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Roman Law

Samuel Williston

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OUTLINES

OF

ROMAN LAW

COMPRISING

ITS HISTORICAL GROWTH AND GENERAL PRINCIPLES.

BY

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PREFACE.

THE primary object of this book is to serve as a manual for the use of students and of others who desire an elementary knowledge of the history and principles of the Roman Law. Since the founding of the "historical school" in Germany, and the new direction given to legal studies by Sir Henry S. Maine, the importance of the Roman law as a part of liberal education has been strongly emphasized in England, and has received some recognition in this country. It seems now to be a well-established fact that the history of modern systems of law and the principles of comparative jurisprudence cannot be properly understood without some knowledge of this most important branch of learning. Twelve years experience in teaching this subject has convinced me of the valuable results which it affords to the student in widening his historical horizon and in deepening his sense of the importance of law as a liberal science.

The general scope of this outline is somewhat similar to that expressed in the ordinary German title, *Geschichte und Institutionen des Römischen Rechts*. But its arrangement, both in the historical and the expository part, differs considerably from that usually followed by the German text-book writers. The departure from a plan approved by writers of such eminence may require a word or two of explanation—in addition to the general necessity of adapting a work, as far as possible, to the special needs of those for whom it is written.

Since the time of Leibnitz it has been customary in Germany to separate the *external* from the *internal* history of the Roman law. This method has, it is true, made clear the distinction between the formal sources of the law, on the one hand, and the development of the various branches of the law, on the other. If the method fails at all, it fails to give a proper synthetic view of the general historical influences which have contributed to the growth of the law as a whole. I have adhered to the division into periods adopted by Puchta; but have added a fifth period in order to emphasize the continuity which binds together the history of the Roman law from the earliest times to the present. I have also attempted to point out in each period the organic agencies at work in Roman society, whether social or political, philosophical or religious; the mode in which these agencies acted upon the prevailing legal forms and ideas; and the effects which they produced upon the substance of the law, as a whole, and in its more important branches. And this general line of development is traced, so far as is consistent with the limits of the work, by the aid of specific illustrations. In controverted questions regarding the origin of law, I have usually followed the safe judgment of Sir Henry S. Maine.

In describing the general principles of the Roman law, one of three modes of classification may be adopted. In the first place, we may accept the ordinary arrangement adopted by the German writers in describing the modern civil law. Again, we may re-arrange the principles of the law according to an ideal order, which we think the Romans ought to have adopted. Finally, we may adhere to the general classification with which the Romans themselves were familiar in the works of their own text-book writers. Were it not for the fact that this last method is

rarely followed, it would seem hardly necessary to claim that the spirit of the Roman law can be best understood in the form in which it is expressed in their own systematic treatises. Without assuming that this is the most scientific arrangement, I have yet followed as closely as possible, the order of the "Institutes" of Gaius and Justinian, as that which most faithfully represents the legal system of the Roman jurists. The special portions of the law are explained, however, in the light of the "Digest" and the works of modern commentators.

That this book may also serve as a guide to the further study of the Roman law, each chapter is followed by a short list of references, which is intended not to be a bibliography of the subject discussed, but to call attention to certain works in English, French, and German, and to some original authorities, in which the study of the subject may be continued. The most important of these references will also be found collected in a single list at the close of the volume.

The great extent of the subject embraced in this outline must be pleaded as an excuse for the brief and often inadequate discussion of particular topics. The purpose of the outline will, however, be accomplished if it presents to the student and to the general reader a clear and comprehensive idea of the historical and scientific significance of the Roman law, and thereby awakens an interest in its further study.

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PART FIRST.

THE HISTORICAL GROWTH OF THE ROMAN LAW.

PERIOD I.

FROM THE EARLIEST TIMES TO THE CODIFICATION OF THE TWELVE TABLES.

OUTLINES OF ROMAN LAW.

CHAPTER I.

THE ORGANIZATION OF EARLY ROMAN SOCIETY.

In explaining the origin of law, a wide difference of opinion has hitherto separated the purely analytical from the historical school of jurists. The former class of writers have attempted to explain its origin upon principles derived from the study of an advanced and highly complex state of society. Reasoning from facts observed in such a social condition, it is held by these writers that all law derives its origin from the definite sanction of a well-organized state authority. The historical jurists, on the other hand, observe that the state itself is the result of a slow and gradual process of growth. In the actual evolution of human society they discover no sharply defined limit, separating the early community-life—which can hardly be said to have any political character at all—from the fully developed state, furnished with all the means of compulsory power. They also see that early customs, which have scarcely any other authority than that derived from public opinion, pass into well-defined, positive laws only by slight and almost imperceptible gradations.

As a matter of fact, the law and the state grow up side by side; and in the early stages of society the character of the one is no more definitely fixed than that of the other. A certain sense of duty, embodied in common

usages and enforced by general opinion, acts as a rule of civil conduct even before the community has acquired a distinct political consciousness. It is these customs which furnish the content of the early law, which determine the form of early legal processes, and which, in fact, afford a justification for the sanctions which are afterward imposed by a constituted state authority. The germs of law must, therefore, be found in the early life of a people, especially in its common customs and institutions, which tend to give a uniform direction to thought and conduct.

From the intimate relation which exists between legal facts and social progress, it is evident that any thing like unity in the law must depend upon the extent to which society itself has become unified and organized. Hence, the historical sources of the Roman law must be sought not only in the beliefs and customs of the early Roman people, but also in those institutions which tended to give an organic unity to the early Roman state.

The essential features of the early society at Rome were common to all the ancient communities of Italy; and were, no doubt, derived from the primitive customs of the Aryan race. With the growth of Aryan institutions in Italy, as elsewhere, the early form of social life, founded upon a patriarchal and religious basis, acquired more and more a civil and political character. The patriarchal family, the *gens*, the *curia*, the tribe, the city, the state, marked the successive steps in the enlargement and organization of society. As a result of this federative process of growth, in which each new association was rendered sacred and permanent by the worship of common deities, we find the early community at Rome made up of a collection of social groups organized upon principles which were essentially religious in their char-

acter. The performance of certain common rites, called *sacra*, formed the bond of union in these several groups, and upon their maintenance depended the preservation of the whole social body. Religion and the priestly power which necessarily attended it were the constituent principles of the early Roman state. Bearing these facts in mind, we may be able to understand the organic features that characterized Roman society during the early period which we are now considering.

1. The Early Roman Family.—The elementary unit of Roman society was the family. But this association was far different from the modern family. The special features by which it was marked and the regulations adopted for its continuance grew out of the conditions incident to the observance and perpetuation of a domestic worship. This may be illustrated by the character of the paternal power, the nature of the membership, and the principle of succession within the family.

(1) The power of the household father was derived not simply from his lineal superiority, but from the importance which attached to his priestly character. He was the oldest living male ascendant, and had derived from his predecessor the supervision of the ancestral worship. His authority was clothed with all the sacredness of religion, and he was amenable to no one but the gods for the character of his domestic government. This irresponsible power of the father extended over all the persons and property within the sphere of the patriarchal family.

(2) The membership of the early Roman family was determined, fundamentally, not so much by blood-relationship as by participation in common religious rites. Some who were related by blood—as a married daughter—were excluded from the family. Some who were extraneous

by birth—as the wife of the father, and of the son—were admitted within its sacred circle. By marriage, a woman was, in fact, completely transferred from the religion of her father to that of her husband, so that both she and her children became identified with the family of her husband. The father's priestly power could not therefore extend over the offspring of his daughters, who had passed into another worship. It could extend only over the offspring of his sons, who remained within his own domestic religion. On this account, those descendants only who were related through a male line—that is, *agnati*—were members of a given household. Moreover, to prevent the extinction of the domestic worship, a stranger might be initiated into the rites of family, and being thus "adopted" he was as truly a member of the family as though he were of the same blood. The family, in short, comprised those persons, and only those, who were admitted to the same domestic altar, and who were consequently subject to the same paternal power.

(3) The principle of succession also was dependent upon the essential nature of the family considered as a kind of religious corporation. The extinction of the domestic worship was regarded as the greatest of evils; and hence its preservation was not made to depend upon the life of the father. At his death the sons immediately under power were obliged to succeed him in the supervision of the *sacra;* and with the priestly office was transmitted all the responsibility and authority which it involved—that is, the care of the dependent members of the household, and the administration of the *patrimonium.* Succession was not so much a legal right as a religious duty. The paternal power and the administration of the family estate thus followed the same principle of descent as that which governed the perpetuation of the *sacra.*

2. The Roman Gens.—The union of families thus constituted formed the next higher group—the *gens*. But this union was not an artificial association. It was rather a natural outgrowth of principles already existing in the family. While the death of the father would tend to separate the domestic group into new families, each subject to its own paternal head, the preservation of a common worship and of a common name would furnish a ground of perpetual union. The family relationship would thus widen with successive generations into the gentile relationship. The special features of the *gens* may be indicated as follows:

(1) The participation of the *gentiles* in common sacred rites (*sacra gentilitia*)—which were required to be celebrated at a given time and place.

(2) The preservation of a common name—which seems to have been transmitted with nearly the same care as the worship.

(3) The theory of a common descent—which was, however, in great part, a fiction, since the membership of the *gens*, like that of the family, was restricted to descent through a male line, and was similarly affected by marriage and adoption.

(4) The obligation of the members to render mutual assistance—which extended to repelling a common enemy, to ransoming a captive in war, to aiding indigent members, and to paying the fines of persons condemned.

(5) The possession of common proprietary rights—which related not only to the altar and burying-place, but also to certain lands, and to the estate of a deceased member in default of more immediate heirs.

(6) A kind of civil organization—which consisted of a *chief*, who, like the father of the household, assumed religious and judicial functions, and represented the group

in its external relations; and a *council* made up of the chief men of the *gens;* and, perhaps, a more general *assembly* composed of all the members capable of bearing arms.

3. The Roman Populus.—As we pass to consider the character of the early body politic, we must keep in mind the fact that the ancient *Populus Romanus* was emphatically a collection of *gentes*. The state did not, of course, spring into being by a direct union of these groups. It was rather the result of a slow federative process, which passed through several stages of development. For example, a number of *gentes* united to form a *curia*; a number of *curiæ* coalesced to form a tribe; and three tribes composed the early Roman community. Each one of these intermediate groups had, doubtless, at some time, formed an independent corporate body, united by a common worship and a common civil organization, with its own chief, its own council, and its own general assembly. It was from this gradual coalescence of *gentes* that the early Roman *populus* derived its unity; and it was from the institutions which were evolved during the federative steps of this union that the early Roman state derived the peculiar features of its religion, government, and law. Besides the state religion, with its common gods, its common priesthood, and its common ceremonial, the organic unity of the people was expressed in three important institutions, derived, it is true, from earlier customs, but now acquiring a more fixed and definite form. These were the *Rex*, the *Senatus*, and the *Comitia Curiata*.

(1) The Roman kingship, like the other features of the early constitution, was derived from the more primitive societies which had united to form the *populus*. Each tribe, *curia*, and *gens*, had been presided over by its own head-man, whose authority was modelled after that of

the household father. The Roman *rex*, therefore, representing remotely the father of the family, exercised a sort of patriarchal power over the nation at large. He was at once the high-priest of the national religion, the supreme judge in all private and criminal matters, the commander-in-chief in time of war, and the source of all magisterial power, the inferior officers being subject to his appointment and removal.

(2) Associated with the king was the senate, which evidently grew out of the council of elders existing in the earlier tribes. The number of its members corresponded theoretically with the number of *gentes*. In its functions it was at first merely an advisory body, assisting the king in his administrative duties, and perhaps drawing up proposals to be submitted to the people.

(3) With the growth of the early Roman state, not only did the tribal chieftain grow into the *rex*, and the tribal council into the *senatus*; but, still further, the tribal assemblies coalesced to form the *Comitia Curiata*. Like its prototype, this assembly was composed of all the people capable of bearing arms. In a certain sense it was the source of sovereign power, since it confirmed the appointment of the king by a formal act (*lex curiata de imperio*); and it was called upon to ratify all measures of unusual importance. The highest authority of the early Roman state thus rested with the *gentes*, organized into *curiæ* and incorporated into the *Comitia Curiata*.

4. The Plebeian Element.—The earliest organization of the state included, as is evident, only those persons who were members of the subordinate groups of which the original *populus* was composed. Only the members of the ancient patrician *gentes* could claim the privileges of the citizen. But from various causes, such as conquest and immigration, there grew up by the side

of the original community an alien population, which was excluded from the worship and the protection of the state. With the growth of this non-citizen class the patricians came to assume more and more the character of an aristocratic body. The antagonism thus established between the two orders was the occasion of a series of efforts to incorporate the plebeians into the patrician state. With every fresh encroachment of the plebeian body the spirit of the ancient society became somewhat modified, and supplementary institutions were established which gave a new form to the political society. The most important of these new institutions were the *gentes minores*, the centuries, and the local tribes.

(1) The plebeians at first gained a partial admission into the state, not by the formation of new tribes patterned after the patrician tribes—the original plan ascribed by tradition to Tarquinius Priscus—but by the insertion of new *gentes* into the tribes already existing. Each tribe thus contained a patrician and a plebeian element. The plebeian *gentes*, which probably included only the more important families, were called *gentes minores* to distinguish them from the patrician *gentes*, which were now called the *gentes majores*.

(2) A more radical revolution was that which is attributed to Servius Tullius. The whole population, including both orders, was reorganized upon a military basis and divided into five classes, or "centuries," which were arranged according to the equipments worn in military service. Since the capacity of a citizen to furnish himself with heavy or light armor depended upon the possession of a greater or less amount of wealth, the newly organized state acquired somewhat the character of a "timocracy." The bestowment of the suffrage upon the body of the people thus constituted created a new assembly, called the *Comitia Centuriata*.

(3) The incorporation of the plebeians was still further aided by the development of an internal organization peculiar to themselves. The principle of this new organization was founded upon territory. There were formed thirty districts, corresponding to the number of the patrician *curiæ*. The "local tribes," as these districts are called, possessed to a certain extent the right of local government. They held their own meetings, levied their own taxes, and appointed their own officers. In the process of time—probably not until after the establishment of the Republic—they all met together in one assembly called the *Comitia Tributa*, where they passed general laws under the name of *plebiscita*.

5. The Consular or Republican Government.—The paternal power of the king, which was necessarily extended by the previous reforming legislation, acquired a despotic character in the hands of the second Tarquin, leading to a revolution which resulted in the fall of the kingdom and the establishment of the Republic. The chief features of this revolution grew out of the efforts to restrain the royal power by distributing its various functions among several officers, whose term was limited to a fixed period of time. By this means were established the Consulate, the Dictatorship, and the Plebeian Tribunate.

(1) By the Valerian laws (B. C. 508) the royal power was put into commission—that is, entrusted to two officers called Consuls (at first "prætors"), whose term was restricted to a single year. In connection with the Consuls there was also appointed the *rex sacrorum*, who exercised the priestly functions hitherto belonging to the king. The royal power was still further specialized by the creation of two Questors to be appointed by the people for the purpose of administering the finances.

(2) The power of the royal *imperium*, thus restricted

by the creation of two "annual kings," was temporarily restored to something like its ancient vigor by the appointment, in certain grave emergencies, of a Dictator, who held supreme power for a period of six months. In this way the magisterial power could be centralized and rendered more efficient to meet an impending danger.

(3) The Consulate was practically a patrician office, and was used, generally speaking, for advancing the interests of the patrician body. The continued and aggressive demands of the plebeians for a greater degree of protection finally led to the creation of the Plebeian Tribunate. The person of the Tribune was rendered inviolable, and his chief duty was, by his veto, to protect the interests of the oppressed class.

Such were the main features which marked the progressive organization of Roman society previous to the codification of the Twelve Tables. From the early gentile communities, which had been brought into Italy with the Aryan migration, there had grown up a comparatively well-defined political society, in which the functions of government were distributed between three popular assemblies and a body of religious and civil magistrates. The authority of the early state was exercised primarily in repelling common dangers and in determining the relation of the subordinate groups to each other and to the entire community. The father, it is true, was still the head of the household. The *gens* also preserved a certain degree of autonomy. And the other groups—the *curia* and the tribe—did not lose entirely their identity. But all these communities were yet brought into a closer union by the recognition of a common authority and the growth of common political institutions.

References.—A general review of the social and political organization of early Roman society may be found in: Arnold, "History

of Rome," chs. 1–13; Mommsen, "Roman History," vol. 1; Ortolan, "Hist. of the Roman Law," Eng. trans., sects. 1–24; Walter, "Geschichte des Römischen Rechts," I., §§ 1–48; Deurer, "Geschichte und Institutionen des Röm. Rechts," §§ 28–53. The relation of early Roman society to the family and gens is discussed in: Maine, "Ancient Law," ch. 5; Coulanges, "The Ancient City," Eng. trans. by Small; Freeman (E. A.), "Comparative Politics," lecture 3; Hearn, "The Aryan Household"; Morgan, "Ancient Society," Part II., chs. 11–13; Lange, "Römische Alterthümer," I., §§ 29–54. The progress of criticism as applied to early Roman History is marked chiefly by the following works: Perizonius, "Animadversiones Historicæ," Amsterdam, 1685; Beaufort, "Dissertation on the Uncertainty of the First Five Periods of Roman History," in "Transactions of the Académie des Belles-Lettres," Utrecht, 1738; also "La République Romaine," Hague, 1766; Niebuhr, "Römische Geschichte," first volume, 1811, completed Berlin 1826–32; Newman (F. A.), "Regal Rome," Lond., 1852; Schwegler, "Römische Geschichte," Tübingen, 1853–58; Lewis (Sir George Cornewall), "On the Credibility of Early Roman History," Lond., 1855; Mommsen, "Römische Geschichte," Berlin, 1861; Dyer, "History of the Kings of Rome," Lond., 1868; Ihne, "Römische Geschichte," Leipzig, 1868–76.

CHAPTER II.

THE BEGINNINGS OF THE ANCIENT JUS CIVILE.

THERE is nothing more clearly established by historical investigation than the fact that the growth of the state and the growth of law sustain to each other the closest relation. As long as there exists no common political authority, the conduct of individuals is restrained simply by private force or by a code of conventional morality. Private redress is the only remedy in case of injury; and the only standard by which social relations are fixed is customary law or, more properly, conventional usage. But as the social groups, hitherto distinct, come to be united under some common organization, the customary relations of society come to be more uniform, and also more definitely protected by penal sanctions. The law thus assumes a *positive* character when the rules of custom become embodied in the organic will of the community, and rendered compulsory by the growth of some recognized authority. At first this authority is very limited; but it gradually increases in extent and efficiency as the organic unity of the state becomes more fully developed. The following considerations may indicate, generally, the character and extent of the authority which the early state exercised to control the conduct and adjust the relations of its citizens, and thus to bring into existence a body of legal rules.

1. **Character of the Earliest Sanctions.**—From the mode in which the Roman state had its origin, it is evident that its authority was founded primarily upon

religion. Every step which had led to the wider organization of society was accompanied by the enlargement of religious ideas; and the civil power which had arisen with the growth of society was believed to be exercised under the approbation of the gods. A crime against the state was regarded as an offence against its guardian deities. The culprit was exposed to an anathema (*sacer esto*), by which he became an outlaw, and no longer entitled to the protection of the national gods. He could be slain by any one with impunity. Outlawry thus seems to have been one of the earliest forms of punishment. But as the state became more conscious of its own power, it assumed itself the execution of the criminal, who was either hanged from the *arbor infelix* or thrown from the Tarpeian rock. This kind of jurisdiction, which was founded upon religion, and was directed toward what we call criminal offences, was chiefly exercised to preserve the sanctity of the national worship, to protect the authority of the magistrates, and to shield the lives of the citizens.

2. The Rise of Civil Jurisdiction.—The idea of administering justice in civil matters did not enter distinctly into the early conception of state power. That the public magistrate might forcibly interfere to decide private disputes was an idea of prerogative that grew up only as the members of the various social groups came more and more to be regarded as integral and responsible members of a single political body. We will point out the probable steps which led to state interference in civil matters, and afterward verify the view presented by reference to certain customs which survived in the early form of legal procedure at Rome.

(1) The first step in the direction of controlling private disputes and of restraining private revenge grew out of the custom of appealing to an arbitrator, to whom was

left the question whether an injury existed, and whether, as a consequence, the customary mode of redress was permissible. In the earliest times this arbitration was entirely a private and voluntary act; and the decision might or might not be respected. The person, however, in whose favor the decision was made, would feel justified in pursuing the method of private redress that custom had hitherto approved; and the unsuccessful party would generally feel bound by honor or public opinion to submit to the customary remedy.

(2) An advance upon purely private arbitration is made when the contesting parties appeal to a priest, or public magistrate. This is also at first an entirely voluntary act. The public authority does not compel the process, but simply takes charge of it. With the consent of the parties, the magistrate may either decide the dispute himself, or appoint a private person as arbitrator, whose decision thus receives a kind of public approval.

(3) The state assumes a part that has more properly the character of jurisdiction when it gives the plaintiff the power of compelling the defendant to appear before the magistrate. The summons is still to a great extent a private act, performed by the defendant himself, though sanctioned by the public authority. The magistrate simply hears the altercation between the parties, fixes upon the points at issue, and appoints a private person as arbitrator, to decide who is in the right. Arbitration is thus made compulsory. But still the execution remains in the hands of the successful plaintiff, who is allowed to pursue the private redress according to custom.

(4) The further interference of the state is shown by the efforts made to regulate private remedies. The injured party was entitled to satisfaction. The state could at first do no more than restrain somewhat the feeling of

vengeance, and compel the defendant to give an acceptable compensation for the wrong committed. The instinct of resentment had for a long time to be respected by the law, as is seen in the principle of "retaliation," whereby the injured person could legally demand "an eye for an eye, and a tooth for a tooth." The limited character of early civil jurisdiction is evident from the fact that the execution of judgment was a private process. While the magistrate might fix the character and extent of the remedy, the injured party was allowed to obtain by force the compensation adjudged, and in extreme cases to incarcerate the delinquent debtor, or even to put him to death.

3. The Earliest Civil Procedure.—The statement that civil jurisdiction had its origin in arbitration is verified by the earliest form of civil procedure with which we are acquainted. The most ancient mode of proceeding among the Romans was the *actio sacramenti*, which, as Maine says, was "the undoubted parent of all the Roman actions, and consequently of most of the civil remedies now in use in the world" ("Early Hist. of Inst.," p. 252). A detailed account of this early procedure is preserved in the "Institutes" of Gaius (iv., 10–17). In the symbolic form there described is presented to us a survival of the mode in which the early state interfered for the settlement of private disputes. The action represents a mock combat followed by a reference of the case to arbitration. The steps of this process may be indicated as follows:

(1) The proceeding opened with a mimic combat over the property in dispute. This feigned quarrel Gaius thus describes: "The claimant held a wand and, grasping the slave or thing over which he claimed dominion, said: 'This man I claim as owner, by the law of the Quirites, according to the reason that I have stated; thus upon

him I lay my lance,' at the same time he touched the slave with the wand. The adversary then said the same words and performed the same act." The wand, according to Gaius, "represented a lance, the symbol of dominion, for the best title to property was held to be conquest." This judicial combat was called *manuum consertio*, or the "hand-grapple," and symbolized a conflict between the parties for the possession of disputed property.

(2) The feigned quarrel was followed by the interference of the magistrate, who called out to both disputants to let go their hold (*mittite ambo*). The state was thus represented as interposing its authority for the peaceful settlement of the point at issue.

(3) An altercation then ensued between the parties as to their respective titles, and each challenged the other to stake a sum of money upon the truth of his assertion. This stake was called *sacramentum*, from which the action took its name. This has often been explained as a judicial wager, and Maine regards it as an evidence that "the tendency to bet upon results lies extremely deep in human nature." But whether or not it had its origin in a bet, the sum forfeited did not go to the successful party, but to the public worship (*ad sacra publica*). The *sacramentum* seems to have been a certain sum solemnly consecrated to sacred purposes, both as an assurance of good faith and as a compensation for the public service performed. The entire proceeding before the magistrate was called *in jure*.

(4) The final step in the process was the reference of the disputed question to a private person, called the *judex*, or arbiter. The property in dispute was assigned to the temporary possession of one party, who gave surety to the other for its restoration in the event of his losing the suit. The *judex* simply decided as to which of the liti-

gants was right in his claim. The part performed before the *judex* was called proceeding *in judicio*.

The execution of the judgment formed no part of the *actio sacramenti*. Neither the magistrate nor the *judex* enforced the claims of the plaintiff. The unsuccessful defendant, if he failed to satisfy the claims of the plaintiff, was liable to private arrest by his adversary and to be cast into chains. The state authorized the arrest, on the one hand, by refusing to treat such an exercise of force as an assault, and, on the other hand, by treating resistance to it as a crime. The original form of civil procedure was thus a method adopted by the early state to encourage arbitration between contestants, and to authorize an injured party to enforce the claims adjudged to be his due. The symbolic and sacred forms of the *actio sacramenti* not only formed the basis of all other actions; it also furnished the ground of nearly all other legal processes.

4. The Growth of Legal Conveyance.—Next in historical importance to the civil action, by which disputed rights are settled, is the form of legal conveyance, by which rights are transferred. The peculiar features which in early times marked the latter process lead us to suppose that conveyance as a legal form was based upon procedure. At least this seems to have been the case at Rome. Before the forms of the "action" were attached to the transference of a thing, such transference, however much it might be respected as an affair of honor, possessed no legal validity. If the ownership in a thing thus informally transferred was disputed, the question could be settled only by going through the forms of the judicial contest before the magistrate. On the other hand, the property which had already been made the subject of litigation would possess a certain

legal title not attached to that which had merely passed in an informal way from one person to another. The successful party in such an action would have his right sanctioned by a public authority. A legal significance might therefore be given to conveyance, if there could be attached to it, in some way or other, the sacred forms of the action. In this way the transference of property could be made under the sanction of the state.

(1) The first, and when considered with reference to its origin the simplest, method of clothing the fact of conveyance with the forms of law was by means of a fictitious suit. Instead of deferring the judicial process until a dispute had actually arisen, the forms of the legal action were gone through at the time the property was transferred. The purchaser came before the public magistrate, and placing his wand upon the property, as in the *actio sacramenti*, claimed it as his own according to the law of the Quirites. The seller making no counter claim, the thing was adjudged to the claimant. This process, which corresponded to the proceeding *in jure* of the action, was called *in jure cessio*. It gave a legal sanction to the transference of property, and confirmed upon the purchaser the same formal right as though the property had been adjudged to him in an actual litigation.

(2) A modification of this procedure was effected by performing the "hand-grapple" in the presence of witnesses, instead of before the magistrate. This process is said to have been introduced to relieve the parties from the inconvenience of going before the public officer. Its general character and its relation to the forms of civil procedure are evident from the necessary conditions which attended it. Its most significant feature was the symbolical "hand-seizure," including the formal claim of the purchaser that the property was his according to the law

of the Quirites—which form was evidently derived from the older procedure. It was from this feature, as Gaius says, that the process was called *mancipatio* (I., § 121). The state was now represented, not by the magistrate, but by five male Roman citizens. The number, corresponding to the five Servian centuries, would seem to show that this change in the form of conveyance was made in connection with, or after, the Servian revolution. Again, instead of the judex who in the ancient procedure weighed the claims of the two parties, a neutral person (*libripens*) was present at the "mancipation," holding in his hand the symbolical balance. The conveyance was completed when the buyer struck the balance with a piece of bronze, which he transferred to the seller as a sign of the purchase-money. On account of the use of the bronze and the balance, this form of alienation was also called *per æs et libram.*

The *mancipatio*, or conveyance *per æs et libram*, which was based indirectly upon the forms of procedure, came to be the most important means for the transference of legal rights, and for fixing the legal relations between different persons. We shall hereafter see that it was not only the form by which property was conveyed, but the form by which nearly all transactions were legalized, by which a marriage was effected, a son adopted or emancipated, a mortgage, a contract, and a testament made.

5. The Nature of Early Quiritarian Rights.—The idea of a legal right—that is, a certain degree of liberty sanctioned by law—grew up with the legal processes just described. The exercise of exclusive dominion over any person or thing would come to have a legal character only when such a privilege was made defensible in a legal action, or was treated as a proper subject for legal conveyance. Certain privileges might, indeed, be recog-

nized through customary observance; but they would obtain a new significance when they had once become sanctioned through the forms of law. As the state—directly through a legal action and indirectly by legalizing conveyance—gradually interfered to adjust and protect the private relations of its citizens, the kind of protection which it thus afforded indicates the extent of legal rights possessed by the different members of society.

An analysis of the legal rights which were capable of being protected by a legal action and of being transferred by legal conveyance, shows that they were at first exceedingly simple in their nature. An action could be brought and a conveyance could be made only by an independent Roman citizen—that is, the father of a household. The rights which were sanctioned by a legal process were hence attached to the person of the *paterfamilias*. From his domestic status he obtained a legal dominion over all that belonged to his household—wife, children, slaves, cattle, land. This general authority, or right of dominion, whatever might be its object, went under the general name of *manus*—or hand-power—which term entered largely into the legal phraseology of the time. It was this generic right that formed the basis of the more specific civil rights peculiar to early Roman citizenship.

The mode in which the specific rights emerged from the general right of dominion cannot be traced with any degree of exactness. But the tendency to specialization is very evident from the subdivisions of the father's power, and from the common features which attached to the several rights after they were differentiated from each other. They all partook of the character of dominion, or ownership; and we also find "legal conveyance forming a large part of those acts in law by which that peculiar

relation was transferred, modified, or extinguished." (Clark, "Early Roman Law," p. 125.)

(1) In the first place, the father exercised a proprietary control over the wife. To this power the term *manus* came to be restricted. Although the earliest form of marriage was a symbolic capture followed by a sacred rite (*confarreatio*), after the introduction of "mancipation," marriage was effected also by a purchase (*coemptio*), the woman being conveyed from her father to her husband according to the form *per æs et libram.*

(2) Another branch of the father's general right of dominion was his legal power over his children (*patria potestas*). The children of the household legally belonged to the father. He could treat them as he saw fit. His authority over them was unlimited. The process of mancipation could, moreover, be used to transfer the child from the power of his own father to that of another Roman citizen.

(3) The power of the master over the slave (*dominica potestas*) was also but a special form of the father's dominion. This power, too, was absolute, simply because no one had a legal right to interfere with it. The slave —like the wife and the child—was to all intents a chattel; and ownership in him was also transferred by mancipation.

(4) A Roman citizen, otherwise free, might be held in temporary bondage or apprenticeship, to a *paterfamilias.* This form of subjection was called *mancipium* from the fact that the power over the bondsman was acquired by mancipation. Although of a more temporary nature than the powers previously mentioned, it was, while it continued, but a special form of the father's dominion.

(5) The right of ownership, in a more restricted sense, applied to the exclusive control over those things which

we are accustomed to designate as property, such as houses, land, and cattle. This was called by the Romans *dominium*. It differed, at first, in no essential respect from the other forms of dominion. It was protected in the same way by a legal action, and was in the same way transferred by a conveyance *per æs et libram*.

This brief analysis goes to show that the special rights recognized by the *jus Quiritium* were an outgrowth of the general idea of dominion involved in the hand-power (*manus*); just as the legal processes of "action" and "conveyance" were a development from the original symbolical form of the hand-contest (*manuum consertio*).

References.—There are as yet few works that treat in a satisfactory way of the beginnings of the Roman law, showing the *nexus* between the ancient Aryan customs in Italy and the laws of the XII. Tables. It is only by inferences drawn from the latter law and by the use of the comparative method that this connection can be established. A clearer light will doubtless be thrown upon this subject by further investigations in comparative jurisprudence. A few works are here mentioned which may give the student some aid in this direction: Hearn, "The Aryan Household," chs. 17–19; Maine, "Early Hist. of Institutions," chs. 9 and 10, and frequent discussions in the "Ancient Law"; Coulanges, "The Ancient City," Bk. II.; Mommsen, "Hist. of Rome," Bk. I., ch. 11; Clark (E. C.), "Early Roman Law—Regal Period"; Phillimore, "Intr. to the Study and History of Roman Law," pp. 17–32; Hunter's "Roman Law," §§ 811–818; Zimmern, "Gesch. des Röm. Privatrechts," §§ 26–28, and "Der Röm. Civilprozesz," §§ 38–48; Puntschart, "Die Entwickelung des grundgesetzlichen Civilrechts der Römer," Erlangen, 1872. Suggestive comparisons are drawn between the early Roman Law and the Anglo-Saxon law in the valuable work entitled "Essays in Anglo-Saxon Law," Boston, 1876. In the early chapters of Lightwood's "Nature of Positive Law," the English readers will become acquainted with the opinions held by Jhering in his "Geist des Römischen Rechts."

CHAPTER III.

THE CHARACTER OF THE TWELVE TABLES.

THE ancient *jus civile* received a definite form in the XII. Tables, which the Romans were accustomed to regard as the foundation of their entire system of jurisprudence. Our knowledge of the law previous to the formation of this code is, in great part, a matter of speculation, based upon comparative investigation and inferences drawn from certain legal forms which are evidently "survivals" from an early period. It is true that fragments of a collection, called the *jus Papirianum*, and ascribed to the period of the kings, have reached us. But these fragments, though clearly showing the religious spirit of the early law, are yet meagre and unsatisfactory. The more important fragments which we possess of the XII. Tables afford us a means of definite knowledge regarding the general character of the early Roman law. A review of this code—so far as it can be restored from the fragments preserved and the references made to it by classical authors—will indicate the degree of development which the law had attained in the fifth century B. C. It will also tend to verify the opinions which we have expressed with reference to the origin of the law itself.

The XII. Tables must be regarded as a compilation of the customary law of Rome, hitherto preserved and administered by the aristocratic or patrician class. The story that the Decemvirate imported these laws from Greece must be rejected, not only as being opposed to the natural principles of legal growth, but also on ac-

count of the absence of any positive internal evidence of their Greek origin. The direct occasion of this compilation was the struggle between the patricians and plebeians. The existing law, being unwritten, afforded no invariable standard to which both classes could appeal; and, being administered by the patrician class, it could be used as a means of oppression. The plebeians, therefore, demanded the publication of the law and the "equalizing of liberty." The laws were, consequently, reduced to a codified form by the decemvirs, approved by the Senate, and afterward ratified by the *Comitia Centuriata.*

In reviewing this code, we can notice briefly only its more prominent features, especially those which illustrate most clearly its general character, and which suggest its relation to the earlier customs from which its rules were evidently derived.

1. **The Law of Procedure.**—Cicero tells us that the first table contained the *in jus vocatio*, or the summons before the magistrate; and the critical restorations of the text invariably place the main rules of procedure in the first three tables. The prominent place thus assigned to procedure shows the importance which litigation holds in the early stages of legal growth. Rights become legalized not so much through the direct process of legislation as through the indirect process of adjudication. In considering the procedure of the XII. Tables, we perceive the unmistakable signs of its origin. It evidently grew out of the effort on the part of the early state to compel parties in dispute to submit to arbitration, and also to regulate the method used by an injured party to obtain redress. This is seen alike in the summons, the intermediate process or trial, and the mode of execution.

(1) The first table begins with the words: "If you

summon a man to court, he must go ; if he refuse, call a witness and arrest him ; if he attempt evasion or flight, lay hands upon him." The law thus authorized the plaintiff to use sufficient force to drag the defendant before the magistrate. This process shows the limited extent to which the state interfered in the preliminary steps of the suit. The summons was a private act, though sanctioned by law. Being exercised under the approval of the state, it was, however, a step in advance of the earlier and more barbarous practice of private redress ; since the exercise of private force was now authorized only to the extent necessary to compel the defendant to appear before the magistrate.

(2) That part of the process in which the claims of the litigants were heard and settled was divided into *jus* and *judicium*—the former being conducted before the magistrate, and the latter before a private citizen acting as arbiter. The proceeding *in jure* was exceedingly formal and rigid. The *actio sacramenti*, already described, shows the character of this process. It preserved, in a technical and symbolical form, facts which had once possessed a real significance, when the exercise of private force was beginning to be regulated by a public authority. It shows how the customs of a barbarous age had become stereotyped into a regular judicial process. The lance, which was a weapon of conquest, had become transformed into a symbol of ownership. The heated wrangle had cooled down into a formal method of joining an issue. The challenge to a bet had become translated into a mode of testing the good faith of the parties, and of securing a compensation for the public service. Anger and force had thus become tempered into the forms of law. It is true that adherence to a technical ritual often seemed to be of more consequence than the administration of

justice. But if we look through its symbolical husk, we shall see that the sacramental action was in fact nothing but a rough method of ascertaining the points at issue, and of compelling the parties to refrain from force, until a cool decision could be made as to who was in the right. Furthermore, the proceeding *in judicio* was simply a private investigation, conducted by the person appointed as *judex* with a view to ascertain whether the claims of the plaintiff were well founded.

(3) The process of execution, as it existed at the time of the XII. Tables, was a method adopted to restrain the exercise of private vengeance by regulating the mode in which redress should be obtained. After the defendant had been condemned by the *judex* in a certain amount, he was allowed thirty days in which to satisfy the judgment. If he failed at the expiration of that time he was liable to the *manus injectio*. That is, he was seized by the plaintiff and brought before the magistrate. If he could find no surety (*vindex*) his person was adjudged (*addictus*) to the plaintiff. He was thrown into chains and confined in the plaintiff's house for sixty days, during which time the amount of his debt was proclaimed on three successive market days. On the third occasion, if he obtained no surety, he might be sold into slavery, or slain, and his body divided among his creditors. In the words of the XII. Tables: "On the third market day let him be cut into pieces; if any one cut too much or too little it will not be a crime." The significant features of this execution are: that it is for the most part a private process; that it is a crude method to restrain private redress; and that it is an execution against the person of the debtor.

The *actio sacramenti* and the *manus injectio* were both called "actions of the law" (*legis actiones*), although one

was properly a form of trial, and the other a mode of execution. Beside these there were two other "actions" existing at the time of the XII. Tables, viz.: the *judicis postulatio*, which was a direct appeal to the magistrate, dispensing probably with the sacred deposit of the *sacramentum*; and the *pignoris capio*—that is, a kind of "distress," by which the creditor was allowed, in certain specified cases, to seize upon the property of the debtor to satisfy a claim without applying to the magistrate for a judgment. The whole procedure of the XII. Tables, whether we consider its general spirit or its technical forms, is seen to be a development from a more primitive body of customs in which private redress formed an essential feature.

2. The Law Regarding Family Relations.—The fixing of definite modes of procedure to protect the customs of society gave birth to certain legal, or sanctioned, rights. As the elementary unit of Roman society was the family, the most primitive civil rights were those which arose for the security of the domestic group. From its peculiar structure the Roman family was, as we have seen, a kind of close corporation bound together by a common worship and a common *potestas*. In its internal relations it was entirely subject to the household father; and only through him did it come into external relations to the rest of the community. The most important civil protection that the state afforded was thus to secure the rights of the independent Roman citizen over all the persons and things that belonged to the *familia*. From these efforts to uphold the customary power of the father there sprang up various laws—some of which are preserved in the IV. and V. Tables—with respect to the family organization and the relation of its members to the *paterfamilias*.

(1) The relation of husband and wife grew out of the

nature of legal marriage—which obtained its significance from the fact that by it a woman was completely transferred from the power of her father to that of her husband. There were three forms of legal marriage recognized by the ancient *jus civile*, viz.: *confarreatio*, *coemptio*, and *usus*. The first was a sacrament and derived its form from the ancient domestic worship. It consisted of a formal introduction of the wife to the religion of her husband, when she partook with him of the cake of wheaten flour (*panis farreus*) in the presence of his ancestral gods. The second form of marriage possessed more strictly the character of a legal conveyance. By it the wife was transferred from the father to the husband through the forms of mancipation. The introduction of this more strictly civil form of marriage may be considered as a part of the general movement toward the secularization of the law. The third form of marriage was founded upon the principle of prescription as applied to movable goods. In this case the possession of the wife for one year (uninterrupted by an absence of three consecutive nights) gave to the husband legal authority over the wife. Without these legal forms no woman could properly be regarded as a married wife. She might, it is true, without these forms live with a man as a wife (*pro uxore*); but in that case she belonged to the family of her father and not to that of her husband. It was only by fulfilling the technical conditions of civil marriage (*justæ nuptiæ*) that the new relation possessed any legal character. Civil marriage was thus a kind of legal title by which the husband obtained an absolute power (*manus*) over the wife; and, conversely, by which the wife acquired a claim to the *patrimonium* of her husband.

(2) The relation of father and child was founded in the very nature of the Roman family. As the family was

organized upon a patriarchal basis, the children included, of course, persons who would not be comprised in the modern family. From the various modes in which they became attached to the household, they may be referred to three classes: first, the children by birth, which included all agnatic descendants—that is, all persons descended from the household father through a male line; secondly, children by marriage, or the wives of the male descendants—that is, all females (besides the *materfamilias*) who had been introduced into the family by lawful wedlock; thirdly, children by adoption, which included all extraneous persons who had been received into the family with the consent of the *comitia centuriata*, or by mancipation. These persons were the sons and daughters of the family (*filiifamilias*, *filiæfamilias*), and were legally subject to the *patria potestas*, which involved the absolute control of the person and property of the child. According to Dionysius, the XII. Tables gave to the father "absolute power over his children, the right existing during their whole life to imprison, to scourge, to keep to rustic labor in chains, to sell them, even though they might be in the enjoyment of high state offices" ("Antiqq. Rom.," II., 26, 27). Cicero also says that the XII. Tables authorized the immediate destruction of monstrous or deformed offspring ("De. Legg.," III., 8). It is probable that this power was originally dissolved only by the death of the father. But the XII. Tables provided that a son under power might be relieved from the father's power by three successive sales *per æs et libram*. This process was called "emancipation," and was evidently the first interference on the part of the state to limit the life-long authority of the Roman father.

(3) The relation of master and slave was indicated by the terms *dominus* and *servus*, and the master's right by

the term *dominica potestas*. The power of the master was absolute, extending to the right of life and death (*jus vitæ necisque*). Slavery did not, however, possess the same importance in the early Roman law that it afterward acquired. It was only with the great influx of slaves resulting from the later conquests, that it became important to determine, in an explicit manner, the status of slaves in their relation to freemen. Hence very few legal principles regarding slavery can be traced to the ancient *jus civile*. But slavery, to a limited extent, doubtless existed at Rome from the earliest times. The survival of the ancient mode of manumission by the *vindicta* —which was a fictitious process performed before the magistrate according to the forms of the *in jure cessio*— is an indication that the old Quiritarian law sanctioned the freeing of slaves from the master's power. Moreover the XII. Tables expressly provide for a remedy against the master whose slave has committed an injury (*si servus furtum faxit noxiamve nocuit*).

(4) The relation of master and bondsman was somewhat similar to that of master and slave. By virtue of his *potestas*, a father could transfer his son by mancipation into the power of another person. A new relation would thus arise. Persons over whom power was thus acquired by mancipation, were said to be held *in mancipio*. They were not exactly in the position of children; nor were they yet in the condition of slaves. They occupied a kind of intermediate status between free and slave. So far as their domestic superior was concerned, they were practically in a servile state; but with reference to the rest of the world, they were free. When the relation between the bondsman and his superior ceased, the former resumed the status of a free Roman citizen. His bondage did not reduce him to slavery. How then did he

differ from the son *in potestate?* Practically, in no respect, for they were both subject to the absolute power of the father. But legally they sustained quite different relations to the *patrimonium.* The son possessed *in futuro* the right of succession to the father; but the bondsman, no more than the slave, could succeed to the master's estate. The condition of domestic bondage, or *mancipium,* was a peculiar institution of the ancient *jus civile;* it gradually passed away with the growth of the Roman law. For a time after the XII. Tables, it had special reference to the intermediate status of the son between the three sales that led to his emancipation.

3. The Law Relating to Succession.—The rules of inheritance, as set forth in the XII. Tables, are immediately connected with the laws relating to the paternal power and the family organization. All legal rights belonging to the family were, as we have seen, held and exercised by the household father. The administration of the *sacra,* the rights over the persons and property attached to the family group, all centred in him. The aggregate of these rights constituted the *patrimonium.* As the family was thus bound together by the legal power of the father, when the latter died the family would be broken up and the *patrimonium* lost unless taken up by the surviving members. Inheritance was thus the mode whereby the *potestas,* with its incidental rights, was assumed by those who succeeded to the personality of the father. It must not be supposed that inheritance in early times was simply a method adopted for the disposition of the father's property after his death. It had a deeper significance. Founded upon the necessity of perpetuating the family worship—which lay at the basis of the whole social organism—it came to be the succession to the entire personality of the decedent—that is, to the *patri-*

monium, with all its incidental rights and duties. Moreover, as the father's power, or the *potestas*, conditioned the extent of the family organization, so it was the degree of relationship, reckoned by means of the *potestas*, which determined upon what persons the *patrimonium* should descend. According to this principle, the three orders of succession were *sui heredes*, *agnati*, and *gentiles*.

(1) The inheritance first devolved upon the *sui heredes* —that is, those who were under the power of the decedent at the time of his death, and who became independent (*sui juris*) by virtue of his death. This class included all children whether natural or adopted, male or female, who had not by any means passed out from the power of the father. In case a son had died, his share of the *patrimonium* went to his children (*per stirpes*).

(2) In default of *sui heredes* the succession devolved upon the *agnati*. In the words of the XII. Tables: "If a man die intestate and have no *suas heres* let the nearest agnate have his *familia*." This relationship depended upon an antecedent *potestas*, since all persons sustained to each other the relation of agnates who were descended from a common ancestor through a male line. The agnates were, in fact, those and only those who, if the common ancestor had been alive, would be living together under his *potestas*. Male descendants who had been emancipated and female descendants who had married into other families—together with the children of such persons born since the domestic separation occurred —would consequently be excluded from the agnatic relationship. The idea of relationship based upon the *potestas* thus determined the second, as well as the first order of succession.

(3) If there were no agnates, then the members of the same gens succeeded to the inheritance. There is here

no radical deviation from the general principle which determined the right to the succession. As the *sui heredes* bear a common relationship to their deceased father; as the *agnati* are those who bear a common relationship to some more remote, but known, ancestor—so the *gentiles*, however remote from each other, claim a common relationship to some professed progenitor, either real or mythical, whose name they continue to bear. Whether introduced into the circle of the *gens* by birth, by adoption, or by marriage, all the members hold a common relation to the same epomynous ancestor, to whose worship they are all devoted, and to whose *potestas*, if he were living, they would all be subject.

(4) In case all the heirs pointed out by the customary law were likely to fail, other means were used to prevent the extinction of the worship and to provide for the inheritance. This leads us to consider the origin of the Roman will and its character at the time of the XII. Tables. It is evident from the very nature of succession in early times, that the formal appointment of an heir was an encroachment upon the primitive laws of descent. It is well established that among all early peoples, as among the Romans, intestate succession was for a long time the only form of inheritance. It was only when the line of descent threatened to be cut off by the failure of the customary heirs that measures were gradually introduced to supplement the traditional law and prevent a possible calamity. At first, the father before his death might, with the consent of the *Comitia* or by mancipation, "adopt" a person who by becoming a member of his family would become his legal heir. Adoption was thus a legal method to prevent the loss of the *familia*, or family estate, and was in fact the earliest process in which the will of the father formed an element in determining his successor.

As a modification of the practice of adoption, the father was allowed in the presence of the *Comitia* to designate a person who, with the approval of the people, should act as his heir, and upon whom his legal status should descend at his death. This was the first form of the Roman will in the proper sense, and was called *testamentum calatis comitiis.* From the mode in which it originated, it was evidently a kind of special law, and was an innovation upon the more ancient custom of intestate succession. It was an act of the state to meet an exceptional emergency; and there is every reason to believe that it was employed at first only where the customary law failed to point out a successor, or a proper reason could be given why the customary heir ought not to receive the *familia.* In case the *Comitia* could not be convoked, as on the eve of battle, the name of the heir might be submitted by the testator to his comrades in arms. This kind of will, which was privileged to soldiers, was called *testamentum in procinctu.*

When the idea became developed that the disposition of the *familia* might depend upon the will of the father, the form of the sale *per æs et libram* came to be employed in the appointment of an heir—the *familia* being transferred to a fictitious purchaser (*familiæ emptor*) who was compelled to dispose of the estate according to the directions which accompanied the sale. Gaius describes this form of the testament as follows: "A man who had not made his will either in the *Comitia Calata* or on the eve of battle (*in procinctu*) used to convey his estate (*familia*) to a friend who was requested to distribute it to certain persons in a certain manner after his death. This was called the will by the bronze and the balance (*testamentum per æs et libram*) because it involved the process of mancipation" (II., 102). The will thus described indicates the growing capacity of the testator to dispose freely of

his property at death. The XII. Tables provide that "the directions of the testator regarding his property and the guardianship of his children shall be law." The *testamentum per æs et libram* came to be more generally employed than the two previous forms; and, with the modifications afterward introduced by the prætor, in which writing was substituted for the oral instructions of the testator, it became the basis of the modern will.

(5) As an incidental feature of succession we may notice the law of guardianship as it existed at the time of the XII. Tables. By the death of the *paterfamilias*, the proper heirs, whether male or female, old or young, acquired each a share of the rights involved in the *patrimonium*. But the civil right of inheritance might be accompanied by a natural disability on the part of certain heirs. The wife, the unmarried daughter, the infant son, and others regarded as incompetent, though not disqualified from sharing in the inheritance, were yet compelled to exercise their rights under the protection of a guardian. In the appointment of the guardian, the father possessed, after the growth of the testament, the same right as he had in the appointment of the heir. But when no will was made, the customary law which determined the heir, also pointed out the guardian. We learn from Gaius that the XII. Tables provided that in case no tutor was appointed in the will, the nearest agnate should act as such (Gaius, I., 155). And we also learn from Cicero and Festus that, according to the Tables, the custody of an incompetent person, as an idiot, and his property, in case there is no curator appointed by will, belongs to the agnates; and in default of agnates to the *gentiles* (Cicero, "De Invent.," II., 50; Festus, on the word *Nec*).

4. The Law Relating to Property.—The XII. Tables contain, moreover, certain rules which refer to

proprietary relations, and indicate the extent to which the idea of individual ownership had become developed at the time the code was framed. As we go back in the history of society we approach a state of things in which property is held not separately by the individual, but in common by the group. From such a state of communism were developed the early ideas of intestate succession which we have noticed. Property, like the *sacra*, was a kind of adjunct to the family organization, to be administered by the one possessing the *potestas*, and to be assumed by those upon whom the *potestas* descended. The *patrimonium*, though legally held and managed by the father, was, in fact, communal property; and the child, though subject to the paternal power, was in reality a co-proprietor in the family estate. This community of interests in the family estate and the closeness of the patriarchal organization greatly limited the freedom of alienation on the part of all the members—that of the father as well as the son. The freedom which the father came to acquire in the disposition of his property at death shows a tendency in the direction of individual ownership. Still further, the law regarding the acquisition and alienation of property during the lifetime of the father also illustrates a tendency in the same direction. But the laws with reference to property in the XII. Tables are very far from having the distinct character which they afterward acquired. Some of the more important features of these laws may be briefly noticed.

(1) The first feature to be considered is the division of all things capable of ownership into *res mancipi* and *res nec mancipi*, according as they did or did not require the symbolic process of mancipation in their legal transference. The former class included land, slaves, and beasts of burden—that is, the things which would be most valu-

able in an early agricultural community, and which would therefore naturally come first under the protection of the law. The less valuable things, requiring at first no special protection, would be transferred in the customary way from hand to hand, the validity of the transaction depending merely upon honor before it was sanctioned by law The recognition of *res nec mancipi* as objects of legal ownership and the sanction given to the non-technical mode of conveyance by "tradition," show that even at the time of the XII. Tables, the strictness of the ancient *jus civile* was already beginning to give way. This growth of a non-technical element in the law of conveyance, opposed as it was to the sacred symbolism of the *jus Quiritium*, was no doubt due to the encroachment of the plebeians, who were admitted to commercial relations with the Romans before they were allowed to participate in the sacred forms of the Quiritarian law. Besides the methods of conveyance already referred to—the strict mode of mancipation, the judicial mode of *in jure cessio*, and the non-technical mode of tradition—the XII. Tables also recognized *usus*, or prescription, as a mode of acquisition. Undisputed possession for a period of two years in the case of immovables, and one year in case of movables, vested the right of property.

(2) In connection with this subject of property and conveyance should also be noticed certain legal transactions which afterward took the form of contracts, but which at this time were closely related to the subject of conveyance. The process of conveyance *per æs et libram* was used as a means to give security for debt. The debtor transferred to the creditor a piece of property in accordance with the forms of mancipation. The creditor by this means obtained absolute and unqualified right to the property thus transferred. The only security for its

return after the debt was paid rested entirely upon the honor of the creditor. This transaction was called *fiducia*, or conveyance upon trust. It will hereafter be seen that this "fiduciary conveyance" was the basis of the law relating to pawn and mortgage.

(3) Upon the process of conveyance was also based a peculiar relation between debtor and creditor, which approached more nearly the form of a legal contract. This was the *nexum* of the ancient law. A word of explanation will show its origin and character. The term *nexum* originally referred to the relation between the parties to a conveyance *per æs et libram*, the parties themselves being called *nexi*. The conveyance by mancipation, or *per æs et libram*, involved an interchange of property and price; and being strictly a legal transaction, the obligation of the parties could be enforced by the magistrate. By suspending, however, the process after the transference of the price, a kind of loan came to be effected; and the parties continued to hold the relation of *nexi* to each other until the process should be completed. The debtor who received the price, or loan, was thus under obligation to complete his part of the transaction, or to return the money received; and this obligation, if ignored by the debtor, could be enforced by an executory judgment (*manus injectio*). In this way the term *nexum* came to be applied to the relation arising from an incomplete conveyance, by which a compulsory obligation was established between a debtor and a creditor. It will hereafter be shown how, from this simple obligation, based upon the forms of a conveyance, sprang the various contracts of the later law.

5. The Law Respecting Injuries.—The Tables show very clearly that the Romans had made very little advance upon the regulations in respect to injuries that

prevail in all rude and barbarous peoples. They drew no clear line between public and private wrongs. Nearly all offences, as is common in primitive society, were treated as private wrongs. Only to a limited extent had the idea of a crime as an offence against the public, dawned upon the Roman mind. The principle of retaliation, which is closely related to private revenge, was still respected; although compensation for certain injuries was allowed, in a manner somewhat similar to that which we find among the ancient German tribes. As there was no attempt at a classification of offences, the spirit of the law on this subject will perhaps best be seen from the character of the penalties employed. These were chiefly satisfaction, retaliation, and punishments of a public nature.

(1) Satisfaction took the form either of reparation in kind, or of compensation by a money payment. Reparation was required for any ordinary damage caused by intent or accident. If the injury was caused by any animal, either the damage must be repaired, or the animal forfeited. Money compensation seems to have been required when the damage was such as not to be readily repaired, as, for instance, "if one pastures his flock upon a neighbor's land, if he cuts down his neighbor's timber, or if he inflicts an injury upon a neighbor's person." The penalty was graded in a rough way, according to the status of the person or to the extent of the injury. The penalty for the fracture of the bone of a free man was twice as much as for that of a slave. The slightest personal injury required a compensation equal to one sixth of that resulting from the fracture of a bone. Again, if a thief was taken in the act of stealing (*furtum manifestum*), he was compelled to make a compensation equal to four times the value of the property stolen; but if he was not taken in the act (*furtum nec manifestum*), he was required to

make a twofold restitution. This distinction was evidently intended to satisfy the stronger feeling of resentment which would be natural in the former case.

(2) The ancient and barbarous custom of retaliation was still sanctioned, when satisfaction—either by reparation or by compensation—was not made. According to Aulus Gellius, the Tables provided: "If any one has broken the limb of another, unless satisfaction is made, retaliation shall be had." The principle of retaliation was immediately related to the older custom of personal revenge, by which one took the law into his own hands; and which was still allowed in certain cases at the time of the XII. Tables. For example, any one committing a robbery by night could be lawfully killed. The same liberty was given during the daytime, if the robber attempted to defend himself with arms.

(3) Notwithstanding the fact that penalties were more frequently of a private than of a public character, the idea of a crime as a public offence, and subject to a public penalty, existed to a certain extent even in the early Roman law. The idea of punishment, however, was still founded upon the principle of revenge. The victim was tortured by fire, sacrificed to some deity, or thrown from the Tarpeian rock into the Tiber. There was, moreover, very little effort made to adjust the penalty to the offence. Murderers, rioters, libellers, false witnesses, corrupt *judices*, patrons who defrauded their clients, those who stealthily destroyed their neighbors' crops—were all alike condemned to capital punishment. There was yet an attempt, in some cases, to graduate the penalty according to the intention. For instance, the law declares that, if any one of sound mind intentionally burns a house, he shall be scourged and put to death by fire; but if he does it through negligence, he shall be moderately chastised.

6. General Character of the XII. Tables.—This brief review of the ancient civil law, as embodied in the XII. Tables, shows that it continued to bear traces of the primitive customs from which it had descended; and that, while it contains evidences of an improvement upon those early customs, it was yet extremely technical, illiberal, and conservative.

On account of its religious origin, it acquired the technical features of a ceremonial law. All the more important legal transactions were invalid, unless accompanied by symbolic acts and rigid formularies. These technical forms, being associated with the sacred rites of the popular worship, were looked upon with religious veneration, and not the slightest deviation from them was permitted.

The spirit of exclusiveness was, moreover, a characteristic feature of the early law. The government being framed by and for the interests of the patrician class, the law was, for the most part, interpreted for the special benefit of this class. The broadest distinction was made in the legal capacity of different persons, according as they were free or slave, patrician or plebeian, citizens or foreigners. This exclusive spirit was attacked, but not destroyed, by the gradual encroachment of the plebeians.

The final embodiment of the law in a codified form, the ultimate authority of which was unquestioned, tended to prevent its further progress. Its fixed character hindered the improvement necessary for the enlarged administration of justice; and rendered it incapable of further development except through means which were in many respects revolutionary, and not contemplated in the law itself.

References.—The works and discussion upon the XII. Tables are quite numerous. Some of the more important of these are here named, in the order in which they are, perhaps, most available for

the student: Ortolan, "Hist. of Roman Legislation," Eng. Trans., pp. 96–146; Demangeat, "Droit Romain," I., pp. 43–47; Rivier, "Introduction Historique au Droit Romain," pp. 163–181; Walter, "Gesch. des Röm. Rechts," I., §§ 49–53; Zimmern., "Gesch. des Röm. Privatrechts," §§ 29–32; Hugo, "Histoire du Droit Romain," trad. par Jourdan, I., pp. 58–65, 69–206; Gravina, "Origines du Droit Civil," trad. par Requier, Paris, 1822, pp. 38–126; Bruns, "Fontes juris Romani Antiqui," 1871, pp. 12–27; Schoell, "Legis XII. Tabularum reliquiæ," Lipsiæ, 1866; Dirksen, "Uebersicht der bisherigen Versuche zur Kritik und Herstellung des Textes der Zwölf Tafel Fragmente," Lipsiæ, 1824; Hanbold, "Institutionum juris Romani privati Lineamenta," Lipsiæ, 1826; Zell, "Legum XII. Tabularum Fragmenta," Freiburg, 1825; Bouchard, "Commentaire sur la Loi des Douze Tables," Paris, 1789; Godefroy, "Fragmenta XII. Tabularum," etc., Heidelburg, 1616.

PERIOD II.

FROM THE CODIFICATION OF THE TWELVE TABLES TO THE ESTABLISHMENT OF THE EMPIRE.

CHAPTER I.

THE ENLARGEMENT OF THE ROMAN STATE AND THE EXTENSION OF THE FRANCHISE.

THE expansion of the Roman law after the codification of the XII. Tables was due primarily to the enlargement of the state by the introduction of foreign elements into the body-politic. The direct result of the Roman conquests, however, was not so much to modify the character of the *jus civile* itself, as to extend its peculiar rights to the subject communities, and thus to break down its exclusive spirit. This movement, commencing with the full enfranchisement of the plebeian order, continued with the advance of the Roman dominion, until the gift of citizenship had before the close of the Republic been granted, either in whole or in part, to conquered communities in nearly every part of the Roman world.

1. The Equalization of the Orders—Jus Civitatis.—The enlargement of the state was due, in the first place, to the admission of the plebeians on terms of civil and political equality with the patricians. This was, in fact, the completion of a movement which had begun in the time of the kings, and which had formed the most important political feature of the early Republic. The demands of the plebeians had, however, been satisfied only in part by the creation of the Tribunate and by the reduction of the law to a codified form. The last two Tables, by excluding the plebeians from the right of intermarriage, led, in connection with other causes, to the

overthrow of the second Decemvirate and the restoration of the consular government. The struggle between the orders did not cease until the plebeians obtained the full franchise of citizenship. The chief measures which led to this result were the following:

(1) The passage of the Valerio-Horatian laws (B. C. 449), which, besides granting the right of appeal to the people, gave to the *plebiscita*, or laws of the *Comitia Tributa*, an authority over the whole body of the people. This provision was afterward confirmed by the Publilian law (B. C. 339), and still later by the Hortensian law (B. C. 286).

(2) The passage of the Canuleian law (B. C. 445), which gave to the plebeians the *connubium*, or the right of intermarriage with Roman citizens, which involved the peculiar privileges of the *jus civile* in respect to domestic relations.

(3) The admission of the plebeians to the public offices. The Licinian legislation not only looked to the relief of debtors and to the more equitable distribution of the public land, but also provided that the consulship should be open to the plebeians. Other concessions speedily followed, so that the plebeians were admitted to the censorship (B. C. 351) and to the prætorship (B. C. 337)—offices which had been created since the codification of the XII. Tables. To complete the equalization of the orders, the plebeians were finally admitted to the sacred colleges by the Ogulnian law (B. C. 300).

From the union of the patricians and plebeians in one political society there originated, according to Savigny, the notion of *civitas*, or the sum of rights belonging to Roman citizens as opposed to those possessed by foreigners. The full franchise of citizenship (*jus civitatis*) comprised, on the one hand, public rights, including the

right of holding offices (*honores*) and the right of voting (*suffragium*); and, on the other hand, private rights, including the right to hold and dispose of property according to the forms of the civil law (*commercium*) and the right of intermarriage and of domestic relations (*connubium*).

2. The Pacification of Latium—Jus Latii.—The next important step in the extension of the Roman franchise was due to the reduction of the towns of Latium. The relation between Rome and the Latin towns had, in early times, been of a federative character, with Rome at the head of the league. By the conditions of this hegemony there were recognized the rights of self-government in each city, and of "reciprocity" in respect to private rights as between the different communities. This relation continued, with some interruptions, until the great Latin war (B. C. 340–348), which resulted in the dissolution of the Latin confederacy. With the pacification of Latium began a definite policy on the part of Rome with reference to the status of her conquered subjects. This involved both political and civil features.

(1) The political features of this policy were founded upon one definite and uniform principle, viz.: that all conquered cities should be entirely isolated from each other and brought into immediate relationship with Rome. The latter relation might involve more or less freedom on the part of the conquered city, but in any case it must recognize the supremacy and the pre-eminent interests of the capital city. The variety of privileges which were granted to the different Latin towns did not obscure the fact that they were all directly dependent upon Rome, and could in no way derive support from each other.

(2) In connection with the political settlement of Latium there was bestowed upon the several communities

a kind of qualified citizenship (*civitas sine suffragio*), such as Rome had, in early times, granted to the inhabitants of Cære. It seems quite certain that this peculiar franchise was derived from, or at least closely related to, the principle of reciprocity of private rights which had been common in the early Italian leagues. This principle as regards civil rights Rome still respected in her relation to her Latin subjects, even after destroying the political relations upon which the confederacy had been founded. The rights of intermarriage and of commercial intercourse (*connubium et commercium*) were thus preserved between Rome and the inhabitants of the Latin towns. The possession of these rights formed the essential feature of the early *jus Latii*, or *Latinitas*. In later times, however, the right which went under this name and which was bestowed upon the Latin colonies outside of Latium, included the *commercium* only.

3. The Reduction of Italy—Jus Italicum.—The extension of the Roman power to the natural boundaries of the Italian peninsula followed closely upon the pacification of Latium. By the victory over the Samnites, the successful war against Pyrrhus, and the subjugation of Umbria and the independent cities of Etruria, the authority of Rome at the close of the year 265 B. C. extended from the Rubicon to the Sicilian Straits. The general policy which was adopted with reference to the newly conquered people was, in many respects, similar to that which had already grown up in Latium. Isolation, a certain degree of local self-government, and the direct dependence of the different communities upon Rome as the central city, were the main features of this policy. Rome was thus a city governing cities. The various communities in Italy, which were brought into relation to Rome, may be arranged in the following classes according to the privileges which they enjoyed.

(1) *Municipia.* These were free towns which retained their original right of self-government, but whose inhabitants also acquired certain rights of Roman citizens. These as a rule, included the private rights only (*civitas sine suffragio*). But as a special favor certain privileged towns (*municipia optimo jure*) were granted the full rights of citizenship including those of a public character.

(2) *Coloniæ.* The colonial towns formed an important instrument of Roman supremacy in Italy. They were of the nature of garrisons planted in conquered cities. The colonists themselves occupied a portion of the confiscated land, and were organized after the manner of an independent municipality; while the conquered inhabitants were reduced to a state of subjection akin to that of the early plebeians at Rome. In some cases, the colonists retained all the public and private rights of Roman citizens. In other cases, they were left with the Latin franchise, which was frequently restricted to the *commercium.* While the colonial system did not, as in the case of the municipal system, extend the right of citizenship to those who did not hitherto possess it; it yet enlarged the territorial jurisdiction of the civil law by transplanting to every part of Italy those who possessed the Roman franchise.

(3) *Præfecturæ.* Certain towns were deprived, for the most part, of their local government and ruled by a *præfectus* sent from Rome. They were subjected to all the political burdens, without receiving any of the political rights of citizens. Civil justice was administered in these towns by the Roman præfect according to the forms of the Roman law.

(4) *Civitates Fœderatæ.* Besides the cities already mentioned, there were others which were left comparatively independent and were related to Rome by special treaties. They generally retained their own laws,

appointed their own governors, and managed their own affairs; but they were subject to Rome in their foreign relations, and were bound to furnish levies of men and money to the Roman government.

As a result of the relationship established between Rome and the Italian communities, there grew up a peculiar franchise known as the *jus Italicum*. As the early *jus Latii* was derived from certain common privileges granted to the inhabitants of Latium; so the *jus Italicum* must be regarded as indicating certain common rights conceded to most of the Italian towns. Nearly all the cities of Italy retained, in some form or other, the right of local self-government. Notwithstanding the opinion of Sigonius and of many subsequent writers that the *jus Italicum* was a personal right of less extent than the *Latinitas*, the more consistent view seems to be that of Savigny, viz.: that this right was a grant to a community as a whole and not to the individuals composing it. The right of municipal liberty was doubtless the essential feature of this privilege. This involved the right of possessing an independent municipal organization, the right of exclusive dominion over the municipal territory and, as a consequence, the exemption of the land from Roman taxation.

4. The Conquest of the Provinces—Jus Provinciarum.—The cities of Italy were scarcely reduced to submission when Rome came into contact with Carthage—which event ushered in the period of her greatest conquests. The extension of the Roman power beyond the Italian peninsula was attended by the erection of provinces, in which the cities of a particular territory were grouped together under a common government made up of Roman officials. From this organization of extra-Italian cities were derived the distinguishing features of the

Roman provincial system. What these features in general were, will be seen by considering briefly the political status of the consequent cities, the nature of the provincial government, and the character of the provincial laws.

(1) The condition in which the conquered cities were left after the erection of the province, may be illustrated by the towns in Sicily. In some of these towns the inhabitants were deprived of their municipal government, and were dispossessed of their territory, which became a part of the *ager publicus*. A few were left independent of all burdens except that of military service—thus occupying the position of allied towns. But the majority of towns held a position hitherto anomalous in the Roman state. They were practically independent with respect to their rights of self government and civil administration; but their territory—though not formally confiscated as *ager publicus*—was held as tributary land of the Romans, and made subject to a tithe of the produce. According to Mommsen, the Romans derived this idea from Carthage and the Kingdom of Hiero. In early times the Romans knew nothing of tributary subjects, properly so called. The *ager publicus* might, indeed, be rented to citizens; but the municipal land in Italy had been left free from taxation. By this policy there came to be a wide distinction between Italian and provincial land; the former could be held by an absolute title, while a qualified ownership only was possible in the latter.

(2) To adjust the relations between the conquered communities, and also to administer the new land-tax, a common provincial government was necessary. Each province was ruled by a governor, under the general name of *præses*. At first, prætors were appointed to fill the office. Afterward a custom arose whereby a prætor was assigned to a province only after the expiration of a term

already served at Rome—when he received the title of pro-prætor. The same honor was also bestowed upon pro-consuls. The governor was assisted by a questor, who was responsible for the financial administration. The duties of the governor were both military and civil. He commanded the army and was responsible for the peace and security of the province. He also administered justice between the citizens of different communities. The importance of the governor's duties, as regards our purpose, grew out of his relation to the law and the civil administration.

(3) The laws of the province, so far as they were strictly provincial in character, depended for the most part upon the governor, as regards both their origin and execution. Certain general laws were, indeed, issued by the Roman senate, which set forth the main principles to be followed in the government of the province. But the *præses* issued his own edicts, containing the specific rules to which the provincials were subject. While these rules were not intended to displace the local municipal laws, they yet restrained the conduct of the citizens in many particulars. Especially was this the case when, as was common, they dealt with the inter-municipal relations. The *jus civile* itself was not formally introduced into the province, since the large part of it which applied to persons and property was inapplicable to provincial persons and provincial property. The provincial law was also administered by the governor. He might sometimes delegate this function to others, but he was yet the responsible judge in all provincial affairs.

From these facts is indicated the limited nature of the franchise conferred upon the provincials, as compared with that granted to the peoples of Italy. While there might be Romans sojourning in the province who retained

all the rights of citizenship ; while the *Latinitas* might be conferred upon the inhabitants of certain towns, and the *jus Italicum* upon some entire communities—the largest part of the provincials were allowed the privilege simply of retaining their own municipal government and municipal land subject to the teritorial supremacy of Rome. The *jus provinciarum* might be described as a franchise equivalent to the *jus Italicum* minus the freedom from land taxation which the latter right involved. In short, the provincials possessed no status as Roman citizens; and even their capacity of ownership in their own land was qualified by their tributary obligations to Rome. The civil incapacity of the provincials had reference, however, merely to their exclusion from the strictly legal rights sanctioned by the *jus civile*. The equitable rights which they acquired under the *jus gentium* will be referred to hereafter.

5. The Civil Wars and Roman Citizenship.—The civil dissensions which attended the decline of the Republic resulted in enlarging still further the franchise already possessed by the inhabitants of Italy, and also in improving somewhat the civil status of the provincials. The primary purpose of the civil reforms introduced by the Gracchi was to benefit the proletariate of Rome. But circumstances soon brought the interests of the Latins and the Italian allies within the sphere of Roman politics. The oppression of these peoples, and the unsatisfactory policy of the Roman leaders with reference to their relief, led to an armed secession of the allies, which has been called the "social war." The allies were defeated in the field, but the legislation which accompanied and followed the war was beneficial to most of the Italian towns.

(1) The Julian law (*lex Julia de civitate* B. C. 90) pro-

posed by L. J. Cæsar, granted the rights of citizenship to certain subject communities, the extent of its provisions, however, being a matter of some dispute. Niebuhr insists that "it is quite certain the *lex Julia* affected the Latins only." Mommsen is equally certain that it "conferred the franchise on burgesses of all those communities of Italian allies which had not up to that time openly declared against Rome." There seems to be no special reason, however, for dissenting from the statement of Cicero, in which he refers to the *lex Julia* as affecting, under certain conditions, both the *socii* and the *Latini* ("Pro. Balb.," ch. 7).

(2) The *lex Plautia Papiria* (B. C. 89) extended the *civitas* to persons not reached by the Julian law. By the new provision, any person might become a Roman citizen who was enrolled in an allied town, who was a resident of Italy at the time of the passage of the law, and who had within sixty days expressed his desire to become a citizen (Cicero, "Pro Arch.," ch. 4).

(3) Supplementary legislation was still necessary to complete the civil equality between Romans and Italians. Many cities refused to accept the civil rights proffered by the previous laws, owing to the fact that their political rights were not sufficiently guaranteed. It was only by the efforts of Marius and Cinna, and by the revolution of the municipal system during the Sullan epoch, that the civil distinction between Romans and Italians in Italy disappeared. Under the new arrangement every *municipium* came to be a body of Roman citizens, possessing the full franchise, together with the power of local administration, so far as this was consistent with the political sovereignty of Rome.

(4) With the union of the people of Rome and of Italy into a body of equal citizens, the opposition became more

marked between Italy and the provinces. The *jus provinciarum*, though granting certain privileges of local government, did not confer any of the distinctive rights of Roman citizenship. The movement, by which this distinction between Italians and provincials was broken down, began before the fall of the Republic. The system of extra-Italian colonization introduced by C. Gracchus transferred to the provinces a citizen class, although it did not affect the provincials themselves. Sertorius had, indeed, attempted to give to the Spanish province an independent constitution, securing to its inhabitants civil and political rights similar to those enjoyed by the Italians. But Julius Cæsar seems to have been the first statesman of Rome who fully conceived the need of a civil reorganization of the provinces, like that which had taken place in Italy; and before his death this result was in part accomplished. Cisalpine Gaul was granted full Roman rights and united to Italy. The Latin right was bestowed upon certain cities in Spain and Africa; and upon other towns were conferred the right of the old Italian allies. But the completion of this movement was not brought about until after the establishment of the Empire.

References.—A general review of the extension of the Roman franchise may be found in the ordinary histories; *e. g.*, Leighton, Liddell, Arnold, Mommsen, Ihne, Schwegler, Niebuhr. More special references are the following: "Dict. Antiqq." (*Colonia*, *Civitas*, *Latinitas*); Arnold (W. T.), "Roman Provincial Administration," ch. 2; Phillimore, "Study and Hist. of the Roman Law," pp. 191–207; Ortolan, "Hist. of Roman Legislation," pp. 169–182; Walter, "Gesch. des Röm. Rechts," I., §§ 99–270; Warnkönig, "Vorschule, der Institutionen und Pandekten," Zweite Period; Marquardt, "Röm. Staatsverwaltung," I., Italia, pp. 18–89, "Des Röm. Provinzen," pp. 90–425; Madvig, "De Jure et Condicione Coloniarum"; Savigny, "Zeitsch.," I., "Ueber

Entstehung . . . der Latinität," IX., "Der Röm. Volksschluss der Tafel Heraclea"; Heineccius, "Antiquitatum Romanarum Syntagma," ed. Haubold et Mühlenbruch, Appendix lib. I., ch. 1, "De Jure Quiritium et Civitatis," ch. 2, "De Jure Latii," ch. 3, "De Jure Italico," ch. 4, "De Jure Provinciarum"; Frontinus, "De Coloniis Italiæ"; Sigonius, "De Antiquo Jure Provinciarum."

CHAPTER II.

THE ROMAN PRÆTOR AND THE EARLIER JUS GENTIUM.

We have now seen how, with the enlargement of the Roman State, the privileges embodied in the ancient *jus civile* were gradually extended from the patricians to the plebeians, from the Romans to the Latins and the Italians, and from the inhabitants of Italy to the more favored inhabitants of the provinces. In connection with this movement, which of itself tended to break down the formal exclusiveness of the old law, a more thorough revolution was taking place in the spirit and substance of the law under the influence of the Roman prætor. During this period the prætor was, in fact, the fountain of justice in the Roman State. Under his administration, a progressive spirit was introduced into the whole legal system. Not only were there important changes made in the *jus civile*, but there grew up a body of more liberal principles, which, under the name of *jus gentium*, formed what might be called a system of equitable jurisprudence.

1. **The Jurisdiction of the Prætor.**—The germs of that authority which expanded into the full prætorian jurisdiction may be traced to the power of the consul, and remotely, of course, to that of the king. The *imperium* of the kings involved supreme military and judicial power. When the royal power was put into commission by the appointment of the consuls, the comprehensive notion hitherto attached to *imperium* became specialized into two somewhat distinct elements, viz.: the power of the sword (*imperium merum*), which could be exercised only

outside of the city, and the power incident to the administration of the law (*imperium mixtum*). With the creation of the new Republican offices, the prætor (first appointed as a special judicial officer B.C. 366) acquired all the power hitherto involved in the judicial functions of the consul. In the broadest sense of the word, therefore, jurisdiction included not only the power to declare the law (*jus dicere*, to which power the term jurisdiction is sometimes restricted in a special sense), but also the *imperium mixtum*, or the power to carry into execution any judicial decision or decree. The scope and importance of this authority will be seen by considering the forms under which it was exercised and its influence upon the development of the law.

(1) There were several forms under which the prætor's judicial authority was exercised. His jurisdiction might be either "voluntary" (*voluntaria*) or "contentious" (*contensiosa*). In the former case it referred to the pronouncing of judgment, in order to render valid certain legal acts where there was no conflict of claims, *e.g.*, in the case of manumission, *in jure cessio*, etc. In the latter case, it was exercised to settle a dispute between contending claimants. When there was no dispute as to the facts in the case, the prætor himself disposed of it according to his interpretation of the law. But when the facts were disputed, he ordinarily referred the case to a *judex*, giving the latter the necessary legal instructions as to the mode of rendering a decision. In certain extraordinary cases, however, the prætor assumed charge of the entire case, including law and fact. This gave rise to the distinction between "ordinary" and "extraordinary" jurisdiction. Besides the power of granting judgment in actions, another element of the prætor's judicial authority was the power of issuing "interdicts" (*interdicta*). This

was exercised when the summary interference of the magistrate was necessary to prevent an immediate invasion of rights.

(2) While the primary function of the prætor was to declare and enforce the existing law, he of necessity assumed the power to construe the law so as best to secure the rights of injured persons; and, in this way, he contributed to the development of the law itself. The XII. Tables formed, of course, the legal basis of the prætor's decisions. This code was regarded as the ultimate guide to civil conduct. But the very act of interpreting and applying it led to the internal growth of the law, and to its adjustment to the new relations and growing needs of society. By the use of fictions, the old rules of the law were employed as a means for the introduction of new principles. In the process of administration, the practical sense of the prætor often supplied the defects of the code; and, although the forms of the *jus civile* were ostensibly preserved, its spirit and substance were undergoing important changes.

2. The Character of the Prætorian Edicts.—In addition to the administration of the law in a judicial manner (*jus dicere*) the prætor also possessed the power of issuing edicts, which power partook of the character of direct legislation (*jus edicere, jus edicendi*). The edictal power, it is true, belonged to all the higher magistrates; but the prætorian edicts are especially important as an historical element in the Roman law. In fact, there was no other source of legislation which contributed so largely to the growth of broad and liberal principles by breaking down the extreme technicalities, and supplying the defects of the ancient *jus civile*.

(1) The various kinds of edicts issued by the Roman magistrates, suggest the mode in which the edictal power

acquired importance as a source of legislation. In the earliest times, edicts were issued occasionally as circumstances might require, and were hence called *edicta repentina*. Although a magistrate might publish an edict at any time during his term of office, the custom arose of issuing a general edict at the beginning of the term, and the *lex Cornelia* (B.C. 67) forbade a prætor from disregarding the provisions of the edict issued at his accession. Such edicts were called *perpetua* (in distinction from *repentina*) since they continued in force during the whole of the official term. Each succeeding prætor, however, had the right to issue his own edict without regard to that of his predecessor. But there were reasons which would naturally lead a new magistrate to adopt many provisions already published and tested by experience. The elements of the edict which were thus transmitted from the edicts of previous magistrates were called *tralititia*, as opposed to the new provisions of the edict, which were called *nova*. Whatever rules and principles had been found most conducive to the interest of society, would in this way be handed down from one prætor to another, until the transmitted portion would come to form the most important part of the edicts. By this process, the series of edicts came to form a continuous and well-defined body of legal principles founded upon experience and continually growing as new emergencies required. The body of law thus developed was called the *jus prætorium*.

(2) The beneficial influence of such a mode of legislation is quite evident. Though founded theoretically upon the *jus civile*, the prætorian law was instrumental in modifying the strict rules of the old procedure and in enlarging the substantive portion of the law to meet the needs of an advancing society. It was characterized by

Marcian as "viva vox juris civilis" (D. 1,1,8). Papinian says of it: "Jus prætorium est quod prætores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia, propter utilitatem publicam" (D. 1,1,7,1). The mode in which the prætorian law was developed was entirely in harmony with the conservative character of Roman institutions. The process was not abrupt and revolutionary, but gradual and reformatory. What already existed was not destroyed; it was rather adjusted to a new state of things. This mode of legislation was found to be more efficient than that of the *Comitia* in introducing a progressive spirit into the whole body of the civil law.

3. The Functions of the Prætor Peregrinus.—The judicial and legislative authority thus described belonged especially to the early Roman prætor, who came to be called by way of distinction the *prætor urbanus*. This authority was exercised in the hands of the "city prætors" to protect the rights and interests of Roman citizens. When, by the extension of the Roman dominion, a large class of foreigners were brought into relation to the state, the jurisdiction of the city prætor was found to be inadequate to meet all the demands of justice. So far as the foreigners were granted rights of citizenship, they came, it is true, under the authority of the city prætor; but so far as they were excluded from citizenship, they possessed no rights that could be protected by the Roman law. A new prætor was accordingly appointed (B. C. 246)—called the *prætor peregrinus*,—who was given authority to decide those cases which were not provided for by the *jus civile*.

The office of the new prætor was modelled, to a certain extent, after that of the existing prætor. He was appointed in the same way and exercised a similar kind of

judicial and legislative power. His functions yet differed materially from that of the prætor of the city. His jurisdiction did not extend exclusively over Roman citizens, nor was his administration based upon the *jus civile*. He was, therefore, at first, not a judge, in the proper sense of the term, administering an established body of law; but rather an arbitrator, making periodical tours through the Italian cities, hearing those cases not provided for by the existing law, and deciding them upon principles of general utility. There was a variety of relations which demanded the cognizance of the "foreign prætor," and which may be described as follows:

(1) Relations between Romans and foreigners. It was a general principle which marked the early Roman policy in Italy to allow a subject community to retain its own municipal laws, and to administer justice between its own citizens, so far as this was consistent with a state of subjection to Rome. The citizens of such a state would thus have legal rights with reference to each other. But when these citizens were brought into commercial relations with Romans, an anomalous state of things would arise. In case a Roman citizen, for instance, committed a wrong against a subject foreigner, the latter had no means of redress—either in the Roman law, because he did not possess the rights of Roman citizenship, or in his own law, because the Roman was not amenable to the laws of a foreign city. Justice could be done only by referring such a case to the *prætor peregrinus*.

(2) Relations between foreigners of different communities. Although each city possessed the right of local jurisdiction over its own citizens, and although the several cities were in common subject to the political supremacy of Rome, still they possessed no strictly legal relations with each other. A citizen of one subject com-

munity possessed no legal status in any other, and was not amenable to the laws of any other. In short, the citizens of different communities had no legal rights as against each other. But public policy required some sort of adjustment of the difficulties which might arise between such persons, and hence, cases of this kind were left to the jurisdiction of the new prætor.

(3) Relations between foreigners of the same community when residing at Rome. In case a controversy arose between members of the same community when residing at Rome, or outside of the jurisdiction of their own city, such a controversy could not originally be decided by any legal process. Being foreigners, they could not appeal to a Roman tribunal; and being at Rome, they could not appeal to their own magistrate since the latter possessed no authority in the Roman city. The only mode of adjusting their claims was by a reference to the foreign prætor.

4. The Growth of the Earlier Jus Gentium.— The most important result which grew out of the administration of justice in the cases referred to, was the development of a new body of law supplementary to the ancient *jus civile*, and destined by its superiority to exercise a beneficial influence upon the whole body of Roman jurisprudence. The peculiar position in which the foreign prætors were placed rendered them, in great measure, independent of the old civil law; and compelled them to administer justice upon broader principles than those embodied in the XII. Tables, or expressed in the edict of the city prætor. How this was brought about will be apparent from the following considerations.

(1) The foreign prætors, at first, must have decided the cases presented to them in a somewhat arbitrary manner, that is, without reference to any fixed body of

legal rules. They were appointed not to administer a system of law, but to settle disputes in a manner most satisfactory to the contending parties and most conducive to the public interests. They were therefore, at first, placed in the position of arbitrators rather than that of judges. They were not bound to refer to any code in order to determine whether an injury had been committed, nor were they bound to adhere to any technical mode of procedure in affording redress. While their previous legal education might unconsciously affect their action in a given case, they were bound simply to consult their own sense of justice and the public utility.

(2) But this primitive mode of settling controversies speedily gave way to a more fixed method of adjudication. Experience taught the necessity of recognizing certain uniform principles which should furnish a permanent standard of judicial decision. These uniform principles the foreign prætors obtained by comparing the local laws of the various communities over which they exercised jurisdiction. This was done not with any conscious design of developing a better set of legal rules than those already existing in any single state, but as the most expedient way of settling disputes and of satisfying the contesting parties. While each party would naturally chafe under a technical procedure which was foreign to the laws of his own community, both parties would alike feel the binding force of a principle which formed a common element in the laws to which they had severally been subject. This consideration furnished a motive to the foreign prætors to compare the local laws of the various communities in Italy, and to render judgment with reference to the common principles thus discovered.

(3) As a result of this method of judging between subject foreigners in Italy there grew up a common sys-

tem of Italian law. Following the custom which the city prætor had adopted of issuing an edict for the government of Roman citizens (*edictum urbanum*), the foreign prætor also issued an edict containing rules for the decision of cases in which foreigners were concerned (*edictum peregrinum*). The same consideration, moreover, which led the foreign prætor, when deciding a case, to effect a compromise between the customary laws of different states, would also induce him, when issuing an edict, to embody in it those principles of law and modes of procedure which were recognized in common by the several communities. As the observation of the prætor became more extended the local and technical features of the different systems would be more and more eliminated until the foreign edict would come to have the character of a general and impartial code. The foreign prætors thus acquired a legislative power, and in their successive edicts developed a body of law founded not upon the Roman *jus civile*, but upon the common usages of the Italian states.

(4) We may further observe that the position of the foreign prætors with reference to the inhabitants of Italy furnished a kind of model for the authority which the provincial governors assumed with reference to the inhabitants of the provinces. In fact, the first governors were themselves prætors and had a judicial and legislative authority similar to that exercised by the prætors in Italy; and whatever these governors were afterward called (whether proprætors, proconsuls, or *præsides*) they continued to exercise the same kind of official power. They possessed the right to judge (*jus dicere*), and the right to issue edicts (*jus edicere*). To whatever extent the provincial cities were allowed to retain their own laws, cases would continually arise which would require the interfer-

ence of the governor. No existing law would apply to the disputes between Roman citizens and provincials, or between the provincials of different cities. These cases were similar, in many respects, to those for the settlement of which the foreign prætors had developed the common system of Italian law. The principles of this law were, consequently, adopted by the provincial governors for the adjudication of such cases, and were also promulgated in the form of legislation whenever they issued a provincial edict (*edictum provinciale*).

(5) This whole body of supplementary law, which had grown out of the common usages of the Italian states and which had become extended throughout the provinces, received the general name of *jus gentium*—that is, the law common to all nations. The term *jus gentium*, in its earlier empirical sense, must not be confused with the higher philosophical meaning which it afterward acquired. During the time of the Republic, or at least before the introduction of the Stoic philosophy into Rome, the phrase was applied simply to "the sum of the common ingredients in the customs of the old Italian tribes," which had become incorporated into the prætorian edict. From the mode in which this supplementary body of law was developed, the general character of its principles is quite evident. Since it was created to afford relief in cases which transcended the authority of the civil law of Rome and that of any subject state, it was more comprehensive in its scope than any previously existing law and possessed broader and more equitable principles. Since, moreover, it was called into existence, in great part, to facilitate commercial transactions, it was especially beneficial in promoting safe and easy modes of transferring property, and in securing the validity of business contracts. And, finally, since it was

gathered from the common elements of various systems, its modes of procedure were divested of the extreme technicalities which marked the special laws of Rome and of the other early Italian communities.

5. Relations of the Jus Gentium to the Jus Civile.—The earlier *jus gentium*, thus springing up as a practical means to adjust the civil relations between Romans and foreigners, and afterward extended to the non-citizen class of the whole Roman world, approached the character of an impartial and universal code. The relation which this new body of law sustained to the *jus civile*, or the body of strictly Roman law, was quite different at different periods of its development. The steps by which the *jus gentium* was brought into harmonious relations with the *jus civile* may be indicated as follows :

(1) At first these two systems were regarded as entirely distinct from each other, being totally separate in their origin and application. The *jus civile* was the law of the XII. Tables, augmented by subsequent legislation and juristic interpretation founded upon that code. The *jus gentium* was the law gathered from the common usages of the Italian states and published in the edicts of the foreign prætors and of the provincial governors. The former was the peculiar and sacred heritage of the Roman people ; the latter possessed no traditional sanctity, and being accumulated from the laws of foreign states, the Romans looked upon it at first with no favor. The superior features of the *jus gentium* were disregarded on account of the greater dignity which attached to the ancient Roman code.

(2) But while the *jus gentium* was at first regarded as totally distinct from the civil law, its marked superiority came to be gradually recognized, and it soon exerted an important influence upon the legislation of Rome. It

served as a model for the city prætor and enabled him to give a wider interpretation to the ancient civil law. As the city magistrate looked forward to the provincial governorship as a sequence to his own office, he was led to view with favor the foreign system, and to introduce many of its principles into his own edict. Wherever the civil law was defective or manifestly unjust in its application, recourse was had to the body of principles contained in the foreign edict. This compelled a comparison of the two systems, and exposed the technicalities and defects of the old law. In this way, the equitable rules which had been established to meet the exceptional cases in which foreigners were concerned, were gradually adopted to adjust the relations between Roman citizens. The impartiality of the "Gentile law," the facility with which it met many cases for which the ancient law provided no remedy, served to destroy the early prejudice against it until the Roman citizen appealed to it as a refuge to protect him against the limited justice afforded by the ancient code. It was often called by the Romans *jus æquum*, or *æquitas*—not however in the sense of being a standard of abstract justice, but as being a branch of positive law more even and fair in its provisions than the *jus civile*, and better suited to protect the interests of all persons.

(3) In the process of time a large part of the *jus gentium* came to be absorbed into the *jus civile*, or, in other words, embodied in the edicts of the city prætors. The real distinction between the two systems became less and less important. When the Italian communities were received into the rights of citizenship, after the "social war," the equitable principles of the *jus gentium* were not abandoned, but continued to be administered between the new Roman citizens throughout Italy. And so when the office of *prætor peregrinus* fell into disuse, the law which he had

administered was still preserved, since it had been, for the most part, taken up into the perpetual edict of the *prætor urbanus*. The *jus gentium* thus came at last to form a constituent part of the Roman law—of equal and even of superior dignity to the *jus civile*. The names of the two bodies of law were preserved chiefly to indicate the separate sources from which various legal principles were derived. Consequently, the whole body of the Roman law (or the *jus civile* in its more extended sense) was considered as made up of two essential and co-ordinate parts—that which was derived from the old *jus civile*, and that which was derived from the *jus gentium*. These two parts, however, were welded into one complete body of jurisprudence, and were administered by the same tribunal.

The tendency of legal development at Rome was thus to blend "law" and "equity" into a single and organic system of justice. The ancient customary law was in this way continually enlarged and improved by the introduction of a supplementary body of principles, which had been developed to supply apparent deficiencies and to afford a greater facility in the protection of the rights of Roman subjects.

References.—The general character of the praetorian office and legislation will be found discussed in the following works: Maine, "Ancient Law," ch. 3; Kaufmann's Mackeldey, N. Y., 1845, I. pp. 20–22; Austin, "Lectures on Jurisprudence," Lect. 31; Walker (B), "Edictum Julianum," Introduction; Phillimore, "Study and History of the Roman Law," ch. 3; Ortolan, "Hist. of Roman Legislation," Eng. trans, §§ 33, 40–45, 54; Rivier, "Introduction Historique," pp. 198–201; Grapel, "Sources of the Roman Civil Law," ch. 6; Warnkönig, "Vorschule," S. 83; Zimmern, "Geschichte," §§ 37–41; Hugo, "Histoire du Droit Romain," trad. par Jourdan, I., §§ 177–179; Holtius. "De jure prætorio tum apud Romanos tum apud Anglos," 1841; Lenel, "Beitrage zur Kunde des prætorische Edicts," Stuttgart, 1878.

CHAPTER III.

THE IMPROVEMENT OF THE ROMAN LAW DURING THE REPUBLICAN PERIOD.

THE improvement of the Roman law, from the time of the XII. Tables to the fall of the Republic, was due, for the most part, to the two movements already described, viz.: first, the extension of the Roman franchise by the enlargement of the state, whereby many persons who had hitherto belonged to the non-citizen class were admitted, either wholly or partly, to the rights of citizenship; and, secondly, the growth of the earlier *jus gentium* under the administration of the prætors, whereby those who were still excluded from the strict privileges of the *jus civile* were yet protected in the exercise of certain equitable rights. To obtain more definite knowledge with respect to the progress of the law during this period it will be necessary for us to review briefly the effect which these two important influences produced upon the substance of the law itself.

1. Extension of the Civil Capacity of Persons.—The most obvious example of the liberalizing tendency of the law is seen in the status of persons. In the beginning of this period, the possession of legal rights was restricted to a comparatively few persons, and these were mostly the members of the old patrician *gentes*. The progress of the law, however, was characterized by the removal of the civil incapacity resting upon a large part of the persons subject to Roman authority. Though prompted by motives of expediency rather than the sense

of justice, the Romans came to recognize the principle that every freeman had a right to appeal to some tribunal and obtain redress for injuries received. All men were not yet recognized as equal before the law. Still every free person possessed a legal status—whether as a citizen, a Latin, or a *peregrinus*.

(1) The status of citizenship, at first restricted to the patrician aristocracy, was extended, as we have seen, to the extra-patrician class, so that before the establishment of the Empire it was held not only by the plebeians, but by all the free inhabitants of Italy and by the Roman colonists in the provinces.

(2) Moreover, the *Latinitas*, originally bestowed upon the Latin nation, came to be a general right granted to the inhabitants of any community whose commercial relations Rome was willing to protect by the sanctions of the *jus civile*. The Latin right was thus a sort of qualified citizenship; and wherever bestowed, it paved the way for the more complete rights of the *civitas*. With the recognition of the separate rights involved in the *commercium* as affording the basis of a distinct status, many persons received the protection of the civil law who otherwise would have been excluded from its privileges.

(3) A more striking illustration of the expansion of the law relating to persons is to be seen in the equitable rights conferred upon the alien population. In early times a foreigner was looked upon as a *hostis*, and debarred from all legal privileges. He was soon allowed to transact business under the patronage of a Roman citizen, who could protect him as a client in a court of justice. But it was only under the liberal administration of the *prætor peregrinus*, and with the growth of the *jus gentium*, that the foreigner came to have his rights so dis-

tinctly recognized that he may be said to have a real status in the Roman law. On account of the large number of rights which were recognized in the *jus gentium*, and on account of the facility with which these rights could be pursued before the prætor, the legal position of foreigners came to be well-nigh equal to that of citizens.

2. The Prætorian Law of Possession.—The growth of the Roman law may be still further seen in the tendency to give a more adequate protection to the rights of property—or rather to give to certain forms of "possession" a right analogous to that of property. According to the ancient *jus civile* there was strictly but one form of ownership, which was called emphatically Quiritarian ownership (*dominium ex jure Quiritium*). This right could not be acquired except through the forms of the civil law; it could not be exercised by a person not possessing the *commercium;* and it could not be acquired in the provincial land. To prevent the inconvenience or injustice which might arise from the strict application of these rules of the civil law, the prætor was wont in certain cases to protect a person in the *possession* of property, even when all the legal conditions of ownership had not been technically complied with. He did not assume to create Quiritarian ownership where it could not legally exist. He did, however, give a sanction to the right of possession, treating it as practically equivalent to the right of property. This may be illustrated as follows:

(1) In the first place, it is evident that even a Roman citizen could not acquire Quiritarian ownership in a thing except through the technical forms of the civil law. If, for instance, a *res mancipi* was delivered to a purchaser without the process of mancipation, the seller would still retain the legal ownership. Between the time of the

transfer and the time allowed by the civil law for the possession to ripen by *usucapio* into complete ownership, the purchaser would have no legal protection against the legal owner, or against any other person who should dispossess him of the object. This defect of the civil title was, however, met by the prætor, who sanctioned the equitable right of the purchaser under the name of *possessio in bonis*, or what has been called "bonitarian" ownership. The purchaser was now secured in his rights by the possessory interdicts (*interdicta retinendæ possessionis et recuperandæ possessionis*). He was also protected against any technical claims of the legal owner by a special remedy (*exceptio rei venditæ et traditæ*). He was, moreover, given a real action to recover the thing from any persons whatever who wrongfully dispossessed him of it (*actio in rem Publiciana*). In this way the practical right of ownership might be transferred without the cumbrous forms of the *jus civile*.

(2) Again, a foreigner could not hold property under the protection of the ancient civil law. Although the prætor could not grant to aliens Quiritarian ownership, he could, by the issue of the possessory interdicts, prevent any invasion of their just rights. Foreigners were thus secured in the enjoyment of the practical rights of ownership through the sanction which the prætor gave to the right of possession.

(3) Furthermore, the same general principle was applied to the enjoyment of provincial land. There is reason to believe that in early times nearly all land was subject to public dominion, having been acquired by conquest. But the security which the state granted to its citizens in the private occupation of land resulted, in the process of time, in the gradual translation of the *ager publicus* into *ager privatus*, so that before the close of the

Republic all the land of Italy was capable of Quiritarian ownership. But the provincial land—except where the *jus Italicum* had been granted,—continued to be subject to the public dominion. This land, though incapable of Quiritarian ownership, could yet be occupied; and its possession was regarded as the proper object of commercial exchange. Although one could not acquire in it the right of Quiritarian ownership, he might yet be regarded as its proper possessor, having a better right to its enjoyment than any other person. By securing this enjoyment against invasion, the right of possession in provincial land came to be practically equivalent to the right of ownership.

The various modes which the prætor adopted to secure the undisturbed possession of property in cases not provided for by the old *jus civile*, illustrate the growth of equitable ownership in the Roman law. When the right of possession became so protected as to secure to the possessor not only the use and the fruits of the property, but also the power of voluntary transfer; and when this right was still further made available against the world at large, it fulfilled all the essential conditions of a proprietary right. But since it was protected under sanctions distinct from those of the *jus civile*, it had the character of an equitable, rather than that of a strictly legal right.

3. Acquisition of Property ex Jure Gentium.—Somewhat allied to the growth of the prætorian right of possession was the introduction of new methods of acquiring property, which were admitted and sanctioned at first by the *prætor peregrinus*. By the comparison of various customs and the adoption of those features which were found to be common, the prætor was led to recognize the validity of certain forms of acquisition not burdened with the technicalities of the *jus civile*.

These titles were hence said to be derived from the *jus gentium*. They comprised *traditio*, *occupatio*, and *accessio*.

(1) The common element which characterized the early forms of conveyance, wherever observed, was the actual transfer of the possession accompanied by the intention of passing the ownership. Even the old mancipatory process, though cloaked with symbolical forms, was in reality a hand-transfer. The importance which the prætor attached to possession as a right analogous to that of ownership caused him to regard the actual transfer of possession as a proper title to property, when it was accompanied with an evident intention to transfer the ownership. This mode of acquisition, called *traditio*, had been no doubt recognized at the time of the XII. Tables as applicable to *res nec mancipium*; but it was now applied in general to the transference of bonitarian ownership, and also to the transference of all proprietary rights coming within the jurisdiction of the *prætor peregrinus*, and also of the *prætor urbanus* so far as the latter accepted the rules of the *jus gentium*.

(2) From the theory of possession arose also the idea of "occupation" as a legal title. In case a thing was a *res nullius*—that is, the property of no one—the right of the first possessor could not be justly questioned by any other person. Therefore, he who first brought such a thing within his possession with the intention of making it his own was regarded by the prætor as having a valid title to its ownership.

(3) As by priority of possession a person obtained a right to that which belonged to no one else, so a person obtained a right to that which came into his possession by acceding to, or growing out of, what already belonged to himself. For instance, if one owned a piece of land, he was entitled to its fruits; if he owned an animal, he

was entitled to its offspring. This form of acquisition, though involved in the early customs of all peoples, was adopted by the prætor as a distinct legal title under the name of "accession."

4. Changes in the Law of Succession.—The changes which the prætor made in the law of succession —both intestate and testamentary—are also worthy of notice. The history of the Roman law of intestate succession reflects the progress which took place in the spirit and constitution of the Roman family. We see the natural principle of consanguinity gradually invading and superseding the ancient principle of the *potestas*. The tendency of the prætor's legislation was to recognize the claims of the natural family as well as those of the civil family. This was done, not by formally setting aside the civil law, but by the introduction of a fiction, whereby persons not technically entitled to the inheritance were yet protected in the possession of the estate. This form of succession was called *possessio bonorum*, and sustained the same relation to legal succession that bonitarian or equitable ownership did to Quiritarian or legal ownership.

(1) This may be illustrated, in the first place, by the mode in which the rights of emancipated children were secured. When a father died, the first right to the inheritance belonged to the children immediately under his power (*sui heredes*). By the strict law those who had been emancipated from the *potestas* were deprived of the inheritance, because by the act of emancipation they were legally excluded from the family. But the natural claims of these emancipated children came to be respected by the prætor. As such children could not by any strict interpretation of the civil law be considered as *sui heredes*, they were called by the prætor *possessores bonorum;*

and their rights were protected by the prætorian interdicts. This mode of evading the strictly legal effect of emancipation was applied not only to the first order of succession—that is, the *sui heredes*, but also to the second order—that is, the agnates.

(2) A more important change in the law of succession was the introduction of the *cognati*, or the kindred by blood, as the third order of succession in place of the *gentiles*. This change was the result of two significant facts: first, the decay of the *gens* as a civil institution; and secondly, the legal recognition of relationship traced through a female line. The *gens*, which formed such an important element in early Roman society, became less and less defined as its membership increased with each successive generation, and as the relationship between its members became more remote and difficult to be traced. On the contrary, the growing disposition to set a value upon blood-relationship caused the substitution of descendants through a female line in place of the *gentiles*. The method by which this was accomplished was the same as that adopted to protect the rights of emancipated children and agnates—that is, by securing to the persons admitted to the inheritance their rights of "possession" to the estate.

(3) Besides these changes in the law of intestate succession, the prætor brought about a radical change in the form of the testament, which practically dispensed with the cumbrous process of mancipation. The mancipatory will of the civil law was a sale of the estate *per æs et libram*, in the presence of witnesses, to the *familiæ emptor*, who received the instructions of the testator as to how the estate should be disposed. The directions of the testator were at first given orally; but afterward they were permitted to be reduced to writing. At first it was

customary for the heir himself to act as *familiæ emptor;* but later it was allowable for some other person to act in that place, especially if the testator wished to conceal his intention from the heir, or if, from any cause, the heir himself could not engage in the process. It is evident that the essential part of the old will was the symbolical process, which gave a legal validity to the whole transaction.

But the introduction of writing, whereby the directions of the testator were recorded, and the relief of the heir from being a party to the transaction, rendered the mancipatory part of the will a mere artificial form. The prætor, consequently, declared a will valid, if the written instructions of the testator were attested by the seals of seven witnesses, even though the process of mancipation was omitted. The number of witnesses corresponded to the five witnesses of the old process together with the *familiæ emptor* and the *libripens*, or balance-holder. The heir, in this case, did not receive the legal *hæreditas* in the strict sense of the civil law; but he obtained the *possessio bonorum*, which permitted him to enjoy practically what he would have enjoyed had he been technically constituted heir. The distinction, however, between *hæreditas* and *possessio bonorum* ceased after a time to be of any special significance.

These few examples are sufficient to show the sweeping reforms which took place in the Roman law of property resulting from the simple idea of possession as an equitable right,—reforms which not only widened the conception of ownership itself, but also increased the facility of alienation both during the lifetime of the owner and at his death.

5. Growth of the Law Regarding Contracts.— The increase of commercial business among the Romans

themselves, the growing intercourse with foreign communities, and the necessity of more simple processes by which to conduct exchanges, led to the improvement of the law relating to contracts. We have seen that the mancipatory process, or sale *per æs et libram* (otherwise called the *nexum*), was the necessary condition which entered into the contract of the ancient civil law. When the *nexum* was used to legalize an obligation it comprised three elements: first, the symbolical process *per æs et libram*; secondly, the transfer of the property or thing which formed the basis of the obligation; and, thirdly, the *nuncupatio*, or the formal words which fixed the terms of the obligation. The first of these elements tended to lose its significance with the general decay of legal symbolism. From the other two elements were specialized new forms of contracts which were accepted as valid and enforced by the prætor.

(1) The contracts which evidently stood in the closest historical relation to the ancient *nexum* were those which were said to be made *verbis* and *literis*. In the "verbal" contract the process *per æs et libram* was fictitiously held to have been performed, and the formal words of the *nuncupatio* were regarded as sufficient to fix the nature of the obligation. The form of words was at first restricted to a single interrogation with a corresponding answer, viz.: *spondes? spondeo.* But as foreigners were admitted to the privilege of making contracts, other forms were allowed: *e. g.*, *promittes? promitto; dabis? dabo.*

In a somewhat similar way the "literal" contract can be traced to the *nexum.* In this case, the sum of money was considered as having been weighed out,—as was symbolically done in the process *per æs et libram*,—and the fact was noted in the family register. This written register was held to be a formal acknowledgment of the debt,

and determined the extent of the obligation in a manner similar to the oral form of words used in the *nuncupatio.* The historical relation of this contract to the symbolical process of weighing out the bronze by means of the balance is evident from its original name, *expensilatio* (*expendere*, to weigh out). The sum itself which formed the object of the contract was called *pecunia expensa lata*, or simply *expensum.*

The origin of verbal and literal contracts here given has been questioned by Mr. Hunter; but sufficient reasons have been set forth by M. Ortolan and Sir Henry S. Maine to justify the view presented.

(2) The way in which new contracts were developed from the ancient *nexum* may be illustrated still further by those obligations which were made *re*—or by the transfer of the thing which was the object of the contract.

In the old law an obligation might be created by the conveyance of property through the forms of the *nexum*, under the conditions indicated in the *nuncupatio.* With the separation of the idea of possession from that of ownership, the simple possession of property might be transferred conditioned by special forms of agreement. The different conditions under which such possession was accepted gave rise to different kinds of "real" contracts. If, for example, a party accepted the possession of a thing on condition of preserving it and of returning it on demand, the contract was called *depositum.* If he received possession of a thing on condition that he might make use of it while it was in his hands, it was called *commodatum.* Still further, if together with the possession he was given the right to consume the thing on condition of returning an exact equivalent, the contract was called *mutuum.* Finally, if he received possession of a thing as a security for debt on the condition of returning it when the debt was paid, it was called *pignus.*

In all these cases the contract was based upon the fact of conveyance, conditioned by an accompanying agreement; and hence it was genetically related to the *nexum* with its accompanying *nuncupatio*.

(3) A more important advance was made in the law of contract when, in certain cases, the technical forms were dispensed with altogether, and the legal obligation was made to depend simply upon the mutual consent of the parties. This innovation was due to the influence of the *jus gentium*. It grew out of the increasing demands of trade, and was introduced by the prætors to facilitate the business transactions between Romans and foreigners. Here, as in other instances, the comparison which the prætors made between the customs of different communities, led to the pruning away of those features which were technical and local, and to the preservation of those elements which were common and universal. By this process, not only was the law simplified in its forms, but its essential principles were brought more clearly into view. However various might be the forms of the contract in different communities, the element of consent seemed to be everywhere present. By recognizing the mutual consent of the parties as the basis of a legal obligation, the prætor developed a new class of contracts, said to be made *consensu*. These comprised the contract of purchase and sale (*emptio et venditio*), of letting and hiring (*locatio et conductio*), of partnership (*societas*), and of agency (*mandatum*).

(4) The principle of consent was at first applied only to the contracts above named. But the prætor was led to apply the principle to other cases. Any convention, involving the assent of both parties, followed by an execution or partial execution of the terms of the agreement by one party, was held to be binding upon the other. To such

agreements were given the general name of "innominate" contracts. They were simply contracts in which the consent was evident by a part performance—that is, an execution by one of the parties—and which could not be referred to the classes already named. They were sometimes designated by the consideration which accompanied the part performance as follows: *do ut des; do ut facias; facio ut des;* and *facio ut facias.*

(5) But the idea of consent was still further extended. It came to be applied to those cases in which the consent was implied in the very relation which the parties assumed with reference to each other. For example, if a person voluntarily and in good faith assumed the business of an absent person, he had the same legal rights with reference to that person as though he had been employed by a special mandate. Such contracts in which the consent was implied in the mutual relation of the parties were called obligations *quasi ex contractu.*

This cursory review indicates the general manner in which the various contracts of the Roman law were evolved from the ancient *nexum* under the administration of the prætor. The *nexum* itself was gradually transformed and developed into the verbal, literal, and real contracts. The idea of consent which was implicitly contained in the nuncupative part of the *nexum*, was brought into prominence by the prætor through the comparison of the customs of different communities, and was made the basis of the consensual, innominate, and implied contracts.

6. Reform of the Law of Procedure.—The same general influences which tended to enlarge the civil capacity of persons, to improve the law of property, of succession, and of contracts, also led to the modification of the old "actions of the law." These actions were the product of a barbarous age, and were ill-suited to the ad-

vanced condition of Roman society. By the rigid and sacred forms with which they were invested, the administration of justice had in early time been confined to the aristocratic class. But the introduction of the plebeians and foreigners into the state, and the disposition of the prætor to secure the rights of all classes, brought into discredit a procedure which was adapted only to the protection of Quiritarian rights.

(1) The first step which led to the decline of the *legis actiones* was due to their publication. As long as the knowledge of legal forms was restricted to the patrician class, the people at large were helpless in their efforts to obtain an impartial administration of justice. The credit of divulging the judicial secret is given to Cnæus Flavius. From the knowledge which he obtained as scribe of Appius Claudius, he was enabled to publish (B. C. 304) a practical manual on the modes of procedure, giving also a list of the *dies fasti*, or the days on which justice could be administered. This work received the name of *jus civile Flavianum*. A more complete work was afterward published (about B. C. 200) by Sextus Ælius, called the *jus Ælianum*. It was also called the *Tripertita*, because it contained three parts, viz.: first, the law of the XII. Tables; secondly, the interpretation of the same; and thirdly, the description of the *legis actiones*.

(2) As the forms of procedure lost their mysterious and sacerdotal character, they were laid open to public criticism, which finally resulted in their overthrow. The formal abolition of the *legis actiones* was effected by the *lex Æbutia* and the *leges Juliæ*. The date of the former law is uncertain; but it was probably passed about a century before the fall of the Republic. There is also some uncertainty attaching to the *leges Juliæ*—it being a matter of doubt whether they were passed under Julius

Cæsar or under Augustus. However this may be, Gaius distinctly says that by these laws the old "actions" were abolished.

(3) The *legis actiones* were superseded by the "formulary system," which dispensed with the symbolical processes of the old procedure. The new system derived its name from the *formula*, which was a legal document drawn up by the prætor after hearing the claims of both parties, containing instructions to the *judex* as to the points at issue, and the mode of deciding the case according to the facts which should be proved. The general character of this process and its improvement upon the old actions, will be evident from an analysis of the *formula*, which consisted usually of three distinct parts.

The *demonstratio* was the statement setting forth the subject-matter of the controversy.

The *intentio* contained the precise claim or demand made by the plaintiff.

The *adjudicatio* contained the charge of the magistrate directing the *judex* how to decide the case after investigating the facts; this was employed in suits in which the ownership of property was disputed. The *condemnatio* was substituted for the *adjudicatio* if the claim was made for pecuniary damages.

The *formula* might also contain, in connection with the *intentio*, the pleadings of the parties, or the counter-statements made by the defendant and again by the plaintiff, in order to ascertain the exact point at issue between the contestants—thus taking the place of the oral altercation already described as forming a part of the ancient *actio sacramenti*.

(4) It is quite evident that the formulary system was, in the words of Ortolan, "nothing but an ingenious

method of constituting and directing a jury in civil cases." The separation of questions of *law* from questions of *fact*, though not clearly defined in this proceeding, was yet involved in it. This distinction was undoubtedly an outgrowth from the ancient distinction between proceedings *in jure* and *in judicio*. With the decay of symbolism, the proceeding *in jure* was translated from a sacred and technical ceremony into a series of directions founded upon the legal aspect of the case, and setting forth the points at issue; while the proceeding *in judicio* came to be an elaborate and careful investigation of the facts in the case. In this way the formulary procedure, in its application to civil cases, brought into prominence one of the most essential features of the jury system.

(5) There was also a tendency to introduce a form of jury trial into criminal cases. Although the Senate, with the growth of its administrative powers, acquired criminal jurisdiction in certain cases, the prosecution of crimes was, in the early Republic, conducted for the most part before the assembled people in the *Comitia*. With the growth of the population and the increase of crimes, this inconvenient method of conducting criminal trials was superseded by the custom of making each particular case subject to a special trial (*quæstio*), which was conducted before a select body of *judices* under the direction of a *quæstor*, specially commissioned to preside in the given case. The custom of creating a special commission to try each case soon gave way to the organization of several permanent tribunals (*quæstiones perpetuæ*), each having jurisdiction over a certain class of crimes. Every criminal trial was thus conducted before a legal magistrate and a body of *judices*, or, in modern phrase, before a judge and jury. These two elements of the criminal

court were distinct in character and functions. It was the duty of the magistrate, who was either a prætor or an officer called *judex quæstionis*, to conduct the trial according to the law which applied to the case. It was the duty of the jurors, who were private citizens selected for the occasion, to decide upon the guilt or innocence of the accused according to the evidence.

The reforms of procedure were thus in harmony with the changes which we have noticed as taking place in the substantive portion of the law, and alike illustrate the general progress of Roman jurisprudence during the Republican period.

References.—Few writers have presented in a clear manner the changes which actually took place in the substance of the Roman law from the time of the XII. Tables to the establishment of the Empire. A general survey of the law during this period is given in Ortolan, "History of Roman Legislation," Eng. trans., pp. 169–175, 269–275. A more thorough review will be found in Hugo, "Histoire de Droit Romain," I., §§ 187–273, and in Rivier, "Introduction Historique," pp. 183–274. The actual extent of the improvement of the law can, perhaps, be best discovered by gathering together the various legal changes ascribed to the Roman prætor. These can be presumed to belong to this period, since the influence of the prætor declined after the establishment of the Empire. The student will find much assistance by consulting the last chapters of Maine's "Ancient Law," and the annotated editions of Gaius and Justinian, *e. g.*, Poste's "Gaius," Sandar's "Justinian," and Ortolan, "Instituts de Justinien"; also the general histories of the Roman law, *e. g.*, those of Walter, Gravina, Hoffman, Rudorff, Esmarch, Vering; and special historical works, such as Zimmern, "Der Röm. Civilprozesz," and Savigny, "Das Recht de Besitze."

PERIOD III.

FROM THE ESTABLISHMENT OF THE EMPIRE TO THE ACCESSION OF DIOCLETIAN.

CHAPTER I.

THE ESTABLISHMENT OF THE IMPERIAL SYSTEM.

We come now to consider the character of the imperial system, and the influences existing under the early Empire that tended still further to improve the body of the Roman law. It should be noticed that the transition of the Roman State from the Republic to the Empire was not a sudden and formal revolution. It was rather a gradual transference of the real sovereign power from the Senate and the people to the hands of a single person—while the constitutional forms of the state remained substantially unchanged. The power of the ancient *imperium*, which in the regal period was well-nigh unlimited, and which had retained some of its original features in the offices of the consul, the dictator, and the proconsul, had grown into extraordinary proportions in the hands of Marius, Sulla, Pompey, and Cæsar. By the victory at Pharsalia, Julius Cæsar became the true founder of the new monarchy. His authority was, in its essential nature, hardly any thing more than a restoration of the old *imperium* of the kings, with its military, priestly, and judicial functions. The true character of the Empire, as a unifying influence upon legislation and jurisprudence, will be evident from the position which the Emperor occupied in the State, and the relation which he assumed with reference to the surviving institutions of the Republic.

1. The Position of the Emperor.—The Empire, which was, in fact, established by Julius Cæsar, was

permanently organized under his true successor, Octavianus, or Augustus. The prudence and sagacity of this prince were shown in his conservative policy of heeding the popular attachment to existing forms, and of refraining from the open assumption of power which had provoked the assassination of Julius. His purpose was to reconcile the old Republican prejudices to the spirit of the new monarchy, and thus to organize the whole administration upon principles which would draw to his support the adherents of all parties. He was, as Gibbon says, "sensible that mankind is governed by names; nor was he deceived in his expectation that the Senate and the people would submit to slavery, provided that they were respectfully assured that they were enjoying their ancient liberty." The irresponsible character of the government was thus concealed by the preservation of Republican forms.

The apparent complexity which marks the early Empire grows out of the fact that it was real autocracy co-existing with those departments of state in which the various functions of public authority had hitherto been kept distinct. While, in *form*, the Empire preserved the differentiated branches of a legal government, as in the Republic; in *fact*, it returned to the original idea of a united magistracy, as in the Kingdom.

The functions of administrative power, which from the fall of the ancient kingdom had been parcelled out to new magistrates, were now re-united in the hands of the Emperor. By being made the honorary recipient of the official titles of state, Augustus gradually appropriated all real administrative power. Contrary to the usual custom of resigning the *imperium* on his return to the city, he was induced to retain this power, which involved the command of the army and of those provinces that required

the presence of the army. The title of Censor was conferred upon him, by which he was enabled to "purge" the Senate. At the suggestion of Agrippa he was appointed *Princeps Senatus*, so that he could direct the deliberations of that body. There were showered upon him in rapid succession the titles of Perpetual Tribune, which identified him with the interests of the people; of Perpetual Consul, which made him supreme magistrate in the capital; of Perpetual Censor, which confirmed his previous reconstruction of the Senate. After the death of Lepidus he consented to assume the office of *Pontifex Maximus*, which brought the Roman religion under his immediate supervision. And, finally, the title of *Pater Patriæ* was a recognition of the paternal character of the government under his reign.

The imperial authority thus came to be a consolidation of all the prerogatives hitherto distributed among the several Republican offices.

2. The Relation of the Senate to the Emperor.—The spirit of the monarchy is illustrated by the new relations which the various branches of the government sustained to the Emperor. Although still recognized as formal elements of the constitution, they lost their independent character, by being reduced to the will of the prince. In the flourishing period of the Republic, the Senate had been the most dignified and important branch of the government. With the rise, however, of the democratic leaders during the civil wars it had been gradually deprived of its ancient authority and distinction. Augustus tried to gain the support of the aristocracy by restoring to this body some of its ancient dignity. He accordingly raised the property qualification of its members, and reduced their number to the old standard of six hundred. He also flattered the Senate by ostensibly sharing

with it the administration of the government, assigning to its management a certain number of the provinces and a certain portion of the revenue.

Although the emperor thus gave to this body a sort of new dignity, and although he formally derived from it his official power, he was in no respect controlled by its action. On the contrary, the senators, being dependent for their place upon the imperial censorship, were not disposed to interfere with the execution of his designs; and instead of assuming their right as an independent branch of the government, they became the submissive instruments of his will.

3. The Position of the Comitia.—The tendency of the monarchy was also to infringe as much as possible upon the rights of the people, without immediately destroying the ancient forms of legislation. The people had hitherto been recognized as the ultimate source of public authority. Assembled in the *Comitia Centuriata*, they had confirmed or rejected the proposals of the consul; and in the *Tributa* they had passed measures which had an authority over the whole nation. The real position which they occupied in the new government is evident from the rights which they still retained, and the privileges which they lost.

(1) The rights which they still retained were: the formal confirmation of the laws submitted to them by the Emperor; and the election of the old Republican officers, who still held a nominal position in the state.

(2) The privileges which they lost were: first, the right of initiating legislation, which had passed to the emperor with the tribunitian and consular titles; secondly, their legislative independence, by being obliged to submit their most important acts to the approval of the Senate, and by the growing custom which the Emperor acquired of issuing

edicts with full legislative authority; and, thirdly, the judicial authority which the *Centuriata* had previously exercised as the highest tribunal in criminal cases, which right was superseded by the "prerogative of pardon" assumed by the emperor. Under the successors of Augustus other rights—such as that of formally ratifying the imperial laws—were also gradually taken away from the people.

4. The New Imperial Officers.—All substantial power necessary for the administration of the government was, as we have seen, vested in the hands of the Emperor. But this power was concealed, to a certain extent, by the preservation of the principal offices of the commonwealth. The consuls, prætors, quæstors, ædiles, and tribunes continued to be elected as before, although possessing only a semblance of their former authority. There were, however, appointed certain new officers, who actually assisted the emperor in the administration. Of these the most important were the following:

(1) The Præfect of the City (*præfectus urbi*) was entrusted with all power necessary to preserve order within the city—which was organized for this purpose into fourteen regions, each with its own subordinate minister. This præfect had at first a certain civil jurisdiction in cases involving domestic relations, which power was gradually extended until it absorbed the functions of the *prætor urbanus*.

(2) The Prætorian Præfect (*præfectus prætorio*) was a new military officer, who commanded the body-guard of the emperor. This office increased in importance until it became second only to that of the prince.

(3) The Præfect of Provisions (*præfectus annonæ*) had the supervision of the corn market, and the supply of largesses to indigent citizens. This office had existed

temporarily under the Republic, but was made permanent by Augustus.

Besides these three officers there were also created the Præfect of the Night Guards (*præfectus vigilum*), governors of the imperial provinces (*legati Cæsaris*) and a few others of minor importance. All these offices were entirely under the control of the Emperor, and were held by those persons who were devoted to his interests.

5. The Judicial System of the Empire.—By the constitutional limitations which had been imposed upon the *imperium* during the growth of the Republic, the judicial power had been taken away from the chief Executive and entrusted either to the prætor and the *judices* in civil cases, or to the *Centuriata* and the *quæstiones* in criminal cases. But with the establishment of the imperial power, the regal idea of jurisdiction was practically restored; and the Emperor became the supreme judge in the state. The adjustment of these two contradictory ideas of judicial authority—the one republican and the other autocratic—was brought about by subjecting the judical system of the Republic to the appellate jurisdiction of the Emperor Ordinary cases were conducted in the same manner as heretofore, the Emperor simply assuming the right to revise the judicial sentence. The custom of revising cases on appeal was soon followed by the practice of giving instructions to the magistrates previous to their decisions, whenever this seemed advisable; and also, in exceptional cases, by the original institution ot proceedings before the Emperor himself. In the latter case, the Emperor was assisted by a judicial council called the *auditorium*.

Thus, in accordance with the general spirit of the period, the old judicial methods were formally preserved, but made subject to certain modifications to meet the demands of an autocratic government.

References.—The facts relating to the establishment of the Empire may be found in the general histories of Rome. The influences leading to the imperial revolution are treated in the last chapter of Mommsen's "History," in Long's "Decline of the Roman Republic," and Seeley's "Essays on Roman Imperialism." A general survey of the early imperial government is given in the first three chapters of Gibbon's "Decline and Fall," and in Merivale's "Romans under the Empire," vol. III., chs. 31, 32. Other references are the following: Deurer, "Geschichte," §§ 69–77; Warnkönig, "Vorschule," S. 100–108; Ortolan, "History," Eng. ed., §§ 58–64; Rivier, "Introduction Historique," pp. 293–301; Walter, "Geschichte," I., §§ 271–290; Mommsen, "Römisches Staatsrecht," Zweiter Band, II. Abtheilung; Pigeonneau, "Transformation de la République romaine en monarchie," Paris, 1874.

CHAPTER II.

THE SOURCES OF LEGISLATION UNDER THE EARLY EMPIRE.

WHATEVER opinion may be held regarding the influence of imperialism upon the political liberties of Rome, it cannot be denied that the most flourishing period in the history of the Roman civil law is that which followed the establishment of the Empire. The overthrow of the aristocracy of the later Republic, and the reduction of all citizens to a plane of practical equality under a single supreme head, though exposing the Roman state to the dangers of autocracy, tended in great measure to destroy class distinctions and to give breadth and uniformity to the administration of civil justice. Legislation, moreover, whatever might be its formal sources, was ultimately derived from the will of the prince, and hence acquired more than ever before the character of unity and coherence. Before looking into the philosophical influences which affected the fundamental ideas and the inner spirit of Roman jurisprudence, let us first consider how the various sources of legislation were reduced to a formal unity by being brought under the influence of the imperial will.

1. **The Enactments of the People.**—The ancient sovereignty of the Roman people could not be entirely ignored even after the establishment of the principate. But it was only in the early part of the period which we are now considering, that the *leges* and the *plebiscita* possessed any legal significance; for they were soon

superseded by other forms of legislation. The character of these enactments, so far as they possessed the force of law at all, may be seen from the authority held by the different assemblies at this time.

The *Comitia Curiata* still existed, although possessing only a shadow of its ancient power. It continued to pass the *lex curiata de imperio*, by which in ancient times it had conferred the magisterial power upon the kings and the consuls. This law, under the name of *lex regia*, the *Curiata* still enacted after the accession of each Emperor, as a perfunctory recognition of his authority.

The *Centuriata* and *Tributa* also continued to meet, and the early Emperors, especially Augustus, allowed them to confirm the imperial acts. To show the waning influence of the people in legislation mention may be made of the chief laws passed by them under Augustus and his successors. The following are referred to the reign of Augustus: the *lex Julia Majestatis*, relating to the crime of treason; the *lex Ælia Sentia*, to restrain the manumission of slaves; the *lex Furia*, to limit the number of slaves manumitted by will; the *lex Junia Velleia*, protecting the rights of posthumous heirs; and the *lex Julia et Papia Poppæa*, discouraging celibacy and regulating other domestic matters. During the reign of Tiberius was passed the *lex Junia Norbana*, conferring the *Latinitas* upon a certain class of manumitted slaves. Under Caligula was passed the *lex Mamilia*, with reference to colonies; and under Claudius, the *lex Claudia*, abolishing the agnatic guardianship over women. These enactments, which were merely ratifications of proposals coming from the Emperor, thus became less and less in number after the time of Augustus. And from the time of Claudius, even the formal recognition of the popular will in legislation came to be disregarded,

as the princes found more convenient means to give to their acts the force of law.

2. The Decrees of the Senate.—As the legislation of the people declined, that of the Senate increased in importance. The Senate had, even in the later periods of the Republic, exercised a kind of legislative power; and Cicero includes the *senatus-consulta* as a part of the civil law in his time. But before the accession of Augustus the decrees of the Senate pertained almost entirely to matters of administration. After that time they related also to subjects of private law—the greater part of them referring to the status of persons and the rights of inheritance. From the time of Tiberius to that of Hadrian, the *senatus-consulta* formed the most important part of the imperial legislation. But even during this time they derived their spirit from the policy of the Emperors. Tacitus, it is true, mentions a few cases in which the senators ventured to express their own ideas, and attempted to revive their decaying power. But the very idea of independence gradually died out, and the senate met merely to ratify the proposals of the Emperor, which under the name of *orationes* were submitted to it. In some cases, the *oratio* contained all the details of the proposed law, when the senators were expected to confirm it without change. In other cases, the general outlines of the law were presented to them, when they were allowed to supply the details. After the reign of Hadrian, the *senatus-consulta* decreased in importance; and under Septimius Severus and Caracalla they entirely disappeared.

3. The Edict of the Prætor.—In accordance with the general spirit of the early Empire the prætors continued, formally at least, to publish their edicts on entering upon their term of office. But this practice lost its ancient

significance as the Emperors assumed the power to control the various acts of legislation. It should, however, be noticed that the *jus honorarium*, or the edictal law, containing the great body of principles hitherto developed by the prætors, lost none of its ancient authority. On the contrary, it became the object of assiduous study, and efforts were made to put it into a permanent and codified form. The mode in which this law had grown up gave to it a lack of coherence and uniformity. We therefore find various attempts to reduce it to some kind of system. This work had been begun by Ofilius, the friend of Julius Cæsar. Under the Empire still greater attention was paid to its study and arrangement. During the reign of Augustus, Labeo wrote an extensive treatise, called *Ad Edictum Prætoris Peregrini*. But the most important and successful attempt to systematize the prætorian law was made by Salvius Julianus during the reign of Hadrian. This compilation was called the *Edictum Perpetuum*—a name which had hitherto been applied to the prætor's annual edict.

On account of the fact that only fragments of this work—the Perpetual Edict of Salvius Julianus—have come down to us, there has been much controversy regarding its authority, the extent of its subject-matter, and its effect upon the subsequent edictal power of the prætor. With reference to this discussion the following conclusions may be given:

(1) Regarding the first question, it is now quite definitely settled that the Perpetual Edict was not a mere private collection made for a scientific purpose; but that it was made under the direction of the emperor, was confirmed by the Senate (A. D. 131), and hence possessed all the authority of a proper code.

(2) Regarding the subject-matter of the Edict, the

most trustworthy view seems to be that it was made up of the edicts of the *prætor urbanus*, the *prætor peregrinus*, and the provincial governors. Julian seems to have collected together the whole edictal law, to have rejected what was obsolete, and to have reduced the rest to a form best suited to the needs of judicial administration.

(3) In regard to the influence of the publication of this code upon the edictal power of the prætor, it is difficult to speak with certainty. But it is quite evident that the promulgation of the prætorian law in a codified form would do away with the necessity of each prætor's declaring in an edict of his own the principles that he expected to follow. It would also restrain the independent legislative power of the prætor by binding him to a fixed code. Whether or not the prætor ceased to issue edicts, it is quite certain that from the time of Hadrian, the Roman law received no important additions from this source.

4. **The Responses of the Jurists.**—Not only did the old forms of legislation yield to the imperializing tendency, but the scientific interpretation of the law was also brought into relation to the Emperor. The opinions of the jurists now obtained a positive authority which they had not before possessed. The relation of the jurists to the imperial legislation will be seen by considering first, their character as a professional class, and secondly, the authority which their opinions acquired under the Empire.

(1) The origin of the jurisconsults as a professional class may be traced to very early times. When, by the publication of the *jus Flavianum* and the *jus Ælianum*, the knowledge of the old civil law ceased to be the exclusive possession of the pontiffs, certain persons assumed the

right to expound the meaning of the law and to give advice to any one that might desire it. It is said that Coruncanius began publicly to give information on the law three centuries before Christ. The general lack of legal knowledge on the part of the prætors, *judices*, and even of advocates, led to the continuance of this practice. A class of professional jurists thus sprang up, who made the law a distinct branch of scientific study, and who gave legal advice whenever it was desired. Under the Empire the number of jurisconsults increased in number and importance, and a great impulse was given to the production of legal literature. The adoption of various methods of interpretation, or at least the acceptance of different views upon mooted questions of law, led to the growth of different schools. The most important of these were the schools of Labeo and Capito—or, more properly, the Proculeians and Sabinians. From the time of Hadrian to that of Alexander Severus flourished the most distinguished jurists of the Empire, pre-eminent among whom were Gaius, Papinianus, Paulus, Ulpianus, and Modestinus.

(2) In respect to the authority of the jurists, it should be noticed that before the time of Augustus their opinions and writings were entirely of a private character and had in themselves no binding force. Their discussions no doubt led to a clearer statement of legal principles, and thus exercised a beneficial influence upon the growth of jurisprudence. But under the Empire, a wholly new character was given to the juristic writings. Augustus, desiring to bring the jurists into harmonious relations with the new government and to make their opinions appear as a kind of emanation from the imperial will, gave to certain of them the legal right of giving opinions (*jus respondendi*), which opinions were to have the full force

of law. The jurists upon whom this right was not conferred were not deprived of the right to express their private views as heretofore; but the views of such persons would have little importance in comparison with the opinions of the privileged class. The *jus respondendi* thus gave to a body of scientific persons the right to declare the law, and such opinions were to be followed by the judicial magistrate. The fact that these opinions were sometimes found to be conflicting led Hadrian to issue a rescript to the effect that the opinions of the privileged jurists, when unanimous, must always be accepted as law; but when they were not unanimous, the magistrate might follow the one which he thought best suited to the case in hand.

The opinions of the privileged jurists (*responsa prudentum*) became a very important source of law during the early imperial period; and, by the scientific influence which was thus brought to bear upon legislation, they contributed, as we shall hereafter see, more than all other means to give breadth and consistency to the Roman law.

5. **The Constitutions of the Emperors.**—From the time of Augustus, the emperor had exercised an indirect influence upon all the existing forms of legislation. But his legislative power acquired a more direct mode of expression with the growing practice of issuing edicts, or constitutions (*placita*, or *constitutiones principum*). The exercise of direct legislative authority on the part of the Emperor was not an open usurpation; it was founded upon well-established precedents. The "initiative" in legislation, which he exercised from the first with reference to the comitia and the Senate, he acquired naturally by being invested with the tribunitian and consular powers. The right to issue edicts was, in a similar way, de-

rived from the prætorian power with which he was invested. Augustus, it is true, was cautious in the exercise of the edictal power; and was generally contented simply to guide the legislation of the Senate and the people. But the exercise of the "initiative" over a submissive body and the consciousness of possessing the functions of the prætor, led the successors of Augustus—especially from the time of Hadrian—to substitute the direct for the indirect mode of enacting laws. Ulpian has described the legislative power which the Emperor possessed in his time in the well-known formula—*quod principi placuit, legis habet vigorem.*

Every formal expression of the imperial will was called a "constitution," which in its widest sense might apply to any matter of public or private law,—of legislation, administration, or jurisdiction. In view of the great variety of imperial constitutions, they may be conveniently classed as edicts, decrees, rescripts, mandates, and privileges.

(1) Edicts (*edicta, edictales leges, generales leges*) were general legislative enactments issued by the emperor as chief magistrate of the state. They were universal in their application—that is, binding upon all the subjects of the Empire.

(2) Decrees (*decreta*) were judicial decisions in cases brought before the emperor, either in the first instance or upon appeal. They were called *definitive* when they contained a complete and final judgment upon the whole case; and *interlocutory* when an incidental point of law was decided in the intermediate stage of a judicial process. The decrees of the emperor, like the judgments of the prætors, had reference primarily to the case in hand. But as they might be looked upon as precedents, they had practically a general application.

(3) Rescripts (*rescripta*) were written answers to questions proposed to the prince either by private persons or

public officers. These were sometimes called *epistolæ*. If the answer was directed to a corporate body or community it was called a *sanctio pragmatica*. The rescript, while primarily having only a particular application, might, from the nature of the questions submitted, have a general significance.

(4) Mandates (*mandata*) were official instructions directed by the emperor to public functionaries, whether governors of provinces or other officers.

(5) Privileges (*privilegia*) were special acts having reference to a particular person or case. They might be beneficial or unfavorable, according to the will of the emperor. From their very nature they could not be used as precedents, since, as Gaius says, the application of such acts could not extend beyond the particular person affected.

The imperial constitutions, under these various forms, comprised a large part of Roman legislation after the time of Hadrian. These acts were not necessarily of an arbitrary and despotic character, issued simply to carry out the personal interests of the emperor. They were frequently drawn up by the emperor's legal advisers, who were generally professional jurists, and who took advantage of this mode of legislation to bring the law into harmony with their conceptions of justice.

References.—The different sources of legislation under the early empire will be found described in the following works: Sandar's "Justinian," Intr., pp. 15–18, 81–84; Kaufmann's "Mackeldey," pp. 27–36; Taylor's "Civil Law," pp. 177–235; Ortolan, "Hist. of Roman Legislation," Eng. trans., §§ 65–68; Demangeat, "Droit Romain," I., pp. 79–104; Zimmern, "Geschichte," §§ 20–25, 33–36; Warnkönig, "Vorschule," S. 109–115; Hugo, "Histoire," trad. par Jourdan, II., p. 1–95; Deurer, "Geschichte und Institutionen," §§ 78–81; Marezoll, "Lehrbuch," §§ 23–26; Walter, "Geschichte des Röm. Rechts," II., §§ 431–442; see also Walker (B.), "The Fragments of the Perpetual Edict of Salvius Julianus."

CHAPTER III.

THE STOIC PHILOSOPHY AND THE LATER JUS GENTIUM.

THE unity which the Roman law acquired by being brought under the authority of the Emperor as supreme law-giver would have been merely formal and artificial had it not been supplemented by some more fundamental and rational principle of growth. A more important unifying influence than that due to political centralization was derived from the philosophical spirit that pervaded the legal thought of the time. It was this scientific spirit that distinguished the law of the Empire from that of the Republic.

During the Republican period, the law had advanced, for the most part, through empirical methods. Legal reforms had been brought about through the agency of the prætor, and in the actual process of administration. The rules of law had not been deduced from general principles of justice ; but had been gathered together from local customs, or constructed by the extension of existing law to new cases as they might happen to arise. The prætorian law, like the old *jus civile*, had grown up through procedure. Under the Empire, however, the belief that law was founded upon ethics, that the specific rights and duties of men were derived from certain ultimate and universal principles of natural justice, furnished a new impulse and gave a new direction to legal development.

The effort to found civil law upon natural equity

gave to Roman jurisprudence a breadth and liberality that it had not possessed under the Republic; and, in fact, resulted in the development of a body of universal legal principles applicable to all times and nations. The influences which thus furnished a scientific impulse to the legal reforms of the early Empire were derived, in great part, from the philosophy of the Greeks—especially that of the Stoics.

1. **The Stoic Philosophy at Rome.**—Since the conquest of Greece, this philosophy had been received with favor by the Romans, and was especially cultivated by the more intelligent classes. Even under the later Republic it had been a formidable rival of the schools of Epicurus and Carneades. Cicero, though attached to the speculative doctrines of the New Academy, accepted with little change the ethical principles of the Stoics. After the establishment of the Empire, this philosophy attained a still greater influence; and although it was proscribed by a few despotic princes, it was the object of favorable regard on the part of nearly all the early emperors. Athenodorus was highly esteemed and often consulted by Augustus. Seneca was a Stoic as well as a statesman, and as long as he was the adviser of Nero, the imperial government was mild and judicious. Under Antonius Pius, schools of Stoicism were supported at public expense. In the person of Marcus Aurelius, Stoicism ascended the throne of the Empire; and from the time of the Antonines to that of Alexander Severus this philosophy continued to be taught at Athens and Alexandria, the two great intellectual centres of the Roman world.

The Stoic philosophy thus became an important element in Roman education and culture, and received the almost uninterrupted support of the state during the

period in which the influence of the Roman jurisconsults was most marked.

2. The Stoic Theory of Natural Law.—The prevalence of a philosophy so vigorous and elevating as that of Stoicism could not fail to affect the fundamental conceptions and the habits of thought of all those persons who were brought under its influence. It will not be difficult for us to find in this system certain doctrines, which, however vague and speculative they may appear in the writings of Greek theorists, were yet capable of a practical application in the hands of Roman jurists, in solving questions regarding the rights and duties of men in civil society.

The point of contact between the Stoic philosophy and Roman jurisprudence is to be found in the theory of the Law of Nature—which the Stoics had deduced from their conception of the universe, and which the Roman jurists employed, under the name *jus naturale*, to indicate the natural or ethical foundation upon which civil law must rest. With the Stoics, the universe was considered as imbued with an all-pervading soul or power, which was looked upon not only as a dynamical force producing motion, but as a rational principle producing order and perfection. This rational principle is a constituent element of all being. It is revealed not only in external nature as a law of the physical world, but also in the original nature of all men as a guide for human conduct. The great duty of man is, hence, to discover and conform to the highest law of reason, as this law is set forth in the essential constitution of his nature. "To live in harmony with nature" was thus the highest precept of the Stoic philosophy, and the ultimate principle which must guide men in all the relations of life. By his original constitution, man is a participant of the Universal Reason, and

by the exercise of his rational faculties he can discover the law of nature, so far as it is necessary to control his own conduct. When looked at from a moral point of view, the law of nature is thus the highest rule of human conduct, and the ultimate standard by which all human actions, whether individual, social, or civil, must be judged.

3. Acceptance of this Theory by the Jurists.—This conception of natural law worked its way into Roman thought, and was used to explain not only the foundation of individual and social morality, but also the basis of legal rights and duties. From the time of Cicero to that of Alexander Severus, the legal literature of Rome is pervaded with the idea that law has a more ultimate foundation than custom or convention—that it is founded in the very nature of things. The first important attempt made by the Roman writers to ground law upon nature we find in the "Laws" of Cicero, where the fundamental proposition is laid down "that man is born for justice, and that law and equity are not a mere establishment of opinion, but an institution of nature" ("De Legg.," Bk. I.). The specific application of this principle in determining legal rights and duties was reserved for the jurists of the Empire.

The influence of Stoicism upon the Roman lawyers is not to be judged—as was attempted by Cujacius and his followers—by any servile repetition of particular moral precepts. It is to be judged rather by the prevalent belief in natural law as the ethical basis of civil law; by the general recognition of the supremacy of reason as a guide in civil action; and by the common method which came to be employed of interpreting legal duties in the light of the higher principles of natural equity. It is sometimes claimed that the idea of natural law exercised very little

influence upon these writers, on the ground that the term itself is rarely employed in their works; and that, when it is employed, it is not used in the sense of the Stoics. But as a matter of fact, not only is the term "natural law" specifically defined by the institutional writers in an ethical sense, but the method of reasoning which is used in their interpretation of the law is founded upon the theory that the civil law must be brought into harmony with natural justice—with what is right in the nature of things.

It is true that Ulpian gave a peculiar definition to natural law—as that which nature teaches all animals—which conception exercised little or no influence upon the judicial thought of Rome. But even Ulpian in other forms of expression recognized, like his contemporaries, an ethical standard of law; for example, when he defines justice as "constantia et perpetua voluntas jus suum cuique tribuendi"; when he lays down as the fundamental precepts of the law, "honeste vivere, alterum non lædere, suum cuique tribuere"; when he defines jurisprudence as "justi atque injusti scientia"; and when, in speaking of the duties of the jurists, he says: "Justitiam namque colimus, et boni et æqui notitiam profitemur; æquum ab iniquo separantes, licitum ab illicito discernentes" (D., 1, 1, 1). But to cite from other jurists: Paulus refers definitely to the law of nature as a moral principle, when, in distinguishing the various meanings attached to the word *jus*, he says: "Id quod semper æquum et bonum est, jus dicitur, ut est jus naturale" (D., 1, 1, 11). The belief that all law is limited and determined by nature is expressly declared by Celsus in the words: "Quæ rerum natura prohiberetur, nulla lege confirmata sunt" (D., 50, 17, 188).

These few illustrations are sufficient, for the present, to

show that the jurists of the Empire possessed certain philosophical conceptions concerning the moral basis of law which were closely related to the ethical system of the Stoics. The influence of these conceptions, and the method of reasoning which followed their adoption, will be more clearly understood as we proceed.

4. New Meaning Attached to Jus Gentium.— The influence of new ideas in changing the significance of existing phrases is seen in the way in which the term *jus gentium* came to be turned from its old meaning and brought into harmony with the new theory of natural law. This term was originally applied, as we have seen, to the body of customs common to Rome and the states subject to Roman dominion. As the Roman conquests came to be looked upon as universal, the *jus gentium* was considered to be the law common to all nations. But still there was attached to the term no philosophical meaning. It was simply the sum of the ingredients which were found in the actual laws of existing communities. When viewed, however, in the light of the "natural law," the *jus gentium* acquired a new significance. The common laws collected by the prætors were now believed to be remains of that primitive law which the Universal Reason had instituted for all men. The fact that they were common seemed to prove that they were derived from universal principles inherent in the very nature of man. The tendency thus showed itself among the more philosophical jurists to identify the *jus gentium*, in its highest sense, with the *jus naturale*. Gaius says that "the law which natural reason has constituted for all men obtains equally among all nations, and is called *jus gentium*" (Gaius, Inst., 1, 1).

This higher interpretation of the *jus gentium* served to explain the practical superiority of the prætorian law over

the ancient *jus civile*. It was now easy to see that the prætors in their efforts to develop a universal law had been unconsciously reaching after the perfect code of nature. But with the highest respect for the edictal law so far as it had been developed, it was yet believed that the perfect law of reason could best be discovered not through the empirical method of the prætors, but through the rational interpretation of the jurists; and these writers, when expounding the Edict, felt called upon to construe it as far as possible in accordance with the highest dictates of reason.

The gradual change in the meaning of the term *jus gentium* also explains the apparent ambiguity which is sometimes seen in its use during this period. For example, Florentinus says that "slavery is an institution of the *jus gentium*, by which one becomes subject to another contrary to nature" (D., 1, 5, 4, 1). This could hardly be true in the sense in which Gaius used the term, as being the law which is in conformity to natural reason. It is evident that while the old meaning of the word has survived in the former author, it has acquired its higher philosophical significance in the latter. Slavery was consistent with the older idea of *jus gentium* as a body of common usages, but it was inconsistent with the latter idea of *jus gentium* as a body of principles founded upon the law of nature.

5. The Later Jus Gentium Viewed as Equity. —As the *jus gentium* received a higher significance when seen in the light of the theory of natural law, so too the conception of Equity passed from that view in which it refers simply to the broader and more liberal portion of the positive law, to that view in which it is looked upon as a rational standard to which all positive law must conform.

The old *jus gentium* by its incorporation into the prætor's edict, had become a part of the positive law of Rome. It possessed as definite a sanction as the *jus civile*, and was in the same way enforced by the public authority. As it was distinguished from the special and technical features of the *jus civile* by containing broader and more liberal rules, it was sometimes called *jus æquabile*, *jus æquum*, or *æquitas*. Equity, in its earlier sense, thus referred to the more general and impartial rules which the positive law had derived from the administration of the *prætor peregrinus*. But with the growth of more philosophical ideas regarding the *jus gentium*, it was believed that the superiority of the equitable portion of the positive law was due to its approximation to the perfect law of reason. That is, equity, in its highest sense, is identical with natural reason and justice. In this way the *positive equity* of the prætors, which had been derived from the observation of general customs, and had become actually incorporated in the existing body of law, was supplemented by the *natural equity* of the jurists, which was based upon the dictates of reason and regarded as a moral standard by which the character of the existing law must be judged, and to which it must as far as possible be made to conform.

It was by means of this higher conception of equity, which resulted from the identification of the *jus gentium* with the *jus naturale*—that the alliance between law and philosophy was made real and efficient. As the ethical system of the Stoics thus acquired a legal significance in the writings of the jurists, there was erected a moral standard of justice to which every expounder of the law felt obliged to appeal, and by a comparison with which the defects of the existing law were exposed and corrected. Paulus says: "In omnibus quidem, maxime

tamen in jure, æquitas spectanda est" (D., 50, 17, 90), and the same jurist in interpreting a provision of the edict defends the position which he advocates by saying: "Hæc æquitas suggerit, etsi jure deficiamur" (D., 39, 3, 2, 5). According to the view of the classical jurists, law, though made compulsory by the state, derives its ultimate authority from the moral code of nature, and is itself regarded simply as a means for the administration of justice.

References.—Regarding the influence of Stoicism upon the Roman jurists, different opinions have been advocated by different legal writers. Some profess to find the Roman law filled with particular precepts drawn from the Stoic philosophers; while others seem to question the reality of any Stoical influence at all. Among those who are perhaps inclined to exaggerate the influence of Stoicism may be mentioned Cujacius, Heineccius, Welker, and Pothier, and among those who are inclined to take the opposite view are Hoffman, Hugo, Austin, and Hunter. The view which seems most reasonable, is that the Stoic theory of natural law exercised a positive influence upon the legal thought of Rome, exhibited not so much in the form of particular rules, as in the general principles which controlled the methods of interpretation employed by the jurists.

This subject is treated in the following works: Maine, "Ancient Law," ch. 3; Ortolan, "Hist. of Roman Legislation," Eng. trans., p. 225; Hereford, "The Stoics as Teachers"; Zimmern, "Geschichte," § 62; Gravina, "Origines du Droit civil," p. 513 *et seq.*; Taylor, "Elements of the Roman Law," p. 67 *et seq.*; Hugo, "Geschichte," §§ 314–334. Some of the more important special works on this subject are the following: Laferriere, "L'influence du Stoicisme sur la doctrine des Icti Romains," 1860; Ratjen, "Hat die stöische Philosophie bedeuten Einfluss . . . gehabt?" Kiel, 1839; Ortloff, "Ueber den Einfluss der Stöischen Philosophie auf die Römische Jurisprudenz," Erlangen, 1797; Boers, "De Anthropologia Jurisconsultorum Romanorum, quatenus Stoica est," 1766; Schaumberg, "De Jurisprudentia vet. Rom. Stoica," 1745; Hering, "Pr. de Stoica veter. Roman. Jurisprudentia," 1719; Otto, "De Stoica veter. Jurisconsultorum Philosophia," 1714; Boehmer, "Pr. de Stoica Jurisconsultorum Philosophia," 1701. One of the first of modern writers to point out the Stoical element in the Roman law was Cujacius, "Observationum," Lib. 26, ch. 40.

CHAPTER IV.

THE INFLUENCE OF THE JURISCONSULTS UPON THE ROMAN LAW.

We have thus far considered the general influence which the philosophical ideas derived from Greece exercised upon Roman thought by developing broader conceptions regarding the foundation and purpose of law. These new philosophical conceptions did not, however, exist in the mind of the Roman jurists merely as speculative theories. They worked their way into the actual system of justice, and tempered by their influence the whole body of Roman jurisprudence. As a result of this movement the law was brought within the domain of reason. Its particular rules were interpreted in the light of general principles, and its various branches became unified into something like a coherent system. This may be illustrated by the method adopted by the jurists in their interpretation of the law, and the way in which their general ideas of justice affected the substance of the law through indirect and direct legislation.

1. **The Method of the Jurists.**—In considering the scientific influence of the Roman jurists, it must not be supposed that these writers were consciously inspired by what we would call a strictly scientific purpose. Their efforts were directed not so much toward the construction of an ideal system of rights and duties as toward the actual improvement of their own law. The legal writers of Rome were, in short, performing the work, not of

speculative philosophers, but of practical jurists. This fact will enable us to give a fair estimate of the relation which these writers sustain to legal science in general. A great deal of unnecessary criticism has, in recent times, been levelled against the Roman jurisconsults on account of their failure to treat of law as a pure science, and to apply to it the principles of classification which an ideal logical method would seem to demand. It ought never to be assumed, however, that a body of concrete law—especially while it is in the process of historical growth—can acquire the formal completeness of an abstract science. But in spite of their defects in logical arrangement, the Roman jurists made important contributions to legal science in general.

(1) In the first place, they emphasized the importance of appealing to general principles in the solution of specific questions, and hence brought into prominence the idea—without which there can be no scientific conception of law—that the rights of men in civil society depend upon something more ultimate than custom or arbitrary legislation. On account of their liberal methods of interpretation they were led to appreciate the value of certain *criteria* with reference to which the merits of particular rules must be judged. The relation which they were thus led to perceive between abstract principles and the concrete rights of persons and of property gave to their writings a truly scientific character. While, therefore, they were especially concerned in improving their own national system, they gave to the Roman law the character of a universal code.

(2) In the second place, the jurists perceived the true relation between law and morality. They properly regarded law as founded upon ethics; but they did not look upon it as commensurate with the full extent of

natural morality. The cardinal virtues of the Stoics were wisdom, justice, courage, and temperance. It is justice which by way of distinction furnishes the basis of legal rights and duties. Jurisprudence is defined by Ulpian as "that science which discriminates between the just and the unjust" (D., 1,1,10). But law in its relation to morality has a still further specific feature. While law and natural justice are at one regarding the kind of duties to be enforced, they differ with respect to the method by which they are enforced. The one depends upon free volition; the other upon public authority. If we consider the positive sources from which the jurists conceived all law to be derived, and also the fact that they regarded every legal duty as enforceable by a legal action, we will not fall into the common error of supposing that these writers made no distinction between moral and legal duties. According to the Roman jurists the fundamental principles of the law rest upon morality, since it is from the latter that those duties are to be determined which should govern men in civil society; but they believed that moral duties are transformed into legal duties only by the express or tacit sanction of some public authority.

2. Definitions and Maxims of the Law.—The scientific spirit of the jurists is still further seen in their efforts to make clear and definite the fundamental conceptions of the law, by setting forth the significance of legal terms, and by formulating the general rules which should be employed in the interpretation and application of the law. This is seen in the character of their definitions and maxims.

(1) There are two dangers into which legal language may fall. The one is the danger of looseness, by which it is liable to uncertainty and vacillation. The other is

the danger arising from a professional and technical rigidity, by which it may become estranged from popular usage, so that while gaining in scientific precision it is made liable to misapprehension on the part of those who appeal to the law for protection. The jurists guarded alike against these two dangers to which all language is exposed. To employ terms which are at the same time precise and intelligible was considered by them as essential to the equitable interpretation of the law. This method of definition was in harmony with their general theory that the purpose of the law was to promote, and not to obstruct, the ends of justice. The writings of the jurists abound in examples that show their earnest efforts to prevent the failure of justice, which may result, on the one hand, from a vague and indefinite, and, on the other hand, from a too technical, use of language. Many of these definitions are gathered together in the title of the Digest, "De Verborum Significatione" (D., 50, 16).

(2) The scientific wisdom of the jurists is still further seen in their legal maxims. Those who deny the influence of the theory of natural law upon Roman jurisprudence fail to appreciate the real character of these axiomatic rules and their influence upon legal interpretation. The jurists looked upon these maxims of the law as self-evident truths, dictates of reason. They were founded neither upon legislation nor customs; they rested in the very nature of things. They were, in reality, the outgrowth of those enlarged ethical conceptions which formed a part of the philosophical tendency of the times. If we look at any of these rules—many of which may be found in the title of the Digest, "De Diversis Regulis" (D., 50, 17)—we must be impressed with the scientific spirit which inspires them and the axiomatic

form in which they are stated. For example: "What is prohibited by the law of nature can be confirmed by no statute" (Celsus). "It is just by the law of nature that no one should be enriched through another's disadvantage or injury" (Pomponius). "It is according to nature that he who suffers the inconvenience should enjoy the benefit" (Paulus). "According to the law of nature all men are equal" (Ulpian). "Lapse of time cannot cure that of which the origin is vicious" (Paulus). "What is ours cannot be transferred to another without an act of our own" (Pomponius). "No one can transfer a greater right than he himself possesses" (Ulpian). "He who can say Yes can also say No" (Ulpian). "He is free from blame who knows but cannot prevent" (Paulus). "They are not defrauded who know and consent" (Ulpian).

The constant use of such general principles in determining the character of specific rules in the various branches of the law—though not necessarily improving the formal arrangement of the different parts,—tended to give a logical consistency and substantial coherence to the whole body of jurisprudence.

3. The Reason of the Law, "Ratio Legis."—In their efforts to apply the principles of natural justice to the actual relations of society, the jurists did not openly ignore the binding force of the existing law. Nearly all their writings, on the contrary, were expositions of the previous Roman law, and a large part of their commentaries treat of the Prætorian Edict. But they were not slow to discover that a law which had grown out of a previous condition of things, was not necessarily adapted to the present; and that a rigid application of any given rule might result in injustice. It was seen that a strict and severe application of a particular law might thwart

the very purpose for which all law existed. "*Summum jus summa injuria*" had been received as an axiom even in Cicero's time. Consequently, the jurists sought to harmonize law with justice. Without denying the authority of the existing law, they believed that its real binding force resided, not in its form, but in its rational spirit; and that the "reason of the law" would be found, if properly interpreted, to be consistent with natural equity. They thus perceived the principle—which must be fundamental in all scientific interpretation—that the rational intent of the law is to promote justice, that the law itself is but a means whereby that which is just and equitable may be secured. The respect which the jurists thus paid to what they called the *ratio legis*, or *ratio juris*, led to the adoption of certain equitable rules of interpretation.

(1) In the first place, where there is an apparent opposition between the letter and the spirit of the law, the spirit of the law must be followed rather than the letter. As Julianus says: "In his, quæ contra rationem juris constituta, non possumus sequi regulam juris" (D., 1,3,15). This principle was at variance with all mere verbal quibbling. Notwithstanding their rigorous method of reasoning, the Roman jurists did not tolerate that mode of formal and grammatical construction which stops at the word and loses sight of the thought. Paulus says: "Scire leges non hoc est verba earum tenere, sed vim ac potestas" (D., 1, 3, 17). This principle was also opposed to a harsh and severe application of a legal rule. In the words of Modestinus: "Nulla juris ratio aut æquitatis benignitas patitur, ut, quæ salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipsorum commodum producamus ad severitatem" (D., 1, 3, 25).

(2) In the second place, when the meaning of a law is

capable of more than one interpretation, that interpretation is to be followed which will result in the least injury. We find that this rule was frequently kept in mind by the jurists, showing that the very ambiguity of the law was made an occasion to further the ends of justice. Gaius says: "Semper in dubiis benigniora præferenda sunt" (D., 50, 17, 56). A similar rule is laid down by Celsus: "In ambigua voce legis, ea potius accipienda est significatio, quæ vitio caret" (D., 1, 3, 19). So, too, Marcellus: "In re dubia benigniorem interpretationem sequi, non minus justius est, quam tutius" (D., 50, 17, 192).

(3) In the third place, when a particular rule of law construed by itself would seem to operate unjustly, it must be interpreted with reference to other rules of a similar character, and even with reference to the spirit of the whole law upon the subject in hand. The body of the law must be looked at as a whole, and each part must be construed with reference to all other parts. Thus an earlier rule may be superseded by a later one; and a particular rule may be modified in its application, when seen in its relation to all other legislation bearing upon the subject. To quote a fragment of Celsus: "Incivile est, nisi tota lege perspecta, una aliqua particula ejus proposita, judicare vel respondere" (D., 1, 3, 24).

In all these rules there is no open disposition to ignore the binding force of the existing law, but rather a desire to fulfil its highest and most rational purpose—that is, to protect those natural rights which spring from the moral constitution of man.

4. Restrictive and Extensive Interpretation.—Certain rules of interpretation were also recognized when it became necessary to deal with cases for which the written law obviously contained no provisions whatever. The deficiency of the law might grow out of the fact that

it was either too broad, or too narrow, to meet exactly the case in hand. To supply such defects—while still respecting, in theory at least, the authority of the existing law—the jurists adopted certain modes of construction, which have been called *restrictive* and *extensive* interpretation.

(1) Laws which are established to meet the needs of a large community must of necessity be general in their nature. "Jura non in singulas personas," says Ulpian, "sed generaliter constituuntur" (D., 1, 3, 8). The difficulty of framing laws so as to cover expressly every case that may arise is clearly set forth in the following statement of Julianus: "Neque leges neque senatus-consulta ita scribi possunt, ut omnes casus qui quandoque inciderint comprehendantur; sed sufficit ea quæ plerumque accedunt contineri" (D., 1, 3, 10). In the solution of actual cases it often becomes necessary, therefore, to supply the defects of the law growing out of its generality. This might be effected not only by the legislation of the prince but also by interpretation. As Julianus further says: "Et ideo de his, quæ primo constituuntur, aut interpretatione aut constitutione optimi principi certius statuendum est" (D., 1, 3, 11). It was through this restrictive mode of interpretation that the law became specialized to meet a large number of cases which, though not expressly provided for, were yet construed as coming under its general provisions.

(2) Extensive interpretation, on the other hand, is that which is used with reference to cases which the letter of the law strictly taken would not comprehend at all. By studying the intention of the legislator with reference to certain cases, it is inferred what his intention would have been had it been expressed with reference to certain other cases of a similar character. This mode of extending the law to meet the case in hand was regarded by Julianus as

coming within the province of the magistrate in the exercise of jurisdiction. Says this jurist: "Non possunt omnes articuli singillatim aut legibus aut senatus-consultis comprehendi; sed cum in aliqua causa sententia eorum manifesta est, is qui jurisdictioni preest ad similia procedere atque ita jus dicere debet" (D., 1, 3, 12). But Ulpian regards this process as belonging to the legitimate function of interpretation as well as of jurisdiction, as is shown in the following passage: "Nam, ut ait Pedius, quotiens lege aliquid unum vel alterum introductum est, bona occasio est cætera, quæ tendunt ad eandem utilitatem, vel interpretatione vel certe jurisdictione suppleri" (D., 1, 3, 13).

By these various methods of interpretation which the jurists adopted to construe the law, and which they employed to carry out what they believed to be the rational purpose of the law, they were enabled to bring Roman jurisprudence more and more into harmony with the natural law, or, in other words, with the fundamental principles of reason and equity.

5. The Jurists and Indirect Legislation.—To appreciate still further the great influence exercised by the Roman lawyers in the days of the Empire, we must keep in mind the fact that the privileged class of jurists were not merely scientific expounders of the law. They were, in fact, a body of men who exercised a kind of legislative authority. The possession of the *jus respondendi* gave to them a position entirely unique in the history of jurisprudence. It is evident that their interpretation of the law partook of the character of indirect legislation; and, consequently, the rational principles which they advocated became actually incorporated into the body of the positive law. Let us look for a moment at the peculiarity of this kind of legislation, and the

reforming influence which it exerted upon the substance of the law.

(1) The indirect method of legislation employed by those jurists who possessed the *jus respondendi* may be roughly compared to what has been called in modern times "judicial legislation." The function of the judge is theoretically confined to declaring and applying the law to a given case. But in the very process of construing the law to meet the case in hand, the law may become specialized or even modified. Supplementary provisions thus grow up through judicial administration, which, by being enforced in the given case and by being used as precedents in similar cases, acquire the character of new laws. In certain respects, this bears an analogy to the way in which the Roman law became modified by passing through the hands of the jurists. But the jurists were not judicial magistrates; and their opinions of the law were not restricted to cases actually presented for adjudication. Any legal question whatever might be made the subject of their discussion, and their opinions upon such a question obtained the same authority as though it had been declared as law by a legislative body.

(2) As a result of this process of indirect legislation, the substance of the law became not merely adjusted to the special relations of society, but imbued with the same liberal and equitable spirit as that which inspired the jurists themselves. It would, of course, be impossible to indicate in this place the many changes which were brought about by this means, since nearly every portion of the Roman law was reviewed in the juristic writings. A few examples taken from the law of status may serve to illustrate the general character of these changes.

It was accepted as a principle of the natural law that all men are born free and equal. Ulpian says: "Jure

naturale omnes liberi nascerentur" (D., 1, 1, 4); and again: "Quod attinet ad jus civile, servi pro nullis habentur; non tamen et jure naturali, quia, quod ad jus naturale attinet, omnes homines æquales sunt" (D., 50, 17, 32). The belief that slavery was not natural to man, but was a civil institution contrary to nature, led to certain rules favorable to liberty. While the jurists were unable to ignore the laws which recognized the existence of slavery, they yet laid down the principle that in all cases of doubtful status the presumption should be in favor of freedom. Pomponius states the rule as follows: "Quotiens dubia interpretatio libertatis est, secundum libertatem respondendum erit" (D., 50, 17, 20). Paulus applies the rule to cases of doubtful manumission: "In obscura voluntate manumittentis favendum est libertati" (D., 50, 17, 179).

Again, a person according to the civil law, was free if born of a free woman—that is, a woman who was free at the time of the birth. But the jurists extended this rule so that a child was considered free, even though the mother was a slave at the time of the birth, provided she had been free at any moment between conception and birth (D., 1, 5, 5, 2—Marcianus).

So too, the theory of natural equality led the jurists to ignore many artificial distinctions among persons which had been but partially destroyed by the prætorian legislation. The legal rights of women, of sons and daughters of mature age, came to be more definitely recognized. As a general rule, only those persons that were physically or mentally incompetent were regarded as legally incapable of acting for themselves; and even these were carefully protected from injustice "benigna juris interpretatione."

Similar examples of this liberal spirit might be given from the law of property, of contracts, of wills, and of

actions. Such phrases as *quasi possessio*, *quasi ususfructus*, *quasi maleficium*, *quasi publica accusatio*, of which the writings of the jurists are full, bear evidence of the extent to which, by the use of fictions, the body of the law was enlarged and liberalized to meet the demands of public utility and equity.

6. The Jurists and Direct Legislation.—The important influence of the jurists is finally shown in the direct legislation of the emperors themselves. The imperial constitutions as far as they bear upon matters of private law evince the same equitable temper as that seen in the interpretation of the jurisconsults. Even some of the most despotic emperors are noted for wise and beneficent legislation. This seeming anomaly is only to be explained by the fact that in matters of civil law the emperors were guided by the counsels of the jurists. The great favor in which these persons, with few exceptions, were held by the princes, the official positions with which they were frequently honored, and their membership in the imperial council, together with the positive statements of Roman writers that the emperors often yielded to their advice—indicate that, for a time at least, the Roman Empire was, like France under Philip the Fair, and England under Edward I., a government of lawyers. Servidius Scævola reduced to writing the edicts of Marcus Aurelius, and was the teacher of Septimius Severus. Pomponius was a member of the council of Alexander Severus. The great jurists—Papinian, Ulpian, Paulus, and Modestinus, also held important positions in the imperial government.

The most conclusive evidence of the influence of these writers upon the constitutions of the emperors is to be found in the character of the legislation itself. If we

look at these acts we shall find a disposition to found the civil law upon the natural rights of men that is in striking accord with the philosophical spirit displayed by the jurisconsults. A few examples may be given by way of illustration.

(1) In the first place may be noticed the tendency to protect the slave from unnatural cruelty on the part of the master. Augustus granted to the præfect of the city jurisdiction over the domestic treatment of slaves, whereby the master was restrained from certain forms of cruelty. Claudius enacted that if a master exposed his sick or infirm slave, he forfeited all rights over him; and if he killed the slave the act should be treated as murder. Hadrian suppressed the work-houses (*ergastula*) in which masters sometimes imprisoned their slaves; and also restrained a master from selling his slave as a gladiator except for punishment, and then only with a judicial sanction. Antoninus Pius declared that a man had no more right to kill his own slave than a slave belonging to another; also that on proof of intolerable treatment a master should be compelled to sell his slave to a more humane master. "Both ordinances" says Gaius, "are just; it is proper that the abuse of a legal right should be restrained." (Gaius, Inst., 1, 53.)

The most direct illustration that the imperial acts were influenced by a theory of natural law, such as inspired the jurists, is afforded by the *naturalibus restitutio*—whereby a freedman, that is, a man who had once been a slave, might by an act of the emperor acquire the status of a *freeborn* person. This was based upon the doctrine that all men by nature are born free—since the freedman in this case was restored not to the actual state in which he was born, but to his supposed state of original freedom.

(2) Again, the imperial legislation tended to restrain

the great power which the father had hitherto been permitted to exercise over the son. These provisions were in harmony with the general theory which prevailed at the time, that all persons possess certain natural rights, and that it is the office of the law to protect as far as possible such rights. Trajan compelled a father who had been guilty of cruelty toward his son to emancipate him; and deprived the father, in such a case, of the right of inheriting the son's property acquired since emancipation. And Papinian says that the act was made by Trajan on the advice of the jurists Neratius and Aristo (D., 37, 12, 5). Passing over other examples which might be mentioned, it is to be noticed that Alexander Severus treated the power of life and death as obsolete in his time; and limited the father's power to simple correction, placing all severe punishment under the jurisdiction of the public magistrate. The proprietary rights of the son also began to be respected under the Empire. From the time of Augustus the son was permitted to hold as his own whatever he acquired in the military service. This was called *peculium castrense*, and was defined by Macer to be "whatever the son received from his father or relatives by way of equipment, or whatever he himself obtained while in the service" (D., 49, 17, 11).

(3) Another important feature of the imperial legislation was the disposition to extend the rights of citizenship, and to make these rights, as far as possible, equal. However far the Roman Empire may have come short of a perfect government, it certainly tended to reduce all its subjects—*optimates* and *populares*, Italians and provincials—to a plane of civil equality. Independent, then, of its political significance, the gradual extension of Roman citizenship was really a movement in the direction of a more complete equalization of civil rights, and, conse-

quently, of a more equitable administration of justice. This movement was carried on by the acts of Augustus, Tiberius, Claudius, Nero, and Hadrian, and reached its culmination in the celebrated edict of Caracalla, by which citizenship was conferred upon all the freeborn subjects of the Empire.

Certain writers have attempted to belittle the importance of this last act by impeaching the motives of the Emperor. But granting all that is claimed,—that the edict was prompted by the avaricious desire to extend the tax upon legacies,—it yet simply imposed a kind of burden upon provincials which already rested upon citizens. Independent of the motives of the Emperor, it equalized, even though it increased, the pecuniary burdens resting upon the Roman subjects; and so far as it affected civil rights, it was in the line of previous reforms, and was in harmony with the principle of equality advocated by the jurists. As a result of the edict of Caracalla and certain minor acts which immediately followed, both the rights and the duties of citizenship belonged equally to all the freeborn subjects of the Roman world.

If further examples were necessary to illustrate the general spirit of the imperial laws, we might cite the acts regarding testamentary trusts, which formed a large part of the legislation of this period, and which show how the natural or moral duties of the trustee were made compulsory by law, and how the equitable rights of the testator, the trustee, and the heir were alike carefully protected. But the illustrations already given are sufficient to show that a common spirit pervaded the constitutions of the emperors and the interpretation of the jurists, and that the whole tendency of legal reform during the early Empire was toward realizing those ideas of natural jus-

tice which were derived from broad philosophical conceptions regarding the essential nature and rational end of positive law.

References.—Additional information regarding the scientific method and influence of the Roman jurisconsults may be obtained from the following works: Grapel, "Sources of the Roman Civil Law," ch. 8; Ortolan, "History of Roman Legislation," Eng. trans., pp. 367–378; Rivier, "Introduction Historique," §§ 132–162; Warnkönig, "Vorschule," S. 115–132; Hugo, "Histoire," trad. par Jourdan," §§ 335–366; Zimmern, "Geschichte," §§ 61–63; Phillimore, "Legal Maxims"; Bremer, "Rechtsleher und Rechtsschulen im Römischen Kaiserreich"; Fitting, "Alter der Schriften Römischen Juristen von Hadrian bis Alexander"; Schulting, "Jurisprudentia vetus antejustinianea"; Huschke, "Jurisprudentiæ antejustinianæ quæ supersunt" An enumeration of the jurisconsults together with their respective works may be found in: Vering, "Geschichte und Pandekten," § 27; Deurer, "Gesch. und Inst.," § 85; Zimmern, "Geschichte," §§ 71–103.

PERIOD IV.

FROM THE ACCESSION OF DIOCLETIAN TO THE FINAL CODIFICATION OF THE LAW BY JUSTINIAN.

CHAPTER I.

THE REORGANIZATION OF THE IMPERIAL SYSTEM.

WITH the accession of Diocletian began a series of political and social changes which brought about a complete reorganization of the imperial system, and which affected in various ways the character of the Roman law. In the earlier Empire, the power of the prince had been concealed by a covering of constitutional forms; in the later Empire, the disguises of republicanism were thrown off, and the Emperor stood forth as the real source of law and justice. In the former period the distinctive features of Roman jurisprudence had been derived from the influence of the classical jurists; in the latter period the law received its liberalizing impulse from the influence of the Christian clergy. Since the character of the law in this period, as in those that have gone before, was impressed with the political and moral features of the age, it may be well for us to consider briefly the character of the revolution by which the Empire of Augustus and Hadrian was transformed into the Empire of Diocletian and Constantine.

1. Failure of the Augustan Constitution.—It is not necessary to probe very deeply into Roman society to find the causes which naturally led to this change. Besides the general decay of morality and patriotism, whereby the primitive force of the Roman character was undermined, the government itself had relapsed into a condition of weakness that made it incapable to withstand

longer the internal and external dangers threatening the state. The early constitution of the Empire had evidently failed to secure permanently that unity and peace which it was originally intended to promote.

In the first place, the imperial office since the time of Commodus had lost the dignity which had previously attached to it. No regular law of succession had become established, and the prætorian guard assumed the right of murdering or deposing a distasteful prince, and of choosing a successor. The military force with which Augustus had sought to support the throne had already become the power behind the throne. The early government had doubtless been conducive to the welfare of Rome, when vested in a paternal prince like Nerva, or a philosophical statesman like Marcus Aurelius; but from the close of the second century it had become degraded into the worst form of military despotism.

Again, the degradation of the central authority was accompanied by the dissolution of the provinces. The Empire had been held together by the supreme authority of the prince. The decline of this power opened the way for local insurrections. Almost every provincial governor became an aspirant for the imperial throne, or at least desired to exercise an independent authority within his own domain. Within a single century, it is said, nearly a hundred governors might be named who with various success raised the standard of revolt.

Moreover, the decay of the internal organization laid the Empire open to the attack of foreign enemies. The rivalry of different armies prevented any united and successful resistance to these invasions. Asia Minor and Greece had already been devastated by the Goths, and the eastern frontiers were continually shrinking before the encroachments of Persia.

On account of the growing weakness of the imperial power, the threatened dismemberment of the provinces and the increasing incapacity to repel the foreign invaders, it seemed necessary either to abandon the state to its enemies, or to give it a new and more efficient organization.

2. The Orientalization of the Empire.—The immediate source from which the forms of the new imperialism were derived, can be found in the growing influence of Eastern ideas. The new Persian monarchy had impressed the Romans with its political and military strength. The exalted veneration in which its prince was held by the people, the brilliancy of its court, the systematic organization of its dependencies, the efficiency of its armies, were in striking contrast to the degenerate condition into which Rome had fallen. The oriental features of government expressed in the forms of the Persian monarchy were hence taken as a model upon which Diocletian began his reforms. The influence of these reforms is seen directly in the new position of the Roman emperor and the retinue which became attached to his person.

To exalt the person of the emperor was one of the first objects of the reforms of Diocletian. This prince assumed the diadem of the East, and the approach to his person was rendered difficult by complicated ceremonies. Every means were used to prevent any detraction from the imperial honor and sanctity.

The dignity of the emperor was further secured by the introduction of a court retinue by Constantine, which was also borrowed from the East. The large body of court officials who were honored by being brought into immediate relation to the prince, and by being made the agents through whom he exercised the functions of gov-

ernment, was organized under several chief officers. The Grand Chamberlain (*propositus sancti cubiculi*) stood nearest to the prince and exercised a supervision over the private apartments of the palace. The Chancellor, or Master of Offices (*magister officiorum*) was the chief judicial officer of the court and minister of foreign affairs. The Quæstor (*quæstor sacri palatii*) was the organ of the emperor in legislation, putting into form and announcing the imperial edicts. The Minister of the Treasury (*comes sacrarum largitiornum*) controlled the collection and disbursement of the public revenue. The Master of the Privy Purse (*comes rei principis*) managed the private estate of the emperor. The two Counts of the Domestic Troops (*comites domesticorum*) commanded the infantry and cavalry which formed the body-guard of the emperor. This organization intended to give seclusion and sanctity to the emperor, was preserved by the successors of Constantine, and was in fact the prototype of the royal courts of modern times.

3. Reorganization of the Provinces.—But beyond these changes which related to the person and retinue of the emperor were others of greater importance which affected the whole provincial system. Diocletian had associated with himself in the government his companion in arms, Maximian; and under the name of "Augusti," these two persons had divided between them the Eastern and Western provinces. Each Augustus also chose an associate under the name of "Cæsar." Thus all the Roman provinces were grouped into four great territorial divisions. This formed the basis of the provincial system of Constantine, who not only perfected the territorial organization of the Empire, but also separated the civil from the military authority, so as to prevent the dangers of local insurrection.

(1) For purposes of civil administration the whole Empire was divided into four great præfectures, each under its own governor, called a Prætorian Præfect. The præfecture was divided into dioceses, each under an officer called a Vicar. Each diocese was subdivided into provinces, under officers variously called Presidents, Consulars, Correctors, or Dukes. Within the provinces were the cities, each under its own municipal government. A review of this distribution of territory shows that there were in all four præfectures, thirteen dioceses and one hundred and nineteen provinces. Each governor represented in his own domain the imperial authority. By the hierarchy of civil officials thus established, the government of the Roman territory was reduced to the most systematic organization.

(2) Moreover, an entire separation was made between the civil and military power. The old custom whereby the provincial governor was also a military commander was discontinued. The army received a distinct organization under its own officers, and hence a great temptation to revolt was taken away from the provincial governors.

4. The Forms of Legislation.—The centralizing policy of the later emperors had a noticeable effect upon legislation. Even more than in the previous period was the will of the emperor the ultimate source of law. On account of the decay of legal science after the time of Alexander Severus, the interpretation of the jurists became no longer an active source of legislation; although the opinions of certain jurisconsults of the previous period were still recognized as binding. The written law under the later Empire was restricted therefore to the imperial constitutions, and the writings of the classical jurists designated in the "law of citations."

(1) The imperial constitutions now became the chief source through which the law was extended or modified. They were restricted for the most part to the "rescripts" and "edictal laws." The former had reference to matter of a special character; while the latter applied to matters of general legislation. Nearly all the additions which were made to the body of Roman law from the time of Diocletian to that of Justinian were consequently made through these two forms.

(2) During this period the emperors designated by name the jurists whose writings should be accepted as law. Constantine ordered the works of Papinian and the "Sentences" of Paulus to be respected by the judge; and his respect for Papinian was so great that he invalidated the notes of Paulus and Ulpian upon this writer. About a century after this time was passed the famous "law of citations" (*lex de responsis prudentum*) by Theodosius II. and Valentinian III. By this constitution all the works of Papinian, Paulus, Ulpian, Modestinus, and Gaius, and these only, were declared to have a legal authority. The notes of Paulus and Ulpian upon Papinian were still held to be invalid. To fix the relative weight to be attached to the accepted jurists, it was declared that a majority of those whose opinions were given upon a certain point should be decisive; and that if their opinions were equally divided, that of Papinian should be accepted. The law of citations continued in force until the time of Justinian.

5. **The Character of the Judicature.**—The establishment of the later form of imperialism involved also important changes in the judicial system. The formulary system of the Republic was inconsistent with the spirit of the new government. The old system not only involved the general separation of questions of law and

fact, but it admitted a body of non-professional citizens to a share in the administration of justice. This system had been continued in the early Empire in accordance with the general tendency to preserve the constitutional forms of the Republic. But the revolution of Diocletian and Constantine resulted in bringing the administration of justice entirely under the control of the Emperor and the officers expressly appointed by him. This is seen both in the decay of the formulary system and in the duties of the *pedanei judices*.

(1) The formulary system was in harmony with the old republican idea that the functions of government should be exercised by the citizens, or by the magistrates chosen by citizens. The prætor, who presided over the proceedings *in jure*, was an officer chosen by the people. The *judex*, who took charge of the proceedings *in judicio*, was a man selected from the body of citizens. This whole procedure, involving the separation of *jus* and *judicium* and the exercise of judicial functions on the part of private citizens, was overthrown by Diocletian. The change not only grew out of the autocratic tendency of the new government; but was in part rendered necessary by the decay of the public spirit of the citizens, who avoided as irksome all share in public duties. Hitherto, the magistrate might, in exceptional cases, assume the entire control of a case, and thus dispense with the services of a *judex*. It was by ordering the exclusive use of this kind of procedure, which was called "extraordinary," that Diocletian abolished the formulary system, which was involved in the "ordinary" method of procedure. By a constitution of the emperor all officers having jurisdiction were instructed to decide all questions—even those of fact, which had previously been referred to the *judices*. Even the word *judex* was no

longer used in the old sense, but was applied to the magistrate, who exercised both *jus* and *judicium*. The decay of the formulary system through the exclusive use of extraordinary procedure placed the whole administration of justice under the direct control of the emperor.

(2) In order to relieve the provincial governors from an excess of judicial business Diocletian granted to them the right to refer cases of minor importance to subordinate officers (*pedanei judices*). This, however, involved in no respect the preservation of the formulary system. The distinction between *jus* and *judicium* was in no sense retained, but the whole case was turned over to subordinate magistrates. The *pedanei judices* were not *judices* in the old sense of the word, but, according to the opinion of Ortolan, permanent magistrates entrusted with the special duty of conducting such cases as the governor might see fit to refer to them. No other view of the character of these officers seems consistent with the autocratic spirit which permeated the whole imperial system.

References. The general character of the new imperial system is described in Gibbon's "Decline and Fall," ch. 17. To this may be added Ortolan, "Hist. of Roman Law," Eng. trans., §§ 83–95; Hugo, "Histoire," trad. par Jourdan, §§ 378–383; Rivier, "Introduction Historiqe," §§ 163–173; Marezoll, "Lehrbuch," §§ 27–31; Warnkönig, "Vorschule," S. 135–145; Walter, "Geschichte," I. §§ 359–423; Manso, "Leben Constantins des Grossen"; Burckhardt, "Die Zeit Constantins des Grossen."

CHAPTER II.

THE RELATION OF CHRISTIANITY TO THE EMPIRE AND TO LEGISLATION.

THE principal influence that affected the substance of the Roman law during this period grew out of the new relations between Christianity and the Empire. The pagan religion, which, from the earliest times, formed an essential element of the Roman state, had already lost its hold upon the people. On the other hand, Christianity had made rapid progress throughout the Empire; and the failure of the last attempt under Diocletian to crush the new religion led Constantine to adopt measures whereby the Christian worship should not only be tolerated, but be taken up into the imperial system, and be made to play the part hitherto performed by the pagan *cultus*. The elevation of Christianity to the position of a state religion was therefore due not so much to the ambition of the Church as to the the policy of the Emperor.

1. **Triumph of Christianity.**—The steps which finally resulted in the incorporation of the Christian religion into the Empire may be seen in the indirect support given to it by Constantine, and in the more positive legislation of his successors.

The edict of Milan was the beginning of a series of enactments which finally opened the doors of the state to the Christian hierarchy. Constantine himself issued additional laws more or less favorable to the Church. That the

"first Christian Emperor," however, looked upon the new religion merely as a serviceable prop to the state is evident, not simply from the fact that he tolerated Christianity only when he was obliged to accept its triumph as inevitable, but because his attitude toward the contending faiths bears the marks of duplicity rather than of unequivocable friendship toward the new worship. While professedly favoring Christianity, he also tried to obtain all the advantage possible from the surviving relics of paganism. He humored the Christians by enjoining the religious observance of Sunday; and reconciled the pagans by calling it *Dies Solis*, or the day of the sun-god, and urged them to consult the auguries in proper form. He placed his capital under the joint protection of the God of the Martyrs and the goddess Fortune. He not only called himself the Bishop of bishops, and assumed a sort of headship over the Christian clergy, but he also retained to the last the title of *Pontifex maximus*, which marked his supremacy over the pagan hierarchy.

But the irrepressible conflict between the old and the new religion rendered the double dealing of Constantine difficult for his successors. Julian, indeed, declared openly for paganism. But with the legislation of Jovian, Valentinian, Gratian, and Theodosius, the heathen worship was gradually deprived of its position in the state. Its rites were condemned, its property confiscated, its temples demolished. With every blow given to paganism the Church obtained a new and stronger hold in the body-politic, until at last it was completely installed as an essential feature of the imperial government.

2. Relation of the Church to the State.—The precise relation that the Church sustained to the Empire, it is difficult clearly to define, since the alliance between the two was gradual in its formation and was founded

rather upon tacit consent than upon any formal compact. The Church was incorporated into the state; but each preserved to a certain extent its independence within its own sphere of action. The state maintained its authority over all things relating to the political administration. The Church, on the other hand, preserved its supremacy in all matters of a purely ecclesiastical nature. The priest, as a citizen, was amenable to the laws of the Empire; while the magistrate, as a Christian, was bound to submit to the canons of the Church.

Considered thus roughly, the boundary between the ecclesiastical and political bodies might seem to be clearly defined; but still there were many circumstances that would lead the one, in defending its own interests, to encroach upon the jurisdiction, and sometimes even to seek the protection, of the other. The clergy sought as far as possible to bring the acts of the emperor into conformity to the spirit of the Christian religion. The emperor, on his part, assumed not only an external authority over the Church as a legal corporation, but also frequently exercised an internal supervision over its controversies, when such interference seemed necessary for the general peace of the Empire.

The Church was, in fact, a sort of *imperium in imperio*, struggling at the same time to merit the protection of the state and also to maintain its own independence, but obliged to recognize itself as a part of the imperial system and subject to the imperial authority.

3. Immunities and Privileges of the Clergy.— The fact that the Church was looked upon as a kind of political support to the Empire seemed to justify the emperors in bestowing upon the clergy certain rights and privileges similar to those hitherto enjoyed by the pagan priests.

(1) In the first place they were relieved from those public burdens (*munera publica*) to which all subjects qualified by a certain amount of property were liable. This included the exemption from the decurionate in municipal towns. They were also discharged from the personal services which were due to the state from the less opulent classes, such as the duty of keeping in repair the public highways and bridges and of entertaining governmental officers and messengers. They were, moreover, exempted from certain pecuniary burdens, such as the capitation tax, the road tax, the tax upon trades, local taxes imposed for the temporary supplies of the army, etc.

(2) The emperors also provided for the endowment of the churches and the support of the clergy. Constantine not only restored the buildings and lands confiscated during the previous persecutions and transferred to the Church certain temples, estates, and public property of pagans and heretics, but he also granted to the Church the right to receive bequests. The clergy, hitherto dependent for their support upon the voluntary contributions from the Christians, now received a fixed income from the church fund derived from the imperial and municipal treasuries.

Immunities and privileges of this kind, though subject to many abuses, gave to the clergy a political status which not only bound them to the support of the government, but added to their power and influence in civil affairs.

4. The Judicial Authority of the Clergy.—But the most important prerogatives which the clergy received from the state were those connected with the exercise of judicial authority. Their jurisdiction was partly of an ecclesiastical, and partly of a civil and criminal nature.

(1) With the growth of the church organization the clergy had already assumed an authority necessary for the internal government of the Christian body. But this authority could not hitherto be enforced except by spiritual penalties, and was not of such a character as to prevent a person from appealing to the civil tribunal for protection against the bishops. The Christian emperors, however, passed a series of ordinances which prohibited all appeals to lay authority in spiritual and ecclesiastical causes. The ecclesiastical courts thus obtained an independent jurisdiction in the domain of Church doctrine and discipline.

(2) The jurisdiction of the clergy was still further recognized in certain civil cases. It had been customary for the members of the early church, in order to prevent the scandal of going before a heathen tribunal, to submit to the bishop their disputes, even those of a civil nature. But, of course, the judgment of the bishop had hitherto possessed no strictly legal sanction, and was valid only so far as both parties were in conscience bound to submit to it. But Constantine made the sentence of the bishop legally binding in such cases, when the parties had once agreed to submit their cause to an ecclesiastical tribunal.

(3) The clerical courts also obtained a limited criminal jurisdiction extending to those cases in which the clergy were charged with certain crimes, termed lighter offences (*leviora delicta*). But this exemption of the clergy from responsibility to the imperial courts did not extend to the greater crimes against the state (*graviora delicta*).

(4) Somewhat connected with the jurisdiction of the clergy was the right of "asylum," and the right of "intercession." The heathen temples, public altars, and the statues of the emperors had heretofore been respected as

places of refuge, conferring temporary exemption from pursuit to debtors and criminals amenable to public justice. This sanctity was transferred to the Christian houses of worship. It was enacted (A. D. 431) that not only the altar, but whatever formed any part of the church building, should be an inviolable place of refuge; and it was forbidden on pain of death to forcibly remove any person who had fled thither unarmed.

The right of intercession, moreover, grew out of the pagan custom whereby the priests were allowed to intercede for criminals, prisoners, and unfortunate persons of any class who were resting under the penalty of the law. This right was given to the Christian clergy to be exercised, as the law says, "for the interests of humanity."

5. Christianity and Legislation.—Different views have been held by legal historians regarding the influence of Christianity upon Roman legislation. Those who dwell upon the intolerant laws of the Christian emperors with respect to pagans, Jews, and heretics, are led to depreciate the beneficent results that flowed from the religious revolution. On the other hand, those who assume that with the professed conversion of Constantine, the spirit of Christian morality was suddenly infused into the whole body of Roman institutions, are inclined to exaggerate the legal reforms of the later Empire. There is, moreover, a certain class of apologists who, recognizing the great improvements made in the law, during the previous period, are disposed to attribute even those improvements, not so much to the influence of pagan philosophy, as to an unconscious influence which Christian ideas exercised upon the minds of the Roman philosophers and jurists.

This diversity of opinions is evidently due, on the one hand, to the failure to distinguish Chris-

tianity as an ethical system from the Church as a corporate institution; and, on the other hand, to the failure to give proper credit to paganism for the possession of high moral purposes and conceptions. In spite of the fact that the Church in some cases set its face against civil equality, and the fact that the Roman law had already received a liberal temper from the influence of Greek philosophy, it cannot be doubted that the progress of the law, in general, kept pace with the unfolding of ethical ideas in the Roman mind; and that so far as Christianity furnished a system of ethics more just, liberal, and humane than that of Stoicism, it brought to bear upon the Roman law a moral power superior to that which had previously been exerted upon it through the writings of the philosophical jurists.

The changes made in the law under the Christian emperors consisted, partly, in carrying still further the liberal reforms begun in the previous periods; and, partly, in introducing modifications which were essentially new. A few examples must suffice to indicate the general character and tendency of legislation under the Christian Empire.

(1) The laws regarding slavery were inspired by a humane disposition to respect the inborn rights of the slave, to encourage manumission and to break down the distinction hitherto existing among freedmen. In the first place, the slave was still further protected from the cruelty of the master. To poison a slave, to tear his body with the nails of wild beasts, and to brand him were regarded as equivalent to homicide. Again, the higher spirit of the new legislation is shown in the encouragement given to manumission. Although no general acts of enfranchisement were passed, easier methods of manumission were introduced. A slave could be freed by a

letter from his master (*per epistolam*) by a declaration of the master in the presence of witnesses (*inter amicos*), or in the presence of the assembled congregation (*in ecclesiis*). Many legal restraints upon manumission were also removed. The Church encouraged the freeing of slaves, and treated the act as the mark of a religious disposition on the part of the master. Moreover, the civil condition of freedmen was made uniform. Until the time of Justinian, there were certain cases of misconduct on the part of the slave which prevented him, when manumitted, from receiving the full rights of citizenship. But Justinian removed these disqualifications and declared that full citizenship was involved in the gift of liberty. These changes in the law were due, in great part, to the sympathy between the master and the slave growing out of their common ecclesiastical relations, and to the humane spirit of Christianity itself.

(2) Further restrictions were also laid upon the paternal power. It is true that the early emperors and the jurists had greatly mitigated the severity of the *patria potestas*. Marcian had already declared that "the paternal authority should consist in affection and not in atrocity" (D., 48, 9, 5). But Christianity made more efficient this reforming tendency. Constantine openly declared that the father who killed his son should be held for murder. Except in the rarest cases, the father was forbidden to expose his children, or to sell them into slavery. The father could not give away his son by adoption except with the son's consent. The proprietary rights, also, which a son acquired in his military earnings (*peculium castrense*) were extended by Constantine to what was acquired in any public office (*peculium quasi castrense*). By later legislation, the son possessed the right to property coming from other sources (*peculium*

adventitium). By these measures the personal and proprietary independence of the son after reaching majority was almost completely recognized; and the patriarchal idea of the family founded upon the life-long and absolute power of the father, gave way to the more modern and humane idea of the relation of parent and child.

(3) The influence of Christianity may also be seen in laws regarding marriage and the status of women. Marriage was transformed from a civil contract to a religious sacrament; and a moral freedom was given to it by the abolition of the artificial penalties which the *lex Papia et Poppeia* had fixed upon celibacy and childlessness. The reverence which Christians paid to the Old Testament scriptures led to the adoption of the Jewish restrictions upon marriage within certain degrees of consanguinity. Marriage was also rescued from certain abuses and corruptions, by restraints placed upon divorce and concubinage. There were, however, such inconsistencies in the various laws regarding marriage, some being founded upon old practices and some upon Christian ideas, that Jerome said of them that "some were the laws of the Cæsars and some of Christ." The legal status of women was also somewhat affected by the later legislation. Women were granted substantially the same rights as men in the control of their property; and they were no longer compelled to be subject to tutors. A woman was granted the right of guardianship over her children, which right had formerly been exercised exclusively by men.

(4) It is difficult to determine how far the reforms in the law of succession were due directly to Christianity; but these reforms were evidently made from humane motives, and with a desire to recognize to a greater extent than heretofore the natural ties of blood. Both the decay

of the paternal power and the greater respect paid to woman rendered the descent through a female line equally worthy of recognition as descent through a male line. Valentinian the Younger placed the children of a daughter on an equality with the children of a son. Justinian also enacted that the children of a daughter should represent their mother in the inheritance as if she were technically within the family. But the greatest reform occurred with the revolution of the law of succession by Justinian, which is recorded in the 119th and 127th Novels. By this change the old orders were done away with, and the natural ties of blood substituted as the basis for the devolution of property. The first order of succession now became the descendants; the second, the ascendants; the third the collaterals—the male and the female lines sharing equally in the inheritance.

Other examples might be given of the influence of Christianity upon the general legislation of Rome, such as the care exercised over widows and orphans, the treatment of prisoners, the protection of benevolent foundations, the abolition of gladiatorial shows, etc., which exhibit a spirit of humanity more broad and liberal than that which marked any previous period of Roman jurisprudence.

References.—This has been a favorite topic, especially with the ecclesiastical historians, who have not always, however, treated the subject with the discrimination that it requires. The following references may be of service to the student: Ortolan, "Hist.," § 93; Zimmern, "Geschichte," § 130; Gibbon, "Decline and Fall," ch. 20; Smith's "Dictionary of Christian Antiquities," art. *Law*, by Sheldon Amos; Greenwood, "Cathedra Petri," Bk. II., ch. 7; Balmes, "European Civilization," chs. 14–19; Lecky, "European Morals," vol. II., pp. 1–90; Ozanam, "Civilization in Fifth Century," I., ch. 5; Schaff, "Hist. of the Christian Church," II., ch. 3; Guericke, "Church History," § 69; Gieseler, "Church History,"

I., § 105; Bingham's "Antiquities of the Christian Church," I., Bk. 5; Milman, "History of Christianity," Bk. III., Bk. IV., ch. 1, and "Latin Christianity," Bk. III., ch. 5; Broglie, "L'Eglise et l'Empire romain du IV.e siecle"; Troplong, "De l'influence du Christianisme sur le droit civil des Romains"; Meysenburg, "De Christianæ religionis vi et effectu in jus civile"; Rhoer, "De effectu religionis Christianæ in jurisprudentiam Romam"; "Codex Theodosianus," which is the chief original authority.

CHAPTER III.

THE FINAL CODIFICATION OF THE ROMAN LAW.

THE period extending from Constantine to Justinian was preëminently a period of codification. Although efforts had previously been made—notably that of Salvius Julianus—to bring portions of the law into a condensed form, such efforts now became so numerous as to form a distinctive feature of the time. The body of Roman jurisprudence was no longer inspired by the creative and scientific spirit which prevailed during the previous period. Few jurists of eminence had appeared since the days of Alexander Severus, and on this account the great legal authorities belonged to the past. Practically the sources of the law were restricted to the five great classical jurists already mentioned, and to the constitutions of the emperors. Upon these all legal decisions were based. Efforts were now made to bring the juristic and statutory law into such a form as to render it most serviceable to the courts. These efforts were at first directed toward the less unwieldy portions of the law, the imperial constitutions; and as a greater faculty for codification was developed, they were extended to the writings of the jurists. We may group these compilations into three classes: the pre-Justinian codes of the East, the Roman codes of the West, and the final codification of Justinian.

1. The Pre-Justinian Codes of the East.—Before the time of Justinian several efforts were made in

the East to collect the scattered fragments of the law. Some of these were made by private persons and some under the imperial sanction.

(1) The first of these attempts was made by Gregorianus and Hermogenianus, who probably lived during the reign of Constantine. This code (*codex Gregorianus et Hermogenianus*) comprised the constitutions of the emperors from the time of Septimius Severus to that of Diocletian and Maximian. It is generally regarded as having been the work of private persons, and consequently not possessing any public authority. But very little is known of this work, either as to its date or the extent of its subject-matter, since a few fragments only have reached us.

(2) The Theodosian code (*codex Theodosianus*) was of much greater importance. Taking as a model the code just mentioned, Theodosius II. appointed a commission under the direction of Antiochus to collect all the imperial edicts, with many of the rescripts issued since the time of Constantine. This collection was published in 438 A. D. as the law of the Eastern Empire; and in the same year it was received by Valentinian III. and confirmed by the Senate as the law of the West. The code was divided into sixteen books, which were subdivided into titles and sections. With the exception of the first five books, which are imperfectly preserved, the collection is still extant in a complete form. The Theodosian code possesses great historical importance; first, because it is the chief source of our knowledge of the legislation of the early Christian emperors; and, secondly, because it exercised a marked influence upon the West, being made the basis of the codification of the Roman law by the German conquerors. It is said to have been the original intention of Theodosius not only to codify the imperial

constitutions, but to compile the writings of the jurists. This latter work, however, even if commenced, was never completed.

(3) The first evidence that we have of any compilation of the writings of the jurists is found in a collection of fragments known as the *Fragmenta Vaticana.* This name is given to these fragments because they were discovered and edited by Angelo Mai in 1823 from a *codex rescriptus* in the Vatican library. So far as can be determined, they were not arranged according to any general design, but seem to have been collected simply as materials preparatory to some more systematic work. They contain excerpts from the writings of Paulus, Ulpian, Papinian, and many other jurists. They also contain certain imperial constitutions extending from the time of Marcus Aurelius to that of Valentinian I. This collection possesses some historical value, as it throws light upon the details of certain portions of the law, such as dower and usufruct, not to be obtained elsewhere.

(4) Another work, which is perhaps worthy of note, was a collection of juristic writings evidently intended to compare the Mosaic and the Roman law. This is generally known as *collatio Mosaicarum et Romanarum legum.* So far as it realizes its evident purpose to show that the Roman law was derived from the Mosaic law, it is of little value. But it has been of service in reconstructing certain ancient works, especially the "Sentences" of Paulus and the "Rules" of Ulpian.

2. The Roman Codes in the West.—During the fifth century occurred the fall of the Western Roman Empire and the erection of the new Germanic kingdoms. While the Germans brought with them their own laws and customs, the Romans still claimed the right to be judged by the laws of the Empire. The respect which

the German kings paid to this claim led to the adoption of the principle of "personality of the law," whereby every person, whether German or Roman, was allowed to be judged by his own national laws. Moreover, the desire for codification which had shown itself in the East now extended to the West, and the barbarian kings not only caused their own laws to be reduced to writing, but were also induced to compile the Roman laws for the benefit of their Roman subjects.

(1) The first collection of law made after the fall of the Roman power in Italy was the Edict of Theodoric (*Edictum Theodorici*). This edict is said to have been drawn up by the two eminent Latin writers, Cassiodorus and Böethius. It was published by Theodoric, King of the Ostrogoths, in the year 500 A. D. As Theodoric, more than any other barbarian king, was desirous to bring his own people under Roman influences, this law was made binding not only upon the conquered Romans but also upon the Ostrogoths themselves. The Gothic customs, however, were allowed to remain so far as they did not conflict with the provisions of the Edict. Although the Roman sources are treated with more freedom in this collection than in any other made at this time, the traces of its origin are sufficiently evident to show that the law was drawn, in great part, from the Theodosian Code and the "Sentences" of Paulus. This Edict remained in force until the conquest of Italy by Justinian, when it was superseded by the body of codified laws drawn up by that emperor.

(2) A similar collection of Roman law was made by Alaric II., King of the Visigoths, in 506 A. D. This code is known as the *Lex Romana Visigothorum* or the *Breviarium Alaricianum*. It was composed of two sets of materials, which were distinguished by the com-

pilers as *Leges* and *Jus*—the former being imperial laws, and the latter extracts from the jurists. The chief sources from which this compilation was drawn were the Theodosian code, a series of new constitutions (*novellæ*) issued by Theodosius II. and his successors, the "Institutes" of Gaius, and the "Sentences" of Paulus. This was the most important of all the codes of the Roman law made by the barbarian kings. Its authority extended over the southern part of Gaul and nearly the whole of Spain. Its influence is seen in the subsequent legislation of the Spanish clergy in the Council of Toledo. It also possesses important historical value from the fact that certain portions of the Roman law are nowhere else so well preserved—for example, the first five books of the Theodosian code, and the writings of Paulus. Before the discovery of the "Institutes" of Gaius in the beginning of the present century, it also furnished to us our chief knowledge of that work.

(3) A less important collection was published by Sigismund, king of the Burgundians, about the year 517 A. D. It is known as the *Lex Romana Burgundiorum*. The name *Responsa Papiniani*, by which it is sometimes called, was incorrectly applied to it by Cujacius, who at first mistook it for the responses of Papinian. In the preface of this collection is clearly announced the "personality of the law," since it expressly orders that the Romans shall be judged by the Roman law. The authority of this code was very brief. At the fall of the Burgundian kingdom (534 A. D.) it gave way to the Roman code of Alaric, which became the law for all Roman subjects throughout the southern part of Gaul.

3. The Final Codification by Justinian.—While the provinces of the West were becoming the seats of the new Germanic kingdoms, and a new set of institutions

was springing up through the union of German and Roman elements, the Empire of the East was successfully withstanding the invasions; and during the reign of Justinian (A. D. 527–565) it even recovered some of its ancient splendor. By the notable victories of Belisarius and Narses its dominion was extended once more over Italy and Africa. But the fame of Justinian rests chiefly upon the codification of the Roman law made under his direction. The previous collections had been, to a great extent, partial and unsatisfactory. Moreover, the imperial constitutions, issued since the publication of the Theodosian code, had, with few exceptions, been left in an uncollected form. But more than this, the great body of juristic literature had remained almost untouched by the compilers. Those jurists only whose writings had been sanctioned in the "law of citations" had furnished any materials for codification. Justinian, therefore, determined to complete the work of Theodosius, and also to bring into a condensed form the works of all the most important jurists of Rome, so far as their opinions were applicable to the existing state of society.

(1) The first efforts of Justinian were directed to the imperial constitutions, and resulted in the formation of the Earlier Code (*codex vetus*). A commission of ten persons was appointed, with instructions to collect into a single code the constitutions already embodied in the previous codes, together with all the constitutions issued since the time of Theodosius. The commission was empowered to omit all obsolete matter, to adjust the law to the requirements of the time, and to divide the whole into suitable books and titles. This first edition of the code was completed and confirmed by Justinian in the year 529 A. D.

(2) After the publication of the Earlier Code, Justinian, to translate his own words, "resolved to make a complete revision of the whole civil law and of all the Roman jurisprudence, by collecting together in a single work the scattered volumes of the many jurists." For this purpose, in 530 A. D., a commission of sixteen persons was appointed, under the direction of Trebonian, with instructions to "choose and correct all that had been written by the jurists whom the emperors had authorized to interpret the laws." The commissioners were, therefore, not restricted by the Theodosian "law of citations," but the whole field of authorized juristic literature lay open before them. They were directed to avoid repetitions and contradictory statements, to omit what was obsolete, and otherwise to adjust the law to the needs of the present. This work was completed in three years, and confirmed in 533 A. D. It was the boast of the commission that three million lines had been reduced to one hundred and fifty thousand. Extracts were made from the works of thirty-nine jurists, chief among whom were Ulpian—who furnished more than one third of the whole,—Paulus, Papinian, Julianus, Pomponius, Quintus Cervidius Scævola, Gaius, and Modestinus.

The whole work was called the Digest or Pandects (*Digesta sive Pandectæ*). It was divided into fifty books, which were generally subdivided into titles, laws or sections, and paragraphs. The general arrangement of subjects was not made with reference to any strictly logical method, but was probably founded upon the traditional order of codification as it existed in the Perpetual Edict and the XII. Tables. The special order of the titles, according to the theory of the German critic Blume, grew out of the method adopted by the compilers to facilitate their work. The theory

of Blume, which seems to be well supported by the facts in the case, may be indicated by the following brief extracts from his Essay on this subject. "The compilers separated all the writings from which extracts were to be made into three parts, and formed themselves into three committees * * * When the three committees had finished their labors, the present Digest was formed out of the three collections of extracts * * * The commentaries on Sabinus (*ad Sabinum*), on the Edict (*ad Edictum*), and Papinian's writings, are at the head of these three classes. We may accordingly denote these three masses respectively by the names Sabinian, Papinian, and the Edict. In each of these classes, the several works from which extracts are made always follow in regular order."

The Digest, when completed and sanctioned by the emperor, was made to supersede all the ancient juristic writings, and was also forbidden to be supplemented by explanatory notes, lest the original text might be obscured.

(3) Since the works already described were hardly suited to the purposes of elementary instruction, Justinian directed Trebonian, with the assistance of Theophilus and Dorotheus, to prepare a brief and systematic treatise which should contain the elements of the law. This work, called the Institutes (*Institutiones*), was scarcely more than a revision of a similar work written by Gaius, with such modifications as seemed necessary to make it applicable to the time. It consisted of four books, subdivided into titles. Though intended merely for the use of students, it received the imperial sanction, and obtained the force of law at the same time as the Digest.

(4) In the course of the work of codification, many

contradictory opinions were discovered in the writings of the jurists. The more important of these, which the compilers themselves did not wish to adjust, were referred to Justinian for his special decision. These decisions had increased to the number of fifty, and were at first published under the name of *Quinquaginta Decisiones;* they were afterward embodied in the revised edition of the Code, which was now published. In order to bring the old code into harmony with the Digest, and to put into a permanent form his own constitutions issued up to this time, Justinian ordered a revision of the Earlier Code. The new edition of the Code (*codex repetitæ prælectionis*) was confirmed in 534 A.D. It contains, besides the Fifty Decisions, the most important constitutions issued from the time of Hadrian to the year in which it was published.

(5) During the interval which elapsed between the republication of the Code and the death of Justinian, new constitutions were issued which affected the law in many particulars. The number of these ordinances was, however, very much decreased after the death of Trebonian (545 A.D.), which fact perhaps indicates the great influence which this jurist exercised upon Justinian's legislation. The new constitutions (*novellæ constitutiones*) were collected and published after the death of the Emperor. Many of them were originally published in Greek, as the language of the people; but their translation into Latin was permitted. The most important part of this collection is that which relates to the new law of intestate succession, contained in the 118 and 127 Novels.

4. General Character of the Corpus Juris.—The Institutes, the Digest, the Code, and the Novels, comprise what is known as the *Corpus Juris*—or the *Corpus Juris Civilis*—as distinguished from the *Corpus Juris Canon-*

ici. The most diverse opinions have been expressed regarding this work of Justinian. Those who look at it from a merely logical or critical point of view, of course, find much fault with its arrangement and general method. By such persons its faults and imperfections are exaggerated, and its adjustment to the existing wants of the Empire is regarded as evincing a barbaric disregard for the purity of the ancient texts. On the other hand, those who look at it from an historical point of view, see in it materials from which may be reconstructed the legal history of the Roman state. In spite of the freedom which may have been taken with the ancient texts, it is still the completest record that we have of the legal thought of Rome; and, without it, we would lack the greatest monument of the genius of the Roman people.

The Corpus Juris marks the close of the development of the ancient Roman Law—which, from a body of customary and technical rules originally adapted to the narrow interests of a small aristocratic class, had expanded into a universal system of human rights founded upon principles of natural equity and adjusted to the needs of a highly developed civilization. Its reforms were, to use the language of Legaré, "a perpetual sacrifice of law to equity, of science to policy or feeling, of *jus civile* to *jus gentium*, of the pride and privileges of Rome to the genius of humanity consecrated by the religion of Christ." The legislation of Justinian was the end of ancient, and the beginning of modern, jurisprudence. "It was in this form," as Savigny says, "that the Roman law became the common law of Europe."

References.—Mackenzie, "Roman Law," pp. 22–29; Phillimore, "Introduction to Roman Law," ch. 4; Gibbon, "Decline and Fall," ch. 44; Guizot, "Hist. of Civilization in France," Lect. 11; "Dict. Antiqq." (*Codex Gregorianus*, *Codex Theodosianus*, *Brevi-*

arum Alaricianum, Edictum Theodorici, Corpus Juris Civilis, Codex Justinianeus, Pandectæ, Institutiones, Novellæ); Kaufmann's Mackeldey, I., pp. 37–60; Ortolan, "History," Eng. trans., §§ 100–111; DuCaurroy, "Instituts de Justinien," Preliminaire; Rivier, "Intro. Historique," §§ 176–197; Demangeat, "Droit Romain," I., pp. 104–141; Hugo, "Histoire," trad. par Jourdan, II., §§ 384–407; Thibaut, "Gesch. und Inst.," §§ 86–95; Deurer, "Geschichte," §§ 87–92; Marezoll, "Lehrbuch," §§ 27–36; Zimmern, Geschichte," §§ 46–49; Gravina, "Origines," p. 588, *et seq.* On the arrangement of the Roman codes, see Maine, "Law and Custom," ch. 11; Hammond's Introduction to the American edition of Sandar's "Justinian"; also Blume, "Abhandlung über die Ordnung der Fragmente in den Pandektentiteln," "Zeitschrift," IV; On the historical significance of the Roman law, see Legaré, "Origin, History, and Influence of Roman Legislation," "Writings," I., p. 502.

PERIOD V.

FROM THE CODIFICATION OF THE LAW BY JUSTINIAN TO THE PRESENT TIME.

CHAPTER I.

THE ROMAN LAW DURING THE MIDDLE AGES.

If we pursued no farther our study of the history of the Roman law, we would lose sight of the important influence that this body of principles has exercised upon modern jurisprudence. The chief significance that this system has for the student of to-day is due to the position that it holds as an essential and permanent factor of European civilization. Its history may, in fact, be regarded as continuous from the time of the XII. Tables—or rather from the earliest settlement of the Aryan tribes in Italy—to the present. And it is only by tracing its fortunes since the days of Justinian that we can fully appreciate the large place that it occupies in the legal systems of modern times. Indeed, it may be said that, by its perpetuity and diffusion among European states, its importance as a civilizing agency has been even greater in the modern than it was in the ancient world.

In attempting to review the modern history of the Roman law, we must, of course, confine ourselves to the merest outlines of the subject. We shall consider, first, its preservation during the Middle Ages; then, the revival of its scientific study since the twelfth century; and, finally, the extent to which it has become an integral element of modern jurisprudence. In looking at its destiny in the Middle Ages, we shall find that its influence was preserved, not only in the Eastern Empire, but also in the barbarian kingdoms of the West, in the feudal

system, in the mediæval Empire, and in the Latin Church.

1. Its Continuance in the Eastern Empire.— The Roman Empire, under various names and dynasties, continued to exist in the East until the capture of Constantinople by the Turks in 1453 A.D., or more than nine hundred years after the codification of the law by Justinian. During this time the *Corpus Juris* never lost entirely its influence, although it was not always respected with that deference which Justinian had desired. At first, its original authority was weakened by numerous translations and by new constitutions; but it recovered, to a great extent, its prestige through the works of Basilius, the Macedonian, and became recognized as the fundamental element in the Græco-Roman law. The stages of its history in the East may be noticed as follows:

(1) Soon after the death of Justinian, the Institutes, the Digest, and the Code were translated into Greek as the more popular language of the East. As these translations were more convenient than the Latin text, they soon superseded the original law books of Justinian. They became the basis of new commentaries; and this fact, together with the fact that new constitutions were continually issued by the Eastern emperors, caused the *Corpus Juris* in its Latin form to be received with less and less authority. But the legal principles which it contained, though clothed in a Greek garb and somewhat modified in their application, did not entirely pass away.

(2) The multiplication of Greek commentaries upon the laws of Justinian led in the ninth century to an important legal reform, involving a new compilation of the law, by which it was brought into closer harmony with the original Roman sources. This compilation was begun by Basilius, the Macedonian. An abridgment of the Roman and Greek laws was first prepared as a text-book. A more

complete compilation was then made, containing selections from the *Corpus Juris* and the later constitutions. This work, which was a kind of restoration of the body of Justinian's law, was completed by Leo the Philosopher, and published (A.D. 887) by him as an authoritative code under the name of *Basilica*. That this code preserves in great measure the laws of Justinian is evident from the fact that it is regarded by modern writers as affording great assistance in the interpretation of the *Corpus Juris*.

With the conquest of Constantinople by the Turks and the fall of the Eastern Empire, the Koran became the chief legal authority. But still the Romano-Greek law was not entirely superseded. A policy somewhat akin to that of "personality" was adopted by the Turks. The Greeks were allowed, in many cases, to retain their own courts and laws. As a consequence, the *Basilica* have remained not only under the Turkish rule, but under the recent independent government, as an essential element of the laws of modern Greece.

2. Its Preservation in the Barbarian Kingdoms.—Passing to the West, we find that the Roman law was subject to more unfavorable influences on account of the overthrow of the provincial system and the introduction of peoples and institutions foreign to those of Rome. But these influences, unfavorable as they may have been, were not sufficient to destroy the remains of the civil law. The theory once held that all knowledge of the Roman law was lost with the fall of the Western Empire only to to be restored by the discovery of a manuscript of the *Corpus Juris* at the siege of Amalphi (A.D. 1135), has been so thoroughly exploded that it is now scarcely worthy of mention. In the noted work of Savigny on the History of the Roman Law in the Middle Ages, there is collected a mass of facts showing conclusively that the knowledge

of the civil law was never lost in Western Europe. We have already seen that between the reigns of Theodosius and Justinian, the kings of the Visigoths, Ostrogoths, and Burgundians permitted their Roman subjects to be governed by the Roman law, and framed codes for the benefit of these subjects. In other parts of Europe it might also be shown that, although there were issued no special Roman codes, yet the knowledge and practice of this system never died out. The survival of the ancient law during the barbarian period is evident from the following circumstances :

(1) In the first place, the relation which generally exists between a conquering and a conquered people would lead us naturally to conclude that the civilization of Rome survived in the new Germanic kingdoms. A superior civilization is never utterly destroyed by a conquest. The Greek culture, for example, was not overthrown when Achaia was subdued by the Romans. On the contrary, it was taken up by the conquerors, and its influence became more extensive than ever before. In the same way Carthage, Egypt, and Syria survived in the Roman Empire. Although the political system of Rome was dismembered by the German invaders, the conquerors did not destroy—they rather absorbed the civilization of the conquered people; and of that civilization the law was the most imperishable element.

(2) Again, the fact that the Roman municipal system was preserved in the West furnishes a presumption that the law continued to exist. The organization of the cities suffered very little change as the result of the invasions. The *curia* and the city magistrates—the *duumviri* and the *defensores*—still remained as features of the municipal government. The Roman provincial governors, it is true, disappeared, and their places were occupied

by the barbarian kings. But these new princes, as a general rule, assumed those functions only which were of a political nature. They required allegiance on the part of the Roman population; but the civil jurisdiction and the control of the private relations of the citizen generally remained with the *curia* and the municipal magistrates. As a result, the traditions and practice of the Roman law were kept alive in the cities.

(3) The influence of the clergy, moreover, tended to perpetuate the principles of the ancient civil law. The dignity which was attached to this body of men, their superior intelligence, and their close relation with the governing powers enabled them to guide in many respects the policy of the kings and the forms of legislation. The private law of the Romans was always looked upon by the clergy with the greatest respect; and the laws by which they themselves were governed, were largely pervaded by Roman principles. The clerical influence, therefore, was everywhere directed toward upholding the ancient jurisprudence. A respect for the laws of the conquered people was thus instilled into the minds of the barbarian kings; and their own customs were reduced to a codified form after the pattern of the Roman codes. By the peculiar position which they occupied, the clergy were, in fact, the mediators between Roman civilization and barbarism.

3. The Roman Law and the Feudal System.— As Europe gradually emerged from the barbarism of the early mediæval period, there grew up that peculiar form of social organization known as the feudal system. Previous to the growth of this system the Romans and the Germans had lived side by side, each retaining to a great extent the customs of their own ancestors. But during the ninth and tenth centuries the line of separation be-

tween the two races became less and less distinct. Common customs and institutions were developed that gave a more uniform character to the social and political system. These institutions, indeed, possessed many specific differences in various parts of Europe ; but there were certain general features everywhere present. The personal relation between lord and vassal, the " double ownership " of land involved in the feudal tenure, and the exercise of civil jurisdiction by the holders of fiefs were principles which in the tenth century prevailed throughout Western Europe.

Historians have been divided as to the origin of this peculiar social system. Some have professed to see in it nothing but the continuance of German customs. Others attempt to trace it exclusively to a Roman source. The more comprehensive view seems to be that it was the product of a union of Roman and German institutions resulting from the fusion of the two races. While it is impossible to refer all the essential features of feudalism to Roman sources, it is unquestionably true that Roman ideas became incorporated into this system,—which fact was conducive to the preservation of certain principles of the Roman law. One or two facts may be sufficient to illustrate this statement.

(1) The peculiar mode in which the feudal land was held and certain incidents connected with this tenure bear the marks of a Roman origin. This statement refers not merely to the fact pointed out by Sir Francis Palgrave, that the land was held on a military condition similar to that in which the colonial lands and the lands on the frontiers had been held by the Roman veterans ; but to the fact that the land was held by a perpetual lease, a sort of " double ownership " similar to the Roman *emphyteusis*. In the Roman law of *emphyteusis*, as in the feudal

tenures, the superior right of ownership on the part of the proprietor coexisted with the inferior right of ownership on the part of the tenant. In both cases, the right of the landlord, as well as that of the tenant, was hereditary. Moreover, certain specific incidents, such as "escheat" and "fine upon alienation," were common to both systems. Whether the growth of feudal tenures can be traced directly to a Roman origin or not, it is yet quite certain that some peculiar principles of the Roman law of property, which had survived in Europe after the fall of the Empire, came to be applied to the proprietary relation existing between the feudal lord and vassal.

(2) Again, the written remains that we possess of the mediæval feudal law show that it contained considerable infusions of Roman law. A compilation of the feudal law, made by the consuls of Milan, is extant, and is appended to some modern editions of the *Corpus Juris*, under the name of *Consuetudines Feudorum*. An examination of this collection is sufficient to show that the two bodies of law—the Roman and the feudal—are not entirely foreign to each other. The terminology, for example, is strikingly similar, especially in those parts which relate to servitudes, to the division of estates, to the contracts of purchase and sale, and of letting and hiring, to *pignus* and *hypotheca*, etc. We also find repeated in the feudal code the well-known formula of Ulpian, that "the precepts of the law are to live uprightly, to injure no one, and to render to every one his due." Moreover, the express statement is made that "some causes are to be tried by the Roman and some by the Lombard laws" (lib. 2, tit. 1, ed. Gothofredus).

It must not be supposed that the Roman law, which became mingled with feudal customs, was preserved in all its original purity. It was, of course,

modified in many respects, and adjusted to the new relations of society; but still it did not lose entirely the marks of its descent.

4. The Roman Law and the Mediæval Empire.—Another influence which tended to preserve certain principles of the ancient civil law during the Middle Ages was due to the survival of the Roman idea of imperialism. The idea of Rome never passed away from the minds of men. On the contrary, the imperial notion of government to which the people of Europe had become accustomed under the old Empire continued to hold sway over the political life of the West, even after the dissolution of the provinces. And, consequently, those doctrines of the civil law which were bound up with the idea of imperialism were fostered by the new rulers.

(1) The idea of the Roman Empire exercised a certain influence in Europe even during the interval which elapsed between the fall of the Western Empire and its restoration by Charlemagne. This is shown in the nominal submission which the new princes of the West yielded to the Eastern emperor. By accepting the titles of "consul," "patrician," etc. from the sovereign at Constantinople, the barbarian rulers evinced the respect which they still retained for the imperial government. Such facts seem to justify the opinion of Professor Bryce, that, according to the prevailing belief of the time, the Western Empire was not so much destroyed by the deposition of Romulus Augustus, as re-united under the common sovereignty of the Eastern emperor.

Besides, the barbarian kings not only accepted titles from the East, but affected Roman methods of administration in their several governments. It is true that they were led to do this, as well by the influence of the clergy as from their own reverence for the Em-

pire. Without detailing the causes that brought about this result, it is enough to say that the idea of monarchy among the barbarians was continually tending in the direction of imperialism. "So soon as the royal authority," says Sir Francis Palgrave, "became developed among any of the barbarians who settled upon Roman ground, all the kings took upon themselves, so far as they could, to govern according to the Roman policy, and agreeable to the maxims prevailing in the decline of the Empire, and declared to be imperial law."

(2) The idea of imperialism became a more conscious and efficient factor in the organization of society through the revival of the Western Empire by Charlemagne. Whatever reasons may have existed at the time to justify this movement, it was generally believed that Charlemagne was the legitimate successor of Constantine and Augustus. And there is no reason to doubt that the Emperor himself shared sincerely in this belief. With the restoration of the imperial title we see attempts made to consolidate and organize the peoples of Western Europe under one administration, and in a manner similar to that which had existed in former times. The Emperor adopted Roman methods, both in his central and in his provincial administration. Notwithstanding the prevalence of barbarian ideas, we can easily see that Charles the Great was moved by a policy more broad and elevating than that of a mere Frankish king—a policy, indeed, which aimed to restore the Roman Empire in fact, as well as in name, and which affected the judicial as well as the political system. The respect in which the Carlovingian rulers held the civil law of the Romans is evident from a capitulary of Charles the Bald, which provided "that in all the

provinces subject to the Roman law, the delinquent must be punished according to that law"; with the further statement of this prince, "that neither he nor his predecessors had ever designed to enact any thing repugnant to it."

(3) With the dismemberment of the Frankish Empire, the imperial title, after some interruption, passed to the German monarch, in whose hands the idea of the mediæval Empire attained its full development. Under the general concept of Rome as typifying supreme and universal dominion, the rulership of the Christian world was conceived to be divided between two co-ordinate spheres of government—the one temporal and the other spiritual. Within the one ruled the Roman Emperor; within the other, the Roman Pontiff. This idea of universal dominion, comprehending the secular and the spiritual government of the world, was known as the Holy Roman Empire. By such an exaltation of the idea of Rome, the Emperor and Pontiff alike drew upon the Roman law for legal principles upon which to support their respective claims to authority. Especially was this true of the German emperors, who thought they could definitely trace their line of succession to Charlemagne, to Constantine, and to Augustus; and who in support of their power called into requisition the principles of the civil law.

5. The Roman Law and the Mediæval Church.—Although the theory of the mediæval Empire involved the co-ordinate union of Church and state, the Church herself was not always bound by this theory. She regarded herself in the early period of the Middle Ages as independent of the state; and in the later period, as superior to the state. But in all the changes of her policy the Western Church never ceased, through the entire mediæval period, to be Roman; and during this time she

never ceased to feel the influence of Roman legislation.

(1) The close relation of the civil law to the Church is seen, at a very early period, in the preservation of ecclesiastical provisions established or at least sanctioned by the later emperors. The Church was not, of course, indebted to the Roman emperors for the articles of her faith or discipline. The ecclesiastical organization had become quite fully developed before Christianity was accepted as the state religion. After this time, however, the emperors not only sanctioned the new religion, but confirmed by their edicts the laws of the Church relating to faith, morals, and discipline; so that in the course of time, as Gosselin says, "there was hardly a single important article of faith or of discipline which was not confirmed by the imperial decrees." The extent to which ecclesiastical provisions formed a part of the later legislation of Rome is evident from the codes of Theodosius and Justinian. It was but natural that these elements of the Roman law should survive in the Church after the dissolution of the Empire.

(2) The devotion of the clergy to the civil law was another reason why it retained an influence in the Church. Having been accustomed to this system, the clergy continued to respect it after the barbarian invasions; and taking advantage of the principle of "personality" they chose the Roman code as the system by which they should be governed. "It seems to be certain," says Robertson, "that ecclesiastics never submitted, during the Middle Ages, to the laws contained in the codes of the barbarian nations, but were governed entirely by the Roman law." And this author further observes that "when any person entered the holy orders, it was usual for him to renounce the code of laws to which he had been formally subject, and to declare that he submitted to the Roman law."

(3) Again, on account of the attachment of the clergy to the forms and principles of the civil law, the influence of the law was extended with every encroachment made by the clergy upon the secular jurisdiction. By continually enlarging the authority of the ecclesiastical courts, it was soon in their power, says M. Fleury, "to withdraw almost every person and cause from the jurisdiction of the civil magistrate. As they thus obtained control over new causes, they applied to these causes, not the imperfect rules of the barbarians, but the more refined principles of the civil law." They set their faces against private warfare and trial by combat and favored the modes of judicial procedure derived from the Roman system. Thus the canon law derived large accessions from the civil law as a result of the extensive jurisdiction assumed by the ecclesiastical courts.

(4) Furthermore, with the growth of the papacy, the entire organization of the Western Church became pervaded with the imperialistic idea of government. The papacy may, in many respects, be regarded as an historical continuation of the ancient Roman monarchy. Hobbes not inaptly characterizes it as "the ghost of the old Empire sitting on its tomb and ruling in its name." The centralization of all authority in one supreme head was the idea of government which clung to the Latin Church, after the Latin Empire had fallen under the weight of the barbarian irruptions. At first this idea was attached only to the exercise of authority in matters spiritual; and was thus in harmony with the coördinate supremacy of the German emperors in matters temporal. But the rivalry which grew up between the Church and the Empire caused the Church to adopt a theory of supreme dominion more consistent than that involved in the idea

of the mediæval Empire, viz.: the theory that absolute sovereignty cannot be divided. Consequently, the temporal power was regarded not as coördinate with, but subordinate to, the spiritual power. In carrying out this idea the Pope succeeded to the place of the later Roman emperor, who had assumed to be the only supreme ruler of the Christian world. The methods of administration adopted by the papal government were hence, in many respects, derived from the old imperial government of Rome; and the principles of the civil law were in this way, as well as in others already mentioned, taken up into the canon law, becoming an important element in the legal system by means of which the ecclesiastical authority was maintained throughout Western Europe.

With reference to the profound influence of the Roman law during the mediæval period, Legaré very forcibly and truthfully says that "one does not very readily conceive how the history of the human mind in the middle ages, can be written without reference to a branch of study, which, in its double form of civil and canon law did, during that period, more than all others put together, to shape and control the opinions of mankind."

References.—The history and influence of the Roman law from the time of Justinian to the twelfth century will be found described with more or less of detail in the following works: Mackenzie, "Roman Law," pp. 30–33; Kaufmann's Mackeldey, pp. 61–66; Amos, "Roman Civil Law," Part III., ch. I., "The Civil Law in the East"; Schomberg, "Historical View of the Roman Law," pp. 164–204; Robertson's, "Charles V.," Intro. notes 24, 25; Irving, "Introduction to the Civil Law," pp. 56–77; Ortolan, "Hist. of Roman Legislation," §§ 115–123; Gosselin, "On the Power of the Popes in the Middle Ages," trans. by Kelly, Intro.; Rivier, "Introduction Historique," Appendice, ch. I; Marezoll, "Lehrbuch," §§ 37–39; Deurer, "Gesch. und Inst.," §§ 94, 95; Warnkœnig, "Vorschule," S., 164–180; Savigny, "Geschichte des Röm. Rechts

im Mittelalter," earlier chapters of the work; Haubold, "Manuale Basilicorum," Leipsic, 1819; Zachariä, "Historiæ Juris Græco-Romani Delineatio," Heidelberg, 1839; Heimbach, "Histoire du Droit Byzantin, ou du Droit Romain dans l'empire d'Orient," Paris, 1843–46. For the general influence of Roman imperialism in the West, the student is referred to the admirable work of Professor Bryce, "The Holy Roman Empire."

CHAPTER II.

THE REVIVAL OF THE STUDY OF THE ROMAN LAW FROM THE TWELFTH CENTURY.

THE traditions of the civil law which survived in the secular and ecclesiastical governments of Western Europe from the fifth to the twelfth century were drawn, in great part, from the ante-Justinian legislation. This law survived because it had already become incorporated into the life and practice of the provincials. The *Corpus Juris* itself possessed no positive authority, except perhaps in Italy, where it had been introduced when this territory was wrested by Justinian from the Ostrogoths. And even in Italy, as in other parts of Europe, the contact of German customs and the growth of new institutions tended to obscure the knowledge of the Roman law as a scientific system. It would perhaps be too much to say that there existed during this time no scientific knowledge whatever of the law in its codified form. But it is doubtless true that such knowledge was exceptional; and where it did exist it was confined almost exclusively to the clergy. The civil law which prevailed in Europe from the fifth to the twelfth century was, hence, not so much a system of scientific jurisprudence, as a body of legal rules inherited from the Empire and preserved in the practice of the Romano-Germanic states.

From the beginning of the twelfth century, however, the ancient law acquired a new position and influence in the legal systems of Europe. While we may discard the story of Amalphi, we cannot lose sight of the new and

powerful impulse which was, at this time, given to the study of the laws of Justinian. This movement was, in fact, a part of the general awakening of the human mind which followed the Crusades; and so important was it that the statement of Blackstone is hardly overdrawn, when he says that the revival of this study "established in the twelfth century a new Roman empire over most of the states of the continent."

1. The School of Bologna in Italy.—It was in Italy, the home of the Renaissance, that this scientific movement had its inception. Even in the eleventh century, a magistrate of Bologna had given a public course of law lectures in that city. But it was not until about the year 1120 that the school of Bologna became famous as a seat of legal studies. To this place students flocked from all parts of Europe to become acquainted with the original laws of Justinian. Among the names of many legal writers, those of Irnerius, Accursius, and Bartolus, may be noticed as marking the progress of legal study in Italy.

Irnerius is properly regarded as the founder of the school of Bologna. The method which he adopted in the study of the *Corpus Juris* was followed by his successors; and, in fact, gave the distinctive character to this school for nearly a hundred and fifty years. He was accustomed to illustrate the text of Justinian by making brief interlinear and marginal notes, called *glosses;* and this method of annotating the original text gave to him and his followers the name of *glossators.*

Accursius, who died in 1260, is chiefly known from his collection of the glosses of his predecessors. This collection is called the *Glossa Ordinaria.* It contains important extracts from the whole *Corpus Juris*, with the annotations of the glossators, supplemented by his

own comments. The value of this work has been variously estimated. On account of its many contradictions, it has often been made the object of ridicule; and has hence tended to bring into discredit the whole school which it represents. But Ortolan, with more charity than some others claims that the work must have possessed great utility, at the time at least when it was written, from the assistance and impulse which it gave to the new study of the civil law.

From the school of Bologna the interest in the Roman law extended to other parts of Italy. Bartolus, who lectured at Pisa, gave a new direction to legal study by departing from the method of the glossators. The great respect for the traditional gloss began to disappear, and more attention was paid to the exposition of the principles of the law. Although the independent method adopted by the Bartolists led to broader and more scientific notions, their excessive subtilty and finely spun theories have caused their writings to be well-nigh forgotten.

With all the defects of the Italian civilians, it is well to remember that their earnest labors, extending over a period of four hundred years, aroused an interest in the study of the Roman law throughout Europe which has never ceased to the present day.

2. Study of the Roman Law in France.—It is said that Lanfranc, in the middle of the eleventh century, gave lectures upon the Roman law in Normandy; and that there appeared, about the same time, in the south of France, a collection, called *Petri exceptiones legum Romanorum*, and derived from the Institutes, Digest, and Code of Justinian. But it was not until after the rise of the school of Bologna that the study of Justinian's laws began to exercise any general or marked influence upon

education in France. The study of the civil law in this country may be sketched under three distinct phases: its study from the twelfth to the sixteenth century; its study during the sixteenth and seventeenth centuries; and its study from the eighteenth century to the present.

(1) The first school of the civil law was established at Montpelier by Placentinus, whose name is said to be derived from the fact that he came from the Italian city of Placentia. The system which he introduced into France was that of the glossators; but this system was soon supplemented by broader and more liberal methods. There arose a class of civilians who, in their zeal for the Roman law, sought to instil its principles into the practice of the local courts and into the policy of the French kings. Louis IX. ordered the Roman law to be translated into French; and the *Établissements* of this monarch show that his own laws were in some cases drawn from Roman sources. The extraordinary favor with which the civil law was received, and the seeming prejudice which the canon law thereby incurred, led Pope Honorius III. to issue the decretal *Super-specula* (1220 A.D.), regulating the study of the *Corpus Juris* at Paris, the chief centre of theological learning. The purpose of this decretal was not, however, as is often supposed, to forbid absolutely the study of the civil law, but, as has been pointed out by M. de Ferriere, to prevent ecclesiastics from leaving the holy orders and betaking themselves to the secular professions of law and medicine. There is every reason to believe that the Roman law continued to be studied during this period, not only by civilians as a means of professional advancement, but even by ecclesiastics themselves as an aid to the interpretation of the canon law.

(2) From Montpelier and Paris the study was trans-

ferred to other parts of France ; and there sprang up the great schools of Bourges, Orleans, and Toulouse. In these seats of learning the law was taught from the texts of Justinian ; and legal instruction and investigation were marked by a scientific clearness and breadth unknown since the days of the Roman jurisconsults. Among the great French civilians who flourished during the sixteenth and seventeenth centuries, should be mentioned Alciat, who gave a polite and liberal character to the study of law ; Cujacius, whose influence has been enduring from the impulse which he gave to the historical method of legal study ; and Domat, who introduced a more systematic and philosophical treatment by attempting to set forth the "civil laws in their natural order."

(3) Since the eighteenth century the study of the civil law has been made auxiliary not only to liberal culture but also to the improvement and recasting of the French law. Among the jurists of this period, Pothier undoubtedly holds the most distinguished place. By his labors and his genius he "exercised an important influence upon the juridical studies and legislation of his country, inspiring both the jurist and the legislator with an earnest desire to adjust and digest the incongruous laws which prevailed at that time." Following in the steps of Domat, he published his *Pandectæ Justinianæ in novum ordinem digestæ*, in which the attempt was made to rearrange the laws of Justinian in a scientific and logical order. This work has received the highest encomiums of jurists ; and it was doubtless of great service in preparing the way for the formation of the *Code Napoleon*.

3. Study of the Roman Law in Holland.—In the early part of the sixteenth century the low countries were subject to Spain, where the study of the civil law had not been neglected. As early as 1254, a university

had been founded at Salamanca in imitation of the school at Bologna. But the rise of legal studies in Holland may be traced more directly to the French influence. The first impulse in this direction was given by Donellus, a French Protestant who had been driven from his native country during the religious wars. Under his influence the University of Leyden soon became famous as a seat of legal learning. Afterward, there sprang up the Dutch schools of Utrecht, Harderwyk, Groningen, and Franeker. During the sixteenth and seventeenth centuries Holland produced many able men who hold a high rank among the most distinguished of European civilians. Among these may be mentioned the names of Grotius, Vinnius, Huber, Voet, Schulting, and Bynkershoek. Two of these names at least should not be passed by without a brief notice.

"If Holland had added no other name to the annals of jurisprudence," says Dr. Irving, "the native country of Hugo Grotius must still have commanded our respect." The great distinction of this jurist rests not simply upon his exposition of the laws of Justinian, but upon his application of the principles of the Roman law to the relations between sovereign states. Although he was preceded by Gentilis and some other writers, his claim to be the real founder of the science of international law can never be questioned. His work, "De Jure Belli et Pacis," is a remarkable example of the utility which can be derived from the study of the civil law, and the mode in which its principles may be employed in the solution of legal and ethical questions.

One of the most thorough and critical expounders of the Roman law in Holland was Voet, who was a professor at Utrecht and Leyden. There have been few civilians whose opinions have been so highly esteemed in

every part of Europe; and in Scotland his authority surpassed even that of the ancient jurists. "With us nowadays," says Professor Wilde, in his preliminary lecture to the Institutes, "the authority of this whole law seems, in Scotland, to be referred to Voet. It is not the *Corpus Juris* that is held in estimation; and the authority of this Dutchman is now far beyond any authority of Paulus or Ulpian, or any decision of a Roman emperor, strengthened by the advice of all the lawyers in his states. In short, the commentaries of Voet are made our Roman law."

It must not be supposed that the interest in the civil law ceased with the seventeenth century. Its study was not, it is true, pursued with great zeal during the eighteenth century; but since the erection of the recent kingdom of the Netherlands, the universities of Leyden, Utrecht, and Groningen have been placed upon their former footing. Two new schools have also been established in Belgium, at Ghent and Liége, which have been honored by the labors of Warnkönig, one of the prominent civilians of the present century.

4. Study of Roman Law in Germany.—There is no country of modern times in which the study of the civil law has been pursued with greater zeal and success than in Germany. This study, beginning with the sixteenth century, has been continued with increasing interest until, at present, the German civilians hold the preeminent authority which hitherto belonged successively to the writers of Italy, France, and Holland. The writings of the earlier German civilians, though marked by great industry and research, were extremely technical and prolix, and possess very little interest for the student of the present. It is true that a broader appreciation of the civil law was awakened by such men as Leibnitz and

Thomasius, who looked upon it as an important element of liberal culture. But it was not until the time of Heineccius (1681–1741) that the German writers may be said to have attained a rank among the great civilians of Europe. From this time the various writers on the civil law may perhaps be grouped into two classes—according as they have followed the expository, or the historical, method.

The writings of the eighteenth century were, by way of eminence, expository in their character—although some works appeared having more or less of an historical purpose. The great representative writer of this period was Heineccius, whose concise and systematic method has gained for him a great reputation as a text-book writer. His works were for a long time used in many of the principal universities of Europe. Although his most important works were devoted to expounding the doctrines of the laws of Justinian, he did not ignore the importance of uniting the study of history with the exposition of the law. His work on "Roman Antiquities" was followed by the "History of Roman Jurisprudence" by Bach, and by other similar works, and perhaps paved the way for the historical school of the present century.

The recent historical school in Germany grew out of a reaction against the extreme idealistic tendencies of German philosophy, which sought to deduce the principles of positive law exclusively from ideas of "pure reason." This attempt to ignore the empirical element in law, and to construct a system of jurisprudence with no reference to the principles of historical growth, was opposed by a class of writers by whom the historical method was strongly emphasized. The founder of this school was Hugo; its chief representative was Savigny. The influence of this school has extended to other countries

of Europe ; and its methods has been of great service in throwing light upon the origin and development of the legal systems which prevail throughout the world.

It would be a mistake, however, to think that all the recent civilians of Germany have been devoted to the historical method. As in the eighteenth century there were exceptions to the expository mode of treatment that generally prevailed at that time, so in the present century the historical method has not been the exclusive method pursued by legal writers. Even Savigny met with a strong opponent in Thibaut, who believed that Germany, having thrown off the French yoke, should declare itself free from every foreign system of law, ancient as well as modern. The historical method as expounded by Savigny, has also at present a prominent antagonist in Ihering, who claims that law should be regarded not so much as the product of unconscious historical forces, as the result of a conscious struggle for the attainment of rights.

5. Study of the Roman Law in England.—As to the extent to which the civil law has been cultivated in England, there is by no means a uniform opinion among historians. The vulgar belief that the English law sustains no historical relation to the Roman, has no doubt prevented in England the same enthusiasm that has been displayed in other parts of Europe. But in spite of this lack of interest, due to an inadequate knowledge regarding the relation of the two systems to each other, it may yet be shown that the study has not been entirely neglected. Leaving for the present the question as to the historical influence of the Roman law upon the substance of the English law, a few observations may here be made regarding the cultivation of the civil law as a scientific study, both in earlier and in later times.

It is well known that almost immediately after the

rise of the school of Bologna, the Italian civilian, Vicarius, was invited to England by Theobald, Archbishop of Canterbury, to deliver lectures at Oxford. These lectures were very popular; and Vicarius wrote an epitome of the Digest and Code for the use of his students. The similarity of the civil and the canon law led to the idea that the former, as well as the latter, was an instrument of papal dominion, and prompted Stephen to forbid its further study. This interdict was only temporary in its effect, and the laws of Justinian continued to be studied as a part of a liberal education. The subsequent kings encouraged the study in the universities; and "every one that affected learning," says Arthur Duck, "both civil and ecclesiastical persons, eagerly pursued the study of the civil law as the high road to rewards and preferments." This author, after enumerating the civilians who are known to have taught in England, says: "It is plain that the study of the civil law has flourished in the kingdom from the reign of King Stephen; that our kings have ever had it in their royal protection, and since the reign of Henry VIII. have allowed an annual salary for the maintenance of the royal professors of the civil law, who were before supported by contributions from their auditors." And Professor Bryce also says that "there is abundant evidence that the study of the Roman law was regularly pursued down to the sixteenth century." Toward the close of this century the interest languished, and it was not until the succeeding century that the study was again pursued as a branch of legal science.

From the seventeenth century the study of the civil law in England has been pursued with considerable success, although, it must be confessed, with not the same zeal as that shown by the continental jurists. Only the more intelligent and liberal scholars and jurists

have been able to see the utility to be derived from its pursuit. Certain scholars, like Duck, Zouch, Taylor, Irving, and Phillimore, have been devoted to the study, and have acquired a European reputation; and certain jurists, like Selden, Hale, Holt, and Mansfield, have been well versed in its principles. And there are not wanting names at present—for example, those of Maine, Hunter, Holland, Clark, and Amos—to show that the study of the civil law is still pursued with interest and with profitable results.

References.—Mackenzie, "Roman Law," pp. 33-43; Tomkins and Jencken, "Modern Roman Law," Intr.; Bryce, "Academical Study of the Civil Law"; Irving, "Introduction to the Study of the Civil Law," pp. 78-167; Ortolan, "History of Roman Legislation," §§ 124-127; Kaufmann's Mackeldey, pp. 64-77; Marezoll, "Lehrbuch," §§ 40-42; Deurer, "Gesch. und Inst.," § 96; Warnkœnig, "Vorschule," S 181-295; Haubold, "Institutiones Juris Romani," Bd. I; Hugo, "Lehrbuch der Gesch. des Röm. Rechts seit Justinian," S 99-575; Savigny, "Geschichte des Röm. Rechts im Mittelalter," later chapters of the work; Duck, "De Usu et Auctoritate Juris Civilis Romani," etc.; Wenck, "Magister Vicarius Primus Juris Romani in Anglia Professor," Lipsiæ, 1820; Rivier, "Introduction Historique," Appendice, ch. II, with an extensive bibliography.

CHAPTER III.

THE ROMAN ELEMENT IN MODERN JURISPRUDENCE.

We are now prepared to consider the extent to which the principles of the Roman law have become a part of the substance of modern jurisprudence. The continued practice of this system, to a greater or less extent, after the fall of the Latin Empire, and the scientific interest shown in its study since the twelfth century, are facts which would naturally lead us to believe that it must have exercised an important influence upon the spirit of modern law. On examination it will be found that, as a result of the historical and scientific tendencies already described, the general legal principles which control the administration of justice throughout the courts of Christendom to-day, are essentially the same as those embodied in the code of Justinian. These principles have, of course, been applied in modern times to a wide range of social, industrial, and commercial facts which did not exist in the Roman Empire; but it is no less true that the general doctrines expressed in the various branches of the ancient civil law still influence, either consciously or unconsciously, nearly every modern tribunal.

It must be observed that the reception of the Roman law in modern times has been due not so much to any positive state authority as to the essential superiority of the law itself. As Puchta says: "It was not through any external power, but by the force of scientific conviction, that the Roman law, just like the philosophy of the

Greeks and the masterpieces of the ancient world, found an entrance into modern life." This fact is also expressed in a maxim which prevails upon the Continent: "*Servatur ubique jus Romanum non ratione imperii, sed rationis imperio.*"

1. The Modern Civil Law on the Continent.— We may illustrate the influence of the Roman law upon the substance of modern jurisprudence by first referring briefly to the "modern civil law." This term is usually applied to that part of the Roman system which has been preserved in the municipal laws of modern continental states. Although the term ought, perhaps, to be extended so as to apply to the whole body of principles derived from Roman jurisprudence wherever they may be found, we shall lose nothing by employing it in the ordinary sense, provided we bear in mind that the reception of these principles is by no means confined to the municipal, or national, laws of continental Europe. So well recognized is the fact that the states of the continent have derived the main part of their jurisprudence from the civil law of Rome, that they are often called the "civil-law countries," as opposed to the "common-law countries," that is England and her congeners, which are supposed to have an independent system of jurisprudence. The reception of the Roman law on the Continent may be illustrated by a few statements regarding the civil law in Italy, Spain, France, and Germany.

(1) In Italy, the *Corpus Juris* has never ceased, since the days of Justinian, to form an integral element of the legal system of the country. With the union of Italy to the Eastern Empire, the Roman code obtained full authority in all the courts. With the conquest of the country by the Lombards, and afterward by Charlemagne, a portion of the peninsula still remained under the Eastern

authority; and even in that part which became subject to the invaders, the Roman people were not deprived of their national laws. With the gradual amalgamation of the Romans and the Germans, the laws of these peoples became fused into a common body of legal customs. The clergy, by their great influence, emphasized the importance of the ancient jurisprudence, and succeeded in giving to the Roman element a predominant importance throughout the peninsula. More than all else, the veneration which the *Corpus Juris* acquired by the revival of its scientific study, caused it to be accepted by the courts as the chief authority in legal decisions. And this influential position it has in general retained until the present time. The authority of the *Corpus Juris* may, of course, be superseded by legislative enactments, or be modified by well-established customs; but where it is not thus superseded or modified, it is by presumption the law of the kingdom.

(2) In Spain, as we have already seen, the law rests historically upon the ante-Justinian legislation embodied in the code of Alaric II., together with the German customs brought into the country by the Visigoths. The almost unlimited influence of the clergy during the formation of the Visigothic state, secured the continuance of the Roman law, in spite of the efforts of some Gothic princes to abolish it. The conquest of the Saracens, indeed, imposed the Koran upon Spain for the time being; but the recovery of the peninsula by the Christians reëstablished the Gothic law with all its Roman ingredients. The revival of the scientific study of the law had the same general effect in Spain as elsewhere, although its influence may not have been so marked. The *Corpus Juris* was respected as a body of auxiliary law, to be quoted, but not to supersede established cus-

toms. It is doubtless true that the external authority of the laws of Justinian did not have as much weight in the Spanish courts as in those of some other countries; but an examination of the substance of the Spanish law is sufficient to convince any one who is acquainted with the Roman code that it is in fact largely derived from Roman sources. Among certain Spanish writers—for example, Asso and Manuel—it is the fashion to ignore this indebtedness. In the Institutes of the Spanish law, however, compiled by the writers just mentioned, not only are the survivals of the Roman law most apparent and striking, but the explicit statement is more than once made that certain rules are derived from the laws of Rome. "The truth is," says Mr. Johnston, the translator of Asso and Manuel's Institutes, "that almost every civilized European nation which may wish to assume credit for the originality and perfection of the principles of its jurisprudene, proclaims its plagiary in the very promulgation of those principles; and it appears something like an act of imbecile ingratitude to wish to diminish the debt, more or less, due to their great prototype, Rome. To no nation more than Spain does this charge attach for the disavowal of this obligation." But still certain legal writers of Spain—such as Castro, Alvarez, and Palacios—openly avow the Roman or civil law to be a part of the common law of the country.

The various compilations of the Spanish law have tended to reduce to a permanent form whatever Roman elements it may have hitherto contained. As early as 1255, the "Fuero Real" was issued by Alfonzo the Wise. This prince also collected the "Partidas," a code which was not, however, put into force until about 1348. A significant remark is made by Alvarez, in reviewing the history of the royal laws of Spain, to the effect that the "Partidas"

were "composed in great measure of the laws of the Roman codes, and of chapters from the canonical law." These collections formed the basis of the later codes—the "Recopilacion," published in 1567 under Philip II; and the "Novisima Recopilacion," issued in 1805 under Charles IV.

(3) In France, influences of a similar kind have been at work to make the Roman law a constituent part of the national jurisprudence. In early times these influences were stronger in the south than in the north of France, which gave rise to the distinction between the country of the written law (*pays de droit écrit*) and the country of the customary law (*pays de coutume*). The proximity of Southern France to Italy, its larger number of Roman municipalities, its occupation by the Visigoths and Burgundians among whom Roman codes had been published, and, later, the ardor shown in the revived study of the law at Montpelier and Toulouse, are facts sufficient to explain the preponderance of the Roman law in the south. But its influence was by no means unfelt in the north. Charlemagne had republished the code of Alaric II., and both he and his successors recognized the principle of "personality." And in later times the Roman law came to be treated as common law by some cities, as Metz, Toul, and Thionville, and also by certain provinces, as Auvergne, Bourbon, and Berry.

The growth of the French monarchy had a tendency to unite the north and the south under a common administration of justice, and to give a more extended influence to the laws of Justinian. This movement was greatly aided by the civil lawyers (*légistes*), who used their superior knowledge not only to repress the anarchy of the feudal system, but to build up a uniform system of jurisprudence throughout the kingdom. By their admission

to the baronial courts and the Parlement of Paris, they introduced the principles of the civil law into all the tribunals of France. The authority thus given to these principles is evident from the statements of Pierre de Fontaine and Beaumanoir, to the effect that the Roman law was in their time considered as common law in default of well-established customs to the contrary.

With the decline of barbarism and feudal customs, and the more complete organization of the judicature, together with the increasing influence of the *légistes*, the civil law became by far the most important element in the laws of France. The "Code Napoléon," in which these laws are brought into a codified form, is, hence, in great part, a republication of the laws of Justinian, as they have in the process of time become adjusted to the needs of the French nation.

(4) In Germany, we find a state of things which, in early times, was entirely different from that existing in other parts of the continent; but which, in later times, was quite similar to that already described in France. Since the Romans gained no permanent foothold beyond the Rhine, this country was affected by scarcely any Latin influence before the fall of the Empire. The people, unmixed with foreign blood, retained the primitive customs of their ancestors. Even the principle of "personality," which in other countries favored the continuance of the Roman law, enabled the Saxons who were brought within the empire of Charlemagne to cling to their old traditions. While, therefore, the Goths, the Burgundians, and the Franks, who had sought new homes across the Rhine, were brought under the Romanizing influences of the south, the Germans who remained in their original seats developed a customary law of their own. This body of customs was in the thirteenth century com-

piled in the "Saxon Mirror" (*Sachsen Spiegel*), and later in the "Swabian Mirror" (*Schwaben Spiegel*), which codes represent an important historical element in the local jurisprudence of the modern German states.

But causes similar to those existing in other parts of Europe gave to the civil law a marked influence upon the general laws of the Empire The growth of the monarchy, the influence of the clergy upon the civil power, but especially the conquest of Italy and the revival of the imperial title, together with the prevailing theory that the German Empire was merely a continuation of the Roman —led to the introduction of the civil law as a support to the royal power. This gave a new importance to the civil lawyers who had received their legal education in Italy. These persons espoused the cause of the emperor as against the feudal nobility, and the alliance thus formed gave to the *Corpus Juris* a predominant authority in the imperial courts. The subsequent cultivation of the law in the German universities, and the new organization of the judicial system, by which the civilians were given a place in the administration of justice, opened the way completely to the influx of Roman ideas. The civil law, so far as it was applicable in judicial cases, became incorporated as a part of the imperial law ; and the later codification of the law in Prussia, as well as in Austria, while professing to supersede the Roman law, has, in fact, given to the body of the civil law already received by the courts, a permanent legislative sanction. Besides those portions which have thus become embodied in the German law through judicial and legislative sanctions, the *Corpus Juris* itself has still, with few exceptions, a subsidiary authority in the courts, having a binding force in default of contrary statute or custom.

2. The Roman Element in the English Law.

—That the laws of Continental Europe are grounded upon the Roman law is a fact everywhere recognized. As we approach, however, the question as to its influence upon the English law, we come upon controverted ground. The theory was for a long time held, and still prevails to a certain extent, "that the development of the English law has been entirely uninfluenced by the Roman, and that it should be regarded as merely the natural indigenous product of the English soil." In opposition to this view, certain jurists, such as Selden, Hale, and Lord Holt, have for a long time recognized the fact that many portions of the English law have been drawn from Roman sources; and, more recently, certain legal historians, such as Spence and Finlason, have earnestly advocated the opinion that the great body of the English law, notwithstanding its own distinctive features, is indebted to the Roman more largely than is generally supposed. While there can be no doubt regarding the Roman influence upon the ecclesiastical, the chancery, and the admiralty laws, the theory is gaining ground that even the early common law was based upon, or at least greatly influenced by, Roman ideas. This influence was not, of course, due so much to any formal sanction, as to causes which were indirect and often unconscious in their operation.

To estimate the full extent to which the laws of Rome have passed into England, it would be necessary to consider their early introduction into Britain by the Roman occupation; their continuance after the Saxon migrations and the Norman Conquest; their incorporation into the early common law, as shown by the early text-book writers; and their influence upon the other branches of English jurisprudence. It will be impossible for us here to follow out this line of argument; but those who pursue such an investigation, uninfluenced by a national bias, will be drawn inevitably to the following conclusions:

(1) The Roman law was firmly implanted in Britain while that island was yet a province of the Empire. The Roman rule continued in that country for nearly four hundred years, during which time justice was administered by Papinian, and also, as Selden thinks, by Paulus and Ulpian. That the island was not reduced merely for a military purpose is evident, not only from the general policy, expressed in the words of Seneca, that "where the Roman conquers, he also inhabits," but also from the specific testimony of such writers as Tacitus and William of Malmesbury. Without going into the details of this question, it must suffice to say that all the evidence derived from the extent of the Roman occupation; the thorough organization of the provincial system; the introduction of Roman and Italian colonists; the large number of Roman municipalities; the extension of civil rights to all the free inhabitants of the province by the general edict of Caracalla; the administration of justice by eminent Roman jurists, and the introduction into the Roman code of opinions delivered in Britain—combine to show that the Roman law prevailed in England during this period.

(2) The Roman law was not abolished by the Anglo-Saxon invasions and the Norman Conquest. The notion that it was so abolished is due to mistaken views regarding the effect of the withdrawal of the Roman legions, and regarding the importance of the early Saxon and Norman institutions, as well as to an inadequate knowledge of the substance of the law itself during this period. It is impossible to suppose that the transfer of a few thousand soldiers across the channel could uproot four centuries of civilization. On the contrary, the cities still remained, and the Roman law continued to be administered in them, even after the Saxons introduced

their barbarous customs. During this period the influence of the clergy, here, as elsewhere, was always in favor of the civilized code of the Empire. These persons aided in the administration of justice in the Saxon courts; and it was under their influence, Bede tells us, that the Saxon customs were codified in imitation of the Roman laws. Mr. Spence has collected a large number of legal principles current in England at this time which can be explained only on the theory of their Roman origin.

The Norman Conquest, moreover, did not entirely destroy the Roman influence. Regarding the body of law, known as the *Leges Henrici Primi*, the only important collection made during this period, Mr. Finlason says it "is composed of equal portions of Roman law and Saxon law, and is an obvious endeavor to engraft the former upon the latter, or rather to unite a Roman system with Saxon institutions." It may be safely asserted that at no time from the organization of Britain as a Roman province to the end of the Anglo-Norman period did the Roman law cease to be an important element of the legal institutions of England.

(3) The actual incorporation of the Roman law into the substance of the English common law is shown from the works of the early text-book writers. The revival of the scientific study of the civil law under Vicarius and his successors resulted—notwithstanding the opposition sometimes shown to the new studies—in the desire to reduce the prevailing customs to a systematic form. These customs comprised Roman as well as Saxon and Norman elements, as is evident from the writings of Glanville, Bracton, and the author known as Fleta. Of these writings the work of Bracton is the great monument of the early common law. It is called *De Legibus et Consuetudinibus Angliæ*, and the author says in his preface

that he is expounding the law actually in force in the English courts. An exhaustive analysis of this work by a recent German writer, Güterbock, shows that the English common law relating to persons, to property, to contracts, and to procedure is governed by principles and rules, and even expressed in phraseology, to a great extent, identical with those found in the laws of Justinian. And Mr. Spence, whose thorough knowledge of both the English and the Roman law is unquestioned, says: "My own observation would lead me to say that there is scarcely a principle of law incorporated in the treatise of Bracton that has survived to our own time, which may not be traced to the Roman law."

(4) The influence of the Roman law in England is still more clearly seen in other branches of the national jurisprudence. It is seen in the ecclesiastical law, in which a great variety of Roman principles regarding the administration of estates passed into England. It is also seen in the chancery law, in which Roman doctrines were employed by the English chancellor in the construction of the law relating to uses and trusts, the right of redemption in mortgages, the extent of liability in cases of ignorance and fraud, etc. It is, moreover, seen in the commercial law, in which the general principles relating to contracts which had been developed by the Roman prætors and jurists became absorbed into the English law—notably under the judicial reforms of Lord Mansfield.

Speaking generally, it may be said that, with the exception of certain provisions relating chiefly to the law of real property, the most important principles of the English law, not established by direct legislation, may be traced either directly or remotely to the laws of Rome. There is a strange fascination which seems to lead some

authors to attempt to ground the great principles of English jurisprudence—and especially those that are derived from the common law—upon the barbarous customs of the Anglo-Saxons. This spirit is well rebuked by Mr. Goldsmith, an eminent English writer on Equity. "It is scarcely possible," says this jurist, "to suppose that any well-read lawyer, captivated as he may be with the notion of Saxon liberty, can proceed far in the study of either system without perceiving a striking analogy between the civil law of Rome and the common law of England, not only as to their maxims and principles, and their technical phraseology, but also their method of practice, showing how early, and to what extent, one system became the instructor and guide of the other. To some minds there is a black-letter witchcraft in the expression 'Anglo-Saxon liberty,' 'ancient constitution,' and the like, whilst the chances are that, in furnishing an example, they may not unfrequently fall into the whimsical position of seizing upon some relique of Roman jurisprudence, to prove the perfection and justice of their own."

3. The Roman Law and the Modern Canon Law.—Besides the municipal laws of different countries, the laws of the Church, which have formed an important part of modern European jurisprudence, have also taken up and perpetuated the principles of Roman jurisprudence. By the term "canon law" is meant "the body of rules and regulations which were primarily established by the Christian Church and enforced by ecclesiastical authority, but which in the course of time became extended to many matters purely civil, and were recognized and sanctioned by the tribunals of the state." We have already seen how the early Church became related to the Roman Empire; how the clergy acquired jurisdiction

in civil as well as in ecclesiastical matters; and how the imperial system of law furnished a repository of legal principles from which the Church derived many rules applicable to those cases which came under its jurisdiction. By these means the Church has aided in preserving the Roman law to modern times.

The modern stage of the canon law may be said to date from the formation of the *Corpus Juris Canonici*, which was a direct result of the revival of the study of civil law in Italy. It is difficult to indicate in a few words the precise relation of the civil to the canon law. But a brief reference to the form, the substance, and the authority of the latter code will serve to show that it has been a sort of counterpart or reflection of the laws of Justinian, and has aided in extending their influence in modern Europe.

(1) The form of the *Corpus Juris Canonici*, as regards not only its name but its arrangement, was fashioned after that of the *Corpus Juris Civilis*. In imitation of the Digest, the Code, and the Novels, the main body of the canon law has taken the form of three distinct compilations.

The first part is the "Decree" of Gratian (*Decretum Gratiani*, A. D. 1140), which was published by Gratian, a Benedictine monk of Bologna; and was based upon all the previous legislation of the Church, contained in the acts of councils, decrees of popes, and previous compilations.

The second part consists of the "Decretals," including the "Five Decretals" of Gregory IX. (*Quinque Libri Decretalium Gregorii Nono*, A. D. 1234), which is said to have been issued on account of the light thrown upon the previous law by the study of Justinian's works; the "Sixth Decretal" (*Liber Sixtus Decretalium*, A. D.

1294), prepared by order of Boniface VIII.; and the "Clementine Constitutions" (*Clementis Papæ Constitutiones*, A. D. 1313), issued by Clement V., and sometimes called the "Seventh Decretal."

The third part consists of the "Extravagantes," including those issued by John XXII. (*Extravagantes Johannis XXII.*, A. D. 1340), and others issued from the time of Urban VI. to that of Sixtus IV. (*Extravagantes Communes*, compiled A. D. 1483).

The formal relation of this body of law to the codification of Justinian is well expressed in a statement often quoted from the work of Arthur Duck, on the "Use and Authority of the Civil Law": "The Roman pontiffs effected that in the Church which Justinian effected in the Roman Empire. They caused Gratian's Decree to be published in imitation of the Pandects; the Decretals in imitation of the Code; the Clementine Constitutions and the Extravagantes in imitation of the Novels; and to complete the work, Paul IV. ordered Launcellot to prepare Institutes, which were published at Rome under Gregory XIII., and added to the *Corpus Juris Canonici*."

(2) As regards the substance of the canon law, there is, of course, much that deals with matters peculiar to Church doctrine and discipline, to the functions of the clergy, etc., which bear few marks of the ancient secular law. But there are yet many examples which indicate the survival of Roman legislation in the Church. In opening the body of the canon law, we first notice the preliminary statements of the "Decree" which define the general principles and sources of the law, and which reproduce, in many respects, the phraseology of the Digest. More striking examples are seen in the various titles of the "Decretals," which, for instance, relate to the elements of procedure, as *restitutio in integrum*, *litis contestatio*, presumptions, exceptions;

to the different kinds of contracts, as *commodatum*, deposit, purchase and sale, letting and hiring, exchange; to modes of acquiring property, as prescription, donations, testaments; to dower, and donation between husband and wife, etc. And the rules and principles which are found in the various branches of the law are largely identical with those found in the corresponding branches of the civil law.

In many cases, it is true that the principles of the canon law are modified to meet the advanced ideas of the Church regarding morality and justice. For instance, the laws relating to marriage and divorce are more closely linked with the religious idea of the family than was the case in the laws of the Empire. So, too, the principle of good faith (*bona fides*) on the part of the possessor, when this is made the condition of a good prescriptive title, is more strongly emphasized in the canon than in the civil law. But, in spite of such changes, it is clearly evident that the laws of Justinian have been woven into the fabric of the canon law, and in that form have obtained the sanction of the Church.

(3) So far as the ancient law has been taken up into the *Corpus Juris Canonici*, it has been kept alive through the influence and authority which the canon law itself has obtained in different countries. The peculiar position of the Latin Church in the growth of modern states has served to bring this code into close connection with the national laws of Europe. As long as the papal supremacy was recognized, the canon law possessed an unlimited authority in the Church, and formed, in great part, the basis of the ecclesiastical law in every country. And even after the decline of the papal power, it generally retained the force of subsidiary law in Protestant states. In Scotland and Germany it has not only exercised a great in-

fluence upon the common law, but its authority is openly acknowledged when not opposed by the established law or customs of the land. In France, though it is accepted only so far as it has received the formal sanction of the state, it has yet contributed much to the ecclesiastical and secular jurisprudence. Even in England, where the opposition to it has been most marked, it has retained, in connection with the civil law, an authority in the ecclesiastical, the admiralty, the military courts, and the courts of the two universities. On account of the peculiar jurisdiction of the ecclesiastical courts in England, a considerable portion of the law relating to marriage, divorce, inheritance, and wardship have been derived from the principles of the canon law, which in many cases, as has been said, can be traced to the ancient civil law.

In addition to this, it may be remarked, in passing, that the administration of the estates of deceased persons, which formerly characterized the English diocesan courts, indicates the origin of the distinct surrogate jurisdiction that prevails in the United States ; and thereby suggests an important point of contract between the Roman canon law and American jurisprudence.

4. The Roman Law and Modern International Law.—Not only has the Roman law been preserved in the municipal and ecclesiastical jurisprudence of modern Europe ; it has also exercised a marked influence on the growth of that body of rules by which the states of Europe are bound together in one moral commonwealth. International law is by way of eminence a product of the last three hundred years. The Greek states, it is true, recognized certain mutual obligations in times of peace and war ; and the Romans observed certain forms in declaring war, which were expressed in their *jus feciale*. During the Middle Ages, also, the papacy sometimes exercised a

sort of international authority ; and certain rules governing international trade were also embodied in maritime codes, such as the *Consulato del Mare* and the laws of Oleron, of Wisbuy, and of the Hanseatic towns. But still the fact remains that international law has obtained a definite scientific form only since the time of Hugo Grotius. The introduction of Roman ideas into the writings of this great publicist and of his successors, and consequently their influence upon certain general principles of international law, are facts that might be illustrated in many ways. A few examples only of this influence can be noticed here.

(1) The most fundamental point of contact between Roman and modern international law is to be found in the idea of natural law embodied in the *jus gentium.* The *jus gentium* was not, it is true, conceived by the Romans as applying to the relations between independent states. It was, nevertheless, so interpreted by the early publicists of modern times ; and the ambiguity thus attaching to the term, *jus gentium*, led, in fact, to the most important and beneficent results. It came to be regarded, not simply as a law common to all states, nor even as a natural law universally binding upon individuals,—the earlier and later ideas of the Romans,—but as a universal law morally binding upon all nations *inter se.* While Grotius rejected Ulpian's definition of the *jus naturale*, he accepted the idea of natural law expressed in the later *jus gentium* of the Romans, as a body of principles based upon the common reason of mankind. It was therefore possible for him to extend the equitable principles already developed in the Roman *jus gentium* to the relations existing between sovereign states. States were looked upon as moral persons—subjects of the natural law, and as equal to each other in their moral rights and obligations.

(2) The contact between Roman and international jurisprudence may be seen more specifically in the law relating to national dominion. Mr. Maine has clearly shown how the application of the Roman law of ownership (*dominium*) was favored by the association of political sovereignty with territory. The old mediæval idea that a king was merely the chief of his tribe, or people, was gradually superseded by the idea that he was the owner of the soil occupied by his people. Hence it became possible to look upon the sovereigns of Europe as "a group of Roman proprietors." Their respective rights over their own lands, and their territorial relations to each other, could be justly determined upon principles derived from the Roman law of *dominium*, or ownership. The influence of these principles is seen in the definition of those things common to all mankind (*res communes*); in the founding of the right of discovery upon the law of "occupation"; and in the determining of other modes of territorial acquisition, as voluntary transfer (*traditio*) and long possession (*præscriptio*).

(3) Furthermore, the law relating to treaties is, to a great extent, founded upon principles derived from the Roman law of contracts. As states are moral persons, the obligations which they establish by mutual agreement are binding in so far as a recession from the agreement would be injurious to either party. The Roman law of contract was largely derived from the *jus gentium*, and was liberally interpreted according to the principles of natural equity. It thus furnished a broad basis for the law relating to those obligations which grow out of national agreements. Grotius not only founds the conventional obligations between states upon the law of contract, but shows, in a manner similar to that pursued by the Roman jurists, how specific obligations are affected

by damages wrongfully done, and by other accessory facts.

The connection between the two systems might, further, be indicated by selecting other examples from the work of Grotius, and by pointing out the influence of Grotius upon more recent publicists, and also by showing how the scientific principles of Grotius and his successors have been taken up into the concrete body of rules actually binding between civilized nations. Such examples, however, would but furnish additional evidence that modern international law cannot be adequately understood without some reference to the Roman sources from which it is in great measure derived. In the words of Mr. Maine: "If International Law be not studied historically—if we fail to comprehend, first, the influence of certain theories of the Roman jurisconsults on the mind of Hugo Grotius, and, next, the influence of the great book of Grotius on International Jurisprudence—we lose at once all chance of comprehending that body of rules which alone protects the European commonwealth from anarchy."

5. Spread of the Roman Law by Colonization.—One of the most important movements of modern history has been the spread of European civilization by the establishment of colonies. It is but natural to suppose that such a movement would result in transferring to other lands the ideas and institutions already existing in European states. Making all due allowance for the changes which a legal system must undergo in being adjusted to the customs of a foreign people, it is yet true that the laws of European colonies are, in great part, the laws of Europe. The administration of justice in these territories has generally been conducted by European officials, and according to the forms of European jurisprudence. Even when native courts and customs have been recognized,

the judicial decisions have been subject to review by the tribunals of the mother country. Hence, if we examine the laws of those countries which have sustained, or which still sustain, a colonial relation to Europe, we shall find that wherever European power has extended, there have been diffused the principles which modern jurisprudence has derived from Rome. While a large number of colonial states have passed from the state of dependence to that of independence, the laws established by the mother country have, to a greater or less extent, remained in force as a part of the customary law. Important traces of the Roman law may, therefore, be found in the colonial states of Spain, Holland, France, and even of England.

(1) The extensive discoveries made by Spain in the East and West Indies, in Mexico and South America, although prompted by the spirit of commercial enterprise, were accompanied by a policy which required the permanent possession and organization of the conquered countries. The supreme authority over all the colonies was vested in a general council (*consejo de Indias*) residing at Madrid. The local authority was exercised by viceroys (*virreyes*), and justice was administered by local tribunals (*audiencias*), from whose decision there was an appeal to the general council. Under such an administration, the Spanish laws were transported to the newly discovered countries. With the throwing off of the Spanish yoke and the formation of independent states, the civil law of Spain with its Roman ingredients remained as an important element of the national jurisprudence.

(2) The principal colonial settlements of the Dutch were made in India, Java, and Japan. By repeated successes over the Portuguese, the Dutch held for a time the control of the commerce of the East. The exclusive commercial spirit which inspired them did not, however,

require such an extensive occupation of the inland territory as that to which the Spaniards, by their desire to possess the mining districts, had been driven in America. But still the Dutch organized local governments, and their laws became introduced into the East, the most important example of this being the Dutch laws of Ceylon, which contained a large Roman element.

(3) Although France took some part in the East Indian trade, her colonies were principally confined to America, where she took possession of the countries bordering on the St. Lawrence and the Mississippi. These countries were organized under French rule, and justice was administered in accordance with the laws of the mother country. When her possessions on the St. Lawrence were wrested from her by the English, a deposit of French civil law remained in the customary law of Lower Canada. A similar result took place in Louisiana when the territory of the Mississippi was purchased by the United States. The code of Louisiana, in which the customary law of this State was compiled in 1824, is regarded by many as the most faithful and systematic compendium of the modern civil law. This code is certainly a remarkable monument of the influence of Roman institutions in the New World.

(4) England must, of course, be regarded as the most important colonizing country of recent times. If we accepted the old view which assumes the absolute independence of the laws of England from those of Rome, we might despair of finding in her colonies any deposit of Roman law. But the result of the recent investigations to which we have referred as establishing the historical connection between the Roman jurisprudence and the various branches of the English law, would lead us to believe that the laws of the United States, as well as of

the colonial countries still under the British rule, have a genetic relation to the legal system developed by the Roman prætors and jurisconsults. The colonies in America adopted, at the outset, the English common law, which has remained a fundamental element of American jurisprudence. The portion of the common law, however, which relates to real property and which is the most distinctive feature of the English law, has been greatly affected by the prejudice existing in this country against feudal ideas; and there has consequently been a tendency to assimilate the law of real property to that of personal property, which is more strictly in harmony with the principles derived from the ancient jurists. The English commercial law, moreover, which possesses large infusions of Roman law, and the principles developed in the English chancery and ecclesiastical courts, have been, in great measure, taken up by the various tribunals in this country.

More direct remains of the civil law may be found in those colonies which the English have obtained from other countries. These remains may be seen not only in the province of lower Canada, to which we have already referred, but in other countries as well. Chancellor Kent says: "The Roman law was blended with that of the Dutch and carried into their Asiatic possessions; and when the island of Ceylon passed into the hands of the English, justice was directed to be administered according to the former system of laws in the Dutch courts; and Van Leeuwen's commentaries of the Roman Dutch law were translated into English in 1820 expressly for the benefit of the English judiciary in the country." So, too, when the island of Trinidad passed from Spain to the English, a translation of Asso and Manuel's Institutes was published to facilitate an

acquaintance with the Spanish civil law which remained in force after the English occupation of the island.

These illustrations must suffice to indicate the important place that the principles of the Roman law now hold in the various systems of jurisprudence throughout the civilized world. In speaking of the modern influence of the Roman law, Chancellor Kent says: "With most of the European nations, and in the new states of Spanish America, and in one of the United States, it constitutes the principal basis of their unwritten or common law. It exerts a very considerable influence upon our own municipal law, and particularly on those branches of it which are of equity and admiralty jurisdiction, or fall within the cognizance of the surrogate or consistorial courts. * * * It is now taught and obeyed not only in France, Spain, Germany, Holland, and Scotland, but in the islands of the Indian Ocean, and on the banks of the Mississippi and St. Lawrence. So true it seems are the words of d'Aguesseau, that 'the grand destinies of Rome are not yet accomplished; she reigns throughout the world by her reason, after having ceased to reign by her authority.'"

References.—This subject is so extensive that it is difficult to make a brief list of references touching all the points involved in its investigation. For a general survey of the subject the student is referred to Sheldon Amos, "Roman Civil Law," Part III., ch. 2, "The Civil Law in the West," but especially § 4, "The Civil Law in Modern States previous to the French Revolution"; Maine, "Essay on Roman Law and Legal Education," Cambridge Essays, 1856; Kaufmann's Mackeldey, vol. I., pp. 64–87; Tomkins and Jencken, "Modern Roman Law," Intr.; Ortolan, "Hist. of Roman Legislation," §§ 119–128; Rivier, "Revue de Legislation Ancienne et Moderne," 1873; Spangenberg, "Einleitung in das Römisch-Justinianeische Rechtsbuch," S. 94–116, on the present authority of the Roman law in Italy, Portugal, France, England, Netherlands,

Germany, Poland, Denmark, Sweden, Switzerland, etc.; Duck (Arthur), "De Usu et Auctoritate Juris Civilis Romanorum in Dominiis Principum Christianorum. For the influence of the civil law in France, *cf.*, Le Bas, "Dictionnaire Encyclopédique de la France," "Droit Romain"; Ferrier, "Hist. of the Roman or Civil Law," trans. by J. Beaver, Esq., ch. 26, "Of the Use of the Roman Law in France"; the "Code Napoléon." For Spain, *cf.*, Guizot, "Hist. of Representative Government," Part I., Lect. 26; Alvarez, "Instituciones de Derecho Real de España," part relating to the history of the royal laws, translated in White's "New Recopilacion," I., pp. 352–356; Asso and Manuel, "Institutes of the Civil Law of Spain," trans. by L. F. C. Johnston, Esq. For Germany, *cf.*, Meyer, "Esprit, Origine, et Progrès des Institutions Judiciares," tom. IV., ch. 9, "Intro. du Droit Romain et Canon en Allemagne"; Eichhorn, "Deutsche Staats- und Rechts-Geschichte"; the "Fredrician Code," Eng. trans., Edinburgh, 1761. The extent to which the civil law has become embodied in the German law may be seen in the works entitled "Pandekten," *e. g.*, Puchta, "Lehrbuch der Pandekten," Leipzig, 1856; Von Vangerow, "Lehrbuch der Pandekten," Leipzig, 1863; Arndts, "Lehrbuch der Pandekten," München, 1865; Windscheid, "Lehrbuch der Pandektenrechts," Düsseldorf, 1870. For England, *cf.*, Finlason's Introduction to Reeve's "History of the English Law"; Spence, "Equitable Jurisdiction of the Court of Chancery," vol. I., and "Origin of the Laws of Modern Europe," especially ch. 25; Hoffman, "Course of Legal Study," vol. II., p. 504, *et seq.*; Story, "Comm. on Equity," vol. I., § 23; Goldsmith, "Doctrine and Practice of Equity," pp. 6–16; *Law Review and Quarterly Journal of British and Foreign Jurisprudence*, vol. V., Nov., 1846, "Origin of the Common Law"; Güterbock, "Bracton and his Relation to the Roman Law," Eng. trans.; Selden, "Dissertatio ad Fletam"; Diemer, "Comm. de Usu et Auctoritate Juris Romani in Anglia." For the canon law, *cf.*, Butler, "Horæ Juridicæ"; "Enc. Britannica," ninth edition, "Canon Law" (W. F. Hunter); "Enc. of Christian Antiquities," "Law" (Sheldon Amos), "Canon Law" (Benjamin Shaw); Phillimore, "Influence of the Canon Law," Oxford Essays, 1858; Arndt's "Encyclopädie, §§ 119–121; Gibson, "Codex Juris Ecclesiastici Anglicani," Preface; Schulte, "Lehrbuch des Katholischen Kirchenrechts," 1868, "Geschichte der Quellen und Literatur des canonischen Rechts," 1877; "Corpus Juris Canonici," Editio Lipsiensis Secunda, Lipsiæ, 1879.

For influence of Roman law upon international law, *cf.*, Maine, "Ancient Law," ch. 4; "Enc. Brit.." ninth ed., "International Law" (Prof. E. Robertson); Wheaton, "Hist. of International Law," Intr. For its influence through colonization, *cf.*, Kent, "Commentaries," vol. I., ch. 23; White, "New Recopilacion," containing ordinances of Great Britain, France, and Spain, with reference to their respective colonies, with those of Mexico and Spain on the same subject; "Civil Code of the State of Louisiana," ed. by Upton and Jennings; Heeren, "European States and Colonies," Eng. Trans., 1846.

PART SECOND.

THE GENERAL PRINCIPLES OF THE ROMAN LAW.

INTRODUCTION.

FUNDAMENTAL CONCEPTS AND DIVISIONS OF THE LAW.

HAVING completed our review of the history of the Roman law, we proceed to consider the substance of the law itself, as it existed at the time of Justinian. And as we do this, we should keep in mind the fact, which has been emphasized by our historical review, that we are dealing with a body of legal truth that forms the common basis of nearly all the modern systems of positive law. While we are professedly studying the laws of ancient Rome, we are in fact studying certain general doctrines, which, to a greater or less extent, pervade the laws of all civilized countries. It is, of course, true that some peculiar features of the Roman law have passed away with the decay of the social institutions upon which they were founded, as, for instance, those that relate to slavery. It is also true that certain features have been modified to meet the new and more complex relations of modern life. But so far as modern jurisprudence moves in harmony with the rational purpose of all law, it cannot depart from those broad and essential truths which received a clear and scientific form in the writings of the Roman jurists, and which have been preserved in the *Corpus Juris*.

1. Justice and Law.—The scientific character of the Roman law is seen, not so much in its formal arrangement, as in the fact that it is founded upon certain principles which are conceived to be ultimate in their nature and universal in their application. All law, when looked at from a rational point of view, must rest in justice.

This principle was regarded by the Romans as an essential element in the moral nature of man. In the words of Ulpian: "Justitia est constans et perpetua voluntas jus suum cuique tribuendi." Being a moral quality, it depends, like every other moral quality, upon an intelligent conformity to the nature of things. By means of this broad conception of justice, the jurists grounded law directly upon the moral nature of man, and remotely upon the moral order of the universe. Law was not only based upon a moral principle; it was also conceived to be a means for the attainment of a moral end. As a science, it discriminates between the just and the unjust. "Jurisprudentia est justi et injusti scientia" (D. 1, 1, 10, 2). As an art, it aims to bring about that which is right and equitable. "Jus est ars boni et æqui" (D. 1, 1, 1).

In thus connecting law so closely with morality, it need not be supposed that the jurists confused these two ideas, and regarded the purpose of the law to be the moral improvement of the individual. It may not create in the subject a truly moral respect for the rights of others. It must itself, however, be prompted by a constant and perpetual disposition to render to every one his right. Law in its truest sense has thus a permanent moral character and purpose of its own, independent of the character and motives of the subjects to whom it may be addressed. It is, as Cicero says, "right reason conformable to nature, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions and the wicked treat them with indifference. It is not one thing at Rome, and another at Athens; one thing to-day, and another to-morrow; but in all times and nations, this universal law must forever reign, eternal and imperishable" ("De Rep.," 3,

22). By thus perceiving in law an ethical principle, the Romans were able to construct their jurisprudence upon a rational, instead of a merely empirical basis.

2. Natural and Positive Law.—When the law is considered in the broad ethical sense just indicated, it is called *natural* law, or the law which the natural reason has constituted for all men (*jus naturale*, or *jus gentium* in the later sense); in opposition to the *civil* or positive law, or that law which derives its special binding force from the authority of any particular state (*jus civile*). But the great body of positive law is, in theory, drawn from the sphere of natural law. In other words, the rules of natural justice, in accordance with which every one is bound to respect the rights of others, are transformed into civil laws by the state's affixing to them a compulsory sanction. In this way the natural law furnishes the underlying basis of positive law. It is true that a portion of the civil law seems to be of an arbitrary character and does not rest upon uniform principles, as, for example, the forms of marriage, and the number of witnesses to a testament. Such provisions may vary in different states. But the essential portions of the law are yet derived from the natural precepts of justice, and are for the most part recognized by the common reason of mankind.

In spite of the ambiguity which sometimes attaches to the term *jus naturale*, the proper distinction between natural and positive law is clearly indicated in the writings of the Roman jurists. This distinction depends, not so much upon the content of the law, as upon the authority by which it is enforced. All those rules of conduct which are universally binding upon men and are sanctioned by the dictates of right reason belong to the domain of natural law. On the other hand, the rules of conduct which are prescribed and enforced by the sov-

ereign power of the state belong to the domain of positive law. But while natural law and positive law are entirely distinct from each other as regards their respective sanctions, the jurists believed that they should be entirely harmonious with each other as regards their subject-matter.

3. Written and Unwritten Law.—Having reached the conception of positive law, as a body of rules founded upon natural justice and sanctioned by the state authority, we may next consider the modes in which this sanction is expressed. What are the sources from which the law derives its positive character?

The most obvious manner in which the positive law is sanctioned, is through the express enactment of a legislative body, or of a person having legislative authority. Such law is called written law, because its provisions are explicitly set forth, and are generally reduced to a written form. But its distinctive character does not depend upon the mere fact that it is written. It depends rather upon the fact thas it derives its binding force from the expressed will of the state. This will may be expressed not only directly by the supreme power of the state, but also indirectly by subordinate authorities upon whom the legislative function has been conferred. For example: in the early Roman empire, laws might be instituted by the popular assemblies, by the Senate, by the prætor, by the privileged jurists, as well as by the emperor himself.

But all law does not, according to the Roman conception, depend for its sanction upon the express enactment of a legislative body or person. It is sometimes recognized as binding even though it has not been formally promulgated as law. Such law is said to be constituted by custom—that is, such usage as indicates the tacit consent of the community. It was known at Rome as unwritten law (*jus ex non scripto*, or *jus moribus constitutum*).

Regarding this kind of law, Ulpian says: "Diuturna consuetudo pro jure et lege in his quæ non ex scripto descendunt, observari solet (D. 1, 3, 33). Whatever has existed for a long period of time, and is in harmony with the moral judgment of the community, is regarded as having the force of law, and the judicial authority is bound to recognize it as such, even though it has never been expressed in a legal enactment. It was also a maxim of the Romans, that not only can laws be established by custom; they can also be abrogated by custom —that is, by contrary usage.

It is unnecessary to consider here the objections raised by some modern jurists, such as Austin, to this view of customary, or unwritten, law. It is enough for our present purpose to say that this was the conception of the Roman jurists regarding the origin of a portion of the positive law, and a conception which has been adopted by the majority of modern civilians.

4. Public and Private Law.—Besides the above distinction between the written and the unwritten law, founded upon their sources, or the methods in which they were sanctioned; the positive law was also divided with reference to its subject-matter into public and private. The former was defined to be that which pertains to the Roman state; the latter, that which pertains to the interests of individuals.

More specifically, the public law includes all those regulations which have reference to the organization and administration of the government—whether in its religious or political character. The public law may hence be divided into the sacred law (*jus sacrum*), and the non-sacred law (*jus non sacrum*)—the former being concerned with matters relating to the public worship, such as the appointment of priests and the regulation of the

sacrifices; the latter dealing with the duties of civil magistrates, the preservation of public order, and the rights and duties of persons in their relations to the state.

The private law, on the other hand, comprises all those provisions which determine the rights and duties of persons with reference to each other, as the right of property, of contract, of personal security, of obtaining redress in case of injury.

5. The Law as to Persons, Things, and Actions.—The most important division of the Roman law, and that which formed the basis of its logical treatment, had reference to the character of the *rights* secured by the state to the subject. Every legal right, when considered in its fullest and most complete sense—as a certain degree of liberty sanctioned by law—may be said to involve three distinct elements, viz.: first, a certain degree of *legal capacity* on the part of the subject by whom it is exercised; secondly, a certain degree of *legal control* over the object with reference to which it is exercised; and, thirdly, a certain degree of *legal authority* involved in the sanction, or remedy, by which its validity is insured. Although a general legal right cannot be regarded as complete without all these elements, it may yet be resolved into subordinate specific rights according as it is viewed with reference to its subject, its object, or its sanction. This furnished the basis upon which the whole treatment of the private law was separated by the Roman jurists into the law pertaining to persons, to things, and to actions.

(1) Rights may thus be considered, in the first place, with reference to the person, or subject, by whom they are exercised. Thus we may speak of the right of a freeman, the right of a citizen, the right of a father and of a son, the right of a husband and of a wife, the right of a

guardian and of a ward. These rights, relating to persons as such, which refer to the extent of capacity that the law recognizes on the part of the subject (and which may be called *subjective* rights), are treated in the law pertaining to persons—*jus ad personas, jus personarum.*

(2) Rights may also be viewed with reference to the thing, or object, in respect to which they are exercised. Thus we may speak of the right of ownership, the right to the use and to the fruits of a thing, the right to sell a thing pledged, the right to a specific performance based upon a contract, the right to compensation for private injuries. These rights, relating to things as such, which refer to the extent of legal control that the law permits to be exercised over the object (and which may be called *objective* rights), are treated in the law pertaining to things —*jus ad res, jus rerum.*

(3) Rights may finally be considered with reference to the action, or remedy, by which they are enforced. Thus we may speak of the right of real action, the right of personal action, the right of injunction, the right of appeal. These rights, relating to actions as such, which refer to the extent of authority that the law permits to be used in obtaining a remedy (and which may be called *remedial* rights), are treated in the law pertaining to actions—*jus ad actiones, jus actionum.*

This division of the private law, adopted by the institutional writers of the Romans, has been made the subject of severe criticism by modern jurists. Many attempts have, consequently, been made to form a new classification which will not involve the defects that are charged against the Roman method. But it may be questioned whether any recent division is more natural, or convenient —not to say logical—than that given by Gaius and Justinian. For our purpose at least, we shall certainly ob-

tain a more accurate knowledge of the Roman law itself, if we adhere as closely as possible to its method of classification.

References.—Gaius, I., 1–8; Justinian's Institutes, I., 1, 2; Digest, "De justitia et jure" (Bk. 1, especially titles 1, 3, and 4); Mackenzie, "Roman Law," preliminary chapter; Kaufmann's Mackeldey, vol. I., pp. 1–8; Taylor's "Civil Law," earlier dissertations of the work; Goudsmit, "Roman Law," trans. by Gould, Bk. I., chs. 1 and 2; Sandars, "Institutes of Justinian," introd. to the American edition, by Judge Hammond; Hunter, "Roman Law," p. xxxiii., "Criticism of the Order of Gaius"; Austin, "Lectures on Jurisprudence," vol. II., various lectures on the divisions of law and criticism of the Roman method; Lightfoot, "The Nature of Positive Law," ch. 11, "Modern Theories of Law"; Demangeat, "Droit Romain," I., pp. 143–146; Ortolan, "Instituts de Justinien," II., pp. 17–36; Marezoll, "Lehrbuch," §§ 47–65; Vering, "Geschichte und Pandekten," §§ 4–26; Böcking, "Römischen Privatrecht," S. 1–13.

BOOK I.

THE LAW OF PERSONS—JUS PERSONARUM.

CHAPTER I.

PERSONS CONSIDERED WITH REFERENCE TO LIBERTY.

THE exposition of the Roman law properly begins with the description of persons as the subjects of rights. In the "Institutes," this is regarded as necessary to the understanding of the other portions of the law. As has already been suggested, the provisions of the law relating to persons, to things, and to actions, are so closely related that a full discussion of the one seems to involve a knowledge of the others. In the application of the law to a given case, it is, of course, necessary to ascertain, not only the legal capacity of the person who lays claim to a given right, but also the character and extent of the right over the thing to which he lays claim, and the character of the remedy by which the claim may be enforced. But in reviewing the general principles of the law, without reference to their specific application, it is more convenient to consider the various classes of persons as regards their legal capacity, as a separate subject—distinct from, and preliminary to, the various kinds of rights which may be exercised in respect to things, and also the various kinds of remedies by which these rights are enforced.

1. The Legal Idea of Person and Status.—In reviewing the principles of the law regarding persons, it is necessary at the outset to attach a definite notion to the term person (*persona*), and also to understand how, in general, legal personality is affected by the possession and the loss of civil status.

(1) According to the popular meaning, the word

"person" is applied to any human being without regard to his condition or capacity. But in the legal sense, those only are looked upon as persons who possess the capacity of assuming the rights and duties which are sanctioned by the state. Although every man may be considered as entitled by nature to the possession of legal rights, as a matter of fact, the law sometimes refuses to accord personality to certain men—as, for example, slaves. On the other hand, the law sometimes regards as persons certain subjects other than human beings, as corporations, endowments, etc. In the sense of the Roman law, the term person may be defined "as a being, whether abstract or concrete, real or ideal, whether physically existing or a mere creature of the law, capable of becoming the subject of legal rights and duties."

A legal person is thus a being vested with a civil capacity. By virtue of this capacity, he is *qualified* to exercise the rights and privileges protected by the law, whether, as a matter of fact, he exercise them or not. For example, a person may have a legal capacity to hold property, and yet have no property of his own. He may have a legal ability to form a contract, and yet have no actual claim against any other person. In like manner, he may be legally qualified to bring an action, and yet have no cause of action against any one.

(2) While every legal person must possess a certain degree of legal capacity, the extent of this capacity is not the same for all. In spite of all humane efforts to equalize the rights of men, there still remain certain distinctions which seem involved in the very structure of society, and even in the necessities of nature. A progressive system of law tends, it is true, to reduce these inequalities to the minimum. But with all the liberal theories of the Roman jurists, the Roman law still im-

posed legal disqualifications upon certain members of society. Some of these, no doubt, rested in nature, as the incapacity of dependent children. Others have since been proved to be artificial, as the incapacity of slaves.

In general, the extent of one's legal capacity depended at Rome upon his civil position, or *status*. This was viewed with reference to three things, viz: *libertas*, or personal freedom; *civitas*, or citizenship; and *familia*, or domestic position. Accordingly, a person's capacity, in the eyes of the law, depended, in the first place, upon whether he was a freeman or a slave; in the second place, upon whether he was a citizen or a foreigner; and, in the third place, whether he was independent of paternal authority or dependent upon it. If a person were free, he was relieved from the severe and almost absolute disqualifications which rested upon the slave. Besides being free, if he were also a citizen he was not burdened with the civil disabilities which for a long time rested upon foreigners. And if, besides being a freeman and a citizen, he were independent, he was not subject even to the lighter incapacities which rested upon the dependent members of the household. It was, hence, only the free and independent Roman citizen who possessed the full capacity of exercising all the rights guaranteed by the law.

(3) The loss of status was called *capitis deminutio*. As a person might possess one or more of the elements of status, so he might lose one or more. The loss of freedom involved, of course, the loss of citizenship and of family rights, and was called *maxima capitis deminutio*. The loss of citizenship did not necessarily involve the loss of freedom, but it carried along with it the loss of domestic position, and was called *media capitis deminutio*. The loss of domestic position involved the loss of nothing

more than the rights growing out of one's previous domestic relationship. It was called *minima capitis deminutio*. In the following arrangement of the elements of status, it will be observed that the possession of the lower status involves the possession of the higher; and, conversely, the loss of the higher involves the loss of the lower.

Elements of Status.	Loss of Status.
Status libertatis,	Maxima capitis deminutio,
Status civitatis,	Media capitis deminutio,
Status familiæ,	Minima capitis diminutio.

2. Freedom as a Condition of Personality. Freedom was the primary condition upon which, in the Roman law, every man's legal capacity was made to depend. Liberty was somewhat vaguely defined by Florentinus to be "the natural faculty by which one can do what he pleases unless restrained by force or by law" (D. 1, 5, 4). When viewed with reference to status, freedom may be regarded as that condition which does not involve a general negation of legal rights. As regards the general relation of liberty to the law of status we may notice, first, the theory upon which the Roman jurists justified the recognition of slavery; and, secondly, the division of persons in respect to personal freedom.

(1) The origin of slavery was referred to the *jus gentium* (in the earlier sense) as an institution common to all nations. It was not by the Roman jurists, as by some of the Greek philosophers, justified as consistent with nature. The Romans held that by the law of nature all men were born free. Slavery was, however, inwrought into the social structure of all ancient nations; and although the tendency of Roman legislation was to do away with its harsher features, it was yet accepted as a creature of immemorial custom. And only upon this theory did the jurists justify its recognition in the positive law.

(2) The division of persons with reference to liberty was made necessary by the very fact that slavery existed as a civil institution. Slaves could not, in the strictest sense, be regarded as legal persons; they were yet, with some inconsistency, considered as forming a class coördinate with that of freemen. With the growing spirit of humanity the barriers which separated the free and the slave became less fixed; and the class of freemen was continually reinforced from the slave population. The custom of releasing men from slavery, whereby they obtained certain civil rights, was the occasion of subdividing freemen into those who were born free and those who were made free. Hence there came to be at Rome three classes of persons as regards freedom: *servi*, or slaves; *libertini*, or freedmen; and *ingenui*, or freeborn person.

3. Legal Status of Slaves.—In reviewing the law relating to the status of any class of persons we must notice, first, the antecedent facts, or conditions, by which a person is recognized as belonging to one particular class and not to any other; and, secondly, the extent of capacity or incapacity which attaches to him by virtue of his membership in that class.

(1) The antecedent facts which indicated that a person belonged to the slave class, had reference either to a certain condition of birth, or to some event after birth specified by law. A person was a slave by birth whose mother was in a servile condition at the time of birth and had not been free at any time during the period of gestation. As slaves could not contract legal marriage there was applied to them the maxim that a person born out of lawful marriage followed the condition of the mother—*partus sequitur ventrem*. But a person once free might become a slave by law—either *jure gentium* or *jure*

civile. In accordance with the *jus gentium* a person was reduced to slavery by being captured in war, such captives being sold as belonging to the state, or else distributed by lot among the soldiers. According to the *jus civile* a free person became a slave if he permitted himself to be sold for the purpose of sharing in the price; if he were condemned to certain kinds of punishment (*servus pœna*); if he evaded the military service; if he refused to be enrolled on the censor's list; and if, being a freedman, he was guilty of ingratitude toward his patron.

(2) The condition of slaves as regards their legal capacity may be described, in brief, as a general negation of rights. They were not, strictly speaking, persons in law; and their only claim to be so classed was based upon the fact that they might perform acts somewhat analogous to those of persons, and were also recognized as having certain natural rights which were sanctioned by custom and which even possessed some legal significance. The way in which the incapacity of the slave, strictly imposed by the law, came to be beneficially affected by certain customs may be illustrated by the following examples.

It was a principle of the law that slaves could not contract civil marriage. A certain matrimonial relation yet existed under the name of *contubernium*, which formed the basis of a domestic group; and this group was sometimes recognized by law, as, for instance, when it was forbidden in selling slaves to separate those belonging to the same family, and also when the former relationship by blood was legally recognized, after manumission, as determining the rights of inheritance.

Again, slaves could not legally hold property. Yet they were frequently allowed, at the discretion of their

master, to use a certain amount of property (*peculium*), which might by skilful management be so increased as to enable them to purchase their own freedom; and the freedom thus obtained was legally protected.

Moreover, a slave could not form a legal contract nor bring a legal action. Yet the natural obligations arising from the dealing of a slave with other persons sufficed for nearly every transaction of business; and in certain cases of injury his rights might be assumed and prosecuted by his master.

Still further, the slave strictly possessed no legal right as against his master; but the whole tendency of the later legislation was to make the master responsible to the state for his treatment of his slave, and thus by the time of Justinian the natural right of the slave to his own person was, in great measure, protected.

(3) Closely allied to slaves was a class of persons which come into view in the later period of the Empire. This class comprised the *adscriptitii* and the *coloni*. The former corresponded more nearly to rural slaves; they could not, however, be removed from the soil to which they were attached, and they possessed the right of legal marriage, even without the master's consent. The *coloni* approached more nearly the condition of freemen. In addition to the privileges of the *adscriptitii*, they had a right to the products of the soil after paying a certain fixed rent to the owner; they might also bring an action against the owner for an injury done to themselves or to their families.

With the extinction of the Western Empire, which followed the invasion of the northern nations, Roman slavery, in its various forms, was merged into the system of serfdom and villenage which prevailed throughout Europe during the Middle Ages.

4. Legal Status of Freedmen.—The next class of persons to be considered is that of freedmen (*libertini*)—that is, those persons who had been released from slavery in a manner prescribed by law. We may briefly notice the legal methods in which a slave might obtain his freedom, and the legal capacity which he acquired by becoming a freedman.

(1) In case the slave had performed some signal service to the state, he might be freed by the Emperor without the master's consent. But the usual method required the master's consent, and was accompanied by a process called "manumission." Of this process there were various forms. By the *vindicta*, or lictor's rod, the slave in early times obtained his freedom in a fictitious suit before the magistrate. He was said to be freed by the *census*, when he was enrolled as a free citizen upon the censor's list with the consent of the master. By *testament*, the master might confer liberty upon his slave, either by commanding the heir to manumit him in proper form, or by simply declaring him to be free. We have already had occasion to refer to the easy methods which had become current in the Empire before the time of Justinian,—for example, *per epistolam*, *inter amicos*, *inter ecclesiis*; and Justinian himself removed nearly all the legal impediments which had previously stood in the way of manumission.

(2) The civil capacity enjoyed by freedmen before the time of Justinian was by no means uniform. With reference to their status, they had been divided into three classes, viz., *cives Romani*, or those who obtained the full rights of citizenship; *Latini Juniani*, or those who, being manumitted without the proper formalities, were restricted to the Latin franchise; and *dedititii*, or those who, having suffered certain disgraceful punishments,

were compelled after being manumitted to remain in the condition of surrendered enemies and deprived of civil rights. These distinctions were abolished by Justinian, who declared that the full right of citizenship was involved in the gift of liberty. But even when granted the full right of citizenship, the freedman still retained, as *libertus*, a subordinate relation to his former master, as *patronus*. He was obliged to pay to the latter a certain degree of respect, to render certain services to him, and to support him, if reduced to poverty. The patron possessed also the right of succession to the property of the freedman, if the latter died intestate.

5. Status of Freeborn Persons.—The remaining class of persons to be noticed under the status of liberty are those who were freeborn (*ingenui*). We may consider here, as in the previous classes, the facts which indicated that a person belonged to this class, and the legal qualifications which attached to the class.

(1) A person was regarded as freeborn if born of free parents *in matrimonio*, or even of a free mother *extra matrimonium*, and this rule held good whether the parents themselves were *ingenui* or *libertini*. A child born in civil marriage must necessarily be free, because legal marriage could be contracted only between persons who were themselves free. But a child born out of lawful marriage followed the condition of the mother according to the maxim already quoted, *partus sequitur ventrem*. With the growth of the later *jus gentium*, there arose a fiction, to which we have already referred, whereby the Emperor gave to a freedman, that is, a person who had in fact been born a slave, the character of an *ingenuus*, that is, a person who was legally considered as born free. This form of proceeding, which was founded upon the maxim of the natural law that all men are born free, was called *natalibus*

restitutio. By it a freedman became in every legal sense an *ingenuus*, and was hence relieved from those obligations which he otherwise would have sustained to his former master.

(2) The status of a freeborn person was called *ingenuitas.* Considered by itself, it determined a man's civil capacity only in a negative manner. It showed that he was relieved from the almost absolute disqualifications resting upon the slave, and also from those minor burdens which continued to weigh upon the freedman. The positive capacity of the freeborn person could be ascertained only by a further consideration of his status with reference to domestic position.

The Roman law with reference to the status of liberty exercised some influence during the Middle Ages, and perhaps in modern times. But the gradual abolition of slavery in all its various forms has given to this portion of the Roman law, for the most part, a merely historical interest.

References.—Gaius, I., 9–47; Inst., I., 3–7; Digest, "De statu hominum" (1, 5), "De manumissionibus" (40); Code, "De his qui ecclesiis manumittuntur" (1, 13), "De vindicta et apud concilium manumissione" (7); Poste's "Gaius," pp. 29–44; Sandars' "Justinian," Eng. ed., pp. 86–99, Am. ed., pp. 76–88; Mackenzie, "Roman Law," pp. 91–96; Hunter, "Roman Law," pp. 12–38; Smith, "Dict. Antiq.," (*Servus, Manumissio, Libertus, Ingenui*); Blair, "Slavery among the Romans"; Demangeat, "Droit Romain," pp. 148–220; Ortolan, "Instituts de Justinien," II., pp. 36–69; "Deurer, "Gesch. und Inst. des Römischen Rechts," § 104; Marezoll, "Lehrbuch der Institutionen," §§ 154–170. Wallon, "Histoire de l'Esclavage dans l'Antiquité," Paris, 1847, tom. II., III.

CHAPTER II.

PERSONS CONSIDERED WITH REFERENCE TO FAMILY RELATIONS.

In passing from the status of liberty to that of domestic position, it should be noticed that the intermediate status based upon citizenship had by the edict of Caracalla and the reforming legislation of Justinian lost the importance which it had hitherto possessed. It hence finds no place in the "Institutes," as the legal incapacities previously resting upon foreigners and Latins no longer existed. But yet all free persons were not entirely equal before the law. The natural incapacity of the dependent members of a family was still recognized by the law as a ground of distinction among persons. This distinction was not, it is true, in ancient times, based upon the theory of natural incapacity, but rather upon the customary principle that the father was the legal head and representative of the family, and that he only sustained any legal relations to the state. But the social revolution, by which the structure of the old patriarchial family was in later times undermined, was attended by a growing recognition of legal rights on the part of the wife and children; and with the acquisition of personal and proprietary rights, the wife and older members of the household became practically independent even during the lifetime of the father. While the theory of the ancient law regarding the relative position of the father and the members of his family was maintained in some respects until the latest period, the tendency of Roman legislation was

to remove those legal incapacities on the part of the children which were not necessary for their protection.

1. The Power of the Father over the Child.—The term *patria potestas*, in the Roman law, refers to the mutual relation of father and child, and involves not only the capacity of the father to exercise authority over the child, but also the correlative incapacity of the child growing out of his subordinate position. In considering this subject there can be no greater mistake than that which is often committed of transferring to the laws of Justinian the idea of the paternal power which prevailed in the early ages of Rome. In ancient times, the *patria potestas* involved the "power of life and death" on the part of the father, and the utter incapacity of acquiring and holding property on the part of the son. But at the time of Justinian neither of these features of the paternal power existed. By the efforts of the censors under the Republic, and by the legislation of the emperors, the son was released from the unjust oppression to which he had been subject. The later law was the product of a more just conception regarding the natural rights of the individual.

(1) In the first place, we may notice the features which rendered the paternal power at the time of Justinian but a shadow of what it was in early times. The imperial laws not only restricted the father's authority over the person of the son, but also granted to the son extensive proprietary rights. The power of life and death was transferred to the magistrate; and the father who killed his son was held guilty of murder. The theory of the modern law was fully established, that the authority of the father is limited to simple correction. The ancient custom also of selling freeborn children as *mancipia* was practically abolished.

Moreover, the law granted full proprietary rights over all that the son acquired in military service (*peculium castrense*); and over that which he acquired in the exercise of public duties (*peculium quasi castrense*); and, finally, over all that which he acquired by gift, by testament, or by any legal title from any person except his own father (*peculium adventitium*). The only remains of the ancient law is seen in the fact that, while the ownership in the cases mentioned was vested in the son, a life interest in the property still remained with the father. The special fund which the father might loan to the son for purposes of business (*peculium profectitium*) remained, of course, in the father's estate. But all other property acquired by the son was his own, subject to the life interest just mentioned. There were certain cases specially designated by the law in which even this life interest was not allowed to the father, as when a gift was made to the son with the special condition that he should receive it in full ownership.

From these facts it it evident that after reaching an age when he was able to transact business for himself, the son was, in fact, well-nigh independent as regards both his personal and proprietary rights. The chief significance of the *patria potestas*, at the time of Justinian, consisted in the fact that, in connection with blood, it determined the extent of the family, and the right of succession in the event of the father's death.

(2) The paternal power was acquired, or, in other words, a person came under the *potestas* of another, by birth; by legitimation; and by adoption. A person born in lawful marriage came immediately under the power of his father. An illegitimate child could, however, by a late constitution, be brought under the power of his father by "legitimation." This could be effected by a

subsequent marriage (*per subsequens matrimonium*), or by an imperial rescript (*per rescriptum principis*). The paternal power could also be acquired, in certain cases, by adoption, although the effect of adoption was greatly modified by Justinian. We have seen that adoption had its origin in the necessity of providing for the transmission of the estate in case the father was childless. But the subsequent growth of an elaborate law of testamentary succession had to a great extent done away with its importance as a legal institution. Justinian, therefore, ordained that only in case a person was adopted by his natural ascendant—for example, his father or grandfather —should the *potestas* be acquired ; since in this case, as the Institutes say, "the rights of nature and adoption concur." In all other cases adoption produced no legal effect, with the single exception that the adopted person still retained the ancient right of succession to his adoptive father in case the latter died intestate.

(3) The paternal power might be disolved by the death of the father ; by his suffering a *capitis deminutio ;* or by the emancipation of the son. By the death of the father the *potestas* may be said to have been dissolved—although, in fact, it was transmitted to the sons hitherto under power, who thus became independent.

The father might suffer a *capitis deminutio* sufficient to destroy his *potestas*, either by deportation, or by being captured in war. By deportation, which was a perpetual banishment, the criminal lost with his citizenship all rights incident to his domestic position ; and his sons acquired his *potestas* and his inheritance. If, however, he were pardoned, he was restored so far as it was consistent with justice to his former civil and domestic position. A captive in war, in a similar way, lost his paternal power ; but if he returned he was restored to his former position by what was called *jus postliminii.*

Finally, by emancipation, the son was released from his father's authority. The cumbrous process by which this was originally effected through three fictitious sales was modified, so that it could be accomplished by a simple declaration before the proper magistrate. Justinian further improved the law by requiring the son's consent to legalize the act. There were other minor modes in which the paternal power might cease—as, for example, by the son's obtaining certain civil and religious offices.

2. The Nature of Roman Marriage.—The legal capacity of persons was also affected by marriage, or the relation existing between husband and wife. In considering the Roman law on this subject, we must, as in the case of the paternal power, keep in mind the great difference between the early customary law and the principles developed by the later legislation. The strictness of the old *jus civile*, the extreme technicality of its forms, and the peculiar nature of the ancient patriarchal family combined to give to the marriage relation a very arbitrary and despotic character. This was, however, superseded by an extremely liberal theory, which involved the almost absolute independence of husband and wife, at least so far as their legal rights were concerned. No change could be more radical than this transition from one extreme theory of marriage to its opposite. The excessive liberality of the later law will be best understood when it is seen to be in fact the result of a natural reaction against the arbitrary and oppressive features of the early customary law.

(1) The first peculiarity of the later law that we notice, is the fact that no importance was attached to the ancient distinction between *matrimonium justum* and *matrimonium non justum*. This distinction was originally

founded upon the notion that marital rights, like all other rights, were created by the civil law. The strictly civil, or legal, marriage was confined to Roman citizens. The non-civil marriage possessed no legal significance, except as it came to form a part of the equitable provisions of the *jus gentium*. The *matrimonium justum* was prohibited between certain classes of persons, as patricians and plebeians, *ingenui* and *libertini*, citizens and foreigners. The connubial right was, however, bestowed upon the plebeians by the *lex Canuleia* (B.C., 444), and upon the *libertini* during the reign of Augustus (A.D., 4); and with the general extension of citizenship under the Empire the exclusive character of civil marriage entirely passed away. At the time of Justinian, legal marriage (*nuptiæ justæ*) was simply restricted by a few reasonable conditions, hereafter to be noticed.

(2) Another important feature of the later law, and one which explains the free notions of marriage prevailing in the Empire, was the tendency to recognize the legality of wedlock, when not accompanied with the *manus*. The significance of this change will be seen by recalling certain features of the ancient law. In the earliest times, when the family was organized upon the purely religious basis, marriage took the form of a religious sacrament (*confarreatio*), by which the wife was transferred from the worship and priestly power of her father to the worship and priestly power of her husband. This was supplemented by the more secular and commercial form of marriage (*coemptio*), in which the dominion over the wife was transferred from the father to the husband by the process of "mancipation." In this case the transaction was to all intents a legal conveyance, involving all the consequences of any transfer of property. In connection with this proprietary idea of marriage, the principle of pre-

scription was so interpreted that the husband could, even in the absence of the above forms, acquire dominion over the wife by an uninterrupted possession of one year (*usus*). When brought under the power (*manus*) of her husband in any of these ways, the wife lost all the rights which she previously had in her father's family. Although she was legally recognized as a daughter (*in loco filiæ*) to her husband, and thereby acquired the right of inheritance to his estate, she yet lost the right of inheritance to the estate of her father, and, moreover, whatever she may have previously acquired in her own name was, by marriage, merged in her husband's property ; and the same despotic authority which the ancient law allowed the father to exercise over his child, the husband was permitted to exercise over his wife.

Against this unjust conception of marriage, by which the wife lost her legal personality by being brought *in manum viri*, was gradually developed the idea that the matrimonial relation need not involve any change of domestic status. Provided she did not submit to the technical forms of the old law, the wife might remain in the family of her father, and at his death she might retain her own share in his estate. Even the *usus* she might avoid, by absenting herself for three successive nights from her husband's domicile. A marriage could, therefore, be effected either with or without the *manus*, according to the will of the parties. With the general adoption of the latter form, which did not involve the subjection of the wife to the husband's power, marriage came to be regarded as a simple contract, or, more properly, a lifelong union between husband and wife, based upon the mutual consent of the parties. Justinian defines it as "viri et mulieris conjunctio, individuam vitæ consuetudinem continens"

(Inst. 1, 9, 1); and Modestinus describes it as "conjunctio maris et feminæ, et consortium omnis vitæ, divini et humani juris communicatio" (D. 23, 2, 1). In the later Roman law, no special form was required for a valid marriage; the consent of the parties, or of those in whose power they were, was the essential element. Paulus says: "Nuptiæ consistere non possunt nisi consentient omnes, id est, qui coeunt quorumque in potestate sunt" (D. 23, 2, 2).

3. The Conditions of Legal Marriage.—While marriage was primarily founded upon the simple consent of the parties interested, there were certain conditions which determined the capacity or incapacity of persons to assume the marriage relation. All persons who were legally competent to marry were said to possess the *connubium*. The conditions upon which the connubial right depended were defined by the law in a negative rather than in a positive manner. In other words, the *connubium* was possessed by all free persons who were not expressly deprived of it by the law. The impediments to legal marriage existing at the time of Justinian depended chiefly upon age, relationship, and public policy.

(1) Persons were forbidden to marry who had not attained the requisite age—which was fixed at fourteen for males and twelve for females.

(2) Certain persons related by consanguinity or by affinity—that is, by blood or by marriage—were forbidden to intermarry. This provision included, first, ascendants and descendants of whatever degree; secondly, speaking in a general way, collaterals within the third degree of relationship, as brother and sister, uncle and niece, aunt and nephew,—but marriage between cousins was lawful. As an example of the prohibition based upon affinity may be noticed the law of the later Empire which provided that

a man could not marry his brother's widow, or his deceased wife's sister.

(3) Still further, certain marriages were forbidden from motives of public policy. For example, provincial officers were forbidden during their term of administration to marry any woman living in their province. A guardian could not marry his *pupilla* until she had passed the age of pupilage. By a law introduced A. D. 388, Christians were forbidden to marry with Jews.

4. The Legal Effects of Marriage.—In the old Roman law, when the marriage was attended with the *conventio in manu*, the wife, as has been stated, came under the absolute dominion of her husband. Her legal personality was merged in his. Her property passed to him by universal succession. She had no power to acquire property for herself. She lost entirely her legal independence. But after the marriage *sine conventione* became the prevailing form, the legal relation of husband and wife acquired an entirely different character. The effects of the later Roman marriage may be viewed with reference to the personal relation between husband and wife, the power over children begotten in lawful wedlock, and the proprietary rights of the wife.

(1) As to the personal relation between husband and wife, the wife acquired the name, the rank, and the domicile of her husband. Otherwise they were entirely distinct as regards their domestic status. The husband had no power over the wife; and the wife had no claim to support from her husband, unless there had been a special contract to that effect. Their mutual rights and duties rested, for the most part, upon a moral basis. The duty of fidelity may, however, be regarded as having a legal sanction, inasmuch as each party was liable to certain penalties affixed to the violation of the marriage vow.

(2) The law granted to the husband the *potestas* over the children begotten in lawful wedlock. Although the paternal power itself was relieved of many of its earlier features, the principle that children born in lawful marriage came under the power of the father, continued to the latest period of Roman history.

(3) With regard to the rights of the married woman to her own property, it may be said in general that they were unaffected by the marriage relation. She retained her previous property, and continued to hold it in her own name and in full ownership. She had a right to whatever she acquired after marriage; and she had a right to dispose of her own property as she pleased, either by gift, by sale, or by testament. Marriage, in brief, gave to the husband no claim to the property of his wife.

5. The Roman Dos and Donatio Propter Nuptias.—While marriage did not impair the woman's right to her own property, certain proprietary relations might yet exist between husband and wife. These relations depended upon the peculiar character of the Roman dowry and the marriage settlement.

(1) According to the later idea of Roman marriage, whereby the wife was considered as still belonging to the family of her father, the husband was under no obligation to maintain the wife, unless there had been some provision made for that purpose at the time of the marriage. To provide for the support of the wife, the father usually furnished to the husband a marriage portion, called the *dos*. This portion might, however, be furnished by other persons than the father, as by the wife's relations, or even by the wife herself. By whomsoever it was furnished, it was governed by substantially the same principles.

The *dos* comprised every thing that was contributed in

behalf of the wife to aid the husband in meeting the expenses incident to the marriage state. By the *lex Julia* every father was compelled to give his daughter a marriage portion, if he had the means. The husband acquired the management of the *dos*; but he could not dispose of it, or burden it by a mortgage. The wife, on her part, had not only the right, previously mentioned, to manage her own property (*parapherna*), but also a right to see that the *dos* was applied according to its legitimate purpose. By the dissolution of the marriage the *dos*, generally speaking, reverted to the donor or to the heirs of the donor.

(2) A proprietary relation might also exist between husband and wife by virtue of a marriage settlement (*donatio propter nuptias*). This was a conditional gift made by the husband to be vested in the wife in the event that she survived him. This property was managed by the husband, and reverted to him in full ownership in case he survived the wife. But during the lifetime of the latter it could not be alienated even with the wife's consent. This donation, at the time of Justinian, was regarded as a necessary correlative to the *dos*; and whenever the latter was furnished by the wife, the former must be furnished by the husband.

6. Divorce and its Legal Effects.—The marriage relation might be dissolved by the death of either party, or, during the lifetime of the parties, by divorce. In its form divorce was closely related to marriage. Corresponding to the ancient forms of marriage by *confarreatio* and *coemptio*, there existed the forms of divorce by *diffarreatio* and *remancipatio*. But when simple consent became the sole condition of marriage, divorce depended simply upon the will of the parties. It was merely a private act, and required the sanction of no tribunal. It

might be effected by the will of both parties, or by the will of either. In the latter case, however, the state sometimes interfered, not by way of preventing the dissolution of the marriage, but by attaching a penalty to unjust repudiation. It is noticeable that there was little legislation to restrain the freedom of divorce, until the time of the Christian emperors, when stringent laws were passed to make the marriage relation more binding.

The legal effects of divorce related chiefly to the disposition of the *dos* and to the custody of the children In case the separation was brought about through the fault of the wife, a certain portion of the *dos* was retained by the husband. The custody of the children also depended upon the fault of the parties, as they were taken from the party at fault and assigned to the other.

The Roman law of marriage was modified in many respects when taken up into the canon law; and it was principally in this modified form that it entered into the modern continental law. The theory of the English common law bears some analogy to the old Roman idea of marriage with the *manus*, involving the absorption of the personality of the wife into that of her husband. But the tendency of legislation in England, and especially in the United States, is in the direction of a greater degree of legal equality between husband and wife, similar to that which obtained in the later Roman law.

References.—Gaius, I., 55–141; "Inst.," I., 9–12; "Digest," *De his, qui sui vel alieni juris sunt* (1, 6), *De adoptionibus*, etc. (1, 7), *De peculio* (15, 1), *De castrensi peculio* (49, 17), *De sponsalibus* (23), *De divortiis et repudiis* (24, 2); "Code," *De sponsalibus* (5), *De patria potestate* (8, 47), *De castrensi peculio* (12, 37), *De adoptionibus* (8, 48); Poste's "Gaius," pp. 47–94; Sandars' "Justinian," Eng. ed., pp. 102–128, Am. ed., 91–117; Mackenzie, "Roman Law," pp. 97–145; Hunter, "Roman Law," pp. 43–77, 498–514; Amos, "Roman Civil Law," pp. 267–290; Smith, "Dict. Antiqq.,"

"Patria Potestas," "Marriage (Roman)," "Dos," "Divortium"; Smith, "Dict. Christian Antiqq.," "Marriage"; Tomkins and Jencken, "Modern Roman Law," pp. 112–135; Demangeat, "Droit Romain," pp. 231–326; Ortolan, "Instituts de Justinien," II., pp. 70–135; Zimmern, "Geschichte," §§ 139–193, 219–231; Marezoll, "Lehrbuch," §§ 158–181; Deurer, "Gesch. und Inst.," §§ 199–208; Böcking, "Röm. Privatrecht," S 14–28, 165–182; Vering, "Geschichte und Pandekten," §§ 220–238; Thibaut, "Lehrbuch," §§ 154–170; Arndts, "Lehrbuch der Pandekten," §§ 393–438.

CHAPTER III.

PERSONS CONSIDERED WITH REFERENCE TO GUARDIANSHIP.

A PERSON who was dependent (*alieni juris*) became independent (*sui juris*) when released in any way from the paternal power. But even when he had passed from a state of dependence to that of independence, there might exist certain reasons, such as immaturity of age or mental incapacity, which would require him still to be protected in the exercise of his legal rights. Upon this necessity depended the law of guardianship. The special features of this law originally grew out of the nature of the family organization, and were closely connected with the laws of inheritance. The care of incompetent persons in the family was, at the death of the father, naturally placed in the hands of those upon whom the estate devolved, and who were at first hardly more responsible than the father himself had been. But as the state gradually interfered in controlling the appointment and the duties of the guardian, the office came to be a public trust (*munus publicum*), and the person receiving the trust became responsible to the magistrate for the proper fulfilment of his duties. Thus the office of guardian in the Roman law was somewhat akin to that of trustee. The person holding it was a kind of joint administrator of the ward's estate, supplementing by his own legal acts the natural incapacity of the ward. The incapacity of the ward, however, was of a nature entirely different from that of the child under power. The former, since he was *sui juris*, had the full capacity of acquiring rights in his own name, which the

latter had not. The ward was simply incapacitated, either wholly or in part, from performing legal acts; and this incapacity extended only so far as it was necessary to protect him from possible injury.

The general idea of guardianship was not expressed in the Roman law by a single word, but was designated by the terms *tutela* and *curatio*, according to the degree of authority held by the guardian; or, conversely, according to the degree of incapacity resting upon the ward. The two kinds of guardians were called tutors (*tutores*) and curators (*curatores*). Although in many respects the two offices were similar, there were certain specific differences which justify their separate treatment.

1. Different Kinds of Tutors.—Justinian preserves the definition of Servius to the effect that "*tutela* is the right and power conferred or authorized by the civil law for the protection of an independent person, who is, by reason of age, incapable of protecting himself. And tutors, who have this authority, are so called from the nature of their office, in that they act as protectors (*tuitores*) and defenders" (Inst. I. 13, 1 and 2). The age of puberty was fixed in the Roman law as that before which every independent person required the protection of a tutor. In the ancient law, it is true that women remained under tutelage during their entire lives, or until they were married with the *conventio in manu*. But the tutelage peculiar to women passed away with the later legislation, when substantial equality was established between the sexes.

As tutelage was looked upon as a public trust, no one could hold the office of tutor who had not attained the age of twenty-five; and, as a general rule, females could not act as such, although an exception was made in favor of the mother and grandmother of the pupil. Moreover, for the same reason—that the office was a public trust—no

one could refuse to act, unless he was relieved under certain excuses specified by law (*excusationes tutorum*). Tutors were divided, according to the method of their appointment, into three classes, viz.: testamentary, legal, and dative.

(1) Testamentary tutors were such as were appointed by the testament or codicil of the father. The power thus to appoint tutors existed as early as the XII. Tables, and formed, in fact, a part of the general law regarding the disposition of the *familia* by the father's last will. That an appointment by testament might be valid, it was the general rule of the law that the pupil must have been under the power of the father at the time of the latter's death, and must become *sui juris* by virtue of such decease. In case, however, the father wished to appoint a tutor for his emancipated son, the magistrate generally felt bound to ratify the nomination made in the will.

(2) Legal tutors, or tutors-at-law, were those who, in case no one had been named in the will, were called to the office by operation of law. It was a maxim of the Roman law that "he who has the benefit of the succession ought also to have the burden of the tutelage" (Inst. I. 17). This maxim was, of course, founded upon the more ancient customary principle, that the care of the feeble members of a household devolved, at the death of the father, upon those who became the father's legal successors. Therefore, according to the XII. Tables, the tutelage descended upon the nearest agnates, and failing agnates upon the *gentiles*. But as the *gens* lost its legal significance, and as the distinction between agnates and cognates was abolished, the principle obtained that the nearest legal heir who was capable of fulfilling the duties was bound to accept the trust.

Moreover, the duties of legal tutelage were imposed upon

the father who had emancipated his son, and upon the master who had manumitted his slave, provided the son or the slave was in the pupillary age. And the duties of such a father with reference to the emancipated son, and of such a patron with reference to his manumitted slave, descended by law upon the heirs of the father, and of the patron.

(3) In default of testamentary tutors and of tutors-at-law, the magistrate who was duly authorized appointed certain persons to the office, who were thus called tutors-dative. A tutor-dative might even be appointed temporarily, in case there was any delay in the assumption of the office by the persons otherwise designated; or, in case the testamentary tutor or the tutor-at-law should at any time be rendered incapable of performing the duties incident to the trust.

2. Powers and Duties of Tutors.—We need here refer only to the official powers and duties of the tutor as they are determined by the legal incapacity of the ward; since the personal rights and obligations of the tutor with reference to his pupil belong rather to the law relating to implied contracts. As the office of the tutor was intended to supplement the legal personality of the pupil, his power was in a general sense correlative to the incapacity of his ward. The law, in fact, determined the extent of disability on the part of the pupil, as well as the extent of power granted to the guardian. The power of the latter was, of course, greater, as the capacity of the former was less. Hence a distinction existed between the power of the tutor when exercised over an infant, and the power when exercised over a person who had passed the age of infancy.

(1) The first period of pupilage extended from birth to the end of the seventh year, during which time persons

were called infants (*qui non fari possunt*). An infant was considered incapable of performing any legal act whatever, even with the consent of the tutor. Although he was in the full sense of the word a person, and could be made the recipient of proprietary rights, he was yet held to be incapable of performing any legal act which required the exercise of will. Hence the power of the tutor extended to the entire management of the affairs of the infant so far as such management was not specially restricted by law. The tutor acted in his own name, but in behalf of his ward. His chief duty was to preserve intact the property, and to supply the necessities of the one placed under his protection ; and only in rare emergencies was he allowed to perform any acts beyond that required for the safe management of the property. The custody of the infant remained with the mother, and only in extreme cases did the tutor control the person of his ward.

(2) When the pupil had passed his seventh year he acquired a greater degree of legal capacity. He was then said to possess understanding (*intellectus*), but not judgment (*judicium*). He could engage in legal transactions in his own name so far as they were beneficial to him ; but no act of his own could operate to his prejudice. In the language of the law, he could bind another, but could not be bound himself.

In order, therefore, that the acts of the pupil might possess full legal force and be binding upon himself as well as upon the party with whom he came into relation, it was necessary for the tutor to add his authority (*auctoritatem imponere*). This involved the active co-operation on the part of the tutor by means of which a "natural act" would be converted into a "juridical act." The specific cases requiring the authorization of the tutor depended upon the general principle that the pupil

could improve but not worsen his condition. Hence, in making contracts which involved an obligation on the part of the pupil, the tutor must sanction them to render them binding in law. Again, the pupil could not enter upon an inheritance without the tutor's authority, since its acceptance involved duties as well as rights; and this general rule was preserved in all cases, even where no risk was apparently involved. The tutor retained the power to manage the property of the pupil, when such management was in the interest of the ward; but in no case could he use it for his own benefit.

(3) The office of tutor was terminated by the pupil's reaching the age of puberty; by the death or *capitis deminutio*, either of the pupil or of the tutor; by the fulfilment of the condition on which the tutor, if testamentary, may have been appointed; by the removal of the tutor on "suspicion"; or by an "excuse" which was valid.

3. The Law Relating to Curators.—According to the old Roman law, a person *sui juris*, on passing the age of pupillage, acquired full legal capacity—except the right of holding public offices, which was not obtained until the age of twenty-five. The necessity, however, of granting some kind of protection to persons between the ages of fourteen and twenty-five became apparent, and led to the growth of the law relating to curatorship (*curatio*). With reference to this subject, we may notice the steps in the growth of the law; the power of the curator over the minor; and his power over persons other than minors.

(1) The XII. Tables provided for the appointment of curators over the insane and prodigals, but not over minors. The young man who had passed the age of puberty was, if *sui juris*, considered to be of full age and

was responsible for all his acts. The first enactment made specially for the benefit of minors was the *lex Plætoria.* This law was passed before the time of Plautus; and there has been much dispute as to its exact provisions. It is sometimes supposed that among other things it allowed a minor to chose a curator to advise and protect him in a particular transaction. The undisputed portion of this law is that which held criminally liable those who defrauded persons under twenty-five years of age (*minores viginti quinque annis*).

The prætor also interfered for the protection of the minor, without appealing to the penalties of the Plætorian law. He introduced a remedy which was intended not so much to protect the minor from the fraudulent acts of others, as to protect him from the consequences of his own inexperience and folly. If the minor had performed an act or incurred an obligation that would inflict upon him any injury, the prætor ordered a *restitutio in integrum*, by which he was restored to the position in which he was before the unfortunate transaction had occurred. But it is quite evident that such a "restitution," while it would fully protect the minor in his dealings with others, would also act as a restraint upon others from being drawn into any dealings with minors. The prejudice thus naturally engendered against dealing with minors, who might, by a special plea before the magistrate, render void a transaction, was met by an edict of Marcus Aurelius. This emperor provided that on the application of the minor, curators should in all cases be appointed, whose consent to any act of the minor should render it less capable of being reversed by a plea of minority. These provisions furnished the basis of the law relating to curatorship as it existed in the time of Justinian.

(2) The extent of the curator's power depended upon

the purpose for which he was appointed. He might be appointed for a special transaction, or for the general management of the business interests of the minor. But a minor was not bound to receive a curator against his will—except in case of a lawsuit, or in case a debtor wished to compel a final settlement of accounts with him. If appointed for a special transaction, the curator's power was restricted to that transaction ; but his consent was necessary to render valid any act involved in that transaction. The authority of the general curator (*generalis curator*) extended to the entire management of the estate of the minor, in that the consent of the curator was required to render valid any act of the minor with reference to the disposition of his estate. The minor could, however, without such consent, incur an obligation, subject to the right of "restitution." Even when the consent of the curator was given to an act, the minor was not entirely deprived of the *restitutio in integrum*, although the grounds for obtaining it were much restricted.

In general, it may be said that the office of the curator was to assist the minor in the management of his estate and to sanction his legal acts when such assistance and sanction seemed necessary for the protection of his interests. A person appointed as general curator held his office until his ward had attained the age of majority. As an exception to this rule, however, a man at twenty, or a woman at eighteen, might, if deemed advisable, receive from the emperor a special dispensation (*venia ætatis*) and be relieved from further guardianship.

(3) Curators were appointed not only over minors, but also over the insane, spendthrifts, and all independent persons who, on account of any natural incapacity, required the assistance of others to give to their acts a juridical character. The guardianship of the insane and

spendthrifts, as before noticed, owes its origin to the XII. Tables, which provided that such persons be placed under the supervision of their agnates or the members of their own *gens*. In the later law, curators might be appointed not only by the law (*curatores legitimi*) but also by the magistrate (*curatores honorarii*). In either case they held their office until the ward recovered his normal capacity, or until they were removed for a valid cause. The power of the curator, when exercised in these cases was quite similar to that of the tutor. In the case of the insane, all legal acts were performed by the curator; but in the case of spendthrifts, the curator was required only to give his consent.

4. Protection against Tutors and Curators.— To prevent the property of wards from being wasted and destroyed by tutors and curators, the Roman law established certain special provisions. Some of these related to the imposing of special obligations upon guardians; others related to the removal of persons suspected of malfeasance.

(1) Generally speaking, all tutors, except those appointed by testament, and all curators, except those appointed upon inquiry, were bound to give security for the proper execution of their duties. And the magistrate himself was liable if such security was not imposed, or if it was insufficient. Every guardian was also bound to make an inventory of the property of his ward, and to render a final account at the expiration of his term of office. And the guardian was himself made liable for all losses due to neglect or fraud.

(2) In addition to the protection of wards afforded by the provisions mentioned above, all tutors and guardians were liable to be removed on the charge of suspicion (*suspecti crimen*), which provision existed as early as the

XII. Tables. Since the office of guardian was a public trust, malfeasance was looked upon as a public offence; and the accusation could be brought against a suspected guardian by any one who could institute a public action. The grounds of suspicion were specified in the law, and if sustained in a particular case, the suspected person was removed and his place was filled by a more suitable person.

The general principles of the Roman law with reference to guardianship are quite faithfully preserved in the modern civil law, and to a certain extent in the English common law, although the broad distinction which the Romans recognized between tutors and curators does not exist in England.

References.—Gaius, I., 142–200; "Inst.," I., 13–26; "Digest," *De tutelis* (26), *De excusationibus* (27), *De curatore bonis dando* (42, 7); "Code," 5, 28–70; Poste's "Gaius," pp. 94–129; Sandars' "Justinian," Eng. ed., pp. 128–164, Am. ed., pp. 117–153; "Dict. Antiq.," (*Tutor, Curator, Infans, Impubes*); Mackenzie, "Roman Law," pp. 146–154; Hunter, "Roman Law," pp. 516–556; Tomkins and Jencken, "Modern Roman Law," pp. 137–149; Demangeat, "Droit Romain," pp. 326–435; Ortolan, "Instituts de Justinien," II., pp. 135–216; DuCaurroy, "Instituts de Justinien," I., pp. 172–248; Deurer, "Geschichte und Institutionen," §§ 209–212; Böcking, "Röm. Privatrechts," S. 182–192; Marezoll, "Lehrbuch," §§ 184–191; Arndts, "Lehrbuch der Pandekten," §§ 439–462; Vangerow, "Pandekten," §§ 261–294; Puchta, "Pandekten," §§ 321–358.

CHAPTER IV.

ARTIFICIAL PERSONS—CORPORATIONS.

THE legal capacity which we have thus far considered is that which the law recognizes as belonging to natural persons—that is, persons who derive their existence from nature. But the law also takes account of certain subjects of rights other than natural persons. It attaches a legal personality to certain artificial persons which are themselves the creatures of the law. Although in both cases the legal personality is strictly derived from the sanction of the law, in the one case the personality is conferred upon a subject whose existence is independent of the law, while in the other case the personality is conferred upon a subject which, at the same time, is created by the law, and which, in fact, has no existence independent of the law. Such fictitious subjects have a legal capacity, however, as distinct and real as that which is attached to natural persons.

1. Nature and Kinds of Artificial Persons.—In the sense of the Roman law, an artificial or juridicial person is any being which is regarded as a proper subject of rights and duties, and which owes its existence to the law alone.

The nature of such persons will be apparent from the general purpose for which they are constituted. As the legal capacity of a natural person ceases at the death of such person, in order to give perpetuity to certain rights and duties, the law creates a subject which receives the capacity to exercise such rights and duties beyond the

natural period of human life. Although the artificial subject is generally constituted by an association of natural persons, as in the case of a corporation, a new personality is brought into being which is distinct from the natural persons who compose it, and which continues its identity even though the membership is entirely changed. In this case the legal personality belongs to that fictitious and independent unit which results from the corporate organization.

This will be more clearly seen by defining the various kinds of juridicial persons recognized in the Roman law.

(1) In the first place, the public treasury (*fiscus*) was regarded as a distinct person, having its own rights and obligations independent of the rights and obligations of the person or persons who performed the fiscal duties connected with it. And it remained one legal person even when the management of accounts required a separation into a number of different departments.

(2) Again, an estate, or inheritance of a deceased person before it was taken up by the heir (*hæreditas jacens*), itself constituted an independent legal person. It could be a debtor and creditor, and thus sustain legal relations to other persons as really as the decedent whose legal position it temporarily held.

(3) So, too, a charitable endowment (*pia causa*), founded in a proper manner for the purpose of carrying out some specific object, constituted a legal person. Whether founded by testament or by gift, if within the scope of the law, it possessed a legal status of its own independent of the persons by whom its provisions were executed.

(4) Finally, a corporation (*universitas*), that is, a body of persons legally organized for some permanent object, was invested with the capacity of acting as a single being,

and was hence recognized by the state as a distinct juridicial person. There are various kinds of corporations mentioned in the Roman law, viz.: political, such as municipalities, colonies, and even the provinces; religious, such as associations of priests, and anciently of the vestal virgins; official, such as organizations of scribes and *decuriales*; industrial, as the organizations of the artisans of various trades; mercantile, or organizations of merchants and of other persons in the pursuit of gain; social, or associations organized for friendly purposes, as clubs.

2. Legal Status of Corporations.—The "status" of a corporation has reference to its position as a distinct personality, which involves its legal capacity to possess certain rights and duties apart from the rights and duties of the natural persons who form its constituent members. Ulpian lays down the maxim: "Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent," (D. 3, 4, 7, 1). As the corporation is in all respects an artificial person, not only is its possession of a distinct legal capacity derived from the state, but the extent to which that capacity may be legitimately exercised is determined by the same authority. It is therefore improper to extend to the corporation all the principles regarding personality which apply to natural persons. As it is created primarily for some specific object—which generally involves the administration of property—its capacity is, in general, restricted to the exercise of those functions or the performance of those acts necessary to accomplish that object. The legal capacity of a corporation may be considered with reference to its essential rights, or those for the exercise of which it is directly established; and its incidental rights, or those without which it would cease to exist as a corporate body.

(1) Its essential rights are: first, the right to acquire, hold, and dispose of property in its own name and under its own seal, so far as this is not limited by special provisions of the law; secondly, the right to form contractual obligations with other persons—the corporate property only, as a general rule, being liable for the debts of the corporation; thirdly, the right to sue in a court of justice and obtain the ordinary remedy for any infringement upon its proprietary or contractual rights.

The possession of these rights with reference to other persons involves, of course, the existence of corresponding duties to which the corporation itself is subject. It is not, however, as a distinct person, answerable for the commission of crimes, since the several members in their individual capacity—and not the corporation—are amenable for criminal offences.

(2) The incidental rights are those which it possesses *ipso jure*, as being involved in its existence as a corporate body, and which are indirectly necessary to fulfil the ultimate purposes for which it is established. These are, first, the right to an internal organization, which generally includes the right to fill vacancies in its membership, to elect its own officers, to pass its own by-laws; and secondly, the right of representation—that is, to indicate who shall express its will in its transactions with others.

The whole legal capacity of the corporation is circumscribed, in the Roman law, by the obligation to respect the general laws of the state, and also the particular law or act from which it derives its existence and by which its legitimate object is determined.

3. Creation and Dissolution of Corporations.—A corporation could be created only by the express authority of the state. This authority could be expressed either by a general law relating to the organization of

certain corporate bodies as a class ; or by a special law or act relating to a particular corporation. Three members at least were necessary in the Roman law for the creation of any *universitas ;* although its existence might be continued by one. When once constituted it remained the same identical person whatever changes might take place in its membership.

A corporation might cease to exist in any one of the following ways :

(1) By the expiration of the time fixed by the charter, if established for a limited period.

(2) By voluntary forfeiture of its charter to the state.

(3) By an act of the state declaring it dissolved—which might occur if the corporation transcended its legitimate purpose.

(4) By the death or withdrawal of all its members, when it was organized for a private purpose.

The Roman law regarding corporations has, so far as its main principles are concerned, been largely preserved in modern jurisprudence. The application of these principles may vary somewhat in different countries as the result of statutory legislation : but the underlying doctrines of the modern law are clearly indicated in the Digest of Justinian.

References.—"Digest," *Quod cujuscumque universitatis nomine* (3, 4), *De collegiis et corporibus* (47, 22), *De jure fisci* (49, 14) ; "Cod.," *De sacrosanctis ecclesiis* (1, 2) ; Mackenzie, "Roman Law," pp. 155–160 ; Kaufmann's "Mackeldey," I., pp. 145–150 ; "Dict. Antiqq.," (*Universitas, Collegium*) ; Goudsmit, "Roman Law," Eng. trans., pp. 66–88 ; Böcking, "Röm. Privatrecht," S. 28–30 ; Arndts, "Lehrbuch," §§ 41–47 ; Mommsen, "De Collegiis et Sodaliciis Romanorum."

BOOK II.

THE LAW OF THINGS—JUS RERUM.

TITLE I.

THE LAW OF PROPERTY OR OWNERSHIP.

CHAPTER I.

THINGS CONSIDERED AS THE OBJECTS OF OWNERSHIP.

EVERY right, in the broadest sense of the word, involves both a *subject* by whom it is exercised, and an *object* with reference to which it is exercised. A system of law must therefore determine not only who may be the subjects, but what may be the objects of a right. It must define not only the extent of legal capacity which belongs to the subject, but also the extent of legal control capable of being exercised over the object. It must still further indicate not only the antecedent facts upon which one's legal status depends, but also the antecedent facts by which one's power over an external object may be legally established. The consideration of rights thus viewed with reference to their objective relations forms the subject-matter of the law of things (*jus ad res, jus rerum*).

It is clear that the legal right of one person to control for his own benefit an external object involves a corresponding legal duty on the part of others to respect that right. This duty in some cases is universal—that is, binding upon all men; in other cases it rests merely upon some particular person. Rights with reference to things may thus be distinguished, in general, according to the extent of their correlative duties. In this way the right of property may be clearly separated from the right growing out of a contract. Over against the former right is a general duty resting upon all men; while the duty which stands over against the latter right is specific, resting upon some determinate person or persons. The former is

called a *real* right; the latter a *personal* right. This distinction, though not explicitly stated by the Roman jurists was implied in their writings. It was clearly indicated in their division of "actions," by which rights are enforced. For example, those actions which are employed to enforce a right availing against all the world were called *actiones in rem;* while those which are employed to enforce a right availing against some determinate person were called *actiones in personam.* Applying to rights the same terms that the Roman jurists applied to their corresponding actions, we may say that every right included under the *Jus Rerum* is either a *jus in rem* or a *jus in personam.* The Law of Things may therefore be properly divided into the law relating to real rights, and the law relating to personal rights; or, in other words, the law of Property, and the law of Obligations.

In dealing with the law of Property, we shall follow the general order of the Institutes, and consider the way in which things are viewed as the objects of ownership; the extent of the various rights which are involved in ownership; and the different modes of acquiring ownership, whether in single things or in an entire estate.

1. Legal Idea of Res or Thing.—The term "thing" as employed in the Roman law has a meaning as broad and flexible as the term "person." As the word *persona* designates every being capable of becoming the subject of a legal right, so the word *res* is used to denote any thing capable of becoming the object of a legal right. The term may be applied to a physical object which one person may legally appropriate to the exclusion of others—as a piece of land. It may also refer to any specific service or "right" in a physical object which may be regarded as distinct from the object itself—as the right of way over a field. It may even refer to an act

(positive or negative) on the part of one person the exercise of which is beneficial to another—as the obligation due according to the terms of a contract. Ulpian says: "Nominis rei appellatio ad omnem contractum et obligationem pertinet" (D. 50, 16, 6).

This broad conception of *res* was evidently in the minds of the jurists when they declared that all law relates to persons, to things, or to actions. But the term is more often used in a restricted sense to denote the object of ownership, or of a *real* right. In other words, when any thing is viewed with reference to its being made the object of a proprietary right, it is called a *res*—the right itself being called by modern civilians a *jus in rem*. It is thus in connection with the law of property or ownership that the legal characteristics of things are chiefly discussed.

Things were classified in the Roman law with reference to different principles, and were arranged into various antithetical groups, as corporeal and incorporeal, movable and immovable, etc. In looking at these different classes we shall see that things are sometimes considered with reference to their legal capacity to be made objects of ownership; sometimes with reference to their general qualities; sometimes with reference to the mode in which they are designated in a legal transaction; and sometimes with reference to their relation to each other. For the sake of convenience we will adopt this order in defining the various classes into which things were divided by the Roman lawyers.

2. Things as to Their Legal Capacity.—As persons were distinguished from each other with reference to their capacity to be made the subjects of legal rights; so things were separated into classes with reference to their capacity to be made the objects of legal

rights. The capacity of a thing to be made the object of a right might be taken away entirely by being excluded from the jurisdiction of ordinary law; or by not being capable of individual ownership; or its legal capacity might be affected by certain artificial and formal restrictions.

(1) According to Gaius the most important division is that by which things are separated into those which are subject to the divine law (*res divini juris*) and those which are subject to the human law (*res humani juris*). The former class included sacred things (*res sacræ*), or those consecrated to the superior gods, as temples; religious things (*res religiosæ*), or those consecrated to the inferior gods, as burial-places; and holy things (*res sanctæ*), or those specially protected from desecration, as the walls of a city. All these things by being subject to the divine law were incapable of being made the object of private rights. The importance of this distinction depended solely upon the peculiar relation that existed between the religious and the civil law at Rome.

(2) Again, of those things which were not subject to the divine law some were regarded as incapable of individual ownership (*res extra patrimonium*, or *extra commercium*); while over others the rights of property could be exercised (*res in patrimonio*, or *in commercio*). In the former class were included things common to all mankind (*res communes*), as the air and the sea; things belonging alike to all the members of the state (*res publicæ*), as public roads, rivers, ports, theatres; and things belonging to a corporation of any kind (*res universitatis*).

(3) Among those things which were capable of individual ownership there was recognized up to the time of Gaius the distinction between *res mancipi* and *res nec mancipi*, according as their alienation did or did not re-

quire the formal process of mancipation. But at the time of Justinian, this distinction became practically unimportant, on account of the decay of symbolic forms and the practical identification of legal and equitable ownership.

3. Things as to Their General Qualities.—With the decline of the artificial distinction between *res mancipi* and *res nec mancipi*, there was brought into prominence the more natural classification based upon the general quality of the things themselves.

(1) We notice, in the first place, the division most usually emphasized by the Roman jurists, that by which things are grouped as corporeal (*res corporales*) and incorporeal (*res incorporales*). The former class includes all those objects which are tangible or perceptible to the senses (*quæ tangi possunt*), as land, houses, clothing, money. The latter class includes all those objects which cannot be touched or perceived by the senses (*quæ tangi non possunt*), as certain claims, privileges, "rights," or services which, though not tangible, are yet capable of being made the objects of a real right. Among these things are, for example, a "right" of way, a "right" of using and enjoying the fruits of a corporeal thing.

It must be observed that an incorporeal thing viewed as the object of a right is sometimes itself called. a "right"—as the "right" of way. But here the term simply refers to a service in a material thing, which service is properly a *res*, or the *object of a legal right* in the general sense of that phrase. The criticism which is often made upon the Roman lawyers in drawing this distinction between corporeal and incorporeal things, may perhaps be explained from the twofold meaning here attached to the word *right*. It is claimed that this distinction is entirely illogical, since "the right of owner-

ship is just as incorporeal as the right of way." It may be said in answer to this statement, that neither the term "corporeal" nor the term "incorporeal" can be applied, in the sense of the jurists, to the *right* of ownership at all. These terms can only be applied, in this connection, to *things* as the objects of a proprietary right. If the object is a field, it is a corporeal thing. If the object is merely a specified service in a corporeal thing, as the "right of way" over a field, it is itself an incorporeal thing. It is therefore incorrect to say that the Roman jurists speak of some rights as incorporeal rights, implying that other rights are corporeal. As a matter of fact, they speak of certain services (to which the term "rights" in a special sense is sometimes applied) as incorporeal things as opposed to other things which are corporeal.

(2) Again, things were divided into movable (*res mobiles*) and immovable (*res immobiles*), according as they can or can not be transferred from place to place without injury to their substance or form. Among immovable things were included lands and every thing attached thereto, such as buildings, trees, ungathered fruit, standing grain, minerals. While this distinction is based primarily upon the physical nature of the things themselves, the question as to the immovability of certain things may depend upon their juridical relation to other things. Upon this principle, the jurists worked out quite thoroughly the subject of fixtures (*fixa*), that is, things which are so related to an immovable thing as to partake of the same character.

(3) Things were, moreover, regarded as either divisible (*res dividuæ*) or indivisible (*res individuæ*), according as they can or can not be separated into parts without destroying their essential character or use. The jurists regarded as divisible only those things which, without de-

struction of their substance or perceptible diminution of their value, are susceptible of being split into portions analogous in quality to the thing itself and differing from it only in quantity. But the principle of division was extended so as to apply not only to a physical division into definite parts (*partes certæ*), but also to a juridical division into imaginary parts (*partes incertæ*), as when a single thing is owned by two or more persons in common.

(4) For certain special purposes, things were also regarded as either consumable (*quæ usu consumuntur*) or inconsumable (*quæ usu non consumuntur*). The former class include those which necessarily lose their substance or value by legitimate use, as wine, oil, food, etc. All other things are included in the latter class. This distinction is important in connection with certain kinds of loans, and also in determining the extent to which a person is liable who has received the right of using a thing belonging to another.

4. Things as to Their Mode of Designation.— A still further method of viewing things was according to the mode in which they are designated in a legal transaction.

(1) On this principle was founded the division of things into those which may be furnished *in genere*, and those which must be furnished *in specie*. By a "generic" thing is properly meant not a class of things, but a thing designated by the class to which it belongs. When, therefore, a thing is generically designated in a contract, any one of the kind may be furnished. But when a thing is specifically named, the particular thing itself must be furnished. These classes are sometimes distinguished by the barbarous Latin phrases, *res fungibiles* and *res non fungibiles*.

(2) Somewhat allied to the above distinction is that by which things are regarded either as particular (*res singulares*) or collective (*rerum universitates*). By a *res singularis* is meant an individual thing taken by itself, as a slave, a house. By a *rerum universitas* is meant a group of things taken as a whole without regard to the number or specification of the individuals composing it, as a flock of sheep, a stock of goods, an entire estate. The peculiarity of a collective thing consists in the fact that it is not legally affected by any natural increase or diminution of the individual elements that enter into it.

5. Things as to Their Mutual Relations.— When considered with reference to their relations to each other, things were regarded as either principal (*res principales*) or accessory (*res accessoriæ*). A principal thing, according to the Roman law, is one that can subsist by itself, and is legally viewed as the direct object of a right. An accessory thing, on the other hand, is one that is so joined or related to the principal that its legal character is merged in that of the latter. This relation of principal and accessory is of the greatest importance as connected with the transference of the title to property and the recovery of property by suit. It was a general principle of the law that whoever has the right to the principal, has also the right to the accessory thing.

In defining the things that are included under the term "accessory," it is necessary to observe that the term applies to something else than that which merely forms an essential and constituent part of another thing (*pars rei principalis*) and which from its very nature must follow the disposition of the whole. The term applies rather to that which possesses, to a certain extent, a distinct character of its own, but which loses its legal independence by sustaining a subordinate relation to another thing.

Things properly regarded as accessory may be grouped, in general, under "appurtenances" and "fruits."

(1) Appurtenances are things which have been so joined or attached to the principal thing as to be regarded as necessary auxiliaries to it (*causæ rei*) and to be legally treated as though they were parts of it (*quasi partes rei*). They may belong to movables or immovables. But that they may be properly auxiliary to the principal thing, it is necessary, first, that they be naturally adapted to serve the principal thing and augment its utility; secondly, that this adaptation be of a permanent character; and, thirdly, that it be efficiently realized. The rule of the Roman law is that every disposition that affects the principal affects also the appurtenances, unless an exception be expressly made.

(2) Under the term "fruits," the Roman law includes not only the natural organic products of a thing (*fructus naturales*), as the products of the soil and the offspring of animals; but the pecuniary benefits that may be legitimately drawn from a thing (*fructus civiles*) as interest and rents. Natural fruits comprise something more than those which are called strictly natural (*mere naturales*), that is, which result from the spontaneous growth of nature; they include, besides, those which are called industrial (*industriales*), that is, the production of which requires the aid of human labor, as agricultural and mechanical products. For the purpose of determining the legal disposition of certain natural fruits, it becomes necessary sometimes to distinguish between those which are still unsevered from the principal thing (*pendentes*); those the separation of which has resulted from chance or natural causes (*separati*); and those which have been gathered or appropriated with the intention of retaining possession (*percepti*). The principles which

were applied to the legal disposition of natural fruits were, in general, applied also to civil fruits.

Within the meaning of the Roman law, the term accessory thing thus comprehends everything which in a legal transaction is by presumption transferred or retained with the principal; and, consequently, everything which, in a civil suit, the claimant of the principal may properly demand from the defendant in addition thereto, including what he would have derived from the principal had it not been unjustly withheld from him.

References.—Gaius, 2, 1–14; "Inst.," 2, 1–12; "Digest," *De divisione rerum* (17, 8), *De actionibus emti et venditi* (19, 1); Mackenzie, "Roman Law," pp. 161–164; Tomkins and Jencken, "Modern Roman Law," pp. 56–62; Amos, "Roman Civil Law," pp. 123–131; Kaufmann's "Mackeldey," I., pp. 151–158; Phillimore, "Private Law Among the Romans," pp. 88–93; Goudsmit, "Roman Law," Bk. I., ch. 4; Demangeat, "Droit Romain," I., pp. 438–447; Marezoll, "Lehrbuch," §§ 82–85; Böcking, "Röm. Privatrecht," S. 30–36; Arndts, "Pandekten," §§ 48–55; Vangerow, "Pandekten," §§ 61–79; Windscheid, "Pandekten," §§ 137–144

CHAPTER II.

THE GENERAL RIGHT OF OWNERSHIP—DOMINIUM.

THE law of property in general determines not only the various kinds of things which may be made the objects of a real right, but also the various kinds of real rights which may be exercised with reference to things. These rights may be very extensive or they may be very limited. But the common feature which characterizes them and which distinguishes them from personal rights is the fact that they avail against the world at large. In defining the character and extent of real rights, a distinction is to be drawn between those which one possesses in that which belongs to himself (*jura in re propria*), and those which he possesses in that which belongs to another (*jura in re aliena*).

Reserving for the present the consideration of the latter class of rights, we shall notice the distinctive features of those rights which one is said to possess in that which is his own. These rights involve the highest and most absolute control which a person is permitted under the law to exercise with reference to an object. To this superior class of real rights, the Roman jurists applied the term *dominium*—that is, ownership in the proper sense of the word. It is true that the term *dominium* was sometimes used to include all kinds of real rights, whether superior or subordinate; but it was generally restricted to that class of rights with reference to things which not only avail against the world at large, but which are held under no superior except the law-making power.

We shall be in a position better to define the specific elements and various forms of ownership, if we first consider the growth of the legal idea of property as illustrated especially in the Roman law.

1. Growth of Property as a Legal Right.— Property is founded primarily upon the instinct to appropriate the necessary means of human existence and happiness; and when considered as a moral right, it has no doubt an ultimate basis in the nature of man. But when looked upon from a purely legal point of view, it is seen to be immediately connected with the evolution of civil society and the growth of state-power. This may be illustrated by the successive forms in which property has been held, and by the successive modes in which it has been protected.

(1) In the early stages of society, the social and the proprietary relations of men are so closely allied to each other as to be governed substantially by the same principles. On account of the peculiar organization of early society, the primitive form of property, especially as it relates to immovables, partakes somewhat of the character of "communism." The individual rights of appropriation are merged in the general proprietary rights of the group. Whatever is acquired by any member belongs to the common estate; and it is held and perpetuated as an adjunct of the community as a whole. But the growth of the importance of the individual as an independent member of society is accompanied by the growth of individual ownership as a right distinct from the general right of ownership exercised by the community at large. The transition from collective to individual property seems to be an historical fact that has everywhere attended the emergence of man from a state of barbarism.

In Roman history, we find illustrations of this fact in

the gradual decline of the collective idea of property involved in the organization of the *gens* and the patriarchal family, and in the corresponding growth of an elaborate system of rules, granting to the individual the independent power of acquisition and alienation.

(2) The growth of the legal idea of ownership is also associated with the evolution of the state as a mediating and sanctioning power. In primitive society the right of property is based upon force. The right of the group to that which it holds depends upon its capacity to retain its goods against forcible dispossession. With the growth of the state, however, the force necessary to protect property is taken away from the elementary group and the individuals composing it, and reposed in the larger body-politic. This results in the adoption, on the part of the state, of certain rules in accordance with which its mediating and sanctioning authority is exercised. The right of appropriation, protected by the force of the proprietors themselves, is thus modified by the growth of common rules of acquisition, which apply alike to all and which are enforced by the sovereign power of the whole community. And in adjusting the conflicting claims of different proprietors, the state, as it ceases to be a respecter of persons, comes gradually to recognize principles that are based upon an equality of rights. In connection, therefore, with the movement whereby collective property is translated into individual property, there is also a movement whereby the sanctioning power is transferred from the proprietors to the body-politic.

The growth of the Roman law of property gives unmistakable evidence of this twofold process—the differentiation of the proprietary tenure from collectivism to individualism, and the integration of the sanctioning power from private force to state authority. The legal

idea of property, therefore, which we find in the Roman law is that of a right held by a person over a thing—absolute with reference to all other persons, but relative with reference to the state. It is relative with reference to the state not only because the right itself is sanctioned by the state, but because its extent and the legitimate modes of its acquisition are determined by the state authority. The legality of the right of property thus depends directly upon the sanction given to it by the state. But it must not be supposed that the Roman jurists ignored the ethical basis of this right. No more than any other right is the right of property created by the arbitrary will of the state. It is sanctioned by the state because it is in accordance with the natural principles of justice, which the state is always morally bound to respect.

2. Elements Involved in Ownership or Dominium.—According to the Roman law, the right of ownership, or *dominium*, is the most extensive real right which a person can legally exercise over a thing. It is the plenary control over an object availing against the world, and in its exercise it is subject to no superior authority except that of the state. It must not, however, be regarded as an absolutely unlimited right, for it is restricted by the legal rights of other persons and by the general duties resting upon the owner as a law-abiding citizen.

Though subject to these necessary restrictions, it yet approaches in its complete form the character of an absolute right. It is, in general, indefinite as to its extent, unlimited as to its duration, and unrestricted as to its disposition. Hence, the owner, or *dominus*, can hold the object to the exclusion of all other persons; can use it according to his own free-will; can reap all the benefits capable of being legitimately derived from it; and can

freely dispose of it during his lifetime or at his death. In the technical language of the Roman law, *dominium*, or complete ownership, includes :

(1) The *jus utendi*, or the right of making use of the thing.

(2) The *jus fruendi*, or the right of appropriating its fruits, whether natural or civil.

(3) The *jus abutendi*, which involves the right of destruction, consumption, and free disposition.

3. Different Forms of Ownership.—In connection with the simple idea of ownership just described, there are certain special features relating to the form of ownership, or the mode in which it is exercised, that should be noticed.

(1) In the first place, the Romans made a distinction that corresponds somewhat to legal and equitable ownership. This distinction, which as we have seen played a very important part in the history of the law of property, was based not so much upon the extent of the right as upon the kind of sanction by which it was protected. It is only necessary to collate certain facts already referred to, in order to see the relation which these two forms of ownership sustained to each other. *Dominium*, it will be remembered, referred originally to that right of property which was protected by the *jus civile*. But the prætor assumed the authority to protect *bona fide* possession even when all the conditions required by the *jus civile* had not been complied with. This kind of property was said to be held *in bonis ;* and these two forms of ownership the commentators have distinguished as *dominium Quiritarium* and *dominium bonitarium*. With the fusion of the *jus civile* and the *jus gentium*, and with the tendency of the jurists to found all rights upon common principles, the *possessio in bonis* came to be assimilated to *dominium*.

Though the distinction between these two forms of ownership continued to exist in legal phraseology, they were practically equal in extent, and came to be protected by the same tribunal.

(2) Again, the right of *dominium* in one and the same thing may be exercised by a single person or by two or more persons. This gives rise to the distinction between single and joint ownership. In the latter case (*condominium*) the undivided thing is held in common by all the owners; they are all in common, according to their share, entitled to its fruits, and are also obliged to defray its necessary expenses. No one of the owners is entitled to the entire thing, nor indeed to any separate part of it. But either owner could obtain his own proper share by an action called *communi dividundo*.

(3) While the *dominium* in the fullest sense is an unlimited and exclusive right, it may yet be qualified in various ways without destroying the real right of the *dominus*. Upon this fact depends the distinction between absolute and qualified ownership, or free and burdened property. The ownership is said to be free, or absolute, when all the rights involved in the *dominium* are vested in the owner himself; and in this case it is distinguished by the terms *dominium plenum*, or *plena proprietas*. But when certain subordinate rights, as the right to use the thing or of reaping the fruits, are detached and transferred to another person than the owner, the property becomes to this extent burdened. The superior right, however, which still remains with the owner, does not lose its essential character as *dominium*. On account of the fact, however, that it is burdened and not free, it is called by way of distinction *dominium minus plenum*, or *nuda proprietas*. The *dominus* is still a *dominus* even when his rights of ownership are thus restricted or qualified.

4. Possession and its Relation to Ownership.—Besides the right of ownership, the Roman law recognizes another real right, which often sustains an important relation to ownership, viz.: the right of possession. It is evident that there is a clear distinction to be drawn between the right to possess (*jus possidendi*) which is merely a legal consequence of ownership, and the simple right of possession (*jus possessionis*) which may exist independent of ownership. Possession and ownership may, and generally do, coincide. But as a person may be the owner of a thing and not possess it, so a person may be the possessor of a thing and not be the owner. It is when the possessor is not the legal owner that it becomes important to consider to what rights he is entitled by virtue of his possession. To sum up in the briefest space a subject which has afforded much discussion and controversy, the following statements must suffice.

(1) Possession, when considered as a mere fact, is simply the corporeal apprehension of a thing, or the holding of a thing under one's physical control. In order to have any juridical significance, the corporeal detention (*corpus*) must be accompanied by an intention (*animus*) to hold the thing as one's own—which, of course, cannot be the case when one holds a thing as the property of another (*alieno nomine possidet*) as a trust or security, in which case the Roman law says, that he does not strictly "possess" it (*non possidet*). In order that possession may have full significance as a legal fact (*possessio civilis*) it must have been acquired lawfully and in good faith. It is lawfully acquired (*possessio justa causa*) when it has been acquired through the forms of a legal title and not in a vicious manner (*vi, clam, vel præcario*). It is acquired in good faith (*possessio bonæ fidei*) when the possessor believes that no one has a better right to the thing than himself.

(2) A question which has seriously disturbed the minds of modern civilians is, Whether possession, in the Roman law, is a *right* or merely a *fact*. Notwithstanding the clear statement of Papinian, "possessio non tantum corporis sed et juris est" (D., 41, 2, 49, 1), and the fact that the term *jus possessionis* is repeatedly used by the jurists, it may be the part of wisdom for us to avoid this issue, and simply say that, whether possession is a legal fact or a legal right as well, it is certainly true that the Roman law recognizes on the part of the possessor certain definite legal rights to which he is entitled by virtue of his possession. These rights may be considered with reference to juridical possession, and with reference to civil possession.

In the case of juridical possession—that is, where the detention of a thing is accompanied with the intention of holding it as one's own—the possessor has the right of protection against any other person who has not a better title than himself; and in case he is improperly dispossessed (*vi, clam, vel precario*) he has the right to be summarily restored to his possession. As against any one claiming a better title, he has the right of retaining possession until the issue is legally decided.

In the case of civil possession—that is, where juridical possession is also *bonæ fidei* and *justa causa*—the possessor has not only the right of protection but the right of assuming full ownership after a period of time specified by law (*usucapio*). He has also the right to the gathered fruits of the estate as long as his title remains secure against adverse claimants.

When considered with reference to their accompanying rights, juridical and civil possession are sometimes distinguished as *possessio ad interdicta* and *possessio ad usucapionem*. The former was protected by the prætorian in-

terdicts (*interdicta retinendæ et recuperandæ possessionis*); the latter was protected by the *actio Publiciana* until it ripened in full ownership. The rights which accompany juridical and civil possession possess a close similarity to ownership. They are substantially real rights, availing against all the world, except the single person who can show a better title—and in the case of civil possession this exception ceases after a prescribed period of time.

References.—Gaius, 1, 54; 2, 40; 3, 80; Digest, *Communi dividundo* (10, 2); *De aquirenda vel amittenda possessione* (41, 2); *Uti possidetis* (43, 17); Code, *De acquirenda et retinenda possessione*, (7, 32); Mackenzie, "Roman Law," pp. 165–167; Hunter, "Roman Law," pp. 195–222; "Dict. Antiqq." (*Dominium*, *Possessio*); Tomkins and Jencken, "Modern Roman Law," pp. 99–111, 150–154; Kaufmann's "Mackeldey," I., pp. 231–272; Demangeat, I., pp. 447–452; Deurer, "Gesch. und Inst.," §§ 147–150; Marezoll, "Lehrbuch," §§ 82–103; Böcking, "Röm. Privatrecht.," §§ 133–140; Vering, "Gesch. und Pandekten," §§ 136–140; Arndts, "Pandekten," §§ 123–143; Vangerow, "Pandekten," §§ 198–210, 295–304; Windscheid, "Pandekten," §§ 145–169.

There is hardly any topic connected with the Roman law which has been so extensively discussed as that of "possession." A great number of the more recent writings have been provoked by the theory of Savigny, which the English student will find stated in the "Dict. Antiqq." (*possessio*). The diverse views regarding this subject may be found in Tomkins and Jencken's "Modern Roman Law," and in Kaufmann's "Mackeldey," in the text and the notes. The literature of this subject is extensive; but, perhaps, the most significant works are: Thibaut, "Ueber Besitz und Verjahrung," Jena, 1802; Savigny, "Das Recht des Besitz," Giessen, 1803; Warnkönig, "Analyse du Traite de la Possession par M. De Savigny," Liege, 1824; Zachariä: "Neue Revision der Theorie des Röm. Rechts vom Besitz," Leipsic, 1824; Gans, "Ueber die Grundlage des Besitzes," Berlin, 1839; Pfeiffer, "Ueber dem Besitz nach Röm. Recht," Tübingen, 1840.

CHAPTER III.

THE SUBORDINATE RIGHTS OF OWNERSHIP—JURA IN RE.

In complete ownership, all the rights involved in the *dominium* are united and vested in the *dominus*. But ownership without losing its essential nature, may become qualified or burdened. This occurs when certain subordinate rights are separated from the *dominium* and conferred upon some other person than the *dominus*. For instance, one person may be the owner of a thing and have the right to its substance ; while to another person may be granted the right to use the thing in a specified way, or to make use of its fruits for a specified time. The rights which may thus be detached from the *dominium* without destroying the superior right of the *dominus*—in other words, the rights which one person may exercise in the property of another—are called *jura in re aliena*, or simply *jura in re*. They are regarded as subordinate to, yet distinct from, the *dominium*, and are hence subject to a separate consideration.

1. General Features of Jura in Re.—The *jura in re* of the Roman law may be defined in general as certain subordinate rights of ownership which are exercised by one person in the property of another. They do not themselves constitute ownership in the proper sense, but are certain rights of a specified nature "carved out" of the *dominium*, without, however, destroying the residuary or principal right of ownership (*nuda proprietas*). In this separation of the rights of property, the distinction must be kept in view between the superior rights which the

owner still retains in his property, and the subordinate rights which are transferred to another. In such a separation, these two sets of rights in the same object are correlative to each other—the superior right being restricted in proportion to the extent of the subordinate rights which are detached.

The general characteristics of the *jura in re* may be described as follows :

(1) They are regarded as *real* rights, availing against all the world equally with complete ownership.

(2) They are less in extent than complete ownership (*plena proprietas*), although they may, in some cases, be practically of greater extent than the residuary right of ownership (*nuda proprietas*) left after their separation.

(3) They sustain a certain subordinate relation to ownership, since in case of their extinction as separate rights, they are re-absorbed into the *dominium*.

(4) They are never presumed, but if questioned they must be proved as to their existence, and also specifically defined as to their extent, and as to their duration if limited in time.

Among the various *jura in re* of the Roman law, some are granted for the benefit of an adjoining estate, as prædial servitudes ; some are granted for the benefit of a particular person, as personal servitudes ; some are granted in perpetuity for the benefit of a person and his heirs, as *emphyteusis* and *superficies ;* and some are granted to a creditor as a security for debt, as *pignus* and *hypotheca*. We shall consider them briefly in the order named.

2. Prædial Servitudes—Rural and Urban.—Prædial servitudes comprise certain rights, or services, in one estate which are detached from that estate and united to

an adjoining estate for the benefit of the latter. In such a case, the one estate is burdened to the extent that the other is benefited; or, in the language of the law, one estate serves the other—*prædium servit prædio.* Of the two adjoining estates, the one from which the rights are detached, or which suffers the burden, is called the *prædium serviens;* while the other, which receives the benefit of the servitude, is called the *prædium dominans.* When a prædial servitude has once been established, the privileges of the dominant estate and the burdens of the servient estate remain without regard to what particular persons may come into possession of the different estates.

The general principle controlling prædial servitudes is, that the dominant estate must derive an actual benefit from the servitude, and the benefit derived must be due to the relative position, the essential nature, or the peculiar features of the servient estate. This benefit, which the owner of the dominant estate derives from the other, may be *positive,* as when he is allowed to put the servient estate to a certain use which he could not otherwise do, *e. g.*, in using the right of way; or the benefit may be *negative,* as when the owner of the servient estate is restrained from using his property as he might do if the servitude did not exist, *e. g.*, in being prevented from raising his building so high as to obstruct his neighbor's light. Upon this principle depends the distinction between positive (or affirmative) and negative servitudes.

Prædial servitudes are commonly divided into *rural,* or those that relate to land, and *urban,* or those that relate to buildings—so-called because the former are more common in the country, and the latter in the city.

(1) Rural servitudes comprise the rights which the owner of one piece of land has to certain services or benefits afforded by an adjoining piece of land belonging

to another person. As examples of such servitudes may be mentioned: the right to pass over an adjoining field on foot or horseback (*iter*); the right of passage for carriages or for cattle (*actus*); the right of way for any kind of vehicle or for any kind of purpose (*via*); the right of drainage (*aquæductus*); the right of watering cattle on another's field, or of drawing water from another's well (*aquæhaustus*); the right of pasturage on another's land (*jus pascendi*), etc.

(2) Urban servitudes are similar to the preceding, except that they relate to buildings. The following are some of the chief examples: the right of supporting a building upon another's house-wall (*jus oneris ferendi*); the right of inserting a beam into another's wall (*jus tigni immittendi*); the right of projecting a roof over another's ground, or of opening a house-drain upon it (*jus stillicidii vel fluminis recipiendi*); the right to restrain a neighbor from raising a wall so high as to obstruct the light (*jus altius non tollendi*).

No servitude, whether rural or urban, whether positive or negative, exists unless it has been constituted in a manner prescribed by law. And when once established, it remains until terminated according to the rules of the law. A prædial servitude may be created by agreement; by testament; by prescription; or by a judicial decree. It may be terminated by renunciation, or voluntary surrender; by negative prescription, or non-use for that period of time which would have been necessary to establish it; by consolidation or merger, which takes place when the ownership of the adjoining estates becomes united in a single person; and by destruction either of dominant or of the servient tenement.

The general principles of the Roman law regarding prædial servitudes are preserved in the modern civil law,

and are applied, in a great measure, to the "easements" of the English common law.

3. Personal Servitudes—Usufruct, Use.—Personal servitudes comprise certain subordinate rights in property which are detached from the *dominium* for the benefit of some particular person other than the owner. On account of their distinctive character in being granted by the owner to some specific person, they cannot, strictly speaking, be alienated, and they cannot extend beyond the lifetime of that person for whose benefit they are granted. The character of personal servitudes will be more clearly indicated by defining their species, which are Usufruct, Use, and some others of less importance.

(1) Usufruct (*ususfructus*) is the right of using a piece of property belonging to another and enjoying its fruits without impairing the substance. Or, in the words of Paulus, it is: "Jus alienis rebus utendi fruendi salva rerum substantia" (D., 7, 1, 1). This right may be established in any corporeal thing, whether movable or immovable. It was originally restricted to things that are not consumed by use; but a *quasi* usufruct was afterward allowed in consumable things, on the condition that an equivalent of the substance consumed be restored, either in kind or in money. The person for whose benefit the servitude is established is called the usufructuary (*usufructuarius*). It was a peculiar principle of the Roman law that, while the right of usufruct was regarded as strictly inalienable, the usufructuary might permit a third person to exercise it and receive the benefit that it afforded. But in this case the original relation between the usufructuary and the proprietor still remained unchanged.

The privileges and the liabilities of the usufructuary grow out of the essential nature of the right itself. He is

entitled to use the property in any legitimate manner. He is entitled to the benefit of all the fruits, both natural and civil, that are properly accessory to the estate—that is, the fruit ungathered at the commencement of the interest, and the fruit gathered before the termination of the interest. Consequently, the fruit gathered before the commencement and ungathered at the termination of the interest belong to the *dominus*. The usufructuary is also under certain obligations which attend his right, viz.: to make compensation for any injury done to the property; to keep the property in ordinary repair; and to pay the public burdens or taxes to which the estate is liable. Every usufructuary was also obliged, according to the Roman law, to give security to restore the property in the same condition as that in which he received it.

Like all other servitudes, the usufruct must be created and terminated in a manner prescribed by law. It may be established by testament; by agreement followed by a *quasi* tradition; by being reserved in the alienation of the *nuda proprietas;* by adjudication, as when a judge by a compromise between disputants decrees the *nuda proprietas* to one claimant and the usufruct to another; and by special law, as where Justinian gave the father a life interest in the son's *peculium*. The right, on the other hand, may terminate by the natural or civil death of the usufructuary; by limitation, when granted for a specified period; by merger, when the usufruct and the *nuda proprietas* are re-united in the hands of the same person; by renunciation, when the right is voluntarily surrendered to the proprietor; by non-use for the prescriptive period; and by the destruction of the property in which the right is established.

(2) Use (*usus*) is an interest in the property of another of less extent than the usufruct. It is restricted to the

simple use of the property, excluding the fruits—except when granted in land, in which case there is included the right to the fruits necessary to supply the daily wants of the usuary (*usuarius*). The use was not only inalienable, like the usufruct, but even the exercise of the right could not be transferred to another. The principles relating to the establishment and termination of the use were substantially the same as those that applied to the usufruct.

(3) Besides these more important personal servitudes, there were in the Roman law certain others which need merely to be mentioned, viz.: the right to reside in a house (*habitatio*); the right to the labor of slaves (*operæ servorum*); the right to the use of animals (*operæ pecorum*); and the right to possess and enjoy the temporary benefit of another's property, whether movable or immovable, at the will of the owner (*præcarium*). The general principles applicable to these were similar to those principles already mentioned in connection with the other personal servitudes.

The personal servitudes of the Roman law, and of the modern civil law, so far as they relate to immovable property, are somewhat analogous to the "estates not of inheritance" of the English common law. Owing to the peculiar and distinctive origin of the English law of real property, this analogy indicates, however, no historical relation between the two interests.

Emphyteusis and Superficies.—The most extensive *jura in re* of the Roman law were the *Emphyteusis* and the *Superficies*, which approximate quite nearly to the complete right of ownership. In these cases, the largest portion of the rights involved in the *dominium* are granted to some other person than the *dominus*, so that the residuary rights belonging to the *dominus* are of a comparatively limited character.

(1) *Emphyteusis* is the perpetual right of using and enjoying the fruits of the land belonging to another on condition of proper cultivation and the payment of an annual rent. Before the legislation of Justinian, this right had no definite character of its own, sometimes being treated as a sort of perpetual usufruct and sometimes as *quasi dominium*—although it could neither be a usufruct, since it was inheritable; nor *dominium*, since it was distinct from the right of the *dominus*. Justinian, accordingly, gave it a distinct character, by applying to it the law relating to *ager vectigalis*—or the land leased in perpetuity by towns,—which had itself been founded upon the law relating to *ager publicus*.

We may, therefore, trace the principles involved in the *emphyteusis*, or the perpetual lease of land, to the earliest theories of landed property existing at Rome. The land which was originally conquered by the Romans was for the most part given over to individual citizens to occupy and enjoy. But its true ownership still remained with the state, the land itself being called *ager publicus*. Its possession involved the exclusive right to its enjoyment, and was protected by the prætor's interdicts. The land thus possessed was subject to an annual rent—usually a tenth or a fifth part of the products,—whereby it was sometimes called *ager vectigalis*. The latter term was afterward applied to any land leased in perpetuity by the state, or by any municipal or ecclesiastical corporation; it was usually restricted, however, to town lands, which were so leased that neither the lessee nor his legal successors could be ejected or disturbed so long as the *vectigal*, or rent, was paid. The application of the law regarding the *ager vectigalis* to perpetual leases of private land gave to the latter, under the name of *emphyteusis*, a distinctive character as a part of the law of private property.

Although the *emphyteusis* did not properly carry with it the *dominium*, it involved all the beneficial rights of ownership. Not only did the *emphyteuta*, or holder of the right, possess all the privileges involved in the usufruct, but the right itself was alienable, devisable, and inheritable. The rights which the *dominus* (with his heirs) still retained were the right to the annual rent, the right of pre-emption, the right to a fine of one-fiftieth part of the value of the estate upon alienation, and the right of reversion. There was thus involved in the relation growing out of this right a sort of "double ownership"—a practical but inferior ownership held by the *emphyteuta*, and a theoretical but superior ownership held by the *dominus*. This principle of double ownership in land, uniting the beneficial right of the tenant with the reversionary right of the lord, is analogous, and perhaps historically related, to the feudal tenures of the Middle Ages, upon which are founded the "estates in fee" of the English law.

This right, like every other *jus in re* of the Roman law, was never presumed to exist. It might be created by contract, which was, on account of the early indefinite nature of the right itself, sometimes regarded as a lease and sometimes as a sale, until the emperor Zeno gave to it a distinctive character and name (*contractus emphyteuticarius*); by testament; and, as some suppose, by prescription. It might cease to exist—that is, revert to the *dominus*—by renunciation; by serious injury to the property; by the non-payment of the rent or of the public burdens to which the land was liable; by alienation without due notice to the owner; by negative prescription, which might occur when the owner himself held the land by *bona fide* possession for the prescriptive period; and by the death of the *emphyteuta* without heirs.

(1) *Superficies* is a right similar to the preceding, appli-

cable, however, to buildings instead of land. By it a person could erect a building upon the land of another, which building, though theoretically belonging to the proprietor of the land, was practically the property of the grantee, who could use it, transfer it, or transmit it to his heirs, subject to the payment of an annual rent. This right is analogous to the long building-leases of the English law. The conditions of its creation and extinction were substantially the same as those of the *emphyteusis*.

5. Pignus and Hypotheca.—The remaining *jura in re* to be considered are those rights which a creditor might acquire in the property of another as a security for debt. These are the *pignus* and the *hypotheca*. The chief distinction between these two rights consists in the fact that the former, like the English pawn, involves the transference of the possession of the property to the creditor; while the latter, like the English mortgage, allows the possession to remain in the hands of the debtor. In considering the nature of these rights, we may notice the mode in which they were developed as *real* rights; the principles by which they are controlled; the modes in which they may be established; and the conditional power of sale which they involve.

(1) The earliest mode of granting security for debt—leaving out of account the *manus injectio* of the XII. Tables, which placed in jeopardy the personal liberty of the debtor—was by the *fiducia*. This involved the transfer of full legal ownership in the property to the creditor (by mancipation or *in jure cessio*) upon the condition of its being re-conveyed by the creditor on the payment of the debt. The *fiducia* was not only attended with inconvenience, but did not secure the debtor from the injustice which might arise in case the creditor saw fit to alienate the property. Having relinquished the legal ownership

the debtor had no remedy for the recovery of the property, in case it passed from the hands of the creditor. This injustice was partially met by the early *pignus*, or pledge. In this case, the possession only of the property was transferred to the creditor, who simply acquired the right of sale if the debt was not paid when due. The debtor was now made safe by retaining the full ownership of the property; and the claim of the creditor was secure as long as he retained possession of the property pledged. But in case the latter lost his possession, he also lost his security; since, not being the owner, he had no real action for its recovery.

In order to prevent injustice either to the debtor or to the creditor, it was necessary not only to preserve to the debtor his right of ownership, but also to secure to the creditor his right of conditional sale, whoever might happen to be the possessor of the property. This was accomplished by the prætorian law, which at first gave to the proprietor of an estate a real action (*actio Serviana*) for the recovery of property pledged by his tenant (*colonus*) as a security for rent. This right was extended by the *actio quasi Serviana* (called also *actio hypothecaria*), so that any creditor might pursue his right to any property that had been pledged as a security for debt, against any person having it in his possession. The ancient *fiducia* passed away, as the *pignus* and *hypotheca* assumed the character of *jura in re*, or real rights, available against any person who might hold the burdened property in possession. With certain supplementary provisions giving to the owner of the burdened property a reasonable time in which to redeem his property from the burden resting upon it, the Roman law of pledge and mortgage was essentially complete.

(2) The principles which controlled the *pignus* and the

hypotheca were substantially the same, with the general distinction that the former involved possession on the part of the creditor, which the latter did not. Each right pre-supposes a valid claim, for the security of which it is established; and hence, if the debt is not legally valid, the security has no significance. The right may be granted in any thing which is capable of alienation. This generally consists in a corporeal thing, movable or immovable, or in any aggregate of rights that can by conveyed. But a personal servitude (as a usufruct) although it cannot itself be strictly alienated, may furnish the basis of a security; in this case, however, the creditor cannot seize upon the right of usufruct itself, but only upon the fruits that result from the usufruct. The right of pledge or mortgage is said to be *general*, when it relates to the whole property of the debtor; and *special*, when single things only are pledged.

(3) The right may be established by agreement; by testament; by judicial decree; and by operation of law. When created by agreement or testament, it can be established only by the one who has the legal right to the thing pledged. By a judicial decree, the possession of the debtor's property may be adjudged to the creditor until the judgment-claim has been satisfied. By operation of law, the tacit right of mortgage (*hypotheca tacita*) was, among the Romans, attached to certain specified claims. For example: The *fiscus* had a general mortgage on the property of all subjects as a security for public taxes; the husband on the property of him who promised the *dos*; the wife on the property of the husband for the restitution of the *dos*; the lessor on certain things belonging to the lessee as a security for rent. In some other cases specified by law, similar burdens rested upon property as a security for claims—which were somewhat analogous to

certain liens of the English law. The right of *pignus* or of *hypotheca* is terminated upon full legal satisfaction of the claim for the security of which it was established.

(4) The power of sale (*jus distrahendi*) in cases of non-payment, forms an essential feature of the pledge and mortgage. Lest creditors on the one hand should be hindered in pursuing their rights, and lest debtors on the other should too hastily lose the ownership of their property, Justinian fixed certain provisions regarding the enforced sale (*distractio*). If the parties had agreed as to the time and manner of the sale, the terms of the agreement must be carried out. If there had been no agreement to that effect, and the creditor wished to sell the property, he must, if he had possession, give formal notice of his intention to the debtor; or, if he had not possession, he must obtain a judicial decree; and after two years from either of those events, he was authorized to sell the property and satisfy his claim. After the satisfaction of the claim, the surplus of the proceeds of the sale belonged to the debtor. If the claim was not fully satisfied by the proceeds, the debtor was still responsible for the deficiency.

Closely connected with the right of sale is the question of priority, when several pledges are established in the same property. In general, the rule holds that the earlier pledge or mortgage has the preference over the later. But this rule is modified by the recognition of certain privileged mortgages specified by law. For example, those based upon an operation of law were generally preferred to those created by convention or testament. Among privileged mortgages, those based upon the claims of the *fiscus* stood first, and those based upon the claims of the wife to her dowry stood next. The claims of each prior mortgage must be fully satisfied, before the right of sale passes to the one next in order of priority.

It may be said, in conclusion, that the Roman law of *pignus* and *hypotheca* forms the basis of the modern civil and English law of pawn and mortgage. The English law of mortgage, however, being based upon the theory of a legal conveyance by deed, is more analogous to the ancient *fiducia*. It is, no doubt, true that the rights of the debtor are better protected in the common law than in the ancient law of the *fiducia;* while in equity, the practical tendency is to bring the mortgage into substantial harmony with the principles of the later Roman *hypotheca*, both in respect to its essential nature as a *jus in re*, and to its principles regarding redemption.

References.—"Inst.," 2, 2–5; "Digest," *De servitutibus* (8); *De usufructu*, etc. (7), *Si ager vectigalis, id est emphyteuticarius, petatur* (6, 3), *De superficiebus* (43, 17), *De pignoribus et hypothecis* (20); "Code," *De usufructu et habitatione* (3, 3), *De jure emphyteuticario* (4, 66); Sandars' "Justinian," Eng. ed., pp. 195–216, Am. ed., pp. 185–206; "Dict. Antiqq." (*Servitutes, Emphyteusis, Pignus*); Mackenzie, "Roman Law," pp. 177–185; Kaufmann's "Mackeldey," I., pp. 317–400; Hunter, "Roman Law," pp. 222–276; Tomkins and Jencken, "Modern Roman Law," pp. 168–200; Ortolan, "Instituts de Justinien," II., pp. 317–359; Du Caurroy, "Instituts Expliquées," I., pp. 321–367; Demangeat, "Droit Romain," I., pp. 500–563; Deurer, "Gesch. und Inst.," §§ 156–164; Marezoll, "Lehrbuch," §§ 104–117; Böcking, "Röm. Privatrecht," S. 93–124; Vering, "Geschichte und Pandekten," §§ 158–177; Arndts, "Pandekten," §§ 175–200; Vangerow, "Pandekten," §§ 338–392; Windscheid, "Pandekten," §§ 200–249. See also the recent work of Prof. Roby, "An Introduction to the Digest of Justinian," which contains a full commentary on the title, *De usufructu*.

CHAPTER IV.

THE ACQUISITION OF OWNERSHIP IN SINGLE THINGS.

HAVING thus far considered the various kinds of things that can be made the objects of ownership, and the various kinds of real rights that can be exercised with reference to things, we pass to consider the various modes by which ownership in things may be legally acquired. A "mode of acquisition" (*modus acquisitionis*), or title to property, refers to any fact or event by which the *dominium* becomes legally vested in a determinate person. It applies alike to the *original* acquisition of a thing which has no previous owner; and to the *derivative* acquisition of a thing, that is, the transference of a thing from one owner to another, whether the transference is made during the lifetime of the previous owner or on the occasion of his death. But it applies strictly to the *dominium* only; and not to the creation and transference of the *jura in re*, except where such application is specified by law. From the point of view of the owner, the *jura in re* are simply burdens or restrictions resting upon his property; so that when he transfers his property to another, he must transfer it subject to such burdens—that is, *minus* the rights which are detached. Ulpian says: "Nemo plus juris ad alium transferre potest quam ipse haberet" (D., 50, 17, 54).

In their arrangement of this subject, the Roman lawyers made a broad distinction between the acquisition of single things (*acquisitio singularum rerum*), and the acquisition of an entire estate (*acquisitio per universi-*

tatem rerum). Following their order let us then define first the modes, or titles, by which ownership may be acquired in single things as opposed to an entire estate. At the time of the classical jurists, these were regarded either as "natural" or "civil." In other words, things were said to be acquired either *ex jure gentium* or *ex jure civili*. The former comprised occupation, accession, and tradition; the latter comprised mancipation, *in jure cessio*, *usucapio*, and donation. But by the changes which had taken place in the law, mancipation and *in jure cessio* had practically passed away; and *usucapio* had become identified with *possessio longi temporis*, assuming the more general character of prescription. We may, therefore, consider the Justinian law regarding the acquisition of single things under the heads of occupation, accession, tradition, prescription, and donation.

1. Occupation, its Principles and Application.—Occupation (*occupatio*) consists in taking possession of a thing over which no one has a proprietary right. The rule of the law is, *res nullius cedit occupanti*. There are four essential conditions which must co-exist in order to give to occupation its full legal significance as a title to property. First, the thing must be a *res nullius*—that is, a thing which either never had an owner, or which, by virtue of a previous dereliction, has not an owner at the time of its occupation. Secondly, it must be a thing which is capable of ownership—that is, a *res in commercio*. Thirdly, it must be brought into the actual possession or control of the one professing to acquire it. Fourthly, the person must acquire it with the intention of assuming ownership in it; in other words, the possession must be juridical.

There are several applications of this title that are specified in the Roman law, of which the following are the most important:

(1) Wild beasts, birds, fishes, and in fact all animals which are still in their natural state of freedom, become the property of the captor. This rule, of course, applies especially to hunting, fishing, and fowling. The rule holds good even though the capture be made on another's land; the captor, however, is in this case liable for any damage resulting from his trespass.

(2) Precious stones and gems in a state of nature become the property of the finder. This principle does not, however, apply without modification to a treasure-trove—that is, a treasure deposited in a place for so long a time that its owner is unknown. If found upon one's own ground, such a treasure belongs wholly to the finder; but if found upon another's ground, the property is equally divided between the finder and the owner of the ground.

(3) Things the ownership of which has been abandoned are capable of occupation. But the dereliction must have been absolute. Ownership is not abandoned in things which have been lost, or which have been thrown overboard from a ship in distress.

(4) Things captured in war were generally regarded by the Romans as *res nullius*, and hence became the property of the captors. This rule was restricted to movables, since the conquered land was reserved for the state. Moreover, in case property captured by the enemy was retaken, it was restored to the original owners by the *jus postliminii*. The law of the Romans regarding captures in war has been almost entirely superseded in modern times by the theory that all captures belong to the state. The ancient rule seems to be preserved only in the exceptional cases of privateering and foraging.

2. Accession, its Character and Various Forms.—By accession one becomes the owner of that which is legally united to what already belongs to him.

In this case the owner of the principal thing becomes the owner of the accessory thing, according to the rule, *res accessoria cedit rei principali.* When the accessory thing is produced by a natural or industrial process, as in the case of the fruit of one's own trees, or the new product which one forms from his own material, the accession is closely related to occupation, since no one other than the owner of the principal has a prior claim to that which is thus acquired. But when a thing which hitherto belonged to one person becomes accessory to the property of another, the rule relating to accession is just only on the condition that compensation is granted to the previous owner of the accessory thing. These principles the law seeks to apply to the various forms of accession, of which the following are the chief examples:

(1) *Fructus.*—The simplest mode of accession is that by which one acquires the right to whatever is produced from that which he already owns. Here the principle applies not simply to purely natural fruits, or those which are produced by a process of nature; but to industrial fruits, or those which are produced by the application of one's labor to one's own material; and also to civil fruits, or the revenues which accrue from one's own property. In all these cases, the owner of the principal thing acquires *ipso jure* all that which is produced from it.

(2) *Alluvio.*—The new soil gradually deposited by the natural action of a stream or other waters belongs to the owner of the land upon which the deposit is made. But this accretion must be strictly of the character of alluvion, in that it cannot properly be referred to any previous owner. Hence the principle does not include violent changes, as when a piece of land is detached from one estate and transferred to another by a deviation in the course of a river. If, however, by natural causes, a piece

of land hitherto belonging to no one, as an island, appears in the middle of a stream, it belongs in common to the adjacent owners; if it appear on one side of the middle of the stream, it belongs to the nearest proprietor.

(3) *Adjunctio.*—The forms of accession previously noticed are those in which the principal thing receives its increment without disturbing any previous right of ownership. But there are cases in which things belonging to different owners may become related as principal and accessory, and the property of one owner is thus increased at the expense of the other. If the things can be disunited without injury to either, then each owner may claim his own property and the principle of accession does not apply. But if the two things are so related that they cannot be separated, then the rule holds that the accessory yields to the principal. In such a case, however, it is sometimes difficult to determine which is the principal and which is the accessory. In general, the less important yields to the more important. For example, a building accedes to the land; that which is sown or planted, to the soil; the writing to the parchment; but, in the case of a painting, the canvas accedes to the picture as the principal thing.

As to the question of compensation, the general rule is that he who has adjoined to his own property a thing that belongs to another is obliged, if he acted *bonâ fide*, simply to compensate the other for his actual loss. But if he acted with evil intent, he is liable for the penalty of theft.

(4) *Commixtio and Confusio.*—If the things that are united are of equal importance, as the union of homogeneous things, whether solid (*commixtio*), or liquid (*confusio*), the rule is that the compound, if inseparable, becomes the common property of both the previous owners. In

this case, it may be said that each thing accedes to the other, since the owners of the different things become joint owners of the common product. This principle applies properly only to the case in which the compound is inseparable into its constituent elements. If the separation of the compound is possible, then no accession takes place, and each owner retains his original right of property, which can be pursued by a real action.

(5) *Specificatio.*—The last example of accession is the case where one person has formed a new species from the materials belonging to another. The Roman jurists were for a long time divided upon the question whether, in this case, the material or the product should be regarded as the principal thing. The opinion finally prevailed that if the product be capable of being resolved into its original material without injury, then the material is the principal thing, and the workman is entitled to compensation for his labor ; but if the product cannot be thus resolved, then the product is regarded as the principal thing, and the workman is liable to the owner of the material for the simple value of the material, if he acted in good faith ; or for the penalty of theft if he acted *malâ fide.*

3. Tradition, its Requisites and Modes.—The third general method of acquiring ownership in single things is by tradition (*traditio*), or the actual delivery of a thing from one person to another, accompanied with the intention to transfer the ownership in the same. According to the Roman law, property cannot be transferred by mere agreement. The agreement, even though it take the form of a legal contract, simply expresses the intention of the parties and does not create a *real* right to the property ; it merely creates a *personal* right against the one making the agreement. To effect a legal transfer the

intention must receive a physical expression in the form of delivery. The special features of tradition as a title to property may be seen from its requisites, and from the various modes in which it is effected.

(1) The requisites, or conditions, necessary for a legal delivery are the following: First, the person making the transfer must be the owner of the thing and be legally capable of making the conveyance. Secondly, the person receiving it must be legally capable of acquiring and holding property. Thirdly, there must be a *justa causa*, that is, some external fact or legal transaction which indicates the intention to transfer the ownership; in other words, the delivery must be based upon some legitimate reason, as for example a previous contract of sale, a bargain for a dowry, an intention expressed in a legacy, or even a motive of liberality. A *justa causa* does not necessarily involve a *quid pro quo*; it is simply a fact indicative of the intention to transfer the right ownership. Fourthly, if the *justa causa* be a contract of sale, the delivery is not regarded as complete until the price is paid, even though the thing has passed to the buyer; but when the price is paid the legal delivery is fictitiously dated back to the time of the contract. This is based upon the theory that the intention of the seller to transfer the ownership is based upon the condition of receiving the price. If the price is unpaid, the transaction is invalid, and there is no transference of ownership; but on the payment of its price the transaction is rendered valid from the first.

(2) The formal element of tradition is the actual transfer of possession from one party to the other. This is interpreted to mean simply that the one who receives the thing is put into a position to deal with it as his own. Hence tradition may be performed in many ways according to circumstances. It may be effected by the transfer

of the actual physical possession of the thing itself; or by the transfer of the means necessary for taking possession, as the keys of a house; or by pointing out the thing from a distance with the permission to take possession (*longâ manu*); or by allowing the person who already holds a thing to retain possession, when the intention to transfer ownership in it has been declared (*brevi manu*). These formal acts of tradition are valid whether performed by the parties themselves or by their authorized representatives.

4. Prescription, its Origin and Principles.—In addition to the modes of acquisition already described which were referred to the *jus gentium* were certain others which were referred to the *jus civili*. The most important of these, after the decline of mancipation and *in jure cessio*, was prescription (*præscriptio*), whereby one becomes the owner of a thing on the ground that he has possessed it for a long time under certain specified conditions. This mode of acquisition was based upon public expediency, and was established, as Gaius says, that the titles of property might not remain uncertain.

(1) In considering the origin of the law of prescription as fixed by Justinian, we find it to be the result of a union of principles hitherto applicable to *usucapio*, to *possessio longi temporis*, and to the limitation of actions. This will appear from the following statements. *Usucapio*, which had existed from the time of the XII. Tables, provided that uninterrupted *bona fide* possession of movables for one year, and of immovables for two years, vested the right of ownership. But this rule applied only to Roman citizens, and to property capable of Quiritarian ownership —for example, Italian land.

Under the prætors a principle patterned after the analogy of *usucapio* was recognized whereby possession for a

long time (*possessio longi temporis*) either by a foreigner, or in provincial land, could be pleaded as an exception (*præscriptio*) to debar any opposing claims that might be raised by other persons than the possessor. The time was ten years for persons "present," that is living within the same province, and twenty years for persons "absent," that is, living in different provinces. While this kind of prescription did not, as in the case of *usucapio*, confer the strict right of ownership, it yet served as a legal protection to persons in their possessory rights over things that were not susceptible of *usucapio*.

In addition to this form of prescription founded upon "long possession" there arose another form based upon the limitation of actions. As a general rule, all actions were in early times perpetual (*actiones perpetuæ*)—that is, could be brought within any period of time; but certain prætorian actions were made limited to a definite time within which they must be brought or the cause of action would not be recognized (*actiones temporales*). And as a result of the later imperial legislation, the term of thirty years was prescribed as the limit of every action—with the exception of a few specified cases in which the limit was extended to forty years. Under this provision, therefore, a person who had held uninterrupted possession of property for the prescribed term of years, was secured in his possession by the extinction of all rights of action against him.

These various principles were finally welded together into the general law of prescription as finally established by Justinian; so that possession under certain conditions and for a certain length of time not only debarred the technical right of action but also gave a positive right to ownership, which principle was applied alike to provincial and to Italian soil.

(2) The main principles which governed the law of prescription at the time of Justinian were the following:

In the first place, the thing must be capable of prescription (*res habilis*). This principle, in its ordinary application, excluded the public property of the state and the private property of the ruler; immovable property belonging to municipal or ecclesiastical corporations; the *adventitia* of children—that is, the property legally acquired by a person under power; and things alienated by a person in bad faith without the knowledge of the proprietor.

In the second place, the possession must, as a general rule, be "civil" and "continuous." It is civil (*possessio civilis*) when, as we have seen, it has been acquired through the form of a legal title (*justa causa*), and when it is held in good faith (*bonâ fide*). Possession is said to be continuous (*possessio continua*) when it has not been subject to an interruption (*usurpatio*)—which may occur when the possession of the thing has been actually lost, or when a just action has been instituted against the possessor.

In the third place, the possession must have continued for the period of time prescribed by law. In fixing this time a distinction is made between ordinary and extraordinary prescription. In case all the foregoing conditions have been fulfilled, the ordinary period is sufficient to vest the ownership. This period is three years for movables, and for immovables ten years if the parties contesting the right live in the same province, and twenty years if they live in different provinces. On the other hand, in case the *bonâ fide* possessor can show no former title, or in case a former title can be shown to a thing which is not susceptible of ordinary prescription, the extraordinary period must elapse before the right is incon-

testible. This period is generally thirty years, except in the case of property claimed by the state or by municipal and ecclesiastical corporations, when the time is forty years.

Before leaving this general subject, it should be noticed that donation (*donatio*), or free gift, is often mentioned as a civil mode of acquiring property. But the tendency of the later legislation was to assimilate gifts to other branches of the law. For example, the *donatio propter nuptias* was connected with the law relating to *dos;* the *donatio causa mortis* was treated by Justinian as a kind of legacy; and the *donatio inter vivos* was generally regarded merely as a *justa causa* indicating the intention to transfer the thing, having no legal validity except when followed by tradition.

References.—Gaius, I, 15–96; "Inst.," I, titles I, 6, 7; "Digest," *De acquirendo rerum dominio* (41); Poste's Gaius, pp. 139–176; Sandars' Justinian, Eng. ed., pp. 172–195, 216–233, Am. ed., pp. 162–185, 206–223; "Dict. Antiqq." (*Dominium, Usucapio, Præscriptio*); Mackenzie, "Roman Law," pp. 168–174, 186–193, Kaufmann's "Mackeldey," pp. 272–302; Hunter, "Roman Law," pp. 109–174; Tomkins and Jencken, "Modern Roman Law," pp. 156–165; Ortolan, "Instituts de Justinien," II., pp. 260–313, 359–400; Du Caurroy, "Institutes Expliquées" I., pp. 259–317, 367–405; Demangeat, "Droit Romain" I., pp. 452–500; Deurer, "Gesch. und Inst.," §§ 151–153; Böcking, "Röm. Privatrecht," S. 81–91; Vering, "Gesch. und Pandekten," §§ 141–149; Arndts, "Pandekten," §§ 144–164; Vangerow, "Pandekten," §§ 305–331; Windscheid, "Pandekten," §§ 170–190.

CHAPTER V.

THE ACQUISITION OF OWNERSHIP BY INHERITANCE.

THE acquisition of things by universal succession (*per universitatem*) follows in the Roman law as a subject co-ordinate with the acquisition of single things. Universal succession may be defined, in brief, as the acquisition, on the part of one person, of the entire estate belonging to another. By an entire estate is meant the totality of the rights and duties which are attached to the legal status of any particular person. The effect of universal succession is, hence, to transfer to one person the whole set of rights and duties which make up the legal personality of another, so far as these rights and duties are capable of being transferred.

The Roman law recognized three principal modes by which an entire estate might thus be transferred, viz.: by inheritance, or the succession to the estate of a deceased person according to the rules of the *jus civile;* by *bonorum possessio*, or the acquisition of the estate of a deceased person according to the principles of equity laid down by the prætor; and *per adrogationem*, by which a person *sui juris* placed himself and his estate under the protection of another person. There were still other modes of less importance, which need not be mentioned here. The most important mode of universal succession was by inheritance, which in later times was blended with the *bonorum possessio*—both methods being treated by Justinian as forming substantially one mode of acquisition.

1. Nature of Inheritance.—Inheritance is defined

to be the succession to the entire legal position of a deceased person. In the words of Julianus: "Hereditas nihil aliud est, quam successio in universum jus, quod defunctus habuerit" (D. 50, 16, 24). According to the theory of the Roman law, when a person dies, his status or legal personality does not perish, but survives, and is assumed by a successor who continues to represent him in all his proprietary relations. This idea may be traced to the very earliest stage of Roman society, and in fact to the primitive Aryan customs from which the first principles of the Roman law had their origin. Here we find that the idea of succession was immediately connected with the organization of the family as a religious group, under obligation to perpetuate the ancestral worship and the *patrimonium* which was conceived to be accessory to the worship. Property, like the *sacra*, was regarded as a permanent adjunct to the family organization, to be administered by the one who possessed the *potestas*, and to be assumed by the person or persons upon whom the paternal power descended. Though legally held and managed by the father during his lifetime, the property theoretically belonged to the collective body, so that the child was, in a certain sense, co-proprietor with the father in the family estate. When, therefore, the father died, the corporate estate descended upon the corporate members, who thus assumed both its benefits and its liabilities. The death of the father, therefore, occasioned no acquisition of new property, but only an increased freedom in the administration of existing property. The family estate still remained with its claims and liabilities with reference to all extraneous persons.

This fundamental idea of inheritance affected the law during all the subsequent periods of its history. Although inheritance was deprived in later times of its religious

significance, although the father acquired a certain degree of liberty in designating his successor and in distributing his property, and although inheritance came to be regarded as giving a new title to property on the part of the heirs and legatees—still the idea was kept alive that the estate itself was something permanent, retaining its claims against its debtors, and its liabilities with reference to its creditors.

The main features of the law of inheritance grew out of this conception, that the status or legal personality of a man does not die with him, or rather, that all those legal rights and duties which make up his estate remain after his death. Only those rights and duties which are essentially of a personal nature and untransferable—such as the rights of family, usufruct, etc.—can be said to cease at death. All other legal relations are still maintained in the permanent estate of the person deceased. Before the estate is again taken up by any natural person, it is itself regarded as a juridical person (*hereditas jacens*), possessing, to a certain extent, the legal capacity to acquire new rights and incur new liabilities. This fiction of the personality of the *hereditas jacens* ceases, however, as soon as the estate is assumed by the heir.

2. Position and Functions of the Heir.—The heir, or universal successor (*heres*), in the Roman law, is simply the person upon whom is devolved the entire estate of the person deceased. By assuming the estate, the heir not merely obtains a title to property; he becomes the legal representative of the one whose estate he has acquired. In other words, he steps into the position made vacant by death. Ulpian says: "Heredem ejusdem potestatis jurisque esse, cujus fuit defunctus, constat" (D. 50, 17, 59). There is no essential difference in the character of his position, whether he is designated by law

or appointed by the deceased. Neither are the rights and duties of heirship essentially different, whether the position is assumed by a single person, or by two or more co-heirs. In the latter case, the relations of the joint-heirs to each other are entirely consistent with the common relations which they sustain to the estate. In considering the legal functions of the heir, we may look at, first, the rights and duties incident to heirship in general; and next, the mutual relations existing among co-heirs.

(1) In general, the heir succeeds to all the rights of the deceased, with the exception of those which are from their nature untransferable. He acquires the right of ownership in the property of the deceased, subject to the burdens incident to heirship. His proprietary rights in the estate involve not only the right to that which is in the possession of deceased at the time of his death, but also the right to all that which is due to the estate. Hence, it is sometimes said that the heir acquires both rights *in rem* and rights *in personam*. But the rights *in personam* which he acquires are, in general, only those obligations against third parties, the prosecution of which will increase the pecuniary value of the estate, such as debts due to the deceased.

But the heir does not acquire usually an absolute ownership of the whole estate. The estate is generally burdened with certain obligations, which pass to the heir, and become duties incidental to his position. These include, first, the duty of paying all debts due to the creditors of the estate; and, secondly, the duty of paying all legacies or gifts in accordance with the desire of the deceased, so far as this desire is legally expressed. These two classes of duties, as regards their character and extent, may be considered separately.

In the first place, the heir was bound, before the time of Justinian, to pay all the debts of the deceased, even though the estate was insolvent. By accepting the estate, the legal personality of the heir became merged in that of the deceased, and the property of the heir became liable for the debts of the person to whom he succeeded. But this injustice, which resulted from the old conception that the *patrimonium* was the common property of father and son, was remedied by Justinian, who granted to the heir the benefit of inventory (*beneficium inventarii*), by which he might escape any liability beyond the actual value of the estate. The legal personality of the heir became no longer identified with that of the deceased. The heir acquired, in this respect at least, something of the character of the English executor combined with that of the residuary legatee.

In the second place, the heir is bound to distribute the property of which he comes into possession according to the legally expressed will of the decedent. In early times this duty was absolute, so that after the debts were paid, the remaining property of the estate might be entirely exhausted in legacies, leaving nothing in the hands of the heir to compensate him for assuming and administering the estate. To remedy this defect, certain laws were passed, which Justinian says "were made in the interest of testators themselves, for often men died intestate because the heirs named in the will refused to enter on inheritances from which they would derive little or no benefit." The character of this legislation will be more properly noticed under the head of "legacies." It is sufficient to say here that the heir was still bound to pay all those legacies which were made in accordance with the law.

(2) When two or more co-heirs succeed to the estate,

their rights with reference to the property and to the debtors of the deceased, and their duties with reference to the creditors and legatees are, when looked upon as a whole, in all respects the same as though the estate had been assumed by a single person. But the rights and duties of each one of the joint-heirs are affected by the proportionate share which he acquires in the estate. In the case of intestacy, this share is equal for all; otherwise, the proportionate share of each is determined by the will of the deceased. In either case, all the successors become, according to their respective shares, joint-owners of the property left by the deceased and of the debts collected in favor of the estate. And, in the same way, each successor, in proportion to his proper share, is liable to the creditors and legatees, so far as these obligations come within the limits of the law. The mutual rights and duties of co-heirs thus depend upon the principle of joint-ownership. Any heir is, however, entitled to a partition of the estate, by which he may obtain the individual control of his own share, through a judgment rendered by the court (*judicium familiæ erciscundæ.*)

3. Character and Forms of the Testament.— We are now prepared to consider the mode in which the heir is appointed. We have already seen that the original mode of designation was by law, that is, by the customary rules that grew out of the family and the gentile organization. But as the father came to exercise his own will in the appointment of his successor, the customary mode of designating the heir by law was called into exercise only when the father had failed to express his will in a legal manner.

The testament, in the Roman law, was essentially an instrument by which a person appoints his own heir, or universal successor. It might, it is true, contain other

provisions than the appointment of an heir. It might, for example, dispose of property to legatees, or appoint tutors for dependent children. But these were merely incidental and not essential features of the testament. A testament might be made without the appointment of legatees or tutors; but if no heir was appointed, there was no testament. However much the form of the testament may have varied at different times, its essential nature remained the same. The ancient *testamentum calatis comitiis* was the appointment of an heir under the approval of the popular assembly. The *testamentum per æs et libram* was the appointment of an heir through the forms of "mancipation." And the prætorian testament was the appointment of an heir by a written instrument attested by witnesses. No heir, no testament, was the general principle of the Roman law. We shall hereafter see, however, that in spite of this strict notion of the testament, the Romans, by the peculiar force which they gave to the "codicil," provided that the desires of testator need not be entirely ignored, even if the testament failed for want of an heir. Passing by for the present the peculiar nature of the Roman codicil, let us consider the testament as an instrument for the appointment of an heir, or universal successor to the estate.

The special requirements necessary for the formal validity of the testament, at the time of Justinian, may be briefly enumerated as they relate to written wills; to nuncupative, or oral, wills; to privileged wills; and to the legal capacity (*testamenti factio*) on the part of the persons connected with the testament, whether as testator, heir, or witnesses.

(1) The formalities required for the written will, at the time of Justinian, bear the marks of the different stages through which the testament had passed in the process of

its evolution. "When the progress of society," says Justinian, "and the imperial constitutions had brought about a fusion of the *jus civile* and the prætorian law, it was established that the testament should be made at one and the same time in the presence of seven witnesses (which was a provision of the *jus civile*), with the subscription of the witnesses (which was introduced by the imperial constitutions) and with the attachment of their seals, according to the edict of the prætor. So that the law of the testament seems to have a threefold origin, since the witnesses and their presence at one time for the formal solemnizing of the will are derived from the *jus civile*; the subscriptions of the testator and the witnesses, from the imperial constitutions; and the seals of the witnesses and their number, from the prætorian edict" ("Inst.," 2, 10, 3). This description renders sufficiently clear for our purpose the general formalities required for the written will, viz.: the presence of seven witnesses, the subscription of the testator, the attachment of the names and seals of the witnesses, and the fact that the whole process must be performed in a single transaction (*uno contextu*).

(2) In the nuncupative or oral testament, the above formalities were not required. A person might declare his last will by word of mouth in the presence of seven witnesses. And even without the formality of witnesses, he might declare his will in the presence of the magistrate, who entered the statement upon the public records.

(3) In certain privileged cases, the usual formalities were modified to suit the convenience of the testator. For example, a soldier might make a testament by expressing his intention in any way susceptible of proof, whether by writing or word of mouth. Such a will, however, retained its validity for a year only after the soldier's discharge from service. Another privilege which

attached to soldiers may be mentioned here—that is, the fact that they could die partly testate and partly intestate, which was not the case with any other persons. There were also other examples of privileged testaments. It was provided that in times of pestilence the presence of the seven witnesses at one and the same time was not required; and also that in sparsely settled districts, five witnesses might suffice if a greater number could not be obtained.

(4) The formal validity of a testament depended, moreover, upon the *testamenti factio*, or the legal capacity of those concerned in the production and execution of the will. This capacity may be considered in its relation to the testator, to the heir, and to the witnesses. First, as regards the testator, legal capacity (*testamenti factio activa*) involved domestic independence, the possession of a mature and sound mind, and the exercise of free will. Persons incapacitated were thus slaves, persons under power except as regards their *peculium*, pupils, spendthrifts, and persons both deaf and dumb; also persons not in the possession of full consciousness, and those under constraint. Secondly, as regards the heir, legal capacity (*testamenti factio passiva*) was less restricted, as the capacity to receive property is more extended than the capacity to dispose of it. Many of the persons, therefore, who were disqualified from making a will might yet be instituted as heirs. The chief conditions required for a person to be made heir in the time of Justinian were that he be specifically appointed in the testament, and that he be capable of holding property. Thirdly, as to witnesses, legal capacity was possessed by all persons not expressly disqualified by law. Persons thus disqualified were slaves, *impubes*, women, those instituted as heirs, those under the power of the testator, and persons deaf,

dumb, blind, or insane. The disability of women to act as witnesses was continued in opposition to the general spirit of the law, which conferred upon them in nearly every other respect full legal independence and equality with men.

4. Necessary Contents of the Testament.—The validity of the Roman will depended not merely upon the formal conditions just mentioned; there were also certain conditions relating to the contents of the testament that must be observed. The provisions upon this subject relate to the disherison, the institution, and the substitution of heirs.

(1) There were certain persons who were regarded as having such an interest in the estate that if the father desired to exclude them from the inheritance, he must do so in a definite and express manner. If such persons were entirely ignored, and were neither made heirs nor expressly disinherited, the will was void. The necessity of disherison was, of course, based upon the ancient principle that the children were, in a certain sense, co-proprietors of the family estate, and were, consequently, at the death of the father, presumptively entitled to succeed to the inheritance. This principle still retained an influence upon the law even after the father had obtained larger testamentary powers; so that if he desired to appoint other persons as heirs, he could do so only by formally setting aside those who had a natural claim to the estate. Although this provision was necessary to prevent the will from being void at the outset, it left open the question whether or not the disherison was just; and did not, as we shall hereafter see, prevent the will from being invalidated by an action. The persons who (if not made heirs) must be formally set aside were in general those who would have been entitled to succeed had the father died intestate.

In the first place, the *sui heredes*, or those who became *sui juris* at the father's death, must, if the father desired to exclude them, be expressly disinherited. Before Justinian, the sons only needed to be mentioned by name (*nominatim*), it being sufficient to disinherit the daughters in a general clause (*ceteri*). But this emperor required both the sons and the daughters to be mentioned by name, for as Justinian says: "Between males and females in this branch of the law there is no difference."

In the next place, those who became *sui heredes* after the making of the will, must be mentioned by anticipation, or else the will became void. Posthumous heirs had formerly been regarded as uncertain persons (*incertæ personæ*); and as such persons could not be instituted heirs, they need not be disinherited. But in the later law this principle was modified for the benefit of the children of the testator born after the making of the will. The necessity of disherison also applied to a grandson, who became a *suus heres* by the death of a son.

Again, in the case of emancipated children, the effect of the prætorian legislation had been to do away with the ancient idea that emancipation destroyed the right of inheritance; so that such persons were now entitled to a special mention in the testament. If, however, emancipated children were passed over, the prætor, instead of declaring the will wholly void, granted them the right of "possession contrary to the terms of the will" (*possessio bonorum contra tabulas*). Emancipated children could not, therefore, be disinherited without special mention; and in case they were not mentioned, the will was practically set aside to the extent necessary to secure them in their rights to the inheritance.

Furthermore, the general principle of disherison was applicable, in part, to adopted children. In early times,

children by adoption acquired, of course, the same legal position as children by birth. But the tendency of the later legislation was to lessen the legal importance of adoption. In the laws of Justinian, the adopted child still retained a claim to the estate of his natural father, and acquired in general a right to the estate of the adopted father only in case the latter died intestate. But adoption retained its full legal significance if the adoptive father was a natural ascendant of the adopted son. The principle of disherison was, therefore, still applicable to an adopted son who was the natural descendant of the testator.

(2) But disherison, however necessary it might be in certain cases, was not the ultimate purpose of the will. On the contrary, the essential object of the will was the institution of heirs. If no heirs were instituted, the testament possessed no validity as a testament. The heirs instituted by the testator might be either the natural heirs, or, if these had been properly disinherited, any other persons who possessed the legal qualification to hold property—even slaves, who became free by the very act of being instituted. In sketching the provisions of the law relating to the institution of heirs and its effect upon the vesting of the estate, we must notice, first, whether the heirship is conferred upon one person or upon more than one; and, secondly, whether it is conferred absolutely or conditionally.

In the first place, if a single person is instituted heir, the estate, of course, remains undivided, and the entire ownership rests in the heir, after the burdens resting upon the estate are removed—whether these be in the form of debts or legacies. But, if more than one person is instituted, the estate is shared between them in certain proportions. If no express provision has been made

upon this point by the testator, they all obtain equal shares. But if it be the desire of the testator that the heirs receive unequally, the estate is ideally divided into certain aliquot parts, and to each heir is assigned a greater or less number of these fractional portions; and in the vesting of the estate they all become joint-owners to the extent of their respective shares. Since a person cannot, according to the general rule of the Roman law, die partly testate and partly intestate, if any part of the estate is unprovided for, either by the oversight of the testator or by the failure of any of the heirs, it is ratably distributed among the remaining heirs in accordance with what is called the right of accretion (*jus accrescendi*).

In the second place, if the heir is appointed unconditionally, his rights in the estate date from the death of the testator; but if he is appointed conditionally, his rights date from the fulfilment of the condition. The term condition (*conditio*) is here used in its technical sense to denote the happening of an uncertain event and not the arrival of a certain day (*dies*). For example, if a person is appointed heir on condition that he outlive a third person, the provision is a condition in the proper sense of the word. It should be further noticed that an impossible condition does not invalidate the will; it is simply treated as if it had not been written.

(3) Closely allied to the institution of heirs is the substitution of heirs, that is, the conditional appointment of certain persons to act as heirs, in case those first appointed should from any cause fail to act. This may not seem to be an essential part of the will. But it is evident that should those first appointed die or refuse to accept the inheritance, a provision in the will for others to take their place would be necessary to prevent the will from becoming void. Moreover, the great discredit which the

Romans attached to dying intestate greatly enhanced the importance of substitution as a special feature of the testament. Three forms of provisional appointment are mentioned in the Roman law.

Ordinary substitution (*substitutio vulgaris*) is simply the provisional institution of heirs to act in case those first appointed fail. The object of such substitution was, of course, to prevent the failure of the testament by the death or refusal of the heirs originally instituted. Any number of substitutions might be made. One person might be substituted for several, or several for one; or the original heirs might be substituted for each other, so that in case one failed some other might succeed also to his share.

Pupillary substitution (*substitutio pupillaris*) is the conditional appointment of a person to receive the inheritance of a child in pupilage in case the latter die before reaching the age of maturity.

Quasi-pupillary substitution (*substitutio quasi pupillaris*) is similar to the preceding, except that instead of applying to a child in pupilage, it applies to any person of unsound mind. This is equivalent to the father's making a will for such a person, to take effect at the latter's death. This form of substitution, as well as the preceding, loses its effect as soon as the circumstances on account of which it was made, cease to exist.

5. Methods of Invalidating the Testament.—A will which does not conform to the requirements already mentioned is void, or invalid, from the first (*injustum*). In this case it is regarded either as imperfect (*imperfectum*), when some formality is wanting, or an heir is not properly instituted; or else, as of no effect (*nullius momenti*), when persons who have a claim upon the estate have not been properly disinherited. But a

will that is in all respects valid at the time when made, may become invalid from several causes.

(1) A testament is technically said to be broken (*ruptum*) when rendered invalid in any of the following ways:

By the subsequent agnation of a *suus heres*, that is, by the introduction into the family of any person—as a child by birth or by adoption—who has a natural claim upon the estate and who has not been mentioned in the will, as being either instituted or disinherited.

By the making of a second will according to the proper legal forms—since a subsequent will, properly made, revokes any prior one.

By destroying the will already made, by tearing or defacing it, or by otherwise indicating the wish on the part of the testator that it shall no longer remain in force.

(2) Again, a testament is technically rendered ineffectual (*irritum*) if the testator after making the will suffers a *capitis deminutio*. But in this case, if the testator recovers his legal capacity before his death—although the testament is strictly regarded as invalidated—the estate is generally granted to the appointed heirs, in accordance with the equitable principle laid down by the prætor under the name of "possession according to the will" (*bonorum possessio secundum tabulas*).

(3) Still further, a testament which is formally and essentially perfect may, under certain circumstances, be set aside as undutiful (*inofficiosum*). In this case the will is not regarded as void; it is yet voidable by an appropriate action (*actio de inofficioso testamento*). The mere fact that a person has been disinherited in due form in the will is not sufficient to debar him from his just rights in the estate. The question whether this disherison has been made on sufficient grounds can be laid before the

court and decided upon its merits. The provisions of the law were made very specific by Justinian, and the reasons were precisely stated that were admitted as the only proper grounds for disinheritance. The persons who are allowed to attack the will as undutiful are the children; or the parents, if there are no children; or the brothers and sisters, if there are no children or parents, or if an infamous person has been instituted in their stead. In case the will is successfully attacked as *inofficiosum*, it is rendered entirely void and set aside.

It must be observed that the will can be set aside as undutiful only in case the persons above named have been completely disinherited, and nothing at all has been left to them. But the law goes still further, and protects them in their claims to a definite portion of the estate. This legal portion (*portio legitima*), to which they are by presumption entitled, is one-fourth of what they would have received by intestate succession. If, therefore, they have been unjustly cut off with a less amount, they may have the legal portion made up to them by bringing an action for that purpose (*actio in supplementum legitimæ*). By these methods, the legal and worthy heir was protected in the Roman law from any malice or caprice on the part of the testator.

(4) Finally, a testament may become invalid by the failure of all the heirs appointed in the will, whether on account of death or non-acceptance (*destitutum*). An estate might be of such a character as to render its acceptance a burden instead of a benefit to the heir—for example, if it be insolvent. With reference to the capacity to accept or refuse an estate, heirs are considered as necessary (*necessarii*), proper and necessary (*sui et necessarii*), and extraneous or voluntary (*extranii, voluntarii*). A necessary heir is the testator's slave, who is

obliged to receive the master's inheritance, and to pay all the debts—being liable, however, only to the extent of the value of the estate. Proper and necessary heirs are the descendants of the deceased, who are instituted heirs and become *sui juris* at the testator's death. They are called necessary because they were originally obliged to accept the inheritance with all its burdens; but the prætor afterward gave them the benefit of refusal (*beneficium abstinendi*), provided they abstained entirely from all interference with the estate. Extraneous heirs comprise all other persons who may be instituted. They are perfectly at liberty to accept or refuse the inheritance, and are hence sometimes called voluntary heirs. If, however, they have once assumed it, they are not at liberty to renounce it.

6. Inheritance ab Intestato.—A person is said to be intestate who has made no will at all; or one not legally valid; or one that has become invalidated from any of the causes previously mentioned. Although intestate succession was the original form of inheritance, it was, after the development of the will, called into exercise only exceptionally, and in the absence of testamentary heirs. We have already considered the general character of the law relating to this form of inheritance as it existed at the time of the XII. Tables; and also as it was modified by the prætorian legislation. We have seen that in the earliest times, intestate succession was simply the succession of the independent members of the family to the family estate; and that the order of legal heirs was determined by proximity of relationship to the deceased, as traced through a common *potestas*—this order being *sui heredes*, *agnati*, and *gentiles*. We have also seen how the prætor recognized the claims of the natural as well as the civil family, by granting the right of possession to

emancipated children, and by substituting the cognates, or blood-relations, for the *gentiles*.

The most important change in the law of intestate succession was made by Justinian in the 118th and 127th Novels, when all legal distinction was abolished between the *sui heredes* and the emancipated children, and between agnates and cognates; and the principle of blood-relationship was fully recognized in place of the old principle of relationship based upon the *potestas*. We may also notice that the Roman law draws no line of distinction between real and personal property, between elder and younger sons, or between males and females. The right of inheritance to the entire estate devolves, in general, upon all persons according to the proximity of their blood-relationship to the deceased. The orders of succession may be considered under three classes—descendants, ascendants, and collaterals.

(1) The first order of legal heirs (*heredes ab intestato*) are the descendants—that is, those persons of either sex and of whatever degree who are lawfully descended in a direct line from the deceased. Such persons exclude all ascendants and collaterals. Descendants of the first degree, that is, lawful children—whether sons or daughters—succeed *per capita*; in other words, they share equally in the estate. Descendants of a more remote degree succeed *per stirpes*, or by representation. For example: if a son or daughter has died leaving lawful children, such grandchildren of the deceased receive among themselves the share of the estate to which their parent would have been entitled had he remained alive. And among descendants, this right of representation extends to the remotest degree.

In connection with this subject, it should be observed that the wife of the deceased, if without a dowry, is en-

titled to a certain share of the estate along with the children. Justinian provided that in case there were three children, or a less number, she should be entitled to a fourth part of the estate; but in case there were more than three children, she should share with them equally. A similar provision applied to the succession of the husband to the wife's estate. These are the chief instances in which affinity, or relationship by marriage, is recognized by the Roman law as a basis of the right of succession.

(2) The second order of legal heirs are the ascendants —that is, those persons of whatever degree, whether male or female, from whom the deceased has lawfully descended in a direct line. Such persons exclude all collaterals, with the exception of brothers and sisters of the whole blood, and the children of such brothers and sisters. We must, hence, distinguish the case in which ascendants succeed *without* collaterals from that in which they succeed *with* collaterals.

In the first place, if there be no brother or sister, or children of the same, then the ascendants—male or female, paternal or maternal—succeed to the inheritance according to their proximity to the deceased; the nearer degrees entirely exclude the more remote, for among ascendants there is strictly no representation. Consequently, not only the father and mother, but the father alone or the mother alone will exclude the grandparents and all remoter degrees. But if there be no parents living and there are several remoter ascendants who concur in the same degree, they receive the estate *per lineas*—that is, one half of the estate is divided equally among those of the paternal line, and the other half among those of the maternal line.

In the second place, if in connection with ascendants

there are brothers or sisters of the whole blood, such brothers and sisters share the estate with the nearest living ascendants. A vexed question has arisen among commentators as to whether such brothers and sisters are placed, in all respects, upon an equality with the father and mother, thus excluding the remoter ascendants if the parents of the deceased are not living; or whether they are obliged, if the parents be dead, to share the estate with the ascendants of a remoter degree, if any such be living. It was the opinion of Voet that such collaterals exclude the grandparents and remoter degrees. The great influence of this jurist is seen from the fact that this opinion was incorporated into the English law through a decision of Chancellor Hardwicke. The opposite view is, however, held by Domat, Warnkönig, and other eminent civilians. Without discussing this question, we may accept the latter view as that which at present prevails among commentators. Furthermore, the same principle that applies to the brothers and sisters of the whole blood applies also to the children of such persons, since such children succeed to their parents' share by representation.

(3) If there are neither descendants nor ascendants, then the right of inheritance belongs exclusively to the collaterals—that is, those persons, not in the direct line of ascent or descent, who can trace their relationship to the deceased through a common ancestor. The general principle that governs the succession of collaterals is that the nearer degrees exclude the more remote. But this principle needs to be more specifically stated in order to indicate the preference given in certain cases to the whole blood over the half-blood, and the extent to which representation exists among collaterals.

In the first place, brothers and sisters of the whole

blood exclude all other collaterals. Such heirs succeed to the estate *per capita;* and if any have died, the children of such receive the vacant share *per stirpes;* but the principle of representation does not extend below the children of such brothers and sisters.

In the next place, if there are no brothers or sisters of the whole blood, or children of such persons, the brothers and sisters of the half-blood are next entitled to the estate, and consequently exclude all collaterals of a more remote degree. The principle of representation applies in this case as in the one previously mentioned.

Finally, if there are no brothers or sisters, either of the whole blood or of the half-blood, or children of the same, then the remaining collaterals have a claim upon the inheritance in the order of their proximity to the deceased. But in no case does the principle of representation apply to the children of collaterals beyond the two cases previously described. Among collaterals, the degrees of relationship are determined by counting the whole number of generations in passing from one collateral to the other through the common ancestor. Thus in the Roman civil law, the number of generations is counted in both lines of descent from the common ancestor. But the method of the canon law, which has been adopted in the English law, is to reckon simply the number of generations passed over in a single line, passing from the common ancestor to the more remote ancestor. In the words of Blackstone:—"The method of computing these degrees in the canon law, which our law has adopted, is as follows: we begin with the common ancestor and reckon downward; and in whatsoever degree the two persons, or the more remote of them, is distant from the common ancestor, that is the degree in which they are related to each other" (Comm. II., 206).

It is necessary to observe, in conclusion, that if there are no collaterals, the entire estate devolves upon the surviving spouse according to the prætorian edict (*unde vir et uxor*); and on the failure of all the legal heirs mentioned, the succession goes to the public treasury as the *ultimus heres*.

7. Legacies, Fideicommissa, and Codicils.—In connection with the subject of inheritance, the Institutes treat of certain topics which, though not strictly belonging to universal succession, are yet incidentally related to the transmission of property by inheritance. These are legacies, *fideicommissa*, and codicils.

(1) A legacy (*legatum*) is a gift left by the testator to be delivered by the heir to a third person designated as the legatee. The extremely technical features that characterized the early legacies were abolished by the imperial constitutions; and the law was so simplified that the intention of the testator was carried out without regard to the form of words employed in making the legacy. The capacity to give and to receive by legacy is the same as that which is required in the case of the testament. The largest liberty is also given as to what may be left by legacy. It may be any thing *in commercio* belonging to the deceased; or it may be, in effect, even the property of another, since the testator can impose upon the heir the obligation of purchasing something and of delivering it to the legatee. If the same thing be left to two or more persons, each takes an equal share; and if one of two or more joint-legatees should die before the common thing left to them has been delivered by the heir, the share thus left vacant goes to the remaining joint-legatee by the right of accretion (*jus accrescendi*).

The general rules for the interpretation of legacies, as of wills, came to be, in the later Roman law, very liberal

in their character. For example, a mistake in the name of the legatee does not vitiate the legacy, provided there is no doubt as to the identity of the person intended.

A legacy is extinguished by the death of the legatee, if the death occurs before the property vests in him. It may also be extinguished by the testator himself, either by revocation (*ademptio*) or by the transference (*translatio*) of it from the original legatee to another person.

Besides these general principles, we may notice, in brief, the effect produced upon legacies by the limitation of the testamentary power. Certain provisions were made in order that the whole estate might not be exhausted in legacies, and that there might be, consequently, some inducement for the heir to accept the estate. The *lex Furia* provided that more than a certain sum (1000 *asses*) could not be left in a single legacy. But this failed of its purpose, as the number of legacies was not limited. The *lex Voconia* then provided that no legatee could receive more than the heirs. But this was also ineffectual for a reason similar to that mentioned in the previous case. The defects of these laws were met, however, by the *lex Falcidia*, by which a testator was prohibited from giving away in legacies more than three-fourths of his entire estate after its debts were paid. The fourth of the estate thus ensured to the heir was called the Falcidian portion (*quarta Falcidia*).

It was a peculiar feature of the early law that a legacy was valid only when embodied in the testament, so that if the testament failed, the legacies failed with it. But Justinian assimilated the law of legacies to that of *fideicommissa*, so that they could be made independent of the will, and be binding upon the heirs-at-law.

(2) *Fideicommissa*, or bequests in trust, are directions given to the heir that he, on coming into possession of

the estate, convey the bequest to a third person, or use it for the benefit of such person (*fideicommissarius*). Such fiduciary bequests were originally introduced to evade the strict provisions of the civil law, and to leave property to persons legally incompetent to receive by testament or legacy. Before the time of Augustus, the execution of the trust depended solely upon the honor of the heir upon whom the trust was imposed (*heres fiduciarius*). But this emperor made it legally binding upon the heir to execute the trust; and soon after, a special prætor was appointed having jurisdiction in such cases (*prætor fideicommissarius*).

In order to prevent certain forms of injustice that might arise from the legalization of trusts, two supplementary laws were passed. Since the civil law had made the heir responsible for the debts of the estate, the *senatus-consultum Trebellianum* provided that when an inheritance was transferred by an heir in pursuance of a trust, all the liabilities relating to the estate should also be transferred to the person for whose benefit the trust had been made. Again, in order to ensure the acceptance of the inheritance by the heir in such a case, and thus prevent the loss of the trust intended by the testator, the *senatus-consultum Pegasianum* permitted the heir to retain a fourth part of the estate as against the *fideicommissarius*, in a manner similar to that in which the *lex Falcidia* protected the heir as against the legatee. These two provisions were adjusted to each other by Justinian, who guaranteed the "Pegasian portion" to the heir, but divided the liabilities of the estate between him and the *fideicommissarius* according to their respective shares, so that the two persons were practically placed upon the same footing.

A *fideicommissum* might be made in a testament, in

which case its validity would depend upon the validity of the will; or it might be made in a codicil, when its validity would not depend upon the appointment of testamentary heirs.

(3) A codicil (*codicillum*), in the Roman law, is a written direction to the heir—requiring none of the solemnities of the testament,—which expresses the wishes of the deceased regarding the disposition of the estate, either by way of legacies or *fideicommissa*. It is said that Augustus set the example of executing a trust imposed by a codicil, and from that precedent the codicil acquired a legal validity. This instrument must not be regarded, like the English codicil, as a supplementary will; although it may be employed to modify all the provisions of an existing will, with the exception of what has been described as its necessary contents. That which constitutes the essential feature of the testament—the appointment of an heir—cannot be provided for by the codicil. But in case no testament has been made, or in case the testamentary heirs fail, the provisions expressed in the codicil are still binding upon the heirs-at-law.

On account of this peculiar feature of the Roman codicil, the testament itself acquired a new character, and the dispositions therein contained were rendered more secure. By the addition of a "codicillary clause"—to the effect that if the will should prove invalid it should be regarded as a *codicillum*—its execution was made binding upon the legal heirs, who thus acquired functions somewhat similar to those possessed in the English law by persons called "administrators with the will annexed." In this way the lawful intention of a person regarding the disposition of his estate at death might be fully carried out whether the inheritance passed to the testamentary or to the legal heirs.

References.—Gaius, II., 97–289, and III., 1–76; "Inst.," II., 10–25, and III., 1–12; "Digest," *Qui testamenta facere possunt*, etc. (28), *De testamento militaris* (28). *De legatis et fideicommissis* (30–34), *De conditionibus*, etc., *quæ in testamento scribuntur* (35), *Ad senatus-consultum Trebellianum* (36), *De bonorum possessionibus* (37); "Code," *De inofficioso testamento* (3, 28), and various titles in Book VI., especially 11–59; Poste's "Gaius," pp. 179–275; Sandars' "Justinian," Eng. ed., pp. 245–408, Am. ed., pp. 235–396; Mackenzie, "Roman Law," pp. .253–292; Amos, "Roman Civil Law," pp. 305–340; Hunter, "Roman Law," pp. 559–782; Hallifax, "Elements of Roman Law," pp. 43–62; Phillimore, "Private Law Among the Romans," pp. 328–392; "Dict. Antiqq." (*Heres Roman*, *Legatum*, *Fideicommissum*); Tomkins and Jencken, "Modern Roman Law," pp. 201–299; Ortolan, "Instituts," II., pp. 436–677, III., pp. 1–128; DuCaurroy, "Institutes," II.; Demangeat, "Droit Romain," I., pp. 638–875, II., pp. 1–162; Deurer, "Gesch. und Inst.," §§ 213–252; Thibaut, "Gesch. und Inst.," §§ 222–252; Böcking, "Röm. Privatrecht," S. 229–289; Marezoll, "Lehrbuch," §§ 192–237; Vering, "Gesch. und Pandekten," §§ 246–287; Puchta, "Pandekten," §§ 446–564; Arndts, "Pandekten," §§ 463–607; Vangerow, "Pandekten," §§ 393–565; Windscheid, "Pandekten," §§ 527–622.

TITLE II.

THE LAW OF OBLIGATIONS.

CHAPTER I.

THE GENERAL CHARACTER OF OBLIGATIONS.

We now pass from the law of property, or ownership, to the law of obligations, which forms the second general branch of the *Jus Rerum*. The relation between these two branches rests upon the distinction already noticed between rights *in rem* and rights *in personam*. It has been said that every objective right refers to a certain degree of legal control which a person may exercise with reference to some object external to himself. The earlier modern civilians, in attempting to expound the theory of the Roman jurists, explained the division of rights by a reference to the directness of the relation between the person and the thing, or the subject and the object of the right. For example, if a man owns a house, he has a direct control over the thing itself, and his right is said to be *in* the thing (*in rem*). But if he makes a contract with another that the latter convey to him a house, his right, so far as the house is concerned, cannot be realized except through the act of the person with whom the contract is made; in other words, he has only a right *to* the thing (*ad rem*). The later civilians, however, have made more clear the Roman theory of the distinction between rights, by comparing it with the distinction between actions by which rights are enforced. Taking the examples just mentioned, if a man owns a house and is deprived of his right, he brings, according to the Roman law, an action *in rem*, in which his right is merely asserted, as such, without reference to the person who has

deprived him of it—that is, the right is conceived as availing against the world at large. But if he is deprived of the right due him according to the terms of a contract, he brings an action *in personam*, in which must be named the particular person who has deprived him of the right —that is, the right is looked upon as availing against a determinate person.

In thus distinguishing between actions, the Roman jurists indicated the distinction that they had in mind with reference to the rights themselves. The rights involved in ownership, whether superior or inferior, differ, therefore, from those growing out of what is called an "obligation," in that the former avail against the world at large, while the latter avail against some determinate person or persons. The duties corresponding to rights *in rem* are general and negative, but those corresponding to rights *in personam* are specific, and may be positive as well as negative. The latter class of rights and duties forms the subject-matter of the law of obligations.

1. Nature of Obligation as a Personal Right. —A legal obligation must be distinguished, in the first place, from those general negative obligations which are correlative to the rights of property, and which rest upon the world at large. It must also be distinguished from those natural or moral obligations which, though resting upon particular persons, and though sometimes having a legal significance, are not made compulsory by a legal action. The distinctive feature of a legal obligation is the fact that it rests upon a particular person and is enforceable by a legal action. It is defined in the Roman law as "a legal bond (*vinculum juris*) whereby, according to the laws of the state, one person is bound to render something to another" ("Inst.," 3, 13, pr.). This personal relation involves both a right and a duty—a right on

the part of one person called the "creditor" to exact something, and a duty on the part of another person called the "debtor" to render something.

The nature of a legal obligation may be illustrated by referring to its historical origin. The legal bond between debtor and creditor sprang from the relation existing between the parties to the ancient *nexum*. The *nexum*, as we have before seen, was originally identical with "mancipation," or the conveyance of property *per æs et libram*. The parties to such a transaction were called *nexi*, and were legally bound to each other until the process was completed. At first, every such proceeding was an interchange of property and price. By a kind of fiction, however, a loan could be effected through this process. The price would be paid and the transference of the property with-held until some future time. The debtor would still be a *nexus*, and be legally bound either to convey the property, or to repay the price advanced to him. This obligation the magistrate could enforce by granting to the creditor an executory judgment (*manus injectio*) against the person of the debtor. The idea of an obligation as a "legal tie" between debtor and creditor thus arose in the civil law, from the bond which existed between the *nexi*, and which was established through the forms of an incomplete conveyance. These forms might be used for other purposes than for effecting a loan; but in all cases they gave a compulsory character to the obligations thereby established. However much the formal processes may have been changed by the decay of symbolism and the influence of the prætor, the relation between the parties remained a *vinculum juris*. The creditor still retained his power over the debtor to the extent of enforcing his claim by a legal action. But this power included not only the right growing out of a claim founded upon

the voluntary consent of the parties; but also the right resulting from an injury which one party had done to another, and by which the former was placed under obligation to pay to the injured party compensatory damages.

The essential features of the legal obligation, as conceived by the Roman jurists, may be summed up as follows: First, it involves a legal relation between two parties, a creditor and a debtor. Secondly, it involves on the part of the creditor a personal and not a real right—a right which avails against the debtor only. Thirdly, it involves on the part of the debtor a duty whereby he is bound to the creditor, either to transfer something to him, or to render him some service, or to grant him compensatory damages for some injury done to him. In the concise words of Paulus: "The essence of an obligation consists not in this, that it makes a thing or a servitude ours; but that it binds another to give something to us, or to do something for us, or to grant us some compensation" (*ad dandum vel faciendum vel præstandum.*—D. 44, 7, 3).

2. The Subject-Matter of Obligations.—The subject-matter of an obligation, or the object for which it is established, always involves some act on the part of the debtor, the performance of which will be beneficial to the creditor. It must be observed, however, that this may be a negative as well as a positive act. The obligation may require the debtor not to do something, as well as to do something. In either case, the act of the debtor is subject to the control of the creditor. The general principles which apply to the subject-matter of an obligation may be described with reference to its essential, and to its non-essential elements.

(1) The essential elements of an obligation are those which are involved in its very nature, and without which

it could not exist. For example, the obligation arising from a contract of sale necessarily has in view the transference of a thing from the seller to the buyer, and the transference of the price from the buyer to the seller. The duty to perform these two acts forms the essential feature of such an obligation. Without such requirements, this specific obligation could not exist. In like manner, every legal obligation possesses certain elements which constitute its essential or necessary subject-matter. The validity of every obligation must therefore be determined, primarily, with reference to the character of its essential elements, or necessary subject-matter.

In the first place, it is a general principle of the Roman law that the essential elements of an obligation must not involve any thing that is impossible, illegal, or contrary to good morals. No one can be bound to do that which is in the nature of things impossible. *Impossibilium nulla obligatio* (D. 50, 17, 185). An obligation is also null the primary object of which is to require something to be done that is forbidden by law. The law cannot enforce that which it at the same time prohibits. Associated with the above invalid objects are those which are opposed to the general moral sense of the community, or inconsistent with the public welfare.

In the second place, the essential object of an obligation must be determinable, and of an actual pecuniary value. That the object may be determinable, it is simply necessary that it shall be so fixed as not to depend upon the arbitrary will of either of the parties. It need not, however, be specific, since it may properly require the delivery of things *in genere*. It need not be particular, as, for example, when one of two or more acts is required, either one of which will satisfy the claims of the creditor. If the object be specific and particular, it is called certain

(*certum*); if not, as in the cases just noticed, it is called uncertain (*incertum*). The object may hence be either certain or uncertain; but in no case can it be so indefinite as not to be determined by either party to the obligation. The object must also be of sufficient benefit to the creditor that its value may be estimated in money. As Ulpian says: "Ea enim in obligatione consistere, quæ pecunia lui præstarique possunt" (D. 40, 7, 9, 2). This principle depends upon the fact that the obligation is rendered compulsory in law by the debtor's being compelled to pay to the creditor a pecuniary compensation for the damage resulting from his failure to perform his part of the obligation. An obligation would, therefore, have no legal significance, the breach of which did not cause appreciable injury to the creditor.

(2) The non-essential, or incidental, elements of an obligation are those which are not necessarily involved in the nature of the obligation, but which being introduced, impose additional or more specific duties upon one or the other party. The most important of these elements relate to time, condition, place, and conventional penalty.

The time (*dies*) may be specified by the parties to an obligation, before which the performance cannot be demanded. Without such specification, the obligation must be performed immediately; but by thus fixing upon a future time the execution of the obligation may be suspended. This future time may be definitely fixed (*dies certus*); or it may be made to depend upon some future event which must at some time occur, as the death of some person (*dies incertus*). In either case, the obligation begins to exist from the day on which the agreement is made, although its performance cannot be demanded until the arrival of the time, or the occurrence of the

event specified. This is the basis of the distinction made in the Roman law between the time at which an obligation arises (*dies cedit*), and the time at which it may be enforced (*dies venit*).

But when the obligation is made to depend upon some future event which is not only uncertain as to the time of its occurrence, but uncertain as to the fact of its occurrence—as the election of a particular person to the consulate—such an element is technically called a condition (*conditio*). In such a case the obligation does not arise, and of course is not enforceable, until it is ascertained that the uncertain event has happened. But with the occurrence of the uncertain event, the obligation at once arises and is enforceable.

A specification may also be made with reference to the place (*locus*) at which the performance must be made. If for any reason the debtor is required to perform the obligation elsewhere than the place fixed upon, he is entitled to compensation for the disadvantage thus incurred.

A specific obligation may still further grow out of what is called a stipulated penalty (*stipulatio pœnæ*), by which either party may bind himself to forfeit a certain amount if he fails to perform the principal obligation. In case of non-performance, the creditor can demand either the fulfilment of the principal obligation, or the forfeiture of the penalty—but not both.

Other accessory elements of a similar kind may be introduced into an obligation, which we need not describe. It is sufficient to say, in general, that they depend upon the expressed will of the parties; and that they cannot destroy the essential nature of the obligation, although they may modify the legal consequences which would naturally flow from an obligation in case no specification was annexed.

3. Accessory Liability in Obligations.—In addition to those rights and duties which grow out of the nature of the obligation itself, and which arise from the expressed will of the parties, are others which depend upon the liability of either party to an obligation, to make indemnity for any injury or loss occasioned to the other. This liability must be distinguished from the principal obligation arising from a "delict," in that the injury must be of such a character as to affect the obligatory relations of parties who are already bound by a *vinculum juris*. The party who occasions such an injury or loss becomes still further a debtor, and is bound to make indemnity; and the party who suffers such a loss becomes still further a creditor, and has a right to claim indemnity. In order to produce this new relation between persons already bound by an obligation, it is of course necessary that the loss which is suffered by one of the parties be inflicted by the other; and also that the loss have reference to something that comes within the scope of the obligation already existing. As a general rule, each party is liable to the other for the loss or damage of which he himself can be said to be the proper cause. But the extent of this liability is dependent upon various circumstances, as, for example, whether the damage arises through malicious intent (*dolus*), negligence (*culpa*), delay in performance (*mora*), or accident (*casus*). The following principles apply to these several cases:

(1) The party to an obligation who with malicious intent (*dolus*) inflicts a loss upon the other party, is always responsible to the full extent of the injury done. The parties to an obligation are always bound *dolum præstare;* and any special agreement to the contrary is void. This principle holds whether the malicious act is a positive or a negative one. The failure to prevent a loss, if such

failure is due to a malicious purpose, creates a liability, so far as such loss affects the subject-matter of the obligation.

(2) When a loss is occasioned by a party, not through malicious intent, but through the lack of proper care or attention, it is said to be due to negligence, or fault (*culpa*). In fixing the extent of liability for fault, the Roman law draws a distinction between two kinds of negligence, viz.: that which is gross and inexcusable (*culpa lata*), and that which is slight, or which any careful person not exercising extraordinary diligence might commit (*culpa levis*). In the former case, where the loss is occasioned by gross neglect, the party at fault is always responsible to the full extent of the injury done, without regard to what may be the subject-matter of the obligation. Gross negligence is thus assimilated to malicious intent—*culpa lata æquiparatur dolo.* But in the latter case, where the loss is occasioned merely by slight neglect, that is, where it has occurred in spite of the exercise of ordinary care, the extent of the liability depends upon the character of the obligation. As a general rule, a party is not responsible for loss occasioned by slight neglect—in other words, he is not obliged to exercise more than ordinary care—unless he himself derive a benefit from the obligation. For example, if a person receive a deposit obtaining therefrom no benefit, he is obliged simply to preserve it with ordinary care, such as an ordinarily careful person would exercise over his own property; and he is not liable for any loss not occasioned by the lack of such reasonable care. But if a person receive a pledge as a security for debt, since he obtains from it a benefit, he is obliged to exercise extraordinary care, and is responsible for the slightest neglect—that is, he is liable for any loss that might have been prevented by the greatest

diligence (*exactissima diligentia*). It is not necessary to mention the exceptions to these principles; it is sufficient to say that when they occur, they depend upon the special nature of the obligation itself.

(3) If a party to an obligation occasions any loss by delay (*mora*) in the performance of the obligation, after the time has arrived when its execution may be legally demanded, and such delay is not unavoidable, he is obliged to make indemnity for the loss thus occasioned.

(4) A loss or injury occasioned by an unavoidable accident (*casus*), that is, by a cause which no human foresight or power could avert, can be attributed to neither party. Hence such loss cannot be indemnified, but must remain with the person upon whom it is inflicted; for example, with the owner of a piece of property which has been damaged or destroyed in the way mentioned, even though its possession is in the hands of another party.

4. Classification of Obligations.—Before proceeding to the specific obligations described in the Roman law, we may notice the various classes into which they are grouped. These classes are based upon different principles, viz.: upon the legal significance of the obligations themselves; upon the jurisdiction by which they are enforced; and upon the modes in which they are established.

(1) With reference to their legal significance, they are divided into natural and civil. Natural obligations are those which, though based upon a moral duty, cannot be legally enforced. Although such an obligation is not directly compulsory by law, it is yet not deprived of all legal significance. It might, in the Roman law, be pleaded as an "exception," whereby a performance based upon it could not be rescinded. Civil obligations, on the other hand, are those which are directly enforceable by a legal action.

(2) With reference to the jurisdiction to which they are subject, they are divided into civil (in a restricted sense) and prætorian. The former are constituted by the civil law, and enforceable by a civil action. The latter are created by the prætorian law, and are enforceable by a prætorian action. By far the largest part of the obligation of the Roman law was developed under the prætor's jurisdiction, and hence relieved of the technical features which characterized the ancient civil law.

(3) A more important division is that based upon the modes in which they may arise or become established. Some are established by a contract (*ex contractu*), or a voluntary agreement, whereby one person legally binds himself to render something to another. Others are established by a delict (*ex delicto*), or a private wrong, whereby one person is legally bound to make compensation for the injury done to another. Obligations may also arise from several other causes, which are, however, from their peculiar features assimilated either to those arising from contract (*quasi ex contractu*) or to those arising from delict (*quasi ex delicto*). We may, hence, treat all obligations as arising (properly or fictitiously) either from contracts or from delicts.

References.—"Inst.," III., 13; "Digest," *De obligationibus et actionibus* (44, 7); "Code," *De obligationibus et actionibus* (4, 10); Sandars' "Justinian," Eng. ed., pp. 408–413, Am. ed., pp. 396–405; Mackenzie, "Roman Law," pp. 194–200; Amos, "Roman Civil Law," pp. 169–177; Phillimore, "Private Law among the Romans," pp. 220–237; "Dict. Antiqq." (*Obligatio*); Tomkins and Jencken, "Modern Roman Law," pp. 300–320; Ortolan, "Institutes," III., pp. 128–138; Ducaurroy, "Institutes," III., pp. 1–7; Molitor, "Les Obligations en Droit Romain," tom. I.; Deurer, "Gesch. und Inst.," §§ 165–188; Böcking, S. 124–135; Marezoll, "Lehrbuch," §§ 118–125; Vering, "Gesch. und Pandekten," §§ 178–194; Puchta, "Pandekten," §§ 218–248; Arndts, "Pandekten," §§ 201–277; Vangerow, "Pandekten," §§ 566–594; Windscheid, "Pandekten," §§ 250–301.

CHAPTER II.

OBLIGATIONS ARISING FROM CONTRACTS.

By far the largest and most important class of obligations, or rights *in personam*, are those which arise from the legal transactions called contracts. "This is," says Poste, "the portion of Roman jurisprudence which has survived with least alteration in modern Europe." It should be observed that the Roman law does not, as is done in the English law, confuse the idea of contract with the idea of the obligation that results from the contract. The contract (*contractus*) is simply the investitive fact which gives rise to the obligation. The one stands in relation to each other as cause and effect. The contract itself is not a right; it is a transaction by which a right and a duty are legally established between two or more determinate persons. Keeping in mind this distinction between the contract and the obligation *ex contractu*, let us consider the essential features of the contract, and indicate the specific kinds of obligations which arise from the different forms of contracts.

1. **Essential Features of the Contract.**—A contract, in the strict sense of the word, may be briefly defined as an agreement between two or more persons which gives rise to a legal obligation. An agreement which does not produce a legal obligation is called a simple pact (*nudum pactum*). That an agreement may be of such a character as to create a legal obligation, it must, of course, not attempt to establish a relation between the parties inconsistent with the principles already mentioned

as controlling the legality of obligations in general. But besides this, it must possess three distinctive and essential features, viz.: it must be made by parties legally competent; it must express an actual *consensus* between the parties; and it must be made according to the forms prescribed by law.

(1) All persons are competent to make a contract except those who are expressly disqualified by law. The chief persons thus disqualified are, in the Roman law, infants, *impubes* except to ameliorate their condition, madmen, and lunatics except in lucid intervals.

(2) The contract must be a voluntary concurrence of will (*consensus*) between the parties. This involves a promise on the part of one (*pollicitatio*) and an acceptance on the part of the other, so that the wills of the two parties are brought together (*conventio*). And the promise and acceptance must relate to the same identical object (*consensus ad idem*). Since a true *consensus* must grow out of a free and intelligent exercise of the will, a contract is void, or at least voidable, if it is the result of force, of fraud, or of excusable error.

An agreement is not binding if extorted by force (*vis*), or, what is equivalent to force, such an intimidation (*metus*) as would cause a man of ordinary firmness to do what he would not do of his own free will.

Again, an agreement which has been obtained through fraudulent deception (*dolus malus*), though not properly void at the outset, is so vitiated that it may be rendered void, or its effect modified by an appeal to the magistrate.

Moreover, an error bearing upon the subject-matter of the agreement, whether due to mistake or ignorance—without which the agreement would not have been made—furnishes a ground for modifying the effects of the

contract. As a general rule, an error is excusable only when it relates to a matter of fact (*error facti*), as all persons are presumed to know the law, or at least to have the opportunity of knowing it. Certain persons, however, such as minors, women, and soldiers, in certain cases, were allowed by the Roman law to plead error as to law (*error juris*) as well as to fact.

(3) Finally, an agreement to be a contract must be made in a manner prescribed by law. The different modes in which contracts might be formed in the Roman law may be seen from the various classes into which they were divided. They were broadly separated into "innominate" and "nominate."

Innominate contracts (*contractus innominati*), on the one hand, are those which have no special designation in the law, but which comprehend transactions involving the mutual consent of the parties, followed by a part performance. The execution of the agreement by one party is regarded as forming a consideration sufficient to make the execution compulsory upon the other party. These contracts involve the various kinds of exchanges, whether of things or of services. Paulus sums up the various cases in which such contracts may arise, as follows: "Aut do tibi ut des; aut do ut facias; aut facio ut des; aut facio ut facias" (D. 19, 5, 5). That is, if I give something to you on the condition that you give something to me, the very fact that I have executed my part of the agreement places you under a legal obligation to execute your part; and the same principle applies to the other forms of exchange mentioned.

Nominate contracts (*contractus nominati*), on the other hand, are those which are distinguished by a special name in the law. They are divided, in general, according to the ways in which they are formed—that is, with refer-

ence to the specific fact which is regarded as giving a binding force to the agreement. If the binding force of the agreement is based upon the delivery of something from one party to another, the contract is said to be made *re;* and the obligation arising therefrom is said to be contracted *re* (*re contrahitur obligatio*). If the contract is based upon a form of words, it is said to be made *verbis.* If it is based upon a written record, it is said to be made *literis.* And if it is founded merely upon the consent of the parties, it is said to be made *consensu.* We may therefore designate the nominate contracts of the Roman law as real, verbal, literal, and consensual.

To present in the briefest manner the general principles of the law regarding these contracts, it will be best simply to define the specific contracts belonging to each class, and indicate the principal obligations to which they severally give rise, and the accessory liability resting upon the contracting parties in case of loss or injury.

2. Real Contracts, or Those Made Re.—A contract is said to be made *re,* when the agreement is accompanied by the delivery of a thing from one person to another under certain specified conditions. The obligation resulting from such a contract does not arise until the delivery has been made. The voluntary acceptance of the property of another imposes upon the receiver the obligation to abide by the terms of the agreement, whether expressed or implied, according to which the thing is delivered. There are four real contracts in the Roman law, each one of which creates obligations peculiar to itself: *mutuum, commodatum, depositum,* and *pignus.*

(1) *Mutuum,* or loan for consumption, is a contract formed by the gratuitous delivery of consumable goods from one person to another on condition of a return in kind. The subject-matter of the *mutuum* must consist of

things that can be measured, weighed, or numbered, such as wine, corn, or money; that is, things which being consumed can be restored *in genere*. As this is a gratuitous loan, it does not include the lending of money on interest. From the nature of this contract the obligation is imposed upon the borrower to restore to the lender, not the identical thing loaned, but its equivalent—that is, another thing of the same kind, quality, and value. A contract which thus creates an obligation upon one party only is said to be "unilateral."

With regard to the responsibility for loss, since from the peculiar character of the contract the right of consumption passes to the borrower, the latter is looked upon as the practical owner of the thing loaned, and he therefore holds it entirely at his own risk; he is not relieved from his obligation to return the equivalent even though the thing be destroyed by unavoidable accident.

(2) *Commodatum*, or loan for use, is a contract whereby the owner lends a thing to another to be used for its legitimate purpose, without payment, on the condition that it be returned after the purpose has been served. This contract is "bilateral," imposing an obligation on both parties—viz.: a direct obligation on the part of the borrower to return the identical thing uninjured after the use specified (enforced by an *actio directa*); and a contrary obligation on the part of the lender to pay for any extraordinary expenses which the preservation of the thing has required during its use (enforced by an *actio contraria*).

As to the liability for loss, since the ownership of the thing remains with the lender, the borrower is not responsible for loss by accident. Since, however, the loan is for the benefit of the borrower, he is responsible not only for culpable negligence (*culpa lata*), but even for the slightest neglect (*culpa levis*); in other words, he is

obliged to exercise extraordinary diligence in preserving uninjured the thing loaned.

(3) *Depositum*, or deposit, is a contract by which the owner entrusts a thing to another for safe-keeping, without pay. As in the previous case, this contract is bilateral, creating an obligation on the part of the depositary (*depositarius*) to restore the thing on demand; and an obligation on the part of the owner to reimburse the depositary for necessary expenses incurred in preserving the thing.

Since, in this case, the contract is not made for the benefit of the depositary, the liability for loss, or injury done to the thing deposited, does not extend to *culpa levis*—the depositary being responsible only for loss resulting from fraud, or such gross neglect as amounts to fraud. This rule is, however, modified so that the liability extends to slight neglect in the following cases: if the depositary assumes charge of the thing without being authorized so to do; or if he receive pay for his services, in which latter case, the deposit is assimilated to the contract of hiring. The liability for loss due to slight neglect was interpreted by the prætor to apply to ship-masters and innkeepers with reference to the baggage and other effects of travellers. This rule has been extended in the modern civil law and in the English law to apply to all common carriers, by land as well as by water.

(4) *Pignus*, or pledge, is a contract by which a thing belonging to a debtor is delivered to a creditor as a security for debt. The present use of the word is distinct from its use as denoting the *real* right which the creditor acquires in the thing pledged, and which avails against all the world, enabling him to recover its possession if lost. It here refers to the simple transaction which gives

rise to personal obligations between the debtor and the creditor with reference to the thing pledged. This contract imposes a twofold obligation. Upon the receiver of the thing pledged is imposed the duty of restoring it on payment of the debt; or, in case of sale, of restoring the surplus of the proceeds above what is necessary to liquidate the indebtedness. Upon the owner of the thing pledged is imposed the duty of reimbursing the receiver for necessary expenses incurred in its preservation.

As this contract is made for the benefit of the creditor as well as the debtor, the former is liable for any injury done to the thing pledged, resulting even from slight neglect. But it should be further observed, that in this case, as well as in the case of the other real contracts, the liability of the person having the property of another in his possession may be offset by contributory negligence on the part of the owner of the property. In other words, the owner of the property must bear the loss to which he may be said to have contributed by his own knowledge.

The real contracts of the Roman law are preserved in the modern civil law, and they correspond in many particulars to the English contracts of bailment.

3. Verbal Contracts, or those made Verbis.—A contract is said to be made *verbis* when it is based upon a solemn form of words. This form consists of an interrogation and a corresponding answer. In the ancient civil law, the question and answer must respectively contain the words *spondes* and *spondeo*. But afterward, other words were allowed as *promittes* and *promitto*, or *dabis* and *dabo*; and by a constitution of the Emperor Leo, any form of words was sufficient that clearly expressed the consensus of the parties.

(1) *Stipulatio* is the name by which a verbal con-

tract is generally designated. Such a contract is not confined to any particular kind of transaction; but any promise, whatever may be its subject-matter, may be made legally binding by being put into the form of a definite question and answer. It may refer to the delivery of a thing or to the performance of a service, and that, too, without reference to the element of consideration. Its essential features are, that the question and the answer be consecutive, and that they refer to precisely the same thing. This contract is unilateral, creating an obligation—not upon the *stipulator*, or the one who asks the question—but upon the *promissor*, or the one who answers the question in the affirmative. If a reciprocal obligation is to be created, it is necessary for the parties to make two distinct stipulations, each person taking successively the part of *stipulator* and *promissor*.

The principles which have been described as the non-essential, or incidental, elements of an obligation are especially applicable to the obligations arising from this form of contract. In other words the stipulation may be made unconditionally (*pure*), or with reference to a certain time (*in diem*), or subject to the happening of an uncertain event (*sub conditione*). In the first case, the obligation arises immediately and the performance can be instantly demanded (*dies cedit et dies venit*). In the second case, the obligation arises immediately, but the performance cannot be demanded until the time specified (*dies cedit sed dies non venit*). In the third case, the obligation neither arises nor can its execution, of course, be demanded until the condition is fulfilled (*dies nec cedit nec venit, nisi exstiterit conditio*).

While the stipulation is essentially an oral contract, its terms may be reduced to writing. But the writing is not

regarded as the basis of the obligation; it merely furnishes evidence as to the actual subject-matter of the contract.

(2) *Fidejussio* is a special form of the verbal contract by which one binds himself as surety to another person. This contract, in its earliest form (*adpromissio*), was used simply to secure a previous obligation which itself rested upon a verbal contract. But in its later form, the contract of surety, although it was itself still made *verbis*, came to be used to guarantee an obligation based upon any kind of contract, whether made verbally or otherwise. As a result of this contract the person who becomes a surety (*fidejussor*) is bound to meet the obligation of the principal debtor, in the case of the latter's failure. This duty is not limited by time, and it may even be transmitted to heirs. But to protect the surety from arbitrary action on the part of the creditor, the creditor is obliged, in the first place, to sue the principal debtor, if solvent, before proceeding against the surety (*beneficium ordinis*); and, in the second place, if there are several sureties, to demand a share of the debt from each (*beneficium divisionis*). Moreover, if the surety pays any thing toward securing the principal debtor, he retains a right of action against the latter for its recovery.

It may be observed regarding the verbal contracts of the Roman law, that the peculiar feature which marks them—in creating an obligation without regard to a consideration—is rejected by the English law, which professes to make a good or valuable consideration an essential element of every contract.

4. Literal Contracts, or Those Made Literis.—A contract was said to be made *literis*, when it was based upon a formal record or entry made by the creditor with the knowledge and consent of the debtor. In

this case the writing itself was the foundation, and not merely the evidence, of the contract. In case of litigation, the parties could not go back of the written record. This peculiar form of contract originated from the ancient custom of the Romans of transcribing their accounts from the ordinary day-book (*adversaria*) to the more formal and permanent ledger (*codex accepti et expensi*), which was evidently done with the most scrupulous care, since Dionysius declares that every Roman was obliged to take oath before the censor that his book-keeping was honest and accurate.

The early form of the literal contract, called *expensilatio*, was superseded by the *chirographum*, or a written acknowledgment of debt on the part of the debtor given to the creditor; and also by the *syngrapha*, or a written statement of the debt, signed by both parties and kept by both. But these passed into disuse, and at the time of Justinian there were no literal contracts, in the earlier and strict sense of the word. The *cautio*, or written acknowledgment of debt, which existed at that time, was not the basis, but merely the evidence, of a contract.

5. Consensual Contracts, or Those Made Consensu.—A contract is said to be made *consensu* when it is based upon the simple consent of the parties. In this case the contract is complete when a real concurrence of will has been reached. Such contracts, therefore, to be valid, require no delivery of a thing, no special form of words, and no reduction to writing, although their subject-matter may be reduced to writing as an evidence of the agreement. Consequently, they can be made not only by parties present, but by parties absent through letters or by messenger. They, moreover, create in all cases bilateral obligations—that is, reciprocal duties resting upon both parties to the contract—whereas literal

and verbal contracts, and the real contract of *mutuum*, as we have seen, impose a duty upon one party only.

The consensual contracts were introduced into the Roman law through the prætorian legislation, and were consequently founded upon broader principles of justice than the other classes of contracts, which continued to preserve, in some respects, the technical features of the ancient customary law. They were liberally interpreted, according to the intention of the parties and the demands of equity. Although few in number, they formed by far the most important part of the Roman law of contract, and have survived, with little alteration, in the modern civil law; and have also exercised a great influence upon the English common law. These contracts comprise purchase and sale, letting and hiring, partnership and agency.

(1) Purchase and sale (*emptio et venditio*) is a contract in which one person (*venditor*) agrees to deliver to another (*emptor*) a certain commodity in consideration of a given price. This contract in itself does not, of course, transfer the right of ownership in the thing which is the object of the sale; it simply creates personal obligations between the buyer and the seller. In considering the general principles that relate to the contract of sale, we may notice briefly the essential elements of the contract, the principal obligations that it imposes upon the parties, the incidental features that may attend the principal obligations, and the responsibility for loss that results from the contract.

Besides the legal competence of the parties, there are three elements essential to a contract of sale, viz.: a thing, which is *in commercio*, and which is of a determinable character, whether it be corporeal or incorporeal, present or future, *in genere* or *in specie*; a price, which must be a

sum of money of a legal character and definite in amount, whether fixed by agreement, or by reference to a third party, or by the market rate; the consent of the parties, which is regarded as consummated as soon as the price is agreed upon—or, if the contract is to be written, with the complete execution of the writing. The writing, however, was in no case obligatory in the law of Justinian; it merely furnished a better proof of the terms of the contract.

The principal obligations which by this contract are imposed upon the seller are: To deliver the thing itself to the buyer, and to give him lawful and undisturbed possession; to guarantee the buyer against eviction by law resulting from a defective title at the time of the sale, and to compensate him for any loss sustained by such eviction; and to warrant the thing sold to be free from secret faults, which might be done, if such faults were afterward discovered, either by a satisfactory reduction of the price or by a dissolution of the contract itself. The implied warranty, which in the Roman law was annexed to every sale, was thus entirely at variance with the maxim of the English law, *caveat emptor*. The principal obligations resting upon the buyer, on the other hand, are: To pay the price fixed upon, together with interest from the time the price is due; and to compensate the seller for necessary expenses in keeping the thing prior to its delivery.

Incidental obligations may be created by special agreements, or pacts (*pacta adjecta*). For example, the sale may be made to take effect *in diem*, or *sub conditione*, or subject to approval on the part of the buyer, or to recission on the part of the seller. An additional obligation might, in the Roman law, be also created by the giving of earnest money (*arrha*). This was originally regarded

simply as a proof of the contract, but under Justinian it became a measure of damages in case either party failed to abide by the contract—the purchaser being obliged, in case of failure, to forfeit the earnest that he had paid; and the seller, if he receded from the contract, to forfeit the earnest that he had received with an equal sum in addition.

With regard to responsibility for loss or injury inflicted upon the thing before its delivery, the seller is liable not only for fraud and gross negligence, but also for slight neglect; so that he is obliged to preserve the thing with the greatest diligence until the time of delivery. But in case of unavoidable accident, the loss falls not upon the seller but upon the buyer; in other words, the risk passes to the buyer as soon as the contract is completed. This seems to be opposed to the general principle *res domino perit*, since the ownership does not, by the mere contract of sale, properly pass to the purchaser, but remains with the seller. To explain this apparent discrepancy, it is necessary to recall the theory of the Roman law, that, although no real rights can be created by a simple contract, yet when the object of a contract of sale has been delivered, the real rights of the purchaser are fictitiously dated back to the time of the contract. When, therefore, the purchaser acquires possession of the thing by delivery, he also acquires the rights to all the fruits and natural accessions which the thing has received since the contract was made; and, on the same principle, should suffer all the losses which the thing has received from merely natural causes. This general principle regarding risk does not, however, relate to a contract in which the seller specially stipulates to take the risk upon himself, or the case in which things are sold *in genere*. The question of responsibility may be still fur-

ther affected by delay (*mora*). If the seller fails to deliver the thing at the time he ought, he becomes liable not only for fault but even for accidental loss. But if the contract is of such a character as to require the buyer to remove the goods, and he fails to do so at the proper time, the seller is held responsible only for fraud or gross neglect.

(2) Letting and Hiring (*locatio et conductio*) is a contract somewhat similar to purchase and sale, in being founded upon consent and in being complete when the price is fixed. But its primary object is not, like that of sale, to effect the absolute transfer of a thing from one person to another. It does, however, involve a sort of qualified delivery, that is to say, one person, called the *locator*, agrees to place something at the temporary disposal of another person, called the *conductor*, on the condition that the person receiving the benefit of such disposition—whether he be the *locator* or the *conductor*—pay a certain price to the other person. It is thus evident that, according to the theory of the Roman law, the determination of the question as to which party should be called the *locator*, and which the *conductor*, does not depend upon the fact that one receives and the other pays the price, but upon the more fundamental fact that one delivers to the other, or places at his disposal, that which forms the subject-matter of the contract. In the contract of sale, the one who makes the delivery (that is, the *venditor*), always, it is true, receives the price; but in the present contract, the one who makes the delivery (that is, the *locator*) may or may not receive the price, as will hereafter be seen. The character of this contract and the distinctive obligations and liabilities attending it will be made clear by considering the different phases that it presents, viz.: the letting of things, the letting of services, and the letting of work.

In the letting of things (*locatio-conductio rerum*), the *locator* agrees to deliver to the *conductor* a thing whether, movable or immovable, to be used by the latter on condition of paying a fixed price. This phase of the contract relates specially to the leasing of houses or lands—the *conductor*, or lessee, being techinally called, in the former case, *inquilinus*, and in the latter case, *colonus*. But whatever may be the particular thing leased, the lessor is bound to deliver the thing, and the lessee is bound to pay the price, or not. Besides these most patent duties, the lessor, on the one hand, is also bound to gurantee the tenant against eviction, to reimburse him for necessary expenses, and to keep the thing in proper state of repair; the lessee, on the other hand, is also obliged to pay interest if the rent falls in arrears, and to give up possession at the expiration of the time specified, or if the rent is not paid for two years. As to liability for loss, the lessor not only holds the risk in case of accident, but is responsible for damage resulting from hidden faults in the thing leased, that is for contributory negligence; and the lessee, on his part, is responsible for *culpa levis*, or slight neglect.

In the letting of services (*locatio-conductio operarum*), the *locator* agrees to place his services or labor at the disposal of the *conductor* on the condition of receiving some fixed price, or wages. In this case, it is the labor which is let by the workman, and hired by the employer; and, as in the previous case, the *locator* receives the price. The principal obligations growing out of this contract are exceedingly simple, and are indicated by the definition already given. The workman is bound to place his services at the disposal of the employer and to perform the labor expected of him in a proper manner; and the employer is bound to pay the wages agreed upon. With

reference to any property of the employer which comes into his hands, the laborer is responsible for fraud and gross negligence, and even for slight neglect with reference to any thing specially entrusted to his care.

In the letting of work to be done (*locatio-conductio operis*), the *locator* agrees to place in the hands of the *conductor* certain materials, upon which work is to be expended for the accomplishment of a certain result, on condition that the *locator* pay to the *conductor* a certain compensation. Here the price is received by the *conductor* and not by the *locator* as in the previous cases. But still the essential character of the *locator* remains the same, in being the person who delivers to the other that which forms the subject-matter of the contract. Although the purpose of the contract is to effect some improvement or modification of the material, such improvement is merely an accession to the material itself which belongs to the *locator*. It is, therefore, essential to this contract that the materials, either wholly or in part, be furnished by one party and the improvement be effected by the other, as when silver is delivered by one to the smith to be wrought into a vase; or goods are furnished to a carrier to be transported to a certain place; or when upon one's ground a building is constructed by a contractor even with material furnished by the latter, since in this case the land is the principal material to which the building accedes. The chief obligations resting upon each party are sufficiently indicated by the nature of the contract itself. But there are certain distinctive rules regarding responsibility that need to be noticed. The one who undertakes to do a piece of work upon the materials of another is responsible not only for any damage, however slight, due to his personal negligence, but also for any injury due to the lack of proper knowl-

edge and skill. Moreover, if the work is to be done as a *whole*, that is "by the job," the entire risk remains with the contractor until it is completed and approved; but if it is to be done by the *piece*, the risk of those portions which are approved passes to the *locator*. In the case of jettison (*lex Rhodia de jactu*) where a ship-master contracts to carry goods belonging to different owners and is obliged to sacrifice a part in order to save the rest, the risk is distributed between the several owners of the goods and the owner of the vessel.

(3) Partnership (*societas*) is a contract by which two or more persons agree to combine their property or labor, or both, on the condition of sharing the common profit and loss. The contract requires that there be some contribution on the part of each of the parties, whether this be equal or unequal, alike or unlike. It also requires that there be some adjustment of the profits and losses between the parties. In the absence of any special agreement each party has an equal share in the profits and losses. But this may be modified in any way according to the will of the parties, with the single exception that no one can be excluded entirely from a share in the profits (*societas leonina*).

A partnership may be either *general* or *special*, according to the extent and purpose of the contributions. A general, or universal, partnership may be either one in which everything belonging or in any way accruing to each of the partners is held in common by them all (*societas universorum bonorum*); or one in which everything arising from the gains of a mercantile or professional business is contributed to the common stock (*societas universorum quæ et quæstu veniunt*). A special, or particular, partnership may be either one which is formed for a single transaction (*societas negotiationis alicujus*); or one

which is formed to effect the joint-ownership in a particular thing (*societas rei unius*). The form which is generally made and which is presumed, if no other is specially agreed upon, is the business or professional partnership.

The general rights and duties of partners with reference to each other spring from the nature of the transaction itself. Each one is bound to furnish what he agrees to furnish, to pay his share of the common expenses and losses, and to grant to the others their share of the common gains. These mutual obligations are enforced by the *actio pro socio*. In their relations to each other, all the partners are bound by the acts of each partner, so far as these acts are consistent with the legitimate object of the partnership. But in relation to third persons no partner, speaking generally, is bound by the acts of another. According to the Roman law there is no implied agency in partnership. Therefore, only the particular partner who has transacted business with a third person can be held responsible by that person. As regards responsibility for fault each partner is bound to exercise the same care over the property and business of the firm as he does over his own affairs, and he is liable to his copartners for any loss due to the lack of such care.

Partnership is dissolved by the expiration of the time for which the contract was made; by mutual consent of the parties; by the retirement of one of the partners, provided this is done in good faith and not for the purpose of defrauding the others; or by the death or insolvency of any of the partners.

(4) Mandate (*mandatum*) is a contract in which one person (*mandator*) commissions another (*mandatarius*) to do something, and which involves a guaranty on the part of

the former to secure the latter from loss in the transaction. The service must necessarily be gratuitous; if a price is given, the contract becomes *hiring*. The contract of mandate is binding if the service to be performed is for the benefit of the principal alone; of the principal and the agent; of a third party; of the principal and a third party; or of the agent and a third party. But if it is for the sole benefit of the agent it has no legal force.

The agent, or *mandatarius*, is under obligations to execute faithfully the terms of the agreement, and to give up to the principal all the property entrusted to his care, and all the proceeds resulting from the execution of the commission. The principal, or *mandator*, on his part, is bound to reimburse the agent for all necessary expenses, and to protect him from any loss incurred in faithfully executing the mandate. If the agent, however, transcends his commission, and, for example, pays for a thing a higher price than that authorized, he cannot recover the excess from the principal.

In this contract, the general rule regarding responsibility for fault is subject to an exception, since the agent, even though he derive no benefit from the contract, is liable not only for fraud and gross negligence, but also for slight neglect. An exceptional degree of responsibility is, in this case, imposed upon the agent on account of the peculiar nature of the contract itself, which requires the exercise of special care for its proper execution.

It must be observed that the Roman contract of mandate does not involve the modern idea of agency, whereby the principal is brought into direct legal relation to a third party through the acts of his agent. The Roman contract establishes a personal relation only between the *mandator* and the *mandatarius*; the latter alone is bound

by his transactions with the third party, although he has himself a personal right against the *mandator* to be indemnified for obligations thus incurred, if properly within the scope of the mandate. But it may be noticed in passing that the modern doctrine of representation was partly realized in the Roman law; as, for example, in the case of slaves and children with reference to the father; in the case of a shipmaster in the case of the owner of a vessel (*exercitor*); and in the case of the manager of a business (*institutor*) with reference to his employer.

6. Obligations Quasi Ex Contractu.—In addition to the obligations that arise from contracts properly so called, there are others that grow out of certain relations existing between persons, whereby they become bound to each other by duties similiar to those arising from a contract. Such obligations are said to arise *quasi ex contractu*. The mere fact of holding a particular relation to another person may, in certain cases, impose special obligations which are enforceable by a legal action. A number of these cases are specified in the Roman law.

(1) *Negotiorum gestio* is the assumption on the part of one person of the business of an absent person, without an express mandate. In this case, if the assumption is made in good faith, the law imposes upon the parties the same reciprocal rights and duties as those that arise from the *mandatum*.

(2) *Tutelæ administratio*, or the administration of the estate of the ward, necessarily imposes reciprocal duties on the part of the tutor and the ward, the former being legally bound to administer faithfully the estate of the ward, and the latter to indemnify the tutor for necessary expenses incurred in the execution of his trust.

(3) *Rei communis administratio*, or the administration of a common thing, creates an obligation, whereby two or

more persons who acquire a thing in common, as by joint legacy or gift, are each liable to the other for its proper division.

(4) *Hereditatis aditio*, or the acceptance of an inheritance, imposes upon the heirs the obligation to divide the estate in a proper manner, to settle all accounts relating to it, and to pay all legacies that the testator has legally made.

(5) *Indebiti solutio*, or the payment by mistake of money, not due either by a natural or legal obligation, imposes upon the person to whom such money has been paid the duty to make restitution.

7. Dissolution of Contract-Obligations.—The obligations arising *ex contractu* or *quasi ex contractu*, exist until they are discharged in a manner prescribed by law. With the proper dissolution of the obligation the debtor is no longer liable to an action. The various modes of dissolving obligation may be grouped as general and special.

(1) The general modes are those which are applicable to obligations arising from any kind of contract. They include the following: *solutio*, or the actual payment of the debt or fulfilment of the obligation, either by the debtor himself or by another for him; *compensatio*, or the offset of one debt by another existing between the same parties; *confusio*, or the merging of the debtor and creditor in the same person, as when the debtor becomes the heir of the creditor; *oblatio*, or the tender of the money due to the creditor, which may be formally done by placing it subject to the order of the court; and *novatio*, or the dissolution of one obligation by the formation of a new one to take its place.

(2) The special modes are those which are peculiar to obligations arising from certain kinds of contracts. They

include the following: *acceptilatio*, or the acknowledgment in the form of a "stipulation," that the debt has been paid—a mode peculiar to verbal contracts, but fictitiously applied to others; and *contraria voluntas*, when parties recede from an obligation by mutual consent—a form peculiar to consensual contracts.

References. — Gaius, III., 88–181; "Inst.," III., 13–29; "Digest," *De in integrum restitutionibus* (4), *De rebus creditis*, etc. (12), *Mandati, vel contra* (17), *De contrahenda emptione*, etc. (18), *De actionibus empti et venditi* (19), *De verborum obligationibus* (45), *De fide jussoribus et mandatoribus* (46); "Code," *De rebus creditis*, etc. (4); Poste's "Gaius," pp. 289–367; Sandars' "Justinian," Eng. ed., pp. 408–488, Am. ed., pp. 396–478; Halifax, "Roman Law," pp. 63–72; Mackenzie, "Roman Law," pp. 194–241, 248–252; Phillimore, "Private Law," pp. 238–327; Tomkins and Jencken, "Modern Roman Law," pp. 353–378; Hunter, "Roman Law," pp. 279–486; "Dict. Antiqq." (*Obligationes, Emptio et venditio, Societas, Mandatum*); Ortolan, "Instituts" III., pp. 128–410; Demangeat, "Droit Romain," II., pp. 163–431; DuCaurroy, "Instituts," III., pp. 7–233; Molitor, "Les Obligations en Droit Romain," tom. 2; Deurer, "Gesch. und Inst., §§ 189–196; Böcking, "Röm. Privatrecht," S. 135–148; Marezoll, "Lehrbuch," §§ 126–144; Vering, "Gesch. und Pandekten," §§ 195–207; Arndts, "Pandekten," §§ 278–363; Vangerow, "Pandekten," §§ 616–673; Puchta, "Pandekten," §§ 303–374; Windscheid, "Pandekten," §§ 362–450; Pothier, "Treatise on the Law of Obligations, or Contracts," Eng. trans.

CHAPTER III.

OBLIGATIONS ARISING FROM DELICTS.

BESIDES the obligations already described, which arise from contracts and relations that are assimilated to contracts, there is another class of obligations comprising those which arise from delicts, or private wrongs. These two classes of obligations are in a certain sense correlative to each other—the one being based upon beneficial acts, and the other upon injurious acts. In either case the two parties concerned are bound to each other by a *vinculum juris*, and are placed in the legal relation of "debtor" and "creditor" in the broadest sense of these words. If we look at a delict from one point of view—simply as an injury done to a person's property or his body or his reputation—it would seem to be merely an infringement of a right *in rem*, and not properly related to obligations, or rights *in personam*. But, according to the Roman view, a delict is something more than an infringement of a right *in rem*; it is, like a contract, regarded as an investitive fact giving rise to a right *in personam*.

1. Delict as a Ground of Obligation.—The Roman view of delict, as furnishing the proper ground of an obligation, seems to be justified by the distinction between rights *in rem* and rights *in personam*. A right *in rem*, though availing in a negative manner against the world at large, really terminates in the thing that is the object of the right. When infringed upon, whatever may be the motive of the infringement, the *real* right is in

every respect vindicated by a re-establishment of the right over the thing itself. It involves no further remedy than the recovery of that of which one has been deprived. It requires nothing more than restitution. Even in the case of theft, as conceived by the Roman law, the *real* right is fully vindicated by a *real* action for the recovery of the thing stolen. If the law merely protected the *real* right, it would grant no further redress; and if the owner were completely satisfied with the recovery of the thing, there would be, so far as he is personally concerned, no need of further redress. But because he is not thus satisfied, the law grants to him a *personal* right, enforceable by a personal action, to compel the offender, not simply to restore the thing, but to give satisfaction for the injury done. By such an injury, a *vinculum juris* is established between the offending and the offended party; and this legal bond, whatever may be its specific marks, possesses the same generic character as that arising from a personal agreement to pay a certain sum of money. It establishes a claim which can be enforced by a legal action.

This view is consistent with the idea of private revenge which lies at the historical basis of the law of private wrongs, and also with the fact that, as the idea of private revenge passes away with the progress of civilization, acts that were once looked upon as private delicts, as theft and robbery, are transferred to the class of public crimes, and punished not for the sake of giving satisfaction to the offended party, but for the sake of protecting the community at large. To properly understand the Roman idea of delict, it must therefore be borne in mind that its legal significance consists, not in being a violation of a right *in rem*, but in giving birth to a right *in personam*. According to this view, delicts are properly co-

ordinated with contracts, since both are alike investitive facts giving rise to legal obligations.

2. General Features of a Delict.—A delict may be defined as an injurious act which is regarded as sufficient to impose upon the offender an obligation to give satisfaction to the offended party for the evil done. It is thus distinguished from a contract, which involves a concurrence of wills and a beneficial relation between the parties. It is also distinguished from those injuries which may arise in connection with a contract, through fault or otherwise, and which simply modify the extent of the contract-obligation already existing. It is, in fact, such an injurious act which, even though there were no obligation already existing between the parties, would of itself create such an obligation. A private delict must also be distinguished from those public wrongs, or crimes (*delicta publica*), which, though they may cause personal injury, are punished by the state as offences against the whole community. The fundamental idea of a private delict is that of an act creating an injury which can be remedied only by the giving of personal satisfaction. The penalty (*pœna*), or "damages" imposed in such a case, is solely for the benefit or satisfaction of the person injured.

While the specific acts to which the law attaches the character of delicts may change with the progress of society, there are certain features that must in general characterize an injurious act in order that it may give rise to a legal obligation.

(1) On the part of the offender, the act must be a culpable one, that is, one for which the offender himself is to blame. An act is not culpable merely because it is injurious. In the first place, it must be voluntary, or capable of being referred to the sphere of free volition

—whether it be prompted by a criminal intent, that is, a conscious purpose to inflict injury; or due to criminal negligence, that is, the failure to use that precaution which every one is bound to exercise in performing every act. In the second place, it must be unsanctioned by law, that is, not involved in the exercise of one's own legitimate rights. Paulus says: "Nemo damnum facit, nisi qui id fecit, quod facere jus non habet (D. 50, 17,-151).

(2) On the part of the offended person, the act must be one which produces an injury capable of being estimated in pecuniary damages. Consequently, the injury must be actually inflicted, and not merely contemplated or attempted; and in the second place, it must be real not merely fanciful. The "damages," however, may be not simply compensatory, that is, to make amends, but penal, that is, to give additional satisfaction to the injured party.

3. Different Kinds of Delicts.—In specifying the various kinds of wrongs that give rise to personal obligations, the Roman law includes certain offences which in the modern law are looked upon rather as crimes. In the estimation of damages, it also preserves to a greater extent than the modern law the idea of penal satisfaction which had its root in the primitive custom of private revenge. In the Roman law at the time of Justinian, there were recognized four kinds of delicts, viz.: theft, robbery, damage to property, and injury to the person.

(1) Theft (*furtum*) is defined by Paulus to be "the fraudulent taking, for the sake of gain, of that which belongs to another, whether a thing itself or its use or its possession—an act which is forbidden by the natural law" (D. 47, 2, 1, 3). The two essential elements of theft are a wrongful intent, and an actual appropriation.

A wrongful intent involves a knowledge that the object belongs to another, and a knowledge that the act is done without the consent of the owner. But a fraudulent intent does not alone constitute theft; there must be combined with it an actual exercise of physical force over the object (*contrectatio fraudulosa*). There may be theft of a thing (*rei furtum*), as when one purloins the goods belonging to another. There may be theft of use (*usus furtum*), as when a depositary uses for his own benefit, and without the consent of the owner, a thing committed to his charge, or even when a borrower puts a thing to a use different from that for which it is lent. There may also be theft of possession (*possessionis furtum*), as when a debtor fraudulently takes from a creditor a thing which has been pledged to the latter as a security for debtor. In the last case, a person may be guilty of theft in taking wrongful possession of his own property. Not only are those persons guilty of theft who directly perform the wrongful act, but those also who knowingly assist in the act or contribute to it.

In estimating the degree of liability resulting from theft, the Roman law distinguishes between theft "manifest" and "not manifest." A manifest theft (*furtum manifestum*) is one in which the thief is taken in the act, or near the place of the theft, with the stolen property in his possession; in this case, the thief is made liable for four times the value of the property stolen. In other cases of theft (*furtum nec manifestum*), the thief is liable for twice the value of the property. The only satisfactory explanation of this distinction is to be found in the fact, that originally the penalty was imposed to satisfy the feeling of revenge on the part of the offended person, —which feeling would naturally be greater in the former than in the latter case.

The purely personal obligation arising from theft was, in the Roman law, enforced by an action for penal damages (*actio furti*). But by pursuing this personal right against the thief, the owner did not forfeit his real right to the thing itself. He might therefore recover the possession of the thing from the thief in the same way as he might from any other person—by a real action (*vindicatio*); and if the thief had lost possession, he might recover its value with interest (*condictio furtiva*). The right of personal action against the thief belonged not only to the owner of the stolen property, but also to any person who had a beneficial interest in the thing—for example, a *bona fide* possessor, or a usufructuary, or a person deriving an interest from another's property as the result of a contract. In the modern civil law, the action for penal damages in the case of theft has become obsolete, which fact illustrates the tendency to eliminate the idea of personal revenge from the law of delicts.

(2) Robbery (*rapina*) is the unlawful seizure of another's property, accompanied by force. To constitute robbery, in the strict sense, it is necessary that the act be done with violence and with evil intent. In early times, this offence applied only to movables; but by a late constitution, violent dispossession in the case of immovables was assimilated to robbery. The thing taken need not be the property of the one dispossessed. It is sufficient that the possessor have an interest in it, or even that it be among his goods, as in the case of deposit.

The liability of the offender was, in the Roman law, enforced by an action introduced by the prætor (*vi bonorum raptorum*). If the action was brought within a year, four times the value of the property might be recovered. But if the offended party suffered a year to elapse before bringing the action, he could recover the simple value

only. Moreover, the quadruple damages allowed in the former case were not, as in the case of theft, purely penal, but included the restitution of the property or its value. The lighter civil penalty attending robbery, as compared with that of theft, is perhaps explained by the fact that one had less opportunity to protect himself against the thief than against the open robber, in repelling whom one was justified in using any amount of force necessary for the purpose. In robbery, as in theft, the offender was also liable to a criminal as well as a civil prosecution.

Although robbery, strictly speaking, involved a criminal intent, a constitution was issued in the time of Valentinian whereby the violent seizure of any kind of property, even with a lawful intent, was made an actionable offence. It was established that if a person who was a rightful owner reclaimed his property by force, he should be obliged to forfeit it to the person from whom he took it; and if he were not the rightful owner, although believing himself to be such, he was bound not only to restore it, but also to pay damages equal to the value of the property.

(3) Damage to property (*damnum injuria datum*) comprehends every wrongful injury to the property of another by which it is destroyed or its usefulness is impaired. To constitute this offence there must be an actual diminution in the value of the property, capable of being estimated in money; and the injury must result from an evil intent (*dolus*) or from culpable negligence (*culpa*). The question whether negligence is culpable must be determined by the circumstances of the case, and may sometimes depend upon unskilfullness or even lack of proper knowledge. The liability of the offender may, however, be modified by contributory negligence on the part of the owner of the injured property, as when the latter has the power to prevent the injury and fails to exercise it.

The extent of liability in case of damage was fixed in a general way by the *lex Aquilia* (B. C. 286), a law which superseded the earlier provisions of the XII. Tables. By this law, if a person wrongfully killed a slave or animal belonging to another, he was liable to pay, not the actual value at the time of its death, but the greatest value that it had possessed during the previous year. Moreover, if a person caused any kind of wrongful damage to a slave, animal, or other property belonging to another, he was liable to pay the greatest value possessed by the thing during the previous thirty days. The expansion of this law relating to damage may be seen from the actions subsequently granted to the injured party. An action founded upon the text of the Aquilian law (*actio directa Aquiliæ*) could be brought only when the damage was caused by an actual contact of the offending party with the body of the injured thing (*corpore corpori*). The defect of this action was supplied by the prætor who gave an equitable action (*actio utilis Aquiliæ*) against a person who had in any indirect way inflicted an injury upon the substance of another's property (*non corpore sed corpori*). But when an injury was caused to the owner of a thing where there was no contact of the offending party, and when the thing itself was not injured (*nec corpore nec corpori*), as when one assisted in the escape of another's slave, the owner could have recourse to an action (*actio in factum*) which was given in general cases of damage and which afforded a compensation warranted by the circumstances of the case. Still further, if the damage was caused by the property of another, as a slave or an animal, the owner of such slave or animal was liable to an *actio utilis*, based upon the *actio noxalis* of the XII. Tables, by which the offending animal or its value was adjudged to the injured party. Finally, in case damage

was not actually done (*factum*) but was apprehended (*infectum*), the threatened party has a special action (*damni infecti actio*) by which he might obtain a security against any loss that might reasonably be expected.

(4) Injury to the person (*injuria*) includes every malicious act which affects harmfully the body or reputation of another. Such an injury is done by assaulting another, by publicly reviling him by word of mouth or by writing, by proceeding against him as though he were insolvent when he is not, by attempts made against chastity, or by any other contumelious act directed against a person's liberty or honor. An injury is committed against a person himself if committed against one under his power. In the Roman law, an injury was said to be aggravated (*atrox*) when the circumstances were such as to increase the extent of the outrage. Such an aggravation might be due to the mode in which the act is performed, as when one is beaten with a club ; or to the nature of the place, as when one is assaulted in a public assembly ; or to the quality of the persons injured, as when an officer is assaulted by a subordinate ; or to the part of the body injured, as when a blow is struck in the eye.

The penalty for injuries to the person was, in the XII. Tables, based upon retaliation, and compensation by fixed rates. But the prætor allowed the injured party to estimate the extent of the injury and to make a claim for the damages that would satisfy him, which claim the *judex* might admit or lessen as he thought proper. But in the case of grave injury (*injuria atrox*), the amount of damages was fixed by the magistrate, which the *judex* was expected to grant if the guilt was established. It may also be observed that the offender was liable not only to a civil action, but also to a public prosecution as a criminal.

4. Obligations Quasi Ex Delicto.—In addition to the delicts already mentioned, there were other cases of wrong-doing which gave rise to legal obligations. The principles governing these cases were not, however, essentially different from those which applied to delicts technically so-called. The law was simply extended to meet cases not hitherto provided for; and the obligations growing out of such cases were said to arise *quasi ex delicto*. Four examples of this kind are given in the "Institutes":

(1) If a *judex* made a cause his own, that is, gave an improper decision, whether through fear, favor, corruption, or ignorance, he was made liable for civil damages to the party suffering from such improper decision.

(2) If a person occupied a house or apartment from which any thing was thrown, causing injury to another's property or person, he was liable for twice the value of the injury done, or an amount which the *judex* should estimate as proper under the circumstances.

(3) If a person allowed any thing to be suspended over a public way where it was likely to fall and do harm to one passing by, he was liable to a penalty fixed by law; and in this case, the action could be brought by any one whose safety was threatened.

(4) A master of a ship or keeper of an inn was liable for any damage to property, or loss by theft, occasioned by any one employed in his service. In this case, as well as in the previous cases of *quasi delict*, the action brought was usually the *actio in factum*. But in the present instance, the injured party was at liberty to avail himself of the *actio furti*, or the actions based upon the Aquilian law, and thus make liable the actual wrong-doer.

It may be observed, in conclusion, that the general conception of a delict as a wrongful act creating a per-

sonal liability on the part of the offender to the offended party, survives in the modern civil law of delicts and in the English law of "torts."

References.—Gaius, III, 182–225; "Inst.," iv., 1–5; "Digest," *De dolo malo* (4, 3), *De condictione furtiva* (13), *De doli mali et metus exceptione* (44, 4); *De privatis delictis* (47); "Code," *De dolo malo* (2, 21); *De condictione furtiva* (4, 8); *De lege Aquilia* (3, 35); *Vi bonorum raptorum* (9, 33); *De injuriis* (9, 35); Poste's "Gaius," pp. 367–398; Sandars' "Justinian," Eng. ed., pp. 489–517, Am. ed., pp. 479–507; Hallifax, "Roman Law," pp. 72–79; "Dict. Antiqq." (*Crimen*, *Furtum*, *Bona rapta*, *Damnum injuria actio*, *Injuria*); Mackenzie, "Roman Law," pp. 242–245; Phillimore, "Private Law among the Romans," pp. 170–196; Hunter, "Roman Law," pp. 1–11, 86–109; Tomkins and Jencken, "Modern Roman Law," pp. 378–395; Ortolan, "Instituts," III., pp. 411–471; DuCaurroy, "Instituts," III., pp. 234–272; Demangeat, "Droit Romain," II., pp. 432–488; Molitor, "Les Obligations en Droit Romain," tom. 3; Marezoll, "Lehrbuch," §§ 145–150; Deurer, "Gesch und Inst.," § 197; Böcking, "Röm. Privatrecht," S. 148–152, 154, 155; Vering, "Gesch. und Pandekten," §§ 206–217; Puchta, "Pandekten," §§ 375–387; Vangerow, "Pandekten," §§ 674–706; Arndts, "Pandekten," §§ 322–339; Windscheid, "Pandekten," §§ 451–472.

BOOK III.

THE LAW OF ACTIONS—JUS ACTIONUM.

CHAPTER I.

THE CHARACTER OF CIVIL REMEDIES.

THE last general branch of the Roman law, as set forth in the "Institutes," is that which treats of "actions" in the broad sense of this word, comprising the various forms of civil remedies and the modes of civil procedure. It is evident that the legality of a right depends ultimately upon its protection by the state. However clearly the "subjects" and the "objects" of a right may be defined in the law, and however definitely its extent and the modes of its acquisition may be indicated, if the right itself be not protected from invasion, or if there be no means of redress in case of infringement, it has properly no legal character or significance. The existence of a right involves the possibility of a wrong; but the legal validity of a right involves the possibility of preventing or redressing such a wrong; and of doing this not by private force, but by means established by the public authority.

In many respects the law of actions forms the most important part of a nation's jurisprudence. It lies at the historical basis of the whole legal system. The substantive portion of the law is, in fact, born of procedure. At first the granting of remedies determined, in particular cases, who would be guaranteed protection, and showed what things with reference to which that protection would be granted. In other words, it developed the consciousness of legal personality and of objective legal rights. In the process of historical growth, the law of

actions is thus antecedent to the law of persons and the law of things. But as society advances, the idea is gradually developed that a human right is something essential to human nature; that it may exist antecedent to a wrong; and, consequently, that the state, by becoming the administrator of justice, is bound to protect the natural rights of men, whether these rights have hitherto been protected or not. In primitive society the principle exists—*ubi remedium ibi jus;* and only with a more highly developed civilization does the maxim become current—*ubi jus ibi remedium.* As the state authority becomes well differentiated, the ultimate guardian of rights is that branch of the state that exercises judicial power; and only through the remedies that it employs do rights obtain a legal sanction.

1. **The Roman Judicature.**—The methods adopted by the Roman state for the legal protection of rights may be considered first with reference to the judicial system, or the body of persons authorized to administer justice. Before the time of Diocletian such persons included those who exercised jurisdiction (*jus dicere, jurisdictio*) and those who pronounced judgment (*judicium*), but after that time these two functions were united in the same persons.

(1) Jurisdiction, in the language of the Roman law, involves the power to grant an action (*dare*), to declare the law (*dicere*), and to vest the title of disputed property by adjudging it to one of the litigants (*addicere*); it is also accompanied by the power to enforce obedience to the judgment of the court (*imperium mixtum*). The exercise of jurisdiction, under the Republic, belonged by way of eminence to the prætor, although other magistrates, such as the ædile, possessed some limited judicial power. The first prætor (B.C. 366), who inherited his functions

from the consul, and who exercised jurisdiction within the city (*prætor urbanus*), was supplemented by a second prætor (B.C. 246), who took cognizance of cases throughout Italy in which foreigners were concerned (*prætor peregimus*). With the conquest of Sicily, Sardinia, and the two Spains, four new prætors were appointed to administer justice in the new provinces. Before the fall of the Republic the number had increased to sixteen. And after the establishment of the Empire special prætors were appointed for cases relating to trusts, to guardianship, and to the *fiscus*.

The functions of the prætors became greatly limited by the appropriation of judicial power on the part of the Emperor, who became the supreme judge of the state and who was assisted by a judicial council (*consistorium*, or *auditorium*). Moreover, the prætorian præfects obtained, in connection with the Emperor, a general jurisdiction throughout the empire; and the præfect of the city acquired judicial power at Rome, and appellate jurisdiction over the prætors. Outside of Rome and Italy, local jurisdiction was exercised by the provincial governors and the municipal magistrates, subject to the general appellate authority of the prætorian præfects and the Emperor.

(2) An important feature of the judicial system of Rome during the time of the Republic and the Empire was the fact that the pronouncing of judgment was not, as a general thing, left to the magistrate, but to private persons invested by the magistrate with a judicial commission to try the case in hand. Such persons were generally called *judices*. They bore some resemblance to the English jurors in being chosen from the non-official class of citizens and in dealing more especially with the facts of the case. But at Rome there was generally one *judex*

only, who was appointed in a civil case and to whom was left the whole investigation and decision, after the issue had been joined before the magistrate. The person to whom the case was referred was sometimes called an *arbiter*, when a greater degree of latitude was allowed in pronouncing the sentence. When several persons were commissioned to decide a case, they were called *recuperators;* and it is generally supposed that it was not necessary for them to be drawn from the usual judicial lists from which the *judices* and the arbiters must be selected.

In connection with this feature of the judicial system should be noticed the centumviral court (*centumviri*), concerning which—although it seems to have existed from very early times down to the later Empire—very little is definitely known. It was a permanent tribunal made up of over a hundred members (from 105 to 180), presided over by the prætor, and exercising the same kind of authority as that exercised by the *judices*. The causes that came under its cognizance were probably those more closely related to the old *jus civile*, as questions regarding Quiritarian ownership, and certain questions relating to status and inheritance. The antiquity of this court is evident from the fact that a spear, the ancient symbol of ownership, continued, as Gaius declares, to be set up in its place of meeting.

(3) The new phase which the judicial system assumed at the time of Diocletian, and which remained down to the time of Justinian, grew out of the exclusion of the non-official class from the administration of justice, and the union of *jus* and *judicium* in the hands of the territorial magistrates. The granting of sole judicial power to the governors of the præfectures, the dioceses, the provinces, and the cities, created a complete hierarchical system of courts, subject to the supreme jurisdiction of the

Emperor. Over the præfectures presided the new prætorian præfects; over the dioceses, the vicars; over the provinces, the *correctores* and the *præsides;* and over the cities, the *duumviri* and the *defensores civitatis.* The præfects of Rome and Constantinople retained judicial authority within these cities; and the bishops obtained jurisdiction in ecclesiastical matters.

These comprised the most important persons who at various times in the history of the Roman state were concerned in the administration of justice. In close connection with the courts there also grew up two classes of professional persons, viz.: the assessors (*assessores*), who gave legal advice and assistance to those administering justice; and the advocates (*advocati*), who aided the litigants in the conduct of their cases.

2. Various Classes of Action.—An action is the means by which the plaintiff (*actor*) and defendant (*reus*) submit their issues to a public authority for adjudication. It was defined by Celsus to be "the right of pursuing by judicial means that which is one's due" (D. 44, 7, 51). This definition, though framed when the formulary system was in vogue, was preserved by Justinian as sufficiently concise for the purpose of his text-book. The changes that had taken place in the organization of the courts and in the forms of procedure did not modify the essential idea of an action as the judicial means for the enforcement of a legal right. In reviewing the various classes of actions in the Roman law, it will be evident that an attempt was made to afford the most ample protection for all the private rights of the citizen. The classification was based upon a number of different principles as follows:

(1) The first and most important division is that with reference to the nature of the rights to be enforced.

Upon this principal all actions are either real or personal (*actiones in rem, in personam*). A real action, which is also called *vindicatio*, is brought to enforce a right availing against all the world. It is intended simply to vindicate a person's right over that which he claims as already his own, as is shown in the typical words used in the formula—*Si paret Auli Agerii esse rem.* Such an action might be brought to enforce the right to property (*rei vindicatio*), to affirm or deny the existence of a servitude (*actio confessoria, negativa*), or to determine by a preliminary process a question relating to status (*actio præjudicialis*).

A personal action, otherwise called *condictio*—a name derived from an old "action of the law" introduced after the time of the XII. Tables, as Gaius says, by the *lex Silia* and the *lex Calpurnia*,—is brought to enforce a right availing against some determinate person. It is intended to enforce a claim which is due to one person from another, as is shown in the words of the formula: *Si Numerium Negidium Aulo Agerio dare oportet.* These actions are based upon an "obligation," and are as various in their character as the obligations upon which they are founded. They may depend, in general, upon a contract, or a relation similar to that growing out of a contract (*actiones ex contractu, quasi ex contractu*); or they may depend upon a delict, or a similar offence (*actiones ex delicto, quasi ex delicto*). And more specifically, every particular right *in personam* has its corresponding action *in personam.*

There are, moreover, certain actions which are regarded as mixed (*actiones mixtæ*), since they seem to involve the enforcement of both real and personal rights. Such are the actions for the division of an inheritance, the division of common property, or the fixing of the boundaries

of adjoining estates (*actiones familiæ herciscundæ, communi dividundo, finium regundorum*).

(2) With respect to their sources, actions are divided into those derived from the civil law and those derived from the prætorian law (*actiones civiles, prætoriæ*). Even in the latest period of the Roman law there were many actions, both real and personal, the origin of which was traced back to the *jus civile*. But there was a large number of others, both of a real and personal character, which the prætor had introduced to afford redress in cases not provided for by the ancient civil law. From this source, arose, for example: the *actio Publiciana*, to enable a *bona-fide* possessor to recover a thing that was lost before his right had matured by prescription into legal ownership; the *actio Pauliana*, to enable creditors to recover goods fraudulently alienated by their debtors; the *actio Serviana*, to enable the proprietor of an estate to recover goods pledged by a tenant as a security for rent; and the *actio quasi Serviana*, to enable any creditor to recover goods pledged by any person as a security for debt,—called also *actio hypothecaria*.

Besides the special actions above named, there were others of a more general nature that sprang from the prætor's jurisdiction. The prætor was accustomed to grant remedies, based not merely upon a well-recognized legal right, but upon a right analogous to that already protected by the law; such remedies were called *actiones utiles*. He also introduced what were called *actiones in factum*, which were based, not upon a strictly legal right or one properly analogous to it, but upon what seemed to be just and equitable in the circumstances of the particular case.

(3) With reference to the object for which they were brought, actions were divided into those brought for the

recovery of something or its equivalent value, and those brought for the recovery of penal damages as a satisfaction for injury done (*actiones prosecutoriæ, pœnales.*) The former included all real actions, and those personal actions which had for their object the delivery of a thing or the recovery of merely compensatory damages. The latter included such actions *ex delicto* as required additional or exemplary damages, which might be double, treble, or quadruple the amount of the actual loss inflicted.

(4) There was a further division with reference to the power granted to the judge (*iudex*). In the so-called actions *stricti juris*, there was no discretion whatever allowed to the judge, who was obliged to decide strictly according to the directions laid down in the *formula*. Such actions were limited to those brought for the enforcement of unilateral obligations, and for condemnation in a certain fixed amount (*certum*). But in the actions *bonæ fidei*, more latitude was allowed to the judge, resulting either from the direction contained in the *formula* (*quidquid dare oportet ex bona fide*), or from the general nature of the obligations to be enforced ; for example, those arising from deposit, mandate, loan, pledge, and from the consensual contracts. In these cases the judge was permitted to take account of the circumstances of the case, the good or bad faith of the parties, the counter-claims that might be presented, and to estimate the damages as seemed to him just. These actions were therefore said to be for an uncertain amount (*incertum*). Under this head were also included certain other actions called *arbitrariæ*, in which the case was referred wholly to the arbiter, who was at liberty—after satisfying himself that the claims of the plantiff were legal and just—not only to give judgment that the defendant satisfy the specific demands of the plaintiff, but, in case of his refusal, to

condemn him to pay damages, which might be either compensatory or penal.

(5) Actions are again considered with reference to the persons against whom they may be brought. As a general rule an action can be brought against him only with whom a contract has been made, or by whom an injury has been performed. But the close relation existing between one person and those under his power renders the former liable, in certain cases, for acts performed by the latter. An action which could thus be brought might be based upon a contract or upon a delict.

In the first place, an action could be brought against a master to enforce a contract made by a slave in the following cases: when the latter had acted upon the master's express command (*actio quod jussu*); when he had been commissioned to act as the commander of a vessel belonging to the master (*actio exercitoria*); or when entrusted with the management of a shop or any particular business belonging to the master (*actio institoria*). There were a few other cases involving a similar principle, which need not be enumerated here. The same general rule that applied to the slave applied also to the son under power.

In the second place, the master was subject to an action in the case of a delict performed by a slave (*actio noxalis*), in which case the master could make pecuniary amends or deliver the slave up to the injured party. In early times this principle applied as well to the son under power; but, afterward, the father was liable simply for pecuniary damages for an injury performed by a son. A "noxal" action could also be brought against the owner of a beast which had caused an injury to any one.

(6) Finally, actions were divided into perpetual and

temporary according to the period of time that must elapse before which the right to bring them ceased (*actiones perpetuæ, temporales*). In the earlier law, all actions founded upon the civil law, upon a senate decree, or upon an imperial constitution were absolutely unlimited as to their duration; while those based upon the prætorian law lasted for one year only. But a constitution issued by Theodosius II. imposed a general limitation upon all actions. From this time those actions were called "perpetual" that did not expire before the lapse of thirty years; and those that expired before the lapse of that period retained the name of "temporary." The effect of the later legislation was, moreover, to extend the period of the prætorian actions to thirty years, and thus to make them "perpetual"—except in the case of those founded upon a delict and involving penal damages, which were still limited to a single year.

The right of action, during the legal period of its duration, did not, as a general rule, become extinct by the death of either party; but it was transmissible to the heir of such party. The principal exception to this rule related to those actions arising from delicts—which were not allowed against the heir of the wrong-doer, although they were (with the exception of the action for personal injuries—*actio injuriarum*), retained by the heir of the injured party.

3. Exceptions and Replications.—We have thus far considered the various remedies in which a person, by becoming a plaintiff in a suit, might protect himself from any unjust invasion of his rights. But the law provided a further remedy, whereby, after the institution of a suit, the defendant might protect himself from any unjust demands on the part of the plaintiff. Ordinarily, the claims

set forth in a civil action might be met in one of two ways: either, in the first place, by an absolute denial, that is, a denial of the facts upon which the plaintiff founds his claims, or of the legal consequences which he attributes to such facts; or, in the second place, by a qualified denial, or the introduction of new facts which show that the plaintiff's claims, though originally well founded, have been destroyed *ipso jure*, as, for example, by the payment of a debt. Such defences were permissible from the very nature of the action itself and required no modification of the *formula*.

But there were other defences of such an independent character as to introduce new questions of right and to modify the contents of the *formula*. Such defences were called exceptions (*exceptiones*). They possessed the character of counter-actions brought by the defendant, who thereby asserted independent rights or claims of his own, tending to modify or neutralize the claims brought against him by the plaintiff. The defendant himself thus became a plaintiff as to the matter introduced. Ulpian says: "Agere etiam is videtur, qui exceptione actor est; nam reus in exceptione actor est" (D. 44, 1, 1). But though the exception was a sort of counter-action proceeding from the defendant, it was yet incorporated into the same *formula* alongside of the claims of the plaintiff, so that the claims of the one and the counter-claims of the other could be tried in the same suit. Exceptions were considered under two classes, either as peremptory or dilatory.

(1) Exceptions were said to be peremptory (*exceptiones peremptoriæ*) when they presented a permanent obstacle to the action, and furnished a complete offset to the plaintiff's claims. Examples of such exceptions are those based upon fraud—upon fear—upon a previous judgment

settling the question in favor of the defendant—or upon a previous agreement that money shall not be demanded (*exceptiones doli mali, metus causa, rei judicatæ, pacti conventi*).

(2) On the other hand, exceptions were said to be dilatory (*exceptiones dilatoriæ*) when they presented an obstacle only for a certain period of time, and for the purpose of producing delay. Such exceptions were those based upon a previous agreement that the claim shall not be demanded for a certain definite time—upon the ground that the plaintiff is not qualified to bring the action—or upon an objection to the person authorized to bring the suit(*exceptiones pacti conventi ad tempus, cognitoriæ, procuratoriæ*).

As the defendant might thus defeat an action by means of an exception, so the plaintiff, on his part, might render the exception of no effect by a replication (*replicatio*), which was merely an exception to an exception. This might in turn be met by a duplication (*duplicatio*) on the part of the defendant ; and these counter-claims might be continued until the whole matter in dispute was brought to an issue. The peculiar and independent character which attached to the exceptions and replications under the formulary system was somewhat modified after the decay of that system, so that they came to be regarded simply as a means of joining the issue between the parties, similar to that employed in the modern form of "pleadings."

4. Interdicts and their Different Forms.—In the protection of rights by the means already described, there was involved not only a formal joining of issue in the presence of the magistrate, but also a judicial investigation before the pronouncing of a judgment. There was another remedy, however, of a preventive nature, by

which a threatened invasion of *primâ facie* rights was stopped by a provisional order issued by the magistrate. Such preventive remedies were called interdicts (*interdicta*). They took the form of provisional judgments, or interlocutory decrees, commanding a person to do or not to do a certain thing, until the question of right, if disputed, could be settled in the ordinary judicial way. They were employed mostly in cases in which a matter of possession was involved; but they might also be used for the protection of other real as well as personal rights.

(1) The first and principal division of interdicts comprised the following forms: "prohibitory" (*prohibitoria*) by which something was forbidden to be done, as to use force against a person in lawful possession; "restitutory" (*restitutoria*), by which something was compelled to be restored, as the possession of land to the person who had been violently expelled from it; and "exhibitory" (*exhibitoria*), by which some person or thing was ordered to be exhibited, as a freeman improperly detained in custody—which example has been compared by modern jurists to the English *habeas corpus*.

(2) Another division of interdicts was based upon the fact that they were given either to acquire, to retain, or to recover possession (*causa adipiscendæ, vel retinendæ, vel recuperandæ possessionis*). To acquire possession, for example, an interdict called *quorum bonorum*, was given to the *bonorum possessor* to protect his equitable right to an inheritance. To retain possession, the interdicts *uti possidetis* and *utrubi* were given to protect a person in the possession of property, the right to the ownership of which was in dispute—the former being applied to immovables, and the latter to movables. To recover possession the interdict *unde vi* was granted, in the case one had been deprived of a thing by violence.

The interdicts, like the exceptions, lost something of their distinctive character and form, though none of their remedial effects, after the decay of the formulary system, when the principles governing them were assimilated to those relating to actions.

5. Restitution and its Various Grounds.—The disposition of the Roman law to grant an equitable redress in cases where the strict application of the law would manifestly work injustice, is nowhere more clearly shown than in the remedy of "restitution" (*in integrum restitutio*). The restitution, like the interdict, grew out of the "extraordinary" jurisdiction of the prætor by which he pronounced a judgment without reference to the *judex*. But in this case, the judgment was not provisional, like the interdict, but absolute and based upon grounds which the magistrate regarded as sufficient in themselves to annul a strictly legal transaction. By a restitution the parties to a contract, or other transaction, were restored to the position with reference to each other that they held before such transaction had taken place, Its purpose was not so much to annul the law, as to correct the law by protecting the equitable rights of the parties concerned. To obtain this remedy it was necessary, first, that the claimant be really injured by the transaction, and that without his own fault; secondly, that the circumstances of the case be such as to justify a remedy; and thirdly, that the injury be not remediable by any ordinary process of law.

The principal grounds which were regarded as sufficient to justify the granting of this remedy were the following:

(1) All minors (*minores viginti quinque annos*) were entitled to restitution with regard to any transaction or omission by which they had suffered an injury, in so far as

such injury was not due to their own fraud or to a mere accident. This rule was subject to some exceptions, as when the minor had solemnly bound himself not to nullify the act by seeking a restitution.

(2) Violence. When a person had been compelled by unlawful force or intimidation (*vis vel metus*) to perform an act, he was entitled to relief for any injury thereby resulting. A contract obtained by force was itself void, and required no restitution; but if any act had been performed as a result of such illegal agreement, it was capable of being rescinded by a restitution.

(3) Error. Another ground of restitution was error committed without any fault on the part of the person himself, and resulting in an injury which could not be remedied by ordinary means. It was, of course, the province of the magistrate to decide whether the mistake was of such a character as to entitle the claimant to a restitution.

(4) Absence. When an injury resulted from any omission due to unavoidable absence, or obstacle akin to absence—such as mental derangement, imprisonment, etc.—the injured person could plead such fact as a proper ground for reinstatement.

(5) By a general clause introduced into the prætor's edict, a restitution could be claimed in many other cases (*restitutio ex clausula generali*), where one was deprived of his just rights by external events over which he had no control, or by the acts of third parties without fault of his own; as, for example, in case of sickness or serious accident affecting himself or family, or fault on the part of his advocate, or even unnecessary delay on the part of the judge.

These examples are sufficient to show the tendency to introduce into the remedial portion of the law the most

liberal principles of equity, and to make the judicial enforcement of rights a means for the administration, not of strict law, but of justice.

6. The Private Protection of Rights.—So far as the state provides a system of legal remedies through which rights are enforced by public authority, the private redress of injuries becomes unnecessary and hence unjustifiable. The primitive custom of "self-help" becomes more and more restricted as the state assumes the function of administering justice. But still there remain certain emergencies when imminent danger renders the timely interference of the state impracticable. In such cases, if the person is protected at all, he must protect himself. The circumstances, therefore, that render self-protection necessary are regarded by the law as sufficient to make it permissible. We hence see the survival of the original principle of "self-help" in the right of legitimate self-defence. The law, while accepting the principle of self-protection, points out the limits within which such self-protection is allowable. As regards this subject, we find in the Roman law two principles set forth: the one authorizing the use of private force when the state cannot interfere; the other forbidding its exercise in cases in which the state has afforded a remedy.

(1) The private exercise of force is never authorized in order to invade the rights of others. It is only permitted in defending one's self in the possession of one's legitimate rights against a present peril. Gaius says: "Adversus periculum naturalis ratio permittit se defendere" (D. 9, 2, 4, 1). It is then regarded as lawful to meet force with force, as Paulus says: "Vim vi defendere omnes leges omniaque jura permittent" (D. 9, 2, 45, 4). In brief, the exercise of private force is legal when it is purely defensive, and when it is indispensable to ward off

an imminent attack or a danger which cannot be escaped in any other way.

(2) On the other hand, the law forbids any encroachment upon another's rights, even to do justice to one's self. The general principle that the state is the administrator of justice is opposed to the private redress of injuries in all cases where the law itself furnishes a remedy. The Roman law expressly forbids the exercise of private force, not only in the Julian law, *de vi privata*, but also in the provision of Marcus Aurelius, whereby one is compelled to forfeit his claim, if he seizes that which is due him, without the authority of the law; and also in the provision, before noticed, whereby a person who seizes by force his own property from another forfeits his right of ownership to the possessor.

The whole tendency of legislation was thus to transfer, as far as possible, the enforcement of rights from the individual to the state, and to limit the sphere of self-help by providing adequate means for the redress of all injuries.

References.—Gaius, IV.; "Inst.," IV.,6–15; "Digest," *De jurisdictione*,(2), *De in integrum restitutionibus* (4), *De rei vindicatione* (6), *Finium regundorum* (10), *De rebus creditis* (12), *De actionibus empti et venditi* (19), *De interdictis* (43), *De exceptionibus*, etc. (44); Poste's "Gaius," pp. 398–527; Sandars' "Justinian," Eng. ed. pp. 517–587, Am. ed., pp. 507–580; "Dict. Antiq.," (*Actio*, *Jurisdictio*, *Interdictum*, *Restitutio in integrum*); Hallifax, "Roman Law," pp. 80–92; Hunter, "Roman Law," pp. 786–804; Kaufmann's "Mackeldey," I., pp. 187–230; Tomkins and Jencken, "Modern Roman Law," pp. 82–98; Goudsmit, "Roman Law," Eng. trans., pp. 227–366; Ortolan, "Instituts," III., pp. 471–787; Demangeat, "Droit Romain," II., pp. 540–815; Marezoll, "Lehrbuch," §§ 54–65; Deurer, "Gesch. und Inst.," §§ 137–146; Böcking, "Röm. Privatrecht," S. 291–333; Vering, "Gesch. und Pandekten," §§ 118–135; Vangerow, "Pandekten," §§ 132–157; Arndts, "Pandekten," §§ 92–125; Keller, "Der Römische Civilprocess," §§ 1–45, 87–93; Zimmern, "Der Römische Civilprocess," §§ 1–31; Windscheid, "Die Actio des Römischen Civilrechts vom Standpuncte des heutigen Rechts."

CHAPTER II.

THE ELEMENTS OF CIVIL PROCEDURE.

THE adjective portion of the law, or that which the Romans designated by the comprehensive phrase *jus ad actiones*, not only defines the various remedies capable of being used in cases of injury; it also sets forth the various processes, or modes of procedure, in which these remedies are made operative. By establishing a remedy, the law simply indicates that a specific right is "sanctioned," that is, that its protection is guaranteed by the state. By laying down rules of procedure, however, the law shows how an injured party can take advantage of the remedy and make his cause an actual matter of adjudication. The state may provide scrupulously for the protection of its citizens; but the injured party himself must finally be the one to pursue the right of which he supposes himself deprived. The rules of procedure afford a practical guide to the injured person, so that he can make the general remedy of the law a means for the judicial enforcement of his own specific rights.

The forms of procedure existing at the time of Justinian were the result of a long process of development reaching back to the very earliest times. And in the simple processes of the later Roman law we can easily perceive the influence of certain reformatory steps that affected the character of the whole system. The old "actions of the law," in which a very rigid, technical, and symbolical process was used for the purpose of submit-

ting a point in dispute to a disinterested person, were succeeded by the "formulary system," in which the claims of the plaintiff were reduced to writing and submitted to a non-official person for judgment. From certain modifications of the formulary system—by which the issue was in some cases decided wholly by the magistrate, and in other cases left almost entirely to the discretion of the *judex*—arose the later system of "extraordinary procedure," which united the *jus* and *judicium* in the hands of a single person, a public officer appointed on the ground of professional knowledge and skill. These three stages in the growth of the law of procedure at Rome exhibit an unmistakable progress from forms extremely technical and rigid to forms extremely simple and pliable. The forms of procedure may not have reached absolute perfection even in the later period of the Roman law. Their special merits must be judged from the fact that they had thrown off not only the ritualistic symbolism of the old "actions," but to a great extent the technical refinement that often marked the prætorian *formulæ*. They had come to afford an easy and rational method whereby the principles of law and equity could be applied to every man's cause.

In sketching the law of procedure as it existed at the time of Justinian, and in comparing this law with that of the earlier periods, we may consider it with reference to the five essential elements of a civil process, viz.: (1) the institution of the action, or the process by which the defendant is brought into court; (2) the joining of issue, in which is ascertained the exact points of conflict between the litigants; (3) the trial of the case, in which the conflicting claims of the parties are investigated according to the principles of law and the rules of evidence; (4) the sentence of the court, whether in the first instance, or as

the result of an appeal; and (5) the execution of judgment, or the carrying into effect the law as judicially applied to the case in hand.

1. **Beginning of a Civil Action.**—The first step in a civil action is the summons, or citation, by which the plaintiff brings the defendant into the presence of the magistrate. The action is, hence, instituted by the aggrieved party himself. If we look at the phases through which the summons passed in the Roman law, we shall see how it was transformed from a private and extra-judicial process into one more properly judicial and under supervision of the public authority.

(1) At the time of the XII. Tables, the summons (*in jus vocatio*) was a private act performed by the person seeking redress. As the magistrate was supposed merely to assist parties in settling their disputes, he had no jurisdiction until their respective claims were presented to him. The plaintiff himself was, therefore, compelled to bring the defendant before the magistrate. If the defendant refused to go, the plaintiff was permitted, after obtaining a witness to such refusal, to drag him into court. The summons was, in fact, a private arrest made by the plaintiff. The defendant could be released from such an arrest only by satisfying the demands of the plaintiff, or by finding a satisfactory substitute (*vindex*) who would become personally responsible for his debt.

(2) Under the edicts of the prætors, there was no essential change in the form of the summons; but certain supplementary provisions were introduced that gave it somewhat more of a judicial character. It was still executed by the plaintiff, but disobedience to it was made a legal offence, punishable by the state. The plaintiff, in executing the summons, thus became, in a certain sense, an officer of the law; since refusal to obey his order brought

the offender within the cognizance of the court. Moreover, the old security by means of a *vindex* was supplemented and gradually displaced by a security more akin to bail (*vadimonium*, or *cautio judicio sistendi*). This was given to secure the reappearance of the parties, after their first appearance and the granting of an action (*actionis editio*) by the magistrate. By the *vadimonium*, the defendant stipulated, either by himself or through a surety, to defend the action, to satisfy the judgment, and to make good any loss to property in dispute, if occasioned in the meantime by fraud. The suit was thus properly instituted by the plaintiff's citing the defendant to appear before the magistrate, and by the giving of the *vadimonium* by the defendant as a security for his reappearance at the proper time.

(3) By the imperial constitutions certain important changes were introduced which gave to the initial steps of a suit something of their modern features. The old form of the summons was simplified by Marcus Aurelius, who probably acted under the advice of the jurists. This emperor introduced a process by which it was simply required that a formal notice (*litis denunciatio*) be served by the plaintiff upon the defendant, setting a time for his appearance. In the time of Constantine this notice was submitted to the judge and served upon the defendant by a public officer. And by the time of Justinian it had taken the form of a written summons (*libellus conventionis*), containing a statement of the complaint and of the material facts, which was served by an officer (*executor*) under the direction of the court.

It is thus apparent how, as Professor Hunter says, "the summons advanced from the rude form of a legalized use of force, through various intermediate stages, in which prætors, jurisconsults, and emperors took part, until, at

length, it became an act of public authority, and gave the defendant formal notice of the claim made against him."

2. Joining of Issue—Pleadings.—The next step in the process of an action is the joining of issue, or the settling of the exact points of controversy between the litigant parties. At the time of Justinian this stage of the procedure had reached a very complete and simple form—which has, in fact, exercised an important influence upon modern judicial proceedings. This process, like the one already described, was derived from the more primitive forms of the early law. Based ultimately upon the heated altercation of angry disputants, it gradually came under the supervision of the court and was reduced to forms more and more suited to the requirements of judicial practice. In the "actions of the law," in the formulary system, and the later extraordinary procedure, we can trace the successive steps by which this process acquired its modern features.

(1) In the sacramental action of the XII. Tables the mode of joining issue was evidently nothing more than an oral altercation reduced to a ritualistic form and carried on before the priest or magistrate. Recurring to the form of this action previously described (*cf.* p. 17), it will be seen that the plantiff, in a set form of words, makes a claim to the property in dispute; and that the defendant, repeating a similar form of words, asserts his claim in opposition to that of the plantiff. The plaintiff then wagers a certain amount (*sacramentum*) as a challenge in support of his right. The defendant in a formal reply accepts the challenge. This crude performance is simply an oral dispute fashioned into a set form of words, in which the issue between the parties is joined by the laying of a wager, or forfeit. In this way the disputed ques-

tion was prepared for trial; but the only issue to be tried was the question as to which party was right in the assertion upon which the wager was laid.

(2) Passing to the formulary system, we find the claims and counter-claims of the parties reduced to a written form. We also find that the fiction of the wager has been dropped, and that the issue is so joined as to present more clearly than before the real merits of the case submitted for adjudication. The primary object of the *formula* was to prepare the case for reference to the *judex*. Hence, in the preliminary proceedings the prætor ascertained from the statements and counter-statements of the litigants the exact nature of the subject matter in dispute; this was set forth in the *demonstratio*. The plaintiff's claims were then heard, and, if allowed by the prætor, were embodied in the *intentio*. The *intentio*, therefore, presented the case from the plaintiff's point of view. If, however, there were other facts and circumstances, not presented by the plaintiff, that would tend to annul or modify the legality of his claim, these were set forth by the defendant in the *exceptio*. The *exceptio* thus presented the case from the point of view of the defendant. The issues involved in the case were in this way brought clearly to view by the *intentio*, supplemented, if necessary, by the *exceptio* (and even by the *replicatio* and *duplicatio*), and were hence put into a convenient form for reference. The remaining part of the *formula* simply comprised the instructions of the prætor to the *judex* to guide the latter in his investigation and decision of the case.

(3) The chief defects in the mode of joining issue under the formulary system grew out of the somewhat technical character of the *formulæ* themselves. But with the introduction of the extraordinary procedure, in which

the case was not referred to the *judex*, but was tried before the magistrate himself, the preliminary process of joining the issue became less formal. The general lines of the old *formulæ* were, indeed, followed, statements and counter-statements being made by the opposing parties. But these were now made, not for the sake of reducing the case to a form suitable for reference, but for the simple purpose of satisfying the magistrate himself as to the exact nature of the question in dispute. The written *formula* was thus superseded by a form of pleadings that partook of the character of a preliminary discussion to elicit the precise points at issue.

3. Trial and the Principles of Evidence.—The trial consists in an examination of the merits of the case as set forth in the pleadings. Before the time of Diocletian, this formed the essential part of the proceedings *in judicio*. It is impossible to say definitely how the trial was conducted in very early times. The *judex* probably pursued the method that seemed to him best fitted to bring out the facts in the case. But the process came at last to be conducted in a regular form and according to certain well-established rules. The case was opened by the parties, or their advocates; the evidence was introduced, and the cause summed up with reference to the proofs admitted. There was no essential change made in this part of the process after the decay of the formulary system, except that the trial was conducted before the same officer before whom the issue had been joined.

The most important feature of the trial was the introduction and sifting of evidence. By the time of Justinian certain principles had become fixed, which have been substantially accepted by all modern tribunals. These principles relate chiefly to the burden of proof, presumptions, the forms of evidence, and the admissibility and

sufficiency of evidence. The general bearing of these principles may be briefly indicated.

(1) The burden of proof lies upon him who asserts an affirmative fact, if unsupported by a legal presumption. If a legal presumption be in favor of one party, the burden of proof is thrown upon the other. The burden of proof may, of course, shift from one party to the other during the course of the trial, according as the affirmative fact is made to support the claims of the plaintiff or those of the defendant.

(2) The necessity of presenting evidence may be affected by what are called presumptions (*præsumptiones*), by which a certain state of things is assumed to be true unless the contrary is proved. For example, a presumption may be based upon what is probable in human experience (*præsumptio hominis*), whereby from a given fact or state of facts another fact or state of facts may be naturally inferred. Again, a presumption may have reference to certain facts which are assumed to be true by a rule of law (*præsumptio juris*); for instance, the possessor of movables is presumed to be the owner. Finally, a presumption is said to exist in the case of certain facts which the law regards as essential to a legal transaction or relation (*præsumptio juris et de jure*); for instance, a sale cannot be effected without a price, an *impubes* cannot make a contract to his detriment. The first two presumptions mentioned are disputable and capable of being entirely overthrown by contrary proof. The last so-called presumption is absolute and conclusive, no evidence being admissible to controvert it.

(3) The forms of evidence capable of being introduced are generally classed as written and oral. Written, or documentary, evidence comprise public records, private documents attested in a legal manner, and even private

papers, when proved to be genuine. Oral, or parole, evidence includes all proofs derived from the examination of competent witnesses. All persons, in the Roman law, were competent to testify unless expressly disqualified. Such incompetence might be absolute, as in the case of *impubes*, lunatics, infamous persons; or it might be relative, as in the case of a father and son with reference to each other, a slave with reference to his master, etc.

(4) A most important feature of this branch of the law is that relating to the admissibility of evidence, and the probative force to be attached to evidence when admitted. The elaborate character of the rules upon this subject, renders it impracticable to recount them in this outline. It is yet well to remember that the essential principles regarding the admission and weighing of evidence that prevail in modern courts were quite fully worked out in the laws of Justinian.

4. Judgment and Appeal.—The judgment is the authoritative decision of the judge with reference to the conflicting claims of the parties. Such a judgment may be interlocutory, that is, made with reference to an incidental point arising in the process of the suit; or it may be final, when it puts an end to the action by deciding the whole matter in dispute. It must in all cases, until properly reversed, be accepted by the parties as a true and authoritative statement of their respective rights and obligations. In the Roman law, a final judgment in favor of the plaintiff gave to him the benefit of the *actio judicati*, whereby he could, in case the defendant refused to abide by the decision, call upon the public authority for its execution. When the judgment was rendered in favor of the defendant, it gave to the latter the benefit of the *exceptio judicati*, whereby he could debar the plaintiff from bringing a second action based upon the same issues.

The judgment of an inferior court might, after the establishment of the Empire, be carried to a higher court. Such a process was called an appeal (*appellatio*). It had the effect to suspend the execution of the judgment, or to obstruct it entirely by the reversal of the former judgment. The law indicates specifically from what courts and from what judgments an appeal could be made, and also the form of proceeding to be followed in obtaining an appeal.

5. Execution of Judgment.—The last step in a civil process is the execution of the judgment, in case the defendant refuses voluntarily to satisfy the claims adjudged to the plaintiff. The successive methods in which this was performed in the Roman law illustrates, like the summons, the gradual interference of the state with the exercise of private force. According to the XII. Tables, the execution, though authorized by the public magistrate, was, as before described, a private act on the part of the plaintiff. The ancient "executory action" (*actio per manus injectionem*), in which the person of the defendant was adjudged (*addictus*) to the plaintiff, and which was barbarous in the extreme, was superseded by an action merely to enforce the judgment (*actio judicati*). The defendant could still, it is true, be taken into custody, if necessary; but his person was no longer adjudged to the plaintiff, and he could obtain his release either by satisfying the judgment directly, or by giving a security for its satisfaction (*cautio judicatum solvi*).

But under the above system, if the defendant could escape arrest, he might avoid the execution. A supplementary process was accordingly introduced, whereby the plaintiff was allowed, in case of the defendant's escape, to take possession of his entire estate (*missio in possessionem*). This was a sort of execution by means of

a bankrupt-sale, and was probably the origin of the law relating to the general assignment of goods in case of insolvency (*venditio bonorum*). The execution against the entire estate of the defendant was followed by the practice of levying execution against the property in detail sufficient to satisfy the judgment; and the seizure and sale of the defendant's goods were effected by officers of the court.

Such were the principal steps in which the "execution" was gradually taken up by the state, and became, at the time of Justinian, a part of the regular judicial process. This movement is seen to be in harmony with that which marks the evolution of law in general, whereby the determination and enforcement of rights are gradually transferred from the sphere of individual volition to the domain of public authority.

References.—Gaius, IV., 10–60; "Digest," *De jurisdictione* (2), *De re judicata*, etc. (42), *De appellationibus* (47); "Code," *De judiciis* (3), *De edendo* (2); Poste's "Gaius," pp. 407–445; "Dict. Antiqq." (*Actio, Judicati actio*); Hallifax, "Roman Law," pp. 96–101; Mackenzie, "Roman Law," pp. 337, 338; Amos, "Roman Civil Law," pp. 380–391; Hunter, "Roman Law," pp. 805–901; Keller, "Der Römische Civilprocess," §§ 46–86; Zimmern, "Der Römische Civilprocess," §§ 32–182.

In concluding this synopsis of the Roman law of persons, of things, and of actions, it may not be out of place to indicate the relation that this order of treatment sustains to that adopted in modern times. The glossators naturally followed the order of the "Digest," since their writings were scarcely more than annotations of this work. This method was succeeded by a tendency to recast the subject matter of the "Digest" more or less in accordance with the order of the "Institutes." Domat in the seventeenth century, and Pothier in the eighteenth, cut loose from this order, and attempted to rearrange the law upon what they deemed to be more scientific principles. In the beginning of the present century Hugo adopted an arrangement which has exercised considerable influence upon the present treatment of the law. This was as follows: I. Rights as to Things; II.

Rights of Obligations; III. Family Rights; IV. Rights as to Inheritance. The extent to which the order of Hugo has, or has not, been adopted, may be seen from the arrangement of some of the more prominent of recent civilians. For example, the order of Puchta is: I. Rights as to Personality; II. Rights as to Things; III. Rights as to Actions (obligations); IV. Rights as to Other Persons (domestic relations); V. Rights of Succession (inheritance). Of Vangerow: I. General Principles, including (1) sources of law, (2) persons, (3) things, (4) transactions, (5) rights, (6) prosecution of rights, (7) computation of time, (8) possession; II. Family Law; III. Real Rights; IV. Inheritance; V. Rights of Obligation. Of Arndts: I. Rights in General; II. Rights as to Things; III. Obligations; IV. Domestic Relations; V. Inheritance. Of Windscheid: I. Law in General; II. Rights in General; III. Rights as to Things; IV. Law of Obligations; V. Family Law; VI. Inheritance. Professor Hunter, whose work on the Roman law is probably the most exhaustive on the subject in the English language, has sought to reduce the law to the following order: I. Rights in Rem; II. Rights in Personam; III. Inheritance and Legacy; IV. Civil Procedure.

The modern civil codes follow more nearly the order of the "Institutes" of Justinian. For example, in the civil code of France the order is: I. Law of Persons; II. Property and its Various Modifications; III. Various Modes of Acquiring Property (including acquisition by succession, by gift and will, and by the effect of obligations), which order is also that of the code of Louisiana. The code of Prussia is arranged as follows: I. Law of Persons; II. Law of Things (including the division of things and the modes of their acquisition, both singly and by universal succession). It may also be noticed that in Asso and Manuel's "Institutes of the Civil Law of Spain," which is based upon the "Partidas," the order of the "Institutes" of Justinian is followed in almost every particular, the main division being: I. Law of Persons; II. Law of Things; III. Law of Actions.

The relation of the Roman arrangement to that adopted by writers on the English common law is clearly stated by Judge Hammond in his introduction to the American edition of Sandars' "Justinian."

APPENDIX

Comprising a list of the most important works, with the editions, referred to at the close of the preceding chapters:

Amos (Sheldon) History and Principles of the Civil Law of Rome: An Aid to the Study of Scientific and Comparative Jurisprudence. Lond., 1883.

Arndts (Ludwig) Lehrbuch der Pandekten. München, 1865.

Arnold (Thomas) History of Rome. N. Y. and Phila., 1846.

Arnold (W. T.) The Roman System of Provincial Administration to the Accession of Constantine the Great. Being the Arnold Prize Essay for 1879. Lond., 1879.

Asso and Manuel. Institutes of the Civil Laws of Spain. Trans. by L. F. C. Johnston. Lond., 1825.

Austin (John) Lectures on Jurisprudence, or the Philosophy of Positive Law. Lond., 1873.

Bingham (Joseph) Antiquities of the Christian Church. Lond., 1850.

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