

KJA  
162  
B83  
1965-

# ROMAN LAW AND COMMON LAW

A COMPARISON IN OUTLINE

BY THE LATE  
W. W. BUCKLAND

AND

ARNOLD D. McNAIR

C.B.E., LL.D., Q.C., F.B.A.

*Fellow of Gonville and Caius College, Cambridge*

SECOND EDITION REVISED BY

F. H. LAWSON

D.C.L., F.B.A.

*Professor of Comparative Law in the University of Oxford and  
Fellow of Brasenose College*

RECEIVED

JUL 08 1994

CAMBRIDGE  
AT THE UNIVERSITY PRESS

1965

17-2

PUBLISHED BY  
THE SYNDICS OF THE CAMBRIDGE UNIVERSITY PRESS

Bentley House, 200 Euston Road, London, N.W.1  
American Branch: 32 East 57th Street, New York 22, N.Y.  
West African Office: P.O. Box 33, Ibadan, Nigeria

*First edition* 1936  
*Second edition* 1952  
*Reprinted with corrections* 1965

*First printed in Great Britain at the University Press, Cambridge*  
*Reprinted by offset-lithography by Jarrold & Sons Ltd, Norwich*

# CONTENTS

<i>Preface</i>	<i>page</i> ix
<i>Preface to the Second Edition</i>	xi
<i>Note on the 1965 Impression</i>	xiii
<i>Introduction</i>	xv
<i>Abbreviations</i>	xxiii
<i>Chapter I. THE SOURCES</i>	i
1. Legislation	1
2. Case Law	6
3. Juristic Writings	10
4. Custom	15
5. General Reflexions	18
Excursus: Roman and English Methods	21
<i>Chapter II. THE LAW OF PERSONS</i>	23
1. Territorial and Personal Law	23
2. Slavery	25
3. Marriage	31
4. The Family	38
5. Adoption and Legitimation	42
6. Minority and Guardianship	46
7. Juristic Personality	54
<i>Chapter III. LAW OF PROPERTY</i>	60
1. Land and Moveables	60
2. Property and Possession	62
Excursus: Property and Possession	71
3. <i>Iura in rem</i> and <i>in personam</i>	89
4. Ownership <i>in futuro</i> and Terminable Ownership	91
5. Content of Ownership	94
6. Trespass	102
7. Common Ownership	103
8. Modes of Conveyance	110
9. Acquisition by Long Possession	117
10. Partition	123
11. Acquisition of Fruits by a Non-owner	124

<i>Chapter IV. LIMITED INTERESTS AND SERVITUDES</i>	<i>page</i> 127
<i>Chapter V. UNIVERSAL SUCCESSION</i>	143
1. Introductory	143
2. <i>Heres</i> , Heir, Executor and Administrator	147
3. Testamentary Form and Capacity	156
4. Soldiers' Wills	158
5. Interpretation	159
6. Freedom of Testation	167
7. Revocation	168
8. Restrictions as to Remoteness, Unborn Beneficiaries, etc.	173
9. Trusts	176
10. Succession on Intestacy	179
11. The Surviving Spouse	183
12. Succession to Freedmen	186
13. <i>Bonorum possessio</i>	187
14. <i>Cura prodigi</i>	188
15. Dislike of Intestacy	191
<i>Chapter VI. OBLIGATIONS: GENERAL</i>	193
1. Introductory	193
2. Reality of Consent in Contract	196
Excursus: Mistake	205
3. Position of Third Parties	214
4. Agency	217
5. Consideration	221
Excursus: Cause and Consideration	228
<i>Chapter VII. OBLIGATIONS: GENERAL (cont.)</i>	237
1. Impossibility	237
2. <i>Casus</i> and Frustration	244
3. Conditions	247
4. Duty of Third Parties not to interfere with Contract	257
5. Liability for Non-performance	258
6. Need and Number of Witnesses	263
7. The Relation between the General Law of Contract and the Law of the Particular Contracts	265

<i>Chapter VIII. PARTICULAR CONTRACTS</i>	<i>page</i> 271
1. Unilateral Contracts in General	271
2. Loan for Use, Deposit and Pledge	277
3. Consensual Contracts: General	279
4. Sale	280
Excursus: The Passing of Property and Risk in Sale	291
5. Lease of Land and Houses: Letting out of Contracts and Services	294
6. Partnership	300
7. <i>Mandatum</i>	307
8. Innominate Contracts	310
9. Joint, and Joint and Several, Obligations	312
10. Security	314
11. Suretyship	324
<i>Chapter IX. QUASI-CONTRACT AND NEGOTIORUM GESTIO</i>	329
<i>Chapter X. DELICT AND TORT</i>	338
1. General	338
2. Compensation or Penalty	344
3. Personal Capacity	348
4. Border-line between Contract and Tort	350
<i>Chapter XI. PARTICULAR DELICTS AND TORTS</i>	352
1. Theft	352
2. Negligence:	362
(a) General	362
Excursus: Duty of Care	367
(b) Contributory Negligence	370
(c) Necessity	373
(d) Acts and Omissions	374
3. <i>Iniuria</i>	378
4. <i>Dolus</i>	383
5. <i>Metus</i>	390
6. <i>Calumnia</i>	391
7. Nuisance	392
8. Quasi-delict	395

<i>Chapter XII. PROCEDURE</i>	<i>page</i> 399
1. Substantive and Procedural Law	399
2. Consent of the Parties. Arbitral Origin of Roman Procedure	400
3. Oaths	404
4. Discovery of Facts and Documents	405
5. Representation in Litigation	407
6. Forms of Action	409
7. Contracts of Record	410
8. Appeals	411
9. Judgement	412
10. Prescription: Limitation and Abatement of Actions	413
11. Delay in securing Judgement	419
12. Interdicts and Injunctions	420
<i>Index</i>	425

# ROMAN AND COMMON LAW

## A COMPARISON IN OUTLINE



### CHAPTER I. THE SOURCES

#### 1. LEGISLATION

With us legislation has always been in form the act of the King, though for many centuries the co-operation of the two Houses of Parliament has been necessary and, for two centuries, the Royal veto has not been exercised so far as the English law is concerned. But, in Rome, the legislative power shifted in much more striking ways. During the Republic it was in the hands of Assemblies of the people, not representative bodies such as our House of Commons, but bodies in which all male citizens sat and voted. There were several such Assemblies and we need not here consider the vexed questions of their relations to each other and their respective competences.<sup>1</sup> The different Assemblies were grouped in different ways and while the voting within each group was by head, this decided only the vote of the group, which was the effective vote in the Assembly. As might have been expected the legislative power was at first in the hands of the Assembly (*comitia centuriata*) in which the grouping was such that an overwhelming preponderance was given to the wealthy and noble, but passed ultimately to the Tribal Assembly, arranged on democratic lines. But the machinery was very different from that by which an Act of Parliament is produced. There was no such thing as a 'Private Member's Bill': every measure had to be proposed by the

<sup>1</sup> Jolowicz, *Historical Introduction to Roman Law*, 2nd ed. ch. v.

presiding officer, himself an elected 'magistrate', i.e. a high officer of State. There could be no amendments: the measure must be passed or rejected as it stood. Even the presiding magistrate had not a free hand in early times; no measure could become law without 'auctoritas patrum', the approval of a body which seems to have consisted of the patrician members of the Senate. And, till the bad times at the close of the Republic, all measures were previously considered by the Senate and submitted to the Assembly in a form which the Senate had approved.<sup>1</sup> The Senate was not elective; vacancies were filled by nomination, at first by the Consul, later by the Censor, for the time being.

By the end of the Republic, when the Empire had become a vast area, popular Assemblies of the old type had become impracticable, and, early in the Empire, by no act of legislation, but by the Emperor's influence, legislation passed to the Senate, which was now substantially nominated by him. Its enactments (*senatusconsulta*) show a gradual transition from instructions to the magistrates, which had always been within the province of the Senate, to direct legislation. Here, too, the measures were proposed by the presiding magistrate, who was the Emperor or his nominee, so that the Senate had very little independence. And when in the second century the Emperor claimed to legislate directly, *senatusconsulta* soon ceased to be utilised: thenceforward the Emperor was the sole legislator. Thus the evolution of legislative power was from popular legislation to legislation by the Head of the State, exactly the opposite course to that which it has hitherto taken with us, though it must be admitted that to-day the tendency is for very few bills to become law which are not prepared by the government and then submitted to the legislature.

In addition to these methods, there existed in the later centuries of the Republic and in the first century of the

<sup>1</sup> Jolowicz, *cit.* pp. 30, 31.

Empire a method of legislation to which the common law has no real parallel. The administration was in the hands of annually elected magistrates, and the more important of these, Consuls, Praetors, Aediles, had the *ius edicendi*, i.e. the power of issuing proclamations of the principles they intended to follow. For the most part these seem to have been no more than declarations of policy, but that of the Praetor became a great deal more. The Praetor Urbanus had charge of the administration of justice. All ordinary litigation came before him in the first instance and the issue was framed under his supervision, though the actual trial was before a *iudex*, who was not a professional lawyer, but a mere private citizen of the wealthier class, aided by professed lawyers. At some time in the second century B.C., a statute, the *l. Aebutia*, authorised a more elastic system than the *legis actio* hitherto in force.<sup>1</sup> The new method, by *formulae*, needed explanation, and the Praetor's Edict at once assumed great importance as the agency by which this was given. The power of moulding the procedure and the forms of action carried with it, inevitably, much power over the law itself, though there is no reason to suppose this was originally contemplated. However this may be—it may have been only a tolerated usurpation of power—the Praetor began to give actions where the civil law had given none and defences which the civil law had not recognised, in such a way as to create a great mass of law. The Edict was valid only for the year, but in fact it was renewed from year to year by the successive Praetors, with only such changes as experience suggested. It was thus a convenient mode of experimental legislation. A good rule survived: a bad one was dropped or modified. The tendencies of change were of course in the direction of equity and thus it is common to speak of praetorian law as the Roman Equity. And, apart from the general equitable

<sup>1</sup> It is probable that the formula was in use for some purposes before this enactment. (Jolowicz, *cit.* pp. 226 *sqq.*)

trend of his innovations, the Praetor, like the Chancellor, respects the earlier law: he does not set aside the civil law, but he circumvents it.

Herein is another similarity. The fundamental notions, the general scheme of the Roman law, must be looked for in the civil law, a set of principles gradually evolved and refined by a jurisprudence extending over many centuries, with little interference by a legislative body. The Edict is a collection of ordinances issued by the Praetor, by virtue of his *imperium*, which, while formally respecting the civil law (for the Praetor cannot alter this) practically modifies its working at a number of points where conditions called for such modification. The Edict can hardly be said to express any general principle: even in its latest form as *ordinatum* by Julian, it remained a set of sporadic rules (it has been called 'chaotic'<sup>1</sup>), a mere appendage to the civil law. All this may be said equally well of our Equity, except that in the nineteenth century it became much more systematised than ever the Roman Edict was. On this it is enough to cite a few words of Maitland:<sup>2</sup>

Equity was not a self-sufficient system, at every point it presupposed the existence of Common Law. Common Law was a self-sufficient system. . . . If the legislature had passed a short act saying 'Equity is hereby abolished', we might still have got on fairly well; in some respects our law would have been barbarous. . . . but still the great elementary rights. . . . would have been decently protected. . . . On the other hand had the legislature said 'Common Law is hereby abolished', this decree. . . . would have meant anarchy. At every point equity presupposed the existence of common law. . . . It [equity] is a collection of appendixes between which there is no very close connexion.

All this might have been said, *mutatis mutandis*, of the Praetor's Edict.

It would be hard to find a better description of the functions of English Equity than Papinian's words (D. I. I. 7. 1): 'ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris

<sup>1</sup> Biondi, *Prospettive Romanistiche*, p. 40.

<sup>2</sup> *Equity*, p. 19.

civilis gratia propter utilitatem publicam'. And, just as the personality of the Praetor seems to have exercised a considerable influence on the Edict during his term of office, at any rate in early times, so we may say that the personality of the Chancellor, for a long time the sole, and until the nineteenth century the dominant, judge in Equity, was a powerful factor in the development of Equity.

Some of the Edict, however, has nothing particularly equitable about it, and a great part of the Roman equitable development owes nothing to the Edict. And the Edict differs from Equity in many ways. It was not administered by a separate tribunal, like the Chancellor's Court, or by a Court acting in special capacity, like the Exchequer. It did not acquire a special ethos through being handled by a separate Bar. A praetorian action was formulated before the Praetor and tried by a *iudex*, like a civil action. And the fields are very different. The Praetor never developed the Trust concept, which is probably the most important product of Equity, and he revolutionised the law of succession not only under wills, but in intestacy, which the Chancellor never touched. There is for the Praetor no question of the principle that 'Equity acts *in personam*': he creates both actions *in rem* and actions *in personam*. There is nothing corresponding to the writ of Subpoena. He has means of putting pressure on parties, but he applies them in civil actions as much as in praetorian. And the rules are not established, as those of Equity are, by a gradual crystallisation out of a series of cases, but by definite acts of legislation, though it is legislation of a peculiar kind. In fact the Edict is much more like a series of reforming statutes than it is like Equity as conceived in common law countries. Most law reform is equitable in some sense.

One further parallel between the Praetor and the Chancellor may be drawn. Just as the Praetor introduced by his Edict new actions, so, in the early years of our writ system,

and before the growth of parliamentary power in the thirteenth and fourteenth centuries, the Chancellor, by reason of his control, as the head of the royal secretariat, over the issue of original writs, had a quasi-legislative power of developing the common law. To quote Pollock and Maitland:<sup>1</sup> 'A new form of action might be easily created. A few words said by the chancellor to his clerks: "such writs as this are for the future to be issued as of course"— would be as effective as the most solemn legislation.'<sup>2</sup>

## 2. CASE LAW

The Romans had, in principle, no case law: the decision of one Court did not make a precedent binding if the point arose again. This was inevitable. In a system in which the *iudex* was not a lawyer, but a private citizen, little more than an arbitrator, it would be impossible for his judgements to bind. It is true that he usually acted with legal advisers, but this would not suffice, for to make the decisions binding on others would be to give legislative power, within limits, to indeterminate groups of irresponsible advisers.<sup>3</sup> This does not indeed apply with the same force in the later Roman law, when, in principle, cases were tried to decision by the magistrate himself, who was often a distinguished lawyer; and when they were, as they might be, delegated for trial, the *iudex datus* was normally a lawyer chosen from those practising in the Court.<sup>4</sup> But it is not surprising that no such innovation was made as to give their judgements force as precedents. The later Emperors were autocrats, not likely to allow to the lawyers what was in effect legislative power.

<sup>1</sup> i. p. 171.

<sup>2</sup> See also Holdsworth, i. pp. 397, 398: 'writ, remedy and right are correlative terms'.

<sup>3</sup> On the *consilium* of the *iudex*, Wenger, *Römisches Zivilprozessrecht*, pp. 29, 194. It is quite possible that some of the advice so given found its way into the writings of the jurists, and so acquired authority.

<sup>4</sup> Bethmann-Hollweg, *Civilprozess*, iii. pp. 121 *sqq.*

It is sometimes said, and it is literally true, that decisions by the Emperor constituted an exception. His *decreta* were binding precedents, at least if they were meant to be such.<sup>1</sup> This however is not really the introduction of a new idea into the law. The Emperor was a legislator with a free hand and he could lay down the law in any way he thought fit. Whether he decided a point in a general enactment or in the course of the hearing of a case, what he said was law. Our books too contain cases which definitely break with pre-existing law and introduce absolutely new principles,<sup>2</sup> but in general, each decision is only a step forward on a way already marked out. However, the *decreta* of the Emperor are under no such limitation. We have remains of some collections of *decreta*<sup>3</sup> from which it is plain that the Emperor often establishes what he thinks a salutary rule without reference to its relation to the earlier law.<sup>4</sup> In fact, the usual mode of statement puts the emphasis wrongly. We ought not to say that decisions were binding if they were by the Emperor, but that what the Emperor laid down was law even if it was merely in a decision.

It is, however, clear that though decisions were not binding precedents, a current of decisions in the same sense did in fact influence judges.<sup>5</sup> But this is a very different matter. It is no more than evidence of general expert opinion regarding the law on the point. It is exactly what happens, e.g., in France, where our doctrine of 'case law' is rejected and called 'la superstition du cas', but the

<sup>1</sup> G. 1. 5; D. 1. 4. 1. 1; Buckland, *Text-book*, p. 18.

<sup>2</sup> E.g. restraint on anticipation, see *Parkes v. White* (1805), 11 Vesey 209, 211; *Jackson v. Hobhouse* (1817), 2 Mer. at p. 487; see Hart, 40 *L.Q.R.* (1924), pp. 221 *sqq.*; support for buildings, *Dalton v. Angus* (1881), 6 App. Cas. 740; deserted wife's right to remain in matrimonial home, *Bendall v. McWhirter* [1952] 2 Q.B. 466.

<sup>3</sup> See Lenel, *Palingenesia*, 1. 159.

<sup>4</sup> In Buckland, *Equity in Roman Law*, pp. 11 *sqq.*, will be found instances of such unheralded decisions and there are many more.

<sup>5</sup> See Allen, *Law in the Making*, 6th ed. pp. 159, 160, on the evidence from Cicero and others. We have not much information on the matter from juristic sources.

'jurisprudence', i.e. the current of decisions of one or more tribunals on the point, is constantly cited in support of an argument.<sup>1</sup> It must not however be supposed that case law is inherent in the common law and inconceivable in other systems. If Roman law countries have not adopted the principle it is either because they lack our wealth of reported decisions or because they think it a bad one. We shall not here consider what it is which is binding in a case, interesting and unsettled as the question is,<sup>2</sup> but will merely observe that some of the dislike of the English doctrine expressed by foreign lawyers is probably due to some misconception of its nature.<sup>3</sup> On the other hand the common law has not always admitted it. The doctrine of precedent does not appear in the Year Books. Throughout the period covered by them the tendency to refer to previous decisions is growing, though usually with no precision of citation and often by memory, and the judge is apt to say something like: 'Never mind that! Go on with your argument.'<sup>4</sup> It seems indeed that it is only in what, in the history of the nation, is a recent time that the principle has prevailed with any strictness.<sup>5</sup> And even where the common law prevails, e.g. in the greater part of the United States of America, local conditions have led to a certain distrust of the notion of precedent, or at least to a certain freedom in handling it, greater than that admitted by

<sup>1</sup> See K. Lipstein, 'The Doctrine of Precedent in Continental Law', *Journal of Comparative Legislation*, 3rd ser., xxviii. pp. 34-43. It is becoming evident that the differences between the English and Continental practices have been greatly exaggerated. See, in particular, Gutteridge, *Comparative Law*, pp. 90-93.

<sup>2</sup> See Goodhart, *Essays in Jurisprudence and the Common Law*, pp. 159q.

<sup>3</sup> For an excellent recent description of the English system by a French author, see R. David, *Introduction à l'Étude du Droit privé de l'Angleterre*, pp. 142-154; see also Goldschmidt, *English Law from the Foreign Standpoint*, pp. 34-47.

<sup>4</sup> Ellis Lewis, 46 *L.Q.R.* at p. 220; and generally *ibid.* pp. 207-224, 341-360; 47 *L.Q.R.* pp. 411-427; 48 *L.Q.R.* pp. 230-247; Goodhart, 50 *L.Q.R.* pp. 40-65, 196-200; Holdsworth, *ibid.* pp. 180-195.

<sup>5</sup> See Allen, *Law in the Making*, 6th ed. pp. 183-230.

British Courts. Apart from the Courts of the State, there are the Federal Courts, and also the Courts of other States, the decisions of which though not binding are of 'persuasive authority'. This has led to the existence of a great unmanageable mass of case law, often conflicting, and American lawyers seem to be coming to think rather in terms of a course of decisions, a 'jurisprudence', like the French and German lawyers, though, in principle, in the United States as in England, a decision is binding in future cases.<sup>1</sup>

The fact that the Romans had no case law does not mean that their method was less casuistic than ours. If we may judge from what is preserved, it was unusual for a Roman lawyer, except in elementary books, to enter on abstract general statements of the law on a topic: he nearly always put the matter as a concrete case. The main difference is that with us the case is an actual one which has been decided in Court, with the Romans it is one which has been discussed in the lawyer's chambers and may be quite imaginary. In the great formative periods neither the Roman lawyers nor ours have been great theorists: they rarely get back to first principles. Both argue from cases more or less like the one under discussion and rules gradually emerge which sometimes find expression in a terse *regula*. But this *regula* is not a first principle: we are told that we must not take our law from a *regula*; it is only an attempt to state a rule deducible from the cases.<sup>2</sup> It is true that Justinian tells judges that they are to decide not by precedent but according to the *leges*,<sup>3</sup> but he has specially in mind imperial legislation: it is plain that the Roman common law was built up like ours by argument

<sup>1</sup> See Goodhart, *Essays in Jurisprudence and the Common Law*, pp. 50-74.

<sup>2</sup> D. 50. 17. 1. See Lord Esher M.R. in *Yarmouth v. France* (1887), 19 Q.B.D. at p. 653: 'I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended to be included in them.'

<sup>3</sup> C. 7. 45. 13.

from case upon case, with the difference that ours are decided cases and theirs are discussed cases, more open to dispute. The underlying principles are there and sometimes come to the surface, but it has been left to modern Romanists to work them out, and it is not surprising that in setting them forth for the purposes of the modern Roman law they have often arrived at principles which are not Roman law at all. Nothing could be more unlike the method of Papinian than that with which Windscheid started on his great work. The 'Willenstheorie' which pervades his *Allgemeiner Teil* (it is much less traceable in the detailed treatment of the law) is not Roman at all. It comes from Kant, who expressly warns his readers that he is not expounding any actual system of law.<sup>1</sup> Even the Byzantines, though they speak more readily of *voluntas* than the Roman jurists did, have nothing on which the 'Willenstheorie' can reasonably be based.<sup>2</sup>

### 3. JURISTIC WRITINGS

From the absence of authority attaching to cases it followed as a corollary that the opinions of learned lawyers enjoyed a much greater authority than with us. Our Courts do not indeed go so far as to refuse all help in a difficult case from the writings of one known to have, or to have had, profound knowledge of the matter in hand, but recourse is not often had to this kind of writing, and it is always done with a clear recognition of the fact that, however sound the propositions may be, they are 'not authority'.<sup>3</sup> It is

<sup>1</sup> *Philosophy of Law*, trans. Hastie, p. 44.

<sup>2</sup> But it is certainly present in the Prussian Code of 1794, whence it can be traced back, through the Natural Lawyers, to the maxims contained more especially in the final title (50. 17) of the Digest. This at least appears from a study of such a book as Zouche's *Elementa Jurisprudentiae, etc.*, 1629.

<sup>3</sup> Allen, *Law in the Making*, 6th ed. pp. 264-9, has pointed out that in two branches of our law, namely, real property and conflict of laws, our Courts have been readier to resort to the works of text-writers and to allow to them a considerable influence.

true that some ancient writers, e.g. Bracton and Littleton, are differently treated. But these books are used much as Gaius is used by students of the Roman law. What is found in their books is not authoritative because they said it, but because they recorded it: it is often the chief source of our knowledge of the early law. It is largely because the case is authoritative that the writer is not, and it does not seem wholly insignificant that in the United States, where the system of precedent shows some signs of breaking down, the authority of writings is much greater than it is with us. In American Courts writings of great lawyers and essays in legal periodicals are very frequently cited, not indeed as of binding authority, but as carrying great weight. In our Courts this is rarer, except where the Court has occasion to enquire into some other system of law.<sup>1</sup> Another factor has made for the greater recognition of legal literature in the United States. Modern representative assemblies seem inclined to regard legislation as their primary duty. There are many legislative bodies in the United States and it is computed that they have produced in the present century more statutes than have been enacted in all the legislatures of the known world in all previous history. It seems that in some States the Courts show a tendency to treat this mass of legislation with some freedom, though it is important to distinguish between matters entirely regulated by statute, such as Adoption, and those in which the legislatures have merely purported to amend the common law in detail, or to clarify it. But where both case law and statute law are handled loosely the writer on law is likely to have more influence.

<sup>1</sup> But the practice is undoubtedly changing: one might almost say that any author of ability who is prepared to go beyond the cases, whether he attempts to build up a body of doctrine or to answer undecided problems, is certain to be cited in Court nowadays. Such books as Pollock or Salmond on Torts have always been cited. Indeed it is astonishing how quickly a good text-book can become 'citable'. See Denning L.J.'s review of Winfield, *Textbook of the Law of Tort*, 3rd ed. at 63 *L.Q.R.* p. 536.

The Roman attitude was very different from ours. We need not consider the *interpretatio* of the early law. The Pontiffs, who, by ingenious distortions of the text, or what passed for the text, of ancient laws, introduced new rules and even new institutions into the law, were officials, and their action was in fact, though not in form, delegated legislation. It was in principle not unlike that of the Praetor, though on the one hand less comprehensive, and on the other affecting directly the civil law.<sup>1</sup> When, in mid-Republic, the task of interpreting law passed into the hands of lay lawyers, something of this power, though no formal authority, passed to them, but very soon the Edict was beginning to be the most convenient agency for law reform, and it was mainly by suggestions to the Praetor that the lawyers induced changes in the law. There are however cases of more direct influence. It was the example set by Antistius Labeo which definitely established the validity of codicils, i.e. in the Roman sense of the word, informal instruments by which the provisions of a will might be modified or, even without a will, the distribution of the property could be determined.<sup>2</sup>

It seems also that the purely consensual commercial contracts of Sale, Hire, etc., the early history of which is obscure, owed their recognition to the jurists of the later Republic. But in all this there was no suggestion of any formal authority. Augustus made a change by introducing the *ius respondendi*, by which some, probably only a few, privileged jurists could give sealed *responsa* under the authority of the Emperor, and Hadrian made these *responsa* binding if they were all agreed. We cannot go into the

<sup>1</sup> On the old *interpretatio*, Jolowicz, *cit.* pp. 85 *sqq.*; Schulz, *History of Roman Legal Science*, pp. 5-37.

<sup>2</sup> For their rules and history, Buckland, *Text-book*, p. 360. An interesting parallel is afforded by the story (see Hart in 40 *L.Q.R.* (1924) pp. 221-226) that Lord Thurlow invented the married woman's restraint on anticipation for the purpose of a marriage settlement of which he was to become a trustee.

story of these *responsa*: there is hardly a point in their history, the effect of the *ius respondendi*, etc., which is not hotly controverted.<sup>1</sup> No text of the classical age which survives independently of Justinian in anything like its original form ever speaks of a point as having been definitely settled by *responsum*, and it seems possible to overrate their importance as sources of law in their own age. Apart from that, it seems the better view that, notwithstanding some loose language in Gaius<sup>2</sup> which may be corrupt, writings of lawyers as such were not authoritative. No doubt they might be cited, but they would not, even if unanimous, bind the Court and they were the less important in that the jurists themselves were available to advise the *oratores* who addressed the Court.

If we pass to the time of Justinian we again find that juristic writings are not authoritative. It is true that the principal source of law in Justinian's time, the Digest, is made up of juristic writings and these writings are declared to be selected from the writings of jurists who had had some sort of authority. But the authority of the texts in the Digest is not due to their having been written by the jurist, but to their having been incorporated in the Digest and made law by enactment. Justinian is at great pains to tell us this several times and to warn people against attempting to use as authority writings not in his book or in a different form from that they have in it.<sup>3</sup> As to contemporary writers he goes further. He does not say that their writings are not to be authoritative, but that they are not to have any writings, for he forbids any commentaries on his legislation,<sup>4</sup> and it is difficult to imagine any practical juristic writing which would not be

<sup>1</sup> For various views, Girard, *Manuel*, 8th ed. p. 76; Buckland, *Text-book*, p. 22; Jolowicz, *cit.* p. 369.

<sup>2</sup> G. I. 7.

<sup>3</sup> Const. '*Deo auctore*' [C. I. 17. 1] 7; Const. '*Tanta*' [C. I. 17. 2] 19.

<sup>4</sup> Const. '*Deo auctore*' 12; '*Tanta*' 21. These enactments are prefixed to the Digest.

such a commentary. Of course he did not succeed in preventing the writing of commentaries or the use of matter not in his canon, but these writings and citations had no authority.

The question for us, therefore, is the state of things in post-classical times, when there were no more *responsa*, and no more great jurists, and before Justinian's legislation. Here too there is a distinction to be drawn. After the Law of Citations of A.D. 426<sup>1</sup> it is quite clear what writings were authoritative and what was the extent of their authority. But, for the fourth century, things are really very dark. All that we know is that there was legislation under Constantine, one enactment declaring that certain notes of Paul and Ulpian on Papinian were to be abolished, which no doubt means that they could not be cited, and another declaring the works of Paul, including the *Sententiae*, to be confirmed in their *recepta auctoritas*,<sup>2</sup> and we are told by Justinian of an enactment excluding notes of Marcian on Papinian.<sup>3</sup> There may have been earlier legislation but the words *recepta auctoritas* rather suggest that the writings of the great jurists of the past had acquired a *de facto* authority in the Courts, though it is not possible to say how far this authority went. It can hardly be that any sentence of any book of one of these men bound the Court, and it may be that the rule enacted by Hadrian as to actual *responsa* was applied and that they bound the Court if uncontradicted by any other writing. In view of the innumerable conflicts of which we have so many traces this would mean little more than that they could be cited. Indeed, the authority seems to have been something like that which attached to writers on International Law till recent times. In the absence of any evidence of limiting legislation it is not unlikely that contemporary lawyers,

<sup>1</sup> C. Th. I. 4. 3.

<sup>2</sup> C. Th. I. 4. 1 [A.D. 321]; C. Th. I. 4. 2 [A.D. 327].

<sup>3</sup> Const. 'Deo auctore' 6.

the post-classical men generally, came to be cited, and that it was this mass of matter, which by the fifth century had become unmanageable, that was cut out by the Law of Citations which drove men back to the classical literature. For it is obvious on its terms that it did not cut out much classical literature of importance. All this, however, is little more than conjecture.

Before leaving the question of the contribution made by *responsa* to the development of Roman law, we should note the important part played by professional opinion in one branch of English law, namely the practice of conveyancers. Holdsworth<sup>1</sup> cites a number of judicial acknowledgements of this fact and states that in course of time 'the practice of these conveyancers, who settled the common forms which carried out in practice the principles of the law, tended to be treated by the courts as such cogent evidence of the law, that it can be regarded almost as a secondary source of law'.

#### 4. CUSTOM

Law may be said to begin, everywhere, in custom, in the sense that when a central authority begins to intervene in the settlements of disputes, the rules which it applies are mainly those rules of conduct which have been habitually observed by members of the community in their dealings with one another. Our own common law is described by Blackstone as the general custom of the realm.<sup>2</sup> It is notoriously, as a matter of history, nothing of the kind. The common law was brought into existence by the King's Justices, all over the country, precisely because there was no general custom of the realm. The customs of different parts of the country, settled by different elements of our hybrid population, were very diverse, and manorial justice had brought it about that there was an almost

<sup>1</sup> vii. pp. 355, 384-387.

<sup>2</sup> *Commentaries*, Introd. Sect. iii.

infinite variety of customs prevailing in small areas. Indeed, anyone who has had occasion to study the law of copyholds (which to a large extent evaded the unifying process by which this common law was created) can form some idea of what the law of England would be like to-day but for the compulsion towards uniformity applied by the King's itinerant Justices. They gradually substituted for this mass of customs a law which doubtless has its roots in Germanic custom,<sup>1</sup> but a great part of which was apparently of their own creation.

The Roman common law, the *ius civile* of republican language, had perhaps a better claim to be called the general custom of the realm; for it is now generally agreed that the law of the XII Tables was based upon existing Latin custom, and we can see from what is left of the Tables that they assume an immense amount of custom which they do not state. It is however obvious that this too was greatly modified and augmented by the lawyers. Pomponius tells us indeed that the law had a customary basis: 'coepit populus Romanus incerto magis iure et consuetudine aliqua uti', is said of the state of things mended by the XII Tables,<sup>2</sup> but, speaking of it after that enactment, he says it is 'compositum a prudentibus'<sup>3</sup> and that it 'sine scripto in sola interpretatione prudentium consistit'.<sup>4</sup> Except in that sense, general custom, though it is occasionally mentioned, plays only a very small part in the developed Roman law. The only case in which it seems to raise a practical issue is the question whether a statute can be abolished by non-use. We are plainly told by Julian that it can, for the reason that it is immaterial whether the people expresses its will tacitly by conduct or by a formal statute.<sup>5</sup> In fact, there are several statutes

<sup>1</sup> Pollock, *Expansion of the Common Law*, pp. 11 *sqq.*

<sup>2</sup> D. 1. 2. 2. 3.      <sup>3</sup> D. 1. 2. 2. 3.      <sup>4</sup> D. 1. 2. 2. 12.

<sup>5</sup> D. 1. 3. 32. 1. Whether the reasoning is Julian's or Tribonian's we need not here consider.

declared to be obsolete by non-use. The reasoning would not apply to enactments by an autocratic Emperor, and the cases commonly cited of such statutes are all of popular enactments of the Republic.<sup>1</sup> Justinian preserves the text, but it is very unlikely that he contemplated this fate for his own laws, which were to be valid not only for his own time 'sed etiam omni aevo tam instanti quam posteriori'.<sup>2</sup> Modern systems of Roman law seem however in general to have treated desuetude as a mode of repeal, a rule definitely rejected by the common law.<sup>3</sup>

On local customs our information is not satisfactory. Many enactments of Diocletian show refusal to accept local customs as against the Roman law, but these are questions of foreign law: citizens in regions only recently made subject to the Roman law tried still to apply their own law. From Constantine onwards there are enactments accepting such things, but this is adoption into the law, not recognition of local validity as against the law. On the other hand it has been made clear that throughout this period the foreign and abrogated law was still freely applied in the remoter parts of the Empire, as against the imperial law.<sup>4</sup> As to local customs of the ordinary kind we have the rule that to be valid they must be reasonable and not contrary to statute.<sup>5</sup> And though there are other texts

<sup>1</sup> Illustrations, Jolowicz, *cit.* p. 364. As to the proper interpretation to be put on the facts, see Solazzi, *La desuetudine della legge*.

<sup>2</sup> Buckland, *Main Institutions of Roman Law*, p. 19; *Text-book*, p. 52.

<sup>3</sup> Craies, *Statute Law*, 5th ed. p. 375, n. (u), cites the case of Mr Gladstone's appointment of two suffragan bishops under the statute 26 Hen. VIII, c. 14, although no suffragan bishop had been appointed under that statute since the reign of Queen Elizabeth. It must, however, have been difficult to give full effect to the English rule by the first half of the nineteenth century, before the Statute Law Revision Acts purged the Statute Book of the immense mass of obsolete statutes which had survived from different periods. It is interesting to note that pre-Union Scottish statutes are subject to the Continental, post-Union Statutes to the English rule.

<sup>4</sup> Mitteis, *Reichsrecht und Volksrecht, passim*.

<sup>5</sup> C. Just. 8. 52. 2.

which allow local custom in some concrete cases without saying anything about statute, it seems that this was the rule at least of later law.

#### 5. GENERAL REFLEXIONS

Though to laymen and even to lawyers, in countries the laws of which are codified, a statute seems the normal form of law, it must be borne in mind that in the classical age of Roman law, and throughout our own legal history, statute, so far as private law is concerned, occupies only a very subordinate position.<sup>1</sup> Of the many hundreds of *leges* that are on record, not more than about forty were of importance in the private law, and though the Edict, regarded as delegated legislation, and the *senatusconsulta* of the early Empire constitute a considerable addition, it still remains true that the main agency in legal progress was in Rome, as with us, not the legislator, but the lawyer. As we have seen the method was not the same as with us. With us it is the judge who is directly effective. With the Romans it was the lawyer, by his opinions communicated to magistrates, *iudices* or suitors who consulted him. But essentially the agency is of the same kind, for the English Bench is recruited from the Bar and preserves close contact with it. Moreover, at Rome and in England the lawyers have never liked legislation.<sup>2</sup> It is only when they have arrived at an *impasse* from which legislation is the only escape—more frequently with us than at Rome—that the lawyers have been willing to advise the legislator to act.

The later Roman law and our own recent history seem at first sight to indicate a change in both systems. The later Emperors were immeasurably more active in legislation than their predecessors or any earlier legislative agency. Our statute books for the last hundred years have been much bulkier than those of earlier centuries. But the re-

<sup>1</sup> Except in land law and company law.

<sup>2</sup> Schulz, *Principles of Roman Law*, pp. 6-18.

semblance here is largely superficial. Though our modern legislature has intervened and codified some few parts of our private law, the great mass of our modern legislation is concerned with what may be called administration, legislation rendered necessary by the complexity of our modern life. And even those codifications of fragments of the private law are in the main little more than orderly statements of results already reached by the Courts and are themselves being every day modified by the action of those Courts. But in Rome the civilisation was in decay. The successors of the great lawyers were of an inferior type and the necessary reforms came from the Emperor and his officials, partly because an absolute monarchy is intolerant of any authority other than its own, but partly because there was no one else with the necessary knowledge and skill.<sup>1</sup>

In the preceding paragraphs the word 'source' has been used to denote the agency by which a rule of law is created. These agencies, however, do not work *in vacuo*: they apply ideas derived from various sources. Thus it is widely held that the *aequitas* which plays so great a part in Roman law is essentially only a borrowing, through the rhetoricians, of the *ἐπιείκεια* of the Greek philosophers. The movement from form to intent, from *verba* to *voluntas*, from *strictum ius* to *aequitas*, is said to have this origin. But though the influence of Greek thought on the Roman lawyers cannot be denied, and had much to do with this progress, this is an over-statement of the matter: the Romans had not waited for the Greeks to tell them that law was a social science and the servant, though at times the reluctant servant, of morality. Our own law has progressed independently in the same way, and it is not insignificant that the reasonings and devices by which the Roman lawyers

<sup>1</sup> However, much of the contents of the Code is devoted to the organisation of society on an increasingly collectivist basis, and here the resemblance to modern Britain is very marked.

made the law serve the needs of the time can be paralleled over and over from our law reports, without the smallest sign or probability of borrowing.<sup>1</sup>

Foreign law has of course affected both systems. In our law it can be traced from the courts of the medieval markets, attended by merchants of all countries, to the present day. In the Roman world, foreign law meant essentially Hellenistic law. In both systems it is naturally the commercial law which is most affected. In this connexion it is impossible not to think of the *ius gentium*, as practically applied. But there is nothing essentially foreign about *ius gentium*. It is that part of the Roman law which is extended to dealings in which peregrines are concerned, not because it is thought of as universal but because it is simple and intelligible to aliens. The 'philosophical' view of it as universal and therefore 'natural' is not that which is important and is at variance with the facts. Probably its most important institution is the consensual and executory contract of sale, but that is peculiarly Roman: Hellenistic systems knew nothing of it. With the spread of the Roman State, from the second Punic War onwards, the *ius gentium* must have gone far towards realising, for the then known world, the universal commercial law which the more enlightened lawyers of all modern countries are striving to attain.<sup>2</sup> In the later Empire the borrowing of Hellenistic and oriental ideas was much accentuated, but this was not the result of a striving to discover and adopt what was best in other systems, but of the fact that the centre of the Empire had shifted to the East. Unconscious and express adoption of oriental notions was inevitable when the surroundings were oriental and the men who made, and those who administered, the law were themselves orientals.

<sup>1</sup> Buckland, *Equity in Roman Law*, *passim*.

<sup>2</sup> See especially *L'Unification du Droit*, 1948, published in French and English by the Rome Institute for the Unification of Private Law.

EXCURSUS:<sup>1</sup> ROMAN AND ENGLISH METHODS

It is right to emphasise the general resemblance in the methods followed by Roman and English law. Neither is in general a coherent intellectual system; both are rather ways of doing the legal business of society, observed and developed more or less instinctively by relatively small groups of men who have been trained by their predecessors in traditional procedures and habits of decision. No doubt the Roman law of the post-classical period, and English law from and after the career of Pollock, have tended to become more self-conscious and theoretical in character, but Roman law never reached a state at all comparable to that reached by the pandectists of the nineteenth century, nor has English law yet reached it, if it ever will.

Yet there is some danger of overdoing the likeness between Roman and English methods. In one department at least, that of real property, English law is much more systematic than Roman law ever was. One may even say that it is more systematic, more abstract and more intellectualised than any part of any foreign system derived from Roman law. This is the more surprising in that it has hardly been touched by civilian influences; though the old learning seems to have taken its final form at the hands of the Roman Catholic conveyancers, who doubtless imported into it some of the scholastic logic which was more characteristic of their thought than that of their Protestant contemporaries.<sup>2</sup> The tradition of accurate professional draftsmanship, which depends for its certainty very largely on the strict doctrine of precedent, long upheld by English Courts, is however found in many other branches of legal work, especially commercial law. It is one of the most marked characteristics of English law. It is perhaps even more strikingly developed in the United States.

<sup>1</sup> By Professor Lawson.

<sup>2</sup> Cf. Plucknett, *Concise History of the Common Law*, 5th ed. p. 15.

Perhaps it is precisely because both Roman and English law are original creations and have for the most part grown up without much regard for system that each has produced an incomparable elementary treatise, namely Gaius' *Institutes* and Blackstone's *Commentaries*. Both books have had an extraordinary influence in determining the main lines of legal education and in ensuring the spread of Roman and English law to other lands.<sup>1</sup> Both, after a period of undue depreciation, have come into their own as works of exceptional but peculiar quality. They are, indeed, like all the best elementary books, works of inspired journalism, simple, clear, and persuasive, containing, but hardly disfigured by, a few unimportant mistakes. Other countries have produced literary works that are more thorough and more scientific, but hardly so influential.

<sup>1</sup> The missionary work of Gaius was of course mainly done through the *Institutes of Justinian*.