SOURCES
OF
THE ROMAN CIVIL LAW.

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THE ROMAN CIVIL LAW:

AN INTRODUCTION TO

THE INSTITUTES OF JUSTINIAN.

BY

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CAMBRIDGE:

MACMILLAN & CO.,

LONDON:

BELL AND DALDY, 186, FLEET STREET.

1857.


BIBLIOTHECA

PREFACE.

THE Roman Civil Law, as a Branch of Professional Education, has now in England claimed its rightful place. Thinkers, in the present day, maintain that the training of the Lawyer should be something more than a conventional heaping up of forms, and precedents, and technical results. That the attempt to solve the great problems of General Justice and Morality, which underlie each special System, is essential to the framing of a legal and a judicial mind. "By mastering principles," say the Members of the late Commission, "the Student becomes more "interested in, and obtains a steadier grasp of practi-"cal details."

It is futile to brand as unreal, or of secondary worth, studies which have ever ranked so high in every Continental Scheme of Education; studies which, from the day when Theobald first brought Vacarius to Oxford, have never ceased to be followed in our own great Universities. It is worse than futile to carp at as unpractical, and a real hindrance, that which has been deliberately revived by the several

Inns of Court in England; and which, as well by those to whom has been entrusted the power of admission to the Bar, as by a Committee of our greatest living Jurists, has been declared a necessary element in the training of every Student of the Law.

In May, A. D. 1854, a Royal Commission was addressed to eleven Commissioners, among whom were Vice-Chancellor Sir W. Page Wood, Mr. Justice Coleridge, the Right Honorable Jos. Napier, the Attorney, and the Solicitor General, Sir Erskine Perry, and Mr. Shaw Lefevre. The appointment and authority was "To inquire into the "arrangements in the Inns of Court for promoting "the Study of the Law and Jurisprudence, the Re- "venues properly applicable, and the Means most "likely to secure a systematic and sound Education "for Students of Law, and provide satisfactory Tests "of fitness for admission to the Bar." The Report, which was published in August, A. D. 1855, contains a recommendation that the several Inns of Court should be united in a Legal University. After laying down a general scheme for the constitution of such University, the Commissioners proceed to consider the nature of the studies, and of the tests to be demanded of Candidates for Degrees. And here it is well to remark that they consider the study of the Law as divisible into two distinct Branches. The one, speculative and extra professional; the other practical and professional. While acknowledging the benefits which are, or may be, derived from

the system of pupilage in a Barrister's Chambers, the Commissioners insist on the value of a previous systematic study of the Law considered as a Science rather than an Art. In so doing they endorse the opinion of Professor Maine, Reader to the Middle Temple, who, in his evidence (1108) expresses his anxiety, "That the more speculative branches of "study should be engaged in before proceeding to "the more practical. The minds of young men," he continues, "are never in a worse condition to con- "sider the higher principles of Law, than when they "are on the eve of embarking in actual practice. "Just then the necessity for shaping every question "with a view to immediate success is apt to take "precedence of all other considerations."

The two Branches suggested by the Commissioners consist of the following subjects :—

First Branch :

a. Constitutional Law, and Legal History.
b. Jurisprudence.
c. The Roman Civil Law.

Second Branch :

a. Common Law.
b. Equity.
c. The Law of Real Property.

The Report further suggests, "That no Person "shall be called to the Bar unless he shall receive a "Certificate from the Senate of having passed a satis-

" factory Examination in at least one subject, in each " of the above Branches."

It were needless to insist on the worth of that which bears the stamp of men, whom all confess to be so able to advise. It may, however, be doubted whether the objections which have been, by some, advanced to a compulsory study of the Roman Civil Law, have not, in most cases, sprung from a misconception of the meaning of the term as used by its supporters. If it were narrowed to the Letter of the Pandects, or the Code, a study of the Roman Law would have all the dangers, with but few of the benefits attendant on that of any other technical System. But, besides being, what no modern System can be, an unshifting standard of comparison, the Roman Civil Law has a special worth and meaning of its own. The term, when used aright, implies not alone the Municipal Law of the Empire, with its several modifications, in old times and in new; but includes a handling of the great questions of Morals, and of Polity. Ethics, on the one side, bounds its province; and, on the other, such History as serves to shew the working of its principles. It rises, so to say, to the unseen from the seen; and is the one System which both craves and furnishes, that union of metaphysical and of historical knowledge in lack of which, says Bolingbroke, none may deserve the name of Lawyer. " I might instance," writes that splendid declaimer,* " in other Professions, the obligation

* Letters on History; No. 5.

" men lie under of applying themselves to certain " parts of History; and I can hardly forbear doing " it in that of the Law, in its nature the noblest and " most beneficial to mankind, in its abuse and debase- " ment the most sordid and the most pernicious. " A Lawyer now is nothing more, (I speak of ninety- " nine in an hundred at least), to use Tully's words, " 'Nisi leguleius quidam cautus et acutus, præco " actionum, cantor formularum, anceps syllabarum.' " But there have been Lawyers that were Orators, " Philosophers, Historians. There have been Bacons " and Clarendons. There will be none such any " more, till, in some better age, true ambition, or the " love of fame, prevails over avarice, and till men " find leisure and encouragement to prepare them- " selves for the exercise of their profession by " climbing to the 'vantage ground,' so my Lord " Bacon calls it, of science instead of grovelling all " their lives below in a mean but gainful application " to all the little arts of chicane. Till this happens, " the Profession of the Law will scarce deserve to be " ranked among the learned Professions, and when- " ever it happens one of the vantage grounds to which " men must climb is metaphysical and historical " knowledge."

The principle of a division of Legal studies, suggested by the Commissioners in England has already been, in some sort, carried out in India. The Presidency College of Calcutta has its Chair of Jurisprudence, for the handling of the subjects con-

tained in the first of the Branches stated by the English Commissioners; and its Chair of Municipal Law, for the treatment, with reference to India, of those set forth in the second. To judge from late results, there is good ground to hope that, so soon as the scheme is more fully furnished and developed, this may not be the least fruitful of the Branches of the Government Educational System. Assuredly, the resolute endeavour to raise the tone, both moral and intellectual, of those who may hereafter be called upon to fill Magisterial or Judicial appointments, is one which merits the good-will of all who look with Hope on the Future of this vast Peninsula.

The substance of the following pages was delivered by way of Introduction to a course of Lectures on Comparative Jurisprudence based on the Institutes of Justinian. The intention has been to state clearly, and within the compass of a very few pages, just such amount of facts with reference to the Elements of Roman Law as seems absolutely needed for the proper understanding of its subsequent developments. There has been no attempt to deal with the many doubtful questions with which the subject teems; nor could such an attempt have been other than a failure, in a Work which, in so small a compass, seeks to map out so wide a theme. Little more than a general acknowledgment of obligations is possible, where the sources of information have been so widely searched for, and so largely used. Still it does seem

right that, when he makes his acknowledgment of debt to those of other lands, an English Scholar should not forget to mention those who, at home, have toiled so nobly in the self-same fields. He must needs be under a load of obligation to men like Savigny, and Thibaut, Hugo, Marezoll, and Puchta among the Germans ; and to Ortolan, Ducaurroy, Pellat and Blondeau of the French ; but he must also own with gratitude to many a benefit received from Long, and Bowyer, and Lindley, and Phillimore, and Spence.

PRESIDENCY COLLEGE,
November 1856.

CONTENTS.

SOURCES

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THE ROMAN CIVIL LAW.

CHAPTER I.

PRELIMINARY.

THE Roman Civil Law needs for its interpretation a knowledge of the sources whence it sprung. Nor is it singular in this. No system of Law can be studied in other than empiric fashion, which is not taken in its entirety; that is, in connection with the several elements which went to form it. A Human Law is the expression of a Want; an expression made by means of words, shifting and weak, because the instruments it uses are so. Words, then, alone —— the barren letter of the Law —— can never be relied on as its true expounder. From the Past must be called up the Want which once gave spirit to those voiceless symbols. In the Past must be read the Old Law which the New was meant to over-ride, and the grievance which it sought to remedy. As Introduction, therefore, to a closer study of the Civil Law, it is essential that one give some thought to the type or character of those by whom that Law was formed; and to the several causes,

whether of need or of expedience, which braced its first rude aims, and cast it in that high and lasting mould wherein we find it in Justinian's day.

It has been usual, and seems convenient, to consider the Roman Law as divided into four distinct periods fixed by certain great and well known changes in the civil History of the people. These periods, which Hugo of Gottingen, fancifully likens to the childhood, youth, manhood, and old age of human life, are—

First.—From the foundation of the City to the time of the Decemvirs.

Second.—From the time of the Decemvirs to Augustus.

Third.—From Augustus to Constantine.

Fourth.—From Constantine to Justinian.

CHAPTER 2.

FIRST PERIOD.

THE first point which deserves attention is that the Roman people down to a period very low in the historical age was a double state; made up of two races, originally distinct in type and character, living in close neighbourhood, and at last joined on equal terms. The first, called Ramnes, was a Latin Colony, on Mount Palatine; founded, as tradition said, by Romulus, and dwelling in a town called Rome. The second called Titienses or Quirites, was a settlement of Sabines, dwelling on the Quirinal and Viminal Hills in a town which Niebuhr holds to have been Quirium. The period when the thorough union of these tribes took place is doubtful; it probably began in the time when Romulus was King in Rome, and Tatius in Quirium. At first, no doubt, the union

was imperfect, but "in course of time" writes Niebuhr, "when the feeling, that the citizens of the two towns were one people, had been fostered by intermarriages, and by a common religious worship, they came to an agreement to have one Senate, one popular Assembly and one King, who was to be chosen alternately by the one people out of the other."* A third tribe of Etruscans, known as Luceres, and dwelling on the Cœlian Hill in a town which Niebuhr thinks to have been Lucerum, was probably conquered by the Ramnes and Titienses at a very early period after their union. The Luceres, therefore, though considered from the time of Numa as an integral part of the State, were still denied certain privileges which the other tribes enjoyed. It is probable that they were not admitted to a full participation in the rights of the two other tribes until the time of Tarquinius Priscus, himself an Etruscan. So soon as this perfect union took place, the several free burghers or patricians of the three united tribes composed the *Populus*—Sovereign People—of Rome.

Before the day of Priscus, then, the Roman people was made up of three tribes, of separate types and manners, and bound by the ties whether of inclination or of force. But of these three elements, one was for a long time reft of all political power. Two only—the Ramnes and Titienses—were at first admitted into the general estate, and by these two alone were all the great offices of state supplied. The full union of the Luceres was made at a period when the general body of the earliest law was finished; and the presence of Etruscan manners and traditions seems to have been but little felt. So far, then, as actual influences are concerned, the Romans may be considered as a double people, ruled in accordance with their respective characters by Romans and Quirites

*Hist. of Rome 1,293.

—Ramnes and Titienses of the earliest days. This double source was recognized by the ancient writers, while historians of our own days have equally observed it. Niebuhr sees it in the story of the twin brothers, in the head of Janus which, from the very infancy of Rome, was stamped on the Roman *As;* sees it also in the double throne, which, with its vacant seat, "points to the time when there was only one King, and represents the equal but quiescent rights of the other." It is impossible to lay down with nicety the extent of special influence exerted by each one of these ruling tribes. To the Ramnes, indeed, a certain precedency was always given; and it thence seems probable that the influence of this tribe was rather on the public law and general polity. To the Titienses, beyond all doubt, belonged the main features of the private law; and above all that power of the *Manus* which was the great characteristic of that which was, from its authors, called *Jus Quiritium*—'Law of the Quirites.'

The next point for consideration is the political sub-division of the members of the tribes. The custom of all ancient peoples was to adopt such arbitrary divisions, and to regulating them by some fundamental number. It was a custom general enough to give us good assurance that the tradition which assigned some such organization of the Roman polity was in its broad outlines worthy of belief. "Such forms," says Niebuhr.* "can never be accidental; they are a law like the Dorian music; they contain the evidence of their own truth." Each of the tribes was, say the writers, old and modern too, divided into ten smaller bodies, called *Curiæ*; each *Curia* was, in turn, sub-divided into ten *Gentes* or Houses; each Gens, or House, was made up of an aggregate of

* Hist. of Rome 2.84.

Families; but for political ends the *Gens* was the lowest element. The Family again was composed of two great parts, first Members, and second, Dependents. Members of a Family were Members of a House, therefore of a Curia, therefore of a Tribe, and therefore of the Sovereign Populus. Dependents, on the other hand, were linked with the House, as the aggregate of Families, but had no union with the Curia, none with the Tribe; nor, therefore, could they form any portion of the Populus, or Burghers. Members, then, of Families alone were considered as full members of the Tribe. The actual work of Government in each Tribe was carried on by two distinct Assemblies; the one popular, the other oligarchical. The first was the Great Council of all the heads of Families, in what was called *Comitia Curiata*—'Assembly of the Curies.' The second was the Senate, a body whereof the Members were elected from among the heads of Families; the number being always equal to the number of the Houses. "Each Gens," says Niebuhr,* "sent its Decurion, who was its Alderman, and the President of its by-meetings, to represent it in the Senate." The Senate, therefore, of one Tribe would, when every seat was filled, consist of one hundred Members. The President of the Senate,—Rex—or King, was a Life Officer chosen on the nomination of the Senate, but by election of the Populus, or Burghers, met in Assembly of the Curies. The hereditary principle was unknown in the election of the earlier Kings. The King might have the prerogative, but its source was always held and acknowledged to be the will of the Sovereign Populus. The extent of the Royal prerogative must at all times have been but vaguely limited. His power, says Arnold, was "as varied and ill defined as in the feudal monarchies of the middle ages. Over the Commons he was absolute; but over the real People, that is, over the Houses,

* Hist. of Rome 1.338.

his power was absolute only in war and without the city. Within the walls every citizen was allowed to appeal from the King or his Judges, to the sentence of his Peers, that is, to the great Council of the Curies."*

Such was the general frame-work of each one of the three original Tribes. When the equal union took place between the Ramnes and the Titienses, there was no change in general principle, and the only trace of the alliance is to be found in the stories as to the increased number of the Senate. Thus, when the earliest writers speak of the Senate of Rome as made up of one hundred Members, they allude to the Ramnes alone. And when they go on to say that the number was in course of time increased to two hundred, they mean only that the Titienses joined their Senate to that of the Latin Tribe. The Luceres were, as has before been said, admitted into no full participation of political rights until the reign of the first Tarquin. They therefore had, up to that period, no vote in the Comitia of the Curies, and consequently no weight in the election, nor share in the composition of the Senate. Still they, like the others, kept their own peculiar sub-divisions; had their own Senate, own Curies, own Houses, and the rest, "not however as national, but as local offices, as was subsequently the case in the municipal towns." Each Tribe, it may further be remarked, had its own two Vestal Virgins for the service of its own religious rites. Just, therefore, as the Senate of Rome had, up to the day of Tarquinius Priscus, but two hundred Members; so up to that same period, the early writers say, that the number of the Vestal Virgins was not more than four. But when the Luceres were admitted to a full share in the rights of citizenship, their offices and institutions which, though dormant, still existed, were added to, and amalgamated with those of the other Tribes. The

* Arnold 1.28.

Senate after that time numbered three hundred Members and the Vestal Virgins six. Not by the simple will of Tarquin, but as a consequence of his giving a full share, in the legislative functions, to the hundred Senators who had before formed the separate ruling body of the Luceres; and, in the religious offices, to the two Vestal Virgins who had before been busied with the sacred rites of their own peculiar Tribe. After the reign of the first Tarquin, then, the Members of the three great Romulan Tribes, were joined in one great Body, and formed the Sovereign People, the Populus of Rome.

But, side by side with the Populus, had sprung into existence a new and most important element. That namely, of the *Plebs*, or Commons. Much question has arisen as to who the first Plebeians were, and what their true position in the early policy of Rome. The most probable idea is, that they were, at first, dwelling in the districts conquered by the Romulan tribes, who afterwards were kept in thraldom by their conquerors. To these might be added as well the vanquished citizens of other towns, who were afterwards transplanted to Rome, as those strangers who, of their own will, settled in the city of Rome, and agreed to accept of such privileges and be bound by such restrictions as the Burghers might dictate. The original relation of this Commonalty with the State was, as Arnold remarks, political and not domestic; "it united personal and private liberty with political subjection."* To continue the quotation, "This inferior population possessed property, regulated their own municipal as well as domestic affairs, and as free men fought in the armies of what was now their common country. But strictly they were not its citizens; they could not intermarry with the Houses; they could not belong to the State, for they belonged to no House,

* Hist. of Rome 1.27.

and therefore to no Curia, and no Tribe; consequently they had no share in the State's Government, nor in the State's property.

The Plebs, or Commons, as a free portion of the Polity, existed in a state of toleration rather than of union. Its numbers far outwent those of the Burghers, but for many a weary year it existed merely as an aggregate of individuals. It bore no trace of any such organization by division in Curies and Clans, as marked the order of the Burghers. Tarquinius Priscus seems to have been the first who sought to give a regular organization to the Commons. He was, however, unable to carry out his views, and the division was reserved for his successor Servius. Before we go on to discuss this measure, it may be well if, for a moment, we recapitulate the leading features in the policy of Rome at the period of the earlier Tarquin's death.

First.—A virtually equal union of three ruling Tribes, each with its regular division into Houses and Families; each with its equal number of Senators, combined into one great legislative body; all dwelling in one City which, from the mother-city of the most considered Tribe, was known as Rome.

Second.—When all the chairs were filled, a Senate of three hundred Members, which continued of that number for several hundred years.

Third.—A King, elective, and with such power only as the Burghers gave.

Fourth.—A *Populus*, or body of Burghers invested with high and peculiar powers, as well civil as religious.

Fifth.—A *Plebs* or Commonalty, which shared in the private law, was tolerated by the ruling body, but admitted to no share in any public office.

As to the mode of legislation during the like period, all new Laws were first proposed, discussed and settled in the

Senate, under direction of the King; they were afterwards submitted for ratification by the source of greatest power, the Burghers assembled in the Comitia of the Curies; and when so ratified, became binding on all citizens and sojourners. All causes, whether civil or religious, were decided by the King; the civil by virtue of his authority as Chief Magistrate, the latter in his quality of Pontifex Maximus. In matters criminal, the King was Supreme Judge; but there existed this distinction, that if the accused party were a Burgher, he had the right of appeal to the Comitia of the Curies; but if a Member of the Commonalty, he had no privilege of appeal, or rather there was no Tribunal which could receive it.

CHAPTER 3.

FIRST PERIOD.—*(Continued.)*

THE story of Rome's early Constitution, is little more than a record of strife between the two great Orders of the citizens. The Burghers seeking to keep the Commons in complete subjection. The Commons, on their side, struggling ever to share in the privileges of Government, gaining now by force and now by policy, on the once unlimited power of the Patrician Houses, and in the end admitted to an equal share in all State-honors, legal rights, and sacred ceremonials.

The earliest attempt to place the Commonalty in a certain recognized position, and to define their relations with the Members of the Houses, was made by Servius Tullius, a King, whose Constitutions were, by the later Roman Commonalty, looked on as fondly as were the Laws of the Confessor by the Conqueror's Saxon subjects. The first aim of Servius was to give to the Commonalty an internal organization, in some sort like

that enjoyed by the Burghers. As the division of the Burghers had been one of birth, he determined to make that of the Commonalty, one of land. To effect his end, he divided the whole Roman territory into thirty districts, or Tribes; four of these were for the city, and twenty-six for the neighbouring and subject country. In these local Tribes were included all those Romans who were not Members of the privileged Houses. "Every local Tribe," says Niebuhr, "had a region corresponding to it, and all the free substantial Members of the Roman State not included in the Houses, who were dwelling within the limits of any region, when the Constitution was introduced, were its Tribesmen." To distinguish them from the three great Romulan Tribes, these are usually called the Local, or the Servian Tribes.

The division of the Commonalty into thirty Tribes was a matter of internal organization analogous to the division of the Burghers into their thirty Curies; and as the latter had their Comitia of the Curies, so the Commons were allowed to meet when convoked by their respective Headmen, or Tribunes, in the Comitia Tributa—"Assemblies of the Tribes."

Such was the first Constitution of Servius. It gave a definite organization to the Commonalty, but did nothing more. Their Assemblies were convened for the consideration of their private interests alone, and the right to take part in public elections, whether as voters or candidates, was not as yet conferred on them. This boon, however, was afterwards accorded; as was another Institution, also the work of Servius; the end of this was to give to property that political power which had before belonged to birth alone. In order to give such influence to the aristocracy of wealth, Servius divided the whole body of Roman citizens, as well Burghers as Plebeians, into six Classes, according to the amount of their property. Each Class was broken up into a specified number

of sub-divisions, called 'Centuries;' and to each Century was given one vote in the general Assembly of the Centuries, or Comitia Centuriata. As, however, the great aim of Servius was to give the political preponderance to wealth, the Century was not made up of any definite number of Members; it consisted of such a body of citizens as, when taken together, were taxed at a certain sum. The consequence was, that the first or wealthiest Class contained 80 Centuries, and had therefore eighty votes; the fourth, though naturally a more numerous Class, had but 20 Centuries or votes; while the last, though it contained the greatest number of Members, had but a single vote. The whole number of the Centuries was 193, and as each Century had a vote, 97 formed a majority. The first Class, with its 80 votes, could in most cases calculate on securing a majority; and it is clear that the real influence of the poorer Classes must have been almost imperceptible, while the actual direction of affairs was given to wealth, and not to either birth or numbers. Niebuhr, and Arnold* follows him, considers the Centuries as a purely democratic institution; it would seem however, to have been rather oligarchical and exclusive. Such certainly was the belief of Dionysius; "Every time," writes he, "that the votes of the Burghers were given in the Comitia of the Curies, the vote of the poor man was equivalent to that of the rich; and as the poor voters out-numbered the rich, the poor for the most part prevailed. Now when Servius Tullius saw this, he fell upon a plan to make the rich the stronger; so when it was necessary to elect public officers, pass laws, or declare war, he no longer convened the Burghers by Curies, but the Citizens by Centuries." The most that can be said is that Servius first allowed the political existence of the Commonalty. His organization of the local Tribes was a great step; but the establishment of the Centuries

* History of Rome, 1,415.

went far beyond it, in that it gave the Commons, in shew at any rate, a social standing equal with that of the Members of the old Patrician Tribes. Not that, in theory even, such equality was absolute; on the contrary, the old lines of severance between the bodies were in fact as clearly marked out as before. The Commons in the Assembly of the Centuries had the privilege of voting, but that vote was absolutely null until it had received the sanction of the Curies in their Assembly .In course of time, indeed, as the Commonalty step by step had won its way to a more true equality of rights, the sanction of the Curies became first a matter of form, and then was quite dispensed with. But, by the Servian Constitution, the Burghers had the power in their Curies to negative a vote, however solemn, of the general Assembly. Nor was more than a portion of the full rights of citizenship given as yet to the Commons. They might vote for officers, but were themselves not eligible to any of the public offices of state. They were not allowed to intermarry with the Burghers; and though they could hold lands, and bring suits without the intervention of a Patron, they were shut out from all share in the lands acquired by public conquest. The functions of the Assembly of the Centuries were, for the most part, those which had belonged to that of the Curies, and may be reduced to four heads, to wit:—

First.—The right to elect the higher Magistrates.

Second.—The right to proclaim, and decide upon War.

Third.—The right to pass Laws and repeal them.

Fourth.—The right to hear judicial Appeals.

From the time of Servius, then, the citizens of Rome possessed three great Comitia, or Assemblies. In the first, Birth alone, and the Blood of the Tribes of Romulus were represented; these were the Comitia of the Curies. In the second, Wealth took the place of Birth, and Burghers were joined with Commons in the franchise; these were the Comitia of the

Centuries. In the third, at least until the time of the Decemvirs, the Commons only were entitled to take part: these were the Comitia Tributa, or Comitia of the Servian Tribes. The functions of the last named, were originally limited to mere local arrangements; and to the discussion of the internal requirements of each Tribe. But when, by slow degrees, the Commons won their way to a full share of the rights of the Burghers, the powers of their Comitia were increased, and became, as we shall hereafter see, the great Source of legislation.

Over and above the two great bodies of Burghers and Commons, the inhabitants of Rome were composed of two other classes which were most effectual in upholding the power of the patricians; these were—(1,) that of Slaves, and (2,) that of Clients. Of the first, it is needless here to say more than that the Roman Law looked with especial kindness on its Slave population. The Slave might, in accordance with certain methods duly set forth in the Institutes, obtain his freedom. If he did so, he was called, not Freeman, but Freedman, and was ever afterwards attached to the Master who had enfranchised him in the relation of Client. Who then was a Client? In the beginning, a Client was any person who, not being a Slave, placed himself under the protection of a Member of the Burgher-body, whom he called his Patron. If only he were free, any person whatsoever might place himself in this relation. Thus, the Client might be himself a Burgher, but poor and in need of support. Or, one of the Commons who lacked aid against oppression; or, a dweller in the rural districts, who wanted a powerful friend to represent his interests in the City; or, an exile from another land, who took up his abode in Rome; or, an entire Corporation, a foreign State or Town which being on unfriendly terms with the great City, chose some powerful Burgher as its Patron, to look after its interests at Rome. It seems

to be clear that the Clients had the right of suffrage in the Assembly of the Centuries; if so, and Livy* directly affirms it, the body of Clients must have exerted an enormous influence in favour of that Order to which it was so closely linked.

The institutions of Servius were crushed by the tyranny of his successor, who closed the kingly line. After the establishment of the Republic, they were restored; but no single barrier between the Burghers and the Commons was set aside. The first were still alone capable of election to the higher offices of State. The change from King to Consuls was assuredly no boon to the Commonalty. The King was, as has been shown, an Elective Life Magistrate of Patrician Order, who got his power, in the first days from the Burghers in their Curies, and in the latter from the Citizens in the Centuries. The Consuls were Patricians also; were chosen by the same Centuries, and were as powerful or more so than the King; the main difference was that the power was divided between two individuals, and its duration limited to one year. The badges of both King and Consuls were the same; both had the purple robe, and both the guard of lictors with the axes and fasces. "Thus," says Arnold, † "the monarchy was exchanged for an "exclusive aristocracy, in which the Burghers or Patricians "possessed the whole dominion of the State..... As "for any legislative power in this period of the common- "wealth, the Consuls were their own law. No doubt the "Burghers had their customs, which in all great points the "Consuls would duly observe, because otherwise, on the ex- "piration of their office, they would be liable to arraignment "before the Curies, and to such punishment as that sovereign "Assembly might please to inflict; but the Commons had no "such security, and the uncertainty of the Consuls' judg-

* ii. 56. † 1. 143.

" ments was the particular grievance which afterwards led to " the formation of the code of the Twelve Tables." The first substantial benefit which the Commonalty received was given them B. C. 509, by the Valerian laws of Publicola, colleague of Brutus in the first year of the Consulate. The most important of these was that which furnished the Commons with the same right of appeal from the sentence of a Magistrate, which had at all times been enjoyed by the Burghers. As the appeal of the Burghers lay to their Peers, the Burghers in the Curies, so that of the Commons lay not to the Centuries, but to their own especial Assembly, that of the Local Tribes.* The right of appeal did not extend beyond the City of Rome, and the circuit of a mile outside of its walls; still, as an acknowledgment of the claims of the Commons, the grant was all important. The next great change took place some ten years later, B. C. 499, when thanks to foreign war and civil misery, the Burghers superseded the two Consuls by a single Magistrate, to be appointed in times of great emergency; with powers more absolute; and with no appeal, for either Burgher or Plebeian, from his sentence. The appointment was made by one of the Consuls on the bidding of the Senate, and its declaration that such a Magistrate was needed; none were eligible except those who had before been Consuls. It was a measure of precaution taken by the ruling body, which left unchanged the relations of the two great Orders.

The Burghers were up to this time still the only source of legislative power. The Citizens at large had, indeed, in the assemblies of the Centuries, the power to affirm, or to negative any measure which it might be proposed to raise into a Law (*Lex*), but it was essential that the proposition should have originated from one of the higher Magistrates, or from

* Niebuhr. 1. 532.

the Senate which was still the assembly of the Burghers only. A measure passed by the latter body was called *Senatus Consultum*——'Senatorial Decree'——and became a *Lex*——'Law'——only after it had been ratified by the Assembly of the Curies. Such Decree was a Law in the inchoate state; and bore to it the same relation that in England a Parliamentary Bill does to a binding Law.

Some fifteen years after the right of appeal had, by the Valerian Laws, been granted to the Commons, a yet more important change took place.

The Commons, worn down by the tyranny of the ruling body, determined, in the year B. C. 494, to found a new town of their own, and leave the old one to the Burghers and their Clients. They seceded, therefore, to Mons Sacer a hill beyond the limits of the Burghers' power. "But," says Arnold,* "the Burghers were as unwilling to lose the services of the Commons, as the Egyptians in the like case to let the Israelites go, and they endeavoured by every means to persuade them to return." The result was a compromise: and, in consideration of their coming back to Rome, the Burghers agreed that the safety of the Commons should be assured. That they should have the right to appoint officers for their own protection. That such officers should be called Tribunes of the Commons; their persons inviolable; and their powers far larger than had been hitherto enjoyed by the former Tribunes, or Head-men of the Tribes. The number of these Tribunes was originally two; then five; and finally, B. C. 457, it was increased to ten. Their power was at first protective only, and rather negative than active. A Senatorial Decree was invalid until it had received their ratification; and any Magistrate whatever his degree, might be summoned to ap-

* History 1. 147.

pear before them. They had the power to convene at will the Comitia Tributa—or Assemblies of their Order, and the enactments known as Plebiscites which were passed at such Meetings, were binding on their own Order, while on the Citizens at large they had the force of Law, provided they had the assent of the Senate. The Plebiscites originally were, as Niebuhr has remarked, so far as regarded the State, little more than resolutions such as in England are passed at public Meetings, and then presented as petitions to Parliament. The Senate had at first the right to refuse to discuss the resolutions of the Commons. It was only in the year B. C. 456, that the Tribune Icilius claimed, and the Senate acknowledged the right of the Commons to have their Plebiscites taken into express consideration. It is impossible to overrate the worth of this first acknowledgment that the Commons also had a right to be represented in the great ruling Assembly. "The legal recognition," says Niebuhr,* "of the Tribunes' right to speak daily before the whole people, on the general affairs of the State, as they had hitherto done on those of their own Order, was under the circumstances of the times, far more than granting the freedom of the press is now." There were therefore, at this period in the State, two independent legislative bodies, distinct, hostile; yet each having power to check and restrain the proceedings of the other. The Senate might place its veto on a Plebiscite sent for its consideration by the Commons. While the Commons might, by their Tribunes, refuse to ratify an ordinance of the Senate. It is needless to dwell on the evils of this double source of legislative power. At length, to stay the endless bickerings which arose between the Orders, it was, in the year B. C. 452, agreed by the Senate, on the motion of the Tribunes, that recourse should be had to a new Magistracy with powers to frame

* 2. 218.

a new legislation, which should over-ride as well the Laws of the Senate, as the Plebiscites of the Commons. Three Commissioners were sent "beyond seas," to collect, in Greece especially, such notices of the laws and constitutions of other peoples as might be of service to the wants of Rome. These were absent for a year, and on their return, ten of the Burghers were appointed, with the name of Decemvirs, for the purpose of preparing a body of Laws which should be binding on the whole body of the Citizens. The result of their labours in revising and digesting appeared in the year B. C. 451; was distributed into ten sections, and engraven on ten metal tablets which were hung up in the Forum. At the end of their year of office, the administration of the Decemvirs was so high in the estimation of the people, that it was resolved to continue the like form of Government for another year. The second Decemvirate added sundry laws, which were engraven on two supplementary tables; thus was completed the body of laws, which is so famous as that of the Twelve Tables. It is needless to say more of the compilers of this Code, than that their general tyranny, crowned by the vile decision of their colleague Appius Claudius in the matter of Virginia, fired the people to resistance; the Decemvirs were ousted, and all the usual Magistracies restored. It is important to guard against the idea that the rules of law contained in the Twelve Tables, were absolutely new. The better assumption is that the main object of the framers was the embodiment in writing of the ancient Customary Law, which was before known fully only to the Patricians, as the recognized expounders of the Law. There was, indeed, the infusion of a foreign element, drawn either from the sources given by the three Commissioners who had been sent to Greece, or from the hints of Hermodorus, that Ephesian Sophist, who gave, if History may be believed, undoubted aid in interpreting the Institutions of his countrymen. But such infusion is quite con-

sistent with the belief that the Digest of homesprung Law was the main end of the framers of the Tables. The new would be added only when the old was incomplete, and, "where," says Mr. George Long,* "the Roman Law was imperfect, the readiest mode of supplying the defects would be by adopting the rules of law that had been approved by experience and were capable of being easily adapted to the Roman system."

CHAPTER. 4.

SECOND PERIOD.

THE Law of the Twelve Tables was the early Statute Law of Rome; nor were its provisions as to private rights, at any period, formally repealed. A mighty influence was, at a later period, raised to curb the rigour of this written Law, but no positive legislation meddled with its fundamental principles. Cicero, when a boy, was made to learn by rote the laws of the Twelve Tables; and though in later life the custom of so teaching them was rare, his own enthusiasm for them was unaltered; "To me" says he "a single copy of the Twelve Tables seems of more worth and weight than the libraries of all the Philosophers." Disjointed fragments only of this famous Code have come down to us; the general arrangement seems to have been as follows:—

Table 1 and 2.—Forms of Judicial Proceedings.
Table 3.—The law as to Loans, Bailments and the like.
Table 4.—The law of Parent and Child.
Table 5.—The law of Inheritances and Wardships.

* Dict. Gr. and Rom. Antiq. p. 680.

Table 6.—The law of Property and Possession.
Table 7.—The law as to Damages.
Table 8.—The law of Servitudes.
Table 9.—Public Law.
Table 10.—The law as to Funerals.
Table 11.—The Pontifical law.
Table 12.—The law of Marriage and Divorce.

It must be borne in mind that the great object of the Framers of the New Code was to soothe the differences between the Orders, and especially to give additional security to the Commons. The restoration, however, of the old Magistracies brought back the old jealousies. The Tribunes still negatived the proceedings of the Senate: and the Senate refused to waive its right to pass its veto on the Plebiscites of the Commons. In the year B. C. 449, however, a Valerian Law enacted that the Burghers, and Citizens at large, should be bound by the Plebiscites, or votes of the Commons in their Tribes. The Publilian law of B. C. 339 confirmed this Enactment. While the Hortensian Law, passed B. C. 286, revived and confirmed the former Laws; declaring that thenceforth the Plebiscites of the Commons should bind all the Members of the community, and, be in all respects of like force with the Laws of the Burghers. From the year B. C. 286 when this Law was passed, the great political distinction between Burghers and Commons may be said to have ceased. Henceforward all the highest offices of State were open to Members of the Commons: and the old prohibitions as to intermarriage of the Orders were abolished.

The address of the Burghers, however, was always seeking to regain the old supremacy. At first, when the publication of the Twelve Tables had given the Commons a knowledge of the laws whereby to regulate their acts, it would have seemed that all the Citizens stood on equal terms. But the Burghers got over this seeming difficulty by reserving to

themselves the sole right of interpreting the Laws. If legislation be, as has been shrewdly said, the exposition of a written Law, then were the Burghers still Rome's only legislators. Judicial forms and solemnities were invented; arbitrary meanings were affixed to certain words, and none save Burghers had the key to their interpretation. Religion, too, was called in to support the ruling class. Certain days were styled 'Holy,' and on them legal proceedings might be taken; certainly others were 'Unholy,' and on them no legal acts were valid.

This knowledge was confined to the Patricians. They had the power to stay all proceedings, check all suits, and dissolve even an Assembly of the Commons in their Tribes, by a simple appearance and declaration that the day was not Holy;——'Not Useful,' as they called it. The forms of legal proceeding, also, were strict in the highest degree. At first, no man could have a right of action who was unable to bring his case within the terms of some positive law. Subtleties of all kinds were upheld; symbolical forms, words and actions, were essential, and the slightest error in any point of form was held to be fatal. Such was the state of things until the year B. C. 304, when Cnæus Flavius, who had been Secretary to Appius Claudius Cœcus, published a collection of the several Legal Forms, together with a Calendar of days on which it was lawful to conduct legal proceedings. This attempt to make the Commons share, in what had up to that time been the especial privilege of the Burghers was, however, soon made of small avail. Fresh meshes were woven by the dominant party; new technicalities fabricated, and it was only after the lapse of another centuary that the labyrinth was finally laid open. This was done, B. C. 200, by Sextus Ælius who published a collection, which in addition to the precedents of Flavius, contained all later Forms. This was known as the Jus Ælianum.

The work of Ælius contained no fresh element of legal knowledge; it was merely a collection of those Legal Forms of action which had before been in the keeping of the Burghers. These Forms of action were called *Legis Actiones* ——'Legal Actions'—— either because they were directly founded on the Laws of the Twelve Tables, or because they were, in certain arbitrary modes, based on the letter of those Laws, and could, therefore, not be swerved from. Not only was any mistake in the Form of claim fatal to the suit, but no action could be brought for any matter whereof a precedent could not be found in the authorized Collection of Forms. After the publication of the Ælian compilation, all had access to the repertory of precedents: but he who, not being practised in the use of them, should have attempted himself to choose one for his purposes, would in all likelihood have fared no better than would he who in the present day, without a proper training should try to act as his own attorney. Thus was called into existence, a body of men, who made it their business to expound the Law, and to aid those who consulted them in matters connected with their affairs. They were called Juris-consults—— Jurists —— or Jurisprudents, and were originally Patricians; but after the passing of the Hortensian Law, Plebeians also were competent to act. At all times, however, the body of Juris-consults included the first men in the State; and the profession was esteemed the worthiest that could occupy the close of a life spent in the service of the State. Of the Jurisconsults, of the influence of their Answers, and of the mode whereby those Answers came to be ranked as among the direct sources of Law, it may be more convenient to speak at a later stage of this inquiry. The Legal Form, then, in the oldest actions founded on the Law of the Twelve Tables was essential to the success of a suit. It alone gave jurisdiction to the Magistrate, and defined the limits of the claim. Precisely similar to the unbending Forms of the

Roman *Legis Actio*—Legal Action—were in the English system, Original Writs in real actions. An Original Writ was an instrument sued out of the Court of Chancery, "founded on some principal of law—regula juris—which gave the right on which the action was founded."* The great similarity between the Roman Legal Form of Action and the English Original Writ consisted in the technical importance which attached to both instruments. As there were collections of Roman Forms without which no Legal Action would lie; so in England there was a Registry of Original Writs, and no Action would lie in cases where a fitting Precedent could not there be found. To use the words of Serjeant Stephen† "great technical importance was attached to a writ of this description. For as it had constituted from time immemorial, the first step in the suit, and always set forth (in general or special terms according to the nature of the case) the circumstances upon which the suit was founded, it had incidentally the effect of defining the scope and number of our legal remedies themselves; it being held that no Action would lie unless the case was one for which a precedent could be found in the Registry of Original Writ."

Before we proceed to a consideration of the next great stride made in the modes of civil process, by a departure from the strict Forms of the Legal Actions, it seems expedient to say something of the tribunal before which, and the functionaries before whom suitors were allowed to assert their claims. From the earliest period we find that the Judge in our acceptation of the word, was so in virtue of his being one of the higher Magistrates. Thus in the regal time, the King was sole Magistrate, and as has before been said, sole Judge. After the expulsion of the Kings, there was a change in the

* *Spence, Equit. Jur. of Court of Chan., vol.* 1, *p.* 226.

† *Commentaries, vol.* 3, *p.* 563.

duration rather than in the nature of the supreme authority. The Consuls, therefore, who succeeded to the Kings, succeeded also to their rank as Magistrates, and consequently to their judicial authority. Afterwards the rank and title of superior Magistrate was given to many other functionaries; as for example, to the Tribunes of the people, to the Ædiles, and to the Prætors, of whom hereafter we shall have much to say. All, then, were qualified to act as Judges in matters of legal dispute, who were superior Magistrates, and superior Magistrates were declared to be all those who bore what the Romans called *Honors* in the state; *Honors* being defined as "high offices of the State to which qualified individuals were called by the votes of the Roman citizens."*

Of the Magistrates, or Honor-Bearers as one of the sources of direct legislation, we shall treat hereafter; they have now to be considered in their character of expounders of the Law, rather than as its framers. Now here it is essential to bear in mind that in the practical administration of justice, two distinct functions are required. One to enquire into and decide questions of Law; and one to enquire into and decide questions of Fact. There is and can be no reason why one and the same person should not exercise both functions; that is, decide as well questions of Law as Fact. Such was the case at a later period of the Roman History, when what were called *Extraordinary Judgments* were in use. But from the earliest times up to the day of Constantine, the Roman system was one which placed the different functions in the hands of different persons, and called the results *Ordinary Judgments.*

The person who exercised the right of deciding on questions of Law was called MAGISTRATE; He, who exercised that of settling questions of Fact was called *Judex*—JUDGE. The

* *Long, Dict. Gr. and Rom. Antiq. p* 613

Law as laid down by the Magistrate was called JUS. The questions of Fact as settled by the Judex, or Judge, was called *Judicium*—JUDGMENT. The method of procedure was for the Magistrate to conduct the preliminary proceedings, to discover the real matter in dispute, to appoint a Judge on the nomination of the parties; and to give him formal instructions as to the enquiry demanded from him. The whole system of civil procedure, therefore, was devided into two well defined parts; the one before the Magistrate, where the points at issue were reduced to proper legal Form, was said to be *In Jure*; the other before the Judge, where the Facts were decided on, was called *In Judicio.* The first part of the proceeding was technically called the *Jurisdictio*——'Jurisdiction'—of the Magistrate: the second the *Officium*—'Duty and Obligation'—of the Judge. The litigants were said to have joined issue, or come to *Litis Contestatio* at the moment when the Magistrate sent the question of Fact to be decided by the Judge. In cases where the parties contending were unable to agree as to a Judge, the appointment was made by lot; but under every circumstance his authority to act was derived directly from the Magistrate. The Judge was usually chosen from a body of men, possessed of certain pecuniary qualifications and enrolled in a List, not unlike the English Jury-Roll. In certain cases, probably, at first, in all those wherein foreigners were parties, the matter was sent by the Magistrate, not to one, but to a fixed number of Judges of the Fact, who were called *Recuperatores.* Any persons whose services were available though not enrolled in the ordinary List might be nominated by the Magistrate; these were akin to the Tales-men of English Juries. In every case each party was entitled to an equal number of challenges. At times the Magistrate seems to have vested the Judge with a discretionary power which enabled him to treat the whole matter "in accordance

with the principles of Equity and Good Conscience,"* without being bound to the letter of the Magisterial instructions; here the Judge was called an *Arbiter*. In disputes as to Land, the Judges were always chosen from a College, of 105 members, three being yearly chosen from each of the 35 Local Tribes; these were called *Centumvirs*—The Hundred-men. In criminal cases, a plurality of Judges of the Fact were appointed; nominated from the public Album, or Judge-roll, by the prosecutor on the one side, by the accused on the other, and reduced by an equal number of challenges, on either side, to a number which varied in accordance with the nature of the charge. It is especially worthy of notice that neither in criminal cases, nor in others where a plurality of Judges was engaged, did the Civil Law demand Unanimity; the Judicium——'Verdict'——was that of the majority. All that it required was that the facts should be fairly discussed by competent and impartial persons, and that if doubts arose, the majority should overrule the dissentient minority.

It is no doubt unsafe to give over much weight to seeming analogies, but it is impossible to consider the respective modes of procedure without remarking in how wonderful a manner the Roman Magistrate tallied with the English Judge, as the expounder of the Law, and how similar were the *Judices*——'Judges'——of Rome, to the Jurors of England, as deciders of the Facts. Nothing, therefore, can be more erroneous than to speak of the English Jury as an Institution of peculiarly national growth; or to deny, as many have done, that it, or its equivalent ever had a place in the Roman Law. For upwards of thousand years, that is during the whole duration of the Ordinary Judgments, the Roman Law recognized in theory, and in practice acted upon the principle of

* Justinian. Instit. B, IV. § 31.

separating the expounders of the Law from the Judges of the Facts; a principle, which is the very essence of the English Jury. One portion of the Jury system indeed, as administered in England is pecular to that country, and to those which thence have borrowed it. I mean that which even the cautious Hallam* speaks of as "that preposterous relic of barbarism——the requirement of Unanimity." The necessity laid on a number of men to say upon oath that they are of one mind, when in reality they are not so, was assuredly at no time a part of the Roman system. According to the Roman Law the votes of the majority decided the matter; and in no English tribunal save the Jury is Unanimity essential to the validity of its decisions. To use the words of Mr. Forsyth,† "when in any of the Courts of Common Law, or in the Court "of Appeal in Chancery, the Judges differ in opinion, that of "the majority prevails; or if the numbers on each side are "equal, then the maxim of *præsumitur pro neganti* prevails and "the party who seeks to set the Court in motion fails in his "application." The like rule holds in the House of Lords when sitting as Supreme Appellate Court, or in the exercise of any of its judicial functions. The question why an exception should have been made in the case of Twelve Judges of the fact, or Jurors, is one most fit to be considered in connection with the principles of Jurisprudence. The main argument in favour of the rule which demands Unanimity is that given by Serjeant Stephen,‡ namely, "that in the event of a difference of opinion, it secures a discussion, and enables any one dissentient Juror to compel the other eleven fully and calmly to consider the question." The arguments for the requirement and against it were fully considered by the Commissioners appointed by the Crown to enquire into and

* Suppt. Notes to Mid. Ages. p. 262.

† Hist. of Trial by Jury p. 246.

‡ Commentaries, vol. 3 p. 622. Note,

report upon the Courts of Common Law. Their Report was published in 1830, and is strongly against the continuance of the rule :—After saying that "it is difficult to defend the justice or wisdom" of the principle; and that "the interests of Justice seem manifestly to require a change of Law upon this subject;" it goes on as follows:—"We propose, "therefore, that the Jury shall not be kept in deliberation "longer than twelve hours, unless at the end of that period "they unanimously concur to apply for further time, which "in that case shall be granted; and that at the expiration "of the twelve hours, or of such prolonged time for delibera-"tion, if any nine of them concur in giving a verdict, such "verdict shall be entered on record, and shall entitle the party "in whose favour it is given to judgment: and in failure "of such concurrence the cause shall be made a Remanet."

Such was the suggestion made somewhat more than a quarter of a century ago, by some of the most distinguished lawyers of the day; no measures however, have been taken to carry it out in practice, and to the present day the old requirement of unanimity is maintained.

It is very curious to remark that the tendency of the English system has of late years been, to give to one functionary the same power of deciding issues of Fact and of determining the Law, which was enjoyed, by Roman Magistrates after the time of Constantine, in the so-called 'Extraordinary Judgments.' Thus the Common Law Procedure Act of 1854 gives a power to litigants, under certain restrictions, by consent in writing, to dispense with a Jury and leave the issues of Fact to be decided by the Judge alone; "and the verdict of such "Judge or Judges shall be of the same effect as the verdict "of a Jury, save that it shall not be questioned on the ground "of being against the weight of evidence."* So in the new County Courts, established by 9 & 10 Vict. c. 95, and

* 17 & 18 Vict. c. 125 § 1.

modified and enlarged by sundry later Statutes, the Judge in all actions determines questions as well of Fact as of Law, unless a Jury be applied for by either party litigant, and summoned at the expence of such party. In cases where the amount claimed does not exceed £5, it is in the discretion of the Judge to grant or to refuse such application. In the new Jury so summoned, there is also a variation from the ancient type, as the number is reduced from Twelve to Five. The rule as to Unanimity is indeed upheld; but in this abandonment of an even, and choice of an uneven number there seems to have been the idea that, as in case of a difference of opinion there must be a majority, such majority would be more likely to influence the dissentients than when the numbers were equal.

If, therefore, in the Roman polity after the lapse of nearly a thousand years, the *Ordinary Judgments*, where different functionaries decided questions as well of Law as Fact, were replaced by *Extraordinary Judgments*, where one and the same functionary settled both the Law and Fact, it is not very different from what is now taking place in England; where, in the new County Court, a Jury is the exception not the rule, and where, even in the Superior Courts, a Jury may under certain limitations, be dispensed with. To say, therefore, of the Roman Civil Law that it was ignorant of the principle of trial by Jury, because a functionary under Constantine, settled questions of Fact as well as Law, is as untrue, as it would be ridiculous to say that it is not valued in England because in the great majority of cases which come before him, the County Court Judge is unaided even by his Jury of Five.

CHAPTER 5.

SECOND PERIOD—(*Continued.*)

In the year B. C. 200, the publication of the Jus Ælianum revealed, as we have seen, to the Commons, the mysteries of the Forms of the old '*Legis Actiones.*' The Forms themselves, however, were soon to be done away with, in all save a few exceptional cases. There were two great reasons for the change. First, because the old Legal Actions were confined to Roman Citizens, and because the growth of commerce and the influx of foreigners demanded that the rights of others also should be maintained. And secondly, because the old Forms, with their unbending requirements, were unfitted to a state of society so different to that in which they first arose. The new method of procedure was formally authorized by the *Lex Aebutia*, which was passed, probably, about 180 B. C., and the whole system was fully developed by two Julian Laws passed in the time of Augustus. According to the new system, the proceedings commenced with a written Instrument ——called a FORMULA—drawn up by the Magistrate, and containing a short recital of the facts on which the plaintiff sued; this statement was technically called *Demonstratio*—— '*Setting Forth*;' next came a precise statement of the plaintiff's legal claim, called *Intentio;* and last was the *Condemnatio*, a clause giving to the Judge authority to condemn or to acquit according to his finding on the Facts. The whole Instrument was headed by an order for the appointment of a Judge, or Judges; such order, however, was looked on as a mere preface to the Formula, and as no integral part of it. The three usual parts of the Formula, therefore, were, (1,) the *Demonstratio;* (2,) the *Intentio*, and (3,) the *Condemnatio.* In three

kinds of action for division of property, an additional clause called *Adjudicatio*, gave the Judge power to award the subject matter of dispute, to one or other of the parties litigant.

The following is an example of a simple Formula taken from Gaius, and divided into its several clauses. The subject matter of dispute is a Slave, and the simple questions left for decision of the nominated Judge are, first, whether any Slave at all were sold by plantiff to defendant for the sum alleged; and secondly, whether such sum were still unpaid.

Let X Y be the Judge:

[*Demonstratio.*] Whereas Aulus Agerius has sold a slave to Numerius Negidius.

[*Intentio.*] If it appear that Numerius Negidius ought to pay over to Aulus Agerius Ten Thousand Sesterces.

[*Condemnatio.*] Then, O Judge, condemn Numerius Negidius to pay the Ten Thousand Sesterces to Aulus Agerius.

If it do not so appear, then acquit him.

It is especially worthy of notice that in all cases the 'Condemnation-clause' involved a pecuniary penalty, and never the restitution, or giving of a specified thing. At times it might, as in the instance given, be for a specific sum. At times, it was in the nature of damages; a maximum being fixed in the clause, which the Judge could not exceed. At times again, no limit was fixed in the clause, and power was given to the Judge to assess the damages according to his discretion. But, in all cases, the Decree or Condemnation was for a Specific Sum, and never for Specific Performance.

In cases where the defendant either denied the Facts as set forth in the Formula, or admitted them in the sense intended by the plaintiff, no further pleading was required. In the latter case judgment on his own confession, went against him. In the former, the plaintiff had merely to prove his

allegations of Fact before the Judge; if he could do so, he suceeded in his suit; if otherwise, he failed. But in certain cases the defendant, while he admitted the allegations of the plaintiff, might wish to urge fresh matter, in order to defeat, whether wholly or in part, the ordinary bearing of the facts alleged. He was enabled to do this by pleading what was called an *Exception;* which was engrossed on the Formula immediately after the *Intention,* or Legal claim of the plaintiff. The plaintiff in his turn might except to the Exception of the defendant; that is, might urge something which, while it partly acknowledged the defendant's plea, served to destroy its effect as a *primâ facie* bar; this was called a *Replication,* and was inserted after the *Exception.* If the defendant were able to rebut the effect of the *Replication,* he might do so by a *Duplication.* This the plaintiff might answer by a *Triplication,* and so on. The Instrument might thus be lengthened until the matters in dispute were narrowed to a point affirmed by the one side and denied by the other. The whole document so perfected was then handed over to the Judge or Judges of the Fact, who had been appointed to decide on the questions thus raised. At the momemt when the labours of the Magistrate ended by the final execution of the Formula, and those of the Judge began by his acceptance of it, the parties litigant called upon the by-standers to witness that the parties had Joined Issue. This formal Joinder of Issue, or *Litis-Contestatio,* was a most important period in the suit. It fixed the time at which the suit in reality began; at which juridical possession was interrupted; at which the original obligations of the parties became merged in a fresh obligation to abide by the sentence of the Judge; at which, in case of death, the representatives of either party became entitled to maintain the suit, although before they would have been unable; and from which the successful party could claim all profits, rents, and benefits accruing from the thing in dispute.

It must then be borne in mind that the Formula in the Roman system was an instrument drawn up by the Magistrate, or his Officers, wherein were contained as well the allegations of the plaintiff, contained in the *Demonstration, Intention, Replication, Triplication,* and the rest; as the counter-statements of the defendant, in the *Exception, Duplication,* and so forth; together with an affixed Condemnation-Clause, and a prefixed appointment of Judge or Judges by the Magistrate. It was a history of the suit, from its commencement to the time of Joinder of Issue; and was handed over to the Judge of the Facts, as a means to enable him to see what really were the matters in dispute, and as an authority for him to make, or to refuse a certain award as the result of his enquiry. Without instituting any very close comparison between the Formulary system of the Civil Law, and the English mode of procedure in civil cases, it is impossible not to be struck by the resemblance between the general principles of pleading as recognized by both. The Nisi Prius Record with its prefixed Panel of Jurors, and its several pleadings is in all main features one with the Roman Formula, with its authority to the Judge or Judges of the Fact, and its chain of allegations.

In the English Instrument, the first step in the pleadings is the statement by the plaintiff of his cause of action; this is termed the *Declaration,* and tallies precisely with the Roman *Demonstration* and *Intention.* To this the defendant may answer by what was originally, as in the Roman system, called an *Exception,* but now a *Plea.* When it is a Plea 'in confession and avoidance,' that is, when it admits the truth of the facts alleged in the Declaration, but sets forth certain new matter whereby to destroy the plaintiff's right of action, it corresponds exactly with the common *Exception* of the Formula. Again in both systems, the same word, *Replication,* is applied to the answer made by the Plaintiff to

the *Exception* or *Plea.* The defendant's answer to the *Replication* is in England called *Rejoinder,* as in Rome it was *Duplication.* So, the English *Sur-rejoinder* answers to the Roman *Triplication.* The *Rebutter* to the *Quadruplication.* The *Surrebutter* had no corresponding name in the Formula; but in neither system is there anything to hinder the Pleadings from being still further lengthened out by steps alike in both, but void of distinctive names. In practice English Pleadings seldom reach to Sur-rebutter; and the Roman rule was for the Court to require Cause to be shown, in order to permit the allegations to go beyond Duplication.

Again, as the Roman Formula gave no power to compel Specific Performance and could give pecuniary damages alone, so the Common Law of England, in all cases of breach of agreement for performance of any act, was equally unable to decree fulfilment of the duty, and was able to remedy by action for damages only. As, therefore, the amount of pecuniary damage was set forth in the Roman *Intention,* so, according to the old rules, it was necessary that the Declaration in the English Pleadings should specify the damage calculated in current coin of the realm.*

The amount stated as damages was left in both systems to the discretion of the pleader; but in both the amount alleged was the extreme which could be recovered. The Judges of the Fact at Rome might deduct from, and the Jurors in England may do the like, but neither could exceed such stated sum. In England, the Common Law Procedure Act of 1854, has created a new kind of action, called Mandamus,

* The like rule holds in the Regulation Law of the H. E. I. C.; as to the rules for computation see Reg. X. of 1829, Sch. B, Art. 8.

Macpherson *(Civ. Proc.* 156) says, "even when the plaintiff does not seek to "recover a sum of money, but sues for re-admission to caste, it is necessary for "him to specify in his plaint a certain amount, in order to the institution of "the suit. There does not appear to be any rule for fixing such amount."

whereby a plaintiff is enabled to enforce on a defendant the performance of "any Duty in the performance of which the plaintiff is personally interested."* This, however, makes little alteration in the general rule, because, as has been well observed, it seems that the new Mandamus "cannot be "made available to compel specific performance of a Contract "——quâ Contract——but is appropriate merely for compel- "ling performance of a DUTY, under circumstances such as are "above stated."† It were needless to dwell at greater length on the features of likeness between the two modes of simplifying the matters in dispute, and of bringing the contested points before a tribunal fitted to decide upon them. To the Roman system of Pleadings, we may apply the terse and eloquent description which Mr. Justice Buller gave of the English as, "the statement in logical and legal form of the "FACTS constituting the Plaintiff's cause of action, and the "Defendant's ground of defence;——the formal mode of alleg- "ing that on the Record (or *Formula*) which would be the "support or defence of the party in evidence."‡

* Com. Law Proced. Act. 1854. § 68.

† Broom, Commentaries p. 129, *n.* (*t.*)

‡ Reed v. Brookman, 3 T. R. p. 150.

CHAPTER 6.

SECOND PERIOD—(*Continued.*)

THE Higher Magistrates, the Honor-Bearers of the Roman State, were directly Expounders, indirectly Makers of the Law. Nor, if one thinks of the unbending strictness of the Law which they had to administer, and of the wants of those on whose behalf it was administered, could this be otherwise. It must be borne in mind that the Laws of the Decemvirs were never formally repealed; and that those Laws addressed themselves to Citizens alone, nor mentioned Strangers save to bar them from its benefits. Usage made certain modifications, special Laws made more, but to the last the Law of the Twelve Tables was that which the Magistrate was sworn to administer, interpret and expound. Legislation has been shrewdly called the art of interpreting a written Law. Such art must beyond all doubt, have been needed by those who, like the Magistrates of Republican Rome, were bound by the letter of a Law, framed in other ages and with other ends. Impossible, according to any ordinary rules of construction, it must have been to bring Strangers and Sojourners within the provisions of a Code addressed to Citizens alone. Impossible, according to such rules to make enactments framed for a handful of soldiers and their followers apply, to a mixed and swollen population, to the requirements of commerce, to the considerations of wealth, and to the breaking down of those old barriers which at one time severed Class from Class. An application, such as this, must clearly have been Legislation, by what name soever

it were known. Nor does it seem that the Magistrate was subject to any present check. During his term of office, and within his own sphere, he was absolute; and none might dare to question the correctness of his views. Ulterior checks indeed, there were; his successor might refuse to ratify or to adopt his rulings, and he himself might, when his term of power was at an end, be called to account for an abuse of trust; but for the time being he was supreme, and his decrees unquestioned and unquestionable. Edicts issued by a Magistrate which set forth what he held to be the proper rulings in particular cases were held, for his term of office, to have full force of Law. Nor did they lose their binding power, until formally rejected by a successor. This right to issue Edicts which, though they might be disavowed, might also be, and for the most part were, confirmed by his successor was enjoyed by all who bore Honors in the State, that is, by all the Higher Magistrates. Thus, though mainly exercised by the Prætors, of whom much must hereafter be said, we read also of Edicts of Tribunes,—Edicts of Ædiles,—Edicts of Censors,—Edicts, in short, of all and every officer on whom the Populus conferred its gifts of HONORS. The Edicts so issued made one great element of the Roman Civil Law; called, from those that issued it, JUS HONORARIUM,—'Honorary Law;' called also 'Prætorian Law;' because the most important of the Edicts were those sent forth by that Honor-bearing officer, the PRÆTOR. We have next to inquire into the functions of this Magistrate, who exerted so mighty an influence in the expansion of the Civil Law.

PRÆTOR was, at first, a title given to the Consuls in their character of Leaders of the Armies of the Republic. Cicero expressly says,* that the functions of the Consuls were threefold, namely, to lead the armies, to exercise judicial power,

* De Leg. iii. 3

and to convene and preside in the Senate; and that while in virtue of the last, they were called Consuls; in that of the second, they were Judges; and in that of the third, Prætors. It is very important to remember this definition, as we shall find that when erected as a separate office, the Prætorship was still held to be a supplement to the Consulship. The only difference being that the special duties had reference to the second, not to the first of Cicero's list of functions; were judicial and not military. The first Prætor, specially so called, was created B. C. 366; he was then a Burgher, chosen by the votes of Burghers only. The functions of the Prætor were generally judicial, and such as in former days had, as Cicero has shown been an element of the Consular duties. The reason given for the creation of the office, was that the two Consuls were already over-busy in the discharge of other duties, in the command of armies abroad, and in presiding over the Senate at home, to be able to fulfil their judicial functions, that it was advisable to guard against arrears and delays in legal claims by the appointment of a coadjutor, who should relieve the Consuls, and give his time wholly to judicial duties. If one considers the growth of Rome at this period of her history, and the constant wars in which she was involved, it seems impossible to believe that this was a mere pretext on the part of the Burghers. That the latter would be only too glad of so good a plea to get a fresh Magistrate of their own Order, is clear enough. The rather as, in this very year B. C. 366, they had been forced to allow the Commons to share with them in the Consulship. A Plebeian Consul might be looked on by the Burghers as a disgrace to their Order; a new Patrician Magistrate, with powers wide as were those of the Prætor, would be deemed a fair reprizal, and an honorable set-off. "The division of the Consulship," says Niebuhr, "was thus at the beginning very unequal; the Patricians "had in reality reserved more than two-thirds for themselves."

The Commons had now, however, become too strong to be shut out from any of the high offices of State. The struggle, probably, began immediately after the first appointment of the Prætorship, it was finally successful in the time of Publilius Philo, who was Consul of the Commons, B. C. 339. Publilius was the great champion of his Order. When Consul, he carried the Publilian Law which made the Plebiscites binding on all Members of the community.* Two years later, he caused it to be enacted that of the two Censors, one should be a Plebeian. As to the Prætorship, Niebuhr conjectures that at this time a Law was passed which provided that the Prætor should, in each alternate year, be a member of the Commons. So well defined an interchange of power between the Orders is hardly warranted by facts or by analogy, and Niebuhr does not hesitate to acknowledge it.† Still whatever be the worth of the theory, it is a sure fact that at this period both Censorship and Prætorship were open to the Commons. The first Plebeian Prætor was Publilius Philo himself, who was chosen B. C. 337, twenty-nine years after the first appointment.

The chief functions of the Prætor were, as has been said, judicial. But as his Judgments were founded on the Law of the Twelve Tables, they could include none who were specially excluded there. His Jurisdiction, therefore, was limited to questions between Citizen and Citizen. The spread

* Ante p. 20.

† "This secure Establishment of the Equipoise of the Orders against arbitrary power and chance, by which the one, whose strength was departing through the force of circumstances, was prevented for its own good from making daring attempts to recover what it could not hold, and by which oppression was checked in the one that had gained ascendancy,—— this is peculiar to the Romans."

Hist. of Rome, Vol. 2, p. 155.

Arnold. Hist., Vol. 2, p. 154.

of the State, and the influx of foreigners, soon made it necessary to do away with the old arbitrary lines of severance between the Stranger and the Citizen. Thus, while the letter of the Law declared that the Stranger was void of all legal capacity; the Prætor came to his relief by declaring that the Municipal Law was unable to place limitations on the Law of Nature; and that as a Stranger could acquire rights and contract obligations according to the Law of Nature, the Prætorian Equity would acknowledge and enforce such rights and obligations. It thus became the great object of the Prætor to expand the provisions of the written Law, and by interpretation which at times amounted to a virtual repeal, adapt it to the altered conditions of society. In other words, the *Jus Civile*—'Municipal Law'—was adhered to strictly in all cases where it was enough for the ends of substantial justice. And only where it failed, did the Prætor have recourse to that higher law, the *Jus Gentium*—'Law of Nature,'*—of which the principles are the heritage of Man, in every country and in every age.

In the year B. C. 246, a hundred and twenty years after the first creation of the office, a second Prætor was appointed. The duties of this second were, to adjudicate in all disputes in which foreigners were parties. He was thence called *Prætor Peregrinus*——'The Stranger's Prætor'——, as the other had been *Prætor Urbanus*——'The City Prætor.' As the State stretched her borders beyond the Peninsula, fresh Prætors were called for and supplied. Two were created

* It is needless to say that, in spite of Ulpian's fanciful definition (*Inst.* 1, 2, *Init.*), *Jus Gentium* is juridically one with *Jus Naturale*. Jus Gentium "has a reference to the mode in which the notion originated; Jus Naturale is the term more applicable to the induction, when made more complete by further acquaintance with the Institutions of other people, and by the development of more universal notions."

Geo. Long's *Two Discourses*, p. 63.

B. C. 227, to administer the newly created Provinces of Sicily and Sardina. For Spain and Provence, two more were added B. C. 197. Sylla increased the number to eight; the two newly added by him having jurisdiction especially in criminal prosecutions, and presiding over "permanent Courts established for the trial of certain specified offences."* Julius Cæsar raised the number successively to ten, twelve, fourteen, and sixteen. In the time of Hadrian it appears, from a sentence of Pomponius in the Pandects, that the number of Prætors had been increased to eighteen, of whom each had his peculiar department.

It is impossible to over-rate the influence wrought on the Roman Jurisprudence by this judicial recognition of the rights of men, whether Strangers or Citizens. It forced a comparison between other systems, and the Municipal Law of Rome. It drove the Jurisconsults from their own narrow round of limitations and permissions, and made them see the worth of rules of Law more general than their own. It forced them to mistrust the unsupported Letter of a Law, and look for its interpretation to the higher Power from whence it drew its sanction. It sent them in every case of doubt from the mutable to the unchanging; from the Local to the Catholic; from the arbitrary enactment to that Jus Gentium, or Natural Law, which binds in every land, at every time, "because its general precepts are essentially adapted to "promote the happiness of Man as long as he remains a being "of the same nature with which he is at present endowed, or, "in other words, as long as he continues to be Man, in all the "variety of times, places and circumstances in which he has been "known, or can be imagined to exist; because it is discoverable "by Natural Reason, and suitable to our Natural Constitu-"tion; and because its fitness and wisdom are founded on the

* Long. Dict. Gr. & Rom. Antiq. p. 648.

" general nature of human beings, and not on any of those " temporary and accidental situations in which they may " be placed."*

It must be well remembered that the Prætor was vested with no power to change the express declarations of the written Law according to his own caprice. All that was allowed him was, in cases where equity and good conscience needed it, to widen its provisions, so as to cure some real wrong for which no special legal remedy had been provided. Thus while his Edict was so framed as to give relief against the rigor of the written Law, he was bound by that Law where its provisions were express, and the intentions of its framers undoubted. And this even where an actual hardship might be wrought; Ulpian was not the only Judge who, when the written Law was clear, was forced, on issuing his Decree, to cry—" This is truly very harsh, but so the Law is written." When strangers betook themselves to his Tribunal, his powers of relief were far less fettered. He might, with the utmost liberality of construction, avail himself of rules drawn from the legal stores of Greece and Asia, Africa and Spain; might bring the Jus Gentium to modify the Jus Civile; but even here, the Prætor was bound to introduce no principles which could not assimilate or were utterly inconsistent with the Spirit of his own Municipal Law. He was ever bound to bear in mind that he was a Citizen of Rome; invested with his honors by Citizens of Rome; and recognized as an authorized expounder of the will of those who had helped to frame the Law of Rome. The Jus Prætorium—' Prætorian Law,'——was nothing save the fulfilment and the complement of the Jus Civile ——' Municipal Law.'

* Mackintosh, Law of Nature and Nations, (*Works,*) p. 164.

Its earliest days, the Prætor, when he settled the more important cases which came before him, was wont to set forth officially the reasons which influenced him in his decision, and the rules of law which he adopted as his guide. The Instrument which he so published was called *Edictum Repentinum*, —— 'Edict framed for the Occasion.' It afterwards became the custom for the Prætor, when he entered on his term of office, to publish a formal Instrument in which he gave a summary of the general principles which he meant to follow, and of the rules of construction on which he proposed to act. This was called *Edictum Perpetuum* —— 'Continuous Edict.' The Continuous Edict was first read aloud to the people by a subordinate officer, and then the Tablet —— 'Album' —— on which it was written, was put up in a public place that all might have notice of its contents. In course of time it became usual for the newly appointed Prætors to adopt, either wholly or in part, the Edicts of their predecessors, and to add to such original stock whatever special rules accorded with their own peculiar views. By this adoption of the Old Edicts when approved and this yearly accumulation of New matter to furnish out the Old, was called into existence a vast body of Law; in practice as well recognized as were the provisions of the Municipal Law itself.

Thus year by year, the Roman Jurisprudence was increased by new and needful rules; and yet was kept in manageable bulk by the continual rejection of the Old and Obsolete. There was ample power to reform and furnish out the old cramped list of precedents, but it was coupled with most salutary checks to wayward innovation. The Prætor, for example, might publish in his Edict, rules and principles obnoxious, wrongful, or in opposition to the general policy of the State; in such case the obnoxious matter would be rejected by his Successor. Or, he might abuse his trust, give corrupt Judgments or such as were in contravention

of his own rules; if so, he well knew that he acted at his peril; that he was responsible to the community and liable to impeachment when his year of office was expired. "The Romans," says Mr. Phillimore,* "looked for their security against "unconstitutional and oppressive violence, not to the scanty "power of their Magistrates, but to the shortness of the time "for which that trust was delegated." Most erroneous, therefore, is it to think of the Roman Prætor as of a judicial functionary with powers bounded only by his own caprice; and who was always striving to over-ride the broad principles of Constitutional Law. It is not unlikely, nay, rather it is certain, that in the earlier stages of the Prætor's power, attempts were made to give his Law a purely arbitrary character.

To the calmest and most conscientious of men, the power to frame an Edictum Repentinum, to meet the requirements of any special case, must have been a great temptation. But that such was felt to be a dangerous weapon to entrust to the hands of any man, is clear from the steps taken to curb it, by the compulsory adoption of the Edictum Perpetuum —'Continuous Edict.' The latter was probably at first a voluntary act, but we find that, about the year B. C. 70, a Law of the Tribune C. Cornelius, made it one of obligation.

Again, while the Law bound the Prætor to follow the rules of his own Continuous Edict, public Opinion would be strong enough to check him in first framing it. "The publicity of the "Edict," says Long† "must also have been a great security "against any arbitrary changes, for a Magistrate would hardly "venture to promulgate a rule to which Opinion had not by "anticipation already given its sanction. Many of the rules "promulgated by the Edict, were merely in conformity to ex-"isting Custom, more particularly in cases of Contracts; and

* Hist. of Rom. Law, p. 184.

† Dict. Gr, and Rom. Antiq. p. 445.

"thus the Edict would have the effect of converting Custom "into Law. This is what Cicero seems to mean when he says, "that the Edict depends a great deal upon Custom."

The several changes of practice and modifications of the strict rules of Law which resulted from the development of the Prætorian system, will be handled more fitly in their places in the Institutes. There are, however, certain changes and adaptations of the provisions of the Civil Law which must be noticed, and that for reasons which will presently appear. They all resolve themselves into the one grand principle, that where the old technical forms of procedure were not wide enough to meet the requirements of substantial justice in any particular case, the Prætor was, under certain limitations, free to extend them. In other words, the jurisdiction of the Prætor was twofold; partly Ordinary, where he worked by means of Formulæ, addressed to nominated Judges of the Fact; and partly Extraordinary, where he had a direct power of action. Thus, instead of waiting for the legal Judgment, craved for in the Formula, he might, where substantial justice needed it, command a thing to be done, and this he effected by the issue of a DECREE. Or, he might forbid a thing to be done, and this was by the issue of an INTERDICT. Or, he could order restitution in cases of contracts made through fear of fraud; this was called *Restitutio in Integrum.* Or, he had power to enforce the production of things, documents or instruments wanted to determine a question of right; this was granted by the *Actio ad Exhibendum.* Or, he might compel either litigant, at the request of the adverse party, to answer Interrogatories, and to make Discovery on oath as to matters which were questioned in the suit; this was done by the *Actio Interrogatoria.*

Such is, in broad outline, a sketch of the rise and general objects of that system from which the Law of Rome drew its most enduring features and which made direct legislation

a matter of secondary importance. If now, in other matters, it has been no hard task to find in English Law, rules and principles which have their strict equivalents in that of Rome; if in the Original Writ of the Court of Chancery has been traced a likeness to the strict form of Legal Action in the earliest stages of the Roman procedure; and if, in the Nisi Prius Record, with its chain of pleas and prefixed Jury-Panel, has been recognized an instrument one with the Formula of the Roman Magistrate, with its like list of Exceptions, and its prefixed names of Judges of the Fact; there can be small difficulty in finding in the legal History of England a functionary whose origin was like that of the Roman Prætor; a functionary who wielded, and still wields, power no more limited than did he. In England will be found a System which like the Prætorian at Rome, declares itself to be nothing save the complement and the fulfilment of the Law. A System, which, like that, in all humility declares that it 'follows the Law', although we know that in earlier days its functionaries, like those of Rome in the time of the Repentine Edicts, often bade defiance to the Law.* It is almost needless to add that the Functionary is the Lord Chancellor, and the Jurisdiction that of the Court of Chancery.

Between the Officers themselves are very many striking features of resemblance. The Prætor, it will be borne in mind, was first appointed for the purpose of giving aid in judicial matters to the Heads of the State. These Heads were the Consuls; Successors of the Kings; Chief Magistrates and like their forerunners, Sources of Justice. But, in addition to judicial functions, the Consuls had two other most important duties; first, to head the Armies abroad; and secondly, to convene and preside over the Senate at home. It was impossible for them to satisfy all these requirements at their hands;

* Spence I, p. 419.

in order, therefore, to prevent arrears in suits and legal claims, the first function——the judicial——was detached and placed in the hands of a new officer, called Prætor. In England the case was strictly parallel. There, too, the Head of the State, the King, was also the Chief Magistrate, and also Source of Justice. In earlier days he was wont personally to preside in his own Court; and, says Allen,* "it was not till long after the Conquest that the Kings of England ceased, occasionally at least, to attend and take part in the proceedings of their Courts of Law." The King's Court, or Bench, was the tribunal where the King with his Justices decided in litigated matters of importance; and did so either in accordance with the rules of positive Law, which must, in those days, have been meagre to a degree, or in accordance with the royal ideas of substantial justice. The Justices—— the royal Coadjutors—it must be observed, were bound to observe the rules and provisions of the written Law, narrow and insufficient as they might be. The equitable element, or Prerogative of Grace could only be infused by him who was the Source of Justice. In cases, therefore, where the English King was, like the Roman Consul, over-busy with wars abroad, or affairs of state at home, to attend personally in his Court, the discretionary jurisdiction remained dormant; nor could it be aroused save by special instructions, in writing, addressed from the King to the Chief Justiciary of the Court. In the reign of Edward I—a King who has been fitly named the English Justinian—the Royal Prerogative of Grace, or equitable relief, was often delegated by Writ under the Privy Seal to the Lord Chancellor and his Coadjutor, the Master of the Rolls, or to each or either of them separately. The adjudication in accordance with the rules of positive Law, being left

* On the Royal Prerogative, p. 92.

with the Great Justiciary and other the Justices of the Court of King's Bench. The Justices were bound by the written Law. The Chancery Judges were also generally so bound; they were merely, in Extraordinary cases, commanded by the Royal Writ, to be channels of the Royal Grace, and grant relief on the principles of Honesty, Equity, and Good Conscience. The latter jurisdiction of the Chancery Judges was, at first, exceptional, existing only by special delegation in each case from the Crown. It was, therefore, called the Chancellor's Extraordinary, as distinguished from his Ordinary method of relief. Not probably until the reign of Edward III, was the Court of Chancery recognized as the regular quarter in which to apply for all extraordinary relief. "In this reign," says Mr. Spence,* "the Court of Chancery appears as a distinct Court for giving relief in cases which required Extraordinary Remedies. The King being, as may well be conceived, looking to the history of his busy reign, unable from his other avocations to attend to the numerous Petitions which were presented to him, he, in the twenty-second year of his reign, by a Writ or Ordinance, referred all such matters as were of GRACE, to be despatched by the Chancellor or by the Keeper of the Privy Seal." A Statute passed in the thirty-sixth year of the same Monarch enlarges and confirms the equitable jurisdiction of the Chancellor.†

The authority, therefore, which before this Reign had been granted at times only, for special reasons and by express delegation, was now declared to be of general avail; and the Chancellor was empowered by Statute to give relief in all cases where the King himself might exercise his own Prerogative of Grace. In virtue of this general authority, the Chancellor had power in all such cases to proceed without

* Equit. Jur. of Court of Chanc, 1, 339.

† 36 Edw. III, c. 9.

any express delegation from the King. From this time, in the Courts of Chancery, preliminary Writs were dispensed with, and suits by Petition, or as it was afterwards called by Bill, became the ordinary mode of procedure there. The Bill and not the Writ commenced the suit. If, after the Bill had been presented, there was need of any extraordinary interference or relief, a Writ to compel appearance of parties might be issued in the name of the King, but by the sole power and authority of the Lord Chancellor. The Prerogative, however, thus delegated to the Chancellor, was always kept within certain well recognized limits. It referred to certain matters only, and could proceed only upon certain principles. As to matter, it must have been one of Grace; and as to principles, they were those of 'Honesty, Equity and Good Conscience.' The power entrusted to the Chancellor, was that and that alone which constitutionally could have been wielded by the King. But the King, Fountain of Justice, though he were, was still like the meanest of his subjects bound to pay obedience to the Common and Statute Laws of the Realm. In earliest days this was often very practically enforced upon him. Before the reign of Edward I, the King might be sued as though he were a private person. Afterwards, the absence of coercive jurisdiction of sufficient power made it impossible for a King of England to be sued in a Court of Law. But still the old theory continued, and yet is unchanged; it is ever held that there is in the State, some authority which has the right to control the deeds of Royalty. That authority is THE LAW, and by it the Constitution of England has in every age held that the King is bound. "The King," says Bracton,* who wrote in the reign of Henry III, "hath a "Superior in GOD; hath also a Superior in the LAW which

* Bracton, lib. 1, c, 8.

"made him King. Let the King, therefore, ascribe to the Law, "what the Law ascribeth to him to wit, power and dominion. "For where WILL ruleth and not the LAW, there no King "exists." So Fortescue,* writing in the reign of Henry VI., says:——"The King of England must rule his people "according the decrees of the Laws thereof, insomuch that he "is bound by an oath at his coronation to the observance "and keeping of his own Laws." The whole matter is now settled as well by the Coronation Oath, as by the Statute 12 and 13, Will. 3, C. 2,—"that all the Kings and Queens "who ascend the Throne of this Realm ought to administer "the same according to the said Laws; and all their Officers "and Ministers ought to serve them respectively according "to the same; and, therefore, all the Laws and Statutes of "this Realm for securing the established Religion, and the "rights and liberties of the people thereof, and all other Laws "and Statutes of the same now in force, are satisfied and con- "firmed accordingly."

The Prerogative of Grace, therefore, as wielded by the King, must at all times have been valid only when it did not run counter to the positive Law of the Realm. It could have had no existence save as suppletory to, or corrective of, the common Law. It could furnish where the strict enactment might be lacking, and could relieve where a right existed, but the Law was unable to supply a remedy. But if the King, the Chief Magistrate and Source of Grace, were so fettered, if he were bound to abide by the Letter of the Law where its provisions were plain; it is clear that the subordinate Magistrate, the Chancellor, who was nothing save the appointed channel through which flowed the Royal Grace, must have been at least as strictly bound. As the Roman Prætor was often forced, with Ulpian, to say, "The case is very hard, but so the Law is written," so the English Chancellor was bound to observe

* Fortescue, c. IX and c. XXXIV.

the maxim that "Equity follows the Law;" and that other which said, that "No man can be wiser than the Law." No man in either system was free to set himself above the express directions of the Law, instead of obeying its commands. But in both systems where the provisions of the Positive Law would have been unable to do substantial justice, or would have worked real wrong; the equitable jurisdiction of Chancellor and Prætor, relieved against the Law, and interfered as well with its doctrines as with its forms of procedure. "Conscience," saith St. Germain,* writing in the early part of the reign of Henry VIII., "Conscience never resisteth the Law, but only when the Law is directly in itself against the Law of God, or of Reason." Again, if in earliest days the Positive Law was frequently in practice evaded, or contravened by the Prætor in his Repentine Edict, it was in the early stages of the equitable jurisdiction of the Court of Chancery not different. When the Chancellor issued Decrees which were 'Repentine;' or, to use Blackstone's words, "rather in "the nature of awards formed on the sudden, *pro re natâ*, "with more probity of intention than knowledge of the sub-"ject." In both cases, however, such evasion and contravention was contrary to the spirit of the system. If in latter days the Prætor was bound by the principles laid down in his own Continuous Edict, the Chancellor was compelled to act on principles at least as well defined. Never since the reigns of Henry VIII. and of Elizabeth, have there been Chancellors who, by extravagant Decrees, originating "in "too high an estimation of their individual endowments, and "erroneous views as to the nature of their office,"† could warrant the jesting charges of Selden that Equity was 'a roguish thing;' that it was 'according to the conscience of him that

* Doctor and Student, c. 18.

† Spence, vol. 1, p. 414.

was Chancellor;' and that it is in Law 'the same that the Spirit is in religion, what every one pleases to make it.' Sir Joseph Jekyll, in the year 1734, when delivering judgment in the great case of Cowper *v.* Cowper,* thus endeavours to reconcile the conflict between the doctrines of the Courts of Chancery and Law:—"The discretion which is to be exercised here, is to be governed by the rules of Law and Equity; which are not to oppose, but each in its turn to be subservient to the other. This discretion, in some cases follows the Law implicitly; in others assists it, and advances the remedy; in others again, it relieves against the abuse, or allays the vigour of it; but in no case does it contradict the grounds or principles thereof as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity, is by the Constitution entrusted with." To like purport are the following sentences of Lord Redesdale;†——"There are certain principles on which Courts of Equity act which are very well settled. The cases which occur are various, but they are decided on fixed principles. Courts of Equity have, in this respect, no more discretionary power than the Courts of Law. They decide new cases, as they arise, by the principles on which former cases have been decided, and may thus illustrate and enlarge the operation of those principles; but the principles themselves are as fixed and certain as the principles on which the Courts of Common Law proceed."

Both Chancellor, then, and Prætor were high functionaries, to whom, in addition to ordinary judicial duties, was delegated an extraordinary authority enabling them to relieve where sub-

* 2 Peere Williams, p. 752.

† Bond *v.* Hopkins, 1 Scho. and Lefr. 428-9.

stantial justice needed, and to do so on fixed principles," in accordance with Honesty, Conscience, Good Faith and Equity. It is evident that all consideration of the nature or extent of their influence, and of their extraordinary jurisdiction, must be incomplete, which fails to attach a definitive meaning to the word 'Equity.' A very full discussion of the meanings affixed to the term might be misplaced here; but some few hints, principally suggestive, seem requisite in order to understand clearly the nature of the relief afforded respectively by Prætor and by Chancellor. Probably the very best definition of the word Equity, is that which is given by Aristotle, and adopted by Grotius*—— "Equity" says he, "is the correction of the Law where it is "defective by reason of the universality of its expression." He adds, that the Law being addressed to all, is of necessity universal in its expression; but that there are certain things which are incapable of being expressed universally; that the failing, therefore, is not in the Law, not in the Law-maker but in the nature of things. Whereby, says Puffendorf, is meant that a sound equitable interpretation is one which shows that a particular case is not included in the spirit and general meaning of a General Law, for that if it were so, some undeniable wrong and hardship would ensue. The equitable relief administered by the Roman Prætor, was in its kind precisely one with that afforded by the English Chancellor. To the former may be literally applied the words of Mr. Spence in his consideration of the latter†; both "embraced "all those cases in which a party, without having committed "any act which would be contrary to good faith or con- "science, might yet by the vigour of the positive provisions "of the Law, —— though founded as regards their general "application or natural justice, —— or by the silence of the "Law, —— the particular case not having been provided

* Of Peace and War, B. 2, C. 16. § 26.

† Equit. Jur. of Court of Chanc. I. 412.

"for at all —— have an advantage which it was contrary "to the principles of Equity that he should be permitted to "enforce or to retain. In such cases the general principles of "Equity, which are antecedent to all Positive Law, were "resorted to. When the rigor of the Law favored the posi- "tion of the party who had committed any unconscientious act, "that would be relieved against, also under the head of "Conscience."

Without an attempt to go into any consideration of the details of Chancery Jurisprudence, it is necessary to make some few cursory remarks as to certain points of analogy between the modes of relief as administered by it and by the Prætorian jurisdiction. The Prætor had, as has been said, the right in certain cases to act directly, without waiting for the legal judgment of the Judge; if he commanded a thing to be done, he issued his Decree; and if he forbade an act to be performed, or stayed it when commenced, he published his Interdict. Precisely similar to the Prætorian Decree, is the Decree of the Court of Chancery; and just as similar to the Prætorian Interdict is the Injunction of the Chancellor. The distinction between the English Judgments at Law, and the Decrees of the Court of Chancery is thus set forth by Mr. Spence;*

"The Judgments of the Courts of Common Law, following "the Writ on which the action was founded, were uniform, "simple and invariable, according to the nature of the action; "as that the said William recover seisin, or his term of "years, or his damages (specifying the sum) by occasion of "the not performing the alleged promises and undertakings. "In the Court of Chancery no Writ or Formula of action im- "posed any fetter of form, and the Court not being tied to

* Equit. Jur. of Court of Chanc., vol. 1, p. 390.

" forms, was able to modify the relief given by its Decrees, " to answer all the particular exigencies of the case fully and " circumstantially, —— to make binding and authoritative " declarations concerning the rights alleged —— to direct " many things to be mutually done and suffered, and to trace " out the conduct to be respectively observed by the parties " to the suit; the parties being frequently very numerous, " and sustaining various relations, some of those who were " named as defendants having, perhaps, the like interest and " object as the plaintiff."

The preventive remedies of the English Chancery which correspond to the Roman Interdicts, are called Injunctions. As the former were never issued by the Judges, but always came direct from the Prætor by virtue of his extraordinary jurisdiction, so the prohibitory jurisdiction was in England restricted to the Courts of Equity. Attempts were, from time to time, made by the English Common Law Courts, to participate with the Court of Chancery in this jurisdiction, but were always superseded as irregular ;* where Injunctions were needed in cases of purely legal cognizance, they were issued at suggestion of the Judges, but always proceeded from the Court of Chancery. The Common Law Procedure Act of 1854, Sections (79-82) alters the privileges of the Common Law Courts in this respect, and enables them to give almost the same complete redress by means of preventive remedies, which had previously been exercised by Courts of Equity alone. Thus, the Sections referred to, give the right to issue a *Writ of Injunction* to stay the repetition or continuance of the breach of contract, or other injury complained of; or " the committal of any breach of contract or injury of a like kind arising out of the same

* In the year 1594, such an attempt was made by the Court of Common Pleas. Spence, vol. 1, p. 672.

contract, or relating to the same property or right." And such Injunction may be sued for at any stage of the proceedings, whether before judgment or after it. The same Act of 1854, in Sections 68-74, also gives a direct remedy by *Mandamus*, which is in many respects akin to the Decrees for Specific Performance of Prætor and of Chancellor. It enables a plaintiff to compel a defendant "to fulfil any duty, in the fulfilment of which the plaintiff is personally interested." Again, as the Prætor had the power to ordain, *Restitutio in Integrum*, or restitution in contracts made with fraud; so the English Court of Chancery issued its Decrees on bills for relief on the ground of fraud. In fact, there are instances so "early "as Car. I., of relief given on the gronnd of fraud *after*, and "against a verdict and Judgment at Law, and even execution."* The Prætorian Power *ad Exhibendum*, that is, to enforce production of the things or documents necessary for proof of a right has, together with the *Actio Interrogatoria*, or power to comple an answer to Interrogatories, a parallel in the English Equitable BILL OF DISCOVERY. This power to enforce Discovery, in order to sustain an Action at Law, and without reference to any equitable question was exercised by the Court of Chancery, so early as the reign of Henry VI.† The Common Law Procedure Act of 1854 has in this respect, as in many others, extended to the Common law Courts the equitable relief before restricted to the Courts of Chancery. Thus the Court or a Judge is now entitled to order that either party, on the due application of his opponent, state on oath what documents relative to the matters in dispute are

* Spence, vol. 1, p. 624.

† "Where certainty wanteth the Common Law faileth, but yet help is to be "found in Chancery for it; for if the Queen grant to me the goods of A, that is "attainted of felony, and I know not the certainty of them, yet shall I compel any "man to whose possession any of them come to make invcntory of them here." 36 Hen. VI. c 26, quoted by Spence 1, p. 678.

in his possession, power, or knowledge; and if he object to produce such documents, he must state the grounds of his objection. The Court may further order an inspection, or (if necessary) a copy of such document in all cases in which, previous to the passing of the 14 and 15 Vict. c. 99, he might have obtained a Discovery by filing a Bill, or by any other proceeding in a Court of Equity. The Court or Judge has also the power under the Act of 1854, in certain cases, to order either party in a cause to deliver to the opposite party (if liable to be examined as a witness) INTERROGATORIES in writing on any matter in which discovery is sought, and to require such party, within ten days, to answer the questions in writing by affidavit; and the omission to answer sufficiently, without just cause, is punishable as a contempt of Court.

It is most interesting to remark that the spirit which has actuated the framers of these recent Common Law Procedure Acts in England, is precisely that which made itself felt in the Roman Jurisprudence after the day of Constantine. Up to that period, the verdicts or judgments had been what was called "Ordinary," that is the Equitable powers were *solely* in the hands of the Higher Magistrates, and questions of Fact alone were left for the decision of the Judges. After Constantine, there came into use "Extraordinary Judgments," wherein the Judge had authority to decide questions as well of Law as of Fact, and was vested with very extensive Equitable remedies, as well direct as prohibitory. So, in the recent legislature of England, whether in the several Acts for the regulation of the County Courts, whereby Juries may be set aside and, as a rule, are so; or by the Procedure Acts, especially of 1852 and 1854, whereby a very extensive equitable jurisdiction is given to the Courts of Common Law, and modes are provided for the more speedy and efficient dispatch of business, there is a movement precisely similar to that made

by the later Roman Emperors. Our obligations to Justinian become each day more apparent; and if the Common Law were, as Lord Chief Justice Holt affirmed, "raised on the ruins of the Civil Law;" and, if the Equitable Jurisdiction of the Court of Chancery were drawn from the Prætorian mould, the attempts now made to lessen the gap which separates them, and to grant certain common remedies to both, are precisely similar to those begun by the Jurists in the day of Constantine, and furthered by Tribonian and the Lawyers of Justinian.

CHAPTER 7.

SECOND PERIOD.—(*Continued.*)

THE written Law of Rome was made up of two great parts; whereof each aided, and supplied the defects of the other. First, was the JUS CIVILE——'Civil Law'——analogous to the Common Law of England; and Secondly, the JUS HONORARIUM——'Honorary Law'—— akin to the Law as administered in the Courts of English Equity.

THE CIVIL LAW, with reference to its sources of existence was made up of the five following elements, whereof the two last alone remain to be considered:—

1. LEGES.
2. PLEBISCITES.
3. DECREES OF THE SENATE.
4. ANSWERS OF THE JURISTS.
5. ACTS, or CONSTITUTIONS OF THE EMPERORS.

THE HONORARY LAW, also with reference to its formal origin, consisted of the Edicts of who had borne Honors in the

State; to wit, the Higher Magistrates, and in a peculiar degree the Prætors.

Of the Honorary, or Prætorian Law, no further addition need be made to the foregoing remarks, save to mention that it was not until the full establishment of the Empire than any formal collection of the existing Edictal Law was thought of. The great Dictator, Julius Cæsar, is said to have had among his many other splendid projects, one for the full arrangement of the Laws, Plebiscites and Senatorial Decrees on the one hand, and of the Edictal Law on the other. It was not possible, however, in his few months of undisputed power, to do that for which a lifetime were too short. It was one of those "vast conceptions obviously floating in his mind of which "he was not even permitted to shadow forth the outline."* Ofilius, a celebrated Jurist and friend of Cæsar, did something towards a realization of one portion of the Dictator's views and made a careful analysis and compilation of that branch of the Law which arose from the Prætorian Edict. The work of Ofilius was never formally sanctioned; and, as the unauthorized endeavour of a private Citizen, could necessarily carry with it no great influence. In the day of Hadrian, a more systematic attempt was made to do what Julius planned, and Ofilius sought to realize. By command of the Emperor, a collection and classification of the whole body of Edictal Law was made. The author of the work was Salvius Julianus, one of the most distinguished Jurisconsults of his day, and who himself had filled the office of Urban Prætor.

This collection, on Hadrian's recommendation, received the authority of the Roman Senate, and obtained the force of Law A. D. 131. It was known as *Edictum Hadriani*—— Hadrian's Edict;' or as *Edictum Perpetuum*——'the Continuous,' or 'Perpetual Edict.' This was the authorized body

* Merivale, Hist. of Rome under the Empire, vol. 2, p. 405.

of Edictal Law during the greater portion of the Imperial Period. After Jurists, indeed, wrote so voluminously upon this theme; so many fresh points of law arose, and, as a consequence, so many new Edicts were published, that the work of Julian became in course of time practically obsolete; and in Justinian's day, as we shall see hereafter, the whole work of arrangement needed to be done afresh.

One other source of the Roman Law remains yet for consideration; that, namely, which has been placed forth in the list of elements which went to form, with reference to its sources, the Civil Law. It is the Answers of the Jurists, or Jurisconsults, men to whose recorded opinions no less than to the Equitable Jurisdiction of the Prætor, is to be attributed the preponderance of substantial justice, over the wearying formalities of the Written Law. The consideration of this body will lead us from the Republican to the Imperial Age; that is, from the second to the third of the four great periods into which we have divided this sketch of the History of Roman Law. The change, however, will be gradual, as, while Jurisconsults existed during the Republic, and were, as will be shortly seen, of greatest weight as Interpreters of the Law, they had an influence small in comparison of that which certain Members of their body enjoyed during the Imperial Period. All consideration, therefore, of the nature of the influence exerted by this body of men, must divide itself into two great heads; namely, the Jurisconsults of the Republic, and the Jurisconsults of the Empire.

The Jurisconsults, as expounders of the Law, existed in Rome from a very early period. It is probable that their general origin may be carried back to the time when, by the publication first of the Flavian collection of Forms, in B. C. 304, and afterwards of the Ælian in B. C. 200, the Commons were allowed some knowledge of the days and modes of legal procedure. Tiberius Coruncanius, a Member

of the Commons, who was Consul B. C. 281, is said to have been the first to make a public profession of the Law. The expression 'public profession' has given rise to much discussion. Schrader holds it to mean that whereas previously Jurists had allowed Students of the Law, if Burghers, to be present at their consultations with their clients; Coruncanius was the first to make the profession public, by allowing all whether Plebeians or Burghers, to be present. In any case, and under any interpretation, it is clear that at a period posterior to the Flavian, and anterior to the Ælian compilation, a distinguished Roman, who had filled the very highest office in the State, still deemed it no unworthy task "to make a public profession of the Law." Cicero speaks of the authority of the Jurisconsults, as one of the elements of the Civil Law. He afterwards defines a Jurisconsult as "One who has such a knowledge of the Laws and of the Customs which prevail in a State, as to be able to counsel, to act for, to write on behalf of, and to protect another in his dealings."* The Jurisconsults were usually the leading men in the State, and this even, after the Hortensian Law had broken down the barrier between the two great Orders. They expounded, and adapted to the particular wants of those who consulted them, the provisions as well of the Civil as of the Edictal Law. They used at certain hours to appear in public on the Forum, and were ready to give their advice to such as asked it; while in their own houses they drew up legal instruments, and settled in due legal form such as were submitted to them. Numbers of young men followed in their train, were present at their consultations, saw how they transacted business, and so prepared themselves for practice. It does not appear that even during the Republic, the Jurisconsults ever actually pleaded, or themselves conducted causes in Court. Under the Empire,

* De Oratore, 1, 48,

they undoubtedly did not; their position was then acknowledged, and, so far as a portion of their body was concerned, they were virtually Law-makers rather than Law-expounders. It is certain that the advice and labor of the Jurisconsult was at all times given without pay or hope of reward. The Advocatus, on the contrary, was one who made the Law a profession. Who was ready to aid others in the actual conduct of their suits; who sometimes pleaded in person, and at others prepared the materials for a special Orator, and who was requited by a fee called HONORARIUM. Such fee was, as its name imports, less a salary or hire than a gratuity, for which the Advocatus, like the English Barrister, could make no legal demand. Still its existence was recognized by the Roman Jurisprudence, as well in Laws like the Cincian which forbade it; as by the modification of Claudius, which directed that such fee should not exceed ten Sestertia (then worth about £78-2-6); and as by the restriction of Trajan that it should be paid, but not until the work was done. The mere existence of such a fee, whether sanctioned or forbidden by the Law, was utterly unknown in the case of the Jurisconsults.

It is to be borne in mind that the Answers of these Jurisconsults or Jurists, during the Republic, were merely the opinions, oral or recorded, of Citizens, who, though of highest rank and learning, had still from the Heads of the State no special authority to give such Answers. They, like their fellows, were bound by the letter of the Written Law, and by acknowledged Custom; they were expounders only, without a trace of sanctioned Legislative Power. Still their personal authority was so great, and their modes of exposition and construction of the Law, so wide and liberal, that practically their answers were looked on as having a certain place in the composition of the Law of Rome. To certain of the Jurists of the Empire was given, as we shall shortly see, a more direct

authority; and it is plain that these always paid great deference to the recorded answers of their fellows under the Republic. The authority given to the latter, by the Jurists of the Empire, was probably very like to that which modern Courts in England pay to those early but unauthorized writers who furthered, and expounded English Law. Writers such as Glanville and Bracton, who wrote in the reigns of Henry the Second and Henry the Third, respectively;* as the author of Fleta, a work written in the Fleet Prison by one who lived in the reign of Edward the First; as Littleton, a Judge in the Court of Common Pleas, in the reign of Edward the Fourth; as Fortescue in the reign of Henry the Sixth; as St. Germain, who wrote the treatise called "The Doctor and Student," in the reign of Henry the Eighth; as the author of Sheppard's Touchstone, who lived in the reign of James the First; as Coke himself, and as so many other Writers of weight scarce less than that, of these. The treatises of these, says Blackstone, "are cited as authority, and are evidences that cases have formerly happened in which such and such points were determined, which are now become settled and first principles." Sir Edward Coke, in the preface to his first Institute† gives an instance of the weight which in the day of James the First, was given to the opinion of Littleton:——"Sir Henry Hobart," writes he, "that honorable Judge and great Sage of the Law, and those reverend Judges, Warburton, Winch, and Nicholls, his companions, gave judgment according to the opinion of Littleton, and openly said, that they owed so great reverence to Littleton, as they would not have his case disputed or questioned."

The Jurisconsults of the Republic, and the early English

* Bracton was beyond all doubt one of the Kings Justices in the 30th Henry III. (A. D. 1246). Spence vol. 1, p. 120.

† Instit. pref. p. 37.

Reporters and Commentators are, therefore, alike in this; that the recorded opinions of neither had authority of Law. That the authority of both one and other was, and is observed in so far only as they coincide with the principles laid down in Magisterial or Judicial rulings, and with the provisions of the Municipal Law. But that where new points arose on which Decisions and Written Laws could shed no light, much weight is given to the recorded opinions of such Writers; and the anthority of certain of them was in Rome, and is in England, held to be conclusive. Of the more celebrated Jurists of the Republic were, Publius Mucius Scævola —— Pontifex Maximus, B. C. 131, ——; Quintus Mucius Scævola, Cicero's teachor, who was Consul, B. C. 95, and also eventually Pontiff; and Servius Sulpicius Rufus, Consul B. C. 51, the friend of Cicero, who called him the greatest Orator of his age.

CHAPTER 8.

THIRD PERIOD.

THE Jurisconsults of the Empire gained, from the privileges granted to certain of their number, a position very different from that which had been held by their forerunners in the Republic. Augustus is said first to have allowed that certain of the leading Jurisconsults of the day should give their Answers under the Imperial Sanction. The privilege so granted to the favored Jurists was called JUS RESPONDENDI. ——'The Right to give Answers.' It is certain that the Imperial License granted to the few, did not bar the other Jurists from giving their Opinions. But it is also certain that the Answers of the latter must have had little weight in compa-

rison of those which were issued by their privileged brethren. The writtten Answer of the unauthorized Jurist, was an informal document. That of the privileged Jurist, was a much more solemn Instrument; was always authenticated under Seal; and was an authority for the guidance of a Judge. The legal Expositions and Writings of the privileged Jurisconsults were of like authority with their Answers.

In matters of doubt, the Judge was directed to follow the rulings of the leading Jurisconsults; if a parallel case had ever previously arisen, he was referred to their Writings on the subject; if none, he was bound to lay the doubtful questions before a certain number of the privileged Class. Where the Jurists, so consulted, were of one mind in their Answers, or their Writings, the Emperor Hadrian ordered that their authority should be binding on the Judge. But where the Writings of such Jurists were of conflicting tendency, or where the Answers to the special cases showed that their Authors were not of one mind, the Judge was free to follow out the course which he himself preferred. It is well to be remembered that by the term RESPONSA PRUDENTIUM——'Answers of the Jurists' ——, when used to denote one of the Elements of Roman Law, is to be understood as well Answers properly so called, as all previous Writings of such Jurisconsults as had received Imperial Sanction.

The Privileged Jurisconsults were, like the Prætors, bound to follow the Law; but, also like them, used a wide and generous discretion in its Interpretation. When of one mind, their recorded opinions gave them, by virtue of Hadrian's Rescript, a power which, though not unqualified, was virtually that of Legislation. So comes it that Gaius, writing in the age of the Antonines, speaks of the Privileged Jurisconsults, as men who had obtained from the Emperor "permission to frame rules of Law;" and whose Answers and Writings "have the force of Law."

The Jurisconsults of the Republic who, though unauthorized directly by the State, won so high a place in the History of Roman Jurisprudence, have been seen to have many a feature of likeness in common with the Old Reporters, and the Commentators of Early English Law. In like manner it will be no hard matter to find in the English Judge of the Superior Courts of Common Law, an Officer in the exercise of functions very much akin to those committed to the privileged Jurisconsults of Imperial Days. Both were, and are, Magistrates appointed by the Chief Power in the State, for the decision of cases and for the interpretation of the Law. Both functionaries were, and are, bound to follow the Law; but both might do so by an amplification of its remedies; and by the use of Canons of Interpretation and Construction wide as might be, short of actual trespass on the purely legislative province. The Jurisconsult of the Empire, who acted under Sanction, might have said of his system, what Lord Abinger said of his,——that its maxim was "to amplify remedies, and "without usurping Jurisdiction, apply its rules to the advance-"ment of substantial Justice"* As the unsupported opinion of one Jurisconsult was not held to be conclusive, and the Judex was always directed to be guided absolutely only where several of the privileged body, whether by their Writings or their Answers, were of one mind; so, in the English System, the single dictum of no Judge has ever been taken as evidence of the Law on any point. But where the Judges in Bench are of one mind, or the majority is so; or where the ruling of a single Judge is supported by the recorded opinions of his Brethren on the Bench, the result is an evidence as to what the Law is upon the particular point. It is at least as weighty as could have been the unanimous

* Russel *v.* Smyth, 9 Mees. & Wels. 818.

Writings or Answers of the privileged Jurists even after publication of Hadrian's Rescript.

In practice, the province both of Judge and Jurisconsult, is easily discovered. In words, however, it is most difficult to state it: difficult inasmuch as it involves the question of the boundaries which divide Legislation from Judicial Interpretation. Sir Fortunatus Dwarris, in his most valuable Treatise on Statutes and the Rules of their Construction, speaks of the general principles of decision in terms which would, in many respects, apply as forcibly to the favored Jurisconsults of the Empire, as they do to the Superior Judges of the Common Law in England;——— "when rules of Law," says he,* "have been found to work injustice, they have been evaded "instead of repealed. Obsolete or unsuitable Laws, instead "of being removed from the Statute Book, have been made "to bend to modern usages and feelings; instead of the Legis- "lature framing new decisions, it has been left to able Judges "to define its Province, and to arrogate to themselves the "lofty privilege of correcting abuses and introducing improve- "ments. The rules thus left are in the hearts of the Judges, "instead of being put upon a right footing by Legislative "enactment. Much of the evil is, no doubt, attributable "to the narrowness of the Common Law; but the principal "share, to the want of a proper understanding at what point "Interpretation ought to end, and Legislation should begin."

The Common Law, therefore,—— the Jus Civile—— whether set forth and expounded by the privileged Jurisconsults in Rome, or by the Judges in England, must always have had in itself the germs of its own development. It must, as Sir James Mackintosh has ably said†, be in continual struggle "to combine inflexible rules with transactions continually

* Dwarris on Statutes, p. 792.

† Hist. of Eng. vol. 1, p. 274.

changing." But while the Law, as a vast seed-field, must thus have within itself its own possible developments; the accredited Interpreters and Expounders of the Law, whether Judges or Jurisconsults must have much to do with the actual results. As the tree may be stunted or luxuriant, and the fruit well-flavored or insipid, in proportion to the skill of him who has pruned and fostered it; so the growth of legal principles, and the construction of enactments must depend, in great measure, on the individual temperaments and mental constitutions of the accredited Expounders of the Law. Thus, one such functionary acting in accordance with the generous impulses of his own breast, may seek, in every case, to mould the letter of the written Law to meet the altering requirements of the times. Another, of opposite make and temper, may studiously disclaim all power to trench upon the Legislative province, may take the Law in its unvarnished letter, and follow it even at the risk of failing to do substantial justice in particular cases. The first, like Lord Abinger, would seek to furnish "an amplification of remedies." The second would found his rulings on what Hallam calls, "an adherence to fixed rules, and a jealousy of judicial discretion,"* and adopt the maxim of Lord Tenterden, that "hard Cases make bad Law." Hence it is that the instances are so common of Judges who, with like facts before them, with like statutes and like precedents for their guides, still come to conclusions so absolutely opposite. Hence, that the English legal reports have in their pages so numerous instances of Judges who speak of previous rulings in terms such as these,——'bad law,'——'a shocking decision,'——'an extraordinary case'——and the like. It is to be observed that where a ruling which has been so condemned as mischievous or wrong, has become settled Law, it is followed

* Middle Ages 2, p 469

" although some possible inconvenience may grow from a strict observance of it." The reason alleged being that if the hardship be general, " affecting a general class of cases, " it is a consideration for the legislature, not for a Court of " Justice;" whereas if it be particular, arising " from the par- " ticular circumstances of the case, nothing can be more " dangerous or mischievous than upon those particular cir- " cumstances to deviate from a general rule of Law."*

Probably the most striking example of the extremes of opinion held by English Judges as to the duty of a Judge in the interpretation of a legal enactment, is to be found in the records of the Court of King's Bench, in the report of cases tried before two consecutive Chief Justices of England. The first being Lord Mansfield; the second, Lord Kenyon. The former, in the case of Barwell *v.* Brooks,† says——" as the " usages of Society alter, the Law must adapt itself to the " various situations of mankind," And again, in Corbett *v.* Poelnitz‡, the same great Jurist says,———" This is the " general rule. But then it has been said, that, as the times " alter, new customs and new manners arise. These occasion " exceptions; and justice and convenience require different " applications of these exceptions within the principle of the " general rule." Lord Kenyon, however, filling Mansfield's place, acted, says Kent§ ' like a Roman Dictator appointed to ' recall and reinvigorate the ancient discipline.' He took delight in overruling the decisions of his great predecessor wherever they had in his opinion varied from the strictness of the

* Broom, Legal maxims, p. 110; Dwarris on Statutes, p. 550; Ram, Science of Legal Judgment, p. 116; Phillimore, Principles and Maxims of Jurisprudence, p. 326.

† Douglas, 373.

‡ 1 Term Rep. 8.

§ Commentaries 1, 533.

precedents, or of the statutory enactments. In Clayton *v.* Adams,* he says,——"We must not by any whimsical "conceits supposed to be adapted to the altering fashions of "the times, overturn the established Law of the land. It "descended to us as a sacred charge, and it is our duty to "preserve it." And again, in Ellah *v.* Leigh†——"I con- "fess I do not think that the Courts ought to change the "Law, so as to adapt it to the fashion of the times; if any "alteration in the Law be necessary, recourse must be had "to the Legislature for it."

The like conflict of opinion, more or less covert, runs through all the reported decisions of the English Courts. It is needless here to enquire as to which, or whether either of the Judges whose opinions have been quoted was strictly right in his rules of interpretation; or whether both were not virtually right, and both in reality more of one mind than their words would seem to indicate. It is certain that much difficulty exists in the nice application of a general principle to new cases, arising in other times and presenting a thorough change of circumstances. It is also certain that the difficulty which is found in practice, is incalculably increased so soon as one seeks to state it accurately in words. The opposition which has existed on the English Bench with reference to the limits of judicial interpretation, and to the duty of the Judge to guard against the usurpation of a virtually legislative action, is here mentioned in order to show that a conflict of like kind prevailed among the Jurisconsults of Imperial Rome. In the days of Augustus, we read that there arose two great Schools of Jurisconsults, and that their heads respectively were Antistius Labeo and,

* 6 Term Rep. 605.

† 5 Term Rep. 682.

Ateius Capito. There has been much bootless discussion as to the distinctive characteristics of these Schools; and some difficulty has been made by reason of the conflicting mention of them made by Pomponius in the Pandects, and by Aulus Gellius who cites a somewhat doubtful Epistle of Capito. The best evidence, however, of their different opinions is that which is given in the many instances where they are cited as well in the Institutes as in the Pandects. From these we glean that Labeo must have held to Capito a relation not unlike that which Mansfield held to Kenyon. Labeo, the man of greater grasp of mind, seems to have dwelt rather on the meaning of the Law, and on the intention of its framers, than on its mere external form. Thus, by a seeming deviation from the letter he, and those who followed him, arrived in most cases at more just results. Capito was in constitution and in political principle, the very opposite to Labeo. Labeo was the rugged Republican, son of one of Cæsar's murderers; Capito was, on the other hand, the courtier, the ready flatterer and favorite of Augustus and Tiberius. As Labeo with his followers turned, if we may believe Pomponius and the Law Books of Justinian, to the side of Equity; so Capito, and those who thought with him clung to that of strictness. The former cavilled not at changes where the times demanded them*; the latter were guided by old traditions, and by the bare letter of the Law, expounded by the rules of literal interpretation. The Schools of which the real Heads were Labeo and Capito, did not in after-days retain the names of these great Jurists. The Jurists who took, with Labeo, the more

* Labeo was one of the first to use Codicils instead of a formal Testament and his use was held to be a proof of their validity.

"When Labeo himself had executed Codicils, no one entertained "any doubt but that those Instruments were perfectly valid."

Justinian, Instit. ii. 25. init.

equitable view were called Proculeians, after Proculus, a Jurist of great mark, whos writings are extracted next to those of Labeo in the Pandects. The followers of Capito were called first, Sabinians from Massurius Sabinus; and afterwards Cassians from Cassius Longinus. Each of these Schools had a long line of followers, and assuredly, the old antagonism was still well marked in the age of the Antonines. Gaius who then wrote, professed himself a follower of Capito and Cassius; but notwithstanding his general leaning to that School, he at times follows the opinion of Proculus. From one very curious passage in his Institutes, it seems that even the first leaders of the rival Schools were not blindly tied to their own party. In a question as to Price in a Contract of Sale, he says† that Cassius approved the opinion of Labeo; while Proculus rejected it, and followed that of Ofilius, the Master both of Capito and Labeo. From this period the open conflict of the Schools seems gradually to have died away. This may be attributed to many causes, but especially to the authorized publication by Salvius Julianus of the 'Continuous Edict,' or general Digest of Prætorian Law; and to the issue of that Rescript of the Emperor Hadrian which gave authority of Law to the unanimous opinions of certain of the privileged Jurisconsults. Thenceforward opinions were drawn from the Writings of both Schools. And, though it now seems clear that no distinct middle School of Eclectics, or Miscelliones, was ever formed, the Jurists of the later times availed themselves of the works of all who had preceded them; and thought rather of the reason of a rule, than of the Party of him who had propounded it.

The power of the privileged Jurisconsults received a vast increase in the reign of Hadrian, by the addition, in virtue of

† Gaius, Instit, III. 143;
See also Justinian, Instit, I. 23, 82,

his office, to their number of the City Præfect. An Officer who bore this title, and to whom was confided the Wardenship of the City during the absence of the Consuls had existed from very early times. The duties of the Office were, however, within the province of the City Prætor; and after the institution of that Magistracy, the other was virtually absorbed in it. The Name still survived, but the Office was a sinecure. Augustus acting on the advice of Mæcenas, revived the Office, and added a definitive Jurisdiction such as in earlier days had not belonged to it. Step by step this Jurisdiction grew; not only regained the weight of which the old City Prætorship had robbed it, but equalled, and in the end absorbed the functions of the latter. The Jurisdiction of the City Præfect extended not only to the City but to a hundred miles round it, and was as well over cases civil as criminal. Against his sentence there was no appeal save to the Emperor in person; while he was authorized to hear appeals from the sentence of every other City Magistrate, and in the end even from that of a Provincial Governor. When Constantinople was made a seat of Empire, it also had its City Præfect. Thenceforward the two Præfects were held to be the direct representatives of the Emperor; had an acknowledged precedence over all other Magistrates; and were the channels of communication between the people and the Head of the State. With a privileged Jurist like the City Præfect ever at his hand, and others as a standing Council, always ready to consult with and advise, it is scarcely wonderful that Emperors, even the most scandalous, should have shewn themselves so well acquainted with both the principles and practice of the Law. And, that in their Decrees and Constitutions, they should display a tact and a sagacity for which their other acts could give no warranty. The Jurisconsults thus, as legal advisers of the Head of the State, obtained a yet firmer foot-

ing on the ground of Legislation. Again, they gained by their Writings a most powerful, though indirect influence in the framing of the Laws. Numbers of the privileged class were not content to give mere Answers to cases laid before them. They busied themselves in the composition of works upon the several branches of the Law. Some wrote Commentaries on the Law of the Twelve Tables; on the Prætorian Edicts; and on the writings of the earlier Jurists. Some made Digests, or collections of cases and opinions. Some strove to bring the principles of Law to a more systematic arrangement; and wrote elementary treatises for the good of learners. One of the earliest of this kind, appears to be the Institutes of Gaius, a Jurist, who was born in the reign of Hadrian, and whose work was written, probably about A. D. 150. With exception of the fragments in the Pandects of Justinian, this work of Gaius is the only specimen which remains to us of the Writings of the Jurisconsults. It was discovered in the year 1816 by Niebuhr, during a three days' sojourn in Verona: and was a palimpsest, Gaius having been washed out and erased, to make room for the Works of Jerome. The work as now restored "may serve," says Phillimore* "to prove the loss mankind has sustained by "the destruction of the great bulk of the Roman Jurists. Its "merit in point of style, as an elementary treatise, it is im-"possible to exaggerate; and its discovery has been to the "Students of Roman Law, what the Law of gravitation was "to astronomers."

It is scarcely possible to overrate the worth to Law as a Science, of the labours, so many and so varied, of the Jurisconsults. Assuredly no land can show a line of Jurists more high in character, in learning, and in political position than

* Hist. of Rom. Law, p. 227.

that which was for three centuries the ornament of Rome, which had Quintus Mucius Scævola as its beginning (B. C. 95) and Modestinus as its end (A. D. 222). It were here beside the purpose to give any thing approaching to a list of those who so adorned the Roman Jurisprudence, and rescued it from the dreary forms and sickening routine of earlier times. Still, over and above that Gaius, to whom allusion has been made, there are four Names of Fame so widely spread, that it were impossible to let them pass in silence by. These four: are (1.) Papinian; (2.) Paulus; (3.) Ulpian; and (4.) Modestinus.

PAPINIAN was Prætorian Præfect under the Emperor Septimius Severus, who held him in high esteem. The story goes that the Emperor on his death-bed commended his sons Geta and Caracalla to the care of Papinian. Caracalla, after the murder of Geta, sent for Papinian and bade him write a justification of the deed. Papinian refused, saying that it was an easy matter to slay a brother, but a far more difficult to justify the deed. The refusal was enough to give the tyrant an excuse for ridding himself of an unwelcome adviser; and the great Jurist was condemned to die. Of Roman Jurisconsults none had a fame so wide as had Papinian. Writers in after days speak of him in terms such as were given to no Jurist else. "He was," writes Spartianus, "the "Asylum of Right, the Treasury of Law." Nor was his a fleeting fame; nearly two hundred years after the great Jurist had been dead, a Constitution was promulgated in the Eastern Empire by Theodosius II., and confirmed for the Western by Valentinian III., which gave the highest place as Jurist to Papinian. The Constitution (A. D. 246) sought to get rid of the evils, arising from the multiplicity of conflicting opinions, by ordering a Judge to be guided implicitly by the Writings of the five Jurists, Papinian, Paulus, Gaius, and

Modestinus. If they were not unanimous, the opinion of the majority was to be his guide. But, if those of them who had written on the doubtful point, were equally divided, then was Papinian's influence to turn the scale; and the ruling of the side on which his opinion was ranged was binding on the Judge. It was a wretched mode of helping the weakness of a Judge; but full of interest now as showing in what high esteem were held these five great heads of Roman Jurisprudence; and how relatively high Papinian. Extracts from three Books of Papinian, 'of Questions,' 'of Answers,' and 'of Definitions,' are to be found in the Pandects of Justinian, and are worthy of his great fame. Though at times obscure, the result perhaps of the way in which they appear, they are enough to justify his character for shrewdness, learning, eloquence, and honesty of purpose.

PAULUS and ULPIAN were both pupils of Papinian. Both were Prætorian Præfects; both were exiled by Heliogabalus; and both recalled by Alexander Severus when he became Emperor. Of all the Jurisconsults, Ulpian is said to have been the most prolific writer; and next to him comes Paulus. Of the Pandects, about one-third consists of extracts from the works of Ulpian; while a proportion scarcely smaller is taken from those of Paulus. Paulus outlived his friend. The latter fell a victim to the fury of the soldiery, A. D. 228. An outbreak of the Prætorian Guard took place; the soldiers forced their way into the palace, and murdered their Præfect, Ulpian, in presence of the Emperor, Alexander Severus, who vainly strove to shield him with the Purple.

MODESTINUS, was a pupil of Ulpian; and, like his master, high in the favor of Alexander Severus. The extracts from his Writings in the Pandects are comparatively few in number, but are enough to shew the justice of his claims to fame.

Thus much of those far-famed men to whom the Jurisprudence, first of Rome, and so that of modern Europe owes so deep a debt. Their Writings even in the disjointed forms in which they have been handed down, have qualities such as one hardly finds in Legal Treatises of later days. One sees, throughout the whole of them, a yearning after the application of principles to the wants of daily life. One sees a severe logic, an unequalled method, a rich comparison, and a simple elegance of style. One sees a never-ceasing struggle to be rid of subtle tricks, and technical conceits; and to avail themselves instead of those high principles of Right, which are unchanging as is HE Who stamped them on Man's Soul.

CHAPTER 9.

THIRD PERIOD—(*Continued.*)

ONE other source of Roman Law has yet to be considered. From the beginning of the Empire, the conduct of the State, and thus the Legislative function, was thrown of necessity into the hands of him whom the State acknowledged at its Head. The Will, therefore, of the Emperor became at first virtually, and afterwards avowedly a fruitful source of Law. Virtual at first, because in the earlier stages of Imperial sway, the Senate was still held to be the grand source of Legislation, and its decisions were issued in the form of Senatorial Decrees. Plebiscites even were known down to the time of Hadrian. But though enactments under such names were passed, they were in truth nothing save expressions of the Emperor's Will; disguised in order to soothe the feelings of

a people which still chafed beneath the pressure of an unwonted yoke. As for the Senatorial Decrees in this period, they were always framed in accordance with terms and propositions laid before the Assembly by the Emperor in a formal address called an ORATION. The Oration, or Senatorial Address became Law, in the form of a Senatorial Decree, so soon as it had been adopted by, and received the sanction of the Senate. In certain cases the Oration entered into all details of the proposed change, and when this was so, the Senate had no liberty to meddle with its provisions. In others the general outlines were set forth in the Oration, and the Senate was left to supply the special details and provisions at its will. The result was that while the shadow of Legislative power was still in the hands of the great popular Assembly, the substance had been wrested from it by its Head. The mere show of choice was soon taken away. In the reign of Pertinax (A. D. 181) the Emperor is said to have 'decided in a Senatorial Address.'* Many Orations of Septimius Severus, and Caracalla his son, are cited in the Pandects; but after this period Senatorial Decrees appear to have fallen into absolute disuse. From the commencement of the third century the direct was substituted for the indirect mode of Legislation. The Senate was, indeed, to so late a period as the ninth century consulted by the Emperors upon matters of Legislation, but its sanction was no longer needed in order to given force of Law to the Will of the Emperor. The latter was expressed and promulgated directly by Acts or Constitutions; and in him was vested, and acknowledged to be vested, the ordinary Legislative power. The Imperial Will in all cases as well of Legislation, as of procedure and of policy, was declared by ordinances known as CONSTITUTIONS. These

* Justinian, Instit. 2, 17, § 7.

Constitutions were of three kinds, according to their purport. If addressed to all the members of the State and binding upon all, they were called *General.* If addressed to, and binding only upon particular persons and in particular circumstances, they were said to be *Special.* Of another kind were those which, in accordance with the Emperor's Will were at times Special and at times General.

Constitutions always General, were called Edicts.

Constitutions which might be either General or Special were Decrees; Mandates; and Rescripts. The last being again sub-divided into Pragmatic Sanctions, Epistles, and Subscriptions or Annotations.

Constitutions always Special were known as Privileges.

The several kinds of Imperial Constitutions were, therefore, as follows:—

1.—EDICTS.
2.—DECREES.
3.—MANDATES.
4.—RESCRIPTS. { *a.* Pragmatic Sanctions. *b.* Epistles. *c.* Subscriptions or Annotations.
5.—PRIVILEGES.

1.—EDICTS were issued by the Emperor in his character of Chief Magistrate. The old name which had marked the rules which, in the days of the Republic, had been published by all who bore Honors in the State——to wit, the Higher Magistrates——was upheld when the power to publish them was centred in the grasp of One. It was an attempt, transparent enough, to lull the jealousies of those who praised the customs of the Good Old Times. Imperial Edicts were of general application; issued with the intention to bind either the whole Empire or the whole of a particular Province, or other specified portion of it. But whatever the extent of territorial

application, they were of universal obligation, on every subject of the Emperor, who there lived.

The Edicts of Imperial Rome have an analogy in the prerogative of issuing Proclamations, which is in England, vested in the Sovereign alone. One great difference, however, exists between them. Both are expressions of the Sovereign Will; but, while the Edict was of general obligation as a Legislative enactment, the English Proclamation has binding power only when it enforces, and is grounded upon the Laws of the Realm.* For a very few years, even this mark of difference was set aside; and by Statute 31 Henry VIII. Chap. 8, it was enacted that the Royal Proclamations should have all the force of Acts of Parliament. This Statute, so liable to abuse, was repealed, after a lapse of five years only, by 1 Edward VI. Chap. 6. At present it is held that while the Sovereign cannot make the Laws, he may still, as Chief Executive Magistrate, often wisely be entrusted with the manner, time and circumstances of putting such Laws in execution. "Therefore," says Blackstone,† "his Constitu-"tions or Edicts concerning these points, which we call Pro-"clamations, are binding upon the subject, where they do "not either contradict the old Laws or tend to establish new "ones, but only enforce the execution of such Laws as are "already in being, in such manner as the Sovereign shall "deem necessary."

2. DECREES were decisions issued by the Emperor in his character of Supreme Magistrate. They were solemn Judgments delivered in cases which at times directly, more often on appeal came before the Imperial Tribunal. Decrees were either Definitive or Interlocutory. Definitive, when the merits of the whole case were gone into, and a conclusive

* Coke 3 Instit. 162.

† Comment. b. 1. chap. 7; Stephen 2. 497.

decision pronounced. Interlocutory, when the decision was only as to incidental points of Law which had arisen during the process. Decrees proceeded only at the instance of parties, and at the suit of individuals. It is, therefore, clear that, as the Decree of the Prætor had been purely personal and special, the Decree of the Emperor must have been of no wider obligation. But when gradually the absolute power became centred in the grasp of one, the influence of that one was soon great enough to give the force of Law to his Decisions. It thus became the rule to treat the Imperial Decrees as General or Special in accordance with the Will of him who issued them. As a rule they were not of universal obligation, but became so provided such intention were set forth in the Instrument. According to Justinian's Legislation, it appears that even such special statement of intention was uncalled for; and that Imperial Decrees were then always general and conclusive, as precedents of the Law on any point. The Emperors thus took to themselves the right of regulating the decisions of the Magistrates, and "had reserved to themselves personally the office of applying "the undefined principles of Equity in particular cases "requiring special interference." In England it was little different, and a similar Jurisdiction by way of Appeal in respect of Decrees of the Court of Chancery, was held to reside in the Sovereign. "The very nature of the Extraordinary Jurisdiction of the Court of Chancery," says Mr. Spence,* "precluded all notion of Appeal but to the King himself. "The Jurisdiction was founded on prerogative; originally "it was exercised by the King himself, under advice no doubt, "and generally of the Chancellor." The King had of course the power to delegate his prerogative of hearing appeals and of

* Equit. Jur. of Court of Chanc. 1. 393.

issuing with reference to them his Decrees which were in all main features one with that of the Roman Emperors; but such delegation must have been express. The Supreme Appellate Jurisdiction is now vested in the House of Lords. That over Common Law suits seems to have been exercised by the House of Lords from the early part of the reign of James I. That over Chancery suits, not founded on express delegation from the Crown, was, according to Sir Matthew Hale, first attempted in the year 1640; there was much discussion on the subject, and says Spence,* "it was not until 1726 that the "Appellate Jurisdiction of the Lords over Interlocutory orders "and Summary proceedings was completely established." The Decrees now issued by the House of Lords, in its settled character of Supreme Appellate Court, are in few points different from the Decrees of the Empire.

3. MANDATES were instructions and expressions of the Emperor's Will, addressed to public functionaries; for the guidance of them, and of all others to whom they were to be published.

4. RESCRIPTS were Written Answers to questions proposed to the Emperor for his solution. They were of three kinds, with reference to their origin, and to the extent of their intended application. If the Rescript were written in answer to questions proposed by a public body, or community, it was called a PRAGMATIC SANCTION. If addressed to an individual, and that individual were a public officer, and the contents of the Constitution were general and official, it was known as an EPISTLE. If, again, it were written to an individual, but with reference to doubts and questions of mere private application, the Rescript was less formal; was endorsed upon, or written at the foot of the paper which con-

* *ib.* 1. 396.

tained the case proposed, and known as an ANNOTATION, or SUBSCRIPTION. It is clear that Rescripts, of whatever kind, could not in their nature have the force of Constitutions General. They were addressed to particular persons, or bodies of persons, and affected none save those to whom they were addressed, or others of whom they made special mention. But while they were so framed for the single case which called them forth, they soon came to have a vastly wider application. Were, thanks to the power of him that issued them, cited as precedents; and, in the end, the bulk of them were looked upon as Laws and binding universally.

5. PRIVILEGES,——literally 'Private Laws'——, were enactments which had for their object individuals whether things or persons. A Privilege was a juridical anomaly at all times exceptional and restrictive. Privileges limited to the individual, and not extended to others who at another time might fill his place, were called PERSONAL. Those annexed to things, and which extended to the owner or acquirer of the thing, by virtue of his ownership, were REAL. The Exception and Restriction might be favorable; or it might be directly the reverse; the word 'Privilege' itself gives no clue to the character of the measure. As a rule, indeed, the Classical Writers use the phrase of extraordinary punishment, rather than of extraordinary good.* Where the latter was intended, the word generally used was BENEFICIUM——'Beneficiary Grant'——. If the Privilege were beneficial it conferred a Right; if prejudicial it imposed a Duty; in either case it had its Sanctions available for the punishment of those that sought to hinder its exercise. By reason of its very essence the Privilege could never form a precedent. So soon as that

* Cicero, in the Oration *Pro Domo* (§ § 16, 17), asserts that no Privilege could be passed against the life, freedom, or citizenship of a Roman Citizen, unless he had been first formally condemned by a Judex.

were granted, the exceptional would become the regular; the restrictive, the comprehensive; and the Private Law, the General.

In England, also, the Sovereign has the power to grant Privileges, or Laws limited with reference to their extent; but such, unlike the Roman, are always beneficiary. "The Sovereign," says Blackstone* "is the fountain of Honor, of "Office, and of Privilege; and this in a different sense "from that wherein he is he fountain of Justice; for here "he is really the parent of them." The sole power of conferring dignities and offices is entrusted to the Sovereign in the confidence that they will be bestowed on none save such as merit them. In the nature of beneficiary Privileges are grants of precedence to individuals; conversions of aliens into denizens; charters; and pensions to a fixed, and very small amount,† chargeable on the revenues of the Civil List. Private Acts of Parliament are also Privileges. They are restricted in operation to certain individuals, or to the owners of certain things, and do not affect strangers. In former days, Courts of Law were not bound to take judicial notice of Private Acts, unless specially set forth and pleaded. The Statute 13 and 14 Vict. Chap. 21., s. 7., however, enacts that every Act passed after the 4th February 1851, shall be held to be a Public one, and to be judicially noticed as such, unless the contrary be expressly provided and declared by the Act itself. As a Privilege is granted only the ground of certain merits, or advantages, open or implied, a Court of Law will relieve against a Private Act, if proved to have been obtained

* Commentaries, B. 1. Chap. 7.
Stephen, vol. 2, p. 502.

† The Civil List Act, 1 and 2 Vict. Chap. 2, fixes the amount at £1,200 per annum, for the remuneration of those who "by their services or "discoveries have merited the gratitude of their country."

on false statements, or by unlawful means. Akin to Privileges are Letters Patent, whereby the Crown secures to an inventor of any new contrivance in art or manufacture, the sole right in his discovery for a period of fourteen years, with powers of assignment and extension. Akin, also, is that species of beneficiary Patent called Copyright; which, with regard to the inventions of man's brain, gives rights similar to those accorded to the new productions of both head and hands. The duration of Copyright was originally,——by 8 Anne Chap. 19——, a term of fourteen years; the same as that granted by Patent of Privilege to inventors of new manufactures. The whole subject of Copyright is, however, now regulated mainly by the Stat. 5 and 6 Vict. Chap. 45, which repeals former enactments, and provides that the term of Privilege shall be the life of the author, and seven years longer. But, that if such seven years expire before forty-two years have elapsed from first publication, then for the full period of forty-two years. In the case of a posthumous publication, the term is forty-two years, and the right is in the owner of the manuscript.

The Imperial Constitutions, swollen by so many elements, became in the latter days of the Empire not alone a source of Law, but the most large and weighty body of it. Sundry attempts were made, from time to time to form a Systematic Code; that is, an arrangement of such Constitutions as were in their nature General, or had, by their authority and use as precedents, become so. As the earliest of such Codes was compiled in the reign of Constantine the Great, it may be more convenient to speak of it in connection with the last of the four great periods into which the History of Roman Law has been divided.

CHAPTER 10.

FOURTH PERIOD.

In the last of its four great periods the Roman Law, together with the whole scheme of Government was subjected to a thorough revolution. It was a necessary development of the political system introduced by Octavianus, although as different from that, as that had been from the rule of the old constitutional Magistrates during the Republic. It was a development which ripened under the bold and far seeing policy of Diocletian; and came to full maturity under the influence of his great successor, Constantine. The general policy was to concentrate all real power in the hands of the Emperor; to protect his person by the creation of a well-nigh endless list of high officials, who looked for rank and for promotion to the personal favor of the Sovereign. To get rid of the old civic titles which brought to the memory of the people, a time when Rome was a Republic; to supersede them by others borrowed from the despotisms of the East; or, where the old name was maintained, as was that of Consul, to take the right of appointment from the people, and vest it in the Emperor alone. To guard against mutinies and outbreaks of the troops by well planned counter-checks; by placing at the head of the four great armies, four leaders, all interested in the maintenance of order; the two elder being the Augusti, the two others the Cæsars, who were in their turn to take the higher rank, and so supply an unbroken

succession of Emperors. And above all, to crush the remembrance of Roman freedom by the removal of the Court from Rome, and the creation, first, of four new Capitals, and afterwards of the one great Seat of Government, Portal alike to East and West, which had its name afresh from that of Constantine. Development became in the hands of Diocletian and of Constantine so much akin to revolution, that when the latter left to his family the inheritance of the Roman Empire, he bequeathed, to use the words of Gibbon,* "a new Capital, a new Policy, and a new Religion."

As part and parcel of the system of centralization which now prevailed was the abolition of the old distinction between the Office of Magistrate and of Judges of the Fact. The first was in the pay of the State: the latter were independent Citizens, chosen from the general body, and bound by no ties of interest to follow the wishes of the Emperor. There was, indeed, on the part of the Citizens a general wish to be rid of the burthen of this service. The duties were at all times harassing, the corresponding rights had with the new system been destroyed; and, under a tyrannical Sovereign, the free expression of opinion might be perilous no less than irksome. It is probable, therefore, that the abolition of the old Order of Judges of the Fact and the concentration of the powers of Jurisdiction in the hands of paid functionaries was as grateful to the People, as wished for by the Sovereign. In the days of the Formulæ it will be remembered that the Magistrate had in certain cases, and by certain well defined methods, a power of Summary Jurisdiction, as well active as prohibitory: but that such Jurisdiction independent of the sentence of a Judex, was held exceptional, and called Extraordinary. In the new system the exceptional became the general, and the

* Decline and Fall, Chap. 171, *init.*

Magistrate was empowered in all cases to act summarily without reference to the authority of any one. The old distinction of *Jus* as laid down by the Magistrate, and *Judicium* as declared by the Judge was abolished; and the Magistrate who pronounced both, was also, by virtue of his office, Judge. The only Law which directly orders this change is a Constitution of Diocletian published A. D. 294, addressed to the Magistrates in the Provinces. This Constitution, which is published by Justinian,* commands the Magistrate to try and to adjudicate upon such causes as had formerly been referred to Judices; but permits him, if burthened by press of business, to appoint Judges, but only for the decision of cases of small importance. A somewhat later Edict repeats the permission to the Magistrate to appoint Judges, 'Judices Pedanei' ——, but only for decision of the more trifling cases.† The Pedanei, though called Judices, were very different from the Judices of the old Formulary System. The latter were simply Jurors who decided as to the Facts; the Pedanei were Assessors to the Higher Magistrates, and had, in all such matters as were referred to them, the Magisterial authority to determine both the Law and the Facts. In the time of Justinian, the old system of 'Ordinary Judgments' was utterly obsolete; thus in the Institutes, when treating of Interdicts, it is said that "It would, in the present day, be "waste of time to speak of the ancient process and effects of "Interdicts. For, when the Jurisdiction is Extraordinary, "and now it is always so, Interdicts are unnecessary." In the Constitutions of the later Emperors, the word Judex is applied to the Magistrate, and this has given rise to some confusion. As to the Law Books of Justinian, it may be

* Cod. Just. 3. tit. 3. § 3.

† "Qui negotia humiliora disceptent."
Cod. 3. tit. 3. § 5.

observed, that in general, where the term Judex is used in the Code, Novels, or Institutes, it denotes the Functionary who determined both the Law and the Fact; but that where it occurs in the Pandects or Digest, it refers to the Juror appointed by the Magistrate, on nomination of the parties, to decide as to the Facts.

The Written Law, from this period, may conveniently be looked upon as made up of two great Elements. The one being the Writings of the Jurisconsults, whose Commentaries had served to crush and supersede the old Enactments whether Laws or Plebiscites, Edicts or Senatorial Decrees on which they had been founded. The other, which was then the ordinary vehicle of Legislative change, being the Acts and Constitutions of the Emperors. As to the Writings of the Jurisconsults, little was done to reduce them to a manageable form, or to give them force of Law, before the time of Justinian. An attempt to do something of the kind is said to have been made in the reign of Constantine; of this, however, nothing is known. The only similar endeavour of which direct mention is made, was that contained in the Constitution of Theodosius II. in the Eastern, and adopted by Valentinian III. in the Western Empire, whereby a general authority of Law was given to the Writings of Papinian, Paulus, Gaius, Ulpian and Modestinus; and where, as has before been said* a special reverence was given to the rulings of Papinian.

The Imperial Constitutions were collected at a much earlier period than were the Digests of the Writings of the Jurists. The first compilation of the kind was made in the time of Constantine the Great. This was the Gregorian Code and was probably compiled by that Gregorius to whom Diocletian

* Supra, p. 75.

addressed a Rescript in A. D. 290, and who was Prætorian Præfect under Constantine in A. D. 336 and 337.

It is probable that this Code began with the Constitutions of Hadrian, A. D. 117, and ended with those of Diocletian and Maximian, A. D. 285—305. A second compilation of Constitutions of Diocletian and Maximian was made about the same period, and was probably intended as a Supplement to the other. This was the Code of Hermogenianus, and was probably compiled by that Jurist of this name, whose Writings are the latest, from which an Extract is given in the Pandects of Justinian. His Code appears to have been a Supplement to the other. It consisted but of one Book, while, that of Gregorius was divided into several; both being sub-divided into Titles. These Codes were the work of private individuals, and prepared doubtless only for the convenience and use of those who administered the Law. Though, therefore, often quoted in legal proceedings, they lacked that impress of authority which the Emperor alone could give.

In the reign of Theodosius II., commonly called the Younger, a Collection of the Constitutions from the time of Constantine down to the date of publication, was made by command of the Emperor. Instructions for the Work, which was to be "after the model of the Code of Gregorius and "Hermogenianus" were first issued A. D. 428. The Commissioners then appointed, were eight in number. Nothing seems to have been done until A. D. 435, when the instructions were renewed, and a fresh Commission of sixteen was appointed. The Code was published in the course of A. D. 438, and was declared from the first of January, A. D. 439, to be the only authority as to the Imperial Constitutions since the days of Constantine. It was at first binding only on the Eastern Empire; but in the year of publication it was sent to Valentinian III., who adopted and declared it to have

force of Law in the Western Empire also. In order to maintain the uniformity of Law thus established, the Emperors agreed that all future Constitutions which might be published in either Empire, should be forwarded to the other, and there also promulgated. Such additions were called 'Novellæ Constitutiones'——New Constitutions. A Collection of these Novels, binding on both Empires is annexed to the Theodosian Code; the latest being published A. D. 468, by Leo in the East, and confirmed by Anthemius, eight years before the downfall of his Empire. The Theodosian Code consist of sixteen Books, sub-divided into Titles; the Constitutions belonging to each Title being arranged according to their chronological order. Thanks to the discovery of a Palimpsest by Peyron, in 1823, at Turin; thanks to the Epitome of the Code preserved in the Breviary of Alaric II; and thanks the thirty years' labor of its great Commentator James Godefroy——'Gothofredus'——, we now possess the Code of Theodosius in comparatively perfect form. Of its sixteen Books the first treats of Offices; the second, third, fourth and part of the fifth, of Private Law; the sixth to the fifteenth inclusive of Public Law; and the sixteenth is filled with the Laws relating to Ecclesiastical affairs.

Thirty-eight years after the first publication of the Theodosian Code, and eight only from the issue of the last of its appended Novels, A. D. 476 the Roman Empire of the West was at an end. Wrenched from the strengthless grasp of Romulus Augustulus; it fell before the blows of Odoacer and his hosts. The Roman Rule thenceforward was confined to the Empire of the East; there it lingered on until A. D. 1453, when the last Emperor Constantine XIII. was slain in its defence, and the tottering Polity was crushed by the Moslems under Sultan Mahommed II.

But, though the Empire of the West was overthrown, the Roman Laws and Institutions still lived on. The Northern Conquerors in all their floods, were always but a handful by the side of the hereditary subjects of the Empire. They were forced to bear with customs, in which they might refuse to join; and here, as elsewhere, it was found that toleration was the first step to assimilation. Each District, each Town or Village had its double systems for the use respectively of conquerors and conquered. The Roman still regulated his affairs by the Code of Theodosius, and the traditions of the Jurists; the German yet upheld the customs of his Fatherland and, in the Mallus, sought the protection of Ancestral Laws. But this owing of a double duty was, as might be well conceived, irksome and fraught with inconvenience to all. One sees that it was so in the constant endeavours made by the New Rulers of the Soil to rid themselves of it; and, by modifications of the Old Roman Law, to frame a system which should bind as well their German as their Roman subjects. It says much for the genuine power and vitality of the Roman Law, that its worth was acknowledged even by men so wedded to other usages and traditions as were the Germans. And, that when they sought to frame a Code of general obligation, their Theodorics and Alarics were content to make but trifling changes in the Law which was, and is, the most enduring relic of the fallen race. Before Justinian began his legislative labours in the Eastern Empire three distinct endeavours of this kind were made by the Teutonic powers.

They were:—

1. The Edict of Theodoric, drawn up by order of the Great King of the Ostrogoths and published at Rome A. D. 500. The Work, which still exists, is compiled principally from the Code of Theodosius, and from the Writings of the Jurist Paulus. It is occupied principally with Public Law; the

old Private Law of both Goths and Romans was still held to prevail for its own people, in all cases where no special provision to the contrary was furnished by the new Collection.

The Edict of Theodoric had authority of Law in Italy until A. D. 554, when it was superseded by the Collections of Justinian.

2. THE BREVIARY OF ALARIC II. The Code which is now commonly known by this name, was compiled by order of Alaric II., King of the Visigoths, and published A. D. 506. Officical copies of this Code were required to bear the signature of Anianus, the Refendary, or Chancellor; it has, therefore, sometimes been erroneously called the Breviary of Anianus. It is drawn from the two sources, of Constitutions, and of Writings of the Jurisconsults. Under the former head it gives an Epitome of the Code of Theodosius, with its appended Novels. While under the latter, it includes as well extracts from the works of Papinian, Gaius and Paulus, as the unauthorized Codes of Gregorius and Hermogenianus.

3. THE ROMAN LAW OF THE BURGUNDIANS, known also as 'The Answers of Papian,' was probably compiled about A. D. 517. It differed from the Edict of Theodoric in that it was limited to the Roman subjects of the Burgundian Kingdom. For the use of others a fresh body of Burgundian Law was collected, and published at the same time with the other; it is based on the Old Teutonic usages, but is filled with provisions borrowed from the Theodosian Code.

While these several compilations and adaptations of the Roman Law were being made by Teutonic Rulers in the West, it was close upon a century before any legislative changes were thought of in the East. The Theodosian Code had been promulgated A. D. 438, and no further steps were taken until A. D. 527, when Justinian gained the Purple and was acknowledged for the lawful Sovereign of the East.

CHAPTER 11.

FOURTH PERIOD.—(*Continued.*)

JUSTINIAN was proclaimed sole Emperor of the Eastern Empire in the month of August A. D. 527; and at once began those legislative labours which ended only with his life. It must be borne in mind that, from the time of Diocletian and of Constantine, the whole body of Roman Law was held to be made up of two great Elements; to wit, of Imperial Constitutions, and of Answers of the Jurists. That no authorized attempt had been ever made to reduce the latter to a systematic arrangement. But that the Constitutions had been collected as well in the unauthorized Compilations of Gregorius and Hermogenianus, as in the duly sanctioned Code of Theodosius. The Answers of the Jurists were so voluminous, and oftentimes, from change of circumstances, so conflicting, that it was well nigh impossible to refer to a particular point of Law, or to feel sure that it was good Law even when found. The Constitutions, though far less bewildering were in great need of consolidation; the Theodosian Code, with its appended Novels, was only a first attempt, admitted of retrenchments, and did not come down, in its latest Novel, to a period later than A. D. 468. Justinian resolved to take prompt steps to ensure an uniform system of legislation throughout his dominions, and to provide that there should be at all times a body of men duly qualified to expound it. It was a vast conception,

and he who views its hindrances aright, will rather wonder at the power which shaped thought into act at all, than seek to find out flaws in the result. The means which Justinian held to be best fitted for the furtherance of his ends were two-fold; namely, first, the establishment of certain Colleges for the study of the Law; and, secondly, the limitation of the Instruction there afforded to matter contained in certain unchanging legal Compilations, to be drawn up in accordance with his own instructions. As Law Colleges he recognized three only, and forbade the study of the Law in any School save these; they were (1) Rome, (2) Constantinople, and (3) Beyrout. The last was, probably, founded by Justinian; the others had been established by Theodosius II., but were remodelled, and when after the victory of Narses, A. D. 555, Rome yielded to the sway of Justinian, one method of instruction was common to all the Schools. To carry into effect the idea of a symmetrical legal system to be taught in the Schools, and to be of universal application, it was essential to draw up two great Collections based on the two acknowledged Sources of the Law; and to prepare, besides, an Elementary Work, clear, short, and well-arranged, adapted to the wants of Students in the Schools. The Collection of Imperial Constitutions was, like those made in earlier days, known as THE CODE. The Arrangement of the Extracts from the Writings of the Jurisconsults, was called THE DIGEST, with reference to its method; or, from its comprehensive plan, THE PANDECTS. The Compendium for the use of Students in the Law was drawn up on the model of the one which Gaius had prepared; and known, like his, by the name of INSTITUTES.

1. THE CODE, like the other compilations, was entrusted to a Commission. "The theory of Professors" says Gibbon*

* Decline and Fall, Chapter 44.

" was assisted by the practice of Advocates, and the experience " of Magistrates; and the whole undertaking was animated " by the Spirit of Tribonian." The appointment was contained in an Imperial Epistle, dated in the month of February A. D. 528, within a year of Justinian's accession to the single sway. The Commissioners were ten in number, and had full power as well to retrench and modify the Codes of Gregorius, Hermogenianus, and Theodosius, as to collect and classify all Constitutions of a later date. The Work was carried on with speed, received the Imperial sanction on the 7th of April 529, and was declared to be of universal obligation from the 16th of the same month. A Code so comprehensive, brought to an end within a space so short as fourteen months might well be found defective. Further researches consequent on the after publication of the Pandects and the Institutes threw light upon these failings. Accordingly a fresh Commission was issued, whereby Tribonian, Dorotheus and three others were empowered to revise the first edition of the Code, and to add such Constitutions and Decisions as had been put forth since. The Second Code was sanctioned by the Emperor on the 16th of November A. D. 534, and was held to have force of Law from the 29th of December, in the same year. This is the Code which now forms one element of the Corpus Juris Civilis. It is divided into twelve Books; each Book into Titles; and each Title into Laws. The earliest Constitution which it contains is one of Hadrian; the latest, one of Justinian, bearing date November A. D. 534. As Theodosius had added fresh Constitutions to his Code, under the name of Novels, so did Justinian. The first of such additions was made A. D. 535; and the last bears date the 4th of November A. D. 565, ten days before the death of him who issued it. The Novels were collected after the death of Justinian, and now form a most valuable Appendix to the Code.

2. THE DIGEST, or PANDECTS, the other great independent portion of Justinian's design, was far more difficult to carry into act. More difficult because it had no public precedent to follow; because it had to deal with a well nigh countless mass of ancient Writings, produce of twelve centuries; and because it had to reduce to scientific form that which in its origin had been dogmatic, taking its color from the pressure of the cases which created it. An Imperial Epistle addressed to Tribonian, on the 15th of December A. D. 530, empowered him to choose a fit number of fellow-laborers, and with their aid to consolidate and arrange all that might seem worthy to be preserved among the Writings of the Jurisconsults. The authority at first given by the Emperor included only the Answers of the Privileged Jurists; this, however, must have been varied, or at least was practically ignored, as the Digest comprises extracts from Jurists of the Republic. Certain instructions were given as to the mode of arrangement, and of division; and, finally, a term of ten years was given for the preparation of the Work. Tribonian summoned sixteen Coadjutors to the work; among them were the two Law-Professors from the School at Constantinople, namely Theophilus and Cratinus; and the two from the Law School at Beyrout, namely Dorotheus and Anatolius. There had been wondrous speed in the compilation of the Code; there was infinitely greater in the framing of the Digest. In three years was finished that for which Justinian had given ten; the Digest was published on the 16th of December A. D. 533, and received the force of Law from the 30th of the same month. The compilers state, in their Preface, that they had availed themselves of some two thousand separate treatises; and had reduced to one hundred and fifty lines, what in the originals had occupied three millions. It is impossible to

know what was the bulk of the treatises here spoken of* still the mere number is enough to vouch as well for the zeal of the Compilers, as for the hopeless intricacy which must, before their labors, have existed. The extracts were, for the most part, given in the words of the authors; but, at times, the plan of the Work demanded that there should be interpolations and alterations. The number of Jurists whose Works are literally extracted amounts to thirty-nine; inclusive of those whose Answers are cited in the Works of other Jurists. The Digest is divided into Fifty Books, which, with exception of the 30th, 31st, and 32nd, are subdivided into Titles; the Books, again, being grouped into Seven larger Masses, or Parts. The Compilers were fettered in their attempts at any systematic distribution of the matter of the Digest by the injunction of Justinian, that they should follow the order observed as well in the Code, as in the 'Continuous Edict' of Salvius Julianus, after which the Code had been arranged. The Edict had arisen from accidental and historical causes; and could not, from its very nature, possess that wide and systematic development of first principles which one seeks in the model, after which a country's legislation should be framed. The extracts under the several Titles were for a long time held to have been heaped together without any specific principle of arrangement. The German Jurist Blume, however, in a very learned Essay on the subject, asserts that the extracts under each Title may be reduced to three leading groups;—— the first, being Commentaries on Sabinus, and bearing especially on the Civil Law;——the second, Commentaries on the Edict of Salvius Julianus, with peculiar reference to the

* Professor Hugo computes that of the three millions of lines, one allows twenty-four to a page, and four hundred pages to a volume, the old Juristical Law would have been contained in 580 volumes.

Honorary Law;—— and the third, Commentaries on the writings of Papinian, Prince of Roman Jurists.

3. THE INSTITUTES, it must be borne in mind, was a legal compilation independent of the other two. The Code as comprising the whole body of Lex, and the Digest as containing the whole essential part of Jus, together set forth all the Written Legislation which Justinian had in view. Both, however, were too bulky, and too much occupied with practical details to be profitably used by beginners in the Schools. The Institutes, therefore, was drawn up, as a general introduction to the larger collections, and as a simple Manual for the use of Students. The preparation of the Work was entrusted to a Commission consisting of Tribonian, and of the two Law-Professors Theophilus of Constantinople, and Dorotheus of Beyrout. Jurists in former days had written Works of like Character; and among these was Gaius, whose Books of Institutes, and whose Treatises on legal Doctrines connected with the practical affairs of daily life——— 'Rerum Quotidianarum'——— were the ground-work on which Tribonian and the two Professors built. On the 21st of November A. D. 533, the Work was published with the Imperial Sanction; and, from the 30th of December, it was declared to have, together with the Digest, force of Law. The Institutes consist of Four Books; each Book being divided into Titles; and each Title into Sections. The general arrangement of the Work is the same as that of Gaius; and it retains his triple division of Persons, Things, and Actions. PERSONS, as the subjects of right; THINGS as the objects of right; and ACTIONS as the remedies for breaches of right. Book I.—— with exception of the first two Titles, which are prefatory—— treats of Persons. Books II., III., and IV., to Title 5 inclusive, treat of Things. Book IV., from Title 6 to the end of Actions.

Justinian's three great Works, the Code with its appended Novels, the Digest, and the Institutes from one great Body of Law; known since the sixteenth century, or as Savigny argues from the twelfth, as Corpus Juris Civilis——'The Body of the Civil Law'——. When the power of the Goths was broken by the arms of Narses, and Italy once more became a province of the Roman Empire, Justinian issued a Pragmatic Sanction for its settlement. Narses was stationed at Ravenna as the Governor of Italy; and from the date of the Sanction, A. D. 554, the Compilations of Justinian had the force of Law in the West, and were the Text Books first in the School at Rome, and afterwards in the several Colleges which sprang up in the Peninsula.

In the East, the Legislation of Justinian held its place for three centuries; translated indeed and paraphrased, but with leading features still unchanged. The Emperor Basil, surnamed 'Of Macedon', however, A. D. 880, determined to publish an authorized version, in Greek, of the several Law Books of Justinian, altered where requisite, and increased by such Constitutions as had since been promulgated. Basil died on the 1st of March, A. D. 886, and the Work was continued by his son Leo, strangely surnamed The Philosopher. It was completed A. D. 890, and published under the title of THE BASILICA——that is, 'Imperial Laws'. Fifty years afterwards, a revised edition of the Basilica, was published by the son of Leo, Constantine, surnamed Porphyrogenitus. "The Law of the Basilica" says Dr. Plate,* "is by no means a matter of "mere antiquity; it is the groundwork of the Legislation of "the modern Greeks in Turkey as well as in the Kingdom of "Greece, and also that of the Legislation of the Principalities of "Moldavia and Wallachia; and a closer investigation of the

* Dict. of Gr. & Rom. Biog. 2, 740.

" Laws of Russia would perhaps trace the influence of the Basi-
" lica upon the History of the Civilization of that country also."

In the West, the Roman Law Books of Justinian were assuredly in use from the foundation of the Exarchate of Ravenna, under Narses, A. D. 554, to its destruction by the Lombards, A. D. 750. Nor can one believe that the Roman Law was lost even in that dread shock. As in former days the Theodorics and Alarics had been content to avail themselves, with trifling alterations, of the Code of Theodosius, so must one feel that their brethren, later-come, transferred to their own purposes the legislative labors of Justinian. History forbids us to conceive that a series of legal doctrines, and municipal institutions which had taken fifteen centuries to gain a slow-developed strength, should be crushed in any season of sharp but sudden agony. The thews of Norsemen, even, were of no good here: " they found themselves" says Guizot,* " entangled in the network of that most wise Legis-
" lation, and were compelled, in great measure, to make the new
" social system bend to it in matters of municipal order if not
" of political rule." The Roman Law was never wholly dead in Europe; like every Science else it slumbered for some weary centuries, but was never wholly lost. In Italy and Spain it was to be found in the Law Books of Justinian; and in France and other lands it was spread through the Breviary and the Code of Theodosius. The Formulæ of Marculfus show that in the middle of the seventh century, the Roman Law was still in vigour throughout Gaul. While in the middle of the eleventh century one Peter wrote, in the neighbourhood of Valence, Exceptiones Legum Romanarum ——'Extracts of the Roman Laws'——, with reference to the existing Legislation of France. The same century saw

* Essai Sur la Civil, 1, 386.

Abbot Lanfranc lecturing on the Roman Law at Bec, in Normandy. In the twelfth century one meets with that story, now deemed idle, of the wonderful discovery at Amalfi, of those two quarto volumes of the Pandects which now are treasured in the stores at Florence; and of the way in which, thanks to such discovery, the study of the Roman Law was once more brought into repute. Be the story true or false, sure it is that the study was thenceforward carried on with a zeal and system such as had theretofore been lacking. Lacking to it, as Savigny well observes, in common with all other subjects of scientific research; and supplied rather thanks to civil progress, and to the increasing wants of commerce, than to a chance discovery of two parchment volumes at Amalfi. Irnerius in the twelfth century lectured on Justinian's collections in the School of Bologna, where Law was as peculiarly the study of the place, as was Theology of Paris, or Medicine of Salerno. The method of instruction was partly by means of oral Lectures, and partly by short marginal notes and explanations on the Pandects, Code and Institutes. Such explanations were called GLOSSES, and they who made them GLOSSATORS. Of these Irnerius was the first, and Accursius, also of Bologna, who died A. D. 1260, the last.

In England one can hardly conceive that for some centuries the Roman Law should have been less deeply rooted than it was in France or Italy. For three centuries Britain had been a Roman Province; and Papinian once sate in the Judgment Seat at York. Nor when the Saxons came can one believe that Roman Laws and Roman Institutions were wholly swept away. As their Teutonic brethren, in earlier floods, had availed themselves of the polities which they found established, it is not likely that the Saxons would have acted otherwise. The Saxons, indeed, like their fellows regulated

the affairs of life by their own Teutonic customs. But what these were, and how little more their Legislation than a mere system of police, with scales of composition for every imaginable wrong, may be seen from their earliest Code, published by authority of Ethelbert. There is no attempt to lay down any rules for the transfer and settlement of property, for contracts, successions, and the like; in all such matters the people were left to avail themselves of the system which their earlier Conquerors had left. "On this head," says Spence,* "the Conquerors were almost compelled to adopt, to some "extent at least, the Institutions of the conquered, or they "would have had to construct a system of Jurisprudence "from the very foundations, for here they had no customs "purely their own to embody." In the later Saxon Codes of Alfred and Edgar, that which was left unhandled in the Work of Ethelbert, was filled up by extracts from the Breviary, and modifications of the Roman Law. While this is yet more clearly to be seen in the Code of Canute, on which were based those Laws of the Confessor, to regain which the subjects of the Conqueror were so clamorous. William's own Code was a renewal of that of Canute; nor, if one remembers the weight of Lanfranc's influence, is it to be thought that the element of Roman Law would fail to be increased by the Archbishop, who had once taught it in his Norman Abbacy. In the unfinished fragment of the Laws of Henry I., there are unmistakable traces of the Roman Legislation; in one place is a citation from the Theodosian Code; in another is Ulpian's definition of Jus; and in the description of the four parts of an action, Mr. Spence has observed* a reference to the four parts of the Roman Formula. The great revival of the study of the Law Books of Justinian took place about the

* Equit. Jurisd. of Court of Chancery 1, 10.

middle of the twelfth century, with the School of Bologna, and the alleged discovery at Amalfi. Then, too, is mention, for the first time, made of a public profession of the Civil Law in England. Theobald, predecessor in the See of Canterbury of his pupil Thomas á Becket, is said to have made two visits to Italy, and on his return to have brought with him in his train, the celebrated Jurist, Vacarius, together with a complete Collection of the Roman Laws. By the latter must, clearly have been meant a perfect copy of the Law Books of Justinian. This was A. D. 1143; six years afterwards, Vacarius established a School of Roman Civil Law at Oxford; and compiled "for the use of poor students" an Epitome, in nine Books, of the Code and Pandects. Stephen whether influenced by Henry of Winchester, the enemy of Theobald, or by a jealousy of ecclesiastical interference, issued a proclamation imposing silence on Vacarius, and putting a bar on the study of the Roman Law. The bar in this as in other like cases, was of no avail; the Epitome, in fragments, still survives; and, for its subject, "the more," saith John of Salisbury,† a pupil of Vacarius, "Impiety kept striving to destroy this Law, "the more, with God's blessing, did it wax in strength." From the time of Stephen to the present the study of the Civil Law in England has never wholly ceased. Fostered by some few of the Monarchs; checked and resisted by the most, it still has held its ground. Avowedly confined to certain courts, its leaven may be felt in all. In spite of narrowness and petty jealousy the Common Law has ever been beholden to it. From the time when King's Justice Glanville followed the method, and King's Justice Bracton further

* *Ib.* 1, 108

† De. Nugis Curialium, Lib. 8, c. 22; quoted by Savigny, Geschichte des R. Rechts, 4, 95.

made long transcripts from the Institutes, down to that of the late wrought changes in the Common Law Procedure, the Roman element has been at work. "The School of Vacarius "says Spence,* in which Bracton and many others of the "Judges had studied, had rendered accessible to all, a Body of "Laws which contained provisions applicable, *in specie* to most, "in principle to all, the questions that could be presented for "judicial decision. To have neglected to take advantage of "the assistance which was thus offered, would have argued "a high degree of presumption, or gross and culpable "ignorance;——neither is to be imputed to the founders of "our system of Jurisprudence."

In England, then, as in every other land where the Mistress of the World impressed her stamp, the image and the superscription yet remain. As the Spirit of the Roman Tongue survives in the words and forms of well-nigh every Language in the Old World and the New, so does the Spirit of the Roman Jurisprudence live and work in well-nigh all their Codes. That Spirit which, twelve centuries ago, entangled the earlier Teutonic peoples in its net, and made them bow before a system which they might not crush, has for their children also, meshes which they may not burst. Ignore it as we may, the Books of Gaius and Justinian are no mere fragments of a by-gone world, the broken links of a chain once strong, now riven, and of worth only as memorials of the mighty race that forged them; they are portions of a living

* Equit. Jur. of Court of Chanc. 1, p. 123.

In another place he says, (p. 132.)—

"There is scarcely a principle of Law incorporated in the treatise of "Bracton, that has survived to our times, which may not be traced to the "Roman Law. Bracton's direct references plainly do not comprise nearly "the whole of what he adopted immediately from the Corpus Juris."

and a growing system; working, at times covertly and at times confessedly; appealing from the weakness of a Present to the glories of a Past; enriching, in the hands of those that recognize their power: endangering, only when that power is unfelt, or unacknowledged. Scarcely a change for the better has, of late years, taken place in the administration of the Law of England, which has not been foreshadowed in the Law-Books of Justinian. Wearied with subtle trickeries, and clumsy forms, and constant breaches of substantial justice, we have been driven, at times unwittingly, and grudgingly at times, to the broad principles and the severe logic of the Roman Jurisconsults. And, as the Work of Law Reform can scarce be said to be begun, the obligations to, and need to be acquainted with the Principles of Roman Law, will grow with each new step. If the Corpus Juris Civilis were a thing of price when looked on merely as the Key to many an ancient rule of English Law, and many a decision of an English Judge, its worth must be increased a thousand fold in an age of legal progress like the present; an age when each fresh change will, as seems likely, take its measure and its tone from it. Comparison, which has wrought such miracles in every Science else, must, in Jurisprudence also, find its place; and that Reformer of existing Law shall best fulfil his mission, who seeks to strengthen and to furnish out his dogmas, with principles and maxims drawn from the Codes of other Lands; and, most of all, from that unshifting Roman Code which underlies them all. Thus, with unripe Haste matured by slow-developed Thought, and Hope tested by Experience, shall such an one go calmly on from height to height,

> Not clinging to some ancient saw,
> Not mastered by some modern term,
> Not swift, nor slow to change, but firm,
> And, in its season, bring THE LAW.