such as tombs or burial-grounds,
consecrated to the infernal gods; or, lastly, *res sancta* (hallowed),
things human, but having a sort of sacredness attaching to them,
such as the walls and gates of cities.

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 territ-
ories of the early State, the *ager Romanus*, was distin-
guished from all other land by being alone capable of
being the subject of sale by *mancipatio* 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 *solus Italium*
came to be the name of all soil wherever situated to which the
privileges of the old *ager Romanus* were accorded, as opposed to
*solus provinciale*, which always remained, at least in theory, the
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.

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 Ulpius,† 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 agricul-
tural 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, sanc-
tioning 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

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* D P M. H A R I N A R N , 1 V . 1 3 .

† U L P . R E G . X I X . 1 ; C I C E R O , P R O F L A C C O , 5 2 ; G A I U S , 1 I . 2 7.

* 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 *manus capita* would be the booty of plunderers.
and the air, which cannot be appropriated by any particular individuals; res publica, 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 privata, 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.

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 fulfill 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.† The phrase suus 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.  

* We have, however, such expressions as suus 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 Brachylagus, 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 est quassatum in re, licet ad rem.)
Nor did the old law recognise any dominium other than that which was enjoyed ex jure Quiritium. But the praetors 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 praetor's authority, but which was not technically the same as ownership ex jure Quiritium. Commentators have called this ownership the dominium bonitariwm, a term not, however, used by the jurists. The distinction between the dominium bonitariwm and that ex jure Quiritium entirely disappeared under Justinian.

63. To the notion of dominium was opposed that of possessio.

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.

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 some servitutes, the right over the thing subject to the servitude, res serviens, was attached to the ownership of another thing (res dominans): the servitutes were then spoken of as servitutes serviorum or prioriorum, and a distinction was made in these servitutes according as the right given by them referred to the soil itself, as the right to go or to drive over it, when the servitutes were said to be rusticorurn prordiorum, or to the soil as supporting some superstructure, as a house, when the servitutes were said to be urbanorum prordiorum. In other servitutes, the right was given to particular persons; and the servitutes were then termed servitutes personarum. The most important of these latter servitutes were suasfractus and usus. Ususfractus 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 immovable property was subject to the servitutes praediorum; both moveable and immovable to the servitutes personarum.

65. There were two other rights over things which had something of the nature of servitutes, but which received a particular name. These were emphytesusis 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.

66. Lastly, there was the right given over a thing by pledge or mortgage, pignor, hypothec; 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.

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.

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.

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.

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.

Gifts. 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

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 immovable. 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 mancipatio 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 immovable 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 immovable.

73. The ownership was also transferred when things were surrendered by the fictitious process of in jure esse, 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.

74. The entirety of rights was acquired when one person succeeded to the person, 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
(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.

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
(familiae 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 sub-
scribed 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.

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 Polidia (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 (heres necessarius).
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
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,
writeings 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.

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 sui 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 suc-
ceded. In default of agnati, under the pretorian 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 pre-
furred to those of merely civil kinship.

The Institutes also notice three other modes of minor import-
ance by which universitates rerum were acquired. Other modes
of acquiring universitates rerum.
(1) Honorum additio, the giving over of the property
of a deceased person to a slave to whom the deceased
had given his freedom. (2) Honorum 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.
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 prretorian system, its value.

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 debtor. 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.

80. According to the theory of Roman law, all obligations owed their origin either to the consent of the parties (contractus), or to injuries (deditus) 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 consentio, pactum, conventum. A contract was properly an obligation arising by 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 Quirinum, 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 nequum,* 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.

82. In the time when the civil law had assumed its full shape, and apart from the alterations it received from contractus the prretorian system, the nequum was used chiefly as made re. 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 verba and littera. 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

* Nequum est, quodcumque per res et librum geritur, idque neci 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 (responsum, promissio). To the validity of the contract it was necessary that the question should be couched in the form 'spondeo' 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.

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 (tabulae 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 tabula the same sum as pecunia accepta relata. Either party could call on the other to produce his tabulae, 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 tabulae, the creditor could show his own tabulae as a proof of the contract. These contracts were peculiar to Roman citizens. Peregrini had as a substitute syngrapha, signed by both parties, or chirographa, signed only by the debtor; and on these documents an action could be brought.

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 (compositio-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.

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.

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.*

88. It was not every wrong deed for which compensation could be obtained that gave rise to an obligation ex delicto; obligations 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.

*See Austin, Jurisprudence (ed. 1869), p. 944.
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When any wrongful 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.

88. 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 ve, it was enough that the thing should be restored; when it had been formed verbi, a question and answer again furnished the means of accomplishing the desired object. Habes aceptatum? Habes, sufficed to put an end to the contract. The parties made an entry of payment in their coluces, 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 praetor would always provide a remedy by means of his equitable jurisdiction.

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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 magistrates, 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.

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 formular, by which the praetor, 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.

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 with which the State places at the disposal of those it selects to administer justice. Secondly, an inquiry has
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 iure); the claimants appeared, each touched it with a rod (vindicatio or festuca), and said, 'Hunc ego hominem (the instance given in Gaius is that of a claim to a slave) ex iure Quirinum meum esse au secundum suam causam, scuti dixi. Ece 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 manum conserto, 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 representing a combat which was supposed to take place in the field, a house, or a flock. When the vindicatio and manum conserto 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 (cerarium), 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 in Gaius:—He who had first gone through the vindicatio asked his adversary why he claimed it. Postula annas dicas, qua ex causa vindicaveris. The other replied that it was in conformity with right and law that he had made his claim. Jus perperi scuti vindicati inposui; the first answered, Quando tu injuria vindicasti, D. annas sacramentum te praevo. I challenge you to a deposit of 300 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 securities were called praeda liti et vindictarum—his signifying the thing contested itself, and vindicta 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.

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. * De incerto postulatu.\footnote{If the thing was an immovable, 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 (deduc-\footnote{Præxarum in majoribus aequitatis mosum rogandi judicis, si eum temeritatem, quæ solius jide facere posset. Cicero. In Off. in. 10.} toio). See Aurelius Gallicus, Notit. Att. xx. 10; Cicero. Pro Marcello, c. 12.)}
actio sacrae. The judicis postulatio may have left to the sphere of the actio sacrae the demand for things certi, and then the condicio took that also away.

96. There were two other actions of law, that per manus injectionem, and that per pignorarum capitionem.* 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 injectit, 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 treasury.†

Actio per pignorarum capitionem.

97. The lex actiones were necessarily replaced by other forms of actions more convenient as Rome advanced in civilization. They were in a great measure suppressed by the lex Abutia (about B.C. 180), and afterwards, in the time of Augustus, by the lex Julia. 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 praetor 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 praetor persequinus had for years been administering justice through forms of action devised by him where persequinus were concerned.

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 leges 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 praetors, of whom there were eighteen in the days of Pomponius,* and one or two other magistrates; and in the provinces the praetores or prefects, who held conspectus 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

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* D. i. 2. 34.

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* Gates, iv. 31-33.
† Gates, iv. 36-39. (See also ante, sec. 8.)
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said (sec. 12), in the judges ceasing to be taken entirely either from the senate or the equestrian orders; and two, at least, out of the five deuries of judges appearing in the album were taken from a comparatively humble class. The rogatorii and centumviri still continued to act in the cases which properly fell within their province.

90. The directions which the magistrate sent to the judge were always conveyed in a formal shape, and the word formula was used to express the different forms in which directions were given. These formulae were preserved and collected, and 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 means might suggest to him. These formulae, 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 praeors 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 praetorian system. Thus, in certain actions the parties entered into a wager, sponsio parata, 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.

100. To show what these formulae were, it will perhaps be best to give at length one of those we find in Gaius, a formula, 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 Numerium Negidius hominem vendidit; si paret Numerium Negidius Aulo Agerio estertium X. millia dare sportere, judex Numerium Negidius Aulo Agerio estertium X. millia condemn; si non paret, absolvit.*

Judex esto is merely the order for the appointment of the 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 sportere’ is the intendio; and from ‘judex’ to the end is the condemnatio. The formula ordinarily consisted of these three parts—the demonstratio, the intendio, and the condemnatio.

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.

102. The intendio 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.

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 ‘adjudicat’ 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 adjudicaveri sportere, judex Titio adjudicato. This was called the adjudicatio; so that in these actions the parts of the formula might be four—demonstratio, intendio, adjudicatio, and condemnatio.§ Of course when a thing, and not a sum of money,
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 *dantatuat X. milia condanna*. Sometimes the direction was still more indefinite, and the sum was left to the discretion of the judge. *Quanti ea res est, tantam pecuniam, &c., condanna*. Sometimes, too, as when the action was real, i.e. brought to claim a thing, the *actio* was *arbitraria*, and the words *nisi resitutat* 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.

104. The *intentio* sometimes stood quite alone, as in what was called a *praedictialis formula*; *when the object of the formula* 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 *praedictium*. 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 Auti*.

*Replicatio.* *Agrii factum sit nique 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 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*.

*Caesar, iv. 44, 183.
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106. *Actio* meant, under the system of the actions of law, a particular form of procedure; under that of the *formula*, it meant the right granted to a plaintiff by the magistrature 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 forimulary 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 *persona*. If the object of the proceedings was to enforce a right to a thing, then the *formula* ran *si parere hominem Audi Ageri esse*; if to enforce an obligation, then the *formula* ran *si parere Numerium Negandum Audii Ageri dare, facere, prestare aportere*; and it was according to this difference in the *intentio* that actions were said to be in *rem* or in *persona*. *Vindicatio* came to be used as a generic term for actions in *rem*, and *contrectio* for actions in *persona*. 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-

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 directas*) 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 foign 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 *bonae 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. 109), 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 *arbitraria* was one termed *ad ebulendum*, 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 *formulae* 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, ebulendum, restitutum*; '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

* See note in Appendix (page 453) to Abyd's *Gaius.*
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.

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.

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.*

110. In the days of the later emperors, the provinces were clased together into prefectures. Over each province was a praeses, 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 provinciae, or by the defensores of provincial towns. The great cities, such as Constantinople and Alexandria, were under a separate jurisdiction. The praetorian prefect was the head judge of appeal.

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.

*Justin. iv. 15. b.
but one was often made, and then this statement, called the *libellus conventionis*, was sent by a bailiff of the court (victor, 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 proceeding *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 *titia 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 putting executions on so much of the debtor's property as was requisite had been introduced.

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 (*presumptiones juris*) were recognized, 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 recognized 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 truth 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.*

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 centuriata* 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 (quastio) of the crime. At first each *delegatio* was made to try one particular offence, and when the case had been tried the quastio was at an end. These quastiones, 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 quastiones began to be made perpetuae the first of these being probably the *quastio peccaminum repetundae*.

* HUNTER, 844, 858, 859, 860.
established by the lex Calpurnia (n.c. 233), and this change was accompanied by the introduction of something like a body of criminal law. When a questio 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 questio 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 questiones 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 them, 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 (praeses), 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, absolvus, non liquet. If the accused was condemned, he received the precise punishment provided by the law creating the questio 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 questio 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 questiones 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.

753-509 THE ROYAL PERIOD.

Comitia curiata and the Senate; the earliest legislative bodies.

706-504 The Republic.

495 First meeting of comitia tributa.

50-30 The Empires.

30 First meeting of questiones perpetuæ.

B.C. 10-286

590 Lex Valeria.

450 Lex acer.

450 The Twelve Tables.

443 Lex Valeria Horatia.

444 Lex Caelia.

341 Lex Gensia.

285 Lex Publica.

295 Lex Petelia Papiria.

295 Lex Hostilia.

295 Lex Antonia.

246 Lex Sula.

233 Lex Calpurnia.

197 Lex Atilia.

197 Lex Atilia.

197 Lex Cincia.

197 Lex Piaterna.

197 Lex Piaterna (testamentaria).

181 Lex Albitia.

181 Lex Yocamia.

121 Lex Sempronia.

121 Lex Apulia.

96 Lex Varia (de sponsis).

90 Lex Flamina.

91 Lex Cornelius.

91 Lex Pompeia (de pariciadiis).

12 Lex Palculia.

12 Lex Hostilia.

12 Lex Publica (de sponsis).
CHIEF LAWS, EVENTS, ETC.

B.C.
33 Lex Scribonia. Legal effect given to fideicommissa and codicils.

A.D.
4 Lex Alia Servia.
8 Lex Pana Cassia.
9 Lex Pania Poplica.
11 Lex Julian Velica.
16 Sc. Libonamum.
19 Lex Junia Noriana.
22 Sc. Largumum.
23 Lex Claudia.
25 Sc. Macdonelnum.
27 Sc. Villaniurn.
53 Sc. Ulanniurn.
60 Sc. Neroniunum.
61 Lex Petronia.
65 Sc. Trabeianum.
73 Sc. Petroniunm.

Benefitum divisionis (Rescript of Hadrian).

B.C.
30 THE EXPIRE.
The jus respondendi conferred by Augustus (in ex auctoritate eujj respondenti).

Tributum.
Antistius Laba.
Alcicus Capio.

Proculius.
Mansion Sabinius.

A.D.
158 Sc. Trabeianum.
Adicliio borionin liberalica causa (Rescript of Marcus Aurelius).

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

470 Formal words no longer necessary in stipulations.
Lex Brionum (amplissima).

JUSTINIAN:
Change in law of adoption.
Changes in law of succession.

Roman citizenship conferred upon the whole empire.

Extantjus hiependicabatur quibus permium Suzuki est juris consoderi (Cast. 1. 17).

Celsius.
Salius Julianus.

Oasus.
Pomponius.
Papianus.
Paulus.
Ulpianus.

Codex Gregoricum.

Seat of empire transferred to Constantinople.

Codex Hierapontense.
Codex Eulapius.
Codex Theodosianus.
Fall of Western Empire.

Jovian (189-560).

Codex Vetus (not extant).
Quinquinagintae decisiones.

Codex Institoris.
The Institutes.

Codex epistola praedictorum.

The Novels.

INSTITUTIONUM JUSTINIANI
PROCEMII.

IN THE NAME OF OUR LORD JUSTIN CHRIST.

The Emperor Caesar Flavius Justinianus, Basarius of the Alamanni, Goths, Franks, Germans, Antes, Allies, Vandals, Africans, Picts, Happy, Olybirus, Trumphator Augustus Cuiusque Legum Juventutii.

Imperatorium majestatem non solum aequum decusdatum, sed etiam legibus opertam esse armarm, ut utrumque bennips et bellorum et pacis recto positi, gubernari et principis Romanus victor existat non solum in hostilium proelii, sed etiam per legiones transitis calamitarum iniquitatis expellere, et frater in re publica religiosissimus quum vicit hostibus triumphator.


2. Retinuntur inMaximis constitutis estra, confusis in hibernae crecimini consentia, tunc nostri extendimus cursum et ad im-
PROEMIUM.

3. Cunque hoc Deo propitii peractum est, Tribonianum, video magnifico et ex fere nostro sacro palaco nostris, nec non Theophilo et Dominico, viris illustribus, autolocioribus, quorum omnium illustrissimorum constitutis et legitimis sequentibus, et circa nostra jussiones silemus jam ex multis rerum argumentis accepimus, conveniunt, specialiter mundanissìsum, ut nostro gentem neque Thrasianis, neque consecutis institutis, ut lapsus vocis prima quoniam existat non ab antiquis fabulis disparet, sed ab imperiali splendore appelle, et tam aures quam animum vestra nihil intulit nihilque perperum postumus, sed quod in quaerum optimi argumentis, accipiant et quod in priore tempore vix post trienniis interiusque contingebat, atque constitutiones imperatoris legerent, hoc vos a primumo ingredimini, digni teneae tamquam repetitam feliciter, ut et initium vos et finis legum conditioni a voces principia procedat.

4. Igitur post libros quinquagesim digestorum seu pandectarum, quos omne jux antiquam collaborum est (quoque per eundem virum ecle- sum Tribonianum nem non eorum viris illustribus et fere hominum con- fecisimus), in hos quattuor libros cas- deae institutiones parti possimus, ut sint tectius legitimae scientiae prima elementa.

5. Quibus brevi et extus spectum est et quod ait orationes, et quod postes consuetudine manifestantur ut imperialis regnum illum est.

6. Quos ex omnibus antiquorum institutionibus et praebet ex communem tribun flavi nostro tam institu- tionum quam rerum eotidiezum, adique unius communis constitutis com- positis cum tenebam vestri principes ut eras opulentissimum, et legibus ex conditionibus et pleasantissimis instituti- tionibus rebus eis accommodatis.

7. Summa itaque ope et alicui studio haec nostra acceptae et vostrum ipse sit eruditione extulit, ut spec vostrorum industriae foret, tota legis opera perfecto, posse etiam nostram rem publicam in partibus eis nobis cedereiis gubernare.

Data undécimo kalendas December Constantinopolitano domino nostro Justiniano perpetuo Augusto tertium consule.

7. Receive, therefore, with eager- ness, and study with cheerful di- lIGENCE, these our laws, and show your- selves 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 por- tions that may be entrusted to your care. Given at Constantinople on the eleventh day of the calends of Decem- ber, in the third consule of the Emperor Justinian, ever August (533).
Liber Primus.

Tr. I. DE JUSTITIA ET JURE.

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

D. i. l. 10.

The term jus, in its most extended sense, was taken by the Roman jurists to include all the commands laid upon men 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 aequi. (D. i. l. 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, of things divine and human; the science of the just and the unjust.

D. i. l. 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 Intro. sec. 24.)

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 distress 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 distress of his own powers, have been sooner conducted.


4. Haec studiis dux sunt positiornes, publicum et privatum. Publicum jus est, quod ad studia rei Romanae spectat, praevalens, quod ad singulorum utilitatem pertinent, resistent est inter duum publicum: collectum est eum ex naturalibus preceptis et gentium act civilium.

Both the jus publicum and the jus privatum fall under municipal law, that is, the law of a particular state. Publicum jus in sacrus, in securitatem, in magnatissimam consistit. (I. i. 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.


Tr. II. DE JURE NATURALI, GENTIUM ET CIVIL.

Jus naturale est, quod natura m (see Intro. sec. 24). Publicum jus in sacrus, in securitatem, in magnatissimam consistit. (I. i. 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.


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Tr. II. DE JURE NATURALI, GENTIUM ET CIVIL.

Jus naturale est, quod Naturae m (see Intro. sec. 24). Publicum jus in sacrus, in securitatem, in magnatissimam consistit. (I. i. 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.


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

D. xlviii. 10. 1. 4; 13; D. xlvii. 10. 15. 1.

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

8. Also the lex Julia de vi publica a privata punishes those who are guilty of violence, whether with armed force or without. For violence with armed forces 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, or person devoted to religion, whether wearing the veil or not, both the ravisher and all who have aided in the commission of the crime are punished capitaly, according to the provisions of our constitution, in which may be found fuller information on this head.

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

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

9. Also the lex Julia peculatus eos qui pecuniam vel rem publicam vel sacram vel religiosam furati fuerint. Sed si quidem ipsi judices tempore administrantissima publica pecuniam subtraxerunt, capita animadversione puniuntur, et non solum hi, sed etiam qui ministerium sibi ad hoc adhibuerunt vel qui subtracta ab his scientes susceperunt: aliis vero, qui in hanc legem incidunt, poenas deportationis subjungant.

D. xlvii. 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.


Lex Julia peculatus is a law which 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 capitaly, 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.

Cicero refers to this law (pro Rabiria, 3), but nothing more is known.

D. xlvii. 13. 5; C. ix. 28.