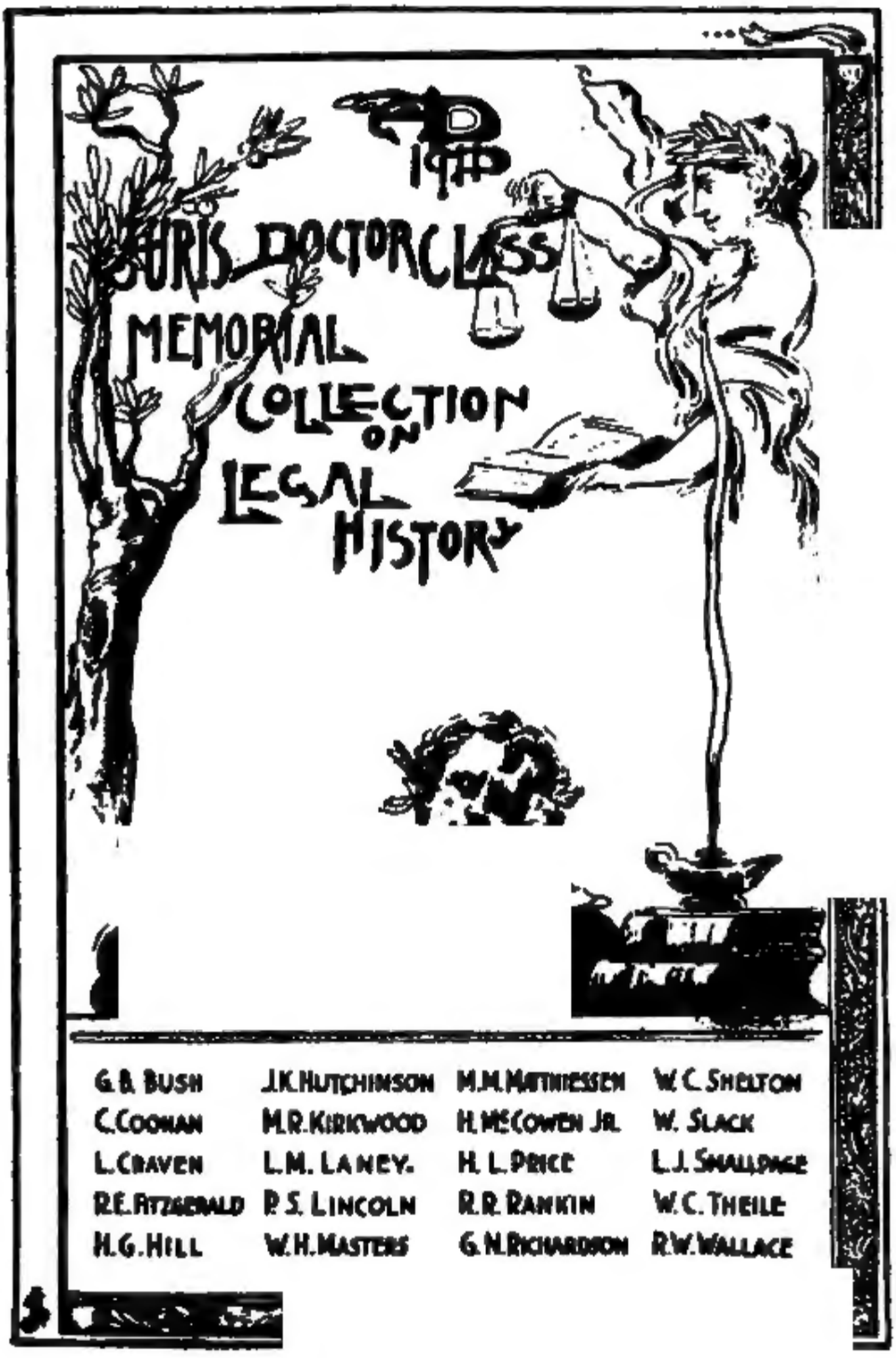
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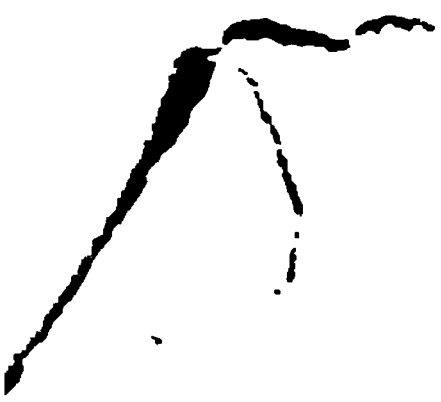
A HISTORY OF ROMAN LAW



A HISTORY
OF
ROMAN LAW

WITH A COMMENTARY ON THE
INSTITUTES OF GAIUS AND JUSTINIAN

BY

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PREFACE

THIS volume is the outcome of a series of lectures given to advanced college students who were specializing in history. It is, therefore, an institutional study and aims to give, in a clear, analytical manner, the origin and development of Roman law in such compass as can be mastered by well trained students in a two-hour course running throughout the year.

The arrangement facilitates collateral reading and criticism and the use of standard authorities as well as the sources of information. Texts of the Institutes of Gaius and Justinian are plentiful and cheap, both in Latin and English.

Such a work as this, giving in one volume of moderate size the main features of the history of Roman law, without being too brief, together with an interpretation of the more important laws as found in Gaius and Justinian, seemed to be necessary. The writer trusts that this book will be found helpful to many.

ANDREW STEPHENSON.

GREENCASTLE, INDIANA,
August 7, 1912.

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A HISTORY OF ROMAN LAW

Part One

THE HISTORY OF ROMAN LAW FROM ITS BEGINNING TO ITS CODIFICATION IN THE REIGN OF JUSTINIAN

CHAPTER I

INTRODUCTION

§ 1. Value of the Study of Roman History.

The superior value as a study, of the history of the institutions and laws of Rome to the historian, the lawyer, and the politician, would appear to consist in the fact that the Roman nation presents to the modern student the most perfect and complete specimen we have of national growth, development, and decay. The great influence which the Roman language, literature, and institutions have had upon modern nations is, unquestionably, in itself sufficient to justify the time and research which have been spent in their study. Apart from this, however, there is no period of ancient history which contains in so complete and so compact a form, although extending over a thousand years, a purview of a nation's career from its cradle to its grave. Roman civilization may justly be considered the crown of antiquity. It had taken unto itself the civil and artistic life of the Orient; the poetry of Homer and Sappho; the philosophy of Plato and Aristotle,

and the religion of the Jew; the sum total, in fact, of all that remained of the religions, laws, customs, languages, letters, arts, and sciences of all the nations of antiquity that had successively arisen, held sway for a season, and passed away. It seemed to be the appointed task of the Romans to collect the product of all this mass of varied national labor as a common treasure, to preserve it from destruction at the hands of ignorant and barbarous peoples, and to deliver it over to the future ages for their instruction, enlightenment, and inspiration.

In the early ages of the Christian era the Roman empire embraced all the countries around the Mediterranean Sea, together with vast tracts north of the Alps, and stretching in an unbroken line eastward along the Danube to its mouth, and westward and northward to the Atlantic Ocean, St. George's Channel, the Solway Frith, and the North Sea. Or, as Gibbon has it, "The empire was about two thousand miles in breadth, from the wall of Antoninus and the northern limits of Dacia to Mt. Atlas and the tropic of Cancer; it extended in length more than three thousand miles, from the western ocean to the Euphrates; it was situated in the finest part of the temperate zone, between the twenty-fourth and fifty-sixth degrees of northern latitude; it was supposed to contain about 1,600,000 square miles, for the most part of fertile and well cultivated land."

§ 2. The Beginnings of Rome.

The marvelous growth of the Roman empire, indicated not only by its geographical limits, but also by its preëminence in all the arts of war and peace, and the solidity of its structure which enabled it to last throughout so many centuries, was due, no doubt, to mixed causes, but chiefly to the conservative insight of her people which led them along the toilsome but safe track of

political experience, shunning alike philosophical theories and revolutions, and clinging with a desperate tenacity to the things that appealed to their sterling common sense.

With a cluster of hills rising upon either bank of the river Tiber about fourteen miles from its mouth has been associated for more than twenty-six centuries the name of the Romans. This name is of uncertain origin, but is usually made to stand for a confederacy of three independent tribes of different, but common, Indo-Germanic stock, — Latins, Sabines, and Etruscans, or, as Cicero subsequently calls them, Ramnians, Tities, and Luceres; subdivisions merely of that Latin race that came from the table-lands of Iran and settled throughout the peninsula of Italy. It was not known how or when these three peoples were united or merged into one nation, but in the earliest divisions of the citizens of Rome a trace of this separate origin is discernible, and each seems to have contributed certain characteristics and institutions toward the formation of the spirit and government of the new State.

It is quite certain that the Ramnians were the oldest of the settlers within the hills of Rome, and that they fortified and held some of the hills and occupied the surrounding territory. They thus had property and antiquity on their side in the confederate State that subsequently arose. They further had a rare sense of discipline and a respect that came near to worship for power and might. Latin origin can be seen in the idea that a man can call his own that which his strong hand has taken; in the right which the creditor had of laying hands upon his debtor and reducing him to slavery; in the patria potestas, jus vitæ necisque, and manus, and the power that the husband had over his wife.

After the Romans were settled and well in possession,

came the Sabines from their old home farther up the river. They seem to have seized and fortified some of the hills in close proximity to the Ramnians, and engaged for a time in a struggle with these people for mastery and possession. In this struggle neither one proved supreme and, as a consequence, a national alliance was entered into for mutual safety and protection. This alliance subsequently developed into a federal State, a closer political union, a consolidation of interests, social, political, and religious. To this the Sabines contributed the religious marriage ceremony known as confarreatio and the recognition of the wife and her part in the administration of household affairs. This influence is also seen in the council of kinsmen who advised the pater familias with respect to the administration of family affairs and the adoption of children in order that the gens might not die out and they thus be deprived of the prayers of their descendants.

The Etruscans differed very widely from the two peoples mentioned above that went to form the Roman State. They spoke a different language and were far in advance of the Ramnians and Sabines in civilization, in architecture, and other arts, in trade, and in commerce. Before coming into conflict with the confederation of Ramnians and Sabines the Etruscans had established settlements from the Alps to Campania. They were thus much more powerful than their rivals, and the struggle seems to have resulted in an Etruscan conquest and absorption of the growing confederacy. But this Etruscan supremacy only resulted in adding a third party to the dual confederation. They came too late to bring about much change in institutions now hardening into fixed form. They are perhaps responsible for the strict regard that came to be required and enforced in the ceremonial law. The Etruscan language contributed the words used

in these ceremonies. Indeed, it was chiefly from an Etruscan source that the Romans derived their science as well as the greater part of their religious practices. All the religious institutions and rites contained in the public law of the Romans were no doubt from this source.

§ 3. Extent of Early Rome.

Early Rome was, geographically speaking, a very small affair. That which was properly called Ager Romanus at first only occupied the surface of a slightly expanded arc whose chord was the river Tiber. Primitive Rome did not extend beyond the Tiber into Etruria, and toward Latium her possessions did not extend beyond the limits of some five or six miles, reckoning from the Palatine. Toward the east the towns of Antemnæ, Fidenæ, Cænina, Callatia, and Gabia lay in the immediate neighborhood, thus limiting the extension of the city in that direction within a radius of five or six miles; and northward the Anio formed the limit. Southwest, as you approach Labinium, the sixth milestone marked the boundary of Rome. Thus it appears that in every direction save one the territory of Rome was limited to a radius of from six to ten miles. Strabo makes the statement that it could be traveled around in a single day. The one unlimited outlet was toward the sea. Between Rome and the coast there seems to have been no settlement to obstruct the free passage of her peoples, thus making an easy outlet for trade and commerce and pointing the way for her subsequent supremacy. There could not easily be found anywhere a place better fitted by nature to be the center of a river and sea traffic than Rome. Certainly nothing equal to it could be found along the southern coast of Italy. It combined the advantages of an impregnable position with easy access to the sea. It commanded both banks of the stream to its mouth and thus offered greater

protection from pirates than places situated directly upon the coast, as the river furnished safe harborage.

§ 4. Sources of Roman History.

The infancy of all ancient nations is wrapped in obscurity, and their earliest history is clouded by a mass of doubtful traditions and incredible fables. While this statement is generally true, it is especially applicable to Rome, whose origin, though not of very great antiquity, was veiled even from the eyes of the Romans themselves. Popular stories, heroic ballads, the Pontifical annals containing the records of prodigies and supernatural events, formed the basis for its history. These were supplemented by a species of tradition adopted by poets, historians, publicists, and jurists. This tradition was at first vaguely set forth, but it gathered assurance by repetition until it came to be regarded as an historical record to be accepted at its face value. It became the national belief and can be traced in every branch of Roman literature. But the skeptic of modern times has ruthlessly assailed these traditions of Roman origin and has ranked them with the fables of mythology. Very little of the history of Regal Rome is left after the critic has completed his task. The picturesque myths and heroic stories of the brave deeds of old have long since passed into the literary junk heap, but Roman history has been largely reconstructed upon scientific lines, and it is not going too far to say that the modern scholar knows much more about the history of Rome than did Cicero or Livy.

§ 5. The Beginnings of Roman Law.

In various departments of intellectual exertion the Greeks have never been surpassed. Here was the cradle of philosophy, poetry, oratory, music, and the fine arts; and modern nations have never been able to get very much beyond what they accomplished in these lines. The Jews have been preëminent in the de-

velopment of religion, and Christianity, which bids fair to conquer the earth, finds its birthplace and literature among these people, being but the blossom end of Judaism. But the Greeks contributed nothing to the science of jurisprudence. The laws of Lycurgus were never put in writing, and those of the Athenians, although placed in written form, were crude and insignificant. While the Jews developed religion to its most perfect form, they were never politically wise, and were, consequently, almost constantly subject to some other nation. Under these conditions it would be useless to look for the development of a broad and sound jurisprudence. Speculation found little favor among the Romans. They had little or no imagination, and were preëminently a practical people. They never produced a system of philosophy; what they had was copied from the Greeks, but we owe to them the first successful cultivation of law as a science. In fact, they contributed to universal history the most profound system of jurisprudence that the world has ever seen. Says Professor Ihne; "The Roman law possesses an intrinsic excellence which has made it the foundation of all legal study in Europe, and the model of almost all codes of civil law now in force. Every one of us is benefited directly or indirectly by this legacy of the Roman people, a legacy as valuable as the literary and artistic models which we owe to the great writers and sculptors of Greece."

Although we cannot speak positively of the subject matter of early Roman law, we do know that during the three centuries which lie between the mythical foundation of the city and the Twelve Tables, the law by which the Romans were governed was unwritten. It was purely traditional, handed down by the elders, and was identical with the usage of the Aryan peoples. Modern investigation has discovered

resemblances so striking between the institutions of Rome, the primitive Irish, and Asiatic Aryan peoples that have been open to observation and study, that it is safe to conclude that the legal institutions of Rome go back to a far antiquity. There existed here, as in many other places, rules of conduct dependent upon custom long prior to any enactment. Individual legislators have been assigned for the oldest laws that have come down to us. Thus Dionysius makes Romulus institute the patria potestas, while many of the legal fragments preserved by Flaccus have been attributed by him to Romulus, Tatius, and Numa Pompilius. As a matter of fact, we cannot discover any legislation establishing the patria potestas, or regulating the law of descent of property upon the death of its owner. Early Roman law was merely a body of customs or quasi-religious regulations preserved by the college of pontiffs who acquired the title of custodes legis. Our picture of the earliest Roman law must, therefore, be entirely colored by the sources from which it was derived. Mommsen seems to think that the pontiffs would only record such laws as affected their own offices and in which they were specially interested. In this way he accounts for the quasi-religious nature of the law. Professor Clark, who is an acknowledged legal authority, differs from Mommsen. He suggests; "(1) Priority of rule of conduct, not law, is in analogy with all we know of the laws of other nations. (2) The college of pontiffs having charge of these codes is not likely to have excluded any laws from their books, as they were continually called upon to verify them. (3) Some of the best of Roman laws can be traced to a religious source."

It would be foolish to expect at this early age a clear line of cleavage between religious and secular laws. The Roman priesthood was chosen from among the leading citizens and

was always intimately associated with the political life of the State. The civil law must, therefore, needs be permeated with the religious spirit. It may be well here to add that many of the imperative sayings attributed to the religious guilds, which were believed to have been extracted from the pontifical books, were merely axioms pertinent to the matter to which they belonged or referred, and were sanctioned, not by law, but by fear of divine displeasure and reluctance to lose the religious fellowship of those to whom they were addressed. It is reasonable to suppose that some of these came to do duty as laws, some sumptuary, some sanitary, and some for the enforcement of public order and decency. This was surely the case with the burial laws of the Twelve Tables. They had in them little of the nature of true law, but were the regulation of a religious custom which was far older.

§ 6. Sources of Law during the Regal Period.

It is necessary here to note that no original documents of Roman law have come down to us. Dionysius of Halicarnassus tells us that the early laws of Rome were engraved upon tablets of oak and perished in one of the temples of Rome. We could scarcely expect that these would survive the great fires which swept the sacred city at various times in its history. Livy states that all the laws and treaties which were in existence at that time were ordered sought out and copied by Marcus Tullius, and he further testifies that this copy contained not only the laws of the kings but also the Twelve Tables. However this may be, it is certain that no copies in regular and authentic form survive. What seems to have been the only collection known to the Romans was mythical in origin and wholly untrustworthy. The celebrated jurist Pomponius, in the first book of the Digest (written A.D.

117–138), asserts that all the laws enacted by the kings were in existence at the time he wrote and were contained in a compilation made by the pontiff, Sextus Papirius, having the title "jus civile Papirianum." It is with the mention of this work that Pomponius begins his account of the sources of Roman law, and mentions Papirius as the first of Roman jurists. This work of Papirius seems to have been prepared about the close of the Republic and was merely a private collection. The so-called leges regiæ were loose statements of law concerned for the most part with sacred matters. They probably dated back to the time of the kings and bear testimony to the closeness of the original connection between law and religion.

The question as to the origin and authenticity of these leges regiæ was often discussed by the ancient writers themselves. Livy says that the pontifical writings and other records, both public and private, were destroyed by the Gauls in 390 B.C. and that subsequently the chief task of the magistrates was to collect all the treaties and laws that could be found. In this task memory was, no doubt, resorted to, and the more common religious laws together with the Twelve Tables may have been reproduced with accuracy. But even the records made in this manner have been completely lost, together with the compilation made by Papirius, and we know little more of the leges regiæ than their name.

§ 7. Regulations of Public and Private Order.

We glean from the writings of Pomponius that originally the law was far from definite, and much of it which existed fell short of the conditions which philosophical jurists hold essential to the conceptions of law. There was no single sovereign authority that established it; its quality was not always the same, and the enforcement was ofttimes left to the in-

dividual rather than the State. There were, however, many rules established for defining men's rights and preventing their infringement, regulators of public and private order, out of which was to be evolved in the course of centuries the matured jurisprudence of the Corpus Juris Civilis. Such rules took shape under (1) Fas, (2) Jus, and the principles of (3) Boni Mores.

(1) Fas was the expression of the divine will. Some of the laws of Fas were directed, not against individuals of the nation, but against all men and all nations. It was merely the recognition of innate right and was not governed by any law. It was its province to come in and correct the abuses of Jus. Fas sometimes allowed what Jus forbade. "Transire per alienum fas est, jus non est." Indeed, it occupied a higher plane and had a fuller scope and wider range than any human law. It forbade that a war should be undertaken without the prescribed fetial ceremonies; *i.e.*, it required the sanction of the divine will before anything should be undertaken of national importance. Nothing was so impious as a "bellum non pium et purum." It required that faith should be kept with an enemy when the promise had been sanctioned by an oath. It enjoined hospitality to foreigners because the stranger was also under the protection of the gods. It punished murder as an offense against the gods who bestowed the life that had been taken away. It forbade the sale of a wife by her husband, as she was the partner with him of the sacra. It forbade violence to a parent, as this was deemed subversive of society and religion. It forbade incestuous connections, for such defiled the altar. It punished the displacement of boundary stones, for boundary stones were under the protection of the gods. Here there must arise an interesting question. How were rules of Fas en-

forced? This is difficult to answer. The breach of any rule of Fas rendered the offender impious, but his sin might be expiable. This required a peace offering to the offended deity as well as satisfaction to the injured party. An offense which was not expiable was probably dealt with by the pontiff, the person being declared sacer and left to the mercy of the offended deity who was supposed to inflict punishment consonant with the crime committed.

(2) Jus was the established law. It was the code of legal authority which was accepted and obeyed by the people. It was solely the product of human agency, while Fas was deemed inspired. Jus might be the result of tradition, as "jus moribus constitutum." Custom rather than statute seems to have been the law of the regal period. We see this in the patria potestas. Indeed, this fact is universally admitted. The legis regiæ mentioned by Pomponius must for the most part have been rules of Fas which were of interest to the public as well as to the pontiffs.

(3) Boni Mores were customary laws or rules of action sustained by good usage, but not enforced in Jus and not mentioned in Fas. There was a twofold change continually going on in these three fields, but most especially in Fas. Fas by recognition became Jus, and Jus by abeyance became Boni Mores.

The customs of different races and gentes, which at first were widely different, underwent a gradual change and approximation. In course of time there was thus formed one common body of laws.

§ 8. Religious Institutions.

It is of great importance to us in our beginning of the study of Roman law to understand something of the character assumed by the State religion of the Romans, as their religion was closely bound up

with public law and all State matters. The Romans never worked out a philosophical system of religion; in fact, they had no theology and no sacred books upon which to base a system of theology. Their mythology was exceedingly crude and rudimentary, and consequently there are no myths of genuine Roman growth. The deities of the Italian nation are to a very large extent blended with the Greek divinities, and not infrequently the names are the same. It would seem that the Romans simply naturalized the deities of Olympus and transplanted the whole system of Greek mythology, including their myths and sacred art. But in the practice of religion which springs from feeling rather than from reflection and fancy, the relation between God and man, "the sentiments with which the gods were approached, the duties which they exacted, the worship prescribed for their service; in short, the law, or the practical as distinguished from the theoretical part, were peculiarly Roman, and remained so even when the whole host of the Greek Olympus had migrated to Rome."

The religion of Rome became a fully and carefully elaborated legal system. In it the duties of man were minutely laid down and the fines incurred by each transgression specified. "It regulated the intercourse between gods and men, and showed how the good will and coöperation of the gods could be obtained by a certain and infallible process."

It was chiefly from an Etruscan source that the Romans derived their science of religion as well as the greater part of their religious practices. These people possessed a ritual which was very old, and all the religious institutions and rites contained in the public law of Rome were no doubt from this source. This whole complicated system of divine law was placed in the keeping of the pontiffs, but they had no author-

ity to enforce it on their own word, as neither priests nor pontiffs constituted an independent power in the State. The priestly functions were considered by all the early Italian nations as civil charges and were consequently a privilege of the patrician cast. The Roman priest was under no obligations to law aside from the ordinary habits of society. He was free to marry like any other citizen, and could aspire in general to any dignity in the State which was open to a citizen. These priests formed colleges or societies of which the king was chief. No important enterprise was ever undertaken without offering a sacrifice to the gods and without consulting the oracles. The validity of a public act was made to depend upon the determination of the divine will. It was the province of the augurs, who presaged the result of any enterprise by means of observations upon the entrails of the sacrificial victims, attention to the flight, the song, or the appetite of sacred birds, or the actions of the sacred serpents, to discover this.

A conflict between the State and the priesthood was impossible, as the priesthood did not constitute a body distinct from the rest of the community and had no independence whatever. Priests were elected for life from among the body of citizens and performed certain public functions that were deemed necessary for the welfare of the State.

The sacra publica were those sacrifices and rites which were performed by one or other of the sacred colleges of priests in the name and at the expense of the city, and which were religious ceremonies varying with the occasion, the divinity, and the time. Every important act of a Roman, whether public or private, assumed a religious character. For this reason implicit reliance was placed on an oath, and their respect for all things sacred knew no bounds. So long as this

religious faith remained honest and the priesthood really believed in the ceremonies which they performed, the influence of religion must have been profound and the government received from it a hierarchical character. The king himself was but the high priest of the nation.

§ 9. The Calendar.

It was the supreme duty of the pontiffs to regulate the calendar. In order to obviate inconvenience and attain to a degree of accuracy in the calculation of time the year should involve the same time precisely that is occupied by the earth in its circuit round the sun. This being the case, times and seasons correspond. We are told by Censorinus that it was no uncommon thing for different Italian nations to have years peculiar to themselves and differing from each other so much that it was almost impossible to compute the time of one nation in that of another. The Romans at first adopted the year which was in use among the Albans. This year was based upon the revolutions of the moon and consisted of ten months, the first being March, the last December. Of course these ten months contained but three hundred and four days, while the time occupied by the earth in its revolution round the sun is three hundred and sixty-five days and a quarter. The month of March was by this process of computing at one time in winter, and at another in the summer, each month of the year being correspondingly displaced. This want of harmony between the months and the seasons could not fail to bring about a vast amount of confusion. To obviate this, the Romans had recourse to intercallation.

The early historians attribute the first correction of the calendar to Numa, who is said to have added to the ten lunar months two new ones, January and February. Of these months January was placed at the first of the year and Febru-

ary at the last. But this correction still left an error of something more than ten days to be accounted for. The pontiffs distributed these days by periodic intercallation upon a scheme to suit themselves. This left considerable uncertainty and was a source of constant complaint on the part of the historians of the period. These calculations were intimately connected with both the public and the private law. The duration of magistracies, the classification of feast days, the celebration of public or private ceremonies in honor of the domestic deities, fixed and movable holidays, the dies comitiales, upon which the comitia could be held, and those upon which it could not, and, lastly, that which was all important to the jurist, the days upon which the magistrate could exercise his functions, when he was permitted to pronounce judgment depended upon the decision of the pontiff. The result of this was to place all functions within the direction and under the control of the priesthood.

In the time of Ovid the arrangement and the character assigned to each day of the year had been in use for more than three hundred years and were universally known; but in the commencement and, for a period reaching far into the republic, this knowledge was confined to pontiffs and the patricians. The ordinary Roman could never tell what day it was until he had heard the decision of the priests.

§ 10. Divisions of the People.

The entire population of Rome was divided into a ruling and a subject, or dependent, class. This division of the people can be clearly traced to the very beginning of the State and points indisputably to a conquest of the lands and to the subjugation of the people that formerly occupied it.

There was a part of the Roman law which was known in the

time of the empire as the jus quiritium; *i.e.*, the law of the spearmen. The quirites were the members of the gentile houses which were organized into curiæ at an early date for military and political purposes. These 'wielders of the spear' were the only persons who were ranked as full Roman citizens of all the people that settled about the 'urbs quadrata.' They alone could consult the gods through the medium of the auspices and participate in the services offered to the tutelary deities of Rome. They alone could take part in the comitia, contract a lawful marriage, or make a will. The quirites enjoyed these prerogatives because they were members of the gentile houses. The Roman State was based upon these houses. The community of the Roman people rose out of the junction of these ancient clanships, such as the Romilii, Valtinii, Fabii, and these clans in turn were but the aggregate of families bearing a common name and, at least theoretically, tracing their descent from a common ancestor. For this reason the quirites, or burgesses, assumed the name of patricii, or fathers' children. They alone in the eye of the law had a father. Whether or not the traditional account of the numerical proportion of families to clans and clans to curiæ has any substantial historical foundation, it is beyond all reasonable doubt that the gentile organization was common to all the races that contributed to the citizenship of Rome, and that it was made the basis of the new arrangements of the confederated State. As the clans resting upon a family basis were the constituent elements of the State, so the form of the body politic was modeled after the family, both generally and in detail. The household was provided by nature with a head in the person of a father with whom it originated and with whom it perished. The State which was modeled after the

Patricians.

family had no natural head; accordingly some one from the ranks of the patriciate was chosen as leader (rex) and lord in the household of the Roman community. The blazing hearth and the store chamber of the community, which were in later times always found in or near his residence, indicate with sufficient exactness the nature of his position. ´ The king had the same powers in the State which the house father possessed in the family.

Plebeians.

The subject or dependent body was in the earliest times composed of two classes: clients, or those dependent upon patrician houses; and plebeians, or those who were dependent upon the whole body of patricians, *i.e.*, the State. To the family or household united under the control of the living master and the clan which originated out of the breaking up of such households, there further belonged the dependents or clients. These were persons who, while they were not free citizens of any commonwealth, yet lived within one in a condition of protected freedom. They had doubtless been dwellers in small communities that had been deprived of their independence, leaving their members alike bereft of their religion, their territory, and their means of existence. These were compelled to turn elsewhere for protection and, therefore, sought it from their conquerors in large numbers. To this class also belonged those slaves whose masters had for the time being waived the exercise of their rights and so bestowed upon them practical freedom. The relation in which these clients stood was not properly in the character of a relation de jure, like the relation of a man to his guest or his slave: the client remained non-free, although good faith and use and want alleviated his condition of non-freedom. His patron had to provide for his wants and those of his family, and it was common for the patron to bestow upon his clients a plot of

land to cultivate for themselves claiming in return a rent either in produce or in money. This method was very similar to that in vogue among the early English, save that the churl could not be dispossessed so long as he paid his rent, while the client's land was held wholly at the pleasure of his patron. The patron had, moreover, to assist him in his transactions with third parties, obtain redress for him for his injuries, and represent him before the courts whenever he became involved in litigation. The client on his part had to maintain his patron's interest by every means in his power; the property which he accumulated was not his own, but belonged to his patron, and as against his patron he had no rights and, therefore, no protection from the law.

In its broader sense the term *plebeian* embraces the whole non-free population, *i.e.*, the clients and plebeians as the term is here used. Upon the capture of a town it frequently happened that instead of confiscating the whole territory and selling the population into slavery or dispersing them to become the clients of patrons, it seemed best to allow them the continued possession of freedom de facto, so that in the capacity of freed men of the State they entered into relations of clientship to the king. This latter class had one advantage over clients. They held their lands as private property, paying to the State only such taxes as were levied upon citizens. Whatever they accumulated was their own. At an early date the floating population seems to have recognized the advantage of placing themselves under the protection of the State (*i.e.*, the king) rather than of becoming clients of a lord. This latter class grew rapidly at the expense of the former. Rome liberally granted the privilege of settlement to every child born of unequal parents, to every manumitted slave, and to every stranger who, surrendering his rights in

his native land, emigrated to Rome. The right of settlement in Rome was granted to all the members of the Latin league. Manumissions must have increased in number as the prosperity of the citizens increased, and these freed men had the privilege, as time passed, of becoming clients of the State rather than of a patron. This great body thus composed of separate and distinct elements had always the right of acquiring property in movables, and gradually obtained the right, recognized by the Twelve Tables, of acquiring property in immovables, *i.e.*, in land. Thus they enjoyed many of the privileges of citizens without having to share in the burdens. The patricians, bearing the whole burden of warfare, were scarcely more than holding their own, while these 'metœci' were increasing both by natural means, by conquest, and by immigration. In this way there gradually grew up a second community in Rome. Out of the clients and plebeians in the restricted sense came the body of the 'independent plebs.' This was a step in advance of clientship — as the feeling of special dependence upon a privileged class was diminished and there was born in its stead the determination to advance to a condition of political equality with the privileged order of citizens. The Servian Constitution was the first step toward this political equality.

Roman law properly begins with the Twelve Tables and ends with the Code of Justinian. It thus covers a period of one thousand years, and is divided by most legal historians into three periods: —

§ 11. Divisions of Roman Law.

I. From the Founding of Rome to the Twelve Tables, 451 B.C.

II. From the Twelve Tables to the Founding of the Empire, 451–30 B.C.

III. From the Founding of the Empire to the Death of Justinian, 30 B.C.–A.D. 565.

The imperial period is further subdivided by some writers into: —

(*a*) 30 B.C. to the Reign of Alexander Severus, A.D. 222.
(*b*) A.D. 222 to the Death of Justinian, A.D. 565.

Hugo and Gibbon divide the entire field of Roman law into four periods: —

I. Founding of Rome to the Twelve Tables, 451 B.C. (Infancy.)
II. From the Twelve Tables to the Birth of Cicero, 104 B.C. (Youth.)
III. 104 B.C. to the Accession of Alexander Severus, A.D. 222. (Maturity.)
IV. A.D. 222 to the Death of Justinian, A.D. 565. (Old Age.)

The German historian Puchta gives the following classification: —

I. From the Founding of Rome to the Twelve Tables, 451 B.C.
II. From the Twelve Tables to the Empire, 451 B.C.–30 B.C.
III. From the Empire to the Accession of Diocletian, 30 B.C.–A.D. 284.
IV. From Accession of Diocletian to the Death of Justinian, A.D. 284–565.

In this work the following divisions are made: —

I. From the Founding of Rome to the Twelve Tables, 451 B.C. (Infancy.)

II. From the Twelve Tables to the Empire, 451–30 B.C. (Youth.)

This period is further subdivided as follows: —

(*a*) 451 B.C. to the Submission of All Italy, 269 B.C. (Jus civile).

(*b*) Submission of All Italy to the Empire, 269–230 B.C. (Jus gentium).

III. From the Empire to the Death of Justinian, 30 B.C.–A.D. 565. (Maturity and Old Age.)

The First Period of Roman law was characterized by a constant struggle on the part of the patricians and plebeians, the one for complete dominance, the other for complete equality before the law. Out of this struggle came the sources of the Roman law. In the Second Period, or Youth, of Roman law, the civil wars took place, and, in order to extinguish them, the right of citizenship was bestowed upon many of the Latins, while equality before the law was finally obtained by the plebeians by means of gigantic revolutionary efforts. This second effort may be subdivided into the jus civile, or period of the dominance of the civil law of Rome, to the subjugation of the entire Italian penisula, and the jus gentium, or period in which the civil law was broadened so as to embrace many fundamental legal principles which were the common inheritance of all nations, to the Empire. The latter division was distinguished by great development in legal ideas, and some of the greatest of Roman jurists lived and labored within this period. Among these were Appius Claudius, Ælius, and Cato.

In the Third Period arts and sciences flourished, and jurisprudence developed as a philosophical science to a marvelous

degree. Four well-marked sources of law may be traced during this time: —

1. Plebiscita.
2. Senatus Consulta.
3. Responsa Prudentium.
4. Principum Edicta.

Each of these various sources had a marked degree of influence and, combined, they developed a code which was both logical and explicit. At the end of this third period the inhabitants of provinces were assimilated into the body politic, and one law was enforced throughout the length and breadth of the empire. Scævola, Sulpicius, Paulus, Sabinus, Julian, Papinian, Ulpian, and Modestinus all flourished during these years. They must be ranked among the greatest jurists of all time and may be said to have completed the science of jurisprudence. Subsequently it became the business of lawyers, not to frame new laws, but to codify and quote those that had already been enacted. With them jurisprudence made no progress. Still their work was important. By them three complete codes were compiled: —

I. The Gregorian Code, A.D. 290–300.
II. The Hermogenian Code, A.D. 365.
III. The Theodosian Code, A.D. 429.

The Gregorian and Hermogenian Codes were private collections prepared by individuals and had no binding legal authority, although they were considered of very great value. The Theodosian Code, prepared under the direction of the emperor Theodosius, received the sanction of the emperor and became the binding law of the entire country.

§ 12. Kinds of Law.

The celebrated French historian, Ortolan, distinguishes four kinds of Roman law: —

I. Public Law.
II. Sacred Law.
III. Private Law.
IV. Customs of the People.

Public law comprised the constitution, the machinery of legal justice, and the right of enacting peace and war. Sacred law regulated the ceremonies of religion both in public and private and supervised the election of the pontiffs. Private law was that which considered the interest of private association and regulated marriage, property, and inheritance. The customs of the people had an influence equal to that of all the others combined.

All these laws were semi-religious in character and were common to all infant States, but they never attained such widespread influence among other peoples as they did in Rome.

It was formerly customary for English lawyers to hold that Common Law was indigenous to all parts of England. This, however, is not the case. An examination of the laws of Henry III and Edward I reveals the fact that the jurists that prepared the codifications of those reigns, and so crystallized what we call the Common Law, copied in toto from the Roman Code without any acknowledgment of the fact. However, very little importance is to be given to this fact, as everything of intellectual importance which has been imported into England has been colored by the peculiarities of the national characteristics. Roman law was one of the most exact of sciences. It was a system distinguished above all others for its logical and systematic development and arrangement. It was almost revolutionized by the distortion of one of its parts or the omission of a word. When this law

was interpreted by jurists who had not been educated in it, it soon lost its distinctive characteristics and was merged in the mass of English custom.

It is not, however, because Roman law was thus made use of in the development of English jurisprudence and so made to do duty as common law that we should study it to-day, but, rather, because all laws, however dissimilar in use, tend to resemble each other in maturity. The commentators upon the English Common Law are accustoming themselves to the same mode of legal thought and the recognition of fundamental legal principles to which the Roman prudentes had attained by centuries of development. The business of these prudentes consisted chiefly in the application of principles and formulæ which were supplied them both by canons and examples, to the interpretation of the written law. There is nothing in modern legal development which exactly corresponds to this method of procedure. Sir Henry Maine compares the power which the methods invented by these Roman prudentes gave over their subject matter to that which the geometrician obtains from his figures.

Book I. FROM THE FOUNDING OF ROME TO THE TWELVE TABLES, 451 B.C.

Regal Period: From the Founding of Rome to the Republic, 734–509 B.C.

CHAPTER II

INSTITUTIONS OF THE PRIVATE LAW

In the discussion of the Roman family it is first necessary for us to disabuse our minds of any preconceived con-

§ 13. Family.

ceptions which the word gives rise to. The Roman family is not, as with us, a natural family.[1] It is the creation of the Quiritarian law. It would probably be better for us to confine ourselves to the Roman word *familia* instead of the English word *family*. Husband, wife, and children did not necessarily constitute an independent family among the Romans, nor were they all necessarily of the same family. The Roman family is not based upon marriage, but upon power. Those formed a familia who were all subject to the right or power (manus) of the same family head (pater familias). He might have a whole host dependent upon him, wife, and sons, and daughters, and daughters-in-law, and grandchildren by his sons, and even remoter descendants related through males. So long as these remained subject

[1] Sohm, Institutes of Roman Law, pp. 356–359; Hunter, Roman Law, pp. 203–204; Ortolan, Histoire de la legislation Romaine, 119; Muirhead, Historical Introduction to the Private Law of Rome, pp. 26 *seq.*

to him, they constituted but one familia. This was split up only on his death or loss of citizenship. Thus it was that the familia formed a unity; the man who had, upon his father's death, become his own master, and the wife whom the priest by the ceremony of the sacred salted cake (confarreatio) had solemnly wedded to him to be a partner with him of water and fire, with their sons and their lawful wives and their unmarried daughters and sons' daughters, along with all goods and substance pertaining to any of its members. To the Roman citizen a house of his own with a wife and children appeared not only a blessing, but the chief end and essence of life. The death of the individual was not looked upon as an evil, because the Roman saw in this a matter of necessity, but the extinction of a household or of a clan was a loss to the State which was to be guarded against in every way possible.

Man alone could be the head of a family and as such was recognized as a member of the community or State. The woman necessarily belonged to the household and not the community. In the household she was not a drudge to grind the corn and make the bread, but the mistress who superintended the labor of the servants and engaged in the lighter task of spinning and weaving. The moral obligations of parents were fully and deeply felt by the Roman nation. Father and mother were held responsible for the careful training and education of their children. To neglect them or to squander the property to their disadvantage was looked upon as the most heinous of offenses.

While the housewife was thus associated with her husband in the labor and care of the household, and looked up to and honored, from a legal point of view the family was absolutely guided and governed by the single all-powerful will of the

'father-of-the-household.' In relation to him all other members of the household were destitute of legal rights.

§ 14. Patria Potestas.

This power which the pater familias wielded in such an arbitrary and unlimited manner was known in Roman law as patria potestas.[1] It was, in brief, that power which the pater familias enjoyed over children born to him in justæ nuptiæ. It is not improbable that to some extent, at least, it was due to his being a participant of sacra that he had this despotic power vested in him. This patria potestas, though founded upon usage common to all peoples, came to be so distinctly Roman that her jurists boasted that it was an institution enjoyed by none save Roman citizens. It is to be noted that the Latin municipalities of Spain and other western provinces, though their burgesses were not Roman citizens, yet had patria potestas modeled after that of Rome. But this paternal power never reached such intensity and all-pervading authority as it did in Rome. Here it would seem to have entitled the father, or his pater familias if he were himself under domestic subjection, to decide whether he would rear a child born to him. He had the right and duty of exercising judicial authority over the members of his household and, if need be, of punishing them as he deemed fit in life and limb. All property gained by the labor or skill of any member of the household belonged to the pater. He could even sell his son or daughter as property to a third person. In fine, there was no legal limit to the patria potestas. Romulus is said to have placed boundaries to this authority, but only in a religious sense by pronouncing a curse upon the pater who sold into slavery his wife or son. Rome was centuries old before it became possible either to destroy or mitigate this patria potestas,

[1] Ortolan, 329; Muirhead, 113; Hunter, 188–223.

and then it could be accomplished only in a very roundabout manner.

The death of the pater familias did not wholly destroy the solidarity of the family. The immediate male descendants were thereby made independent, and thus each became the head of a separate family, but there still remained a bond of association which in some respects preserved the old family unity. Roman law reveals the institution, not wholly forgotten, of a certain association of related families which still had something in common, and which might have had a common life.[1] There are marks of this in both law and religion. Next above the family were the agnati or agnated kindred. These were the connected body of kinsmen on the male side that would have been members of the same family had their common ancestor been living. According to the older Roman view, a woman was not capable of having power either over others or herself. She must be provided with a guardian upon the death of her husband, or of her father, in case she was unmarried. This guardianship remained with the house to which she belonged. When the pater familias died, the nearest male members of the family, usually sons, became the guardians of the female members of the household. Sons thus had power over their mother, and brothers over their sisters. In this legal sense the family lived on until the male stock of its founder died out. The bond of connection grew gradually weaker generation after generation, until it became no longer possible to prove descent from the common male ancestor. At this point agnation ceases, as the agnati were a group of actual or adopted descendants from a known ancestor.

§ 15. Agnati.

When we pass down the line of agnation until we reach the

[1] Sohm, 124, 356, 358; Muirhead, 43 and *n.* 3, 117, 118.

point where it is no longer possible to trace the descent from a known male ancestor, although the group claimed such common descent, we arrive at the gens, or clan.[1] Sir Henry Maine says that the community of the South Slavonians corresponds with the Roman gens and the Teuton kings. He further claims that the gens answered still more closely to the joint family of the Hindus. As Sir Henry passed more than twenty years as a resident of India and was a close and careful student of Hindu customs, his word must have great weight.

§ 16. Gens.

Ortolan says that the first requisite to constitute a gens was the tracing of the descent to the ultimate ground without discovering an ancestor in a state of slavery. To this Hunter adds that no one having suffered capitis deminutio could ever be considered as a member of a gens.

The institution of gentes was of such a nature that we find the members not only bearing the same name, but uniting in politics, forming colonies, and even enduring exile together. They were united by special religious ties that were cultivated and fostered with the greatest care by the Roman government. The notion of gens is associated with that of the right of inheritance and the privileges enjoyed by the patron in reference to clients and dependents. In the time of Gaius, but apparently not in the time of Cicero, the claim of the gens became extinct. The knowledge concerning this institution is so meager that it is no longer possible to construct a satisfactory account of it. The gens, however, was not an institution peculiar to Rome as it is found in the Greek States in various parts of the world. One thing is certain; it was not a fortuitous institution. It had a common life;

[1] Sohm, 359, 437–438; Muirhead, 38, 69, 210; Ortolan, 25, 130, 586.

it had a common worship, and the object of that worship was the deified ancestor of the gens. It had a common town or village and possessed common property. It was answerable for the debts of one of its members and was bound to ransom any member who had been captured by the enemy. Each gens had a common leader who was judge, priest, and military commander. Lastly, the very name was said to be connected with gignere and implies the theory of a common descent, and this view is strengthened by that of a common name. Dr. Canning argues that the gens is merely the patriarchal family in a state of decay, and this reasoning seems to be very hard to get away from.

§ 17. Marriage.

With the early Romans, as with the Greeks and Hindus, marriage was a religious duty, a duty which a man owed alike to his ancestors, to the State, and to himself. The Roman believed that the happiness of the dead in another world depended upon their proper burial and the periodical renewal by their descendants of prayers and feasts and offerings for the repose of their souls. It was, therefore, incumbent on him above all other duties to perpetuate his race and his family.[1] When he took a wife he separated her from her father's house and made her a partner of his family mysteries. Henceforth she worshiped the gods of her husband and was no longer bound to reverence those of her father. In order that this change might be brought about, a religious ceremony was performed by a priest with ten members of the tribe of the bridegroom as witnesses. The nature of this religious ceremony made it impossible for a man to marry a woman with whom he had no connubium. She must be a member of a gens connected by religious rites to that of his own; in other words, a citizen of Rome. This was a mat-

[1] Sohm, 359, 360, 365–369; Muirhead, 26, 63, 84, 227.

ter of State arrangement. A patrician citizen, therefore, was compelled to wed either a fellow patrician or a woman who was a member of an allied community to which this right had been extended by treaty. This marriage ceremony was known by the name of confarreatio (the breaking of the sacred cake together). With this marriage ceremony the wife passed into the complete control (in manu, into the hand) of her husband, or, in case her husband was dependent, into that of her husband's father. She was no longer a member of her father's household. Any property which she might have passed to her husband and whatever she earned during marriage fell in like manner to her husband. On the death of her husband she shared in the estate with her children as if she were a daughter.

Romulus is reported by Plutarch to have enacted a law that if a man divorced his wife for any other cause than adultery he forfeited his estate, half to her, half to Ceres;[1] if he sold her, he was to be accursed and given over to the infernal gods. How this decree was to be enforced is a matter of doubt. Surely the State had nothing to do with it. The supposition seems to have been that the gods themselves would inflict the prescribed punishment.

Upon the death of the pater familias all those who were under his potestas either became independent (sui juris) or fell into the power of another. Those under the age of puberty were placed under guardians, and so became pupili. With males this guardianship came to an end when puberty was reached, but females remained under guardianship until they married. This was doubtless to keep them from disposing of any of the property to the prejudice of the heirs. Muirhead does not believe that in the regal period a testa-

[1] Sohm, 381–384.

mentary appointment of a guardian for wife and children could be made. If this be true, then the office must have devolved upon the agnati or gens, as I have previously stated, and they delegated one of their number to act as guardian, retaining the right of supervision in their own hands.

Plebeians were not citizens and, therefore, they did not possess the necessary qualifications for legal marriage (justæ nuptiæ). They had certain forms of their own, however, in accordance with which they married, but these were looked upon with contempt by the patricians, who considered all plebeian marriages null and children sprung from such unions spurious.

§ 18. Guilds.

Guilds are said by Plutarch to have been established by Numa Pompilius, who organized the artisans and craftsmen who had made their way into the city into eight or nine of these associations. Whether it was actually Numa who first organized these trade-unions, it is certain that such associations are very ancient.[1] It was the creation of such associations among the plebeians that compensated, to a certain extent at least, for the absence among them of gentile organization. By means of these guilds the plebeians obtained a common cult and possibly a common burying place, with a master and his council to manage their affairs, consolidate customs, and arrange disputes. These guilds cannot be said to have had any political significance in the first stages of their life. Their members were bound together, not indeed by descent, either real or fictitious, from a common ancestor, but by interdependence and by similarity of tastes and occupations.

The next division of the populus Romanus above the clan, and consisting of a certain though indefinite number of

[1] Muirhead, 11.

clans or gentes (the primitive division of ten households is not historic), was the curia (from cura) or wardship. The curia was a genuine corporate unity the members of which held frequent assemblies for purposes of worship and festal occasions. Each curia was under the charge of a special warden known by the name of 'curio,' and each had a priest of its own (flamen curealis) to officiate at religious ceremonies. The curia was the unit for military levies and property valuations in the assessment of taxes. Each of the three original tribes was supposed to be divided into ten curiæ, and the thirty curiæ by this arrangement made up the 'civitas' or Roman State.

§ 19. Curia.

The comitia curiata[1] was merely the assembly of the curiæ for the purpose of carrying on the business of the State. As the populus Romanus was at first merely the body of citizens proper, the patricians, or those who were members of the curiæ, none but patricians could take an active part in the curiata. Plebeians might be admitted to the meeting to hear what was being said, but they could take no part in the proceedings, and certainly could not vote.

§ 20. Comitia Curiata.

It is necessary to bear in mind at the outset that no comitia could originate any measure, introduce amendments, or discuss the merits or demerits of any subject whatsoever that was brought before them. All the comitia curiata could do was simply to vote yes or no to a proposition submitted to them. Therefore all proposals coming up for their consideration were rogations (bills from the senate) which they passed by the formula 'uti rogas,' or rejected by the formula, 'antiquo.' That which was passed became law for the king and senate as well as for the people. The main points upon

[1] Ortolan, 22, 23, 27–31; Muirhead, 6, 48 *n.*, 64; Sohm, 349, 386, 387; Botsford, The Roman Assemblies, I, 119–151, 152–167.

which the comitia curiata had to decide were: the election of magistrates, the passing of laws, war and peace, the capital punishment of Roman citizens, and the affairs of the curiæ and gentes.

In the regal period the only officer who was to be elected by the curiæ was the king. He appointed all the other magistrates. The candidate for king was first nominated by the senate, and the curiata either elected or rejected this candidate.

The laws that were passed by the curiata were very few in number and of little importance. Custom was almost the only law. A few modifications were introduced by the senate in the form of rogations. These were passed or rejected by the comitia curiata.

The curiata decided upon questions of war and peace; but here again the proposal came from the king, all discussion having been previously gone through in the senate. The curiata simply gave formal sanction or refusal. There is no existing evidence that the curiata ever made peace, but the logical conclusion is that they sanctioned the agreement previously entered into by the king and senate.

The right of finally deciding upon the life of any Roman citizen was vested from the earliest times in the populus as the judiciary. Of course this confined the decision to the patricians, as plebeians were not citizens. The organ of the patriciate was the curiata. After the reforms of Servius this right of passing judgment where a question of life was involved passed to the centuriata.

All the priestly officers such as the curiones, flamenes curiales, and pontiffs were either elected or inaugurated by the curiata.

A subcommittee of the curiata, known by the name of

comitia calata, existed to carry on the necessary business when the curiata was not in session. It was held under the presidency of the college of pontiffs and settled questions of arrogation, witnessed wills, elected the pontifex maximus, and conferred the magistracy. This was the formal bestowal of the insignia of office upon the person vested with it by election. When the comitia calata had ceased to exist, its old-time function was performed by a representative body of thirty lictors who were appointed for the purpose.

The place of meeting for the comitia curiata and also the comitia calata was the capital, hard by the curia Calabra.[1] Both assemblies were opened by prayer and sacrifice. The curiata held its meetings after the senate upon certain days only, having three market days intervening. It was to the comitia calata that were announced the nones and ides of new months, dies fasti, dies non fasti, dies comitiales, feriæ, etc.

By the side of the assembly of citizens (comitia curiata), but not directly associated with them in legislation, there existed from the earliest times another very important body, the council of elders or senate (patrum concilium).[2] This body consisted of all the most influential heads of families, and formed a sort of representative assembly. It, no doubt, had its origin in the old clan constitution, and thus far tradition runs parallel with fact in stating that in the original Rome the senate was composed of all the heads of households. The ancient clan was a monarchy under the rule of one elder, chosen to this position for life by the clansmen. When the separate clans federated

§ 21. The Senate.

[1] Botsford, II, 154; Varro, De Lingua Latina, V, 13; VI, 27.

[2] Sohm, 77–78; Muirhead, 287 and *n.* 10; Ortolan, 19; Botsford, 37, 101–113.

into one community, these clan elders formed a sort of ruling body, independent alike of the curia and the king, and partaking to a certain extent of the powers of each. It shared with the king the executive government of the State, and at the same time indirectly controlled legislation. Its composition must have partaken of the same irregularity as that of the clans composing it, and, therefore, the number could not have been arbitrarily fixed. Tradition states that Romulus chose at first one hundred men to be senators, that this number was doubled on the union with the Sabines, and that under Tarquin one hundred more were added. Thus the normal number would seem to be three hundred, corresponding to the three hundred households or clans into which the ancient tribes were said to be divided. When it became no longer possible to trace the clans and so have a senate composed by natural selection of clan elders, the king selected this body from the number of more prominent citizens.

It is impossible to believe that this forceful body of clan leaders, brought together by the necessity of federation, contented itself with the empty function of giving advice to the king, when asked, without putting forth any effort to enforce its opinions and so have an active part in government. This was no doubt true in the republican period, when the senate had been shorn of some of its prerogatives, but in the earlier regal period it certainly partook of the executive government of the State. In accordance with the monarchical principle of the Romans with which they were alone acquainted, these clan elders recognized the authority of the king and aided him in carrying out his plans, but they manifested their real power in their control of all elections and of all legislative acts. The "authority of the fathers" (patrum auctoritas) was here insisted upon to the fullest.

Another privilege of the senate was to determine when a magister populi should be chosen for the command of the army. Again, when the king died, the senate at once took his place and exercised all the royal prerogatives, each member, in turn, acting as king for five days and nominating his successor. This idea of associate royalty was further indicated by the senatorial dress. The insignia of the senator were similar to that of the king, though inferior; he wore the purple on his dress and the red shoe like the king, but the whole robe of the king was purple, and his shoes were much finer in quality and finish than those worn by a senator. Thus, under the sacerdotal kings, the senate occupied a most influential position. On the senate devolved the duty of examining every resolution adopted by the centuriata at the instigation of the king, and refusing to confirm it if it seemed to violate existing rights or work any unusual hardship. This amounted to a practical veto on the action both of the curiata and the king, and yet this must not be construed into bestowing upon the senate the powers of a second legislative chamber, equal to that of the comitia curiata. The senate was a watchdog merely, and so guarded against innovations and hasty action on the part of king or people.

A vast amount of discussion has arisen touching the relation in which the plebeian stood to the senate.[1] Mommsen represents one extreme in this controversy. He holds that plebeians were admitted to the senate at a very early day and cites the word 'conscripti,' in the phrase, 'patres conscripti' as evidence of this, inserting "et" so as to read 'patres et conscripti,' 'fathers and those associated with the fathers.' Ihne is utterly opposed to this view and takes the ground that the plebeians were in no

Plebeians and the Senate.

[1] Botsford, 235.

way related to the senate; that they were not admitted to membership in this body and, having no gens, could not even be represented. He deduces a great mass of evidence against the view advocated by Mommsen and says that 'conscripti' does not mean what Mommsen says it does, but has reference to the fathers, being used as an adjective and designating those patres who were chosen (adlecti) from among the other patres for senators, and not applying to plebeians at all who, according to Ihne, could not have been made patricians without destroying the plebeian party by removing its backbone.

Such an argument seems to me to be out of place in the early regal period when clans were still vital and election rarely resorted to, and then naturally limited to the clan whose leader had been recently removed by death. But in the later regal period and early republic when election to the senate became the rule, the argument of Ihne touching the exclusion of plebeians seems to be unanswerable.

The places for holding the senate were always consecrated by the augurs.[1] The oldest place of meeting was the Curia Hostilia, in which alone, originally, a senatus consultum could be made. Later in the history several temples were made use of for this purpose, such as the temple of Concordia. **Place of Meeting.**

The king, or perco acting in his name, after consulting the pleasure of the gods by auspices, convoked the senate (convocare) by summoning each individual by name, and opened the session with the words: "Quod bonum, faustum, felix fortunatumque sit populo Romano Quiribus." He then laid before the body what he had to propose. **Convening the Senate.**

[1] Botsford, 130.

The senate was regularly held with open doors, but no one could be present save senators, lictors, pages, and scribes; later, tribunes, sons of senators, and foreign ambassadors were admitted to the floor. The man who called the senate regularly presided at the meeting.

No one could speak upon any question unless called upon by the presiding officer, and no new business could be brought forward by any one save the presiding officer.[1] The magistrate regularly called upon members to speak in the order of their rank, but this order was not always followed. Sometimes he called upon members to speak twice. There was no real discussion of the question. A senator sometimes broke away and talked of something outside of the business in hand, but this was only as a question of privilege.

Controlling Business.

A vote was taken (sententiam rogare) by a simple method of polling; each man, when asked, expressed himself either as in favor of or as opposed to the bill as introduced by a statement of his agreement or disagreement with the view held by the presiding officer.[2] Sometimes a standing vote was called for, known as pedibus sententiam. An opinion of the senate thus taken, which required a vote of the people, was known as a senatus consultum. When the senate passed an act which did not require a popular vote, it was called senatus decretum. All bills were inscribed in the senate before witnesses. The name of the decree and date of passage were affixed, and the tribunes (in the republican period) agreed to it by inscribing the letter "c." The senate was adjourned by the presiding officer rising and saying, "We delay for no other business."

The power of the senate was ever the compelling force

[1] Botsford, 188–197, 230–232, 304. [2] Ortolan, 287.

of the best public opinion legally expressed. It always overawed the populace and generally controlled the king.[1]

As the Roman State was built up out of a number of clans which in turn were composed of families, so the form of the body politic was modeled after the family, both in general and in detail. The family was provided by nature with a head in the person of the father with whom it originated. The State was merely an overgrown family that traced its descent from one mythical founder. As no such person lived to perform the functions of the house father, it seemed but natural to choose from among the patricians some one to act in his stead. Accordingly one of their number was set apart for this duty and became the leader (rex), and master and lord in the household of the Roman community. As the house father was also the family priest, his representative, the king, was high priest of the nation. The family theory was carried out completely in the case of the king. He was consecrated by proper religious ceremonies and set apart for life to the duties of his office. He possessed in fullness that power over the community which belonged to the house father in his household. He held intercourse with the gods of the community and consulted them continually for the common welfare, and offered sacrifices to appease their wrath in case the divine displeasure had been incurred. He concluded treaties in the name of the community with foreign powers that were binding upon all. He was commander in chief of the army, and his power was unlimited. Lictors preceded him, bearing axes and rods, the emblems of the power of life and death. He kept the keys of the public treasury and was the only one who had the right publicly to address the

§ 22. The King.

[1] Muirhead, 68–75.

citizens. He it was who sat in judgment in all private and in all criminal processes. He was also chief fireman and was himself bound to respond in person whenever an alarm of fire was sounded.. Some of his functions he delegated to subordinates, who acted in his name. Thus judges nominated by him tried criminal cases, and military commanders, acting in his name, ofttimes relieved him of the burden of commanding the army in the field. But at the last analysis all executive and judicial functions were performed by the king. While it was considered an honorable and highly valued thing to be of noble descent and related to earlier rulers, it was not a necessary condition. Any Roman citizen of mature age and sound mind and body could fill the kingly office.

The Romans were a people that originally gave their almost exclusive attention to agriculture and stock-raising.

§ 23. Landed Property.

To say that a man was a good farmer was, at one time, to bestow upon him the highest praise.[1] This character, joined to the spirit of order and private avarice which in a marked degree distinguished the Romans, has contributed to the development among them of a civil law which is perhaps the most remarkable monument which antiquity has left us. This civil code has become the basis of the law of European peoples, and recommends the civilization of Rome to the veneration of mankind.

Urbs, the name of the village, takes its origin, according to an etymology given by Varro,[2] from the furrow which the plow traced about the habitations of the earliest dwellers.

[1] Cato, De Re Rustica, I, lines 3–8; "Majores nostri . . . virum bonum cum laudabant, ita laudabant, bonum agricolam bonumque colonum. Amplissime laudari existimabatur, qui ita laudabatur."

[2] Varro, De Lingua Latina, V, 143.

But what is of more interest to us is that the legal signification of Urbs and Roma was different. The former was the village comprised within the sacred inclosure; the latter was the total agglomeration of habitations which composed the village, properly so called, and the outskirts, or suburbs. The powers of certain magistrates ceased with the sacred limits of the Urbs, while the privileges accorded to a citizen of Rome extended to the village and the suburbs and finally embraced the entire Roman world.[1]

The most ancient documents which have reached us from the history of India and Egypt show that they had landed property fully established, while Roman annals reveal to us the very creation of this institution. Whatever modern criticism may deduce, Dionysius, Plutarch, Livy, and Cicero agree in representing the first king of Rome as merely establishing public property in Roman soil. This national property the people possessed in common and not individually. Such appears to us to be the quiritarian property par excellence,[2] and its primitive form was a variety of public community [3] of which individual property was but a later solemn emancipation. To this historic theory attaches the true notion of quiritarian land of which we will speak in greater detail hereafter.

As regards the organization and constitution of individual and private property, the traditions themselves attribute this to the second king of Rome, the real founder of Roman society, who divided the territory among the citizens, marking off the limits of individual shares and placing them under the

[1] Frag. of Digest, 287 and 147 of Title 16, Bk. 5, with notes of Schultung and Small.

[2] Plutarch, Romulus, par. 19.

[3] Mommsen, History of Rome, I, 194.

protection of religion. In this way a religious character was given to the institution of private property. Thus a primitive division of territory appears to have been the basis of these varied traditions, but the precise form of this division eludes us.

The Roman territory, as is shown in another chapter, was confined for many ages to a surface of very limited extent, which properly bore the name of Ager Romanus. This name with signification slightly changed appeared to be still in use in the time of the empire, and even at the present day a portion of the Roman territory which very nearly corresponds to the ancient territory of the regal period is called Agro Romano.[1]

Both city and land increased with time. Property seems to have been added and lost successively during the regal period.[2] The last increase of the Ager Romanus was due to the labors of Servius Tullius, and it was in the reign of this king that it reached its greatest limit. Dionysius[3] says; "As soon as he (Servius) was invested with the government, he divided the public lands among such of the Romans as, having no lands of their own, cultivated those of others. . . . He added two hills to the city, that called the Viminal and the Esquiline hill, each of which forms a considerable city; these he divided among such Romans as had no houses, to the intent that they might build them. . . . This king was the last who enlarged the circumference of the city by the addition of these two hills to the other five, having first consulted the auspices as the law decided, and performed the other religious rites. Further than this, the city has not since

[1] Sismondi, Etudes sur l'econ. polit., I, 2, par. 1.
[2] Dionysius, II, 55; III, 49–50; V, 33, 36; Livy, I, 23–36.
[3] Dionysius, IV, 13.

then been extended." Without doubt these possessions received great additions in later times,[1] but they were not incorporated in the Ager Romanus as the preceding had been. The subjugated territories kept their ancient names, while their lands were made the object of distributions to the people, of public sales to the citizens who also extended their possessions outside of Roman territory,[2] or else the new conquests were abandoned to municipia, given up to colonies, or became a part of that which was called Ager Publicus. In fine, it was a fundamental principle of the public law of Rome that the lands and the persons of the conquered belonged to the conqueror, the Roman people, who either in person or by their delegates disposed of them as it seemed best. Among the ancients war always decided concerning both liberty and property.

The result of all these facts is that the Roman territory was made the object of a division or a primitive distribution either among the three races of the first population, or, a little later, among the citizens or inhabitants. This very same principle has been frequently observed in recent times in regard to confiscated [3] territories and conquered peoples.

But what was the allotment of the first distribution of land?

Upon this topic the ancient authorities are blind and confusing to such an extent as to be wholly inadequate for the solution of the difficulty. Among the more recent authorities, two opposing systems have been sustained, the one represented by Montesquieu, and the other by Niebuhr. (1) According to Montesquieu, the kings of Rome divided the

[1] Varro, De Lingua Latina, V, 33.
[2] Sigonius, De Antiq. Juris Civ. Rom., Bk. I, ch. 2.
[3] Hume's Hist. of Eng., I, ch. 4; IV ch. 61.

land into perfectly equal lots for all the citizens, and the title of the law of the Twelve Tables relative to successions was for no other object than to establish this ancient equality of the division of lands.[1] (2) Niebuhr,[2] on the contrary, claimed that territorial property was primitively the attribute of the patriciate, and every one who was not a member of this noble race was incapable of possessing any part of the territory. From this theory the author deduced numerous consequences which are important both to law and history. Neither of these systems is free from errors. Montesquieu seems to have made no difference between patrician and plebeian in using the term citizen, while it is no longer disputed that the plebeian was not a burgess and consequently had no civic rights save those granted to him by the ruling class. His idea of goods must have, at least, become chimerical at a very early date, as this equality was so little suspected by the ancients that Plutarch,[3] after having spoken of the efforts of Lycurgus to overturn the inequality of wealth among the Spartans, accuses Numa of having neglected a necessity so important. It is, moreover, difficult to see how Montesquieu could think that testamentary disposition tended to maintain equality when the privilege was accorded to every citizen of disposing of his entire patrimony by will even to the prejudice of his children.[4] Again, the law of debt was hardly favorable [5] to equality.

Niebuhr clearly [6] denied the existence of the plebs until Ancus incorporated the Latins and bestowed upon them

[1] Esprit des lois, liv. 27, c. I.
[2] Roman History, II, 164, III, 175 and 211.
[3] Lycurgus and Numa, II; Cicero, De Republica, II, 9.
[4] Muirhead, Roman Law, 46 and note — uti legasset suae rei ita jus esto.
[5] Muirhead, 92–96. [6] Niebuhr, I.

peculiar privileges, thus forming a new and third class distinct from both patricians and clients. Had Niebuhr succeeded in establishing this view, the right to landed property would appear to be wholly vested in the patricians, for a client, from the very nature of his position, could hold nothing independent of his master. But this theory has fallen to the ground, and no writer of the present day pretends to uphold it.[1] The plebeians existed from the very first, and some of them held land in full private ownership very little different from the quiritarian ownership of the patricians. Cicero, who in his Republic has occupied himself with the ancient constitution of Rome and has spoken in detail of the division of the lands, always speaks of the distribution among the citizens without regard to quality of patrician or plebeian, divisit viritim civibus. He has nowhere written that territorial riches were the exclusive appanage of the patriciate. It must be confessed, however, that it is doubtful whether he intended to embrace the plebeians in his "civibus." For more than two centuries before the time of Cicero the plebeians had enjoyed the full rights of Roman citizenship, but for more than that length of time property had been concentrated in the hands of the aristocracy. This result was the consequence of the Roman constitution [2] and the establishment of a populous city in the midst of a narrow surrounding country. Roman policy had ever been conducive to this concentration, and the nobility, who had the chief direction and administration of public affairs, had little by little usurped the property which formed the domain of the State, *i.e.*, Ager Publicus, and swallowed up the revenues due the treasury.

[1] Mommsen, I, 126; Ihne, I; Nitzsch, Geschichte der römischen Republik, 52; Lange, Römische Geschichte, I, 18.

[2] Dureau de la Malle, Mém. sur les pop. de l'Italie, 500 *et seq.*

Citizenship was the first requisite to the right of property in Roman territory. This rule, although invariable and inherent in the Roman State, bent under the influence of international politics or the philosophy of law, yet its severity affords us a notable characteristic of the law of ancient Rome. Cicero and Gaius have preserved to us an important monument of this law in a fragment of the Twelve Tables which proclaims the solemn principle, adversus hostem æterna auctoritas esto.[1] Hostis in the old Latin language was synonymous with stranger, peregrinus.[2] This Roman name was, moreover, applied to a person who had forfeited the protection of the law by reason of a criminal condemnation, and who was therefore designated peregrinus.[3]

§ 24. Quiritarian Ownership.

Auctoritas also had in old Latin a different signification from what it had in later Latin. It expressed the idea of the right to claim and defend in equity. It was very nearly equivalent to the right of property.[4] The sense of the Roman law was, then, that the peregrinus could not bar or proceed against a Roman, a disposition somewhat similar to the old law of England.[5] And as it was necessary to be a citizen in order to acquire by the civil and solemn means which dominated the law of property in Rome, it followed that the peregrini were excluded from all right to property in land by those laws. This exclusive legislation for a long time

[1] Cicero, De Officiis, I, 12; Gaius, Frag., 234; Digest, 50, 16.

[2] Varro, De Lingua Latina, V, 14; Plautus, Trinummus, Act I, Scene 2, V, 75; Harper's Latin Dictionary; Cicero, De Off., I, 12; "Hostis enim apud majores nostros is dicebatur, quem nunc peregrinum dicimus."

[3] Cicero, *loc. cit.*; Gaius, Frag., 234.

[4] Forcellini, Lexicon; Harper's Latin Lexicon.

[5] *I.e.*, the descendants of a person escheated could bring no action for the recovery of the property.

governed Europe and did not disappear even from the Code Napoleon of 1809.[1]

We have a forcible example of the severity of the old Roman law in this regard in the text of Gaius, — "Aut enim ex jure quiritium unusquisque dominus erat, aut non intelligebatur dominus." [2]

Dominium was therefore inseparable from Jus Quiritium, the law of the Roman city, the optimum jus civium Romanorum. The peregrinus was excluded from landed property both Roman and private; he could neither inherit nor transmit, claim nor defend in equity. Moreover, the name peregrinus was not confined to the stranger proper, but was also bestowed upon subjects of Rome [3] who, being deprived of their property and also of political liberty by right of conquest, had not received the right of citizenship which was for a long time confined within very narrow limits. It would thus appear conclusive from the law quoted that the client and plebeian could not at first hold land optimo ex jure quiritium.

Thus the tenure of the patricians was threefold: first, they had full property in their own land; second, they had a seigniorial right, jus in re, in the land of their clients and the plebeians whose property belonged to the populus, *i.e.*, the generality of the patricians; in the third place, in their own hands, they had lands which were portions of the domain and which were held by a very precarious tenure called possessio.

According to Ihne, all lands in Rome were held by the above-mentioned tenures until the enactment of the Icilian law converting the former dependent and incumbered tenure of the plebeians into full property.

[1] Giraud, Recherches sur le Droit de Propriété, p. 219.
[2] Gaius, Bk. II, 40.
[3] Ulpian, Frag., Title XIX, 4; Giraud, 216.

In her early history Rome was continually making fresh conquests, and in this way adding to her territory.[1] She steadfastly pursued a course of destruction to her neighbors in order that she might thereby grow rich and powerful. In this way large tracts of territory became Roman land, the property of the State or Ager Publicus.[2] This public land extended in proportion to the success of the Roman arms, since the confiscation of the territory of the vanquished was, in the absence of more favorable terms, a part of the law of war. All conquered lands before being granted or sold to private individuals were Ager Publicus,[3] a term which with few exceptions came to embrace the whole Roman world.

§ 25. Ager Publicus.

This Ager Publicus was further increased by towns[4] voluntarily surrendering themselves to Rome without awaiting the iron hand of war. These were commonly mulcted of one third of their land.[5] "The soil of the country is not the product of labor any more than is water or air. Individual citizens cannot therefore lay any claim to lawful property in land as to anything[6] produced by their own hands." The State in this case, as the representative of the rights and interests of society, decides how the land shall be divided among the members of the community, and the rules laid down by the State to regulate this matter are of the first and highest importance in determining the civil condition of the country and the prosperity of the people. Whenever but one class among the people is privileged to have property in land, a most

[1] Long, Decline of the Roman Republic, I, ch. XI.
[2] Muirhead, Roman Law, 92.
[3] Ortolan, Histoire de la legislation Romaine, p. 21.
[4] Mommsen, I, 131; Arnold, I, 157.
[5] Dionysius, IV, 11, Livy.
[6] Ihne, I, 175.

exclusive oligarchy is formed.[1] When the land is held in small portions by a great number and nobody is legally or practically excluded from acquiring land, there we find provided the elements of democracy.

According to the strictest right of conquest in antiquity, the defeated lost not only their personal freedom, their moveable and landed[2] property, but even life itself. All was at the mercy of the conquerors. In practice a modification of this right took place, and in Rome extreme severity was applied only in extreme cases, generally as a punishment for treason.[3]

This magnanimity was not rare, and it even went so far as to restore the whole of the territory to the people subdued.[4] But let us not suppose that this humanity toward a conquered people sprang from any pity inspired by their forlorn condition. It was due merely to the interest of the conquerors themselves. The conquered lands must still be cultivated and the depleted population restored. For this reason the conquered had generally not only life and freedom left them, but also the means of livelihood, *i.e.*, some portion of their land. This portion they held subject to no restrictions or services save those levied upon quiritarian property. It was private property to the full legal extent of the expression, thus being in the unlimited disposition of the individual.[5] These people formed the nucleus of the plebeians, the free-

[1] *Ibid.*

[2] Livy, Bk. I, c. 38, with note by Drachenborch; Livy, Bk. VII, c. 31.

[3] Siculus Flaccus, De Conditione Agrorum, 2, 3: "Ut vero Romani omnium gentium potiti sunt, agros alios ex hoste captos in victorem populum partiti sunt, alios vero agros vendiderunt, ut Sabinorum ager qui dicitur quæstorius."

[4] Cicero, in Verrem, II, Bk. 3, par. 6.

[5] Giraud, Droit de propriété chez les romains, 160.

men who were members of the Roman State,[1] without actually having any political rights.

The Ager Publicus was the property of the State, and as such could be alienated only by the State.[2] This alienation could be accomplished in two ways: (*a*) by public sale, and (*b*) by gratuitous distribution.

(*a*) The public sale was merely an auction to the highest bidder, and in the later days of the monarchy and early part of the republic, rich plebeians must have become possessed of large tracts of land in this way, the privilege of acquiring property in land having been extended to them some time before the Servian reform.[3]

(*b*) The gratuitous distribution of land was accomplished by means of Agrarian Laws or royal grant and had for its object the establishment of colonies for purposes of defense, the rewarding of veterans or meritorious soldiers,[4] or, in later times, the providing for impoverished plebeians.

But even in the earliest times a portion of the domain lands was excluded from sale or private appropriation,[5] in order to serve as a resource for the needs of the State. This was the general usage of ancient republics, and this maxim of reserved lands was recommended by Aristotle [6] as the first principle of political economy.

Such reserved ager publicus was leased either in periods of five years (quinquennial leaseholds) or perpetually, *i.e.*, by emphyteutic lease or copyhold. From these lands [7] the

[1] Ihne, I, 175.

[2] Muirhead, 92; Giraud, 165.

[3] Hygin. De Limit. Const. apud Goes. Rei Agr. Script., pp. 159–160.

[4] Giraud, 164. [5] Dionysius, II, 7.

[6] Aristotle, Politics, Z. Κεφ. θ. 7: *Ἀναγκαιὸν τοίνυν εἰς δύο μέρη διηρῆσθαι τὴν χώραν καὶ τὴν μὲν εἶναι κοινὴν, τὴν δὲ τῶν ἰδιωτῶν.*

[7] Giraud, 163.

treasury received an income of from one tenth to one fifth of the annual crops.

Besides these legal methods mentioned, there was another very common one which was seemingly never established by any law and therefore existed merely by title of tolerance. I speak of the indefinite possessio, which was nothing but an occupation on the part of the patricians [1] of the land belonging to the State and was in nature quite similar to the so-called "squatting" commonly practiced in some of our Western States and territories. The title to the enjoyment of the public lands was at first clearly vested in the patricians, nor was this right extended to the plebeians until after they had been admitted to full citizenship. With regard to the State, the possessor [2] was merely a tenant at will and could be removed whenever desired; but as regarded other persons he was like the owner of the soil and could alienate the land which he occupied either for a term of years, or forever, as if he were the real proprietor.[3] The public land thus occupied was looked to as a resource upon the admission of new citizens. They customarily received a small freehold according to the general notion of antiquity that a burgess must be a landowner. This land could only be found by a division of that which belonged to the public, and a consequent ejectment of the tenants-at-will. In the Greek States every large accession to the number of citizens was followed by a call for a division of the public lands and,

[1] Festus, p. 209, Lindemann; Cicero, ad Att., II, 15; Philipp., V, 7; De Leg. Agr., I, 2, III, 3; De Off., II, 22; Livy, II, 61, IV, 51, 53, VI, 4, 15; Suet., Julius Cæsar, 38; Octavius, 13, 32; Cæsar, De Bell. Civ., I, 17; Orosius, V, 18.

[2] Aggenus Urbicus, p. 69, ed. Goes.

[3] Giraud, 185–187; Mommsen, I, 110; Ortolan, 227; Hunter, Roman Law, 367.

as this division involved the sacrifice of many existing interests, it was regarded with aversion by the old burgesses as an act of revolution. A great part of the wealth of the Romans consisted in domains of this kind, and the question will occur to the thoughtful mind how the government was able to keep the most distinguished part of her citizens in a legal position so uncertain and alarming.

§ 26. Roman Colonies.

Probably in no other way does the Roman government so clearly reveal its nature and strength as in its method of colonization. No other nation, ancient or modern, has ever so completely controlled her colonies as did the Roman. Her civil law, indeed, reflected itself in both political and international relations. In Greece, as soon as a boy had attained a certain age his name was inscribed upon the tribal rolls,[1] and thenceforth he was free from the potestas of his father and owed him only the marks of respect which nature demanded. So, too, at a certain age, the colonies separated themselves from the mother city without losing their remembrance of a common origin. This was not so in Rome. The children[2] were always under the potestas of their parents. By analogy, therefore, the colonies ought to remain subject to their mother city. Greek colonies went forth into a strange land which had never been conquered by Hellenic arms or hitherto trod by Grecian foot. Roman[3] colonies were established by government upon land which had been previously conquered and which therefore belonged to the Roman domain. The Greek was fired with an ambition to obtain wealth and

[1] Bouchaud, M. A., Dissertation sur les colonies romaines, pp. 114–222, en Memoires de l'institut Sciences, Morals et Politique, III.

[2] Muirhead's article on Roman Law in Enc. Brit.; Ihne, I, 235.

[3] Mommsen, I, 145.

personal distinction, being wholly free to bend his efforts to personal ends. Not so the Roman. He sacrificed self for the good of the State. Instead of the allurements of wealth, he received some six jugera of land, free from taxation, it is true, but barely enough to reward the hardest labor with scanty subsistence. Instead of the hope of personal distinction, he in most cases sacrificed the most valuable of his rights, jus suffragii et jus honorum [1] and suffered what was called capitis diminutio. He devoted himself, together with wife and family, to a lifelong military service. In fact, the Romans used colonization as a means to strengthen their hold upon their conquests in Italy [2] and to extend their dominion from one center over a large extent of country. Roman colonies were not commercial. In this respect they differed from those of the Phœnicians and Greeks. Their object was essentially military,[3] and from this point of view they differed from the colonies of both the ancients and moderns. Their object was the establishment of Roman power. The colonists marched out as a garrison into a conquered town and were exposed to dangers on all sides. Every colony acted as a fortress to protect the boundary and keep subjects to their allegiance to Rome. This establishment was not a matter of individual choice, nor was it left to any freak of chance. A decree of the senate decided when and where a colony should be sent out, and the people in their assemblies elected individual members for colonization.

From another point of view Roman colonies were similar to those of Greece, since their result was to remove from the

[1] Mommsen, *loc. cit.*

[2] Brutus (Appian, De Bello Civile, II, 140) calls the colonists, *Φύλακας τῶν πεπολεμηκότων.*

[3] Ihne, I, 236.

center to distant places the superabundant population, the dangerous,[1] unquiet, and turbulent.

But the difference in the location of the colonies was easy to distinguish. In general the Phœnicians and the Greeks, as well as modern peoples, founded their colonies in unoccupied localities. Here they raised up new towns which were located in places favorable to maritime and commercial relations. The Romans, on the contrary, avoided establishing colonies in new places. When they had taken possession of a city, they expelled from it a part of the inhabitants, whether to transfer them to Rome as at first, or, a little later, when it became necessary to discourage the increase of Roman population, to more distant places. The population thus expelled was replaced with Roman and Latin citizens.[2] Thus a permanent garrison was located which assured the submission of the neighboring countries and arrested in its incipiency every attempt at revolt. In every respect these colonies remained under surveillance and in a dependence the most complete and absolute upon the mother city, Rome. Colonies never became the means of providing for the impoverished and degraded until the time of Gaius Gracchus. When new territory was conquered, there went the citizen soldier. Thus these colonies mark the growth of Roman dominion as the circumscribed rings mark the annual growth of a tree. They were of two kinds, Latin and Roman.

1. Latin colonies were those[3] which were composed of Latini and Hernici, or Romans enjoying the same rights as these, *i.e.*, possessed of the Latin right rather than the Ro-

[1] Cicero, Ad Att., I, 19: "Sentinam urbis exhaurire, et Italiæ solitudinem frequentari posse arbitrabor."

[2] Mommsen, I, 145.

[3] Marquardt u. Mommsen, IV, 35–51; Mommsen, History of Rome, I, 108, 539; Madvigi Opuscula Academica, I, 208–305.

man franchise. They were established inland as road fortresses and, being located in the vicinity of mountain passes or main thoroughfares, acted as a guard to Rome, and held the enemy in check.

2. Roman, or Burgess, colonies[1] were those composed wholly of Roman citizens who kept their political rights and consequent close union with their native city. In some cases Latini were given the full franchise and permitted to join these colonies. In position, as well as rights, these colonies were distinguished from the Latin, being with few exceptions situated upon the coast, and thus acting as guards against foreign invasion.

§ 27. Joint Cultivation and Separate Allotments.

Professor Mommsen says;[2] "Land among the Romans was long cultivated upon the system of joint possession and was not distributed until a comparatively late age; the idea of property was primarily associated, not with immovable estate, but with 'estate in slaves and cattle' (familia pecuniaque). Each clan tilled its own land, and thereafter distributed the produce among the several households belonging to it. There exists indeed an intimate connection between the system of joint tillage and the clan form of society, and even subsequently in Rome joint residence and joint management were of frequent occurrence in the case of co-proprietors. Even the traditions of Roman law furnish the information that wealth consisted at first in cattle and the usufruct of the soil, and that it was not till later that land came to be distributed among the burgesses as their own special property. Better evidence that such was the case is afforded by the

[1] Marquardt u. Mommsen, IV, 35–51; Ihne, Vols. I–V; Mommsen, Vols. I–V; Madvigi Opus., *loc. cit.*

[2] Mommsen, II, 440.

earliest designation of wealth as 'cattle-stock' or 'slave and cattle-stock' (pecunia, familia pecuniaque) and of the separate possessions of the children of the household as 'small cattle' (peculium); also by the earliest form of acquiring property, the laying hold of it with the hand (mancipatio), which was only appropriate in the case of movable articles; and above all by the earliest measure of 'land of one's own' (heredium, from herus, lord), consisting of two jugera (about an acre and a quarter), which can only have applied to garden-ground and not to the hide. . . . When and how the distribution of the arable land took place, can no longer be ascertained." Commenting on this same statement, the author goes on to say: "Since this assertion still continues to be disputed, we shall let the numbers speak for themselves. The Roman writers of agriculture of the later republic and the imperial period reckon on an average five modii of wheat as sufficient to sow a jugerum, and the produce as fivefold. The produce of a heredium accordingly (even when, without taking into view the space occupied by the dwelling house and farmyard, we regard it as entirely arable land and make no account of years of fallow) amounts to fifty, or, deducting the seed, forty modii. For an adult hard-working slave Cato [1] reckons fifty-one modii wheat as the annual consumption. These data enable any one to answer for himself the question whether a Roman family could or could not subsist on the produce of a heredium. This result is not shaken by reckoning up the subsidiary produce yielded by the arable land itself and by the common pasture, such as figs, vegetables, milk, flesh (especially as derived from the ancient and zealously pursued rearing of swine), etc., for the Roman pastoral husbandry, though not in the older time

[1] c. 50.

unimportant, was yet of subordinate importance, and grain notoriously formed the chief subsistence of the people; nor is it much affected by the boasted thoroughness of the older cultivation.

"By assuming, indeed, that the return was on an average not fivefold, but tenfold, and taking into account the after-crop of the arable land and the fig harvest, a very considerable increase of the gross produce will no doubt be obtained, and it has never been denied that the farmers of this period drew a larger produce from their lands than the great landholders of the later republic and the empire obtained, but moderation must be exercised in forming such estimates, because we have to deal with a question of averages and with a mode of husbandry conducted neither methodically nor with much capital, and in no case can the enormous deficit, which is left according to those estimates between the produce of the heredium and the requirements of the household, be covered by the superiority of the cultivation. The attempted counterproof goes astray when it relies on the arguments that the slave of later times subsisted more exclusively on corn than the free farmer of the earlier epoch, and that the assumption of a fivefold return for this epoch is too low; both assumptions really lie as the foundation of the view here given. The counterproof can only be regarded as successful when it shall have produced a methodical calculation based on rural economics, according to which among a population chiefly subsisting on vegetables, the produce of a piece of land of an acre and a quarter shall be proved sufficient on an average for the subsistence of a family.

"Perhaps the latest, although probably not the last, attempt to prove that a Latin farmer's family might have subsisted on two jugera of land, finds its chief support in

the argument that Varro[1] reckons the seed requisite for the jugerum at five modii of wheat but ten modii of spelt, and estimates the produce as corresponding to this, whence it is inferred that the cultivation of spelt yielded a produce, if not double, at least considerably higher, than that of wheat. But the converse is more correct, and the nominally higher quantity sown and reaped is simply to be explained by the fact that the Romans sowed and garnered the wheat already shelled, but the spelt still in the husk,[2] which in this case was not separated from the fruit by threshing. For the same reason spelt is at the present day sown twice as thickly as wheat, and gives a produce twice as great by measure, but less than that of wheat after deduction of the husks. According to Württemberg estimates furnished to me by G. Hannsen, the average produce of the Württemberg morgen is reckoned in the case of wheat (with a sowing of one quarter to one half scheffel at three scheffel of the medium weight of two hundred and seventy-five pounds (= 825 lbs.); in the case of spelt (with a sowing of one half to one and one half scheffel) at least seven scheffel of the medium weight of one hundred and fifty pounds (= 1050 lbs.) which are reduced by shelling to about four scheffel. Thus spelt compared with wheat yields in the gross more than double, with equally good soil perhaps treble the crop, but by specific weight before the shelling not much above, after shelling (as 'kernel') less than the half. It was not by mistake, as has been asserted, but because it was fitting in computation of this sort to start from estimates of a like nature handed down to us, that the calculation instituted above was based on wheat; it may stand, because, when transferred to spelt, it does not essentially differ, and the produce rather falls than

[1] De R. R., I, 441. [2] Pliny, H. N., XVIII, 761.

rises. Spelt is less nice as to soil and climate, and exposed to fewer risks than wheat; but the latter yields on the whole, especially when we take into account the not inconsiderable expenses of shelling, a higher net produce (on an average of fifteen years in the district of Frankenthal in Rhenish Bavaria the malter of wheat stands at eleven gulden three Kreutzer, the malter of spelt at four gulden thirty Kreutzer), and, as in South Germany, where the soil admits, the growing of wheat is preferred and generally with the progress of cultivation comes to supersede that of spelt, so the analogous transition of Italian agriculture from the culture of spelt to that of wheat was undeniably a progress."

This is certainly a very skillful argument and ably sets forth all that can be said upon this side of the question. Granting the hypotheses assumed to be true and the conclusion is inevitable. It is indeed fully established upon the authority of Pliny that far was the grain which the Romans used, and thus far Mommsen is right. But Varro testifies [1] that not five modii, but ten of far, are consumed in seeding a jugerum, and he also declares that not a fivefold but a tenfold yield is obtained, in these words: "Seruntur fabæ modii IV, in jugero tritici V, hordii VI, farris X; sed non nullis locis paulo, amplius aut minus ut ex eodem semine aliubi cum decimo redeat, aliubi cum quinto decimo, ut in Etruria et in locis aliquot in Italia. In Sybaritano dicunt etiam eum centissimo regere solitum." By this statement it is clearly evinced that the grain fluctuates in Italy between ten and fifteen fold, and the soil of Etruria furnishes an example of the remarkable yield of fifteen fold, according to Varro. It is true that the words of Columella seem to be opposed to this; "Frumenta majore quidem parte Italiæ quando cum quarto respon-

[1] De R. R., I, 44.

derint, vix meminisse possumus." This writer, however, lived in the time of Pliny when Roman agriculture was almost destroyed by the civil wars with which the republic was distracted during the rule of the Cæsars. He too speaks in glowing terms concerning the agriculture in the time of Cato and Varro,[1] "ut omittam veterem illam felicitatem arvorum, quibus et ante jam M. Cato et mox Terentius Varro prodidit, etc." Even if we decide that an eightfold gain was obtained, and Varro declares that this occurs not only throughout Latium but throughout all Italy, deducting the grain consumed in seeding, the annual harvest will be, not forty but one hundred and forty modii of far to the heredium. Such a yield is obtained as a common thing in the cultivation of far in many places in Germany.[2]

As to the second argument set forth by Mommsen, it is true that four modii of wheat for each winter month and four modii of spelt for each summer month are assigned by Cato to each hard-working slave, thus making a whole of some fifty-one modii as the food for one year. But it will appear on examination that the slave, in the time of Cato, received no meat at all, but grain, olives, oil, salt, and wine. Again, only thirty-six modii were assigned per annum to the steward, overseer, and shepherd, whence it may be safely concluded that meat and milk were measured out to them.

Now, since the grain supply of an adult man is to be estimated at little more than fifty-four modii of far or only forty modii of wheat (the strength of one hundred modii of far is equal to seventy-three modii of wheat) the annual production of a heredium, in the time of Cato, one hundred and forty modii, would be sufficient to sustain almost three men in the open field. Hence, without taking into consideration the

[1] III, 2. [2] Hildebrand, p. 4.

use of public pasture, belonging to each man's heredium, where the most valued part of a man's private property, his flock, was fed, it seems clear that the food produced by one heredium would go far towards supporting a family. Again, it would seem that Mommsen's statement that "pasturage must not be considered important in the early period of Roman history" is wide of the truth. For, although it must be admitted that in the time of Cato and Varro, this kind of husbandry was of little moment, there is much probability that the agriculture of the Roman people, and the kind and consumption of food, progressed in a manner similar to that of their more recent Aryan kinsmen, the Britons, Germans, and Franks. In the first place men made their chief gain by means of flocks and pasturage and lived almost exclusively on flesh and milk. Secondly, by the increasing study of agriculture an age followed in which a living was sought almost exclusively in grain until flesh was at last used only by the rich. A third period followed in which to their zeal for agriculture men added the breeding and rearing of cattle. This followed as an actual necessity in order to keep life in the soil. Without doubt, flesh became again an article of food, and indeed we find it given to the plebs in the early empire, as in the time of the republic corn was distributed, thus proving that it had become a common article of food.

Pliny, when speaking upon the exceeding cheapness of former times, narrates upon the authority of Varro that at the end of the first Punic War a modius of far or thirty pounds of dried figs could be bought for one as; likewise twelve pounds of meat and ten pounds of oil.[1]

We grant with Mommsen [2] that these prices were unusual and cannot be taken as representative Roman prices, but

[1] Hist. Nat., XVIII, 316. [2] Röm. Ge., I, 316.

if we compare this price of meat with the prices of beasts of burden which in A.D. 326 were valued in the estimation of cattle fines, we will see that in an earlier time the prices set forth by Pliny were very customary.

In that estimate of fines a sheep was valued at ten and an ox at one hundred asses. An adult sheep is estimated at seventy to eighty pounds of mutton and an ox at seven hundred to eight hundred pounds of beef. Accordingly, a modius of far and twelve pounds of meat were of the same price, and, as a modius of far was equal to about fifteen Roman pounds, one pound of far was equal in price to one and one quarter pounds of flesh. It is therefore certain that flesh, as compared with grain, was, in early Roman history, very cheap. The history of prices common among the Romans cannot be described with accuracy, and consequently the ratio between the prices of meat and grain cannot be fully given, but the testimony of the ancients argues, as we might suppose, that meat as compared to grain became gradually dearer.

In the edict of Diocletian concerning Prices of Salable Articles, the value of one hundred denarii is given to a modius (*i.e.*, fifteen pounds) of shelled spelt and twelve denarii for a pound of pork, so that a modius of spelt equaled the price of eight and one third pounds of pork. Again, in the edict of Valentinian III, given at Mauretania in the year A.D. 446, forty modii of spelt were bought for a gold solidus and two hundred and seventy pounds of meat for the same money, so that a modius, or fifteen pounds of far, was equal to six and three quarters pounds of meat. Accordingly, one pound of meat which had, at the time of the first Punic War and before, a price equal to one and one quarter pounds of far, in the time of Diocletian equaled one and three quarters

pounds of far, and in the time of Valentinian III, two and eight tenths pounds of far. Hence, if in the time prior to the republic it is shown that meat was cheaper than grain, then we must justly conclude that a greater abundance of flesh was at hand and was consequently a staple article of food for the people.

Finally, if we believe that, as Columella says,[1] the Roman farmers themselves held pasturage and cattle raising among the most ancient and profitable occupations of the farmer, and, if we bear in mind the words of Pliny,[2] "etiamnum in tabulis censoriis pascua dicuntur omnia ex quibus populus reditur habet, quia diu hoc solum vectigal fuerat," then the third argument which Mommsen has set forth must fail of its object. We must, therefore, conclude that there is no well-founded reason why we should cast doubt upon the statements of Dionysius and Livy concerning the divisions of land among the Romans.

If Dionysius can be trusted, when land was assigned to the plebeians by Servius Tullius, each man received in addition to his heredium a building lot within the city, and this would seem to be the method followed in the early days of the city. The houses were placed for safety within the city walls, while the heredium, without, was cultivated by members of the household passing to and fro. As conquest extended Roman territory and at the same time rendered it safe for families to settle outside of the city walls, it became customary for those holding allotments outside of colonies to construct their dwellings and barns upon their heredium, and we find the allotments usually increased in size in order to make up for the waste of farm land incident to this change.

[1] De R. R., VI, Præf.
[2] Hist. Nat., XVIII, 3.

The heredium consisted of two constituent parts of different economic functions; (I) the ager, *i.e.*, the farm, properly speaking, and (II) the garden lot. The latter was commonly composed of three separate belongings: the cottage with its dwelling and workrooms, sometimes surrounded by a narrow walk; the farmyard with its barn and outbuildings; and finally the pomerium, a garden for fruit, vegetables, and flowers for the use of bees. The ager was usually a level piece of land set off by official limitations, and separated on all sides from the adjoining lands by narrow roads or calles. It commonly consisted of two jugera, a jugerum or jugum being the amount of land which a span of oxen could plow in one day. The jugerum was again divided into two smaller portions called actus or morgen, each a half-day's work, a strip of land one hundred and twenty feet square, being the amount of land which a span of oxen could plow around without rest. The jugerum, therefore, was an oblong one hundred and twenty feet by two hundred and forty feet, which contained 28,800 square feet. In this way it would appear that the Roman farm was commonly two hundred and forty feet square and contained about an acre and a third.

The actus was the smallest unit of measure with the agrimensores of Rome. A higher unit of measure, and that most commonly used even in latest times, was the centuria, consisting of two hundred or two hundred and forty jugera, one hundred sortes or lots, a sors being the Roman farm.

§ 28. Method of Survey.

The ordinary method of procedure in measuring land was as follows: the gnoma (Greek, *γνῶμα*) was a cruciform machine of wood (sometimes called a stella) supported on an iron leg which passed through the center and was fixed in

the ground. This instrument was used by agrimensores to mark out the land in lots by lines exactly perpendicular to each other, tested by looking along the ground in opposite directions, backwards and forwards, signa or meta being set at each end of the lines, which covered one another exactly. The augur, or person making the survey, stood upon the center of the gnoma, and according to the direction he took the four regions were named. The most usual aspect of the augur was toward the east. Hence the region in front of him was called antica or citrata, that behind him postica, or ultrata, that on each side dextrata and sinistrata. The line from east to west was called decimanus, and was the most important and the broadest; that from north to south was the kardo. The two principal of these lines were public military roads. On each side of them were limites dividing the land into square plots called centuriæ. Every fifth line (quintarius) was also a road, but not so broad as the two principal lines. The others were generally merely lines of demarcation, though in Italy they were rough roads eight feet broad, used by the occupiers for agricultural purposes. The centuriæ were marked out by termini, stones or stakes with letters upon them indicating their distances in this or that direction from the center and the main lines of division. By this means each single lot had its proper notation.

From the earliest times the Romans recognized inheritance and an order of succession.[1] This is made clear from the statement that Romulus granted little homesteads to certain people that were "to follow the heir" (qui heridem sequentur). The fundamental idea which lies at the base of this recognized succession is that of immortality. The owner dies, but the prop-

§ 29. Order of Succession.

[1] Muirhead, 166; Sohm, 408–413; Ortolan, 125–129.

erty lives on. The debtor dies, but the obligation remains. Property is not destroyed by the death of the proprietor. The reason for this is that while the individual may die, the family survives. Romans made it obligatory on a man's descendants to perpetuate the family and its sacra. It would seem only reasonable and just therefore, that the property as a means of defraying the expense of their obligations should pass to them.

In the oldest times the family is the sole owner; individual ownership is unknown, and common ownership is the only recognized form. Thus family ownership in time developed, on the one hand, into the common ownership of the gens or even the State, and on the other into the private ownership of the individual. The death of the individual for this reason does not remove the real owner of the property, as the family continues to exist, and they were co-owners. As the years went by the idea of private ownership outstripped the tradition of family ownership, and the individual was allowed by law to dispose by will of his possessions as he saw fit. But there is no evidence that this could be done in the early regal period, and only intestate succession maintained.

On the death of a pater familias his patrimony devolved upon those of his children in potestate who by that event became sui juris, his widow taking an equal share with them.[1] There was no distinction made between movables and immovables, personalty and realty. In case the deceased left no immediate family, the estate went to his agnates in equal division; and in case agnates failed, it went to the gens.

Romans never made any distinction between males and females in the distribution of an estate.[2] Among the Athe-

[1] Sohm, 409.

[2] Muirhead, 275 *et seq.*

nians daughters could not succeed, because they could not perpetuate the family. Sons, therefore, took all and, failing sons, nearest male heirs. In India the same custom held. But Rome stands out in clear distinction in this regard, and unmarried daughters took share and share alike with sons, and completely excluded male heirs that were more remote. A daughter who had passed into the hand of a husband during her father's lifetime of course could not have any share in the inheritance, for she no longer belonged to the household of her father.

Further, there is no trace of any law of primogeniture to be found in Rome. Estates held together sometimes for centuries, but this was accomplished by means of limitations placed upon alienation. Women held their shares of the estate only in name. In reality they were under the control of the guardian, who was always a member of the family or gens. This kept the property together. It was further a very common method for brothers to hold the inheritance in common and thus to avoid the splitting of an estate into numerous small holdings. Another method of preserving the estate was the drafting of the younger members of the family into colonies. In the time of the republic the testator regulated his estate by testament and so managed to conserve it by keeping the lands intact, but it is exceedingly doubtful if testamentary power had developed during the regal period, and surely this evolution had not proceeded far enough to permit a man to disinherit some of his children in order that the family estate might remain unbroken.

Plebeians had no legal heirs, as they were not members of any gens, but there can be little doubt but that the children of a plebeian became sui juris at the death of their father and entered upon the free administration of the estate. This

would be custom, however, and not law. In case a plebeian died without children, he would be heirless at law. Custom did not disapprove of the appropriation of his property by another. A brother would very naturally come first, and if he succeeded in maintaining his possession for a year, the law dealt with him as heir, and the pontiff fixed upon him the maintenance of the sacra.

§ 30. Early Contracts.

The ancient Roman was engaged preëminently in pastoral and agricultural pursuits. This necessarily implied considerable commerce and exchange of goods. The location of the city of Rome proved the commercial instinct of her people. They must have bought and sold, made loans, rented houses, carried goods, hired labor, and been parties to a variety of business transactions incident to such pursuits. There must, therefore, have been some system of contracts common among them, and consequently some law of contract.[1] In business transactions involving other things than a mere barter or exchange and immediate delivery of one commodity for another, one of the parties must have trusted to the good faith of the other. If he did, what guarantee did he have, and what security for breach of engagement? In the first place, he evidently relied on the honesty of the party with whom he was dealing and his respect and reverence for Fides; the dread he felt for the disapprobation of his fellows should he prove false, and of the penalties, both social and religious, that might be imposed upon him by his gens or his gild. A solemn oath (jusjurandum) might be demanded from the person obliged in case the handshake and the good faith that went along with it were deemed sufficient. The ancient writers, Cicero

[1] Muirhead, 49, 143–157; Ortolan, 134; Sohm, 132, 288, 282–290.

and Gellius especially, give testimony as to the sanctity of an oath and its potency in holding men to their word. An altar was erected to Hercules in the cattle market where those who desired mutually bound each other by a covenant, and he who forswore himself was amenable to pontifical discipline. A pledge or pawn was sometimes turned over to the promisee in case he desired substantial security. This he was forced to return when the contract had been fulfilled. If he did not do this, he suffered a penalty on the ground that he was committing a theft in retaining that which did not belong to him.

§ 31. Breach of Contract.

An action for damages or reparation founded on breach of contract, at this early stage, was unknown.[1] If actual loss was sustained, the injured party was permitted to resort to self-redress and to seize the goods at issue with the strong hand. Self-help, in the time of the kings, as a vindication of a right of property, and not merely in self-defense, was permissible, and an actual display of force between the contending parties was common. Manus injectio, the actual arrest of the debtor, and pignoris capio, the seizure of the goods by the creditor, were customary transactions until late in the republic.

§ 32. Early Criminal Law.

Family relationships gave rise to the first bonds of national union in Rome. This is discernible everywhere, but specially seen in the early concepts of crimes and civil injuries.[2] For anything like a clear line of demarcation between these, we look in vain in the regal period, and the reason for this is to be found in the family origin of the Roman State.[3] Blackstone makes the

[1] Sohm, 335. [2] Muirhead, 18, 53, 65.
[3] Mommsen, History of Rome, Vol. I, Bk. 1.

distinction between public and private offenses as follows: "A crime is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. Private injury concerns no one but the individual." This distinction is not strictly true. Austin was perhaps the first to give the correct distinction. He says;[1] "The difference between Crimes and Civil Injuries is not to be sought for in a supposed difference between their tendencies, but in the differences between the modes wherein they are respectively pursued, or wherein the sanction is applied in the two cases. An offense which is pursued at the discretion of the injured party or his representative is a Civil Injury. An offense which is pursued by the sovereign or by the subordinates of the sovereign is a crime." If now, in this definition of Austin's, we substitute for sovereign the words "any member of the State," we will arrive at the distinction and definition given by Justinian to public crime, where any one could prosecute.

Muirhead says; "Offenses against the State itself, such as trafficking with an enemy for its overthrow (proditio) or treasonable practices at home (perduellio), were of course matter of State concern, prosecution, and punishment from the first. But in the case of those that primarily affected an individual or his estates, there was a halting between, and to some extent a confusion of, the three systems of private vengeance, sacral atonement, and public or private penalty."

"The field of law," says Holland, "may be divided between the law which regulates rights between subject and subject and that which regulates rights between the State and its subjects." Hannis Taylor, commenting on this, says; "The private person just referred to must be under-

[1] Austin, Province of Jurisprudence Determined, p. 417.

stood to be an individual, or a collection of individuals, however large, who, or each one of whom, is of course a unit in the State, but in no sense a representative of it, even for a special purpose.[1] The public person thus referred to must be understood to be either the State, or the sovereign part of it, or a body or individual holding delegated authority under it."

The application of the above definition and explanation leads us to a correct concept of the difference between a tort (civil injury) and a crime. "Torts are an infringement or privation of the private, or civil, rights belonging to individuals, considered as individuals; crimes are a breach of public rights and duties which affect the whole community, considered as a community." Let us now consider judicial procedure in the light of this distinction.

§ 33. Damage.

In all cases whatsoever where the individual alone was injured, and not the public peace, the king, who represented the State, never interfered save when he was appealed to by the party injured.[2] The prosecutor compelled his opponent to appear with him before the king, if necessary by forcibly seizing him. When both parties had appeared, the plaintiff orally stated his demand and the defendant in like manner refused to comply with it. The king thereupon, or a deputy in his name, investigated the case, and two witnesses established the truth or falsity of the prosecutor's claim, and rendered a decision. This decision was enforced by the winner of the suit.

§ 34. Loan.

If repayment of a loan did not take place at the specified time, the procedure depended on whether the facts relating to the case had to be established by proof or were already clear. The establishing of the facts as-

[1] Taylor, The Science of Jurisprudence, 525–526.
[2] Taylor, *loc. cit.*

sumed the form of a wager in which each party made a deposit (sacramentum) against the contingency of his losing his suit. Thereupon the judge decided, after hearing the evidence, who had gained the wager. The deposit of the losing party fell to the priests, who were the stakeholders. The party who lost was allowed thirty days in which to satisfy the judgment. In case he did not do so, then he was liable to procedure in execution (manus injectio). The plaintiff seized him wherever he found him and haled him to the bar of the judge to demand the acknowledged debt. Here he was not allowed to defend himself, but he either paid or was adjudged a bondsman to his creditors.

§ 35. Theft.

Theft [1] may be defined as the secret and wrongful appropriation of a movable thing not one's own. In the regal period of Roman history it was looked upon as a civil or private injury and not a crime. If the thief was caught plying his vocation by night, he might be slain on the spot by the person whose goods he was despoiling, but he could not be dealt with in this summary manner if caught in the daytime unless he resisted arrest. A thief taken in the act (fur manifestus), if he was a free man, was scourged and turned over by the magistrates (addictus) to the person whose goods he had stolen; if a slave, he was flogged and thrown from the Tarpeian rock. A thief who was not caught in the act, but who subsequently had the theft proved upon him, suffered merely a pecuniary penalty. He was compelled to pay twofold the value of the stolen goods. A person who aided and abetted the thief in any way, or received the stolen goods, was punished as if he himself had committed the act.

Judicial procedure took the form of a public process only

[1] Sohm, 323–325.

in case of a breach of the public peace. Such breach was considered a crime and was pursued by the State itself, *i.e.*, the king, and not a private individual.[1] § 36. Crimes. These crimes were comparatively few in number and consisted in public treason or communion with the enemy[2] (proditio), violent rebellion against the magistracy (perduellio), foul murder, rape, adultery, arson, bearing false witness, and a few others. The king or his deputy arrested the accused, opened and conducted the trial, and pronounced sentence. The punishment for all violation of the public peace was death. The king could not pardon; that power was vested in the community alone (curiata); but the king could either grant or withhold permission to make an appeal for pardon. The modes of inflicting capital punishment varied according to the nature of the crime. The false witness was thrown from the Tarpeian rock; parricides and incendiaries were burnt alive; while the person convicted of treason was either scourged to death or hurled from the Tarpeian rock, his goods confiscated, and his memory accursed.

Between these two kinds of offenses were many that were not classified and which were left wholly in the hands of the individuals concerned. Thus the field of self-redress was necessarily large, and private vengeance continued to be an active power for a long time. There was a difference between foul murder, where the State prosecuted, and manslaughter, which was looked upon as a private injury to be punished or condoned by the injured party, *i.e.*, the family of the deceased. This is in accordance with a law attributed to Numa Pompilius; "Si quis imprudens occidisset hominem pro capiti occiso agnatis ejus in contione offeret arietem." No doubt a

[1] Taylor, 591–594. [2] Muirhead, 69.

formal tender of reparation had been made and accepted before "offeret arietem." "Contio" signifies a meeting, but only a meeting called together by a local magistrate or priest. It is altogether probable that the meeting took place under religious auspices and that a priest presided over it, as the offender had taken what the gods alone could bestow. It was necessary to appease the wrath of the gods as well as that of man, therefore the earnest of the victim was a purifying sacrifice. The Athenian law was the same as that of the Romans. The consent of the relatives of the slain man must be obtained before the offering was made. The case is entirely different according to Numa for willful murder; "Si quis hominem liberum dolo sciens morti duit, paricidas esto."

"Si quis dolo," and its sequel, "Si quis imprudens ocidisset etc.," furnish the real distinction, not only between crimes and private injuries, but also a true guide and criterion for a definition to murder. So Lord Coke defines murder; "When a man of sound reason killeth another reasonable creature in being and under the king's peace with malice aforethought." The distinction between murder and man-slaughter is malice aforethought.

To avenge the death of a kinsman was a religious duty, as his manes had to be appeased.[1] This idea was so strongly impressed that long after the State had interfered and made murder a matter of public prosecution, a kinsman was bound to set such prosecution in motion, and if he failed to do so, he was not permitted to take anything of the inheritance of the deceased. Private vengeance was also lawful at the instance of a husband or father who surprised his wife or daughter in an act of adultery. Before his wrath had time to cool he

[1] Sohm, *loc. cit.*

could kill her and her paramour on the spot. Afterwards, he must deal with her only judicially in his domestic tribunal. There are some other cases where private vengeance is traceable, especially in talion and the imprisonment of the nexal debtor who was not able to meet his obligations.

CHAPTER III

THE REFORMS OF SERVIUS[1]

It is stated by Livy that Servius Tullius became king of Rome (578 B.C.) without being indebted in any way to the patricians who had heretofore controlled elections (non comissit se patribus). He was, in fact, the first rank outsider to obtain this office, and being left free from aristocratic influence was able to accomplish some very necessary reforms. The old tribal division based upon primitive origin was outgrown by reason of the population daily increasing of those who came from the outside and who, consequently, had no part in the government. Servius himself is represented by the Etruscan annals as a chief of a band of Etruscans who had left their old home and settled in Rome, thus increasing the plebeian population of that city and rendering the old-time aristocratic control impossible.

The radical reform which he introduced in the political constitution of Rome was to place side by side with an aristocracy of race, the superior caste of the ancient patrician order, an aristocracy of wealth whose ranks were open to all. The aim of the Servian reforms, whether military or financial, was to promote the equality of the plebeians and patricians, and this could only be done by a fundamental change of base.

[1] Discussions of the Reforms of Servius are almost without end. The following are among the best: Moyle, Institutes of Justinian, 6–10; Ortolan, 63–69; Mommsen, Bk. I, 6; Muirhead, 36–77; Ihne, I, 78–110; Hunter, Roman Law, 8–10; Botsford, The Roman Assemblies, 49–118.

Heretofore all the revenue necessary to the carrying on of the government had been raised by means of a poll tax arbitrarily imposed without any fixed principle or any adequate proportion between the rich and the poor. The division of the people into tribes and curiæ, based on origin, and, from the latter, the formation of the only legislative assembly (comitia curiata) had kept all political power in the control of the patriciate and had denied the franchise to the plebeians even though they had wealth and social standing. It was the work of Servius to substitute for this division depending upon caste, a distribution of the people and a system of voting regulated by wealth. In fine, he made the amount of taxation and the suffrage of each citizen depend upon property.

To carry out his reforms it was necessary for Servius to know the number of persons holding property, and the amount and kind of each holding.[1] To accomplish this he caused the head of each family to make a written statement upon oath of the number of persons composing his family, of his property of every description, and its fair estimated value, under penalty of confiscation of any article omitted. When this task was accomplished he held a grand review of the entire population by marching them in order through the Campus Martius. Subsequently they underwent the ceremony of purification (populum lustrare). As this ceremony was repeated every fifth year the term *lustrum* finally came to signify a period of five years. This table or register of all the people and property was called the "census." A new chapter (caput) was added for each head of a family, and thus it was easy to ascertain the condition of the population and the respective fortunes of the various families.

§ 37. Census.

[1] Botsford, *loc. cit.*

According to the first census the population of Rome was somewhat above 80,000. This shows a large influx of foreigners and consequent increase of the plebeian population.

Every person whose name appeared in the census was henceforth a citizen and enjoyed the privilege of citizenship. The names of sons were doubtless inscribed in the chapter dedicated to the father. Women and males under age were enumerated merely, while slaves were indicated simply by numbers amongst the chattels of their masters.

From the institution of the census, which had determined the amount of the fortune of each citizen, was derived the distribution of the people into classes (from calare) or summonings according to the amount of the property held by each.[1] This division of the populace into classes was primarily to determine the amount and kind of military service to be demanded of each. "Every freeholder from the seventeenth to the sixtieth year of his age, including children in the household of fathers who were freeholders, without distinction of birth, was under obligation of service." If a manumitted slave had come into the possession of landed property, he was compelled to render military service.

§ 38. Classes.

The body of men thus made liable to serve was divided into five classes. As to this division Livy and Dionysius are in practical agreement. Livy[2] gives the following account; "From those whose rating was 100,000 asses or more he made eighty centuries, forty of seniors and forty of juniors, and termed them all the *first* class. The seniors were to be ready for guarding the city and the juniors were to serve in the field. The

[1] Huschke, Die Verfassung des Königs Servius Tullius (followed by Muirhead); Botsford, 67–71.

[2] I, 43.

arms required of them were a helmet, round shield, grieves, and cuirass, — all bronze, — for the protection of the body. Their offensive weapons were a spear and a sword. To this class were added two centuries of sappers who were to serve without arms. Their duty was to convey the engines of war. The *second* class was made up of those whose rating was between 75,000 and 100,000 asses, twenty centuries of seniors and juniors together. They were equipped with an oblong shield (scutum) instead of a round one, and they lacked the cuirass, but in all other respects their arms were the same. The minimum rating of the *third* class was 50,000 asses. They had the same number of centuries but their arms were changed, nothing being assigned them but a spear and a long javelin. The *fourth* class consisted of all those having from 25,000 to 50,000 asses. They were not required to furnish any defensive armor, but must be equipped with long spears and light javelins. The *fifth* class was larger, composed of thirty centuries. They carried slings and stones for throwing. Among them were counted the accensi, the horn blowers, and the trumpeters, three centuries in all. This class was appraised at 11,000 asses. Those whose rating was less formed one century exempt from military service. Having thus armed and organized the infantry, he levied twelve centuries of equites from among the chief men of the State. Also the three centuries instituted by Romulus he made into six others of the same name as those under which the three had originally been inaugurated."

Modern critics generally agree in rejecting the money reckoning in this account as being too high for the period, and in fact only in use nearly two centuries later. The source made use of by Livy and Dionysius [1] was the Commentarii

[1] Dionysius, Hal., IV, 18–22.

Servi Tulii or descriptio centuriarum. This was not written before the year 269 B.C. In the meantime a change of base had taken place. Most historians, including Mommsen, have adopted the rating of Huschke, who concludes that before the censorship of Appius Claudius Cæcus, 312 B.C., military service was based on the possession of land, and that the gradations of equipment must have been determined by the size of the estate reckoned in jugera. Thus we have the following gradation: —

I. All those who possessed a full hide or twelve acres of land were placed in the first class. These were divided into eighty centuries, forty of juniors, twenty to forty-five years of age; forty of seniors, forty-five to sixty years of age. To this class also belonged the knights, a privileged class who voted first and made up the cavalry service, who furnished eighteen centuries, thus making ninety-eight centuries, in all, belonging to the first class.

II. All who possessed nine acres or three fourths of a hide of land were placed in the second class. These were subdivided into twenty centuries, ten juniors, and ten seniors.

III. The third class consisted of those who possessed six acres or one half hide. These were subdivided into twenty centuries, ten juniors, and ten seniors.

IV. The fourth class consisted of those who possessed three acres of land or one fourth hide. These were subdivided into twenty centuries, ten juniors, and ten seniors.

V. The fifth class consisted of all those who possessed one and one half acres or one eighth of a hide. These were subdivided into twenty-eight centuries, fourteen juniors, and fourteen seniors.

It is to be noted that the centuria which is here used as the unit of computation, was not an exact hundred, as the word would imply, as the number fluctuated. The members of the first class had to equip themselves fully in the heavy armor of the hoplite. The remaining classes of freeholders were compelled to render service but were not required to arm themselves fully.

Those not classified by Servius had no part in the public burdens at all. The proletarii furnished workmen and a number of substitutes (accensi) who went with the army unarmed, but were furnished with tools and weapons by the government and were also fed.

The object of the legislation of Servius Tullius was purely military. This is seen at a glance. "In the whole detailed scheme we do not encounter a single feature suggestive of any destination of the centuries to other than purely military purposes; and this alone must, with every one accustomed to consider such matters, form a sufficient reason for pronouncing its application to political objects a later innovation."

§ 39. Comitia Centuriata.

The centuriate assemblies represented the aristocracy of wealth.[1] Power and influence were to be determined by property and age. The division of the entire body of Roman citizens into great property classes expedited this. In settling any question which was referred to them each centuria had one vote, so that a class had as many votes as it had centuriæ.

[1] Botsford, 86–100, 200–236.

Adding the eighteen centuriæ of the knights to the eighty centuriæ of the first class gave to that body a majority of the whole. If this wealthy class agreed, the question was settled at once, as the Romans continued the voting only till they obtained a majority. Thus it may well never have happened that the inferior centuriæ were called upon for their suffrage.

As the people were arranged in military order and under arms, the comitia centuriata could not meet within the city as there was not sufficient room. The Campus Martius was, consequently, chosen as the meeting place, and the people were summoned at the sound of the bugle. The king who summoned the centuriata in the regal period gave thirty days notice, three market days. This was at first nothing but a notice of war, as the centuriata was merely the nation in battle array. A red flag hung upon the wall for thirty days was the signal for gathering. The people arranged themselves in military order like soldiers, each under his own standard and commander, and each man was called upon to vote in the order in which he stood in his centuria.

Questions of war and peace were referred to the centuriata for decision, but beyond this there could have been no political activity until the establishing of the republic.

In order to facilitate the levying of the infantry the city and its precincts were divided into tribes (tribus, parts) or

§ 40. Tribes.

levy districts.[1] These must not be confused with the ancient triple division of the city. As the population of Rome was rapidly increased by the accession of strangers, it became no longer possible to maintain the old distinction of the three primitive tribes whose origin was traced from race. The new elements had no way of entering

[1] Ortolan, 71–75.

these. The Servian tribes were determined by locality (ex locis).

The boundaries of the city were extended so as to embrace the seven hills, and this enlarged territory was split into four tribes, the Palatina, Colina, Esquilina, and the Suburana. The old tribal names were retained and, in fact, the districts assigned to the first three were those occupied by the three ancient tribes. These four tribes, designated as urban, were increased in size as the city grew but were never increased in number.

The country around Rome occupied by persons enjoying, by the constitution, the rights of citizenship, was in like manner divided into levy districts, each with its separate name. These formed the rural tribes (tribus rusticæ). They were gradually increased in number as Rome added by conquest the surrounding territory, but this number cannot be definitely ascertained.

It was a bond of union between citizens to be members of the same tribe. Taxes were levied by tribes and the legions were recruited in the same manner. Each tribe had its own religious system and sacrifices. The tribal name now took the place of the old-time curia as a means of designation. The chief of a city tribe was called magister vici; the chief of a rustic tribe was called magister pagæ. The tribal grouping embraced all who were able to pay the land tax. Up to this time revenue had been raised by a poll tax arbitrarily imposed without any distinction between rich and poor. Servius instituted a method of voting regulated by wealth. In short, he arranged a system of taxation in accordance with the amount of property held. This distinction seems to have been made for the purpose of providing for three contingencies, — revenue, war, and legislation. Privileges, duties, and

burdens were to be measured by the amount of real estate which a man held by quiritarian title. Henceforth the burdens of the State must have fallen on each in a manner in proportion to his means.

At first the new Servian tribes had no political functions. They did not meet for any legislative purpose. The comitia tributa represents the rise of democracy. It had its origin in the plebeian troubles which preceded the secession of the plebeians to Mons Sacer, and had the oppressive laws against debtors as an incentive to organization.[1]

§ 41. Comitia Tributa.

One special feature of the Servian Census was the recording of the ownership, the value of lands, and the appurtenances, which record was to be revised at least once every five years.[2] To aid in the accomplishing of this it was declared that no transfer of property would henceforth be recognized which had not been surrendered in court by a formal ceremony before the supreme magistrate (in jure cessio), or by a solemn formula which was a sort of imaginary sale per æs et libram, in the presence of five witnesses and an official librapens or balance holder. Thus we have two forms of property conveyance recognized by Servius, — in jure cessio, and mancipatio.

§ 42. Effect of the Reforms on the Law of Property.

In jure cessio, or title by a fictitious surrender in court, according to Gaius, took place as follows: "Before a magistrate of the Roman people, as the Prætor, or before the president of a province, the man to whom the thing is being granted appears holding it, and makes his claim thus; 'This slave, I say, is mine, ex jure Quiritium.' Then after he has made his claim the prætor asks him that grants it whether he will make a counter claim. And when

In Jure Cessio.

[1] Botsford, 283–295.

[2] Muirhead, 55–61.

he says no, or remains silent, then the Prætor makes over the property to the claimant." [1]

This form of conveyance was called a legis actio and could take place anywhere, even in the provinces before their presidents. It was, however, rather too formal and cumbersome to be made use of very commonly.

The second mode of conveyance, which is said by Gaius to have been almost universal, was known by the name of mancipium or mancipatio, and the lands and other properties which were conveyed by this process were called res mancipi. These were, according to Ulpian, lands or houses in Italy, prædial servitudes thereto attached, slaves, and ordinary beasts of burden, such as horses, mules, asses, oxen, but not elephants or camels. **Mancipatio.** **Res Mancipi.**

The transfer of property known as mancipation was accomplished as follows: "The transferee, with one hand on the thing being transferred, and using certain words of style, declared it his by purchase with an as (which he held in his other hand) and the scales (hoc ære æneaque libra); and simultaneously he struck the scales with the coin, which he then handed to the transferrer as figurative of the price. The principal variation when it was an immovable that was being transferred was that the mancipation did not require to be on the spot; the land was simply designated by its known name in the valuation roll."

If these forms were not observed, the property of res mancipi was not transferred, and the purchaser had no rights which he could defend in court.

Gaius calls mancipatio a fictitious sale, but before the Twelve Tables, when there was as yet no coined money, the weighing out of the æs by the libripens, no doubt, constituted

[1] Muirhead, *loc. cit.*

the actual payment of the purchase money. Then it was not a fiction (imaginaria venditio), but a genuine sale. The use of the scales goes back to a time when money was not yet current but raw copper was a standard of value, and to a certain extent at least a medium of exchange. Back of this lay a period when all values and fines were estimated in cattle and sheep. Raw copper could be made available for loans or payments only when weighed in the scales. The decemviri introduced coined money into Rome in the form of a copper as. Silver was not coined till nearly two hundred years later. But this change to a coined medium of exchange did not affect the formalism of mancipatio. The libripens and the scales still remained, though no longer in actual service in the weighing out of the raw copper. The enactment in the Twelve Tables that no mancipatio should be legally operative unless the price were actually paid, or security given, marks a development of the older form, but still indicates a real sale for ready money with rigid formalities and only available for a single economic purpose.

Transfer of property was thus made public and a matter of record. Witnesses were present to vouch to the census officials the regularity of the procedure. The parties themselves were not intrusted with the scales, but an impartial officer, an official balance holder, performed the weighing, thus securing accuracy in detail.

Thus it is clear that mancipation, as regulated by Servius, was no fiction, but a completed sale in the strictest sense of the term.

All things not embraced in the list of res mancipi and which were capable of ownership, when taken separately and not as a universitas, were res nec mancipi. These were provincial lands generally whose ownership was vested in the State,

the ager publicus, swine, sheep, poultry, vehicles, precious stones, jewels, gold, silver, wearing apparel, household furnishings, etc. The ownership of res nec mancipi passed by simple delivery without any formality whatever. Concerning these Gaius says; "For what are nec mancipi pass to another in full ownership by simple delivery, provided they are corporeal and thus capable of delivery. Therefore, if I have delivered to you a garment, or gold, or silver, whether in pursuance of a sale, or as a donation, or upon any other sufficient cause, it straightway becomes yours, provided always that I who deliver it am in law its owner."

Prior to the time of Servius the unions of plebeians were not considered as lawful marriages. At least this was the opinion held of them by the patricians. For this there were two reasons. In the first place, they did not possess the preliminary qualification for justæ nuptiæ, connubium, as they were not Roman citizens. In the second place, since they were not patricians, the only ceremony of marriage known to the law (confarreatio) was incompetent to them. The first obstacle was removed through the instrumentality of the Servian reforms by the admission of the plebeians to citizenship. The second difficulty in the way was overcome by the development of a new form of marriage, coemptio.[1]

§ 43. Incidental Effects of the Reforms on the Law of the Family.

Coemptio was without doubt the adaptation to a new form of contract of the mancipatio which has already been described. The Roman looked upon marriage as "a contract by which a man and a woman entered into a mutual engagement, in the form prescribed by law, to live together as husband and wife during the remainder of their lives."

Coemptio.

[1] Muirhead, 64–67.

Marriage itself and the form of marriage were questions which were left entirely to the discretion of individuals, without any legal compunction of any kind. The law did not require the intervention of any authority or of any public ceremony whatsoever. The mutual consent of the parties, consummated by the tradition or delivery of the woman was all that was deemed necessary. It was a transaction primitive in its simplicity, but savoring of rough justice.

But this contract by consent and delivery was not sufficient to give Quiritarian property in any human being, and marriage thus contracted did not place the woman under the hand (in manu) of her husband. To accomplish this it was necessary that the nuptials should be performed according to the formula of the confarreation, or that the woman should be transferred per æs et libram to her husband. This coemptio was a sort of symbolical purchase of the wife by the husband in the presence of five witnesses and the official balance holder. As mancipatio placed the thing purchased under the dominion of the dominus, so coemptio placed the woman under the hand (in manu) of her husband. So soon as it was demonstrated that coemptio conferred the manus over wives, plebeians would naturally make use of it.

In coemptio it was not the father who sold his daughter so much as the daughter who, with the consent of her father, sold herself. Indeed this sale must have been mutual, as the term *coemptionem facere* would imply, the woman buying a husband and the man buying a wife. Boethius, in his De Consolatione Philosophiæ, causes persons marrying by this civil law to use the following form: —

Man. — An mihi mulier, mater familias esse velis? Illa respondet, Velli. Idem mulier interrogabat; An vir, mihi pater familias esse velis? Ille respondet, Velli.

Following this came the regular form of the mancipatio, which was, in all probability, the binding part of the contract.

There was another mode of marriage in vogue prior to the enactment of the Twelve Tables by which a woman passed in manum. This was usus or cohabitation for one year with the consent of her father or guardian.[1] Usus was founded on prescription, just as coemptio was founded on mancipatio. Uninterrupted cohabitation for one year carried with it manus and the absolute control of the woman's property by her husband. To avoid this the woman absented herself from her husband's bed for three consecutive nights (tri noctium) during the first year.

Usus.

To the introduction of mancipatio is also due a device resorted to by the plebeians for the disposal of their estates in contemplation of death.[2] They had not obtained admission to the comitia curiata, and could therefore make no valid wills other than "testamenta in procincta facta." They commonly made a disposal of their property to a friend by *sale on trust* to let the former have the use of it until his death and to distribute whatever remained of the estate, after taking out whatever he was authorized to keep, among his heirs as per arrangement. The person to whom this sale on trust was made was designated familiæ emptor. He always paid the nominal price which made an obligation in law. This disposition of the property was entirely unprotected by law, the persons whom the transferrer really meant to benefit having no action whatever against the transferree. But the perfectly mutual character of the transaction and respect for Fides compelled the familiæ emptor to fulfill the lex mancipii. The declaration of the testator set forth the entire disposition

§ 44. Effect of the Reforms on the Law of Succession.

[1] Sohm, 260, 261

[2] Muirhead, 63–67.

of his property (nuncupatio). The full form of the mancipatio was passed through, the five testes witnessing the transaction and also the testament itself. This mortis causa but inter vivos alienation was the forerunner of the testamentum per æs et libram of the Twelve Tables.

§ 45. Effect of the Reforms on Contract.

It is impossible to tell just how much effect Servius had on the law of contract.[1] Dionysius states that he was the author of more than fifty enactments relative to contracts and crimes. Nexum certainly felt the influence of his legislation. This was originally merely a loan of money or of raw copper which took the place of money, but we know nothing of the formalities accompanying this loan beyond the mere weighing of the money, nor do we know what rights, if any, the creditor had over the debtor who failed to pay prior to the time of Servius. Certain it is, however, that nexum was severe upon the plebeian who had borrowed money from the patrician and then failed to pay. Such a person was doubtless sold into slavery or even in aggravated cases, put to death. This was considered all the more severe by reason of the fact that the contract between the debtor and creditor was never published or recorded, and the probability is that the patrician creditor never really fulfilled his part of the contract but demanded repayment before it was due and at a time totally unexpected by the plebeian debtor. This would be a very easy procedure since the plebeians had no way of officially knowing the calendar. Servius demanded the publication of the contract and withheld the right of manus and restraint of the debtor if the conditions had not been fulfilled.

These conditions consisted of a solemn loan in the presence of five witnesses. The libripens weighed out the proper

[1] Muirhead, *loc. cit.*

amount of raw copper to the borrower and the lender at the same time declared in solemn words that the borrower was now in his debt (dare damnas esto). This placed the debtor under an obligation to repay. He was said to be 'nexus' to his creditor. He had mortgaged his own person as security for the loan. When coined money was introduced a modification of procedure in nexum took place. The actual loan was arranged privately and the money paid over; the official transaction became a mere fiction for the purpose of securing witnesses and record. As in the case of mancipatio, the weighing of a single piece of copper in the presence of five witnesses by the libripens and its delivery by the creditor was symbolical of the actual weighing and delivery of the whole, and the recital of certain words of style had the effect of binding the borrower in an obligation to repay with interest. Thus the reform brought the certainty of an open and provable contract.

§ 46. Servian Amendments on the Course of Justice.

Very little is known of the course of justice in either criminal or civil matters before the time of Servius.[1] Professor Clark, referring to criminal matters and summarizing the information about the judicial functions, says; "The king as judge, sometimes availing himself of the aid of a council, sometimes, perhaps, in cases of minor importance, delegating his judicial powers to individual judices; aided in his quest of capital crimes by the quæstores parricidii; appointing at his pleasure, in cases of treason, the extraordinary duum viri; allowing, though perhaps not bound to do so, an appeal from the latter to the assembled burgesses: this is all that we can recognize with any degree of confidence."

King.

But the king alone was by no means invested with the sole

[1] Muirhead, 68–75.

criminal jurisdiction, as the pater familias was judge within the family of criminal as well as civil matters. He alone was competent in any charge against the domestic order. He could inflict the death penalty, sell into slavery, or banish, as he saw fit, as punishment for crime against the domestic order. Voygt cites many examples from the history of the early republic where the pater familias, with the aid of a family council, passed judgment and inflicted the penalty in case of unchastity of wife or daughter, immorality of his sons, or undutiful conduct of children or clients.

Pater Familias.

The indications of criminal jurisdiction on the part of the gens are very slight. It must have been called on, however, by reason of its organization and composition, to exercise criminal jurisdiction continually over members of the gens. Muirhead cites as an example of this gens jurisdiction its sitting in judgment on one of its members to determine whether he was guilty of having put one of his children to death before it had reached its third year, contrary to the law of Romulus, and so incurring the penalty of sacratio capitis.

Gens.

Besides the cases of jurisdiction cited above, the individual right of self-redress was still granted by custom, and must have been prevalent well on toward the end of the republic.[1]

Self-redress.

The boundary between civil and criminal jurisdiction was not strongly marked at this time in Rome. This is true in a very marked degree in the history of the procedure of any people in the same stage of development. Theft and robbery, although punishable by death or slavery, were looked upon as private wrongs and the thief or robber was not entitled to a trial, but was summarily disposed of by the injured

[1] Muirhead, *loc. cit.*

person in order to satisfy his desire for vengeance. Prior to the enactment of the Twelve Tables compounding with the wrongdoer was allowed, and thus was taken a step in advance, as it was surely much more beneficial to the injured party than was the mere taking of vengeance upon the violator of his peace or property. The right of self-redress was thus gradually lost, as, when the custom of compounding for private wrongs became common, difficulty in settling arose necessitating an appeal to a third party. It was doubtless this fact that called into use the intervention of the king and ultimately gave him jurisdiction in these matters. He would very naturally be the person to whom to refer disputes as he alone had the power of enforcing his decision.

Private Wrongs.

It is not definitely known how the kings acquired jurisdiction in questions of Quiritarian right (disputes about property or inheritance).[1] Such questions could not arise in the family, as the distinction of ownership could not be drawn owing to the common right of its members. Disputes concerning property between clansmen would certainly be settled by the gens or its leader. The spear was in earliest times the arbiter, and victory of one faction over another decided the right. When the State was established such a procedure as this must have gradually passed away. The question of right was submitted to the pontiffs of whom the king was the head, and in order that this college might have jurisdiction the parties interested were required to make oath to their contention. The matter then became a religious one and, since the parties thus referred the matter to the gods, the truth or falsity of their oaths could be decided by the pontiffs. Under this head the real question at issue could be decided and the party winning was then allowed to take self-redress.

[1] Muirhead, 74–75.

TITLE 2. EARLY REPUBLICAN PERIOD: FROM THE BEGINNING OF THE REPUBLIC TO THE TWELVE TABLES, 509–451 B.C.

CHAPTER IV

EARLY REPUBLICAN INSTITUTIONS TO THE TWELVE TABLES

509–451 B.C.

THE expulsion of the kings and the establishment of the republic is dated 509 B.C.; that is, nearly two hundred and fifty years after the reputed founding of the city.[1]

§ 47. The Political Revolution.

Neither the cause nor the course of this revolution can be stated with confidence, but the immediate result was the lodgment of exclusive powers in the hands of the patricians. The plebeians were not eligible for any of the offices or honors in the new republican State. They were excluded from the auspices and from all knowledge of the laws; they could not lawfully intermarry with patricians, and they possessed practically no influence in that new institution of Servius, the comitia centuriata. All the good which came to them from the revolution that had culminated in the overthrow of the kings was to teach them a political lesson. Perhaps they aided in the expulsion of the tyrants, thinking that they too would have an active part in the new political organization. In that they were mistaken. The methods of revolution must doubtless have been absorbed by the plebeians during the long struggle in which they, may-

[1] Ortolan, 18–26.

hap, united their forces with the patricians in order to free themselves from royal restraint. The establishment of the consulate was not attended by the happy results that must have been anticipated by many of the people of both orders who had rejoiced over the expulsion of the Tarquins. Through revolutionary methods, however, the plebeians, in the fullness of time, were destined to compel the recognition of their rights.

§ 48. The Consuls.

It would appear at first sight as if the revolution which had culminated in the expulsion of the kings had brought in its wake but slight change. There was no apparent innovation in the comitia, in the senate, or in the administration generally. In the place of the kings who held their position for life there were now elected by the comitia centuriata two consuls as joint chief magistrates who were chosen for a period of one year.[1] At first these magistrates were always of patrician rank. Although each possessed supreme power, neither could act alone in opposition to the will of his colleague. Their powers were the powers of the kings, more or less modified; but as time went on many of the original functions of the consuls were clipped away and bestowed upon other officials by reason of the rising power of the hitherto despised plebeians. The priestly functions of the king were at once transferred to a special officer (rex sacrorum) who was excluded from all political offices and officially subordinated to the chief pontiff. However, this brought about no real loss of power to the chief magistrates, as they were always able to bend religion to what they considered to be the true service of the State. The nomination of the priests, however, did not remain with the consuls as it had been with the king. The consuls were in-

[1] Muirhead, 79–81.

vested with the supreme military power and because of this had the authority of life and death outside of the limitations of the city. As civil heads of the State they convoked the senate and the assemblies of the people (regularly the comitia centuriata, rarely the comitia tributa), conducted the business of the meetings, and directed the executive administration. As judges the consuls administered justice both in civil and criminal cases to patricians and plebeians alike, either in person or through their delegates. However, in criminal cases, the patricians were tried before the comitia centuriata, while the plebeians were brought to justice before the consuls. They, however, had the right to appeal from consular decisions, in case of the death penalty, and a little later, the tribunes could interpose a veto in their behalf.

By this time the comitia centuriata, which was at first but an organization for military purposes, had entered practically upon the functions of the comitia curiata, superseding it in all respects except in the matter of unavoidable formalities which lay under a strong religious sanction.[1] It had already become the sovereign power in the State. It elected the chief magistrates; it passed the laws; it decided questions of peace and war; it formed a court of last appeal. The comitia centuriata embraced the whole body of citizens, and was consequently spoken of as the populus, but the real power lay with the patricians. During the next century and a half measures submitted to the centuriata could not pass into law without senatorial sanction, and the senate was still patrician.

§ 49. Comitia Centuriata.

According to Livy the first act of the centuriata as a political body was the election of the two consuls. Thereafter the comitia not only continued to elect

Elective Authority.

[1] Botsford, 219–241.

the consuls but also naturally acquired the right to choose all elective higher magistrates who were intrusted temporarily or permanently with some or all of the consular powers. These magistrates were, aside from the consuls: —

Prætors, chosen first in 366 B.C.
Military Tribunes with consular powers, first chosen in 450 B.C.
Censors, first chosen in 443 B.C.
Decemviri legibus scribundis, chosen in 451 B.C.

The authority of this assembly expanded with the growth of the number of offices and its importance was further increased by the opening of the patrician magistracies to plebeians. The validity of centuriate elections at first depended upon the subsequent sanction of the curiata, later upon the patrum auctoritas. This latter action was finally done away with by the Mænian plebiscite and the centuriata was henceforth free to make its own elections without check.

Primitive Rome, like primitive Greece, regarded law as god-given. This, indeed, was the concept of nearly every nation of antiquity. It left no scope for legislation by a popular assembly. The comitia curiata, no doubt, confined its legislative activity to resolutions affecting custom. It was only from the custom of the soldiers to participate in the settlement of questions touching their interests that developed the function of declaring war. This was a very slow development and can only be said to be fully recognized by the time of the Twelve Tables. The legislative authority of the comitia centuriata began in their sanctioning or rejecting measures brought before them by the presiding magistrate in the form of a senatus consultum.[1] The earliest

Legislative Authority.

[1] Botsford, *loc. cit.*

legislation of this assembly that has been recorded was the lex de provocatione attributed to Valerius Publicola, consul in the first year of the republic, 509 B.C. In 449 B.C. the consuls Valerius and Horatius passed through the centuriata a law prohibiting the election of a magistrate without appeal, and affixed as a penalty the outlawing of the trespasser. Thus far popular legislation had no basis save that of precedent, but a law of the Twelve Tables provided that there should be resolutions and votes of the people, and whatever the people voted last should be the law of the land. This established the fundamental principle that the will of the people, whenever expressed, prevailed over every authority. But the initiative still remained with the magistrates so that we should not be justified in pronouncing this popular sovereignty. The auctoritas of the senate had to be obtained for all acts of the comitia centuriata until 339 B.C., when an article of the Publilian law required them to grant it to legislative acts of the centuriata before the voting began and while the issue was still in doubt. Thus it became a mere formality, and centuriate legislation was freed from the constitutional control of patrician senators. Still, a senatus consultum introduced by a consul was the only business brought before the centuriata in its legislative capacity.

The comitia centuriata were the court of last resort; their jurisdiction, however, was confined to cases of crime and of serious disobedience to magistrates.[1] Their power was not exercised in the first instance but only by way of appeal. There came to them through this channel all offenses committed against the State, purduellio, and majestas, and all cases involving the life of Roman citizens.

Judicial Power.

Gradually the comitia centuriata shook off the control of

[1] Botsford, *loc. cit.*

the comitia curiata and acquired the right of discussing and deciding upon matters which were not brought before them in the form of a senatus consultum. In other words, they obtained the right of originating and deciding upon measures of import. The magistrate at first proposed all candidates who had in turn been previously chosen by the senate. Gradually the people claimed the right to vote upon any candidate who might offer himself without his having received any previous nomination from the senate. This made elections popular. As heretofore, the place for holding the comitia centuriata was the Campus Martius, which lay outside of the city walls. It contained the septa for the voters, the tabernaculum for the president, and the villa publica for the augurs. The centuriata met annually for the purpose of holding the elections, at a certain time appointed by the senate and consul; this time consequently changed from year to year. As we have seen, the method of voting was at first oral; each person present was called upon to vote according to his rank in his centuria, and this vote was recorded opposite his name. In 139 B.C. the custom of voting at elections by tablets with the names of candidates written upon them was introduced by the lex Gabinia tabellaria; two years later this method of voting was introduced into the curiata when acting as a court of justice, and afterwards it was followed in all legislative measures. Thus each voter was provided, in case of a judicial decision, with two ballots or tablets, upon one of which was written "A" (absolvo); on the other the letter "C" (condemno).

In case of a legislative decision he had two tablets, on one of which was written "uti rogas" or "R"; on the other, "antiquo" or "ant." The septa or ovile, where they voted in later times, was a stone building large enough to contain

the whole body of franchised citizens. It was divided into separate compartments for each class, and tribe, and century. To each one of these compartments there led a narrow passage or fidus. Upon entering, each citizen received his tablets, and after deciding he cast his tablet into the cista or ballot box, which was carefully watched over by custodes who saw to it that no citizen "stuffed the box." Votes were taken out and counted immediately by officers appointed for that purpose. As soon as a majority was obtained the voting ceased, as has been previously stated; at first, the classes voted in order, but when the two bodies had become fully consolidated, the order was ascertained by lot, thus making it more democratic. The business of the meeting having become completed, the president recited a short prayer and then dismissed the assembly with the word "discedite."

It frequently happened that the centuriata was disturbed so that it became necessary to postpone the meeting. This occurred when it was discovered that the auspices had been unfavorable, or when the gods manifested their displeasure by means of rain, thunder, or lightning, when a tribune interceded, when the sun set before the business was over, or when a morbus comitialis occurred (when one of the assembled citizens was seized with an epileptic fit).

In all such cases the comitia had to continue their business on some other day.

§ 50. The Senate.

The senate remained for a long time purely patrician. Says one authority; "A whole century elapses after the beginning of the Republic before we find a single plebeian in the senate."[1] Of course there are many authorities who do not agree with this statement in its entirety. The senate had no independent legislative or

[1] Sohm, 77; Botsford, 177, 406–408.

executive power, but was simply an advisory council, appointed, convened, and presided over by the consuls. The senate advised the consuls when the latter saw fit to ask its advice, just as it had formerly advised the kings under like conditions, but it had no legal or formal means of controlling their actions. And yet, owing to the permanency of the senate and the annual election of consuls, the practical result of it all was that, in all essential and important questions, the senate decided the policy which the consuls had no alternative but to adopt. The senate underwent no legal change at the time of the revolution, although its authority and prestige must have been very materially increased for a time. In usual course a consul laid a proposition before the senate and that body after discussion and deliberation adopted a resolution (senatus consultum) on the subject. This resolution was then carried by one of the consuls before the comitia centuriata, which body without discussion took immediate action thereon. If approved, it returned to the senate and the confirmation of that body (patrum auctoritas) gave it the force of law. This senatorial right of confirmation was of especial importance only when the magistrates laid a proposition before the people without previously submitting it to the senate.

In the year 508 B.C., one of the earliest of the consuls, Publius Valerius Publicola, proposed to the comitia curiata and carried through that body certain very important enactments which were suggested by the circumstances of the recent revolution.[1] The most popular of these were the following: (1) Whoever should attempt to obtain royal power should be devoted to the infernal gods, his head to Jupiter, his property to Ceres. This

§ 51. Leges Valeriæ.

[1] Ihne, I, 141; Mommsen, I, 267; Ortolan, 94; Hunter, 13.

enactment was deemed to be a substantial security for the annual election of magistrates and the control of any ambitious person who might aim at the establishment of a despotism. (2) A law of appeal securing to every citizen the right of an appeal to the comitia centuriata from a sentence of death or scourging which had been pronounced by a magistrate (in the first place a consul). This law has been called the Roman Habeas Corpus Act and is spoken of by Cicero and Livy in terms of highest praise. It evidently embraced all persons, patricians and plebeians, although upon this there is no agreement among the authorities. Livy leaves the impression that appeal from the decision of the magistrate is now granted for the first time, yet it is quite certain that this law merely transferred into writing what had previously been a custom among the patricians. The new feature was the application of this principle to the plebeians and it must have resulted in a great accretion of protection and security to that class.

This law had three very important exceptions: —

(*a*) It did not apply to foreigners and slaves, who could be scourged and put to death by any magistrate on his own authority.

(*b*) It did not apply to the jurisdiction of the pater familias, who could carry out his own right independent of any enactment or interference on the part of either magistrate or assembly. It thus came to pass that a person who could not legally be put to death without the consent of the comitia curiata, could be executed by his own father.

(*c*) This law was not enforced for more than one mile beyond the city limits. Outside of this circle the

magistrate had the authority of life and death and could act upon his own volition.

Any private citizen was at liberty to prosecute before the comitia centuriata for capital crimes as well as a magistrate. This body, however, frequently delegated their power to a committee of citizens called quæstors (quæstores parricidii), whose duty it was to preside over the investigation of all criminal charges, to direct the proceedings, and to deliver judgment in the name of the people.[1] It is well to note that parricidium signifies at this period in the development of Roman law "paris-cidium," the murder of one's equal (homicide); and not, as in later times, "patris-cidium," the murder of a father (patricide). To this body of quæstors was added the care of the State chest and the State archives, and they became annual magistrates elected by the people in the comitia centuriata, rather than appointed by the consuls, a custom which had previously been maintained. The last-named duties were clipped away from the consuls and devolved upon the quæstors by means of a law brought forward by the same Valerius Publicola who was the author of the laws mentioned above.

§ 52. Quæstors of Homicide.

When the Tarquins were expelled by means of a combination of patricians and plebeians against them, they did not remain inactive but, instead, waged an almost continual warfare against the Romans for a period of more than nine years, endeavoring to reëstablish the kingship and regain their lost authority. At one time in this struggle it looked as if they might succeed in their purpose. Conditions became so desperate that the Romans

§ 53. The Dictator.

[1] Ortolan, 95.

at last resorted to a plan of reuniting their sovereign power in the hands of one man in order that their energies might be centralized and better directed. The consuls and other magistrates gave up their offices and, at the advice of the senate, appointed from among the patricians a dictator who was invested with supreme power for a period of six months.[1] As chief magistrate he ruled Rome; as general he commanded the army. The ax (a symbol of the life and death power) was restored to the fasces of his lictor. He could condemn citizens to the scourge, exile, or death without the appeal to the centuriata (provocatio ad populum). The appeal to a colleague, as in case of consuls, of course, no longer existed, as the dictator possessed the sole authority. His word was law. The plan worked with success and the enemy was quickly overthrown and the effort to reëstablish the kingship abandoned. The Romans found this to be a good thing in time of great danger, and so long as citizens were animated solely by love of country, but later this constitutional scheme of centralization led to arbitrary despotism.

§ 54. Magister Equitum.

The dictator was provided with a lieutenant whom he was at liberty to choose, and who was styled the master of the horse (magister equitum), a military office which is thought to date back to the time of Romulus. This lieutenant headed the young nobles who composed the cavalry contingent and made up the knights of the new Servian classification. The dictator himself always went on foot, whether in the city or in the field, at the head of the infantry, preceded by his twenty-four lictors. This order of procedure would put the dictator specially in command of the plebeians, who furnished the greater part of the infantry.

[1] Ortolan, 100.

As soon as the danger which caused the appointment of a dictator had passed away and the people had an opportunity to consider their own condition, the struggle which had been rife between patrician and plebeian almost from the first year of the city was renewed.[1] Let us see how the case now stood. The political situation of the plebeians was by no means promising. It had changed little for the better during the brief period of the republic. The senate was composed solely of patricians. They had a monopoly of the religious offices, of the posts of consul, quæstor, dictator, and master of the horse. They alone held military command and ruled arbitrarily in the comitia centuriata and the comitia curiata; in the one by virtue of their wealth, in the other by reason of their race. Thus all the offices of the State from the consul to the lowest rank in the army were in the hands of the patricians. The conditions of private life were no better. The plebeians knew little or nothing of mercantile affairs or the practice of mechanical arts, there being little or no demand for such occupations at this time. They thus had no other resource open to them but agriculture on a very small scale. On the other hand they were subject to military service without any recompense, thus being compelled ofttimes to neglect the cultivation of their fields and the harvesting of their crops. If there came an unproductive harvest, the plebeian was compelled to borrow from his more fortunate patrician neighbor. In case he was unable to pay, by the process known as nexum he lost what little property he possessed as well as his liberty, and fell into a condition of servitude to his creditors. The Twelve Tables forbade his intermarriage with the patrician.

§ 55. Struggle between the Patricians and the Plebeians.

[1] Ortolan, 91–94.

He had no share in the conquered territory and could not take possession of the ager publicus, as did his wealthy patrician neighbors. Common necessity and common poverty and degradation taught their lesson at last; namely, common sympathy and a united effort toward bettering their condition. We have already stated that the revolution taught the plebeians the method of revolution. The first use to which they put this new knowledge was to retire en masse to Mons Aventinus beyond the Anio, in 494 B.C.

Tribuni Plebis.

This first secession of the plebeians had for an immediate result the remission of debts, the liberation of debtors, and, most of all, the creation of two magistrates, the plebeian tribunes (not tribunes of the people as is often stated). Tribunes already existed prior to the first secession, but their functions were economic, pertaining to land and taxation. The word and the office were of still older military origin. A compromise was brought about by which this office was changed in nature and given over to the plebeians.[1] The tribunes were henceforth chosen from among the plebeians, but, strange to say, they were at first nominated by the curiata, which was the most thoroughly patrician of all the assemblies. The functions of the tribunes were not at first initiative, nor did the office at first confer executive power, but it was solely protective. It was the province of the tribune to shelter the plebs from acts of violence or injustice. This protection was secured by what was termed their intercession (intercedere, intercessio) or their opposition; that is, the veto which they were empowered to pronounce upon the acts of the consuls, other magistrates, and even the decrees of the senate. At a later period they acquired executive power and the right of initiating action.

[1] Ortolan, *loc. cit.*

The rights mentioned were guaranteed to them by the comitia centuriata; they were sanctioned by the senate, and consecrated by religious ceremonies. The persons of the tribunes, the hill to which the plebeians had retired, the laws which secured these privileges, all became sacred objects: the hill took the name of the sacred mount (Mons Sacer); the laws, that of sacred laws (leges sacræ); the person of the tribune was inviolable (sacro-sancta); and the head of him who should attempt the life of a tribune was forfeited to Jupiter (caput Jovi sacrum), and his family sold into slavery in aid of the sacrifices to Ceres. The power of the tribune at no time extended farther than the first milestone from the city. Thus it was powerless against the military imperium; that is, against the authority of the dictator or the consul beyond the limits mentioned. The doors of the houses of the tribunes stood open day and night to afford unimpeded access to the plebeians who required their aid. The chief limitation of their power lay in the right of mutual veto, as any one tribune could veto the order of a fellow tribune as well as that of a consul. The increase of their numbers increased the chances of patrician control, as it made bribery practical. In 494, two tribunes were appointed; in 471, the number was raised to five, and, in 457, to ten.

Tribuni.

At the same time that the tribunes were first elected two ædiles were also appointed as their assistants.[1] These corresponded in a way to the quæstors of the consuls. The ædiles had charge of the details of police administration, thus arresting offenders and bringing them before the plebeian tribunals. They also had under their care the protection of the temple where the resolutions of the tribes were

[1] Ortolan, *loc. cit.*

deposited (plebiscita). The persons of the ædiles were inviolable as well as those of the tribunes. They possessed inferior judicial power extending, as did that of the tribunes, to the imposition of fines. A great expansion of their authority took place in the later republic, and next to the tribunes they were the most influential of the officers of the republic.

Every year added to the difference between the patrician and plebeian, the rich and the poor; a difference which had now grown so great as to threaten seriously the very existence of the State. The most sagacious of all the plans which had been proposed to stop this evil was that set forth by Spurius Cassius, a noble patrician now acting as consul for the third [1] time. In the year 486 B.C., he submitted to the burgesses [2] a proposal to have the public land surveyed, that portion belonging to the populus set aside and the remainder divided among the plebeians or leased for the benefit [3] of the public treasury.

§ 56. Lex Cassia.

He thus attempted to wrest from the senate the control of the public land and, with the aid of the Latini and the plebeians, to put an end to the system of occupation.[4] The lands which he proposed to divide were solely those which the State had acquired through conquest since the general assignment by King Servius, and which it still retained.[5] This was the first measure by which it was proposed to disturb the possessors in their peaceful occupation of the State lands, and, according to Livy, such a measure had never been

[1] Dionysius, VIII, 68; "Οἱ δὲ παρα τούτων τὴν ὑπατειαν παραλαβόντες πόπλιος Οὐεργίνιος καὶ Σπύριος Κάσσιος, τὸ τρίτον τότε ἀπαδειχθεὶς ὕπατος, κ. τ. λ."

[2] Dionysius, VIII, 69; Livy, II, 41, *et seq.*

[3] Dionysius, VIII, 81.

[4] Dionysius, VIII, 69; Mommsen, I, 363

[5] Niebuhr, II, 166.

proposed from then to the time in which he was writing, under Augustus, without exciting the greatest disturbance.[1] Cassius might well suppose that his personal distinction and the equity and wisdom of the measure would carry it through, even amidst the storm of opposition to which it was subjected. Like many other reformers equally well meaning, he was mistaken.

The citizens who occupied this land had grown rich by reason of its possession. Some of them received it as an inheritance, and doubtless looked upon it as their property as much as the Ager Romanus. These to a man opposed the bill. The patricians arose en masse. The rich plebeians, the aristocracy of wealth, took part with them. Even the commons were dissatisfied because Spurius Cassius proposed in accordance with federal rights and equity to bestow a portion of the land upon the Latini and Hernici, their confederates and allies.[2] The bill proposed by Cassius, together with such provisions as were necessary, became a law, according to Niebuhr,[3] because the tribunes had no power to bring forward a law of any kind before the plebeian tribes obtained a vote in the legislature by the enactment of the Publilian law in 472 B.C.; so that when they afterwards made use of the agrarian law to excite the public passions it must have been one previously enacted but dishonestly set aside, and, in Dionysius's account, this is the form which the commotion occasioned by it takes.[4] Though this is doubtless

[1] Livy, II, 41; "Tum primum lex agraria promulgata est nunquam deinde usque ad hanc memoriam sine maximus motibus rerum agitata."

[2] Livy, II, 41; Dionysius, VIII, 69.

[3] Niebuhr, II.

[4] Dionysius, VIII, 81: "*ἐκκλήσιαί τε συνεγείς ὑπὸ τῶν τότε δημάρχων ἐγίνοντο καὶ ἀπαιτήσεις τῆς ὑποσχέσεως.*" See also VIII, 87, line 25 *et seq.*

true, yet the law, by reason of the combined opposition, became a dead letter, and the people who would have been most benefited by its enforcement joined with Cassius's enemies at the expiration of his term of office to condemn him to death. In this way does ignorance commonly reward its benefactors. This agitation, aroused by Cassius, stirred the Roman Commonwealth, now more than twenty years old, to its very foundations, but it had no immediate effect upon the ager publicus. The rich patrician, together with the few plebeians who had wealth enough to farm this land, still held undisputed possession. The poor plebeian still continued to shed his blood on the battle field to add to Roman territory, but no foot of it did he obtain. Wealth centralized. Pauperism increased.

§ 57. Agrarian Movements between 486 and 367 B.C.

Modern historians who have written upon the Roman Republic have, so far as I know, passed immediately from the consideration of the Lex Cassia to the law of Licinius Stolo. Meanwhile more than a century had passed away. Cassius died in 485 B.C., Licinius proposed his law in 376. During this century which had beheld the organization of the republic and the growth, by tardy processes, of the great plebeian body, many agrarian laws were proposed and numerous divisions of the public land took place. Both Dionysius and Livy mention them. The poor success of the proposition of Cassius and the evil consequences to himself in no way checked the zeal of the tribunes. Propositions of agrarian laws followed one another with wonderful rapidity. Livy enumerates these propositions, but almost wholly without detail and without comment upon their tendencies or points of difference from one another or from the law of Cassius. As this law failed of its object by being dis-

regarded, we may safely conclude that the most of these propositions were but a reproduction of the law of Cassius.

In 484 B.C., and again in 483, the tribunes proposed agrarian laws, but what their nature was, Livy, who records them, does not tell us. From some vague assertions which he makes we may conclude that the point of the law was well known, and was but a repetition of that of Cassius.[1] The consul, Cæso Fabius, in 484, and his brother Marcus in the following year, secured the opposition of the senate and succeeded in defeating their laws.

Livy[2] mentions very briefly a new proposition brought forward by Spurius Licinius in 482. Here we are able to complete his account by reference to Dionysius,[3] who says that, in 483, a tribune named Caius Mænius proposed an agrarian law and declared that he would oppose every levy of troops until the senate should execute the law ordaining the creation of decemvirs to determine the boundaries of the domain land. He, in fine, did forbid the enrollment of citizens, but the senate was able through the consuls, Marcus Fabius and Valerius, the former colleague of Cassius, to invent a means of avoiding this difficulty. The authority of the tribunes, by the old Roman law,[4] did not reach without the walls of the city, while that of the consuls was everywhere equal and only bounded by the limits of the Roman world. They moved their curule chairs and other insignia of their authority without the city walls and proceeded with the enrollment. All who refused to enroll were treated as enemies[5] of the republic. Those who were proprietors had

[1] "Solicitati, eo anno, sunt dulcedine agrariae legis animi plebis, . . . vana lex vanique legis auctores." Livy, II, 42.

[2] Livy, II, 42.

[3] Dionysius, VIII, 606, 607.

[4] Livy, *loc. cit.*; Dionysius, *loc. cit.*

[5] Dionys., VIII, 554.

their property confiscated, their trees cut down, and their houses burned. Those who were merely farmers saw themselves bereft of their farm implements, their oxen, and all things necessary for the cultivation of the soil. The resistance of the tribunes was powerless against this systematic oppression on the part of the patricians; the agrarian [1] law failed and the enrollment progressed.

There is some difficulty in determining the facts of the law proposed by Spurius Licinius [2] of which Livy speaks. Dionysius calls this tribune, not Licinius but Σπύριος Σικίλιος. The Latin translation of Dionysius has the name Icilius, and this has been the name adopted by Sigonius and other historians. Livy tells us that the Icilian family was at all times hostile to the patricians and mentions many tribunes by this name who were stanch defenders of the commons. In accepting this correction, therefore, it is not necessary to confound this Icilius with the one who proposed the partition of the Aventine among the plebeians. Icilius, according to both Livy and Dionysius,[3] made the same demand as the previous tribunes, *i.e.*, that the decemvirs should be nominated for the survey and distribution of the domain lands, according to previous enactment. He further declared that he would oppose every decree of the senate, either for war or the administration of the interior, until the adoption and execution of his measures. Again the senate avoided the difficulty and escaped, by a trick, the execution of the law. Appius Claudius, according to Dionysius,[4] advised the senate to search within the tribunate for a remedy against itself,

[1] Dionys., VIII, 555.
[2] Val. Max., Fg. of Bk. X: "Spurii, patre incerto geniti."
[3] Livy, *loc. cit.*; Dionys., *loc. cit.*
[4] Dionys., IX, 558; Livy, II, 43.

and to bribe a number of the colleagues of Icilius to oppose his measure. This political perfidy was adopted by the senate with the desired effect. Icilius persisted in his proposition and declared he would rather see the Etruscans masters of Rome than to suffer for a longer time the usurpation of the domain lands on the part of the possessors.[1]

This somewhat circumstantial account has revealed to us that at this time it took a majority of the tribunes to veto an act of their colleague. At the time of the Gracchi the veto of a single tribune was sufficient to hinder the passage of a law, and Tiberius was for a long time thus checked by his colleague, Octavius. Then the tribunician college consisted of ten members, and it would be no very difficult thing to detach one of the number either by corruption or jealousy. But it is evident that, at the time we are considering, it took a majority of the tribunes to veto an act of a colleague; moreover, the college consisted of five members. This latter fact is seen in the statement of Livy,[2] when he mentions the opposition which four of the tribunes offered to their colleague, Pontificius, in 480 B.C. In this same case he attributes to Appius Claudius the conduct which Dionysius attributed to him in the previous year. But he causes Appius to state, in his speech favoring the corruption of certain tribunes, "that the veto of one tribune would be sufficient to defeat all the others."[3] This is contrary to the statement of Dionysius[4] and would seem improbable, for, if the opposition of one tribune was sufficient, the patricians would not

[1] Dionys., IX, 559–560; "*τοὺς κατέγοντος τὴν χώραν τὴν δεροσίαν . . .*" "*Καὶ Σικίλιος οὐδενὸς ἔτι κύριος ἦν.*"

[2] Livy, *loc. cit.*

[3] Livy, II, 44: "Et unum vel adversus omnes satis esse . . . quatuorque tribunorum adversus unum."

[4] Dionys., IX, 562.

have deemed it necessary to purchase four. That would have been contrary to political methods.

Of the two propositions of the tribunes, Icilius, in 482 B.C., and Pontificius, in 480 B.C. the results were the same. The opposition of their colleagues defeated them. But this persistent opposition rather than crushing seemed to stir up renewed attacks. We have seen the tribunes, Mænius, Icilius, and Pontificius, successively fail. The next movement was led by a member of the aristocracy, Fabius Cæso,[1] consul for the third time in 477 B.C. He undertook to remove from the hands of the tribunes the terrible arm of agrarian agitation which they wielded constantly against the patricians, by causing the patricians themselves to distribute the domain lands equally among the plebeians, saying; "that those[2] persons ought to have the lands by whose blood and sweat they had been gained." His proposition was rejected with scorn by the patricians, and this attempt at reconciliation failed, as all the attempts of the tribunes had. The war with Veii which, according to Livy, now took place, hindered for a while any agrarian movements; but, in 474, the tribunes Gaius Considius and Titus Genucius made a fruitless attempt at distribution, and, in 472, Dionysius speaks of a bill brought forward by Cn. Genucius which is probably the same bill.

In 468, the two consuls, Valerius and Æmilius, faithfully supported the tribunes in their demand[3] for an agrarian law. The latter seems to have supported the tribunes because he was angry that the senate had refused to his father

[1] Livy, *loc. cit.*; Dionys., *loc. cit.*

[2] Livy, II, 48: "Captivum agrum plebi, quam maxime æqualiter darent. Verum esse habere eos quorum sanguine ac sudore partus sit. Aspernati Patres sunt."

[3] Livy, II, 61, 63, 64.

the honor of a triumph; Valerius, because he wished to conciliate the people for having taken part in the condemnation of Cassius.

Dionysius, according to his custom, takes advantage of the occasion to write several long speeches here, and one of them is valuable to us. He causes the father of Æmilius to set forth in a formal speech the true character of the agrarian laws and the right of the State again to assume the lands which had been taken possession of. He further says; "that it is a wise policy[1] to proceed to the division of the lands in order to diminish the constantly increasing number of the poor, to insure a far greater number of citizens for the defense of the country, to encourage marriages, and, in consequence, to increase the number of children and defenders of the republic." We see in this speech the real purpose, the germ, of all the ideas which Licinius Stolo, the Gracchi, and even Cæsar, strove to carry out. But the Roman aristocracy was too blind to comprehend these words of wisdom. All these propositions were either defeated or eluded.

In the year 454 B.C.,[2] Lucius Icilius, one of the tribunes for that year, brought forward a bill that the Aventine hill should be conveyed to the plebeians as their personal and especial property.[3] This hill had been the earliest home of the plebeians, yet thay had been surrounded by the lots and fields of the patricians. That part

§ 58. Lex Icilia.

[1] Dionys., IX, 606, 607; Livy, III, 1. The authorities are somewhat conflicting at this point, and I have followed the account of Dionysius.

[2] Schwegler, Römische Geschichte, II, 484; Dionys., X, 31, p. 657, 43.

[3] Dionys., X, 31, 1. 13; Ihne, Hist. of Rome, I, 191, note; Lange, Röm. Alter., I, 619. Also see art. in Smith's Dict. of Antiquities.

of the hill which was still in their possession was now demanded for the plebeians. It was a small thing for the higher order to yield this much, as the Aventine stood beyond the Pomœrium,[1] the hallowed boundary of the city, and, at best, could not have had an area of more than one fourth of a square mile, and this chiefly woodland. The consuls, accordingly, made no hesitation about presenting the bill to the senate before whom Icilius was admitted to speak in its behalf. The bill was accepted by the senate and afterwards confirmed by the centuries.[2] The law provided: "that all the ground which has been justly acquired by any persons shall continue in the possession of the owners, but that such part of it as may have been usurped by force or fraud by any persons and built upon, shall be given to the people; those persons being repaid the expenses of such buildings by the estimation of umpires to be appointed for that purpose, and that all the rest of the ground belonging to the public, be divided among the people, they paying no consideration for the same."[3] When this was done the plebeians took possession of the hill with solemn ceremonies. This hill did not furnish homes for all the plebeians, as some have held; nor, indeed, did they wish to leave their present settlements in town or country to remove to the Aventine. Plebeians were already established in almost all parts of the city and held, as vassals of the patricians, considerable portions of Roman territory. This little hill could never have furnished[4] homes of any sort to the whole plebeian population. What it did do was to furnish to the plebeians

[1] *I.e.*, outside of the "quadrata" but Ἐμπεριεχόμενος τῇ πόλει, Dionysius, X, 31, l. 18: "pontificale pomœrium, qui auspicato olim quidem omnem urbem ambiebat præter Aventinum." Paul. ex Fest., p. 248, Mull.

[2] Dionys., X, 32. [3] Dionys., X, 32. [4] Momm., I, 355.

a trysting place in time of strife with their patrician neighbors, where they could meet, apart and secure from interruption, to devise means for resisting the encroachments of the patricians and further to establish their rights as Roman citizens. Thus a step toward their complete emancipation was taken. For a moment the people were soothed and satisfied by their success, but soon they began to clamor for more complete, more radical, more general laws. An attempt seems to have been made in 453 B.C. to extend the application of the lex Icilia to the ager publicus,[1] in general, but nothing came of it. In 440 B.C. the tribune, Petilius, proposed an agrarian law. What its conditions were Livy has not informed us, but has contented himself with saying that "Petilius made a useless attempt to bring before the senate a law for the division of the domain lands."[2] The consuls strenuously opposed him and his effort came to naught.

[1] Dionys., X, 34.

[2] Livy, IV, 12: "Neque ut de agris dividendis plebi referrent consules ad senatum potuit. . . . Ludibrioque erant minae tribuni."

CHAPTER V

THE TWELVE TABLES[1]

§ 59. Origin.

CICERO says that the later kings generally regarded the plebeians as in a manner royal clients and were careful that justice should be done them in their private relations. This was a matter of good policy on their part, as the plebeians made up the mass of the population and sooner or later would force recognition of their rights. When the republic was established the royal laws were generally disregarded, and the consuls were too busy with the military affairs of the nation to listen to complaints coming from the oppressed and poverty stricken plebs. The yearly changes in the magistracy made it all the more difficult to obtain any uniformity either of rule or practice so long as the law rested upon nothing more stable than unwritten custom, and few people knew what that custom was. "The constant clash of coördinate jurisdictions," says Hunter, "and the constant operation of acrid political bias, corrupted and reduced to miserable uncertainty the administration of the law. It was useless for the plebeians to possess special officers for their legal protection, if the interference of the tribunes could be thwarted by the opportune production of a forgotten or wholly unknown law by the representatives of the patricians. Such written laws as existed, and the law of custom which was chiefly followed in legal proceedings,

[1] Sohm, 24–27; Muirhead, 86–100, 434–443; Ortolan, 112–142; Botsford, 30, 233, 239–245; Hunter, 15–28.

were guarded by the patricians with intense jealousy and with the cloak of religious mystery from the plebeians. This was no longer to be endured. The efforts of the plebeians were therefore directed mainly to two things; to secure publicity and equal laws for all classes (Livy, III, 31). And with this object in view, they demanded that the pristine laws of the republic should be reduced to writing and promulgated."

The first step taken for the carrying out of this reform was made by one of the tribunes, C. Terentilius Arsa, who, in 462 B.C., demanded that a commission of five plebeians be appointed to draw up laws defining and regulating the arbitrary powers of the consuls.[1] This was resisted by the patricians, and Terentilius was persuaded to withdraw his bill and cease his agitation for a time. In 457 the number of the tribunes was increased from five to ten and, in 456, some land was given the plebs to turn their minds from the question at issue. In 454 the consuls themselves proposed a bill limiting the amount of fines that they should have the right to impose. This was passed by the centuriata. Still the issue could not be dodged nor longer delayed, and, in 452 B.C., a bill was carried sanctioning the appointment of ten commissioners for one year with sole and supreme power, for the purpose of compiling a complete code of laws.

In the meantime it would appear that three ambassadors had been sent to the Greek colonies and settlements in southern Italy to make a study of their statute law and to collect such materials as would be useful in preparing the contemplated code.

The commission of decemviri legibus scribundis, patricians with consular power, took office in 451 B.C. under the presi-

[1] Ortolan, 114.

dency of Appius Claudius. The regular magistrates retired and laid down their authority, while each decemvir administered the government for a single day. They drew up, with the aid of the material and knowledge gained by the ambassadors, and the assistance of a Greek exile, Herodorus, a body of laws which was approved by the senate and the comitia centuriata and immediately set forth in public on ten tables of wood. The work of the commission was not completed and was reëstablished the following year with some change in its membership; five plebeians probably receiving seats in that body. However, the laws which were prepared by the decemvirs the second year were for some unknown reason rejected, and the consular system of government was again resumed in 449 B.C. The consuls of this year, Valerius and Horatius, immediately drew up two tables of laws which were passed and published. The ten sections of the decemviral laws and the two sections of the consular laws constitute, when taken together, the famous laws of the Twelve Tables (Lex XII Tabularum). They form a collection of the earliest known laws of the Roman people and are the foundation of the whole fabric of Roman law.

"There were provisions in the Tables that were almost literal renderings from the legislation of Solon; this is so stated, with reference to particular enactments, by both Cicero and Gaius. Others again bore a remarkable correspondence to laws in observance in Greece, such as the provision that the conveyance following on a sale should not carry the right of property until the price had been paid or security given for it to the seller, and the rules about theft discovered with loin-cloth and platter (furtum linteo et lance conceptum), but which there is no authority for saying

were directly borrowed." It is certain, however, that by far the greater portion of the laws was native and original, being but a codification of the customary law in vogue for centuries. Cicero speaks in terms of highest praise of them and Livy calls them "the fountain of the whole law both public and private," and yet they are in many instances both rude and barbarous, revealing the fact that the Roman people, at the time of their enactment, were but half civilized; in pretty much the same condition as were the Jews at the time of the enactment or codification of Deuteronomy.

"Such was the origin," says Ortolan,[1] "of this primitive monument of Roman jurisprudence, called for distinction 'The Law,' Lex (Leges XII Tabularum, Lex Decemviralis). As a carmen necessarium it was the custom to make children commit it to memory, for imagination was sometimes fertile enough to enable people to believe that they could recognize a poetical character in its clauses. These laws, which survived so many ages of Roman history, and even outlived the republic itself, were held in such respect that the slightest alteration was never permitted."

The task that the decemvirs had to perform was to equalize the law for all and to remove every cause of arbitrary dealing and legal oppression on the part of the patri- § 60. Sources.
cians by means of distinct specification of penalties and precise declaration of the circumstances under which rights should be held to have arisen or been lost, and to make such amendments as were necessary to meet the complaints of the plebeians and prevent their oppression in the name of justice. Those portions of the common law that were, by their nature, universally known, were omitted. This is

[1] Ortolan, 113.

why the leges regiæ form so little part of the Twelve Tables, and the enactments of the early republic have been passed by in silence. They gave their attention only to the more obscure portions and the technical machinery of the law that had been the exclusive appanage of the patriciate.[1]

§ 61. Remains and Reconstruction.

We are told that the original laws of the Twelve Tables were destroyed when Rome was sacked and burned by the Goths. If so, they were, no doubt, quickly reproduced from memory and copies of them multiplied, as Cicero says that when he was a youth the children were required to commit them to memory as an ordinary school task. This fact renders it all the more extraordinary that the remains of them are so scattered and fragmentary. All we know of them have been collected from different authors throughout whose pages they are scattered, and the genuineness of these portions are in many cases debatable. The Twelve Tables were embodied in the Tripertita of Sextus Ælius, consul in 558 A.U.C., and formed the basis of all the writings on the jus civile to the time of Servius Sulpicius Rufus at the beginning of the eighth century A.U.C., when the prætor's edicts were used as a text. Labeo, in the early days of the empire, and Gaius, in the time of Antoninus Pius, made them the subject of monographs, and yet despite all this some two score of these laws are all that can be found. Further, the order of their arrangement is very largely a matter of presumption. Cicero tells us that the first table contained the invocatio in jus; that the tenth treated of religious ceremonies and funeral rites, and that either the eleventh or the twelfth prohibited intermarriage between patricians and plebeians. Dionysius indicates the existence in the fourth

[1] Muirhead, 95.

of the permission of a father to sell his children. With these definite indications, and aided by hints found in Gaius and the Digest, we are able to arrive at the probable order of the subject of each table.

With these fragments, few in number and somewhat doubtful in content, scholars have undertaken from time to time the reconstruction of the Twelve Tables.[1] In this task they have relied for the most part upon the guidance of Gaius's commentary on the decemviral code and the consolidation of the prætorian edict of Julian. The commentary of Gaius is arranged in six books; he is supposed to have followed the order of his text of the Twelve Tables and to have written one book of commentary for every two tables. These commentaries of Gaius exist only in excerpts from them in the Digest and do not furnish evidence sufficient in themselves to warrant any definite conclusion. The compilers of Justinian's Digest and Code are supposed to have followed the order of the Edictum Perpetuum of Salvius Julianus, while the latter is supposed to have followed that of the Twelve Tables. Thus by a second step we get back to the decemviral laws. The latest and perhaps the ablest of all the scholars who have attempted this reconstruction is Voigt. He concludes that the jus civile of Sabinus, together with the commentaries on the same, formed a trustworthy guide to the order of the Twelve Tables. After commenting on the work of the various editors, Muirhead says in conclusion; "It is safer, therefore, when referring to a provision of the Tables, to quote the ancient writer on whose authority it is said to have been contained in them, without specifying either table or law. For after all, the sequence is of little importance, and is throughout purely conjectural."

[1] Muirhead, 96–100.

We may safely admit that the course of Roman law was strongly influenced by the principal arrangement of the Twelve Tables. In fact, to the close of its history, compositors used language which implied that the body of their system rested on the Tables, and therefore rested on a basis of written law. Among the chief advantages which the Twelve Tables, and similar codes, conferred upon societies obtaining them was the protection afforded against fraud on the part of the principal classes or oligarchy, and the consequent debasement of the national institutions. The Twelve Tables are but a written account of laws already in existence.

TABLE I. PROCEEDINGS PRELIMINARY TO TRIAL

1. If the complainant summon the defendant before the magistrate, he shall go; if he do not go, the plaintiff may take a bystander to witness, and take him by force.

§ 62. The Tables.

2. If the defendant attempt evasion or flight, the complainant may lay hands upon him.

3. If the defendant be prevented by sickness or old age, the complainant shall provide a conveyance; but he need not provide a covered carriage, unless he choose.

4. A freeholder (or taxpayer, or man whose fortune is valued at not less than 1500 asses) shall find a freeholder (or taxpayer) as vindex or surety (for his appearance at trial); a proletary (or man of less fortune) shall find such surety as he can.

5. Where the parties agree (as to preliminaries), the plaintiff shall open his case at once. (Otherwise: Where the parties come to terms, let the matter be settled.)

6. If the parties do not agree, the plaintiff shall state his case in the comitium or in the forum before midday. Let both parties appear, and argue out the matter together.

7. If one of the parties has not appeared by midday, the magistrate shall then give judgment in favor of the party that has appeared.

8. If both have appeared, at sunset the court shall rise.

9. Both parties shall enter into recognizances for their reappearence (vades, subvades).

TABLE II. THE TRIAL

1. The amount of the stake to be deposited by each litigant shall be either 500 asses or 50 asses; 500 when the subject of dispute is valued at 1000 or upwards, 50 when at less than 1000. But when the subject of dispute is the freedom of a man, then, however valuable the man may be, the deposit shall be only 50 asses.

2. A dangerous illness, or a day appointed for the hearing of a cause in which an alien is a party. . . . If any one of these circumstances occur to a judex or to an arbiter, or to a party, the cause shall be adjourned.

3. A party that is in want of a witness, shall go and cry aloud at the door of his house, thus summoning him to attend on the third market day following.

4. Theft may be the subject of compromise.

TABLE III. EXECUTION

1. In the case of an admitted debt or of awards made by judgment, 30 days shall be allowed for payment.

2. In default of payment, after these 30 days of grace have elapsed, the debtor may be arrested (or proceeded

against by the action of manus injectio), and brought before the magistrate.

3. Unless the debtor discharge the debt, or some one come forward in court to guarantee payment, the creditor may take the debtor away with him, and bind him with thongs or with fetters, the weight of which shall not be more (but, if the creditor choose, may be less) than 15 pounds.

4. The debtor may, if he choose, live on his own means. Otherwise the creditor that has him in bonds shall give him a pound of bread a day, or, if he choose, more.

5. In default of settlement of the claim, the debtor may be kept in bonds for 60 days. In the course of this period he shall be brought before the prætor in the comitium on three successive market days, and the amount of the debt shall be publicly declared. After the third market day the debtor may be punished with death or sold beyond the Tiber.

6. After the third market day the creditors may cut their several portions of his body; and any one that cuts more or less than his just share shall be held guiltless.

TABLE IV. PATRIA POTESTAS

1. Monstrous or deformed offspring may be put to death.

2. The father shall, during his whole life, have absolute power over his legitimate children. He may imprison the son, or scourge him, or keep him working in the fields in fetters, or put him to death, even if the son held the highest offices of State, and were celebrated for his public services. He may also sell the son.

3. But if the father sell the son a third time, the son shall be free from his father.

4. A child born within ten months of the death of the mother's husband shall be held legitimate.

TABLE V. INHERITANCE AND TUTELAGE

1. All women shall be under the authority of a guardian; but the vestal virgins are free from tutelage.

2. The mancipable things belonging to a woman that is under the tutelage of her agnates are not subject to usucapion, unless she herself deliver possession of them with the authority of her tutor.

3. The provision of the will of a paterfamilias concerning his property and the tutelage of his family shall be law.

4. If the paterfamilias die intestate and without suus heres, his nearest agnate shall succeed.

5. Failing an agnate, the gentiles shall succeed.

6. In default of a testamentary tutor, the male agnates shall be tutors by operation of law.

7. If a man cannot control his actions, or is prodigal, his person and his property shall be under the power of his agnates, and, in default of these, of his gentiles . . . if he has no curator.

8. If a freedman die intestate, and without suus heres, his patron shall succeed.

9. Debts due to or by a deceased person are divided among his co-successors, by mere operation of law, in proportion to their shares in the inheritance.

10. The rest of the succession is divided among the co-successors by the action familiæ erciscundæ.

11. A slave freed by will, upon condition of giving a certain sum to the heir, may, in the event of being alienated by the heir, obtain his freedom by payment of this sum to the alienee.

TABLE VI. OWNERSHIP AND POSSESSION

1. The legal effect of every contract, and of every conveyance (made with the money and the scales) shall rest upon the declarations made in the transaction.

2. Any one that refuses to stand by such declarations shall pay a penalty of double damages.

3. A prescriptive title is acquired after two years' possession in the case of realty; after one year's possession in the case of other property.

4. If a wife (not married by confarreatio or coemptio) wishes to avoid subjection to the hand of her husband by usucapion, she shall absent herself for a space of three nights in each year from his house, and thus break the usus of each year.

5. No length of possession by an alien can vest in him a title to property as against a Roman citizen.

6. In the case where the parties plead by joining their hands on the disputed property, in the presence of the magistrate (the actual possessor shall retain possession; but, when it is a question of personal freedom), the magistrate shall award provisional possession in favor of liberty (that is, in favor of the party that asserts the man's freedom).

7. If a man finds that his timber has been used by another in building a house, or for the support of vines, he shall not remove it.

8. But he shall have a right of action against the other for double its value.

9. Between the first pruning and the vintage (the owner may not recover the timber by vindicatio?). (Otherwise: And when they become separated, then they may be claimed by the owner.)

10. Things sold and delivered shall not become the property of the vendee until he has paid or otherwise satisfied the vendor.

11. Conveyance by bronze and scales (mancipatio), and surrender in court (in jure cessio) are confirmed.

TABLE VII. REAL PROPERTY LAW

1. A clear space of two feet and a half shall be left around every house. (That is to say, every two houses must stand at least five feet apart.)

2. Boundaries shall be regulated (according to the commentary of Gaius) by the provisions of Solon's Athenian code: (if a man plants a fence between his own land and his neighbor's, he shall not go beyond the boundary line; if he builds a wall, he must leave a foot of space; if a house, two feet; if he digs a ditch or a trench, he must leave a space equal in breadth to the depth of the ditch or trench; if a well, six feet; and olives and fig trees may not be planted within nine feet of a neighbor's land, nor other trees within five feet).

3. Conditions relating to villas, farms, and country cottages.

4. A space of five feet between adjoining lands shall not be liable to usucapion.

5. For the settlement of disputes as to boundaries, three arbiters shall be appointed.

6. The breadth of road over which there is right of way is eight feet in the straight, and sixteen feet at the bends.

7. The neighboring proprietors shall make the road passable; but if it be impassable, one may drive one's beast or vehicle across the land wherever one chooses.

8. If one's property is threatened with damage from rain-water that has been artificially diverted from its natural channels, the owner may bring an action aquæ pluviæ arcendæ, and exact compensation for any damage his property may sustain.

9. The branches of trees that overshadow adjoining land shall be lopped to a height of fifteen feet from the ground.

10. Fruit that falls from one's trees upon a neighbor's land may be collected by the owner of the tree.

TABLE VIII. TORTS

1. Whoever shall publish a libel — that is to say, shall write verses imputing crime or immorality to any one — shall be beaten to death with clubs.

2. If a man break another's limb, and do not compromise the injury, he shall be liable to retaliation.

3. For breaking the bone of a freeman, the penalty shall be 300 asses; of a slave, 150 asses.

4. For personal injury or affront, 25 asses.

5. (Accidental) damage must be compensated.[1] This provision was followed up by the Lex Aquilia.

6. A quadruped that has done damage on a neighbor's land, shall be given up to the aggrieved party, unless the owner of it make compensation.

7. He that pastures his animals on a neighbor's land is liable to an action.

8. A man shall not remove his neighbor's crops to another field by incantation, nor conjure away his corn.

9. For a person of the age of puberty to depasture or cut

[1] On the whole of this subject see Sell, Die Actio de rupitiis der XII. Tafeln.

down a neighbor's crop by stealth in the night, shall be a capital crime, the culprit to be devoted to Ceres and hanged; but if the culprit be under the age of puberty, he shall be scourged at the discretion of the magistrate, and be condemned to pay double the value of the damage done.

10. If a man willfully set fire to a house, or to a stack of corn set up near a house, he shall be bound, scourged, and burned alive; if the fire rose through accident, that is, through negligence, he shall make compensation, and, if too poor, he shall undergo a moderate punishment.

11. If a man wrongfully fell his neighbor's trees, he shall pay a penalty of 25 asses in respect of each tree.

12. A person committing theft in the night may lawfully be killed.

13. But in the daytime a thief may not be killed, unless he defend himself with a weapon.

14. If theft be committed in the daytime, and if the thief be taken in the fact, and do not defend himself with a weapon, then, if a freeman, he shall be scourged and adjudged as a bondsman to the person robbed; if a slave, he shall be scourged and hurled from the Tarpeian rock. A boy under puberty shall be scourged at the discretion of the prætor, and made to compensate for the theft.

15. A person that searches for stolen property on the premises of another, without the latter's consent, shall search naked, wearing nothing but a girdle, and holding a plate in his hands; and if any stolen property is thus discovered, the person in possession of it shall be held as a thief taken in the fact. When stolen property is searched for by a consent in the presence of witnesses (without the girdle and plate), and found in a person's possession, the owner can recover by action of furti concepti against the person on whose

premises it is found, and the latter can recover by action furti oblati against the person who brought it on his premises, three times the value of the thing stolen.

16. For theft not discovered in commission, the penalty is double the value of the property stolen.

17. Title to property in stolen goods cannot be acquired by prescription.

18. A usurer exacting higher interest than the legal rate of ten per cent per annum is liable to fourfold damages.

19. A fraudulent bailee shall pay double the value of the deposit.

20. Any citizen may bring an action for the removal of a tutor suspected of maladministration, and the penalty shall be double the value of the property stolen.

21. A patron that wrongs his client shall be devoted to the infernal gods.

22. If any one that has consented to be a witness, or has acted as scale-bearer (in mancipation), refuses to give his evidence, he shall be infamous and incapable of giving evidence, or of having evidence given on his behalf.

23. False witnesses shall be hurled from the Tarpeian rock.

24. If one kill another accidentally, he shall atone for the deed by providing a ram to be sacrificed in place of him.

25. For practicing incantations or administering poisonous drugs (the penalty shall be death).

26. Seditious gatherings in the city during the night are forbidden.

27. Associations (or clubs) may adopt whatever rules they please, provided such rules be not inconsistent with public law.

TABLE IX. PUBLIC LAW

1. No laws shall be proposed affecting individuals only.

2. The assembly of the centuries alone may pass laws affecting the caput of a citizen.

3. A judex or arbiter, appointed by the magistrate to decide a case, if guilty of accepting a bribe, shall be punished with death.

4. Provisions relating to the quæstors (or court appointed for the investigation of cases) of homicide. — There shall be a right of appeal from every decision of a judex (judicium), and from every penal sentence (pœna).

5. Whoever stirs up an enemy against the State, or betrays a citizen to an enemy, shall be punished capitally.

6. No one shall be put to death, except after formal trial and sentence.

TABLE X. SACRED LAW

1. A dead body shall not be buried or burnt within the city.

2. More than this shall not be done. The wood of the funeral pile shall not be smoothed with the ax.

3. Not more than three mourners wearing ricinia, one wearing a small tunic of purple, and ten flute-players may attend the funeral.

4. Women shall not tear their cheeks, nor indulge in wailing.

5. The bones of a dead person shall not be preserved for later burial, unless he die in battle or in a foreign country.

6. Regulations regarding (prohibiting?) unction, drinking (banquets), expensive libations (of wine perfumed with myrrh), chaplets, and incense boxes.

7. But if the deceased has gained a chaplet, by the achievements either of himself or of his slaves or his horses, he or

his parents may legitimately wear such, in virtue of his honor and valor (while the corpse is lying within the house or is being borne to the sepulcher).

8. No person shall have more than one funeral, or more than one bier.

9. Gold shall not be burned or buried with the corpse, except such gold as the teeth have been fastened with.

10. A funeral pile or sepulcher for burning a corpse shall not be erected within sixty feet of another man's house, except with his consent.

11. Neither a sepulcher for burning nor its vestibule can be acquired by usucapion.

TABLE XI. SUPPLEMENTARY

1. Patricians shall not intermarry with plebeians.

TABLE XII. SUPPLEMENTARY

1. An action of distress shall lie, on default of payment, against the purchaser of a victim, and also against the hirer of a beast of burden that has been lent for the purpose of raising money to spend on a sacrifice.

2. If a slave commit a theft, or do any other injury, the master may, as an alternative to paying the damages assessed, surrender the delinquent.

3. If any one wrongfully obtain possession of a thing that is the subject of litigation, the magistrate shall appoint three arbiters to decide the ownership; and, on their adverse decision, the fraudulent possessor shall pay as compensation double the value of the temporary possession of the thing in question.

4. A thing whose ownership is the subject of litigation

shall not be consecrated to religious purposes, under a penalty of double its value.

5. The most recent law repeals all previous laws that are inconsistent with it.

§ 63. Character of the Twelve Tables.

The law of the Twelve Tables is, as has peen previously stated, a compilation in writing of the more important portions of the customary law in use at the time.[1] Familiar details are omitted and principles emphasized. It is this fact that has caused these laws to be regarded by the Romans as the basis of their civil rights. The early law of Rome was, like the early law of every nation, personal and not territorial. A man enjoyed the benefits of its institutions and of its protection, because he was a Roman citizen and not because he was within Roman territory. All rights, connubium, commercium, and actio, flowed from citizenship, and under the jus civile, belonged to no other save Roman citizens. Connubium was the capacity to enter into a marriage which would be productive of the patria potestas and agnation of Roman law. Dependent upon these latter was intestate succession of sui heredes and agnates and of the tutories and curatories claimable by the agnates of the clansmen. Commercium was the capacity of acquiring or alienating property by civil methods unconnected with connubium, such as mancipation, cession in court, or usucapion, and of becoming a party to an obligation by any civil contract, such as nexum. Actio was the capacity for being a party to a legis actio or legal action clothed in the forms of the jus civile and used for vindication, protection, or enforcement of a right either included in or flowing from connubium

Citizens.

[1] Ortolan, *loc. cit.*

or commercium, or which was conferred by a statute that embraced none but citizens in its intent. Non-citizens may have enjoyed some or all of these rights, but only by reason of treaties or special enactments.

In addition to citizenship and the laws pertaining thereto, the law of the Twelve Tables treats of gentility and gentile relations. These were greatly affected by the main purpose of the Twelve Tables, which was to give equal rights to all citizens whether they happened to be members of a gentile association or not. Some clan customs were not in conflict with the common law and were left undisturbed, the clan occupying the position of a corporation under the law. Clans still possessed the right to make laws or regulations affecting no one but themselves; to hold common property; to discipline their members; to forbid the marriage of a female member with a man belonging to another gentile house; in fine, to carry out all customs that affected patricians alone. But there were many old clan customs that necessarily ran counter to the new order of equality before the law of patricians and plebeians, and these had to give way. For instance, the old-time gens control of clients passed to the ordinary civil magistrates, as they were now citizens and entitled to equal rights with their fellows.

Gens.

It does not appear that the family was affected in any material way by the Twelve Tables. All forms of marriage recognized by them were doubtless in use before their publication, and even the limitation upon usus (trinoctium) by which the wife escaped being subject to her husband, was in operation some time before the decemviral legislation.

Cicero makes a vague allusion to a provision in the Twelve Tables touching divorce, whereby the husband simply deprives his wife of the house keys, and turning her out of

doors, formally dismisses her with the words, "Take thy goods and get thee gone." But there is no evidence to show that this method of divorce was not in vogue at an earlier time. Moreover, divorce must have been very rare, especially by this summary method, as a marriage by confarreatio could be severed only by diffarreatio and a marriage by coemptio could be dissolved only by the legal process known as remancipation.

Family.

In connection with the law of parent and child, the first thing to be noticed is touching the legal status of a child born after the death of the father. The Twelve Tables declared that the birth must be within ten months after the alleged father's death, that being the longest possible period of gestation. A few fragments refer to the patria potestas and apparently raised the question as to whether children born of an informal marriage were under the potestas of their father. The decision of this question seems to have been that such children were in the same position touching potestas as if they had been born of a confarreatic or coemptionate marriage.

An interesting question has also arisen in connection with patria potestas from the statement in the Twelve Tables; "si pater (familias) ter filium venum duuit, a patre filius liber esto." What did this mean? Was it a law in favor of a son and indicating a way by which he could be freed from the potestas? This seems to be the original purpose of the law. "If a house-father have thrice sold his son, the latter shall be free from his father." It reads as if it were the intention of the law to relieve the son from a gross disregard on the part of the father of the laws of parental duty and affection. Muirhead[1] suggests a very plausible reason for this law.

[1] P. 92.

"May not its object," he says, "have been to restrain the practice, which prevailed to a late period in the empire, of men giving their children to their creditors in security for their loans — a process that, at the time of the Tables, could be effected only by an actual transfer of the child per æs et libram as a free bondsman (mancipii causa), under condition of reconveyance when the loan was retained?"

There was not a word spoken in the Tables concerning the question of adrogation of a paterfamilias, or adoption of a filius familias as a means of recruiting a family when natural issue had failed. Possibly prior to the time of the Tables there had taken place an adaptation of the conveyance per æs et libram in accordance with which the natural parent mancipated his child to a friend for a nominal price and the friend then remancipated to the parent. By repeating this process three times the child was no longer in potestate, but in mancipio; he was now in a position in which he could be transferred to the adopter and thus passed forever from the control of his natural parents.

The nature of the relation between master and slave, like that of manus and patria potestas, was passed by in the Tables, no doubt because it was deemed to be so well known as to need no comment or explanation.

There are some other topics mentioned or omitted in the Twelve Tables that are worthy of some note and comment, but these are left for discussion in a subsequent chapter.

§ 64. Roman Magistrates.

After the enactment of the Twelve Tables, as before, the law was administered publicly in the forum by the magistrate (that is, in the early times of the republic, the consul or, as he was at first named, the prætor) and the judex or arbiter. A definition to the word magistratus is given by a celebrated Roman lawyer as

"qui jure dicendo præsunt," or those who have the charge of making the law. The king was originally the sole magistratus; he had all the potestas of the Roman State. Upon the expulsion of the kings, two consuls were annually appointed, and they were magistratus. In the course of time the powers of the consuls were differentiated and other magistratus were created, so that, toward the end of the republic we find the following list:—

(*a*) Consuls, two in number.
(*b*) Dictator, when necessary.
(*c*) Tribunes of the plebs, ten in number.
(*d*) Ædiles, six in number.
(*e*) Prætors, eighteen in number.
(*f*) Proprætors and proconsuls.
(*g*) Censors, two in number.
(*h*) Decemviri litibus judicandis.

Festus says that a magistratus is one who has "judicium auspiciumque." In this, however, must be distinguished some grade, as the auspicia maxima belonged to consuls, prætors, and censors only who were, therefore, called magistratus majores and were always, as we have seen, elected by the comitia centuriata. The other magistratus were called minores. This distinction was not wholly based upon the auspicia maxima, however, as there was a further mark of distinction in that the majores had imperium, while the minores had no such authority.

Functions of the Magistratus.

The functions of the magistratus may be broadly divided into two, command and veto power. These were generally vested in one man. Further than this the Romans classified all government under three heads; (1) potestas, (2) imperium, and (3) intercessio.

(1) Potestas was the general term for the power of doing anything.[1] When this was bestowed upon the magistratus it was called imperium, provided that officer was a major, otherwise it was not. Potestas conveyed the right of issuing edicts, of calling a popular assembly, and of taking the auspices, as well as that of magisterial interference, which latter must be considered as totally distinct from the veto power of the tribune.

(2) Imperium, or sovereignty, was historically connected with patria potestas, but could, unlike it, be unmade by the people who created it. It was personal, supreme, absolute power or authority over individuals, but not the absolute tyranny over the individual. It simply expressed the will power of the nation. Romans regarded all imperium of whatever sort to be divided into military and judicial. Both of these were vested in the king and, after his time, the consuls. Subsequently these were divided so that military imperium vested in the consuls, while judicial imperium vested in the censors and prætors. However, the consul still had judicial power outside the limits of the city of Rome, while the prætor sometimes had military power vested in him. Imperium belonged to no officers save those who had been invested with it.

(3) Intercessio was the peculiar power of the tribune, and was distinct from imperium in that it was merely the brake applied to imperial power.[2]

After the enactment of the Twelve Tables, as before, the law was administered publicly in the forum by the magistratus. It was before them that the vocatio in jus had to take place; it was before them that the solemn ceremonies peculiar to the legis actiones had to be performed; upon them rested,

[1] Sohm, 385–389. [2] Sohm, 299–300.

at least during their term of office, the duty of declaring the law, of arranging the suit, and either themselves determining the case or instructing a judex charged with the duty of hearing the suit and pronouncing judgment. It must be remembered that the judex was not a magistratus, but a simple citizen who was converted by the magistratus into a judicial officer in the individual case, at the conclusion of which his judicial functions ceased and he returned to the rank of private citizen. It was a principle of Roman law that while the magistratus had to be selected and created by the State, the judex, in each case, was nominated, or at least accepted, by the litigants themselves. All citizens however were not eligible to be selected. From the earliest time, the privilege of acting as judex was monopolized by the patricians. Only a senator could act as a judex. The magistratus invested him with his powers, and he took an oath to discharge the duties of his office without fear or favor. The judex heard the evidence and declared judgment in accordance with the instructions given him by the magistratus; the latter enforced the judgment. The proceedings before a magistratus were called jus, and were said to take place in jure; the proceedings before a judex were called judicium, and were said to take place in judicio.

Judex.

The two functions were kept distinct down to the reign of Diocletian, at the close of the first century after Christ. It is to this separation between the acts of the magistratus and those of the judex that the private law of Rome was indebted for its logical clearness and practical precision.

In some cases instead of a judex being appointed, an arbiter was chosen. There seems to have been no difference in function between these two judges, unless it be that to the latter was given greater latitude in reaching his decision.

Criminal cases involving the caput of a citizen were decided by the comitia centuriata. The right of appeal from the sentence of a magistratus affecting any of the elements of the caput was established and confirmed by the Valerian laws. The magistratus who summoned the assembly was the accuser, and the defendant pleaded his own cause, being sometimes assisted by his nearest relation. No professional assistance was afforded the accused party prior to 150 B.C. Subject to the prisoner's right of appeal, the magistratus might sentence him to be flogged, imprisoned, or even put to death.

To the judex and arbiter given above there was added some time later the court of the centumviri. Instead of being nominated for an individual case like the judex and arbiter, the centumvirs constituted a permanent tribunal whose members were elected in equal number from each tribe.

Centumvirs. It was in this tribunal that the plebeians were first admitted to the judiciary. It would seem that the members of this tribunal were chosen annually in the comitia tributa. It was divided into four chambers or councils, but it is impossible to tell whether these chambers sat separately and had jurisdiction over special cases or not. The centumviral court confined its action very largely to the settlement of disputes concerning the ownership or possession of lands.

The law had been carefully written down and published for the benefit of the whole people in the Twelve Tables, but this was only one step on a long road and proved in reality of very little value to the plebeians, because a form of procedure

§ 65. Statute-process[1] (Legis Actiones).

[1] Muirhead, 172–176; Sohm, 52, 152–172; Ortolan, 140–147; Hunter, 23–38, 41–52, 979–980.

adapted to put the law into operation was indispensable, and of this the pleb knew nothing. There must be, together with the law, a judicial authority and a judicial procedure. Judicial authority has been explained above. It now becomes necessary to make clear the statute-process, that is, the procedure by which the plaintiff could get his cause into court, obtain a decision, and have it enforced. The law did not go abroad to take cognizance in a civil dispute, except in so far as it authorized the plaintiff to compel, in the presence of a witness or witnesses, an unwilling defendant to come before the magistrates for the appointment of a judex to settle the question at issue. If there was no witness at hand, or if the plaintiff was not strong enough to make the arrest, or if the defendant could contrive to get away, the law did not serve in aid of the aggrieved party. Further, a defendant might avoid immediate appearance by obtaining some friend of equal rank with himself to go bail for him. When both parties at length appeared before the magistrate, the procedure took on the aspect of a voluntary arbitration, although, as a matter of fact, it was compulsory. So soon as both parties invoked the decision of the law, the civil jurisdiction asserted itself, and neither party could thereafter withdraw. The old barbaric custom of trial by battle had fallen away into the symbolical mock-combat preceding the more essential usage of the sacramentum, namely, the wager. In order to decide this wager the law prescribed that the case should be investigated and pronounced upon by a judex.

The forms of procedure in an action at law were called legis actiones, according to Gaius, because they were appointed by statutes before the days of the prætor's edict, or because they followed the letter of a statute, and were as incapable of variation in form as law. Indeed, they were so

rigid that, if a man brought an action against another for cutting down his vines, and in his action called them vines, he was nonsuited, because he ought to have called them trees, as the Twelve Tables, from which he derived his right of action, spoke not of vines, but generally of trees (arbores). The term *action*, at the period we are now discussing, is a generic designation which signifies a particular form of procedure. This procedure, taken as a whole, includes the ceremonies, the acts, and the words which constitute it. These legis actiones were four in number at the time of the Twelve Tables. Of these four, two are forms of procedure instituted in order to arrive at a decision of the point in dispute, the other two are forms of procedure used to put the judgment into execution.

Of the first two, the most ancient was the actio sacramenti. This, with some slight variations of form, was employed in suits either to enforce obligations or in suits relating to rights of property or other real rights. The predominant characteristic in all cases was the sacramentum, or sum of money which each litigant had to deposit in the hands of the pontiff before the action proceeded. This was forfeited by the unsuccessful party for the benefit of public worship. The sacramentum was in fact a form of bet. A similar process is described in the laws of Moses. We know more concerning this form of action than any other. The Twelve Tables fixed the amount of the sacramentum. This was in favor of the poor litigant, who would not be able to make a deposit of any great sum for the purpose of obtaining justice. The second of the legis actiones instituted in order to arrive at a decision of the point in dispute was the judicis postulatio. This was an application made to the magistrate calling upon him to appoint a judex to try a given case without recourse

to the sacramentum. This was a simplification of procedure and was at first only admitted in certain cases. By reason, however, of its simplicity and freedom from the sometime onerous burden of the sacramentum, it was destined to come into almost universal use.

Of the last two actions which were instituted to put the judgment which had been arrived at into execution, the first was the manus injectio (the putting on of the hand). This was the corporeal seizure of the person of the debtor, when he had been condemned by the judex or surrendered by himself in default, as a result of which the debtor was adjudged to his creditor by the magistratus. The second of these actions was known as the pignoris capio (the taking a pledge); this was the seizure of the property of the debtor after judgment had been rendered. Concerning this there was a specific law of the Twelve Tables.

These legis actiones could not be made use of by any save Roman citizens. They required the parties to appear personally in court; but an assertor libertatis was allowed to claim the freedom of the person alleged to be unjustly held as a slave, such person not being present in court. They maintained an absolute rigidity of form and exhausted the cause of action in every case, even though that cause ended in a nonsuit by reason of the slightest technical error. The sentence commonly awarded the subject in dispute and not damages.

Even with the publication of the Twelve Tables, and the settlement of the forms of procedure, the plebeians remained at very serious disadvantage. Plebeian suitors were usually unable to adapt their peculiar cases to the rigid forms of procedure, not being masters of the proper legal terms. In this event the suit would be lost. Besides this, the calendar

was in the hands of the pontiffs, who were all patricians and who sedulously preserved the mysterious knowledge of the days when it was lawful for the magistrates to sit in court. The veil was not lifted from these mysteries until one hundred and fifty years after the date of the Twelve Tables.

When speaking of the Roman civil law the whole system of usages and rules of private law adopted by the Romans is meant. The Corpus Juris Civilis as left by Justinian was the result of gradual modification and enlargement of the code of the Twelve Tables, under three great influences, the jurisconsults, the prætors, and legislation. All these influences will receive consideration in their proper place.

Book II. FROM THE TWELVE TABLES TO THE EMPIRE, 451–30 B.C.

Title 1. *From the Twelve Tables to the Submission of all Italy (Jus Civile). 451–269 B.C.*

CHAPTER VI

THE PASSING OF THE PATRICIATE

The origin of the Servian tribes has been shown in a previous chapter to lie in the necessity of facilitating the levying of infantry. It was, therefore, like the centuriata, a military institution. The tribes had no political functions at first. There is no evidence that the tribes ever met in a general assembly for a political purpose until some time after the establishment of the republic. As has been previously stated, the tributa had its origin in the troubles which preceded the first secession of the plebeians to Mons Sacer. When, as an outcome of this revolution, tribunes of the plebs were appointed whose duty it was to protect them from oppression, the only means open for the performance of this

§ 66. The Development of the Comitia Tributa.[1]

[1] Botsford, 236–259; Ortolan, 106, 107, 273–276; Muirhead, 86 *et seq.*

duty was through personal contact. The law prohibited a tribune from being absent from the city over night and required him to keep the doors of his house open at all times in order to afford easy access for those who would appeal to him for aid. In furthering the interests of the citizens the tribunes had the unrestricted right of calling the plebs to a contio and addressing them at any time and upon any subject. There soon grew out of this custom some organized plan of obtaining their opinion as to important measures that had been discussed in their presence. The assembly was divided into voting groups, according to their tribal lines, and a vote was taken on proposals affecting plebeian interests. Such questions were brought before them from time to time by the tribunes and their opinion obtained by means of a vote. At first this plebiscitum had no other value than an expression of sentiment and sympathy with the efforts of the tribunes in their behalf. Soon, however, a plebiscitum was made binding upon plebeians in so far as it was in harmony with the laws of the State. It was from these original functions that the vast powers of the tribunes and the comitia tributa gradually developed.

Thus it was that assemblies, convened without consultation of augurs, and convoked and presided over by plebeian tribunes, though originally intended solely for the political deliberation of a single order of citizens, soon acquired the right of pronouncing judgment in certain cases, of making certain elections, and of passing laws affecting private rights. Thus it became a branch of the national legislature. Their decrees were termed plebiscita, decrees of the plebeians. The unit for the purpose of voting was the Servian tribe, and as each tribe consisted of both patricians and plebeians, there can be no doubt but what patricians had the right to

vote in the tributa. The plebeians, however, greatly outnumbered the patricians, and the enactments of the comitia tributa always bore the name of the preponderating element.

In the early republic the senate had undergone a great accretion of power. It looked for a time as if it would become not only a legislative body, but the supreme legislative body of the land. In treaties of peace and alliance the senate assumed full authority, and at the close of a conquest the senate disposed of the acquired territory and population. In the affairs of peace it retained almost as absolute power of administration as it had assumed in times of war. It at one time authorized a magistrate to erect a temple in commemoration of victory; it provided for the restoration of the city after it was sacked by Brennus and his Gallic horde; it built temples, paid the soldiers for service, founded colonies, and meted out justice to magistrates and officers who had gone beyond their authority, or failed in the performance of their duties.

In the face of a force so vast as that indicated above, the assemblies, whether centuriate or tribal, could for a time make slow headway. The development of their functions, nevertheless, though slow was steady. At first the patricians seem to have put forth an effort to control the tribunate by choosing the tribunes from their own class. This plan was successful for a time and patricians were chosen as tribunes of the plebs. The danger of patrician control was at last obviated by the passage of a law brought forward by a tribune, Lucius Trebonius. This law enacted that whoever presided over the comitia for the election of tribunes should continue till ten tribunes were elected, the object being to preclude coöptation and leave the plebeians in the

Elective.

ascendancy.[1] The tribune who violated this law was to be burned alive. If there ever had been any danger of patriciate control of the tribal assemblies, this law obviated it. Subsequently the comitia tributa elected the quæstors, curule ædiles, military tribunes, and other minor officials.

Shortly after the abolition of the decemvirate, a division of popular jurisdiction was made between the centuriate and the tribal assemblies, on the basis of a distinction in the nature, not of the crime, but of the penalty. It became the function of the comitia tributa to try all cases that were punished with fines,[2] while the centuriata tried all cases where the extreme penalty was inflicted, banishment or death, to which was always added the confiscation of all property. It became necessary for the prosecutor first to determine what the penalty would be in case the accused was proven guilty; then he brought his accusation before the body that had jurisdiction of that particular case. If he wanted a death sentence he went before the centuriata; if he could demand nothing more than a fine in cattle and sheep, he went before the tributa. Gradually the Roman people became averse to the death penalty and, consequently, the judicial business passed over to the comitia tributa.

Judicial.

The legislative functions of the tribal assembly were almost continuously under the presidency of the tribunes; at first these assemblies were contiones merely, with no authority to consider anything but matters pertaining to the plebs.[3] It was not till the lex Valeria, in 445 B.C., that the tributa obtained the authority to legislate for the whole people. Thereafter they became very ac-

Legislation.

[1] Botsford, 272–274. [2] Botsford, 283–316.
[3] Botsford, 274–279.

tive in legislation. They assumed the control of finances and passed many plebiscita in relief of the poor; they gradually absorbed the authority to regulate magistracies, and to extend the term of office, if they deemed it necessary, of a magistrate whose time had expired; they assigned provinces and regulated the provincial government; they even took it in hand to regulate the composition of the senate. An Ovinian plebiscitum, passed in 339–312 B.C., took the power of nominating to the senate away from the consuls and bestowed it upon the censors, with the requirement under oath that they would enroll "all who were worthy among the retired magistrates of every rank from the curule functionaries down through those of plebeian standing to the quæstors." They assumed the right of legislation in matters of religion by passing the Ogulnian plebiscitum in 300 B.C.

§ 67. The Evolution of Plebeian Equality.[1]

In the long struggle that had been going on between patrician and plebeian, the one to keep absolute control, the other to gain political and legal equality, the balance seemed at last to turn in favor of the plebs. In this gradual democratic evolution there may be traced some thirteen distinct steps.

Of these thirteen steps the lex Valeria de plebiscitis may well be considered the first.[2] This law was passed in the comitia centuriata during the consulship of Valerius and Horatius immediately after the expulsion of the decemvirs. This law recognized the general authority of the comitia tributa and declared that the plebiscita decreed in these assemblies should be binding on all persons: "Ut quod tributim plebis jussisset, populum teneret." Henceforth plebiscita, passed under certain conditions, were the full equivalent

[1] Ortolan, 21–24, 29–39.
[2] Botsford, 234, 274–280; Muirhead, 82.

of leges passed by the comitia centuriata and, in fact, they quite frequently bore this name. It is so similar to a provision of a later Publilian statute and also one still later bearing the name of Hortensius, that many writers have been inclined to reject it as an anticipation merely of the one or the other of these. But many plebiscita of great importance, such as the Canuleian, the Licinian-Sextian, and the Genusian, were passed under this law, and historically its enactment cannot be doubted. It is probably nearer the truth to conclude that it was not enforced and required to be reënacted. This would be only in accordance with the usual fate of progressive legislation. It was sanctioned by the senate and thus made constitutional. By it all bills brought before the tributa for consideration must previously have been sanctioned by the senate, so that the advantage gained by the plebeians was not so great as would appear on the surface. In support of this plan the patricians could urge that their magistrates had always been required to obtain the consent of the senate before bringing any measure to the consideration of either the curiata or centuriata, and that the same formality should be observed by the tribunes in presenting bills for the consideration of the tribes.

Lex Valeria, 445 B.C.

The use of the words 'tributim plebis' to designate the tribal gatherings under tribunician presidency in this law has given rise to much controversy, many contending that the patricians, who were certainly members of the tribes, were by this excluded from the meeting and, consequently, disfranchised. But Dionysius is of opinion that they participated in the comitia tributa both before and after this enactment; Livy also thinks of them as still present in the meetings as late as the struggle for the Licinian-Sextian laws. It seems

to be a question to be settled by the method of voting in the early tribal assembly. The plan followed was for the leaders to meet in council and determine upon a measure, which they then submitted to the people to be accepted 'with clamor and din' according to their custom. As all members of the tribes were permitted to be present, all must have joined in the shouting or at least have been entitled to do so, as it is difficult to conceive of any method of eliminating the noble class. This method of voting by acclamation continued in use in the tributa for some time. The expression, 'tributim plebis' must, therefore, have been used in the same sense in which populus was used in speaking of an act of the centuriata.

In 445 B.C. a resolution was carried in the comitia tributa by Caius Canuleius that the obnoxious provision in the Twelve Tables prohibiting marriage between patricians and plebeians and thus perpetuating the old caste system, should be abrogated.[1] There was also attached to this resolution a second, that the consulate be opened to the plebs. Having carried these resolutions through the tributa by acclamation Canuleius presented himself before the senate and asked for a senatus consultum sanctioning the same. There followed a strenuous debate, in which the loose marriages common among the plebeians, which were without any religious sanction whatever, were roundly condemned. But after a long discussion in which the objectors grew eloquent in their abuse of the measure, the outcome was the desired senatus consultum for the first resolution and the rejection of the second. The stigma which had hitherto rested upon the plebeian body was thus removed, and social inequality passed away.

Lex Canuleia, 445 B.C.

[1] Muirhead, 84; Botsford, 294.

The plebeian still lacked admission to the highest dignity of the republic, and although Canuleius was inclined to rest satisfied with the half of what he had asked for, his colleagues in office were not. They demanded the passage of the second resolution, — the admission of plebeians to the consulate. This, as might be supposed, was strenuously opposed by the patricians. They seemed to recognize, however, that defeat was certain, and they brought about a compromise. There was introduced into the comitia centuriata a bill to change the constitution and to substitute for consuls military tribunes with consular power, this office to be open to the plebeians.[1] This bill finally passed and became a law. This plan was continued for a short time only, when a return to patrician consuls was made, and there is no evidence that plebeians were chosen to this new office for a period of more than forty years. The number of military tribunes was at first three, but afterwards increased to six. It is clear enough that this was only a political makeshift in order to keep the supreme power in the hands of the patriciate.

Military Tribunes, 445 B.C.

Prior to the year 443 B.C. the consuls had presided over the taking of the census every fifth year. They had themselves constructed the tables; they had assigned to each citizen his class in his tribe and in his curia; they had inscribed whom they thought fit in the ranks of knights and of senators; they had, in fact, arranged the whole political organization in a way to suit themselves. It was doubtless with a view of checking the growing powers of the plebs and keeping these prerogatives in their own hands that the new censorship was created.[2] The censors were two in number. They could only be selected from the

Censors, 443 B.C.

[1] Ortolan, 31.

[2] Ortolan, 32; Muirhead, 85.

members of the senate, and could only be elected by the comitia centuriata. It was centuriate legislation that created this body. The same senator could not hold the office twice, and the term of this office was for a period of five years; that is, from census to census. As guardians of the public, as well as private, morals, they could blast the reputation of any citizen.

It is difficult to understand the extent of the influence possessed by those who had the power of determining the class to which a citizen should belong, and the exercise of this power, in the composition of the different tribes, was not without its uses. As has already been stated, there were at no time more than four urban tribes, while the number of rural tribes ultimately reached thirty-one. The censors inscribed in the urban tribes all those who possessed no property, the proletarii, no matter whether they dwelt in the city or not. The proprietors, though dwelling inside the city walls, were classified by the censors in the rural tribes where they had their estates. It was in this way that the votes of the more turbulent and, at the same time, more dangerous, class were reduced, even in the plebeian assembly, to four out of thirty-five. This lower class strove frequently to have their numbers distributed, for political purposes, throughout the rural tribes, but the censors checked all such movements and rendered them of no avail.

By one of the Licinian laws of 367 B.C. the plebeians were at last admitted to the consulate, which had been reëstablished in place of the military tribuneship mentioned above, and it was enacted that at least one consul must be a plebeian.[1] The nobility of blood now saw the proudest of their old-time offices

Lex Licinia (Plebiscitum), 367 B.C.

[1] Ortolan, 39.

pass from their control and were compelled to submit to the humiliation of being commanded by a person who had risen from the ranks of the plebs. The immediate effect of this law was the passing of tribunes of the soldiers with consular power.

The word *prætor* is derived from præire (to go before), and was early in use to designate the first or chief magistrate of the city. It was, further, frequently given as an honorary title to the consuls. But it now became the exclusive title of a special magistrate.

Prætor Urbanus, 367 B.C.

The senate detached from the functions of the consul, as soon as plebeians were admitted to that office, all that related to his judicial office, together with the powers consequent upon it, and conferred them upon a special patrician magistrate, under the title of prætor, which was qualified by the term 'urbanus' on account of his powers being limited to the city of Rome.[1] At first there was only one prætor, who was nominated by the centuriata and selected from the patrician order. The dignity of this office was only second to that of consul. The prætor was preceded by lictors and considered the colleague of the consuls. In the absence of the consuls upon military expeditions the prætor took their place and administered the government within the city of Rome. At such times he convoked the senate and presided over it; he assembled the comitia and presented to them any suggestions as to new laws. This office is destined to become very powerful. It will subsequently be considered in extensio.

There already existed two plebeian ædiles who were created in 494 B.C. and charged, under the supervision of the tribunes, with the details of police. In the year 365 B.C. two patri-

[1] Ortolan, 33; Muirhead, 85.

cian magistrates were created bearing the same name and having similar though superior functions. They were called ædiles majores or ædiles curules,[1] while the older plebeian officers were called plebeii ædiles or ædiles minores. By the creation of this new office the latter had their powers somewhat curtailed. They were limited to the supervision of the market, the price and quality of commodities, the accuracy of weights and measures, and the security and good order of the public streets. All the higher offices of police were confined to the ædiles curules. To them also belonged the maintenance and improvement of roads and bridges, the preservation of temples and amphitheaters, together with the public thoroughfares. They also had charge of the public games, and in later days were expected to furnish, at their own expense, wild beasts for the amphitheaters.

Curule Ædiles, 365 B.C.

Ten years after the first election of a plebeian to the office of consul, Popillius Lænas, plebeian consul for the year, nominated a plebeian, Caius Marcius Rutilus, as dictator.[2] To this nomination no objection was offered and no formal lex passed the comitia. This act was subsequently interpreted as formally opening the office of dictator to the plebeians.

Dictator, 356 B.C.

The severance of the censorship from the duties of consul when plebeians were admitted to that office was "good politics" on the part of the still powerful but waning aristocracy. Thus they kept control of the most coveted of the consular powers for one hundred years after the plebs had captured the consulate.[3] In 339 B.C. a lex Publilia was passed which opened the censorship to the ple-

Censor, 339 B.C.

[1] Ortolan, 34. [2] Botsford, 182.
[3] Botsford, 60–64, 234, 237; Ortolan, 32.

beian and made an easy road to the admission of plebs to the senate. In addition to the original and important duties of registration the censors, in process of time, undertook the general oversight of public morals. "Not only gross breaches of morality in public and private life," says Ramsay, "cowardice, sordid occupation, or notorious irregularities, fell under their corrective discipline, but they were in the habit of denouncing those who indulged in extravagant or luxurious habits, or who, by the careless cultivation of their estates, or by willfully persisting in celibacy, omitted to discharge obligations held to be binding on every citizen." It was also their duty to superintend the arrangements for the collection of the revenue, fixing the amount of property-tax each citizen should pay, and even framing the leases or contracts on which the greater part of the imposts were farmed out to contractors. They also exercised a general superintendence of public works, kept in good repair all existing buildings, and made the contracts for the overseeing and the execution of all new works. The censorship is thus seen to have been one of the most important offices in the Roman State. For plebeians to be admitted to this office meant that they had at last succeeded in forcing the hands of a stubborn aristocracy.

Prætor, 336 B.C.

Apparently without any formal lex, the prætorship was opened to the plebeians in 336 B.C.

Livy says this law was the commencement of a new era of liberty for the plebeians. It had its origin in the reaction against the excesses of a creditor, Lucius Papirius by name.[1] The cruel fate that awaited the debtor, and the severity with which he was liable to be treated, were made use of by the tribunes in ex-

Lex Petillia Papiria (De Nexis), 326 B.C.

[1] Ortolan, 37.

citing the animosity of the plebeians against the patricians. This stirred up such a storm that the nobility bowed before it. The lex which was passed as a result of it prohibited debtors from assigning themselves per æs et libram in slavery to their creditors as security for their debts, and in this way terminated the nexi. Henceforth it became illegal for a man to mortgage his person as security for a debt. The law did not abolish poverty, but it did ameliorate the condition of the unfortunate.

Technically religious, but of vast importance politically, was the plebiscitum known as the lex Ogulnia, which admitted plebeians as pontiffs and augurs.[1] It increased the number of augurs and pontiffs to nine each, and provided that four augurs and five pontiffs should henceforth be plebeians. This was the last step in the opening of the offices of the State to the plebs, and must have been one of vast satisfaction to them. They had, no doubt, for several hundred years, gazed with envy upon the flowing robes and insignia of these priests of the State religion. At last they too are permitted to pass the threshold and become acquainted with the penetralia which had hitherto been sedulously hidden from their eyes.

Lex Ogulnia, 300 B. C.

Two laws had already been passed concerning the authority of the plebiscita, — the lex Valeria-Horatia, and the lex Publilia of the dictator Publilius Philo, in 339 B.C.[2] Under the name of this dictator Livy mentions three laws. By one of these it was ordained that one of the censors should be taken from among the plebeians, as above. Another related to the laws decreed by the centuriata and enacted "Ut

Leges Publiliæ, Lex Hortensia (De Plebiscitis), 286 B.C.

[1] Botsford, 102, 166, 307.

[2] Muirhead, 83, 93; Ortolan, 39; Botsford, 292–302.

legum quae comitiis centuriatis ferrentur, ante initium suffragium, patres auctores fierent." The third, lex Publilia, related to the plebiscita. We have already called attention to the fact that Livy alludes to it in terms that are almost identical with those of the lex Valeria-Horatia, which was passed one hundred and ten years earlier; "Ut plebiscita omnes Quirites tenerent."

Fifty-three years after the publication of the lex Publilia we have another, a third lex de Plebiscitis, enacted by the dictator Quinctius Hortensius, the lex Hortensia. This law is given by both Pliny and Aulus Gellius in very nearly identical language with that used by Livy in describing the lex Publilia. These three laws, enacted upon the same subject at different intervals during a period of a century and a half, cannot fail to lead to much misunderstanding among critics.

At first it would seem that the plebiscita had to be confirmed by a vote of the comitia centuriata and afterwards receive the auctoritas of the senate. Whatever may have been the process of development, it is certain that after the lex Hortensia was passed, the authority of the plebiscitum was never called in question, provided it had the previous sanction (senatus consultum) of the senate. Thus we may properly date the plebiscita from this period in the legal history of Rome, touching both public and private law. Hereafter the auctoritas of the senate was never needed to make a plebiscitum binding upon all Roman citizens. Henceforth the comitia tributa and the comitia centuriata coexisted as supreme legislative bodies. The comitia tributa for the most part dealt with private law, while the comitia centuriata busied itself with public law, such as peace and war, alliances with foreign States, boundary treaties, and the like, as well

as the judicial proceedings which involved the caput of a Roman citizen, or matters affecting the constitution. This was the last step needed to raise the plebeian to full legal rights. Henceforth, so far as law was concerned, there was no distinction between patricians and plebeians.

§ 68. Jus Flavianum.[1]

Only three years before the passage of the lex Ogulnia an event occurred to diminish the influence of the pontiffs in connection with the law more than anything else in the whole history of Rome. This was the publication of a work setting out in detail the steps to be taken and the formulæ necessary for conducting the legis actiones, together with a calendar of the lawful and the unlawful days for the bringing of such action. For this work the plebeians were indebted to the grandson of the enfranchised slave Cnæus Flavius, who, as secretary to the celebrated jurist Appius Claudius Cæcus, had access to the pontifical records, and with rare ingenuity and power of observation, and, according to Pliny, encouraged and aided by his patron, prepared this manual, which was known as the jus civile Flavianum. The preparation of this work proved so acceptable to the people that they raised its author successively to the dignity of tribune, senator, and curule ædile. The outcome of this was to make a knowledge of the law as much a heritage of the laity as of the pontifical college. Cicero, referring in derision to the pontiff and patricians, to whom it had previously been necessary to have recourse as to the Chaldeans in order to ascertain these days, says that Flavius "put out the crow's eyes" (qui cornicum oculos confixerit).

The progress now made by the plebeians as a result of this opening up of an hitherto closed door was immense. Men of intellect now took up the study of the law as a means of

[1] Muirhead, 246; Ortolan, 164.

advancement. "They occupied themselves in giving advice to clients, teaching, pleading at the bar, framing styles of contracts, testaments, and various other deeds of a legal character, or writing commentaries or shorter treatises on different branches of the law." Pomponius gives a long list of eminent jurists who now flourished, and Cicero adds the weight of his influence to their honor in his Orator and Brutus. "Among them may be mentioned the two Catos, — M. Porcius Cato Censorius, who wrote some commentaries on the *jus civile*, and his son M. Porcius Cato Licinianus, the author of a famous doctrine in the law of legacies known as the regula Catoniana; M. Junius Brutus, who wrote three books de jure civili; M. Manilius, whose styles of contract of sale are celebrated by Cicero, Varro, and Gellius; the three Scævolas, — Quintius Mucius, the augur, who in his old age gave Cicero and his friend Atticus their first lessons in law, Publius Mucius, his cousin, and, greatest of the three, Quintus Mucius, the son of Publius, who, Pomponius says, first wrote systematically on the *jus civile*, arranging it in eighteen books, from which a few extracts are incorporated in Justinian's Digest; P. Rutilius Rufus, the author of the bankruptcy procedure described by Gaius; C. Aquilius Gallus, who devised the *actio* and *exceptio de dolo* and the Aquilian stipulation; Servius Sulpicius Rufus, frequently mentioned by Gaius and Justinian, regarded by his contemporaries as the greatest jurist of his time, and after Cicero the greatest orator; Aulus Ofilius, a scholar of Servius's, and intimate of Cæsar's, who wrote at some length on the prætor's edict; Alfenus Varus, also a scholar of Servius's, whose works are largely quoted and cited in Justinian's Digest; and Ælius Gallus, author of a treatise De Verborum quæ ad jus civile pertinent significatione, which must have been very welcome

when the Roman law was penetrating into provinces in which the Latin language was strange." [1]

The introduction of the simplified form of contract known as stipulation had an influence more far-reaching than did any other event in the history of private law. It brought about a revolution in the law of contract, as there was created by it a unilateral obligation that in time became adaptable to almost every conceivable undertaking by one man in favor of another. By this simple form of question and answer with certain words of style inserted, any lawful agreement could thereby be made not only morally but legally binding. In this way many transactions that heretofore were outside of the civil law and binding only on a man's sense of honor, now became enforceable by a legal procedure. For instance, when a vendor of any article gave his stipulatory promise to his vendee to guarantee peaceable possession of the thing sold or its freedom from faults, and the vendee in turn gave his stipulatory promise to pay the price, the engagement thus entered into was enforceable in a court of justice, when without stipulation neither party would have had legal redress. This made the contract sure and safe and accounts for Paul's derivation of the name of this species of contract from the word *stipulum*, 'safe.' Subsequently the Roman jurists grouped about the stipulation nearly all their disquisitions upon the general doctrines of the law of contract, and so caused it to mark an epoch in the history of the law.

§ 69. Stipulation. [2]

Although this is true, yet there is no certainty as to the time at which stipulation was introduced or the manner of its coming. Modern criticism has developed three theories touching it: (1) that it was the verbal remnant of the nexum,

[1] Muirhead, 247–248.
[2] Sohm, 296–304; Muirhead, 213–216, 256–258.

after the copper and the scales had gone out of use; (2) that it was evolved out of the oath of covenant at the great altar of Hercules or the appeal to Fides; (3) that it was imported from Latium, which it had reached from some of the Greek settlements farther south. Of these theories Muirhead thinks the last the most probable and accepts the statement of Verrius Flaccus as quoted by Festus that it is connected with the Greek *σπένδειν* and *σπονδή*; Gaius also considers the word of Greek origin. In fact, Homer and Herodotus both refer to *σπονδή* (a libation) as a frequent accompaniment of treaties and other solemn covenants — a common offering by the parties to the gods, which imparted sanctity to the transaction. Gradually the libation and other religious features were dropped, but the word *σπονδή* was retained as in the sense of an engagement that bound parties just as if the old religious ceremony had been passed through. Thus it came about that as a question by a creditor the word *spondes* came to mean, "Do you engage as solemnly as if the old ceremonial had been gone through between us?"

This simple form of contract by the use of the words *spondes* and *spondeo*, was confined to Roman citizens down at least to the time of Gaius and was, hence, essentially juris civilis. Other similar forms, such as promittesne? promitto, dabisne? dabo, and the like, though less solemn, were nevertheless legally binding, and were open to peregrins, thus belonging to the jus gentium. In such contracts no witnesses were required to assist at them, and they were always open to qualification by conditions and terms. Words of style made the contract legally binding; a mere promise to fulfill was not enforceable in Roman law. In case suit was entered to compel the carrying out of the contract, the action lay upon the promise which the words of style embodied, apart from any consideration

whether or not value had been given for it. It will be seen by what has been said that the stipulation was a form of contract that was not confined to particular transactions, such as buying and selling, or hiring, and the like, but was coextensive with the subject matter of contract. It was a universal form by which any promise could be made binding in law.

Much discussion has arisen as to the age of stipulation as a contract. Bekker holds that it was in use before the Twelve Tables. Most writers, however, are agreed that it became actionable, and, therefore, enforceable in law only by the lex Silia.[1] This was a fifth actio legis, the condictio, and was introduced, in all probability, in 277 B.C. This was at first exclusively confined to disputes respecting specific sums of money. It was afterwards extended by the lex Calpurnia, in 234, to every species of obligation, provided the obligation was definite in its character. The date given above is only approximate, and is open to considerable criticism. By this last form of legis actiones, the symbolic and material acts of the sacramentum were dispensed with and more simple ideas and practices were substituted in their place. In this process the plaintiff merely announced (condicebat) to his adversary that he would have to appear before the magistrate in order that a judex might be appointed to arbitrate the matter of dispute between them. The condictio was evidently a much more simple and inexpensive legal process for the recovery of damages than any that had been in use previously.

Lex Silia.

By the enactment of the lex Silia when a man "disputed his liability for what was called pecunia certa credita and forced his creditor to litigation, the latter was entitled to require from him an engagement to pay one third more than the sum

[1] Botsford, 339, *n.* 5.

claimed by way of penalty in the event of judgment being against him. The creditor also had to give an engagement to pay as penalty the same amount in case of judgment in favor of the alleged debtor." Such an engagement as the above was not allowed in every case in which a definite sum of money was claimed per condictionem, but only when it was technically pecunia credita. Thus the lex Silia may be considered as an enactment which gave legal sanction to the sponsio or stipulation. When this was once recognized the simplicity of the procedure and its convenience soon gave it greater range and caused it to be adopted in other transactions.

§ 70. Capitis Deminutio.[1]

Caput, in Roman law, meant primarily a person whom the law regarded as capable of having rights. In a derivative sense it was applied to his personality or jural capacity, passive and active, in public and private life. The measure of this jural capacity depended, according to Roman notions, on three considerations; (1) whether he was free or slave, (2) whether, being free, he was a citizen or non-citizen, (3) what, being a citizen, was his position with regard to family. If a man was not free, he had no rights at all. If he lost his liberty, it carried with it the loss of all the other elements of status. This was the theory of the jus civile and also that of the jus gentium. He was simply a chattel and not spoken of as a person at all. In case he were free, the extent of his capacity varied according as he was or was not a citizen. It was only among citizens that the supremacy of the paterfamilias was recognized and, consequently, it was only among them that the position of an individual in the family was of any moment. A person in the power of the paterfamilias though free, had no jural capacity, only as this was derived from the latter.

[1] Muirhead, 122–126.

When, therefore, a man lost either freedom or citizenship, or changed his family, he was said to have suffered capitis deminutio, or loss of his jural capacity. In the first two cases the civil status was entirely lost. In the third, the status was maintained, but modified, since a person came out of one family to enter into another or himself to commence a family. It is to be noted that when a man changed his family, property and person also changed; property, because in each family a distinct joint ownership was centered; person, because there was in each family no other persona than that of the chief, and by changing his status he quitted this persona to identify himself with another. This he did even when, by the death of the paterfamilias, he became sui juris and, so, the head of a new family. All these events were called capitis deminutio, of which there were three degrees. The loss of freedom was maxima capitis deminutio; the loss of citizenship, as when a man went into exile or joined a Latin colony, was media capitis deminutio; the change of family (familiæ mutatio) was minima capitis deminutio. This deminutio implies a fall or degradation in the status of the person suffering it. This is very clear in the first two, as they affected the capacity of the person suffering it in a marked and prejudicial degree, causing serious loss. But this is surely not true in the last case, minima capitis deminutio, as this may well have involved an advance in jural capacity. The Roman evidently looked upon it as a sort of degragation to pass by adrogation, when sui juris, to the position of a son, but as this was done at pleasure, it must have been accompanied by substantial gain. In case a person alieni juris suffered minima capitis deminutio by adrogation or adoption into another familia he severed the bond of agnation and was no longer looked upon as related to any of those persons that had been previously bound to

him by ties of love. There was no longer any right of succession between him and them.

§ 71. The Law of Succession.[1]

Early patrician Rome had developed two varieties of testament, that made at stated periods in the comitia calata, under the advice and direction of the college of pontiffs, and that made by soldiers upon the eve of battle, in the hearing of a few of their comrades (testamentum in procinctu factum). This latter was in all probability nothing more than a distribution of the property of the testator among his proper heirs. Both these forms of will remained in use in the early republic, but they were in course of time displaced by the very general adoption of a form of will executed with the copper and scales (testamentum per æs et libram). There is a general statement in the Twelve Tables touching inheritance; "uti legassit suæ rei ita jus esto." This very broad statement has been generally interpreted to apply only to the two older forms of testament. Whether resort was to be made to the comitia or to the army, the testator's own will in the matter was to be henceforth supreme. No interference of the pontiffs touching the expediency of the testament in view of the interests of the family sacra or of some creditor of the testator was to be tolerated. The Quirites in the comitia calata were henceforth merely witnesses and were not called upon to sanction a departure from the ordinary rules of succession. They listened to the oral declaration of the testator's will in regard to the distribution of his property.

The development of the testamentum per æs et libram marked a very distinct departure and growth from these older forms. There may be seen three distinct stages in its history. Its origin has already been explained in describing the result of

[1] Muirhead, 408–413; Sohm, 409–414, 462–464.

the Servian reforms upon the private law. It was at first nothing but a makeshift to aid the plebeian who was not qualified to make a testament in the comitia to dispose of his property before his death. As has been already stated, he transferred his estate to a friend on whom he could rely, with instructions as to its distribution upon the event of his death. This same device may easily have been resorted to by patricians who had neglected the making of a regular testament until it was too late, by reason of sickness, to appeal to the curiata. At first this would not be looked upon as a testament at all, but merely as a temporary sale of the estate. A testament proper was the nomination of a person as the testator's heir, so that the testator might be able to impose upon him what burdens he pleased as the tacit condition of heirship. The person thus instituted became the representative of the testator after his death, just as the heir-at-law would have been, had no will been made.

The testamentum per æs et libram did not necessarily immediately divest the testator of the property mentioned, as he could reserve unto himself a life interest in the same. He was equally competent to postpone the liberty of possession without infringing the rule that the mancipation itself could not be ex certo tempore. Indeed, there was nothing to prevent him making a bargain that he was to retain the possession till his death.

In case the testator was in debt at the time he executed the mancipation, upon his death his creditors would have no security for the liquidation of their claims other than the honor of the testator and the heirs appointed. No action for payment would lie against the person or persons who received the estate through mancipation per æs et libram, as the obligation did not carry over to the person newly invested.

The second stage in the development of this testament was reached in the addition to the transfer of the testator's estate to the familiæ emptor, of the institution of an heir. This was in accordance with the idea that the true testament per æs et libram had its legal warrant, not in the law quoted from the Twelve Tables, but in another equally famous provision, "cum nexum faciet mancipiumque, uti lingua nuncupassit ita jus esto." The comprehensiveness of these words led subsequent interpreters to the conclusion that there was nothing in them to prevent the direct institution of an heir in the course of the verba nuncupata which were annexed to a mancipation. As soon as this view was adopted and put in practice, the familiæ mancipatio ceased to be a transfer of the testator's estate to the familiæ emptor; this was looked upon as a mere form; it was the oral declaration addressed to the witnesses that really contained the testamentary disposition; *i.e.*, the institution of an heir, with such other provisions as the testator thought fit to embody in it. The third stage was marked by the introduction of tablets in which the testamentary provisions were set out in writing, and which the testator displayed to the witnesses, folded and tied up in the usual manner, declaring that they contained the record of his last will. Gaius gives the words spoken by the familiæ emptor, as an illustration of this third stage in the development of the testamentum per æs et libram, as follows; "Your estate and belongings, be they mine by purchase with this bit of copper and these copper scales, subject to your instructions but in my keeping, that so you may duly make your testament according to the statutes." The nuncupation, attached to the above sale, was; "As is written in these tablets, so do I give, so do I legate, so do I declare my will; therefore, Quirites, grant me

your testimony." Gaius adds to his quotation of this formula the following statement; "Whatever the testator had set down in detail in his testamentary tablets he was regarded as declaring and confirming by this general statement." After the testator had made his appeal to the witnesses they responded by giving their testimony, but the words of this formal testimony have been lost. The testament thus completed was sealed by the testator, officials, and witnesses, the seals being on the outside, and over the cord with which the tablets were tied. It would thus be impossible subsequently to tamper with or change the testament without destroying the seals, and this fact would render the will inoperative.

By subsequent interpreters of the Twelve Tables the widest possible construction was given to the statement uti legassit. Upon the strength of these words the testator was held entitled to enfranchise slaves, to appoint tutors to wife and children, to make bequests to legatees, and even disinherit his proper heir in favor of a stranger, so long as he did so in expressed terms. The institution of a stranger without mention of the proper heir, however, was fatal, at least if the latter was a son; for without expressed disherison his father could not deprive him of the interest he had in the family property, as in a manner one of its joint owners. In fact, disherison cannot be supposed to have been made use of to any great extent, as it was altogether foreign to traditional conception of the family and the family estate.

In the absence of a testament, or in case of its failure from any cause whatsoever, the succession opened to the heirs ab intestato; of these heirs the sui heredes were entitled to the first place, as they were looked upon as now entering upon the active exercise of rights that hitherto existed but had lain

dormant. This was in accordance with the statement in the Twelve Tables; "If a man die intestate, leaving no suus heres, his nearest agnates shall have his estate. If the agnate also fail, his gentiles shall have it." The establishment of agnate inheritance was no doubt due to the action of the decemvirs. They had to devise a law of intestate succession that would be suitable alike to the patricians who had gentes and the plebeians who had none. To put the latter in exactly the same position as the former was beyond their power, as the fact had to be met that the plebeians had no gentile institutions, and to create these was as impossible as it would be to give noble blood to those who were of common origin. They overcame the difficulty by accepting the principle of agnation upon which the patrician gens was constructed and establishing an agnatic circle of kinsmen which was to reach out to the sixth degree. This did not result in perfect equalization, but the nearest approach to it that the circumstances permitted.

The order of intestate succession which was thus established by the Twelve Tables, was first to the sui heredes of the deceased, as has been stated, next to his nearest agnate or agnates, and finally, if the deceased was a patrician, to his gens.[1] His sui heredes included those of his descendants who were in his potestas at the time of his death, who by that event became sui juris, together with his wife in manu; but did not include children whom he had emancipated, or daughters who had passed in manum of husbands.

The heir was burdened with the debts, as well as enriched by the property, of the deceased; he was also burdened with his family sacra, — the sacrifices and other religious services that had periodically to be performed for the repose of the souls of the deceased and his ancestors. The jus civile in

[1] Sohm, 409.

reference to this latter matter contented itself with the simple statement that the heir was responsible for their maintenance. According to Gaius it was a stimulus to heirs to enter as soon as possible on an inheritance that had opened to them, and thus to make early provision alike for satisfying the claims of creditors of the deceased and attending to his family sacra. There seems to have grown out of this a rather remarkable institution of usucapion or prescriptive acquisition of the inheritance in the character of heir.[1] Such a usucapion was of course impossible in case the deceased had left sui heredes, for the inheritance vested in them the moment he died. But in case there were no sui heredes, then any person, by taking possession of the effects that had belonged to the deceased, and holding them without any interruption for the space of twelve months, thereby acquired them as if he were heir. In this case the possessor was required to pay all debts against the property and to charge himself with the maintenance of the family sacra.

§ 72. Lex Licinia.

Party lines were, at the time of the enactment of the Licinian law, strongly marked in Rome. One of the tribunes chosen after the return of the plebeians from Mons Sacer was a Licinius. The first military tribune with consular power elected from the plebeians was another Licinius Calvus. The third great man of this distinguished family was Caius Licinius Calvus Stolo, who, in the prime of life and popularity, was chosen among the tribunes of the plebs for the seventh year following the death of Manlius the Patrician. Another plebeian, Lucius Sextius by name, was chosen tribune at the same time. If not already, he soon became the tried friend of Licinius. Sextius was the younger, but not the less earnest of the two. Both belonged to that

[1] Sohm, *loc. cit.*

portion of the plebeians supposed to have been latterly connected with the liberal patricians. The more influential and by far the more reputable members of the lower estate were numbered in this party. Opposed to it were two other parties of plebeians. One consisted of the few who, rising to wealth or rank, cast off the bonds uniting them to the lower estate. They preferred to be upstarts among patricians rather than leaders among plebeians. As a matter of course, they became the parasites of the illiberal patricians. To the same body was attached another plebeian party. This was formed of the inferior classes belonging to the lower estate. These inferior plebeians were generally disregarded by the higher classes of their own estate as well as by the patricians of both the liberal and illiberal parties. They were the later comers, or the poor and degraded among all. As such they had no other resource but to depend on the largesses or the commissions of the most lordly of the patricians. This division of the plebeians is a point to be distinctly marked. While there were but two parties, that is, the liberal and the illiberal, among the patricians, there were no less than three among the plebeians. Only one of the three could be called a plebeian party. That was the party containing the nerve and sinew of the order, which united only with the liberal patricians, and with them only on comparatively independent terms. The other two parties were nothing but servile retainers of the illiberal patricians.

It was to the real plebeian party that Licinius belonged, as also did his colleague Sextius,[1] by birth. A tradition of no value represented the patrician and the plebeian as being combined to support the same cause in consequence of a whim of the wife and daughter through whom they were

[1] Livy, VI, 34.

connected. Some revolutions, it is true, are the effect of an instant's passion or an hour's weakness. Nor can they then make use of subsequent achievements to conceal the caprices or the excitements in which they originated. But a change, attempted by Licinius with the help of his father-in-law, his colleague, and a few friends, reached back one hundred years and more (486 B.C.) to the law of the martyred Cassius, and forward to the end of the Commonwealth. It opened new honors as well as fresh resources to the plebeians.

Probably the tribune was raised to his office because he had shown the determination to use its powers for the good of his order and of his country. Licinius and Sextius together brought forward the three bills bearing the name of Licinius as their author. One, says the historian, ran concerning debts. It provided that, the interest already paid being deducted from the principal, the remainder should be discharged in equal installments within three years.[1] The statutes against excessive rates of interest, as well as those against arbitrary measures of exacting the principal of a debt, had utterly failed. It was plain, therefore, to any one who thought upon the matter, — in which effort of thought the power of all reformers begins, — that the step to prevent the sacrifice of the debtor to the creditor was still to be taken. Many of the creditors themselves would have acknowledged that this was desirable. The next bill of the three related to the public lands. It prohibited any one from occupying more than five hundred jugera, about 300 acres; at the same time it reclaimed all above that limit from the present occupiers, with the object of making suitable apportionments among the

[1] Livy, VI, 35: "unam de ære alieno, ut deduco eo de capite, quod usuris pernumeratum est, id, quod superesset, triennio æquis portionibus persolveretur."

people at large.[1] Two further clauses followed, one ordering that a certain number of freemen should be employed on every estate; another forbidding any single citizen to send out more than a hundred of the larger, or five hundred of the smaller, cattle to graze upon the public pastures.[2] These latter details are important, not so much in relation to the bill itself as to the simultaneous increase of wealth and slavery which they plainly signify. As the first bill undertook to prohibit the bondage springing from too much poverty, so the second aimed at preventing the oppression springing from too great opulence. A third bill declared the office of military tribune with consular power to be at an end. In its place the consulate was restored with full provision that one of the two consuls should be taken from the plebeians.[3] The argument produced in favor of this bill appears to have been the urgent need of the plebeians to possess a greater share in the government than was vested in their tribunes, ædiles, and quæstors. Otherwise, said Licinius and his colleague, there will be no security that our debts will be settled or that our lands will be obtained.[4] It would be difficult to frame three bills, even in our time, reaching to a further, or fulfilling a larger, reform. "Everything was pointed against the power of the patricians[5] in order to provide for the comfort of the

[1] Livy, VI, 35; Niebuhr, III, p. 16; Varro, De R. R., 1: "Nam Stolonis illa lex, quæ vetat plus D jugera habere civem Romanorum." Livy, VI, 35: "alteram de modo agrorum, ne quis plus quinquagenta jugera agri posideret." Marquardt u. Momm., Röm. Alterthümer, IV, S. 102.

[2] Appian, De Bello Civile, I, 8.

[3] Livy, VI, 35; see Momm., I, 382; Duruy, Hist. des Romains, II, 78.

[4] Livy, VI, 37.

[5] Livy, VI, 35: "creatique tribuni Caius Licinius et Lucius Sextius promulgavere leges adversus opes patriciorum et pro commodis plebis."

plebeians." This to a certain degree was true. It was chiefly from the patrician that the bill concerning debts detracted the usurious gains which had been counted upon. It was chiefly from him that the lands indicated in the second bill were to be withdrawn. It was altogether from him that the honors of the consulship were to be derogated. On the other hand, the plebeians, save the few proprietors and creditors among them, gained by every measure that had been proposed. The poor man saw himself snatched from bondage and endowed with an estate. He who was above the reach of debt saw himself in the highest office of the State. Plebeians with reason exulted. Licinius evidently designed reuniting the divided members of the plebeian body. Not one of them, whether rich or poor, but seems called back by these bills to stand with his own order from that time on. If this supposition was true, then Licinius was the greatest leader whom the plebeians ever had up to the time of Cæsar. But from the first he was disappointed.[1] The plebeians who most wanted relief cared so little for having the consulship opened to the richer men of their estate that they would readily have dropped the bill concerning it, lest a demand should endanger their own desires. In the same temper the more eminent men of the order, themselves among the creditors of the poor and the tenants of the domain, would have quashed the proceedings of the tribunes respecting the discharge of debt and the distribution of land, so that they carried the third bill only, which would make them consuls without disturbing their possessions. While the plebeians continued severed from one another, the patricians drew together in resistance to the bills. Licinius stood forth demanding, at once, all that it had cost his predecessors their utmost energy to demand, singly

[1] Ihne, I, 314.

and at long intervals, from the patricians. Nothing was to be done but to unite in overwhelming him and his supporters. "Great things were those that he claimed and not to be secured without the greatest contention." [1] The very comprehensiveness of his measures proved the safeguard of Licinius. Had he preferred but one of these demands, he would have been unhesitatingly opposed by the great majority of the patricians. On the other hand he would have had comparatively doubtful support from the plebs. If the interests of the poorer plebeians alone had been consulted, they would not have been much more active or able in backing their tribunes, while the richer men would have gone over in a body to the other side with the public tenants and the private creditors among the patricians. Or, supposing the case reversed and the bill relating to the consulship brought forward alone, the debtors and the homeless citizens would have given the bill too little help with hands or hearts to secure its passage as a law. The great encouragement therefore to Licinius and Sextius must have been their conviction that they had devised their reform on a sufficiently expanded scale. As soon as the bills were brought forward every one of their eight colleagues vetoed their reading. Nothing could be done by the two tribunes except to be resolute and watch for an opportunity for retaliation. At the election of the military tribunes during that year, Licinius and Sextius interposed their vetoes and prevented a vote being taken.[2] No magistrates could remain in office after their terms expired, whether there were any successors elected or not to come after them. The commonwealth remained without any military

[1] Livy, VI, 35: "Cuncta ingentia, et quæ sine certamine obtineri non possent."

[2] Livy, VI, 35.

tribunes or consuls at its head, although the vacant places were finally filled by one interrex after another, appointed by the senate, to keep up the name of government and to hold the elections the moment the tribunes withdrew their vetoes, or left their office. At the close of the year Licinius and Sextius were both reëlected, but with colleagues on the side of their antagonists. Some time afterwards it became necessary to let the other elections proceed. War was threatening,[1] and in order to go to the assistance of their allies Licinius and Sextius withdrew their vetoes and ceased their opposition for a time. Six military tribunes were chosen, three from the liberal and three from the illiberal patricians. The liberals doubtless received all the votes of the plebeians, as they had no candidates. They had in all probability abstained from running for an office, bills for the abolition of which were held in abeyance. They showed increasing inclination to sustain Licinius and his colleague, both by reëlecting them year after year and by at length choosing three other tribunes with them in favor of the bills. The prospects of the measure were further brightened by the election of Fabius Ambustus, the father-in-law of Licinius and his zealous supporter, to the military tribunate.[2] This seems to have been the seventh year following the proposal of the bills. This cannot be definitely determined, however.

During this long period of struggle, Licinius had learned something. It was constantly repeated[3] in his hearing that not a plebeian in the whole estate was fit to take the part in the auspices and the religious ceremonies incumbent upon

[1] Livy, VI, 36.

[2] Livy, VI, 36. Fabius quoque tribunis militum, Stolonis socer, quarum legum auctor fuerat, earum sua.

[3] Livy, *loc. cit.*

the consuls. The same objections had overborne the exertions of Caius Canuleius three-quarters of a century before. Licinius saw that the only way to defeat this argument was by opening to the plebeians the honorable office of duumvirs, whose duty and privilege it was to consult the Sibylline books for the instruction of the people in every season of doubt and peril.[1] They were, moreover, the presiding officers of the festival of Apollo, to whose inspirations the holy books of the Sibyl were ascribed, and were looked up to with honor and respect. This he did by setting forth an additional bill, proposing the election of decemvirs.[2] The passage of this bill would forever put to rest one question at least. Could he be a decemvir, he could also be a consul. This bill was joined to the other three which were biding their time. The strife went on. The opposing tribunes interposed their vetoes. Finally it seems that all the offices of tribune were filled with partisans of Licinius, and the bills were likely to pass when Camillus, the dictator, swelling with wrath against bills, tribes, and tribunes,[3] came forward into the forum. He commanded the tribunes to see to it that the tribes cast no more votes. But on the contrary they ordered the people to continue as they had begun. Camillus ordered his lictors to break up the assembly and proclaim that if a man lingered in the forum, the dictator would call out every man fit for service and march from Rome. The tribunes ordered resistance and declared that if the dictator did not instantly recall his lictors and retract his proclamation, they, the tribunes, would, according to their right, subject him to a fine five times larger than the highest rate of the census, as soon as his

[1] Appian, De Bell. Civ., I, 9.
[2] Momm., I, 240: "decemviri sacris faciundis." Lange, *loc. cit.*
[3] Livy, VI, 38; Momm., *loc. cit.*

dictatorship expired. This was no idle threat, and Camillus retired so fairly beaten as to abdicate immediately under the pretense of faulty auspices.[1] The plebeians adjourned, satisfied with their day's victory. But before they could be again convened some influence was brought to bear upon them so that when the four bills were presented only the two concerning land and debts were accepted. This was nothing less than a fine piece of engineering on the part of the patricians to defeat the whole movement, and could have resulted in nothing less. Licinius was disappointed but not confounded. With a sneer at the selfishness as well as the blindness of those who had voted only for what they themselves most wanted, he bade them take heed that they could not eat if they would not drink. He refused to separate the bills.[2] The consent to their division would have been equivalent to consenting to the division of the plebeians. His resolution carried the day. The liberal patricians as well as the plebeians rallied to his support. A moderate patrician, a relation of Licinius, was appointed dictator, and a member of the same house was chosen master of the horse. These events prove that the liberal patricians were in the majority. Licinius and Sextius were reëlected for the tenth time, A.U.C. 366, thus proving that the plebeians had decided to eat and drink.[3]

The fourth bill, concerning the decemvirs, was almost instantly laid before the tribes and carried through them. It was accepted by the higher assemblies and thus became a law. It is not evident why this bill was separated from the others, especially when Licinius had declared that they should not be separated. Possibly it was to smooth the way for the

[1] Livy, VI, 38; Momm., *loc. cit.*
[2] Dion Cassius, Fragment, XXXIII, with Reimer's note.
[3] Livy, VI, 42.

other three more weighty ones, especially the bill concerning the consulship.[1] There seems to have been an interruption here caused by an invasion of the Gauls.[2] As soon as this was over the struggle began again. The tribes assembled. "Will you have our bills?" asked Licinius and Sextius for the last time. "We will," was the reply. It was amid more violent conflicts, however, than had yet arisen that the bills became laws[3] at last.

It takes all the subsequent history of Rome to measure the consequences of the revolution achieved by Licinius and Sextius, but the immediate working of their laws could have been nothing but a disappointment to their originators and upholders. We can tell little or nothing about the regard paid to the decemvirs. The priestly robes must have seemed an unprecedented honor to the plebeian. For some ten years the law regarding the consulship was observed, after which it was occasionally violated,[4] but can still be called a success. The laws of relief,[5] as may be supposed of all such sumptuary enactments, were violated from the first. No general recovery of the public land from those occupying more than five hundred jugera ever took place.[6] Consequently there was no general division of land among the lackland class. Conflicting claims and jealousy on the part of

[1] Livy, VI, 42; et comitia consulum adversa nobilitate habita, quibus Lucius Sextius de plebe primus consul factus.

[2] Livy, *loc. cit.*

[3] Livy, VI, 42; Ovid, Faustus, I, 641, *seq.*:

"Furius antiquam populi superator Hetrusci
Voverat et voti solverat ante fidem
Causa quod a patribus sumtis secesserat annis
Vulgus; et ipsa suas Roma timebat opes."

[4] Momm., I, 389. [5] Momm., I, 384.

[6] Arnold, Roman History, II, 35; Ihne, Essay on the Roman Constitution, p. 72; Ihne, Roman Hist., I, 332–334; Long, I, ch. XI; Lange, *loc. cit.*

the poor must have done much to embarrass and prevent the execution of the law. No system of land survey to distinguish between ager publicus and ager privatus existed. Licinius Stolo himself was afterwards convicted of violating his own law.[1] The law respecting debts met with much the same obstacles. The causes of embarrassment and poverty being much the same and undisturbed, soon reproduced the effects which no reduction of interest or installment of principal could effectually remove. It is not our intention, however, to express any doubt that the enactments of Licinius, such as they were, might and did benefit the small farmer and the day laborer.[2] Many were benefited. In the period immediately following the passing of the law, the authorities watched with some interest and strictness over the observance of its rules, and frequently condemned the possessors of large herds and occupiers of public domain to heavy fines.[3] But in the main the rich still grew richer and the poor and mean, poorer and more contemptible. Such was ever the liberty of the Roman. For the mean and poor there was no means of retrieving their poverty and degradation.

These laws, then, had little or no effect upon the domain question or the redistribution of land. They did not fulfill the evident expectation of their author in uniting the plebeians into one political body. This was impossible. What they did do was to break up and practically abolish the patriciate.[4] Henceforth were the Roman people divided into rich and poor only.

[1] Livy, VI, 16: "Eodem anno Caius Licinius Stolo a Marco Popillio Lænate sua legi decem milibus æris est damnatus, quod mille jugerum agri cum filio possideret, emancipandoque filium fraudem legi fecisset." Appian, Bell. Civ., I, 8; "*τὴν γῆν ἐς τοὺς οἰκίους ἐπὶ ὑποκρίσει διένεμον.*"

[2] Momm., I, 389.

[3] Momm., I, 389, 390.

[4] Momm., I, 389, 390.

"To sow discord among different nations in order to array one against another, — to assist the vanquished in conquering their conqueror, — to husband its own resources, and under the pretext of defending its allies to exhaust them, — to invade the territories of its neighbors, — to interfere in the disputes of other states, so as to protect the weaker party and finally subjugate both, — to wage unceasing war and prove itself stronger in reverses than in success, — to evade oaths and treaties by subterfuge, — to practice every kind of injustice under the specious guise of equity. It was such a policy as this that gave Rome the scepter of all Italy and which was destined to secure for it that of the entire known world." The first stage in this universal conquest has now been reached. Although in existence but a few centuries, Rome has passed far out upon the road of conquest. The Albans, the Sabines, the people of Veii, have been incorporated in the new State. The Equi, the Volsci, and the Samnites, who struggled hard against their fate, have been destroyed. The Etruscans, the Campanians, and the Tarentines have submitted to the Roman yoke and been received as allies. Rome is master of Italy.

§ 73. Foreign Policy of Rome.[1]

But it is rather the legal history with which we are concerned, and it is of special interest as well as of vital importance for us fully to comprehend this legal history in its relation to other nations. This task is a difficult one because there are a number of different elements to be distinguished with care and because there was no uniform policy applicable alike to all the cities and territories connected with the ruling State, but its relation with each depended on the terms and conditions of treaties. For convenience we will consider this question of relationship under three heads; (1) in relation

[1] Ortolan, 181–218.

to the cities themselves, (2) in relation to the soil or territory, and (3) in connection with the persons or inhabitants. Each one of these fields is worked out in answering the question whether there was, as regards the city, the soil, or the individual, any participation in the public or private privileges of Roman citizenship.

Before entering into a discussion of the question it may be well to remark that the Quiritarian law (jus Quiritium, jus civitatis, jus civile), which was confined to Roman Citizens, may be divided or considered under two heads, (I) private law and (II) political rights.

(I) Private law comprised: —

(*a*) The connubium, whence sprang the patria potestas, agnation, and all the effects of the civil law.

(*b*) The commercium, which affected both the individual and the soil; as to persons, conferring the right to make contracts with citizens, and to acquire and alienate property under the civil law; as to land, constituting it Quiritarian property under the operation of the civil law.

(*c*) The factio testamenti, which was the right of receiving from citizens, or of making dispositions in their favor by testament.

(II) Political rights comprised: —

(*a*) The jus honorum, or the capacity to hold office and magistracies in the State.

(*b*) The jus suffragii, or the right of voting in the comitia.

The above-named powers could be granted either separately or collectively by the ruling power to cities, to territories, or to individuals. The whole was called the optimum jus.

(1) Taking up the subjects as classified above, Rome is the dominant city and the sovereign power.[1] The Roman colonies (coloniæ Romanæ, coloniæ togatæ) were offshoots of the sovereign city. These were constituted upon the Roman model, each having a senate (curia), two consuls (duumviri), and the order of patricians and plebeians. Each was admitted, both as to the population and soil assigned to it, to a complete participation in the rights of private Roman citizenship (connubium, commercium, factio testamenti, and dominium ex jure Quiritium), but they were deprived of those of public citizenship (civitas absque suffragio). Being daughters of Rome they did not cease to observe the laws of Rome and to be dependent upon her, and under her government. These coloniæ multiplied as the power of Rome increased and, when that power, as now, had spread over all Italy, they formed stepping-stones upon which this centralizing power could safely rest a foot. In those places which had offered the firmest resistance, a senatus consultum decreed the establishment of a colony and commissioners called triumviri or quinqueviri, according to their numbers, were appointed. The commissioners enrolled the enfranchised, and the proletarii, who volunteered, conducted them to the spot, and distributed among them, in some cases, a portion of the conquered territory, in some cases the whole of it, without leaving anything to the former inhabitants. The colony was then founded upon the model of the mother city. At the time of the extension of Roman authority over all Italy about thirty of these colonies had been founded.

In Relation to Cities.

The cities of Latium bore different titles and were placed under various conditions, according to the treaty entered

[1] Ortolan, *loc. cit.*

into with each; they were either free towns or allied towns (civitates liberæ, civitates fœderatæ).[1] They were the nearest neighbors of Rome and, consequently, the earliest subjected to its power and taken into alliance. After the defeat at Lake Regillus, in 396 B.C., they were placed under a more onerous yoke. The cities which escaped destruction and were not transferred into coloniæ were allowed to remain in the enjoyment of independence under the conditions of the treaties admitting them to alliance. Some concessions were made toward them in the shape of admission to the rights of Roman citizenship: —

(*a*) They generally had the commercium, and their soil was susceptible of Quiritarian ownership.

(*b*) They enjoyed the factio testamenti, providing they had commercium.

(*c*) There are cases where the connubium and a participation to a certain extent in political rights were conceded. The citizens of such favored towns who happened to be at Rome at the time of the meeting of the comitia were at liberty to vote, and the tribe to which they should attach themselves was determined by lot. Such was the jus Latii, jus Latinitatis which, in course of time, became extended to towns and countries beyond Latium, and still later beyond Italy, to Spain and Gaul, to the inhabitants of which the jus Latii, and not the full Roman rights, was extended.

Latin colonies (Latinæ coloniæ) were colonial communities, assimilated not to Rome, but to the towns of Latium, and they consequently enjoyed the jus Latii rather than full Roman

[1] Ortolan, *loc. cit.*

rights.[1] These colonies were chiefly composed of Latins or other people settled either by the arms or policy of Rome in a conquered country. The Romans who enrolled themselves in these coloniæ, and there were many of them, forfeited their Quiritarian rights and enjoyed only the jus Latii. A decree of the senate was not necessary for the establishment of such colonies, and a Roman citizen was generally permitted to join one of these without the special permission of the tribes.

The towns of Italy which submitted to Rome at the conclusion of the struggle and the consequent total subjection of all Italy in the latter part of the fifth century A.U.C. remained, by virtue of treaties, free cities in alliance with Rome (civitates liberæ fœderatæ). They did not receive so good terms as did the cities of Latium, but they still possessed the fundamental element of their own constitution, liberty and independence. They were governed by laws made and magistrates appointed by themselves. They had the commercium, and their property enjoyed the Quiritarian rights (dominium ex jure Quiritium). In virtue of this they were free from the tax imposed upon the possessors of conquered lands, but their inhabitants could not obtain citizenship as could those of Latium. Such right was known as the jus Italicum.

The distinctive characteristics of municipia did not rest upon the basis of origin or geographical position but upon the peculiar constitution of the city to which the term *municipium* was applied. Thus in Latium and Italy there were certain cities that were separated from their surroundings and erected into municipia. As Rome's conquests increased, these municipia extended beyond Italy. The word *municipium* has not at all times had the same meaning, but

[1] Ortolan, *loc. cit.*

the dominant idea of a municipal town was a town to which liberty of legislation and freedom of internal administration had been accorded. The greater number of these, although they enjoyed the free exercise of their own institutions, had, like the colonies, a political system somewhat analogous to that of Rome. They usually had: —

(*a*) A species of senate under the name of curia.

(*b*) Under the name of decurians or curiales, they had orders answering to senators, patricians, and below these, plebeians.

(*c*) Their duumviri or quatuorviri made up a species of consul.

(*d*) They also had ædiles, censors, and quæstors for their police and local finance, officers, designed to maintain the balance of power in the State just as they did at Rome. These differed in some details owing to local peculiarities. Their legal systems, like their institutions, were a close copy of Rome.

The plebiscitum which conferred upon a town the title of municipium, determined the extent to which the privileges of Roman citizenship were to be accorded to its inhabitants. Sometimes the jus Latii was in this way conferred; sometimes all the rights of Roman citizenship as to private law, including connubium, were conceded, while in others the concession was restricted to the commercium and the factio testamenti; sometimes even the public rights of Roman citizenship were accorded, together with the capacity to hold magistracies (jus honorum) and to exercise the suffrage (jus suffragii). The inhabitants of these latter municipii were citizens of two countries, of the municipality and of Rome itself. This latter right had been bestowed upon very

few at the time of the subjugation of Italy. The town of Cære was the first to be created a municipium, in 389 B.C.

Prefectures were towns, municipalities, or colonies to which Rome, while leaving to the inhabitants the free exercise of their own administration, yet sent a prefect for the administration of justice.

(2) As regards the soil or territory belonging either to the Roman colonies, the allied towns of Latium, and Latin colo-

In Relation to Soil.

nies, the allied towns of Italy, or the municipia,[1] — of all these we can say that an assimilation to the Ager Romanus had taken place and, by reason of the commercium granted to these several peoples, the land was treated as Quiritarian property. The proprietors of this class of soil had the territorial rights of Roman citizens (dominium ex jure Quiritium). They were subject to the civil law, and held their lands in full ownership free from all rent or tribute.

(3) As regards personal status, the inhabitants of these lands were divided into six classes: —

In Connection with the Persons.

(*a*) Cives, citizens.
(*b*) Romani coloni, Roman colonists.
(*c*) Socii Latini, or Latini, allied Latins.
(*d*) Latini colonarii, Latin colonists.
(*e*) Municipes, citizens of municipalities.
(*f*) Hostes, peregrini, or barbari, foreigners.

(*a*) The title of citizen was at first bestowed upon all the vanquished, but it gradually became restricted and guarded with great jealousy. It carried with it all civil rights, both of a public and of a private nature, — the privilege of electing and being elected to magistracies,

Citizens.

[1] Ortolan, *loc. cit.*

and of voting in the comitia. It was conferred by a plebiscitum upon the inhabitants of an Italian city collectively; in others it was bestowed upon individuals who were distinguished by reason of their wealth and influence.

(*b*) Roman colonists had full private rights, but no share in political rights. They took part in the political affairs of their colony, but could not vote or hold office in Rome. **Roman Colonists.**

(*c*) The allied Latins possessed the rights of private citizenship accorded to the city of which they were members. These usually consisted of commercium and factio testamenti; this last, per æs et libram. **Latins.**

(*d*) Latin colonists were placed in a legal status entirely similar to that of the Latins just named. They, too, enjoyed the rights of private citizenship. **Latin Colonists.**

(*e*) Municipes, as the word implies, took part in the munera; that is, the charges, functions, and consequently the advantages of Roman citizens. Their personal status varied according to the concessions made to each municipium, but usually they had the full rights of Roman citizenship and, in case they were present in Rome at the time of the meeting of the comitia tributa, could vote; the tribe in which they would be entitled to make use of the franchise being settled by lot. **Municipes.**

(*f*) Three different expressions were applied to the foreigner; he was either peregrinus, hostis, or barbarus. The peregrinus was the foreigner whose country was already under Roman dominion, but who lacked the right of Roman citizenship. This term applied to the majority of Latins and Italians. The hostis was a foreigner whose country had not yet submitted to Rome and who was consequently still looked upon as an enemy. The barbarus **Foreigners.**

was one who dwelt beyond the limits of civilization and the scope of Roman geographical knowledge. These were the relations in which the peregrinus, the hostis, and the barbarus stood to Rome; the one in her bosom, or at least under her dominion; the other beyond the pale of her influence; and the third outside the limits of the empire and beyond the reach of its civilization.

TITLE 2. *From the Submission of all Italy to the Empire, (Jus Gentium) 269–30* B.C.

CHAPTER VII

COMMERCIAL EXPANSION AND ITS INFLUENCE ON ROMAN LAW

IN the life of the nation, as in that of the individual, there is nothing abrupt. History reveals very few instances of a sudden revolution in the political laws of a State, while an abrupt change in the manners of a people is a phenomenon that has never been witnessed. The unskilled and superficial observer may believe in the occurrence of such revolutions, for he sees events only when they have become conspicuous to all mankind. But he who has been trained in the observance of political phenomena and who takes note of causes and calculates their effects will never be so deceived. At the beginning of the epoch the Romans were flushed with the glory of success. Italy had acknowledged their sway and they were already reaching out for the conquest of Asia and Africa. But while there appears on the surface nothing save the signs of prosperity and success, if we look deeper we will discover that the primitive simplicity and the austerity of manner of former days had passed away and luxury and wealth obtained by conquest had already sapped the strength of their former virtues of self-restraint and magnanimity. The remaining period of the republic which we are now to consider may be divided

§ 74. Introduction.[1]

[1] Muirhead, 223–236.

into two portions. The first terminates with the destruction of Carthage, Numantia, and Corinth. The second commences with the fall of Corinth and reaches down to the empire. During the first of these two portions, events are preparing the way for the second. Every fresh victory increased the wealth of the victors. The number of slaves was continually increased and habits of luxury were encouraged by a growing familiarity with the usage of the more cultured conquered nations. This increased wealth was concentrated in the hands of the few, while poverty was engendered for the many by their being forced to work in competition with slave labor. As success accompanied the Roman arms, the purity of Roman morals declined, and in proportion as Rome was victorious, she became corrupt. The political history of this period may be summed up as follows: from the expulsion of the kings to the subjection of all Italy there was an internal struggle for supremacy between the two classes of patricians and plebeians which finally culminated in the supremacy of the latter. While this was going on there was also an outward struggle progressing which involved the fate of all Italy. From the subjugation of Italy to that of Asia and Africa, the internal conflict had ceased, but the external struggle for universal dominion continued to rage. When the object of this struggle was finally attained and Rome found herself the mistress of the world, on to the establishment of the empire, the annals of Rome record no important wars, but she was again rent by internal dissensions, and by civil war instituted for the personal aggrandizement of some general, consul, or dictator. Such a struggle could culminate in one way only. The hatred and animosity engendered could result in nothing short of the triumph of one leader and the destruction of his

opponents. In other words, such a condition of affairs leads inevitably to empire.

The campaigns in which Rome was engaged until the end of the First Punic War absorbed all her energies and tested her strength to the utmost. At the close of this struggle strangers began to flock to Rome, lured by the opportunities for trade which rapid conquest had made certain. In the first place, Latins and other allied peoples added their numbers and strength to the city. Following them came Greeks, Carthaginians, and Asiatics. This influx of foreigners and the expansion of commerce which came with them gave rise to new political and legal conditions. The jus civile, peculiar as it was to Rome and her citizens, was inapplicable to these changed circumstances. Roman modes of acquiring property and contracting obligations were too narrow. For this reason there gradually developed a jus gentium, which very early in its history supplanted the jus civile and drove covenants for recuperatio out of use. At first the jus gentium was limited to transactions between non-citizens, or between citizens and non-citizens, but it eventually proved so far-reaching and useful that it was accepted in the dealings of citizens with citizens, and became part and parcel of the jus Romanorum. Gaius and Justinian speak of the jus gentium as "the common law of mankind," "the law in use among all nations." This law, however, was not built up by the adoption of one doctrine or institution after another that was found to be generally current among other peoples. It was, in reality, Roman Law, built up by Roman jurists, but it was called into existence through the necessity of intercourse with other peoples. At first it simply regulated intercourse between peregrins or between peregrins and citizens, on the basis of their common liberty.

The growth of commerce caused the law of contract to develop more rapidly than any other legal branch. The adoption and development of the stipulation and the recognition of consensual contracts may be cited as an example of this. But it is difficult to state with precision exactly just what were the doctrines and institutions of the jus gentium as distinguished from the jus civile. The distinction must have been familiar enough to the Romans.

The subjugation of all Italy was speedily followed by the extension of commercial relations. Following the successful termination of the First Punic War many foreigners, as I have already stated, flocked to the city to practice the mechanical arts or to engage in mercantile pursuits. These callings were looked upon with contempt by Romans in general and specially forbidden by law to patrician families. These strangers brought with them new objects and new wants, followed by new agreements and new disputes. The great mass of the foreign population was not in a condition to make use of the jus civile, while those who were admitted to this favored footing felt themselves bound and hampered by the narrow range allowed to them in the acquisition of property and the protection of their rights. To meet these new demands, there gradually grew up a jus gentium whose application for a time was confined, no doubt, to transactions between these foreigners or between foreigners and Roman citizens. However, in course of time, it was accepted in the dealings of citizens with one another. It was greatly added to by the creation of jurists that were guided by the principles of comparative jurisprudence and private international law.

§ 75. The Institution of the Peregrin Praetorship.

It was to meet the demand of this new order of things

that there was created a new magistracy, that of the prætor peregrinus or prætor of the stranger.[1] The urban prætorship was an outcome, as has been seen, of the Licinian laws of 367 B.C. The object of its institution was that the administration of justice might be retained in the hands of the patricians, although the consulate had been thrown open to the plebs. It was the business of the prætor to administer the law within the city; "qui jus in urbe diceret." In dignity he was on a footing of equality with the consuls and, in their absence from the city, he could administer civil affairs as their substitute. In the course of time this office, which was an annual one, was opened to the plebeians, but no change was made in the duties devolving upon this officer. The prætor administered justice single handed and without fear or favor to both citizens and foreigners. But in the beginning of the sixth century A.U.C. the altered condition of things made it necessary to relieve him of a portion of the burdens of this office. A special prætor was appointed, known by the name of prætor peregrinus. The date of this appointment is not known with accuracy, but may be placed at 512 A.U.C. Pomponius says, "The creation of the new office was rendered necessary by the increase of the foreign population of Rome, and that the name of prætor peregrinus was given him because his principal duty was to dispense justice to this foreign element." The jurisdiction of this magistrate extended to all matters of dispute between foreigners or between a foreigner and a Roman citizen. He did not apply to foreigners the rules of the civil law, that is to say, those that were exclusively confined to citizens, but he applied to them the rules of the jus gentium or, in other words, the law as it was made ap-

Prætor Peregrinus.

[1] Muirhead, 228, 229; Ortolan, 40.

plicable to all men. The dignity of the prætor urbanus was infinitely above that of the prætor peregrinus; nevertheless these officers, when necessary, could act for each other.

The prætor exerted a great legislative power. With him all legislative proceedings commenced. He put in shape to come before the court all cases at issue. When the power of the people went beyond the province of law, it was necessary for the prætor to exert an authority far more influential than that of prudentes. As this power increased a practice grew up to avoid the evils of uncertainty; a proclamation or edict stating the rules by which he would be guided in granting or refusing causes was promulgated by the prætor. This was called a perpetual edict (edictum perpetuum) for his entire term of office. Temporary edicts of the prætor were known as edicta repentina. The prætor was content for the most part to follow in the footsteps of his predecessors and simply to enforce the decisions rendered by them in similar cases that arose in his own jurisdiction. That which he copied from a predecessor was called edictum translatum.

At first a prætor had only judicial function; afterwards his power encroached upon that of the consuls and he assumed executive authority. There was no guarantee except constitutional usage and opinion that a prætor would adhere to the rules laid down in his edict. In the discharge of his duties he necessarily met from time to time with cases for which there was no provision, or with others to which the application of the law appeared to be unjust. Under such circumstances he felt the necessity of supplementing this law or correcting it with such means as was in his power. Frequently he was compelled to build up a new system. In the course of time there were precedents established for almost every case that could arise, so that it was no longer

necessary to make law. Thereupon a law was passed (lex Cornelia de Edictis Perpetuis) declaring it to be unlawful for a prætor to depart from the edict which he promulgated at the first of his year of office. Cicero, speaking of this limitation placed upon the authority of the prætor, says, "You must, as soon as you have entered upon your magistracy and taken your seat, publish by an edict the rules that you intend to observe during the term of your office." In his prosecution of Verres, Cicero makes it one of the chief accusations against him that he did not adhere to his published edict.

During the reign of Hadrian, Salvius Julianus, an illustrious jurist of that epoch, who held the office of prætor, published a work entitled Edictum Perpetuum. This was a methodical arrangement of the prætorian law, of the various edicts published up to that time, and of the provisions established by common use. Henceforth the prætors were obliged to adopt its provisions and to conform thereunto. They still enjoyed the right of adding such accessory rules and forms as the course of events rendered necessary. But their powers were very much limited. Henceforth the authority of the prætor may be said to be threefold:—

(1) He denied to a person having a perfect legal right his proper remedy, in case the carrying out of the law seemed contrary to equity.

(2) He granted actions to persons having no legal right, if in his estimation the ends of justice were attained thereby.

(3) He introduced entirely new actions in order to facilitate the rendering of justice. Of these the most powerful was the interdict. Of this kind of law we have many examples. They are described by

Gaius as fictions, but he uses the word in a peculiar sense. Of this kind of action on the part of the prætor the following is a good example: while it was a law that the prætor could not make an heir, yet he by bonorum possessio gave to a person all the rights and duties of an heir. "If, supposing Aulus were heir, Numericus ought to pay him so many sestertia, let the judex condemn Numericus to pay him that amount." In this form it may be observed that it does not make the statement that Aulus is heir, but says that the judex must give the same verdict as if he were. This seems rather more a hypothetical than a fictitious act. An action of this kind was founded upon utility. In some cases the prætor took a much bolder course. Although the fiction was a bold scheme, it was adopted to avoid trouble and to simplify legal procedure. It was less of a shock to say that Aulus ought to recover as if he were heir, than to say that he ought to recover, no matter whether he were heir or not.

In some formulæ a more direct course was taken, as, for instance, in the sale of an inheritance, when it was decreed that the buyer pay the debt of the deceased. The herus was the universal heir, that is, he was heir both to the assets and the liabilities. If, therefore, the property which he received was sold, it was deemed a mere matter of justice that all debts be met with the proceeds of the sale and only the residuum turned over to the heir. The prætor stands in Roman law midway between the jurisconsult and legislator. His right to alter the law was acknowledged but this right was limited. He was hedged round by a firm but elastic

band. He represented the conscience of the citizens of Rome. He decided in what cases the strict law was to give way to equity. In this way a wide range was given to his judicial activity, publica utilitas. "Jus prætorium est quod prætores introduxerunt ad privandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam." A single example may suffice to show that the prætor's power was limited by definite bounds, although these bounds were very flexible. The Twelve Tables gave the succession to a man's sui heredes, but children released from potestas did not succeed. The prætor did not hesitate to allow the emancipated child to enter upon the property of his deceased father. Afterwards, the prætorian law allowed the child to inherit from its mother as well as from its father, thus removing all restrictions whatever. The prætor's power was exercised umder three heads:—

(1) He admitted aliens into the protection of Roman law.
(2) It is due to him that the religious fanaticism and the narrow bigotry of the jus civile gave way to well-established rules of jurisprudence, thus giving effect to fundamental legal principles.
(3) He took the first and most decisive part in revising the law of intestate succession in such a way that property should henceforth follow the ties of blood instead of the artificial relation of potestas.

§ 76. The Establishment of Provinces.[1]

The organization and administration of provinces was a new departure for Rome and came quite late in her history, long after the development of her internal domestic institutions and laws. Foreign conquest made it necessary for Rome to depart from her long

[1] Ortolan, 41; Muirhead, 230–232.

established administrative custom of leaving everything in the hands of her two consuls, and to establish transmarine provinces with provincial officers to carry on the government. This departure was but a necessary expansion to meet the needs of the new conditions of conquest and consequent subordination of foreign States. Of these Sicily was the first, organized in 241 B.C.; then came, in order, Sardinia, in 228, Spain, in 206, Cisalpine Gaul, in 160, Illyria, in 155, and Carthaginia, in Africa, in 146. Each province was placed under the direct domination of Rome and governed by Roman magistrates according to the terms of the plebiscitum or senatus consultum which had been issued to regulate their condition upon the completion of their conquest. It now became a principle in the law of conquest among the Romans that the ownership in the soil of a conquered country passed to the conqueror. By this plan the conquered inhabitants ceased to be the proprietors of the soil and sank to the condition of occupants, paying to Rome a fixed annual rental or vectigal. In addition to this payment, which was a tax on the provincial soil, the inhabitants were also called upon to pay a personal impost or tribute. They were, in fine, tributaries and not citizens. The entire province was, with the exception of municipia and colonies established within its bounds, subject to the general supervision of the Roman governor or prætor and under his immediate control.

The provinces were at first administered by magistrates who were nominated by the comitia especially for this service.[1]

Increase in the Number of Prætors.

They were called prætors after the prætor urbanus and prætor peregrinus in Rome. In 227 B.C. a prætor was appointed to administer the govern-

[1] Ortolan, 42.

ment of Sicily. In the same year one was sent to Sardinia. In 197 Spain was divided into two provinces and a prætor sent to each. Thus there were in all six prætors, two for Rome and four for the provinces. When the number of provinces was increased a new method was adopted for their administration. Consuls and prætors were chosen for a period of one year only. When they surrendered their offices at the expiration of their term, it was thought wise to utilize their knowledge and experience by sending them to administer the government of the provinces under title of proconsuls and proprætors. The four prætors created originally for the provinces of Sicily, Sardinia, and Spain, remained for one year at Rome before taking office. Here they aided their colleagues in the administration of home justice and so learned the duties of their office before entering upon it.

When Rome discarded her kings and established a republican form of government she needed but one army to protect her narrow borders, and her two consuls were sufficient for its command. But when, by reason of her many conquests, it became necessary to maintain an army simultaneously in Italy, Sicily, Spain, and Africa, her two consuls were insufficient for the purpose of commanding them.[1] When, therefore, a consul retired from office, resort was had to law to continue him in command of the forces as provincial governor. In this way Scipio Africanus the Second was continued in office for ten years until Carthage was overrun and completely destroyed. When a victorious war terminated the province thus obtained had to be governed, and, as there was generally more or less danger of insurrection in a recently subdued territory, the government was intrusted to a proconsul, and troops under his

Proconsuls.

[1] Ortolan, 43.

command were stationed there. He had almost absolute authority in his province. The army and the administration of justice were in his hands, and he was restricted only by the law that had been passed regulating the mode of government of the province over which he was appointed. He had legati chosen by himself to assist him in the discharge of his duties and to represent him in his absence. The only check upon his autocratic rule was a quæstor, or treasurer, sent out by the senate and responsible to that body. He received and paid out all moneys, and the proconsul had to make all drafts on the treasury through him. Taxes were levied immediately by farmers of the revenue (publicani) who purchased the impost from the government at as small a figure as possible and then by extortion collected nearly double the amount.

Proprætors.

The consular provinces were those that, by reason of recent conquest, or exposed frontiers, maintained a military force that was kept ready for instant service. The command of these was intrusted to the proconsul. When a province had been organized for some time and was located in such a manner as to be free from barbarian inroads so that a military force for protection and safety was unnecessary, it was usually conferred upon a prætor who had no military authority.[1] From the nature of the case the condition of the provinces fluctuated and the classification as consular and prætorian differed from year to year. Both proconsuls and proprætors were required to render an account to the senate upon resigning their post. Provincial government during the republican period was usually just and moderate, although we have examples of tyranny and extortion.

[1] Ortolan, 44.

Until the time of Diocletian, the administration of law was not confined to professional lawyers. It was rather regarded as a public office that any citizen might be called upon to undertake. After the creation of the office of prætor that functionary was, generally speaking, a politician and statesman rather than a man learned in the law, while the judex, appointed to try a case, was a man of senatorial rank and in good social standing, but without any legal training. The tendency of the Romans to judicial studies and legal pursuits can be seen at an early date. The Roman mind was essentially legal and formal. The Roman had an instinctive love of law and order and took naturally to legal studies and pursuits. Many persons during the republic gave their attention to the study of law and to the directing of citizens in their private affairs.

§ 77. Public Consultations of the Jurists.[1]

At first, patricians were the only persons who had knowledge of the law and were initiated into the mysteries of the actiones legis and the dies fasti. The pontifex maximus and his college of pontiffs had a monopoly in legal procedure, and a trial of a case assumed in their hands something of a religious nature, and the aristocratic jurisconsult pronounced his dictum as a species of oracle. When, however, the curtain was drawn aside and the legal mysteries revealed to the unhallowed eyes of the plebeians, rapid advancement in legal knowledge was made. Tiberius Coruncanius, the plebeian who first attained to the dignity of pontifex maximus, was also the first plebeian to devote himself to the public profession of the law. He died in 249 B.C., highly honored by the Roman people. Many others followed his example and gradually there grew up a body of men who were learned in the law and who gave their services to those who

[1] Ortolan, 45.

had need of them. Cicero, speaking in reference to his own time, after passing in review over the instruction which formed a less essential part of the profession, summarizes in four words the office of a jurist; respondere, cavere, agere, scribere. "Respondere, that is, to give advice according to the facts laid before the legal adviser upon the matters submitted to him, and frequently upon matters not in litigation, *e.g.*, the marriage of a daughter, the purchase of an estate, or the culture of a field. Cavere, that is, to indicate the forms that must be pursued, or the precautions taken, in order to secure the rights of an individual or the protection of his interests. Agere, that is, to interfere actively for his client in the Forum before the magistrate or before the judge, to appear with him there to support his advice with his presence, and to give such counsel as the exigency of the occasion should require. Scribere, that is, to compose and publish collections, commentaries, or treatises upon certain parts of the law."

This acquaintance with and practical profession of the law served as a means of acquiring popularity and election to the higher magistracies. It was not at first a source of revenue, as nothing could be charged for legal services until late in the history of the republic. Such were the prudentes, to whose opinions so much weight attached that they were finally considered as one of the sources of law.

The legis actiones gradually declined in use until towards the end of the sixth century, when they were practically suppressed by the enactment of the lex Aebutia.

§ 78. The Lex Aebutia.[1] The date of this lex is variously given. Ortolan makes a rather strong argument for 170 B.C., while Muirhead gives the date 247 B.C. The earlier date seems to be preferable, although there is no direct evidence for this.

[1] Muirhead, 230–234.

Very little is known about the contents of this law, but it is generally supposed to have empowered the prætors: —

(1) To devise a simpler form of procedure for causes that were already cognizable per legis actiones.
(2) To devise forms of action for causes that were not cognizable under the older system.
(3) To formulate the issue and reduce it to writing so that no mistakes could be made in its interpretation or application.

The general character of this process and its improvement upon the old legis actiones will be evidenced to every one from an analysis of the formula. This usually consisted of four distinct and separate parts: (1) The demonstratio or statement of the fact or facts set forth by the plaintiff as the ground for his cause; "Quod Aulus Agerius Numerio Negidio Hominem Vendedit." This element did not necessarily form a part of the formula, inasmuch as this preliminary statement might be sufficiently set forth in the second part. (2) The intentio, which contained the precise claim or demand made by the plaintiff which was to be determined by the judex and which, consequently, involved the question of legal rights, the juris contentio, according to the expression used by Gaius: "Si paret N. M. dare oportere, etc." This is the vital element of the formula and could in no instance be wanting when the question was the existence or nonexistence of a civil right. (3) The condemnatio, which was the authority or order given by the judge to condemn or to acquit, according as the facts were proved or not, and which determined the latitude of his authority; ". . . condemnatio; si non paret absolvito." Every condemnatio was pecuniary. The judex, whatever might be the nature of the action, was only

empowered to condemn in a pecuniary penalty. (4) The adjudicatio was the power of partition which was conferred by the magistrates upon the judex, in addition to that of merely finding for or against the plaintiff. It authorized him to make such provision or distribution of the property in question as the circumstances of the case seemed to require.

The formula might also contain, in connection with the intentio, the pleadings of the parties or the counter statements made by the defendants and again by the plaintiff, in order to ascertain the exact point at issue between the contestants, thus taking the place of the altercation already described as forming a part of the ancient actio sacramenti. It was little less than an ingenious method of constituting and directing a jury in civil cases. The origin of this system is, as I have previously stated, somewhat in doubt. Some authorities contend that it was in existence long before the enactment of the lex Aebutia as a part of the instructions given to the judex who was to render a decision under one or the other of the legis actiones. But it would seem to be fairly well established that the formula had constituted the mode of administering justice between peregrini, or between citizens and peregrini. In this case its origin would be ascribed to the prætor peregrinus who developed and elaborated it into a system.

§ 79. Procedure Extra Ordinem.[1]

The two-stage procedure, first in jure, before the magistrate, and then in judicio, before the judex, constituted the ordo judiciorum privatorum. Early in the empire, however, it became the practice in certain cases for the magistrate to abstain from adjusting a formula and making a remit to a judex, and to

[1] Muirhead, 344 *seq.*

keep the cause in his own hands from beginning to end. This course was, no doubt, adopted sometimes because the claim that was being made rested not so much upon legal, as upon moral grounds, and sometimes in order to avoid unnecessary disclosure of family misunderstandings. It was in this way and for this reason that the earliest questions that were raised about testamentary trusts were sent for consideration and disposal to the consuls. Questions of dispute which arose between pupil wards in like manner began to be dealt with extra ordinem, the cognition being intrusted by the emperor, Marcus Aurelius, to a prætor tutelaris. Many other cases of like nature that seemed to involve questions of morality were settled in this same manner.

§ 80. Decline of Religion and Morals.

The vast increase in foreign population that took place during the latter half of the republic materially lowered the moral standard of Rome. The increase of wealth and luxury helped on this moral deterioration and produced a very marked decline in religious sentiment and public and private virtue. This decline manifested itself everywhere and influenced to a considerable extent those branches of the private law which regulated the domestic relations and those which dealt with property and contract.

Perhaps this decline in morals manifested itself in the disregard of the sanctity of the marriage tie more than in any other branch of private law. Even the casual reader of Roman history and law has this fact brought home to him vividly. It was due to many causes. Chief among these was the bringing into the wealthier Roman families numerous slaves, Greeks and Syrians, more polished, refined, and accomplished than their masters, but utterly devoid of all religious and moral sentiment. These corrupted both

master and mistress. While from earliest times the law denounced causeless separation, and Romulus is said to have pronounced anathema upon the man who put away his wife, yet in principle it maintained the perfect freedom of divorce. Gradually the thought became current that it was improper to force persons to continue in the bonds of matrimony between whom conjugal affection no longer existed. The frugality and simplicity of the older days, together with the supervisory care and advice of the consilium domesticum, offset the ease with which divorce was obtained and no evil resulted therefrom. Family misunderstandings were easily smoothed over and divorces were of very raré occurrence.

In 287 B.C., however, the lex Mænia was enacted, and from this time on there is a growing fequency of divorce. This law "displaced the family council as a divorce court, and transferred its functions in that matter to a iudicium de moribus, — a court of inquiry nominated by the prætor, and whose duty it was to decide to what extent there should be forfeiture of the nuptial provisions in case of separation or repudiation." This made divorce easier than ever and rendered the idea familiar, while at the same time it removed the wholesome check put upon it by the domestic council. As the marriage bond became loose, it also had effect on the other family relations. The obligation of the father to provide for his children, which in the early history of Rome was looked upon as a sacred duty, now began to be lightly esteemed. He took advantage of the freedom given to him in the Twelve Tables to dispose of his property as he saw fit, to disinherit some or all of his children, or to give to certain ones less than the share that would fall to them in case he died intestate. This was done quite frequently in the latter part of the republic, and that, too, in order to give a portion or all of

the property to a stranger. To meet this undutiful conduct on the part of the father the centumviral court introduced the querela inofficiosi testamenti, — challenge of the testament by a person whose natural claims had been carelessly disregarded. Finally, the rule came to be established that every child was entitled, notwithstanding the terms of his father's testament, to at least a fourth part of what would have come to him had his father died intestate, unless it appeared on investigation that the latter had sufficient grounds for excluding him from benefit in the will.

The decline in morals also had a marked effect upon business transactions; there was a lack of confidence shown in the integrity of the individual, and laws were enacted to compel honest fulfillment of business obligations, such as exceptio rei venditæ et traditæ, or exceptio non numeratæ pecuniæ.

During the period between 367 and 133 B.C. we find no record of serious disputes between the patricians and commons. Indeed, the senate usually took the lead in popular measures; lands were assigned without any demand on the part of the plebeians. But we must not be deceived by this seeming harmony. In the midst of this apparent calm a radical change was taking place in Roman society. It is necessary for us to understand this new condition of affairs in the republic before it will be possible to comprehend the rogations of the Gracchi.

§ 81. Agrarian Legislation.

One of the greatest dangers to the republic at this time reveals itself in the claims of the Italians. These people had poured out their blood for Rome; they had contributed more than the Romans themselves to the accomplishing of those rapid conquests which, after the subjugation of Italy, quickly extended

Condition of the Country at the Time of the Gracchan Rogations.

the power of Rome. In what way had they been rewarded? After the terrible devastations which afflicted Italy in the Hannibalic war had ceased, the Italian allies found themselves ruined. Whilst Latium, which contained the principal part of the old tribes of citizens, had suffered comparatively little, a large portion of Samnium, Apulia, Campania, and more particularly of Lucania and Bruttium, was almost depopulated; and the Romans in punishing the unfaithful "allies" had acted with ruthless cruelty.[1] When at length peace was concluded, large districts were uncultivated and uninhabited. This territory, being either confiscated from the allies for taking part with Hannibal, or deserted by the colonists, swelled the ager publicus of Rome, and was either given to veterans,[2] or occupied by Roman capitalists, thus increasing the revenues of a few nobles.

If a nation is in a healthy condition politically and economically, so that the restorative vigor of nature is not impeded by bad restrictive laws, the devastations of land and losses of human life are quickly repaired. We might the more especially have expected this in a climate so genial and on a soil so fertile as that of Italy. But Roman laws so restricted the right of buying and selling land that in every Italian community none but members of that community, or Roman citizens, could buy or inherit.[3] This restriction upon free competition, by giving the advantage to Roman citizens, was in itself sufficient to ruin the prosperity of every Italian town. This law operated continually and unobservedly and resulted in placing,[4] year by year, a still larger quantity of the soil of Italy in the hands of the Roman aristocracy. In order to palliate the evils of conquest, or at least to hide their condi-

[1] Livy, XXXI, 4, 1; Ihne, IV, 370–372.
[2] Livy, *loc. cit.*
[3] Ihne, IV, 148.
[4] *Ibid.*, IV, 371.

tions of servitude, the Romans had accorded to a part of the Italians the title of allies, and to others the privileges of municipia.[1] These privileges were combined in a very skillful manner in the interest of Rome, but this skill did not hinder the people from perceiving that they depended upon the mere wish of the conquerors and consequently were not rights, but merely favors to be revoked at will. The Latini, who had been the first people conquered by Rome and who had almost always remained faithful, enjoyed under the name of jus Latii considerable privileges. They held in great part the civil and political rights of Roman citizens.[2] They were able by special services individually to become Roman citizens and thus to obtain the full jus Romanum. There were other peoples who, although strangers to Latium, had been admitted, by reason of their services[3] to Rome, to participate in the benefits of the jus Latii. The other peoples, admitted merely to the jus Italicum, did not enjoy any of the civil or political rights of Roman citizens, nor any of the privileges of Latin allies;[4] at best they kept some souvenirs of their departed independence in their interior administration, but otherwise were considered as subjects of Rome. And yet it was for the aggrandizement of this city that they shed their blood upon all the fields of battle which it pleased Rome to choose; it was for the glory and extension of the Roman power that they gained these conquests in which they had no share. Some who had attempted to regain their independence were not even accorded the humble privileges of the other people of Italy, but were reduced to the state

[1] *Ibid.*, IV, 354; Momm., III, 277.
[2] Momm., I, 151–162; Ihne, IV, 179; Marquardt u. Momm., IV. 26–27, 63.
[3] Livy, IX, 43, 53; Ihne, IV, 181.
[4] Ihne, IV, 185–186; Marquardt u. Momm., 46, 60.

of prefectures. These were treated as provinces and governed by prefects or proconsuls[1] sent out from Rome. Such were Capua, Bruttium, Lucania, the greater part of Samnium, and Cisalpine Gaul, which country, indeed, was not even considered as a part of Italy. Those who had submitted without resistance to the domination of the Romans, and had rendered some services to them, had bestowed upon them the title of municipia.[2] These municipia governed themselves and were divided into two classes:—

(1) Municipia sine suffragio, for example, Cære in Etruria, had only inferior privileges; their inhabitants could not vote at Rome and, consequently, could not participate in the exercise of sovereignty.[3]

(2) Municipia cum suffragio had, outside of their political and civil rights, the important right of voting at Rome.[4] These citizens of villages had then, as Cicero said of the citizens of Arpinum, two countries, one ex natura, the other ex jure. Lastly, there were some cities in the south of Italy, *i.e.*, in Magna Græcia, that had received the name of federated cities.[5] They did not appear to be subject to Rome; their contingents of men and money were looked upon as voluntary gifts;[6] but, in reality, they were under the domination of Rome, and had, at Rome, defenders or patrons chosen because of their influence with the Roman citizens and charged with maintaining their interests. Such was the system adopted by Rome. It would have been easy for a person in the compass of a few miles to find villages having the jus Latii, others with simply the jus Italicum, colonies, prefectures, municipia cum et sine suffragio. The object of the Ro-

[1] Marquardt u. Momm., IV, 41–43.
[2] *Ibid.*, IV, 26.
[3] *Ibid.*, IV, 27–34.
[4] *Ibid.*, IV, 27–34.
[5] *Ibid.*, IV, 44.
[6] *Ibid.*, IV, 45–46.

mans was evident. They planned to govern. Cities alike in interests and patriotic motives were separated by this diversity of rights and the jealousies and hatreds which resulted from it. Concord, which was necessary to any united and general insurrection, was rendered impossible between towns, some of which were objects of envy, others, of pity. Their condition, moreover, was such that all, even the most fortunate, had something to gain by showing themselves faithful; and all, even the most wretched, had something to fear if they did not prove tractable. These Italians, with all the varied privileges and burdens enumerated above, far outnumbered the Roman citizens.[1] A comparison of the census of 115 B.C. and that of 70 B.C. shows that the numbers of Italians and Romans were as three to two.[2] All these Italians aspired to Roman citizenship, to enjoy the right to vote to which some of their number had been admitted, and the struggle which was in time to end in their complete emancipation had already commenced. During the first centuries of Roman history, Rome was divided into two classes, patricians and plebeians. The plebeians by heroic efforts had broken down the barriers that separated them from the patricians. The privilege of intermarriage, the possibility of obtaining the highest offices of the State, the substitution of the comitia tributa for the other two assemblies, had not made of Rome "an unbridled democracy," but all these benefits obtained by tribunician agitation, all the far-reaching advances gained by force of laws and not of arms, had constituted at Rome a single people and created a true Roman nation. There were now at Rome only rich and poor, nobles and proletariat. With intelligence and ability a

[1] Momm., Röm. Ge., II, 225.
[2] Ihne, IV, 370.

plebeian could aspire to the magistracies and thence to the senate. Why should not the Italians be allowed the same privilege? It was neither just nor equitable nor even prudent to exclude them from an equality of rights and the common exercise of civil and political liberty.[1] The Gracchi were the first to comprehend the changed state of affairs and the result of Roman conquest and administration in Italy. Their demands in favor of the Italians were profoundly politic. The Italians would have demanded, with arms in their hands, that which the Gracchi asked for them, had not this attempt been made. They failed; Fulvius Flaccus,[2] Marius,[3] and Livius Drusus[4] failed in the same attempt, being opposed both by the nobility and the plebs.

The agrarian laws, as we have seen, had been proposed by the senate, in the period which we are considering. How was it then that the Gracchi had been compelled to take the initiative and that the senate had opposed them? This contradiction is more apparent than real. It explains itself in great part by the following considerations. Upon the breaking down of the aristocracy of birth, the patriciate, the senate was made accessible to the plebeians who had filled the curule magistracies and were possessed of 800,000 sesterces. Knights were also eligible to the senate to fill vacancies, and it was this fact which caused the equestrian order to be called seminarium senatus. For some time the new nobles, in order to strengthen their victory and make it permanent, had formed an alliance with the plebeians. For this reason were made the concessions and distributions of land which

[1] Momm., Lange, Ihne, Long — as given.
[2] Momm., III, 132.
[3] *Ibid.*, 252, 422.
[4] *Ibid.*, III, 281.

the old senators were unable to hinder. These concessions were the work of the plebeians who had been admitted to the senate. But when their position was assured and it was no longer necessary for them to make concessions to the commons in order to sustain themselves, they manifested the same passions that the patricians had shown before them. Livy has expressed the situation very clearly; "These noble plebeians had been initiated into the same mysteries, and despised the people as soon as they themselves ceased to be despised by the patricians."[1] Thus, then, the unity and fusion which had been established by the tribunician laws disappeared and there again existed two peoples, the rich and the poor.

If we examine into the elements of these two distinct populations, separated by the pride of wealth and the misery and degradation of poverty, we shall understand this. The new nobility was made up partially of the descendants of the ancient patrician gentes who had adapted themselves to the modifications and transformations in society. Of these persons, some had adopted the ideas of reform; they had flattered the lower classes in order to obtain power; they profited by their consulships and their prefectures to increase or at least conserve their fortunes. Others having business capacity gave themselves up to gathering riches, to usurious speculations which at this time held chief place among the Romans. Even Cato was a usurer and recommended usury as a means of acquiring wealth. Or they engaged in vast speculations in land, commerce, and slaves, as Crassus did a little later. The first-mentioned class was the least numerous. To those nobles who gave their attention to money-getting must be added those plebeians who elevated them-

[1] Livy, XXII, 34.

selves from the masses by means of the curule magistracies.[1] These were insolent and purse-proud, and greedy to increase their wealth by any means in their power. Next to these two divisions of the nobility came those whom the patricians had been wont to despise and to relegate to the very lowest rank under the name of ærarii; merchants,[2] manufacturers, bankers, and farmers of the revenues. These men were powerful by reason of their union and community of interests, and the money which they commanded. They formed a third order and even became so powerful as to control the senate and, at times, the whole republic. In the time of the Punic wars the senate had been obliged to let go unpunished the crimes committed by the publican Posthumius and the means which he had employed in order to enrich himself at the expense of the republic, because it was imprudent to offend[3] the order of publicans. Thus constituted an order or gild, they held it in their hands at will to advance or to withhold the moneys for carrying on wars or sustaining the public credit. In this way they were the masters of the State. They also grasped the public lands, as they were able to command such wealth that no individual could compete with them. They thus became the only farmers of the domain lands, and they did not hesitate to cease paying all tax on these. Who was able to demand these rents from them? The senate? But they either composed the senate or controlled it. The magistrates? There was no magistracy but that of wealth. The tribunes of the people? These they had disarmed by frequent grants of land of two to seven jugera each, and by the establishment of numerous

[1] Ihne, IV, 354–356. [2] *Ibid.*

[3] Livy, XXV, 3: "Patres ordinem publicanorum in tali tempore offensum nolebant."

colonies. This was beyond doubt the real reason for their frequent distributions. They had all been made from land recently conquered. The ancient ager had not been touched, and little by little the Licinian law had fallen into desuetude.

In 222 B.C. Roman conquests were extended to the natural boundary of Italy, the Alps, by the subjugation of the Gauls north of the Po. At the close of the war with Hannibal, Rome further added to her territory by the confiscation of the greater part of the Gallic territory, Campania, Samnium, Apulia, Lucania, and Bruttium. Thus the territory of Rome grew in the 287 years of the republic from 115, to 93,000 square miles. Of this territory, 254 square miles had been given to colonies, leaving 92,746 square miles in the control of the wealthy classes.

Latifundia.

"After having pillaged the world as prætors or consuls during the time of war, the nobles again pillaged their subjects as governors in time of peace;[1] and upon their return to Rome with immense riches they employed them in changing the modest heritage of their fathers into domains vast as provinces. In villas, which they were wont to surround with forests, lakes, and mountains . . . where formerly a hundred families lived at ease, a single one found itself restrained. In order to increase his park, the noble bought at a small price the farm of an old wounded soldier, or peasant burdened with debt, who hastened to squander, in the taverns of Rome, the modicum of gold which he had received. Often he took the land without paying anything.[2]

[1] Cicero says that these exactions were common and that the provinces were even restrained from complaining. Verres apologized for his exactions by saying that he simply followed the common example. In Verrem, II, 1–3, 17.

[2] "Parentes aut parvi liberi militum, ut quisque potentiori confinis erat, sedibus pellebantur." Sall., Jugurtha, 41. Horace, Ode II, 18.

An ancient writer tells us of an unfortunate involved in a law-suit with a rich man because the latter, discommoded by the bees of the poor man, his neighbor, had destroyed them. The poor man protested that he wished to depart and establish his swarms elsewhere, but that nowhere was he able to find a small field where he would not again have a rich man for a neighbor. The nabobs of the age, says Columella, had properties which they were unable to journey around on horseback in a day, and an inscription recently found at Viterba, shows that an aqueduct ten miles long did not traverse the lands of any new proprietors. . . . The small estate gradually disappeared from the soil of Italy, and with it the sturdy population of laborers. . . . Spurius Ligustinus, a centurion, after twenty-two campaigns, at the age of more than fifty years, did not have for himself, his wife, and eight children more than a jugerum of land and a cabin."[1]

To this masterly sketch quoted from Duruy, we can but add a few facts. Pliny affirms that under Nero only six men possessed the half of Africa.[2] Seneca, who himself possessed an immense fortune, says, concerning the rich men of his time, that they did not content themselves with possessing the lands that formerly had supported an entire people; they were wont to turn the course of rivers in order to conduct them through their possessions. They desired even to embrace seas within their vast domains.[3] We must here, it is true, make some allowance for rhetoric. So, too, in the writings of Petronius, some allowance for satire must be made, where he represents the clerk of Trimalchio making a report of that

[1] Duruy, Hist. des Romains, II, 46–47.
[2] "Sex domini semissem Africae possidebant." Hist. Nat., XVIII, 7.
[3] Seneca, Epist., 89.

which has taken place in a single day upon one of the latter's farms near Cumæ. Here on the 7th of the calends of July, were born 30 boys and 40 girls; 500,000 bushels of wheat were harvested and 500 oxen were yoked.[1] The clerk goes on to say that a fire had recently broken out in the Gardens of Pompey, when he is interrupted by Trimalchio asking when the Gardens of Pompey had been purchased for him, and is informed that they had been in his possession for a year.[2] So it appears that Trimalchio, in whom Petronius has personified the pride, the greed, and the vices of the rich men of his time, did not know that he was the possessor of a magnificent domain. In another place Petronius causes Trimalchio to say that everything which could appeal to the appetite of his companions is raised upon one of his farms which he has not yet visited, and which is situated in the neighborhood of Terracina and Tarentum,[3] towns which are separated by a distance of 300 miles. Finally, led on by his immoderate desire to augment his riches and increase his possessions, the hero of Petronius asks but one thing before he dies, *i.e.*, to add Apulia to his domains;[4] he, however, admits that he would not take it amiss to join Sicily to some lands which he owned in that locality or to be able, should envy not check

[1] Petronius, Sat., 48: VII. calendas sextilis in praedio Cumano, quod est Trimalchionis nati sunt pueri XXX, puellae, XL; sublata in horreum, ex area, tritici milia modium quingenta; boves domiti quingenti . . . eodem die incendium factum est in hortis Pompeianis, ortum ex aedibus nastae, villici.

[2] Quid? inquit Trimalchio: quando mihi Pompeiani horti emti sunt? Anno priore, inquit actuarius. (*Ibid.*, 53.)

[3] Vinum, inquit, si non placet, mutabo; vos illud, oportet faciatis. Deorum beneficio non emo, sed nunc, quidquid ad salivam facit, in suburbano nascitur eo quod ego adhuc non navi. Dicitur confine esse Terracinensibus et Tarentinis.

[4] Quod si contigerit Apuliae fundos jungere, satis vivus pervenero. (*Ibid.*, 77.)

him, to pass into Africa[1] without departing from his own possessions. All this has a basis of fact. Trimalchio would never have been created, had not the favorite freedmen of Nero crushed the people by their luxury, debauches, and scandals.

But the condition of society pictured by Seneca and Petronius is that of the first century of the Christian era and might not be taken to represent the condition of affairs in the second century B.C., had we not some data which go to prove the concentration of property, the disparity between classes, and the depopulation of Italy within the same century as the Gracchi. Cicero was not considered one of the richest men in Rome, yet he possessed many villas, and he has himself told us that one of them cost him 3,500,000 sesterces, about $147,000.[2] Cornelia, the mother of the Gracchi, had a country residence in the vicinity of Misenum which cost 75,000 drachmæ ($14,000);[3] Lucullus some years afterwards bought it for 500,200 drachmæ ($100,040). According to Cicero,[4] Crassus had a fortune of 100,000,000 sesterces ($4,200,000). This does not astonish us when we see upon the via Appia, near the ruins of the circus of Caracalla and but a short distance from the Catacombs of St. Sebastian and the fountain of Ægeria, the still important remains of the tomb of Cæcilia Metella, daughter of Metellus Creticus and wife of the tribune Crassus, as the inscription testifies. It is a vast "funereal fortress" constructed of precious

[1] Nunc conjungere agellis Siciliam volo, ut quum Africam libuerit ire, per meos fines navigem. Sat., 48.

[2] Ad Fam., V, 6: "quod de Crasso domum emissem emi eam ipsam domum H. S., XXXV."

[3] Plutarch, Life of Marius.

[4] De Repub., III, 7: Cur autem, si pecuniae modus statuendus fuit feminis, P. Crassi filia posset habere, si unica patri esset, aeris millies, salva lege?

marble, and which gives us the first example of the luxury afterwards so common among the Romans. Then, too, we remember that Crassus was wont to say that no one was rich who was not able to support an army with his revenues, to raise six legions and a great number of auxiliaries, both infantry and cavalry.[1]

Pliny confirms this statement concerning Crassus, but adds that Sulla was even richer.[2] Plutarch gives us fuller details and also explains the origin of the colossal fortune of Crassus. According to him, Crassus had 300 talents ($345,000), with which to commence. Upon his departure for the Parthian war in which he lost his life, he made an inventory of his property and found that he was possessed of 7,100 talents, $8,165,000, double what Cicero attributes to him. How did Crassus increase his fortune so enormously? Plutarch says that he bought the property confiscated by Sulla at a very low figure. Then, he has a great number of slaves distinguished for their talents; lecturers, writers, bankers, business men, physicians, and hotel keepers, who turned over to him the benefits which they realized in their diverse industries. Moreover, he had among his slaves 500 masons and architects. Rome was built almost entirely of wood and the houses were very high, consequently fires were frequent and destructive. As soon as a fire broke out, Crassus hastened to the place with his throng of slaves, bought the now burning buildings — as well as those threatened — at a song, and then set his slaves to work extinguishing the fires. By this means he had become possessed of a large part of Rome.[3]

[1] Cicero, Paradoxia, VI.
[2] Pliny, Hist. Nat., XXXIII, 10.
[3] Plutarch, Crassus, c. 1 and 2.

Some other facts confirm that which Plutarch tells us of Crassus. Athenæus[1] says that it was not rare to find Roman citizens possessed of 20,000 slaves. At the commencement of the civil war between Cæsar and Pompey, the future dictator found opposed to him, in Picenum, Domitius Ahenobarbus at the head of thirty cohorts.[2] Domitius seeing his troops wavering, promised to each of them four jugera out of his own possessions, and a proportionate part to the centurions and veterans. What must have been the fortune of a man who was able to distribute out of his own lands, and surely without bankrupting himself, about 100,000 jugera?

The last of the evils which we wish to mention as bringing about the deplorable condition of the plebeians at the time of the Gracchi, and which brought more degradation and ruin in its train than all the others, is slavery. Licinius Stolo had attempted in vain to combat it. Twenty-four centuries of fruitless legislation since his death has scarcely yet taught the most enlightened nations that it is a waste of energy to regulate by law the greatest crime against humanity, so long as the conditions which produced it remain the same. The Roman legions, sturdy plebeians, marched on to the conquest of the world. For what? To bring home vast throngs of captives who were destined, as slaves, to eat the bread, to sap the life blood, of their conquerors. The substitution of slaves for freemen in the labors of the city and country, in the manual arts and industries, grew in proportion to the number of captives sold in the markets of Rome. All the rich men followed more or less the example of Crassus; they had among their slaves, weavers, carvers, embroiderers, painters, architects, physicians, and teachers.

The Influence of Slavery.

[1] Athenæus, Deipnosophistæ, VI, 104.
[2] Cæsar, Bell. Civ., I, 17.

Suetonius tells us that Augustus wore no clothing save that manufactured by slaves in his own house. Atticus hired his slaves to the public in the capacity of copyists. Cicero used slaves as amanuenses. The government employed slaves in the subordinate posts in administration; the police, the guard of monuments and arsenals, the manufacture of arms and munitions of war, the building of navies, etc. The priests of the temples and the colleges of pontiffs had their familiæ of slaves.

Thus, in the city, plebeians found no employment. Competition was impossible between fathers of families and slaves who labored en masse in the vast workshops of their masters, with no return save the scantiest subsistence, no families, no cares, and most of all, no army service. In the country it was still worse. It would appear that none but slaves were employed in the cultivation of the land. Doubtless the number of slaves in Italy has been greatly exaggerated, but it is certain that the substitution of slave labor for free was an old fact when Licinius[1] attempted by the formal disposition of his law to check the evil. In the first centuries of Rome, slaves must have been scarce. They were still dear in the time of Cato, and even Plutarch mentions as a proof of the avarice of the illustrious censor, that he never paid more than 15,000 drachmæ for a slave.[2] After the great conquests of the Romans, in Corsica, Sardinia, Spain, Greece, and the Orient, the market went down by reason of the multitude of human beings thrown upon it. An able-bodied, unlettered man could be bought for the price of an ox. Educated slaves from Greece and the East brought

[1] M. Dureau de la Malle, Ec. polit. des Romains, ch. 15, p. 143; ch. 2, p. 231.

[2] Plutarch, Cato the Censor, 6 and 7.

a higher price. We learn from Horace that his slave Davus, whom he has rendered so celebrated, cost him 500 drachmæ.[1] Diodorus of Siculus says that the rich caused their slaves to live by their own exertions. According to him the knights employed great bands of slaves in Sicily, both for agricultural purposes and for herding stock, but they furnished them with so little food that they must either starve or live by brigandage. The governors of the island did not dare to punish these slaves for fear of the powerful order which owned them.[2] Slave labor was thus adopted for economic reasons, and, for the same reasons, agriculture in Italy was abandoned for stock raising.

Says Varro;[3] "Fathers of families delight rather in circuses and theaters than in farming and grape culture. Therefore, we pay that wheat necessary for our subsistence be imported from Africa and Sardinia; we pick our grapes in the isles of Cos and Chios. In this land where our fathers who founded Rome instructed their children in agriculture, we see the descendants of those skillful cultivators, by reason of avarice and in contempt of laws, transferring arable lands into pasture fields, perhaps ignorant of the fact that agriculture and fatherland were one."

Fewer men were needed for the care of these pasture lands; but the evil did not stop here. Little by little these pasture lands were transformed into mere pleasure grounds attached to villas. This had already begun to take place as early as the second Punic war, when the plains of Sinuessa[4] and Falernia were cultivated rather for pleasure than the necessaries

[1] Horace, Sat. II, 7; v. 42–43: "Quid? si me stultior ipso quingentis empto drachmis, deprehenderis."

[2] Diodorus Siculus, Fg. of Bk. XXXIV.

[3] Varro, De R. R. Proem. 3, 4.

[4] Livy, XXII, 15.

of life; so that the army of Fabius could find nothing upon which to sustain itself. Under these influences the plebeians, in 133 B.C., had become merely a turbulent, restless mass, but full of the activity and the energy which had characterized them in the early centuries of the republic. They were composed chiefly of the descendants of the ancient plebeian families, decimated by wars and by misery. They were the heirs of those for whom Spurius Cassius, Terentillius Arsa, Virginius, Licinius Stolo, Publilius Philo, and Hortensius had endured so many conflicts and even shed their blood; but they had become brutalized by poverty, debauchery, and crime. No longer able to support themselves by labor, they had become beggars and vagabonds.

§ 82. Lex Sempronia Tiberiana.

In 133 B.C., more than two centuries after the enactment of the laws of Licinius Stolo, Tiberius Gracchus, tribune of the people for that year, brought forward a bill which was in fact little less than a renewal of the old law. It provided that no one should occupy more than five hundred jugera of the ager publicus, with the proviso that any father could reserve 250 jugera for each son.[1] This law differed from that of Licinius in that it guaranteed permanent possession of this amount to the

[1] App., I, 9; Livy, Epit., LVIII, XII: "possessores, qui filios in potestate haberent, supra legitimum modum ducena quinquagena jugera in singulos retinerent.

Mommsen states that this privilege was limited to 1000 jugera in all, and Wordsworth follows him, making the same statement. Lange, Röm. Alterthümer, III, 9, agrees with Mommsen and cites, App. B.C., I, 9, 11; Vell., 2, 6; Livy, Ep., 58; Aurelius Victor, 64; Sic. Flacc., p. 136, Lach. I find no direct proof in the places mentioned of what Lange asserts, while App. (I, 11) says: "*καὶ παισὶ, οἷς εἰσὶ παῖδες ἑκάστῳ καὶ τούτων τὰ ἡμίσεα.*" Long says that there is no proof of any limitation as to the number of sons, while Ihne, Duruy, and Nitzsch are agreed in following the statement of Appian, as I have done. See Marquardt u. Momm., Röm. Alter., 106.

occupier and his heirs forever.[1] Other clauses were subjoined providing for the payment of some equivalent to the rich for the improvements and the buildings upon the surrendered estates, and ordering the division of the domain thus surrendered among the poorer citizens in lots of 250 jugera each, on the condition that their portions should be inalienable. They bound themselves to use the land for agricultural purposes and to pay a moderate rent to the State. It appears that the Italians were not excluded from the benefit of this law.[2]

The design of this bill was to recruit the ranks of the Romans by drafts of freeholders from among the Latins.[3] Such as had been reduced to poverty were to be restored to independence. Such as had been sunk beneath oppression were to be lifted up to liberty.[4] No more generous scheme had ever been brought before the Romans. None ever met with more determined opposition, and for this there was much reason. There might have been some, like the tribune's friends, ready to part with the lands bequeathed to them by their fathers; but where one was willing to confess, a hundred stood ready to deny the claim upon them. Nor had they any such demands to meet as those of the olden

[1] App. I, 11.

[2] Momm., III, 114; Plutarch, Tiberius Gracchus, 9, l. 9.

[3] App. I, l. 3.

[4] *Ibid.*, 9: "Τιβέριος Γράκχος . . . δημαρχῶν ἐσεμνολόγησε περὶ τοῦ Ἰταλικοῦ γένους ὡς ἐυπολεμωτάτου τε καὶ συγγένους, φθειρομένου δὲ κατ' ὀλίγον ἐς ἀπορίαν καὶ ὀλιγανδρίαν. Also App. B.C., I, 13: Γράκχος δὲ μεγαλαυχούμενος ἐπὶ τῷ νόμῳ . . . οἷα δὴ κτίστης οὐ μιᾶς πόλεως οὐδ' ἑνὸς γένους ἀλλὰ πάντων ὅσα ἐν Ἰταλίᾳ ἔθνη, ἐς τὴν οἰκίαν παρεπέμπετο.",

Ihne, IV, 385. Lange says (III, 10): "Das Gracchus die Latiner und Bundesgenosen nicht berücksichtigte, war bei der Gesinnung der römischen Burgerschaft gegen die Latiner ganz natürlich." I cannot see how he harmonizes this statement with that of App., Ἰταλικοῦ γένους and Ἰταλίᾳ ἔθνη. Momm., Röm. Ge., II, 88.

times. Then the plebeians were a firm and compact body which demanded a share of recent conquests that their own blood and courage had gained. Now it was a loose and feeble body of various members waiting for a share in land long since conquered, while their patron rather than their leader exerted himself for them.[1]

Tiberius, like Licinius, met with violent opposition, but he had not, like him, the patience and the fortitude to wait the slower but safer process of legitimate agitation. He adopted a course[2] which is always dangerous and especially so in great political movements. Satisfied with the justice of his bill and stung by taunts and incensed by opposition, he resolved to carry it by open violation of law. He caused his colleague, Octavius, who had interposed his veto, to be removed from office by a vote of the citizens — a thing unheard of and, according to the Roman constitution, impossible — and in this way his bill for the division of the public land was carried and became a law. It required the appointing of three commissioners to receive and apportion the public domain.[3] This collegium of three persons,[4] who were regarded as ordinary and standing magistrates of the State, and were annually elected by the assembly of the people, was intrusted with the work of resumption and distribution. The important and difficult task of legally

[1] Sallust, Jugurtha, XLII.

[2] App., I, XII; Plutarch, Tiberius Gracchus, X–XII; Julii Flori Epitoma, II (Biblioth. Teubner, p. 67): "Sit ubi intercedentem legibus suis C. Octavium vidit Gracchus, contra fas collegii, juris, potestas, is injecta manu depulit rostris, adeoque praesenti metu mortis exterruit, ut abdicare se magistratu cogeretur."

[3] Momm., III, 115.

[4] App., I, 9; Livy, Epit., LVIII, 12; Plut., Tib. Gr., 8–14; Cic., De Leg. Agr., II, 12, 13; Valleius, 2, 2; Aurelius Vic., De Vir. Illus., 64.

settling what was domain land and what was private property was afterward added to these functions. Tiberius himself, his brother Caius, then at Numantia, and his father-in-law, Claudius, were nominated, according to the usual custom of intrusting the execution of a law to its author and his chosen adherents.[1] The distribution was designed to go on continually and to embrace the whole class that should be in need of aid. The new features of this agraria lex of Sempronius, as compared with the Licinio-Sextian, were, first, the clause in favor of the hereditary possessors; secondly, the payment of quit-rent, and inalienable tenure proposed for the new allotments; thirdly, and especially, the permanent executive, the want of which, under the older law, had been the chief reason why it had remained without lasting practical application.[2]

The dissatisfaction of the supporters of the law concurred with the resistance of its opponents in preventing its execution or at least greatly embarrassing the collegium. The senate refused to grant the customary outfit to which the commissioners were entitled.[3] They proceeded without it. Then the landowners denied that they occupied any of the public land, or else asked such enormous indemnities as to render the recovery impossible without violence. This roused opposition. The ager publicus had never been surveyed, private boundaries had in many cases been obliterated, and, except when natural boundaries marked the limit of the domain land, it was impossible to ascertain what was ager publicus and what was ager privatus. To avoid

[1] Plutarch, Tiberius Gracchus, 13.

[2] Momm., III, 115. See Ihne's just condemnation of this clause: IV, 387.

[3] Plutarch, Tib. Gr., XIII, line 12; Duruy, Hist. Rom., vol. II, pp. 339–429 of Translation.

this difficulty the commission adopted the just but hazardous expediency of throwing the burden of proof upon the occupier. He was summoned before their tribunal and, unless he could establish his boundaries or prove that the land in question had never been a part of the domain land, it was declared ager publicus and confiscated.[1]

According to Appian, during the years which followed the death of Gaius Gracchus up to the tribunate of Saturninus, that is to say, between the years 120 and 100 B.C., three agrarian laws were proposed and accepted.

Lex Thoria.[2]

1. A law "That the holders of the land which was the matter in dispute might legally sell it."[3] Appian, who is the only authority for this period, does not give the date of the law nor the name of the tribune who proposed it, but Ihne[4] makes the date 118, and Mommsen assigns the law to Marcus Drusus.[5] This law was a repeal of all the restrictions which the Gracchi had placed upon assignments of public land. The object of this clause was to secure the success of their great reforms, and to establish a number of small proprietors who would cultivate their little farms, and breed citizens and soldiers. But forced cultivation is impossible, and sumptuary laws have never yet succeeded in increasing population.[6] Again it is inconsistent to give land to a man

[1] Long, I, 183; Ihne, IV, 387; Lange, III, 10–12; Nitzsch, Die Gracchen, 294 *et seq.*

[2] Rudorff, Ackergesetz des Spurius Thorius, Zeitschrift für geschichtliche Rechtswissenschaft, Band X, s. 1–158. Corpus Inscriptionum Latinarum, vol. V, pp. 75–86. Wordsworth, Specimens and Fragments of Early Latin, 440–459.

[3] Appian, Bell. Civ., I, c. 27.

[4] Ihne, Roman History, V, 9.

[5] Momm., Rom. Hist., III, 165.

[6] Long, Decline, of the Rom. Rep. I., 352. See Lange, Röm. Alter., III, 48.

and deprive him of the power of sale, for this is an essential part of that domain which we call property in land. If a man wishes to sell, he will always have sufficient reasons for so doing, and a rich man can afford to pay [1] the highest price, freedom of exchange thus bringing ultimate good to both parties. It is easy to comprehend the consequences of this law. It was the commencement of a reaction entirely aristocratic in its nature.[2] It was skillfully conducted with the ordinary spirit of the Roman senate, the ruses, the mental reservations, and dissimulations under guise of public interest. The aristocracy presented to the plebeian farmers, established by the lex Sempronia, a means of promptly and easily satisfying their passions. They had never earned their little farms, nor did they appreciate the independence of the tiller of the soil. Unaccustomed to farm labor,[3] and the plodding, unexciting life of the Roman agricola, they made haste to abandon a toilsome husbandry, the results of which seemed to them slow and uncertain, and with the pieces of silver which they received as the price of their lands, returned to Rome to swell the idle and vicious throng [4] which enjoyed the sweet privilege of an existence sustained without labor.

Thus the nobles reëntered promptly and cheaply into the possession of the lands of which Tiberius had but a short time before deprived them, and, by means of a little sacrifice, substantially and legally converted their possessions into real property, while the plebeians whom Tiberius had wished to elevate by means of forcing [5] upon them the necessity of

[1] Long, *loc. cit.*
[2] Momm., III, 161; Ihne, V, 10.
[3] Long, *loc. cit.*
[4] Lange, III, 48–49; Marquardt u. Momm., IV, 108.
[5] Long, *loc. cit.* Momm., III, 167–168; Ihne, V, 8–10.

labor, fell back into their accustomed poverty and brutality. But the object for which the nobles were striving was not yet completely gained. The present victory was theirs; they now strove to guarantee the future, and so render impossible dangers similar to those already passed through.

2. A second law was thus enacted: "Spurius Borius, a tribune, proposed a law to this effect; that there should be no more distribution of the public land, but it should be left to the possessors who should pay certain charges (vectigalia) for it to the State (δήμῳ) and that the money arising from these payments should be distributed."[1]

It is easy to comprehend the effect of a law so conceived. On the one hand, it guaranteed to the possessors full property in the public lands which they held. From this point of view it was aristocratic. But on the other hand it aimed to unite the interests of the common people with those of the aristocracy, by placing a tax of one tenth of the produce upon the holders of these lands,[2] thus reëstablishing the law which had been annulled by Drusus. This took the place of distributions of land, which had now been made impossible[3] in Italy. In reality this law was disastrous to the plebeians, as it established a tax[4] for their benefit, a congiarum, and placed a premium upon laziness.

The narration of Appian presents some grave difficulties. In all the manuscripts of Appian the name of the tribune proposing the second law is Spurius Borius.[5] Cicero mentions a tribune by the name of Spurius Thorius,[6] and Schweighauser in his edition of Appian has changed 'Borius' to 'Thorius.'

[1] Appian. I, c. 27.
[2] Long, I, 353.
[3] *Ibid.*, I, 354.
[4] Ihne, V, 10–11.
[5] Long, I, 353; Wordsworth, 440; Momm., III, 165, note; Ihne, V, 9; Lange, III, 48; Appian, I, c. 27.
[6] Cicero, Brut., 36.

But this does not lessen the difficulty, as the law which Cicero attributes to Thorius is entirely different from the second law of Appian which, according to him, was introduced by Spurius Borius. Cicero says that Spurius Thorius "freed the public lands from the vectigal."[1] Appian says that Spurius Borius guaranteed the possessions in the public lands, levying a tax on them for the benefit of the people. It is a sheer waste of time to attempt to harmonize these two statements.[2] Granting that Spurius Borius and Spurius Thorius are one and the same person, the statements still remain diametrically opposed according to a simple and commonly accepted translation of Cicero's words; "Sp. Thorius satis valuit in populari genere dicendi, is qui agrum publicum vitiosa et inutile lege vectigali levavit."

Mommsen makes Cicero agree with Appian by changing "vectigali" into the instrument, and rendering "relieved the public land from a vicious and useless law by imposing a vectigal."[3] No other writer agrees with Mommsen in making such a translation.

3. The third law is mentioned by Appian alone who says; "Now when the law of Gracchus had been once evaded by these tricks, an excellent law and most useful to the State if it could have been executed, another tribune not long after (*οὐπολὺ ὕστερον*) abolished even the vectigalia."[4] This is evidently the same law which Cicero mentions as that of Spurius Thorius, and as he also mentions him in another place (De Or., II, 70, 284), we may possibly accept him as the author.

[1] Cicero, De Orat., II, 70.

[2] Marquardt u. Momm., Röm. Alter., IV, 108, m. 4; Wordsworth, 441.

[3] C. I. L., vol. I, p. 74.

[4] Appian, I, c. 27.

There are still extant some fragments of a bronze tablet which contains upon its smooth surface the Lex Repetundarum and has cut upon its rough back an agrarian law.[1] These fragments were discovered in the sixteenth century among the collections in the Museum of Cardinal Bembo at Padua.[2] Sigonius attempted the reconstruction of this law, and after him Haubold and Klentze, but Rudorff has completed the reconstruction as far as possible and made the law the subject of an interesting essay.[3] Mommsen has a commentary in the Corpus Inscriptionum Latinarum [4] upon this law. From all these sources the date of this law has been established almost beyond doubt as 111 B.C. Sigonius assigned it to Spurius Thorius, and, as the name is immaterial, and his arguments moreover, for this title, are not easily set aside, we can do no better than adopt it.[5]

The law evidently consists of three parts, although the rubricæ are absent:

Argument of the Lex Thoria.[6]

I. De agro publico p. R. in Italia (1–43).
II. De agro publico p. R. in Africa (44–95).
III. De agro publico p. R. qui Corinthorum fuit (96–105).

I. On the Ager Publicus in Italy.

This part may be divided roughly into three sections: (1) lines 1–24, defining ager privatus; (2) 24–32, defining ager publicus; (3) 33–43, on disputed cases.

It thus embraces the first forty-three lines of the law,

[1] Long, I, 355; Wordsworth, 440.

[2] Long, I, 355; Wordsworth, 440; see Rudorff, Ack. fes Sp. Thor.

[3] Zeitschrift für geschichliche Rechtswissenschaft, Band X, 1–194.

[4] C. I. L., I, pp. 75–86.

[5] Long, I, 356.

[6] Wordsworth, 447. See the text of this law in C. I. L., vol. I, pp. 79–80.

and is concerned with the public land of Italy, from the Rubicon southwards. It commences by referring to the condition of this land in the year 133 B.C., when Tiberius Gracchus was tribune. The law does not affect to touch anything which had been enacted concerning this land prior to 133. It either confirms or alters what had been done in 133, and since that time. All the public land which was exempted from the operation of the Sempronian laws, *i.e.*, Ager Campanus and Ager Stellatis, was also excluded from the operation of the lex Thoria.

(1) The first ten lines of the law relate to that part of the ager publicus which was occupied before the time of the Gracchi, if the amount of such land did not exceed the maximum fixed by the Sepmronian laws;

(2) Also, to the assignments made by lot (sortito) to Roman citizens by the commissioners since the enactment of the Sempronian laws, if such assignments were not made out of land which had been guaranteed to the old possessors;

(3) Also, to all lands taken from an old possessor, but on his complaint restored to him by the commissioners;

(4) Also, to all houses and lands, in Rome or in other parts of Italy, which the commissioners had granted without lot, so long as such grants did not interfere with the guaranteed title of older possessors;

(5) Also, to all the public land which Gaius Sempronius, or the commissioners, in carrying out his law, had used in the establishment of colonies or given to settlers, whether Roman citizens, Latini, or Italian Socii, or which they had caused to be entered on the "formæ" or "tabulæ."

All the lands comprised in the above are declared in lines seven and eight to be private property, in these words; "Ager locus omnis quei supra scriptus est, extra eum agrum

locum, quei ager locus ex lege plebeivescito, quod C. Sempronius Ti. f. tr. pl. Rogavit, exsceptum cavitumve est nei divideretur . . . privatus esto."

Lines 8–10 declare that the censors shall, from time to time, enter this land upon their books like any other private property; and it is further declared that nothing shall be said or done in the senate to disturb the peaceful enjoyment of this land by those persons possessing it.

Of lines 11–13 (ch. II) nothing definite can be said, because of the few words which have been preserved.[1] Rudorff explains them as referring to land granted to viasii vicani (dwellers in villages along the roads), by the Sempronian commissioners; such lands to remain in their possession, but to be theoretically ager publicus.

Lines 13–14 refer to lands occupied since 133 B.C. agri colendi causa. They allow to every Roman citizen the privilege of occupying, for the purpose of cultivation, thirty jugera of public land; they further declare that he who shall possess or have not more than thirty jugera of such land, shall possess and have it as private property,[2] with the provision that land so occupied shall be no part of the public land excepted from appropriation, and further, that such occupation shall not interfere with the guaranteed lands of a previous possessor.

Lines 14–15 relate to holders of pasture land (ager compascuus). This ager compascuus was land which had been left undivided, and had not become the private property of any individual, but was the common property of the owners of the adjacent lands. These persons had the right to

[1] Long, I, 359.

[2] "Quom quis ceivis Romanus agri colendi causa in eum agrum agri jugera non amplius XXX possidebit habebitue, is ager privatus esto."

pasture stock upon this land by paying pasture dues (scriptura or vectigal) to the State. The Thoria lex freed these lands from the vectigal or scriptura, and granted free pasturage to each man for ten head of large beasts — cattle, asses, and horses — and fifty head of smaller animals — sheep, goats, and swine. This common pasture must be carefully distinguished from the communal property which was granted to the settlers in a Colonia and called "compascua publica" with the additional title[1] of the colony, as "Julienses."

These rights of common resemble, in some respects, the English common of pasture as described by Bracton.[2] By English customary law, every freeholder, holding land within a manor, had the right of common of pasturage on the lord's wastes as an incident to his land.

Lines 15–16. The possession of land, granted by the commissioners in a colony since 133 B.C., to be confirmed before the Ides of March next.

Lines 16–17. The same rule applied to lands granted otherwise by the same commissioners.

Line 18. Such occupants if forcibly ejected to be restored.

Lines 19–20. Land assigned by the Sempronian commission, in compensation for land in a colony which had been made public, to become private.

Lines 23–24. Comfirmation of the title or restitution of such land to be made before the Ides of March next.

Lines 24–25. Land besides this which remains public is not to be occupied, but is to be left free to the public for grazing. A fine for occupation is imposed. The law al-

[1] Long, *loc. cit.*; Wordsworth, 446.

[2] Digby, History of the Law of Real Property in England, p. 157.

lowed all persons to feed their beasts great and small on this public pasture, up to the number mentioned in lines 14–15 as the limit to be pastured on the ager compascuus, free of all tax. · This, according to Rudorff, was done for the benefit of the small holders. Those who sent more than this number of animals to the public pastures must pay a scriptura for each head.

Line 26. While the cattle or sheep were driven along the "calles," or beast-tracks, and along the public roads to the pasture grounds, no charge was made for what they consumed along the road.

Line 27. Land given in compensation out of public land, to be privatus utei quoi optuma lege.

Line 27. Land taken in this way from private ownership to be publicus, as in 133 B.C.

Lines 27–28. Land given in compensation for ager patritus to be itself patritus.

Line 28. Public roads to remain as before.

Line 29. Whatever Latins and peregrini might do in 112 B.C., and whatever is not forbidden citizens to do by this law, they may do henceforward.

Lines 29–30. Trial of a Latin to be the same as for a Roman citizen.

Lines 31–32. Territory (1) of borough towns or colonies (2), in trientabulis, to be, as before, public.

Lines 33–34. Cases of dispute about land made private between 133 B.C. and 111 B.C., or by this law, to be judged by the consul or prætor before next Ides of March.

Lines 35–36. Cases of dispute after this date to be tried by consuls, prætors, or censors.

Lines 36–39. Judgment on money owing to publicani to be given by consuls, proconsuls, prætors, or proprætors.

Line 40. No one to be prejudiced by refusing to swear to laws contrary to this law.

Lines 41–42. No one to be prejudiced by refusing to obey laws contrary to this law.

Lines 43–44. On the colony of Sipontum (?).

Thus we see that the lex Thoria had two main objects in view: (1) The guaranteeing to possessors full property in the land which they occupied. (2) The freeing from vectigal or scriptura the property of every one.

In this way was the reaction of the aristocracy completed. It left nothing of the Sempronian law. Appian[1] has fully comprehended all this, and, in his enumeration of the three laws, connection between which he indicates, we see clearly the entire revolutionary system, conducted, we must admit, with a rare address and a perfidy which rendered the effect certain. The aristocracy did not rest. As soon as they had gained the people by their new bait of money and food, soothed them by their apparent generosity, and familiarized them with the idea that the possessions of the nobles were not only legally acquired but inviolable, then they raised the mask, and by a bold step swept away the vectigal,[2] thus leaving their property free. The enactment of this law virtually closed the long struggle between patrician and plebeian over the public lands of Rome, and left them as full property in the hands of the rich nobility.

[1] Long, I, 357.

[2] Appian, I, c. 27.

CHAPTER VIII

FACTORS OF THE LAW[1]

PRIVATE Roman law made little or no progress during the latter half of the republic through the channel of direct legislation. The comitia centuriata and the comitia tributa dealt with constitutional questions, municipal and colonial government, agrarian arrangements, fiscal policy, sumptuary prohibitions, criminal and police regulations, and other matters that affected the public law rather than the private. Of the enactments that affected the private law mentioned by Gaius and Ulpian, not more than half a dozen can be said to have exercised a permanent influence on the principles of the law as distinguished from mere details. Most of these were enactments of the comitia tributa which body had by this time absorbed almost all legal function of a private nature. This was due to the ease with which this body could be convened, and its quick response to popular demand.

§ 83. Legislation.

Cicero numbers the senatus consulta among the contemporary sources of the civil law in terms almost identical with those which at a later period were adopted in the Institutes of Gaius and of Justinian. The senate seems to have assumed an authority which never belonged to it in the early part of Roman history. It, no doubt, grew rapidly after the establishment of the republic and before the development of the comitia tributa,

§ 84. Senatus Consulta.

[1] Muirhead, 237–249.

but it never reached the dignity of being ranked as one of the constitutional law-making bodies. Necessity and custom (according to Pomponius) had raised the senatus consulta to rank as a source of law. In the latter part of the republic the senate confined its law-making activity very largely to matters of public interest which had been confided to its special care. Its legislation upon matters of private concern is exceedingly small, as it could not abrogate any civil law, but it, no doubt, controlled with its advice and orders the consuls, and other magistrates. Toward the end of the republic its powers began to grow at the expense of the more democratic centuriata and tributa, and in the early empire it very largely displaced these bodies.

§ 85. Edicts of the Magistrates.[1]

It is quite certain that the practice of propounding edicts was very ancient and had been followed by the kings and, after them, the consuls, long before the institution of the prætorship. It was the usual method of exercising the imperium with which the supreme magistrate was invested. He laid an injunction upon a citizen restraining him from some contemplated action, or compelled him to perform some duty that he otherwise would not. He conferred upon him some advantage and maintained him in the enjoyment of the same. It was one of the ways of protecting public order where the civil law did not act. At the time of the creation of the prætorship Roman society had grown much more complex, and the need of action outside of and beyond the civil law became daily more apparent. The earliest edicts of the prætors were doubtless of a transitory and special character, issued with reference to particular cases (edicta repentina). In course of time, as it became apparent that they served

[1] Muirhead, 238–242; Sohm, 48–55.

a vital purpose, they became more frequent until finally they assumed a fixed and permanent character (edicta perpetua). Announcements by the prætor were made upon his assumption of office setting forth the principles that would govern him throughout his term. The next year's prætor was free to adopt the edicts of his predecessor or not as he saw fit. However, since he was himself not a lawyer and was usually a man ignorant of legal procedure, it is more than likely that he was glad to avail himself of the assistance offered. As each new prætor entered upon his term of office he announced his program of judicial procedure (his lex annua). It was usually made up almost wholly of tralaticium, that is matter carried over from the work of his predecessor.

By the time of Cicero edicts had come into common use, as he says that, in his later years, young men were directed to the prætor's edict for their first lessons in law instead of making a study of the Twelve Tables. It was the flexibility of the edict that made it popular with the people. An action could be entered, dropped, resumed, or amended by the prætor at any time according to his judgment and without any delay. It was the viva vox juris civilis, adapted at a moment's notice to the changing needs of the time.

The edict, at maturity, contained two parts; the first, the edict proper, and the second, an appendix of styles of actions derived, no doubt, from the jus civile. A person bringing an action under the prætor's edict did so not of right, as he would under the jus civile, but rather of grace on the strength of the prætor's promise to grant what he claimed and make the grant effectual. The edict, in fine, caught the spirit of equity which was broader and more just than was the older formal jus civile.

Besides the factors of legislation already given, another perhaps more prolific than all others was consuetude or custom approved by the judgment of courts of law. There is much of this in every legal system, but it is especially noticeable in that of Rome. It can hardly be doubted that the literal contract per expensulationem originated in this manner at the beginning of the sixth century B.C. Mutuum or formless loan of money as certa credita pecunia came to be recoverable by the same kind of an action. Many examples of consuetudinary law could be given, but these are sufficient for purposes of illustration. The formulæ for actions of this kind were furnished by the magistrates whose coöperation was necessary to make them workable. It required the combined efforts of judges and commons to weld custom into law in this manner, and they were both doubtless aided by the advice given them by professional jurists. In this matter of consuetude Muirhead says; "The judge was to a great extent the spokesman of the forum; his judgment was formed in accordance with current public opinion, which he had ample opportunity of gauging; it was the reflection of that general sentiment of right, which, phrase how we may, is the real basis of all customary law." The formula in an action for establishing a right of property in a res nec mancipi was a very simple affair. It was as follows; "If it appear that such or such a thing belongs to the plaintif in quiritary rights, should the defendent refuse to restore it on your order, then, Judge, whatever be its value for the plaintif, in that condemn the defendent; should it appear otherwise, acquit him." Thus it would appear that the primary duty of a judge in such a case was to determine whether the title on which the plaintiff founded

§ 86. Consuetude.[1]

[1] Muirhead, 243–248.

his pretensions gave him a right that came up to property. This was, no doubt, the origin of that long list of natural modes of acquiring property given by Justinian. These decisions, whether grounded upon the obligations of a vendor, direct or indirect, or upon the sufficiency of a title set forth by a party averring a right of property by natural acquisition, may have been arrived at under professional advice and were in all cases embodied in judgments. However that may be, the doctrine deduced from them had the character of customary law.

CHAPTER IX

SUBSTANTIVE CHANGES IN THE LAW

§ 87. Criminal Law (Quæstiones Perpetuæ).

FROM the earliest period of Roman history there is nothing to mark with any particular characteristic feature the jurisdiction in criminal matters.[1] Under the kings this jurisdiction belonged to them while the right of an appeal (provocatio) in all capital cases lay to the people assembled in the comitia curiata. After the passage of the leges Valeriæ it became a fixed principle that the comitia centuriata could alone pass sentence of death in the case of Roman citizens. This being the case, an appeal to the people (provocatio as populum) would always lie from a sentence of death or scourging by a magistrate. The comitia tributa also acquired by the gradual growth of the custom a certain jurisdiction in criminal matters, but they could never go farther than the imposition of a fine or imprisonment. This assembly had the power to summon magistrates before them upon the termination of their office and, in case they were proven guilty of malfeasance in office, meted out to them the proper punishment. Men of station and rank who were by their position above the jurisdiction of an ordinary court, were called to account before the tributa. The magistrates who convoked these assemblies, usually the tribunes, alone had the rights of charging the offender, and therefore it was necessary for a citizen to appeal to these magistrates in

[1] Ortolan, 272–280.

order that an accusation might be lodged, when necessary, against an offender.

In addition to the comitia, the senate sometimes exercised the functions of criminal jurisdiction, although they never had any constitutional right to inflict punishment on any citizen without the sanction of a magistrate, or the right of an appeal to the comitia centuriata. From this general summary it would appear that the superior authorities in criminal matters were: (1) the kings, (2) the comitia curiata, (3) the comitia centuriata, (4) the comitia tributa, and (5) the senate.

But there was a custom which dated from the time of the kings and continued to the empire, that the superior authorities, when any criminal matter was presented to them, either took cognizance of and determined it themselves, or else delegated the investigation (quæstio) to a commission (quæstores) specially summoned for that particular case. This practice was constantly resorted to in order to save time and facilitate the carrying out of judgment. This delegation of criminal jurisdiction was ordinarily made with reference to the particular case in hand, and when this case was determined, the commission or quæstio expired. Sometimes, however, it happened that quæstiones were appointed for a length of time and their duties specially defined, as for some specific class of public crimes. Thus we have a quæstio de homicidiis, a quæstio de beneficiis, etc. This practice became more and more a necessity as the population of Rome increased and crime multiplied. The final state of this development was reached when the tributa established quæstiones perpetuæ to have jurisdiction over the most flagrant cases of crime. The adoption of this system placed the Roman criminal law upon the same stable basis as civil

law and freed it from the arbitrary character which it had at first acquired. Under this system each tribe had its law, its penalty, its tribunal, and its procedure. Every detail was regulated. The number of judges, the mode of selection, the right of rejection, the witnesses, and the time allowed to both the accuser and the accused, were established by law.

Any citizen could be the prosecutor for crime before a quæstio perpetua. It was his business to point out the accused, to state the law in accordance with the terms of which he brought his accusation, and the crime that was imputed. He was compelled to take an oath that his accusation was not calumnious, and that he was actuated by no motive of revenge. In this way the accuser himself became a party to the cause and was compelled to furnish the necessary proof. The jury or judge was obliged to pronounce a verdict in accordance with the law and evidence of the particular case. No jury or judge had any authority to remit or modify the sentence.

Toward the end of the republic many changes in the law of property and lesser real rights took place. These changes were rendered necessary by reason of the vast increase in commerce and trade. The judges recognized a variety of natural grounds of ownership. They were frequently called upon to decide the question as to whether a res nec mancipi belonged to the party claiming it in a vindication. Their decisions culminated in allowing to peregrins a right of property in movables, although they could not defend such rights ex iure Quiritium. The later custom of the republic vested the ownership of provincial land in the State, and those occupying it could not have more than a right of usufruct

§ 88. The Law of Property and the Publician Edict.[1]

[1] Muirhead, 250–255.

or possession. Still, the law allowed such possessors to protect themselves in their occupation by vindication as if they really held the property by dominium. Usucapion was no longer the result of prolonged possession pure and simple, but it was made subject to the condition that the usucapient had acquired the land in good faith and on a sufficient title, but had unwittingly failed to fulfill the proper form of conveyance, or had derived his rights from one who was not owner, or, at least, not in a position to convey. The list of prædial servitudes was greatly increased and such rights made good by stipulated penalties. The informal delivery of a movable by the debtor to his creditor to hold by the latter until such time as the debt was paid, was now made use of under the title of pignus. There was also introduced from Greece the hypothec or mortgage by simple contract without possession. This latter was contrary to Roman legal principles. But the most important change in the law of property during the latter half of the republic was that which was brought about by the Publician Edict which indirectly recognized the validity of two new forms of ownership; (1) bonitary ownership, as an actual though inferior kind of ownership, and (2) bonæ fidei possessio, a fictitious ownership of either res mancipi or res nec mancipi, valid against all the world save the dominus himself.

These two forms of ownership were made use of, or rather recognized, in order to correct errors in transfer or to alleviate the condition of a person who had purchased property in good faith, but had been subsequently defrauded by the transferrer.[1] There is no definite knowledge concerning the edict that established these forms, but there is no doubt as to its general purpose, or the defects which it was meant

[1] Muirhead, 257.

to correct. One of these defects was as follows. If a man had taken a transfer of a res mancipi from its rightful owner, by simple tradition and not by mancipation or session in court, he did not acquire ownership in the complete or legal sense, dominium ex jure Quiritium, and the seller still remained the legal owner. If now he were so willed, he could sue by rei vindicatio and oust the purchaser from his possession while he still kept the purchase money in his pocket. Moreover, a third party might have, in the meantime, obtained possession of the thing, but in such a way as not to be amenable to an interdict. The transferee who had paid out his good money had no effectual vindication against him, as he was unable to prove dominium ex jure Quiritium. The first remedy for this condition of affairs was the exceptio rei venditæ et traditæ. In case the seller attempted to repossess the thing by vindication on the ground of his donimium, the purchaser ('transferee') pleaded sale and delivery as an effectual prætorian defense. In case the third person entered into the transaction, although he acted in good faith and held by a formal conveyance from the transferrer, he could not defeat the prior right of the original transferee who would have had an unassailable quiritary right had his possession ripened into usucapion by the lapse of time. The prætor, therefore, announced in his edict that if a man came to him and represented that he had bought a res mancipi from its owner, and had it delivered to him, but had subsequently lost possession within the period of usucapion, he (the prætor) would allow him a vindication embodying a fiction of usucapion with which he might proceed against any third party whatsoever.

The outcome of this enactment was the same as if the legislature had directly enacted that in future deliver of

a res mancipi in pursuance of a sale, or other good cause, should straightway confer a right of ownership in it even before the completion of the period of usucapion. The result of the recognition of this tenure in bonis was that mancipation became regarded as an unnecessary formality and the distinction between res mancipi and res nec mancipi, which had dominated for so long a time, gradually passed away.

The second case that was met by the Publician edict was that of the bona fide transferee of a thing by purchase or other sufficient title, who found out afterwards that the person who made the sale to him was not the owner, and that, therefore, no ownership had been transmitted to him, and he would be unable to vindicate his claim.[1] Of course, as against the true owner whose property had been disposed of by fraud, no equitable action could lie, but as against the rest of the world the right of the transferee was recognized by the prætor, who accorded to him a vindication proceeding on a fiction of completed usucapion.

It was in this way that the prætors introduced that bonæ fidei possessio which was worked out with much skill by the jurists of the early empire.

§ 89. Development of the Law of Contract.[2]

Probably in no other branch of Roman law was there so much advance made during the latter half of the republic as in the law of contract. This was only natural, as there had taken place within the same period a gigantic development in commerce and business of every kind. In that branch of obligations arising from contract, as well as in those arising from delict, or those arising from facts and circumstances of various and unusual kinds, advance was steady and rapid.

[1] Muirhead, *loc. cit.*

[2] Sohm, 132, 288–290; Muirhead, 255–270.

The law of suretyship received considerable attention and formed the subject of a series of legislative enactments for limiting the liabilities of suretyship. The law of agency, which was but slightly used in Rome, recognized, with some qualifications, a man's liability for debts contracted by his filiifamilias or slaves. It also made him liable for debts contracted by persons who were managing business on his account, or whom he had placed in command of a ship belonging to him. The development of the law in the matter of obligations was greatly facilitated by the simplification of procedure and the introduction of new forms of action. The instruction which was at this time given by the prætor to the judex, "Whatever in respect thereof the defendant ought to give to or do for the plaintiff, in that condemn him," and which was preceded by a statement of the cause of action, gave wide scope for the recognition of new sources of liability.

The origin of the verbal contract of stipulation has been already given. It was theoretically a formal contract which created an obligation on the strength of the formal question and answer interchanged by the parties, even though no substantial ground of debt might underlie it. In the interrogatory the respondent of a loan incurred liability, the contract being unilateral; if mutual obligations were intended, it was necessary that each should promise for his own part, with the result that two contracts were executed which were perfectly independent. Originally, the only words that could be employed were spondes, on the one side, and spondeo on the other; and in this form the contract entered into was a civil law contract and competent only to citizens. In the course of time the words promittis, promitto, came to be used alternatively. These latter were

not new words in the law, as the expression dicta et promissa had long been familiar in reference to the assurance given by a party transferring a thing by mancipation. They seemed, eventually at least, to have been competent to peregrins as well as citizens, although they may not have been until the stipulation had become of daily use. The contract was originally competent for the creation of an obligation to pay a definite sum of money merely; subsequently it created an obligation for the delivery of a specific thing other than money. In course of time, by reason of the simplification of the words of interrogatory and response, the substitution of the conditions of the formular system for the legis actiones of the Silian and Calpurnian laws, and the introduction of the actio ex stipulatu, it came to meet cases of indefinite promise, to be adaptable to any sort of unilateral engagement, whether initiated by it or only confirmed. Its capabilities are admirably set forth by the general stipulation formulated by Aquilius Gallus as the precursor of an equally general formal release by acceptilation; "Whatever on any ground you are, or will be, or ought to be bound to give to or do for me, now or at a future date; whatever I am or shall be in a position to claim from you by any sort of process; whatever of mine you have, hold, or possess, or would be in possession of but for your fraud in parting with it, — whatever may be the value of all these, do you promise to pay me the amount in money?" This in definite form was of immense value outside of the ordinary range of contract in what were called necessary stipulations, if a man complained that the safety of his house was endangered by the ruinous condition of that of his neighbor, the latter was required under serious penalties to give his stipulatory undertaking that no damage should

result; a tutor before entering on office had to give his cautio that his pupil's estate should not be diminished in his hands. We might cite innumerable examples of this kind of stipulation. Advantage was taken of it in all directions to bind a man by formal contract either to do or refrain from doing what, in many cases, he might already be bound ipso jure to do or abstain from doing, and that because of the simplicity of the remedy that would lie against him in the event of his failure.

A second form of contract that came into use to a very considerable extent in the latter half of the republic was that which was designated by Gaius the nomen transcripticium, or literal contract.[1] It is this sort of a contract that is discussed by Cicero in his celebrated speech made in behalf of the player Roscius. In describing this form of contract Gaius mentions two forms of entry, the nomina arcaria, and nomina transcripticia. The former were entries of advances in cash; these, he observes, did not create obligations, but only served as evidence of one already created by payment to and receipt of the money by the borrower. Of the latter, he says, "there were two varieties: the entry transcribed from thing to person, and that transcribed from one person to another; and both of them were not probative merely but creative of obligation." At first this would seem to be nothing but a series of bookkeeping operations, but it was much more than this for the Roman citizens who first had recourse to it. There was a time when sale, and lease, and such like transactions, so long as they stood on their own merits, created no obligation enforceable at law, however much they might be binding as a duty to Fides. In order to found an action they required to be clothed

[1] Muirhead, 260.

in some form approved by the jus civile. The stipulation was one of these forms; but stipulation was competent only between persons who were face to face. Another form, expensilation, was competent also as between persons located at a distance from each other. This of itself gave expensilation an advantage in some cases over stipulation. It paved the way for subsequent transcriptions from one person to another. This latter must have been of infinite convenience in commerce, not only by enabling traders to dispense with the service of coin, but by obviating the risks attending the transit of money over long distances.

Next to the development of the forms of obligation mentioned above, came the evolution of the four purely consensual contracts — sale, location, partnership, and mandate.[1] These form a very interesting chapter in the history of law. They did not all follow identically the same course, but they reached the same goal at almost the same time. It is impossible here to sketch the history of each one of these, but that of the independent contract of sale will be sufficient to indicate in general terms some of the milestones that were successively passed by all four. Going back as far as history carries us, we meet with it under the names of emptio and venditio, but meaning no more than barter, for emere originally signified to take or acquire. Sheep and cattle were usually articles of exchange on one side, and raw copper weighed in the scales on the other. When the reforms of Servius were instituted, the distinction between res mancipi and res nec mancipi arose, but still the transaction was barter. However, there was now introduced an obligation on the part of the transferrer of the res mancipi to warrant the transferee against eviction.

[1] Muirhead, *loc. cit.*; Sohm, 288.

The substitution by the decemvirs of coined money that was to be counted out instead of rough metal that had been weighed, converted the contribution on one side into price (pretium) as distinguished from the article of purchase (merx) on the other. Thus sale became distinct from barter.[1] When the process of mancipation degenerated into an imaginary sale, it was enacted that the property of what was sold should not pass to the purchaser until the price had been paid or security given. As a necessary corollary of this, no eviction should attach to the transferrer until the price was paid. In case the money had been paid over and the transferrer refused to mancipate, the purchaser could recover his money by a legis actio per condictionem on the ground of unjustifiable enrichment of the vendor.

By the beginning of the sixth century B.C., there had arisen three several obligations consequent on sale of a res mancipi. The vendor was bound to support the purchaser in any action by a third party disputing his right, and to pay him the price twofold in case the third party was successful. He was, moreover, bound to make good to him any loss he had sustained through a deficiency of acreage he had guaranteed, non-existence of servitudes he had declared the lands enjoyed, existence of others he had stated they were free from, incapability of a slave for labor for which he was vouched fit, and so on.

In sales of res nec mancipi, a vendor who had been incautious enough to deliver his wares before he had been paid, or obtained stipulated security for the price, or had converted it into a book debt, might recover them by a real action, if payment was unduly delayed. The purchaser could also bring suit for the recovery of the purchase price

[1] Muirhead, *loc. cit.*

in case he had paid in advance and had failed to obtain the delivery of the goods purchased. This action was on the ground of the unwarranted enrichment of the vendor.

In early times, before trade assumed any great proportion, it was doubtless the custom for the purchaser to rely on the honesty of the vendor. The expansion of intercourse with foreigners, as well as moral decay among citizens, made necessary some security to the purchaser. This gave rise to the popularization of the stipulation. Of this there were two forms in common use; stipulatio habere licere, and stipulatio duplæ. The first of these occurs in Varro in a collection of styles of sales of sheep, cattle, etc. It was the guarantee of the vendor of a res mancipi that the purchaser should have peaceable enjoyment of the things he had bought. It entitled him to reparation on eviction, according to the loss he had sustained. The idea of the stipulatio duplæ may have been borrowed from the duplum incurred by a vendor in the eviction of a purchaser acquiring a thing by stipulation. One of its earliest manifestations was in the edict of the curule ædiles who insisted upon it from persons selling slaves, probably because the dealers were mostly foreigners, and, therefore, unable to complete their sales per æs et libram. Judging from the statement of Varro, it was a form of stipulation against eviction or loss of the enjoyment of the thing purchased, that in his time was used only in sales of slaves. We also learn from Varro that the vendor at the same time, and in the body of the same stipulation, guaranteed that the sheep or cattle he was selling were healthy and came of a healthy stock and free from faults, and that the animals had not done any mischief for which their owner could be held liable on a noxal action. In the same way the vendor

guaranteed that the slave sold was healthy and not chargeable for any theft or other offense for which the purchaser might be held to answer. If the guarantee turned out fallacious, then the purchaser had an actio ex stipulatu against the vendor after this fashion; "Whereas the plaintiff got from the defendant a stipulation that the sheep he bought from him were healthy, etc. (repeating the words of guarantee), and that he, the plaintiff, should be free to hold them (habere licere), whatever it shall appear that the defendant ought in respect thereof to give to or do for the plaintiff, in the value thereof, judex, condemn him; otherwise acquit him."

The actio empti, in its original shape, was nothing but a simplification of the actio ex stipulatu on a vendor's guarantee given above. The stipulation had become such an ordinary accompaniment of sale that the presumption of the law was in favor of its existence. But the introduction of the actio empti in this shape was far from the recognition of sale as a purely consensual contract. If the price was not paid at once, the purchaser gave his permissio for it, or got some one on whom the vendor placed more reliance to do so for him, or else the vendor made a book debt of it. In case suit had to be entered to collect, it was by a condictio certi and not by an action on the sale. If the money was paid but the thing purchased not delivered, the only remedy open to the purchaser was to get back his money by the same condition. It required but little to convert this stricti juris actio empti into a bonæ fidei. This was accomplished by the simple process by the prætor of adding the words, "on considerations of good faith," to the "whatever the defendant ought to give to or do for the plaintiff." The effect of this addition on the part of the prætor was immeasurable, as it rendered stipulations un-

necessary. It turned a sale into a purely consensual contract, in which, in virtue of the simple agreement to buy and sell, all the obligations on either side that usually attended it were held to be embodied, without express formulation, or still less, stipulatory or literal engagement.

The history of the four real contracts — mutuum, commodate, deposit, and pledge — is even more obscure than that of consensual ones.[1] Down to the time of the Poetelian law (324 B.C.) loan of money, corn, etc., was usually contracted per æs et libram, and it is probable that after the abolition of the nexum the obligation on the borrower to repay the money or corn advanced to him was made actionable, under the Silian and Calpurnian laws respectively, by a stipulation that ran contemporaneous with the loan. With the rise of the jus gentium, loan became actionable on its own merits. The giving and receiving, mutui causa completed the contract. The obligation arising was purely unilateral and was enforceable by the same action as a literal contract. The other three became independent real contracts very much later than mutuum, not enforceable by action until late in the republic or early in the empire.

It was due to the prætors that the most important changes in the law of succession were brought about. The prætors introduced under the technical name of bonorum possessio what was really beneficial enjoyment of the estate of a deceased person without the legal title of inheritance. This condition of affairs was doubtless brought about by a succession of edicts devised by different prætors in the latter half of the republic and the early empire. Justinian observes, when speaking of the origin of bonorum pos-

§ 90. Amendments of the Law of Succession.[2]

[1] Sohm, 289–290.

[2] Muirhead, 270–276.

sessio, that in promising it to a petitioner, the prætors were not always actuated by the same motives. In some cases they wished to facilitate the application of the rules of the jus civile; in some, to amend their application according to what they believed to be the spirit of the Twelve Tables; in others, again, to set these aside as inequitable. Doubtless it was with the purpose of aiding the jus civile that the first step was taken in what gradually became a momentous reform. According to Muirhead a prætor, when there was a dispute as to an inheritance, and a testament was presented to him bearing not fewer seals than were required by law, would give possession of the goods of the defunct to the heir named in it, pending the question of legal rights. It was not till the time of Marcus Aurelius that it was declared that a plea by the heir-at-law of the invalidity of a testament on the ground of defect of formalities of execution might be defeated by an exceptio doli; this on the ground that it was contrary to good faith to set aside the wishes of a testator on a technical objection that was purely formal. This converted bonorum possessio secundum tabulas into possession contrary to the terms of the jus civile.

Another variety of the bonorum possessio was that contra tabulas. If the person instituted was a stranger, and not a brother or sister of the child passed over, then, on the petition of the latter, the prætor gave him and the other sui heredes concurring with him possession of the whole estate of the deceased, the person instituted by the will being left with nothing more than the empty title of heir. In case of emancipated children of the testator, the jus civile did not require their institution or disinheritance, for they were no longer sui heredes and had no interest in the estate of their natural father. The prætors put them on the same

footing as unemancipated children and required that they be either instituted or disinherited like other heirs, giving them bonorum possessio if they were not. This was bonorum possessio contra tabulas, and it frequently displaced the instituted heirs either wholly or in part.

It has already been shown that the jus civile was very strict in reference to succession on intestacy. It did not allow emancipated children nor agnates who had suffered capitis deminutio to succeed. A widow, unless she had been in manu of the deceased, could have no part of the inheritance, while no female agnate except a sister could receive anything. The prætors changed all this. They established four classes:

(1) They gave the first place to descendants (liberi) including all persons whom the deceased would have been bound to institute or disinherit had he made a will.
(2) On failure of liberi the right to petition for bonorum possessio was opened to the nearest collateral agnates of the intestate, under their old name of legitimi heredes.
(3) By the jus civile the property fell to the state on the failure of agnates. The prætors recognized the rights of "cognates" to succeed in case agnates failed. By cognates was doubtless meant any relative whatever down to the last degree.
(4) Finally the claim passed to the survivor of husband and wife, assuming always that their marriage had not involved manus.

A year was allowed for the filing of a petition for bonorum possessio on the part of descendants; all others had to make petition within one hundred days. No guarantee was given to the petitioner of peaceful possession.

Book III. FROM THE BEGINNING OF THE EMPIRE TO THE DEATH OF JUSTINIAN
(30 B.C.–A.D. 565)

CHAPTER X

CHARACTERISTICS OF THE LAW DURING THE PERIOD [1]

§ 91. Introduction.

In our discussion of the history of Roman law we have now reached the period of its maturity. After the battle of Actium had placed the government of Rome in the hands of one man, Cæsar Octavius, instead of proclaiming at once the overthrow of the republic as a less politic man might have done, he proceeded step by step to make his way to supreme power. He gained over the soldiers by his liberality, his enemies by his clemency, and the populace by his extravagance and by gratifying their love for public spectacles. The stormy period of the civil wars was followed by a period of tranquillity and the revival of the fine arts. Rhetoricians, poets, and historians crowded the court of Augustus. All joyfully lent their aid to the increasing of his power day by day. The senate vied with the people in fastening upon themselves the bonds of servitude. They conferred on Octavius the title of "Imperator" in perpetuity, confirmed all his acts, and swore obedience to him. This was in B.C. 29. In 31 B.C. they decorated him with the title of "Father of his Country" and "Augustus." They placed the supreme power in his hands for ten years, and made over

[1] Sohm, 49–97; Ortolan, 59–81; Muirhead, 293–299.

to him, as his own, the finest and most important provinces of the empire, provinciæ Cæsaris, reserving for the people as provinciæ populi, the provinces which were the most quiet and submissive. This was in B.C. 27. Four years later the people, assembled in centuriata, conferred on Augustus the power of the tribunes in perpetuity as well as those of the proconsul. In 19 they bestowed upon him the consular power in perpetuity. In 17 the senate, not to be outdone, again conferred upon him a ten years' period of absolute power and, later (13 B.C.), made him pontifex maximus, which carried with it the duty of presiding over the public worship. Thus without appearing to subvert the magistracies of the republic, Augustus annulled them by accumulating their powers in his own hands, and by thus grasping the whole of them became an absolute sovereign. Thus it was that the emperor by becoming a multiple magistrate and supreme leader in all matters of state, arrogated to himself all state functions. He was, indeed, the state personified.

There were, however, consuls, proconsuls, prætors, and tribunes, who were chosen as colleagues to the emperor, and who were merely subordinates who aided him in carrying on his government. In choosing these officers a form of election was gone through, but all nominations were made by the emperor, and this nomination was equivalent to an election. Augustus was skillful enough to keep all these offices in his own family, nominating his nephews, sons-in-law, and grandsons when the latter were scarcely more than infants. At first this method was deemed sufficient, but to complete any far-reaching scheme of absolutism, it was necessary that all officers should be appointed by the emperor without the formality of an election, and so be attached to his fortunes and dependent upon him. To accomplish this, Augustus estab-

lished several new offices with functions not very well defined, but which grew at the expense of the more popular ones. These were destined in the hands of his successors to be so developed as to absorb all the old elective offices and thus render the absolutism of the emperor not only complete, but permanent. These new offices were seven in number; legati Cæsaris, procuratores Cæsaris, præfectus urbi, præfectus prætorius, quæstores candidati principis, præfectus annonarum, præfectus vigilum.

I have already stated that the provinces were divided between the people and the emperor.[1] That portion of them which was considered as still belonging to the people (provinciæ populi) was governed as formerly by the consuls and by the prætors after leaving office. The revenue derived from them and which was collected and paid into the public treasury was called stipendium. The other provinces were looked upon as the property of Cæsar (provinciæ Cæsaris) and the revenue derived from them was called tributum. They were administered by officers appointed by the prince (legati Cæsaris). The powers, however, of these legati differed very materially from those of the proconsuls. The emperor was the commandant of the army, and as he had reserved to himself the provinces most liable to disturbance, together with the frontier provinces in which it was necessary to make war, or from which it was necessary to carry on warlike expeditions, his legati were military officers, wearing the military insignia and costume, and commanding soldiers. The proconsuls were only civil magistrates with no military authority whatever.

1. Legati Cæsaris.

The treasury, like the provinces, was divided into two parts, one for the public, ærarium, the other for the prince,

[1] Ortolan, 58.

fiscus.[1] In order the better to manage the property which constituted his peculiar domain and to secure his own interests, Augustus appointed to the provinces a steward or agent, who had about the same functions in the imperial provinces as did the quæstors in the older organization. These procuratores were not magistrates in any proper sense and were at first selected solely from the emperor's freedmen. But as they acted as agents of the emperor they became, in the course of time, important personages and acquired an important administrative position, and were empowered to adjudicate on all questions connected with the fiscus.

2. Procuratores Cæsaris.

In the regal period of Roman history we frequently meet with mention of the præfectus urbi.[2] It was the duty of this functionary, when the king went away at the head of the army, to remain in Rome to protect the city and to preside over the administration. Augustus re-created this office and made it permanent. In concert with the consuls he tried criminals in extraordinary cases, and performed duties formerly belonging to the ædiles. As time went on he was invested with almost entire criminal jurisdiction, thus absorbing the functions of the prætors. But his authority did not extend beyond a radius of one hundred miles around the city.

3. Præfectus Urbi.

Augustus had raised himself to his autocratic position by his military skill. He did not lose sight of this in his reorganization of the empire. He created a body of troops called prætorian guards, who were soldiers exclusively attached to the person of the sovereign. At their head were two knights, styled prætorian præfects.[3] The number of these præfects varied at different times.

4. Præfectus Prætorius.

[1] Ortolan, 59. [2] *Ibid.*, 60. [3] *Ibid.*, 61.

They were at first purely military in function, but under succeeding emperors they acquired civil powers, and eventually retained these alone.

These were functionaries new to the Roman constitution, having nothing in the older forms in any way parallel to them.[1] They were simply imperial readers whose duty it was to read aloud in the senate the dispatches which the emperor addressed to that body, together with all the transactions which he thought proper to communicate to it. They were regularly two in number and held office at the emperor's pleasure but were usually permanently attached to his court.

5. Quæstores Candidati Principis.

The title given to this official is sufficient to indicate his functions as connected with the supply of provisions.[2] He was a subordinate of the præfectus urbi, and his duties were those of a purveyor.

6. Præfectus Annonarum.

Public tranquillity, in the early times of the republic, was secured by the plebeii ædiles; later by a body of five magistrates, called the quinqueviri. These seemed to furnish insufficient protection to life and property. Augustus told off for this duty seven cohorts, each commanded by its tribune, and distributed about the city, so that each had two districts to protect. Rome was thus divided into fourteen districts or precincts for purposes of police. To superintend all these cohorts, a special magistrate, præfectus vigilum, or police commissioner, was created whose business it was to make nocturnal rounds, to prescribe to the inhabitants all the precautions necessary to prevent fires, and to punish breaches of this law. He also had jurisdiction over and took cognizance of certain offenses connected with house breaking, and thefts committed at the

7. Præfectus Vigilum.

[1] Ortolan, 62.

[2] *Ibid.*, 63.

baths. In special cases, where the penalty was a heavy one, he was required to send the case before the præfectus urbi.

As these imperial offices came into existence they gradually superseded the republican magistracies. It is difficult to say to what extent they were a growth incident to changed conditions, and to what extent they were created with the fixed purpose of aiding the emperor in his assumption of absolute power. Thus the absolute power of the emperor was erected amid new institutions which it had itself created, and which contributed to its support.

§ 92. Legislation of Comitia and Senate.[1]

Under the influence of the imperial will not only did the offices of administration and police pass from the people to the emperor, but this centralizing force was felt in matters of legislation. Augustus, clinging to the forms of republican institutions as much as possible, thought it expedient not to break with the old practice of submitting his legislative proposals to the vote of the tribes. Some of these laws were of very great importance. Various measures for the amendment of criminal law were submitted that were far-reaching and effective. Besides these, three sets of enactments of great importance may be said to owe their authorship to him. Of these the first had for its object the improvement of domestic morality and the encouragement of fruitful marriages; the second strove to abate the evils that had arisen from the too lavish admission of liberated slaves to the privileges of citizenship; the third aimed to regulate procedure in public prosecutions and private litigations.

To the first set of laws belonged the lex Julia de adulteriis coercendis, of the year 18 B.C.[2] This was demanded by

[1] Ortolan, 65–67.

[2] Muirhead, 284.

reason of the prevailing licentiousness of the times, but it is doubtful whether it ever accomplished anything in the checking of the evil. Here also belonged the lex Julia et Papia Poppæa which was a voluminous matrimonial code that exercised, for more than two centuries, an influence so great as to be regarded as one of the sources of Roman Law almost equal to that of the Twelve Tables, or Julian's consolidated Edict. This law originated in that of the lex Julia de maritandis ordinibus which was approved by the senate in the year 28 B.C., but met with such violent opposition that it was not until 18 B.C. that it passed the comitia tributa. Experience taught Augustus that the provisions of this law were not sufficient to attain its purpose. Accordingly he introduced an amended edition of it in 3 A.D., which he succeeded in carrying only by means of allowing a three years' grace before it should be put into operation. This grace was afterwards extended to five years. It was thus postponed until 9 A.D., in which year a supplement to it was carried through by the consuls Marcus Papius and Quintus Poppæus; hence the change of name to lex Julia et Papia Poppæa. Its leading provisions were intended to prevent misalliances, marriages between men of rank and women of low degree or immoral character, and to compel women of a certain age (18) to marry and have children, by declaring unmarried persons incapable of taking anything of what they were entitled to under a testament, and married but childless persons, incapable of taking more than half. In this case the lapsed provisions fell to those other persons named in the testament who had fulfilled the requirements of the statute. Women who had borne a certain number of children (3 in Italy or 5 in the provinces) were freed from the tutory of their agnates or patrons and thus had complete control of their

1. Lex Julia.

property. By this law divorce was also regulated by requiring express and formal repudiation.

2. Lex Ælia Sentia.

The second set of enactments referred to above included the lex Ælia Sentia of the year 4 A.D., the Fufia-Caninia of the year 8, and the Junia-Norbana of the year 19. These will be discussed in another place.

The third set included the two leges Juliæ judiciariæ of which we know very little. One of these seems to have completed the work of the lex Æbutia, in substituting the formular system for that of the legis actiones. It must have been a comprehensive and far-reaching statute, as a passage in the Vatican Fragments refers to a provision of its twenty-seventh section.

3. Lex Junia-Norbana.

The lex Junia-Norbana was the last legislation passed by the comitia, as it is quite certain that the lex Claudia which abolished the tutory-at-law of women was a senatus consultum and not a lex.[1] There are some other enactments bearing the title of leges that are almost certainly actions of the senate, or mere decrees of the emperor. From the time of Tiberius onward it was the senate that did the work of legislation, for the simple reason that the comitia were no longer fit for the task. Cicero mentions senatusconsulta among the sources of law, but very few can be cited as belonging to the period of the republic. Some few bearing on the jus privatum are attributed to the epoch of Augustus, but this cannot be established with certainty. The activity of the senate as a law-making body was probably due to the fact that the great professional jurists all had a seat in the imperial council where the drafts of the senatus-consulta were prepared, and they were thoroughly cognizant

[1] Muirhead, 286, 317.

of the legal reforms that were needed. It was the senatusconsulta that were the chief statutory factors of what was called by both emperors and jurists the jus novum, the new law that departed very widely from the principles of the old jus civile, and was much more nearly in accordance with those of the edict, the jus naturale. Had not the authority of the prætors been overshadowed by that of the prince, the greater part of the jus novum would doubtless have become a part of the edict.

The series of senatusconsulta affecting the forms of jus privatum continued, during the imperial era, to run for about two centuries, till the time of the emperor Septimius Severus. After this it is difficult to trace any. Ulpian remarks that in the time of Caracalla, "non ambigitur senatum jus facere posse." As the form of legislation became that of the senatusconsultum and this acquired strength and permanence by being frequently employed, the plebiscita diminished in number and soon disappeared, so when the imperial constitutions increased in number and in power, the senatusconsulta, in their turn, became rare and at last ceased. The abstract principle of their authority however still remained in the law long after the imperial constitutions had taken their place.

§ 93. Constitutions of the Emperor.[1]

The constitutions of the emperor were the last source of law and were also destined to be the only source of law. The generic name of constitutiones embraces all the acts of the emperor of whatever time, but they must for practical purposes be divided into three distinct classes: —

(*a*) General ordinances promulgated by the emperor (edicta).

[1] Ortolan, 66; Muirhead, 293–295.

(*b*) The judgments rendered by the emperor in cases which he decided in his tribunal (decreta).

(*c*) The acts addressed by the emperor to various persons, as for example, to his lieutenants in the provinces; to the inferior magistrates of the city; to the prætor or proconsul, who interrogated him upon any doubtful point of law; to private individuals, who petitioned him in any circumstances whatsoever (mandata, epistolæ, rescripta).

The following is a definition of an imperial constitution as given by Gaius in his Institutes, Sec. 5; Constitutio principis est quod imperator decreto vel edicto, vel epistola constituit. Of these constitutions some were general and had universal application; others were particular, and only had reference to the cases and to the persons to whom they were addressed. In some respects the constitutions were similar to the edicts of the prætor, in that they were enacted to meet the present occasion and were not binding upon the emperor's successor unless he was minded to continue them. Force must be recognized as the only right which lay back of the constitutiones. This is, in fact, the real nature of their authority when stripped of all the coloring and trappings of the ancient institutions with which the imperial power had clothed itself.

§ 94. The Consolidated Edictum Perpetuum.[1]

I have already given some attention to the history of the edictum perpetuum during the time of the republic. It certainly received some additions in the early empire, but by the nature of the case these would be few, as the emperor was ever jealous of any legislative authority but his own. The prætors

[1] Muirhead, 289–291; Sohm, 76, 77.

still continued annually, upon entering on office, the edicts that had been handed down to them through generations, but their own additions were limited to mere amendments rendered necessary by the passage of some senatusconsultum that affected certain of their provisions. This was the status of the edictum perpetuum when Hadrian came to the throne. He was of opinion that the time had come for giving to the edict a final and authoritative form, and so sanctioning it that it might be received as a law and not merely as an edict, throughout the length and breadth of the empire. With this purpose in mind he commissioned Salvius Julianus, urban prætor at the time, to revise it, with a view to its approval by the senate as a part of the statute law. This task was accomplished and thus we have the Consolidated Edictum Perpetuum.

The revised version prepared by Julianus has been lost and we do not know the extent of his labor or what use he made of the previous decisions of the peregrin prætor and other magistrates who had contributed to the jus honorarium. It is altogether probable that he used both the edicts of the urban and peregrin prætors as well as the enactments of the curule ædiles. These he abridged and arranged in convenient form. This edictum perpetuum was approved by Hadrian and sanctioned by a senatusconsultum, and thus became a part of the statute law of the empire. No prætor could henceforth alter it in the least and its interpretation passed from the prætorian court to that of the emperor. The edict was not divided into books, but only into rubricated titles; however, its arrangement is not difficult to ascertain by reason of the numerous commentaries that have been written upon it. A comparison of these shows the following order: —

(1) In the first place came a series of titles dealing with the first steps of legal procedure; jurisdiction, summons, intervention of attorneys, etc.
(2) In the second place stood ordinary processes in virtue of the magistrate's jurisdictio.
(3) In the third place came extraordinary process, originally in virtue of his imperium.
(4) In the fourth place came execution against judgment-debtors, bankrupts, etc.
(5) In the fifth place came interdicts, exceptions, and prætorian stipulations.
(6) Lastly came the ædilian remedies.

The German historian, Lenel, has gone far toward reproducing in a thoroughly scientific manner, the edictum perpetuum. This work was published in 1883.

§ 95. The Responsa Prudentum.[1]

We have seen above how all power was lodged in the hands of the emperor and how he gradually absorbed the administrative and legislative functions which were formerly exercised by the republican magistrates and the popular assemblies. But imperialism did not stop here. It reached over to the jurists and controlled their independence as well. Pomponius says; "It is well to remember that before the time of Augustus the right to give opinions publicly concerning the law had not been conceded by the chiefs of the republic, but that all those who considered themselves sufficiently learned were at liberty to give their opinions to those who thought fit to consult them. These opinions were not given under the seal of the jurist who delivered them; but he in many cases himself wrote to the judge; in other cases, the parties who came to

[1] Ortolan, 68; Muirhead, 291–293.

consult the jurist brought with them witnesses, who testified before the judge as to the opinion given. Augustus, whose object it was to give additional authority to the law, was the first who gave to the jurists the right to express their opinions by virtue of imperial authority, and this authorization being once established was supplicated as a favor."

It was the desire of Augustus to give more credit and authority to jurisprudence than had hitherto been given. He desired that the responses of the jurist should represent his own power, simply delegated to certain persons of his own choice. It was for this purpose that he created the class of privileged jurists.

Giving advice to clients in public was no new thing. Tiberius Coruncanius did this in the beginning of the sixth century of the city. Scipio Nasica had a house in the Via Sacra given to him at public cost for the greater convenience of the public in consulting him. During the last two centuries of the republic it was a matter of pride and ambition to a patron to have daily a great throng of clients. His political influence was augmented by this and his standing in the community increased in proportion.

But the right of responding under imperial authority, first granted by Augustus and continued by his successors down to the time of Alexander Severus, was something far different from this. It did not imply publicity nor did it cut off the right of unpatented jurists to give advice as before to any one who chose to consult them. It simply gave authoritative character to a response, so that the judge who had asked for it and to whom it was presented, was bound to adopt it as if it had emanated from the emperor himself. It is well to remember that the judge was a private citizen usually unskilled in the law and having no tenure of office.

Whatever may have prompted Augustus in originating this plan, its beneficial results for the law were immediate and far-reaching. The quasi-legislative powers exercised by the patented jurists enabled them to influence current legal doctrine and to leaven their interpretations of the jus civile and jus gentium with suggestions of equity and natural law which gave to them a wider and more liberal scope.

The unlicensed jurist gave his legal opinion when asked by a judge or client, by word of mouth, accompanying it with such reasons for his opinion as he saw fit to give. The patented jurist reduced his opinion to writing and sent it to the court under seal. He was not called upon to give the reasons which governed him in his decisions. In case the opinions of patented jurists differed, as they sometimes did, the judge, by a rescript of Hadrian, was left free to use his own discretion.

CHAPTER XI

ROMAN JURISPRUDENCE

§ 96. Introduction.[1]

THE beginnings of Roman jurisprudence date from the time of the pontifices, who acted as skilled legal advisers in the court of the king, in the regal period, and, after the establishment of the republic, performed these functions for the consul, and, later, for the prætor. From this fact it will appear that the science of law was closely bound up with that of religion and astronomy. It was only the priests that had the knowledge of the jus sacrum and the calendar; they alone could tell the dies fasti and nefasti, or the times in which an action at law might or might not be commenced. In fact they had a monopoly of all legal knowledge and for this reason the control and development of the formulæ relating to actions rested entirely with them. Their science was that of the letter of the law and its technical application, interpretation, and utilization. This knowledge they kept exclusively confined to the college of pontifices and handed it down to the new members by tradition and instruction. The early legal opinions of the college which formed the base of existing practice were preserved in the archives of the college, and to these archives only members had access. All legal business was thus confined to a few, and pontifical jurisprudence was looked upon as a kind of occult science. It was a powerful weapon in the hands of the patricians to which class every member

[1] Sohm, 59–80; Muirhead, 279–314; Ortolan, 71–82.

of the pontifices belonged when they entered upon their long and strenuous struggle with the plebeians.

The publication by Cnæus Flavius, the secretary of Appius Claudius Cæcus, in 304 B.C., of the Dies Fasti and a work which set out in detail the steps and the formulæ which were necessary for conducting the legis actiones, was justly considered a great popular act. The same may be said of the work of Sextus Ælius, published in 204 B.C., the jus Ælianum vel Tripartita.[1] This work contained the law of the Twelve Tables, their interpretation, and the actiones legis, or the entire procedure necessary to carry out the law together with a brief treatise on the law itself. Fifty years before the publication of the jus Ælianum, Tiberius Coruncanius, the first plebeian pontifex maximus, proclaimed his readiness to give information to anybody on legal questions. The knowledge of law was thus to be opened up to all who desired it, no matter whether they were parties to a suit at law or merely students of the jus civile. The idea of casting the hard and crude materials of the Roman law into artistic form now occurred to Marcus Cato, the younger, who died in 150 B.C. In his Regulæ Juris we can trace general principles of law shaped from the raw material of history. It represents the first attempt to set forth the pontifical jus civile in literary form; the first book dealing with law, "the cradle of juristic literature" (qui liber veluti cunabula juris continet).

From this time onward the knowledge of law passed more and more out of the hands of the pontifices and became an ingredient in national culture. At the same time the influence of Greek literature and the scientific methods of Stoic philosophy operated as a powerful and ennobling stimulant.

[1] Muirhead, 247, *n.* 12.

But the most distinguished of the "veteres" was Quintius Mucius Scævola, the younger, pontifex maximus.[1] About 100 B.C. he wrote his great treatise on the jus civile, in eighteen books, a work of wide and enduring fame. It was Scævola who for the first time set forth in systematic order the positive private law, arranging and classifying it according to the nature of the subject dealt with. He did not confine himself like his predecessors, to the discussion of isolated cases or unrelated questions of law, but arranged his work according to the subject matter with which the several rules of law are concerned. He was the first to determine in clear outline the nature of such legal institutions as will, legacy, guardianship, partnership, sale, hiring, etc., and to state in logical order the various kinds of these institutions. His was the first attempt to set forth general legal conceptions as distinct from the mere facts of law, and this was the reason for the enormous success of his work. A mere knowledge of law became in his hands a legal science, and jurisprudence may be said to date from 100 B.C.

The most important part of the business of a Roman jurist was to give answers to legal questions propounded to him by judges or clients. With this he was accustomed to combine the practice of teaching law and writing upon legal subjects. The college of pontifices was accustomed to appoint one of its number every year to give opinions on questions of private law. The judges in special cases were bound by these responses and were not allowed to render opinions in contradiction. When the republic came to an end, however, and the knowledge of law spread among the people, it became a frequent practice for persons outside of the college of pontifices to give "juristic responses," but they were

[1] Muirhead, *loc. cit.*

not considered as binding, as no authority lay back of them. This unrestrained rendering of responsa tended to the lessening of the prestige of jurisprudence in general, while on the other hand, a return to the old monopoly of all legal learning by the pontifices was out of the question. It was the emperor Augustus who, perhaps as pontifex maximus, devised a remedy for this difficulty. He left the practice of the law absolutely free as before, but ordered that hereafter all responsa should be given ex auctoritate ejus, *i.e.*, with the authority of the emperor. By this action the pontifices ceased to play any part in the development of the civil law and the princeps together with scientific jurisprudence became the permanent agents in the future development. The responsa prudentum ex auctoritate principis became a source of law, and their force began to extend to juristic literature in general.

Roman jurisprudence was thus placed in a position of commanding influence, and it only remained to be seen whether it would be able to utilize the influence which it had acquired and pass on to even greater heights.[1]

§ 97. Labeo and Capito and the Schools of the Proculians and Sabinians.[2]

But at the very beginning of the science of jurisprudence a conflict arose between the jurists themselves that threatened the very life of the science. Two rival schools sprang up, the Sabinians and Proculians, the Sabinians being the followers of Caius Ateius Capito, the Proculians the followers of Marcus Antistius Labeo. Both Capito and Labeo lived during the reign of Augustus and were for a time political rivals. Capito attached himself to the court party and was a zealous adherent of the emperor. Labeo was inclined to range himself on the side of the repub-

[1] Sohm, *loc. cit.*

[2] Muirhead, 296–299.

lican opposition and to champion the old order of things as against the regime of the rising monarchy. The Sabinians derived their name from Masurius Sabinus, an adherent of Capito, who lived in the reign of Tiberius. The Proculians derived their name from Proculus who lived in the reign of Nero and was acknowledged as the leader of the disciples of Labeo. The successors of Sabinus and Proculus were Caius Cassius Longinus and Pegasus, respectively, and it is after them that the Sabinians are sometimes called Cassiani, and the Proculians, Pegasiani.

It is really impossible any longer to determine, with any certainty, what the essence of this divergence of schools was. The attempt has often been made to trace a parallel between the modes of thought in politics and jurisprudence of Labeo and Capito and to discover here the reason for the diverging lines in the two schools, but this reason fails because we do not know enough of Capito as a jurist to enable us to speak with any certainty as to his opinions. He is very rarely referred to in the law texts that were in use before the time of Justinian, and his name does not appear in the collections of law made by that emperor. Labeo's name, on the other hand, was that of the greatest authority from the time of Augustus down to that of Hadrian. From the remains of his writings preserved in the Digest, it is easy to see that he was a man of great general culture, well versed in the history and antiquities of the law, an acute dialectician, and in philosophy imbued to some extent at least with the teachings of the Stoics. Pomponius and Aulus Gellius both speak of him in terms of highest praise. Labeo was as independent in his exposition of the law as he was in his political opinions. He criticized with freedom the doctrines of those who had been his instructors in jurisprudence and was guided in his

own judgments by constant reference to the origin of an institution or a rule and the object it was intended to effect. He composed a theoretical treatise on law which was epitomized and annotated by Paulus two centuries later. He also wrote a Libri Posteriorum, a practical treatise on the various branches of the jus civile. This work was abridged by the jurist Javolinus and seemed to have enjoyed considerable authority. Besides these works, Labeo was the author of commentaries on the pontifical law, the Twelve Tables, and the Edicts of the urban and peregrin prætors, as well as of a collection of responses. He was held in very high esteem by the classical jurists down to Alexander Severus. It is not uncommon to find his opinions and definitions of terms of law referred to ten or fifteen times in the course of the same title.

Neither Labeo nor Capito seemed to have founded a regular school themselves although they both gave legal instruction according to the traditional republican fashion of old and distinguished Romans, whose practice it was to give public answers to questions in the presence of their pupils with whom they sometimes argued, but they rarely gave regular private tuition in a series of connected lectures. It is generally conceded that Sabinus was the first to establish a school of law and to give systematic instruction by means of a corporate organization, such as had been in vogue among the Greek schools of philosophy. In opposition to the school of Sabinus, a second school sprang up, organized in the same manner. This was the school of Proculus. As has already been said these schools took the names of their founders. The leading spirit among the chiefs of these schools was Sabinus. He pointed out to his pupils the lines on which Roman law should progress, in the sense of ridding itself

of old-fashioned formalism. He seems to have caught the progressive spirit of Capito, who was a political opportunist and sympathized with the imperial reforms in law and politics. The Proculians, on the other hand, were inclined to abide by traditional rules and to sacrifice the spirit for the letter of their master's teachings. In this way they became more conservative than was Labeo.

§ 98. Julian, Gaius, and the Antoninian Jurists.[1]

The task of classical jurisprudence was to reconcile the opposition between these two schools. Its labors resulted in the fusion of the jus civile, the already stationary jus honorarium, and new imperial law into one harmonious whole. The foundations of this were laid by Publius Juventus Celsus in his Digesta, a work in thirty-nine books. Celsus was a follower of Proculus and died in the reign of Hadrian. He was succeeded by a still more eminent lawyer of the Sabinian school, Salvius Julianus, who was by birth an African and maternal grandfather of the emperor Didius Julianus. Under Hadrian and Antoninus Pius he filled the office of prætor, consul, and præfectus urbi, and for a long time was the leading member of the imperial council. The task of his life was the consolidation of the edictal law and the composition of his great digest in ninety books. Like Celsus he adopted the arrangement of the prætorian edict, utilizing it, however, for the purpose of expounding the whole of Roman law. He illustrated his doctrines with hypothetical cases and fresh and lively questions and answers. "His vast acquaintance with practical case-law, the ingenuity of his own countless decisions, his genius for bringing out, in each separate case, the general rule of law which, tersely and pithily put, strikes the mind with all the force of a bril-

[1] Sohm, 68, 69, 73; Muirhead, 299–303.

liant aphorism and sheds its light over the whole subject matter around — these are the features which constitute the power of his work." There is probably none in the whole catalogue of Roman jurists whose dicta are so frequently quoted by his successors and even by his contemporaries. Many brilliant and scholarly men were associated with Julianus in advancing the development of jurisprudence. Of these Sextus Pomponius was, perhaps, the most distinguished. His life was a long one, beginning in the reign of Hadrian and continuing through the twenty-three years of that of Antoninus Pius and well into that of Marcus Aurelius and Verus. He was a man of extensive reading and learning in various themes; archæological, historical, doctrinal, and critical. His writings on Scævola and Sabinus were drawn upon very largely in the compilation of the Digest of Justinian. His Enchiridion or Hand Book of Roman Law is the chief source for the knowledge of the external history of Roman law from the foundation of the city to the time of Hadrian. Cæsilius Africanus was also a friend of Julianus, though some years younger. He wrote several books of questions which were made liberal use of by the commissioners of Justinian.

It may now be said that the star of the Proculian school began to set. The jurist Gaius, who died about the year 180 A.D., and whose institutional treatise was adopted as a model by all subsequent writers of legal textbooks, is the last in whom the opposition between the schools is represented. He himself was a Sabinian. He still mentions contemporary teachers "of the other school," *i.e.*, Proculians, but their names have not reached us. The Sabinians, in Gaius, finally gained the day. Henceforth there was to be but one jurisprudence and the lines of it were those marked

out by him. Gaius must be placed somewhat later than Julianus and Pomponius, as his literary activity only commenced under Antoninus Pius and continued until sometime after the death of Marcus Aurelius. He is only mentioned once by a contemporary writer and never by his immediate successors. Some writers argue from this fact that he must have been a provincial, and probably an Asiatic, while others maintain with equal force that he was a resident, if not a native of the city of Rome. It was as a teacher and theoretical jurist that he excelled and it is asserted by some commentators that he never practiced law at all. It may be confidently asserted that he did not enjoy the jus respondendi. His famous work was his Institutiones commentarii quattuor; a compendium of the fundamental doctrines of the law of very great value, alike for the simplicity of its method, the interest of its historical illustrations, and the precision and accuracy of its language. In the year 1816, the discovery of the manuscript of this work which had been lost for centuries, produced a profound effect. It came at the proper time to give an impetus to the newly established historical school of jurisprudence and to furnish a store of new material for their investigation and criticism. As a jurist Gaius does not rank with Labeo, or Julian, Ulpian or Papinian, but as a teacher he is unexcelled. All his writings seem to have had an educational aim and are models of exposition. When his ground is sure his tread is firm, but he does not relish controversy. He furnishes a wealth of instruction about branches of the law of the republic and early empire, and his clearness of exposition leaves no room for doubt as to his meaning.

A little later than Gaius came Quintus Cervidius Scævola. He was a Greek by birth, and subsequently a member of the

council of state of the emperor Marcus Aurelius. He wrote a Digest in forty books in which he set forth Roman law after the casuistic method, in the shape of "responsa," adopting, like others, the arrangement of the edict. His pupils were Septimius Severus, who afterwards became emperor, and, best of all, Æmilius Papinianus, the most illustrious of the Roman jurists.

§ 99. Papinian, Ulpian, and Paul.[1]

The nature of the task which was now the function of Roman jurisprudence to fulfill had become manifest. This was to unfold, in all its wealth and multiplicity, the great legal system by means of decisions and opinions which would bring order out of chaos by vindicating the force of firm principles. Celsus and Scævola had aided in this task to a great degree, but it remained for Æmilianus Papinianus to carry this work to its highest point of perfection. He was a pupil of Scævola and was advocatus fisci under Marcus Aurelius and prætorian præfect under Septimius Severus, who was among his dearest friends, and probably related to him by marriage. He was, like Scævola, an Oriental, and combined the moral weight attaching to a character of the highest rectitude with the elegance of a Greek and the terseness and precision of a Roman. He made use of the casuistic method of expounding the law, as did his famous teacher, by means of answers to concrete legal cases, and he carried this method to perfection. He has been called the prince of jurists, and this justly, because he was not only a master of Roman law, but a man so upright in character that he could not be induced to lend his talents to the doing of evil even by an emperor. The sons of Severus, Caracalla and Geta, were left to his guardianship, but he was unable to prevent the murder of Geta by his

[1] Sohm, 70, 71, 84, 85; Muirhead, 303–306.

brother, in 212 A.D. Caracalla called upon Papinian to defend his acts and, when he utterly refused to do so on the ground that, "to defend the murder of the innocent was to slay him afresh," he was himself killed at the command of the emperor. His most important works were eighteen "libri responsorum" and thirty-seven "quæstiones libri," in the latter of which he follows the arrangement of the edict. Greek and Roman culture combined produced in Papinian the brightest luminary of Roman jurisprudence. "He has no equal in the precision with which he states a case, eliminating all irrelevancies of fact, yet finding relevancies of humanity that would have escaped the vision of most, and without parade, and as it were by instinct, applying the rules of the law as if it lay on the surface and was patent to the world."

Domitianus Ulpianus and Julius Paulus made their first appearance in public life as assessors in the auditorium of Papinian and members of the imperial council of Septimius Severus. In the reign of Caracalla they were the heads of two ministerial offices, that of records and requests. Ulpian was a Tyrian by birth, and was, probably for that reason, an intimate friend of Alexander Severus, whose mother was from this country. He wrote a commentary on the Edict in more than eighty books; collections of Opinions, Responses, and Disputations; books of Rules and Institutions; and treatises on the functions of the various magistrates. The characteristics of his work are exposition of the highest order, together with lucidity of arrangement, style, and language. His works have supplied to the Digest of Justinian fully one-third of its contents.

Paul, who seems to have been a pupil of the jurist, Scævola, had a career quite similar to that of Ulpian, and wrote upon

much the same themes. He wrote a short commentary on Sabinus and composed many monographs, some of which were devoted to the exposition of points of procedure. By some writers Paul is ranked second only to Papinian as a jurist, but in clearness of diction and precision of statement he is certainly inferior to Ulpian.

After Papinian the period of decline begins. Roman jurisprudence had reached the pinnacle of its development and produced its masterpiece. The era of creative genius is followed by that of compilers. Ulpian and Paul mark a distinct decline from Papinian, great as these two jurists really are. Modestinus, a pupil of Ulpian, is worthy of mention, but we know little about him. He is put by the Valentinian Law of citations on the same distinguished platform as Gaius, Papinian, Ulpian, and Paul. Numerous extracts from his writings are preserved in the Digest. His favorite topics are the law relating to public officials of the empire and subtle questions of theory and practice. From this time on Roman jurisprudence lost its leading position and began a rapid decline. The jus respondendi ceased to be conferred after the close of the third century and the emperor alone gave "responsa," in the form of "rescripta principis."

§ 100. Remains of the Jurisprudence of the Period.[1]

The principal repository of what remains of the jurisprudence of the first three centuries of the empire is the Digest of Justinian, the imperial rescripts being largely contained in various collections of the later empire, as well as in Justinian's code. Besides these a large number of passages from the writings of Gaius, Papinian, Ulpian and Paul, are to be found also in the collatio, the Vatican Fragments, and the Consultatio. In addition to the works mentioned above we have

[1] Sohm, *loc. cit.*; Muirhead, 308–314.

from other quarters three of great importance, the Institutes of Gaius, part of a work of Ulpian's, and Paul's Sentences, together with some lesser ones, and a few isolated fragments. The history of the finding of these various works after they had been long lost makes an interesting chapter, but our limited space precludes our entering into details. The work of Gaius will be considered later in connection with the law itself.

CHAPTER XII

THE PERIOD OF CODIFICATION

In the later empire (which dates from the fourth century) there were two groups of sources of law: —

§ 101. The Stages preliminary to Codification.[1]

a. The jus vetus: —

The old traditional law, the development of which was completed in the classical period of Roman jurisprudence.

b. The leges or 'jus novum': —

The later law which had sprung from imperial legislation.

These two classes of law, 'jus' and 'leges,' mutually supplementing each other, constituted the whole body of law as it existed at the time, and taken together, represented the result of the whole development of Roman law from the earliest times down to the period we have now reached.

a. The 'jus' was based on the Twelve Tables, the plebiscita, the senatusconsulta, the prætorian edict, and the ordinances of the early emperors. As a matter of fact, however, neither the tribunals nor the parties were in the habit of using these sources of law, in their original form, but preferred to resort to the classical juristic literature where they found the results of these sources set forth and worked out in logical form. Practitioners no longer quoted the prætorian edict or the plebiscitum, but Papinian, Ulpian, Paul, or other

[1] Muirhead, 353–365; Ortolan, 100–104; Sohm, 82–86.

noted jurists. It is also to be noticed that no distinction was made as to whether the opinion quoted was in the form of a 'responsum' or not. The old-time authority of the responsa was now carried over to the juristic literature in general. To this must also be added the fact that the conferring of the jus respondendi on individual jurists was discontinued in the course of the third century. Later ages failed to appreciate the distinction between jurists who had, and jurists who had not the right of the jus respondendi. Gaius, who never had this authority conferred upon him, was cited in the courts of law as an authority equal to that of Papinian or Paul. The Law of Citations of Valentinian III may be said formally to close the period of the jus vetus proper. He enacted that the writings of the jurists, to wit, of Papinian, Paul, Ulpian, Gaius, and Modestinus, as well as of all those who were cited by these writers should possess quasi-statutory force, so that their opinions should be binding on the judge.

The 'jus vetus,' was traditionally taken to include those collections of early imperial ordinances, more especially of rescripts among which the Codex Hermogenianus, a later collection supplementing the former, and published in the course of the fourth century, were preëminent. The practical value of these codices lay in the fact that they contained such rescripts as the classical jurists had not yet been able to take into account.

b. The second group of sources, 'leges,' consisted merely of the new imperial law (jus novum), the 'edictum' in the later sense of the term, and the 'constitutio generalis' promulgated to the public. The only thing necessary to be done regarding these new sources of law was that they should be collected. This was accomplished by the Codex Theodosi-

anus, published by the emperor Theodosius II in the year 438 A.D., and promulgated in the very same year with statutory force for the Western Empire by Valentinian III. It contained the constitutiones generales issued since Constantine and at the same time abrogated all such constitutions of the same period as had not been adopted.

Between the Codex Theodosianus and Justinian a series of separate imperial laws were issued, which were known as 'Novelæ,' and collected under that name (post-Theodosian Novels).

We can now summarize the sources of law that were in use at the time of Justinian as follows: —

1. The sources of law as determined by Valentinian's Law of Citations.
2. The earlier imperial ordinances (Codex Gregorianus and Codex Hermogenianus.)
3. The Codex Theodosianus and its Novels.

These are the materials out of which our corpus juris was constructed.

§ 102. The Corpus Juris of Justinian.[1]

Flavius Anicius Justinianus, the most famous of all the emperors of the Eastern Roman Empire, was by birth a barbarian, native of a place called Tauresium in the district of Dardania, a region of Illyricum, and was born, most probably, on May eleventh, 483. His family has been variously conjectured as Germanic or Slavic by reason of dominating family names, but the probability is in favor of the latter view. He was early adopted by his uncle, Justin, emperor from 518 to 527, and given the very best education that the times could afford. Latin seems to have been a mother

[1] Muirhead, 376–387; Ortolan, 105–112; Sohm, 87–91.

tongue to him, but he was a fluent Greek scholar though speaking the language with a barbarian accent. He was appointed consul by his uncle, in 521, and won over the populace by games and spectacles of unrivaled magnificence and splendor. This was in direct contrast to the frugality of Anastasius, who carried this virtue to the point of penuriousness. This luxuriousness indicated the reactionary policy of the new dynasty. In April, 527, Justinian was created Augustus, and in August of the same year, on the death of his uncle, became sole monarch without any opposition.

Justin had been known as an able soldier, but without any aptitude for civil affairs. It is doubtful whether he even knew how to read. He had, however, guided the empire into a new era and inaugurated a thoroughgoing reaction. Anastasius had relieved the empire of financial embarrassment by his careful hoarding of the resources. Justinian reaped the benefit of all of this. He commenced his reign with a full treasury and political reforms well under way.

The enterprising spirit of Justinian carried out the idea of regaining a footing in western Europe, and his famous generals reconquered Africa and the Ostrogothic Empire, in some measure extending the borders of Rome well toward her ancient boundaries. As against the aristocracy he made himself political autocrat; as against Pope and Patriarch, he made himself ecclesiastically absolute. His buildings in number and splendor were the marvel of the age and, in St. Sophia, he bequeathed to posterity an imposing monument of his greatness. But his greatest work was to set in order a system of law for the world, and this will ever be his enduring monument. He was ambitious to carry out a legal reform more complete than that undertaken by Theodosius and which that emperor had failed to complete. He took

the first step toward this object but a short time after the death of his uncle, in the appointment of a commission to prepare a collection of the statute law. The first intimation of this first great scheme of Justinian's was contained in a constitution addressed to the senate, bearing date, 13th February, 528. This constitution contained no hint whatever of what the emperor really had in his mind beyond a collection of statute laws (leges) of all that was worth preserving in the Gregorian, Hermogenian, and Theodosian Codes, and the later enactments of his imperial predecessors. He informed the senate that he had already appointed a commission of ten members, mostly ministers of state, but including Theophilus, who was a professor of law at Constantinople, and two barristers of distinction. This commission was instructed to reject all enactments that had gone into disuse and all that they considered necessary or expedient they were to add. This work was completed in a little more than a year, and officially ratified under the name of Justinianeus Codex, by a constitution of the seventh of April, 529, addressed to Menna, one of the prætorian præfects. The emperor declared in this constitution that the new collection was in future to be regarded as the sole repository of statute law throughout the empire, references to the earlier collections being expressly prohibited. Everything embraced in this new Codex was to have the force of a general enactment even though it had previously been addressed to an individual and had only ranked as a rescript. In the new Justinianeus Codex was thus gathered all the sources of law save the writings of the jurists, as determined by Valentinian's Law of Citations; in other words, the emperor made laws (leges).

This task was no sooner completed than Justinian turned his attention to the jus vetus or jurisprudential law as it was

established by Valentinian's Law of Citations. This was excessive in bulk and unequal in quality. Moreover it was uncertain in its meaning in some cases. The emperor deemed it expedient that the whole should be gone over with care and thoroughly sifted and reduced into manageable shape. In this undertaking he was seconded by Tribonian, who had become quæstor of the Royal Palace, and whose name will ever be associated with that of Justinian as the master spirit of the latter's law reforms. The emperor addressed to Tribonian a constitution in which the lines were laid down upon which the new collection was to be constructed. It was to embody such a selection of extracts from the writings of those of the older jurists whose authority had been recognized by earlier sovereigns, as would afford an exposition of so much of the law still in observance as had not already been promulgated in the recently completed collection of statutes, the Codex. To this work was to be given the name of Digestæ or Pandectæ. Tribonian, who was appointed to this task, was to associate with himself such coadjutors as he saw fit. This commission was required, in testimony of their strict adherence to the general design, to insert at the head of each extract the name of its author and the particular treatise of his from which it was taken. The commission had a very large discretion in its choice of materials and in its mode of dealing with them. It could interpolate a word or phrase when it was deemed expedient, and could omit such passages as it thought fit. In this it is made clear that the purpose of the emperor was to publish, not a historical view of the law, but an authoritative statement of it as it then stood, which should be beyond controversy, and everywhere be received as definitive.

Tribonian associated with himself sixteen colleagues, of

whom four were law-professors, and eleven were members of the bar. Even before they had commenced their labors Tribonian had discovered that there were mooted questions in the law which could be satisfactorily settled only by imperial authority and, as the work progressed, more and more of them became apparent. To settle these mooted questions Justinian passed a series of enactments in the years 529 to 532 which received the name of "the Fifty Decisions." These formed a collection by themselves before they were finally incorporated in the second edition of the Codex.

In the preparation of this work the Tribonian commission was divided into three sections, each of which was instructed to extract a particular group of writings: —

(1) The first section had assigned to it the group of works dealing with the jus civile. This was usually spoken of as the "Sabinian group" because the chief part of these works consisted of the writings of Sabinus and his commentators.

(2) To the second section was assigned the group of works dealing with the prætorian edict; the so-called "edict-group."

(3) To the third section was assigned the group of works dealing with separate legal questions and cases, the "Papinian group," so called because in this branch the writings of Papinian and his commentators transcended all others in importance.

When the separate sections completed the portion assigned to them, the whole was consolidated into one work; a uniform self-consistent whole. This was the Digest.

While the commission was busy with the preparation of the Digest and this was nearing completion, another work was

taken in hand which had been mentioned in the constitution, entitled "Deo-auctore." This was the little volume so well known under the name of Justinian's Institutes. This was an elementary treatise for the use of students. Its preparation was intrusted to Tribonian, Theophilus, and Dorotheus. Tribonian, however, was too busy with the Digest to give active assistance to his colleagues who were men well fitted for this task, being professors of law, the one in Constantinople, the other in Berytus. This is, in fact, little more than a new edition of the Institutes of Gaius, edited and brought down to Justinian's time by the omission of all obsolete laws and the insertion of necessary new material.

The Institutes were published on the twenty-first of November, 533; the Digest or Pandects followed on the sixteenth of December in the same year.[1]

The completion of this great body of legal labors was announced by three separate constitutions; one, known as "Tanta," ratifying the work, was addressed to the senate and the world; another, known as "Dedoken" which was but a Greek version of the first; and the third known as "Omnem rei publicæ," addressed specially to the professors in the law-schools. The whole task had been completed in three years by reason of the division of labor mentioned above, and the entire positive law cast in final shape. Equal validity was given to Institutes, Digest, and Code. The writing of commentaries upon these works was forbidden and all points of doubt were to be settled by the emperor himself.

[1] Muirhead, *loc. cit.*; Sohm, 88, 90.

CHAPTER XIII

THE TEACHING OF ROMAN LAW BEFORE AND AFTER JUSTINIAN[1]

PRIOR to the reign of Justinian legal education had passed through various changes. During the republican period success in the study of law depended wholly upon the natural intelligence of the pupil and his diligence in the pursuit of knowledge. There were no schools of law. He attached himself to a jurist of renown and derived instruction by imitating the example set by him in actual practice. These practical lessons were at times accompanied by explanations on the part of the master, but as he received no emolument for his services explanations were probably disconnected and meager. From this method there grew, in course of time, the habit of lecturing upon fundamental legal principles to such students as cared to listen. This had become customary in Cicero's time. In this manner theory and practice had gradually run together. It was this method that was followed by Tiberius Coruncanius and others, and is described by Pomponius as follows; "Huic nec amplæ facultates fuerunt, sed plurimum a suis auditoribus sustentatus est." Cicero speaks in keen appreciation of this method of teaching and it surely did combine excellent qualities. This was the method adopted in the school of Labeo, who divided his time between literary labors and study in the country and reading law and expound-

§ 103. Teaching of Law before Justinian's Time.

[1] Ortolan, 115–128; Muirhead, 394–398; Mackenzie, 31–43.

ing the same to his numerous studiosi in town. These were advanced students and were dealt with in a different manner than were those of a lower class called auditores. They had already been admitted to practice but were still under the direction of their master. All legal instruction was as yet private and carried on at the home of some prominent man who gave his services for the love of imparting the knowledge of his chosen cause, and without any pay or emolument save gifts made by appreciative students. Sabinus was himself trained in this way and followed the same method in giving instruction. Pomponius says of him; "Not having resources of his own, he was chiefly supported by his auditores." This was merely a token of appreciation on the part of his pupils and not the payment of any fixed fee for instruction.

Paul, Ulpian, and Modestinus may be said to represent the close of this period in legal instruction. Modestinus, who studied under Ulpian, and who speaks of him as 'studiosus meus,' is the last example of any importance of this private method of being initiated into the mysteries of the legal profession. Henceforth law is placed on an equal footing with philosophy and literature and its study is commenced in the same manner. It was made free both in Rome and in other parts of the empire, and professors of law at Rome were exempted from the burdens of tutorship as were those of philosophy. Schools of law were still private and received no support from the government, but the profession was distinctly honorable.

Toward the end of the fourth century a system of public instruction which was independent of the private schools came into vogue and enjoyed great popularity. In these schools where literature and philosophy held an important

place law was also taught. The first school of this kind, supported by the government, was at Rome. A little later there was founded at Constantinople a public school of the liberal arts with thirty-one professors, of which number two were professors of law. The emperors, from time to time, issued rules to govern these schools, touching both studies and conduct. In 370 A.D. a constitution of the emperors Valentinian I, Valens, and Gratian, concerning the discipline to be observed by the students, enjoined them to be punctual at their classes, to take care not to acquire a character in any way disgraceful or disreputable, and to avoid associates of disreputable reputation.

When Justinian issued his directions to the professors of law, in 533, Rome was only a nominal part of the empire and had been, in reality, in the hands of the Ostrogoths for nearly half a century. Still it was mentioned as if it were the urbs regia of the olden time and classed with Constantinople and Berytus as one of the places where law could be taught with imperial sanction.

§ 104. Teaching of Law after Justinian's Time.[1]

Upon the same day that the Digest was promulgated by Justinian, which was done by the issuing of two constitutions in Latin and Greek addressed to the senate and the entire nation, he addressed a third to eight professors of the law of the empire who were mentioned by name, giving instructions as to the course to be pursued by them and their successors in the teaching of law. A five-year course is authorized as follows:—

"During the first year let them learn our Institutes, which have been derived from the ancient source of the old Institutes, and reduced to a simple and intelligible form by Tribonian, a man of transcendent genius, and two of your

[1] Ortolan, *loc. cit.*

number, Theophilus and Dorotheus, illustrious professors. The remainder of the year is to be occupied with that which logically follows, *viz.*, the first portion of the laws, called by the Greeks *πρῶτα* (preliminary books 1, 2, 3, and 4 of the Digest).

"The students are no longer to use the old, frivolous appellation of Dupondii (students of the double as); they will be called Justinianani novi. Let those who aspire to the science of law bear for the first year our name, inasmuch as the first volume of our work is placed in their hands. They heretofore have borne a name answering to the ancient confusion of laws; but since the laws have been presented to them in a clear and lucid manner, it has become necessary to exchange this name for a more honorable one.

"During the second year we sanction the use of the name edictales, given to them in allusion to the Edict; as students of the Edict, they shall be instructed in this, or rather in the seven books (De judiciis, lib. 5 to 11 of the Digest), or in eight books (De rebus, lib. 12 to 13, of the Digest), according to the opportunity that the professor shall have of selecting either subject, so it be done without confusion. These books, whether De judiciis or De rebus, must be explained completely and in their order, without any omission whatever, inasmuch as everything has been arranged in them in excellent order, and nothing will be found there that is useless or obsolete. To these let there be added four books, at discretion, taken from the fourteen relative to specialities, one of the three treating upon dower (lib. 23, 24 and 25 of the Digest); one of the two treating upon tutelage and curatorship (lib. 26 and 27 of the Digest); one of the two upon wills (lib. 28 and 29 of the Digest); and one of the seven treating upon legacies, fideicommissa and their accessories (lib. 30 to 36 of the Digest);

the ten remaining books of the fourteen being reserved for a convenient occasion, for it is impossible, in the second year's course, for the professor to take the whole fourteen.

"The third year's course shall include either the books De judiciis or De rebus, according as the professor has adopted one or other in the preceding year. After this, three courses of special subjects: the book upon pledges and hypothecations (lib. 20 of the Digest); the book upon interest (lib. 22 of the Digest, De usuris); the book upon the edict of the ædiles; the actio redhibitoria, evictions and stipulationes dupli; subjects which were placed in the latter part of the Edict, but which we have transposed in order that they may be more approximate to the subject of sale, with which they are intimately connected. These three books shall be taught conjointly with the reading of the most ingenious Papinian. The students shall, in their third year, learn to recite his works, in fragments, upon various subjects. As to you, the illustrious Papinian will furnish remarkable lessons, derived not merely from the nineteen books of his responsa, but also from the thirty-seven books of his questions, from the double volume of his definitions, from his book upon adultery, and from almost the whole of his works which are distributed throughout our Digest.

"In order that the students in their third year, who were formerly called Papinianists, may not lose the name and the fête, the study of his works has been introduced into this third year, for we have supplemented the book upon hypothecation by the reading of the great Papinian: thus the students, rightly deriving their name of Papinianists, in which they rejoice, and which is to be retained, shall continue to celebrate the fête, to which they have been accustomed, upon their entrance upon the study of his laws, in

order that the memory of the sublime Papinian, of præfectorial dignity, may endure forever.

"During the fourth year the students shall preserve the name derived from the Greek λύτας (licentiates) as heretofore. In the place of the responsa of Paul, eighteen books out of the twenty-three which they were in the habit of reciting in a partial and confused manner, let them learn to read frequently the ten books of the specialities out of the fourteen to which we have already referred, from which they will derive greater benefit than from the responsa of Paul. Thus the seventeen books which we have composed upon the specialities, forming the fourth and fifth part of our Digest, will have been acquired by them, and from the commencement of their studies they will have learned in all thirty-six books; as to the remaining fourteen books, which constitute the sixth and seventh parts of the Digest, let them be so explained as to enable them to study them afterwards in private, and, when required, to be able to cite them in court.

"During the fifth year, when they enjoy the name of Prolytae, if after having been well grounded in the subjects already indicated, they devote themselves to the reading and thorough understanding of the constitutions contained in our Code, they will lack nothing of the science of the law.

"Thus may they succeed in becoming great orators, satellites of justice and powerful advocates or judges — happy in all places and in all ages."

Henceforth Constantinople, Berytus, and Rome were the only places where the study of law could be pursued, and professors of law had to be licensed by the emperor. This method was followed with considerable strictness until the fall of the empire of the East.

CHAPTER XIV

FATE OF THE ROMAN LAW AFTER JUSTINIAN, AND REVIVAL OF THE STUDY IN EUROPE

§ 105. Fate in the East.

THE Institutes, Pandects, and Code of Justinian were almost immediately translated into Greek and were in this form used in the Eastern empire together with abridgments and commentaries. These were soon preferred to the originals, as Greek was the universal language of the East. The emperors, from time to time, published edicts or ordinances which modified the law of Justinian, and subsequently a series of official works appeared in the Greek language which gradually displaced the Corpus Juris and caused it to become obsolete. The emperor Basilius, the Macedonian, began the compilation of a new work in 878, containing extracts from the Institutes, the Digest, the Code, and the Novels of Justinian, arranged according to the subjects discussed, with the imperial constitutions and modifications of later days. This work was in Greek and contained, when completed, sixty books divided into appropriate titles. It was known as the "Basilica," and was completed by Leo the Philosopher, son of Basilius, who reigned from A.D. 886 to 911.

The Roman law in this form maintained its authority till the overthrow of the Eastern empire by the Turks in 1492. The Basilica have not reached us entire, but in 1647 Fabrot published them in Paris in an incomplete form. They have

been of great importance in explaining the books of Justinian and have been extensively used for that purpose.

The Western empire had been dismembered before the reign of Justinian. The law-books were, consequently, destined for his subjects in the East. In 415 the Visigoths

§ 106. Fate in the West.

founded a kingdom in Gaul and Spain. About the middle of the fifth century the Burgundians founded a kingdom on the banks of the Rhone. Odoacer, after having overthrown the empire of the West and established himself with his Heruli as master of Italy, was himself overthrown and slain by the Ostrogoths, in 493, under their king, Theodoric, who became ruler of all Italy. These three kingdoms, established upon the ruins of the Western Roman empire, formed legal codes of their own. The first one to appear was the Edict of Theodoric (Edictum Theodorici) published at Rome in the year 500 for the kingdom of the Ostrogoths. It is made up of extracts from the sources of the Roman law, dealt with in a free and easy manner, and, consequently, is very imperfect. When Narses finally overthrew the Ostrogoths in 553 the Edict of Theodoric was replaced by the legislation of Justinian and Italy was again a portion of the Roman empire. Alaric II composed, in 506, the Lex Romana Visigothorum, commonly called "Breviaricum Alaricianum," for the benefit of the Romans resident in the kingdom of the Visigoths. It contains extracts from the Thcodosian Code and the Novels annexed to it, from the two works of Gaius and Paulus, from the Gregorian and Hermagenian Codes, and from the Responses of Papinian. This code was in force in Spain till the middle of the seventh century. In Gaul the code of Alaric was also in force throughout those provinces which the Franks conquered from the Visigoths. The Burgundians

also formed a code, in 517, known as the Lex Romana Burgundiorum. This was the shortest and most insignificant of them all. It was in force until 536 when the kingdom of the Burgundians was conquered by the Franks, when it was superseded by the Breviarium.

After the victories of Belisarius and Narses had reëstablished Roman rule in Italy and Africa, Justinian, by an edict of 554, ordered his laws to be observed in the conquered territory. Almost immediately after the pacification of the West, the Lombards took possession of the greater part of Italy, and the emperors of the East lost what remained to them — the Exarchate of Ravenna — in 752, but while the Roman empire finally passed away and barbarian nations settled down upon the ruins, Roman law still lived and, indeed, never lost its authority among the subject populations of the Gothic, Lombard, and Carlovingian kingdoms. The works of Justinian, especially the Pandects, were known and studied in different parts of Europe long before the discovery of the Florentine copy of this work in the sack of Amalfi which took place in 1135.

§ 107. **Roman Law Never Wholly Unknown.**

The revival of the Roman Law as a science in Europe corresponds very largely to the rise of the city states throughout Italy. This is natural enough, as the movement carried with it a great quickening of intellectual activity in all directions. It was at the very end of the eleventh century or the beginning of the twelfth that Irnerius, who was not a jurist but a man of letters, founded a school of law at Bologna which flourished greatly and attracted students from all parts of southern Europe. The early jurists connected with the school gave their atten-

Revival of Roman Law in Europe.[1]

[1] Muirhead, 403–406; Mackenzie, 32–39.

tion to the writing of glosses, which were short lecture notes explaining what was ambiguous or obscure in the original text. These glosses were collected by Accursius of Florence and recast into something like permanent form about the middle of the thirteenth century, and the dates of these two men, Irnerius and Accursius, mark the beginning and the end of the period of the Glossatores.

Irnerius obtained the Corpus Juris from Ravenna in three parts, known respectively as the vetus, the novum, and the infortiatum, the last being the intervening portion between the old and the new. The Digestum Vetus contained books 1 to 24 (tit. 2); the Digestum Infortiatum, and the Digestum Novum, books 39 to the end. There was thus an omission of fifteen books from the records of the Glossatores. That portion of the Corpus Juris in their possession was published in five volumes, and with this Roman jurisprudence began a new career.

From the famous school of Bologna, the knowledge of Roman law spread with great rapidity throughout Europe and was largely instrumental in correcting the many absurdities which prevailed at that time in the administration of justice, due to the crudity of the ancient barbarian laws. Vacarius, a Lombard, went to England and delivered a course of lectures at Oxford, in 1149, thus inaugurating the study of Roman law at that ancient seat of learning. He found that the students were very poor and, consequently, unable to purchase the necessary books for the pursuit of this study. To remedy this condition of affairs he prepared a book consisting of extracts literally taken from the Pandects and parts of the Code, with the title; "Liber ex universo enucleato jure excerptus, et pauperibus præsertim destinatus." King Stephen forbade Vacarius teaching the Roman law in

England and condemned the manuscripts to the flames, but this had little effect and the study of the civil law was promoted in every way by the clergy who possessed all the learning of the times and filled all the important offices, not only throughout the kingdom of England but throughout all Europe as well.

The scholastic lawyers succeeded Glossatores and pushed forward the knowledge of Roman law from the thirteenth, to the end of the fifteenth century. Among these Odofredus, Bartolus, and Baldus are conspicuous. For two hundred years longer the cultivation of the science of law in Europe was chiefly confined to the schools of Italy, where jurisprudence flourished by the side of literature, poetry, and art. When Constantinople fell, exiles from that city repaired to Italy and raised the standard of learning, jurisprudence benefiting by this as well as science and literature.

The chasm was thus bridged till 1550 when Cujas became professor of law at Bourges and by his genius and scholarly labors founded the modern historical school of jurisprudence.

PART TWO

COMMENTARY ON THE INSTITUTES OF GAIUS AND JUSTINIAN

CHAPTER I

FUNDAMENTAL CONCEPTS AND DIVISIONS OF THE LAW AS FOUND IN GAIUS AND JUSTINIAN[1]

§ 108. Introduction.

IN Part I of this work the history of Roman Law from its beginning to its codification has been traced with some degree of care, together with the process by which this perfected legal system was carried over, and subsequently became the law of every nation in Europe. It is now our purpose to proceed to the consideration of the substance of this law itself as it existed at the time of Justinian. Possibly this will be best accomplished by a careful study and comparison of the two bodies of Roman law, the Institutes of Gaius and the Institutes of Justinian. While our minds are occupied with this task it may be well to remember the fact that has been emphasized again and again in previous historical discussions, that we are dealing with a body of legal truth which forms the common basis of nearly all the modern systems of positive law. Thus it happens that

[1] Mackenzie, Roman Law, 46–72; Phillimore, Introduction to the History of Roman Law, 9–21; Williams, Institutes of Justinian, 1–10; Hunter, Introduction to Roman Law, c. I; Hunter, Roman Law, 1–38; Moyle, Imperatoris Justiniani Institutiones, 53–61; Poste, Gaii Institutiones Juris Civilis, 1–40; Roby, Roman Private Law, 1–16; Taylor, The Science of Jurisprudence, 28–41, 48–191.

while we are professedly studying the laws of ancient Rome, we are, in fact, studying general legal doctrines which, to a greater or less extent, pervade the laws of all civilized countries. Some peculiar features of the Roman law have passed away with the decay of the social institutions upon which they were founded, as, for instance, those that relate to slavery; certain features have been modified to meet the new and more complex relations of modern life; but so far as modern jurisprudence moves in harmony with the rational purpose of all law, it cannot depart from those broad and essential truths which received a clear and scientific form in the writings of the Roman jurists, and which have been preserved in the Corpus Juris Civilis.

§ 109. Jurisprudence.

Jurisprudence, when considered in its literal sense, means knowledge of law. The Roman jurist Ulpian, who entertained very lofty ideas of his favorite study, defined jurisprudence as "the knowledge of things divine and human, and the science of right and wrong." "According to modern notions," says Lord Mackenzie, "jurisprudence is the science or philosophy of positive law — that is, law established in an independent political community by the authority of its supreme government. By positive law jurists understand a collection of rules, to which men living in civil society are subject in such a manner that they may, in case of need, be constrained to observe them by the application of force. General jurisprudence investigates the principles which are common to various systems of positive law, apart from the local, partial, and accidental peculiarities of each; while particular jurisprudence treats of the law of a determinate nation, such as France or England." The term jurisprudence is used by French writers in a technical sense to denote that portion

of law which is founded on judicial decisions, or on the writings of celebrated lawyers; in popular use the word is frequently employed as synonymous with law. It is the ideal task of jurisprudence to satisfy the desire for unity which exists in the human mind. It deals, therefore, with the facts, or groups of facts, which produce juristic effects with a view to arranging these under definite categories or conceptions. Thus in the place of a series of legal rules such as we have in positive law, we have in jurisprudence a number of abstract conceptions which are supposed, at least, to lie at the base of all positive law.

The scientific character of Roman law is seen, not so much in its formal arrangement, as in the fact that it is founded upon certain principles which are at least conceived to be ultimate in their nature and universal in their application. All law, when looked at from a rational point of view, must rest in natural justice or in equity, which consists in doing what is right in the circumstances of each particular case. The Romans regarded this principle as an essential element in the moral nature of man. Justice was defined by Ulpian as "a constant and uniform disposition of mind to render to every one his due." Being a moral quality, it depends like every other moral quality upon an intelligent conformity to the nature of things. Judicial tribunals, however, without diving into the motives of men, only take cognizance of their external actions, which in a legal sense are accounted just or unjust, according as they are or are not in conformity with positive law. By means of this broad conception of justice, the jurist grounded law directly upon the moral nature of man, and remotely upon the moral order of the universe. Law was not only based upon moral principles; it was also conceived to be a

§ 110. Justice and Law.

means for the attainment of a moral end. As a science law discriminates between the just and unjust. So the Digest has it; "Jurisprudence is the science of the just and unjust." As an art law aims to bring about that which is right and equitable. "Jus est ars boni et aequi." The jurists did not, however, confuse the two ideas of law and morality, but rather regarded the purpose of the law to be the moral improvement of the individual. Law must be prompted by a constant and perpetual disposition to render to every one his right, although it may not create in the subject a truly moral respect for the rights of others. It is, as Cicero says, "right reason conformable to nature, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions and the wicked treat them with indifference. . . . In all times and nations, this universal law must forever reign eternal and imperishable." The Romans, by thus perceiving in law an ethical principle, were able to construct their jurisprudence upon a rational, instead of a merely empirical basis.

§ 111. Natural and Positive Law.

When the law is considered in the broad ethical sense which has been indicated above it is called natural law, or the law which the natural reason has constituted for all men (jus naturale or jus gentium), in opposition to the civil or positive law which derives its binding force from the authority of some particular State (jus civile). It is true that the great body of positive law is in theory drawn from the sphere of natural law. In this way the natural law furnishes the underlying basis of positive law, so that, although the provisions may differ in different States, the essential portions of the law are yet derived from the natural precepts of justice, and

are for the most part recognized by the common sense of mankind.

Although there is much ambiguity which sometimes attaches to the term jus gentium, the proper distinction between natural and positive law is very clearly indicated in the writings of the Roman jurists. This distinction depends not so much upon the content of the law as upon the authority by which it is enforced.[1] All those rules of conduct which are universally binding upon men and are sanctioned by the dictates of right reason belong to the domain of natural law. On the other hand, the rules of conduct which are prescribed and enforced by the sovereign power of the State belong to the domain of positive law. This can probably be better understood by citing a few cases in which this welding of natural and positive law has taken place. To do this we will refer for a moment to the law of obligations which will subsequently be considered in full. These obligations were divided into two classes according to the degree in which they were recognized by civil law:—

A portion of jus naturale was recognized as a ground of action. To this class belongs: (1) Simple or formless contracts to which we have already alluded. (2) Obligations to indemnify, founded upon delict. (3) Right (quasi ex contractu) to recover property when it has been lost by one side and gained by another without any legal right. In any of these three cases the obligation, though naturalis as founded in jus gentium, as actionable, was said to be civilis obligatio. Civil obligations were those which were actionable under civilis actio.

[1] Moyle, 27–30.

Other rights and obligations of the jus gentium were not admitted as direct grounds for maintaining an action, yet were otherwise noted by the institutes of civil jurisprudence and enforced. Of this we might cite many examples. The following will suffice: (1) On payment of money which has been paid naturalis, the person paying could sustain an action for recovery on the ground of payment made in error; the defendant could meet a claim by compensatio, *i.e.*, cross-demand or set-off of a debt that merely rested upon natural obligation. For instance, A pays one hundred oriæ to B in mistake. What can he do? He can bring an action for repayment of the money and in this way recover it. (2) A pays B one hundred oriæ in mistake and brings suit for the recovery of the money. But A owes B fifty oriæ by a merely naturalis obligatio. B can cross-demand or set-off A's claim and require the payment of the fifty oriæ which he holds against A, although he could not have had in that circumstance any base for an action.

§ 112. Written and Unwritten Law.

Having reached the conception of positive law as a body of rules founded upon natural justice and sanctioned by State authority it becomes necessary next to consider the modes in which this sanction is expressed. In other words, what are the sources from which the law derives its positive character? This question has already been answered by the statement that laws were instituted by the popular assemblies, by the senate, by the prætor, by privileged jurists, and by the emperor. Such were written laws. We have also mentioned another source, custom or unwritten law. It is unnecessary to consider these any further.

§ 113. Public and Private Law.

Besides the distinction already drawn between written and unwritten law, founded upon their sources or the methods in which they were sanctioned, the positive law (jus civile) was also divided with reference to its subject matter into public and private law (jus publicum et jus privatum). The former was defined to be that which pertains to the Roman State; the latter, that which pertains to the interests of individuals. More specifically, the public law includes all those regulations which have reference to the organization and administration of the government whether in its religious or political character. The private law, on the other hand, comprises all those provisions which determine the rights and duties of persons with reference to each other; as the right of property, of contract, of personal security, of obtaining redress in cases of injury, etc.

§ 114. The Law as to Persons, Things, and Actions.

The most important division of the Roman law, and that which forms the basis of its logical treatment, had reference to the character of the *rights* secured by the State to the subject. Every legal right when considered in its fullest and most complete sense may be said to involve three distinct elements: (1) A certain degree of *legal capacity* on the part of the subject by whom it is exercised. (2) A certain degree of *legal control* over the object with reference to which it is exercised. (3) A certain degree of *legal authority* involved in the sanction or remedy by which its validity is insured.

Although a general legal right cannot be regarded as complete without all these elements, it may yet be resolved into subordinate specific rights according as it is viewed with reference to its *subject*, its *object*, or its *sanction*. This furnishes the basis for the division of the

treatment of private law which has been adopted by Gaius and Justinian, into (1) De Personis, (2) De Rebus, and (3) De Actionibus.

§ 115. Classification given by Gaius.

(1) Rights may thus be considered, in the first place, with reference to the person, or subject, by whom they are exercised. Thus we may speak of the right of a freeman, of a citizen, of a father, of a son, of a husband and wife, of a guardian, etc. These rights, relating to persons as such, and referring to extent of capacity which the law recognizes on the part of the subject, are treated in the law of persons, jus ad personas, jus personarum, jus de personis. Gaius[1] divided *De Personis* into seven groups as follows:—

Manus
Potestas
Tutela Mulierum
Tutela Impuberum
Mancipium
Servus
Curatila

Of these, three had disappeared before the time of Justinian; Manus, mancipium, and tutela mulierum. In modern times two out of the remaining four have vanished,—servus, and potestas.

(2) *De Rebus*, or the law of things, is divided by Gaius and Justinian into three groups or divisions as follows:—

Dominium
Hereditas
Obligatio

[1] Gaius, II, 97–100; Justinian, II, 9–16.

(3) *De Actionibus*, or the law of procedure, passed through many changes between the time of Gaius and Justinian. The analysis will be given subsequently.

This division of the private law, as given by Gaius and Justinian, has been made the subject of severe criticism by modern jurists. Many attempts have been made to form a new classification which would not involve the defects that are charged against the Roman method. German writers have reconstructed the entire Roman law upon a plan to suit themselves with varying degrees of success. Still, it may be seriously questioned whether any recent division is more natural or convenient than that followed by Gaius. For the purposes of this work it seems better to adhere to the method of classification followed by our authorities than to attempt any new or more modern scheme.

Book I. THE LAW OF PERSONS

CHAPTER II

PERSONS AND THEIR CIVIL CAPACITY[1]

The exposition of the Roman law properly begins with the description of persons as a subject of rights. In the Institutes of Gaius and Justinian this is regarded as necessary to the understanding of the other portions of the law. In the application of the law to a given case it is first necessary to ascertain the legal capacity of the person who lays claim to a given right. It is, therefore, necessary to consider the various classes of persons as regards their legal capacity.

§ 116. 'Person' Defined.

To be a 'person,' within the meaning of Roman private law, is to be capable of holding property, of having claims, and of being subject to liabilities. Hence a person, in the sense of private law, is a subject endowed with proprietary capacity. All persons are considered as capable of enjoying civil rights, but not all in the same degree. Individuals differ from each other in their natural and social qualities, from sex, birth, age, state of mind, and a variety of other circumstances, which are made the grounds of peculiar privileges or disabilities. In reviewing the principles of the law regarding persons, it is necessary at the outset to attach a definite notion to the term person (persona), and also to understand how, in general, legal

[1] Hunter, 160–194; Mackenzie, 77–82; Roby, 16–24.

personality is affected by the possession and loss of civil status.

According to the popular meaning the word 'person' is applied to any human being without regard to his condition or capacity. In a legal sense those only are looked upon as persons who possess the capacity of assuming the rights and duties which are sanctioned by the State. In the sense of the Roman law the term 'person' may be defined as "a being, whether abstract or concrete, real or ideal, whether physically existing or a mere creature of the law, capable of becoming the subject of legal rights and duties." Thus slaves have no person; corporations have.

§ 117. Persons Classified.

The entire Roman world consisted of two classes of human beings, freemen and slaves.[1] Freemen were of two classes, either born free, or made free by release from lawful slavery. This last class were usually called liberti. A freeborn Roman, although captured and enslaved by others, by a liberal interpretation of law, resumed his original rights and position, in so far as possible, on his return to Roman territory. He did not, as might be supposed, become a libertus.

Freemen, in the broad sense of the term, were either Roman citizens, Latins, foreigners, or dediticii.

Roman citizens had full control over their children, could make a valid will, be appointed guardians by will, be witnesses to a will; they could hold and deal with all kinds of property, and vote and hold office in Rome.

Latins were originally merely the inhabitants of Latium, but the term was afterwards applied to members of certain colonies established by the Roman government, although members of such colonies were very frequently originally

[1] Roby, 18.

Roman citizens. They had rights of intermarriage and commercial dealings with Romans, only when specially granted by treaty or by statute. Some of these Latin colonies enjoyed the rights of mancipation and inheritance with Romans.

Foreigners (peregrini) may be briefly defined as freemen who were not either Roman citizens or Latins. They were not regarded by the Romans as having such full rights over their children as Romans had. The Romans carried on business with these foreigners according to what they were pleased to call the law of the world (jus gentium). Foreigners, dwelling within the boundaries of the empire, usually enjoyed many of the privileges of Roman citizens (their lands were held ex jure Quiritium and they enjoyed commercium and factio testamenti), but these privileges they held by treaty or statute.

Dediticii were foreigners who had been engaged in war against the Romans and had surrendered at discretion with arms in their hands. They occupied the lowest place in the rank of freemen.

Slaves were human beings held and treated as articles of property, like intelligent animals. They had no legal rights whatever. Persons became slaves principally by reason of capture in war, or by birth from a slave mother. There were some other special cases that will be hereinafter considered.

While every legal person must possess a certain degree of legal capacity, the extent of this capacity is not the same for all.[1] In spite of all human efforts to equalize the rights of men, there still remain certain distinctions which seem involved in the very structure of society and even in the necessities of nature. Although the

§ 118. Status.

[1] Mackenzie, 77; Moyle, 81, 84, 146.

theories of Roman jurists were exceedingly liberal, the Roman law still imposed legal disqualifications upon certain members of society. In general, the extent of one's legal capacity depended at Rome upon his civil position or status. Status is any set of rights and duties that a person acquires in any given character. Among human beings the theory of Roman law distinguishes three kinds of status or degrees of legal capacity among men: (1) status libertatis, according to which men are either free or slaves; (2) status civitatis, according to which freemen are either Roman citizens or aliens; (3) status familiæ, according to which a Roman citizen is either a pater familias, a filius familias, or filia familias. A person's capacity, in the eyes of the law, depended, in the first place, upon whether he was a freeman or a slave; in the second place whether he was a citizen or a foreigner, and in the third place, whether he was independent of paternal authority or dependent upon it. If a man were free, he was relieved from the severe and almost absolute disqualifications which rested on a slave. Besides being free, if he were also a citizen, he was not burdened with the civil disabilities which rested upon a foreigner. If he, besides being a freeman and a citizen, were independent, he was not subject even to the lighter incapacities which rested upon the dependent members of the household. It was only the free and independent Roman citizen who possessed the full capacity of exercising all the rights guaranteed by the law.

The loss of this status was called capitis deminutio. As a person might possess one or more of the elements of status, so he might lose one or more. The loss of freedom involved the loss of citizenship and of family rights, and was called maxima capitis deminutio. The loss of citizenship did not necessarily involve the loss of freedom, but it carried along

with it the loss of domestic position, and was called media capitis deminutio. The loss of domestic position involved the loss of nothing more than the right growing out of one's previous domestic relationship. It was called minima capitis deminutio. It will be seen that the possession of the lower status involves the possession of the higher, and the loss of the higher, involves the loss of the lower.

There were five modes of suffering capitis deminutio that were in vogue in the time of Gaius but which had become obsolete before the time of Justinian.[1] These were:—

§ 119. Modes of Suffering Capitis Deminutio.

(1) Nexus or self-sale. This has already been explained.

(2) Insolvent debtors who were adjudged by the prætor under the law of manus injectio to the creditors. Gaius says that a debtor was allowed a period of thirty days in which to discharge a judgment debt before he could be arrested. In case he did not pay the debt within the specified time, or find a vindex to dispute it, he was arrested and carried off in chains. At this point of the process he was said to be addictus, in arrest, but not in slavery. If released, he did not become a libertus, but retained his status as ingenuus, as if he had been subject to no prosecution.

(3) Fur manifestus, or thief caught in the act. This was by the Twelve Tables a capital offense if the fur manifestus was a slave, but if he was a freeman he was adjudged a slave to him from whom he had stolen. The Prætorian Edict substituted, whether

[1] Roby, 41–44; Mackenzie, 82, 83.

the theft was by a slave or a freeman, the payment of fourfold. (Cf. Spartan idea of theft).

(4) Evasion of military service.

(5) In the case of a man who omitted to have his name placed upon the tax roll in the table of the Census as a freeman in order to defraud the revenue. (The Census was taken every five years during the republic, but ceased during the empire early in the second century A.D.)

Three ways of suffering capitis deminutio existing at the time of Justinian but abolished by him:—

(1) Servi pœnæ, or persons condemned to labor in mines or to fight with wild beasts in the arena, became eo ipso servi pœnæ, slaves of punishment with no master. These were somewhat in the position of penal servitude in England. Justinian, in a novella, abrogated this class and prohibited the infliction of slavery as a punishment for crime.

(2) Dediticii. These were enemies who surrendered at discretion with arms in hand. They were not reduced to slavery, but to a condition quite analogous. They were not allowed to make a will, or to take under one; they never obtained Roman citizenship, and they could not come within one hundred miles of the city of Rome.

(3) When a free woman persisted in intercourse with a slave against the will of the master, and in spite of him, under provision of a Senatus Consultum Claudianum, after three denunciations in the presence of seven witnesses on the part of the master, she was awarded to him as his slave, and her issue,

whether born before or after the adjudgment, were slaves. The master also acquired the estate of such a woman by a species of universal succession. If, however, the owner winked at this act on the part of his slave, then the woman retained her status and her children were free. This enactment was abrogated by Justinian.

Three ways of suffering capitis deminutio retained by Justinian:[1]—

(1) Capture by the enemy. The capture must take place in actual war by belligerents. To be captured by pirates or brigands was not considered a legal capture and had no effect upon the status of the person so taken, but actual capture by the public enemy or surrender to them, makes a man, if brought within their territory, their slave. If such a captive returned to his own or to a friendly country with no intention of going back again to the enemy, he resumed his rights and status as before captivity, in so far as possible. This reversion was called the jus postliminii, 'the law of recrossing the threshold.' If he died in captivity, he was deemed to have died when captured and, consequently, in the condition of slavery. Whatever property he possessed at the time of his capture would in this case revert to the fisc, as a slave could have no heirs.

(2) An ingratus libertus; when a slave set free showed gross ingratitude toward his patron during the republic a recession of liberty was unknown. In the time of Nero the utmost severity that could be inflicted

[1] Moyle, 146 *et seq.*, 172–174.

relegated into slavery a freedman who had been grossly ungrateful. Claudius ordered such a person who had brought a false charge against his former master again to become slave to his patron. The emperor Constantine established a law even more severe than that of Claudius. He enacted that for slight breach of duty a libertus might be taken back into slavery, although a mere want of reverence was not sufficient to cause a forfeiture of liberty.

(3) The fraudulent sale of a freeman. This was in the nature of a conspiracy to defraud the purchaser and divide the purchase money. A and B enter into such conspiracy. A sells B to C. B then says, "I'm not a slave, I am a freeman." Freedom was not rashly taken away and it was only when the following four conditions were fulfilled that this punishment followed: (*a*) The person sold must not be under twenty years of age. However, if a man just under twenty sells himself and after he becomes twenty takes part of the purchase money thus becoming a party to the fraud, he becomes a slave. (*b*) The person sold must have entered into the sale with intent to defraud. If, however, he repents and restores the money, he is not remanded to slavery. (*c*) The person sold must know that he is a freeman. (*d*) The buyer must have been ignorant of the person sold being a freeman. These four conditions being fulfilled, the ingenuus became servus.

CHAPTER III.

CAPUT (STATUS) LIBERTATIS

As has been previously stated the Roman world of mankind consisted of freemen and slaves. Freemen were of two classes, either born free, or made free by release from lawful slavery. The further discussion of freemen together with their rights, privileges, and duties will be discussed under a separate head. § 120. Freemen.

At the present time, in this country, labor is voluntary and rests upon contract. The authority of the master over the servant, therefore, extends no farther than is permitted by the terms of the contract. The question of slavery has for us merely an historical interest, but it enters so deeply into the public and private life of the Romans that it becomes necessary to give some attention to its origin and character. In principle, the Roman jurists were wont to acknowledge that all men were originally free and equal by natural law. They ascribed the power that masters were wont to make use of over their slaves entirely to the law and general custom of nations. They made no claim as to its ultimate righteousness. They accordingly defined slavery as follows: "constitutio juris gentium, qua quis, dominio alieno, contra naturam, subjicitur." § 121, Slaves.[1]

Among the Romans slavery originated in three ways: (1) Prisoners of war were considered the absolute property of the captors, and were either retained for the service of the State

[1] Roby, 19–21; Mackenzie, 93.

and employed in public works, or were sold by auction, sub corona, as parts of the plunder. Very frequently captives were assigned to individual soldiers and were sold by them as part of their pay for military service, to slave dealers who always accompanied a Roman army. (2) All the children of female slaves followed the condition of their mothers, and belonged to their masters, according to the principle applicable to the offspring of the lower animals, — Partus sequitur ventrem. Slaves that were born in the house of the master were called vernæ, as opposed to those that were acquired by purchase or otherwise. (3) By judicial sentence Roman citizens might be condemned to slavery as a punishment for heinous offenses, like the galley slaves of modern times. According to strict Roman law a Roman could not be the slave of another Roman. The Twelve Tables permitted an insolvent debtor to be turned over to his creditor in chains, but required that the debtor be sold abroad or trans Tiberim.

§ 122. Origin of Slavery.

In the early ages of the republic the number of slaves was very small, Romans performing all the labor incident to their frugal method of life themselves, but after their conquests had extended beyond the boundaries of Italy, the influx of captives became very great, and slaves were sold by dealers in the public market and ofttimes at a very low figure.[1] Gradually it came about that a very large portion of the wealth of the Romans consisted of slaves. Among these were skilled artisans whose labor yielded a highly profitable return. Physicians, schoolmasters, artists, actors, hotel keepers, and scribes were for the most part slaves and carried on their various callings for the benefit of their masters rather than for themselves. All

§ 123. Condition of Slaves at Rome.

[1] Mackenzie, 94; Roby, 53–57.

slaves were under the power of the master. Slavery, indeed, destroyed the dignity of man and placed him, in the eye of the law, on a level with the beasts of burden. A slave was, therefore, a human being who was legally not a person but a thing. Whatever a slave acquired belonged to his master, and he could transfer it, like other goods and chattels, by sale, gift, or legacy, to any one he pleased. During the entire period of the republic, and for some time under the empire, the master had the absolute power of life and death over his slaves, but it became necessary to put a check upon this authority in order to stop the wanton cruelty of some masters towards their slaves. In the Augustan age Vedius Pollio ordered one of his domestics to be cast into his fish-pond to feed his lampreys because he had broken a crystal goblet that the master cherished. By a constitution of Antoninus Pius a master who willfully put his slave to death was declared to be guilty of murder and punished accordingly. The same emperor issued a rescript to protect slaves from wanton cruelty and oppression, directing the governors of provinces to inquire into the complaints of all slaves who took refuge in temples, or at the statues of the emperor which were placed in all the principal towns, and if it appeared that they had been treated with unreasonable severity to order them to be sold, so that they would never again fall into the hands of the same master. By these and similar measures the condition of slaves was in some degree ameliorated, and we must not forget that there were very many kind masters who treated their slaves as if they were equals and provided for them in their old age. But the master still retained a power of correction over them, which was substantially unlimited and which led to great abuses.

The coloni composed the agricultural class under the em-

pire.[1] Their origin was obscure, but by the end of the second century A.D. they had become very common. They occu-

§ 124. Coloni or Serfs.

pied an intermediate position between freemen and slaves. They were classified as freemen but were attached to the soil for the purpose of cultivation and were transferred along with the land when it was sold. The first mention of coloni in the codes is by the emperor Constantine where there is an enactment for their recovery in case they ran away and an imposition of a fine upon any one who harbored them. A colonus was a real right, a jus in re. He was, like a slave, considered as stealing his body from his master if he ran away. He was distinguished from a slave and classified as ingenuus, but he could not move and take up his residence anywhere he chose nor could his master transport him. When the land was sold he went with it. Coloni paid a fixed rate of rent for their holdings and were in a position somewhat akin to ancient copyholders in English law. They could marry and have control over their children; thus they were regarded as persons capable of enjoying certain rights, but they could not dispose of their effects without the consent of their master and they were subject to chastisement at his hands.

Manumission was the process by which a slave was set free from the authority of his master. Masters were thus

§ 125. Manumission.[2]

entitled to give liberty to their slaves. In ancient times this was usually done in three ways: (1) Manumissio vindicta, (2) Manumissio censu, and (3) Manumissio testamento.

(1) *Manumissio vindicta* was the oldest form of manumission in use. This was accomplished by taking advantage of

[1] Mackenzie, 95.
[2] *Ibid.*, 98; Roby, 30–35; Hunter, 157–168.

the in jure cessio of the Servian reforms. A third party, in the presence of the prætor, placed his rod (vindicta) on the slave and at the same time claimed him as a freeman (vindicatio in libertatem). The master admitted his freedom and the prætor accordingly declared the slave free. This was merely a fictitious action at law. Subsequently the forms of an action were dropped and all that remained was the declaration by the master, in court, of his desire to enfranchise his slave.

Modes of Manumission during the Republic.

(2) *Manumissio censu.* The censor could make any one a citizen of Rome by the simple process of entering his name upon the census roll, and this plan was made use of in the process of manumission. The master accompanied his slave whom he wished to set free to the censor and allowed him to set up the claim of being a freeman (professio libertatis) and having his name entered by the censor upon the census roll. This was the only formality necessary. The slave thus immediately became a freeman and a citizen by a single stroke of the pen.

(3) *Manumissio testamento.* The master could either bequeath a slave his liberty directly, thus making him a freedman without any living patron, or he could impose on the heir an obligation to manumit him, in which latter case he became the freedman of the person by whom he was manumitted. In such a case the slave did not become free by virtue of the will, but only when the heir carried out the trust and performed the act of manumission.

The forms mentioned above were all in use during the republic. Manumission was during that entire period wholly formal. The State was represented either by a magistrate (prætor, or censor) or assemblies, as a consenting party to the manumission. It was further necessary that the owner who

desired to manumit his slave must have full right in the slave ex jure Quiritium. If both these conditions were conjoined it had the effect of making the slave at once free and a Roman citizen. For the slave to obtain freedom alone it was not necessary for both of these conditions to be met. If the owner was not full owner, or if the ceremony was private and, consequently, lacked the full sanction of the State, the slave became free, but he did not become a Roman citizen, and at his death his property fell to his master. However, the master could not again reduce him to a state of slavery.

Within the first years of the empire some special conditions were added to emancipation by means of the lex Ælia Sentia, A.D. 4. These were as follows: —

Additions and Modifications to Manumission to the Time of Justinian.

(1) The slave must not be of an infamous character; otherwise he becomes a dediticius and not a freedman and citizen.

(2) The manumissio must not be in fraud of creditors; otherwise it is wholly void and the slave instead of becoming free remains statu quo.

(3) The master who desires to manumit his slave must be at least twenty years old unless he manumits upon a cause approved by the council at Rome, or by the twenty recuperatores, in case he is resident in one of the provinces. Otherwise the action will be void.

(4) The slave must be thirty years of age or be accepted by the council at Rome as a proper person for manumission.

The lex Junia-Norbana which was passed in A.D. 19 created a new class of freedmen out of those who had been previously considered free by the prætor but not admitted to citizenship.

These were called Latini Juniani. By this law they were given such rights and privileges as were bestowed upon Latin colonists. Later, by a special enactment, they had the full rights of citizenship bestowed upon them.

Constantine's legislation added a fourth mode of manumission, namely manumissio in ecclesia. In this form the master made a declaration in the presence of the bishop and congregation of his desire to emancipate the slave, and the slave was thereby manumitted and became not only a freedman but a Roman citizen.

Justinian abrogated the lex Ælia Sentia and the lex Junia Norbana and altered the restrictive laws entirely. The conditions of effectual manumission were now four in number and were as follows:[1] —

Changes made by Justinian.

(1) The person manumitting must be the owner.
(2) The person manumitting must be at least twenty years old, unless he manumits by will; this he could do when but seventeen and later, by a novella, when but fourteen, if done in anticipation of death.
(3) Manumission must not be in fraud of creditors.
(4) The manumission must be by some recognized and established authority.

By these changes brought about by Justinian's legislation, a slave when made free became a citizen in all cases. All restrictions were abolished in regard to age and character, and there henceforth existed but one class of freedmen. Justinian even went farther than this and practically washed out the distinction between a freeman and a freedman by allowing the latter to wear the gold ring which had always heretofore indicated free birth as well as gentility.

[1] Justinian, I, 6, 4; Gaius, I, 206.

(1) In addition to the formal modes of manumission already given, there grew up sometime within the early empire an oral declaration of freedom in the presence of witnesses.[1] This appears to have been the oldest form of private mancipation inter amicos. Justinian recognized this form of manumission but required the number of witnesses to be five and requested the declaration to be subsequently written out and attested by the witnesses or by the magistrate for them.

Informal Modes of Manumission.

(2) Manumission per epistolam or by letter. This form of manumission was in vogue as early as the time of Cicero and became very common during the empire. Justinian recognized this form also but required the attestation of five witnesses.

(3) Ostentation at funerals. Romans were very fond of display at funerals, and deemed it a special mark of distinction that the deceased should be followed to the grave by as large a number as possible of slaves wearing the cap of liberty, thus bearing testimony to the generosity of their former master. It had become customary on such occasions to have all the slaves of the familia march in the procession with heads decorated with these emblems of liberty. Subsequently these caps were snatched from their heads and the slaves remanded to their previous condition. This grew to be such an abuse that a law was enacted that slaves wearing the cap of liberty at the funeral of their master, whether by the request of the deceased or by the consent of the heir, should be free eo ipso.

(4) A female slave who had been given a dos by her master and united in marriage to a freeman became by that act free without any formal enactment; but it was necessary for her to have a written statement of the dos.

[1] Moyle, 109.

(5) If a master gave the deeds of a slave to him, or destroyed them in the presence of five witnesses, the slave became free without any further enactment.

It is well to note that there was one exception made to the law that no one could manumit in fraud of creditors. If insolvent, a master could manumit his slave in order to set him free by will and appoint him his agent, or solus et necessarius heres. If he did not so provide, difficulty would arise in the settlement of the estate and the division of it in a proper way among the creditors, as no heir would enter upon the estate in case the deceased owed more than he possessed, as the law would require him to pay all debts in full.

CHAPTER IV

CAPUT (STATUS) CIVITATIS

§ 126. Citizens.[1]

In our own times the importance of citizenship is confined chiefly to matters of public law, such as the franchise, the liability to taxation, etc. In ancient law, however, citizenship is, at the same time, a most decisive element in determining the extent of a person's private rights. A civis is a Roman citizen, *i.e.*, a man who, in the eye of Roman law, has full legal capacity in matters of public law (jus suffragii et jus honorum) and who alone has full legal capacity in matters of private law (jus commercii et jus connubii). His capacity is recognized not only by the jus gentium, but also by the jus civile. "In the free republic," says Savigny, "there were two classes of Roman citizens, one that had, and another that had not a share in the sovereign power. That which peculiarly distinguished the higher class, was the right to vote in a tribe, and the capacity of enjoying magistracies." According to the view of this writer, those who had the suffrage at public elections and also access to the honors of the State, were full citizens, — cives optimo jure; while those who had the civil rights of Romans without the special privileges named, were citizens of an inferior class.

In its full sense, citizenship embraced both political and civil rights. Under political rights it comprehended partic-

[1] Mackenzie, 83–85; Roby, 21–24.

ularly the right of voting in the comitia, and the capacity of enjoying magistracies. These were known in the Roman law as jus suffragii et honorum. But political rights were not held to constitute the essence of citizenship, as these were not enjoyed by many of the free-born subjects of Rome. Further, in the early republic, plebeians, although classified as citizens and free, did not enjoy these privileges. That which essentially distinguished the Roman citizen was the enjoyment of the civil rights of connubium and commercium. By virtue of the former the citizen could contract a valid marriage according to the tenets of the jus civile, and acquire the rights resulting from it, and especially the paternal power and the civil relationship called agnation, which was long necessary to enable him to succeed to the property of a person who died intestate. By reason of commercium he could acquire and dispose of property of all kinds, according to the forms and with the peculiar privileges of Roman law. He could sue and be sued in a Roman court and receive in all cases the full protection of the civil law.

Privileges of Citizenship.

In accordance with the terms of the Porcian law, De capite et tergo civium, which was passed in the year 256 B.C., a Roman citizen could not be scourged or put to death without the right of an appeal to the centuries, so that his person was in a manner sacred. We have a very remarkable example of the application of this law in the history of St. Paul, who asks the centurian, "Is it lawful for you to scourge a man that is a Roman, and uncondemned? When the centurian heard that, he went and told the chief captain, saying, Take heed what thou doest; for this man is a Roman."

There were three ways of acquiring Roman citizenship;— by birth, by grant, and by manumission.

Citizenship by birth.[1] Citizenship was primarily acquired by being the child of a Roman father by a lawful marriage (justis nuptiis, justo matrimonio). Touching the matter of nationality, if the mother was not a Roman, she must be a citizen of a place or class recognized by Rome as being on an equality for purposes of marriage. If there was connubium the child followed the condition of the father at the time of its conception, but if there was no connubium between the parents the child (in accordance with jus gentium) followed the condition of the mother at the time of birth. In accordance with this law, if the mother was a Roman citizen and the marriage irregular her child became a Roman citizen, no matter what the status of the father was.

The Acquisition of Citizenship.

Citizenship by grant.[2] It early became a custom of Rome to grant as a special privilege her citizenship to whole communities. This was done as a special mark of favor. Upon the conclusion of the Social war Roman citizenship was in this way given by the terms of the lex Julia (90 B.C.) to all such municipia within Italy south of the Po as assented to the grant. Many other examples of this granting of citizenship to communities might be cited from the history of Rome.

Individuals also sometimes obtained Roman citizenship, the grant being made by a victorious general, later by the emperor. Special instances of this were the grants made to veterans upon their discharge. This was very common. In case they were foreigners, they obtained citizenship for themselves, their children, and their descendants, together with the right of connubium. If they were already Roman citizens, the grant carried with it the privilege of intermarriage

[1] Roby, *loc. cit.*

[2] Roby, 21.

with foreigners, and consequent Roman citizenship for the children.

The emperor Caracalla, in A.D. 212, granted Roman citizenship to all persons throughout the Roman world (in orbe Romano qui sunt). This was of course to all persons who were free at that time. This grant was no doubt dictated by financial considerations, in order to increase the number of persons liable to the death-duty of five per cent, or as Caracalla made it, ten per cent on all inheritances. This, together with the ordinary capitation tax, would make quite an addition to the imperial income.

Citizenship by manumission. Slaves had no civic position whatever, as they were members of the family and not of the State, but their manumission was a matter of State concern, as by this they became citizens. The State, therefore, always made itself a partner to the emancipation of slaves in order that it might have some control over the number and quality of its citizenship. This question has already been sufficiently discussed.

CHAPTER V

CAPUT (STATUS) FAMILIÆ[1]

EVERY Roman citizen is either a pater familias or a filius familias, according as he is free (homo sui juris) or not free from parental power. "Pater familias is the generic name for a homo sui juris, whether man or woman, child or adult, married or unmarried; filius familias is the generic name for a homo alieni juris, whether son or daughter, grandson or granddaughter and so on." So far as the public law is concerned, the distinction made above between pater familias and filius familias is of no importance whatever, as a filius familias, provided he has all other necessary qualifications, is as much entitled to vote in the comitia and to hold public offices as a pater familias. This confines the effect of this distinction to the private law. The filius familias is entitled to the jus commercii and the jus connubii as much as the pater familias, as he is as much a Roman citizen as his father. According to the civil law, therefore, he can make contracts, acquire ownership, be instituted testamentary heir, contract a valid marriage, etc. "But whatever a filius familias acquires he acquires for the pater familias. Whatever rights he acquires, be they rights of ownership or obligatory rights, nay, the very marital powers over his own wife and the paternal power over his own children vest not in him, but in his father. For according to early Roman law there exists in every Roman household but one ownership,

[1] Roby, 52–169; Mackenzie, 100–150.

one marital and one paternal power, viz. that of the pater familias."

A Roman household, outside of the pater familias, might contain four classes of subordinates: slaves, children, women in hand, and persons in handtake. As slaves and children were both in potestate, it may be stated that under caput familiæ there were three ways of being subject to another (alieni juris): (1) potestas, (2) manus, and (3) mancipium.

§ 127. Potestas.[1]

Potestas was a name used to denote the power which a man exercised over his slaves and over his legitimate children. This power could not be made use of by any one who was not sui juris. A slave who had gained his freedom could exercise potestas over those children that were born to him after he became free, but not over those that were born prior to his becoming a libertus. As we have considered the question of slaves and slavery under another head, it is not necessary to dwell further on this topic here.

Aside from slaves, those who were under the potestas of the pater familias may be considered under two heads: those born under the potestas of the father, and those born under the potestas of another, but afterwards adopted.

By birth children came under the power of their father only in case their father was a Roman citizen and begot them in lawful marriage. The conditions of a lawful marriage were the connubium of the parties, the consent of themselves, and, if they were not sui juris, of their family superior, and the age of puberty. The effect of connubium was to make the children carry the condition of the father, rather than that of the mother, and be under his potestas.

[1] Justinian, I, 8; II, 12.

There were three conditions by which children were not under the potestas of the father at the time of birth, but were subsequently brought under it:—

(1) A Latin freedman who had a son a year old could have a grant bestowed upon him giving him potestas over his child.

(2) When a mistake had been made in the status of the persons marrying. Of this there were two classes:—

(*a*) A freeman marries a woman who is supposed to be free, but afterwards it is proved that she was in the catalogue of Latini or Dediticii. Upon the proof of this being furnished, the woman and her children were made free, the children passing under the potestas of their father.

(*b*) A free woman marries a man who is supposed to be free, but it is afterwards proved that he belonged in some lower condition. Upon the proof of this being furnished and it being made clear that no fraud had been practiced, the man becomes free and a Roman citizen, and his children pass under his potestas.

(3) In the time of Justinian natural children could be placed under potestas by legitimation. This was accomplished in five ways:—

(*a*) Legitimation per ablationem curiæ. This was simply accomplished by presentation to the curial magistrates.

(*b*) Legitimation per subsequens matrimonium.

(*c*) Legitimation per rescriptum principis.

(*d*) Legitimation by testament confirmed by the em-

peror. In case the father, during his lifetime, neglected to apply for the rescription, his children could apply for it and obtain it, in case their father had indicated such a wish.

(*e*) Legitimation by adoption. The emperor Anastasius allowed a man to adopt his illegitimate children, but Justinian, and Justin before him, took this right away on the ground of its being unjust to his legitimate children. But in case the man had no legitimate children, this adoption was permitted by law.

By arrogation (adoption) persons came into the family of a Roman and were under his power just as if they were his lawful natural children.[1] Arrogation was the oldest form in use by which this was accomplished. It varied a great deal in early times, but was brought about by a vote of the comitia calata taken in regular form. This bore the specific name, arrogatio per populum. The sanction of the pontiff was always required, thus giving a religious color to the act. He was the guardian of sacred rights and was obliged carefully to guard against the extinction of a family, thus being sure to keep alive the family sacra. At some time which is unknown the fiction of the populum was dropped, and arrogation was performed by a rescript of the emperor without any other formalities.

Potestas gained over the Children of Another.

Adoption proper or in the narrow sense was brought about by taking advantage of the statement in the Twelve Tables; "If a father sell his son three times, he shall be free." To this form of adoption there were regularly five steps:—

[1] Justinian, I, 11.

(1) The natural father sold his son to a fictitious purchaser under the form known as mancipatio. The son thus became a mancipium, and the purchaser became his dominus.

(2) The son is manumitted (freed from the hand) by the dominus and falls back into the potestas of his father.

(3) The second sale and second manumission are merely a repetition of the first, and produce the same result, the son falling back into the potestas of the father.

(4) For the third time the father sells his son as before. This is the last sale that the father will be able to make according to the terms of the Twelve Tables. The son now becomes for the third time a mancipium of the fictitious purchaser, with the option of two alternatives:—

(*a*) Remancipation to the natural father by the dominus and cessio in jure by the natural father to the adopted father who had acted throughout as the fictitious purchaser.

(*b*) Third sale or mancipation to some third person (not the fictitious purchaser mentioned above), a fiduciarius, who cedes the son in jure to the pater adoptans.

In case of a daughter or grandson the first four steps were omitted, as a narrow construction was given to the statement in the Twelve Tables, so that a pater was not permitted to sell a daughter or grandson but once. This method of adoption was not changed until the time of Justinian. This emperor abolished the sales and manumissions and substituted therefor a mere expression of will in writing. In this manner

parents could appear before magistrates and free their children from potestas. Any male of the age of puberty and independent could adopt another male or female as his child. In case the person adopted was independent, his consent had to be obtained. Adoption broke all relations with the former family according to the civil law, and the former or natural relation was not resumed in case the adopted person was emancipated by his adopted father. The effect of this arrogation was that whatever property the adopted person possessed passed at once to the arrogator, except as to such rights as were altogether lost. Debts due to him passed also to the arrogator, who could enter suit for their recovery. The adopted person became the heir to the person adopting him just as if he were his heir by blood, while he at the same time ceased to be the heir of his natural father.

The potestas of the pater familias was destroyed in two ways: (1) by act of the parties — emancipation, and (2) by application of the law.

Potestas destroyed.

(1) By *act of the parties*. The father could not be compelled to emancipate his son, and the son could not be emancipated without his consent. The formula for emancipation was just the same as that for adoption, in the first five steps. If, now, the fiduciarius should manumit the son, he would be free and the fiduciarius would be his patron, inheriting whatever property he had in case he died childless. Usually this was an object to be avoided. A pater who emancipated his son generally desired to maintain his place as patron, and thus be his heir. In order to accomplish this, after the third sale the fiduciarius remancipates the son to his father, and the father manumits him, thus becoming his son's patron and heir to whatever property he is possessed of in case he dies childless.

Form of emancipation:—

(A desires to emancipate his son B. C is by supposition the purchaser or fiduciarius.)

(1) A sells B to C.
(2) C manumits B by the process of vindicta, and B falls back into the potestas of his father, A.
(3) A mancipates B to C.
(4) C manumits B by same process as before and with the same results.
(5) A again mancipates B to C.
(6) C, instead of manumitting B, remancipates him to A.
(7) A manumits B. B thus becomes free from the potestas of his father, but his father is still his patron and, if he dies, is heir to any property that B possesses in case he is childless.

All this is changed by Justinian.[1]

(2) By *application of law*:—

(*a*) The death of any person having potestas is a divestiture from that person, but does not always free a person from potestas. This would be true in case a person was under the potestas of his grandfather. Upon the death of his grandfather he would immediately fall under the potestas of his father, in case his father were alive.

(*b*) Any capitis deminutio suffered by a filius familias takes away the potestas of the father. In the same way the father lost potestas by suffering capitis deminutio.

[1] Justinian, I, 12.

(*c*) The father, by gross misconduct, loses potestas; this by court action upon prosecution.

(*d*) The attainment of certain honors, as indicated by law, destroyed the potestas. These honors were:—

(1) To become consul.
(2) To become censor.
(3) To become præfect.
(4) To become master of the horse.
(5) To be excused from the curia.
(6) In case of a filia familias, to become a vestal virgin.

All such persons were allowed the privileges which accrued from potestas, but were free from the duties. Generally speaking, wherever the burden falls there are the privileges. The cases mentioned above are exceptions to this rule.

Privileges under Potestas.

The position of children under potestas was in some respects quite similar to that of slaves. As in the case of slaves, the father had the power of inflicting punishment on his children, even to the extent of the death penalty. The actual exercise of such power is recorded in several cases. It is expressly given in case of adultery on the part of a daughter. But this extreme right was very rarely made use of, and was, no doubt, closely guarded. On the other hand, children enjoyed many privileges which were not open to slaves. Sons, as has already been stated, who were of mature age could vote in the comitia and hold any office in the State. They further enjoyed the privileges of the private law, could engage actively in business, could acquire property and dispose of

the same, could sue and be sued, could marry and, in fact, perform almost any act of the pater familias. But whatever they acquired became the property of the father, and the various business transactions of the son had to have at least a nominal sanction of the father in order to make them legally binding. Children could hold the ordinary peculium or property granted to them by their father, in the same way as slaves were wont to hold similar grants. But such peculium could not be taken away from the children in case the fisc took the father's estate for debt.

The filius familias, on becoming a soldier, could hold under the title of castrense peculium that which he acquired during his military service. This included not only his pay as a soldier, but anything given or left him for the purchase of what he required for the campaign, as well as acquisitions from comrades, or the share of spoils which fell to him. Over all such property he had full control as if he were himself a pater familias. With such property he could engage in business and enter into legal obligations either with his own father or other parties. In such a case his father could not be sued for debts contracted by him.

Manus was the power which a husband had over his wife in case the marriage had been either confarreatio, coemptio, or usus. It is practically certain that manus always accompanied marriage in the earliest times and had not become obsolete in the time of Gaius, although no trace of it is discoverable in the time of Justinian. No woman could enter into a marriage in accordance with any one of these three ways without the authority of her father, grandfather, or guardian. A woman in the hand of her husband had the legal position of a

§ 128. Manus (In Hand).[1]

[1] Roby, 70–76.

daughter. All her property passed as a whole without separate delivery of the items to her husband or her husband's father (in case her husband was not sui juris).

In the earliest days of Rome marriage was a holy relation and, under whatever form it took place, founded a religious communion between husband and wife.[1] It, therefore, received at its commencement a religious sanction. This religious sanction, however, was superimposed upon the marriage proper, which was contracted merely by consent and had no form prescribed by law. The agreement to marriage was usually entered into by mutual promises (sponsalia) originally made by sponsio and restipulatio. Justæ nuptiæ or marriage, which would give patria potestas over the issue, required one special condition besides those necessary for marriage in general; namely, connubium, and this belonged mainly to Roman citizens. Connubium is thus defined by Ulpian; "Connubium est uxoris jure ducendi facultas." *I.e.*, when there is no impediment to the marriage of two persons, they are said to have connubium. Children sprung from such a marriage were called agnates. As distinguished from justæ nuptiæ, we have nuptiæ simply. Originally the former was the only kind of marriage known at Rome. But even in the time of the republic there had grown up into almost equal recognition a matrimonium juris gentium, a lawful wedlock of persons between whom there was no connubium. Children born under this marriage were not in patria potestas, but were called "liberi justi sed non legitimi concepti." They were cognates to the father. In ancient times equality of condition was required in marriage, so that both patricians and plebeians married only among their own class, and

§ 129. Marriage.

[1] Mackenzie, 100–109; Roby, 70–73, 127–137: Justinian, I, 10.

freedmen were prohibited from marrying the freeborn. By the lex Canuleia, in 445 B.C., connubium was authorized between patricians and plebeians; and by the lex Julia, in A.D. 4, the prohibition of marriage between freedmen and the freeborn was removed, subject to certain restrictions as regards alliances with families of senatorial rank.

Besides these kinds of sexual union which were recognized by law, there were the following of a lower class:—

(1) *Concubinatus.* This was a relation of sexes resembling a legal marriage, but failing to give potestas over the children. It was a lawful union of an inferior kind. Only those people could enter into this kind of a union who were able to marry. It placed the woman in an inferior position, but the connection was generally looked upon as marriage. By Roman law a man could not have a concubine and a wife at the same time. The only question raised in law was; "Does the man intend to treat the woman as a wife or a concubine?" Children by such a union were natural; they were not considered as being related to the father, but were cognates of the mother. Of course they were not in the potestas of the father and could not inherit his property. They could be made lawful children, however, by any of the methods of legitimation that have been mentioned and were entitled to maintenance from the father.

(2) *Stuprum* or *promiscuous intercourse.* This name was at first employed to designate all connection between a freedman and free woman outside of connubium, but this was later modified. It embraced

all the connections of slaves of every kind even with a free woman. Children born of all such unions were called spurii or bastards. They were cognates to the mother and were said to have no father.

Though certain forms were necessary in order to bring the wife in manum mariti, these were not essential to the validity of marriage itself.[1] Although at first there was no marriage without manus, in the later republic and throughout the empire the wife did not pass under the power of her husband unless she expressly consented to do so. In the first case, the wife passed out of her own family into that of her husband, who acquired all her property and exercised over her the same kind of control as if she had been his daughter. In the latter case, the woman remained in the power of her father or tutor, and retained the free disposition of her own property.

Marriage with or without Manus.

There were three modes of contracting marriage which conveyed manus, confarreatio, coemptio, and usus.[2] These are mentioned in the probable order of their age.

Three Ancient Forms.

The form of marriage by the spelt loaf (*confarreatio*) was a sacrifice to Jupiter of the Spelt (Jovi Farreo). This was a solemn religious ceremony, before ten witnesses, and various things were done with fixed traditional words. An ox was sacrificed and a cake of spelt was divided by the officiating priest between the man and woman as an emblem of the consortium vitæ, or life in common, which they were expected henceforth to live. Gaius gives no further description, but by his time this marriage ceremony was no longer performed save in connec-

[1] Mackenzie, 101. [2] *Ibid.*, 102.

tion with certain priesthoods. This kind of marriage was no doubt the oldest, and, in fact, the only kind in use among the ancient patricians.

Coemptio. The most usual form by which a woman passed on marriage into the hand of her husband was co-purchase. This form of marriage was in large part a mere adaptation of the ordinary form of mancipation and came into use some time after the reforms of Servius. This was merely a symbolical purchase of the wife by the husband, per aes et libram, in the presence of five witnesses and the balance holder. Ulpian implies that there was mutual questioning and a consequent sale of the woman to the man and the man to the woman. The man asks the woman whether she wills to be mother of the household to him. The woman answers that she so wills. The woman then asks, whether the man wills to be father of the household to her. The man answers that he so wills. By this marriage the woman experienced a change of civic position and as a consequence all her property passed to her husband, or to her husband's father in case her husband was not sui juris. She ceased longer to be a member of her father's household.

Usus. About the same time that marriage by coemptio came into use, there arose another form, usus, which was founded on prescription. In this the woman simply cohabited with the man as her husband for a whole year, without having been absent from his house for three whole nights in succession. This must have been with the consent of her father or guardian. These conditions having been fulfilled, the woman passes under the hand of her husband just as a movable becomes a man's property by uninterrupted possession for the same length of time. In later times the conventio in manum was found by the Roman

women to be undesirable. The Twelve Tables provided that, if she desired to prevent this result, she should absent herself for three nights (trinoctium) every year, and thereby break the use. These three nights must not be a mere absence of the body by chance or some other cause, but there must be an adverse act of the mind as well. In other words, the absence must have been for the real and avowed purpose of bringing about this result. This form of marriage had fallen into disuse by the time of Gaius. In fact, all the forms of marriage by which the woman passed in manum mariti gradually passed away. The confarreation shared the fate of the old pagan worship to which it belongs. Coemption, though more frequent and still made use of in the time of Gaius, disappeared long before the time of Justinian. Under the new system of marriage which grew up, the ordinary rule of the common law granted to married women the right to dispose of their property without the authority of their husbands and, in fact, to be entirely free from marital control. Marriage by the Roman law was now contracted by the simple consent of the parties. No written contract was necessary, and no religious ceremony was passed through. According to the generally accepted opinion, the ceremony of marriage was completed by consent alone — consensus facit nuptias. Some writers, however, such as Ortolan, think that marriage was not really perfected until after the wife had been delivered over to her husband, which was accomplished by the deductio in domum mariti. This view made of marriage a real contract completed by tradition.

So far as physical capacity for marriage was concerned, the Romans fixed puberty at fourteen years of age for males, and twelve years for females.[1] All persons below these

[1] Mackenzie, 102–104.

ages were looked upon as pupils, and could not be legally married. Absolute impotency was also considered as a physical disqualification. Beyond these physical disqualifications, there were four impediments to marriage recognized by Roman law: (1) rank, (2) general public policy, (3) relationship, and (4) quasi-relationship.

Impediments to Marriage.

(1) *Rank*: —

(*a*) Patricians were not allowed to marry plebeians until the enactment of the lex Canuleia, in 444 B.C., when the restriction was removed by the admission of plebeians to connubium.

(*b*) Ingenui could not marry liberti until the enactment of the lex Julia, A.D. 4, when all freeborn men except senators could marry freed women.

(*c*) Senators were not permitted to marry freed women.

(*d*) No ingenuus was permitted to marry a person of notorious character or a comic actress even after the enactment of the lex Julia.

(2) *General public policy*: —

(*a*) A person acting as guardian could not marry his ward until she had attained the age of twenty-six unless she had been bestowed upon him by her father before his death. For the same reason the son of the guardian was not permitted to marry his father's ward before she had attained the age of twenty-six.

(*b*) A governor was forbidden to marry a woman that was domiciled in his province during his term of office.

(*c*) A Jew could not marry a Christian. Such a marriage was declared void, and the children were classed as spurii.

(*d*) A ravisher could not marry the woman whom he had ravished, and if such persons married by the consent of the parents, they were banished.

(*e*) An adulterer was forbidden to marry his paramour. The woman was forbidden to marry at all, and the man was forbidden to marry her.

(*f*) A female patron was forbidden to marry her freedman, and a freedman could not marry the daughter, granddaughter, or widow of his patron.

(*g*) A man was permitted to marry his freedwoman, but it was considered more respectable on his part for him to make her his concubine.

(3) *Relationship.*[1] Relationship within certain degrees, whether of consanguinity or affinity, rendered the parties incapable of contracting marriage. Ascendants and descendants to the most remote degree could not enter into marriage in accordance with Roman law. This rule applied to those who were related by adoption as well as by blood, even after the tie of adoption had been dissolved. In accordance with the principle just stated, father and daughter, grandfather and granddaughter, mother and son, grandmother and grandson, and so on to the last living link could not marry. In the collateral line, marriage was prohibited between brothers and sisters, including persons so related by adoption so long as this relationship subsisted, and also in the special case where one of the parties stood in loco parentis to the other, as uncle and niece, aunt and nephew, etc.

[1] Justinian, I, 10; Poste, 66–69.

(4) The degrees which were prohibited in consanguinity were also prohibited in affinity, this latter being the connection arising from marriage between one of the married persons and the blood relations of the other. This was known in Roman law as quasi-relationship. Under this head a man was forbidden to marry his wife's daughter or his son's wife; his wife's mother or his father's wife; his wife's sister, etc.

These rules as to forbidden degrees have been substantially adopted both in England and Scotland, as well as wherever the tenets of the Catholic church hold.

In accordance with the Roman law the consent of the father or pater familias was indispensable to the marriage of such children as were under potestas. The consent of the mother was not required, nor was the consent of the guardian necessary in case the parties were under tutelage. It was deemed sufficient to have the tacit consent of the father. If he did not forbid the marriage, the law considered that he gave his assent.

Father's Consent, when Necessary.

In the early history of Rome, celibacy was considered censurable. In fact, this is true in the early history of all nations. But this view passed away toward the end of the republic in the general degeneracy of Roman manners, when the conduct of women of rank rendered marriage exceedingly distasteful to men. Many efforts were put forth to counteract this evil during the later republic and the early empire. By the lex Julia et Papia Poppæa, which contained several severe regulations against celibacy, solid favors were bestowed upon those who had a certain number of children, three in Italy, or five in the provinces. It seems, however, that little lasting benefit resulted from these laws, which operated very unequally and sometimes oppressively. The emperors themselves went far to defeat

Celibacy at Rome.

the purpose of such legislation by bestowing the benefits of the jus trium liberorum upon persons who had no children, and even upon those who were not married. Constantine abolished all the penalties of celibacy, and the rewards to increase the number of children were discontinued.

A Roman marriage was at no time indissoluble, but it was for life unless one or the other of the contracting parties wished to terminate it.[1] Divorce was always private and required no legal action whatever. However, persons who had been married by confarreatio had to be divorced by diffarreatio. A man could be punished if he took advantage of divorce without proper reason, yet his right was never questioned. Cicero seems to indicate that all that was necessary in his time for a man to divorce his wife was simply to say, "Take thy goods and get thee gone." Romans generally took the ground that as marriage was a mere mutual contract to live together, it could be terminated by the determination of either party no longer to live together in the bonds of wedlock. Marriage could, therefore, be terminated at the will of either party. A marriage could be dissolved by the woman's father if she had not passed in manum and was still under his potestas. Cicero in this manner divorced his daughter from her first husband in order that he might subsequently marry her to Dolabella. The above methods may be considered as voluntary. Marriage may be said to have been involuntarily terminated by the death
loss of liberty on th
ties had fallen into
elapsed since the ca
might marry again

Marriage Terminated.

It was considered the duty of the father (or pater familias) to give his daughter a marriage portion or dowry, in proportion to his means.[1] He might even be compelled to do this. Such a dowry was called dos profectitia. The Roman law imposed upon the husband (or the pater familias in case the husband was not sui juris) the burden of all domestic expenses and the rearing and education of the children. It was doubtless this inequality of burdens that led to the institution of the dowry, which was a contribution from the wife or some one on her behalf toward defraying the expenses of the marriage state. There could be no dower unless the marriage entered into was a legal one. If the husband was filius familias, the dower went to the father, on whom the burden fell.

Dowry.

The general rule was that the dower existed so long as the marriage continued and at the termination must be restored to the woman or other person from whom it proceeded. An action for the recovery of the dower could be brought in case of divorce or repudiation on the part of the husband. The husband or his father had the sole management of the dower and the fruits of it during the marriage. He could exercise over it all the acts of ownership, so far as it consisted of movables, but he could not alienate or incumber any part of it which was immovable, or invested in land, even with his wife's consent.

§ 130. Mancipium (a Person in Hand-take).[2]

All children, whether male or female, that are in the potestas of a parent may be mancipated by him exactly in the same way as slaves. And so with persons in manu; for women may be mancipated by their coemptioners in the same way as are children by their parents. This mancipation was a sort of

[1] Roby, 136–145; Mackenzie, 107–108.

[2] Roby, 73–76.

imaginary sale, and the right to make use of it was peculiar to Roman citizens. It was performed in the presence of at least five Roman citizens of the age of puberty, called together as witnesses, and of another person of the same condition holding a pair of copper scales, who was a libripens. The mancipee, or party taking mancipio, having hold of the thing that is being transferred, says; "I say that this slave is mine in quiritary right, and be he my purchase with this as and these copper scales." Thereupon he strikes the scales with the coin, which he then gives to the mancipant or party from whom the slave is being received, as if by way of price.

In precisely the same manner as above, free persons were mancipated, as also were such animals as were mancipi, among which were reckoned oxen, horses, mules, and asses. Gaius further says; "Those in the position of mancipia, being regarded as if they were slaves, become sui juris on their manumission either vindicta, or through the medium of the census, or by testament." Persons so held were subject generally to the same disabilities as other persons alieni juris. However, as they were not in the possession of the individual to whose jus they were subject, it is doubtful whether they could amass possessions on his behalf. If a person in mancipio was instituted heir or had a legacy left him by the person in whose mancipium he was, it required to be accompanied with freedom, otherwise he could not enter.

Persons in mancipio were relieved from it, just like slaves, by manumission vindicta, censu, or testamento. But a person in mancipio, being manumitted, did not become a freedman, but was still classified as a freeman.

CHAPTER VI

GUARDIAN AND WARD[1]

§ 131. Tutela.

PERSONS became sui juris when they were released from paternal power, but even then they, by reason of immaturity of age or mental incapacity, might need to be protected in the exercise of their legal rights. It was upon this necessity that the law of guardianship or tutela depended. Guardianship in Roman law was very closely akin to trusteeship in English law. The person holding it was a kind of joint administrator of the ward's estate, supplementing by his own legal acts the incapacity of his ward. The general idea of guardianship was expressed in the Roman law by the word *tutela*. Justinian defines it as "the right and power conferred or authorized by the civil law for the protection of an independent person, who is, by reason of age, incapable of protecting himself." Servius Sulpicius defines guardianship as "force and power (vis ac potestas) given and allowed by the civil law over a free person to protect one who on account of age is unable of his own will to defend himself." The age of puberty was fixed in the Roman law as that before which every independent person required the protection of a tutor. In the early law women remained under tutelage during their entire lives or until they married, at which time they passed under the control of their husbands. But the idea of female incapacity passed away in later legislation, and virtual equality between the sexes was established.

[1] Mackenzie, 151–157; Roby, 92–107, 121–126.

Tutelage was looked upon as a public trust and, therefore, no one could fill the office of tutor till he was twenty-five. For the same reason he could not refuse to act, if appointed, unless he was relieved from the burden under certain excuses that were specified by law. (See page 366.)

All males under the age of puberty and all females of whatever age, whether they were married or not, required a guardian, if they were not under potestas or in hand or handtake.

Originally there were three kinds or classes of persons that were placed under guardianship: pupils, on account of their age; women, on account of their sex; incapables, on account of their deficiency in intellect or physical incapacity by reason of disease, etc. This gave rise to three kinds of guardianship: —

Kinds of Guardianship.

(1) Tutela mulierum.
(2) Tutela impuberum.
(3) Curatela.

(1) There is scarcely any trace of the tutela mulierum to be found in the legislation of Justinian, but the discovery of the Institutes of Gaius has thrown some light upon this subject.[1]

Tutela Mulierum.

According to the ancient Roman law, a woman, throughout her whole life, was placed under the guardianship of agnates when she ceased to be under paternal power, or was not in manu mariti. This, no doubt, had for its object the protection of the property of women, and the prevention of its being withdrawn from the lawful succession of agnates. Of course this rested upon the theory of the family ownership in common of the property. It was for this reason that the nearest male relations of women were appointed as their guardians or tutors.

[1] Roby, 101–103; Mackenzie, 151–152.

They had no right of administration of the property, but only the power to prevent the woman from disposing of her property or undertaking any important obligation, without their authority. By degrees this rigid control of women slackened, and they were admitted to the full control of their own property. By the lex Papia Poppæa married women were released from this superintendence of their agnates, in case they had borne a certain number of children. Later a law of Claudius delivered freeborn women from the lawful tutory of agnates; but a tutor-dative was still required in order to validate the more important acts of women in civil life. Various devices were resorted to in order that women might escape from the control of troublesome tutors and be placed under the guardianship of those who would leave them at liberty to do whatever they wished. Vestiges of this guardianship remained as late as the reign of Diocletian, but cannot be discovered thereafter.

Tutela impuberum is that kind of guardianship which has been defined by Justinian in the definition just given.[1] Only males could become guardians; even the mother was not qualified to act. A guardian, being a creation of the civil law, had a formal function and importance irrespective of any practical counsel or management of affairs which might belong to him. The interposition of his authority was essential to the validity of his ward's acts, in so far as they were a part of the civil law. This authority was given orally, usually in reply to a question. Guardians were divided, according to the method of their appointment, into three classes: (1) Tutores testamentarii, (2) Tutores legitimi, and (3) Tutores dativi a magistratibus.

Tutela Impuberum.

(1) *Tutores testamentarii* or testamentary guardians were

[1] Roby, 103–105; Mackenzie, 152.

such as were appointed by the testament or codicil of the father. The power thus to appoint tutors existed as early as the Twelve Tables, and formed a part of the general law regarding the disposition of the familia by the father's will. For the appointment of such a tutor to be valid, the pupil must have been under the potestas of the father at the time of the father's death, and must become sui juris at the father's death. There were two cases that came under this head: —

(*a*) When the will was valid it was unnecessary for the tutor to be confirmed by the prætor.

(*b*) In some cases, where the will was imperfect by reason of the omission of some necessary word, the prætor interfered and formally bestowed the guardianship upon the person named in the will.

(2) *Tutores legitimi* or legal guardians were those who, in case no one had been named in the will, were called to the office by operation of the law. "He who has the benefit of the succession," says Justinian, "ought also to have the burden of the tutelage." In accordance with this principle the tutelage fell upon the nearest agnates, and failing agnates, upon the gentiles. As the gens lost legal significance and the distinction of agnates and gentiles was abolished, the tutelage went to the nearest heir who was capable of fulfilling the requirements. He was bound to accept the trust whether he wished to or not.

(3) In default of testamentary tutors and tutors at law, an authorized magistrate appointed certain persons to the office who were for this reason called *tutores dativi a magistratibus*. Such a tutor might be appointed temporarily, in case of delay in the assumption of office by the persons other-

wise designated; or in case other tutors should become incapable of fulfilling the duties incident to the trust.

A distinction existed between the power of the tutor when exercised over a person who had passed the age of infancy, and an infant. There were three well marked divisions: (1) Infans, (2) Infantiæ proximus, and (3) Pubertati proximus.

Powers and Duties of Tutors.

(1) *Infans* (cannot talk). This period of the child's life lasted for two years, during which it was in the custody of its mother, and it was only in extreme cases that the tutor had charge of the person of his ward.

(2) *Infantiæ proximus* or that period nearest infancy when the child can speak, but has not passed the seventh year. During this period the tutor acted in his own name, but in behalf of his ward. His chief duty was to preserve intact the property, and to supply the necessities of the one placed in his care.

(3) *Pubertati proximus*. When the pupil had passed the seventh year, he acquired a greater degree of legal capacity. In this period he is said to understand the language of the law, but not to have judgment for settling legal questions (intellectus sed non judicium). He could engage in legal transactions in his own name, in so far as they were beneficial to him, but no act of his own could operate to his prejudice. "He could bind another, but could not himself be bound." In order to make the acts of the pupil binding upon himself as well as upon the other party, it was necessary for the tutor to add his authority. The coöperation of the tutor converted the natural act of the pupil into a judicial act, and so made it enforceable by law. (In this case the tutor supplied the judicium requisite for a legal act.)

In some cases the ward could not act even for his own

benefit without his tutor's consent. Of these there were three:—

(*a*) He could not enter upon an inheritance.
(*b*) He could not seek bonorum possessio.
(*c*) He could not take an inheritance under trust.

For all these limitations there were good reasons, as the Roman law said; "Wherever the benefits lay, there lay also the obligations." The obligations in the cases mentioned above might well exceed the benefits.

Unless he had a valid excuse, the guardian must take up the administration of the affairs of his ward as soon as he is made acquainted with his appointment. He had to act with absolute good faith and bestow the same care upon the affairs of his ward that a sensible man is expected to use in his own affairs. The first duty that devolved upon him was to make an inventory of all the assets and liabilities, deposit all moneys with a banker, or in safe keeping, and sell all perishable articles and things that were liable to deteriorate in value by the lapse of time. He was expected to purchase suitable lands with this money or else place the money at interest in the hands of persons who were perfectly solid. He was also required to resist all demands on his ward that he did not deem righteous, bring actions, and enter into stipulations on his ward's behalf. In addition to all these duties he must provide a suitable home for his ward, supply his bodily wants, and see to his proper education. This education must be suitable to his rank and estate.

Guardianship might be terminated in various ways.[1] The following were the ordinary methods:—

[1] Mackenzie, 155; Justinian, 117.

(1) By attainment of puberty.

(2) By the death of either the pupil or tutor.

Tutorship Terminated.

(3) Capitis deminutio. A capitis deminutio of the tutor takes away his tutelage, but still leaves the pupil subject to that of some one else. A capitis deminutio of the pupil destroys all tutelage.

(4) If a person was appointed tutor by will, he terminated the office by the fulfillment of the conditions; if he were appointed for a certain length of time, he laid down the office at the expiration of the time.

Excuses from Guardianship.

The post of guardian was regarded in Rome as a part of the duties of citizenship and could not, therefore, be declined except on recognized legal grounds. These legitimate excuses were: —

(1) Having rendered a service to the public, or being then in the discharge of some public duty: —

(*a*) Having a certain number of children living, *i.e.*, three in Rome, four in Italy, or five in the provinces. In these lists children who had been killed in battle were counted.

(*b*) Absent from Rome on account of state business.

(*c*) Magistrates, military persons, or members of the liberal professions such as law, medicine, or teaching, were excused.

(2) Being in a position adverse to the pupil: —

(*a*) A creditor or debtor.

(*b*) Appointed by the pater through enmity.

(*c*) Being at enmity through the pater's lifetime.

(*d*) Having had his status questioned by the pater.

(*e*) The husband of a woman under curatela.

(3) Unable to perform the duties of guardianship:—

(*a*) By reason of poverty; not able to sustain the expenses due to the performance of the duties of guardianship.

(*b*) By reason of poor health.

(*c*) Unable to read.

(*d*) Over seventy years of age.

(4) Having already filled similar offices:—

(*a*) Having already held three unsolicited offices of a similar kind.

(*b*) Having already acted as tutor to the person for whom a curator was to be appointed.

Any guardian, no matter how appointed, could be removed from office either by the prætor, provincial governor, or pro-consular legate for good and sufficient reasons.[1] Any one could make the application for the removal of a guardian. The following causes were accepted as sufficient for the removal of a tutor:—

The Removal of a Tutor.

(1) If, being obliged to give security, he had entered upon the administration of the tutorship without doing so. In such a case he was compelled to produce the necessary surety or relinquish the administration.

(2) If, after interfering in the administration, he refused to continue, he could be removed.

(3) If he refused or neglected to give the pupil proper maintenance out of the property under his control, he could be removed.

(4) If in the administration of the property he acted with deliberate disregard of the pupil in such a manner

[1] Roby, 119.

as to amount to dolus (fraud), or with such gross negligence as to be scarcely distinguished from willful misconduct.

(5) General incompetency. This incompetency had to be proved by means of a legal investigation.

(6) If the tutor had become hostile to the pupil during the process of his tutorship, he might be removed. Beyond these reasons given, any other, deemed sufficient by the magistrates.

According to the old Roman law, a person sui juris, upon passing the age of pupilage, acquired full legal capacity.[1]

§ 132. Curatela. He therefore no longer required a tutor to supply judicium. But it was still necessary to grant him some kind of legal protection between the ages of fourteen and twenty-five, at which time he was declared of age. This necessity gave rise to the law of curatorship or curatela. The Twelve Tables provided for the appointment of curators (caretakers) over the insane and prodigals, but not over minors. The first law for the benefit of minors was the lex Plætoria. This law was passed some time before the time of Plautus, about 184 B.C. It is generally supposed that, among other things, it allowed a minor to choose a curator (caretaker) to advise and protect him in certain particular transactions. This law held criminally liable those who defrauded persons under twenty-five years of age. The prætor also interfered for the protection of the minor and, in case he had suffered injury from any act of his, ordered a restitutio in integrum by which he was restored to the position in which he was before the unfortunate transaction occurred.

The office of the curator was in general to assist the minor

[1] Justinian, I, 23.

in the management of his estate and to sanction his legal acts whenever it was deemed necessary. Without some special dispensation, the curator held his position until the minor had attained his majority, *i.e.*, twenty-five. Curators were appointed over:—

(1) Minors between the age of fourteen and twenty-five.
(2) Furiosi (madmen); authorized under the Twelve Tables.
(3) Lunatics, the deaf, dumb, blind, and incurably diseased.
(4) Spendthrifts (prodigi). Agnates had more than a reversionary right, a kind of immediate interest in the family property, and for this reason a person was not allowed to squander in a heedless manner the property which would ultimately vest in them.
(5) In certain cases, as when the statutory tutor was not a fit person to manage the business, although no fraud (dolus) was charged, a curator was appointed as an associate to aid in the conduct of the more important business.

Tutors and curators were required, in certain cases, to give surety for their proper conduct of the affairs of the ward. When such was the case, no act of theirs was valid until this requirement had been complied with.[1]

Surety.

Legitimi tutores were regularly required to give security, although there was one exception to this rule. When a patron or his children acted as guardian or curator of a freedman who had very little property, while they had an abundance, they were not required to furnish any security.

[1] Roby, 114.

Tutores dativi a magistratibus were not required to give security after an inquiry into their condition had been made and the court had accepted them. Otherwise they were compelled to furnish security. This was a verbal promise, fide jussio, of a person other than the tutor or curator to make good any loss that was sustained by the pupil through the misconduct of a tutor or curator, as the case might be. The pupil was in this manner protected in four ways:—

(1) Remotio.
(2) Statutory restriction.
(3) Statutory hypothec over the tutor's property.
(4) Responsibility of others for the tutor or curator.

CHAPTER VII

CORPORATIONS[1]

THUS far natural persons alone have been considered, *i.e.*, human beings with proprietary capacity. No other concept of a person was known to early Roman law. The jus privatum was throughout a law for the individual only and, hence, as far as the old private law was concerned, there could be no subject of rights and duties other than a natural person. Societies had arisen, but these societies had never been invested with any legal capacity. In case there was property which was designed for the use of a society, it had to be formally vested in some individual member and treated as though it was his private property. It is indeed true that the Roman State (populus Romanus) had property and conducted all the business pertaining to this property, but this property and the juristic acts flowing therefrom were not governed by the jus privatum, but by the jus publicum. It therefore happened that the State never appeared as the subject of a legal right and could not be summoned before a private law court to make answer to any charge. The law was not available against the State as it was against the individual. The State conducted all its affairs and protected its property by the administrative acts of its magistrates. In case a private person had any grievance against the State, he lodged

§ 133. Definitions and Distinctions.

[1] Mackenzie, 161–166; Poste, 142–170; Hunter, 314–315, 799, 866.

his complaint at a public office and awaited the action of the State authorities.

The conception of a collective juristic person as a possible subject of private rights was not developed until towards the close of the republican period, and was connected with the rights of the system of municipal government. The property of the municipium was brought under the private law, and the municipium itself looked upon as a person and made capable of private rights and duties. After this transition had been worked out successfully, lawful societies (collegia, sodalitates, universitates) were likewise acknowledged to possess proprietary capacity in the domain of private law and were thus clothed with person, having all the rights and duties of a natural person. It was in this manner that by slow degrees the conception of a juristic person arose and obtained recognition in the Roman law of the empire.

"A corporation consists of a number of individuals united by public authority in such a manner that they and their successors constitute but one person in law, with rights and liabilities distinct from those of its individual members. Cities, colleges, hospitals, scientific and trading associations, and societies for other public purposes may be so incorporated." The corporations of modern society were taken full-grown from the law of Rome. The technical term in the Roman law that corresponds to a modern corporation is collegium; a still more general term is universitas. A Roman collegium had to be composed of at least three members who were said to be corporati — habere corpus, but the existence of such a corporation might be continued by one member. It could hold property in common and had a common chest. It subsisted as an abstract legal person, though all its original members

A Corporation Defined.

were changed; it could sue and be sued by its agent; could elect new members from time to time; make by-laws for the administration of its own affairs as far as not contrary to the law of the land, and in fact could act in all respects like any private person.

All corporate property and effects belonged to the corporate body as distinct from the particular members of which it was composed, and all debts due to the corporation followed the same law. In case the corporation owed debts, the individual members of which it was composed could not be held responsible for any portion of the same, nor could their goods be seized upon to satisfy any claim held against the corporation.

Corporate Powers.

The manner of voting at corporate meetings depended upon the constitution. When the constitution said nothing touching the matter, the will of the majority at a corporate assembly duly constituted, expressed the will of the corporation and bound the minority as well as all absent members. But if the act of incorporation or the special constitution fixed what should be necessary to constitute a corporate assembly, whether as regards the number of persons present or otherwise, this must be followed implicitly.

Voting at Corporate Meetings.

A corporation came to an end by the expiration of the term fixed by the constitution, when a definite period was named, by the death of all its members when it had for its object the personal interests of the individuals originally composing it, or by act of the legislature declaring it dissolved. It is impossible to state with accuracy what disposition was made of the corporate property when dissolution took place. It would seem that when the corporation had been formed solely for

Termination of a Corporation.

the public benefit, property belonging to it fell to the State. When it had been formed for personal advantage, then the property belonging to it was distributed among the members or heirs of members deceased.

Special Corporate Bodies.

In addition to the corporations where several members were united into one body, and which in English law are called corporations aggregate, the Roman law recognized another class of artificial persons as capable of rights and obligations. This class bore some resemblance to the corporation sole of modern law. To this class belonged the State itself; the emperor, in so far as he was regarded as the depositary of sovereign power; every public office, considered with reference to the rights and duties attached to it; the public treasury or fisc; and, finally, the inheritance of a deceased person so long as it was not taken up by any one as heir.

Every corporation was constituted by a law, by a decree of the senate, or by an imperial constitution. It had to have a name. It might have more than one name, but two corporations could not have the same name. A corporation could not change its name save by charter or some equivalent authority. It regularly possessed a common seal, and all corporate acts of any legal importance had to be performed under this seal.

Book I. THE LAW OF THINGS (JUS DE REBUS)

Title 1. *The Law of Property or Ownership (Jus in Rem)*

CHAPTER VIII

OWNERSHIP IN GENERAL (JURA IN RE PROPRIA)[1]

Every right, in its broadest sense, involves both a *subject* by whom it is exercised, and an *object* with reference to which it is exercised. A system of law must determine not only who may be the subjects, but what may be the objects of a right. It must determine not only the capacity of the subject, but also the extent of legal control capable of being exercised over the object. The consideration of rights thus viewed with reference to their objective relations forms the subject matter of the law of things (Jus de Rebus).

It is sufficiently clear that the legal right to control for one's own benefit an external object involves a corresponding legal duty on the part of others to respect that right. It will appear on investigation that in some cases this duty is universal, binding upon all men; in other cases it rests merely upon some particular person. Rights, therefore, may, with reference to things, be thus distinguished according to the extent of their correlative duties. Thus the right of property may be clearly separated from the right growing out of a contract. Over against the right of property is a general

[1] Mackenzie, 171–181; Roby, 408–431; Poste, 151–197; Moyle, 313–328.

duty resting upon all men; while the duty which stands over against the right accruing from contract is specific, resting upon some determinate person or persons. The one is called a *real* right; the other is called a *personal* right. This distinction is inferred rather than expressed in Roman law. It was clearly indicated in the division of 'actions,' by which rights were enforced. Those 'actions' which were employed to enforce a right availing against all the world were called actiones in rem; while those which were used to enforce a right availing against some determinate person were called actiones in personam. Applying to rights the same terms that the Roman jurist applied to their corresponding actions, we may say that every right included in jus rerum is either a jus in rem or a jus in personam. Therefore, the law of things may be properly divided into the law relating to real rights, and the law relating to personal rights; or, in other words, the law of property and the law of obligations.

In dealing with the law of property the general order of the Institutes is here followed. The way in which things are viewed as the objects of ownership is considered, the extent of the various principles which are involved in ownership, and the different modes of acquiring ownership.

§ 134. The Legal Idea of Res, or Thing.[1]

The term *thing* as employed in the Roman law has a meaning as broad and flexible as the term *person*. As the word *persona* designates every being capable of becoming the subject of a legal right, so the word 'res' is used to denote anything capable of becoming the object of a legal right. Thus the word may be applied to a physical object, as a piece of land; it may also refer to any specific service or 'right' in a physical object distinct from the object itself, as the right of way over a

[1] Mackenzie, 172.

field. It may refer to an act on the part of one person, the exercise of which is beneficial to another, as the obligation due according to the terms of a contract. Ulpian says; "Nominis rei appellatio ad omnem contractum et obligationem pertinet." But the word *res* is more often used in a restricted sense to denote the object of ownership, or of a real right.

Things were classified in the Roman law with reference to different principles and were arranged in various antitheti-

§ 135. Classification of Things.

cal groups.[1] For the sake of convenience merely in defining the various classes, this order is here preserved. According to this idea there are four general classes:—

1. Things as to their legal capacity.
2. Things as to their general qualities.
3. Things as to their mode of designation.
4. Things as to their mutual relations.

1. *Things as to their legal capacity.*

According to Gaius the most important division is that by which things are separated into (*a*) Res divini juris, those which are subject to divine law, and (*b*) Res humani juris, those subject to human law. To the former class belonged res sacræ, sacred things consecrated to the superior gods, as temples; religious things, res religiosæ, those consecrated to the inferior gods, as burial places, and res sanctæ, holy things, or those specially protected from desecration, as the walls of the city. None of these things could become the object of private ownership. Of the latter class, or res humani juris, there were two divisions: (1) res extra patrimonium, or extra commercium, regarded as incapable of in-

[1] Gaius, II, 1–14.

dividual ownership; and (2) res in patrimonio, or in commercio, things over which the rights of property could be exercised. In the former class were included things common to all mankind (res communes), as the air and the sea; things belonging to all members of the State (res publicæ), as public roads, rivers, ports, theaters; and things belonging to a corporation of any kind, as warehouses, etc. In the latter class (res in patrimonio) there was recognized up to the time of Gaius the distinction between res mancipi and res nec mancipi, but at the time of Justinian this distinction was practically obsolete on account of the decay of symbolic forms and the identification of legal and equitable ownership.

2. *Things as to their general qualities.*[1]

Things are classified according to their general qualities into:—

(*a*) Res corporales, including all those objects which are tangible, as land, houses, clothing, money, etc., and res incorporales, including all those objects which cannot be touched, as certain claims, privileges, or services which, though not tangible, are yet capable of being made the objects of a real right. Such are right of way, right of aqueduct, right of using the fruits of some corporeal thing, etc.

(*b*) Things movable and things immovable, according as they can or cannot be transferred from place to place without injury. This distinction was primarily based upon the physical nature of the things themselves; but the immovability of certain things may depend upon their juridical relation to other things. The whole subject of

[1] Gaius, *loc. cit.*

fixtures has been developed by the jurists from this basis.

(*c*) Things divisible and things indivisible, according as they can or cannot be separated into parts without destroying their essential character or use. This principle of division was extended so as to apply not only to a physical division into definite parts, but also to a juridical division into imaginary parts.

(*d*) Things consumable and things inconsumable. The former class includes those which necessarily lose their substance by use, as oil, wine, food, etc. All things that do not lose their substance by use are classified as inconsumable.

3. *Things as to their mode of designation.*[1]

Upon this was founded the division of things into those which may be furnished in genere, and those which must be furnished in specie. When a thing is generally designated in a contract, any one of the kind may be furnished; when a thing is specifically named then the thing itself must be furnished, and not some other thing similar in quality and value.

4. *Things as to their mutual relations.*

According to this classification, things were either principal or accessory. A principal thing was by Roman law something that could subsist by itself and was, consequently, viewed as the object of a right. An accessory thing was by Roman law one so joined or related to the principal that its legal character was lost or merged in that of the latter.

The law of property in general determines not only the various kinds of things which may be made the objects of a

[1] Gaius, *loc. cit.*

real right, but also the various kinds of real rights which may be exercised with reference to things. The common feature which characterizes these and distinguishes them from personal rights is the fact that they avail against the world at large. In defining the character and extent of real rights, a distinction is to be drawn between those which one possesses in that which belongs to himself (jura in re propria), and those which he possesses in that which belongs to another (jura in re aliena). This gives rise to two divisions, jura in re propria, and jura in re aliena. Attention will first be given to the distinctive features of those rights which one possesses in that which is his own. These rights involve the highest and most absolute control which a person is permitted under the law to exercise with reference to an object. To this class of rights the Roman jurists applied the term *dominium* — *i.e.*, ownership in the proper sense of the word.

§ 136. The General Right of Ownership (Dominium).[1]

Property is no doubt primarily founded upon the instinct to appropriate the necessary means of human existence and happiness. Morally it has an ultimate basis in the nature of man. Looked upon from a purely legal point of view, it is immediately connected with the evolution of civil society and the growth of State power. This is clearly seen in the successive forms in which property has been held and the modes in which it has been protected. In the early stages of society the social and the proprietary relations of men are so closely allied to each other as to be governed substantially by the same principles. The primitive form of property, especially as it relates to immovables, partakes of the nature of communism. In this form of property individual rights are merged in the

Growth of Property as a Legal Right.

[1] Poste, 148–154.

general proprietary rights of the group or gens, and whatever the individual acquires belongs to the common estate. This growth of the importance of the individual in society is accompanied by the growth of individual ownership. This transition from collective to individual ownership of property is an historical fact which has everywhere attended the emergence of man from a state of barbarism. It is especially marked in the history of Rome.

The growth of the legal idea of ownership is also associated with the evolution of the State as the mediating power. In primitive society the right of property is based upon force. The right of the gens to that which it holds depends upon its capacity to retain its goods against forcible dispossession. With the growth of the State, the force necessary to protect property is removed from the individual and the gens and vested in the State. Parallel with this growth of the State spring up common rules of acquisition which apply to all and which are enforced by the sovereign power. The State thus comes gradually to recognize principles that are based upon an equality of rights, and in connection with the movement whereby collective property is translated into individual property, there is to be seen a movement whereby the sanctioning power is transferred from the proprietors to the body politic. The legal idea of property, therefore, which we find in the Roman law is that of a right held by a person over a thing, absolute with reference to all other persons, but relative with reference to the State.

Elements involved in Dominium.

The right of dominium is the most extensive real right which a person can legally exercise over a thing.[1] It is, in general, indefinite as to its extent, unlimited as to its duration, and unrestricted as

[1] Roby, 413.

to its disposition. The owner, or dominus, can hold the object to the exclusion of all other persons; he can use it according to his own free will; he can reap all the benefits capable of being legitimately derived from it, and can freely dispose of it during his lifetime or at his death. Dominium includes:—

(1) The jus utendi, or the right of appropriating its use.
(2) The jus fruendi, or the right of appropriating its fruits whether natural or civil.
(3) The jus abutendi, which involves the right of destruction, consumption, and free disposition.

Different Forms of Dominium.

In connection with the simple idea of ownership just described, there are certain special features relating to the form of ownership, or the mode in which dominium is exercised that should be noticed.[1] (1) Romans made a distinction corresponding in name to legal and equitable ownership. This distinction was based not so much upon the extent of the right as upon the kind of sanction by which it was protected. Dominium referred originally to that right of property which was protected by the jus civile and was designated dominium Quiritarium. The prætor assumed the authority to protect bona fide possession even when all the conditions of the jus civile had not been complied with. Such property was said to be held in bonis, and this right was designated as dominium bonitarium. By the assimilation of the jus civile and the jus gentium these two rights became identical and were protected by the same court. (2) Dominium in one and the same thing may be exercised by a single person or by two or more persons. This gives rise to the distinction between single and joint ownership. In the latter case no one of

[1] Roby, *loc. cit.*

the owners is entitled to the entire thing, nor indeed to any separate part of it. (3) While dominium in the fullest sense is an undivided and unlimited right, it may yet be qualified in various ways without destroying the dominium. It is upon this fact that the distinction between absolute and qualified ownership, or free and burdened property, depends. When all the rights are vested in the owner, the ownership is said to be free or absolute. In this case it is known by the term *dominium plenum* or *plena proprietas*. But when certain subordinate rights are detached and transferred to another person than the owner, the property is to this extent burdened. The superior right which still remains with the owner does not lose its essential character as dominium, but it is now known as dominium minus plenum or nuda proprietas.

Besides the right of dominium, the Roman law recognizes another real right, the right of possession.[1] Possession and ownership may, and generally do, coincide. But as a person may be the owner of a thing and not possess it, so a person may be the possessor of a thing and not own it. When the possessor is not the legal owner of a thing, it is important to consider to what rights he is entitled by virtue of his possession. Possession, when considered as a mere fact, is simply the corporeal apprehension of a thing, or the holding of a thing under one's physical control. In order that possession may have full significance as a legal fact, it must have been acquired lawfully and in good faith. It is acquired lawfully when it has been acquired through the forms of a legal title and not in a vicious manner (vi, clam, vel præcario). It is acquired in good faith when the possessor believes that no one has a better right to the thing than himself.

Possession and its Relation to Dominium.

[1] Mackenzie, 181; Roby, 451–458.

CHAPTER IX

THE ACQUISITION OF OWNERSHIP IN SINGLE THINGS

§ 137. **Definition.**

HAVING thus far considered the various kinds of things that can be made the objects of ownership and the various kinds of real rights that can be exercised with reference to things, it is now necessary to consider the various modes by which ownership in things may be legally acquired. A mode of acquisition or title to property refers to any fact or event by which the dominium becomes legally vested in a determinate person. It applies alike to the original acquisition of a thing, *i.e.*, the transference of a thing from one owner to another, whether the transference is made during the lifetime of the previous owner or on the occasion of his death. It applies to dominium only, and not to the creation and transference of jura in re aliena. In their arrangement of this subject the Roman lawyers made a broad distinction between the acquisition of single things and the acquisition of an entire estate. At the time of the classical jurists, ownership in single things was acquired both by natural and civil law. This gave rise to two grand divisions of the modes of acquisition:—

(1) Modes of acquisition recognized by jus gentium.
(2) Modes of acquisition recognized by jus civile.

The modes of acquiring ownership are called 'original,' when they result in the independent creation of a new right of ownership; when their effect, therefore, is independent

of the ownership of a definite third person. A derivative acquisition arises when a person enters into the right of property which had preëxisted in another, and derives the thing from him. In this class of cases there is always a loss of property by the third person, the owner, who makes it over to the new proprietor. A person who acquires by an original mode has no such third person back of him. Of the original modes of acquisition recognized by jus gentium, the following are ordinarily recognized:—

§ 138. Modes of Acquisition Recognized by Jus Gentium.[1]

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

(*a*) *Occupatio.*[2] Among the original methods of acquiring property, occupancy is the most natural. This occupation consists in taking possession of a thing over which no one has a proprietary right with a view to its appropriation. The rule of the Roman law is, res nullius cedit occupanti. There are four conditions which must be fulfilled in order to give to occupation its full legal significance: (1) The thing must be a res nullius — that is, a thing which either never had an owner, or, at least, has no owner at the time of its occupation; (2) it must be a thing which is capable of ownership — that is, res in commercio; (3) it must be brought into the actual possession or control of the one professing to acquire it; and (4) the person must acquire it with the intention of assuming ownership in it — that is, possession must be juridical. There are several applications of this title that

[1] Hunter, 321–347.
[2] Gaius, II, 68, 71; Poste, 188–191.

are specified in the Roman law, of which the following are the most important:—

(1) Wild beasts, birds, fishes, and, in fact, all animals which are in their natural state of freedom become the property of the captor. Such things, however, must not be let go again. In case such a thing be captured and afterwards regains its liberty, it becomes the property of any one who thereafter captures it. This law holds in regard to things taken upon another man's land.

(2) Precious stones and gems in a state of nature become the property of the finder; but this law does not apply in the case of treasure trove. If treasure trove be discovered upon land belonging to the finder, it belongs to him in entirety, but if it be found upon the ground of another person, then it is equally divided between the finder and the owner of the land.

(3) Things captured in war within the territory of belligerents were regarded by the Romans as res nullius and were the property of the captors.

(4) Things, the ownership of which has been abandoned, are capable of occupation; but this does not apply to things thrown overboard from a ship in distress.

(5) Things found on the sea shore, having been cast up by the sea, belong to the finder.

(6) Islands found in the sea become the property of the finder.

(*b*) *Accessio.*[1] Another mode of acquiring property is by accession. This can hardly be called a distinct mode of

[1] Gaius, II, 65–79.

acquisition. It is the process by which a person becomes the owner of that which is legally united to that which already belongs to him. There are two main classes of accessio:—

(1) Natural increment.

(2) Where the things of two owners have become mixed, the law decides which one shall possess.

(1) Natural increment is the simplest mode of accession. Of this there are several subdivisions:—

(*a*) Fructus is that by which a person acquires the right to whatever is produced from that which he already owns; as the young of animals, the fruit of trees, industrial products, revenues from property, etc.

(*b*) Alluvio. The new soil gradually deposited by the natural action of a stream or waters belongs to the owner of the land upon which the deposit is made. This does not include violent changes, and when, in consequence of a sudden flood in a river, a considerable portion of land clearly distinguishable is forcibly carried off from one estate and added to another, either on the opposite side or lower down the stream, the ground so severed still remains the property of the original owner, provided he asserts his right to it in proper time.

(*c*) An island found in the middle of a river. In this case the persons owning the property on each side of the river own to a line in the midst of the river, thus each receives a portion of the island. Roman law vested the ownership of the bed of the river up to the same line (admedium filum), in like manner.

(2) Where the things of two owners have become mixed — *Adjunctio.* Things belonging to different owners may become related as principal and accessory, and the property of one owner is thus increased at the expense of another. Here the principle of accession does not apply if the things can be separated without injury; but if they cannot be thus separated, then the accessory yields to the principal; the less important yields to the more important. Of this we may have many examples: —

(*a*) A tree belonging to A takes root in soil belonging to B. In this case the tree belongs to B.

(*b*) Wheat belonging to A is sown on land belonging to B. Sown wheat, like rooted trees, belongs to the owner of the soil, B, but B can be compelled to pay A for the wheat.

(*c*) A writes a letter on parchment which is the property of B. In this case B owns the writing, but if A is in possession, he can defend himself against B's suit for possession by a plea of fraud, unless B offers to pay for the writing.

(*d*) A paints a picture on a tablet belonging to B. Here on account of the value of the painting the product will belong to A. If B is in possession of the painting, then A cannot get it without paying B for the tablet. If A is in possession, then B can bring action for the tablet by offering to pay A for the painting.

(*c*) *Traditio.*[1] Tradition is the actual delivery of a thing from one person to another, accompanied with the intention

[1] Gaius, *loc. cit.*

to transfer the ownership in the same. Among the derivative modes of acquiring property are gift, exchange, contract, succession, or other just titles, followed by possession of the thing. It is of the essence of property that the owner of a thing should have the right to transfer it to another by giving him possession. But it was an established principle of Roman law that property could not be transferred merely by agreement. Delivery must also have taken place. The transferrer must have put the transferee in position to take possession of the thing transferred to the exclusion of every one else. This was accomplished in various ways. The actual transfer of physical possession may have taken place, or without the actual change of possession delivery might be brought about by placing the thing to be transferred in sight and telling the transferee to take it. This latter was called delivery longa manu. Another method of transfer was the delivery of the keys of a house which meant either the delivery of the goods within the house or the building, as the case might be. This was known as delivery breve manu.

(*d*) *Specificatio* is where one person has formed a new species from the materials which belonged to another. It is in the broad sense merely a portion or subdivision of accessio, which has already been discussed. The Roman jurists were for some time divided upon the question as to whether the material or the product should be regarded as the principal thing. The opinion seems finally to have prevailed that if the product be capable of being resolved into its original material without injury, then the material is the principal thing, and the workman is entitled to compensation for his labor; but if the product cannot be thus resolved, then the product is regarded as the principal thing

and the workman is liable to the owner of the material for the value of the same, provided he acted in good faith, or for the penalty of theft if he acted mala fide. Of specificatio we may have several cases:—

(1) A makes a thing with materials belonging to B. If the product can be reduced to the materials, it belongs to B; if not, then the product belongs to A.

(2) A weaves into a garment purple belonging to B. If the product is separable, it belongs to B; if not, it belongs to A.

(3) Two owners consent to mix their materials. In this case the product belongs to them in common.

(4) Materials belonging to two different persons become mixed by accident. If separable, as two kinds of wheat, each owns his share and no accession takes place. If inseparable, they own in common.

The following is the list of modes of acquisition recognized by jus civile:—

§ 139. Modes of Acquisition Recognized by Jus Civile.[1]

(1) Cessio in jure.
(2) Usucapio.
(3) Mancipatio.
(4) Adjudicatus.
(5) Lex. (Ulpian's title for a legacy.)
(6) Jus accrescendi or right of accrual.
(7) Donatio.

(1) *Cessio in jure* was obsolete in the time of Justinian and has been already sufficiently discussed.

(2) *Usucapio* or *Præscriptio* is the acquisition of ownership by possession for a certain length of time required by law.[2] It is made use of as a cure for defective title, and ex-

[1] Poste, 159–169; Gaius, II, 15–26. [2] Gaius, II, 40–61.

tinguishes claims which are not prosecuted within the legal limits. Rights, therefore, are both acquired and lost by prescription. To obtain ownership by possession, certain specific conditions must have been fulfilled; Gaius says that prescription was established in order that the titles of property might not remain uncertain. This possession was considered of two kinds: (*a*) naturalis possessio, and (*b*) civilis possessio.

(*a*) By naturalis possessio a Roman understood the mere physical apprehension of a corporeal thing, and such a dealing with it as to exclude every one else. For example, a person who has the key to a granary has the means of going in, to the exclusion of others.

(*b*) When to this naturalis possessio was added a fundamental element, namely, animus domini or sibi habendi, *i.e.*, the intention of the detainer of dealing with the thing detained as owner and not as a person to whom a thing has been pledged, it becomes civilis possessio or legal possession, an interest protected by special legal remedies called interdicts. This civilis possessio was of great importance and ripened into a perfectly good legal title. The remedies or interdicts which were used to enforce the civilis posse were merely announcements of the prætor that he would act upon certain cases directly without referring them to a judex. Of these interdicts there were two kinds:—

(1) Interdictum retinendæ possessionis; granted to a person whose possessions had been threatened or disturbed.

(2) Interdictum recipiendæ possessionis; granted to a person who had been forcibly ejected from his possessions.

The oldest form of usucapio known to the Roman law was that recognized by the Twelve Tables. To establish usucapio under the sanction of this civil law, four conditions must have been fulfilled:—

(1) Possession for sufficient time.
(2) Bona fide et justa causa.
(3) Property acquired must be a res non vitiosa.
(4) There must be capacity for quiritarian ownership both on the part of the person and the thing. In other words, the thing must be a res intra commercium.

In accordance with the law of the Twelve Tables, possession, under the conditions named above, ripened, in case of movables, into ownership in one year. Possession of immovables ripened into ownership in two years. This right by prescription proved to be very valuable in quieting titles and, consequently, putting an end to numerous disputes. It must be kept in mind, however, that Roman law in this respect as well as in others was a manner of gradual growth. The usucapio of the Twelve Tables was an institution of the jus civile and was, of course, confined to Roman citizens, and was applicable only to such things as admitted of quiritary ownership. Thus all provincial soil was excluded from its operation. As a peregrinus could not obtain a thing by quiritarian right, he was excluded from the benefit of usucapio. To meet this difficulty, the prætor invented a new kind of usucapio, known as longi temporis præscriptio. Of this there were two divisions:—

(1) Occupation for ten years, if the parties lived in the same province.

(2) Possession must have been nec clam, nec vi, nec præcario as against the plaintiff. To illustrate this, the following case may be cited: A has had land in his possession, claiming it as owner, for a period of eleven years; B sues for the land, claiming that he owns it. "Where were you living?" asks the judge. "In the same province with A," answers B. "Well, then you are barred by lapse of time," says the judge.

Usucapio was made use of by Justinian in a somewhat different sense. He extended the time of possession for movables to a period of three years. For immovables, provided the parties lived in the same province, he established the time of possession as a period of twenty years. If the parties did not reside in the same province, then the period of possession was extended to thirty years. Justinian confined the term *usucapio* to the possession of movables, while to the possession of immovables he applied the term *præscriptio*. For præscriptio, Justinian further enacted that the possession of property, whether movable or immovable, for a period of thirty years, or in case of the property belonging to the state or minors, for forty years, should constitute ownership whether the property admitted of ordinary usucapio or not.

(3) *Mancipatio* was already obsolete in the time of Justinian and has been sufficiently discussed.

(4) *Adjudicatus* or *Judicatum* was a judgment rendered against a debtor in accordance with the forms of the legis actiones, and entitled the creditor to proceed against his debtor by manus injectio, — arrest and imprisonment. In

the course of time this practice was abolished, and in its stead was substituted an actio judicati against a debtor who failed to satisfy a judgment that had already been obtained against him. By this last process a debtor was adjudged to his creditor to work off his indebtedness. But in case he had funds, a real execution might proceed upon the judgment after the expiration of sixty days of grace.

(5) *Lex* (Ulpian's title for a legacy). The discussion of this topic is postponed until after the consideration of testaments. (See Chap. XIII.)

(6) *Jus Accrescendi*, or right of accrual. Under the old law when one of several testamentary heirs failed, his share went to the others jure accrescendi. In case there were several agnates of the same degree, and some declined the inheritance, their shares went by accretion to those who took under the law. This was a method by which a man's property was sometimes added to by act of the civil law.

(7) *Donatio*. Among the special conventions which might be enforced by a civil action in Roman law, donation was included. Donation consists in one person giving something from a mere spirit of generosity, and without any antecedent obligation, to another who accepts it. The subject of the gift may be either movable or immovable property, or anything having a pecuniary value, such as the release of a debt. In order to constitute donation there must be the animus donandi on the part of the donor, and acceptance, or at least willingness to accept, on the part of the donee. Acceptance, however, may usually be presumed without any formal act. Although donation was considered by Justinian as a distinct mode of acquisition, yet it was not donatio alone, but donatio in combination with and serving as a justa causa for traditio, exactly as an exchange or sale,

which confers dominium. Again it is not necessary that donatio should take the form of conferring dominium; it may consist in the constitution of a jus in re aliena, the transfer of possession the giving of an actionable promise, or the release of a debt. Donation must voluntarily, gratuitously, and intentionally improve the proprietary position of the donee and actually diminish the property of the donor. These three conditions being fulfilled, the donatio may take any form given. There were two kinds of donatio:—

(*a*) Donatio mortis causa.
(*b*) Donatio inter vivos.[1]

(*a*) Donatio mortis causa is a gift made in anticipation of death and is revocable at any time before that event. It stands halfway between a legacy and a gift inter vivos. According to Justinian two essential conditions must be fulfilled:—

(1) Donatio must be made with the view of meeting death.
(2) It must be made to take effect only in case of death, revocable at any time previous, and if the recipient dies before the giver the donatio is void.

(*b*) Donatio inter vivos is, as a general rule, irrevocable unless the recipient proved ungrateful. Under such conditions it might be recalled. A mere promise to give, without the actual transfer of the thing given could be enforced by an action, and Justinian said that delivery was not required for the perfection of a gift. Gifts were forbidden by customary law between husband and wife, but some modifications arose in the later empire.

A new donatio known as donatio ante or propter nuptias was gradually developed. It is first heard of in a constitu-

[1] Poste, 390.

tion of Theodosius II, where it is spoken of as already recognized by law. It was a gift on the part of the husband as an equivalent to the dos on the part of the wife. A woman had a legal claim against her husband or pater familias for the donatio propter nuptias equivalent to the dos. During the marriage the husband had control of this, but he could not alienate land or houses contained within it, even with the consent of his wife.

The usual method of acquiring property is through one's own activity. Indeed, it was the general rule that a person sui juris could always acquire dominium by himself, but not through others. There were, however, certain cases that were exceptions to this rule. These were: —

§ 140. Acquisition of Property through Others.[1]

I. As to persons in potestas nostra.

(1) Whatever a filius familias acquired was acquired for the pater and came to him. Sometimes, however, the pater granted to the filius a small portion of property called peculium. This peculium, under the early Roman law, belonged to the pater, but the son had control of it, and so long as it remained in his possession it was his in so far as it concerned a third party. He could sue and be sued to the extent of his peculium. He could even engage in business, using his peculium as capital, and whatever he gained he gained nominally for himself, but in the eye of the law all this property belonged to the pater. About the time of Augustus the son began to have possessions independently of his pater. This was

[1] Justinian, II, 9; Gaius, II, 2–68.

the property given to the son upon his setting out on a military expedition, together with all he obtained in war. This he could dispose of as he saw fit, and was known in the law as castrense peculium.

(2) There was no further change made for nearly three hundred years, but under Constantine a further privilege was given to the filius familias under the name of quasi peculium castrense. This was an extension of rights similar to those of a soldier to those in civil positions. This law applied to the salary of an officer of the palace as well as salaries and earnings in the learned professions. In the time of Justinian the quasi peculium castrense differed from the castrense peculium in that it could not be willed, but only belonged to certain persons. Justinian did away with this distinction and made this also disposable of by will.

(3) Peculium adventitium was established by Constantine. This was everything belonging to a filius familias by his mother's line, no matter in what way obtained. Other emperors included in it everything received either by succession or gift from one married person to another (dos and donatio propter nuptias). Justinian further included in the peculium adventitium everything that the filius gained in every way save from his father (ex re patris). Thus it is seen that in the time of Justinian a child might have rights over property of three kinds: (*a*) one of which he controlled absolutely; (*b*) the second one vested the nuda propriatas in him, but the usufruct in the pater;

and (*c*) lastly, the peculium profectitium or property of the pater which could be resumed by him at will and the use of which merely he had granted to his son. In this last the son had a right, but no legal one. If the son were emancipated, the pater obtained, by the old law, one third of the son's peculium adventitium. Justinian changed this, granting to the pater the usufruct of one half, but still vesting the dominium in the son.

II. Persons subject to manus or mancipium acquired both dominium and obligatio for the person to whom they were subject in any and every form whatsoever.

III. Slaves in whom a person has the usufruct acquire for such person in two ways: (1) Ex re nostra, *i.e.*, by administering the property of the usufructuary; and (2) Ex operibus suis, *i.e.*, by their labor.

IV. Slaves and freemen whom we have bona fide in our possession are in the same position toward us as is the servus to the usufructuarius in 'III.' When they acquire by any other mode than the ones mentioned, they acquire, the one for his dominus, the other for himself.

V. Slaves in whom a person has the nuda propriatas acquire for that person all that is not fructus.

VI. Slaves in whom one man has bonorum possessio and another man has dominium ex jure quiritium, acquire for the person having bonorum possessio.

VII. Extraneæ personæ acquire by their own acts only for themselves unless they act as agents for other persons.

Alienation is the right or power to sell or dispose of any property which a person has under his dominion. The law in its ordinary course allows an owner to dispose of his property as he sees fit. However, there are some conditions under which a person who is owner could not alienate his property. A husband could not alienate the immovables that formed a part of the dos of his wife, although the ownership vested in him. The dos which the wife brought to him as common stock belonged to the husband. The lex Julia, A.D. 9, prevented a husband selling immovables in Italico solo without the consent of his wife, nor could he even place a mortgage on such property without her consent. Justinian went further than this and enacted that immovables wherever situated that formed a part of the dos of the wife or the donatio propter nuptias could not be sold or mortgaged by the husband, even with his wife's consent.

§ 141. Alienation.[1]

The general rule was that no pupil of either sex could alienate anything without the consent of the guardian, but he could acquire property in anything transferred to him by a third party.

A woman, in the time of Gaius, could not alienate res mancipi without the action of her tutor. This restriction upon the power of a woman to alienate her property was removed in the later empire, and she was permitted the same freedom of alienation that belonged to a man.

A person not owner of property was sometimes able to alienate it. An agent who was the curator of a lunatic might alienate the property of his ward under the Twelve Tables. An agent when he had vested in him the power of attorney could sell the principal's goods. A creditor might

[1] Justinian, II, 8; Gaius, II, 62–85.

alienate the possession which had been pledged or mortgaged to him, although he was not the owner of it. Justinian enacted that, unless persons otherwise agreed, the sale of property held by pledge or mortgage should take place two years after notice to pay had been made. In case no purchaser could be found, then the creditor became the owner of the thing pledged or mortgaged. Thus a perfected title was obtained in a manner not unlike usucapio.

CHAPTER X

JURA IN RE ALIENA[1]

THE varying conditions of human intercourse cannot be permanently satisfied by ownership alone. It must be possible for a person to deal in a manner authorized by law with things which belong to others. This condition is in a measure satisfied by the process of supplementing our own property by the property of other persons without acquiring ownership in their property. This has been done to a certain extent by the development of obligations entered into with the owner, such as agreement to let or to lease. But in all such cases the right which we acquire is merely an obligation, and it is available only against the person bound by the obligation. This is made clear by the following example: If a lessee is disturbed in the possession and enjoyment of his lands by a person other than the lessor, his rights as lessee do not, in Roman law, entitle him to sue the disturber. He can only address himself to the lessor, so that the latter may interfere to prevent the disturbance and, if necessary, take legal proceedings. In other words, the person granting the lease is bound by obligation to guarantee the lessee in the undisturbed possession of the thing leased. It will be seen that this kind of a transaction is in effect merely personal and is unsatisfactory to this extent.

§ 142. Jura in Re Aliena in General.

[1] Poste, 154–157; Roby, 467–483, 490–506.

It was for the purpose of satisfying this want that real rights in re aliena were developed. Rights thus established in regard to the thing are stronger than those depending merely upon obligation, because they are directly operative and enforceable as against any third party. This chapter has to deal with these real rights in re aliena. The common characteristic, legally speaking, of all such rights, and that which distinguishes them from ownership in general, is this, that the rights of control over things which they confer are limited in regard to their contents, even though they are directly available against any other person who interferes with them.

The jura in re aliena which have been developed in Roman law are comparatively few in number. They are:—

(1) Servitudes.
(2) Emphyteusis.
(3) Superficies.
(4) Pledge.

§ 143. Servitudes.[1]

"The object of servitudes is to enable persons other than the owner of a thing to share in the benefits derivable from the use of that thing, while preserving the interests of the owner as fully as possible." By this ownership is somewhat curtailed and is not left absolutely free, though, at the same time, its economic effect is not done away with. These may all be regarded as detached fractions of property, portions of the right of dominion taken from the proprietor and vested in another person. But it must not be lost sight of that ownership is still the dominating right. The only jura in re aliena known to the early civil law were servitudes. All the others were

[1] Moyle, 204–210; Justinian, II–V; Poste, 155–168.

developed at a later period in Roman history, either by the prætor or by the legislation of the later empire. Whenever the enjoyment of the owner was curtailed, his property was said to be in servitude (res servit). Whenever the enjoyment of ownership was in no way restricted, the property was said to be free from any servitude. The restrictions which were imposed upon servitudes in the interests of ownership were twofold. In the first place servitudes conferred upon the person entitled certain specific and clearly defined rights of usufruct. Beyond these well-defined limits the person enjoying the servitude could not go. In the second place, servitudes were inalienable and non-transmissible, being annexed to a definite subject whose destruction entailed the destruction of the right. When the person who possessed the servitude died, the servitude also perished.

The subject of a servitude was determined in one of two different ways. It was either a definite person, or it was determined by reference to a thing. This gave rise to two classes of servitudes: (1) personal servitude, and (2) prædial servitudes.

(1) *Personal servitudes.* A personal servitude was given to an individual for his enjoyment, and died with him. It was therefore a right enjoyed for a lifetime. The important servitudes are:—

(*a*) Usus fructus.
(*b*) Usus.
(*c*) Habitatio.
(*d*) Operæ servorum.

(*a*) Usus fructus. A usufruct is the right of using and taking the fruits of anything that is not con-

sumed by use during the lifetime of the person receiving, unless another time is fixed. A person having the ownership of property in which another has a usufruct is called simply dominus, or more properly dominus proprietatis nudæ. A person having the usufruct is called fructuarius, while the property is called res fructuaria. The fructuarius was entitled by Roman law to choose whether he would have the use and the fruits as they were or the same in the shape of a money equivalent; that is, by selling or letting the exercise of the usufruct to a third party. After the expiration of the usufruct the thing had to be restored. As this was the case, things that were consumable did not admit of a usufruct.

A usufruct might be established not only in a field or a house, but also in slaves and beasts, and, in fine, in everything except what was consumed by the very fact of use.

(*b*) A usus confers a real right to enjoy and take the fruits of a thing not one's own, so far as is necessary for the satisfaction of the usuary's personal requirements. This lasted at most for a lifetime. A usuary was barred on principle from letting or selling. He had to give security that he would restore the thing after the expiry of the usus, and that he would exercise care in using the thing, with the alternative of paying whatever damages were incurred.

It was understood that a person who had the use of a house could dwell in the house himself, but could not transfer this right to another. His wife

and children might dwell in the house with him, as well as freedmen and servants, but he was not permitted to entertain guests or lodgers.

(*c*) Habitatio is a real right, existing at most for a lifetime, to live in a house not one's own, but to live there after the manner of a person entitled to maintenance. Papinian observes that the right of habitation is scarcely to be distinguished from the right of using a house. Anciently it was supposed to be a grant for one year only, but it was ultimately put on the same footing as usufruct. A usuary of a house had the right to determine for himself in what manner and in what part of the house he would live, while in the case of habitatio it was the owner of the house who determined in what manner and in what part of the house the habitator should dwell. But the habitator was entitled to let out to others the rooms assigned to him for habitation instead of occupying them himself. He was, in other words, permitted to realize, in the shape of money equivalent, the benefit which was conferred upon him.

(*d*) Operæ servorum was a limited right to the use of another person's slave. It was, like habitatio, a real right, at most for a lifetime, to make use of the working powers of another man's slave, either by accepting his services, or by letting them out to others. This right was extinguished by the person suffering a capitis deminutio minima.

(2) *Prædial servitudes.*[1] "A prædial servitude is a definite right of enjoyment of one man's land by the owner

[1] Poste, 154–157; Justinian, II, 1.

of adjoining land; including in the term *land* also houses. The land subject to this right is called prædium serviens, and the land to which the right is attached is called prædium dominans." The name 'prædial' is attached to these servitudes, because they cannot exist without landed estates. No one can acquire a prædial servitude in either town or country unless he has landed estates, nor can a person become subject to prædial servitude unless he is the owner of a landed estate. The lands must also adjoin each other, or a prædial servitude cannot exist, and a prædial servitude is restricted in its enjoyment to that to which it is attached. Prædial servitudes are divided for convenience into: (*a*) rural servitudes, and (*b*) urban servitudes.

(*a*) Rural servitudes are for the most part rights of way, rights of aqueduct, and rights of drawing water on another's land.

(*b*) Urban servitudes are for the most part the right to prevent buildings being raised above a certain height on the adjoining land; the right to place a beam on which a story rests on a neighboring wall; the right to use a neighboring wall to support one's own; and the right to let rainwater drop on a neighbor's premises. In all these cases one piece of land is said to 'serve' another. For this reason the land on which the servitude is imposed is called the prædium serviens, and the land which has the benefit of the servitude is called the prædium dominans. The situation of these lands must be such that one can be of use to the other. It is also required that the advantage which the prædium dominans derives from the prædium serviens shall arise from the permanent character of the latter,

and, conversely, that the benefits of the servitude shall exist, not only for this or that owner, but for every owner of the prædium dominans. There cannot exist any servitude where the object is merely to satisfy the wants of the present owner.

In accordance with the Roman civil law there is only one way in which a genuine servitude can be created by agreement.[1] This is by in jure cessio, or, in other words, by a fictitious vindicatio of the servitude followed by a confession on the part of the fictitious defendant, and an addictio of the prætor or judgment of the judex in favor of the fictitious plaintiff. Acquisition of Servitudes.

According to the prætorian law of a later date no such formal juristic act as that mentioned above was required. It was sufficient, if the servitude were actually granted by one party and exercised by the other. The forms of the civil law were not available in this case, nor were they called upon. The prætorian law was made use of chiefly in the province where the soil did not admit of genuine private ownership.

In addition to agreements, we also have the following modes of acquiring servitudes:—

1. *Legacy.* The civil law required in this case that the direct and solemn form of legatum per vindicationem should be made use of.
2. *Adjudicatio.* This was made use of in proceedings to partition an estate. An example of this would be when a judge, for purposes of partition, awards the ownership to one party and a usufruct to another, or when he, in case of an actual partition

[1] Justinian, II, 4; Poste, 165–166.

of the land, awards the respective owners mutual prædial servitudes.

3. *Usucapio.* The magisterial law extended the application of longi temporis possessio to servitudes. A servitude was acquired if exercised for ten years inter præsentes, or for twenty years inter absentes, nec vi, nec clam, nec precario.

Extinction of Servitudes.

A servitude was extinguished:[1] (1) by the death of the person entitled to it, where the servitude was personal; (2) by confusio, when the person entitled to the servitude acquired ownership in the thing, or when the owner acquired the right of the servitude; (3) by release to the owner of the thing in servitude; (4) by bequest of the exemption from the servitude; (5) by non usus, *i.e.*, non-exercise of the right per longum tempus.

Protection of Servitudes.

Servitudes were protected by means of the actio confessoria in rem.[2] The plaintiff in this action was bound to maintain and prove his title to the servitude. The condemnation ordered the disturber to pay damages, to recognize the servitude, and to discontinue all further acts of disturbance. The owner could employ an actio negatoria in order to stop any other disturbance of his ownership. Particular servitudes were protected by possessory remedies or interdicts granted without proof of legal title, on the ground of the juristic possession of the servitude alone. Juristic possession was the actual exercise of the servitude coupled with the intention of acting as a person entitled to such servitude.

[1] Poste, 169–170.
[2] *Ibid.*, *loc. cit.*; Gaius, IV, 3.

The tenure which was afterwards called emphyteusis is to be traced to the long or perpetual leases of lands which had been captured in war, granted by the Roman State. The word itself is from the Greek ἐμφυτεύειν, to plant, to cultivate. The expression as here used occurs for the first time in a passage of Ulpian. The rent given for such land was called vectigal and the land itself ager vectigalis. The advantages of this perpetual lease were appreciated by corporations, both ecclesiastical and municipal. The governing bodies of towns let out in this manner the lands which belonged to the community for an indefinite term of years, subject to the payment of an annual rent. Subsequently this system was extended to the vast domains of the emperor, whenever it was desired to have uncultivated lands made arable (emphyteusis). There were at first doubts in the minds of Roman jurists as to whether emphyteusis was a sale or merely a hire of the land. This doubt was put to rest by an enactment of the emperor Zeno to the effect that the agreement between the emphyteuta and the dominus was a special kind of juristic act and was placed in a category by itself. Thus the legal relationship created by emphyteusis was sui generis, and was governed by rules of its own.

§ 144. Emphyteusis.[1]

Though not the owner of the land, the emphyteuta was nevertheless entitled to exercise all the rights of an owner, so that, practically, he stands to the land, as long as his right lasts, in the same relation as though he were actually the owner. He had the full right to take not only the fruits, but all the produce of the land, and consequently also the right to make improvements and to change the manner of cultivation. These

Rights of an Emphyteuta.

[1] Gaius, III, 145; Justinian, III, 24, 3.

features distinguish the powers of the emphyteuta from those of the usufructuary, and the mere lessee for a short term of years, as these persons did not enjoy the right to change the method of culture. The emphyteuta might, if he chose, sell the fruits of the field for a money equivalent, or sublet portions of the land under inferior tenures. He could enforce his rights the same as if he were the owner by means of the possessory interdicts. In fact, his possession was in every way equal to that of the owner.

While the emphyteuta enjoyed the numerous rights given above, he also had numerous duties devolving upon him.

Duties of the Emphyteuta.

These were as follows: (1) he must pay his annual rent (vectigal); (2) he must not deteriorate or depreciate the value of the property; (3) he is bound to give his landlord notice of his intention to dispose of his rights as perpetual lessee, so that the landlord may, if he so wills, exercise his right of preëmption. If the emphyteuta failed in any of these duties, the landlord might deprive him of his rights as perpetual lessee and relet the property to another person. This, however, could not be done without a fair opportunity being given the emphyteuta to make good. For instance, he could not be dispossessed for failure to pay his rent unless the rent had fallen into arrears for three years.

Superficies stands in the same relation to houses that emphyteusis does to agricultural land. In Roman law superficies is a perpetual lease of building land, subject to the payment of an annual rent known as solarium. Upon this land the superficiary erects a house out of materials belonging to himself. By the rules of accession, already explained, the ownership of the house

§ 145. Superficies.[1]

[1] Poste, 157, 619.

vests in the owner of the soil, since the land upon which the house is built is deemed greater or more valuable than the house. However, the superficiary is possessed of a real right for himself and his heirs, to live in the house and exercise all the rights of ownership therein for the specified term of years (as, for instance, three generations or ninety-nine years) or forever, as the case may be. It appears from this that the legal position of the superficiary is the same as that of the emphyteuta. He enjoys the same legal remedies as the owner, and his possession is expressly protected by the same process of interdict as was that of the emphyteuta. He can execute all necessary repairs and alterations in the house, provided he does not deteriorate the value of the property. He has the control of the house, can sublet it for a limited term of years, and, in fact, enjoys the juristic possession of the house in precisely the same way as if he were the owner. All the statements that have been made in reference to emphyteusis can be made with equal force touching superficies.

A right of pledge is a real right which enables the person entitled to secure payment of a claim through the medium of a thing. The early Roman law knew no such thing as a right of pledge in any modern sense of the word. There were certain acts performed, the economic result of which was the creation of a pledge; the securing of a claim by means of the deposit of a thing which was considered of equal, or even greater, value. But there was no juristic act the formal object of which was to create a right of pledge over a thing.

§ 146. Pledge.[1] History of Pledges.

[1] Gaius, III, 203, 204, II, 64; Justinian, II, 8, 1, III, 14, 4, III, 19, 20, IV, 1, 14.

Forms of Pledge.

In later times three forms of pledge were made use of. These were; (1) fiducia, (2) pignus, and (3) hypotheca.

(1) *Fiducia.* If a person wished to obtain credit by giving his creditor security for his claim, he could accomplish his purpose by mancipating a thing to the creditor, *i.e.*, by conveying to him the ownership of the thing, subject, however, to an understanding that as soon as he (the debtor) discharged his liability, the creditor should reconvey to him the thing pledged. The mancipatio was in this way a mancipatio on trust (fiducia). By this process the creditor was made absolutely safe, since the ownership of the thing deposited in security was absolutely vested in him. He could deal with it as he saw fit. He could sell it in satisfaction of his claim against the debtor. But while the position of the creditor was made secure, that of the debtor was unsatisfactory. He might pay his debt in due time, but he could never be sure of recovering the property he had parted with as security for his debt. The creditor might have already disposed of the thing either by sale or exchange. In such a case the creditor was bound to compensate him for any loss sustained, but as regards the thing itself that was pledged, the debtor had no remedy. The dissatisfaction growing out of this gave rise to a second method of securing creditors for their claims. This was pignus.

(2) *Pignus.* The second method of granting security without the transfer of ownership in the thing pledged was known as pignus. This was accomplished by mere traditio in such a manner as to confer on the creditor, not the ownership of the thing, but simply the complete actual control of the thing, juristic possession. Here the position of the debtor was made satisfactory as well as that of the creditor.

He retained his ownership and, with it, a real right to recover his property from any one who obtained possession of it. So soon as he paid his debt, no one had the right to withhold from him the thing pledged. In this case the position of the creditor was not so satisfactory as under fiducia. He had, indeed, actual possession of the thing, and the prætor protected him in this possession by means of the possessory interdicts. But he had no real right in the thing, and could not, therefore, make use of the ordinary actio in rem against any third party. Moreover, he could not dispose of the thing with a view to satisfying his claim. In case the debtor defaulted he could not sell the pledge and so recoup himself out of the proceeds. Further, if the debtor preferred leaving the thing with the creditor to paying his debt, the pignus was of no use to the creditor at all. It became necessary, by reason of this unsatisfactory side to pignus, to discover a new transaction under which, though the debtor retained the ownership of the thing, and, with it, a real right to recover it from a third party, the creditor could nevertheless acquire a right in the thing, or remedy, if necessity arose, to realize its value for the purpose of satisfying his claim, in a word, a right of pledge, in the true sense of the term.

(3) *Hypotheca.*[1] The difficulty which was involved in the question of pignus was solved with the aid of the prætorian edict. The debtor was able to enter into an agreement with the creditor by the terms of which certain things belonging to him (the debtor) could be made to serve the creditor as a 'hypotheca'; that is, should serve as a means of satisfying the creditor's claim in case the debtor failed to pay. Such a relation was called 'hypotheca,' which term was borrowed from the Greek law. In the early republic such an agreement

[1] Gaius, IV, 147.

could never have been made, and had it been entered into, it would have been legally void. But the development of the prætorian edict made this natural sort of a compact legal. The prætor enabled the creditor to obtain possession of the things pledged by granting him the so-called 'interdictum Salvianum,' as well as an ordinary legal remedy called the 'actio Serviana.' Protection was also extended to any person to whom property had been hypothecated by another. In this manner, in accordance with the prætorian law, hypotheca gave the creditor, in the first place, a real right of action, which enabled him, on non-payment of the debt, to obtain possession of the thing hypothecated; and, in the second place, it gave him a right of sale, *i.e.*, a right to realize the value of the thing for the purpose of satisfying his claim. Thus the creditor had all the rights he required, and at the same time the interests of the debtor were protected by the fact that he retained his ownership and, with it, the real right to recover his property from any third party into whose hands it might come. This was nothing more nor less than the modern mortgage. No transference of the thing into the possession of the creditor was necessary. The whole transaction rested upon mutual agreement.

TITLE 2. *Hereditas or Inheritance*

CHAPTER XI

HEREDITARY SUCCESSION[1]

THERE are two kinds of succession recognized in the Roman law — testamentary and legal. When a person by a testament appoints heirs to succeed to his estate after his death, they are preferred by reason of this special destination of the proprietor; this is called testamentary succession. If the deceased has left no will, his estate is devolved upon his relations in a certain order prescribed by law, from a presumption that they would have been called by the deceased had he made a destination. This is termed legal succession, or succession ab intestato.

§ 147. Kinds of Succession.

The fundamental idea which lies at the base of proprietary rights and proprietary liabilities is the idea of immortality. An owner may die, but his ownership survives him; a debtor may pass away, but his debt remains. In this respect the rights and duties of private law differ from those of public and family law, as it is a principle of the rights and duties incident to public and family law that they perish with the person to whom they are attached; while it is a characteristic of a private right and a private liability that they can survive their subject and can pass to a new subject. This is but another way of stating that property is not destroyed by the death of the proprietor.

§ 148. Foundation and Conception.

[1] Mackenzie, 273–284; Roby, 171–287; Hunter, 739–874.

This circumstance is explained by the fact that though the individual may die, the family to which he belongs survives. It has been shown in a previous chapter that in ancient times the family was sole owner; individual ownership was unknown, and common ownership was the only recognized form. This community of goods on the part of the family developed in the course of time into the common ownership of the community, on the one hand, and the private ownership of the individual, on the other. The rights granted to the family in the law of inheritance give clear testimony to the influence of this original conception of family ownership on the law of private ownership. The true owner of the property was not removed by the death of the individual, because the family continued to exist, and as they were coöwners of the estate, it might be that the property never changed hands.

As time went on, the idea of private ownership outstripped the traditional conception of family ownership, and the individual was allowed, through the medium of a will, to realize his absolute right of disposition as against the family, even after his death. It would appear from this brief sketch that intestate succession must have been much older than testate, and this is undoubtedly true. And yet testaments are of very high antiquity and are mentioned in Roman law before the legislation of the decemvirs. The Twelve Tables recognize the power of the owner to dispose of his property by will in these words; "Uti legassit super pecunia tutelave suæ rei, ita ius esto." A testament is a declaration of the testator's last will made according to the formalities prescribed by law, and containing the appointment of a testamentary heir or executor. According to Modestinus; "Testamentum est voluntatis nostræ iusta sententia de eo, quod quis post mortem suam fieri velit." Testate succession was allowed to take place

only upon the failure of persons entitled to have the inheritance by right of blood, whether genuine or fictitious, and, consequently, testators were compelled to satisfy, to some extent at least, the just demands of their nearest relations. This was in the interest of the community, as it was a matter of public concern that the nearest relations of the deceased who depended upon him when alive for their sustenance should not be deprived of his property without good and sufficient reasons.

§ 149. Universal Succession.

In Roman jurisprudence succession takes the form of universal succession.[1] When a Roman died, the heir or heirs succeeded to all his property as a unit (hereditas) with all its rights and liabilities. The institution of an heir in a testament was a formality that could not be dispensed with. The testator might appoint any number of heirs and divide his estate into as many parts as he saw fit. The whole inheritance was called *as*, and was usually divided into twelve parts called unciæ. Of these unciæ or twelfths: —

2 = sextans, sextantis.
3 = quadrans, quadrantis.
4 = triens, trientis.
5 = quincunx, cuincunctis.
6 = semis, semissis.
8 = hes, hesis.
9 = dodrans, dodrantis.
10 = dextans, dextantis.
11 = deunx, deunctis.

Hence the heres ex ase is heir to the whole of a man's property, heres ex semisse, to the half, and so forth.

[1] Roby, 171–175.

§ 150. Chronological Order in the Development of Testamentum.

There were three modes of making wills in use among the Romans in the earliest times.[1] These were: (1) wills made before the comitia calata; (2) testamenta in procinctu facta; and (3) testamenta per æs et libram.

Ancient Forms.

(1) The oldest of all wills were those made before the general assembly of the people, called comitia calata, which were held twice a year for the purpose. Aulus Gellius says; "This was the mode in which the patricians made their wills before the time of the Twelve Tables. The comitia calata consisted of the same members as the comitia curiata, but were so called (from *calare*, to summon) when convened by the pontiffs for the purpose of witnessing wills and other business. In these early times, when the art of writing was little known or practiced, the testament usually consisted of an oral declaration, and it was therefore desirable that its tenor should be known to as many witnesses as possible." This was a legal act either when the testator had no heirs discoverable, or when they had waived their claim.

(2) Testamenta in procinctu facta. These were wills made by soldiers upon the eve of battle, as the army was about to set forth to meet the enemy. They were made in the presence of their companions and were considered as perfectly legal.

(3) Testamentum per æs et libram. This consisted of an imaginary sale of the inheritance by the testator to the intended successor, in the presence of the balance-holder and five witnesses. As the name would imply, this method came into use some time after the Servian reforms. There were three forms of this testament in use: —

[1] Gaius, II, 97, III, 82.

(*a*) Originally a bona fide conveyance, taking effect in the lifetime of the testator and giving the whole property to the familiæ emptor. By this method the inheritance at once vested in the heir. There was no secrecy observed, and, in this way, many heres obtained the entire property of the testator and disposed of it in ways not at all conducive to his happiness. It was doubtless for this reason that a change was made.

(*b*) The conveyance was next made revocable and did not take place until after the death of the testator, the latter no doubt making a reservation of property sufficient to support him during the remainder of his life.

(*c*) Finally, the conveyance was revocable and did not take place until after the death of the testator. Moreover, the familiæ emptor was a different person from the heres and simply acted as his trustee. This testament was at first made orally to the familiæ emptor, who also made his responses orally. The responses of a buyer in an ordinary mancipatio embraced two main points: (1) the assertion on his part of absolute ownership; (2) an assertion of purchase for his own benefit as his title to that ownership. The responses of the familiæ emptor were different from this. In the first place, it was an assertion of trusteeship; "I declare your patrimony and money to be in my charge, guardianship, and property." In the second place, it was an assertion of purchase for a purely ceremonial object.

In the process of time the oral forms mentioned above were

superseded by the introduction of written wills properly attested, which, after being recognized by the prætors, were regulated by constitutions of the emperors.[1] These wills required to be signed by the testator, or some person acting for him, in the presence of seven witnesses, called together for the purpose, who attested the same under their hands and seals. Wills made in such a manner were called prætorian sealed wills, as the prætor always enforced such wills. Moyle claims that as these wills were not recognized by the civil law, they cannot be classed as wills in any proper sense.

Wills in Writing.

Prætorian Sealed Wills.

Besides the written wills already mentioned, there is another kind given in Justinian which was ordained by Theodosius II and Valentinian III, although it must have been in use some time before that (439).[2] This was commonly called testamentum tripertitum. This testament had to be in writing, signed at the foot by the testator and seven witnesses at one and the same time and, lastly, had to be sealed by seven witnesses. This ceremony passed the civil law universitas or hereditas, and the person taking under it was heres and not merely bonorum possessor, as was the case in that given above. It was called 'tripertitum' because it was derived from three branches of the law: (1) seven witnesses all present from the civil law; (2) sealing and number of witnesses from the prætorian law; (3) signing by testator and seven witnesses at foot from the Imperial constitution.

Testamentum Tripertitum.

In the time of Justinian another form of will was introduced. This was the private nuncipative will, which was merely an oral declaration in the presence of seven witnesses. It was, apparently, only

Private Nuncipative Will.

[1] Moyle, 236.

[2] Gaius, II, 103–104.

made use of in special cases, but it passed the civil law hereditas, and the person taking under it was heres and not merely bonorum possessor.

Shortly after the establishment of the private nuncipative will, there was recognized the public nuncipative will, where a person without any formality declared his last will and testament in the presence of a magistrate or had a memorandum of the same entered with the records of the court.

Public Nuncipative Will.

All written wills might be written on a tablet of wax or, indeed, any substance capable of receiving legible characters. Women and all persons under the power of the testators, the heir and his family, were disabled from being witnesses to the will.

Such were the formal testaments in use among the Romans. But wills could be made without the formalities in certain privileged cases.[1] These were four in number and are considered without regard to time. (1) Testamentum militarium. It is impossible to tell at what time the testamentum militarium came into use, but it was evidently quite old. When military persons were engaged in actual service against an enemy, they might make their wills without any of the ordinary formalities. All that was required was sufficient evidence of their intention regarding the disposal of their property after death. Such wills were only valid for one year after the discharge of the testator from the army.

Privileged Wills.

During the prevalence of a pestilence or contagious disease, the presence of all the seven witnesses at one time and place was dispensed with. It was deemed sufficient if each witness in succession attached his name and seal to the will.

[1] Justinian, II, 11.

In rural districts, when seven qualified witnesses could not be found, the number might be reduced to five, and one witness might sign for those who could not write. This latter modification was introduced to accommodate the many persons dwelling in the country who were unable to read or write.

If a will was made by a parent for distributing his property solely among his children or other descendants, no witnesses were required, provided the testator wrote the will himself, or filled up in his own handwriting the date of its execution, with the names and portions of the children. But a legacy left to a stranger in such a will was necessarily void.

The legal validity of a testament depended upon the testamenti factio or legal capacity of those concerned in the production and execution of the testament. This legal capacity may best be considered in its relation to three persons: (1) the testator, (2) the heir, and (3) the witnesses.

§ 151. Formal Validity of Testaments.[1]

(1) Testamenti factio activa, or legal capacity of the testator, involved domestic independence, the possession of a mature and sound mind, and the exercise of free will. Persons incapacitated from making a will were thus slaves, persons under power, except as regards their peculium, pupils, spendthrifts, and persons both deaf and dumb. There was also included in this class persons who were not in the possession of full consciousness and those who acted under restraint.

(2) Testamenti factio passiva, or legal capacity of the heir, was less restricted than was 'activa,' as the capacity to receive property is far more extended than the capacity to dispose of it. The chief conditions required in order that a person might be made heir in the time of Justinian were that he be specifi-

[1] Justinian, II, 12, 1–4.

cally appointed in the testament, and that he be capable of holding property.

(3) Testamenti factio relativa, or legal capacity of witness, was possessed by all persons not expressly disqualified by law. Persons thus disqualified were slaves, impubes, women, those instituted as heirs, those under the power of the testator, and persons deaf, dumb, blind, or insane. Women had full legal independence and equality with men in nearly everything else, in the law of Rome at the time of Justinian, save this.

Some further modifications of the testator's power were that he must be in the enjoyment of commercium and be sui juris both at the time of making the will and at the time of his death. The heres must be possessed of commercium and be in the enjoyment of 'passiva' at the time of the making of the will, at the time of the death of the testator, and at the time of accession.

A testament made by a man in captivity was invalid, but if he had made a will before he became a captive, it was valid provided he returned. If he did not return, but died in captivity, the will was naturally voided, but was invalidated by a deduction from the lex Cornelia de Falsis.

The validity of the Roman will depended not merely upon the formal conditions just mentioned; § 152. there were besides certain conditions relating to the contents of the testament that must be observed. The provisions upon this subject relate to:—

Necessary Contents of the Testament.[1]

I. The disherison of heirs.
II. The institution of heirs.
III. The substitution of heirs.

[1] Mackenzie, 280–284.

By the ancient law, if a father of a family wished to deprive his children of the succession, he was obliged to declare his intention by formally disinheriting them in his will. At first, sons under the father's power were disinherited by name, so as to prevent any error; but daughters and grandchildren might be disinherited in general terms (ceteri). This law was doubtless based upon the fact that the children were, in a certain sense, co-proprietors of the family estate and were, consequently, at the death of the father, presumptively entitled to succeed to the inheritance. This principle still retained an influence upon the law even after the father had obtained larger testamentary powers, so that if he desired to appoint other persons as heirs, he could do so only by formally setting aside those who had a natural claim to the estate. This provision was necessary to prevent the will from being void from the beginning; but it left open the question as to the justness of the disinherison, and it did not, consequently, prevent the will from being invalidated by an action. In discussing the various classes that took under a will, unless disinherited, we will first consider them under the laws governing prior to the time of Justinian, and then note the changes made by him.

I. Disherison of Heirs.

(1) Prior to the time of Justinian:—

(*a*) Sui heredes, or those who became sui juris at the father's death, were in two classes: (1) filii familias, or sons in potestas, had to be disinherited by name (nominatim), otherwise the will was void; (2) filiæ familias, or daughters in potestas, were disinherited in a general phrase and not by name (ceteri). They were apparently not deemed of sufficient importance to mention specifically. However, the

will was not voided by their being passed over, but in that case they took share and share alike with those properly mentioned.

(*b*) Those who became sui heredes after the making of the will must be disinherited by anticipation. Of these there were two classes: (1) postumi proper, *i.e.*, those born to the testator after the will was made, and (2) postumorum suorum loco, *i.e.*, those adopted, and children legitimated after the will was made.

(*c*) Filii familias and filiæ familias who "in sui heredes locum succedendo — fiunt." "For instance, if a testator had a son and by him a grandson or granddaughter under his power, the son has the right of self-succession, though the grandson and granddaughter are equally in the ancestor's power. But if the son die in the lifetime of the testator, or by any other means pass out of the testator's power, the grandson and granddaughter succeed to his place and thus acquire the rights of self-successors to the testator." Male postumi must be disinherited by a special form which was invented by the jurist, Gallus Aquilius, for the express purpose of providing for a son dying before the testator and then, the testator dying, a son afterwards being born to the testator's son. This is the form: "If my son die in my lifetime, if any grandson be born to me within ten months, let him be my heir or (let him be disinherited)."

(*d*) Emancipated children. Under the old law emancipated children did not share in the inheritance, so that it was not necessary to name them as heirs or disinherit them, in order to secure the validity of a will. They were simply passed over. Prætorian legislation, however, admitted emancipated children to share in the inheritance. If, however, emancipated children were passed over, the prætor,

instead of declaring the will void, granted them the right of 'possession contrary to the will' (bonorum contra tabulas). Emancipated children had, therefore, to be disinherited by special mention.

(*e*) Adopted children prior to the time of Justinian. The general principle of disinherison was applicable to adopted children. By the old law children by adoption acquired, as a matter of course, the same legal position as children by birth, but the tendency of later legislation was to lessen the legal importance of adoption. Up to the time of Justinian the adoptatus was cut off from any part of his natural father's estate. By Justinian's laws he still retained a right to the estate of his father and also acquired a right in that of his adopted father only in case the latter died intestate. Prior to Justinian, therefore, the adopted child had to be instituted heir or disinherited by special mention by his adopted father; after the time of Justinian, he had to be instituted or disinherited by his natural father just the same as any other child.

(2) After the time of Justinian:—

Justinian abolished all distinctions between males and females and provided that all heirs must be disinherited by name, and, further, the testament was rendered invalid by the omission of any one of the heirs of any class.

According to the strict rule of the Roman law, no will was effectual unless one or more persons were appointed heirs to represent the deceased.[1] The testator might appoint one heir or any number of heirs. No one except a soldier could die partly testate and partly intestate. The heirs instituted might be either the

II. Legal Institution of Heirs.

[1] Roby, 187.

natural heirs or, if these had been properly disinherited, any other persons who possessed the proper legal qualifications to hold property. A master might appoint his own slave as heir, but a mistress could not appoint a slave as heir who had been accused of adultery with her till after he had been acquitted. The institution of an heir is the pivotal point of a will. In sketching the provisions of the law relating to the institutions of heirs and its effect upon the vesting of the estate, we must notice specially two points: (1) whether the heirship is conferred upon one person or upon more than one, and (2) whether it is conferred absolutely or conditionally.

(1) If a single person is instituted heir, the estate remains undivided and the entire ownership rests in the heir, after the burdens resting upon the estate have been removed. If more than one person has been instituted, the estate is shared between them in the proportions indicated by the testator. If the testator has made no provision, all will participate equally in the inheritance. If it be the wish of the testator that the heirs receive unequally, the estate is ideally divided into certain aliquot parts as is indicated in the table already given, and to each heir is assigned a greater or less number of these fractional portions; in the vesting of the estate they all become joint owners to the extent of their several shares. By law a man could not die partly testate and partly intestate. Therefore, if any part of the estate was unprovided for, it was rateably distributed among the remaining heirs in accordance with what is called a right of accretion (jus accrescendi). If the shares of some are mentioned and nothing said of others, they will be entitled to the remainder of the property undisposed of by the testator. Again, if the number of heirs mentioned reaches eleven or thirteen

unciæ, then the 'as' is supposed to be divided into eleven or thirteen parts, as the case may be; but if he give part to one and part to another and then mentions a third person without designating his portion, recourse is had to the normal number, and the last named receives one half, the other two, each a fourth.

(2) If the heir is appointed unconditionally, his rights in the estate date from the death of the testator. If he is appointed conditionally, his rights date from the fulfillment of the conditions. Thus he may be required to pay legacies, to enfranchise slaves, to build a monument, etc. The word *condition* in this case is here used to denote some uncertain event, as one of the examples above, or that he outlived his grandmother, and not the arrival of a certain day. All conditions which are impossible or contrary to law or good morals are rejected pro non scripto without working any voidance of the testament.

Closely allied to the institution of heirs is the substitution of heirs, *i.e.*, the conditional appointment of certain persons to act as heirs, in case those first appointed should from any cause fail to act.[1] The discredit among the Romans attached to dying intestate greatly increased the importance of substitution as a special feature of the testament. There were three forms of substitution mentioned in Roman law: (1) substitutio vulgaris, (2) substitutio pupillaris, and (3) substitutio quasi pupillaris.

III. Legal Substitution of Heirs.

(1) Substitutio vulgaris, or ordinary substitution, is simply the provisional institution of an heir or heirs to act in case those first appointed fail. Of this, we have an example in the Digest taken from Modestinus; "Lucius Titius

[1] Justinian, II, 15, 5.

heres esto; si mihi Lucius Titius heres non erit, tunc Seius heres mihi esto." The object of this was, of course, to avoid intestacy. Any number of substitutions might be made. One person might be personated for several, or several for one; or the original heirs might be substituted for each other, so that in case one failed some other might succeed to this share also.

(2) Substitutio pupillaris, or pupillary substitution, is the conditional appointment of a person to receive the inheritance of a child in pupillage, in case said child die before reaching the age of maturity. In this way a man may be said to make a will for his son. But this pupillary substitution for children was only effectual when the father made a valid testament of his own. The substitutes, in this case, took not only all the son received from his father, but whatever property he might have from any other source.

(3) Substitutio quasi pupillaris, or quasi-pupillary substitution, is similar to the preceding, except that instead of applying to a child in pupillage it applies to any person of unsound mind. This is equivalent to the father's making a will for such a person to take effect at the latter's death. This form of substitution, as well as the preceding, loses its effect as soon as the circumstances on account of which it was made, ceased to exist. This latter form belonged to the time of Justinian.

§ 153. Modes in which Testaments are Voided.[1]

A will which does not conform to the requirements already mentioned is void, or invalid. Of these there are two divisions: (1) when the will is void ab initio, and (2) when the will is valid when made, but subsequently loses its effect.

(1) *Void ab initio.* Such a will is one which does not

[1] Gaius, II, 138; Justinian, II, 17.

conform to the requirements already mentioned. Of this there are two cases: first, where the will is injustum by reason of lacking its formality, or the heir has not been properly instituted; second, when persons who have a claim upon the estate have not been properly disinherited. In this latter case it is said to be nullius momenti.

(2) *Valid when made, but afterwards voided.* Of this there were several cases:—

(*a*) Ruptum or broken, when rendered invalid by any of the following ways:—

(1) By the subsequent agnation of a suus heres who has not been mentioned in the will as being either substituted or disinherited.

(2) By the making of a second will according to proper legal forms.

(3) By the destroying of the will already made, by tearing or defacing it, or by otherwise indicating the wish on the part of the testator that it shall no longer remain in force.

(*b*) Again, a testament is technically rendered ineffectual (irritum):—

(1) If the testator after making the will suffers a capitis deminutio. In this case, however, if the person recovers his legal capacity before his death, the estate is generally granted to the appointed heirs in accordance with æquitas.

(2) A testament is also irritum by reason of no one entering upon the inheritance.

(*c*) Inofficiosum, or undutiful; as when a will formally and essentially perfect may, under certain circumstances,

be set aside. In this case the will is not regarded as void, but it is voidable by an appropriate action (actio de inofficioso testamento). The mere fact that a person has been disinherited in due form in the will is not sufficient to debar him from his just rights in the estate. The question whether this deherison has been made on sufficient grounds can be laid before the court and decided on its merits. Hunter says that the duty of the testator to make provision for his family is a moral rather than a legal or technical one. When a testament was first made, it seemed to be an invasion of family rights, as has been previously stated. The community of property was doubtless the idea back of this. As during the lifetime of the testator, he was obliged to provide for his family, but to no amount fixed by law, so in leaving property he was left to his own discretion. The provisions of the law were made very specific by Justinian, and the reasons were precisely stated, that were admitted as the only proper grounds for disinherison. The persons who were allowed to attack the will as undutiful are the children, or the parents if there are no children; or the brothers and sisters, if there are no children or parents, or if an infamous person has been instituted in their stead. In case the will is successfully attacked as inofficiosum, it is rendered entirely void and set aside. In such a case the inheritance passes according to the laws regulating succession ab intestato. The will cannot be set aside as undutiful only in case the persons above named have been completely disinherited and nothing at all has

been left to them. An actio de inofficioso testamento could not be brought only as a last resort, open to those who had no other. But the law goes still further and protects them in their claims to a definite portion (portio legitima) of the inheritance to which they are by presumption entitled. This portion is one fourth of that which they would have received by intestate succession. Justinian enacted that in the future no 'querela' should be on any other grounds than that the complainant had received nothing at all. If he had received anything, be it ever so little, his proper remedy would be the new actio ad supplendam legitimam against the heir or heirs, which left the will untouched. By these methods the legal and worthy heir was protected in the Roman law from any malice or caprice on the part of the testator.

(*d*) Finally, a testament may become *invalid* by the failure of all heirs appointed in the will, whether on account of death or non-acceptance. An estate might be of such a character as to render its acceptance a burden instead of a benefit to the heir; for example, if it were insolvent. With reference to the capacity to accept or refuse an estate, heirs are considered as (*a*) necessary (necessarii), (*b*) proper and necessary (sui et necessarii), and (*c*) extraneous or voluntary (extranii, voluntarii). A necessary heir is the testator's slave, who is obliged to receive the master's inheritance and to pay all the debts, being liable, however, only to the extent of the estate. Proper and necessary heirs are the descendants of the deceased, who are instituted heirs

and become sui juris at the testator's death. They are called necessary because they were originally obliged to accept the inheritance with all its burdens; but the prætor afterwards gave them the benefit of refusing (beneficium abstinendi), provided they abstained altogether from interference with the estate. Extraneous heirs comprise all other persons who may be instituted. They are perfectly at liberty to accept or refuse the inheritance. If, however, they have once assumed it, they are not at liberty subsequently to renounce it.

CHAPTER XII

INHERITANCE AB INTESTATO[1]

§ 154. Definitions and Distinctions.

A PERSON is said to be intestate who has made no will at all, or one not legally valid, or one that has become invalidated from any of the causes previously mentioned. Although intestate succession was the original form of inheritance, it was after the development of the will called into exercise only exceptionally, and in the absence of testamentary heirs. The general character of the law relating to this form of inheritance as it existed at the time of the Twelve Tables, and also as it was modified by prætorian legislation, has been previously considered. Intestate succession was simply the succession of the independent members of the family to the family estate; the order of legal heirs was determined by proximity or relationship to the deceased as traced through a common potestas, the order being sui heredes, agnati, and gentiles. Subsequently the prætor recognized the claims of the natural as well as the civil family, by granting the right of possession to emancipated children, and by substituting the cognates, or blood relations, for the gentiles.

Justinian made the most important changes in the law of intestate succession in the 118th and 127th novels, when he abolished all legal distinction between sui heredes and emancipated children, and between agnates and cognates, and recognized the principle of blood relationship in place of that

[1] Roby, 258–264; Mackenzie, 311–322.

based upon potestas. The Roman made no distinction between real and personal property, between older and younger sons, or between males and females. The right of inheritance to the entire estate devolved, in general, upon all persons according to the proximity of their blood relationship to the deceased. The order of succession may be considered under three classes: (1) descendants, (2) ascendants, and (3) collaterals.

(1) Descendants are the first order of legal heirs. They are those persons, male or female, of whatever degree, who are descended lawfully in the direct line from the deceased. Such persons exclude all collaterals and ascendants. Descendants of the first degree, *i.e.*, lawful children, succeed per capita; in other words, they share equally in the estate. Descendants of a more remote degree succeed per stirpes, or by representation. For example, if a son or daughter die leaving lawful children, such grandchildren of the deceased receive among themselves the share of the estate to which their parent was entitled before death. This right of representation extends to the remotest degree. The wife of the deceased inherits as a descendant, if she be without dowry.

(2) Ascendants are the second order of legal heirs; those of whatever degree, male or female, from whom the deceased was descended in direct line. Such persons exclude all collaterals except brothers and sisters of the whole blood, and children of the same. The nearer degrees exclude the more remote, so that a father or mother alone excludes grandparents and all remoter degrees. If there are no parents living, but several more remote ascendants of equal degree, they receive the estate per lineas.

(3) Collaterals make up the third degree of legal heirs.

They are those persons not in the direct line of ascent or descent who can trace their relationship to the deceased through a common ancestor. The general principle that governs the succession of collaterals is that the nearer degrees exclude the more remote. Specifically, brothers and sisters exclude all other collaterals. Such heirs succeed to the estate per capita, and their own children represent them. In the next place stand brothers and sisters of the half blood, and representation applies as in the preceding.

Finally, if all heirs fail, the entire property goes to the wife, and if she fail, the property goes to the public treasury as the ultimus heres.

CHAPTER XIII

LEGACIES[1]

§ 155. **Legacies Defined and Classified.**

In connection with the subject of inheritance, the Institutes treat of certain topics which, though not strictly belonging to universal succession are yet incidentally related to the transmission of property by inheritance. These are: (1) legacies, (2) fideicommissa, and (3) codicils.

(1) A legacy is a donation of a sum or subject which the testator directs to be delivered after his death to the legatee. Anciently there were four modes of leaving legacies in use among the Romans: (*a*) per vindicationem, (*b*) per damnationem, (*c*) per præceptionem, and (*d*) sinendi modo. To each of these modes of leaving legacies was assigned a certain form of words.

(*a*) The formula for per vindicationem ran; "I give and bequeath (do, lego) the man, Stichus, to Titius." With small exception nothing could be given per vindicationem which did not belong to the testator ex iure quiritium at the time both of execution and decease. Such dominium alone at time of death was sufficient when the subject matter of the legacy was anything appreciable by weight, number, or measure. The legatee at once became the owner.

(*b*) The formula for per damnationem ran: "Let my heir be condemned to give my slave, Stichus, to Titius."

[1] Justinian, II, 20; Gaius, II, 191–245.

The legatee did not by this legacy become at once the owner of the subject matter of legacy, but had a personal action against the heir to compel him to give (dare) or produce (præstare) that which the giver of the legacy had named. Anything could be given by this method that could be the subject of an obligation.

(*c*) The formula for per præscriptionem ran; "Lucius Titius hominem Stichum præcipito." (Let Lucius Titius take by prescription my slave, Stichus.) The proper application of this formula was the giving to a person, probably one of the heirs, something which he was to receive before the division of the property was made.

(*d*) The formula for sinendi modo ran; "Heres meus damnæ esto sinere Lucium Titium hominem Stichum sumere sibique habere." This form was applicable to anything belonging to the testator by any legal form whatsoever. If the heir refused to allow the legatee to take possession, he could be compelled to do so by proper legal action. "Quidquid heridem ex testamento dare facere oportet."

But all these distinctions which were worked out elaborately by Gaius were abolished by the imperial constitution, and Justinian ultimately reduced them all to one kind, which might be left either in a testament or codicil. The capacity to give and to receive by legacy is the same as that required in the case of a testament. The largest liberty is also given as to what may be left by legacy. It may be anything in commercio belonging to the deceased; or it may even be the property of another, since the testator can impose upon the heir the obligation of purchasing something and of de-

livering it to the legatee. If the same thing be left to two or more persons, each takes an equal share, and if one of two or more joint legatees die before the common thing left to them has been delivered by the heir, the share thus vacant goes to the remaining joint legatees by the right of accretion.

The general rules for the interpretation of legacies, as of wills, came to be, in the later Roman law, very liberal in their character. For example, a mistake in the name of the legatee does not vitiate the legacy, provided there is no doubt as to the identity of the person intended. A legacy is extinguished by the death of the legatee, if the death occurs before the property vests in him. It may also be extinguished by the testator himself, either by revocation (ademptio) or by the transference of it from the original legatee to another person. A revocation of a legacy was accomplished by any expression of the testator which used either directly contrary words or an equivalent. For instance, if the testator dealt with the property afterwards as if he had not already given it away, as, "I give as a legacy to John my slave Stichus whom I have previously given to Titius."

Certain provisions were made in order that the whole estate might not be exhausted in legacies, and that there might be, accordingly, some inducement for the heir to accept the estate. Most noticeable among these laws was the lex Falcidia by which the testator was prohibited from giving away in legacies more than three fourths of his estate after the debts were paid. Thus the fourth of the estate was made sure to the heir and was called the Falcidian portion (quarta Falcidia). In the early law a legacy was valid only when embodied in the testament, so that if the testament failed, the legacies failed with it. But Justinian assimilated the law of legacies to that of fideicommissa and thus

caused them to be independent of the will, and at the same time be binding upon the heirs at law.

§ 156. Fideicommissa.

(2) Fideicommissa,[1] or bequests in trust, are directions given to the heir that he, on coming into possession of the estate, convey the bequest to a third person or use it for the benefit of such person. They were at first introduced to evade the civil law provisions and to leave property to incompetent persons. Such a trust depended solely on the honor of the heir until the time of Augustus. He made this trust legally binding upon the heir to execute. Soon afterwards a special prætor was appointed for this purpose, called prætor fideicommissarius. The civil law made the heir responsible for the debts against the estate; when the property was left in trust to a person, the obligations were also transferred to him.

§ 157. Codicils.

(3) A codicil in the Roman law was a written direction to the heir requiring no solemnities, which expressed the wish of the deceased regarding the disposition of the estate either by way of legacies or fideicommissa. Augustus is mentioned as executing a trust by a codicil, and in this way a codicil obtained legal validity. It was not, like the English, a supplementary will, but it could modify any or all of the conditions of the will except the necessary contents. But in case no will was made, or the testamentary heirs failed, the provisions of the codicil were binding upon the heirs at law.

[1] Roby, 356–364.

TITLE 3. *Obligations: Rights in Personam*

CHAPTER XIV

GENERAL CHARACTER OF OBLIGATIONS[1]

§ 158. Introduction.

THIS branch of the Roman law is, in some respects, the most important of all, as it reveals, by comparison, a fundamental weakness of the early English law which was not plastic enough to accommodate itself to the rapid growth which took place in commerce, and the still more rapid changes which took place in civilization. This portion of the Roman law was, therefore, very widely copied in order to supply this lack, during the reigns of Henry II and Henry III. This is shown conclusively in the works of Glanvill and Bracton, where the Corpus Juris has been brought over into English law without any change whatever and without any acknowledgment. The relation between ownership and obligations rests upon the distinction already noticed between rights in rem and rights in personam. In this discussion it was made clear that every objective right refers to a certain degree of legal control which a person may exercise with reference to some object external to himself. This whole question is far better understood by modern legal writers than it was by those who belong to the older, or medieval, school. Modern writers make clear the Roman

[1] Roby, II, 10–212; Mackenzie, 204–211, 228–231; Gaius, III, 88–225; Justinian, III, 13–29; Austin, Province of Jurisprudence Defined, 49 *et seq.*; Maine, Ancient Law, 460–465; Hunter, 451–455.

distinction between rights by comparing them with the actions by which they are enforced. To understand this we will take a very simple example. If a man owns a house and is deprived of his right, he brings, according to the Roman law, an actio in rem, in which his right is merely asserted, as such, without reference to the person who has deprived him of it; that is, the right is conceived as availing against the world at large. But if he is deprived of the right due him according to the terms of a contract, he brings an actio in personam, in which must be named the particular persons who have deprived him of the right; that is, the right is looked upon as availing against a determinate person.

It was in this way that the Roman jurists indicated the distinction which they had in mind with reference to the rights themselves. The rights involved in ownership of whatever kind differ from those growing out of an obligation, in that the former avail against the whole world, while the latter avail against some determinate person or persons. Again, the duties corresponding to rights in rem are general and negative, while those corresponding to rights in personam are specific and may be positive as well as negative. The latter class of rights and duties forms the subject matter of the law of obligations.

A legal obligation must be distinguished, in the first place, from those general negative obligations which are correlative to the rights of property, and which rest upon the world at large. It must also be distinguished from those natural or moral obligations which, though they rest upon persons and sometimes have a legal significance, are not enforced by a legal action. A legal obligation may be defined as an agree-

§ 159. Nature of Obligation as a Personal Right.[1]

[1] Mackenzie, 205–210; Hunter, 452; Justinian, III, 13. 1.

ment to make some payment, or to do or not to do some act, conferring on the person in whose favor the agreement is made a right by law to enforce performance of it. It is defined in the Roman law as "a legal bond whereby, according to the laws of the State, one person is bound to render something to another." (Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendæ rei secundum nostræ civitatis iura.) This involves both a right and a duty; a right on the part of one person called the 'creditor' to exact something, and a duty on the part of another person called the 'debtor' to render something. The historical origin of a legal obligation throws some light upon its nature. We have already seen that the law recognized no contract, but conveyance only. The second step was the enforcement of a conveyance one portion of which remained executory. This is clearly seen in the bond between the debtor and creditor in the ancient nexum. The parties to such a transaction were called nexi and were legally bound to each other until the process was complete. At first every such transaction per æs et libram was an interchange of property and price. By a kind of fiction, however, a loan could be effected through this process. The price was paid and the transference of the property withheld until some future time. The idea of an obligation as a legal tie (iuris vinculum) between debtor and creditor thus arose in the civil law from the bond which existed between the nexi and which was established, as has been seen, through the forms of an incomplete conveyance. These forms could be used for other purposes than for effecting a loan, but in all cases they gave a compulsory character to the obligations thereby established. The creditor still retained his power over the debtor to the extent of enforcing his claims by legal action, even after the old symbolism had

decayed and passed away. The essential features of the legal obligation, as conceived by the Roman jurists, may be summed up as follows: —

(1) It involves a legal relation between two parties, a creditor and a debtor.

(2) It involves, on the part of the creditor, a personal and not a real right — a right which avails against the debtor only.

(3) It involves, on the part of the debtor, a duty whereby he is bound to the creditor, either to transfer something to him, to render him some service, or to grant him compensation for some injury done to him. In the concise words of Paulus; "Obligationis substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel præstandum." (The essence of an obligation consists not in this, that it makes a thing or a servitude ours; but that it binds another to give something to us, or to do something for us, or to grant us some compensation.)

§ 160. The Subject Matter of Obligations.[1]

The subject matter of an obligation, or the object for which it is established, always involves some act on the part of the debtor, the performance of which will be beneficial to the creditor. The nature of this act, however, may be negative as well as positive. The obligation may require the debtor to abstain from doing something, as well as to do something. Be this as it may, the act of the debtor is always subject to the control of the creditor. The general principles which apply to

[1] Justinian, III, 20.

the subject matter of an obligation may be described with reference (*a*) to its essential, and (*b*) to its non-essential elements.

(*a*) The essential elements of a contract are those without which it could not exist. For instance, there can be no sale without a thing to be sold and a price; the transference of a thing from the seller to the buyer; and the transference of the price from the buyer to the seller. Thus every legal obligation must possess certain elements which constitute its essential or necessary subject matter. It is, therefore, necessary to determine the validity of every obligation, primarily with reference to the character of its essential elements. In this two general principles govern: —

(1) The essential elements of an obligation must not involve anything that is impossible, illegal, or contrary to good morals. (Impossibilium nulla obligatio est.) An obligation is null the primary object of which is to require something in itself contrary to law. The law cannot enforce what it prohibits. That which is inconsistent with the public welfare, or opposed to the general moral sense of the community, is by nature associated with the preceding.

(2) The essential object of an obligation must be determinable, and of an actual pecuniary value. To make the object determinable, it is simply necessary that it shall be so fixed as not to depend upon the arbitrary will of either of the parties. It need not be particular, as one or more acts may be required either one of which will satisfy the claims of the creditor. It need not be specific, as the delivery of things in general may properly be re-

quired. Thus the object may be certain (certum) or uncertain (incertum); but it may not be so uncertain as not to be determined by either party to the obligation. Again, the object must be of sufficient benefit to the creditor to have a value estimable in money. Says Ulpian; "Ea enim in obligatione consistere, quæ pecunia lui præstarique possunt." This latter statement is made clear by the fact that the obligation is made compulsory in law by the debtor being compelled to pay to the creditor a pecuniary compensation for the damage resulting from his failure to perform his part of the obligation. An obligation, the breach of which caused no appreciable injury to the creditor, would have no legal significance whatever.

(*b*) The non-essential or incidental elements of an obligation [1] are those which are not necessarily involved in the nature of the obligation, but which, being introduced, impose additional or more specific duties upon one or the other party to the obligation. Of these non-essential elements, there are four: —

(1) Time (dies).
(2) Condition (conditio).
(3) Place (locus).
(4) Convential penalty (stipulatio pœnæ).

(1) The time (dies) may be specified by the parties to an obligation, or not. If specified, the performance cannot be demanded before the time specified. If not specified, the obligation must be performed immediately. This time may be definitely fixed

[1] Poste, 343–345.

or dependent upon some future event, as the death of a person. In either case the obligation begins with the time of making the agreement.

(2) When the obligation is made to depend upon some event which is uncertain as to time, and likewise as to fact, — as the election of a certain person to the consulate, — such an event is technically called a condition. In such a case the obligation does not arise, and is not enforceable until it is ascertained that the uncertain event has happened.

(3) A specification may also be made with reference to the place (locus) at which the performance must be made. If, for any reason, the debtor is required to perform the obligation elsewhere than the place fixed upon, he is entitled to compensation for the disadvantage thus incurred.

(4) A specific obligation may still further grow out of what is called a stipulated penalty (stipulatio pœnæ) by which either party may bind himself to forfeit a certain amount if he fails to perform the principal obligation. In case of non-performance, the creditor can demand either the fulfillment of the principal obligation, or the forfeiture of the penalty, but he cannot demand both.

§ 161. Accessory Liability in Obligations.[1]

In addition to those rights and duties which grow out of the nature of the obligation and which arise from the expressed will of the parties, are others which depend upon the liability of either party to an obligation, to make indemnity for an injury or loss occasioned to the other. They are those claims

[1] Morey, A History of Roman Law, 348; Phillimore, Introduction to the Study and History of the Roman Law, 231–233.

which a plaintiff can enforce that were not in the original object of the contract. This liability must be distinguished from the principal obligation arising from a 'delict,' in that the injury must be of such a character as to affect the obligatory relations of parties who are already bound by a vinculum juris. The party who occasioned such loss becomes still further a debtor, and is bound to indemnify, while the party who suffers such a loss becomes still further a creditor, and has a right to claim indemnity. In order to produce this new relation between persons already bound by an obligation, it is necessary that one of the parties be injured by the other to such a degree that the injury may be estimated in money. The loss must further come within the scope of the already existing obligation. The extent of the liability is dependent upon various circumstances. Of these circumstances, the chief are the following: (1) dolus, (2) culpa, (3) mora, and (4) casus.

Dolus.

(1) Dolus is where the party to an obligation maliciously inflicts a loss upon the other party. He is always responsible to the full extent of the injury done (dolum præstare), an agreement to the contrary notwithstanding.

Culpa.

(2) Culpa, negligence or fault, is where a loss is occasioned by a party to an obligation, not through any malicious intent, but through the lack of proper care or attention. In fixing the liability for culpa, the Roman law made a distinction between two kinds: —

(*a*) Culpa lata, or gross negligence.
(*b*) Culpa levis, or slight negligence.

(*a*) Culpa lata involves the person in liability under all sorts of obligations, because, "culpa lata æquipara-

tur dolo," so that it is placed in the same category as fraud.

(*b*) Culpa levis, or slight negligence, where the loss is occasioned by slight neglect. Under such conditions a party to an obligation is not, as a general rule, responsible, unless he himself has derived some benefit from the obligation. He is not obliged to exercise more than ordinary care; *i.e.*, more than the attention which he usually gives to his own business, — "talem diligentiam, qualem suis rebus adhibere solet." Perhaps we may see this better if we take an example. If a person receive a deposit, obtaining therefrom no benefit, he is obliged simply to preserve it with the ordinary care which he manifests toward his own property, and he is not liable for loss not occasioned by the lack of such care. But if a person receive a pledge as a security for debt, since he obtains from it a benefit, he is obliged to exercise extraordinary care; if any loss takes place which might have been prevented by the greatest diligence, he is responsible in full for all loss incurred.

(3) If a party to an obligation occasions any loss by delay (mora) in the performance of the obligation, after the time for execution has arrived, unless the delay be unavoidable, he is obliged to make indemnity for the loss. **Mora.**

(4) A loss or injury occasioned by an unavoidable accident can be attributed to neither party. Such loss, therefore, cannot be indemnified, but must remain with the person upon whom it is inflicted. **Casus.**

Before passing to the consideration of the specific obligations which are described in Roman law, it is necessary to notice the various classes into which they are grouped. These classes are based upon different principles, namely: (1) upon the legal significance of the obligations themselves; (2) upon the jurisdiction by which they are enforced; and (3) upon the modes by which they are established.

§ 162. Classification of Obligations.[1]

(1) Obligations considered in regard to their legal significance are divided into two kinds: (*a*) natural, and (*b*) civil.

(*a*) Natural obligations are those where one person is bound to another by the law of nature. Such obligations are not enforceable by a civil action. They may be considered in two classes: reprobatæ, or those which the civil law absolutely reprobates, as for instance a wager or a gaming contract; nuda pacta, or those upon which an action cannot be founded, but which can be used as a ground for equitable defense. Such obligations have pact, but not contract. An exceptio could be pleaded.

Kinds of Obligations.

(*b*) Civil obligations are those which may be enforced by civil action.

(2) With reference to the jurisdiction to which they are subject, obligations are divided into civil, sensu stricto, and prætorian. Civil obligations are those constituted by the civil law and enforceable by a civil action. Prætorian obligations are those enforced by an edict of the prætor and enforceable by a prætorian action. By far the greater part of the obligations of the Roman law were developed under

[1] Mackenzie, 204.

the jurisdiction of the prætor and were, therefore, free from civil law technicalities and complications.

(3) A still more important division is that based upon the modes by which obligations may arise or become established. Viewed in this light by the Romans, obligations are divided into: (*a*) contracts and quasi-contracts, and (*b*) delicts and quasi-delicts.

(*a*) Contracts were those obligations which were established by a voluntary agreement whereby one person legally bound himself to render something to another.

(*b*) Delicts, or private wrongs, were those obligations by which one person was legally bound to make compensation for the injury done by him to another.

Besides these two chief forms, obligations may arise from other causes which are, however, from their peculiar features, assimilated to those arising from contracts or those arising from delicts. Thus we have the two sub-forms, quasi ex contractu, and quasi ex delicto; but they really differ in no essential characteristic from those already given. All obligations may, therefore, be treated as arising from contract or delict, either properly or fictitiously.

CHAPTER XV

OBLIGATIONS ARISING FROM CONTRACTS[1]

§ 163. **Contracts Defined.**

By far the largest and most important classes of obligations, or rights in personam, are those which arise from the legal transactions called contracts. This portion of Roman jurisprudence has survived in modern European codes with the least alteration. We must bear in mind that contract is not in itself an obligation, but is simply the investative fact which gives rise to an obligation. They stand related to each other as cause and effect. A contract itself is a transaction by which a right and a duty are legally established between two or more determinate persons.

§ 164. **Essential Features of the Contract.**[2]

A contract is an agreement between two or more persons which gives rise to a legal obligation. An agreement which does not produce a legal obligation is called a simple pact (nudum pactum); as has been previously stated, it is merely an accord of two wills. There must in the first place be policitatio, *i.e.*, offer or proposal made by one, and conventio or acceptance by the other. When this accord of two wills is such that law adds a third element, namely, vinculum juris or obligatus, we have a contract. This may be written in a formula: —

Policitatio + conventio = pactum.

Policitatio + conventio + vinculum juris or obligatus = contractus.

[1] Mackenzie, 215–218.

[2] Gaius, III, 137.

In order to have the vinculum juris added, three conditions must be fulfilled: (1) the pact must be made by parties legally competent; (2) it must express an actual consensus between the parties, and (3) it must be made according to the forms prescribed by law.

(1) All persons are legally competent to make a contract except those who are expressly disqualified by law.[1] The chief persons thus disqualified are infants, impubes (except to ameliorate their condition), madmen, and lunatics, except in lucid intervals.

Parties Legally Competent.

(2) There must be a voluntary concurrence of will.[2] This concurrence of will must grow out of a free and intelligent exercise of the will, and a contract is always void, or at least voidable, if it is the result: (*a*) of force, (*b*) of fraud, or (*c*) of inexcusable error.

Voluntary Concurrence of Will.

(*a*) An agreement is not binding if extorted by force (vis) or fraudulent deception (dolus malus), or such an intimidation (metus) as would cause a man of ordinary firmness to do what he would not do of his own free will.

(*b*) An agreement which has been obtained through fraudulent deception, though not properly void at the outset, is so vitiated that it may be rendered void, or its effect modified, by an appeal to the magistrate.

(*c*) An error bearing upon the subject matter of the agreement, whether due to mistake or ignorance, without which the agreement would not have been made, furnishes a ground for modifying the effects of the contract. An error is excusable only when it relates to a matter of facts (error facti), as all persons are presumed to know the law; minors, women, and

[1] *Ibid.*, III, 163. [2] *Ibid.*, IV, 116.

soldiers are allowed by Roman law to plead error due to ignorance of the law (error juris).

(3) Finally, an agreement must be in accordance with the prescribed forms of law in order to be a contract. These forms are seen in the various classes of Roman law into which they are divided. In the first place, contracts are broadly separated into two grand divisions: (*a*) nominate contracts, and (*b*) innominate contracts.

Agreement with the Prescribed Forms of Law.

(*a*) Nominate contracts (contractus nominati) are those which are distinguished in the Roman law by special names. They are divided, in general, according to the ways in which they are formed, into: (1) contractus ex re; (2) contractus ex verbis; (3) contractus ex litteris, and (4) contractus ex consensu.

§ 165. Nominate Contracts.

(1) Contractus ex re, or simply 're,' are those in which the binding force of the agreement is based upon the delivery of something from one person to another, under certain conditions. The obligation under a contract re does not arise until the delivery has been made. The voluntary acceptance of the property of another imposes upon the receiver the obligation to abide by the terms of the contract, whether expressed or implied, according to which the thing has been delivered. There are four contractus ex re: (*a*) mutuum (loan for consumption), (*b*) commodatum (loan for use), (*c*) depositum (deposit), and (*d*) pignus (pledge).

(*a*) Mutuum is a gratuitous loan of things intended for consumption which are usually estimated by number, weight, or measure; such as money, corn, flour, wine, and the like. These are things that after consumption may be restored in genere. From

the nature of the thing, the property passes to the borrower, and, if it perish for any cause, the loss falls on him. The lender becomes a mere creditor, the obligation resting entirely upon the borrower. Such a contract creates a unilateral obligation. In the loan of money under mutuum the borrower paid no interest, and an action to recover could not claim any. In the loan of corn, wine, or other articles of like nature, the borrower is required to restore as much of the same kind and quality as he received, no matter whether the price of such article has in the meantime risen or fallen in the market. Should he fail to satisfy his obligation, he will be responsible to the creditor for the value of the article, having regard to the time and place when it should have been delivered. The name of the action for recovery was condictio certi, which was strictly a personal action for the recovery of certa pecunia only.

(*b*) Commodatum, or loan for use, is a contract whereby the owner of a thing lends it to another for a certain use without payment, on condition that it shall be restored after the purpose is served. It is necessary that the loan be gratuitous, for if anything be paid for the use, it becomes a contract for hire. This contract is bilateral, imposing an obligation on both parties. The borrower is obliged to return the identical thing borrowed, whether it be a horse and carriage, or a book, and not another of the same kind. He is further required to return the thing uninjured after the specified use (enforced by an actio directa). He is bound to make

good all injury which befalls the thing while in his possession, provided the injury was caused by his fault, or might have been prevented by a careful person. "In rebus commodatis, talis diligentia præstanda est, qualem quisque diligentissimus pater familias suis rebus adhibit." The lender, on the other hand, has to pay for any extraordinary expenses which the preservation of the thing has required during its use (enforced by an actio contraria).

(*c*) Depositum, or deposit, is a contract by which the owner places a thing in charge of another to keep it gratuitously and restore it on demand.[1] The property and the risk remain with the depositor, so that if the subject perish accidentally, the loss falls on him. This contract is also bilateral, creating an obligation on the part of the depositary (depositarius) to restore the thing on demand, and an obligation on the part of the owner to reimburse the depositary for necessary expenses incurred in preserving the thing. The thing in deposit cannot be retained as a set-off for a debt or claim due to the depositary by the owner. Again, he can make no use of the thing deposited, and if he does, he is guilty of theft. (This is not true in English law.) Depositum miserabile, or necessary deposit, is where sufferers from shipwreck, fire, or other calamity have been compelled by circumstances to leave their goods in the hands of persons wholly unknown to them. In such a case a depositary who proved unfaithful to his trust was liable to be sued

[1] Gaius, III, 90–91, 196, 207.

under a prætorian action for double the value of the articles embezzled.

By an edict of the Roman prætor, the policy of which has been adopted in modern Europe, England, and the United States, shipkeepers, innkeepers, and stablers are responsible for the luggage and effects of travelers intrusted to their care, or brought into the ship, inn, or stable. The following are the words of the edict; "Nautæ, caupones, stabularii, quod cuiusque salvum fore receperint, nisi restituent, in eos iudicium dabo." Under nautæ are comprehended all carriers by water; but the principle has been extended very generally to land carriers, whose responsibility is more stringent than it appears to have been by the Roman law. Caupones are keepers of inns where travelers are accommodated with food and lodging. On grounds of public policy they were held responsible for goods deposited with them by their guests whether the damage or loss arose from acts of servants or of strangers. A limit to the amount of damage is generally set by law, varying in different countries.

(*d*) Pignus, or pledge, is the delivery of a thing to a creditor as a security for money due, on condition of his restoring it to the owner after payment of the debt, and with a power of sale in case the debt is not paid.[1] The present use of the word is distinct from its Roman use as a real right which the creditor acquired in the thing itself and which availed against all the world, enabling him to

[1] Gaius, III, 203, 204; Justinian, II, 8, 1, III, 14, 4.

recover its possession if lost. Here it refers to the simple transaction which gives rise to personal obligation between the debtor and the creditor, with reference to the thing pledged. This contract imposes a twofold obligation. The receiver of the pledge is under obligation to restore it to the debtor on payment of the debt; or, in case of sale, to restore the surplus after subtracting necessary expenses, together with principal and interest. Upon the owner of the thing pledged is imposed the duty of reimbursing the receiver for necessary expenses incurred in its preservation. Both debtor and creditor are liable to action for failure to fulfill the legal requirements. The creditor is liable for any injury to the pledge arising in any way from his own carelessness or negligence. The owner of the property must bear the loss if it happen through no fault of the creditor, or if he himself was party to the carelessness which produced it.

The right of pledge is terminated by the destruction of the subject, by payment of the debt, by the creditor releasing the debtor, and various other ways.

(2) Contractus ex verbis.[1] The verborum obligatio of the Romans was contracted by uttering certain formal words of style; an interrogation being put by the one party and an answer being given by the other. These obligations were called stipulations, and were binding even without consideration. As the word itself would imply, stipulations were contracts entered into by question and answer. A mere promise given without an interrogation was invalid, being looked upon as a nudum pactum. In the

[1] Justinian, III, 15, 1.

ancient civil law the question and answer must exactly correspond, each one containing the words *spondes* and *spondeo*. Afterwards other words were allowed without vitiating the stipulation; as, promittes and promitto, or dabis and dabo; thus "Quinque aureas mihi dare, spondes?" — "Spondeo." "Promittes?" — "Promitto." "Dabis?" — "Dabo." "Facies?" — "Faciam."

In the time of the emperor Leo, any form of words was sufficient that clearly expressed the consensus of the parties. These verbal contracts were not confined to any particular kind of transaction. Any promise, whatever might be its subject matter, could be made binding by being put into the form of a definite question and answer. Its essential features were that the question and the answer be consecutive, and that they refer to the same thing. This kind of contract was unilateral, creating an obligation upon the promissor, or the one who answers the question in the affirmative. Stipulations or contracts ex verbis may have all the non-essential elements, previously described, attached to the obligations arising from them. In other words, stipulations may be made in three ways: (*a*) unconditionally (pura), (*b*) with reference to time (in diem), and (*c*) with reference to a certain event (sub conditione).

(*a*) An unconditional stipulation, or stipulatio pura, was where the interest in the thing stipulated for passed at once to the stipulator, and he could demand the performance (dies). "Cadit et dies venit."

(*b*) Stipulatio in diem was when the interest in the thing stipulated for passed at once, but the thing could not be demanded till 'dies' was passed. "Dies cadit sed dies non venit."

(c) Stipulatio sub conditione. In this case the obligation neither arises, nor can its execution be demanded until the condition is fulfilled.

While the stipulation is essentially an oral contract, its terms may be reduced to writing. But the writing is not regarded as the basis of the obligation; it merely furnishes evidence as to the actual subject matter of the contract.

Fideusio was a contract by which a person bound himself as surety to fulfill an obligation to another, in case of the failure of the principal obligant. The obligation of the surety which was usually entered into by stipulation, but might be reduced to writing, extended not only to the surety himself, but to his heirs. Sureties are entitled by the Roman law to the benefit of discussion — that is, they may insist that the principal debtor be first sued, unless the creditor can show that it would be useless to do so in consequence of his insolvence or absence.

(3) Contractus ex litteris.[1] A contract was said to be ex litteris when it was based upon a formal record or entry made by the creditor with the knowledge and consent of the debtor. This was chiefly made use of in the case of a money loan. Here the writing itself was the foundation, and not merely the evidence, of the contracts. In case of litigation the proper action was condictio in chirographo, and the parties to the contract could not go back of the written record. The creditor could not sue upon the note within two years from its date, without being exposed to the requirement of proving that the money was actually paid to the debtor. This plea called exceptio non numeratæ pecuniæ, could not be used after the lapse of two years. This particular form of contract arose from

[1] Justinian, III, 15, 2.

the ancient custom of the Romans of transcribing their accounts from the daybook (adversaria) to the more formal and prominent ledger (codex accepti et expensi). This was done with great care and accuracy. Dionysius says that every Roman had to make oath before the censor that his bookkeeping was honest and accurate. Of these contractus ex litteris there were three kinds: (*a*) expensilatio, (*b*) chirographum, and (*c*) syngrapha.

(*a*) Expensilatio was merely the account kept, as previously stated.

(*b*) Chirographum early superseded the expensilatio.[1] This was a mere written acknowledgment of debt on the part of the debtor given to the creditor (our note).

(*c*) Syngrapha was a written statement of debt signed by both parties, and a copy kept by each.

All these forms had passed out of use at the time of Justinian, leaving no litteris in the strict sense of the word. The cautio, or written acknowledgment of debt which was then in use, was merely evidence of contract, and not the basis of it.

(4) Contractus ex consensu.[2] Consensual contracts are those based on consent alone. Such a contract is complete when a concurrence of will has been reached. It requires no delivery of the thing; no special form of words; no writing. It can be entered into by parties either present or absent, through letters, or by messenger. They are usually classed under four heads: (*a*) sale; (*b*) location or hiring; (*c*) partnership, and (*d*) mandate.

All these were introduced by the prætorian legislation

[1] Gaius, III, 134.
[2] *Ibid.*, III, 136; Justinian, III, 13, 2, III, 24, 1.

into Roman law, and were founded upon broader principles of justice than were the other classes of contracts, but they were considered contracts bonæ fidei.

(*a*) Sale is a contract by which one person becomes bound to deliver a subject to another with the view of transferring the property in consideration of a money price.[1] When one commodity is given in return for another, this constitutes exchange, not sale. By the Roman law all contracts of sale were good without writing, to whatever value they extended. Apart from the personal capacity to contract, three things were required for sale: (1) a subject, (2) a price, and (3) the consent of the parties.

(1) The subject must be a thing in commercio, of a determinable character, whether corporeal or incorporeal, present or future, in genere or in specie.

(2) The price must be a sum of money of legal character and definite in amount.

(3) The consent of the parties is regarded as consummated as soon as the price is agreed upon, or when the writing (if the contract calls for this) is completed.

The obligation in sale is bilateral; it imposes upon the seller (venditor) the obligation to deliver the thing itself to the buyer and to give him lawful and undisputed possession; to guarantee the buyer against eviction by law resulting from a defective title, given at the time of the sale and to compensate him for any loss sustained by such eviction. He must

[1] Gaius, III, 135; Justinian, III, 23.

further warrant the thing sold to be free from secret faults. This was done either by making a satisfactory reduction, or by a dissolution of the contract. This warrantee was implied in every Roman contract. The buyer was, on the other hand, bound to pay the price fixed upon, to pay interest from the time the price was due, and to compensate the seller for necessary expenses in keeping the thing prior to its delivery.

(*b*) Location or hiring.[1] This contract is of two kinds: the hiring of things, and the hiring of work or service. The hiring of things is a contract by which one of the parties engages to give the use of a thing to the other for a limited certain rent or hire. The hiring of work is a contract by which one of the parties engages to do something for another for a certain hire. In both cases the contract is perfected by consent, and bears a close affinity to sale. Further, the contract in either case is perfected by the affixing of a price. One person, called the locator, agrees to place something at the temporary disposal of another person, called a conductor, on the condition that the person receiving the benefit of such disposition pay a certain price to the other person. The character of locario-conductio will be made more clear by considering the different phases that it represents. These are: (1) hiring of things (locatio-conductio rerum), and (2) hiring of work or services (locatio-conductio operarum).

[1] Gaius, III, 147; Justinian, III, 24.

(1) All sorts of things which are the subject of commerce, whether movable or immovable, may generally be let for hire. But things which are consumed in the use made of them, such as wine and vegetables, are not suitable for hiring, though they may be bought and sold. The chief phase of this kind of contract is seen in the leasing of houses and lands. Leases of houses and lands are granted for a limited term agreed upon between the parties. Among the Romans the usual term for a lease of land was for a lustrum or five years. The lessee or conductor was called a colonus. But whatever be the particular thing leased, the lessor (locator) is bound: to put the lessee in possession; to deliver the property in a proper state of repair, and to maintain it in such a condition as that it shall be fit for the purpose for which it is let; to guarantee the peaceable enjoyment to the lessee during the term agreed upon. The lessee is also bound: to use the subject well; to preserve it in good condition; to put it to no other use than that for which it was let; and to restore it at the end of the term agreed upon. In this matter he is liable for culpa levis. The principal obligation of the lessee is to pay the rent or hire at the stipulated time. Payment may be either in money or a portion of the fruits or produce.

The contract of hiring usually came to an end at the expiry of the stipulated term. If the tenant was allowed to continue in possession

after the term, it was construed into a renewal of the lease.

(2) Hiring of work or services. Most of the general principles which regulated the hiring of things applied likewise to the hiring of work or services. The locator agreed to place his work or services at the disposal of the conductor upon the receipt of some fixed price or wages when the work or service was completed. To distinguish between hiring and sale in this matter, Justinian laid down the rule that if a workman furnish all the materials, as well as the work, for a certain price, as, for instance, if a blacksmith furnish the material and make a plow at a certain price, this would be sale and not hiring; but if he were furnished the material and he gave the work only, this would be locatio operis. Again, if a builder contracts to erect a house on your ground and furnish the material, this would also be locatio operis because the ground which is the principal subject belonged to you, and the building follows it as accessory — ædificium solo cedit. The person who undertakes to perform a piece of work must do it in a proper manner and within the time agreed upon; he is bound to bestow upon it due time and skill, and if from any negligence or ignorance the work is defective or useless, he is liable in damages to his employer. No man should undertake a work which he is not qualified to perform.

As to the hiring of common laborers little

need be said. Their rights and obligations, and the kind and quantity or work to be required of them, involve many particulars which must be determined, in great measure, by custom, unless expressly fixed by contract.

(*c*) Partnership (societas).[1] Partnership is a contract whereby two or more persons agree to combine their property or labor in a common stock for the sake of sharing the gain. The contract requires

Kinds of Partnership.

that there be some contribution on the part of each of the parties, whether this be equal or unequal, alike or unlike. The contract is perfected by consent. If there be no especial agreement to the contrary, the shares of profit and loss are divided among the partners equally, but this is almost always provided for by contract. There are two kinds of partnership: (1) general, and (2) special, according to the extent and purpose of the contributions.

(1) General contracts of partnership may be either those in which everything belonging or in any way accruing to each of the partners is held in common by them all, or those in which everything arising from the gains of a mercantile or professional business is contributed to the common stock.

(2) Special partnerships are those formed either for a single transaction or for joint ownership in a particular thing.

A partner is bound to exercise the same care and diligence in the business of the company as

[1] Morey, 368; Mackenzie, 243–248.

Liabilities of Partners.

he does in his own private affairs, and he is answerable to his copartners for loss arising from negligence. He is further bound to furnish what he agrees to furnish, to pay his share of the common expenses and losses, and to grant to the others their shares of the common gains. These mutual obligations are enforced by the actio pro socio. The acts of one partner are not binding upon the rest, if he acts without authority or beyond the scope of the partnership.

Partnership is dissolved by the expiry of the time for which the contract was made; by mutual consent of the parties; by one of the partners retiring, especially when no term is fixed by law, provided this is not done fraudulently or in a way to injure others; and, lastly, by the death or bankruptcy of any of the partners.

(*d*) Mandate. Mandate is a contract by which one person confides the management of some business to another, who undertakes to perform it without pay or reward. He who gives the commission is called mandator (mandant), and he who undertakes the commission is called manditarius. It is essential to this contract that it should be gratuitous, because, if any remuneration is given to the agent for his services, the contract is not mandate, but locatio operare.

A mandate may be constituted verbally or by letter, and it may even arise where one person permits another to transact his business for him. The mandatory is not bound to undertake the business, but

when he does so, he must perform it in the terms of the order given, otherwise he will be liable for neglect. He is answerable not only for fraud, but also for slight neglect.

Innominate contracts are those which have no special designation in the law, but which comprehend transactions involving the mutual consent of the parties followed by part performance. The execution of the agreement by one party is looked upon as forming a consideration sufficient to make the execution compulsory upon the other party. These contracts involve the various kinds of exchanges whether of things or of services. They are summed up by Paulus as follows; "Aut do tibi ut des; aut do ut facias; aut facio ut des; aut facio ut facias." In other words, if I give something to you on condition that you give something to me, the very fact that I have executed my part of the agreement places you under legal obligation to execute your part; and the same principle applies to all the other forms.

§ 166. Innominate Contracts.[1]

Certain engagements are formed by implication from circumstances, without express agreement, on the part of either party. Quasi-contracts are constituted, without convention, by one of the parties doing something that, by its nature, either binds him to the other party or the other party to him; of this kind of obligation Roman law specifies five: (1) Negotium gestio; (2) Indebiti solutio; (3) Hereditatis aditio; (4) Tutelæ administratio, and (5) Rei communis administratio.

§ 167. Obligations Quasi ex Contractu.[2]

(1) Negotium gestio is the assumption on the part of one person of the business of another person who is

[1] Digest, IX, 5, 5; Morey, 371.
[2] Morey, 372; Mackenzie, 227; Hunter, 540–545.

absent, without any express mandate. If made in good faith, the law recognizes the acts of such a person and renders them legal.

(2) Indebiti solutio, or payment by mistake of money not due either by natural or legal obligation. This imposes upon the person receiving it the duty of restoration.

(3) Hereditatis aditio. The acceptance of an inheritance imposes upon the heirs the obligation to divide it in accordance with the terms of the will.

(4) Tutelæ administratio. The administration of the estate of a ward imposes upon the administrator the duty of administering the estate in accordance with the terms governing his appointment.

(5) Rei communis administratio, or the administration of a common thing, creates an obligation whereby two or more persons are each liable to the other for its proper division.

CHAPTER XVI

PROCEEDINGS IN A CIVIL ACTION[1]

THE first step to be taken by a person who deemed himself aggrieved by the conduct of another was to bring that person before a court of justice. In modern times this process is performed by the State as a matter of course and with so little difficulty that it entirely escapes the notice of the casual observer. We have long been accustomed to yield unqualified obedience to the State's authority, and its pressure causes us no discomfort or inconvenience. But this was by no means the case with the men who laid the foundation of Roman greatness. This accepted authority on the part of the State came only through centuries of development. Looking at the subject historically, three epochs are easily distinguished: (1) the law of the Twelve Tables; (2) the edicts of the prætors; and (3) the imperial constitutions.

§ 168. The Summons (in Jus Vocatio).

Summons according to the law of the Twelve Tables was a private act of the complainant, and failure to obey was not looked upon as an offense against the law. The entire length that the Twelve Tables went in the matter was; "If the complainant summon the defendant before the magistrate, he shall go; if he do not go, the plaintiff may take a bystander to witness and take him by force."

(1) The Summons according to the Law of the Twelve Tables.

Thus the State legalized the exercise of force by a com-

[1] Ortolan, 239–280; Hunter, 968–1060; Sohm, 148–163.

plainant to drag an unwilling defendant before the court. This mode of summons reached to the empire and beyond, as we find in Plautus, Terence, and Horace examples of the formal summons.

It appears, by the law of the Twelve Tables, that the defendant could resist arrest without exposing himself to any punishment, and this was, no doubt, often resorted to if the defendant was a powerful man, or had friends who were able to help him. Moreover, the complainant was entitled to use force only when witnesses were called to give testimony to the refusal of the defendant to obey the summons.

A person on being summoned could avoid an immediate appearance before the court by giving bail for his future appearance. The person going surety was called the vindex, and, by taking upon himself the responsibility of the defendant, released him from arrest. A freeholder, or taxpayer whose fortune was estimated at not less than 1500 asses, had to furnish a freeholder as vindex. In case the accused was a mere workman, any one could act as his vindex.

When the prætorian edicts came into use, they left the mode of summons as regulated by the Twelve Tables, but introduced the following important changes: —

(2) Summons according to Edicts of Prætors.

I. The prætor made it an offense for a person who was duly summoned to refuse to obey.[1] He could not plead that the court had no jurisdiction as a sufficient reason for his non-appearance; such a plea could be made only before the court itself.[2]

II. The prætor made it an offense to rescue a person summoned, or in any manner to cause his escape, or to delay

[1] D., 2, 5, 2, 1. [2] *Ibid.*, 2, 5, 2; 5, 1, 5.

the appearance of the defendant so as to cause the plaintiff to lose his suit by prescription. This eliminated the interference of friends and aided the cause of justice.[1] The penalty for interference was the payment of the plaintiff's claim as estimated by himself.[2]

III. Under prætorian jurisdiction the practice was to have a cautio judicis sisti instead of the vindex. The cautio was the giving of security for the appearance of the defendant. In case the complainant was satisfied therewith, a mere promise of the defendant to appear by stipulation was deemed sufficient. Any one could act as a cautio judicis sisti who had the means to answer the defendant's default, no matter whether he was a freeholder or simply a proletarius.[3]

IV. The prætor made it possible for a complainant to get justice when the defendant kept out of the way in order to avoid a summons. This was a long step in advance of the primitive law of Rome, which furnished no remedy in such a case. This was because the ancient law recognized no litigants until they were actually in the presence of the magistrate and had invoked his interference; a condition but one step in advance of 'faustrecht.' The law went no farther than to allow the exercise of force in order to bring a wrongdoer into court. Again, it was characteristic of early Roman procedure that the tribunals did not attempt to lay hold of the property of any one, but only of his person. No magistrate gave execution against a man's property, but only against his person. In case the wrongdoer kept out of reach of his adversary, the only remedy open to him was the seizure of his goods. This the prætor allowed, and so introduced execution against property. He simply inserted in his edict a notice to the effect that if a defendant

[1] D., 2, 7, 4, 2. [2] *Ibid.*, 2, 7, 5, 1. [3] *Ibid.*, 2, 6, 1.

concealed himself in order to evade a summons (latitare fraudationis causa), he would order his goods to be seized and sold.[1]

The prætorian edicts, by making neglect or refusal to obey a summons an actionable wrong, rendered it henceforth unnecessary to drag a defendant into court by the neck (obtorto collo), but still the summons remained a private act of the aggrieved person. The change from the private summons to that of the public summons was brought about in the course of three centuries and involved four steps: —

(3) Summons under Imperial Constitutions.

I. The ancient practice of oral summons, followed by the acceptance of a vindex, already discussed, gradually gave way in favor of the *vadimonium*. This may be described as a reciprocal promise of two persons having a dispute with or without sureties, to appear on a given day before a magistrate to adjust their differences. The terms *vades* and *subvades* are said to have been contained in the Twelve Tables, the first used to designate the sureties given by defendants, the second, the corresponding sureties given by complainants. Gaius describes vadimonia as the means of securing the appearance of both parties in court after the first appearance. By the end of the republic vadimonia seems to have been a regular way of beginning a civil suit.

II. According to Aurelius Victor[2] vadimonia were abolished by Marcus Antoninus and a new system introduced called *denuntiandæ litis*. This was a movement in the direction of simplicity. According to this the complainant simply gave notice of his demand to the defendant, and a day was appointed for their appearance before a magistrate. This

[1] D., 42, 4, 7, 1; 42, 4, 7, 13.
[2] Aurelius Victor, De Cæsare, 16.

still remained a private affair, but a penalty was attached to the non-appearance of either party; the complainant forfeiting his claim, and the defendant paying a fine.

III. Constantine, in 322 A.D., required that the denuntiatio litis take place before a judge and notice of the demand be sent to the defendant *by a public officer*. This was a formal procedure and somewhat cumbersome, but it introduced the State and limited the activity of the individual.

IV. By the time of Justinian the procedure established by Constantine disappeared and the *written summons* (libellus conventionis) came into universal use. This written summons contained a precise statement of the demand of the complainant, signed by himself, and requiring an answer in five days. This time was subsequently extended by Justinian to twenty days. The complainant was permitted subsequently to amend the statement which he made in his summons. The officer who served the summons was paid according to the amount of the demand. By this plan the presence of the defendant in court was secured without any effort on the part of the complainant.

The fundamental characteristic of Roman civil procedure and that which distinguishes it from that of any other nation was the division of all judicial proceedings into two sharply distinguished sections: the proceedings 'in jure,' and the proceedings 'in iudicio.' Hunter, commenting upon this peculiarity, says; "This division of labor which some modern writers have shown the disposition to exalt as a highly scientific arrangement, but which may be viewed rather as an imperfect and inchoate form of civil procedure, lasted until the reign of Diocletian, who made the immense change of committing the trial of civil causes to State-paid lawyers. This step

§ 169. Proceedings in Jure.

was in harmony with the whole course of development of Roman civil procedure; it was one of the steps by which the State assumed to itself the exclusive control from first to last of civil causes." The proceedings 'in jure' were the proceedings before the magistrate or judicial officer, the organ and representative of the sovereign power of the State. It passed through two stages: in the earlier stage the preparation of the case and its reference to arbitration was wholly *oral;* in the latter, it was *written*. To the first stage belonged the legis actiones — the actio sacramenti, the actio per judicis postulationem, and the condictio. To the second stage belongs the *formulæ*. The object of the proceedings 'in jure' was, in the first place, to ascertain whether the complainant had a claim which was admissible and, if so, to determine the nature of this claim and to fix the conditions subject to which it could be asserted. The proceeding in jure culminated in and terminated with the litis contestatio, which was the formulating of the legal issue in such a manner as to supply a foundation for the 'judicium,' and thus to obtain a final decision of the case. The granting of the litis contestatio by the magistrate was equivalent to a decision (decretum) on his part, that the complainant's claim was admissible in itself and ought to be enforced, subject to such limitations as resulted from the contents of the litis contestatio. At this stage the case passed out of the hands of the magistrate who formulated the case merely, to be passed upon by the judex or private individual who was chosen for this special task. Our interest in the first stage, that of the legis actiones, is purely historical and has been already sufficiently discussed (see pages 144–148). Of the legis actiones Gaius has this to say;[1] "Of the legis

[1] Gaius, 4, 12.

actio there were five forms: sacramento (by wager), per judicis postulationem (by demanding a judex), per condictionem (by formal notice), per manus injectionem (by laying hands on a man), and per pignoris capionem (by taking a pledge)."

"The proceedings called legis actiones could be conducted only between Roman citizens; aliens, unless by special favor (as some Latins), could neither sue nor be sued.

"The parties could not appear in the formalities of the legis actiones by agents or procurators, but must themselves perform the ceremonies. This is another characteristic of the old jus civile, the refusal to allow one freeman to represent another in a legal transaction.

"The system was marked by a rigorous pedantry, in which form was everything and substantial justice nothing."[1]

The second stage in the proceedings 'in jure,' the formulæ, seems to have owed its origin to the necessity which the prætors were under of devising a method of civil trial for peregrini. In the legis actiones the alien had no part. But in the complex life which had been brought about by Roman conquest the necessity arose of providing a means of determining disputes in which an alien was a party. The prætor peregrinus devised a scheme to meet this need. He followed the essential features of the Roman system (jus civile), but modified it when necessary and thus brought about a reform of Roman procedure by reason of his imperium. He formulated, as heretofore, the litis contestatio and passed the case on to be determined in judicio. Here is where the chief departure from the old system took place. The magistrate wrote out his directions to the judex whom he appointed instead of merely giving oral directions as

[1] Hunter, 979.

heretofore. Moreover, the judex was no longer a Roman senator, but any person upon whom the litigants could agree.

The chief thing to be noticed in this new form of procedure is that it contained no positive assertion of any right in the plaintiff, but proceeded at once from a recital of the facts constituting the complaint to give the arbitrators power to award damages. A slight modification of the written formula made it possible to introduce an agent or attorney either for the plaintiff or defendant. In this manner; "If Dio has received in deposit a golden vase of Agerius, and refuses to give it up, let the recuperatores order Dio to pay to Negidius the value of the vase." [1]

The next step in the history is the introduction of formulæ in civil cases between citizens. The lex Æbutia is generally thought to have this as its object. Certain it is that formulæ were first brought in for the use of citizens in the case of actiones in personam and were but a modification of condictio, which was in turn but a modification of the sacramentum. The fundamental difference between them was the omission of the reciprocal wagers that formed an indispensable preliminary to the condictio.

The steps by which the formula was adapted to actions for property can be traced with certainty. In the sacramentum the question finally submitted for trial was not, which of the claimants was owner of the thing in dispute, but which was right in his wager (sacramentum esse justum vel injustum). It is the truth of an assertion and not the justice of a demand that is at issue. The State does not yet assert a claim to civil jurisdiction. From the sacramentum is only a step to trial by sponsio or wager.

[1] Hunter, 981.

"In a sponsio we proceed thus. We challenge the opposite party by a sponsio such as this, — 'If the slave in dispute is mine ex jure Quiritium, do you undertake (spondes) to give me twenty-five sestertii?' Next we put forth a formula, in which the statement of claim is that the amount thus undertaken for ought to be given us; and in this we win if we prove that the thing is ours." [1]

Gaius thus shows that the sum of the wager is nominal, and the wager itself is introduced merely to give jurisdiction.

In the next stage, the condictio, the wager is for a substantial sum — one third of the amount claimed. In the case of interdicts and the actio de pecunia constituta, the praetor, while making use of the condictio, made the sum of the wager sufficiently serious to act as a penalty. Here the question referred to the judex was not the mere truth of an assertion, as was the case in the sacramentum, but whether the complainant had a right to the thing claimed. This is a step in advance, but the action is still, strictly speaking, in personam.

In the third stage, the fiction of the wager is dropped and the right of the complainant is submitted directly for the judgment of the judex. Here we have for the first time reached a true actio in rem.

"An action for a thing is twofold; for it can be brought either by formula petitoria or by a sponsio. If, then, it is brought by a formula petitoria, the stipulation called judicatum solvi (that what the judex awards shall be paid) finds a place; but if by a sponsio, that which is called pro præde litis et vindiciarum. A petitoria formula is one in which the plaintiff alleges in his statement of claim (intentio) that the thing is his." [2]

[1] Gaius, 4, 93.

[2] *Ibid.*, 4, 91–92.

We have now reached the second stage of a Roman civil procedure. The case has passed into the hands of the judex. It is first necessary to consider his liability. Says Justinian;[1] "The very first thing he ought to observe is this, not to judge otherwise than is laid down by the statutes, by the constitutions, and by custom."

§ 170. Proceedings in Judicio.

"If a judex makes himself liable in a case by a wrong decision (litem suam fecerit) it is not strictly an obligation ex maleficio that he seems to incur. But it is not an obligation arising from contract, and there is understood to be wrongdoing on his part, although it may be only through want of judgment. He seems, therefore, to be liable quasi ex maleficio, and will have to bear such penalty in the matter as shall seem fair to the sense of duty of the judex that tries him."[2]

Liability of Judex.

"A judex, if required by the formula either to give plaintiff a definite sum or to acquit defendant, who gives plaintiff a different sum, makes the cause his own, and must make good the loss."[3]

"In like manner, if the reference permits a judex to condemn defendant up to a certain amount, and not beyond, if he gives more, the defendant may reclaim the excess from the judex."[4]

Prior to the adoption of formulæ by the prætors, reference to a judex was always oral and had to be attested by witnesses. Exactly the same procedure was adopted whether the case was referred to a judex, arbiter, recuperatores, or centumviri. Says Gaius;[5] "They came to receive a judex. Afterwards, when they came back, a judex was given them not before the thirtieth day. This was done through the lex Pinaria; for before that statute a judex was

Procedure in Judicio.

[1] Justinian, 4, 17. [2] *Ibid.*, 4, 5.
[3] Gaius, 4, 52. [4] *Ibid.*, *loc. cit.* [5] *Ibid.*, 4, 15.

given at once. This we have understood from the foregoing, that if the action was for less than 1000 asses, they used to contend with a sacramentum of 50 asses, not of 500. After a judex had been given them, however, they gave formal notice to one another to come before him the next day but one. Then when they came before him, before they fully plead their case in his hearing, they used to set the matter forth to him shortly, and as if by way of index. This was called causæ conjectio (throwing the case together), as being the gathering together (coactio), so to speak, of their case into short compass."

Procedure under the Formula.

Under the formula system the parties appeared before the judex or other referee and presented a brief statement of the nature of the case referred. This was followed by longer pleas delivered by the contending parties or their advocates, stating the facts involved. Then followed the examination of witnesses and the production of any written documents deemed of value in securing a just decision. In the presentation of evidence there was no fixed rule. Witnesses were examined on oath. When the evidence was all in, the parties to the suit or their advocates summed up their case. It was then ready for judgment. An adjournment could be taken in case the judex had not made up his mind, and further discussion could be called for. The judex was permitted to ask the opinion of the trial magistrate on a point of law, but not on a question of fact.

A judex or other referee could not render his judgment except in the presence of both parties, and, in later times, a direct and summary process of securing the attendance of these persons was adopted through the intervention of the court. The judgment had to be pronounced in the regular

manner on pain of being null and void. There must have been an opportunity given to each side to present and argue its case. The judgment was given orally to the parties and could not be delivered in writing. The usual plan was for the judices to retire after hearing the case and to dictate their judgment to a clerk. This written statement they then read to the contending parties. The Latin language was regularly made use of, but Arcadius and Honorius permitted judgments to be rendered in Greek. In case there was more than one referee, all had to be present when the judgment was pronounced, but a majority of votes was sufficient to support the judgment. In case the judges were equally divided, the decision was for the defendant.

An order for execution did not necessarily follow the decision of the judex, although this was the usual procedure. When a plaintiff obtained a judgment in his favor, he was compelled to go back to the prætor with the judgment in his hand, and to ask his authority for proceeding further upon it. This gave an opportunity for the defendant of calling in question the justice of the decision on various grounds. It might happen that the prætor would refuse to give any effect to the judgment, thinking it erroneous. In the same manner, if the defendant succeeds before the referee, the complainant might, under certain circumstances, treat the decision as null and void, and go again to the prætor for a new formula and another judex. But this questioning of the decision of the judex could not take place upon frivolous or inadequate grounds, and judgment was not set aside save for good and sufficient reasons. These were: —

§ 171. New Trials.

1. When the judgment had been pronounced and subsequently an error in law appears in the face of it. In such

a case it is wholly void and a new trial is the remedy. Many cases may be cited as examples of this. For instance:—

"A person is required to be a tutor, and he pleads as an excuse that he is beyond the age of compulsory service. The referee, however, held that no excuse was admissible. His decision is null and void without appeal. (Quum de jure constitutionis, non de jure litigatoris, pronunciatur.) If, however, the referee admitted age as a ground of excuse, but held that the tutor had not proved himself beyond the proper age, his judgment could be upset only by regular appeal." [1]

"In a testamentary suit, a referee supported a will on the ground that a boy under fourteen could make a will. The decision is null." [2]

"A judge condemned a defendant in the amount claimed, with a sum in addition that represented compound interest. But compound interest is illegal. Nevertheless, as the judgment did not bear this fact in its face, it was valid, unless upset on appeal." [3]

2. If a judgment has been rendered by the judex on the strength of false documents and the falsity of the documents has been subsequently proved in criminal proceedings, the judgment is held to be void.

3. A judgment was held null and void if it exceeded the terms of the reference, unless with the consent of the litigants.[4]

4. If it be shown that the referee accepted a bribe, the judgment is null and void.

5. Finally, a judgment was null and void if it had not been pronounced in open court in proper form, or if either party was absent on excusable grounds, such as sickness.

[1] D., 49, 8, 1, 2.
[2] Codex, 7, 64, 2.
[3] D., 42, 1, 27.
[4] *Ibid.*, 5, 1; 74, 1.

Under all such conditions a new trial was allowed as the proper remedy.

§ 172. Execution of Judgment.

It may be stated that the judgment of the judex was the natural termination of a Roman civil trial. This trial began in a feigned quarrel and, the judgment having determined which one was right and which was wrong, nothing remained. If the defendant refused to obey the judgment of the judex, another suit became necessary for the enforcement of the decision. The plaintiff, in this case, went again to the prætor with the complaint that the defendant refused to satisfy the judgment that he had obtained against him. Upon his satisfying the magistrate that the judgment had been righteously obtained, the latter granted him an actio per manus injectionem, which was merely a legalizing of the arrest of the defendant by the plaintiff and the compelling of him either to satisfy the judgment or to go with him as a prisoner.[1] So long as the legis actiones were in use the proper procedure in execution of judgment was the actio per manus injectionem. Gradually there developed a method of seizing the property of the defendant instead of his person to satisfy judgment against him. In this development there were three well-marked epochs: —

(1) Execution against the Person.

1. A debtor was allowed thirty days in which to discharge his judgment debt before he could be arrested. If he did not pay or find a vindex to dispute the judgment, he was carried off by the creditor in chains. He was kept in this manner for a period of sixty days, during which time, on three successive market days, the creditor was required to bring his debtor before the prætor and proclaim the amount of the debt, in

[1] Gaius, 4, 21.

order to give an opportunity to his friends to discharge the debt and release him. On the third occasion the debtor was either killed or sold into slavery beyond the Tiber.

Throughout this entire period the State only interfered to soften the severity of the individual, who was ever the active prosecutor.

About B.C. 326–313, an act was passed commonly called lex Poetelia Papiria, abolishing the nexum and establishing the rule of law that liberty is inalienable. The debtor could no longer be sold into slavery. Instead he was imprisoned in a public prison. Imprisonment for debt was finally abolished by Constantine in 320 A.D.

When it was no longer legal to seize the person of a judgment debtor, or when the debtor kept out of the way of the creditor so that he could not be taken for the debt, the prætor granted to his creditors an entry on his property (missio in possessionem). This was an arrest of property in lieu of the owner. It cut off the debtor from all right to enjoy his property.[1] The creditors had a right to administer the property as if it was their own, to receive all moneys and increase of every description, but they were simply in the place of mortgagees and not owners. They had to give an account of all receipts and expenditures and, in case the debtor should find security to contest the claim, must abide by the decision of the court. In case the property was forced to sale, the debtor was thereby released from all past debts and could neither sue nor be sued for the same. But he was rendered infamous by this bankruptcy and could no longer defend any suit unless he could find sureties.

(2) Bankruptcy.

A lex Julia, generally attributed to Julius Cæsar, enacted that debtors should get rid of their debts by transferring

[1] D., 42, 4, 7.

their property to their creditors in lieu of execution against their bodies. Such surrender did not entail infamy, but it did not release the debtor from liabilities in case he could afterward pay without leaving himself in want.[1]

Bankruptcy on Application of Bankrupts.

Thus far the Roman law had provided two modes of enforcing the collection of judgment debts — imprisonment and bankruptcy. These means were for many centuries efficient because, if the debtor concealed himself so that his creditor could not imprison him, he could be made a bankrupt and whatever he had, divided among his creditors. At length, in the time of Antoninus Pius, a more expeditious method was devised, and one that lacked the cruelty of the older procedure. To satisfy a judgment debt a debtor's goods were taken possession of by the officers of the State and sold. The money thus obtained was paid over to the creditors, only a small reduction being made for expenses. This method quickly became the regular way of levying execution for debt. Anything belonging to the debtor could be taken in execution except slaves, oxen, or implements of agriculture, but it was necessary first to exhaust animals and movables before levying upon the land of the debtor.

(3) Execution against Property.

The sale of goods was conducted by the officers of the court, and if this sale was in any way defeated by the debtor, the creditor had the goods adjudged to him as his property unless they were of greater value than the debt.

During the period of the republic, Roman magistrates were looked upon as representing in their persons the sovereignty of the people. They were, consequently, completely independent of one another, no one

§ 173. Appeals.[2]

[1] D., 42, 3, 4.

[2] Hunter, 1044–1048.

having any power or authority only as he received it from that sovereign body. This being the case, there was no subordination of one body of magistrates to another; no superior and inferior courts, and, consequently, no challenge of the judgments of a lower court in that of a higher. So long as there were no subordinate magistrates there could be no appeal. While this was the case during the entire republican régime, there were, nevertheless, two institutions that somewhat imperfectly supplied the need of a regular system of appeal, the provocatio and the appellatio.

I. Appeals during the Republic.

Very early in the history of Rome it came about that a person who had been condemned by a magistrate (a criminal court) could appeal (provocare) from the decision to the Roman people gathered in the comitia centuriata. According to Cicero this right of appeal existed in the time of the kings, but a text of Pomponius states that the right of appeal was introduced on the expulsion of the kings, as a limitation on the powers of the consuls, who could not touch the caput of a Roman citizen without the sanction of the people (see lex Publilia, page 103).[1] Later criminal justice was administered by commissions (quæstiones perpetuæ) composed of private citizens who were selected by the prætors. The appeal to the comitia centuriata gradually fell into disuse as the quæstiones were delegates of the people, and there was, consequently, no longer fear of the arbitrary power of the magistrate.

(1) Provocatio.

The early Roman constitution developed another marked and peculiar characteristic, — the right of veto which one officer had over the official act of another officer even of a higher rank than himself. It became

(2) Appellatio.

[1] D., 1, 2; 2, 16.

a maxim of the Roman law with reference to partnerships, that in a dispute between two partners (as, for instance, consuls or tribunes), that one who said "No" was to have his way.[1] In like manner, a magistrate could be stopped in any official act by the veto of any other magistrate of equal or higher rank. Such a veto was called intercessio, and the formal demand for it by a private individual, appellatio. The tribunes were most active in the use of such power and frequently vetoed the acts of consuls and prætors. The effect of the veto was purely negative; it stopped for the time being the forbidden act, but it suggested nothing in its place. It could not, therefore, be considered an amending power, but merely a check upon unconsidered or arbitrary acts.

Throughout the early days of the empire the old system continued in force. The theory of the Roman government was ever that of a limited monarchy. The latter days of the republic reveal a gradual passing over of power from the 'people,' where it was thought to reside, to one man. This is clearly seen in the disturbances under the Gracchi and the party struggles between the Optimates and Democrats under the leadership of Sulla and Marius. It culminated in the struggle between Octavius and Antony. The complete transformation from republican into imperial institutions was brought about by Octavius when he either assumed or had bestowed upon him by a subservient people, the imperium; the title of Augustus; tribunician, proconsular, and consular powers; supervision of the laws and the office of pontifex maximus. The emperor, by becoming a multiple magistrate and supreme leader in all matters of State, arrogated to himself all State functions. Thus the emperor, by virtue of being made tribune for life,

II. Appeals during the Empire.

[1] Hunter, 1045; D., 5, 1, 58.

could veto the acts of any magistrate in Rome or Italy. In the imperial provinces the emperor governed by his lieutenants. Of course an appeal lay from these to him. In those provinces which were reserved for the senate and which had governors appointed by that body, the emperor could interfere in his capacity of proconsul and veto any act of a governor that was contrary to his wishes. A system of appeal was in this way inaugurated in the administration of justice from the fact of the emperor combining in himself all ministerial functions. Augustus followed with scrupulous care all republican forms; still, as a matter of fact, the establishment of the empire meant the abolition of all the independent and rival magistracies of the republic and the substitution of a single sovereign. Even the forms of the ancient republican constitution were abolished by the next generation of emperors. The want that had certainly been felt during the republican period of a proper court of appeal was now met by the emperors making themselves a supreme appellate tribunal from all courts throughout the Roman world.[1]

At first the only court from which no appeal lay was the emperor, but from the time of Constantine, the prætorian prefects gave final decisions.[2] These courts might, however, be asked to rehear a cause. The emperor could also, in appointing a judge to determine any cause, provide that his decision should be final. Generally appeals from magistrates in Rome, and from the judges in certain provinces, were carried, in the first instance, to the prefects of the cities, and from the presidents of provinces to the prætorian prefect. While no regular appeal could lie beyond these courts, the emperor might be asked in certain cases for mercy. This was simply in the nature of a pardon rather than an appeal.

[1] D., 42, 2, 1, 2.

[2] Codex, 7, 62, 19.

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