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Jurisp. 510
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TWO DISCOURSES

DELIVERED IN THE

MIDDLE TEMPLE HALL,

BY

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WITH

AN OUTLINE OF THE COURSE.

LONDON:
CHARLES KNIGHT, 22, LUDGATE STREET.

1847.
The two following Discourses were read in November last, by way of Introduction to the Lectures on General Jurisprudence and the Civil Law, which are now delivered in the Hall of the Middle Temple. They are printed with some few additions and alterations, and with a few notes, some of which are intended to shew to what authorities I am under obligations, and others are designed to help those who may wish to carry their inquiries further.

Some things contained in these Discourses, and particularly in the second, which treats, in a short compass, of a very extensive subject, could not be handled completely within such limits; and for this and other reasons there may be error both in my facts and in my judgments. I have, however, endeavoured to state nothing that is not supported by good authority, though on some points there is a difference of opinion among those whose opinions are entitled to respect.*

Any person who is acquainted with the work of Savigny, 'System des Heutigen Römischen Rechts,' to which I have often referred, will see how much I

* For instance, on the Jus Respondendi, and the mode in which it was exercised, p. 72.
am indebted to it. This general acknowledgment of benefits received is always due, and should be freely made, even when the benefit is small, and the giver is honoured by the acceptance of his offering. But obligations may be so great, and the character of him to whom they are due so exalted, that the receiver can only present with all humility the tribute of his gratitude and admiration, and express a hope that he has made a worthy use of those lessons of wisdom, to the understanding of which he has diligently devoted whatever of ability he may possess, and whatever time he could command from other and laborious pursuits.

The chapter entitled Bracton is designed to shew that a large part of the Roman Law was received before and during the reign of Henry III. as a part of the Law of England.

6, Stone Buildings, Lincoln's Inn,
December, 1846.
I.

The subject of this address will be most appropriately derived from the Report of the Committee of this Society on Legal Education. For the reasons stated in their Report, the Committee "recommend that the first step for the promotion of Legal Education to be taken by this House, should be the appointment of a Reader on Jurisprudence and the Civil Law."—"By the term 'Jurisprudence' the Committee mean to indicate General Jurisprudence, as distinguished from the Particular Jurisprudence of any individual nation."—General Jurisprudence has been properly called a Philosophy of Positive Law, as being something which comprehends the principles of all systems of law. By virtue of its universality, it is rightly called General; and inasmuch as it is a systematic exposition of principles with their logical consequences, it is appropriately called a Philosophy. The Committee also contemplate a comparison of the systems of Jurisprudence of particular nations, which they indicate by the term Comparative Jurisprudence.

The process of discovery may not be, and generally is not, the best method for expounding a thing. 'The principles of General Jurisprudence are grounded in and derived from the constitution of man's nature; they are developed by the existence of political society. Each society political has something peculiar, which has made it that particular political
society, and given some peculiar character to the notions of positive morality and to the rules of positive law which obtain therein. But if we compare particular political societies, we recognise the same general principles of morality and of law in all of them, under various names and under different forms; and such a comparison furnishes materials for the construction of a philosophy of positive morality, and positive law. The order of instruction may, however, be reversed. The principles of General Jurisprudence, as they are now determined, may be expounded in a systematic way; and thus the first part of the Committee's recommendation will be complied with. The principles of General Jurisprudence may also be explained, or the generalities of abstract rules or principles may be made clearer, by a comparison of such rules or principles as they appear in the jurisprudence of different nations,—wherein both agreements and differences may be noted, and the conformity to and deviations of the particular from the general rule will be made evident; and this will be to some degree a compliance with the Committee's recommendation of a comparison of the jurisprudence of different nations.

By the term Civil Law, the Committee "indicate what may be called Modern Roman Law, that is to say, those portions of the civil law which being of a universal character and applicable to the relations of modern society, have formed the basis of the jurisprudence of many continental nations, and entered so largely into our own." The recommendation to add to the exposition of general jurisprudence, an
exposition of the Roman law, as now received in many European states, is justified by the consideration that the Roman law, by reason of its universality, approaches nearer to a system of general jurisprudence than any other.

The matter which I have thus indicated I purpose now to discuss at some length, and I fear at the risk of being tedious. But, at the commencement of a new course of lectures of so comprehensive a character, it may perhaps not be considered unreasonable if I ask a patient hearing, even if I should run to some length. I have divided the whole of what I have to say, by way of introduction, into two parts, the first of which will treat of the general reasons suggested by the Report of the Committee; and the second, which I shall reserve for the next time when we meet, will treat of the special reasons for cultivating the Roman law in this country, by shewing what it is, how it came to be what it is, and how our own system of law is connected with it.

These two introductory lectures, as they may be somewhat longer than future lectures, so they will also differ from them in the mode of exposition; for the formal manner of address which may be suitable to the present occasion would not be the best adapted to the purpose of teaching.

Before proceeding further, I think it expedient to answer some objections which are made to lectures generally, and which have been especially directed against lectures on law, and to endeavour to correct some misconceptions about the nature of lectures, which appear to be not uncommon. Though some
of the objections have not much weight in themselves, they may derive some weight from the names of those who make them; and if the objections have no weight at all, they are still entitled to consideration when they are honestly made.

It is sometimes objected to lectures that they are useless or of little use, that they either only contain what is in books, or they contain less; and accordingly a student will do as well or better by keeping to his books. The objection which is in terms directed against what are called lectures, is in substance an objection to oral instruction. Books are the depositories of thought, the records of man's intellectual activity; they connect the past and the present; they transmit the present to the future. To commend good books as among the best of all the wealth which the labour of man can create would be waste of time, because all thinking men know it already: to disparage books or to commend the use of them in comparison with something else which is different, would be to mistake them for that which they are not. And yet those who would have recourse to books only, and think oral instruction useless, do mistake both the nature of a book and the nature of oral instruction. A man may learn from a book, but the book does not teach. Where there is teaching, there is an intellectual being who teaches, and another who is called the learner; and their activity is mutual, and each works upon the other. Now if this distinction should be thought trifling, as by some it may be, we must try it by the test of all general propositions, and see whether it accords or not with
that which really takes place every day. The chief part of the knowledge that we get in early life, and a large part of that which we get afterwards, is from oral instruction or communication, and not from books; a fact of which those who will search their memories carefully may perhaps be convinced. If a man finds a difficulty in a subject, he would rather go to a competent person to have it cleared up than to a book, though the author of the book might be the wiser man of the two. And the reason is obvious: the words of a book are fixed, and even when their meaning is clearly ascertained, the difficulty, if there is a difficulty, remains just as it was. When a man consults another man, he must state what his difficulty is, and in doing this he often half removes it; and when he has put his case, he gets an answer suitable to the case, and if he does not understand the answer fully he can ask again till he is satisfied.

A lecture is an oral exposition which differs from the case supposed, in that it is not simply an answer to a particular question, but it is designed to be in answer to the general demands of those who listen; and a series of lectures is a series of oral instruction, designed to answer the demands of those who wish to learn a particular thing in a systematic way. A lecture further differs from the case supposed, in that it is not addressed to one but to many; and, as among many hearers there are different tempers and capacities, the instruction must have some reference to those differences: in a word, the nature of a lecture, or of a course of lectures, is partly determined
by the special circumstances of the time, place, and hearers, in all which points the purpose of lectures is more distinct than that of a book generally can be.

A book or scientific treatise on any subject is or at least is designed to be in a systematic form. A course of lectures on any given subject must also present a systematic view of it; but the lecturer is less bound to a fixed form than the writer of a book. He can vary his order and correct his matter as he finds occasion. A printed book is fixed, till the occasion arises for altering and amending it. A course of lectures is a thing which must be undergoing some change every time that it is delivered, which may be annually, or oftener. It is a great misconception of the nature of this kind of instruction to suppose that, because a lecture or discourse be once written, a man shall go on delivering it in the same words: this is to suppose either that he can at once expound his subject in the best way, which we know to be impossible; or that he has so little energy, so small a liking for his subject, or so indifferent an audience, that from some one of these causes, or all combined, he shall never be induced to advance one step in improving on his original conceptions. But a good course of oral instruction implies progress and uninterrupted improvement.

The communication between a writer and his reader is limited to the matter which is set down in the book, and here, as I have said, the reader only is active. A lecturer, or to use a better phrase, a public teacher, cannot discharge his function by barely reading to his audience what he has in writing
before him. There are opportunities of communication between a teacher and his pupils which are for the advantage of both. From such communication the pupils may derive useful hints, and the teacher may profit by the suggestions of his pupils; he may learn where he has been imperfectly understood, or he may discover that his exposition is incomplete; and so he may find it useful to reconsider many things which he has said, and he may recur in a subsequent lecture to the matter which he has treated insufficiently.

Lastly, a teacher may refer his pupils to books or parts of books, which will aid them in the better understanding of the lectures, and in prosecuting their studies; he may lead them right, and prevent them from going wrong. He may save a misapplication of their labour by pointing out what they may properly omit to study, and he may assist their labours by giving them in few words the results of his own. He can look for matter where they have neither time nor opportunity to look. Thus there is a saving of the pupil's labour effected by the labour of the teacher: it is one of the many examples of the division of labour. But this labour of the teacher does not diminish the necessity for the pupils' industry; it is merely designed to do that for them which they cannot so well do for themselves. Thus it appears that oral instruction is neither the same with the reading of books, nor is it a substitute for private study. The two things are distinct; but so far as they are related, it is the business of the teacher to assist the learner in his studies. There is
no rivalry nor opposition between the two things; neither is the one a substitute for the other: each gives and derives aid from the other.

There is an advantage derived from the meeting of many learners for one object, which should not be overlooked. In all places of public instruction, those who come together to learn are excited to greater activity by their intercourse; and the discussions which may take place among them on the matter upon which they are labouring in common, are calculated to develop the intellectual powers of each, to rouse those who might otherwise be indolent, and to excite a generous emulation to excel. Those who study alone are either deprived of this useful intercommunication, or at best can only have it in a limited degree with the few with whom they are most intimately acquainted. This incidental profit, and others of a like kind, which result from bringing learners together, are as great as any direct advantage that is derived from public instruction; and it is in itself a strong reason for the establishment of places of education, such as large schools and colleges. This reason is not weakened, but becomes still stronger, when the studies are a preparation for active life. Such studies should be pursued as much as possible, as much as the nature of the case will allow, in common; for man is not best prepared for moving about in public by shutting himself up at home; but if he wishes to move with ease and comfort in the great concourse of human life, he must associate with others, and so learn what he can never learn by himself, to form a just judgment of his own powers, and rightly to estimate those of others.
These considerations lead me to speak of a third recommendation of the Committee—an annual examination of the members of this class. The Committee do not propose to make this examination compulsory; and it would be out of place for me to discuss this subject, or to consider whether it would be useful to require all men to undergo an examination before they are called to the Bar. There is something to be said on both sides. Some of the reasons for requiring such examination of those who are to practise medicine, and from those who are to practise law, as solicitors or attorneys, do not apply here, because the barrister is not directly the legal adviser of his client, but is selected by a professional person who is supposed to be a competent judge. Yet it is important to maintain in the English bar a high standard of liberal education, sound knowledge, and honourable character, if we consider the numerous important places which a barrister may fill; but in what way this is best to be effected must be decided by those who have the power of calling to the Bar.

The advantages which a student may derive from this voluntary examination are pointed out by the Committee in their Report; to which I shall merely add, that those who prepare well for an examination and do what they can, gain more than they are aware of. I am supposing an examination to be so constituted, that it shall have regard to the course of instruction, that it shall be comprehensive both as to the matter and the manner, that it shall not be such as to lead the student to burthen his memory with
minute things in their detached form, or with many curious things, though they may be true, but to master fully both the great divisions and the general principles of the law, and the chief rules that belong to each several head.

The true theory of an examination is this, though it is often little attended to in proposing a paper of questions. Firstly, the matter of the examination, its extent, should be determined, and questions should not be asked beyond it. Secondly, the questions should not turn on small things viewed as detached from other more important things to which they are subordinate. Thirdly, to shew the student that exact, minute and technical knowledge is necessary, and will be required as a proof and the only proof that many things are properly understood, he should be required to answer questions which shall involve a full exposition of great heads or titles of law, as possession, servitudes, husband and wife, and the like, and to state clearly all the main rules of law under such heads; and also to answer any minute question that may be asked in reference to matter already comprehended in a general question. Every thing, however small, that helps to the explaining of another thing is properly inquired about, if it belongs to the matter of the examination, and if it is so placed among the questions of a more general kind as when answered to make the answer to the general question more complete.

It is somewhat difficult when a man is studying a subject to bring his knowledge to a test. The best plan that I know, is to try to set down on paper
what he has learned of a thing, which, if he does with care, and examines with impartiality, he will soon see where his knowledge is defective. But this is a labour that a man will not often subject himself to without some motive. It is useful to register particular things as they occur to us, so that we may find them when they are wanted, but this is only getting together materials to work with. An examination offers the opportunity of learning what we really know, what we have got and kept, and what we can produce when it is called for.

There is a kind of objection made to law lectures, and especially to lectures on the general principles of law, the consideration of which properly belongs to the present subject. The business of a lawyer in this country is eminently practical; he has to advise on difficult cases, to draw instruments in proper form, to prepare pleadings, to make himself well acquainted with the forms of procedure in courts, and to manage his client's business there. The due discharge of these various functions constitutes a good practical lawyer; and the power to discharge these duly, or even any one of them, is only acquired by many years of labour and painful experience. Indeed, the difficulty of mastering so complicated a subject as the Law of England has led to a distribution of it into various branches, to some one of which it is usual for a man to devote himself, and to trouble himself little about those branches which do not immediately concern his own practice.

Now, some people apprehend that the best or the only mode of obtaining the practical expertness which
is necessary for a lawyer's success, is by steady application to some one branch of the law in a practical way as it is termed; and some people suppose or seem to suppose that the study of the general principles of law, and of any particular system which is different from our own, is rather a hinderance than an aid to attaining this practical skill which is assumed to be the true end of all a lawyer's labour.

If this objection were sound, it would equally apply to many of those previous studies which form a part of the training of most persons who practise the law. These previous studies do not directly tend to make a skilful lawyer, for they are about other things than law; and yet nobody doubts that a course of study which shall inure a man to continuous mental labour, to a habit of patient investigation, to a just estimate of each thing that is presented to him, and to a correct apprehension and right use of language, is a good and a necessary preparation for a successful study of the law. If there are men who without these aids, by their great natural capacity and unwearied diligence, have attained and merited the name of distinguished lawyers, they are exceptions, which only shew more strongly the necessity under which ordinary men lie of preparing themselves for one of the severest of studies by a good and sufficient training.

There is a notion of a kind of opposition between theory and practice, as the phrase is, which is mixed up with a common misapprehension of the real nature of both; but like most other misapprehensions, it has some truth in it. The terms theory and practice are
indeed often vaguely and sometimes differently conceived. Theory may be considered, for our present purpose at least, as the exposition of the law of any country generally, or of particular divisions of the law, in a systematic form, for the immediate purpose of shewing what the law is, and for the remoter purpose of contributing to its improvement. Theory has not, and affects not, a reference to particulars; it deals with the matter of law in its generalities. Practice applies the law, or the several institutions of law, to the circumstances of real life; it ascertains among the infinite relations that may arise among persons and things what rules of law are applicable to each relation; it gives to the abstractions of law their material and their living energy. Practice is theory in action; or if it is not, it is mere routine, a kind of labour no ways differing from handicraft. There is then an opposition of a kind between true theory and true practice, though they have something in common, for true theory observes the operations of true practice, from which it may learn wherein it has failed either by excess, or by defect, or by error of any other kind. A good practice, which is a realization of theory, must operate beneficially on theory generally, just as the strict and just application of a particular statute may shew wherein the statute is defective. A practice is bad when it seeks to determine something particular, solely or mainly by its likeness to something particular already determined, without a direct reference to the theory which involves the particular; for that which is already determined may be wrongly determined, and if the
determination is right, it will only be established the more firmly by being again subjected indirectly to a new and independent judgment. Between theory and good practice there is a mutual and productive action: between theory and bad practice there is hostility. It is true that some men are better adapted than others to view things in the abstract, or in the form in which they are detached from all particular matter, and both to conceive and to express truths in the most general terms. Men of this sort are often ill suited for practical affairs, not because they have this generalizing power, but because they have cultivated it exclusively.

Again, other men are more suited for dealing with particular matter, for things of detail and special application, in which they often attain a rapidity and dexterity which persons of better capacity never reach. But this art, this empirical skill, may and often does exist with the grossest ignorance of the real nature of the thing which is handled. It is of the character of empirical skill to neglect the principles by which its own hand is directed, and to forget the true source of its power. If all existing sciences were reduced to the condition of mere practical applications of the knowledge which we have acquired, not only would they cease to be progressive, but the foundations on which we build the goodly structure of art would decay and perish. Now, if we take instances from the two extremes, we may find men eminently gifted with the faculty of dealing with the abstract, who from natural disposition or some other cause have an inaptness for all special appli-
cations. We observe this in various branches of science, and it may be so in the science of law. If we look to the other extreme, we may find men incapable of comprehending any general formula or general truth, men who have an aversion to everything that is not 'immersed in matter,' who confine themselves to the specialities of things, and are by their nature compelled to abide in them.

But the bulk of mankind do not belong to either extreme. Most people have in them a contemplative, or to express it in other terms, a theorizing element as well as a practical. The perception of a general truth gives pleasure in itself, for men desire to know simply for knowledge sake. But men are also moved to action by the constitution of their nature, and it is in the realities of life that many principles receive the clearest evidence of their universal truth. That which the mind has often obscurely apprehended as an abstract doctrine, becomes clear when it is embodied in a palpable shape; and we often do not know the extent of our knowledge, or the value of that which has cost so much mental labour, till we come to apply it to practice; we then perceive that in learning the general we have mastered the particular; that we have a rule far more comprehensive than the single case which is before us. The due proportion between the power to apprehend fully the general and rightly to estimate the relation to it of the particular constitutes the well-balanced self-relying character of the man of sound judgment. If any attempt should be made in this country to revive studies that once flourished, and are now
neglected, to give to our higher education somewhat more of a philosophic character, there would be no danger of practical applications being neglected. Our political constitution and our social condition favour the active rather than the contemplative element. Practical knowledge brings great consideration and great profit: speculative knowledge brings little either of one or of the other.

Now it is for the purpose of keeping alive the creative and active principles of every science, that public teachers are appointed in colleges and universities. As the mass of mankind, and even the great bulk of those who are engaged in the practical application of the sciences, have not leisure or opportunity to cultivate the general principles of them, it is necessary that there shall be men to watch the progress of the sciences, and to present all discoveries and all new results in that form in which they may be most readily and correctly apprehended. In this way the sciences of physiology, organic chemistry, and other branches of medicine, all of which have their practical uses, are now expounded in this metropolis by a body of able and industrious teachers, who communicate to their pupils the results of the labours of other nations, as well as those of their own countrymen. Thus a profession which, without these public teachers, would inevitably sink to the condition of an empirical practice, by which we should all be sufferers, is not only maintained in a respectable position, but is in a state of improvement.

It is not easy to find any reasons why law should not be cultivated like other sciences, such as that of
medicine; and it is easy to find reasons why it should. Both sciences have their fundamental principles, but law has the advantage over medicine in being reducible to fewer and less dubious elements: both admit of divisions and distribution according to the nature of the matter, and the practical use of both is for the commodity of human life.

The ultimate elements of these and of all sciences are unchangeable; they exist in ourselves and in the things around us. There is no system of law, and no part of a system, which is not pervaded by universal principles, whatever may be the form into which it is moulded by positive rules. The actual existence of law, as a body of imperative rules, is a necessity. Law is not in its general character a limitation of man's power to act, though it may appear to be so sometimes; it is the security for man's freedom of action. It may consist of a few rules in a state of society where the objects of property are few, and the relations of individuals are limited by want of combination and the simple nature of those facts and acts to which law attaches as consequences—rights, duties, compensation for injuries, and punishment. When wealth, the product of human labour is augmented, both in quantity and variety, when men combine their capital and skill for a common object, and when the relations between individuals become indefinitely increased and varied, matter is made for new positive rules, which of necessity must be formed, if this increased activity is to be secured and to have its free development. These rules are only new in form: they are merely
particular applications of universal principles; for if they were not, it must be admitted that it is indifferent what the rule is, provided it is fixed. And there are cases of this kind, in which the positive rule might be either what it is or something different, without materially affecting the public utility. But this is not generally so; and whether the application of general truths to the making of a positive rule may be done skilfully or unskilfully, it is, and it is acknowledged to be by the very form which the rule of law assumes, nothing more than an application. A really new principle cannot be created: a principle is sometimes evoked from its obscurity by the intellectual energy of the judge or the jurist: it is admitted to be a truth, because in its nature it bears its own evidence; and it receives the character of law from the legislator or from him who has power to declare the law. Now it is the tendency of particular systems of law to emerge from the narrow rules which originate in the peculiar character of any given political society, and to obtain a character of greater generality, as a nation advances in civilisation, and as the commerce with other nations is extended. This was the history of the Roman law, the best part of which became and is universal. This is the history of a great part of our own law, and this is the direction of its actual development. The study of law then must in its nature become more general, and every nation may derive some aid from others in which law is cultivated. These are reasons for promoting the cultivation of law by every means that can be devised; and among these means one is by
the establishment of public teachers here as in other countries. The greater the extent and variety of the matter of law, the more need there is for continually working at it: all the activity of the legislator, all the wisdom of the judge, all the skill of the practitioner, and all the industry of the writer and the teacher, are barely sufficient to maintain, even in a stable position, this ponderous and evergrowing mass. For no system of law is secure against corruption and decay: there is none which is permanent or perfect; there is none that can resist the force of time and circumstances, which work changes in all human institutions. There is no science or art which more requires the uninterrupted activity of man to maintain its integrity, or further its improvement. Positive rules and forms are the outward shape in which it is embodied; but its real existence is in the understanding of the living men, and in its just applications to the purposes of human life.

The question which I have more particularly to answer is, What advantage will a student who designs to practise the law derive from a course of general jurisprudence and the civil law? To answer the question fully and satisfactorily, as I believe it could be answered, would take some time. The institution of a readership of this kind, by those who are themselves engaged in the practice of the law, and who are the judges of the proper qualifications of those whom they admit to practise it, must be considered as some evidence that there is a sufficient reason for recommending such a course of studies. But as opinion may not be unanimous on this point, and
as some may have no opinion either one way or the other, because they have never considered the matter, I shall endeavour to give such answer to the question as the time will allow and I am able to give.

When we speak of the Law of any country, we mean the whole body of law of all kinds by which the society of such country is regulated, so far as the regulation of law extends; and we do not mean any part of the usages, habits, and rules, which may be classed under the head of morality, and which regulate many things which law does not affect to regulate, and often cannot regulate. By the Law then we mean all the laws, all the rules of law, every thing which properly is comprehended under the term law, the sum total of which may be said to form the system of law in that particular country. A thing which is a system is composed of parts, and in order to know the system we must not only know the parts, but we must also know the relation of all the parts to one another, for a system is only such by virtue of all the parts having some certain relation to one another and to the whole, analogous to that of the parts of an organized body. The analogy is just and complete between a system of law and the system of an organized body: the purposes and the ends are the same in both; and they are the conservation, and the due action and development of each.

To know what the system of law of a given country is, we must resolve the complicated mass into its parts, and we must arrange the parts in some order, such as shall be best adapted to show the whole of what there is, and how it forms a whole or
a system. This was done in some degree by the Roman jurists in their Institutional Treatises; it was done by Hale for the English law, in his Analysis of the Civil Part of the Law, and it has been done by Blackstone in his Commentaries, and by others. In every science, and law in its generalities is a science, some order and method and distribution of the parts conduce to the better understanding and easier apprehension of the whole. A system of general jurisprudence must have an order and method, and a set of terms which are capable of application to any particular system, for the matter of law is universal; and if a system of general jurisprudence should be more applicable to some particular systems of law than to others, this is owing to the fact, that some systems or bodies of law are more congruous and coherent than others.

Hale's observations in the Preface to the Analysis of the Civil Part of the Law are clear and pertinent. After referring to the difficulty of his undertaking, and its necessary defects in a first essay, he says, "However, the following essay will do thus much good. Firstly, it will discover that it is not altogether impossible, by much attention and labour, to reduce the laws of England at least into a tolerable order of distribution. Secondly, it will give opportunity both to myself and others, as there shall occur new thoughts or opportunities, to rectify and to reform what is amiss in this, and to supply what is wanting; whereby in time a more methodical system or reduction of the titles of law under method may be discovered. Thirdly, that although, for the most part,
the most methodical distributors of any science rarely appear subtle or acute in the sciences themselves;—because, while they principally study the former, they are less studious and advertent of the latter;—yet a method, even in the common law, may be a good means to help the memory to find out media of probation, and to assist in the method of study."

As the Roman law presents more of congruity or less of incongruity than the English law, though in truth similar circumstances have produced more resemblances between them than are generally surmised, it might be supposed that we should find there a system of arrangement which would be applicable to our purpose: But this is not so. Neither the two Institutional Treatises which are extant, nor the Digest, are adapted to the purpose of an outline of general jurisprudence. It seems probable, that the Roman jurists in their Institutional Treatises did not all follow the same method, but with the exception of the institutions of Gaius, and the compilation made by the order of Justinian, A.D. 533, these writers are chiefly known to us from the excerpts contained in the Digest. The merits of the Roman jurists did not consist in making a systematic arrangement of the whole matter of law, though they have done much towards helping us to make it. Their merit lay, as I shall hereafter on various occasions show, in their skilful application of principles to the resolving of particular cases, in which they display a rectitude of purpose, a happy brevity of expression, and a mastery of their matter, that have commanded the admiration of all competent judges, and furnish the best models for our imitation.
It is not, however, difficult, with the aid of what has been done by modern jurists, to arrange the whole matter of law in a tolerable order, and in such an order that a student of any particular system of law may be assisted by it. He will thus learn to view the law which he studies, as a body more or less congruous as a system, the parts of which have relation to one another more or less distinct, and he will thus get a sufficiently comprehensive view of the wide field of his studies, and of the divisions of which it is susceptible.

It is a fact which has sometimes been insisted on, and it is an undeniable truth, that the most general principles in any science, when clearly propounded, are the parts which are easiest understood. The principles of general jurisprudence find a ready reception in most men's minds, if they will take reasonable pains about them; and though the subject does present difficulties both to the expounder and the learner, it is in such a state, owing to the labours of past generations and of the present age, that it may be considered a science of determinate limits, of determinate objects, and of ascertained principles. These principles when clearly propounded and illustrated by instances from particular systems of jurisprudence, as the Roman and our own law, are of much easier apprehension than any detached part of our law studied by itself, and infinitely easier than the practical application of law to a given case.

The study of English law is sometimes at first exceedingly repulsive, because of the confusion and perplexity that pervade it; the difficulty is increased
by the mode in which the study is generally com-
menced. But he who comes to the study of any
particular system of law with a competent knowledge
of those principles which are involved in all legal
systems, cannot have the same difficulty as he who
comes to it without any preparation; nor is he likely
to view it with the same distaste. In our own
system he may discover beneath the uncouth phrase-
ology, half barbarous terms, and quaintly expressed
rules, many of those general principles with which
he is already familiar, and which must and do exist
in all systems of law, by whatever terms they are
expressed and under whatever forms they are ob-
scured.

There is nothing more painful to a mind that is
trained to method and accustomed to look for co-
herence in all that it labours upon, than to be thrown
upon a subject of which the matter is confused, and
for which there is no well-digested plan of study.
Those who are not perplexed by such a subject and
such a want of method should not therefore conclude
that they have better heads than their neighbours.
It may be that they do not see the difficulties which
others do; and there is risk that, if they readily take
in whatever is proposed to them without question or
scruple, they may have their memory loaded with
rules and cases, and their ability to use them rather
impaired than strengthened.*

* Slowness to apprehend is not always accompanied with a
sound judgment, for a man may have no intellectual power at all.
But a really tenacious memory, a memory which keeps what is
worth keeping and no more, and a clear judgment, and a firm
resolve, do in their nature imply deliberation and slowness to
The two modes in which a knowledge of our law is now chiefly acquired are by reading and by attendance at the chambers of a practitioner where law in some one or more of its branches is learned by actual practice. Reading is necessary, and if well directed may be efficiently combined with the more necessary and more useful labour of working upon the matter of law as it is presented in actual practice. The opportunities which a student thus enjoys of seeing the kind of business which he himself at some time will have to transact, and the mode in which it is managed, are not only essential, but the best parts of his legal discipline. If we had to choose between a system in which the instruction was purely theoretical and our own, there could be no hesitation in giving the preference to our own, the object being receive. The younger Cato was dull at taking in and slow, but when he had taken in anything, he kept it and remembered it. It is according to nature, says Plutarch (Cato Min. 1), that those of quick parts take in easiest, but those remember best who apprehend things with labour and much study; for every thing that is learned is a kind of branding on the mind. He conjectures that Cato's disposition not to yield to persuasion made learning more laborious to him; for to learn is to be the object of some action, and to yield easily to persuasion is incident to those who have less power of resistance. Laborious learning then in a man who has good natural parts simply shews that he yields his assent slowly, because he has a resisting power. Quick apprehension and ready reception may exist with sound judgment, if the learner sees clearly the reasons why he should give his assent; and thus he will be a whole step in advance of his slower neighbour, who resists because he has not yet seen that he ought to yield assent. Those who are slow need not be discouraged, if they find that with labour they can learn. Those who are quick will do well to consider whether they keep what they get, and whether they do not take in much that is not worth the having.
to qualify a man to do his client's business well; and a man can only do the actual business of law well by working at the practical application of the law.

But whatever assistance a student may derive in chambers towards understanding a particular case of practice, this part of his instruction has from the nature of the case little method in it. It is not I believe considered the office of his instructor to give his pupils a regular course of instruction in that branch of the law which he professes; both want of time and other circumstances must generally render this impossible. But the successful study of the actual business of law presupposes a certain kind of knowledge in the pupil; and if he has this knowledge, or if he can acquire it during his attendance in chambers, his education as a lawyer is good. But the practical application ought not to be considered the whole of his education; it should be the supplement to and the completion of something which has preceded it. If law is a system, if the whole of it and the various branches into which it is divisible and the various parts of each branch have some relation to each other and to the whole body of law, it is absurd to attempt to learn any branch of law by simply studying cases as they come. Such cases furnish excellent opportunities for the application of general rules which have been learned. They are invaluable materials to work upon, but a man must have his tools in tolerable order before he can fashion this material into shape. Those who without the necessary preliminary notions of law are plunged into the difficulties of particular cases, often so com-
plicated as to require the practical sagacity of an experienced lawyer to unravel them, must be content to grope their way in the dark for some time. If they persevere, the light will no doubt begin to break in upon them at last, and their first care will be to put the knowledge which they acquire into some convenient shape in order to retain it. But it follows from the nature of the case that a student cannot derive from the actual business of the law all the advantages that may be derived from it, unless he knows enough to be able to refer each matter that comes before him in actual practice to its proper place in the system, and so at once to apply himself to master that part of the law which is applicable to the particular case. Unless he has learned in some way what relation the particular matter that he has before him bears to the general matter of the law, he will not derive from his labour the full profit that it ought to yield; and there is some danger that he may get erroneous notions which he will afterwards have to correct.

London offers greater opportunities for a man's becoming a good lawyer, in the proper and large sense of that term, than any other place, if all these opportunities are duly used. These opportunities, so far as they concern the practical application of the law, consist in the great amount and great variety of matter which comes before legal practitioners in their usual course of business, and in the great number and variety of cases which are heard and determined in the courts, and reported.

Law, which exists in the form of general rules
and abstract principles, is thus made a living reality, and that which it is in possibility and in power becomes better understood when we see what it is in act. For it has been well observed, * that "many who have devoted themselves to the science of law have found by experience that a particular case has given them a more distinct apprehension of a legal principle, than any study of books and any thought ever did." The truth is that any general principle is never fully appreciated in all its extent till it is applied to a particular case; and that when so applied, it becomes thenceforth both an intellectual and an active principle, and so satisfies both that part of our nature which is always looking for the general in the particular, and that part which seeks for realities that shall correspond to general truths. In order, then, that there may be no separation between theory and practice, that theory may not become mere idle speculation, and that practice shall not become a mere routine, we must combine the two things in such wise that theory shall receive its illustration and confirmation from practice, and that practice shall repose on the solid foundation of theory.

This solid foundation of theory must be laid in the student's own labour, combined with the instruction of books and teachers. The public teaching of law has almost fallen into disuse in England; though for the reasons already given, England of all countries is that in which it might be made most efficient, because here more than in any other country theory

may be confirmed by and combined with practice. Indeed, it is probable that the facilities for obtaining a practical knowledge of the law may have tended to the neglect of other means of studying the law; while in some countries, where there are fewer facilities for this practical discipline, the study of the law is nearly altogether disjoined from its practical applications.

The place in which there are the greatest opportunities for obtaining a knowledge of the practice of the law, is also the fittest place in which law should be studied purely as a science; and the mutual influence of the theory and the practice will thus operate beneficially on both.

Lectures in London on General Jurisprudence, and on the various branches of English Law, might then have these advantages. They would facilitate the study of law to beginners; they would be useful as preliminary to studying the actual practice of the law, or might be useful in combination with it; they would give a student a systematic view of those general principles which he has one day to see applied to actual business; they would accustom him to view things in their utmost generalities, as well as in their minute details; they would furnish him with admitted principles or rules, the right application of which he must learn by practice; they would train him to seek for solutions of difficult questions in fixed principles rather than in the mere resemblances of particular cases; to strengthen his understanding by seizing the rules of law in all their fulness, and following them out to all their logical
consequences with obstinate resolution; and not to burden his memory with nice distinctions and endless differences, and minute subdivisions and petty classifications, which are not the stuff and matter of any science, though they have a deceitful show of reality about them, but are mere appendages and tinsel with which all sciences are encumbered.

If a general course of legal education should be established in London, it would also enable all persons who intend to practise a particular branch of the law, to obtain some exact knowledge of those branches which they do not intend to practise. It is a defect in a lawyer’s education that he has not an adequate knowledge of the whole law of his own country; for though a man may and generally must confine himself to the practice of a part of the law, he often feels the want of a knowledge of other branches, even in his own practice. Such a general knowledge of the law would enlarge his views, and enable him to form a juster judgment of the whole effect of any proposed alterations in the law. He would neither be a hasty innovator nor an obstinate enemy to all change. One of the strongest arguments in favour of a body of public teachers, whose business it shall be to expound the whole of the law which we possess, is derived from the development and the change which all law must and does undergo in the course of time. We have two striking historical examples of this—the Roman law and our own. The Roman law had many centuries of growth, change, and progress. So long as the huge mass was impressed by the mental activity and sound practical
sense of their great jurists, it was in the course of useful practical development. With the decay of this class of men and the contemporaneous political disorganization of the empire improvement ceased, and all that we find afterwards was an attempt to preserve, by compilations, of little merit as such, the dismembered fragments of that to which the clear understandings of a Paulus, an Ulpian, or a Papinian, could alone give a vital coherence. For it may be as well to observe, by way of obviating any misconstruction of what is here said, that it is not supposed that a body of public teachers, however able they might be, are here compared with the jurists whom I have mentioned. A right apprehension of the real character of these jurists will shew that another class of persons is referred to. The eminent Roman jurists were specially practical, they were engaged in the judicial administration of the law, and in giving legal opinions which were to determine the law; and their writings are practical, that is practical in the good sense of practice. A large part and the best part of the Digest consists of legal cases and their solutions. The law of a country lives not in its outward form, but in the intellectual activity of those who practise and those who judicially administer it. The reasons then for the establishment of a body of public teachers of law are, that they may aid in giving to the practised sagacity and skill of the English lawyer another element which shall contribute to the conservation of all that is good in our system, and to the improvement of that which requires to be mended. The changes which our own social condition has
undergone from the time when the Conqueror seated himself on the throne of England, up to the present day, are as great in kind, if not in degree, as the changes in the condition of this island between the time when the Romans first set their feet upon it and the day when the Saxon gave way before the Norman invader. Nor is it possible but that further changes must from time to time be made, as the social wants shall be more clearly developed, and new necessities shall arise. And they are daily arising from the changes in our habits and ways of thinking, the increased activity of our industry, and in the extension of the empire. But in the midst of the overwhelming and incongruous mass of which the whole body of our law consists, we possess certain elements of order and improvement. We have had a long national existence, and our present condition has grown out of the past; a rude and irregular growth, it is true, but our past condition has always had in it the elements of improvement, and our present condition has them too. Our present and our past are not disjoined by any rude separation, and we find ourselves in the nineteenth century with the experience of age and the vigour of youth. To make the best use of our opportunities, it is necessary that the general education of the country be comprehensive and exact, especially in all matters political, of which one important branch is the science of law. Jurisprudence, though distinct from legislation, is intimately connected with it. Legislation is directly concerned about the determination of the objects which can properly, that is usefully, become objects
of law. It is connected with general jurisprudence as with a system of principles and rules embodied in a technical language, by which it shall accomplish its general ends or purposes; and it is connected with the jurisprudence of the particular country in which it is active as a system of principles and rules to which it must have regard in establishing any new rules in order that harmony and coherence may be preserved.

The department of Legislation which is concerned about the digestion of law, whether written or unwritten, which also may involve the introduction of new rules of law and the abolition of old rules, and the change of old modes of accomplishing a given end for new and better modes which shall accomplish the same end, requires the aid of jurisprudence, or, to speak more exactly, cannot operate without it; and the assistance of practical lawyers is here absolutely necessary in order that legislation may effect that which it designs to do.

The establishment of a School of Law in London would be useful for those who may become members of the legislature, by giving them opportunities of learning the general principles of jurisprudence and also obtaining some exact knowledge of the whole of our system. Many men, I believe, are called to the bar, or prosecute legal studies to some extent, without any intention of practising, and some of them enter the Commons’ House. As members of a legislative body they have a political science to regard, the object of which is public advantage or utility—the science of legislation, which is distinct from that of
jurisprudence. But they have also to regard the fitness of the means to the end, the form of a law as well as its use; and the combination of legislative and jurisprudential science is especially necessary in a country where old legal institutions are continually subjected to revision and to alteration. Though the aid of professional lawyers is indispensible in reforming law, competent knowledge in some of the members of the legislative body is equally requisite, when reforms are made by direct legislation.

The method which I propose to follow in my course of lectures is determined by the matter that I have to expound; and the method must be judged with reference to the end, and not viewed simply as an attempt to expound the matter of general jurisprudence in what may be termed a purely abstract form. Such an exposition would not answer the practical end that these lectures have in view. I do not, however, mean it to be inferred that I shall omit the exposition of any of the matter of General Jurisprudence, so far as I am able to seize and apprehend its principles. I shall make that arrangement which seems best for the purpose of teaching; and in order that general principles may not be misconceived or misunderstood, I shall accompany them with instances or examples by which they may be made clearer to the apprehension, and which may be applied to them as a test of their truth.

Keeping in view that it is the object of these Lectures to combine a course of General Jurisprudence with a course of Roman Law, and proceeding on the
fact that the Roman law is capable of an arrange-
ment which would in the main correspond to a well-
arranged course of general jurisprudence, and that it
supplies abundant matter for the illustration of most
principles of jurisprudence, and that we owe to the
Roman writers the first clear exposition of the most
important elements of a sound classification, I shall
follow that arrangement which has been adopted by
the best modern German jurists. Without over-esti-
mating the value of a good arrangement of the
matter of law, and admitting that all arrangements
will have defects inseparable from the nature of the
thing, there is still a wide difference between a bad
arrangement, or that which puts all into confusion,
and one which shall bring together those parts which
have the clearest relation to one another, and which
when so arranged present as much congruity as we
can attain. The chief object of such an arrangement
is that all which precedes shall help to explain that
which follows. What I have said implies that I
shall chiefly confine my present course to that part of
the law for which the Roman law is most available.
A large part of this law is not directly applicable to
modern purposes, such as the law relating to crimes
and punishments, and the law relating to the condition
of political persons, as magistrates, judges, and the
like. Accordingly, the Roman law, as received in
Germany,* for instance, is that part of the Jus Civile
which the Romans separated under the name of

* Savigny, System, etc. i. 1. A view of the Roman criminal law
is given by Rein, 'Das Criminalrecht der Römer,' etc. Leipzig,
1844. This work contains abundant references to other works on
Criminal Law.
Privatum Jus from that which they called Publicum Jus. There is some objection to this division of law (Jus) into Privatum and Publicum, which I shall hereafter explain; but the two opposed terms serve to separate with sufficient precision that part of the Roman law which we may use from that which has much fewer applications to any of the purposes of modern times. The Publicum Jus has little affected modern European law, though some parts of it have been received even in this country: the Privatum Jus has been largely received in Europe, and it is that part of the Roman law which has been methodized and explained by modern German jurists with consummate skill.

The two works which I shall chiefly use for my purpose, are the 'System des Heutigen Römischen Rechts,'* an unfinished work by Savigny, 5 vols. 8vo. and the 'System des Pandekten Rechts,' of Thibaut.† It is nothing extravagant when I say that any praise which could be bestowed on these two works by any

* Translated into French by Guénoux; at least four of the volumes. Among other very useful recent works, are Puehta, 'Cursus der Institutionen,' Leipzig, 2 vols. 8vo. 1841, (there is a second edition of the first volume at least of this work); Böcking, 'Institutionen,' Bonn, 8vo. 1843, of which only the first volume, so far as I know, has appeared; and Vangerow, 'Lehrbuch der Pandekten,' 1846.

Mackeldey's 'Lehrbuch' appeared in 1842, in a twelfth edition, by Rosshirt, and the first volume, at least, has been translated into English in the United States, by P. Ignatius Kaufmann, with some notes of his own. The work has been extensively used. The 'Chrestomathia' of Hermann, 2 vols. 8vo., which is adapted to it, contains the passages from the Corpus Juris, which are referred to in Mackeldey's work.

† The ninth and last edition, 1846, is by Buchholtz, 2 vols. 8vo.
man the most competent to judge, would not be exaggerated. They are characterised by a soundness of knowledge, clearness of expression, perspicuity of arrangement, and a subtlety and depth of thought, that have seldom been equalled by any writer on any subject, and cannot be surpassed. The reader is never bewildered with useless distinctions, or deceived by specious generalities, which so often mean nothing; every thing has a definite object, and while the mind is filled with knowledge it is prompted to activity and fertilized with suggestions. The general is never conceived without an adaptation to the particular, and the particular is always in its proper place, subordinate to the general.

With the aid of these two works I hope to be able to dispose of all the matter which I shall include in my present course in an order which shall be adapted for a learner, and, with these works and others, to treat each separate head, not completely, for that would be impossible, but at least adequately.

These works, like other German treatises of the same kind, have a General Division and a Special Division.

This General Division is of considerable extent, as it includes matter which is applicable to every thing in the Special Part. It comprehends the determination of the exact notion of Law, Sanction, Right, Duty, Person, Thing, Act, Fact, Event, Capacity to have or to take, Capacity to act or to dispose, Succession, Possession, and some others. I shall endeavour to explain these general notions clearly but briefly, and I shall add illustrations chiefly
from the Roman and English law, and sometimes from the Scotch law. As I shall always refer the student to books, or parts of books, which may be useful, so I shall always refer, in giving special instances, to some particular passages in the Roman or in the English law books, or to particular decided cases; not on the supposition that a student should perplex himself with an examination of every thing that may be referred to, but partly in support of what I shall say, and partly that he may select from the references such as may suit his purpose for the present, and may, if he pleases, register others for future use. I shall sometimes translate and explain such passages from the Corpus Juris as may be pertinent and instructive; and in doing this I shall particularly explain such words as have a technical meaning, for the purpose of aiding those who may wish to study the Roman law in its sources.

The Special Division will bring us still nearer to the comparison of Roman and English law, in which the numerous identities and resemblances will be noted, and also some of those more striking discrepancies which owe their origin not so much to a fundamental difference in principle, as to the peculiar development which many principles common to the English and Roman law have received in this country.

In presenting the Roman law, I shall expound it as it exists in the Corpus Juris, and not trouble myself with the modifications which it has undergone in various continental states; for he who wishes to know what Roman law is, as received in any
European state, or any state or dependency out of Europe in which it prevails, will have no difficulty in mastering these modifications when he knows what that is which has been modified; and without knowing what is the thing modified he will not very readily apprehend the modification. No person can acquire a competent knowledge of the Roman law of the Corpus Juris without some labour and a study of the original. It may suit the purposes of some to devote themselves to this study; and those who have not leisure for it, will, I hope, still acquire something that will be useful.

Though I have not comprised every thing in the scheme of my present course, it is comprehensive enough, and too comprehensive to be executed fully within the time. But still it may be executed to a considerable extent; though how far this is practicable will be best ascertained by experiment, and experience cannot fail to suggest improvements. If I had to trust altogether to my own resources, I should not attempt a thing of so much magnitude and difficulty; but Jurisprudence is a matter which has been elaborated now for many centuries by some of the best heads that Europe has produced, and there is a rich harvest for us of the present generation to reap if we apply ourselves to it with hearty goodwill, and a sincere purpose to derive from it all the fruit that it can yield; without, however, surrendering our own independent judgment, or forgetting that all science must be progressive in order that it continue to be productive of social advantage. A great part of what I shall teach will not be my own.
I shall discharge my duty properly if I expound correctly what others have already done, and if I can stimulate those who hear me to independent labour; for the real amount of what a man may teach is a subordinate thing to shewing others how to learn, and making them wish to learn.

If I have conceived my design largely, I think this is a less error than to conceive it in a narrow and contracted sense. In every thing we undertake we generally propose to ourselves more than we can accomplish; and as this is the case in the regulation of a man's general conduct in life, so it is in all his intellectual efforts. It is therefore wise and practically useful to propose a high standard of excellence, in order that, as we never reach what we do propose, we may actually reach something which shall be useful and good.
II.

The History of the Roman State is the most instructive chapter in the history of mankind. It is an error to consider Roman history as something far removed from us, as separated by the arbitrary term Ancient from that what we vaguely designate as Modern. "The history of all nations of the ancient world," observes Niebuhr, "ends in that of Rome, and that of all modern nations has grown out of that of Rome. Thus, if we compare history with history, that of Rome has the highest claims to our attention. It shews us a nation which was in its origin small like a grain of corn; but this originally small population waxed great, transferred its character to hundreds of thousands, and became the sovereign of nations from the rising to the setting sun. The whole of western Europe adopted the language of the Romans, and its inhabitants looked upon themselves as Romans. The laws and institutions of the Romans acquired such a power and durability, that, even at the present moment, they still continue to maintain their influence upon millions of men. Such a development is without a parallel in the history of the world."*

* Niebuhr's Lectures by Schmitz, i. 92. There is a curious resemblance between this passage and a remark of Lord C. J. Holt, "And this is the reason of the Civil law in this case, which, though I am loth to quote, yet, inasmuch as the laws of all nations are doubtless raised out of the ruins of the Civil law, as
The Roman State had its commencement at an unknown time; but if we reckon from the supposed or the probable commencement of it, to the destruction of the Eastern Empire, it had an existence of nearly twenty centuries, a period which far exceeds the duration of any other European State. In its origin it possessed a few square miles on the south-east bank of the lower course of the Tiber; in its greatest extent, it reached from the pillars of Hercules to the Euphrates, and from the German Ocean and the Grampians of Scotland, to the first cataracts of the Nile, and the border of the great African desert. It comprehended the best part of the globe then known to Europeans; and numberless nations of various race and various language. It owed its extension to the military character of the people, and almost every inch of this boundless territory was won by the sword. But its extension was due also to the active internal energy of its institutions; and its conservation to the general prudence of the government, and to the great administrative talent of the nation. Those who survey the history of this extraordinary people in a careless way, who look only to external events, may declaim against the unbounded ambition, the grasping cupidity, and the blood-stained career of the conquering republic.

all governments are sprung out of the Roman empire, it must be owned that the principles of our law are borrowed from the Civil law, and therefore governed by the same reason in many things. And all this may be, though the common law be time out mind."

—Lord C. J. Holt, 12 Mod. R. p. 482.

I am indebted for this reference to Mr. Spence's Work, on the Equitable Jurisdiction of the Court of Chancery, i. p. 286.
But though battles and conquests, and devastation of flourishing towns, and subjection of brave resisting people, are prominent facts in the History of Rome, they occupy comparatively a small space in the whole existence of a nation, and leave large intervals for the quiet pursuits of peace and industry. If we were to take a rapid glance in the same way, and it has been done in no friendly spirit, of our own history, we might say that a portion of a small island in the far west, which the Roman of Cicero's period regarded as beyond the limits of the civilized world, has associated in its political system three several and independent neighbouring countries, and by the power of the sword has planted its dominion in every sea, and in every part of the habitable globe; has subjected to its sway countless people of different races, language, and religion; and that its career of conquest and of dominion is apparently as unlimited as its increasing power and its never-satisfied ambition.

Whatever may be said of war and conquest, the important fact is, that some nations have in the character of their people and in their political institutions the elements of development and progress, and others have not. The Romans began their conquests in Italy as soon as they began to be a nation, and they secured them by establishing garrisons of Roman soldiers in the conquered places; for such were their early colonies. These colonies, which consisted only of the Romans who occupied the places, were not independent of the parent city; they had a municipal constitution like Rome, but they were parts
of the Roman State, and they owed obedience to the mother from which they sprung. They had liberty as free members of the political body, and union with it as parts of one whole. The Roman system of colonization protected the conquests of Rome, and secured the unity of the increasing commonwealth. The establishment of a naval force, and the defeat of the rival Republic of Carthage, enabled Rome to extend her dominions beyond Italy, and the fertile islands of Sicily and Sardinia became Roman provinces. The States of Italy which were not subdued were gradually formed into a kind of alliance with Rome, the conditions of which imposed heavy burdens, and gave few advantages. The Italian allies (Socii), who furnished men and money for the perpetual wars of Rome, claimed to have all the advantages and honours of her citizens; but it was not till after a desperate struggle with the Italians, that Rome prudently conceded to them the citizenship, and this change was the result of the Social or Marsian war, B.C. 90. From this time the greater part of Italy was Roman, and before the Christian æra, the entire Peninsula, from the Alps to the Straits of Sicily, which had been filled with Roman colonies, became incorporated in the Roman State, and the whole was Romanized. Under Augustus, and his immediate successors, the empire consisted of Italy, which had an administration of its own, and of numerous provinces, which were under the administration of Roman governors. There were three classes of persons within the Roman dominions, Roman citizens, Latini, who had an intermediate status, and Peregrini,
to which class most of the provincials belonged. The condition of the provinces, with some features in common, presented many varieties. Land in the provinces was not the same as Italian land, nor subject to the same rules of law, as to its transfer and the acquisition of ownership by usucapio, except so far as the quality of Italian land was given from time to time to particular places in the provinces, by conferring upon them the Jus Italicum, which privilege gave to the inhabitants of such places also exemption from the land-tax and capitation-tax, and a free municipal constitution with the choice of their own magistrates, like the Italian municipia and coloniae. There were also cities, especially Greek towns, which retained their old constitutional forms, and had the title of Free Cities (Liberae Civitates).* The empire, beyond the limits of Italy, thus consisted of numerous heterogenous parts—Roman and Latin colonies, free cities, and the provincial towns, all which were included within the several provinces. Each province was administered by a governor, and subjected to Roman law, so far as it was applicable, for there is no reason to suppose that local usages were not respected.† The nature of the Roman

* Savigny, Zeitschrift für Geschichte. Rechtsw. vol. xi., has given a brief sketch of this subject, with reference to his earlier labours upon it in the same journal.

† When M. Marcellus was assassinated at Piræus, Servius Sulpicius, who was then governor of Achæa, could not prevail on the Athenians to allow the body to be interred in the city; the Athenians pleaded religious objections, and that the thing had never been done. The body of Marcellus was burnt, and interred outside the city. (Cicero, Ad Diversos, iv. 12.)
administration, and its adaptation to the wants of the people, are shewn by the distribution of a province into Conventus (juridici conventus), or districts, in which the governor made his circuits for the dispensation of justice, and the discharge of administrative duties, and each of which had a chief town.

Pliny (Nat. Hist. iii. 1) has given a particular account of the Conventus of Spain, under the empire; and we learn from the Gallic war of Cæsar (De Bell. Gall. i. 54), that he visited in the winter his province, south of the Alps, or Cisalpine Gaul, for the purpose of holding his courts.* A complete view of the condition of the provinces under the later Republic, and at various periods under the empire, would form the subject of a treatise, for which ample materials have been collected. Here, it is enough to indicate the fact, that the laws and language of Rome followed the extension of her power and the establishment of her colonies, in Spain, Gaul, and other countries. Commerce was also enlarged and secured, for the Italian nations were a trading and a money-loving people. We find the Italian merchant and money-lender following the victorious arms of the republic; and the love of gain made them venture their lives and property in countries which were not fully subdued, and to penetrate even beyond the limits of the Roman conquests. Towards the close of the republic, the pirates who infested the Mediterranean, and carried their ravages within sight of Rome, were hunted out, destroyed, or reduced to obedience by

* See the letter quoted in note (p. 49), in which Sulpicius speaks of making his circuits in his province.
one of the most active commanders that Rome ever had. During the peaceful administration of Augustus, after the battle of Actium, B.C. 31, the shores of the Mediterranean enjoyed the benefits of uninterrupted commerce, and the tin* of Britain, the grain of Egypt, and the spices and products of Ceylon and India,† found their way to the metropolis of the western world. At this time the town of Ostia, at the mouth of the Tiber, which is now buried in swamps and covered with earth and rubbish, was the great port of the imperial city, and numbered 80,000 inhabitants. In an empire so extensive, in which peace was established, and commerce was free, there were abundant materials on which the practical good sense of the Roman could operate for the improvement and development of all parts of the law that concerned commerce and contracts.

Other circumstances contributed to furnish materials of law. The power of testamentary disposition of property existed as far back as we know anything of Roman law; and with the increase of wealth arose as many modes and varieties of testamentary disposition as man has whims and caprices.

* Diodorus Sic. v. 22.
† In Strabo's time, Myos Hormos, on the west coast of the Red Sea, was the port at which Indian and Arabian merchandise was landed. The goods were conveyed on camels from Myos Hormos to Coptos on the Nile, and thence down the river to Alexandria, (Strabo, p. 781, ed. Casaub.) The trade between Alexandria and Puteoli, in Italy (Pozzuoli), was very active, (Strabo, p. 793, ed. Casaub.) Strabo, who visited Myos Hormos when Aelius Gallus was in Egypt, ascertained that, at that time, one hundred and twenty vessels sailed from Myos Hormos to India. (Strabo, p. 110, ed. Casaub.)
The practice of making substitutions and trusts, of giving legacies under every conceivable condition, and, in short, of making a man's last will, the most difficult thing in the world to understand, gave ample materials for the establishment of a great number of rules as to the interpretation of testaments. Land also was much divided in many parts of Italy, which circumstance, combined with the system of laying out the assigned lands, marking boundaries, the use of irrigation, the enjoyment of common pastures, and the like, gave rise to a great mass of law that affected the condition of landowners, and developed a system of rules relating to sales, mortgages, servitudes, water, ways, and boundaries. The love of commercial adventure led people to combine their skill, labour and capital, for a common purpose, and thus the matter was given for establishing the general rules of partnership. The practice of farming the public revenue, which was managed by the Publicani, in a kind of joint-stock associations, contributed still further to the establishment of rules of law applicable to such partnerships. And the various gilds and companies, and colleges, which existed at Rome, led to the determination of the exact notion of corporate bodies, and to rules of law applicable to these fictitious persons. An examination into the condition of the Roman state, under the later republic and the earlier empire, will shew that there was abundant material for the production and elaboration of a large body of law, applicable to all the purposes of life, and to the condition of every civilized nation.

But material may exist without being worked
upon, just as a barbarous people may starve with all the elements of wealth around them. The Roman knew how to use what he possessed, and this power he derived from the native energy of his character and the free institutions under which he lived.

It is certainly worth inquiry how a state that, till the time of Augustus, was always at war with its neighbours, or distracted by internal struggles, not only maintained its political existence and extended its empire, but laid the foundation of so many just and useful rules for the regulation of the ordinary concerns of life. The development of a popular form of government out of the old aristocratic constitution was one step in progress; but so vicious was this popular constitution, that it brought new evils with it, without removing all the old ones. Still it gave opportunity to men of ability to rise to the highest honours of the state; and in this turbulent period were especially cultivated the two arts by which a Roman gained distinction, arms and eloquence. That the Romans shewed abilities of the highest order in the field is proved by the results of a universal conquest; that by a patient and laborious course of study they attained unrivalled oratorical power, we learn from the evidence of Cicero himself, no mean judge in the matter, from his own orations, and from the numerous fragments of a long series of orators whose names he has himself immortalized.*

* Their names are recorded in Cicero's Brutus. The Fragments have been collected by Meyer, 'Oratorum Romanorum Fragmenta,' 2nd ed. Zürich, 1842.—Oratory was as much a peculiar Roman excellence, as the study of jurisprudence. But oratory, in its best
The Roman orator not only applied his powers in the Senate, and in his addresses to the people, but he was the advocate in criminal trials and in important civil cases.* The lawyer, simply as such, occupied a subordinate place; he merely gave advice in the matter of the law or drew up legal instruments; he had no direct management of any business before a court. Indeed, some few men of rank, who were also distinguished as orators, had begun to make the practical knowledge of the law a part of their occupation, because it brought consideration with it; and some eminent names occur before and in the time of Cicero,† among whom are the Pontifex Maximus, Q. Mucius Scævola, and Servius Sulpicius. But law sense, did not survive the usurpation of Cæsar, and Cicero was himself the last of the great names; for the orators under the empire wanted that freedom, without which true eloquence cannot exist. Appius Claudius Cæcus, the blind censor, was the first who got a reputation for eloquence. He was born B.C. 54.

* We see from a letter of Cicero to Trebatius (Ad. Div. vii. 21), how this was managed. In the case of Silius, which Cicero appears to have intended to argue, the opinions of three jurisconsulti were taken.

† Tib. Coruncanius, the first Plebeian Pontifex Maximus, about B.C. 253, had a great reputation as a giver of responses, and as an orator. He is said to have been the first public professor of law; but we must not suppose that by this is meant a professor in our sense. The instruction consisted in the respondent permitting young men to attend him while he gave his responses, or drew up legal documents, on which occasions he would drop such remarks as would be pertinent to the matter. This was the kind of instruction that Cicero had when he attended Q. Mucius Scævola (Brutus, 89). These early Jurisprudentes, from the time of Papirius to P. Mucius Scævola (consul B.C. 132), the father of Q. Mucius Scævola, must not be put in the same class with the Jurisprudentes who followed them.
was only becoming a distinct pursuit and a science about the time of Cicero; and it was not till the latter part of the Republic, and the establishment of the imperial system under Augustus, that a distinct class of men arose, who, though designated by the same general terms of Jurisconsulti or Jurisprudentes, as those of the Republican period, are contrasted with the old jurists, who are called Veteres, by the more significant title of Juris Auctores. Their peaceful labours began where the active career of the general and the orator of the Republic ended, and they attained their highest eminence at a time when every other art and science was on the decline. The materials for their industry to work upon had been the growth of centuries; and they were due to the gradual development of native institutions, a practical good sense in the people, which had worked out useful results, and a love of order and method, with a strong attachment to old forms, which is characteristic of the Romans. The jurists did not create; indeed, they could not create the matter on which they laboured: it existed as a product of the long series of years during which the legal institutions of Rome had grown out of the wants of the people. The manner in which it was brought about was somewhat in this way.

The oldest authentic remains of Roman legislation are the fragments of the Twelve Tables, an attempt to reduce to order the old enactments and customary law of Rome, not a new code, as some have erroneously supposed, though the circumstances of the times led to the introduction into the Tables of
rules which were intended for the settlement of some political questions, and the greater security of the rights of the Plebeians.

The Twelve Tables were soon found insufficient for the wants of society; but they were neither repealed nor forgotten: they contained fundamental principles which endured to the time of Justinian's legislation, and were embodied in his compilations. The development of Roman law was mainly due to the mode in which the law was administered; it owed comparatively little to direct legislation. The administration of justice in the kingly period was in the hands of the kings. In the Republican period, it was in the hands of the consuls, prætors, and inferior magistrates; but the Prætor Urbanus was the magistrate who in the later republic was chiefly occupied with the administration of the law. The magistrates, however, did not directly decide in matters that were brought before them. They regulated the proceedings up to the point in which the matter in dispute

* Much has been written on the Twelve Tables, and some have denied the fact of the Romans sending deputies to the Greek states to inquire into their laws. But the fact of the mission rests on the same evidence as the compilation of the Tables, and it is idle to deny it. That the Romans did introduce some Greek elements into their new code is distinctly stated, and that they felt themselves unequal to such a compilation as the Twelve Tables, is shewn by the fact of the mission and the employment of a Greek, Hermodorus of Ephesus, by the Decemviri, (Strabo, 642, ed. Casaub.) Pliny (Nat. Hist. xxxiv. c. 5,) says that there was a statue erected in honour of Hermodorus, who assisted the Decemviri, or acted as interpreter, in making the compilation; and that the statue once was in the Comitium. No one can suppose this statement to be a mere invention. The Greeks had already had considerable experience in constitution-making
was reduced to a proper form for investigation and decision; and it was then referred to a judex, whose business was to investigate all the facts, and to pronounce a judgment in conformity with them. It is as well proved, as anything else in the history of Rome, that from an early time there could be no decision of a matter in dispute between parties except by a judex, who was one of their fellow-citizens. The judex was chosen by the parties themselves; and this rule applied probably to all legal disputes, except those about the ownership of land, which were settled by the court of the hundred men (centumviri). To the prætor belonged the admitting of the action, and the referring it to the judex who decided; the prætor's juris dictio was one part of the proceeding; the office of the judex (officium judicis) was the other.

The old form of proceeding was rude, but simple and strict. A man could have no action, unless he could bring his case within the very terms of the law of the Tables, on which the legis actiones were founded.*

* It is a mistake, as Savigny remarks (System, etc. v. 7. n. b), to suppose that no regular form of words was used while the legis actiones existed; for Gaius (ii. 24; iv. 16, 21, 24,) shews that there were formulæ or set forms of words. These formal words were combined with certain acts, such as we observe in the rude procedure in other countries; if the property of a thing was disputed, and it could be brought into court (in jus), it was brought; in other cases, they brought a part as symbolical of the whole, as
The old forms of actions, with some few exceptions, were at last abolished by enactments (lex Ἀεβοῦτία, and two leges Juliae, Gaius, iv. 30), and the directions which the magistrate gave to the judex were contained in a formula, which was a written instruction from the magistrate, which contained the statement of the matter in dispute, the general rules of law applicable to it, with a direction to the judex to make his decision conformable to the facts as he should find them. It is enough here to indicate the general nature of the process, and to shew how it worked on the development of the Roman law. *

The activity of the Prætor Urbanus, a magistrate annually elected, was thus put in motion to devise rules and orders which should be applicable to the special cases which might arise, in fact to give new actions; † and indeed it was not till the abolition of the old forms of procedure (legis actiones), that the edict of the prætor had or could have any material influence on the development of the law. The process by which this was accomplished was simple. If a man complained of something for which the jus civile gave no remedy, the prætor upon a state-one sheep out of a flock, a clod of earth from a piece of land, a tile from a house. The formal words, adapted to the change of circumstances, were still used after the symbolical acts were discontinued, and called Formulae, which name was also applied to the written instructions of the Prætor to the Judex.

* For the earlier administration of the law among the Romans, the useful work of Hollweg, 'Handbuch des Civilprozesses,' Bonn, 1834, may be consulted.

† Gaius iv. 11, 'quippe tunc edicta Prætorum, quibus com- plures actiones introductae sunt, nondum in usu habeabantur.' Thus C. Aquilius Gallus, Cicero's friend, established the judicium de dolo malo. (Dig. 4, tit. 3; Cicero, De Nat. Deorum, iii. 30.)
ment of the facts could allow him a right of action, and embody in a formula, as it was called, the facts which the judex had to investigate, and the judgment which he was to give according as he might find the facts. Thus a new class of actions, called Honorariae, from the Honor or office of the magistrate, was introduced; and the introduction of new actions was equivalent to the declaration of new rights, and the establishment of new rules of law applicable to the necessities of society. New actions were also allowed by a kind of analogy. The old forms of the Jus Civile were rigid, and a man might have a right, which all the world would admit to be equitable and just, without having a legal right. For instance, he might not have obtained the legal ownership of a thing for want of having observed the necessary legal forms, but he might have complied with every other substantial condition. In such case, if it were necessary, the Formula of the prætor would direct the judex to treat him as owner, and if he found the substantial facts of the case to be in his favour, to pronounce his judgment as if he were owner. Thus fictions were introduced, in devising which the Romans shewed no small ingenuity. This people had a talent for administration and a sense of fair dealing which led them to the right end, but they respected what was established, and so made their innovations take the form of that which was honoured by time and observance.

The prætor was a person from the people, and after his year of office he returned to them; he must therefore have worked under the influence of that
opinion which he shared with others, and he must have recognised in his edict those principles and customs which time and circumstances establish in all progressive communities, in which new wants and necessities are produced by new activity. Thus that which custom generated was received into the Edict, and obtained the force of law. That which did not find its way into the Edict, was fashioned into shape by the writings of the jurists, when this class of men had assumed a distinct existence. Thus Roman law was administered by the citizens, and its growth was out of the common knowledge and common consciousness of all.

The Roman word Edictum had various significations. All the higher magistrates had the power of publishing edicta, or orders, by virtue of their office; but these must be distinguished from the Edictum which the prætor published, as a kind of programme when he entered on his office. This Edictum contained general rules, according to which he declared his intention to administer justice during the year of his Prætorship. This is the Edictum Perpetuum, not so called because the rules which it contained were fixed, for this is not the fact, nor is it the meaning of the Roman word perpetuum, which simply means 'continuous,' and not perpetual in our sense. Every prætor, upon entering on his office, published his Edict, and thus the Edict was Perpetuum or continuous. There is no doubt that the prætor published edicta during his year of office, as occasion might arise in the administration of his functions, and as a consul might do in his office without any reference to the administration of justice.
The edictal rules had only authority during the office of the praetor who issued them; he had no direct nor indirect legislating power. All that he did was only by virtue of his office, and the authority of his rules expired when he became a private person. But Roman practical sense found a remedy for this apparent defect. A good rule was adopted by a praetor's successor; and such was the nature of the Roman notion of law, that what was established in this indirect way, and was conformable to good sense and common utility, was considered as well settled as if it had received the confirmation of direct legislation. The doctrine was well recognised under the Republic, and is distinctly expressed in a passage of Cicero (De Invent. ii. 22); not that Cicero's testimony is necessary to shew the nature of the edictal law, but it proves clearly that in his time it was an established principle that the Praetorian edicts, which had stood the test of time, were received as law. In this manner grew up a large body of law called Edictal law, or Jus Honorarium, upon which the juristical writers subsequently exercised their sagacity, and wrote voluminous works, in which it was methodized and commented on.

It was not, however, only by means of the formula that the praetor worked; he could act directly in certain cases* by interdict, and forbid a thing to be done, or order restitution to be made, or something to be produced. The order might be of such a nature as to settle the question in dispute; or it might merely

* Gaius iv. 139, 'De Interdictis.' For examples of the various Interdicts, and the forms of them, see Gaius iv. 139; and Dig. 43.
be preliminary to further proceedings in which the rights of the parties were to be determined.

Though the Edict of the prætor was the form in which new law was from time to time embodied, it is important to see that the chief part of this law grew out of the social relations of the people, and had its source in their customs and in the common understanding of all. And this must be so in every state which owes its social development to its own internal activity; and as we judge of a people by their social institutions, so we must affirm of the old Romans of the Republic, that a people who produced the material for so many useful rules of law applicable to all the purposes of life, was in the main a people of sound good sense, of honest purpose, a lover of order, industrious, brave, and free.

The establishment of a second prætor, a Praetor Peregrinus, at Rome (B.C. 247), was required by the circumstances in which Rome was placed with respect to the neighbouring states, and all foreigners who were in friendly relations with her. The Italians, when they visited Rome, were either aliens (peregrini), with no civil rights, or they were persons who by treaty had certain civil rights, and not others, such as the capacity to acquire and hold property (commercium), but not to contract a Roman marriage. The observation of those rules of law in their own system, which were of a general character, and not peculiarly Roman, and the comparison of them with like rules of law which obtained in other states, may have led the Romans to a consideration of those universal principles which prevail in the law of all
nations. In matters in dispute between aliens and Romans, they must also have been led to a practical acquaintance with the law of foreign states, and to the reception of such law, when it was recommended by reasons of utility, and when it was not opposed to the positive rules of their own Jus Civile. As the Romans were a practical, not a theoretical people, it seems that it was in this way, by their intercourse with other people, that they were led to the assumption or the acceptance of the notion of rules of law more general than the strict Roman rules. This was the probable origin of the notion of a Jus Gentium, or Jus Naturale, or Natural Law, which two terms are perfectly equivalent in the Roman writers. The term Jus Gentium has a reference to the mode in which the notion originated, that is, from the intercourse with other states: the Jus Naturale is the term more applicable to the induction, when made more complete by further acquaintance with the institutions of other people and by the development of more universal notions.*

It is to the extended intercourse of the Roman

* Ulpian's threefold division of law (Dig. 1, tit. 1, fr. 1, 4, 6), with respect to its sources, Civile, Gentium, and Naturale, was not the ordinary one. His assigning the Jus Naturale as common to men and other animals, when it is understood, as it probably ought to be understood, that men and animals have appetites in common, which are a foundation of social life, has a meaning; but to make it one of the three divisions of the sources of law is a strange way of treating the subject. (Savigny, System, etc. Beylage, 1.)

The Scotch Institutional writers, who were led by their own law to look to the Roman, properly enough object to this division of Ulpian, but it is plain that they have taken it in a sense which was not intended. (Erskine's Principles, p. 2, ed. 1764.)
with other people, that we must attribute the development of that part of their system, which consisted in the admission of those rules which the common understanding of mankind in all ages, and in all countries, has recognised to be right or just, or equitable, or by whatever other name the same thing is designated. The Jus Gentium acquired a positive character, by the reception among the Romans of rules derived from foreign sources, and rules founded on the reasons which were thus suggested, and which were either incorporated in the Edict, and so formed a part of the written law, or were received as part of that which the Romans understood by Mores.*

The Romans accordingly view law under its most general aspect, as comprehended under the two terms Jus Gentium or Jus Naturale and Jus Civile. Such acts and forms of contracts as were not regulated by the special rules of the Jus Civile belonged to the Jus Gentium. The Roman law required for the transfer of ownership in many cases (res mancipi) certain forms to be observed; in other cases, bare delivery (trdditio) was sufficient; and in these cases, the Roman law coincided with the Jus Gentium. But there were some institutions which were peculiarly Roman, and excluded all possibility of any

* The origin of the Jus Gentium and its development are a proof of the extension of commerce between the Romans and other people. The reception of foreign law, or its admission as valid in a Roman court, was a matter of necessity. Thus commercial intercourse prepared the way for the extension of the Roman law, and for the reception of rules founded on the experience of their utility. This subject is discussed by Savigny, System, etc., i. 105, etc., and Puchta, Cursus, etc., i. 344. 1st edit.
other system of law operating, as in the case of the Patria Potestas. The result, however, was, in the course of time, to assimilate the Jus Civile more to the Jus Gentium, or to introduce modifications of it tending to that end. And this is the progress among modern nations, where rules of law as to commercial dealings and contracts become assimilated, while the fundamental rules of law as to land and all that is interwoven with the peculiar political system retain the ancient forms.

If we inquire what is meant by the opposition between the Jus Civile and the Jus Honorarium,* or that law which the Prætor’s edict and the edict of the Curule Ædiles introduced, and what relation the Jus Honorarium had to the Jus Gentium, it appears to be this. The Jus Honorarium, as already observed, had only force by virtue of the magistrate’s office. The Jus Civile, which consisted of laws properly so called (leges), Plebiscita, Senatusconsulta, Immemorial Usage, and under the empire of Imperial Constitutions, prevailed as positive law (ipso jure). The Jus Honorarium is not identical with the Jus Gentium, for it frequently is concerned about purely Roman law, and sometimes contains principles opposed to

* Jus Honorarium is the proper term, and comprehends the edict of the Prætor Urbanus and the Prætor Peregrinus, and the edict of the Curule Ædiles. It is the law which has its source in, or rather it is that which was received into the edict of those who had the honores (the higher magistracies), and to which they gave authority by virtue of their office. As the edict of the Prætor was a more fruitful source of edictal law than that of the Curule Ædiles, the term Jus Prætorium is often used in the wider sense. (Dig. 44, tit. 7, fr. 52.)
the so-called Naturalis Ratio, a term which is sometimes used to express the Jus Gentium. Nor is the Jus Honorarium to be viewed as a division of the whole Jus Civile, the whole of the Jus Civile being viewed as opposed to the Jus Gentium; for the provincial edict and the edict of the Prætor Peregrinus contained much of the Jus Gentium. The practical meaning was this: the Jus Honorarium was the organ or instrument by which much of the Jus Gentium passed into the Roman system, and so became in a sense a part of the Jus Civile Romanorum. The Jus Civile and the Jus Gentium are then properly opposed, as two distinct sources of law; and Jus Civile and Jus Honorarium are properly opposed, the Jus Civile as that which was beyond the direct influence of the Jus Gentium, but was operated on through the medium of the Jus Honorarium.

The development of the Roman law then arose out of the peculiar condition of the people, of which the extension of the empire was one chief cause. This development was a thing of necessity, not of caprice or choice, but it was favoured by the nature of the Roman mode of administering justice. The merit of the Romans consisted in modifying, extending, and adapting a very narrow and rigorous system to the progressive wants of society; in keeping to the form and letter of the law as far as they could, and reconciling it with the change of circumstances. The original institutions of Rome were only adapted to Roman citizens. He who was not a Roman citizen had not the capacity of making himself a

* Savigny, System, etc. i. p. 118.
subject of Roman law. By the admission of persons to the citizenship in various degrees, the incapacity of aliens was so far removed: but by an acknowledgment and reception of universal principles, the Roman system obtained a practical adaptation to all useful purposes.

All law proceedings were public. The magistrates sat in open courts, where they discharged their functions. Every Roman citizen might be present, whether the matter in hand was the trial of a criminal, or the formal proceeding in civil cases before a magistrate, as the prætor, or the investigation of facts before a judex. In all essential characters, the modes of procedure in use in the time of Cicero continued to the end of the second century of the Christian æra, when great changes began to be introduced in the whole political system. But we may say that it was not till even the time of Constantine, that the old system (ordo judiciorum) of conducting suits before a judex was altered.*

* The Comitium and the Forum under the Republic were the places in which the courts were held. For the sake of convenience they were afterwards removed into Basilicæ, which contained halls, where the courts sat with open doors. These halls had the name of Auditoria, a term which was also applied to any place for hearing anything; but by the latest jurists it is used as the common term for a court of justice.

The expression Auditorium Principis is first heard of under M. Aurelius (Dig. 36, tit. 1, fr. 22). It was the court in which the Emperor presided when he sat as judge, and appears to have been in the Imperial residence. Under Diocletian, the word Secretarium was also used as equivalent to Auditorium; and, as the name implies, the sittings were not public. Though a constitution of Constantine enacted that causes should be heard
It was on this mass of positive enactments (leges), edictal law (jus honorarium), and established usage, that the good sense and honest purpose of the Roman jurists laboured. It was they who taking up the matter of law when it had become too unwieldy to be handled, except by those who made it a profession, endeavoured to reduce it to shape in those numerous treatises, the fragments of which compose the *Digest* of Justinian, and are the most valuable part of the Roman law that has been preserved.

The Roman jurists (jurisconsulti), in the time of Cicero, were persons who gave their advice orally and without pay in matters that were under litigation; they also appeared in public at certain times, and at certain places, to give their advice to those who asked for it; they opened their house for the same purpose; they drew up instruments in proper legal shape, such as contracts and testaments. They were attended by young men (auditores), who wished to acquire legal knowledge, who were trained by actual converse with their masters, were present when they gave their responses, and had the opportunity of seeing the mode in which they transacted the business which came before them. Cicero himself, by pro-

openly (before the tribunal), and not in auditorio or secretario, yet we find that afterwards and from the fifth century the courts were only open to those who had business there, and to those who were allowed by the magistrates to enter, and to certain persons by virtue of their rank or office. Under the despotism of the late Emperors, one of those Roman institutions, which is essential to the proper administration of justice, open courts, had entirely disappeared. This subject is well treated by Hollweg, *Handbuch des Civilprozesses*, ss. 10, 18.
profession an orator, and not a lawyer, attended both
the Scævolæ when he was a young man.

Q. Mucius Scævola, consul b.c. 95, and Pontifex
Maximus, was the first Roman who attempted to
reduce the Jus Civile into a kind of system. With
him begins the proper series of those writers whom
we call or ought to call the Roman jurists. His
work on the Jus Civile in eighteen books, had great
influence on subsequent writers by whom it is often
cited. He had many hearers (auditores), that is, he
allowed persons to be present when he gave his
opinions. This distinguished man, an able admi-
istrator in his province of Asia, which gratefully
commemorated his government by establishing a
holiday called Mucia, an excellent orator, a profound
lawyer, and a man of unblemished character, lost
his life in the civil wars of Marius and Sulla. He
fled from his assassins to the temple of Vesta, but
neither the sanctity of the place nor his own virtues
could save him, and the altar of the goddess was
stained with the blood of the chief pontiff. Cicero,
one of his hearers, has commemorated the talents,
and deplored the fate of this illustrious Roman (De
Oratore, i. 39, iii. 3).

Servius Sulpicius Rufus, also a friend of Cicero,
and about the same age, was consul b.c. 51. He
was, next to Cicero, the first orator of his time. A
reproof from Q. Mucius for his ignorance of the law
stung his pride, and he made himself a lawyer,
second only to Mucius, and perhaps equal to him.
He wrote near 180 treatises or chapters (libri) on law,
and he is often cited by subsequent jurists. He had

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a great number of hearers. His affectionate letter to Cicero, on the death of Cicero's daughter (Cicero, \textit{Ep. ad Diversos}, iv. 1), is a proof that his friend has not exaggerated the literary powers of Servius, and that his writings, if they were extant, would justify his reputation. The fourth book of these Epistles contains Cicero's letters to Sulpicius, and two letters from Sulpicius to Cicero.\footnote{Sulpicius died B.C. 43. Cicero pronounced his eulogy in the Senate, and on his motion, a bronze statue was erected to the memory of Servius, which existed when Pomponius wrote. (\textit{Dig.} 1, tit. 2, fr. 2, § 43.)}

We have no information about any Roman jurist so particular as about Servius, who owes the preservation of his fame to Cicero. In the \textit{Brutus} (c. 41), "Cicero attributes his excellence as a lawyer to the philosophical discipline which he had undergone. He observed that others possessed a knowledge of the law, but Servius alone possessed it as an art. This art, he adds, he could never have derived from mere knowledge of the law; but he had acquired that dialectic skill, the greatest of all arts, which enabled him to dispel the obscurity that characterized the speeches and responses of other lawyers. 'He distributed the matter of a thing into its parts; he developed by definition what was latent; he cleared up what was obscure, by correct interpretation; he first ascertained and then separated what was ambiguous; lastly, he had a measure by which to estimate truth and falsehood, and to determine what consequences followed and what did not follow from premises.' To these acquirements and to a profound knowledge of the law, he added an
acquaintance with letters, and an elegant diction. Such a combination of talent seldom appears."*  

It would be difficult to find in any country a series of names worthy of comparison with the great Roman jurists, from the time of Q. Mucius Scævola to that of Modestinus, the last who left a great name. For a period of more than three hundred years, the subject of law was elaborated by their honest purpose and clear understanding. 

It seems to have been under Augustus that the jurists obtained a position somewhat distinct from those who managed the actual business of law. The custom of paying a person for his trouble in managing any legal matter in a practical way was established, and the jurists became separated from the practitioners as respondents and writers. The usage of giving written answers (responsa) to cases was introduced, of which we have innumerable examples in the Digest; and finally, in the time of Tiberius Cæsar, we are informed that Cervidius Scævola was the first who gave written opinions, which were authenticated under his seal. Augustus Cæsar had already established a rule that certain Jurisconsulti should give responsa under his sanction (ex auctoritate ejus respondent), but it is not fully explained what was meant by this arrangement (jus respondendi). So much seems pretty clear, that a certain number of jurists received the privilege of giving opinions on cases which a judex might refer to them; and if the jurists were unanimous, their opinion was to be

* Article 'Sulpicius Lemonya Rufus, Servius' (Penny Cyclopaedia), by the author of this note.
adopted; if they were not, the judex might adopt what opinion he pleased. It is not possible to understand how this was to work, unless the privileged Jurisconsulti formed a kind of body or college. There is no reason to suppose that the non-privileged jurists were excluded from giving their advice to those who wanted it: the privilege given to the particular jurists was that of being able by their unanimous judgment to pronounce an opinion that must be received as conclusive. The authority of these privileged responsa was such that Gaius, writing in the time of the Antonines, speaks of these responsa, or opinions, as those of persons who by permission, that is of the Emperor, make rules of law (quibus permissum est jura condere: Gaius i. 7). The establishment of the Jurisconsulti, as a class distinct from mere practitioners of law, is further shewn by the fact, that from the time of Augustus there were two distinct schools (scholæ, not schools in the modern sense), which originated respectively with Ateius Capito and Antistius Labeo; though the schools were designated by the respective names of Proculiani and Sabiniani. Each of these distinguished lawyers had a long series of followers, and the different opinions of the two schools are often cited in the Digest and in the Institutions of Gaius.* Proculus was a pupil of Labeo; Massurius Sabinus of Ateius Capito.

Much has been written, and to very little purpose,

* Puchta (Cursus, etc. i. 432) has given perhaps the best account of these two schools. He has also discussed the passage of Gaius (i. 7.)
on the distinctive character of these two schools; all that is positively said by any Roman jurist is contained in a short passage in Pomponius (Dig. 1, tit. 2, fr. 2, § 47). The rest must be collected from the difference in their opinions as shewn in the particular cases which are cited.

From the time of Augustus some suppose that we may date the establishment of regular schools of law at Rome, that is, places for instruction, but it is very difficult to collect from scattered notices what the nature of these schools was.* Massurius Sabinus, a distinguished jurist of the time of Tiberius, was poor, and he received something from his hearers (auditores); but we cannot conclude from this that he was a teacher in our modern sense.

* It has been already shewn what kind of practical instruction the young Romans received about the time of Cicero. This practical part of their education was expressed by the term 'audire,' and they were 'auditores.' But such practical instruction would be useless without some preparation, and this was expressed by the word 'instituere;' whence it appears the Roman institutional treatises, such as that of Gaius, were called Institutiones. Q. Mucius Scaevola did not teach (instituere), but he gave his answers to those who consulted him in the presence of those who were desirous to listen (audire), and in this sense he taught them (Cicero, Brutus, 89). Thus Pomponius (Dig. 1, tit. 2, fr. 2, §§ 43, 47) speaks of Servius hearing (audivit) certain persons, but being taught the elements (institutus) by Balbus Lucillius; to which he adds 'instructus autem maxime a Gallo Aquilio;' whence it has been inferred that 'instruere' expresses a more complete legal education. (Puchta, 'Cursus,' etc. 1, 470, 1st edit.) However this may be, to hear (audire), and to be instituted (institui), if we may use the expression, are distinctly opposed as the two parts of the education: 'Labeo omnes hos audivit; institutus est autem a Trebatio.' But this 'institutio' was private instruction: at least there is no trace of schools, in the modern sense, either in the time of Cicero, or for a long time after.
Teachers of the law are called by Ulpian "juris civilis professores;"* and in his time, and that of Modestinus, they received a fee, but conformably to Roman notions this honorarium could not be sued for, which was probably the reason why it was paid in advance. These teachers were of course lawyers: but there is no reason to suppose that any of the great jurists whose writings are extant, belonged to this class. They occupied a higher station. Schools of law, however, did become common; and they were more necessary in the declining state of the Empire, when the great writers had ceased, and their works alone remained, and had received the authority of law. There were three great schools of law in the later period of the Empire, those of Constantinople, Rome, and Berytus in Syria; but the establishment of these schools as legal faculties is not earlier than the time of the Christian Emperors.

The course of studies before the time of Justinian is explained to some extent in the Constitution addressed to the teachers of law after the completion of the compilations made under his order, which begins "Omnem Reipublicæ nostræ sanctionem;" and the new course of instruction which he prescribes is also laid down there. The matter on which the instruction was mainly founded was the writings of the old jurists, both before and after Justinian published his plan of studies.

* Proinde ne juris quidem civilis professoribus jus dicent (præsides provinciæ); est enim quidem res sanctissima civilis sapientia, sed quæ pretio numario non sit aestimanda nec dehonestanda, dum in judicio honor petitur, qui in ingressu sacramenti offerri debuit; quædam enim, tametsi honeste accipiantur, inhoneste tamen petuntur.—Ulpian, Dig. 50, tit. 13, fr. 1, § 5.
From the time when the cultivation of law commenced among the Romans, that is, from the age of the Pontifex Scævola to the age of Charisius and Hermogenianus, under Constantine, there was a long series of jurists, many of whom are only known by name. Of the large mass of legal literature which their industry produced, little remains except that which Justinian has embodied in his Digest. This work contains four excerpts from a small book on Definitions by the Pontifex Scævola (Dig. 41, tit. 1, fr. 64; 43, tit. 20, fr. 8; 50, tit. 16, fr. 241; 50, tit. 17, fr. 73.) The rest* is from writers who lived under Augustus and his successors, but all the Roman jurists occasionally cite the writings of their predecessors.

Many of these jurists had a great reputation, and filled high offices under the Emperors; some of them were engaged in the administration of the law, and were the advisers of the Emperor in all difficult matters that were referred to him, either directly or by way of appeal. They thus had a direct influence on the interpretation of law and on legislation, but an indirect and greater influence by their writings. Some of the best of the Roman Emperors also had a good legal education, and were competently acquainted with the general principles of the Roman law. In their communications with their legal advisers they often call them their friends. The judgment which the Emperors sometimes pronounced in person was in

* There is a single fragment of C. Aelius Gallus, a contemporary of Cicero, and fifty-four excerpts from Alfenus Varus, a pupil of Ser. Sulpicius. The excerpts from Ulpian, who lived under Septimius Severus and Alexander Severus, are much more in amount than those from any other writer. Those from Paulus and Papinian stand next.
fact the judgment of their jurists; and their aid was required in the formation of the Imperial Rescripts and Constitutions. Septimius Severus, a soldier of fortune, and a man of ability and energy, though his character is stained with the imputation of cruelty, had a legal education, and while he was Emperor he used to hear and decide cases. He was the pupil of Cervidius Scævola, and the fellow-student of the illustrious Papinian.

These jurists, then, were both authorized expounders of law, advisers in legislation, and writers of law treatises, which, owing to their political position and high character, obtained an authority which no other law writers have since enjoyed. Their writings, as excerpted in Justinian’s Digest, finally received the character of law by the pleasure of the Emperor.*

Their writings were of the most diversified kind, from treatises in single books to large works on various branches of the law. The jurists commented on the Twelve Tables, on the Praetorian Edict, and on particular laws (leges), and Senatusconsulta. They wrote commentaries and notes on the works of prior jurists, or made epitomes of them. They composed elementary treatises (elementa, institutiones), of which the extant treatise of Gaius appears to be

* Before this time they were included under Jus. They were now Lex; that is, the whole mass of excerpts contained in the Digest, by receiving the Emperor’s confirmation, became a work of legislation. Hence it has been usual to call the several fragments which are excerpted, Leges; but though the whole compilation obtained the force of law, or a Lex, by the Emperor’s command, the term Laws (leges) is not applicable to the several excerpts, and it is better to cite them as fragmenta, with each author’s name, as is now sometimes done.
the earliest; and small manuals ( enchéiridía) of various kinds, with books of rules ( regulæ) and definitions ( ἐρωτήματα, definitiones). They also made collections of cases and opinions ( respondaa, epistolæ), and other works of a like kind ( sententiae); and large works under the name of Digesta. This enumeration will give some idea of their activity, and of the varied kind of their labours. It will also shew that their writings were practical, and what we have of them proves that their merit lay rather in their successful method of applying legal principles to cases, than in giving definitions, or reducing the whole matter of law into a strictly scientific form. One merit they have in a high degree; they express themselves with clearness and brevity. They write, as a lawyer should write, in a plain and popular language, with no further employment of terms of art than the matter requires.*

Something had been done before the time of Justinian towards reducing into order the great mass of Roman Law. Among the projects of the Dictator Cæsar, which were sufficient to occupy not one man’s life but many generations, was a scheme for the arrangement of the Jus Civile (Suetonius, Julius Cæsar, 44), that is the Leges, Plebiscita, and Senatus-

* A general view of this whole branch of literature is contained in Zimmern’s ‘Geschichte des Römischen Privatrechts,’ vol. i., but in a most repulsive form, though perhaps well enough suited to the object of his book. A more useful sketch for general purposes is contained in Puchta’s ‘ Cursus,’ etc., vol. i., pp. 417-498, who denies that the philosophy of the Greeks, by which the Stoical is meant, had any material influence on the jurisprudential writers, and with good reason. It is an idle fancy merely, and rests on no sufficient evidence.
consulta. Ofilius, a friend of Cæsar, and a jurist, was the first who attempted with any care to make a compilation of Edictal law, or of the Jus Honorable (Pomponius, Dig. 1, tit. 2, s. 2, fr. 2, § 44); whence we perceive that the design of a collection of law comprehended two distinct things, an arrangement of the positive law which was founded on direct legislation, and an arrangement of that branch of the law which was formed by the Praetor's Edict, or arose out of actual practice.*

The design of the Dictator was not accomplished, and the compilation of Ofilius was the work of an unauthorized person. But in the time of Hadrian, a distinguished jurist, Salvius Julianus, who himself filled the office of Praetor Urbanus, made an arrangement of the whole body of Edictal law by order of the Emperor. This compilation was not merely a scientific treatise; it was a work that received the authority of the Roman Senate, on the recommendation of the Emperor (A.D. 131). The work was arranged under titles, according to subjects; and it continued, under the name of Edictum Perpetuum, or Edictum Hadriani, to be an authorized body of Edictal law, and one of the main subjects for the study of jurists. Julianus himself wrote a commentary on it, and it was commented upon by Ulpian, and others.†

* Among the evidences of Cicero's literary activity, Gellius (i. 22) mentions a treatise, 'De Jure Civili in artem redigendo.' Cicero might have seen the use of such a thing, but he had not the knowledge for executing it.

† There has been much confusion about the Edictum compiled by Julian and confirmed by Hadrian. There is no doubt that
Before the legislation of Justinian attempts had been made to give the authority of positive law to the writings of some of the Roman jurists, in order to guide the helplessness of those who had to interpret the law. This was done by a Constitution* of Theodosius II. (A.D. 426), which was promulgated in the Eastern Empire, and confirmed for the Western

this Edictum was compiled by authority, and that it was sometimes called Perpetuum, though the name Perpetuum could still be correctly applied to new Edictal law, in the old sense of the term Edictum Perpetuum; for it is a mistake to suppose that no new edicts were published after the Edictum was compiled by Julian. It was sometimes called the Edictum Hadriani. The activity of Hadrian as an administrator of law, and as a reformer of the judicial organization, are undoubted. He is said to have given the Athenians a code compiled from the legislation of Draco, Solon, and others. (Böcking, Institutionen, i. p. 30, n. 11, 12. Puchta's views are contained in his 'Cursus,' etc., i. s. 114, 1st edit.)

The historical importance of Hadrian's Edictum, as an authorized compilation, appears from the terms in which it is mentioned in Justinian's Constitution, Tanta, etc. s. 18 (Cod. i. tit. 17). It appears from another Constitution, Dedit, etc., s. 18 (Cod. i. tit. 17), to have been a small book (brevis libellus). This will explain why Julian himself wrote a commentary on it. Hadrian's judicial organization of Italy consisted in making Rome and its neighbourhood one district, and dividing all Italy into four other districts; and it is probable that the compilation of the Edict was intended to further the administration of justice all through Italy. The Praetor Urbanus had Rome and its district; but in the other four districts justice was administered by magistrates called Consulares, and subsequently, in the time of Aurelius, Juridici. Whether the Edictum of Hadrian was promulgated in the provinces, and whether it contained other Edictal law besides that of the Praetor Urbanus, is not known. Justinian, in one of his Constitutions, simply calls Julian the 'Ordinatorem Edicti Praetorii perpetui.' (Cod. 4, tit. 5, s. 10.)

* Constantine had already done something of the kind.
Empire by Valentinian III. \textit{(Cod. Theod. i. 4. De Responsis Prud.)} The constitution declared that the writings of Papinian and Paulus, Gaius, Ulpian, and Modestinus, should, with some few exceptions, have the force of law. The judge was to follow the opinion of the majority of these jurists, when they were not unanimous: when they were equally divided, the opinion of the body to which Papinian belonged, was to prevail. This was a miserable attempt to help the incapacity of a judge, and is evidence of the low state of legal studies and legal practice.*

There was little direct legislation after the time of Augustus, in the old form. The mode of legislation was by Senatusconsulta, the terms of which were in fact prescribed by the Emperor in a formal address (oration). The Imperial Rescripts and Constitutions were also a source of law, and formed a large body. There were unauthorized compilations of Imperial Rescripts and Constitutions before the time of Theodosius II. About the middle of the fourth century two jurists, Gregorianus and Hermogenianus, each made a collection of Imperial Constitutions, or rather chiefly of Rescripts; and some fragments of these two compilations still remain.†

The first authorized compilation of Imperial Constitutions was that which goes under the name of the Theodosian Code. Theodosius II, appointed a com-

* Puchta, \textit{Cursus, etc.} i. § 134.

† These two jurists are often incorrectly named Gregorius and Hermogenes. The fragments are contained in Schulting, \textit{Jurisprud. Vet. Antejust.} Leiden, 1717; and in the \textit{Jus Civile Antejustianianum}, Berlin, 1815.
mission of jurists at Constantinople, to collect and arrange the Constitutions of the Emperors, from the time of Constantine. The Code, which consisted of sixteen books divided into titles, was promulgated in the Eastern Empire A.D. 438, and in the same year was accepted by Valentinian III. and the Roman senate as law in the Western Empire. In the year 476, the Western Empire was destroyed by Odoacer, and thenceforth the Roman dominion was limited to the Empire of the East, which prolonged its existence till it was overthrown by the Turks in 1453.

Though the Western Empire was destroyed by the Northern nations, who established new states, the institutions of Rome still survived. The conquerors and the conquered people lived together: the Romans had still their own law; the Germans had their customs. The Roman subjects of different Germanic states had the same Roman law; and the several Germanic states had a law, which, if not the same, was in most respects the same. Three compilations of Roman law were made in the West before Justinian commenced his labours in the Eastern Empire. The Edictum of Theoderic was promulgated at Rome, A.D. 500, and intended both for the East Goths and his Roman subjects. The Breviarium Alaricianum, which was compiled by the command of Alaric II. king of the Visigoths, was promulgated in A.D. 506. The Lex Romana was compiled between A.D. 517 and A.D. 534, for the use of the Roman subjects in the Burgundian kingdom.

From the time of Theodosius II. to the reign of
Justinian, who became emperor of the East in A.D. 527, nothing was done in the Eastern Empire towards arranging the body of the Roman law and providing for legal instruction. Justinian had both extraordinary activity and good abilities; and the men whom he commissioned to make his compilations, though not equal to the best jurists of the earlier empire, had a sound knowledge of the law and practical good sense. At this time Constantinople and the eastern schools kept alive the study of the law, which in the Western Empire had ceased. If we consider the circumstances under which Justinian's commission accomplished their labours, and the objects which they had in view, we shall not be disposed to criticise their work too severely. Justinian perhaps did the best thing that could be done at the time to form a body of law adapted to the use of his extensive empire. His plan of study was by oral instruction in the law schools, but the instruction was to be limited to the matter contained in his compilations, and to explaining it in such way as to remove difficulties. He forbade the writing of any new books, for one of the great evils that his Digest was to remedy was the overwhelming mass of juristical writers. Accordingly his Digest is a compilation made up of excerpts from the principal jurists, sufficient according to the view of Justinian and his commission for the actual circumstances of the time, and specially for the administration of the law. In this way the writings of the Roman jurists, as excerpted in the Digest, received from the emperor's confirmation the authority of positive law, which was to remain fixed and unchangeable.
Not only did he forbid the writing of any legal treatise, but he would not allow even any commentary on the text of the Digest to be made by any person, under the penalty of having his writings destroyed, and being himself charged with the offence of falsification (falsitas). It is clear from the terms of the Constitutions that Justinian's notion was that he had made a perfect body of law, and that all comment would only unsettle and pervert it; he legislated not only for the present, but for the future, and the activity of the human mind and the progress of society were to be arrested by his unchangeable rules.

It is the compilations of Justinian which are now received as the Roman law in Europe, and not any other writings or compilations of Roman law. These compilations compose what is commonly called the *Corpus Juris*, which consists of the Digest or Pandects, the Code, Institutiones, and the separate Novellae, which Justinian published after the promulgation of his three compilations. They are received in Europe with the limits and in the form which they assumed in the school of Bologna. Consequently, all prior Roman law, which is not included in the compilations of Justinian, has now no practical application, though it may be used for other purposes. Three collections of Novellae have come down to us, but that which is received is the Corpus Authenticum, or Authenticae, and in the abbreviated form which was given to it in the school of Bologna with the name of Vulgata. There are also included in the Corpus Juris the Authentica of the German emperors, Frederick I. and II., which were received into the body of the
work at Bologna. Of the whole law contained in this great collection, part is inapplicable to modern times; for instance, that which relates to the State and the various functionaries, and also that which relates to crimes, to procedure, and some other heads. The Roman law has undergone certain extensions and modifications in the Canon law, which, like the compilations of Justinian, has been generally received in Europe. Those collections, which can be considered as generally received, are the Decretum of Gratian, the Decretalia of Gregory IX., the Sextus, and the Clementine. The Extravagantes are generally included in the collection of the Corpus Juris Canonici; but as to their reception there is difference of opinion (Savigny, System, etc., i. 75). On the mode of quoting the Roman canon law, see the note (p. 2) in Hallifax's Analysis of the Roman Civil Law, 4th ed. 1795.

It is an idle imagination that the Roman law was ever forgotten or out of use in Europe. It has prevailed up to and since the time of Justinian without interruption; but it was not till the twelfth century that the study of it as a science was revived in the school of Bologna, of which Irnerius, who lived in the beginning of that century, is considered to be the founder.* He introduced the practice of explaining

* Accursius is the last of these Glossatores; he died in 1260. His son Franciscus Accursii (sometimes incorrectly called Franciscus Accursius, for he was Francis the son of Accursius) was in England, probably from about 1274 to 1281, and employed by Edward I. His residence was at Oxford. In 1282 he was teaching law at Bologna, which makes it probable that he had taught at Oxford, though there is no direct proof of it, nor of his assisting Edward in his legislative measures, though it is certain that it
the text of Justinian's compilations by short notes or glossae, in which he was imitated by his successors in the school, who have accordingly received the name of Glossatores. The school of Bologna founded the study of the Roman law in Europe, and thus made it a law for all civilised nations. The Franks, who were the masters of Gaul in the time of Justinian, had for their Roman subjects the Breviarium and Theodosian Code; and both in Italy and France the use of the Roman law continued uninterrupted through the Middle Ages. Even in the eleventh century, before the Glossatores commenced their labours, Roman law is said to have been taught in France by Lanfranc; afterwards Archbishop of Canterbury, and the extant work of Petrus (Exceptiones, that is, in Middle Age Latin, Excerpts, Legum Romanorum) was compiled about the middle of the eleventh century: it is a systematic view of the law as it then existed, and mainly of Roman law. The sources from which it is taken are the Institutions of Justinian, the Digest, the Code, and the Novellae according to the epitome of Julian.* It can hardly have been this work, but rather a complete copy of the Corpus Juris, which John of Salisbury (De Nugis Curialium, p. 672, edit. Leiden, 1639,)

was for his legal knowledge that he was brought to England. Dante gives him a bad character, and puts him in an appropriate place (Inferno, xv. 110). On the Accursii, see Savigny, Geschichte des Röm. Rechts im Mittelalter, v. 237-307, and the Biog. Dict. of the Society for the Diffusion of Useful Knowledge, 'Accursius.'

describes as brought into England by the train (domus) of Archbishop Theobald.*

The History of the Roman law in Britain is the strangest part of its history. The island was fully reduced by Agricola, at the close of the first century, and it continued to be a Roman province for about three hundred years. Towns grew up under the Roman dominion, and Roman colonies were settled. Roads were made, some of which still exist; the mines were worked; the British learned the language of their conquerors, and all the Roman settlers, at least, must have had their property and their contracts regulated by Roman law. If Britain was Romanized less than Gaul, it is still certain that the Roman law must have been the general law of the country, for there was no other. Though the Roman dominion was succeeded by a period of barbarism, it is not conceivable that all Roman institutions were destroyed and replaced by

* "Tempore regis Stephani a regno jussæ sunt leges Romanæ, quas in Britanniam domus venerabilis patris Theobaldi Britanniarum primatis asciervat. Ne quis etiam libros retineret edicto regio prohibitum est, et Vacario nostro indictum silentium; sed deo faciente, eo magis virtus legis invaluit, quo eam amplius nitebatur impietas infirmare." (Lib. viii. c. 22.)

Lanfranc is said to have been born at Pavia in 1005, and to have studied at Bologna. He was afterwards Abbot of Bec, in Normandy, where he is said to have taught Roman law. He was made Archbishop of Canterbury by the Norman conqueror in 1070. He died in the reign of William Rufus, in 1089.

According to Duck (lib. ii. c. 8, Pars ii. 27) we hear nothing of Roman law in England under William I. and his successor Rufus. Theobald was Archbishop of Canterbury under Henry I. and Stephen. Vacarius was teaching Roman law at Oxford in 1149. It was Theobald who sent Thomas à Becket to study Roman law at Bologna.
others. The Saxon invaders had their own customs, which, after their conversion to Christianity, were formed into a code, under the authority of Ethelbert, king of Kent; but it is so meagre that it does not suffice for any of the purposes of property, contracts, or testamentary succession, and we must assume that the Saxons took this part of the law as they found it. In fact, the whole body of Saxon laws is mainly a rude system of criminal law and of police. The connection of the clergy with Rome, and their being possessed of all the learning of the age, allow us to infer that the Roman law at least, as then known in France and Italy, could not be unknown and without its influence in England. Indeed, it is consistent with all we know to suppose that the clergy were the cultivators of Roman law in England, from the time of Augustine's mission till the great changes brought about by the Reformation of Henry VIII.*

* Mr. Spence remarks ('Equitable Jurisdiction of the Court of Chancery,' p. 712) that "the substitution of lay for ecclesiastical chancellors furnishes a new era in the history of the court (of Chancery); and, though it ultimately led to the establishment of our present enlarged and comprehensive system of jurisprudence, the interval that took place between the appointment of Sir Thomas More and that of Lord Nottingham may perhaps be considered as the most unfavourable part of its history." At a time when the Chancellor was a clergyman, and the Master of the Rolls, and the Masters in Ordinary were appointed from those among the clergy who were learned in the civil law, the direct use and application of the Roman law in the Court of Chancery must have made the study of it necessary both for the judge, the masters, and those who practised in the court.

Hooker (Preface to Ecclesiastical Polity) seems to allude to the decline of the study of the Civil law in England. "Your opinion concerning the Law Civil is, that the knowledge thereof might be spared, as a thing which this land doth not need. Pro-
The history of the teaching of Roman law in England commences with the Lombard Vacarius at Oxford, in the reign of Stephen, from which time its study has never entirely been interrupted, and the law has never ceased in some degree to operate upon our own. Yet, so little has this fact been noticed that the best Continental writers speak of the Roman law as having no effect in England, which for three centuries was a Roman province; and while Germany, which was never conquered by the Romans, has received through the Germanic empire the Roman law as its common law, England is supposed to have escaped its influence.

It is no part of my purpose to trace this history. It is a matter of inquiry, partly literary and partly legal, which has lately been done with great care.* If a man competently acquainted with the civil law should look into our own, he would first be struck with the great number of Latin terms, some of which are used in the Roman sense, and some are much perverted from their original meaning. If he examined the rules of law, and chiefly those relating to property, contracts, and the interpretation of testators in that kind being few, ye are the bolder to spurn at them, and not to dissemble your minds as concerning their removal; in whose studies, although I myself have not much been conversant, nevertheless, exceeding great cause, I see, there is to wish, that thereunto more encouragement were given, as well for the singular treasures of wisdom therein contained, as also for the great use we have thereof, both in decision of certain kinds of causes arising daily within ourselves, and especially for commerce with nations abroad, whereunto that knowledge is most requisite."

* 'The Equitable Jurisdiction of the Court of Chancery, by L. G. Spence, Esq., one of her Majesty's Counsel, London, 1846.'
ments, he would often find them the same, even if the terms differed; and this not only in that part of the law called Equity, and in the law administered in Ecclesiastical courts, and some other courts, but also in what we call the Common Law. In what manner a foundation was laid for this extensive reception of the Roman law in the courts not ecclesiastical, is made quite clear when we examine Bracton's * Treatise written in the reign of Henry III., and both as to method and matter founded on Roman originals.

Reference to Bracton is now nearly disused, though Coke, in his Commentary on Littleton, cites Bracton very often; and the quotations which he gives from Bracton are sometimes pure transcripts from the Corpus Juris, which Bracton embodied in his work. Much of the law that is contained in Bracton has been altered in the course of time, but his work certainly contains the foundation of a large part of our system, and we are still elaborating principles contained in it.

* Mr. Spence, in dissenting from Reeves's statement, that what Bracton has taken from the Roman law would perhaps not fill three whole pages of his book, "and it may be doubted whether they be such as can mislead the reader;" and his remark that where Bracton states the Roman law "with most confidence, it would seem to be rather alluded to for illustration and ornament, than adduced as an authority," 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 times, which may not be traced to the Roman law. Bracton's direct references plainly do not comprise nearly the whole of what he adopted immediately from the Corpus Juris." 'Spence's Equitable Jurisdiction of the Court of Chancery,' p. 132. It is plain that Reeves knew nothing of the sources of Bracton. His language
It is not then solely for its real merits, or for its supposed merits, which are sometimes a little exaggerated, that the study of the Roman law is to be recommended now in England. There is another reason; it is the foundation of a large part of our own system, and is still almost imperceptibly working upon it. But if it work unseen or misunderstood, it can only work mischief. The Roman law is not to be studied as a mere curiosity, or in that part of it which has no application to modern times; but it should be studied among other purposes to know what we have of it, how far and in what sense we have received it, and where we have misunderstood and modified it. Many heads in the Roman law are and must be considered as subsidiary to our own law as it now is, as offering rules and principles, which we may adopt when we have no positive rule of our own. Not that this should be done in an arbitrary way, or without a good reason; but a reason for applying to it, and for using it, is this: Whenever we have rules of law, or large heads of law, and we have several such, which are undoubtedly of Roman origin, and which have got into our system in a way very like that in which new rules of law got into the Prætor's Edict, by the decisions of judges, and not by direct legislation, it is fit that we should look to

is vague, and is that of a man who must say something, but does not exactly know how to say it. The only part of his statement which approaches to distinctness is, that what Bracton has taken from the Roman law, "would perhaps not fill three whole pages of his book;" and this statement is not true. I have shewn in a general way, in an Appendix, what Roman law there is in Bracton's first three books.
the foundation of these rules in cases of difficulty; and, as we have received the Roman law, we should recur to it in its sources, when we find that we want it. It is not, therefore, to yield obedience to its authority that we appeal to it; but in order that we may fully understand what we now have of it, and may make the best use of it for the future. If we merely apply to the Roman law, because we may now and then pick out of it something that may serve our purpose, or seem to do, there is the same reason for applying to any other system of law. The true reason for using the Roman law is, that we have largely used and received it; and, if we were to act consistently, we should accept the Corpus Juris as authority in all cases to which it applies, and where we have no fixed rules.

Some exact knowledge of the Roman law cannot be got without labour, nor without a study of the original sources; but this should be no obstacle to those who are preparing for a liberal profession, which has always numbered among its members the best-instructed part of the people; especially as the most valuable of the compilations of Justinian is made up from those Latin writers whose language is a model of clearness and precision, and forms the elementary education of all those who receive a good school education.

Not only some exact knowledge, but a considerable knowledge of the Roman law, as received in Europe, is requisite for those who in any way are engaged in legal practice connected with those foreign dependencies of Great Britain in which the
Roman law is used. A man must know it, simply because it is the modified law of those countries, just as he must know the law of England, or some part of it, if he practises English law. The shortest and the only sure way of obtaining a competent knowledge of the Roman law, as it exists in any modern country, is to know what the Roman law is in the compilations of Justinian.*

• Demarara, Berbice, and Essequibo, which now form the government of British Guiana, the Cape of Good Hope, and the islands of Ceylon, Trinidad, and Sainte Lucie, and the Mauritius, retain the laws which they had when they became British possessions. In British Guiana, the Cape, and Ceylon, this is the Roman Dutch law; in Trinidad, the law of Spain, which is chiefly derived from the Roman law; in Sainte Lucie, the Coutume de Paris, which also prevails in Lower Canada; and in the Mauritius, the Code Civil. (Burge, ‘Commentaries on Colonial and Foreign Laws,’ etc. i. p. xiv.) The Civil law is also the basis of the law of Malta.

If any person will turn over the titles of the chapters in Mr. Burge's work, he will see to what questions the Roman law is now applied.

As to the reception of Roman law in the Ecclesiastical courts, the 'Admiral court or jurisdiction,' and the 'Military court,' Hale's History of the Common Law (chap. 2) may be consulted, and Strahan's Translation of Domat's Civil Law, 2 vols. fol. London, 1722. Strahan complain's "that one of the noblest of the human sciences, and which contributes the most to cultivate the mind and improve the reason of man, as that of the Civil Law does, should be so much disregarded, and meet with so little encouragement." Hooker's complaint, about a century before, is to the same effect. Yet there have never been wanting persons who cultivated the Civil law in England, though its general study has been neglected.

Duck, 'De Usu et Authoritate Juris Civilis Romanorum,' Leiden, 1654, lib. ii. c. 8, etc., gives a sketch of the history of the Roman law in Britain.
I am not aware that there is any complete account of what
the Treatise of Bracton contains, and of the Roman sources
from which so much of it is derived.* A superficial ac-
quaintance with it, and I pretend to no more, will shew
that Bracton was well versed in the Roman law, and that
he incorporated a large part of it in his work.

He divides his work De Legibus and Consuetudinibus
Angliæ into Five Books; but the general arrangement is
that of the Institutiones of Justinian. The First Book treats
De Rerum Divisione, in twelve chapters. The Second
Book treats De Acquirendo Rerum Dominio, in forty
chapters. The Third Book treats, first, De Actionibus, in
twelve chapters, which include Contracts (Obligationes),
and then De Corona, or on the Placita Coronæ (Crimes),
in thirty-seven chapters. The Fourth Book treats De
Assisiæ novæ dissecysinæ, in fifty chapters; De Assisiæ
ultimæ præsentionis, in nine chapters; De Assisiæ Morti
antecessoris, in nineteen chapters; De Consanguinitate, in
seven chapters; De Assisiæ utrum, in eight chapters; De
Actione Dotis, in twenty chapters; and De Ingressu, in
eight chapters. The Fifth Book treats De Recto, in six
chapters; De Essoniis, in seventeen chapters; De Defalts,
in twelve chapters; De Warrantia, in seventeen chapters;
and De Exceptionibus, in thirty-three chapters.

The Table of Contents shews that the work consists of
two chief elements: the Roman law, of which a great part
of the first three books consists, and of something else which

* Reeves (History of the English Law, ii. 86) has given what he calls
"a prospectus of the work;" but it contains little more information than
the Tractatus and Chapters which are prefixed to the work of Bracton.
composes the chief part of the De Corōna, and of what follows, though Roman law, is mixed up with this part also.

In his Preface (Chap. I.) Bracton states that his object in compiling a book of the Leges and Consuetudines of England, is to correct the errors of those who become judges before they have learned the law, and decide cases rather by their own pleasure than the authority of the laws; but his object also was the instruction of learners, for whose use he examined the ancient judgments of those learned in the law (vetera judicia justorum),* their acts (facta), consilia and responsa, which he reduced into one sum or whole. He says nothing here of the Roman law; he professes to give the laws and customs of England, as then established. In his second chapter his object is more distinctly expressed: "The matter of my book is the facts and the cases (casus) which daily arise and happen in the realm of England, that it may be known what action is suitable, and what writ (brevre), according as the plea (placitum) shall be real or personal," etc. Again, he says, "It is the design of the author to treat of these things, and to instruct and teach all who desire to be taught, in what way and in what order suits and pleas are decided according to the English laws and customs," etc. These laws and customs, he says, are efficient by the authority of the kings; that when they have been approved by the consent of those who use them, and the oath of the kings, they cannot be changed, except by the common consent and counsel of those by whom they have been promulgated. If this is not all quite clear, it is however clear that Bracton proposed to treat of the law as it then existed. He says that the law might be improved without this common consent, by which of course he means, as the context shews, by the decisions of judges. New cases were to be determined by like cases, if there were like cases; if they were

* Justorum does not mean just. It means those 'qui in jure versantur.'
unlike anything that had been determined, the decisions (judicia) were to be referred to the Magna Curia, to be there determined.

The First Book, which consists of eight folios in the folio edition of 1569 (Londini, Apud Richardum Tottelum) contains much, both of matter and words, taken from the Corpus Juris, with some additions and variations. The only way to shew fully how much of the Roman law Bracton incorporated in his book would be to have an edition printed with the references to the Corpus Juris. I shall here only select a few passages, which may be compared.

The fourth chapter, De Justicia et Jure, etc., may be compared with the Digest 1, tit. 1, De Justitia et Jure, and the Institutiones, tit. 1, De Justitia et Jure.

The fifth chapter, Qualiter dividitur Jus, may also be compared with the two titles above mentioned. Bracton's remarks on the Jus Naturale are more pertinent than those of many who have touched on the same matter. Bracton does not follow his Roman authorities literally. His object was, among others, to make a law treatise (de jure scribere), and he uses his materials in this part of his work as an Institutional writer.

The sixth chapter, De Prima divisione personarum, may be compared with the Digest 1, tit. 5, De Statu Hominum, and the Institut. 1, tit. 3, De Jure Personarum, and tit. 4, De Ingenuis. He adopts a rule of Roman law, such as "servi aut nascentur aut fiunt," and then gives its explanation according to the English law.

The ninth chapter, De quarta divisione Personarum, etc., Qui sunt sui Juris, Qui sunt alieni Juris, etc., may be compared with the Digest 1, tit. 6, De his qui sui velalieni Juris sunt, and with the Instit 1, tit. 8.

The tenth chapter, Qualiter dissolvitur patria potestas, etc., may be compared with part of the seventh title of the First Book of the Digest, and with the Institut 1, tit. 12, Quibus modis Jus Potestatis solvitur.
The twelfth and last chapter of the First Book, De Rebus and Rerum divisione, is purely Roman, and is taken from the eighth title of the First Book of the Digest, De Divisione Rerum et Qualitate, and the first title of the Second Book of the Institutiones, which has the same heading, De Rerum Divisione, etc.

These chapters also contain occasionally short passages from other parts of the Corpus Juris. Some chapters of Bracton, as chap. XI., De diversis condicionibus personarum tenentium in dominico domini regis, of course have a different origin. The whole, however, is blended into one system.

The Second Book, De Acquirendo Rerum dominio, is a curious compound of Roman law and Feudal usages. Bracton's plan, however, is to derive his general principles from the Roman law.

I shall indicate in two parallel columns the Roman sources of some parts of this book.

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* He treats of treasure trove under the Pleas of the Crown.
† An instance will here shew Bracton's method, and how the principles of the Roman law are worked into his book. After stating that a gift (donatio) must not be made under the influence of fear or compulsion, he cites a case in his own times, and then lays down what "fear" is
BRACTON.
Chap. 6.—Donations, absolute and conditional.

Chap. 9.—If a husband can make a gift to his wife during marriage.

Chap. 17.—On possession, and what is possession.

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Chap. 22.—How possession is acquired by usucaptio.

Chap. 26.—De donationibus inter mortuos and mortis causa;† and on the testamentary power (testamenti factio, a Roman term.)

CORPUS JURIS.

Dig. 39, tit. 5, contains the general doctrine of gifts, but Bracton’s chapter is chiefly special.

Dig. 24, tit. 1. De Donationibus inter virum and uxorém; and Cod. 5, tit. 3, s. 20, Quum multæ, etc.*

Dig. 41, tit. 2. De acquirendá vel amíttenda possessione.

Ditto.

Dig. 41, tit. 3. De Usurpationibus and Usucapiónibus; Instit. 2, tit. 6.

Dig. 39, tit. 6. De donationibus mortis causa.

(metus), which he takes from the Digest 4, tit. 2, Quod metus causa, etc. There is an odd blunder here in the text of Bracton: he has “nani,” where the Digest has “vanij;” it is merely a mistake of the printer or copyist.

* In the edition of Bracton that I have referred to, it stands “L. cum milite.” The text of Bracton is corrupted in many places by the ignorance of the copyists. Bracton supports the cases decided in his own time by reasons drawn from the Roman law, from which it is to be inferred that the Roman law was made the ground of the decisions.

† All the principles are derived from the Roman law; and the words of the Digest are introduced into the chapter, but without any reference to the sources. Here, as usual, the text of Bracton is corrupt. For instance, he takes his definition from Ulpian, Dig. 39, tit. 6, fr. 2, but the words ‘cum quis nullo présents periculi metu conterritus’ etc. are printed ‘cum quis nullo présents mortis periculi metu conteritur,’ etc. In this chapter, he observes, ‘what has been said holds good, unless there is some contrary custom; and he instances the custom of London. He
Bracton.

Chap. 27.—On acquisition by purchase, and on the arrhae or earnest.∗

Chap. 28.—De Locato et Conducto (letting and hiring).

Chap. 29.—On the succession of the heir.†

Chap. 31.—De gradibus cognationis.

Chap. 32.—De partu suppositori.‡

Crpus Juris.

Dig. 18, tit. 1. De Contrahenda emptione and tit. 6. De periculo et commodo rei venditae, Instit. 3, tit. 23.


The thirty-fifth chapter of the Second Book treats of Homage and Fealty, and contains the law which we find in Littleton (sec. 85-94, Homage and Fealty). The terms in which the homage is done and in which the oath of fealty therefore distinctly affirms that the Roman law, as to donationes mortis causa, was then the law of England; and it is probable that such gifts at that time were more common than now.

∗ Bracton has here changed the rule of the Roman law, as to loss or damage happening to the thing sold, and also as to advantage accruing to it.

† Bracton, in this chapter, takes various definitions from the Roman law, and correctly explains the notion of universal succession.

‡ This chapter treats, among other things, of the case where a woman declares that she is with child, in order to deprive the heir of his inheritance. Bracton gives the various writs applicable to this and other cases mentioned in this chapter. The original is the part of the Digest above referred to. The Edict of the prætor is given at length by Ulpian, and the Rescript of Antoninus and Verus, in the case of a woman who was divorced, and denied that she was pregnant, while her former husband maintained that she was. This is an instance in which a writ is derived directly from the Roman practice, and it is one that exists at the present day. The rest of the Second Book of Bracton treats mainly of matters that are peculiar to the customary law of England. Coke (Co. Litt. 86), treats of the writ De Ventre Insiciendo, and refers to Bracton, Britton, and Fleta, but, as usual with him, he says nothing of the Roman original.
is taken, are substantially the same in Littleton, and in Bracton; and Coke here cites Bracton. This chapter, as we might suppose, contains nothing Roman.

But in the 39th chapter, where he treats of Dos, Bracton defines Dos to be a gift from the husband, 'propter nuptias,' either out of his own property, or the property of father, mother, brother, sister, or other friend, with their consent; and this is called Dos. But it cannot be perfected before the death of the husband. Dos, again, he says, is 'quod liber homo dat sponsae sum ad ostium ecclesiae propter nuptias futuras et onus matrimoni et ad sustentationem uxoris et educationem liberorum cum fuerint procreatii, si vir prae-mortiatur.' Rationabilis Dos is a third part of what the husband holds 'in dominico suo et ita in feodo quod eam inde dotare poterit die quo eam desponsaverit.' Dos must be given 'in facie ecclesiae et ad ostium ecclesiae.' He then divides Dos into two species, Profectitia et Adventitia, according to the Roman system (Dig. 23, tit 3, fr. 5). Profectitia is Maritagium (et terra sic data poterit dici maritagium et patrimonium mulieris). This Dos is given by the father, or mother, or 'alia parente in ipso contractu profilia maritanda.' Dos Adventitia may also be called 'Maritagium; and this is given 'ab aliis quam a patre vel matre sive parens sit sive extraneus.' There is here some confusion in Bracton. The Profectitia should be confined to father or mother, and the words 'alia parente' be omitted. Ulpian (Frag. vi. 3), says, 'Dos aut Profectitia dicitur, id est quam pater mulieris dedit; aut Adventitia, id est, qua a quovis alio data est.'

Bracton proceeds to say there is also a 'Donatio propter nuptias, quod sponsus dat sponsae ad ostium ecclesiae et de qua hic agitur, die desponsationis. Et hoc proprie dicitur

* Fleta says the same, but he merely copies Bracton, as he often does.
† 'Non enim valet constitutio facta in lecto mortali, vel in camera,' etc. Thus the passage stands in Bracton, and so it is cited by Coke (Co. Litt. 34a). In Butler's edition there is this note upon it, 'Quære, if this should not be read 'Lecto maritali.' There is no doubt that it should.
dos mulieris secundum consuetudinem Anglicanem, et talem
dotem lucratur vir uxore præmortua, et uxori remanet ad
vitam viro præmortuo et lucratur sic vir dotem uxore præ-
mortua.’ He adds that a woman sometimes gets Dos after
the death of her husband, when it has been assigned accord-
ing to the customs of the cities and counties, as in Kanc.
(Kent?), and London, Lincoln, and elsewhere. ‘And,’ he
says, ‘you must know that the maritagium ob causam matri-
monii always remains to a woman and her heirs, if she
has heirs; but if not, it reverts for defect of heir.’

The real English Dos, then, according to the custom of
England, is the gift of the husband ‘propter nuptias’ and
‘ad ostium ecclesiae.’ This is the Doument ad ostium
ecclesiæ of Littleton (sec. 39), and is a Roman institution.
(Inst. 2 tit. 7, § 3; Cod. 5, tit. 14, c. 9; 5 tit. 3, c. 19, and
many others). The Doument, by assent of the father (Lit.
sec. 40), is analogous to the Profectitia; the dowment is
made by the son and heir apparent, at the church door, out
of his father’s lands, with the father’s assent.

In Littleton’s time (sec. 36), Dower, as Coke, explains it
in the common law, is taken for that portion of the lands or
tenements of the husband, which the wife hath for her term
of life, of the lands or tenements of the husband after his
decease, etc.; and he adds ‘propter onus matrimonii et ad
sustentationem uxoris et educationem liberorum cum fuerint
procreati, si vir præmoriatur: et hoc proprie dicitur dos
mulieris secundum consuetudinem Anglicanam.’ The refer-
ences in the margin are to Glanville, lib. 6, c. 1; Bracton,
lib. 2, fol. 92; Brit. c. 101; Fleta, lib. 5, c. 22. From
this we might conclude that, according to Bracton, the
common law dower was the third, and that this was accord-
ing to the English custom. But Coke makes his definition
by taking two separate portions of Bracton and putting
them together, and so purposely perverts his meaning. The
Dower, according to the English custom, is the Dower ad
ostium ecclesiæ, and apparently the true original dower.
The rule of law, that a wife should be endowed of a third part, was probably introduced in order to give her something when her husband had not provided for her (see note 178, Co. Litt. ed Hargrave and Butler); and this was the Rationablis Dos, the one-third, which a man might have given 'ad ostium Ecclesiae.' The existence of different customs, as in Kent, as to the amount of dower, proves at least that the one-third was not a universal rule, and that the common law dower is not older than that which Bracton calls the English dower. There may have been various customs as to dower before the Donatio propter nuptias was introduced, or there may not. It seems most probable that the Donatio propter nuptias was the original dower; that, as it might often not be given, a custom would arise of assigning dower, and that the custom would vary. The common law established the rule of one-third, when no dower had been given, because this was what generally might be given; but the places where a different rule had obtained, were allowed to retain their custom. The diversity in the custom is most readily explained, by supposing that in different places it was usual to give a different amount, 'propter nuptias,' and that in some places one amount, in others a different amount was given. The custom of assigning a definite amount in case of no Donatio propter nuptias, would naturally follow the rule that was usually observed as to the amount given propter nuptias, which was a third.

The Dos profectitia and adventitia, called Maritagium, was a gift to the wife and her heirs; and therefore was not the modern dower. The Donatio propter nuptias was the origin of the present dower. The husband could not give more than the third part, but he could give less. According to Littleton (sec. 39), a man might at that time endow his wife ad ostium ecclesiae of all his lands; on which Coke remarks, 'In ancient time, as it appeareth by Glanville, lib. 6, c. 1, it was taken that a man could not have endowed his wife ad
ostium ecclesiae of more than a third part, but of less he might. But, at this day, the law is taken as Littleton here holdeth."

The chapter on Dos does not prove that dower is of Roman origin; but it proves, if we follow Bracton, that the 'donatio propter nuptias' was founded on the Roman Institution, and that the amount which the English custom allowed to be given was one-third. The one-third being established as the amount that could be given according to English usage, it followed naturally enough that one-third would be the amount to which the wife was entitled, when it became a rule that she should be endowed of her husband's lands, if he had not provided for her. And when the wife's title to one-third was thus established, it was a further step to allow the husband to endow her of the whole of his lands, if he chose, which was the case in Littleton's time. We cannot assume that the rule, as to the wife being entitled to one-third, was the original rule, and that the dowment 'ad ostium ecclesiae' was introduced after the rule as to one-third was established. For a man in Glanville's and Bracton's time could only endow his wife of one-third, and might endow her of less. If her right to one-third was prior to the custom of endowing her ad ostium, there was no use in the dowment, for her husband could not take away her right, if it was incident to the marriage. The reasonable conclusion is, that her right originated in the custom of the husband being able to give her a third.

But we may carry the inquiry still further back. Glanville,† who is supposed to have written in the time of Henry

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* Bracton's text (fol. 93) is corrupted, as the rest of the chapter shews; item constitui potest dos rationabiliter secundum quod predictum est, et ideo ultra tertiam partem, quia in majori quantitate quam in tertia parte constitui non potest, potest tamen in minori, dum tamen uxor in constitutione se teneat contentam. 'Ultra,' should be 'infra,' or we should read 'non ultra.'

† 'Tractatus de Legibus et Consuetudinibus Regni Angliae,' by
II., says that Dos is of two kinds (lib. 6, De Dotibus, c. 1); 'dos enim dicitur vulgariter id quod aliquid liber homo dat sponsae suae ad ostium ecclesiae tempore desponsationis sua.' This is the Dos which Bracton, in order to give it more of a distinct character, designates by the Roman name 'Donatio propter nuptias.' Glanville adds, that every man is bound by the law, ecclesiastical and secular, to endow his betrothed (sponsa), at the time of the betrothal. He adds, that a man at such time either named the Dos, or did not. If he did not name the Dos, it was understood (intelligitur) to be the third part of the man's 'liberum tenementum;' and this was rationabilis Dos. Thus, it appears, that the Dos ad ostium was the same in Glanville's and in Bracton's time, and it was the gift of the husband. Glanville (lib. 6, c. 5) gives the writ which was applicable to a claim for Dos Rationabilis. Between the time of Glanville and that of Bracton, whom we presume to have written after A.D. 1217, the date of the charter of Henry III., we learn from the charter, that a woman had for her dower a third part of the lands of her husband, unless he had endowed her with less, ad ostium ecclesiae. In another part (lib. 7, c. 1), Glanville treats of the other kind of Dos: 'in alia accpectione accipitur dos secundum Leges Romanas; secundum quas proprie appellatur dos, id quod cum muliere datur viro, quod vulgariter dicitur Maritagium.' This is the Dos Profectitiae and Adventititia of the Romans, and of Bracton.

The earliest notice that I can find of anything which looks like the 'Donatio propter nuptias' in England, is in Ranulph de Glanville. . . . . 'Illas solum leges continet et consuetudines secundum quas placitatur in curia regis, ad scaccarium, et coram justiciis ubicunque fuerint,' etc. London, 1780. There is an English translation of Glanville, by Beames, who has noticed some of the parts which are taken from the Roman law. But the parallel is much better made by reading Glanville in the original Latin than in the translation. The title of Glanville's work is the same as that of Bracton, and accordingly he calls that the Law and Custom of England, which his book contains, and a great part of that is Roman law. Glanville in his work complains of the number and confusion of the Leges (laws), and Jura Regni (rules of law).
the laws of king Edmund (APXAIONOMIA, p. 60, by Lambard, Cambridge, 1644). The title of the section is 'Quomodo desponsanda Virgo, etc.' The third title, as it stands in the Latin version, is this: 'edicat jam tum sponsus qua bonorum parte uxorem donat praeter hanc quam ex ejus beneplacito ipsa prius cooptaverit.' (See also title 4).

A large part of the Third Book of Bracton, De Actionibus, is founded on the Roman Law. The second chapter treats of Contracts under the Roman name of Obligationes, and may be compared with the Digest, 44, tit. 7, De Obligationibus et Actionibus. The whole of the form of the Verborum Obligationes, in this chapter, is taken from the Digest 45, tit. 1, De Verborum Obligationibus, and the Institutiones, 3 tit. 15, De Verborum Obligationibus.

The third chapter treats of the various kinds of Actions, or placita, which he uses as an equivalent term, and is founded on the Roman law, with some modifications. This chapter may be compared with the Institut. 4, tit. 6, De Actionibus; but both in this, and in other instances, where I have referred to a title of the Corpus Juris, it will be found that Bracton has interspersed in his chapter matter taken from other parts, besides those to which I have referred.

The fourth chapter treats of Actions, which arise from delicts (ex maleficiis). The matter and all the terms of the chapter are Roman; it treats of the Actio Injuriarum, Quod metus causa; of the Interdictum Quod vi aut clam; of the Interdictum De Itinere actuque privato, which applied when a man was prevented from availing himself of a Servitus to which he was intitled; of the Interdictum Quorum Bonorum; and of the Actiones Præjudiciales, or those who concerned a man's status. All these several heads are in the Digest. (Dig. 43, and elsewhere.)

The use of the Interdictum Quorum Bonorum shews that Roman principles were actually applied to facts in English law, to which they were applicable. The object of
this Roman Interdict was to give to the Prætorian heres anything belonging to the deceased person, or, as the Romans expressed it, to the hereditas, which any other person had possession of ‘pro herede,’ or ‘pro possessore.’ The Interdictum, or Actio Quorum Bonorum, says Bracton, is given to the nearer heirs of the seisin of the death of ancestors, and is given against any person in possession.

The twelfth chapter is a mixture of Roman law with other institutions; but here, as in many other parts of Bracton, the substance is Roman, though there are many terms foreign to the Roman law. This chapter contains the doctrine that, if there is a dispute about property, the question as to possession must be settled first, if violence has been used; and for this doctrine, Bracton here refers to the Digest (48 tit. 6, Ad Legem Juliam).* This chapter also treats of the Actio vi bonorum raptorum, which is a Roman action (Dig. 47, tit. 8). There are in this chapter (fol. 114) several references to the Digest and the Code, which references are not very common in Bracton. He cites his authorities here to shew that, when a man has several concur rent actions about the same thing, he must try one of them.

These first three books, up to the end of the chapter De Actionibus, contain 115 folios out of the 444 of the whole book. There is in the first three books much more from the Corpus Juris, than in the following books; but it would be very inaccurate to conclude from the peculiar titles of the following chapters, that Bracton used his Roman sources no further. In the De Corona there are several things under the head Læsa Majestas which are Roman, such as the Crimen falsi, and Thesaurus (treasure-trove), the definition of which (fol. 120) is taken from Paulus (Dig. 41, tit. 1, fr. 31,) in the exact words, and the general notion of treasure-trove remains unchanged.

* As it stands in the printed text, it is ‘Ad Legem Juliani de vi publica.’ This and the like blunders shew that little care was taken with the printing, for even if the transcriber of the MS. has written Juliani for Julianus, the mistake is obvious enough, and should have been corrected.
Bracton quaintly enough remarks that treasure by the Jus Naturale belongs to the finder, but now by the Jus Gentium it belongs to our lord the king. It is here worth observing that, after defining treasure-trove according to the Roman law, he states that such treasure is the king's property. He therefore determines the extent of the prerogative of the king, as to treasure, by a definition from the Digest.

In the thirty-second chapter of the De Corona, he treats of theft, under the Roman title of Actio Furti, and he takes the Roman definition of Furtum (Instit. 4, tit. 1).

In his Fourth Book, De Assisa novae disseisinæ, in chap. 1, 2, 3, 4, his notions of Possessio and his language are from the Roman Law, which he applies to the English facts of seisin, intrusion, and disseisin.

A complete examination of this comprehensive Institutional Treatise would be a labour of some years, and would require a combination of knowledge that few persons possess. Though much of the law of Bracton is obsolete or repealed, this book is certainly the foundation of our system. A good edition of the text, with a translation, and an attempt to trace the law which it contains to its various sources, would be a labour worthy of being executed at the public expense. The impression that is got by an occasional use of it is this, that the author was well versed in the Roman law, which he views, as to many of its rules as fully received and established in England; and as to things, such as the law about land, wherein many rules prevailed, not derived from the Roman law, he uses the Roman law as a source which supplies the reasons of the rules, or expresses them. It is generally easy to detect the expressions taken from the Corpus Juris, by the greater purity of the language. Coke often refers to Bracton, but very seldom, if ever, to the Corpus Juris, though he frequently uses its expressions; and several passages which he quotes from Bracton, are taken by Bracton from the Roman writers, though Coke takes no notice of that.
Bracton's mode of citing the Digest is the same as that of the Glossa, with which he must have been acquainted. In fol. 114, where he lays down the doctrine that, when a man has several concurrent actions for the same thing, he ought to try one, he quotes the Digest 4, tit. 2, fr. 21, § 4, thus: F. quod metus causa, L. similiter, si coactus. But here, as usual, the text is corrupt. In place of 'similiter,' the true reading is 'si mulier;' and the § or ff which Bracton uses in other instances is here omitted. This will appear from another quotation (fol. 114) from the Digest 14, tit. 4, fr. 9, § 1, which Bracton cites thus: F. de tributoria, L. quod in herede, ff Eligere. In this chapter (lib. iii. c. 12), he cites a great number of passages from the Code and the Digest, and derives his conclusions from them. In the printed text the abbreviation ff is sometimes used for D being one of the usual modes of indicating Digesta. Sometimes P or π, which signifies Pandectae, is used by writers in citing the Digest, instead of D or ff. The F of Bracton has probably arisen from the ff.

There can now be little doubt that Bracton was a justice (justiciarius) in the latter part of the reign of Henry III. (Spence, 'Equitable Jurisdiction of the Court of Chancery,' p. 119, note m.) His work, therefore, had some authority in respect of the high station which he held. There are several reasons why this work has been neglected, one of which is that it is in Latin. When Coke made his commentary on Littleton, he used Bracton and the other old writers, so far as served his purpose; and sometimes he abused them. But Coke succeeded in forming a good deal of the law after his own way; and his great legal learning and reputation, combined with the change which the law had undergone since Bracton's time, contributed still further to the neglect of the old writer. That part of the law in Bracton which is peculiarly English has been much altered by statute and judicial decisions; that part which is Roman remains comparatively little affected, and some of it is capable of application. According to Chief Justice Parker
(in the 'Grand Opinion,' Fortescue, p. 408) "as to the authority of Bracton, to be sure many things are now altered, but there is no colour to say it was not law at that time, for there are many things that have never been altered, and are law now." Chief Justice Best (Blundell against Catterall, 5 Barn. Ald. 282), after quoting Parker's opinion about Bracton, says, with reference to a passage of Bracton which had been cited in that case: "I do not say that the whole of the passage in Bracton is now good law: it was all good law at the time he wrote, and all of it that is adapted to the present state of things is good law now." Bracton, then, may be considered as evidence of what the Common (unwritten) Law was in his time.

The mode in which Lord Holt used the authority of Bracton directly, and indirectly, that of the Institutes, appears from the case of Coggs v. Bernard. (Smith's Leading Cases). All the five passages which he there cites from Bracton have been taken by Bracton from the Institutes (3 tit. 14, 22, 24).

It would require a treatise to trace the Roman law all through the English writers, many of whom give it without any intimation of its being Roman. It is remarked in the Preface to the 'New Institute of the Imperial or Civil Law (by Wood), London, 1704: "Upon a review, I think it may be maintained that a great portion of the Civil Law is part of the Law of England, and interwoven with it throughout." He also observes: "Mr. West having occasion, in his book of Presidents, to give a general account of Obligations, Contracts, Offences, etc., has unskilfully epitomized and translated the account from Herm. Vulteius, and passed it off for the pure Common Law of England." The reader may see how West did his work in his 'Simboleography,' London, 1615.

Cowell's 'Institutiones Juris Anglicani,' Oxford, 1676, is a reduction of English law to the order and method of the Institutions of Justinian.
OUTLINE
OF
A COURSE OF LECTURES
ON
GENERAL JURISPRUDENCE AND THE ROMAN LAW,
TO BE DELIVERED
IN THE MIDDLE TEMPLE, 1846-7.

GENERAL PART.

The general meaning of the term Law will be explained, and the meaning of the expression Positive Law; and the Roman terms Jus and Lex: and, as necessary to this explanation, the terms State, Sovereign or Supreme Power, Citizen and Subject, Political Superior and Inferior, Command, Rule, Sanction, Right, and Duty.

The terms Jurisprudence (Jurisprudentia) and General Jurisprudence will be explained.

Positive Law, as the matter of Jurisprudence, will be distinguished from Positive Morality.

Positive Law will also be distinguished from the so-called Natural Law, or Naturale Jus of the Romans; and from the Law of Nations, or International Law, to which the Roman Jus Feciale partly corresponds. In stating the nature of International Law, the meaning of the terms Collision or Conflict of Laws will be explained.

The immediate sources of Positive Law will be shewn, which consists of law made directly by the sovereign power, that is by legislation, and of law made by political superiors to whom the power is delegated; and of law made or declared by the decision of a judge.
The terms Written Law and Unwritten Law will be explained (jus quod constat ex scripto aut ex non scripto), (Inst. i. tit. 2; Hale, History of the Common Law, chap. i.); and the term Promulgation of Law.

The remote sources of law are common opinion and usage, out of which arises Custom, which is either general or particular. Here will be explained the Roman terms Consuetudo and Mores Majorum or Mos.

Custom may become law either by being embodied in a law or statute, and so may become Written Law; or by the decision of a judge, by which it becomes Unwritten Law.

Immemorial usage or custom sometimes constitutes Law, but only because the usage has been recognised by competent authority.

The meaning of the term Privilegium will be explained.

Received Law is that foreign law which is received and obtains the force of law in another country by being received. This may happen in various ways, but chiefly by the decision of a judge.

Akin to this is that law which a judge's decisions frame according to the principles of morality contained in what is called International Law or the Law of Nations.

The nature of the opposition between the Jus Civile Romanorum and the Jus Honorarium will be explained; and the nature of Equity as opposed to Law.

Here it may be convenient briefly to consider:

The extent of the application of a law.
The modes in which it is made known.
The relation of laws to one another, as subordinate or co-ordinate, which includes the collision or conflict of laws.
The modes in which a law ceases.
The interpretation of a law.
The Objects of Law.

The Matter of Law consists of Rights and Duties, the notion of which will be now more particularly determined.

The subjects of Rights and Duties are Persons.

The objects of Rights and Duties are respectively the legal powers or faculties which persons have, and the legal necessities or the legal compulsion to which they are subjected.

Here the nature of certain so-called Absolute Rights and Natural Rights will be examined.

Duties are divided into Absolute and Relative Duties. Relative Duties imply Rights.

The determination of the nature of Rights and Duties is the necessary foundation of the division of law into the Law of Things (jus quod ad res pertinet), and the Law of Persons (jus quod ad personas pertinet).

The matter contained under these two chief divisions of Law respectively will be stated.

Here the nature of the Roman division of law into Publicum Jus (quod statum Rei Romanae spectat), and Privatum Jus (quod ad singulorum utilitatem pertinet), may be most conveniently explained: and it will be shewn what objections there are to this division, and how far it may be adopted as a convenient means of placing by itself a part of the matter of law which is of a less general nature than the rest, and varies greatly according to the political constitution of each country; this part embraces what may be termed Constitutional Law, or what concerns the status or condition of political persons, and Administrative Law.

The nature of the opposition intended by the terms Civil and Criminal Law may also be here explained; and the
arbitrary character of the distinction between the two divisions will be shewn.

Criminal Law is not included in the Roman Institutional Treatises, which are confined to Privatum Jus.

The Publicum Jus of the Roman writers comprehended, among other things, Criminal Law, Criminal Procedure, and even Civil Procedure; but the notion was often vaguely conceived by the Roman writers.

To exemplify the nature of the division of Law into the Law of Things and the Law of Persons, the arrangement of the Institutions of Gaius and of Justinian will be explained; and this arrangement will be contrasted with that of Hale's Analysis of the Civil Part of the Law, Blackstone's Commentaries, and Stephen's Commentaries, and Erskine's Principles of the Law of Scotland.

The nature of the compilations called the Digest and the Code of Justinian will be briefly explained, and the modes in which they are cited, for the purpose of enabling a student to refer to them.

There are many general notions which pervade all Law and every part of it. These General Notions can be properly explained independently of the Particular things to which they apply, and when they are properly apprehended, they render the study of the Special Part easier.

Accordingly, after having explained the nature of the division of Law into the Law of Things and the Law of Persons, and the chief subdivisions of these two divisions, I shall determine more particularly the notion of Person, as the subject of Rights and Duties. Person will be considered under two aspects—first, with respect to the capacity to Have; or, as Hale expresses it, to Take; second, the capacity to Act, or, as Hale expresses it, to Dispose.—(Hale, Analysis of the Civil Part of the Law, sect. i.)
The various incapacities to Have or to Take will be considered under the heads of Want of Freedom, or the Condition of Slavery; Want of Citizenship, or the Condition of an Alien; Dependance on the Paternal Power; Infamy; Religion, and any other incapacities.

Some of these incapacities belong to the Roman system, and to the law of some modern countries, but not to all, as Slavery.

The nature of the fictitious Person, called a Corporation, will be explained; and its capacities to take and to dispose. The origin and nature of corporations among the Romans will be explained: their various kinds of legal incidents enumerated; and the general notion of a corporation aggregate, according to the English system, will be explained.

Rights and Duties, which are the only objects of Positive Law, become attached to individuals by legal facts or events, which are either the acts of individuals, or something of which they are the passive objects, or they may arise from omissions to act.

Legal facts may also terminate Rights and Duties, or change them into other Rights and Duties. Of all legal facts those which consist in Positive Acts are the most numerous and important.

The legal Fact of Succession is one, the right apprehension of which is important, and it will be fully explained, and illustrated by instances from the Roman and the English law; and it will be shewn in what cases the notion of succession exists in the English system, where the term is not used.

The legal capacity to Act is a capacity which is necessary for the existence of most of those legal facts which are the condition of Rights and Duties; and its consideration belongs to this General Part.
The capacity to Act is determined by the rules of law which create incapacities to Act. The general incapacities to do legal Acts are defect of age, want of intellectual capacity, interdiction; and those incapacities of fictitious persons which are the consequences of their legal nature.

The capacity to Act is extended by one person being legally empowered to do acts for another, as his agent generally, factor, broker, and the like.

The essential part of an act which shall constitute a legal fact is the Declaration of the Will, which must be free. Under this head will be briefly considered Force or Compulsion, and Error or Mistake; also Condition, Time and Mode.

Declaration of Will may be divided into Formal, Express, Tacit, and possibly other varieties.

The nature of Consent or Agreement will be explained, as a more general term than Contract, for all agreements do not produce legal contracts.

The general nature of a Right of Action will be explained, as a right which supposes an existing right and a violation of it.

The Law relating to Actions is made one of the three chief divisions of the matter of law by the Roman Institutional writers, (Gaius, i. 8; Justin. Instit. i. tit. 2); and the Law of Actions is co-ordinated with the Law of Persons and of Things. But this is a mistake. The Right which we call a Right of Action may be appropriately explained here, as it is a right of a general nature which either arises out of an existing right, and is a new form of it, or comes from a violation of a duty.

But this explanation will only be of a general kind, for every particular right, or every duty violated, has its appropriate action.
It may be briefly considered here, how the Right of Action may pass to another person and still exist; and how it may terminate, or be lost.

**Special Part.**

The order in which the second division will be treated, is as follows:

*Property or Ownership.*

First, of Property or Ownership, and, as introductory to the matter of ownership and contracts, the doctrine of Possession will be explained; and the various senses in which the word is used in the English and the Roman law.

The Right of Possession, or that right which results from possession, will be explained and illustrated by instances.

As things are the objects of ownership, the distributions that are usually made of them will be stated, and the sense in which the several terms are used: Public, Private, Corporeal, Incorporeal; Moveable, Immoveable; Things appurtenant; Fruits, or Produce; and things that are not objects of commerce, as things consecrated to the purposes of religion, and some others.

The notion of Property or Ownership will be determined, and the nature and extent of the enjoyment implied in that notion.

The distinction between legal and beneficial ownership will be explained, and exemplified in the Roman and the English system.

The limitations of ownership will be considered: Firstly, as regards Time, or the Quantity of Interest, which includes both the time during which the enjoyment shall continue and the power of disposition, and the time when the enjoyment shall commence. Secondly, as regards Quality, or the mode in which a thing may be enjoyed.
The various modes in which property may be acquired will be considered, and the modes in which it may be lost or aliened.

The notion of Servitudes will be explained, and the points of agreement and difference between the Roman Servitudes and the English Easements, and other rights, will be explained.

The law of Pawn or Pledge will be explained; and the nature of this security in the Roman and English system will be considered.

The nature of Gifts will be explained. Gifts contain the notion of agreement, but they have many peculiarities, and require to be considered by themselves.

Contracts (Obligationes).

The general notion of Contracts will be explained; and the Roman division of obligationes (a term which has a larger meaning than contracts), with respect to their origin, into Obligationes ex contractu, ex malificio, and ex variis causarum figuris (Dig. 44, tit. 7, fr. 1), will be contrasted with the English system.

The various kinds of Obligationes ex contractu in the Roman system will be explained, and contrasted with those in the English system, especially in those matters in which the same general principles apply to both, as letting and hiring, selling and buying, partnership, and so forth.

The nature of Contracts which are forbidden by Positive Law will be considered; and also such as are or may be declared void on grounds of Public Utility, or as it is now frequently termed Public Policy.

The class of Obligationes ex delicto will be considered; and the Obligationes ex variis causarum figuris.

The nature of specific performance of Contracts will be considered.
The modes in which contracts terminate will be considered.

As the law of Contracts is a matter of the widest application, I shall here consider those rules of law which apply to the contracting parties, with reference to the place where a contract is made and where it is to be executed; and as introductory to this, I shall explain the Law of Domicile, the knowledge of which will also be applicable to the title of Marriage and of Testament.

Marriage, and the Relations which arise from it.

Under this head will be treated of Marriage, of its essential conditions, of its nullity, and of its dissolution.

This will be the proper place for considering the effects of marriage by persons belonging to one state, contracted in the dominions of another state, and of the conflict that arises or may arise from the laws of different countries as to Divorce.

This head also comprises the legal effect of marriage as to the capacities of Husband and Wife, and the rights which they respectively acquire by marriage. Here will be considered the rights which the man acquires in the property of the woman, and his duties or liabilities; and also what rights the wife acquires, or may acquire, in the property of the husband.

The nature of the Roman Dos will be explained, and the Parapherna; also the nature of Settlements made in consideration of and contemplation of marriage; and the Roman Pacta Nuptialia and Dotalia.

The nature of the Roman Donatio propter nuptias will be explained, and this institution will be compared with the original English Dower, (Glanville, vi. De Dotibus, c. 1; Bracton, ii. c. 39, fol. 91).
The rules as to Gifts made to one another by husband and wife during marriage will be considered; and the rules of English law will be contrasted with the Roman rules.

(Hale places the matter of this division in section 14, under the title ‘Of the Rights of Persons under Relations economical; and first, of Husband and Wife.’)

Here will be considered the subject of Legitimacy, and the conditions on which it depends; the Senatus consultum Plancianum (Dig. 25, tit. 3, fr. 1), and the origin and meaning of the writ De Inspectiendo Ventre (Dig. 25, tit. 4, fr. 1); and the nature of the Patria Potestas, or the father’s power over his children, and his duties to them.

Also Adoption, according to the Roman law, and according to the rules of some modern states; and Legitimation by subsequent marriage, and of the conflict of laws which may arise thereby, as for instance between the law of Scotland and of England.

The modes in which the Patria Potestas may terminate will be considered.

(This partly corresponds to the matter contained in Hale’s section 15, ‘Concerning the Relation of Parent and Child;’ but he treats (section 16), ‘Of the Relation of Master and Servant,’ as the third economical relation, Husband and Wife being the first, and Parent and Child the second.)

The nature of the Roman Tutela will be explained, and the difference between Tutor and Curator, and the English relation of Guardian and Ward.

The various modes in which the Tutela originates will be considered; and the history and purposes of the Curatela (Lex Plaetoria).

The rights and duties which arise from the Tutela.

The modes in which the Tutela terminates.

(The Tutela is most appropriately placed here, as its office is to supply the incapacity of the Pupillus to act.)
On Testamentary Succession, and Succession ab Intestato.

Under this head will be treated of the nature of Succession to the property of a deceased person, and of the Roman Heres, and of Substitution.

Of the form of making a Testament, and of Codicils (codicilli).

Of Donationes mortis causa in the Roman and the English system (Ward v. Turner, 2 Vez. 431).

Of intestacy, and of the succession to intestates in the Roman and the English system; and of the degrees of consanguinity.

Of the taking possession of the hereditas, and the duties of the heres; and of the inventory.

Of the executor and his origin; and of the administrator.

Of the English statute of Distributions.

Of Legacies (legata), and singular fidei commissa.

Of the Lex Falcidia, and of the Trebelliana.

Of Universal Fidei commissa.

Of the vesting (quando dies cedit) and payment (quando dies venit) of Legacies and Fidei commissa.

Of the capacity to take, as heres, legatee (legatarius), or Fidei commissarius.

Of the general rules for the validity of a Testament.

Of the testator's capacity to make a Will (testamenti facio).

Of fraud, compulsion.

Of the mode of the testator expressing his intention.

Of conditions.

Of the circumstances which make a Testament invalid from the time of making; and after it is made; or invalidate a portion of it.

Of the interpretation of Testaments.
This Outline has been made merely for the purpose of assisting the members of the class in following the Lectures. It does not affect to be complete or free from objection; and it may be modified and improved hereafter.

The books that I have used in drawing up this Outline, are Hale's Analysis of the Civil Part of the Law, Austin's Outline of a Course of Lectures on General Jurisprudence, Savigny's System des Heutigen Römischen Rechts, and Thibaut's System des Pandekten Rechts, ed. 1846.

The Outline has reference solely to the matter which is comprehended within the scheme or purpose of the Readership; and, though founded on the arrangements adopted by jurists of authority, it is adapted to what I propose to teach. The proportion between the General and the Special Part in this Outline does not represent the proportion which these two parts will occupy in the Lectures, as will be apparent from looking at the heads of the matter contained in the Special Part.

GEORGE LONG.