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A SUMMARY

OF THE

ROMAN CIVIL LAW.

VOL. I.—PART I.
A SUMMARY
OF THE
ROMAN CIVIL LAW,
ILLUSTRATED BY
COMMENTARIES ON AND PARALLELS
FROM THE
Mosaic, Canon, Mohammedan, English, and Foreign Law.

BY
PATRICK COLQUHOUN,

Juris utriusque Doctor, Heidelberg; M.A. St. John's College, Cambridge; and Barrister-at-Law, Inner Temple; C.C.S. of Greece, and of the Imperial Ottoman Order, &c.; late Plenipotentiary of the Hanseatic Republics at the Sublime Ottoman Porte, in Persia, and at Athens.

Χρώμεθα γάρ πολυτά ὁτ ηφλονθάς τοὺς τῶν πλας νήμων, παράδειγμα δὲ αὐτοὶ μᾶλλον δυτές τισίν, ἡ μεμόριαν ἰδέρουσι. ΘΟΥΚ. ΠΙΤ. Β. κεφ. λζ.

ΓΚ

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TO

JAMES COLQUHOUN, LL.D.,

KING, FIRST CLASS, OF THE IMPERIAL OTTOMAN NISHANI FPTANAR;

COMMANDER OF THE ROYAL SAXON ORDER OF MERIT, &c. &c.

AND CHARGE D'AFFAIRES OF HIS MAJESTY THE KING OF SAXONY, OF HIS ROYAL HIGHNESS

THE GRAND DUKE OF OLDENBURG, AND OF THE HANSEATIC REPUBLICS,

LÜBECK, BREMEN AND HAMBURG;

POLITICAL AGENT FOR THE LEGISLATURES OF ST. CHRISTOPHER, NEVIS, ST. VINCENT, TOBAGO,

DOMINICA, ANGUILLA, AND THE VIRGIN ISLANDS.

This Work

IS AFFECTIONATELY DEDICATED,

BY

HIS SON.
PREFAE.

The object of the Author in the following Summary, is to supply a deficiency which has hitherto existed in the legal literature of this country with respect to the Roman Civil Law. On the Continent there are various works on this subject, but many are inaccessible to readers not acquainted with the modern languages in which they are written, while those which are composed in Latin, require the devotion of much time and labour to their perusal; many of them, too, are intermixed with the local laws of the countries to which their authors belong; in addition to which, it is difficult to fix upon any one work which unites the desiderata of law and legal antiquities—a deficiency which the Author proposes to remedy, by combining both in one work. It may be urged, that these matters are not of practical application; but, in order to meet this objection, parallels have been introduced, without, however, asserting, in all cases, that because the law in several different systems coincide, the one is necessarily derived from the other, although this may be demonstrated in a variety of instances beyond the possibility of doubt. When the greater part of the manuscript was completed, the Author found that an historical introduction on a limited scale would be convenient. Impressed with this conviction, he has prefixed a passing sketch of the dynasties under which the Civil Law of Rome arose, flourished, and decayed, mentioning the principal writers who have contributed to its rise, perfection, preservation, and revival; and in this part of his task he has found
the renowned work of Dr. de Savigny of signal service. Were the Author, however, to acknowledge the obligations under which he lies to the works of other continental authors scarcely less distinguished, this preface would swell insensibly into a volume; he therefore is constrained to content himself with this general acknowledgment, and by placing references to their works at the foot of the pages; at the same time, he cannot restrain an expression of the respect he entertains towards that distinguished jurist at whose hands he received one of his highest honours—the Right Honourable Professor Dr. Mittermaier. The subject is not a new one; but the present method of treating it has not, as far as the Author is aware, as yet been adopted by any other writer.

In dealing with the legal systems, at once ecclesiastical and civil, the Author must be understood as leaving the former element entirely out of the question, as the exclusive property of another Faculty; thus, in commenting upon the law of the Israelites, the Moslems, and the Christian Church, he has separated the temporal from the ecclesiastical or dogmatic view, simply shewing the operation which a Divine Law may also incidentally exercise, in a temporal point of view, upon the community for whose government it was intended; thus, if we take the prohibition of the Second Commandment of the Two Tables against the making and worshipping of graven images, the great and primary object was avowedly ecclesiastical, to preserve unalloyed the true worship of one God; the secular, and consequent operation of the law, was to provide against the introduction of the debasing and immoral practices connected with the worship of a personification of attributes, or idol worship, as customary among the Egyptians, and later among the Greeks and Romans. The prohibition in this very law against making idols for the purposes of worship was rendered absolute by Mohammed, who, instructed by the then perverted worship of the surrounding Christian tribes, assumed that if there were no idols there could be no worship of them, and therefore forbade their being made at all. Again, the Fifth Commandment, in its ecclesiastical sense, inculcates that respect to parents to which they are entitled; but the temporal meaning went further; it
enjoined obedience to superiors generally, without which the municipal government of a nation emancipated from slavery would have been impossible. False witness, too, including, as it does, a false oath, is one of the highest offences against the Deity; in a secular point of view it would render the administration of justice, and consequently of the State, impossible.

The chief systems by which nations have been governed may be divided into two categories: those which arose out of a code, and those which had their origin in the accumulation of individual laws. Of the first description are the Mosaic and Mohammedan Laws; of the second, those of Rome, of the Christian Church, and of Great Britain. The law of the Israelites had a definite origin in the laws of the Two Tables, termed of Moses, in which the most general rules were laid down, and subsequently completed in detail by a succession of Divine commands communicated through Moses. These were further developed and extended by the interpretations of those charged with their execution, and which obtained their authority in practice from the general ordinances upon which they were founded, and from the sacred character of their interpreters. These oral traditions were subsequently reduced to writing, and are to be found in the Talmud, which, however, has in many instances disfigured the original intention, and rendered the law of none effect by tradition. The Jewish priesthood, it may be hence inferred, on the one hand, and the Sectarians on the other, framed interpretations more or less sophistical, more or less strained, in order to increase their power or to meet their particular and several views. The Jews having for many centuries lived under the subjection of nations using other laws, have been unable to work out any system of civil jurisprudence, since, in all cases in which one party was not a Jew, the lex loci formed the basis of the decision, and their own law could only be made applicable in cases where two or more Jews agreed to abide by the decisions of their own authorities; and this could seldom be the case where an appeal would always be left open to the local authority. In the present day, in this country, it is only adopted among the poorer classes, the decisions being chiefly based on equity and the merits of
the case. Under the Romans, we infer from the expression of Pilate, the governors avoided interfering in ecclesiastical matters; but, at the same time, we learn from what followed, that the Jews were not allowed to execute a capital sentence, or one affecting life or limb, even among their own people. The reverse would, indeed, have been contrary to the Roman Laws, although in pressing cases the Roman Governor, from indifference, custom, fear, or love of tranquillity at all hazards, did execute such sentences for them at their request, even though it was contrary to Roman Law. It must also be doubted whether the Jews ever attained any literary eminence; certainly not as long as they were an independent people, all their energies being then devoted to war, offensive and defensive. In the middle ages, individuals of this nation appear, especially under the Moors in Spain, to have been highly distinguished in certain branches of science, more particularly in medicine; still, as a nation, they made no advances. In the present day, Germany is, perhaps, the only country in which we meet with individual Jews distinguished for their literary attainments, which may probably be attributed to their having free access to the schools and universities in that country; yet, as a people, they may be said to be more than ordinarily ignorant even of their own literature.

The Moslem Code of Mohammed was founded upon the Precepts of the Two Tables, and so far may be said to have an origin common with the Israelitish Law; but the Koran, their peculiar Code, was not put forth to the world as a whole, nor did it appear in its entirety until collected from the isolated fragments left by Mohammed, and arranged without regard to dates or matter, but simply according to the length of the chapter, the longest having been placed first. These Suras were probably imitated from the second portion of the Mosaic Law, and Mohammed became inspired whenever he perceived the political necessity of a special revelation. The Koran, however, _per se_, like the revelations by the mouth of Moses, did not extend to details; recourse was consequently had to deduction, interpretation, and comment; and, as was the case with the Jews, and always must be the case when the ecclesiastical and civil laws
are intermingled, sects arose giving different interpretations to the civil portion of their law, as they did to portions of the ecclesiastical. Although the Mohammedan sects are innumerable, there are, nevertheless, two prevailing ones: the Sonnites and the Shiites. The doctrines of the former are followed by the Turks; those of the latter by the Persians, who are also termed Aalyites; a schism which, in its nature and origin, bears a striking resemblance to that of the Eastern and Western Churches; nor is the detestation they bear to each other more violent in the one than in the other case, each applying unreservedly the term "accursed heretic" to the other.

The Roman Law cannot be traced to any fixed principle or code. Romulus appears to have adopted such of the customs of the Ramnes, Tities, and Luceres, the nations of which his new kingdom was composed, whithersoever derived, as were most applicable to the state of government which he introduced, reserving a further power of legislation to himself and the council which he established. We do not, however, find any traces of a code drawn up by authority, although we read of the private collections of these Senatus Consulta, or statutes of a later date, until the decemviral period, when the law was revised, and certain principles, short and terse, laid down. We now possess nothing more than disjointed fragments of these laws, nor has any successful attempt been made to restore them. Enough, however, has survived to induce the belief that these rules enunciated mere general principles, and that many customs, founded upon older laws, prevailed, which were, however, soon superseded by the increasing number of special enactments, and the practice, interpretations, and deductions derived from both; so that the Decimviral Law was overwhelmed, and, what may be termed Statute and Common Law, founded on the above, obtained a paramount authority. Of this, interpretation formed the principal part; and as the interpreters were men of great reputation and learning, and usually decided upon cases-propounded under feigned names, a practice which, as it excluded the supposition of favouritism or bias, deservedly acquired the force of law. When two of these great authorities disagreed, which was sometimes the case,
more especially after the adverse sects of Sabinians and Proculeans appeared, recourse was had to the Emperor, who settled the point at issue by a Constitution. The Prætor's Edict was also an authoritative decision, and formed a part of the Roman Common Law. In later years codes of these constitutions, and digests of the decisions, were drawn up; but the first authoritative work in a codified form was that of Theodosius. Justinian followed soon after with a Code of constitutions and a Digest of decided cases, and after his age the Law declined with the Empire.

It must be borne in mind that the law underwent a progressive change, and consequently much of that which in the time of Cicero was law, in the time of Ulpian and Papinian was legal antiquity, and so in the preceding and succeeding ages. Compared with the Jewish Law, the principle upon which Roman jurisprudence was founded was very different; the former treats principally of criminal matters, and is most severe in its penalties; the latter, on the contrary, treats all questions as civil; and so jealous was the people of severity in criminal matters, or those which affected life and limb, that originally a special law had to be passed in each individual case for the punishment of a public offender; in other words, he was tried by the Legislature, the highest tribunal of the State. This system could not have endured as long as it did, had it not been relieved by the patriarchal jurisdiction of the pater familias, or head of each family, to whom extraordinary powers were entrusted, even that of capital punishment. This, however, became impaired and restrained; but it was long before a standing court of criminal jurisprudence was established. In the mean time, the civil remedy had become so effective, that many cases which other nations treat as criminal were cognisable by a civil tribunal, and an indemnification effected by damages, of which the actio furti may serve as an example. Generally, no crime was punished capitally, especially where no force or violence was employed: a most salutary distinction, which of late years has been adopted in this country, where, indeed, we may have perhaps erred on the other extreme. The laws called Public Judgments were, with two exceptions, promulgated by Julius Cæsar and Cornelius Sylla; the peculiar composition and
constitution of the Roman State, however, regulated the punish-
ment according to the class of the offender; thus a slave might be
punished capitally when a freeman would not be so.

The Canon, too, like the Civil Law, is not traceable to any code,
but is founded upon the general moral rules to be collected through-
out the New Testament. These were made the basis of certain
administrative rules for Church Government, together with those
enjoined partly orally and partly by the Epistles of the Apostles;
the Bishops who succeeded them pursued the same practice, until
after Christianity had obtained a firmer footing; Councils and
Synods were assembled, which passed legislative enactments re-
specting Church Government and dogmas, which latter do not
belong to this work. When the Emperors had been converted
from paganism to the new religion, they promoted its progress by
their Constitutions, which then properly became a part of the
Canon Law, although enacted with other municipal laws. These
were followed by the Decretal Epistles of the Popes, which, joined
with the decrees of Councils, and embodied in Constitutions, or
those parts applicable to the Church, together with maxims taken
from the Civil Law, formed that entirety which we term the Canon
Law. The Pope, as the arch-archbishop of Christianity, enforced
the observance of this code in all Christian countries, except
among those who adhered to the Eastern Church, and, by inter-
weaving many secular matters into it, obtained, with its more
extended application an influence, which he exerted with so much
arrogance as, in the end, to contribute in a great measure to the
downfall of his power. Of all nations, the British appear to have
most sternly opposed these clerical innovations on their native
law, even while they were as good Catholics as their continental
neighbours. The Canon Law is now extinguished in England,
except in a most modified form, as used among the clergy in mat-
ters of Church discipline.

The origin of the present law of England is so remote and so
varied, that even when we travel across the Channel to seek its
rise among the Saxon conquerors, we find ourselves almost equally
involved in the dark cloud of past ages. We may, however, assume,
that it took its rise in various enactments of different tribes of Saxons
and Danes, and not in any code. These enactments of individual chiefs or kings were severally developed in their little kingdoms; the older ones became obsolete as enactments, but continued in practice and in spirit under the name of Common Law. The system thus created was codified by Alfred, increasing in volume by interpretations and decisions, until a new element was infused through the Norman Law, itself a motley mixture of the Roman, Canon, Feodal, and Frankish systems. This reduced most of the Saxon laws to the position of Common Law. Acts of Legislation began to be passed, and, in progress of time, grew obsolete and were forgotten; statutes operating as Common Law were revived, others were repealed, still always leaving practically some ill-defined vestiges of their former existence; in other words, forming the basis of a custom. Charters were granted and contracts entered into; interpretations were given by the Courts where the case at issue was not directly provided for; Civil Law maxims and principles were introduced in certain branches by standard legal authors; in addition to which, some traces of the Canon Law are discernible; in short, the varied sources of the Common Law defy the discovery of their individual origin. Statute Law is, however, now the prevailing strength or weakness of the age, and tends not a little to complicate the whole, at once repealing and reviving parts of different Acts, and super-adding new provisos. Those new starting places called Codes and Digests, if introduced, would tend to place the whole on a more satisfactory footing, since continual alterations on alterations, and exceptions on exceptions, have gone far to destroy everything like general principles.

Lastly. The plan pursued in the strictly legal portions of this work, parts of which have been read before the Royal Society of Literature, will be, after stating the law, to trace its origin and development, followed by such parallels from the above systems as shall appear opportune, but always applying the principle to English Law on a more full and extended scale.

Temple, 13th April, 1849.
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TITLE VI.

A SUMMARY

OF THE

ROMAN CIVIL LAW.

BOOK I.

TITLE I.

Legislation as connected with Civilization—State of the Roman Law under the Regal Policy—During the Republican Period—The Senate—Assemblies of the People—Magistrates—The Imperial Period, and leading Lawyers of that Age—Transfer of the Empire by Constantine to Byzantium—Line of Emperors to Justinian—Review of the Law up to his time—Triobonian—Contents of Justinian's Legal Works—Succession of Roman Emperors to Arcadius and Honorius—To Basil the Macedonian—The Basilica—Succession of Byzantine Emperors until the Latin Period—The Crusades—Godfrey de Bouillon—The Assize of Jerusalem—Continuation of the Eastern Empire until its Extinction by Mohammed II. under Constantine XIII.—Transfer of the Empire to the Turkish Padishah—Mohammed the Apostle of God—His Koran and Law—The first Caliphs—Fate of the West—The Kingdom of Lombardy—The Romano-Germanic Empire—The Lawyers of the Middle Age—The Popes and the Canon Law—The Roman—Canon—Common and—Statute Law in England.

§ I.

Civilization in the history of all states has ever advanced pari passu with the enactment of just laws and wisely-liberal institutions; for it is obvious that a state must be well governed internally, and possess such institutions as contribute to secure a national bond, in order to render itself either physically or morally respected by neighbouring or more distant nations. Nor is this a mere theory, but rather an incontrovertible fact drawn from experience of past ages. It is true that the physical force and power of a nation may not be directly referable to civilization and wise political institutions, such as in the present age would be considered as enlightened—for it suffices that they were so relatively to the advancement of their time—yet we find that where such have not been opportunely introduced into a state powerful in arms, or where that state has not advanced with the spirit of its time, it has gradually declined and relapsed into its normal state of weakness or anarchy. Thus, Egypt flourished no longer than her excellent civil institutions were upheld; and the Jews, having learned there the art of civil government, overran the whole of Syria, and were only subdued when they began to

Civilization connected with legislative policy.

Egypt, Syria, Persia, Greece, Rome, Carthage.
neglect the principles which had led to their former success. Persia made the rest of Asia, less civilized than herself, bow before her; but in her turn was overthrown in many battles by the more cultivated, though numerically weaker, Greeks; these again succumbed to the rising power of Rome. The Romans, having destroyed in Carthage the last remnant of the Phcenicians, proceeded to extend their power over three continents, until surrounding and tributary states, instructed in their arts and tutored by their power, now devoid of centralization, continued to cultivate what their masters had begun to neglect, and thus emancipated themselves one by one from the Roman power at Byzantium, in the day of its decline; until a wild horde of Tartars on the one side, and of Arabs of Vandal and Saracenic origin on the other, united by the aid of laws at once ecclesiastical and civil, and excellent so long as observed in purity, drove out this wretched remnant of the most powerful nation of antiquity, and extending its conquests threatened to subject Europe, as it had done Asia, to its dominion; but here again their civilization, science, and hardiness, then superior, did not keep pace with those of the rest of the world, and these once-powerful states sank into comparative insignificance and dependence on the jealousy or forbearance of their former vassals.

The speedy termination of Napoleon's career proved sufficiently that where the civilization of nations, as in the case of England and France, is nearly balanced, no occupation on the part of either can be lasting; thus he readily crushed the degenerate Italians and the Austrians, overran the barbarous Russians, and subdued the Germans, then less civilized than at present, and oppressed by corrupt and irresponsible governors. England, equal, if not superior, in civilization to France, checked the torrent, and has since taken the lead. Germany, roused from her lethargy, and partially emancipated from the rule of some of her worst princes and the system of subinfeudation, is quickly overtaking France, while Eastern nations succumb to the moral and physical influence and power of Western Europe. Thus the current of civilization, whose cradle was in the East, has flowed gradually but determinately towards the West, deserting the more genial and languid land of its birth, for a more robust and invigorating clime of its adoption.

§ 2.

Rome walled
b. c. 753, 20th April.

Destroys Remus.

Rome in its infancy, be its origin what it may, no sooner assumed the form of a connected state than it acknowledged the alternative of submitting to a common law and a common governor, or of being destroyed by its jealous neighbours. Under these circumstances, Romulus appears to have been chosen as her first ruler, and, having disposed of his brother Remus, collected about him his former associates, consisting of armed shepherds,
who, like the Bedouins or Arab shepherds of the Desert, combined that idlest of all occupations with the more active employment of marauders. Nor is it at all improbable that these reckless plunderers no longer felt secure without walls to protect themselves and their spoil from neighbours determined to put a period to their lawless inroads; they therefore built a town, the walls of which were completed on the 20th of April B.C. 753.

§ 3.

Although men may live wildly in the open country without laws or rules of conduct except those of the stronger, the case becomes very different when they are exposed to hourly collision within a narrow compass. To effect his object Romulus divided his people into three Tribes, which he again subdivided into ten Curiae, appointing priests to them ostensibly for the purpose of sacrifices, but really in all probability as the moral agents of his government among the people; and aware of the advantage of a representative system for dividing responsibility, he established the Senate, consisting at first of one hundred members chosen from the most respectable class of citizens. In order to fortify his position, he termed the members of this assembly Patres, or fathers of their country, which gave rise to the class they were chosen from being called Patricians. Nor did Romulus make any law without consulting this body, which was doubled on the accession of the Sabines and the citizens termed Quirites, after their chief city Cures. The primary object of Romulus in establishing a constitutional form of government was, probably, to escape the odium which enacting, of his own sole authority, equitable and consequently, to such a people, unpalatable laws would have drawn down upon him.

With increasing success he, however, became unpopular, probably from imprudence in the assumption of too much authority, and ultimately fell a victim, perhaps to the caprice and jealousy of rivals and malcontents, having been privately murdered, after a reign of thirty-seven years, when the common and hackneyed fable of his having been carried up to heaven was imposed upon the public, who built a temple to the deified mortal, under the name Quirinus, willing to worship as a god him whom they had abhorred as a man.

§ 4.

Numa Pompilius, a Sabine, ascended the throne B.C. 712, or A. u. c. 38, by right of popular election, reigned till 673, a period of forty-three years, and died peaceably; having done much for social intercourse, and infinitely more for superstition, in which he took the deepest interest. He enacted many good laws, as penalties on homicide, &c., and abated the rigour of others, especially of those regulating the reciprocal duties of parent and child, introduced by his predecessor; making it illegal for a parent...
to sell his son after marriage, because the woman who had married a freeman should not be forced to live with one who subsequently had in fact become a slave. He regulated the kalendar, and, pretending to be inspired by the nymph Egeria, succeeded by his priestcraft in turning the incredulity and superstition he had implanted to his own purposes.

§ 5.

The choice of the two constituent assemblies next fell on Tullius Hostilius, in the beginning of whose reign, B. C. 671, the city was eighty-two years old. He reigned thirty-two years midst war and tumult, and died probably by treason; nor do we learn that he did much for the legal institutions of the young state, occupying himself almost constantly in war.

§ 6.

Ancus Martius, the grandson of Numa Pompilius, was elected king A. U. C. 115, B. C. about 638, and reigned twenty-four years, which he employed in beautifying the city, and died quietly in his bed; but like his predecessor appears not to have troubled himself much with legislation.

§ 7.

Lucius Tarquinius Priscus reigned B. C. 615, A. U. C. 138. During thirty-eight years he did as little as his predecessor for the advancement of the law; indeed, he seems to have done little else than invent the laticlavis or distinctive toga of Senators, whose number he increased to three hundred, and that of the Vestal Virgins from four to seven. He was of Greek origin, and introduced some of their arts; he was murdered, like two of his predecessors.

§ 8.

Servius Tullius reigned forty-five years from B. C. 577, A. U. C. 176. He revived several of the laws of Romulus and Numa, and enacted many new ones, which were subsequently transcribed into the Twelve Tables. He instituted the census or general review of individual property every fifth year, or lustrum, which, until the appointment of Censors, was made by the Kings themselves, and subsequently by the Consuls. The laws, according to the rules of Romulus, were proposed to the Senate by the Kings, and then confirmed by the votes of the public Assembly, divided into thirty curiae, hence these laws were called Leges Regales et Curiales; but Servius Tullius divided them into six classes (which will be more particularly noticed later) and one hundred and ninety-four centuries, whence the name Legis Centuriales. The first division consisted of eighty-four centuries, composed of the principal citizens, who being the most nume-
rous could alone, if unanimous, always outvote the others. By this popular measure of individual taxation, pro rata in respect to their fortune, the power was retained in the Senate. Servius Tullius married his two daughters to the two grandsons of Tarquinius Priscus; she of meek temper to Lucius, who was of a fiery disposition, and Tullia, whose disposition was also un-governable, to the other brother, a man of meek temper. The result of these ill-assorted matches was fatal to the king, for Tarquinius, afterwards called Superbus, murdered his wife, and Tullia, her husband, and married Tarquin, who then conspiring, murdered the king, and placed himself on the throne.

§ 9.

Tarquinius Superbus ascended the throne B. C. 533, A. U. C. 220, and was expelled, after a reign of twenty-five years, for his tyranny, by a revolution, to which the violation of Lucretia by his son gave rise; his reign produced no legal literature, nay, his absolutism tended to render illusory the laws of former reigns, which were nevertheless collected during his dynasty by Sextus Papyrius Pontifex Maximus; a collection, which is known by the name of Jus Civile Papyrianium: many of these regal laws, however, grew obsolete—exsoleverunt; for we find "Exactis deinde regibus lege tribunitia, omnes leges haec exsoleverunt,"—and it may here be observed, that the comma in the passage should follow tribunitia, not regibus, which gives the sense, "after the kings were expelled by the tribunitial law, all these laws fell into disuse,"—not "after the expulsion of kings, all these laws were abolished by the lex tribunitia;" on the contrary, however, it would rather appear that those laws Tarquin had repealed were revived by the ordinance of Brutus; they, however, gradually fell into disuse. Livy, however, informs us that the laws of the Twelve Tables, and such Leges Regiae as were still extant after the destruction of the city by the Gauls, were collected, and followed at a much later period. Dionysius supposes these to have been the laws of Servius Tullius relating to contracts, which were very popular, and the ceremonial laws preserved by the priests; nor can it be doubted that many of the regal laws were incorporated into the Twelve Tables.

§ 10.

The words Lex Regia signify a law passed by the Comitia under the presidency of the Kings, as Lex Tribunitia that passed under the presidency of the Tribunes. It has appeared that by far the majority of regal laws were passed under Romulus, Numa Pompilius, and Servius Tullius; some indeed which obtained this denomination may not possibly have been

1 P. 7, 2, § 3. 2 Liv. 2. 1.
THE ROMAN CIVIL LAW.

passed under the Kings; their authority remained unimpaired until the final abolition of the Monarchy, A. U. C. 244-5.

§ II.

On the banishment of the Kings from Rome, two magistrates called Consuls a consulendo (colleagues) were chosen in their place, with great but not unlimited powers; the first-named were Junius Brutus and Tarquinius Collatinus, widower of Lucretia, but whom the very name he bore caused to be banished from Rome. The exterior insignia of these officers were identical with those the Kings formerly used—the purple robe, the twelve lictors, with the axes and fasces. These magistrates at first agreed to govern alternately by months; an inclination was soon, however, shewn to exceed the legitimate authority, which caused the enactment of the Lex Valeria, —249 U. C., giving a power of appeal from the magistrate to the people. The attempts of the banished Tarquin, and the insufficient power of the Consuls, induced the appointment of Larcius as dictator in A. U. C. 255, B. C. 498; the office lasted, however, only some six years. In A. U. C. 261 the Lex Sacrata concerning the election of Tribunes of the people, to protect them from the oppression of the nobility in cases of debt, was proposed and passed.

§ 12.

The Consuls thus aiming at arbitrary power, encouraged the patricians to usurp undue authority over the plebeians, who, A. U. C. 261, under the pretence of marching against the Æqui and Sabines, retired to the Montes Crustumierinus, afterwards called Sacer, armed, a measure which ended in a compromise above alluded to under the name Lex Sacrata, by which five plebeian officers, called Tribuni Plebis, whose office was to support appeals of the people against the patricians, and cause the redress of grievances to be enforced. Their persons were sacred; and they could, when they chose, assemble the people, and summon any magistrate, no matter what his degree, to appear before their tribunal; no Senatus Consultum was in force without their ratification or approval, which they gave by affixing to it the letter T, or refused it by the word Veto, without being forced to shew cause. At length the patricians also crept into this office, getting themselves adopted into plebeian families for this purpose, and with the increasing population their number was augmented to ten. The plebeians took occasion, by assistance of these officers, to enact laws, called Plebisita, independently of the Senate, but it is doubted if such were valid without the concurrence of this latter body (this question will, however, be more fully alluded to hereafter). It may, however, be here observed, that the disputes which these proceedings gave rise to, were the chief reason which moved the State to establish a code of laws which

1 Liv. 2, 8.
THE DECEMVIRAL PERIOD.

should be certain and invariable, and equally applicable to, and imperative on, all classes of citizens without distinction.

§ 13.

The uncertain and insufficient state of the law, in the commencement of the Republican period, joined to the uneasiness created by these continual bickerings between the patricians and plebeians, rendered some more precise system of legislation indispensable, and after much opposition on the part of the patricians, a law was proposed by Caius Terentilius Harsa, 460 B.C., A. U. C. 293, to appoint a commission to draw up a body of laws; and in B. C. 452, A. U. C. 301, three commissioners were actually chosen by the patricians to go over to Greece for the purpose of collecting materials for a code; on their return, after an absence of three years, ten patricians were appointed, with the title De Legibus Scribendis, whose duty it became to revise and digest, and ultimately to enforce these laws. Upon this all other magisterial offices were suspended, and these ten commissioners, or Decemviri, invested with the sole management of State affairs. The Ten Tables they drew up, having been approved by the Senate and Comitia, were engraved on metal, and suspended in the Comitium, and all parties were so well satisfied with the result of the first year's administration of the Decemviri, that it was resolved to continue the same sort of government for another year; new members were therefore elected to sit upon this commission, the only one re-elected being Appius Claudius.¹

In the former year the whole ten had been taken from the patrician class, but this year three of them were plebeians. The new laws drawn up by this new commission having been duly approved, and reduced to writing on two supplementary tables, made up the total number of Twelve Tables, by which name they subsequently were known, and under which they became famous. To judge from the fragments of these laws which have survived, they were very epigrammatic and positive in their nature, and became the catechism of the Roman youth of education; indeed, all well educated persons were expected to know them by heart. Cicero, in his book De Oratore, describes the law of the Twelve Tables as "a summary of all that is excellent in the libraries of the philosophers."

The administration of the Decemviri, however, did not endure long; they began to arrogate to themselves an undue share of power, and by restoring the axes to the lictors' rods appeared to be anxious to revive the abolished regal power. They, moreover, by siding with the patricians against the plebeians, excited distrust, and on their refusal to vacate their office at the expiry of the year were at length obliged to resign, B. C. 449, on account of the judgment given by Appius Claudius in the case of Virginia, upon

¹ Liv. 3, 35. Dion. 43, 10, 55.
which the people retired to the Aventine hill, and the old magisterial offices were re-established.

§ 14.

The consular office being restored on the abolition of the Decemviri in A. u. c. 304, the Plebiscita received Legis Vigorem by the Lex Horatia, which provided, that what the people enacted without the co-operation of the Senate, should have the same force as if enacted in the Comitia Centuriata; but two other disputes arising between the patricians and plebeians, which had occasioned the latter to retire in the first instance to the Mons Aventinus, and later to the Janiculum, the Senate, to induce them to return, were obliged to pass the Lex Publia in 415 A. u. c., and the Lex Hortensia in A. u. c. 478, confirmatory of the force of the Plebiscita, a right which, it would appear, was subsequently often taken advantage of. In addition to these, the interpretation and determination of the learned gave rise to another kind of law called Jus Civile, and the law resulting from practice or custom, which will be treated of in its place.

§ 15.

About the same time certain forms of pleadings, begun to be introduced by the lawyers, called Actiones Juris, in a set and formal style, to be followed in all proceedings and acts of court. These forms were collected somewhere about the year 446 A. u. c., or B. c. 312, by Appius Claudius Caecus, who was blind, and consequently obliged to employ an amanuensis, one Gneus Flavius, who published them under the title of the Jus Civile Flavianum, and is said to have been made Tribune and Curule Aedile in acknowledgment. Theretofore these forms, as well as the knowledge of legal or term days, had been confined to the patricians, who were consequently annoyed at the publication of an arcana, which secured them much power, and the more complete dependence of the plebeians; it is asserted by some that it was at this period that the civil was separated from the pontifical jurisprudence.

The Flavian collection being the first, was naturally imperfect; in consequence of which, Sextus Aelius Pætus, surnamed Catus, published a supplement to it, again promulgating the new formulæ subsequently introduced, and adding to it an interpretation of the laws of the Twelve Tables, whence it is called Tripartita, because the first part contained the laws of the Twelve Tables; the second, their interpretation; and the third, the forms of pleadings. It was in existence in the time of Pomponius, and from the fact of Aelius being a cotemporary of Erinius, we may fix the period at which he lived on or about the the year A. u. c. 553, or B. c. 200. This code acquired the name of the Jus Civile Aelianum, and was, if it may be so termed, a new edition of the Jus Civile Flavianum.

1 P. 1, 2, 7.  2 P. 2, 2, 38.
§ 16.

It will be foreign to the intention of this work, in which the greatest conciseness is aimed at, to follow the Roman history fully through all its phases from a period when a fixed system of legislation became universally acknowledged, a task out of the sphere of this work, and infringing on the office of the historian. Let us then rather trace the history of the law by the lawyers known as having written upon, laid down, and expounded its principles, and by the Princes who enacted laws or revised them.

The first, as we have seen, of these was PUBLIUS PAPYRIUS, who made a collection of the regal laws, and who was followed by

APPIUS CLAUDIUS, employed on the digest of the Twelve Tables, finished A. U. C. 304, in which he is supposed to have taken the leading part.

APPIUS CLAUDIUS, surnamed CENTIMANUS, is said to have been the third son of the former; his legal talents raised him to the consulate in A. U. C. 449.

SEMPRONIUS, the only man whom the people had honoured with the surname of σοφος, was a patrician, and attained the consulate in A. U. C. 450.

TIBERIUS CARUNCANIUS, the author of several memorable judgments or responsa, but whose writings are lost, was Consul, 473 A. U. C., and was the first plebeian raised to the dignity of Pontifex Maximus; he was, moreover, Censor and Dictator—nay, so famous was he that his opinion was followed in all questions divini et humani juris.

QUINTUS MUCIUS combined the qualities of lawyer and politician, in both of which he excelled, and is noted in history as having been sent as ambassador to Carthage to offer the alternative of peace or war.

SEXTUS AELIUS, alluded to above as author of the Aelian code, was the next in order; and followed by Publius Aelius, who lived about the same time. Scipio Nasica, Publius Attilius, Marcus Portius Cato, and Marcus Manlius flourished about 600 A. U. C.

Scipio Nasica acquired great reputation, as well by his skill in the law, of which he was a perfect master, as by his upright conduct in the offices of prætor and consul, and his signal victories over the enemy obtained him a decree for a triumph. He was surnamed Optimus by the Senate, who allowed him a house in the Via Sacra at the public expense, that clients might advise with him more conveniently.

Publius Attilius was of the family of Attilius Regulus, whose heroic conduct in the Punic war will be remembered. This Attilius the lawyer was the first to whom the title of Prudens was given by the people.
Marcus Portius Cato composed several law books: it is of him probably that Paulus speaks. He is supposed to be the author of the *Regula Catoniana*, treated of in the Seventh Title of the Thirty-fourth Book of the Digest.

Marcus Manlius, according to Cicero's account, was a very great lawyer:—"If any one should ask me," says he, "who deserved the name of lawyer? I would answer, the man who had a perfect knowledge of the laws and customs of the place where he professes it, and knows how to put it in practice; and if I must adduce examples, I would name Sextus Ælius, Marcus Manlius and Publius Mucius."

Publius Mucius and Brutus flourished about the year of Rome 630; and Publius Rutilius about 640 A. D. 640.

Publius Mucius, of whom Cicero speaks in the passage before cited, composed two books upon law subjects. He was descended from the famous Mucius Scævola.

Brutus, equally celebrated for his actions and birth, wrote seven legal treatises.

§ 17.

Before passing to the Imperial period, which began with Augustus A. D. 725, and continued in the West until A. D. 476 or 479, and in the East until the capture of Constantinople, on the 29th of May 1453, by Mahommed II., in the reign of Constantine XIII, the Palæologist, it will be well to pause and take a retrospective glance at the constitution of the Senate, and the institution of those magistrates who were gradually created during previous periods.

§ 18.

The Senate was the Legislative Assembly of Rome, equivalent to the *μηκαιον* of the Greeks, of which the King was properly only the Executive. The *Senator quasi à senex* is evidently borrowed from the Greek word of like import, Patres, the other term applied to senators, is of like origin, whence also the word *patricius*, which, on account of the exalted rank of the Senate, came to signify nobility.

The first hundred Senators represented the original tribe of Romans, but when the Sabine tribe was incorporated with the State another hundred was added, and a third hundred on the accession of the Luceres, who, in the reign of Tarquinius Priscus, were termed *Patres minorum gentium*.

The new Senators appear to have been distinguished from the old, by the term *Patres Conscripti*, a term subsequently applied to the whole body of the Senate. The result of a comparison of the various writers, who have touched on this subject, induces the

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2 Lib. de Clar. Orat.
3 Dion. 75, 2, 47. Plut. Rom. 20.
4 Dion. 3, 67.
5 Dion. 2, 57.
THE SENATE.

belief, that the number of three hundred remained without variation, until the civil war between Marius and Sulla, when we find the Senate amounted to six hundred. Sulla, during his dictatorship, about B. C. 89, having added three hundred of the most distinguished Equites to that body.¹

Julius Caesar augmented it to nine hundred, raising common persons and strangers to this dignity.² Augustus reduced the number to six hundred, clearing it of the Orcini Senatores,³ so termed, because they had no patrons but in the inferior regions.

The office was for life, and the election made by each Curia sending its representative, thus, in the beginning, the Senate of one hundred represented ten Curia.

Subsequently, however, the election of Senators passed to the Consuls, Consular Tribunes, and lastly to the Censors;⁴ but this nomination was not arbitrary, as they were always taken from such as the people had elected to a public office, or from the Equites.

On the institution of Censors, the right of election was vested in that magistrate with the power of selection from those who had served public offices. The Censor passed over such as he considered unworthy, who were hence termed Præteriti Senatores.⁵

The passage of Festus in the Lex Ovinia Tribunitia, as to the true meaning of which some doubts have arisen, viz., ex omn ordine optimum quemque curiatim, appears to be involved in not great difficulty if rendered according to its plain meaning of the words; thus, to elect “from every qualified order whoever should be the most fitting (curiatim), in the form prescribed by the standing orders of the Senate, or according to the curies,” that is to say, the most fitting person was to be taken by preference from some curia not represented.

In after times, certain magistrates had ex officio a right to a seat in the Senate, with the jus sententiae or right of declaring their opinions, but without a vote, like the Syndics of the Hanseatic republics, who have what is termed a berathende Stimme, or “advising voice;” the analogy is the nearer, as the Syndics are the ministers of those republics, as the Roman magistrates were. These were termed pedarii, from their joining the party with which they agreed after it had voted, they remained in the Senate a year after the expiration of office, probably for the purpose of reference as to acts done by them during such past period.

No property qualification was required before the time of Augustus, who fixed it at 400,000 sesterces, which he ultimately increased to triple that sum, or 1,200,000, respectively 833l. and 2,499l. of our money. He also admitted persons from the municipia to the dignity of Senator, when the municipium was said to have received the Jus Senatus.

It is difficult to ascertain the senatorial age, but it may be pre-

¹ Appian Civil. 1, 357. ² Dion. Cam. 45, 47. Suet. Ces. 80. ³ Dion. Cam. 54, 14. ⁴ Liv. 2, 1. ⁵ Zonar. 7, 19. Cit. de Leg. 3, 12.
sumed to have been 32, as a Quaestor was eligible on the expiration of his office. Augustus fixed it at 25.

Commerce in all its branches was forbidden to be carried on by Senators, lest the Senate should be disgraced by the bankruptcy of one of its body.

The Senate met on the Kalends Nones and Ides of every month, but extraordinary meetings might be summoned on such dies fasti when no Comitia met by the Kings, or under the Republic by the Curule Magistrates and Tribunes. Non-appearance was punished by a fine, and enforced by pignoris captione.

The month of February was set aside for business with foreign ambassadors.

In the beginning the Senate met in the Curia Hostilia, subsequently in several temples, as that of Concordia. Julius Cæsar commenced the Curia Julia, which magnificent design was, however, never completed, but under the Emperors it often met in the house of a Consul.

The Senate was opened in the solemn form Quod bonum, faustum, felix fortunatumque sit populo Romano Quiritibus. After the discussion the votes were taken by dicensio, division, or by numeratio, telling by the President, the former appears in later times to have been the more usual. The Senate originated in the discussion of all matters which the question might be referred to the people, who could only vote affirmatively or negatively. No sitting could strictly take place before sunrise, or be prolonged after sunset.

The powers of the Senate consisted in the superintendence of religion and of military affairs, declarations of war and the conclusion of peace and treaties, the appointment of ambassadors and their reception, the settlement of differences between allied states and corporate towns (municipia), the punishment of crimes dangerous to the State. In cases of emergency, the Senate might delegate its power to the Magistrates videant Consules ne quid Reipublica detrimenti capiat, equivalent to the declaration of martial law. The taxes and expenditure were in the province of the Senate, and were collected and administered by its officers. The Senate granted triumphs or refused them, by declining to grant the funds necessary for that purpose.

No certain rule can be fixed as to the number of Senators which formed a quorum; one instance of one hundred having been required, is, however, on record.

When Augustus restricted the meetings to two per mensum, he made four hundred members the quorum, subject, however, to modifications, and subsequently we find seventy and less forming a quorum.

1 Cic. ad. Q. Frat. 2, 13.  
2 Liv. 3, 28.  
3 Gell. 14, 7.  
4 Varro ap. Gel. 13, 8.  
6 Polyb. 6, 15.  
7 Lamprid. Al. Sever. 16.  
THE SENATE.

The Princeps Senatus, who was the president of the ordinary but the summoner of extraordinary meetings, and when the business was opened, the magistrates sat in the following order,—Princeps Senatus, Consulares, Censorii, Praetorii, Aedilicii, Tribunitii, Questorii, in which order it is presumed they had a right to speak, from the expression suo loco sententiam dicere. Towards the end of the Republic, the presiding Consul appears to have put the question nominatim to the senators, observing the same order throughout his year of office, which was at his option, nor were the members strictly confined to the matter in issue, the President having the option of selecting those questions which he would put to the vote; a Clerk, or one of the Senators, when secrecy was required, noted down the names of the chief supporters of a measure, when he made up the roll containing the import of the Senatus Consultum.

During the Imperial period, the Emperor, as Princeps Senatus, introduced his measures under the title of Oratio, Libellus, and Epistola Principis when he did not preside in person, and such notice was read by a Questor, and termed Jus Relationis. During the Imperial period, if the Emperor did not nominate his successor, the Senate had a right to do so; this right was, however, usually usurped by the army. Augustus raised the Senate to a high court of justice and appeal, with the cognisance of capital offences committed by members of its own body.

§ 19.

Constantine instituted a second Senate at Constantinople, on which Julian conferred all the privileges of the Senate of Rome; the dignity of Senator now became hereditary, and was conferred by the emperor ex speciali gratia. The office was most burdensome, not only on account of their contributions in times of necessity, but also on account of the tax folles or gleba on their landed property, or double on those who had none, which confined the office to the richest persons.

The privileges enjoyed by Senators were few, compared with their burdens.

The tunica laticea being a broad purple stripe woven into the front, a short boot with the letter C (centum), in allusion to the original number of the body, distinguished their dress.

The right of sitting in the orchestra in the theatre and circus, designated their precedence, together with the jus publice epulandi when a sacrifice was offered to Jupiter in the capitol, and the jus libere legationis.

1 Cic. Ph. 5, 17, and 13, 15. Ad Att. 12, 21.
2 Cic. Leg. 3, 18. Gell. 4, 10.
4 Zosim. 3, 11.
5 Zosim. 2, 32. Cod. Theod. 6, 2.
7 Suet. Ces. 21.
9 Dion. Cass. 52, 31.
10 Cod. Theod. 6, 2, 2, & 12, 1, 58.
11 Quint. 11, 3.
12 Cod. Thore. 6, 2, 2, & 12, 1, 58.
13 Cell. 12, 8. Suet. Aug. 35.
§ 20.

Parliaments or general councils in England, though essentially different, as will be seen, from the Senate of Rome, have existed from the most remote period, under the style of michel synoth, great council; michel gemote, great assembly; writenagemote, meeting of sages; the Latin terms, by their allusions, are more modern,—commune concilium regni, magnum concilium regis, curia magna, conventus magnatum vel procerus, assisa generalis, and communitas regni Angliae. Ina, King of the West Saxons, Offa, King of the Mercians, and Ethelbert, King of Kent, appear to have summoned similar meetings novis injurias emersis, nova constitutae remedia. The succeeding Saxon and Danish kings continued the same system. Edgar, Ethelstan, and Edmund, recite such mode of enactment at the head of their statutes.

The Normans appear to have continued the practice, according to Glanvill, who wrote in the time of Henry II. and Edward III. Blackstone informs us that a statute passed under the Conqueror was held a good plea by the court.

The Parliament, however, first obtained its present form under John's great Charter in 1215, by which the archbishops, bishops, abbots, earls, and greater barons, were to be summoned together, with all other tenants in capite of the Crown, to meet within forty days for the assessment of Scutages, &c.

It concerns us now, however, no longer to dwell on these Saxon antiquities, but rapidly to glance at the Legislative Assemblies of Great Britain, with a view to a comparison with the Senate of Rome. The Parliament in England is twofold; the House of Peers is increased at the discretion of the Crown by writ or patent, the former has, however fallen into disuse; from this must be distinguished the calling up a Peer's son from the Commons by writ, and forms the body most resembling the Roman Senate; the dignity, like that of Senator under the Eastern Empire, is hereditary, and except in peerages by writ is usually confined to the male line, while the older peerages by writ descend to heirs general.

§ 21.

Temporal Peers.

The Lords Temporal of Parliament are dukes, marquises, earls, viscounts, and barons, and form one division of the House of Peers. Of the total number of peers, sixteen are elected for Scotland, from among the peers of that kingdom for one Parliament only, and twenty-eight for Ireland for life; all must be of the full age of twenty-one years before they are capacitated to sit. Irish peers not in the House of Lords are not disqualified from election into the House of Commons.

In the case of Scotch peers, the Commissioners of England agreed at the Union that all peers of Scotland, and their suc-
cessors to their honours and dignities, should from and after the Union be reckoned and declared peers of Great Britain, and should be tried as peers of Great Britain, and enjoy the privileges of peers as fully as the peers of England did then enjoy the same, or as they or any other peers of Britain might hereafter, enjoy the same, except the right and privilege of sitting in the House of Lords and the privileges depending thereon, and particularly the right of sitting upon the trials of peers.  

The Parliament is summoned by the Crown by writ, and may be prorogued at pleasure by commission or proclamation, and this is in fact an adjournment.

The President of the House of Lords, or the Speaker in the Commons, regulates the proceedings, and may take part in any discussion; but this can only be done in the Commons when the House is in Committee.

The forms of voting are by division, but the peers may vote by proxy, entrusted to some other peer, and enter their dissent on any question on the books of the House. The peers may reject any bill sent from the House of Commons, or may return it amended, except a money-bill, in which case they have the right of veto only, but not of amendment.

The persons of peers are free from arrest in civil actions, and in case of criminal offences they have the right of trial by their own body, the verdict being given upon honour, not upon oath. They are the hereditary counsellors of the Crown, and as such have a right to demand an audience of the sovereign whenever they choose. Poverty was formerly considered a sufficient ground for degrading a peer from his dignity; but at the present time a contrary system is followed, and pensions are granted to those whose private fortunes are insufficient for the support of their station.

The peers may be attended by the judges of Queen’s Bench and Common Pleas, and such of the Barons of the Exchequer as are of the degree of the coif, or are serjeants, and the Queen’s counsel being serjeants, the Masters in Chancery being the messengers of the House of Lords, for their advice on points of law, and for the greater dignity of the proceedings. The Secretaries of State are, and the Attorney and Solicitor-General were, formerly also summoned, hence it was long a debateable question whether the latter could sit in the House of Commons.

§ 22.

The other division of the House of Peers, that of the Spiritual Lords, consists of three archbishops and twenty-eight bishops, of these one archbishop and three bishops sit by rotation as Lords Spi-

1 History of the Union between England and Scotland, by Daniel de Foé, Stockdale, 1786, p. 170.
ritual of Ireland. Blackstone tells us they sit in right of temporal baronies annexed to the dignity.

The Conqueror having changed their tenure from frankalmoign of free alms to feudal, exposed the Lords Spiritual to taxes from which they had formerly been free. Some authorities dispute this position, and assert that episcopacy sits by custom only, inasmuch as a bishop has never been tried, or claimed to be tried, by the House of Peers, and for other reasons foreign to the present subject. The Spiritual Peers are termed Lords of Parliament in contradistinction to the temporal peers, termed Peers of the Realm. It is, however, a curious contradiction in our Constitution, and an obsolete remnant of ecclesiastical feudality, that while the clergy are rigidly excluded from the House of Commons, the bishop, whose eye should ever be upon his clergy, and who should be occupied in promoting by strict superintendence the literal meaning of Episcopacy, the spiritual welfare of his diocese, is obliged to pass a great portion of the year in the temporal pursuits in the capital, secular legislation and political controversy. This clerical anomaly, existing not even in countries the most eminently Roman Catholic, is perhaps one of the chief causes of dissent, sectarianism, nay of infidelity, and of those two parties of high and low doctrine which have lately disgraced the church by their unseemly disputes, and is a source of inquietude to many of the sincerest friends of Episcopacy.

§ 23.

The same inconvenience appears to have been felt in Justinian's reign, and to have been checked by that staunch episcopalian and most orthodox high churchman, by restrictive ordinances. Fleury tells us, "that Justinian, in his first year, made laws relating to bishops." "The absence of bishops, says the Emperor, is the reason that divine service is so negligent performed, that the affairs of the churches are not so well taken care of, and the ecclesiastical revenues employed in the expenses of their journey, and of their residence in this city (he means the metropolis of Constantinople), with the clergy and domestics who accompany them. Let no bishops quit their churches to come to this city without an order from us, whatever may happen. If we find their presence to be necessary here, we will send for them." What motives induced bishops to attend the courts so much is easy to guess; and we have here a plain description how much the Eastern church was secularized, and how it gradually ripened into a fitness for desolating judgments.

In order to explain the Episcopal preference for the metropolis, we must refer to another passage of Justinian. "When an episcopal see becomes vacant, the inhabitants of the city shall declare in favour of three persons, whose faith and manners shall be

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2 Fleury, 30, 10.
testified by witnesses, that the most worthy shall be chosen. He proceeds, "continues our author, "to lay down rules to restrain the avarice of bishops,—rules which had no existence in purer times, because a purer spirit prevailed." In the present day all bishoprics from Constantinople are sold by the patriarch to the highest bidder, Justinian's law being extinct in that metropolis. Henry VIII. foresaw the possibility of such uses, and reduced the elective power of the chapters to a dead letter by the congé d'écrire.

§ 24.

Comitia is derived from co and eo, and were meetings or committees of the Roman populus, not of the plebs, according to curiae, or colleges. Rome originally contained thirty Curiae, and each curia ten houses, which gives three hundred—the number of the then Senate. The word may be derived from the Greek kúpos; hence Donaldson compares the assembly to "one of master burgesses or free householders;" the word is further connected with quírites quasi Curites.

This House of Commons, which had only the right of veto or assent, but not of amendment, originally met to confirm Senatus Consulta; to ratify war or peace; to confer the military power on any magistrate by the Lex Curia de Imperio, since without this they only possessed the potestas, ordinary executive power; in short, this assembly could confirm the proclamation of military law or forbid it.1 Adrogatio, or the adoption of a man sui juris, must be performed in this assembly. Formerly wills were made there, priests elected, and the Detestatio Sacrorum carried out.

The votes were not individual, but by colleges; thus there were thirty votes in the Comitia Curiata. If priests were to be elected, the Pontifices presided; otherwise, the patrician magistrates. The meeting was held in that part of the Forum called the Comitium, where the Suggestum stood. When these meetings were summoned for a special purpose, they were termed Comitia calata. As for the making a will, or the inauguration of a flamen, they latterly became a mere matter of form, the thirty lictors of the Curiae representing the votes of that assembly.

§ 25.

The Comitia Centuriata is attributed to Servius-Tullius, otherwise called the Comitia et Majora. Its operation was to unite the populus in three tribes, and plebs in one and the same assembly.

As every citizen was equipped for military service according to his fortune, this was the basis of the division into hundreds called centuries.²

1 Liv. 5, 52.
² This in some measure resembles the manner in which the regiments or orta of Yeni-sharis were divided before their destruction by Mahmoud II.
The cavalry ranked first, and was composed of 6 centuries of patrician, and 12 of plebeian equites.

The remaining 6 classes were composed of infantry, musicians, mechanics, artificers, sappers, &c., as follow:—

1st Class was composed of those worth 100,000 asses, or 10,000 drachmai, divided into 40 seniores from forty-five years of age upwards, 40 juniores from seventeen to forty-five. These were armed in a complete suit of bronze.

2nd Class was composed of those worth 75,000 asses, or 7,500 drachmai, divided into 10 seniores and 10 juniores. They had no coat of mail, and used a wooden scutum instead of a bronze clupeus.

3rd Class was composed of those worth 50,000 asses, or 5,000 drachmai, 10 seniores and 10 juniores, they were armed with pike and javelin only.

4th Class was composed of those worth 25,000 asses, or 2,500 drachmai, 10 seniores and 10 juniores. They were armed with a pike and javelin only.

5th Class was composed of those worth 12,000 asses, or 1,200 drachmai, 20 seniores and 10 juniores. They were armed with slings and darts.

The remainder, formed the 5th Class, and was composed of those worth less than the last class, of these were the accensi and velati, who were worth more than 1,500 asses, or 150 drachmai.

Those worth 375 asses, or 37½ drachmai, were termed Proletarii, and formed.

Those under this sum were termed Capite and Censi, and formed.

In addition to this there were those classed according to their occupations of Fabri, Corticis, tibicines, or laticines, reckoned with the 4th Class.

Total number of Centuries 195

Thus divided would make, of cavalry, heavy infantry, light infantry, of reserve or camp followers, smiths, musicians, 18 140 30 4 3

The first class of 80, with the Knights 18, and Fabri 1, made 99 centuries, and the four last classes, with the supernumeraries.
and musicians, made 96 centuries; if, therefore, the richer classes were unanimous they would outvote the latter by three, and even though the Fabri voted with the latter two.

As a military body, they were summoned by trumpet to the campus Martius, after seventeen days, or three market days, triumvindicinum (three ninth days). Before the Comitia Centuriata was opened, however, the presiding magistrate pitched his tent outside the city to observe the auspices, and if this formality or any other was omitted, the whole proceedings were vitiates. The Tribune, a sudden tempest, or the removal of the standard from the Janiculum, or the seizure of any one with epilepsy, hence ironically termed the Morbus Comitialis, might bring the meeting to an abrupt termination.

The mode of voting in this Assembly is reserved for another place. The Comitia Tributa was first established A. u. c. 362, or b. c. 391, when the plebeians had acquired considerable influence; no qualification of birth or property was required, but merely the residence in certain regions. Fabius tells us there were originally thirty tribes of plebeians, a number equal to the patrician Curiae, four were urban and twenty-six rustic; the tribuni plebis were the presiding magistrates when the object was the election of Tribunes or Aediles, but the Consuls or Praetors when that of the inferior magistrate, as Questors or Praefectors. Till a. u. c. 465, b. c. 288, the plebiscita they passed were only binding on themselves, but at that epoch, Gaius informs us, they obtained the force of laws by the Lex Hortensia (288 b. c.).

§ 26.

The period when the House of Commons was separated from the House of Lords has never been accurately ascertained. Hallam places it in the year 1264, or 49 Hen. III. Writs of summons by the Earl of Leicester, Simon de Montfort, being still in existence, calling knights, citizens, and burgesses to Parliament. The object of thus summing the Commons may have been for the purpose, as above remarked, of assessing aids and scutages; and as the voting of supplies has ever since been the peculiar province of the lower house, this origin may be taken to be the true one. The system of self-taxation is one of the constitutional privileges of a British subject.

Parliament was farther regulated by Charles I., repealed by Charles II., William and Mary, and William III. In the year 1834 the famous Reform Act was passed, to remedy abuses which had in the progress of nearly six years crept into the representative system. During that period the migration of the population from the so-called rotten boroughs had left the elections of these boroughs in the hands of the aristocracy and

1 Hall. Med. Ag. v. 2, 328. 8 16 Car. I. 1. 16 Car. II. 1.
2 1 W. & M. 1, 1, & 2, 2. 7 & 1 W. III. 1, 25. W. IV. c. 45.
3 & 2 2
other influential landed and monied proprietors, and of limited corporations, affording opportunities to wealthy, learned, and intelligent persons connected with commerce, shipping, the arts and sciences, colonial and other absent interests, and the army and navy, to procure seats, and of thus making the claims and interests of their respective classes, as connected with those of the empire at large, better understood in Parliament, because none others possessed the requisite practical, professional, and local information they could afford.

A more ready introduction into public life was thus afforded to the sons of the nobility, who also became thus legislatively educated for their future position, and hence we find in the upper house, much intelligence and useful knowledge, which could only have been acquired through attendance at committees and debates in the Commons; nevertheless, the reform introduced invaluable improvements in the mode of conducting elections, by limiting the duration of them, and which must have reduced the inordinate and ruinous expense attendant on the contested ones. How far it is possible to check the bribery attendant on them, without extinguishing the excitement of a pseudo-patriotism, and introducing in the course of time apathy in regard to public affairs, is a problem yet to be solved. In the times of the Roman emperors, with which a parallel in this respect may be drawn, we find that this selfish feeling so inherent in human nature, when no longer tolerated, indirectly produced an utter carelessness and indifference in regard to political matters, to which Juvenal bears witness:

\[ \text{Jampridem ex quo suffragia nulli} \]
\[ \text{Vendimus effudit curas—nam qui dabit olim} \]
\[ \text{Imperium, fasces, legiones, omnia nunc se} \]
\[ \text{Continet, atque duas tantum res anxius optat} \]
\[ \text{Panem et Circenses—} \]

alluding to the traffic in votes by the poorer class of plebeians, and to their disfranchisement by Julius Caesar in consequence.

§ 27.

The extension of the elective franchise introduced by the reform bill operated, \textit{pro tante}, as a substitution of the personal rights of persons for the rights of property, and of the class interest of absentees.

This alteration has on the one hand been hailed as an instalment of reform beneficial to the nation, while on the other it has been deprecated as injurious to unrepresented interests of the empire, and extending to its dismemberment.

The House of Commons thus remodelled, consists of six hundred and fifty-six members, of whom four hundred and sixty-nine are English, twenty-nine Welsh, fifty-three Scotch, and one hundred and five Irish representatives; forty county divisions in England are represented by one hundred and forty-four, and one

\[ \text{1 Juv. 10, 7.} \]
hundred and ninety cities and corporate bodies, including the two universities, by three hundred and twenty-five members.

In Wales, twelve county divisions are represented by fifteen knights of the shire, and the interests of fifty-nine boroughs by fourteen burgesses.

In Scotland, twenty-three county divisions are represented by thirty members, and twenty-one city towns and borough districts by twenty-three members.

In Ireland, thirty-two county divisions send sixty-four members, the university cities and boroughs send forty-one members to the Imperial Parliament.

Parliament must be summoned by the Crown and by none else, and must meet within fifty days, nor can it meet spontaneously; instances thereof exist on record, but it has been held that the acts of such Parliament required confirmation, being in se illegal.

There are statutes to enforce the summoning of Parliament within three years, but, practically, these statutes may be said to be obsolete in the present age; other statutes provide its being summoned every year, or oftener if need be. The duration of Parliament is seven years, but the Crown may dissolve it within that time, when the ministers are said to appeal to the country. If on the demise of the Sovereign there be no Parliament in being, the last Parliament, if regularly summoned, revives for six months, unless dissolved before the expiration of that period by the successor.

Every male natural-born British subject is eligible to sit in Parliament, if otherwise duly qualified. The qualification for knights of the shire is 600l. of clear yearly value, arising out of legal or equitable estate in lands, tenements, or hereditaments within the United Kingdom, or the rents and profits thereof for life or lives, or term of years, absolute or determinable on life or lives, whereof not less than thirteen years are unexpired at the time of election. A personal estate to the same value is also a qualification, or it may be composed of both of these, if of the necessary amount. Burgesses, or the representatives of boroughs, must possess the half of the qualification of a knight of the shire, or 300l. But after the return of the writ, the member need not remain so qualified.

The university members for Cambridge, Oxford, and Dublin, are excepted from this regulation, as also the eldest son or heir-apparent of any peer or lord of Parliament.

There are certain circumstances, however, which work a disqualification. The disqualified are, aliens born, and minors, idiots, madmen, persons attainted of treason or felony, outlaws on criminal prosecution, peers of Parliament, and all Scotch peers, judges of

1 2 Hals. 235. 2 7 W. & M. 1, 1.
3 16 Car. I. 1. 3 16 Car. II. 1. 1 W. & M. 2.
6 1 & 2 Vic. 48. 7 30 & 40 Geo. III. 67.
8 Com. Jour. 9th Nov. 1605, 1 Black. Com. 175. 7 Geo. II. 16, 4. 1 & 2 Geo. IV. 44.
the three kingdoms, metropolitan police, magistrates, and clerks, whether of the established, Scottish, or Roman church. Numerous offices disqualify, as those created since 25th October 1705, being new offices, or places of profit under the Crown, commissioners of prizes, &c., with many others. Excepting members of corporate trading companies, all government contractors, pensioners under the Crown during pleasure, or for a term of years, or the acceptance of any government office of profit, except commissions in the army or navy. The appointment to an office existent previous to 1705 does not bar re-election. The partially disqualified are sheriffs within their own jurisdiction, also mayors and bailiffs of boroughs.

Bankrupt members are suspended for the next twelve months, and if within this time the fiat be not superseded, or his affairs arranged, his seat becomes vacant. 

Electors are qualified to vote for counties in virtue of freehold estate to the annual value of 40s. above all charges; this was, at the time the qualification was restricted, probably equal to more than 20l. Freeholders for life and copyholders, however, require an annual value of 10l. for a qualification. Holders of sixty-year leases 70l., of twenty-year leases 50l., and if a sub-lessee, that he be in actual possession, also all bona fide yearly tenants to the amount of 50l.

The qualification for burgesses, electors, is lower, being 10l. holding, and there are many exceptions and ancient rights reserved by the act, which it is unnecessary to mention here.

The universities were first admitted to the permanent privilege of electing members of their own body to sit in Parliament by James I.; they were considered as the representatives of the literary interest of the kingdom; the only qualification is that of a perfect degree, and that the elector be a member of one of those corporate bodies, and qualified according to their respective charters; the regulations relating to them are totally exempt from the operation of the act.

With this last exception, registration, under certain regulations, is required of all voters by the act, and that the vote should be allowed by the revising barrister of the district, to be conformable to the provisions of the act.

The constitutional reason given in favour of a property qualification is, that by it those persons are excluded whose poverty, if the franchise were universal, would be open to the influence of their patrons, or bribery and treating on the part of rich men.

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1 10 Geo. IV. 44, 118. 2 41 Geo. III. 63, 4. 10 Geo. IV. 719. 
3 Vid. Rogers on Elections. 4 22 Geo. III. 45. 
5 6 Ann. 7. 5 Geo. I. 2. 56. 6 6 Ann. 7. 5 Geo. II. 56. 
The Speaker presides in the House of Commons, by which body he is elected, and is judge of all matters of order, and decides on questions arising out of rules of the House; he is chosen in each new Parliament, and his office lasts during that Parliament. In committee of the whole House, the Chairman of the Committee presides, and the Speaker relapses into an ordinary member for the time: both are salaried offices.

The Chancellor, or, in his default, the Speaker sues writs out of Chancery for a general or particular election. In counties the Sheriff in person returns the member elected, but in boroughs the returning officer, on the præciepe of the Sheriff.

The polling in counties is limited to two days, and is taken at many places simultaneously. In boroughs, to one day, by open votes tendered in person by the elector.

The peculiar attribute of the House is the passing of the so-called money bills; those imposing taxes on the public, and such bills, cannot be modified by the House of Lords, which must wholly accept or refuse them; this is the only exclusive privilege attaching to the Commons.

All voting is open and in person, and the majority binds the whole; for each member is a member for the whole realm, and therefore is not a deputy, but a representative, and, as he cannot resign his seat, is driven in order to disqualify himself, to the acceptance of a now fictitious office under the Crown—the stewardship of the chiltern hundreds, the manor of East Windred, or the like.

It requires the presence of forty members to make a House or constitute a Quorum; if that number be not present, the House may be counted out, on motion of any member, and must adjourn. As the Sovereign alone can summon the Parliament, so that power alone can prorogue or dissolve it; a prorogation is not usually for a greater period than forty days.

§ 28.

The word magistratus signifies alike the office and the person exercising it, and contains the same element as the word magnus. The King was formerly the sole Magistrate in whom all the potestas was reposed, and who was succeeded in this respect by the Consuls. Pomponius defines magistrates to be qui juri diciendo præsunt. Festus says, he was one who possessed the judicium auspiciumque.

Magistrates generally were either Majores or Minores, Ordinarii or Extraordinarii. The first possessed the imperium, the which the latter did not; the ordinarii includes all magistrates, the extra-ordinarii only such as were created temporarily and for a specific purpose, with more or less authority.

1 Liv. 23, 23. 2 P. 1, 2.
§ 29.

Imperium was of two kinds, the Merum1 conferred specially by the Lex Curia\textita de Imperio on a general in command,2 or on any one temporarily invested with extraordinary powers, termed by Ulpian,3 "gladii potestatem ad animadverterendum in facinerosos homines," equivalent to a declaration of military law, or the suspension of the habeas corpus act in England.

Mixtum.

Imperium mixtum was the simple and ordinary executive power, cui etiam jurisdiction inest, the competency to order a sentence to be carried into execution.

§ 30.

English parallel. We may draw a parallel from our Ecclesiastical Courts, which must apply to Chancery to obtain execution of their sentences in due form, as the Court of Chancery, Queen's Bench, Common Pleas, Exchequer, &c., can mero motu order a sentence to be carried out by the proper officer, the sheriff. Smith's Antiquities contained a long article on this subject, but it is confused and inconclusive.

§ 31.

Potestas.

In order to understand the force of the word potestas, we must refer to its derivation from potere, the power of doing a thing. Paulus' tells us that this word when applied to a magistrate was imperium, when applied to a pater familias patria potestas, and dominium when applied to slaves, yet all these three have one and the same signification; for the head of a family had originally magisterial power in his domestic Tribunal and even Imperium. Now, as potestas is applied to minor magistrates, who had not the imperium mixtum or executive power, it must be understood to mean the power of pronouncing a valid sentence without executive power, for this, long before Paulus' time, had been taken away from the domestic Tribunal; potestas then is the power of exercising the functions of an office of any sort or kind.

§ 32.

Dominium.

English parallel. We may draw a parallel from customs more familiar to us; the judge of a superior court has the potestas, that is, he pronounces a valid judgment according to law, but the sheriff has the imperium or jus gladii, and must execute the criminal or civil sentences so pronounced, and this executive power is derived from the Crown or supreme magistrate—the legislative power precedes both, and resides in the body of the people by the Parliament.

Thus, in England, we have the Parliament who makes the law;

1 P. 1, 21, 1.  2 Cic. Phil. v. 16.  Liv. 5, 72.  3 P. 2, 1, 3.  4 P. 50, 16, 225.
The judge who interprets it, and pronounces a sentence in conformity with it; and 
The Crown who executes such sentence by its sheriff. 
Under the Magistratus majores were reckoned Consules and 
Proconsules in Provinces, Praetores and Propraetores, Praesides Pro-
vinciarum, Censors, Aediles Curules. 
Superior magis-

Under the Magistratus minores were reckoned Aediles, Tri-
bunes, Quaestors, Quaestores Paricidii, Triumviri Capitales. 
Inferior magis-

Extraordinary Superior Magistrates were Interrex, Dictator, 
Extraordinary 
Extraordinary inferior magis-

Duumviri Perduellionis. 
Judices, Recuperatores. 
§ 33: 
Let us now pass to the Supreme Magistrates of the State, the 
Consuls, who were first created A. u. c. 240, and derived their 
name à consulendo (colleague, con and salio). They possessed at once 
an administrative and executive power, of which latter the Lictors 
were the type; to this end they carried a bundle of rods with an axe 
in the middle, typifying corporeal and capital punishment. We 
find them also called Praetores in their judicial capacity. 

They were chosen from the patricians in the Comitia Curiata, 
and possessed the power of veto in the Senate. Their power was 
subsequently much abridged on the appointment of Tribunes. 

During the Decemviral period, from B. c. 452 to 444, their office 
was in abeyance, but revived in 366 A. u. c., the plebeians ob-
tained the appointment of one Consul from their body, after which 
the Consuls were indifferently patricians and plebeians. 
The Consuls were elected some time before they actually 
entered on office, and were during this expectant state termed De-
signati. The same person strictly could not be re-elected before 
a lapse of ten years. C. Martius shews the exception. 
The Lex Consulis b. c. 181, fixed the age of the consul 
at 43. 

Latterly, under the Emperors, the consulship naturally became 
an honorary office, their functions practically ceasing on the re-es-

Consules ordin-

Consules suffecti were those appointed by the Emperors, for Ti-
berius transferred the elective power to the Senate, and subsequent 
emperors fairly usurped it themselves: honorarii were, as their name 
imports, titular Consuls. 
Fasti Consulares were the calendar of years, named after those 
who were consuls of the year.

1 Cic. Phil. 5, 17, 47.
§ 34.

A Prætor must be considered in a double capacity; 1st, as a supplementary consul; and, 2ndly, as an annual judicial officer.

The office which Cicero\(^1\) derives from praëre was first created B.C. 366, and the election made at the Comitia Centuriata from the patricians, as an indemnification for the admission of the plebeians to the consulship;\(^2\) but in B.C. 337 plebeians were also admitted to this office.

The Prætor's principal duty was jus in urbe dicere—jura redere;\(^3\) he, however, commanded the armies in the absence of the consul; hence the office was usually conferred on an ex-consul the year his office expired, the object of which probably was that the new consul might profit by his experience and advice, and hence the term collega consulis.

A second Prætor was elected B.C. 246, called Prætor Peregrinus,\(^4\) to relieve the press of business by administering justice between foreigners and citizens.

Subsequently we find their number increased to four, B.C. 227, six, B.C. 197; four of the six going to the provinces, Sicily and Sardinia, and Spain. Under Sulla there were eight, and under Julius Cæsar ten, twelve, fourteen, and sixteen. Pomponius says there were even eighteen in his time, and particular departments were assigned to them, as guardianships, fiscal and other matters.

As the ex-consul became Prætor, so the ex-Prætor became pro-Prætor in a province. Both the Prætores urbani, who could not be absent from the city more than ten days at a time, had the jus edicendi,\(^5\) or the right of proclaiming the rules of his court, called jus prætorium, or jus honorarium.\(^6\) His chief attribute was assigning a judex, hence the expression do, dico, addico—do judicem, dico jus, addico rem. The Prætores also sat in judgment in criminal matters in tribunalis, or superiore loco, presiding over a sort of jury, judices; but a Prætor could do many judicial acts e plano, or ex aquo loco, out of court.\(^7\)

This Edictum was written on a white board, hence called album Prætoris. This Edictum was made perpetuum, under Adrian, by Salvus Julianus the then Prætor, before which each annual Prætor promulgated his own edict, although he usually in fact adopted that of his predecessor in office.

§ 35.

Censores were created A.U.C. 311, or B.C. 442. They were elected in the first instance from the patrician class by the Curiae, and confirmed by the Centuriae; and as the census was originally taken every lustrum or five years, the office of this magistrate was also quinquennial: B.C. 433, or A.U.C. 423, the dura-

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\(^1\) Leg. 3, 3. \(^2\) Liv. 6, 42, & 7, 1. \(^3\) Liv. l. c. \(^4\) P. 1, 2, 28. \(^5\) Gaius, 1, 2. \(^6\) P. 444, 7, 58. \(^7\) Gaius, 1, 30.
SUPERIOR MAGISTRATES.

Duration of office limited.

Plebeians obtain the censorship.

The power and office.

tion of the office was limited to eighteen months, consequently, during the latter three and a half years of the lustrum, the office was in abeyance. In the year A. U. C. 403, the plebeians also came in for a share in this office, and the election was then indifferently from patricians and plebeians.

Their power was very considerable, as no man's concerns could be concealed from them, and as to them was confided the registration of citizens according to their property. Thus the divisions of the Comitia Centuriata depended upon the magistrates, who were in fact commissioners of the exchequer, managing the farming of the vectigalia, or regular revenue; the contracts for the repair of public buildings and roads, including the care of the temples.

Their dress was a scarlet robe, and thier rank consular. When a Censor died, his colleague resigned, and his place was not filled up. The census was taken in the Campus Martius in solemn form, with sacrifices and purifications, every five years, hence termed a lustrum. Res mancipi (quod vide post) were only taken into account, consequently no estates or public domains.

§ 36.

ÆDILES CURULES were created A. U. C. 388, B. C. 365, from among the patricians, in consequence of a dispute about the ludi maximii, henceforward then their number was four. There appears to have been little difference, if any, in their respective functions. Within five days of their election they divided the city by lot or consent into four divisions, as far as local matters were concerned; in most others exercising a joint jurisdiction.

There were some duties, however, especially within the province of the Curule Ædiles; as, for instance, the celebration of the ludi maximii, megalesii, and ludi scenici generally; and while the Plebeian Ædiles had funds assigned to them for public purposes, the Curule Ædiles made all disbursements out of their private means, often amounting to lavish expenditure.

The distinctive attributes of a Curule Ædile was the sella curulis, the toga pretesta, the jus imaginis, a precedence of speaking in the Senate, and the jus edicendi. Their edicts, however, were confined to the duties of their office, applying to contracts of bargain and sale, and the like.

After the passing of the Lex Annalis, A. U. C. 573, B. C. 180, the age at which these offices could be held was increased from twenty-seven to thirty-six. Under the Emperors the office fell so much into disrepute that it was found necessary to compel persons to bear it, its superior functions having merged in the Emperor.

ÆDILES being then of two ranks, Plebeian and Curule, were elected
Ædiles, not Curule, created B. C. 494.

Functions of their office.

Their officers.

Tribunes.

Tribunes of the people created B. C. 494.

Increase of the power.

Their presence in the Senate.

in the Comitia Centuriata, and subsequently in the Tributa. The simple or plebeian Ædiles was first created A. U. C. 259, or B. C. 494, as assistants of the Tribunes. Their number was two, and their designation is said to have been derived from their having care of the Ædes or Temple of Ceres; but more probably from the repair of all buildings generally being entrusted to them, including aqueducts, wells, and the like. This was extended to public lands and markets, with their incidents, whence they exercised a sort of police jurisdiction within the city, hearing and disposing of plaints connected with order, public honesty, and decency. Brothels, houses of amusement, baths, and prostitutes consequently came under their jurisdiction, which were registered by the Ædiles, who had under them proper police-officers, by the denominations of praecones, scribae, and viatores, for the execution of their office, and must very nearly have represented our police force. The care of the Seta. and Plebiscita, which they had to preserve without alteration, was, however, among their more important duties.

§ 37.

TRIBUNI were of various kinds; originally, they appear to have represented the three Roman Tribes in all civil, religious, and military affairs.

The Tribunes of the Servian tribes headed in a somewhat similar manner the thirty rustic tribes of Servius Tullius, having the custody of the Registers for the purposes of taxation and military levies. The most important officer, however, with whom we have to do was the

TRIBUNUS PLEBIS, first appointed A. U. C. 259, B. C. 494, on the secession of the mass of people to the Mons Sacer. These officers had the right of convoking the tribes, interposing their veto to any law calculated to infringe the popular rights, and of affording protection against any abuse of power by the patrician magistrates. They presided at the Comitia Tributa.

With the progress of democracy it is not astonishing that their power should increase, and with that increase should be abused by them; and although they had no imperium, and their power was circumscribed to the space of a mile round the city, they arrogated to themselves in the course of time an almost autocratical jurisdiction. A. U. C. 297, B. C. 456. They assumed the right of summoning the Senate, and four years later demanded the appointment of a commission for framing a new system of legislation.

The Tribunes having obtained the right of being present at the deliberations of the Senate, sitting before the open doors on seats prepared for that purpose, they assumed the right of summoning patricians before the Comitia Tributa for violation of plebeian

1 Dion. Cass. 6, 90, 9, 43, and 49.  
2 Liv. 3, 22.  
3 Liv. 3, 55.  
INFERIOR MAGistrates.

right's, and asserted the binding force of a plebiscitum on the patrician class. Their intercessio was used to arrest the act of any magistrate.

It was natural that the patricians should wish to participate in these extraordinary powers. Thus we find the patricians obtaining the office by adoption into plebeian families, since none but plebeians were eligible to this office.

The office of Quæstor usually preceded that of Tribune, consequently the plebiscitum, conferring upon them the right of a seat in the Senate, remained almost a dead letter, an ex-Quæstor being eligible to that body. Their persons were sacred, and their doors always open to afford access to all such as held themselves aggrieved.

Whether they were originally elected by the Curiae, or the Centuriae is a matter of uncertainty, though after the Pubilian law it is clear their election rested with the Comitia Tributa.

They could prevent a Consul from convoking the Senate, or compel him to do so (b.c. 456), to suspend the proposal of new laws of elections in the Comitia; they even went so far as to intercede against the official duties of the Praetors or Censors, to force the Consuls to comply with the decrees of the Senate, and even to seize their persons by their viatores, and execute them themselves. They had the power of imposing a fine, but not being judges they had not the right of citation (vocatio) but the right of apprehension (prehensio), treating the matter as a criminal offence. Sulla first checked their power; but it was subsequently restored by Pompey, and finally began gradually to decline under the Empire; nevertheless, their power was considerable to the fifth century.

Their number was originally two, but was soon increased to five, one to represent each class, and subsequently doubled, A. U. C. 296, B. C. 457, which number continued thenceforth. The majority of their body ruled their proceedings up to A. U. C. 359, B. C. 394, after which the vote of one tribune sufficed to neutralize the votes of all his colleagues; this was finally changed by C. Tiberius Gracchus, Cicero asserts their jus edicendi; hence Vellaius speaks of their imperium; their collective power was termed tribunitia potestas.

Tribuni militum cum consulari potestate arose in a division of the consular power between the patricians and plebeians, the consulsipship was held in abeyance during seventy-five years from B. C. 445, to 367, and divided between these officers and the

1 Liv. 3, 36—4, 44—5, 11. 9 Dion. Cass. 53, 17, 32. 2 Liv. 45, 15.
7 Gell. 15, 32. 8 Liv. 8, 33—42, 4—26, 3.
9 Zonar. 7, 15. 9 Dion. 6, 89.
11 In Verr. 2, 41.
censors at the latter date; however, the ancient status was re-established, their number varied from three to eight.

The Tribuni militares were military officers, eight of which were attached to each legion, to keep order, and enforce sanitary regulations, &c.

§ 38.

Quaestores Classici, so called from their election by the centuries, were instituted A. u. c. 245, B. c. 508, and were originally two in number, but were subsequently increased with the exigencies of the State to four, A. u. c. 332, B. c. 421, and again doubled in A. u. c. 488, B. c. 265. Sulla raised the number to twenty, to enlarge the number of candidates for the Senate. This office continued to the latest times of the Empire.

At the commencement they were chosen from the Patricians, and were the executive officers of revenue of the Senate, and controllers of the publicani, tax farmers and collectors, hence not only the collection of the revenue was in their department, but also the registry of public accountants, and the care of persons receiving public hospitality, the reception of ambassadors, and the like. The Plebeians first obtained this office A. u. c. 344, B. c. 409, eleven years after their capacity to hold it had been admitted, and on the termination of their office they became eligible for the Senate. Two of these officers accompanied the Consuls when in the field as paymasters, the two remaining at home for the execution of the usual duties, and being termed urbani, to whom Augustus transferred the custody of the records of the Senate from the Aediles.

It was the duty of the Quaestor Ostiensis, to provide Rome with a proper supply of corn. Under the Empire one of the quaestors was termed candidatus principis, whose duty it was to read the epistole or libri principis in the Senate. On the foundation of the Byzantine Empire, the quaestor Sacra Palatii, a most important and confidential minister, grew out of the above office, but the expense of bearing this office was always extremely heavy.

In the provinces they performed the double office of Quaestores and Aediles, and a pro-Quaestor was appointed by the Praetor on the death of his Quaestor; on the other hand, the Quaestor supplied the place of the Praetor in his absence, with the same ensigns of dignity and office, consequently the relation between a Praetor and the Quaestor of his province was always most intimate. The imperial provinces, however, had no Quaestores, but only those termed provincia populi Romani.

1 Niebuhr, 2, 430.
2 Ostia was the port at the mouth of the Tiber, the present Civita Vecchia.
3 P. 7, 13, § 2 & 4.
INFERIOR MAGISTRATES.

§ 39.

Quæstores Paricidii, or parici, were ordinary magistrates, and in this respect to be distinguished from the Duumviri perduelionis, who were extraordinary officers appointed ad hoc.

The Quæstores Paricidii were two in number, and acted as public prosecutors in capital offences, the Attorneys-General of the State; but they, moreover, carried out the sentence. They differed from the Triumviri capitales in that they were not judges, but prosecutors, whereas the others resembled our Justices of the Peace in their capacity of preliminary inquirers, the Juges d'Instruction of the French, and in their summary jurisdiction in small offences, but not a Justice of the Peace considered as a Judge of Sessions.

On mature examination of the subject, little doubt can exist that they were ordinary magistrates, dating from the oldest times; so much so, that their first appointment cannot be ascertained; they were probably for life, or quamdiu se bene gesserint, but subsequently, under the Republic, they became annual, of five, appointed by the Curia on presentation of the Consuls, as they had formerly been on presentation of the King, A. u. c. 306, B. c. 447; they were appointed by the pepulus without presentation.

Their functions appear, about the year A. u. c. 387, B. c. 366, to have merged in those of the Triumviri Capitales, whose office thereby changed in nature and increased in importance, though, it may be presumed, not to the advancement of justice, as the examining magistrate became thereby also the prosecutor.

§ 40.

The word paricidium has, in the opinion of the author, been not usually correctly understood, or confused with the word parcicide; the derivation is evidently, in one case, from parem an equal, and caedo to kill—that is, the murder of a fellow-citizen, not a slave; but in the other, from patrem a father, and caedo.

Homicidium is a larger word, for a slave was a homo though not a persona; now, although the root of homo may be the same as that of par-δύος, yet it is very clear it had among the Romans lost that significance, or that it was confined to signify one of the same genus, but not of the same political species.

Paricide is therefore to be distinguished from patricide or paricide with two rs, which is simply a softening of the t. The one is a murderer generally, the other a murderer of his father; were this not so, the fraternum paricidium of Cicero, and the paricida liberum of Livy, would be absurd expressions.

§ 41.

There were not less than twelve sorts of Triumviri, or Tresviri, of whom it will, however, suffice to mention those connected with legal proceedings; these were the Triumviri Capitales, or judges in capital matters; these regular magistrates were first created A. u. c. 461, B. c. 292;¹ their election rested with the Comitia under presidency of the Praetor. Their functions resembled, in many respects, those of the Quaestores paricidii; they inquired into and received information of all crimes, apprehended and committed² the offenders for trial, but it does not appear that they were more than Justices of the Peace with us, or the Juges d'Instruction of the French, they had, however, a summary power of punishing slaves and like persons. The care of the public peace and prisons, and the execution of sentences,³ was their peculiar province, and in such respects they co-operated with the Aediles.⁴

§ 42.

Interrex was an extraordinary and superior magistrate, whose duty was to act as administrator of the Government during an interregnum, properly so called on Romulus’s death; one was elected from each securia of the Senate, then composed of a hundred⁵ members, and assumed the attributes of the regal authority for five days during fifty days when the rotation was to begin, and if no king had been elected.

Under the Republic they held comitia for the appointment of Consuls, when circumstances had prevented the Consuls from doing so before the expiration of their office.⁶ Under the old regulations, the interrex was sometimes styled Praetor Urbis.⁷

Interreges were appointed to hold the comitia for the election of Sulla as Dictator, A. u. c. 671, B. c. 82, and of Pompey and Crassus as Consuls.

The office could only be held by a Patrician, and the Interrex was a superior magistrate by virtue of the jurisdicton belonging to the rank.

§ 43.

Dictator was an extraordinary and superior magistrate, with almost more than sovereign imperium, polémou te kal éphímws kal pauthós állou prágmatos ánthropátor.⁸ There was no appeal against his decrees under the Kings. The only limitations were that of his office to a period of six months,⁹ after which he was responsible for his administration.¹⁰ They, however, usually resigned on the object of their appointment being completed.

He could not exceed the credit assigned him by the Senate on the treasury, or ride on horseback, or quit Italy, without permission. These were the safeguards against an abuse of power, which nevertheless was practised by Sulla and J. Cæsar.

The appointment must be made by the Consuls, and if they refused to do so the Tribunes could compel them on the request of the Senate. When so appointed the Curiae ratified the imperium to them.

His duties were threefold: for fixing the clavus annalis on the Temple of Jupiter in times of pestilence and civil discord; for holding the comitia or elections in the absence of the Consuls, for appointing holidays on the appearance of prodigies, and officiating at the ludi Romani in the absence of the Prætor; for trials and filling up vacancies in the Senate.

There are two accounts of the origin of this office; the one that the Consuls were distrusted after the expulsion of the Tarquins, the other that the office was created ten years later.

The appointment of a Dictator was, it may be seen from the above, equivalent to a declaration of military law. The late position of General Cavaignac probably very nearly represents that of a Roman Dictator in troublous times.

§ 44.

The descriptions of Duumviri were various. Of the six sorts, only one had a judicial character.

The Duumviri Navales were extraordinary naval commissioners.

The Duumviri Sacrorum had the charge of the Sybilline books.

The Duumviri Quinuenniales were the Censors of the provinces.

Other Duumviri were created for the dedication of a temple.

The Duumviri Juridicundo, however, were the highest magistrates in municipal towns.

The Duumviri Perduelliones, however, were extraordinary magistrates, appointed by the Kings and later by the Consuls, and confirmed by the Comitia Curiata, or Centuriata, to try treasons and seditions endangering the peace of the State. The house of those found guilty of this offence was razed to the ground, and their relatives forbidden to mourn for them.

The same punishment was in the reign of Charles IX. inflicted upon traitors, the sentence was as follows:

Arrêt rendu par la cour séant au donjon de Vincennes, contre Marc Annibal de Coconnas, atteint et convaincu du crime de lèse majesté, de tentative d’empoisonnement, de sortilège et de magie contre la personne du roi, de crime de conspiration contre la sûreté de l’état, comme aussi pour avoir entraîné, par ses pernicieux con-

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2 Liv. 4, 26.  
3 Liv. 9, 38.  
4 Liv. 8, 23—9, 7.  
5 Liv. 7, 28.  
6 Liv. 9, 26.  
7 Liv. 2, 18.  
8 P. 3, 2; 9. 11, § 3.
seils, un prince du sang à la rébellion. En conséquence de quoi sera le dit Marc Annibal de Coconas conduit de la prison à la place Saint Jean en Grève, pour y être décapité, ses biens confisqués, ses hautes futaies coupées à la hauteur de six pieds, ses châteaux ruinés, et en l’aire un poteau planté avec une plaque de cuivre qui constatera le crime et le châtiment.

§ 45.

A great deal of confusion has arisen respecting the functions of the Judex, which the author in endeavouring to clear up is aware that he differs in many points from contemporay authors, though he trusts it will be allowed on good grounds. The Judex was an officer appointed by the Praetor (datum) for the purpose of examining into the facts of the cause as stated in the issue joined between the contentious parties before the Praetor, who was a judge of law; or, as it was termed, sat in iure, as distinguished from the Judex who sat in judicio, and judged principally of facts.

The signification of Judex in the singular corresponds then very nearly with our Judge at nisi prius. The Praetor, on the other hand, representing the judge at chambers, before whom we are used to discuss points of pleading, or the bench before whom demurrers are argued. The writ, or citatio, was issued by the Praetor in later times, a practice which superseded the original vocatio in jus by the plaintiff; on being satisfied, at least ex parte, that the plaintiff had a fair cause of action. The Judge so assigned by the Praetor could not be challenged; but, on the other hand, he must be taken from a class qualified to act in this capacity, and a certain number of which the Praetor probably selected for this duty during his year of office.¹

They appear, in the first instance, to have been persons of senatorial or patrician rank, presumed to be cognizant of the science of law; for although the issue, as has been before remarked, was made up by the Praetor, points of law and evidence must and necessarily have arisen then as well as in our days, which would render it extremely difficult for a lay judge to try a cause satisfactorily, a modern instance which may unfortunately be seen at almost any of our quarter-sessions, especially in the trial of civil cases.

With respect to the Court, the business was conducted by the plaintiff’s patron (actoris patronus) briefly opening the case, and calling witnesses (testes) or producing documents under proof, on oath, by way of affidavit, to establish his case, cross-examination was resorted to, in which the advocate showed his skill, the defendant, or reus, defended himself in like manner, and when all was finished the Judex pronounced his sentence; but if the case could not be finished in one sitting he had the power of adjournment (ampliatio), as to him might seem necessary. On the conclusion of the proceedings the Judex might defer judgment, or if
unable to make up his mind declare on oath,\textsuperscript{1} \textit{dico non liquere}. \textit{Non proven.}

From the same passage, it appears that the Judge was surrounded by friends, acquaintances, and legal amateurs, whose advice he might if he chose ask as \textit{amici curiae}, but which he was by no means bound either to ask or adopt.

Nor will the question as to the class whence these Judges are chosen be difficult of solution. The \textit{science}, study, and practice of law was notoriously confined to the patrician class; any man, therefore, of that class might be called upon by the \textit{Praetor} to act in the capacity of a Judge, nor could he evade the duty but by a valid excuse, \textit{excusatio}, which was defined and settled by practice and usage; lastly, this \textit{Judex} was termed \textit{Pedaneus}, because he sat \textit{quasi ad pedes praetoris}.

\textit{Called Pedaneus.}

A parallel may be drawn from our practice, where the Court of Chancery often sends down an issue to be tried by the Common Law Courts, with a view to ascertain the facts. Somewhat similar is a reference from the Superior Court to some barrister constituted judge by a Rule of Court, with certain powers of administering oaths, adjournment, enlargement of the term in which he is to make his award, \&c., which is to be binding on the parties without the intervention of a jury, on which account this parallel is nearer than that of the above-cited issue out of Chancery.

\textit{Arbiter was a sort of judge of a \textit{res incerta}, where an amount was to be assessed in cases termed \textit{bonae fidei}, or arbitraries; and I am inclined to think this arbiter was either alone a private extrajudicial judge, the province of the judge being confined to \textit{res certa}, but not to the estimation of damage, or assessment of value;\textsuperscript{2} he was, moreover, a judicial person appointed by the \textit{Praetor}. Festus says,\textsuperscript{3} \textit{arbiter est qui totius rei arbitrium et potestatem habet}; whence we must infer that he was not assisted by \textit{Recupatores}; the contract by which the parties bound themselves to submit to arbitration was termed a \textit{compromissum}. The proceeding was not so formal, and devoid of the formula\textsuperscript{4} of \textit{sponsoio}; in short, the arbiter was the same as ours, where not appointed by a Rule of Court, but extrajudicially agreed upon by the parties.}

\textit{Judges in the plural.}

\textit{Compromise.}

\textit{His office.}

\textit{Arbiter.}

\textit{English parallel.}

\textit{Album Judicum, or jury lists.}

\textit{Challenges.}

\textit{In contradistinction to those rejected, \textit{Aedititi}. The jury panel}

\textsuperscript{1} Aul. Gell. 14. 2. \textsuperscript{2} Gaius, 47, 50, 62. \textsuperscript{3} 253. \textsuperscript{4} Cic. pro. Rosc. Com. 14.
thus made up tried the cause. Their office was, however, to examine into the facts laid before them; their verdict (judicium) the opinion of the majority. The Praetor sitting as Questor acted as the judge, and gave judgment if the judices convicted. These men were probably first taken from the patricians, subsequently, with the increase of criminal business, the Equites came in for their share of the munus publicum, after which the office was extended to other classes; nevertheless, it appears to have been confined as much as possible to the superior class of society.

The legal age was between thirty and sixty, and all below and above that age were excused. In England, the age is between twenty-one and sixty by statute.

With respect to the number required to try a criminal, we find it variously stated at fifty-six, seventy, and one hundred, which might have depended on an express law, in very important cases, passed to regulate the proceedings; but in ordinary cases it may be presumed the number was fixed, and lower than the above: we have, unluckily, no authority on the subject.

Recuperatores appear to be the first jurymen or assessors of damage in civil actions; these, however, did not apply to cases where a definitive thing or sum was sought to be recovered. Aulus Gellius\(^1\) gives their origin as follows:—A certain Lucius Veratius amused himself by wantonly slapping freemen he met in the face, a servant followed him with a bag of money, tendering to all such the estimation of an assault fixed by the Twelve Tables at twenty-five asses. Such Recuperatores or assessors appear to have assisted the judge, after the fashion of jurymen, to estimate merely the pecuniary satisfaction or even measure of punishment; but it is to be presumed the arbitrator still remained in such cases judge of the fact, which, having found, he left it to the Recuperatores to assess the sum to be paid\(^2\) or punishment to be suffered by the defendant. When Recuperatores were chosen to find a fact, they were usually very few in number, in fact, the cause was tried before more than one judge.\(^3\) We find the question of the mural crown, claimed equally by the centurion Q. Tribellius and Sex Digestius, referred to the supporters of either party, C. Lælius and M. Sempronius Tuditanus, to whom Scipio added a third, P. Cornelius Claudinus, to decide who first entered the city; but this being a transaction on the field of battle cannot be drawn into a legal precedent, but must be looked upon merely as a private reference for the purpose of settling the dispute; nevertheless, the real arbitrator or judge in this case was P. C. Claudinus, as both the others were partizans.

A Scutum. was passed for five Recuperatores, to inquire into the conduct of the Roman Magistrates in Spain;\(^4\) accused of extortion by the native Spaniards, but this was also an exceptional case, and nothing more than a commission. With us the damages are

\(^{1}\) Tac. An. 26, 48. 4 Liv. 43, 52.
laid in the declaration; more than which the jury cannot award, though less may be given; but first they find the fact, then assess the damage; the Recuperatores only did the latter.

The assessment of damages before the Sheriff resembles this mode of proceeding exactly. In cases of adultery, where the defendant confesses judgment, a Sheriff's jury assesses the amount, and have nothing to do with the fact, that having been admitted.

Another parallel may be drawn from the so-termed compensation jury (also a Sheriff's court), frequent in the appropriation of land under Act of Parliament. Here, too, in the common case of a Railway Company taking land, the Sheriff's jury assesses the damage or loss to the plaintiff, according to evidence of value.

§ 46.

The independent state and liberty of the Romans received its first shock from Julius Caesar who founded a new monarchy on the ruins of the Republic. He disposed of all as if he had been sole master; caused himself to be created perpetual Dictator, against the constitutional law of the land; and even ordered the insignia of sovereign power to be conferred on him. He was murdered by Brutus, in the Senate House, B. C. 44 on the Ides of March.

Publius Rutilius Rufus, who came after Brutus, was first Tribune of the people, then Consul, A. U. C. 648; and subsequently Proconsul of Asia. His ancestors had been both Censors and Consuls. All that is related of him is, that he was in high esteem with Augustus, who supported all his own plans by the reasonings of this great lawyer. Towards A. U. C. 650, Paulus Virginius, Quintus Tubero, Sextus Pompeius, Cælius Antipater, Lucius Crassus, and Quintus Mucius Scævola appeared.

Paulus Virginius, who was of a very ancient patrician family, composed several law books, which are lost.

Quintus Tubero was a stoic and a good lawyer.

Sextus Pompeius was uncle, by the father's side, to the great Pompey, and is greatly commended by Cicero.¹

Cælius Antipater applied himself more to the art of speaking than the study of law, and was considered rather an advocate than a profound lawyer; hence Pomponius² calls him an historian. Nevertheless, Cicero gives him the character of an able lawyer. Quintilian calls³ him a man of great parts, describes his discourse profound, pure, correct, entertaining and very lively, and adds that he was one of the best writers of his time.

Balbus Lucilius was a good lawyer, admired both for his eloquence and learning.

Sextus Papyrius, the descendant of an illustrious family, taught Servius the elements of law, which is gratefully acknowledged in his works, and his memory thus preserved.

Gaius Juvenetus, also, was an eminent and well-read lawyer.

¹ In Bruto. ² P. 1, 2, 2, § 40. ³ Liv. 30, Inst. 1, 2.
Servius Sulpicius, the son of an Eques Romanus, was descended from one of the most ancient families of Rome, and was the best orator of his day after Cicero. Quintus Mucius having reproached him with his ignorance of law, he took so ardently to study that he composed several books, reducing the science of law, taught without order or method before his time, to an art; after he had discharged the office of Praetor the government was put into his hands by authority of the Senate, the Republic being then without Consuls. He was subsequently created Consul and Governor of Greece; he acquitted himself so well in all his offices, that having died, while on an embassy, the people erected a statue to his memory in the Forum.

Publius Crassus was the brother of Quintus Mucius, Quaestor and Aedile, and subsequently Consul and Pontifex Maximus simultaneously; he, too, was accounted an able and eloquent lawyer.

Quintus Mucius Scævolus, the son of Publius, was Tribunus Plebis, Consul, and Pontifex Maximus, a concise speaker and close reasoner. He was the master of a pure though florid style, and his ideas were at once sound and sublime. We may infer that Cicero alludes to him, when he says, that Mucius was the most eloquent among all lawyers, and the best lawyer among men of eloquence. He compiled an entire treatise of the law in eighteen books, and was the author of the Cautio Muciana—which provides, that, if a man have a legacy left him upon condition of abstaining from a certain act as long as he live, he might require payment of the said legacy upon engaging to surrender it on not performing the will of the testator. But even his great merit did not suffice to protect him from the malice of the ill disposed; he was murdered in the Temple of Vesta, A. u. c. 672, by one Sembría, employed by the Praetor Damasippus; and we are told that the assassin was directed to say, that he was a criminal because too honest.

Aquilius Gallus was a very popular man. As tribune he caused the Lex Aquilia to be passed, alluded to in the fourth book of the Institutes. He was the colleague in the Praetorship of Cicero, between whom and Aquilius Gallus an intimate friendship existed. He was an Eques and a Patrician, and several of his ancestors had been Tribunes, Consuls, and Ambassadors; indeed, he was so learned and honest a man that the Praetors often deputed him to give final judgments in private causes; nor was his voice of less authority in the enactment of laws. He was, moreover, author of the Novatio per Stipulationem Aquilinam, and established the custom of instituting or appointing posthumous grandchildren heirs; upon which we have the famous Lex Gallus.  

1 P. 28, 2, 28.
The Republic was at length utterly extinguished under Augustus, in the year A. U. C. 725, at which time the sovereignty was transferred from the people to his person. It was done by a decree of the Senate, which, with the consent of the people, revived the Lex Regia, first passed in favour of Romulus, and now renewed in favour of Augustus. Augustus's ambition made him passionately desirous of the empire; but his discretion directed him to pursue his aims in such manner as not to forfeit the good-will of the people. His design was not only to appear disinclined to accept the government, but to induce them to petition him to accept it. With this view he pretended to be unable alone to support the weight of so great an empire; but the more he apparently strove to avoid the honour, the more eagerly the people urged it upon him. He at last consented to the passing of the Lex Regia, by which the sovereignty was transferred to him; that is, the right of making laws, of commanding generally, and of enforcing obedience. This law was subsequently always renewed upon the accession of the Emperors, to the reign of Vespasian.

Augustus enacted several excellent laws; and among others the law Julia de Adulteriis, for punishing adulterers—it also prohibits the alienation of lands given in dowry; the law Julia Peculatus, to prevent the misapplication of the public money; the law Julia de Residuis, to oblige receivers and managers of public treasure to account; the law Julia de Ambitu, to punish bribing, in order to obtain employment in the government. Many other laws were made in this Emperor's reign, which it is unnecessary to notice here.

§ 48.

Pomponius says, that Alfenus Varus, Gaius, Aulus Ophilius, Titus Cassius, Aufius Tucca, Aufius Namusa, Flavius Priscus, Gaius Aetius, Pacuvius, Laberio Antistius, Cinna, Labo's father, and Publius Gellius, were pupils of Servius Sulpicius; but Cujacius says that the putting Gaius into this list is a mistake of Pomponius, and that he ought to be struck out. All these lived under the Emperors Julius and Augustus Caesar. Eight of them left some of their works behind them, out of which Aufius Namusa made a body of law, divided into fifty books.

The most celebrated amongst them were Alfenus Varus, who was Consul, and wrote forty volumes upon the law, and Aulus Ophiulus, a Roman knight, and Julius Caesar's bosom friend. Besides several books which he wrote upon the nicest points of law, he reduced all the Praetor's edicts, of which Servius had published too short an extract, into one volume. There were many other lawyers who lived and were eminent about the
same time, as Trebatius, Aulus Cassellius, Quintus Aelius Tubero, Atilius Capito and Antistius Labeo.

Trebatius.

Trebatius was disciple to Cornelius Maximus. He laboured hard at the law, and it was at his instigation that Augustus, who placed great reliance upon his judgment, introduced the use of codicils; he had been banished for siding with Pompey, but Cicero, who was attached to him, obtained for him leave from Caesar to return home. He afterwards served Cesar as a counsellor; he even offered to make him a military tribune, with a dispensation from attending the army, which could not be unacceptable to a man who had preferred the civil to the military profession.

Aulus Cassellius.

Aulus Cassellius, who was a knight, distinguished himself by his knowledge both of law and all kinds of polite learning. Trebatius was deeper read than Cassellius; but in eloquence he surpassed Trebatius and Ofilius; according to Pomponius, he excelled them both.

Antonius Augustinus and Cujacius remark, that there is a fault in the beginning of this paragraph, which ought not to be read as it is, but thus, fuit Aulus Cassellius, Quinti Mucii, Volusii auditor. This Cassellius was contented with the quaestorship, and refused to accept of any higher office, although Augustus made him an offer of the consulship; there is only one of his books remaining, entitled Benedictorum.

Although in the law Pomponius speaks of Volusius only, as having been Cassellius’s master, it appears he wrote upon the law; and Cujacius, in his notes upon it, speaks very favourably of a treatise written by him upon the Ass, and advises all beginners to read it before they enter upon the Institutes.

Ælius Tubero.

Ælius Tubero, who followed Ofilius, was of an ancient family; after having studied rhetoric and passed to law, he wrote several books upon that science; but their antiquated style makes them very unattractive to the reader.

Attieus Capito.

Attieus Capito, Ofilius’s scholar, was perfectly well acquainted with both public and private law. He was Consul A. u. c. 746, and wrote Commentaries upon the Law of the Twelve Tables, seven books on the Sacerdotal Rights, one on the Senatorial Office, and a Commentary upon Public Judgments.

Antistius Labeo.

Antistius Labeo was of a noble family, and son of that Labeo who was Servius Sulpicius’s pupil. This Labeo the son, received his legal education from Trebatius; he had also much legal instruction from others, and in order that he might apply himself wholly and solely to the study of the law, he refused Augustus’s offer of the consulate. He used to spend six months of the year in conversing with learned men, and the other six in writing. He composed a Commentary upon the Law of the Twelve Tables, thirty books Ad Edictum Pratoris Peregrini, some upon the edict Pratoris Urbani, and eight books Pithanon, that is, Credibilium, or Verissimilium.

1 P 1, 2, 2, § 45. 2 P. 33, 1, 21, § 2. 3 Aul. Gell. 13. 10.
AUGUSTINE PERIOD.

As to these two last-mentioned lawyers, it is to be observed that they were authors of two different sects; for Atticus Capito, adhering closely to the common method, went on still as he had been taught, without making any alteration; whereas Labeo, relying much on his own judgment and knowledge, made various innovations and changes; the division was much widened by two lawyers who succeeded them, and as the two sects ofProculeans and Sabinians arose about this time, it will be well here to premise that the adherents of Capito obtained the name of Sabinians or Cassians, from the two famous lawyers of this sect, Masurius Sabinus, and Caius Cassius Longinus; Labeo’s pupils were termed Proculeans, from Procules, one of the most renowned men of this school. Labeo supported the old system and republican freedom, while Capito, more of a courtier, accommodated himself to the new regime; hence they often differed in opinion.

§ 49.

Tiberius succeeded Augustus A.D. 15, A.U.C. 767, being his adopted son by Livia; he did no act without the Senate’s authority, by which means he gave the Senatus Consulta the force of laws.

Cocceius Nerva was a very eminent lawyer of Labeo’s party, and a great favourite with this Emperor.

Masurius Sabinus was an Eques, and ultimately a Senator; he composed, among other works, his Memorabilia in twelve books, three Commentaries De Indigenis, and one De Furtis. He enjoyed a high reputation with Tiberius, and the fact of his attaching himself to Atticus Capito’s party conferred on it the epithet Sabinian.

Caius Cassius Longinus succeeded Sabinus, and was Quirinus’s colleague in the consulship under Tiberius, A.U.C. 764, and governor of Syria 782, according to Tacitus.1 The high legal reputation he enjoyed conferred the epithet Cassian upon the party to which he attached himself, as his predecessor had conferred that of Sabinian on his.

Caligula succeeded to the Empire A.D. 39, and was killed in 42.

Claudius began to reign A.D. 43, continuing until 54; as he was almost an idiot, it could only be said that he was the auctor of many laws, as having been passed in his reign; he repealed the clause of the Lex Papia Poppaea, relating to the marriage of men of sixty and women of fifty. Being disposed to marry his niece Agrippina, daughter of his brother Germanicus, by whom he was afterwards poisoned, he caused a Senatus Consultum to be passed to legalize this marriage. Under Claudius, a part of Britain, which Seneca says before his reign was sui juris, was reduced to the form of a Roman province. The imperial edict silenced the Druids, who up to that time combined in their persons the double office of priests and

1 An. 12.
judges, and who were now superseded by the Roman laws. Hence Seneca’s lines—

Ille Britannos  Colle catenis
Ulta noti  Justit et ipsum
Lictora ponti  Nova Romanae
Et carruleos  Jura securis
Scota Brigantes  Tremere Oceanem.
Dare Romuleus.

Before this time, Britain had been only required to give hostages and pay a tribute; otherwise it was governed by its own kings, and under its own laws. Tacitus tells us that Claudius planted a colony at Doncaster (Dun castrum), to keep the country in check and teach his allies the Roman system of law. An ancient poet in the time of Claudius says, according to Joseph Scaliger—

Cernitas ignotus Latik sub lege Britannos
Sol cits nostrum spectatur imperium.

Nero, the last of the Julian family, succeeded Claudius in the Empire A. D. 56, and killed himself A. D. 69. Tacitus says, “that whereas in former times the Britains had but one king, they now were governed by two; the Lieutenant to suck their blood, and the Procurator their substance,” which reminds us very much of the present government of a Turkish province, in which the Pasha is the Lieutenant, and their Armenian banker’s agent the Procurator. The Scutum. Trebellianum was passed in this reign, with many others, among which that relating to testamentary dispositions, which provides Nequis alienum scribens testamentum legatum sibi adscriberet. Under this reign, St. Paul was beheaded, and St. Peter crucified with his head downwards.

Galba held the government but seven months and twenty-five days, being killed by

Otho, who in his turn, after a still shorter reign of a few months, killed himself, and was succeeded by

Vitellius, who reigned eight months and five days, and was publicly and deservedly executed A. D. 70.

To the shortness of the reigns of these three Emperors, is attributable the small number of laws bearing their names.

Vespasian, one of Rome’s best Emperors, began his reign A. D. 70, and died a natural death in 79. In his reign Jerusalem was destroyed, and all Britain reduced to the form of a province under Agricola; from this time all former laws were superseded in all Britain by the Romans, and the government carried on by Pro-consules, Praesides, Legati, Praetores, and other Roman magistrates. The Lex Falcidia and Scutum. Pegasianum were both passed in his reign.

Titus, his son, the conqueror of Jerusalem, succeeded him. In his reign Britain began to acquire, under Agricola, a relish for refinement and the arts of Rome, and the inhabitants of North Wales and Mona being finally subdued, nothing was left to do but to cultivate the arts of peace. Titus died of a fever, after a reign of two years two months and twenty days.
PROCLUS, who gave his name Proculoan to Laboe's sect, obtained a great reputation under Vespasion, by his profound learning and legal acuteness.

NERVA, his son, flourished at the same time, and followed his father in embracing Labo's party; he left several books De Usu capionibus. According to Ulpian, he was so great and early a proficient in law, that he answered questions publicly at the age of seventeen.

CASSIUS LONGINUS, an Eques, and the second of that name who rose to the office of Praetor, must have been a distinguished lawyer, since we find many laws in the Digest taken from his writings.

CAELIUS SABINUS became Consul, and was a great favourite of Vespasion; he succeeded Cassius Longinus, to whose sect he belonged. He wrote a book upon the edict of the Ediles Curules.

PEGASUS lived also in Vespasion's time, and was Consul and Governor of Rome. Juvenal calls him the best and most "sacred" interpreter of the laws; he was author of the Senatus Consultum, which goes by his name, and is spoken of in the Institutes under the title De fidei commissar. bœreditati; he succeeded Proculus, and the Proculoan sect, which he followed, was afterwards called after him the Pegasian.

DOMITIAN, Titus' brother, termed the last of the twelve Caesars, who succeeded him, reigned fifteen years, and was assassinated by Stephanus A. D. 96.

§ 50.

NERVA, upon Domitian's death, was raised to the Empire by the Senate, and died of a fever sixteen months after, A. D. 98, A. u. c. 851. He enacted many laws, one of which enabled soldiers to make military testimonials without any formality of law.1

TRAJAN, his adopted son, succeeded him, and died of apoplexy A. D. 117, after a reign of nineteen years. This Emperor made some laws, which are instances of his lenity and justice. Among the rest, one which obliges a father who has treated his son too harshly to emancipate him.

Before proceeding further, it must be premised that none of the Emperor edicts, from Augustus to Trajan, are to be found in Justinian's Code, which collection contains such edicts only as were issued by later Emperors, that is, from Adrian to Justinian.

ADRIAN, Trajan's cousin-german, who was declared Emperor A. D. 117, reigned twenty-one years and eleven months, and died at sixty-two years of age, A. D. 138; he made several laws upon different subjects, one was concerning the property in Treasure Trove;2 he declared children legitimate, who were born in the eleventh month, and forbade masters to kill their slaves; he granted the twelfth of the estate to the children of such parents as had been condemned to

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1 P. 29, 1, 1. 2 P. 2, 1, 39.
death; the Perpetual Edict was composed in his reign by Salvinus Julianus, A. D. 132. The Senatus Consultum Tertullianum, or Tertullianum, which provides that the children's estates shall revert to their mothers, in default of heirs in the descending line, was also of this reign. Under Trajan, Adrian, and Antoninus Pius, there appeared Javolenus Priscus, Celsus, father and son, Neratius Priscus, Alburnus Valens Tuscianus, and Salvius Julianus.

Javolenus Priscus succeeded Cæleus Sabinus; he was Salvius Julianus's master, as appears from the Digest.¹

Celsus, the father, much esteemed by the Emperor Trajan, was a member of Adrian's council, and succeeded Pegasus, whose sect he followed.

Celsus, the son, succeeded his father, and adhered to the same sect; he was twice Consul, and left many legal works behind him.

Neratius Priscus followed the same or Proculean sect, and became Consul; he left many works, among which the most valuable were the fifteen books De Regulis Fularis.

Alburnus Valens, Tuscianus, and Salvius Julianus, succeeded Javolenus, and embraced the opposite, that is the Sabinian sect. Valens wrote seven books upon Fiduciary Trusts. As nothing of Tuscianus is found in any of our books, some have been induced to think that in the Digest,² Fuscius ought to be substituted for Tuscianus, because there is a constitution of Antoninus Pius directed to Fusciusan.

Salvius Julianus, a disciple of Javolenus, was governor of Rome, and twice Consul. Whilst he commanded in Aquitain, the Emperor Adrian wrote to him. Justinian calls him excellent lawyer; he was the composer of the perpetual edict, the decisions of which were of so much weight, to which he added a clause in favour of the children of an emancipated son, entitling them to a part of their grandfather's estate in conjunction with their father. The pleasure he professed to take in studying, and his great desire to learn, can never be sufficiently commended; for he used to say, etsi alterum pedem in sepulchro haberem, adhuc tamen addiscere vellem. These are all the lawyers mentioned by Pomponius; let us now take a view of those of whom he has said nothing, and whose writings have contributed to the composition of the Digest; first, it may be observed, that the greatest number of them always attached themselves to one of the two before-mentioned sects, but formed their decisions according to the rules of justice and equity.

§ 51.

Of those lawyers not mentioned by Pomponius, there were two who flourished in the reign of the Emperor Adrian, Tertullianus and Africanius.

Tertullianus was Consul under the Emperor Adrian, and

¹ P. 40, 2, 5. ² P. 1, 2, 2, § 47 in fin. ³ P. 37, 2, 7.
wrote four books of questions, and one De Castrensi Peculio; he was the author of the Senatus Consultum which bears his name, and is spoken of in the Institutes. Cujacius supposes he wrote upon religion, for which opinion he quotes Eusebius, who says that Tertullian the Divine was also a lawyer, but others think they were different persons of the same name.

Africanus lived also in Adrian's time, and was a pupil of Salvius Julianus. It is he that Aulus Gellius mentions under the name of Sextus Cecilius. Cujacius, in the beginning of his commentaries upon the treatises written by this author, confirms it, and refutes those who have asserted that he lived in Papinian's time, and was his disciple; however that be, it is certain that Africanus was the most intricate and unintelligible author of all the Roman lawyers, and no commentator of less learning and penetration than Cujacius could ever have explained his meaning.

Titus Aurelius Antoninus, surnamed Pius, succeeded Adrian, began to reign A. D. 138, and reigned twenty-two years and seven months, and died A. D. 161. Among the many edicts which he made, there is one prohibiting legacies paene nomine. Coreidus or Servidius Scævola lived under Antoninus, whose edicts he reduced to writing; he was Septimius Severus's master, and it is remarked that he took more pains than any lawyer to solve questions proposed to him.

Marcellus, who was a member of the council of Antoninus, left several highly esteemed legal works.

Marcus Aurelius, surnamed the Philosopher, and Lucus Verus succeeded Antoninus, and reigned jointly about nine years, but the latter dying A. D. 169, Marcus Aurelius reigned alone till 177, from that time taking his son Commodus as co-Regent. This joint regency lasted till 180, when Aurelius died. The code contains many laws of the Divi Fratres, by which name these co-Emperors were called.

Marcus Aurelius also enacted many laws whilst sole Regent, which were transferred to the Code under the title Ne de statu defunctorum; and he created a Praetor to determine causes arising out of guardianships. In his time the Scutum Orphitianum, admitting children as heirs-at-law to their mothers, was passed.

Gaius, one of Rome's most celebrated lawyers, wrote many legal works, a great proportion of which have been transferred into the Digest; he flourished under Antoninus and Aurelius, according to Eusebius's preface to the Gaian Institutes. If, therefore, there was a lawyer of the same name in the Republican period, as asserted by Pomponius, it must have been another person. We have no information as to his life or the offices he filled, indeed all we know of him is from the writings he left behind him.

Commodus reigned alone after his father's death till A. D. 192, when he was strangled.
Ælius Pertinax was chosen Emperor in his place, notwithstanding his refusal of the government, and although he was killed three months afterwards by the Praetorian guard, A. D. 192, many laws enacted in his reign are found in the Code.

Didius Julianus, grandson of the famous lawyer, author of the perpetual edict, and himself a successful advocate, succeeded Pertinax, having bought the empire from the Praetorian guard by auction, and was beheaded; some laws of his are to be found in the Code.

§ 52.

Septimius Severus was elected Emperor A. D. 195, and died in 211; he passed the Statum, which enacts ne prædia rustica aut suburbana minorum alienarentur sine decreto magistriatus. Although cruel, this emperor had his good qualities; he took a pleasure in doing justice, and highly esteemed Papinius. Under this emperor, Æmilius Papinius sat at York, and pronounced judgment as Prefectus Praetorio, or Chief Justice, which was the most eminent degree in the empire, according to Dio Cassius, who wrote the life of Severus, and whose testimony may be credited, although there is no mention of it in any other Roman writer.

Severus, to wean his sons Antoninus (Caracalla) and Geta, from the debaucheries of Rome, and keep his legions from idleness, came over into Britain at an advanced age, with his son Antoninus, leaving his son Geta with some of his councillors and intimate friends to govern the inland parts subject to the Romans. In his expedition, as they were riding together at the head of an army against the Caledonians, Antoninus stopping his horse, suddenly drew his sword, with the intention of killing his father, but was prevented by the interposition and clamour of the soldiers. Severus passed this over, and stifled his resentment until he came to his quarters, where he ordered his son Antoninus, together with Papinius and Castor, his intimate friends to come to him; and commanded that a sword should be placed in his son’s hands, reprimanded his son, for making so villainous an attempt, in the sight of his allies and enemies, and said, “If thou art desirous to destroy me, do so with thine own hand, or there is Papinius, who, if thou commandest, will obey thee.” This Papinius was made Prime Minister to the Emperor Severus as much for his superlative skill in legal science, as from his being nearly connected with the emperor by a second marriage.

Severus having subdued the Caledonians, returned to York, where he made an edict, providing, that if a man had a slave, which he bought or otherwise came honestly by, and believed himself to have a good title to him, though he proved to belong to another, yet all acquisitions made by that slave, either with his present master’s money, or by his own work and industry, should

¹ P. 27, 9.
stand good in law; and the contrary, if the master knew the servant to belong to another. This edict, which was made in the year when Faustinus and Rufus were Consuls, and in which Severus died at York, was drawn up by Papinian; for our commentators are of opinion that all the laws both of Severus and Antoninus were framed by Papinian with great care and deliberation. The learned think, that not only Papinian, but Paul and Ulpian were both in Britain as assessors to Papinian, and coadjutors to Geta in the administration of affairs. There never was, nor ever will be, says Cujacius, a lawyer that excelled or can equal Papinian.

Papinian studied under Scævola; was Master of Requests, Treasurer, and Captain of the Guard to Septimius Severus, by whom, as we have seen, he was highly esteemed. He was called “the Asylum of Right and Treasurer of the Laws;” he was the most ingenious and learned of the profession. Thus Cujacius who was better able than any man to discover his excellences, says, in his Epistle Dedicatory to the Theodosian Code, “That there never was so great a lawyer before, nor ever will be after him.” The panegyrists also speak of his sublime genius in terms of the highest commendation; and the honour conferred upon him by Valentinian III., who ordered that in case of an equality of opinions Papinian’s should turn the scale, sufficiently shews the veneration due to his memory.

The exactness and high finish to be found in his writings, as well as their great volume, would induce the presumption that he exceeded the ordinary term of human life. Subsequently, after Caracalla had murdered his brother, he endeavoured to persuade Papinian to justify the act to the Senate and people; but he answered, that it was much easier to commit fratricide than to justify it, which drew upon him the Emperor’s resentment; who ordered him to be beheaded.

Ulpian was at first tutor to Alexander Severus, afterwards his secretary, and much favoured by him. Having been a member of the Council of State, his merit quickly raised him to the office of Captain of the Guard, which was the most important trust in the Empire. We have many of his laws in the Digest, and several fragments which afford great assistance in elucidating difficult points, and sufficiently shew how greatly he had distinguished himself in the legal science. Many successive Emperors speak of him in terms of the highest commendation; and, lastly, Justinian in several places lauds his sublime genius. His excessive attachment, however, to the Pagan superstitions, and his severe persecutions of the Christians, have somewhat injured his memory. He was killed by the Praetorian Guard A.D. 226.

Julius Paulus, Papinian’s scholar, was Prætor, Consul, and Captain of the Guard; to all which honours he attained by his singu-
lar merits. He lived in the reign of Alexander Severus; his statue is to be seen at Padua, where he was born. No lawyer has written so much as he has. His style is clear, and his conclusions judicious. Aulus Gellius asserted that he was a good poet as well as a good lawyer. *Poeta vir bonus et rerum literarumque veterum impente doctus;*\(^1\) qualities which have been proved in the present age not to be incompatible.

**Pomponius.**

Pomponius, who was brought up under Papinian, was one of the council to Alexander Severus. He applied himself closely to the study of the law, and was eminently successful. We have many of his laws in the Digest.\(^2\)

**Herennius Modestinus.**

Herennius Modestinus was Ulpian's scholar, or, as some say Papinian's: he was a perfect master of the beauties of the Greek and Latin languages. Under Alexander Severus, who made him one of his counsellors, he was raised to the Consulate with Probus in the year 228, and afterwards appointed tutor to the young Prince Maximianus. He composed several books on legal subjects, and among others two works in Greek on the Excuses of Tutors.

**Antoninus Caracalla and Geta, sons of Severus, were made joint Emperors by their father, A.D. 212, whom they agreed to deify. Caracalla, however, after a year's joint reign, slew his brother Geta and the great Papinian, as before mentioned, upon his refusing to countenance his injustice. After a reign of six years of atrocity he was stabbed, A.D. 217, by Martial, a captain of the Guard, whose brother he had murdered. Several of his laws are to be found in the Code.

The legal science appears to have been in its highest state of refinement at this period. The tyranny, however, of subsequent emperors, and their despotic rule, rendered right a less honourable study than force and flattery, consequently, we find comparatively few names of eminent lawyers cited in the Digest after this period. The following, however, occur in the Digest, who lived under Antoninus and his successor, viz., Taruntius Paternus, Æmilius Macer, Terentius Clemens, Arianus Maxander, Aurelius Arcadius, Lucinius Rufinus, Papyrius Justus, Publius Furius Anthianus, Maximus Hermogenianus, Florentinus, Claudius Tryphonius, Callistratus, Venuleius Saturnius, Julius Mauricianus, Julius Aquilius, and Ælius Gallus.

\section*{§ 53-}

Macrinus was proclaimed Emperor after the death of Caracalla. His reign lasted only a year and two months, being put to death in 218. None of his laws appeared in the Code.

**Varius Antoninus Heliogabalus, A.D. 223.**

Varius Antoninus Heliogabalus, reputed the natural son of Caracalla, was proclaimed Emperor by the army in Macrinus's lifetime. The name of Heliogabalus was given him be-

\(^1\) Lib. 19, 7.

\(^2\) P 1, 2.
cause he was a priest of the sun, as the word denotes. He was killed A.D. 223, after a reign of four years; nevertheless, there are some of his laws in the Code.

Aurelius Severus Alexander his successor, equally skilled in the arts of peace and war, was an excellent prince, but only reigned thirteen years, having been killed in 235. He was the author of many laws, and the impartial administration of justice was his chief care. He was one of the best of the Roman Emperors, and four hundred and sixty-one laws passed under his reign have been transferred into Justinian’s Code.

Maximianus, some of whose laws are to be seen in the Code, reigned three years, and was killed in 238.

Gordianus I., the next emperor, reigned one month and six days, and killed himself on the defeat of his son in 237.

Albinus and Papianus, the two emperors who succeeded him, reigned about a year, and were then both put to death by the army.

Gordianus II., younger son of Gordianus, succeeded them, and reigned six years; he died 224. There are some of his laws in the Code.

Marcus Philippus succeeded him, reigned about five years, and died 249. The Code contains some of his laws.

Decius succeeded, and reigned two years; some of his laws are to be seen in the Code.

Gallus and Hostilianus succeeded, and reigned two years. Some of their laws are also found in the Code.

Valerianus and his son Gallienus succeeded them, and reigned conjointly seven years. We see several laws in the Code in both their names.

Claudius II. reigned two years; we have, however, some of his laws.

Aurelianus reigned five years, and was killed 276. We find many laws of his making in the Code.

Tacitus reigned six months.

Florianus reigned about a year.

Probus was raised to the empire, and reigned six years. He was killed.

Carus, with his sons Carinus and Nunnerianus. The father reigned one year and was slain, the two brothers then reigned about a year, and then were killed in 285. There are some laws in the Code which bear the names of all three, and others which only bear the names of the two sons.

Diocletianus and Maximianus Herculis reigned together eighteen or twenty years. Diocletianus resigned the empire in favour of

Constantius Chlorus.

Maximianus Herculis did the same two years later in favour of

Maximianus Galerius. Constantius was contented with Eng-
land and Gaul, and died at York A.D. 306, while Galerius had all the rest of the Empire for his share. There are some laws in the Code made by Diocletianus alone, others by him and Maximianus, and some by Constantius, Maximianus and Galerius.

§ 54.

Constantinus, surnamed Magnus, succeeded his father Constantius in 312, and reigned several years with Galerius and Maxentius, son of Maximianus, the first of that name; after which he governed the Empire alone for thirteen years, and died in A.D. 335.

Constantine the Great was the first Christian Emperor. After having conquered Maxentius, he entered Rome in triumph with a cross, and laboured to persuade the Senate and the people to embrace the Christian faith. There are a great number of his laws in Justinian’s Code, most of them relating to religion and the Catholic faith, bishops, and other ministers of the Church, and places dedicated to the service of God, all which are incontestable proofs of this emperor’s zeal. A.D. 328, he transferred the seat of the Empire to Byzantium, henceforth called after him Constantinople (Constantinopolis).

Constantine’s mother, Helen, was the daughter of an English innkeeper, who lived at Drepanum in Nicomedia, where he lodged on returning from an embassy to Persia, a circumstance bearing much similitude with the marriage of the present administrator of the German empire.

This Helena discovered the true cross, beautified Jerusalem and the other holy places, and, as might be expected from a person of her uneducated class, gave herself as blindly up to Christian superstition as she would, had she lived at an earlier period, to Pagan errors.

Constantinus the younger, Constantius, and Constans, a three sons of Constantine the Great, divided the empire between them at their father’s decease. Constantine reigning at Constantinople, Constantius in Thrace, and Constans, who was murdered in 350, in Italy.

Constantine the younger, was killed A.D. 340, and Constantius reigned alone until A.D. 361. Some of the laws in the Code are in the names of all three, some in the joint names of Constantius and Constans, and some in that of Constantius alone.

Julianus, surnamed the Apostate, from his having relapsed into Paganism, was the nephew of Constantine the Great. He succeeded to the Empire A.D. 361, and was killed two years after. Some of his laws are preserved in the Code.

Jovianus succeeded him, and reigned but eight months. The Code contains also some of his laws, A.D. 364.

Valentinianus and Valens, brothers, were made joint emperors, A.D. 364, and Gratianus, son of Valentinianus, who

died in the following year, A.D. 375. Thus we find in the Code, laws
made by Valentinianus and Valens, and others by Valentinianus,
Valens, and Gratianus. These two latter and Valentinianus II.
reigned conjointly in A.D. 378, and there are several laws un-
der the names of these three emperors in the Code. Valens,
however, was killed five months afterwards, A.D. 378. Thus
the two brothers, Gratianus, who was associated in the Empire,
A.D. 375, and Valentinianus II. became Emperors of the East, with
Theodosius, whom Gratianus had associated in the Empire. They
reigned together until A.D. 383, and several laws enacted in their
reigns are extant. After the death of Gratianus, Valentinianus
II., with Theodosius, was invested with the Empire of the
East A.D. 379. Th Code contains also many laws
in their names. Valentinianus II. was secretly strangled A.D.
392.

Theodosius the elder reigned until A.D. 395. Some laws
under his name are to be found in the Code. On his death his
two sons

§ 55.

Arcadius and Honorius divided the Empire between them;
and the Code contains also some of their laws.

Arcadius reigned in the East from A.D. 395 until the year 408.

Honorius in the West until A.D. 423.

On Arcadius's death the Empire was administered by the Prefect
Anthemius, until about the year A.D. 414, during a part of
the minority, and subsequently by the Empress Pulcheria, whose
nominal marriage with Marcianus, procured for him an equally
nominal throne.

Theodosius the younger died A.D. 450; he reigned, how-
ever, entirely, under the government of his mother Pulcheria,
whose administration continued after his death. This fanatically
religious and weak prince was author of the Code bearing his
name, compiled A.D. 438, and which will be noticed hereafter.
In this Code were inserted his own edicts, together with those of
Constantine, and the intermediate emperors, which have for the
most part been transcribed into Justinian's Code.

Valentinianus III. reigned cotemporaneously in the West up
to A.D. 450, under the administration of his mother Placidia.
Hence the Code contains some laws under the joint names of
Valentinianus and Theodosius, and some under their several
names. He was killed A.D. 454, by

Maximus, who reigned but a short time, A.D. 455.

Avitus succeeded him, until succeeded, A.D. 456, by

Majorianus, who reigned until A.D. 461. He was suc-
cceeded by

Severus, who reigned until A.D. 472, and was succeeded in
the West by

Emp. Valens,
A. D. 375.

Emperor Gra-
tianus, A. D. 383.

Emperor Valen-
tianus II. A. D.
392.

The emperor The-
o dosius the elder,
A. D. 395.

Emps. Arcad: &
Honorius. Emp.
of the East,
Arcad. A.D. 408.

Emp.of the West,
Honorius. A. D. 423.

Emperor of East,
Pulcheria, mar-
ries Marcianus
A. D. 455.

Emperor of the
East, Theodosius
the younger,
A. D. 450.

Code compiled,
A. D. 438.

Emperor of the
West, Valen-
tianianus III. A. D.
454.

Emp.of W. Max-
imus, A. D. 455.

Emp.of W. Avi-
tus A. D. 456.

E.of W. Majori-
ianus, A. D. 461.

Emp. of W. Se-
verus, A. D. 472.
ANTHEMIUS, who reigned in A.D. 472. OLYBIUS's reign was equally short, and ended in the same year. GLYCERIUS can hardly be said to have reigned.

JULIUS NEPOS, however, reigned until A.D. 475, and he was succeeded by AUGUSTULUS, son of Orestes, whose reign ceased with the Empire of the West, A.D. 476 or 479, according to Gibbon.

§ 56.

LEO succeeded Theodosius the younger, and Marius A.D. 453. We find in the code some laws in the East, bearing the joint and several names of this Emperor, and Majorianus of the West.

LEO junior, the grandson of Leo the elder, by his daughter, Ariadne and Frasacilpeus (Zeno) an infant, succeeded his maternal grandfather, but was shortly after murdered by his father Zeno. We find in the code, laws under both their names, and some under that of ZENO, who only reigned up to A.D. 491.

ARIADNE, his widow, on his death, married ANASTASIUS, who reigned up to A.D. 518, in right of his wife; this reign of twenty-seven years, unusually long for that period, is the reason that we find many of his laws in the code.

JUSTIN succeeded Anastasius; he was a Dacian by birth, and of low extraction, having been in his youth a herdsman. As he grew older, he left his native village with two other youths for Constantinople, and was enrolled among the guards of the Emperor Leo. He obtained the Empire on the death of Anastasius, A.D. 518; he reigned alone above six years, and we find many laws in the code under his sole name; but after his nephew Justinian was made co-partner in the Empire, many of the laws are found under the joint names of the uncle and nephew. He reigned nine years, and died A.D. 527.

Justin ascended the throne A.D. 518, at the age of sixty-eight, and during a reign of nine years profited by the administration of the Quaestor Proctus, and his nephew Justinian, whom he had educated as heir to his private fortune. The decrepitude of Justin becoming more and more apparent, the Senate recommended to him the adoption of his nephew as co-partner in the Empire, a suggestion with which he reluctantly complied about four months before his death, which took place in A.D. 527.

§ 57.

The Emperor Justinian was born on the 5th May, A.D. 482 or 483, near the ruins of Sardica, in Dacia, the modern Sophia, of an obscure race of barbarians; his mother, who was sister to the Emperor Justin, was called Bigleniza, latinized into Vigilantia; his father's name was Istock, latinized into Sabatius, and his own
original name Uprauda, upright, translated into Justinianus. He owed his fortune to the persevering energy of his uncle Justin, who in the Persian wars, and during a period of fifty years, rose successively to the rank of Tribune, Count, General, Senator; and having become Captain of the Guard at Anastasius’s death, obtained the Empire by bribing the Guards in his favour with the money entrusted to him by the Eunuch Amantius, to secure the support of that body for his own candidate.

In order to marry Theodora, Justinian obtained before his uncle’s death the repeal of the law which forbade the marriage of a person of senatorial rank with a female of servile origin, or who had practised the ars ludicra, as it was termed, and which included all branches of the theatrical profession.

Theodora was the second daughter of Acacius, a Cyprian, who from his office was styled "Master of the Bears," and after the death of her father exceeded in the licentiousness of the stage and that of a prostitute, perhaps, any woman on record; nevertheless, this woman was, on Justin’s death, crowned by the Patriarch of Constantinople, simultaneously with Justinian, as Empress of the East, and even appears to have remained chaste during the twenty-four years of her coverture. She died of a cancer A.D. 548, on the 11th of June. Her conduct upon the whole, considering the manners of the times, appears to have been rather exemplary than otherwise, certainly not such as might have been naturally expected from a common harlot;¹ certain it is, that her courage rescued the Emperor from the effects of the Nika conspiracy. The massacre which took place on that occasion, its manner, locality, and numbers of its victims all bear a striking resemblance to that of the Janissaries, under Mahmoud 1295 years afterwards.² The Church, dedicated αγία σοφία τού θεοῦ, vulgarly termed Santa Sophia, was built by Anthemius at an expense of a million sterling, under the Emperor’s superintendence, and occupied five years, eleven months, and ten days in construction; its existence during the thirteen centuries which have elapsed since its first erection up to the present day, justifying the Emperor’s exclamation on its consecration, "I have vanquished thee, O Solomon!"

¹ Gibbon, c. 40.
² Thirty thousand Janissaries are computed to have perished on the Almeidan 'Προτομῆ, or ancient Hippodrome, in their barracks, and elsewhere, under Hussein, Agha of the Janissaries, who entered the Hippodrome in the same way as Beliarius and Mundus, in A.D. 532. Others calculate the massacre of the 25th and 26th June 1826 at a much less number. Since the occupation of Constantinople by the Turks, these revolutions have been frequent: under Osman II. in 1622, under Mustafa I. in 1623, under Ibrahim in 1648, under Mohammed IV. in 1655, under Ahmet III. in 1730, under Selim III. in 1807, under Mustafa IV. in 1808, and under Mahmoud II. in 1826—of these Sultans Mohammed IV. and Mahmoud II. alone saved their lives; and of these two the former was subsequently dethroned, though the latter for ever broke their power and rooted the corps out of the land.

* White, Three Years in Constantinople, 3, 4, 124.
Justinian's Code, Pandects, and Institutes, with which is our more immediate concern, had well nigh falsified the boasted superiority of literary over architectural works and the codes, long hidden and mutilated while the Church still stood firm, might have induced us to look with suspicion on Horace's assertion of the superior durability of literary works. Justinian died childless A.D. 565, on the 11th November, after a reign of thirty-eight years.

We must pass over the important incidents of Justinian's reign, for which the reader is referred to Gibbon's classical history, in order to recur to the immediate object of this work, his legislation. "In the first year of his reign," says Gibbon, "he directed his faithful Trebonian, with nine learned associates, to revise the ordinances of his predecessors, as they were contained since the time of Adrian, in the Gregorian, Hermogenian, and Theodosian Codes; to purge the errors and contradictions; to retrench whatever was obsolete or superfluous, and to select the wise and salutary laws, best adapted to the practice of the tribunals and the use of his subjects."

§ 58.

The legal works previous to Justinian's time may be thus shortly reviewed, and it will be necessary to make this digression in order to shew the progress of the legal science up to the year in which Justinian directed the compilation of the three authentic sources of law, the Code, the Institutes, and the Pandects.

As soon as there were any laws established at Rome, care was taken to collect and reduce them to order, the chief of which it will be well to recapitulate.

Under the Regal Government they had, we have seen, two principal compilations.

The first consisted of the laws made by Numa Pompilius, relating chiefly to Religion and Divine Worship. These Ancus Martius took out of the Pontiff's Registers, and having put them into order, hung them up in the public places.

The second was that of the Regal laws, made by Papyrius in the time of Tarquin the Proud, called after the author's name the Papyrian Civil Law, as has been observed before. During the Republican period all that remained in use of the Regal Laws was collected with great care, and an addition made of the best laws of the chief cities of Greece, thus the whole body of the Roman Law as contained in the Twelve Tables was formed.

Subsequently the lawyers composed certain forms for regulating the Acts and Proceedings of the Court. Of these Appius Claudius made an exact collection, which his secretary appropriated and published.

Next in order follow the Compilations of Law, which were made from the time of Julius Caesar to Justinian.

First, then, in Julius Caesar's time Ofllius the Lawyer under.
took a compilation of the Prætor’s Edicts, made perpetual by
Julianus at the command of the Emperor Adrian many years
later.

Under Constantine the Great reigned Gregorius and Hermo-
genius, who severally undertook to collect the Constitutions of the
Pagan Emperors from Adrian to Diocletian, which two books
were called by their names the Gregorian and Hermogenian Codes.

The Code of Gregory is supposed to have been compiled by
one Gregorius Præfectus Annona, under Valens and Gratianus; 
while others assert it to have been composed under Constantine
the Great, by one Gregorius Præfectus Prætorio; the former
opinion, however, appears to prevail. Nor is it a matter of great
consequence, as this book, which is said to have contained the
Constitutions from Hadrian to Diocletian and Maximianus, is
now lost.

The author of the Hermogenian Code is not more certain. One
Eugenius Hermogenes was Prætorian Prefect under Diocletian, and
appears to have moved in the Senate respecting the persecution
of the Christians. Another lawyer of this name flourished under
Constantine the Great. Heineccius considers him as having writ-
ten subsequently to Gregory to supply omissions in his work, both
embracing the same period. The fragments of this work, which
Cujacius has placed at the end of the Theodosian Code, is all
that remains of these two works, and contain nothing but Con-
stitutions of Diocletian and Maximianus, save three of Aurelius,
by whom probably Aurelius Valerius Diocletianus is meant, or
Marcus Aurelius Valerius Maximianus. Be this as it may, his
works bring us down to A. D. 312.

Some suppose these collections to have been made to rescue from
oblivion the Constitutions of the Pagan Emperors, which under-
went daily repeals after Constantine, but it is probable that these
compilations more nearly resembled our statutes at large, or pos-
sibly more nearly the Abstract Collection of the Public and Gene-
ral Statutes, and the like, which were collected from time to
time by private individuals for the use and convenience of the
profession.

The Emperor Theodosius the younger collected, on the other
hand, the Constitutions enacted from the time of Constantine
the Great up to his own time A. D. 438. This work is of
considerable magnitude, and is still extant, it is supposed, in an
imperfect state, from three hundred and twenty Constitutions being
found in Justinian’s Code, which are sought in vain in that
which remains to us of the Theodosian. It is probable that this
book, having been compiled by imperial command, had the stamp
of authority. There are added to it the newer Constitutions
of Theodosius, Valentinianus III., Marcianus, Majoranus, Seve-
rus, and Anthemius. Theodosius the younger also made another
Code, divided into seventeen books, and called the Theodosian
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Code. Hence the Constitutions of the Roman Emperors, from the reign of the Emperor Adrian to that of Theodosius the younger, were contained in these three Collections, viz. those of Gregorius, Hermogenius, and Theodosius the younger. The latter, published under the imperial authority, was followed until suppressed by Justinian’s order, and is not unworthy of the attention of the learned.

Cujacius has placed at the end of his edition of the Theodosian Code, the few fragments of the Gregorian and Hermogenian Codes which have survived the ravages of time.

The Theodosian Code was no sooner finished than published and received both in the Eastern and Western Empire. The first novel which stands at the head of this Code shews that the Emperor employed all his authority to bring a work undertaken by his orders to the desired result.

Valentinian the Third, who governed in the West, soon adopted this Code, which his father-in-law, Theodosius, had ordered to be compiled. Besides the consideration of alliance and other reasons, it was to Theodosius that Valentinian owed his title of Cæsar, and his being instituted heir to the empire. Valentinian alleges another reason for making this Code the law of his dominions, that as the empire obeyed two princes whose wills were inseparable, so there ought likewise to be an exact uniformity in their laws.

If the authority of the Theodosian Code in the West were disputed, it would be an easy matter to adduce in its support the evidence of several authors, either cotemporaries, or who have written since. Their names and quotations are to be found in the learned Gothofredus’s Prolegomena, at the beginning of his Commentaries on this collection of the Imperial Constitution.

Some time after the Theodosian Code appeared, about the year 506, Alaric, the second King of the Goths, caused a new body of Roman Law to be compiled, which he published, by the advice of his bishops and nobles, twenty-three years before Justinian’s Code. This was composed by Amien, Referendary to Alaric, an officer answering to our modern chancellor, and published under the name of the Theodosian Code, of which, properly speaking, it was an abridgment. This Code was for a long time the only Roman Law that was known or used in France.

It were to be wished that Amien had contented himself with making choice only of what was most useful in the Code, without altering the texts which he had taken to make his collection; very likely with a view of pleasing Alaric. Some he has altered, others he has abridged, and to others added his own interpretations. His language, however, is readily distinguished from the Latin of the text of the Roman law. However, in consideration of what is taken out of the ancient law, his work is not totally to be rejected.
It is not to be denied that Amien's compilation was very favourably received by the Goths. It was not only called the Theodosian Code, but generally the Roman Law; and it is quoted by that name in the Capitulans of the Kings, in Marculfsus, in the Laws of the Burgundians and Ripuarians. The book entitled Jurisprudentia Vetus anti-Justinianea cum Notis Schultingii, contains the whole collection and several fragments of the ancient lawyers. It was printed at Leyden in a large quarto in the year 1717.

Having given this brief account of the several collections of laws extant before Justinian's time, let us now proceed to speak of those made by that Emperor's order, and which form the body of the Civil Law, and its present state. But first let us consider the motives which induced him to reform and codify the law. The three Codes just now mentioned were ranged in no kind of order, and contained abundance of Constitutions contradictory to one another, occasioning much confusion. Besides, the multiplicity and vast variety of the writings of the ancient lawyers, rendered the study of them equally tedious and difficult.

Before Justinian's time there existed no authentic collection of the answers and other writings of the lawyers, to form which was the most difficult portion of the task imposed on Trebonian.

§ 59.

Trebonian was born at Side, in Pamphylia, and combined the dissimilar qualities of a poet, philosopher, rhetorician, lawyer, and statesman; and so versatile was his genius that he was equally distinguished in each of these characters. Poetry, astronomy, political economy, and law, successively employed his pen; added to which he was master equally of the Latin and Greek literature. This rare combination of qualities soon attracted the notice of Justinian, under whose patronage he quickly raised himself from the bar to the rank of Questor, Consul, and Master of the Offices. While the suavity of his manners protected him from the envy of his cotemporaries, his avarice and a suspicion of his trading in justice drew down upon him the dislike of the multitude. His disgrace was, however, but temporary; so rare a combination of talents enabled him to surmount temporary difficulties, augmented though they were by some doubts which were entertained of his orthodoxy, for in so bigoted a Court as that of his Imperial Master, freethinking was the greatest of all crimes; flattery, however, appears to have come to his aid, and during twenty years he enjoyed the uninterrupted confidence of his Sovereign. His talents and vices have induced Gibbon not inaptly to compare this great lawyer and philosopher to Bacon, and the parallel, if history be true, is but too correct.

To use the historian's own words, "The compilation of the Code was accomplished in fourteen months, and the Twelve
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Books or Tables which the new Decemvirs produced might be designed to imitate the labours of their Roman predecessors. The new Code of Justinian was honoured with his name, and confirmed by his royal signature; authentic transcripts were multiplied by the pens of notaries and scribes; they were transmitted to the magistrates of the European, the Asiatic, and afterwards the African provinces; and the law of the Empire was proclaimed on solemn festivals at the doors of churches."

§ 60.

The Codex. Irnerius it would appear first possessed the first nine Books of the Codex only, the latter three, which contained the Jus Publicum, had been separated from the whole at an early period, as of less practical utility, and often bound up with other works. These three latter books are termed the Tres Libri, while the nine first were emphatically called the Codex.

Its Divisions. The Code was divided into Twelve Books, each Book into Titles, and each Title into Laws, each Law containing several Parts. The first is called Principium, being the beginning of the law, and those which follow, paragraphs, so that the part next the beginning is the first paragraph: a Greek term, signifying a part of section of a law that contains one article, the sense whereof is complete.

Contents of Lib. Cod. I. The first Book of the Code treats of the Catholic Faith, Churches, Bishops, Ecclesiastical persons, Heretics, Jews, Pagans, Church Privilege; then of Laws and their different kinds, and lastly, of Magistrates.

Lib. Cod. II. The second Book explains the Forms to be observed in commencing a suit; then it treats of Restitutions; and after that of Compromises; Sureties that are to be given, and the Oath of Calumny.

Lib. Cod. III. The third Book speaks of those who may stand in Judgment, of Contestatio litis in a cause; of Holydays; of the Jurisdiction wherein we are to pursue our rights; after which it treats of undutiful Testaments; undutiful Donations and Dowries; of the demand of Inheritance; of the real actions of Services; of the Law Aquila; of mixed Actions; of Actions for crimes done by slaves; of the action Ad Exhibendum; of Gaming; of Burying-places; and Funeral expenses.

Lib. Cod. IV. The fourth Book begins with the Explanation of personal actions, arising out of the Loans and other causes; after which it speaks of Obligations and Actions which have their effect in relation to Heirs and other persons bound by them; then it treats of Testimonial or Written Evidence; of things borrowed for the use of the Contract by Pledge; and the personal action thereon founded on the Senatus Consulta Macedonianum, and Vellei- num; of Compensation; Usury; Deposites; Mandate; Partnership; Buying and Selling; Permutation; Hiring, and Mortgages.
THE CODE.

The fifth Book treats of Espousals; Donations in contemplation of Marriage; then of Marriages; Women’s Portions; of the Action for the Recovery of the Dowry; of the Donations made between Married Persons; of Estates given in Dowry; of Alimony due from Fathers to their Children, and from Children to their Fathers; of Concubines; of Natural Children and the ways of making them Legitimate; after which it treats of Testamentary, Legal, or Dative Tutorships; of those who have a power to appoint or be appointed Tutors; of the Administration of Tutors; and the action arising thereon against them and their heirs and bondmen; then it shews after what manner the office of a Tutor ceases; and lastly, it speaks of the Alienation of Minors’ Estates.

The sixth Book first treats of Slaves and Theft by Freemen, of the rights their Patrons have over them and their goods; then it explains at large the Praetorian Possession called Bonorum Possesso; after which it explains the whole question of Testaments,—e.g. Institutions and Substitutions, Preteritions and Disinherisons, the right of deliberate refusal of an Inheritance, the opening of Wills, of Codicils, of Legacies and Fiduciary Bequests; and lastly, of successions to Intestate Estates.

The seventh Book begins with Manumissions; after which it treats of matters relating to Prescriptions; and then of Sentences and Appeals of the Session; of Estates or Goods; of the seizure of the Debtor’s Goods and sale thereof; and lastly, of the Privileges of the Exchequer, those of Dowries; and the revocation of Goods alienated to defraud Creditors.

The eighth Book begins with Possessorial Judgments in Law, called Injunctions; then of Pledges and Pawns; of Stipulations Novations and Delegations; of Payments, Acceptations, and Evictions; after which it treats of Paternal Power, Emancipations of Children, and their ingratitude; it explains the jus postliminii; what is meant by custom or unwritten Law; Donations, their different kinds and their revocation; and lastly, of Abrogations, and the Penalty on Celibacy.

The ninth Book treats of Criminal Judgments and the Punishment of Crimes. The first title explains what relates to Accusations, public or private; Prisons; how the Accusation drops by the death of the Accuser or Accused. The following titles speak of Criminal Judgments, which are treason, adulteries, and other unlawful copulations, public and private violence, rape, homicide; and under this last head, of the correction of slaves. The rest of the crimes which are under Criminal Judgments, and are explained in this book, are Paricide; Malificium, which comprehends poisoning, sacrilege, juggling, sorcery, and witchcraft, the robbing of sepulchres, and forging certificates and wills, extortion, cheating the public, sacrilege, and raising sedition and tumult. Afterwards this book treats of judgments commenced for Private Offences, such as stealing, or abstracting
anything out of another man’s inheritance before administration be taken, rapine, cozenage, called Crimen-stellionatus, injury, and some others; then it speaks of Abolition of Accusations proceeding either from the Accused or the Accuser; and lastly, explains Punishment, under which is comprised the confiscation of goods.

The tenth Book treats of the Rights and Prerogative of the Exchequer; of Unclaimed Property, and how the same may be incorporated into the prince’s domain; of those by whose means such unclaimed property is discovered; after which it speaks of Treasurer’s Tributes levied upon the people, Tolls, Super-impositions; Magistrates called Decuriones, and matters relating to them; of the Freedom of Citizens, of the Inhabitants of Cities, of the Domicile or place of abode of Public Offices, and the causes which exempt persons from bearing them; of Ambassadors; of the different kinds of Public Offices, and functions of officers, and of those who were intrusted with civil government and the reformation of manners.

The last two Books treat of the Rights common to Municipal Towns with the City of Rome, which were four in number.

The rights of bodies corporate and communities;
The rights of the public; or censor’s registers;
The rights of dignities and the military;
The rights of magistrates to execute judgment.

Of these the first two are set forth in the eleventh, and the two last in the twelfth Book.

Within six years after the publication of the Code, it was suppressed as imperfect, and replaced by a new edition entitled the Codex Repetita Prælectionis, containing 200 of Justinian’s own laws, and the 50 decisions on the most obscure and debateable points of jurisprudence.

They had the force of law given them by the Emperor’s Constitution placed at the head of the work by way of preface.

The letter C is invariably the mark of the Codex, which may be variously quoted by the initial words of the Paragraph, Law, Book, or Title, thus: § ad fil. l. Meminimus, C. De Jur. Fisc., or Quando et quibus.

By the initial words and numbers of the Paragraph and Law, and the initial words of the Book and Title, thus: § ad fil. 1, l. Meminimus 2, C. De Jur. Fisc., or Quandoet quibus.

By the number of the Law and Paragraph, with the initial words of the Book or Title, thus: § 1, l. 2, De Jur. Fisc., or Quando et quibus.

The modern method adopts simply numbers, thus: C. 10, 32. 2, 1.

Pr. stands for the Principium, or first Paragraph not numbered, and in fin or fine for the latter part of the Lex.
The Institutes were published a month before the Pandects and designed as an elementary introduction to legal study. The work was divided into four Books, subdivided into Titles.

The Institutes are the first elements of the Roman Law, and were composed at the command of the Emperor Justinian by Trebonian, Dorotheus, and Theophilus, who took them from the writings of the ancient lawyers, and chiefly from the Institutes and other writings of Gaius, especially from his books called "Aureorum"; that is, of important matters.

The Institutes are divided into four Books, each Book into several Titles, and every Title into several Parts; the first is called "Principium," which is the beginning of the title, and those which follow, Paragraphs. The first Book of the Institutes has twenty-six Titles, the second twenty-five, the third thirty, and the fourth eighteen; in all, ninety-nine titles. First, it is to be observed that the division is triple, Persons, Things, and Actions; under which the subject-matter of the four books of Institutes is comprised. The first Book treats of the Right of Persons; the second, third, and five first titles of the fourth, of Things; and Actions are the subjects treated of from the sixth title of the fourth Book to the end. The first Book treats of Persons, but it is from Title III. only; for the first two, which are by way of preliminaries, explain Justice, Law, and Right; the meaning of the Right or State of Persons follows, under two divisions, which complete the remaining part of the first Book.

According to the chief Division of Persons treated of from Title III. to VIII. of the first Book, men are either free or slaves.

The condition of all slaves is the same, but it is not so with freemen, of whom some are free by birth, others are made so by emancipation, which is null when effected contrary to law.

The second Division of Persons begins at Title VIII. of the first Book, and is explained in the following titles of that Book. It is of independent persons, and of such as are under the power of another, that is, of a father; the power of masters over their slaves, and of fathers over their children, is first treated of; after which is shown the manner of acquiring paternal power, viz. by marriage, legitimation, and adoption; and how that power may be dissolved.

From Title XIII. to the end of the first Book treats of Pupils, or such as have tutors; of Minors, or such as have curators appointed to them; and lastly, of persons that are of age, subject to nobody, and masters of their own actions.

Three points are particularly explained, which concern Tutorship; the first is the definition or division thereof into testamentary, legal, and dative; the second is the effect of the tutorship, which consists in putting the pupil under the care of his tutor, so that he may do nothing that will bind him, unless the authority of his tutor
intervenes at the very instant when the act is passed by the pupil; the third concerns the manner in which tutorships end or expire.

After this, in Title XX., matters relating to Curators; and in the last three of this Book, three things common to tutors and curators are treated; these are, the security they are obliged to give to indemnify pupils and minors, the lawful causes exempting persons from being tutors or curators, and lastly, those for which they may be deprived of their offices. From Persons, a transition takes place to Things; of which, beginning at Title I. of the second Book and continuing to Title VI. in the fourth, three points concerning Things are explained,—their divisions, the ways of acquiring them, and the means by which Things become due to us.

The divisions are principally two; by the first, Things are either objects of commerce or not so; by the second, they are corporeal or incorporeal.

In relation to the second, the property of Things is acquired either by the Law of Nations or by the Civil Law.

The ways of acquiring introduced by the Law of Nations are explained in Title I. of the second Book.

Title II. explains the second Division of Things, which are either corporeal or incorporeal; and here real or personal services, as being incorporeal things, are treated of. The modes of acquisition introduced by the Civil Law follow; and the property of Things, according to the Civil Law, acquired either by particular or universal title.

The civil means of acquiring by particular title are, Adjudication, Usucaption, or Prescription; and the express provision of the law, which, transferring a full right and donation in contemplation of death, resembling legacy,—the property whereof passes to the donee without delivery.

Title VI. speaks of Usucaption or Just Usurpation, and the conditions which it requires, and Title VII. of Donations; after which it proceeds to treat of those who have the power of alienating, and of those through whom property may be acquired.

The modes of acquiring property in Things, according to the Civil Law, by universal title, are: Inheritance, the Praetorian Succession, called Bonorum Possessio, Acquisition by Adrogation of the goods of a deceased person in favour of liberty bestowed upon slaves, succession by public sales, and the succession called miserabile; these six modes of acquisition occupy from Title X. of the second to Title XIV. of the third Book. As every succession is either testamentary or legal, and the legal takes place only in defect of the testamentary, the question of Testaments takes precedence, and extends from Title X. to the end of the second Book, and may be reduced under three principal heads.

The first relates to the four conditions required to make a
testament valid; whereof the first is, That it be made in the form prescribed by law; from which, however, the military testament is exempt. Second, The testator must legally possess the power of making a will. Third, He must either institute or disinherit such children as are sub potestate. Fourth, He must institute an heir; for without that, the testament is null. Now, the institution may be to the first, second, or third degree. That in the first, is called properly Institution; that in the second or other degree, is termed Substitution; and it is divided into vulgar, pupillary, quasi-pupillary. The second article shows how a testament duly made may afterwards become null, which is the subject-matter of Titles XVII. and XVIII. of the second Book.

Title III. shows how a Testament made in the form prescribed by law, and not invalidated, may have its execution, which is done by the heir accepting to the succession. Now this may be done several ways, according to the different qualities of the heir; for some are necessary heirs, or such as are obliged to accept the inheritance; others are both necessarii and sui hæredes, and others extranei hæredes.

The entering on inheritance makes the heir liable, not only for the debts of the deceased, but to the liquidation of legacies and fiduciary bequests, which are, therefore, the subject of the second Book, from Title XX. to the end. In the first place, the meaning of a legacy is explained; what actions a legatee may bring on account of the legacy left him; what things may be disposed of by legacy, and to whom. It is then shown how legacies are taken away or transferred; and lastly, the diminution to which they are subject by Lex Falcidia.

Fiduciary Bequests are treated of in Titles XXIII. and XXIV. In the first of these the nature of the universal Fiduciary Bequest, called Inheritance by the Fiduciary Bequest, is explained; and in the other, the nature of a particular Fiduciary Bequest; the last title of the Book speaks of Codicils.

Testamentary Successions, which take place before all others, are explained in the last fifteen titles of the foregoing Book.

Title I. of the third Book, and those that follow, treat of Legal Successions, admissible only in default of Testamentary.

According to the Ancient Law, there were but two kinds of legal heirs; for by the provisions of the law of the Twelve Tables, the legal, or succession to intestates, fell only to two sorts of heirs; which were, first, hæredes sui, or domestic heirs, and in default of them to the next of kin on the father's side, termed Agnati, which makes the subject-matter of the two first titles of this Book.

In process of time, another sort of legal succession was created by the Lex Tertullianum and Orphitianum contained in Titles III. and IV.
Tit. 5. Title V. treats of the Succession to Intestates, to which the
cognati, or female side, were admitted by the prætorian equity,
according to the degree of cognation; this necessitates an explana-
tion of the degrees of kindred, which immediately follows in
Title VI.

Tit. 6. The title, in conclusion, treats of those who were excluded
from this prætorian succession because allied to the deceased only
by a servile relation.

Tit. 7 and 8. The Succession of Freemen is the subject of Title VII., and
the Assignment of Freemen that of Title VIII.

After disposing of the question of Succession, which by the
Civil Law is the first mode of acquiring the property by
universal title, the other five which, followed by the præto-
rian succession, are called bonorum possessio; acquisition by adro-
gation; the adjudication of the goods of a deceased person in
favorum libertatis granted to slaves; the succession accruing
from public sales; and the successio miserabilis; occupying the
Titles between VIII. and XIV.

We then come to the last point relating to Things, viz. Obliga-
tions, being the means whereby things accrue to us. First, it
is shown what an Obligation is, and the causes producing a
mixed Obligation: that is, partly natural and partly civil, as a
contract, quasi-contract, crime, or offence.

Tit. 8—14. Contracts are called Nominate; that is, distinguished by certain
proper names authorized by law, which assigns to them a par-
ticular action; others are called Innominate Contracts, having
no special name or particular designation, and are completed only
by one of the parties fulfilling the agreement.

Nominate Contracts are formed four ways; by delivery of the
thing agreed for, by solemn and formal words, by writing, and by
the sole consent of the contractors. Nominate Contracts made
by the delivery of the thing itself, of which kind are loans, de-
posits, and pledges, and all of which are treated of in Title XV.

Contracts made by words are called Stipulations; the general
principles of which are first explained, in order to arrive at the
chief divisions of that kind of contract. The first is of the
Stipulation made between the person who demands and him
that promises; and of that made between several who stipulate or
promise together.

The second is of the Stipulation made by free persons or slaves.

The third is of Stipulations that are called judicial, prætorian,
common, or conventional.

The fourth is of Stipulations called equitable (utiles), or good in
law, and of Stipulations which are inutiles.

The fifth is of Principal and Accessory Stipulations, called
sureties or cautions.

Tit. 15—21. Title XXII. treats of Written Contracts. The five following
Titles explain contracts made by the sole consent of the con-
tracting persons; which are the contract of purchase, of hire, of partnership, and of mandate.

Title XXVIII. treats of Quasi-Contracts; the next shows how Obligations are to be acquired; and the last in what manner they may be extinguished. Having spoken of obligations which arise from contracts or quasi-contracts, the first five titles of the fourth Book treat of obligations arising out of faults and quasi-faults, — *delicta* or *quasi-delicta*. The rest of the Book from Title VI. to Title XVI. is devoted to the treatment of actions.

It begins with the definition of an Action, which is followed by several divisions explained in Title VI.; according to the chief and principal of which, Actions are either real, personal, or mixed.

The second is of Actions derived from the Civil Law, and such as have their foundation in Praetorian equity.

The third is of Actions by which the plaintiff pursues the right of a thing belonging or due to him, and of those by which the punishment of the offender is only aimed at, and of such Actions by which both are intended.

The fourth division, is of Action by which the plaintiff sues for the single, double, treble, or quadruple value of the thing he would recover.

The fifth is of Actions of good Faith, strict Law, and arbitrary.

The sixth is of Actions in which the total of what is due is sued for, and in which the defendant is either not sued for the whole, or in consequence of which he is condemned to pay only so much as his circumstances will allow.

After these divisions of Actions are explained in Title VII., the seventh treats of certain Praetorian Actions which men are liable to, and which proceed from contracts made by slaves or children under power, or else by persons to whom they have committed the management of their affairs.

Title VIII. speaks of Actions that may be brought against a master for an error committed by his slave.

Title IX. of Actions to which the owner is liable for the hurt or damage done by a beast.

Title X. directs what persons are to be employed in carrying on lawsuits.

Title XI. treats of the security required of the parties to a suit, or such as appear for them.

Title XII. sets forth the nature of temporary or perpetual Actions, and what Actions the law affords to or against heirs; which those are which lie in their favour, and not against them; and, lastly, those which are neither allowed for nor against them.

Title XIII. treats of Exceptions, and Title XIV. of Replications.

Title XV. of Injunctions, or Actions to put the party injured into possession.
Title XVI. declares the Penalty against such as commence vexatious suits.

Title XVII. prescribes Rules to be observed by Judges, in the several suits brought before them.

And Title XVIII., and last, shows what were the Roman public judgments, wherein every one had free liberty of prosecuting, and of which the penalties were established by the laws called *Judiciorum Publicorum Leges*.

The Institutes are quoted in the same manner as the Code and Pandects, with the letter *I. or Inst.*, thus, *§ si adversus, 12 I. De Nuptiis*, is nothing more than twelve paragraphs of the Title *De Nuptiis*, which on reference to the index, will be found to be the tenth of the first Book; this is usually now cited *I. 1. 10. 12.*

§ 62.

A more arduous task, however, was reserved for Tribonian—to compile from the decisions, conjectures, questions, and disputes of the most famous lawyers who had existed up to that time, rules founded on the pure spirit of jurisprudence, and thus compress the substance of many thousand treatises into one work, which should henceforward supersede existing digests, and render unnecessary references which had become not only laborious, but almost impossible.

Tribonian received the imperial command, *De Conceptione Digestorum*, A. D. 530, with directions to choose his colleagues; and seventeen were ultimately appointed, with absolute power to make such use of preceding works as should appear most conducive to the object in view. Tribonian's library afforded forty of the works of the most renowned civilians, which, with above two thousand other treatises, containing three millions of lines, were abridged into a hundred and fifty thousand; the work was completed in the incredibly short space of three years, and published on the 16th Dec. A. D. 533, a month after the appearance of the Institutes; its publication having been delayed a month, in order that the elementary work might precede it.

Justinian then ratified the work, and declared it the only rule to be followed in the courts. Henceforward, these three systems were alone taught in the schools of Rome, Constantinople, and Beirut (Berytus).

In order to prevent the corruption of the text, all contractions and ciphers were strictly forbidden, as well as all interpretations and perversions of the text, which were comprehended under the term forgery,—the fate of the perpetual Edict of Julian had probably led to this resolve; the futility of which, though it was observed religiously for many centuries, may be proved by glancing at the cumbrous mass of learning in the shape
of glossaries and commentaries of the Middle Age, and, perhaps the reader may add, of the 19th century!

The Pandects, after having been lost for ages, was transcribed at Constantinople in the seventh century, as the character would lead us to suppose, by a Greek scribe, on thin parchment, with large margins, and is bound in two volumes quarto,¹ and was discovered at Amalfi, A.D. 1137, and thence transported to Pisa, where it appears to have been consulted by Bartolus in the fourteenth century.² On Pisa being taken by the Florentines, in A.D. 1406, it was transported to the capital, rebound in purple, placed in a rich casket in the ancient palace of the Republic, as a sacred relic, and shewn to the curious by the monks or magistrates uncovered. It is supposed that all editions of the Pandects trace their origin to this original; they were, however, quoted by Ivo of Chartres, who died A.D. 1117, by Theobald, Archbishop of Canterbury, and by Vacarius, the first professor of Civil Law in England, in 1140.³

The only sources of Roman Law known in the Middle Age were the Pandects (Digestum), the Codex, the Institutes, the old Latin text of the Novels (Authenticum), and Julian's edition of the Novels (Novella); the rest used in later ages were as good as unknown. The Lombarda,—the compilation of Lombard Feudal Law,—the later laws of the Emperors, together with the statutes of singular states, and the Canon Law works, served as an alloy to the study of the Roman Law; the latter, however, formed almost a separate course of study.

§ 63.

The division of the Pandects into the Digestum Vetus, Digestum Novum, and the Infortiatum, belong to the fifteenth and sixteenth centuries.

That part of the Pandects from the first Book to Title II. of the twenty-fourth (De Divortii), formed the Digestum Vetus; so called, according to Odofredus, because first compiled dicitur.⁴ Digestum Vetus, quia prius su it in compilatio.

The Infortiatum begins with Title III. of the twenty-fourth Book (Soluto Matrimonio), and ends with the thirty-eighth Book; an unnatural division, as it begins not only in the middle of a book, but in the middle of the doctrine of Succession.

The word Infortiatum is, according to Odofred, so named from its author, Infortiatus; or, according to Inerus, Aurum vel argentum, nam ab initio fuerunt habitu alii libri legales in civitate ista, postea supervenit Infortiatum unde scientia nostra aucta vel augmentata est, sicut dicitur pannis Infortiatus in quo magis est de land quam sit de aliis communiter. And again, Ut dicitur de veste de lana INFORTIATA; i.e., de veste de lana augmentata. Inerus, too,
says, *fus nostrum augmentatum Infortiatum est, sic et vestis seria
dicitur Infortiata, &c.*; and Odofoed explains the word by *augmen-
tatum,* an augmentation to the parts then already known—the Old
and New Digests, that is found afterwards and inserted in its
proper place between those parts already known and in use: but a
still more extraordinary subdivision was that of the latter portion
of the *Infortiatum,* termed the *Tres Partes,* this begins not only
in the middle of a Book, of a Title, and of a Lex, but also in the
middle of a sentence of that law. 1 The initiatory words doubtless
gave it the name by which it went, *Illa pars, quae dicitur Tres
Partes, non est liber, quia est super Infortiato et non est ibi lex vel
§, sed totum sub lege illa quaeribatur,* says Odofoedus. That gloss-
sator, moreover, informs us, that they had not the Infortiata
which was at Rome, and was afterwards brought to Pentapolis in
an imperfect state; that is, minus the portion beginning *Tres Partes.*

Savigny, however, clears up the question more satisfactorily. He
says that the *Digestum Vetus*—that portion called the *Tres
Partes*—and the *Digestum Novum* were discovered; and lastly the
remaining part, namely, that beginning with Title III. of the
twenty-fourth Book, and ending at 35, 2, 82, where the *Tres
Partes* begin; on this discovery being made, this missing portion
was inserted into its proper place, between the end of Title II. of
the twenty-fourth Book of the *Tres Partes,* until then forming a
continuous part of the *Digestum Vetus.*

As for the *Digestum Novum,* Savigny thinks it only meant *pars
secunda* and *Vetus, pars prior,* and is not to be taken in the sense of
not new or newly found; both having been found simultaneously.

In order to prevent incorrect editions getting into circulation,
three Ultra and three Citra montan scholars were chosen every
year in the University of Bologna, and termed *Peciarii,* they
were excused from all other *muneria publica,* and held their sessions
once a week for the purpose of correcting imperfect copies in
possession of circulating libraries; a fine of five solidi was imposed
on all possessors of defective books, together with the expenses
of correction, for which purpose every doctor or scholar was
obliged to lend his own perfect copy, under pain of a fine of
five lire; hence the term *exempla correcta et bene emendata.* Books
thus corrected were advertised by the Bedel.

§ 64.

It now only remains to add a few observations on the forms in
which the Digest or Pandects are quoted by the glossators and
civilians; and it must be premised that the words *Digestum or
Digesta* is not a synonym of *Pandecta,* the former signifying an
abstract of the opinions of lawyers upon certain points of law,
while *Pandecta,* from *paw* and *δέχομαι,* implies a compendium of the

1 Sin vero centum tantum facere posse hic, heredes ex refecto quarta servanda est: sic fiat,
ut centum, quae præstari possunt, in quatuor partes dividantur. *Tres Partes* ferant
legatarii, heredes viginti-quinque habeat. P. 35, 2, 82. (Ad Legem Falcidiam.)
law; hence, we find this book variously quoted by the letter D. P.
or π, and ff, which latter is supposed to be a corruption of the
D with a stroke through the middle; why not a corruption of the
Greek π?

The most ancient method of quotation is by mentioning the
initial words of the Law and Paragraph with those of the Book or
Title, which necessitates a reference to the general index, with which
all modern editions are not furnished; thus, § sin. ver. l. quæsitum
est D., De Peculio.

The second, by citing the initial words and numbers of the Law
or Paragraph, with the initial words of the Book or Title; thus,
§ sin. ver. 3 l. quæsitum est 30 D., De Peculio.

The third, by mentioning the number of the Law or §, with the
initial words of the Book or Title; thus, § 3 l. 30 D., De Peculio;
which is the method adopted by Heineccius.

The modern mode, which avoids all reference to the index, is
thus, D. 15, 1, 30, 3.

The first paragraph is not numbered, and is usually quoted by
the abbreviation in pr. (in principio) in like manner, the last para-
graph is sometimes quoted by the words in fin (fine), or § ult.
(paragraphus ultimus).

§ 65.

The Pandects were divided into fifty Books, each Book
containing several Titles, divided into Laws, and the Laws
generally into several Parts or Paragraphs.

The First is called Principium, being the beginning of the
law; the rest are called Paragraphs.

The First Book begins with laying down the general prin-
ciples of justice, and sets forth its different kinds; it then proceeds to
treat of divisions of Persons and Things; Senators are mentioned
next; and lastly, Magistrates, their delegates and assessors.

In the Second we have an account of the Power of Magis-
trates, and their several Jurisdictions, continents; how a Defen-
dant is to be brought to try an Issue, and of Bail for Action. The
subject of the latter part of this Book is Covenants and Transac-
tions, imparances.

The Third Book explains, in the first place, who those
persons are that are allowed to sue at law; and as infamous
persons are not admitted so to do, the second title treats of
them. The following, of those whose assistance is required in
legal proceedings, as attorneys, &c.; and lastly, the third Book
treats of the Oath of Calumny.

The Fourth Book explains the different causes for restoring
a question to its normal state, and of an act done under coercion
or fear of death. The next subject it treats of is Compro-
mises and Arbitrations; after which it speaks of Innkeepers and
others in whose custody we leave anything.

The Fifth states, after having treated of Judgments, who

Contents of the
fifty Books of
the Pandects.

Lib. Pand. I.

Lib. Pand. II.

Lib. Pand. III.

Lib. Pand. IV

Lib. Pand. V.
ought to make an Assignment of the Demand of Inheritance and of the Impeachment of a Will for Informality.

The SIXTH treat of Real Actions by which private persons recover their own; which actions may be civil and direct, or pretorian or equitable.

The SEVENTH respects Burdens termed Personal (servitudes), Usufructs (leases), hirings.

The EIGHTH treat of Real Burdens, prædial and urban.

The NINTH speaks of Personal assimilated to the Real Actions, as actions for damage or crime committed by a slave, the actions of the Lex Aquilia; and as connected with this last, at the end of the Book, of the Action for Damage done by throwing things into a Highway, and of Noxal Actions.

The TENTH Book treat of Mixed Actions, such as the action of bounding and butting, finium regendorum; the action for partition of an inheritance or other particular thing; of the action called Ad Exhribendum, to compel the party "to produce," which is preparatory to the Real Action above mentioned.

The ELEVENTH Book treats of Interrogatories upon Facts; of such matters as are to be heard before the same Judge; of Seduced or Runaway Slaves; of Gambling, False Measurements of Land; and lastly, of Burials and Funeral Expenses.

The TWELFTH Book explains those Personal Actions by which the descendant shall be obliged to transfer the demise or inheritance of anything, such as the action for a loan, and some others which go by the name of Condictio, in its proper signification; that of fixing a day for the appointment of a Judge.

The THIRTEENTH Book speaks also of some of these actions, and then of Things Lent, and of the Action Relating to Pledges.

The FOURTEENTH and FIFTEENTH Books treat of Actions arising from Contracts made by Three Persons, but whereby such are bound; and lastly, of the Scm. Macedonianum.

The SIXTEENTH contains Scm. Velleianum, Compensations, and the Actions concerning Deposits.

The SEVENTEENTH treats of Commissions (Mandatum), and Partnership.

The EIGHTEENTH contains the Law on the Usual Covenants of Contracts of Sale, the mode of their decision, and on what ground these contracts may be receded from, and upon whom the gain or the loss of the thing sold is to fall.

The NINETEENTH, in the first part, treat of Actions of Bargains and Sale, of Actions of Hiring, of the Action for Computation of Value, called Estimationis, of Permutation, of the Action on the Terms of the Contract, called Prescriptis Verbis, arising from inominate contracts.

The TWENTIETH Book treat of Pledges of the Precedence.
of Creditors, and the Subrogation of the Rights of Prior Lien; of the 
Distractio Pignoris or sale of things pawned; and the Re-
demption of the Pledge, or extinguishment of lien.

The Twenty-first explains the Aedile's Edict concerning 
the Sale of Slaves and Animals; Dispossession, called Evictio; 
Warranty, and the Exception of the Thing Bought and Delivered.

The First Part of the Twenty-second treats of Usury, 
Fruits, Dependencies, Accessories to Things, and Default; 2d, 
of Proofs and Presumptions, and of Ignorance of the Law or 
Fact.

The Twenty-third is upon Espousals, Marriage Dowry, 
Agreements made relatively to that subject, and of Lands given 
in Dowry.

The Twenty-fourth lays down the Law of Gifts between 
Husband and Wife; of Divorces, and Recovery of the Marriage 
Portion.

The Twenty-fifth treats of Expenses laid out upon 
Dowries; of Actions for the Recovery of Things carried away 
by a Wife or other Person against whom no Action of Theft 
lies; of the Obligation to acknowledge Children, and provide 
for their maintenance; and lastly, of Concubines.

The Twenty-sixth and Twenty-seventh Books treat 
wholly of Guardianships, Tutela and Curatela—and of the 
Actions which result from them; of Exemptions from Wardship, 
and the Alienation of Goods belonging to Wards, Pupilles or 
Minores.

The Twenty-eighth Book contains the Law of Wills; the 
Institution and Disinheritance of Children; of the Institution 
of an Heir; of Substitutions; of Conditions required in Institu-
tions, and of the Right of Deliberating before Accepting an 
Inheritance.

The Twenty-ninth Book treats of the Military Wills; of 
the Acquisition of an Inheritance, and of the Opening of Wills, 
&c., and of Codicils.

The Thirty-first, Thirty-first, and Thirty-second, treat 
of Legacies and Bequests in Trust in general.

The Thirty-third, and likewise the first Titles of the 
Thirty-fourth, treat of Particular Legacies; the Catonian 
Regulations; of Legacies reputed never to have been left, and 
those of which unworthy persons are deprived.

The Thirty-fifth speaks of Conditional Legacies, and of the 
Law Falcidia, reserving a certain portion of the inheritance for 
the heir.

The Thirty-sixth explains the Setum. Tribellianum, regu-
larising Bequests in Trust; the Time when Legacies and Fidu-
ciary Bequests become due, and the Security the Heir is 
obliged to give for their Liquidation, if left conditionally; and 
of their Foreclosure in default of such security.
Lib. Pand. XXXVII. The Thirty-seventh Book speaks first of the Succession to a Deceased Person's Estate, called Universal, granted by the Praetor, under the name of Bonorum Possessio; after which it treats of Hotch-Pot (Collationes), of Goods and Dowry, and the Right of Patronage.

Lib. Pand. XXXVIII. The Thirty-eighth Book lays down the Duties of Freed Men to their Patrons; the Law of their Succession; of Intestate Succession under authority of the Praetor; and lastly, of Domestic and Legal Heirs, and of the Sctm. Tertullianum and Orphilianum.

Lib. Pand. XXXIX. The Thirty-ninth Book first shows the means which the Law or the Praetor furnishes to prevent any one from receiving Damage, where a Personal, Real, or Mixed Action will not lie; these means are, Caveat against a New Work—Caution Damni Infecti, and the Action of Aves Drop,—De Aqua Pluvia Arcenda; it ends with the Explanation of Donations which come into operation during the life of the donor, and of such as are made in contemplation of death.

Lib. Pand. XL. The Ffortieth Book relates to Manumissions, distinguishing between Ingenious, Freed Men, and Slaves, and explaining their rights.

Lib. Pand. XLI. The Fortieth treats of the different modes by which Property in Things is acquired by the Law of Nations; of Possession; of Prescriptions; and lastly, of lawful causes authorizing Possession, and consequently making it capable of prescription.

Lib. Pand. XLII. The Fortyninth treats, in the first place, of Things Adjudged; of Definitive and Interlocutory Sentences; of Confessions in Judgment; of the Assignment of Goods; of the Causes of Seizure and its Effects, and of the Privileges of Creditors; it then passes to Curators appointed for the Administration of Goods, and of the Revocation of Acts done to defraud Creditors.

Lib. Pand. XLIII. The Forty-third treats of Injunctions and Possessor Actions.

Lib. Pand. XLIV. The Forty-fourth treats of Exceptions and Defences, and then of Obligations and Actions.

Lib. Pand. XLV. The Forty-fifth of Stipulations.

Lib. Pand. XLVI. The Forty-sixth, of Sureties, Novations, and Delegations of Payments, and Discharges of Acceptations, Stipulations, and some Bails for Action.


Lib. Pand. XLVIII. The Forty-eighth begins with Public Judgments; then follow Accusations, Inscriptions, Prisons, and all Public Offences; thence it passes to the Sctm. Turpilianum and Abolition of Crimes; and lastly, it treats of the Torture, Punishments, Confiscation, Exile, Transportation, and of the Bodies of Malefactors executed.

Lib. Pand. XLIX. The Forty-ninth treats of Appeals, and matters relating
thereunto; it then gives an account of the Rights of Exchequer; of matters relating to Captives, Military Discipline, Soldiers, and Veterans.

The Fiftieth Book treats of the Rights of Cities and Citizens; of Magistrates and their Children; of Public Offices, and the causes which exempt persons from them; and also of the Right of Immunity; after, of Deputies and Ambassadors; of the Administration of Things belonging to Cities; of Public Works, Fairs, Promises (termed Pollicitationes), Judgments given in extraordinary cases by Magistrates; of Brokers and Factors; of Taxes laid upon the Provinces; and lastly, it ends with the Interpretation and Signification of Law Terms, and of the Rules of the Law.

§ 66.

Besides this Distribution of the Digest into Fifty Books, it was divided into Seven Parts, but the reason that induced the Emperor to make this division is not known. Some supposed it was done in order to separate the different matters, and include all that related to one subject in one Part, consisting of several Books. Others attribute it to the superstitious respect of the Ancients for the number seven, as the most perfect.¹

The First Part contained the first four Books.

The Second Part, intituled De Judicis, contained all, beginning with the fifth to the end of the eleventh.

The Third Part, De Rebus, included all to the end of the nineteenth.

The Fourth Part included the Accessories to Contracts and Actions arising out of Marriage and Guardianship, ending with the twenty-seventh Book.

The Fifth, intituled De Testamentis, began with the twenty-seventh, and ended with the thirty-sixth.

The Sixth is intituled De Bonorum Possessionibus, at the commencement of the thirty-seventh Book, and ends with the forty-fourth.

The Seventh contains the remaining six Books.

§ 67.

We now come to consider the Novelle Constitutiones of Justinian, commonly called Novels. The term did not originate with him, having been previously applied to the Constitution published by the Emperors Theodosius, Valentinianus, Martinthus, Leo, Majorianus, and Severus, after the compilation and acknowledgment of the Theodosian Code as an authentic compilation, and the Novels of Justinian are held to bear the same analogy to the Codex Repetitor Prelectionis. The term has also been adopted by later Emperors. Whatever the value of the Novels may be, it cannot be denied that they are most useful when considered as explanatory of the Code.

¹ Vid. Macrobr. in Som. Scrip.
Although Tribonian was undoubtedly often employed in the composition of the Novels, there is reason to believe, from the difference which is perceptible in the style of some of these Novels, that Justinian occasionally had recourse to other persons also. Be that as it may, it is asserted that Trebonian reaped great pecuniary advantages from several of those which he himself drew up, either by the introduction of a principle contrary to that generally recognised, or by deciding disputes in suits then pending; hence, many of the Novels are rejected in some States where the Civil Law is received.

All these Novels are directed either to magistrates, bishops, or citizens of Constantinople, and were of equal force and authority for those private persons to whom they were directed, and who were enjoined to have them proclaimed, and to see them executed according to their form and tenor.

After Justinian’s decease, some part of his Novels were collected and reduced into one volume, together with thirteen of the Edicts; which, together, make up the fourth and last part of the body of the Civil Law.

§ 68.

The greatest part of these Novels were composed in Greek, owing to the seat of the Empire being then at Constantinople, where few or none spoke Latin in perfection; notwithstanding which some of them were published in Latin, and have been noticed by Antonius Augustinus. There are four Latin translations of the Novels. The author of the first translation is not known. It appeared, according to Contius, in 1559, at the beginning of this collection, just after Justinian’s death.

Contius, Alciatus, and many others, call this a barbarous translation; and the famous Du Moulin, in his Treatise on Usury, holds the author of it to have been no good Latin scholar. Cujacius, on the other hand, commends it in his Observations, and demonstrates the translator’s learning from many passages, declaring his translation better than any since undertaken, imputing the faults which occur in the several editions to the press rather than the translator.

Leuclavius also proves that this translation is in many respects more ample and correct than the others.

It is, however, by no means surprising that this translation abounds with barbarous expressions, on account of it being a literal one—a mode of translation which does not allow the language to be either very elegant or polite: Habet omnis lingua sua quaedam propria genera locutionum, quae cum in aliam linguam transferruntur videtur absurda. “Every language,” says St. Augustine, “has its idioms, which when translated into another seem absurd.”

1 Q. 1, No. 67. 2 Lib. 46, c. 38. 3 In Not. ad Parat. Aut. Græc. lib. 2, n. 244, Vers. mult. in locis. 4 Lib. de Vera Relig. c. 50.
The second translation, which appeared almost at the same time as the first, is a Latin paraphrase, made by Julian, professor of law at Constantinople, who lived under Justinian, and several other succeeding Emperors. This abridgment, called Julian’s Novels, consists only of the decisions contained in Justinian’s Constitutions, by way of paraphrase; but it is so much the more valuable, on account of the age in which the author lived; and was consequently in great legal repute at Constantinople.

Julian did not adhere to Justinian’s order in the second law of the Code, De Vetri Jure Enucleando, which was to translate the laws word for word, and not otherwise; he may, nevertheless, be excused for having omitted all that was useless, and kept only to the Emperor’s decisions, which he often explains in the clearest manner, without deviating from their genuine sense, so that when there is any difficulty in a Novel, recourse must be had to this paraphrase, which has at least the character of being very faithful and exact.

The third translation is that of Holoander, printed first at Nuremberg, A. D. 1531, and since reprinted at several places.

The fourth and last, which is very much valued, is that made after Seringer’s Greek copy, printed at Basse by Hervagius, A. D. 1561.

The first, commonly called the Vulgar, is printed in the Civil Law Courses, either with or without glosses; its antiquity and the unanimous consent with which all the interpreters of the law have generally received it, renders it very valuable. Besides, as all nations acknowledge it for law when any doubt arises upon the text, there is no need to have recourse to the Greek original; because, as Contius observes, this Latin version was made from a Greek copy, much more correct and perfect than that which we have.

§ 69.

The unhappy wars and incursions of the Goths into Italy and Greece, occasioned, as we have already seen, the utter loss of Justinian’s law; but on its recovery at Amalphi, Irnerius, by the authority of Lotharius II., A. D. 1130, restored the Digest, Code, and Latin version of the Novels; it was, however, very defective, many Novels were wanting, either because they could not be found, or because they were quite out of date, being calculated for particular-places, and therefore forming no part of the common and general law.

This first version contained only ninety-eight Novels, but Holoander and Seringer made up the number one hundred and sixty-five, out of the Greek Book of Novels, and Cujacius added the three last, which make in all the present number of one hundred and sixty-eight. Matthew, the monk, in his preface, affirms that Justinian made one hundred and seventy; if so, there must have been two lost. Justinian’s epitome contains only one hundred

and twenty-eight, among which there are four of the Emperor Justinus, and three of Tiberius.

This volume was called authentic, as containing Justinian's last constitutions, and as such is of greater authority than the rest; according to the maxim, that when two laws are contrary one to the other, the last repeals the first.

§ 70.

It is believed that about the year 1140, some interpreter changed the order they were first placed in, and divided them into nine collations. But what reason he had for making this division does not appear, since there are in the same collation constitutions upon matters which had no relation to each other, and which are in no other order than that in which he who divided them was pleased to place them. It were to be wished he had observed the order of time, by which we might have easily distinguished those that made others void.

Every collation is divided into several titles; and the number of a title of collation does not run on in the following collation; so that the last title of the first is the sixth collation; and the second collation begins with the first title, and is not the seventh. But all these titles are distinguished by the number of the Novels; for instance, the first title of the second collation is the seventh Novel.

Most parts of these Novels consists of a preface, several chapters, and an epilogue.

In the beginning or preface, the Emperor explains the reasons and motives which induced him to make that constitution, which is the method observed in most Royal Edicts. The titles contain several decisions upon the matters in question, and these chapters are divided into many paragraphs.

In the epilogue the Emperor enjoins strict obedience to his Constitution, modo et forma of all royal ordinances.

Irnerius¹ composed summae or extracts of several of the Novels, when he republished the first translations, inserting them after those passages of the Code which they either repealed, augmented, or explained in a different type to avoid confusion. These summaries are still termed authentics, a word to be distinguished from the same word in the singular, which applies exclusively to the collections of Justinian's Novels as a whole.

No analysis of the Novels is attempted, on account of the impossibility of making a methodical succession, either as to time, titles, or subjects, many matters which have no relation to each other, being found following each other in the same Novel. Otho-

The Novels are quoted simply by their respective numbers, thus, N. 117, cap. 18, § 2, or Auth. Coll. 8, cap. 18, § 2, or Præm. or Epit. as the case may be.

¹ Vide Life of Irnerius, in seq.
Justin II. succeeded his uncle Justinian, and after a reign marked with disgrace, abdicated, A.D. 574, in favour of Tiberius, and died four years afterwards. His empress was Sophia.

Tiberius, who reigned only until A.D. 582, was an excellent prince. Anastasia was his empress.

Maurice was selected as his successor, and reigned twenty years, respected and beloved; indeed he was, with few exceptions, worthy to follow so excellent a predecessor; he abdicated A.D. 602, in consequence of a public revolt, and, with his five sons, was murdered by his successor.

Phocas, a simple Centurian, whose cruelty bespoke his origin, usurped the throne; he murdered Constantina, the late empress, and her five daughters, and is compared by Gibbon to Caligula or Domitian.

Heracleius, the Exarch of Africa, who had never acknowledged the usurper, arrived at Constantinople, and executed him A.D. 610. Heracleius reigned until A.D. 641, when he was succeeded by his son.

Constantine III., who was poisoned, it is supposed, by Martina, after a reign of one hundred and three days, and was succeeded by his brother.

Constans II. began his reign A.D. 641; his half-brother, Heracleonas, and his incestuous step-mother, Masteria, were sentenced by the Senate to have, he his nose, and she her tongue, cut out. Constans II. murdered Theodosius, the grandson of Heracleius, and died, or was murdered, in a bath in Sicily.

Constantine IV., called Pogonatus, his elder son, succeeded him, A.D. 668; he deprived his two younger brothers of their noses for sedition; he was succeeded by

Justinian II., one of the most cruel of the Byzantine Emperors; he was deposed and mutilated by Leontius, but subsequently restored, and ultimately murdered A.D. 711, after a reign of unexampled atrocity.

Philippus had no sooner ascended the throne than he was murdered, and was succeeded by

Anastatius II., A.D. 713, the Imperial Secretary, who soon resigned the purple, and was succeeded by

Theodosius III., A.D. 716.

Leo III., the Iconoclast, founded the Isaurian dynasty A.D. 718, and expired in his bed, after the extraordinary long reign of twenty-four years, surpassed only by that of

Constantine V., surnamed Copronymus, from his polluting the baptismal font, reigned thirty-four years amid blood and butchery, revelries in bestiality, unnatural crime and infidelity. Notwithstanding which, the empire appears to have flourished exceedingly in his time.

Leo IV., his son, succeeded him A.D. 775, and was crowned Emperor Justin II. A.D. 565.

Emperor Tiberius, A.D. 574.

Emperor Maurice, A.D. 582.

Emperor Phocas, A.D. 602.

Emperor Heraclius, A.D. 610.

Emperor Constantine III. A.D. 641.

Emperor Constans II. A.D. 641.

Emperor Constantine IV. A.D. 668.

Emperor Justinian II. A.D. 685.

Emperor Philippus, A.D. 711.

Emp. Anastatius II. A.D. 713.

Emp. Theodosius III. A.D. 716.

Emperor Leo III. A.D. 813.

Emperor Constantine V. A.D. 741.

Emperor Leo IV. A.D. 775.
with his mother Irene; he reigned until A. D. 780, when he was succeeded by

**Constantine VI.** reigned twelve years, in conjunction with his mother Irene, who caused him to be at once deprived of sight and murdered.

Irene was in her turn exiled, after a reign of ten years, by

**Nicephorus I.**, A. D. 802, a bad prince. He was slain by the Bulgarians A. D. 811, and succeeded by

**Stauracius,** who reigned only six months, during which time he appears to have emulated the vices of his father; he was superseded by

**Michael I.**, a weak and bigoted prince. The insolence and assumption of military power by his wife, Procopia, ultimately obliged him to assume the monastic garb.

**Leo V.**, surnamed the Armenian, reigned seven years and a half, and was slain A. D. 820, at the foot of the altar, defending himself with the cross.

**Michael II.**, surnamed the Stammerer, reigned until A. D. 829.

**Theophilus** succeeded him; the custom of assembling the daughters of the principal patricians at the marriage of the Emperor is said to have arisen with him, and she to whom he gave a golden apple, a practice probably originating in the mythological tale of the Judgment of Paris, became the Empress. The Russians continued a like practice until the last century; hence, too, probably arose the vulgar error, that the Sultan throws a hankiechief to her whom he selects for his bed on the night of power.

**Michael III.** succeeded the throne on his father's death, A. D. 842, at the age of five years; his mother and guardian, Theodora, restored the images; at the age of eighteen he, however, banished her from court, and at the age of thirty was murdered in his bed A. D. 867, after a reign of vice and folly, by

§ 72.

**Basil I.**, surnamed the Macedonian, who was the framer of the Basilics. Gibbon justifies the final abolition of Justinian's system of jurisprudence, in summing up the reign of this Emperor. After praising his application, his temper, and understanding, the success of his arms, his financial measures, his reformation of luxury, the extent of the useful public works executed by his order, and the hundred churches with which he caused the city to be embellished, he says, "In the character of a judge he was assiduous and impartial, desirous to save, but not afraid to strike; the oppressors of the people were severely chastised, and his personal foes, whom it might be unsafe to pardon, were condemned, after the loss of their eyes, to a life of solitude and repentance. The change of language and manners demanded a
revision of the obsolete jurisprudence of Justinian; the voluminous body of his Institutes, Pandects, Code, and Novels, was digested under forty titles in the Greek idiom; and the Basilicæ, which were improved and completed by his son and grandson, must be referred to the original foundress of their race." It is true this savours a little of the panegyrist, yet few will venture to impeach the position of Gibbon, or the temporary necessity which he supposes. Be that as it may, the respect paid throughout Europe, after centuries of oblivion, to Justinian's system of jurisprudence, while the very existence of the Basilicæ, a work more recent by three centuries and a half, is now for the most part unknown except to antiquarians, pleads strongly in favour of the superior worth of the compilations of Tribonian.

The legislative successor of Justinian died from a wound received from the horns of a stag while hunting, A.D. 886, after a long and prosperous reign of nineteen years.

Leo VI: obtained the surname of the Philosopher, and probably so high a title was never founded on more slender grounds; he was married four times, having repudiated his wives successively, on account of sterility; the Patriarch refused the benediction to his fourth marriage with Zoe; hence the legitimatio per subsequens matrimonium was held to have but an imperfect operation in respect to his only son and successor.

§ 73.

Justinian's system of law does not appear even to have obtained generally in the Western Empire, the greater part of it, with the exception of Rome, Sclavonia, and a few other provinces, having been swallowed up by different nations, more or less barbarous, to whom the Roman laws were unknown. The nations which adopted them did so in a modified form, mixing them up with laws and customs of their own, and such was the case with the Goths, Burgundians, and Franks.

§ 74.

The logical construction of the Roman system of Jurisprudence, and its argumentative deduction from equitable principles, gave it the great influence it has possessed on the Continent since its revival; and even in universities like those of England, where its practical utility has ceased, its theoretical value has been so highly prized as to have retained for it a place among those sciences which have for their object the formation of the mind for close argument, and the charges of government.

With respect to contracts, it has never been superseded; and although the form and language are changed, yet there are few decisions of the old lawyers adopted in the Digest, which would not even now be good law in Westminster Hall.

The perfection to which the science of law attained at Rome
is referable to three great facts. First, The administration of it in all its branches by the most highly educated class in the State, whose position and fortune enabled them to devote their attention almost wholly to it as a science. Secondly, To the practice of it being exclusively confined to the highest order in the State,—the Patrician class,—which made a profession, but not a trade, of it; and, lastly, The prevalence of a free Constitution, founded on personal liberty, where no unjust or, what in the end is worse, illogical decree diverted it from the natural course.

§ 75.

In England the common law of our ancestors is logical and consistent, for it enjoyed the advantages which developed the Roman law; but in latter times the mass of illogical statutes has become a greater evil than the despotic ukase of a Russian Emperor: changed, interpolated, and curtailed by a lay committee of legislators, the legal framer of the bill sees the child of his brain born a wretched distortion, even devoid of logic, nay, even of common sense, and often rejected as inexecutable by the Judge; whereas, formerly, all laws passed by the legislature were, at the end of each Session, digested by the judges into one statute, in due legal form and language, and the present inconvenience of amateur legislation was unknown.

§ 76.

The body of law composed by Justinian kept its ground in the East for three hundred years after his death, without suffering any other alteration than that of being translated into other languages. The Digest and Code were put into Greek during Justinian’s reign; and after the Emperor’s death Theophillus (not the composer of the Institutes) made a Greek Paraphrase of the Institutes. The Novels also, written originally in Greek, were translated into Latin, as has already been observed.

Three hundred years after Justinian’s death, the body of law made by his order with so much pains and success, was so changed that it could no longer be said to be followed in the Eastern Empire.

The baseness of the Emperors, and their jealousy of Justinian’s fame, made them studious of a pretence to destroy it. They began then by asserting that Justinian’s Books were not alone sufficient to meet all difficulties which daily arose; that their compilation was deficient in exactness. They then made several new ordinances contrary to the Roman law, and introduced particular customs with the view of totally abolishing it.

§ 77.

These new ordinances and customs furnished the Emperor Basilius with a pretext for framing a new body of law, A. D. 880;
but dying before its completion, Leo, surnamed the Philosopher, finished it, and divided it into sixty books, which he published A.D. 886, under the title of Βασιλικά, either in honour of his father, as the first projector, or as containing the imperial law, taken partly from the later Emperors of Constantinople; the word Βασιλικῶς signifying Royal or Imperial, but most probably both.

Constantine Porphyrogenitus, Leo's son, corrected and augmented the Basilics, put them into better order, and published them about the year 920, when they began to be in full authority among the Greeks. Indeed, Cujacius asserts that the Constitutions of the Emperor Leo were of no force, but in so far as they agreed with the Basilics.

From that time the Basilics alone, together with some epitomes and abridgments, and a few Constitutions of the Emperors who succeeded Basilius, comprised the whole law of the East, and continued so till the reign of Constantine XIII., the last Emperor of the Greeks, in whose time Constantinople was taken by Mahomed, Emperor of the Turks, A.D. 1453, which put an end both to the Eastern Empire and to its laws. Justinian's law had become a dead letter, upon the introduction of the Basilics and epitomes before mentioned; and so desirous were the Emperors of Constantinople to give a currency to their own Constitutions, and encourage the vulgar tongue of the country in which the Basilics were written, that Justinian's Books were utterly neglected, and scarcely any copies of them were to be found in the East for a long time before Constantinople was taken by the Turks.

Some impute the loss of Justinian's Books to the burning of Constantinople, under the Emperor Zeno, when above six thousand volumes were destroyed.

There are two things to be remarked of the Basilics: the first, that they were partly composed of Roman laws translated into Greek, the use of which had been preserved in the East; the second, that, after the taking of Constantinople by the Turks, they lay unnoticed during a long time.

Hervetus first published seven Books; then Cujacius three more; it is, however, supposed that he possessed them all; lastly, M. Tabrot edited a Greek and Latin edition of seven volumes in folio, which is held to be sufficiently complete.

The Grecian lawyers made many remarks and commentaries upon the Basilics. As to the Novels of Leo the Philosopher, they are in number one hundred and thirteen, which are to be found translated into Latin at the end of the body of the Corpus Juris, and are sometimes referred to in cases omitted by Justinian.

Besides the Basilics and Novels of Leo the Philosopher, the Greeks had many abridgments of their laws, which were more in credit than the Basilics. The first was the manual

1 Vid. 1 & 17 Leo Nov. and Cuj. Ob. l. 6. c. 9. 2 Obs. l. 17. c. 31.
of Basilius; the second, Michael Ataliatus’s Abridgment, called The Abridgment Abridged, published in 1070; the third is Michael Psellus’s Abridgment, which appeared about the same time; the fourth is the Epitome of the Universal Law, by Harmonopolus, published A.D. 1150; the fifth is the Basilics of Leunclavia, which appeared A.D. 1570.

§ 78.

CONSTANTINE VII., surnamed Porphyrogenitus, from the imperial porphyry chamber where the empresses were accustomed to be delivered, commenced his reign A.D. 911. The origin of this term, as applied to Constantine VII., probably alluded to his birth in concubinage, but with the attributes of the royalty to which he afterwards succeeded; he came to the throne at six years of age, and reigned fifty-four years; his uncle Alexander, and subsequently his mother Zoe, with a council of seven, formed the Regency, which was superseded by

ROMANUS LECAPENUS, who, with his three sons, Christopher, Stephen, and Constantine, termed the VIII., degraded Constantine VII. to the fifth place in the college of princes. Two of his sons, however, conspiring against him, banished him to an island in the Propontis, whither public indignation soon forced them to follow him.

CONSTANTINE VII. A.D. 945, then reigned weakly fifteen years, and was, A.D. 959, succeeded by his son

ROMANUS II., who was supposed, by the agency of his wife Theophano, to have poisoned his father. This Greek, who finds a parallel in Charles IX. of France, as far as his love of hunting and the tender age at which he ascended the throne were concerned, was in his turn poisoned by his wife, a woman of base origin, and was, A.D. 963, succeeded by

NICEPHORUS PHOCAS II., whom Theophano had secretly invited to the capital, to the prejudice of her two sons. The Patriarch, however, refused his benediction—an obstacle which was at length overcome by perjury. Nicephorus II., like his predecessor of the same name, is accused of penury and avarice, and after a reign of six years, Theophano became for the third time a murderess, introducing for this purpose into the palace

JOHN ZEMISCE, the Armenian. The repudiation of Theophano was the price demanded for his coronation by the Patriarch; he began his reign A.D. 969, and was, it is supposed, poisoned, after a reign of seven years.

BASIL II. and CONSTANTINE IX. succeeded jointly A.D. 976; the former, however, governing until he died at sixty-eight, in the superstition of monkish celibacy, and was succeeded by his younger brother,

CONSTANTINE IX., A.D. 1025, whose family consisted of three daughters; of whom Eudocia took the veil; Theodora refused, while Zoe accepted the hand of
THE EASTERN EMPIRE.

ROMANUS III. (Argyrus) a patrician, who was reluctantly compelled to repudiate his own wife, to make way for this imperial spouse. She poisoned him, A.D. 1034, to place on the throne MICHAEL IV., a man of low degree, who was succeeded by

MICHAEL V., surnamed Calaphates, from his occupation of a caulker, whom her late husband's brother, the eunuch of the palace, had forced Zoe to adopt as her son; he reigned but a year, when he was deposed or destroyed, and

ZOE and THEODORA reigned jointly as Empresses. This, however, did not last long; Zoe's lust, at the age of sixty, raised to the throne CONSTANTINE X.; surnamed Monomachus, or "the duellist," on whose decease, in 1054,

THEODORA, the last of the Basilian dynasty, became sole Empress, Zoe having died before her third husband; she named as her successor

MICHAEL VI., A.D. 1056, surnamed Stratistius, from his military calling; he was defeated and forced into a monastery by ISAAC I., A.D. 1057, of the family of Commeni, of noble Italian origin; after a reign of two years, however, he too assumed the monastic robe, and was succeeded A.D. 1059, by

CONSTANTINE XI. (Ducas), who caused his three sons, Michael VII., Andronicus I., and Constantine XII., to be invested with the imperial purple, compelling at the same time his Empress Eudocia to take a solemn oath of celibacy, for the period of her prospective regency, Eudocia however violated it in seven months after his death, by marrying

ROMANUS III. (Diogenes) A.D. 1067. This unsuccessful soldier was, however, taken captive by the Turks, and becoming thus capitis minor,

MICHAEL VII., termed Parapinaces, then reigned conjointly with his three brothers, until he assumed the monastic garb, with the title of Bishop of Ephesus. This despicable prince was succeeded by

NICEPHORUS III. (Hotoniates), a member of the Commenian family, who ascended the Byzantine throne, A.D. 1078, but reigned only three years, when he retired to a monastery, and was succeeded by

ALEXIUS I., son of John Comnenus, who had refused the imperial inheritance of his brother Isaac. In his reign the first crusade was undertaken; he restored the origin of the laws, abolished the venality of employees and judicial officers, and died in 1118, after a prosperous reign, making way for

JOHN, surnamed the Handsome (Kalohannah), in irony of his want of beauty; his sister Anna conspired against him, and was condemned to the extreme penalty of the law attached to that crime, but was respite by his imperial clemency. After a long

Emperor Romanus III. A.D. 1028.
Emp. Michael IV. A.D. 1034.
Emp. Michael V. A.D. 1041.
Empresses Zoe and Theodora, A.D. 1042.
Emp. Constant. X. A.D. 1042.
Empress Theodora, A.D. 1054.
Emp. Michael VI. A.D. 1056.
Emperor Isaac I. A.D. 1057.
Emperor Constantine XI. A.D. 1059.
Emperor Romanus III. A.D. 1067.
Emp. Michael VII. A.D. 1071.
Emperor Nicephorus III. A.D. 1078.
Emperor Alexius I. A.D. 1081.
Emperor John, A.D. 1118.
reign of twenty-five years, this accomplished prince died accidentally from the wound of a poisoned arrow from his own quiver, while hunting the wild boar. Gibbon terms him the best of the Commendian princes.

Manuel, the youngest of the two surviving of the four sons of Kalojohannes, succeeded his father A.D. 1143. This prince has been compared to Richard I. of England and Charles XII. of Sweden; his gigantic strength and indomitable courage have made him worthy of the comparison, and his victories over the Turks are to be placed among the most astonishing records of bravery and success; unfortunately he fell into sloth and debauchery, which exhausted the revenues of his empire, and he died after a long reign of thirty-five years, leaving the imperial inheritance to his son,

Alexius II. by Maria, a French princess of Antioch A.D. 1180, a boy of twelve or fourteen years of age. As the reign of his father had been disturbed by the continual sallies and varied success of Andronicus, the younger brother of John, son of Isaac, and grandson of Alexius Comnenus, so was his minority in the year 1183.

Andronicus I. succeeded in strangling Maria, the widow of Manuel. He had successively seduced Eudocia, the sister of Theodora, the late Emperor's niece, with whom he had lived in incestuous intercourse, and Philippe, sister of Maria, the widow of the late emperor, and the widow of King Baldwin III. of Jerusalem. He reigned but three years, during which time he abolished the pillage of wrecks, and purged the administration of justice; notwithstanding which the blood of his former enemies flowed on all occasions, in which resulted his ruin and disgraceful execution by the populace. The romantic adventures of this prince before he came to the throne might be held fabulous were they not confirmed by indubitable testimony.

Isaac II. (Angelus), a grandson, in the female line, of Alexius the Great, destroyed the tyrant, A.D. 1185, but was dethroned by his brother Alexius Angelus, if possible the more contemptible prince of the two, who deprived him of his eyes and confined him in a fortress, while Isaac's son, whom the usurper spared, escaped to Sicily. Young Alexius, however, having at Venice enlisted the Crusaders in his service, returned, took Constantinople by storm, and restored his father. The Emperor and his son now feared to dismiss, and were unable to satisfy, the Crusaders. During these disputes, both father and son were deposed and destroyed by Mourzoufle in 1204, and the city was again stormed and taken by the Crusaders, and a Latin prince ascended the Eastern throne.

It is in this period that the loss of the greater part of the ancient legal works is to be placed, confounded in one splendid ruin with the finest specimens of art and memorials of history.
§ 79.

Since the introduction of Christianity, but more especially since it had become the religion of the Imperial Court, it had been the practice of those professing that faith to visit the scene of their founder's sojourn, and to pay an almost superstitious reverence to the conventional spot of his burial. So long as the arms of the Roman Empire compelled the respect due to its power, pilgrims from all parts of the Christian world were protected and facilitated in their visits to the cradle of their faith, but with the decline of the Roman power, and the conquests of the Arabian preacher, though the character and person of the Christian pilgrim was respected, he was deprived of his former facilities, and fines or duties were levied upon all such as visited the Holy City.

The renown of Charlemagne gave rise to an alliance between that Emperor and the famous Caliph Haroon al-Rasheed, who granted the French pilgrims permission to establish a house in Jerusalem for the entertainment of their Latin brethren; this privilege was, however, withdrawn from Charlemagne's successors, and the pilgrims were left to wander unprotected and unprovided for.

Toward the middle of the eleventh century, the Caliphs, or Sultans, of Egypt, the then masters of Palestine, permitted their subjects, the Greek Christians, to settle in Jerusalem, the governor assigning them a quarter near to the site of the holy sepulchre. In the same century some merchants of Amalfi, trading with Egypt, obtained from Caliph, Mustaser Billah, in 1048 of our era, by means of presents, a renewal of the privilege of a hospitium for the Latin pilgrims, whereupon they erected the Ecclesia Ste. Marie ad Latinos, with two houses or hospitia for either sex of pilgrims, with chapels attached, and dedicated severally to St. John the Almoner and St. Mary Magdalen, the former of which may be regarded as the origin of the order of the Knights Hospitallers of St. John.

In 1065, however, the Turcomans, from the interior of Turkey, overran Palestine, crushing the power of the Egyptian Caliphs in Palestine, and treating the pilgrims with the most unexampled harshness and barbarous cruelty.

The indignities which the pilgrims suffered, induced Peter the Hermit, of the diocese of Amien, to preach the first crusade, and having obtained the co-operation of Simeon, Patriarch of Constantinople, and the covert and ultimately the avowed support of Pope Urban II., like himself, a native of France, he traversed all Europe, preaching his holy war with such effect, that in 1096 he was enabled to deliver his first crusade sermon to the collective host, in the valley now called Buyukdereh, and it is asserted, under a sycamore which the reproductive nature of that tree has still pre-
Gottfried of Bouillon elected King of Jerusalem, A.D. 1099.

Motives which led to the Crusade.

served on the spot. Duke Gottfried, Godefroy, or Godfrey, of Bouillon, as it is variously written, was chosen as the common commander of the immense army which, when it stormed Jerusalem, on the 15th of July, A.D. 1099, defended by 40,000 Saracens, had been reduced by war and hunger to 21,500.

The motives which led the more formidable of the feudal nobles of Europe to embark in this distant and perilous undertaking (for none of the reigning princes of Europe engaged in the first crusade), were various, deriving their character from the beneficial results anticipated by each in the new field thus opened to the prowess of his arm.

The nobility of the continent were tired of preying on each other, and the vassals on their part foresaw in the holy war, a fair chance of freedom from the oppressive yoke of feudal servitude. Some were influenced by the desire of glory; some by the prospect of liberty, many by religious enthusiasm, and all by the hope of advantage in some form or other. The vanquished baron, the portionless younger son, the vassal, the fanatic, the adventurer, and the needy priest—all saw in the crusade the one method of obtaining their several various ends.

§ 80.

Gottfried of Bouillon, who had been elected King of Jerusalem in 1099, alive to the expediency of consolidating his new and precarious rule by some code adapted to the military disposition and mode of life of his subjects, called an assembly-general of the estates of his kingdom, and craving the advice of those pilgrims best skilled in the statutes and customs of Europe, composed that great monument of feudal jurisprudence, known as the Assises de Jerusalem. The code thus compiled was attested by the seals of the King, the Patriarch and the Viscount of Jerusalem, and deposited in the holy sepulchre, serving as the law of the country in succeeding times. After the capture of the city, this code was preserved by tradition, and restored by the Count John d’Ibelin of Jaffa in the thirteenth century; its final revision took place in 1061, for the use of the Latin kingdom of Cyprus.

The new constitution established two tribunals, the king presiding in the Court of Barons, consisting of all such as held their lands immediately of the crown, and who were obliged to attend the king’s court, while each exercised in the assemblies of his own subordinate feudatories a like presidency. The relation of Lord and Vassal represented that of the Patron and Client of the Roman system. The cognisance of marriages and wills was usurped by the clergy, while that of civil and criminal causes, and the tenure of fiefs, devolved upon the Supreme Court. Thus the arbitrary violation of the property of a vassal was checked by the confederate peers, who used on such occasions all means to obtain the acknowledgment of a right infringed, short of personal violence to
the sacred person of the superior Lord. In the legal proceedings of the courts, the advocates were subtle and diffuse, but defective evidence might be supplied by judicial combat.

In criminal cases, excepting treason, combat was the privilege of the accuser, if testimony could not be obtained; but in civil cases the claim of the plaintiff must be established by witnesses; the defendant might, however, repel the implied charge of perjury on the part of the witness by combat, assuming the situation of the appellant in criminal cases. Champions were only allowed to women, or to men who were maimed or past the age of sixty, and defeat was death to the person accused, or to the champion or witness, as well as the accuser; but in civil cases the plaintiff was punished with infamy and the loss of his suit, while his witness and champion suffered an ignominious death.

The judge in many cases had the option of granting or refusing combat, to which there were, however, two exceptions, impeachment of the veracity or judgment of the court by an unsuccessful suitor, or who in such case had to fight all the members of the tribunal; and the lie given by a vassal to his compeer, who claimed any part of his lord's demesnes.

To tempt vassals of Europe to withdraw themselves from the allegiance of their lords, the privilege of a court of burgesses was granted to that class, in which the Viscount of Jerusalem presided; in this court a select number of the most worthy and discreet citizens were sworn to pronounce according to law, respecting the fortunes and actions of their equals, and this example was imitated by the kings and their greater vassals, and extended to thirty municipalities, before the loss of the holy land.

A third court of limited jurisdiction was instituted for the use of the native Christians, who were there judged by their countrymen, the office of Reis, or President, being sometimes exercised by the Viscount of the city.

Villains, slaves, and captives of war were considered as mere objects of property; their recovery was provided for, but it is true that no punishment was denounced against them; their value was fixed by a tariff, one slave equalled in value a hawk or four oxen; three slaves, twelve oxen, or one war horse, valued at three hundred pieces of gold in the age of chivalry. Such is a short view of the provisions of the Assise of Jerusalem.

The kingdom of Jerusalem being sorely pressed by the Saracens, in 1147, Pope Eugenius III., a monk of the order of Clairvaux, and disciple of St. Bernard, appointed that ecclesiastic to preach a new crusade in France and Germany, and succeeded in enlisting Louis VII. (St. Louis) of France, and Conrad III. the Emperor of Germany, in a second crusade, in which unfortunate expedition no less than 200,000 are said to have perished.

In 1187, Jerusalem was taken by the chivalrous Salem al-Deen (the Heath of the Faith), commonly called Saladin, eighty-eight
years after it was first rescued from the Saracens by Gottfried of Bouillon.

The third Crusade was solicited by Amawry, A. D. 1188, and afterwards by Baldwin IV.; unfortunately, however, the unaccountable and passionate behaviour of the patriarch Heraclius, who was ordered to negotiate, prevented its success.

The fourth Crusade then was raised, A. D. 1189, against Salem al-Deen (Saladin) after the battle of Tiberias. Philip King of France, and Henry II. King of England, assumed the cross; the latter in order to obtain absolution from the excommunication issued against him by the Pope, on account of the murder of Thomas-à-Becket, of a guilty participation in which he was suspected; the Emperor Frederick (Barbarossa) also joined them. Acre was besieged by the Crusaders, whose army during the siege was attacked by famine and pestilence. At this period Frederick arrived in Sicilia, but perished from bathing in the river Kalykadmus Seleph during the heat of the weather, or perhaps was drowned in endeavouring to pass it; but his son led his army, considerably weakened, towards Acre, where he joined the King of France. Richard King of England, the greatest hero of the Middle Age, arrived there, having taken Cyprus on his way, and led its king in silver chains with his army. A jealousy now arose between the French, English, and Germans, which resulted in the retirement of the French king. Richard, however, took Jaffa and Ascalon, and having made a truce with the Saracens, returned to Europe, on which journey he was perfidiously and unchivalrously taken prisoner by the Emperor of Austria, whose banner he had insulted in the Holy Land, and confined in a fortress, until discovered by his troubadour and ransomed by his people.

Pope Celestine III., notwithstanding the truce concluded by Richard, published a fifth Crusade, and which was composed almost wholly of Germans.

The sixth Crusade was preached by Fulk, curate of Neuilly, and the Crusaders agreed with the Venetians to be transported by sea to Syria, on condition of taking Zara in Dalmatia, which they performed on their way; they, moreover, took Constantinople, and re-established Isaac Angelus on the throne. Disputes, however, arose, and Mourzoufle seized this opportunity to depose the emperor, upon which the Crusaders took Constantinople a second time, and placed Baldwin, Count of Flanders, on the throne.

John de Brieime now reigning for the Emperor of Constantinople, a minor, solicited the seventh Crusade, A. D. 1248, which was resolved on by the Council of the Lateran, under Pope Innocent III. The Crusaders besieged Damiat under Louis IX. of France. On the arrival of the Pope's legate from Italy with reinforcements, the Saracens made advantageous proposals, which the legate ill-advisedly, and with the wonted arrogance of a priest, persuaded the Crusaders to reject; they, however, took Damiat, and advanced
into the heart of Egypt. The Sultan now opened the sluices and laid the country under water, thus forcing his foes into a disadvantageous truce, and dispersing their army. The King of France was taken prisoner, but honourably released by the victorious grandson of Saladin, on condition of a ransom of 400,000 pieces of gold.

Louis IX. was the chief of the eighth Crusade, which was resolved on at the first Council of Lyons, summoned by Innocent IV., A.D. 1274. Louis entertained the visionary idea of baptizing the Bey of Tunis, but died in his tent near the ruins of Carthage, on his way to the Holy Land, and thus acquired the title of Saint.

The ninth Crusade was determined on in the second Council at Lyons, and with it the Holy Land was totally lost, A.D. 1291. The Hospitallers and a few Templars took refuge in Cyprus, while the Teutonic Knights settled in the barren districts of Prussia and Livonia, and became the founders of one of the first military powers of the present age.

§ 81.

Baldwin, Count of Flanders and Hainault, was elected Emperor of the East, now reduced to one-fourth, the Venetians receiving half of the remainder, and the remaining moiety being reserved for the French and Venetian adventurers. During this reign Theodore Lascaris, who had married the daughter of Alexius, established himself at Nice in Nicomedia, and subsequently restored the Greek race to the throne. Baldwin was captured, A.D. 1205, by the King of Bulgaria.

On the death of Baldwin, Henry succeeded to the purple, A.D. 1206, and died at Thessalonica, after a reign of ten years; with him the male line became extinct, and Peter de Courtenay, Count of Auxerre, a French prince, who had married Yolande, sister of the two preceding emperors, was invited by the Latins to assume the Empire of the East, and it was he that passed laws for the determination of the feudal services and imperial prerogative. He was, however, made captive in Epirus by Theodore Lascaris, and his wife reigned in Constantinople ignorant of his fate until A.D. 1221.

Robert de Courtenay, his brother, assumed the Empire on the refusal of his elder brother Philip to accept it. During his reign John Vataces, son-in-law of Theodore Lascaris, had succeeded to the empire of Nice. Robert de Courtenay died in 1228, and was succeeded by Baldwin, the youngest son of Peter, whose infancy prevented his taking possession of the Empire. He was betrothed to the second daughter of John de Brienne, King of Jerusalem, who was also invested absolutely, for the term of his life, with the Empire of the East.

John de Brienne, the most formidable of the champions of
Christendom of that age, vanquished John Vataces and Azan King of Bulgaria, who twice attacked Constantinople; dying A.D. 1237, he was succeeded by his ward,

Baldwin II., who, after a contemptible and mendicant reign, was driven out of his capital, A.D. 1260, and the Byzantine Empire revived under

§ 82.

Michael Palæologus, who, the better to secure the succession of his family, made his son his colleague A.D. 1272.

Andronicus the Elder, then only fifteen years old, reigned conjointly with his father nine years; and after his death, following his father's example, he associated his son with him in the Empire at the age of eighteen.

Andronicus the Younger was crowned 1325, and the elder Andronicus abdicating three years afterwards, his son reigned alone until A.D. 1341, when he was succeeded by his infant son by Anne of Savoy,

John Palæologus, at the age of nine years.

John Cantacuzene ruled the Empire for him, but was soon obliged to assume the imperial title in his own defence as well as in that of his ward. His reign was, however, one of discord and civil war, and he ultimately abdicated A.D. 1355.

John Palæologus was then restored to the Empire. In the mean time the conquests and aggressions of the Turks grew formidable. He died A.D. 1391, and was succeeded by Manuel, who reigned until A.D. 1425, when he was succeeded by his second son,

John Palæologus II., during whose reign the Turks pressed the capital daily more and more. The death of Andronicus before the Emperor, and the retirement of his younger brother Isidore, reduced the Greek princes to Constantine, Demetrius, and Thomas; the eldest of these, on the death of John, assumed the throne, A.D. 1448.

Constantine XIII. Palæologus, now succeeded to an empire circumscribed by Mohammed II. within the walls of his capital; Mohammed II. built the fortresses on the Bosporus, about five miles above the golden horn, which go still by his name, and finally in Sept. A.D. 1452, prepared to besiege Constantinople, which fell on the general assault on the 29th of May 1453. The Emperor, having cast aside the ensigns of royalty, died bravely fighting, and was buried under a heap of slain. Thus ends the dominion of Rome in the East; nevertheless, in the imperfect system of the legislation of the Turks of the present time, the principles of Justinian's Code are still traceable. The Turks, on abandoning the active life of war, adopted many of the institutions of their more civilized subjects; hence the remnants of Roman jurisprudence in the courts of Constantinople.
The three greatest Legislators who ever existed, are doubtless Moses, Justinian, and Mohammed; indeed, it is most miraculous that the Codes of these lawgivers should have continued to be followed in their most material points, the former for a period of upwards of thirty-three, and the second of thirteen, and the last of twelve centuries, the most convincing testimony to their internal merit.

Mohammed, the only son of Abdallah, of the tribe of Koreish, and Amina, of the noble race of the Zahrites, was born four years after the death of Justinian; the exact date of his birth is fixed by the Arabian Chronicles on Monday the 10th of Reby, and by others variously on 569, 570, 571, of our era; the first is probably the more correct. Mohammed is asserted to derive his descent from Ismael, from whom the tribe of Koreish is descended, and to which belongs the family of Hashem, who were at once princes of Mecca, and hereditary guardians of the Kaaba, the holy place of the ancient Arabs. Hashem’s son was Abd-el-motalib, who is said to have died at the age of one hundred and ten; he left six daughters and thirteen sons, the youngest of whom, Abdallah, was the father of the “Apostle,” or “Ambassador of God.”

His father dying, young Mohammed fell to the care of his grandfather, and on his death to that of his eldest uncle, Abd-el-Taleb. The great subdivision of his grandfather’s property left him not only an orphan at the age of thirteen, but poor, in the sole possession of five camels and an Ethiopian female slave.1 Abd-el-Taleb having instructed his nephew in commerce, and taken him into Syria, recommended him to the rich widow Khadijah, of Mecca, as her factor. His handsome person and agreeable manner pleased his mistress, whom at the age of twenty-five he married, and began to entertain his first views of reforming and consolidating the existing religious sects of that part of Arabia. The most prevalent of these were the Jewish, Christian, and idolatrous Arab creeds, all equally corrupt and overloaded with superstition and extraneous fable. The Christian religion had, perhaps, wandered the furthest from the pure doctrines of its Founder; overloaded with a host of saints and martyrs, it was reduced almost to the state of idolatry of Pagan worship, the licentious and intriguing lives of the priesthood had rendered it disagreeable, and their avarice insupportable; while the acrimonious schism of its sectaries substituted Christian hatred for Christian charity. In a word, the Polytheism of Egypt, Greece, and Rome, arising out of a personification of the attributes of the one God, were restored in the Christian superstitions of saints and shrines. Mohammed professed the restoration of the true religion of Adam, Noah, Abraham, Moses, and Jesus, all founded on the Unity of God, rather than the institution of a novel creed. With this design he based his religion on the original creed of the Jews, improved by the pious principles of Christianity, and modified by the local tenets of his own race,

1 Abd-el-f o da, vit. Moh. 2.
in order to render it at once useful, practicable, and acceptable to his disciples. His first care was to assert pre-eminently the Unity of God, utterly to abolish the use of idols, relics, saints, demi-gods, and martyrs, and to assert the Divine inspiration, without the divinity, of Adam, Noah, Abraham, Moses, Jesus, and himself. Jesus he styled the Spirit (Rookh-Allah), but himself the Apostle (Arookh-Allah) of God, or him promised by Moses and Jesus.

The restraint he placed upon the licentiousness of the Arabs was not calculated to insure his religion a ready support, and we find him exposed at the outset to bitter persecution, which invariably attends the preacher of a new and purer doctrine. Mohammed was obliged to fly from Mecca, and to secrete himself more than once from the resentment of the Meccans. In the sixth year of the Hegira his tenets had so far taken root as to enable him to proceed from Medina, where he had taken up his residence, to Mecca, at the head of 1400 men; and from this time his religion made such rapid progress that he lived to see his mission established throughout Arabia, and the ancient idolatry for ever destroyed. Mohammed died A.D. 632, on the 7th of June, and was buried at Medina.

§ 84.

The Koran contains at once the ecclesiastical and secular law by which Mohammedans are governed; and its chief civil provisions, if, indeed, this distinction can be made in the written law, relate to Marriage and its incidents—Divorce, Fornication, and Adultery, Incest, Inheritances, Bastardy, Wills, Contracts, Homicide, Larceny, Retaliation, Injuries, Law of Peace and War. The Koran is by Mohammedans in general regarded as the fundamental part of their Civil Law, and the decisions of the Sonna among the Turkish, and of the Imaums among the Persian sects, together with the decisions of the great doctors, form the rule and precedent in judicial cases; in the secular tribunals these precedents are, however, departed from when not consonant with equity; whence arises the real distinction between the written and common law,—the former more strictly confined to ecclesiastical, and the latter applicable to civil cases. In the latter, which is more modern, the principles of the Roman Civil Law may often be traced, while the former is more directly referable to the Old Testament.

§ 85.

Abubeker, the father of Mohammed’s favourite wife Ayesha, in whose arms he expired, reigned over the Faithful two years; and was succeeded by Omar, on whose assassination, in 644,

Othman, the secretary of Mohammed, in whose reign the new religion was divided by the sect of the Shiites, who asserted Aalee to be the Vicar, as Mohammed was the Apostle, of God. The Persians are of this latter sect, detesting their Sonnite co-religionists, the Turks, with a truly sectarian hatred. Othman was killed in 655 by Aalee and his party.
AALEE, the brother of Ayesha, now reigned, but in his turn was killed at Kafa, by Moawiyah. AAlee, Hossan, Hosein, and the lineal descendants of the latter to the ninth generation, form the twelve Imams of the Persian creed.

To pursue this line further would be to digress into the history of the Turkish and Saracenic victories, which may be summed up in the words of Gibbon, that “One hundred years after Mohammed's flight from Mecca, the arms and reign of his successors extended from India to the Atlantic Ocean, over the various and distant provinces, which may be comprised under the names of—1. Persia, 2. Syria, 3. Egypt, 4. Africa, and 5. Spain.” Thus the law of the Mohammedans ruled at one period of history no contemptible portion of the habitable globe.

§ 86.

Italy, at the time of the extinction of the Roman Empire in the West, consisted of a great number of Republics, which is one of the characteristics of the government of Italy at that period: the local administration of the subjects of the sovereign Roman people was left to them, according to the old system of Municipia and Coloniae. Their Senates were termed Ordo Decurionum, or simply Ordo, and later still, Curia—whence Decuriones and Curiales. The magistrates obtained a nominatio or presentation, and on election their creatio. The distinction, too, of Cives optimo jure, those possessing the suffragium et honores, or capacity to hold State offices, and those non optimo jure; the Plebeians were also continued. Savigny thinks the Duumviri were the deputies of the Praetors; but it is clear that they were the legal officers of these municipalities. Defensores belonged more properly to the provinces, while Rectores were the imperial governors. The word Scriba was applied in ancient times to the clerks of the courts, in contradistinction to the Exceptor, who was employed by private persons. The terms Notarius and Actuarius designated a peculiar sort of employé; but in the fourth and fifth centuries these terms changed, and the word Exceptor applied to every chancery, Notarius and Tribunus being reserved for the Imperial Chancery alone,—hence Tabellio came to signify what Notarius originally implied, namely, such persons as prepared contracts, wills, and the like, without a public sanction, in the beginning of the sixteenth century; these persons were termed Amanuenses and Cancellarii.

According to the Roman constitution the Honor might be enjoyed by a public employé without the munus or burden, which rendered the office of Decurio so unpalatable; but Justinian deprived them of the former, obliging them to accept the latter only, which brought the office into such disrepute, that it was found necessary to affix certain advantages to it in order to induce any one to fill it.

1 Nov. 45, C. Th. 12, 1, 99—165—157.
In the provinces there were two sorts of Decuriones: those termed Patroni, who enjoyed the honours only in order to qualify them for the magistracy, and who had the precedence—and the actual members. Savigny quotes an inscription to this effect, in the city of Canusium, A. D. 223:—

30 Patroni, C. C. V. V. (clarissimi viri).
7 Quinquennalicii; in Rome, Censors and the protectors of the liberal professions.
4 Allecti inter quinquennales.
22 Duumviralicii.
19 Ædilicii.
9 Quæstoricii.
21 Pedani.
34 Prætextati.

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Which latter Niebuhr holds to have been the sons of Decurions who had not attained the legal age for sitting in that council.

The civil power was in the hands of a Rector, Judex, or Judex Ordinarium, who, according to the extent of the vice-royalty, were variously termed Consulares, Correctores, or Præsides.

The military power belonged to the Magistri Militum, under whom there were many Duces, the more important of whom were termed Comites. The Magister Militum acquired a jurisdiction even in civil questions, where the defendant was a military person, and the plaintiff being a civilian agreed to submit to this jurisdiction.

Contentiosa jurisdictio was exercised by a private person chosen from the Ordo judiciorum privatorum, by the magistrate before whom the suit was initiated, but whatever he did without such intervention of a judge was said to be done extra ordinem. Under the Emperors, certain questions were excepted from this order, called extraordinariae cognitiones.

Diocletian abolished the Ordo Judicum, quoad the Viceroy of the provinces, and an exception was only made in times of great pressure of business, and in cases involving small amounts. Justinian finally abolishes the Ordo Judicum. Savigny’s theory.

Auditorium Consistorium.

Voluntary jurisdiction, its kinds.

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1 C. 33, 2.
2 C. 33, 5.
3 I. 4, 15, 8.
THE WEST GOTHIC BREVIARIUM.

Vindicta, as Manumission, Adoption, Emancipation, and the like, and gifts of large sums, which formerly required mancipation or tradition, together with the making or opening of wills, all of which was transferred in like manner to provincial governors. Hence, for instance, the probate of wills may have arisen in England, where it, however, has not been extended to cases of gift and contract.

The practice of sending a commission to examine witnesses abroad, or with respect to wills, by the Ecclesiastical Courts, arose undoubtedly from a similar practice in the later ages of the Roman Empire.\footnote{N. 47.}

§ 87.

Taking up the narration at § 54 in fin. we approach the period at which the Western Empire passed for ever out of the power of its ancient rulers, under that of the barbarian race. Italy had already suffered from the invasion of the Visigoths under Alaric, A. D. 400, a tribe which had penetrated southwards from the banks of the Dnieper, about fifty years later, of the Huns from the Volga, under Attila, and of the Vandals from the Elbe, under Geneseric, and in 472 by that of the Suevi from the shores of the Baltic and Vistula, under Ricimer. Yet none of these conquerors and actual masters disturbed the outward form of government of the Roman state, but were content to govern while another reigned.

§ 88.

There exists a complete printed collection of the West Gothic laws in twelve books, arranged according to its matter. Euric, A. D. 482, was the first king under whom the Gothic law was reduced to writing; but it has not been ascertained whether a regular code was drawn up under him or his successors in the seventh century.

The work in question is divided into three parts, the older of which is inscribed as of King Gundemar, A. D. 612, the later as of King Egica, A. D. 700, and the remainder is intituled simply Antiqua.

By far the greater proportion of the laws named therein are attributed to King Chedaswind, A. D. 652, and his son and co-regent, King Receswind, A. D. 672, and who may be looked upon as the authors of the present collection. In its character, it differs materially from other German codes, laying as it does a claim to elegance, persuasion, and even philosophy, and giving a preference to practical law, and where this fails leaving the decision to the king, who is then to supply the deficiencies of the code. There are also evident traces of the part which the Roman clergy took in it, and of an abortive attempt at an imitation of the Codex Theodosianus. The sources whence later authors suppose this book to have been derived, are Justinian’s works, while others sup-
pose it to have been the Breviariu; both may, however, be right, if we suppose the Breviariu to have been taken from Justinian’s compilations, in which opinion Savigny does not concur. In order to procure a greater circulation for this book, it was decreed that whoever bought or sold it for a price above twelve solidi, should receive one hundred lashes.

In some parts of it we find literal excerpts from the Roman law, that on relationship is, according to Paulus, unde vi, and usury; this may be termed the first class. The second contains paragraphs of the Roman law, which are implied, altered, or abrogated; as for instance, marriages between Goths and Romans, forbidden in the Breviariu, are permitted, with consent of the Comes, a law relating to Dowries according to German usage, and prohibition of marriage within the anni luctus. The guardianship of the mother during celibacy is referred to; the minor is called pupillus, and twenty-five fixed as the age of majority, and fourteen as that at which a party is capable of making a will. The manumission of slaves in the church is cited as an acknowledged right, and the succession of husband and wife to each other in default of relations, also the enslavement of one who sells his slave out of mere avarice.

The third class consists of such passages as are taken more or less literally out of the Bavarian collection, most of which are entitled antiqua.

§ 89.

The word Breviariu, as applied to the West Gothic Code of Alaric II., does not occur until the sixteenth century; it was composed of Leges, constitutions, and Æus, the writings of lawyers; the Hermogenian and Gregorian Codes being considered in the latter category, which proves that these works never had the stamp of public authority, as has been before premised; the so-called Breviariu consists of the following, each part considered as an independent whole of itself:

1 Codex, Theodosianus XVI., Libri.
2 Novellæ, Theodosii, Valentiniani, Marciani, Majoriani, Severi.
3 Gaii Institutiones.
4 Pauli receptæ sententiae V., Libri.
5 Codex Gregorianus XIII., Tituli.
6 Codex Hermogenianii II., Tituli. Papiniani I. liber.

The preservation of this book is of great value, as many sources of the old law are preserved in it, of which we would otherwise be in ignorance; such are Paulus’s works, and the five first books of the Theodosian Code, and, inasmuch as later editions have succeeded

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Footnotes:
1 Lib. 4, T. 11. 2 C. Th. 4, 22, 3. 3 C. Th. 2, 33, 1.
4 L. Vis. 3, 1, 5. 5 L. Vis. 3, 2, 1. 6 L. Th. Brev. 3, 8, 1.
6 L. Vis. 4, 2, 11. 7 L. Vis. 4, 3, 1. 8 L. Vis. 4, 3, 11.
9 L. Vis. 5, 7, 2. 10 C. Th. 4, 7. 11 L. Vis. 5, 4, 10, P. 40, 13.
in reconciling the various readings, and supplying omissions in other laws.

Of such later editions the following are known:—

1. The Summae Legum, printed 1517.
2. The extract of a MS. at Wolfenbüttel.
3. An extract with an original preface by a Monk, at the desire of his Abbot.
5. Extract of Gulielmus Malmesburgensis, 1,142, not printed.
But one edition of this book has been attempted; it is by Sichard.

§ 90.

When the Burgundians, who occupied the country between the Vistula and Elbe, below the Vandals and Suevi, who inhabited the coast of the Baltic immediately north of them, emigrated about the year 500 to the country between the sources of the Rhine and the Rhone, the territory was divided between them and the Romans, the conquerors taking the half of all mansions and gardens, two-thirds of cultivated lands, and the same of all slaves; but those who arrived later received only the half of the lands without slaves. The forests remained common to both, who reciprocally termed each other hospes; the land so divided was called sors, and the right to it hospitalitas. The same is the case with the Turks dwelling in European Turkey, who term themselves Moosafir, as an oriental race, never having considered their tenure on this side the Bosphorus as stable. If a Burgundian had received land from his sovereign, he had to cede to his hospes that which he would otherwise have received; but if a Burgundian had no landed property elsewhere, he could not sell it, but if he had, he must give his hospes the first refusal of it.

Little can be learned from the constitution of the laws, nor are there any deeds of that period extant.

Roman and Burgundian Comites are mentioned in the preface to the laws which were subscribed by thirty-two of these officers. There is as little trace of municipal institutions.

§ 91.

The vestiges of Roman jurisprudence in the Burgundian legislation are twofold: in the collection of Burgundian laws, and in the proper code of the Roman subjects of the Burgundian kingdom. The former consists of continuous titles and two appendices, of the age of the native kings. The second year of the reign of King Gundobald is mentioned in the preface, A.D. 468. Some laws date in 506, but as others date in 517, it is probable

1 Conrad, per erza, p. 23, 100—101.
4 Selden, ad Fletam, c. 7, § 2.
5 C. Th. 16; Sav. l. c. B. 3, c. 8, 62.
6 L. Burg. i. 54, § 1.
7 L. Burg. ii. 84, § 1, 2, 3.
that the code was completed by King Sigismund. The appendices
must be by this king and Godemar, the last Burgundian king.
There are no literal excerpts from the Roman law, but many
references to Roman sources, supposed by Savigny to be taken
from the Breviariurn; as, for instance, a Burgundian wife had
only the usufruct of her first dower in case of her second marriage.
Divorce is, by the second section, at the will of the husband, on
payment of a fine (this is now the law of Turkey); but in the
third and fourth sections this is confined to the cases of adultery,
poisoning, and the robbery of graves; hence, with these excep-
tions, the whole property of the husband devolved on the wife
and children: a provision taken evidently from the Theodosian
Code. Freed men could also be reduced again to slavery for
 ingratitude to patrons, as by the constitution of Constantine; wills
were to be made in presence of five or seven witnesses, as in the
Theodosian Code. The Inscriptio in criminal cases is also quite
Roman.

The Burgundian law continued under the Frank conquerors,
according to Marculfus, in a capitulary of Charles the Great; and
still later, according to the testimony of Agobardus 840, and
Hincmar 882, who requests Louis the Pious to abolish the
diversity of law, by abrogating the Burgundian law, which few
then adhered to.

§ 92.

The Romans had their own code, called Papian or Papien,
**Papiani Responsa**, which the learned Savigny holds must not be
confused with Papiniiani, a question which he discusses at great
length, and with his usual ability, and proves that there was no
connection between the two but in a single passage in the begin-
ing of the work, taken from that greatest of Roman lawyers.
Savigny also proves, by dates, that it was not taken from the
West Gothic Breviary, as that work was published in 506, and
Papian in 517. It consists of forty-six titles, and resembles the
**Lex Burgundionum** in many respects. Whosoever wishes can
refer to the second volume of Savigny’s “Geschichte des Römi-
schen Rechts im Mittel-Alter” for a columnar comparison. The
best and most complete edition is the Ottobon, printed by
Amaduzzi. The Vatican edition contains only the first half of
the work. In that in the Parisian Library, the beginning to the
end of the seventh title is lost.

§ 93.

The Franks first appeared on the north side of the Rhine in
250, as a confederate nation of German tribes, occupying that
country which now forms Westphalia, and the north bank of the
Rhine, up to beyond the present Frankfort; warriors by nature, they

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1 C. Th. 3, 16, 1.
THE FRANKS AND THEIR LAWS.

overran Gaul and Spain, and even passed into Africa; but it was not until the reign of Clovis, 483-512, that they finally settled in Gaul.

There is no evidence to prove that the land was divided by The Frank kingdom. A.D. 512.

but, on the other hand, there are here evident traces of a municipal organisation having continued under the new lords.

In 543, Ansemund and Anselubana founded a monastery at Vienne, and it is remarked that the Senate of the city ratified the endowment. In 573, H. Nicetius made a will in Roman form, which was opened and published by the municipal authorities. In the sixth century, the municipal jurisdiction in legal cases, and the existence of Senators and Patrician families as connected with corporate constitutions, are clearly referred to. The Abbot Widrad of Flavigny left two wills in 721, and a codicil, according to the Roman form. In the same way, Bishop Tello, in 766. In 804, Harvich executed four deeds of gift of estates to the Abbey Prum, according to the Roman Law. It would, moreover, appear that about this time the terms Comes and Consul were interchangeable.

Marculfus, in 660, mentions in his formulæ, Defensores, Curiae Principales, and Ordo, applied to Decurio, as in the Codex Theodosianus. Independently of this, the tradition of a continuance of the Roman constitution in many cities of France, speaks strongly in favour of the fact. In the twelfth century, claims of the community were founded on this tradition, and the edict of Du Moulin, in the sixteenth, abrogating the corporate tribunals, excepts the city of Rheims, expressly on account of its great corporate antiquity. In 844, Roman and Salic Scabini are mentioned in Southern France, and in 910 Gothic Roman and Salic in Regensburg. In like manner, in 983, Gothic Roman and Salic Judices in Narbonne, and in 968, a Placitum of William, Count of Provence, remarks the origin of Roman and Salic vassals, who appear as living each under different laws, according to their nationalities. Dubos supports the view which supposes the continuance of municipal constitutions. Count Buat is not so clear. Moreau mixes that which is Roman with that which is Frank in the constitution. Mably takes the contrary view, and strives to disprove the continuance of municipal institutions, according to the Roman form; but Savigny exposes his fallacies in a few words, and decides in favour of the former view.

§ 94.
The laws of Roman origin, in the Frank kingdom, consist either in popular laws or capitularies. Roman Law is only to be found in the Bavarian, the Alemanian, and the Ripuarian Codes.

§ 95.
The Bavarian Code was composed in the seventh century The Bavarian Code, A.D. 638, in the reign of the Frank King Dagobert, and was probably Component elements of the Frank Law.
augmented at a later period, very few passages can be referred literally to the Roman Law; the prohibition of female connexion for priests is, however, taken from the Breviary, and a provision as to Lese Majesty from the Pandects. Other passages are quite Roman in their tendency, though not literally taken from it; as, for instance, the prohibition of marriage in the fourth degree, as in the Breviarium and anti-Justinian law. The quadruple damages, in case of theft committed at fires. The prohibition to sell the object of conflicting claims. The similarity between exchange and purchase in the operation of a contract. Lastly, the case in which the purchaser of a slave who pays the price out of the proper peculium of such slave, provides that he remain the property of the seller. Another class of proof consists in an implied knowledge of the Roman Law; of this class is the provision, that if the beast of one man die accidentally in the possession of another, he must pay the value or not, according as he may or may not have received recompense for his keep. The question of Culpa is indeed more extended in the Roman Law, but not applied in cases of accident, thus, if a thing in deposit, or left to be sold, be burned, the value need not be refunded. The Breviary applies thus to the Depositum and Commodatum equally, that in case of the theft of a deposit, the depositor may reclaim the thing, and the depositary the composition, being half value; this has a parallel in the Pandects, quoad the Commodatum, that a widow has the usufruct of a child's share, that the usufruct ceases on a second marriage, which was Roman Law until changed by Justinian. That he who wittingly sold what did not belong to him must restore it twofold, and to the buyer the price paid. That an earnest (arriba) was lost by mora, together with the whole purchase money. That a sale was not questionable for want of due value.

It was also an old Bavarian custom to summon witnesses by touching their ears. Savigny is at a loss to account for the introduction of all these Roman elements in the Bavarian Law, the more so as the Justinian Law is more frequently used than the Breviarium. Claudius, Chadoindus, Magnus, and Agilulf, appear to have been the authors of this collection, and as this work has a great and almost literal similarity with the West Gothic Code, it is clear that one was used in the compilation of the other.

Savigny holds the Bavarian to have been the original work,
THE BAVARIAN, ALEMANN, AND RIPUARIAN CODES. 101

whence the West Gothic was excerpted, by which he accounts for the greater proportion of Justinian's law in it, than in the West Gothic Code, to which he supposes such matter was not transferred.

§ 96.

The only passage in the Alemann Code, which, as far as its contents go, is taken wholly from the Roman Law through the Breviariurn, is to be found literally in the Bavarian Code; hence, it must either have been copied thence, or have originated simultaneously and in the same way.

§ 97.

The Ripuarian acknowledges the validity of the manumission of slaves in the church, which is clearly derived from the Roman Law.

§ 98.

The Capitularies are laws of the Frank kings, relating to no particular race. Some of them are isolated pieces, with the names of the kings, and usually with the dates; others consist of collections of the first description.

The Chronological Capitularies commence with the reign of Chlotar I., A. D. 560, whose constitution referred especially to the Roman subjects in the provinces; the introduction is, for the most part, the literal transcript of a Novel of Valentinian. As in the Breviary, it is here forbidden to force a woman into a marriage, by appeal to the royal prerogative. The prescription of thirty years confirmed the possession of all ecclesiastical and provincial (Roman) property.

A constitution of Childebert of Austrasia, A. D. 595, fixes prescription at ten years, for parties living under the same Dux or Judex, otherwise at thirty years; but no prescription ran, if the property lay in another kingdom. Here the difference made in case of absence, and the period of ten years, is entirely Roman; the only variation being, that thirty years are introduced instead of twenty. In a Capitulary of Worms, 829, thirty years is the common rule of prescription; it refers to villans (colonii), and is taken from the Breviary with but few alterations.

The forms for exchange of ecclesiastical lands, introduced A. D. 865, by Charles the Bald, is founded upon a passage of Julian; but in another capitulary of uncertain date, a passage of Julian is verbally inserted.

1 L. Alem., T. 39; L. Baju. T. 6, c. 1. 2 L. Rip. T. 58, c. 1; C. Th. Brev. 47. 3 N. Val. I. 8. 4 Const. Clot. c. 13; C. Th. 4, 14; N. Val. I. 8. 5 Dec. Child. c. 3; Baluz. T. 1, p. 17. 6 Baluz. T. 1, p. 673, 674, c. 2, 3; C. Th. 5, 10. 7 Cap. a. 865, c. 6; Baluz. T. 2, p. 198; Jul. Const. 48, c. 2, 40; c. 2. 8 Baluz. T. 2, p. 361, c. 2; Jul. Const. 115, c. 28.
The collections of the Capitularies are in seven books, with continuous numbers considered as a whole, and four appendices. Each book and appendix being divided into chapters, without any order. Ausegis is the author of the first four, and Benedictus Levita of the three last, the author of the appendices is unknown. Ausegis’s four books contain all Capitularies from Charles the Great to Louis the Pious; nor is there any doubt of their authenticity, as they are quoted by succeeding kings. There are two passages respecting the church transferred verbally from Julian. The three books composed at the request of Olgar, Archbishop of Mainz, in the middle of the ninth century, by Benedictus Levita, contain less Roman Law. Savigny calls this work most uncritical and void of system, and condemns it as containing un- genuine and garbled passages; he, moreover, attributes a fraudulent intention to the author, considerable use being made of the un- genuine Isidorian Decretals, of which Savigny conjectures Benedict may have been the author: as far as concerns the Roman passages in this work, he supposes them to have arisen from the author’s acquaintance with the sources of Roman Law, the Breviaryum, Theodosian, and Justinian Codes, but especially Julian. The Civil Law is taken from the Breviary (Paulus), other sources being used only for Ecclesiastical Law; the West Gothic Code is little used, as the Roman Law was forbidden in it.

With respect to the Additiones, the two first contain no Roman Law, and the two last but a few passages from the Breviaryum, the genuine Theodosian Code, and Julian.

§ 99.

Another trace of Roman Law in the Frank kingdom, may be found in deeds of ancient date. The will of Archbishop Cæsiarius, about 542, of Aredius and his mother, Pelagia, in 634, the four sons of the Duke Sadregisilus, lost their property, for not, according to the Roman Law, avenging the murder of their father. The will of Count Roger, 785, to which there are seven witnesses. A Placitum of Arles, 968, has a passage taken verbally from the Breviaryum.

In the 10th century, Gerardus, Count of Aurillac, refuses, according to the Lex Fusia Caninia, to free more than one hundred of his vassals; this is also a provision of the Breviary. In 1005, a marriage is concluded with Sponsalia, according to the Roman Law. In 1005, Bertrand, son of the Count of Toulouse, concludes a marriage, giving certain cities as a portion, according to Roman Law. Many deeds of the eleventh and twelfth centuries mention, that gifts, according to Roman Law, must be made in
THE FRANKS AND THEIR LAWS.

iting, and with witnesses; this is to be found in the Breviary, it was abrogated by Justinian.

As to West-Gothic lands of the second conquest, two deeds of Louis the Pious of 816 and 835 exist, promising the convent of Aniane restoration of its possessions and runaway vassals, as the prescription could not hold by Roman Law; Justinian having extended the ecclesiastical prescription from thirty to forty years. The public will of the Abbot Widrad of Flavigny, 721, made according to Roman formulæ, and the private will of Autun, 744, with seven witnesses. A Placitum of Monosque on the Durance, 984, contains a passage taken verbally from the Breviary. Two deeds of Apt, 991 and 1,115, state that he should, according to Roman Law, give his property to the Church, and that a will must have seven witnesses.

In lands originally Frank, we find the will of H. Remigius, Archbishop of Rheims, 533, and several other deeds of doubtful authenticity, according to Roman formulæ. There are two wills of the Bishop of Mans (Cenomanum) of Bertram, 615, and of Hadolinus, 642, both containing Roman formulæ, and signed by seven witnesses, the Notary, however, certifying each signature separately. In 632, the will of Burgundofara of Fare-Moustieres (Eboriacum), near Meaux, refers expressly to the Theodosian Code. At the end of the seventh century, the old formula of Ulpian is preserved in a will made at Paris, by Ermenrade, viz., five witnesses and the Notary. In four deeds of gift in 804, the Roman Law and Breviariun is referred to.

In 838, Bishop Aldricus of Mans, had a suit with Louis the Pious, respecting a monastery in which he cites the Breviary. In addition to these many formulæ and expressions, references to the Roman Law occur; as for instance, Stipulatio Legis Aquilias et Arcadiae, the Lex Falcidia, and lastly, the manumission which conveyed the Roman Ingenuitas.

§ 100.

In the early period of the Middle Age no legal schools existed; a knowledge of this science was usually practically acquired in the different courts of the Schöffen and from the Notaries. Savigny thinks that it was incidentally taught in other schools, quoting the instance of the Andarchius, the freed man of King Sigebert, who learned Virgil and the Theodosian Code, and of Bonitus of Auvergne; at the end of the seventh century, the Bishop Desiderius, of Cahors; and in the tenth century, Abbo of Aquitain, are all said to have been acquainted with the Roman Law, according to Justinian. Certain writers, too, preserved the Roman formulæ—Mabillon, about 700, Marculfus 660, also Sirmons, Baluze, and Lindenbrog; but this all refers to notarial business, and it would appear more had been borrowed from the Roman Law in this than on any other branch.

1 C. Th. Brev. 8, 121, C. 8, 54, 29.
Certain passages refer to Roman and others to Justinian's Law; of the first description, those referring to the manumission and sale of slaves. Adoption in the Curia; double Purchase-money promised in case of Eviction; Gifts and their Registry; Wills made in the Curia, and the solemn opening of private Wills before that body; Succession to Parents and the like; the Falcidian portion; of Prescriptions; quadruple costs in cases of Appeal, mostly from the Breviary. Of the latter descriptions are, that a father who has no legitimate children may leave all his property to his natural offspring; Manumissions and their effects, and the like.

There exists, however, one curious work on Roman Law, entitled Petri exceptiones legum Romanorum, printed in Strasburg in 1500, but of which there exists five manuscripts, the earliest of which is of the twelfth century. Exceptio here stands for Excerptio, in the parlance of that age. This work must have been composed in France near Valence, which passed at once from the Burgundian under the Frank rule; its date, conjectured from internal evidence, cannot be fixed earlier than 878, and the use of the word foedum induces the belief that it belongs to the twelfth century, before which time the forms Feux, Feum, and Fevum, were used; nevertheless, on other weighty grounds, Savigny, after a full discussion of the question, fixes the date of this work at about the year 1075.

It is divided into four Books, and contains a systematic recapitulation or statement of almost exclusively Roman Law. The first Book treats of Persons, the second of Contracts, the third of Offences, and the fourth of Actions. The work is distinguished by a deep reading of sources, the diligence with which they are collated, and above all, by the acuteness with which the conclusions are drawn.

Some passages differ from the Roman Law, either from an error from the view the author takes, or arising out of the practice of his age.\(^1\)

He enumerates the sources whence he derives his law. The Code, Pandects, Institutes, and Novels (Julian), but there is no trace of the Breviary; the fact of this work, so purely Roman, appearing in a country purely French is considered most curious.

To sum up, then, no trace was left of Papian in the Frank kingdom, where he originated; but the Breviarium continued not only in the Gothic lands, but extended over the Frank kingdom, and became the chief source of law to the Roman population there, intermixed with a few passages from the genuine Theodosian Code, frequent passages of Justinian, and a few from Julian, as applied to ecclesiastical, but more rarely still, to civil questions. Petrus stands alone, and is referable exclusively to

\(^1\) I. 10; II. 23; 57; II. 32; III. 2; III. 4; II. 48; IV. 34; I. 37; I. 30; II. 32; IV. 48.
Justinian's law, thus it is in fact true that the Breviary had always the preference in the Frank kingdom.

§ 101.

Odoacer, to recur to the son of Edecon, a barbarian, put a final period to the Empire of the West, long since become almost nominal; he allowed Augustulus to retire to the Lucullan villa with a handsome pension; but being obliged to satisfy his rapacious followers, consisting of Heruli, Scyrri, Alani, and Turcilingi, he confiscated for their benefit the landed property of Italy, to the extent of one-third, and although Odoacer has not been, by historians, accused of cruelty or wanton oppression, it is certain that Italy was reduced to a most miserable state under his government; the impoverished Patricians were no longer able to support their dependent Plebeians, who starved or emigrated in proportion to the pressure of their necessities. Odoacer, after a reign of fourteen years, was overcome by Theodoric, king of the Ostrogoths, at Ravenna, at whose instance he was put to death, A.D. 490.

Theodoric, who was born in the neighbourhood of Vienna, was the fourteenth direct lineal descendant of the royal line of the Ostrogothic Amali. He combined the valour of a soldier with the education and refinement of a statesman; he, however, began by putting the first in practice, in 493; he overcame Odoacer, and made himself master of Italy, while his captain, Ippa, overthrew the Franks, with a slaughter of 40,000 men. Having finished his warlike exploits, he betook himself to the arts of peace, and the improved state of Italy, at the end of his reign of thirty-three years (or thirty-seven from his first invasion of it), testified the progress of the arts of peace. Like his predecessor, he was attached to the Arian heresy, which moved him to put to death Boethius and Symmachus, two of the most distinguished philosophers of their age, who had condemned that doctrine. Their murders weighed, however, so heavily on his conscience at an advanced age, as to be the cause of considerably hastening his death.

§ 102.

The Edictum Theoderici in 500, is the oldest collection of laws since the destruction of the Western Empire, and differed in principle from that of other Gothic conquests, where each was bound by its own laws, whereas this Code was equally obligatory on both Romans and their conquerors, was based on Roman Law, and varied materially from Gothic customs, the object being evidently to unite the two nations. By far the greater part of it is taken up with criminal law, while the civil portion is very lightly passed over; the sources which appear to

have been used in this work are the constitutions, Leges, and law as laid down by the most eminent lawyers, Juris, or the later Novels, and the Pauli receptae sententiae.

§ 103.

ATTALARIC assumed the government in 526, together with AMALASUNTA, his mother, and died, having reigned eight years.

THEODOTUS commenced his reign 534, and was basely put to death by Amalasunta, after a reign of three years.

VILIGIS, the Goth, began his reign in 537; he besieged Rome for a whole year without gaining any advantage over Justinian's general, the renowned Belisarius, who, in his turn becoming the attacking party, overthrew him; he was made prisoner, and died in exile, on the extreme confines of the Empire, after a reign of four years.

THEOBALD was cruelly put to death, after a reign of one year.

ALARIC had hardly assumed the government when he was put to death, A. D. 542, after a short reign of seven months.

TOTILLA was elected king by the army, and overrunning Italy entered Rome, already straitened by famine and stratagem. He depopulated the city, driving out the inhabitants. Justinian, however, sent the eunuch Narses into Italy, at the head of a powerful army, who overthrew the Goths without the city with great slaughter, leaving Totilla, their king, after a reign of eleven years, dead on the field.

TEJA, the last king of the Goths, succeeded him in 553, and lost at once his empire and his life, after a short reign of one year; upon his death the Greeks took possession of Italy, which the Emperor, Justin the younger, administered by his lieutenant, or Eparchos, who resided at Ravenna.

§ 104.

Although Italy was reconquered by the Greeks in the middle of the sixth century, their power did not long continue over the whole of that country; for in 560 the Lombards founded their kingdom, and confined the authority of the Eastern Empire to Rome with its duchy, and Ravenna with its Exarchat and Pentapolis. The civil was again separated from the military power1 in cases where both parties, or the defendant only, was a civilian; thus the Judex Civilit recovered his jurisdiction from the Magister Militum. Civilians called in the Codex, Privati, were here termed Romani.

§ 105.

Martini1 published a portion of Records and Archives, the originals of which are on papyrus, beginning with the age of Odo-

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1 C. 3, 13, 6.

1 Mar. Pap. n. 82, 83.
vacer, and which threw considerable light on the municipal constitutions of that portion of Italy.

The first record is of a large donation of land in Sicily, by King ODOVACER to Pierius, signed by the Magister Officorum. Andromachus, the attorney of Pierius, appears to obtain its registry in the Curia of Ravenna, the deed is read, its contents protocollated and laid before the royal Notary and writer of the instrument, Marcianus, by a deputation of the Curia, for verification; this verification is protocollated by the deputation, and a copy of the whole delivered to the attorneys, who then travel with an attorney of the king to Syracuse, and cause a second protocol to be drawn up, whereupon a Decemprimus is deputed to be present at the tradition of the land. The next day all appear before the Curia, recount the tradition, which is added to the protocol, a copy of which is delivered to the attorney of Pierius. The record in question is accompanied by this official copy of the protocols of Syracuse, with original signatures, in which all the proceedings at Ravenna are inserted, and this instrument in the deed of gift.

From this is proved, the continuance of the form of business, of the constitutions of the cities, of the office of Magistratus (Duuvoir) in Ravenna acting independently of his colleague, of the existence of two Magistratus in Syracuse, before whom the business was transacted, lastly, of Principales in Ravenna, and of Decemprimi in Syracuse.

The next relates to the insinuation of a Protocol of Gift in Ravenna, the deed itself, both probably of 491, when Odoacer was besieged by the Goths in Ravenna. Flavius Projectus appears at the head of the Curia, and is styled in the deed itself merely Quinquennalis, but in the signature Quinquennalis et Magistratus.

In 504, during the Gothic age, a deed of sale and its insinuation is protocollated in Ravenna, in which Firmilianus Ursus is mentioned as Magistratus, and several as Principales.

A protocol is found in Ravenna, of 540, together with the simultaneous insinuation of the deed of sale of a piece of ground in Faventia, and a letter of the seller dated 3rd January 540, directed "Defensori Mag. Q. cunctoque Ordini Curiae civ. Faventine," requesting expedition in the tradition (Epistula Traditionis) subsequently, nearly the same course is then pursued as in the first case. This record proves that at that time there was then in Faventia a Defensor, at least one Magistratus, a Quinquennalis at the head of the Ordo; and in Ravenna, a Magistratus, Principales, and Exceptor.

An original Epistula Traditionis, dated Ravenna, 21st March 540, and similar to the above, is directed to the Defensor of

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1 Mar. Pap. n. 84.  2 Ibid. n. 113.  3 Ibid. n. 115.  4 Ibid. n. 116.
Faventia; both this and the former were probably written before the Greeks recovered Italy.

§ 106.

The next, in 553, is under the Greek dominion, and consists of a deed of gift, the *Gesta*, respecting which had been taken down from a verbal *ex parte* declaration. 1 *Curiales* is the term used here instead of *Principales*.

In 557, six *Curiales*, but no *Magistratus* or *Defensor*, sign a municipal protocol at Reate, appointing a guardian. 2

In 564, an *Agent Magistratum* was employed in Ravenna, to examine into the authenticity of an *Instrumentum plenariae securitatis*, 3 for the delivery of receipt of inheritance.

In 572, a *Magistratus*, several *Principales*, and an *Exceptor* of the Curia of Ravenna, are noticed in the verification of a protocol, respecting the insinuation of a deed of gift.

In 575, the original will of Mannanes is made and opened at Ravenna, 5 the *Magistratus* certifies the opening and reading.

The Church of Ravenna requests certified extracts from the protocols made on the opinion of certain wills, containing legacies and inheritances to that body.  6 The loss of the beginning of the protocol prevents it being ascertained how many documents were abstracted, five have remained, the date of the first is uncertain, the others bear the dates, 480, 474, 521, 522. Magistrates, either *Defensores* or *Quinquennales*, and *Principales* appear as active parties in all cases, the protocol embodying these may be dated between 552 and 575, and is signed by two *Magistratus*.

In two deeds of sale made at Ravenna, the first is dated 591, the second 616, the purchaser is permitted to draw up *gesta municipia* without the privity of the seller, which clearly proves the continuance of the former municipal constitution.  7

In 625, there is the protocol of Ravenna, respecting a deed of gift drawn up, as far as can be ascertained from its delayed state, in the form of an ordinary dialogue, one line remains perfect in which the word *Magistratus* in the plural is preserved.  8

It may generally be remarked, with reference to all these records, that all trace of the title *Duumviri* has vanished, and *Magistratus* substituted unexceptionably to describe this office.

The word *Exceptores* is also used in its old signification. *Notarius*, too, is used in the same sense as formerly, when connected with the Imperial chancery.  9 *Tabellio* has also preserved its original signification, although the word *Forensis* is often used as a synonym; but it may be presumed that the *Tabelliones* had at that time become a collegiate body.  10

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1 Mar. Pap. n. 86.  
2 Ibid. n. 79.  
3 Ibid. n. 80.  
4 Ibid. n. 38 & 38 A.  
5 Ibid. n. 75.  
6 Ibid. n. 47 & 47 A.  
7 Ibid. n. 946, l. 67; n. 103, l. 41.  
8 Ibid. n. 744, coll. 5, l. 1.  
9 Ibid. n. 74, p. 212.
The Greek Rule in Italy.

The Novel 104 provides that the appointment to all offices requires confirmation, as the election of a Pater Civitatis, or of a Defensor, should receive it from Constantinople. Magistrates are not mentioned, as they required no confirmation, on account of their common law tenure of office, and this is proved by there being no formula for the confirmation of Duumviri, although there is for Defensores and Curatores (Quinquennales). The Duumviri then were succeeded by the Pater Civitatis and Defensor.

Gregory the Great, who was Pope in 590 and 604, directs many of his epistles to the Ordini et Plebi, or Nobilibus et Plebi, and commissions the Bishops of Rimini and Tyndaris, in Sicily, to accept presents, and recommends them not to forget the Gesta Municipia. In other epistles to the Bishops of Squillacium and Caralis, in Sardinia, which island had belonged to the Greeks since Justinian’s reign, he orders that none liable to serve in the Curia should be ordained, the Pope also wrote during five successive years to Theodor, curator of Ravenna, continuing him in the office. In a letter from Naples, Patronus Civitatis is mentioned, who, like Pater Civitatis, was probably the curator. Hence we may conclude that the municipal constitutions were in force at least up to this period.

§ 107.

In 554, Italy had been completely reduced and reconquered by the Greek Empire, and Justinian issued his ordinance for the regulation of this new province; his Code, Pandects, and the then existing Novels, were extended to this new portion of his Empire, nor was it necessary expressly to abrogate the Edict of Theodoric, his jurisprudence, as reformed, met the practical requirements of the nation so completely that it spread rapidly over Italy; it nevertheless appears, on the evidence of a record, that such Goths as remained were allowed the use of the Theodosian Edict. Savigny thinks that the professorships of Gothic Law, mentioned as existing in Italy some centuries later, are to be understood as referring to the West Gothic Law.

The Papyrus Records of Ravenna, of this and the previous Gothic period, afford valuable information on this subject.

In 575, slaves were manumitted by will, and, in conformity with Justinian’s law, received the Ingenuitas.

On account of the continuance of the ancient form of Man- cipation being still applied to the transfer of property, Justinian forbids it expressly in deeds; it may, nevertheless, be doubted, if this were not before the thorough establishment of the Greek dominion.

1 Murat. Script. tom. 10.
2 Ibid. 4, 26.
3 Ibid. 9, 69.
4 Ibid. 9, 59; 10, 6; 12, 6; 13, 47.
7 C. 8, 54, 37.

The Usufructus is often found reserved in deeds of gift and sale for life, or very short periods of five, ten, or thirty days, probably by way of precaution, to meet any presumed defect of corporeal delivery.

The forms of stipulation which belonged to the Justinian as well as the older Roman Law, also occur, and are sometimes used to provide against dolus, or to effect a correal obligation. The old form of duplica stipulatio, which gives the purchaser, in case of eviction, the choice of double indemnification, or an assessment of double the improved value, is very frequent.

The records of two cases of wills of 575 are curious.

The first fragment of 575 contains the conclusion and signatures, the other consists in the office copy of a protocol made in court on the opening of several wills. All these wills are in the old solemn, not in court form. These wills are subscribed by the witnesses who add a detail of the proceedings. There is a superscription or endorsement as well, in which the above is repeated and the seals added, all which is recorded in the protocol made at the opening, thus proving that the will when subscribed by the witnesses was sealed up to conceal its contents, and subscribed in order that it might be ascertained where the will was opened to whom each seal was to be attributed, and that such persons might be summoned, in order to be present at the opening of the instrument.

Justinian says the subscriptio was introduced anew by an Imperial Constitution. This has been erroneously understood of the superscriptio, which, as the most important of the two, was doubtless never discontinued.

The difficult question of the indivisibility of the ancient fundi, and the alienation of such parts of them as were divided by uniae, often occurs here, joined with certain obscure provisions.

In a deed of purchase of 551, the Lex Aquiliana and a Lex Nerviana, are mentioned, of which latter this is the only trace, also a formula, apparently of the greatest antiquity, is cited. We, moreover, find Justinian's ordinance, that the year of the reigning Emperor should always be inserted at the head of records, conformed with in the case of a will of 552, though disregarded in older instruments.

A few small scientific legal works appeared also during that period. Scholiasts to Julian, first published by Miræus, 1561. The Dictatum de Consiliis and Collectio de Tutoribus, both erroneously attributed to Julian, and first edited by Pithou, in 1573.

Of these three unimportant works, the second, containing passages from the Codex, Pandects, and Novels (Julian), deserves the

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1 Mar. l. c., n. 89; n. 122; n. 93; n. 123; n. 86; n. 120; n. 121.
2 Nov. Th. g., l. 2, 10, 3.
3 Mar. l. c., n. 119, l. 57.
4 Nov. 47, c. 1; Anno 537; Mar. n. 74, col. 6, l. 12.
most attention; it is, moreover, a curious fact that they are quoted by numbers which are generally correct, and when erroneous are to be attributed to the transcribers. Savigny judges, from the language and the citation by numbers, that they were not composed in Constantinople, but in the West, long before the age of the glossators, and that the author had access to older and fuller copies of the Codex, which contained Greek constitutions, than these which we now possess; the words principis nostri prove the author to have lived under the Greek dominion. Savigny adds to this category the collection for the Agrimensores, on account of its legal contents, and as well because it belongs to the age and country.

§ 108.

The Lombards, or Longobardi, who originally inhabited that part of Germany which now forms a portion of the present kingdom of Prussia (Brandenburg), which lies between the Elbe and the Oder, having, in 567, overthrown the kingdom of Gepide, founded by Ardric about a hundred years previously, and which occupied the position of the present Wallachia, Moldavia, Transylvania, and that part of Hungary south of the Danube, coveted those fruitful plains which lie north of the Alps. Having conquered this country in 568, under Albinus, or Alboin, those northern barbarians introduced their laws and customs into a new and fertile settlement, which has ever since followed the denomination which its victorious possessors themselves derived from the length of their beards.

The Lombard rule now commenced in Italy.

Albinus, or Alboin, invaded Lombardy A.D. 567, at the head of 200,000 men, at the instigation of Narses, made himself master of it, with the exception of Rome and Ravenna, and established the seat of government at Pavia. Being excited at a banquet, he compelled his wife, Rosomund, to drink from a cup formed of her brother Kunimund’s skull. Her resentment at this outrage induced her to compass his death, after a reign of three years.

Clesus was murdered by his servant, after a reign of one year and five months.

His death was followed by an interregnum of ten years; at the expiration of which thirty dukes were elected by the Lombards, who divided Italy among them.

Flavius Antonius began to reign A.D. 585. His successors acquired the name Flavii in the same way as the descendants and successors of the Julian family retained that of Caesar. He extended his dominion over the greater part of Italy, and died of poison, after a reign of five years.

Agilulfo assumed the reins of government A.D. 590, being

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called to the empire at the instance of Theodolinda, the widow of Antarius. This monarch reigned twenty-five years.

Adalwald, A. D. 616.

Adalwald began to reign in 616; but becoming insane, from the effects of a poisonous beverage which had been administered to him, he was deposed after a reign of ten years.

Ariowald, A. D. 626.

Ariowald, in consequence of his marriage with Gundeburga, the sister of his predecessor, was raised to the throne, which he filled with little tranquillity, owing to the intrigues of the partisans of Adalwald, who had recovered his understanding. He began, in 626, a reign which lasted twelve years.

Rotarius, A. D. 637.

Rotarius, whom Gundeburga had selected as her husband, was elected king in 637. He fought with success against the troops of the Greek emperor, near Ravenna, and reigned sixteen years and four months.

Rudowald, A. D. 654.

Rudowald, son of Rotarius, succeeded his father, in 654. His cruelties and debaucheries drew upon him a miserable end, after a reign of five years.

Aripertus, A. D. 659.

Aripertus administered his kingdom peacefully from 659 to 662.

Gundepert and Bertaritus, A. D. 662.

Gundepert and Bertaritus having quarrelled, Gundepert, in order to rid himself of his brother, called in Grimaldus, Duke of Beneventum, who, with a view to the throne, killed Gundepertus, but Bertaritus escaped, after a joint reign of two months.

Grimaldus, A. D. 663.

Grimaldus then assumed the sovereign authority, in 663, and defeated the French, by the stratagem of Reigning a retreat, and allowing them to plunder his commissariat, at that time very fully supplied, and then falling upon them during the confusion incident to their so doing, completely overthrew them. He also overcame the Emperor Constans II., both at Capua and Nola, and died, after a reign of nine years.

Garibald, A. D. 672.

Garibald, son of Grimaldus, was deprived of the kingdom by Bertaritus, whom his father had deposed, after a reign of three months.

Bertaritus, A. D. 673.

Bertaritus recommenced his reign alone in 673, having returned from Britain, where he had been living for eleven years in exile. He reigned seventeen years in peace jointly with his son,

Kunipert, A. D. 691.

Kunipert, who, on his father's death, in 691, reigned alone; he was, however, obliged to retreat from Pavia, and was subsequently slain in battle, by Alachi, Duke of Trente, after a reign of twelve years.

Luitpert, A. D. 703.

Luitpert having been put under the guardianship of Aspraud by his father Kunipert, was conquered by Ragumpert, after a reign of only eight months.

Ragumpert, A. D. 703.

Ragumpert, son of Gundepert, began his reign in 703, which lasted three months.

Ariowald, his son, engaged Ragumpert and Rotarius, both of whom he destroyed. Having granted the Alpine territory to the Church,
his fear of Aspraud caused him to fly into France, laden with gold, which accidentally caused his death in the river Tessino, after having reigned from 704 to 712, when

Aspraud assumed the government, but reigned only three months.

Luitpraud conquered many of those princes of Italy who had opposed him, and reigned thirty-one years.

Hildebrand only reigned seven months, having been deprived of his crown by the Lombard princes.

Rachisius commenced his reign with a war against the Pope Zacharias, whose fatherly admonitions, however, succeeded in inducing him to exchange the kingdom for the cloister, after a reign of five years.

Aistulphus, brother of his predecessor, commenced his reign by taking possession of Ravenna, in 950, from which city he drove out the Byzantine exarchos or lieutenant, harassed Stephen III., and finally laid siege to Rome. The Pope, however, having craved the assistance of Pepin, King of France, Aistulphus was obliged to raise the siege, and was afterwards killed by a wild beast in the chase, after a reign of six years.

Desiderius began his reign in 756, like his predecessor, with a war against the Apostolic Chair, then occupied by Pope Adrian, who having implored the aid of Charles Martel, King of France, the latter came to Italy, vanquished the Lombards, besieged Desiderius in Pavia, and finally, after a reign of eighteen years, compelled him to live in exile in France. In Desiderius the dynasty of the Lombards in Italy was finally extinguished, and his son was driven to take refuge in the court of Greece.

§ 109.

The conflicting opinions of the different historians who have written on this period are admirably compared by Savigny, who comes to the conclusion, that the ancient municipal institutions of Upper Italy were never destroyed by any of its conquerors, and disturbed as little by the Lombards as they had been by their predecessors; but that these last masters used the institutions they found implanted in the country, simply transferring them into their own hands, and he argues with his usual acuteness, that otherwise it is unnatural to suppose the sudden resurrection of all these ancient constitutional forms of local government, as we find they undoubtedly existed in the eleventh century. Maffei supposes that the original natives of Italy were little mixed with the invaders, and are still preserved in the present inhabitants of the country. Lupi, a native of Bergamo, asserts exactly the converse; at the same time it may be possible that the records of a town in a peculiar geographical position, may shew more of the invading

element than another, of which there are many modern examples. It is, however, reasonable to suppose, that the country having been during a long series of years overrun by different tribes of northern barbarians, all derived from one common Germanic stock, and all treating the original inhabitants as a conquered people, the preponderance in point of blood at the present time would be in favour of the conquering race. It is, moreover, reasonable to suppose that the nobility or patrician class would suffer the most, and that traces of the original race are, therefore, to be looked for among the peasants; but even these have been found to vanish under oppression or by extirpation. The Gaelic branch of the Celtic in Caledonia, the Ordovician and Silurian in Wales, the Carnbian and Cimbrian about the region of Cornwall, the remnant of the Celtic race in Brittany, and the entire substitution of a mixed race of Saxons, Danes, and Northmen in England, where, with the exception of Cornwall, formerly almost a part of Wales, scarcely a family, if even one, can be traced or supposed for a moment to be descended from the original inhabitants of the country, prove this position; the same applies to the Greek Archipelago, where the names, blood, manners, and religion, so eminently demonstrate the utter extinction of the Greek element.

With respect to Lombardy, however, one point must not be passed over, viz., the language, in which the Latin so strikingly predominates, while the Celtic element, in the English dialect of the Teutonic has, until lately, escaped the perspicuity of philologists. Lappenberg, at the conclusion of his History of England, sacrifices his first theory, and asserts, at the conclusion of his work, the existence of the enormous number of 4,000 Celtic roots in English; but in Upper Italy it is more than a question of mere roots, imperceptible to other than the microscopic eye of the philologist. It is probable that a nation speaking a language almost or quite devoid of inflections would corrupt an inflected one, and reduce it precisely to the state in which we find the modern Italian. *Homo* would appear to the barbarian incomplete without the article prefixed to it in his own language, and he would naturally be led to place a demonstrative article before it, which readily produces the Italian form, ille homo, ill' homo, il uomo; the Italian verbs are usually inflected where Teutonic verbs are, and the auxiliary used where they are not so; in short, it would appear as if the conquerors had translated their own language and idiom literally into Latin. It may be asked why, after the example just adduced of the Saxon and Norman invasion in England, the conquerors did not impose their own language on those they subdued; the answer is clear, a barbarous race invaded a civilized one, and necessarily, more or less, adopted the language of its vassals as it became civilized, and which was indispensable to the acquirements of its arts, whereas in the former case the civilized nation invaded the barbarous one and implanted its language; for
we find the Norman-French qualified, but did not supplant, the Saxon in England, as the Saxon had supplanted the Celtic. It, however, cannot escape observation that the present Lombard race differs materially, as do also the inhabitants of Sardinia, in appearance, manners, and disposition, from those of Lower Italy.

We now come to the continuance of Roman institutions, which it is not probable would be at once supplanted by a race devoid of civil polity, but which would rather content itself with usurping the offices already in existence, possessing none of its own by which to replace them. We have seen that the Teutonic races confiscated either thirds (tertiae) of the land or of its profits. The former was the system followed by the Burgundians and Odovacer, the latter by the Ostrogoths, who succeeded the Heruli, when they did not require the land itself, and although this was interrupted under the short resumption of the government by the Greeks, it is natural that the Longobardi should recur to this example of their kindred German races. Thus Paulus Diaconus (Paul Warnefried), himself a Lombard, says, in his national history, in the reign of King Cleph, his diebus multi nobilium Romanorum ob cupiditatem interfecit sunt, reliqui vero per hospites (al. hostes) divisi, ut tertiam partem suarum frugum Longobardis per solventem, tributarii efficiumtur. The meaning of hospes has been explained under the head of Burgundians. Again, the same author says, King Autharis received, as an endowment or apanage, the half of their property from all the Duces, whom he superseded on his accession; i.e. the half of their apportionments. Populi tamen aggravati per Longobardos hospites particiuntur.

The laws of King Rotharis mention nothing of the sort, whence Gibbon concludes the custom was extinct; but the contrary is more likely to be the fact; the partition had been made, the conquerors were in possession of that to which they had thus acquired a legal title.

It may be fairly presumed, that if the municipal institutions of Rome had been utterly destroyed in Lombardy no traces would be left of the Roman Law, as is undoubtedly the case; now, we find under the Schöffen, the placita of the judicis civitatis, a term at first only applied to Roman, but at a later period to the Lombardo-Roman municipality, in which latter case, more especially, the word scabinus is used as synonymous with judex. The oldest testimony of this is to be found in the letters of Gregory the Great, between 590 and 604, addressed ordini et plebi (the Senate) of Perusia, Mevania (Vivania), Nepet, Ortona, Messana, and Tadina. The Bishop of Firnium, too, commissions a person living within the jurisdiction of the corporation to receive a gift, and not to forget the gesta municipia. Gregory, too, addresses

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1 Savigny, Gen. des R. R. im M.-A. 1, 8, 345.
2 Otto Trea. lib. 2, c. 11.
4 P. Diaconus, 3, 16.
his letters to the Greek cities, *ordini et nobilibus*. There is a Record of Placentia of 721, written by the Exceptor\(^1\) of the City (Curia). At a later period, and in the same city, 890, a papal brief alludes to the same\(^2\) independent community. John VIII., in 822, directs *ordini et plebi* to the town of Valva, and the Archbishop of Beneventum,\(^3\) 988, does the same to the town Alifa.\(^4\) The word *respublica* is used to designate the royal fiscus, and has no relation to the municipal communities.\(^5\)

§ 110.

The *Codex Urbanensis*, printed by Canciani,\(^6\) under the title *Lex Romana*, gives information on the position of the Lombard Romans, upon which reliance may be placed. The original was discovered in the archives of the cathedral of Aquilia, whence it found its way into that of Udina. Canciani begins with an epitome of Julian’s Novels, after which the work in question follows. It is a recast of the West Gothic Breviary, composed chiefly of the interpretation, and partly of the text; it terminates with Vol. II., Title XVII., of Paulus, so that the latter half of Paulus, the Gregorian and Hermogenian Codes, and the passage of Papinian are wanting. The Italian forms\(^7\) of the Latin words prove its Italian origin, and the class of them\(^8\) places it about the eighth, ninth, or at latest the tenth century. Another testimony of these facts may be derived from the variations from the Theodosian Code; for where *Nas* is found as applied to the Emperor speaking, the old interpretation explains it by *Principes*; but in this work *Principes* and *Principes* occur where the text does not require it; evidently referring to the Dukes or Counts of the Marches. The occasional occurrence of *Rex*\(^9\) indicates the acknowledgment, theoretically at least, of the principle of a supreme chief, in the Codex Theodosianus; the place of this word is supplied by the expression *We*, or Emperor. It may then be said that this work contains “The state and private law of the Roman subjects of the Lombard kingdom, to the end of the ninth or beginning of the tenth century.”

The style is barbarous to the last degree; scientific ideas and passages are mistaken and perverted; hence the attempt of Canciani\(^10\) to justify the language, by asserting it to be the juridical language of the period, fails. From this fact, as well as from the extraordinary incapacity and denseness exhibited by the author on every occasion, Savigny\(^11\) argues the genuineness of the work.

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1 Beretta, 263.  2 Mur. An. It. 2, 973.  3 Ibid. 1, 1, 1010.  4 Ibid. 1, 1014.  5 Mur. r, 384; L. Long. Car. M. 121-123, 157.  6 Vol. 4—A-D. 1789.  7 Const. cum, C. Th. 1, 2; da-de, C. Th. 3, 4, 27—3, 3, 4, 10; esse, C. Th. 4, 20; cosi-quadri, Caio, util. 8; patronem, C. Th. 4, 10; esse-duces, C. Th. 4, 8, 3; tema-timor, N. Val. 9, 502; ecusare, Paul. 1, 12, 507.  8 Adm Mailare, C. Th. 2, 2, 1, 1, 2—2, 5; 4—9, 1, 4; fretum, C. Th. 4, 15, 2—4, 19—2, 18, 2.  9 C. Th. 10, 6, 459 (Goths); C. Th. 8, 4, 1—10, 1, 1—10, 5, 1; Paulus, 4, 7.  10 L. c. 464—7.  11 Ges. des R. R. im M.-A. 1, 5, 372.
With respect to its contents, it demonstrates that the towns had their own jurisdiction, and that a fine was imposed for their benefit upon such as violated this provision. Decurions (boni homines), chose one or more judices for the exercise of this jurisdiction, who exactly resembled the old magistrate with extended power; as, for instance, respecting the revenue. And two, it appears, directed the affairs as colleagues, but the duration of this office is uncertain. The Decurions served as assessors. The defendant usually decided the question of jurisdiction. Judices were either Publici and Fiscales, or Privati and Mediocres. The first applied to all such as were concerned in the policy of the Lombard Germanic State. The Count, and his deputy the Principes, and their vassals, were the municipal magistrates invested with the judicial office, and having cognizance of all civil matters among the Romans, and of the more trivial crimes among the inferior class; the Judices Privati et Mediocres were the same. A criminal offence committed by a bishop, ecclesiastical questions, and civil disputes among the clergy, were of episcopal jurisdiction. The issuing a decree for the sale of a minor’s property belonged to the Judex Publicus, as well as granting the venia atatis. Gesta are often mentioned with reference to voluntary jurisdiction; but in the passage cited much of the Theodosian Code is omitted, especially that which relates to the magistrate and exceptor. The Lombard boni homines were the same as the Decuriones, for boni homines signified only such as were full citizens, and in the Roman period, before the destruction of the Empire of the West, the Decurions alone possessed the rights of perfect citizenship. In the Frank collection of formulæ, to be found, among other places, in an appendix to Marculfus, the terms boni homines and Curiales are interchangeable; and the same may be said of later centuries, where the term is often used for municipal senators. In Florence, Lucca, and in Salamanca, and by a decree of Louis VII. of France, in 1145, Curiales may be proved by the passages referred to to signify such Romans as were charged with the collection of the revenue, called in the Theodosian Code Exactores and Susceptores. It is then quite clear that Curiales at this point of time meant Fiscal Officers, but it must not be deduced hence that Curiales, wherever it occurs, means this only, but as frequently Decuriones, where the old text was imported into the work, or perhaps the fiscal officers being taken from that class.

The Codex Ulnennas.
Bonì homines.
Decuriones.

Judices publici
fiscales, privati
mediocres.

Curiales,
A. D. 1124—
1145.

1 C. Th. 2, 18, 2. 2 Ibid. 1, 10, 1. 3 Ibid. 3, 11.
4 Ibid. 1, 11, 2 & 3, 11. 5 Ibid. 1, 6, 2. 6 Ibid. 2, 1, 2 & 4; Nov. Marc. 1, 503.
7 Ibid. 2, 18, 2; 1, 7 (1, 9).
8 Ibid. 16, 3 (2, 12), 16, 4 (16, 11, 1).
9 Ibid. 17, 2, 17—13, 1, 151.
10 C. 3, 9 & 2—8, 5, 1.
11 Ibid. 12, 2, 17—13, 1, 151.
12 Ducange, Bon Hom. 1, p. 122.
15 C. Th. 12, 2, 1 (12, 6, 20); C. Th. 3, 1, 8—3, 1, 3—16, 1, 14 (16, 2, 39); C. Th. 5, 2; N. Th. 8, p. 500 & 11, 500; N. Val. 9 (10) 502—11 (12), 502.
Nearly all the countries composing the Western Empire were occupied by German tribes, except a small part of Italy, which, with a very short interruption, belonged continuously to the Eastern Empire; and it is curious that the Roman form of municipal institutions continued under the foreign rule of a German race, and was lost only in that part of the country which had remained free from those conquerors, and that these municipal institutions were later in the twelfth century imported anew into these cities from their Germanized countrymen.

§ 111.

In reviewing the state of the Roman Law under the Lombard rule, it will be necessary, for the sake of continuity, to exceed the period during which they governed that country. The Lombards introduced no new code into their conquered possessions, being contented with the works of Justinian, as the Franks had been with the Breviariurn. Savigny, in examining the state of the Roman Law of this period makes a triple division of its sources,—The remains of the local laws of the Lombards; Records and the course of study pursued, and the authors of that period.

§ 112.

The Lombard laws have reached us in two different collections, confirmed by manuscripts,—the historical collections following the order of the kings who promulgated these laws; and the systematic collection, termed Lombarda.

§ 113.

The historical collection contains, first, the laws of five native kings,—Rottharis (643), Grimwald (668), Luitpraud (713, 724), consisting of six books, Rachis (746), and Aistulf (754). Then, since the Frank rule, laws of Charles the Great, Pipin of Italy, Ludwig the Pious, Lotharius I., Ludwig II., Guido, Otto II., Otto III., Henry, termed I. as an Italian sovereign, but otherwise II., Conrad I., Herny II. (III.), and Lotharius II.

§ 114.

The systematic collection called Lombarda is compiled from the above. It consists of three books, of which the first contains thirty-seven titles, the second fifty-nine (sixty), the third forty. Its date may be placed in the twelfth century, as we find in it the ordinances of Lotharius II., who reigned 1137, and because it is glossed by Carolus de Tocco, who lived in 1200, and who cites therein the Lombard Feudal Law, which was collected in the twelfth century. Its author is unknown. The chief merit of the Lombarda consists in its great practical utility, and the similarity of its arrangement with that of the Corpus Juris. The law

1 Feud. 10.
of the Lombards maintained its ground longer than any Germanic law, but suffered in the twelfth century, as the municipal system developed itself; notwithstanding, a professorship of Lombard law existed in Crema, 1334, and this law was first finally abolished in Bergamo in 1451, by statute Liber Juris Longobardorum et ipsum jus vacet in totum et servetur jus commune. Since the conjunction of Lombard Greek Italy, it would appear that the two systems co-existed as personal law, according to the origin of either individual.

In the kingdom of Naples, the Lombard law was still in force in the sixteenth century, by a special ordinance of Frederick II., prout qualitas litigantium exigerit judicabunt, whence it is to be inferred that it had become common law. In the thirteenth century, it had the preference in cases of conflict. The validity of the Roman is generally acknowledged in the Lombard law, the following may serve as an example of parallels between the two. The peculium castrense et quasi castrense, and the manumission of slaves in the church, follow the Theodosian and Justinian Codes; the prescription of thirty years; the emphyteusai prejudicial to the Church were to be abolished; the expression insidicari for pledging; the property of minors was not to be alienated, but in cases of urgent necessity, and not without permission of the authorities; church property was only to change hands when the exchange should be found on examination advantageous to the Church; the law of Justinian provided the same between Churches; in cases of succession in many of the old laws, wills are generally declared valid.

A constitution of Charles the Great allows voluntary revocation in cases of Donatio mortis causa, made in immediate anticipation of death; but every revocable disposition of a future heritage was forbidden. A Lombard Capitulary of Charles the Great presupposed the validity of wills, if duly made according to Roman form with five or seven witnesses. Parents and Children reciprocally should not be disinherited at pleasure, but only upon three grounds, which is referable to the Novels. Henry II. (III.), issues an ordinance respecting the Juramentum Calumniae (1047), premising that the obligation of this oath is general, but that clergymen are forbidden all swearing, which is, however, confined to the priesthood of Constantinople; but, inasmuch as Justinian confirmed the concilia, no clerk was to swear personally in a suit. If the Institution attributed to Otho II. (Verona, 967) be genuine, A.D. 967.

1 lupi Cod. Dip. Berg. 231. 2 Const. Sic. lib. 1, t. 59, 7; Canciani, 1, 323.
3 L. L. Roth. 167. 4 L. L. Luit. 2, 3, 4 & 5.
5 L. L. Ortin. 1, 2, 4; Luit. 6, 7, 246, 62; Aist. 9.
6 L. L. Ortin. 1, 2, 4; Luit. 6, 7, 120, 7; Jul. Const. 14, 43, C. 8, 9, C. 5.
7 L. L. Luit. 1, 5; Aist. 3.
8 Ibid. 4, 1.
9 Ibid. 5.
11 L. L. Luit. 1, 6; Aist. 3.
12 L. L. Cat. M. 78, 79.
13 A. D. 1047.
15 L. L. Hen. II. 1, 7, C. 2, 59, 2, N. 124, 3; C. 3, 3, 25, 1, N. 131.
it is abridged from the Novels which gives two rei promittendi, the
beneficiarum divisionis.

§ 115.

The first record which Savigny cites in support of his view
from this source bears date 752, shortly before the expulsion of
the Lombard race of kings. It had reference to a suit between
the Bishops of Arrezzo and Siena, and contains many literal pas-
ages from the Code and Pandects. The gift of a woman in Ra-
venna, 767, refers to the Scutm. Velleianum. The Bishop of
Modena grants an emphyteusis in 811, and provides that if, ac-

It contracts buchase, made at Capua in 954, premises the
payment of the price according to Roman Law. In

In several suits relating to the Monastery of Farsa, which was
governed exceptionally according to Lombard Law, passages of
Roman Law are cited, and when Otto III. sat in Rome judicially,
in 999, Roman Law is quoted, with reference to the comparison
of handwriting, and the triple citation of the parties before dis-

The same question occurs again in 1014, with the ob-

servation that the unsuccessful party could not appeal against such a

sentence. In two other suits in 1060 and 1070, two passages are taken verbally from the Codex. In a Placitum of 1058, a pas-

sage is distorted from the Codex, and another of 1075, in which an ecclesiastical foundation puts in its claims to certain estates; here the defendant adds the forty years' prescription, to which the plaintif's answer that they are within the time, and the judge awards a restitutio in integrum, according to the Pandects. An obligation in debt of 1097, contains various renunciations according to the spirit of Roman Law.

A Placitum of Teramo in 1108, witnesses the case of an ecclesiastical foundation, which brings an actio in rem, condicio ex

lege, and interdict unde vi, with respect to part and personal actions
and actio hypothecaria, for property of which it had been violently deprived, conformably to Roman Law. Many cases occur of
freemen obtaining the right of freemen, and absolution from the
duties due to patrons, and the validity of many contracts of ex-
change are supported by a garbled quotation of a passage of the
Codex. In contracts of bargain and sale, the Roman penalty of
dupla is usually provided for the contingency of eviction.

1 N. 99; Jul. Const. r2.
2 C. 9, 19, 2; p. 46, 3, 12—P. 43, 16, 1, 14; C. 8, 4, 7; C. 9, 12, 7, P. 5, 1, 37—
P. 40, 5, 1; C. 4, 1, 12, 2.
4 N. 7, c. 3—N. 120, c. 8; Jul. Const. 7, 31 n. 111, 4.
6 C. 4, 11, 20, N. 49, 2, N. 73, 7.
7 P. 4, 11, 53, 1; C. 7, 43, 89, N. 112, c. 3.
8 C. 7, 56, 1.
9 C. 7, 65, 1—C. 7, 56, 6.
10 C. 7, 59, 1.
11 P. 4, 5, 16, 4.
12 C. 8, 4, 7.
13 C. 4, 64, 2.
14 Lupi, 605, 695.
The pars Falcidia is often mentioned in wills, with respect to which Savigny accounts for the fact of sometimes five and at other seven witnesses being required. He supposes that either the anti-Justinian form had continued after the revision, or that the difference between wills and codicils—the one requiring seven and the other five, according to Justinian's legislation—had become confused. Secondly, that all witnesses actually present signed, or those only who could write, and that this variation is referable to Roman Law in the first case, when the will was considered as an oral, and in the second, as a written one; moreover, that the possibility of such being testamento rusticorum, as allowed by Justinian, may also be taken into account. Thirdly, that the Notary who drew the will may sometimes be reckoned in as a witness, but at other times not so for the sake of greater solemnity, and that this appears not to have been unfrequent.¹

The same regularity is not observable in contracts, in which the provision of Justinian—that when the contrahtant cannot write he shall call in a Notary and five witnesses—is occasionally followed where, as in other cases, no settled number appears to have been requisite. ²

§ 116.

Paulus Diaconus³ gives an accurate description of Justinian's legal works, it is to be presumed from his own knowledge of them. Bobbio, in the tenth century, gives a catalogue of MS. in which he cites a Liber Pandectarum,⁴ in the next century a catalogue made at the instance of Desiderius, Abbot of Monte-casino, contains the Institutiones and the Novella (Julian).⁵

1 Marini Pap. n. 75. Savigny gives the following table, which is curious:

<table>
<thead>
<tr>
<th>Witnesses who sign</th>
<th>Who do not</th>
<th>Notary</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fumagalli, No. 66</td>
<td>3</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>&quot; &quot; 69</td>
<td>1</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Lupi, p. 871</td>
<td>—</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>Fumagalli, No. 15</td>
<td>4</td>
<td>1</td>
<td>(1)</td>
</tr>
<tr>
<td>&quot; &quot; 32</td>
<td>1</td>
<td>6</td>
<td>(1)</td>
</tr>
<tr>
<td>&quot; &quot; 40</td>
<td>3</td>
<td>2</td>
<td>(1)</td>
</tr>
<tr>
<td>&quot; &quot; 100</td>
<td>4</td>
<td>3</td>
<td>(1)</td>
</tr>
<tr>
<td>&quot; &quot; 124</td>
<td>5</td>
<td>4</td>
<td>(1)</td>
</tr>
<tr>
<td>&quot; &quot; 126 (7)</td>
<td>—</td>
<td>—</td>
<td>(1)</td>
</tr>
<tr>
<td>Lupi, p. 537</td>
<td>5</td>
<td>2</td>
<td>(1)</td>
</tr>
<tr>
<td>&quot; p 627</td>
<td>2</td>
<td>3</td>
<td>(1)</td>
</tr>
<tr>
<td>Fumagalli, No. 70</td>
<td>6</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>&quot; &quot; 216</td>
<td>6</td>
<td>3</td>
<td>1</td>
</tr>
</tbody>
</table>

⁵ Chronicon Casinense, 3, 63; Mur. Script. 5, 474.
A.D. 1089.

A.D. 1083—
1106.
Lex Romana Utinensis.
Tenth century.

Conflict.
The Lombard Questions and Monita.

francus of Pavia, appears, about 1089, to have studied "arts, sciences, and law," according to the custom of his native city," and to have presided over a school of great repute in the monastery of Bec, in France, where Ivo was one of his scholars.

Wipo alludes to this junction of arts and law in a panegyric to Henry III.; the Lex Romana Utinensis, or recast of the Brevisarium, has already been alluded to as the earliest legal work of the Lombard kingdom, and its barbarous style and errors, arising either from the ignorance of the author or from the admixture of German rules and forms remarked upon, of the first description are the definitions of Furiosus, Fides, Commisionum, and Furtum Oblatum; 3 the preservation of the absurd law of the old Breviary, 4 forbidding marriage between Romans and Germans on pain of death; although the Lombards (Luitpraud) allowed it, of the second or Germanic origin, are the passages respecting emancipation, 5 compurgators, 6 and stipulation. 7 The Lombard questions and monita 8 consist in remarks taken from different German and Roman Laws, about the year 1,000; they assigned twenty-four causes for judicial combat, many being distorted from the laws of Otto II., 9 which fix their date.

The work is nearly as barbarous as the Codex Utinensis, but shews a better acquaintance with Justinian's works generally; there his ages of man do not accurately follow the idea as conceived by the Romans; the law of intestate succession, according to the Novel 118, is confused; the law of treasure trove gives the owner of the ground the half, according to Justinian; 10 for, according to Theodosius, he could only receive a fourth. 11 The Pandects have supplied the following rules;—The Actio Depositii lies against a slave who has received a deposit and been manumitted, only in case he be still in possession of it. 12 The Commodatarius is not required to repay the value of what he has lost by accident. 13 The theft of deeds appears here to imply the theft of the value of the object, if it prejudice the proof 14 of the property; he who has been robbed by a slave who has subsequently run away, can maintain no action against his master if not a participator, with respect to which he may, however, put him upon his oath. 15 In criminal accusations, the prosecutor must give bail to prosecute, and stand committed in default. 16

The text of the Lombard Law is illustrated by formulæ, and glosses most of the later period of the schools of Bologna. Can-

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1 Mil. Crisp. Vit. Lant. cap. 5.
2 L. Rom. Caius, 1, 12.
3 L. Rom. Caius, 1, 13, 505.
4 L. R. C. Th. 3, 14, 479.
5 Varr. de Toeco ad Lom. 2, 35, 7.
6 C. Th. 8, 51 (8, 12, 1) & 11, 23, 5, 509, 497.
7 C. Ca. 1, 12, 1.
8 Mur. Script. R. J. 1, 2, 163-5.
9 C. 10, 15; 1, 2, 1, 59.
10 Can. 1, 223, P. 16, 5, 1, 18 & 21, 1.
11 P. 47, 2, 37 pr. and 33 pr.
12 P. 48, 2, 7, 1—P. 48, 3, 1; C. 9, 1, 33 C. 9, 3, 2, in fine; C. 9, 2, 17.
ciani places the elder immediately after Henry II., as nothing is mentioned of the law for the capital punishment of prisoners by Henry III. These glosses usually cite Lex Romana, without designating which branch, and others refer to the Codex or Julian, and even Cicero.

§ 117.

A work which has been long known under the name Brachylogus is the third work on the Lombard Law extant, and may be assumed to have been composed in Italy about the end of the eleventh or beginning of the twelfth century, immediately preceding to the schools of the Glossators, of which, should this supposition be true, it gives us by no means a contemptible opinion. The plan of the work indicates a system based on Roman Law, which the author has used as his source, but more especially the Institutes, the plan of which he follows, passages taken from the Codex, Pandects, and Novels (Julian), but not the Breviarii. Its chief value is historical, inasmuch as much supposed to be peculiar to the more recent system of jurisprudence may be found in it.

Savigny takes a great deal of trouble in tracing the history and fixing the date of this work, the result of which is that the oldest edition of it was published in 1549, under the title, Corpus Legum per modum Institutionum; the second, in 1551, by Apel; the third, first termed, Brachylogus, in 1553; the fourth bears the same date; the fifth in 1557, reprinted in 1559; the sixth in 1558; the seventh in 1562; the eighth in 1567; the ninth in 1570; the tenth in 1575; the eleventh in 1585; the twelfth in 1743; the thirteenth in 1761. Of these thirteen editions, only two, the first and ninth, are found on Manuscripts, of which there are three. The first is in 4to, and exists in the library of the University of Koenigsberg, dating in the thirteenth century, is neither divided into books nor titles, and is bound up with Roskredus' Libellus de jure canonico. The second, existing in the library of Vienna, is on parchment, 8vo, dating in the beginning of the thirteenth century, divided into books, and intituled Summa Novellarum Constitutionum Justiniani Imperatoris. The third is in the library of S. Emmeran, in Regensburg. (Ratisbome.)

From the foregoing, it is clear that the law of Justinian maintained the chief place in all ages in the Lombard kingdom. The Breviarii was introduced therewith by the Franks, under Charles the Great, and recast there in the Codex Utinensis, but never became a first authority. This was the state of the law of Justinian in Lombardy, until it was revived in the great University of Bologna, and subsequently in others in the twelfth century.

1 Br. 2, 28, 1, P. 31, 36, I. 2, 20, 1. 2 Br. 2, 11, 1, C. 7, 39, 8.
3 Br. 2, 9, 2, P. 41, 3, 3; Br. 12, 2, 2; Br. 4, 33, 19.
4 Br. 1, 9, 1, 3; Jul. Const. 108, 7, 8, 11; Br. 2, 23, 2; Jul. Const. 107, 3.
5 C. I. M. S. jur. civii. Num. 290.
Thus it appears that the Germanic tribes did not force their laws upon their subjects in those portions of their conquests where the Roman Law was acknowledged, as had been the rule under the Western Empire; at the same time they asserted the independence of their own as a personal law, allowing the vanquished to live according to their former system of jurisprudence.

The north of France before the Carolingian dynasty was governed by the Frank and Roman systems, but after this period, the laws of the West Goths, Burgundians, Alemann, Bavarians, and Saxons, became valid in the kingdom generally, always excepting the Lombard Law, as Italy had never become a province of the Frank kingdom; but after the Franks became conquerors, they brought with them many of their own laws and customs, and here arises the difficult point as to the law under which each member of the newly-amalgamated community lived; secondly, the principle upon which this diversity was based, whether it followed origin, locality, or choice. The following passage in the Salic Law bears upon this subject:—

1. Si quis ingenuus Francum, aut hominem barbarum occiderit qui lege Salica vivit, VIII. M. den. qui faciunt sol C. C. culp. jud. Si quis Romanum hominem, conviviam regis occiderit, &c. The other reading, 2. Si quis ingenuus Franco, aut barbarum, aut hominem qui Salica lege vivit occiderit, &c., is repudiated by Savigny as corrupt.

Now, in the first case, we have two descriptions of persons mentioned, a Frank and a Barbarian, living according to Salic Law, and in the latter part a Roman of the country; in the second quotation we have the Barbarian, or the man who lives according to Salic Law. Hence, it would appear that the conquerors and other Germans, of whom the Salic was their own proper law, could live according to it, but that the conquered nation had not this privilege. The Alemann, Ripuarian, and Bavarian were modifications of the Salic Law; others, then, besides Franks could be said to use the Salic Law as their own, but no Roman. Under the rule of the Lombard kings, the Roman and Lombard Law were alone acknowledged, and Notaries so instructed under pain of fine,3 all other foreigners were to live according to the Lombard Law, and would only have the benefit of their native law by special permission from the king.4 A Placitum of the beginning of the eighth century proves this, here Alemann are judged by Lombard Law, but some of the Schöffen were allowed to be Alemann.

But the important question is with regard to the Frank kingdom; in what mode the particular law was assigned to each, since Marcusfus informs us, that in the instruction for a Dux Patricius or Comes, it was expressly provided that Franks, Burgundians,

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1 L. Sal. Emend. t. 43, § 1, 6.
2 Pactus L. Sal. t. 44, Georgisch, 89.
3 L. Luit. 6, 37.
4 L. Roth. 390.
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Romans, and other nations, should each be bound by their own laws. With respect to the Roman Law, it has been often confirmed in the Frank Capitularies of Charles the Great; in the reign of the first, the Breviary was also confirmed, as is testified by the Decretals. Ludwig, in his coronation oath, A.D. 858, promises to grant uniciuque competentem legem et justitiam.

That Origin is naturally the first and most general rule which could be applied to determine what law an individual should follow, is proved by the numerous laws of the Franks, Lombards, and Romans, which can refer to no other principle, and which are immediately connected with it as a natural consequence. In the following sentence, the nation is simply mentioned, although the private law of an individual only is intended to be implied. Sicut consuetudo nostra est, ut Longobardus, aut Romanus, si evenerit, quod causam inter se habeant, observamus, ut Romani sucessiones juxta illorum legem habeant, &c.

It may fairly be supposed that the nationality of the father rather than that of the mother would determine the race, and is the more probable in this case, inasmuch as the mother usually adopted the law of her husband, which is indeed provided by the Lombard Laws. Illegitimate children in Lombardy, as having no father, were free to choose their own law, and probably the same was the case among other races. The law under which a man was born decided that which he should follow; hence, if a Lombard became a priest, he adopted the Roman Law, but his children adhered to the Lombard Law. By way of exception, wives adopted the law of their husbands, but resumed their original law on their widowhood, and probably these rules applied equally to other Germanic tribes. As marriages between Romans and Goths were utterly prohibited, this would not apply in that case, and when they were allowed, the Roman Law was utterly abolished.

It was natural that the churches should, as juristical persons, follow the Roman Law, on account of its connexion with religion, the great degree of favour it manifested to that body, and the accuracy of its provisions in that behalf; this was already a rule in the Frank kingdom under Chlotar, in 560. The same provision is found in the Ripuarian Code, and writers of the eleventh century in France, in the laws of the Lombard native kings, and in the Frank period. A few exceptions are found, however, to this rule among the isolated clergy, in the tenth and eleventh century, more rarely with respect to monasteries. Farsa adopted Lombard Law, and demanded duel.

1 Marc. Form. r. 3. 2 Cap. 6, 837, art. 2. 3 Lud. P. Liv. imp. a. 817, art. 9.
4 2, 1, 13, X. 5 L. Pip. 46; L. Luit. 4, 1; Car. M 89; Pip. 8, 43; Loh. 14.
6 L. Luit. 6, 74. 7 Can. i. 224. 8 L. Luit. 6, 100.
9 L. Luit. 6, 74; Loh. sen. 14. 10 L. Loh. cit.
11 L. Rip. tit. 58, 51; Adredalads de mir. S. B. 1, 3, 9, num. 8, p. 308; Ivo Ep. N. 200.
12 L. Luit. 6, 100. 13 L. L. Lud. P. 53; L. Pipin. 46.

Nationality or origin the first granted.

Exceptions.
The Goth.
The Roman law of the Church.
The freedman among the Burgundians adopted the law of his origin, among the Lombards he took the law of his patron. The Ripuarian Law admitted two species of manumission at the option of the Ripuarian master, and Roman or Ripuarian form, and the freedman adopted that under which he was freed. So great was the diversity of laws in Italy, that it is said you might find five persons sitting together, each governed by a different law.

It was usual to add to the names of the witnesses an instrument, with the addition *N. Alemannus, or ex genere Alemannus*, in order to designate the nationality of the party; or *legibus vivens Longobardorum*, or more commonly, *qui professus sum legibus vivere Longobardorum*, which depended on the Notary. *Natio*, says Savigny, indicated the law to which the person was born, *lex* that which he adopted; there are, however, evidently some variations, hence *qui professus sum ego ipsa Ferlinga ex natione mea legem vivere Longobardorum*, sed nunc pro ipso viro meo legem vivere videor Salicam. Again, *Landulfus et Petrus clericus Germani*. . . . *qui professi sumus ex natione nostra legem vivere Longobardorum*, sed *ego Petrus clericus per clericalem honorem lege videor vivere Romana*. Mattilda, too, of Salic parentage, says, *qui professa sum ex natione mea lege vivere Salicâ*. The first authentic record, testifying the *professio*, is in 807, accepit ad te Verotracheri *ex Alemannorum genere*, and in 839, *ego qui supra Te ut legibus vivertis Longobardorum*, and in the ninth century these expressions become more frequent, but more so in the tenth and eleventh. In 1297, Roman Law is professed in a testament at Como, and in the Archive of Cuma there are many *professiones* of the fourteenth century, the last 1334. In Bergamo, they are to be found during the greater part of the same century; the latest, according to Lupi, being in 1334. Lupi first demonstrated the error of the theory of free choice. His first argument lies in the above quoted expressions, *Alemannus* and *qui lege Alemannorum*; the second in the interpretation of the expression *ex nomine*, which he understands to refer to the nation; thirdly, no record mentions this choice; fourthly, if the choice were free, why should illegitimate children be expressly allowed it? fifthly, when children or clerks did not claim their privilege, it is especially noticed; lastly, no case occurs which cannot be explained by the above rules, without having recourse to the free choice. There are several passages which have been quoted to prove the free choice; but as they are evidently exceptions rather prove the reverse, thus the Lombard Law of Luiprad. *Si scribis hoc prospexitus, ut qui chartam scripserit, sive ad legem Longobardorum . . . sive ad Legem Romanorum, non aliter facianti, nisi quomodo in illis legibus*

1 Pap. Rom. 3.
2 L. Roth. 229.
3 L. Rip. 58, 1—57 & 61, 5—56, 3.
4 Gen. des R. R. M.-A. 1, 8, 126.
5 Farnaghall, n. 39, 49.
6 Cancian. 3, 460.
7 1250, 1.
8 41, 37.
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continetur . . . Et si unusquisque de lege sub descendere voluerit ei actiones atque conventiones inter se fecerint istud non reputetur contra legem, quod ambæ partes voluntar[æ] faciunt. Et ills qui tales chartas scripsissent, culpables non inventantur esse. Nam quod ad hæreditandum pertinet, per legem scribant.

The common rule was, that the law of the person who was to profit by the contract should be followed. Now, Paulus, in the case of marriage-contracts, distinguishes between the pacta qua ad jus, and qua ad voluntatem spectant; and Savigny remarks that in contracts in which the State has no immediate interest of its own, and which were only incidentally important, it might be deviated from; but could not, in such as belonged immediately to the jus publicum, quod privatorum pactis mutari non protest; or, according to Pomponius, nec ex prætorio, nec ex solemni jure privatorum conventione quiscum immutandum est, quamvis obligationum causæ pactione possint immutari.8

Wills and other solemn acts belong to the jus publicum, for testamenti factio non privati sed publici juris est; and if we compare this with the laws of Luipraud, it will simply appear an instruction to Notaries to alter nothing quod ad jus publicum spectavit, and consequently quotes quod ad hæreditandum pertinet, but allows them to make private contracts according to either rule. The strongest argument in favour of the free choice is to be sought in the Constitution of Lotharius I. of 824. Ludwig the Pious sends his son to Rome, to arrange differences between Pope Eugenius II. and the citizens; there are two versions of the law that made one in the Collectio Canonum of 1086-7, and the other in the collection of the Lombard Laws, the law itself dates from 824. The Roman version is as follows, c. 5:—Volumus etiam ut omnis senatus et populus Romanus interrogetur quali vult lege vivere ut sub ea vivat; etsi denuntietur quod procul dubio, si offenserit contra eandem, idem legi quam profitebantur dispositione Domini pontificis et nostra omni modis subjacebunt. The Lombard version, Volumus ut cunctus populus Romanus interrogetur, quali lege vult vivere: ut tali lege, quali vivere profesaris sunt, vivant. Illisque denuntietur, ut hoc unusquisque tam judices quam duces, vel religios populus sciat. Quod si offensebant contra eandem legem fecerint, idem legi, quod profitebantur vivere, per dispensationem (ad dispositionem) pontificis ac nostram subjaceant. Savigny shortly explains this as follows:—He admits the freedom of choice, but confines it to the Exarchat of Rome, which was not a conquered country, and was never, since the Heruli and Goths, governed by the Germanic tribe; it was, therefore, not exposed to the jealousy that the Germanic races in France and Spain, and in the rest of Italy, felt of their vassals being placed on a legal equality with

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1 P. 23, 4, 12, 7.
2 P. 50, 17, 27 & 45, 1; P. 2, 14, 38; C. 6, 23, 13; P. 2, 14, 34, 42 & 61; Pallius, 1, 1, 6.
3 P. 28, 1, 3.
4 Georgisch, p. 1224; L. Loth. 37; Lombards, 3, 37 or 38.

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How distinguishable.

Jus Privatum and Publicum.

A. D. 824.

Savigny's explanation.
Whether the law was assigned territorially or personally.

Burgundians.

Ripuarians.

Variety of law in the north and south of France before the Code.

Exclusive law in certain parts.

The Salic written Law as now existing, and as common law.

Division of Germany for judicial purposes.

The Gauen.

The Freyen.

The Graf.

The Schöffen.

The Hertzog.

them. The question also arises of how the law was chosen, whether territorially, in districts, or individually; the latter is the more probable, that the races having become confused, each was to declare the law he meant to follow in future; in other words, the race to which he belonged. The law of the plaintiff was that to be followed; the same in cases of oaths and contracts by which one made himself the debtor. Inheritances followed the law of the deceased legator, but the Burgundians could in wills and gifts avail themselves of either, and we have seen that the Ripuarians had two modes of manumission.

With respect to penal offences, the robbery of a Frank by a Frank was punished by a fine of 62½ solidi by the Salic Law; but if a Roman were robbed the fine was but 30; and if a Roman robbed a Roman, then the Roman Law came into force. The king, too, often issues capitularies which only applied to the Salic Law, and those which applied to the whole kingdom, as for instance, Otto II. issued his capitulary relating to the duel.

It is notorious that the north and the south of France had different laws before the introduction of the Code; the former being ruled by coutumes, the latter by a droit écrit. Roman Law lost, too, its influence as personal law in some provinces, for we read, in Francia et nonnullis provinciis laici Romanorum imperatorum legibus non utuntur, and from another passage we may be led to believe that in certain places so many adherents of the Roman Law lived together, that as to establish it to the exclusion of all other, and the converse in other parts, in illâ terrâ in quâ judicia secundum legem Romanam terminantur, secundum ipsam legem judicetur. Et in illâ terrâ in quâ judicia secundum legem Romanam non judicantur, &c., and this partiality of settlement may be explained by a fewer number of Franks having originally settled in the south than in the north, the scene of their first inroads. To conclude, it is to be observed, that where the Salic Law is mentioned here, it is to be understood as not confined to that which we have remaining of the Lex Salica, but also to that part which was not reduced to writing, and existed at that period as common law.

§ 119.

Germany, for the purposes of government, was originally divided into districts (Gauen), containing a certain number of free-men (Freyen), presided over by a Graf, whose business it was to serve as a leader in time of national wars, and to preside in the courts of law, where the Freyen, however, acted as judges. In Charles the Great’s time, certain Freyen began to be elected especially to this duty, and termed Schöffen; they are met with as free Schöffen or elected Schöffen, which is expressed in Latin by Scabini. The Bertjoq, or Dux, was probably a general chosen ad hoc, under whom the Grafen served as Colonels.¹

¹ L. Burg. 60, 1.
³ Decretal, 5, 33, 28, x.
⁴ Tac. de Mor. Ger. 7 and 12.
In the laws of the Friezen, Angles, and Saxons, the terms nobiles and liberi, Adelini al. Edhilingi and liberi\(^1\) occur, and a chronicle of the ninth century says of the Saxons, quae gens omnis in tribus ordinibus divisa consistit. Sunt enim inter illos qui Edhilingi, sunt qui Frilingi, sunt qui Lazzi, illorum linguâ dicuntur. Latīnā vero linguâ hoc sunt Nobiles, Ingenuiles, atque Serviles.\(^6\) Mörser compares the word Ebre with Adel, and Caput, as synonymous terms. The Freyen represented the cives optimo jure. The Schöffen Savigny, after a careful investigation, declares to be of a later date, they formed a court of jūdices selecti, and are alluded to in the old capitularies—ut\(^3\) Scabini boni et veraces et mansueti cum Comite et populo elegantur et constituantur; and again, ut Missī nostrī\(^4\) ubicunque malos Scabineos inveniunt, ejiciunt, et totius populi consensus in loco eorum bonos eligant. Ut\(^8\) sicut in capitulis avi et patris nostri continetur, Missī nostri, ubi boni Scabinei non sunt, bonos Scabineos mittant, et ubicunque malos Scabineos inveniunt, ejiciant et totius populi consensus in locum eorum bonos eligant.

About the year 800, these assessors appear as jūdices; nor is it improbable that the Schöffen are the origin of our jurymen, who were in other times taken from the neighbourhood where the question to be tried arose, and judged according to their own proper knowledge of the case and parties; whereas at present, every precaution is taken to prevent the jury knowing anything of either, and for reducing them to judge of the truth or falsity of facts, from evidence produced orally before them, determined to be legal by certain fixed and known rules.

Thus it may be asserted beyond any manner of doubt, that the system of English juries was deduced from the Gauen of Germany, where now no trace of it is left, and first appeared here actually in the same form in which it had been practised there.

The Graf or Lord of the district presided to direct the proceedings, without, however, exercising any further influence. In the Salic Law we find this officer under the name of Grafo, Gravio, and Graphio; this word is translated by Comes, who Savigny\(^6\) is right in supposing to be the same person, though it is difficult to perceive with him that the one word is a translation of the other.

The Anglo-Saxons term him, who was chief of a community of ten, called Friborgus or Freeburg, (their president,) Friborges Henfod; ten such communities were subject to a Decanus or Tiemhefod, and a hundred such, or one thousand men formed a Hundredum or Wapentachium; here the Decanus had jurisdiction in minor cases, and the Centenarius, in all, including the higher;\(^7\) the Comites and Vicecomites were superior to all. Although the re-

\(^1\) Frisioon, T. 1, 3; L. Sax. T. 17, 1; L. Angl. et Werin, T. 11, 2.
\(^2\) Nichardus, 4, 4.
\(^3\) Cap. 3, 1, 809, art. 22 (Baluz. 1, p. 467).
\(^5\) Cap. a. 873, art. 9 (Baluz. 2, p. 232).
\(^6\) Ges. des R. R. im M. A. 1, 4, 324.
\(^7\) L. L. Edward, 32, 33.

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1. The nobility and freemen.
2. Schöffen or Scabinei.
3. A. D. 800.
4. Schöffen or Scabinei origin of English jurymen.
5. Their functions changed.
6. Extinct in Germany.
7. The Graf presided.
8. Graf and Comes synonymous.
9. Not translation one of the other.
10. The Anglo-Saxons.
11. The divisions of their jurisdiction.
The origin of this arrangement is attributed to Alfred, there is little doubt it existed in principle before his time.

§ 120.

The term Salic\(^1\) originated about the year 420, when the Frank tribe separated into two parts, whereof the one took up its abode on the Mosel and Maas, as the lower part of the Rhine is termed, and acquired the name Salier or Salii in Latin, and Menzel admits the possibility, though not the probability, of this being a nickname given to those of this tribe who served in the Roman Legions, of whom there were a great many, on account of their geographical proximity to the Roman frontier colonies. A still more probable theory is, that the name is derived from the river Saal, now called Yssel (\textit{quasi} Y, or DySaal), and Saal land, the province of the Upper Yssel, in the Netherlands, where the Franks, who were tributary to the Romans, possessed settlements; a third supposition is that the denomination is derived from the district of the Saal, in Würzburg (afterwards the country of the East Franks), or from the Thüringian Saal, on account of the ancient relationship between the Franks and Thüringians; lastly, from the word \textit{Saal} signifying a free alodial house and court (kurt). But come the name whence it may, it is not to be doubted that the Salic Law is of Frank origin, and that it arose before the separation of the nation into Salian and Ripuarian. The latter word is doubtless of Latin origin, and designates those who lived on the Ripa of the Rhine,\(^2\) and who were more attached to their own German interests than to the Roman, and between whom continual feuds existed in consequence.

§ 121.

Menzel\(^3\) asserts, arguing from Tacitus, that the system of fees is originally German, and that the old pagan Germans were wont to \textit{leiben}, lend, parts of their \textit{alods} to slaves, freedmen, or poor freemen, upon condition of certain services or other returns; failing which, it reverted to the \textit{lender}. Speaking of the practice of gambling among the Germans, Tacitus\(^4\) says, \textit{extremo et novissimo jactu (aleae) de libertate et de corpore contendunt. Vicious voluntariam servitutem adit, and adds that such slaves were saleable. Caeteris servis, non in nostrum morem, descriptis per familiar ministeriis utuntur. Suam quisque sedem, suos Penates regit. Frumenti modum dominus, aut pecoris, aut vestis, ut colono, injungit, et servus hactenus parat; but this is a light ground for supposing a system of feudality, the more so as Tacitus goes on to say, that there was an excess of land, and that this migratory people often divided it, and changed for new soil; this servitude, then, was not exactly feudal, but the farmer cultivated any piece of unoccupied ground for the benefit of his master; in fact, he was

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\(^1\) W. Menzel Ges. der Deut. 64.
\(^2\) The word Rhine in the Celtic language signifies anything continuously moving.
\(^3\) Ges. der Deut. c. 77.
\(^4\) Germ. 24.
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an agricultural labourer, not a domestic servant; the word *leben* is, moreover, comparatively a modern form, and signifying also one who leans on another, and in so far connected with the word to lend, *leiben*, and thus the latter has certainly some affinity with the derivation of the word Feodal.

§ 122.

We are now come to the meaning of the words Allodium and Feodum, which are necessary in order to comprehend the principles of the feodal law. Allodium is composed of the two words *al*, otherwise *cole* all, and *od* or *odh*, a word synonymous with *gut*, and from which the latter is derived; allodium, therefore, signifies all property, or that the possessor had the entire property in his land as original owner, and not having obtained it from a superior lord. Another derivation is *an lat*, as connected with the third part, or *tertia*, taken by the Germanic invaders, and termed *sort*.¹ The derivation of *Feux*, *Feum*, or *Feodum*, is more intricate; the word *feo* or *fee* has in the modern language become *Vieb*, cattle, but originally signified whatever moved a chattel, and this would apply before the feods became hereditary, the owner having only a chattel or usufructuary interest; hence, we say, lands held in fee and fee simple, thus, in Wallachia and Moldavia (Dacia), where riches consisted in the possession of cattle, the nobility were, and still are, termed Boyards (*Bous*); *feo,* in its secondary signification, signified wages in Anglo-Saxon, cattle being the medium of exchange, thus *feo odh* would signify property held by rent, wages, or service of some kind, and may point to military tenures. The Latin word *pecunia* has, too, the same origin *à pecus,* and acquired the same signification. Or *Feodh* may be derived at once from *feobtan,* to fight; the history of fees will, however, incline us to prefer the first derivation. *Vassal,* according to Hallam,² is derived from *gwais,* a Celtic word signifying a servant.³

§ 123.

The word *Hertzog* is derived from the words *beer,* an army, the root of which is probably the latin *berus* a master, and *ziehen,* *tegen,* *zog,* *tog,* to lead, thus, the word bears the same signification as *Dux,* but was higher than *Graf,* while *Comes* was superior to *Dux* under the Byzantine Empire.

The word *Graf* has been asserted by most etymologists to be derivable from the same root as *Comes,* and in order to force this derivation, the Anglo-Saxon dictionary of Bosworth sets about the business in a most arbitrary way; he takes the word *far,* a journey, and asserts *ge* to signify "together" (*odb*); hence, he forms

¹ Vid. § 101.
² M.A. 1, p. 155.
³ The whole system of feodal tenure, and feodal rights and services, has been lately far ever abolished in Germany, the country in which it first originated. In Bremen the peasants were obliged to drive a senator a certain number of days in the year, from sunrise to sunset, with his horses; and a case is related of a peasant unharnessing his horses by the roadside when the sun went down, with the remark, "Herr Senator, mien tied is ürn."
gefar or gefæra, he who travels with another; and then he is as far off Graf as before. In fact, the one word is in no way connected with the other, but as the Graf of the Germanic tribes performed many of the same duties as the Comes; of the Byzantine Emperor, who had military commands, and were occasionally governors of provinces, with responsibility as to the imperial revenue, the terms were considered as expressing like officers, without reference to derivation; as well might we attempt to derive publicanus and tax-gatherer from the same root. The Anglo-Saxon verb refan or reafer signifies, in its original sense, to rob, Refa, a robber, but in its secondary sense, a tax-gatherer; refan is also to rob, pull, or pluck. By prefixing the Teutonic augment, we obtain gera, the participle, and by adding a, gera: again we find Gerafamæd, governor’s wages, Geraescipe, a county, and from this word, Gref or Graf is regularly formed in the more modern dialect. The English word Sheriff has, too, the same origin, scyr gera, for softening the y, and considering the English bias for contraction, we have at once Skeyref, Sheriff; in older English books, this officer is also termed a "Reeve." The Vice Comes was the Latin term used for the Sheriff in England. Now the word Jarl, earl, is translated by Comes, yet no one will presume to say their meaning or root is the same. Jarl is taken from the root earl, elder, elderman, a judicial officer exercising the same jurisdiction as the Graf.

Graf or Comes are explained in the Salic Law, as a fiscal officer.1 A title of the Ripuarian Law is headed De eo qui Grafionem interfecerit, but in the text we find si quis judicem fiscalem quem comitem vocant interfecerit.

Schoffen is derived from the root scafen, to shave,—the derivation of the names of legal officers are certainly not flattering,—from this the more modern German word Schöppe, or Schöpte, wretched, and the English word Shabby is deduced, and probably applied to the suitors, viz., that the most wretched man had the benefit of that free court.

The word Baron, about which so much uncertainty has prevailed, is no other than the Gaelic word Fear, or the Latin form Vir, the corruption. The old Spaniards termed the valiant men of the kingdom, Birones fortes; and as the B and V in Spanish are blended in pronunciation, the barbarous form Virones came to be written with B. In old Highland charters,2 of the period at which feudal tenures of land supplanted the personal and patriarchal nobility of the Gaelic tribes, which applied only to the people and not to the soil, we find the word Fear or man, always used as the equivalent of the Latin Baro.3 The Freyherr or free lord of Germany differs from the Baron, in that the first held

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1 L. Sal. Emen. t. 56.
3 L. Rip. t. 55.
his lands immediately of the Empire, whereas the latter was subject for his barony to some feudal superior; in countries south of Germany this distinction does not exist.

§ 124.

After all it may be doubted if the system of feodation be not derived from the Roman custom of patron and client; at any rate the similarity is striking and the comparison tempting. If we consider the respective state of civilization of both, we shall probably admit the resemblances to be closer than it would at first appear; and if we refer it to the earlier period of Roman history, we shall find that the plebeian was in a state little if at all better than the most favoured class of German peasants, that the freedmen, or liberti, resembled the enfranchised class among the German, and all will agree that the leibegene of the feudal age was in an infinitely better position than a Roman agricultural slave.

§ 125.

The origin of the feudal system has already been mentioned in the darker age of its history, let us now see how it developed itself; at a later period the class of masters gradually separated itself more and more from the people, and differences of rank arose. Wolfgang Menzel,¹ in his history of the Germans, asserts that the lords derived all their consequence from their personal offices about the court, and these designations of household servants became inseparable from the first offices of the Empire. A king or an emperor conferred the greatest dukedom under the title of imperial cupbearer, carver, &c. The dukes again, on their side, imitated their royal masters in the details of their court, and a count stood in the same position to the duke as the duke to the emperor. The appointment to places like these about the imperial court was usually connected with estates. Thus these court servants, who even in the third and fourth degree were distinguished gentlemen, entertained a large crowd of servants, who performed their ordinary duties at all times, save on days of grand ceremony. Bishops and monasteries were as capable of large feudalities as dukes and counts. It was, however, in the beginning considered inconvenient that a clerk should occupy himself with mundane affairs, hence a Schirmvogt or protectorate commissioner was deputed as sword-bearer for his protection and the command of his armed contingent of his feudality in the imperial army. The Dingvogt, or legal commissioner, held his court, and the Kastvogt, or bursar, administered the estates. These offices were often combined in one person. The bishop or abbot himself controlled these commissioners; nor was it long before he assumed the entire temporal administration, and led his vassals to battle on horseback, armed cap-à-pié. Feodal investiture consisted partly in offices, partly in estates, and partly in rights. The higher order of the first could only be granted by the emperor.

¹ Cap. 257.
himself; but the inferior description might be conferred by a
duke or bishop, but any one who possessed them could subin-
feodate to estates or rights, such as tithes or the right of chase,
any one he pleased. Thus the ancient freemen, who held neither
service nor fee, according to the amount of which everything
was now regulated, enjoyed neither advantage nor honour from
their free birth, if they had not increased their patrimony so
considerably by inheritance or purchase, as to enable them to
subinfeodate, or to be raised to the rank of dukes or counts.
Their independent aleodial possessions procured them no higher
rank than that of the large possessors of fees and bishopricks;
they were equal, because they had large estates and many ser-
vants, and in the same way the poor and weak were equal,
whether poor vassals or poor freemen. Originally they enjoyed
the privilege of suit in no court inferior to the imperial tribunal;
but the measures taken by the emperor and great crown vassals
compelled them to surrender their free lands on condition of
receiving them back as a fee. By laymen the investiture was
performed by a slight stroke of the sword, whence the English
form of knighthood or admission into the corporation of knights.
In England bachelors (bas chevalier) are not clerical knights, but
an inferior feodal nobility, which in Germany was hereditary
like our present baronets, and originally sold and bartered in the
same way as under James and Charles; and as it indeed is now
in some degree, since the fees or wages paid to the Home
Office are nothing more than the price paid of old for this
honour. To which is now added, from the great number of
competitors, interest for permission to pay, which poor men com-
paratively seldom obtain, and thus honour is made inseparable
from property.

A distinction must be drawn between the member of the *knights
order* generally, corresponding with the *ordo equitum* of ancient
Rome, and the *knights of a particular corporate order*. Both were
invested in the same feodal form derived from the old Roman form
of manumission of slaves by the *alapa*, or blow on the face, in-
dicating figuratively that this was the last punishment he should
receive, hence the word *knecht*, *knight*, *servus* or *slave*; later,
the class of knights, or last in the order of nobility, became here-
ditary, as well as the higher feodatories, even the younger
sons of the French nobility assumed the title of chevalier, and
this was also extended to the royal family; for instance, the
Chevalier de Lorraine, who married Henriette sister of Charles II.
and daughter of Charles I. of England, whose descendant
Charles Edward, grandson of James II., was also termed the

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1 Menzel Ges. des Deut. c. 256.

2 The fees on all honours in England are extravagant:—A Duke pays £1,500; a Mar-
quis, £1,000; an Earl, £800; a Vicount, £500; a Baron, £350; a Baronet, £450; a
Knight-Bachelor, £110—by patent £520; and the intermediate fees on each advancement
to a higher degree.
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chevalier. These are our knights-bachelors, or the lowest class of nobility in its old signification, which at the present time is accounted the lowest order of dignity, all below it being mere titles of worship. The English word knight has not reference to the same root, as words in other language, implying knighthood, all of which are connected with horses, eques, ἱππότης, caballero, cavaliere, chevalier, but is a purely feodal word.

When the orders of chivalry arose for the recovery of the Holy Land, the feodal principles on which it was founded was certainly in the zenith of its power. Two corporations of ecclesiastical knights were founded; the first the Order of St. John, the second that of the Temple, and lastly the Teutonic Order, by Walpot of Bassenheim, a citizen of Bremen. The chivalrous vows were chastity, poverty, the defence of widows and orphans, of the weak, and of the Christian faith. The Johannites and Teutonic knights professed especially the care of the sick and wounded, and the Templars unceasing war with the Infidels. The corporate constitution of these knights, as well as the vow of celibacy, precluded the possibility of personal heirs; their corporation, therefore, was kept up by the admission of novices, each must serve the various grades from page to bas chevalier, or bachelor, equivalent to ecuyer or esquire; and when the master he served considered that his feats of arms entitled him to the distinction he manumitted him by a blow of his sword, enjoining him never to submit to another insult. Every knight could create a knight; but ambition led novices to prefer receiving their freedom from a distinguished warrior, hence the monopoly of knighthood lapsed into the hands of kings. A mixture of the celibacy of the ecclesiastical knights and the feodal custom has produced the knight-bachelor, or imperfect knight, who is, however, feodal not chivalrous, and hence is preceded by all knights of orders of ecclesiastical or quasi-ecclesiastical origin. The word bachelor has hence come to signify any transitory or incomplete status, as bachelor of divinity, law, medicine, or arts.

The bishops and abbots were invested by receiving a staff and ring, which latter bears traces of the Roman Law—jus aureorum annulorum.

The rank and precedence of the maiores optimates, or juniores, was regulated by the number of vassals they could produce at the Imperial Parliament. Thus the dukes, counts, nobles, freemen, bishops and abbots, neglected no means, fair or foul, by bribery, deceit, and violence, to procure the greatest possible number of vassals in the district. The status of the inferior nobility was not determined until the smaller feodalities also became hereditary, as well as the more considerable ones. By this time the freemen were effectually suppressed, and when the order of knighthood arose, from out of the rest of the population, as an acknowledged class, the inferior nobility assumed a definite position, whether

Ordo militaris.

Origin of the orders of chivalry.

The orders of St. John of Germany and of the Temple.

Origin of knights-bachelor.

Investiture with ecclesiastical feors.

Precedence of feodal nobility according to number of vassals.

The Ritter-schaft of Germany.
holding immediately of the Empire, or mediately as feodal or landed gentry under a superior lord. The peasants were of various descriptions; those dependent immediately on the Empire; those on an ecclesiastical body in respect of tithes; those bound to the performance of certain personal services, or payment of interest; and, lastly, those termed leibeigene, who were purely slaves, a state to which the superiors endeavoured to reduce every free peasant, and in which they for the most part succeeded. The clergy have the credit in Germany of having treated their slaves better than others; but in England this class did not emancipate their villans until long after the laity had done so, on the hypocritical pretence that they were not justified in deteriorating the property entrusted to them by the Almighty for his purposes. The imperial tribunals consisted in those of the Counts, Grafen, Schöffens or Échévins; in addition to which there was the jurisdiction of the feodal nobility over his vassals and clients, and in addition to this the increasing jurisdiction of the clerical tribunals. Thus the old German pecuniary mulct, termed Wergeld, co-existed with bloody punishments of life or limb, introduced from the Roman and Jewish Laws. God’s judgments (ordeals) and judicial combat increased in proportion as legal proof became more difficult, on account of the intricate questions relating to feodal tenures.

§ 126.

Guizot, in his essay on the history of France, remarks in the fifth essay, intituled Of the Political Character of the Feodal Regimen, that many learned men have fallen into a great error in asserting, that the original population of countries into which the feodal system had been introduced, was violently dispossessed by their conquerors, and reduced into a state of slavery, that the new lords then divided the territory among them, and established themselves in the midst of their new subjects, between whom and the new superior a reciprocal system of military, judicial, and political relations arose, which acquired the term feodal regimen.

This view is doubtless erroneous, and we have seen from the foregoing sketch of the occupation of Italy by the barbaric tribes, that although a third of the land or profits thereof were taken by the invaders, the whole was not seized in the way represented.

The system of feodality occupied centuries in its development, and appears in the tenth century, under an aspect perfectly different from that in which it might have been seen in the preceding ages. The Roman Law, founded as it was on logical and philosophic principles, required many centuries before it arrived at full perfection, under Ulpian, and the feodal law, in like manner, may be said to have arrived at the acme of its power in the time of the Crusades.
"An Xe siècle," says M. Guizot, "en effet, la France, hommes et terres, était partagée entre les possesseurs de fiefs, comme on à cru qu'an VI° elle l’avait été systematiquement entre les barbares." The existence of aleods or alodial lands until a comparatively late period, sufficiently demonstrates the mistake of such as suppose a complete usurpation and consequent enslavement of the entire population; it is very true that as the feodal system spread, the lords encroached more and more on their vassals, whom in the end they succeeded in reducing to a state little above that of absolute slaves; the frequent wars of the period, the hope of plunder, and the instinct of self-preservation, induced the vassals to submit to the lesser of two evils; on the other hand, the scantiness of the population in the Middle Ages, and the strong bond by which the lords were connected, rendered any opposition on the part of the vassals impossible; upon the whole, the system was theoretically by no means so oppressive as it became in later times, and which led to its own extinction in the very country in which it first took root, was developed, and formed into a system. Guizot describes it as "une confédération de petits souverains, de petits despotes, inégaux entre eux et ayant les uns envers les autres, des devoirs et des droits, mais investis dans leurs propres domaines, sur leurs sujets personel et directs, d’un pouvoir arbitraire et absolu;" but after this most unfavourable view of the feodal system, M. Guizot proceeds to say, that where the sovereign power has been placed in the hands of an individual, the condition of the people may be servile and deplorable; but that after all feodality is fundamentally the better of the two, the difference between an aristocratic government and a feodal one is plain, the former governs collectively, discussion is induced, and the one party will often take up the cause of the people, in order to obtain the support of the mass; in truth, an absolute monarchy or feodality is nearly the same, differing only in degree, the Lords Paramount or Vassal Lords are equally despotic in their respective positions. In the working of the feodal system, what M. Guizot remarks is, however, not to be lost sight of: "Le roi de France, qui ne tenait sa couronne que de Dieu et de son épée, tenait des terres de plusieurs seigneurs. Nouveau principe de réciprocité et d’égalité." Nor was this accident unfrequent, the more potent lord often held part of his lands from others inferior to him;¹ the King of France might receive a legacy of land held by the legatee of a superior lord, into whose place he now came by the accident of a previous subinfeodation.

Guizot thinks that feodality is more likely to produce a monarchy and liberty, than an aristocratic or absolute rule; the internal quarrels of the great Lords may certainly afford the crown the opportunity of supporting one against the other, and of promising freedom to the vassals as the price of their co-operation, thus by

¹ The Pope enfeoffed Pipin of Rome and its Exarchat. (Vid. post. § 130.)
degrees the king would usurp the divided power of the feodatories, and the people not only be absolved from the tyranny of their Lords, but obtain a freedom they had thitherto not enjoyed. When, however, the Sovereign power resides in a corporate body, or absolutely in a sole head, there is no step conceivable between this regimen and that of a democracy; that this latter will not succeed among people bred up under a system of servitude is natural, and evidenced by experience; a popular movement, therefore, has simply the effect of removing the individual head, without affecting the condition of the body.

§ 127.

The higher feudal nobility of Germany were not long in arrogating to itself the election of the Emperor, whose power they kept in their own hands, leaving him the shadowy title. The electoral princes formed a college consisting of seven persons, of whom the three first were clerical, and the remaining four laymen. The Archbishop of Mainz was the Archchancellor of the whole Empire; the Archbishop of Treves, the Chancellor of Burgundy; the Archbishop of Cologne, the Chancellor of Italy. The Count Palatine of the Rhine, the Imperial Carver, or Master of the Table, and bore the Imperial Orb in the ceremony of Coronation, and placed the dishes on the table, hence he was termed Truchsess. The Duke of Saxe-Wittenberg, as Imperial Marshal, carried the sword, and presided over the Imperial Stud. The Marquis of Brandenburg, as Imperial Chamberlain, carried the Imperial Sceptre, presided over the household, and presented water to the Emperor to wash his hands after the coronation banquet. The King of Bohemia, as Imperial Cup-bearer, presented the wine. The election took place at Frankfort-on-the-Main, the coronation at Aix-la-Chapelle, and the first Imperial Diet was held at Nuremberg.

These ministers chose a house mayor, who represented their feudal claims at the Imperial Throne, and whom they all obeyed. The new feudal regulations of the Emperor Conrad, 1037, introduced considerable ameliorations into the feudal system, and redressed many grievances, the more important points were, “that every vassal without distinction should be able to transmit his feod to his son; that no superior Lord should alienate a feod without the consent of all his inferior vassals; that no superior Lord should in future judge his inferior vassals, but institute a tribunal composed of the equals of the defendant; that every superior vassal should have the right of appeal to the Emperor, in case of injustice being done him by his superior Lord.” By this arrangement, the Emperor gained in influence and confidence with the lower and more numerous class of vassals: how far this was agreeable to them was testified by the behaviour of the Swabian vassals to the Duke Ernest.
§ 128.

In order to put a stop to the advances of the Roman Law, Eike, Ekhard, or Ecco of Repcow, collected at the instance of Count Hoier of Falkenstein, in 1215, all the chief statutes and common law of the Saxons, under the title of Sachenspiegel in Latin and low German; it comprised imperial, feodal, local, and old common law or usage; but as it differed in many points from the papal ordinances, the Pope repudiated many titles therein, nevertheless, and although it manifests much want of arrangement, it was warmly received, but only incidentally acknowledged by Frederick II. as a private collection. In 1282 it was re-edited under the title of Schwabenspiegel, with additions and ameliorations.

§ 129.

The Liber Feudorum, which is to be found bound up in the Corpus Juris, and which has been before alluded to, consists of two Books, of which the first contains twenty-eight, and the second fifty-eight Titles. In addition to this there are four Appendices.

The first Title of the first Book treats of those who could grant a fee and who not, how it may be acquired and how retained.

The second, of the fee of Guastaldia or Guardia.

The third, of the successors bound to invest.

The fourth, of the case of dispute arising respecting investiture.

The fifth, of the means by which a feod may be forfeited.

The sixth, prohibits bishops, abbots, abbesses, or lords of the plebeians, to infeodate under certain circumstances.

The seventh, treats of the nature of a feod.

The eighth, of feodal succession.

The ninth, of those who may be held to be successors.

The tenth, of dispute between the lord and he who owes fealty as to investiture.

The eleventh, of the law applicable to a feod given in pledge.

The twelfth, of disputes between the lord and the brother of a deceased brother.

The thirteenth, of the alienation of a feod.

The fourteenth, of feodal march, duchy, or county.

The fifteenth, of whether the husband succeeds to the beneficium (right or privilege) of his wife.

The sixteenth, of the law applicable to feods granted to the smallest class of valvasors.

The seventeenth, treats of the means by which a feod may become forfeit.

The eighteenth, of the competent tribunal for the decision of feodal controversies.

The nineteenth, of the feodal constitution of the Emperor Lotharius, drawn up before the gate of St. Peter, and ordered to be observed.

1 This was a species of subinfeodation. The Gastaldiones were the Misse of a Count, Viscounts Gastaldia a Viscounty. Vid. Sav. Ges. des R. R. im M.-A. 243, 244.

2 Protection.
Tit. 20. The twentieth, of the beneficium (right or privilege) of a brother, and in what way he may succeed to his brother.

Tit. 21. The twenty-first provides that a feod shall not be forfeited without (culpa) some wilful laches.

Tit. 22. The twenty-second defines the time within which a knight must demand investiture.

Tit. 23. The twenty-third treats of disputes between lord and vassals concerning the feodal investiture.

Tit. 24. The twenty-fourth, of how the father's feod may devolve on a daughter.

Tit. 25. The twenty-fifth, of the means by which a feod may be created.

Tit. 26. The twenty-sixth, of the case of dispute arising between a lord and his vassal respecting investiture.

Tit. 27. The twenty-seventh, of the recovery of a feod pledged.

Tit. 28. The twenty-eighth, of the custom of the Mediolenses according to certain authorities.

Lib. II. Tit. 1. The first Title of the second Book treats of the law applicable to feodal disputes.

Tit. 2. The second defines investiture.

Tit. 3. The third shows by whom investiture may be performed, and by whom received.

Tit. 4. The fourth Title, whether investiture or the oath of fealty should precede.

Tit. 5. The fifth, how a vassal ought to swear fealty to his lord.

Tit. 6. The sixth, the form of the oath of fealty.

Tit. 7. The seventh, a new form.

Tit. 8. The eighth, treats of the investiture of the property of another.

Tit. 9. The ninth, of how a feod could formerly be alienated.

Tit. 10. The tenth, defines who may be termed a duke, marquis, count, captain, or valvasor.

Tit. 11. The eleventh, treats of the succession of brothers, or the degrees of successors to a feod.

Tit. 12. The twelfth, of brothers invested with a new beneficium (right or privilege.)

Tit. 13. The thirteenth, of the investiture of Titus by Sempronius (fictitious case).

Tit. 14. The fourteenth, of a vassal decrepit from age who resigns a feod in favour of his son.

Tit. 15. The fifteenth, of the investiture of a husband.

Tit. 16. The sixteenth, of the determining feodial controversies by equals or peers.

Tit. 17. The seventeenth, of him who has received investiture in favour of his male and female heirs.

Tit. 18. The eighteenth, of two brothers invested by a captain (capitaneus.)

Tit. 19. The nineteenth, of whether witnesses who have ceased to be equals ought to be removed.
The twentieth, of the investiture as between a bishop and vassal.

The twenty-first, of a vassal knight who has renounced the profession of arms.

The twenty-second, of a contumacious military vassal.

The twenty-third, of the causes which may induce the loss of a feod.

The twenty-fourth, of the first cause of losing a beneficium or right.

The twenty-fifth discusses the contingency of a vassal’s title to a feod being questioned, and of the lord refusing to support him.

The twenty-sixth, the case of a dispute arising between the lord and agnates of the vassal respecting the feod of the deceased.

The twenty-seventh treats of keeping the peace, and of those who violate it.

At the twenty-eighth, the customs of the kingdom commence.

The twenty-ninth treats of sons born of a morganatic marriage.

The thirtieth, of a female feod.

The thirty-first, of whether a vassal on whom a feod may devolve can be ousted thereof.

The thirty-second, of who are necessary witnesses to prove a new investiture.

The thirty-third, of the customs of a real feod.

The thirty-fourth, of the law of Conrad.

The thirty-fifth, of the clerk who invests.

The thirty-sixth, of whether a man who is dumb, or otherwise imperfect, may retain a feod.

The thirty-seventh, of whether he who has killed his lord’s brother forfeit his feod.

The thirty-eighth, of the vassal who has alienated his beneficium or right contrary to the constitution of King Lotharius.

The thirty-ninth, of the alienation of a paternal feod.

The fortieth, of the capitarilides of Conrad.

The forty-first, of the dispute between a male and female about a beneficium or right.

The forty-second, between the lord and purchaser of a feod.

The forty-third, between a vassal and another respecting a beneficium or right.

The forty-fourth determines the law to be applied to a vassal who shall have recovered a feod after having lost it.

The forty-fifth, whether the agnate or son of the deceased can retain a feod after having repudiated the inheritance.

The forty-sixth, whether a suit about a feod should be heard before a judge or in the lord’s court.

The forty-seventh, how a lord may be deprived of the property in his feod.

The forty-eighth treats of a feod not partaking strictly of the nature of a feod.
The forty-ninth, of him who extinguishes a paternal feud quoad his agnates.

Tit. 50. The fiftieth, of the nature of secoal succession.

Tit. 51. The fifty-first decides whether the captain who has sold his court can be understood to have sold his beneficium or right.

Tit. 52. The fifty-second treats of the prohibition of Lotharius to alienate feods.

Tit. 53. The fifty-third treats of the peace to be maintained among subjects, of its confirmation and vindication by oath, and of the punishment of such judges who shall have neglected to vindicate it and do justice.

Tit. 54. The fifty-fourth treats of alodial lands.

Tit. 55. The fifty-fifth, of Frederic’s prohibition to alienate a feod.

Tit. 56. The fifty-sixth, of what are royalties (by the same).

Tit. 57. The fifty-seventh, of the number of witnesses necessary to prove the ingratitude of a vassal.

Tit. 58. The fifty-eighth, of the marks of feods.

First Appendix. The first Appendix is divided into four Titles.

Tit. 1. The first is a caputulary of Hugo of Gambolado.

Tit. 2. The second contains ordinary capitularies to be met with generally in the Liber Feudorum.

Tit. 3. The third, extraordinary capitularies of John of Ardizione, recapitulated from Cujacius’ Institutes, L. iv. Tit. 73—109, and L. v.

Second Appendix. The second Appendix, from the fifth Book of Cujacius, contains, Title 1, a constitution of Conrad, eight Titles found in the preceding Books and Titles, but chiefly in the second Book, Title 10, another constitution of the Emperor Frederic relating to incendiaries and disturbers of the peace. At Titles 11 and 12 the constitutions found in the foregoing, at Titles 13 and 14, two constitutions of Frederic respecting the right of pre-emption.

Third Appendix. The third Appendix contained the constitutions of some emperors not comprehended in the foregoing.

Tit. 1. The first Title (15) treats of statutes and customs promulgated against the liberty of the Church, and respecting the immunity of religious places and persons wherever resident; of their privilege of court; of Gazarians, Patareians, and other heretics, and their successors; of foreign travellers and strangers whithersoever they may come, and their successors; and the security of husbandmen.

Tit. 2. The second (16) Title regulates the proceedings in cases of treason.

Tit. 3. The third (17), defines rebels.

Tit. 4. The fourth (18), contains a constitution of Frederic.

Tit. 5. The fifth (19), one of Henry the Seventh.

Fourth Appendix. The fourth and last Appendix, intituled the Treaty of Peace of Constantia, concluded between the Emperor Frederic, his son Henry, and certain nobles of the first part, and the States of Lombardy, &c., of the second part, dated the 25th of July 1183, settles the relations which are to exist between them in future.
§ 130.

Charles Martel, the only one of the natural children of Pipin, who survived him, was imprisoned by his stepmother, Plectrudis, that he might not stand in the way of her grandson, Theudoald, son of Grimoald. Theudoald, however, was conquered by the Mayor of the Palace, Raganfried, and died. Charles, freed from prison, placed himself at the head of an army, and fully established his power in 711, by a series of conquests. In 732 he was called to the assistance of the Christians against Abderrhaman, whom he slew, and whose army he routed, slaughtering 375,000 Arabs, which procured for him the surname of the Hammerer. Charles left two sons of his first marriage, Charles and Pipin, by whom he was succeeded in 752.

Pipin the Little, was requested by the Pope Zacharias, to give him his assistance against the Lombards, which he granted to his successor Stephen, on his coming to Paris, and humiliating himself, Pipin then forced Aistulf to a disgraceful peace, which the Lombards, however, soon after broke, and were then finally reduced under the Frank rule, and Pipin received Rome and its Exarchate as a feud from the Pope, as a reward for his assistance.

Charles, surnamed the Great, was the second son of Pipin, and succeeded on his brother Karloman’s accidental death in 771. He repudiated his wife Desiderata, daughter of Desiderius, the last king of Lombardy, and on this king endeavouring to force the Pope to anoint Karloman’s sons kings of France, he introduced himself clandestinely through the passes into Lombardy, he besieged Desiderius in Pavia, overthrew the Lombard kingdom, and added it to his dominions. Pope Leo III. crowned him Emperor of Rome, his great bodily strength and victories over the Saracens, Saxons, Danes, Bohemians, Lombards, and Huns, are matters of notoriety. He consolidated all Germany and the surrounding kingdoms under one sceptre, by means of the feudal system, and became the first Romano-Germanic Emperor. Although he could neither read nor write, he was the founder of education on the continent. His personal strength is said to have been gigantic, and superior to that of any in his army. He was buried in 814, in Aix-la-Chapelle, in imperial robes, in a sitting posture.

Ludwig, surnamed the Pious, the youngest and most incompetent son of Charlemagne, though resembling his father in person, was a man of the weakest understanding. He replaced the many nobles of his father by designing priests, and was at length deposed by his sons. He, however, regained his kingdom, and died despised by all his subjects, as well as by the very priesthood whose arrogance and assumption his weakness had abetted and upheld. He reigned twenty-seven years, but never governed.

Lotharius I., son of Ludwig, was opposed by his brothers Charles and Ludwig, with whom he, however, afterwards con-

Charles Martel began to reign A.D. 716.

Pipin the Little, A.D. 752.

Invested with Rome as a feud.

Charles the Great, A.D. 771.

Ludwig the Pious, A.D. 824.

Lotharius I., A.D. 843.
cluded a peace, through the Pope Sergius II. ceding to them France, and what had hitherto been Germany. He resigned the empire in favour of his son Ludwig, and retired into a monastery, where he ignobly ended his days, after a reign of twelve years.

Ludwig II. began his reign in 855. He obtained a great victory at Beneventum, over the Saracens, who had overrun Italy. He reigned twenty years. He was succeeded by

Charles II., surnamed the Bald, in 875. This son of Ludwig the Pious was conquered near Verona, by his nephews, Charles the Fat and Ludwig the Stammerer. He died from poison administered to him by Sedechia, his Jewish physician, after a short reign of two years.

Ludwig III., surnamed the Stammerer, also Charles’s son, and was crowned by the Pontiff John VIII. He came to the throne in 877, and died in 879, having reigned two years. The Imperial Throne was then vacant until the year 882, when

Charles III., surnamed the Fat, was elected emperor. He bought off the Normans, but after a reign of seven years, being declared incompetent, was deposed, and Arnulph, his nephew, declared Emperor in 888.

Arnulph, having entered Rome with an army, was elected 888, and crowned Emperor by Formoso, in 895, and died of poison in 899, having reigned four years.

Guy, Duke of Ipolito, in 892. Guy, Duke of Ipolito was crowned in Rome by the Pontiff Formoso, after reigning two years. He caused his son Lambert, who had been driven from his kingdom by Arnulph, successor of Charles the Fat, to be elected Emperor; but while he was preparing to make war against Arnulph, he died near the river Tarus, having reigned three years.

Lambert, 894, after reigning two years, was obliged to fly with his father Ovid, and was killed by Hugo, Marquis of Milan.

§ 131.

Ludwig IV. having come into Italy from Germany, conquered Berengarius, after which he entered Rome in triumph, was crowned by Stephen VII. in 900, but being conquered in his turn by Berengarius, he was by him deprived of his kingdom and his eyes, in the year 904, having reigned four years after the death of Lambert.

An interregnum then followed until the year 912.

Berengarius. This Prince was Duke of Friuli, and having been declared Emperor by Pope John X., he overcame Ludwig and drove out the Saracens, but was conquered himself by Rudolph, Prince of Burgundy, and put to death by his own soldiers in 924, having reigned nine years.
THE ROMANO GERMANIC EMPIRE.

Konrad I. succeeded in 912, and died 918. Henry, called the Hawker, who died 936, was one of the greatest emperors who had reigned in Germany since Charles the Great.

Otho I. of Saxony, succeeded his father, Henry the Hawker, in 936, and was crowned in Rome by Pope John XII. in 952, whom he subsequently deposed for his vices. He expelled King Boleslaus, who had killed his brother, from Bohemia, and delivered Italy from the Hungarians, who had laid waste the country, and for this service he was rewarded by the title of Great. He forced the Greek emperor into an alliance, and died, having reigned twelve years.

Otho II., his son, surnamed the Red, succeeded him, 973. He took up arms against the Greeks, who had possession of Calabria, his wife Theuphano's dowry, and was overcome with great slaughter, but escaped by swimming on shore from a Greek vessel in which he had left Italy incognito. He reigned ten years.

Otho III., his son, surnamed the Wonder Child from his early progress in letters, was crowned by Gregory V., and with him the custom of electing the Emperor by seven Princes of Germany, who were called electors, was first established. He liberated this Pontiff from the machinations of the Consul Crescentius, conquered the Saracens, who had taken Capua, and was poisoned by Crescentius' widow, his mistress, in the year 1002, after a reign of nearly eighteen years.

§ 132.

Henry I. (II.) (Saint) was crowned by Pope Benedict VIII. in 1014, in the presence of Kanut the Great, of England, and Rudolf of Burgundy. He conquered the Saracens, and expelled them from Troy in Puglia. He died in 1024, childless, having reigned twenty-two years, renowned, as was also his wife, Cunegunde, for priest-ridden bigotry and monkish superstition.

Konrad II., Salic Duke of Franconia, reigned thirteen years. He was crowned by Pope John XIX., and after vanquishing the Slavonians and Hungarians, died in 1039.

Henry II. (III.) of Franconia. Compelled Odelricus, king of Bohemia, to pay him tribute, went to Rome to assist at the election of Pope Clement II., by whom he was crowned. He deposed Benedict IX., Silvester III., and Gregory VI., and successively caused to be elected Clement II., Damasius II., Leo IX., and Victor II.; and he died in 1056, having governed Church and State twenty-seven years with an iron hand.

Then followed the regency of Anno, archbishop of Cologne, until the year 1065.

Henry III. (IV.) succeeded to his father and grandfather, Henry and Konrad; but having taken upon himself to sell ecclesiastical benefices, thus depriving the Pope of a great source of profit, he was excommunicated by Gregory VII., whom he deposed. He was, however, pardoned by the Pontiff, through
the mediation of the Countess Matilda; on this journey he was accompanied by Friedrich of Büren, the ancestor of the imperial family of Hohenstaufen; but having again resorted to the crime of simony, and again been excommunicated, and having presumed, in addition, to elect a Pope of his own choosing, called Clement III., he marched on Rome, in order to take Gregory prisoner, but was driven out by the assistance of King Rudolph’s party, and having unluckily failed in successfully checking the papal arrogance, he was finally deprived of his kingdom by his son Henry, and died in 1111, after reigning thirty-one years.

Henry IV. (V.) entered Rome, and made Pope Pascal II. prisoner in the Vatican. He compelled the Pope to crown him, and exacted many concessions from him, for which he was excommunicated. Having again gone to Rome, he gave umbrage to Gelasius II. by electing Maurice Burdino, Archbishop of Braga, anti-pope, under the name of Gregory. He was, however, ultimately obliged to succumb, and was absolved by Calistus II., and died 1125, after reigning nineteen years.

Lotharius II., of Saxony, having been created Emperor of Germany after the death of Henry, entered Italy, and restored Innocent II., who had been driven out by Anacletus the Anti-Pope, to the pontificate. He disgraced the Empire by receiving it from the Pope, whose humble servant he was, as a feod; he was crowned at Rome, and returned to Germany to oppose the Bohemians. He thence passed again into Italy to fight against Roger, king of Sicily, who, having adhered to the anti-pope, had made war against Innocent, and driven him from the kingdom of Naples. He reigned thirteen years.

Konrad III., Duke of Swabia, on Pope Eugenius III. having ordered the preaching of a crusade against the Saracens for the conquest of the Holy Land, crossed the sea with Louis VII., King of France, accompanied by a powerful army, which, being much reduced by disease and death, occasioned by the perfidy of the Greek Emperor Emanuel, who adulterated the provisions supplied to the army, he was defeated near Iconium, 1147, and died not without suspicion of poison administered to him through the influence of Roger, King of Sicily, against whom he had made a league with the Emperor of Greece. He began his reign in 1138, and reigned thirteen years. In his reign the double-headed eagle, representing the two empires and two churches, originated.

Frederic I., called Barbarossa, from the colour of his beard, ascended the throne in 1152. He entered Italy with an army, tranquillized Lombardy, having taken Tortona by force of arms, and was crowned in Rome by Pope Adrian IV., whom he reduced to hold his stirrup. He afterwards quarrelled with Alexander III., and on his death in 1159, the Welshish Cardinals elected the Ghibelline, Victor IV. Frederic then destroyed the city of Milan, conquered Lombardy, and marched to Rome (whither Pope Alexander III. had fled), took possession of the Vatican,
and installed Pascal III. The Lombard cities having again revolted against the emperor, Frederic returned into Italy to subdue them; but being defeated was obliged to negotiate with Alexander in Venice. Clement III. now ordered a new crusade to be preached for the reconquest of the Holy Land, and the Emperor departed for Asia, where, after having conquered the Sultan of Iconium in battle, he was drowned in passing the river Selep, in Armenia Minor, having reigned thirty-seven years and three days.

Henry V. (VI.) of Swabia, the son of Frederic, was crowned in Italy by Celestine III., together with Constance his wife, daughter of Roger, King of Sicily, who, in order to re-establish his right, made war against and conquered Tancred, who, though illegitimate, was then in possession of this kingdom. The unchivalrous and cruel Henry died in Messina, having left an infant son Frederic. He came to the throne in 1190, and reigned eight years.

Philip, Duke of Swabia, and Otho IV., Duke of Saxony, having been raised to the throne after the death of Henry, Germany was divided into a great many factions, and much bloodshed followed. Philip, confiding in the assistance of Philip King of France, and Otho in that of John King of England, Otho finally prevailed; and Philip, nine years after, was cruelly put to death by the Count Palatine of Wittelsbach.

§ 133.

In the twelfth century a great difference is perceptible in the Lombard cities, of which the inhabitants consisted of three classes, Capitanei or Cattanei, Valvassores, and Civis (populares sive plebi). The first two formed the greater and less nobility; and the feudal system had thoroughly penetrated into the heart of the kingdom. The higher class of nobility, the Capitanei, held their feods immediately of the crown, or of dukes and bishops, and by degrees had obtained elevation of them into counties. The inferior nobility, Valvassores, were the old vassals of the higher nobility; but all newly infeoffed persons,1 or those without any feod, were reckoned among the plebeians. The government of these bodies was carried on by Consules, taken almost exclusively from the nobility. The Potestas (Podesta) was the president, and is sometimes termed Prætor. The former is, however, as much the Roman general denomination for the attributes of a magistrate, as the latter of the magistrate himself. He was sole regent, was taken from the class of knights, and must not be a citizen of the town in which he exercised his office. This officer first appears under Frederic I.

§ 134.

The two great political parties of the Welfs2 and Gibellines

1 L. Feud. 2, 10.
2 Welf signifies a puppy (whelp) in old German. For the legend, see Menzel Ges. des Deutsch. Cap. 170.
exercised much influence on even the development of jurisprudence, and therefore merit a passing notice. The origin of these parties is involved in utter obscurity; but in the beginning of the thirteenth century they assumed the names of two noble families, who were at that time their respective heads.

The Lambertazzi were at the head of the Gibellines, or party of the Empire; the Geremi at that of the Welfs, the popular or church party: in short, they may well be compared to the Tories and Whigs of the eighteenth century. These names continued long after the family of Geremi had become extinct, and the Lambertazzi had ceased to be at the head of the Gibelline party. Nor were these mere parties; they had become, fairly corporations represented by Syndici,\(^1\) which engaged in even bloody conflicts, and concluded formal treaties of peace. This policy was inherited in certain families, thus a man was born to be a Welf or a Gibelline, and had the greatest difficulty in changing his party. The Geremi had usually the upper hand, and often banished their opponents one and all from Bologna, the greatest part of the population of which were Welfs, who ultimately succeeded in annihilating their antagonists.

§ 135.

Universities, like families, always strive to acquire a fictitious consequence, by an endeavour to trace a very ancient foundation: thus the less cosmopolitan Universities of Cambridge and Oxford, regardless of their geographical position, but determined not to be behind-hand, assert an origin cotemporary with Bologna, but unluckily anterior to the development of literature in this country. The three eldest Universities are, doubtless, Bologna for Law, Paris for Theology and Philosophy, and Salerno for Medicine.

Their origin. Universities originated in a number of students congregating around some distinguished teacher—jurist, or philosopher—who was willing to impart the knowledge he possessed to his hearers. It is natural that in the place where one such teacher has existed, he will be succeeded by others, probably from among his own hearers. With few exceptions, academies may be traced back to this origin. On a university, however, beginning to decline, the regent of the country has often granted it privileges by incorporation and otherwise; or a flourishing university has obtained these corporate rights for its own government, and in order to obtain a greater independence from the political institutions of the country in which it may be situated.

The Universities in their origin were of two kinds; those founded on the principle of free constitutions, in which the students formed part of the corporation, and consequently participated in the government of the body, and those in which the professors

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\(^1\) Ghirardacci. P. 1, p. 248.
THE FIRST LEGAL UNIVERSITY. 149

alone governed the students, the one a representative, the other an oligarchic form of government: of the first description was Bologna, of the second Paris, where the circumscribed study of Theology rendered mental and bodily discipline, after the monastic pattern, more indispensable; this latter system was that transferred to England, and Savigny remarks, that while the Italian students were more independent of their professors, in England the professors had succeeded in obtaining a far greater municipal independence of the Crown.

France, Spain, and Italy followed the free system of Bologna, or Universitas Schollarum, while the Universities of Germany and England imitated the aristocratic system of Paris, or the Universitas Magistrorum; it cannot, however, be asserted, that the Universities have since adhered to these original forms; on the contrary, many changes have taken place in them since that time. English Universities were little affected by the Reformation; the dogmas of religion have, it is true, undergone some change, yet the colleges in the learned corporations of Cambridge and Oxford, which have long since absorbed the University, may be said to have practically maintained most of the outward forms of Romanism.

The German Universities, on the other hand, were affected by the more thorough reformation. The destruction of ecclesiastical hierarchy extended to the higher classes of schools of instruction throughout the country, and the Universities of Germany obtained political freedom, while those of England retained rich endowments; which system operates the most in advancement of science—the system of protection, monopoly, and exclusion, or that of free trade in literature—may be inferred from the great number of distinguished scholars, critics, philosophers, and scientific men, in all branches, produced on the continent, but more especially in Germany; and from the unfrequent appearance of such in the English academies, where foreign editions of classical works are preferred even to the similar productions of their own members.

§ 136.

Bologna, the mother of the law schools, it would appear, received its first privilege under Frederick I. in 1158, at the Diet of Roncaglia, and Savigny proves that the words of the constitution, granting an exceptional jurisdiction in favour of all foreign students,

1 In considering the system of self-government, it must be remembered that a student of the Middle Age was a man of mature age, whose object was to learn a faculty, and thus qualify himself for certain offices—for which purpose he voluntarily travelled far and wide—and not a youth of eighteen, sent by his parents to a university, as the majority of students are in England, merely to be impressed with a stamp, as precious metals are with a die, and who quit it when the professional part of their education should begin—a system which has converted our universities into nothing better than large grammar schools. The period of study has been shortened by half, the previous examination now represents the old Baccalaureat, the present Baccalaureat representing neither one thing nor the other.


3 It is perhaps unnecessary to remark that the word University applies equally to any corporation, and is not confined to academies, the more proper term.

could apply to no other place, *hujus rei optione data scholaribus, eos coram domino vel magistra suo, vel ipsius civitatis episcopo, quibus banc jurisdictionem dedimus, conveniatur.* Later, however, about the end of the twelfth century, the university found it had not the physical power to protect its members and exercise its jurisdiction, and resigned it. In 1316, the *philosophi et medici* (*sive physici*) established their right in the University, under the generic term *artes,* and in the latter half of the fourteenth century, a theological faculty was added by Pope Innocence VI., after the model of Paris, and placed under the Bishop.

From this time Bologna contained four learned corporations, two legal (of Roman and canon law), a medical, philosophical, and a theological; but the two first formed a whole, and were often so represented.

The *advocae forenses* enjoyed alone full corporate rights in virtue of Frederic I.'s constitution.

Bolognese scholars had no vote in the Senate, and could not bear office, as owing allegiance to the city. The third class consisted of *suppositi universitati.* This class was composed of pawnbrokers, circulating library keepers, tradesmen, and students' servants; the same system still exists in Oxford, where such persons are required to be matriculated, in order to bring them within the jurisdiction of the University Court. The *Rector* was chosen annually, must be twenty-five years of age, a law scholar of the corporation of five years' standing, unmarried, not a monk, and most probably not in orders, but professors were accounted scholars; to this Rector the students swore obedience on his entry into office. The office was elected according to a cycle of nations, and nationality was determined by birth.

The *Cirramontani* were divided into seventeen, and the *Ultramontani* into eighteen nations, and formed two corporations; the English were reckoned among the latter. The Senate, *Consiliarii,* consisted of deputies of the nation.

The *Syndicus* was chosen from among the scholars annually, and represented the two Universities in all Courts.

The *Notarius* was similarly chosen, but from notaries of the town.

The *Massarius,* or banker, the same from the bankers.

Two *Bedelli* were also chosen yearly.

*Taxatores* were chosen at a very early period, to regulate the letting of lodgings, and contumacious housekeepers were discommoded (interdicted).

Such was the civil government of the corporation as an academy. *Doctor, Magister,* and *Dominus* were the oldest terms, and occur in the middle of the twelfth century; and towards the end of that century, we find *Doctores decretorum,* and in the thirteenth *Doctores medicinae (sive fixica), grammatica, logica, philosophia, et aliarum artium,* also *notarius.*

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1 Sarti, p. 1, 434, 463, 501, 504, 511.
THE MIDDLE AGE UNIVERSITIES.

public teaching, and might be of Civil or Canon Law, or of both (in utroque jure).

A civilian was required to study eight, and a canonist six years, but a lectura or repetitio counted as a year; of this he made oath, and was then presented by one or two doctors to the Archdeacon for examination, which was twofold, examen (privata examinatio) and convenitum (publica examinatio); for the first the candidate had to work up two texts, puncta designata, from either law; the President examined the candidate. After he had read his treatises, the other Doctors could examine, and must swear they were not previously understood with him; they were to treat him civilly as their own son, on pain of suspension for a year. Immediately after the examination, if worthy, they passed him, with the title of licentiatius. The Licentiate was made a Doctor in the cathedral, by the Conventus or Senate; he had to make a speech, read a legal lecture, and dispute this time with the scholars; the Archbishop or his deputy then made a speech proclaiming him Doctor. The presenting doctors then delivered to him the book, the ring, and the Doctor’s hat, and assigned him a chair. Oaths of various descriptions followed this solemn form, which are in a great measure preserved in the University of Cambridge till this day, and were all, until a few years ago, accurately preserved in Germany; the installation in the cathedral is now discontinued. There was probably no statutable period between the Licentiate and Doctorate; but the one might follow immediately after the other; the fees upon the first appear to have been considerable, 60 lire, on the second 80 lire, which may be calculated together at between 30l. and 40l.; natives, however, paid much more. Bacalarius was not a degree, but such students were termed so who, after five years’ study, obtained from the Archdeaconus the Venia docendi; the German term these privat docenten, as distinguished from professors appointed by Government, but they are nearly always graduated Doctors. Doctors who read were said to hold lecturae or regere in Schola, and these had a jurisdiction. Lectures began on the 19th October, and continued until the 7th September, when the long vacation began; there were eleven days holidays at Christmas and fourteen at Easter, with other holidays, making ninety in the year, in addition to which no lectures were read on Thursdays.

The morning lectures were to conclude before nine A. M., the afternoon ones to begin at from one to four, according to the time of year; hence, probably, acts at Cambridge and Oxford are kept at two out of lecture time.

The Lectures were held in the houses of the Doctors, until the fourteenth century, when public lecture-rooms are first mentioned. The regular professors were paid by the city, but elected by the students; the more famous, however, were those whom the students induced to read by subscription.
§ 137.

Padua arose A. D. 1222, from students who migrated thither from Bologna, and modelled itself according to Bologna.

We first find traces of Pisa as a University in the thirteenth century. Vicenza arose A. D. 1204, by emigrations from Bologna, and in 1228 Vercelli is first mentioned as an Academy. Arezzo, however, which existed in the beginning of the thirteenth century is the eldest, of which the statutes are printed. Ferrara existed in the same century, and the University of Rome was instituted by Innocence IV., in the middle of the thirteenth century, for studium generale. Frederick II. established an Academy of "all arts and sciences" in Naples, in 1224. The remainder, Piacenza, Modena, Pavia, Rezzio, and Turin, were of less account.

Of Paris, there are traces as early as 1180, in the Decretals of Pope Alexander. The difference of its constitution, from that of the Italian Universities, has been already alluded to. Montpellier was nearly as old, and Orleans dates about fifty years later.

§ 138.

Irnerius, the first and most important of the civilians of his time, is mentioned by all cotemporary writers as the founder of the school at Bologna. His name has been variously spelt, Wernerius, Wernerius, Guaranerius, Guernierius, Gwerne-rius, Hirnerius, Hynnerius, Ynerius, and Irnerius, which last has been conventionally adopted. Irnerius appears to have been, as far as regards jurisprudence, autodidact, being described as a teacher of the liberal sciences. He was not a German by birth, as some presume from his name, but a native of Bologna; Teutonic names being at this age common in Lombardy. In 1113 his name appears in a plauitum of the Marchioness Mathilda as a witness, and he is there termed causidicus. In 1116 to 1118 he seems to have been in the service of, and constantly in attendance on, the Emperor Henry V., at which time it is probable he quitted the school of Bologna, which he founded, in order to turn his attention to politics.

Of his works all that have survived, perfect and imperfect, are his glosses, distinguished by his mark Yr or Y, and Authenticae; but we learn from other writers that he wrote a Formularium Tabellionum, or forms for Notaries, Questiones, and a book De Actionibus, which is now lost. We know little of his cotemporaries; of

Raymundus, A. D. 1127.

Raymundus de Gena appears in 1127 in an old charter, with the term Legislator applied to him; and of

1 Vid. § 141, Piacentinius.
2 By Authenticae are here meant those novels by which some constitutions in the Codex were varied or annulled, and which are extracted and placed by way of note under the constitution to which they refer.
3 The biographies of the glossators and lawyers of the middle age, up to the fifteenth century, are founded on the authority of that distinguished jurist and legal author, M. de Savigny.
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Walfredus, whose name appears in charters between 1128 and 1146 as Magister and Legis Doctor, both terms importing a professorial occupation, and subsequently as Judex Imperatorii Lotharii. He died before 1151, leaving some glosses which are lost.

§ 139.

The four Doctors, Bulgarus, Martinus Gosia, Jacobus, and Hugo, lived in the middle of the twelfth century. Savigny rejects the assertion of the contemporary Otto Morena, that they were pupils and successors of Inerius.

I. Bulgarus, the first of the four doctors, was born at Bologna, and from his eloquence obtained the honourable cognomen Os Aureum, the χρυσόστομος of lawyers, as surpassing even the other three doctors of his time. He is mentioned as the rival of Martinus in the imperial favour. Johannes Bassianus and Albericus were his scholars; but Savigny is of opinion he was never, as some assert, Imperial Vicar in Bologna. It is reported that walking one day with a scholar, in the neighbourhood of Bologna, they found a wild swine caught in a noose. The scholar was about to appropriate it, quoting his master's opinion on the passage of the Pandects, that sēra naturae had not become property merely by being set fast in a snare. Bulgarus, however, while he agreed that no action would lie, feared their good name might suffer, and forbade the appropriation.

He was twice married, but all his children died before him. By his second wife he had no issue. He died himself between 1159 and 1166, and was buried in the church of St. Proculus, on the opposite side to his old antagonist Martinus, who died before him, the antagonistical position even after death being preserved. He glossed the Digestum Vetus, the Infortiatum, and the Digestum Novum, the Codex, the Novels, and the Institutes; wrote a Comment on the Regulae Juris; a work De Judicis, in fifteen titles; and a Gloss on the Liber Feudorum, according to Alaricus. His glosses are marked B & b and Bul.

II. Martinus Gosia, the second of the four doctors, was born at Bologna, and belonged to the noble Gibelline family of the Gosi. He was living in 1157; but neither the date of his birth nor of his death can be accurately ascertained. He wrote a gloss on the Digestum Vetus, the Infortiatum, and Novum, the Codex, the Novels, the Tres Libri, and the Institutes. These glosses are usually recognisable by the mark M MG or Ma.

III. Jacobus was the third of the four doctors, and, like his contemporaries, appears to have been a native of Bologna, and to have

1 Sarti, P. 15 p. 29. 2 Ges. des R. R. im M.-A. B. 4, c. 28. 3 On her death his father-in-law consulted his rival Martinus as to whether the des prefectitis of the wife belonged on her death to the husband, or reverted to the father-in-law. “My opinion,” said Martinus, “is in favour of the husband’s right; but Bulgarus held the contrary opinion, and must, therefore, in conscience return it.” This Bulgarus did, to the great annoyance of Martinus, whose sole object was to detract from Bulgarus’s reputation.
died on the 11th October 1178. Gratian wrote his Decretals during the time that Jacobus was reading on Roman Law at Bologna, and cotemporaneously with Alexander, afterwards Pope Alexander III., who read on theology. He glossed the Digestum, Vet. et Novum, the Codex, and Novellæ, which he distinguished by the mark Ja. or Jac.

IV. Húgo, the fourth of the four doctors, was born at Bologna, and died about 1166 or 1171. His family belonged to the Gibe-line party, and in later years was banished on this account. The name is sometimes written Ugo without the H. He glossed the Digestum, Vet. et Novum, the Codex, Institutiones, and Novellæ; but less fully than his cotemporaries. He also composed a book of Distinctiones, which appears to have been worked up again by one Albertus.

The four doctors were appointed by Frederick I. to defend the rights of the crown in respect to municipal towns, which had usurped many royal privileges; and on their refusal to undertake a duty to which so much odium attached, the Emperor named twenty-eight judges, two from each city, as assessors. Their decision was termed the judgment of Roncaglia; but its validity was questioned by the Lombards, because founded on Roman instead of Feudal Law, by which they held themselves bound, and the principles of which they considered more advantageous to them. Upon the whole, Savigny thinks the four doctors were hardly judged.1

Imperial favour. The first two of them appear to have enjoyed the imperial favour in an eminent degree. It is related that when Martinus and Bulgarus were riding one day with the Emperor Frederick, he asked them “If he were master of the world?” Bulgarus denied the proposition as far as it referred to property, but Martinus assented to it; whereupon the Emperor presented his horse to Martinus. On which Bulgarus remarked, “Amisi equum, quia dixi aequum, quod non fuit aequum.”* The same story is told of Azo and Lotharius, with Henry VI., respecting Merum Imperium, assigned by the former to the immediate superior; but by the latter to the lord paramount (the Emperor).

The impugning a contract of sale by minors is forbidden in the Codex, because ratified by oath.3 Bulgarus understood it to relate to a transaction ipso jure valid; but Martinus was of the contrary opinion. The Emperor decided the dispute in favour of Martinus, and issued a rescript to that effect, which has been interpolated as an Authentica in the Codex, 1. c.

The last period in which the four doctors are mentioned is 1162, when, on the Emperor threatening the city of Bologna, they are said to have gone out to him as a deputation, and to have succeeded in propitiating him; but this is asserted to

* Sallcetus in Cod. 7, 37, 3.
3 C. 2, 28, 1.
be an invention of Sigonius for the sake of introducing a speech, and to be utterly without foundation.

§ 140.

Rogerius, who was born at Beneventum, and was professor in Placentia, flourished A. D. 1162, and was a somewhat young contemporary of the four doctors; he is supposed to have been a scholar of Bulgarus. He is said to have glossed the Digestum Novum, Infortiatum, and Vetus, the Code and Novels; the mark of his glosses is an R. He also wrote a summary of the Codex, and three pamphlets on prescriptions,—Compendium suæ Summa de diversis Præscriptionibus, Dialogus de Præscriptioœibus, and Catalogus Præscriptionum. They are very sound, but not remarkable for their order. He, moreover, wrote a treatise, De Dissentientibus Dominoribus.

Albericus de Porta Ravnante was contemporary with John, though somewhat his senior; he lived in 1165-94, and is said to have been a pupil of Bulgarus. He is reported to have been a free liver; he wrote glosses—which may be recognised severally by an A, Al, or Alb—on the Digestum Vetus and Infortiatum, the Codex, Novellas, and Institutiones. With respect to his Distinctions, he appears, from the passage incipiant distinctiones a domino Ugone compositæ et a Domino Alberico consummatae, to have finished the glosses begun by Hugo.

Aldricus appears, as nearly as can be judged, to have been of Bologna, and a man of considerable influence. It is, however, doubtful if he ever attained the dignity of Doctor, although he was undoubtedly a teacher, and delivered lectures. The similarity between the two names and initial letters Al., has caused him to be often confounded with Albericus.

Wilhelmus de Cabriano was of a noble Grecian family; he lived in the beginning of the twelfth century, and his glosses are found of the Codex, the Digestum Infortiatum and Novum, of which latter he is said to have written a summary. His glosses are distinguishable by a W.

Odericus flourished between 1666 and 1200. From the various affixes of Judex, and the higher title of Doctor to his name, it would seem that he read publicly, the more so as Pillius terms himself his pupil.

§ 141.

Placentinus was, on his own shewing, so designated after the name of his birth-place, Placentia. His other names are unknown, as he marks all his glosses simply with P.

He first taught at Mantua, where he wrote a book upon Actions; he subsequently read in Bologna, but was obliged to leave that city, having spoken disrespectfully in his lectures of Henry of Baila, who fell upon him, in consequence, in the night, and obliged him to fly to Montpellier, where he founded a school, and wrote the summary of the Codex and Institutiones. Hence he returned to

1 Sig. Inst. Bon. lib. 3, t. 3, p. 143.
his birth-place, but was soon recalled to Bologna by the influential family of Castello, and excited the envy of his cotemporaries. He returned home after two years, followed by many of his hearers, at whose request he continued his lectures four years; he then returned to Montpellier, wrote his Summary on the Tres Libri, and died there A.D. 1192. An anecdote is related, from which it would seem that he was very nearly entering the Church, having indeed been duly elected Bishop, but the clerk of the poll (tabellio) being by some error a layman, his election was declared void.

His works consisted of a work De Varietate Actionum; Summaries of the Codex, which is much esteemed, of the Institutiones, and Tres Libri; additions to Bulgarus's De Regulis Juri. In addition to these, he also produced several minor treatises, Distinctiones; Summa de Restitutionibus; Summa de Verborum Obligationibus; Summa, beginning Placitum; Summa ad Legem Si Pacto; legal rhymes found in various places; Oratio de Legibus, lost, and a fragment of a Summa of the Digests.

HENRICUS DE BAILA was of a noble Bolognese family, whence Odofred calls him rather a knight than a jurist; he appears as a Doctor in 1669-70, marking his glosses with Yr. His glosses are found in the Digestum Novum, Vetus, and Infortiatum, and the Codex.

JOHANNES BASSIANUS was born at Cremona, and was famed for his knowledge of polite literature as well as of the legal science, at the same time he has been accused of leading a debauched life. He was a pupil of Bulgarus, and the teacher of Azo; his pupil Nicolus Furiousus wrote down his lectures as he delivered them, from which source we have obtained some knowledge of their merit. The exact age in which he lived is unknown.

His glosses, bearing the marks J; Joh, and Jo, are to be found throughout the Digestum, the Codex, Novella, and Institutiones. He, moreover, wrote summaries of the Authentic, a tabular view of Actions (Arbor Actionum), and summaries on that part of a Bill of Plaint termed Quincunque Vult. These are all that remain of his writings. The greater part of John Bassianus's other works—as for instance, Additions to the Glosses of Wm. de Cabrano on the Codex; his Distinctiones; his Disputationes, his Commentary on the Regular Juris; Lectures on the Pandects and Codex; Summaries of the Codex de Actionibus; Feudal Law—have perished either wholly or in part.

§ 142.

PILLIUS, otherwise written Pilius, Pileus, Pylius, Pyleus, &c., was born at Medicina, in the district of Bologna, and lived between 1169 and 1187, as old charters, the testimony of Odofredus, and his autobiography witness; nor must he be confounded with Pillius Bagartus. The city of Modena offered Pillius the sum of 100 marks of silver to teach in their city; but the Bolognese getting wind of this negotiation, swore all the jurists, and the pupil of Odericus among the number, to teach nowhere else for two years from that time, 1182, and having exacted this oath, deprived them
of their immunity from local taxes, which they, up to that time, had enjoyed. The Modenese then modified their proposal to Pillius, namely, that he should not be bound to read until the expiry of the two years, whereupon he migrated to Modena, where he obtained the freedom of the city, and in due time professed law there.

Two anecdotes are told of him, one of which, as it relates to the history of this country, has a certain interest.

A dispute having arisen between Baldwin, Archbishop of Canterbury, and the monks of the monastery attached to the Cathedral in the time of Henry II., it was referred to the then Pope Urban III. The argument at Verona lasted several days, Pillius being for the Monastery, and Petrus Blesensis for the Archbishop, whom Henry supported; no decision is reported as having been come to, though the Pope is said to have leant to Pillius’s side.

Pillius, on another occasion, was retained for some masons who had wounded a passenger in throwing materials from a house, calling to passengers to have a care. The wounded man sued them in damage. By Pillius's advice they feigned dumbness, and thus were unable to prove they had warned passers-by. The plaintiff grew angry, and declared it to be a deceit, for he had heard them call out, and the proof of the facts thus given by the plaintiff obtained the acquittal of the defendants. He appears to have been twice married, and to have had male issue by his second wife. The last notice of him is A.D. 1207.

His glosses are distinguished by Pi or Py, and are found in the Digestum Novum, Infortiatum, Codex, Novellæ, Tres Libri, and Institutiones. He also wrote Questiones, the Brocarda, or Disputationes, in the form of a dialogue between himself and Jurisprudencia. A summary of the three last books of the Codex begun by Placentius, and beginning at de municipibus et originariis, and ending with de fundis patrimonialibus, with some interruptions. He also wrote a treatise De Ordine Judiciarum, Distinctiones, and an excellent treatise upon Feudal Law.

Of his Oppositiones permodum Dialogi; De Ordine Criminali; De Confectione et Porrectione Libelli, and Pillii Bagarotti Questiones et Lectura in Codicem, no more is now known.

§ 143.

Cyprianus was born at Florence, and was the teacher of Carolus de Focco and Rosfredus, whence we infer that he read publicly in Bologna. That he flourished about the end of the twelfth century may be inferred by his quoting Placentinus and the Decretum Gratiani. He appears to have written nothing beyond glosses, which are to be found plentifully dispersed throughout the Digest and Code, but more particularly in the roll of the Novella, Tres Libri, and Institutiones, with the mark Cy or Ci. He is accused of falsifying the text of the authorities, in conjunction with Galgosius.

Galgosius is another form of Gaulcoxius (Walcausus). This

Aneodotes of Pillius.

His works.

Cyprianus lived A.D. 1198.

His works.

Galgosius lived about A.D. 1190.
lawyer was born at Florence, and became notorious from being accused of fabricating the following Constitution, which is certainly not genuine:—"Id A. A. et C. C. Inter eos qui de illis et inveni procreatione nati sunt nulla est successio vel hereditatis petitio, nisi ab eisdem relictum vel concessione aliquo modo inter se docetur;" and within the punishment of the law, "si quis falsis constitutionibus nullo autore habito utitur lege Corneli à aquæ et igni et interdicitur."

The evidence of his having done so, however, while it is inconclusive, proves Galgosius to have been at least a man of considerable legal reputation.

Otto, a disciple of Placentinus, and a teacher of Carolus de Focc, was born in the latter half of the twelfth century in Pavia, and professed in Bologna. His works consist in glosses on the Digestum and Codex, in a work De Ordine Judicarium, and in a few distinctions, his mark being Ot.

Lotharius was born in 1191, in Cremona, under the Emperor Henry VI., of a good family, being termed Melior Miles, and is supposed to have been the first who made oath never to teach out of Bologna. Subsequently he appears to have gone into orders; for we find him mentioned as Bishop of Vercelli, and in 1208 Archbishop of Pisa, in a rescript of Innocent III. of 1210, and by two decretal letters of this Pope addressed to him. The story of the horse, alluded to in the notice of Bulgarius and Martinus, is properly applied to him. His glosses on the Digestum Vetus and Codex may be recognised by his mark, Lot.

Bandinus was born of a distinguished family in Pisa, and hence the designation Familiatus. He took the oath as teacher in Bologna in 1198, and died in 1218. Few of his glosses are extant; they are marked B.

Burgundio lived in 1138. Bernardo is believed to have been a native of Pisa. In 1138 he was present at a discussion between the Emperor, Lotharius's ambassador and the Greek clergy, between which time and 1155 he appears severally as an advocate-judge of the Pope, judge of the city of Pisa, &c., in 1171 as the Pisan ambassador at Constantinople, and in 1179 in the Lateran Assembly. He died at Pisa, 1194, at an advanced age, having published works on a diversity of subjects;—A Translation of the Homilies of Chrysostom on St. Matthew and St. John; of the Homilies of Basilus on Isaiah; of the Work of John of Damascus, De Fide Orthodoxæ, and of Remesius De Naturâ Hominis; of a Fragment of the writings of Galenus.

He, moreover, according to Savigny's opinion, translated the short Greek passages to be found in the Pandects; but not those longer ones in the twenty-seventh book, to which, it would appear, Justinian appended an official translation. His greatest merit seems to have consisted in his perfect knowledge of Greek.

1 P. 42, 10, 33. 2 Vid. p. 154, ad voc. imperial favor.
§ 144.

Vacarius is to be distinguished from the Abbot Rogerius, and the glossator of that name, with whom he has often been confounded. Vacarius was born in Lombardy about 1120, and founded a school of Roman Civil Law in Oxford, having come to England at the instance of Theobald, Archbishop of Canterbury, who twice visited Italy, and who was, in the time of the Pope Cælestimus II, 1143-44, concerned in heavy lawsuits and appeals with Henry, Bishop of Winchester. It would appear that the system of Roman jurisprudence had, at this time (1149), vanished out of England; but few faint traces of its spirit remaining among the people. He composed a work in nine books, being an abstract of the Codex and Pandects, for the use of his hearers at Oxford, many fragments of which have been discovered in later times; its title was, "Liber ex Universo Enucleato jure exceptus, et Pauperibus praestitit destinatus." This work is represented as sufficiently comprehensive to afford the means of answering all questions. It appears, indeed, to have been a very full abstract of the leading works of the day, and for a long time afterwards law-students at Oxford were called Pauperista, from the title of this work. Vacarius was not the only man who, having established a legal school at Oxford, contributed to its rise.

John of Salisbury, termed Johannes Salisburyensis, was born in Salisbury about 1120, and died Bishop of Chartres 1180. In his Policraticus he makes copious use of the Roman Law. Savigny praises him highly, remarking that law with him must have been an occupation subservient to others, and that he was probably unable to profit by any of the existing foreign works on this subject. The legal references in his letters are fewer.

Petrus Blesensis, a disciple of the above, was born at Blois, and died about 1200, as Archdeacon of London. He had studied also at Bologna.

William of Malmesbury (Gulielmus Malmesburiensis), who died 1142, was a predecessor of Vacarius.

Sylvester Geraldus (Geraldus Cambrensis) was also born 1146, in England, where he studied arts. In 1176 he proceeded to Paris to study the Roman and Canon Law, and Theology.

About this time the University of Oxford appears to have been disturbed by the disputes of the students of law and of arts; the latter complaining their faculty was neglected in favour of a science which only aimed at profit. Whatever may then have been the case it is certain that it would now be difficult to find any one who need be so innocent of law as an Oxford D.C.L.,¹ whose only exercise consists in eating a luncheon, and whose only qualification is the ability to pay very heavy fees.

¹ It may be doubted if our young but eminent international lawyer obtained his knowledge of law at Oxford.
These disputes lasted until 1209. Otho IV., being, on Philip's death, left without a rival, ascended the throne in 1209. Germany having acknowledged him as Emperor, he was crowned by Innocent III., whose support he had purchased by the most unwarrantable sacrifices of his imperial rights. The arrogance of the Pope soon, however, became past endurance, and in order to bring the question to a crisis, he withheld Tuscany and Ancona from the Pontiff, who answered by the Bann. The Emperor, on his part, now fairly took up arms against the Pope's protégé, Frederic II., King of the two Sicilies, and the German Princes, who obeyed the Pope, invested Frederic with the empire. Otho then retreated into Germany, was defeated by Philip, King of France, and fled to Saxony, where he died, in 1218, after a reign of ten years. Under Otho, in 1215, arose the court for judging heretics, known as the Holy Inquisition.

Frederic II. of Swabia, son of Henry VI., was crowned in Rome by Pope Honorius III., in the year 1220, and proved as hostile to the Apostolic See as his father and grandfather; he not only outwitted this Pontiff, but kept his successors, Gregory IX. and Innocent IV., within due bounds. Speaking of the Church, he is reported to have said, "The bloodsucker masks herself in words of honey, and sends wolves in sheep's clothing into all countries as her emissaries, not to spread the word of God, but to enslave all who are free, irritate all who are peaceful, and extort money everywhere." Gregory excommunicated him. Frederic then passed over into the East, and obtained Jerusalem rather in virtue of a treaty made with the Sultan than by force of arms, and raised himself to the dignity of King of Jerusalem. The Pope was now intimidated, and relieved him from the Bann.

By the Emperor's command, Peter de Vinea his chancellor, composed a code for Lower Italy; but immediately after, in 1234, the Pope issued another, containing utterly different principles. Frederic's wish was, doubtless, to destroy at one blow the hierarchical and feudal systems, and introduce a constitution anticipating those of the nineteenth century. He had brought the learning and wonders of the East into Italy and Germany, and was undoubtedly the most enlightened man of his age. He married Isabella, sister of Henry III. of England, as his second wife, and the splendour of his nuptial ceremony surpassed all those heard of in that age. His son Henry, who was only fifteen years, his father's junior, revolted against him, but soon returned to obedience. The Pope Gregorius IX., who had secretly maintained his old grudge against the Emperor, excommunicated him a second time (1239) as an arch-heretic. The Emperor hereupon laid aside all reserve, called the Pope the polluter of Christianity. "What said the Teacher of teachers?" wrote the Emperor. "Peace be to you. What did he leave to his disciples? Love!
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Why then, oh self-named Vicar of Christ, doest thou the reverse?" The Pope answered, "A beast rose from the sea, and opened its mouth with blasphemy against the Divine name, and directs its shafts against the tent of Heaven, and the saints who live therein, threatening to crush all with its claws and iron teeth." The Emperor answered, "Thou art the beast of whom it is written, another horse arose from the sea that was red, and he who sat thereon took peace away from the earth, thou art the dragon that has seduced the world, the Anti-Christ." During the long siege of Parma he built Victoria, which was destroyed by the contrary party, against whom the Gibellines, however, managed to hold their own. The capture of his son, Enzio, and his death in a dungeon in Bologna, the treachery of his friend, Peter de Vineis, who was suborned by the Pope to poison him by the instrumentality of a physician, pained him deeply. He died in 1250, in Firenzuola, fighting against the Saracens, dying as he had lived, a true Emperor. Seven crowns, the Imperial Roman, the regal German, and iron crown of Lombardy, together with those of Burgundy, Sicily, Sardinia, and Jerusalem, had adorned his head. He was buried in Palermo.

Conrad IV., son of Frederic, assumed the title of Emperor after his father's death, and made war against William, Count of Holland. He was elected King of the Romans in 1247, by the influence of Innocent IV., but dying in 1254, and William being put to death by the Frieslanders in 1256, the Imperial crown of Germany was fairly put up to auction, as in the time of Julian; the electors, however, could not agree among themselves as to who should be chosen Emperor, some being in favour of Richard of Cornwall, brother to Henry, King of England, who offered the largest sum, and some of Alphonso, King of Castile. Both may be said to have been elected, but neither reigned, in consequence of which there may be said to have been an interregnum until 1273, when

Rudolph, Duke of Austria, was elected Emperor in the council assembled in Lyons by Gregory X. He conquered and killed Ottokar, King of Bohemia, freed several cities in Tuscany, but was never crowned in Italy. After reigning nineteen years, he abdicated the throne of Austria in favour of his son, and was the progenitor of the family of Austria.

Adolphus of Nassau having alienated the good will of the Princes of Germany, by his covetousness, they elected Albert of Austria Emperor. Adolphus was killed in a battle near Spires, after he had reigned six years and six days.

Albrecht of Austria was declared Emperor by Boniface VIII. in 1298, and having been urged in vain to make war against Philip the handsome, King of France, was treacherously murdered by John his nephew, after a reign of ten years.

We must now revert to the great legal authorities of this century.

1 Some say this treachery arose from the Emperor having mistrusted him, others ascribe it to the Emperor's having asked him altogether.
Azo, Azzo, or Aelolinus, was a native of Bologna, and disciple of Johannes; his reputation was so great as to give rise to various apocryphal accounts of the number of his hearers. That the exclusive study of jurisprudence was much followed in his time, is, nevertheless, proved by the fact of the number of students in Bologna, having reached the incredible number of ten thousand. The excellence of his own system may in some measure be inferred from the subsequent reputation enjoyed by his pupils, Jacob Baldwin, Roffred, Accursius, Martin of Fano, Goffred of France, Jacob of Ardissone, Bernard Dorna, and John the Teuton, as well as from the fact of his being frequently employed in the public business of Bologna, while his diligence is established by the number of his works, and his love of his profession, by his never feeling well during the vacations. Savigny proves that he did not die before 1230, and exposes the error in the manner of his death, by showing the confusion of his name with that of Azo Porcherus, who was executed in 1247 for the murder of a colleague. His still existent works consists of Glosses, lectures on the Codex, summary of the same and of the Institute, Bracarda, and Questions. The first partake of the nature of an apparatus, as it is technically called, or a continuous explanation of the whole text as a work of itself. He wrote a great and small apparatus on the Digestum Vetus, which are both mentioned by Odofred, the former of which is held to be his best performance. His glosses on the Infortiatum exist, but no Apparatus, and the same may be said of the Digestum Novum; his commentary, however, on the tide De Regulis Juriis, may be looked upon as a separate work. He wrote an apparatus of the Codex, also mentioned by Odofred. Some of his lectures on the Codex were taken down by one of his own pupils, one Alexander, and subsequently published. The date of its delivery is fixed in 1229. These are remarkable, from the number of references to classic, as well as legal works. His summary of the Codex and Institutiones together, is his chief work, and although three summaries of the Codex already existed, yet they appear to have been superseded by that of Azo. His Bracarda consisting of short legal maxims, supported by passages from legal sources, have been enlarged by subsequent jurists. His Questions close the list of those works of Azo which have been preserved. His definitions and distinctions have been lost, and the following works have been erroneously attributed to him, or are without sufficient proof of authorship, Tractatus de Interesse Secundum Azonem; Summa de Usuris; Summa de Praescriptionibus; Summa de Arbitriis, are probably mere titles out of his Summa Codicis. The questions of Canon Law must be attributed to Azo de Lambertaccaiis, and the notes on the summa of Hostiensis, cannot be Azo's, as he lived before Hostiensis.

1 Dipl. N. 58; Sarti, 1, 91-103; Tirabos. St. 4, 2, 40, 155; Massuch. 2, 9, 2893; Ariel Crem. lit. 1, 89.
The Repetitio"es on passages of the decree of Gratian, are to be attributed to Azo Ramenghis, son-in-law of John Andrea; lastly, the Summary of the Decretals is doubtless from the pen of one of the two Azos, who were canonists as above mentioned.

§ 167.

Hugulinus, who comes before us frequently under the forms Ugolinus, Hugelinus, Hugo, and Ugo, was born at Bologna. He was a pupil of Johannes, consequently the contemporary of Azo; the distinguished lawyers, Rossfredus, Jacob de Ardisone, and Odofred, were among his pupils. Hugolinus was at once a Public Teacher, an Author, and a Statesman. He may be presumed to have died in 1233, leaving an only daughter, Feliciana. Many of his works have been ascribed to other authors; his Glosses, Summary of the Digestum and of the Codex, his Distinctiones, Questions, collection of controversies, and additions to Azo's summary, are undisputed, and may be recognised by an H.\(^1\) \(\text{116}\) Nicol.

Nicolaus Furiosus was a disciple of Johannes Bassianus, and was born at Cremona; his writings, whether they be taken as glosses or lectures, are marked with N.\(^2\) \(\text{116}\) Nicol.

Lanfrancus arrived in 1203 at Bologna, from his native place at Crema; he wrote upon the Canon as well as upon the Civil Law, and became, in consequence of the combination of the two branches, juris utrinque Doctor.\(^3\)

Cacciavillanus, the teacher of Rossfredus, taught in Bologna in 1199. He wrote additions to the Breviarium, marking his work with a Coz or Caza.\(^4\)

Guzizardinus's glosses are found marked Wz ant. Wz. He was born at Bologna, and took the oath of a priest there in 1156.

Albertus Papienis was born at Pavia; as his designation implies, and is mentioned in 1211; 1235 at Modena; he is said to have been the teacher of Homannus; his glosses are marked A.\(^5\) Basp.

Jacobus de Ardisone, the son of Ardiso of Verona, was a pupil of Hugolinus, and lived under the Emperor Frederick II. His reputation is founded on his work on Feudal Law, although he also wrote on the Roman Law. He wrote a summary on the title of the Codex: De Jure Principum, and another on the Liber Feudorum; he was, however, a teacher as well as an author; his mark is A.\(^6\) in order to distinguish him from his father, Jacobus de Ardisone, whose mark is \(\text{116}\) A.\(^7\) Buck.

Jacobus Columbi also wrote on the Feudal Law; little is known of him. Diplomatists suppose two persons of this name in the thirteenth century; the one a Feudalist, the other a Civilist.\(^8\)


Hugolinus lived A. D. 1233.

His works.

Nicolaus Furiosus lived.

His works.

Lanfrancus lived A.D. 1203.

His works.

Cacciavillanus lived A.D. 1199.

His works.

Guzizardinus lived A.D. 1186.

His works.

Albertus Papienis lived.

His works.

Jacobus de Ardisone lived.

His works.

Jacobus Columbi lived A.D. 1300.

His works.

Jacobus Balduni lived A.D. 1274.
which year he was chosen arbiter between the Archbishop of Ravenna and the city of Cesena. In 1213 he was sworn in as professor of the university of his native state, which de jure gave him a seat in the senate of that republic. In 1229 he became Podesta of Genoa, in which position the reformation of the law of that state was entrusted to him—a mark of confidence that created jealousy among the higher authorities, and a riot among the people, which prevented his re-election to that office. He was a pupil of Azo, but often presumed to differ from him; among his pupils we find the distinguished names Hostiensis and Jacob of Ravannis. He appears to have died in 1235, but a few years after Azo. With reference to his works but few glosses are found with his name attached to them; Savigny having examined the whole question with his usual acumen, comes to the conclusion, that his glosses were never great in number, and that his lectures were in circulation before his death; but that he never wrote any commentaries properly so called.¹

His works. The title of his Libellus Instrucionum Advocatorum, explains its own contents. His De Primo et Secundo Decreto, treats of the two degrees of the Missio in Possessionem, and went through two editions by the author. His pamphlet, De Remediis contra Sententiam, beginning with the words, "Sententiae objicitur multis modis; primo eo quod judex non sedet sed stat in pedibus vel ambulat," demonstrates the legal quibble and pedantry of the age. His De Confessionibus are by some ascribed to John Andrea, whose work begins with the same words, "Ad quorundam verborum clamationem."

Tancred was born at Bologna, and was alive in 1234. In 1226, being canon of the collegiate cathedral of his native place, he was raised to the rank of archdeacon by Honorius III. He had been a hearer of Azo; his chief study, however, appears to have been the Canon Law. His works consist of the Ordo Judiciarius, in four books, being a system of proceeding founded on the Roman Canon Law after the year 1234; the Summa de Matrimonio, or Manual of the Law of Marriage, is called by John Andrea, a well-arranged review of the four decreals; of an Apparatus of the three old collections of Decretals by way of gloss; and of the Provinciale, or list of all bishopricks in the province. Savigny² rejects the other works attributed to him on very sound grounds, as unauthenticated.

His works. Bagarottus was also a Bolognese. We have the first notice of him in 1200 as a judex, and six years later as legum doctor, and he is believed to have died in 1242. Though his instructor is unknown, Odofred is supposed to have been among his pupils.³ His works all have reference to process; that on dilatory pleas, De Precibus et Instantiis, is supposed to have been intituled

¹ Dipl. N. 73; Panz. 2, 27; Tirabos. l. c. 1, 148; Trith. f. 66; Maxuch. 2, 1, 164; Sarti; 1, 111.
² Sav. Gen. des R. R. im M.-A. 5, cap. 39, p. 120.
³ Patr. f. 15; Trith. f. 63; Dipl. N. 74; Panz. 2, 24; Sarti; 1, 107; Maxuch, 11, 1, 40.
Cavillationes; another, commencing with the words Cum periculum sit mihi, has great similarity with the preludia of Ubertus or Bonacurso. His authorship then, in respect of this work, is open to dispute; and, except the De Reprobatione Testium, all the other works are said to be falsely attributed to him.

Ubertus de Bobio (the latter being his family name) is supposed to have been born at Parma, where he was professor in 1214, and in 1237 Martin, subsequently Pope Martin IV., was numbered among his scholars; in 1245 he is mentioned as dead. He has left glosses or lectures, marked Ub. Bo., on the Digestum Vetus et Codex. 1 A book like this of Cavillationes, another De Postulationibus, and Quaestiones or Determinations.

Ubertus de Bonacurso was a scholar of Azo, and taught in his native town of Modena in 1231-6, and in 1228 in Vercelli; and wrote on Process. 2

Bernardus Dorna was a Provençal, 3 and both a pupil and friend of Azo. He appears certainly to have been living in 1240; most of his works were on the subject of Process.

Pontius, variously termed De Ilerda, Catalanus, and Hispanus, is supposed to have been born in Lerida, in Catalonia, in Spain, which at once accounts for all these epithets; he also professed law in Bologna about 1213. 4 He wrote a commentary on Johannes Arbor-Actionum.

Gratia taught in Bologna, in 1206, under the title of Magister Decretalum; 1218, he was capellanus pontificis; 1219-24, archdeacon in Bologna. He also wrote a book on Process. 5

Damasus was likewise a canonist. 6 His works consist in an Ordo Judiciorum; Bracarda, or Regulae jur. Canonicae, re-edited by Bartholomæus Brixienis; a Summa to the Collectio Prima; Quaestiones on the Decretals; and Historiae super Libro Decretorum.

Gilbertus Bremensis, who lived at the end of the twelfth century, wrote a work on Process.

Anselmus ab Orto wrote a book De Instrumento Actionum. 7

§ 149.

Carolus de Tocco, whose glosses are marked V., Va., and Var.; C., Ca., and Car., was born in Tocco, near Beneventum; Roffredus was his pupil; and he himself a judge in Salerno. 8 He glossed the Digestum Infortiatum et Novum and Codex, wrote Summaries, especially on Actions, and an Apparatus to the Lombarda.

Roffredus Epiphanius, who is often confounded with Odofredus, was born at Beneventum. Roffredus commenced his career as a public professor in Bologna; but being driven by the disturbances there to quit the university, he left in 1215 for Arezzo. In 1219 he was at Pistoja, where he assisted the Bolognese minister in the conclusion of a peace with Pistoja.
1220, he was in the employ of Frederick II. on his coronation at Rome, shortly after which, in 1220, he appears as buying a house with a tower in Beneventum for seventy-six ounces of gold. In 1227 he quitted the emperor's service for that of Pope Gregory IX.; nor does it seem that he accepted the emperor's subsequent pressing invitation to re-enter his service on his conquering Beneventum in 1241. In 1230 he is mentioned among the judices of Beneventum, and as building a church for the Dominican order there in 1233, in conjunction with his wife Truccia. That he lived until 1243 is proved by his mention of the election of Innocent IV. in that year.

With respect to his works, most of his glosses have disappeared; and Savigny thinks that many of Rogerius are attributed to him, from the similarity of the initial. He delivered very copious explanatory lectures on the first four books of the code, and Savigny insists that they are falsely ascribed to John. He delivered other lectures on the Digestum Novum. He, moreover, composed some highly useful practical works on the civil and common law.¹

_De Libellis et Ordina Judiciorum._ Libelli de Jure Canonicæ.


His work on the Canon Law is divided into twelve parts. 1. Elections and Postulations; 2. Episcopal Rights; 3. Marriage; 4. Tithes; 5. Patronage; 6. Spoliation; 7. Criminal Matters; 8. Excommunications; 9. Judges and Arbiters; 10. Appeals; 11. Execution; 12. Pardon. Of these the first seven divisions only have reached us, time having destroyed, or the writer's age or death prevented, the completion of his task.

His third practice work was intituled, _Quaestiones Sabbatinae._ These questions were fifty-four in number, and written with a view to supersede those of Pillius, hitherto used in disputations, and which he considered incomplete.

The _De Pugna_ on the judicial combats introduced by the feudal law of the Lombards, although bearing his name, has excited doubt as to whether it was written by Roffred or Carulos Beneventanus his pupil. Savigny decides in favour of the former, supposing Ka. to have been put for Ro. The little work, _De Positionibus_, Savigny ascribes to this author, and not to Odofred; nor was Odofred a Beneventan. Independently of treating De Bonorum Possessionibus, in the sixth part of his great work on Actions, he wrote this small separate work on the same subject at the desire of his friends. His _Summa Jurs_, mentioned by Johannes Andrea, is nothing else than this little pamphlet, and not a great work, as the title would imply.

¹ Trith. f. 63; Dipl. N. 82; Panz. 2, 28; Sarti, 1, 119; Guist. I. c. 1, 113-6; Step. Borg. 2, 4, 423-33; Tafur. 24, 393-7.
THE LAWYERS OF THE MIDDLE AGE.

Petrus de Vinea was a native of Capua, of obscure origin, and studied in Bologna. He became a notary and proctoruary under Friederich II. He then studied jurisprudence, and became Iudex Majoris Curia shortly before his death, which occurred in 1240. He is described as imperialis aula Protonotarius et regni Sicilia Logistota. Having fallen into disgrace with the Emperor Friederich II., whom he attempted it is said, to poison, he, with the barbarity which characterized the age, caused his eyes to be put out, and Petrus de Vinea committed suicide in prison. By imperial command he collected and arranged certain constitutions, and drew up a code at Amalfi, in 1232, which was published at St. German.

§ 150.

Accursius was born of poor peasant parents, in the neighbourhood of Florence, in 1182, and died in 1260 at the age of seventy-eight. His tomb may be seen in the church of the Franciscan Friars at Bologna, bearing the inscription Sepulcrum Accursii. This distinguished man was a pupil and afterwards a colleague of Azo's, under whom, according to the oldest authority, he began his studies at a very early period, although later writers assert that he entered upon them later in life. He was a long time a colleague not only of his old master Azo, but also of Hugoim, in conjunction with whom we find him delivering a judgment. Odofred was likewise his cotemporary, and the canonist Vicentius, a commentator on the old decretals before Gregory IX. his pupil. In 1252 he possessed the Podesta in Bologna, where none but a foreigner could hold that office. He subsequently, however, settled there, and his family attained great consideration.

Accursius was twice married. By his first wife he had Franciscus, born in 1225; by his second, Cervottus, Wilhelmus, and Cursinus, this latter born in 1254, of whom hereafter. Accursius is represented as of elegant person, and as very neat in his dress. He amassed a considerable property in Bologna, where he possessed not only a house but a beautiful country seat called Ricordina, with a very extensive estate attached to it. To this seat he retired after forty years' service, in order to pursue uninterrupted his legal labours.

In his politics he was a Gibelline; but the respect he commanded was such that on the overthrow of that party the rights of a Welf were secured to his family by a special enactment. His original works were not great in number; and it is remarked of him that he was not in the habit of prefixing his name to the works he composed. He wrote a new and enlarged edition of the John's summary of the Authentics; An Apparatus of the Authentics by his own hand, now lost; A Treatise on the Office of the Arbitrator, also lost; and isolated Questions.

1 Justhiani, p. 264; Sarti, 1, 128.
2 Vid. § 145; Dipl. N. 65; Panz. 2, 29; Mazzuch. L. c. 1, 1, 81; Sarti, 1, 236.
3 Epit. Canciani, p. 375. 4 Past. I. 13; Mechus, p. CL.; P. Villani, 2, 9; Mural. 9, 133.
Other works have been erroneously attributed to him.

Accursius may be looked upon as the great father or regenerator of the glosses, whence he was termed the advocates' idol. He appears to have revised the works of his predecessors with so much care and ability that he superseded them with the public and before the tribunals, so much so that they soon obtained an authority equal to the text itself.

He wrote his gloss on the Authentica probably in 1220. The date of his gloss on the Codex is supposed to be 1227, and that on the Institutes may be placed seven years later. His own glosses bear the mark Ac.

Diplovataccius, in his life of Accursius, lays down the following rule for understanding the glosses of Accursius; the last opinion expressed is that of the author, except, 1. when the previous opinion rests on a better foundation; 2. when the latter follows the strict rule of law, the former, equity; 3. when the latter begin with alii or quidam dicunt; 4. when marriage is favoured as the first; or, 5. the church. Savigny does not hold them in such high esteem as other and earlier authors, whose opinions are nothing short of a panegyric.

Franciscus Accursii, the eldest son of the Glossator, Accursius, was born A.D. 1225, in Bologna. The first mention of him in connexion with public business was in 1256 and in 1270, among the professors who resisted the Archdeacon in his promotions and violations.

In 1273, Edward I. of England, on his return from the Holy Land, passed through Bologna, and took Franciscus into his employ; having remained to arrange his private affairs, and close his lectures, he joined the king at Limoges, and was present at a trial before the king; subsequently he was twice sent as ambassador to France, and in 1278 to Pope Nicolaus III. In the documents, the king styled him consiliarius, familiaris, secretarius, and his clericus.

Wood, in his history of the University of Oxford, says he had an aula there, but it does not appear that he read publicly.

In 1274 he was banished, in his absence, by the Welfs; in 1281 he obtained a reversal of his decree of banishment, by renouncing his party, and swearing allegiance to Pope Martin IV., and left England to resume his chair at Bologna, and in 1284 was reinstated in the consilium of the city, with a royal present of 400 marks, and a yearly pension of 40 marks, promising fidelity to the king's interest on the continent. He enjoyed his pension only twelve years, and died 1298, aged sixty-three.

His fame rests rather on his reputation as a lecturer, and the high position he occupied, than on his literary labours; the only work that can safely be attributed to him being a Casus of the Digestum Novum. He made some additions to his father's glosses;

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1 Dipl. N. 108; Sarti, r, 176; Panz. 2, 29; P. Villani, 10; Mazzuch. L. c. 1, 89; Alidosi D. B. 73; Dom. Bandini.
2 Dante Inf. 15, 110, sees him walking in hell among the Sodomites; vid. et Sav. l. c. 6, 286.
it may also, with some ground of probability, be admitted that he composed Consilia or judgments, which are not collected. Two speeches of his exist, one addressed to the Pope, in his character as English Ambassador. All other works attributed to him are of doubtful authenticity.

Cervottus Accursii, the eldest son of the first Accursius, by the second marriage, was born in 1240. He took his degree at a very early age at the desire of his father, who wished to see him Doctor before his death.  

In 1265 he was Podesta in Riva Tramontis, but was deposed: in 1273 he was called to the legal school in Padua, with a salary of 500 lire. His obstinate attachment to his political party caused the confiscation of his property and his banishment.

His glosses to his father's works are said to have been so faulty, as to have passed into a proverb, as a false law was termed a Lex Galgiana. Many ill-natured remarks and hard judgments may, however, be attributed to the unpopularity of the party to which he belonged.

Wilhelmus Accursii, the third son of the first Accursius, was born in 1246. He, like his brother, was made a Doctor very young, not only of Civil but of Canon Law; he also shared the banishment of his party in 1274. In 1297, his decree of banishment and confiscation was reversed on the petition of his pupils, and he returned to read the Digestum Novum, but returned into the Pope's service in a year, and died in 1314; his children, as was the case with his brothers', all died before him.

His works consist of Casus longi Institutionum, which Savigny ascribes to him, as also Casus to the Codex; certain questions are likewise attributed to him.

Curinus Accursii, the youngest son of Accursius the Elder, was born in 1254, and the only one of the sons of Accursius who did not become Doctor; he died in exile in 1288. His four sons were afterwards recalled, and lived on their estates in Ricardino; after this we read nothing of the family.

Vivianus Tusceius, son of Oseppus Tusceus, headed the popular party against the nobility at Bologna in 1228, and his name appears in the lists of Societatis Tuscorum in 1259. He wrote Casus on the Digestum Vetus, Infortiatum, and Codex.

Wilhelmus Panzonius, Panzonis, Pansonis, and Panthonius, was a distinguished advocate in Bologna, and held office in his native city in 1241-8 and 1252. All that can be attributed to him with certainty, are Casus on the Novels.

§ 151.

Odofredus, the similarity of whose name with that of others, has led to his being often confused with his contemporaries. The

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1 Dipl. N. 65; Sarri, 1, 185.
2 Dipl. N. 105; Sarri, 1, 188; Fansa, 3, 39; Mazzuch. 1, 191; S. Salvini, 4, 10, N. 107.
3 Sarri, 1, 191.
4 Dipl. N. 115; Sarri, 1, 160.
5 Dipl. N. 114; Sarri, 1, 158.
6 Tribh. f. 65; Dipl. N. 98; Fansa, 3, 35; Guiza. 1. c. 2, 108-112.
year of his birth is unknown, but his birthplace was doubtless Bologna. In 1228 we meet with him as the father of a family. As a student he appears to have heard Jacobus Babhini, Hugo- lianus, Bagarotus, Bobredus, and Accursius, whose son Franciscus was his rival; that his reputation was great, may be inferred from the fact of his receiving 400 lire for a single lecture.

In 1238 he appears as assessor to the Podestà of Padua, and from 1244 to 1254 he was employed by the Republic of Bologna, in concluding treaties of peace and alliance, and as late as 1257 he acted as chief arbiter between Bologna and Ravenna; his monument fixes his decease at the end of the year 1265.

His works consist principally, 1st, of notes of lectures taken down by his hearers; for they are not glosses by his own hand, as some suppose, and the merit of them is considerably obscured by the barbarous language in which they are composed, a drawback which had become too general in this age. He wrote by authority, 2nd, a Gloss on the Peace of Constantia, and 3rd, additions to Azo's Summary; 4th, a Summary of the Feudal Law; 5th, a work which is lost, intituled De Ordine Jurisdictoria, and Opus Artis Notarii, and 6th, Summa de Libellis, De Libellis Formandis, intended as a continuation of the first; it is divided into five parts, Praetorian Actions, Interdicts, Edicts, and Civil Actions; 7th, De Percussionibus; 8th, De Positionibus; 9th, De Confessionibus; 10th, a collection of forty-four Questions; 11th, many Consilia or Judgments; and 12th, some small pamphlets of doubtful authenticity. The distinctive mark adopted by Odofred was usually Odo.

Albertus Odofredi, son of the above, did not inherit his father’s reputation as an author and professor of jurisprudence, but surpassed him by far in the reputation he gained in public life; he belonged to the Geremeei party, and appears from the multitude of masses he left in his will dated 1299, to have been an excellent catholic and a great sinner. We find one Consilium signed conjointly by himself and Dynus.1

Homobonus, a native of Cremona, was the master of the famous Hostiensis, and himself a disciple of Albertus Papiensis; Homobonus must, consequently, have lived after 1240.

He made a few very important additions to the Glosses of Accursius, to be found in the Digestum Vetus and the Codex; but there is hardly sufficient evidence to prove that the lectures on the Codex ascribed to him ever existed.2

§ 152.

Guido de Suzaria was probably born in a place of that name in the Mantuan territory. His master is not known, but two of his disciples, Jacob of Arena, and Guido of Bassio, commonly termed the Archdeacon, became famous.3

In 1260 he contracted with the city of Modena to settle and

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1 Cacciatupus de Mod. Stud.; Dipl. N. 150; Sarti, 7, 170.
2 Dipl. N. 92; Sarti, 1, 159.
3 Thriv. t. 65; Dipl. N. 97; Paniz. 2, 41; Sarti, 8, 666; Tirabos, l. c. 5, 55-60.
teach there for the term of his natural life, in consideration of receiving the citizenship and 2350 lire, of which he was to invest 1230 in land. It seems that he soon violated this contract, for he appears in 1234 as professor in Padua, in 1266 in Bologna in the same capacity, and two years later as a counsellor of Charles of Anjou; nor did he hesitate to declare the execution of Conradin unjust. In 1270 he contracted to remain for ever in Rezzio, with an exception in favour of obeying the summons of King Charles or the city of Mantua, but not to teach there on pain of forfeiture of the estates granted him. In 1279 he contracted with the students, for the sum of 300 lire, to lecture on the Digestum Novum for a year only, but remained until his death, shortly before 1292.

Although but a poor canonist, he had a narrow escape of a bishopric, which he was declared incompetent to fill, not from ignorance of Canon Law, but because he had entered into a contract for a marriage. Guido is accused of having been too careful of his dress for the grave station he occupied; a fault of which literati and lawyers are rarely accused.

He also added to the glosses of Accursius, especially in the Digestum Vetus, termed Supplicationes, Questiones, and Reprobationes. Some lectures of his taken down by his hearers exist in the library of the Vatican.

He wrote a little work on Process, and Questiones Statutarum; and another, De Testibus, to be found at Lucca.1

Other works are attributed to him, but without foundation.

Jacobus de Arena was a native of Parma, and discipile of Guido, and teacher of Richard Malamura and Oddarius. He taught in Padua simultaneously with Guido before 1266, and was probably still there in 1286. In 1296 he read in Naples, also at the same time in Sienna and Rezzio.2

He wrote a Commentarium in Universum Jus Civile; Lecture super Codice; Distinctiones sive Repetitiones super Codice; Lectura, Tit. I., De Legatis; Lectura, Tit. I., De Actionibus; De Positionibus; De Præceptis Judicium; De Excussionibus Bonorum; De Sequestrationibus; De Expensis in Judicio Factis; De Commissonariis; De Questionibus; De Bannitiis; Disputatimae; De Executoribus ult. volunt; Summa Juris Food; De Fratibus simul Viventibus; De Exceptionibus; De Excussionibus; De Opposit Compossitis; De Cassione Actionum.

This last is supposed, however, to be by some anonymous Lombard.

§ 153.

Andreas de Barulo,3 of the city Barletta, is also termed Banelius, his hereditary family name. Before 1250, under Friederich II., he was fiscal advocate in Naples; in 1269, pro-

1 Biblia Tel. Cod. N. 419.  
2 Trith. f. 76; Dipl. N. 105; Sarti, 5, 240; Pana. 2, 50; Marxuch. 1, 2, 990; Gerson, f. 351; Asof. 1, 237.  
3 Dipl. N. 110; Sarti, 5, 193; Guist. l. c. 1, 101.
fessor there, in which capacity he received fifty, and latterly sixty-eight and seventy-three ounces of gold; in 1269 he appears as counsellor of Charles I. We have his own testimony for his being in Bologna during the minority of Dr. Cervottus. Lastly, he was of the number of the Neapolitan professors in 1291.

Two of his works remain: his lectures on the Tres Libri, taken down from oral delivery; and Commentaria in Leges Longobardorum, being a recapitulation, in thirty-nine titles, of the variations of the Lombard from the Roman Law.

The following are likewise attributed to him:—On the ordinary Legal Works; on the Authenticum; on the Laws of the King of Naples; certain Responsum; a record on the customary Law of Bari, according to the order of the Roman legal sources. Martinus Syllimani was born in Bologna; his master is not known, but the distinguished John Andrea studied under him. He obtained the honour of his doctor’s degree in 1278.

In politics he was a Gibelline, and was one of the few excepted from the general decree of banishment against this party in 1280, which was done at the request of his hearers; in consequence he retained his professorship, but withdrew from state affairs. He died in 1306, leaving a valuable collection of books to his sons, and was buried in the Dominican Monastery at Bologna.

He wrote, as appears from his will, glosses on the Digestum Vetus and Codex, which are distinguishable by the mark Sy; he also delivered lectures on the legal literature. He was author of a work on Feudal Law, and some Responsum.

Pacipoverus appears in the public business of the Republic in 1249 and 1252, and it is to be remarked that he bears the title of Utriusque Juris Doctor—a title not common, at least at this period. He is, however, the first who attempted a Concordia Utriusque Juris. This work which was divided, as Sarti informs us, according to the order of the Roman legal works—the first containing the Institutiones, the second the Infortiatum, and so on to the remainder—deserves attention from its originality.

With respect to the questions attributed to him, it would rather appear that he has been confounded with the later author of the same name, Vianesius Pacipoverus.

Lambertinus de Ramponibus was of an old and noble family, and designated in old charters as Miles et Doctor, which degree he obtained in 1269. He belonged to the Welf party. He died in 1304.

He is said to have glossed the Digest and Code, but none of his glosses have reached us. His Quaestiones are alike involved in obscurity. His works De Consiliis Habendis is printed among the works of Bartolus, who made additions to it, Albertus being erroneously put for Lambertus; it is of minor importance, and treats

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1 Dipl. N. 1, 30; Sarti, 1, 224.
2 Trith. I. 78; Dipl. N. 128; Sarti, 1, 213.
of the drawing up of sentences by a judge who would have the advice of men versed in the legal science.

§ 154.

Nicholauus Materellus was born in Modena, where he first taught in 1279 as Doctor, and was chosen the next year a member of the committee of the town council (sapientes). He was then a long time professor in Padua, in 1295 he is mentioned in a promotio. In 1306-7 we find a formal request made, that he should be allowed to terminate his professorship in Modena, but in 1308-10 we find him again in Padua. Though a learned man, he is said to have been a bad writer; he attempted an abbreviation of Odofred's works termed Decisa. Pastrengo mentions Repe- titiones, Questions, and a Consilium, which latter they drew up conjointly. A Vatican MS. is said to contain tractatus varius of this author.

Vincentius Bellovacensis was a learned Dominican, who died after 1260.

He spent the greater part of his life in the compilation of an Encyclopaedia of all sciences in four parts, Speculum Doctrinale, Naturale, Historale, et Morale, the three first of which he completed. Of the first, the eighth Book treats of Politics, and then of Civil Law, with historical extracts from Pomponius; the ninth contains Actions, Process, and Criminal Process; the tenth and eleventh, Individual Crimes, as an attempt to systematize the entire legal service. The sources of Roman Law and passages in the Pandects to which he refers, are—Summa Azois (Azo); Libellus de Actionibus; Placitum de Varietate Actionum (abridged); Pontius in li. de Arbore Actionum; Liber qui Dictur Instrumentum Juris. Of the Canon law, Gratianus; Hugo (Huguccius) Guleimius; Frater Raimundus; Summa Fratris; Summa de Paenitentia; Summa Damasi; Summa Juris or Jur. Can., or de Casibus, or de Cas. Dec. or Juris Decretalium.

Accursius Reginus, a native of Reggio, is here mentioned on account of his being so often confused with the celebrated glossator of the same name. His native town granted him an annual salary of 25 lire in 1226, a sum raised to 200 lire in 1273. He professed law at a later period in Padua, during which time he is mentioned as having held many disputationes.

Bartolomaeus de Capua having filled many public offices in his native place, obtained the honour of the Doctorate in 1278. Laws of King Robert, of 1318, 1322, 1324, 1326, are found signed by him. His death took place in 1328 at Naples, where he was also buried. His father had been engaged in state affairs, conjointly with the office of a professor before him.

1 F. 52. 2 Trith. f. 85; Dipl. N. 145; Tirabos. l. c. 3, 185. 3 Castil. 1, 212, & 2, 818. 4 Pans. 2, 42; Tirabos. l. c. 1, 79-81; Col. St. des Pad. 5, 45. 5 Dipl. N. 130; Pans. 2, 48; Guist. 1, 203; Origilia St. di Nap. 1, 159-61, 216.
His works.

His *Singularia Doctorum in Utriusque Jura* consist of one hundred and five legal questions, shortly and neatly decided from the sources of Roman Law.

Thirty-five of his *Questiones* will be found printed as an appendix to the *Grammatici Aditiones ad Constituciones Regni*.

His glosses to the constitutions of the kings of Naples, are printed in the margin thereof, together with those of other authors.

HUGOLINUM FONTANA was of Parma, and is mentioned in charters in 1285-8. Santi doubts his very existence, and Pancirolus confuses him with Hugo de Porta. Ravennate, and Hugolinus Presbyteri. Many very old authors cite his *Questiones and Distinctiones*.

§ 155.

Dinus was also called Mugellanus, from his birthplace, Mugello, near Florence: his father's name was Jacob, his family name Rossonis.

He obtained the degree of Doctor about 1278, and was appointed the next year professor in Pistoja, with a salary of 200 Pisan lire; in 1284 he was in Bologna. On the application of the students, two professors of jurisprudence were henceforward to be constantly paid by the state, and excused from public offices. Dinus was the first that held this newly created appointment; he, moreover, received 100 lire for reading *Extraordinaria* on the *Infinitium* and *Novum*. He was cotemporary with Francis Accursius, with whom he is said to have lived in continual scientific antagonism.

He does not appear to have accepted the offer of the Neapolitan Government, to teach at a salary of one hundred pieces of gold; he, however, read on the Digestum Vetus, in the papal high school at Rome, and so great were his hopes of a cardinal's hat, that his wife entered a cloister to remove every impediment. He is supposed to have assisted Pope Boniface VIII. in his *Sextus* about that time; this must, however, probably be understood of a small appendix in the *Regula Juris*, consisting almost exclusively of paragraphs taken from the Roman Law, for he is said to have been no Canonist.

His reputation must have been very considerable, since Diplomata eius tells us of a Local Law in Verona, which conferred legal authority on his opinion, when two glosses of Accursius's contradicted each other. This was done in a former age, with reference to Papinian's opinion.

His explanation of the legal sources consist in the following:—

On the *Digestum Vetus, Infortiatum, and Novum*, beginning, *Solut Matr.; Quemadmodum; Dictio ista quanadmodum quando ponitur similitudinem*; and *Quae sit Materia*.

Additiones to Accursius's *Sol. Matr. L.* in prima Glossa; Ut circa bane materiam plene legeat quis possit notari; Lectura

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1 Dipl. N. 136; Aff. Mem. 1, 934.
2 Pastr. f. 25; Thir. f. 75; Dipl. N. 125; Panz. 8, 45; Sarti, 3, 933, P. Villani, 2, 14.
in Dig. Now. begins Io. Domini natus loco praemio permisimus
am regulario vol ordinario. Of these the Additioes alone have
been preserved. Another work, or the Glossa Centurie of
Accius, beginning An ille qui saltit, &c. still exist.

He wrote two treatises De Actionibus, the first a commentary
on that title of the Institutes, the second on Arbor Actionum
Dni. Johannis; De Regulis Juris in Sexto, of this mention has
already been made above; De Praescriptionibus, a treatise on
prescription of all periods; De Successionibus ab Intestato; De
Primo et Secundo Decreto; De Interesse; De Ordine Judiciarii,
a metrical work in hexameter and pentameter, a conceit of the
age; De Præsumptionibus; Modus Arguendi; Consilia; Qua-
tiones and Disputationes; Singularia, consisting of 275 isolated
sentences, by Dinus and Rainerius conjointly.

§ 156.

Johannes de Deo was born in the town of Silves, in Algarbia
of Portugal; he is also termed Hispanus, or a native of the
Spanish Peninsula. He graduated as doctor in Bologna, and
styles himself Doctor Decretorum, and Utrosque Juris Professor,
and also speaks of himself as a priest; certain it is that he studied
under the Canonist Zoen. He appears as an arbitrator in Bologna
in 1247, and was subsequently named judge in a matter by the
Pope; he seems also to have had a canonicate in Lisbon.

In his works composed by himself he enumerates, among others,
Civilitates, in the preface to which he mentions thirteen former
treatises consisting of the works of Ubertus de Bobio, rewritten
and inscribed ad honorem summae trinitatis. The date of this work
may be 1246 or 1256. The Liber Judicium, which contains a list
of five former treatises in its preface, is a treatise on Process,
and is divided into four books; Of the Judge; Of the Plaintiff;
Of the Defendant; Of the Advocates and other accessory
persons. 1246 is stated as its date. Comm. in Joannis Arborum
Actionum consists of the works of John Bassianus with some
original glosses. 1

The following are canonical:

Breviariurn Decretorum, Decretum Abbreviatum is a mere
short table of contents of the Decree, many distinctions being
jumped; Flos Decretorum, a work very similar to the Breviariurn,
but somewhat more extended, each distinction being separate;
Casus Decretalium cum Canonicibus Concordantes or Concordatic, are
casus to the Decretals, with parallels from the Decree; Tabula
Decreti; Tabula Decretorum; Notabilia cum summis super titulis
Decretalium et Decretorum.

The first is an alphabetical index of the contents of the Decree.
The second is the same applied to the Decretals.
The third was probably a composition of the other two.

1 Trith. f. 65; Dipl. N. 93; Anton, Bib. Hosp. 2, 64-5; Cave de Sac. Eccl. 632;
Oudin de Ibd. 5, 177-91; Saris, 2, 449.
Apparatus super toto Corpore Decretorum, of this work we have no information; Continuation of Huguccio, who left his work unfinished, in this nine former treatises are mentioned; Liber Dispensationum; Liber Pastoralis is a treatise on the disqualification to hold clerical posts of honour; in this eleven former treatises are mentioned; Liber Parnitentialis (De Cautela Simplicitum Sacerdotum) is a treatise on Confession and Absolution in seven books; Liber Distinctionum; Arbor Versificata, a metrical explanation of the genealogical tree and degrees of kindred; Liber Questionum; Chronic, a tempore B. Petri bucusque qualiter subcruerit ecclesia inter Turvines et Procellas; Liber Opinionem; Casus Legum Canonizatarum, que inter Canones continentur et unde habeant orum in Libris Legalibus, is a list of those parts of Gratian's decree which have been taken from the Roman Law; Summa de Sponsalibus; Lecturae super Decretalibus; Commentum super Novellis Decretalium; Catalogus Hereticorum; Liber Primarius de varii Juris Pontifici Materiis; Summa Moralis; De Abusibus contra Canones.

Martius de Fano, A. D. 1270.

Martius De Fano was of the family Cassaro, the noblest of Fano. He studied under Azo, and taught in his native place in 1229. He was chosen rector and professor of the school of Arezzo in 1255, at which time new statutes were drawn up; in the same year, however, he appears as a professor in Modena. He was Podesta of a town in Romagna, and in 1260-62 twice held this office in Genoa; soon after which he became a Dominican monk, and was living as such in 1270-72. 1

Few of his writings have survived, they are as follow:—

System of Process; Book of Actions, with Forms and Glosses; De Jure Emphyteutico, consisting of twenty-eight or twenty-nine Questions; De Modo Studiendi; De Homagis; De Elementis; De Dotis Restitutis; De Ordine Judiciorum; De Arbitris; De Restitutibus; De Exceptionibus Impedentibus Litis Ingressum; De Testamentis; De Brachio; s. Auxilio implorandum per Judicem Ecclesiasticum a Judice Sacerdari; Notabilia super Decreto; Notabilia super Authent.

The following are attributed to the author:—

De Positionibus, De Conditione Humani Generis, De Probanda, Negativa, and On Legal Literature.

Johannes Blancoso, A. D. 1250.

Johannes De Blancoso was born at Blanot, near Macon, and lived in Bologna in the middle of the thirteenth century; probably as a teacher of jurisprudence.

He left a Commentary on the title De Actionibus of the Institutes, with Formula, published 1256 at Bologna. The preface informs us that the work was composed at the suggestion of two clerks at Hereford, Archdeacon W. de Conflens and the Chancellor Mag. J. de Altacuria. John Andrea says it contains no

1 Dipl. N. 84; Sardi, 1, 152; Tirabos, l. c. 1, 50-2.
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canon law. The other works attributed to him are either spurious, or at least doubtful:—De Ordine Judiciorum; Varia Questiones; De Feudis et Homagiiis.¹

Neapos De Monte Albano was born in Montauban, in the south of France, to judge from his citations of the juridical customs of many towns there. We may also conclude, from his quoting Azo, Tancred, and Accursius, and none more recent, that he lived in the middle of the thirteenth century. In confirmation, the date 1258 or 1268 is found in one of the formulae of his writings. ²

He wrote Exceptiones, beginning Cum plures libelli. He calls this work a Libellus Fugitivus, as he therein instructs the defendant how to avoid the charges of the plaintiff. Another work, De Testibus, is also attributed to him; it is, however, merely, a particular title excerpted from a larger work, and printed separately.

Bonaguida, according to his own testimony, and that of John Andrea, was born in Arezzo, and was professor of canon law there.³ He also practised there during the pontificate of Innocent IV.

Most of his works, which treat of Canon Law and Procedure, are for the most part extant.

Summa Introductoria Advocatorum is a system of procedure in five books. Gemma s. Margarita, a somewhat confused work, is divided into three parts, contains practical legal questions under certain titles and rubrics. This work is also a literary repertorium of practical questions, chiefly respecting canon law and process, with citations from the Roman Law. De Dispensionibus; and a few unconnected Glosses on the Decretals.

Johannes Fasolus was probably born about 1223, and belonged to a distinguished family in Pisa, one of the streets of which town still bears his name. We find it variously written, Fasolus, Faziolus, Fayelus, Faezolus, Fagelus, Fazolus, and Fazeolus.⁴ He studied under Benedictus Beneventanus, in Bologna. In 1244 he is recorded as a judex, in 1270 as president of the Republic, in which year he was twice sent from Naples as ambassador to the Emperor Charles I. He is mentioned in records in 1277 and 1280; but Savigny thinks he was not the author of the oration attributed to him, on the occasion of a great misfortune which befell the Republic in 1284. He taught only in his native city, and died 1286.

He wrote De Causis Summariiis, the oldest work on summary process, at the request of a certain Justinianus de Civitate Castelli, which is reproduced by Durantis in the second edition of his Speculum. The Summa de Feudis is now utterly lost.

Ægidius Fuscararius sprang from a distinguished Bolognese

¹ Trith. f. 65; Dipl. N. 118; Panz. 2, 38; Sarti, 1, 159.
² Dipl. N. 113.
³ Trith. f. 64; Dipl. N. 103; Panz. 3, 11.
⁴ Sarti, 168-9; Memoire, 174-9 and 180.
family, and obtained great personal consideration as a teacher and author in 1252 and 1269, and as a statesman in the service of Charles I. in 1267; and is remarkable for being the first lay professor of canon law. He died in 1289 in Bologna, a special law being passed to allow the attendants at his funeral to wear scarlet robes, a distinction until then confined to knights and professors of the Roman Law.\(^1\)

His works consist, according to the testimony of Durantis, and of John Andrea, of *De Ordine Judiciario*, being a system of procedure in spiritual tribunals, in five parts, and which, from one of its formulæ, may be concluded to have been composed in 1260; of a Commentary on the Decretals, according to John Andrea; of *Questiones*, according to Trithemius and John Andrea; of *Consilia*, and of a work *De Officio Tabellionis*, according to Trithemius.

§ 158.

**Albertus Galleottus** was born in Parma,\(^2\) and taught in Padua and Modena. In 1251 he was sent on a mission by his paternal city to Bologna, and other towns, to solicit military aid against Cremona; passed by Naples, 1255; but in 1272 we again find him in Parma.

His works consist of the following:—

*Summula Questionum*, sometimes called *Margarita*, an original work, containing decisions on juridical points and instruction to advocates, and is largely used by Durantis. As printed, the book contains forty-two Treatises on Procedure and the Theory of Law. He often quotes Azo, Accursius, and other authors. *Reportiones super Codice*, according to Johannes Andrea; *De Consilis Habendi*, according to Diplovataccius; *Declaraciones Judiciorum*, according to Trithemius; but the works *De Pignoribus* and *De Positionibus* are erroneously attributed to him.

**Salathiel** was born at Bologna, and was admitted a notary of that city in 1237. In 1249 he was styled Antianus Populi Doctor Notariz. In 1274, however, he was banished with the Lambertazzi party, and is mentioned as dead in 1275.

Sarti mentions his *Summa artis Notariæ*,\(^3\) which contains as foundation a treatise on Actions and Formulæ. The remainder fills thirty-two folio sides; the dates 1248, 1251, 1253, are to be found in it. *Summa de Libellis Formandis*, a manuscript copy of which is in the possession of the Right Hon. Dr. de Savigny, who states it has much similarity with one of Odofred, whose disciple he was, and who was the real author of this work.

**Rolandinus Passagerii** is sometimes called Rolandus Rudolphini Floretæ, from his father and grandmother. He was a

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\(^1\) *Trith. f. 63*; *Dipl. N.* 116; Sarti, *i*, 366.
\(^2\) *Trith. f. 65*; *Dipl. N.* 104; *Panz.* 2, 39: Sarti, *i*, 117.
\(^3\) Sarti, *i*, 423.
sworn notary in 1234, and afterwards a teacher probably of the Institutes, as many other notaries were, but never LL.D. About this time a college of notaries was formed under the presidency of six consuls, who were at a later period reduced to one who was termed proconsul, a dignity held by Rolandinus. He belonged to the church party, and rose to great consideration in Bologna. He died in 1300 at an advanced age.\(^1\)

His chief work was the *Summa artis Notariae*, in ten chapters. 1 to 7 contains Contracts; 8, Wills; 9, Judicial Procedure; 10, treats of Copies and Renewals of Deeds. *Tractatis de Notulis* contains an introduction to the seven first chapters of the above. *Aurora* is a commentary or apparatus of his Summa, but is incomplete. *De Officio Tabellionatus in Villis vel Castris*, the title whereof explains sufficiently its contents.

§ 159.

**Petrus de Unzola**, born at Unzola, in Bologna,\(^2\) became a notary 1275, taught this profession in 1301, and died eleven years later; he wrote exclusively on this peculiar branch.

*Aurora Novissima* is a continuation of the uncompleted work of Rolandinus, and both were henceforth termed *Meridiana*.

He wrote also additions to Rolandinus' *Aurora*, and a Commentary on his *Tractatus de Notulis*. His *De Judiciis* is a Commentary on the ninth chapter of the *Summa* of that author, and a continuation of his own *Aurora Novissima*. He, moreover, composed additions to Rolandinus' *Flos Ultimarum Voluntatum*.

**Rolandinus de Romancis** sprang from an old noble family of Bologna, and accompanied Lambertinus, Podesta of Brescia, as assessor, in 1255; he belonged to the Church party, and died 1284.

His works were, *De Ordine Maleficiorum*; additions to the *Summula* of Galeotto; *Statuta*; *Determinationes et Quaestiones*; *Summa Feudorum*.\(^3\)

**Petrus Boaterius** was a disciple of Francis Accursii, also a notary 1298, and a professor of that science, which he taught in 1306-7 at the request of the students.\(^4\)

He commented on Rolandinus, and wrote, *Practica Judiciorum*; *Super Arte Dictaminis*—on Style—on which subject he also delivered lectures. *Aurora s. de Concessionibus*, which Savigny calls an obscure title.

**Albertus de Gaudino** was born in Crema or Cremona, and lived in the latter part of the thirteenth century, as he says Johannes de Anguisola was his teacher; Dinus, and perhaps F.\(^5\)

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\(^1\) Dipl. N. 119; Sardi, 1, 424; Fant. 6, 301.
\(^2\) Dipl. N. 121; Sardi, 1, 420; Fant. 1, 265.
\(^3\) Dipl. N. 108; Trith. f. 65; Sardi, 1, 198.
\(^4\) Dipl. N. 131; Mazzuch. 3, 3, 107; Fant. 2, 203.
Accursii and Jacobus de Arena were his cotemporaries. He was an assessor in Perugia, Florence, Siena, and Bologna. He wrote De Malificis, a work on criminal law and procedure, of which his successors made liberal usage; 1 Quæstiones Statutorum.

Thomas de Piperata lived A.D. 1281.

His works.

Pierre Defontaines.

His works.

Pierre Defontaines was in office under Ludwig, and his only work was one entitled, Le Conseil que Pierre Defontaines donna à son Ami. Savigny speaks disparagingly of it, describing it as an abortive attempt to make Roman Law practical in France, by combining it with the French coutumes. 2

§ 160.

DURANTIS or DURANTI, and not Durandus or Durandi, is the proper orthography of the name of this nobleman, who was born in the diocese of Beziers, in Languedoc, A.D. 1237; his Christian name was William, and his instructor Bernardus Parmensis, and Hostiensis was probably his superior on the bench.

He obtained the dignity of Doctor in Bologna, and professed Canon Law in Modena. At a very early age he is mentioned as Auditor Patalii, Subdiaconus, and Papal Chaplain, with which offices he combined several benefices in the French Church. In 1274 he accompanied Gregory X. to the Council of Lyons, and assisted him in drawing up many of the papal laws; but at a later period he filled more important offices; among others, the spiritual and temporal Viceregency in Patrimonio Scit. Petri, under Nicholas III. In 1278 he was deputed to take possession of the district of Bologna and Romagna, and received homage for the Pope, and Martin IV. made him spiritual vicar of these newly-acquired provinces, and two years later secular Vicery, in which he was confirmed by the succeeding Pope Honorius IV. It is asserted that he also led the troops, but he himself denies this, asserting that it would have been highly uncanonical in him to have done so.

A small papal town having been destroyed in the wars of the time, he built another for the inhabitant, and christened it after himself. In 1285 he was elected to the vacant see of Mende, in Languedoc, and confirmed in the following year, notwithstanding which he remained long in Rome, and first took possession in 1291. In 1295 Boniface VIII. made him Archbishop of Ravenna, but he refused the dignity, probably because he preferred the extensive and rich administration of Romagna, and of the Mark or Manor of Ancona; he was, however, driven from it

1 Dipl. N. 126; Panz. 3, 47; Arisi Crem. Lit. 1, 155.
2 Dipl. N. 120; Sarti, 1, 205.
3 Dupin Not. Hist. 8, 38-40.
the next year by the Gibelline party, which proved too strong for
him, and died in Rome on the 1st Nov. 1296.¹

Many fables relating to his life Savigny shews by dates to be
releaborable to his brother's son, who followed him in the bishopric
of Mende.

His Speculum Judiciale contains a system of practice of Civil
and Spiritual Law, in a more extended form than had hitherto
been attempted. The dedication to Ottobonus Fresco (Hadrian
V.) contains a list of canonists and writers on actions. It is
divided into books, parts, titles, and rubrics, each of which con-
tains an entire subject. The first book, in four parts, treats of
those persons actively employed in suits; the second, of the pro-
ceedings in civil suits; the third is short, and treats of criminal
suits; the fourth, in four, treats of practical application of law,
actions, forms of libels, &c., and follows the order of the Decretals.

The chief value of this book is the practical learning of its com-
piler; this word is used advisedly, as it contains extracts consisting
of the entire works of some authors, and the additions by Johannes
Andrea and Baldus. It, however, sadly requires a good index.
There were two editions of this work. The Repertorium Aureum
or Breviarium is his second work, and is an attempt to digest
the opinions of the Canonists; in it the Speculum is cited, whence
it is concluded that it was composed between the two editions
of that work, and, it may be implied, before the author became a
bishop.

His Comm. in Concilium Lugdunense, or Commentary on the
Council of Lyons, held 1274 by Gregory X., may be looked upon
as a commentary on part of the Sextus, as these councils were at
a later period introduced into that portion of the Decretals, in the
composition of which Durantis himself, we have seen, was engaged.
The Speculum Legatorum treats of the duties of Legate; it was
written before the Speculum, and adopted into the second edition.
His Rationale Divinorum Officiorum was composed in 1273; it is
not a legal work. The Pontificale treats of the ecclesiastical func-
tions of Bishops. Savigny holds the following for unauthentic or
doubtful—Breviarium, Glossarum Juris Canonici; De Origine
Jurisdictionum et Legibus (Durandi de St. Porciano); De Pre-
scriptionibus is a mere except from the Speculum; a commentary
on the Decree and Decretals; Statuta Procleri sui Minutientis
Instructione; De Modis Celebrandi Concilii is by his nephew.

§ 161.

Jacobus de Ravanis was born at Revigny aux Vaches, near
Bar le Duc, on the frontier of Lothringen, about 1210. He
studied under Baldwin. In 1274 he taught in Toulouse, but
afterwards entered the papal service, and became Bishop of Ver-
dun in 1290, but died six years afterwards in Rome, whither

¹ Patr. f. 35; Trith. f. 72; Dipl. N. 121; Sarti, 1, 386; Panz. 3, 14.
he had gone on account of his disputes with the citizens. He is said to have introduced the dialectic method into the schools.\footnote{Caccialupus Trith. f. 77; Dipl. 106; Panz. 2, 34.}

According to Caccialupus and Trithemius, he wrote a commentary, if indeed they be not only lectures, on the Digest and Codex, and an apparatus to the Institutes; a \textit{Dictionarium}, according to Albericus—called by Diplovatacius a Law Dictionary; \textit{Summa de Feudis}, according to Baldus and Alvarottus; \textit{Depositionibus}, according to John Andrea; \textit{Disputationes Variae}, according to Trithemius.

\textbf{RAIMUNDUS LULLUS}, a great reformer of the law, was born on the Island of Majorca in 1234 or 1236. In his youth he was a reprobate, but was reclaimed by a beautiful woman, to whom he had long paid his addresses without success, suddenly exposing her bosom which had been destroyed by a cancer. Like most repellant sinners, he now in a moment became a saint, and occupied himself in voluntary missions with a view to convert infidels, but died in 1315 on his passage from Africa, in consequence of the ill-treatment he received there on one of these occasions at a very advanced age. This notable man, though not usually mentioned, says Savigny, among lawyers, did much for their science. His drawback consisted in certain theories which he entertained. One he termed the \textit{ars magna}, by which all scientific questions were to be acquired in a semi-mechanical manner, and upon this he wrote most copiously.

He wrote the \textit{Ars Juris Particularis}, beginning with the words \textit{Quoniam vita hominis brevis} ; and as a set-off to it, his \textit{Ars Utriusque Juris s. Ars Brevis de Inventione Mediorum Juris Civilis}, beginning \textit{Quoniam scientia Juris est valde prolixa} ; in which he recommends every jurist to prove each law by his \textit{ars magna}, and repudiate it silently if he find its basis false. To enable his scholars the better to comprehend his art, he divided the period into three degrees of comparison, allowing three months to the first, two to the second, and one to the third, half of which time they were to apply to theory, the other half to practice.\footnote{Vit. R. Lulli 1721-1742 ; Wadding Ser. An. Ord. Min. Car. Bouil. Ep. in Vit. R. L.} \textit{Liber Principiorum} was his second, and \textit{Ars de Fure} his third; his fourth was \textit{Opusculum Novae Logicae ad Scientiam Juris et Medicina}.

He also wrote on Canon Law—\textit{Liber de Jure Canonico}, and \textit{Ars Juris Arborea}.

Previously to passing to another century, it will be well to review the emperors which reigned during the fourteenth century.

\S\ 162.

\textbf{HENRY VI. (VII.),} Count of Luxemburg, was now chosen emperor by the electors of Mainz and Treves; it having been...
resolved, in order to satisfy the Church, by the lay electors, that
the nominee of the majority of clerical electors should be em-
peror. The House of Hapsburg was already too strong for
the purposes of the lay electors, who cared little who was chosen,
so long as he was powerless; nevertheless this emperor was
one of the most worthy men upon whose head the German
crown had hitherto fallen. He received the royal silver crown
of Germany at Renze, and later the iron crown of Lombardy,
and the imperial golden crown at Pavia, where Frederic II. had
lost it. He also caused his son John to be raised to the Boh-
emian kingdom. On his arrival in Italy the Gibellines all flocked
to his standard; and the poet Danzé, in his address De Monar-
chia, addressed him as the famous restorer of right and destroyer
of popedom and tyranny, and a worthy follower of Frederic II.
He drove from Milan, Guido della Torre, chief of the Welfs.
At Milan the terrified Welfs opened their gates to him; but the
chief of the party, Guido della Torre, having ventured to oppose
him was crushed, and the Riconto then declared representative.
He then drove the Welfs in like manner from the other cities of
Lombardy; and on his arrival at Rome he was crowned in the
Lateran Basilica by the cardinals, who had been appointed for this
purpose by the Pope, the family of Orsini, then at the head
of the Welf faction, having barricaded the suburbs, and success-
fully prevented him from passing to be crowned in the Vatican.
Having received assistance and troops, he issued the imperial
Bann against Robert, King of Naples, but restored him at the re-
quest of the Pope; after many skirmishes, the Welfs compelled Henry
to quit Rome, where he had declared war against the Florentines,
who banished all belonging to the Gibelline faction from their
city, among whom was the renowned poet Dante Alighieri.
While Henry at Siena was preparing to invade the kingdom of
Naples, having obliged the Florentines to submit to him, he
was poisoned at Buonconvento Siena, by a monk, in the year
1313, having reigned five years.

Ludwig of Bavaria. The electors were now again unable
to come to a settlement, some being in favour of Ludwig of
Bavaria, others of Frederick of Hapsburg. Ludwig, however,
having conquered Frederick, and taken him and his brother
prisoners, they were reconciled, and he was ultimately elected
at Frankfort; and on his arrival at Rome he was crowned in the
Lateran Basilica. John the XXII. was dead, and his successor
Benedict XII. relieved him from the Bann of excommunication
which his predecessor had fulminated against him. In spite of
all his concessions he, however, was unable to satisfy the un-
reasonable demands of Pope Clement VI., who ultimately excom-
municated him; but the emperor treated this with disregard and
contempt.

In this age the Hanseatic league was in its glory, and suppressed
the piracy of the Baltic, and cleared Holstein of noble robbers, and reduced Sweden to obedience. The famous battle of Cressy, too, took place in this reign, and Edward the Black Prince was made Vicar of the Netherlands by Ludwig. This period was also remarkable for the three plagues:—The black death, which is said to have arisen in China, and wasted all Europe, passing through Germany in 1248-49, the plague of grasshoppers, and of the Flagellants, men and women, termed Beghards and Beguims, laymen, who with white hats and crosses drove all to repentance amidst the horrors of the plague; and ultimately raised a general persecution of the Jews, under the pretence that all these plagues arose from their having polluted the sacred elements. The Church, however, was opposed to this nuisance, as it feared it might lead to a reform of its abuses. Ludwig was appointed governor in Italy; but the princes, afraid of the Pope and bribed by the house of Luxemburg, elected another emperor at Rome. During this banquet of perjury, the imperial standard fell into the Rhine and was lost; the people murmured. Ludwig survived this only a year, having died at Munich (Frederick’s-feld) in a bear hunt, 1347, after a reign of nearly thirty-three years, not without the suspicion of having been poisoned by his opponent.

Charles V. (V.) was son of John of Bohemia, of the Luxemburg family, and adopted the name of Charles from the king of France, having been christened Wenzel. He had all the types of the Slavonic race to which he belonged, being short, dark, and thick-set, with high cheek-bones. The great benefits his policy conferred on his country obtained for him the name of Father of Bohemia, and his unworthy, nay grovelling servility to the Pope, the surname of Stepfather of Germany. His policy was directed to destroy the alliance between France and Rome; but whether he succeeded or not could have been of no consequence to him, as he neglected all claim on Italy, and held himself alike aloof from the Welf and Gibelline party. His real object was to raise and accumulate money at the expense of the Empire, by selling every privilege the Germans possessed in Italy to the Pope, the Viscontis, and other local chiefs of districts or towns. Aware of the doubt that could be cast on his election, he bribed the Pope by any concession he might require to crown him, which was done by commission under the hardest conditions, as Pope Innocent VI. was living at that time at Avignon, whence the Emperor conducted Urban V., a Frenchman by birth, in 1367 to Rome, re-established him on the papal throne against the Republican party, and took that opportunity of "haggling

1 Menzel Ges. der Deut. cap. 292.
2 The Emperor Mahmoud gilt on the sword of Mahommed, kept in the Mosh of Job, and until then never used but for inventiture. On getting up the side of a vessel of war, this valuable relic fell into the Golden Horn, and has never since been found.
disgracefully”¹ for the price of the last of the imperial rights. In order to secure the succession in his family, as against the house of Hapsburg, it suited his purpose to reconstitute the former electors, and publish the golden bull of the Pope, excluding all other subsequent participators. He, however, before his death, acted contrary to experience by dividing his lands among his children, and against the golden bull by purchasing the succession for his son from the electors for 100,000 florins. Apart from what must be detestable in his character, it must be admitted that Charles IV. was the most learned man of his age, and did more for the advance of science and learning than any emperor since Charles the Great. He reigned thirty-three years.

§ 163.

The first German University was founded in Prague, on the 6th April 1348, by Charles IV., on the model of that of Paris. This gave rise to the foundation of a like University at Vienna, 1365, by the Hapsburgers, and in 1386 at Heidelberg, by the Count Palatine. The spiritual princes, not to be behindhand, founded Universities at Cologne 1388, Erfurt 1392, and at Würzburg 1403. Menzel,² without giving his authority, describes the constitution of these Universities precisely according to the model of Bologna, whereas Savigny³ states, the German Universities were formed after that of Paris, and probably the greater weight is to be attached to his opinion, especially as respects those founded by spiritual persons. The University of Vienna, too, at the present day, bears decidedly this type, but Heidelberg far less so. We find that the “spiritual power was cunning enough to people these Universities with her creatures, and to erect Universities in spiritual districts, as the mere nurseries of Ultramontanism, nor was it long ere Germany was deluged by the sophists of Rome, who preached the grossest popery under the name of Philosophy.”

We may, therefore, conclude with Savigny, from Menzel’s own shewing, the circumstances of the age, the persons of the founders, and the politics of the Emperor, that these were originally Universitates Literarum Magistrorum, and not Scholarum.

Menzel, after describing a constitution similar in all respects to that of Bologna, tells us that the Instruction was divided into four Facultates, whereof the three first, Theologia, Jurisprudentia, and Medicina, were termed Scientiae, and the masters therein Doctores, the fourth comprising Grammar, Rhetoric, Dialectics, Mathematics, Physics, Metaphysics, and Morals, termed generally Artes Liberales, whereof the masters were denominated Magistri Liberalium Artium, but arts have since been raised to the rank of a science, and the masters thereof are now called Philosophiae Doctores. In England and France the old terms have been preserved,

¹ Menzel, Ges. der Deut. cap. 301. ² Ges. der Deut. 303. ³ Vid. ant. § Univ.
and we find the expressions, Master of Arts, and Maitres des Arts, a title still preserved in the diplomas of Germany, although the title Doctor of Philosophy is superadded.

§ 164. Wenzel having become Emperor, thanks to his father's having bribed and packed the Electoral College, soon distinguished himself by his indolence, drunkenness, and cruelty; the first of these vices was agreeable to the Electoral Princes, as it left the government of the empire in their hands, his other vices were thus looked upon as his own and his people's concern. He instituted persecutions of the Jews, and took that opportunity of confiscating their property to his own use, and then declared all claims that Jews had on Christians null and void. At length, however, his brother Sigismund, finding his absurdities were ruining his family, surprised and confined him; he, however, escaped and was restored, but never left Bohemia. He died in 1418, and was superseded six years before by his brother, Sigismund, in 1412, becoming Emperor.

§ 165. In the beginning of the fourteenth century, the science of Jurisprudence began to decline, the former boldness of style and clearness, formerly shewn in exhibiting the logic of the science, gradually failed, and every branch of literature, to be tainted with the study of theology.

The fifteenth century was as little an age of law as the preceding one; poetry and prose usurped its place under Dante, Petrarch, Boccaccio, and other literary men. The individual freedom of the Italian cities had been practically reduced to a dead letter, and monopolies of teaching and learning arose in the place of free instruction. The professorships were confined in Bologna, the most renowned of all legal universities, first to natives of that city, and afterwards to the members of certain families. Students were, moreover, forbidden to study at foreign universities, of which we have the first example in the thirteenth century in Naples, which Galeazzo Visconti of Milan, followed in 1362, with respect to Pavia. In addition to this step, and when the system of paying professors by the Government was introduced, the system of assigning the subject on which he should read also obtained a footing, and these subjects were often arbitrarily changed, without reference to the aptitude of the teacher for that particular subject. The Disputationes in academies and the practice of the courts were the only means by which the science of law was prevented from falling into utter decay. The theoretical works consisted principally of commentaries on the sources of the science, and of these a great number are extant. In the fifteenth century

1 Ch. Mur. 16, 406.
printing began to be applied to the works of jurists of the preceding as well as of the existing age, and at this time supposi-
tious cases termed *questiones*, gave way to the *consilia* or actual cases decided before competent tribunals, which are instructive from the great learning they exhibited. As the renown in his pro-
fession had formerly led to the highest places in the State in which the particular jurist lived, so it still led to his being sought after to draw up Consilia, or judgments, in particular and important cases; nay, even between Emperors and Popes, Popes and opposition Pontiffs.

§ 166.

Petrus de Bellapertica was born at Lucenay, near Ville-
neuve, in Bourbon; he studied under Jacob de Ravenis, and
taught with great success both in Toulouse and Orleans. On his
way to Rome, in 1300, he read a publicum in Bologna. At a
later period of his life he was advanced to high ecclesiastical
honours, was Dean of the Cathedral at Paris, and Bishop of
Auxerre, in 1308; at the same time he was, moreover, keeper of
the seals, and afterwards chancellor of France. He died 1308,
it is said by a visitation from Heaven, for having advised the king
to remove the head of St. Louis. He was buried in the Cathedral
of Notre Dame at Paris.

A continuous lecture by him on the Codex is extant, but mere
single Repetitiones on the other legal sources, viz., thirteen on the
Digestum Novum, five on the Digestum Vetus, and a com-
mentary and thirty-six single Repetitiones on the Codex. A com-
mentary on the Institutes, consisting of extended Repetitiones,
especially on the fourth book, *Questiones aureae; Brocarda; De
Missiones in Possessionem; Consilia et Singularia; and De Feudis.*

Wilhelmus de Cuneo, Savigny determines in favour of his
being a Frenchman of Provence. He studied in Bologna, was
long professor in Toulouse and Orleans, and ultimately obtained a
mitre. He died in the great plague of 1348. Cynus was his co-
temporary, and Bertrand, who afterwards became a cardinal, his
colleague.

His commentaries on the *Digestum Vetus* and *Codex*, of which
the latter still exists, is highly praised by Diplovataccius, and is often
quoted by Bartolus. Two other unimportant treatises of his, *De
Muneribus and De Securitate*, are still extant.

Petrus Jacobi was born at Aurillac, in Auvergne, and pro-
fessed law in Montpellier; he is supposed to have been a disciple
of Franciscus Accursii, and to have finished his chief work in
1311, which bears the title *Practica*, and is a work upon the
libel; he advises his readers to adopt the Tuba Veritatis of Azo in

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1 Dipl. N. 150-7; Coquille Hist. du Nivernois, p. 339; Pans. L. 2, c. 34 and 46; Lebras. Hist. d'Aux 4 T. 1, p. 423; Gallia Christ. T. 7, p. 287 and 12, 313.
2 Dipl. N. 143; Forster Hist. Jur. L. 3, c. 26; Pans. L. 2, C. 60.
preference to the other works. He also wrote De Arbitris et Arbitratoribus.\(^1\)

Johannes Faber was born in the diocese of Angouleme, and his surname supposed to apply to his great diligence. He had been practising fourteen years, when he wrote his commentary on the Institutes, wherein he mentions Philippe de Valois as reigning (1328 and 1351), and Pope John XXII. as dead (1334), he cites Jacob of Ravais, and Petrus de Bellapertica, but seldom Butrigarius and Bartolus, which fixes his age with sufficient accuracy.\(^2\)

He wrote in addition, a Breviarum in Codicem. These works are remarkable for their terseness. His contention against the French jurists, who in this age had begun to use French in their legal instruction, is also curious.

Odo was born at Sens, in Champagne,\(^3\) hence termed De Sensonis and Sensonensis. Little more is known of him than that he was a professor in Paris, and that he lived in the beginning of the fourteenth century is learned from his work Summa de Judiciis Possessoribus, which is highly praised by Diplovataccius; it was written in 1310.

§ 167.

Ricardus Malumbra was born at Cremona, and was a disciple of Jacobus de Arena. He first taught in Padua between 1295 and 1310. In 1314 he was a consultore in Venice, and is mentioned there as late as 1320. He professed in Bologna, in 1319, contemporaneously with Buttrigarius, Belvisio, Rainerius, and Arisendus. In 1326 he was accused of heresy by the Pope, for supporting the justifiableness of treating with the Saracens, but in truth for his attachment to the King of Bavaria and Marquis of Este. He appears to have died at Venice in 1334, highly respected by his cotemporaries and immediate successors. On his monument he is styled a Knight and Count. He left two renowned scholars, Albericus and Andrea. He was also a great opponent of the French scholastic system of imparting legal knowledge.

His works.

His works consisted of commentaries on legal works; the best authenticated is that on the Codex. Quœstiones and Judgments are also attributed to him. Diplovataccius asserts that he received 5,000 ducats for drawing up the Venetian statutes, but it would appear he was simply a councillor on this occasion.\(^4\)

Oldradus, sometimes styled De Ponte, sometimes De Laude, from his native place Lodi, first appears in Bologna in 1302-3 as an assessor of the court; and in 1307-10 as professor in Padua. He studied under Jacobus de Arena and Dinus. He also professed in Siena, Montpellier, and Perugia. He then quitted this

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\(^2\) Dipl. N. 159.
\(^3\) Dipl. N. 127; Sarti, 2, 265.
\(^4\) Dipl. N. 134; Panz. 2, 54; Térabowski, 5, 2, 4, 7; Foscar, Let. Ven. 5, 17-18, 41.
profession and became a papal councillor at Avignon, where he
died, 1335. Albionus; Bartolus, and Pastrengo studied under him.1

His works are chiefly expositive, and probably lectures taken
down by some of his hearers as delivered. His Questions are used
in Padua for disputations, but his 333 Consilia are the basis of his
reputation. There are also many treatises of his; among others,
one De Legitimaticine.

JACOBUS DE BELVISIO was born in 1270, in Bologna, and had
studied under F. Accursis and Dinus. In 1296-7 he read in
Bologna as Bachalarius, but his adhesion to the Gibelline party
prevented him ever obtaining the degree of doctor there; and
hence he graduated in Aix, 1207; and again the following year in
Naples, where he was appointed professor, with a salary of 300
florins. He ultimately graduated for the third time in Bologna.
He went to Padua in 1306, and obtained at Siena the banishment of
his colleague Oldradas, on account of his political opinions. In
1308 he read publicly again in Perugia, where he obtained the
citizenship, and 200 florins salary; but in 1309 we find him again
in Bologna; in 1313 in Naples; in 1316 in Perugia; whence,
after a residence of five years, he returned to Bologna in 1321,
was received among the Geremei, with all his family, and occupied
the highest offices in the State. He was one of Bartolus's
teachers and examiners, and died in 1335.2

His writings consist in a Commentary on the Authenticum. He
states in his preface that he possesses the unglossed Novels, and
adds the same at the end of his work; neither of which, however,
is to be found in the only edition of his works, nor in the existing
MS. Among other things, he treats of the retrospective opera-
tion of laws. Savigny thinks it was written in the later part of his
life, in Bologna, in 1325, since a questio is to be found there which
was publicly discussed in that university. He wrote a Commentary
on the Book of Feuds before 1310. A Practica Criminalis, con-
sisting of two parts; a bill of indictment in a case of Injuria, with
a diffuse Commentary and a Theory on Criminal Process; but that
on Civil Suits is attributable to another hand. Questiones Dispu-
tationes are for the most part to be found in his Commentary to
the Authenticum. Solutiones Contrariorum et Brocardorum Insolu-
torum a Glossatore is an unimportant addition to the Gloss. Of
De Excommunicatione there are many editions, but the treatise De
Prima et Secundo Decreto is erroneously attributed to him.

JACOBUS BUTTRIGARIUS was born of a Bolognese family, in
1274. It is not known where he studied; but he was a notary
in 1293, and doctor in 1309, in possession of a salaried situation.
He conferred the degree of doctor on Bartolus, and died in
the great plague in 1348.3

1 Dipl. N. 141; Ibid. 2, 5, 52; Ibid. 51, 3, 4, 5.
2 Dipl. N. 135; Sarri, 3, 2, 722-4; Fant. Scr. Bol. 2, 44 and 60.
3 Dipl. N. 135; Sarri, 3, 37-31; Fant. 3, 330-8; Mazzuch. 2, 3, 1911-2.
His works.

His writings are exegetical, and consist in a _Lectura in Digestum Vetus, Lectura in Codicem_, on the title _De Actionibus_ of the Institutes, _Quæstiones_, and _Disputationes_, and certain other smaller pamphlets.

§ 168.

CINUS, otherwise called Guito, Guittone, and diminutively Guittoncinus, was born at Pistoja, in 1270; his family name is Sinibuldi. Personally very little is known of this author, but that he studied under Dinus, whom he often mentions with respect, also Lambertinus de Ramonibus, and it is not improbable also F. Accursii, he studied under Lambertinus, whom he chose his _promoter_, he became licentiate, between 1290 and 1304; and it is not clear why he did not proceed in degree of doctor, but we may infer that he went about this time to France.

Tuscany was dismembered by civil discord, and the two parties, Neri and the Bianchi, the ultra and moderate or Gibelline Wels, increased the confusion. On the return of the Neri to Pistoja, Cinus was an assessor of the Civil Court, and mentions incidentally these for his political controversies, which ultimately caused him to quit Pistoja, and pass some time with the chief of the Bianchi party, Filippo Bergiolesi.

On the arrival of Henry VII. in Italy, he attached himself yet more strongly to the Gibelline party. Ludwig of Savoy made him his assessor at Rome in 1310. From this time his political opinions are broadly evidenced in his writings, by defences of the imperial rights against the Pope, and violent attacks upon the canonists, who always supported the Church party. He subsequently left Rome for Naples, and in 1312 began his Commentary on the Codex, which he finished two years later, and which does not consist in lectures. Five months later Cinus attained the degree of Doctor, the merit of his work having probably removed the political difficulties which had hitherto existed. From this time he appears to have devoted himself to the life of a professor. In 1318, he was appointed three years in Frevigi, and at the end of this period received 200 florins of gold to go to Siena (1323), where Andrew Pisanus, and Frederic Petrucius, were his colleagues. He also read in Perugia some time, where we find him, in conjunction with other professors, occupying himself in state affairs in 1326. In 1329 he received 250 florins of gold for reading the Digestum (Vetus), and 25 florins additional for the _Jus Civile_ in 1330; he received 64 lire 64 solidi for reading the title _De Actionibus_, and in the same year 175 florins for three years, to hold ordinary lectures on Civil Law, and in 1332 he received 315 florins for an extraordinary lecture on the same subject. He refused in 1334 the appointment of a gonfaloniere in Pistoja, and accepted a professorship of Roman Law in Florence in 1336; he again appears unconnected with public affairs in Pistoja. He died.
somewhat suddenly on the 24th December, leaving considerable property to his grandson, his widow, and four daughters.

Bartolus was his scholar, and John Andrea his intimate friend. Dante praises his style in the highest terms, and many of the poems of both mention their friendship for him. Petrarch, too, is said to have been one of his hearers, and his respect and affection for him is testified in many of his poems, but especially in his famous sonnet on Cinus's death. Boccaccio is also supposed by some to have attended his lectures on Canon Law, and if this be true, he was connected with the greatest men of that century, nay, of many centuries.¹

One of his avowed objects was to disseminate the new views of the French school of De Ravanis and De Bellapertica, and the more distinguished of his own school, Dinus, &c. He appears to have possessed a sound, clear understanding, differing from the traditional narrowness of the systems of his age, and which had almost entirely disappeared since Accursius, and to which his travels in foreign countries probably contributed in a considerable degree, as he quotes the statutes and the practice of the courts of different countries, to which he added great depth of reading and a considerable knowledge of classical literature; when he published his first work, he had probably not acted as a public teacher. His works have been much quoted in the eighteenth century, on account of two passages of Gaius therein mentioned.

His Lectura on the Digestum Vetus were probably held at two different times, the second mentioned by Diplovataccius, which treats of the whole work, was published later.

His De Successione ab Intestate appears in many printed collections, but his Additiones, which are not printed, are general glosses. His Consilia are also not printed.

It is curious to remark the duality of mind exhibited by this man who was honoured as a poet by Dante and Petrarch, in being able to descend for legal objects to the pure materialism of experience, and the prose of everyday life.

To conclude, it may be asserted that few have combined in so eminent a degree the dissimilar attributes of a poet and a lawyer, of fancy and fact.

§ 169.

Johannes Andrea, the natural son of Andreas and Novella, was born about 1270, in the Valley of Mugello, near Florence, at the foot of the Apennines, and brought up in Bologna, under his father, who soon after his birth took orders.

He studied the Decretals under Aegidius, and completed his grammatical studies under Bonifacius of Bergamo. He studied Theology under John of Parma, and began his Canonical Law at a very tender age, which he terminated under the Archidiaconus Guido de Baisio. He also studied Roman Law under Martinus

¹ Dipl. N. 140; Panz. 2, 58; Tiraboschi, 5, 2, 4, 14 and 17; Bini. 1, 77-84.
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Syllimani, and Richardus Malumbra. His poverty, and possibly his love of amusement, made him unwilling to assume the degree of Doctor, which, however, Guido de Baisio ultimately conferred upon him gratuitously. He is first mentioned among the professors of the Decretals in Bologna in 1302, and as a deputy of the city, to take possession of Medicina, also as professor of the Decrees. Subsequently, in 1307, he was some years a professor at Padua, where he held a public disputation, and refused to return to Bologna, whither he however went in 1309, and remained until his death, occasional missions excepted. One of these was a mission to Pope John XXII. in Avignon, on his return whence he was surprised by the Gibellines, robbed to the amount of 1285 florins, and obliged to pay 4000 more to ransom himself from prison, where he had lain eight months. The city, however, reimbursed him, and the Pope conferred a secedal estate upon him. He died in the great plague of 1348, at the age of seventy, after having been occupied forty-six years in public teaching; he was buried in the monastery of the Dominican Friars.

His fourth daughter, Novella (the other three were married to lawyers), is said to have read his lectures for him when ill, from behind a curtain, lest the students’ attention should be distracted by her beauty, and although this story is well authenticated, it is probably too like a fable to obtain credit. He left also four sons, one of whom taught simultaneously with himself. He is considered the first of the Canonists, and was renowned for his great charity; he left, notwithstanding, as far as may be implied, considerable property, but during the last twenty years of his life, affected privations and penance.¹

The friendship that existed between himself and Petrarch, is evidenced by three letters of the poet, which are extant, addressed to him.

His works consist of Novella in Decretales, which he states that he undertook with a view to compress the great mass of literature on this subject. The name was chosen to express a new compilation of glosses, as well as in memory of his mother and daughter. His Glossa in Sextum was written contemporaneously, and preferred to those of Guido de Baisio and Johannes Monarchus. At a later period he published a second edition of this, under the title Novella in Sextum, endeavouring to remedy the errors of his first work, by Additiones, and by a new edition comprehending the subsequent Clementine Institutions. The Quastiones Mercuriales are so termed, from their discussion on Wednesdays, the subject being taken alphabetically from the Regulis Juris in Sexto. The Glossa in Clementinis was written 1326. The Additiones ad Durantis Speculum was composed in 1346, two years before the author’s death, and is valuable, though it is accused of containing many plagiaries from Durantis and Òldradus. His smaller works

¹ Dipl. N. 136; Panz. 3, 19; Trab. 5, 2, 5, 3-9; Fant. 1, 246-56 and 9, 22; Mazzuch. 1, 2, 695-701; Sarti, 2, 207.
consist in a *Summa de Sponsalibus et Matrimoniiis*, which sometimes appears with the title *Summa Super Quarto Libro Decretalium*, the *Summa de Consanguinitate, s. Lectura Arboris Consanguinitatis*, is a small portion of the first work. *Qrado Judiciarius and Processus Juris* is still extant. *Summa Super II Libro Decretalium*, and *Heironymus s. vita s. Heironymi* is also extant. The other works attributed to him are by other authors.

§ 154.

*Albericus de Rosciate* was born of obscure parents, in a small village in Bergamo. He studied in Padua, under Malumbr and Oldardus, and became Doctor, though he never professed, but practised as an advocate in his native town, where he was member of a commission for the revision of the statutes. Subsequently he was in the service of the Visconti of Milan, in whose affairs he was sent to the Court of Benedict XII., at Avignon, in 1340, whence it is clear, as well as from his works, that he was a Gibelline.

At a more advanced period of life, he retired from practice to write exegetical works. The story of his banishment, mentioned by Diplovataccius, is doubtless without foundation. The last mention made of him is in 1350, when he travelled with his sons to the Jubilee at Rome. He died 1354, and was buried in the suburbs of Bergamo, in the Benedictine monastery. He enjoyed great renown as a practised author.

He wrote *three explanatory works* on the three parts of the *Digestum*, and one on the *Codex*. His *Opus Statutorum* is a collection of Questions interpreting certain passages of the Municipal Law. His *Dictionarium* is devoid of order, and contains in fact three subjects mixed together; an alphabetical Repertorium of Regulae Juris, an absolute explanatory dictionary, and what belongs properly to an index of legal sources, being an alphabetical list of certain parts of the Corpus Juris, in which certain expressions occur. Originally he had written one such for Roman and one for Canon Law, but a subsequent author combined the two, in which form we now have them. He also wrote an Italian translation of the Latin commentary of Jacopo della Lana on Dante. The style of his works somewhat agrees with that of Cinus, leaning more to practical views than the theory of the schools.

§ 155.

*Bartolus* was born in 1313, at the village of Sapoferato, in the Duchy of Umbria. His father’s name was Franciscus (Cecchus), son of a certain Bonaccursius; his mother’s name was Sancta. He had two brothers, on the one, Bonaccursius, he himself conferred the degree of Doctor. His family name is by some said to be Severi, by others Alfani; indeed, he is said to have originally borne the first, and later, 1375, the second name. Petrus of Assisi was his teacher up to his fourteenth year, when he com-

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1 Dipl. N. 1531; Sarti, 2, 253; Panz. 2, 66; Tirabos. 5, 2, 4, 20; Calvi. 4, 14.
menced the study of the law (1327-8), at Perugia, under Cinus; he also studied at Bologna, under Buttrigarius, Rainerius, Oldrus, Belvisio, and held Repetitions and Disputations even in his twentieth year. The next year he received the degree of Doctor; Buttrigarius presented him, and nine Doctors were present at his private examination, on the 17th September 1334, among whom were Belvisio, Cernitus, Rainerius, &c., of whom the first two put Questions. On the 10th of December he was promoted to the degree of Doctor by Buttrigarius.

John Calderinus, the Canonist, was the Archdeacon’s substitute in both examinations. Bartolus confined himself by no means to the study of law, but studied the liberal arts, geometry, under Guido de Perusio, as well as Hebrew; of the next five years of his life little is known, but it is supposed he retired to perfect himself before becoming a public teacher. Savigny thinks there is no truth in the story of his banishment for giving a false judgment, from the want of cotemporary corroboration, though it has escaped that author that his tender age would render the story impossible. Baldus tells us that he was next an Assessor in Todi, then in Pisa 1339, where he also taught, with a salary of 150 florins, and where he became the colleague of his old master, Rainerius. In 1343 he read at Perugia, where his reputation became so great, that students from all Italy flocked to his lecture-room; those, however, who were subsequently the most renowned, were the brothers Baldus and Angelus de Ubaldis, natives of Perugia. The town offered and conferred on him and his brother, the citizenship, with special permission, contrary to the statutes, to retain his salary.

In 1355 Charles IV. came to Pisa, and Bartolus was sent on a mission to him to obtain a charter for the university, and certain privileges for the town. The emperor not only complied with his request, but named him one of his council, and gave him and his successors the privilege of legitimating their students, and declaring them of age; he also granted him family arms. Bartolus died in 1357, in the forty-fourth year of his age, and was buried in the church of St. Francesco. Bartolus was twice married, and had two sons and four daughters; his second wife outlived him, and it is found from his will that he left them considerable property. His library, which consisted of thirty volumes of Civil and Canon Law (no very extensive library, it will be thought, for a modern advocate, since the invention of printing), and thirty-four volumes on Theology, he left to a monastery of Olevetan monks, near Perugia, whence they were stolen by a monk and brought to Naples. Savigny strives very hard to discover wherein consisted his great reputation at so early an age; but is obliged to allow that it could only be attributed to his

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1 Dipl. N. 155; Pans. 267; Timbor. 5, 2, 2, 4, 22-4.
2 Jo. P. Lancel. vid. Bart. and Mensch. 4, 78-122.
4 Or, a lion rampant, gules double queued. The Bohemian arms are the same, except that the lion is argent, and the field gules.
actual superiority in an ordinary way,¹ and not to any new discovery or method. He infers that his having, like Cinus, passed his early years as a judge before he became a professor, enabled him to make his lectures more practical, lively, and agreeable, and illustrate them with more anecdote than others. He followed the dialeotic school, but with moderation, and the Welf party with something like lukewarmness.²

His works have been published by Diplovataccius, with notes and such Consilia and Quæestiones as had hitherto not been made known, and later still in five volumes or parts. The Digest is divided into six parts, two to each division, the Codex into three, the last three books forming one part. The Novels and Institutes together form one part, and his minor works, under the title Consilia, Quæestiones, &c. Savigny considers all the passages which are questioned in the lecture of the Digestum Vetus genuine, and attributes all to him that do not bear the names of others, which are only two in number. The same remark applies to the Infortiatum.

In the Novum nothing is questioned. With respect to the Tres Libri his illness prevented him from proceeding further than the title De Periculo Eorum, 11, 34; the rest is attributed to Comes or Comtes of Perugia, with exception of De Dignit., 12, 1, 1, which he asserts to be his own. The whole commentary on the Authenticum is held by Jason and Diplovataccius to be un genuine, from the difference of style, and because he cites Gratian’s decree. The commentary on the Institutes is rejected by Diplovataccius and Jason,³ in which Savigny concurs, and attributes it to Bartholomeus from Novaria. Bartolus is here cited as an authority, and the style varies. The older editions contain two hundred and twenty-four Consilia; but a second volume, containing one hundred and seventeen, was published in the edition of 1580, consisting of Consilia of Bartolus, hitherto unpublished, with few accidental interpolations. Savigny holds both to be genuine. Eighteen Quætiones, and four additional ones of 1588, in all twenty-two, are not doubted; the Tractatus alone remain. Some of them are unimportant, others attributed to other authors. The most important of them are:

On State Policy.—De Tyrannia; Tract. Repressaliarum; De Insignis et Armis; Tract. Bannitorum; Tract. Exbannitorum; De Guelpis et Gibellinis; De Regimine Civitatis; De Statutis.

Criminal Law.—Glossa in Extravagantes, ad Reprimendum et qui sint Rebeles; De Carceribus; De Percussionibus; De Quæestionibus; De Cicatricibus. Of which the first is the most important as a gloss on the two notorious laws of Henry VII.

Private Law of Real Property.—De Fluminibus or Tyberiadis;

² Masch. 2, 1, 460; Vermiglioli Biog. Scrit. Perug. 1, 17-56 (Alfani).
³ Jason in Dig. Nov. 132; De V. O. N. 35-42; Bini. Mem. Scrit. Perug. 1, 84-100.
De Alimentis; De Arbitris; De Successione ab Intestato; De Natura Actionis et Interdictionem; De Prescriptiobus; De Substitutionibus. Of which the first is the most important, and is illustrated by figures and practical detail.

On Suits.—Ordo Judicii; Ritus Judiciorum; De Jurisdictione; De Citatione; Tract. Praesumtionum; De Procuratoribus; Tract. Testimoniorum. De Testibus; Questio inter Virginem Mariam et Diavolum. The last, though of doubtful piety, has been much praised, and often imitated. Savigny supposes it to be a species of broad farce.

Lastly, there are several extracts and commentaries of others on his works.—The Singulaires Bartoli; C. N. Placentini Argumentum Concordiantiurum Contrarietatum Dni. Bartoli Lud. 1555; Distinctiones Bart.; Repertorium Bart. aut.; A Minuccio de Pratoveteri; Apostillae Bart. de Tartagnus; Summaria Bart.; Casus Breves in Digest. Vet.

§ 156.

Rainerius de Forlivio, a. d. 1319.

Rainerius de Forlivio was born in Forti, of the knightly family of Arisendi, which belonged to the Welf party, and was banished to Ravenna, where he passed his youth. In 1319 he began to lecture, and in 1324 read on the Digestum Novum in Bologna. He was a colleague of I. de Belvisio, Buttrigarius, and Malumbra, and Bartolus’s master;¹ he read on the Infor-tiatum in 1334, in which year the university being banished or discommoded, was transferred under his guidance to Fort St. Peter. He returned the same year, and accepted a chair at Pisa, where he was the colleague of his scholar Bartolus. In 1344 he was called to Padua, with a salary of 600 ducats. In 1358 he died, and was buried in the church of St. Antonio, where his tomb and the inscription thereon may still be seen.

His works.

His writings consist in a Lectura on the Dig. Vet., delivered at Padua; a Lectura on the Infor-tiatum, delivered in Bologna in 1334; Lectura on the Digest. Nov.; a Commentary on the Codex is loosely cited by Diplovacaccius from hearsay; a Commentary on the Liber Feudorum; a number of Repetitiones.

Smaller treatises.

Of the smaller treatises, De Substitutionibus; some Consilia, found in the works of others; a Summa modi Argendi; Propositiones majores et minores and Singulaires, mixed with those of Dinus.

Franciscus de Tigrinis, a. d. 1310.

Franciscus de Tigrinis was born at Vico, in the district of Pisa, about 1310.² He was often employed in State affairs between 1333 and 1345, and is named six times in records of Antianus. He must have professed in Pisa, as Baldus studied under him. In 1345-48 he was called to Perugia as professor, and appears as a witness to the diploma of citizenship of his friend and colleague Bartolus, with whom he was often associated in drawing up Consilia. In 1355 he was called to Pisa with a salary of 200 florins; but was dismissed when the financial difficulties

¹ See ante, and Dipl. N. 146; Panz. 2, 62; Mazzucch. 1, 2, 1139; Sarti. 2, 36-8.
of the city rendered the suppression of all salaried offices necessary. His most renowned scholars were the brothers Angelus and Baldus.

Nothing but fragments of his works are extant, preserved in the works and in the Consilia of Bartolus.

Williamus de Pastrengo was a Veronese and cotemporary of Bartolus, whom he survived a long time. He was the first writer on the history of the Roman Law. Although this work is most imperfect, yet the advantages which might have been derived from it in developing the Pandects were strangely neglected. Hence Savigny argues that it requires a capacity in the age to receive and profit by a newly-discovered source of literature, independently of its presence.

Lucas de Penna, one of the least known but most remarkable lawyers who lived in the fourteenth century, was born in Civita de Penna, in Abruzzo, and the distinguished family to which he belonged was extinct only in the eighteenth century. He studied under Henricus Accozaiocus and Simon de Borsano. There can be little doubt he studied in Naples, where he attained the degree of Doctor in 1345. He appears to have confined himself to his native place, where he practised as an advocate and judge. Nor does it appear he was ever a professor, which must otherwise have been evidenced in his works, the most important of which is his Commentary on the Tres Libri of the Codex, dedicated to Cardinal Petrus s. Marisæ Novae, which he undertook at the instance of the librarian of King Robert of Naples, after that person had died in the great plague. The merit of the work consists in his endeavouring to explain the text of the sources and steering in mid-channel between the exegesis and dogmatic. He wished to see the whole Lombard Law entirely disused and abrogated, a desire probably arising from the practical difficulties in the simultaneous application of Roman and Lombard Law. There are also attributed to him, De Juris Interpretatione; Lucas de Penna in Val. Max. quem Librum ded. in Greg. P. P. (Gregory IX.); A Commentary on the Lombard Law, which only applies to him as far as regards certain notes thereto which are taken from his works.

§ 157.

Baldus de Ubaldis was born at Perusa, probably in 1327. His father Franciscus, who was a professor of medicine, and possessed several castles, had three sons, Baldus, Angelus, and Petrus, who were all bred to and attained high reputation as lawyers. This family was later termed Baldechi from this renowned man. Baldus was so precocious that he is said, as a boy, to have puzzled his master Bartolus, and to have held a Repetitio in his fifteenth year. He mentions himself three of his teachers in Roman Law, Johannes Pugliarensis, Franciscus de Tigrinis, and Bartolus, and Fredericus Petruccius, of Siena, as his instructor.

in Canon Law; whence it must be implied that he studied in Pisa as well as in Perugia. Bartolus conferred his degree upon him in 1344, whereupon he went to Bologna, and held a disputation on his way at Siena, which lasted five hours, and at which Bartolus was present.

Baldus passed his whole life as a professor, and changed frequently the places where he held appointments. Bologna, Perugia, Pisa, Florence, Perugia, Padua, Perugia, Pavia, all had the advantage of his talents in succession. In Bologna he appears to have resided from 1344 to 1347; in Perugia from 1347 to 1357. Here he appears in the service of the State, as one of the commissioners of the legal academy, as a judex and envoy; as vicar-general he also administered the affairs of the Bishop of Todi during his banishment. At this period Belforte, whom Pope Clement VI. sent for his improvement to Perugia, studied under him, and was at a later period raised to the papal dignity under the name of Gregory XI.; at the same time he was a colleague of his former master Bartolus.¹ At Pisa he resided from 1357 to 1358; at Florence, where he received the citizenship, from 1358 to 1364. In 1350 his wife bare twins, of which he naively informs his hearers. At Perugia, during 1364 and 1376, he was often employed in State affairs: on a mission to the Pope, at Bologna, in 1370, and in the administration of the war department; at Padua from 1376 to 1379, at that time under the supremacy of Francis of Carrara, Duke of Padua; at Perugia from 1379 to 1390, during which period he was often entrusted with missions. The Republic of Florence then made him an offer of employment there; but he was required and did promise to remain at Perugia. In 1389 a new contract was entered into with him for three years, which appears not to have been executed, as we find him going to Pavia in 1390, where he received 1,080 florins, and where he drew up new statutes for the city; and a special grace was passed by the university, that on conferring all degrees either Baldus, or some noted canonist of this school, should be added to the usual Promotor. He received 1,200 florins for his ordinary lectures on the Digestum Vetus. He passed with the academy, when temporarily removed to Placentia in 1398, and held lectures there in 1399, in which year he made his will, and died the next year at 73. He was buried at his own desire in the Franciscan church. He left three sons, who were all lawyers, Zenobius, Franciscus, and Bartholomæus, and a large amount of property, 15,000 ducats of which, he informs us, he gained by opinions on disputed substitutions.

Baldus's most distinguished scholars were Petrus Belforte (Gregory XI.), Petrus Ancharamus, Cardinal Zabarella, Johannes de Imola, and Paulus de Castro. Baldus appears to have been as far as Bartolus from introducing a new method; he is said to have

¹ Dipl. N. 168; Panz. 2, 70; Manni. Sig. Ant. 7, 67-83; Fabbruc. l. c. 23, 44-55; Colle, 2, 174-192.
surpassed his master in memory and subtlety, but not to have attained the same weight in the public opinion. His varied knowledge on legal subjects is remarkable; for he not only professed to be an equally good Romanist and canonist, but wrote upon both branches of law. As a public man he frequently took part in business during his professorship, especially in diplomatic missions; he was also the standing counsel of most of the chief companies of the city. He, moreover, drew up opinions, De Schismate, in favour of Urban VI. on two occasions, the first in Padua, 1378, and the second in 1380 at Rome, whither he had travelled at the Pope's request for that purpose. Urban gave him in recompense a castle, near Gabbio, of which he never could obtain possession. His former pupil, Pope Gregory, however, had given him the town of Castro with its jurisdiction; and is said to have removed the Curia from Avignon to Rome, at Baldus's suggestion. His enemies have accused him generally of giving contradictory opinions, but without being able to prove any particular case, hence the accusation is to be attributed to envy.

His exegetical works consist in a Commentary on the Dig. Vet. two parts; on the Infortiatum Novum, and the Institutes together, one part; on the Codex, inclusive of the Tres Libri, four parts.

The imperfect state in which these works were left is, however, remarkable. On the Infortiatum, the commentary begins with the first title of the thirty-fifth book, and the Dig. Nov. is still shorter, thus giving an example of the practice of the age, of confining the attention to one particular part or favourite subject, since otherwise, by taking the subjects in succession, Baldus would in the fifty-six years during which he professed, have been able to have commented upon the whole Digest. The style of his Commentary on the Institutes is less elegant than that of the former works. Baldus wrote his Commentary on the Liber Feudorum, when he had been forty-seven years a public teacher, and in this work his Casus Breves, extracted hence, are to be found. Savigny calls it his best work; he also wrote additions to Sylmanus's book on Feodal Law. The Commentary on the Pax Constantiae is a later work, as he cites the first in it. Since this period the Pax Constantiae has always been considered as a part of the Corpus Juris, though not of the Liber Feudorum.

His Lectura on the three first books of the Decretals is an exegetical work on Canon Law. His Consilia are more numerous and, in proportion to his works, more important than those of Bartolus. Diplovataccius divides them into five volumes. His larger work upon Suits consists of very comprehensive additions to the Speculum of Durantis. His system of the law of Suits, intituled Practica (Judiciaria), belongs to the category, and Savigny cannot make up his mind if it be by Tancred or Baldus. His smaller works consist of a treatise De Juris Doctoribus and De Commemoratione, now lost; of one De Pacis, often printed; of a Treatises and smaller works.

1 Mazzuch. 2, 1, 146-155; Tirabos. 5, 2, 4, 27-9; Fabroni. 1, 51-54; Bini. 133-139.
Disputatio de Viturbatius, and many others scattered in collections of tracts. The book De Statutis is not his, but his great grandson, Sigismund's.

§ 158.

Angelus de Ubaldis was the brother of Baldus, and probably only a year his junior. He studied under Franciscus de Tigrinis, Bartolus, and his brother Baldus, and became an Advocate in his twentieth year, and Doctor in his twenty-fourth (1351), when he was appointed professor in Perugia. Thus he was the colleague of Bartolus and Baldus, and remained professor from 1351 to 1384, during which time, however, he was employed in other states; in 1363-66 he was Assessor in Bologna, in 1380 Podesta in Citta di Castello (Tifernum). On disturbances taking place in Perugia in 1384, he was banished for five years to Padua, where he was immediately appointed professor. In 1386 he broke the Ban by returning to Tuscany, as Vicar of the Bishop of Arezzo, whereupon the Ban was renewed. In 1388 he professed in Florence, and probably afterwards in Rome, and lastly in Bologna, where he taught from 1391 to 1394, when the Ban was removed with an indemnity for damage. He now again entered into the business of the town during four years, when he was forbidden to leave the academy; he was, nevertheless, in Florence from 1398 to 1399. He died in 1407 in Perugia.

He wrote on the Digestum Vetus, Infortiatum, and Novum; the Codex; the Tres Libri, usually found among the works of his brother Baldus; and on the Authenticum. His Consilia are 405 in number, according to the Lyons edition of 1532. He wrote also treatises on Legal Doctrine, Disputations, Repetitions, single and in larger collections.

Petrus de Ubaldis, the youngest brother of Baldus, read Canon Law at Perugia, and was consistory advocate some time at Rome, but returned to teach in his paternal city. Many works of his are in print.

Although many descendants of this family are mentioned, yet there are none who arrived at any great distinction. Hugelus de Periglis was the grandson of Angelus. Baldus de Periglis was a son of Angelus, and Baldus, Novellus, Bartolinius, lived all soon after this period, and were all Perugians, hence also termed De Perusio, it being a common practice of the age to name persons after their birthplace, instead of by their family name, whence much confusion has arisen.

Before entering on the lawyers of the fifteenth century, it will be well to glance at the history of the country in which they lived, as was done at the beginning of the present age.

§ 159.

Ruprecht, Duke of Bavaria. Although the indifference of

1 Dipl. N. 172; Panz. 1, 71; Massuch. 2, i, 104; Timbres. 5, 5, 4, 30.
2 Bini. 103; Collis, 2, 192; Vermiglioli, 1, 95.
3 Dipl. N. 169 & 207; Massuch. 2, i, 104; Bini. 138-300; Vermiglioli, 1, 93.
4 Menzel Ges. des Deut. cap. 314.
Wenzel was agreeable to the electors, as leaving them entire power, they at length became ashamed of their Emperor, cited him to Oberlahnstein to account for his misdeeds, and solemnly deposed him in default of appearance. The college, however, split, and while a part elected the Count Palatine Ruprecht Emperor, others of the electors chose the Welf, Friedrich of Brunswick, who on his return from Frankfort was, however, murdered in Fritzlar by the people of the Archbishop John of Mainz, thus leaving Ruprecht undisputed Emperor. The Bohemians even rose against Wenzel, but were soon after disposed to come to terms with him, as he left the people to govern themselves, and practised his mad freaks alone in his castle at Prague.

Ruprecht having obtained the support of Leopold the Proud of Austria, determined to effect what Wenzel had neglected—a journey to Rome. Leopold was taken prisoner in an encounter with the Visconti Giovanni Galeazzo, Duke of Milan, was obliged to retire, and was condemned to remain powerless. He reigned nine years and two months, and was outlawed by Wenzel.

Sigismund of Hungary, Wenzel’s brother, and Iodocus of Moravia, his cousin, then divided the votes of the Electoral College. Sigismund, however, was successful, and Iodocus dying, Sigismund entered upon the government. “As Wenzel,” says Menzel, “was a slave of Bacchus, so was Sigismund of Venus.” He now turned his attention to settling the great schism in the Church. To this end he was present in person at the Council of Constance, where the heresies of John Huss and John Wickliff were condemned by 3 patriarchs, 33 cardinals, 47 archbishops, 145 bishops, 124 abbots, 1800 priests, 750 doctors, and many monks. Gregory and Benedict only sent their legates, but John XXIII. appeared in person, and astonished the pious peasants of Arlsberg by the terrible imprecations he gave vent to when his carriage was overturned in the snow. One hundred and fifty thousand persons assembled at this congress, among whom were 700 prostitutes, about one-fifth of the whole, “whom,” says Menzel, “neither priest nor layman could do without in those days.” In addition to these there were 346 players, jugglers, and mountebanks; the first of whom were brought by the English clergy to perform scenes from holy writ, which gave rise to the first theatres in Germany.

The election of Martin V. put an end to the schism which had disturbed Europe for so many years. Huss died at the stake for having taught — 1st, that the sacrament was to be administered in both kinds to laymen as well as priests; 2nd, that an unworthy minister could administer no sacrament; 3rd, that the Holy Ghost pervaded the congregation, and not the order of priests only; 4th, that every pious layman who felt a call was fit to preach and teach without ordination; 5th, that no Roman bishop had power over foreign nations. In those days these were hetero-

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1 Ibid. cap. 324-5.  
2 Ibid. cap. 329.
dox and damnable doctrines, and perhaps not less so in the present. He is reported to have foretold Luther's victory before his death:—"To-day," he said, "you roast a goose, but in a hundred years a swan will come whom you will not be able to kill."

Sigismund having continued a long religious war against the Bohemians, at last went to Italy, concluded a truce with the Duke of Milan, and having remained some time at Siena and Rome, occupied with wantonness, at length persuaded the Pope, Eugenius IV., to crown him at Rome, in 1433; another person placed the crown on his head while the Pope slept, who when he awoke kicked it aright with his foot. After this disgraceful ceremony, the Emperor returned to Germany, when Bohemia was again in a state of revolt. He reigned twenty-seven years.

**Albrecht II. of Austria.**

After the death of Sigismund, in 1439, his father-in-law obtained all the Luxemburg lands, Moravia, Silesia, Launitz, Hungary, and Bohemia, in right of his wife Isabella, and was elected Emperor; hence the proverb _Tu felix Austria nube_, alluding to the aggrandizement of that house by marriage. He endeavoured to subdue the Bohemians and Moravians, who had risen in rebellion, and to stay the incursions of the Poles, and to drive Amurats out of Hungary; in which attempt he was deserted by his army. He reigned only two years.

**Friedrich III. of Austria, 1440.** This prince was of a most peaceful disposition, and desirous of eradicating the seeds of discord from the minds of his subjects. He received the imperial crown in Rome, together with Eleanor of Portugal, his wife, from the hands of Nicholas V., who entertained him with the greatest magnificence, as did all the other Italian princes. After some time he again returned to Rome from religious motives, was received there by Paul II. in the year 1469, and succeeded in obtaining the legal resignation of the Popedom by Amadus of Savoy, called Felix V., he having been raised to that dignity by the schismatic of Basilia. This prince, in spite of his notorious incapacity, reigned fifty-three years and five days over Germany.

**Maximilian I. of Austria, 1493.** was created King of the Romans during the life of his father. He entered Burgundy with a powerful army, where he married Maria, only daughter of Duke Charles, by right of whom he succeeded to this dukedom and to that of Flanders. After the death of King Matthias, he aspired to the kingdom of Hungary, and defeated Alteveral. He was, however, shortly afterwards compelled by his adversaries to abandon this kingdom in favour of Ladislaus. He fought for some time against the Swiss, and being called into Italy by Ludovico, Duke of Milan, he took the people of Pisa under his protection, and compelled the army of the Florentine Republic to raise the siege of Florence; but having in vain besieged the port of Livorno and Leghorn, he recrossed the mountains. He returned a second time into Italy against the Venetians, and laid siege to Padua,
which he failed in taking. His son Philip died in the flower of his age, having married Jane, only daughter of Ferdinand King of Spain, and secured by this alliance the succession of these extensive dominions to the house of Austria.

Let us now revert to the biography and works of the most distinguished lawyers who flourished in the fifteenth century.

§ 160.

Bartholomæus de Saliceto sprang from an old Bolognese family, which derived its name from the Villa Saliceto, four miles from Bologna. He is mentioned as professor in Bologna in 1363-4-5-70, when he was dismissed to make room for younger men by Anglicus, cardinal-legate of Urban V. He then taught in Padua four years, and wrote his ninth book of Commentaries to the Codex in 1373. He subsequently returned to his native city, where he is mentioned among the professors, and in public business, in 1389; in this year he was, however, detected in a conspiracy to deliver the city to Giovanni Galeazzo Visconti; his life was spared, but he evaded from shame, upon which a sentence of banishment and confiscation issued against him. In Ferrara he was a member of the school then lately established there, and was recalled to Bologna with others, but was again banished in the next year, and lived in a monastery of Dominicans at Padua, where he finished his commentary on the Codex in 1400, and taught there in 1403. He returned to his native city, where he appears regularly in the list of professors until his death in 1412. His will and codicil are still preserved. Fulgosius, Alvarottus, Petrus de Ancharuna, and Zaberralia, studied under him.

His Commentary on the Codex is a complete work, though written at different times, and is not a collection of lectures; it occupied him twenty-seven years, and, as we have seen, he began with the ninth book. His Commentary on the Digestum Vetus contains only the second half thereof, and was probably a lecture, not a work. Of his Consilia, one is only preserved upon the schism under Urban VI. Of his Repetitioes, many are to be found in general collections, so his Tretise de Moria. The other works attributed to him are not his own.

Raphael Fulgosius was born in 1367, of an old and distinguished family of Placenza, and studied under Bartholomæus de Saliceto, in Bologna, and Castellionus. In 1389 he was already a professor in Pavia, and went with the university ten years later to Placenza. In 1407 he was appointed professor in Padua, and retained there by the Venetian Government, by an increase of salary when invited to Parma. He appeared at the Council of Constantia, and on his return was often consulted on the state affairs of Venice. He died in Padua in 1427, at the age of sixty. He was supposed to have been the inventor of some new method, which, however, does not appear from his works; it, however, does ap-

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1 Fant. 7, 272; Colle, 2, 127.
2 Poggioli, 1, 22-35.
3 Dipl. N. 183; Panz. 2, 78; Tirabos. 5, 2, 4, 36-8.
4 Tirabos. 6, 2, 4, 4; Panz. 2, 82-31; Dipl. N. 205.
pear that he held opinions differing from those of the glosses, which
gave rise to the error.

He commented upon the Codex in two parts, in the form of a
regular work, not of a lecture. He also wrote a Commentary on
the Digestum Vetus, which is not known to Diplovataceius. The
old collection of Consilia contains 243, often signed jointly by him-
self and Castellioneus.

§ 161.

JOHANNES DE IMOLA belonged to a distinguished family, De
Nicolitis, of the city Imola. He studied in Bologna, under Fran-
ciscus, Ramponus, and Johannes de Lignano, and graduated in
1397 in utroque jure, and soon after received an ordinary pro-
fessorship of Canon Law under a dispensation, not being the
grandson of a citizen born. In 1402 he was a professor in
Ferrara, and in 1406 ordinary professor of the Decretals in Padua.
In 1416 and 1422 he was in Bologna, where he lost six hundred
volumes on his house being burned, and received a gratuity to enable
him to replace them. In 1430 he taught again in Padua, on an increased salary, and died in Bologna 1436. Marionus,
Socinus, Tartagnus, Ludovicus, Romanus, Angelus, and Aretinus
studied under him.

His works.

He wrote an Exegesis on the Civil Law, and his Commentaries on
the Digestum Infortiatum and Novum are still extant in several
old editions. He likewise wrote an Exegesis of the Canon Law, the
three first books of the Decretals, the Clementines, and Sextus; some
Consilia; and smaller works, De Appellationibus, and Repetitiones.

PAULUS DE CASTRO was born of humble parents in Castro, and
studied under Baldus, in Perugia, and Castellioneus. He took his
Doctor’s degree in Avignon, and commenced his teaching there.
In 1390 he was professor in Siena, and again in Avignon in 1394
till 1412; lastly, he professed until his death in Padua, where he
received 800 ducats. During some time he was Auditor of the
Archbishop of Florence, Cardinal Zabarella, in Rome, and his
Vicar-General, by special papal permission, at Florence, as a mar-
rried man, when he revised the statutes. Johannes de Imola was
his colleague at Bologna; he probably also professed at Perugia.
He died, according to the best authorities, on the 20th July 1441.
Cæpola, Tartagnus, and Mincuccius were among his most noted
scholars. He stood far higher in respect to conscientiousness
than almost any man hitherto in his profession, and often impressed
the advantage of it upon his hearers. His son and descendants
also followed the same profession.

His works. His works were so highly prized, that it became a proverb, Quon
non habet Paulum de Castro, tunicum vendat et emat. His
Exegesis are nothing more than lectures on the three Digesta and
Codex. The first are very complete, not so the second. Some
Consilia in three parts by him are also extant.

1 Dipl. N. 222. 2 Panz. 2, 88; Fant. 4, 237-7. 3 Dipl. N. 223; Panz. 2, 89; Tirabos. 6, 2, 4, 10.
ANTONIUS DE MINCUCCIUS was born in 1380 at Pratovecchio, in Tuscany, his father's name being Marc, and that of his family Mincuccis, whence he is usually called De Pratovetere.\(^1\) He began his studies in his native city, and came to Florence to study languages and philosophy. Florianus de St. Petro, in Bologna, and Paulus de Castro were his instructors in law. He first appeared in public life in a council at Pisa in 1409, and justified the deposition of the Emperor Wenzel, whence we imply that he was opposed to the imperial party. In 1410 he obtained a professorship in Bologna, which, with some interruptions, continued until he obtained his Doctor's degree. He was well received by the Emperor Sigismund, who had summoned him to the council of Constance, and honoured him with the dignity of Count, and the title of Councillor. He read in Bologna in 1419-20. In 1424 he became Doctor of the Roman Law in Bologna, in his forty-fourth year, and completed the text of the Feodal Law four years later, and in 1431 was employed in revising the University statutes of Florence, whereby the jurisdiction of the University was considerably extended, and salaried professors forbidden fees. He received a splendid house from Cosmo de Medici, to whose party he belonged. In the mean time he had professed at Padua and Siena, attended the council at Basle, and was employed in the business of the Emperor and King of Naples, and the Republic of Vienna, against the Pope. In 1438 he professed in Bologna, and became Doctor of Canon Law in his fifty-eighth year, and received first 550 florins, and then 1200 florins for life, with leave to choose his subject, and appears to have remained there until his death, which was melancholy; two of his sons having committed a murder, his whole family was banished the city, at the advanced age of eighty-eight years. He appears, from being a Gibelline, to have become a Welf. Franciscus Areinus was at once his scholar and friend.

He is supposed to have written a Commentary on the Infortiatum, indeed on the three Digesta, but they must be very scarce, as Savigny has not seen them. His Consilia are printed with those of other authors. His Tractatus Quattarum is probably a systematic treatise on the Lex Falcidia. The Repertorium Bartoli he explains by saying how difficult it is to become acquainted with the Corpus Juris; that as Bartolus was the best guide to it, an index ought to fit both equally well, and such an index he proposed to write to Bartolus. Repertorium Baldi was probably a similar work applied to Baldus.

His new arranged Editio of the Libri Feudorum was simply an attempt to bring this work into better order, but containing nothing original. The text was finished at Bologna, on the 1st March 1431, and the last revision of the whole completed 13th April 1442, the series titulorum added 1442. This work was dedicated to the University of Bologna, and intended to be confirmed by

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\(^1\) Maccioni. \(^2\) Dipl. N. 250; Panz. 2, 101; Fant. 7, 98-117; Mauritii Dip. de Lib.
Sigismund in 1461; the city gave 200 lire to assist in its confirmation by Henry III., which was done in so far that it was recommended to legal schools, but was not to supersede the old books in the Tribunals; a mission was then despatched to the Pope for a like purpose, but there is no record of its result. Mincuccion says the work contained six books, and twenty-five titles. Some of the old glosses of Jacob Columbus are worked into the text with great judgment, and render it a valuable work. He also wrote some small treatises on Feodal Law and Singularia Cini.

§ 162.

Alexander Tartagnus, born at Imola, whence he is often called Alexander de Imola, in 1424 attained the degree of Doctor at Bologna, and became Vicar and Assessor of the Conservator of Justice in the following year. From the year 1450 he was occupied continuously in public teaching; in Favia from 1450 to 1451; in Bologna from 1451 to 1457, having received the citizenship of the town in the first year; in Ferrara from 1457 to 1461; in Bologna again until 1467; in Padua until 1470, where Cæpola was his colleague, and claimed the precedence in consideration of his knightly rank. In Bologna he remained from 1470 until his death in 1477, during which time he administered many state offices. His humanity led him to pronounce several judgments in criminal matters against the Inquisition. He is said to have possessed more industry than talent, and to have suffered from a defective memory. He was a great enemy of the Italian literature, and Boccaccio, as originator of the Italian prose, which he designated as containing nothing good, and as being the vehicle for the dissemination of useless and injurious matter. Among those who studied under him we find the following distinguished names, Jason, Bartholomæus, Socinus, Bologninus, and Lancellottus Decius; nor were those under whom he himself studied of less repute, Johannes de Imola, Johannes de Anania, Angelus Aretinus, and Paulus de Castro V. This may be doubted with regard to Imola, as Tartagnus could have been only twelve years of age at his death.

All that remains of his works consists of Lectures on the Three Digests and the Code, each containing two parts, taken down from oral delivery. That part which relates to the Digestum Vetus and Codex, is exceedingly imperfect. Mathæus, who studied under our author seven years, and occupied the same house with him, also took down his lectures on the Three Digests. Savigny describes them as very bad, and replete with the errors of that age. He wrote Apostille to the Commentaries of Bartolus; a Comm. in lib. 3, Decretalium; also a Commentary on Sextus and the Clementines. His Consilia, Diplovatacicius pronounces better than those of other lawyers, and superior to his Commentaries; and it was probably on these he founded his reputation. They are arranged in seven books by

1 Dipl. N. 262; Panz. 2. 112; Tirabos. 6, 2, 424; Fant. 8, 88-94.
himself. He also wrote a small work, *De Actionibus*; some attribute this treatise to Jason.

**Bartholomeus Cæpola**, often called Veronensis, from his being born in Verona, studied in Bologna under Paulus de Castro and Angelus Aretnius, and received the degree of Doctor in 1446. In 1450 he professed in Ferrara, and in 1458 in Padua; but it is not known when; he was raised to the order of knighthood, and made a Count Palatine, honours that made him presumptuous, and caused him to quarrel with his colleague Tartagnus.1 In 1466 he was in Rome as a consistorial advocate; but did not remain thus long, being made second professor of civil law at Padua in 1470, and first professor in 1477.

His works, which have been often printed in collections, or separately, treat *De Servitutibus Urbanorum Praediorum*; *De Servitutibus Rusticorum Praediorum*; *De Usucapione*; and *De Simulatione Contractum*. The practical nature of the first two have contributed considerably to his reputation. His practical works consist of *Consilia*, in three books; two on civil, and one on criminal law. The *Tractatus Cautelarum* is to be found in collections. Diplovatacius attributes to him a commentary on legal works in general, *In ordinariis*, and *De Verborum Significatione*; and Jugler one on the *Inforitatum*.

**Johannes Baptista Caccialupus** is very often termed S. Severino, from his birthplace in Ancona, instead of by his family name De Caccialupi. He began his studies in Perugia in 1441, under Angelus de Periglis, and Johannes Petrucci a Monte Sperello, whence the year of his birth may be fixed at 1420. He professed in Siena, and is much praised by his scholar B. Socinus.2

He wrote *De Modo Studendi* in 1467, at Siena, which work contains a short literary history, to which Savigny has often referred. *De Pactis* was written in 1468, to complete some lectures interrupted at Siena from fear of the Pope. There is a collection of his Repetitions in three volumes; and many others are to be found in various collections, and also many of his minor works in collections of treatises. Diplovatacius attributes several commentaries on the ordinary legal works to him.

§ 163.

**Franciscus de Accoltis** was born of noble family in 1418, and is often termed Aretnius, from his birth-place. He wrote extensively on philology, and many have thence deemed it impossible that he could as a lawyer have written in such a barbarous style, and supposed two persons of like name. He was a scholar of Philelphus and Minuccius. He first professed in Bologna from 1440 to 1445, and in Ferrara 1448; and in 1450, when his salary was raised from 900 to 1,200 livres, by a decree of the Marquis Leonello d'Este, for five years, at the expiration of

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1 Dipl. N. 267; Pans. 2, 112; Maffei, Verrill. 2, 101; Fact. 2, 43; Tiraboschi 6, 2, 4, 25.
2 Dipl. N. 269; Pans. 2, 115.
which time he went to Siena, and did not return thence until 1457, where, after a residence of three years, he went to Rome and Florence, and then entered the service of Francesco Sforza at Milan, where he remained from 1461 to 1466, during which time he was sent on a mission to Pope Paul II. He then professed in Siena until 1479, when he went to Rome at the command of Sixtus IV., who raised him to the equestrian order, but refused him, it is said, a cardinal's hat, in order to retain him in his former occupation of a professor; hence the severe judgment given by him against the Pope in 1478 in favour of Lorenzo de Medici of Florence, when under the papal Bann, which was the cause of the Duke of Calabria requiring his extradition. The Republic of Florence, however, steadfastly refused it. The same cause probably led to his call to Pisa, where he lived till his death in the enjoyment of a salary of 1,400 florins, reduced to 800 as an honourable pension when he was so old as to be unable to lecture more than once a week; later he was totally excused from lecturing, retaining his appointment as a pension. Ruinus Felinus and Bartholomæus Socinus studied under him. He died a bachelor, it is supposed, in 1486. He excelled in philosophy, music, poetry, and even theology; but Savigny cannot admit he merited in these liberal sciences the praise attributed to him, or even in his own profession, and therefore attributes his reputation to the low ebb to which all literature was reduced in that age, for even his contemporaries accuse him of being a most unpractical man.

His legal works. His legal works consist in commentaries in the form of lectures, confined, according to the fashion of the age, to peculiar points; nay, he even read two years on the title De Adquirendâ Hæreditate. He read on the Dig. Vet. as far as the title xvii. 1.; Mandati in 1450 at Ferrara, which forms the second part. That on the Infortiatum extends to both parts; but stops short at the thirtieth book. His lectures in Ferrara, of 1448, 1449, and 1451, have been thrown together to form a whole, and extend up to the middle of the sixth book of the Codex. His lectures on the Institutiones are not printed, but exist probably in many editions under the head of Casus. The same remark applies to his Exegesis of the Decretals. His Consilia exist to the number of 167, in the edition Papiae of 1494. His smaller works consist of Repetitiones.

His literary works. His literary works contain chiefly Translations; Letters of Phalaris and Diogenes; A Translation of Chrysostom's Homilies on John the Evangelist is also erroneously attributed to him, but is really the work of Burgundio corrected by him. Manuscript letters and Italian poems are extant; also his speech to Paul II., and a small work on the baths of Pozzuoli, which he, however, only edited.

1 Fabroni, 1, 250–7, and 85, Bayle & Aretin.
2 Dipl. N. 165; Penn., 2, 103; Fabrus. 43, 410–37; Massuch, 1, 1, 68–76; Manz. ad Fab. 2, 193, and 4, 344; Tirabos. 6, 2, 4, 17–20.
§ 163.

Marianus Socinus, the Elder, belonged to the ancient and noble house of the Socini in Siena, and was born in 1401. He appears, with the exception of a short journey to Rome, on a mission to his friend Pope Pius II. (Æneas Sylvius Piccolomini), to have remained continuously in the university of his native country. He was distinguished for Latin and Italian poetry, philosophy, mathematics, rural economy, music, painting, sculpture, medicine, history, eloquence, legal knowledge, and for his high character and standing, according to the testimony of Pope Paul II., who nevertheless makes himself merry at the expense of his friend, "Homuncio est, nasci ex media familia debuti cui parvulum hominum est cognomen. (Piccolomini.)" In a letter to M. Socinus, this Pope, after paying him the highest compliments, protests against receiving his Commentary on the Decretals, having heard that it consisted of twenty-four volumes. Lastly, a renowned novel exists in the letters of Æneas Sylvius, addressed to Marianus Socinus. He died in 1467.

Bartolomæus Socinus, his son, was born at Siena in 1436; he studied there under his father and Thomas Doctius, in Bologna under Tartagnus and Barbitia, and in Pisa under Franciscus Aretinus. He was first appointed professor in his native city in 1471, and probably even earlier, for in that year he entered into a contract to read at Ferrara for three years, but broke it after two years, and retired secretly from Ferrara. In 1473 he held disputations in Padua, Pavia, and Turin, and went to Pisa, where he was appointed Professor in 1473, and remained there nineteen years with several interruptions. His salary was gradually raised from 800 to 1,665 florins, and ultimately to 1,025 florins gold. He gave the university much annoyance during this time, from his quarrels with his colleagues, and had even an action brought against him in Florence by the priores of the city for gross incivility; a conduct which he also pursued towards the curators of the university, who remonstrated with him for omitting half his lecture, the proper time being an hour, half of which should have been employed in reading, the other half in dictation. During this time he was employed by his native town, Siena, in diplomatic missions, and occupied the post of Capitano del Popolo with the consent of the university.

On one occasion, being dissatisfied with the administration of Siena, he rode thither before the senate-house with an armed force, and violently changed the government. It might therefore be thought that the university would have been glad when he tendered his resignation in 1488; but on the contrary it was refused him; whereupon he left Pisa clandestinely, and went to Siena,

1 Dipl. N. 266; Panz. 2, 35.
2 Lib. 1, Ep. 112.
3 Ibid. 39.
4 Dipl. N. 293; Panz. 2, 126; Fabrucci in Cal. 345211-25.
5 Fabroni, 1, 204-20; Tirabos. 6, 2, 4, 33-35.
6 Mur. 23, 809-15, and 822.
where he negotiated for a professorship in Padua. The Florentine government, however, enticed him within their territory, apprehended and proposed to execute him as a traitor. He was saved, however, by the active intervention of the Republic of Siena, of Lorenzo de Medici, and of the Pope; and in 1490 obtained his release from prison, and another professorship in Pisa for three years, under a security of 15,000 florins, and the bail of many persons, thus at once proving the hatred borne towards him, and his great value as a public teacher. The Florentine government did all in its power to fix him at Pisa by donations of estates, and permission to undertake missions and offices in the service of Siena. Ultimately, however, he excited the Pisans to separate from Florence, and adhere to the Emperor Charles VIII. of France; and in consequence of this agitation left Pisa for ever in 1494. He was then professor four years in Bologna until 1498, with the same interruptions in the Siena service, and subsequently professed in Padua until 1501, with a salary of 1,100 ducats, and from that time again in Bologna; when, after three years, he became dumb, and died in 1507, so poor that he was buried at the public expense. His reputation was so great that it is said five hundred students received their doctor's degree from him.

So few of his works are extant, that it is difficult to discover whence his great reputation arose. They appear, however, to have been critical; for instance, his remarks on the error of his time, as to the Roman mode of calculating interest, &c. Lorenzo was present at a disputation between him and Jason; and Politian considered his assistance indispensable in a critical examination of the Pandects, terming him Suae etatis Papinianus. He is said to have been given to extravagance and play, and hence the poverty in which he died; but just and true, and ready to admit merit even in his enemies. Diplovataccius says he wrote a commentary on the usual legal works, part of a Commentary on the first half of the Infortiata, and some parts of his Repetitiones are extant. His Consilia have become mixed up with those of Marianus, p. 2; from 153 to 252 belonging to this latter; and from 253 to 304 to Bartholomaeus. The Opus fullentiarum et regularum, Savigny does not attribute to him.

Marianus Socinus the Younger, and nephew of Bartholomaeus, was born in 1482, at Siena, studied in Bologna under his uncle, and obtained the degree of Doctor in his 21st year, and successively professed at Siena, Pisa, Siena, Padua, and Bologna, where he died in 1556. He followed Alciat. Two of his hearers attained a high reputation, Antonius Augustinus and Paucero-lus. His son and nephew, Lælius and Fausta, brought the family into greater notoriety by their theological heresies, than the three preceding had by their great legal reputation.²

² Panz. 2, 162.
His works, consisting chiefly of Consilia, have, as we have observed, been mixed up and confounded with those of his uncle Bartholomeus. Savigny gives the following pedigree of the family:

MARIANUS, seniOR.

BARTHOLOMEUS.

ALEXANDER.

LAEULUS.

PHILIPPUS.

FAUSTUS.

§ 164.

Ludovicus Bologninus was born at Bologna, of a distinguished noble family, in 1447, and received the degree of Doctor of Roman Law in 1469, after studying under Tartagnus, and the following year that of Canon Law; thus becoming a member of both doctoral colleges. He appears in the professors' lists of Bologna immediately after the first degree. In 1473-4 he professed in Ferrara. The Emperor Charles VIII. of France, and Ludovico Sforza, conferred the title of councillor upon him. He also administered many public offices in Florence. His relationship with the Popes Innocent VIII. and Julius II. contributed considerably to increase his influence; thus he became a consistorial advocate at Rome, and was near being advanced to the high dignity of senator. He was often sent as envoy to the court of Louis XII. of France. He died on his return from Rome to Florence, in 1508, after having reported the result of one of these missions. His life was adorned with many virtues; but in his scientific character Savigny considers him as devoid of all sound judgment, taste, and fundamental knowledge, and places his works even under the usual run of those of that degenerate literary period, and laments the failure of his attempt to supply the notorious want of the age of philological criticism as applied to jurisprudence.

His works Savigny declares to be scarcely worth mentioning, as they consist of interpretations of inferior merit of many isolated passages of the Roman Law. He is, however, remarkable for his endeavours to introduce into the Corpus Juris the forged constitution of Theodosius, purporting to contain the statutes of Bologna. He edited with notes the works of many former lawyers. His plan for a criticism merits mention, as it has a great effect on the subsequent criticism of the sources.

The Liber Authenticorum Graecus editus nuper per D. Lud. Bologninum, is a copy of the Greek text of the Novels of Florence made for him, and is important as forming the basis of Holoander's edition of the Novels. To this Bologninus did nothing but prefix

3 B. iv. 67.
a long preface. Politian sent him, in 1488, a copy of L. 4, § 1, De Verb. Oblig., at the desire of Lorenzo de Medici, for the purpose of criticism; whereupon he published, in 1490, the text and a commentary thereon. At a later period he formed the plan of publishing a critical edition of the Pandects, founded on the Florentine MS. He published a thick volume, containing the collation of the Florentine MS., in a most confused form, wherein he marks the variations referring to some other printed edition. Originalis Libellus Castigationum inter Pandectas Originales et Communes Libros transumptus manu propriâ D. Lud. Bolognini is a thick volume, divided into three parts: the Digestum Vetus, Infortiatum, and Novum, dedicated to the Archidiaconus of Bologna, Ant. Gal. Bentivoglius, datum in regiâ civitate Flor., A. D. MDII., in ædibus nostris, sed nunc publice editum in vetustiss. patrio, Bonon. Gymn., A. D. MDVI., consisting of a fair copy for press of certain passages of the Pandects. Lud. de Bol. Discordantium Pandectarum also a small volume ready for press, consists of emendations of passages in the Greek Pandects, as the former was of the Latin text. Pandectarum Originalium Libri L. nuper editi opera Clar. Dni. Lud. Bol. de Bol., is also a MS. for press, and intended as the chief work, with four introductions: — 1st, The Privilege of Julian II., 1507; 2nd, a Dedication to the same, with the history of the finding at Amalfi; 3rd, a Dedication to the Professors of Bologna, also with the history of the discovery at Amalfi; 4th, Bolognini de Orthographia Pandectarum Admonitio. The text then follows to Lib. 1, Tit 3, l. 11, when it breaks off; then follow critical remarks on a great number of titles of the Pandects and Codex, often containing entire constitutions. Savigny believes this to be simply a copy of Politian's collation, and that Bologninus misunderstood many of his words, of which he gives examples, adding Politian's remarks as variations, &c. The value of these works arises from the fact of most of the subsequent readings of the Pandects being taken from them, and thus they came to the knowledge of Fradin, Holender, and Alciat.

Lancelottus de Decio belonged to a country gentleman's family of that place, and was bred to the law. He studied under Tartagnus, and was professor in Pavia in 1464; in 1473 in Pisa, whence he returned to Pavia in 1482, and resided there until his death in 1503. In his character he was conscientious, quiet, and agreeable, and respected as a teacher, though perhaps not a man of eminent talent.

Several of his works are preserved, consisting of commentaries on the Digestum Vetus, Infortiatum, and Codex.

1 B. iv. 65. 2 B. iv. 64. 3 B. iv. 66. 4 B. iv. 68.

Parodi, 130; Fabroni, 1, 151-204; Panz. 2, 135; Tirabos. 6, 2, 4, 43-45; Argel. Bib. Med. 1, 548-54.
§ 165.

Philippus Decius, the younger brother of Lancellott, born at Milan in 1454, was destined and received an education for the court; but when the plague broke out at Milan, in his seventeenth year, he went to his brother at Pavia, and by his advice applied himself to the study of law under his brother, Jason, and Jacob Puteus. In his second year he held a disputation, much against his brother’s advice, but which, contrary to his expectation, terminated so creditably as to surprise all present. In his third year, 1473, he accompanied his brother to Pisa, where he held many public disputations before Baldus, Novellus, Corneus, Socinus, &c., and thus laid the foundation of his subsequent renown. He graduated in Pisa in 1476, and was soon after appointed Professor of the Institutes, at the instance of Lorenzo de Medici, and continued as such till 1484. It was here that those characteristics were developed which subsequently rendered him so famous, and which drew upon him at once the envy, hatred, and fear of his colleagues, and the preference of his hearers, to so great an extent that other professors refused to become his colleagues, according to the wish of the students; and Socinus left Pisa for this reason. The indecision of the curators made Decius resolve to do the same in 1484, and accept a chair of Canon and then of Roman Law in Siena. He then visited Rome, where Pope Innocent VIII. made him Auditor Rotae, on which account he received deacon’s orders, but not liking the monotonous routine of the Breviary he resigned the post; he was, however, allowed to retain the titular office, and returned to his professorship at Siena, which was rendered the more honourable to him by his preference in rank and salary over professors of older standing; but here again the former difficulties as to his colleagues presented themselves. A revolution which changed the government of Siena at this time led him to resolve on changing his residence; and Felinus, who a few years previously preferred leaving Pisa to becoming Decius’s colleague, proposed him, at the request of the curator, as the person best fitted to succeed him, as being the most distinguished man in Italy. Thus, in 1487, Decius became again professor in Pisa, where he remained until 1501. War and plague, however, caused the whole university to remove temporarily back to Florence, and later to Prato. The curators now year by year encroached—attempting to govern the university despotically, and to award to the professors their several faculties without reference to their tastes or peculiar talents; and Decius piques himself on never having declined a faculty or missed a lecture. This unpleasantness, however, may probably have induced him to accept, in 1501, a professorship of Canon Law in Padua, where he lived four years on the most

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1 Boeza.  
2 Panz., 2, 135; Fabrucci in Cal. 37, 18, 41; Fabroni, 191-204.  
3 Tirabos. 6, 2, 4, 45; Argelati Bib. Med. 1, 548-54, and 2, 1985.
friendly footing with his colleagues, John Campellius, Carolus Rainius, and Areinus. In 1505, Louis XII. called him as pro-

fessor to Pavia, but the Venetian government would not grant
him permission to leave until induced to do so on the pressing
instances of the French envoy, and after many letters from the
king. He now professed the Canon Law there, with a salary of
2,000 florins, and retained his chair until 1512, amidst frequent
disputes with his former teacher, and his then colleague, Jason.
He was mixed up in public business much against his will. The
Council of Pisa was summoned under French influence, in order
to annoy Pope Julius II., in 1511, and the sentences of Jason,
Decius, Fr. Curtius, and Paul Picus demonstrated that there was
reason for it. The cardinals now insisted that Decius should
accompany them to Pisa, with which he was obliged to comply,
by order of the king; and even when the council was removed from
Pisa to Milan, a new ordinance compelled him to remain attached
to it. Notwithstanding that he had ever respected the person of the
Pope, he was excommunicated and deprived of his title of Auditor
Rotae. The council now fled to France, but Decius, unwilling to
learn a foreign language at his advanced age, retired first to
Asti, and then to Alba in Piedmont, and endeavoured to reconcile
the Pope to him. In the mean time the Swiss army came to
Pavia, and plundered his house, whereby he lost his library of
500 volumes and his furniture. His house and estates were
given away, his daughter was taken from a convent, and lost all her
property; he himself fled through Savoy to Lyons, holding lectures
at Gap and Grenoble, and was received and accompanied free of
charge by the students, wherever he passed. The king now made
him a Councillor of Parliament in Grenoble, where he was received
with great distinction. He was, moreover, made professor in
Valence and raised the number of his auditory rapidly from
twenty-five to four hundred. In the mean time all his negotia-
tions with the Pope were unavailing, but when Julian II. died, in
1513, Leo X., an old hearer of Decius, revoked the bann, and he
on his part renounced the schism, protesting his innocence ab
initio. He refused a professorship in Rome, but accepted one
temporarily in Pisa; and as in the mean time the French recon-
quered Milan, he recovered not only his former professorship, but
obtained a seat in the Senate of Milan, and the curatorship of the
university, the catalogue of which he arranged; he also read there in
1515-16. He fled from fear of the Swiss and Maximilian, and was
prevented by the ruined state of the university from returning
thither. Proposals were now made to him from Avignon and
Padua, but he finally accepted a permanent professorship of
Roman Law at Pisa. During this period he either established,
but more probably revised, the quadrennial cycle of lectures on
Roman Law, which were as follows:—

1 Jovii Eloc. c. 88; Franc. Boeza Vit. P. Decii.

This arrangement has continued until the present time with few alterations, and is condemned as most objectionable by Savigny, as circumscribing the plan of instruction within too narrow limits, and to one portion of the science.

Decius remained professor in Pisa until his death, on the 13th October 1535, at the age of eighty-one. His character is not supposed to have been very amiable, to judge from the frequent disputes he had with his colleagues. His delivery was most brilliant, his person and manner commanding, and his repartee and replies so ready as to silence his opponents at once, which gave him the great advantage he possessed in disputations; these acknowledged talents may possibly have led him to presume. The great French lawyer, Corasius, received his degree from Decius, when at so advanced an age as to be incapable from weakness of repeating the formula. He numbered, too, the Pope Leo X., Caesar Borgia, the historian Guicciardini, Corasius, and Emilius Ferretus, among his scholars, and was honoured with the friendship and intimacy of Lorenzo de Medici.

His works were not important in number or merit. They consist of a Commentary on the Digestum Vetus and Codex, a Commentary on the title of the Pandects, De Regulis Juris, the most important and best known of his theoretical works, and a Commentary on the Decretals, and seven hundred Consilia, collected by himself, and dedicated to the Cardinal Archbishop of Narbonne.

Jason was the natural son of Andreatus de Mayno, a noble Milanese, who was banished to Pesaro in 1435, when Jason was born. He studied in Pavia, where he at first led a wild irregular life, but soon improved under Tartagnus, Jacobus Puteus, and Hieronymus Tortus. He first appears as a public teacher in Pavia in 1467-85, from which time many of his works date. He was the next three years professor in Padua, with a salary of 800 ducats, and it was here that Diplovataccius studied under him. In 1488 he accepted a professorship at Pisa, with 1350 florins; in 1489 he left for Pavia, where he passed the remainder of his life;

1 Dipl. N. 289; Jovii Elog. c. 66; Panz. 2, 127; Argelati, 2, 827, 892, 2004; Fabrucci in Cal. Op. 46, 91, 111.
he, however, only read a year, suffering from a complaint of the eyes for the nine succeeding years, during which time he lived in the country, not lecturing, but occupying himself with author-
ship, the arrangement of his lectures and other works which he printed, being present at examinations, and retaining the first chair in the University, that of the Digestum Vetus, with a salary of 2250 florins. Louis XII., when he had conquered Milan, re-
quired him to renew his lectures, and conferred the Castle Piopera upon him, as a feed for life. Ludovico Sforza, however, soon after took possession of the country for a short time, and when Louis recovered it, a French nobleman had taken forcible possession of Jason's feed. From 1511-19 he was active in his former pro-
fessorship of the Digestum Vetus, and in 1507 the King Louis, on his return victorious from Genoa, attended one of his lectures in person, accompanied by five Cardinals, and a hundred dis-
tinguished men. The lecture he delivered treated of the heri-
tability of the honour of a knight Banneret made by the king's own hand in person in the battle-field. Of the fifty-two years during which he taught, he was absent but four from his own University of Padua. He died in 1519, in his eighty-fourth year, his under-
standing having become somewhat impaired, leaving behind him a natural son. He had been raised to the order of knighthood, and made a Palatine Count by the Emperor. Andreas Alciat, who subsequently surpassed his master, was one of his numerous scholars.

He is said to have possessed more assiduity than genius or talent for order; his delivery and manner were agreeable, an improvement may also be perceived in his style, as compared with that of his predecessors. On his pupil, Alciat, being accused of having over-rated his master, he answered that Jason had ben-
efited the profession in three substantial ways, by rendering the confused opinions and commentaries of former lawyers useful by the clearness and order of his arrangement; by raising the value of an opinion from 3 or 4 to 50 and above 100 ducats; and by raising the salaries of the professors from 200 or 300 to 1000 ducats. Jason is also accused of appropriating the works of others to his use, and paying students to write down other people's lec-
tures, but with what truth it is difficult to judge.

His Lectures on the Digestum Vetus, are as incomplete as all other works of that age. They consist of two parts, the first composed in 1483-84 at Pavia, the other in 1487-88 at Padua. His Lectures on the Infortiattum in two parts, the first from Pavia in 1506, the second from Pavia, delivered in the former year. His Lectures on the Digestum Novum, of which the first part is of 1502, the second of 1506, the third appears to be of 1514. His Lectures on the Codex, the first part of which consists of two lectures, the first of Pavia in 1483-84, the second of Padua 1486-87. The second part consists of a lecture in Pisa 1489-90,
and is very imperfect. The appendix to the first part is printed as a separate work, and contains two divisions. Comm. in Tit. Cod. De Jure Empyhteutico of 1475, and Comm. in Usus Feudorum of Pavia 1483. His Consilia are 414. His De Actionibus may or may not be a plagiarism from Tartagnus. Apophlegmata s. Mingri, Curiae Juris, and certain speeches are without pretension or thought. He also wrote an Italian poem printed in the work intitled Sepolcro del ill. Sig Beatrice de Dorimborogo. Brescia 1568.¹

§ 166.

Lectures, Lecturae, had up to this time been divided in the following manner:—first, the teacher gave² a review of the whole title, termed a Summa, reading the text (litera) of certain parts, in order to explain the passage, a simulated case was propounded, then arguments against it, and lastly the solution of it was given; this was followed by the general legal maxims applicable to the peculiar passage termed Brocarda; next came real or feigned cases, Quaestiones, which had or might arise out of it, which if they were too long, were referred to the Repetitiones or evening lectures. Taking down the lectures, which appear to have been quite contemporaneous, in writing, was a common practice among the students, and is general in Germany in the present day, and here it is to be remarked that lego meant to expound. The students, however, often interrupted and asked questions of the lecturer, although less frequently during the morning than at the afternoon lecture or Repetitio.

§ 167.

From this period, that is from the commencement of the fifteenth century (1400), a new school of jurists arose, which endeavoured to check and to reform the system of the age, between the last of the Glossators and their own time.³

This fact is probably attributable to the introduction of printing, which diffused the knowledge of classical literature, and enabled philologists and scholars to compare many authors, instead of confining themselves perhaps to one only as heretofore, hence, those distinguished men who follow will be found to be rather classics than jurists, and from this period dates the revival of ancient literature, and its gradual development down to the present day.

With respect to the exegesis of the sources of law, Accursius succeeded in outshining his predecessors, and even the most distinguished of those who immediately succeeded him, as Cinus, Albericus, Bartolus, Baldus, and Jason, who in their turn surpassed Salicetus, Fulgosius, P. Castrensis, Tartagnus, Franciscus, Arétinus, and Ph. Decius. The cessation of the dogmatic labours of the commentators was already a sign of the decline of the legal

science, and the treatises of Bartolus, Baldus, and Cespota, are all that can be cited of the comparatively more recent period. The theory of suits and books of formulæ were nearly forgotten.

Tancred and Roffred were the only authors who retained their reputation, while the Speculum of Durantis, and the Additiones of J. Andrea and Baldus superseded the rest. The notaries for their practical purposes confined themselves to Rolandinus. But a new species of work arose, the Consilia, to which many directed their almost exclusive attention, and which, formed into regular collections, served as a rule in courts of law: these were the modern Responsa prudentum, and exactly similar to our reported cases, which in the time of the year books were drawn up under the immediate superintendence of the judges, by persons appointed for this purpose. The most important Consilia are from the pens of Oldradus, Baldus, and Tartagnus; of great but not equal authority were those of Bartolus, Salicetus, Fulgosius, Castrensis, Fr. Are- tinus, the Socini, Ph. Decius, and Jason. We thus pass to the jurists, and from them to a new school, which began with Alciat, in the middle of the sixteenth century, and which Cujacius at the end of it raised to the height of its perfection.

§ 168.

Ambrosius Camaldulensis was born in 1386 at Portico, near Forti, of the noble family of Traversari. From 1400 he lived thirty years continuously at Florence, as a Camaldulensian monk. In 1431 he became general of the order, and was occupied in visiting the monasteries, and as envoy to the Emperor Sigismund. He was also present at the Council of Bâle, and at Florence, and died 1439.

In his letters he recommends young jurists to study the sources, and apply themselves more to classical literature, with which he was well acquainted; in short, he may be considered as the first of the new school of jurists.

Nicolaus Nicolici. Died A.D. 1458.

Nicolaus Nicolci was a noted Florentine, and cotemporary of Ambrosius: like him he endeavoured to revive the old style of study and taste for classical literature. He endeavoured to copy the Greek passages in the Pandects from the Florentine MS., but was unable to accomplish it, from the difficulties thrown in the way of those who desired access to this curiosity.

Maphæus Vegius. Died A.D. 1458.

Maphæus Vegius was born at Lodi, educated at Milan, and studied in Pavia, where he principally attached himself to classical literature. He obtained a good appointment in Rome, and was protected by the Popes Eugenius IV. and Nicolas V. He died in 1458.

2 Negri Scr. Flor. 423 (420).
He devoted himself as diligently to the examination of sources, as Ambrosius had to philology, and wrote a legal lexicon, De Verborum Significatione, which is as innocent of arrangement as an alphabetical work well can be. A pompous dedication to the Archbishop of Milan precedes it.

Laurentius Valla, one of the most diligent restorers of ancient literature, was born at Rome about 1400, and died there in 1457.1

His six books on the Elegantiae Linguae Latinae contain remarks on passages of the old law in lexicographic form, with a view of settling the true meaning of expressions in it, as well as in the older jurists. He has often been attacked by lawyers on this point, and the whole controversy is contained in Opuscula Varia de Latinitate Ictorum Veterum, ed C. A. Duker, Trag. 1761-68.

§ 169.

Angelus Politianus was born at Montepulciano in 1454, and resided principally at Florence, as a friend and protégé of Lorenzo de Medici. Angelus Politianus, in literature, was one of the greatest men of his age, and although not to be considered in the light of a jurist, he may be looked upon as a philologist in the most extended sense of the word, and as one who contributed in a great degree to the development of legal science, and the purging of its literature.2 He died in 1494.

On referring to his works, it will be necessary only to mention such as refer to the present subject. The following passages in his printed writings refer to jurisprudence:—A description of the Florentine MS. Miscell. C. 41, and Epist. Lib. 10, Ep. 4; Recapitulation of the Ancient Points, from the Index Florentinus Epist. Lib. 5, and Ep. 9; Emendatio Const., Omnem, and other passages in the Pandects, from the Florentine MS. Miscell., c. 93, 78, 82, 95, 41, and Epist. Lib. 11, Ep. 25. The use of the Pandects, in respect of Orthography, Miscell. c. 77; on the Paraphrase of Theophilus, Miscell. c. 84, Epist. Lib. 10, Ep. 4. Portions of his unfinished plans are preserved in manuscripts. He intended to write a commentary on the authorities of the law; not however a legal, but a philological work, containing a criticism on the text, an explanation of the sources from classical authors, and in which the legal sources were to serve for philological purposes. Secondly, he proposed a critical edition of these sources, concerning which he took the advice of Bartholomaeus Socinus; but as no further development of this plan is found in his writings, it is not known how far he followed it out. Several manuscript fragments of materials have been preserved, some referring to the Commentary, which he intended probably to combine with the text, and some to the last-mentioned work.

1 Tirabos. 6, 2, 3, 5, 31-8.
2 F. O. Mencken Hist. Pol. ; Tirabos. 6, 2, 3, 5, 33-7, and 6, 2, 2, 4, 41.
He wrote his entire apparatus on the margin of the three Digests, of which he possessed many editions. This edition was lost for a considerable time; but was at length discovered at a little retail shop, and placed in the St. Lorenzo Library at Florence. The Digestum Novum was communicated to Petrus Victorius, who transcribed the marginal notes into his own copy; and this work remained in the Victorian Library at Rome, until that collection was bought by the Elector Palatine, Charles Theodore, and is now to be found in the Royal Library at Munich. The collection of Variations is very incomplete. This is perceptible not only in the passages where Politian probably often rejected the Florentine reading as the least correct, but what is more extraordinary with respect to inscriptions, which, on account of their completeness, are notoriously superior to the Florentine, and which Politian only transcribed up to the fourth book of the Pandects; the most complete restoration is of the Greek passages of the Pandects; the worst is that the collation is not only incomplete but not always to be relied on, which may partly arise from Victorius, who transcribed them, having used a different printed text from Politian, in which case misconceptions might be difficult to avoid; but even in Politian himself variations from the Florentine occur which are evidently erroneous, the number of which would probably increase on more careful investigation. Taking all these circumstances into consideration, Savigny is of opinion that the whole must be considered as a rough collection of materials, which Politian intended to complete, and correct as he proceeded; although this is contradicted by the signature of Politian being affixed, thus implying the Collation to be a complete work; yet it cannot be doubted but that Politian, had he lived, would have discovered as he proceeded how insufficient his materials were, and would have subjected the work to frequent revisions. The pedantic respect paid to the MS. may too in some respect explain the difficulty of the undertaking.

This collection of materials has been much disseminated at second-hand. Bologninus used it without judgment or discrimination, transcribed them almost all; and his collection remained in the Library which he originated in the monastery in Bologna. Thence the Variations were first disseminated in the Digestum Vetus, Lugd. Franc. Fradin. 1510, 10 Jul. fol.; but are still more perfect in the excellent edition of the Pandects by Holoander Norimb. 1529, 4, who, doubtless, had Bologninus's materials in view, although it was evidently not the intention of that author to bind himself to any collection, but to form the best text from any source he considered authentic. Savigny also thinks that Alciat, Crinitus, Baisius, and Budæus, used Bologninus Transumpt; on the other hand, that Augustin used Bologninus, Politian, and the Florentine MS. itself, which must, therefore, be considered the first fundamental examinations of the text, which,
in consequence of increasing elucidation itself, had been finally settled in Taurellian's edition. The remaining materials of Politian tend to fix the readings, and those by way of explanation, consist in parallel passages from classical authors.

§ 170.

Pomponius Lætus, born in Calabria in 1428, was a natural child of some member of the great family Sunseveriano. He assumed the name Lætus at a later period, and is often termed Sabinus. He resided chiefly in Rome, where he taught publicly, and died in 1498. He was a scholar of Valla, and like his master was attached to antiquarian research.

In his small work, De Romanis Magistratibus Sacerdotiis Jurisperitis et Legibus ad M. Paulagathum; all that concerns us here, is the portion of it De Jurisperitis, which is nothing but a meagre extract from l. 2 of Pomponius de Origine Juris.

Aymarus Rivallius, or Aymar du Rivail, Seigneur de la Rivalière, was son of Guy, who was a President at St. Marcellin in Dauphiné. Nothing more is known of him than that he was born in the middle of the fifteenth century, and occupied the position of a Councillor of Parliament at Grenoble, that he was living in 1535 appears from his writings.

Civilis Historiae Juris s. on the twelve tables. Leges Comm. libri quinque. Historiae item Juriscont., liber singularis. This work in five books, contains 1st, a history of the kings; 2nd, Plebiscita, with restoration, and commentary on the laws of the twelve tables; 3rd, Senatus Consulta and Edicta; 4th, history of the Emperors; 5th, review of the lawyers. His history of the Canon Law is far more meagre than that of the Roman.

This is the first attempt at a legal history, and as such is remarkable and valuable; it is evidently based on Pomponius l. 2, De Origine Juris, the order of which it follows. His restoration of the twelve tables is uncritical, and Savigny thinks that more than the half of his fifty chapters are not authentic, nevertheless, it has been frequently used by later authors. Comm. in Concordata Regis Francisci et Leonis X. 3rd, a history of the Dauphiné is to be found in the Parisian library in MS.

Ælius Antonius Nebrisensis was born in 1442 at Lebrixa, or Lebrija, in Andalusia, and began his studies at Salamanca, in his fourteenth year, continuing them at Bologna in his nineteenth. He subsequently revived the liberal arts in his native country. He professed in Salamanca for a long time with many interruptions, and lastly in Alcala, where he died in 1552. He was a voluminous author, particularly as a grammarian and lexicographer, in addition to other branches.

Cicero’s topics are preceded by an original work of this author, which has since been printed separately, the chief part of which consists of a small dictionary of such words as occur in the legal sources, but the work is devoid of plan, incomplete, and of small import. The preface declaims against the barbarity of the style of new legal schools. Two legal works are also attributed to him, Observationes Juris, consisting of a few scattered remarks printed at the end of his Dictionary, and not to be attributed to him; and Annotationes in Pandectas, in the very existence of which Savigny disbelieves.

ALEXANDER AB ALEXANDRO was born at Naples in 1461, studied under Philolphus, and became an advocate, but left the profession on account of the great abuse of justice which he had witnessed. He died in Rome in 1523, having published there a year before his death, a work bearing the title Genialium M erum, libri sex, which has been since treated on the same footing as a classical work, and is framed upon the same plan as that of Aulus Gellius, containing researches on grammar, and antiquities of various kinds.1 Those which refer to the Pandects are usually treated of with reference to the language. The most important portion of it consists in an attempt to restore the XII Tables, in which there is little admixture of the false with supposititious fragments.

§ 171.

PETRUS ÆGIDIUS, born at Antwerp in 1486, studied under Erasmus, who speaks most highly of him.2 He was also a friend of Morus, and died at his birth place there in 1533, having been town-clerk in his native place since 1510. He published in 1517 one of the many Summaries of the West Gothic Breviary. His other works are unimportant.

PIUS ANTONIUS BARTOLINUS is only known from his small work,3 written probably towards the end of the fifteenth century, intituled, Corriguntur in hoc Opusculo LXX. Loca in Jure Civili et Septem Legum Novae et Verae Sententiae Aperiuntur, s.l. et a 4. These emendations result from conjectures founded on verbal criticism, which have since for the most part been settled by the Florentine MS.; this work is, nevertheless, valuable. The seventy Emendations are followed by an interpretation of seven passages, and a general view of the history of the Emperors. The whole has been often printed.

BARTHOLOMEUS RAIMUNDUS,4 of whom it is only known that he published a critical edition and interpretation of the Pandects, towards the end of the fifteenth century, doubtless according

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1 Fabricii Bib. Med. Lat. 1, 61; Mazzuch. 14, 436.
2 Val. And. Bib. Belg. 719; Adelungii Söcher, 1, 255.
3 Mazzuch. 2, 457.
4 Cataneus ad Plin. Ep. 9, 28.
to the system of the Philologic School then in course of formation.

Budeus was born of a noble family, at Paris, 1467. He spent three years at Orleans, and subsequently some time at Paris to complete his legal studies, without, however, making any great progress; at length he abandoned lighter pursuits for serious study. Nor did the representations of his friends succeed in convincing him of the danger he ran of destroying his health by his close application to study. In order to avoid interruption he retired to the village of Hieres, in the neighbourhood of Paris, where, in a very short time, he acquired an incredible amount of knowledge. Nor was it long before he gave public marks of his improvement; and after having translated some Greek authors, published his observations upon Roman Law. Francis I. was induced to make him his Librarian and Master of Requests. The excessive heat of the year 1540 having obliged the king to retire to the coast of Normandy, Budeus accompanied him; but being seized on the road with a violent fever, he returned home, and died August 23, 1540, leaving behind him a numerous family of four sons and eight daughters.

Nicolaus Everardi was born in 1462 at Grimskirk, near Middelberg, in Seeland, and studied at Louvain, where he attained the degree of Doctor in 1493; and, after holding many legal appointments, became President of the Supreme Court at Malines, where he died in 1532.

A remarkable work of his is extant, intituled *Topica s. de Locis Legalibus*, printed in Louvain, 1516, f., and since often reprinted. It is a juridical dialexis, adhering mostly to material facts, criticising the most important course of arguments of the lawyers, and endeavouring to set bounds to their admitted practice. It is preceded by a *Praeambula*, containing the general theory which ought to be adopted in legal argument. In the special part he has increased from 100 *loci* to 131. Savigny calls the book remarkable, as an attempt to break the shackles which had been hitherto laid on legal science. The author informs us that Cicero, Boethius, and Quintilian were his patterns, and uses them to excite a philosophic course of thought. Thus differing from the preceding, Savigny compares this work to the Brocarda. There exists also a printed collection of his *Consilia*, and a small work of doubtful authenticity, intituled *De Legibus Praceipuis Studioso Perdiscendis*.

§ 172.

Charles V. was born at Ghent, in Belgium. By right of primogeniture he inherited the Hapsburg lands, and was elected Emperor in 1519, in preference to Francis, whom the princes feared. In 1521 Charles came to Germany, and appeared long etc.

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1 Val. And. l. c. 685; Nicerom, 6, 944. 2 Manuel Ges. der Deut. cap. 377, et seq.
undecided whether he would attach himself to the Protestant party under Luther, or support Adrian of Utrecht, his old master, whom he had raised to the papal dignity in 1521. Unluckily he chose the latter, and this political error prevented him becoming the greatest prince who ever lived. Luther’s party was the stronger, and the power of St. Peter’s successor was broken. In 1522 Henry VIII. of England carried on his memorable correspondence with Luther; but five years later, a better politician than Charles, yielded to the pressure, threw off the papal yoke, and appeared at the head of Protestantism in the west, while Gustavus Vasa did the same in the north. Luther had been summoned before the Imperial Diet at Worms in 1521, whether he went despite the entreaties of his friends. Charles kept his word, and respected the safe conduct he had given him, while four hundred knights were prepared to protect him against even the Emperor himself, who now hurried from Worms against the Hapsburg dynasty, leagued himself with England, and sent a Spanish army under Piscara to Italy to protect it against the French, whom he defeated near Lautrec. In 1525 he took François I., King of France, prisoner, at Pavia. England now supported France, as did also Sforza, whom the Emperor had reinstated as Duke of Milan. François now made peace with Charles, renouncing all claim to Italy and Burgundy, and marched to Rome, where the Lutherans declared contemptuously they would make Luther Pope.

Charles now caused himself to be crowned in Bologna by Clement VII., married the Pope’s natural son Alexander de Medicis to his own natural daughter Matilda, and made him Duke of Florence. In the mean time Soliman besieged Vienna twenty-one days, but the Count of Salm warded off the blow, and the Turkish Emperor retired into winter quarters with a host of captives. On the 15th June 1550, Charles held the Diet of Augsburg where the famous Confession was made. At this period the whole continent was in a ferment of religious and political reform; the latter was crushed, but the former held its ground.

In 1535, Charles, accompanied by his admiral, Doria, undertook an expedition against the pirates who paralyzed the commerce of the Mediterranean, and took Tunis, but was obliged to retreat in his second expedition against Algiers. War now broke out again with France. The Emperor had taken Frederic of Saxony prisoner, and refusing to release him drew Maurice of Saxony upon him in 1552, and retired to Innsbruck, which ended in the treaty of Passau.\(^1\) Maurice then turned his arms against the Margraf Albrecht; but was shot in the hour of victory. The Augsburg treaty was now concluded, and Charles resigned his crown in 1557 to his son Philip and his brother Ferdi-

\(^1\) Menzel, Ges. der Deut. 413.
nand, and retired into the monastery of Justin in Spain, where he became a Hieronymite monk. Here his understanding appears to have failed him; he occupied his time in endeavouring to make a number of clocks agree, and died from a cold caught in solemnizing his fictitious burial during his lifetime in 1558.

Ferdinand I. was in a difficult position. On his accession to the throne, the pope, Paul IV., refused to recognise him, on account of his having concluded a peace with the Protestants, until his jesuitical confessor, Bobadilla, reconciled him with Pius IV., and propositions were made for a reunion of the churches; but it failed, and from that time they were permanently separated. Ferdinand died in 1561, leaving the kingdom to his son,

Maximilian II., in whose reign the massacre of the Huguenots took place at Paris, on St. Bartholomew's day, 1572, under Charles IX. Charles's brother, Henry of Anjou, after having obtained by intrigue the kingdom of Poland, abandoned it again on his brother Charles's death for that of France. The votes of the electors were now divided, some chose Maximilian II. as their king, and others sided with Stephen Bathori, Prince of Siebenbürgen. Maximilian could never make up his mind to support either the Catholic or the Protestant party with vigour. During his reign the League of the Geux arose in the Netherlands, and Philip II. of Spain persecuted the Protestants in every direction. Alba took Antwerp, burning and murdering throughout the Netherlands. Maximilian II. died in 1576, some suppose of poison administered to him by the Jesuits.

Rudolf II., his son, was little better than a madman. He interfered in no wise in the government of the Empire, which he abandoned to the mercy of the Jesuits; occupying himself in collecting horses and shutting himself up in his palace, surrounded by astrologers, alchemists, and other charlatans of this description. The Grand Duke, at length tired of the at once passionate and imbecile conduct of the Emperor, raised his brother Matthias against him, and endeavoured to depose him. Rudolf, now suddenly roused from his sloth, marched against his brother; and in order to secure the support of Bohemia, changed his religious policy, which till then had been exclusively Catholic, and declared a freedom of confession, and gave the kingdom a liberal constitution. It was not long, however, before Matthias succeeded in forcing him to cede the Bohemian crown to him. Rudolf lived after this until 1612, when he died.

§ 173.

Balduinus was born at Arras the 1st of January 1520. His father was a counsellor, and the king's advocate-general. He studied Latin and Greek at Louvain, and afterwards Law, of

1 Mensel Gen. der Deut. 415.
2 Ibid. 416.
which he rendered himself the master, in some measure by his intimacy with Du Moulin. He subsequently professed law at Bourges for seven years, and then at Strasburg, Heidelberg, Douay, and Besançon; whence Henry III., then King of Poland only, but afterwards King of France, sent for him, and made him one of his Counsellors of State. As he was preparing to follow that prince into Poland a violent fever terminated his days.

HOTOMANNUS, originally descended from a German family, was born at Paris, August 23, 1524. He began to study law about fifteen at Orleans, and three years later obtained a Doctor's degree. His father, who was a counsellor in the Parliament of Paris, put him to the bar, with the design of bringing him up to his own profession; but the young man had more taste for the study of the Roman Law and Belles-lettres. It is said, that he read public lectures in the Law Schools in Paris at the age of twenty-five, and that his chief study was Roman Legal Antiquities. He was afterwards Professor of Law at Strasburg, and then at Valence, the credit of which university was very much increased by his merit. He was called to Bourges three years after, by Margaret of France, King Henry the Second's sister, whence he went to Geneva; and after teaching law there for some time, went to Bâle, where he died in 1590, aged sixty-six. Hotomann was cotemporary with Littleton, whose works he attacks with the most bitter criticism and virulent abuse. The father was so great a lawyer, that St. Marthe considers him almost equal to Cujacius; it would, however, appear that he paid more attention to antiquities than to the decisions of the Roman Law.

DUARENUS was born at Brien in Brittany, where his father was a judge, and whom, though very young, he succeeded in that office. He came to Paris in the year 1536, where he read lectures upon the Pandects; probably as the deputy of some professor. He was intimately acquainted with the learned Budeus, from whom he acquired much of his knowledge of the Greek language, and of Roman antiquities. Whilst he was at Paris he endeavoured to improve Budeus's three sons in the law, being desirous to repay the obligations he owed to their father. He was sent for to Bourges in 1538, three years after Alciatus had left that place. In order that he might combine the practice with the theory of the law, he quitted his professorship, and came to the bar at Paris, where he remained only three years, or thereabouts. Balduinus, who succeeded him in the faculty at Bourges, prevailed upon his colleagues to recall him; and to remove all obstacles, yielded to him the point of precedence.

The Duchess de Berry, sister to Henry II., increased his pension as chief Professor of Law, and made him her Master of Requests. Thus none, except Alciatus, had acquired so much reputation in that university. His writings, which are perfectly free from the barbarisms of the glossators of former ages, refer
only to the pure sources of the Roman Law. The desire he had not to share this honour with any man living, made him jealous of his colleague Baronius; which, however, ended with Baronius’s death, and turned into so passionate an esteem that he did his best to perpetuate his memory by erecting a monument and epitaph to him.

It was, however, not long before Duarenus’s jealousy was excited by other colleagues. Baldinus’s death did not relieve him of his embarrassment. Cujacius, who had more talent, succeeded him; and the quarrels that arose between them would have ruined the University of Bourges, had not Cujacius given way by retiring to teach at Valence. Duarenus’s works were always in great esteem among the learned, and Cujacius himself valued them exceedingly; for, notwithstanding their frequent differences, he acknowledged himself much obliged to his colleague for making him redouble his efforts. The works of Duarenus upon the Canon Law are superior to all that he wrote upon the Civil Law. He died in 1559, at the age of fifty.

Baronius, a native of Leon in Britany, professed law with Duarenus, at Bourges. The emulation between these two learned men caused a difference between them. He composed a Commentary upon Justinian’s Institutes, some Interpretations of the other portions of law, and a Treatise of Benefices, with some others. He died August 22, 1550, aged fifty-five.

§ 174.

John Paul Alciatus, a Milanese gentleman, was the first, as M. de Thou says, who united the study of the law with polite literature and the knowledge of antiquities. His works upon the law, and his emblematas, sufficiently prove his capacity and judgment. Francis I. brought him to France, where he professed law at Avignon and Bourges, and subsequently at Bologna, Ferrara, and lastly at Pavia, where he died in the year 1550. His epitaph exists in the church of St. Epiphania, as follows:—Andrea Alciato Mediolanensis Jurisconsulto, Comiti, Protonotario Apostolico Caesareaeque Senatori, qui omnium doctrinarum orbem absolvit primus legum studia antiqua restituit decori, vixit annos LVIII. mensis octo, dies quatuor obiit pridie Idus Januarii, anno MDL.

Franciscus Connanus, Sieur de Coulon and de Rabestan, was a Parisian, and son of one of the judges of the exchequer, or master of accompts. He studied law at Orleans, under Peter Stella, and at Bourges, under the famous Alciat, by whom he appears to have been highly esteemed. On his return to Paris, he attached himself to the practice of the bar, became master of accompts, and was at length preferred by Francis, in 1544, to the mastership of requests. He undertook to reduce law to a method, but the weakness of his health prevented his accomplishing his task. He died in September 1551, at forty-three years of age.
Du Moulin,  
A.D. 1556.

Du Moulin, who was descended from a noble family, was born at Paris, towards the latter end of the sixteenth century. He came to the bar at twenty-five, and followed the study of the Roman, Canon, and French Law, with such diligence, that his name soon became famous all over Europe, so much so that he affirmed that he would neither yield to nor be taught by any one; he, moreover, added practice to theory. He was, however, infinitely more learned in the Canon Law, usages on beneficial matters, and in the French, than in the Roman Law. So great was his application and fear of interruption, that he refused to be made a counsellor in the Parliament of Paris. His style, modelled on German authors, is the one fault in this great man’s works, yet his solutions of the most difficult questions are so perspicuous, as to make the reader wonder how he could ever have entertained any doubt. His life was chequered with good and bad fortune. He died at Paris in 1566.

§ 175.

Cujacius,  
A.D. 1590.

Cujacius, the most celebrated of all the interpreters of the Roman Law, was born at Toulouse. His parents were of the lowest rank of society; but nature made him amends for the baseness of his extraction, by endowing him with a transcendant genius. He acquired the Greek and Latin languages without the aid of a master. He left Toulouse, on account of an inferior competitor being preferred to a professorship before him, with the exclamation, Ingrata patria non habebis ossa. M. de l’Hopital, afterwards Chancellor of France, sent for him to Bourges from Cahors, to which place he had retired. He professed law nearly forty years, sometimes at Toulouse, sometimes at Cahors, then at Bourges and Turin, and lastly again at Bourges, whither he retired at the pressing instances of the magistrates. It is asserted that he spent seven hours in preparing for every lecture, and by that means was able to personate all those great men whose decisions compose the most valuable parts of the Corpus Juris.

The prodigious volume of his works, and the correctness of them, bear witness to the elegance of his mind and his unwearied application. He has explained, ex professo, most of the Roman Laws, and there are scarce any which he has not elucidated.

Pope Gregory XIII., apprised of his great worth, endeavoured to induce him to come to Bologna, by offering him a very considerable salary. He was Honorary Counsellor of Grenoble and Turin; but his infirmities and business did not often allow him to profit by the appointment. M. de Thou says that Cujacius was the first and the last since the ancient lawyers.

He died at Bourges in the year 1590, aged sixty-eight or seventy. All the orders of the town in several public bodies attended his funeral, and the day after his interment, M. Mareschal, Counsellor in the Parliament of Paris, who had formerly been his scholar, pronounced publicly his funeral oration.
It has been doubted whether the palm should be given to Cujacijs or Du Moulin, the latter probably had more imagination, and Cujacijs more arrangement.

Cujacijs, on his deathbed, forbade any of his works, but those he had already published, to be printed; yet all that could be got of his writings has since been edited. He also directed that his books should be sold in detail, with a design of disappointing such as might collect his marginal annotations, for purposes of publication, probably at the expense of his reputation, having made them only for himself, and without that order or method that is requisite in writings designed for the press.

Anthony Favre says of Cujacijs, *Nibil fere intactum in iure reliquit et assiduo labore vicit tarditatem ingenii*. But Du Moulin's greatest admirers admit that he has neither order nor method; and that it were to be wished he had written with Cujacijs's polish, perspicuity, and brevity.

**Brissonius**, President in the Parliament of Paris, was born at Fontenay le Comte in Poitou. He was first Advocate-General. Henry III. used to say, that no prince in the world could boast of so learned a subject as his Brissonius, as he called him *par excellence*. He therefore employed him in several negotiations of peace, and to collect his ordinances and those of his predecessors. He was the author of two works upon Roman law; one, De Verborum quae ad jus pertinent significatione, and the De Formulis et Solennibus populi Romani verbis, which are full of learning. He had given hopes of other works, when he was disgracefully murdered at Paris by some of the leaguers, who, annoyed with him because he was not one of their party, threw him into prison, where he was strangled on the 15th of November 1591; they, however, paid for it with their lives a few days after, by order of the very heads of the league itself. His body is interred at St. Croix de la Bretonnerie.

§ 176.

Matthias became Emperor on the death of his brother Rudolf in 1612, having been previously elected King of Bohemia in 1609. During his reign the Jesuits obtained immense power, contributing to the commencement of the thirty years' war in 1618. The Emperor left the administration of the state entirely to his nephew Ferdinand, who in 1619 himself became *de jure* Emperor, on the death of his uncle, who died without issue.

Ferdinand II. of Austria. In the Diet held at Frankfort by the electors, Ferdinand, son of Archduke Charles, and brother to Maximilian II., was elected Emperor. The protestants in Bohemia were now in open and obstinate rebellion, they had taken a large part of Austria, and had gone so far as to crown Frederick Count Palatine of the Rhine, King at Prague. The Emperor, however, with the assistance of the Catholic League of Germany, having recruited a powerful army, sent it against them, under the

Cujacijs as compared with Du Moulin.

Brissonius, A.D. 1591.


Ferdinand II. A.D. 1619.
command of the Duke Maximilian of Bavaria. The battle was fought in the plain near Prague, and ended in the total defeat of the Count Palatine, who was obliged to take refuge in Holland, after losing his dominions, part of which the Duke of Bavaria obtained, together with the electoral dignity of the Rhenish Palatinate. Charles, Duke of Nivern, in France, having succeeded, through the death of Vincenzo Ganzarta, Duke of Mantua, to that kingdom, the Emperor commanded Collalto to besiege that city, with a view to deprive him of it, thus Mantua fell into the power of the Emperor, but was afterwards restored to the Duke on certain conditions. In the mean time, Gustavus Adolphus, King of Sweden, entered Pomerania, and having leagued himself with the Duke of Saxony, gained several signal victories over the Imperialists, and continued to overrun Germany, until he was slain in the battle of Lützen. The Swedes, however, by means of their league with the French, continued the war, and in the mean while the Emperor breathed his last in a fit of apoplexy, after a reign of seventeen years and six months.

Ferdinand III., Duke of Saxony, prosecuted the war against the Swedes, though harassed on another side by the army of France, which was leagued with Kagozzi, Prince of Transylvania, until the peace of Munster happily put an end in 1648 to this sanguinary war. His eldest son, Ferdinand, who had been elected King of the Romans, died before his father, who reigned twenty years, one month, and twenty-three days.

Leopold Ignatus of Austria, having been elected Emperor on the death of his father Ferdinand in 1658, after many great contests in Frankfort, sent some troops to support Casimir, King of Poland, and the King of Denmark; then harassed by the Swedish army, after the victory he obtained at Raab, he repulsed the Turks, who had overrun Hungary.

In the year 1683, a very powerful army of 180,000 Turks, under Kara Moustafa, besieged Vienna, but were forced, by means of the timely assistance afforded by King John III. of Poland, and Charles V., Duke of Lorraine, to retreat with immense slaughter, after a long siege. The victory was followed up with such success, that the whole of Hungary and Transylvania together, with other considerable acquisitions, was recovered by Christian arms. This war was terminated by the peace of Carlowitz. Hungary then again rose in insurrection against the Emperor, who died at an advanced age, after a reign of forty-six years and nine months. He was succeeded in the throne by his eldest son. This reign terminates the seventeenth century, and it will only be necessary to glance at the leading lawyers of the more recent age.

§ 177.

Dion. Gothofredus was born at Paris in 1549, where in process of time he acquired great reputation. The civil wars obliged
him to leave France; and he professed law in some of the universities of Germany. After the death of Cujacius, no means were left unattempted to persuade him to accept this chair, but he was otherwise engaged in Germany. He died in 1622, aged seventy-three, leaving behind him most excellent notes, and some other works upon law, history, and other parts of elegant literature. There was another Dion. Gothofredus, known more particularly by his histories, who was son to Theodorus, the eldest son of Dionysius of whom we are now speaking, and although this Theodorus was also remarkable for his great learning, he composed no legal works.

JAC. GOTHOFREDUS, second son of Dion, settled at Geneva, where he was preferred to the chief offices of the Government. He was a man of universal information, learned in Greek, chronology, the fathers' councils, and ecclesiastical history. The best of his works is his learned Commentary upon the Theodosian Code. He did not live to publish any of his own works; but Anthony Marville, professor of law at Valence, having purchased his library of the executors, gathered from it that vast work which he printed at Lyons in four volumes, folio, in the year 1665; the rest of his writings have since appeared.

ANTONIUS FABER, a native of Bourg in Bresce, was a long time the chief magistrate there. After the exchange of the province, the Duke of Savoy being unwilling to lose so useful a man, made him President of the Council of Geneva, and afterwards of Chambrey.

This able magistrate, in the midst of all his great employments, dedicated some of his private hours to the public. He wrote several Commentaries upon Law, which are printed in eight volumes folio. His faults consist in his occasional disregard for precedents and alteration of laws. Bachovis, a German author, has written against the second part of his book, De Erroribus Pragmaticorum, and Jer. Borgias of Naples has censured his Treatise, De Conjecturis; but it must be allowed their criticisms are not all of them just. His Code is reckoned the best, and least faulty of his works; in that he does not ramble, but generally keeps to adjudged cases. But notwithstanding all the faults in his other works, it were to be wished he had lived to finish his Rationalia, which goes no farther than the twenty-sixth book of the Digest, and his Jurisprudentia Papiniana, wherein his design was to have comprehended all the law, according to the order of the Institutes; he, however, only taught the first book, and died in 1622, aged sixty-seven.

ANTHONY MORNAC, advocate in the Parliament of Paris, was one of the most famous lawyers of his time, remarkable for his great probity and learning. To his skill in the Roman Law he added an equal knowledge of the practice of the bar, and had undertaken a comparison between the Roman and French Law, a
work that deserves the highest commendation; but although he did not live to finish it, enough of it exists to make us regret the want of the rest.

We will now return to the last hundred years of the holy Roman, as it was termed at that period, properly the Romano-Germanic, Empire.

§ 178.

Joseph I.
A. D. 1705.

Joseph of Austria, in 1705, who continued the war commenced by his father Leopold, against France, in respect of the succession to the Spanish crown, but he was cut off in the flower of his age, after a reign of five years, eleven months, and twelve days, and was succeeded by his brother.

Charles VI., Emperor, 1711, concluded a peace with France, and made war against the Turks, who had besieged the Island of Corfu, then belonging to the Venetians. He not only gained two victories in Hungary over the Turks, but also recaptured the important fortresses of Temisvar and Belgrade. His Minister, Count Lenzendorf, is reputed to have been the worst statesman but the best cook in the world; the extravagance of the court, too, was appalling. The famous Maria Theresa was his daughter. Charles VI. died in 1740.

Charles VII. now argued most logically, that if succession in the female line were to be admitted, he had, as direct descendant of Albert, Duke of Bavaria, who had married a daughter of Ferdinand I., a better title to the throne than Maria, inasmuch as he represented the elder line, and, supported by French influence, caused himself to be crowned at Frankfort. The confusion that followed was only increased by the seven years' war between Prussia and Austria. Charles died about a year before its termination, leaving his successor in undisputed possession of the Empire.

Francis I.
A. D. 1742.

Francis I., Duke of Lothringen, had been married by Charles VI., to his daughter Maria Theresa, whom he destined for his successor. On the death of Charles VII. in 1748, all the powers acknowledged Francis I. as Emperor; his mind was that of a merchant, not of a king, and while he managed his private money speculations, Maria Theresa governed with the clever Minister Kaunitz. On Francis I.'s death in 1765, his son

Joseph II.
A. D. 1765.

Joseph II. ascended the throne under the co-regency of his mother. Kaunitz, however, was the true Emperor, using his imperial master and his mother as his tools. On the death of Maria Theresa, however, in 1780, Joseph appeared as a reformer of Church and State, and succeeded so perfectly in humbling the former, that when Pope Pius VI. arrived in Vienna, in order, if possible, to check these proceedings, the Emperor kept him almost a prisoner in his house during his stay. With respect to state

1 Menzel Ges. der Deut. cap. 532.
policy, he endeavoured to check the licentiousness of his nobility by a law which provided that natural children should be heirs to their fathers, if unmarried. Having fought with varied success against the Turks, he died on the 20th February 1790, as Jellenz says, "a century too early," and, according to Remer, misunderstood by his people.

Leopold II., the brother of Maria Antoinette, far from continuing the policy of his brother, restored priest and noble to their former position; nay, he did more, he established the secret police in Vienna, which, although it was abolished on his death, in 1792, by his son, soon reappeared in a clandestine manner, and continued until the year 1848.

Francis II., the last Romano-Germanic emperor, did not long enjoy his dignity. The French Revolution was followed by the appearance of Napoleon Buonaparte, who divided Germany against herself; and after a series of unsuccessful battles, the treaty of the Rhine was concluded, on the 12th July 1806, between the western German princes and Napoleon, who declared the German Empire at an end; and Francis II. abdicated the Empire on the 6th of August following, of the same year.

§ 179.

It would be almost endless to attempt to sketch the biographies of the leading jurists of the eighteenth century. Their works, too, are in such constant use by all civilians, and will be so often referred to in the sequel, as to tend rather to confusion than elucidation; in addition to which, although the works of Heineccius, for instance, are still of the greatest value, and exhibit a rare perseverance in research, especially in antiquarian learning, other continental writers have since occupied their pens with the same subjects, and assisted by the subsequent discoveries of manuscripts, and the labours of their predecessors, have set many questions at rest which hitherto had been treated on an erroneous basis, or left open for further investigation. The language in which these later works are composed is, it is true, less accessible to the general student than the works of the last century, when Latin was considered the proper language for all classical and juristical works; on this account the new views contained in such works, where they correct erroneous, or satisfactorily establish new theories, will be duly referred to.

§ 180.

We have now followed the progress of the Roman Law up to the eighteenth century in those countries in which it has continuously obtained. With respect to the later commentators, sufficient may be learned of them from individual sources, as
they have not exercised that influence on the revival of a science almost totally lost in a barbarous age which fell to the lot of their forerunners, theirs has been rather a work of correction and refinement, in which sphere they have not been less useful than their mediaeval predecessors. It is chiefly to Germany that we must turn for fundamental criticism and the elucidation of questions of antiquarian lore, which have for ages lain buried in the depths of darkness, or been disfigured by the hand of ignorance.

France in the later time has afforded some excellent treatises on certain points of the Roman Law; Italy, whence most might have been expected, few; and England absolutely none, notwithstanding that many of her earlier legal authors have evidently founded their works upon the labours of Justinian's law commissioners, although the spirit of that law pervades, as will be seen, all our tribunals at the present age in a greater or less, yet always in a great degree.

This introductory title would not be complete were not some short history of the origin of the Canon Law to be given, which, although it possesses but a fictitious authority in this country, is nevertheless of considerable importance, as well in a historical point of view as from its connection with the Roman Civil Law, with which it is so much intermingled, and whence it was indeed derived. For this purpose we must commence by a short reference to the Byzantine Age and Empire where it originated, and thence pass to Rome, where it was developed and assumed the form in which we now find it.

§ 181.

The origin of the Canon Law may be referred to a period far anterior to the papal supremacy, if indeed we deny that St. Peter was the first Bishop of Rome, or indeed Pope, as he is termed by his apostolic successors. When Christian communities first formed themselves into congregations, ἐκκλησίαι properly so called, certain rules were agreed upon for their government; these with characteristic simplicity were termed rules, κώνως, canonum statuta, forma, disciplina, nor were the terms canonica sanctio, lex canonica, and canonum jura, introduced until the ninth century, nor the term jus canonicum until the Canon Law began in the twelfth century to be treated as a science.

The twelve apostles and the seventy-two disciples entered upon their office on the feast of Pentecost, and as congregations were formed, deacons were appointed, and consecrated by the apostles in their offices by prayer and the imposition of hands; the eldest, τρεσβοτερος, was chosen to preside, and first began to

1 Act. 13, 1; Eph. 1, 23, and 5, 23; Coloss. 1, 18.
2 Lec. 6, 13-16; Mark. 3, 13-19.
3 Lec. 10, 1-16.
be termed ἐπίσκοπος \(^1\) after the death of the apostles. The apostles exercised a personal and joint supervision over all these, and hence the origin of visitations by the bishops of the English Church; they also addressed instructive and exhortative letters to them, to which the origin of the papal epistles may probably be traced. With the death of the apostles and the increase of congregations, the bishops assumed their office of general supervision, and it was natural that the highest rank should be given to him who resided at the supreme seat of Government, hence the Bishop of Rome came to be looked upon as the superior of all other bishops, not only from the importance of his local position, but because he was more immediately the successor of St. Peter, who had suffered martyrdom after having preached at Rome. The next rank in the order of precedence was expressly confirmed to the bishops of Alexandria and Antioch by a general council,\(^6\) until they were superseded, and this distinction formally conferred upon the Bishop of Constantinople,\(^3\) as the second capital of the Empire, despite the opposition of the Pope, who protested against this infringement of the original order of precedence.\(^4\) The Pope, however, remained the undisputed chief and head of Christianity; and great respect was, in consequence, always paid to his opinion \(^5\) in matters of doctrine. Nevertheless these and like differences could not fail to open a breach in the Church; but the first actual rupture took place on Johannes, surnamed Jejunator, taking upon himself in 587 to call a general or economic council of his own sole authority, under the title of economic patriarch, and without consulting Pope Gregory the Great. A still more serious disagreement took place on the Emperor Michael III. deposing in 858 the virtuous patriarch Ignatius, and raising his eunuch Photius, per salutum, from the condition of a layman to the patriarchal dignity, while Nicholas I. resolutely supported the persecuted Ignatius against the synod summoned by Photius in 861. Photius virulently accused the Western Church of false doctrine, and ended in pronouncing the Anathema or Bann against the Pope in a synod summoned for that purpose; it is true that this involved no evil consequence at the time, for the Emperor Basilius restored Ignatius to his dignities, and caused Photius to be anathematized by the economic council, which the Pope summoned in 869, at Constantinople for that purpose, at the desire of the Emperor. On Ignatius’s death, however, Photius succeeded in obtaining the patriarchal dignity a second time, and artfully took advantage of a synod assembled at Constantinople, with the concurrence of the Pope, in 879–80, to declare the economic council null and void, on account of the sentence it had pronounced upon himself. The anathema subsequently issued against him by the Pope in 881 on this ground, was so far seconded as to cause his deposition for the

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\(^1\) Act. 20, 17, 28; Phil. 1, 7; 1 Tim. 3, 1, 8.
\(^2\) Con. Nic. c. 6, D. 65.
\(^3\) Con. Const. c. 3, D. 22.
\(^4\) C. 1, 2, 16; N. 135, 2.
\(^5\) C. 1, 8, 7.
Again deposed
A.D. 886.

A.D. 1053.

Separation of the Churches, A.D. 1054.

Reunion in
A.D. 1274.

Dissolved in
A.D. 1284.

Fourteenth century, John V. Palæologus, A.D. 1369.
The fifteenth century.

Project of 1439 miscarries.

second time, under Leo in 886. A schismatic party, nevertheless, continued ever afterwards from that time, which often called up the remembrance of Photius in subsequent synods.

In 1053 a new controversy arose. The patriarch Michael Cerularius, and others, violently attacked the doctrine and practices of the Western Church, as Photius had done before, which, notwithstanding the conciliatory attempts of the Emperor, and the specious justification of the Latins resulted in the separation of Pope and Patriarch in 1054. All subsequent attempts at a reconciliation proved abortive, nor could the influence of the Commenan dynasty accomplish the desired object. The attempts at a union, however, partially succeeded at the council of Lyons in 1274, but its effects were destined to endure for only ten years, when the Church was again rent asunder by Andronicus II. In the fourteenth century the negotiations were again opened by John V. Palæologus, who, at that time hard pressed by the Turks, himself swore to the formula of union at Rome in 1369; but his example was devoid of result, when it was found that the aid expected from the West did not arrive. The fifteenth century witnessed another attempt, and another general council was agreed upon in the West. The Emperor John Palæologus VII. arrived, in consequence, at Ferrara in 1438, accompanied by the patriarch Josephus and a numerous suite, and the several points of difference were discussed in the year following at Florence, by the most learned men of the age, on either side at length, on the 6th July, 1439, points of union were agreed on; but on the return of the Emperor, the people, excited by the monks, declared against the union, and the majority of the bishops seceded. Nevertheless, some communities of the Greek Church still acknowledge the validity of the Florentine council, and the primacy of the Roman Church.

$182.$

In conformity with the example of the apostles, councils were held to draw up rules for church government, these were sometimes framed in a general council of the Church, summoned for the purpose, or subsequently acknowledged by the Christian community at large, occasionally, however, these councils applied only to a particular portion of the Church. The economic or general councils may be taken to be twenty-one in number:—Of Nicaea, in 325; of Constantinople, in 381; of Ephesus, in 431; of Chalcedon, in 451; of Constantinople, the second in 553, and the third in 680; of Nicaea, the second in 787; of Constantinople, the fourth in 869; of the Lateran, the first in 1123, the second in 1139, the third in 1179, and the fourth in 1215; of Lyons, the first in 1245, and the second in 1274; of Vienny, in 1311; of Pisa, in 1409; of Constance, in 1414-18; of Bâle, in 1431-7; of Florence, in 1439; of the Lateran, the fifth, in 1512-17; and of Trent, in 1545-63.
The resolutions of these councils form the most important basis of the Canon Law, of which general collections have been subsequently made, or partial ones for particular countries.

§ 183.

The papal constitutions which resulted from the activity of the primates, and acquired great importance, form another source of ecclesiastical law; their tenor is various, some contain general regulations affecting the whole body of the Church, others, authoritative answers to the questions put by bishops; some, orders and exhortations; others, instructions for ecclesiastical officers, rescripts respecting administration, and directions applicable to individual kingdoms and sees. Special decrees were framed merely to meet particular emergencies, and presuppose certain conditions in which the rules of the Roman Law are adopted, and these, so far as they developed the legal view of the Church, were taken, as in the middle ages in doctrine and practice, as a rule in parallel cases. In the West, the more important decrees of the popes now began to be given in the form of bullæ; these were engrossed on parchment, and issued from the apostolic chancery with a seal of lead, termed bulla, appended to them.\(^1\) The brevæ were less solemn documents, signed by an officer of the apostolic secretarial office, and sealed in red wax with the fisherman's ring. Authentic copies of these documents have been preserved in the record office of the Romish Church, which has existed since the fourth century. Collections of them, though none quite perfect, began to be formed from those in circulation even in the fifth century.

§ 184.

The concordats, which formed a third source of ecclesiastical jurisprudence, were nothing more than treaties concluded between the Popes and the Government of various States, for the uniform regulation of ecclesiastical matters. They are founded upon the ecclesiastical and civil policy of the church, and the sovereign rights of the State with which they were contracted. Collections of these exist applicable to various continental states. To these may be added special conventions respecting diocesan synods, ordinances of bishops, privileges of the Pope, Emperor, or reigning princes, conventions between bishops and their feudal superiors or chapters, and the statutes of these latter.

§ 185.

The fourth source was common or customary law, which in no case could be contrary to divine law, common sense, good manners, public order, or the spirit and the rights of the Church; to these may be added the authority given to the opinions inculcated by the teachers of the law, whereby the whole was connected, and

\(^1\) Devoti Inst. Can. Proleg. § 95-6-7.
the obsolete parts insensibly purged away, hence the authority enjoyed by the fathers of the Church, and the professors of the Canon Law, their writings and decisions which obtained the authority of custom and precedent in courts of justice.

§ 186.

Up to the fifth century diocesan synods were not unfrequently held, of which the most important of the canons preserved are those of Ancyra, in 314; and of New Caesarea, in 314; of Nicea, in 325; of Antioch, in 332; of Sardica, in 347; of Gangra, between 362 and 370; of Laodicea, between 337 and 381; of Constantinople, in 381; of Ephesus, in 431; and of Chalcedon, in 451; of these, those of Nicea, Constantinople, Ephesus, and Chalcedon have obtained the authority of economic or general councils. All these are composed in the Greek language, with exception of those of Sardica, which are in Latin. As far as regards the canons of the Eastern Church, few have reached our time; and their tenor can only be learned from the use that has been subsequently made of them in later collections of the Western Church, especially in Spain, where Latin translations of the four canons of Nicea, Ancyra, New Caesarea, and Gangra, were made and formed into one collection, to which those of Antioch were added later in the fifth century; the Canons of Chalcedon and Constantinople were added to the original four by a compiler, the translation of which is now termed the Prisa in the West; to these four another compiler added those of Laodicea and Constantinople; and a third those of Laodicea, Constantinople, and Chalcedon: by these means the old Spanish translation, consisting originally of four Consilia, was further augmented by four.

§ 187.

After the Emperors had assumed the Christian religion, ecclesiastical legislation began to form an important consideration in municipal enactments, and for this reason ecclesiastical laws were for the most part received into the collection which Theodosius II. prepared at Constantinople for the Imperial Edict in 438, and which Valentinian III. afterwards adopted for the West; nevertheless, we have received many independently of this source, notwithstanding which the principal ones are to be sought in the collection of Theodosius II.

§ 188.

The first work appeared in the East in the latter part of the third century, to which, with subsequent additions, the title of διατάξεως, or διαταγμα τῶν ἀποστόλων, in six books, was ultimately given; it purported to contain the ordinances and epistles of the

1 Ballerini, P. i, cap. 5.
2 Bal. I. 2, n. 2, 3, 7; II. 2, n. 17, 19.
3 Bal. I. c.
4 Drey.
apostles in ecclesiastical matters. To these a seventh book was added in the fourth century, containing moral precepts and liturgies; and later, an eighth, in the form of constitutions, purporting to have been drawn up by the apostles, dating about the middle of the fourth century; and in the beginning of the sixth century a last chapter was added to the eighth book, consisting of ordinances relating to discipline, which had come into circulation under the name of apostolic canons. This collection was compiled in the East in the latter half of the fifth century, from extracts from the apostolic constitutions and the existing decrees of the councils, especially those of Antioch, together with some other sources; it originally contained fifty canons, but was somewhat later increased to eighty-five by other compilators. In the East these were received as having the stamp of authority,¹ not so in the West,² where their origin was not a matter of doubt; but as they were useful for the purposes of discipline, Dionysius adopted the smaller collection of fifty, and thereby procured for them the stamp of authority.³

§ 189.

The Greek collections were augmented at an uncertain period by three new additions: first the canons of Sardica,⁴ probably including those of Nicaea, the canons of Ephesus, and those of the Apostles, in the sixth century; then they included the eighty-five apostolic canons, and those of Nicaea, Ancyra, New Cæsarea, Sardica, Gangra, Antioch, Laodicea, Constantinople, Ephesus, and Chalcedon.⁵ From these materials new collections were formed, not in chronological order as formerly, but according to systematic arrangement, that in sixty titles no longer exists.⁶ Another is by John, Presbyter of Antioch, formerly scholasticus and patriarch of Constantinople, under Justinian, in 564; he took these as he found them, and added thereto sixty-eight canons taken from the three epistles of Basil, dividing this matter into fifty heads or titles.⁷ Johannes Jejunator caused an extract therefrom to be made in 595 respecting confession.

§ 190.

Justinian now made church discipline a part of the municipal law, and incorporated it in the new Codex in 534; but there was no authentic collection of the Novellæ relating to ecclesiastical matters after this time, private collections were all that existed, among which may be noticed that of one hundred and sixty-eight Novels, compiled with the assistance of an older edition, which originated either under Justinian, or was prepared under or immediately after Tiberius II. in 578-82. All general principles

of law were, however, taken from Justinian's Pandects and Institutes of 533.

§ 191.

The immense increase of imperial constitutions rendered it necessary that such as related to the Church should be excerpted and arrayed together from time to time: and three such collections exist; the first contains, after a preface, excerpts of about ten Novellæ in eighty-seven chapters, compiled by the patriarch Johannes before mentioned, the year after Justinian's death. The second has no preface, and contains passages from the Codex and Novellæ, to the number of twenty-five; the date is towards the end of the sixth century, and the author is unknown. The third is the most copious, and is divided into three parts, the first of which contains the thirteen titles of the Codex complete; παράτητα are added at the conclusion of most titles, containing a succession of extracts from the Codex and Novellæ. The second part contains a series of passages from the Pandects and Institutes, relating to Ecclesiastical Law. The third part contains extracts, more or less complete, from the thirty-four Novella, divided into somewhat prolix titles; four Novellæ of Heraclius, 610-41, respecting ecclesiastical matters, appear to have been added later, hence it is presumable that the Novellæ did not originate under this Emperor, but under Justinius II. in 565-68.

§ 192.

In order to facilitate the study of the Canon Law, collections were made in systematic order according to the subject, the first attempt of this nature was termed Nomocanon; it is composed of the fifty titles of Johannes, to which are added parallels of Municipal Law taken for the most part from the collections of the 87 chapters, and comparatively but little from the Codex and Pandects. There is an appendix of twenty-one chapters taken from the eighty-seven above mentioned, its date may be fixed very soon after Justinian's age, but there is much discrepancy in the manuscripts.

Another collection is only known from the use subsequently made of it by Photius, from whose preface we learn that it consisted of two parts, the first containing the canons of ten councils, followed by the canons of the apostles and of a council of Carthage, and lastly the canonical decisions of the fathers. In the second part the compilator gave a Nomocanon in fourteen titles, and the canons applicable thereto under every title, but only as citations according to their numbers and excerpts from Justinian's legal works. These latter he took principally from the collection in three parts, erroneously ascribed to Balsamon, but more probably the work of the same author.

1 Zach. 22, n. 3. 2 Zach. 22, n. 4. 3 Zach. 1. c. n. 7.
4 Zach. 1. c. n. 5. 6 Zach. 1. c. 6.
§ 193.

The fifth and sixth general councils, in 533 and 680, occupied themselves merely with dogmatical questions, without interfering with those which related to discipline. Justinian II. therefore, in 692, assembled a new council for this express purpose, in a vaulted hall in the Imperial palace, called the Trullus, which resolved upon one hundred and two canons. The whole was composed of the canons of the Apostles, those of the ten councils already mentioned, the canons of the synod of Carthage, subsequently adopted in the collection of Photius, the decrees of a synod held in 394 at Constantinople, under Nectarius, the canonical decisions of the twelve patriarchs and ecclesiastical presbyters of the East, from the third to the fifth century, and lastly, of the canon of a council held at Carthage, under Cyprian, in 256; to these were added the one hundred and two canons drawn up by the Trullanian Synod itself, to which were added later the twenty-two canons settled in the second council of Nicaea, in 787. On this foundation the Ecclesiastical Law was based, up to the middle of the ninth century.

The ecclesiastical law was however afterwards augmented by the seventeen canons resolved by the synod assembled by Photius, against the Patriarch Ignatius in 861, and the twenty-seven, or, according to some MSS., the fourteen canons decreed by the eighth œcumenic council of 869, but rescinded by Photius, after his re-accession in 879, by the synod held in the church of St. Sophia.

§ 194.

Photius having conceived the idea of a general collection of canons, based on the above collection, and augmented it considerably. The first part contained eighty-five canons of the Apostles, those of the ten councils, and of the Carthaginian Synod of 419, the canon of the synod of Constantinople of 394, the one hundred and two canons of the sixth synod, the twenty-two of the seventh œcumenic council, the seventeen of the Synod of Constantinople of 861, and the canonical decisions of the Fathers. The second part, called the Nomocanon, remained unchanged. The date of this work may be fixed in A. M. 6391, or A. D. 883.

From this collection having been rescinded by Leo in 886, it would appear that it never quite obtained the stamp of authority, and it may here be remarked that as Latin had ceased already, under Heraclius, in 610-41, to be the official language, Justinian's collection was consequently used in a Greek translation, to which circumstance the origin of the Basilics, in the end of the ninth century, may probably be attributed; nevertheless, the three older collections extracted from Justinian's legal works still retained their authority until the twelfth century, when they appear to have been superseded in the general opinion.

1 C. 6, D. xvi.
§ 195.

The new ecclesiastical constitutions issued from the Emperors, as, for instance, from Leo Philosopher, in 911; from Constantine Porphyrogenitus, in 961; from Alexius Comnenus, in 1118; from John Comnenus, in 1143; from Isaac Alexius, in 1185-90, &c. The resolutions of diocesan synods summoned by the patriarchs of Constantinople, canonical epistles of renowned presbyters, and their decisions, formed another progressive addition to the Canon Law of the Eastern Church.

§ 196.

The commentaries on the canons formed no unimportant part of the Ecclesiastical Law of the East; the first of these was undertaken by Theodore Prodromos in the eighth century. The second, containing the text with a commentary, is the Nomocanon of Doropater; but, as the matter increased, a more comprehensive work was required, for which the rich collection of Photius served as a basis, upon which the renowned historian, the Monk John Zonaras composed a pretty comprehensive verbal interpretation in 1120. Theodore Balsamon followed his example fifty years later, again commenting as well on the part to which Zonaras had turned his attention, as on the systematically arranged extract called the Nomocanon, with a view to practical questions, comparing the canons with the Civil Law, and insisting that Justinian's maxims only applied when conformable to the Basilics; he, however, inverted the order, placing the decrees of the oecumenic or general councils first, and adding many matters not included in Photius's collection, a change which probably originated with Zonaras.

§ 197.

The mass of the body of the Canon Law having become unwieldy and difficult of reference, epitomes were composed at a comparatively early period, the author of the first of which appears to have been Stephen of Ephesus in the fifth century. An epitome augmented by subsequent matters, approaching in its order the works of Zonaras and Balsamon, is printed in the name of the Magister and Logothet Simeon. The synopsis printed under the name of Aristenus contains like matter, with the exception of its arrangement, in which respect it conforms more nearly with that of Photius; the synopsis was augmented by Alexius Aristenus in 1160, and elucidated by Scholia; lastly, canonical epistles were excerpted and added to this synopsis. Another synopsis was composed by Arsenius, a monk of Mount Athos, in

1 Zach. § 51, n. 4.
2 Bal. 1, 11, n. 8; Zach. 22, n. 1.
3 Ibid. l. c. n. 5.
4 Zach. § 57, n. 3.
5 Ibid. l. c. n. 9.
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1255, for which he used partly the usual canonical collections, partly the collection of the eighty-seventh chapter. Constantine Harmenopolus composed, in 1350, an epitome of the Spiritual Law in six parts, using, with some omissions, the collection of Photius as altered by Zonaras. A confused anonymous collection, under the title Nomocanon, may here be mentioned.

§ 198.

In order to reduce the Canon Law to a more accessible and practical form than it appeared in the collection of Photius, and at the same time to present a more comprehensive work than these synopses and epitomes, Mattheus Blastares drew up his syntagma in 1335, divided into chapters of different lengths, and arranged according to the principal word of these Rubrics, the numbers of the chapters commencing anew under each letter. Each chapter begins with the Ecclesiastical Law, followed by the Civil Law applicable to it, without, however, mentioning the source whence the latter is derived, the ecclesiastical ordinances being taken from the usual canonical collections. This work came into very general use among the clergy. In most MSS. there is appended a register of small practical works, probably from the pen of Blastares himself.

The collection of Photius with its scholia, and the syntagma of Blastares, continued still in use under the Turkish rule, and were alike termed Nomocanon, and metaphorically, Μηδαλωφ, or Rudder. The collection and interpretation of Zonaras also obtained canonical authority. These and other sources were widely disseminated, but, in addition, the printed editions of the Beveridge and Lumsclavius were brought from the West. From these materials many extracts were translated into modern Greek up to the eighteenth century, and several text books composed for the use of the clergy; many of which were printed at Venice. The Nomocanon of Manuel Malalrus published in 1561, was among those in most general use. In 1798, an epitome of the Monk Christophorus, issued from the patriarchal press; and lastly, a comprehensive collection was published in 1800, at the instance of the patriarch and the synod. It contains the old Greek text of all the authentic canons of council and fathers since Photius and Zonaras, according to the arrangement of this latter, to which are added the interpretations of the authentic commentators in modern Greek, especially those of Zonaras, Balsamon, sometimes of Aristenus, that is to say, the synopsis attributed to him, together with the scholia of an anonymous author, probably those of Aristenus. In the interpretation, the canons of those fathers are taken into account which had not been confirmed by any general synod, but had obtained a canonical authority, and among these the

1 Zach. I. c. n. 15.
2 Ibid. 55, n. 2.
3 Ibid. 55, 56.
4 Ibid. 56, n. 7.*
small works appended to Blastares. Nothing was adopted in the interpretation from the Municipal Law works, which did not agree with the canons. To the whole several appendices were added, including formularies for ecclesiastical business, and upon these and the other collections is founded the present law of the Greek Church.

Its Greek title, which, however, will probably best explain its object and contents, is as follows:—ἐλε δύσεν Πατρὸς, Τίου καὶ ἄγιου Πνεύματος, τῶν ἐνὸς θεοῦ. ΠΗΔΑΛΙΩΝ τῆς νοοτής νηός, τῆς μιᾶς, ἄγιας, καθολικῆς, καὶ ἀποστολικῆς τῶν ὀρθοδόξων ἐκκλησια- ἕτοι ἄταυτες οἱ λεπτοὶ καὶ θέας λοιποῖς, τῶν τῆς ἀγίων καὶ πανευφήμων 'Αποστόλων, τῶν ἀγίων Οἰκουμενικῶν Συνών, τῶν τοπικῶν, καὶ τῶν κατὰ μέρος θείων πατέρων. Ἐλληνιστὶ μεν χάρις ἀξωπιστίας, ἐκτιθήμενοι, διὰ τὴς καθ' ἡμᾶς κοινοτέρας διαλέκτων, πρὸς κατάληψιν τῶν ἄπλωστέρων ἐρμηνευόμενοι πάρα Ἀγαπίου ἐρμομαχοῦ, καὶ Νικο- δήμου μοιχοῦ. —Ἐν Λειψίᾳ τῆς Σαξονίας, εὐ τῇ τυπογραφίᾳ τῶν Βραδτσκόφ καὶ Αρτελ Αὐ (1800) Φολ. The Greeks now call themselves simply ὀρθόδοξοι, orthodox Christians, as distinguished from Romanists, whom they ironically term κατόλυκοι, wolves of the lower world, from the way the Italians themselves pronounce the θ.

§ 199.

The Russian followed the Greek Church in the adoption of all its works up to the end of the fifteenth century, when the Uloschenic or territorial law of Iwan III. Wasselgewitch, 1498, confirmed in the Sudebuk, or code of Iwan IV. Wasselgewitch, 1550, introduced certain regulations respecting the jurisdictions of bishops. The only sources this Church possesses different to the above, consist in canonical epistles and the rules drawn up at councils. This Church possesses manuals of its own, compiled from the above sources, and adapted to the country. Peter the Great reformed the Church in 1721, superseding the patriarch, by a synod, and issuing a new regulation, to which many subsequent ukases may now be added.

§ 200.

Although we have presumed that the heads of the Christian community, whom we, for want of a better word, have termed Bishops,1 followed St. Peter very soon after the first promulgation of Christianity at Rome, as the central point of almost universal government; there is, however, as good a reason to suppose that Christianity, so far from having excited much notice, was almost ignored by the State until long after the period fixed by those who so foolishly weaken a strong case, by straining the clearest and most unequivocal passages in classic authors, in order to confer a crown of useless and unconscious martyrdom, upon those who

1 Bishop is corrupted from ἤπισκοπος (Ἑ)πισκόπο; some of the Teutonic races confound the letters b and p Bishop in the old German and Dutch, in which the ə being aspirated, and the word divided into Bis-chop; the softer Franconian dialect pronounces Bi-schof, p becomes f invariably, and ch (χ) sh ∇.
were the mere objects of a tyrannical Emperor’s indiscriminate cruelty.

Muratori, doubtless as good a Catholic as a historian, in order that no link should be lost in the apostolic succession of the Popes, raises St. Peter to the dignity A.D. 29, almost before Jesus of Nazareth began his ministry; having lost no time in asserting the early rights of ecclesiastical supremacy, he proceeds in each succeeding chapter of his annuals to register the popes, who follow in order, under their respective reigns or dynasties of their temporal and pagan superiors, for the satisfaction of the curious.

In fact, however, the supremacy of the Christian religion was not asserted before the reign of Theodosius the Great, upwards of three hundred and fifty years later, or between A.D. 380 and 395, when he ordained “Cunctos populos quos clementiae nostrae regit temperamentum in tale volumus religionem versari quam divinum Petrum apostolum tradidisse Romanis religio usque nunc ab ipso insinuata declarat.”¹ There is also an ordinance of Valentinian III. forbidding bishops in Gaul and elsewhere to depart from ancient usages, without the approbation of the venerable the Pope of the Holy City.²

§ 201.

In the West the canons of Nicæa and Sardica composed originally the only source of Ecclesiastical Law; at a later period, however, large collections were formed by means of translations from the Greek Codices, the Spanish being the first adopted.

In the latter half of the fifth century, the Spanish translation into Latin, usually termed the Prisca or Isodorian, on account of its having been transferred from the later Spanish into the Isodorian collection, was generally received. It is composed in barbarous Latin, and is a translation of the Canons of Ancyra, New Cæsarea, Nicæa, Gangra, Antioch, and Constantinople, together with the Latin Canons of Sardica in original, inserted after those of Nicæa.

Lastly, fragments occur in an old Italian collection, taken from a third old version founded on the original of the Alexandrian Church in Greek.

Thus the collection of the Eastern and Western Churches coincide up to this period in all material points, and differ only in respect of their order or completeness.

§ 202.

The Consilia of Nicæa, then of 325, which treated merely of questions of dogma, were equally acknowledged both in the East and West; those of Constantinople, of 381, on the other hand, which referred to Church discipline, were some time in obtaining authority with the œcumeneic council in a dogmatical point of view, and were never regularly received by the Western Church,³ although they

¹ Cod. Theo. 16, 1, 2.
³ Zach. 57, n. 2.
were tacitly adopted through private collections. The eight Canons of Ephesus as regarded the Nestorians were of no authority. Twenty-seven of the twenty-eight Consilia of the Chalcedon of 451 were received without the addition of the three of the Oriental Church, these being rejected on account of the dispute respecting papal supremacy. The fifth and sixth general councils of 553 and 680 issued no canons, and the seventh of 787 was only known in the West, through the translation of Anastasius of the ninth century, from whom the Latin edition of the decrees of the eighth council, at which he was present in person, is also derived. In the mean time, another important source sprang up in the Decretals and Epistles of the Bishops of Rome, respecting discipline, issued either merō motu, or at the instance of other bishops; these had been so far received into the collection since the fifth century, and placed on an equal footing with the decrees of councils.

§ 203.

In the latter half of the fifth century, the translation from the Greek termed the Prisca only existed, to which the decretals were added from time to time, forming three additional collections, differing in so far as the one only contained Consilia, the other papal decretals in addition. For the Nicæan Canons, the first of these used a peculiar, and for the rest the old Italian version, the other two were founded partially on these, partially on the old Spanish version.

A collection by the Monk Dionysius, made for the Bishop Stephen of Dalmatia, followed, containing in the second edition a translation of the fifty Apostolic Canons, and those of Nicæa, Ancyra, New Caesarea, Gangra, Antioch, Laodicea, and Constantinople, under one hundred and sixty-five consecutive heads, after the Greek collection, under new numbers, the twenty-nine Canons of Chalcedon, and the Latin original of the twenty-one Canons of Sardica, the Acts of the Council of Carthage (419) under one hundred and thirty-eight numbers, with the decrees of later African Councils. Dionysius collected at a later period the decrees of the Roman Bishops as far as he could ascertain them, and this work probably dates under Lymmachus in 498 or 514. A third by Dionysius, containing simply the Greek decrees of councils in Greek and Latin in juxtaposition, is lost.

The Deacon Theodosius caused a new collection to be framed later, founded on the old Spanish and Dionysian, and third version above mentioned. A third collection, valuable for the important historical documents it contains, termed the Avellanian, appeared in the latter half of the sixth century, but all were superseded by the second edition of Dionysius, probably under Gregory II. in 731. Certain decrees which had escaped him were added in chro-

1 Bal. 3, r.
nological order, another appendix of genuine and ungenuine decrees was afterwards added to Dionysius, consisting of the statutes of the Roman Bishops from Linus downwards; those up to Siricius, however, being given simply in an historical form, as no longer actually in existence.

It has been seen, in a former part of this work, that the German conquerors of Italy, in 476, did not, although Arian, interfere with the lex loci, and least of all with the law by which the Church was governed; on Justinian's reconquest of Italy in 554, however, the sources hitherto used, drawn from the Codex of Theodosius II. and subsequent rescripts, were superseded by the Novellae of that Emperor, in the Julian translation of 556, nor was this changed by the Lombard kings in 568, who, having, since Grimoald in 670, become Christian, upheld the order of things by their Edicts.

§ 204.

In Africa, the Deacon Fulgentius Ferrandus made the first collection in 547, termed Breviatio, being an excerpt in 232 consecutive numbers of nearly all the Greek, including the Nicæan Canons, and African Consilia, those under Gratus in 348-9, under Genevlius in 390, the important council of Carthage in 419, which issued in all thirty-three or forty canons, to which were added three hundred and four more of synods, held under Aurelius and later, and an extract of the canons framed at Hippo, in 393, and six more added at the second session.

The second African work of this description was the Concordia of Bishop Cresconius of 690, founded upon Dionysius, but arranged in three hundred titles, instead of chronological order. This work was incorporated with Dionysius, and reprinted under the name Breviarium.

The Arabs put a sudden stop to all further development of Ecclesiastical Law in this quarter. We have already referred to the translation of the Greek Canons in Spain in the fifth century; in the following century, important collections of the African, Spanish, Frankist, and Papal decretals were formed, and a short work on Church Government, by Martin, Bishop of Braga, in Gallicia, in 572, founded chiefly on the Greek Consilia, obtained particular credit; it contains eighty-four chapters divided into two books, the first relating to the clergy, the latter to laymen; later rough abstracts were made of this work, and the above collections, together with the Frankist Codices, giving merely the sense of the chapters, canons, and decretals. In the seventh century another and better collection was formed from the Greek councils and old Spanish versions, the Consilia of Ephesus in two epistles of Cyprillas, the eight African Consilia, ten Gallic, fourteen Spanish, the chapter of Martin of Braga, concluding with the sententiae of the council of Agde in 506. The second part is wholly taken from Dionysius.

1 Bal. 3, n. 2
2§ 104.
3 Bal. 4, n. 2.
sius’s work, with the addition of many decretals not possessed by him, its date may with safety be fixed in 633. This collection was afterwards augmented by the Consilia of Constantinople of 680, and five papal epistles referring thereto, together with Gallic and Spanish Consilia under those heads. The second part, concluding with the latter of Gregory I., received three additions, a systematic abstract was made of this at the end of the seventh century, in ten books, divided into titles, which was probably only the index to the same work, when arranged in a systematic order. In addition, the Codex of Theodosius II., and an abstract of the West Gothic Breviary of Alarich II. (506) was used in Spain, and as the kings who followed Riccard in 589, had renounced Arianism, many provisions of great importance to the Church were imported from the new edition of the West Gothic Codex.

§ 205.

In the fifth century, an extensive but confused collection of Consilia and Decretals was compiled in Gaul under Gelasius, founded upon the old Spanish version, and some peculiar version of the Nicaean Canons and the Prisca, as far as regards the Canon of Chalcedon. Out of these sprang other collections. The first, in the middle of the sixth century, containing the Consilia of Nicaea, the Canons of Sardica, the Frankist Consilia, and papal decretals. A second of the same date, containing the Greek, African, and Gallic Canons, and Papal Epistles, in a confused order taken from the old Spanish and Dionysian versions. A third, dating in the seventh century, contains one hundred and three numbers, many decretals, Frank, Roman, and Italian Consilia, &c. A fourth contains, more especially, Frank Consilia. A fifth of the same date, comprising Frank and Spanish Consilia. After Charles the Great, Hadrain’s Codex was that principally in use.

In addition to these principal works, many of the bishops composed capitularies for their own dioceses, as for instance, Boniface of Mainz, 745,1 the Bishop Theodulp of Orleans, 707, Haytho of Bâle, 820, the Archbishop of Herard and Tours, 858,2 Walter of Orleans, 871, and Bishop Hincmar of Rheims, 852-74.

§ 206.

There existed, in addition to these works, others in the Frank kingdom, systematically arranged according to matters and titles. That in ninety-two titles, is chiefly from the Hadrain and Dionysian collection, dating before the middle of the eighth century; the second, in sixty-four titles, is similar in its order to the first; the third, in thirty titles, was an abstract of the preceding; the fourth, in seventy-two chapters, resembled the first, except in its

1 Mani, Conc. 12, Col. 383-13, 993, and 1008-14, 392.
3 Mani, 15, 505-9, and 473-504.
order; and upon all these testimonies of the Fathers were engrafted. A more extensive collection appeared at the end of the eighth century, divided into three books, treating of confessions, accusations, and consecration, founded upon the Hadrian and Spanish collections; and at the same period another, in three hundred and eighty-one chapters, from the same source. A similar collection is that by Haltigar (Bishop of Cambray about 825), in five books, to which a sixth was added, consisting of penitential fragments.

Penitential books, founded on the authority of councils and of the Fathers, formed an important feature in the ecclesiastical jurisprudence of that age: the principal of which were that of Columbanus, in the middle of the seventh century; that attributed to the Irish Abbot Cumin; the widely-spread work of Archbishop Theodore of Canterbury, in 690, and his means of redemption by good works; another, in twenty-eight chapters, of the same age; one at the beginning of the eighth century, erroneously attributed to Bede; the penitential collection of Bede, 735; the De Remediis Peccatorum of Archbishop Egbert of York, about 775, being the abstract of a larger work; another, in three books, attributed to the same author, and often appended as a fourth book to his greater work in three hundred and eighty-one chapters; another still smaller is also attributed to him; another, De Remediis Peccatorum, quite distinct from that of Egbert; another excerpt, in thirty-three chapters, attributed to Pope Gregory III.; the Penitentiale Romanum, doubtful as to its origin and the genuineness of its contents; a collection of penitences, in one hundred and sixty-nine chapters, connected with those of Columbanus, Cumin, and Haltigar; a collection in forty-seven chapters, and another in forty-six; that of Theodulphe of Orleans, 797; the Liber Peneitentium of Rabanus Maurus, of 841, directed to Archbishop Otgar of Mainz, and another to Heribald of Auxerre, otherwise arranged; to which others might be added.

§ 207.

The rituals and books of forms of this age are also very important in an historical point of view, as throwing light on the forms observed at solemn ceremonies at that time. Of these the oldest and most complete is that attributed to Gregory the Great in 604, but by far the greater number belong to the Frank kingdom. Of these the Monk Marculfus, of the year 669, and who has been before alluded to, composed the first; others were published by Sirmond, Vignon, Lendenbroc, Baluze, and Le Peletier. The Roman Church used the Liber Diurnus, composed in 714. This book contained formulæ for every species of State business.

1 Bal. 4, 8, n. 3. 2 Walter. Kirchr. § 95, p. 182.
§ 208.

Before taking a general review of the sources whence the Canon Law, in the state in which we at present find it, was drawn, the forged decreals deserve a passing notice. The origin or object of this forgery has never been cleared up, for while Walter supposes the clerical world to have been the dupes of this deceit during six centuries, Menzel, with more probability, attributes the deceit to the clergy, or perhaps the holy chair itself, which was the most interested in their authenticity being established. This collection first appeared in the Frank kingdom in the ninth century, and was said to have been received from Spain, by Riculf, Bishop of Mainz, in 787-814. In addition to certain false documents which had crept into private collections, probably from the ignorance of the compilers, we here find an array of systematic forgeries. The oldest edition of it is divided into three parts, of which the first, after a preface taken from the Spanish collection, contains the canons of the apostles, followed by fifty forged breves and decrees of the thirty older popes from Clemens in 91, to Melchiades in 313. The second part contains, after an introduction, the forged act of gift of Constantine, followed by the preface of the Spanish and of the old Gallic collections of the fifth century, the Greek, African, Gallic, and Spanish Consilia of 683. The third part, after a preface, also from the Spanish collection, contains the decrees of the popes from Silvester in 335, to Gregory in 731, followed by thirty-five forged decrees, and many spurious Consilia; the genuine passages are from the Spanish, Gallic, and Dionysian collections, with many forged interpolations. After the decree of Gregory II., with which the Codex formerly closed, are placed two forged Roman Consilia referring to Symmachus in 514, and a second appendix by the same author. The name of Saint Isodor, to whom it was attributed, is prefixed to the whole, as it probably was to the original Spanish collection, which was made to serve as the ground-work of the forgery.

The forged portions treated of dogmatical questions, of the dignity, advantages, and privileges of the Romish Church, of the prosecution of bishops and the clergy, of appeals to the papal chair, of the usurpers of Church property, of ordination, of bishops, of the choir, of priests, deacons, baptism, confirmation, and marriage, of the oblation of masses, of fasts, the solemnization of Easter, of the finding of the cross, of the translation of the bodies of the apostles, of unction, and holy water, of the consecration of churches, of the blessing of crops, of holy vessels and robes, and often of personal matters, but consisting for the most part of moral and religious exhortations.

In the fifteenth century the forgery was more than suspected by the learned, especially as regarded the decreals of the elder popes;

* Van Espen.
but in the 16th century, when the whole was accessible in a printed form, and which gave an opportunity for critical examination, every remaining doubt vanished. They are supposed, by Blondel, to have been forged in the Frank kingdom, and their true date may be fixed between 845 and 857. Their author was probably Benedict of Mainz; the Consilia, Decreta, and Epistles of the Fathers and other ecclesiastical writers, from the pontifical books and works of Ruffinus, Cassiodor, the West Gothic Breviary and its interpretation, together with other parts of the Roman Law, furnished the materials. Walter supposes the object to have been chiefly to improve the Church discipline, and not for the aggrandizement of the papal power; a view that is open to the greatest question.

Nor does this appear to have been the only forgery of which Levites Benedict was guilty; in the above work he notifies a collection of capitularies of the Abbot Anselgesius, as a complement of the above work, which was probably destined for the ecclesiastical tribunals, as portions of capitularies actually occur in it, intermixed with fragments of Scripture, of the Fathers, of the West Gothic Breviary, Consilia, and Decrees of the Codex Theodosianus, of Julian Novella, and the German legal works, but without any order or reference. This work dates in 840, and was probably composed, like the first, at the instance of Otgar, Archbishop of Mainz, but only came into circulation after the death of that prelate. It was at first treated as an independent work, but afterwards abstracted by Isaac, Bishop of Langres, in 859, under eleven titles, for the use of his own diocese, and was ultimately bound up with the four books of Anselgesius, as the fifth, sixth, and seventh. It received several appendices: the first was composed of the eighty rules of Aix-la-Chapelle, of 817, respecting monkish life; a second, third, and fourth appendix, in the form of Benedict's collection; the last, containing several forged decreets, with the names of the popes affixed. Another collection, of the fourth century, contained seventy-two (eighty) chapters or sentences respecting the accusation of bishops and clerks, used by Hincmar of Laon in his defence against Hincmar of Rheims; it purported to have been given by Hadrian I. to the Bishop of Angelram on his visit to Rome in 785, or vice versa, which of the two is not clear. Walter thinks that Levites Benedict composed from his materials about the same time all these; that is, the three capitularies, the collection of false decreets, and the Angelramni Sententiae, because they are found distributed in the "Three Books." Lastly, there exists a collection abstracted almost wholly from the forged decreets, the origin and locality of

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1 Kirchr. § 98, 197.
2 A detailed account of this will be found in Walter's Kirchenrecht, § 95, et seq.
which is entirely unknown, and which has been attributed to Bishop Remigius, or Remigius of Chur, 800-20, without the shadow of foundation.

§ 209.

The temporal dominion of the Pope began in 751-2, when King Aistulf had conquered Ravenna, and was threatening Rome. The Pope applied to Pipin, King of France, for assistance, and in consideration of it being afforded, Pipin was named Patriicus of Rome; the Pope, on the other hand, received the exarch of Ravenna, including Pentapolis, on Aistulf's second defeat; but it was thirty years ere he obtained tranquil possession of it, and thus the last remnant of the Eastern dominion in Italy passed from the Greeks to a new dynasty. With respect to Ravenna and its vicinity, powerful private individuals and the Archbishops usurped the papal dominion; the differences with the Lombards were, however, soon settled when the question of attacking their common enemy, the Greek, occurred; an alliance was formed, nor was the papal sovereignty again disturbed, after the accession of Charles the Great to the Lombard throne. Savigny considers that no new kingdom was erected, nor that this was a continuation of the Greek dominion, but rather a revival of the Western Empire in a small scale. As no record of the gift of this territory exists, the fact must be implied from circumstances which took place, such, for instance, as the terms in which Charles the Great asked for columns and certain other ornamental works in 784, and the style in which the Pope answers, &c., and from this time the independence of the Pope can no longer be a question of doubt. It now remains to ascertain how the Pope became possessed of Rome, having been up to that time master of the Exarchate of Ravenna only, and having exercised, as appears from a constitution of Lothar I. in 824 a joint jurisdiction of the Emperor, acts typical of sovereignty being competent to the Emperor or Pope, which it may be implied that Charles the Great first conferred on the Pope quoad Rome. This community of jurisdiction was confirmed to the Pope in 962, by Otho I., when he united the Imperial dignity with the German crown.

§ 210.

The Primate.

St. Peter.

It appears indispensable to a clear understanding of the papal jurisdiction, to explain the nature of the office of primate, which, as we have already seen, originated with apostles, or rather, as Romanist divines maintain, with St. Peter, who is by them understood to be, metaphorically speaking, the Janitor of Heaven, from the expression of his master, on his name being changed

from Simon to Peter, οὗ et Ηέτρος καὶ ἑπὶ ταύτη τῆς πέτρα οἰκοδομής μου τὴν ἐκκλησίαν καὶ δῶσο σοι τὰς κλεῖς τῆς βασιλείας τῶν θυρανών, hence also originated the custom of bestowing a new name upon a pope at his election. The Pope is the supreme authority in the Church, bound to give account to none but God and his conscience. His duties are to care for the unity, and discipline of the Church, and exercise a general superintendence over it; in this capacity he has the power of legislation in points of general discipline, and consequently summons oecumenic councils, appoints or suppresses feast days, conducts the propaganda fidei, canonizes and confirms orders and superior ecclesiastical institutions of a general nature, receives appeals, confirms, translates, and deprives Bishops, transfers, unites, or divides dioceses, absolves and dispenses in the more important occasions, examines relics and the like; in short, the Pope is the Küblets Aulum, or centre of the Christian world.

§ 211.

The dignity of the Pope consists in certain honorary rights, such as his insignia of office, consisting in a straight staff surmounted by a cross, the Regnum or triple crown first used by Clement V. in 1314. Nicholas II. probably first originated the double crown in 1061, and though other inconclusive origins are attributed to it, may have typified the two empires of the East and West in the same way as the double-headed eagle of the Romano-Germanic Empire. May not the triple crown have pointed metaphorically to the Trinity?

The ancient address of the Pope was Holy Father, your Holiness, your Blessedness. In the sixth century he assumed the title Servus Servorum Dei, in contradistinction to the Greek patriarch, who styles himself the oecumenic patriarch, the title of Pontifex Maximus was transferred to him from the Roman Emperors in the time of Gratian. Papa was the generic title of Bishops, as was also the term Vicarius Christi, which was also afterwards restricted to the Bishop of Rome. As a temporal prince he has the right of embassy, but many other customs have become almost obsolete, such as the old Byzantine form of homage by kissing the foot in use between the Emperor and Bishops. The first instance of the Emperor himself submitting to it, was in the case of John I. and Justinus in 525, and of Agapetus and Justinian. This form was afterwards confined to solemn acts of homage, the present Pope Pius IX. however finally abolished it.

The necessity of the Pope being invested with temporal as well as spiritual power, confirmed by the treaty of Vienna of 1815, is founded on three distinct grounds. The financial independence of the Holy See is necessary to render the Pope independent of those

1 Matthew, c. 16. v. 17. et seq.
2 Some assume the third to have been the iron crown of Lombardy, but this was conferred on Henry VI. (VII.) about this time at Wenzel; Charles IV. (V.) sold all the imperial rights in 1367.
3 Sancte Pater, Vestra Sanctitas, Vestra Beatitudo.
monarchs with whom he may have to treat on points of religion; he requires to dwell on a neutral territory, not exposed to the contingency of war, and upon this ground the Pope refused in 1848 to declare war against Austria. In the second place, the Pope requires an independent revenue for the support of the dignity of the head of the Catholic Church, and in order to enable him to meet the clerical expenses inseparable from the administration of his office. Lastly, the Pope must be sovereign, subject to the temporal courts of no superior, for the spiritual cannot be wholly divided from the temporal sovereignty; these are all indispensable to the existence of the supreme Pontificate. Democratic convictions, however, not guided by logical reasoning and ennobled egotism, often originate in the desire of the power of oppression.

§ 212.

The election of the Bishop of Rome formerly differed in no respect from that of other diocesan bishops, and was performed by the neighbouring bishops, clergy, and community; the Pope, when elected, was consecrated by the Bishop of Ostia. Double elections, however, often afforded the Roman Emperors an excuse for interfering. This influence passed into the hands of the German dynasty, with the possession of the city, and these kings, although Arians, appear to have exercised their influence most moderately. Theoderic, on the contrary, violently usurped the right of nomination, which was modified when the Greeks recovered Italy. At this period, the death of the Pope had to be notified immediately to the Exarchat of Ravenna, and the election made by the clergy, optimates, the army, and people, and the preëcie returned to the Emperor through the Exarch; a considerable sum was then exacted for the confirmation which was first remitted by Constantine Patagonatus to Pope Agatho in 680. In the mean time the Roman Consilia defined the detail of the election more accurately, and when Italy fell under the Frank dynasty in the eighth century, the election was conducted with more freedom; but the Emperor’s consent was always required before the consecration, which was, however, often evaded. Otho I. endeavoured to uphold the Imperial rights, by treaties with John XII., Leo VIII., and Henry II., with Benedict VIII., nor did the intrigue cease until Nicholas II. got a new decree passed, which provided that the Cardinal Bishops should carefully prepare matters for the election, then summon the other cardinals, clergy, and people, who should vote with due respect to the Imperial rights, which was, in fact, a mere restoration of the old form of Episcopal election; the three latter soon became a dead letter, and the Cardinals alone elected.

According to the present practice, those Cardinals only who are

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actually present have a voice in the election of the Pope, nor are any summoned, neither can any Cardinal leave the building until the election shall have been determined, which is performed by scrutiny, and two-thirds of the votes must fall upon the same person, who is then consecrated by the Cardinal Deacon, usually also Bishop of Ostia, with very ancient forms and customs, the same person performs the coronation, and, last of all, the induction takes place with great solemnity.\footnote{1}

\$ 213.

As the Cardinals exercised so great an influence in the affairs of the papal state, it will be well to glance at their origin, which is derived from the Presbyters of the ancient Church, elected to assist the Bishop, otherwise termed Diaconi Cardinales.\footnote{2} The city of Rome was divided by Fabian in 240 into seven ecclesiastical regions, and each Diaconus Regionarius acquired also the above distinctive title Cardinalis, and as their office was in the ninth century transferred to the seven bishops of the neighbourhood, they in like manner acquired the same style. In the Middle Ages the number of the Spiritual Cardinals of Rome amounted to fifty-three, composed of seven bishops, twenty-eight priests, and eighteen deacons, viz. twelve regionarii and six palatini, for the service of the Lateran Church, the importance of their office especially, on account of the part they took in the election of the Pope, procured for them insensibly a precedence even before Archbishops and the Latin Patriarchs, so much so that, in 1567 Pius IV. forbade all other clergy to assume the title.

The Cardinals now came to be nominated by the Pope, and were to be taken as much as possible from all nations of Christendom,\footnote{3} thus forming a representative assembly, and several monarchs possessed the right of recommendation to that honour. The council of Bâle, with a view to reduce expense, fixed their number at twenty-four, but a bulla of Sixtus V. 1586, finally settled it at seventy, consisting of fourteen deacons, fifty priests, and six bishops. On the death of the Pope the Government was administered by the Cardinal Chamberlain or first Cardinal Bishop, a priest, and deacon, until the new election could be had. The red hat was conferred upon them by Innocent IV. in 1245, and the predicate ementissimi given to them in 1644 by Urban VIII. in order to place them, as the spiritual electors, on an equality with the three ecclesiastical electors of Germany, on which account also their persons were inviolable.

\$ 214.

We have already seen the works on Canon Law, which were in existence up to the tenth century. At that period the mass of matter became so overwhelming, that the necessity of a collection

\footnote{1}{Lib. Diur. 2, 8, 9.  
\footnote{2}{Cons. Trid. Sep. 24, 1, De Ref.  
\footnote{3}{C. 3, D. 24, c. 45, c. 7, p. 1, c. 5, D. 7.}
of the Canon Law in a more convenient form became a matter of
urgent necessity, this was so sensibly perceived that several
appeared. First, a manuscript collection, systematically arranged
under twelve heads, and divided into three hundred and fifty-four
chapters, abstracted from Cresconius. This was followed by
another, in three hundred and forty-one chapters, chronologically
arranged, extracted from Dionysius and the forged Spanish col-
collection. The third, likewise in MS., very voluminous, is divided
into twelve parts, and dedicated to the Archipresul Anselmus; it
is taken from Hadrian’s Codex, augmented from the genuine, as
well as the forged Spanish collections, the Register of Gregory I.,
Justinian’s works, Julian’s edition of the Novels, and the four Coun-
cils of Rome held under Zacharias and Eugen in 743 and 826: its
date is probably 888. The fourth, belonging to the ninth or tenth
century, contains portions of Consilia, of the Decretals, of the
Scriptures, of the Fathers, and of Justinian’s works, and is divided
into nine books. The fifth, made by Regino, Abbot of Prum,
between 906 and 915, is divided into two books, and is supposed
to have been his visitation manual; the first part is prefaced by
points referring to divine service and the clergy, the second by
those relating to the laity, the canonical authority being appended
each. It is founded upon the three Frank collections, that of Hal-
litgar, and the circular of Rabana to Heribald. Dionysius, and the
Spanish version, are indifferently used for Greek Canons, the rest
is taken from various sources, the Fathers, the interpretation of the
West Gothic Breviary, the German Consilia, Penitential books,
&c. At a later period three appendices were added to it, and the
order of many parts of it inverted. A Leipzig Codex contains an
extract from Regino. A Darmstadt Codex in four books, taken
from the Frank collection, from the four books from Ansegisius, the
Angilramni Sententiae, German Consilia, forged and genuine De-
cretals, and from the Regino in its original form.

The eighth collection in a Wolfenbüttel MS., containing two hun-
dred and forty-eight chapters, is attributed to Rotgerus, Bishop of
Treves, in 922; it contains fragments of the false and genuine De-
cretals from the collection of Remedio of Chur, and portions from
Regino. This may be the collection made by Rotgerus, Bishop of
Treves, after 922. The ninth, from a Viennese MS., contains
fragments of Decretals, from Clement to Gregory II., excerpts
from Regino, of the Fathers and Decretals, also of Consilia, and
the genuine and forged decretales. The tenth is likewise an un-
printed collection in five books, composed in Italy, and belonging
to the middle of the tenth century; it is founded upon the Irish

1 Theiner über IVo, 7-9.
2 L. c. 9-10.
3 Bal. 4, 10; Theiner, l. c. 10-14; Sav. 2, 100-1.
4 Bal. 4, 18, n. 6; Sav. 2, 102.
8 Bal. 4, 1I, n. 4, 2, 3.
8 Vid. § 205, p. 249, Theiner, l. c. 14, 216.
6 L. c. 20-28.
9 Theiner über IVo, 15-17.
10 Bal. 4, 18, n. 4; Sav. 2, § 104.
collection in sixty-five titles, on fragments of the Fathers, lives of the Saints, on penitential books, the false Decretals, on Julian's edition of the Novellæ; Capitularies, &c. of the Emperors, up to Henry I., being added. An extract of this work in five books is likewise extant. The eleventh was addressed by Abbo, Abbot of Fleury, in the end of the tenth century, to King Hugo and his son Robert; it consists of a treatise in fifty-two chapters, on the Church and Clergy, containing passages from the Decretals, Capitularies, the West Gothic Breviary, and Julian's edition of the Novellæ.

The twelfth collection was composed by Burchard, Bishop of Worms, in 1012-23, in twenty books, in unconnected order; the sources are given in the preface, namely, some collection of canons not further described, the Canons of the Apostles, the Transmarine, German, Gallic, and Spanish Consilia, the Papal Decrees, the New and Old Testament, the writings of the Apostles, many Fathers of the Church, and the three penitential books; many passages are, however, from the work dedicated to Anselmus; many too, are taken from the emended edition of Regino, &c., a manuscript abstract of Burchard of the thirteenth century also exists. The thirteenth is a MS. collection in twelve books, made in Germany or France, chiefly taken from that dedicated to Anselmus and Burchard, German Consilia, and the penitential books. The fourteenth belonged to the eleventh century, and is a Tarraconian MS. in six books. The fifteenth is an introduction to discipline, taken from the work, in five books (vid. 10), and Burchard. The sixteenth is a collection of canons and penances in two books, MS. taken chiefly from Halitgar, Rasbahu, Maurus, and Burchard. The seventeenth is a rich collection in thirteen books by Anselm, Bishop of Lucca, 1086; it is MS., and the first seven books are taken from the Anselman, the latter six from the Burchardian edition. The eighteenth in seventy-four titles is taken from the above, and is also MS. Towards the end of the eleventh century the nineteenth appeared, consisting of nine books, taken from the Anselman and Burchardian editions. The twentieth of like date in thirteen books is taken from the same source with some additions. The twenty-first in thirteen books differs from the foregoing. The Capitularies of Cardinal Atto in 1081, excerpts from the forged and genuine Decretals in chronological order, make the twenty-second. Cardinal Deusdeditus composed the twenty-third in four books, at the end of the eleventh century, from Dionysius, the Greek Canons, the old Italian and Spanish Saxon, and Roman records.
The twenty-fourth is from the pen of Bourzo, Bishop of Satrim, in 1089, and is divided into ten books. The twenty-fifth belongs to the eleventh or twelfth century, and is in two books. The first chapter of the first book is inscribed from the Primate, of the Roman Church, and published with the Dionysian collection. The twenty-sixth is the decree attributed to Ivo, Bishop of Chartres, in seventeen parts; there is also a MS. abstract of it in sixteen parts, probably by Hugo of Chalon, his cotemporary. In 1090, Ivo published his Pannoria in eight parts, taken chiefly from the Decrees and Decretals of that period, but Anselm's of Lucca, and Anselmus's works are also used, there is also a MS. excerpt of it. This forms the twenty-seventh. The twenty-eighth is a large MS. collection in three divisions, arranged according to the nature of the sources, first, Decretals; secondly, Consilia; thirdly, passages from the Fathers and the Roman and Frank legal collections, systematically divided into twenty-nine rubrics; there is also a MS. abstract of this. The twenty-ninth of 1102-18 under Pascal II. in seven books, is derived from the last named Anselmus, and that dedicated to him. The thirtieth may be attributed to Hildebert, Bishop of Tours, 1134, and is taken from the Pannoria, the collection in three divisions, and Burchard, probably this is identical with that in ten books attributed to Ivo. The thirty-first is a MS. in fifteen books, termed the collection of Saragossa, chiefly taken from the Decretum of Ivo, and the collection of Anselm of Lucca. The thirty-second is wholly abstracted from the above, and is divided into ten books. The thirty-third, in four parts, is taken from Burchard and Ivo. The thirty-fourth is a penitential book in nine titles of the twelfth century. The thirty-fifth, taken chiefly from Anselm of Lucca, and the collection dedicated to Anselmus, is divided into eight books, and belongs to the middle of the twelfth century. The Spanish priest Gregory is the author of it. Lastly, the work of Algerius of Liege, of the beginning of the twelfth century, on Mercy and Justice, contains a treatise on Church Discipline in three parts, with references, whence it may be perceived that the works of Anselm of Lucca, and of Burchard, have been used in its composition.

§ 215.

Gratianus, a monk of the monastery of St. Felix, then belonging to the Camaldulensian order, composed at Bologna, in the middle of the twelfth-century, a scientific and practical work on the whole Canon Law, with references and proofs. The first part treated

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1 Bal. 4, 16.  
2 Bal. 4, 18, n. 3.  
5 Theiner, l. c. 55-8; Bal. 4, 16; Sav. 2, 106.  
6 Bal. 4, 18, n. 2.  
7 Theiner, l. c. 48-50.  
8 Bal. 4, 18, n. 5; Theiner, l. c. 345-56.  
9 Bal. 4, 18, n. 14; Theiner, l. c. 31-9; Sav. 2, 106, n. f.  
10 Bal. 4, 18, n. 11; Theiner, l. c. 356-9; Sav. 2, 104.  
11 Theiner, 360-2.  
12 Theiner über Ivo, 62-3.  
14 Richter, Bey. 7-17.
of Ecclesiastical Administration; the second contained thirty-six legal positions, with their answers, the thirty-third of which respecting penance forms a small work of itself. The third part treats of arrangements bearing upon Divine Service.

The whole is founded on previous collections or the authorities from which they were compiled; those principally used appear to be Burchard, Anselm of Lucca, the collection of nine, and that of thirteen books, that in three divisions, that of Saragossa, of Polycarp, and the treatise of Algerus of Liege. Thus Gratian's work differed little from those which preceded him, except in fulness.⁵

In 1182, Cardinal Laborans published a collection very nearly resembling that of Gratian; it is divided into six books, the first five into many titles, and these into rubrics. The sixth book serves as a recapitulation of the whole.⁶

The Universities of Bologna and Paris began at a very early period to exercise a considerable influence on the Canon Law, as well as on other sciences, and those who had studied there, returned to their homes with educated and logical views, hence the opinion of the universities on all points of controversy was considered as decisive, and was termed the authority of the schools. Gratian's collection attracted attention at an early period at Bologna, and became the basis of lectures, and the class of teachers called Magistri and Doctores Decretorum, the students of this faculty being styled Canonists, Decretists, or Decretalists. Oral instruction soon led to written glosses and interpretations, extending to running commentaries. Such a commentary on the whole text by a single jurist was termed an Apparatus, and these usually comprised the glosses of former commentators, nor was it until they assumed a connected form that they were termed commentaries. The interlinear glossators were Paucapalea, Omnibus, Sicardus, Ansaldis.⁷ Rufinus, Silvester, Joh. Faventinus, Joh. and Peter Hispanus, but Stephen of Tournay, glossed in a more extended form. Huguccio of Pisa commenced a more extended work termed Summa Decretorum, which Johannes de Deo⁸ continued in 1247, after Huguccio's death in 1210; he did not, however, complete it. Johannes Teutonicus in 1212 wrote an Apparatus to the Decree, which was enlarged and emended in 1236, by Bartholomæus of Brescia, and appears in this form in printed editions.

§ 216.

Soon after the collection of Gratian, the decrees of ecumenic councils augmented the body of the Canon Law, on which the high standing of the Apostolic chair at that period conferred great importance. These decrees were termed Extravagantes, from their, as it were, wandering about in addition, to the acknowledged collections, and their number soon increased to such a degree, as

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⁵ Walter, Lehrb. des K. R. 107.
⁶ Ughelli It. Sac. 36 n. 30.
⁷ Sav. 3, 37; Sarbi, 1786; Fattorini, 1789.
⁸ § 156 p. 175.

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to render it indispensable that they should be collected. The first part of the collection in fifty parts, contained merely the decrees of the third Lateran council of 1179, the other forty-nine, the remaining decreals of other Popes, especially those of Alexander III. 1181, the most recent, however, were those of Clement III. 1191. The second, a MS. collection, was arranged under sixty-five titles, and contained, after the decrees of the Lateran council, the decreals of the Popes, from Leo I. to about the year 1180-90, followed by the canons, councils, and the like. The third was also a collection in sixty-five titles, derived from the foregoing. The fourth found in a MS. at Bruges is similar, and divided into fifty-nine rubrics. The fifth, being the first recognised, obtained the title of *Compilatio Prima*, and was composed by Bernhard, when Prepositus of the Church of Pavia in 1190, and who taught at Bologna and Rome; it professed to be a *Breviarium Extravagantium*, comprising partly the older ones which Gratian had not collected, and partly the Decretals from Alexander III. to Clement III. It is arranged in five books, subdivided into titles and rubrics, founded upon the first and third above mentioned, and framed after the Codex of Justinian. This collection was used at Bologna, together with Gratian's, and glossed in like manner. An abstract was also made of it.

The sixth, compiled by Rainerius, a monk of Pomposi, never received the stamp of authority. It was composed in 1216 from the Decretals of Innocent III. Of the seventh, by Gilbert, little is known. In a MS. lately found in Brussels, and supposed to be this work, Rainerius is used, and Decretals of the five first years of Innocent III. occur. The eighth is by Alanus, whereof nothing is known. The ninth is a collection of the Decretals of Innocent III. by Barnard of Compostella the elder, called *Compilatio Romana*; this was also not received. The tenth, called the *Compilatio Tertia*, was composed at the instance of Innocent III. by Master Peter of Beneventum in 1210, and sent to Bologna, where it was received, and where it was glossed by Tancred. Its object was to purge away from the constitutions, those falsely attributed to this Pope up to that time, it is founded upon the *Compilatio Prima*, divided into five books, and published under the papal authority. The eleventh, termed *Liber Secundus Decretalium*, or *Secunda Decretales*, was drawn from Alanus and Gilbert, by Johannes Galliensis, and acknowledged, it contained a more complete collection of Innocent III.'s Decretals. The twelfth is of an inferior description, and contains the Decretals of Alexander III. and Innocent III. under rubrics. The thirteenth, termed the *Compilatio*...
Quarta, was glossed by Johann the Teuton, and compiled after the fourth Lateran council; it is composed of the Consilia promulgated there, and of Innocent III.'s Decretals, subsequent to 1210. ¹ The fourteenth, termed the Compilatio Quinta, was composed in 1216-27 of Decretals of Honorius III., the successor of Innocent, and sent to the Universities; but as it was soon superseded by the collection of Gregory IX., it was only glossed by Jacob de Albengo.

§ 217.

Gregory IX., now instructed Raymund of Pennafort, his auditor Rotae, and Penitentiarius in 1275, to digest the former five received collections, adding his own constitutions to them. These were sent to the schools, where, as the preface provides, they were to be the sole authority, nor were others to be made without the papal concurrence.² In conformity with the usage thitherto adopted, they were divided into five books, and subdivided into titles; they were followed by three smaller collections made by the papal authority, and likewise transmitted to the Universities of Bologna and Paris. The first of these contains the Consilia of Lyons, under Innocent IV. 1243-54, with other Decretals of that Pope. This has been glossed by Henry, Cardinal of Ostia, 1254. The second by Gregory X. 1271-6, was drawn up at the second council of Lyons, and contains these Consilia only.³ William Durantis, who assisted in the composition, also wrote a commentary thereon.⁴ The third contains only the five Decretals of Nicolaus III. 1277-80. It was intended that all three should be inserted into the collection of Gregory IX., indeed they were arranged with that view under rubrics, but Boniface VIII., (1295-1303,) caused a new collection to be made at Rome in 1298, confirmed by a council of Cardinals, and sent to Bologna and Paris, under the name of Liber Sextus. It was to serve as an appendix to Gregory IX.’s work, and was divided in like manner, and contained his own and some earlier decretales. After this collection appeared, but without the stamp of authority, the Decretals of Boniface VIII. and Benedict IX. in 1304, and of Johannes Monarchus in 1313. Clement V. now caused the Consilia of Vienna of 1313, to be collected into five books, and having published them in a Consistorium of Cardinals, sent them to the University of Orleans, and his successor John XXII. sent them also to Bologna and Paris in 1317. Subsequent Extravagantes were no longer collected by authority, but treated as separate pieces.

Guillemus de Montelauduno, 1346, glossed three Extravagantes of John XXII. of 1317. Zenzelius de Cassanis in 1325, twenty Extravagantes of the same Pope, of 1316 and 1324, including the above three. Joa. Franc. de Pavinis in 1466 also collected many;

¹ Theiner, Com. 20, and Rech. 58-63.
² Theiner, Com. 25-38, 40-79.
³ Corp. J. c. 2, col. 369.
⁴ § 160.
these enjoyed no great authority, and hence were added to the Clementines in a greater or less number.

Towards the end of the fifteenth century, however, Vital de Thebes, and Joh. Chappius, framed two new collections, the one founded upon Zenzelinius, which he arranged and divided into fourteen titles, and the other gathered to the number of seventy from existing collections, he termed Communes. In a new edition of 1503, he added five additional ones, including the three under John XXII. For the sake of uniformity, he divided this collection also into five books and titles; the fourth book, however, is only noticed in the title, there being a want of matter. From this time the sources of the Canon Law appear to separate into three parts, the first containing the Decree, the second the Decretal of Gregory IX., the third the Sextus, the Clementinae, and the two above Extravagantes.

Gratian’s collection, it must be observed, did not retain exactly its original form; the first part was for convenience divided into one hundred and one distinctions, and the third into five; it is believed, by Pancapalea, an old scholar of the author;1 the treatise on Penances was also divided into seven Distinctions, by whom is not known. In the decree there are also about fifty passages, from the pen of Gratian, but which may with great probability be attributed to Pancapalea; these formerly were not received but inscribed Paleæ “sterile,” in contradistinction to the fruitful seed of Gratian; they, however, obtained credit at a later period,2 and were printed with the collection,3 which was vulgarly known in the fifteenth century by the term Corpus Juris,4 from the circumstance of the work composed of the above parts having been rapidly republished in this form, and issuing from the same press.5 In the sixteenth century they were always published in the three parts we have seen, viz., first, the Decretum; secondly, the Decretals of Gregory IX.; thirdly, the Sextus, with the Clementines, and two collections of Extravagantes; and lastly, the whole was termed Corpus J uris Canonici.

§ 218.

In alluding to those who illustrated and explained the Canon Law, little more will be necessary than to refer back a few pages to the biographical sketch of the lawyers of the Middle Age; it will, however, be convenient to show shortly the system adopted by the leading canonists, from the time of Gregory IX., which, on comparison, will be found to be similar to that of the same period. The chief canonists who wrote glosses and apparatus on the Decretals of Gregory IX., were Vincentius Hispanus in

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3 Strassburg, 1471 and 1472; Mainz, 1472; Venice, 1477.
4 So distinguished at the Councils of Bale and Costmitz.
5 Walter, Lehrb. des Kirch. § 121-273.
The first work upon the Sextus was a commentary on the last title of the *Regulae Juris*, composed by Dinus, who had co-operated in the compilation of the original, at the desire of the Pope. Johannes Monachus of Picardie, in 1313, John Andreae, Guido de Baiso, and Zenzelinus de Cassanis, wrote glosses and apparatus. In 1326 he also provided a gloss of the Clementines, which Franz Zabarella, 1417, has preserved and emended.

The *Summae* belong to the more independent works, they first appeared in the form of exegetical lectures, and afterwards were developed into books. Sicardus wrote a summary of this description on Gratian's work, perhaps under the name Omnibus, on the *Compilatio Prima* of Bernhard of Pavia and Damasus, in 1220. Goffred Tranensis wrote on the Decretals of Gregory IX., and this was the first systematic treatment of the science, which soon degenerated into large prolix works. Of the latter sort is the summary of Huguccio of Pisa in 1210, on the Decree, and that of Henry, Cardinal of Ostia, upon the Decretals of Gregory in 1254.

*Distinctiones* were almost synonymous with summaries. Richardus Angius drew up the first of these upon the decree in 1190. Petrus de Sampson followed him in 1240, with respect to the decretals, and Johannes de Deo, quod all the Canon Law in 1247; he also published two short extracts of the Decree, as we have seen, entitled *Breviarium* and *Flus Decretorum*.

*Repetitions* were another form of work originating also in the lectures, and containing thorough explanations of the more difficult passages on this subject. Azo de Ramenghis, a son-in-law of John Andreae, edited such for the decretals.

The *Casus*, or explanations of particular passages, by means of real or feigned questions of law, arose in like manner. Benencasa Senensis wrote such in 1200, which were used and amended by Bartholomeus of Brescia. In 1245 Bernard of Compostella, Johannes de Deo, and Bernard of Parma, composed Casus to the Decretals of Gregory IX.

The *Brocarda* or *Regulae Juris Canonici* of Damasus, re-edited afterwards by Bartholomeus of Brescia, arose from the general rules which pervade the glosses.

The *Disputationes* gave rise to another species of literature, deduced from the *Quastiones*, and worked out in writing. Collections of these questions were made by Damasus, Bartholomaeus,
of Brescia, Johannes de Deo, Azo de Lambertacciis, in 1280, I. de Baysio in 1286, and many others.

Peter Blessenseni¹ wrote an excursus between 1186-90, with a view to the contradictions occurring in the sources.

Systematical and practical works were next formed for the use of the courts, and furnished with forms of action or libel. Of this description is the Speculum of William Durantis,⁶ first published in 1272, and afterwards in 1290; to this J. Andreaæ wrote Aditiones, prefaced by copious notices of the canonists, up to his age.

§ 219.

In the fifteenth century the legal literature confined its sphere to commentaries or lectures on received collections. Commentaries of this kind were written on the Decretals of Gregory IX. by Baldus de Ubaldis³ in 1400, by Petrus de Ancharano in 1415, by Johannes ab Imola⁴ in 1480, by Nicolaus de Zedescis in 1443, by Alexander Tartagnus⁶ in 1477, by Andreas Barbatica Siculus in 1482, by Franciscus de Acclitis⁷ in 1486, by Feinus Sandeus in 1444-1503, and by Philippus Decius⁷ in 1454-1536. On the Sextus by Petrus de Ancharano, Johannes ab Imola, and Alexander Tartagnus. On the Clementines by Petrus de Ancharano, Johannes ab Imola, Nicolaus de Tudeschis, Alexander Tartagnus, and Andreas Barbatico Siculus. Lastly, Johannes a Turrecremata conceived the idea of recasting the whole in 1468, in a systematic form, and actually did so, accommodating all to the order of the Decretal collection. This enterprise did not, however, meet with much encouragement.

§ 220.

The critical activity of the sixteenth century introduced many ameliorations in the canonical collections. These began with Anthony De Mochares,⁸ who first perfected general citations by more exact references, emended the text and reconciled many variations. Charles du Moulin,⁹ appended to the decree the same kind of critical Apostilla, as had been formerly added to the decreal,¹⁰ designating them by numbers. Le Conte¹¹ added under the particular decreals, the Partes Decisaæ, which had been omitted by Raymund of Pennafort. Actuated by the scientific and critical spirit of the age, Pius IV. assembled a congregation of cardinals and savants¹² in 1563 for the correction of that collection, whose wide extended labour was brought to a close under Gregory XIII. in 1580, and an authentic edition was published,¹³ in which the glosses

were retained, a series of editions which have appeared since are founded on these, to which two appendices were subsequently attached. The one containing the *Institutiones Lancelotii*, drawn up at the desire of Paul IV., after the model of the work of Justinian, similarly entitled and intended as an introduction to the study of the Canon Law; this work was confirmed by Paul V. in the commencement of the seventeenth century.

The other appendix contained the private collection of Petrus Matthaeus of Lyons, 1590, published under the title of *Liber Septimus Decretalium*, and contained the Extravagantes to Sextus V. 1590. In addition to all these, many critical corrections were made in the decree; to conclude, that most useful addition, Indices or Registers were added, the most important of which are that by Peter Guenois, the four on the decree and the three on the decrees, wherein, according to the example of De Mochares, an historical reference to the sources in these collections is given.

§ 221.

After such careful revisions, and such scientific treatment, it is not astonishing that the Canon Law should be, for the most part, received generally in Christian States. The rules for its application were as follow:—1st. In cases not contained in the Civil Law, or the rule for which was obscure, open to doubtful interpretation, or not expressly determined, if expressly and clearly resolved by the Canon Law, this latter formed the basis of decision; and on the contrary, if the case was not provided for, or ambiguously resolved by the Canon Law, when it was expressly met, or its solution more clearly inferable from the Civil Law, this latter was to be preferred. 2nd. In cases of conflict, the Civil Law formed the rule in courts of civil, and the Canon in those of ecclesiastical jurisdiction. Thus, when a matter of Canon Law cognizance arose in civil law courts, the decision was given according to the rules of the Canon Law; and *vice versa*, when a question of Civil Law cognizance occurred before an ecclesiastical tribunal. 3rd. Within the Imperial States the Civil Law formed the basis, and the Canon Law in the Papal States. 4th. In matters of a feudal nature the Civil was preferred to the Canon Law. 5th. In forensic causes the Canon is not presumed to differ from the Civil Law.

Although the Canon Law was first introduced merely for church discipline, the Popes at an early period took upon themselves to place their decrees and decretal epistles above the imperial code when it was opposed to their rules. Thus we read in the decree, *Lex imperatorum non est supra legem Dei sed subter, imperiali judicio non possunt ecclesiastica judicia dissolvit*, and *constitutiones contra canones et decreta præsulum Romanorum vel bonos mores nullius sunt momenti*.

The expression of Clement V. when he dissolved the order of the Templars, is remarkably illustrative of the boldness with which the Popes assumed the power of *sic volo sic jubeo* legislation, *licet hoc de jure non possimus volumus tamen de plenitude potestatis*; but these arbitrary stretches of power contributed to circumscribe the power of the Popes, and render their acts suspected and unpopular, and obtained for the Pope the by no means flattering title of *demon meridianus*. The Canon Law\(^1\) is said to have been received by Catholic princes, not because it emanated from the supreme pontiff, but as a law of the country, which by general consent had obtained the force of custom when agreeable to reason and piety, and not contrary to the divine law. *Illeud (jus) in provincis principum ac statuum evangelicorum usurpatur ac docetur non ut a pontifice Romano prefectum sed ut jus proprium libero consensu receptum in viam consuetudinis iisque in rebus qua ratione ac pietati conveniunt nec divino jure adversantur.*

§ 222.

To sum up the foregoing, it may be observed that the *Decreta* were ecclesiastical constitutions made by the Pope and his council of cardinals at their own instance, or *mero motu*. In A.D. 1149, Gratianus arranged and revised the collection of Ivo of 1127, and collected and collated subsequent decrees, a work which he completed after twenty-three years labour; this code was submitted by Gregory XIII. to a council composed of cardinals and learned men, and published by him in a corrected form under the title of the *Decretum Gratiani*. This work has been divided into three parts; the subdivisions of the first termed *distinctiones* are 101 in number, and are again subdivided into *canones*; those of the second are divided into *causes*, of which there are 33, and these again into *questions* and *canones*; the third and last contains a treatise *De Consecratione*, in five *distinctiones* subdivided into *distinctiones* and *canones*.

The method of quoting is even more illogical and inconvenient than that of the Civil Law, the first words of the Canon alone being cited, which drives the reader at once to the index. The more modern way is to cite the number of the distinction and canon, adding the initial word thus—*18 dist. 4 c. propter* or *18 propter*.

The third part is also quoted shortly in the same manner, prefixing to the distinction and chapter the words *de consecr., thus-*

The second part likewise may, and sometimes is quoted by numbers indicating the cause, question, and canon, 10 *qu. 2 c. 3. buysmodi*.

The Decretals. The *Liber Decretalium* is composed of the omissions of Gratian, and decrees subsequent to his time; the chief difference is that they were issued at the instance or *suit of some person*, and, like rescripts, have the force of law. Those first collected and arranged,

\(^1\) *Cro. Js. 5, 18.*

\(^2\) *Cal. Lex. ad voc. Jus Can.*
A.D. 1231, by order of Gregory IX., form the first volume, consisting of five books.

Bonifacius VIII. collected the second volume in 1298, making the sixth book.

Clemens V. collected the third volume, A.D. 1308, after him termed Clementinae, but his successor, John XXII. published it in 1317, dividing it into five books subdivided into titles and chapters.

The only difference in the mode of quotation here, is the addition of the word extra or $X$, thus 5 extra, de jure jurando, represents 2 lib., 24 tit., 5 cap.

The same rule is applicable to the Sextus Decretalium and Constitutiones Clementinae, substituting in the first in Sexto, and in the latter in Clem. for extra or $X$.

The Extravagantes, or Constitutiones Viginti, Joannis XXII., were published by him, A.D. 1325, after the fashion of Novellae, and divided only into titles, of which there are fourteen chapters; to these were added the Constitutiones of some later Popes termed Communes, in five books, subdivided into titles and chapters. The first of these is quoted by prefixing the word Extravag. with the initial words of the chapter and title, thus—Extravag. ad conditorem, Job 22 de V.S. is the 12th title, which treats of the signification of words, and three chapters which begins with the words Ad conditorem.

The Communes are quoted Extravag. Comm. c. Postulasti de Præbendii or the 3rd book, 2nd title, which treats De Præbendii et Dignitatisbus, and ten chapters beginning with the word Postulasti (Extr. Com. 3, 2, 10).

Liber Septimus

After these follow usually in order in the Corpus juris canonici, the Liber septimus decretalium constitutionum apostolicae, divided into five books, and again into titles and chapters; they are quoted as the sextus decretalium, substituting Sept. for Sext.

In order to render the Canon Law more accessible, John Paul Launcelot was directed by Pope Paul IV. to draw up a set of Institutes after the fashion of Justinian's work; the work is considered one of great merit, and is called by the author Privati Hominis. It is divided into four books, the books into titles, and the titles into paragraphs.

It is supposed the Decreta or Constitutiones at no man's suit were intended to represent the Codex; the Decretalia, or answer made at some man's suit, the Pandectæ; the Extravagantes, the Novellæ; and the Institutiones of Launcelot, the Institutiones of Justinian.

§ 223.

The fact of the Imperial Civil Law not having ever been recognised as the law of this country, will sufficiently account for the non-existence of the voluminous and learned works and commentaries of Justinian.

Few English writers on the Civil Law.
upon it, to be found in countries where it possessed influence more or less direct, and the same cause will account for the imperfection and inferiority of such as have been hitherto attempted. It will be found, however, while the Roman Law is banished eo nomine almost entirely from our courts, that it forms the basis of most of our civil jurisprudence and proceedings, even in common law courts, and that the study of it supplies the best groundwork of legal logic and sound reasoning.

§ 224.

The insular position of Britain enabled her to enjoy her barbarity undisturbed, until a period comparative late in universal history, and indeed until the military ambition of Julius Cæsar, desirous of outstripping his predecessors by the conquest of an island almost unknown, for Tacitus calls this acquisition at once a conquest and a discovery, undertook the invasion of Britain, which he justified, under the pretence of that nation having assisted his then enemies the Gauls with supplies; he appears to have effected his purpose with little trouble, driving the naked savages who inhabited the coast to the upland country. The remote and geographical position of Britain, however, rendered its continuous occupation both difficult and expensive, in addition to which, the aborigines constantly pressed forward and harassed the settlers. The revolt of the Panonii and Cantabri prevented Augustus from visiting Britain, and Tiberius appears not to have thought it worth his while, but to have been satisfied with the British tribute; Claudius, however, sadly in want of a little glory at that time, invaded Britain anew, and by the assistance of Aulus Plautius, Vespasianus, and Ostorius Scapula, led Caractacus, the king or general of Britain, after a successful battle, captive to Rome, and assumed the title of Britannius. Suétionius Paulinus preserved the acquisition for Nero, still the Romans had no firm footing in the country, until the time of Vespasian and of his son Domitian, when better organised measures were introduced by Petitus Cereales, and more particularly by Julius Agricola, and Britain, after a struggle of one hundred and thirty years, was reduced to the form of a Roman province.

§ 225.

The system now introduced by Agricola was more calculated to succeed; it consisted in opening highways as arteries throughout the country, introducing the Roman manners, arts, architecture, language, and laws, in short, in civilising the people; and his success

1 Diodorus Siculus, the historian of Julius and Augustus, says, that neither Hercules nor Bacchus pushed their conquests so far. He is however a mere compiler.

2 Polybius treats the account given of Britain by the Roman historians as fabulous; Dion. Camillus does not go quite to that extent, but says, whatever Greek and Roman historians reported respecting Britain was founded on supposition. § 49.

3 Camden, Selden, and Spelman, are of opinion that the Romans, on assuming the dominion in Britain, superseded any British laws that might then have been in existence.
THE ROMAN LAW IN ENGLAND.

may be attributed not a little, it may be presumed, to his having at length been enabled to form native legions, and to sow dissension among the different tribes of inhabitants, and by adopting the practice now in force in India and generally in the East, to secure the co-operation of one tribe against its neighbour, tending in the end to the civilization of both, and to that of the country generally.

Succeeding emperors often visited Britain in peace, until the North Britons during the reign of Adrian, 138, again rebelled against Cn. Trebellius; the Emperor's presence, however, settled the matter, and caused the construction of the famous Agger and Vallum, formed of stakes and a turf embankment, eighty thousand paces in length, against the incursions of the Pictich.

The Pictich and Scuite, however, against whom this fortification had been constructed, soon set it at nought, and Antoninus Pius and Commodus despatched Helactius Pertinax to check them, and they did, in fact, succeed in overawing them for a certain time. Under Septimus Severus, however, Virius Lupus, then governor of Britain, was so pressed by a revolt of the Britons, that he implored the Emperor's assistance, who arrived, accompanied by Basianus and Geta, his sons, and Papinius, his chief justice, and after a residence of three years, subdued the North Britons and Caledonians, though not without considerable difficulty, built a stone wall, and died at York, but not before the success of his warlike operations had obtained for him the title of Britannicus Maximus.

Severus and his son Caracalla, the succeeding Emperors, subsequently were sufficiently embarrassed in holding Britain in subjection. The Roman Lieutenants, moreover, and especially Carausius and Alectus, under Dioclesian, usurped the imperial power, and growing tyrannical, increased the evil. Constantinus Chlorus now succeeded as Governor of Britain and commander against these insurgents, and in reducing the country under the imperial dominion, and improved his position by being declared Caesar by Dioclesian, becoming father of Constantine the Great, by Helena, daughter of Coel, a native British king. Constantine subsequently had to thank the British legions in a great measure for subduing his rival Maxentius, whereby he became sole master of the Roman Empire.

by those of Rome; but it may be almost doubted if, in that barbarous and illiterate age, there existed aught more than a custom, vague and varying with the locality and will of the dominant chief; indeed, that it was rather a question of establishing a system of law than of superseding one already extinct. The epistle of Lucius, a British king, to the Pope Eleutherius, requesting him to transmit him a copy of the Roman laws, is evidently spurious, for it is dated in A.D. 159, whereas Eleutherius was not Pope until A.D. 177; it also bears the internal evidence of the Norman style of Latin composition and English law; the scriptural passages also quoted in it are taken from the translation of St. Jerome, who lived two hundred years after Eleutherius. Neither is it mentioned by Godfrey of Monmouth or Hovenden. The Pope, moreover, addresses Lucius by the words Ecce estis vicarius Dei, an interpretation of later date. There are also many other internal evidences of the unauthenticity of this epistle.

1 Literally plunderers and wanderers.
§ 226.

Britain now received another form of Government under the Praetorian Lieutenant of Gaul, together with the Duke and Count of Britain, the Count of the Saxon shore, and the Lieutenant or Vicar of Britain, who had the administration of both civil and military departments.

The transfer of the seat of the empire to Byzantium, however, caused its dissolution, and the Scots and Picts seized Britain. Gratian, notwithstanding, kept possession of Britain until the time of Valentinian, whose lieutenant, Theodosius, delivered it once more from the Scuete and Pictich, and became Emperor of the East. He was succeeded by his son Theodosius the younger.

During the minority of Honorius, the government of Britain was entrusted by his father to Stilicho, who again drove back the Scuete and Pictich, together with the Attaots; they, however, speedily invaded it again, under Honorius and Arcadius, nor were Honorius and Valentinianus III. in a position to defend it. So that Britain, after a Roman occupation of about five hundred years, from 60 B.C. till about 455 A.D. became a derelict.

§ 227.

Some of the Britains flew to Wales and Cornwall, others into Brittany; in France, the few Britons who remained pressed on one side by the Scots and Picts, and on the coast by the Saxons, applied to their neighbours the Germans for help to expel the Scuete and Pictich; the Britons soon found, however, they had a hydra for king, for Hengist and Horsa at once subdued the invaders, invaders, and natives, and laid the foundation of the Saxon heptarchy. Kent was the first of the seven kingdoms over which HENGIST made himself king in 445.

ELLA was the first king of the South Saxons in 488. OFFA of the East Angles in 575.

ERCHWIN of the East Saxons in 527.

CRED, a Saxon, ruled the Mercians in 502.

INA was king of the Northumbrians in 588, and published a code of laws which we have in Latin at the present time.

CERDIC erected the West Saxon kingdom in 521, and his successors conquering the other kingdoms, ultimately extinguished the heptarchy, reducing all under Egbert, King of the West Saxons, in 800, who by his edict conferred the name of England, a word derived from the Angles (Angel land) on Britain.

§ 228.

Egbert, out of the spoils of the Saxon kingdoms, had founded a new dynasty, and continued for a period of 175 years under Ethelwolf and his successors; in the time of Ethelwolf, however, the Danes invaded and plundered Kent; under Ethelred, Northumberland; and under Eldred, London and Exeter, laying the English
under tribute, until in 1014, Swain, king of Denmark, obtained possession of the whole kingdom, which he and his son and successor Canute ruled twenty-eight years. On Canute’s death, however, the English, averse to the Danish rule, solicited the assistance of William the Bastard, Duke of Normandy, and recalled Edward Ethelred, who had been living there during the period of his exile; he died without issue, his piety and justice having obtained for him the honour of canonization.

Edgar Atheling, surnamed Ironside, a minor and grandson of Edmond, endeavoured, with the support of the people, to possess himself of the kingdom; but Harold, son of the Earl of Godwin by Canute’s daughter, had seized the throne, and caused himself to be inaugurated by the Archbishop of York in 1046.

§ 229.

William of Normandy now demanded the kingdom as the next of kin to Edward the Confessor, being son of Robert, Duke of Normandy, by Arlette of Falaize, with whom he had fallen in love, and on the ground of the kingdom having been left to him by the Confessor; Harold who had, moreover, sworn to assist him in obtaining the kingdom after Edward’s death, having broken his oath. William invaded England with an army, slew Harold, and was proclaimed king in 1067. His second son, Rufus, succeeded him in 1088, but dying childless, Henry I., William’s youngest son, ascended the throne, and also dying childless, the Norman male line became extinct in the first generation. The female line consequently succeeded in Stephen de Blois, son of Adela, Henry the First’s sister. He was succeeded by Henry II., and Henry by his son, Richard I., whose successor was born in England.

§ 230.

Agricola’s policy had introduced Roman civilization into Britain (§ 49), and the rapid progress which Roman jurisprudence had already made under Domitian, is satisfactorily testified by Ulpian and Javolenus, the patria potestas, the foundation upon which a great part of the Roman Law rests, had become an established rule; and we find Ulpian, in answer to a question of Vinius Lupus, Governor of Britain, informing him that the validity of a pupillary substitution depended upon an heir having been instituted in the Will; Javolenus, too, in like manner, rules in the case of Seius Saturninus’s Will, that an estate reverts to the fiduciary heir, or in other words, vests absolutely in the trustee, if the person for whom it was so held in trust die before the period fixed for the restitution or delivery of the inheritance to the real heir expire.
§ 231.

Roman literature, arts, and law, which was advancing with such rapid strides, received, according to Zoizimus, a sudden check under Honorius, from the Saxons on their invasion of Britain imposing their law upon the conquered people, an example which was subsequently followed by the Danes. We are, however, informed by Bede, that Ethelbert, king of Kent, 613, with the assistance of his wise men, made certain decrees, and gave judgments between his subjects, in conformity with the principles of Roman Law, so far as regarded sacrilege, bishops, and the like; nor is it surprising to judge from the great admixture of Roman Law which it has been seen the Saxon codes on the continent contained, that they should carry the same principle with them into their new settlement; indeed, traces of a Roman original may still be perceived in the laws of Ina, king of the West Saxons, Offa, king of the Mercians, Alured, king of the West Saxons, and his successors, Edward the Elder, Athelstan, Edmund, Edgar, and Ethelred, whose laws were published by Canute, and translated into Latin by William Lambard; it is true that there are few direct evidences of Roman Law in these codes, and the greater part of what is traceable relates to ecclesiastical matters, on account of the Roman system being very advantageous to the priesthood, which was the only educated class of the age, and who would naturally strive to introduce and uphold the system most consonant with their interests; on the continent, indeed, the Roman remained by preference the law of the church, generally where even it was not that of the privileged class of subjects; thus Edward the Confessor compiled a code out of the materials then extant, which formed the basis of our common law. The direct influence of the Roman Law as such, however, doubtless ceased with the Roman dominion in Britain.

§ 232.

During the dominion of the Saxons and Danes, those Britons who had fled to Wales were governed by their own princes in 940. Howel Dha is said to have assembled his bishops and the more literate amongst the laity, for the purpose of revising the law which Blegaridus Longuaridus translated into Latin at his command.

In the 85th Article he approves the Roman rule of two witnesses being sufficient in cases where no specific number is stated, and for holding the testimony of one to be insufficient; exceptions to this rule are, however, expressly made in favour of a woman in cases of rape, of a lord between two tenants, an abbot between two monks, a father between two of his children, a priest in a matter attested in his presence, and a thief turning king’s evidence in the place of execution. Most of the Roman Laws of this age

1 § 118, h. oper.
appear to have been taken from the Theodosian code, and the
fragments of Gaius Paulus and Ulpian, and possibly from some
few parts of the Pandects, as they were then known in Europe.

§ 233.

The law of England was now again altered and modified by the
introduction of the Norman Laws by William I., and we have
already learned how far the Norman Laws were derived from the
Roman Civil Law; he introduced the law of Feodal Tenures from
his native country, and grafted the law as it then existed in England
upon that of Normandy. The Court of Chancery, which bears
such evident traces of the praetorian practice, was established by
him, though perhaps not in the form which it assumed under the later
Chancellors,1 and to this court all feudal inquisitions were intrusted.

The Civil Law was not in force as such under the reigns of
William and his sons. Under Stephen, however, an attempt was
made by Theobald, Archbishop of Canterbury, to introduce the
study of Civil Law, and the King granted the clergy a charter, en-
larging the privileges bestowed on them by William I. and his son
Henry; but the opposition which his plan received from the
nation, obliged him to publish another, confirming the charter of
his predecessors with respect to the Saxon laws, and later, a
proclamation proscribing the teaching of the Civil Law, which,2
nevertheless, was continued to be taught by the clergy in their own
religious houses and universities. Vacarius3 having come to Eng-
land at the instance of Theobald, in the reign of Henry II., the
study of the Roman Law which had revived on the continent, was
introduced into the English universities, where it has since that
time held its place among the learned faculties.

Andrew Quercitanus mentions Vacarius in his Norman history.

Vacarius magister gente Longobardus vir honestus et juris peritus
cum leges Romanos anno ab Incarnatione MCXLIX. in Anglia discipulos
doceret et multi tam divites quam pauperes, ad eum causâ discendi
confuerunt suggestionem pauperum de Codice et Digestis excerptos
novem libros composuit qui sufficient ad omnes legum lites quae in
Scholis frequenter solent, si quis eos perfecte noverit.

In the same reign, Theobald, Archbishop of Canterbury, sent
Thomas-à-Becket to study Civil Law at Bologna, in order to qualify
him for public business, and on his return he was created Doctor
of Law at Oxford, and subsequently Chancellor of England under
Hen. II.

1 John of Salisbury, a cotemporary of à-Becket, has the following verses in allusion to
the origin of the term Chancellor:

Querendus Regni tibi Cancellarius Angli
Primus sollicitus mente petendus erit,
Hie est qui Regni leges cancellat iniquas
Et mandata pili principis aqua facit.
Sicquid obest pulpos, vel moribus est inimicum,
Quicquid id est, per eum desinit esse nocens.

2 Roger Bacon, Cit. per Selden in Flet. 7, 6, in Fortes. 33 and 8, Rep. Pref.

3 Vide § 144, h. o. p. p. 159.
Stephen’s prohibition appears to have had little effect, or rather the effect of all persecutions, for the prohibited study flourished much more after than before the edict. Giralduis Oxoniensis, however, draws the attention of the students and of his age to the error of studying the Civil Law without a sufficient previous knowledge of arts; Martin rebukes them for suffering the Imperial Laws to supersede all other sciences; and Stephen Langton, 1116, the philosophers and divines, for allowing the study of the Roman and Canon Laws to engross their attention. Daniel Marley, who lived under Richard I. 1189, on his return from studying in Portugal and Toulouse, informs us of the extent to which the Civil Law was then studied at Oxford, but regrets that Senis Titius and Ulpian had superseded Plato and Aristotle. Meckamus and Longtonus lived under Henry III. 1216. The works of Aldricus, professor of laws at Oxford, are cited by Franciscus Accursius, where Bartolus terms the King of England’s (Edward I. 1273) advocate; and a præcepte addressed to the sheriffs of Oxfordshire, in which Accursius is termed his trustee and well beloved secretary, and in another doctor of laws in Bologna, and counsellor to the King of England, is still in existence, charging him to put Accursius into possession of the manor of Marley, a residence at that time in the administration of the Crown during the minority of Hugh le Dispence, whose father held it in capite of the Crown.

Edward I., upon the death of Alexander of Scotland, summoned all the civilians and canonists to the Parliament at Norham on the Tweed, as the proper judges of the dispute between the English and Scotch, as to the dominium directum of all Britain. Ricardus Anglus and William de Dororeda, otherwise called Dorobius, or of Drogheda, are mentioned as professors of law at Oxford by Johannes Andreas, and as authors, the first of a Summa Ordinis Judiciorum, and the latter De Ordine Judiciarii; they were followed by Alanus Gulielmus and Jo. Severleus, professors at Oxford, and who published their Lectura; these were followed by Stephanus Anglus, Mylius, and many others.

In the reign of Edward II. 1327, the chapter of Winchester having elected William de Raleigh bishop against the king’s wish, he appealed to the Pope, and sent to the civil lawyers at Oxford for their opinion of this appeal, of which they approved.

§ 234.

The bickerings which have been before alluded to between the doctors, masters, and bachelors of divinity and arts, and the doctors and bachelors of law at Oxford, came to an open rupture under the reign of Edward II. The divines and artists, who were the more numerous, passed certain statutes respecting the Responsa of Doctors and Bachelors of Laws, and followed up the obnoxious measure by a sentence of prescription against those who refused obedience to

1 § 144, Joh. Salis, or Sarisburgensis, Peter Blesensis. 2 Vide § 150, p. 168.
them, hereupon the legal faculty appealed to the king, who appointed delegates to inquire into the matter, among whom were the Bishops of London and Ely. The delegates having heard the parties, decided in favour of the appellants, avoided the statutes, and revoked the sentence of prescription, which was subsequently ratified by a Royal Charter, containing many privileges in favour of the faculty of Civil Law; this charter was subsequently confirmed by another of Richard II.

§ 235.

With respect to Cambridge, Henry V., who reigned in 1413, wrote to Cambridge, commanding the students of Civil and Canon Law to attend the lectures of the professors at their respective faculties, and to pay the ordinaries and beadles thereof their respective salaries.

Henry VIII., while he on the one hand suppressed the study of the Canon Law, appears to have been the first who erected and endowed the royal professorships of Civil Law in the universities of Oxford and Cambridge, which up to that time had been supported by the contribution of the students. Under the reign of his son, Edward VI., it having been represented to that monarch that the study of the Civil Law in both universities was fast decaying, probably from the diminution which the Reformation had caused in the revenues of the Church, he appointed the Earl of Warwick, the Bishops of London and Rochester, Lord Paget, comptroller of the household, with several other distinguished men, to visit the universities with a view to remedy this evil.

§ 236.

Although the Civil Law never prevailed in the courts of this realm as such, yet we find that all the older writers on the Common Law of England evidently not only based their literary labours on those of Justinian, but interwove many Civil Law maxims, and even transferred passages from it into their works, and quoted it co nomine. Glanville and Bracton, who held the office of chief justice under Henry III., commenced their works with the same words, and followed the same method as Justinian in his Institutes. Gilbert de Thornton, chief justice in the eighteenth year of Edward I., abridged Bracton, who had been previously professor of Civil Law at Oxford, under the name of a Summa, a term hitherto exclusively applied to the Civil and Canon Law. Selden first brought Fleta to light, which in its matter bears many striking marks of a knowledge of the Civil Law. The author of Fleta lived about this time, his name is unknown, but he is supposed to have written his commentary when a prisoner in the Fleet.\(^1\) Briton, doctor of law, also imitated the arrangement of Justinian's Institutes; but we are in ignorance as to what he was; some assert him to have been a

\(^1\) He was probably one of the judges disgraced and punished at this time for corrupt practices.
bishop, some a judge. The very form of our legal sources bespeaks a Civil Law model; our statutes resemble the Constitutions of the Emperors contained in the Codex, and our reported cases, the Responsa Prudentium of the Pandects.

§ 237.

The Court of Chancery has, however, adhered more exactly than any other to the form of its original foundation, which may be explained by its being a creation perfectly new, and in no way connected with the law which had existed in the country up to that time; it was, moreover, a prerogative court of the Crown, as lord paramount in all feodal matters, and its proceedings less easy to be understood by the majority of the people than those of a court of Common Law. Through this court the kings have been accustomed to grant relief where the Common Law was inadequate to the purposes of justice which was here administered by the keeper of the king’s conscience, and therefore a court of grace of the Crown, with which no one had a right to interfere.

The proceedings of this court, in which the Chancellor sits as Praetor, closely resemble those of the Civil Law in the Middle Ages, and are by petition, bill, and decree, without a jury; the oral examination of witnesses is dispensed with, and affidavits are substituted. The Chancellor is the sole judge, and the subordinate officers were formerly for the most part clerks, probably from the fact of their chief being so. Henry VIII. first raised a common lawyer to this dignity; and since the time of Lord Rich, Archbishop Williams, under James I. 1621, has been the only Ecclesiastical Chancellor.

The assessors and masters were also formerly doctors of law and clerks, and the book of original writs, which, moreover, demonstrates a perfect knowledge of the Civil Law, represents the book of the forms of actions published by Gneus Flavius.

The keepers of the Privy Seal in the Court of Requests were also formerly doctors and clerks, as well as the masters, and this may be readily accounted for by the clergy being in earlier times the only educated class, although the quality of their Latin savours more of the Middle than of the Classic Age.

§ 238.

Christianity was introduced into Britain under the Roman dominion, and had been preached in Scotland and Ireland since 430, but no collection of that period was known to exist; Gregory now sent St. Augustine as his legate to extend the papal power into England, who, as the first messenger of this description, obtained the name of the Saxon apostle, and may also be said to have stepped into the place which the heathen priesthood occupied in the national government of the Saxons.1

In 680, at the command of Ethelred Egfrid, king of Northumberland, Aldwulf, king of the East Angles, and Lothar, king of

Kent, Theodore, the then Archbishop of Canterbury, summoned a synod at Hatfield, in Hertfordshire, in which the canons of the five general councils of Nicæa, Constantinople, Ephesus, Chalcedon, and the second of Constantinople were received, together with the Consilia drawn up under Martin, at Rome, in 648; he also collected in his Capitularies the most important points of Church discipline, with which we are only acquainted through a collection. 1 Archbishop Theodore's Book of Penances, of 690, obtained also considerable reputation. 2

Egbert, Archbishop of York, in the latter half of the eighth century, made an extensive systematic collection of the spiritual law from the sources then existing, some of which are printed in the Collections of Consilia. The same prelate also wrote a small work in the form of a dialogue on Ecclesiastical Institutions; 3 this work was abstracted in 1040 by the Deacon Hukarius, and Archbishop Theodore's Book of Penances obtained considerable reputation, as well as Egbert's book, De Remediis Pecatorum, at about one hundred years later. In the eighth century, a systematic collection in sixty-five books or titles, appears to have been drawn up in Ireland, in which the Dionysian Collection, and Roman, Gallic, and Irish Consilia are used. 4

§ 239.

King Henry I. first repudiated several whole titles of the Canon Law, and insisted on the ancient laws of the realm being upheld as follows:—That all controversies between the laity and clergy should be tried in the aula regis: that no bishop or clerk should quit the kingdom without the royal licence, and should then swear to procure no damage to the king or the realm: that no appeal should be made to the Pope, but that all pleas in the Consistory should be made and removed into the Archdeacon's Court, thence to the Bishop's Court, and in the last instance to the aula regis: that Peter's pence were to be paid to the king: that clerks guilty of treason be hanged, drawn, and quartered, and such as be guilty of felony hanged: that all persons who were found bringing any excommunications or interdicts from Rome into England be dealt with as traitors; with many of like nature. But King Henry II., endeavouring to establish the laws by the name of Avitæ Leges, or his Grandfather's Laws, met with powerful opposition from that turbulent prelate and reformed sinner, Archbishop à-Becket.

§ 240.

In 1215, King John confirmed the freedom of election of the clergy, by the Magna Charta, to the prelates and barons of his kingdom, which acted as a general acknowledgment of ecclesiastical

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1 Wilkins, Conc. Brit. 1, 101-12; Manai, 12, 482-8.
3 Wilkins, Conc. 1, 82-6; Manai, 12, 411-41.
The Legatine Constitution.

Henry III.
A.D. 1260.

Boniface of Canterbury, his assumption of secular power.

Stephen.

Richard II.

rights and liberties. The ordinances which issued from national synods under Otho, Legate of Gregory IX. in 1230, and Othobon, Legate of Clement IV. in 1268, afterwards raised to the apostolic chair under the name of Adrian V. in 1276, and commented upon by John of Athon, had a great effect on the development of the ecclesiastical jurisprudence in England.

§ 241.

In the forty-second year of Henry III. in 1260, Boniface, Archbishop of Canterbury, and son of the Earl of Savoy, directed several canons and provincial constitutions against the laws of the realm in 1258, as to the trials of the bounds of parishes,—right of patronage,—against the trial of tithes by indicavit,—against writs to a bishop upon a recovery in a quare implevit in the King's Court, and that none of the possessions or liberties which any of the clergy had in right of the Church should be tried before the secular judge; also concerning distresses and attachments within their Sees, whereby the writ of quo warranto was intended to be barred; a command was also given to the bishops to admonish the king, to interdict his lands and revenues, and to excommunicate such judges as acted in contradiction thereto, and against sheriffs and their officers who acted in contravention thereof; the manifest object being to remove all cases savouring of ecclesiastical jurisdiction out of the power of the temporal authorities.

Under Stephen, two parties formed themselves—the ecclesiastical and secular party. The latter adhering as pertinaciously to the Common, as the nobility and laity did to the Canon and Civil Law, and each reciprocally preaching legal crusades against the other. In the parliament of Merton, however, the prelates in parliament made a last effort to uphold the Canon Law, and, with a view to obtain jurisdiction over real property, chose as a question for their purpose the legitimatio per subsequens matrimonium, or retrospective operation of the marriage ceremony by the Canon and Civil Law, which they supported in principle, claiming, as they did, jurisdiction in cases of marriage, but were outvoted by acclamation by the laity, for omnes comites et barones una voce respondeunt, quod nonlant leges Angliae mutari, que bucusque usitate sunt et approbatae.

§ 242.

The feud had not much diminished in virulence under Richard II., above a hundred years later, when the nobility declared that "the realm of England had never been unto this hour, neither, by consent of our Lord the King and the Lords of Parliament, shall it ever, be ruled or governed by the Civil Law;" and here it must be remembered that the Civil and Canon Laws were founded on the same principle.

1 Sh. Merton, 20 Henry III. 9.
2 Rich. 2.
3 Selden, Jan. Angl. 3, 2, § 42, in Fort. c. 33.
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§ 243.
The decrees of Provincial Councils held under the Archbishops of Canterbury, from Stephen Langton to Henry Chichele, and glossed by William Lindwood, official of the Court of Canterbury under Henry, in 1422, which were also received in the Archsee of York, 1463, formed a further source of Anglo-Canon Law. In the mean time, many statutes bearing upon the relations existing between ecclesiastical and secular jurisdiction were enacted by the kings of England: of this description are those of Henry IV. in 1272, and Edward I. in 1307: also the Articles respecting the freedom of the clergy, handed by the English prelates to Edward II. in 1316, and the charter of Edward V., 1463, on the same subject.

§ 244.
A statute of Henry VIII., the great restrainer of the arrogance of the Catholic clergy, was the first to check the growing nuisance; the statute rendered all canons void which were contrary to the law of the realm, or hurtful to the royal prerogative, a sweeping provision in those days, and provided for a new commission to revise them. The time limited for their revision by this act was enlarged two years later, and again eight years later. Edward the Sixth renewed the commission which then perfected its work, but the royal confirmation not being given before the king’s death, this code remained in abeyance. Mary, it will be seen, repealed all these Acts, but Elizabeth revived the first Act of Henry VIII., still no effective steps were taken thereupon.

§ 245.
In 1603 some constitutions and canons were made in the convocation of the province of Canterbury, and confirmed by the king; but as the confirmation of Parliament was wanting, Lord Chief-Justice Hardwicke ruled, that the canons of 1603 do not, proprio vigore, bind the laity, but are merely declaratory of the ancient Canon Law, and bind the laity only so far as they are not repugnant to the laws of the realm, which, in fact, reduces the Canons of 1603 to a mere rule, quoad the laity, being leges sub graviori lege. He, however, admitted that the clergy were bound by them in re ecclesiastica.

1 The intermediate archbishops were Richard Wethered, Edmund of Abingdon, Boniface, John Peccham, Robert Wincheley, Walter Reynold, Simon Mepham, John Stratford, Simon Islepe, Simon Langham, Simon of Sudbury, and Thomas Arundel.
3 Wilkins, Conc. Brit. 2, 406, and 3, 583; Manii, 24, col. 56.
4 Harduin, Conc. 9, col. 1469.
6 27 Hen. VIII. 17.
7 26 Hen. VIII. 16.
8 2 & 3 Ed. VI. 21.
9 7 & 8 P. & M. 8.
10 1 El. 1, 10.
12 Middleton & Croft, M., 10 Geo. II. (6).
13 12 & 13 Geo. II. 33; More v. More, 2 Alb. 138.
Henry VIII. was in the commencement of his reign the most violent opponent of Luther; but at a later period, when the sensual monarch desired to give his divorce and second marriage the semblance of legality, he set all difficulties which the Canon Law and papal chair opposed to his ends at defiance, and conceived the idea of constituting himself head of the Church and lord of the law in his own dominions. To this end he commenced his plan by a series of negotiations with the clergy and parliament, in 1531, and obtained, three years later, for himself and his heirs the acknowledgment of his supremacy over the English Church, and of all the rights incident thereon. In 1536 the smaller convents were suppressed, and the more considerable ones in the following year. In 1538 an English edition of the Scriptures was prepared, and all relics destroyed. Despite of these measures, the king held to the doctrines of the Catholic Church, which he caused to be confirmed by statute, in six articles, in 1539; and on the same day caused three persons to be burned as heretics, for presuming to question certain Catholic dogmas; and three others to be hung as traitors for adhering to the doctrines of the papal supremacy. During the minority of Edward VI., in 1547-53, however, the party attached to Church reform, in the sense of the school of Geneva, obtained the preponderance, and the royal ordinance, in six articles, was rescinded by act of parliament, the sacrament administered in both kinds, the marriage of priests declared lawful, and a new liturgy in the vernacular prescribed.

Queen Mary, in 1553-8, restored the Catholic religion to the condition in which it had existed before Henry’s reforms; but Elizabeth, who, as the child of a marriage illegal according to the rules of the Catholic Church, had no right to the royal inheritance of her father, declared in favour of the reformed doctrine. Elizabeth caused, in 1559, the statute of her predecessor relating to the Church government to be annulled, and the ordinance of Henry VIII. respecting ecclesiastical supremacy, together with that of Edward, to be revived in 1562, establishing the Confession of Faith of the English Church upon the basis of thirty-nine articles adopted by Edward in 1552.

All these religious changes were extended, from the time of Henry VIII., to Ireland, but met with considerable opposition on the part of that nation, the major part of which adhered to the religion of its forefathers.

Scotland was at that period an independent kingdom, and was first excited against the Catholic religion by the violent preaching of John Knox, in 1547. Ten years later the Reformers formed an association in Edinburgh, which they termed the Congregation.

1 John Lingard, Hist.: Walter, Kirchenr. § 33, p. 68.
of the Lord, whereby they obligated themselves to quit the Congregation of Satan, as they termed the Catholic Church, and declared themselves its enemy. In July of the year 1560, one of the lords of the congregation, carried away by religious enthusiasm, and supported by Elizabeth, convoked the Estates without royal warrant. In this assembly the articles of Confession of the Scotch Church were drawn up, the performance of Catholic rites forbidden under heavy penalties, and the papal power abolished. In the following year the destruction of churches, Catholic robes and vessels, libraries, and every other remnant of papacy was resolved upon and executed.

§ 247.

In England, the defection from the Catholic faith had its origin in Acts of Parliament, which declared the king supreme head of the Church; this placed the Catholics in the awkward dilemma of either renouncing their faith or violating the law, heightened by severe penal provisions, even those of high treason, against such as should presume to doubt the supremacy of the king, not to speak of defending that of the Pope; and in order to test the feeling of the nation in this respect, the oath of supremacy was required from all who were about to receive a fee, or office under the Crown. A new form of Church service was simultaneously introduced, declared to be the only legal one, and all neglect of it, not to mention the participation in any other, punished with an increase in fines and penalties. With respect to Catholics, special pecuniary mulcts were denounced against such as performed or attended mass, and the sojourn in the kingdom of all priests of that confession was prohibited, under the penalties of high treason. Catholics were forbidden to travel more than five miles from their dwellings, or to educate their children in the Catholic faith without the realm; they were forbidden to keep arms or ammunition in their houses, or to reside within a circle of ten miles round the capital. In respect to their baptisms, marriages, and burials, they were placed under the clergy of the English Church. They could neither be attorneys, executors, physicians, nor apothecaries; the authorities were even enjoined to propose the oath of supremacy to all such as they suspected of being papists, and in event of their refusing to take it, to subject them to perpetual imprisonment and confiscation of property.

1 26 Hen. VIII. 1; 35 Hen. VIII. 3; 1 Eliz. 1, § 16-17.
2 1 Ed. VI. 12, § 6, 7; 1 Eliz. 1, § 27-30; 5 Eliz. 1, § 2.
3 1 Eliz. 1, § 19-20; 5 Eliz. 1.
4 5 & 6 Ed. VI. 1, § 2; 1 Eliz. 1, 22; 1 Eliz. 2, 23; 3 Eliz. 1, § 5; 29 Eliz. 6.
5 5 & 6 Ed. VI. 1, § 6; 35 Eliz. 1, 22; 22 Car. II. 1.
6 23 Eliz. 1; 3 Jac. I. 5, § 1.
7 27 Eliz. 2; 1 Jac. I. 4, § 1.
8 35 Eliz. 2, § 3; 3 Jac. I. 5, § 7.
9 1 Jac. I. 4, § 6; 7; 3 Jac. I. 5, § 16; 3 Car. I. 3.
10 3 Jac. I. 5, § 27; 28; 29; 1 Will. III. 9, § 2.
11 3 Jac. I. 5, § 4; 1 Will. III. 9, § 2. 18 3 Jac. I. 5, § 13; 14; 15.
12 3 Jac. I. 5, § 8; 32.
13 7 Jac. I. 6, § 26.
After the civil war, in order to check the increasing power of the Presbyterians, it was rendered imperative by the Corporation Act of 1661, on all who aspired to a public charge to receive the sacrament according to the legal rite. The Test Act, on the other hand, was passed in 1673, with reference to the Catholics, who, in addition to the above, were obliged to subscribe a declaration, in writing, against the doctrine of transubstantiation; lastly, in 1678, in addition to the oath of supremacy, a renunciation of the doctrines of Catholicism was required, in order to enable a member to sit in Parliament; however severe these provisions may have been in England, they were doubly so in Ireland, where the majority of the population was obliged to contribute tithes and submit to Church rates levied by Protestants, for the support of a religion which they did not profess. After the revolution in 1689, a new form of the oath of supremacy was introduced, in order to accommodate dissenters which was only directed negatively against the supremacy of any foreign power, and which thereby tacitly allowed them the free exercise of their own religion; with respect to Catholics, however, who refused to make this oath and the above declaration, not only were the old penalties left in force, but new ones were superadded, and they could still be required to take the oath of supremacy; they could own no horse valued at more than 5l., the real property acquired by them by succession or legacy, passed to their nearest protestant relatives, their contracts for the purchase and sale of land were declared void, and their bishops and priests threatened with imprisonment for life.

§ 248.

The policy of England, however, gradually changed; for in 1778 a form of oath was substituted, which referred to the civil duties of the subject, without interfering with the question of ecclesiastical supremacy; upon taking which, Catholics were declared capable of acquiring and inheriting real property, and their clergy freed from the above-mentioned pains.

A little later, in 1791, most of the above penalties against Catholics were remitted by another statute, on their taking another form of oath similar to the last, and the free exercise of their religion and of instruction was allowed them; in 1793 the benefits of this act were extended to Scotland; and in the same year Catholics in Ireland, but not those in England, obtained the right of electoral franchise, the capacity of sitting on juries, and exercising other inferior offices. In 1828, the Test Act was

1 13 Car. II. 2, 1.
2 25 Car. II. 2.
3 30 Car. II. 2, 1.
4 5 Will. III. 8.
5 1 Will. III. 18; 10 Anne, 3, § 7.
6 2 Will. III. 15, § 22; 1 Will. III. 18, § 22; 8 & 9 Will. III. 276; 1 Geo. I. 2, 19, § 70, 11.
7 1 Will. III. 15, § 9, 10.
8 11 & 12 Will. III. 4.
9 18 Geo. III. 50.
10 31 Geo. III. 32.
11 33 Geo. III. 44.
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repealed, which, however, benefited the dissenters only, as the oath of supremacy was still retained as a qualification for all the higher offices of the State. In 1829, the Catholics of the three kingdoms were declared capacitated to sit in and vote for Parliament upon their simple oath of allegiance, and to exercise all public offices, some few excepted; this act made no difference in the claim of the dominant Church with respect to the Catholics, who are still bound to pay their tithes and other Church rates, although since 1833 they are protected, at least in Ireland, from the imposition of any new ecclesiastical dues.

§ 249.

It appears, then, in the earliest times of English history, that the Canon Law obtained some influence in this country, though never a firm footing; but, on the contrary, excited at a very early period the suspicion of the nobility, who at once perceived the tendency it had to supplant their power, and transfer it to a class, however superior in learning, yet inferior in birth and feudal power.

This opposition to the encroaching jurisdiction of spiritual courts has then been constant since the time of Stephen, and ended in its almost final extinction at the present day, for though an ecclesiastical court can still pronounce judgments, yet it is not a court of record, and has no power of execution of itself, but is dependent in this respect on the Courts of Chancery and Common Law, and of the Privy Council, which is thus laid down under three heads by Blackstone.

Speaking of "the Courts of the Archbishops and Bishops, and their derivative officers, usually called in our law courts Christian, Curie Christianitatis or Ecclesiastical Courts, the Military Courts, the Courts of Admiralty, the Courts of the two Universities:"

"The Courts of Common Law have a superior tendency over these Courts, to keep them within their jurisdiction, to determine when they exceed it, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal."

"The exposition of all such Acts of Parliament as concern either the extent of these courts or the matter depending before them; and therefore, if these courts either refuse to allow these Acts of Parliament, or will expound them in any other sense than what the Common Law puts upon them, the King's Court at Westminster will grant prohibitions to restrain and control them."

"An appeal lies from all these courts to the Sovereign in the

1 9 Geo. IV. 37. 2 2 Geo. I. st. 24 13; 2 Geo. II. 31; 5 Geo. III. 52. 2 & 3 Will. IV. 92; 3 & 4 Will. IV. 41.
2 2 Jast. 653, ex parte Jenkins; 2 Burn. & Camp. 655; Beaulieu v. Sir W. Scott, 3 Camp. 388.
3 Hall v. Mable, 7 Al. I. 504.
last resort, which proves that the jurisdiction exercised in them is derived from the Crown of England, and not from any foreign potentate or intrinsic authority of their own. And from these three strong marks and ensigns of superiority, it appears beyond a doubt that the Civil and Canon Laws, though admitted in some cases by custom in some courts, are only subordinate and leges sub graviori lege, and that thus admitted, restrained, altered, new modelled, and amended, they are by no means with us a distinct, independent species of laws, but are inferior branches of the customary or unwritten laws of England."

Henry VII. abolished the degree of Doctor utriusque juris thitherto conferred in the universities of Oxford and Cambridge, substituting that of juris civilis Doctor, or D.C.L., and the older title of doctor of both laws now only exists in continental universities.

§ 250.

The leges non scriptæ, customary or common laws, were not peculiar to this country alone, but are found among every nation in the world, possessing more or less authority, and being more or less prevalent; in short, experience has proved that no system of legislation can be so perfect as to meet every shade of case that may arise. In Rome, the first attempt at codifying the law was made after the abolition of monarchy in the Roman state under the Decemvirs, if we pass over the leges regiae, which were probably composed of single constitutions collected by Papyrianus, and termed the Jus Civile Papyrianum; these laws, whatever they were, were superseded by the decemviral or laws of the Twelve Tables, which certainly had the form of a code, and into which, it is presumable, all that was useful and of general application in the royal laws was received, always excepting those which applied to monarchy. We have but a few fragments of these decemviral laws, and these several authors have attempted to complete, with more or less success. That these laws were short, we are assured from the terse style of the remaining fragments, and from the fact of their being learned by heart by young Romans of birth and education. From the date of this collection we hear of no code until a comparatively recent period; nevertheless, the study of the law had in the mean time attained its zenith as a science and a faculty; other sources had, however, sprung up in the mean time: Senatus Consulta and Plebiscita had been passed, to meet particular cases or abuses requiring special remedy; but the greater part of the law consisted of consuetudo, custom, and the acknowledged interpretation of learned men, which were deductions from existing enactments for contingencies not directly provided for, but inferable from them according to admitted principles of logic and consecutive argument.
§ 251.

From the terse nature of most ancient specimens of the written laws of the Saxons which have come down to us, we are enabled to judge of the necessity of a system of interpretation; and hence we may trace the origin of the Common Law, so called, because it was generally received as of binding authority. These branches very soon became more and more numerous, and the trunk whence they sprang was overshadowed by the ramifications into which it itself had spread; hence the error that *leges non scriptae* had their origin entirely in usage, as if usage could spring up at once without an inciting cause. Blackstone even inclines to this theory, and without denying that some customs may have arisen not directly referable to a statutory enactment, yet that by far the greater part of them more probably originated in the manner presumed. Blackstone relies upon the illiteracy of the age, and because the British, as well as the Gallic Druids, committed all their learning as well as their laws to memory, *leges solâ memoriâ et usu retinentur*; but then it must be remembered that the Druids assumed a monopoly of the law upon which their power was founded, and that if they preferred memory to writing in order to retain this privilege in their own class, it by no means follows that these laws were not mainly *unwritten enactments* retained by memory, the interpretation of which they reserved to themselves; and no one will deny that a statute is equally a statute after having been orally agreed to, whether subsequently reduced to writing or not. Aulus Gellius defines *jus non scriptum* as that which is *tacito et illiterato hominum consensu et moribus expressum*, which, while it applies to the interpretation, does not exclude the supposition of an origin in special enactment or contract. "The Romans, the Picts, the Saxons, the Danes, and the Normans," says Selden, "must have introduced and incorporated many of their own customs with those that were before established;" but this does not necessarily compel the supposition that these customs were not founded upon enactments of those nations; and among ourselves custom has no force against a statute: thus, if the oldest statute unrepealed can be adduced contrary to common usage, or even adjudged cases, it must be a peculiar case indeed when a judge will not give it the preference. Hence we come to the conclusion, that the unwritten or customary law is founded either on some enactment now no longer traceable, or on some contract of mutual consent, grant, charter, or other and the like, now lost or forgotten. A custom, to have the force of law, must have been in use for time whereof the memory of man runneth not to the contrary, for this will presume the original existence of a charter or act, and this presumption has existed from the reign of Richard I., 1190: since that time ages have passed; nevertheless, this is still held to be the limit of legal memory, a memory of which more is required every succeeding day.

1 Spel. Glom. 362.
§ 252.

Blackstone divides the Common Law into three kinds:—
1st. General Customs, which are the universal rule of the whole kingdom, and form the Common Law in its stricter and more usual signification. 2nd. Particular Customs; which affect only the inhabitants of particular districts. 3rd. Certain Particular Laws; which by custom are adopted and used by some particular Courts, of pretty general and extensive jurisdiction. Among the first he places the precedents which guide the ordinary courts of justice,——these are undoubtedly interpretations,—and then instances "the course in which lands descend by inheritance;" with respect to which there can be little doubt that it was founded on a special enactment,—"the solemnities and obligations of contracts." This in Rome was founded on bargain and sale,—"the rules for expounding wills, deeds, and Acts of Parliament." Originally every will was among the Romans a separate statute; this, then, again is a question of interpretation, "the respective remedies of civil injuries," under which head we find enactments in almost every code in existence. "The four courts of law," whose jurisdiction is derived from the king, who presides in all courts; and why should these courts not have been as much founded on statute as the new County Courts or the Saxon courts formally established by Alfred. "That the eldest son alone is heir to his ancestor," bears the evident marks of a statute, because, though conformable to sound policy, it is in direct contradiction to justice, and bears strong traces of seodality, or a kindred; though perhaps older, system; sealing and delivery, being essential to the validity of a deed, is also not a law, but a proof of the presence of the number and quality of the witnesses required by the Roman law of bargain and sale. "That wills should be construed more favourably, and deeds more strictly," are interpretations of some obsolete statute that allowed such instruments the place of actual delivery.1 "That money lent upon a bond should be recoverable by an action for debt," is a deduction from the law which gives a remedy for the recovery of a debt generally; he then tells us that there is no statute on these particulars, but does not mean to say that they are not founded upon some statute. The instance given in the second division is still more striking,—"that the eldest shall be heir to the second, to the exclusion of the youngest;" for what is this but the unequal law of primogeniture: that the king cannot do wrong is a maxim founded on the legislative power of the sovereign, and the sacredness of certain persons was expressly enacted in Rome: "that no man is bound to criminate himself," is the converse of the law which obliges another to prove the crime against him, and is eminently English. The very existence of these maxims is a prima facie proof of an origin in, or deduction from, a special enactment, at some time or

1 There are many existing statutes relating to written instruments, of which the most notorious is the Statute of Frauds.
other, for customs do not suddenly appear amongst us; and with respect to its practical application, it suffices that the judge know these customs to be such; but it is not required, nor is it necessary, that he should be aware of their origin; he is to adhere to precedent, to secure uniformity, and to guard against arbitrary acts; and as he strives to bring a case within a known custom or precedent, so he formerly endeavoured to bring it within the statute whence that custom sprang.

§ 253.

These precedents or interpretations are contained in the Reports of decided cases founded upon the Records; the Reports contain a short detail of the case, with the arguments on both sides, and the grounds of the judgments. The Reports from Edward II. to Henry VIII. are termed Year Books, from their being published annually, and were compiled by the prothonotaries of the several courts at the expense of the Crown; these official Reports ceased with the reign of Henry, and were not revived until that of James I., who, at the suggestion of Lord Chancellor Bacon, appointed ten persons to continue them; the office, however, was soon neglected, and from that time private individuals have continued this duty. Dyer and Plowden were succeeded by Coke, who was followed by Hobart, Croke, Yelverton, Saunders, Vaughan, and Levinz.

The Reports of Coke are eminently termed the Reports, being quoted 1 or 2 Rep.; those of Croke which embrace the reigns of Elizabeth, James, and Charles I., are variously quoted by numbers 1, 2, and 3 Cro., or by the reigns, Cro. Éliz., Cro. Jac., and Cro. Car. Saunders’s Reports have been edited and commented by those distinguished lawyers, Serjeant Williams, Justice Paterson, and Justice Williams, son of the first editor, and are among the most valuable books of reference of the time; the Reports are now divided under the heads of the different Courts, those of the Queen’s Bench being styled Term Reports; there are also Reports in the Courts of Bankruptcy and Quarter Sessions, and in all the Courts of Chancery, the Chancellor’s Court, the Rolls, the Vice-Chancellor of England’s Court, and the two Courts of the Vice-Chancellors, and those called Practice Reports or Practice Cases. These are quoted by the initial letters of the authors’ names, with number of the volume and page, and sometimes of the case, as Doe v. Lynes, 3 Barn. and Cres. 388, Lambert v. Norris, 2 Mees. and W. 333, &c. In addition to these, there are periodical reports published in the “Law Journal,” the “Jurist,” the “Law Times,” &c., which, although of not equal authority, have still the advantage of supplying the practitioner with the most recent case immediately after its decision, and which is usually still in the memory of the court, they are therefore received; the regular reports generally appear in trimestral parts; and as upon these more time is em-

1 For details, see Crabb’s History of the English Law, pp. 468 and 568.
ployed, and the judges frequently referred to in their composition, they are looked upon as more authentic. These interpretations and judgments of the courts, although reduced to writing, are to be reckoned among the *leges non scriptae* of the land.

§ 254.

The older commentators on the English law have already been mentioned, and as the principles laid down in their works are of authority, they may also be reckoned to form part of the Common Law; the chief of these are those of Glanvill, Bracton, Fleta, Fortescue, De Laudibus Legum Angliae, in the reign of Henry VI., the doctor and student by St. German in that of Henry VIII.; Staundford on the Criminal Law under Philip and Mary; Hale and Hawkins in the eighteenth century; Shephard’s Touchstone, attributed to Justice Doderidge, under James I. The chief digests and abridgments of the Common Law reports are by Fitzherbert, Brooke, Rolle, Viner, Comyns, Bacon,¹ Petersdorff, and Gilbert Coke² upon Littleton’s³ Tenures, enlarged by an original commentary. But Justice Blackstone was the first who attempted a systematic commentary of the English Law, probably the most successful and best legal work ever written. In the later times practice works have increased to a great extent, some of which may be aptly compared with the formule published by Gneus Flavius, and the formulary books of the Middle Age; of these, Pearson’s Precedents in Pleading is the most recent and best work; there are also like guides to the drawing up deeds and instruments belonging to the Courts of Equity. Archbold is the great authority in questions of practice. Smith’s leading cases, lately re-edited by Willes, is justly in high repute. The works, however, of the most general application are those upon the rules of Evidence, of which the most leading are those of Roscoe, Philippis, Archbold, Starkie, and Taylor, which are the most recent text-books; and works on particular subjects, such as Abbott on Shipping, Woodfall’s Landlord and Tenant, Gale’s Easements, Scriven’s Copyholds, Sugden’s Vendors and Purchasers, Best’s Presumptions, with many others too numerous to mention, which render reference to those great sources of the Common Law—the Reports—as well as the Statute Law, more easy. The American authors have, too, not been behindhand, and Kent’s Commentaries, and Story’s Bailments enjoy the highest credit. The reports are rendered accessible by means of the annual digest, known under the title of Harrison’s Digest; new editions of which are published from time to time, so as to include the new cases, it is compiled in the form of an index, divided under heads.

§ 255.

"The second branch of the unwritten laws of England," says Blackstone, "consists in particular customs or laws, which affect

¹ Hen. VIII., Elizabeth, Charles II.  ² 1628.  ³ Ed. IV.
only the inhabitants of certain districts," which he refers to a period anterior to England’s unity, and considers them the remnant of former dynastic laws, an explanation which favours the theory of these customs having been the result of the enactments of the kings who formerly ruled these now districts as independent kingdoms. Many such local customs have been confirmed by statute, or in other words, the lost statute has been revived by a new one. Blackstone adds as an instance gavel kind, a custom of the county of Kent, and of some other parts of the kingdom, which he thinks may have been general before the Norman conquest. According to this custom, all sons succeed alike to their father, whose attainder does not invalidate his heir’s right to the succession. Borough English, according to which the youngest son succeeds in preference to his elder brothers, is said to have come from the Tatars, where the elder sons desert the paternal seat, when old enough, with the flocks apportioned to them, leaving the younger at home, who finally succeeds to the father; others conceive it to be based upon the supposed illegitimacy of the elder brothers, from the time in which the lord had the jus primae noctis (droit d’enjambage) with all brides married within his jurisdiction, but this practice never obtained in England. The particular customs of manors are referable to their charters, that is, they are founded on contract, those of London have been confirmed by Act of Parliament.

The Lex Mercatoria, or law merchant, referred to in earlier statutes, is doubtless founded on an enactment, for this mercantile law has from the earliest time been the subject of as many Acts of Parliament and charters as any other branch of law. The usages of particular trades are also referable to those charters by which that particular branch of industry was protected or incorporated.

§ 256.

In the third division, Blackstone places customs used only in peculiar courts and jurisdictions, and then cites the Civil and Canon Laws, which, as far as they relate to this kingdom, are as much leges non scriptae as the reports, for the true definition of lex scripta is a statute, act of Parliament, or orders in council, grants, charters, and privileges, or burdens granted or imposed in compliance with their provisions.

§ 257.

Customs, in order to be legal, must be, 1. Immemorial; 2. Continuous; 3. Peaceable; 4. Reasonable; 5. Certain; 6. Compulsory.

1 Black. Com. Intr. § 3, p. 74. 1787.
2 Mag. Cart. 9; Hen. III. 9; 1 Ed. III. st. 2, 9, 14; Ed. III. st. 1, 2, 3; Hen. IV. 1.
3 Some derive this word from gif sel cyn, given to all the children; others from geful, gwal, a tribute, rent, or service, and geyed, kind (of service). Geful in Welsh signifies to hold. Thus Crab, in his history of the English Law, p. 83, supposes gail kind to be a kind of tenure to which the partiality of the lands was merely incidental.

1. By Immortal is meant, of such antiquity that the memory of man runneth not to the contrary, which is equal in effect to an Act of Parliament or Charter, and is now further limited in particular cases by statute. 2. By Continuous is meant, that the prescriptive right, not possession, has not been interrupted during its existence. 3. By Peaceable is meant undisputed, for Coke says, customs derive their origin from common consent given at some remote period. 4. By Reasonable is meant good, for malus usus abolendus est. Blackstone gives as an example, the custom of beasts not being put into a common before a certain day, as a reasonable, and the custom of none being put in until the lord of the manor shall have first put his in, as an unreasonable custom; it is moreover, 5. Uncertain; thus, to pay a fixed commutation for tithes is good, but at one time more, at another less, is bad, for uncertainty; but the payment of a year's improved rental, though uncertain, is good, for certum est quod certum reddi potest. 6. By Compulsory is meant obligatory, and not optional, as to those bound. 7. By Consistent, is meant that one custom cannot be set up in opposition to another, for in this case the custom cannot be said to be peaceable. 8. By Strict Construction is meant, that a custom must confine itself within the established modes of its exercise, out of which it must not travel. 9. As all customs originated in an enactment or mutual consent, otherwise grant or charter, so an Act of Parliament will annul them, for lex posterior abrogat priorem.

§ 258.

Thus the Common Law is of such antiquity, that it is coeval with the first peopling of Great Britain. From the earliest records of the Saxon times may be traced rules and principles of law acknowledged in the present day; as the jurisdiction and proceedings of courts, the distribution of powers and offices among ministers of justice, and the like. Among the Saxon kings there was a series of law-givers, whose Codes, then distinguished by the name of Dombocs, are still extant, and present us with the outlines of that scheme of English jurisprudence which afterwards obtained a footing. These Codes contained little more than a brief abstract of laws or general rules for the guidance of judges or magistrates, the details being left to be filled up at their discretion, or by the known and prior existent laws of the place.

The first of these Codes, which is also asserted to be the oldest in Europe, was that of Ethelbert, who began his reign A.D. 561; his was followed by the Codes of Hlothaire, Edric, and Wibtrid, all kings of Kent, and Ina, King of the West Saxons; after which we have the laws of Alfred the Great, who, when he had

got rid of his enemies, set about new modelling his kingdom. He divided it into more regular and uniform portions, to which he
gave the name of sceฟ division, from sceฟ, to divide. The
Earl (Yarl) presided over this shire in the double capacity of mili-
tary and civil chief, with the title of heretocб (here and taken),
leader of the armies, or dux in the former, and alderman in the
latter. In this manner Alfred not only established his code, but
also provided for its due execution.

The laws of Edward the Elder, his son, are next in order,
followed by those of Athelstan, Edmund, Edgar, Etheldred,
Canute, and Edward the Confessor. Alfred, the most celebrated
of the Saxon law-givers, acquired the title of Conditor, and Edward
the Confessor of Restitutor legum Anglicarum. Wisdom was
shown by the Saxon lawgivers in selecting from kindred people
laws agreeable to the feelings of their subjects, and the same
cautions was observed in the Code of the Danish king, Canute, which
is perfectly uniform in spirit and language with that of his predeces-
sors; so much so, that Edward the Confessor gives under the head
of Saxon laws three Codes, distinguished by the particular names,
Saxon-lage, Dane-lage, and Merchen-lage, or laws of the Saxons,
Danes, and Mercians. These, with some additions, were pub-
lished in original, with a Latin translation, under the title of
Archaionomia, by Lambard, and have since been enlarged by Dr.
Wilkins (Leyes Anglo-Saxonie), with those of Edward the Con-
fessor in Latin, of William the Conqueror in Norman, and of
Henry I., Stephen, and Henry II. in Latin.

§ 259.
The Lex Scripta of England, in its strict sense, consists of
Statutes, Acts, or Edicts made by the Sovereign, by and with the
advice and consent of the Lords Spiritual and Temporal, and
Commons, in Parliament assembled. That which is done in
conformity with any Act of Parliament, for instance, an Order in
Council, is the Edict here above alluded to; for in latter days the
Legislature has considerably extended the prerogative by passing
clauses in Statutes enabling the Queen in Council to do certain
acts and issue orders in certain cases. This arose from the
unwillingness of Ministers to meet the House of Commons, and
be subjected to a lengthened debate and frivolous and factious
opposition on every new point.

§ 260.
The oldest Statute in existence is the Magna Charta, as con-
firmed by Parliament in the ninth year of Henry III. 1225.
This is followed by the Vetera Statuta, which are composed of
those from the beginning of the reign of Edward II. 1307.
There are also others passed in the reigns of Henry III.,

1 Black. Com. Int. § 3. 2 Dwaris on Stat. 326.
Edward I., or Edward II., termed *Incerti Temporis*, as their exact date is not known. *Nova Statuta* are those passed since the beginning of the reign of Edward III. 1327. All statutes previous to this period are lost; and, Blackstone admits,¹ are perhaps at present currently received for the maxims of the old Common Law. A Statute over-rides every other law, and restrains even the Royal Prerogative; for a Statute cannot be perfect without the consent of the first estate of the realm, as well as of that of the Lords and Commons.

This was, however, not always the case; but first became so in the reign of Henry VIII.² The Commons were summoned in the reign of Edward I. merely to give assent to taxes; nor was it for a moment imagined that this body had any right to interfere in legislation. Under Edward III. they advanced so far as to get some of their petitions passed into laws by the King and Lords, in whom the power then resided. Under Henry IV. they made an effort to take part in the proceedings of the Upper House,³ where, on their petitioning that they should not be made parties to an award made by the King in Parliament respecting the lands of a restored archbishop, he told them that all judgments belonged to the King and the Lords, except in Statutes and the like. Under Henry V. the Statutes are said to be made "with the advice of the Lords Spiritual and Temporal, and at the special interest and request of the Commons of this realm;" and the same under Henry VI., except on one occasion, where it runs "by the advice and assent of the Lords Spiritual and Temporal, and the Commons being in the said Parliament, by the authority of the said Parliament," &c. Under Henry VII. Petitions began to be presented to the Commons, on which Statutes were passed in the eleventh and twelfth years of the king, permitting merchant adventurers⁴ dwelling out of London to visit foreign countries. Hence it is probable that they⁵ ceased to be petitioners after the reign of Edward IV. The nearest step short of their participation in the Legislature appears to have been just before the reign of Henry VIII., when Petitions were drawn in the complete form of an Act of Parliament, which was entered thus: *Item quaedam petitio exhibita fuit in hoc Parliamento Formam Actus in se continent.* When they ceased to be Petitions, they were termed Bills, which, when they had passed through both Houses, were brought to the Sovereign for assent, the reverse of the originally custom.

§ 261.

Statutes are cited somewhat variously; some according to the *age*, and some according to the *place* in which they were passed, as the Statute of Merton and Marlberge, of Westminster, Glou-

¹ Black. Com. Int. § 3. ² Reeve's Hist. 3. 225. ³ Parl. Hist. 2. 50. ⁴ St. xii Hen. VII. 19; st. 12 Hen. VII. c. 6. ⁵ Hale's Hist. c. 3.
cester, and Winchester; others, according to their matter, as the Statute of Wales and Ireland, the articuli cleri and the prerogativa regis, the Statute of Frauds, the Statute of Mortmain, &c.; others, according to the rule applied by the Jews in the Pentateuch, by the Christian Church with regard to their psalms and offices, and by the Civilians and Canonists, by the initial words, as Quia Emptores, Circumspetet Agatis, and the like; but, from Edward II., by the date of the reign in which they were passed, together with the number of the chapter. As all Acts passed in one Session of Parliament make properly but one Statute; hence, when two Sessions have been held in the same year, it is usual to state whether it was the first or second, thus the Bill of Rights is cited 1 W. & M. st. 2, c. 2. Formerly a Statute, that is, each chapter of a Statute, took its force retrospectively from the date of its passing, although it may not have received the Royal Assent until some time afterwards; but this inconvenience, which rendered illegal, acts which, when done, were perfectly lawful, has been met by the Rule, that all Acts shall become obligatory from the date of the Royal Assent; and this is often further modified by a time being fixed in the Statute itself for its coming into operation, in order to give time for its promulgation.

§ 261.

Statutes in England are public, private, local, personal, declaratory, penal, remedial, enlarging, restraining, enabling, or disabling.

Public acts resemble the Senatus Consulta of the Romans; they are universal, and all courts of law are obliged to take judicial notice of them, ex officio, without their being specially pleaded.

Private acts, on the contrary, must be formally pleaded, otherwise the judges will not take official notice of them; they are usually exceptions, and Stephen adduces the instance of a statute enabling a Dean and Chapter to grant a lease for sixty years, such corporations being by public and general statute restrained from granting one of a greater duration than twenty-one years, or three lives, and compares them to the Senatus Decreta; but these may, and often are, declared public by a special clause.

Local acts affect particular places only, and not a particular person; but all such as live in that locality are bound thereby; of this nature are highway acts.

Personal acts are confined to particular persons, as for inclosures, divorce, and change of name.

Declaratory acts simply declare what the Common Law is when it is in danger of falling into oblivion, or is falling into disuse, and are said to be made in perpetuum rei testimonium; they may otherwise be called reviving statutes, as they revive, in fact, the Statute upon which the Common Law is founded.

1 33 Geo. III. 13. 2 4 Rep. 13 s, and 76 s; 3 T. R. 125; 2 T. R. 569.
Penal acts are those which contain a penalty for their infringement.

Remedial acts, those enacted to remedy an evil which exists, or a deficiency in the Statute or Common Law of the land.

Enlarging acts are such as extend a power already existing; thus the 32 Hen. VIII. 28, enabled certain sole ecclesiastical corporations to grant longer leases than they had theretofore been able to do.

Restraining acts are the converse of these, circumscribing a power in existence, as the 13 Eliz. 10, did in the case above cited.

Enabling acts are such as confer a capacity hitherto not in esse; an enactment to divorce A. B. from his now wife, and to enable him to marry again, is at once personal, remedial, and enabling.

Disabling acts are such as deprive of a capacity hitherto enjoyed; thus the act which disables clerks from sitting in Parliament.

Many provisos, too, have this effect, such as those in the naturalization, but which provide that naturalized British subjects shall not sit in Parliament, or be members of the Privy Council. 1


§ 262.

Formerly acts were short, concise, and logically drawn; for it was the business of the Judges, at the close of each session of Parliament, to digest the acts passed during that sitting into one statute. The general interpretation of them was left to the Courts, which is one of the sources of the Common Law before alluded to; but modern acts, in endeavouring to provide for every possible contingency, are in fact less effective than formerly, since what is not included, is presumed to be intentionally omitted; this practice has changed the rule of interpretation, rendering it necessarily far more stringent than formerly, when left to the discretion of the court. Generally, statutes are to be construed, not according to the mere letter, but also according to the evident intent and object 2 with which they were made; 3 thus the judge has a double option, that of deciding that a case within the words, is not within the meaning, or that, although within the meaning, it is not within the words: a judge is, however, bound to use this discretion with moderation, and not lightly disregard the letter of the statute, the general maxim being a verbis legis non recedendum est, 4 which is more than ever applicable in the present day.

1 7 & 8 Vic. 66 § 6.
3 Plow. 205, 9, Inst. 101.
§ 263.

Penal statutes are to be construed literally;¹ this arises from the jealousy which exists in this country of allowing more discretion than is actually necessary to the judge; thus a maximum of punishment is always fixed, and no change in that specified is permitted; even the Sovereign cannot direct a man to be hanged who has been condemned to be hanged, although he may pardon the criminal, or, as has been often done in the case of treason, remit any part of the punishment. Blackstone quotes the instance adduced by Lord Bacon,² that if for a certain offence a man shall lose his right hand, and he has already lost that hand, he cannot be condemned to lose his left.

Remedial statutes are construed more liberally, and here the first point to be attended to is the object of the statute, the mischief or defect in the Common Law, or in preceding statutes, intended to be remedied.³ Thus, if an informer sue for a penalty, the act will be construed strictly, that is against the plaintiff; but if a person who has suffered a wrong sue for damages, or the return of the thing of which he has been unjustly deprived, it will be construed remedially, that is in favour of the plaintiff; and this is consonant with the ends of justice and the object of the Legislature, and it is a rule of law that what is not within the mischief is not within the remedy.⁴

In construing one statute, regard must be had to all those in pari materia, and former or cotemporary statutes may be taken to interpret later ones, as the best evidence or intention of the Legislature and of the line adopted in that species of legislation.

A statute which treats of things or persons of an inferior rank cannot be made applicable to those of a superior;⁵ a statute respecting priests and deacons will not include a dean or a bishop, nor an act mentioning trees, apply to underwood.

The contravention of the provision of an Act of Parliament, where such provision is general, and which awards no particular penalty for an offence specified therein, is a misdemeanour in the eye of the law, and an indictment⁶ may be supported accordingly, if the concern be of a public, or an action will lie if it be of a private nature. "The case will be the same," says Stephen, "even though the statute, after the prohibition, proceed by a separate clause to annex a particular pecuniary penalty to the offence if committed, for that will not take away the other remedies; but where a statute merely inflicts a pecuniary penalty for an act not previously unlawful, and contains no direct prohibitory clause, no indictment can in this case be sustained; the only remedy being to proceed for the penalty."⁷

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¹ Black. Com. 88. ² Bac. Max. 12. ³ 3 Rep. 7, 1 Black. Com. 87; 2 Inst. 110. ⁴ Black Com. 87. ⁵ 1 Black Com. 88. ⁶ Steph. Com. 1, 75; 2 Inst. 131; 10 Rep. 75 b; 2 Hale, P. C. 171; 4 T. R. 205; 1 Mod. 71; 5 Bing. N. C. 253. ⁷ 7 T. R. 620; 1 Burr. 543. ⁸ Str. 679; 2 Burr. 80, 5.
In cases of contradiction between two statutes, leges posteriores priores abrogant is a maxim of the English law similar to that of the twelve tables, quod populus postremum jussit, id jus ratum est. The contradiction may be either direct or by implication; if direct, no doubt can arise, but if by implication, the negative must be so strong, as to render the two irreconcilable and inexecutable if co-existent; if, however, they can be reconciled, then both stand, and Stephen gives us an example,—an offence hitherto indictable at quarter sessions, and by a later law made indictable at assizes, both have concurrent jurisdiction, if the words "indictable at the assizes, and not elsewhere," be not contained in it.¹

If a Statute repealing another be itself repealed, the Statute originally repealed revives of itself without any reviving clause,² which however is usually added.

"Acts of Parliament," says Blackstone, "derogatory from the power of subsequent Parliaments, bind not," and Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses which endeavour to tie up the hands of succeeding Legislatures. Cum lex abrogatur, illud ipsum abrogatur quo non eam abrogari oporteat.³ "When you repeal a law itself, you at the same time repeal the prohibitory clause which guards against such repeal."

¹ Dr. Foster's case, 11 Rep. 63.
² 12 Rep. 7 & 9; 4 Inst. 345 & 43; 3 Bing. 493; 9 Bacon & Cres. 344; 10 Ibid. 39.
³ L. 3, Ep. 23.
A SUMMARY

OF THE

ROMAN CIVIL LAW.

VOL. I.—PART II.
TITLE II.

Rights and Obligations—The different Genera of Law—The Forms of making Laws at Rome—The various species of Laws at Rome. (Parallels throughout.)

§ 282.

The word jūs is immediately derived from jubeo, and is used in jus, what. a variety of significations. In the expression ambula mecum in jūs, it stands for a tribunal, but it also signifies the whole science of law, as we term a student of law studiosus juris. It, moreover, represents a right or capacity, but sometimes specifically a law, and is synonymous with lex, jūs pro lege sumptum, as in the passage of Ulpian, Senatus jūs facere possē, or even the locus in quo jūs redditur. Lastly, jūs signifies a particular category of laws, as jūs naturale, civile Romanum, Canonicum, &c. Jūs is defined by Celsus to be ars boni et aequi.  

§ 283.

Jūs, in its widest signification of right, is termed natural, id quod æquum et bonum est, or those rights to which every man is entitled equally, and which depend on the law of nature, unfettered by the restrictions of mankind or a state of civilized society—the right to the air we breathe, and the like. Thus Ulpian tells us, that jūs naturale est quod natura omnia animalia docuit; for it is common to the beasts of the field and the birds of the air as well as to mankind, man being, pro tanto, considered in his animal capacity. The philosophers, however, cavil at this definition, for they say that a reasoning power is here supposed,—an objection without foundation; for, as Ulpian requires nothing more than instinct, instancing, as he does, the procreation of the species and the like, the error rests with those who understand by jūs, in this sense, anything more than that imperfect degree of the reasoning faculty, peculiar to the brute creation, with which they have been endowed for mere self-preservation. If we consider man merely with reference to his animal qualities, and as acting only by the instinct of passion, he is nothing better than any other animal;  

1 Other derivations, more curious than probable, are given of this word σοβιω, σελίω, etc.
and, in such case, the word *jus* must be applied in the signification of *naturalis ratio*, in the meaning of natural impulse. Grotius terms that *dictatum rectae rationis* by which a beast eats when hungry, drinks when thirsty, selects food proper for its sustenance, avoiding what is pernicious; sleeps when tired, and by which the male seeks the female at a proper season. But even this mere instinct has degrees: thus the dog is more intelligent than the ass, the beaver than the dog, and the lowest grade of man than both, one race of man than another; so that the progress from instinct to reason is gradual and equal. Hence the dictates of right reason vary in degree with the *genus* of animal or race of man to which that expression is applied.

The *jus naturale* is, however, the natural right of the animal or man to certain things or acts—the *dictatum rectae rationis*, the faculty necessary to the use of that right.

§ 284.

Where a right exists on one side, a corresponding obligation arises on the other; thus right is inseparable from obligation, which may be to do, or to suffer to be done. Obligations are, in this sense, divided by more modern authors into *perfect*, or such as can be enforced by law—in fact, the *justitia expletiva* of Grotius—or *imperfect*, or such as cannot, answering to the *attributrix* of the same author. To pay a debt due, or to give to the poor, would be examples of them both respectively. These minute and merely technical subdivisions, however, while they answer no practical end, often tend to confuse a question otherwise clear, and may be considered as a type of the age to which their authors belong.

§ 285.

*Justitia*, on the other hand, presumes a power of discernment, and, consequently, a higher degree of reason than any animal but man possesses. Animals are influenced by fear or appetite, not by a moral obligation such as justice implies: thus Ulpian\(^1\) defines it to be *constans et perpetua voluntas*, *jus suum cuique tribuendi*, and holds, that the *precepta juris*, or principles of justice, are, *honestè vivere, alterum non lādere, suum cuique tribuere*.\(^2\)

§ 286.

Justice, then, is an innate quality separable from *Jurisprudentia*, which is the administration or knowledge of the best means of doing what is equitable and right. Thus Ulpian\(^3\) defines it to be *divinarum atque humanarum rerum notitia, justi atque injusti scientia*, which has been explained in various ways; under the

\(^1\) P. 1, 1, 10.
\(^2\) Grotius divides justice into *expletiva*, or the giving a man what is his due; and *attributrix*, consisting of those virtues which are of utility to mankind—as liberality, pity, and the like.
\(^3\) P. 1, 1, 10, § 2.
divine law, the *jus feciale*, *pontificum*, and *augurale* are included in it by some.

§ 287. Numa established the *Feciales*, twenty priests, whose duty it was to declare war with foreign nations, and solemnly to ratify peace and treaties, and to examine, nominally at least, into the justice of a war about to be commenced. On the Roman people receiving some injury, real or imagined, a Fecialian was sent to make the complaint and demand satisfaction; to consider which he gave a certain time, and if the wished-for result was not obtained, the Fecialian returned, invoking imprecations on the people who so refused. When Rome concluded a treaty with Alba, the Fecialian oath is thus recorded:¹ "Audi, *Jupiter*; audi pater patrate populi Albani; audi tu, populus Albanus: ut illa palam prima postrema ex illis tabulis cera se recitata sunt sine dolo malo utique ex hic bodie rectissime intellecta sunt, illis legibus populus Romanus prior non deficiet. Si prior defexit publico consilio, dolo malo; tu illo die, *Jupiter*, populum Romanum sic ferito, ut ego hunc porcum hic bodie feriam: tantoque magis ferito, quanto magis potes pollesque." This body founded the *Jus fecile*, which formed a part of the Political Law of Rome; and the death of the sovereign originally appears to have terminated all treaties, as formerly in modern Europe.²

The regulation of the Kalendar, and the proclamation of the *dies fasti*, *nefasti*, and *intercisi*, business days, holidays, and half holidays, was intrusted to the *pontifices*, as also the interpretation of the *juris actionum*.³ The *augures* pronounced, on command of the Senate, the favourable or unfavourable results, according to their observations of the flight of birds, of celestial appearances, or of the entrails of animals; they also predicted future events by similar means, and regulated matters respecting religion and its exercise, under the strict command of the Senate, without whose authority their art was in abeyance.

The whole of this science was termed the *Jus Pontificum*, and was instituted as a political engine.

§ 288. A few remarks on the Roman system of religion will not be here out of place. The religion of ancient Rome was from the beginning, and remained to the end, purely political, and cannot be compared to any religion which has since been practised among any civilized people.

The Roman religion was not directed to the moral improvement, but calculated to render a people, who feared nothing visible, tractable by the fear of what they could not understand or investigate. It was therefore considered impolitic to make any

¹ Liv. 1, 24. ² Vattel, Droit de Gens. ³ P. 1, 2, 6.
change in the religion established by Numa. Since its institution, however, under that king, the ceremonies had undergone insensible changes. Thus, on the writings of Numa (contained in a stone chest, and supposed to have been inspired by the nymph Egeria) being examined by the priest Petitus,¹ by command of the Senate, 400 years after the death of Numa, it was found, that the ceremonies enjoined by him differed so materially from those then in practice, that it was judged wise to destroy them, lest the people should learn this fact and become sceptical.

For like reasons the sibylline leaves could not be consulted without the senate's authority, and then only on grand occasions, when it was necessary to pacify the people; and all interpretations of them were strictly forbidden.

§ 289.

The priests could pronounce nothing respecting public affairs, without the permission of the magistrates, and they were thus entirely under the direction of the senate. Cicero bears testimony to this in the fragments which he has preserved of the Pontifical Law:—Bella disceptanto: prodigia, portenta, ad Etruscos et aruspices, si Senatus jusserit deferuntes; and, again, Sacerdotum duo genera sunt: unum, quod praetit caerimoniiis et sacrinis; alterum, quod interpretetur fastidicorum et vatum effata incognita, cum Senatus populusque adsciverit.²

Polybius attributes the superiority of the Roman commonwealth to this cause; and says, that what is ridiculous to sages is necessary for fools, whose thoughtless fury can only be arrested by an invisible power. The more contrary anything was to human sense, the more divine it appeared, and this divinity the people thought to trace in the most ridiculous and unmeaning miracles.

The appetite of a fowl, says Montesquieu,⁴ or the entrails of a beast, were capable of deciding the destinies of an Empire; consequently ceremonies were so arranged as to captivate the credulity of the one, and advance the political views of the other class of members of the state. Thus the commands of heaven were placed in the mouths of the principal Senators, alike alive to the absurdity and the utility of these divinations.

Fabius, when augur, according to Cicero,⁵ approved of favourable auspices:—Optimis auspiciis aeger quae pro republicae salute gerentur; quae contra rempublicam fierent, contra auspicia fieri. Marcellus marks as a difference between the Romans and other nations, that the former only used auspices for the public good, while the latter prostituted them on all occasions.⁶

The magistrates were enabled to put what interpretation they pleased on natural occurrences, and then impose silence on public

¹ Liv. 1, 40, 29.
² De Leg. 2, 9.
³ l. c. 2, 8.
⁴ Politique des Romains dans la Religion.
⁵ De Sen. 4.
⁶ Cit. de Liv. 2, 35.
THE SACERDOTAL MAGISTRACY.

clamour. *Hoc institutum reipublicae causa est, ut comitiorum, vel
in jure legum, vel injusticiis populi, vel increandis magistratibus
principes civitatis essent interpretes.*

In order to have an excuse for breaking off the comitia, the
divine books provided *ut sonante et fulgurante comitia populi
habere nefas esse,* and Cicero says, *Hoc reipublicae causa constitu-
tum comitiorum enim non habendorum causas esse voluerunt,* for other-
wise thunder to the left was a good augury.

Montesquieu has collected a variety of instances of omens
being unexplained or disregarded.

The unsuccessful examination of the entrails of victims was
cured by *hostiae succedaneae:* the latter omen being always preferable
to the former; thus Paulus Æmilius sacrificed twenty animals, in
short, until he found favourable appearances. *Cæsar* was not,
however, so patient, but quitted the altars for the Senate with ill-
concealed disgust.

When Scipio Africanus, on landing in Africa, chanced to fall, he
converted this bad omen into a good one, by seizing the ground
with admirable presence of mind, and crying, "Oh, land of Africa,
I hold thee!" And, in like manner, an eclipse happening after the
embarkment of the Sicilians, they were told that the phenomenon,
having happened after the embarkation, was directed against their
enemies.

Sometimes recourse was had to a smart repartee: thus, Crassus
having let his knife fall during a sacrifice, exclaimed, "Courage, my
sword has never fallen from my hands." In like manner, Lucullus,
about to engage in the battle with Tigranes, on an unlucky day,
replied, on being informed of the fact, "We will render it lucky
by victory;" and he kept his word.

Junius Brutus, by interpreting the words of the Delphic oracle,
capitis pro capitis suppliantum, to mean heads of any sort,
abolished the human sacrifices to the goddess MANIA, instituted
by Tarquin, by sacrificing heads of garlic and poppy instead.

Sometimes, when time or the will failed, consequences were dis-
regarded: thus, Claudius Pulcher, enraged, when about to enter on
a naval combat, that the holy fowls would not eat, threw them into
the sea, exclaiming "si esse nolunt, bibant." This disregard of the auspices was always useful and welcome
to the Senate, since, if success followed, no one thought of the
bad omen, or it was explained away; but if a defeat followed, the
people were confirmed in their belief.

§ 290.

It was natural to attribute the occurrence of any great plague or
other national misfortune to the vengeance of some god, whose

1 Cic. de Div. 2, 35.
2 Suet. Jul. 81.
3 Politique des Rom. dans la Religion.
4 l. c.
5 Macr. Sat. 1, 7.
6 Val. Max. 1, 4, 3.
worship had been neglected, or who otherwise required pacifying: thus Homer represents Apollo as inflicting a plague on the Greek camp for the indignity offered to his priest.


The manner in which the offended deity was appeasable was the same in both cases: sacrifices were appealed to, and the sacrificium amburbiurn, or amburbiale, was led, before being slain, in procession round the ramparts, preceded by torches; sulphur and salt water being added, the deity was appeased. The Greek mode of appeasing to the appetite of the god by hecatombs was a more serious matter, and probably dwindled down to the amburbiale.

All, however, were considered sufficiently pure to be allowed to feast upon some part of the sacrifice, and this was evidently a joyful occasion, for the self-constituted deputies of the eternal gods.

Practice of the Jews differed.

And of the Christians.

Disbelief of the higher classes of the national religion.

The belief of the educated class.

§ 291.

Montesquieu observes, "Scævola, grand pontif, et Varron, un de leurs grands théologiens, disoient qu'il étoit nécessaire que le peuple ignorât beaucoup de choses vraies, et en crût beaucoup de fausses. St. Augustin dit, que Varron avoit découvert par là tout le secret des politiques et des ministres d'état. Totum prodidit sapientum per quod civitates et populi regerentur."

Scævola, St. Augustin tells us, divided the gods into three classes: those whom the poets, those whom the philosophers, and those whom the magistrates had introduced.

The educated class did not certainly believe in these absurdities, for Cicero declared to his friends, Adeone me delirare censes ut ista credam; and we find Claudius, whose impiety was proverbial, inveighing in the Senate, against the neglect of the ancient rites of religion. Their religion, for it is impossible to suppose its utter

1 II. 1, 10.
2 II. 1, 100.
3 II. 1, 467.
4 De Civit. Dei, 4, 31.
absence, appears to have consisted in pure Deism; thus Balbus\(^1\) says, *Deus pertinens per naturam cujusque rei, per terras Ceres, per maria Neptunus, alii per alia, poterunt intelligi: qui qualesque sint, quoque eos nomine consuetudo nuncupaverit, hos deos et venerari et colere debeamus*, understanding a mere personification of attributes.

§ 292.

Intolerance was the only thing the Roman religious polity repudiated: hence the frequent edicts promulgated against the religion of Egypt as exclusive and intolerant.

That the Romans had no clear idea of the religions of other nations, is evidenced by the beautiful confusion of Tacitus,\(^2\) and by the epistle of Adrian from Egypt to the Consul Servianus: *Ili qui Serapin colunt, Christiani sunt; et devoi sunt Serapi, quse Christi episcopus dicunt. Nemo illic archi-synagogus Judæorum, nemo Samarites, nemo Christianorum presbyter, non mathematicus, non aruspex, non alipes, qui non Serapin colat. Ipsa ille patriarcha (Judæorum scilicet) cum Ægyptum venerit, ab aliis Serapin adorare, ab aliis cogitur Christum. Unus illis Deus est Serapis: bunc Judæi, bunc Christiani, bunc omnes venerantur et gentes.*\(^3\)

In Rome, the priesthood was a civil charge, and the dignities of augur and pontifex-maximus were civil magistracies, and those who held them were members of the Senate.

*Apud veteres, qui rerum potiebantur, iidem auguria tenebant, ut testis est nostra civitas, in qua et reges, augures, et postea privati eodem sacerdotio præditi rempublicam religionum rexerunt.*\(^4\) Every pater familiae was chief-pontiff of his own family, with respect to the sacra privata.

§ 293.

Originally the chief-priesthood vested in the kings; and when they were expelled, it was found necessary to institute the offices of *rex et regina sacrorum*, lest the people should complain of their religion being infringed, for certain religious acts could be performed by the king alone.

Foreign gods, when introduced, received a sort of Roman citizen-ship, and were thus fused into the existing system. * Ipsum quinnetiam oceanum illà tentavimus; et superesse adhuc Herculis columnas fama vulgavit; sive adiit Hercules, seu quidquid ubique magnificum est in claritatem ejus referre consensimus.*\(^5\)

Varro\(^6\) records forty-four such tamers of monsters, Cicero six, twenty-two Muses, five Suns, four Vulcans, five Mercuries, four Apollos, and three Jupiters; and Eusebius\(^7\) reckons as many Jupiters as nations.

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1 Cic. de Nat. Deor. 2, 28.
2 Ann. 2, 85.
4 Cic. de Divin. 1, 40.
5 Tac. de Mor. Ger. 34.
6 De Nat. Deor. 3, 165, 21, 32, 23.
7 Preparatio Evangelica, 3.
"Les Romains," says Montesquieu, "qui n'avoient proprement d'autre divinité que le genie de la republique, ne faisoient point d'attention au desordre et à la confusion qu'ils jetoient dans la mythologie: la credulité des peuples, qui est toujours au dessus du ridicule et de l'extravagant répare tout." Such, then, was what may be termed the Pagan Canon Law.

§ 294.

The *jus humanum* included all secular matters. The science of law, or jurisprudence, therefore consists in a knowledge of the law as it is, and in the capacity to apply it; those who were merely acquainted with the latter were termed *Legulei*; while those who purposely distorted, and those who have obtained simply a superficial practical knowledge of it, are respectively termed *Rabulisti* and *Empirici*. *Jurisprudens*, on the contrary, was he who combined a competent knowledge of principle and practice, a professor of jurisprudence. Cicero tells us, that this science was neither to be sought in the prætor's edict, as many did in his time, nor in the laws of the XII Tables, but wholly in philosophy; that is to say, that no code of laws was sufficient for the ends of justice, which must be logically deduced from the admitted principles of right and wrong by a well-trained and equitably-disposed mind.

§ 295.

Instituted law is the converse of natural law, being such as has been introduced for the government of many states, or of one state looked upon as a family, or of the several families of one such state. In the first case it is termed *jus gentium*; in the second, *jus civile* or *publicum*; and in the third, *jus familæ* or *privatum*.

The division of law among the Romans was duplex, the one assuming two, the other three divisions: the first gives *jus civile* as one, and considers *jus gentium* or *naturale* as the other; whereas the other division is into *jus naturale*, *jus gentium*, and *jus civile*. Savigny, following Gaius, adheres to the first, which he believes to have been that prevalent among the Romans themselves; for Modestinus, Paulus, as well as Marcius, Florentius, Licinius, Rufinus, adopt it. Of the other hand, Ulpianus, Tryphonius, and Hermogenianus adopt the triple division. Savigny then quotes a great many instances of the duplex division being used, and not the triplex; but it is submitted, with all the respect due to so great an authority, that the triple division would not apply in any of the cases.

1 L. C. 238.
2 Cic. Deor. 1, 55.
3 Gaius, 1, § 1; P. 1, 1, 9; P. 41, 1, 1; Gaius, § 65, 66, 69, 73, 79; P. 43, 18, 2; Gaius, 1, § 168.
4 P. 38, 10, 4, § 2.
5 P. 1, 1, 1; P. 23, 2, 14, § 2.
6 P. 1, 8, 2, 3, 4; P. 44, 7, 59; P. 50, 17, 22, 3; Cic. de Off. 5, 15.
7 P. 1, 1; § 2, 3, 4; ibid. 4 & 6.
8 P. 12, 6, 64; P. 16, 3, 31.
9 P. 1, 1, 5.
instances he adduces in which natural law is placed in contrast with civil law. The conditions of marriage depend on *civillis* or *naturalis ratio*; Ulpian also admits a *civillis* and *naturalis cognatio*. Property and obligations may be contracted *civiliter* and *naturaliter*; and Ulpian terms the right of the owner of the soil to the structure raised upon it *naturali jus*, and divides possession into *civillis* and *naturalis*. The antithesis between the *civillis* and *naturalis obligatio* of Ulpian is important, and its signification, as connected with the *jus gentium*, is clear, and evidenced by many passages.

In the Institutes of Justinian, the triplex division of Ulpian is adopted, and exemplified by the case of slavery. This is followed by the passages of Gaius, Marcianus, and Florentinus, who adopt the duplex division. Certainly, if *jus* be taken in the sense of Law, the division may be only duplex; but if we take it in the sense of Right, then the triplex division is maintainable, and we have natural rights, or the law of nature, the rights of nations, or international law, and the civil law, or rights acknowledged within a certain state.

§ 296.

Following then the triple division, the law of nations, *jus gentium*, is natural law in a more restricted sense; for as one individual is bound to preserve certain conventionalities with another, so is one nation obliged to follow some generally acknowledged rule towards its neighbour; and this, in its practical working, will be found to differ very materially from the law of nature. This international law, like the law of an individual state, consists in laws of general and in those of particular application; that is, it has grown up by so-called custom, arising out of international compacts, the interpretations of such, and analogies; and, lastly, it consists in such international conventions as are still in force between particular nations, whose transactions, or local position, have rendered them necessary, and which affect those only who are parties to them. Thus international law may be general or particular; in short, susceptible of all the degrees of which the Civil Law of a State is capable. This being the case, it would be hard to refuse it a place of its own by confounding, or considering it synonymous with natural law or right, from which it appears utterly distinct. The inviolability of flags of truce, of the persons of Ambassadors, the respecting a blockade between two belligerent parties by a third party, the necessity of giving due notice of such blockade, the right of a State to refuse the passage of troops

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1 I, 1, 10, pr. 2 P. 38, 10, 4, § 2; I, 1, 15, § 1; P. 1, 7, 17, § 1. 3 P. 41, 1, 53. 4 P. 9, 3, 50. 5 P. 10, 4, 3, § 15; 43, 16, 1, § 9, 10.

6 P. 46, 1, 6, § 2; P. 44, 7, 14; P. 16, 2, 6; P. 50, 16, 10; P. 13, 5, 1, § 7. 7 P. 50, 17, 84, § 2; P. 12, 6, 47. 8 I, 1, 15, § 4; I, 1, 2, pr.; I, 1, 5, pr. 9 I, 2, 1, § 11. 10 I, 1, 2, § 1, 11; I, 2, 1, pr. § 1, 12.
through its territory, the neutrality of vessels of discovery belonging to belligerents, the obligation of making a declaration of war before commencing hostilities, the right to attack and destroy piratical vessels, and the like, belong to the common or general law of nations. Treaties of Alliance, defensive and offensive, of Peace, of Commerce, &c., are individual contracts, affecting those only who are parties to them, and third parties only incidentally when made public. Thus in the treaty of Hunkiar Iskileys, between Russia and the Porte, both parties were to afford mutual assistance in virtue of this offensive and defensive alliance; but this condition was, on the part of the Porte, secretly exchanged for another condition, that of closing the Bosphorus against armed vessels, and would, in time of peace, oblige the Porte to have resented its violation against any third party. A Treaty of Commerce permits the merchandise of two trading countries to be admitted reciprocally on certain conditions, which is an international contract, or international statute law, and is almost invariably permissive. The Slave-trade Treaties, on the contrary, are restrictive. The interpretations of these Treaties, which forms a part of the international law, is often the subject of grave dispute, as it sometimes happens that one party insists on a forced and arbitrary construction; thus Great Britain declared, that she would consider the possession of a cargo of any articles which could be exchanged for slaves, an aiding and abetting of the Slave-trade; and, consequently, a contravention of the Treaty; this was equivalent to prohibiting the legitimate trade of foreign vessels with the coast of Africa.

An article which prohibits the introduction of war stores is exposed to the interpretation as to what are to be considered munitions of war, and where national produce is only stipulated for it may be a question how far a foreign material, manufactured in a country, can be considered as the product of such country.

The division of jus gentium into primarium and secundarium, adopted by many, and upon which much has been written, does not occur in Roman authors, and answers no end; the first being no other than the jus gentium, the latter the jus civile, or the law which rules all rational creatures, and that which rules a particular state.

§ 297.

1 The third and last great division of jus is the jus civile, or law, peculiar to any one nation in particular:—Nam quod quisque populus ipse sibi jus constituit, id ipsius civitatis proprium est, vocaturque jus civile, quasi jus proprium ipsius civitatis. The Romans, however, when they used the term jus civile without any distinctive adjective, meant emphatically their own national jus civile, which consisted

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1 Treaty of 13th July.  
3 Vattel considers that the violation of treaty does not destroy it, he terms it an injury.  
4 I. 1, 2, § 1.  
5 Ibid.
more especially in the interpretations of the prudentes; Est proprium jus civile,\(^1\) quod sine scripto in sold prudentium interpretatione consistit.

The Civil Law is divided for all general purposes into public and private; and it is this latter which formed the principal object of study as a science. Jus publicum, says Ulpian,\(^2\) est quod ad statum rei Romanae spectat; privatum, quod ad singulorum utilitatem. The first, he continues, respects sacred things, the priests and magistrates; the latter, compounded of natural law, the law of nations, and the civil law, is really the most important: it is composed, jure id est lege, of statute law, of interpretationes, of leges, actiones, plebiscita, edicta, Senatus Consulta, or of principales constitutiones,\(^3\) which, as they all vary, must form separate heads.

§ 298.

Jus singulare was distinguished from jus commune, and usually expressed by the word privilegium, as in the case of military testaments;\(^4\) exemptions from tutorships,\(^5\) or the pre-right of certain creditors in cases of bankruptcy;\(^6\) as of the fiscus, of minors, called actio tutela of the actio doxis; the Senatus Consultum Velleianum is a jus singulare of women. But the laws applying to vendors and purchasers; to men and women, as to the right of the married state, are erroneously placed among the jura singularia, for such would be interminable.\(^7\)

Individual exceptions, when they occur, are not designated by any particular expressions, but described as personales constitutiones\(^8\) and privatae privilegia.\(^9\)

§ 299.

Lex differs from Jus as the species from the genus. Papinian's Lex, what. definition of any word is the great authority, and he describes\(^10\) Lex to be commune praecipuum, virorum prudentium consultum, delictorum, quae sponte vel ignorantia contrabuntur, coercitio, communis republieae sponsio. Leges were originally made at the suggestion of a senatorial magistrate; that is to say, they originated in the Senate, as laws in England formerly did with the Lords;\(^11\) and it was not until a later period that the plebs obtained the right of interference in the Legislature; hence we read,\(^12\) lex est quod populus Romanus senatorio magistratu interrogante, veluti Consule, constituebat. The Roman system was then more constitutional than the British, which did not allow the Commons any participation in legislation before the reign of Henry VIII. It must, however, be here remarked that the expression populus did not include the plebs, to which class it

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\(^1\) P. 1, 2, 13, 22.
\(^2\) P. 15, 16, 17, § 12.
\(^3\) P. 26, 6, 15; P. 26, 7, 40.
\(^4\) P. 27, 1, 30, § 2.
\(^5\) P. 42, 5, 24, § 2, 3, l. c. 32.

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\(^7\) Sav. Sys. d. H. R. R. b. 1, kap. 3; § 16, p. 62, et seq.
\(^8\) C. 3, 14, 3; Const. Summa, § 4.
\(^9\) C. 1, 4, 1, § 2; C. Th. 15, 33 4.
\(^10\) P. 1, 3, 1.
\(^11\) § 260, h. op.
\(^12\) 1, 1, 2, § 4.
bore the same relation as δῆμος to παῦλος. Populus, then, was the patrician class, although it was not synonymous with the Senate, which was a selection from that body. The comitium, composed of this class, then had the sole right of ratifying laws which were to bind all classes in the state.

§ 300.

When it was proposed to introduce a new law, one of the superior magistrates wrote it down at home, and having consulted persons skilled in jurisprudence upon it, he added a certain formula:—si quid jus non fuit rogari hâc lege nihil esset rogatum, or si quid contra alias leges ejus legis ergo latum esset, ut ei quo eam legem rogasset impune esset. The law thus drawn up was then communicated to the Senate, it being necessary that that body should become auctor, father it, and the Maevian law provided against the Senate throwing vexatious difficulties in the way of comitia being summoned. This communicatio was followed by a promulgatio during trinundinium, or three market days, being a term of seventeen days in all, in order that persons living in the country might become acquainted with its provisions. These formalities having been duly observed, the people was said to be acquainted with it, populum jure rogasse. The next step was the Recitatio, or reading by a praeco or crier, in the comitia curiata, and at a later period in the centuriata; and the auspices having been duly consulted, and speeches heard pro and contra, the order in which the centuries were to vote was balloted out; this was termed Sortitio, and was effected by the names of the centuries being thrown into a sitella or urna, whence they were drawn out, and the votes were subsequently given in this order of precedence. The first centuria was said to be the prerogativa, or first called; the next secundo vocata; and the remainder jure vocata. If, then, the tribune interposed no veto, and no sinister event occurred to put a stop to the proceedings, or invalidate the comitia, the Rogatio, or putting to the vote, followed in the solemn form:—Vetustis jubeatis Quiritis hoc ita uti dixi ita vos Quirites rogo, to which was added, si vobis videtur discidite Quirites; upon which each retired into his own century to vote. In the more ancient times, these votes were given vivâ voce, or by word of mouth; but the practice was subsequently changed into voting by tablets in 614 A. U. C. to avoid an undue exercise of the influence of the higher classes. Each voter received two of these tabellae, upon one of which was inscribed the letters U. R. uti rogas, and upon the other, A. antiqua probo. These tablets were distributed by persons called diribitores, assisted by ninety custodes, who received them at the barriers or polling booths. It would appear that intimidation was some-

1 Walter, Ges. des R. R. § 38; Liv. 23, 33, 42, 45, 50, 60; 3, 31, 65; 4, 1, 8, 51.
2 § 24, h. op.
3 C. Att. 3, 23.
4 Liv. 7, 17; Hein. Ant. 1, 2, 3.
5 § 24, h. op.
6 Liv. 10, 22, and 27, 6; Hein. Ant. 1, 2, 3, 6, et seq.
7 C. pro domo, 18, seq.
8 C. Epist. Att. 1, 14.
times practised, and probably bribery also, on these occasions. These large public meetings were held in the Campus Martius, which was for this purpose divided into 193 polling-booths, a number equal to that of the centuries. These were called pontes, and were a sort of gangway permitting one man only to pass at a time; thus each voter conveniently received his tablets on entering, and voted on passing out into the cancelli, or place railed off for that purpose. This done, the diremptio, or counting out the tablets by the several custodes or tellers followed; who ascertained the majority or minority by pricking off the votes; hence the term punctum ferre. If it appeared upon the scrutiny that the new law was carried, it was said to be scita or perlata carried; but if otherwise, antiquata, negatived or thrown out.

§ 301.

In the age of Cicero, the comitia curiata, though not abolished, had become so far obsolete as to be held pro forma only; the thirty Lictors representing the thirty Curiae, and are hence termed by Rullus comitia adumbrata. With respect to the majorities and minorities it must be remarked that the majority of votes in each curia or centuria, which we term electoral colleges, was taken to be the majority or minority of the individual members; thus the thirty curiae represented for these purposes thirty votes, or the centuria one hundred and ninety-three. A measure was carried by sixteen or ninety-seven votes respectively. Equality of votes in any century, for or against the measure, neutralised each other in the elections of magistrates, and ratification of laws; but in trials, involving capital punishments, this equality involved an actual acquittal.

The confirmatio followed, which was effected, jure jurando, by solemn oaths, sacrifices, and auspices.

§ 302.

The law thus passed was then engraved on brazen tables, ari incisam, delatamque in aerarium, and deposited in the treasury, which was situated in the temple of Ceres, under the custody of the Ædiles. A law, when passed, was usually distinguished by the Gentile name of the consuls of the year, as the lex Ælia Sentia, Papia Poppæa, Fusia Caninia, or by that of the dictator, praetor, or censor by whom it had been introduced, as the lex Æmilia, Aurelia, and others; to which its object was sometimes added, as the lex Cornelia sumptuaria, lex Gabiniæ tabellaria, lex Cassia agraria, &c.

We have many remains of the form in which laws were drawn up; several of these have been collected by Reinisius, Sisonius, and Brissonius.

1 Kennet Ant. Ph. 2, B. 3, c. 17, P. 130.
2 Dion. 1, 7.
3 Ibid. 9, 41, 49.
4 Zonar. 7, 15, fr. 2, P. 1, 2, § 21; Liv. 3, 55; Polyb. 3, 26.
5 Hein. Ant. 1, 2, 13.
6 § 261, b. op.
7 Inscr. 473.
9 De Formula, 141, 39.
§ 303.

The Plebeii, who, from the commencement of the Roman polity, had formed an unfranchised class separate from the populus, in the progress of time, and with their increasing numbers and importance, became discontented at being excluded from all participation in the legislature, and consequently took measures for obtaining a position and influence in the state which had so long been denied them. It is true, that, by a series of successful innovations, they had succeeded in obtaining a magistrate to protect them from the oppression of the patrician class. This was, however, but a negative advantage; they therefore continually aspired to a positive one, a share in the making of those laws by which they were to be bound. The Comitia tributa were, we have seen, contemorary with the creation of the tribunes, A. U. C. 259, and they soon after began to pass laws of their own, termed plebiscita qua plebs plebeio magistratu interrogante, veluti tribuno constituebat. These had, however, constitutionally, no binding power on the populus, or patrician class, who repudiated them, and their operation was confined within a certain sphere, which was gradually enlarged, and consisted in an influence on external relations, resolutions upon certain internal matters, the election of magistrates, and impeachments. The distinction of the populus as a class of patrician citizens had ceased to exist after the Punic war with Hannibal, and the plebs had been in a measure confounded with the populus. A plebiscitum, therefore, originally differed from a lex, in that the latter was the act of the entire people—the plebiscitum of the entire population, minus the patrician class, whom the tribune had no power to summon. This independent legislation was, nevertheless, a powerful engine against the upper class, and was rather impaired than strengthened by being assimilated with it; certain measures, such as the conferring citizenship, changing the attributes of the magistracy, and similar constitutional rights, were their exclusive privilege. Other plebiscita respecting administration were rogated by the consul at the request of the tribune. The elective franchise in the Comitia tributa was universal suffrage, without distinction of rank or property qualification, and effected by tribes; the place of meeting was not, however, in the Campus Martius, but in the Flaminian circus, or in the Capitol. After many struggles, in A. U. C. 306, when the lex Horatia was passed, and in 414, when the lex Pubulia was enacted, and lastly, in 466, when the lex Hortensia was carried, the patricians were ultimately compelled to acknowledge the obligatory force of the plebiscita; and from this time, that is to say, after the passing of the Hortensian law, in 465, Plebiscita were

1 § 37, h. op. 6 Cic. Ep. ad Att. 1, 1; ad Fam. 7, 3, 30;
2 I. 1. 2, § 4. Liv. 3, 54, 25; 3, 45, 36; 3, 54-
3 Liv. 25, 12; Cic. pro Mur. 1. 7 Liv. 3, 55; Dion. 11, 725.
called *leges*, as well as resolutions of the *Centuriae*; and, in effect, the only difference which existed between the two was to be found in their origin. Many *leges*, occurring in the Roman law books which have come down to us, are in fact nothing more than *plebiscita*; as, for instance, the *lex Aquilia, Falcidia, Voconia, Cincia, Atilla, Scribonia*, and others. Some writers, and Heineccius¹ among the number, erroneously imagine that *plebiscita* first began to be termed *leges* at the period at which they were recognised to have the authority of general laws; but Bach² shows that they bore this name from the very beginning.

The style in which laws were drawn up was anciently nervous, measured,³ and careful, especially in respect of those clauses which did or did not derogate⁴ from the authority of an older law. Laws were often divided into chapters, the conclusion containing the *sanctio*, and penalties for non-observance of them.⁵

§ 304.

A law proposed to Parliament may be in its nature public or private.⁶

A law in its inchoate state is termed a bill, and, as has been seen, formerly originated exclusively in the House of Lords. In private bills, the old form by petition has been preserved.⁷ This petition is presented to the House by some member, and should set forth the grievance to be redressed: if the facts be disputed, the question is referred to a committee for examination and report; as in Rome, the proposer of a law consulted his friends at home, and it was then taken on his credit, the rest being done by open discussion. Leave having been obtained, the bill is allowed to be preferred; and discussion seldom arises on those of a private nature, their fate being decided in committee.

§ 305.

In public bills, some member moves for leave to bring it under discussion without petition,⁸ which may be compared to the *communicatio*; and such leave having been obtained, the bill is printed and circulated among the members, resembling the *promulgatio*. On the first reading, equivalent to the *recitatio*, the speaker opens the substance of the bill, and puts it to the House, after the second reading, whether it shall proceed any further; and it is at this period that the Romans may strictly be said *rogasse legem*;

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¹ Hist. Jur. Lib. 1, § 42.
³ Cic. de Rep. 4, 8; Diodor. 12, 26.
⁴ Cic. Att. 3, 23; pro Cecina, 33; pro Balbo, 14; Haubold, 111, 114, 117, 118, 153, 176.
⁵ See Christian’s ed. of Bl. h. c.
⁶ 7 Will. IV., and 5 Vic. 83.
⁷ Until the reign of Henry V. all bills were drawn in the form of very humble petitions indeed. *Vos pueriores communes prior et supplent, par Dieu et en œuvre de charité.* The king often enacted more or less than was petitioned for, which gave rise to a petition (2 Hen. V.); to which the king answered, that as they were absenters as well as petitioners, no additions or diminutions should be made to their petitions without their consent, save the right of veto.
and then discussion arises as to whether it shall be referred to a committee or not: if this be granted, the bill is said to be committed. This committee may be of the whole House, which is usually the case in bills of a public nature or of grave importance; but, otherwise, the bill is referred to a number of members selected by the House, and the bill is debated clause by clause. The speaker then reports it to the House, by which it is again reconsidered, and votes are taken as to whether it shall be read a third time. If this be assented to, the bill is then ordered to be engrossed,¹ or written out fair, and may be still again discussed; after which it may also be altered and amended, such amendments being written on an extra skin of parchment, termed a rider.²

The form equivalent to the rogatio then follows: the speaker, holding up the bill, puts the question as to whether the bill shall pass, and the division takes place, not by tablets, as at Rome, but by the members retiring into two lobbies, the "Ayes" into one, and the "Noes" into the other; the proper meaning of sortitio being applicable to the comitia in its reformed state, although we have seen that, in more ancient times, Roman votes were also taken orally and individually by tellers.

A bill so passed may be compared to a plebisicium, in the original signification of that word. Some member is then deputed to carry it up to the House of Lords, where, except the engrossing, it passes through the same stages as in the House below. If rejected upon discussion, the same bill cannot be re-introduced that session; it may, however, be altered and amended, and returned to the Commons for reconsideration, by two masters in Chancery, or, in important matters, by two judges. If the Commons disagree in the amendments, a conference usually follows between members deputed by both Houses; but if they fail, the bill must be dropped for that session. The same course, mutatis mutandis, is observed when the bill arises with the Lords.

§ 306.

The Senate, being a corporate body, deputed to manage all state affairs under the presidency of the consuls, was only circumscribed in its power by certain sovereign rights reserved to the mass of the nation; these were, legislation, the concluding peace or declaring war, and the appointment of magistrates, who then exercised the duties of their office as a matter of course. Certain public duties were, however, left to the Senate, the most important of which were, the superintendence over the public funds and the right of embassy, the administration of provinces subject to Rome, the punishment of serious public offences in Italy, but without the city, the granting of triumphs, the summoning of comitia, holidays in the courts, and supplications, or days of public prayer and thanksgiving. The ordinances issued on these subjects

² Noy, 84.
were termed Senatus consulta, Senatus decreta, and decreta amplissimis ordinis. The power of the Senate in private matters, such as wills, contracts, warships, &c., depended on the particular period; and under the commonwealth it had not this power. It is true that it could enforce the observation of laws growing obsolete, and take cognisance of individual private matters, although it could not promulgate any new general law affecting the community until the reign of Tiberius, who comitia ex campo in curiam transtulis; nam ad eam diem, etsi potissima arbitrio principis quædam tamen studiis tribuum siebant. An address to the Senate was usually prefaced by the words Quod bonum faustum felix fortunatum sit, as in the opening of the assembly, and concluded with referimus ad vos patres conscripti. The senators were then asked their opinions imperatively, and not prefatorially, as at the Comitia,—Sic Sp. Postumi quid censes? Quid fieri placet? or, Quid visbis videtur? Each then gave his vote standing, using this or some like formula, Quod C. Parisa verba fecit de eâ re ita censeo. In matters requiring expedition, this formality of requiring individual votes was dispensed with, as also the debating the question, and the decree was passed by a bare division of the House, and termed Senatus consultum per discussionem factum; while the more formal one was termed simply Senatus Consultum. The Senatus Consultum tacitum, mentioned by Julius Capitolinus, was that before referred to, in which the prothonotaries retired, and their place was supplied by members of the Senate itself; but it is not probable that this was frequently resorted to. As it was the practice to include divers matters in the same oration, it became necessary for the mover to give orders dividere sententiam, that is, to ascertain the votes on each matter separately. To adsentiri, was to follow the opinion of another, which was much the same as passing over to those with whom they voted: pedibus ibat in alterius sententiam. It, however, did not follow, because one concurred in the opinion of another, that he might not add his own thereto; Servilio adsentior et hoc amplius censeo. This method must have caused much confusion; for we find that the consul took upon himself occasionally to suppress some opinions, or to disentangle the affair by ordering qui haec sentitis, in hanc partem, qui alia omnia, in illum ite, quid sentitis, and then declaring haec pars major videtur, upon which the Senatus Consultum was drawn up in the accustomed form.

§ 307. First, the date was placed as a heading, followed by the place of meeting, the name of the person who had made the motion, and the decision of the Senate; after which, the words of the Senatus

2 Tac. An. 1, 15.
3 Brison. de Formul. 2, 165; Suet. Calig. 15.
4 Cic. Phil. 3, 155, 5.
5 P. Manul de Sen.
6 In Gordian.
7 § 18, p. 13, h. op.
8 Cic. Phil. 13, 21.
Consultum, at full length, the most perfect specimen of which still extant is the Setum. Marcianum de Bacchanalibus, illustrated by Bynkerstock. 1

§ 308.

The Senatus Consultum could not, however, be considered complete until the tribune had affixed his official paraph T to it, for he might negative it by his veto; and so often as this occurred, the decree was termed Senatus auctoritas, or opinion of the Senate, in which case, although it did not obtain the force of law, it was preserved in the cerarium, or in the temple of Ceres, with the view of being brought on again at a subsequent period. 2 Some writers think 3 that this also happened when there was not a quorum present; for it may be presumed that a minimum was fixed, although we have no evidence of what such quorum was. 4 The Senate was then adjourned in the usual form, P. C. nemo vos tenet, or nihil vos moratur. 5

Thus it will be observed, that precisely the same forms were adopted in the Senate as in the Comitia, viz., relatio ad Senatum rogatio, sententiarum latio, the engrossing, and confirmatio.

§ 309.

A bill may arise in the House of Lords, as well as in the House of Commons, and this indeed, as has been shown, was originally always the case as at Rome; but a contrary practice now obtains, as by far the greater proportion of bills originate in the Commons. The Sovereign, if he wish to introduce a bill, does it by his Ministers in the Lower House, although he may be said to preside himself continually in the House of Lords by his Chancellor.

As in the Lower House, the majority binds the whole; but a peer may vote by some other peer as his proxy, which a member of the Lower House cannot do in any case. The voting is open, and, as yet, intimidation, bribery, or fear to act, according to conscience and right, have not rendered a ballot necessary: a baseness to which the Roman Senate never descended, although it was introduced into the popular assemblies from such causes.

The proceedings in the House of Lords are identical with those of the Commons, with the exception of doubts on matters of fact, in which case the House of Lords refers private bills to two judges to examine and report on the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. 6

§ 310.

The confirmatio by the Sovereign, termed the Royal Assent, is then given by the Sovereign in person sending for the Commons to the bar of the House of Lords, where the titles of all the bills

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1 De Relig. Pereg. Diss. 2, 259, opusc.
2 Val. Max. 1, 1 2, 7.
4 Kennet, R. A. 2, 3, 104.
5 § 18, h. op.
6 Cit. ad Quint. Frat. 7, 2.
7 § 192, h. op.
8 Com. Dig. Parl. § 11, 413, Geo. III. 105.
being read, the clerk declares le roy or la reine, le veut in the case of a public, and soit fait comme il est désiré in the case of a private bill; but in Bills of Supply, the former is different: le roy (la reine) remercie ses loyal subjects, accepte leur benevolence et aussi le veut.

The Sovereign never directly refuses assent, as the Tribune did veto, by his veto, but uses the evasive and complimentary form, le roy (la reine) s'avisera.  

An act of grace can only be said to be communicated to Parliament, as the Royal Assent precedes in such case; and the form

1 The old form in Norman French has been preserved since the Conquest.
2 In cours of justice curia advisari vult signifies that the court takes time to consider.
3 The last time this prerogative was made use of was in—

14 Car. II. xi. 473. A. D. 1662.  
After the assent to several bills, the titles of these three private bills following were read, viz.:-

“An Act for the Restoring of Charles, Earl of Derby, to the Manors of Mould and Mouldsdaile, Hope and Hopesdale, in the County of Flint.”

“An Act for Confirmation of the Office of Registrar of Sales and Pawns made to Retailing Brokers in London and Westminster, and places adjacent.”

“An Act for the Empowering of Sir Courtney Poole and Sir John Drake, Barons, and others, to make Payment of the Portion of Ellen Briscoe, widow, one of the daughters of Sir John Drake, Knight, by Sale of the Manor of Lymington, in the County of Somerset, or by granting Estates out of the same, or otherwise.”

To which three bills his Majesty’s answer was pronounced in these words:—

“Le Roy s'avisera.”

30 Car. II. 394 a, xiii. A. D. 1678.  
“An Act for Preserving the Peace of the Kingdom, by raising the Militia, and continuing them in duty for two-and-forty days.”

“Le Roy s'avisera.”

“Afier this his Majesty made a short speech to this effect:— That he did not refuse to pass this Act for the disliking of the matter, but the manner, because it put out of his power the Militia for so many days. If it had been but for half an hour he would not have consented to it because of the ill consequences it may have hereafter, the Militia being wholly in the Crown; and so far as he is enabled by law to raise the Militia, if they will enable him with money to pay them, he shall employ such of them as he thinks fit, and are necessary for the safety of himself and the kingdom.”

2 W. & M. xvi. 92 b. A. D. 1691.  
3 An Act for Ascertaining the Commissions and Salaries of the Judges.

“To the bill the answer was:—“Le Roy et la Reyne s'aviseron.”

5 W. & M. xv. 289 a. A. D. 1692.

“An Act for the frequent Calling and Meeting of Parliaments.”

“To these bills the answer was:—“Le Roy et la Reyne s’aviseron.”

5 W. & M. xv. 331 b. A. D. 1693.


“To this bill the answer was:—“Le Roy et la Reyne s’aviseron.”

7 W. III. 593 a, xv. A. D. 1695.

“An Act for the Vesting of the Manor of Madely and other Lands, Tenements, and Hereditaments, in the County of Salop, the Estate of Bazili Brooke, Esq., in trustees for raising money for payment of his debts, and for securing his wife’s jointure.”

“To this bill the answer was:—“Le Roy s’avisera.”

8 W. III. xv. 733 a. A. D. 1696.

“An Act for further Regulating Elections of Members to serve in Parliament.”

“To this bill the answer was:—“Le Roy s’avisera.”

13 W. III. xvi. 739 b. A. D. 1701.

“An Act for the better Improving a certain piece of Ground in St. Martin’s-in-the-Fields, and for other purposes therein mentioned.”

“To this bill the answer was:—“Le Roy s’avisera.”

7 Anne, xviii. 506 a. A. D. 1707.

“An Act for further Settling the Militia of that part of Great Britain called Scotland.”

“La Reine s’avisera.”
then expresss the gratitude of the subject:—les prelats, seigneurs, et commons, en ce present Parliament assembles, au nom de tous vos autres subjects, remercient tres humblement votre majeste, et prient a Dieu vous donner en sante bone vie et longue.

The Sovereign may, however, give assent by letters-patent, under his great seal, signed with his hand, and notified to both Houses assembled together in the high House.

The date of such assent forms a part of the bill, and is immediately endorsed thereon, which is the date of its commencement, if none other be stated in the body of the law.

The imperial laws were promulgated, which is not considered now necessary, in the case of an Act of Parliament, on account of the representative system, which supposes every citizen to be a party to it, and for this reason, every natural subject is, by a fiction, supposed to be cognizant with the law; not so an alien, who is allowed the benefit of his ignorance in Courts of Justice. The impossible nature of the fiction of supposing every one to know what no lawyer does or can know, requires no comment, but to allow ignorance to be pleaded would be to make laws of none effect.

The Acts of Parliament are, however, printed by the Queen’s printer, and may be bought by any one wishing to inform himself of their contents.

The old form of promulgation was by sending to the sheriff of each county, at the end of every session, the King’s writ, with a transcript of all the Acts made therein, commanding him ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publici proclamari, et firmiter teneri et observari faciat. This was complied with by proclamation in his County Court, where they lay open for inspection, nor was this disused until the reign of Henry VII.

The Emperors exhibited their laws on brazen tables, which those might read who were skilled in letters, and could distinguish the contents at the height at which they were sometimes placed.

§ 311.

As the Emperors extended their power, the Senatus Consulta began to be assimilated to the later imperial constitutions. It became the practice for the Emperor either to make his relatio himself in the Senate, or by the mouth of his Quaestor candidatus, who derived this epithet from the white robe he wore—toga candidata.
He even made his wishes known to that body by a libel, *libellus*, or imperial writing; upon which the Senate voted *pro forma* in the affirmative, no one daring to throw it out. And the Senatus Consulta were then often published by an imperial edict, and even termed *leges*. It was also, in this period, that distinctive appellations were added to them, which originally was not the practice; hence we find in the Corpus juris *Scbm. Silanianum, Claudianum, Turpelianum, Trebellianum, Pegasianum, Macedonianum, Velellarum*, and the like. Many also applied to the private, as distinguished from the public, law. From this practice we find that writers often speak of Scra. of this period as *jura orationibus principis constituta*, instead of *jura Scra. constituta*. From the age of the Antonines they were less frequent, the power of the Senate decreasing, as that of the Emperor’s increased; they, however, were not finally abolished until after the reign of Constantine the Great, whence they ceased as regarded the private, but continued *quoad* public law until the age of Leo, who ordained in his seventy-eight Novella, that the law, in virtue whereof the Senate was empowered to make ordinances, should be expunged from the statute-books.

On a comparison of these more ancient constitutional laws with those of a more recent date, a great difference is perceptible; and it is a general opinion among the best civilians that the Civil Law was spoiled by the Imperial Constitution. Of this, any moderately well-informed civilian may form a judgment, by making the comparison himself.

§ 312.

In the most remote age of Rome it would appear that although the kings had the power of making laws, they exercised this prerogative with great circumspection; preferring to shelter themselves under a constitutional form of legislation; and a departure from this sage principle was probably one of the causes which tended to the fall of the first monarchy, and rendered the term *lex regia* detested among the people of the Republican period, which endured for 500 years. The *lex regia* must be understood in a double sense: a law made arbitrarily like the later Imperial constitutions, and the law by which the *imperium* was vested in one sole chief. We find in the Pandects, *initio civitatis fuius constat reges omnem potestatem habuisse*; and after their abolition, that this power was vested in the

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1 Ch. Othon. s Boeckelen Des. de Orat. Prin. in opusc. 109, sq.
2 C. 5, 30, 3; Ulp. Fr. 11, 8; Hein. ad Vinn. de Fiduciam. Hiered. § 4, 452 sq.
3 P. 2, 15, 8; P. 20, 2, 1; P. 17, 2, 52, § 10; P. 25, 2, 60, pr.
4 Zepernick, de Nov. Leon. 269, et seq.
5 Bach. I. c. 3, 1, 4.
6 P. 1, 3, § 14, and § 16.
two consuls, _penes quos summum jus uti esse lege rogatum est_. Their sovereign power was, however, restricted to proposing, but did not extend to making laws; an exception being only made in the case of a dictator being appointed in times of imminent danger.1

§ 313.

The constitutions of the Emperors were termed _Placita principum_, thus explained by Ulpian:2 _quod principi placuit, legis habet vigorem ut pote cum lege regiâ, quae de imperio ejus lata est, populus ei, et in eum omne suum imperium et potestatem conferat_. Augustus, after having established his power, obtained, by degrees, the transfer of imperial rights to his own person; always, however, under protest, but more especially as respected the _lex regia_—a term implying an absolute power, the remembrance of which 500 years had not sufficed to obliterate from the memory of the people: and hence we find it termed the _lex Imperii_, _de Imperio_, and _lex Augusti_, but which in fact was no other than the _lex regia_, _mutato nomine_. The succeeding Emperors became more independent of the people, and, consequently, less scrupulous in asserting their power.

The general terms for these Imperial ordinances were then _placita principum_ or _constitutiones, a constituo_; and Seger3 is of opinion, that they obtained the name because _constituere_ is synonymous with _repetere_, and that the Emperors pretended not to introduce a new law, but to revive or confirm one already existing: this must be, however, taken _quantum valeat_.

§ 314.

The imperial ordinances were distinguishable according to their contents, their object, or the persons to whom they were addressed, and were of a general or particular application. They may be reduced under _Edicta, Mandata, Rescripta, Decreta_, and _Privilegia_.4

_Edicta_, considered as royal constitutions, were general in their application to the whole empire, or to some particular province thereof; but those of Augustus do not appear to have possessed the same authority as those of later Emperors, under whom they became the most important of all laws, being also termed _leges edictales perpetuae, leges in perpetuum valitum_, _sacrae leges, generales epistolae_,5 and _constitutiones_ in the strict sense.6 Waldeck7 is probably right in his definition, _edicta sunt constitutiones generales motu proprio emissae_, for no inducement is stated in them: similar to these were the _decreta_ of the canonists.

The form probably originated in the Emperors wishing in the

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1 P. 1, 2, § 18.
2 P. 1, 4, 1.
4 This appears to be the best view of the many theories to be found in writers upon this subject.
5 Bach. l. c. 3, 3, 3, § 3.
6 Noedt. Dioec. et Max. c. 2.
7 l. c. § 43.
beginning to rule absolutely, but preserve the old terminology, to avoid as much as possible creating jealousy.

Savigny\(^1\) gives a pretty complete list of these, which, for facility of reference, is here transferred to the foot-note.\(^2\)

\section*{§ 315.}

The Sovereign of Great Britain, being the fountain of justice, has the power of issuing proclamations, which resemble the edicts of the Roman Emperors, with this difference, that they must be founded upon the law of the realm; for, otherwise, they have no binding force.\(^3\) The Sovereign cannot make laws, but the mode of putting laws into execution is often left to the executive power, and many acts of Parliament expressly enable the Sovereign in Council to issue such proclamations as circumstances may require: the prerogative has received, of late, considerable extension in this respect, from the unwillingness of the ministers to expose themselves and the time of the country to vexatious discussions on trivial points.

These constitutions or edicts are therefore termed proclamations, because they merely proclaim what the law is. Thus the Sovereign has the power, in virtue of act of Parliament, to prohibit any of his subjects from leaving the realm; consequently, an embargo on all ships in time of war, for three weeks, to effect this end, has binding force.\(^4\) But this cannot be done in time of peace, because the act does not authorize it.\(^5\) A statute\(^6\) was indeed passed, giving the King's proclamation the force of acts of Parliament, but was repealed five years afterwards.\(^7\)

\section*{§ 316.}

\textit{Mandata} were instructions transmitted to governors of provinces for their guidance,\(^8\) who occasionally published such parts\(^9\) of them as it was necessary should be generally known; thus changing their indirect into a direct influence on the community,

\begin{itemize}
  \item By Hadrian.
  \begin{itemize}
    \item Gaius, 1, § 55, 93; C. 6, 33, 3.
    \item Pius.
    \begin{itemize}
      \item P. 50, 4, 11.
    \end{itemize}
    \item By Marcus.
    \begin{itemize}
      \item I. 2, 6, § 14; P. 42, 5, 24, § 1; C. 2, 37, 3.
    \end{itemize}
    \item By Severus.
    \begin{itemize}
      \item P. 47, 12, 3, § 4.
    \end{itemize}
  \end{itemize}
  \item In addition to which, there are edicts which are mere proclamations, involving no legal principle.
  \item Plin. Ep. 10, 66, by Nerva.
  \item By Augustus.
  \begin{itemize}
    \item P. 16, 1, 3, pr.; P. 28, 2, 26; P. 48, 18, 8, pr.; Auct. de Jur. Fisc. § 8.
  \end{itemize}
  \item By Claudius.
  \begin{itemize}
    \item P. 16, 3, 2, pr.; P. 48, 10, 15, pr.; P. 40, 8, 2; C. 7, 6, 1, § 3; Ulp. 3, § 6.
  \end{itemize}
  \item By Vespasian.
  \begin{itemize}
    \item P. 50, 7, 4; C. 8, 10, 2.
  \end{itemize}
  \item By Domitian.
  \begin{itemize}
    \item P. 48, 3, 3; § 1.
  \end{itemize}
  \item By NerVA.
  \begin{itemize}
    \item P. 40, 15, 4.
  \end{itemize}
  \item By Trajan.
  \begin{itemize}
    \item P. 47, 11, 6, § 1; Gaius, 3, § 172; J. 3, 7, § 4; P. 49, 14, 13, pr. § 1; Auct. de Jur. Fisc. § 6.
  \end{itemize}
\end{itemize}
Such is the case of military testaments,¹ and the law forbidding the marriage between officers of provinces and women natives thereof.⁵ Gaius and Ulpian omit them in enumerating the constitutions; but this, Savigny thinks, may have arisen from their being very unfrequent, and of only provincial importance.⁶

§ 317.

Rescripta, or answers of the Emperor to questions proposed to him for solution, were first introduced by Hadrian. If directed to public functionaries, they were drawn up in the form of a letter, and hence were termed epistolæ; but if to individuals, they were termed adnotationes or subnotationes, because recorded on the margin of the petition itself. If, however, a corporate body, often termed a schola, required a rescript from the Emperor, it was termed a sanctio pragmatica, sacra pragmatica, pragmatica forma, divina pragmatica lex, pragmaticum rescriptum (πράγματικά); hence some assert,⁴ that they were also denominated Facta. The canonists often mention pragramatical sanctions as issued by the Pope: as the derivation implies, these were only known under the Greek Emperors. Generally, former laws were not abrogated by rescripts, which were for the most part explicable, declaratory, or confirmatory, but not correctory; nor are they to be so taken, except most clearly expressed to be so in the body of them.

Savigny⁶ expresses his opinion that Rescripts applied exclusively to the cases or persons to which they were originally directed, and formed no precedents as law, although they carried with them, in like cases, the force of a great authority. Or they were meant to lay down a rule, as such, and then termed generales epistolæ or generalia rescripta,⁷ and were later included under the term leges, edicta, edictates constitutiones.⁸

Rescripts were distinguishable from edicts in their application to an individual case: the Emperor became the framer of a sentence, not a judge, when he issued such at the relatio or consultatio of some judge, by the principle to be enunciated being interwoven with a particular case: but it was sometimes purely and simply set forth; the old rule being preserved, in which case the Emperor acted as a consulting jurist only.

Macrinus, to prevent rescripts being used as precedents, entertained the notion of abrogating them all;⁹ for at this time many collections of them had already been formed, and published in the shape of books.

§ 318.

A decretum was a means whereby the Emperor decided some

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¹ P. 29, r, 1, pr.
² P. 34, 9, 2, § 1; C. 5, 4, 6.
⁴ Becker and Schott.
⁵ Schulting Dip. pro Rescr. Imp. Rom.
⁶ § 4.
⁸ P. 14, 40, 1, § 21.
⁹ C. 2, 56, 5, pr.
¹⁰ Capitol. Mac. 13.
legal point after due examination. These decrees were generally the result of appeals, though they occasionally were decisions in the first instance.\textsuperscript{1} Strictly speaking, they were either \textit{decret\ae}\textsuperscript{2} or \textit{interlocuta}, otherwise \textit{interlocutiones};\textsuperscript{3} when the former, they went to the whole suit, and the grounds of them were sometimes given; but the latter only decided some incidental point, and were shorter \textit{de plano}. Before Justinian, these rescripts or decrees were not precedents or general laws, unless made so in the body of such decree or rescript,\textsuperscript{4} an attribute which Justinian first affixed to them.\textsuperscript{5} Thus, with reference to one period, decrees were private in their operation, but with reference to another, they come under the head of \textit{leges}. The Decrees are best compared with cases settled on appeal.\textsuperscript{6}

\section{§ 319.}

Savigny\textsuperscript{7} thus sums up the operation of the imperial constitutions. The \textit{Edicta} and \textit{Mandata} were regular Laws, equally binding on judges and parties,—the latter, of course, only in the Provinces for which they were issued.

\textit{Rescripta} had force of law only for the individual case on account of which they were issued: since Justinian's latest ordinances they were very much circumscribed, inasmuch as those issued to private persons were to remain quite unnoticed; and generally Judges were forbidden to apply for Rescripts, except in the cases of dubious interpretations.

\textit{De recta}, when conclusive judgments, and not interlocutory, were legally decisive in the individual case, and the maxim contained in them was to have general authority as an actual law. In addition to this, all sorts of constitutions had naturally the weight of great authority generally with those who had obtained a casual knowledge of them.

All these were contained in the codex; and whatever was there inserted, whether Rescript or Decree, obtained legal authority, though it might not have possessed such previously: all not inserted were abrogated.\textsuperscript{8} These rules were to apply, from that time, to all those constitutions which should be issued by Justinian and his successors after publication of the Code.

\section{§ 320.}

The \textit{beneficia leges} are indeed a species of \textit{privilegia}, but must precede them, as they are of a general as well as of a private nature, and hence called \textit{generalia} and \textit{specialia}. The first belong to the whole class of subjects alike, and such is the \textit{beneficium inventarii}, or \textit{ordinis et divisionis}, introduced by Justinian, for

\begin{itemize}
  \item \textsuperscript{1} Haubold de Consist. Princip. Spec. 1 et 2.
  \item \textsuperscript{2} C. 1, 14, 12, pr.
  \item \textsuperscript{3} C. 1, 14, 3.
  \item \textsuperscript{4} Zipernnick Diss. de Auct. Rer.
  \item \textsuperscript{5} C. 1, 14, 12.
  \item \textsuperscript{6} Sav. Sys. H. R. R. b. 3, kap. 3, § 23.
  \item \textsuperscript{7} Sys. des H. R. R. b. 1, kap. 3, § 34, p. 142.
  \item \textsuperscript{8} Const. Summa, § 5.
\end{itemize}
winding up insolvent estates, and limiting the responsibility of the heir to the amount of the assets, as in this country an administrator has the advantage of his *plene administravit*. The *specialia* or *jura singulatia*, in its more restricted and more proper signification, affect one class of subjects only; as, for instance, the Sc. Vel-lanianum, which only affected women, releasing them from the responsibilities of suretyship.

Modestinus divides the *beneficia* into *privilegia quaedam causa sunt quaedam personae*, real and personal: the latter benefit only those in whose favour the laws have granted them; but the former extend to heirs and securities, nay, they can even be transferred from the privileged class, *cedi possunt*, to another. The privilege of the *dos in concursu* attaches to the wife personally, and is not transferable to heirs, but only to children in virtue of a legal exception; the *beneficium restitutionis in integrum*, on the contrary, is real, for it belongs not only to the minor, but also extends to his heirs, and usually even to his securities.

§ 321.

The next in order were *privilegia*, a word used by the Romans in a far more extended sense than at the present time. A *privilegia quasi private leges* are constitutions whereby an extraordinary right is conferred or an extraordinary punishment dictated; indeed, it rather signifies the latter than the former, since advantages are usually termed *beneficia*. The soul of privileges is, that they form no precedent, *privilegia non sunt trahenda ad exemplum*; for then it would, *ipso facto*, cease to be a privilege or exception, and become a general, instead of remaining a private law.

§ 322.

In the nature of beneficiary privileges, are patents granted by the Crown, securing to the inventor the exclusive right in his own discovery for a limited period of fourteen years, but do not extend to confer the exclusive right to carry on any trade or manufacturing monopoly. The conditions are, that they be not contrary to law, hurtful to the state, injurious to trade, generally inconvenient, and that the patentee be the original inventor; that the manufacture be new in this country, or a new improvement at least not in use. The grant of letters-patent is, at it were, a premium on invention, and, although a protective measure, is not objectionable, as it is finite and definitive in its operation, and a heavy tax levied upon it for the advantage of the State.

To obtain letters-patent, a petition, on solemn declaration as to the above facts, is lodged for the report of the officers of the Crown; and if they approve, a patent issues under the Great Seal, upon the Chancellor's warrant to that effect.

1 P. 56, 17, 196. 2 21 Jac. 1, 3, § 1. 3 3 Inst. 184.
EDICTA MAGISTRATUM.

The nature of the invention must be specified, and is published; and the failure to comply with the prescribed provisions involves the penalty of forfeiture.

The patent so procured is assignable, and the infringement of it may be punished by action of trespass on the case, or restrained by inquisition. The term of fourteen years may be prolonged for seven years by Her Majesty in Council, if the patentee can prove, six months before its expiry, that he has not profited thereby.\(^1\)

Copyright is also a species of patent beneficiary privilege placing inventions of the brain simply on a level with those of both head and hands; the duration is the same, and it may be sold or assigned in like manner. The Romans,\(^5\) being ignorant of the modern ready mode of multiplying literary productions, had naturally no provisions as to copyright, although they appear to have sold their literary productions for recital or multiplication.\(^3\)

The term for which copyright now endures is the term of life, and seven years longer if such seven years should expire before forty-two years, or forty-two years for posthumous works;\(^4\) and this copyright may be extended to publications in foreign countries by the Queen in Council.\(^5\)

\(^{§} 323.\) The next in order are the Edicta magistratum, which form the point of transition from the written to the unwritten law. It is true that in its origin, the praetorian edict by no means belonged to the written law, although it entered into that category, when made perpetual by Adrian.\(^6\) Walter\(^7\) attributes the origin of the praetorian edict to the increase of communication between Rome and her neighbours, which obliged the praetors to publish certain edicts for regulating the administration of justice between Romans and Peregrini. It is difficult to see how this position is proved, it appears a mere theory without sufficient foundation; on the other hand, it follows, as a natural consequence, that rules of court would be required in every state and system, and that equity would step in to afford relief where a manifest injustice was wrought by the formal operation of the law. That that of Rome was in the beginning exceedingly formal and most strictly construed is sufficiently clear, judging even from the laws of the Twelve Tables and the forms of actions. It now became necessary, with the increase of litigants, that a certain order should be observed in all proceedings, and as laws grew practically obsolete, and the population increased, it was found more convenient to supersede the old and cumbrous forms, no longer adapted to the improved state of society, and at the same time there appeared no sufficient reason for formally abrogating the old law, which could scarcely perhaps have been effected without

\(^1\) 5 & 6. W. IV. 83; 2 & 3 Vic. 67.
\(^2\) Ter. Pro. in Eur. 30.
\(^3\) Mart. Epis. 1, 67—4, 72—13, 3—14, 194; Juv. 7, 83.
\(^4\) 5 & 6 Vic. 45.
\(^5\) 1 & 2 Vic. 59.
\(^6\) § 34, h. op.
\(^7\) Gesch. des R. R. § 466.
interfering with the common principle, upon which other existing institutions also rested. Thus, although the Legislature would neither alter nor formally abrogate the ancient form for the attestation of wills according to the Twelve Tables, which consisted in a conveyance of the inheritance by sale to the *familia emptori*, yet it did not object to the prætor requiring, as a proof of the presence of the proper persons, their *subscription* and *supersignatio*, and so long as these requisites appeared, the prætor held that there was sufficient evidence of the formalities required by law having been complied with at the time. Thus, by adding a formality which theoretically admitted and even strengthened the principle, he virtually abrogated most inconvenient ceremonies, absurd in the improved state of civilization, and rendered the law still more effective and compatible with reason. It is not true, then, that the prætor introduced new laws; he did no such thing, but invented some fiction, whereby the ends of equity could be satisfied, a system which was found to work so well, that the Legislature preferred it to an alteration in the law, which would have still been insufficient in some other point, and have had the disadvantage of disturbing a structure of which the removal of one stone might have caused the downfall. It was, however, provided by the Cornelian Law, 689, that prætors should not vexatiously change their modes of proceeding, but adhere as nearly as possible to those of their predecessor, declaring the principle which he intended to adopt on entering office; but this must not be understood of the prætor’s equity, but of his administration relating to court days, holidays, rules for appearance, the order in which the causes were to be heard, and the like; for it can never be supposed that a prætor would have ventured to abolish the *Bonorum possessio*, or to reject the form of the prætorian testament. Equitable interpretation too, where such was possible, was another source of the prætorian jurisdiction.

§ 324.

Fictions are as useful in the administration of justice in England as they were in Rome, and as they are never favoured by the court but when they tend to vindicate the rightful cause, are not dangerous to the community at large; certainly far less so than a continued emendatory legislation upon matters of trifling importance.

The action by which damages are obtained against the seducer, is grounded upon a fiction; the daughter seduced is supposed to be the servant of the father, and some nominal act of service must be proved; an action is then brought *per quad servitium amisit* for loss of service during pregnancy, and the jury assesses damages according to the circumstances of the case, in fact for the seduction, in law for the loss of service. Another fiction with respect to real property, often occurs in conveyances where there is an incon-
venience in transferring the fee; a leasehold for 999 years, or even 5,000 years, is conveyed instead of the fee-simple. Indeed, the whole doctrine of uses and trusts is founded on a fiction, and injustice is done by the operation of the strict law, not where these fictions are, but where they cannot be introduced; thus, a court of common law will direct the jury to give judgment for the plaintiff on an agreement, but the defendant may apply to a court of equity, and institute an examination into the circumstances of such agreement, and thus obtain justice, which a common law court is unable to afford, because there is no fiction by which such examination can be opened, for the one adjudicates stricto jure, the other bonâ fide.

§ 325.

The legal interpretation introduced by the prætorian equity, was termed Jus Honorarium, Jus Praetorium (and here jus must be distinguished from lex), later Jus Perpetuum, and is defined by Papinian1 to be quod praetores introduverunt, adjuvandi, vel supplendi, vel corrigendi, juris civilis gratia propter utilisatem publicam, quod et honorium dicitur ad honorem prætorium sic nominatum; a definition which perfectly applies to our conception of equity. Marcian2 terms it the vivâ voce juris civilis.

When the law subsists in every branch, it is subject to interpretation, either from the words of it, or circumstances of the fact, or the3 intention, or from the reason of making the law. The reason of a law and the intention of it are different; for the reason of the law is first enquired into to find out the intention. If occasion offers, an interpretation may restrain or extend its meaning; and if the intention of the law ceases in any particular case, it is to be interpreted by equity.

§ 326.

Equity is the correction of a law which is too universal or general. In omnibus quidem, maxime tamen in Jure, æquitas spectanda est.4 Quoties æquitatem desiderii naturalis prætio aut dubitation juris moratur, Justis decretis Res temperanda est.5 This happens of necessity,6 for legislators could not foresee all emergencies. As, for example, it is law that you should restore to every man that which is his own; but this law does not comprehend the case of a madman, when he desires that his sword or money should be restored to him. We must not therefore confound the interpretation of a law with the equity of it; for in its proper signification, equity is a particular interpretation by way of tacit exception from a law, rather than the interpretation of it in its general signification. An7 interpretation is improperly said to be equitable when a cause is adjudged (either where there is no positive law at all to direct,8 or when there is a law and the rigour or ἀριστεία of it is not followed) according to right reason and good conscience.

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1 P. 1, 7, 7; I. 1, 2, § 7.
2 P. 50, 17, 19.
3 P. 1, 3, 17.
4 P. 1, 5, 8.
5 P. 50, 17, 85, 2.
6 P. 1, 3, 12.
7 P. 1, 3, 13.
8 C. 3, 1, 8.
As in this instance, according to the decision of Julian, a man, by his will, directs that if his wife then with child shall bring forth a son, that son shall have two-thirds of his estate, and the wife the other third. But if his wife bear a daughter, the daughter shall have one-third part, and the wife the other two parts. Now it happens that both a son and a daughter are born, which case was not foreseen, and therefore by strictness the testament is void for uncertainty. But because it plainly appears to be the intent of the testator, that the son should have double the wife’s share, and that the wife should have double the daughter’s, equity suggests that the estate should be divided into seven parts, whereof the son should have four, the wife two, and the daughter one part. Again, if the father and the son, past puberty, be slain in battle, and the mother of the son claim succession to the goods of the son, presuming him to have survived the father for some time, but the kindred of the father contend that the father survived the son, it is most equitable, and according to the order of nature, to adjudge the father to have died first.

A dispensation of a law is distinct from an equitable construction of it. For a dispensation suspends the obligation of the law itself, when it does comprehend the case; but equity does not suspend the obligation of the law, but declares that the case is excepted out of it. A dispensation must be from the legislative power, and should be rarely and cautiously used; whereas inferior magistrates may and ought to proceed according to equity, but in its proper signification.

§ 327.

**Edicta omnia ordinaria** were such as the magistrate, whether praetor or edile, promulgated on entering into office, and contained the rules he would follow during its continuance. These were also termed *perpetua*. *Extraordinaria* or *specialia*, on the other hand, also termed *repentina*, applied to particular cases only. The edict continued from a predecessor was termed *tralatitium* (*translatitium*), and those of the provinces *provincialia* or *proconsularia*, as distinguished from the *urbana*, or *praetoria* and *aedilitia* of the praetors, ediles. In the reign of Adrian, however, the system had become so changed, that there was no danger in erecting the praetorian Edict, which until then had subsisted by sufferance, into law. Salvius Julianus, the then praetor, was therefore commanded to arrange the praetorian Edict with this view, which he appears to have done about the year A.D. 131; adding thereto, however, some rules of his own. To this so-called *edictum perpetuum*, sometimes also *jus perpetuum*, the oedilitian edict was also appended, and both from this period entered into the category of written law.

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1 P. 28, 2, 13.  
2 P. 34, 5, 9, 1.  
3 P. 43, 4, 4.  
4 P. 45, 1, 9.  
5 Const. Omnem Reipublicae, § 4; Theophr. Phil. 1, 2, 7.  
6 The last books of Gaius, Ulpian, and Paulus on the Edict bore the title *ad Edictum Aedilium*.  

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§ 328.

The provincial edict appears to have differed little from this edict, and to have been also confirmed in like manner; but, unluckily, nothing remains of either but fragments. This, however, must not be considered as a termination of the system of edicendi, but simply as a collecting and confirming of the edicts in existence up to that time, and must be taken as connected with the decay of the older republican institutions. The lawyers from this period, treating the edict as a work perfect of itself, propounded their own rules for its application; and although nothing could be legally edicted contrary to it, now that it had become a law, yet it might be augmented as necessity required.

The fragments of the edictum perpetuum Salvii Juliani have been collected by Hoffmann, and an unfinished commentary upon it is to be found opusculis posthumis Heinecci. Three of the ædilitian edicts occur in the Pandects: the first provides that no one shall keep a savage animal near the public street to the danger of the passers by; the second, that the seller is bound to exhibit the hidden defects of what he sells, or answer for his default; the third, that whoso castrates the slave of another, without the owner's consent, shall pay four times his value.

§ 329.

A most important part of the body of the jus civile was composed of the responsa prudentum, otherwise called the jurisprudentia media. As the system of patronage will be alluded to again in a subsequent part of this work, it will suffice to say, that it was the origin of advocati or jurisconsulti, and may be traced from the earliest age of Rome.

Patroni were quasi patres, as matronæ, quasi matres; they belonged to the patrician or educated class, from which each plebeian might choose some one to defend his interests generally, and support his cause in courts of justice. The word clients is borrowed from the Roman clientes, and Greek κλησίωντες. The services of the patron towards his clients were honorary, and founded upon the reciprocal and voluntary obligation of service existing between them; but in course of time the jus patronatūs, in this respect at least, fell gradually into desuetude, and those most renowned for knowledge of legal matters answered the questions of all who consulted them, and even conducted their causes for them: thus pleading became a profession to which certain families of patrician origin exclusively applied themselves. The clients thus left their own particular patrons, and with this arose the practice of giving an honorarium in lieu of the services which would have formed the consideration in the case of their own patrons. This, however,

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1 Walter, Ges. des R. R. § 418.  
2 P. 21, 1, 40-1-2; P. 2, 1, 1, § 1; P. 9, 2, 21, § 28.
belonged to a later age, for in the beginning advice appears to have invariably been given gratuitously. With the decay of the empire the profession of an advocate fell into such disrepute, that no respectable man practised it, and it lapsed into the hands of freedmen and the inferior class of society.

At the commencement, it would appear that the opinions of the Roman jurisconsults were given orally, and sometimes partially in writing, or on argument in the Forum, whence the regulae juris arose. Originally, however, as a general rule, they abstained from writing and public teaching, in order to retain the mystery of legal proceedings in their own class; but, after the repeated publication of the legal forms, this practice gradually changed, and their written interpretations obtained the force of law, by their admission on the part of the magistrates, and the confidence placed, by tacit consent of the people at large, in the justice of these opinions, which were even required by the judges to whom they were delivered, both verbally and in writing.

Those learned in the law were accustomed to walk up and down the forum, ready to give advice to all who applied to them; whence they obtained the designation advocati. The houses of the more distinguished lawyers were literally besieged by clients, who, both at home and in public, requested permission to ask their advice. Upon the jurisconsult answering the usual form, licet consulere, by consule, the client shortly stated his case, usuallyprefacing it by Quero an existimes? or by id est necne; to which the person consulted answered, secundum ea que praeponuntur, existimo, placet, puto, and the like. These answers were usually concise, and without any reason being assigned, ratio non editur; nevertheless, they occasionally gave an argumentative answer, citing some case or law in point, or giving a logical reason for their opinion.

The responsa prudentum, or doctrinal maxims of persons learned in the law, formed the first real part of the unwritten law. The laws of the Twelve Tables were not only concise, but severe, and not calculated to meet every case which could possibly arise. It was, therefore, necessary to interpret and apply them to cases not provided for, and often to find means of mitigating this rigour by analogy and fictions. This was, we have seen, partly effected by the praeator's edict, and partly by the opinions of the juris prudentes or juris consulti, termed responsa, given to those who applied to

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1 From the above historical deduction, it has been asserted that the term bonararium is improperly applied to the doctors of medicine.

2 His legisbat latia (sc. XII. Tab.) cepit, ut naturaliter evenire solet, ut interpretatio desideraret prudentium auctoritatem necessariamque disputationem fore. Hec disputationem et hoc jus quod sine scripto venit, compositione prudiritus propris partibus antiquitatem non appellatur ut caeteris partibus juris suis nominibus designatur (datis propriis nominibus caeteris partibus sed communi nomine appellatur Jus Civile.—P. 1, 21, § 5; Gaius, libri 1, ad legem, XII Tabularum.
them, and lastly, by means of the treatises composed by them upon difficult and abstruse questions. The learning and capacity of these men caused naturally a certain degree of importance to be attached to their opinions, and as they particularly referred to civil questions, the practice thus created obtained the name of *Jus Civile*. These men belonging, moreover, to a class whence the highest officers of the state were taken, qualified to become, and often becoming judges, their opinions were almost looked upon in the same light as those of the judges themselves. Augustus, too, perhaps to confer a certain position on this class, or perhaps to exclude ignorant persons from the privilege *de jure respondendi*, or with the view of conferring a greater authority on their responsa, decreed an imperial permission to be necessary to such as followed this occupation, whose answers were to be considered as authoritative. This measure, however, did not exclude others from following the same calling, but divested their responsa of the judicial authority of precedent. These *prudentes* invented many means by which the end of justice might be obtained, where the law was inefficient for the purpose, thus the *querela inofficiis testamenti* allowed a child who has been unjustly passed over, or disinheritied to impugn his father’s testament as informal, the fiction being that the testator could not have been in his right senses to have disinheritied him, and that sufficient proof thereof lay in the instrument itself. They also introduced the *actiones utiles* as distinguished from the *actiones directæ* in which the strict letter of the law was followed, whereas the *utiles* were deductions. Thus the proprietor of an estate is said to have the *dominium directum* or fee, the farmer or tenant the *dominium utile*, and in England the mortgagee has the legal (*directum*), and the mortgagor the equitable (*utile*) estate. From these responsa alone, Justinian was able to compose his best work, the Pandects.

The *actus legitimi* or *legis actiones*, the rules by which forms of proceeding were regulated, and the persons before whom certain legal acts could be done, belonged to this law.

§ 331.

It is curious that this system should have been continued during a period of 2,500 years since its first establishment in nearly all the countries of Europe, and that the ancient prestige should still attach in a greater or less degree to the order of advocates. In the Middle Age, advocates, or rather the doctors of law, after the revival of that science in the Middle Age, were invariably considered *tanguum nobiles*, and is referable to the class to which they belonged in Rome. The German Emperors assigned them a position among the knights, with the privileges belonging to that class, and in England, doctors of law are held equal to esquires, and rank accordingly, although not esquires by blood; the same privilege is usurped by barristers, although, strictly speaking, it
ought only to attach to queen's counsel and serjeants. In Rome it was the class that ennobled the profession, and hence by a false reasoning, the profession in the present age is held to enoble the professor, a sophistical inversion of the former order of things; the real distinction then, is, that the Roman advocates were nobiles, and their successors tanquam nobiles. Doctors of divinity obtained a precedence over the lay doctors of the Civil, or Civil and Canon Law, through the power of the church, which usurped for doctors of the Canon Law a precedence over all others, although a degree of later introduction, and originally confined to clerks. Among protestants, the Canon Law having fallen into desuetude, was replaced by the Sanctorum Theologorum Professores, or doctors S.T.P. or D.D., who, mutato nomine, have retained the same rank in English universities, as their canonical professors had usurped by the authority of the Pope in the Middle Age.

§ 332.

The Civil Law of the Romans, as has been before premised, was in the most remote period administered by the king in person, according to the laws and the forms handed down by tradition;¹ nor is it known in how far the senate or individual senators were called upon to assist with their advice; on the other hand, it is clear that the kings did all in person, transferring no matter to a deputy.²

This state of things continued, as far as we know, until Servius Tullius established a particular tribunal for private suits.³ On the establishment of the republic, this, the royal jurisdiction, was transferred to the consuls,⁴ who are hence sometimes termed judices,⁵ until the praetors were introduced for this especial purpose, and probably because it was thought advisable to separate the administrative from the executive. The ædiles, too, had a certain limited jurisdiction,⁶ which devolved on the praetors when those officers were unable to perform it.⁷ All these magistrates received, however, assistance in their functions in two ways—first, from a permanent tribunal; and, secondly, from the judges they themselves were deputed to try particular causes, which has already been mentioned.⁸

The Centumviral Court was such permanent tribunal:⁹ its jurisdiction extended to all questions of private property and testamentary succession;¹⁰ but little more is known of it than that the most difficult points of law were discussed before

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¹ Dion. 2, 14—4, 41—10, 3; Cic. de Repub. 5, 2. ² Cic. l. c. ³ Dion. 4, 25. ⁴ Dion. 10, 1, 19; Liv. 2, 27. ⁵ Liv. 3, 55; Varro de LL. 6, 88; Cic. de Leg. 3, 3. ⁶ Cic. l. c. ⁷ Dio. Cass. 63, 2. ⁸ § 45, h. op. ⁹ Sav. Zeitschrift, 5, 11; C. A. Schneider de Centumviralis Judicii apud Romanos origine, Rost. 1835; Zumpt über Ursprung Form und Bedeutung des Centumviralgerichts. Berlin, 1838; Walter, Ges. des R. R. § 658. ¹⁰ Cic. de Orat. 1, 38.
RES JUDICATÆ.

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it, and its sentences had great influence in future decisions. Renowned orators spoke less willingly and more rarely there than in other courts and before the people, as it treated of matters of a private interest, although Cicero was certainly not the first who delivered eloquent speeches in that court. The number of its members was 105, when there were 35 tribes, reckoning 3 out of each, and these were probably nominated by the praetor; but it must not, therefore, be supposed that it was not more ancient than the office of that magistrate, but it must be rather considered as a republican institution merely adapted to the new organization of Servius Tullius. Its sessions were marked by a, a spear stuck in the ground, but a better account of it may be derived from the imperial period, in which its number amounted to at least 180, which sat in the Basilica Julia, and was divided into four consilia or senatus, which formed separate tribunals. Nevertheless, there were questions which were referred consecutively to two councils, and others again for the discussion of which all four councils were united.

A praetor presided, but the Ex-quæstors were concerned in directing the business, until Octavian transferred their duties to the decemviri stlitibus judicandis.

This court now became very popular, since public curiosity and eloquence, more and more restrained, found here a more amusing and freer sphere. The period of its duration is unknown, but it may have continued until the dissolution of the Western Empire.

§ 333.

It would appear that the decemviri stlitibus judicandis, who belonged to those called the sixty-six, were the successors to the quaestors, appointed by Octavian at the same time as the Triumviri capitales, in 465 A. u. c., that questions regarding liberty were within their province, and that they presided in the centumviral tribunal. The supposition that they were concerned in capital matters, according to Greek inscriptions, is attributed by Walter to an erroneous translation of the Latin expression.

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1 l. c. et 56; pro Cæc. 18; Quintil. In Or. 4, 2, § 5.
2 The Querela Oﬃciis Testamenti.
3 Cic. pro Cæc. 18, 24; De Orat. 2, 23.
4 Fest. v. Centumviralia.
5 Niebuhr, 1, 472.
6 Gaius, 4, 16.
7 Plin. Ep. 6, 33.
8 Quintil. In Or. 12, 5, § 6; Walter, l. c. § 657, says that this passage refutes Bunte's Beschreibung von Rom. Bd. 3, Abth. 2, s. 87.
9 Quintil. l. c. 5, 2, § 1; 11, 1, § 78.
10 Plin. l. c.; Quintil. l. c.; Plin. Ep. 1, 18—49, 24—6, 33; Val. Max. 7, 7, 1; P. 5, 2, 10, pr.; P. 31 (2) 76, pr.
14 Pomp. P. 1, 2, 2, § 29; Liv. 3, 55; vide Niebuhr, 2, 366—3, 647.
16 Cic. pro Dom. 29; pro Cæc. 33.
17 Pomponius, l. c.
19 l. c. § 659.
The decisions of this centumviral tribunal were termed *Res judicatae*, and formed another part of the *lex non scripta*. *Res judicatae*,¹ says Modestinus, *dictur, quae finem controversiarum pronunciatione judicis accipit; quod vel condemnatione vel absolutione contingit*. None but the decision of a superior judge or tribunal could obtain this force. *Post rem judicatam vel jure jurando decisam vel confessionem in jure factam nihil quaeritur post orationem Divi Marci quia jure confessi pro judicatis habentur*, says Ulpian² on the edict; nor could the spirit of these sentences be afterwards amended, but only the words,³ and the sentence once delivered was considered that of all present,⁴ the sentence of the majority being that of all.⁵ Although two could not deliver sentence, one being absent, yet if he were present and dissented, the sentence of the two was good,⁶ for the court was duly constituted; but when the votes were equally divided, then the judgment, as in penal causes, was given *pro libertate*;⁷ but if this question of liberty did not arise then in favour of the defendant, as is the practice in Westminster-hall, following the principle of liberty, if the judges concurred in condemning, but differed as regarded the amount, sentence was pronounced for the lesser sum.⁸ These divided cases, upon the whole, appear to have been taken still more strictly *quoad* the future than in this country, where, however, the utmost reluctance is shown to deviating from precedent, for it is held that uncertainty in law is a greater evil than the hardship in a particular case which may result from strictly following a precedent.

All law not formally passed by the State in some of the modes described, was termed unwritten law, nor could any doubt exist upon the positive and relative authority of this species of law, were it not for a constitution of Constantine, adopted by Justinian into his Codex.

The force of *consuetudo*, or custom, in the most flourishing period of legal literature and practice, may, upon the maxims of great authorities collected in the Pandects, be reduced to the following rules:

In cases where no written law is in use, regard must be had to custom and usage.

If these be defective, then that which, by a parity of reasoning, is nearest to it.

Failing this, the law of the city of Rome.⁹

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¹ P. 42, 1, 1.
² P. 42, 1, 56.
³ l. c. 46, 55, 42.
⁴ l. c. 37.
⁵ P. 1, 3, 32, pr. Julianus, lib. xciv.
⁶ l. c. 36.
⁷ l. c. 39.
⁸ l. c. 38.
⁹ l. c. 38.
¹⁰ P. 1, 3, 32, pr. Julianus, lib. xciv.

*De quibus causis scriptis legibus non utimur id custodiri oportet, quod moribus et consuetudine inductum est, et siquâ in re hoc defecerit, tunc quod proximum et consequens ei est, si nec id quidem appareat tunc jus quo urbs Roma utitur ser- vari oportet.*
CONSUETUDO.

Long existing usage is law default written provisions. In case of ambiguity, usage and precedent has the force of law. A custom founded on error will not form a precedent, nor will a temporary change alter the law of a province. So far as custom alone is concerned, but it was possible for usage to be equal to, nay, even to overrule actual law.

The user of a series of years, and the tacit consent of citizens, is to be observed as a law, equally with that which has been reduced to writing. With respect to custom overruling written law, the agreement is, that inasmuch as the legislative power rests in the populus, it may make laws either by express vote or imply by its acts; hence a general though tacit consent abrogates a law.

For such law is of so great authority, and has been so decidedly approved of, that it was considered superfluous to reduce it to writing. Hence we find that a law might fall into desuetude, in other words, become obsolete by implied acts contrary to it, of which many instances are mentioned in the Digest.

1 P, 1, 3, 33, Ulp, lib. de Off. Proc.—Diuturna consuetudo pro jure et lege in his quae non ex scripto descendunt, observari solet.
2 P, 1, 3, 37, Paulus, libro 1, Ques tionum.—Si de interpretatione legis quaeratur in primis insipicendum est, quo jure civilis retro in ejusmodi casibus una fuisse; optima enim est legum interpres consuetudo.
3 P, 1, 3, 38, Callistatus, lib. 1, Ques tionum.—Nam Imperator nostrer Severus rescripti; in ambiguitatibus quae ex legibus, profusam consuetudinem aut rerum perpetuo similiter judicaturum autoritaratem vim legem obtinere debere.
4 P, 1, 3, 39, Celso, lib. xxiii. Digestorum.—Quod non ratione introductum, sed errore primum deinde consuetudine obtentum est in aliis similibus non obtinet.
5 P, 50, 17, 123, § 1, Ulpianus, lib. xiv. ad Edictum.—Temporaria permutatio jus provinciae non innovat.
6 P, 1, 3, 35, Hermogenianus, lib. 1, Jur. Epist.—Sed et ea quae ex longa consuetudine comprobata sunt, ac per annos plurimos observata velut tacita civilium conventio non minus quam ea quae scripta sunt jura servantur.
7 P, 1, 3, 32, § 1, Julianus, lib. xiv. Digest.—Inventarata consuetudo pro lege non immiseri custoditur, et hoc est quod dicitur moribus constitutum. Nam quam ipse leges nulla aliis ex causa nos teneant quam quod judicio populi receptae sunt, merito et ea quae sine ullo scripto populus probavit, tenebunt omnes; nam quid interest, suffragio populus voluntatem suam declarat, an rebus et factis? Quare rectissime etiam illud receptum est ut leges non solum suffragio legislatora sed etiam tacito consensu omnium per desuetudinem abrogentur.
8 I, 1, 2, § 1.—Ex vero quae ipsa sit quaeque civilis constituit sepe mutari solent, vel tacito consensu populi vel aliis lege post latk.
9 P, 1, 3, 36, Paulus, lib. vii. ad Sabinium.—Immo magno accurate hoc jus habetur, quod in tantum probatum est ut non fuerit necessario scripto id comprehendere.
10 I, 4, 4, § 7.—Sed pena quidem injuriam, quae ex lege duodecim tabularum introducta est, in desuetudinem abit, quam autem Praetores introduxerunt, quae etiam hodierna appellatur, in judiciis frequentatur.
11 P, 9, 2, 28, § 4, Ulpianus, lib. xvi. ad Edictum.—Hujus legis (legis Aquilae) secundum quidem caput in desuetudinem abit.
12 P, 11, 1, § 1, Callistatus, lib. ii. Edicti Monitori.—Interrogationes autem actionibus hodie non utiur, quia nemo cogit ante judicium de suo jure aliquid respondere,ideoque minus frequentatur,et in desuetudinem abierunt, sed tantum modo ad probationes litigis torigibus sufficient ea ab adversa parte expressa fuerint apud judices vel in hreditatibus vel in alia rebus quae in causa vertuntur.
§ 336. 

Let us now consider the laws in the Digest upon this subject. Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus, quod dicitur moribus constitutum. Num quem ipsae legis nullae alia ex causae nos teneant quam quod judicio populi receptae sunt, merito et ea, quae sine ullo scripto populus prohibuit tenebunt omnes: nam quid interest, suffragio populus voluntatem suam declarat an rebus ipsis et factis? Quare rectissime illud receptum est ut leges [non solum suffragio legislatoris sed etiam] tacito consensu omnium pro desuetudine abrogentur.—Julian.  

This is in a measure explained by the preceding paragraph of the same authority. De quibus causis scriptis legibus non utimur, id custodiri oportet, quod moribus et consuetudine inductum est, et si quod in re hoc deficerit, hunc quod proximum et consequens ei est bi nec id quidem appareat hunc jus, quo urbs Romae utitur servari oportet. This certainly applies to interpretation, and appears to imply that where no written law exists, we are to argue from analogy. In the same way ancient custom, in default of which the custom of Rome is to be followed, inveterata consuetudo, is to be used in the place of a definite law, pro lege. Julian, the rigid republican jurist, then goes on to state, that as the popular voice is the origin of laws, it matters not whether they be reduced to writing or not, and hence it makes no difference whether this consent be given formally by vote, or practically by usage. The negative conclusion drawn hence is, that if a law may be enacted by tacit consent, that is practically, it may also be abrogated by tacit consent, pro desuetudine, probably importius desuetudine simply, that is to say, a positive law may be fairly disregarded by a general non user. An instance of a law becoming obsolete can be found in the second head of the Aquilan Law, in the chapter of Interrogatories, and in the Codex de caducis tollendis. We also read in Pomponius's treatise on the origin of law, with reference to the earlier period, that the kings governed by their own will, that is, they made such laws as they thought proper, sine lege certa sine jure certo primum agere instituit omniaque manu a regibus gubernabantur, that this was followed by the leges curiatae; but that all these laws grew obsolete on the abolition of monarchy, omnes leges hae exsoleverunt, iterumque caput populus Romanus incerto magis jure et consuetudine aliquo uti quam perlatae leges, a practice found so objectionable, that the laws of the Twelve Tables were introduced within twenty years from that time. Ulpian does not go so far, but says, "Diuturna consuetudo pro jure et lege in his, qua non ex scripto descendunt, observari solet.

[1] The words between brackets are supposed to have been interpolated by Justinian.  
[8] Id. § 3.  
Here, written law is made an express exception, but Hermogenian places custom on an equality with written law. *Sed et ea, quae longa consuetudine comprobata sunt, ac per annos plurimos observata, velut tacita civium conventio non minus, quam ea, quae scripta sunt jura servantur;* but what if they be incompatible with one another?

It would appear that that most generally in use would have the preference. Hence it must be concluded, that, perhaps, until the age of Constantine, lapse of time and the prevalence of a contrary usage could abrogate a law, though passed in due form.

§ 337.

In the Codex, we find three constitutions, two relating to customs only, and the third to customs and law, as compared with each other. First, then, usage founded on reason is to be observed, and against it nothing is to be done;1 such, usage and custom have ordained to have the force of law.2

The third constitution, however, places law and custom in opposition, and informs us, that, although the usage and practice of ages is no mean authority, it does not extend to overriding reason or law.3

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3 C. 6, 51, 1, pr—Imp. Justinianus A. Senatus Urbis Constantinopolitann. Et quemadmodum in multis capitulis lex Papie ab anterioribus principibus emendata fuit vel per desuetudinem abolita, etc.

C. 1, 17, 1, § 10—Imp. Justinianus A. Teroniano. Viro eminenterissimo Quersti Sacri Palatii. Sed et si quae lege in veteribus libris posita jam in desuetudinem abierunt, nullo modo vobis casdem ponere permittimus quum hæc tantummodo ob-
Now the question naturally arises of why, if Justinian meant to prevent laws being superseded in any case by usage contrary to them, as appears from the adoption of this passage, he introduced into the Digest opinions and rules diametrically opposed to that principle?

§ 338.

It therefore now becomes necessary to review the history of customs; and we find that it was clearly held, until the Roman people had lost almost every vestige of legislative power, that a custom was as good as a law, nay, if more generally prevalent, even better, because both originated with the same body. This argument rested on the sovereign power of the people in legislation, and it mattered not whether the consent to the abrogation of a law was expressed or tacit, that is, by general adoption; provided always that such law adopted by general tacit consent was conformable to reason, morality, and sound policy. Many may justly find insuperable objections to admitting so loose a form of legislation, which, however, was so far restricted, that it must be founded on interpretation. When, however, Constantine's sweeping enactments exterminated the last remaining right of popular legislation, the principle was narrowed, and custom became confined more strictly still to interpretations and analogies, where no positive law obtained, or local circumstances intervened; and this difference existed, that, whereas formerly expediency allowed interpretation to go the length of abrogating an express
law unfitted to the times, or rendered doubtful by the conflict of two laws on the same subject, it now only went to supply a deficiency, but not to impair any existing enactments, and in such case only when supported by expediency and sound reasoning.

Savigny considers ratio to imply a question of state policy, rather than common sense, in the despotic age at which this constitution was made.

In any case, the dilettanti style of this law demonstrates the commencing decline of the empire; and it must strike every one that the passages in the Pandects, which, when penned, were certainly never destined for laws, have far more the character of enactments than the vague and ill-drawn constitutions, many of which are neither good Latin nor often even comprehensible. Of the many who have attempted this, Savigny prefers, perhaps judiciously, the following explanation. Justinian erected into laws such of the so-called customs existing at that period as he considered fit to be retained, and forbade for the present all other local customs not so authorized. Hence it is clear, that, at the period when the three legal compilations were drawn up by command of that Emperor, all custom ceased, except such as had been especially confirmed, and so made law. It by no means, however, followed, that customs might not be in the course of springing up, or, subsequently, actually spring up, either out of interpretations or otherwise; and as Justinian affected, not only to settle the law up to his time, but also to provide for future contingencies, he inserted in his digest the rules which had been formerly adopted with respect to customs, and which he intended should rule them in future; and if this view be admitted, these passages must be regarded as historical, and of future, but not of present (then) application. Under these circumstances, the passage of the codex is clearly confined in its present operation to interpretation where no positive law exists. Custom cannot spring up at once, for it is essential to its being so that it have a certain antiquity. If this view be the correct one, Justinian will have placed his customs nearly under the same rules as the English lawyers have those which obtain in this country, making custom superior to all but enacted law, nor could anything more logical or consonant with common sense be imagined; for otherwise, we can only regard the passages upon this subject in the digest as antiquities, historical of a state of things which had ceased to be.

1 This question is so difficult and important that the reader is recommended to refer to Savigny, whose dissertation on this subject is unfortunately too lengthy to be inserted in this note: Syst. des Hext. B. R. § 18, 25, and Beylage, II.

2 C. 3, 14, 17; C. 7, 77, 1, § 10; P 37, 10, 1.

3 C. 7, 45, 13.

4 C. 8, 55, 1.

5 § 257, b. o. p.
§ 339.

The Canon Law paraphrased this sentence. *Licet enim longaeae consuetudinis non sit vilis auctoritas, non tamen est usque adeo valitura ut vel juri positivo debeat prejudicium generare, nisi fuit rationabilis et legitime* (canonicé)* sit prascripta.*

The difficulty here lies in the words *nisi fuit rationabilis et legitime* or *canonicé prascripta,* with respect to which the interpretation may be suggested that *rationabilis* is applicable to an equitable construction, and *legitime* or *canonicé prascripta* to the authority of the interpreter, be it individual or court duly authorized to interpret the law, *aliter,* done in a way conformable to the general principles of the Canon Law.

Savigny thinks it is merely a paraphrastic repetition for the sake of greater precision of the word *longaeae,* in the desire to retain the words of the Codex as nearly as possible; yet why it should be desirable to retain so bad a passage, and above all so undignified and unprecise a term as *non vilis auctoritas,* it is difficult to conceive, especially when the sense is inverted, for there can be no doubt, with this passage before us, that, as in the law before Constantine, so in the Canon Law, custom might supersede an express law.

Prescription⁵ must not be mixed up with the doctrine of custom, for prescription is acquisition by enjoyment for the period required by law,⁶ and therefore is law not custom. Thus, no one will call the six years after which a debt in England cannot be recovered, or the twenty years which bars an action of ejectment, a custom. These are statutory provisions; hence we say "statute run," not "custom run;" nay, the very composition of the word *praescribo* shows that is a preordaince not a custom. In the Civil Law, prescriptions were fixed at very various terms, according to the nature of the right acquired.

§ 340.

The Feodal Law makes again another use of this passage, applying it to the Roman Law, which the feodalis, as the English, looked upon as custom only. *Legum autem Romanorum non est vilis auctoritas, sed non adeo vim suam extendunt ut usum vincant aut mores:* here the question is decided as to which of two customs shall be held paramount—that custom called Roman Law, or those which prevailed in countries subject to the Feodal Law?

This assertion of the author is, *that all customs originate directly or indirectly in some legislative enactment,* and, if this be true, then the preference given to feodal over Roman customs is perfectly clear, for the law of the land being feodal, the customs growing out of this indigenous law are preferable to the foreign law, which,

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⁶ P. 41, 33, 3.
it must be remembered, cannot be considered in any other light than in that of a foreign custom, or a custom arising out of a foreign law, viz. national customs are preferable to foreign ones.

In the first and second cases, custom and law are put in opposition by the civilians and canonists.

In the third case, one species of custom is put in opposition to another species of custom by the feudalists.

They form two distinct propositions, and contain two distinct principles, in no way interfering with each other.

§ 341.

Thus, before Constantine, a consuetudo generalis might overrule law.

After Constantine, everything but positive law.

The canonists allowed it to overrule law.

The feudalists declared that their customs should overrule all other customs, but do not tell us the relative validity of their own customs with reference to their law.

§ 342.

The principle of the English law, that no custom to the contrary can override a positive and unrepealed statute, however ancient, has led to some curious results.

An instance of a custom giving way to an old act, occurred in an action brought to recover damages from the defendant for

1 MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF MALDON, v. JOSEPH WOOLVET.

12, Ad. & Ell. 15.

Trespass for breaking, entering, and damaging a close of the plaintiffs, covered with water, called the River Blackwater, situate between Thurstable Spit and Knowl Hall, in the county of Essex, and subverting and carrying away the soil thereof, called culch.

1st Plea. — The close was, and is, and immemorially had been part of the said river, and public and navigable, and that every liege subject ought to, and has the right of fishing and dredging for oysters and spat; wherfore, defendant being a subject of the realm, entered and fished at seasonable times.

Replication. — The said part of the river was and is in the boundaries of the parish of Maldon. That spat is the spawn and young brood of oysters — not fit food for man. Said spat was then fixed to the earth, soil, and culch, to receive nourishment and grow to perfection,* and could not be fished up without removing such earth, soil, and culch. Verificat.

Rejoinder. — That all liege subjects had a right to dredge for oysters and oyster spat in the place which, &c., and of removing the earth, soil, and culch, so far as might be necessary for detaching the oyster spat therefrom; wherefore defendant did so. Verificat.

General Demurrer to the Rejoinder. — Point stated by plaintiffs on the margin of demurrer book, that all the king's subjects have not of right the liberty and privilege of fishing and dredging for oyster spat in, &c. &c., and of removing the earth, soil, and culch thereof for detaching oyster spat.

The case argued Mich. vacation, Nov. 30th, 1839, before Lord Denman, Patteson, Williams, and Coleridge.

Serjeant Stephen. — Oysters are not fish. Properly speaking, a term applied to floating fish, and not to animals not removable without injuring the soil. No right, without special

* This description of spat appears taken from stat. 1 Eliz. c. 17, s. 1, and 3 James I. c. 12, s. 1.
THE ROMAN CIVIL LAW.

oyster dredging, and taking away oysters, and spat or spawn; the
defence was, that the locus in quo was a public navigable tide river,
and that every liege subject had, by immemorial custom, a right to
fish for oysters and spawn therein; but it was then held that the old
statutes, which were enacted for the preservation of the fry or spawn
of fish, and which prohibited the taking of such spawn, overrode
the common law right of a public fishery. Lord Denman, in de-
delivering judgment, says, to remove the spawn is unlawful within
the statutes of Richard II., which have never been repealed, but
frequently recognised, and the immemorial usage contended for
cannot have legal existence.

§ 343.

In the case of Dakin v. Seaman, a curate, appointed by the
special sequestrators of the bishop of the diocese on the death of
the incumbent, sued the next incumbent for his reasonable stipend

prescription or grant, to move those from another’s soil. To show right to drag up shells,
defendant must show right to interest in the soil; Hall de Jure Maris, Part. I. ch. v. p.
19, 18, Anonymous, 1 Mod. 105, 106, and Carter v. Marriott, 4 Burr. 2162, also cited.

Spat unfit for food. References to 13 Ric. II. st. 1, c. 19; 17 Ric. II. c. 9; 1 Eliz.
c. 17; 3 Jam. I. c. 12; 30 Car. II. stat. 1, c. 91; 3 Geo. I. s. 2, c. 18; 33 Geo. II.
c. 27, s. 13; 37 Geo. III. c. 51; 48 Geo. III. c. 146.

If defendant took spawn for warrantable purpose, plea should have stated it.

Wightman contra.—Oysters are fish; spat, oysters; Bagot v. Orr; 2 B. & P. 472.
The public may fish in arm of the sea; Richardson v. Mayor of Oxford, 2 H. Bl. 182,
in error, S. C. (below) 4 T. R. 437. No difference between fish in perfect and imperfect
state; animals fera natura may be taken in any state.

Stephen’s Reply.—Spat is no more oyster, than egg is fowl. Eggs are subject to larceny,
though fowls ferae, unclaimed, are not so. Case of Swans, 7 Rep. 18, 2, and the statutes
referred to, make taking spat unlawful. 7 & 8 Geo. IV. c. 29, 36, are the governing
statutes now in use.—13 Ric. II. st. 1, c. 19, and 17 Ric. II. c. 9, are not repealed.

Per Cur.—Will take time to consider the acts of Parliament.

1840, Lord Denman in this term, June 11th, delivered judgment as above.—The pre-
servation of spawn, or fry, or brood of fish, has been for centuries (since 23 Ric. II.
c. 19) a favourite subject of legislation, and the statutes on this subject are very numerous.
The statute 13 Ric. II. st. 1, c. 19, is inserted here as a curious specimen of the legis-
lation of 1389.

Item come contentus soit en lestatut de Westm. second que salmoneceus ne soient prisas
ne destruits par rees ne par autres engines a lestatutes de mylos na dey April tanqul
Nativite de Saint Johan le Baptist a certaine peine limite en mesme lestatut accordes
est et assignes que le dit estatut soit fermalement tenu et gardes adjoute a ycele que salmone-
ceus ne soient prisas par le dit temps a lestatutes des mylos ne aillons sur mestre la peine
& que null peschour ne, garthman ne null autre de quell estat ou condition qis soit ne mette
desore enavan en les ewes de Thamis Humber Ouse Tente ne null autre ewe du Roalame
par le dit temps ne par null autre temps del an aucun rees appelles stalkers nautres rees
mengine queconques par les quelle le free on brood des salmons laumpres ou autre peson
queconque purra en aucun manere estra pris ou destruist sur la peine suiustre. & eauix
comme contentus soit en mesme lestatut que toutes les ewes et queues salmons soient prisas en le
Roalame soient misas en defense quant al prise des salmons del jour de la nativite de notre
Dame tempal jour de Saint Martin odaignes est & assignes que les ewes de Laue Wyre
Mersey Rebbill & touts autres ewes el counnute de Lancastre soient misas en defense quant
al prise des salmons del jour de Seint Michel tanqe al jour de la Purification de nostre Dame
& en null autre temps del en a causae que le salmons ne sont pas scionables en les dits ewes
par le temps suiustre. & en eauises ou tiex riviers sont soient assigne & jureus bones & suf-
sicaints conservateurs de cest estatut comme est odaignes en le dit estatut de Westm.
& qis purnissent les trespassors salome la peine contentus en mesme lestatut sans aucun
favor ent faire.

1 13 Ric. II. st. 1, c. 19, and 17 Ric. II. c. 9.

9 M. & W. 777.
during the vacancy, the tithes which had accrued during the interval not being sufficient to pay him such reasonable stipend.\footnote{28 Hen. VIII. c. 11.} The action was brought on a statute which provides that if the fruits of the living during the time it is void be not sufficient to pay the curate’s stipend, it shall be borne by the next incumbent, within fourteen days after he obtained possession. The defence was rested on 1 and 2 Vic. c. 106; the effect of which is, that no curate, after the passing of that act, can have any legal claim or demand for or in respect of the performance of the ecclesiastical duties of a benefice during the vacancy thereof by death, except he be appointed by the bishop of the diocese, and have a stipend assigned to him under the provisions of that act. In this case it was held, that as a later statute did not contain negative words, both statutes were compatible; and that the latter did not repeal the former, except where there was an express contradiction; and that although the plaintiff could not have recovered if he had been appointed by the bishop, and therefore under 1 and 2 Vic. c. 106; yet that being in this instance appointed by the sequestrators, whose authority is not taken away by any negative words in that statute, he did not come within the provisions of it, that therefore 28 Hen. VIII. ch. 11, was in full force as regarded his case, and he, therefore, by the whole court, had a verdict.

§ 344.

The following is an instance of two different customs, one larger than the other, and apparently both applicable to the same case, which were made compatible by construing the more extensive as strictly as possible. The action was by a physician,\footnote{Little v. Oldaker, 1 Car. and Manham 370.} who, by the

\footnote{Before Lord Denman.}

\footnote{LITTLE v. OLDAKER.}

Assumpsit for work and labour, with a count upon an account stated.

Plea.—Non Assumpsit.

\footnote{June 30th.—Note.—From 2 M. & W. 149. Cope v. Rowlands. One other case cited for the plaintiff remains to be noticed; it is of Greemare v. le Clerc Bois Valen, in which Lord Ellenborough held that the plaintiff could recover for surgery and medicine, though he had not been admitted pursuant to the stat. 3 H. VIII. c. 11, s. 1. It is certainly difficult to reconcile the case with the rule above laid down (that a contract is void if prohibited by statute, though the statute inflicts a penalty only because such penalty implies a prohibition); for the provisions of that statute were already meant to secure to the public skillful practitioners in surgery and medicine; but on a motion for new trial, the Court of King’s Bench does not appear to have sanctioned the doctrine of Lord Ellenborough, for it disposed of the case on another ground, namely, that there was no proof that the plaintiff had not been duly licensed: and, therefore, thought that case not a binding authority.}

\footnote{Open by Butt.—Plaintiff is a surgeon and member of Royal College of Surgeons, and also physician to an institution for curing contractions of the feet; that he cured defendant of a venereal disease, having attended defendant as surgeon, not as physician. He submitted, that although a physician could not maintain an action for fees, that there was no law to prohibit a physician who was also a surgeon from practising as such, and recovering value for services, just as a physician could if employed to write a book. He cited Batterby v. Lawrence.}
THE ROMAN CIVIL LAW.

Common Law, cannot maintain an action for his fees, who was also a surgeon and a member of the Royal College, for curing a person of a disease, and it was held by Lord Denman, C. J., that though a physician cannot sue for anything done as a physician, he is nevertheless entitled to recover a compensation for his trouble, provided he can show that the business was not done by him as a physician, and further, that the fact of the plaintiff not being paid at the different times when he was consulted, went to show that he was not acting as a physician, and also that the defendant himself did not consider that the plaintiff was then acting in that capacity.

Again, several acts, called the Button acts, were passed for the protection, firstly, of the silk trade, and afterwards of the Birmingham button manufacturers, when metal buttons had gone out of fashion; which provided, in the first instance, that no person should make, sell, or set on any clothes or wearing garments, any buttons made of cloth, serge, drUgetic, frieze, camlet, or any other stuffs of which clothes and wearing garments were usually made—which enactment was subsequently extended to button-holes; and, in the second instance, that the buttons must still be made of metal, although they might be covered, when so made, and that those acts should preclude the maker of clothes from recovering any remuneration for his labour and expense in respect of any buttons and button-holes not made in conformity with them. These acts had become almost obsolete and forgotten, till recently pleaded in bar of a claim for clothes on which some of the prohibited buttons had been placed; and the Court held the plea good.

§ 345.

A still more curious instance, and even more opposed to the spirit of the present day, occurred in the case of a suit of appeal against an accused murderer, in which the appellee waged his

3 H. VIII. c. 11. — Common artisans — smiths, weavers — and women boldly and accustomed take upon them great cures and things of great difficulty, in the which they partly use sorcery and witchcraft; it is enacted, that no person within the City of London, nor within seven miles of the same, take upon him to exercise or occupy as a physician or surgeon, excepting he be first approved and admitted by the Bishop of London, or by the Dean of St. Paul's for the time being, calling to him or them four doctors of physic; or for surgery, other expert persons in that Faculty, &c., &c. Penalty for every month, £5.


2 The writer's attention was drawn to the cases of Goodman v. Morrell, Mayor of Maldon v. Woolver, Dakin v. Seaman, and Little v. Oldaker, by the kindness of Mr. Thomas Howard Fellows, Sp. Pl., the erudite author of "The Law of Costs and Public Health Act."

3 Raw silk and Mohair yarn, 13 & 14 Car. II. c. 13, s. 2; 4 Will. III. 10, § 52; 10 Will. III. 23; 8 Anne, 6; 7 Geo. I. st. 1, c. 12.—Metal, 36 Geo. III. c. 60.

4 Goodman v. Morrell, 1 Dowl. N. S. 283. Plea drawn by Mr. Thomas Chitty.

5 Bl. Com. 3, 339, and 4, 310, gives a most interesting description of a trial of one of these appeals.

battle. The writ of appeal lay in cases of felony; in the case of murder, it was always brought by the heir-at-law of the person slain, and must have been sued out within a year and a day after the deed was done. It had its origin at Common Law, and was supposed to have been introduced at the Conquest. It had this remarkable peculiarity, that the plea autrefois acquit, or autrefois atteint, on an indictment for the same offence, was no bar to the suit of appeal, unless it were prosecuted by the king, in which case it was so. But the appellee could only be arraigned at the suit of the king where the appellant did not prosecute his appeal: this was enacted because it was the practice to wait till the year and a day given for the appeal had expired, at which period the witnesses were often dead and the matter forgotten. The usual mode of trial in this suit was by wager of battle, at the election of the appellee (or defendant); in which case, if the appellant (or plaintiff) killed the appellee, or forced him to yield, the latter was considered guilty of the crime laid to his charge; but if the appellee killed the appellant, or could maintain the fight from sunrise till the stars shone in the evening, he was acquitted. The appellee, however, was not allowed to wage his battle against the appellant if the former was mayhemed, within the age of fourteen or above the age of seventy, or in holy orders, or a woman; or if, being a man, he could aid himself by matter of record; nor when the appellee, having good evidence to support his defence, could aid himself by matter of record; or if he be taken with the mainour (spoils) on him, or if he had broken out of prison: in all other cases he could wage his battle, except where so great and violent presumptions of guilt existed against him, as to admit of no denial of proof to the contrary. This suit differs from an indictment, in being brought, not for the benefit of the public, but that of the party injured, being a private suit and wholly under his control. This trial by appeal, at the time of the case above mentioned, had so far fallen into desuetude as to be remembered only as a piece of obsolete antiquity; the claim of the appellee to wage his battle was in that case allowed, on the ground that the case did not come within any of the exceptions above mentioned, and that there were no presumptions so strong as to admit of no denial. The appellant did not, however, then further prosecute his claim; and in order to prevent the recurrence of such a case, an act of Parliament was directly after passed, abolishing altogether that mode of trial.\footnote{3 Hen. VIII. 1.} \footnote{Geo. III. 46.}

Abolished by Act of Parliament.
TITLE III.


§ 346.

The word persona in the Roman Law has a signification differing from homo, and imports a member of the human species having a civil status. The English language, however, obliges the use of the word person indifferently for both. The status of persons, then, is either natural or civil. Homo, in his natural capacity, differs as to natural rights in respect to birth, sex, and age; for the birth of a man affects not only his natural status, but also that of other persons. The status naturalis hominis is quem naturâ habent homines, and to this birth, after a lapse of seven months at least from his conception, is the first requisite;¹ for it would appear that no child can be perfect that is born within that time.

§ 347.

A knowledge of the Roman divisions of time is indispensable to a clear understanding of many points of their law,² especially those respecting birth and age, which renders a short digression necessary.

The oldest Roman Kalendar was based on a year of ten months, or 304 days.

The year of Numa, which remained in force until Cæsar’s time, consisted of twelve months, or 355 days; every other year, a month termed Mercedonius, was intercalated with alternately twenty-two and twenty-three days, immediately after our 23rd February the anniversary of the Terminalia, the 24th was the anniversary of the Regifugium; thus February in leap year contained only twenty-

¹ P. 1, 5, 12; P. 1, 5, 7; P. 27, 1, 2; § 6; P. 35, 2, 9, in fin.
² The following remarks are based on Savigny’s treatise on this subject: System des Heutigen Römischen Rechts, vol. 2, buch 2, kap. 3, § 177, founded chiefly on Iñeler. The original German of both authors may be referred to by such as require more minute detailed information on the subject than is here given. See also the paper in Smith’s Dictionary of Roman and Greek Antiquities, by Key, p. 176, et sq. (1842).
three days; the odd five were added to the Mercedonius, which thus contained twenty-seven and twenty-eight days on alternate years respectively, an arrangement which gave each year an average of 366 1/4 days; but this being astronomically too much, twenty-four days were omitted in every twenty-four years, thus making the larger average 365 1/4 days. In practice this was most inconvenient, and was rendered more objectionable by the inattention of the pontifices, whose business it was to regulate the Kalendar.

§ 348.

Julius Cæsar, himself a good astronomer, therefore undertook to reduce the year to the astronomical length, which he did A. U. C. 708, B. c. 45. This year, termed the year of confusion, contained 445 days divided into fifteen months, and the new year commenced A. U. C. 709, the year of his death.

Every succeeding year was to contain 365 days, and twenty-four hours were to be intercalated every fourth year, at the period at which a whole month had formerly been so. But here again a slight error of calculation remained in the difference between six hours, and 5h. 48' 48" or 11' 12''.

§ 349.

Gregory XIII., in the sixteenth century, having ordered Aloysius Silius to revise the year, with a view to settling the festival of Easter, an error of quite ten days was discovered. The year was, therefore, fixed at 365d. 5h. 49' 12'', and the ten days were at once omitted, while to obviate the recurrence of the error, three bisextiles were ordered to be left out in every 400 years. This reform of the Kalendar came into force in 1582, and was adopted within the next ten years in the catholic part of Germany, of Switzerland, of the Netherlends, and in Spain, Poland, and Hungary. In 1700-1 the Protestant parts of Germany, Switzerland,

2 Censorinus de die Natali, C. 20; Macrob. Sat. 2. 13; P. 50, 16, 98, § 1, 2.
3 It was supposed that Caesar first intended to fix New Year's Day on that following the shortest day, but delayed it seven days in order that it should coincide with the new moon. Amnum civilum Caesar habitis ad lunam dimensionibus constitutum edicto palam proposito publicavit.—Macrobiius. This could otherwise hardly be said of Caesar's solar month. Plutarch mentions this edict, and says, that on some one telling Cicero that the constellation Lyra would rise next morning, he answered, "Doubtless, in obedience to the edict."
4 Easter varies between 23rd April and 12nd March, and has nothing to do with the Kalendar. The method of calculating Easter by the moon is absurd; the object ought to be to find the actual anniversary of the Crucifixion, which might be as readily done as that of Cesar's or of any other person's death; by the present system, we are pretty sure never to have the right day.
5 There is still an error of 24" per year in the Kalendar, according to the present system, which would require 3600 years to amount to a day.
6 The secular years, 1600, 2000, 2400, were to remain leap years; the three intervening secular years, 1700, 1800, 1900, and 2100, 2200, 2300, etc., which were also leap years, according to the Julian Kalendar were to be omitted.
the Netherlands, and Denmark, adopted it—England in 1752. Sweden in 1753.

Countries adhering to the Greek Church still keep the old style, and are consequently, at present, 1849, about twelve days beforehand with the world.

Religious considerations prevent the Greek Church from revising its Kalendar, which might, however, be accomplished imperceptibly by omitting the leap year for a time.

§ 350.

The day is the period of the revolution of the earth on its axis, as the year is that of its revolution round the sun; but as there is a difference in the duration of the daylight in different countries, midnight has been generally adopted after the Romans for the end and beginning of the civil day. The Eastern nations reckon from the setting of the sun to an apparent meridian, which is open, except exactly on the tropical line, to the objection that no two days are of the same length. The Italians reckon all round the twenty-four hours, thus midnight is twenty-four o'clock.

§ 351.

The Numan and Julian months were twelve, whereof seven contain thirty-one, four thirty days, February, in leap year, twenty-nine, but ordinarily twenty-eight only. The Lunar month contains 29d. 12h. 44' 3", by which Mussulmans reckon.

The Kalendæ fell on the first of every month, the Nonæ on the fifth, and the Ides on the thirteenth, except in October, March, May, and July (Quinctilis) when the Nones fell on the seventh, and the Ides on the fifteenth, varying in February according as it was or was not leap year. This may be remembered by the Greek word "Ourai", the initial letter of those months.

The calculation was made forwards to the next following period

---1 The change of style, as it was called in England, caused riots in London. The mob, under the impression that they had been robbed by the astronomers and the Government of eleven days' life, or actuated by some confused idea that the change would affect the wages of labour in the course of the year, assembled and destroyed the contents of the mathematical instrument makers' shops, crying out "Give us back our eleven days," which were, however, not returned—a fair specimen of plebeian intelligence, for had these demanders of back time been Roman citizens, they would have voted for this same Caesar for giving them a year of fifteen months.

In sailing round the world eastward, on re-arriving at the point of departure, a day will have been gained. This happened to a' British man-of-war: the captain mistook his crew on deck the day before arrival, and declared—"To-day is Sunday, and to-morrow is Sunday, and were I to explain it to you for a week, you would not understand me." The confidence in the captain's knowledge received a shock, but the crew on being informed on arriving in port the next day that it was Sunday, the infallibility of captains in the navy in general was fully restored, and the heresy of ever having doubted it, admitted.

---2 These may be remembered by one of the few useful pieces of versification which exist:—

Thirty days hath September,
April, June, and November;
February alone hath twenty-eight;
And all the rest have thirty-one,
Except in leap year, and that's the time
When February's days are twenty-nine.
of Kalends, Nones, or Ides; thus die X ante Kalendas Januarias, which was synonymous with ante diem X Kal. Jan. indicated the 23rd December, nor did the position of the preposition make any difference, both days mentioned were counted in, consequently there were eight clear days only. Qui ante Kalendas proximas stipulatur, semel est ei qui Kalendis stipulatur. In ante diem IV. was equivalent to in diem, and ex ante diem to ex die. A passage in the Roman Law warns us against error in this respect. Annicululus amittitur qui extremit die anni moritur et consuetudo loquendi id ita esse declarat, ante diem X Kalendarum, post diem X Kalendarum. Neque utro enim sermone undecim dies significatur.

§ 352.

In the Middle Ages, the present mode of reckoning began to be adopted, but sometimes the numeration was backwards and forwards from the middle of the month, ingrediente and exerente mese. The papal chancery alone has retained the old Roman mode, according to Kalends, Nones, and Ides. The division into hours is founded on no astronomical observation.

§ 353.

The Roman week was of eight, the Jewish of seven days, which latter the Christians and Mohammedans have adopted. The last day the Romans termed a Nundina or ninth day, according to the above mode of reckoning. Both are founded on lunar observation from full to full; but the fourth of these divisions falls between seven and eight days; one was, therefore, as scientific, or, as little so, as the other, but may perhaps be preferable, as it divides with a less remainder into 365, giving 52-1, whereas the eight day division gives 45-5.

§ 354.

A perfect separation from the body of the mother, and subsequent signs of life, are necessary to constitute birth: hence a child still-born is not considered to have been born at all: but it is

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1 Sav. l. c.
2 P. 45, 13.
3 P. 50, 16, 132, pr.
4 Sed. Sav. 89a, 16 H. R. R. vol. ii. cap. 3, § 177, p. 297, et seq. for a complete examination of this subject.

The following are some of the passages which refer to time in the Corpus Juris, and in some other authors, P. 50, 16, 98, § 1, 2; P. 5, 12, 8 (Paulus); Censorinus, C. 23; Macrobius. Sal. 2, 3; Gellius, 2, 23; Plin. H. N. 2, 79; Varro de re Rust. 1, 25, P. 45, 1, 131; P. 50, 16, 132, pr.; Id. 237, § 1; Lipsius Excurs. Tac. An. xvi.; Hist. Pat. Mon. Chartur. Tom. 1, Aug. Taurin. 1836, Num. 2, 6, 7, 9, 13;

Fumagalli Cod. Dep. Sant. Ambros. Milano, 1805, 4, Num. 1, 10, 12, 15, 16, 18, 21, 23, 29; P. 9, 21, 51, § 2; P. 40, 7, 4, § 5; P. 48, 5, 11, § 6; Id. 29, § 3; P. 48, 16, 1, § 10; P. 21, 1, 28; Id. 37, § 22; Id. 38; Paulus, 4, 9, § 5; C. 6, 30, 22, § 2; Nov. 115, 2, 2; C. 7, 63, 2 & 5, pr.; P. 38, 16, 3, § 12; P. 1, 5, 12; P. 50, 17, 101; P. 17, 2, 23, § 10; C. 7, 54, 2, 3; P. 21, 1, 19, § 6; Id. 38, pr.; P. 38, 16, 5, § 11; 1. And. Gl. in C. 5, 6; Bart. Gl. in P. 50, 16, 98; L. Gothof. in P. 50, 17, 101; C. Th. 12, 1, 2; Code de Commerce, Art. 132.

§ 352. Mode of dating deeds in the Middle Ages.

The Roman and Jewish week.

Birth, its requirements.

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7 P. 50, 16, 129.
indifferent by what means this separation is effected; consequently, a child cut out of the mother's womb after her death, if it live but for an instant, is held to have been born for all legal purposes, although, as far as regards the mother, she cannot be said to have brought it forth. A child that has died before being thoroughly separated from the mother, has never acquired legal rights, and cannot be looked upon as born any more than an abortion, for in neither case is a will held invalidated.

The child must be born alive, but it is not required, as some have supposed, that it cry, a conclusive proof of life alone being indispensable; nevertheless, it is not necessary that it continue to exist for any period. Until brought forth, the child is considered as a part of the mother; nor can it be called human, except in so far as that the mother is liable to punishment for procuring abortion as well as her accomplices, and inasmuch as the torture or execution of a pregnant woman is deferred until she shall have brought forth. Thus far, then, the law will consider a fetus in utero as homo. The reason of which may be, that these provisions belong to the province of criminal jurisprudence, which takes a more comprehensive view, and is more jealous of acts which may affect human life, than the more artificial rules of Civil Law: hence the rule, that those who are still in the womb are, as far as concerns any advantage which may accrue to them, considered as already born.

The English law does not consider the procuring abortion wilful murder, for a fetus in utero is not a human being until born; but if it be born alive, yet die from injuries received in the womb, it is wilful murder in the person who caused them—a provision which, in this respect, agrees with that of the Civil Law: and here the living are preferred to those in posse, for it is possible the fetus would not have been born alive in any case, but its being born and dying sets that doubt aside.

A child, otherwise duly born, in order to be entitled to the natural rights of a homo, must be neither a monstrum nor a prodigium; that is, destitute of human shape.

The question now arises as to what may, and what may not be considered a monster? To the definition homo est, cecumunque mens ratione prædita in corpore humano contingit, the objection may be raised, that it is impossible to ascertain whether a new-born child have mens ratione prædita, or not? hence we must observe the external formation of the head, and if it be a partus acephalus—that is to say, if the skull or brain be wanting, we must pronounce it not to be human: the same, if it be born with the head of any

Footnotes:
1 P. 5, 12, 16, PR. P. 50, 16, 141; P. 11, 22, 38.
2 P. 50, 16, 132, § 12.
3 C. 6, 29, 8.
4 C. 6, 29, 3.
5 P. 25, 4, 11, § 1.
6 P. 35, 7, 9, § 1.
7 P. 47, 11, 4; P. 48, 8, 8; P. 48, 19, 9.
8 P. 48, 19, 38, § 5.
9 P. 1, 5, 18; P. 48, 19, 3.
10 P. 1, 5, 7.
11 3 Inst. 50.
12 P. 1, 5, 14.
animal; for Paulus says, generally, *Partus autem qui membrorum humanorum officia complacent, aliquis videtur effectus, et ideo inter liberos consueme habetur.* Upon the whole, then, it appears that if the *partus* have the general appearance of the human species, although it be deformed, it must be accounted *homo,* and is endowed with natural-born rights.

§ 355.

Sex is another ingredient necessary to constitute a *homo,* for the Sex. parties may be either male, female, or partaking of both sexes. With respect to males, they are either perfect or eunuchs, for which the generate term is *Spadones;* in its particular sense, however, it signifies natural impotence, and as this may be temporary; such are capable of making a will,* contracting marriage,* committing on account of marriage,* instituting an heir* or adopting,* which *Thlasii,* castrates, and *Thibii,* or such as have lost their testicles by accident, are not, although they may make a will. The Corneilian* law was made applicable to such as practised emasculation.

Females are born in many respects under greater disabilities than males,* for they are not capable of *munera publica,* except the guardianship of their children and grandchildren; neither can they be bound for another, or be witnesses to wills. They have no paternal power, and consequently cannot adopt; nevertheless, many of these natural incapacities arising from sex may be looked upon as advantages. Among positive advantages must be reckoned the rights acquired by having given birth to a number of children, whereby a free woman who has borne three, and a freed woman four,* benefits by the Sctm. Tertullianum respecting intestate succession, and which permits to such an heritable right in the property of their children. Lastly, a Latin who had borne three children acquires citizenship,* exemption from tutelage,* under which women of her family are always placed. Among the penalties evaded, may be ranked the exception in favour of such women from the provisions of the *lex Julia,* whereby they are enabled to inherit by testament.

Hermaphrodites, or those partaking of both sexes, were adjudged to belong to that which was the most prevalent,* where a doubt existed, they were assigned to the masculine gender.

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1 P. 2, 5, 14.
2 P. 50, 16, 38.
3 Dion. Gothofred ad P. 50, 16, 128; Deut. 23.
4 I. 3, 11, § 9; P. 40, 2, 14; P. 21, 2, 6, 7; P. 25, 4, 6, 1.
5 C. 6, 22, 5.
6 P. 235, 3, 39.
7 P. 40, 2, 14.
8 P. 28, 3, 6.
9 P. 1, 7, 2, in fin. and 40, in fin.
10 Arist. de Hist. Animal. 3, Θάντες Θηφίς κερου; Columell. 6, 25; Paulus. 6, 7.
11 Paul. 3, Sent. 2.
12 P. 48, 8, 4, 2.
13 I. 3, 3, § 3, 4; Paulus. 4, 9, § 1.
14 And this is by special exception and under special restrictions, Nov. 96, 1.
15 I. 3, 3, § 3, 4; Paulus. 4, 9, § 1.
16 Ulp. 3, § 1, Sctm.
17 Gaius, 1, § 194-5; Ulp. 29, § 3.
18 P. 1, 5, 10.
§ 356.

The old Roman religious system assumed the natural life of man to be 120 years, reduced into ninety by Fate, and divided into three equal periods of thirty years, whereof the first subdivision of fifteen years represented boyhood. The practical view taken by Servius Tullius added two years to this for military service; hence, probably, the variations we find in the period of puberty, which varied between fourteen and eighteen, that is to say, in the fourteenth or eighteenth year. A man might be potent in the fourteenth year, but not strong enough to bear arms.

§ 357.

The mystic influence attributed to the number seven, combined with the fact of its being about half fifteen, induced this age to be fixed for infantia qui fari non possunt. On this expression much learned discussion has arisen; but as we have passages which determine it to have been the age of seven, it may be so admitted: licentia igitur erit, utrum malint ipsis (tutores) suscipere judicium, an pupillum exhibere, ut ipsis auctoribus judicium suscipiat: ita tamen, ut pro his qui fari non possunt, vel absint, ipsis tutores judicium suscipiant: pro his autem qui supra septimum annum ætatis sunt, et praetio fuerint, auctoritatem præsent.

Infantis filii ætatem nostrâ auctoritate præscribimus, ut sive maturius, sive tardius, filius fandi sumat auspicia, intra septem annos ejus pater... implorat... bacc vero ætate finitâ, filius editi beneficium petat rel.

Si infanti, id est, minori septem annis... hæreditas sit derelicta.

Si autem septem annos ætatis pupillus excepit rel.

In sponsalibus contrahendis ætas contrahentium definita non est... si modo id fieri ab utrâque personâ intelligatur, id est, si non sint minores quam septem annis.

Aut cur hoc usque ad septem annos lucrum fastidiamus?... quantum in infantâ presumptum est temporis adolescentiae adquiritur.

Eodem anno, id est septimo, plene absolutur integritas loquenti.

Prima ætas infantia est... quæ porrigitur in septem annis.

Hence the seven years must be complete; this may be taken to be the half of fifteen, for the eighth year was entered upon.

The expression fari posse does not imply either capability of uttering mere articulate sounds, neither does it mean that the child is capable of understanding what it says, but, between the two, that it comprehends that it is performing a solemn act. This may be elucidated by the English practice, which allows a child to be

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1 See the acute examination of this question by De Savigny System des Heudigen Römischen Rechts, vol. iii. book 2, cap. 3, § 106, et sq.
2 Serv. ad Æn. 4, 653.
3 Gell. 10, 28; Liv. 22, 57.
4 P. 26, 7, 1, § 2.
5 C. Th. 8, 18, 8.
6 C. 6, 30, 18, pr.
7 C. Th. l. c. § 4.
8 P. 23, 1, 14.
9 Quintil. 1, 1.
10 Macrob. in Som. Scip. 1, 6.
11 Iasid. Orig. 11, 2.
sworn as soon as it can comprehend the nature of an oath. The object of this was to obviate some legal difficulties in the old Roman system; there were certain acts that could only be done by the person himself: thus the tutor could give his auctoritas to the infant, who pronounced particular solemn formulæ necessary to his interest, the tutor being responsible for the consequences, which the child could not understand.

The next period of life is the infancy proxima ætis. Some halve the period between seven and puberty, terming that on the younger side infancy proxima, to ten and a half (nine and a half in females); and the period between that and fifteen, puberty proxima: such is the view of Accursius. Others assume the Sabinian doctrine, that a child near fifteen may be backward, and so be said to be infancy proximus, or be very forward, and be, soon after seven, puberty proximus. Infans et qui infantis proximus est... nullum intellectum habet. 2

Si proximus puberty sit et ob id intelligat se delinquere. 3

Doli pupillæ, qui prope puberty sunt capaces esse. 4

Savigny 5 suggests that a year should be assumed before puberty and after infancy as the meaning of proximus, in accordance with J. Gothofried.

It does not appear to have occurred to any one to suggest that the infancy proximus may mean under, but near seven; and puberty proximus, under, but near puberty.

§ 358.

An impubes above infancy can do all acts with the auctoritas of his tutor, but without his authority those only which have beneficial results: meliore quidem suam conditionem licere eis facere, etiam si tutoris auctoritate, deteriorem vero non aliter quam tutore auctore. 6

Hence he can stipulate, but not promise. 7 The bargain in a mutual contract is not binding on him, but is so on the other party.

These questions do not arise in the case of a son under power.

With respect to delicts: Quid enim si impetraverit a procuratore etioris ut absolveretur... vel alia similia admissis, quæ non magnum machinationem exigunt. 8

The English rule, that malice remedies a deficiency as to age, applies here; but it in some measure depends upon the nature of the delict; the puberty proximus may know it is wrong to steal money, but he may not know it is wrong to write another man’s name, 9 and he may unwittingly be used as the tool of another. 10

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1 In L. Pupillum (111) de R. L.
2 I. 3, 19, § 10.
3 I. 4, 1 § 18.
4 P. 44, 45, § 26.
6 I. 1, 21, pr.; P. 2, 14, 28, pr.
7 I. 3, 21, pr.; I. 3, 19, § 9; Gainb, 3, § 107; P. 26, 8, 9, pr.; P. 29, 2, 8, pr.; P. 12, 6, 41; C. 8, 39, 1.
9 P. 48, 22, pr.; C. 9 24, i; P. 29, 5, 14.
10 I. 4, 1, § 20; P. 47, 2, 23; P. 9, 2, 5, § 2; P. 50, 17, 111; P. 47, 10, 8, § 1; P. 47, 8, 2; § 1; P. 47, 22, 3; § 1; P. 44, 4, 4, § 26; P. 16, 3, 15; P. 44, 7, 40; P. 14, 43, § 2.
He can release a contract as debtor, not as creditor. He can conduct no legal suit without his tutor’s auctoritas. He can acquire, but not alienate, without his tutor’s consent. He may contract espousals, because they can be repudiated at any time; the only danger being, that he incur the penalty of infamy by contracting second betrothals.

With respect to the assumption of an heritage before the Sctm. Orphitanum, there was little inconvenience, as the contingency seldom happened; but when it did, neither a slave nor a tutor could accept for him. Paulus suggested it should be done in two ways, either cernendo or nuda voluntate; but this was impossible for those who fari non potuerunt; but the second mode, gerendo, was possible, the tutor authorizing the acts of the impubes, sive enim haeres institutus esset, non dubio pro hærede, tutore autore gerere posses videtur, or by his father doing the like.

To acquire possession, the impubes must express a will, the tutor give authority; but the tutor could not give the authority to an infant. To obviate this difficulty, power was given to tutors to acquire for pupils under such circumstances; but, until this was done, there was no remedy to prevent a loss accruing to the impubes or infants.

§ 359.

The middle-age jurists supposed that pubertas had a certain duration, which in males was 4, and in females 2 years; thus the age of a male until 18, and of a female up to 14, was termed by them pubertas minus plena; but after those ages respectively, plena. This impuberty they again divided; both sexes up to the age of 7 being termed infantes, upon which there is no dispute, and after that, infantiae proximi or pubertati proximi. Accursius, who has the majority of commentators on his side, halves the difference between 7 and 12 or 14; thus, up to 10½, a male, and up to 9½, a female, would be respectively infantiae, and after those ages, pubertati proximi. In like manner, males until 19½, and females until 18½, might be said to be minores pubertati proximi, and after that age, minores majoritati proximi; but these terms do not occur.

Höpfner doubts this principle, and is of opinion that the pubertati proxima ætas must always mean a minor past puberty, but nearer to it than to his majority, upon the ground that a person

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1 P. 2, 14, 28, pr. ; I. 2, 8, § 2 ; P. 26, 8, 9, § 3 ; P. 48, 3, 14, § 8, &c. l. 15.
2 P. 26, 7, 3, § 2, 4.
3 I. 2, 8, § 2 ; P. 26, 8, 9, 52 ; P. 41, 1, 11 ; P. 40, 2, 24 ; P. 40, 9, 39, § 1, 2, 3, 4 ; P. 26, 3, 9, § 1.
4 P. 23, 1, 14.
5 P. 3, 2, 13, § 3, 4.
6 l. 1, 21, § 1 ; P. 29, 2, 9, 8, pr. ; P. 26, 8, 9, § 3, 4 ; C. 6, 36, 1, 65, § 3 ; vide et P. 37, 1, 7, § 1 ; P. id. 8, 11.
7 C. 6, 36, 1, 11 ; C. 6, 36, 1, 37, § 1.
8 C. Th. 8, 10, 8 ; C. 6, 36, 4, 18, pr.
9 P. 41, 2, 1, § 5, § 11 ; id. 32, § 2.
10 P. 41, 2, 1, § 20 ; P. 41, 1, 33, § 1.
11 P. 13, 7, 11, § 6.
12 So termed from the hair growing at those ages on the os pubis.
13 Ad § 10, I. de Inutil. Sup. et ad l. 1, D. de Novat.
THE NATURAL STATUS OF PERSONS.

pubertati proximus can be guilty of a dolum, injuria, or furtum, and he thinks this cannot be attributed to a child of 9½ or 10½; but this hardly appears a sufficient ground. In England, at least children under those ages have been executed for murder, and English are less precocious than Eastern children. After all, the controversy is of little importance, as the expression occurs only incidentally in Justinian's works,¹ and affects the validity neither of contracts nor of wills.²

§ 360.

Before Justinian set the question at rest by an ordinance,³ there was a great controversy, between the adverse sects of the Pro-

¹ P. 4, 3, 133 § 1; P. 50, 17, 111; P. 4, 3, 26; L. 4, 1, § 18; L. 3, 20, § 9.
² The following is a table of these divisions:—

<table>
<thead>
<tr>
<th>Males</th>
<th>From birth to 25 complete,</th>
<th>minor sensu lato.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>... to 14 complete,</td>
<td>impubes.</td>
</tr>
<tr>
<td></td>
<td>... to 7 complete,</td>
<td>infans.</td>
</tr>
<tr>
<td></td>
<td>14 to 25 complete,</td>
<td>pubes, minor sensu stricto, adultus.</td>
</tr>
<tr>
<td></td>
<td>14 to 18 complete,</td>
<td>pubes minus plene.</td>
</tr>
<tr>
<td></td>
<td>18 to 25 complete,</td>
<td>pubes plene.</td>
</tr>
<tr>
<td></td>
<td>25 et deinde,</td>
<td>major.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Females</th>
<th>From birth to 25 complete,</th>
<th>minor sensu lato.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>... to 12 complete,</td>
<td>impubes.</td>
</tr>
<tr>
<td></td>
<td>... to 7 complete,</td>
<td>infans.</td>
</tr>
<tr>
<td></td>
<td>12 to 25 complete,</td>
<td>pubes, minor sensu stricto, adulta.</td>
</tr>
<tr>
<td></td>
<td>12 to 14 complete,</td>
<td>pubes minus plene.</td>
</tr>
<tr>
<td></td>
<td>14 to 25 complete,</td>
<td>pubes plene.</td>
</tr>
<tr>
<td></td>
<td>25 et deinde,</td>
<td>major.</td>
</tr>
</tbody>
</table>

The Civilians of the middle age have divided the age of man as follows:—

<table>
<thead>
<tr>
<th>Minores</th>
<th>from birth to 7 years of age.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Infancia</td>
<td>Infantis proxima (males)</td>
</tr>
<tr>
<td>Infantis proxima (females)</td>
<td>7 to 10½</td>
</tr>
<tr>
<td>Pueritia (males)</td>
<td>7 to 9½</td>
</tr>
<tr>
<td>Pueritia (females)</td>
<td>7 to 12</td>
</tr>
<tr>
<td>Pubertati proxima (males)</td>
<td>10½ to 14</td>
</tr>
<tr>
<td>Pubertas (males)</td>
<td>14 to 25</td>
</tr>
<tr>
<td>Pubertas proxima (females)</td>
<td>9½ to 12</td>
</tr>
<tr>
<td>Pubertas plenissima (females)</td>
<td>12 to 25</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Majores</th>
<th>from 25 to 50</th>
</tr>
</thead>
<tbody>
<tr>
<td>Juventus</td>
<td>50 to 70</td>
</tr>
<tr>
<td>Virilis</td>
<td>70 et deinde.</td>
</tr>
</tbody>
</table>

The Canonists make a sextuple division:—

<table>
<thead>
<tr>
<th>Infancia</th>
<th>Pueritia</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adulta etas sive adolescentia</td>
<td>7 to 14</td>
</tr>
<tr>
<td>Juventus</td>
<td>14 to 28</td>
</tr>
<tr>
<td>Aetas senilis sive gravitas</td>
<td>28 to 50</td>
</tr>
<tr>
<td>Senectus</td>
<td>50 to 70</td>
</tr>
</tbody>
</table>

Servius Tullius adopted a triple division:—

¹ C. 5, 60, ult.
culeians and Cassians, as to whether puberty was to be estimated according to a fixed age, or according to the precocity of the individual; and Priscus (it is not known whether Veratius Priscus or Javolinus Priscus) held that both were to be considered. The view taken by Cassian, however, appears to be more reasonable than that of the Proculeians, in whose favour Justinian ultimately decided, adopting the age as the test; for in so widely extended an empire as that of Rome, comprising various races and temperatures, it is notorious, that a woman may be capable of infertation in one part of it many years before she will be so in another. Justinian probably wished to leave as little to the risk of proof as possible. The exceptions are in cases of adoption, where the age of 18 years is fixed as that of puberty, and in cases where alimony is allowed until puberty, which is until 18 in males, and 14 in females.

§ 361.

Pubertas.

Puberty embraced three great privileges:—
The present right over property; the future right by will; The right to contract marriage. The Sabinians then required practical puberty.

Proculeians admitted a fixed age; and Javolinus (Priscus) required such age to include the former essential. The termination of the 14th year was fixed for puberty (15). Until this age, boys wore the praetexta, a habit with a purple hem, but assumed the toga virilis without it at the Liberalia, on the 17th March. Augustus assumed the toga virilis at 16; Caligula at 19, 20, 21, according to varying readings; Nero at 14; Marcus Aurelius at 15. This discrepancy may in a measure be accounted for, except in the case of Caligula, by the birthday falling before or after the Liberalia. The difficulty does not appear worth the discussion which it has caused, for we do not know that it was imperative on any youth to assume it as soon as possible.

As long as this dress was worn, it was in itself an evidence of puberty to all who might have dealings with the party; and as the investiture was a solemn ceremony, somewhat resembling confirmation in Germany, accompanied by a distinctive dress, fraud would hardly take place; besides, the exceptio doli would have come to the assistance of the person deceived, on non-puberty being pleaded. This was more difficult when custom substituted the

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1 Ulp. Fr. 11, § 28.
2 In Egypt, women at 9 are capable of child-bearing; but in the northern latitudes of the same continent this is scarcely ever the case at 12.
3 J. 1, 22, pr.; C. 5, 60, 3.
4 Gaius, 1, § 196; Ulp. 11, § 28.
5 Vid. § 120, h. op.
7 Suet. Aug. 8.
8 Id. Calig. 10.
9 Born on 16th Dec. 790, A. u. C.; assumed the toga virilis in 804.
10 Capitol. Marcus, 4.
11 P. 44, 4, 2, § 15.
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penula, or travelling dress, for the toga; hence the discussion of later times between the Equity and Common lawyers of Rome.

Justinian repudiated personal examination: *pubertatem vteres ex habitu corporis in masculis atimari volebanti*. The absurdity, too, was manifest, since no examination could take place after death, in the case of a will disputed on these grounds; for before 14 complete they could make no will.  

Women always wore the pretexta until marriage, and, as they were not free agents, the question hardly arose; their age of puberty was 12.

For marriage, puberty was essential. Special provisions, varying from this rule for particular acts, do not affect the general principle: 17 was required to postulate; 18 for the exercise of the old Roman judicial office. If a free person of 20 fraudulently sold himself as a slave, *participandi pretii causâ*, he remained a slave for punishment. Justinian finally settled puberty at 17, the age of military service.

Trajan allowed alimony to several boys and girls until puberty, 14 and 12; but this, too, was a special dispensation.  

§ 362.

Spadones are the last consideration, because they never came to natural puberty; what principle, then, must be laid down respecting such persons? Here the Sabinians are again at fault. Paulus says, *Spadones eo tempore testamentum facere possunt; quo plerique pubescunt, id est, anno decimo octavo.* Plerique here may mean some. Now, this extra term might have been given to *spadones*, to give them the chance of the longest delay of probable puberty, and it is not improbable that many did not attain practical puberty before that time.

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1 Tac. Dial. de Causis Corruptae Eloquentiae, 39.  
2 P. 28, 1, 5; P. 28, 6, 2 & 15; C. 6, 23, 4; Gaius, 2, § 113; Paulus, 3, 4 A, § 1.  
3 P. 23, 1, 91; P. 23, 2, 41; P. 24, 1, 32, § 27; P. 42, 5, 17; § 1; P. 27, 6, 111, § 3, 4; I. 1, 10, pr.  
4 Quint. Decr. 279.  
5 P. 42, 1, 57.  
6 Ulp. 11, § 15; Gaius, 1, § 38; I. 1, 6, § 7.  
7 P. 14, 1, 14, § 1; vid. et age for adoption, Gaius, 1, § 106; s & vide P. 3, 75, 49, § 1; I. 1, 11, § 4.  
8 3, 4 A, § 2.  
9 Tac. H. 4, 84; P. 2, 14, 25, § 2 & id. 26; P. 24, 1, 32, § 10.  
10 Cuj. m. h. 1, D. de Men. (Opp. 1, p. 988).
Constantine\textsuperscript{1} wrote \textit{Eunuchis licet facere testamentum, componere postremas exemplo omnium voluntates}. Eunuchs could clearly never \textit{pubescere}, therefore this constitution accords with the other, they required no term of probation, \textit{quis generare potest, sed in quis pubescere non possunt, quales sunt Spadones eam ætatem esse spectandam cujus ætatis (plerique, some; that is, occasionally), puberes fiunt;}\textsuperscript{2} that is, they were to have the longest usual term allowed for nature to do its best.

\section*{§ 363.}

The majority of 25 was introduced to obviate inconveniences which resulted from so early an administration of property, and is not founded on any natural occurrence. It was established by the \textit{Lex Platoria},\textsuperscript{3} and obtained the name of \textit{legitima ætas},\textsuperscript{4} in contradistinction to \textit{naturalis ætates}.

The law was only indirectly applied to minors. The praetorian edict gave more general protection against fraud, by decreeing restitution generally in respect to all disadvantageous acts or omissions of \textit{minores}.

Lastly came the constitution of Marcus Aurelius, who protected the property of minors by placing them under curators.

The Canon Law has adopted this.\textsuperscript{5}

\section*{§ 364.}

From the foregoing we may perceive that, from the time of Servius Tullius, the divisions became more and more subtle and numerous; that natural full age was deferred eight years for civil purposes; and that \textit{senectus} originally implied middle age, and not exclusively old age, in which sense it was used by the canonists and later civilians.

From a mature consideration of the above, probably the reader will agree in the result that \textit{senectus} implied the age between 46 and 60,\textsuperscript{6} for a female may be considered old when no longer capable of child-bearing; and it is notorious that, although the power of generation never utterly ceases by course of nature in a male, yet that the children of a man of 60 are less vigorous than those of his youth.

Besides the divisions which were the most important,\textsuperscript{7} that is, the \textit{pubertas}, up to which time a \textit{tutor}—and the \textit{minoritas}, during which a \textit{curator}—was assigned, there were others of less importance after 25. The general divisions were into \textit{juvenes} and \textit{senes}, but we have no direct evidence as to when the transition took place.

\begin{enumerate}
\item C. 6, 22, 4.
\item Gaius, 1, § 196.
\item C. Th. 8, 12, 2; Placet. Pseudolus, 1, 3, 69, calls it \textit{lex quinquagesimaria}.
\item C. Th. 2, 17, 2, 1, § 3; P. 49, 1, 28.
\item X. 4, 26, 10 11, 17; X. 4, 2, 10, 8, 9.
\item The assumption of 70 as the period of \textit{senectus} arises from a misunderstanding of the 10th verse of the 90th Psalm, which fixes the term of human life at from 70 to 80, not the commencement of the \textit{senilis ætates}, but the end of it.
\item P. 34, 1, 14, § 1.
\end{enumerate}
THE NATURAL STATUS OF PERSONS.

To judge, however, from the military ages, we may assume juventus to have extended from 17 to 45, from which age until 60 the doubt exists, for at that age senectus had certainly begun. Shakespere counts seven ages, the old German proverb ten, the English law three, as indeed do most foreign nations—that is, the non age, the full age, and old age, when men are excused from public burdens on account of it.

§ 365.

By the law of England the ages of male and female are different for different purposes. A male at 12 years old may take the oath of allegiance; at 14 is at years of discretion, and therefore may consent or disagree to marriage—may choose his guardian, and, if his discretion be actually proved, may make a will as regards his personal estate; at 17 may be an executor; and at 21 is at his own disposal, and may alienate his lands, goods, and chattels. A female also at 7 years of age may be betrothed; at 9 is entitled to dower; at 12 is at years of maturity, which accords with the rule of the Civil Law, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at 14 is at years of legal discretion, and may choose a guardian; at 17 may be executrix; and at 21 may dispose of herself and her lands: so that full age in male or female is 21 years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law.

§ 366.

The law of England, in cases of common misdemeanours, treats infants under age with leniency, especially in cases of omission—as, for instance, where a penalty has been incurred for not repairing a bridge, highway, or the like; for, though indictable, these are, in fact, civil offences, and the minor, not having charge of his own property, is not, strictly speaking, able to satisfy the law of his own motion. The case is, however, different in offences really criminal: thus an infant above 14 is equally liable to suffer for a breach of the peace or a riot, as a person of full age.

In capital crimes, degrees are distinguished with greater nicety. Under 7 an infant cannot be guilty of a felony, but he may be so at 8, if found to be doli capax; in like manner, he may be held to

1 Vid. § 25, h. op. 2 P. 1, 25, § 13. 3 In Shakespere's time the vulgar division of the ages of man appears to have been founded on the mystic number 7. There is a popular division in the lowlands of Germany, in which 100 years appears as a maximum. Tyn Jaar een Kind, Twintig Jaar een Jungskjen, Dederig Jaar een Mann, Veertig Jaar stillgestaen Vrybg Jaar welgedaan, Sestig Jaar gaet Alter an. Seventig Jaar een Grees, Achtzig Jaar de Knop snamees, Nagentig Jaar Kinderspot, Hunderd Jaar Gnad be Gott.
be *doli incapax* even at 14. Thus the law of England adheres to the Cassian philosophy, and holds that *malitia supplet atatem*.

The criminal law, however, considers a female under 10 incapable of giving consent to coition, and therefore treats offences against the person of a child of that age as felonies; and even if committed against a female above 10, though under 12, an imperfect consent is inferred, and the offence treated as a misdemeanour.

Males are excused from serving on juries, and many like public burdens, after 60; hence it may be said that the English law recognises three grand divisions of age: —Infancy up to 21, manhood up to 60, and old age after that period. The age of 60 is also recognised in the Roman law, and was probably the age of *senectus*; for males of 60 marrying females of 50 were deprived of the advantages of the Lex Julia and Papia Poppaea.

In Germany the Roman Law is generally followed, and 25 is the age fixed for majority; in France it is 21; in Holland, 25; in Spain and in Italy, 25; in Denmark, 25; and in Russia, 21, but at 18 a party may receive revenue or estates. The South-American States follow in this respect the law of the original settlers.

§ 367.

Death puts an end to all natural rights, and, as it may happen at any time, the only question that can arise is one of proof, respecting which the Roman Law has no provisions. The necessity of proof may arise when a man has not been heard of for a space of time, of greater or less duration. The following rules have been generally admitted by the civilians for deciding controversies on this subject.

When the contrary is not known, the natural term of human life is presumed to extend to seventy years, the origin of which may, probably, be traced to the passage in the Psalms, thus, seventy years reckoned from the date of the birth is presumptive of death. If, however, the missing person was already seventy years old when last heard of, five years are reckoned in addition, after the expiry of which he is presumed to be dead. But then a question arises, namely, if the presumptive death is to be held to have taken place on the completion of the seventy years, or at the expiry of the term of five years, or at the moment the missing person was last heard of. The better opinion appears to be that, in the one case, that of the seventy-fifth year, and in the other that of the seventieth year; seventy years are to be reckoned from the date of birth, and if no proof exist of the individual having lived over seventy, that age is to be assumed.

1 *9 Geo. IV. 31, § 17.*
2 *Walter Ges. des R. R. § 605; Ulp. 16, 1; Gaius, 2, 3, 286; Tertull. Apol. 4.*
3 *Psal. Dav. 90, 10.*
4 *Glück. b. 7, § 562; b. 33, § 1397.*
as the actual duration of his life, consequently that he died at
seventy.  

A question arises as to the priority of the death of one of two
persons supposed to have perished in a common accident. In this
contingency, the following rules have been adopted; although,
generally, both are supposed to have died at the same moment,  
yet respect is had to age: thus, in the case of father and child dying a
violent death by the same accident, the father, on the presumption
of his greater natural endurance, is presumed to have outlived the
child, if the latter were under age, but the reverse if of full age,  
on the presumption of the greater vitality in a young but mature
person; but, in the case of the common death of a freedman and
his son, the son must be proved to have survived the father, lest
the patron’s rights of succession should be prejudiced. Similar is
a testamentary fidei comissum, under the condition si sine liberis
decesserit to the heir, whose son, if both perish by shipwreck, is in
all cases held not to have outlived him, which involves the payment
of the trust; no children having survived him.  

§ 368.

In respect of the civil status of persons, they are either free,
freed, or bond, and the first of these classes, the freemen, were
also of two descriptions. In order to form a just conception of
them, it will be necessary to glance back at their historical origin,
and the changes affecting them, which were gradually introduced
into the Roman state. At the commencement, it may be assumed
that the Patricians alone possessed the full rights of citizens.
Walter  

informs the original policy of the metropolis, from the
manner in which the Romans settled colonies in later times. On
the conquest of a country, the landed property was confiscated to
the state, and one thousand families, men capable of bearing arms,
transplanted thither to form a nucleus; these became Patricians, 
with votes in the assembly, whence the king, senate, and magis-
trates were chosen. The natives remained as subjects under the
protection of the king, but without franchise, or the right of attain-
ing to honours, nay, even without that of intermarriage with the
upper class; and this is the origin of the plebeians, who came
under the more immediate protection of this superior grade, and
formed the class of clients. This is what was originally meant by
the liberty, which was the peculiar attribute of a citizen optimo jure,
one possessing the full franchise.

These Patrician families were called gentes, and perpetuated a
family name, domestic sacred rights, and places of burial. Each

1 Sav. Sys. des R. R. § 63, for the con-
troversy.

2 P. 34, 5, 17, 18, 19, pr.; P. 36, 1,
34; P. 34, 1, 32, § 14; P. 39, 6, 26.
3 P. 34, 5, 10, § 3, 4; in war which im-
plies majesty; P. 34, 5, 23, 24; P. 33,
4, 26.

4 P. 34, 5, 10, § 2.

5 P. 36, 2, 17, § 7.

6 Cic. des R. R. § 12.

7 Plut. Rom. 9. 8 Festus vi. Patricios.

9 Dion. 2, 8. 10 Dion. 2, 21, 65.

11 Festus vi. Cincia, Cic. de Leg. 2, 22.

Suet. Nero, 57.
gens had, moreover, family rules and customs peculiar to itself, the members of it possessing the right of punishing or expelling unworthy members from their community.

This, then, is the origin of the domestic tribunals among the Romans, which possessed a complete and acknowledged power of self-government, and thus the state, considered as a whole, was of a federate nature. The resemblance of this to the later feudal system must strike even the casual reader. Considered, then, as a federate state, the property was divided into three parts; one dedicated to the maintenance of the king or chief, and the national religion; another for the general purposes of the gens or clan; and the third was divided by lot among ten curiae which formed the community. Each lot contained two hundred acres of cultivable land, for the purposes of raising corn and vegetables, and was termed a century, because it was destined for the use of one hundred families. The cattle was pastured on the common land, for which a small sum was paid to the general fund; and this, Festus tells us, was a regulation of Romulus. If the idea of the division into hundreds of the Saxon race in England was not borrowed from this, it must, at least, be looked upon as a curious coincidence; it is, however, strongly presumable, that it was borrowed from the later Roman colonies, where the system had been perpetuated as facilitating government by local subdivision; in which case the system of local administration prevailing at present in Great Britain is referable only mediatly to the Saxon races, by whom it was immediately adopted from the Roman state. It is true that the oldest inhabitants of the British Isles appear to have had a system in many respects similar, of which the latest traces that have been preserved are to be sought among the Highlanders of Scotland, where every family governed itself under the direction of a chief, who was at once king, general, and supreme judge. The distinction, however, was that the class of subjects did not exist; but all being connected with the hereditary chief by blood, the humbler class obeyed him, not from fear, but from a feeling of relationship; for the meanest was as well born as the chief, and consequently, had the honour of the family as much at heart as himself; hence they never revolted against their chief, as the plebeians did against the patricians, or the vassals against their feudal lords; the only internal differences that ever occurred arising out of a disputed succession in the chieftain’s family.

§ 369.

The Arabs of the desert strongly resemble the Highlanders; each family has its Sheikh, and these Sheikhs are combined under one superior, chosen almost by tacit consent, and who, if he act tyrannically, is deserted by his tribe, which attaches itself to another con-

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1 Liv. 10, 23.  
2 Liv. 6, 20.  
3 Dion. 2, 1, & 3, 7.  
4 Festus v. Cent.  
5 Plin. Hist. Nat. 18, 3; each individual lot of two acres was termed anciently, beredium.
considered more worthy. With the defection of the majority his power is gone; hence he has no means of enforcing his authority but by equitable government,¹ which, if he adopts, his commands are not only obeyed, but the dignity passes to his sons, and continues in his family. It is almost inferable hence, and from many other and like examples, which might be cited as obtaining in every part of the old and new world; (for the system of government among the American Indians closely resembles that of the Scotch Highlanders); that patriarchal government is the most natural form of society, and that which combines good government with physical and moral power. Conquest, however, has disturbed its uniformity, as it did in Rome, and introduced the class of subjects, an evil which appears to have been transferred to the British Isles by the Saxon invaders. That such a class did exist, and that that class did not possess full political rights, is abundantly evidenced by the remains of the laws of that period alone, in which we find different fines imposed upon, and on account of, freemen and churls. The same exists in the *leges barbarorum*, alluded to in the first part of this work, and it is doubtless hence that the ancestors of the Saxon portion of the British population imported the principle. The feudal system of ancient Rome, if that term may be used, and the modern feudal system, are merely corrupt forms of the oldest species of government, the so termed patriarchal system.

§ 370.

It has been observed, that these gentes were distinguished by hereditary names;² thus the gens *Cornelia*, the gens *Sempronia*, *Tullia*, *Cincia*, &c. designated particular families. These gentes, in course of time, were divided into familias, which again diverged into stirpes. Thus the families of the Scipios, Lentuli, Sulpicii, *Cinna*, *Cossii*, and Dolabella belonged to the Cornelian race, and the distinctive names these families assumed were termed cognomina; the stirpes descended from these families also assumed agnomen,—nomen being the general designation of the gens. Thus, for instance, the gens *Virginius* separated into many families, who took the cognomina *Tricosti*, *Ruffi*, &c. The *Tricosti*, on again diverging into stirpes, assumed the agnomen *Rutilii* and *Caélimontani*. To these three names each individual prefixed a praenomen; and thus we have Aulus Virginius Tricostus Caélimontanus.³ Cicero ⁴ thus defines gentile connection: *Gentes sunt, qui inter se ejusdem nominis sunt, qui ab ingenuis oriundi sunt, quorum majorum nemo servitutem servivit qui capit non sunt de minimi*. These, then, constituted the Roman nobility or ingenuitas. The increase of Rome after the destruction of Alba, Ingenuitas.

¹ Layard’s Remains of Nineveh, vol. 1, c. 4, p. 94; vide et Burchard’s Travels.
² Siger. de Nom. Rom. p. m. 1408, & 14, 27; Hein. A. R. 2. 2.
³ The history of the principal gentes of Rome are to be found in Valerius Maximus.
⁴ Top. 6, Festus v. Gentiles.
which caused the transfer of a number of families to the city, worked a sensible diminution of the influence of the upper classes. The following is the way in which Walter reconciles the conflicting authorities: Tarquinius Priscus perceived this, and endeavoured to extend the rights of the plebeian class, by forming three tribes from them, and conferring upon them the same rights as the old nobility possessed; but the strong opposition he met with compelled him to resort to more subtle means; and thus, without interfering with the three old tribes, the number of which had been reduced by many families having become extinct, he consolidated such as remained, so that each tribe contained only five curiae. He then completed their number from plebeian families, which he raised to the patrician dignity, though by this the blood-relationship must have been destroyed. In like manner, Tarquinius doubled the number of the knights.

The measure adopted by Servius Tullius was by far more complete, and introduced an aristocracy of wealth, without destroying that of birth, which had hitherto been the only one. He not only converted the right of election in virtue of blood into a right of election in virtue of property, but also restored the old electoral districts—which amounted to four in the city of Rome, and to twenty-six in the country—to their former position.

It was probably after this time that the word ingenuus was introduced by the patricians of the old school, to distinguish these new nobility from the old, and the word itself indeed implies one who is in a gens, for Scævola distinguishes between gentilis and ingenuus: to be accounted ingenuus, a man must be descended from a free-born grandfather at least, that is to say, be a free-born man in the third generation, for the servile taint was by no means forgotten at once; this status was termed ingenuitas, and it was often necessary to prove this condition, for which cases there was a judicium ingenuitatis resorted to, probably in most instances, for the purpose of determining some claim as to patronal rights.

There are probably few questions in Roman antiquities involved in more obscurity than this. Walter, it has been seen, following Niebuhr, insists that the division into gentes was purely political, and consequently repudiates at least the blood-relationship, or clanship, between the members. In Smith’s Greek and Roman antiquities, there is a long, inconclusive, and somewhat confused article on the same subject, in which, however, the difficulties of the systems hitherto suggested are roughly thrown together.

§ 371.

The only thing, then, that is required, is to vindicate the derivation of gens, or γένος, from gigno and γενομαι, which undoubtedly

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1 Ges. des R. R. § 25.  
2 Dion. 4. 14, 15; Liv. 1, 43; Varro Ap. Non. Marcell. 1, 205.  
3 Liv. 6, 40.  
5 Ges. des R. R. § 16, n. 18.  
implies a blood-relationship,—in other words, kindred. That it bore this meaning in its common acceptation, is abundantly proved by the law which governed the intestate succession; for we there find, in a fragment of the Twelve Tables, *si pater familias moritur, familia, pecuniave ejus agnatorum gentiliumque esto.* The remaining fragments to be found in Dion. Gothsfred's edition, entitled *Legum XII. Tabularum Fragmenta ad Pandectarum et Codicis seriem accommodata, Amst. 1663,* relate to the same subject, and confine the succession to the *proximus agnatus.* We then find, *si minus agnatus sit eadem lex xii.* Tabularum gentiles *ad hereditatem vocat.* *Si agnatus defuncti non sit, eadem lex xii.* Tabularum gentiles *ad hereditatem vocat, his verbis Signatus (lege aghatus) nescit (lege nec sit) gentiles familiam hares hanc (familiam herciscant, Oisellus) familiam habeant (P. Pilheus).*

Now, as it is clear that *agnatus* was the next relation on the male side, *non omnibus simul adhgnatis dat lex xii.* Tabularum *hereditatem,* sed his qui hunc certum est aliquem intestato decipisse proximo gradu sunt, and as, failing such *proximus,* the intestate succession passed to a more remote agnate, even to the tenth degree, *agnationis jure aliquem admittit ad hereditatem etiam si decimo gradu sit sive de lege xii.* Tabularum, *sive de edicto,* thus referring to the passage first cited, the *gentiles* succeed in default of *agnati,* or, as it would now be expressed, the heritage went, *omnibus hereditatibus masculis quibusques.* With such evidence, can it be doubted that the expression *gens* implied blood-relationship (*consanguinitas*) in all *gentiles*?

§ 372.

Now we find that Rome was, at a very early age, composed of three races, even under Romulus, to which he gave the name of *Tribus,* or the Triad; and although *φυλή* (*φω*) in Greek is used as a synonym to *tribus,* it has by no means the same derivation, but more properly corresponds to *gens.*

Now all these races in ancient times, as well as in modern, attributed their origin to a common ancestor; as the Jews, and, later, the Scotch highlanders; consequently, each of these races, improperly termed *tribes,* were properly *gentes.* The *gentes* contained in each of these triple divisions must, therefore, have taken their origin from notorious ancestors in still more remote times; and this will be clear on comparing them with the *Jews* descended from Abraham, as the common ancestor of all, and immediately from his twelve sons, whose descendants formed twelve *gentes* or houses.

Romulus then selected one hundred of the most influential of such families from each of the three nations which formed the old Roman state, but reduced the less influential to the state of plebeians.

1 Tit. xx. § 7, et seq.  2 Id. § 7.  3 Id. § 13, et Gaius apud Ruffinum dicto loco.  4 Id. § 30 (a), I. 3, 5, 5.  5 Id. § 15.  6 The term tribe attributed to the Jews, then, is a contradiction of terms, and a false translation of the word.
These, as derived from a common ancestor, were all consanguini,
or relations by blood. For the convenience of voting, he sub-
divided these hundred families into tens; thus we get one tribus
divided into a hundred curiae, and subdivided into masses of ten curia
termed decuria, which, multiplied by three, the number of the races,
gives three hundred families, or thirty decuria; and one member
taken from each family for the Senate in each tertiary division, will
produce a hundred senators for each race, the original number of
this Senate, or three hundred, the somewhat later number of that
body when two other races were incorporated, and that at which
it remained for a considerable period; and this clears up the difficulty
which has existed in reconciling the expression of those authors
who use gens and familia as synonymous. The familia com-
prised the rights of the gens in the abstract, for familia comprised
all the particular rights belonging to a gens, as we have seen above;
and from the expression familiae mutat, he changes his family rights.
The subsequent subdivision into familiae and stirpes in no way
interferes with this arrangement; but then the familia partook of
the nature of gens,—gens signifying the race, familia the branch
of that race, and stirpes the division of that family, which may be
thus illustrated:

GENS VIRGINIA (nomen).

Familia Tricostii.

Rufii (cognomina).

Stirpes Rutillii.

Callimontani (agonymus).

Aulus (praenomen) Virginius Tricostus Callimontanus.

The patricians, then, sensu stricto, implied the old hereditary
noble by birth; sensu lato, it included also the later noble by
creation, properly, and sensu stricto termed ingenuus. In like
manner, English heralds reckon four several qualities or degrees
of gentility arising from a grant of coat armour. One who
inherits a coat of arms from his father is styled a gentleman of birth; if he derive it from his grandfather, he is termed
a gentleman of blood; and if he succeed to the same from his
great-grandfather, or other more distant progenitor, he is entitled
a gentleman of ancestry: if he obtain the grant himself, he is
simply a gentleman of coat-armour.

§ 373.

The ingenuitas appears at a later period, under the empire, to
have obtained a still more extended signification, for a man might
be made ingenuus, or rather, the jura ingenuitatis might be con-
ferred upon him in two ways, although he were even a libertinus,
first, by the Emperor granting him the jus aurei annuli, or
secondly, by a fiction at law termed natalibus restitution, whereby

1 P. 40, 10, 5 & 6.
2 P. 40, 11.
he was restored to his normal state of freedom. In the first case, the patron was not deprived of his rights, as he was in the second case, inasmuch as the fiction went to his free birth, passing over or making of none effect the intervening manumission; if he had never been a slave, he could never have been manumitted.

§ 374.

Citizens of the Roman state were of two descriptions,—those who possessed the full rights, and such as enjoyed those privileges in a modified degree. The first were termed cives optimo jure; the latter, cives non optimo jure. The first were called emphatically Cives, the others respectively Latini and Italici; after which the Provinciales formed a fourth and last class, all others being styled Hostes,—a term which, in its original signification, was equivalent to the somewhat later expression Peregrini, but soon obtained that of enemies.

The jus civitatis included the jus quirustum, which, however, were not identical, although confused by Ulpian. The rights of citizenship, in the most extended sense, corresponded to the polis of the Greeks. The civis ingenuus, or optimo jure, implied a degree superior to the municipes, or such as dwelt in cities without Rome, whose want of residence naturally deprived them of the power of exercising certain rights. The rights of full citizenship are thus summed up by Cicero: retinetis istam possessionem gratiae, libertatis, sufragiorum, dignitatis, urbis, fari ludorum, festorum dierum, ceterorum omnium commodorum; but, to be less oratorical and more precise, it consisted in the right of being inscribed upon the censor’s rolls, of military service (militia), tribute (tributorum), taxes (vectigalium), of franchise (sufragiorum), of attaining to offices of dignity in the state (honorum), and sacred rights (sacrorum).

§ 375.

The Jus Quiritium was included in the above, and was of a private nature; it consisted in the right of liberty, gentility, marriage, paternal power, legal dominion, testament, heritage, and usu- capionis. The private rights of the Roman citizen were practically by far the most important and valuable, and it is for this reason that the Jus Quiritium is so often used to convey the idea of perfect citizenship, for without it the higher privileges would have been unavailing, or a dead letter. Their libertas protected them not only from the dominion of any master, but also from the imperium of tyrants, the power of magistrates, and the exactions

1 In Germany, it was the practice to ennable the grandfather of the person intended to receive the honour, although long since deceased, in order to give three noble descents.
2 This may be termed in vulgar parlance "making a gentleman of him," which James I. (IV.) told his foster-brother it was not in his power to do, although it was to make him a nobleman.
3 Festus Ad voc. Hostis.
5 Dion. Hal. 2, 89.
7 Orat. 3, de Leg. Agrar. 19.
of creditors; and so zealously was this *libertas* or *ingenuitas* guarded, that it could not be forfeited but by a fraudulent sale or captivity in war; none, in short, could be deprived of this valuable right without his own consent, *nisi ipse auctor factus esset.*

§ 376.

The tribunitian law, another aegis of liberty, was directed, as has been seen, against monarchy; nor were the Valerian laws less stringent, which protected a citizen against the tyranny of those who succeeded to that divided regal power, the magistracy. *Ne quis Romae magistratum gereret injussu populo, qui secus faxit, ejus caput sacrum esset,* secured a popular election, but such magistrate could not inflict death without the consent of the same body by whom he was himself constituted. The discipline of the army indeed formed an exception to this general rule, *ex necessitate rei;* otherwise the Porcian law was applied in all its severity to such as beat or executed a Roman citizen. Criminals were allowed to appeal to the people; thus the word *provoce,* or *civis Romanus sum,* acted at once as an arrest of execution, even as late as the time of St. Paul.¹

§ 377.

The rights of creditors appear to have suffered diminution at a very early period;² and that laws on this subject were originally very severe³ cannot be doubted, from the continual complaints of the mass of the Roman population, and the concessions made in this respect. With a similar object of protecting liberty, the system of ballot was introduced; hence we may infer that intimidation had been customary at elections. Ballot was principally useful in capital questions; the tablets thrown into the balloting urn were inscribed with the initial letters of the words, as L and D for *libero, damno;* A or C for *absolvo, condemno.* This system was first introduced as late as a.u.c. 614, by the tribune, A. Gabinius.

§ 378.

The right of family, or *jus gentilitatis,*⁴ was another privilege of the citizen, and also one of the quiritian rights. It consisted in the privilege of consulting auspices, sitting in the Senate, holding sacerdotal, magisterial, judicial, and the like offices; in short, originally the whole government of the state vested in the patrician class, that is, in those who had a *gens,* or the persons of family. Gradually this was extended;⁵ there were, however, certain offices which, down to the last age of the republic, were held exclusively by patricians:⁶ such were the offices of *Interrex, Flamen dialis, Martialis,* and *Quirinalis, Rex sacrificulus,* and of the *Saltii.*

² A.u.c. 427; Liv. 8, 28; Varro de L. L. b. 5.
³ Cell. N. A. 20.
⁴ Hein. A. R. App. lib. 1, 32.
⁵ Dion. Hal.: 5, p. 308; Liv. 4, 3; Suet. Aug. 2; Tac. A. 11; Suet. Jul. 91; Liv. 105, 7.
§ 379.

The most important, perhaps, of the Quiritian rights was that Jus Connubii of marriage, which was confined to citizens, who could intermarry with none who did not possess the Romana civitas; hence, by the law of the Twelve Tables, there was no connubium between patricians and plebeians, who originally occupied a position little superior to that of slaves,¹ and even when this distinction was legally abolished, by the jus connubii being conferred upon the plebeians, there appears to have been a great objection to intermarriages between these two classes, which were looked upon as mesalliances. The rule connubium solum inter cives, however, obtained as long as Rome and her laws. But even this maxim was open to a restriction, since there was no connubium between freed people and citizens even when such liberti had obtained the rights of citizenship,² against which they petitioned. The issue, too, of those who married strangers when this was allowed in special cases, as in the case of the soldiers in Spain, was looked upon as little better than slaves.³ Caracalla’s constitution, however, extended the jus connubii to all except barbarians alone,⁴ which, however, soon appears to have fallen into desuetude. Augustus had previously introduced certain restrictions as to the marriages of particular classes by the lex Papia Poppæa, possibly with the view of creating a nobility for the support of the monarchy, which he reintroduced, and this remained in force until Justin’s time, in whose reign a constitution was passed by the influence of Justinian, though against his uncle’s wish, in order to enable his nephew to marry Theodora.

The lex Papia Poppæa, among other restrictions, forbade marriages between senators, their sons and grandsons, and freed women, prostitutes, and women manumitted by pimps, those who exercised the craft of players, or the daughters of such.⁵

§ 380.

Another privilege of Roman citizens was the right of being inscribed on the censor’s roll (jus census). The exercise of the censorship first resided in the kings, under Servius Tullius, and subsequently passed to the dictators, and finally to the censors; but as many Latins resident at home, as well as other nonqualified persons, surreptitiously crept upon the censor’s list, the Licinian Mucian Law⁶ was introduced to check the abuse. This census was in the provinces termed professio, though the word census may be occasionally found.

The census took place every five years, and was termed lustralis, from the sacrifice of purification, which appears to resemble a similar rite among the Jews. The word lustror is variously

¹ Dion. Hal. 20, 674; Liv. 4, 4.
² Liv. 38, 36.
³ Liv. 43, 3.
⁴ Cod. Th. 2, 144, 1.
⁵ P. 23, 2, 44, pr.; Dio. Cass. 54, 608.
explained, some render it by *expiare*, others by *purificare*, and others again by *circuire*, from the ceremony of leading round the armed citizens in the Campus Martius, a sow, a sheep, and a bull, which were afterwards sacrificed. The word, therefore, including the whole ceremony, may fairly be taken as comprehending all three, the animals being led round and slaughtered, as an expiatory sacrifice, by which the people were purified. In Vespasian's time, the practice appears to have fallen into disuse, but the word *lustrum* has ever been retained to signify a period of five years. Severe penalties were inflicted on such as evaded this quinquennial census.

§ 381.

Jus Militiae.

The *jus militiae*, or capacity to bear arms, was another privilege of the Roman citizen. None but a Roman citizen was admitted into the legions, and of such even none but *ingenui* belonging to the first five classes; *capiti sensi*, *libertini* and players being rigidly excluded, except in times of the most urgent necessity. This rule was, however, relaxed under the Emperors and Latins, and others were drafted into the Legions.

§ 382.

Jus Tributorum.

In the *jus tributorum et vectigalium* consisted another privilege of the Roman citizen: the former was a sum paid, *tributum*, by citizens at the command of the state; all other taxes were included under the term *vectigal*. The first species of tribute was paid *in capite*, the second *ex censu*, and the third *extra ordinem*, and otherwise termed *temerarium*, and was levied only under most pressing circumstances.

Under the term *vectigalia* were included customs dues (*portoria*), tithes (*decumae*) of the produce of public arable lands, or of pastures and woods (*scriptura*); the right to hold an unlimited quantity of either was restrained *A. u. c. 377* but the law was soon after evaded. The salt mines also came under this head. The duty of 25 *per centum* on the transfer of slaves (*vicesima*), first introduced *A. u. c. 398*, and a like auction duty (*centesima*), also *ducentessima*, levied on military sales, and the *vicesima hereditatum*, or legacy duty, were all *vectigalia*.

§ 383.

The *jus suffragiorum* was one of the most important rights of Roman citizens, and comprehended the passing of laws, the creation of magistrates, and the decision of questions of peace or war. This attribute of Roman citizens originated at the period when the patrician class comprehended all the citizens; it was, however,
gradually extended with the different changes which took place in
the state, a detail of which will be found in Sigionius,¹ and has
been a matter of controversy among antiquarians in latter times.
All who were inscribed in a tribe except persons under age, æra-
rians, and persons who had attained the age of sixty, possessed this
right. Augustus² abrogated the restrictions introduced by Julius
Caesar,³ when perpetual dictator. Tiberius,⁴ however, deprived
the people of it, and Caius again restored it.⁵

§ 384.

The Jus honorum et magistraturum was in a measure connected
with the franchise, which was originally confined to the patrician
class, and consisted partly in the right to exercise the priestly
office, and partly that of the magistracy. The lex Ogulnia⁶ de-
prived the patricians of this exclusive sacerdotal right with a few
exceptions, such as that of the rex sacrorum, Flaminum majorum,
and Saliorum Palatinorum;⁷ but under the Emperors they arrogated
to themselves the right of election to priestly offices.⁸

With respect to the magistracies, they gradually passed from the
patricians to the plebeians,⁹ as that latter class rose in consideration.
The dignity of Interrex, however, formed an exception, probably
from the rareness of its operation, and was never borne but by a
patrician.¹⁰ The empire also assumed the nomination to magis-
tracies, as the senate had done before,¹¹ filling these high offices
with persons of all descriptions; and if we are to give credit to the
testimony of Zosimus,¹² the road to honour was, after the consti-
tution of Antonius Caracalla, which extended the right of citizen-
ship to all Roman ingenii, opened even to foreigners and bar-
barians, insomuch that he terms Rome, βασιλείας ὑπηκοόν.

§ 385.

The Jus sacrorum was eminently a patrician right. Private
sacred rights belonged to particular patrician families, but the
public religion was authorized by the state, and supported at the
public charge.¹³ It would appear that these private sacred rights
very much resembled the system of patron saints in the Catholic
church, on the origin of which it is not improbable they exercised
an influence more or less immediate. The Penates were the
saints of the race, and none had a right to participate in the cere-
monies, termed gentilitia,¹⁴ connected with them, who were not
sub patria potestate, or, in other words, actually members of the

³ Ibid. Jul. 41.
⁵ Dio. Hist. 58, 673.
⁶ Liv. 10, 6.
⁷ Cod. Th. de Dec. 43; C. 12, 11, 12.
¹⁰ Liv. 31—3, 15—4, 43, & 54.
¹¹ Cic. pro Domno, 14.
¹³ 4, 58.
¹⁴ Festus v. Publica.
¹⁵ Macrob. Sat. 1, 16.
family: thus a wife must be in manu to acquire this privilege, and
quitted the patron gods of her own family to assume those of her
husband; hence the origin, in later times, of a woman assuming
her husband's gentile or surname.

The word *penates* is derived from the word *penitus, penus*, sig-
nifying *intrinsecus, intus*, within; indeed, the monosyllable *pen*
appears to convey this sense to all words compounded with it. 1 *Penus*
also means a store of provisions, because kept within the
house; nor is it improbable that there may be an intimate con-
nection between the Greek word *év*, and the probably Pelagic or
Etruscan form of the same word *pen*. Connected with *penates*,
we have *penetralia*, the innermost recess, the holy of holies of the
Hebrews, the ἄδωρον of the Greeks, or the word *shrines*, derived
from the Arab *schereef*, holy.

The *penates*, or household gods, were the same as those pub-
licly worshipped; each family, however, adopted some one of the
defined attributes of the Supreme Being as its particular and especial
protector,—Mercury, Minerva, or others. The Greeks of the
day present adopt a like system, the patron being usually the saint
after which the individual is christened. He hangs up a picture of
this saint in his abode, and keeps his anniversary as Protestants do
their birthday. This day is always celebrated as a holiday; and,
after church, visits are received and made, presents offered, and
rejoicings and congratulations exchanged with more or less cere-
monial and expense, according to the rank of the individual. But,
in times of difficulty, the patron saint of the trade or element gives
way to the private protector: thus, St. Nicholas represents the
Neptune of the ancients, and is invoked by sailors in times of
peril at sea, and the Virgin on all general occasions, who appears
to represent the ancient Ceres; nay, a lamp will be seen burning to
the Panagia (or Virgin) in the ruins of an ancient temple formerly
dedicated to the worship of that goddess. The modern saints
closely resemble the ancient gods of the pagan Greeks and Romans,
mutato nomine. Springs, too, under the name of ἄγιόμουρον, are
dedicated usually to the Virgin or some saint, and give rise to local
festivals, replacing the ancient games, on probably the same spot,
in honour of some Nereid or water-nymph.

These practices are invariable throughout European and Asiatic
Turkey, the kingdom of Greece, and the seven Islands. To
return, however, to the *penates*: we have no record of the species
of worship offered to them; it is, therefore, to be inferred, that
it was in no set form, but of a nature similar to that paid to the
modern household saints in those countries. Before the picture
or image of these saints, in Greek or Catholic countries, a lamp

1 This must not be confused with words
of another origin, as *penne, d pereivóc*.

2 Liv. 5, 52; Gen. Fabian Id. 56; Dión. Hal. A. R. 9, p. 577; Gen. Appian

Dión. Hal. 11, p. 696; Gentes, Claudius,
Æmiliæ, Julius, Cornelius, Macrob. Sat. 1, 16; Gen. Servilius, Plin. H. N. 34, 13; Cic. de H. R. 27.
is kept burning, as a mark of reverence and respect, and as a retaining fee for protection and mediation in times of need.

The classical practice of worshipping household gods may have given rise to the Catholic practice of attaching private chapels to the mansions of the rich; and, were it not foreign to the object of this work, indeed it has been attempted to be shown, that the forms of Catholicism are nothing more than an adaptation of Pagan customs to the Christian religion.

§ 386.

The rights of citizens of the United Kingdom may be reduced under nearly the same heads as those of Rome; thus showing that true political liberty must be the same in all countries and in all ages.

The Great Charter may be rather said to have been a restoration of the ancient Saxon liberties infringed, nay, almost obliterated, by the Norman conquerors, than the introduction of any system hitherto unknown; for, as has been mentioned in a former part of this work, trial by jury was of Saxon origin, and indeed, under a varied form, a Roman republican institution introduced mediately or immediately into this kingdom. The Great Charter provides, \textit{nullus liber homo aliquomodo destruatur, nisi per legale judicium parium suorum aut per legem terre}. This was followed by divers confirmatory statutes, the last of which is termed the \textit{Habeas Corpus} act, and provides that any person restrained of his liberty by the decree of any illegal court, or by the command of the King in person, of the Council Board, or any member of the Privy Council, shall, upon demand, have a writ of \textit{Habeas Corpus}, to bring his body up before the Court of King's Bench or Common Pleas, which shall determine whether his commitment be just, and thereupon do as justice shall appertain; and the amendment acts point out the details to be observed in such suits, nor can this law be suspended but by an express act of the Legislature, which, as lately in the case of Ireland, it is most jealous of granting, and which is only done where danger would result to general liberty by a contrary course.

§ 387.

The writ of \textit{Habeas Corpus} had probably its origin in the Roman law. The interdict \textit{de homine libero exhibendo} was granted by the \textit{prætor}, \textit{ne homines liberi retineantur à quoquam}, and ran in favour of liberty, \textit{quem liberum dolo malo retinet, exhibeat}; and here a

\begin{itemize}
  \item 1 This word is used here advisedly in his individual capacity, and in regard to his political rights. Every Englishman must be termed a \textit{citizen}, though as regards the crown he is a subject.
  \item 2 Bl. Com. gives a full account of the Great Charter, and its progress to the \textit{Habeas Corpus Act.}—See Blackstone's Great Charter.
  \item 3 § 123, h. op.
  \item 4 C. 29.
  \item 5 Ed. III. 9; 25 Ed. III. 5, § 4; 28 Ed. III. 3; 3 Car. I.; 16 Car. I. 10; 31 Car. II. 2.
  \item 6 Amended by 56 Geo. III. 100; 1 W. & M. 2, 2.
  \item 7 57 Geo. III. 3 & 55; 12 & 13 Vic.
  \item 8 P. 43, 29; C. 8, 8.
\end{itemize}
*dolus malus* is implied, for without that it appears the writ would not lie. The Basilics\(^1\) have a like provision, *περὶ ἐλευθέρων πραξεῖνων, ἢ δουλαγωγμένων, ἢ βιὰ κατεχομένων.*

The *Favian law*\(^2\) made the purchase, sale, donation, or acceptance of a freeman, if done unwittingly, a capital crime; and the pecuniary mulct provided by that law having fallen into desuetude, those guilty of plagiary, or man-stealing, which appears to have been a common offence, both as regarded slaves and freemen, were condemned to the mines\(^3\) for the *delictum*, a fine of twenty *aurei*, amputation of the hand, &c.\(^4\) The Salic law provided that nobles guilty of plagiary should be scourged and imprisoned, slaves and *liberti* exposed to the beasts, and freemen decapitated.

§ 388.

Cases of debt, before the abolition of arrest on the mesne process, were more severely treated in England than formerly in Rome; and although this never had an effect on the public tranquillity, nevertheless, it must be confessed, that the power vested in an individual of depriving a fellow-citizen of his liberty, almost with impunity, was most strangely at variance with constitutional freedom.

The free right of suffrage, checked as it is in England by an almost nominal property qualification, appears to place it on a level with the Roman right of exercising political franchise; nevertheless, however the evil of bribery and intimidation may have extended, it has not yet so far corrupted the mass as to call for the introduction of the pusillanimous practice of concealed voting.

The rights of the English nobility are so circumscribed, both in number and extent, as not to allow them to be compared with those of the Roman patricians, whose power appears, nevertheless, to have consisted rather in hereditary wealth, and in bearing public burdens, than in an hereditary right in legislation. In this respect, a conflict is rather perceptible than a parallel, which only extends to the greater proportion of taxes paid by the upper classes in both countries; for, with respect to the second point, although the legislators of Rome were originally taken from a class already privileged by birth, the corresponding class in England succeeded, as a matter of course, in virtue of a simple birthright. The trial by peers cannot be called a privilege, although the exemption of peers from making oath on such trials certainly comes under this head.

The restriction of the free right of marriage in Rome finds no parallel in England, and those of the father as such, or as a master, are unknown, although it must be remembered that, with respect to a difference of classes, rustic slavery once existed in England,

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\(^1\) *Eclog. lib. 7*, tit. 1, c. 18.

\(^2\) *P. 48*, 15, 1 & 4, c. 11, 20, 7, & 15.

\(^3\) *P. 48*, 15, 7, c. 11, 20, 15, & 16; *Exod. 21*; *Deut. 24*; c. 11, 20, 9; C. *Th. 18*.

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at a time when it was unknown, even by name, in Scotland and Wales.

No class is in England excluded from the attainment of the highest honours in the state, and a criminal who has purged his offence is not legally excluded from the office of prime minister. The English Canon Law has retained the Catholic disabilities of certain persons for the priesthood, the practical inapplicability of which has, however, rendered them of none effect.

None but a British citizen can bear arms in the service of the state, subject to the statutory provisions, which confer citizenship on such foreigners as do so; and perhaps an analogy to being placed on the censor's rolls may be traced in this privilege.

§ 389.

It was against the civil policy of Rome to share the allegiance of her citizens with any other state. Thus Cicero informs us, *duarum civitatum civis esse nostro jure civili nemo potest, non esse huius civitatis civis, qui se alii civitati dicavit, potest; and again, in his oration for Cæcina,* 4 nam quum ex nostro jure duarum civitatum nemo esse possit, tum amittitur bæ civitas denique, quum is, qui pro fugit, receptus est in exilium, hoc est, aliam civitatem; for persons under sentence of exile, having become citizens in Greece, where this rule did not apply, held offices of state there, and on their return reclaimed their Roman rights by *post liminium.* It appears, however, that the Emperors occasionally excepted certain persons from this rule.

Thus, a person who accepted the citizenship of another state lost his Roman citizenship *ipso facto,* for the rule was, that none could be so disfranchised against his will, *nisi ipse auctor factus.* Under this were included acts either voluntary or fictitiously so; by exile, in consequence whereof the person's property was sold, and he was interdicted the use of fire and water; 5 by rejection of the citizenship, or by *post liminium,* in which case it depends upon the *animus revertendi* of the party. 6 The Emperors, however, used their own discretion, enfranchising and disfranchising persons and places according to their caprice. Antoninus, Augustus, and Claudius did this, according to Dio. Cassius; 7 and the latter even disfranchised persons for the inability to speak Latin. The deprivation of citizenship by a *lex centuriata* was also one of the tyrannies charged upon Sylla. 8

No British subject can lose his rights, as such, without his own consent and that of the Sovereign; nor does this ever take place,

1 Pro Balbo, 28.
2 24 et pro Archia, 5.
4 Cit. pro Domo, 78.
5 Cit. pro Balbo, 28, 29.
6 Pomponius, P. 49, 15, 5, § 3.
7 Hist. 45, 283—44, 538—40, 676.
8 Cit. pro Domo, 79; Sal. Frag. Hist. I.
except when a country, by force of arms, shakes off its allegiance, as was the case with North America.

§ 390.

An imperfect right of citizenship was the *jus Latii*, or *Latinitas*, termed by Dionysius of Halicarnassus¹ *逻σωπολιτεία*. The Latins were of two sorts,—the inhabitants of old and new Latium. Under the former denomination were included the Albanii, Rutulii, Volschi, and *٪Equi*; under the latter, the Osce, Ausonii, and Hernici. The former were federally bound, even in the time of Romulus, not to make war upon each other, and, in such case, the aggressor had to submit to the penalty imposed by the party attacked;² and although they had a common sovereign, they did not reciprocate marriage, sacred and civil rights. After a series of wars,³ it was ultimately agreed, under Tarquinius Priscus, that they should use their own laws, enjoy their own lands, and be connected with Rome as allies; which treaty was confirmed by Tarquinius Superbus, under whom the *feriae Latinae*, or Latin games, were instituted.⁴ But, after the expulsion of the kings, another war broke out, which was settled by a treaty, A.U.C. 340, to the effect that there should always be peace between the Latin and Roman states; that they should neither levy war against each other, assist external enemies, or allow them safe conduct through their respective territories, but render each other mutual assistance, with an equal division of spoil; that they should submit their private disputes within ten days to those having jurisdiction therein; and that nothing should be added to these laws except with the joint consent of both parties:⁵ and this treaty, according to the testimony of Cicero, remained in force, notwithstanding the frequent rebellion of the Latins, as, for instance, in 366 and 404.

The New Latins had been included in the same treaty since Tarquinius Superbus, which continued not, however, without frequent warlike interruptions.⁶ After the Marsican war, A.U.C. 673, the *lex Julia*, and, soon after, the *lex Plotia*, conceded to the Latini the Roman citizenship; and it then became the custom to confer upon other nations the *jus Latii*, or Latian citizenship, as a right inferior to that of Rome; as, for instance, to the Nemausenses,⁷ Nomocomenses,⁸ Galli Transpadani.⁹ Nero extended it to the inhabitants of the maritime Alps; Vespasian to all Spain; and Hadrian to many other states.¹⁰

§ 391.

It now remains to be seen in what respects the *jus Latii* dif-

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¹ Dion. Hal. 3, 158; Strabo, Geo. IV. 165.
² Din. Hal. 3, 158; Strabo, Geo. IV. 165.
⁵ Tac. An. 15, 31; Plin. Hist. Nat. 35, 3; Spartan Hist. 21.
⁷ Strab. 4, 157.
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ferred from the jus quiritium. The chief points of variance were,
— the Libertas, Connubium, Patria Potestas, Legitimum Dominium,
Testamentifactio, Jus census, Jus militiae, Jus suffragii, Jus potendi
bonorum, Jus sacrorum.

§ 392.

Libertas, in the Roman sense, was denied to the Latins; for it
appears that M. Marcellus, consul of the Nomocomenses, ordered
a Latin to be flogged like a foreigner, as an insult to Caesar;¹ an
indignity from which quiritian citizens were protected by the
Porcian law, which, it is hence clear, did not extend to the Latins.

Connubium was confined to Roman citizens,² although the
Campani obtained special permission to that effect, ut sibi cives
Rumanas duere uxores liceret et si qui prius duxissent, ut habere
eas, et ante eam diem nati ut justi sibi liberi heredesque essent;
hence it would appear that they had been in the habit of marrying
Roman citizens, and obtained the legalization of that practice, as well
as the legitimation of issue otherwise bastards. This passage explains
the expression of Ulpian,³ Connubium habent cives Romani cum
civibus Romanis, cum Latinis autem et peregrinis, ita, si con-
cessum sit.

Patria Potestas was the type of a Roman citizen; and we read,
nuli enim aliis sunt homines, qui talem in liberos habeant potestatem,
qualem nos (Romani) habeant.⁴ Nor can this be doubted, as the
paternal power was, in fact, the very essence and foundation of the
most important quiritian rights.

The Legitimum Dominium is not so clear. The Latini Ḥuniani
and colonarii Latinis⁵ certainly possessed this right, in virtue of the
lex Norbona; but it is not clear, although highly presumable, that
the Latins also possessed it.

With respect to the Testamentifactio, the passages of Ulpian
are apparently so contradictory, that they can only be reconciled as
follows, applying, as we must infer, to the Latini Ḥuniani and Colo-

narii. A Latinus could make a will in the Roman form, and
make a Roman citizen his heir, or a Latin possibly within his own
city, though this is not so clearly inferable, inasmuch as the Latins
were not excluded from adopting the Roman laws and formalities;
hut he could not in Rome take under a will, for he had not the
haretitas, which presupposed patria potestas and full citizenship,
unless, indeed, the heir or legatee obtained quiritian rights before
the day of creation.⁶

The Jus census was occasionally surreptitiously acquired by Jus Census.
Latins. To prevent this the lex Claudia⁷ was introduced, direct-
ing that Latins should be registered in their own states.

The Jus militiae was enjoyed in a more restricted manner than Jus Militiae.

¹ App. de Bell. Civ. 4, 443.
² Liv. 8, 14—9, 43.
⁴ 1, 9, 3.
⁵ Ulp. Frag. 19, 24.
⁶ Compare Ulp. Frag. 20, 14—22, 3.
⁷ Liv. 41, 10, & 12.
by the Romans. The Latins, it is true, acted as allies, but were never inscribed in the Legions; nor could they assume arms, even in self-defence, without permission of Rome. In the course of time, however, they acquired this privilege. The proportion of allies commanded by the Romans in an army was always triple that of citizens, which makes Paterculus complain that, notwithstanding this, they had not the privileges of citizens. M. Livius Drusus endeavoured to abolish flogging as a punishment among the Latin auxiliaries; but the Emperors declared that without this punishment in their power, they could not uphold military discipline.

They enjoyed the *jus suffragii* in a qualified and precarious degree, as it was in the power of the consuls to turn them out of the city whenever they pleased. It is true that this right was not often exercised; nevertheless, Dionysius of Halicarnassus gives instances of it under Virginius and under Fannius. They were not inscribed in a certain tribe, as the passage of Livy informs us: *Testibus datis, tribuni populum submoverunt sitiellaque adlata est, ut sortientur, ubi Latini suffragium ferrent.*

The *jus petendi honores* was limited to their own territories; for they were, previous to the Julian Law, incapable of office in Rome itself. At home, however, no Proprætors or Proconsuls were set over them, in which respect they were in a better position than the Italians and provincials. Two notable attempts were made to increase their privileges at Rome, the one by conferring Roman citizenship on two Latins, and creating them senators; the other to obtain one consul from that people. All, then, that the Latins enjoyed, was the right of internal administration; but, *quoad* Rome, a capacity to bear office did not exist.

The *jus sacrorum* was also enjoyed in a limited degree. There were three species of *sacred rites* at Rome, public, peculiar, and those common to Romans and Latins. Such were the holidays (feriae) introduced by Tarquinius Superbus, in honour of the Latian Jupiter, celebrated on the Alban hill, after the fashion of a large pic-nic, each contributing a quota to the entertainment. The chief victim was a bull, and this festival continued long after the Latins had been admitted to equal civil rights, and was progressively extended from one to three days; it was considered so important, that no consul could leave for the provinces, until installed at this festival, by the pontifices, and the praefects of them held the *imperium* of the city until their return.

The disadvantages under which the Latins then laboured, before they were admitted to the rights of full citizenship, were very great.

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1 Polyb. de Mil. Rom. i, 6, p. 48.
3 Hist. 3, 15.
4 Siger. de Ant. Jurr. Ital. 12, 4, p. 496.
5 Inst. 5, 140; Cic. pro P. Sext. 13.
6 25, 3.
7 Strab. Geo. IV. 87.
8 Liv. 23, 22.
9 Dion. Hal. 1, 250.
10 Id. 6, 415.
11 Hence the word *instaurare* to instal.
12 Liv. 21 & 22, 1.
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for while they were incapacitated from the chief advantages, they were subjected to the same burdens of tribute and taxes (tributa et vectigalia) as Roman citizens, hence they are termed stipendiarii. At the same time, their condition was far superior to that of the Italians and provincials; the only right they possessed in common with the Romans was the Jus commercii; for it was the policy of Rome to encourage freedom of commerce, and not restrict it to a particular class.

§ 393.

Naturalization differed in matter of degree from denization, rather resembling the restitutio natalium, than the Jus aurei annuli. As it could, until within the last six years, only be performed by special Act of Parliament, which, nevertheless, might include many individuals, it was a most expensive and difficult matter. The legislature was, consequently, induced in a spirit which has lately revived to confide in the crown a power it had until then retained in its own hands, and pass a general act, enabling the sovereign in council to naturalize by certificate registered in the Court of Chancery. The commencement of this centralization of popular rights in the sovereign, for various particular purposes, or in other words, the enlargement of the prerogative, forms an anomalous contrast to the increasing democratical tendency of the age, and resembles, in a minor degree, the general cession of the legislative rights by the Roman people to Augustus, which he at once accepted, and so Jesuitically repudiated.

Before the passing of the act above alluded to, every alien, or a given number of such persons, petitioned parliament for naturalization, and the oath of allegiance was required to be taken before the second reading of such bill, in which certain disabilities were reserved against the person so naturalized. These were—the disability to sit in either House of Legislature; to be a member of the Privy Council; to receive directly or indirectly a grant of lands, or other hereditaments from, or office of trust under, the crown; and to enjoy in a foreign country the commercial advantages insured to natural-born subjects, by such state during the first seven years following the first day of the session of the Parliament by which the act of naturalization was passed, during which time the absence of the party from the kingdom must not have exceeded two months. To these may be added the obligation to

1 Liv. 38, 44; App. de Bell. Civ. 1, 353. 18 & 8 Vic. 66.
2 7 Jac. 1, 2; 6 Geo. IV. 57.
3 Similar was the disability imposed upon such as became citizens of Athens, who could never aspire to the priesthood or the dignity of Archon (Demosth. against Neera). Still more astonishing is the restriction of the United States, where none but a natural-born citizen can become president.
4 12 & 13 Will. III. 2, 3, dispensed with its provision in favour of foreign princes and princesses.
5 Because the force of all statutes at that period dated from the first day of the session; this has been now changed to the actual date of the royal assent.
6 14 Geo. III. 84.
receive the sacrament of the Lord's supper a month before the bill was tendered to Parliament. The new statute retains the same disabilities, and enables the Secretary of State to insert restrictions in his certificate.

The effect of naturalization is retrospective, and with the exception referred to, hence all children are naturalized by this fictitious restitutio natalium, nevertheless, an illegal civil act done before naturalization is not thereby legalized.

Those who have served two years on board an English vessel of war, in time of war, or in the army, could be naturalized by proclamation.

Aliens who had resided seven years, without a consecutive absence of two months, in the American colonies, were, in like manner, naturalized; on subscribing the oath of allegiance of 13 George I. now abrogated.

An alien marrying a natural-born or naturalized subject is naturalized by the fact of the marriage, and on being indicted for a capital felony jointly with her husband cannot claim a jury de mediate linguae. And even the children of an English woman married to a foreigner have the rights of English subjects.

§ 394.

All who were not citizens were, strictly speaking, Peregrini, whether they were Latins or Italians, or had the rights of such. After the extension of the citizenship, however, by Caracalla, to all Igniui, this Peregrinitas applied only to freedmen being Latins, and Dedititis, such not being igniui. When, however, Justinian further extended the franchise to Libertini, the very word Peregrini became obsolete, and the word Barbarus substituted for it in contradistinction to Romanus.

§ 395.

Sextus Aelius and Aelius Sextus, in 757 A.D. introduced by the law which obtained their name, an artificial description of peregrini termed Dedititi. This class, which consisted of the lowest persons, such as criminals, slaves, and the like, when manumitted by a Roman citizen, did not, as formerly, obtain full civic rights as others did; nay, they were precluded from ever aspiring to those privileges, but were treated as the lowest grade of peregrini, and subjected to various personal restrictions, which were, nevertheless, not hereditary, as the children were ordinary peregrini.

1 Jac. 1, 21 abolished by 6 Geo. IV. 67.
2 7 & 8 Vic. 66, § 6, 8.
3 Fish v. Klein, 2 Mer. 451-2. a. n. a. This was the case of the sale of an immoveable before the naturalisation, which stipulated that the party was naturalized from that moment, could claim, &c.
4 2 Geo. III. 35.
5 79 Geo. II. 7.
6 7 & 8 Vic. 66, § 3.
7 Reg. v. Manning, 1849, Crown cases reserved. The wife was a Swiss by birth, and was indicted, jointly with her husband, for the murder of O'Connor.
8 Schelter Dia. de Jur. Perg. n. 9.
9 Ulp. Frag. 20, 14.
10 Sidon. Ep. 3, 6.
12 Calus, 13-15; Ulp. 1, 11.
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§ 396.

The next in the rank of political liberty were the Italians, or those who enjoyed the *Jus Italicuim.* Between such and the Latins, there were only two material distinctions; namely, they did not enjoy even the limited *Jus suffragii* of the Latins; nor did that common bond—a participation in sacred rites—connect them with the Romans, although, in respect to government by their own magistrates, they were on an equality with their neighbours.

The Latins, too, enjoyed a contingent privilege, from which the Italians were excluded—the right of such as had held a magistracy in their own state, or left an heir behind them, to acquire Roman citizenship. In respect of taxes of all denominations, too, they were, practically, less favoured than the Latins.

The term Italy comprehended all the extent of country between the sea on either side to the river Rubicon (Ancona), Latium being excepted; the Gauls, Ligures, Veneti, and Carni occupying the remaining space between this and the Alps. The Etruscii, Lucani, Bruttii, Messapii, Sallentini, Apuli, Trentani, Ricentes, Senones, Umbri, Sabini, Marsi, Vestini, Marrucini, Peligni, and Samnites, were all Italian nations, comprised within the above boundaries, and were successively conquered, and severally connected with Rome by international pacts,¹ of the contents of which we are in ignorance; but it is not be doubted that many espoused the cause of Hannibal when he invaded Italy, which led to their being subsequently more roughly treated than before, and their privileges being diminished instead of progressively increased.² In 664, they succeeded—but the Samnites last of all, A. U. C. 670—in obtaining the citizenship by the *Leges Julia* and *Plotia*; but this privilege appears to have undergone a change,³ for, upon the division of the empire after Constantine the Great, we find those who possessed the *Jus Italicuim* treated with great harshness;⁴ nor did Justinian utterly abolish all traces of this *status.*⁵ This must, however, be understood, not of the Italii, but of those upon whom the *Jus Italicuim* had been conferred in parts beyond the Alps.

§ 397.

The provinces were so called, *quod populus Romanus eas provicit, id est, ante vicit,*⁶ and were in a category inferior to all other possessions of the Roman people. They enjoyed not even the limited rights of the Latini and Socii, but, while they paid the taxes and burdens imposed upon the rest of the Republic, were subjected to the harsh rule of magistrates and governors imposed upon them by their conquerors. In the case of a new province,

² Gell. Notc. Att. 10. 3.
³ C. 3. 33; C. 7, 40. 1.
⁵ Schwars, l. c. § 12, p. 36.
the victor, having chosen ten assessors, formed a programme of the laws to be followed in that province. On a proconsul or praetor being sent to a new province, he composed his edict before leaving Rome, basing it upon that of his predecessor; and this part, from the fact of its being so transferred, was termed translatitium. Thus Cicero says, with reference to his mission as Proconsul into Cilicia: Roma composita edictum, nihil addidit, nisi quod publicani me regarunt, quum Samum ad me venissent, ut de tuo edicto totidem verbis transferrem in meum. Diligentissime scriptum caput est, quod pertinet ad minuendos sumptus civitatum, quo in capite sunt quedam nova, salutaria civitatibus, quibus ego magnopere delector. From this passage it also appears, that the publicani, or farmers of the revenue, exercised a considerable influence in the financial administration of the province. The component parts of such edict appears from another passage of Cicero: brevem autem edictum est, propter hanc meam blasphem, quod duobus generibus, edicendum patavi: quorum unum est provinciale, in quo est de rationibus civitatum, de aere alieno, de usurâ, de syngraphis; in eodem omnia de publicanis; alterum, quod sine edicto satis commodo transigii non potest, de hereditatum possessionibus, magistratibus faciundis, vendendis, quae ex edicto et postulari et fieri solent. Tertium de reliquo jure dicendo ἄρα ἄρα ἄρα reliqui. Dixi me de eo generere mea decreta ad edicta urbana accommodaturum. Hence it appears, that, with exception of alterations rendered necessary by local circumstances, the edict in the main followed the rules of Roman law. In Sicily, we find particular provisions of this nature, that where the plaintiff was a Sicilian the judge was a Roman, and vice versâ where the plaintiff was a Roman, but that in causes between Sicilian citizens their native laws ruled the decision.

§ 398.

All people were at liberty to adopt the Roman laws, and those who did so were said to fundi fieri. This adoption, however, conferred no Roman civil rights upon them, or, in the technical language of Cicero, non ut de nostro jure aliquid minueretur; thus these laws applied only between two individuals of a populus fundus factus, not between one such and a Roman citizen, as is further explained in the following passage of Cicero: de nostrâ vero reipublicâ, de nostro imperio, de nostris bellis, de victorid, de salute, fundos populos fieri noluerunt. People wishing to become fundi subscribed the Roman laws, iis Subscribant; nor does any other formality appear to have been observed.
§ 399.

Under the older rule at Rome, the strangers were markedly distinguished from the citizens, and a praetor first appointed to exercise jurisdiction in causes arising between them, A.U.C. 510, whose dignity, too, was inferior to that of the urban praetor. The peregrini were only allowed to reside in the city on sufferance, and could be expelled by decree of the magistrates, which was often done, even as late as Augustus's age, when scarcity of provisions rendered such a measure necessary. Hence the peregrinus had no rights whatever; for the law of the Twelve Tables enacts, adversus hostes aeterna auctoritas est. It is true, they were no longer styled hostes,—a term to which a stronger signification soon became attached; those quiritian or public rights, then, which citizens possessed, and of which strangers were consequently deprived, were connubium, patria potestas, patronatus, testamentis factio generally, legitimum dominium, nexus, mancipium; and as to public rights,—censura, legiones, tributa, suffragii, petendi honorem, &c.

It was, however, competent to the people, or the Emperor, to grant strangers, especially and by way of exception, certain quiritian or public rights, that is, to enfranchise them, in some respects, as to quiritian rights. The law, too, was sometimes evaded in their favour by the introduction and use of trusts. In later times, however, many of these distinctions were abolished, more especially those relating to military duty.

Strangers, too, were distinguishable, not only by their want of political and private rights, but by their dress; for, while the Roman wore his toga, and the Greek his pallium, the stranger was reduced to wear a dress, which at once stamped him as such, nor could he adopt the Roman costume without special permission; and, of course, it follows, à forti, that he could not adopt the laticlavus of the senatorial, or the auguriclavus of the knightly order.

Strangers were, moreover, distinguishable by their names, having no right to adopt praenomen, of which Cicero gives the example of Demetrius Mega receiving the praenomen of P. Cornelius with the citizenship; thus it appears that they even adopted noble names, probably those of the persons through whose interest they obtained their enfranchisement.

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\[1\] P. 4, 2, 3, & 10; P. 27, 9, 7.
\[3\] Hotom. Mag. Rom. p. 121.
\[5\] Suet. Aug. 42.
\[6\] Ulp. Frag. 5, 4.
\[7\] P. 1, 6, 3.
\[8\] P. 2, 4, 10, § 2; Plin. Epist. 10, 12.
\[9\] Ulp. Frag. 20, 14; P. 35, 2, 1; C. 6, 46; 1; P. 28, 5, 6, § 2; C. Th. Eod. 31.
\[10\] P. 28, 1, 11; P. 49, 14, 32; Ulp. Frag. 20, 14.
\[11\] L. 27, 23, § 7.
\[12\] Cic. pro C. Rab. 9; Suet. Claud. 25 Plin. Epist. 4, 11, & 7, 3.
\[13\] P. 49, 14, 32; Schilter Dia. de Jur. Pereg. n. 27; Hein. A.R. App. L. 1, § 133.
\[14\] Epist. ad Fam. 13, 36.
§ 400.

An alien friend in England can possess all sorts of personal property, even a chattel real, such as a lease for a term not exceeding twenty-one years, 1 all former disabilities having been repealed; 2 but they cannot possess any real property. In short, with respect to trade, there are no restrictions; such attach almost exclusively, directly or indirectly, to real property referable to the feudal law, and which now is an effect founded on the mere fiction based upon the law of feods introduced by the Normans, of all holding their land mediatly from the crown: and to state or national offices of all descriptions. There is no difference quoad taxation, and as the act of Parliament for naturalizing aliens excepts all the privileges really valuable, and only confers burdens, on striking the balance, the alien is in a better position than a naturalized subject, and it would be difficult, without the admission of the validity of antiquated fiction, to say, why these reservations are made in favour of a mere accident of locality of birth; for the son of an alien born abroad would never attain the rights which his brother, born within the same year on British soil, and perhaps within twenty-five miles of the same place, obtains as a birthright, and although he may, from the day of his birth, have arrived in, and never since have quitted, the United Kingdom.

§ 401.

Denization in England, granted by the crown, 3 is in some respects similar to this power exercised by the Emperors in particular cases. It has now almost fallen into desuetude; but as the statutes in this respect have never been repealed, 4 and as the word denization has not been mentioned in the last act, 5 it may be held to be still in force. The letters of denization designated the privileges granted to the party. This denization might be ad certam finem, in respect of a legal ability; 6 it might be for life, or a less period, or sub conditiones; 7 and the patent contains the following provision: quod ille (denizatus) in omnibus tractetur, habeatur, teneatur, et gubernetur tanguam legens noster infra dictum regnum nostrum Angliae oriundum et non aliter nec alio modo; 8 but a non-observance of the conditions did not avoid the denization. 9

By denization, a stranger may be confirmed in the possession of an inmoveable, acquired by purchase or devise, although he cannot acquire by inheritance, for his ancestor had no heritable blood; 10 the title is new, and shuts out the rights of the crown, by its own act, and in virtue of such new title; for which reason it has no

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1 § 7 & 8 Vic. 66.
2 Collected by Le Baron, Code des Etrangers, c. c. xii. xiii. p. 168, § 490 et seq.
3 Viner Abr. Tit. Alien. There are instances of the parliament having usurped this privilege.
4 St. 32 Hen. VIII. 161; 1 Bl. Com. 374.
5 § 7 & 8 Vic.
6 Litt. 129 b, Bac. Abr. Tit. Alien.
7 Litt. 129 a, in re Calvin, 9 El. 4, 7;
9 I. c.
10 Bac. I. c. B.
11 Litt. 8 a, Bl. Com. 1, 374.
retrospective effect, except such be especially granted: hence all immovable acquire before the denization escheat to the crown; for the same reason, children born before denization do not inherit the rights subsequently granted to the father. If a denizen die without legal heirs, the lord will inherit his feod; but if he be an alien, the crown. Although a denizen can vote, if otherwise qualified, for members of Parliament, he can neither become himself a member of that assembly, nor of the Privy Council, receive a grant of lands, tenements, or hereditaments of the crown, occupy any office of civil or military trust, nor be raised to the peerage.

§ 402.

Caput is the Latin expression used by Cicero and other authors, to signify all the rights that a man can possess, comprehended in the enjoyment of freedom, of citizenship, and the relation he bears to a family, and is consequently exposed to three several degrees of diminution; for although the loss of the greater comprehends the less, the converse is not true; consequently, a man might change his family without its affecting his citizenship, or lose his citizenship without impairing his freedom; but if he lost this latter, the other two fell with it. Höpfner objects to the definition of the Institutes, capitis deminutio est prioris status mutatio; but "how," he asks, "can this be for a child, on the death of its father, acquires rights it had not before by becoming sui juris; but this is a prioris status mutatio," yet no one will assert that he is capitis diminutus; he, therefore, prefers the expression, "a loss of civil position."

The capitis deminutio is divided, then, into maxima, media, and minima; the first consisting in a loss of freedom, libertatem deminutio.

1 Litt. 278 b.
2 Eyton v. Symonds, Chanc. cases, 612.
3 Litt. 2 b.
4 12 & 13 Will. III. 2; Molloy, 6, k. 3, c. 3, § 14.
5 M. le Baron, a French advocate resident in England, has collected the law on this subject.—Code des Etrangères, ch. 12.
6 Walter Ges. des R. R. § 434.
7 P. 4, 5, 11.
8 Cic. Top. 4, Festus ad voc. deminuere.
9 Gaius, 1, 130-63; Ulp. 9, 10-13; P. 4, 5; 11; I. 1, 16, pr. § 1, 2, 3.
10 187.

11 The author has ventured twice in this volume to depart from the strict order of the Institutes. He has placed the loss of civil rights, Capitis Diminutio, among the rights and disabilities of persons, instead of under Turae, and has treated of corporations, universitates, as collective persons, under Pers. In this latter respect he has adhered to Blackstone's method, which Sergeant Stephens has judged it better to depart from. The property of corporations he proposes to treat together with that of individuals, considering this the more logical arrangement. Many jurists have endeavoured to follow the order of the Pandects, some that of the Code, but both are so destitute of logical arrangement that others have had recourse to the expedient of recasting the sequence of the Pandects on a plan of their own consonant with logic; of these, Thibaut is one of the most successful. Upon the whole, little fault can be found with the order of the Institutes, which the author has preferred to follow to that of the Pandects, not only for the above reason, but because he is rather inclined to defer to the opinion of Gaius, Justinian, and Blackstone who, with very slight variations, has thought he could not do better than reduce the English law to it. On these grounds, and because he himself, after mature consideration, considers it the best, the author has adopted it in preference to that of modern emptiness.
amittit; the second, in a forfeiture of civil rights, civitatem ammittit; the third, in a mere change of family, familiam mutat.

§ 403.

Capitis diminutio maxima is suffered by such as are taken captive by the enemy; and when a freeman above the age of twenty commits a fraud, by allowing himself to be sold as a slave, with the view of reclaiming his freedom and sharing the price with the seller;¹ for the Roman Law does not even admit of servitus voluntaria pactitia;² consequently, no person could make a valid sale of himself, even in bonâ fide, whereby he became a slave: again, when a freedman, for ingratitude towards his patron,³ was reduced to his former state of slavery; and lastly, when a person commits a crime, the punishment whereof is death; according to the old law, it was not lawful to put any citizen to death: to evade this law, when it was found that capital punishments could not be dispensed with, another expedient was discovered; the individual was reduced to slavery, termed servitus paeae, which involved the confiscation of his property as a natural legal consequence. Justinian,⁴ thinking, with more reason than modern legislators and commissioners, that the fear of confiscation would not operate to a prevention of the crime, and justly judging that whosoever would be guilty of a capital offence would have little care for the subsequent welfare of his family, abolished it as far as direct ascendants and descendents to the third degree were concerned, such as father, grandfather, &c., and children, grandchildren, &c., and confined it to more remote relations. In case of such civil death, the individual ceases to be a persona, caput de civitate eximitur; and in accordance with this idea, slaves were said to be capitis destitutis.

Lastly, noble women, ingeniae mulieres, who had carnal connection with slaves, were reduced to a like condition, as a punishment for degrading their order; and Petronius⁵ informs us, quædam feminae sordibus calent, nec libidinem concitant nisi aut servos viderint, aut statores altius cinctos. Harena aliguis accendit, aut perfusus pulvere mulio, aut bistrio sceæ ostentatione traductus ex hac nota domina est mea.

If, after three warnings by the master or his agent, or by the tutor of a pupil, the woman did not renounce the disreputable connection, she was decreed and adjudicated by the prætor⁶ to belong to the condition of an ancilla; but if she continued such practices with his consent, to that of a liberta. This law is attributed by Tacitus⁷ to Claudius, who also informs us that the freedman, Pallas, conceived the idea; for which he was rewarded by the Senate with praetorian insignia, and a present of seven millions of sesterces. Vespasian appears to have subsequently confirmed it by senatus consultum,⁸ and Justinian⁹ seems to have been the first to

¹ P. 40, 12, 23.
² P. 40, 12, 37; C. 7, 6, 10.
³ I. 1, 16, § 13; C. 6, 7, 3.
⁴ Nov. 22, 8.
⁵ Hein. A. R. 1, 16, 8.
⁶ Ann. 12, 53.
⁷ Suet. Vesp. 11.
⁸ Suet. Claud. Toll.
CAPITIS DEMINUTIO.

relax the practice, as we have seen, for his own private views, thereby opening the door to these disgraceful connections. Properly speaking, however, it must be observed, that, as a woman had, strictly speaking, no caput, she could not be minuta, although she was so in effect, as above set forth.

§ 404. The capitis diminutio media involved a loss of citizenship without interfering with liberty; hence, such as were sent into exile,—that is to say, lost their citizenship, and were obliged to avoid the Roman territory,—were, in fact, reduced to the condition of strangers; and in this category were those exiles to whom fire and water had been interdicted. This was frequently done by Augustus, at the suggestion of Livia, and the persons so banished were termed deportati,—a word still used in France to denote transported convicts. Deportatio did not signify a simple banishment from the country, but to a certain place designated for that purpose, and was invented to meet the danger which might arise from exiles being distributed here and there throughout the empire without being under control, and succeeded in the place of the older and simple form of aquæ et ignis interdictio. Deportati were even sent in irons in vessels to certain islands, under the custody of servi publici. This involved the loss of citizenship, which Religatio did not,—a word used by Ovid in opposition to Exilium.

Nec vitam, nec opes, jus nec mibi civis ademit.
Nil nisi me patriis jussit abire focis; and
Ipse Relegatus non Exulis utitur in me nomine.

§ 405. The capitis diminutio minima affected the family only. A man sui juris, who was arrogated, as the adoption of such persons into the family of another was termed, was said to be capitis diminutus; but the arrogation of the father affected the non-emancipated son also, for the family rights were changed. Adopted persons suffered capitis diminutio, according to the ante-Justinian law, without distinction, but, by the law of that Emperor, only those who were adopted by ascendants, and such were said to be perfectly adopted, because nature concurred with the adoption; but before this change, every adopted person lost all the family rights of his natural father. Illegitimate children were sui juris, because they had no legal father; thus, when adopted by their putative father, they suffered a capitis diminutio; for they ceased to be sui juris any longer: in like manner emancipated children, for they lost the jus agnationis and of a sui hæredis.

§ 406. Capitis diminutio maxima could be remedied by the Jus post

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1 57, § h. op. p. 52.
2 Cujec. Obs. 21, 16.
3 P. 48, 19, 2; § 1; P. 48, 13, 3;
4 Trux. 2 & 5, 2.

Abrogated by Justinian.

Capitis diminutio media.

Capitis diminutio minima.

Illegitimate children sui juris.

Jus post remedied.
By postliminium.

liminii—a legal fiction by which the individual was supposed never to have been absent from home, which is a reasonable fiction, as he could do no legal act in his absence. The derivation of the word has been disputed; but Grotius, who has treated this matter at length, holds it to be compounded of post, which, according to Scaevola, implied a return, and limen or limes, the first applied to things of a private nature, as the threshold of a house, and the latter to the boundary of a state, and both being derived from the old word limo, to traverse. Although Postliminium applies properly to war, it may also, under certain circumstances, take effect in time of peace: a distinction thus laid down by Tryphoninus. In bello postliminium est, in pace autem his qui bello capti erant de quibus nibil in pactis erat comprehendens. Pomponius thinks the person so returning must enter presidia nostra. Paulus extends it to fines nostras, but he must not pass through them; but the law of nations extends still further to allies, by a parity of reasoning; and by allies must be understood, not neutrals, but those who take the same side as the nation to which the claimant belongs.

The person claiming the benefits of Postliminium must have been engaged in a legitimate war with another state, for otherwise no proprietary title can be legally acquired. Thus, if a man be seized by robbers or pirates, Postliminium is not required, for neither he nor his property have changed owners by the law of nations, according to Ulpian and Javolenus.

Deserters cannot claim protection from their own country by the law of nations, or others during a truce.

Certain persons and certain circumstances, however, vitiate the Postliminium, thus deserters, transfuges, are excepted; for he who leaves his country as a deserter cannot claim the benefits accorded by this law. But the case is different with a slave deserter, because he is not his own owner, and his master should not be damned, and is in the position of a horse, which, having thrown his rider, has gone over to the enemy’s lines.

Postliminium cannot be claimed during a truce, because it is a suspension of hostilities, and no offensive act can be done or encouraged during its continuance, which the acquisition of a citizen is indirectly. The animus revertendi is also one necessary element in Postliminium. Thus, Regulus, having sworn to return to Carthage, was not within the law; hence, perhaps, Horace describes him on his visit to Rome as capitis minor. If articles of peace had been concluded, in which no stipulation for the extradition of prisoners was inserted, the claim of Postliminium is forfeit, for this silence is a tacit confirmation of the title by war, and, converso, prisoners free by the articles of peace, who delay to return within a reasonable time, lose their privilege, for they adopt the act of their conquerors.

§ 407.

2 P. 49, 15, 12.
3 P. 49, 15, 5, § 1.
4 P. 49, 15, 19, § 3.
5 P. 49, 15, 24.
6 P. 49, 15, 21.
7 P. 49, 15, 19, § 4 & 7.
8 l. c. § 5.
9 1. c. § 1.
10 P. 49, 15, 5, § 3.
11 Od. 3, 5, 42.
CAPITIS DEMINUTIO—POSTLIMINIO. 387

§ 408.

The next question is, upon whom and what the Postliminium acts? A slave, as seen above, is within the privilege,1 also a horse, because neither are under the absolute control of the owners; person manumitted by the conqueror. Deserters2 were excepted, also such as had surrendered with arms in their hands.3

Citizens were said to return slaves to be received. Seneca4 holds that he who has been sold by the captor to a neutral must be declared free, if he have his Postliminy. Immoveable property, too, is susceptible of Postliminium, for if an enemy have seized land, and afterwards utterly abandon or be driven from it, it reverts to the owner, and does not become state property. With respect to moveables, Grotius5 holds with Labeo, that they are prizes, præda, and not reclaimable; but he goes on to mention the old exception of warlike stores, set out at length in Cicero's topics,6 by Aelius Gallus and Modestinus; the chief of these are ships of war and transports, mules broken to the pack-saddle, and riding horses, all other articles remain the property of the purchaser, but arms or a vestment7 were not included, because they could scarcely have been lost with honour.

§ 409.

A person or thing may either be capable of returning, or be capable of reception; thus, during war, if a prisoner escape he can legally return, and is receivable, but a deserter cannot be so received.

The next vexed question is that of ransom, concerning which there were some special provisions. If a person were ransomed, he had, on his return, to indemnify his ransomer, or serve him until he should have repaid the price, and the Postliminy did not take effect until such payment; which rule appears to have been established, in order to induce persons to ransom prisoners, which they might not be disposed to do, if they had no prospect of recovering the money. Thus, the ransomed man remained, as it were, a pledge in the hands of his Ransomer. This law was, however, afterwards mitigated in many ways, and the period of servitude was at last limited to five years by Justinian, the death of the ransomed within that time operating as a discharge. A contract of marriage between the redeemer and redeemed, or prostitution to the redeemer by the redeemed, cancels the obligation. There are also other provisions favourable to such8 as ransomed captives, and others to punish relations who neglected the duty.

§ 410.

The effects of Postliminium by the Cornelian law were, that if a man died in the enemy's power, he was held to have died at home at the very moment at which he was taken prisoner, and

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1 C. 8, 51, 10. 2 F. 49, 15, 19, § 4, 7. 3 F. 49, 15, 4. 4 De Jur. Bell. et Pac. 8, 9, 14, § 1. 5 ¶ 8 & 9. 6 F. 49, 15, 2, § 2, l. c. 3. 7 Gaius, 1, 129; C. 8, 51, 10, 12, & 19.
this civil provision was necessary, because otherwise the property of a captive was in the nature of a derelict, and belongs to the first occupant. In default of heirs, it, however, devolved on the fiscus. ¹

By the common law of Postliminy, if a man returned, his rights revived; thus the Cornelian law went farther, and supplied the defect of the common law.

With respect to children's rights; when the father was taken prisoner his rights were suspended, in suspenso sive pendebant; if returned, the children were again in his power,² but if he died absent, they were sui juris. Gaius³ thinks this status commenced on his actual death; but Ulpian maintains when he was first taken prisoner. The marriage contract was in so far suspended by captivity, as to require consent⁴ for its reintegration. It may be taken then, in fact, to have been voidable, but not absolutely void; in which latter case it would then have required renewal.

With respect to wills; if a man made a will and died in captivity, it was valid by the Cornelian law; but if he returned, it was good by the common law of Postliminy, according to which he was held never to have been absent.

Cicero⁵ applies the term Postliminium in a different sense; namely, asserting that if a man become a citizen of another state, and afterwards return to his former allegiance, his first right revives by Postliminy. But this is an advocate's distinction in favour of his client, for a deserter⁶ did not, according to Paulus,⁷ enjoy the benefits of Postliminy, or one who had surrendered hostibus deduntur⁸ and although Brutus and Scævola are of different opinions, according to the law of the Digest, he loses his citizenship. The old law ruled it otherwise, yet the free volition appears to be the basis of the principle, which militates against Cicero's assertion; for no one could forfeit his rights as a citizen, nisi auctus factus, and in this case he resigned his rights by his own act, for no one could be a citizen of two states at the same time.

§ 411.

Death in England is natural or civil, and this is the origin of the term natural Life used in sentences and other legal acts;⁹ for if Life alone were mentioned, the term would be construed favourably, and signify civil life in criminal matters, whereby the law might often be avoided.

Civil Death may arise by a party entering into a monastery, when the party is held to be dead in law, and may make his will, upon which his executors may act. Condemnation for felony implies civil death, and the property of such convicted felon is forfeited to the crown (as that of an exile was in Rome), which by pardon, however, can rescind such civil death, and restore the felon to his

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¹ P. 49, 14, 37; P. 49, 15, 22, § 1.
² P. 49, 15, § 14.
³ P. 49, 15, § 129.
⁴ P. 49, 15, 14, § 1.
⁵ Pro Balbo, 12.
⁶ P. 49, 15, 19, § 4 & 7.
⁷ P. 49, 15, 17.
⁸ P. 49, 15, 4, pr.
⁹ Bl. Com. 1, 132.
CAPITIS DEMINUTIO—SLAVERY. 389

former civil rights.\(^1\) An outlaw is *civiliter mortuus* until he purges his contempt, for which purpose alone he can appear in court until the reversal; his rights may therefore be said *pendere*, or to be in *suspensio*.

§ 412.

Aristotle\(^2\) asserts that nature destined command and empire for those endowed with powers and a disposition for that purpose, and that she gave to the other division of mankind a strength of body joined to an infirmity of judgment to qualify such for a state of subjection: to which it may be, however, objected that the possession of qualities fitting any one for a certain state or condition does not necessarily imply the condition itself; moreover, that natural law is founded on a unity of condition, and that nature does not keep up that balance between body and mind, *ut imbeciles essent animo quorum lacertos humerosque miramur*; at all events, none of these arguments apply to hereditary slavery.

Nevertheless, it must be confessed that, practically and in a natural state of society, there is a great deal of justice in Aristotle's remark, and that, even in civilized nations, the cleverest man will rise to command, and that persons of great bodily strength are more rarely distinguished by great mental powers than others. In savage nations, however, this is less true, where bodily strength often confers command on the possessor, before prudence in council; and between nation and nation, taking individuals collectively, the principle of “might making right,” whether based on mental superiority or force, is pretty general.

§ 413.

The Romans contended, that the captives taken in war became *ipso facto* slaves, and that thus war gave a valid title to the slave. It was, however, necessary, in order to the *servitus justus*, that the war should be also *justum*: this expression involved, however, no moral question, but simply meant that such war should be regular and according to the law of nations, as distinguished from that warfare which robbers carry on against all mankind; for a man might, as we have seen in the case of Postliminy, be deprived of his liberty by pirates, without his civil *status* being affected by it; in such case, he would be said to be in unjust durance.

Slavery was admitted to be contrary to nature, for *servitus est constitutio juris gentium qua quis dominio alieno contra naturam subjectur*,\(^3\) but not contrary to international law, upon the principle

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\(^1\) Blackstone derived this word from *sce*, a man's estate, and *dam*, the price of it, because a man, by committing certain crimes, forfeited his estate; but as it is clear that a man who has no estate to lose can commit a felony, it may be more logically derived from the nature of the crime itself: thus, the word *fell*, pronounced "fell," means, in Celtic, "crime committed with a malicious intent, very bad, mischievous in the highest degree, as treasons, murders," &c. The word *fell* is still in use in the English language:

- "What! all my pretty chickens, and their dam, At one fell swoop?"
- "That was a fell blow," "by whose fell hand," "with the fell intention," &c., are common phrases, signifying something peculiarly fatal or treacherous in its operation.

\(^2\) 1, 1.

\(^3\) 1, 1, 35 § 1.
of the right of self-defence; if, having conquered my enemy, I spare his life, instead of killing him, I may enslave him, for *quod ex hostibus captivatum, jure gentium statim captivum factum.*

§ 414. Montesquieu and Rousseau attempt to demonstrate the fallacy of this position. The former, one of the most lucid and clear reasoners who ever wrote, enlivens his subject with a satire which renders his productions the most readable of all philosophical works. In treating of the origin of slavery, he adopts a triple division of the subject,—slavery by right of capture in war, by *the law of nations*; slavery by the *civil law* of the Romans, by contract; slavery by *the law of nature*, by birth.

§ 415. With respect to the first, he denies "the right to kill an enemy, except his existence be incompatible with the personal safety of the victor; if it be so, his death is justifiable; if it be not, he has no right to destroy the captive, and, consequently, as little to reduce him to slavery, but merely so far to assure himself of his person as to prevent his doing him harm." It might, however, be urged that the victor is not obliged to keep the vanquished at his own expense, and that he has, consequently, the right to make such person work for his own living until peace be re-established between the belligerent parties. This would be a limited slavery.

§ 416. With respect to the sale of a man by himself, according to the civil law, Montesquieu "terms it absurd, inasmuch as all that a slave possesses on his purchase vests in his master; consequently, the slave, on his part, receives nothing, and there is therefore no mutuality in the contract. If," he continues, "liberty has no value for the seller, it can have none for the purchaser." But, on the other hand, a savage or ignorant man may have a watch or anything else of no value to him but of value to another; he therefore receives a consideration for that to which he attaches no value; so in exchange for *liberty*, which may be of no value to the possessor of it, he receives food, clothing, and lodging, which are so. "Moreover," says Montesquieu, "the Civil Law annuls all contracts which contain a *lesion*, and that such a contract contains the greatest of all *lesions*." But may not a man owe a debt to a third person? and stipulate that the price of his liberty be paid over to such person? or he may owe money to his purchaser, had and received, and has no other method of squaring the account? Lastly, a contract contains no *lesion*, which is *bona fide*, and is valid by the *lex loci contractus*.

§ 417. With respect to slavery by birth, Montesquieu contends that it depends upon the two former propositions; "if a man cannot be

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1 P. 41, 1, 5, § 7.  
3 *Contrat Social*, 1, 4.
enslaved in war, or sell himself, how can he commit his children?"
It is difficult to combat this reasoning.

§ 418.

As regards persons condemned to death or to slavery for crimes by law, Montesquieu "admits that there is a mutuality; the law protects us, and if we violate the law, we must suffer for it: this is penal slavery, arising \textit{ex delicto}, founded on another basis,—that of mutuality."

§ 419.

Again, he continues,—"If a man be incapable of gaining his bread, what advantage can he be to his master?" With respect to the mutuality,—on the one side there is labor; on the other, lodging, clothing, medical aid in case of need, and all necessaries of life; for which slavery may be looked upon as a perpetual contract: and Dion. Prusseensis says, \textit{μύροι δῆπον ἀποδίδουται έαυτοΰς ἑλεύθεροι οὕτε, ὥστε δουλεύειν κατά συγγραφήν;} and the comic poet Eubulus, in like manner, says that many considered their food sufficient recompense:

'Εθέλει δ' ἄνευ μισθοῦ παρ' αὐτοῖς καταμένειν
'Ετι αὐτοῖς. And again:

Πάλαι θεύγοντες δεσπότας, ἑλεύθεροι
"Οὕτε, πάλαι ζητοῦσι τὴν ἄντι ῥαγήν.

Nor can it be denied that many, instinctively conscious of their own mental deficiency, but aware of their power to labor, subject themselves to the control of another to whom their labor, properly directed, is of value: thus Posidonius the Stoic says, \textit{ὅτως παρ' εκείνων τυγχάνοντες τής ἐς ἄναγκαια ἐπιμελείας αὐτοί πάλιν ἀποδίδοσιν ἐκείνοις δὴ αὐτῶν ἀπερ ἄν ὑπηρέτειν δυνατοὶ.}

It is not, therefore, clear that slavery may not be to the advantage of both parties, and differs from common service only in respect of the duration of the contract. That slavery is less advantageous to the master than free labor, when it can be obtained, is indubitable, for the laborer has seldom much surplus after keeping himself clothed, lodged, and fed; and if there be any, it ought to be expended in sickness and old age. On the other hand, in the case of the slave, the master may be said to keep back this surplus for such purposes, and for it, is bound to keep the slave in sickness and old age: thus the account would be balanced. But we come to another important element,—the \textit{fear of want},—which makes men both more laborious and thrifty; consequently a free-man will work harder than a slave: thus the balance will be in favor of the master employing free rather than bond labor. Applied to Great Britain, no parallel can be drawn from the late West-Indian slavery; for in the tropics there is no incitement to labor, as men can exist without it: as freemen, then, they will not work.

\textbf{K K}

Slavery may be to the advantage of the slave and of the master.

Advantage of labor of a free-man to his master.

In the Tropics.
and a white population, from the heat of the climate, cannot do so. There is, therefore, a vast emancipated population living in idleness, and degenerating into barbarism. The contract fair to both parties would have been, to give the slaves their freedom contingently on their emigrating to the land of their ancestors.

§ 420.

Montesquieu having refuted the three pleas,—viz., war, civil law, and birth,—states, that in some cases a conquering people reduce the vanquished inhabitants to slavery from contempt; and exemplifies it as follows:—Lopes de Gamar¹ dit, “que les Espagnoles trouverent, près de Ste. Marthe, des panières où les habitants avoient des denrées : c’étoient des cancrès, des limaçons, des ciga-les, des sauterelles. Les vainqueurs en firent un crime aux vaincus.” L’auteur avoue que c’est là-dessus qu’on fonda le droit que. rendoit les Américains esclaves des Espagnols: outre qu’ils fumoient du tabac, et qu’ils ne se faisoient pas la barbe à l’Espagnole!

§ 421.

Religion is another source of slavery, under the pretext that it is more easy to propagate Christianity among persons absolutely under control. Ce fut cette manière de penser qui encouragé les destructeurs de l’Amérique dans leurs crimes.² C’est sur cette idée qu’ils fonderent le droit de rendre tant de peuples esclaves, car ces brigands qui vouloient absolument être brigands et Crétiens étoient très dévots. Speaking of the West Indies, he says—Louis XIII.³ se fit une peine extreme de la loi qui rendoit esclaves les Nègres de ses colonies; mais quand on lui eut bien mis dans l’esprit que c’étoit la voie la plus sûre pour les convertir, il y consentit.

It is certain that the abuse of religion has led to more tyranny and oppression than aught else in the world; it is, nevertheless, true that the Christian religion⁴ recognises slavery as the antecedent Mosaic practice.

In the next chapter,⁵ Montesquieu gives way to much sarcastic wit, and sums up by saying, “that slavery only exists where liberty is not worth having, and that slaves thereby put themselves mediately or immediately under the protection of the Government.” This he applies especially to warm climates, where the heat, by enervating the body, decreases the natural energy.

§ 422.

Domestic slavery never existed to any extent in cold climates, where it partook more of the form of servitude or real, as distinguished from personal slavery; the servile offices being performed by the wife and children, and not by slaves.⁶ This was certainly

¹ Bibl. Angl. tom. 13, part. 2, art. 2.
³ Le P. Labat Nouveau Voyage aux Isles de l’Amérique, tom. 4, p. 314, 1722, in 12.
⁴ Ephes. vi. 5, et sq. 
⁵ 15, 5.
⁶ Tac. de Mor. Germ. § 25.
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the case in Germany, even in the age of Tacitus,1 where it appears, too, that the then Germans were much addicted to gambling, staking person and liberty on novissimo alæ jactu, and the vanquished party voluntariam servitutem adit. They appear to have been, however, in the state of petty farmers, hardly even in that of serfs, or even, indeed, of the feudal vassals existing until lately in Hungary, Bohemia, and other parts of Southern Germany and Poland. The Helots were real,2 but it does not appear they were personal slaves; they were, perhaps, the most ill-used bondsmen who ever existed, and the cruel and ungrateful treatment of them by their masters3 has left an indelible stain on the Spartan character.

§ 423.

The hereditary slaves, termed verna, existed from the most remote period of the Roman polity as a distinct class, subject alone to their masters, to whose household they belonged, and they were therefore not looked upon as persons, persona, or members of the state, but as property4 which could be sold and bartered by the proprietor,5 who was also uncontrolled lord of their life and limb,6 without appeal to the legal tribunals,7 before which only persona could appear; slaves were, consequently, without the pale of the law,8 their marriages were not acknowledged as such, but their cohabitation was termed contubernium.9

In more ancient times, the condition of slaves was much more tolerable; for although the slave had no legal recourse against his master, he was treated as a subordinate member of the family, often eating at the same table with the lord, instructing and associating with his children, and taking his part in family matters; whence, the term familia included slaves.10 The national religious rites also had a favourable influence on their condition; and, during the saturnalia at least, they were treated as equals at the family table,11 and performed their sacrifices at the compitalia indiscriminately with the freemen,12 and on their death had the same funeral honors.13

All these circumstancés had the effect of softening the asperity of the positive law, and a slave came to be recognised as a homo, or a human being,14 though not, indeed, as a persona; and the lex Petronia, dating, probably, in Augustus's reign, and many Scta. forbade a slave, even when deserving of punishment, to be sold, or to contend with wild beasts without a trial,15 and his life and limb were

1 De Mor. Ger. § 24.
3 Thucyd. 4, 80.
4 P. 50, 16, 215; Gaius, 1, 54.
5 Plut. Cato Maj. 8, et de Re Rust. 2.
6 Gaius, 1, 52.
7 P. 5, 1, 53; P. 48, 10, 7.
8 P. 4, 5, 3; P. 28, 1, 20, § 71; P. 48, 10, 7; P. 50, 17, 32.
9 Paul. R. S. 2, 19, § 6; C. 5, 5, 5.
11 Dion. Frac. 90, 1, ed Mai.
12 Dion. Hal. 4, 14; Cato de Re Rust. 5.
13 P. 213, 7, 2.
14 P. 50, 17, 32.
15 P. 48, 8, 11, § 1, 2; P. 18, 1, 42; Gell. 5, 14.
thus legally protected from arbitrary death or damage. The slave was, moreover, allowed legally to complain of bad food and unchaste advances.

The sale of slaves, too, gradually underwent material ameliorations, the separation of families being forbidden, and, at a later period, even their alienation from the estate. Although their cohabitation had not the civil effect of marriage, the connection still retained its natural ties, which were considered as impediments to marriage after manumission.

§ 424.

Prisoners taken in war, were sold by the Quæstors, with a wreath on their heads, on the spot where they were taken, manguage following the army for that purpose. The trade, although considered disreputable, was very lucrative; for, as it was necessary to disembarrass the army of the prisoners, they were disposed of, sub hæsta, at what they would fetch.

The slave-market at Rome was under the jurisdiction of the Ædiles, and slaves were sold either by auction or otherwise in detail. The better sort of slaves, however, were disposed of by private contract, arcana tabulata catasta, as is now the case in Constantinople, while others were sold by auction. The slave was elevated on a high platform, catasta, or stone, that he might be seen; hence the expression de lapide emptus. The feet of slaves just imported were chalked, gypsatis pedibus. If from the East, they were distinguished by their ears being bored; and if not so distinguished, they were warranted by their wearing a piléus or cap.

Other slaves, however, were accompanied by a warranty extending over six months, within which the vendor could be compelled to take back slaves if defective, or return the surplus of the purchase-money over the actual value; the chief defects to which the warranty applied being, theft, running away, suicide, and epilepsy; but the vendor was obliged to announce generally all defects, although he might puff off his slaves in general terms, having them stripped for examination by the purchaser. The warranty consisted

1 P. 48, 8, 1, § 2; C. 9, 14, 1; Suet. Claud. 12; Gaius, 1, 53; P. 1, 6, 1, § 2; I. 1, 8, § 2; P. 48, 5, 24, & 1, § 4; P. 45, 1, 96; P. 30, 53, 9 3; P. 48, 2, 5; P. 1, 12, 1, § 5; Suet. Domit. 71; P. 48, 8, 3, § 4 & 4, § 2 & 6; Paul. R. S. 5, 23, § 13.
2 Senec. de Ben. 3, 22; P. 1, 12, 1, § 8; Gaius, 1, 53; P. 1, 6, 1, § 2 & 2; I. 1, 8, § 2; Col. Leg. Mox. 3, 3.
3 P. 21, 1, 35; P. 3, 38, 11.
4 C. 11, 47, 7.
5 P. 48, 5, 6; C. 9, 9, 23, 24.
6 P. 23, 2, 14, § 2; 3; I. 1, 10, § 1.
7 Plaut. Capt. 1, 2, 1, 2.
8 P. 50, 16, 207; Plaut. Trin. 2, 3, 51.
9 Suet. Maj. 69; Mart. 8, 13; Plin. H. N. 7, 12, 10; Macrobr. Sat. 3, 4.
10 There is no parallel in African slave wars. The slaves are taken to the dealers on the coast.
11 Mart. 9, 60.
12 Tibull. 2, 3, 60; Penn. 6, 77.
13 Cic. in Plin. 15; Plant. Bacch. 4, 7, 17.
14 Plin. H. N. 35, 17, 58; Ovid. A. 3, 8, 64.
15 Juv. 1, 104.
16 Gell. 7, 4.
17 P. 21, 1, 19, § 6.
18 P. 19, 1, 13; § 4; Cic. de Off. 3, 16, 17, 23.
19 P. 21, 1, 1; Hor. 2, 3, 284.
20 P. 18, 1, 43; P. 21, 1, 19.
in a *titulus* round the slave's neck, in which his nationality was also stated; but as the dealers were used to vamp up their wares, the opinion of medical men was often taken. The same practice prevailed in the West Indies, on the sale of a cargo of slaves.

§ 425.

In the earlier ages of Rome, domestic slaves were few in number but increased with the progress of luxury. The one attendant slave was named after his master, *Carpor, Lucipor, Marcopor, Publipor*, &c., *puer* being the name for a slave; thus we find in Terence, *heus puer*, calling the slave. But in the later ages of Rome, a man's wealth was computed by the number of his slaves, *quod pascit servos*; and it has been said that some Romans possessed as many as 10,000 and 20,000 slaves. The great increase in their numbers, however, did great injury to the poor clients, whom they superseded in mechanical and other arts and employments, and divers measures were adopted to obtain for them competent employment; it was hence enacted that a certain proportion of freemen should be employed for agricultural purposes.

§ 426.

The *servi publici*, or slaves of the state, were in a position superior to private slaves, for they had a testamentary power over the half of their property. They were employed to conduct persons into banishment, acted as lictors, gaolers, and executioners; were employed in the departments of justice, of religion, public buildings, storehouses, and in the police. The ædiles, questors, the fire-brigade commissioners, and *triumviri nocturni*, had large numbers under their command. These offices led to a better prospect of manumission than private slavery. The state being considered as a family, they performed all those duties which, in a private house, devolved upon the domestic bondsmen.

§ 427.

*Literati* were well educated men, who acted as instructors to their master's children, *pedagogi, librarii*, *amanuenses, anagnostae*, who copied books, assisted them in literary labors, wrote from dictation, or composed letters under their orders, or read to them; *medici*, medical men, and *scenici*, players also belonged to this class.

Artisans, also, cannot exactly be numbered among domestic slaves; it was the practice of their masters to let them out at a

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1 Gell. 4, 2; Propert. 4, 5, 51; P. 21, 1, 31, § 21.
2 Claud. in Ev. 1, 35, 36.
4 Quinct. 1, 44, § 26.
5 Juv. 3, 141.
6 Athen. 6, 272.
7 Suet. Jul. 42; Appian B. C. 1, 8.
8 Ulp. Frag. 20.
9 Tac. H. 1, 43.
10 Gell. 13, 13.
11 P. 1, 15, 1.
12 C. 12, 19, 10; Cod. Th. 4, 8, 2.
13 Isiod. Orig. 6, 14; Cie. ad Att. 4, 43; Cie. ad Fam. 16, 23; Suet. Claud. 28; Plin. Ep. 3, 5; Mart. 23, 208.
15 Cie. pro Roscio Com. Perhaps, therefore, the medical men in all countries hold a rank subordinate to the position in society to which their knowledge and acquirements so justly entitle them.
fixed price, or to make otherwise a profit of their labor. Such slaves were then purchased on speculation, and the price paid was looked upon as an investment of reproductive capital.

§ 428.

Slaves were distinguished as ordinarii, who performed the higher household offices in the country and in the city; they acted as actores, procuratores, dispensatores, cellarii, promi, condii, procuratores peni, &c., and had the surveillance over other slaves in their respective departments.

Vulgares.

Vulgares acted under the last mentioned, as pistores, coqui, dulciarii, salmentarii, ostiarii, cubiculari, lecticarii, &c.—bakers, cooks, confectioners, picklers, porters, bedchamber slaves, litterbearers, &c., and performing generally all menial offices.

Mediastini were for the most part rustic slaves; but when applied to those in the city, the term denotes atriarii, focarii, &c., —sweepers, stokers, scullions, and the like, being inferior slaves of that class under the vulgares.

The qualisqualis appears to have been a term intended to include slaves of any condition whatever, and not any particular description or class.

Villicus was the superintendents or bailiff over the rustic slaves used for tilling the ground, who were considered inferior to those occupied in domestic duties. Hence it was a common punishment to send ill-conducted slaves to the country residence, to be put to field labor.

Magister pecoris had charge of the cattle, which was not in the department of the villicus, or bailiff.

Servus vicarius was the slave of a slave, of whose peculium he formed a part. In the British West Indies, slaves often owned slaves.

§ 429.

The value of slaves in the market varied according to their appearance or capacity, and with the age. Thus, during the republican period, slaves were much cheaper than under the Emperors, because a greater number of captives was taken; the manner, too, were less luxurious, and the demand consequently not so great. In Cato’s time, three slaves were enough for a consul; and in Augustus’s, ten hardly sufficed for a private gentleman.

The codex fixed the price of slaves under their respective classes.

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1 Plut. 4. 5, 19; Cic. ad Att. 75, 7; Suet. Cali. 23, Vesp. 22; Colum. 1, 7, 8.
2 P. 4, 7, 3, 35, 33; Hors. 1, 14, 15; Schol. Cic. Cat. 1, 8; Colum. 1, 7, 5, 5.
3 P. 1, 2, 5, 5; P. 7, 5, 6; P. 47, 8, 15, 94.
4 Cato R. R. 5, 142; Colum. 9, 1, 1, 8—12, 1.
5 Varro R. R. 1, 2. 6 Apul. Apol. 430.
7 Hor. Sat. 1, 1, 12. 8 C. 6, 44, 3.
Eunuchs under ten years of age were worth 30 solidi; above that age, 50 solidi, and if, in addition, they were capable of any mechanical art, 70 solidi. Medical men were worth 60 solidi; notaries, 50 solidi; artificers, 30 solidi; and common slaves, male and female, 20 solidi. The latter were, however, usually cheaper than male slaves, except when possessed of personal attractions; and as 72 aurei went to the pound of gold, the ordinary price of a common slave was equal to 14 s. This law was introduced to check the extravagant prices given for slaves, as eunuchs and boys in Pliny’s time fetched as much as 88 s. and 1770 s., girls for prostitution as much as 240 s.; but in Trajan’s time, s. 5 s. was a fair price for a girl of indifferent character; and under Hadrian, the price of two aurei did not induce the suspicion that the girl had been stolen.

§ 430.

A slave could possess no property in his own right, and all that he earned was acquired by him through his master; nevertheless, it was the interest of masters, in order to encourage fidelity, diligence, and economy, to allow them a certain amount of property in their own right, the more so as their number was great, and many were invested with affairs of great responsibility; for slaves were occasionally entrusted with considerable advances, trade in any shape being inconsistent with the dignity of patricians, who escaped the obloquy by carrying it on in their slave’s name. It is true that this peculium always formed a part of the property of the master, who could dispose of it if he so would, which, however, seldom happened; on the contrary, freedom was the reward held out for the saving of a certain sum, which they were then usually allowed to retain, or they were even permitted to dispose of it on their deathbed. Slaves even lent their savings to their masters, which was the form of a debt of honor, as there was no legal mode of recovery by the slave, nor by the master, if he had given it by way of present.

If the master became bankrupt, the peculium of the slave formed an ingredient in the dividend; but the slave might create a valid obligation on account of it by obtaining the security of a free or freedman.

1 The slaves in the West Indies were not allowed to practise physic. Obi men were punished for using charms and herbs; for they knew those which were poisonous, and used them perniciously.
2 C. 10, 70, 5.
3 C. 7, 39, 40; Mart. 3, 62, & 11, 70, & §, 23.
4 Plaut. Prerna. 4, 4, 113; Mart. 6, 66.
5 P. 47, 3, 46.
6 P. 47, 10, 15, § 44; I. 44, 4, § 3.
7 Tac. A. 3, 33—144, 43. 44; Athen. 6, 7; Senec. de tranq. Vit. 8; Plin. H. N. 33, 47 (10).
8 P. 15, 3, 49.
9 Plut. Cat. Maj. 27.
10 P. 41, 3, 32; § 1; I. 2, 12, pr.
11 P. 15, 3, 8.
12 Dion. 6, 24; Tac. A. 14, 42.
13 P. 15, 3, 53; C. 7, 23; I. 2, 20, § 20; Frag. Vat. § 261.
14 Plin. Ep. 8, 16.
15 P. 15, 3, 49; § 2.
16 Gaius, 4, 78; Senec. de Ben. 3, 19.
18 P. 12, 3, 64.
15 P. 15, 3, 5, § 4 & 9, § 2.
20 Gaius, 3, 119; I. 3, 20, § 1.
The power of contracting debts to the extent of his peculium was tacitly allowed to the slave; hence a praetorian action lay against the master to such amount, which, in point of time, was limited by the edict to a year after the slave's death or manumission. The master had, however, the first lien on the peculium, and could pay himself in full, it being a question of priority of demand, as a landlord or wharfinger has the first lien in England.

The peculia of vicarial slaves, and they themselves, formed part of the peculium of their slave master, and the whole was liable to the free master, as above. If the master, however, had permitted his slave to trade, he lost his preference, and took his chance, pro rata, with other creditors, and was liable, on infringing this rule, to an actio tributoria, for contribution.

§ 431.

A slave could be the agent of his master, according to the provisions of the edict, on proof of the agency being established; Actiones exercitoriae or institutioriae lay against the master who had entrusted a retail trade to a slave, or made him supercargo of his vessel. But if a slave, without authority, engaged in any commercial transaction, the master was obligated and exposed to an action, de in rem vero, to the extent of the profit he might be proved to have derived therefrom. Indeed, generally, all acts of a slave bound the master, inasmuch as a consent, expressed or implied, was presumable; but, as it was possible, that a slave might contract an obligation altogether without his owner's privy, it was held, that the advantages, but not the disadvantages, arising out of such transaction, accrued to the master. The mere natural obligation of the slave, however, ceased with his manumission; but this natural obligation could be converted into a civil one by security or pledge.

To the system of slavery is referable the doctrine of the English law of principal and agent; for the slave was, as it were, a part of the master. The English law has transferred the maxim to servants; and those are held to be such even though hired but for the moment, as porters, &c.

§ 432.

The ordinary chastisement of slaves, for domestic offences and damage, was left to the master, and the punishment of more serious, and even capital crimes, was anciently also left to the

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1 Gaius, 4, 73; I. 4, 7, § 4; P. 15, 1, 4.
2 P. 15, 3, 4.
3 P. 17, 1, 5; Theophyl. 4, 7, § 4.
4 Gaius, 4, 73; I. 4, 7, § 3; P. 14, 4, 1, & 7.
5 Gaius, 4, 73; I. 4, 7, § 3; P. 14, 4, 1, & 7.
6 Gaius, 4, 73; I. 4, 7, § 2; P. 14, 1, 1; P. 14, 2, 1, 3, & 5.
7 Gaius, 4, 73, § 4; I. 4, 7, 4, & 5.
8 P. 15, 3, 1.
9 Gaius, 3, 119; P. 44, 7, 14.
10 Paul. R. S. 2, 13, § 9; C. 4, 14, 1, & 2.
11 P. 12, 6, 1, pr.; P. 46, 1, 21, § 2.
12 Cat. de Re Rust. 5; P. 13, 7, 24, § 3, 24, § 5; C. Th. 9, 12, 3, & 2.
master, who executed them by his other slaves; but, with the progress of social intercourse, these last-mentioned powers were, as we have seen, taken out of his hands by the state authorities; and, on account of the abrogation of this power, no obligation arose in favor of the master ex delicto servi, although it might after manumission. As regarded a third party, before manumission, the action termed noxal lay against the master, who could be compelled to make the damage good, or surrender the slave, in the form of quiritian transfer; but if the owner let judgment go by default, the plaintiff acquired the slave by a prætorian or equitable title. Damage thus caused by animals or slaves of another was called pauperies.

A like practice prevailed in the West Indies.

The state authority claimed jurisdiction in capital crimes, as attempts on the life of the master, formerly called petty treason in England, or against a third party. The execution of the sentence pronounced by the public tribunal was, however, deputed to the master.

For the sake of public safety, a dangerous slave might be sold under condition of exportation, or residence in a fixed place, under pain of forfeiture by the purchaser to the vendor if the slave returned with the purchaser’s privity, contrary to the contract; but if he returned manumitted, the fiscus acquired him who sold him into perpetual slavery.

In order to check the harbouring of runaway slaves, the authorities gave every assistance in their power for their recovery; and severe penalties were denounced against those who concealed them.

A penalty was imposed on such crimps as purchased or sold runaway slaves for a small sum, in order to compel masters to pursue them, and thus to cut off all means of escape; nor was any acquisition valid except after capture; but, notwithstanding the security afforded by these provisions, slave-catchers appear, in latter times, to have been deemed guilty of smuggling. No usucaption availed in the case of a runaway slave, upon the principle that the slave had stolen himself, and consequently the legal title of the owner was not extinguished.

1 Dion. 1, 7, 69; Plut. Cat. Maj. 21.
2 In the West Indies, stipendiary magistrates were in like manner appointed by the home government, and superseded the power of the master.
3 Gaius, 4, 78; 1, 4, 6, § 6; P. 47, 2, 37; pr. C. 4, 14, 6.
4 Gaius, 47, 77; P. 44, 7, 74.
5 Gaius, 47; 75 & 78; 1, 4, 8; C. 9, 4, 3, 2; P. 47, 2, 17; § 4.
6 Gaius, 47, 9.
7 P. 2, 9, 2; § 1; P. 9, 4, 26; § 6.
8-Plut. Cat. Maj. 21; Mon. Ancyr. tab. 2, a dext. lin. 1, 2, 3.
9 P. 18, 7, 1.
10 P. 8, 7, 9; Fr. Val. § 6.
11 C. 4, 55, 1, & 2.
12 C. 4, 55, 1, & 3; Fr. Val. § 6.
13 Paul. R. S. 1, 6, § 3; P. 11, 4, 1, § 2 & 8, § 3 & 4; C. 6, 1, 2.
14 Paul. R. S. 1, 6, § 2 § P. 48, 15, 2, § 3 & C. 9, 20, 6; Fr. de Jur. Fisc. § 9.
15 P. 48, 15, 2, § 1 & 2 & C. 9, 20, 7.
16 C. Th. 10, 12, 1.
17 C. 6, 1, 12; L. 2, 6, § 1.
18 P. 47, 2, 60.
19 P. 41, 2, 50, § 1.

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§ 434.

Slavery among the Romans did not expire at a certain period, but was in its nature perpetual; nor could slaves put a period to it by any act of their own, with exception of that introduced in a late age of the empire, by which a slave could, by living twenty or thirty years as a freeman, acquire perfect liberty by prescription. In no case, however, could the status of the children be brought into question after the lapse of five years next following the decease of the father, but they were held to be free by law; otherwise the rights of a master, once lawfully vested, could not be extinguished but by his formal, or at least obvious, abandonment of them.

Persons detained in bondage illegally, or supposed to be so, were, at Rome, entitled to seek redress in the praetorian court, and in the provinces, in that of the Praesidium, to whom alone all questions relating to liberty were entrusted; these were considered to be of such high importance, that they were reserved for the special cognizance of the highest judicial officers, who were prohibited from referring such questions to the investigation and decision of the delegated judges, who tried other causes. If a suit respecting the status of an individual was brought to a "trial, de liberati causa," no new trial could be had before the same court at all, nor by way of appeal, after the lapse of five years, while in ordinary cases it was competent to bring a question to trial three several times, until these rehearings were abolished by Justinian.

The same Emperor, on the other hand, relieved persons apparently in slavery from the necessity under which they formerly lay, of being defended, in the suit respecting their status, by a free assertor, who was obliged to give security to make good to the opposite party whatever he should be found entitled to at the close of the trial.

Prescription did not run against liberty, to the effect of reducing any person to complete servitude; but Diocletian settled (A.D. 302) that freedom should be acquired by prescription viginti annorum, or, as it would be technically expressed in English, by the adverse possession of his liberty for twenty years.

§ 435.

When the master’s right of property was infringed by the state, through his slave being condemned to punishment on account of a public offence, the condition of such slave remained unchanged; but when liberty was to be given by the public, as a reward to a slave, the usual forms for the surrender of his lord’s authority

1 30 years, C. 7, 39; Nov. Val. 8, Ed. Ritter. 20 years, C. 7, 35, 23. 7.
In this latter good faith appears to be required, though not as in the case of the longer period.
2 P. 40, 15. 3 C. 1, 39, 1.
4 C. 8, 27, 4.
5 P. 40, 12, 1, § 29.

The process of reiteratio, or rehearing, was done by C. 8, 7, 1, pr. Auctio secunda, which, perhaps, refers to cases of freedom, is mentioned by Quintilian, Inst. Ort. v. 2.

But a free person might become indisolubly bound to a particular estate, by continuing to live and work upon it for a certain term.
seem to have been gone through, and the master had a right to compensation for the full amount out of the fiscus.

§ 436.

There were anciently three solemn modes of manumission,—

vindicta, census, and testamentum. The first is supposed by many to have taken its origin and name from the ceremony of the emancipation of Vindicius, the slave who discovered the conspiracy of Brutus’s sons, and is at least a form of great antiquity. It consisted in the master conducting his slave before the praetor, or other superior magistrate, and pronouncing the set form of words, hunc hominem liberum esse volo more quiritium, when, the judge having laid his rod upon the head of the slave, the lictor turned him round, and the master dismissed him with a box on the ear, alapa, indicative of its being the last punishment he would receive; and the slave became thereupon a libertus.

This form of manumission is still preserved in some German guilds, when an apprentice has served his time, and is discharged from his articles; the box on the ear is preserved.

§ 437.

Manumission per censum was effected by the slave simply giving his name to be enrolled as a free citizen on the censor’s lists.

The census was so perfect, that, throughout the wide extent of the Roman empire, every private estate was surveyed. Maps were constructed, indicating not only every locality possessing a name, but so detailed, that every field was measured; and in the registry connected with the map, even the number of fruit trees in the gardens, the olive trees in the groves, and the vines in the vineyards, were set down; the cattle were counted, and the inhabitants, both slaves and free, were individually inscribed in this register. With respect to slaves, their nationality, ages, employments, and handicrafts were specially noted.

The mass of statistical information collected by the great census of Augustus, was of such importance that the Emperor himself was induced to prepare an abstract of its results, which was presented to the Senate by his successor Tiberius, and regarded as one of the most valuable monuments of his government. The registers of the census were still farther improved in the reigns of Diocletian and Constantine; and the induction or revision of the whole system of taxation, based on these registers, was established.

1 Ulp. 1, § 16. Manumissio was only applied by the Romans to the enfranchisement of slaves; emancipatio to the dissolution of the patria potestas.

2 Liv. 2, 5.

3 The old forms of vindicta are allowed to by Sidonius, Carm. 2, ad Anthem. 5, 545; Persius, Sat. 5, 51, 75, 9. Many of the particular formalities were omitted in later times, as in that of Hermogenianus; P. 40, 2, 37.

4 Vid. Finlay, p. 36, on the Site of the Holy Sepulchre.—Smith, Elder & Co. 1847.

5 P. 56, 15, 4.

6 P. 1, c. 9, 5.

7 Tac. An. 1, 2; Suet. Aug. 38, 102.
every fifteenth year as a fundamental law of the empire. Augusti
si quidem temporibus orbis Romanus agris divisus censuque descriptus
eit, ut possisio nulla haberetur incerta quam pro tributorum susci-
perat quantitate solvenda.¹

That the rigour of the census had nothing declined in the reign
of Constantine, we have the evidence of Lactantius,² the tutor of
his son: Agri glebatim metieabantur, vites et arbores numerabantur,
animalia amnis generis scribebantur, hominum capita notabantur;
anusquisque cum liberis, cum servis aderat.³

Hence there can be no doubt that the registry of slaves was as
accurately kept as that of property, and slaves, when freed, were
transferred into the category of free persons, of whom a registry
was likewise kept, and thus formed their title-deed of freedom;
until such entry was made in due course, failing other legal evi-
dence, their liberty was probably revocable.

§ 438.
The owner’s consent was necessary to render valid freedom
acquired in this way; but no proof of his permission was neces-
sarily exhibited to the censors. It has been disputed whether
this sort of manumission took full effect immediately upon the
slave’s name being entered in the public register, or remained
suspended until the closing of the lustral or great quinquennial
census, by which the proceedings as to returns of the antecedent
ordinary years were ratified. But the more received opinion is,
that liberty was competent to the slave as soon as he was regis-
tered as a freeman, if his master expressly consented; and that the
publicity of the lustrum was required to secure the slave from
the master’s disavowal of his tacit or informal consent; in other
words, the freedom was revocable until such confirmation.

In the British colonies, a manumission paper was given to the
slave by the master, and registered in the parish. Subsequently,
all slaves were registered, and it was easy, by reference, to identify
the party on the registry. The erasure of the name of the slave
from the local register by the master, with the name and date,
sufficed to enfranchise the slave, and took effect from such date,
without reference to the period of the census.

§ 439.

Manumissio per testamentum might be conferred in three different
ways: first, directly, by ordering that he should be free; secondly,
by commanding the heir to manumit him; or thirdly, indirectly,
by bequest in trust, or simple request, addressed to the heir, that
he would manumit the slave. The first two modes were always

¹ Cassidor. Var. 12 & 13, 52.
² De Mortibus Persecutorum, 23.
³ See also St. Luke ii. 1—5; and
Dureau de la Malle Economie Politique des

Romains; Siculus Flaccus ed Goesti, p. 9;
Frontlai de Col. Libellus ap Goesium, p.
109.
SLAVERY.

indefeasible by the heir; the last, too, was for some time considered to be at his option to fulfil or not; but bequests of this nature were put on a level with direct legacies before the time of the younger Pliny.

Manumission in the British colonies could be performed by will, deed, or gift; and as there were no patronal rights, the question involved in the Roman law did not arise.

A slave, without being made free in express terms, obtained liberty and citizenship if he, by order of either the testator or the heir, attended his master's funeral wearing the pileus, or cap of liberty, or fanned his corpse on the bier, that is, unless challenged by the heir or some one at the funeral.

§ 440.

Various other modes of conferring liberty on slaves were subsequently introduced,—by letter (per epistolam), addressed either to the slave himself or to a third party; amongst friends (inter amicos), in the presence of five of whom the master declared his slave to be free; by banquet (per convivium), where the master, in presence of witnesses, desired the slave to recline with him at table; by the master designately calling the slave his son, which, it was sometimes argued, evinced the master's intention to adopt the slave, after such a step became practicable, but it was more properly interpreted to mean nothing farther than a wish to manumit; actual adoption of one's slave, too, made him a freeman. A master openly destroying, or surrendering to a slave, the document by which the latter was held in property, annulled his own right, and set the other free. Leave given to a slave to subscribe his name as witness to any solemn deed of his master, had the effect of manumission. Attiring a slave with the distinctive marks peculiar to a freeman, in order to evade a tax, put an end to his servitude,—a rule enforced more probably for the prevention of fraud than in favorem libertatis. The nomination of a slave as heir, or as guardian, though without a separate bequest of freedom, was sufficient to imply his release from bondage. On the death of a master who had maintained his slave girl as a concubine, she and her children were free by law, anything to the contrary contained in the will of the deceased notwithstanding.

A female slave marrying a free person with consent of her master,

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1 If a slave was to be freed post amnis, the term was legally interpreted to be two years. P. 402, 4, 17, §§ 5.
2 Plin. 4 Epist. 10 (75).
3 C. 7, 6, 5.
4 Hence the cap of liberty practised by France.
5 The chief ones are enumerated, I. 1, 5, § 7.
6 Noticed by Pliny, 7 Epist. 16 (136).
7 C. 7, 6, 10; I. 1, 11, § 12.
8 I. 1, 11, § 12.
9 C. 7, 6, § 12; but besides cancelling the former title, it was usual to make out an act of liberty, which was attested by witnesses.—S. Chrysost. Serm. 31.
10 Quintil. Declam. 340.
11 Id. Quintil. Declam. 340.
12 C. 7, 77, 5, Pt.
13 I. 1, 14, § 1.
14 C. 6, 4, 4.
who gave her a dowry, was forthwith deemed a freed woman. In fact, when manumission, which the first emperors had checked, came to be encouraged, the law supported a favorable interpretation of any expressions or circumstances from which the intention to manumit could be presumed.

Liberty, with or without citizenship, was held out as a reward to slaves for various public services, of which mention has already been made. It may, however, be added, that the slave who discovered the murderer of his master was declared free by the praetor, and was subject to no patron.

Becoming a cubicularius, or domestic of the Emperor’s bed-chamber (cubiculum), if with his master’s consent, gave freedom to a slave. If we may admit the authority of Rufus’s “Military Code” (Leges Militares), a slave taken by the enemy, and returning severely wounded, was to be instantly declared free, and if he bore no scars, was to be given back to his former owner for five years, upon the expiration of which period he was to obtain liberty. Slaves entering the service of the Christian church, with their master’s approbation, enjoyed the benefits of freedom so long as they remained in such service. In like manner, such as enlisted in the army had a corresponding advantage.

§ 441.

In Christian times, the ceremony of manumission was performed in church, sacrosanctis ecclesiis, particularly at Easter and other religious festivals, and was considered the most regular. In process of time, the other forms were in a great measure superseded; but most of the older modes of enfranchisement had remained in use. When it was wished to give full privileges to a slave who had been previously freed by one of the less formal modes, the ceremony of vindicata was usually gone through, as if no manumission had taken place; but probably any other of the solemn forms in practice would have the same effect.

The formal manumissions were alone irrevocable by the master, while the others seem to have been liable to be impeached or annulled at pleasure, down to the times in which manumission was particularly favored.

§ 442.

When gladiators were discharged from the amphitheatre, and it was intended to make such persons freedmen, some one of the customary modes of manumission was necessarily employed, unless freedom was given at once in the arena itself, when the pileus, or cap of liberty, appears to have been bestowed upon them in pre-

1 C. 7, 5, § 9; the maxim partes sequitur ventum prevailed in the British and all other colonies, whether the children were begotten by a free man or not.

2 P. 28, 5, 90; P. 40, 8, 5.

3 C. 12, 5, 4.


5 Enfrév. jux Graeco Rom. t. 2.

6 Plin. 7 Epist. 16 (136).

7 Vid. Lps. Sat. 11, 23.
SLAVERY.

sence of the people. On obtaining his liberty, in pagan times, the new freedman (like a sailor saved from shipwreck) cut off his hair, and offered it to Feronia, in whose temple he returned thanks for his freedom. Sometimes an altar was raised to the goddess by a wealthy and grateful worshipper; and it has been thought, that the many figures which remain, representing liberated gladiators, were in like manner dedicated to Mars or Hercules on occasions of victory or manumission. A freed gladiator hung up his arms over the altar of either of the last-named deities, and an ostiarius, or other slave, who had worn fetters, consecrated his chains to the Lares, or to Saturn, on becoming a freedman.

§ 443.
The power of manumitting a slave resided solely wherever the dominion over him was vested. We may conclude, then, that slaves belonging to the state could not be freed without public authority, and that those held by any corporation required a vote of that body to warrant their enfranchisement.

If a slave was the property of several private persons, the concurrence of all of them was originally necessary to release him from bondage; and one co-proprietor attempting to manumit lost his own right, which accrued to his co-partners. But, latterly, the cause of liberty was so highly favored, that it was ordained by a law of Justinian, that if any one of several joint holders of a slave chose to free him, he might effectually do so by renouncing his own right, and paying his co-proprietors the value of their respective interests in the slave. This is the strongest instance of interference with the rights of masters which the Roman law sanctioned, and is the only ordinary civil measure that approaches to compulsory manumission.

In the British slave colonies, the law was similar; but if the slave, on account of a dispute arising among the co-partners, became the object of a suit in equity, the decree of the court alone could manumit. In some colonies, slaves were treated as chattels, but in others as real property, as savoring of the reality, which at length became the general law of all the slave settlements.

With reference to criminal law, or questions of correctional police, it is necessary to notice, that a slave offender surrendered (noxæ deditus) by his master to the person whom he had injured, was en-

1 Juven. Sat. 12, 5, 81, 2.
2 Liv. 45, 44.
3 Plut. Per. 3, 3, 5, 42.
5 Horace alludes to a retired gladiator fixing his arms to the door-post of the temple of Hercules; Epist. 1, 5, 4, 5.
6 Hor. 1, Sat. 5, 5, 65-6.
7 Mart. 3, Epig. 29.
8 But Romans alone could make their freedmen citizens.
9 It would appear that in the provinces a public slave could not be freed without a decree of the local senate confirmed by the præses or governor.
10 Paul. R. S. 4, 12, § 1.
11 C. 7, 1.
titled to compel his new owner to manumit him as soon as he had compensated him for the damage caused by his former act—an indulgence which, while it appears incentive of crime, was probably introduced as a protection against undue resentment. Individual owners could manumit their slaves at pleasure, just as they could dispose of their other moveable goods. That power might be lawfully exerted over the one species of property at the same age as over the other, with consent of curators, which was after puberty.

§ 444.

The lex Ælia Sentia was passed to protect the rights of the citizens from the invasion of worthless fellows, whom their masters manumitted in order to get quit of them. Thus Augustus enacted, that slaves who had been publicly beaten for crime, imprisoned, tortured, or branded, should not, on obtaining manumission, be in a better condition than the deditii. Constantine abolished this branding, substituting collars descriptive of the crime to which the slave was addicted; many of these collars are very curious, and quoted from Fabretti by Blair in his inquiry into the state of slavery among the Romans.

This law also restrained the power of manumission in masters under twenty, with certain exceptions. This enactment prevented emancipation by will, but Justinian permitted testators near the eighteenth year to bequeath freedom. Augustus enacted that a slave should not be manumitted under thirty. Muratori appears to think that slaves could sometimes manumit their vicarious slaves, which appears an anomaly and not to be likely, for the master might challenge the enfranchisement, or the creditors, if he became insolvent.

§ 445.

The lex Fusia Caninia, passed in Augustus’s time, A.D. 76, restrained the manumission of slaves by will.

Every man possessed of 10, or fewer, might free

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Dionysius of Halicarnassus tells us, that many were manumitted under such circumstances, who ought rather to have been hanged.

Justinian repealed the law, probably because the necessity for it no longer existed, by reason of the decrease of overgrown families of slaves.

1 P. 4, 8, § 3.
2 I. 1, 6, 7; § 4 & § 7; C. 4, 3, 7.
5 P. 248, n. 63; Fabretti Inscr. Ant. 7.
6 50, 22, p. 159, 69.
7 Walter Ges. des R. R. § 459.
8 C. 7, 33, I. 1, 7.
§ 446.

Manumission afterwards received encouragement by decree, particularly from the Christian emperors; and ultimately Justinian removed, as we have seen, most of the impediments created by his more remote predecessors.

Manumission appeared, in all its forms, to proceed from the gratuitous kindness of the master; and, in fact, it was originally given much oftener as the reward of good conduct, than as an equivalent for a sum of money; but in later times it was frequently the result of a bargain between the lord and the slave, or a third party, and inscriptions recording instances of this sort are still extant. When a slave bargained with his master for enfranchisement, he took a written engagement or promise (tabella), on which an action might latterly be brought to compel specific performance. Slaves set great value upon manumission, and exerted their utmost to gain or save the means of purchasing it. They often borrowed the money with which they redeemed themselves; yet, in general, a freedman could not be sued for payment of a debt contracted, or for performance of an ‘engagement’ entered into by him, while in his former state of servitude. A slave was sometimes allowed to become a citizen, that he might bring his share of the public distributions of corn, or of the largesses, to his former master, or that the latter might be relieved of a useless servant. In some cases, the future freedman engaged to perform various services for his patron; and contracts of this kind between master and slave, which were always binding upon the slave, were afterwards equally so on the owner, who had previously been entitled to disregard his own covenant with his slave. Liberty was frequently left by will, on condition, that the freedman should pay certain duties to the memory of his deceased master,—a subject in which the Romans always felt the utmost interest.

§ 447.

As slaves were liable, in the same manner as other effects, to

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1 Dion. Hal. 4, 24.
2 Brissius. de Formul. 6 (p. 559); P. 40, 1, 11, 6; P. 37, 3, 15, 1; Mart. 6, Ep. 88; Virg. Ecl. 1, n. 33; Tac. An. 14, 42; Haut. Aul. 13; Rudert, 42; Persius, 11, 1. 
3 Domitila, the aunt (not the sister, as sometimes supposed) of Nero, manumitted the pantomimic actor Parisiis, for money; but he, on obtaining a judgment in favor of his original ingeniositas, demanded the reimbursement of the sum paid; Tac. A. 13, 27; P. 124, 3, § 5.
4 Gruter Inscr. 400; and one inscription records an instance of gratuitous manumission by an emperor; Gruter, 308, 9.
5 Seneca, Epist. 80.
6 Plaut. Cist. 2, 5; P. 40, 1, 6, appears to go as far, although the pecuniam of a slave was generally held to belong to his master; yet in cases of this sort it was considered to be the slave’s to the extent of the price of his head. The pactio libertinatis is referred to in many laws; P. 33, 8, 5; P. 43, 4, 3, 1, c. 15; P. 45, 1, 204; P. 4, 3, 75; § 8.
7 Seneca, Ep. 80.
8 P. 15, 1, 3, § 50.
9 Paul. R. S., 2, 13, 91; P. 44, 17, 14; C. 4, 14, 2.
11 P. 38, 1. Redemptionem was more recently the term for manumission purchased with a price, in consideration of which the slave was free from all future service; Append. Marcul. Formul. 100, 42.
be seized and sold in satisfaction of debts, and were in no wise distinguished from other chattels comprising the estates of deceased persons, it was incompetent to manumit, either in one’s lifetime or by will, so as to defraud creditors, or to evade the law of succession. In order, however, to protect the memory of an insolvent testator from the disgrace of his estate being sold in his own name or in that of his legal heir, and to preserve his family sacred rites, he might validly nominate a single slave his heir; and the latter was under the necessity of accepting the inheritance along with liberty.

Such, or perhaps more favorable to liberty, was the state of the law respecting manumission during the whole of the Republic, and masters used to avail themselves of it to a great extent. However harsh their treatment of slaves might be, freedom was the common reward promised for good conduct, and tended, perhaps, to reconcile the master and the slave to temporary rigor and endurance. Cicero induces the belief that good slaves usually attained their liberty after six years’ service. It was usual, also, for a wealthy master to give freedom to a number of slaves upon joyful occasions; for example, on his being elected to the consulship or other high office, when we may suppose that the claims of the nomenclator, whose business it was to whisper the name of each elector to the candidate, &c. who had thus aided in the canvass, would not be overlooked. Occasionally, too, ambitious persons may have made some of their slaves citizens, in order to have the benefit of their political support. The posthumous vanity of masters was gratified by their funeral procession being swelled by a crowd of slaves to whom they left freedom by testament, and who wore the cap of liberty while attending the obsequies; and we have seen that hundreds were often thus freed at once. Slaves appear sometimes to have been manumitted on their deathbed, in order that they might expire in liberty. Martial pays a tribute, in some feeling lines, to the memory of a freedman manumitted during his last illness; and Virgil represents Tityrus as anxious, in his old age, to obtain freedom, the means of acquiring which he had not married in his youth.

The number of freedmen found in Rome at the close of the civil wars was so large, that Augustus, desirous to re-establish the relative importance of the pure civic classes, imposed various

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1 I. 6, § 2.
2 It is, however, uncertain at what time the restrictions of the Lex Fulia Caninia were imposed; Heinec. Antiquit. Rom. 1, 6.
3 Seipio could truly say to the Roman people that he had vanquished and made slaves of most of them.
4 Philip 8, 11. In this passage caprius is the most common reading; but some MSS. are said to have servus.
6 Claudian. 44; Consul. Honor. 5, 617, et seq.; in Crotoph. 1, 5, 310, et seq. Thus, Vitellius, on the first day of his reign, manumitted his slave Aelianus; Suet. Vitell. 12.
7 Vid. § 439, b. op.
8 8 I. Epig. 122 (de Demetrio).
9 Ecl. 1, 5, 47-35.
restrictions upon manumission, and several of his successors were actuated by similar views; yet, in the reign of Nero, a proposition,\(^1\) which might have recalled many freedmen to slavery, was negatived by the Senate, on the ground, partly, that there were too few purely ingenuous citizens.

§ 448.

Under an ancient, although, perhaps, not the earliest system\(^8\) at Rome, there was no distinction amongst freemen; and all slaves manumitted by a Roman became citizens,\(^3\) and adopted members of his gens or race,\(^4\) of which they took the name. They were, however, considered of an inferior order, and labored under various disabilities from an early date. They appear\(^5\) to have been, at first, enrolled in the four city tribes, and remained so until the censorship of Appius Claudius, A.U.C. 442, who distributed them among all the tribes, so that the townspeople and freedmen obtained a preponderance.\(^6\) Fabius the censor, to remedy this evil, again collected them in the four city tribes,\(^7\) which on that account came to be considered less honorable,\(^8\) and where they remained till a late period.

§ 449.

Freedmen were not formally permitted to serve in the army, except in great emergencies, until the reign of Augustus, although they often got into the ranks after the time of Marius.\(^9\) A law of Valentinian\(^10\) (A. D. 426) excluded freedmen at once from the army and public honors; but we learn from the enactment itself,\(^11\) that some freedmen were then actually serving as soldiers, and that the decree did not remain long in force. According to the common opinion, by Tacitus, they could not be legally admitted into the Senate, although, in times of trouble or corruption, some contrived to make their way into that assembly. But Appius Cæcusc,\(^18\) and afterwards the Emperor Claudius,\(^13\) openly made some of this class senators; and Livy says\(^14\) that there was no positive statute against such a measure. At a later period, however, we find Alexander Severus\(^15\) refusing to make any of his freedmen equites, as that order was the seminary of the Senate. Freedmen were long deemed ineligible to the consulship and other high offices, even after they had been made accessible to plebeians. Nevertheless,

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\(^1\) Tacit. Ann. 13, 267.
\(^2\) That is to say, if we suppose the full manumission bestowed upon Vindicius to have been then introduced for the first time.
\(^3\) Vid. Niebuhr, Ges. c. 28; Dion. Hal. 54.
\(^4\) The freedman generally retained his former appellative, as his surname, and took the gentile name of his patron. However, the praenomen, or name of the individual, was not always that of the patron.
\(^5\) Liv. 9, 46; Diod. Sic. 20, 36.
\(^6\) Liv. 9, 46.
\(^7\) Plin. P. N. 18, 3; Dion. Exc. Mai. 57; Ed. Francof. 18, 22.
\(^8\) Epitom. Liv. 74.
\(^9\) C. Th. 4, 11, 3.
\(^10\) The same appears from C. 6, 7, 4.
\(^11\) Sext. Aurel. de Vir. Illust. 34; Liv. 9, 29.
\(^12\) Suet. Claud. 24.
\(^13\) Liv. 9, 46.
\(^14\) Lamprid. Alex. Sev. 19.
they might be appointed judges in the age of Persius; and a person of this class was praetor under Trajan. Freedmen, if sufficiently educated, were permitted to manage business for other persons, and were allowed to do this for patrons or their families in cases where it was not competent for others so to act. They were also expressly authorized to discharge the minor judicial functions of assessors. The valued privilege of wearing the gold ring was by law or custom denied to freedmen, but was often accorded by an act of imperial grace. Freedmen were not permitted to use a litter within the city unless by special license, and were not considered worthy to exhibit public shows without authority previously obtained for that purpose. It may, perhaps, be inferred, from a passage in Seneca, that the public baths allotted to freedmen, although very magnificent, were separated, not only from those destined for ingenui people of rank, but from those used by the plebeians.

§ 450.

The freed and ingenui classes might intermarry; and after matrimony between patricians and plebeians had been legalized, it is probable that no rank was excepted from marriage with freed persons until the Papian law prohibited a senator or his son to marry a freedwoman, or daughter of a freedman. However, while the general prohibition existed, the privileges of ingenui birth, in this respect, were sometimes solemnly conferred on freedwomen for signal services to the state, or on slaves by the government. Augustus, after his elevation to the empire, did not invite freedmen to his table; and until after his death they were not generally admitted to the best society of Rome.

The feeling against freedmen was not extinguished in the time of the elder Pliny, who complains of the honors paid to persons of that condition. The full rank and privileges of ingenui were sometimes granted to freedmen by the Emperor and operated as

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1 Pers. Sat. 5, 5, 80.
2 His name was Largus Macedo, and he was so cruel a master that his slaves caused his death; Plin. 3, Epist. 14.
3 C. 3, 6, 2.
4 P. 3, 1, 1, § 11 & l. c. 3; Ed. Perpet. Had. 4.
5 P. 1, 22, 2.
6 P. 40, 10.
7 Suet. Claud. 28.
8 Id. Ibid.
9 Seneca, Epist. 86.
10 The intermarriage of patricians and plebeians was forbidden by the XII Tables (Dion. Hal. 10); but was allowed in A.D. 300, Liv. 4, 6.
11 The Lex Papia Poppaea is given by Dio. 54.
12 Cic. Phil. 2, 2. Marc Antony's marriage with Tulula, although a mesalliance, was not pronounced illegal.
13 Liv. 35, 19. Hispala Fescennina, the freedwoman and courtesan.
14 Suet. August. He excepted, however, a favorite freedman of his own, and Menae, the freedman of Sextus Pompeius; but the latter had received the privilege of ingenui. Ibid.
15 Cic. Ep. Fam. 9, 26. Cytheus, the freed mistress of Volumnius Eutrapelus, with whom Cicero unwittingly supped.
16 Plin. 35, 18.
17 Dion. Hal. 50. On Narcissus, the freedman of Claudius, haranguing the troops, they cried, Is Saturnalia, "the slave plays the master."
18 A freedman thus favored was, strangely enough, termed "natalibus restitutus." Vid. P. 40, 11.
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their passport through all the barriers which opposed them, even those of society.

§ 451.

The morals of females in the higher classes were guarded by various laws, but those of freedwomen were left entirely in their own charge; nay, it was openly declared that the conduct of women in low stations was unworthy of the regard of the legislature. Freedwomen were, at one time, even forbidden to assume the dress of honest matrons. It is, therefore, matter of no surprise, that many females, celebrated for their gallantry, belonged to this class, and gave rise to the term libertinism.

§ 452.

The taint of servile blood was in part removed by one descent, but not as far as affected the marriages forbidden by law, and perhaps not for entrance into the Senate, although some offices were certainly given to the sons of freedmen. It is thought that, until near the end of the Republic, the children of freedmen were called libertinii, that appellation being always given to freedmen when spoken of as a class; indeed, there is no other Latin adjective which would convey the idea. The haughty kept aloof from the company of those whose fathers had been slaves, but not so the majority of society; and the sons of freedmen, if meritorious in themselves, were not excluded from being the guests of the Emperor. The second generation was considered sufficiently pure, even for admission into the Senate and the orders of nobility, although, by the older strict rule, three descents were required to qualify for patrician rank.

1 Paul. R. S. 2, 26, § 11; C. 5, 20, 1; C. 9, 9, 29 (a.n. 326).
2 Tibull. Cl. 6.
3 Turnebus (adversar) 29, 31; Dunlop Hist. of Rom. Literature, vol. iii. 294-6; or Acte Tac. A. 23, 12, et seq.
4 Cic. pro Cluent. 47. Yet Appius the Blind admitted them: Suet. Claud. 24.
5 The Tribune Furius, who opposed Metellus, was the son of a freedman (Cic. pro Rabir.); and so was Flavius, whom the people made a curule edile, in reward for his disclosing of the formula used by the Roman lawyers: Liv. 9, 46.
6 Walter, Ges. des R. R. § 100.
7 Vid. Suet. Cl. 24. In the time of Appius Cæcusc, libertinii were the sons of liberti; in later times, probably 565, under Calleco, the term libertinus, formerly taken to denote the sons of freedmen, became synonymous with libertus in its original signification. It may then be safely assumed that, originally, libertinus signified a freedman, libertinus his son, libertinii the class. In the age of Claudius, libertinus had become synonymous with libertus as a substantive, and signified a freedman, libertinii being still used to designate the class as heretofore.
8 Horace calls himself the son of a libertinus, (1 Epist. 20; 2 Sat. 6, 45.) Blair thinks, as applied to that age, libertinus means a freedman rather than the child of one; but, although this was true, yet the context of the satire certainly induces the supposition, that Horace "was the grandson of a freedman, son of a libertinus, and therefore ingenuus, being the grandson of a libertus."
9 Suet. Claud. 24—where we are told that Claudius admitted sons of freedmen into the senate, although he had intended to confine it to great-grandsons of citizens.
10 Liv. 10, 8.
§ 453.

The Lex Junia Norbana (published under Tiberius\(^1\)) introduced two new orders of freedmen, neither of which had the privileges of citizenship. In the one of these classes were ranked all freedmen manumitted by any of the less formal modes; they were assimilated in station to the Latin allies, and were known by the title of Junian Latins (Latini Juniani). Freedmen might be raised from this class to be citizens, either by their former master repeating his gift of liberty,\(^2\) but in one of the three original and solemn forms, or by an act of the Emperor.\(^3\) The same law enabled a Latian or Latin freedman to become a citizen, by espousing a citizen\(^4\) or a Latina, if he, in the latter event, declared, that he married merely to have offspring, and then both the wife and children became citizens. The children of a female citizen, by a Latinus husband, were thus made citizens by a law of Hadrian,\(^5\) contrary to the lex Mensia, which had laid down the unfavorable rule; and the Junian law itself made citizenship acquirable by Latini,\(^6\) on various grounds of public utility.

§ 454.

The lowest grade of libertinism corresponded with the state of the dedittii.\(^7\) Freedom of this kind alone could be conferred upon slaves who had ever been branded, or otherwise pointed out by law as unworthy of a higher lot; and a dedittius freedman could not be subsequently transferred to the rank of a Latin, and still less to that of a citizen, except by the Emperor’s authority. Caracalla, by extending the Roman citizenship to all his free-born subjects, did away virtually with the true classes of Latin and dedittius; but the parallel orders of freedmen continued till the reign of Justinian, who entirely abolished the different grades of freedmen, restoring the ancient rule by which a freedman became, if the manumission was legally performed, a citizen, but if informal, it was of none effect.\(^8\) Finally, he abolished all difference between free-born and freed, so that there existed but one denomination of citizens and but one sort of slaves, and a man was aut liber aut servus.\(^9\)

§ 455.

The state of libertinism was not perfectly secure to the manumitted slave so long as his patron lived, for, if he behaved ungratefully to the author of his freedom, he was liable to be again

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\(^1\) Passed in A. u. c. 771; Caji, Inst. 1, 1, § 2; Ulp. Fragm. 1, 10; et vid. Heines, 1, 4, et 5, § 12, et seq.

\(^2\) Plin. 7, ep. 16 (136); although, in fact, the party mentioned in this epistle, having been freed by a foreign owner, was not even in the state of a Latinus.

\(^3\) Id. 10, ep. 45 (Trajan, 4, 222); Suet. Claud. 19—but this last passage refers, perhaps, to some general measure.

\(^4\) Ulp. Fragm. 3, 3.

\(^5\) Ulp. Fragm. 3, 3.

\(^6\) Ulpian enumerates eight ways, 3, 1; but part of that title being lost, we have not his explanations of more than five.

\(^7\) Caji, Inst. 1, 1, § 3; Ulp. 1, 11.

\(^8\) C. 7, 6, 1; C. 7, 5; 1; 14, 5; § 3; Theophil. 1, 5, § 4.

\(^9\) Nov. 78, praet. 1, 5.
SLAVERY.—BYZANTINE EMPIRE.

reduced to his former servitude. But, at last, Justinian declared¹ that freedom once conferred should never be taken away.

§ 456.
Freedmen were not, as such, liable to any peculiar tax after that upon their manumission. In the second triumvirate, indeed, they were called upon for a contribution of one-eighth of their property while free-born citizens paid a fourth of the amount of their income, for one year; but the demand was on occasions of great emergency, and was not afterwards repeated.

§ 457.
Persons who, being yet bondsmen, had a vested right to the attainment of liberty at some future period,² were considered as being in a state of transition from bondage to freedom, and were termed statuliberi, which may be translated by apprentices; and, in consequence of their ultimate prospects, they were regarded as belonging more to the class of freemen than to that of slaves.³

The evidence of ancient authors induces the belief that the statuliberi were such as never had been slaves strictly so called, but merely persons whose original liberty was in suspense.

After the slaves in the West India colonies were made apprentices, previous to their final manumission, they were in this category of statuliberi.

§ 458.
There can be no doubt that the conquest of Greece by Latins,⁴ and the division of their possessions amongst several independent princes, must have tended to ameliorate the condition of that portion of the cultivators of the soil who were still slaves or serfs, since it must have afforded them additional facilities to escape from the severity of tyrannical masters into the territories of the Greek Despots of Epirus or of the Byzantine Emperors.

It has been generally supposed, from the tendency of Justinian's legislation compared with some laws of later Byzantine Emperors, that Christians were not retained in slavery by the Greeks after the thirteenth century, and that rural slavery had been long extinguished and replaced by the labor of serfs or coloni, who made fixed payments in produce and labor for the land they tilled, and to which they were attached.

Two Byzantine laws have been more than once quoted, to show the favorable disposition of that government towards slaves, and as indications of a desire to see slavery completely extinguished.

¹ C. 7, 6.
² Persons ransomed from the enemy, for instance, had to repay the purchase money by servitude, during which period they were statuliberi.
³ There is, at least, one instance of a person styling himself statuliber, in an inscription: Muratori, Inscr. cl. 21, p. 1520, 10. They might be punished as slaves in the time of Pomponius, under Aurelius and Commodus, p. 40, 7, 29; but Caracalla ordered that they should suffer as freemen only: P. 48, 19, 9, § 16. Modestinus, who lived under Gordian, states the law to be the same in his time: P. 48, 13, 14.
⁴ The author is obliged for the following remarks on the last traces of slavery, in the Middle Age, to that distinguished authority on Byzantine history — Major George Finlay, K.R.G.
The first is a law of Alexius I., in the year 1094, declaring that, if any person be claimed as a slave, and be able to produce witnesses of good character, who depose, that he has always been reputed a freeman, the suit will be immediately abated by the oath of the person so claimed as a slave. And the same law declares, that even slaves shall be entitled to claim their liberty, if their masters refuse to permit the religious celebration of their marriages.  

The other is a law of Manuel I., published probably about the year 1158, giving freedom to all persons who had relapsed into slavery by the sale of their property, which reduced them to the necessity of cultivating the lands of others in a servile capacity, or who by poverty had been compelled to sell themselves to the rich, to obtain the necessaries of life.  

Hypocrisy of Cantacuzenos in respect of slavery.

During the civil war between the Empress Anne, of Savoy, regent for her son John V., and the usurper Cantacuzenos, the Empress concluded a treaty with the Turkish Sultan, Orkhan, by which the Mohammedan auxiliaries were allowed to export as slaves any Christians they might take prisoners belonging to the opposite party, and the slave-merchants were even permitted to convey these slaves from the Turkish camp to Asia Minor, even passing through Constantinople and Chrysopolis. This treaty was ratified by Cantacuzenos as applicable to the subjects of the lawful emperor, John V., when the usurper gained Orkhan over to his party, and made him his son-in-law. Yet this unprincipled hypocrite, in his history, records, that it was forbidden by the Roman law to reduce prisoners of war to the condition of slaves, unless they were barbarians, who did not believe in the doctrines of Christianity, and impresses his readers with the idea that such had always been his own humane conduct.

§ 460.

We possess a few documents concerning the existence of slavery under the government of the dukes of Athens, which leave no doubt that both domestic slavery and rural servitude were common

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1 Montreuil Histoire du Droit Byzantin : tom. iii. p. 158 ; Bonnefdius Jur Orientale, p. 57.
3 This law has escaped the attention both of Montreuil and Bonnefdius, but is mentioned by Lebeau, Histoire du bas Empire, tom. xvi. p. 302.
4 Ducis, p. 15, Ed. par.

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in the Frank possessions in Greece during the whole period of their domination. Pope Innocent III. affords distinct testimony concerning the existence of rural servitude at the time of the Conquest, in a letter addressed to the Archbishop of Patras, dated in 1209. The Pope, in giving instructions concerning the dispositions to be adopted in the establishment of a monastery, says,—assignans, nibilominus eis rusticos, qui sine mercede vel expensis eorum in domo sub labores exercant universos.\(^1\)

\(\text{§ 461.}\)

In the following century, in the charter of Robert, titular Latin Emperor of Constantinople, and Prince of Achaia, granting the castle and barony of Corinth to Nicholas Acciaiuoli, dated in 1358, is recited the tenor of a letter from the inhabitants of Corinth. The letter complains of the ravages of the Turks, and distinctly mentions the loss of their slaves as one of their greatest misfortunes. The words of the recital are,—Quia, qui consueverunt servis et divitias abundare, ad servitutem et ad magnas penurias sunt reducti et nullus est in castellaniam Corinthii, qui suum panem non commodat cum dolore.\(^2\)

In the will of Nerio Acciaiuoli, Duke of Athens, dated in 1394, there is a clause conferring liberty on a slave named Maria, daughter of Demetri Rendi, and declaring that all her property, whether moveable or immovable, must be given up to her, wherever situated.\(^3\) This clause affords conclusive proof of the existence both of domestic slavery and rural servitude, for the idea of a domestic slave possessing property, especially moveable, shows, that the condition of the serf, had modified that of the slave.\(^4\)

\(\text{§ 462.}\)

There is still more decisive testimony concerning the existence of domestic slavery, in an act of donation of a female slave by Francesca, Countess of Cephalonia, daughter of Nerio, who signs with red ink, and assumes the title of Basilissa, in consequence of her husband, Charles Tocco, Count of Cephalonia and Leucadia, having conquered part of the Despotal of Epirus, and assumed the title of Despot of Romania, though, as that title was then arrogated by several persons, he is usually called Despot of Arta. The act is dated in 1424, and is written in Latin. It gives to her cousin Nerio, son of Donato, whom she calls her beloved brother, one of her slaves or serfs from Despotal of Epirus, named Eudocia, in absolute property, with power to sell or emancipate her.\(^5\)

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3. The words are,— Item volomo ed ordinamo che Maria figlia di Dimitri Rendi sia libera ed habbia tutti li beni suoi mobili et stabili la dove si trovano.—Buchon, Nouv. Rech. Diplômes, ii. 256.
4. The house of Rendi is one of the principal families in Corinth at the present day.
5. The words of the act are,—Concessimus dedimus delibere donavimus in per-
The last official act relating to the existence of servitude under the Frank dukes of Athens gives us a glance at the numerous personal services then still existing in Greece, corresponding to those to which the villans in Western Europe were subjected. This act is a Greek charter by Nerio II., dated August 15, in diction A.M. 6943, or A.D. 1437. It confirms the privileges granted to Gregorius Chamuches by Antonio, the late duke, whom Nerio II. calls his uncle, and liberates Gregorius and his posterity from the servitudes of transporting the agricultural produce brought to town in panniers, and the new wine from the wine-press; also from collecting or paying a fixed present of oil or olives, and from all other obligations of rural servitude.

§ 464.

We have thus conclusive evidence that rural slavery, or at least a modification of servitude, did not become completely extinct in Greece until the country was conquered by the Turks. The fact is, that in all countries rural slavery has not ceased until the price of the productions raised by the labor of the slave has fallen so low as to leave no profit to his owner. When some change in the condition of the country admits of land being let for a rent, whether in produce or money, greater than the surplus which remains after cultivating it by slave labor, rural slavery cannot be perpetuated; and it would require some extraordinary power to abolish it where the labor of the slave gives fertility to the soil and wealth to the slave-owner, while the land not cultivated by slaves could find no tenants, but would remain waste. Neither the doctrines of Christianity nor the sentiments of humanity have ever yet succeeded in extinguishing slavery in any country where rural slavery could be continued with profit.

§ 465.

All writers are agreed that the continued invasion of Britain, and the influx of the Saxons, appear to have had the effect of...
nearly exterminating the aborigines, or of driving them to the surrounding mountainous districts; those few who remained were reduced to a state little above slaves, and are probably those persons alluded to under the terms Theowas and Eines. The Saxons were, and remained free, until the Norman Conquest; the lower class of freeholders being termed Ceors, the higher Thanes, and the highest of all, King's Thanes; their aestimatio capitis was respectively 200, 600, and 1,200 shillings. The Norman conquerors raised these theowas, or old native slaves, into villans in gross, and degraded the ceors into villans regardant. This appears to be the most reasonable mode of reconciling the conflicting testimony on this point.

§ 466.

That the ceors were freemen, is clear from the following circumstances: they could not be alienated at pleasure, but could neither remove themselves nor be removed from the land, for which they paid a fixed rent; they were effectually protected by law from insult and injury; they could be compurgators to each other, and possessed a capitis aestimatio; and, as they could acquire property and keep it, they might always purchase their own freedom; if they kept possession for six years of six hydes of their own land, or if they travelled three times across the sea, they became thanes. The only difference between a ceorl and a thane was, then, in the property qualification necessary to give him political franchise.

§ 467.

The second class included the slaves, properly so called, the theowas, eumes, and female slaves, of three kinds at least. Captivity, crime, perhaps debt, entailed slavery, and it was perpetuated by birth on the mother's side; the laws on the subject being frequently the same as among the continental Germanic nations. Slaves might be branded, whipped, yoked, sold in a market; they wore an iron ring about the neck; and these are supposed to be the remnant of the conquered Britons.

A person condemned by a judicial sentence, and unable to pay the compensation due for his crime, was called a wite theowa, and was more degraded than other slaves. If he committed theft and ran away, he was put to death without mercy; and he might even

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1 See Palgrave, ut supra, pp. 17-22.
3 Palgrave, ut supra.
7 See Bede, lib. 1, c. 15; Edicts, Vit. S. Wilfrid, c. 19; Henry's Brittain, b. 2, c. 6, vol. iv. p. 238; Fosbrooke's Encycl. Antiq. v. Slave; Lyttelton's Hist. Hen. II.
9 Brady's Hist. Eng. p. 84, note.
10 Turn. Anglo-Sax. b. 7, c. 9; Lingard's Hist. Eng. vol. i. p. 507; Fosbrooke, ut supra, Leg. Sax. pp. 47, 59, 103, 139.
be punished additionally, it seems, for crimes he had committed while free.\

§ 468.

Under the Normans, we read of two sorts of villani,—the villeins regardant or appurtenant to a manor (ad manerium spectantes regardantes), and incapable of being removed from it. In the thirteenth and fourteenth centuries, many of these men (who were then sometimes called, while in the process of transformation, tenants in villenage⁶) slid into copy-holders.⁷ Practically speaking, they could acquire property⁸ and make wills,⁹ and purchase their own freedom if permitted;⁶ and they had legal rights against all persons, except their master, if injured by them,⁷—an evident type of the feudal system; in respect of their status, they resembled the Roman liberti. The wives of villans, and female villans, were termed neisci quasi nativi.

The villeins in gross, or pure villans (the servi of Domesday-book, as Bishop Kennett has very acutely observed⁶), are analogous, as Sir H. Ellis notes,⁹ to the Saxon theowas; "to whom the Normans, who were strangers to any other than a feudal state, might give some sparks of enfranchisement, by admitting them, as well as others, to the oath of fealty, which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition."¹⁰ They might be alienated at pleasure, sold in the market, and were employed as mere drudges. However, "there is no evidence at all to prove that these villans also might not acquire property."¹¹ They were always quite the smaller class of villans; "the cases relative to them are very few, and there were," as Hargrave thinks, "never any great number of them in England."¹² This class also gradually passed into a state of freedom about the same time as the other, and "our village laborers have descended from these villans."¹³ Thus, by a degradation of the eorls into villans regardant,¹⁴ and an elevation of the theowas into villans in gross, the Normans brought those two Anglo-Saxon classes nearer together, and reduced them both to a state of strict dependence,

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¹ Leg. Sax. pp. 18, 22; Archæol. i. c. p. 214.
³ Blackstone quoted in Ellis, ut supra.
⁴ Hallam's Middle Ages, vol. i. p. 222, and vol. iii. p. 270.
⁶ Leg. Sax. (Henry I.) p. 271; Aulde Lawes of Scotland, b. 2, c. 12.
⁸ Kennett, Gloss. Par. Antiq.; Morant's Hist. of Essex, vol. i. p. 27; see also Gudron on Courts Baron, p. 592—but Mr. Hallam (Middle Ages, vol. iii. p. 256) will not allow this.
¹⁰ Blackstone quoted in Ellis, ut supra.
¹² State Trials, vol. ii. p. 42. Domesday-book shows them to have been in Sussex to the villans regardant as 415 to 5866. The orthography of the word villanus was corrupted into villein in Norman French.
¹⁴ See Ellis, i. c. "cyrclusi vel villani; Wilk. Leg. Sax. p. 270 (Henry I.).
often called slavery; though some writers, in consideration of the essential difference between the two kinds of villans, call the villans regardant free in comparison with the other.

§ 469.

Sir T. Smith, the secretary to Edward VI., says, in his Commonwealth, "that the Romans had two kinds of bondsmen. The one which were called servi; and they were either bought for money, taken in war, left by succession, or purchased by other kind of legal acquisition, or else born of these bondwomen, and called vereae. All these kind of bondmen be called in our law villains in gross, as ye would say, immediately bond to the person and his heirs; and another kind they had, as appeareth in Justinian's time, which they called adscripticii glebae, or agri censiti: these were not bond to the person, but to the manor or place, and did follow him who had the manors, and in our law are called villains regardant, for because they be as members or belonging to the manor or place. Neither of the one sort nor of the other have we any number in England, and of the first I never knew any in my time; of the second so few there be, that they are not worth the notice; but our law doth acknowledge them in both these sorts."

The distinction of Sir T. Smith into vereae and servi, when speaking of Roman slaves, is not judicious, for a distinction by occupation is to be preferred to that by origin, and it has been seen, that there was the greatest possible difference between the household and rural slaves, who afterwards became adscripticii glebae.

§ 470.

Mr. Hallam thinks that the free Saxon coecls were equivalent to the Roman coloni, and were reduced to villanage by the Normans, who, by breaking through their privileges, reduced them to that state. Thesuva, on the other hand, he considers to have been the Anglo-Saxon slave, equivalent to the servus of the Romans; thanes being the gentry of the kingdom, of whom there were two descriptions, the major and minor, and that the quality of these two depended upon the extent of their possessions.

1 Villains generally are called servi in Henry I.'s laws (Lug. Sax. p. 269), see Palgr. Eng. Comm. p. 12. Regardant villanage is called servitus in Henry VIII.'s and Elizabeth's commissions, cited below. It is not, however, quite correct to say with Barrington (on the Statutes, p. 6), that "the villains who held by servile tenures were considered as so many negroes in a sugar plantation;" or with Mr. Alleyne (State Trials, vol. xx. p. 69), that the villains in Elizabeth's time (who were regardant only in the sixteenth century) "were mere slaves."

2 "Glebae ascripti ("villains regardant," Sir T. Smith) liberi sunt licet faciant opera servilia: cum non faciant eadem ratione personarum, sed ratione tenementorum: et a gleba removeri non possunt quamfu pensiones debitas presolvere possunt." But "purum villenagium (villanage in gross) est qui scire non potest vespere, quae servitium fieri debet mane."—Bracton, quoted by Barrington, Obs. on Statutes, p. 248 (second edition).

3 Hallam, M. A. vol. iii. ch. 8, 254.
He also denies that there was any essential difference between villans (villani) in gross and regardant, but that the distinction depended upon the title by which the villan was held; that the villan regardant might be severed from the manor, and that, though his condition might thereby have been rendered practically worse, yet that his legal status was essentially the same, and that this change might be made by the villan being transferred by deed; that the services of all villans were uncertain; and that if a man and his ancestors, whose heir he is, have been seised of a villan and of his ancestors, as of villans in gross, hence, out of memory of man, these are villans in gross.

This, then, is in effect to abolish all distinction between the two species of villan tenure—privileged and pure.

§ 471.

These conflicting opinions may be thus reconciled. Savigny satisfactorily proves the existence of a certain class of small allo-dial freeholders, scabini or schöffen, before the introduction of feods, and that the pressure of the feodal system obliged the less considerable of these freemen to surrender their lands to a feodal superior, and receive them back as feods, whereby they were not the less freemen.

On applying this evidently German system to the villans of England, we come to the conclusion that these petty Saxon freeholders, or ceorls, on the Norman invasion, were in like manner assigned to some feodal superior, when the conqueror divided land into 60,000 feods; they were allowed a sort of interest in their land, but were obliged to perform predial service to their lord; in other words, to give him a portion of the profits of the lands held of him; and this system is as old as Tacitus. That the land was acknowledged to be theirs in a qualified degree, is clear from the proviso that they should not be removed from it; and these were the villans regardant of the manor. Norman tyranny, however, soon oppressed these persons; and when their prescriptive right could be impugned, or was incapable of proof, or where they committed minor crimes or neglect of servitude, it is not improbable that they were reduced into unqualified slavery, and disseised of their lands, and thus became villans in gross.

This villanage certainly no longer exists; it is, nevertheless, still traceable in the customs of some manors, the tenants upon which, by custom, send carts, horses, and men to carry the lord’s harvest; and this, though a voluntary service, is nevertheless considered a fact in the rent which they pay to their landlord.

1 Hallam, Suppl. Notes to M. A. ch. 8, 384. 
2 Litt. § 181. Villans in gross is where a man is seised of a manor whereunto a villan is regardant, and graneth the same villan by deed to another, then he is ex-villan in gross and not regardant. 
3 Co. Litt. § 120. 
4 Litt. § 182. 
5 Ges. del. R.R. im M. A. § 119, h. op. 
6 Tac. Germ. 25.
§ 472.

Villans might be enfranchised by manumission, which was either express or implied; express, as where a man granted to the villan a deed of manumission;¹ implied, as where a man bound himself in a bond to his villan for a sum of money, granted him an annuity by deed, or gave him an estate in fee for life or years,² for this was dealing with his villan on the footing of a freeman. It was, in some instances, giving him an action against his lord, and in others vesting in him an ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villan, this enfranchised him;³ for, as the lord might have a short remedy against his villan, by seizing his goods (which were more than equivalent to any damages he could recover), the law, which favors liberty, presumed that, by bringing this action, he meant to set his villan on the same footing with himself, and therefore held it an implied manumission. But, in case the lord indicted him for felony, it was otherwise, for the lord could not inflict a capital punishment on his villan without calling in the assistance of the law.

§ 473.

The villans regardant belonged to bishops, monasteries, or ecclesiastical corporations, in the preceding times of Popery; for, Sir T. Smith tells us, that "the holy fathers, monks, and friars had, in their confessions, and especially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was for one Christian man to hold another in bondage; so that temporal men, by little and little, by reason of that terror in their consciences, were glad to manumit all their villans. But the said holy fathers, with the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the church so much as to manumit such as were bond to their churches, or to the manors which the church had gotten, and so kept their villans still."

§ 474.

Villans, by immemorial usage and tenure of their lands and concessions of lords entered on the court roll, at last obtained a prescriptive right against them, and thus obtained their lands by a title which could not be disputed; and Blackstone tells us that, as such, tenants had nothing to show for their estates but these customs, and admissions in pursuance of them entered on these rolls, or copies of such entries witnessed by the steward; they now began to be called tenants by copy of the court rolls, and their tenure itself copyhold.⁴

Coke,⁵ then, is not correct when he says that these tenures are

¹ Co. Litt. 1. 204. ⁲ S. 204, 5, 6. ³ S. 208. ⁴ Cop. § 32. Steph. Com. vol. i. 206, note n. ⁵ Misconception of Coke.
meantly descended, yet come of an ancient house; for, if the ceorls were freeholders oppressed by the feodal conquerors, the present copyhold tenure is of freehold origin, restored to its normal state.

§ 475.

The British slave trade was instituted in the reign of Queen Elizabeth, who personally took a share in it. At that time the West India colonies did not exist.

In 1662, Charles II. granted an exclusive right in the slave trade to Queen Catherine, the Queen Dowager, the Duke of York, and others, who formed themselves into a trading company, they undertaking to supply the West India planters with 3,000 slaves annually. In the same year, that monarch issued a proclamation, inviting his subjects to transport themselves to Jamaica, agreeing to allot lands to every individual who would go to reside in the island, and signify his resolution to plant there.

In 1679, petitions from the manufacturers in Great Britain of woollen and other cloths, and the makers of the various articles necessary to the slave trade with Africa, were presented to Parliament, alleging that the trade was cramped by being in the hands of an exclusive company, and praying that it might be opened.

In consequence of these and similar petitions to the House of Commons, (a committee of the whole House,) in 1695, resolved, "that for the better supply of the plantations, all the subjects of Great Britain should have liberty to trade to Africa for negroes, with such limits as should be prescribed by Parliament;" and by statute 9 & 10 William III. c. 26, the trade was accordingly laid partially open, the preamble of that act stating, that "the trade was highly beneficial and advantageous to the kingdom, and to the plantations and colonies thereunto belonging."

The manufacturers of Great Britain, however, were still dissatisfied with the restrictions imposed upon the trade. They continued to ply the Legislature with petitions to give greater latitude to a traffic by which they exchanged their goods for negroes, and sold those negroes to the West India proprietors.

The House of Commons adopted their arguments; they declared, by a report from the committee, in 1708, "that the trade was important, and ought to be free and open to all the Queen’s subjects trading from Great Britain." By another report in 1711, that "the trade ought to be free in a regulated company, that the plantations ought to be supplied with negroes at reasonable rates, that a considerable stock was necessary for carrying on the trade to the best advantage, and that an export of 100,000l. at least in merchandize should be annually made from Great Britain to Africa."

It was found that the trade could not be conveniently and extensively carried on without forts on the coast of Africa, and such was the appetite of the British nation for the slave trade, that, in
1729, a committee of the House of Commons passed the following resolutions:

First, "that the trade should be open;" secondly, "that it ought not be taxed for the support of forts;" thirdly, "that forts were necessary for securing the trade;" and fourthly, "that an allowance ought to be made for maintaining such forts."

At length, in 1749, the statute 23 George II. c. 31, was passed, which removed all obstruction to the operation of private traders, declaring "the slave trade to be very advantageous to Great Britain, and necessary for supplying the plantations and colonies thereunto belonging with a sufficient number of negroes at reasonable rates."

In answer to a case referred to the judges for their opinion by the crown on the Assiento contract, they report: "In pursuance of his Majesty's order in council hereunto annexed, we do humbly certify our opinions to be, that negroes are merchandize; that it is against the statute of navigation, made for the general good and preservation of the shipping and trade of this kingdom, to give liberty to any alien to trade in Jamaica, or other his Majesty's plantations, or for any shipping belonging to aliens to trade there, or to export thence negroes," &c. And the certificate is signed by Lord C. J. Holt, Justice Pollexfen, and eight other judges.

The proclamation of Charles II. had invited British subjects to settle in the West India colonies, and offered them lands on condition of their being planted.

The patents by which land was granted show what was meant by the proclamation, viz., that the land should be cultivated by slaves, in the proportion of four negroes for every hundred acres, with a due proportion of white people, if they could be obtained.

§ 476.

In 1760, the slave trade received its first check in the colonies. The colonies, anxious to limit the trade, passed laws imposing a duty on negroes imported. Great Britain refused to sanction any laws having such a tendency. The colonies began in 1760. South Carolina, then a British colony, passed an act to prohibit further importation.

Great Britain rejected this act with indignation, and declared that the slave trade was beneficial and necessary to the mother country. The governor who passed it was reprimanded, and a circular was sent to all other governors warning them against a similar offence.

The colonies, however, in 1765, repeated the offence, and a bill was twice read in the Assembly of Jamaica for the same purpose of limiting the importation of slaves, when Great Britain stopped it through the governor of that island, who sent for the Assembly, and told them that, consistently with his instructions, he could not give his assent: upon which the bill was dropped.
At a later period, 1774, another attempt to the same purpose was made by the Assembly of Jamaica, which passed two bills to restrain the importation of negroes. This was met by letters from Lord Dartmouth, the secretary of state, to Sir Basil Keith, the governor of Jamaica, stating that "the measures had created alarm to the merchants in Great Britain engaged in that branch of commerce," and forbidding him upon "pain of removal from his government to assent to such laws."

The colonies, by the agent of Jamaica, remonstrated against the resolution of the government; but the Earl of Dartmouth replied, "We cannot allow the colonies to check or discourage, in any degree, a traffic so beneficial to the nation."

§ 477.

It being obvious that the British Parliament would not hear of the manumission of slaves, the first measure taken was the registration of slaves; the second, to prevent further importation.

The next step consisted in a series of amelioration acts, which were passed in the various colonies between 1823 and 1826, to prepare the slave for a state of freedom. The property of slaves was made indefeasible, like that of free persons; they could receive under or bequeath by will; when baptized, slaves could be witnesses, even against their masters; collars and chains, as modes of punishment, were forbidden; the maximum number of stripes to be inflicted on slaves was fixed at thirty-nine; the attendance of freemen in slave courts was made compulsory; aged and useless slaves were provided for; all slaves to be adequately clothed, lodged, and fed, and furnished with medicine and medical attendance in an hospital on the estate, or at their houses, free of expense; Sunday labor was prohibited, and one day a week allowed them to labor for themselves; the murder, rape, and maiming of slaves were treated as offences against a free person; and slaves tried for murder had counsel assigned them at the public expense, and, in cases of felony, were to be tried as freemen; families could not be sepa-

1 The following Acts recognise the legality of property in slaves.

First, Acts affording encouragement and protection to the sugar colonies,—35 Cha. II. c. 71; 22 and 23 Cha. II. c. 26; 7 and 8 Will. III. c. 22; 6 Anne, c. 30; 6 Anne, c. 37; 8 Anne, c. 13; 4 Geo. II. c. 15; 5 Geo. II. c. 24; 6 Geo. II. c. 133; 2 Geo. II. c. 30; 19 Geo. II. c. 30; 21 Geo. II. c. 50; 5 Geo. III. c. 45; 6 Geo. III. c. 51; 27 Geo. III. c. 27.

The second general head, of Acts relating to the African slave trade, and stating it to be necessary for the West India colonies,—Royal charters of Cha. II. in 1664 and 1672; 9 and 10 Will. III. c. 26; 10 Anne, c. 27; the Queen's Speech to Parliament in June, 1713; 23 Geo. II. c. 31; 25 Geo. II. c. 40; 4 Geo. III. c. 20; 5 Geo. III. c. 44; 23 Geo. III. c. 65; 27 Geo. III. c. 27; the Proceedings of the House of Commons from 1707 to 1713.

The third head of Acts encourages loans to the proprietors in the West Indies from British subjects and foreigners,—5 Geo. II. c. 7; 13 Geo. III. c. 14; 14 Geo. III. c. 79; 1 and 2 Geo. IV. c. 51.

To these may be added, 59 Geo. III. c. 120, for the registration of slaves.

2 The first colonial Amelioration Act was passed by the Leeward Islands long before the improvement of the condition of the slaves was mooted or canvassed in Great Britain.
rated, even in consequence of a judicial process, or a slave family removed to another colony, but if so removed it became free; religious instruction was provided for, and the clergy empowered to baptize and marry all slaves who were cognizant of the nature of these rites, to induce which the continuance of polygamy was discouraged; labor was limited to ten hours; women were to be punished in private, and this was soon followed by a total prohibition of flogging as a punishment of that sex; taxes upon manumission was repealed, and, in some colonies, manumission was made compulsory on the application of the slave, whose value was assessed by arbitrators; lastly, a council of protection was appointed, to which all slaves might freely appeal. These provisions did not, however, satisfy the anti-slavery and dissenting party at home, of the interference of whom Lord Eldon gave his opinion already in 1826: "My fixed opinion," said his Lordship, "is that these great and desirable objects have been more retarded by the inconstant zeal of those who have been advocates of these measures, than they had been, or could be, by any direct opposition on the part of those who opposed them."

§ 478.

In 1833, the act for the abolition of slavery throughout the British colonies, &c., passed the British Legislature, and received the royal assent. All slaves above the age of six years, in August 1834, were to be made apprenticed laborers for a term of years. All slaves brought into the United Kingdom, with consent of the owners, were to be free: this principle had been firmly established some time previously, in the case of Somerset, a negro, who had claimed his freedom on his arrival in England. Prudential slaves were to be apprenticed for six, and non-prudential for four years; but the enfranchisement might be anticipated by the voluntary act of the apprentice by purchase, or by the master, who could not, however, thus escape his liability to maintain infirm apprentices, and other like provisions; and stipendiary magistrates were appointed to see the act carried into execution. The act contains also other provisions long before in operation by virtue of local enactments. The rest of the act directs the raising of twenty millions, and regulates its distribution, by way of compensation, and other matters connected therewith.

§ 479.

Nothing could have been more dissonant with natural justice than the mode in which the enfranchisement of the slaves in the

1 This was found to encourage running away, the slave on his return not being reducible to his former state.
2 Many availed themselves of marriage in imitation of the whites, but complained afterwards that they were not allowed to change wives, as before, by mutual consent.
3 Abstract of the ameliorating provisions of the laws last enacted in each of the British West India colonies for the Government and protection of the slave population.
4 Those contemplated by the Resolutions of 1823.
West India colonies was conducted. The contract, fair to both parties, would have been to have granted the slaves their freedom on condition of their accepting a free passage back to the country of their ancestors. It is indeed probable, that, with no knowledge of the country of their origin, save the vague tradition of the tyranny and oppression of their former chiefs, few of the present generation would have availed themselves of the offer; and if they had not, it would have been clear that they preferred slavery in the West Indies to freedom in Africa. At all events, the sum of twenty millions sterling, granted to the owners for manumitting the slaves, was wholly inadequate as a compensation. The land had been granted to the proprietors on condition of importing slaves, and guaranteed by various acts of the British Legislature.

The total market value of the slaves was estimated at forty millions, and the amount of the capital sunk in the estates, buildings, and agricultural engines and implements at forty millions more, making in all eighty millions, which sum was due as compensation for abandonment of the estates, which, it would seem, will shortly be complete. And it was tritely remarked by a distinguished German statesman, that Great Britain had paid twenty millions of money in order to destroy a capital of four times that amount.

Civilization had already made rapid strides among the black slave population of the West Indies, and with it manumission was proceeding pari passu, the slaves being gradually prepared for a state of freedom by moral instruction and education; new importations of barbarians had ceased; and the inviolability of the property possessed by slaves held out a certainty of ultimate enfranchisement to the industrious,—the best mode of improving their moral condition.

It is a matter of wonder that the British Legislature should then adopt so abrupt a measure, and one so contrary to its former policy, when it is admitted that the British constitution has obtained its stability by the absence of all sudden shocks and changes,—the result of two political parties acting as a check on each other. In a country where labor is not indispensable to existence, the pressure of population on the means of subsistence, and the requirements of a civilized state, could alone make it compulsory; and as the social condition of the negroes in the West Indies was not so far advanced, it naturally follows that they deteriorate in morals and condition, as is the case in St. Domingo, and will finally relapse into their normal state of barbarism, from the absence of whites, who will abandon a country that yields no return for capital; thus in the end laying a foundation for associations of pirates and buccaneers. A religious delirium and morbid sentimentalism, not sound policy, dictated this measure; and, so far from obtaining the end proposed, it has had a retrograde effect.

1 The Syndic Secretary of State for Foreign Affairs, Dr. Charles Sieweking.
SLAVERY—WEST INDIES.

The slave in the West Indies was in the same, perhaps in a better position, than the free laborer in Europe. The slave was lodged, clothed, and fed; his wages consisted in the free days allowed him to labor for himself, and as he had no outgoings this was clear profit, or the surplus of his labor. How few free laborers are able to show a surplus over expenditure? This surplus was, however, not to be expended ultimately to support him in old age, sickness, and infirmity; for all this was at the charge of the master, and every estate formed, as it were, its own poor-union, with this difference, that no free laborer in England can claim parochial relief so long as he has any property whatever left: the slave could do so; and this is the true balance in favor of the West Indian slave as against the free English laborer.

These advantages were the equivalent for natural and political rights, which, from the want of property-qualifications, few free laborers can, or are fit to exercise. The term slave, then, was more than an indemnity for these imaginary natural and political rights, which the free negroes do not understand, and are incapable of exercising.

But it results hence that, if free labor were continuous at adequate wages, slavery is dearer to the employer than free labor by this surplus, and it is consequently clear that masters would promote their own interest in changing the system as soon as they could safely have done so.

§ 480.

Thus it may be seen that many attempts had been made in America and the West Indies to abolish the African slave trade long before it was carried into force. The Assiento treaty, for the supply of slaves to the Spanish settlements in British ships, had been considered a triumph of diplomacy; and the commerce was farther declared in council, by Lord Somers, to be beneficial to the nation, and one not to be interfered with. The acts of colonial legislatures, prohibiting the importation of slaves, induced by the sense of an undue increase of slave population, had been disallowed, and the governments reprimanded for interfering with British interests. In less than a century from this time, slave-traders were declared felons, and a crusade undertaken against all slave-trading to other countries, which has had the effect of wholesale murder of human beings, formerly treated with care in the interest of the trader.

We find, then, that slavery took its origin in the Crown, and was cherished by the Legislature for a series of years, during which the slaves were treated gradually with more lenity, until manumitted by an abrupt act of the Legislature.

In Rome, slaves were in the commencement kindly treated; their great number, and that of worthless persons belonging to that class, induced an undue severity, and, civilization improving their
condition, the law procured for them what spontaneous good feeling had in the beginning vouchsafed to them; and slavery daily improving in its nature, at length expired under the pressure of progressive civilization.

§ 481.

Among the Israelites, the period of slavery for Hebrew slaves was limited to six years. In the seventh they were free; and if the slave had been married in the time of his bondage, he was allowed to take his wife with him; but if she had been given to him by his master, and had borne him any children during the period of his slavery, the master could not claim them. If the bondman, however, from affection to his wife and children, preferred continuing in bondage to separating from them, his master took him before a magistrate, and his ears having been bored, he entered on perpetual slavery.¹

§ 482.

If a stranger became very rich in Israel, and any Hebrew sold himself to him through poverty, he was redeemable by any of his co-religionists, or he might redeem himself when able to do so.

With respect to the amount to be paid, it was a matter of account between the master and servant. If he had served half the seven years, half the price remained due, and in the same proportion for a greater or less period; the price being divided into seven portions, and the calculation made upon the basis of a yearly hiring.²

If a male Hebrew were sold to another of the same nation, he was not to serve as bondsman, but as a hired servant, until the year of Jubilee, when he returned to his own family with his children. Slaves of any other nation continued all their lives in a state of servitude.³

§ 483.

If a Hebrew sold his daughter for a slave, she was not released as the males were, after the usual term of service: this, however, could be done, if her master had promised her marriage, and refused to complete the contract, in which case she might be redeemed; but he could not sell her to a strange nation, because he had violated his promise. If, however, he had betrothed her to his son, she was to be treated as his own daughter; and, if the son should take another wife, neither the food, raiment, nor duty of marriage of the first could be diminished, nor was the marriage annulled.⁴

§ 484.

If a man punished his slave, and the slave died under punishment, his master was also punished; but if the slave lived a day or

¹ Exodus xxvi. 2-6; Deut. xv. 12-17.
² Leviticus xxv. 39-46.
³ Leviticus xxv. 47-53.
⁴ Exodus xxii. 7-10.
two, then the master escaped punishment. If an Israelite deprived his slave of an eye or a tooth by striking him, the slave was immediately liberated.

If an ox gored a slave, the owner of the ox was bound to give thirty shekels of silver to the master of the slave, and the ox was stoned. This is the case of the *pauperies* of the *lex Aquillia*.

§ 485.

According to the Jewish law, every seventh year was a "Sabbath of Rest," as it was called, and the land lay fallow; but the harvest (or crops) was so abundant every sixth year, that there was sufficient provision for the three following years. Every fiftieth year was a Jubilee and a holy year; lands alienated were restored, and slaves became free.

§ 486.

Slavery, in itself, is perpetual in Turkey, although such is far from being the practice in that empire, nor do any such slaves exist; on the contrary, the Ottomans usually free their slaves after eight or ten years' service, marry them to some one, and set them up in the world as a reward for faithful service; nay, they even sometimes give them their own daughters for wives, attending ever afterwards to their interests as members of their own families, and, with regard to the females, make them their own concubines; or, giving them their freedom in the first place, marry them to their free servants, to their freedmen, and even to independent people.

This practice is founded upon a passage in the twenty-fourth sura of the Koran,—"Marry those who are single amongst you, and such as are honest of your men-servants and your maid-servants; if they be poor, God will enrich them of his abundance, for God is bounteous and wise. And let those who find not a match keep themselves from fornication, until God shall enrich them of his abundance."

This varies widely from the Roman system, which acknowledged no marriage among slaves, and discouraged even the cohabitation called *contubernium*; for, both in Greece and Rome, it was considered cheaper to buy than to rear slaves in the house. That such, however, considered themselves as members of the family, is clear; and the impertinence of the *dikọtρίβες* of Athens and *verne* of Rome is often alluded to.

The Koran doubtless means, in the above passage, that the slave is to be freed as a condition precedent. Whether this system of making slaves members of the family be, or be not, a remnant of the Roman system, borrowed from the Byzantine empire, may be doubted; in practice it would appear very similar; for we find Simo, in the Andria of Terence, addressing his freedman, *feci*.

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1 Exodus xx. 20-21.
2 Exodus xx. 26-27.
3 Leviticus xxv. 32.
4 Leviticus xxv. 1-10.
Slavery in the
Ottoman empire
not debasing.

Servile taint
vanishes on
manumission.

No agricultural
slaves in the
Ottoman em-
pire.

Non-Moslems
may own slaves.

Covenanted
slaves resemble
the statuliberi.

§ 487.
It is a curious fact, that while in other countries slavery had
exercised a debasing influence on the enslaved, in the Ottoman
empire its operation has been the reverse. Of the sultans 1 who
have held the reins of government, almost all have been born of
slave women; and many of the most distinguished pashas and
agents of government, in almost all ages of the empire, have been
either born or purchased slaves, of which many notable instances
exist at the present day; indeed, it is one of the high roads to pre-
ferment; the patronage obtained by these means is not less valu-
able than the education given to the young slave in the house of
his master.

In ancient Rome, the stain of servility was not eliminated till
the third or fourth generation; in Turkey this is far from being
the case; nor does the Sultan himself hesitate to marry his sisters
or daughters to those who were formerly not only slaves, but of a
foreign non-Mussulman race.

It is to be remarked that agricultural slaves—such as those of
America in modern times, or in ancient times, the Helots—do
not exist, all agricultural occupations being carried on by freemen
or rayahs. Slavery, properly so called, is then confined to house-
hold uses, and the slave, from the time of his first entrance into
the family, is considered as forming a part of it; indeed, the nature
of society favors this practice, and the necessity of kindly using
slaves, in whose power so much lies, and in whom fidelity is of
such paramount importance,—circumstances which would gene-
 rally insure his kind treatment on the principle of fear, even in the
absence of better feelings.

§ 488.
It is not the custom at present in Turkey for subjects not being
Moslems to possess slaves, though various passages in Moham-
medan law-books show that they have legal power to own them.
If the slave-mother who has borne a child to her Christian mas-
ter embrace Islam, the master shall be invited to do the same;
if he consent, she remains his property; if not, she works out her
freedom, and is accounted a covenanted slave, somewhat re-
ssembling the statuliber of the Romans. Still, she does not again
become an absolute slave, even though she cannot manage to pay

1 White's Three Years in Constantinople.
her price; and when he dies, she becomes affranchised without working out her freedom.¹

Even foreigners can legally buy and hold slaves in Turkey; but if they take away to their own non-Muslim country a Muslim slave, he becomes free, ipso facto. This legal right is, however, not willingly allowed to be exercised in practice.²

§ 489.

In Persia, there are scarcely any slaves; but the Sconees of Tartary frequently keep theirs in perpetual bondage.

Such being, then, the state of slavery generally in the Ottoman empire, the principle appears to be the same as in ancient Greece and Rome, and we may fairly infer that it is in some measure connected therewith. No free Muslim, and no Christian or Jew subject of the Muslim state, can legally be made a slave.

The slave or his ancestor must have been a non-Muslim foreigner taken in war, either by the Muslim state or by some other non-Muslim nation, or a non-Muslim tributary taken in rebellion, though it is not necessary that he should have borne arms personally, or women and children would be exempt; and hence it follows that all white slaves now in Turkey are held in bondage illegally. The Roman law coincides in this respect with the Turkish; hence the term servus, quia servare nec occidere solet. Although Herodotus⁴ would persuade us, that there were no slaves in Greece in the more ancient periods, nevertheless frequent mention is made of them in Homer as prisoners of war, αἰχμαλώτες, and, as such, serving their conquerors in a servile capacity, or as concubines, in which latter sense we find Agamemnon addressing Chryses⁵—

'*Ιστών ἐποιχομένων καὶ ἐμὸν λέχος ἀυτοίσαν:

and it is in these and similar works that Turkish slave girls are employed; and we can hardly accuse Euripides⁶ of such gross ignorance of the ancient customs of his country as to suppose the existence of slaves, even for poetical purposes, when such practices notoriously did not exist. Hecuba is represented as complaining that, whereas formerly she was queen or mistress, now she will have to act as a slave.

The purchase and sale of slaves is, moreover, mentioned in the Odyssey:—

"Ευθα μὲ Λαέρτης πριτο κτείτεσσαν ἓώσιν.

"Οὕτω τιθεὶ τε γαίαν ἐγὼν ἵδον ἀφθαλμοῖν.

The law of prisoners taken in war vesting in the conqueror, as

¹ According to the Moutka. The Author expresses his thanks to his friend, that learned orientalist, Mr. Redhouse, employed in the Ministry of Foreign Affairs at the Porte, for the substance of these remarks on Ottoman slavery.

² Dr. Davis, an American, holding service for several years in that country, did manage to buy a negro slave woman, but he could not get her to stop in his service. A non-Muslim slave does not become free by embracing Islam.

⁴ VI. 137. ⁵ ii. B. 1, 31. ⁶ Hecuba, 60. ⁷ Hom. Od. xv. 483.
Prisoners of war vested in the conqueror; employed in rowing.

Status of the issue of slaves.

Slaves compellable to marry.

Koran forbids the prostitution of slaves for gain.

A freeman cannot marry a bondswoman.

In Greece, is held to be the national law of Turkey. The practice existing in all countries, of employing such slaves in rowing, appears to have been prevalent in classic as well as modern countries; it was so generally in ancient Greece, as Isocrates informs us, remarking as an unusual circumstance that the seamen of Paralos were freemen. The rowers of the sultan’s kirlangitch and state boat, called Sandak, which are double-banked, consisted, in bygone days, of men on the one side who were renegades, being consequently prisoners taken in war (for conversions scarcely ever took place among the Christian subjects of the Porte), and on the other of the sons of such, between whom a perpetual rivalry existed as to which would out-row the other, and thereby obtain the usual backbisphere or gratuity.

In France and in our dockyards, and also in the Bagno of Constantinople, convicts, who are in fact slaves, are employed as public drudges.

§ 490.

With respect to the issue of slaves in Turkey: children acknowledged born to a man by his slave-concubine possess equal rights with those born of his wife; they are free, and inherit equally; and this is indeed contrary to the Roman maxim, partus sequitur ventrem, though conformable to another,—the presumption in favor of liberty, cum de libertate certandum pro libertate respondendum est. The privilege exists even further, for the slave-mother of a child by her owner, publicly acknowledged by him as such, can never be sold, or even given, to another person, and consequently becomes free on the death of her owner, if not freed before; the object of which evidently is, to destroy his testamentary power over her, and this, indeed, probably as a compensation for her not being allowed to refuse to cohabit with her owner, who can also marry his female slave to a man against her own consent, as he can likewise his male slave to a woman against the slave’s consent. The system of prostituting female slaves for gain, which was practised in Rome, is condemned in express words by the Koran: “And compel not your maid-servants to prostitute themselves, if they be willing to live chastely, that ye may seek the usual advantage of the present life; but whoever shall compel them thereto, verily God will be merciful to such women after their compulsion.”

An owner, however, cannot marry his or her own slave; he or leave her the choice in general, or the refusal in particular, of a husband.—Redhouse.

1 Xen. Cyr. vii. 5, § 73.
2 De Pace, 169.
3 Mulitaka. But another passage of the same Digest says, that guardians cannot force their wards to marry against their will; hence, it may be inferred that the owner of an adult female slave cannot force her to marry a man she does not like. Is this contradiction merely apparent? The owner may force the slave to marry, but

4 Aballat Ebu Obba had six female slaves on whom he laid a certain tax, which he obliged them to pay by prostituting their bodies. On the complaint of one of them to Mahommned this passage was revealed, according to Al Beidawi and Jalloladeen.
SLAVERY—MOHAMMEDAN.

she must free him or her first, and then the former slave, being now free, can legally withhold consent. With respect to a male slave, it is no more lawful for the female owner to procreate with him than with any other man; neither may a woman see or converse with the male slave of her husband, son, or father, than with any other stranger; for here the fiction of family does not extend into a fictitious relationship.

It is not lawful for a man to see more of a woman than her face, properly so called, hands, and feet, unless she be his near relation, his wife, or his bond slave; hence those only can act as female servants and attendants on a man or his wife, and induces the necessity of female slaves. The Koran designates those males before whom a woman may uncover her neck; they are: "their fathers or their husbands' fathers; their sons or their husbands' sons; their brothers or their brothers' sons, or their sisters' sons; or their captives which their right hands shall possess; or such men as attend them and have no need of women; or children who distinguish not the nakedness of women, eunuchs." Al Beidawi and Jalloladeen include slaves of both sexes, with this exception, and say that Mohammed gave a male slave to his daughter Fatema, and when he brought him to her, she had on a garment so scanty, that she was obliged to have either her head or feet uncovered, whereupon the Prophet, observing her confusion, told her she need not be under any concern, for there was no one present but her father, and her slave. The distinction here is between the wife's and the husband's slave.

A slave may be possessed in partnership by several owners, in which case, if one owner free his share in any manner, the slave acquires the right of buying his freedom from the others with or without their consent. 1

§ 491.

With regard to manumissions: the owner may free his slave simply and at once, in nearly the same form as was used in Rome before a magistrate; upon which a record of the act is drawn up and delivered to the freedman; or he may bequeath him his freedom, as in the Roman law, per testamentum. He may, moreover, free him conditionally, and such conditions are naturally of endless number. The most common, however, is, that he pay his ransom or price conformably to the provisions of the Koran in that behalf: "And unto such of your slaves as desire a written instrument, allowing them to redeem themselves on paying a certain sum, write one, if ye know good in them, and give them of the riches which God has given you."

This is one of the species of freedom on condition, in the belief that the slave will honestly perform his contract. With respect to the last—"and give them of the riches which God has given you"—Al Beidawi supposes this to relate to the public alms, by abating

1 See for Roman Law on this point, § 443, b. op.
part of their ransom; but it is more probable that the present practice is what was aimed at,—"give them the benefits of freedom, and the opportunity of succeeding in the world in their new state." A slave cannot legally transfer himself from one owner to another without the concurrence of his master; but from the worse than uselessness of an unwilling slave, the owner only consults his own interest in complying with such expressed wish; and this is also the practice for a slave whom the owner wishes to dispose of; especially females often intimate the house which they wish to be transferred to, and such desire is almost invariably complied with, though a loss may accrue to the owner thereby. The wife can dispose of her own female slaves without consulting her husband (as married women continue by law to possess separate property, they can naturally hold slaves of their own, male or female), and often does so, especially when she suspects her husband of a preference to any particular slave girl; in such cases, the slave has always free choice as to whither she will go. A slave cannot hold property without legal permission from the owner, and this once given, can at any time be annulled: this coincides with the principle of peculium of the Roman law. With respect to the acts of a slave, the parallel is still closer, for an owner is responsible for the acts of his slave up to his value, when he has the option of giving up the slave or of paying for him: this is exactly the actio de pauperie mentioned in the Institutes.

§ 492.

Absolute slaves can hold no property; in fact, they are void of all legal rights. But their owner can allow them to hold property, and even to trade, though then he becomes responsible for their debts to the amount of their value and of all their property.

§ 493.

Lastly, with respect to the jus vitae et necis: a man can, as under the ante-Justinian law, before the license in the law of the Twelve Tables was abridged, put his slave to death with legal impunity; this would, however, now not be openly tolerated in practice in Turkey, but considered murder: but only one case of the exercise of this power has occurred in modern days, and such was the odium with which the act was regarded, even under the circumstances, which in Turkey are considered the most aggravated (a suspicion of adultery or fornication), that, upon the master appearing in the council, the other ministers refused to speak to him, for, morally considered, it was still looked upon as murder. The impunity, however, is caused thus: murder can legally be compounded for,—a practice formerly prevalent in this country, and the composition for which was called, in the barbarous Latin of the age, a murderum; being a sliding scale of prices set upon the various grades of society.

In Turkey, the next of kin has the option of compensation or revenge, and a slave's next of kin, being his owner, as in the Civil
Law; and, in like manner, this right is extended even further, for in both cases the patron is made the natural heir of his intestate freedman. Thus, in Turkey, the master would have either to compensate or take revenge on himself, and his choice cannot be doubtful. An extraordinary instance of this revenge is mentioned by Hay in his "Wild Sports of Africa."

§ 494.

The present Sultan has abolished the public slave-market and the tax upon the importation of slaves, though private slave-marts and private sales are continued as before. The Pasha of Tunis has gone still further to abolish slavery in the regency, and Persia has recently entered into a treaty with England, to prevent in future the importation by sea of black slaves into her territory.

§ 495.

The power of the ruling or patrician class was supported chiefly by the clients attached in a greater or less number to every family. The word is supposed to be derived from cluere, to hear or obey, or κλειω, κλειωντες, colonentes, celebrantes. The origin of this system is involved in considerable obscurity, although it was undoubtedly of old Italian origin. The most consistent explanation of it appears to be, that when Rome became a state and was organized, the poorer classes and less intelligent members of the community, together with the inhabitants of conquered districts, were reduced to a sort of feudal dependence upon their patrons, without, however, a deprivation of liberty. In the beginning, the patrons were selected at the option of the clients, and were, moreover, members of the government. This system proving mutually advantageous,—to the patrons, as increasing their power and consequence, and to the clients as a protection against tyranny, as well as the attainment of other small benefits,—the number of clients increased, and such as had thitherto no patron attached themselves to some one or other, to whom they were the most nearly connected by local or other circumstances. The relation which thus arose was compared to that of father and son: the patron, on his part, was bound to assist the clients in all their affairs, present or absent, especially legal business representing them in the courts, conducting their suits for them, and in cases of pressing necessity, lending them money without interest. The clients, on their part, were bound to support their patron with their person and property, assist him in apportioning his daughters, ransoming himself from captivity, aiding him in paying pecuniary fines inflicted on him, and

1 Liv. 2. 16; Dionys. 5. 40—10, 14; Liv. 23. 2, 7; Liv. 5, 1; Dionys. 9, 5.
2 Plut. Rom. 9.
3 Festus v. Patricios, Dionys. 2, 8.
4 Dion. Hal. 2, 9; Plut. Rom. 133.
5 Cic. de Rep. 2, 9; Festus v. Patrocinia, Liv. 2, 35; 56; & 64—3, 14, & 16; Dion. 7, 19, & 21—9, 41—10, 43.
6 It is not impossible that means were resorted to in order to reduce to the state of clientage many who were not in absolute need of such protection, as was done by Charles the Great in the case of the allodists.
7 Dion. Hal. 2, 19; & 10; Plut. Rom. 13.
8 Dion. Hal. 2, 48.
9 Liv. 5, 32, & 38, 60.
in meeting the expenses of his elections to magistracies, with other
honorary though essential services. So sacred was this connection,
that the one could neither accuse, be compelled to bear witness¹
(which was not forbidden even among blood relations), nor vote
against the other; and he who contravened these regulations, was
exposed to the curse of a traitor, and might be slain with im-
punity.²

§ 496.

It is, however, to be presumed that clientage lost much of its
general character soon after Servius Tullius'³ new division, and
that at that time many plebeians, having attained to wealth and
consequence, were enabled in a great measure to dispense with the
protection of patrons; those, however, who had been born in that
position probably continued in it; freedmen⁴ were obliged to do
so, and thenceforth it may be presumed, formed the bulk of that
class. By the extinction of the families of some free clients and
the emigration of others, the renunciation of patronal rights by
patrons and the like means, vacancies were created, and supplied
by others who sought patrons; but most of all by the increasing
number of slaves, and consequently of freed families. The pub-
licity now given to legal proceedings, too, enabled clients in many
cases to dispense with the assistance of patrons;⁵ and, upon the
whole, clientage may be said to have begun to change its nature
from this time. Although, from the above causes, it was probably
not less numerous, yet it was certainly composed of an inferior
class, but one over which the patron had a more absolute power
even than before. Towards the end of the republic,⁶ the duties of
clients were recognised in the courts; but this position was no
bar to the acquisition of public offices, and the election to any
curule dignity rescinded it at once for the individual and all his
descendants,⁷ by raising him to the position of a patron. Under
the empire,⁸ clients and libertines are mentioned together.

§ 497.

This connection between the patron and client, strongly resem-
bles that between lord and vassal, introduced by the feudal regimen,
although the derivation of one from the other can scarcely be
traced, or the two connected, for this system appears gradually to
have given way to circumstances and a changed state of society,
and to have fallen insensibly into desuetude many centuries before
the introduction of feods. It may also be doubted if this latter
was not rather a German creation than transplanted from Rome.
This remark must, however, be understood of feods existing among

¹ Gellius, 5, 13—20, 1; Plut. Mar. 5.
² Serv. ad Aen. 6, 609.
³ Walter, Ges. dei R. R. 94—105.
⁴ Liv. 43, 16.
⁵ Walter, Ges. dei R. R. 105.
⁶ Walter, l. c.
⁷ Plut. Mar. 9 & 5; Vell. Pat. 2, 29;
Sallius, Cat. 50; Appian de Velico, 4,
18, 19.
⁸ Tac. H. 1, 4—3, 74; Orelli, 2,
562; P. 7, 8, 3; P. 9, 3, 5, § 1; P.
47, 2, 89; P. 49, 15, 7, § 1.
PATRONAGE AND CLIENTAGE.

Teutonic nations,¹ before they were formally introduced as such, and took the systematic shape they had assumed, even under Charles the Great.

§ 498.

With respect to the term in its modern application in England to legal business, it is certainly used in imitation of the practice followed at Rome. It has been before observed that the patricians entirely monopolised the conduct of suits for a very considerable period of the Roman history, in more remote times, on account of the ignorance of all other classes generally; but at a later period, when all persons became more conversant with the system pursued in conducting suits, from habit and the fact of their following it as a profession. Under the empire, however, there can be no doubt but that the connection between patron and client in its original form had become considerably loosened, the client quitting his hereditary patron, attracted by the superior knowledge and the higher reputation of some distinguished lawyer. This was the natural result of the progressive refinement of the age. The intricacy of legal proceedings, too, increased with the population and wealth of a state, the introduction of the system of advocacy, and right of employing the power of rhetoric, as has long been the case in England and France, was recognised.

§ 499.

It is probable that the clients at first benefited altogether gratuitously by the services of those voluntary patrons whom we find described as walking in the forum, for the convenience of all suitors who addressed them with licet consulere, quare an existimes; id jus est, necne; and upon receiving the answer, consul, stated their case shortly, and receiving as short an opinion in answer in the form secundum ea qua proponeuntur, existimo, placet, puto. It is, however, to be inferred that this more properly applied to what would now be termed “advising on cases;” but that others conducted the detail of the suit before the pretor in jure, or the judge assigned to try the cause in judicio.

These jurisconsults being often appealed to by judges in difficult cases, Augustus was the first to acknowledge a class of consulting counsel, who, from the imperial licence they received, may be justly compared to Queen’s Counsel in England, with this difference, however, that the opinions expressed by them on points of law had the force of common law decisions, and it is of these respona prudentum that the Digest is composed. To some of these alluded to in the beginning of this work, a house was assigned at the public expense, in order to enable suitors more conveniently to consult them; and it was out of this change in the original system that professional advocates arose; still, however, confined to the patrician class.

¹ § 124, h. op.

The term client in England; practice derived from Rome.

Introduction of advocacy.

Voluntary legal advisers.

The order of jurisconsults established by Augustus.

Professional advocates.
Between these and the clients there was no longer the old connection and claim on the services of the client in return, for the assistance thus rendered ceased any longer to exist. The adviser might never see the client again, who was most probably under the protection of another patron. Hence arose the practice of bringing an honorarium in lieu of repaying the services in kind as formerly, and from the beginning of that practice the responsibility of the profession gradually declined; the state of it at that period may be aptly compared to that of the English bar, in the beginning of the eighteenth century. It was still in the hands of the patrician class, and, therefore, every advocate was a gentleman, the profession being ennobled by those who practised it, but not ennobling them; hence, it is an error to suppose that the English advocate of the present age is reputed a gentleman by profession, the converse of the ancient rule, the profession being ignorantly now asserted to ennable the practitioner.

§ 500.

The law, as a profession, slowly declined thenceforth in respectability, and we find the lex Cincia passed in 550 to restrain excessive donations, and was peculiarly intended to check the rapacity of patrons; it was, however, easily evaded.¹

During the imperial age, law, as a science, had reached its acme, while the respectability of its practice in the courts declined. In the Byzantine age, we find that it was no longer considered to be a respectable employment for a gentleman, and had sunk into the hands of freedmen and persons of an inferior grade; all trace of the mutual relations of patron and client, or advocate and suitor, having disappeared, and the former become a mere hired servant.

§ 501.

In the countries which had hitherto formed the Western Empire of Rome, another system now arose with the institution of universities. The prudentes of old were continued in the persons of those distinguished civilians whose biographies have been shortly reviewed in this work, and their written consilia answered to the ancient responsa; but the reduction of legal proceedings to writing obliterated almost every trace of the learned legal rhetorician of Rome’s most flourishing epoch, embodied in its highest perfection in the person of Cicero.

Oral proceedings, while they disappeared in the ancient seats of the Roman empire, appear to have been retained in the barbarous provinces; nor does the practice of the civilians of the Middle Age appear ever to have had so strong an influence as to supersede the system introduced by those who first implanted the Civil Law in England. Hence it may be fairly asserted, that the law, and the mode of its practice, is nearer to that of ancient Rome than it is

¹ Walter, Ges. R. R. 80.
at the present day in Rome itself. The argument of those who refer to the Anglo-Saxon laws as the foundation of the English jurisprudence, falls at once before the learned arguments of SAVIGNY, who clearly traces in the *leges barbarorum*—upon which many German commentators have bestowed much learning, and of which we have several different collections—a substructure of Roman law, sometimes of a date anterior to the empire, that is to say, before the birth of Christ. Hence the much-boasted laws of the Anglo-Saxons, and of the scholar-king, Alfred the Great, may be assumed, with some confidence, to be Roman, with a considerable admixture of a barbarous and local nature,—indeed, to be the least pure of all the barbarous codes, having been handed down by tradition rather than in writing; a fact which, however, has doubtless materially conducted to perpetuate oral proceedings up to the present day.

§ 502.

The system of patronage was not, however, exclusively confined to individuals; colonies, allied cities, and friendly nations, as well as those which had succumbed to the Roman arms, chose their patrons from among the patricians of Rome, and afterwards from among the senatorial families. The Senate was itself in the habit of entrusting the decision of controversies arising between such corporate clients to a committee composed of these senatorial patrons; and so extended was this system, and so deep a root had it taken in the Roman administration, that no commercial company or craftsman’s corporation omitted to assure itself a patron in some distinguished Roman family. Provinces, however, were obliged to make enormous sacrifices in order to secure the coveted advantages.

The duty of the patrons of cities, colonies, and allies, was to watch over the interests of those communities as they might be affected by measures passed by the Senate; to obtain for them such privileges and immunities as others enjoyed; adjust their differences with the parent or allied state of Rome and with one another, and to generally use their best influence to the advancement of their interests.

§ 503.

A somewhat similar system prevails in England, at least with regard to colonies upon which self-government, under the presidency of an officer of the crown, has been conferred. An agent is appointed by the colony to reside in England, to watch over the interests of the community he represents, and obtain redress for her grievances. These agents do not come within the category of ambassadors; for the state they represent is a British possession,

1 Dion. Hal. 2, 85; Cic. de Off. 1, 21.
3 Liv. 40, 44; Cic. in Verr. 4, 3, 40—t.
presided over by the representative of the Sovereign, whose presence is therefore fictitiously supposed; at the same time, their corporate capacity renders them, as far as local government extends, independent of the mother country, whose confirmation is nevertheless required to render all local statutes executory; their financial administration is also in their own power. Upon the whole, then, these agents more nearly resemble the patrons of the Roman colonies than anything else, and act as a useful check upon the representations of the governors.

Crown colonies have no legislature, and consequently no representative agents.

§ 504.

The capacity by which patrons, in the course of time, disgraced their trust, rendered it necessary to enact restraining laws, whereupon the pure spirit of patronage may be said to have been extinguished. This commenced with the increase of luxury and debasement of manners; and it may be safely affirmed that patrons, instead of being, as formerly, the protectors of their clients, became the vampires and oppressors who exhausted their resources.

§ 505.

With respect to freedmen,—when the relation of master and slave was dissolved by manumission, that of patron and freedman began.

The patron was regarded in some measure as the parent of him whom he made free,—an analogy frequently noticed in the Roman law; and it has been before observed, that the murder of a patron by his freedman was accounted parricide. None but Roman citizens or lawful corporations could enjoy the rights of patronage over their freedmen, or communicate to them the privileges of citizenship. Other proprietors might liberate their slaves from bondage, but such manumission did not imply a full franchise. The freedman of a Roman received the name of the race, or gens, of his former master, into which he was adopted, together with the first or individual name of that person or of some friend; and the freedmen of towns took the names of those places. Citizens who conferred merely the inferior degrees of freedom had no more than the usual rights of patronage; but the freedmen, in these cases, seem not to have borne their patron’s gentile name, as they were not properly received into his gens. Patrons very commonly admitted into their family tombs the ashes of their grant—with reference, no doubt, to those freedmen previously manumitted.

1 C. Th. De Pat. vic. 9 Paul. R. S. 24, § 1; C. Th. 9, 15; P. 48, 9, 1.
2 Plin. 10, epist. 10 (Trajan. 10, 228); whence it appears that the emperors, in giving the freedom of Rome to foreigners, included sometimes this privilege in the grant.
3 Varro, de L. L.
4 Varro, de L. L.
5 Many inscriptions (as may be seen in all the collections) declare monuments to belong to the builder and his heirs, with
PATRONAGE AND CLIENTAGE.

freedmen, and the descendants of the latter; the vast mausoleum
of Augustus\(^1\) himself was intended to receive some of his freed-
men, as well as his family.

Every freedman had a patron, except one manumitted directly
by will,\(^2\) as the deceased master was then the only person who
could have stood in that position. The freedman was then termed
a libertus orcinus, from his patron being in the shades. A slave
made free by the praetor for detecting his master’s murder became
also an orcinus.

In some cases, the law directed that the rights of patronage
should cease, as when a slave bought his own freedom,\(^3\) or was
deserted in sickness by his master,\(^4\) or entered the army or the
church\(^5\) with his lord’s consent; yet, in the first of these cases,
the title of patron remained.\(^6\) A few examples are to be met
with, in which patronage belonged to the nearest relatives of the
freedman.\(^7\)

§ 506.

Lawyers have disputed whether a freedman’s legal domicile
followed that of his patron or not;\(^8\) but his actual domicile de-
pended probably upon the fact of the freedman being bound to
perform services requiring him to be present wherever his patron
chose to live.

§ 507.

A manumittor might, if he pleased, renounce\(^9\) his right of patron-
age, as was probably done when slaves were manumitted by way
of public reward; and as must obviously have been the case when
the privileges of ingenuous birth were conceded to freedmen in the
lifetime of their patrons. Besides, a freedwoman\(^10\) marrying with
her patron’s consent was discharged from all services, although not
from the usual obligations connected with patronage.

Freedmen released from their usual duties towards their patrons
were styled immunes, a word of frequent occurrence in ancient
inscriptions.\(^11\)

§ 508.

A master, on freeing his slave, might assign the patronage of his
new freedman\(^12\) to any one of his descendants he chose; but who-
ever once became his patron could not afterwards transfer his
right; it was simply a life interest, which might be vested in any

\(^1\) Livy. xiv. 38. 12; Dion. Mil. vii. 26. 6. 
\(^2\) 1. c. 7. 4. 28. 
\(^3\) C. 6. 3. 7. 3. 
\(^4\) C. 6. 4. 3. 3. 
\(^5\) C. 6. 4. 3. 6. 
\(^6\) C. 6. 3. 7. 
\(^7\) A brother; Muratori, Inscr. 150, 21, 
p. 1516, 31; a mother; ibid. 1541, 5. 
\(^8\) P. 134, 1, 12, § 5; Lucian Nigrino. 
\(^9\) C. 6. 4. 3. 6. 
\(^10\) C. 6. 3. 11, § 1; C. 6. 6, 2. 
\(^11\) Muratori, Inscr. not ad. cl. 23, p. 
1586, 8. 
\(^12\) P. 38, 49, 5, § 3; I. 39, 9, § 2; 
Suet. I. Gram. 16; Turneb. adversar. 
27, 21.
single representative of the proper patron, if he did not retain it himself. And it was competent to a testator leaving liberty to a slave to bequeath the right of patronage to any of his issue he chose, instead of the proper heir, in cases where the latter would otherwise have been patron by law.

§ 509.

In consequence of the deferential respect due by a freedman, he might not bring an action against his patron or patroness, their parents or children, without previous leave of the court; he was, likewise, prohibited generally from becoming an informer against them. As freedmen were inadmissible as informers against their patrons, so they were held to be disqualified as witnesses against him, and he could not be compelled to give evidence against them unless he pleased. A patroness, unless of low condition, was not permitted to marry her freedman, but a patron, if not of senatorial rank (at last, even although belonging to that order), might marry his freedwoman, although she could not be forced to marry him, unless freed for that purpose, nor was she allowed to separate herself from him by divorce (repudium) without his consent. At the same time, until the father of the Christian church taught the reverse, it was thought more honourable for the patron to make the freedwoman his concubine; and a liberta entering into a state of concubinage was considered much less disreputable than an ingenuous female forming such a connection. But an intrigue between a freedman and any lady of his patron's family subjected both the parties to severe pains.

§ 510.

Indications of the existence of certain orders in the freed class, have been discovered in ancient inscriptions, which bear the titles of first, second, and third freedmen of a particular patron. But there exist no means of determining whether the individuals to

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1. P. 28, 4, 7; § 3; P. 38, 4, 13, pr, Inst. 3, 9.
2. Edict. Perp. 1; Hadr. 1; P. 2, 4, 4, § 1.
3. Violation of this rule was, sometimes, capitally punished.—Cod. Theod. 9 (Gratian et Valentin, a d. 376), 6, 1.
4. C. 4, 20, 12.
5. P. 28, 5, 4.
6. C. 5, 4, 3; P. 23, 2, 13; yet we meet with an inscription, "patrone et uxori."—Muratori, Inscr. 159, 21, p. 1534, 10; and one by a lady, Gencia Grapte, to her freedman and husband.—Gruter, Inscr. p. 380, 10.
7. C. 5, 4, 15; P. 23, 2, 23; but the objections in the last cited law were nullified, if the all-powerful authority of the prince sanctioned the proposed union.—P. 23, 2, 31.
8. Nov. 78, 3 (Auth. Collat. 6, Art. 7, c. 3).
10. P. 37, 14, 29, & 6, § 3.
11. P. 24, 2, 11, & 45, § 5; P. 38, 11, 1, § 1.
13. P. 25, 7, 3; implies 10; and P. 48, 5, 13, gives such females the honored title of matrons.
14. Vid. Suec. Ill. Gram., 16, for a case where such were not inflicted.
15. Turneb. Adversar. 11, 9, 18, 3.
16. Proximus, Secundus, &c. vid. Turneb. Adversar. 27, 21; Mart. Ep. 1, 2, 7; Columb. &c. Inscr. 69, 70, 71.
whom those applied had any rank or privileges beyond their fellows of the same household, or were merely marked as seniors in date of their enfranchisement. Patrons are, sometimes, designated as first, which would seem to relate to cases of several co-proprietors of the former slave.

§ 511.

The chief obligations imposed by law upon a freedman were, that he should afford aliment to his patron if he became destitute, that he should behave with gratitude towards him, and should treat him and all his family with respect; he was also bound, if nominated or required, to act as tutor to those of his patron’s children or grandchildren who might hope for the right of patronage over himself. Ingratitude on the part of a freedman did not always subject him to the same penalty; we have little trace of its being visited with much reprehension during the Commonwealth; under Augustus, it was probably punished to a certain extent; in the reign of Nero, revocation of liberty was proposed as an appropriate punishment; but that was not fixed before the time of Commodus, after which, it was renewed by several Emperors, and lastly by Justinian. The Emperor also did away with the reduction from freedom to servitude for other less serious misdeemors, which had been made so punishable not long before his reign. Some instances have been observed, in which patrons seem to have, by their own authority, imposed severe pains upon offending freedmen; but we have no grounds for concluding that they possessed by law any such extensive powers of domestic correction. On the contrary, several ancient lawyers were of opinion that freedmen might, without any veniam agendi, prosecute their patrons for any grievous injury or flogging inflicted by them, although a slight blow was to be borne from the hand of a patron.

§ 512.

The only positive obligations incurred by a master becoming a patron, were to maintain his freedman when in poverty, and to

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1 Muratori, Inscr. 150, 21, p. 1520, 4.
2 P. 25, 3, 11, § 5; and the benefit of this obligation was extended to the patron’s children (P. 25, 3, 5, § 20), and to his patrons (P. 25, 3, 5, § 26).
3 C. 6, 7, 2; but the debt of gratitude was not held due to a patron who freed as a trustee, for the manumission was not then the result of his own will; C. 6, 7, 1.
4 This appears strongly from P. 2, 4, 4, § 1.
5 P. 26, 5, 14.
6 P. 27, 1, 14, § 1.
7 Ter. And. 1, 1, 12; Suet. Claud. 24; C. 6, 7, 2 (A.D. 319.)
8 See Chap. 2, Blair’s Inquiry into the state of slavery among the Romans.
9 Tac. Ann. 13, 26-7; Dio. 55.
10 P. 25, 3, 6, § 1; Cass. Oec. 10, 33; Suet. Claud. 25; P. 37, 14, 5; Heinec. A. R. 1, 6, 9; Radvill Conj. 2; I. Gothof. ad C. 6, 7, 12; P. 4, 2, 21; C. 7, 16, 30.
11 C. 6, 7, 2, & 4; Nov. 78, 2 (Auth. Collat. 6, 6, 2); P. 25, 3, 6, § 1. And the revocation of ungrateful freedmen to slavery was recognised as one sort of capitis deminutio in the Institutes, 1, 16, § 1.
12 Cod. Theo. 4, 11, 2, & 3.
13 Sartian. Hadr. 18.
14 P. 24, 4, 10, § 12; P. 47, 10, 7, § 2.
15 P. 25, 3, 6.
act as guardian to his children after his death. Neglect of the former was punished with forfeiture of the rights of patronage over the individual deserted, which must have proved the least efficient as a security, where the need was the most urgent. The guardianship of his freedman's offspring, was a duty from which the patron could not escape, unless by sacrificing the privilege of succession.

§ 513.

On the decease of the freedman, the patron, or the patron's heirs, became entitled to a share of his estate, unless he had in his lifetime redeemed the usual obligations belonging to his class. Originally, the patron's right of succession was annihilated by the freedman leaving issue, or making a will. But, by degrees, the pretors favored the claims of the former to such an extent as to admit him to the whole of the inheritance when the freedman had died childless and intestate, or to the half if the deceased left a child, and to refuse giving effect to the will of a deceased freedman in so far as it apportioned less to his patron. Domitian deprived patrons of this important advantage, but Trajan restored it to them. Patronesses (patronae) were put upon an equality with patrons, in respect to succession to their freedmen, by Augustus, as, in fact, they had been by the Twelve Tables, although the pretors had entirely overlooked their rights. Justinian ultimately regulated the succession of patrons to their freedmen, according to the latter being worth more or less than a certain fixed sum.

§ 514.

Freedwomen were in a much more dependent state than freedmen: they were under the constant guardianship of their patrons, who also succeeded to their whole estate, unless they had four children, or obtained the corresponding privilege from the Emperor. There was great apparent hardship in these rules fettering the disposal of property; but it is highly probable that they tended much to encourage manumission, by the tempting benefits which they held out to patrons.

§ 515.

It was common for masters, when manumitting slaves, to make them agree to perform gratuitously certain services, after they should become free; such conventions were conformable to law, and the right to exact performance of the work to which they

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1 I. 3, 17.  2 P. 25, 3, 6.  3 I. 3, 17.  4 P. 38; 31 § 4.  5 Tab. iii. 5, 1, 3.  6 Ulp. 29, 8; I. 3, 8, § 3, 2.  7 Mart. 10, epig. 34, ad Trajanum.  8 By the Lex Papa Poppae, Ulp. 29, 5, 6.  9 Inst. 3, 8, § 3.  10 Jus quatuor Liberorum.  11 The opere of freedmen form the subjects of one title in the Digest, and of another in the Code of Justinian.—Vid. P. 38, 1; C. 6, 3.
related, was transferable. Patrons tried, sometimes, to bind their freedmen not to marry; but stipulations of that sort were considered improper, because marriage was latterly favored, consequently received no support in law, although they had been confirmed by the solemnity of an oath.

§ 516.

The greatest friendship often subsisted between freedmen and the families and friends of their patrons. Tiro was much esteemed by all who had a regard for his illustrious patron, and Zosimus, the freedman of the younger Pliny, appears to have been treated as an equal by him and by his friends. The freedmen of many of the successors of Augustus wielded all the power of their masters, and the submission with which they were courted may be learned from the servile decree of the senate in favor of Pallas, one of Tiberius’s freedmen, and, perhaps not less convincingly, from Seneca’s cringing address to Polybius, the freedman of Claudius.

1 P. 37, 15, 6, § 4.
2 Plin. Epist. 5, 19 (114).
3 Plin. 7, ep. 29; 8 ep. 6 (149-159).
4 In that one of his treatises, De Consolatione, which is inscribed to Polybius, upon occasion of the death of his brother.


§ 517.

All persons by the Roman law were either sui or alieni juris. The former were such as were perfectly their own masters, owing private allegiance to no one; such were children whom the father had emancipated, and slaves who had not been manumitted. Applied to children, it is termed patria potestas, to slaves, potestas dominica; but the term jurisdictio domestica was general, including the power a father had over all his familia, which comprehended both children and slaves.

Thus, with respect to the signification of the word familia, we find in the Twelve Tables, pater familias uti legasset super familia suâ ita jus esto. The term familiae herciscundae signifies a division of the estate, familiae emport, the purchaser of the inheritance, according to the old form.

In the pretorian edict, we find, unde tu illum, vi dejectisti, aut familia tua dejectit, &c. Familia also signifies the complexus agnatorum, or those persons who are descended from a common ancestor in the male line. When the term status familiae is used, it denotes a number of persons, whereof one, as father or master, has the command over others, their children or slaves.

§ 518.

The word potestas signifies a power or faculty to do anything. The word, according to Paulus, when applied to magistrates, is imperium; to children, patria potestas; to slaves, dominium.

1 Emancipatio is always applied to children, never to slaves; manumissio, on the contrary, to slaves only.
3 P. 10, 2; C. 3, 36.
4 P. 43, 16, 1, pr. & § 16.
5 P. 50, 16, 2, § 25.
Cicero often opposes *potestas* to *imperium* with regard to magistrates. Thus it would appear that *potestas* had a general and particular signification; it signifies the power one private person possesses over another. *Manus* and *mancipium* are also used in a somewhat similar sense.

The *Patria potestas* signifies the power a Roman father had over his children and their descendants by virtue of his paternity, and its foundation was a legal marriage: *in potestate nostrâ sunt liberi nostrî quos ex justis nuptiis procreamus.* The Romans distinguished between the *patria potestas* and *dominium* by the superior rights of the *filius familia* over the slave, the most important of which was the capacity of being *suus hæres*, or *hæres domesticus*, of the father,—capacity, because the father could disinherit him and substitute another person.

§ 519.

The *patria potestas* was acquired by marriage and legitimation or adoption. A son *sub potestate* labored under no disadvantages with regard to the *jus publicum*; he could vote in the *smtia tributa*, fill a *magistratus*, or be a tutor; he had the *jus connubii*, but if his marriage were accompanied by the *in manum conventio*, his wife came under the power of his father, not of her husband; and as long as the husband was *sub patria potestate*, so long were his children under the power of their grandfather; thus a son *sub patria potestate* who marries, is *pater*, but not *pater familia*; on the contrary, if a man *sui juris* be married, he is *pater familia*, but not necessarily *pater*; conversely, a *filius familia* may be *pater*, if married, and simply *filius* if emancipated.

*Pater* is defined to be, *quem nuptiâ demonstrant*; *Filius*, qui *a viro et uxore natus est*; *Pater familia*, qui *in domo dominium habet*; *persona sui juris sive liberos et uxorem habeat sive non habeat*; *Mater familia*, est *quem peperit*; *Filius familia*, est qui *patria potestate tenetur, uxorem et liberos habeat sive non habeat*; *Patria potestas*, est *dominium quiritianum quod patri competit in liberos legitimos non emancipatos*.

Dionysius of Halicarnassus attributes the origin of this right to Romulus; Papinian refers it to the *lex regia*, but Ulpian to a *vetus mos*, and both may be right; considering, however, the prejudice which existed against the former since the expulsion of Tarquin, it is presumable that it was received among the laws of the Twelve Tables, as the latter had before been confirmed by the regal laws as an old custom; it was the natural result of the patriarchal system, where the head of the family exercised jurisdiction over all his descendents or relations, as was the case with the Scottish

1 Or by adoption. *I. 1, 9, & 11.*
3 *P. 2, 4, 5.*
3 *P. 50, 16, 195, 8 2.*
4 *Hopp. Com. ad Inst. 1, 9.*

Manus and mancipium.

The foundation of the patria potestas.

§ 519.

Patria potestas. Quibus modis adquiritur.

Jus nuptialis, legitimation, adoption.

Effect upon issue.

Pater was not necessarily pater familia, or vice versa.

Definition of pater, filius, pater familia, mater familia, filius familia, patria potestas.

The origin of this power attributed to Romulus.
clans, which word signifies children, and in like manner the word
Children of Israel was used among the Hebrews. With the
increase of population, and of migration of branches of families
to more distant parts consequent upon it, each offset, on separa-
ting from the main stock, took with it the same system, and
established a new patriarchal colony: thus, when these all became
collected under one elected ruler, the influence of the head of the
family still remained within its bosom, although subject to one
ruler in respect of public duties, or the duty of one chief towards
another for the public good and consolidation of the state.

Nowhere does the respect for parents exist in so great a degree
as among the Turks, where the patria potestas exists practically to
the greatest extent in the present day.

§ 520.
The duties of the parent and child are reciprocal, and as the
father is bound to educate the son, according to his ability,1 in a
way necessary for social life,2 so the father, for his own support in
time of famine, might formerly sell his son into bondage, with the
equity of redemption on returning the price.3 The parents ought
to educate and support, not only their own children, but also their
grandchildren,4 and so if by reason of sickness or poverty they
require relief; nor does it matter whether such children be
descended from the male or female line.5

In the same manner, children must relieve their parents, though
they be not liable for their debts,6 but a son ought to bail his
parents if imprisoned for debt;7 a brother, too, as being loco
parentis, is bound, default of a father, to relieve his poor sister;8
but this duty extends no farther.

By the English law, the parents are bound to supply their
children until the age of twenty-one with necessaries, which word
will be interpreted according to the station of the father in society;
but no reciprocal obligation can legally be enforced on the children
after non-age, within which period, however, the parents may
enforce obedience.

§ 521.
The natural right of the father is very different from the civil
right by the patria potestas; nor is it anything more than a natural
right to direct the actions of children, in so far as their education
requires it; whereas the paternal power conferred a species of
ownership. Secondly, the law of nature knows nothing of the
unitas persona of the Roman law, by which the father and son
under power are considered by a fiction as one person.

According to the law of nations, the mother exercises with the

1 C. 8, 47, 9.  2 P. 23, 8, 5, & 12.  3 P. 25, 3, 5.  5 P. 25, 3, 5, § 16.
4 C. 4, 43, 2.  6 P. 25, 3, 8.  7 N. 115, 3, 8.  8 P. 26, 7, 13, § 2.
father a joint authority, which the Roman law does not recognise. By natural law, this power is extinguished as soon as the children are fit to shift for themselves; not so by the Roman, as before observed. And, in like manner, daughters who marry come, by the convenitio in manum, under the power of their husband, if emancipated, otherwise under that of those in whose power the husband himself is; but if there be no convenitio in manum, although the mother be in her natural father's power, her children are in that of the husband, or his father or grandfather.

§ 522.

With respect to the unitas personæ above alluded to, Justinian says,—pater et filius eadem esse persona penè intelligitur; and this accounts for the law of succession, for, as the son is one with the father, he has a joint interest in his property during life, and so, as a consequence, succeeds him. Hence, too, results that neither contract nor action can arise between them,—inter patrem et filium non est obligatio; id. actio non est; neither can they reciprocally witness each other's wills, for no one can witness his own will; neither can either witness a will in which the other is made heir, for none can witness a will in which he himself is bares.

It should, however, be remarked, that this unity of person only extends to private matters; for a son can be judex in a suit in which the father is concerned; but the father is not bound by the son's contracts, or answerable for his delicta, and a contract by which the father obtains a promise for something for the son is only valid in certain cases; moreover, a father can, with his six filii familias, witness the will of a third person, and count as seven witnesses.

§ 523.

The paternal power, according to Justinian, was peculiar to the Romans: jus autem potestatis, quod in liberos babemus, proprium est civium Romanorum; nulli enim alii sunt homines, qui talem in liberos babant potestatem qualem nos habemus. The Persians, we are informed, possessed an absolute and tyrannical power over their offspring, whom they treated as slaves; but neither this jurisdiction, nor that of the Athenians, was similar in its nature to the paternal power of the Romans, not inaptly termed patria majestas. The right was quiiritian, and the father had a remedy by vindication, or action for the theft of his children by a third person; they were also reckoned among the res

1 C. 6, 26, in fin.
2 Vid. Hopfner, § 738 (Ed. 1833).
3 I. 1, 9, § 2.
4 Aist. Ech. 8, 10.
5 Dion. Hal. 2, 96.
6 Val. Max. 7, 7, 5; Quintil. Decl. 375.
7 P. 6, 1, 1, § 2.
8 P. 47, 2, 14, § 12; id. 38.
mancipi, hence capable of mancipation,—the form of transferring quiritian property. 1

§ 524.

The power of the father over his offspring was originally perpetual, nor could the child be emancipated from paternal control during his father’s life without his consent; nor did he, indeed, become sui juris, except the father, being himself sui juris, died, when the son was emancipated by the simple operation of the law.

Not only, then, was the paternal power perpetual, but absolute. The father possessed the jus vitae et necis,—or power of life and death. Dionysius of Halicarnassus 2 tells us that, by the law of Romulus, a father could not expose his male, or the first-born of his female children, except they had been declared debiles, weakly, monstrosi, monsters, devoid of human shape, or insignes ad deformitatem, grievously deformed, and then only by a family council of five neighbours, probably relations. This law then passed into the Twelve Tables; 3 but it is probable that the details of it were not strictly adhered to, for we find that nothing was more frequent than this exposition, even under the emperors. 4

The father could also scourge his children, send them to work like slaves in fetters on his country estate, or slay them in what manner soever he thought proper. 5

Libanius 6 endeavours to show that the rigor of this ancient law was mitigated by a favorable interpretation, and that fathers had only the right, τὴν ἀπειλὴν τεθηκέναι, to threaten them with death; nevertheless, there are but too many examples to the contrary, which show that the jndex or magistratus domesticus 7 often punished his children, according to the gravity of their offence, under the co-operation of the proper domestic council. 8 Cassius, 9 the son of Fabius Eburnus, 10 Scaurus, 11 and Fulvius, 12 were thus executed by their fathers. Titus Aurius, 13 too, banished his son, in like manner, by virtue of their power.

§ 525.

The progress of civilization, however, rendered this great domestic power not only unnecessary, but inconsistent with the spirit of a more cultivated age; added to which, when Rome became a monarchical state, such an imperium in imperio became inconsistent with the new form of government. 14

No change was made, however, before the expulsion of the

1 Cal. Inst. 1, 6, 3. 2 A. R. 2, 88. 3 Cic. de Leg. 3, 8. 4 Suet. Octav. 65, et Calig. 5; Tac. H. 5, 5; Tertull. ad Nat. 1, 15. 5 Dion. Hal. 2, 96, & 7; Simplic. Com. ad Epictet. Enchir. P. 28, 2. 6 Decl. 21. 7 Senec. Controv. 2, 3; Ed. de Ben. 3, 2; Suet. Claud. 16. 8 Val. Max. 5, 8; Suet. de Clem. 1, 15. 9 Val. Max. l. c. 10 Quint. Decl. 3. 11 Val. Max. l. c. 12 Salust de Vell. Cat. 39. 13 Sen. l. c. 14 Hein. A. R. 1, 9, 8.
kings, nor even, as some commentators assert, in the time of Augustus, or in that of Dioclesian, Constantine, or even of Valentinian, Valens, and Gratian. This, however, appears incorrect, since it is certain that Trajan passed a law obliging a parent, who had used too great severity towards his son, to emancipate him, and, in case of the son’s death, deprived the father of the bonorum possession. Hadrian, following this example, ordered that a father who should have killed his son, on suspicion of adultery, should be banished to an island. From the time of Alexander Severus, who began to reign A.D. 223, the custom of the father prescribing to the magistrate the sentence to be executed on a son guilty of more serious offences began to fall into desuetude, the father retaining alone the power of repudiating disobedient sons. The whole power possessed in this respect formerly by the father was at length finally transferred to the magistrate, by a constitution of Valentinian, A.D. 367.

Not Hadrian, but Diocletian, who reigned in the third century, appears to have been the first who abolished the sale of children by fathers under any pretence. Constantine afterwards permitted parents to sell children newly born (sanguinlentos), to check the practice of exposure; but on condition that the father, the son, or any other person, should be allowed afterwards to ransom them at the price paid, when they became free; and the same Emperor afterwards allowed such indigent parents an aliment from the state, after the manner of a poor-law, in order to obviate the necessity of this sale of infants, with which the practice appears finally to have ceased.

The power of selling children, then, was probably originally to check the practice of exposure, founded on the jus vitae et necis, of which the history has been traced from its origin to its final extinction. That it could not have been a frequent custom, must be implied from it not having been finally prohibited until Valentinian’s time, A.D. 367, which may have been done either because the law was obsolete in practice, or on account of some gross abuse at that time.

§ 526.

The second right included in the patria potestas, was that of selling the son three times, jus ter venumdandi liberos, which was received among the Twelve Tables. Endo liberis justis jus vitae et necis venumdandique potestas ei esto si pater filium ter venumduit, filius a patre liber esto. In this respect, the son was in a worse

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1 Rauard. ad xii. Tab. 3.
2 F. Baldwin. ad Leg. R. 17, 24.
5 Lipius Epist. ad Belg. 1, 85.
6 P. 37, 12, 5.
7 P. 48, 9, 5.
8 P. 49, 16, 13, § 6; P. 48, 8, 2; P. 28, 2, 11; C. 8, 47, 6.
10 C. 4, 43.
11 Huber. Degrem. 2, 5; Festus, 303; Rauard. Conj. 1, 17, 33—respecting the Lactaria Columna.
12 C. Th. 11, 27, 1 & 2.
position than a slave; for the latter, if sold once and manumitted, was free, whereas a son reverted, under similar circumstances, to his father, and required to be thrice manumitted before he became *sui juris.*

This in later times became a *pro forma* triple sale. It is difficult to imagine why this severity was applied to sons; it may possibly have been to prevent the father alienating his patronal rights, or a number of his *gens,* to a stranger, and to give him a *locus penitentiae* in recovering them, and doing his offspring justice.

Although the father could thus thrice sell his sons, he could only sell his daughters once, and the grandfather his grandchildren, whether male or female, once only. The reason of this may be explained. In the first case, the connection between the grandfather and grandson, was more distant, and it was desirable also to check a disposition of vindictiveness towards his own son. In the case of the grandfather, we do not clearly learn if the two other sales were reserved to the son (father), when he became *sui juris* by the death of his father (the grandfather), or whether emancipation by the purchaser made the son at once *sui juris.*

In regard to the daughter, the reason is clear. The effect of marriage was a *convertio in manum mariti,* or of those under whose power the husband was, and a second sale would have had the effect of separating man and wife, and of infringing the rights of the husband, or of him to whom the husband was subject.

§ 527.

Numa was the first to restrict the severity of this law, and to forbid the sale of sons who had married with his consent. The principle was a most fair one; the wife came under the power of her husband’s father, with the consent of her own family, *quo ad* which she lost her rights of agnation, which her father might have no objection to cede to one of his own choosing, but might fairly object to do to a stranger; neither was it just that a free woman who had married a free man should find that she had become the wife of a slave.

§ 528.

The next incident of the *patricia potestas,* was the right of acquisition by children, as was the case with slaves termed the *jus acquirendi per liberos,* which more properly belongs to the modes of acquisition of property. *Legum Romanarum auctores liberos in manu parentum ad instar servorum esse voluerint,* neque suorum honorum ipsos esse dominos, sed parentes donec manumittantur eo modo quo mancipia solent,* for *filii familias* were reckoned among *res mancipi.*

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1 Dion. Hal. 2, 97; Simplic. Com. ad Epictet. 37. Heineccius thinks that Jac. Ruard. ad xii. Tab. 3; Alexander ad Cai Inst. 1, 6, 3, m. 56; and Jac. Gothofried, ad xii. Tab. (Tab. 4, p. 202), are wrong in supposing Dionysius here refers to the fictitious triple sale.
2 Dion. Hal. 2, 98.
The *jus adquirendi per liberos* depended on the foregoing rules of law; everything, therefore, which a child acquired by contract or otherwise, vested in his father; he had the *commercium*, could be a witness to *mancipationes*, and wills for this affected the *jus publicicum*; but he could hold in his own right neither property nor servitudes, consequently he could not make a will, having nothing to dispose of, and had no heirs. There was, however, one instance in which he could acquire for himself, namely, by stipulation, which gave him the right of action, when released from his father's power, without a *capitis deminutio*—*ex gr.* by his father's death, or by being inaugurated *flamen dialis*—and this extended to *silia familiae*, or a wife *in manu*; and in this consists the difference between the right of a son and of a slave. We have already seen that no civil obligation could exist between a father or son, and that there was no right of action between them, nor would it appear that there existed any difference in the position of a *filius* and *filia familiae* with regard to obligations; they, with regard to other persons, however, could be sued like a *pater familiae*, but the father would be answerable. Some writers found this rule of law on the *unitas personarum*, supposed to exist between father and son under power, while some ground it on the maxim of a man being capable of being enriched, but not impoverished by his children or slaves; nor was there injustice in this, for as the son was the *suus hères* of the father, in acquiring for his father he acquired prospectively, or *in spe*, for himself.

Augustus modified this by his regulations with respect to the *peculium castrense*.

§ 529.

Marriage and legitimation conferred the *patria potestas* by birth—adoption and mancipation by law. The power of the father could also be destroyed in various ways, which may be fixed at three, viz.: firstly, *mors*, the *natural* death of the person, whether father or his ascendant possessing the power; secondly, *capitis deminutio*, civil death, loss of liberty, citizenship, or family; thirdly, *emancipatio*.

These are capable of subdivisions, especially the last two, of which the first is divisible into the three degrees of *capitis deminutio*, the latter into emancipation by volition, by the operation of the law, by appointment to an office, or against the will, as a punishment. The effects on the parents and children are different.

§ 530.

*Mors*, or natural death, deprives the possessor of all personal rights; but it by no means follows that the *patria potestas in spe*, thereby extinguished, should have any immediate effect on the children; for if a grandfather be living whose son is still under his power, his grandchildren are so likewise. Here the death of his father does not make the children *sui juris*, thus—
Let P be the grandfather, \( a \) \( b \) \( c \) his sons, and \( a \) \( b \) \( c \) his grandchildren. On the death of \( P \), \( a \) \( b \) \( c \) become \textit{sui juris}; but if \( a \) \( b \) \( c \) die first, not having become \textit{sui juris}, the position of \( a \) \( b \) \( c \) is not changed. But supposing \( c \) to die before \( P \), and then \( P \), \( c \) becomes \textit{sui juris}; also \( A \) and \( B \), but not \( a \) and \( b \), for they fall under the power of their fathers, who become \textit{sui juris} by the death of \( P \).

§ 531.

Marriage was one of the means by which the \textit{Patria potestas} was acquired; but marriage might be preceded by an intermediate state, viz., of affiancals, termed \textit{sponsalia}, because the parties then \textit{sponsonerunt}, — a mentio et repromissio nuptiarum futurarum.¹ This custom of promising beforehand had its foundation in the ancient law of Rome, because it was then the custom to stipulate and contract for those who should become wives: \textit{stipulari et sponde re sibi uxores futuras}.² From the same word the terms \textit{sponsi} and \textit{sponsae} are derived, and, as will be seen, are connected with the spirit and effect of marriage.

A promise of marriage might be contracted by the parties themselves in each other's presence, or by third parties in their absence; \textit{proœnatae} matchmakers being allowed to receive a recompense³ by messenger, letter, or otherwise,⁴ with the privy of those concerned, a \textit{nudus consensus} being sufficient, without writing;⁵ the reason of which probably is, that it was originally a stipulation which did not require to be reduced to writing.⁶

§ 532.

A man \textit{sui juris} had the full power of promising; but a woman \textit{sui juris} must, it may be presumed, before the later privileges were granted to certain of that sex, have had the \textit{auctoritas} of her curator, because her subsequent marriage would affect the interests of others. The consent of a \textit{filius familias}⁷ was necessary to the \textit{sponsalia}, the foundation being consent; but, in addition, the \textit{tacet} consent, at least, of him who had the \textit{patria potestas} over him was likewise necessary, that is, he must be cognizant of the fact, and not dissent.

The same was the case with a \textit{filia familias}, whose consent to espousals was requisite;⁸ she must have some valid moral cause for refusing him whom her father may have chosen for her; on the other hand, his consent will be implied, or he must evidently dissent.

§ 533.

The earliest age at which espousals might be contracted was

¹ Florentinus 3, 1; P. 23, 1, 1.
² I. c. 2.
³ C. 51, 1, 6.
⁴ I. c. 7.
⁵ I. c. 13.
⁶ P. 23, 1, 12.
⁷ P. 23, 1, 18.
seven in a woman.\textsuperscript{1} Augustus, however, limited the age for contracting espousals to ten: the object of fixing this age was, that early betrothals had become too frequent towards the close of the Republic; and, by adopting two years as a \textit{minimum}, the woman would be about twelve, the age of female puberty, before which the marriage could not take place; for marriage must be possible at the time fixed, in order to render espousals valid.

\section*{§ 534.}
A father may send a message, and dissolve espousals of a daughter under power, but not so if she be emancipated, neither can he withhold her dower. A tutor, however, cannot so break off espousals without the concurrence of his \textit{pupilla};\textsuperscript{2} neither could he affiance her to himself or to his own son. The old law allowed an action for the \textit{quantum valeat} to be brought on a breach of promise of marriage, when confirmed by stipulation;\textsuperscript{3} and this was an old law of the Latins.

\section*{§ 535.}
\textit{Repudium}, in its proper meaning, signified not the dissolution of a marriage had, but the retraction of the promise by which it was bargained to be had. It was the dissolution of the \textit{sponsalia} by the act of the one party, not of the \textit{nuptiae};\textsuperscript{4} and the words used, were \textit{tu\textsuperscript{d} conditione non utor}.\textsuperscript{5}

\section*{§ 536.}
Under the Emperors the old law was not so favorable to marriage,\textsuperscript{6} and persons were allowed to break a promise\textsuperscript{7} without being exposed to evil consequences, on the principle that marriage should be left as free as possible;\textsuperscript{8} nevertheless, whoever was unprincipled enough to violate so solemn an engagement by entering upon a second marriage while the first promise remained in force, was visited with the penalties of infamy.\textsuperscript{9} An earnest or pledge, \textit{arriba},\textsuperscript{10} was, however, forfeited by the party who, without cause, declined to fulfill the promise entered into; this promise sometimes required the consent of parents, which the Canon Law nowhere makes expressly necessary, any more than a particular form of espousal or number of witnesses, presents, &c.,\textsuperscript{11} as are customary in some Catholic countries; free and unambiguous consent, expressed or implied, being all that is requisite.

\section*{§ 537.}
The Canon Law, in the matter of espousals, differs materially from the Civil. In order to have effect, the evident intention of the parties to bind themselves was before all requisite, hence the promise of a person of unsound mind, or under seven years of age,\textsuperscript{12} which

\begin{itemize}
\item \textsuperscript{1} P. 23, l. 18.
\item \textsuperscript{2} Gell. N. A. 44, 4.
\item \textsuperscript{3} P. 50, 16, § 101, & 191.
\item \textsuperscript{4} Heins. A. R. I. Appendix. 43; P. 24, 2, 2, § 2.
\item \textsuperscript{5} Ulp. Fr. 26, § 3.
\item \textsuperscript{6} L. c. 6.
\item \textsuperscript{7} C. 5, 1, § 1; C. 5, 2, 17.
\item \textsuperscript{8} C. 5, 1, § 1; C. 8, 38, 2.
\item \textsuperscript{9} P. 5, 2, 1, 1, 13, § 1—11.
\item \textsuperscript{10} C. 5, 1, 3, 1.
\item \textsuperscript{11} X. 4, 18, § 3; Eichborn. 2, 433—4.
\item \textsuperscript{12} X. 4, 1, § 5.
\end{itemize}
latter is expressly the law of the Greek Church, was invalid, as no intention could be presumed. It is the same with espousals contracted by parents for their children, under the age of seven years, for such by the Canon Law are of none effect. The betrothal of children about seven must continue until puberty, when, however, they can be rescinded pure; but these formalities are now seldom called into operation anywhere, being more or less controlled by local law.

§ 538.

It is unimportant whether the words apply to the present, *ego te in meam accipio*, or the future, *ego te in meam accipiam*; although this was very material before the Council of Trent, inasmuch as an actual though informal marriage, and not espousals only, were contracted in the first case. Hence, it is an error to designate this difference by the antithetical terms, *sponsalia de praesenti* and *sponsalia de futuro*.

In the Eastern Church a solemn betrothal takes place under the benediction of the priest, and the exchange of rings, as it indeed formerly was in the Western Church; for this reason it was considered initiatory to the marriage, and consequently often combined with that ceremony itself, in which case, however, an informal betrothal must be pre-supposed.

§ 539.

The Canon Law has treated promises of marriage with great seriousness, even admitting that, *in foro conscientiae*, spiritual compulsion might be used to enforce performance; but certain exceptions are allowed, such as illness and bodily infirmity, or when the other party violates important duties, in which is included an unjustifiable delay of the marriage. Mutual consent is, however, always held a valid means of dissolution, although the promise have been even confirmed by oath.

When, however, affiancals are made under a condition, or with a limit of time annexed, or (licit modus) reciprocity, such conditions must be first fulfilled, and if the reciprocity be omitted, the other party can retire from the espousals, but such conditions may be dispensed with tacitly or expressly.

Illicit conditions void the whole transaction. The second of two coexistent betrothals is null, but an actual marriage supersedes all, even prior betrothals.

The various collisions to which the informal marriages of the Middle Age gave rise, originated the following rules. In the case of many actual affiancals, the elder had precedence. A more recent marriage, although contracted in the form of *sponsalia de praesenti*,

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1 Nov. Leon. 109. 2 x. 4, 1, 24. 3 x. 4, 1, 24. 4 x. 4, 1, 31; x. 4, 4, 3. 5 Walter is of this opinion, — Kirchenrecht, § 303; but other commentators deny that compulsory measures can be applied, — vid. x. 4, 1, 10, 17. 6 x. 4, 24, 25; x. 4, 8, 3. 7 x. 2, 44, 25; x. 4, 1, 54. 8 x. 4, 1, 2. 9 x. 4, 5, 5. 10 x. 4, 5, 3. 11 x. 4, 5, 3, & 6. 12 x. 4, 1, 22; vi. 4, 1.
over-rode all actual betrothals, although of prior date, even though contracted by the informal mode of sponsalia de presenti. In the case of several marriages, several sponsalia de presenti, or a formal or informal marriage, the prior in date was that held valid. Affiancals accompanied by co-habitation, took precedence of a subsequent formal marriage, inasmuch as it had passed into an actual marriage.

These axioms are naturally now for the most part inapplicable, on account of local civil laws, and the inadmissibility of compulsion in marriage. In the Oriental Church the breach of a promise was held to be a breach of marriage. Leo endeavoured to assimilate formal betrothals with actual marriage, and at the same time to meet the difficulty, by decreeing that the benediction should never be given before years of puberty. Lastly, Alexius Comnenus, in 1084, decreed that betrothals conformable with Leo's ordinance should have the effect of actual marriage; but that informal affiancals should only have the civil effect of the old sponsalia, and confirmed it in 1092 by a specific detailed decree.

Marriage by cohabitation is still the law of Denmark, and was so for some time in England, superseding even a subsequent formal marriage.

In Prussia it operates civilly as a marriage, quaead the mother and issue when pregnancy has followed, though the man decline to marry. In Sweden, compulsion can be used, though this rule is now relaxed.

§ 540.

Burns, on marriage contracts, observes that:—In England, sponsalia de futuro are mutual promises or covenants of marriage, to be had afterwards, as when the man says to the woman, "I will take thee to my wife," and then she answers, "I will take thee to my husband." Sponsalia de presenti are mutual promises or contracts of present matrimony, as when the man says to the woman, "I do take thee to my wife," and she then answers, "I do take thee to my husband."

We find it laid down in Raynolds, that the ministers shall frequently denounce to those who are desirous to contract matrimony, that on pain of excommunication they do not contract matrimony but in an open place, and before divers witnesses in public.

Both by the Civil and Canon Law, infants under seven years of age cannot contract any kind of espousals.

From the age of seven to the age of twelve as to the woman, age for contracting.

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1 Jas Danicum, 3, 16, n. 16.  
2 32 Hen. 3, 38, altered by later statutes.  
3 Geo. 2, 33, § 13; 4 Geo. 76, § 27.  
4 Giffenheit, 3, § 10.  
5 Royal Ord. 3 Apr. 1810, gives the Crown the power of divorce.  
7 Lind. 271.  
8 Swinh. § 6.  
9 Com. Dig. Tit. Baron and Feme (b. 6).
and fourteen as to the man; they cannot contract matrimony de praesenti, but only de futura. 1

A man so soon as he hath accomplished the age of fourteen years, and a woman so soon as she hath accomplished the age of twelve years, may contract true and lawful matrimony. 6

But by can. 100, no children under the age of one and twenty years complete shall contract themselves without the consent of their parents, or of their guardians and governors, if their parents be deceased. 3

The check which ensures the observance of this rule is to be sought in the criminal law, according to which, carnally to know a girl under ten years of age, for she is incapable of giving legal consent, is a felony, and subjects the culprit to death. 4 Above that age, and under twelve, it is a misdemeanor, subjecting the culprit to imprisonment at the discretion of the court, with or without hard labour.

§ 541.

In England, an action for damages may be brought for a breach of promise of marriage; the promise need not be in writing, 8 nor stamped, 6 neither does an illegal condition, as for instance for fornication, bar the remedy if repeated afterwards; 7 but where no special damage is alleged, an administrator can bring no action for breach of promise, on the rule that actio personalis moritur cum person.

A general promise to marry is a promise to marry on request, hence evidence of a promise to marry after a future uncertain event, will not support a declaration stating a general promise. 9 A mere expression to a third party of an intention to marry the plaintiff is not sufficient to support an action for breach of promise, and where conditional, the performance of the condition must be averred. 10

If the defendant have married another, the breach of a promise is evident, but otherwise, his distinct refusal must be proved to some party interested, as the father. 11

If the defendant be actually married at the time of making the contract, and the plaintiff be ignorant of the fact, an action for breach of promise of marriage will lie, and damages may be recovered. 12

Mutual promises may be implied as well as expressed, as by the woman making no objection at the time of the offer, and afterwards receiving visits from the defendant as suitor. 13

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1 Swinb. § 7.
2 Id. § 9.
3 The parents or guardians of infants may prohibit the publication of banns,—Inf. 3, 6; and security is to be given that their consent has been obtained, before a licence shall be granted by the bishop,—Inf. 4, 3.
4 G. 4, 32, § 17.
5 Cork v. Baker, 2 Str. 544; Harrison, v. Cage, Lord Raym. 386; Carth. 467, 8.
6 Orford v. Cole, 3 Stark 551.
7 Morton v. Fenn, 3 Doug. 211.
8 Chamberlain v. Williamson, 2 Maule & S. 408.
10 Cole v. Cottingham, 8 Car. & P. 75.
If the condition of the parties be changed since the promise was made, the connection may be broken off. If the woman’s character turn out to be bad after promise, it is an answer to the action; but it is not so if the promiser knew this to be the case before he promised, evidence of the disapproval of relatives may be given in mitigation of damages.

Mental or bodily infirmities supervening have the same effect.

It is asserted that a bill in equity will lie in aid of an action of assumpsit, to compel a party to discover whether he has promised to marry the plaintiff.

§ 542.

The practice of using rings is derived from affiancals, and does not properly belong to marriage, but has become a part of the ceremony, from the betrothal and marriage being blended together. In Germany rings are exchanged; the origin of this practice is, that they were symbols, tokens, arrha, pledges of future performance, that the parties at a later period would reclaim their symbols by performance of the condition. The custom is as old as the Athenian Republic, and we learn from Terence, who followed Menander, that young men having agreed to sup together, gave the caterer their rings in pledge, that they would keep the appointment, symbolam dedit, canavit. The form, then, in the English marriage service, “with this ring I thee wed,” is founded on the vulgar error that the ring is a link whereby the parties are chained together, whereas, in fact, it is only an earnest of future performance. It will not be necessary here to enter into the question of the antiquity of rings as pledges, which may with considerable certainty be traced back to Egypt. Even the Jews have preserved this custom, and they certainly did not derive it from their Christian neighbours.

According to the practice in the Imperial period, after the parties had agreed to marry, and the consent of those in whose power they were had been obtained, the marriage contract was settled at the house of the bride, and termed sponsalia, which at that period were reduced to writing, and registered in the temple of Quirinus, tabula legitima being signed by both parties, the woman or bride was then termed spona, pacta, dicta, or sperata.

The man then put the ring on the woman’s hand, as a pledge that he would redeem his promise. Rings, according to the custom of the age, were worn on the fourth finger of the left hand as now; but we do not gather that women were in the habit of wearing rings on other occasions; it was, therefore, probably redeemed by the performance of the ceremony, otherwise, being in the nature of an arrha, it was forfeit.

1 Foulke v. Sellway, 3 Esp. R. 236; Young v. Murphy, 3 Bing. N. S. 54.
2 Irving v. Greenwood, 1 Car. and P. 350.
4 Vaughan v. Aldridge, Forrest’s R. 42.
5 Term. An. 1, 1, 61; Enn. 3, 4, 2, & 5, 59.
7 Gell. 1, 2; Plaut. Trinum. 2, 4, 99; Nonius, 4, 213.
8 Macrob. Sat. 7, 13.
9 § 536, h. op.
Nuptias, connubium, matrimonium.

Derivation of flammeola from velamen and βλήμα.

§ 543.

The words used to convey the idea of marriage were nuptias, connubium, and matrimonium, the original significations of which are involved in considerable obscurity, and very difficult of derivation; and it must be premised that those given are not by any means beyond doubt or controversy.

Nuptias is derived from the participle of nubo, to cover; and this word, as well as obnobo, as far as the Latin signification goes, alluded to the veil with which brides were covered during some part of the ceremony, termed flammeola or flammeum, which, if derived, as is usually believed, from flamma, may be presumed to have been of a light red color, and hence is asserted to have been intended to represent the blushes of the newly-married woman; there can, however, be little doubt that it was derived from an old form of velamen, quasi stalamen, and appears to have been of a bright yellow color; such was also the color of the bride's shoes. In Greece, the bride was also veiled; indeed, from the similarity of the ceremonies in both countries, it is strongly presumable that most of the Roman customs were adopted from Greece: this is important in tracing the derivation of words used in connection with Roman marriages, and hence the Greek equivalent words will be given with the Latin. β in Greek was undoubtedly pronounced, as among the moderns, like v in Latin; or possibly like the Spanish b, between b and v: upon this hypothesis, velamen may be derived from βλήμα, a form of βαλλω, to throw, βλήμα; in Doric, η would be ο. Again, b and f are, for this reason, interchangeable letters; hence the analogy between velium and filium. Flamen was then a veiled person, and it is ascertained this veiling was essential to the inauguration of these priests.

Nubo, nuptius, νυμφεύω, which latter word is evidently the root, the radical being ιω, to wet, is a word entering into the composition of many Greek words, such as θυμος, θεόβ, χωρ, λόμφη, νυμφη, &c. Now, as songs were customary at Greek marriages, the fact of such a component element can only be accounted for by the fact of water being an element in sacrifices, as in sprinkling by way of purification; and if this be admitted, the derivation of νυμφη will be clearer. This word is, however, not exclusively applied to a person about to be or actually just married, for Homer uses it to signify a daughter-in-law, but it may be supposed that such may have been lately married. We find a water-carrier, λουτρόφορος, placed over the tombs of those who died unmarried in Greece, and this will again connect the word νυμφη with ιω. Priestesses were unmarried women, or those married as virgins, but not widows, and to them were entrusted the care of sacrifices and purifications; nymphs were inferior goddesses. The veiling of

1 Plin. H. N. 21, 8; Schol. ad Juv. 6, 225.
2 Catull. 42, 10.
3 Bocker, Charikles, 2, 467.
4 Sprinkling and prayer are combined in the Catholic church, the priest walking up and down and sprinkling the congregation with hallowed water.
5 II. 31, 130.
women must have been a very ancient Oriental custom. The Greek woman threw off the veil on marriage, because they ceased to be maids. The custom of veiling women was universal on the Eastern continent, and St. Paul reprobates the practice of women going unveiled in public. The Mohammed revived the custom, in ordaining that women should be decently covered in public. The Greek matrons wore a shawl, after the fashion of a veil, when they went out, which was seldom the case; and Roman matrons could not decently appear in public unveiled.

The Armenian church has preserved the custom of veiling the bride; and both bride and bridegroom are covered during one part of the ceremony with one veil (connubium), which was also the practice in Rome in consecrated nuptials.

In England, the veil has been preserved in the marriage ceremony, and the orange flowers used, point at the color of the veil, as described by Pliny. The word to reveal, ἄνακαλυπτω, is connected with the same idea; the wife revealed, unveiled herself to her husband. In the same way, a curtain, velum, was hung before the sanctuaries of all temples in Greece, Rome, and among the Jews, signifying that the mysteries were only revealed to the initiated; and the same may remotely apply to the bride.

Thus it may be presumed that νυφὴ is derived from νυ, and in its first signification means a virgin priestess; in its second, a virgin; in its third (anatomically), virginity; that it is the root of νυφώ, and thence νυφία came to signify the marriage rite. In the Oriental church, νυφέων is applied to marriage on the part of the man, νυφαδέφων on that of the woman, which will be subsequently alluded to. *Connubium* is the rite applied to both (joint nuptials), and was never used with reference to others than citizens, the jus connubii being one of their most important rights. *Nuptiae* is explained by Modestinus to be *conjunctio maris et fœminæ consortium omnis vitæ divini et humani juris communicatio*; and it is probable, that he gave this definition after the ordinance of Carcalla, which communicated the citizenship of Rome to all who were ingenii; for, of course, citizenship must be understood in this definition, or it must be taken that it is here used as a general term for marriage.

§ 544.

*Matrimonium* had a different sense, and was put in opposition with *nuptiae*, which was eminently used to signify the marriage legal according to Roman law. Until the law of the Twelve

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1 Cor. 11, v. 5, 6, 7, 13, 15.
2 Koran, Sura 44, Sales Trans. p. 269.—
4 And speak unto the believing women, that they restrain their eyes, and preserve their modesty, and discover not their ornaments, except what necessarily appeareth thereof; and, let them throw their veils over their bosoms, and not show their ornaments, except to their husbands or their fathers.”
7 Serv. ad Aen. 4. 374.
*Nubia* was applied to the woman, dux to the man; and when nubia is used with respect to the man, it implies an unnatural offence (Juvi. Sat. 2, 124).
8 P. 35, 2, 3.

Husbands are entitled to see the whole body, but other privileged blood relations all except what is between the navel and the knees.
Tables, the *consuivium* was restricted to the patricians with one another, and the plebeians with each other, until the law was superseded by the *lex Cornelia*; indeed, it may be doubted whether the term *consuivium*, before the passing of that law, was not applied exclusively to the patrician, and the word *matrimonium* to the plebeian class.

*Nuptiae* is often put in opposition to *matrimonium*: *nec vir, nec uxor, nec nuptiae, nec matrimonium, nec dos intelligitur.* Caesar, speaking of the Britons, says, they had no marriage rites; but Tacitus, speaking of the Germans, tells us, *quamquam severa illic* matrimonia,—using the word to signify marriage among barbarians.

*Matriona* is thus defined by Aelius Melissus: *de loquendi proprietate:* *matrona est qua semel peperit; qua sapit mater familias; sicuti sus qua semel peperit, pocceta; qua sapitum scropha.* Gellius admits the truth of the latter definition, but says the former is unconfirmed by ancient testimony, and relates, that a woman was anciently called *matrona* so long as the *matrimonium* lasted, whether a mother or not; but *mater familias* she who was in *manus mariti:* *enimvero illud impendio probabilius est, quod idoneo vocum antiquarum ennarratores tradiderunt; matronam dictam esse propria, quae in matrimonio cum uivo convenisset, quod in eo matrimonio maneret, etiam si liberis nondum nati forent; dictamque esse ita a nostris nomine non adepto jam sed cum spe et omne mos adipsicendi; unde ipsum quoque matrimonium dictur; matrem autem famulas appellatam esse eam solam, quae in mariti manu mancipioque, aut in ejus, in cujus maritus, manu mancipioque esset, quod non in matrimonium tantum, sed in familia quoque mariti et in sui haereditis locum venisset.

Here we have a definition of both *matrona* and *matrimonium* in their original significations. *Matrimonium* was, in addition to being the marriage among non-citizens, that contracted among citizens by usucaption or use; *nuptiae*, that accompanied by a change of family. *Matrona* was the wife of a *matrimonium,* *uxor of nuptiae*; but there can be no doubt that, in a later age, even long before that of Aulus Gellius, it was applied indiscriminately to all married women, being Roman citizens, as a generate term, which is readily accounted for by the increasing number of the less solemn marriages, to avoid the transfer of property, and leave the woman more her own mistress. Hence it may be presumed that women gradually obtained a more influential position, and emancipated themselves from the power of their husbands; the progress of the law, as relates to women, proves this, and the introduction of the *dos* was a consequence of its prevalence.

*Matrionium* then, and *nuptiae* became synonymous, and this may be referred to the progressive enlargement of the Roman franchise,—first by Caracalla, and lastly by Justinian,—which

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1 Liv. 4.                  4 Id. de Mor. Ger. 18.
2 J. 1, 10, 6 10.           5 Gell. 18, 6.
3 Cesar de B. C. 5, 14.     6 This word is now used in Greece as a term of reproach equivalent to "bitch" in England.
removed the necessity of a distinction: hereupon the terms acquired a totally different meaning, $nuptiae$ signifying the act of marriage, or marriage ceremony, $ritus nuptiarum$, $matrimonium$ the duration of coverture or married state. Thus, in the Novels, we find: unde sive secundae provenirent nuptiae, sive parentibus successiones ex prioris matrimonii filius, sive lucra ex dotibus aut antenuptialibus donationibus aut ex alia causâ, sive existentibus ex secundo matrimonio filius, &c.

§ 545.

The Romans are said by some to have used three forms of marriage, termed $confarreatio$, $co-emptio$, and $usus$, and it has been doubted firstly, whether the two first were not originally identical, the latter being but an ingredient of the former; secondly, whether this form was confined to any particular class—and if so, to what class; thirdly, as to the $usus$, it was perfectly distinct from the former two, and founded upon a fiction of law.

§ 546.

The $confarreatio$ was undoubtedly a religious ceremony, $co-emptio$ a civil one; and it now remains to be seen whether the one was formerly a part of the other. In all adoptions in which a change of family was involved, it was the business of the $pontifices$ to examine into the case and report upon it, because it affected the sacred rites of the party. Marriage had the same effect, and it was, therefore, reasonable to suppose that the priests, by a parity of reasoning, would have had and exercised the same jurisdiction. Numa Pompilius entrusted great powers to the $pontifices$, not probably, as is often asserted, from feelings of bigotry, but because he found, that a state religion, strictly subject to his own direction, was the readiest way of governing a barbarous people of somewhat doubtful morals; he governed them then by fear and superstition, instead of reason and right, to which, at that period, he might vainly have appealed. When education had progressed, and the society had developed itself, the state religion, in its ancient and crass form, would have disgusted an enlightened nation, and by insisting on their believing too much, would have driven them to examine, and in the end to have believed nothing, of which we have modern examples enough. The power of the priesthood was then insensibly reduced to the Zero point, and the $pontifices$ and priest-craft remained not to exercise their original functions of instruments of government, but simply as an innoxious remnant of things gone by, for the more pompous inauguration of certain festivals, in which the Roman people delighted, and for the performance of certain buffooneries adapted to the Italian character, which rendered the pageant more solemnly magnificent. That these persons were useful to the senate and authorities, even in later times, there could be no doubt, since it gave those bodies the

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1 Nov. 22, 1.

2 § 289, h. o.
opportunity of deferring, on account of supposed inauspicious occurrences, measures which the people tumultuously demanded, and of thus transferring the responsibility to an irresponsible being.

*Confrarreatio* in its origin, then, was the holy portion of the ceremony, and the priests, by that form, having given their assent, the civil ceremony was added to make it binding for legal purposes, and to give the marriage civil effect; this was termed *co-emptio*; nor is it easy to suppose how this form could have been dispensed with by the holy rite alone.

In France and England, a purely civil marriage is operative in all respects without sacerdotal interference, the same has lately been demanded as a constitutional point in Germany. The ceremony had become purely civil under the Roman and Byzantine Empire, until the priests usurped its jurisdiction, and ended by transforming it into a sacrament, whereby they rendered it indissoluble, except by a pre-existent impediment amounting to a bar, whence it followed, that the marriage had never been, or could have been had; the English Canon Law has preserved this result, although the principle no longer exists, an anomalous remnant of Catholicism.

§ 547.

Farreatio or *confrarreatio* was so called from the far of which the cakes used in the ceremony were made, and termed *farreum*, hence the term *farreatio* and *confrarreatio*, as applied to the joint parties. The invention of this rite is attributed by some to Romulus, by others, with a greater show of probability, to Numa Pompilius, which is a matter of little consequence, for it is certain that flour was used in sacrifices before the age of Romulus, hence the word *immolare*, to sacrifice, and the flour mentioned as used in sacrifices by Homer, and by Ovid, as mixed with salt, and bears a striking resemblance in the use, and with the name (*sacramentum*) to the second sacrament of the Christian Church, with which, however, no connection can by possibility be supposed. In Catholic countries marriage is a sacrament, and in Protestant countries it is recommended that new married persons should receive the sacrament on the earliest opportunity after the performance of the ceremony; it is then a somewhat curious coincidence, that both in the Roman and Christian religious ceremonies the same type was adopted, although on widely different grounds.

§ 548.

It was first of importance to fix a lucky day for the ceremony; and here it must be presumed that previous notice had been given

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1 Dion. Hal. 2, 955 Ulp. Frag. 9, 1—
21, 13—22, 14.

2 Jac. Renvard. ad xii. Tab. 21, p. 95; Plin. H. N. 18, 2; Serv. ad Virg. Aeneid. 10, 541; Hein. Ep. ad Balzac, 18.

3 Il. 1, 458, δυλάς και δυλοχύζας.

4 Ov. Fast. 1, 128, mixtaque farra sali; Plin. H. N. 18, 2, mola sals.
to the pontifices, in order that they might examine into questions within their province.

The Romans had old and curious opinions respecting the times of the year, in which it would be fortunate to contract marriage.

The Kalends, Nones, and Ides of every month were studiously avoided; also, the anniversary of certain festivals, as the Parentalia in February; and lastly, certain months altogether; these were February and May; with respect to the latter month we have preserved the ancient superstition. Ovid says of February,—

Conde tuas, Hymeneae, fasces et ab ignibus atris,
Aufer; habent alias maesta sepulchra facies.

Plutarch and Ovid concur in condemning May marriages,—

Nec viduae tædis eadem nec virginiis atpa,
Tempora, qua nuptis nec diaturna fuit,
Hac quoque de causâ, si te proverbia tangunt,
Mense malas Maio nubere vulgus ait.

The most lucky time was that which followed the Ides of June, and it must here be remarked, that whatever day was chosen, it must not be one followed by a dies ater, that is to say, there must be two lucky days together, thus, Ovid alluding to the marriage of his daughter, writes,—

Hanc ego cum vellerem genero dare, tempora tædis,
Apta requirebam, quaque cavenda forent,
Tunc mihi post sacras monstratur Junius Idus,
Utilis et nuptis, utilis esse viris.

It would be out of place to examine why the general month of May was to be avoided; proverbs have, however, for the most part a sound and reasonable foundation, though not always readily discernible. The wedding day could, consequently, not be fixed without consulting the auspices; indeed, as the priests kept the Kalendar, which they changed and intercalated at pleasure, it was not possible, without this interference, to ascertain whether the day proposed was a dies fætus or nefætus, ater, or otherwise, certainly not before the promulgation of the Kalendar in 304 B.C., or even then with a sufficient degree of certainty at least as to the single day or month intercalated, a measure which was not only also the time of year, and of the month.

June was such lucky month.

Unlucky months.

Unlucky days.

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2 Febru means to purify; hence it was improper and unlucky for a woman to marry in the month of purification, on account of the dies atri.—Fast. 2, 561.

4 Quest. 1, 487.

5 Fast. 5, 487.

8 Cíc. de Div. 1, 4; Val. Max. 2, 1, § 1.

10 Macrobr. 1, 14; Ammianus 16, 1; Solinus 1; Plutarch. Cás. 59; Cicero Epist.

11 Cíc. ad Att. 6, 1. Atticus doubts the truth of this story, confirmed by Livy 11, 46; Cíc. Mur. 11; Plin. H. N. 33, 1; Val. Max. 2, 53 Gell. 6, 9; Macrobr. 1, 15; Pomponius P. 1, 2.

12 Vid. § 344, h. op.
§ 549.

The bridesmaids, on the day being duly fixed, provided a long white robe with a purple fringe, or trimmed with ribbons, the bride; her robe was the tunica recta, so called from the web being perpendicular, instead of being woven as her ordinary clothes. It resembled that worn by young men when they assumed the toga virilis, this being the equivalent epoch with the female sex. This flowing gown was confined round the waist by a girdle called corona, cingulum, or zona, which the husband loosed at the proper time. This zona, ϖωη, was used by the Greeks metaphorically and anatomically to signify a maid; thus Homer writes,—

Δῶσεν παρθενίλην ϖωὴν καθ’ ἔπινος β’ ἔχενεν.

this custom is, therefore, also very ancient, and derived from the Greeks directly, or was common to the Pelasgic race.

The hair of the bride was divided by the point of a spear, to which Ovid alludes,—

_Nec tibi qua cupidae matura videbere matri,_
_Comat virgineas hasta recurva comis_,

and for the origin of which custom many reasons are suggested. Firstly, Roman marriages originated in the rape of the Sabines, taken by force at the point of the spear, and as it were ἀδικία; secondly, as a type, that being married to one of a martial race, she should dress plainly, and without affectation, and bear valiant offspring. The last reason is, however, the best; Juno was the protectress of women in labour, and of married women generally; and to her the spear, anciently termed _quiris_, was sacred, hence too she is called _dea quiris_.

A wreath of yellow flowers was placed on her head, and the veil _flammeum_, or _flameola_, thrown over it.

_Cinge tempora floribus,_
_Suavolentis amaraci,_
_Flammeum_.

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1 Cic. Orat. pro C Fluent.
2 Cic. de Div. 1, 16; Val. Max. 2, 7, § 1.
4 Odys.
5 Ov. Fast. 2, 560; Arnob. adv. Gent. 2, 97; Plut. Quaest. R. 285. _The_ _a_ _γ_ _ε_ _ρ_ _ε_ _ω_ _ς_ of the flamen dialis, or priest of _jove_, may have originated in a spear head; some suppose that the haste was prospectively typical.
6 Plut. I. c.
7 Ter. Adel. 3, 5, 41. _Juno Lucina_ _f_ _e_ _r_ _e_ _m_ _e_ _v_ _e_ _r_ _m_ _m_ _e_ _b_ _e_ _r_ _m_ _m_ _e_ _s_ _e_ _r_ _v_.
8 Plut. I. c. 87.
9 Catull.
10 Theophrast. c. pl. 1, 43; see also I. c. h. pl. 6, 7; Dioscor. 3, 67. A plant with a bulbous root, a marjoram from _α_ _ν_ _δ_ _ω_ _ν_ _ο_ _μ_ _ε_ _ν_ _ν_ _μ_ _α_ _ρ_ _α_ _ν_ _ο_ _μ_ _α_ _ρ_ _α_ _μ_ _α_ _ρ_ _α_ _μ_ _α_ _ρ_ _α_ _m_ _e_ _f_ _e_ _r_ _e_ _v_.
MARRIAGE—CONFA R RATIO.

It is not satisfactorily ascertained what this plant was; it, however, appears to have been one that did not readily fade. In England, orange flowers are, as already mentioned, exclusively the type of a bride.

§ 550.

The bride, being thus dressed, was conducted towards evening to the house of the bridegroom by three boys habited in the prætexta, born of confarreatred parents, and termed patrimi and matrimi, and whose parents, for good luck's sake, were also living.

Some suppose the party was headed by the bridegroom, others, however, do not believe that it was so. The bride was taken with feigned violence from the arms of her mother, in remembrance of the rape of the Sabines, the first Roman mothers.

Two of these boys supported the bride on either side by the arm, the third preceding her with a torch. Plutarch speaks of five wax candles, for which number he has given himself unsuccessfully much pains to find out a good reason; might they not have been carried by the five witnesses necessary in all proceedings of the Roman Law? As the ceremony was performed about nightfall, light would be necessary for the witnesses to see what was done, and of what they were afterwards to bear testimony.

The bride herself carried a distaff and spindle with wool, as a type that she is, like a good housewife, to occupy herself in spinning, and in memory of Caia Cecilia, or Tanaquil, wife of Tarquinius Priscus, a famous spinster. That spinning was eminently the duty of a housewife in the oldest times, we learn from the most ancient Greek authors. Homer says, Chryseis shall spin and share his bed.

Hence, too, in England, unmarried women are termed spinsters. In Scotland, the wife's, or cognate side of a family, is termed the spindle side, in contradistinction to the agnate, or husband's side, which is denominated the sword side. The armorial bearings of the families of widows and spinsters are painted on this spindle, vulgarly termed a lozenge.

A boy termed Camillus followed the bride, bearing in a covered vase the toilet utensils of

Some think that patrimus and matrimus signify that their parents were still alive—but see Tac. H. 4, 53; Festus v. Flamin. 289, et patrimus, 358; Plin. H. N. 16, 2, 790, ed. Schulting.


In modern Greece the distaff and spindle are of a most simple construction; the first being stuck in the belt, the latter depending and spinning round as the hand pulls the raw wool from the distaff and forms it into a thread.

Plin. H. N. 3, 43.

II. 1, 37, et § 489, h. op.
the bride, called camera, camerum, camillum, together with crepundia or toys for the children,\(^1\) and to the train all the friends of both parties attached themselves, which attendance was termed officium.\(^2\)

While this procession was advancing towards the house of the husband, a hymeneal hymn, termed talassio,\(^3\) was chanted, and it is asserted that this was the fessinina of more ancient times. The Greeks had a similar practice, a song of this description being sung, with an accompaniment of Lydian flutes.\(^4\) The term is said to have been taken from Talassio or Talasus, who, in the time of Romulus, stole a Sabine virgin of great beauty, and as the marriage turned out a happy one, the custom was preserved as one of good omen, inasmuch, however, as it is proved to be a Greek custom, too much faith cannot be placed in the origin asserted by the authors cited at the foot.

§ 551.

On arrival at the bridegroom's house, the bride, with her party, remained some time in the garden, where a wall of loose stones had been erected, termed maceria; and which was pulled down for the bride to enter her husband's house. This was typical of the joining of two houses in one, and all difficulty is cleared up by a passage of Terence.\(^5\)

\[\text{Atque hunc in horto maceriam jube dirui,}\]
\[\text{Quantum potest, hunc transfer unam fac domum.}\]
\[\text{Tranquissim et materem et familiam omne ad nos.}\]

This wall is also termed campitum vicinale.

Venus was the goddess, as Priapus was the god of gardens, both in virtue of their being the types of fertility; it was, therefore, considered lucky for the bride to remain some time in the garden, where she possibly offered some sacrifice to Venus before proceeding with the ceremony.

In Greece, the mother-in-law usually followed her daughter to the husband's house.

§ 552.

Arrived at the threshold of the husband's house, the bride wound wool round the door-posts, which were elegantly decorated with flowers, as well as the door-way, and smeared them with hog's or wolf's lard, adeps suillus or lupinus.\(^6\) She was then lifted over the threshold by the pronubi, or bride's men, who must be married men in their first wedlock. She was not allowed to touch it with her foot, for the threshold being sacred to Vesta, the virgin goddess, it would have been improper in one about to cease to be a virgin\(^7\) to desecrate it; it was also a type, that she was not to leave her husband's house except by force; or in remembrance of

\(^1\) Fest. v. Camerum; Plaut. Cistel, 3,
\(^2\) Hom. II. 18, 490; Hes. Scut. Herc. 273; Aristoph. Pax. 1316.
\(^3\) Suet. Calig. 25; Id. Claud. 26; Plut. Q. R. Init.
\(^4\) Adelph. 57; P. 24, 11, 66, § 1.
\(^5\) Serv. ad Æn. 4, 19; Plin. H. N. 28, 9.
\(^6\) Plut. Q. R. 273; Plaut. Cas 4, 4.
the rape of the Sabines, who were forcibly brought into their husband’s abodes. The husband then received her with fire and water, the two elements whereof all things were supposed to be formed; semina rerum, as a type of the necessaries of life, of household cares, of purification, called by Lactantius a sort of sacrament; thus, Dionysius of Halicarnassus speaks of the κοινωνία πυρὸς καὶ ὕδατος.

The interdictio aquæ et ignis was equivalent to excommunication in the Christian Church, exile among the Romans, and discommoding in the English universities of Cambridge and Oxford.

It was then, probably, at this period of the ceremony that the torch-bearer presented the torch to the bridegroom on the part of the bride. The wood of which this torch was made has been variously stated; in some authors we find spina alba cum a novâ nupiâ ignis in face afferetur à foco ejus sumptus, fax ex spinu allata esset uti eam puere ingenuus afferveret; contra novo marito, cum item e foco in titione ex felici arbo re et in aquâ alqua allata esset. The lucky tree has been erroneously supposed to have been of hawthorn, and that the staves of the shepherds who seized the Sabine virgins were made of this wood; it was supposed to drive away evil omens, thus, Ovid,—

*Sic fatus virgâ quam tristes pellere posset
Et foribus noxas (hæc erat alba) dedit:

it was a sign, too, of a distaff.

*Virgaque lanalis de spinâ sumitur alba. It is, however, evidently the white pine.*

Catullus mentions the pineam quatu tædam, and Virgil speaks of the pinam prônubam. Pronuba nec custos accendet pinus bonores.

There can be little doubt that the hawthorn is not intended here, but the spinous-leaved white and resinous pine wood, a species of the abies.

§ 553.

The bride then having touched these two elements, fire and water, it was probably at this period that the ceremony of confarreation was performed.

A sheep having been sacrificed, the bride and bridegroom were placed upon two chairs, fastened together as by a yoke, jugum, hence conjugium, over which the skin of the sacrificed animal was spread, and their heads being covered with a veil, the mola salsa, or salt baked farinaceous cakes, prepared by the vestal vir-

1 2 Inst. 10.
2 1 c.; see also Val. Flac. 8; Ov. Fast. 4; Var. de Leng. 4, et de Vit. Pop. Rom. 2.
3 Var. de Vit. P. R. 1, 1.
5 Servius Fanellia; Fest. v. Diffarreatto; Arnobius 4; Plin. N. 18, 3; Dion. Hal. 1, 2.
6 It may be doubted whether they par-

took of it at this time or at the feast afterwards, for it is not clear that this was the mulaeum, a cake made of meal, aniseed, cumin, &c. and moistened with new wine, mentioned Juv. Sat. 6, 201; in short, a wedding cake, which was distributed, as the custom is in England, to all guests present. In Juvenal’s time confarried marriages must have fallen into great disuse. Juvenal wrote under Nero and Trajan;
gins, and carried before the bride when conducted to the residence of her husband, were administered, probably in the form of a sacrament. What the formula of this oath was we are in ignorance; but five words have been preserved, whence it appears that the bride termed herself Caia, after Caia Cæcilia, the good housewife, aforenamed, and the husband Caius, ubi tu Caius, ibi Caia. This corresponds to the formula of the English Church, I take thee to be my wedded husband, to have and to hold (habendum et tenendum) from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love and to cherish (and to obey) [the woman only], till death do us part, according to God's holy ordinance, and therein I plighted thee (or), thereto I give thee [the woman] my troth.

The habendum et tenendum appears a remnant of the reciprocal mancipation.

The keys were then delivered into her hands, in token that she was to preside over household matters, hence the declaration of the man, "with my body I thee worship, and with all my worldly goods I thee endow," contains the dower clauses.

The marriage supper then took place, and the bridegroom threw nuts about the room for the boys to scramble for, in token that he left childish things for a more serious state of life, whence nucibus relictis passed into a proverb. Virgil writes,—

\[ \text{Sparge marite nucos.} \]

and Catullus,—

\[ \begin{align*}
\text{Du nuces pueros iners,} \\
\text{Concubine : Satis diu,} \\
\text{Lusistis nucibus. Lubet} \\
\text{Jam servire, Thalassio} \\
\text{Concubine, nucis da.}
\end{align*} \]

§ 554.

The bridal bed. In the mean time the lectus genialis was prepared by the pronaæ, or matrons in their first wedlock, answering to bridesmaids in the atrium, and decked with flowers and otherwise. Catullus writes,—

\[ \begin{align*}
\text{Nos bona senibus viris,} \\
\text{Cognita breve feminae,} \\
\text{Collecte puellulam,} \\
\text{Jam licet venias, marite.}
\end{align*} \]

The matron then put the bride to bed with great ceremony.

Therefore between A.D. 98-117. A.D. 23, we find, Tac. A. 4, 16, that then even marriages had gone out of use in a great measure; nevertheless, the cake may have been preserved as we have retained it, though no longer composed of the same materials, or made by vestals.

1 Servius ad Virg. Ecl. 8, 82.
8 Cic. pro Mur. 12; Plut. Q. R. 6, 20.
3 Fest. v. Clavis.
4 Plaut. Curc. 5, 2, 61; Suet. Calig. 25.
6 Ecl. 8.
6 A Metaphorical term for the husband.
The epithalamium was then sung by girls, and probably by boys also, at the door of the bridal apartment, after the guests had left, and it appears that these songs were not of the most decent description; this was also a Greek custom, as the word implies. Here again Catullus mentions,—

*Nec dies tacet procax,*
*Fescinorina locutio;*

and Claudian,—

*Permissisque jocos turba licentior,*
*Exultet tetricis libera legibus.*

Nothing now remained but for the bridegroom to loose the bride's girdle, a custom of great antiquity. Thus Moscius, relating the story of Jupiter and Europa, writes,—

*Zeus kal palin eterno aneladesto morfin*
*Δίσε δε δι παλμ μηριν.*

Homer, in his *Odyssey, Λόθεν πάρθενης κυσνη,* and Museus in *Hero and Leander.*

*Ως ό μεν ταυτ επισων ο δ' αντικα λυσατο μηρίν,*
*Κατ' θεσμών επίβησαν αμυστουδου Κυθερβίης,*

§ 555.

The following day the husband usually gave a feast to her old companions, termed *repotia,* being that on which the wife undertook the management of her husband's household, and as certain religious rites had then to be performed, it was needful that the marriage day should not be succeeded by a *dies ater;* it is probable that on this occasion the wife at least sacrificed to her new *divi penates.*

§ 556.

Lastly, the woman assumed the husband's name, as in England and elsewhere,—a practice which still continued under the emperors: thus we find in inscriptions, *Antonius Drusi, Domitia Bibuli Messalini Neronis Domitia Domitiani,* as the natural consequence of their passing into another family.

§ 557.

In order to clear up all doubts, it will be necessary to add a few words respecting the *flamines.* To be invested with that holy office, it was necessary to have been born of confarreateated parents; and the fact of being chosen to this office, or that of vestal, *de facto* emancipated the son from the paternal power.

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1 Theocrit. Id. 18. 2 Fest. v. Repotia: Hor. Sat. 2, 2, 60. 
4 Rupert. Epist. 41, ad Reines Lap. 156, 235, 237; Gruter Inscript. P. 584, 11—
6 Calvis, 1, 130; Ulp. Frag. 10, 5; Tac. 
7 A. 4, 16.
The flaminica was indispensable to the flamen in the performance of his office, and was necessarily in his power; consequently, to become a flamen, the candidate must be of noble family, and married to a confarreateed virgin, and be in his first wedlock. He was inaugurated by the pontifex maximus.

The office of Flamen, although very high, and conveying great privileges, nevertheless implied certain disabilities to offices of state; hence it is possible that many of the highest class, which alone was qualified by birth, did not wish to have their political ambition interfered with by their children being eligible to the office of flamines.

It was the custom to propose three competent candidates for the office, of whom one was chosen (coptus) in conformity with the ancient rite. When elected, the flamen was a sacred person; if his wife died, he retired from the office, for he required her assistance, and could not marry again.

It is thus with the inferior orders of the Greek clergy, who are allowed to be married men; but they must be married to a virgin in their first wedlock, before ordination, and if she die—although they do not, like the flamines, retire from orders—yet they cannot marry a second time.

In England, persons are incapacitated from bishoprics by bigamy, as second marriages are called by the Canon Law.

The privileges of the Flamen Dialis, the highest of all, was the apex, the albogalerus, a lictor, a toga pretexta, a sella curulis; the highest place at a banquet, except the rex sacrificulus; the right of affording asylum in his house, and freeing persons from bonds; the right of respiring for the day a criminal who met him and claimed his protection (these rights of sanctuary and respite were also privileges of the cardinals). He was, on the other hand, restricted from sleeping out of the city for a single night (this restriction was relaxed by Augustus, who extended it to two nights); neither could he sleep out of his own bed three consecutive nights.

He could not govern a province (and indeed he was originally excluded from all civil magistracies); nor could he ride on or even touch a horse, or behold an army marshalled without the pomerium. He could not make oath, wear any but a plain ring, strip himself naked in the open air, appear without his apex, touch or name a dog, a she-goat, ivy, beans, or raw flesh, nor touch leaven, flour, leavened bread, nor could the sacrificial cakes be placed even in contact with his bedstead; he could not touch a

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1 Serv. ad Æn. 4, 104; 374; Gaius 1, 112.
2 Tac. l. c.; Lev. 27, 8.
3 Varr. ap. Gel. 10, 15.
4 Plut. Q. R. 119.
5 Liv. 1 c. 41, 3, 20.
6 Gel. l. c.; Plut. Q. R. 166.
7 Liv. 5, 52.
8 Tac. A. 3, 58, & 71.
9 Plut. Q. R. 169.
10 Fest. v. Equo, Edra.
11 Plut. Q. R. 114—118—169—170; Plin. H. N. 18, 30, 28, 40. There is in all this an evident trait of the Pythagorean doctrines.
dead body or enter a sepulchre (bustum), nor have a knot in any part of his dress. His hair must be cut by a freeman, and his nail-parings were buried under the felix arbor. No one could sleep in his bed, the legs of which were smeared with clay. He could not walk under vines.

The flaminica, who was subject to the same restriction, wore a purple robe (venenato operitur), her hair plaited in a cone (tutulum), and a square veil or napkin on her head, with a border (rica), to which a slip of the lucky tree was attached. She could mount only three steps, lest her ankles should be exposed; she went to the Argo with her hair uncombed, and she sacrificed a ram to Jupiter every week, or nundina.

It is erroneous to suppose that confarreat marriages were restricted to the flamines, since, in that case, their number being only three, the office would have soon become extinct, from want of qualified candidates. It is, however, as certain, that this rite was confined to the patrician class, whence the priestly college was elected (captus).

§ 558.

Co-emptio was a ceremony founded upon the legal mode of transferring the fee-simple of real property among the Romans, secundum jus quiritium. Sale in old Rome was the safest mode by which such transfer was performed, whether feigned or real; and when applied to real property, res mancipi was by mancipatio. Whatever was transferred by this means was acquired in fee-simple, and a filius familiae was accounted such real property; and, when sold, the best species of title was acquired by such sale, which also implied a warranty. Things thus transferred were said convenire in manum, and to be in dominio, but if otherwise, usucapi, and to be in bonis. This form of transfer was then applied to daughters marrying; and as a daughter on sale became the mancipium of the purchaser, this mode was adopted to pass her from one family to another, and to transfer the paternal authority from the natural father to the husband, of whose gens she became a member, and to whom she stood in the double relation of actual wife and adoptive daughter. The advantage of this position was obvious: it made her a mater familias, and gave her the right of succession as a hæres sua to her husband, in her capacity of daughter, on his dying intestate; if without children, she succeeded to his whole estate, ex asse; but if he left issue, she then shared with them equally as a sister.

This rite, which was purely of a civil nature, was performed,

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1 Geil. l. c.
2 Fest. v. Tutulum.
3 Fest. v. Rica; Varro de L. L. 7, 44.
4 The Roman week consisted of eight days, vid. § 350, h. op.; Macrob. 1, 16.
5 It has been convenient here to render dominium by fee simple, and res mancipi by real property, although sometimes consisting of moveables.
6 Ulp. Fr. 10, § 1.
7 Dbr. Hal. 1.
as appears from an inscription, by the husband and wife reciprocally:

PVBL. CLAVD. QVAEST. AER. ANTONINAM VOLVMNIAM VIRGINEM VOLENT. AVSPIC. A PARENTIVS SVIS COEMPT. ET FAC III. IN DOM. DVXIT.

The form of the emption.

There can be no doubt that the emption on the part of the husband was done in the same form as the usual quiritanian mancipation, that is to say, in the presence of five citizens of the age of puberty (perhaps termed on this occasion senes co-emptionales), of a libripens, an antestatus, and the parties concerned,—the husband as purchaser, the father as vendor, and the woman as object. Neither is there reason to suppose that the formal words differed from those used in adoptions.

The question of emption on the woman’s part is not so readily to be disposed of; for it cannot, on any principle of Roman law, be admitted that the wife bought her husband, as many have asserted, on the testimony of ancient authors1 supposed to point at this fact. How could she be free to buy, who herself was in manu patris? All she bought would accrue to her husband, if after mancipation, but to her father if before; and in the first case, the husband would accrue to himself, which is absurd. It may, nevertheless, be perfectly true that she brought with her three asses; one of these she delivered to the husband, and was typical of her dower or property, perchance of that allowed her as a peculium, and which she brought with her; the second she laid upon the hearth as an offering to secure her participation in the household rites of her husband; the third was a propitiatory offering to the Lares, or external deities of the mansion. She may then be said to have bought herself into the house and sacred rites of her husband, and to have brought a dower, but by no means to have bought him; moreover, as what she had was ipso facto acquired by her husband on his becoming her quiritanian proprietor, and as she came to him, in order of time and place, after having paid her footing to the presiding Genii of his family, it is not only deductible, but almost certain, that she performed these acts before she was mancipated to him. The mancipation to her husband now followed in the form above described.2 Co-emption must not, therefore, be taken to signify reciprocal purchase, but to apply to the husband exclusively, and to imply that the two came together by a purchase,3 or, in consequence of a purchase,

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1 Novius de Propriet. Serm. 12, 50.
2 Peteri lege Romana tres asses ad maritium veniam solebat adferre, atque unum quem in manu tenebat, tanquam emendi causi, marito dare alterum quem in pecie babebat, in foco larium familiarium ponere; tertia in sacrificio quem consideraret, compito vicinali solere resonare (resignare).—Suet. Aug. 41: here is an evident confusion between the Lares and Penates. Partition walls were, however, sacred to the Lares, internal walls to the Penates.—Ov Fast. 2, 616.
3 Observe the term, correî stipulandi—two partners who join in a stipulation with,
were fused into one, for the unitas personæ was the result of the transaction.¹

The principle of co-emption, thus explained, has been preserved in the English rite; when a woman marries, she is legally united, and forms civilly one person with her husband; if he marry her with debts, such debts become his; if with a fortune, it immediately vests in him; if successions fall to her, they accrue to him; if she have made a will, it is destroyed by the coverture.

§ 559.

The so-called Smithfield marriages, which have afforded so much amusement to foreigners, appear traceable to co-emption. The Romans introduced civilization into England Proper, and we learn from Cæsar² that, before the conquest of Britannia by the Romans, the natives lived in a state of incest and communism. The Romans introduced their own laws and mode of administering them, markets, and the forum,³ and applied themselves sedulously to the improvement of the moral condition of the people.

One of the rites most conducive to the moral improvement of the province would have been a regulation of marriage, and the abolition of communistic principles,—the greatest of all abominations in a country despotically governed, and which can, indeed, only exist: in a state of unmitigated barbarism, or of civilization debased and corrupted by morbid refinement. Ancient Britain, on the one hand, or modern France on the other, supported these principles on a perverted and false view of the principles of Christianity.

From the practice of co-emption, as applied to marriage, the Smithfield practice may be easily deduced. Co-emption was dissoluble by re-mancipation, and this mode of transfer must be performed before witnesses, and where the proper officers were present to conduct the transaction. The markets⁴ established by the Romans, in all their provinces, were the most convenient and proper places for this sale, where it was undoubtedly performed. What, then, the ancient Briton did in exact conformity with the law of the land, the modern does perhaps in contravention of it. The lower orders still imagine that the selling their wives for a nominal price, in market overt, operates a valid transfer, and a legal marriage; and it is presumed that no one will doubt its origin in the Roman co-emption. If we look back less than two centuries, we shall find great laxity prevailed in marriages legally valid, and, among others, those of the Fleet prison may be instanced,—an

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¹ a third party, not two parties who stipulate with each other.
² Vid. § 522, h. o.
³ De Bell. Gal. 5, 14. Uxorès habent deni duodenique inter se communes et maxime fratres cum fratribus et parentes
⁴ Cum libris. Sed se qui sunt ex his nati; eorum habent liberti, a quibus primum virgines ductae sunt.
⁵ Tac. Agr. 21.
⁶ Ibid.
abuse which it was found necessary to put down by legislative enactment.

It may be objected that co-emption could never have existed in England, because, it being a province, the British could never have possessed the patria potestas in the full Roman sense of the word, that is, the dominium quiritianum, which was the result of a conventio in manum. Cæsar, however, tells us that the patria potestas was indigenous in Britain on his arrival: Viri in uxores, sicut in liberos vitae necisque habent potestatem; et quam paterfamilias, &c. There Cæsar uses the Roman terms to express what he found in Britain.

If any neighbouring state wished to adopt the Roman laws within its own confines, it could do so, and was then said fundus fieri, with a restriction as to public law; and this was often done, by the Latins for example. Moreover, they would be disseminated by the military colonies introduced into Britain by the Romans.

The patria potestas belonged to the jus privatum, consequently there was nothing to prevent its adoption in Britain; and we may fairly doubt the fact mentioned in the Institutes, that the patria potestas was peculiar to Roman citizens, and that no men had the power that they had, or it may be explained by the addition, nisi fundi facti.

The Britons appear to have taken kindly, under Agricola, to Roman institutions and every sort of refinement, including the study of eloquence, imitating their masters; and it is possible that they would do so to a still greater extent when they became their own masters.

§ 560.

The evidence of Cicero induces the belief of confarreatio and co-emptio being rites blended with each other; and if this was the case, it is probable that the co-emption took place originally in the middle of the ceremony of confarreation above described, beginning in the garden and ending in the house, before the pair to be married participated in the sacrifice, and were placed upon the skin of the bosital victim.

The order of the rites, upon this supposition, would have been as follows:—The bride being dressed, was taken, with apparent force, from her own house, by the party of the bridegroom, and conducted to his garden; here, after having made her offering to the Lares, the wall was destroyed, and she was lifted into the house, where the bridegroom received her with fire and water, accepting the as, dotis nomine. The co-emptio, secundum jus quiritium, was then made by the husband, after which followed the confarreatio

1 Tac. Agr. 14.
2 De Bell. Gall. 4, 12.
3 Gell. 19, 8; Cic. pro Balb. 8; Hein. A. R. App. 1, 82.
4 Hein. App. i, § 88.
6 s. 9, § 2.
7 Pro Flacco; Pro Murmata, 12; Ad Fam. Epist. 7, 29.
with the sacrifice, the seating of both on the skin of the victim, the veiling, and probably an invocation by the officiating priest, the formula of *ubi tu Caius, ego Caia*, the sacrifice and *as* to the *penates*, the marriage supper and bedding: the only doubtful point is, as to whether the sacrifice to the *penates* was not performed on the following day before the *repotia*.

Cicero mentions only two rites of marriage,—the co-emption and use,—omitting the *confarreatio* or priestly part of the ceremony; and Tacitus states that it had been for the most part abandoned: *sub idem tempus, de Flamine Diali, in locum Servii Maluginensis defuncti legendo, simul rogandâ novâ lege desseruit Cæsar.* Nam patricios, confarreatis parentibus genitos, tres, simul nominari, ex quibus unus legeretur, vetusto more; neque adesse, ut olim, eam copiam, omissâ confarrearindis assuetudine, aut inter paucos retenta; pluresque ejus rei causas afferebat; *potissimum penes incuriam virorum fæminarumque; accedere ipsius caerimoniarum difficultates, quæ consulto vitarentur: et quando exiret e jure patrio qui id Flaminium apisceretur quaque in manum Flaminis conveneret.*

The reasons stated for its discontinuance were, then, the carelessness of parties and the tiresome detail connected with the ceremony; in addition to this, the expense must doubtless have been considerably increased; but, the great objection was one which applied equally to the co-emption, the *conventio in manum maritii*, and consequent loss of the paternal power to the woman's father, and lastly, the difficulty of divorce. This latter caused marriages by *usus* to be preferred; and it is presumable that the rite was only preserved in its entirety among a few of the old gentes of Rome.

When a new form obtained, it is natural that many of the old forms belonging to the ancient rites should be preserved from prejudice, although they had lost their significance; thus we find the forms of the banquet and *mustaceum*, and probably some others, preserved, but the rest superseded by other expedients: thus a stipulated dower was introduced in the place of the property acquired by the *conventio in manum*. It is probable that the religious rites of *confarreatio cum co-emptione* were first neglected, thus reducing it to a mere co-emption, which of itself was a sufficient civil marriage, and the gist of the whole rite; and this is why Cicero speaks of *co-emption* alone in his time. When, however, the objection was raised to the transfer of paternal power, that form, too, became comparatively obsolete, and *usus* was the marriage form generally adopted.

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1 This must have originally belonged to the *confarreatio* not the *co-emption*, as many suppose, and is a mere fragment of the formula mentioned by Ulpian Fr. 9. The words used in *manicipations*, therefore in *co-emptions also, are known, and were different.

2 *An. 44, 16.*

§ 561.

An important question is raised by Ulpian’s stating that ten witnesses were necessary in confarreate marriages. Mancipation, and consequently the co-emption, required five; thus, when the system of making praetorian testaments was introduced, this number was increased to seven, that is to say, the five original witnesses were retained, and two more were supposed to have been added in the place of the antestatums and libripens. Now, if to this number we add the three pretestati, the total will be ten, which would in so far agree with Ulpian’s account. This theory can only be admitted on the supposition of the two rites having originally been blended, and the same number of witnesses preserved; when the religious portion of the ceremony fell into desuetude, whereof seven belonged to the civil and three to the old confarreation.

§ 562.

The effects of confarreatio cum co-emptione, of the perfect or full-bodied rite, were, first, a community of sacred rites, γυναικα γαμωτην ματα δομους λεπων συνελθουσαν αυτης κομωνιου απαντων ευαι χρηματων τε και λεπων, πυρτων sunt conjunctio maris ac fæminæ consortium omnis vitæ; divini et humani juris communicatio; secondly, the children became patrimi and matrimi, and were qualified to hold the dignity of flamines; thirdly, the conventio in manum, the becoming mater familias and adoptive daughter, together with the right of a peculium and of succession connected therewith; fourthly, a capitis diminutio minima by the change of family; fifthly, the assumption of the husband’s name; sixthly, the acquisition, on the part of the husband, of the wife’s entire property dotis nomina; seventhly, the contracting of a tie almost indissoluble, and only capable of such dissolution by defarreation and re-mancipation; eighthly, the capacity of election to the high priestly office of Flamen Dialis; ninthly, the right of private tribunal quad the wife, in case of the various crimes.

Cicero, mentioning the modes by which the conventio in manum was effected, does not allude to confarreatio; hence we may presume that this was a part of the accessory rite of co-emption, which he states as having this effect.

§ 563.

The marriage by usus was probably the most ancient practical
form of marriage among the masses, and, indeed, probably among the higher orders also, until Numa invented the more formal modes, in order to give that state more respectability, and to improve morals. Marriage by usus was confirmed by the Twelve Tables; if a woman, matrimonii causa, cohabited with a man, she was his in bonis, until the expiry of a year complete, when she became his quiritian property per usucapionem. Nam velut annua possessione usucapiebatur (uxor) in familiam viri transibat, filiæque locum obtinebat, and thus became mater familias. If the prescription was not completed she was termed merely matrona; and it was the practice under the Empire to interrupt this prescription (usurpare) by an annual absence of three nights trinocium, in order that the wife might remain a feme sole without change of family, and the other consequences of a conventio in manum; thus the prescription was continually running, but never run out. In such case the reciprocal pacta dotaria, dor and donatio propter nuptias, contained in the tabule nuptiales, determined the extent of the rights of both the husband and wife in matters of property; but further she had no right of intestate succession to her husband, nor did he obtain a right over all her property nomine dotis; but the prætor would grant either such husband or wife the bonorum possessio, under the edict Unde vir et uxor.

§ 564.

It now remains to inquire what the form of marriage was after the old forms had fallen into comparative desuetude. That some form was adopted, even in marriages by use, at least among the better classes, cannot be doubted, although we find that an evidence of the use appears to have been required where a difficulty arose. It is not probable that respectable persons would have exposed themselves to a perpetual uncertainty, by which their issue might be bastardized, and themselves be considered concubines. The practice of subsequent marriage for the purposes of legitimation nevertheless proves that still great laxity existed under the Greek Empire; for it can scarcely be supposed that all the persons so married were concubines; persons taken, as far as we can ascertain the general rule, for the purpose of avoiding marriage.

The type of a wife, at the time of the discontinuance of formal marriages, and probably as long as the use existed, was the dos or dowry, a commutation for the conventio in manum: hence we find very long and exact enactments upon the law of dower. On a marriage being contemplated, the consent of all necessary parties having been obtained, a marriage settlement was drawn up in

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1 Quintum quoque Mucium jurisconsultum dicere solitum legi, non esse usurapaiam mulierem, quæ Calendis Januariis apud virium causā matrimonia esse cepisset, et ante diem quartem Januarius usurapatum isset. Non enim posse impleri trinocium, quod abesse a viro usurpandi causa ex illi.

2 Gaius, § 110. 3 Gell., 2, 2; Macrobi. Sat. 3, 2.

3 Aesopus, 2, § 111.

4 Gell., 18, 6, § 594; h. op.

5 P. 38, 11; C. 6, 18.

6 C. 5, 9.

The new forms of marriage.

By contract of dower, the type of marriage.

Roman marriage settlements.
due form, involving a dowry. This, it would appear, was, in the imperial period at least, registered in the temple of Quirinus. A marriage feast was then held, in which some of the old practices of the other forms of marriage were observed as a matter of custom merely; and such document was evidence of a marriage had. The number of witnesses to this contract does not appear, but it may be concluded that it was seven, since that number was required in a divorce. In the age of Julian, the form must have become very loose, so that it was difficult to ascertain who was legally married and who not. It was therefore decreed that antenuptial contracts should be evidence of marriage, even although they contained no stipulation of dower. It was made incumbent on the higher classes to cause such instruments to be drawn up, containing a grant of dower; others of the middle class, however, were allowed to go to any church, and declare, before the parson and not less than three clerical witnesses, their desire to marry: this was to be reduced to writing in a simple form, with date and place, signed by the parties, and preserved among the sacred archives of the church; in this case, no stipulation for dower was required. The low and abject class were permitted to contract marriage privately between each other, as before, without any formality, and such unions were not to be too nearly questioned. Previous to this, marriage contracts without stipulation of dower had been allowed, but the abuse of this privilege, and the perjury of false witnesses, caused this ordinance to issue.

A practice also prevailed of marriage by mutual oath on the scriptures, of which, as there was no evidence, the husband often drove the wife from his house, even after a long cohabitation had produced a family. Such marriages were to be valid on the woman showing by legal evidence that she had been, in the first instance, accepted as a wife, and could not be repudiated otherwise than in the legal form; and, in any case, she was entitled to a fourth of the husband’s substance.

§ 565.

A custom termed handfasting, so similar to this as to leave no doubt of its having been derived from it, formerly existed in the Highlands of Scotland, and was in use among the chiefs of clans, to whom the importance of issue was considerable.

The handfasting continued for a year and a day; if within that time the woman proved with child, the marriage was confirmed, but if not, she returned to her parents before the prescriptive time had run out. This must be the usus of the Twelve Tables.

The present system of “bundling” in Wales is also similar to the usus. When the woman proves with child, the bedding takes place, and a formal marriage follows, which, however, is not now at least compellable by law, whatever may have been the case in

1 Juv. Sat. 6, 10, 201. 2 Nov. 74, pr. 3 Nov. 74, 5, & 117, 3.
MARRIAGE—ENGLAND.

remote times; it is nevertheless said, that it is seldom that a Welshman refuses to marry after having bundled with effect.

§ 566.

The Catholic clergy, anxious to secure every avenue of profit, and taking the hint from the constitution of Leo¹ the Philosopher, who allowed the registration of marriages of the lower well-doing classes in churches for the sake of convenience, invented the bene-
dictio sacerdotalis, unimagined by the civil law, even at the period of the most rabid bigotry. The Canon Law made this benediction necessary; and to seal the usurpation, and fix it on a firmer basis, marriage was declared to be a sacrament, whereof seven were introduced, in order to leave no avenue of profit unbeset, from the baptism at the birth to extreme unction at the death, with its testamentary consequences. Confirmation and marriage were the links between birth and death; confession acting, at the same time, as a politic moral spy on all the intervening actions of life, giving a continuous and satisfactory means of ascertaining the growing wealth of the confessionist, directing its ultimate destination by well-timed scruples as to absolution, and threats of more than usual number of milliards of years of purgatory, and directing its present distribution by insidious suggestions of the importance of family secrets in the possession of the confessor. Marriage alone, as a sacrament, would have been useless unless combined with confession, nor would it have been worth while to have risked an argument in the face of the Levitical provision for divorce.

§ 567.

The usurpation of the Catholic Church was, however, repelled in all Protestant countries with the exception of England Proper; most of them pronounced marriage a civil rite, not excepting the sister kingdom of Scotland, and introduced appropriate forms: even Catholic countries admitted the principle. In France and Sardinia, the title headed Les Devoirs des Epoux, in the code Napoleon, is read to, and an acceptance of its conditions given by, the parties which secured to them and their issue all the effects of valid marriage. England herself at last adopted this principle, and marriage before the registrar of the district was introduced by statute avowedly for the relief of dissenters, but in fact to remedy the extreme carelessness with which church registers had been kept, and the grave consequences resulting from their frequent falsification by interested parties.

§ 568.

Marriage could ancienly only be solemnized in England, in factie ecclesiae, by the proclamation of banns: the archbishop was, however, enabled to grant a licence or dispensation of this wise provision, as the Pope had hitherto done, on the payment of a greater or less sum of money for marriage in a private dwelling, termed special, or in a church for a less sum before the lapse of the trinundary proclamation, on the oath of one of the parties of

¹ Nov. Leon. 74 & 89.
their being of full age, of their having the consent of parents, or being widows or widowers, and knowing of no impediment to their union—an absurd provision, inasmuch as persons who would act illegally in such a case would possibly not hesitate to take a false oath; but the practice went farther, and a statute provided "that all marriages solemnized by a person in holy orders, and consummated with bodily knowledge and the procreation of children, should be held binding:" this gave rise to the so-called Fleet marriages, solemnized by persons in holy orders, confined in the Fleet prison for debt, by whom no impertinent questions were asked.

This abuse was remedied by statute,¹ before which, though the parties were subjected to certain pains and penalties, yet the marriage could not be declared void, even though solemnized by a Catholic priest,² whose orders were acknowledged by the Church of England. Jews and Quakers³ were allowed to use their own forms.

The Registration Acts⁴ add two new legal methods of celebrating marriage by the superintendent registrar's certificate without licence, or by his certificate with licence, to those previously existing, viz. by special licence, by the surrogate's licence, and by banns. If the marriage be celebrated by licence, seven days must elapse between the entry in the registrar's book and the solemnization, otherwise twenty-one days. The ceremony may be performed in any building licensed for religious worship of any sect, and duly registered as a place for the solemnization of marriage; the presence of some registrar of the district, and two or more credible witnesses, with open doors, between eight and twelve in the forenoon; together with the following declaration,—

"I do solemnly declare that I know not of any lawful impediment why I, A B, may not be joined to C D," each of the parties saying to the other, "I call upon these persons here present to witness that I, A B, do take thee, C D, to be my wedded husband (or wife)," is indispensable.

The other condition applies to place only, for it is permitted to enter into this contract in the same terms and at the same hours at the house of the superintendent registrar or some registrar of the district, in the presence of two witnesses with open doors.

Contravention of the terms of the certificate involve the penalty of nullity,⁵ and fraudulent practices on the part of both offenders⁶ expose them to the penalties of nullity under one, and of felony under the other Act.⁷ This registration has the greatest similarity to the Roman practice of marriage by contract, tabulæ nuptiales, under the Empire, under which doubtless some clear declaration of consent was made, similar to the declaration directed by Leo

¹ 4 Geo. IV. 76, § 22.
² 10 East, 288.
³ 4 Geo. IV. 76, § 31.
⁴ 6 & 7 Will. IV. 86; 7 Will. IV. 1
Vic. 22; 3 & 4 Vic. 72.
⁵ 6 & 7 Will. IV. 85, § 42.
⁷ 4 Geo. IV. 76, § 43.
⁸ l. c. 39.
MARRIAGE—CONCUBINATUS.

at a later period to be made before two priests as witnesses in any church, and the subsequent registry.

Marriage abroad may also take place between British subjects in the chapel or house of their diplomatic agent\(^1\) by a clergyman, or in the house of their consul,\(^2\) or in the chapel of a British factory,\(^3\) or within the lines of a British army abroad; but a marriage according to the *lex loci* is good, proof being in fact the object to be attained.

§ 569.

In addition to marriage, another connection between the sexes—at first tolerated, and at a later period authorized by law, grew up in the *concubinatus*. In the more remote ages of the Roman state, seduction and an irregular mode of life was punishable in both sexes;\(^4\) but no objection was made to an unmarried man maintaining a person whose fame was not considered a matter of importance—such as his own freedwoman,\(^5\) or his slave girl,\(^6\) continuously as his mistress or *concubina*. Respect was paid to the weaknesses of human nature, and to the possibility of a durable attachment to persons with whom no legal marriage was allowed by law.\(^7\)

Concubinage was more favoured than previously to the accession of Augustus to power. The *Lex Julia de Adulteriiis animadverts upon the *stuprum* of honest women, whether free or freed, with severe penalties; but concubinage was expressly legalized *ex nomine* by the Lex Papia Poppaea, *concubinatus per leges nomen adsumit:*\(^8\) this clearly took it out of the category of *stuprum*, and consequently of the penalties to which that offence was subjected.\(^9\) Walter\(^10\) thinks that there must have been some formal declaration\(^11\) in the case of a man taking an honest woman of free origin as his concubine in order to distinguish her from one falling within the penalties denounced against *stuprum*, insomuch as such a connection would be of unusual occurrence. With respect to women of doubtful conduct this was of less importance, since in any case no question of punishment arose.\(^12\)

Aurelian\(^13\) published an ordinance prohibiting freeborn women from becoming concubines, which appears, however, to have had no effect. Constantine took great pains to eradicate this practice, but the following emperors appear to have rather favored it than otherwise, until Leo formally abolished it in the ninth century.\(^14\)

§ 570.

The introduction, toleration, continuance, and legalization of concubinage would be difficult to explain, were we not to connect it with the law and practice of marriage. Successive polygamy, or *secundae nuptiae*, were discouraged in both sexes by the policy of the Roman state, which appears to have entertained a wholesome

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\(^1\) Geo. IV. 91.
\(^2\) Geo. IV. 91. 12 & 13 Vic. 68.
\(^3\) Walter, G. des R. R. § 506, et sq.
\(^4\) Plaut. Epid. 3, 4, 29, 30.
\(^5\) Id Punct. Prolog. 102.
\(^6\) Walter, G. des R. R. § 506.
\(^7\) P. 25, 7, 3, § 2.
\(^8\) P. 25, 7, 3; § 1.
\(^9\)§ 1.
\(^10\) P. 25, 7, 3; the word *sine testatione*, see P. 25, 2, 24.
\(^11\) P. 25, 7, 1, § 1.
\(^12\) P. 25, 7, 2, 24.
\(^13\) Vopisc. Aurel. 49.
\(^14\) Nov. Leon, 91.
objection to a stepmother, as connected with the interests of the children of the first marriage. Ovid applies the term sceleris to nuzruna, and other authors are far from mentioning them in flattering terms: even in this country they do not enjoy the most favorable reputation, and experience induces us to believe that no wrong is done them: in Germany, too, the word stief mutterlich behandeln conveys no agreeable impression, and is applied generally as a synonym for bad and meagre treatment.

To avoid this inconvenience, to preserve the property of the first family from diminution, and in more ancient times, as far as at least as women were concerned, to prevent the intermixture of family rites, these second marriages were discouraged: it was, however, necessary to mitigate the evil which would naturally arise from widowers living single; on the one hand, then, stuprum was prohibited—on the other, concubinage allowed and at length legalized, the concubine occupying a humble position in her master’s house, probably very analogous to that of a modern governess, sine dignitate uxoris, her children alone were properly termed naturales, and capable of legitimation.

Concupinage was distinguishable from marriage by the incompleteness of the community and its legal consequences, yet it partook in so far of the nature of marriage that no concubine could be maintained simultaneously with a wife. The reputation of an honest woman suffered by this connection, but it was considered more reputable for a patron to live in concubinage with his freedwoman than to marry her, neither did her reputation suffer, and her unfaithfulness was considered an adultery. Ulpian is of opinion that either as her patron’s wife or concubine she could not separate from him without his consent. Concubinage was not forbidden with a man’s own slave girl, or even with immodest women.

§ 571.

The Romans of the Middle Republican Age appear to have been adverse to matrimony, and this adverseness may be in a measure referred to political grounds. Bachelors were courted by all, but especially by those who hoped to become their heirs, and therefore were anxious to give

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1 Virgil. Ecl. 3, 33; Id. Æn. 7, 765-8, 288; Id. Georg. 2, 128-3, 282.
2 The Austrians say the English treat Ireland stepmotherly; the English retort upon Austria in respect to Poland, and it is very probable that both are mistaken.
3 C. 7, 15, 3; Nov. 78, 4. In Turkey the issue of a master and his slave girl even are equally legitimate with those born of a wife.
4 Paul. R. S. 2, 20; P. 54, 16, 144; C. 5, 26, 7; C. 7, 15, 3.
5 P. 23, 2, 41, § 13; P. 48, 5, 13; P. 50, 16, 144.
7 P. 48, 5, 13.
8 P. 48, 5, 13.
9 P. 25, 7, 11.
10 P. 25, 7, 1.
11 P. 20, 1, 6; § 8; P. 42, 5, 38; pr.; Paul. R. S. 2, 19, § 6.

This most graphic description applies to the present age—the old Peripateticism might have lived in the nineteenth century.
them their political support, in the expectation of being remembered in their testaments, nor does present experience prove that rich uncles and aunts are usually neglected by nephews and nieces.

Bachelors are, by other authors, doubtlessly libellously accused of leading lascivious and irregular lives.\textsuperscript{1}

There existed even under the republic rewards for fecundity, and penalties on celibacy, which Augustus recounts in his oration to bachelors.\textsuperscript{2} The censors were charged with this delicate branch of domestic interference, and were ordered almost in the dictatorial words, \textit{dare operam ne caelibes essent in urbe},\textsuperscript{3} the fines levied on such were comprehended under the term, \textit{as uxorium}.\textsuperscript{4} \textit{Uxorium pendisse dicitur, qui quod uxorem non habuerit, as populo dedit.}

In 350\textsuperscript{5} A. U. C., the censors, M. Furius Camillus, and M. Posthumus Albinus Rigillensis, were very severe on this point; and A. U. C. 622, Q. Caecilius, Metellus, Macedonicus, obligated all to marry for the sake of getting children, and held an oration to this end,\textsuperscript{6} parts of which Augustus\textsuperscript{7} repeated in the Senate.

The censors to punish bachelors, sometimes had recourse to distributing them in the Urban tribes as less honorable;\textsuperscript{8} on the other hand, \textit{praemia}, in the way of honorable distinctions, were suggested to invite citizens to marry, as we learn from the oration of P. Scipio, the censor, in 554 A. U. C.\textsuperscript{9}

\textbf{§ 572.}

Julius Caesar endeavoured to favour the increase of numerous families of children among the citizens, by legal enactments, and when he held the consulate of Bibulos, he divided the province of Campania among 20,000 citizens, being fathers of three or more children.\textsuperscript{10} The population of the city, however, was found, on the census being taken, after the civil war, to have been decreased by half. Rewards were then held out to such as possessed the greatest number of children,\textsuperscript{11} but the death of Caesar shortly after put a period to these measures.

Augustus, however, inherited the same taste for encouraging polygamy, but found great difficulty in bringing his plans into operation, nor did he succeed until he exercised the censorship with Agrippa as a colleague, A. U. C. 725.\textsuperscript{12} In that year, being then for the sixth time consul, and feeling his power secured, he abolished the laws of the triumvirate, and enacted these more favorable to the

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\textsuperscript{1} Tusc. de M. G. 20; Id. An. 13, 52; Asmian. Marcell. 14, 19; Petron. Sat. p. 106.

\textsuperscript{2} Dion. Cam. 6, p. 660: \textit{du γαρ δὴ δέπου μονασκε, καθ' ἄνευ γυναικεῖων διάγαγε, ὑδὲ ἤγιστο, δραγόμον ἡ συνήστατο μόνος ἢ καθίσται μόνος, ἀλλ' ἐξουσίας καὶ ὀφειλέσιν, καὶ διαιτάσιοις ἤγιστο ἤδη.}

\textsuperscript{3} Plin. H. N. 14, 19; Seneca Consolat. Marci. 29.


\textsuperscript{5} Gell. N. A. 1, 6.

\textsuperscript{6} Liv. 45, 15.

\textsuperscript{7} Suet. Aug. 89.

\textsuperscript{8} Gell. A. N. 5, 19.

\textsuperscript{9} Suet. Jul. 20; App. de B. C. 2, p. 483.

\textsuperscript{10} Dion. Cam. H. 43, p. 256; Suet. Jul. 42.

\textsuperscript{11} Gruter, Inscript. p. 23c.
arts of peace and the power of the monarch,\textsuperscript{1} drawing the bond
closer, and introducing the rewards of the Papian Poppæan law.

§ 573.

Ten years later, A. U. C. 735, he revived the same subject,
introducing the famous \textit{Lex Julia de Maritandis Ordinibus}, which
laid more severe penalties on celibacy, and granted rewards and
encouragements to such as were married, and to the procreation of children;\textsuperscript{2} he was, however, as yet, not in a position to enforce
his views, and despite the use he made of Metelius's speech in the
Senate,\textsuperscript{3} he was out-voted.\textsuperscript{4}

The bill was, however, perseveringly proposed, and as per-
severingly rejected time after time, until it was ultimately passed,
its penal enactments having been softened down, the remunerative
provisions having been increased, and a term of three years,\textsuperscript{5} after-
wards extended to five, given previous to its coming into operation,
which it ultimately did A.U.C. 740.\textsuperscript{6}

Augustus had, however, not yet attained his object, celibacy
and sterility were preferred, and so much discontent felt, that the
order of knights, A.U.C. 761, combined in requiring an abrogation of
the obnoxious law.

Augustus's orations on this subject have been preserved by Dio.
Cassius,\textsuperscript{7} without, however, ceding to their demands; on the con-
trary, the next year the famous \textit{Lex Julia Papia}, or \textit{Papia Poppea},
was introduced by M. Papius Mutilus, and Poppeus Secundus,
ex-consuls, neither of whom were married or had children,\textsuperscript{8} and
comprised the provisions of the Julian law before alluded to.

This consolidation of the former laws on this subject, established
many rewards for numerous families. Of many candidates, those
were to be preferred for state offices who had brought up the
greatest number of children.\textsuperscript{9} That consul first assumed the
\textit{fasces}, who surpassed his colleague in the number of his children.\textsuperscript{10}
Latini, who had grandchildren or grand-daughters, and Latiniæ,
who had borne four children, obtained the \textit{jus quiritium}.\textsuperscript{11}

\textit{Liberti} were freed from servitudes,\textsuperscript{12} and freemen from the
burden of tutorship,\textsuperscript{13} in virtue of a number of children.\textsuperscript{14}
\textit{Juvabant etiam liberi in hereditatibus et solidi capacitate}.

The first places in the theatres were reserved to those who ex-
ceded in the number of their issue. Lastly, whoso had three
children living at Rome, four in Italy, and five in the provinces,
were exempted from personal public duties. This was the origin
of the notorious \textit{jus trium quatuor and guinque liberorum}, a favour

\textsuperscript{1} Tac. An. 3, 23.
\textsuperscript{2} Dion. Cass. H. 54, p. 608; Hor. Epist. 18, 17.
\textsuperscript{4} Suet. 34; Propert. 3, 7.
\textsuperscript{5} Suet. Aug. 34.
\textsuperscript{6} Dion. Cass. 56, p. 661.
\textsuperscript{7} L. c.; Suet. Aug. 35.
\textsuperscript{8} Dion. Cass. 56, p. 662.
\textsuperscript{9} Gell. A. N. 2, 15.
\textsuperscript{10} 1. c. 22.
\textsuperscript{11} Ulp. Frag. 3, 3.
\textsuperscript{12} P. 38, 1, 37.
\textsuperscript{13} Plut. in Num. p. 66.
\textsuperscript{14} Gothofr. ad L. P. P. 7, p. 280.
MARRIAGE—POLYGAMY.

subsequently granted to those who had none by special favor of the Emperors. ¹

To prevent fraud, Marcus Antonius decreed that the claim of this privilege should be made within three hundred days of the ²

prefectura ararii, and two copies of the professio made one to be kept at the residence of the claimant, and the other registered in the treasury, both in Rome and in the provinces.

§ 574.

Montesquieu,³ with his usual care, examines the origin of polygamy, and asserts it to result from, 1, The natural inequality of the sexes in Eastern countries; 2, The greater facility of supporting them in some countries; 3, The natural inequality in the birth of either sex.

In warm climates women are marriageable at a tender age; thus when they acquire reason their charms are gone, and the man seeks a younger and more attractive wife; the former has already lost the opportunity of influence which a more mature age would give her.

In cold climates, the capacity of marriage and reason combining at the same age, the result is monogamy; this he assumes to be one of the reasons of Mahomedanism making greater progress in the East, and Christianity in the West.

§ 575.

Polygamia is the marrying of more wives than one, Polyandria the marrying more husbands than one.

Polygamia is simultanea or successiva; the first is generally forbidden, the latter, which is merely a second marriage, is generally allowed. The Canonists apply the term bigamy to the successive polygamy; in its usual acceptance, the term applies to simultaneous polygamy. Polyandry is much rarer in the world than simultaneous polygamy. Monogamia is the marriage of one wife, and strictly speaking excludes the idea of a second marriage. The marriage of one wife at once appears more conformable to the law of nature, since it is the law of the majority of nations, and the practice of many where polygamy is permitted.

In hot climates the wants of mankind are fewer, consequently, the expense of supporting a plurality of wives and children less.

By the estimates we possess of the relative number of male and female children born, it appears that the males exceed in Europe, the females in Asia, hence, monogamy in one, and polygamy in the other, is in some measure a natural result.


² Esprit des Loix, 16, 2—7.

³ Montesquieu’s view of polygamy and its causes:

in warm climates;

in cold climates.

Y Y
Among the Naires, a caste of nobles in Malabar, to whom the defence of the state is entrusted, polyandry is usual, Montesquieu thinks, as a compromise, to obviate in a measure the inconvenience of soldiers being married at all.

The population of nations among whom polygamy is usual, does not appear to increase by these means, on the contrary, experience teaches us that the excess of women leads to abominable crimes.

Before the preaching of Mahommed, the pagan Arabs indulged in an unlimited number of wives. Mahommed not venturing to abrogate this evil, with his usual perspicacity sought to mitigate it, and limited his followers to four wedded wives; assured, from his knowledge of human nature, that although an unlimited number might live together in something like harmony, it would be impossible that so small a number as four, who would then become wives instead of being slaves, as theretofore they in fact had been, should do so. The correctness of this policy has been since practically proved; and the quarrels, jealousies, and expenditure of four wives vying with each other, has introduced practical monogamy in Mahommedan countries as the rule, and made polygamy the exception.

§ 576.

From the earliest age of the Roman state, monogamy was the law; and it was not until a late period that any attempt was made to introduce polygamy.

Helius Cæcina, the tribune, at the instigation, it is said, of Cæsar, suggested a law permissive of polygamy, which, however, was never promulgated or proposed. Antony was the first, however, who had two wives; this fact rests on the authority of Plutarch. Valentinianus, the younger, at a later period, permitted any man to marry two wives; but this law, made to cover his own turpitude, was never acted upon or in force among posterity, being abrogated by Theodosius, Arcadius, and Honorius. Lastly, Justinian declared that duas uxores eodem tempore habere non licet.

§ 577.

Charles V. in his penal code, punished it in the same way as adultery, declaring it worse even than that offence.

The Jews indulged in permissive polygamy, but the New Testament prohibits it. Justinian forbade it to the Jews. The Code pénal of France enacts, Quiconque étant engagé dans les liens du mariage aura contracté un autre avant la dissolution du précédent sera puni de la peine des travaux forcés a temps. The offence of advisedly aiding and abetting incurs the like penalty.

4 Brisson. de Jur. Connub. p. 292. 5 L. 1, 10, 6; C. 5, 5, 2; C. 9, 9, 18.
6 Art. 121. 7 Gen. xvi. 2, 3, & xxx. 3, 4, 9, 18; Lev. xviii. 18; Deut. xxi. 15, & xxv. 5; 8 Chron. xxiv. 2, 3.
9 Matt. xix. 9; Mark x, 8; Eph. v. 28.
10 C. 1, 19, 7. 11 3, 24, § 340.
MARRIAGE—SECOND MARRIAGES.

§ 578.

The statute law of England makes it punishable by transportation or imprisonment, with or without hard labor, for a term not exceeding two years.

This act for punishing bigamy does not apply, however, to marriages contracted out of England by any other than a subject of her Majesty, or to any person marrying a second time, whose husband or wife shall have been continuously absent from such person during the last seven years then past, and shall not have been known by such person to have been living within that period, or to persons divorced a vinculo, or whose former marriage shall have been declared void by any competent court. A marriage de facto is void de jure by reason of consanguinity or affinity. 1

§ 579.

Second marriages, secundae nuptiae, or polygamy successiva, was the subject of many regulations at various periods among the Romans, the chief object being the certainty of offspring, and in a secondary point of view, public decency; consequently, these regulations applied more particularly to women than to men.

The annus luctus was a period within which it was not considered proper for a widow to remarry. Originally this was ten months, that being the ancient term of a year. Justinian increased it to a year according to the Julian calendar, or twelve months, of our calculation, as nearly as possible.

Ulpian 2 tells us that the prohibition to marry within the annus luctus was established with a view to avoid the perturbation sanguinis. That this is the real reason, and not a respect for the memory of the deceased, is evidenced by the death of parents 3 being no impediment. Espousals may also be contracted, and males are not included 4 in the prohibition; hence it is clear that it was the consummation, not the contract, which formed the real objection.

The widow who contracted a second marriage within the prescribed period was accounted infamous, 5 which involved the penalties of loss of caste in the higher orders; 6 but such as forbore to marry again rose high in public opinion, 7 and were greatly distinguished in the divine law. 8

A woman who married a second time was incapacitated from bringing to her second husband more than a third of her property, or of willing more than that amount; of inheriting under the testament of a stranger anything whatever, or of accepting a legacy; and could not inherit from her blood relations beyond the

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In England polygamy forbidden, and penal offence.

Second marriages discouraged in Rome.

Marriage within the year of mourning prohibited to females; originally ten months; increased by Justinian to twelve. Ground of the prohibition.

Widows remarrying within the year infamous.

Restrictions as to property.

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1 Will. 46.
2 P. 40; 21, 11, § 8.
3 l. c. 11.
4 l. c. 9, 10.
5 l. c. 11, § 4; Nov. 2, 22.
6 P. 50, 1, 22, § 1.
did not apply to males.

Rules of the
Canon Law as to second marriage.

In England no prohibition of second marriage exists.

The Roman rule intended to fix paternity;

did not therefore apply to betrothal.

Children said to be more than ordinarily legitimate in England.

Penae Secundarum nuptiarum.

third degree anything whatever. The widower, on the contrary, could remarry as soon as he chose.

§ 580.

The Canon Law abolished the pain of infamy, but it is doubted whether it also abrogates the other penalties; the better opinion, however, appears to be that such is the case: but a widow who does not observe the year of mourning is punished by fine and imprisonment, as however is often the case in the Canon Law, a dispensation, that favorite source of profit against which Luther so bitterly inveighed, may be obtained, if it be proved that the woman be not with child.

In England there is no obligation to observe the year of mourning; so much of the wholesome Roman prejudice, however, remains as to render it indecent for a widow to marry in her weeds, which she ought to wear for a year; and the same, with less reason, applies to the husband also. The Roman institution was evidently intended to fix the paternity of the issue beyond doubt, but the modern practice, though derived from the Roman, refers to the past affection for the deceased, and the convenience or decency of society. The Roman Law did not impose the burden of the annus lactus on a woman only sponsa, or betrothed, for obvious reasons; but in England it is the practice of such to wear weeds like widows, which can only be propter sperm conjugis elatam.

A child born of a mother remarried within the annus lactus, in England is said to be more than ordinarily legitimate, and when he arrives at the age of fourteen years, may choose which of the fathers he will: this, in the age when all considerable estates consisted in real property, must have been a great privilege.

§ 581.

A second marriage labored, however, at all times under considerable disadvantages. These were called the penae secundarum nuptiarum: hence, possibly, Paul adopted the prejudice of the age and country in which he lived, and discouraged second marriages.

This is one of the few illogical cases of the Roman Law, according to which licit acts seldom expose the party to punishment. The disabilities connected with second marriages apply to both sexes, and the introduction of the law must be referred to the policy of the Roman state, in the wish to avoid the inconveniences arising from two, or perchance three, families of different gentes being in a measure amalgamated and brought up together, pro-

MARRIAGE—SECOND MARRIAGES. 491

bably in disunion, arising from the jealousy or favoritism of the respective parents and children. To this cause the introduction of concubinage may with reason be referred.

§ 582.

The principal disadvantages, applying to both a husband or wife contracting a second marriage, were loss of the property obtained from the former marriage, whereof the life interest only was allowed to be retained, the property arising from the one party to the first marriage being distributed, like an intestate estate, among the children of the first marriage: whatsoever that might be, this did not extend to onerosa and things acquired by course of law. When the mother or father contract a new marriage, they also lose, as the intestate heirs of a deceased child by the first marriage, the property, which such child would have inherited, and which they otherwise would have received, and are not at liberty to dispose of anything to the disadvantage of the children of the first marriage, although all rights revive by the death of such children.

The parties to a second marriage can give no more to one another than the portion of a child of the first marriage; and if their portions be unequal, then the same as the child who has the least—all excess over this is equally divided among the children of the first marriage: this applies to gifts, legacies, or heritages under quocanque nomine. Whatever one receives by operation of law is not to be included in such sum.

§ 583.

The children of the first marriage can forfeit their right neither by consenting to the second marriage, nor by a prohibition of a donor, nor by the consent of the first husband to the marriage; although they could by renunciation or by disherison by the donor, or by dying before him. Everything too was forfeited by the second marriage which the first husband had given under the condition not to marry again. Some add to this, that the children could obtain restitution against their parents as guardians; but this holds against parents even without the second marriage.

The father is exposed to the disadvantage of being obliged to

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1 Fully described by Leyser, sp. 300, med. 1, 2; and by Alison in Diss. de eo, quod hodie juris est circa penna sec. nupt. script, § 11, p. 16.
2 C. 5, 9, 3 pr.; Id. 5, § 2; C. 5, 10, 1; compare Nov. 2, 2; Nov. 25, 52; Nov. 28, 2; Nov. 127, 3; Thib. Pand. § 286.
3 Voet. 3, 23, § 101; Thibant, l.c.
4 C. 5, 9, 1; Nov. 22, 27; Voet. l. c. § 136.
5 Voet. 2, 23, § 122.
6 Puffen. 1, Obs. 24.
7 Leyser, spec. 300, m. 20; Hofacker, 1, § 521, n. 2.
8 C. 5, 9, & 3.
9 Nov. 22, 33; Glück com. § 443.
10 Nov. 155.
give security\(^1\) for the legacies which would become due from him in future to the children.

The mother loses the right of guardianship over children,\(^8\) the rank and dignity of her former husband;\(^3\) she can only demand back gifts made to children of the first marriage for great ingratitude,\(^4\) but if exposed to any doubt not under any circumstances.

\section{§ 584.}

Marriage, considered generally, may be most correctly said to be a "partnership for life contracted between parties of different sexes, according to form of law, for the procreation and education of children, and mutual support."\(^5\)

It is objected to this definition, that, according to it, sterile marriages are no marriages; but this is not true, for the intention is the foundation. A marriage is termed by Puffendorf\(^6\) a titular marriage (matrimonium honorarium or civiliter tale), when the possibility of child-bearing is past. With respect to the procreation and education of children being the real intention, it is a matter which may be true or false in each individual case, and cannot be ascertained, so different are the objects for which this contract is entered into: thus the French jurist, Pasquay, who was married three times, on its being doubted if he could have been actuated by the same intention in contracting marriage at such different periods of life, answered—primam propter opus, secundam propter opes, tertiam autem propter opem duxi. It is, however, here not a question of the real object of the parties, but of the legal object upon which marriage ought to be contracted—the finis operis, not finis operandium, for as nature created two sexes for the purposes of procreating the species, marriage is but a civil form, so far controlling the law of nature as to render it more effective. The second object of nature is to provide for the bringing up of such children as have been produced: for this purpose maternal affection has been implanted, and is further made imperative on the male as well as the female by civil laws. The third reason is mutual assistance, mutuum adjutorium, whereby the former objects can be better carried out.

\section{§ 585.}

Inasmuch as marriage is a partnership, and every partnership supposes a contract, and every contract mutual consent, so consent is the essence of a marriage, nuptias non concubitus sed consensus facit;\(^7\) and that is clear, for otherwise every rape would

\begin{itemize}
\item \(^1\) Nov. 23, 41.
\item \(^2\) P. 5, 49, 1; Nov. 22, 38. The mother and grandmother being widows were alone permitted to be wards of their children, by Nov. 118, 5, on declaring in court that they would not remarry, and renounced the immunities of the Scum.
\item \(^3\) Velleianum, which declared void all security given by women.
\item \(^4\) P. 50, 1, 22, § 1.
\item \(^5\) C. 8, 56, 7; Nov. 22, 35.
\item \(^6\) Höpfler Com. § 108.
\item \(^7\) De Jur. Nat. et Gent. 6, 1, 25.
\end{itemize}
be a marriage: and it is extraordinary that it should have long remained a matter of doubt in England whether a rape followed by conception was a rape, the conception being supposed to have implied a consent.

It is therefore essential that a marriage should be free between the parties, consequently metus in any of its varieties vitiates marriage.

§ 586.

Consent may be given in two ways,—by express declaration, as "I will marry Sempronia;" or, tacitly, when by certain acts I make it evident that I intend to marry the party; but in any case the act must be voluntary and certain, in the strict sense of the term: the rule of the Canon Law, quodcunque impedit libertatem aut certitudinem consensui, illud impedit obligationem nuptiarum, is true, and such a pre-impediment is usually called impedimentum dirimens privatim. Compulsion has the effect of vitiating a marriage law, but then it must be such intimidation as may fairly influence persons of ordinary courage—such as the fear of death or imprisonment, as in the instance of a father compelling his son to marry a certain person by imprisoning and beating him, or by the threat of such treatment. Reverential fear of a parent is however excepted, as the difficulty may be obviated by subsequent consent.

Hence it may be concluded, that if there be any force, fear, madness, or drunkenness, whereby persons may be wholly deprived of their senses, the marriage is void; for the consent of the contracting parties is necessary, which cannot be given by persons under such circumstances, they being incapable of consent—and here a distinction is to be drawn between an incurable madman and him who has lucid intervals, for a consent given during such lucid interval would be valid. The general rule, however, is, that all contracts must be made freely, and marriage being a contract like any other, and a most important one, anything which may infringe the freedom of the contract vitiates it ab initio.

Again, as a lesion or illegal element in a contract vitiates it, and as force, fear, or fraud are contrary to law, those based on such conditions are illegal and void.

§ 587.

Puberty, which is indispensable because it implies potency, is fixed at twelve in females and fourteen in males, for it is not only necessary that there be a will to contract, but that they do actually and legally contract, which they cannot do before the legal age.

1 The living together in all respects as man and wife implied a consent in Scotland.
2 X. 4, 1, 14.
3 C. 5, 4, 14.
4 P. 23, 2, 22.
5 C. 5, 4, 14.
6 P. 50, 17, 4.
7 C. 5, 4, 14.
8 P. 23, 2, 18.
9 P. 33, 1, 2; § 4; Nov. x. 10, 109.
The Canon Law follows the Sabinian doctrine, and regards the capacity rather than the age.

The age at which parties in England are capable of giving consent to marriage is the same as that prescribed in the Civil and Canon Law, namely, fourteen in males and twelve in females; but the subsequent consent of parties who have cohabited and have married before that age will render the marriage valid ab initio: up to that time the marriage is only inchoate, and the parties may before the legal age disclaim the marriage without the interference of any court, but the wife was entitled to dower if her husband died before she attained the age of nine years.\(^1\)

\(\text{§ 588.}\)

The physical state of the body, and the incapacity of procreation, is also to be taken into consideration as invalidating the legal object of marriage: thus very old men and women cannot be forbidden to marry, for, although there may be a great improbability, the law will not imply an absolute impossibility, of their procreating. Marriages, however, between a woman of fifty and a man of sixty remained subject to the penalties of the *lex Julia et Papia Poppea*: such marriages are denominated *matrimonia honoraria*, which might also be conceded to eunuchs; nor does the Civil Law expressly forbid them: simply, then, they are not *matrimonia legitima*. If a woman be *nimi arca*, the marriage must be postponed till such defect be removed.

The potency on the part of the man is an essential of marriage,\(^2\) for it is an implied condition under which the consent is given; on the other hand, chastity on the part of the woman:\(^3\) hence, by natural law, the marriages of all *spadones* and eunuchs of all descriptions are void; but the Roman law does not utterly forbid the former.\(^4\)

\(\text{§ 589.}\)

The incapacity of consummation on the part of either the female or male is another ground of nullity, and is in so far connected with consent, as it is presumable that the parties intended a perfect marriage, which such would not be. It is, however, essential that the defect should before the marriage have been unknown to the contracting parties, and should be incurable;\(^5\) an impotency, however, arising during copuature is to be considered in the light of any other malady, and must be borne as a misfortune.\(^6\) But the impotency of the male is not to be lightly believed; it must be verified by medical examination: if the result be doubtful, the old law required three years’ cohabitation, and

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\(^1\) Co. Litt. 234; 3 Dyer, 369; Com. Dig. Baron, & Ferne (B. 1), Bac. Abr. Dower (C. 1.)

\(^2\) Nov. Lev. 93; and see Deut. xxii. 21.

\(^3\) P. 23, 39; 39, § 1.

\(^4\) By the law of the Greek Church, if a man marry a woman represented to be a virgin, but who turns out not to have been so, the marriage is voidable.

\(^5\) 43, 5; 17, 2, 29; X. 4, 14, 2-3-4.

\(^6\) 32, 5, 7; 4, 19, 4, & 14; X. 4, 15, 5, & 6.
that the medical opinion should then be confirmed on oath by
seven jurymen taken from their relations; which latter condition
is now obsolete. The impotent party cannot again marry; but
if he so do, and his potency be proved, such second marriage is
null, and the former revived. The marriage of castrats is declared
null by special decree.

§ 590.

Impotency may be in either party, and may arise from mal-
formation of parts or want of action in them quoad the man, but
from malformation only in the woman, as if she should be nimir
arcta. Before a sentence of nullity can be pronounced, the
English, following the Canon Law, requires three years' coha-
bitation, unless the defect be so evident that there is no doubt
upon the matter. Inspection by medical officers, then, may take
place, and if the impotency be declared to be absolute and in-
curable, a sentence of nullity will issue; but if the party marry
again and procreate, the issue will be legitimate and the second
marriage good, which is contrary to the rule of the Canon Law,
as already referred to. Judgment of impotency will go by default,
if the party omit to submit to medical examination.

§ 591.

When the rite of marriage was entirely abandoned to the
church, the necessity of legislation in this respect became appa-
rent, and first the old element of mutual consent was preserved,
without which, either express, implied, or given by the agents of
absent parties on their behalf, no marriage could be had.

But there is another species of non-consent,—that obtained by
compulsion, &c., or between parties legally incapable of consen-
ting. Force and fear only operate an apparent, but no real
marriage, and even the oath of the party to such compulsory
union is not binding; it is not, however, every kind of threat
which is to be considered as an actual force. Subsequent consent,
expressed or implied by cohabitation, renders the marriage retro-
spectively valid; nay, even the lapse of a certain time bars an
action. Forcible abduction has been treated as a grave criminal
offence since the time of Constantine, and for this reason punished
by the church with heavy penances and excommunication.

§ 592.

Error in the name (nominis) is of no importance (non nocet), but

1 33, 1; 2; x. 4; 15; 5, 6, & 7; vide
et Nov. 22, 6; 33, 1; 4.

2 33, 1; 2; x. 4; 15, 5.

3 31, 2; x. 4; 15, 5, & 6; 33, 4, 1.

4 Const. cum. freg. Sexti, 5 a 1509.

5 Dr. Ryan, Philos. of Mar. 300-8.

6 Aylliffe's Purer, p. 228; Briggs v.
Morgan, 9 Ph. R. 329.

7 Burn's Case, Dyer, 1796, 5 Rep. 98 b.

8 Pollard v. Wybourn, 1 Hagg. Eccl. R.
725; Sanchez, lib. 7, disp. 108, No. 6.

9 x. 4; 1, 2; 31, 2; 37, 2, 2; 31, 2, 3.

10 x. 4; 1, 23.

11 x. 6, 1, 19.

12 31, 3, 3; x. 4, 1, 14.

13 x. 4, 7, 2.

14 x. 4, 1, 6-15-28.

15 x. 4, 1, 21; x. 4, 7, 2; x. 4, 9, 2, &
x. 4, 18, 4.

16 C. Th. 9, 34, 1, 23.

17 Bas. ad Amplwloeh, 50; Can. Apoc.
67, 1; 36, 2, 1; Conc. Calc. a 457.

Z 2
error in the person, or in substantia or persona, is so (nocet). Thus 
the marriage of Leah\(^1\) to Jacob cannot be held to be a valid mar-
riage, because it was based on fraud and error.

If the contract be to marry Sempronia a virgin, and she prove 
not to be so, this is a substantial vitiating error, for the essence of 
the marriage is the consent to marry a certain person, not to marry 
generally. Due diligence must, however, be used to prevent 
and, the degree of that diligence or negligence is a question of 
culpa, and will be taken into consideration in the proper place;
for, according to the Pandects,\(^2\) every one who contracts with 
another is bound to be cognizant of his condition; and this, taken 
strictly, will render such a marriage binding, as it is, indeed, by the 
English law, though not by that of the Greek Church.

§ 593.

Error is another element of non-consent, when the error 
would have exercised such influence on the consent of the parties 
as would have interfered with the material principles of marriage; 
particular points are left to the interpretation of the courts on this 
broad principle. To the maxim of more ancient times, of error 
as to identity, and to the state of freedom or otherwise,\(^3\) modern 
practice and science have added certain other important qualities 
affecting the person, such as radical mental complaints, serious 
criminal actions committed, and the infecation of the bride by a 
third party. In all these cases, as in that of a forced marriage, 
subsequent consent, express or implied by act, or even the lapse of 
a certain time, bars remedy.

By the Canon Law, there were four species of error forming a 
ground for impeachment of marriage. The first two are positive, 
the last two are not so.

The first, the error persona—as when, thinking to marry Caia, 
I marry Titia—dissolves the marriage for want of consent of the 
contracting party.\(^5\)

The second is an error conditionis—as when, thinking to marry a 
free, I marry a bond woman, or vice versâ.\(^6\)

The third is an error fortune—when, thinking to marry a rich 
woman, I marry a poor one: this error did not void the marriage, 
unless a fraudulent condition to that effect had been interposed.\(^7\)

The fourth was an error qualitatis—as when, intending to marry 
a noble virgin, I marry a low prostitute:\(^8\) this will not invalidate 
the marriage, in so far as there may be want of due diligence.\(^9\)

Justinian declared, at a later period,\(^10\) that, even according to the 
ecclesiastical law,\(^11\) the marriage between an abductor and the ab-
ducted was not invalid; and the Oriental Church at first

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\(^1\) Gen. xxix. 23.-8.  
\(^2\) P. 59, 17, 19.  
\(^3\) Ayliffe's Parer, 562-3; Sanch. 7, 18, 170.  
\(^4\) Ewing v. Wheatley, 2, Hagg. Cons.  
R. 182.3.  
\(^5\) C. 9, 13, 1, 6 11; Nov. 143, 150.  
\(^6\) Conc. Trull. a 692, 92; Nov. Leon.  
351; Balsam. ad Conc. Trull. 92 (Bevereg.  
1, 266).
adopted the same view, but afterwards relaxed the rule, declaring that, if full and free consent were subsequently given, the marriage might stand good, and thenceforth abduction was ruled by the principles applied to force. Fraud forfeits the property accruing from a marriage obtained by such means, and the Court of Chancery can treat such persons almost in the same manner as if they were wards of that court.

Inveigling away and marrying a woman by misrepresentations exposes the party to indictment, and her evidence will be received, because the contract having been obtained by fraud is not binding, and the woman is not legally a wife, even though she subsequently consent voluntarily, and is not induced thereto by menace. In Wakefield's case, where the parties were married in Scotland, an act was obtained to dissolve the marriage, although it had been procured by fraud and never consummated.

According to the present canonical practice, the consent must be unconditionally given before a priest, who can accept no conditional consent without leave of the ordinary; it is, however, a possible case that the parties may make mental reservations. Anything so conditioned contravening the principles of marriage voids it; for in that case, it is clear no real consent was given, the contrary where moral or physical impossibilities are conditioned, but if dependent upon the truth or occurrence of an allowed act, the marriage is suspended, but cohabitation must not take place, as such would impliedly cancel the condition. Conditiones resolutiae are ineffectual, for nothing that can be stipulated can dissolve a valid marriage.

§ 594.

Forcible abduction of heiresses is punishable by statute with transportation for life or not less than seven years, or four years' imprisonment. Under this statute, an intent to marry and defile is a complete offence, which it was not by the former repealed statutes, of girls under sixteen, it is a misdemeanor punishable at the discretion of the court, and it appears that subsequent consent is invalid, as the duress is supposed to continue.

As to the degree of force, it is the same as in the Civil Law, and is purged by bonâ fide cohabitation.
§ 595.

Consensus parentum—in whose power the children were, expressed or implied—was a necessary condition\(^1\) to the contracting a marriage; the chief intention of which was, that the parent should not be compelled against his will to acknowledge an heir,\(^2\) and because children were not at liberty, conformably with the paternal power, to act for themselves.\(^3\) Thus the consent of both the paterfamilias and pater, if still under power, was necessary to the marriage;\(^4\) but in that of a grand-daughter, the consent of the paterfamilias alone.\(^5\) In the marriage of cousins-german, the consent of the paterfamilias alone was required.\(^6\) The mother’s consent is not necessary, because she cannot have children in her power, save in the case of a daughter, under twenty-five, who has lost her father, and who, on account of the legal infirmity of her sex, must obtain the consent of her mother\(^7\) or other relation, whom, however, a magistrate will control if they refuse without just cause. The consent of the curator is unnecessary, for nuptials are merely personal, and the duties of a curator do not apply to the person, but to the property.\(^8\)

A woman, be she virgin or widow, and under twenty-five, although emancipated, is wholly under the direction of the father,\(^9\) whom she is to obey, unless he command obedience to an improper marriage;\(^10\) and this power, as before observed, devolved on the mother after the father’s death. In the time of the Emperors, however, a limit was put to this power with respect to the daughter, who could refuse if she could prove she had just cause for disobedience, *si indignus moribus et turpis erat sponsus*;\(^11\) for there was a great difference between the status of a son and of a daughter: it was required, in the former case, that the father should expressly consent, because a stranger was introduced into the family; whereas, in the latter case, it was sufficient that he did not openly dissent.\(^12\)

The Julian and Papian-Poppœan law provided, that a father who refused his consent, without sufficient reason, could be compelled to give it by the *prætor urbanus*.\(^13\)

In case of the father’s absence or captivity, it appears that the later laws hold the marriage good if the consent of the father be to be presumed, and his residence be not known; but if he be imbecile, his curator, relations, and the authorities can give the necessary consent. The history of the question of captivity of the father is, that, in the earlier period, the parties were obliged to await his return, for, as a captive, he could neither consent nor dissent, and he could annul a marriage made in his absence on his return; but if he died in captivity, the marriage remained good.\(^14\)

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1. P. 22, 2, 2.
2. I. 1, 11, § 7.
3. P. 50, 17, 4.
4. P. 23, 2, 16.
5. Id. § 1.
7. C. 5, 4, 18, & 20.
8. P. 23, 1, 12.
9. 11 Ulp. Fr. 12; § 5; C. 5, 4, 20.
10. C. 5, 4, 12; P. 13, 1, 7, § 1.
MARRIAGE—CONSENT.

At a later period, parties were allowed to marry after the lapse of three years; and, subsequently, they were permitted to marry even before the expiry of that time, if to persons against whom the father could have no reasonable objection; and this principle the jurists extended to simple absence, his place of residence being unknown.

But if children contract a marriage without the father's consent, in a case in which it could have been had, the marriage is null; and a fortiori, if contracted with his dissent; and the like is the case if it be contracted without his previous knowledge.

The old Canon law confirmed this view, but the newer law departs from the principle, the bishops having declared such law valid in the Council of Trent, after a stormy debate.

§ 596.

The consent of parents in marriage, considered in its natural bearing, is not requisite; hence the Canon Law considers a marriage contracted without their consent as a violation of parental duty, but not a ground for annulling it; and this principle extended to Germanic countries, overriding the Roman law, where the children were not in the power of the father. The Greek Church adhered to the Roman principle; and although in some Protestant countries the same principle was adopted, yet an unreasonable witholding of consent could be corrected by the civil authority.

§ 597.

When this consent was withheld, but afterwards granted, it was called ratihabitio, being comprobatio postea superveniens, in which it is in opposition to consensus, which preceded. It rendered the marriage valid from the time of such consent, and bastardized all children born before it, according to the old law; but Justinian gave such ratification a retrospective effect.

Whether by the Canon Law the consent be absolutely necessary or not, has been a question, and whether a marriage without consent were null or not. Hopfner agrees with those who think that, if the wife be not obtained from such as have authority over her, and she be not betrothed by her parents, it is no marriage, but fornication; or, as the Civil Law expresses it, neither is the man to be accounted a husband, the woman a wife, the children legitimate, nor is a dowry understood.

In England, in all cases of minors under twenty-one years of age, the consent of parents, guardians, or the mother, if unmarried—and, failing her, of the guardians under the Court of Chancery—Consent of fathers must, when it can, be had; in which the Canon Law coincides.

Consent of parents, in how far requisite.

Ratihabitio.

Consent of parents, how far necessary in England.

1 P. 23, 2, 9.
2 Id. 11.
3 Id. 10, 11.
4 P. 23, 2, 18–35; I. 1, 10, § 12.
5 x. 2, 5, 18.
6 x. 5, 17, 6.
7 x. 5, 17, 3.
8 x. 4, 5, 6; x. 5, 17, 6.
9 Form. Sermon, n. 16.
13 C. 5, 16, 25; C. 4, 28, 7.
14 26 Geo. II. 33, § 2.
The Roman Civil Law.

—is required, under pain of nullity; but a subsequent act\(^1\) legitimated retrospectively nearly all such marriages.

By the law of England the consent of parents or guardians is required by the statute of George IV. c. 92, in the case of persons under twenty-one years of age, not being a widow or widower, who are deemed emancipated; and it is provided that the publication of banns shall be void if such parent or guardian openly signify his dissent at the time, nor can a license to marry without banns be granted unless oath be first made by one of the parties that he or she believes that there is no impediment of kindred, alliance, or other lawful cause, and that one of the said parties has had his or her usual place of abode during fifteen days next before the grant of such license in the parish or chapelry, within which such marriage is to be solemnized, and that in case of minors, not widows or widowers, the consent of the necessary persons has been obtained, or that there is no person capable of giving such consent, and this consent is that of the father; or if he be dead, of the guardian lawfully appointed; failing him, of the mother, if unmarried; and failing such person, then of any guardian under the Court of Chancery.

Want of consent to marriage by banns does not invalidate the marriage after solemnization.\(^2\) Persons under twenty-one years of age, if not widows or widowers, in order to obtain a license must swear that the consent of the necessary parties has been procured; but if they be above that age,\(^3\) oath of that fact must be made.

§ 598.

To the validity of a marriage, it was indispensable that both parties should be free and Roman citizens; for neither was there connubium between slaves or between freemen and slaves, nor even such as were termed justae nuptiae, or such as had all the effects of a Roman marriage, between a Latinus and Latina, or a peregrinus and peregrina, save where allowed by way of exception, non nisi concessum sit.\(^4\) The jealousy which the marriage of Antony and Cleopatra produced is well known. After the constitution of Antonius Caracalla, however, connubium became common to the nations under the Roman sceptre, as Prudentius must be understood.\(^5\)

In Hamburg, citizenship non optimo jure at least is necessary to contracting marriage there.

§ 599.

Similar to the prohibition of patricians and plebeians to intermarry, is the morganatic marriage,\(^6\) already referred to, otherwise termed a sinistra manu, or Heirath zur linken Hand of Germany. In the Book of Feods, and by some supposed to be there erroneously attributed to the Salic law, it is defined to be the insepaa-

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\(^1\) 3 Geo. IV. 75.
\(^2\) Diddear v. Faucelet, 3 Phil. R. 581.
\(^3\) 4 Geo. IV. 76, § 16; 6 & 7 Will. IV. 85, § 12.
\(^4\) Ulp. Fr. 5; 4, & 5; Paul. R. S. 2, 19, 6.
\(^6\) Fred. Cod. p. 135, 6, 2, art. 3, Pothier Traité du Con. de Mariage, 1, 2, 2.
rable conjunction of a single man, of noble or illustrious birth only, with a single woman of an inferior or plebeian station, upon condition that neither the wife nor children should partake of the title, arms, or dignity of the husband, or succeed to his inheritance, but be contented with a certain allowance fixed in the morgenatic contract. The issue of an unequal alliance would not succeed to the dignities of the man, because not born of an eheu bürtige Frau; but the party cannot marry another wife during the morgenatic connection. The late King of Holland, the ex and present Elector of Hesse, contracted such marriages; the former twice successively after having had royal issue by a former wife.

§ 600.

The old Roman law conferred on the husband an almost absolute power over the wife by the conventio in manum; all she acquired vested in him, and he acquired the same right over her person and property as if she had been his natural daughter. The wife, on the other hand, acquired all the rights of a child, her husband’s name and succession as a sua hæres to his intestate estate, and could exercise all the rights which her sex admitted of, upon the principle of the unitas personæ.

In later times, this was, however, changed with the form of marriage; the wife did not take the man’s name, nor did they acquire by each other; the husband received the dower, and the balance of her property belonged to the wife, and was termed bona paraphernalia.

The prætor, however, at length conferred a right of succession on the wife to a part of her husband’s estate; but the persons were divided, and each had a separate legal existence.

The rights which ensued to the man by the marriage-contract were various: obedience, and some think the right of moderate correction, because an excess of it incurs a loss of one-third of the dower, but others dissent from this view; 1 ordinary and usual services; under all circumstances, bad health excepted, the wife must follow the man on change of domicile; he must, on his part, defend her in all processes as her natural attorney; 2 and support her right of action for dower against a third party. With respect to the bona paraphernalia of the wife, the husband had only such rights as the wife ceded to him, and can be forced to give account by the Falcidian law; nevertheless, he can act thereon the supposition of being her attorney, and demand alimony thereout, and can sell them with her consent.

§ 601.

By the law of England, the custody of the wife’s person belongs to her husband; and by some ancient authorities it was considered so far under his power that he might give her moderate correction. But they also held that this right was to be kept within reasonable bounds, and the husband was prohibited from using any violence

1 Nov. 117, 14.

2 C. 5, 17, 8, 2.
to his wife, *aliter quam ad virum, ex causâ regiminis et castigationis uxor is suæ, licite et rationabiler pertinet.*

In the politer reign of Charles II., this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their privilege; and the courts of law will permit a husband to restrain the personal liberty of the wife for any gross misbehaviour.

§ 602.

The later Roman law does not constrain the woman, on her part, to bring the whole of her substance1 as a portion to her husband; she may retain her *paraphernalia,* in which the husband has no interest, for she may dispose of them without his consent, and bring actions for its recovery,* in her own name or in that of her husband. She can require her husband to take the same care of her property as he does of his own.

She has a right to the rank and dignity of her husband, to be protected by him in all suits, and interfere to stay waste of dower. She has also certain rights of pledge; on this there are, however, conflicting laws, with a balance rather against the wife, except with regard to the *paraphernalia;* and some hold she may demand mourning and alimony during the *annus luctús.*

§ 603.

By the law of England, the wife is entitled to her dower if she survive her husband, being the third part of all lands and tenements in fee-simple or fee-tail of which the husband was seised, either *de jure or de facto,* at any time during coverture, and of which any issue which she might have had could by possibility have been heir for her life. The husband during his life must, moreover, maintain his wife with necessaries, for she has recourse against him in the Ecclesiastical Court: this resembles the privilege accorded by the prætor, above alluded to.

In contracts, she cannot bind herself or her husband, unless by his authority, or as his agent. She can only bring an action with her husband’s concurrence, and in their joint names; an action must be brought against her in the same form; in compensation for which she is not limited to time, a certain period being allowed her after the coverture has determined.

Though a married woman cannot convey, yet she may accept an estate until her husband dissent. She may act as an executrix independently of her husband, as the agent of a third party. On separation by consent, the husband is bound to support the wife, and is liable for her debts or necessaries; not so if the separation be against his will, or if she have a separate allowance secured to her by private arrangement or sentence of Ecclesiastical Court. If the husband, however, be transported or attainted, she may be sued as a *feme sole.* By the

1 P. 23, 5, 9, § 3.
2 C. 5, 14, 11.
custom of the City of London, the wife may trade within the city on her own account, independently of her husband, and bind herself, the husband not interfering with the concern. The wife may, moreover, with her husband’s concurrence, by deed duly acknowledged before the proper authorities, convey her real estate by 1, 3, and 4 William IV. c. 74.

A wife may receive property to her sole and separate use during coverture, if vested in a trustee; but if not so settled, it comes to the husband. In case of settlement, the wife may also change her estate at pleasure.

After marriage, the husband becomes answerable for debts contracted by her before marriage. Moreover, when sued in autre droit, she may demand to have her husband joined with her, though he have no control over those acts.

In certain cases, she is absolutely protected from criminal prosecution, so that she cannot be indicted even jointly with her husband, as in case of offences committed in the presence of her husband, being by fiction supposed to act under his coercion: this exemption does not extend to treason, murder, or manslaughter, nor any case of mere misdemeanor, nor to any crime committed in presence or absence of her husband, if proved to have been committed independently of his influence; and where she is liable as a criminal, she may be indicted as such, in general, without making the husband a joint defendant, contrary to the rule which obtains in a civil action.

§ 604.

Having considered, so far as they are divisible, the separate duties and rights of man and wife, it now remains to take a view of their reciprocal and common rights. The first of these is the jus in corpus: reciprocal assistance in housekeeping; misfortunes which, if they had happened previously to the marriage, would have impeded it, must afterwards be borne; reciprocal alimony; they cannot, after marriage, commence actiones penales or famosas against each other, arising before or during coverture. (This can nevertheless be done by promoting the office of the judge.)

Formerly gifts between married persons were held to be absolutely void; which was so far modified by Severus and Antonius Caracalla, as to prohibit the heir of the donor from revoking their gift after his (the donor’s) death.

Community of goods. The jointure must be of the same condition and quality as the portion; and if the portion be returned after dissolution of the marriage, the wife must on her part return the security.

During marriage, the husband has the usufruct of the portion, unless he decline in fortune; then, even during marriage, the wife may seize her portion or security, or bring an action against him, and lodge it out of his reach.

1 P. 24, 1.  2 Nov. 97.  3 C. 5, 13, 17.  4 A
§ 605.

The principle of the older Roman law, which supposed a unitas persona to accompany the conventio in manum, has been preserved in the English common law. Thus, neither husband nor wife can be witnesses for or against each other, upon the maxims nemo in propria causâ testis esse debet, and nemo tenetur seipsum accusare. It is true that a modification of this rule has been admitted, in allowing a wife herself to prove a case of violence against her husband, or to be examined in cases of the husband’s bankruptcy respecting the discovery of his estate and effects.

In this respect, then, the English common law preserved not the more recent, but rather the middle Roman law, once the law of the land, and that the newer institutions, brought in to supersede it by the Norman conquerors, and subsequently attempted to be forced upon the country by ambitious ecclesiastics, to the prejudice of what the people had accustomed themselves to look upon as their national law, never succeeded in outsting its predecessor.

§ 606.

Justinian, in his Institutes, places dower under the head of modes by which property may be acquired; and it is under that head that it will be treated of in this work, merely prefacing in this place such minimum as is necessary to render the subject under consideration intelligible, more especially the change in the rite of marriage.

In may be assumed, then, first, that the dos was a commutation of the effects of co-emptio; secondly, that it was made necessary to fix the distinctive fact of a marriage had. Paulus observes, reipublice nostræ interest mulieres dotes salvæ habere, propter quas nubere possunt; hence it was a necessary ingredient to a marriage.

§ 607.

When the old form of marriage fell into desuetude, owing to the inconveniences before stated, consisting in the loss of the paternal power by the father, and the acquisition by the husband of a greater authority than the increasing independence of the female sex was willing to acknowledge and admit, the marriage by an interrupted use became more and more usual; but it was necessary, at the same time, to attach to this new form some certain type to distinguish it from concubinage; which explains the passage of Plautus—

Sed ut inops, insamis ne sim, ne mibi banc famam differant,
Me germanam meam sororum in concubinatum tibi,
Sic sine dote dedisse magis quam in matrimonium.

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1 Vid. § 521-2, h. op.
2 Hawk. 6, 2, c. 46, § 16; 1 Hale, P. C. 301; Wedgewood v. Hartley, 10 Ad. & El. 619.
4 Geo. IV. 16, § 37.
5 1. 2, 7, & 8.
6 Varro apud Nonium, 12, 50; P. 25;
7 56, § 1.
8 Trin. 3, 2, 64.
The form in which dower was made was originally by stipulation; for tabulae nuptiales were certainly of later introduction, for the purpose of perpetuating; the testimony of the fact has been preserved by Terence.¹—

CH. Dos Pamphile est
Talenta quindecim Pa. accipio.

As co-emption was the origin of dower, so the dos was effected on the same principle; the bride, however, instead of bringing all her property to her husband, or, more correctly speaking, of allowing it all to vest in him by the act of marriage, brought a certain fixed sum, secured by the tabulae nuptiales, or verbally, to the husband during her coverture, into which contract any conditions might be imported which were not contrary to the law on this subject. That this law was at first very meagre, but speedily grew to great importance by the necessity of its frequent application, cannot be doubted. This practice rendered divorce more easy, as a natural consequence, because stipulations could be entered into to meet almost all contingencies, which was rendered peculiarly applicable to the increasing freedom of manners and individual liberty of action.

The abstract legal logic of the day regarded marriage merely as a contract, made, like any other, by mutual consent between the parties, or as a partnership which either was at liberty to dissolve at pleasure; this it was found necessary, for the benefit of society in general, to restrain within due bounds: hence the regulations in this respect, which will be seen in the sequel. Adopting this view of the subject, there will be no difficulty in comprehending the frequency of divorce, or the readiness with which wives passed from hand to hand, as the fickleness or caprice of their husbands dictated.

§ 608.

Speaking of what was not to be considered a marriage, Justinian² says,—si adversus ea, qua diximus, aliqui coœrint, nec vir, nec uxor, nec nuptiae, nec matrimonium, nec dos intelligitur. And this necessity of dower was so stringent, that Leo, in his Novels,³ as before remarked, found himself obliged to introduce other modes of marriage for such as could, and did not, conform to the law of dower, and were from this inability in fact living in a state of concubinage: hence he made it imperative on the higher classes only, allowed the middle class to marry before clerical witnesses, who registered the marriage in the church archives, which is the origin of marriages in facie ecclesiae, and directed that others living together as man and wife under a distinct promise should be held to be so.

There had been, before this period, many methods adopted to discourage concubinage. Direct prohibitions on such a subject can never have the effect desired, less so when the practice had

¹ Andr. 5, 4, 47; see also Plaut. Trinum.
² I. 1, 10, § 12.
³ 25, 3, 39; there are many more examples.
been distinctly acknowledged by law. By meeting the evil, however, in another form,—by giving facilities to those who were honestly disposed on the one hand, and, on the other, making it as easy as was prudent (keeping in view the prevention of abuse) for women, who would otherwise have lived in concubinage, to obtain a promise having the effect of marriage, and by depriving concubinage of its respectability, and, above all, by isolating it and rendering it remarkable,—a more decided blow was struck at concubinage than had been done by the united endeavors of all previous legislators.

§ 609.

To these provisions the Scotch law of marriage by common repute and before witnesses may be referred. Dr. Colquhoun, in his Treatise on the Police of the Metropolis, estimates the number of women living in concubinage and prostitution in London in the year 1800 at 50,000,—a number which, although it was at the time he wrote considered far to exceed the truth, has subsequently been found to be within it. A great proportion of the poor in London and the suburbs, and in all large towns, live in this voluntary marriage by consent, and, after a certain period of cohabitation, consider the form a matter of no consequence, as the heritable rights are of none to them: hence, in a political point of view, the woman is more efficiently protected, and the cause of morality encouraged in all classes of society, by the Scotch than by the English practice; it renders the higher classes careful and continent, and effects among the lower classes an object which carelessness and ignorance alone prevents, and protects the weaker sex from caprice, cruelty, violence, and abandonment; and to this fact may, in a great measure, be traced the greater general morality of the Scotch.

Those who trace the purely Roman institution of the marriage rite in England erroneously to the divine law will not agree with this view, although they cannot fail to approve of it on the grounds of morality and political expediency.

Another legal antiquarian fact may be deduced from England

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1 Dr. Colquhoun's Treatise on the Police of the Metropolis, 6th Edition, 1800, p. 340. The Origin of Crimes: Female Prostitution. The Author classifies prostitution, and estimates the numbers of such persons as follows,—

1. Of the class of Well Educated women it is earnestly hoped the number does not exceed 2,000

2. Of the class composed of persons above the rank of Menial Servants, perhaps 3,000

3. Of the class who may have been employed as Menial Servants, or seduced in very early life, it is conjectured in all parts of the town, including Wapping, and the streets adjoining the River, there may not be less, who live wholly by Prostitution, than 20,000

4. Of those in different ranks in Society, who live partly by Prostitution, including the multitudes of low females, who cohabit with labourers and others without matrimony, there may be in all, in the Metropolis, about 25,000

Total 50,000

8 The marriage rite was established before Judaism was known in Great Britain, and before the birth of the founder of Christianity.
having retained principles of the middle Roman law implanted by the first conquerors. Scotland and Wales, which were never subdued by that people, accepted at a more recent period the later Roman or Byzantine law. The old or first Roman law being almost extinct in Rome itself on the invasion of Julius Caesar, little is left of it; indeed, only so much as still was preserved in the middle law of the later age of the Republic, or still retained in the age of Justinian.

§ 610.

This later law is traceable in England in the practice of marriage settlements, which follow in most respects the law of the dos and donatio propter nuptias, or counter settlement made by the husband on the wife, originally as a security for the return of her dower, both to be used to defray for the common charges of the partnership. No caution or security could be given for the return of the dos, and the difficulty was therefore obviated by a counter-settlement of equal amount, so that it was not necessary for the wife, if she did not insist on specific restitution, to take any further measure, she retained this counter-settlement as a set-off against what she had brought, and then balanced the account without recourse to law; this, however, necessarily underwent divers changes, especially as to specific restoration and other points, which will be treated of in detail in the proper place.

§ 611.

In England this has been much changed, and although post and ante nuptial settlements have their origin in the Roman Law, the origin of them is generally unknown, and has ceased to be of importance; the donatio propter nuptias may be made on a woman who brings no property or dower, and vice versâ, where the husband brings no donatio, the wife's property is often settled upon her by deed, conditioned as to the ultimate destination of the property. Here the fact may be explained, in conformity with the Roman Law, as follows, the wife brings the dos, which the husband, default of property, returns as a donatio propter nuptias, by settling it on her.

The Roman Laws, referable to marriage especially, came into England, it must be remembered, by three distinct channels; first, under Julius Caesar and his successors, which is still traceable in the common law and prejudices of the people; second, under the Saxons, who brought what were supposed to be laws of national origin, but which were for the most part founded on the Codex of Theodosius and antecedent works, these so termed leges barbarorum became common law; lastly, the ecclesiastics who followed William brought with them from Normandy, the law of and subsequent to the period of Justinian, which at that period had revived and become a favorite study in Italy, and the feudal law founded upon it in its then crude and inchoate state. To have forced this law on the mass of the people would have been, and probably was

1 C. 5, 12, 29; Nov. 61, 1; C. 5, 3, ult.; I. 2, 8, § 3. 2 C. 5, 20; 1, & 2.
found to be, impossible, and he was therefore obliged to content himself with introducing it into his newly erected Court of Chancery; the feudal law he committed to the care of his feudal nobles, who were accustomed to no other, and left his clergy to impose the Canon and Civil Law upon the people, as far as the jurisdiction they possessed would permit; the entire law of dower and marriage must thus be traced to the Roman Law as the fountain of nearly all the laws of England, with the exception of the minute balance, if any, attributable to barbarous Saxon origin; but even this may be doubted, for it is by no means improbable that this balance may have been derived from early Roman colonies before the barbarians founded their codes upon that of Theodosius.

§ 612.

The children obtained the rights belonging to legitimacy as those of succession. Such children must have been born within the prescribed time, which was ten months. Post decem menses natus non admittetur ad legitimam hereditatem. De eo autem, qui centis-simo octogessimo secundo die natus est, Hippocrates scripsit et Divus Pius pontificibus rescrivit, justo tempore viserit natum, and qui ex justis nuptiis septimo mese natus est justus filius est; hence a seven or ten months child was held legitimate, but nevertheless was always considered to be so until the reverse was proved, which is the meaning of the term, pater est quem nupitiae demonstrant, or qui natus est in matrimonio, natus censetur ex matrimonio. The same effects result to the children by legitimization by subsequent marriage, the operation of which is retrospective.

§ 613.

Inasmuch as marriage must be legally contracted, so it follows that nothing must be done contrary to rules laid down for the purpose. The law forbids certain marriages on natural grounds, some from political, and others again from religious considerations; of the first sort are incestuous marriages, and of the two latter, affinal marriages, although no sufficient reason founded on the law of nature can be urged against the latter, but rather the reverse, in support of which assertion the biblical law furnishes a universal proof; for where there is no blood relationship, there can be no physical objection to a marriage; on the other hand, the political reasons may be many, such as giving certain families a more than due preponderance in the state, and encouraging political monopolies. Thus in the Hanse town of Lübeck, two brothers-in-law, in Hamburg, two brothers, or father and son, could not sit together in the senate, and on the motion of any senator all related by affinity or consanguinity, to the third degree inclusive, retire and take no part in the election. In Bremen, relations could be elected, but required a greater proportion of votes. 

1 P. 3, § 11, 12.  
2 P. 12. The month is reckoned at thirty days, P. 50, 17, 101; see also Nov. 39, 2, where the question of the terminus in quem aries. Vide et Höpfner, § 218, n. 4.  
3 All these constitutions were altered in 1848.
MARRIAGE—CONSANGUINITY AND AFFINITY.

The religious objections on account of affinity appear founded alone on that logic peculiar to ignorant persons, superstition and prejudice.

Considered in a natural point of view, marriages between blood relations are certainly to be deprecated from the deterioratory influence which extends itself among all creatures procreated by a system of breeding in-and-in, and so long as we avoid the blood relationship the law of nature is not infringed; some even doubt if this be a provision of the law of nature, as it does not exist by instinct among irrational animals; be that as it may, there can be no doubt of the expediency of the provision.

§ 614.

Cognatio vel consanguinitas est vinculum personarum ab eodem stipite descendentium carnali propagatio contractum. Cognatio, as contradistinguished from agnatio, is the relationship on the mother's, agnatio is that on the father's side. Inter agnatos igitur et cognatos hoc interest, quod inter genus et speciem, nam qui est agnatus, et cognatus est, non utique autem qui cognatus est, et agnatus est, alterum enim civile, alterum naturale nomen est. The degrees or steps by which the nearness of relationship is computed, is either the right line, linea recta, which ascending gives all one's ancestors, and descending gives all one's posterity, or the linea obliqua, oblique or collateral line, including the offshoots of this main line, and the nearness of such relationship is differently estimated by the Civil and Canon Laws.

§ 615.

Affinitas is relationship contracted by marriage, in which there is no blood relationship, for then it would be consanguinity; here the Canon Law goes further than the Civil.

The rules for computing the number of degrees according to the Canon or Civil Law is the same, quod persona dempta stipite tot sunt gradus; but as the two go upon a different principle, the result widely varies, as will be seen in the sequel. The forming of tables is good exercise for the student, and the easiest means of understanding this question, which at first appears somewhat involved.

§ 616.

In forming tables, it is to be remarked that the rule is to begin Two women point to their children, and say—

Diede Kind' sind unare Kind',
Ihre Väter unare Brüder sind,
Und dieses doch in rechter Eh',
Nun rathe, wie die Seppchaft steh'?

Which may be thus translated—

These children our children are,
Their fathers our brothers are,
In lawful wedlock wedded we,
Now tell us what our kindred be?

1 P. 38, 10, 10, § 4.
2 P. 38, 10, 10, § 10.
3 P. 38, 10, & 9.
4 The following legal riddles serve to exercise the acuteness of the student—

How is the own sister of my aunt, who is not my aunt, related to me?
This person's father is my father's only son—how is he related to me?
This child was born of my mother, and is yet neither her son nor my brother—how is it related to her and myself?
with $Eg$, tracing back to the party required: $\square$, $\Delta$, $\nabla$, are used to signify females, $\bigcirc$ males, $\bigcirc$ married persons, and a line through either that the person is dead, thus, $\ominus$

Again—

Nuptiae incestae are those contracted by persons within the prohibited degrees of consanguinity or affinity; and a marriage is said to be putatium when contracted bona fide in ignorance of these impediments.\(^1\) Children of such marriages have been held legitimate, and in the paternal power where there was a bona fides on the part of the father.

The prohibition of cognition or blood-relationship applies to the contubernium of slaves, who, for such purposes, are regarded in their natural capacity.

With respect to slaves, illud certum est serviles quoque cognationes impedimento nuptiis esse, si forte pater et filia, aut frater et soror manuumissi fuerint;\(^2\) the meaning of si forte manuumissi fuerint being that, as slaves, they could not contract a lawful marriage, but as soon as they were in a position to do so, they came under the general rule; and it is here a question de justis nuptiis.

In like manner are regarded natural children; for although, for civil purposes, they are filii nullius, yet regard is to be had to their natural relationship to their natural parents. Curious, however, is the passage of Scaevola,\(^3\)—Et nibil interest, ex justis nuptiis cognatio

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\(^1\) Hotom. Diss. de Mal. Put. in Opusc. 1, 1, n. 7.
\(^2\) I. 1, 10, § 10.
\(^3\) P. 23, 2, 64.
descendat, an vero non, nam et vulgo quæsitam sororem quis vetatur
uxorem ducere; in a natural point of view, this is the second degree.1

§ 618.
An agnate is related by generation,—a cognate by conception: thus my son, brother, paternal uncle, and their children, as also my daughter and sister, are agnates to me; but my mother, grandmother, my daughter’s children, and my maternal uncle and aunt, are cognates to me. Before Justinian, there was a great difference between agnatis and cognatis: the first inherited ab intestato; not so the latter. The agnates’ nexus was civilis, and they could be forced to become guardians; not so the cognates’, whose nexus was natural only. Jura agnationis sunt civilia, jura cognationis naturalia. Gentiles were agnates who came from a common stock; so remote, however, that it could not be traced, their only proof being nomen gentilium, sacra gentilium, imagines gentilium; and a Roman termed all those his agnates with whom he could trace any relationship whatever. Justinian removed this distinction, admitting cognates to successions and guardianships equally with agnates.2

§ 619.
Relationship may be natural or civil, or both at once. Adoption produced a civil relationship,—concubinage, or the contubernium of slaves, a natural tie, which, if produced by lawful marriage, combines both: all three are impediments to marriage. Some jurists term that quasi affinitas which arises out of betrothal or divorce. Thus, if I betroth myself to a woman, her relations become my quasi affines; or if I divorce myself from my wife, who then remarries, the children of such second marriage are termed my quasi affines; and, vice versa, if I remarry and beget children, they are quasi affines of my divorced wife.3

When two parties marry, the consanguinei of the one become affines to the other; but the consanguinei of one party are not affines to those (the affines) of the other, for consanguinei duorum concubentium non sunt affines: hence my children by a former wife may marry my second wife’s children by a former husband; such children are termed comprivigni, and are not related. Persons related by affinity to one of a married couple are not so related to the other.

The Canon Law extended this principle, terming it affinitas primi, secundi, tertii generis; the first being the real affinity as above described; the second and third, however, referring to the relation one party in wedlock bore to those related by affinity to the other: hence the stepfather is affinis primi generis of the step-

1 Vide Thibaut Pand. R. § 293.
2 Nov. 118, 4.
3 I. 1, 10, § 9; P. 23, 2, 22, § 1, 2, 3.
daughter, but if, after dissolution of the first marriage, he marry another, an *affinitas* secundi *generis* arises between the second wife and his stepdaughter by the first,—*nexus inter conjugem unum et alterius adfinem primi *generis*; but if the said stepdaughter be also married, her husband is in *affinate* tertii *generis* with such second wife of the stepfather,—*nexus inter conjugem unum et alterius ad fines secundi *generis*.1

§ 620.

In consanguinity, *lines* and *degrees* are to be observed,—the degree being the distance of the relation, which is more or less remote as the person is nearer or farther removed from the main stock, or derives the relationship through a greater or less number of intermediate persons: this difference as to remoteness is termed a degree.2

The following is a table of the right and oblique lines:

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<thead>
<tr>
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<tbody>
<tr>
<td>Avunculus max.</td>
<td>Abavus</td>
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<td>Avunculus major</td>
<td>Preavus</td>
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<td>Avunculus magnus</td>
<td>Avus</td>
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<td>Avunculus</td>
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<td>Sobrinus</td>
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<td>Sobrinus secundus</td>
<td>Filius</td>
<td>Consobrinus secundus</td>
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<td>Sobrinus tertius</td>
<td>Nepos</td>
<td>Consobrinus tertius</td>
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<td>Sobrinus quartus</td>
<td>Pronepos</td>
<td>Consobrinus quartus</td>
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</table>

To calculate the degrees according to the Civil and English law, take the sum of the lines from Ego up to the common stock and down to the person required; to ascertain the number of degrees according to the Canon Law, count the lines of the longest side only.

§ 621.

The Mosaic law did not compute by lines and degrees, but designated each relation by a special name.

The Roman law reckons by lines and degrees,3 upwards, downwards, and on each side, and cognation extended to the sixth degree; this the Prætor4 extended, in questions of succession, to the seventh degree.

The German law calculated from the main stock, not by degrees, but by generations or numbers; and no general limit was adopted, some assuming the fifth, others the sixth and seventh member.5

The Catholic Church at first adopted the mode of calculation of the Roman law, which continued in the East. The connection of the church, however, with Germanic nations, induced it

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2 P. 23, 53; I. 1, 10, § 13 and Gloss. thereon.  
3 Paul. R. S. 4, 11, § 9 & 10; P. 58.  
4 L. Rip. 166, 3; L. Angl. 6, 8; L. Sal. (Herold) 47-48; Ed. Rothar. 153.
to adopt their system of generations,¹ which obtained a permanence in the Frankish kingdom² and in England³; but in Italy, tradition, adhering to the Roman system, gave rise in the twelfth century to a question⁴ between the bishop, Peter Damiani, and the lawyers of Ravenna, which was settled by Pope Alexander II. in favor of the canonical computation.⁵

§ 622.

The Roman law allowed marriage in the fourth degree according to that calculation; the Canon law prohibited it in the fourth degree of that calculation. Here two questions arise,—first, that of inclusive and exclusive, as regards the fourth degree; secondly, the mode of calculation; for both reckoned four degrees, but upon a different principle. The Romans counted up in the ascending, and down again in the collateral line; the Canonists only down, away from the main line.

In the first, according to the Civil Law, I can marry my first cousin four degrees removed from me.

In the second, I can marry my fourth cousin; in the third, my third cousin; each of whom are five degrees removed by the Canon and nine by the Civil, making, then, five degrees of the Canon Law, equal to nine degrees of the Civil. Thus, according to the Civil Law, a man can marry his first cousin; by the Canon Law, he cannot marry his second cousin: hence the vulgar error that first cousins may, but second cousins may not marry. And the same rule applies in both, as to relatives by both blood and marriage, consanguinei and affines.

¹ Mansi, 10, Col. 407; xxxv. 2, 20, pr. xxxv. 5, 2, § 5.
² Bon. Ep. ad Tact. 741, 5, confirmed A.D. 742; Mansi, 12, Col. 376; id. 10, p. 44; Capit. Comp. 4 757, 1, 2.
³ Th. Cant. Cap. (§ 89, n. c.) 24, 25, 189; Anonym. Penit. (§ 93, n. a.) lib. 2, 28 (Mansi, 12, Col. 438); Huculli Excerpt. (§ 89, n. a.), 138 (140), xxxv. 4, 2.
⁵ xxxv. 5, 2.
§ 623.

The first objection to the canonical computation is that, except in a very remote degree, persons of the same age would not be able to contract marriage, i.e. only where there are five connecting lines in both right and oblique lines, equal to ten degrees of the Civil Law, whereas by the Civil Law this can take place at the smallest limit, four; otherwise, in the Canon Law, reckoning unequal degrees, the one must be always a generation older than the other.

Another objection to the canonical computation is shown in the anomaly of my being related in the same degree to my uncle and to his son, to my father’s first and to mine own second cousin; and every one must feel that uncle and nephew are nearer related to each other than cousins, which are in the Canon Law related in the second degree.

The degrees should be founded on the generations: why then should we reckon two generations to one degree? why should we count the degrees between the person referred to and the common stock, when the question is not one of relationship between these parties?

§ 624.

Relationship by marriage has properly no degrees, because degrees originated in generation, whereas relationship by marriage is not contracted by generation but by coition; nevertheless, the rule has been established, quocunque gradus quis uni conjugum junctus est consanguinitate, eodem gradu alter junctus est affinitate.

Affines are said to be quicunque per nuptias ad alterius cognationis fines accessunt,—de carda των γαμελων ανγγελως.

§ 625.

Those who are real parents and children to each other, or in place of such, qui parentum liberorumvel locum inter se obtinere are forbidden to intermarry. Thus, in the ascending and descending line, the prohibition is ad infinitum, and, as we have seen in the oblique lines, to the third and fourth degrees respectively by the Civil and Canon Law; and such marriages are called nefarious or incestuous.

Adoption has the same effect as affinity, nor can an adopting father marry his eunancipated daughter or granddaughter, in tantum ut etiam dissoluta adoptione idem juris maneant; here the impediment is purely civil, but not natural; and it is in consequence held that a dispensation ad banc finem might be obtained.

The marriages of brothers and sisters are prohibited, whether they be born of the same father and mother, or either of them, i.e. of the whole or half blood; nor can an adoptive or foster-

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1 I. 10, § 1.
2 Ibid.
3 This does not extend to a natural sister, vulgo quasita soror.—P. 23, 2, 54.
sister be married during the adoption, which, however, can be done on dissolution of that tie, or even if the brother had been emancipated. If, then, any one wish to adopt his son-in-law, he must first emancipate his daughter; and, vice versâ, if one wish to adopt one's daughter-in-law, one must first emancipate one's son, otherwise the marriage would be invalidated.¹

You cannot marry your sister's daughter (niece), or the grand-daughter of your brother or sister, although they be in the fourth degree, of whom you cannot marry a daughter or granddaughter, for the uncle was considered loco parentis;² a man can, however, marry the daughter of a woman his father has adopted, she being related to him neither by natural nor civil ties.

§ 626.

The Roman legislation has not more frequently varied in any point than in that of the marriage of first cousins. In the more remote ages of Rome, the intermarriage of brothers' children was forbidden, probably on the principle of the uncle being loco parentis; consequently his child, a quasi sister of her first cousin; but it was afterwards permitted. Theodosius forbade these marriages; Arcadius in the East,³ resinded the prohibition; and Honorius in the West permitted it by dispensation. Justinian⁴ expressly permitted them, duorum autem fratrum vel sororum, liberi vel fratris et sororis conjungi possunt; but a new prohibition was issued by the later Oriental Emperors. That these marriages ought not to be permitted is clear, since two brothers may marry two sisters, and their children may marry, who, although legally only first cousins, are in fact equal to brothers and sisters, each having two half bloods. These repeated prohibitions above alluded to may account for the canonsists in the West forbidding marriage in the fourth degree, who, having adopted that as a basis, applied it to the canonical mode of calculation, thus making the prohibition of double the extent of the greatest of the Roman law.

The marriage of a paternal or maternal aunt, real, adopted, or in law, as being in loco parentis—in like manner of a great paternal or maternal aunt—was forbidden by the Roman law; the English law, however, does not disallow it.⁵

The marriage of a privigna, that is, the daughter of a wife by a former marriage, or the widow of a son, is forbidden on account of affinity; for the same reason the marriage of a father or mother-in-law is prohibited, as being in loco parentis. Comprivigni, however, the issue of the former marriages of a husband and wife, we have seen might intermarry.

¹ P. 232, 2, 55.
² The Emperor Claudius, however, wishing to marry his niece Agrippina, caused a senatus consultum to be passed for the purpose of legalizing the marriage.
³ C. 5, 4, 19.
⁴ I. 1, 10, § 4.
⁵ This is either a casus omiumae from design, on account of the impossibility by reason of disparity of age, or an error in enumerating all the individual degrees.
§ 627.

The Mosaic law forbids certain marriages, which are detailed as follows: between parents and children, grandfather and grand-daughter, brothers and sisters, myself and my father’s sister, myself and my mother’s sister. The punishments for transgression are, however, graduated: between parents and children it is capital; between brothers and sisters of the half or full blood, rooting out from among the people; between a man and his father’s or mother’s sister, the bearing their ill deed. ¹ And as Moses mentions persons, not degrees, the best commentators are of opinion that whatever is not forbidden expressly is allowed, and that no analogy can be admitted; consequently that a Jew may marry his niece. With respect to the grandson marrying the grandmother, however, it is supposed that Moses did not anticipate the possibility of the case, or the great-grandfather the great-grandchild, and thought it unnecessary to forbid all in the right ascending and descending lines. ³

Moses forbids, under pain of death, marriage with the father’s wife, ⁴ with a living wife’s mother, ⁵ with the daughter-in-law; without pain of death, marriages with a step-daughter, step-grand-daughter, ⁶ with the father’s brother’s wife, with the brother’s wife, ⁷ the so termed Levir marriage, ⁸ and that with a living wife’s sister, ⁹ the only exception from polygamy.

It has been doubted whether Moses meant to forbid the marriage of Comprivigni, but it is rather to be supposed he did. ¹⁰

Table of eight cases of possible intermarriages, whereof only one is prohibited.

Moses only forbids the first of these eight cases, the marriage

¹ It is difficult to conjecture what these rootings out and bearing ill deeds were. The first may have been exile, as Quakers turn out poor or disreputable brethren; the latter appears to point at the penalty of infamy, P.C. ² Michaelis Abb., von den Ehegesetzen Moses, § 71, and his Mos. Recht a Th., § 117, proves this beyond a doubt.

³ Id. der Ehegesetzen, § 310; Mos. Recht, § 112.

⁴ Levit. xviii. 8; xxx. 11.

⁵ Id. xviii. 17, & xx. 14.

⁶ Id. xviii. 17.

⁷ Id. xviii. 14, & xx. 20.

⁸ Id. xvii. 10, & xx. 21.

⁹ Deut. xxv. 5-10.

¹⁰ Levit. xviii. 11.
with the father's brother's wife, and the critics are of opinion he permitted the other seven.

The following is a table of marriages prohibited by Leviticus, reduced to a system of degrees:

Table of persons prohibited from intermarrying, according to the Levitical code, reduced to degrees.

Prohibited marriages in Protestant countries.

§ 628.

In Protestant countries the Mosaic prohibitions are regarded, but these in the present day have been admitted to be mere civil regulations of the Jews, and as such to be distinguished from the divine law, and to have no binding force on Christians; they are, nevertheless, considered by Protestants as obligatory as far as they go, because the law of all countries goes much further; for cases not contemplated in them recourse is had to the law of the particular country; but if they were entirely sufficient, there would be no occasion to go further; again, were the Jewish law really accepted, Christians ought to accept with it the punishments for its contravention, as for instance stoning for adultery; simultaneous polygamy, too, must also be legalised.

In fact, as Christians we have nothing to do with the Levitical degrees, Protestants generally follow the Roman, Catholics the Canon, and Jews the Levitical Law.

§ 629.

Thibaut\(^1\) sums up the question of prohibited degrees, in the Levitical, Roman, and Canon Law, in the following masterly way: first, as regards consanguinity.

The Levitical,\(^2\) Roman,\(^3\) and Canon Law,\(^4\) forbid marriages in the right line, ascending and descending ad infinitum, the first by name, the two latter by degrees.

The Mosaic law, in the collateral line, forbids marriage between brothers and sisters,\(^5\) and in the case of a respectus parentele with a woman under the power of a common ancestor, but not vice versa.\(^6\)

\(^{1}\) System des Pandectenreches, § 293.
\(^{2}\) Lev. xviii. 7, 10.
\(^{3}\) I. 1, 10, § 1.
\(^{4}\) XXV. 1 & 2, 18.
\(^{5}\) Lev. xviii. 9, 11.
\(^{6}\) Lev. xviii. 7, 13.
§ 630.

With respect to affinity, the same author continues—

The Mosaic law (which here sometimes coincides with a prohibition of polygamy, and cannot be extended arbitrarily beyond the cases named) forbids marriage in the direct affinal line with the father's wife, mother of the wife during her lifetime, daughter-in-law, stepdaughter, and step-granddaughter only.

The Roman and Canon Laws in the same line, forbid them ad infinitum.

In the lateral affinal line, the Mosaic law forbids marriage with a father's brother's wife, with the living wife's sister, with the brother's wife, but the surviving brother, if unmarried, must take the wife of his late brother if he died childless, which is termed a levir marriage.

The Roman Law confines its prohibition to the wife of a deceased brother, and the wife's sister.

The Canon Law, on the other hand, forbids marriage among regular affines, as if they were cognati; thus in the case of a respectus parentela, ad infinitum, but otherwise, only to the fourth degree, among quasi affines only in the second degree. With respect to the remaining species of affinity, the Canon law resinds all its former prohibitions.

The Roman law only forbids the marriage of the stepfather with the stepson's wife; and of the stepmother with the husband of her stepdaughter, in no other cases; ex gr., with the daughter of the first marriage of a son-in-law, in the case of children brought into connection.

§ 631.

The marriage of the stepfather and the stepson's widow was forbidden on grounds of morality, and in like manner that of a stepmother and the widower of her stepdaughter. Neither was it permitted for a man to marry the

1 Hofacker Prin. 1, § 568; Michaelis, § 177 & c. Gebauer, de Mat. cum n潢cui vida, 1757.
2 P. 23, 21, 54. Here Thibaut takes an extreme case, that of a sister, with a third degree would have been more correct. C. 51, 41, 19.
3 x. 1, 14, 14.
4 Schlegel, a. a. O. S. 250-526.
5 Lev. xviii. 8 & Ep. Cor. v. 1.
6 Lev. xviii. 17 & xx. 144 Deut. xxvii. 23.
7 Lev. xvii. 12.
8 Id. 17.
9 I. 1, 10, 6; x. 4, 14, 8; P. 25, 7.
10 x. 1, 10, 6; C. 5, 1, 4.
11 Lev. xviii. 2; & xx. 20.
12 l. c. 18, & l. c. 31.
13 Deut. xxv. 5-10.
14 Lev. xviii. 6, & xx. 21; W. F. Walch de Lege Levitatis ad frat. non Germ. Referenda, 1753.
15 C. 5, 5; 5, 8, 9.
16 x. 4, 14, 8; Concil. Fred. Lep.; x. 4, 14, 8.
17 P. 23, 2, 15.
18 l. 1, 10, 6; P. 23, 2, 34; § 2.
19 P. 23, 2, 15.
daughter of a divorced wife, although by another husband, which prohibition is supposed to rest on the ground of *quasi* affinity, though it may be of possible consanguinity.

- In like manner, if a father or son die betrothed to a woman, the survivor cannot marry the woman betrothed; the reason is double, firstly, the *quasi* affinity; secondly, the presumption that the marriage might have been anticipated.

In the Canon Law, the first of these two prohibitions belongs to the *affinitas secundi et tertii generis*, which were abrogated.

§ 632.

In order to increase the necessity of dispensation, the Catholic clergy, on the hint of Justinian, who forbade the marriage of godfathers with their godchildren, *susceptor patrinus*, invented a number of spiritual relationships, *cognitiones spirituales*, respecting confirmation as well as baptism.

The Council of Trent endeavoured to mitigate this abuse, by declaring that no spiritual relationship should be held to exist, but between the godchild and godfather on the one part, and the godchild and his natural parents on the other. The same was by analogy applied to confirmation.

Protestant churches have no power to sell dispensations, and do not retain these fictitious relationships.

§ 633.

The Roman Law forbids the marriage of an adulteress absolutely.

The Canon Law, which admits adultery to be possible in both sexes, but forbids the marriage of the adulterer and adulteress, in the case of either party having attempted the life of the other, or promised the participator in the crime marriage on the death of the other, both of which provisions are absurd, as being next to impossible of proof.

The old Roman Law also forbade marriage between the ravisher and ravished.

The Canon Law abrogated this in all cases where the ravished being no longer in the power of the abductor, has given a free consent.

§ 634.

The Roman Law forbade the governor of a province *Præses,*

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1 P. 23, 2, 12; § 4, 2; Id. 6, § 1; P. 38, 10, 8; l. 1, 10, § 9.
2 x. 4, 14, 8.
3 C. 5, 4, 26.
4 C. 1, 3, 4, 30; x. 43, 3, 1, 3, 33.
5 xxx. 31 C. 30, Q. 34; x. 46, 11, 1, 6, 7.
6 Conc. Trid. Lep. 24, 2, 3.
7 P. 485, 6, § 1; Id. 46, § 13; Id. 29, § 1; Id. 34, § 1; Nov. 134, 12.
8 xxxii. 4, 4; Id. 5, 13.
9 x. 41, 7, 1; 3, 6; x. 3, 33, 1 Thibaut, R. R. § 287.
10 C. 9, 13, 1, § 1.
11 x. 5, 17, 6, 7; Conc. Trid. Lep. 24, 6.
Proconsul, Proprætor, his son, grandson, or near relation, to marry a woman of his province. A senator or his lineal descendant was generally forbidden to marry a person who had appeared on the stage, artem ludicram exercens, or who had appeared on the stage, *scenica*, as a dancer or actress for money, or one whose parents had been in that position, had kept a brothel, been a public whore, had been taken in adultery, been manumitted by a pimp (*lenu*), had suffered punishment for a public offence. These disabilities also applied to freeborn persons, with the exception of the *liberta*, and the person whose parents had been on the stage, and were provisions of the *legis Papiae Poppaeae*.

Justin, at the instance of Justinian, permitted the marriage of a senator with a *muliere scenica* by rescript, to enable Justinian to marry Theodora, but in all such cases a rescript was indispensable. On Justinian ascending the throne, he abrogated this condition in the years 527, 539, 541, by three ordinances, as well as all the above impediments to *mesalliances*.

Guardians, or even those nearly allied to him, could not, under pain of infamy, marry their wards before the wardship accounts had been closed, or before the lapse of the period during which the ward, having attained majority, could bring an *actioem restitutionis* in *integrum*; this action ran four years, consequently such marriage could not take place before the ward attained the age of twenty-nine.

§ 635.

Religious considerations were likewise an impediment,—a Jew with a Christian, or *vice versâ*; the fear being that the Jew or Jewess should induce the Christian to apostatize.

On like grounds, the Canon law forbids the marriages of *infidelium*, such as do not profess Christianity with Christians, such as heathens or Mohammedans; to these it adds *clerici*, those who have taken the solemn oaths of chastity, poverty, and obedience; such are monks and nuns; such solemn vows even dissolve a marriage. Knights of the Teutonic order and Knights of Malta are also included, as they take the vow of chastity; and it is a curious anomaly that, although this is abolished among Protestants, the Protestant Knights of the Teutonic order in Germany cannot marry, with the exception of those in the bailiwick of Brandenburg.11

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1 P. 23, 4, 38, 57, p. 2, & 65, 65; C. 5, 4. 6.
2 P. 23, 2, 44.
3 § 57, h. op.
4 C. 5, 4. 23.
5 C. 1, 4, 33 pr. § 1; C. 5, 4, 28; Nov. Nov. 78, 3; Höpner, l. c. § 125, n. 1.
6 P. 23, 2, 57, & 62, § 2.
7 P. 1, 19, 6.
8 xxviii. 1, 15, 16, 17, in vi. 5, 2, 14.
9 x. 4, 6, 1, 2, Conc. Trid. Lep. 248,
10 x. 4, 6, 46; xx. 3, 3; xxvii. 3; C.
12 p. 194.
§ 636.

By a statute it is declared, "that all persons may lawfully marry but such as are prohibited by God's law, and that all marriages contracted by lawful persons in the face of the church, and consummated with bodily knowledge and fruit of children," shall be indissoluble. "And because, in the times of Popery, a great number of degrees of kindred were made impediments to marriage, which, however, might be bought off for money," it is declared by the same statute, "that nothing (God's law except) shall impeach any marriage without the Levitical degrees."

By the effect of this statute, the only marriages which are now illegal, in respect of proximity of degree, are those in the ascending and descending line ad infinitum; those between collaterals to the third degree inclusive, according to the mode of computation of the Civil Law, extending equally to the consanguinei and affines. Thus a man can marry neither his sister nor his wife's sister, both being related to him in the second degree; nor his sister's or wife's sister's daughter, for both are related to him in the third degree. Although, as we have already seen, the consanguinei of the wife are always the affines of the husband, and vice versâ, the consanguinei of the husband are not necessarily related to the consanguinei of the wife. Hence two brothers may marry two sisters, or a father and son mother and daughter. The husband is not related to the affines of the wife, or vice versâ; consequently a man may marry his wife's brother's widow.

The prohibition as to collaterals extends to those related by the half blood, and applies though one of the persons be a bastard, for although he is civiliter filius nullius or populi, yet the law recognises his natural parent for moral purposes.

The incapacity by reason of proximity of relationship was, till lately, a canonical only, and not a civil disability. The statute law, however, declares, that all marriages thereafter celebrated between persons within the prohibited degrees of consanguinity or affinity, shall be absolutely void to all purposes whatever, thus bringing the objection within the cognizance of the courts of common law; whereas such marriages theretofore were not ipso facto void, but voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both parties; they were therefore made absolutely void: this was done in order to settle the condition of the children of marriages between persons within the prohibited degrees of affinity, ab initio, instead of leaving so important a matter to chance.

1 32 Hen. 8, 35.
2 5 & 6 Will. IV. 54, § 2; Steph. Com. 2, p. 281, 1842.
Persons prohibited by reason of consanguinity or affinity to intermarry by the English law:

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.
4. Father's sister.
5. Mother's sister.
6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
10. Mother.
11. Stepfather.
12. Wife's mother.
14. Wife's daughter.
15. Son's wife.
17. Wife's sister.
18. Brother's wife.
19. Son's daughter.
20. Daughter's daughter.
21. Son's son's wife.
22. Daughter's son's wife.
23. Wife's son's daughter.
24. Wife's daughter's daughter.
25. Brother's daughter.
26. Sister's daughter.
27. Brother's son's wife.
28. Sister's son's wife.
29. Wife's brother's daughter.
30. Wife's sister's daughter.

The following is a table of degrees as forbidden by the English law:

§ 637.

Blackstone enumerates five impediments to a legal marriage, which, with the exception of the first, make marriage void ab initio. This first is want of age, fourteen in males and twelve in females; under that age the marriage is only inchoate; and either, on coming to those ages respectively, may disagree and declare the marriage void, without the interference of any court, but need not be remarried if they do not so disagree: Secondly, a prior marriage, both parties being alive: Thirdly, want of reason, which implies a want of the legal power to contract marriage; and to obviate the difficulty of ascertaining whether the marriage took place in a lucid interval, statutes were passed declaring that no marriage should be void except the imbecility had been proved in the due course directed by law: Fourthly, consanguinity or affinity, which agrees with and is founded on the Civil Law, with the modification of allowing a man or woman to marry his or her

1 Steph. Com. 2, p. 281—6, and Bl. Com. Id.
great aunt or uncle, which is, logically speaking, an inconsistency; and it has at length been finally determined that the marriage of a wife's sister is void by statute.\footnote{1} Fifthly, want of consent.

§ 638.

Certain causes suspended a contract of marriage; others suspended the marriage itself when contracted.

Of the first description are, the want of consent of parents; the duration of the \textit{annus luctus}; the period of three years allowed to prove impotence or incapacity; guardianship; governorship of a province.

To these the Canonists have added the prohibition of the judge,\footnote{3} on the contravention of which a bishop could impose the penalty of nullity prior to betrothal;\footnote{4} to discover these the church invented the \textit{proclamatio};\footnote{5}—want of consent of parents;\footnote{6} betrothal with another;\footnote{7} an ex-ritual vow of chastity,\footnote{8} which might be rescinded by dispensation,\footnote{9} but did not annul a marriage;\footnote{10} where the clergy cannot solemnize a marriage, because contrary to the law of the land; during certain church festivals in the old time, Advent, the Fasts,\footnote{11} &c. (Protestants generally adhere to this from custom, without real obligation). Public penitences were also formerly suspensive impediments,\footnote{12} and the parental relation borne by the teacher to the Katechumenus, which have both vanished with a change of discipline.\footnote{13}

§ 639.

Suspension, when contracted, arose out of the absence of the husband in known captivity with an enemy,\footnote{14} in which case a wife ought not again to contract until she know certainly, or have great reason to believe that he is dead; after a lapse of five years, however, she is free to marry another; when he returns, he has no ground for refusing his wife by reason of such second marriage,\footnote{15} for he should not have been absent so long without giving notice of his being alive. Justinian\footnote{16} required certain proof of the husband's death before permitting the woman to remarry.

Marriages so suspended were reversible by mutual consent.

§ 640.

By the Canon Law, marriage being considered a sacrament was indissoluble in its legal point of our \textit{quoad vinculum}.\footnote{17} The clergy,
however, to mitigate this absurdity, on weighty grounds dissolved the obligation of the parties to sleep and live together in common; this they termed separatio quod thorum et mensam, which might, according to circumstances, be temporaria or perpetua, the latter judgment was given especially in cases of adultery. In the case of an affinitas superveniens, by reason of the adultery the parties were to be recommended to terminate their cohabitation; but if this be ineffectual, the innocent party could require matrimonial duty, matrimonium claudicans. It is doubted whether a marriage can be dissolved, when one of an infidel couple is converted to Christianity, and the other resigns the marriage. Thibaut is decidedly in favour of the dissolution.

§ 641.

Force by the Canon Law does not constitute adultery, neither does a pardonable error of person, when either party has also been guilty of adultery, or been the cause of its committal no separation will be allowed, nor even if the adultery has been once expressly or tacitly forgiven; but a man, though forgiveness is recommended, can, under such circumstances, receive his wife again only after severe penitence. The marriage tie is, however, not dissolved, and the innocent party may receive the coverture, and must do so if he himself afterwards commit a like offence.

The question of dower is now always decided by the civil authority.

No separation can be effected without the interference of the spiritual judge, except where the one party is exposed to some danger.

Circumstantial evidence, and also that of the guilty party, is admissible, but the latter is to be received with suspicion, as it may be feigned for particular purposes.

§ 642.

A marriage contrary to the Roman Law, was utterly of none effect. Nec vir nec uxor nec matrimonium nec dos intelligitur, consequently the children were bastards, in addition to which there were certain penalties on prohibited marriages. These impedimenta may be dirimentia or impeditia, and the common rule is Multa sunt quae matrimonium impedient sed contractum non diri-

1 The celibacy of the Catholic clergy must have made them very unfit judges in such a matter.

2 Conc. Trid. 1, 8, 2; 12; 26, 2.

3 X. 2, 12, 13; 32; X. 21, 22.

4 Conc. Trid. 1, 8, 2; 12; 26, 2.

5 1 Coren. 11, 12, 13, 14; X. 21, 22.

6 X. 3, 4, 19, 7.

7 X. 3, 4, 19, 7.

8 X. 4, 13, 6; X. 5, 16, 7.

9 X. 4, 13, 6; X. 5, 16, 7.

10 X. 4, 13, 6; X. 5, 16, 7.

11 X. 2, 19, 6, 11.

12 1 Coren. 11, 12, 13, 14; X. 21, 22.

13 X. 2, 19, 6, 11.

14 X. 2, 19, 6, 11.

15 X. 2, 19, 6, 11.

16 X. 4, 19, 6, 11.

17 X. 4, 19, 6, 11.

18 X. 4, 19, 6, 11.

19 X. 4, 19, 6, 11.

20 X. 4, 19, 6, 11.

21 X. 4, 19, 6, 11.
THE SUSPENSION OF MARRIAGE.

munt; such impediments suspend the contracting, but do not dissolve a marriage once contracted. These are again privata, when a third party having an interest can bring suit of nullity or dissolution, and publica when this may be done on grounds of public expediency by any one, or ex officio.

Nullifying privata impediments are error, force, fraud, incapacity of consummation in either party, want of consent of father when he cannot impugn the validity of the marriage. Nullifying publica impediments respect marriage between adulterer and adulteress, seducer and seduced, between infidels and others; in cases of the vow of chastity or of bigamy, consanguinity and affinity. In some cases a prohibited marriage after consummation is punished, but not voided. All others are impedimenta impedientia.

§ 643.

The right to impugn a marriage arises on every legal ground of objection. If such be private, the party injured has a right to the redress; but if public, the clerk must take official notice thereof, and every third party is bound to do the like, the consequence of which is that the marriage is suspended pendente lite, if there be a probable prima facie case. If the objection prove to be a separative one, the right of an action of nullity arises; if the ground be public, all who are not suspicious witnesses have a right and duty to produce such proofs as may be in their power, nay, even the judge is bound to commence such a suit ex officio. Documentary and the vivâ voce evidence of relations and persons living in the house is admissible, but not the oath of parties accused, nay even the confession of the parties is tinctured with the suspicion of collusion, full satisfactory proof must be adduced, and in case of doubt judgment must be in favor of validity and a new ordinance provides that in all such cases a sworn defensor shall be appointed in every diocese, to support impugned marriages. If the marriage be declared nullum, it is void ab initio, and only existed in appearance; and in such case, if no dispensation intervenes, is retrospectively null with all its incidents. The judgment is never judicially operative, and can therefore be reversed for error, inasmuch as it is not a simple question of jus privatum. If, however, the marriage was not solemnized in facie ecclesiae, but merely by consent of the parties, no formal suit of nullity is required in places where the Council of Trent is acknowledged, inasmuch as canonically the marriage was not even one in outward appearance.

1 Höpfner, § 110. 2 Id. § 112.
3 Id. § 125. 4 Id. § 126.
5 Id. § 111. 6 Id. § 123-4.
7 Id. § 127.
8 Walter Kirchenrecht, § 316.
9 X. 4, 31; 31 Pr.
10 X. 4, 3, 7.
11 X. 4, 3; pr; X. 4, 16, 3.
12 X. 2, 20, 28; X. 4, 3, 12, & 27.
13 X. 4, 18; 2, & 6; X. 4, 13, 7.
14 X. 4, 19; 3.
15 XXX. 6, 3; X. 4, 18, 3; X. 3, 27, 10.
16 This is not expressly prohibited by the Canon Law, but by implication as a trans-action which is forbidden.—X. 1, 36, 11.
17 X. 4, 13; 5.
18 X. 4, 14, 1; X. 2, 27, 26.
20 X. 2, 27, 7, & 10; X. 4, 15, 5, & 6.
§ 644.

The English law allows divorce, on account of impotency, and such divorce renders the marriage void ab initio, if the sentence be pronounced during the lifetime of the parties; advanced age is, however, no impediment, although noticed in the form of celebration of the ceremony confirmed by statute.

In England marriage is suspended, or declared de jure never to have taken place ¹ by divorce, which is of two kinds, the one total; a vinculo matrimonii, the other partial, and termed divorcium quodam mensam et thorum. The total divorce, a vinculo matrimonii, is obtained by sentence of the ecclesiastical court, and the proceedings for that purpose must be founded on some of the canonical causes of pre-impediment. These may exist before the marriage, or supervene; that is, arise afterwards, as may be the case in corporal imbecility. In cases of total divorce the marriage is declared null, as having been absolutely unlawful ab initio, and the parties are accordingly separated pro salute animarum. The issue of such marriage as is thus void ab initio, are bastards, and the parties are free to contract another marriage.

Divorce a mensa et thoro is when the marriage is just and lawful ab initio, but for some supervenient cause it becomes improper or impossible for the parties to live together, as in the case of intolerable cruelty in the husband, or adultery in either of the parties; in such case divorce from bed and board will be granted by the ecclesiastical court; but this is a sentence affecting the separation of the parties only, and not annulling the marriage, and therefore essentially different from a divorce a vinculo. A divorce cannot, indeed, be decreed on any grounds of this description; for the common law founded on the Canon Law, has that respect for the nuptial tie, that it will not allow it to be annulled for any cause whatsoever arising after the union has been contracted; its origin is erroneously attributed to the Divine revealed law, which expressly assigns incontinence as the only cause for which a man may put away his wife and marry another. The true ground of the indissolubility of marriage in England is the Catholic faith, which made marriage a sacrament; thus the effect has inconsistently been preserved, though the cause has been taken away. ²

In England adultery is only a cause of separation from bed and board, for which none but a reason of expediency can be given, viz., that if divorces were allowed to depend on a matter within

¹ The law books use the word "dissolved," but this is manifestly a wrong term, for it is a restitutio in integrum, not a dissolution, for no marriage de jure has taken place: when a marriage is declared void ab initio, and as far as regards the de facto marriage, it is permanently suspended.

² It is on this account that there is no effective criminal punishment for incest: the ecclesiastical court retained its jurisdiction in this respect from the Catholic age, and can now visit a divorce with no penalty but those which are solemnly ridiculous in the present century, and are therefore never applied, it being considered very properly too serious a matter for burlesque.
the power of either parties, they would probably be extremely frequent, as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties; but this is a fallacy.

§ 645.

In case of divorce a mensa et thoro, the law allows alimony to the wife, being that allowance which is made to a woman for her support out of her husband’s estate, being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called estovers, for which, if he refuses payment, there is, besides the weak punishment of excommunication, another powerless remnant of Catholicism, a substantial remedy by suit at common law, de estoveris habendis, in order to compel it. It is generally proportioned to the rank and quality of the parties. But the law allows no alimony to the wife, in case the divorce was obtained for adultery on her part, nor in case of her having from other sources a sufficient income.

§ 646.

Marriage was dissolved by the Roman law by the natural or civil1 death of either party. The annus luctus was the only impediment to the wife’s contracting a second marriage.

The Canon Law2 invented another description of civil death,—the vow of chastity; yet this was improperly termed capitis deminutio; for as the Flamen Dialis passed out of the paternal power without a capitis deminutio, so the priest was held to do in the later times.

§ 647.

There are two terms used to convey the idea of the dissolution of the marriage contract,—Divortium and Repudium: the latter word properly applies to the repudiation of an antenuptial promise of marriage, but in course of time came to signify the repudiation of a contract completed, in other words, of a marriage constituted, made by one of the contracting parties. Divortium, on the other hand, means the dissolution of marriage by the mutual consent of the contracted parties.

Lawyers express this variously: they call this latter dissolution of marriage a divortium bonâ gratiâ; and the repudium, divortium malâ gratiâ.

§ 648.

We learn that the law of Romulus permitted the husband to repudiate his wife for three causes,—adultery, preparing poisons, and the falsification of keys. The first two provisions are comprehensible, and some may be a little surprised to find the falsification of keys put into such bad company; it must therefore be understood generally to include all breaches of trust; morally con-

1 P. 24, 3, 10, pr.; C. 5, 18, 5; Nov. x. 3, 32, 2, 7; 14; Conc. Trent. Lep. 24, 7.

2 x. 3, 32, 2, 7, 14; Conc. Trent. Lep. 24-6.
sidered, perhaps the vilest and most dishonorable of all offences, without any exception, the enormity of which can be enhanced only by their being committed by one in whom unlimited confidence is and ought to be reposed. The reciprocity was not conceded to the wife, who had no means of ridding herself of a base husband until this power was given to her by the law of the Twelve Tables.

Montesquieu argues that repudiation should be allowed to the wife rather than to the husband, and argues in the following manner:—"Il est quelquefois si nécessaire aux femmes de répudier, et il leur est si fâcheux de le faire, que la loi est tyrannique qui donne ce droit aux hommes sans le donner aux femmes. Un mari est maitre de la maison; il a mille moyens de tenir ou de remettre ses femmes dans le devoir; et il semble que dans ses mains la répudiation ne soit qu'un nouvel abus de sa puissance. Mais une femme qui répudie n'exerce qu'un triste remède. C'est toujours un grand malheur pour elle d'être contrainte d'aller chercher un second mari, lorsqu'elle a perdu la plupart de ses agréments chez un autre. C'est un des avantages des charmes de la jeunesse dans femmes, que dans un âge avancé, un mari se porte à la bienveillance par le souvenir de ses plaisirs."

Lawyers, arguing on divorce purely as a question of contract, insist that, inasmuch as marriage presupposes the mutual affection and consent of the parties contracting, it would be absurd to compel two persons who hate and despise each other to continue to live together in disunion and unhappiness all their lives, when in all other partnerships either party is allowed to retire at his option. Divorce is therefore based upon nature, common sense, justice, and the right of individual freedom, and ought to be allowed as soon as it is found, that its objects cannot be fulfilled: hence the assignment of particular reasons for divorce is absurd, and the difficulties thrown in the way of it are only useful in so far as they prevent contracts of this nature being concluded without due reflection. Protestant tribunals, where marriage is no longer a sacrament, need find no difficulty on account of old ecclesiastical ordinances, for even in Catholic countries the relaxation of these rules has been favorably received.

§ 649.

We are not aware what were the valid grounds of divorce by the law of the Twelve Tables. That the reciprocal right of repudiation was introduced is certain; that the restrictions of marriage is not founded on holy writ, and is no material dogma of the Catholic church, but a maxim of discipline of the Latin church, capable of change.—Vide et Puffendorf 1, Obs. 160; G. L. Böhmer Prin. Jur. Can. § 408; Schott im Eherecht G. 125, et seq.
MARRIAGE—DIVORCE.

Romulus were enlarged admits of just as little doubt; and it may be inferred that any divorce, or at least repudiation, insisted upon for causes other than those mentioned, was visited by the fine to which Spurius Carvillius Ruga (of whom hereafter) was exposed, namely, the forfeiture of half his property to Ceres, and of the other half to the woman;¹ at any rate, the censors and the public opinion appear to have exercised a wholesome restraining influence, tending to check levity and temerity.² These useful restrictions, however, vanished with the increasing depravity of manners, and the most trivial grounds, nay, even simple volition was sufficient to justify the repudiation of the wife or of the husband,³ the only impediment being the payment of a certain fine upon the property of the party in fault, it being only a question as to which party originated the dissolution;⁴ or if it arose out of circumstances attributing a fault to neither,⁵ and where a particular form was used, it appears hardly to have been legally established,⁶ until such was introduced by the lex Julia de adulteriis.⁷ At a later period, the sending a letter of separation was mentioned.⁸

§ 650.

The divorce of a patron by a liberta was rendered impossible by the Julian and Papian law,⁹ which endured to a late period.¹⁰

The slighter offences of the wife against the marriage vow were punished by the husband in virtue of the manus, but the more serious, such as enabled him to repudiate her, required a family council of her relations, extending to the sobrini, that is, as far as the kiss of friendship extended.¹¹ The husband might, however, slay her without form of law if he surprised her, ἐν ψυγῶ ζηλω, in flagrante delicto.¹²

But if the wife were not in his manus, he left her punishment to her father and relations, after having repudiated her.¹³

Where wives killed their husbands, the relations could anticipate the tribunal of the state;¹⁴ but this family jurisdiction vanished after the first Emperors.¹⁵

¹ Whether or not anything was contained in the Twelve Tables, rests on very uncertain testimony, Cic. Phil. 2, 28; although the state of the case in later ages renders the practice clear.
² Val. Max. 2, 1, 4 & 9, 2; Dionys. Hal. 2, 25; Gell. 4, 3; & 17, 21; Plut. Q. R. 14, 59.
³ Plut. Aem. Paul. 5; Cic. 41; Val. Max. 6, 5, 10, 11, 12; Plaut. Amph. 3, 2, 47; Cic. ad Fam. 6, 7; Id. pro Cluent. 5; Seneca de Hom. 5, 6.
⁴ Cic. Top. 4; Frag. Val. § 121; P. 24, 3, 22, § 7; P. 24, 21; P. 49, 15, 8.
⁵ P. 24, 1, 32, § 10; Id. 60, § 1; Id. 61, 62; P. 24, 2, 6; P. 40, 9, 14, § 4.
⁶ Plaut. Ampt. 3, 2, 47; Cic. Phil. 2, 28; P. 24, 2, 2, § 3; Cic. de Orat. 1, 40, 56.
⁷ P. 38, 11, 1, § 1; P. 24, 2, 9; P. 48, 5, 43; Juv. Sat. 6, 14, 6.
⁸ C. 5, 17, pr. 6, 8; Nov. Th. 12.
⁹ P. 38, 11, 1, § 1; P. 23, 2, 45, 46.
¹⁰ P. 24, 3, 22, 11.
¹² Gell. 10, 23; Val. Max. 6, 3, 9; Plin. l. c.; Serv. ad Æs. 5, 737.
¹³ Liv. 39, 18; Plin. l. c.; Tac. An. 2, 50; Suet. Tib. 35.
¹⁴ Val. Max. 6, 3, 8; Liv. Emit. 48.
¹⁵ Tac. A. 2, 50, & 13, 32; Suet. Tib. 35.
§ 651.

The three several rites of marriage were dissolved by forms appropriated to each; consequently it is quite possible that the religious portion of the confarreatio cum co-emptione might have been dissolved without affecting the civil part, although the reverse could hardly have been the case, as no object would have been attained by it. To the prevalence of this custom in ancient Rome may be attributed the unfrequency of divorces, and that effect probably contributed to its discontinuance.

§ 652.

As a contrast to the word confarreatio, we find the word disfarreatio, which is said to have pointed at the dissolution of this marriage.

Festus tells us that flaminicae divortium nullo modo facere licebit. Tacitus,¹ however, tells us: ita medendum Senatus decreto, aut lege; sicut Augustus quedam ex horrida illa antiquitate ad præsentem usum flexisset; igitur tractatis religionibus placitum instituto Flaminum nihil demutari. Sed lata lex quæ Flaminica Dialis sacrorum causá, in potestate viri, cætera promiscuo fæminarum jure ageret; et filius Maluginensis patri suffectus. Thus the old law of confarreated marriages was continued as far as the priesthood was concerned, with the exception of Flaminica, who thenceforth was to be ruled by the laws applicable to other women, except so far as they interfered with the priestly office, in which respect she was to remain subject to her husband. If a son under power was chosen a Flamen Dialis, or a daughter a Vestal virgin, they became severally sui juris without a capitis diminutio; up to this time, the wife of the Flamen was wholly under his power, as by the old law, and this was the point objected to and modified. It appears, then, the effect of the confarreated marriage was at that time partially changed for one particular case which might occur; and we may ask how this was effected? The confarreation remained binding as far as the religious part of the ceremony was concerned, but not so far as regarded the civil portion of it; and Festus was therefore right in saying that the marriage of a Flaminica could not be dissolved by any means, in which he is supported by Hermogenianus.² It was not, therefore, the confarreat rite that was utterly indissoluble (for we meet with the word Disfarreatio), but in fact the priestly office of the Flamina. We are not aware of the ceremonies connected with disfarreation; it must, however, have been performed under the sanction of the Flamen and Pontifex, by whom it had been celebrated, and the causes for which it could be claimed must have been of grave consideration.

§ 653.

Remancipatio. Co-emption, we learn, was dissolved by Remancipatio, or reselling the wife to another: this sale was probably made to her

¹ An. l. c.
² 60-2.
father, brother, or some agnate relation, as in the way of a fiduciary sale to a third party, with a trust stipulation that it was not for the purpose of marriage, but to dissolve the marriage bond.

Now, if we suppose the two rites to have been blended, a man, by the remanuscipation of his wife, might get rid of the civil part of the marriage without dissolving the sacred part, and in this case remanuscipatio, would resemble a divorce a mensa et thoro; if, however, disfarreatio followed, it would represent that of a vinculo matrimonii. And we may easily imagine, that what would be considered a reasonable cause for remanuscipation might not be so considered for disfarreatio; for the first, for instance, incompatibility of temper might be a good and sufficient cause; nothing, however, short of adultery, an attempt to poison, or falsifying keys, was a valid reason for disfarreatio, because, independently of the offence against good manners, an extraneous member might thus be introduced into the family and sacred rites, in the shape of a spurious child.

§ 654.

The assertion that no divorce took place in Rome, until the case of Sp. Carvillius Ruga occurred, A.U.C. 591, or B.C. 234, has been considered doubtful, but without sufficient grounds. On referring to the history of this transaction, we learn that Ruga was a distinguished man, and that he divorced his wife on the ground of sterility, wishing to give children to the state. He appears to have done it with the consent of her family, but to have required the authority of the censors, which has its difficulties, as a family council and the necessary witnesses were all which we are induced to believe was necessary. The censors, it further appears, required the truth of his assertion to be verified by oath; and that measure was, it would seem, unpopular.

The law of Romulus confined the right of divorce to the husband for causes above mentioned, and the law of the Twelve Tables conferred a reciprocity on the wife; but Plutarch says, that whoever divorced his wife for reasons other than those, was obliged to give her half his property, and consecrate the other moiety to Ceres. Ruga, therefore, would have been liable to these penalties, and so applied to the censors, who, it may be inferred, excused the mulct, or part thereof, on condition of the oath. This passage throws some light on the question of disfarreatio, which we may presume to have consisted in a fine of 50 per cent. to the goddess of corn, for the contempt of her sacrifice. Now, as in the case of Ruga, the divorce was effected with the concurrence of the relations of the woman; those on her part would probably insist upon the moiety due to her being paid, and Ruga probably went to the censors to be excused the mulct to Ceres, thus saving half the fine. Montesquieu treats this question very ably, but argues on false grounds, owing to a mistake of date. Plutarch says that Carvillius Ruga lived A.U.C. 230, or seventy-one years

1 Cic. ad Fam. Ep. 7, 29, may possibly allude to this.  
2 Gell. 4, 3, & 17, 21; Val. Max. 3, 1, § 4.  
3 Esp. des Lois, 16, 16.
before the Twelve Tables; Valerius Maximus, and Aulus Gellius, 519-520; these latter are probably right, inasmuch, as by the law of Romulus, the man alone had the privilege of divorce, or, as Montesquieu calls it, repudiation, but that, after the law of the Twelve Tables, this right was extended to the woman also, which Montesquieu terms divorce.

§ 655.

The whole question of Carvillius Ruga then resolves into this; it was not the first divorce known in Rome, but the first rescinding of a confarreate marriage for the cause of sterility. At the same time, we may venture to admit that divorces became more and more frequent; as luxury spread, morality became more lax; women attained a greater degree of independence and freedom, and increased facilities for divorce were offered by a change in the rite by which marriage was contracted.

The lower orders, who did not adopt this patrician mode of marriage, could obtain a divorce by other means, if married civilly by co-emption alone, supposing that rite to be separated. The redress was certainly open to them, if by use completed by usucapion, by the rescission of the marriage contract before seven witnesses, and if by use incomplete, by an absence of three nights, said to be usurped, in the absence of tabula nuptiales by simple separation.

The edictal form was tuas res tibi habeto or agito. 1 Walter 2 thinks that the freedom of divorce was by no means affected by the marriage, including the conventio in manum, inasmuch as the wife could bring her action to rescind it, 3 and that this was not operated by an immediate emancipation, but by remanicipation to some friend or relation of the woman, and subsequent manumission, or by a co-emption by another husband, which confirms the view taken in a former part of this work. 4 The levity of divorce would be increased by the power the parties possessed of marrying again as soon as it might please them. 5

The Mahommedan law obviates this objection, by providing that a wife twice divorced cannot be remarried to her former husband a third time, without having been married in the interval to another person. 6 Divorce is performed by the pronouncing a certain formula, and the contingency is provided for and conditioned beforehand in the marriage contract.

§ 656.

Constantine endeavoured to check the growing licentiousness by establishing certain offences as legitimate grounds of divorce, mala gratia, punishing by fine on property husbands who caused

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1 P. 24, 2, 1, § 1.
2 Ges. des R. R. 496.
3 Gaius, 1, 137.
4 § 653, h. op.; Gaius, 1, 115, 195; Festus v. Remanicipatum. In this way Gato must have transferred his wife to Hortensius, Plut. Cat. Min. 35, 52; App. de Bell. Civ. 2, 99; and of Livia to Augustus, Dio. Cass. 48, 44. Walter thinks by co-emption, as the woman would otherwise be in mancipio, not in manum. Quere the practical difference in this matter? The transfer by co-emption was termed remanicipation—P. C. 6 P. 25, 2, 18; Plut. Cat. Min. 53.
8 Koran, Sura 2, entitled "the cow."
themselves to be divorced from their wives on grounds not therein set forth, and inflicting even personal chastisement on the woman in like case. At the same time divorce bonâ gratiâ was allowed without allegation of such grounds, and even by mutual consent communis consensus. Justinian afterwards forbade this, but his successors were obliged to revive the old law.

The following, then, were the grounds on which a divorce could be claimed under Justinian’s law:—mutual consent would not effect a divorce bonâ gratiâ, although it was allowed for impotency.

If it was to be effected malâ gratiâ, or by one party, the legal grounds were sufficient without the interference of the clergy, these grounds may have consisted in a certain incompetency, or in the delict of one party called divorcium ob indignationem, six of these grounds were in favor of the man as against the woman: For conspiracy against the state without his knowledge, which Justinian terms the most damnable of crimes; for adultery; for attempting her husband’s life, or even not protecting him from danger; for absenting herself covertly from the house; for attending public spectacles without his permission; for holding assignations with men, or bathing with them for licentious purposes. In like manner, five applied in favor of the woman as against the man: For conspiracy against the state, or concealment of conspiracy; for attempting her life, or omitting to protect her against the attempts of others; for attempting to prostitute her to others; for falsely accusing her of adultery; for not quitting the intimacy of other women after two warnings.

§ 657.

Protestants, with the exception of the English, repudiate the principle of indissolubility of marriage, although they originally restricted divorce to the cause of adultery, to which, on Luther’s opinion, malicious desertion was added, and subsequently extended to other cases varying in different countries.

In Germany, implacable hatred, ordinary or extraordinary diseases, attempts on life, intentional prevention of conception, refusal of conjugal rights, and condemnation to a punishment implying infamy, are deemed adequate grounds; in some states the sovereign has the power of divorce. Separation is guided by the same rule as in the Canon Law. In cases of malicious desertion, the guilty party was formerly not allowed to marry again; this is no longer strictly observed in Germany.

1 C. Th. 3, 16, 1. Honorius et Const.; Id. 2, Theodosius II.; Nov. Th. 12; C. 5, 17, 8. Valentin. III.; Nov. Valentin. 34; 1, 9, 11; C. 5, 17, 10, 11, § 1, 2; Nov. 22, 4, 15; Nov. 117, 8, 9, 13; Nov. 127, 4; Nov. 134, 10, 11.
2 C. 5, 7, 7, 10; Nov. 22, 4—14; Nov. 117, 11, 12; Nov. 123, 40.
3 C. 5, 17, 9; Nov. 22, 4, 18.
4 Nov. 117, 10; Nov. 134, 11.
5 C. 5, 17, 9; Nov. 22, 4, 18.
6 Nov. 140; Thibaut. Syst. Pand. R. § 316, note 9, doubts this novel—it was by Justinian’s successor, and is not glossed.
7 Thibaut, l. c. Nov. 134, 11, pr.
8 P. 24, 1, 6, 62; P. 40, 9, 4, 43; C. 5, 13, § 13; C. 5, 17, 9; Nov. 22, 4.
9 Nov. 117, 8—14.
The Swedish law has increased the grounds to those above mentioned.¹

Denmark recognises adultery and malicious desertion as the only grounds.²

§ 658.

England, it has been seen, has preserved the consequence of Catholicism, although the premises have been abolished. An ecclesiastical court can only pronounce a sentence of separation, even for adultery; the Legislature will, however, grant the innocent party, when sufficiently rich to bear the enormous expense, permission by special law to marry again, but if he be too poor to afford this luxury and purchase justice, he must be content with his lot. English lawyers state the law of divorce as follows:—

Though a divorce a vinculo cannot be obtained in the regular course of law on the ground of adultery, yet it is frequently granted on that ground by a private act of Parliament, it having become the practice of the Legislature to exercise its authority in this matter by way of extraordinary relief to the injured party. This proceeding usually originates in the House of Lords. To prevent collision, the petitioner for a divorce bill must attend upon the second reading to be examined at the bar, and the adultery must be proved by witnesses. By the general rule, evidence must also be given, in the committee on the bill, that a sentence of divorce has been obtained in the spiritual court, and where the husband is the petitioner, that judgment has been given for the husband in some court of law in an action of damages brought by him against the seducer.³ Where no such proceedings have taken place, the practice of Parliament requires that some satisfactory reason should be given for the omission; for example, that the husband has not been able to discover who was the adulterer, or that the adulterer died before a verdict could be obtained against him. In passing such bills, also, it is the ordinary course of the Legislature to make some provision for the wife out of the husband’s estate.

§ 659.

Legitimation, like marriage, was a means by which the paternal power was acquirable, as legitimatio est actus civilis quo liberi legitimi et in specie naturales consequuntur jura legitimorum.

This definition admirably includes all the requisites of legitimation,—a custom and law unknown until the time of Constantine the Great,⁴ by whom it was introduced, and whose constitution is referred to by Zero;⁵ for before that period, arrogation was the however, only alludes to children born of a putative marriage: compare Canon Law. (14, 15, 5.) Livy, in speaking of the jus consub, with Roman citizens being conferred upon the Campanii, states that the issue of such marriages before the passing of the law were to be considered as born in consubio.

¹ Gittemaels Balk, Cap. 13; Royal Ordin. 27th April 1810.
² Jus Danicum, 3, 16, 15.
³ C. 5, 27, 3, 4.
⁴ It is asserted that the senate during the republic, and some of the Emperors, occasionally granted letters of legitimation, on the authority of Livy (38, 36), and the Pandects (23, 2, 57, § 1), which latter,
only mode by which illegitimate children could be brought sub patriad potestate. Theodosius the Younger\(^1\) and Justinian\(^2\) gave legitimation greater latitude; which was still further extended by the Canon Law.

§ 660.

Women who cohabited with men without the form of marriage were of various sorts and degrees, of which the most respectable was the concubina, or mistress, who supplied in all other respects the place of a wife, without the dignity and form of marriage. Widowers often indulged in concubinage, in order not to prejudice the former children by a second family of legitimate children. The word concubine in itself simply signifies bedfellow; and it was the children born of such women that Constantine admitted to legitimation, and who were emphatically termed naturales.

The next class was stuprata, or a woman who had hitherto lived an honest life, but by misfortune, or otherwise, had come into this category.

The meretrix, mulier questuaria, was a woman who prostituted herself generally for gain.

The adultrix she who, being married, intrigued with others than her husband.

The mulier incestuosa, she who lay with one related to her within the prohibited degrees.

The children born from these various intercourses were respectively denounced, the first naturales, the second spurii, the third vulgo quæsitì, the fourth adulterini, and the fifth incestuosi.

The reason that the first species only could be legitimated was, that the patria potestas was looked upon as a great privilege, and no privilege can be allowed to one who acts illegally, for no one can take advantage of his own wrong.

Constantine the Great decreed that subsequent marriage in the case of naturales should have a retrospective force, and affect the issue by bringing them into his power. And this was the first sort of legitimation, which must not be confounded with the restitutio natalium.\(^3\)

Although promiscuous intercourse subjected the parties to no punishment, yet it was looked upon as a disgraceful practice.\(^4\)

§ 661.

Theodosius the Younger introduced a second mode of legitimation, per oblationem curiae, or by making the bastard a decurion in a provincial town. This appears to have been a very disagreeable office; it was, therefore, necessary to hold out all sorts of advantages to induce persons to take it. The municipia, having the jus civitatis minus plenum, were governed by collegia, or town councils, the duty of the members of which were to account for the public revenue, manage the theatres, aqueducts, roads, bridges,

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\(^1\) C. 5, 27, 5.
\(^2\) P. 48, 5, 13; § 2; C. 9, 9, 22; P. 3, 2, 43; § 4 & 24; P. 12, 5, 4, 9, 3.
\(^3\) Nov. 89, pr.
\(^4\) P. 48, 5, 13; § 2; C. 9, 9, 22; P. 3, 2, 43; § 4 & 24; P. 12, 5, 4, 9, 3.
baths, lay in stores of provisions, undertake embassies, exhibit shows, collect taxes and duties, and be responsible for the arrears; they were also expected to present the Emperor with new year's gifts, &c., and were continually subject to the caprice of the Roman governor; and lastly, on their death, to cede a certain portion of their property to the council. In this case, the son was induced to allow his name to be inserted in the album curialium, in order to obtain legitimation by such means, while the acquisition of the patria potestas was the inducement to the father to obtain the consent of his son to that course.

Marrying a natural daughter to a decurion had the effect of legitimating her.\(^1\) Zeno provided by his constitution (476), that a father who married his concubine, and who had no legitimate issue alive, acquired the patria potestas for himself, and conferred upon his children the right of testamentary and intestate succession, either alone or equally with their brothers (if any) subsequently born. This was, however, confined to the issue of ingenuous females born before the law.\(^2\) Anastasius (517) extended this law, by removing the restriction as to the future. Justin (519) again restricted it under the pretext of reforming morals; but his nephew, Justinian (529), superseded his uncle's law, and gave it a still greater latitude.\(^3\)

§ 662.

Anastasius invented a third mode, per arrogationem, that is to say, the natural father arrogated his bastard children, and so brought them under his power;\(^4\) Justin, however, abrogated it, and Justinian approved thereof.\(^5\) This, it is probable, was a mere revival of the expedient used before the constitution of Constantine for like purposes.

§ 663.

Justinian introduced a third method, more compendious and easy than the foregoing, viz., by royal rescript, per rescriptum principis, and provided, that this means shall only be resorted to when the legitimation cannot be arrived at otherwise; thus, if the subsequent marriage cannot be had by reason of the death of one of the parties, marriage on the part of the mother to another, refusal to marry the father, or the woman having good cause for declining the marriage, si mulier non sine peccato sit apud eum ex quo digna qualibet legitimo nomine.\(^6\) Letters patent would not be granted, if the father had legitimate children also, who would be prejudiced by the legitimation of the bastard brothers and sisters; lastly, application must be made straightway to the prince.

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1 See also the constitutions of Leo and Anthimius, C. 5, 27, 4; and of Justinian, C. 5, 27, 9—Nov. 89, 11.
2 C. 5, 27, 6 & 7.
3 C. 5, 37, 10 & 11; I. 3, 1, § 2; Nov. 18, 4—18, 11—74.
4 C. 5, 27, 6.
5 Nov. 89, 7—74, 3.
6 Nov. 75, 1, 2; Id. 87, 9.
7 Nov. 74, 1, 12; Id. 89, 9; rā ἐν τῷ γνωσθείν διὰ ἀναρρητήματα πρὸς ἄνων ἑαυτοῦ ἤμετρον κοιμήσας τινός ὕπομνου.
LEGITIMATION.

§ 664.

Lastly, Justinian introduced another mode of legitimation, per testamentum a principe confirmatum,¹ which, indeed, is only by rescript, executing the voluntas testatoris.

It is pretended that the mode per nominationem filii, may be inferred from the Nov. 117, c. 2; but, in fact, it is a simple question of evidence; that is, if, in case of doubt, the father calls the person his son in his will, it is to be taken as evidence that he really is so.

§ 665.

It has been disputed whether instrumenta dotalia, or nuptialia, was necessary to render a subsequens matrimonium valid, and legitimize the previous issue, for the concubinage resembled marriage so closely, that without written evidence it would have still been difficult to decide which it was, against which it is urged that in that case stipulations for dower must be inserted, which the concubine, as usually poor, could hardly be expected to procure. Cujacius⁵ inclines to think they were not required in such cases. The Council of Treves, in modern times, considers the consent and marriage by a priest before two witnesses sufficient.

The Canon Law⁶ legitimated not only the offspring of concubines, but the other sorts of bastards already mentioned.

§ 666.

Legitimate children and descendents obtain the rights appertaining to them as such in virtue of the law, or ipso jure by their descent from certain persons. Such as are legitimated do not possess these rights originally by virtue of descent, but of some circumstance subsequently accruing, to which the law has appended the legal operation of legitimate birth. Legitimacy then implies nothing further than the status of a child as a person, which it obtains by the legal nature of its descent.⁴ Hence legitimation is a legal consequence, by which a person obtains, as descendent of certain persons, the rights of legitimate birth, which he would not have obtained by the nature of his descent from such persons.

§ 667.

Legitimate descent comprises two points. The actual descent from certain persons, and the legal connection of those persons from whom such person descends.

One question which arises is, whether the legitimacy, status legitime nativitatis, ought to be reckoned from the period of conception, or from that of birth.⁶

Another is, whether the children of parents, who were not contracted in the bonds of marriage at the period of the conception, but were so at the subsequent period of the birth, are to be looked upon as legitimate.

§ 668.

The answer applying to the particular case is, that the legitimacy is to be ruled by the state of the parents at the time of the birth of the child, not at the time of the conception; but this cannot always be taken as a general rule, since a child might be begotten in wedlock, yet born after the parents had been divorced, or within the legal time after the death of either of them.

A German commentator suggests a definition which will meet this case, *illi pro legitimis habentur qui in justo matrimonio concepti vel editi sunt*, nor will this be found inconsistent with the laws upon the subject.

A question worthy of examination is, whether a child which has been proved to have been begotten before but born after marriage, when the husband has confessed the paternity, or such has been legally proved, be legitimate or legitimated.

§ 669.

Before the age of Justinian, there existed no express provision on this subject, and all argument anterior to that period must consequently be based upon analogy.

*Ingenius sunt, qui ex matre liberi nati sunt; sufficit enim liberam fuisse eo tempore, quo nascitur, licet ancilla conceperit.*

The question was set at rest by a constitution of Justinian, which Weber states has escaped these great commentators, and was first remarked by Gönner. *Et generaliter definimus et definitione certa concludimus, ut semper in buiusmodi quaestionibus, in quibus de statu liberorum est dubitatio non conceptionis sed partus temporus inspiciatur; et hoc favore facimus liberorum, ut editionis temporum statuamus esse inspicendum, exceptis his tantum modo casibus in quibus conceptionem magis approbari infantium conditioni utilitas expositur.*

Justinian in the novels, too, lays it down expressly, quod si ante pacta dotalia conceptus quidam est filius, natus autem post dotalia, sancimus, ut non temporum conceptionis sed partus inspiciatur propter filiorum utilisatem. *Si vero conigerit tales aliquid ex cogitari circumstancias casum, in quibus est utilius conceptionis temporum quam partus; tempus illud valere magis præcipi mus, quod utilius sit nascendi.*

§ 670.

With respect to the legitimation by *subsequens matrimonium* of children born out of wedlock, and their being by that means brought under paternal power, we find *quod et aliis liberis, qui ex eodem matrimonio postea fuerint procreati similiter nostra constitutio præbuit.*

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1 Helfeld Jurisp. Forens. § 116.
2 P. 1, 5, 6; 1, 4, pr.; 1, 9, 10,
3 C. 5, 27, 11 (A.D. 530).
4 Nov. 89, 8.
Many commentators have considered this a corrupt passage, and endeavoured, by emendations, to remedy an apparent incongruity, but Weber thinks it may stand as it is, and supposes that Justinian was unwilling to say that his constitution was the first law which conferred upon valid marriages the operation of the patris potestas in respect of children begotten therein. Before the age of Justinian concubinage began to be discouraged, and it is not improbable that that emperor held this out as one of the inducements for converting concubinage into marriage, a standing mode of legitimation, at the entire option of the parties, without any special interference of the law, and that the word praeuit implies a consequence rather than a grant, which view is supported by a subsequent ordonnance. Affectus enim circa filios (naturales) ita ei procedens qui eum etiam ad dotale provocavit instrumentum, ipsis dedit secundis filiis occasionem, qui postea nati sunt, legitimi juris. Qua propter unum amborum fœcismus ordinem, &c. Again,—sed etiam antiores qui et his qui postea nati sunt occasionem legitimi nominis praestiterunt; and, non solum eos liberos, qui post dotem editi sunt justos et in patris potestatis esse, sed etiam antiores qui et iis, qui postea nati sunt, occasionem legitimi nominis praestiterunt.¹

§ 671.

The advantages acquired by children who had been legitimated were—that they obtained the rights of family, became agnates of the father’s family, and were noble if he were so; they obtained a right of inheritance, instead of the right of succession, to the extent of one-sixth only to which they as natural children were entitled—and even that under certain restrictions, namely, the absence of legitimate children, in which case they shared with the mother; on the other hand, legitimated children of course ceased to be sui juris.

The father on his part acquired the much envied patria potestas, the jus adquirendi per liberos, with all the other advantages, real and imaginary, attaching to the patria potestas.

§ 672.

The rights acquired by the various modes of legitimation vary, however, in some trifling respects. Legitimation confers agnate and cognate rights, but adoption the former only. In the case of subsequent marriage, the consent of the agnates is not required, but a rescript could not be obtained without the consent of the cognates, since the person legitimated would become their hares necessarius; nevertheless, the absence of such consent affected the legitimation only so far as the right of cognate succession is concerned.

¹ Nov. 89, 8. ² C. 5, 27, 11. ³ I. 3, 1, § 2.
§ 673.

If a man have children by his slave, whom he manumits and marries, the children are not legitimated by such subsequent marriage, but they become libertini, and as such have no jus conceptionis, for the law admits no impossible fiction, which this would be, inasmuch as marriage between the parties was impossible at the time of the conception, the mother being a slave and no citizen.¹

§ 674.

Modern society attaches an unfair stigma to the object of illegitimacy, which was by no means the case among the Romans, who did not visit the errors of parents upon their issue.

Homer frequently applies the term nôthl to his heroes, by way of distinction, and not as a stigma; on the contrary, it is usually an honorable distinction, inasmuch as illegitimate sons of the gods are included under that designation.

In Scotland, indeed, legitimation may be performed by subsequent marriage: not so in England, where it is provided that, to be legitimate, the child must be born in wedlock, or within a competent time after the decease of the father, to be decided by a jury, but it is not necessary that he be begotten on a married woman.

Blackstone's advocacy of the superiority of the English over the Roman law appears somewhat swayed by prejudice, nor has he taken into consideration, in speaking of the Roman custom, the difference in the respective institutions and customs of the two countries.

With respect to the maintenance of the offspring, the poor-laws have provided that an illegitimate child shall follow its mother's settlement till sixteen years of age, or may gain another for itself; formerly it could claim no derivative settlement. Moreover, two justices, on sufficient proof of parenty, can compel the father to pay a certain sum for alimony and other expenses, which appears to obviate in a measure his first objection as to the difficulty in respect of maintenance.

With regard to the uncertainty of parenty, though it may exist in this country where concubinage is not tolerated by custom, yet it could not under the Roman law, for we have seen that it was difficult to distinguish a concubine from a wife; therefore it did not, nor could it, apply to such uncertain offspring, whom subsequent marriage would not legitimate, even under the Roman Law.

As respects probable frauds and partialities, such might certainly take place here, to oust a younger legitimate child of his estate, by legitimating one in fact not the offspring of the father; not so in

¹ Höpfner, Com. § 136, n. 2. ⁵ 4 & 5 Will. IV. 76, § 71.
LEGITIMATION.

Rome, where the child must have been born of his concubine, whom he afterwards married.

Blackstone further urges that a man might remain a bastard till forty, and then become legitimate; which tardy justice it is hard to blame; and, as regards the protection during infancy, the system of concubinage effected that end more securely than a poor-law.

In Rome, concubinage did not discourage marriage as much as might be supposed, it being practised chiefly by widowers, in order not to prejudice the first family; and as for the impropriety, as we esteem it, it was not accounted so in Rome.

Indeed, it may be urged that, when so short a period as nine months is allowed for marriage (for the Romans did no more than extend the time), and the father does not marry the mother, the probabilities are that he never will do so until she be past childbearing, in order not to place the younger children in a better position than the elder.

Upon the whole then, we must admit that this is a question upon which two opinions may exist, and that the state of society, and the customs of Rome and England, are too dissimilar to make the same principle mutually applicable.

§ 675.

Bastards, in the English law, are considered, as in the Civil Law, filii nullius sive populi, and the maxim is, qui ex damnato coitu nasceuntur, inter libros non computantur.1

The bastard in England has no name but such as he may acquire by reputation; nor can he take by descent, for he has no father; nor can he have heirs but of his own body; neither has he any kindred: thus, formerly, if he died intestate and unmarried, the ordinary might seize his goods, and dispose of them in pios usus.2 But the usual course now is for some one to procure letters-patent, or like authority, from the Crown; and then the ordinary grants administration, as of course, to such appointee of the Crown.3

§ 676.

Children born during marriage may in some instances be bastards; as, if the husband be out of the kingdom of England, or, as the law somewhat vaguely phrases it, extra quatuor maria, for more than nine months, so that access to his wife cannot be presumed, her issue during that period are bastards.

Children born during marriage may also be proved bastards by other cogent evidence; as, by proof of the impotency of the husband, or that they had no opportunity, though both were within the

1 Co. Litt. 8 s, Brac. 1, 1, c. 6, § 7.  
2 Manning v. Nopp, Salk. 37.  
3 Jones v. Goodchild, 3 P. Wms. 33.
realm, of sexual intercourse within such period as is consistent with the supposition of the husband being the parent.

So children born during a divorce a mensa et thoro are bastards, conformity to the sentence being presumed; and in such a case access must be proved. In cases of a divorce in the Spiritual Court a vincula matrimonii, all the issue born even before the divorce are bastards, because such divorce is always for a cause which renders the marriage void ab initio. But, except where a divorce has taken place, or evidence of non-intercourse given, the law will presume in favor of the legitimacy of a child born during marriage.

§ 677.

Posthumous children were in certain cases considered as in esse: thus a will is avoided if posthumous children be born of whom no mention has been made, and it is sufficient for this purpose that the child live but a moment after birth; the child must, however, be born within ten months after the death of the father, for otherwise he cannot be considered legitimate.

This being considered the extreme period of gestation, a woman was forbidden to remarry within this time, as the consequences of her being infested by another husband would have created great difficulty as to the testament of the first husband, which would be ruptum by the birth of a posthumous child not mentioned therein, if such child were his, but not so, if it was begotten by the second husband. The annus lactus and its penalties, for neglecting to observe it, was therefore introduced to obviate this contingency.

Cassius and Javolinus are of opinion that even one who cannot easily have issue may have posthumous children, because they can both marry and adopt. In like manner, Labeo and Cassius assert that spadones can have posthumous children, quoniam nec atas nec sterilitas est et rei impedimento est. But Julianus denies that a cas-tratus can have such, because here the impossibility is absolute and evident; an hermaphrodite, however, can, if the male sex be the more prevalent.

A posthumous child may be one ripped from the mother’s womb, ventre exsecto; for this is equal to natural birth, scilicet si nascatur in postestate.

A general rule may be presumed with regard to children born after the husband’s decease, except such time has elapsed as makes it impossible that the child could have been begotten by him.

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1 Coke, Litt. 244 a. The law has been changed since Coke’s time.
3 7 Rep. 42; 3 P. Wms. 275; 1 Salk. 123.
4 1 Salk. 123.
5 C. 6, 29.
6 P. 29, 2, 29, pr.
7 P. 29, 2, 6.
8 P. 29, 2, 12. C. J. Cesar was never born, but ripped from his mother Aurelia’s womb after her death: Suet. in Ces. Vide et Shakespeare; Macbeth, 5, 7, 54, attributes the like to Macduff.
POSTHUMOUS CHILDREN.

§ 678.

This gives rise to a proceeding at common law, when a widow is suspected to feign herself with child in order to produce a supposititious heir to the estate,—an offence which the rigor of Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death. In this case, the heir-presumptive may have a writ de ventre inspiciendo, to examine whether she be with child or not, and if she be, to keep her under proper restraint until she be delivered, which is entirely conformable to the practice of the Civil Law, which was as follows:—

If a woman deny that she is with child, and the husband affirm it, she may be convened before the Prætor, who shall appoint the house of some discrete matron, that she may be inspected by three skillful midwives to be chosen by the Prætor, but not by the husband; when, if two of the midwives agree that she is with child, she is to be committed to such care and custody as the husband shall appoint; and on the contrary, if a woman upon the death of her husband pretend to be with child, she ought to acquaint those with it twice every month whose interests may be prejudiced by the birth, that they may also send women to inspect her, and men to guard her in a chamber, to which there is but one passage and three lights at least, that they may see when the child is born.

In England, if the widow, upon due examination, is pronounced not pregnant, the presumptive heir is admitted to the inheritance, though liable to lose it again on the birth of a child, within forty weeks from the death of the husband.

§ 679.

If a man die, and his widow marry again soon afterwards, and a child be born within such time, as in the course of nature it may be the child of either husband, it is said to be more than ordinarily legitimate; for on arriving at years of discretion it may choose which of the fathers it please. To prevent this contingency, the Civil Law ordained that no widow should marry infra annum luctus, a
rule which obtained as early as the reign of Augustus, if not of Romulus, when, however, the year appears from Ovid to have contained only ten months, and to which two more were subsequently added by Numa; the annus luctus, nevertheless, was calculated according to the old computation of ten months. Blackstone thinks this rule of Roman origin in this country, as it is found established under the Saxon and Danish governments, but is extended to twelve months.

§ 680.

As bastards have no heritable blood in them, as has been before observed, or as it is technically expressed, no blood of the first purchaser, the land, if there be no other claimant, will escheat to the lord.

There is, however, one instance in which some indulgence is shewn to bastards, namely, in the case of the bastard eigné and mulier puisné.

When a man has a bastard son, and afterwards marries the mother, by whom he has a legitimate son, called in the language of the law mulier, or according to Glauvil filius mulieratus, the woman being before marriage a concubina, and afterwards mulier.

Here the eldest son is a bastard or bastard eigné, and the younger is legitimate or mulier puisné; if, then, the father die, and the bastard eigné enter upon his land, enjoy it till his death, and die seized thereof, which would make the inheritance descendable to his issue, the mulier puisné and all other heirs, though minors, married women, or under any incapacity soever, are totally barred of their right, and the same rule applies to bastard daughters. This is first as a punishment on the mulier for his negligence, in not entering during the bastard’s life, and evicting him; and, secondly, because the Canon Law following the Civil, allowed such bastard eigné to be legitimate on the subsequent marriage of the mother, and therefore the laws of England, without admitting the principles of either the Civil or Canon Law, would not allow the person thus circumstanced, after the land had descended to his issue, to suffer, or the other party to take advantage of his own neglect. This indulgence was shown to no other kind of bastard; for if the mother were never married to the father, such bastard would have no title at all. This is the nearest approach to the practised concubinage legalized by the Civil Law.

Blackstone, following Coke, says the law will allow no man to be bastardized after his death; this is objected to be a reason not

1 Fasti, 1, 27.
3 Bl. Com. 1, 16, ad fin.
4 Sit omnis vidua sine marito duodecim mensis, L. L. Ethelr. a. d. 1008, L. L. Canut. c. 71.

5 L. 7, c. 7.
6 Litt. 339.
7 Coke, Litt. 244 a.
8 Litt. 400.
9 Coke, Litt. 244 a.
of the temporal but of the spiritual courts; somewhat similar is their principle of not granting a divorce after the death of either of the parties.

§ 681.

With regard to legitimation, there is but one way of performing this in England, namely, by Act of Parliament, which confers on him heritable rights, and integrates him as if born in wedlock; this is indeed the *restitutio natalium* of the Imperial Law.

This was done in the case of John of Gaunt's bastard children, by a statute of Richard II.

§ 682.

In Germany bastards were excluded from gilds, corporations of trade, and other colleges; illegitimacy is now remedied there by two sorts of legitimation. The *minus plena* takes away the stain, and makes the child legitimate as far as the state is concerned, and is performed by rescript, the *plena* by subsequent marriage of the parents which confers the *patria potestas* in addition, and all heritable and family rights.

The *plena* can also be given to the bastard on his application, with consent of parents; but if they dissent the *minus plena* only, for the parents must not be prejudiced against their will, nor the legitimate heirs; on the other hand, the bastard must not be excluded from offices and a position in society which does not prejudice the parents, on account of any unwillingness or vindictiveness on their part.

§ 683.

Adoption was a means by which the *patria potestas* could be acquired, and consisted in the establishment of a fictitious parentage reciprocally binding on the adoptor and adoptee. Legitimation conferred on natural children civil and *cognate* rights, adoption conferred fictitiously civil and *agnate* rights on persons strangers by blood; and the fiction was valid, because it was possible that the adoptor might be the natural father of the adoptee.

The private sacred rights inherent in Roman families, of which mention has already been made, were always jealously preserved by each succeeding generation, the more so as they formed an important ingredient in a Roman pedigree, and were inseparable from the idea of patrician descent and the existence of a *gens*.

The decemviral law, too, enjoined their preservation *sacra privata perpetua memento*, and persons were seriously blamed who allowed or caused them to be lost; but as it was not always possible to obviate this contingency, the law had recourse to a

\[1\] Inst. 16.
\[2\] § 368, h. op.
\[3\] Cic. pro Domu, 12, Clodius is repre-
fiction, the favorite expedient of all laws and lawyers. This was the more requisite as we have reason to suppose that the divorce of a barren wife, although probably not forbidden, was surrounded in earlier times by great difficulty.

Adoption may therefore have been introduced for the purpose of perpetuating sacred rights, either to prevent the too great frequency of divorce, or because divorce, on the ground of sterility, was coupled with heavy penalties.1 Another reason may be, that as there can be no satisfactory and absolute proof, that the absence of children is to be attributed wholly to the woman’s sterility; divorce and the marriage of another woman might introduce an evil without the compensating remedy. Adoption was therefore allowed as being, under all circumstances, the expedient offering the fewest points of objection, and interfering less than any other with the internal economy of families. In this point of view adoption was a justifiable fiction, and rendered expedient for the well-being of the state by its influence on the component parts.

§ 684.

That adoption was invented by the Romans, as some authors believe, is probably an error, as traces of an institution very similar may be traced in many countries. That this fiction acquired a more perfect logical development in Rome is not only possible, but highly probable, inasmuch as the private religious law of the Romans strongly favored such a system. It existed in Greece; and hence the Romans probably borrowed the idea. The Athenians termed it ἐισποιήσεως, and sometimes ποιήσεως, or θέσεως simply; hence ποιεῖν θαῖ, ἐισποιηθοῦναι, and ποιεῖν to adopt—ἐκποιεῖν is used in speaking of a mother placing her son in adoption, as she could do after the death of her husband with the consent of her son, who was then said ἐκποιηθοῦν to be adopted out as regarded the family which he left, and ἐισποιηθοῦν to be adopted in with respect to that into which he was received. The object of adoption was termed ποιήτος, ἐισποιητοῦς, or θετός, while the issue of the body was called γνήσιος.

The object of Greek adoption was said to be πρὸς εἴν παραμυθίων ἀπαλίων, for the consolation of the childless; consonantly on this principle, then, no one could adopt who had issue of his body, because he was not at liberty to prejudice their rights of succession, which, inasmuch as the adopted son would have inherited equally with the natural issue, would have been pro tanto the case. If, however, he had no male issue, he might, being of sound mind, adopt in his lifetime, or by will contingently on none being born after his death, or if born dying under age.2

If an Athenian citizen did not dispose of his property by will,

1 Vid. § 649 & 654, h. op.

2 Demosth. pro Coron. 13.
and made no valid adoption during his lifetime, the next of kin inherited; such parties were consequently interested in preventing fraudulent adoptions, and the whole community in excluding from its body one not duly qualified by law. This, too, was further surrounded by other precautions: every Athenian citizen was obliged to enter all his children, whether of his body or adopted, in the English φατρικῶν γραμματεῖον, or agnate registry, with the privity of his γενεσία and φατροποι. At a certain time, the Thargelia, the adopted son, must also be registered in his paternal demos ληξιαρχικῶν γραμματείων, without which he did not enjoy the full rights of citizenship as a member of his adopting demos.

§ 685.

In the case of adoption by testament, the same registration was necessary, which, in the instance of a minor, was performed by his guardian, or by himself if of age. This, however, could not be done so long as any dispute existed between the son so adopted by will and the next of kin, as to the property of the deceased, termed κληρον διαδικασία; but the validity of the testament once established, it followed as a natural consequence that the adoption was acknowledged to be legal.

None but Athenian citizens were eligible to adoption, although females, as well as males, could be adopted by testament at least. On adoption, the child quitted his own family and ἰδήμεν for that of his adoptive father, whose name he also assumed; and, although registered as the son of his new parent, the deed was not irrevocable; for he might return to his original family, if he left a son to represent that of his adopting father, in which case he did not forfeit, or rather he revived his natural rights on his own father, but retained in any case those on his mother; for, although the fiction was allowed to apply to the male, it was considered an anomaly to allow it to extend it to the female side, which might have involved the contradiction of supposing a birth where no mother existed. The father then was only changed, not the mother.

The general rule of Athenian adoption may be found in, or deduced from, the orations of Isæus and of Demosthenes, against Macartatius and Leochares.

From the foregoing it appears that the object, both in Greece and in Rome, was to prevent a family becoming extinct from want of male heirs.

§ 686.

Traces of adoption may, however, be found at a period far anterior to that at which Athens flourished; and as many Grecian

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1 Isæus, περὶ τοῦ Ἀπολλοδώρου κληρον, 3, 5. 2 Isæus, περὶ τοῦ ἄγιου κλήρου.
customs may be traced to Egypt, it is not impossible that adoption may also be of Egyptian origin. A case of adoption may be inferred from the Old Testament. Pharaoh's daughter is represented as adopting Moses: "And Pharaoh's daughter said unto her" (the mother of Moses), "take this child away and nurse it for me, and I will give thee thy wages. And the woman took the child and nursed it. And the child grew, and she brought him unto Pharaoh's daughter, and he became her son."

It may reasonably be inferred, from the subsequent influence of Moses in the palace, and his immunity from the vengeance of the Pharaoh, that the act of his adoption by the Pharaoh's daughter was accompanied by some legal formality, and consequently that the practice was not unknown among the Egyptians, who certainly appear to have considered Moses as one of themselves. This, too, will confute the supposition of his having been a mere *alumnus*; for he was evidently transferred to other sacred rites and mysteries, having been "skilled in all the learning of the Egyptians." Now, as we gather from modern researches that such mysteries were confined chiefly to the priesthood of Isis and Osiris, or, at least, to the priesthood exclusively of the laity, it may also be fairly inferred that he had been incorporated into one of their colleges; we, moreover, know that the king was also head of the church. Moses, then, was looked upon as a noble Egyptian, if not as one connected with the royal family; for the priesthood, as among the Jews, it appears, descended in certain families, of which the royal line was one. That Moses was looked upon as an Egyptian, we learn from the answer of the daughters of the priest of Midian to their father: "How is it that ye are come so soon to-day? And they said, An Egyptian (meaning Moses) delivered us out of the hand of the shepherds, and also drew water enough for us and watered our flock." Had the servile taint not been removed by some process of law, Moses could certainly never have obtained that knowledge and position which he undoubtedly enjoyed.

§ 687.

Adoption once introduced into Rome, it became the vehicle of two abuses: the first, the adoption of patricians into plebeian families for the purpose of securing the office of tribune, and thereby compensating for the annoyance caused to the patrician class by the great powers and frequent interference of that officer; the second, in order to profit by the advantages and escape the penalties of the Papian Poppean law,—a practice reprehended by P. Scipio. According to the provisions of this law, those who

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1 Exod. ii. 9, &c 10. 2 Exod. ii. 19. 3 Cæsius was adopted for this purpose: Suet. tit. 2; Dio. Cass. 58, p. 72; Cic. pro Domit. 13. Dolabella was also adopted into the plebeian Livian gens, Dio. Cass. 42, p. 158. 4 Dio. Cass. 56, p. 660. 5 Gell. N. A. 5, 19.
had three children were, *ceteris paribus*, preferred for honorable offices, and those who had not this number were subject to increased taxes. This abuse induced another and greater one: the requisite number of children were adopted, and straightway emancipated; which caused the passing of a *Senatus Consultum*, providing that no simulated adoption should avail in respect of public offices or burdens, *munera*.

§ 688.

Adoption was of two kinds, both of which were included under the general term *adopțio*. Adoption, in its strict sense, applied to children under power; arrogation to such as were *sui juris*: of these the latter was the more ancient form, and was so called because a law was originally required in every individual case. The *rogatio* was made in the *Comitia curiata*, inasmuch as the people had the power of regulating inheritances: hence wills were originally made in like manner in the *Comitia calata*; another reason may be, that the status of a *caput* was affected. The previous concurrence of the priesthood, or at least the co-operation of that body, was also required, inasmuch as the act involved a change in the *sacra privata* of him who changed his family. It was then the business of the priests to inquire whether the adopting father was of such an age as made it probable that he might still have issue, or, if no probability remained, whether the secundiity of the marriage was in question, and what the object of the adoption might be. In addition to this, those who were *sui juris* had to be interrogated as to their consent to become the son of the adopter, and the adopter as to whether he would accept the party as his son.

Cicero\(^1\) has preserved the formula,—*auctore esse ut in te P.*

*Fontetius vitæ necisque potestatem haberet, uti in filio?* and, on a satisfactory answer being returned, the rogation was made in solemn form in the next *Comitia curiata*,—*velitis jubeatis, quirites uti L. Valerius, L. Titio, tam jure legemque filiis tibi siet quam si ex eo patre matreque familias ejus natus esset utique ei vitæ necisque in eo potestate siet; hæc ita, uti dixi, ita vos quirites, rogo;* whereupon the *populus* having signified assent by votes, the arrogation was perfected, and the arrogated person passed into the other family as perfectly as if he had been born in it, with the rank and the privileges of his new state if he passed from a plebeian into a patrician *gens*, or the loss of some part of them if he passed from a patrician to a plebeian family.

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1 Tac. A. 15, 19; Ulp. P. 1, § 2.
2 Caes. 1, 5, 13: thinks it arose from the interrogation of the father and the adoptive son, but erroneously.
4 Cic. pro Dom. 13.
5 Gell. N. A. 5, 19; Cic. pro Dom. 10 & 13; Ulp. P. 1, 7, 15, § 2 & 3; P. 1, 7, 17, pr.
6 Gell. I. c.
7 Pro Dom. 29.
8 Gell. N. A. 5, 19.
9 Liv. 5, 12.
10 Tac. A. 5, 15; Ovid Fast. 4.
§ 689.

This arrogation before the populus obtained during the continuance of the Republic. Augustus, however, made an innovation by adopting Agrippa and Tiberius by a lex curiata in the forum. Nero's adoption, on the other hand, although performed also by a lex curiata, was doubtless confirmed by the populus. The Emperors, however, in later times, as exempt from the laws, legibus soluti, often neglected the old rites of arrogation; nevertheless the ancient rite continued to be practised among the mass of the people up to the time of Galba.

§ 690.

Heineccius gives seven arguments in proof of this practice:—

I. Roman citizens could only be arrogated, because such alone could take part in the Comitia.

II. Bachelors could not arrogate, because one of the objects of arrogation was the solatium and benefit of the childless, not for the encouragement of celibacy.

III. Men above sixty only could arrogate, because until then they might hope for issue of their own bodies.

IV. deaf and dumb persons could not arrogate, because they could not hear what passed at the Comitia or pronounce the formula, and therefore were not qualified to take part in the Comitia.

V. Women could neither have any one in their power nor participate in the solemnities of the Comitia, and therefore were denied arrogation.

VI. Pupilli could neither attend the Comitia nor be auctores; neither could peregrini, and were therefore excluded.

VII. Lastly, the Comitia curiata could only be held at Rome; consequently arrogation could only be performed there.

§ 691.

It is a question whether a spado could adopt; but it is not always exactly clear what is to be understood by the term.

Eunuchs are of three sorts,—those who have been castrated, those who have been born eunuchs, and those whom ill health has deprived of the power of generation; and it being remembered that adoption is an imitation of nature, and that a fiction is no good fiction which bears impossibility on the face of it, it results that none can adopt who was incapable of procreation at the time at which the adopturus would have been born, had he been the issue of the body of the adoptor. Caius clearly draws a distinction: he says,—Illud utriusque adoptionis commune est, quod et bi quo generare non possunt, quales sunt spadones, adoptare possunt, castrati

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ADOPTION AND ARROGATION.

autem non possunt; and Modestinus says,—Spado arrogando suum
barendem sibi asciscire potest, nec ei corporale vitium impedimento
ess. Hence it is quite clear that spado means a person who pos-
sesses the generative organs, but who may be impotent; for this
is a fact which cannot be satisfactorily proved, since the woman
may be barren; moreover, it would be difficult to prove that the
adopter was impotent eighteen years before, still more that he was
so thirty-six years previously, for this is a matter of such a private
nature as not to be easily ascertained; nor would it profit to prove
his present impotency or potency, since he might have had and lost
it, or lost it and regained it, during that time.

The question, then, appears to be one for the shades of the
Sabinian and Proculeian philosophers, or of equity versus law.
The Sabinians would have required absolute proof of potency; the
Proculeians would have adhered to the law.

Justinian decided all questions by law, which must therefore be
followed, leaving Capito and Labeo to fight it out in Hades.

§ 692.

In order to arrogate, the arrogator must be eighteen years older
than the party arrogated, or thirty-six, if arrogated as a grandson;
because, as arrogation was a mere imitation of nature, it must be
possible, to render the fiction reasonable, that the arrogator should
have been at all times old enough to be the natural father or grand-
father of the arrogated son.²

Anciently a female could not be arrogated,³ for she could legally
give no consent; nor a pupillus, for the same reason. The libertus
of another was excluded on account of the prejudice of such act
to the paternal rights;⁴ but a man could arrogate his own libertus,
who then obtained ingenuus rights, quoad the family into which he
was so arrogated, but not quoad others.⁵

§ 693.

Arrogation brought not only the person arrogated under the
paternal power, but also all such as he, as a man sui juris, might
have under his power,⁶ consequently they changed their family
and lost their agnate rights, inasmuch as they underwent a capitius
deminutio minima.⁷ The property of the arrogated followed him
into the power of the arrogator;⁸ but his liabilities were, strictly
speaking, destroyed by the capitius diminutio which he had under-
gone; nevertheless, a fiction gave their creditors a right of action

¹ P. 1, 7, 15, 40, § 2.
² Why eighteen was fixed, see Sav. Syst. des b. R. R. vol. 3, b. 2, kap. 3, § 110, p. 57; and § 361, b. op.
³ Gell. N. A. 5, 19; Gaius, 1, 101; Ulp. Fr. 8, 5.
⁴ P. 1, 7, 15, § 3; P. 37, 12, 1, § 2; P. 2, 4, 10, § 2; P. 38, 3, 49.
⁵ Gell. l. c.; C. 8, 48, 3; P. 1, 5, 27; P. 23, 2, 32.
⁶ Gaius, 1, 107; Ulp. Fr. 8, 8, 1, 11, § 11.
⁷ Paul. R. S. 3, 6, § 29; P. 4, 5, 2, § 2 & 3, pr.
⁸ Gaius, 2, 98—3, 82—3; P. 1, 7, 15, pr.
to the extent of such property. It was the business of the Pontifices to examine as to what disadvantages the arrogated person was exposed to quoad his property, especially in the case of a minor.

§ 694.

In progress of time, many changes gradually took place as to arrogation. On the cessation of the Comitia, the Emperors both granted and confirmed arrogation by rescript, which they could do the more readily, as they also themselves held the office of Pontifex maximus. Galba first neglected the old, and, it is supposed, introduced the new rite; but in the time of Antoninus Pius, arrogations were undoubtedly effected by rescript. The rule once infringed, women and papilli were allowed to be arrogated, and indeed many simultaneously. The ancient formula and solemnities now ceased any longer to be in use, until finally abrogated by Justinian.

§ 695.

These progressive changes in the form, did not fail to affect the substance also in various ways. With respect to the ownership of property, the arrogated retained it, the arrogator acquiring the usufruct thereof only, which rendered the arrangement as to debts more compatible with reason. According to a constitution of Antoninus Pius respecting the property of those arrogated, the arrogator had to give security that he would restore the property if the arrogated person, being a minor, died during his minority or was emancipated; and this extended to the case of his being disinherited or emancipated without just cause, in which event he was obliged to add to the property so returned one-fourth from his own means,—a provision preserved by Justinian, and termed the quarta Divi Pii.

§ 696.

Adoptio, stricto sensu, is the taking as own child a person not sui juris, and was performed in a different manner to arrogatio. It involved also a capitis deminutio, on account of the change of family, and was applicable to both sexes: it existed, according to the testimony of Cicero, under the Republic. Adoptio is defined to be actio solonnis quà in loco filii vel nepotis adsciscitur quà naturâ non est. Here the consent of the person who possessed the paternal authority superseded that of the party who was the object

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1 Gaius, 3, 84; 4, 38; P. 4, 5, 24, § 1.
2 Gell. 1. c.
3 P. 1, 7, 17, § 3, 4.
5 Schulting ad Ulp. Fr. 8, 25, p. 589.
6 P. 1, 7, 17.
7 P. 1, 7, 17.
8 Ulp. Fr. 8, 5.
9 P. 1, 7, 25, § 3.
10 C. 8, 47, 11, A. D. 530.
11 I. 3, 10, § 2, 5; Walter Oos. des R. R.
12 § 518.
13 Gaius, 1, 102; I. 1, 12, § 3; P. 2, 7, 18, 19, 20, 22.
14 Ulp. Fr. 8, 3, 5.
15 De Fin. 1, 71; Val. Max. 75, 7, 2; Dio. Cass. 39, p. 98.
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of an *arrogatio*. *Adoptio in specie* could be performed in three ways,—either at home, by the Quiritian law of ownership; by testament; or officially before a competent authority, *apud quem erat legis actio*.

§ 697.

The Quiritian mode was by a triple sale in the presence of the natural and adopting father, a *libripens*, *antestator*, and five Roman citizens of the age of puberty; ¹ and it was by this form that Augustus adopted Caius and Lucius.³

Heineccius⁴ mentions a mode of adoption among the barbarians, who, to render the fiction more like reality, feigned an actual parturition. Juno placing herself in bed with the child Hercules, feigned the throes of labor, and then let the child fall from under her garment.⁵ This rite obtained, up to the time of Diodorus Siculus, among the barbarians as a means of adoption, and was termed *ante genialem torum*. No trace of it is, however, found among the Romans, although the ancient Jewish patriarchs practised it, as appears from Genesis.⁶ "And she (Rachel) said, Behold my handmaid Billah; go in unto her, and she shall bear upon my knees,⁴ that I may also have children by her."⁹

There was a wide distinction between the fictitious adoption of the Romans, and that of the barbarians and Jews; the first conferred fictive *agnate*, the latter *cognate* rights.

From the antiquity of adoption in some form or other, that of minors may be presumed to be nearly coëval with the foundation of Rome, the forms varying in conformity with the principles of the Roman Law.

§ 698.

That the adoption by testament was older than the prætorian mode hereinafter referred to, is presumable. A testament was formerly made only in the *comitia calata* by a special law, the sale, *per as et libram*, being the mode of transferring the inheritance, which form was also applied in the case of the transfer of a son. The *legis actiones* were the result of the laws of the Twelve Tables; hence it may be assumed that the adoption by testament was anterior to that by action of vindication, and in this view Heineccius⁸ concurs: added to this, it appears as a Greek custom.⁹ This mode of adoption transferred the name, but not other family rights; nor was it competent to women, as they could not formerly make testaments. It did not confer the *patria potestas*, as it only came into operation after the death of the adoptor, for which reason it is hardly to be termed adoption, in the strict sense of that term, but rather *nominis*

² Suet. Aug. 64.
³ A. R. 1, 11, § 15, note, which consult.
⁵ Id. 50, 23.
⁶ "Be built by her" (Lit. Trans.).
⁷ Which see for example of this mode of adoption, A. R. 1, 11, 18, and the authorities cited there; Cïc. de Off. 3, 18.
⁸ § 683, h. op.
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hæredis institutio, for which reason we find it sometimes repeated,
per æs et libram.¹

§ 699.

The third or official mode was evidently more modern than the imaginary sale, and was performed before a magistrate—the Prætor at Rome, or the Praeses in the Provinces; and in this latter circumstance it again differed from arrogation, which could only be performed in the capital. Adoptio in specie eorum est qui sunt in potestate habet apud quem est legis actio.

According to this fiction, the adopting father by a fictitious action vindicated his right to the child—that is, asserted that the child was his before the praetor;³ and the defendant (natural father) suffering judgment by default, the plaintiff obtained the child. This mode was applicable equally to those of full age and minors of either sex.⁵ Its antiquity is evident by its form, but the exact date of its introduction cannot be ascertained: it was probably by far less frequent than the former method, and perhaps employed only where the transfer per æs et libram was fraught with inconvenience.

The first species definitively transferred the Quiritan ownership; the second premised it to have been transferred, and put the law into operation, although fictitiously, to enforce an existing right.

Thus, when the statute of mortmain prohibited ecclesiastical corporations to purchase more real property, the Church evaded it by bringing an action of ejectment against a freeholder as tenant, with whom an arrangement had been previously come to that he should confess judgment; the land was then adjudged to the plaintiffs in virtue of a supposititious title existing before the tenant was seised. A writ of intrusion between the crown and a tenant is founded on a like, and the more reasonable fiction, that the crown possesses all lands, or the particular parcel in question, and that the tenant is an intruder; nor is this barred by any limitation (save special act), upon the axiom that nullum tempus occurrat regi vel ecclesiæ.

The necessity of this mode of asserting a title to a son by fictitious action might arise in various ways. In the first place, it dispenses with the presence of the natural father, who might be prevented from attending; secondly, it was defeasible by an action of restitution within a given time, and thus gave an opportunity to the parties to see if they were pleased with the adoption; thirdly, it probably did not reserve any rights to the adopted person; but it would hardly be a question, if by the fiction the person adopted could obtain the capacity to marry within the prohibited degrees, that is, with his natural consanguinei.

² Gall. 5, 19; Gaius, 1, 134; Suet. Oct. 64.
³ Gaius, 1, 98-102; Ulp. Fr. 8, 4, 5.
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Although we are not, at this remote period, aware of the advantages of this system, it is sufficiently clear from the whole tenor of the Roman legal system that many may have existed.

§ 700.

Justinian introduced divers modifications, and reduced the mode of adoption to our simple form, by declaration protocolled before a competent magistrate.\(^1\)

§ 701.

Both arrogation and adoption, according to the ancient law, operated the paternal power, the fictitious sale, and vindication, comprised all rights of family, nomen, gens, and sacra, but lawyers contend that although it conferred agnate, it did not confer cognate rights (which the barbarian and Jewish fiction appears to have done); for the adopted might have been begotten by the adoptor, but could not have been borne by the adoptor’s wife; for if he had married a widow with issue, the conventio in manum would have rendered the adoption unnecessary; moreover, the son would have been sui juris, and therefore arrogation would have been necessary, or he would have been under the power of the grand-father, if his father had not been emancipated; if the wife had been divorced, the son would have followed his natural father. By the adoption, then, of such a child, only cognate rights would have also accrued to him; for agnate rights arose from a civil, but cognate rights from a blood relationship, as has been before stated.

By testament, however, we have seen that this was not the case; the name alone was transferred, but with no other rights than those of a common testamentary heir, unless, indeed, further rights had been secured by one of the two before mentioned forms. This might be a question for discussion, but for the fact of the patria potestas never having been acquired by the deceased.

§ 702.

Something similar to this is to be found in England, and which is probably the only parallel to the Roman law,—when a person leaves his property to another, on condition that he assume his name and arms, for which latter\(^2\) a royal license (confirmatio principis) must be obtained in confirmation; here, if the arms and mansion be admitted to represent the sacra familia, the English mode goes farther than the Roman. Again, when a stranger marries an heiress (that is, a daughter who has no brothers), and assumes her name, he becomes agnate of her family and head of that branch;\(^3\) but if several marry co-heiresses and assume the

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1 C. 8, 48, 11.
2 Common notoriety is sufficient to confer a new name upon a person, without any legal form, by mere use.
3 Mr. Ludovic Grant married Anne Colquhoun, only daughter of the chief of the clan, and assumed the name and lands. Miss Colquhoun of Kellermont married Mr. Campbell, who assumed the name and lands.
name, the headship of the family is in abeyance, until the lines of all the sisters are extinct, or without male heirs but one, who then assumes it; thus there being no majority among daughters.

A, B, C are three sisters, heiresses, who marry, and whose husbands assume their names; on A dying without issue, and C terminating in a female, B becomes head of the family.

In England, titles of peerage pass in through females if they be by writ, for such are to heirs general, omnibus hæreditibus quibuscunque; but by patent they are restricted to males, omnibus hæreditibus quibuscunque masculis, which lets in all agnate relations of the deceased, the nearest offset ascending the right line: for it is not considered who is nearest to the first purchaser, for such doubtless must have most of his blood, but probably on account of the difficulty with which the research and proof would be surrounded, who is nearest to the last seised.

Thus, let A be the ancestor or first purchaser, whose direct descendent is B, a female; the line is then to be ascended to C; but it is found that C's descendent d died sine prole, whereupon the line is again ascended to D; but it turns out that d, his descendent, is a female; it therefore becomes necessary to ascend another step to E, whose descendent r will take the title.

Patents of nobility are now, however, usually limited to the heirs of the body, or, with a special remainder for that once only, to a collateral or a female; but in none of these cases can a testator will his honors to whom he may choose, although he may unenteled land, since the honor flows from the Crown, not from himself. In Scotland, too, although the Crown might divert the course of the title, or admit females, it could not interfere with the blood-relationship of the clans: thus, though the land and

1 Sinclair's peerage case.
feodal title might pass through a woman to her husband thus adopted into the family, or by the will of her father, the chief-tainship would be severed and seek an owner in the male line.\footnote{As in the case of Sir James Colquhoun (Grant) of Colquhoun and Luss, who married the heiress of the chief, and obtained the land, while the chieftainship following the male collateral line vested in Sir Robert of Colquhoun, (Tillyquhoun), and on his death, sine prole, in Robert of Colquhoun and Camstradden.} This is the reverse of the Roman law, where agnate rights could be passed, but not cognate.

§ 703.

Justinian not only altered the form of adoption, but also the effects of it, dividing it into two sorts, which have been severally termed \textit{plena} and \textit{minus plena}. The first applied to the adoption in the cognate right line ascending, as when a grand or great-grandson is adopted by his maternal grand or great-grandfather; the second, to the adoption by a stranger; and to each of these a different intrinsic value and operation were annexed, for, in the first case, nature concurs more nearly in the adoption than in the second.

§ 704.

In the case of the \textit{adoption plena}, the operation was as perfect as with natural issue, and the connection with the natural father was wholly suspended so long as the adoption lasted, and the adopted inherited of his adoptive father alone as an agnate to inheritances, \textit{ab intestato}.

Justinian somewhat confusedly relates the reason of this change, and Weber\footnote{Höpf. Com. § 149, n. 1.} remarks that all descendents have not, as a matter of course, the paternal power over their descendents; the latter had not, before Justinian's order of succession, full heritable rights as such. This, then, was the reason of an ascendent often formally adopting the descendent of his body. Whether according to the Novels,\footnote{Höpf. Com. § 118.} which admit cognate as well as agnate succession, all claims be extinguished when an ascendent adopts his descendent, is a matter of grave doubt, for the adopted child remains still a cognate of his natural father despite the adoption.

In any case, emancipation revived his claims on his natural father.

§ 705.

In the case of the \textit{adoption minus plena}, which was by an \textit{extra-neus}, or stranger in blood, or any not an ascendent, the child retained all its claims on its natural father, and remained under his power in \textit{sacris patris naturalis}, from whom he inherited \textit{ab intestato}, and could not be passed over in his testament, or disinherited without good cause.

As far as regarded his adoptive father, he acquired only the right of inheritance as \textit{suis heres ab intestato}. We have seen that he...
was not under the power of his adoptive father, for he could not be under the power of two at once; that he retained his family, being a stranger in respect of the family into which he was adopted sui heredes jus ad ejus (patris adoptivi) successioem, non etiam legi-
tima jura ad familiam extranei patris adoptivi habebat, nec ipse ad
eum communioneam aliquam habeat sed quasi extraneus ita ad illam
familiam iunviatur. Hence, we presume, that he did not succeed
ab intestato to the relations of the adoptive father, and that the
adoptive father did not inherit of such child.

This has been attacked by many commentators, as an anomalous
absurdity and glaring inconsistency, 1 destitute of legislatorial
perception, and confounding the doctrine of adoption. 2

An adoptive father has no paternal power, and can, nevertheless,
emancipate; the child shall not come under his power, and yet
can be a suus hæres of his adopted father. Bellonus 3 calls it a
legal miracle, — per miraculum hoc contingit, nam et alias solet lex
miraculose operari. Others 4 assert, say Justinian what he may,
the pater adoptivus extraneus does, in fact, obtain the paternal
power.

§ 706. An arrangement, resembling in some measure adoption, exists in
Germany, under the name of Einkindschaft; it is, however, in
fact, a contract of inheritance, and as such void according to the
Roman Law. 5 Those German jurists, however, who endeavor
to reconcile everything to Roman legal principles, have assimilated
it to adoption, inasmuch as it would be otherwise irreconcilable
with the Roman Law: and such is the point of view in which it
was considered by the oldest statutes. 6

When parents die leaving issue by various marriages, a dispute
occasionally arises as to the division of the property, e.g.

A marries B, and dies, leaving issue a; C marries D,
who dies, leaving issue d e f; B then marries C, and has
issue b c. On B's death, her property must be separated
from that of A C D; for a in-
herts of A only, a b c inherit of
B, and b c d e f of C, and d e f
inhere the property of D. This separation is usually fraught with
difficulty, to avoid which the Einkindschaft was invented. When

1 Thomasi, Diss. de Usufruct. Tit. Inst.
de Adopt. cap. 1, § 26; in Collect. Dissert.
Tom. 3, p. 856 sq.
2 Gründling, h. t.
3 Supputation, lib. 2, cap. 3 (Novar. De-
4 Wissenbach, Dapr. ad Pand. 4, § 31.
5 Mathai, Com. ad Inst. p. 1, § 2; Best,
vol. 1 part 3, p. 221; see, however, Franken
Ex. 2, Qu. 10; Thomasi in Diss. 1. c. 3;
Feltmann, Tripert. Tit. de Adopt. § 25
Ruttmann, Miscell. Libr. Sing. cap. 9.
6 C. 2, 3, 30.
6 Wilhelm Gottl. Tassinger über die
Lehre der Einkindschaft Nürnberg. 1785, 8.
ADOPTION—MOHAMMEDAN.

B and C marry, the estate of A and D is first examined and determined; this accrues to their children a d e f. B and C then contract that their property shall be cast into one fund, and that their respective stepchildren shall succeed with the issue of their bodies; a inherits of C, and d e f of B. In some places this operates the paternal power, in others, however, not. It is generally a necessary ingredient in the Einkindschaft, that it be done before the court with co-operation of the relations; but this is only strictly necessary when the law of the land or custom require it.¹

The Latin term for this Einkindschaft is unio seu parification pro-

lium.

§ 707.

With respect to the question of the position in which adopted children stand to their adopting parents, it was the custom among the Arabians, before the age of Mohammed, to consider their adopted children to be as nearly related to them as their natural issue, so that the same impediments of marriage arose from the fictitious relationship as to prohibited degrees, as would have done in the case of issue of the body.

The principal Christian commentators state Mohammed to have had a particular reason for abolishing fictitious cognition—namely, in order to marry the divorced wife of his freedman Zaeed, who was also his adopted son; wherefore we find the following revelation² in the Koran: “God hath not given a man two hearts within him;³ neither hath he made your wives (some of whom ye divorce, regarding them afterwards as your mothers) your true mothers; nor hath he made your adopted sons your true sons. This is your saying in your mouths; but God speaketh the truth, and he directeth the right way. Call such as are adopted the sons of their natural fathers; this will be more just in the sight of God. And if ye know not their fathers, let them be as your brethren in religion, and your companions; and it shall be no crime in you that ye err in this matter, but that shall be criminal which your hearts pur-

posely design.”

Before the age of Mohammed, then, it would appear that the cognate as well as the agnate rights were by the Arabians attributed to adopted children,—that is to say, consanguinity,—and that this was general among the Arabian nations, resulting from this mode of adoption by a feigned parturition.⁴

Mohammed, in correcting the error, adopted the principle of the Roman Law, which had extended in his age over the face of the habitable globe. That he was glad of so valid a precedent to change the law is possible; nevertheless, we have no right to

¹ Steenhof. Diss. de praxi judiciorum erronea, § 20.
² Sura, 33, Sale's Translation.
³ By two hearts is meant that a man can-
not have the same affection for supposed parents, or adopted children, as for those who are really so.
⁴ § 684, ib. op.
attribute to so great a lawgiver as Mohammed a corrupt motive for a reasonable act.

§ 708.
Adoption is often mentioned in the New Testament; the Gentile as well as the Jewish converts being denominated adopted Christians. Paul uses the expression, ἔνα τιν υιοθεσίαν ἀπολάβωμεν and ὅτε δικ ζει δι θεού ἀλλά ὑδε αὐτὸν καὶ κληρόνομος Θεοί. Here υός καὶ κληρόνομος, son and heir, is an evident allusion to the adoption for hereditary purposes by the Romans; nor is this to be wondered at, as Paul was a learned man and a metaphysician: at the same time the whole is merely metaphorical, and as we have perfect information of the state of the law of adoption at this period, it is at the best of next to no value, and an excuse must be made for inserting in this place a mere literary irrelevancy and curiosity of corrupt Greek.

§ 709.
The capitis diminutio maxima dissolves the paternal power, for such are civiliter mortui. Those who are made prisoners by the enemy, and such as are in absolute slavery, lose all civil rights, even those of agnation, although they may be revived by the jus pastilimini. It was not permitted to put a Roman citizen to death, and therefore, in order to evade this rule, he was first reduced to the condition of a slave. The interdictio ignis et aquae, deportatio, servi pæna, which consisted in condemnation to death, fire, the mines, and the beasts, on account of atrocious crimes; in short, all capital sentences had this operation. Such persons, however, could be reinstated by an act of grace, which revived all their former rights. This applies to either father or son. Justinian abolished the servorum pæna.

§ 710.
The capitis diminutio media, as involving a loss of citizenship on the part of the father, dissolved the paternal power; for none but a citizen could have a citizen under his power—neque peregrinus cives Romanum, neque civis Romanus peregrinus in potestate habere potest: an exile was incapable of exercising the paternal rights. Thus, too, if a son experienced a loss of citizenship by exile or otherwise, he was civiliter mortuus, and came under the dominion of a master as a slave, whereby the paternal rights were extinguished.

With respect to relegation, the case was different; for relegation

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2 Ephes. i. 5.
3 Cic. Top. 8; I. 11, 12, § 5.
4 P. 4, 19, 29; P. 28, 3, 6, § 6.
5 Paul. R. S. 4, 3, 24; A. Schult. ad Gaium. 1, § 1, p. 47.
6 Nov. 22, 8.
7 Ulp. Fr. 10, § 3.
did not involve a loss of citizenship; it was simply an obligation to leave home, and the son was bound to follow the father, *relegati autem patres in insulam, in potestate sua liberis retinient.*

§ 711.

The *minima capitis diminutio,* a change of family, and consequently adoption, dissolved the paternal power. Generally speaking, a parent could mancipate his child, and by so doing deprive him of the rights of agnation; this law, however, underwent a change by Justinian, who rendered the consent of the child necessary to adoption. Arrogation was a species of mancipation, so far as it dissolved the *patricia potestas,* although it only affected the children by transfer of the power, by the natural to the arrogating father. As regarded the natural father, there resulted to him total loss of the paternal power, on its vesting in other hands.

§ 712.

The chief means by which the father was divested of his power was *Emancipation,* sometimes erroneously termed *Manumission,* which must be *express,* although some have endeavoured to prove it may be implied, as it notoriously might be in the case of slaves. Hence, we may assume that emancipation must be express and in solemn form. In its nature it was triple. The old (*vetus*), the Anastasian (*legitima Anastasiana*), and Justinian (*Justiniana*) mode.

§ 713.

The *vetus* was solemnly performed before a magistrate of competent jurisdiction, *qui habebat legis actionem,* and was an *actus legissim.* The basis of this transaction was a contract termed *fiducia,* and as the law of the Twelve Tables, concurring with that of Romulus, provided, that on a son being sold three times and emancipated, he should be free, this mode of emancipation by three *venditiones imaginariae* and subsequent emancipation, was considered the most simple and effective. The fiction was thus conducted between the parties, who consisted of the *Pater naturalis* as vendor, the *Pater fiduciarius* as purchaser, the *Filius familias* as object of the sale, a *libripens* to verify the sale, an *Atestatus* to summon the witnesses, who were *quinque cives Romanae pateres;* consequently ten persons at least were required for this transaction. In all the older solemnities of the Roman Law, we find a great number of witnesses and parties required, which doubtless arose from all transactions being oral and dependent when called in ques-
tion on the verbal evidence of such persons. This will be proved by the subsequent alterations which took place in this very proceeding. The contract was then one of trust, and although certainly founded on the indubitable right of the father to sell his son three times, was, for the purpose of emancipation, purely fictitious. A *Filius familias* being quiritian property was capable of transfer by sale, and was sold to the fiduciary father twice, the third time, instead of emancipating him, he agreed to sell him back to the natural father, who emancipated him forthwith, and thus kept the patronal rights,\(^1\) which would otherwise have accrued to the fiduciary father, excluding the natural father from the *successio ab intestato*.

The solemnity was conducted by the *Autestatus* formally summoning the five witnesses, *aurium tactionibus*, termed in Greek *αὐτών ἐκπώδεσις*, adding, *memento quod et mihi in illā causā testis eris*;\(^2\) hence, too, the term *icit autestari*? (may I call you as a witness?) The natural father, then, taking his son, addressed the fiduciary father, *manculos tibi bunc filium qui meus est*; who, receiving the son, rejoined, *bunc ego hominem ex jure quiritium meus esse ait, isque mihi emptus est hoc aere aeneāque librat*, striking the balance or steelyard with a sesterce (*sestertium numum*), which he gave to the natural father to represent a price.

The son thus emancipated relapsed into the father’s power,\(^3\) and the same form was a second time repeated; the third time, however, the fiduciary clause was added in the following form of words,—*ego vero bunc filium meum tibi manculp ed conditio, ut sum mihi remanimpese, ut inter bonos bene agier oportet, ne propert te usumque fides fraudere*.* Hereupon the fiduciary father took the money, and, instead of emancipating the son, immediately sold him back to the natural father (*remanimpesh*), who emancipated him in the old form,—*bunc hominem liberum esse volo more quirium*, adding the *vindicta*, or blow on the face, *μεθ' ὑβρίσσω καὶ βαπτισμάτων*,\(^4\) as indeed the father in trust had already done twice. By the expedient of selling him back to the father, instead of emancipating him, the natural father got possession of him, not by lapse as before, but by purchase as a slave, and therefore retained patronal rights.

These three mancippations might be performed all on the same day before the same witnesses, or on the same day before different witnesses, or on different days before the same or different witnesses.\(^5\) The son was then *sui juris*, and the *jus patronatūs* took the place of the *patria potestas*, now fully dissolved.

It has been already remarked that, in the case of a daughter or

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1. Caio Inst. 1, 6, pm. 59.
2. Hor. Ser. 1, 9, 76.
5. Nov. 81, præf.
Dissolution of the Patria Potestas.

Grandson, the last sale and re-sale, mancipatio and remancipatio, were alone necessary; and in the case of a daughter’s marriage, the co-emptio formed a part of the marriage rite, but no emancipation followed: hence it may be deduced that, if the husband of a married woman died, she became sui juris, as far as that was legally possible,—the patria potestas vested in him being annihilated by the death.

§ 714.

The cumbersomeness of this form, at a period when the reality upon which it was founded had become obsolete, induced the Emperor Anastasius to allow it to be performed by imperial rescript, obtained upon petition, and delivered to the competent authority, and registered in the court; but it does not appear that this abolished the old form, but simply left it to the discretion of the emancipator to use which he might prefer.

§ 715.

Justinian, however, finally abolished the emancipation per as et libram, and, in effect, superseded the later Anastasian mode, by permitting fathers to go before any magistrate of competent jurisdiction, and declare, with consent of the son, that he released him from his subjection. Harmenopulus has preserved the formula,—Hunc sui juris esse patior meaque manu mitto. Heineccius very justly remarks, that the term Emancipatio can properly be applied to neither of the last: Enfranchisement is the correct term in English.

§ 716.

Lastly, the paternal power was extinguished quoad the father by adoption, though not quoad the son. The son passed into another family, gens, and adopted other sacred rites, sacra; indeed, this was the effect of one emancipation by the father, whereby he dispossessed himself of the quiritian property in his son; in other words, transferred the patria potestas to another, and thus extinguished it as far as he himself was concerned.

§ 717.

In ancient times, no office of dignity dissolved the paternal authority, except in the case of the Flamines Diales and Virgines Vestales, who were, by virtue of those Dignitates sacerdotalis, exempt from the paternal power. It is, therefore, to be inquired, why this was effected, and how? A ready parallel, if not an imitation, suggests itself in the rights of the Catholic Church, which contends that all priests, monks, and nuns are emancipated to the church, who, its enemies have maliciously suggested, is thus fictively placed in the position of a hermaphrodite polygamist.

1 Gaius l. c. Ulp. Fr. 10, 1. 2 Promt. 1, 17, 8. 3 C. 8, 49, 5. 4 C. 8, 49, 6. 5 C. 6, l. c. 6 Dion. Hal. 2, 96. 7 Ulp. Fr. 10, 5; Gell. N. A. 1, 12.
The Priests of Jove and the Priestesses of Vesta were then
mancipated to those deities, and the paternal rights passed to them;
but as they were not in a position to exercise them practically,
these priests and priestesses were de facto sui juris, though not
de jure, or the paternal power was exercised by the chief priests
(pontifices), qui eos (eas) manu capiebant; this involved a capitis
diminutio, which dissolved the paternal power. The Vestals are
the first nuns on classical record; but the Flamines were not bound
to celibacy,—a system restricted by a Senatus Consultum in the
time of Tiberius.  

The fictive reason of this was, that it was not compatible with
the supremacy of the Deity that any other than His especial ser-
vants should possess a jurisdiction over His ministers. The real
reason, that the pontifices did not choose that it should be in the
power of any one to interfere, directly or indirectly, with their
office, or obtain, by virtue of such a right, an insight into the
jugglery of their trade. There can exist little doubt that, ac-
cording to the principle of the age, this object was effected by
a formal mancipation to the pontifex, as trustee for the Deity, and
not impliedly.

In the Christian times, Bishops, upon the same principle, were
free from the paternal power.

§ 718.

Constantine the Great invented the Patriciat, a dignity corre-
sponding with that of Privy Counsellor, which, in the Middle Ages,
was applied to the City of Rome under the Papal dynasty, and
first transferred to Pepin by the Pope, in reward for the assistance
he afforded him against Aistulfus, king of the Lombards, in
which sense it appears to have been equivalent to a Protectorate.
The Patriciatus was not synonymous with the old patrician dignity,
which corresponded to the term Nobles, as distinguished from
Commoners.

Octavianus, Gentilius, and Curtius give a lengthened description
of the Patriciatum, Bishops, the Consulate, and the praetorian
Prefecture, by which latter term Augustus denominated the office
of general of the Praetorian guard. Constantine named four such
as viceroys of the Empire. The governors of the cities of Rome
and Constantinople were denominated Prefecti urbis, and their
jurisdiction extended 100 miles round the city. Constantine also
introduced the magisterium militum and patrocinium fisci,—respec-
tively Fieldmarshal-in-chief and Attorney-general of the Revenue.

1 Cell. 1, 12; Dion. Hal. 3, 68; Liv. 27, 2; Jac. Gothfr. de Vel. Jur. Pont. 1, 32; Seilburgus.
2 Tac. A. 4, 16.
3 § 108 & 130, b. op.
6 Compare I. 1, 12, § 4; Nov. 81, 1; C. 11, 13, 2.
Dissolution of the Patrim Potestas.

Justinian decreed that the possession of all these offices should constitute a release from the paternal power, to which he added the office of Decurion. 1

§ 739.

There were, furthermore, cases in which the father lost and the child forfeited his paternal rights and claims by way of punishment. Children could not be emancipated against their will; consent being necessary to a capitis deminutio, or to the loss of any right which was involved in the emancipation of a suus bares. Adopted children 2 formed an exception, and natural children, 3 when guilty of some grave crime involving the punishment of exhereditation.

A father who attempted to force his daughter to prostitute herself, exposed his children, or proposed to enter into a second and incestuous marriage, lost his rights ipso facto.

There were three cases in which a father could be compelled to emancipate: For cruelty; when he accepted a legacy to his child to which the condition was annexed that he should emancipate him; in the case of the arrogation of a minor, who, when major, is dissatisfied with the arrogation.

§ 720.

The extinction of the paternal power over adopted children does not permit the adoptive father to marry his emancipated adopted daughter, although this may be allowed by rescript, for, where no consanguinity opposes, a minor who has been arrogated and emancipated without sufficient cause can claim a fourth of the arrogating father's property.

In the case of natural children, the father retains half the usufruct of his adventitia during his life, if the child be emancipated with the father's consent.

By emancipation according to any of the three forms, the father retains his patronal rights, consequently those of succession, as in the case of a Libertus; but if the patria potestas be dissolved by a capitis deminutio, the father or son loses it, for a heritage cannot pass from or to a slave. The real foundation of the principle is, however, the loss of citizenship. Consenting to the adoption of a son forfeits the paternal rights, and consequently those of succession. If an ascendant adopt, the adoptive and natural father succeed jointly. 4

Children plenarily adopted lose, according to the Codex, their right of succession to their natural father entirely, but, according to the Novels, 5 this law is not so clear. Children lose their rights as sui bares on emancipation in the old form, or when the father

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1 Nov. 81.
2 C. 8, 48, 10, pr.
3 I. 2, 11, § 3.
4 Compare Nov. 118, Hopfner Com. § 161, ad fin.
5 § 118.
loses his paternal rights by way of punishment. The *sua hæreditas*
might, however, be retained by application to the Emperor under
the Anastasian method;¹ but, according to the Novels,² although
they lost it *ipso jure*, they might recover it by serving themselves
heirs to the father. No rights of succession were infringed, as far
as the children were concerned, by the *ipso jure* loss of the paternal
power, by the elevation of the child to a *dignitas* involving such
dissolution.³

¹ C. 6, 58, 11. ² Nov. 81, 2. ³ Id.
TITLE V.

Tutorship—The Objects and Kinds of Tutorships—Pupilla or Wards—Nonage—Tutorship as regulated by Law—Curatorship—The Objects of Curatorship—the Warranty of Tutors and Curators—The Caution Fidejussoria—Recourse against Tutors and Curators—The Removal of Tutors and Curators—The Exemption against Tutors and Curators—The Dissolution of Curatorships.

§ 721.

In respect of family, persons were either their own masters, sui juris; or they were not so, alieni juris: and of this latter genus there were two species,—Servi and Filisfamilias, which have been already treated of. Those who were sui juris or patres familias were either sub tutelâ, sub Curatelâ, or neutro jure tenuti. The wards of Tutores were termed Pupilli—those of Curatores, Minores. But no distinction of this sort is recognised by the English Law. The rule by which these two categories (distinct though they be) is governed, is occasionally applicable indiscriminately to both.

§ 722.

Tutela, derived from tueor, is defined in the Institutes, according to Servius Sulpicius, to be vis et potestas in capite libero, ad tuendum eum, qui propter atatem suâ sponte se defendere nequit jure civili data et permissa,¹ a definition which has been the subject of much controversy as to whether in capite libero refers to the tutor or to the pupillus.

Against the opinion of those who uphold the grammatical construction, it is urged that cases of a similar ablative construction are to be found in the passages, pecunia in usu aliquo accepta,⁶ and in hostium potestate⁵ venire.

§ 723.

Tutela was in its nature triple—testamentaria, legitima, and dativa. The first by last will; the second, failing such testamentary deposition, by the operation of the law; and the third, under certain circumstances, by the office of the judge. A fourth, termed cessititia, mentioned by Ulpian, alludes to a transfer of the

¹ L. 1, 13, 8. ³ P. 48, 13, 4; § 4. ³ P. 28, 3, 12.
³ 1
legitima from one relation to another. The Claudian law dis-
allowed this, permitting it to continue only in the case of women;
and it was extinguished with the tutela muliebris. More modern
jurists have fancied a fifth sort, termed pactitia, because in the
exemptions of tutors it is laid down that a tutor who has promised
the father to forego a legitimate exemption,¹ is bound by such
promise. These passages presuppose such tutor to have been
testamentary or legal. The ground of the tutorship, then, was a
testament or agnation, and the contract having waived the ex-
emption, the one or the other revived: pactitia was then hardly a
separate species of tutela.

§ 724.

As tutorship was a munus publicum, all could be tutors who
were capable of holding public office. A filius familiaris, although
with respect to his own family he was subjected to a peculiar
domestic jurisdiction, could as a freeman exercise all the privileges
of a citizen. A slave, on the other hand, or a stranger, was dis-
qualified from want of citizenship, and, as a woman was generally
incapable of public office, neither could she exercise this one.²
The mother and grandmother were admitted at a later period; and
although they had no exclusive right, they had a precedence over
other relations, for it was considered that their natural affection
made up for other disadvantages of their sex. They were, how-
ever, required to remain widows, for the right of education was
lost by second coverture, and to renounce the benefit of the Senatus
Consultum Velleianum, which rendered the security of women void.
This was the more necessary, as great advantages were occasionally
acquired by the tutor giving security for his pupil in business.

§ 725.

The duties of a tutor were to administer the pupill’s property,
advancing proper sums for his education, food, and clothing; but
he was not called upon in any way to educate him, a point upon
which the authority decided in case of need.³

His administration was based upon an inventory⁴ to be made
for the purpose, respecting which and the investment of his money
there are many ordinances;⁵ but, upon the whole, the tutor pos-
sessed a very free discretion, with, according to the old law, a
power of alienation whenever he should think it advisable. In
the Imperial period, however, the tutor’s freedom of action began
to be limited. A Senatus Consultum under Severus prevented his
alienating landed property, and a constitution of Constantine
restricted him to the most pressing cases, and then only with con-

¹ I. 3, 25, § 9; P. 27, 2, 15, § 1.
² Nov. 116, 5.
³ P. 27, 2, 1-4; C. 5, 49, 1, 2; Nov.
22, 38.
⁴ P. 26, 7, 7, pr. & 57.
⁵ P. 26, 7, 5, pr.; Id. 7 & 15; C. Th.
3, 19, 4; C. 6, 37; 24; C. 5, 51, 13; Nov. 72, 6, 7, 8.
sent of the magistrate. Justinian was the first to require the interference of the magistrate in the making of payments.

According to the English law, the legal custody of the person of the minor belongs in general to the guardian, who, if the child be detained from him, may sue out a writ of *Habeas Corpus*, addressed either to the Court of Chancery, or any superior Court of Common law, to have his ward brought before the Court, and if of tender age delivered over to him; and where the father is guardian, he was, till the late statute, entitled to this remedy even as against the mother, who always was preferred, in cases of illegitimate children, to the putative father. A child, however, of sufficiently mature understanding to exercise a sound choice on the subject, will be allowed to leave the Court in freedom to make its election. The Court of Chancery will always protect an infant of whatever age, if possessed of property of any kind so as to fall within its jurisdiction, against even a parent being guardian who shows himself grossly unfit to exercise that office. The Roman law required the appointment of *tutors* even to those who had no property.

The second part of his duty consisted in interposition, which applied to all juristical acts which the legal formalities of the Romans required should be done in person by the pupill, who pronounced the necessary words, while the tutor stood by and conferred operative power on such acts of the pupill. It was of course presumed that the pupill could so far comprehend as to pronounce the necessary words, although it was simply requisite that he should be aware that he was performing a solemn act, without it being necessary that he should understand it in all its bearings; for in such case it follows, as a matter of course, that a tutor would have been superfluous. It was not, however, considered that he could have sufficient understanding to comprehend even that he was engaged in a solemn transaction, when under seven years, which, according to the old law, gave rise to many grave difficulties in cases where the infant co-operation was required to satisfy the legal formalities which the tutor could not fulfil for him, and the inability to perform which damned the interests of the pupill.

The acquisition of an heritage, for instance, differed from other acquisitions in being a purely personal transaction; nor could a slave at any time acquire for his master an inheritance falling to him, instead of passing by mancipation or stipulation; neither could it be effected by agents being freemen, even long after the principle had been admitted as to other species of acquisitions. Hence, as neither a slave, the tutor, a third party for him, nor the infant himself, could acquire the inheritance, this most important

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1 P. 27, 9, 13, § 4, 5, 6; Id. 14, 5, pr. 2 and 3 Vic. c. 54; vide § 405, h. op. for Roman law.

2 Theophil. 2, § 2; C. 5, 37, 25.

3 Theophil. 2, § 2; C. 5, 37, 25.
of all acquisitions must have been foregone from a mere respect for old forms.

Infants under power were exposed to the same inconvenience. According to the old law of agnation, no heritage could fall to a filius familiaris, inasmuch as the father was always one degree nearer the intestate deceased in the descending line: it was therefore only possible in the case of a testament, and it cannot be supposed that the institution by a stranger was a matter of frequent occurrence—the less so as every purpose would have been answered by instituting the father heir. The question, however, became important after the passing of the Senatus Consultum Orphitiam and the new imperial laws, and it then became necessary to devise means of meeting the difficulty. One of these was, in the case of infants, to cause them to do some act of administration (gerendo), which the tutor at once confirmed; and, in the case of those beyond the age of infancy, by nuda voluntas or cernendo.

The imperial laws cut the knot by allowing the tutor to accept for the infant or impubes, or the father, if still under power; and the clever expedients of Paulus only remain in the Digest as a monument of legal acuteness.

§ 726.

Tutors were of three descriptions,—Gerentes, or those who actually administered (acting guardians); Honorarii, who exercised a mere superintendence; and Notitiae causa dat. bound to assist the others with their advice. Ulpian says of honorary tutors, Nec quisquam putet, ad hoc periculum nullum redundare. Constat enim quoque excusis prius facultatibus ejus, qui gesserit, convenire oportere. Dati enim sunt quasi observatores actus et custodes imputaturque eis quandoque, cur, si male eum conversari videbant, spectum eum non fecerant. Assidue igitur et rationem ab eo exigere eos oportet, et sollicite curare, qualler conversetur, et si pecunia sit, quae deponi possit, curare, ut deponatur ad praediorum comparationem.

The honorary tutor must then denounce careless tutors to the authority, although he ought not generally to interfere with the active administration; nevertheless, one law at least makes a transaction concluded under his authority valid. Payments made under authority will be as binding as if made under that of the acting tutor, so long as he be not precluded from administration by any testamentary or judicial prohibition; he must, moreover, be confirmed.

1 Gaius, 2, § 167.
2 P. 36, 1, 65, § 3.
4 P. 26, 7, 3, § 2; P. 26, 2, 32, § 2.
5 P. 46, 14, § 1, 6; P. 26, 7, pr. § 1; C. 5, 28, 1.
6 P. 26, 7, 3, § 2.
7 P. 26, 7, 46, § 6; 27, 3, 1, § 15.
8 P. 26, 7, 3, § 1.
9 P. 26, 8, 4.
9 P. 46, 3, 14, § 1; P. 26, 8, 4.
§ 727. No tutor could appoint a deputy; for the office of the tutor consisted in the performance of actus legiti mi, which was ruled by three requisites:—1. Non admittunt procuratorem; 2. Non recip iunt diem; 3. Aut conditionem.

Höpfner, in his treatise on this subject, endeavours to prove that actio legis and actus legitimus were synonymous terms; but, though his arguments are plausible, it may still be doubted whether his view be correct.

The generally received opinion being that certain solemn and formal acts came under this head, and that such were the fictitious sale of a son, an heritage, or the like, per as et libram, the auctoritas tutoris, etc.

In the present case one may be tutor of his own wrong, either wittingly or unwittingly, in good or bad faith. In such cases he is termed falsus tutor or protutor. Thibaut is of opinion that there is no distinction between these terms, as some modern writers have supposed.

A protutor is under the same obligations as a real tutor with respect to the making an inventory, and is answerable in abstracto for due diligence—not in cases only of a positive laches, but when he has omitted something which he ought as a consequence to have done. On the other hand, the pupil is bound to indemnify the protutor in the same way as if he were a real tutor: at the same time, the removal of such protutor can be insisted upon as soon as this fact be discovered.

With respect to third parties, and the obligations attaching to the pupil and his property, the existence of the protutor is not acknowledged. A third party can therefore avail himself of the plea of illegal administration, exceptio illegitimationis. If such tutor have alienated any property of the pupil, the act is null if not confirmed by the judge; hence it follows that a payment made by him is also void, and an act done by such protutor is to be regarded as though the pupil had done it of his own motion—that is to say, rights but no obligations accru to the pupil therefrom. The Praetor will nevertheless grant such third party restitutio in integrum as against a pupil who has become enriched by the transaction, provided the judge has not confirmed the act, and the third party was under error or was not a free agent. But if the

2 Vid. Grap. delib. ex mate jur. protut. Tab. 2793.
3 Lauterbach, Boehmer, Hellfeld, and others, assert this. P. 275, 5, 1, § 1; P. 276, 6, 1, § 5; P. 276, 6, 1, § 5; are decisive contra, but vide Voet. 275, 5, 6.
5 P. 275, 5, 1, § 9, l. c. 4; P. 47, 2, 53; § 3, Glück, Pand. 32 B. S. 314-316.
6 P. 275, 5, 1, § 8, l. c. 5.
7 P. 276, 4, 1, § 3; P. 276, 5, 1, § 3.
8 C. 5, 45, 2.
9 P. 266, 6, 3, l. c. 1, § 5.
10 P. 265, 3, 144, § 1, l. c. 144, § 4.
11 P. 275, 6, 1, pr. l. c. § 1, 6.
12 P. 276, 6, 1, § 5.
13 P. 276, 6, 1, § 6, l. c. 2, 3, 4, 5.
Dolus on part of the protutor.

Protutor has been guilty of a dolus, such third party has an actio in factum, or action on the case for indemnification against him, which, however, does not extend to heirs.  

§ 728.  

A filius familias requires no tutor, being under the paternal power; and his father performs this office. A slave having no property required no tutor. A non-citizen has no tutor, whose rights and obligations can be referred to the Roman law.

To require a tutor, the pupillus must be sui juris, under the age of puberty, a Roman citizen, and not as yet under tutela: the only exception from this last axiom is when the tutor is suspected of preferring his own interest to that of his ward, or cannot perform his duty; of which hereafter.

§ 729.

The antiquity of tutordship is referred back to the regal period, and the first instance of its known application is that of Ancus Martius entrusting his sons by testament to the care of L. Tarquinius Priscus; hence testamentary tutelage is presumed to be the most ancient description.

The laws of the Twelve Tables confirmed that species of tutordship, paterfamilias uti legasset super pecuniae tutelaque suae rei, ita jus esto; which may be freely translated, "according to the disposition made by the father of the family of his personal, and the administration of his real property, so let it be."

If, then, any father of a family appoint tutors to his children, being under his authority, freemen being citizens, or slaves freed for the purpose, they are admitted to the office without giving security or further examination, to the exclusion of those who would assume the office in due course of law. The Junian Latins, although they possess the testamenti facio, or capacity of testament, can appoint no tutors by the Junian law. The patria potestas being the basis of this tutela, it naturally follows that such grandchildren as do not relapse into the paternal power on the death of the grandfather and disinherit imputere, may have tutors assigned to them by testament: for like reason the mother can not appoint tutors.

§ 730.

Testamentary guardianship is such as a paternal ascendent appoints in due form, in virtue of his paternal authority, for such of his children or grandchildren as after his death will be sui juris; consequently it is requisite,—

1 P. 27, 6, 7.  2 P. 27, 6, 9, § 1.  
3 P. 26, 1, 13; C. 5, 3; Nov. 117-1.  
4 Gluck, Pand. 29, B. S. 12-9-8.  
5 Liv. 1, 46.  
6 Goth. de Leg. xii. Tab. Pecuniæ and tutelæ for pecunia and tutela in the Greek form, with iota subscript, lego comprehends the whole business of a testament, "dispose" λήγεις, λήγεις hereditas, λησταρχάς, who had jurisdiction over testamenta: pecunia is supposed to mean, res nec mancipi, jue rei, res mancipi.  
7 Terming pecunia, chattels; and res sui, really as the nearest kindred term.  
8 P. 26, 26, 6; Ulp. Pr. 21, 16.  
9 P. 26, 26, 6; Id. 26, § 2; Id. 32.
1. That the testator be a paternal ascendent;
2. That he possess the *patria potestas* over the object of the *tutela*;
3. That he make his appointment in due form;
4. That the object thereof become *sui juris* on his death.

Hence, if the mother or maternal ascendent, the uncle, a remote relation, or a stranger in blood, appoint a tutor, the appointment is bad: thus, when any of the above persons institute a *impubes* heir, and appoint a tutor, such is no testamentary tutor, though he may become a dative one by the assistance of the authority *praevide inquisitione*. Modestinus¹ says in such case, *quasi in rem potius quam in personam tutorem dare videtur*; nor is this unreasonable. But if he appoint a tutor to an *impubes* without instituting him heir, it is an impertinence of which the authority is not bound to take cognizance: *mater testamento filiis tutores dare non potest*, nisi eos hæredes instituerit; *quando autem eos hæredes non instituerit*, solet *et voluntate defunctæ, datus tutor a præsidibus confirmari*:² this is, out of respect to the position of the mother with regard to her child, considered as merely directory.

By the law of England, if an estate be left to an infant, the father is the legal guardian, and as such is responsible for the profits;³ but if the child be a daughter, the father may assign it a guardian until sixteen by deed or *will* under the statute;⁴ but failing such appointment, the mother assumes the guardianship.⁵

§ 731.

The paternal power being the foundation of testamentary tutelage, a paternal ascendent cannot properly appoint any tutor to his natural or emancipated children for want of it. The ascendants could, however, exheredit and still appoint a tutor, for the paternal power was not destroyed by that act; the case can of course seldom occur of a child under puberty being exheredit.

It did not follow, according to the Roman law, that, because a son was married and kept his own house, he was not still under his father's power. A grandfather, however, cannot *after his death*—that is, by testament—appoint guardians to his grandchildren who have a father living, and under whose power they naturally come on his (the grandfather's) death.

The grandfather A can appoint a tutor to F, whose father C is dead, for he at A's death is *sui juris*;⁶ not so to D & E, for at his death B alone becomes *sui juris*, and D & E are transferred from the power of A by his death to that of their father B, then *sui juris*.⁷

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¹ P. 4. ² C. 5, 23, 4. ³ Co. Litt. 38. ⁴ 4 & 5 Ph. & M. 8. ⁵ 3 Rep. 39. ⁶ P. 26, 3, 1, § 1. ⁷ P. 26, 2, 1, § 2; I. 1, 13, § 3.
Although the English law does not recognize the same paternal power which the Roman did, yet the father has the first right to the guardianship of his own infant, and such guardians are said to be by nature. In like manner, the father and the mother are guardians for nurture until the infant attains the age of 14, the age of puberty by the Roman Law. In default, however, of both of these, the ordinary usually assigns some trustworthy person to take care of the infant's estate, and to provide for his maintenance and education.

§ 732.

The paternal ascendent who wishes to nominate a tutor must observe the due legal forms; thus, if the testament by which he appoints be faulty, the appointment will be so also, but he may nominate one in a codicil, if such be confirmed in the body of the testament. The reason of this is, that if such tutor be named, the testator intends that he should be bound to conform to the provisions of the testament, which he cannot do if the testament be not valid.

Again, the person named must be capable of fulfilling the duty assigned to him; hence, if there be a physical incapacity on the part of the tutor, such must be removed before he can act, or if a legal impediment, such as being under another jurisdiction, the appointment is without effect; the appointment must, too, be positive, for that "of honest, good, and fitting tutors," generally is void for uncertainty, and this is the case, although the person have become certain at the period of the testator's death.

§ 733.

The Roman Law held testamentary tutelage very favorable to the pupil; such could be appointed to posthumous children, for such as were not born at the making of the testament, for the uncertainty applies to the tutor only, not to the pupil. Upon the same principle a tutor may be absolutely (pure), or conditionally (conditionate), such conditio is suspensiva if required to be fulfilled before it take effect, and resolutiva if to cease on a certain condition accruing; it may be in diem up to a certain period, or ex die from a certain time, thus let A be tutor until the pupil attain the age of ten years, and then let B be tutor until puberty. But no tutor can act for such as refrain from the heritage until their puberty.

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1 Co. Litt. 88.  
2 Moor 738, 3 Rep. 38.  
3 2 Jones 90, 2 Leo 163.  
4 J. 1, 13, § 3. Codicils are of later introduction, and date from Augustus only.  
5 I. 1, 14, § 2; P. 26, 2, 10; § 31; P. 27, 1, 10, § 7.  
6 P. 26, 2, 32, pr.  
7 Gaius, 2, 240; I. 1, 25, § 10; P. 26, 2, 50; P. 26, 2, 23.  
8 I. 2, 20, § 27, ibique Vinnius.  
9 P. 26, 2, 1, § 1; I. 1, 13, § 4; P. 3, 51, 19, § 2; 1d. 29. Liberis as interpreted to mean all children; filii or filius, all of the first degree; posterni, all degrees—I. 1, 14, § ult.; P. 26, 2, 5, 6, 16, § 1. In cases of doubt the latter of several appointments is valid—P. 26, 2, 5, § 3; 1d. 20, § 2; 1d. 34.  
10 P. 26, 2, 8, § 2; I. 8, 14, § 3; P. 260, 2, 33.
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It is moreover necessary, as in the heirship of testaments; that the appointment be not made in the handwriting of the tutor; or that he be appointed for particular acts; in all other respects, the paternal ascendent can act as he likes.

§ 734- No testamentary tutelage accrues when the party appointing possesses no paternal power, or appoints informally,—si tutela testamentaria impeditur, aut deficit. In the first case, a tutor ad interim is appointed, who acts till the difficulty be removed; but in the second case, if the authority lend it's aid, it appoints another tutor, otherwise the tutelage results to the legal heirs. Höpfner gives the reason of this,—si tutor deficit concurrente magistratu. The magistrate need not appoint the next relation, but may choose the most capable, because the father, by passing such over, has thrown some suspicion on him, but si tutor testamentarius deficit non interveniente magistratu; there is nothing to exclude the next relation. The Roman magistrates, it may be said in explanation, had jurisdiction over a very extended district, and often heard nothing of the testamentary tutor failing, and thus usually allowed, as the safer principle, the law to take its course.

We may suppose many cases which may arise in this respect. Firstly, si impeditur:—If the father die, and the period he has fixed for the tutor undertaking his functions have not arrived, si dies ad hoc pendet:

When he is not to enter upon his functions until fulfilment of certain conditions:

When the tutor is positively nominated, but cannot act because heir has not administered:

When a father disinherit a child to whom he has, nevertheless, appointed a tutor, and the heir deliberate.

In these cases, the magistrate will appoint a tutor ad interim; but in cases where the heir has not entered, what need can there be of a tutor, there being no property to administer?

Secondly, the tutor may be altogether wanting; thus:—If a testamentary tutor be in captivity:

Under age:

Utterly dumb or deranged, though not incurably so:

A tutor ad interim is given, but the rights of the testamentary tutor revive when he returns, attains his majority, recovers his speech or his reason.

Thirdly, when the magistrate co-operates; as, for example:—When a testamentary tutor claims his exemption:

When he is dismissed for mal-administration: then The magistrate appoints whom he will.

Lastly, when the magistrate does not interfere, as for example:—If a tutor die before the pupil's puberty:

1 P. 26, 29. 8 I. 1, 14, § 1. 4 P. 26, 2, 9 & 16, pr.
2 Com. § 179. 5 P. 27, 10, § 73; P. 27, 3, 9; § 1.
3 K
When the period for which the tutor is appointed has arrived, —*si dies in quem tutor datur venit*:

When the resolutive condition arises which avoids the tutor's office:

In all these cases, the legal tutor assumes the administration.

§ 735.

According to the later law, the magistrate is under the necessity of confirming in many cases a tutor informally appointed, sometimes unconditionally, but otherwise *praevia inquisitione*; or with security, *cum satisdatione*. Of the first description are emancipated children, to whom tutors have been appointed by a paternal ascendent, even though the child be not instituted heir; but if the validity of the appointment cannot at once be determined, a temporary tutor is appointed.¹

When the mother or natural father appoint, and the child be made heir, the magistrate confirms without security, but after previous inquiry;² it is competent to the magistrate, however, to do so without inquiry.³

If other than the above appoint a tutor, and leave a child a legacy, previous inquiry is necessary, or satisdation if the magistrate be of inferior order, and the child have no other property.⁴ All tutors requiring confirmation, are to be treated as dative, if not placed on an equal footing with the testamentary ones.⁵

§ 736.

If a *paterfamilias* died intestate, the law took its course, and the next agnate heir assumed the tutorship assigned to him by the decemviral law, *ast si intestato moritur, cui suus haeres nec escit, agnatus proximus tutelam nancitor.*⁶ This was termed *tutela legitima*, or guardianship by operation of law.

The origin of this species of tutelage is doubted on account of practices of various nations of antiquity so widely differing from each other.

Solon adopted a course which the English law also acknowledges: he would not entrust the pupil to him who might ultimately succeed to his estate, and thus preferred the cognate line for tutors; nor did he direct the nearest in blood to be preferred, but such as the Archons judged most fitting.⁷

Lord Coke⁸ approves of this principle and of the provision of the English common law, which entrusts the ward to such member of the family who by no possibility can succeed to the estate: to do otherwise, he describes *quasi agnum committere lupo ad devorandum*, considering the temptation to make away with the minor too powerful to be withheld: nor was this contingency

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¹ P. 26, 2, 10, pr.; P. 26, 3, 1, § 1, 2.
² P. 26, 8, 4; P. 26, 31, 2, 7.
³ C. 5, 28, 4.
⁴ P. 26, 2, 26, § 2; P. 26, 3, 4.
⁵ P. 26, 2, 26, § 2; Thibaut P. R. § 397.
⁶ Gothfr. ad XII. Tab. 5, 4.
⁸ Onomast. 8, Pet. ad Leg. A. H. 6, 7.
¹¹ Inst. 88; Blackstone's Com. 1 b. 17 ch.
unknown in Rome, to judge from the supposed expression of a 
guardian in Persius,¹—

Pupillum o utinam quem proximus hares
Impello expungam.

Charondas, however, separated the care of education from the 
custody of the property; the former he left in the care of the 
cognates, the latter in that of the agnates, so that they should have 
no inducement to get rid of the pupil, nor the others have any 
power to dissipate the property.² Lycurgus entrusted the tutelage 
to the next agnates, and Heineccius³ suggests that Spartan poverty 
offered less temptation for, and Spartan continence less probability 
of fraudulent acts; hence, that the Decemviri rather imitated the 
Spartans in this respect than other Greek nations, and cites the 
Athenians,⁴ to show that other laws were introduced from that 
quarter into the Twelve Tables,—of which he doubts the prudence, 
on the subsequent experience of the frequency of hereditas.⁵ 

The Roman lawyers, looking upon tutorship as a great burden, 
established the equitable principle, that he who was legal heir to 
the property, and who therefore possessed a reversionary interest in 
it, was the proper person to undertake the tutorship: in accordance 
with this principle, the nearest agnate was preferred, if fit; if not,⁶ 
the next, and so on; but if many were in equal degree, then they 
became co-tutors;⁷ and as the cognates, according to the law of 
the Twelve Tables, had no heritable right, they were excused. 

This principle was, ipso facto, altered by Justinian's admitting 
the cognates to succession as well as the agnates. Thus, then, 
whoever was next in intestate succession was also next in order 
for undertaking legal tutorship.

The emancipating father taking precedence in tutorship over 
brothers is founded, not on this rule, but on that of patronage. 

Again, the precedence of the natural or legal mother or grand-
mother, on their renouncing subsequent marriage,⁸ is founded on 
the rule, for the mother precedes the grandfather, and the grand-
mother the great-grandfather; but the great-grandmother and 
great-grandfather have equal claim or liability. But as the Novel 
only mentions the widow, it is to be inferred that the emancipating 
father precedes the mother, as well as every relation called to the 
tutorship by the father in his stead during his lifetime. The 
tutorship of a president of an orphan asylum is founded on 
patronage.⁹

§ 737.

When a tutor is appointed irregularly, or found incompetent, 
or retires without the intervention of the authority, the tutores

¹ I. 12.
² Diod. Siv. Bibl. 12, 81.
³ A. R. 1, 13, § 5; Herod. 1, 65.
⁴ C. p. 273; Symmach. Epist. 3, 2; 
Ammian. Marcellin. 16, 5.
⁵ Pers. Sat. 5, 12, 13; Hor. Serm. 2, 5; 
Juv. Sat. 5, 98—6, 38—12, 93; Mart.
⁶ Epig. 6, 63—8, 173; Thom. Diss. de Inj. 
Jur. Hereditet. § 14; Bynk. de Capt. 
⁷ P. 26, 4; 12 § 1, 2, & 3, § 9. 
⁸ Nov. 118, 5. 
⁹ Nov. 94, 1; Nov. 118, 5. 
¹⁰ Nov. 130, 15.
legitimi succeeded; and this term includes all such as come to this
office by operation of law; and we have seen that this is either
founded on the Twelve Tables, expressly or impliedly, or intro-
duced by practice: of the first description, is the tutelage of the
agnates; of the second, that of patrons and parents, which is thus
expressed by Ulpian:1 Legitimi tutores sunt qui ex lege aliquid
descendunt, per eminentiam autem legitimi decurntur, qui ex lege
Duodecim Tabularum introductur, seu propalam quales sunt ag-
nati, seu per consequentiam quales sunt patroni.

§ 738.

The legal tutorship of patrons was also founded on the law of
the Twelve Tables, which decreed: Si libertus intestato moritur
cui suus hares nec scis, ast patronus patronive liberi escint ex ed
familia in eam familiam proxima pecusia autor.2 Here, too, then,
tutelage of an impubes libertinus belonged to the members of
the family of the patron in order of proximity,3 as the patronage
over the father while living belonged to it, and as that of the
impubes would if sui juris.

The rule had, then, already become established in Rome, ubi
successionis emolumentum, ibi et tutela onus esse debebre.4 Hence
Ulpian5 says that the tutelage of the patron was a consequence of
the law of the Twelve Tables.

In England, the nearest resemblance to the tutela legitima of
the Civil Law is Guardianship in Socage, which extends both to
the person and estate, and springs wholly out of tenure; and while
knight service existed, there was also a guardianship in knight
service or chivalry, destroyed by 12 Car. 24, which put an end
to the tenure itself by conversion into free socage. This guar-
dianship in socage occurs only where the legal estate in lands or
other hereditaments held in socage descends upon a minor, in
which case the guardianship of his person and his property, so far
at least as regards the tenements in socage, devolves by common
law on the next of blood to whom the inheritance cannot possibly
descend; for Glanivel remarks, nunquam custodia alicuii remanet,
de quo habeatur suspicio quod possit vel velit aliquid jus in ipsa
hereditate clare. The same principle was acted on by Solon,
who provided that none should be another’s guardian who was to
enjoy the estate after his death; and in this the Greek differed from
the Roman law.

Thus, if the land descend to the heir ex parte paterna, then
the mother or next maternal relation shall have the guardianship;
and, vice versâ, it shall belong to the father or other paternal
relation if the land descend ex parte materna; for, while proximity
of blood is a natural recommendation to the office, the law judges
it, at the same time, improper to trust the person of an infant in
his hands who may by possibility become heir to him, that there

1 Fr. 11, § 3.
2 Goth. l. c. 6, 2.
3 P. 38, 2, 15, § 1; Ulp. Fr. 29, 1.
5 11, 3.
may be no temptation for him to abuse his trust. If there be two or more in equal degree, we are told that he who first obtains possession of the infant shall have custody of him, except where they happen to be brothers and sisters, in which case the law prefers the eldest. But if the infant derive lands both \textit{ex parte paternâ} and \textit{ex parte maternâ}—in which case it will be impossible to find any of his kin incapable of inheriting to the infant—the next of kin on either side, seising the infant, is entitled to the custody of his person; and the lands coming \textit{ex parte paternâ} go to the maternal line, and \textit{vice versâ} as to the lands coming \textit{ex parte maternâ}. These guardians in socage, as those for nurture, continue only until the minor attains the age of fourteen years, except, indeed, in case of lands held in gavelkind, where the office lasts a year longer.

§ 739.

It may be remembered that the father, on the emancipation of his son, added in the last emancipation a fiduciary clause, whereby he reserved the patronal rights to himself, which otherwise would, by operation of law, have passed into the hands of a stranger: hence the father retained the rights of succession to his emancipated son, to whom he stood in the double capacity of an agnate and patron. Thus, if a father emancipated his impubal son, he retained the tutelage; but if he died before the son became \textit{pubes}, then his elder brothers, if of full age, succeeded in this respect; but in cases where they were not \textit{haeredes ab intestato}, this tutelage would hardly be termed legitimate, hence it has been termed \textit{fiduciaria}, from the trust clause in the act of emancipation.\footnote{Ulp. Fr. 111, 5; Haber. Digr. 1, 1, 4.}

When Justinian admitted the cognates to the succession, he provided that emancipation should not extinguish the heritable rights: hence the father and grandfather assumed the tutelage of their emancipated \textit{impuberes as next relations}.

§ 740.

If the father or grandfather have exercised tutorship over their emancipated sons or grandsons, but died before the pupil's puberty, their sons of full age, if any, must continue the tutorship, and this is the \textit{tutela fiduciaria}. It can be exercised by, —1, the father; 2, the brother; 3, the uncle. With reference to the father, this case may arise:—A has retained his son B under power, but emancipated his grandson C, and assumed \textit{tutela} over him before C is major. A his grandfather dies, and B, becoming \textit{sui juris}, must exercise the \textit{tutela} over his son C.

With reference to the brother:—A has two sons, B and C, which last is \textit{impubes}. A emancipates his son, that son C being a minor, becomes his tutor, and dies before his puberty; and in this case B, if major, assumes the guardianship in trust.
As to the uncle:—A emancipates his impubal grandson C, assumes the tutela over him, and dies before C’s puberty; in this case the uncle B becomes his fiduciary tutor.

According to the more recent law, the father, brother, and uncle, in the above cases, acquire the tutorship; not, however, as sons of the emancipating father and patron, but as next of kin.

§ 741.

Women were under a perpetual tutorship. Majores nostris, nullam ne privatam quidem rem, agere feminas sine auctore voluerunt, in manu esse parentum, fratum, virorum, a practice supposed to have been introduced from the Athenian law which appointed κόπους to manage the affairs of women. Numa conferred an immunity from guardianship over the vestal virgins, and this confirms the supposition of the system having existed anterior to Numa’s reign.

The ground upon which the Romans based this rule was the natural infirmity of judgment in women. Another and better legal reason may be added to this, in the fact of women being subject to their parents, and then passing under the power of their husbands, having few opportunities of becoming sui juris, at least under the age of puberty; and even when this might happen, they were, possibly on the ground of a natural infirmity of judgment, excluded from all offices of state, and from taking part in legislative and elective assemblies. This in married women might be referred to the unitas persona with her husband or father; and, in the case of unmarried women, from the impropriety of their appearing in such meetings. The same cause deprived them of the testamenti factio, for testaments were originally made in the Comitia, and it was therefore thought advisable that some one should be appointed to act for them.

In most countries this has been partially preserved; for, though in England and elsewhere a woman having the actual disposal of her property can make a will, be an executrix, and the like, yet she cannot vote for members of Parliament, or sit in either the House of Lords or Commons, against which, if no infirmity of judgment were supposed, there is no valid reason. Many of the disabilities of women, quoad the jus privatum, were subsequently removed by the later Roman and also by the English laws, but they never have been enfranchised, quoad the jus publicum, in any country—even in those northern latitudes where their right of individual action is acknowledged on the broadest basis.

§ 742.

That *tutela muliebris* was termed *pupillaris*, which lasted until puberty, in which it coincided with that of males.¹

*Perpetua* was that which commenced after puberty, and continued thenceforth, and they could neither transact business,² alienate a *res mancipi*,³ or contract marriage without their tutor’s interposition.

This perpetual tutorship was either *legitima* or *praetoria*; the first was that which resulted from the ordinary operation of the law, the latter was granted by the prætor, in cases where a dispute arose between the guardian and ward, who could not give *auctoritas* in his own cause.⁴

Tutela was to be considered as a thing capable of being assigned by the *jus quiritationis*; consequently, he on whom the burden was thus shifted is termed tutor *cessitius*,⁵ but his office of course follows the fate of the principal; thus, if the original tutor die, or be otherwise disqualified, the office of the *cessitius* or assignee ceases *ipsa jure*. Gothofried⁶ thinks that this cession was occasionally made, in order to relieve the next agnate from the perpetual and accumulating burden of tutorships; such a measure certainly might have become necessary, as it might be readily imagined that the tutor in some cases might have more to do than he could possibly attend to.

Husbands are the natural tutors of their wives *in manu*, not when such are only *in matrimonio*. In the first case the *tutela* is absorbed in the domestic jurisdiction of the husband, and in the *unitas personae*; hence, in the second case, the tutela belongs to the agnates, for there is no unity of person but a separate individuality.⁷

The inscription, *sibi conjugi et tutori suo*,⁸ has been understood of an *uxor in manu*,⁹ but it might also apply to the case of a wife *in matrimonio* whose husband was her testamentary or dative.¹⁰

Cicero leads us to infer that the *tutela muliebris* was extended by a fiction of the lawyers.

*Nam quum per multa praclare legibus essent constituta, ea jure consultorum ingeniiis pleraque corrupta sunt. Mulieres omnes propter infirmitatem consili majores in tutorum potestato esse voluerunt; hi invenerunt genera tutorum, quæ potestate mulierum continetur (continetur)*?¹¹

Here, before *mulieres*, we must understand *exempli gratia*; the lawyers rendered futile the original intention, contriving that

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¹ Boeth. in Top. Cic. 4; Gell. N. A. 5, 13.
² Cic. Top. 11.
³ Cic. Or. pro Cæc. 25; Ulp. Fr. 11, 25, 27.
⁴ Ulp. Fr. 11, 7.
⁵ Ad L. 2; C. Th. de Tut. et Cur. creand.
⁶ Vid. § 522, h. op.
⁷ Gruter Inscript. p. 552, 2.
⁸ Liv. 34, 3.
women who had tutors should retain so much authority, that the
tutors might be said to have been rather under the women than
the women under the tutors. Livy has a like passage, invenerunt
genera tutorum, quae potestate mulierum continerentur; both pro-
ably quote from the same authority, or Livy at least from Cicero.
Heineccius believes that these were tutors chosen by the women.
By the conventio in manum, the right of making dispositions in his
testament respecting the tutorship of the wife, passed from the father
to the husband; and the wife in such case may have obtained from
her husband the discretion of choosing her own tutor, but Heine-
ccius has forgotten that if such were the case, the tutor must be
named in the testament; for an appointment made in general terms
or conditionally would, it seems, have been bad as testamentary, and
could have only been made effective as dative.

Another theory is admissible, that women elected their own
tutors by a fictive conventio in manum, invented by legal acuteness.
A woman, on divorce or otherwise, might pass under the power of
him whom she should choose as tutor by a co-emption ad hoc ipsum,¹
not for the purpose of marriage, or by some fictitious form of
adoption, with a fiduciary clause for remaniscipation or stipula-
tion.

The tutela muliebris thus constituted might be described as a
trust transferable at the pleasure of the cestuique trust. In En-
ghland a minor can choose his own trustee.

The tutela muliebris from that period appears to have gone out
of use, probably concurrently with the desuetude of the marriages
involving the conventio in manum. Augustus especially conferred
upon Octavia and Livia² the power of managing their own busi-
ness, but the immunity of the vestal virgins cannot be made avail-
able;³ for this was only an exceptional beneficium, for the Lex
Papia Poppaea decreed that all women constrained to marry
under this law, should, in default of a legal tutor, receive a tutor
from the Praetor, for the purpose of giving, assigning, or promising
dower, which the senate extended to the presides in the provinces.⁴
In this law, however, an exception is contained in favor of such
women as had borne three children,⁵ and hence termed the jus
trium liberorum; this was soon made the basis of an abuse by the
Emperor,⁶ granting the jus trium liberorum to barren and even
single women of illustrious birth, the more evading the law by
adopting and immediately emancipating three children; this latter
was, however, speedily put a stop to.

The Sext. Claudianum prohibited the assignment of tutorships
by the next agnate,⁷ which had subsequently grown into an abuse,

¹ Cic. ad Fam. Epist. 7, 29.
³ Plut. Num. 66.
⁴ Ulp. 11, 20.
et Rom. n. 15, p. m. 807.
⁶ Dio. Cass. 55, p. 549; Plin. Epist. 2,
13—7, 26—10, 95; Paul. R. S. 4, 9, 26.
Fr. 11, 8; Ant. Schult. in Adnot. p. 596,
85.
and this may explain the passage of Cicero, where he tells us the women had their tutors under their power, or chose whom they would.

Under the Antonines it certainly still existed, and the testimony of Ulpian assures us it was in vigor under Alexander Severus. The Codex Theodosianus proves its being the law of the age of Constantine, and a law of the Codex in that of Leo. Nevertheless, it insensibly declined, so that in the reign of Justinian no trace remained; and Trebonian is accused of having diverted the meaning of those passages of Pandects and Codex which originally pointed at this institution.

§ 743.

The Atilian law was introduced with the object of remedying the deficiency of both testamentary and legal tutors, and to obviate any difficulty which might arise from a defect in a testament by which a tutor was appointed. A plebiscitum was therefore introduced for this purpose, which has since been known under the term Lex Atilia. Livy gives grounds for supposing that it dates A.U.C. 567. An Atilius Longus was tribune A.U.C. 309, and an L. Atilius A.U.C. 354; but Heineccius thinks that neither of these has been author of it, since up to that time no praetor existed. A.U.C. 460, M. Atilius Regulus was praetor, but Heineccius also differs with Pighius, who ascribes the law to him, and attributes it to L. Atilius, mentioned by Livy as tribune A.U.C. 443.

This law provided that, in default of a testamentary and legal tutor, the Praetor, concurring perhaps with a majority of the Tribunes, should assign one, pupilis et iuris. These tutors were termed Atiliani or dativi, from the praetorian form of assignment, Do te (tibi?) tutorem.

Great inconvenience having, however, resulted from this law being operative only in Rome, the Lex Julia et Titia was introduced A.U.C. 722, and so introduced from Augustus and M. Titius and M. F. Rufus, the consuls of the year. The practice had existed for some time previously in Sicily that the praetors should assign tutors; and it was then extended to the Praesides of other provinces.

The next alteration was the Sctm. Claudianum, to enable the consuls to assign tutors extra ordinem, which endured until Tra-
Jan's time; and it was their duty to make due inquiry into the condition and qualification of such tutor in the interest of the pupill. It is not known what particular objections were raised against this mode of appointing guardians. Marcus Antoninus, however, restored the jurisdiction to the Praetorian magistracy, one of whom he appointed especially for this service, with the title of tutelaris or pupillaris.

At a later period this officer was disused and the office transferred to the Prefectus urbi, and the praetor according to his jurisdiction.

In the provinces the Praesides continued to assign tutors, after a previous inquiry termed an inquisition. With the increase of the population and extension of the Roman citizenship, however, the power was allowed to be conferred by such president or magistrates of an inferior jurisdiction, such as municipal magistrates, who, however, instead of instituting an inquisition, were required to take security for due performance of the office. And lastly, Justinian directed that pupils whose property amounted to 500 solidi might have tutors or curators assigned to them by the defensores civitatum, concurrently with the bishops, or by the juridicus Alexandrinus.

Hence it appears that the Atilian law conferred the power of assigning tutors on the praetor urbanus concurrently with the tribunes at Rome, and that the Julian-Titian law gave provincial governors the same power.

The jus novum gave the praetor ad hoc power to assign tutors at Rome, the Praesides in the provinces upon inquisition, and the magistrates by order of the presidents in matters of small importance.

The jus novissimum extended this power to all magistrates in matters under 500 solidi, to the defensores civitatum, and the juridica of Alexandria.

§ 744.

Guardianship by statute applies to both person and estate, and is the nearest parallel to the dative tutors of the Romans. Considering the abolition of guardianship in chivalry, the liability of guardianship in socage to be taken away by a devise of lands in trust for the heir, and the imbecility of judgment of minors of the age of fourteen, which renders the guardianship in socage inadequate to its purposes even where it exists, the legislature has, with a view to the remedy of these inconveniences, introduced certain provisions, of which the substance is as follows:

1 Plin. Epist. 9, 13.
2 These questions are detailed by Cujac. in Pap. ad L. C. de Conf. Tut. p. 296.
3 I. 13, § 3.
5 I. 1, 13, § 4; P. 26, 5, 8. Nov. de Jurisdict. 2, 8, p. 162.
6 C. 1, 4, 30; I. 1, 13, § 5.
7 I. 1, 20, pr.
8 I. Car. 2, 24, 4 & 5 Phil. & M. 8, by construction whereof a father could assign a guardian to his daughter under sixteen by deed or will, repeated by 9 Geo. IV. 31.
In all cases, except such as follow either the custom of London and other cities, or corporate towns exempted by the statute from its operation, a father may, by deed or will executed in presence of two witnesses, dispose of the custody of all his children, born or to be born, who shall be unmarried at his decease, or be born afterwards: he may appoint any person (except a Popish recusant); he may appoint the guardianship to last till twenty-one, or for any less time: the appointment may be in possession or remainder: it shall be effectual against all persons claiming as guardians in socage or otherwise; and the guardians so appointed shall have the custody of the infant's person and of all his estate, both real and personal. It is to be observed, however, that this statute makes no mention of the mother, who is consequently not within the benefit of its enactments, nor does it extend to illegitimate children; but where a father has by his will named a guardian to any child of this description, the Court of Chancery, in the exercise of that jurisdiction which will be presently referred to, will in general appoint the same person, as was the case in the Civil Law.

Guardianship by appointment of the Lord Chancellor, which is now so important as to have in a manner superseded that in socage, is of rather modern introduction, having gradually established itself since the introduction of guardians by the father's appointment under the statute of Charles II.; for, as the father may fail to exercise his power in that respect, it was soon found necessary to provide for cases in which such omissions have occurred; and the Lord Chancellor is held to possess a general jurisdiction with respect to the custody of infants, derived, it is supposed, from the prerogative of the Crown, which, as parens patriae, interposes its protection in favor of those who are not of capacity to maintain their own rights.

The Court of Chancery, then, on application to it on behalf of an infant, legitimate or illegitimate, who has no other guardian, will appoint him one for the protection of both his person and estate, and has a right to exercise this jurisdiction, if sufficient reason should appear, notwithstanding the existence of a guardian in socage; and though when there is a guardian under the statute able and willing to act, the court is not entitled to remove him, it will regulate his conduct, or appoint some other person to superintend the infant and his estate, should any case arise to call for such interference. By institution also of a suit in Chancery in relation to the estate of the infant, to which he is made a party, he becomes a ward of court, as it is called, the effect of which is to place him under its more immediate protection: the Court will in that case take the direction of his estate, and appoint a guardian for his person only, and any one marrying a ward of the court without its permission, is guilty of a contempt punishable by commitment to prison. But an infant not possessed of property cannot

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1 32 Car. 2, 24.
be made a ward of the court, nor will it generally appoint a guardian to an infant so circumstanced, though to this there are certainly exceptions; for first, under the Marriage Act, it has the power to appoint one for the purpose of consenting to the marriage of an infant having no father, mother, or other guardian, and in certain instances also to give its judicial sanction to the marriage when the consent of those parties cannot be obtained; it is also empowered to take infants convicted of felony out of the control of their parents or other guardians (if it shall appear expedient), and to assign the custody of them to such other persons as may be willing to undertake the charge.

Guardianship by election is a mode of appointment recognised by the law, though of unfrequent occurrence. For an infant having lands in socage may after fourteen, when the guardianship in socage terminates, elect a guardian for himself, if there be no other then ready to take charge of him and his property; and, according to Lord Coke, the same thing may be done in certain cases with an infant under fourteen. But the law on this subject is obscure, and as such an election, at whatever age it be made, will in no case supersede the authority of the Court of Chancery to interfere for the infant’s protection in the manner above explained, this kind of guardianship is now almost wholly disused.

§ 745.

Dative tutelage is but subsidiary, and took place, first, when no testamentary or legal tutor was to be found; secondly, when the above or either of them were lawfully impeded; thirdly, when the testamentary tutor was excused or removed.

The magistrate must make his appointment in conformity with law. He cannot appoint a tutor ex die or in diem, except where a temporary impediment prevented the testamentary or legal tutor from at once entering on his office.

The magistrate can impose no condition, except when the father has imposed such condition, and where it is not known if such will come into operation.

Höpfner denies that the reason of these restrictions arises from the actus legitimus being irrescindible; insisting that in the interest of the pupill change is to be avoided, as every tutor must buy experience at the pupill’s expense, and that it is not advisable that he should do so oftener than necessary. He also thinks that the duty might be better performed, when the tutor knows he must carry it out to the end.

§ 746.

The magistrate must be competent, and such is he who lives in
the same place as the late legal father\(^1\) of the pupil; otherwise, the commentators\(^2\) think, that where many residences are in question a privileged tribunal has precedence; but failing both, the tribunal of the birthplace; failing which, that of the place where the mass of the property is; but failing all these, that then the tribunal of the place of residence of the pupill himself.

The magistrate can only appoint persons within his jurisdiction with leave of the supreme magistrate, neither can he appoint himself, although he may another member of his own judicial college.\(^3\)

The appointment must be made after examination.

It cannot be conditional or temporary, except in the cases above stated;\(^4\) but otherwise the appointment may be to any time, at any place, and from among persons present or absent.\(^5\)

The power of such tutor\(^6\) applies to all the property of such pupill, be it where it may;\(^7\) nevertheless, if the property of the pupill be situated in places distant from each other, the magistrate in whose jurisdiction the other part is may appoint a tutor by\(^8\) tutors may also be especially appointed for particular solemn acts.\(^9\)

\section*{§ 747.}

The \textit{tutela pactitia} is unknown to the Roman Law, further than the decision that one who has promised not to take advantage of his exemption is bound by his agreement;\(^10\) at the same time the Roman Law has no provision prohibitory of tutorship by agreement. Thibaut proposes to treat it like all other contracts, and assumes that in such case, as none can promise for a third party, the contract would be inoperative.\(^11\)

The legality of the contract by a magistrate is indubitable, because he is bound to protect the pupill by all means in his power; but this \textit{tutela pactitia} must not be confused with the \textit{tutela occupatitia} which a foster father, who only acts as agent for his \textit{alumnus}, exercises, nor with the transfer of the administration, which can be done by mandate or division, for the Romans admitted the validity\(^12\) of legal contracts. On the other hand, the \textit{tutela cessititia} from agnate to agnate, \textit{i. e.} the entire transfer of the tutorship, is prohibited, though it was formerly allowed.\(^13\)

\section*{§ 748.}

Thibaut\(^14\) sums up the various sorts of tutelage as follows:—

\begin{itemize}
\item \textit{Tutela pactitia.}
\item \textit{Tutela occupatitia.}
\item \textit{Tutela cessititia.}
\end{itemize}

\textit{Thibaut's summary.}

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\(^1\) C. 10, 38, 3.
\(^2\) Thibaut, P. R. 399.
\(^3\) P. 26, 5; 3, 4, 19, 24; P. 26, 6, 3.
\(^4\) Thibaut, P. R. § 399.
\(^5\) P. 26, 1, 8; § 2; I. c. 3, § 3.
\(^6\) P. 26, 5, 5.
\(^7\) I. 1, 25, § 17.
\(^8\) P. 26, 5; 27; P. 27, 1, 22, § 2; P. 27, 9, 5; § 12.
\(^9\) Thibaut’s view, founded on authorities, cited § 399, note n.
\(^10\) I. 1, 25, § 9; P. 27, 1, 15, § 1.
\(^11\) I. 3, 20, § 10.
\(^12\) P. 26, 7, 5; § 3.
\(^13\) Gaius, 1, § 168-172; Ulp. Fr. 11, 7, 8, & 19, 2.
\(^14\) P. R. § 401.
The testamentary tutors have precedence of all others, and all tutores confirmans are in the same category.

If the testamentary or legal tutor be impeded, the magistrate appoints an interimistic tutor. If no testamentary tutor have been appointed, the legal tutor steps in.

If he who is called to the tutorship fail before or after entry upon office, the magistrate appoints a tutor if he co-operate in the removal of the tutor, or if one of many tutors named fail in whose place another is to be substituted; but otherwise the legal tutor assumes the office.

The tutorship by contract in the sense explained is in the same category with the dative.

§ 749.

The state is in some cases bound to care for the protection of an individual's person and property.

A tutor is he to whom the complete representation of the person, and generally of the property, of a party under the age of puberty is committed, and is termed cura personalis; and the same terms are used though the tutor be appointed only for particular solemn acts of the impubes.

A curator is he to whom the mere care of the person of a party of full age is committed, termed cura personalis; but if his duty be confined to the property of such party, his duty is termed cura realis.

Should the curator be intrusted merely with the non-solemn acts of a person above the age of puberty, but under full age—a minor—which require no auctoritas, or should both these capacities be combined, the charge is termed a cura mixta.

In England both are combined, and the tutor and curator is termed a guardian,—the object of such guardianship a ward.

§ 750.

Rights and obligations of other descriptions appertaining to minors by the Roman law may be thus distinguished:—

An obligatio ex re—in other words, such coincidence as would obligate a person of full age without his consent—obligates minors in like manner.

Delicts of children are not acknowledged, but all infantia maiores are responsible for their culpa, which, however, must be proved against the infantia proxi.; and the responsibility of a dolus

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1 P. 26, 2, 11, pr.
2 P. 26, 2, 26, § 2, l. c. 27; Nov. 118, 5.
3 I. 2, 26, § 1, 2.
4 I. 1, 15, pr.
5 P. 26, 2, 11.
6 Thibaut, P. R. § 391.
7 I. 1, 14, § 44; I. 1, 23, § 5; C. 5, 31, 9; P. 26, 5, 20; P. 27, 10; C. 5, 36, 4; Gaius, 1, § 143; Ulp. Fr. 11, § 22-25; Theophil. parag. 1, 21, 8 ult.; P. 26, 5, 71, 9; 151; C. 5, 44, 5; I. 1, 13; § 1; Hürf. Com, § 167; Züll. Vergleichung der Römischen tutela und Curas. 8 P. 44, 7, 46; Weber. über de nat. Verbindung. § 71; Bechmann de obl. imp.; Gesterling, l. c. 2, b. n. 1.
9 Thib. l. c. § 142.
TUTELA—OBLIGATIONS OF MINORS.

can only be charged against the *pubertati proximi* on actual proof of their *malus animus*; hence *puberes* only are governed by the ordinary rules.

When consent is a condition precedent in a transaction, and the tutor has consented, the pupill, as has been seen, is obligated as respects a third party; but if he act of his own motion, being a child, the whole transaction is null and void (although the taking possession by a child *ex causâ donationis* has its peculiarities). If, on the other hand, he be beyond the age of childhood, but under that of puberty, he can acquire rights of his own motion, but cannot obligate himself; thus the transaction is only so far valid as it may be advantageous to him. Nevertheless, in the case of mutual contracts, the other contracting party who is sued by the pupill can protect himself by the *exceptio*.

The question, too, arises as to whether the pupill be not at least capable of a natural obligation, which must in part be assented to and in part denied. In as far as regards the pupill himself, he is obligated by third parties who are incidentally obligated, or those who succeed into the place of the pupill.

Where the pupill has given things away, the tutor can recover them, provided he have a legal right of recovery; but if they have been consumed, then by the *condictio*; and in other cases by the ordinary real actions.

In England, a minor can contract for necessaries according to his condition, and for his teaching and instruction. He is, moreover, liable for goods supplied to his wife and family, but not for such as, being unmarried in the house of his father, may be supplied to him; his subsequent consent or ratification when of age will, however, render him liable. By continuing a lease after he is of age, or accepting rent on a demise, he confirms such lease or demise.

He is not liable for trading debts, whether solely on his own account or as a partner with others.

These rules are, however, to be understood exclusively of civil contracts, and the law is by no means certain on all points.

§ 751.

When tutors are to be appointed or confirmed, any friend, rela-

Who might sue out guardians.

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1 I. 3, 20, § 10; P. 4, 3, 13, § 1; P. 9, 2, 5, 3, 2; P. 14, 4, 3, § 2; P. 16, 3, 3, § 15; P. 29, 3, 14, § 1; P. 43, 4, 1, § 6; P. 44, 4, 4, § 36; P. 47, 2, 2, 3; P. 47, 8, 2, § 18; P. 47, 30, 3, § 1; P. 47, 12, 3, § 1; P. 48, 10, 2, pr. i; P. 50, 17, 3; C. 3, 34, 1; Archiv. Civ. Prax. 4 B. Hild. 3 n. 18.

2 Thib. l.c. § 213, note n.

3 P. 2, 14, 28; L. 3, 20, § 9, 10; P. 19, 13, § 29; P. 50, 17, 2, 3.

4 P. 18, 3, 34, § 3; Voet. 19, 1, § ult. 26, 8, § 3.

5 P. 1, 20, § 9; C. 3, 49, 1; P. 12, 6, 41; P. 12, 2, 21, pr.; P. 44, 7, 59; vid. et Weber, l.c. Glück, l.c. § 288.

6 P. 36, 1, 64, pr.; P. 43, 1, 127; P. 46, 1, 25; P. 46, 3, 95, § 21 P. 46, 2, 1, § 1; id. 9; Rosshirt. Zeitsch. 2 St. S. 130-4.

7 I. 2, 8, § ult.; P. 12, 1, 19, § 1; P. 26, 8, 9, § 2; P. 46, 3, 14, § ult.
tion, or creditor has a right to suggest to the magistrate fit and proper persons. The mother, if she either cannot or does not wish to become tutor, and failing her, the intestate heirs, when they do not undertake the office, are obligated, under penalty, to apply that a tutor or curator be appointed to a minor, pendente litem, or to require the confirmation of one informally nominated; if they fail to do so within the year, or if they propose such as are careless, crafty, or have an exemption of which they avail themselves, they are deprived of the right of intestate succession to the child, or of the right of pupilar substitution in favor of the next heir, but not of that which comes to them from the mass of property of the child in virtue of any other title. This penalty attached for not petitioning for a curator, or for proposing one who ought to be rejected on the part of a major who could not act without one, and could not make a testament. Although there is no exemption from this penalty, yet it falls away in certain cases, namely:

If the child have no property at all, or at least during the period for which such tutor is required:

If the mother be the person making default, and she be under age.

If the child have died before the right to testate has accrued.

If the intestate heirs were impeded, or another were beforehand with them.

Thibaut considers none of these have been abrogated, not even the third, by the law of the Novels.

§ 752.

A double right accrues after entry on office and administration; the one with respect to the tutor in his relation to his pupill and his property; the other in respect of his relation to a third party.

The duties of the administering tutor are to be distinguished from those of the honorary ones.

It is a fundamental rule with respect to the first, that the tutor should avoid any oversight, how small soever it be, and apply himself with active diligence to the affairs of his pupill, the more so if he have put himself forward for the office; but if he have not done so, he is only liable in so far as he is in a position to prove that his negligencia in concreto, or his general negligence, was not less.
TUTELA—OBLIGATIONS OF TUTORS.

If the pupill discharged him from further liability on his own account in a valid way, he is only answerable for culpa iacta, in so far as a greater diligentia in concreto be not proved against him; the same is the case if he miss a casual advantage, or if the capital lent out by the father of the pupill at interest be risked. The heirs of the tutor are called upon to answer only for the gross negligence of him from whom they take, if the suit be commenced in the lifetime of such predecessor, and inasmuch as they be not enriched by the mere negligence of such person, also in case the heirs themselves continue the tutorship. The tutor is not, however, free to make his own business arrangements exactly as he may choose, for in some cases the consent of the authority is requisite.

§ 753.

A tutor, though prevented by illness from administering the affairs of his pupill, cannot appoint a deputy. It was, therefore, requisite that an application should be made to the Prætor for the appointment of an actor, for other affairs termed an adjutor in Greek; they were termed ἁπαχραντα, and the same terms in both Greek and Latin were applied to private agents, such as slaves sent into the country to administer farms for their owners.

Somewhat similar is the practice of the Court of Chancery, which will, on application, appoint a guardian to the persons and estate of an infant, legitimate or illegitimate, and whether he have one already or not; if he have one and he be in socage, he may be disregarded; but when by statute and capable, the newly appointed guardian simply superintends in case of need.

§ 754.

The tutor is under an obligation to protect the person of his pupill by all possible means, without co-operation of the authority; but he bears all the disadvantages rising out of a suit commenced in unadvisedly.

He must administer the property of the pupill like a careful father of a family, using his best endeavour to preserve it, take good care of it, and collect the outstanding debts of his pupill, in as far as prudently.

168-9; Hass, v. d. Culpa S. 334-370, 661, 615; Kritz über die Culpa S. 165-178. 1 P. 26, 7, 7, § 2; l. c. 42, P. 30 (1), 20, § 1; P. 34, 3, 20, § 1; P. 35, 3, 72, § 3; C. 5, 51, 2. Vezo. goes further, L. 27, 3, § 13. 3 P. 26, 7, 39, § 6; P. 27, 7, 8, § 1; P. 27, 8, 4; C. 2, 19, 4; C. 5, 54, 4. 4 P. 27, 7, 13, 4; pr. § 1-3; Glück, Pand. 30, B. S. 130, 1, 32, B. S. 368-378. 5 Cipra, Unterricht der Vormütter. 6 P. 3, 2. 7 P. 26, 7, 24; P. 26, 1, 13, § 1. 8 P. 10, 2, 8; P. 40, 7, 40, § 71; P. 40, 5, 41, § 4; Phut. Ambr. 2, 4, 53. 9 Nam si sciet noster senex, idem huie non esse habitam, succenseat, cui omnium rerum impius summam crediderit; Lact. Cap. 53, 44; P. 20, 1, 32; Plin. Epist. 3, 19; Heinec. A. R. 1, 23, § 10. 10 Foulb. Fr. Eq. 235. 11 Ingham v. Bickerdike, 6 Madd. 275. 12 P. 26, 2, 14; P. 26, 7, 30; G. Chlesrer de Off. Tut. circa lites pupill. Alfr. 1762. 13 C. 5, 37, 6; P. 26, 7, 9, § 6; Leyser Sp. 233, m. 1; Müller, Obs. 602. 14 G. C. 5, 37, 22. 15 C. 24-
may be expected thereby, treating him as a debtor, as he would treat any third party.

If the property be lost by his negligence, he is responsible for it; nevertheless, he cannot be proceeded against with full rigor, in respect of moneys lent out at interest by his predecessor in office, or by the father of the pupil, if he did not approve of the investment, but if he did so his predecessor is entirely free of all responsibility. The tutor, as a penalty, must make good all interest he has failed to collect; but not so in cases where he himself was in arrear as creditor. He is also bound to sell in due time, all such objects as are of a perishable nature.

He must, moreover, endeavour to ameliorate the estate of the pupil, and to this end he must invest it on interest, taking security or pledge, that he can do so will be presumed from the fact of his having so placed out his own money. Justinian made it the duty of a tutor to lend out the money of his pupil at interest, only in cases where the property must in any case be disturbed, and in this case it was only permissive in him to lend out the pupil's money at his own risk, against an annual laxamentum of two months, or to invest it in the purchase of land. If he omit to lend it when such is his duty, he must pay the current interest of the place in the first year from six months after receiving power over it, and in the following two months, by way of penalty.

He is even permitted to borrow himself money on interest, if this can be done openly and without risk, and lend out money of the pupil's in his own name, in which last case he is only obligated to hand over the interest accruing thereon to the pupil on his undertaking the risk; but if he apply it clandestinely and to his own benefit, he must pay 12 per cent. interest therefor.

He can continue a business inherited by the pupil from his father, especially if the will of the ancestor contain a disposition to this effect; but the business of trade must not be meagre.

He must satisfy the legal, but not the moral liabilities of his pupil; hence, he can make no presents save where decency and propriety require it. If he have any claim as creditor, he may treat himself as he would any third party.

On all these points, the Canon Law requires that he give annual

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1 P. 26, 7, 15, 46, § ult.
2 P. 26, 7, 9, § 1, 2, 3.
3 P. 26, 7, 15, 39, pr. 43; pr. 47, § 5, 50; Archiv für Civilist. Praxis, 2 B. 2 Sh. n. 20; Gastering Nachforsch. 3 B. S. 7-16.
4 P. 27, 3, 35, 44, pr. 19; C. 5, 51, 2.
5 P. 26, 7, 7, § 3; l. c. 10, 15, 58, § 3.
6 P. 26, 7, 7, § 51; l. c. 9, § 4; Glück, Pand. 30 B. S. 248-351.
7 C. 5, 37, 22; P. 26, 7, 7, § 1.
8 Nov. 73, 6; Puttmann. Misc. Sp. 5, Müller ad Leyser, Obs. 599.
9 P. 26, 7, 7, § 3.
10 Nov. 73, 6-8; Puttmann. Misc. Sp. 1, 3, Müller ad Leyser, Obs. 599.

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11 This Laxamentum of the 72 Nov. is fraught with difficulty. Maresoll im Arch. für Civ. Prax., Pr. 9, B. 1; HfL. S. 40-52; Glück, Pand. 30 B. S. 310-326.
12 C. 5, 37, 44; l. c. 7, § 11; l. c. 15.
13 P. 26, 7, 7, § 6; 45, § 2, 54.
14 P. 26, 7, 58.
15 P. 26, 7, 5, § 9; Puffendorf, T. 3, Obs. 11.
16 C. 5, 37, 13, § 2.
17 P. 26, 7, 7, § 3.
18 P. 26, 7, 7, § 3; l. c. 22.
19 P. 26, 7, 5, § 5; 57; Lauterbach, Coll. L. 36, P. 7, § 22.
account, and before this account be rendered, the tutor can conclude no contract with the fiscus.\(^8\)

\section*{§ 755.}

The tutor, in cases where the pupil is intended to be obligated, directly or indirectly, by an act of volition,\(^4\) must confer validity on the business by his \textit{auctoritas}, which, on weighty grounds, he can, however, refuse; but if he have none such, he can be forced to give it; nevertheless, he is answerable for the disadvantages arising out of such refusal, and the magistrate can integrate his consent.\(^4\) In addition to which it is to be remarked, that a tutor can make no transaction valid by his authority which has been transferred to a co-tutor by a testamentary or judicial disposition;\(^6\) but if several co-tutors conduct the business jointly or severally, having decided it by simple agreement, the \textit{auctoritas} of any one suffices, save the tutorship be entirely terminated by some act; such, for instance, as arrogation, or if the co-tutor oppose.\(^6\)

The tutor can conclude no transaction with his pupill where the question of profit to himself or any member of his family arise;\(^7\) save it be done without risk and by public auction,\(^8\) otherwise the consent of a co-tutor or curator named \textit{ad loc} is requisite.\(^9\)

As long as the pupil is a child, the tutor acts for him alone;\(^10\) but after that time is past he may consult the pupil if he will,\(^11\) and he is obliged to do so where particular solemnities require the presence of the pupil.\(^12\)

The tutor must grant his authority unfettered but cautiously, and if his pupil himself act wrongfully (inasmuch as the tutor is then his attorney for all purposes) at once and unconditionally, and where the pupill contracts with one who is actually present, he must deliver it orally.\(^13\)

The \textit{consensus} of the curator is unfettered to these conditions, which, nevertheless, are applicable by analogy, inasmuch as the authority of the tutor is different from the simple consent of a curator, and considered in the age of the Roman Law as a transaction of a peculiar nature.\(^14\)

Nothing, therefore, can be required of the curator than that which appertains to the idea of consent, which does not exclude the admission of a declaration between absent parties, or after the lapse of a certain time. Hence, all that the laws prescribe respecting the \textit{auctoritas} must be looked upon in a practical point of view.\(^15\)

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\(^1\) Clem. 3, 11, 2; R. A. v. 1548, tit. 31, § 3; R. A. v. 1577, tit. 32, § 3.
\(^2\) P. 48, 10, 1, § 9-12; Marxell in Linde Zeitach. 3 b. 3 Hfl. n. 19.
\(^3\) I. 1, 21, pr.; P. 26, 8, 9.
\(^4\) P. 47, 6, 17; I. c. 1, § 5.
\(^5\) P. 26, 8, 5; C. 5, 59, ult.
\(^6\) P. 27, 10, 7, § 3; C. 5, 59, ult.; P. 46, 1, 34, § 4; P. 29, 2, 49.
\(^7\) P. 25, 8, 5; § 2, 6, 7, § 2; P. 18, 1, 46; C. 4, 38, 5.
\(^8\) P. 27, 7, 5, §§ 4, 5; P. 41, 4, 2, § 8.
\(^9\) I. 1, 21, § ult.; P. 26, 1, 3, § 2; P. 26, 8, 5, § 2; Nov. 72, 2.
\(^10\) P. 26, 7, 1, § 2.
\(^11\) P. 50, 17, 5.
\(^12\) P. 29, 2, 9; C. 6, 30, 5.
\(^13\) P. 26, 8, 1, § 1; Id. 2, 8 & 95, § 51.
\(^14\) Id. 14.
\(^15\) P. 49, 17, § 1; Hübner, Weber, § 207, n. 3; § 227; Glück, Pand. 30, 3; § 449-474.
\(^16\) Lauterbach, Coll. 26, 8, § 3; Mühlenuhruch Dott. P. T. 3, § 156.
The tutor is, however, not obliged to expose himself or his own affairs to any disadvantage, on account of having assented to a transaction of his pupil.\textsuperscript{1}

§ 756.

The tutor, on entering on his office, must obtain the concurrence of the authority; but if any danger may arise from delay, he must enter at once.\textsuperscript{2} He must swear to truly and duly administer,\textsuperscript{3} give security for the faithfulness of his administration, or be dismissed\textsuperscript{4} ex officio.

Testamentary tutors, and those confirmed by the higher magistrates upon inquisition, were exempted from this obligation, as also the presidents of orphan asylums.\textsuperscript{5}

Every tutor must, immediately on his confirmation, draw up a public inventory of the property entrusted to his care;\textsuperscript{6} and if he neglect this, the simple oath of the plaintiff will be held sufficient to prove the case against him,\textsuperscript{7} involving the penalty of dismissal with infamy.\textsuperscript{8} The omission to make such inventory can only be pardoned when the pupil in fact had actually nothing, or the tutor was prevented by illness from drawing it up,\textsuperscript{9} or when the testator had expressly forbidden the making of an inventory;\textsuperscript{10} but this will not excuse the tutor from duly administering and rendering a proper account.\textsuperscript{11} It appears certainly erroneous to suppose that the mother was excused the inventory.\textsuperscript{12}

When many co-tutors are appointed, they should care for one undertaking the administration, which may be done by the majority. If, of many from whom no security is required, one offers security, or better security than the others, he is to be preferred; but the later law requires security invariably: this rule is therefore only applicable as to degree of security, or in the case of utter impossibility in the one party to give it.

Lastly, the judge may endeavor to persuade all the tutors to cede their rights to one of their colleagues; but if they cannot agree, the judge may elect; nevertheless, if they insist, they must all be admitted to administration.\textsuperscript{13}

§ 757.

According to the view commonly taken of the question,\textsuperscript{14} the magistrate must co-operate when steps are taken for the education and maintenance of the pupil,—duties which the guardian is not required to take upon himself.\textsuperscript{15}

\textsuperscript{1} C. 5, 37, 26.
\textsuperscript{2} P. 26, 7, 7, pr.
\textsuperscript{3} Nov. 72, 8.
\textsuperscript{4} C. 5, 42, 2.
\textsuperscript{5} I. 1, 24, § 1; Nov. 132, 15.
\textsuperscript{6} P. 26, 7, 7; C. 5, 37, 24; Nov. 131, 15.
\textsuperscript{7} I. 5, 51, 13, § 1.
\textsuperscript{8} P. 26, 7, 7, pr.
\textsuperscript{9} § 408.
\textsuperscript{10} C. 5, 52, 13, § 1; Thibaut, P. R.
\textsuperscript{11} P. 26, 7, 5, § 7.
\textsuperscript{12} Thibaut, l. c. n. 9, &c.
\textsuperscript{13} I. 1, 24, § 1; P. 26, 3, 17, 18, 19, § 1; P. 26, 7, 3, § 6-9; P. 46, 3, 14, § 1.
\textsuperscript{14} P. 27, 2, 1, 2, § 1; C. 5, 49, 1.
\textsuperscript{15} Arch. für. Civ. Prax. S. B. 2 Hft. n. 8.
Should the father have determined in his testament to whom the education of the pupil should be entrusted, the Praetor will make no new order, if he do not consider the person designated dangerous or unfit; but should such be the case, the choice of the judge is unfettered, with the sole exception of his obligation to entrust it to the mother, if still a widow, and capable of undertaking the duty. He is bound to be very circumspect in the choice of any other relation, especially in respect of a similarity of religious belief.

The party chosen by the judge, or nominated by the will of the testator, cannot usually be compelled to act, be he libertus, consanguineus, or affinis.

The refusal, however, involves the loss of whatever may have been left under testament in consideration of undertaking such education.

§ 758.

If the father have determined the measure of the maintenance of his children whom he has made his heirs, the tutor must observe such disposition, except it be ultra vires hereditatis, in which case he ought to apply to the Praetor, who will review it; but, generally, alimony is to be adapted to the age and substance of the pupil.

A tutor is not bound to obey an unwise order made by the Praetor, and may depart from it.

The pupil has a right to what is necessary to sufficient and respectable education, although it should exhaust his property; nevertheless, not only should the capital, if possible, be preserved intact, but something put by from the annual income.

If the tutor refuse alimony and conceal himself, the pupil has his recourse as to his goods; deprivation, too, follows, together with other penalties which come into operation, particularly when the tutor has refused to maintain the pupil under the false pretence of poverty. At the same time, the tutor is not obliged to maintain an impoverished pupil out of his own substance.

§ 759.

The term alienation is construed in its most extended sense, comprising every act by which the tutor abandons a right on the

1 P. 27, 2, 2, § 5 & 6.
2 C. 5, 49, 2; P. 27, 2, 5; Nov. 22, 38; Buchholz Jur. Abb. S. 262-3. Modern continental nations usually dispense with this condition. Struyk. 37, 2, 3; Voet. eod. § 13; Thibaut. l. c. § 113.
3 C. 5, 49, 2.
4 Schilter, Ex. 37, § 163.
5 P. 27, 2, 1, § 4; C. 5, 49, 1; Glück, Pand. 22, B. S. 161, § 2.
6 P. 27, 2, 1, § 3.
7 P. 27, 2, 2, § 2, 3, and l. c. 3, § 6.
8 P. 27, 2, 2, § 3; l. c. 3, § 4; l. c. 43; C. 5, 30, 1.
9 P. 27, 2, 2, § 1, 2.
10 P. 26, 7, 3; Id. 14; Id. 12, § 3.
11 P. 27, 46, 3; pr. & § 1.
12 P. 27, 2, 3, § 1.
13 P. 26, 10, 3; § 14; Id. 7, § 2, 3.
14 I. 1, 26, § 10; P. 26, 10, 3; § 15.
15 P. 27, 2, 3, § 6.
part of his pupil,\(^1\) extending to the renunciation of a profit\(^6\) accruing \textit{ipso jure}; the acquisition of a thing under a \textit{pactum reservatum hypothecae};\(^2\) and the acceptance of a payment from the debtor of the pupil; because, if a debtor of the pupil pay to the tutor without a decree of the magistrate in all matters (and here two years' arrear of interest and accidents are excepted), he must a second time pay over the money, if squandered or accidentally lost.\(^4\)

Thibaut doubts the wisdom of this rule, while he admits the practicability of the last position.\(^5\)

\section*{
§ 760.

In like manner, the tutor is generally bound to obtain, before alienating any of the pupil's property, the consent of the magistrate by whom he was appointed, but not of him of the district in which it lies, in so far; at least, as the tutor did not obtain such administration by a division of the estate.\(^6\) Originally the tutor could, of his own motion, sell all without reserve.\(^7\) Septimius Severus, however, decreed that \textit{pradia urbana} and \textit{rustica} should not be alienated without decree.\(^8\)

Constantine and Justinian declared a decree to be necessary in all cases, except where the object would be deteriorated by keeping.\(^9\)

The signification of the term perishable commodities has been very wavering;\(^10\) hence some have variously interpreted it, some applying it to all chattels whatever.\(^11\)

With respect to the property of the ward, a guardian in socage is said to have not only authority over it, but an actual estate in the land and domains \textit{pro tempore}, and has a right either to demise it or occupy it himself for his ward's benefit (which the Roman law, we have seen, discontenanced), and to bring actions in his own name against trespassers; nor is the law otherwise with respect to a guardian by statute; but no guardian can alienate a ward's estate, except by way of lease, during the ward's minority, at the expiration of which period all leases extending beyond it are determined. A guardian by the Lord Chancellor has less power, being only receiver of so much of the profits of an estate as the

\footnotesize{\begin{itemize}
  \item \(^1\) P. 27, 9, 1, § 2; Id. 3, §§ 45, 6; Id. 4, 5, pr. §§ 1, 2; Id. 13; C. 537, 22; C. 5, 71, 13, 15.
  \item \(^2\) P. 27, 9, 5, § 8; Voet. cod. § 3. Some hold with Boehner, Jus. D. cod. § 4, that every refusal of a present is an alienation.
  \item \(^3\) P. 27, 9, 1, § ult.; Id. 2.
  \item \(^4\) P. 2, 8, § 2; C. 5, 37, 25, 27; Thibaut, l. c. § 4, 14.
  \item \(^6\) P. 27, 9, 5, § 17; P. 26, 5, 27, pr.; 27, 2, 21, § 2; Voet. 27, 9, § 5.
  \item \(^7\) P. 27, 9, 8, § 2; C. 5, 37, 32.
  \item \(^8\) P. 27, 9, 1, § 2; Haubold Hist. Jur. Civ. R. de Rebar Eorum, etc. Spec. 1, 1798.
  \item \(^9\) C. 5, 37, 22; Id. ult. 5, 72.
  \item \(^10\) Thibaut, l. c. § 144.
  \item \(^11\) Montanus de Jur. Tut. c. 33, n. 166; Leyser, Sp. 544, 3; Wernher, Lec. 26, 7, § 19.
\end{itemize}}
Court may allow for his ward's maintenance; he can grant no lease without the sanction of the Court, with which, however, he or any guardian is enabled to grant leases (the leases will bind the ward after termination of the minority), or to surrender infants' leases with a view to renewal.

At the termination of the Roman guardianship, the tutor must pass a full account, although appointed by testament of the father guardian without account; for it is a munus publicum.

§ 761.

In certain cases, the co-operation of the magistrate is not requisite to the alienation of objects which do not perish by keeping; as, for instance, a third party can alienate the property of a pupill in cases where he has acquired a title to the thing in question from a predecessor of such pupill, with or without the co-operation of the magistrate.

A tutor can do the like on permission by the father of the pupill or the sovereign, provided that the testament of the father have become irritum.

§ 762.

There are conditions under which a legal necessity renders it imperative on the tutor to alienate a precise object; as, for instance:

If he pay money, put it out at interest, or invest it in the purchase of other things;

If he be compelled to give legal security by means of pledge in favor of the pupill;

If he sell an object hypothecated to him;

If he permit a creditor, who has lent money with which another mortgage creditor has been satisfied, to assume the rights of such first party;

If the pupill lend another money in order to purchase a certain thing on condition of acquiring an hypothecatory right.

§ 763.

When a decree of the judicial authority is necessary, it is a condition precedent that a formal examination into the circumstances of the case take place, with a view of ascertaining whether such alienation be absolutely indispensable, which can only be the case where it is requisite to fulfil compulsory duties of the pupill, or satisfy his own necessities, and he possess property which can be made available, but no alienation can be permitted upon the ground of utility. The rule with respect to such alienations is, that the

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1 P. 27, 9, 1, § 2; Id. 7, § 3.
2 C. 5, 72, 1, § 2; Id. 2 & 18.
3 P. 27, 9, 1, § 2; Id. 5, § 4; 7; C. 5, 71, 25, 35, 17; C. 5, 72, 1.
4 C. 5, 37, 28, § 3.
5 P. 27, 9, 5, § 5.
6 P. 27, 9, 7, § 6; W. Sell. Versuche, 1, Thl. S. 141-4.
7 P. 27, 9, 3, pr.
8 P. 27, 9, 1, § 2; Id. 5, § 9; Id. 10 & 11.
9 P. 27, 9, 5, § 14; Id. 13; C. 5, 71, 12; Leyser, Sp. 344, m. 1; Voet. 27, 9, 8.
object which can be the best spared be first sold, and that in such manner as may least of all infringe the pupil's rights.  

Hereupon a regular decree for sale is to be presented, which also has a ratitative force;² but it is a mere vulgar³ error, as destitute of common sense as it is unfounded in law,⁴ to suppose that the alienation must be performed by public auction; after the completion of such alienation, it is the duty of the authority to care that the proceeds⁵ thereof be applied to the end contemplated.

Lastly, if he who has acquired the property of a pupil in a valid manner by auction does not perform his duty, the tutor may take his place.⁶

§ 764.

If a tutor, in cases in which the sole power of alienation is allowed him, alienate in an illegal manner; as for instance, for no consideration;⁷ if he alienate in the above cases without decree; without an inquisition preceding; without sufficient ground for delivery of the decree;⁸ if he exceed the limitations of his decree,⁹ or if it have been obtained by false pretence,¹⁰ the alienation is invalid, as far as it infringes any advantage belonging to the pupil,¹¹ who retains his rights and actions,¹² and can recover¹³ the object from any possessor, on proof of the defective alienation,¹⁴ and recover damages against his tutor who has so acted illegally.¹⁵

In vindicating his property, the pupil is obligated to indemnify the defendant to the extent to which he has benefited by the transaction.¹⁶

§ 765.

Cases may, however, occur in which an alienation which is void may exceptionally become valid, namely, by the ward, on attaining puberty, confirming the transaction by an oath,¹⁷ or by his expressly or tacitly confirming it on arriving at full age,¹⁸ or by allowing five years to elapse without taking any steps for the recovery.¹⁹

The same will be the case if the tutor become the pupil's heir, or vice versa, but then only proportionally to the extent of the heir's inheritance.²⁰

¹ P. 27, 9, 5, § 9-12; Id. 7, § 3, 46.
² C. 5, 71, 6; Hallfeld, Jur. For. § 1386.
³ Stryk. 27, 9, § 6; Carpsov. L. 3, R. 72.
⁴ Corelli, I. C. cod. qu. 4; Leyser, l. c. m. 4; Müller, Obv. 615; Glück, Pand. 33, B. S. 48-58.
⁵ P. 27, 9, 5, § 13.
⁶ P. 26, 7, 56.
⁷ Thibaut, l. c. § 412.
⁸ P. 27, 10, 12; C. 5, 74, 3; Leyser, Sp. 344, m. 4; Voet. l. c. § 9.
⁹ P. 27, 9, 7, § 3.
¹⁰ C. 5, 71, 5, § 13; P. 27, 9, 5, § 15.
¹¹ Lauterbach, Coll. 27, 9, § 17.
¹² P. 26, 7, 46, § 7.
¹³ P. 27, 9, 5, § 15; C. 5, 71, 17, 15.
¹⁴ C. 5, 73, 2; Boehmer, l. c. § 93.
¹⁵ Voet. l. c. § 11; Glück, Pand. 33, B. S. 54-61; Thib. l. c. § 418.
¹⁶ C. 5, 51, 14, 15; P. 27, 9, 5, § 15.
¹⁷ C. 5, 71, 10, 16.
¹⁸ C. 2, 28, 1; Boehmer, I. S. P. 2, 24, § 23; Savigny, Ges des. R. R. 4, B. S. 162-71; Thibaut, l. c. § 419, and authorities there cited.
¹⁹ C. 2, 45, 1, 3; Leyser, Sp. 345, m. 5.
²⁰ C. 5, 74, 3.
²¹ Voet. 27, 9, § 14.
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§ 766.

A pupil has also duties to perform towards his tutor, which are as follows:—

He is bound to follow the guidance of his tutor, in so far as he is under his authority.

To indemnify the tutor for whatever he may have laid out with advantage, although not permanently; hence, he must pay interest upon funds borrowed for his use according to the current interest, and release the tutor from obligations which he may have undertaken, and indemnify damage which the tutor may have suffered by the pupil's fault, not merely accidental.

Lastly, that he pay the tutor whatever he may have promised him, or such salary as usage may authorise.

§ 767.

The rule which guides the relation existing between the tutor and pupil on the one part, and third parties on the other, regarding the tutor or the pupil, is as follows:

As far as the first is affected, he must, in the name of the pupil, exercise all his rights against third parties, and can be compelled by such third parties to perform the obligatory duties of the pupil during the continuance of the tutelage only; for after that an action can only be brought against him in cases where he has acted under his own name, or have obligated himself by deceit or promises.

The pupil has many modes of enforcing his rights as against third parties, to whom he is obligated partly by the payments made by the tutor of his own accord, or with the co-operation of the authority, or otherwise. Thus, if the tutor conduct the business of the pupil alone, which is to be presumed when its nature renders such a course necessary, the pupil acquires in so far a right thereby, as to be able to bring his actio utilis against such third party, if the transaction have been on his account; but if not, he is at liberty to acknowledge or to repudiate its validity, to bring his action, or to vindicate his property.

He acquires, according to the received opinion, a proprietary right in whatever is bought with his money (the title of the true owner always excepted) or a tacit mortgage, if he do not think fit to make use of such right.

1 C. 5, 50, 2; P. 27, 4, 1, pr. § 4, 5.
2 P. 26, 7, 9, § 6; L. 27, 4, 3, § 8.
3 P. 27, 4, 3, § 7.
4 P. 27, 4, 3, § 1-6.
5 P. 27, 4, 3, § 1; L. 3, 28, § 2.
6 P. 44, 7, 46.
7 P. 27, 4, 3, § 4; L. 3, 28, § 2.
8 Voss. 27, 4, § 4; Glück, Pand. 32, B. S. 285-6.
9 P. 26, 7, 15.
10 P. 27, 3, 5, § 2.
11 P. 26, 9, 5; pr.; C. 5, 39, 1.
12 P. 3, 3, 67; P. 50, 8, 3, § 2; P. 26, 9, 5, pr. § 1; C. 5, 37, 15.
13 Cæsar. P. 2, C. 11, D. 38; Mascard. de Probat Concl. 38.
14 P. 26, 9, 2, 6; C. 5, 39, 2, 4, & ult.
15 C. 5, 39, 2; P. 26, 9, 2.
16 Thibaut considers this point open to argument, § 707, l. c.
17 P. 26, 4, 7.
Recourse against the pupil by actio utilis. Fraud of the tutor only affects the pupil when he has profited thereby, and assignment of action against tutor permitted.

The venue of an action against the tutor to be laid where the offence was committed.

Action against the father of a tutor under paternal power.

The only competent tribunal before which this action can be had, is that of the place where the administration was carried on; but this is no impediment to the judge who appointed the tutor, requiring a yearly account ex officio.

The former pupil is here plaintiff under his tutor or curator, or all generally who succeed those persons. The tutor and his successor become the defendants, even though they may have transferred the administration to a third party by mandate, and even in this case such third party may be sued as agent.

The action may even be brought against the father, under whose power the tutor was, and, indeed, unconditionally, if he accepted the risk tacitly or expressly; otherwise, only upon grounds arising, on which the father can be sued as such.

§ 769.

A tutor honorarius can only be sued in where he has grossly neglected to impeach the administering tutor as suspectus, and then only when the pupil can obtain satisfaction from none else.

If the testator or judge has divided the tutorship, then the one, in respect of acts done by the other, is to be looked upon as a mere honorarius.

If all are called to the tutelage, they are answerable for culpable negligence in solidum, with the advantage of the plea of division, de dividundis, or contribution; but if the administration be absolutely faulty, a distinction must be made in the case of the administration

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1 P. 26, 9; 7 C. 5, 39, 73; Voet. 2, 1, 3; Gluck, Pand. 12, B. § 732, S. 53, sqq.; Gesterding. Nachr. 3, B. S. 3, 6; Thib. l. c. § 422. 2 P. 26, 9; 3 P. 3, 46, § 4. 3 P. 26, 9; 3 P. 43, 15. 4 P. 26, 7, ult. For the views of others, see Leyser, Sp. 335; Struen. Syn. 26, 9, § 481; Werner, Lect. Com. eod. § 2; Müller ad Leyser, Obs. 605. 5 C. 3, 21, 2; Lauterbach, Coll. 27, 3, § 19; Struen, 3, B. 56; Bed Gönner Handb. de Process. 1, B. n. 15. But see Weber, Bey. Trag. v. d. Kl. & Einr. 23, 3, St. S. 35, sqq.; B. W. Pfeiffer. Prakt. Ausfuhr. 31, B. n. 19.

6 P. 27, 3, 1; § 17, 18. 7 P. 27, 3, 1; § 16, 9; § 6; C. 5, 54. 8 C. 5, 57, 91; C. 5, 45, 23; C. 4, 52, 24. 9 P. 26, 7; 7; P. 26, 7, 21; C. 4, 26, 1. 10 P. 27, 3; 1; § 15; P. 26, 7, 46, § 61; C. 5, 52, 2; Lauterb. Coll. L. 27, T. 8, § 1; Cocceji, I. C. 27, 7, 7; Müller ad Leyser, Obs. 614; Gluck, Pand. 30, B. S. 333-344; Thibaut, Theor. d. Log. Aust. 3, Auf!, § 35; Contra Lühr im Arch. Civ. Praxr. 2, B. 1, Hist. m. x. 11 C. 5, 57, 3; § 2; l. c. 6, C. 5, 58, 2. 12 P. 26, 7, 38, § 1; l. c. 39, § 11.
THE TERMINATION OF TUTELA.

having been assigned to one in particular by deed; for in this case the others can require that such administrator be first sued to judgment,1 when this can be readily and successfully done; but the plea of division protects the tutor for ever if the others be solvent.2 If, on the contrary, all took part in the administration, then they can only claim the exception of division under the usual restrictions, but this is not granted when one is sued for his own dolus.3 If the pupill be referred in the interim to another, he must sue him at once, if his subsequent insolvency will be no damage to him.4 If the tutor, who is not sued on account of acts not exclusively his own, be ready and willing or be condemned to pay, he may require the cessio actionum from the pupill, or, in default thereof, take his recourse against the co-tutors by an actio utilis, or equitable action, in the form actio negotiorum gestorum.5

This practice is consonant with the law of England; for when the ward comes of age, the guardian must give him an account of all he has transacted on his behalf, and is answerable for all losses by wilful neglect; to compel him to which it is usual to file a bill against him in equity, which may be done even during the ward’s minority. In such account, all reasonable allowance shall be made to him for costs and expenses, but he shall not be in any case allowed to profit by his administration from the ward’s estate.

§ 770.

Tutela is determined by puberty, of which much has hitherto been said. Justinian having settled the question of age, fourteen years complete in males and twelve in females, it only remains to observe on the interpretation given by Heineccius6 to the term habitus corporis, in the passage of Ulpian.7 Puberex autem Cassian: quidem cum esse dicunt, qui habitu corporis, pubes adparet, id est qui generare potest; Proculeian: autem cum, qui quatordecim annos expelit. Verum Priscus cum puberem esse, in quem utrumque concurrit, et habitus corporis et numerus annorum. This he takes in connection with Isidorus.8 Quidam ex annis pubertatem existimant id est, cum puberem esse, qui quatordecim annos expelvet quamvis tardissime pubescat. Certissimum autem, puberem esse, qui ex habitu corporis pubertatem ostendat et generare jam possit. Heineccius thinks this never implied an actual survey, but simply that the lawyers considered the general outward appearance of the party. The words, however, hardly bear out this view, and he himself admits that such survey was the practice in Athens, and although no trace of it is to be found in the laws of the Twelve Tables, as we have them, yet he thinks it not impossible, those laws having been borrowed from Greece, that it existed there.

2 C. 5, 52, 1.
3 P. 27, 3, 1, § 11, 14, 15.
4 C. 5, 59, 1.
5 C. 5, 59, 1, § 15, 14, 18; C. 35, 30; C. 5, 8, 2; Lindorf, contra im. Act. f. Civ. Prax. B. 7, n. 6; Glück, Pand. 30, B. S. 375-86.
6 A. R. 1, 22, § 4.
7 Frag. 11, 28.
8 C. 11, 2.
The more reasonable supposition is, that no such regulation existed, as the Twelve Tables contained provisions too statesman-like and general to enter into such details.

§ 771.

The pupillage of women was not, on the contrary, terminated by puberty, but by *convensio in manum mariti*, which was a *capitis deminutio minima*, being a change of family, and could only be relieved from a *tutela* upon all the tutors consenting, *nihil enim potest de tutelá legitimá, sine omnium tutorum auctoritate diminui*.¹

The *jus trium liberorum* of the Papian-Poppæan law exempted free women from tutelage; but freed-women, to be exempted from that of their patrons, must have borne four children.² This law, it will be remembered, dates only from the reign of Augustus.

§ 772.

**Curators**, like tutors, were either *legitimi*, according to the Twelve Tables, or *honorarii*, according to the praetor’s edict.³

The law of the Twelve Tables assigned curators to madmen and spendthrifts, *si furiosus aut prodigus existat, ast ei custos necescit, agnatorum geniliumque in eo pecuniari ejus potestas este*.⁴

Before this could be made applicable to a spendthrift, sentence must issue from the praetor at the suit of the agnates, interdicting him the use of his property;⁵ hence the difference, that in the latter case the disability did not arise until the issue of the interdict, but in the former from the beginning of the madness.

The formula of the interdict is found in Paulus,⁶——*quando tibi bona paterna vitaeque nequitas tua disperdis, liberosque tuos ad egentatem perducis; ob eam rem tibi eare* (are) *commercio interdico,*—— which committed the prodigal to the care of his nearest agnate, or, failing such, of his gentilis,⁷ until such time as, in the one case, the *furiosus* had recovered his senses, and, in the other, the *prodigus* had become thrifty.

Thus the *curatio* was always considered to be connected with some fact detrimental to the good reputation of the object of it, and it was held disgraceful *ingenius hominibus non esse liberam rerum suarum alienationem*;⁸ hence a curator could be appointed to none, against his consent, otherwise than for the above causes.

It being, however, found that young men of fifteen were apt to be extravagant—in short, that they were at that age not fit to be trusted to manage their own property—the *Lex Latoria* was

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¹ Cic. pro Flacc. 34; Boeth. ad Top.
² Ulp. Fr. 28, 5.
³ Ulp. Fr. 13, 1.
⁴ Cic. Quest. Tusc. 3, 2, et de Juv. 2, 59; Goth. ad L. xii Tab. tab. 5.
⁵ Hor. Sat. 2, 3—
⁶ Interdicto hunc omne adimatur jus.
⁷ Pretor et ad sanos abeat tutela propinquos.
⁸ Ulp. Fr. 13, 2; Val. Max. 5, 6.
⁹ R. S. 3, 4; A. 7.
⁰ Senec. Contr. 3; Val. Max. 3, 5, & 8; 6; Dion. Cass. 57, p. 710.
¹¹ P. 37, 12, 2; Heinecc. A. R. 1, 23; § 6.
introduced, at what exact period\(^1\) was unknown, but probably by M. Lætorius Plaucianus, tribune A.U.C. 490, and prætor A.U.C. 497, which assigned curators to young men under twenty-five, if after due investigation\(^2\) they appeared to be given to excesses of any kind. At a later period, this law was taken advantage of to protect minors from the tricks of swindlers,\(^3\) to the extent of avoiding the stipulations of, and actions by, creditors against minors;\(^4\) and the prætor by his edict declared that he would not only grant a restitutio in integrum to minors, but also assign them curators on their petition,\(^5\) and this was termed the *beneficium tutela minorum*.\(^6\)

The age of twenty-five, which is not founded on any of the foregoing natural divisions of human life, is referable therefore to the prætorian edict.

In England, although the law does not meddle with spendthrifts, the same equitable principle of protecting the heirs is applied to lunatics. The Sovereign, by his Lord Chancellor,\(^7\) is the guardian of all idiots and lunatics, with the power to grant administration: first, a commission *de lunatico inquiring* issues, the proceedings under which are regulated by statute;\(^8\) and if proved *non compos mentis*, his person is entrusted to some person called his *committee*, who, however, is seldom allowed to be his next heir, though it may be his next of kin if not next heir, because this latter is interested in his death; the management of the estate may, however, be committed to such party, because he may be supposed to administer it better than any other, having a prospective interest therein. This person is, however, accountable to the Court, or to the administrator of the idiot or lunatic if he die, for there is no distinction between these two in legal proceedings.

Many other acts refer to this subject;\(^9\) one to the prevention of persons who are presumed to be about to commit an indictable offence;\(^10\) and others to the treatment of lunatics in hospitals, asylums, prisons, and the course of proceeding under commissions.

The prætor, moreover, assigned curators to the spendthrift sons of *liberti* and *ingenui* whom their parents had instituted their heirs, and who dissipated their property; for by the law such could only be assigned to those who inherited *ab intestato*.\(^11\)

To remedy all these inconveniences, M. Antoninus the philosopher decreed that all minors should have curators assigned to

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1 Plant. Pseudol. 1, 3, 68. Perit, aut non tum lex me perdit quinavoxineria? Metuunt credere omnes.
2 I. Capitol. Vit. M. Ant. 11.
3 Cic. Off. 33, 15.
4 Suet. in Lib. prætorum, lib. 1; Lætoria, quæ vel ad minorem annis, xxv. stipulæ; Suet. Frang. ex lib. 4, prætorum, 8; Cic. de Nat. Deor. 3, 29; B. Brem. A. R. 3, 2, p. 46.
5 P. 265, 513, § 2; Ter. Phor. 2, 4.
6 P. 44, 4, 1, pr.
7 M. de Talleyrand remarked in allusion to this, when he received the seals, me voilâ donc le garde des sceaux (eis).
8 3 & 4 Will. IV. 36; 4 & 5 Vic. 84.
9 2 & 2 Vic. 14.
10 2 & 3 Will. IV. 64; 5 & 6 Vic. 87; 3 & 4 Vic. 54; 6 Vic. 84.
11 Ulp. Fr. 12, 5; Goth. ad xii Tab. Probat. tab. 5, p. 98.
§ 773.

As curatela is various in its species, so it is in its origin.

All deranged and idiotic persons of full age must have a curator, and the next heir, though such be the son of the party, may undertake it, upon previous inquiry by a magistrate; but if there be no such next heir, the authority may freely choose any one to this office, although it is under the necessity of confirming in his functions him who may have been appointed by the father.

Spendthrifts, though of full age, are deprived of the power of administration over their property by order of a judge; and upon this occurring, the legal right of administration, in case of no curator being appointed subject to confirmation in the father’s will, vests by law in the next heirs, even in the son; and in such case the proper authority may admit the son; but, default of such legal heirs, the judge has free right of choice, which he does without further investigation as to whether the son be a spendthrift or not.

Many modern jurists have interpreted, without sufficient foundation, the Lex Latoria to require the appointment by the magistrate of a curator to stupid or wild minors. Other minors could have a curator assigned to them by testament only, but otherwise only in particular cases; but in all cases they may apply for one, whom they must retain until their majority.

§ 774.

With respect to minors, curatela in its origin is as diverse as tutela.

Persons under the age of puberty, who are even under tutors, and minors under paternal power, may have a curator assigned to them for the assistance of the tutor, or for particular transactions, who is sometimes termed a tutor, sometimes a curator.

The magistrate may appoint a curator to all persons who are under utter disability to manage their own business. In like manner, an inability in this respect is inferentially supposed to

1 I. Capitol. in Vit. Marci, 11.
2 L. 1, 23, § 4; P. 27, 10, 6, 13; C. 5, 70, 5.
3 L. 1, 23, § 4; C. 5, 70, 7, § 5.
4 P. 27, 10, 1; l. c. 10, pr.; l. c. 15, pr. See authorities cited by Thibaut, § 402, n. c.
5 P. 26, 5, 11, § 1; l. c. 12, § 1; P. 50, 17, 40; Hoppe, s. a. O. § 51, S. 30.
6 P. l. c. 1, 5.
7 P. 27, 10, 16, § 1, 3.

9 I. 1, 13, § 1.
10 C. 3, 6, 2; L. 1, 23, § 2; C. 5, 31, 7; C. 4, 5, 41, § 3, & 7, § 2; P. 26, 6, 21, § 4, 5; P. 26, 5, 15, § 3; Thibaut, P. R. § 424, n. k, and authorities there cited.
11 P. 26, 13, 1; C. 5, 36; Nov. 117, 8.
12 I. 1, 23, § 4; P. 26, 5, 92, pr.
THE CONSENT OF THE CURATOR.

attach to one who is absent, and whose whereabouts is not known; and an officer termed curator absentis is to be appointed, with precedence to the intestate heirs, should such be capable; but if not, their tutors are to be preferred.

The cura ventris belongs more properly to the question of inheritances; and the curator massa of insolvent estates has also no place here.

If a pupill be of the age of puberty, we must distinguish between the cases in which he has or has not a curator; for, in the first case, he is as much restrained in respect of his property as if he were a pupill, but in other respects he can obligate himself without the curator; if, on the other hand, he have no curator, as a general rule he can always obligate himself, being only prohibited from alienating immovable without the consent of a curator. But in all cases, inasmuch as the pupill may be obligated through his tutor, or by his own acts and deeds, he has the privilege of demanding restitution in integrum, wherever he shall have been exposed to any disadvantage.

§ 775.

There are, however, certain rules applicable to the above species of curatela.

A madman is incapable of the expression of legal volition; hence he is incapable of acquiring any rights, his curator transacting all descriptions of business matters for him; but here a distinction must be drawn between such as are continuously and invariably insane, and those who have lucid intervals: technically speaking, furiosi are distinguished from mente capti, for a person who has lucid intervals is, during their continuance, to all effects and purposes a sane man, and, not being exposed to any exceptional provisions, he can perform valid acts without a curator.

Although spendthrifts are not de facto mad, they are so de jure, and are therefore put upon the same footing as insane persons, and are placed under a curator by decree of the court; nevertheless, whatever such persons may have done before the issue of such decree will be binding upon them, but afterwards they stand exactly in the same position as the pupillus infantia major, never-
theless, it must not be misapprehended that he is generally subject, 

quoad his person, to the same direction on the part of the curator 
as though he were actually a pupillus, for such would not be 

consonant with the spirit of curatorship, but he may be perhaps 

properly described as a quasi pupillus; and notwithstanding that the 

fact of being put under such curatorship was formerly a blot on the 

character of the party, he is in no case to be accounted infamous.¹ 

This legal disability ceases as soon as the decree be reversed, 
or he be permitted by decree to re-enter upon the management of 

his own property.² 

The case of such persons as are of weak and imbecile mind, 

but destitute of property, depends in a great measure upon circum-
stances; nevertheless it may be laid down as a principle, that the 

acts of such persons are not fully valid without the consent of a 
curator,⁵ inasmuch as their physical condition has rendered the 

appointment necessary. 

The curatorship of an absentee applies only to the property left 

behind, and which therefore is a curatela realis, but in no respect 
affects either the person or any other property the absentee may pos-

sess; nor is the right on his part to dispose of his property suspended 
or superseded, or otherwise interfered with, for on his return all is 
immediately re-delivered to him; but if he die, those at once enter 
to possession who were his next of kin, or bæredes ab intestato 
to him at the moment of his death— but some think the presumed 
death ought to date from the issue of the decree— which the sub-
sequent practice has fixed at seventy years, reckoned from the 
birth of the person whose existence or death may be in doubt, 
and after the lapse of that period his death may be presumed.⁶ 

§ 776. 

Three titles in the Institutes are common to tutors and curators. 
These are, Satisdatio, Excusatio, and Remotio. 

A tutor or curator who administers another’s property must in 
certain cases give security; if this be by way of pledge or by bond, 
it is termed satisdatio, si ulla in eos cadit suspicio, which does not 
imply a suspicion, but simply a guarding against contingencies. 

§ 777. 

Satisdatio, or the security to be given by tutors on their appoint-
ment, was unknown to the old law, and originated in the dative power of the Prätor, in whose edict the words *rem pupillii vel adolescentis salvam fore, tutorem vel curatorem satisdare jubebo* are contained. The Prätor can only apply it in the following cases:

In the case of testamentary tutors.—Where many were appointed, he was preferred as administrator who offered security for the due performance of his office:

As to testamentary tutors.

In that of legal tutors or curators.—For neither does a testament nor the investigation of a magistrate create a prejudice in their favor. The father and patron form exceptions after investigation. When one is chosen of many to administer, he is obligated to give caution to his colleagues, who became *honorarii*, for they are also liable to the pupill, and must be protected:

As to legal tutors. When one of many acted he gave security to the rest, which only applied to inferior magistrates.

In the case of dative tutors.—Those appointed by the inferior magistrates, with whom it is a condition *tutorem do si satisdederis*; for none could be required of those appointed by superior magistrates after an inquisition, and of the fidelity of those appointed by will the testator is presumed to have satisfied himself.

As to dative tutors.

§ 778.

Satisfaction is given by joint and several bondsmen, who undertake by stipulation to the pupill—or, if an infant, to him through a slave—*rem pupillii (suam) salvam fore*. *Si pupillus absens vel fari non passit, servus ejus stipulabitur; si servus non habeat, emendus ei servus est; sed si non sit, unde ematur, aut non sit expedita emptio; profecto dicimus servum publicum apud praetorem stipulari debere.*

The effect of the stipulation by the slave is, that whatsoever he stipulate or acquire becomes vested in his owner. The Prätor sometimes appoints a person with whom the securities should stipulate in the usual form, *Fide tua promittis rem pupillo salvam fore?* to which the answer *Fide mea promitto* is returned.

The Court of Chancery, on appointing guardians, requires security in like manner.

§ 779.

The neglect to require security from tutors and curators, or the admission of insufficient, is punished by a Sctm. of Trajan, which gives the right of action against the *Duasviiri*, which the Emperor Pius made hereditary against the heirs of such magistrates, in the case of *culpa lata.* In *magistratus municipales, tutorum nominatores, si administrationis finito tempore, non fuerint solvendo, nec ex cautione fidiusulfionis solidum exegi passit, pupillus quondam in subsidium indepositis nomini actionem utilem competere ex Scto. quod auctore Divo Traiano Parente nostro factum est, constitit.*

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1 *P. 46, 6.*  
2 *I. 1, 24, § 1.*  
3 *P. 46, 6, 2.*  
4 *P. 5, § 1.*  
5 *C. 5, 75, & 6.*  
6 *C. 5, 75, 2 & 6.*  
7 *C. 5, 75, 5.*  
8 *C. 75, 6, 3.*
§ 780.

Every citizen is obliged as such to accept a tutorship assigned to him by testament, law, or the public authority, not, indeed, to the prejudice of his own property, but at least gratuitously. The cura bonorum in bankruptcy is, however, a voluntary office, when there is no absolute necessity for its being otherwise. The responsibility for mismanagement accrues immediately on assignment, and the tutor is liable from this moment to action for negligent administration, and all acts done for the pupil. The tempus dilatationis in dative tutorships, is reckoned from the moment the assignment is made in testamentary and legal ones (when the first is founded on the death; the latter on the administration to the estate), from the moment of the knowledge of the unconditional accretion.

Voluntary exemptions can, as a rule, be only made available where the office has not been entered upon, and but rarely where it has.

§ 781.

Those who are freed from the burden of tutorships are said excusari, to be excused or exempted. Cujacius wishes to emend by the word excurari; there appears, however, to be no necessity for this; for the word is used by all old Jurisconsults in this sense, and the Greeks even went so far as to transform it into ἐκκοινωνεύω.

The grounds upon which a man can be exempted from performing the munus publicum of tutela, or curatela, are in their nature voluntary or necessary.

By voluntaria were meant such as were at the option of the party, and which he could consequently claim or not as pleased him, nay, even agree beforehand that he would not avail himself of such optional excuse, which was in the form of an exception or plea.

The exemptions from the conscription for the army, in countries of the continent of Europe, may be not inaply compared to the burden of tutorship. In England the militia—that expensive mode of gratifying at once the milites gloriosi of the provinces, and those who beheld them—having met with a deserved end, the jury now remains as the only munus publicum which can be compared to tutela, nor even is that an exact parallel, since jurors (in certain cases) are indemnified in some measure, whereas, Roman tutors are forbidden all emolument.

Under voluntaria excusationes may be ranked, those who claim: Privilegio, in virtue of some benefit granted to them individually or to their class:

1 P. 27, 11. 6, § 15; 26, 7, 1.
2 P. 27, 11, 6, § 15; P. 59, 4, 1, § ult.
3 P. 45, 7, 2, § 3.
4 26, 7, 40, 58, § 2; C. 5, 28, 1.
5 C. 5, 28, 1, 4.
6 L. 1, 28, § 16; P. 27, 1, 13, § 9—21, § 1.
7 L. 1, 25, § 158, § 9; P. 27, 1, 13.
8 § 21 R. 26, 2, 29.
9 Obs. 26, 28.
10 P. 55, 2, 17; P. 3, 1, 1, § 3.
11 In criminal causes there is no indemnity, but 1s. is paid a common juryman for every common jury cause, and to a special jurymen £1 1s.
Those who claim, ob impotentiam, from a moral or physical impossibility of performing the office; and lastly, ob existimationes pericum, where his good fame might suffer innocently, on account of certain facts known to exist.

§ 782.

Necessary excuses, on the other hand, did not require to be pleaded, but were sometimes imported very much to the inconvenience and annoyance of the tutor or curator, as most of them reflected upon him in some way or other.

§ 783.

Voluntary exemptions, ob privilegium, and firstly, the jus liberorum: in Rome three, in Italy four, and in the provinces, five children born in wedlock constituted this exemption; the foundation was in the Papian Poppean law, although it appears before the age of Augustus. Rewards were held out to such as married and gave children to the state, and penalties to those who remained single. To claim this exemption, it was required that the children should actually have been born alive, nor would adopted or natural children satisfy the provisions of the law: to have lost the same number in war was considered equivalent.

§ 784.

Voluntary exemptions are.

Administratio rei fiscalis.—Under the republic, all revenues were paid into the ararium; but under the Emperor, the fiscus signified the imperial, the ararium the public treasury; hence, the two words are sometimes found conjoined, jura fisci et populi.

Augustus was the first to introduce this difference, and it existed under Tiberius.

The Ratio Cesaris was again a separate administration, and comprehended the Emperor’s private patrimony. This difference between the fiscus and ararium vanished in the later ages of the Byzantine empire, and the public money was termed pecunia sacrarum largitionum, and that of the Emperor privatuum rerum.

The questors at first presided over the ararium, and those officers were nearly coeval with the city, according to Gracchanus Junius. Plutarch, on the other hand, ascribes their creation to Val. Poplicola, and Pomponius makes them more recent than the Tribunes and Ædiles. Heinecius gives little weight to Pomponius, and reconciles Plutarch and Ulpian, on the authority of Tacitus, assuming that the office of questor was abrogated by Tar-

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1 I. 25 pr.
2 For the history of these laws, vid. Heinecc. de L. L. Pap. Pop.
3 L. 1, 25, pr.; P. 27, 1, 2, § 2-8; l. c. 43.
4 Paul. R. S. 5, 12; P. 43, 20; Laminid, Alex. Sev. 12.
5 Tac. A. 6, 2.
6 P. 49, 14, 6, §.
7 C. 6, 59.
8 Tac. A. 11, 22; P. 10, 13, 1, pr. Ulpianus.
9 P. 80, 103.
10 P. 1, 2, 23; § 22.
quinius Superbus, and revived by V. Poplicola, and that their election was transferred from the consuls to the populus. First, two were created for the army, then two added for Rome; their number was doubled at a later period, and Sylla created twenty, to whom he gave a certain jurisdiction; but the care of the ararium was always claimed as a popular constitutional right,¹ until Cæsar transferred it, A.U.C. 709, to the Ædiles.²

Augustus instituted a military treasury, and placed it under prætors first chosen by the senate, and lastly by the Emperor himself.³ Claudius restored the custody of the aræ æsæ, and Nero transferred it to officers called Prefecti aræ, who also had a jurisdiction in fiscal matters.⁴

§ 785.
The fiscus was presided over by officers severally termed Procuratores, Advocati, and Patroni Fisci. The Prætor fiscalis was created by Nerva,⁶ with jurisdiction in fiscal matters, while the Procuratores Caesaris administered the imperial patrimonial domains. The last officers of this department were the Comites sacrarum largitionum; and the Comites rerum privatârûm answered to the former Procuratores Caesaris.⁷

All, then, engaged in the administration of fiscal matters can be excused from accepting guardianships,—not on account of their being public accountants and subject to the Crown as to their property, but on account of the discharge of a high public function;⁸ hence this was not a necessary, but a voluntary exemption, which might be claimed or not at pleasure.

§ 786.
Athletes,⁹ who had been crowned in the circus as victors in the sacred contests, can claim to be exempted from serving.

§ 787.
Senators can claim to be exempted from undertaking the tutela of a plebeian.¹⁰

§ 788.
All made councillors of the regent, consiliarii principum, are excused from accepting, and, if they have accepted, can lay down the office.¹¹

§ 789.
The mensores frumentarii, or corn-meters, are excused by a

³ Suet. Aug. 35.
⁴ Suet. Cl. 24.
⁵ Gel. 12; Tac. 13, 28; Sac. Gutter de Off. Dom. Aug. 3, 32.
⁶ P. 1, 2, 2, § 18.
⁸ C. 5, 62, 10; C. 5, 34; I. 12, 25, § 1.
⁹ P. 27, 3, 6, § 13; C. 10, 53, 1.
¹⁰ P. 27, 1, 15, § 2, 3.
¹¹ P. 27, 1, 30, Pr.
rescript addressed by Marcus and Commodus to the Praefectus Annonae.1

§ 790.

Certain corporate companies have the right of exemption,2 but must be specially named; such are that of smiths and bakers, which last, if in the city, are exempted even from the tutorship of their children; but this is not generally the case, but must be specially conceded.

§ 791.

Those are excused qui cum potestate sunt. The potestas may be had, however, without the imperium. Provincial magistrates3 are opposed to those of the city by this term, which was retained by the republics of the Middle Age in Italy under the name podesta. Those who could try causes without the right of apprehension, as the quæstors, and such as the Praefectus annonae and vigilum,4 who were not magistrates in the strict sense of the word, but who had a sort of police jurisdiction,—in short, minor magistrates.5

To claim an exemption, the person must be a superior magistrate, having that potestas which included the imperium,—in other words, magistratus majores. Thus, not even the Ædiles6 could claim it, for they could neither enforce sentences, commit to prison, nor apprehend, and might themselves be cited.7 But the Emperors latterly extended this privilege to Senators (Duumviri).8

§ 792.

Those absent on the business of the Republic—that is, of the state9—can, during their absence, give up the administration of a tutorship already entered upon, or, if absent beyond seas, can repudiate the tutorship itself in toto.10 They are also excused during a year after their return, inasmuch as that period is allowed them to give an account of the business upon which they may have been sent.

§ 793.

Hereditary farmers of imperial domains, but not those on lease or at will, were exempt.11

§ 794.

Such as change their domicile on the command of the prince,12 in so far as the rescript shows that the prince is aware of the fact, were also exempted. This voids even a tutorship already accepted.

1 P. 27, l, 26.
2 P. 27, l, 17, § 2, 3; l. c. 26; l. c. 41, § 3.
3 Suet. Cl. 23.
4 P. 1, 21, § 33.
5 Thibaut, P. R. § 406, thinks these were excused; P. 27, l, 17, § 4; l. 1, 25, § 3; but admits it is a point upon which great diversity of opinion exists.
6 P. 27, l, 27, § 4.
7 Gell. N. A. 13, 15.
8 P. 27, l, 15, § 2.
9 P. 27, l, 6, § 16.
10 P. 27, l, 10, pr.
11 P. 27, l, 10, pr. § 2; P. 4, 4, 11, § 2; l. 1, 25, § 2.
12 C. 5, 62, 8; C. 5, 34, ult.; Thibaut, P. R. § 406, n. a.
13 P. 27, l, 12, § 1.
§ 795.

The profession of letters was a valid excuse; and the persons included under the generate term *Literati* and *Literatores* were,—Grammarians, Rhetoricians, Philosophers, Medicine-men, Lawyers, or, as they are now termed, professors of the liberal sciences. The *Ludimagistri* were the oldest elementary schoolmasters in Rome, inferior to the *Grammatici*, who interpreted the poets, and occupied themselves with the higher branches of literature. Grammar was not favored in so warlike a state as Rome, and was professed usually by persons half Greeks, until *Crassus Malleotes*, whom King *Attalus* sent to the Senate between the second and third Punic war, having accidentally broken his thigh, excited the Roman youth to this study by his lectures; others followed him, more particularly after the time of *Q. Metellus*, whence the consideration in which grammarians stood was so great, that the most celebrated men occupied themselves with this literature, and upwards of twenty* schools sprung up in Rome; most of these, however, were private, under the patronage and at the charge of illustrious men. Under Tiberius, *Verrius Flaccus* received a salary of 100 sestertia,* but this branch of learning afterwards declined by degrees, and grammarians, attracted by the public stipends, taught publicly,* and an annual ration of corn was distributed to them, which was from time to time diminished and again restored.*

§ 796.

Rhetoricians did not so readily obtain a footing in Rome; nay, they were even expelled the city *A. U. C.* 592 by *Senatus consult*, under the consulsip of *C. Flaminius Strabo* and *M. Vellarius Messala*; and again *A. U. C.* 661, by a censorial edict, by *Cn. Domitius Ahenobarbus* and *L. Licinius Crassus,* but they subsequently began to teach privately,* and are first mentioned by *Eusebius.* Under *Domitian*, *Quintilian* received a salary from the fiscus; under *Vespasian*, Latin and Greek rhetoricians* received a salary of 100 sestertia from the fiscus; and subsequent Emperors were so liberal in this respect, that the salaries of rhetoricians in the second century amounted to 600 aurei, or 1500 philippics.* *Eumenius* received, by the liberality of the Emperor, a salary of 600,000 sestertia *nummi*, whereof he boasts, as well he may.

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1 P. 50, 13, 1, § 6.
2 Suet. de Ill. Gram. IV.
3 L. c. 7.
4 Suet. l. c. 5.
5 Suet. l. c. 17.
7 Symmach. Epist. 1, 33; Cassiod.
8 Epist. 9, 21; C. Th. L. 11, de Med. et Prof. (13, 3).
9 Suet. de Clar. Rhet. 1.
10 Suet. l. c. 3.
11 In Chron. n. MMCIV.
12 Suet. Vesp. 18.
13 Cassabon. ad Suet. Vesp. l. c.
14 In Orat. pro Restaur. Schol. 11.
§ 797.

The philosophers were expelled Rome, together with the rhetoricians, A. U. C. 592, which was often repeated; for instance, under Cato and under Domitian, who ordered Epictetus out of the city; nevertheless the study of philosophy flourished in private, until Antoninus Pius first assigned them a public salary, and granted them honor, 1 and after him Marcus, who granted all teachers an annual stipend, 2 which usually amounted to 1,500 aurei, 3 although some received less. In the time of Lucian, some particular sects of philosophers received as much as 10,000 drachmae, or 100 philippics, 4 and this sum was granted to the Sophist Theodotus. 5

The Alexandrian school of Medicine had, under the Anthonies, arrived at such celebrity, that it was sufficient recommendation for a medical man that he had resided for a period at Alexandria. 6

§ 798.

Medicine was first practised principally by slaves, 7 and thus obtained no consideration until comparatively a late period,—slave and freed women acting usually as midwives, and at the same time administering medicines.

Julius Caesar 8 first made medical men free of the city, and Augustus rewarded the freedman Antonius Musa with the privilege of the golden ring, and granted the whole profession of medicine immunity, 9 for curing him of a serious and dangerous disorder. These privileges were confirmed by many rescripts of Vespasian, Hadrian, and other Emperors; 10 but as the number claiming these immunities increased inordinately, it was found necessary to impose a restriction. 11 Alexander added rations of corn to medical men; 12 and later Emperors even increased these immunities, and confirmed them by many constitutions; 13 and chirurgeons, χειρότεχνοι, were for the most part also physicians at that period, termed vulnerarii or vulnerum medici, 14 also medici chirugi. 15

§ 799.

Jurisprudence always flourished at Rome; its first professor was Tiberius Coruncanus, 16 who was followed by others, the most im-

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2 Xephilius, 73, p. 814.
3 Not. ad Suet. l. c.
5 Philast. Vit. Soph. 2.
7 Carolus Sponius denies this, dans les Recherches d'Antiquités, Dim. 27; but Suet. Cal. 8; Quint. Inst. 7, 3; Seneca de Vren. 3, 34, Varro de re Rust. 1, 16, prove that his assertion in favor of his profession is ungrounded. Grut. Inc. 636; Julia Q. L. Sabina medica minuca; O. L. Arte Medica, Sentia, E. L. S. Medica; P. 9, 2, 9.
8 Suet. Jul. 42.
10 P. 55, 4, ult.
11 P. 27, 7.
12 Lamprid. Alex. 42.
14 Pline. H. N. 29, 1.
16 P. 1, 2, 2, § 2.
portant of whom are found in the first part of this work; nevertheless, the most eminent did not condescend to teach exclusively as a trade, but satisfied at once the learners and the clients, by their opinions publicly delivered, and Q. Scaevola, although he sought to be taught by none, yet taught those desirous of learning by allowing them to hear the answers he gave to clients.

Neither were there certain and ordinary professors of law, each relying on his own study and observation, and thus instructing those desirous of learning and his clients at the same time; in other words, jurisprudence was learned in practice.

In the later times, jurisconsults began to teach publicly at Rome, on a fixed stipend, and thus the only legal school in the East, was frequented by the youth from all parts.

Hence, the most flourishing schools were at Rome, in the auditorium of the capital, in which, in the age of Theodosius and Valentinian, were three Latin rhetoricians, ten grammarians, five Greek sophists, ten Greek grammarians, one philosopher, and two professors of law, and this may be said to have been the first university.

Other schools flourished in the provinces of Augustoduni, Burdegali, Tholosae, Narbonae, Mediolani, Carthagine, in which, however, it would appear that grammarians and rhetoricians of Latin and Greek only taught.

In the East, the position of the schools was different. The Civil Law, however, was confined to Beyrut and Constantinople, at the former in the commencement of the third century; nay, so famous was it that it was termed μητέρα τῶν νόμων. The jurisconsults used to be summoned from Beyrut to assist the magistrates, nor did this give rise to jealousy. But the city was destroyed by an earthquake shortly after Justinian’s reign.

At Constantinople, Theodosius added the faculty of law to the other professorships, to which Justinian subjoined that of philosophy, so that the school of Constantinople was in no wise inferior to that of Rome, and Justinian, to prevent corruption, forbade law to be taught except at Rome, Constantinople, and Beyrut.

§ 800.

To sum up, then: all grammarians, rhetoricians, and physicians teaching at Rome, or in the fatherland, who were within the prescribed number, enjoyed an immunity from tutorships and curatorships, to whom philosophers and lawyers teaching at Rome or
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elsewhere 1 may be added. Poets, hydraulists, and others, however, although they had a place in the public schools,8 did not enjoy the same privilege.3

Illicitly was, however, no ground of exemption. Ejus qui se illiteracy. negat, literas scire excusatio accepti non debet, si modo non sit express negotiorum.4 But the Institutes,6 similiter eos qui literas nesciant, esse excusandos Divus Pius rescriptis quamvis et imperiß literarum possint ad administrationem negotiorum sufficere; it will, therefore, appear that the rescript of Pius was never of much effect, or perhaps that a literary tutor was to be preferred only to an illiterate one.6

§ 801.

Soldiers, who had obtained an honorable discharge, were different categories, according to the particular circumstances of the case. If discharged on the termination of the capitulation, they were free for life; nevertheless, children of comrades in the first degree, after the expiry of a year, form an exception.7

If the discharge take place on other grounds, they have from that date exemption for one, two, three, or four years, according to the period of their service, being five, eight, twelve, sixteen, or twenty years,8 after which they are free for good and all. Although the right of exemption as to the children of comrades does not extend beyond the first year,9 yet veterans are obliged to undertake the tutorship of only one such child.10

Discharged gendarmes doing police service in the city, are exempted during one year only.

§ 802.

Every one whose residence at the time of his appointment is not in the locus in quo11 of such appointment, may decline. The administration of property one hundred miles distant from the locus of the guardianship may be refused.12

§ 803.

The exemption13 of a former tutor from subsequently acting as curator applies of course exclusively to curatela.

§ 804.

All these exemptions can be made available by legal guardians, save the case of compact,14 not to take advantage of them, or when the party has accepted that which was left him, in consideration of the charge he was to conduct.15

1 R. 6, § 12. 2 C. 10, 52, 6. 3 Vin. Com. Ad. I. 1, 25, § 16, p. 139. 4 P. 27, 2, 6, § 19. 5 L. 1, 52, § 8. 6 Höpfner Com. § 244, n. 1. 7 P. 27, 1, 8, pr. 8 P. 27, 1, 8, § 8, 3; C. 6, 95, 1; C. 10, 54, 3.
10 P. 27, 1, 8, pr.
11 P. 27, 1, 8, § 4. 12 P. 27, 1, 8, § 4. 13 P. 27, 1, 46, § 2; P. 26, 2, 32. 14 P. 27, 1, 21, § 2; l. c. 10, § 4.
15 L. 1, 52, 18; C. 5, 62, 20; Höpfner Com. § 246.
16 § 781, h. op. 17 P. 34, 9, 5, § 8. 18 P. 34, 9, 5, § 8. 3 P
§ 805.

In conclusion, it must be observed that certain excuses exempted from accepting a tutorship, others enabled one already entered on to be repudiated, of this latter description were,—

The excuses arising out of poverty or bad health.¹

That arising from a change of domicile by order of the prince.²

The exemption granted to such as were employed in public business.³

That belonging to the privy counsellors of the prince.⁴

§ 806.

These exemptions being voluntary, to be made available must be claimed before a competent magistrate within a certain time,⁵ and in detail by a procurator even, and vivu voce,⁶ supported by the relations of the ward.⁷ In case of the application being rejected, an appeal lies against the decree;⁸ but if this appeal also fail, the guardian becomes liable for all damages which may have accrued in the interim;⁹ nevertheless, a curator is to be appointed during the interval.¹⁰ If, on the other hand, the petition be allowed, the guardian is free, but the decree will be null and void if obtained on false grounds, and all liabilities date from the period of the guardianship accruing,¹¹ and the testamentary guardian, who claims his exemption or retires, loses all advantages which were freely offered him by will in consideration thereof,¹² and this even applies to the tutore confirmando.¹³

§ 807.

The next in order are the exemption ob impotentiam.

Three tutorships in one and the same house operated an exemption,¹⁴ perhaps on the principle of the unitas personae, that is, if the pater and filius familias had three between them; for if the son or sons accept with the father’s consent, he is answerable.¹⁵ Here the number of tutorships is not reckoned by the number of pupils, but according to the administration of property; thus, he who has three pupils having a joint property, such three count as one, and conversely one tutorship, if every one may count for three;¹⁶ but if they be very indifferent, more than three may be imposed.¹⁷

¹ § 781, § 807, § 808, h. op.
² § 794, h. op.
³ § 792, h. op.
⁴ § 788, h. op.
⁵ P. 27, 12, 13, § 1, 32, l. c. 38; l. c. 39, l. c. 45, § 1.
⁶ P. 50, 17; 71; P. 27, 12, 13, § 10.
⁷ C. 5, 63, 1.
⁸ C. 5, 62, 6, 15, 18; P. 27, 12, 44 pr.; P. 26, 7, 20; P. 49, 1, 10, § 4; l. c. 27, § 1.
⁹ C. 5, 64, 15; P. 26, 7, 20; l. c. 39, § 6.
¹⁰ P. 499, 5, 17, § 1.
¹¹ 1. 12, 25, § ult.; C. 5, 63, 7, 3.
¹² P. 27, 12, 27, 28, § 1; l. c. 35, 36; P. 26, 2, 28; P. 30 (3), 12; P. 34, 9, 9, § 2; Voet. eod. § 6.
¹³ P. 27, 12, 52.
¹⁴ P. 27, 12, 4, & 5.
¹⁵ P. 52, Ulpian; P. 26, 27, 12, 73 P. 28, 7, 21.
¹⁶ P. 27, 1, 32, § ult.
¹⁷ P. 27, 1, 15, § 15 & 31.
Tutorships which have been applied for do not count in the number; these are termed tutela affecta.\(^1\)

§ 808.

Poverty was a rescinding exemption even after acceptance, namely, when any one was so poor as to require all his time to get his own living.\(^8\)

§ 809.

Such illness or disease as renders the performance of the necessary duties too burdensome or impossible,\(^3\) this lawyers term a morbus sonticus; for it may be of body or of mind, no matter which.

§ 810.

Advanced age exempts, which is fixed at seventy complete.\(^4\)

§ 811.

Ignorance of letters, we have seen, may be admitted conditionally as an exemption in some heavy matters, but cannot generally be considered under the head of incompetency.\(^5\)

§ 812.

All claims for exemptions, whatever the grounds of such may be, must be made within fifty days, when the claimant lives within one hundred stones from the place of his appointment, and an extra day is allowed for every twenty miles above that distance.

Scævola says that thirty days should be reckoned as fifty, because fifty solar days are equal to about thirty working days.

From stone to stone the distance was eight stadia, which are nearly equivalent to the same number of furlongs.

§ 813.

Every one can be a tutor who can be instituted heir in a will, and who possesses natural and civil capacity to conscientious execution of the duties assigned to him,\(^6\) failing which, he can at any time retire or be removed by the authority, which is termed excusatio necessaria. Incompetent are,—

1. Women, with exception of the mother and grandmother.\(^7\)
2. Usually imbecile and utterly paralyzed persons.\(^8\)
3. Deaf and dumb persons, deaf persons, dumb persons, and to some extent those utterly blind;\(^9\) for the first cannot speak the

\(^1\) Vid. supra.
\(^2\) P. 27, 1, 40, § 1; l. 1, 25, § 6.
\(^3\) l. 1, 25, § 4, 5, 7, 13; P. 27, 1, 7, 10, § 8; l. c. 21, pr. 1; l. c. 6, § 18.
\(^4\) l. 1, 25, § 13; P. 27, 1, 2, pr. § 1.
\(^5\) C. 5, 68, 1; C. 10, 49, ult.
\(^6\) P. 27, 1, 10, § 8; l. 1, 25, § 8.
\(^7\) l. 1, 14, pr. 1; l. 1, 6, § 9.
\(^8\) P. 26, 8, 16, pr. ult.; Nov. 118, 55;

Puf. 2, 11; P. 26, 1, 11; P. 27, 1, 105.

l. c. 15.

C. 10, 49, ult.

l. c. 45, § 4; P. 50, 17, 40; C. (5, 67, 10, 50).

P. 27, 1, 1, § 2, 3; l. c. 17; C. l. c.

1; P. 26, 8, 16; P. 27, 1, 40. Blindness does not necessarily disqualify; Höpf.

Com. § 245.
necessary words of auctoritas, or hear what passes; the second and third either of the two; the fourth cannot see the object of which it is question.

4. Minors under twenty-five as a rule.¹
5. Those declared spendthrifts by public authority.²
6. Slaves.³
7. Soldiers in active service.⁴
8. Bishops and monks. Other clergy under the dignity of bishop, may accept if they please.⁵
9. A Jew cannot be a tutor to a Christian,⁶ lest he should interfere with his creed.

Those interested.
10. All who seek tutorships from interested motives.⁷
11. Notorious and violent enemies of the pupil’s father, or of the pupil himself.⁸
12. Husbands and bridegrooms.⁹
13. All who, when the tutor is to enter on his office, are creditors or notorious debtors of the pupil’s, except the mother and grandmother.¹⁰

If a creditor conceal his claim, he is punished by its utter loss, and the debtor who does not declare his debt, loses as a penalty all his right of exception or plea.¹¹

Upon these wholesome provisions, no doubt exists in the law,¹² which applies to testamentary, legal, or dative tutors, even when in the first case the testator was aware of the existence of the debt or claim.¹³ Claims arising during tutorship have the mere effect of causing the appointment of curator in addition.¹⁴

14. Every tutor from whom satisfaction is due, and who can give no such security.¹⁵

15. The magistrate can appoint none whose appointment has been forbidden by the father or mother,¹⁶ even though the law should point him out as entitled thereto.¹⁷

16. When the person so pointed out is illiterate, and a certain amount of learning is indispensable to the interest of the pupil, in the particular case in question.¹⁸

All other persons are admissible, even the stepfather, in cases of doubt.¹⁹

¹ I. 1, 25, § 13; C. 5, 30, ult.; P. 26, 2, 18, § 2; I. 2, 4, § 2. ² P. 27, 10, 1, pr.; C. 1, c. ult.; P. 26, 5, 11, § 2. ³ C. 5, 34, 7, 4. ⁴ P. 27, 1, 23, § 11 children of comrades are excepted; Puf. 3, Obs. 183. ⁵ C. 1, 3, 52; Nov. 123, 5. ⁶ Not according to P. 27, 1, 15, § 6, but in practice and by analogy. ⁷ P. 26, 5, 21, § ult. ⁸ I. 2, 25, § 9, 11, 12; P. 26, 10, 3, § 12; P. 27, 1, 6, § 17, 18. ⁹ C. 5, 34, 2; C. 5, 70, 4. ¹⁰ Nov. 94, 1. ¹¹ Nov. 72, 1, 3, 4. ¹² Thibaut, P. R. § 394. ¹³ Thibaut, l. c. ¹⁴ Nov. 72, 2. ¹⁵ C. 5, 42, 2. ¹⁶ P. 26, 2, 8, pr.; P. 26, 5, 21, § 2; C. 5, 47, 1. ¹⁷ P. 26, 5, 21, § 1, 2; Leyser, Sp. 330, m. 2; Thibaut, l. c. ¹⁸ This is a doubtful point, and there is a conflict in the provisions of the laws, which has been alluded to above; I. 1, 25, § 8; P. 27, 1, 6, § ult.; Höpf. Com. § 244. Thibaut explains it as in the text, P. R. § 394. ¹⁹ C. 1, 7, 32, § 1; C. 5, 58, ult.; Glück, Pand. 25, B. S. 120-124.
Infamous persons are not absolutely incompetent, although a sole administration is not granted to them.\textsuperscript{1}

§ 814.

A tutor can not only be excused of his own motion, but displaced for negligence of his pupil’s affairs, and such are termed *suscpecti*. Justinian\textsuperscript{2} refers the origin of the *crimen suspecti tutoris* to the laws of the Twelve Tables, which provided *si tutor dolō malo gerit, vituperato, quandoque tutela finita scit furtum duplione luito*;\textsuperscript{3} this law alludes to a known default or fraudulent administration; the *crimen suspecti* therefore does not imply but incur the penalty of theft, together with the disgrace of removal for a suspected want of integrity.

§ 815.

All the different species of tutors are exposed to this action, including legal ones; but in order to save the pupil from the reflected disgrace resulting from the removal of one so nearly allied to him, a curator is added to supervise him; for it is bad enough to have a dishonest relation, without making the fact publicly notorious.\textsuperscript{4}

It is not sufficient that a tutor or curator promise amendment in future; for *melius est ab initio rem sartam tectam servare, quam vulnerata causa remedium quaerere*\textsuperscript{5}. Again, the security only indemnifies the pupil or minor against damage which can be proven; but much may happen which is incapable of proof, or, as Justinian\textsuperscript{6} expresses it, *satisdatio tutoris propositum malevolum non mutat sed diutius grassandi in re familiaris facultatem praestat*.

§ 816.

This *accusatio* is *quasi publica*;\textsuperscript{7} for it has a similarity with public ones, inasmuch as any citizen can institute it, and because it is in the interest of the state that such be removed; hence it is variously termed *crimen suspecti, accusatio, and postulatio suspeti*; nevertheless, it cannot absolutely be called a public prosecution, for such arose out of *delicta publica*, and is had before the criminal tribunals of the *praefectus urbi*, whereas this is a civil action in fact before the Praetor. The word *quasi* is used to qualify the term, as in the case of *quasi delicta, quasi possessio, quasi traditio, accusationes quasi publicae, remedia quasi possessoria*.\textsuperscript{8}

§ 817.

All co-tutors or co-curators were bound to prosecute; other parties were permitted to do so,\textsuperscript{9} and even women, by way of

\begin{itemize}
  \item \textsuperscript{1} P. 3, 1, 1, § 6; P. 26, 2, 17, § 3; C. 10, 54, 1; Lauterbach, Coll. 26, 1, § 25.
  \item \textsuperscript{2} f. 1, 26, pr.; P. 26, 10, 1, § 2.
  \item \textsuperscript{3} Goth. Leg. xii Tab. tab. 7.
  \item \textsuperscript{4} i. 1, 23, § 5.
  \item \textsuperscript{5} This is another version of the vulgar English proverb,—a stitch in time saves nine.
  \item \textsuperscript{6} i. 1, 26, § 12.
  \item \textsuperscript{7} i. 1, 26, § 3; P. 26, 10, 1, § 6.
  \item \textsuperscript{8} Hopfner, Com. § 251.
  \item \textsuperscript{9} i. 1, 26, § 3; P. 26, 10, 1, § 6.
\end{itemize}
exception, were allowed to become prosecutors in these cases, on account of the great favor and protection afforded to pupills by the law.

The pupill himself, however, could not institute these proceedings because of his youth, *persona standi in judicio non habet*; but this does not apply to a minor, who may so proceed against his curator, but the relations of the minor must concur in the suit, on account of the supposed infirmity of the minor’s judgment. If no suit be brought, the court *ex officio* may institute proceedings, and remove the tutor or curator after inquiry. The extensive jurisdiction of the Roman magistrate, however, rendered this course of rare occurrence. After the determination of office, the action would be for mal-administration.

§ 818.

The first step is to interdict the tutor from all further intermeddling with the pupill’s affairs, and appoint a curator in the mean time; but though conviction followed, the promise of *satisdatio* or security did not exempt the tutor from the interdiction or the punishment; and it appears that some tutors were so nefarious as to be exposed to extraordinary punishment by the *praefectus urbi*.

§ 819.

These proceedings involve the doctrine of the *culpa* in its various degrees, which are most generally divided into *lata, levis,* or *levissima.* According to Jones, the first is a gross negligence, such as a prudent man ought not to be guilty of in his own affairs; the second, such as had palliative circumstances; and the third is excusable. *Dolus malus,* on the other hand, is more than *culpa,* being preconceived deceit and fraud.

It would appear that repetition of the *levissima* involves removal, but not one single act; the *levis* also involves removal for the first offence, though not necessarily; the *lata* inevitably involves, some think, even the penalties of infamy, which the *dolus malus* undoubtedly did. Höpner* thinks the *lata* did not incur this penalty; but much must have depended on the individual circumstances of each case.

Sometimes the pupill’s accusation went to pray that a proportionate punishment might be inflicted; in which case it was within the province of the *praefectus urbi*.

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1 C. 5, 437.
2 L. c. § 6; Cic. de Or. 1, 26; pro Coccin. 33; pro Rosc. 6. *Si quae sunt privata judicia summae exstitutionis et gene dicas capitis, tria hac sunt, fiducia tutela, societatis. Aequum enim perfidium et nefarium est, sitem frangere, que content vitam et pupillum fraudare, qui in tutelam pervenit; et socium fallere, qui se in negotio conjunxit.*
3 This doctrine will be treated of at length in a subsequent part of this work,—see Jones on Bailments; Hase admits but two degrees of culpa, and for the present the author is not called upon to compromise himself to either of these two opinions,—see also Story on Bailments.
4 Com. § 254; L. 1, 26, § 6.
§ 820.

For a tutor, being a libertus, to defraud the children or grand-children of his patron, is considered eminently atrocious; and here it must be remarked that the onerum imperium, or power of punishing offences within the city and 100 miles without the walls, was, in the age of Augustus, in the jurisdiction of the praefectus urbi, and not of the prætor, which latter sent to the former the order that he should inflict the punishment.

Galba crucified a tutor who had murdered a pupillus for whom he had been substituted, and, on his objecting that, as a citizen, he would not be subjected to a servile punishment, ordered him to be nailed to a whitened cross and exalted above all his co-sufferers as additionally infamous. The punishment here was for the murder, not for the breach of trust.

§ 821.

A prosecution goes to operate the removal of the tutor or curator, and to punish him. But if he die during the proceedings, they abated ipso facto; but if the suit was determined by the minor coming of age, the question of removal fell away, and that of punishment alone remained.

§ 822.

The minor or pupill was indemnified by several actions. The actio tutela or arbitrium tutela went to require that the tutor should deliver, in due accountant’s form, a true, exact, well-founded account, justifiable against all exceptions which might be made to it, and pay over the balance.

Nor is the tutor exempted from these duties, even if the father of the pupill or another shall have acquitted him thereof. The accounts can, however, be dispensed with, when the late pupill declares in due form that the tutor need render no account, or that he should not be further troubled in this behalf.

By this form of action, all can be demanded for which the tutor is liable on account of careless administration. In cases of dolus and culpa lata, the plaintiff can have recourse to the juramentum in litem to make out his case, though not against heirs if the action be not commenced before the death of the tutor, or the heirs be not suitable for acts done by them.

This action cannot be commenced before the termination of the tutorship, but not sooner, even for fraud; but this will not preclude

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1 I. 1, 26, § 10, 11.
2 Tac. A. 6, 12; Dio Cass. 52, p. 547; Suet. Aug. 37; C. 12, 4, 1, pr. & § 3, 4, 10.
3 Suet. Gall. 9.
4 P. 27, 3, 1; § 3; P. 35, 8, 28.
5 P. 34, 3, 9, 40, § 1, & 31, § 2.
6 P. 27, 3.
7 C. 5, 53, 1, 4; Lauterbach, Coll. 27, 3, § 17.
8 P. 27, 3, 4, pr.; I. c. 9, § 45; I. c. 16.
the action being enforced against heirs.\textsuperscript{1} If the pupill have cause of action against the tutor on grounds not arising out of his administration, it can be conducted during the tutorship by a curator ad hoc,\textsuperscript{2} and the action be repeated on various grounds.\textsuperscript{3}

The *actio de distrabendis rationibus*\textsuperscript{4} is brought against a tutor on the termination of his office for a new account and vouchers, when he is supposed to have furtively abstracted aught from his pupill, and, following the law of the Twelve Tables, involved the penalty of double compensation.\textsuperscript{5} Otherwise, no second account can be required when one has been already delivered;\textsuperscript{6} but the explanation of an error of account\textsuperscript{7} or an answer may be required on a point not touched upon.\textsuperscript{8}

A mixed action did not formerly extend to heirs;\textsuperscript{9} this was changed, and a simple action substituted for it.\textsuperscript{10} Other actions do not exclude this one, and *vice versa*, in as far as the former have not absorbed the latter.\textsuperscript{11}

The following difference is worthy of notice, that the actions brought by the pupill against the tutor will *utiliter* reach a *protutor* and *curator*, with this difference, that the first can be sued at any time,\textsuperscript{12} but the latter only for certain causes, and that must be before termination of the *curatela*.\textsuperscript{13}

\section*{§ 823.}

These two were direct actions against the tutor or curator, but actions also lay against third persons.

Such was the *actio ex stipulatu* against the securities; and it was only necessary to proceed, first, against the tutor or curator; for if this action was first brought against the securities, they could plead the *exceptio ordinis or exceptionis*,\textsuperscript{15} and so throw the plaintiff on the debtor-in-chief; and then, if nothing is to be got from him, his agent (father), or heirs, the sureties may be sued for compensation,\textsuperscript{16} even though his security have been given impliedly only.

The security can take advantage of the same pleas as the principal debtor;\textsuperscript{17} and if there be many bondsmen, they may pray the *beneficium dividendi actionis*,\textsuperscript{18} and require that the suit against the principal be first prosecuted to judgment.\textsuperscript{19}

\begin{footnotes}
\footnotetext[1]{P. 27, 3, 9, § ult.; l. c. 10.}
\footnotetext[2]{Nov. 72, 2.}
\footnotetext[3]{C. 3, 1, 2; P. 17, 2, 38.}
\footnotetext[4]{P. 27, 3, 1, § 10; P. 27, 4, 2; comp. P. 27, 4, 1, § 21 & 2; Thibaut, P. R. §§ 433.}
\footnotetext[5]{P. 27, 3, 1, § 20, & 2; § 2; P. 26, 7, 555; § 1.}
\footnotetext[6]{C. 10, 22, 2.}
\footnotetext[7]{C. 2, 1, 2.}
\footnotetext[8]{§ 22, 23.}
\footnotetext[9]{P. 27, 3, 1, § 22, 23.}
\footnotetext[10]{P. 27, 3, 2, § 2; see § 70, Thib. l. c.}
\footnotetext[11]{Vet. Com. 27, 3, § 19.}
\footnotetext[12]{P. 27, 3, 4, § 3; l. c. 13; C. 2, 19, 17; C. 4, 26, 1; C. 5, 51, 7.}
\footnotetext[13]{P. 27, 3, 1, § 3.}
\footnotetext[14]{P. 27, 4, 1, § 3; P. 27, 3, 10, § 1; P. 26, 7, 26; C. 5, 37, 14.}
\footnotetext[15]{Nov. 4.}
\footnotetext[16]{P. 27, 7, 3; l. c. 4, § 3; C. 5, 57, 2.}
\footnotetext[17]{P. 27, 7, 6 & 7.}
\footnotetext[18]{P. 48, 6, 12.}
\footnotetext[19]{Nov. 43; C. 5, 57, 1.}
\end{footnotes}
§ 824.

A further action of like nature lies against the *affirmatores* who give a false report to the examining magistrate as to the fitness of the guardian.¹

§ 825.

A further and similar action lies against the *nominatores* who, to avoid the tutorship, proposed to them, or who, being municipal magistrates, recommend to the superior magistrate an unfit person.²

§ 826.

Also against the *postulatores* who require the appointment of a guardian unnecessarily and overlook something, or make the risk their own.³

§ 827.

The next is the *actio hypothecaria* against all who possess, by way of pledge, any part of the guardian’s property, which is fictitiously all pledged to the ward.⁴

§ 828.

Next, the *actio subsidiaria* (*actio utilis tutelæ*) lies against magistrates of inferior rank,⁵ when they take insufficient or no security, or omit or delay the appointment of guardian.⁶ The heir of such magistrate is responsible for *culpa lata*.⁷

If a collegium is in fault, the general rule as to individuals applies;⁸ but the innocent guardian who has to pay may sue the magistrate in fault.⁹

§ 829.

Lastly, the *tutores honorarii* may be sued,¹⁰ in so far as any blame can be laid to their charge; it must be, nevertheless, understood that the ward may sue third persons also, directly for damage done, as, for instance, him who makes an omission in drawing up the inventory.¹¹

§ 830.

After the termination of the tutorship the pupill and his successors are exposed to an *actio tutele contraria*¹² for compensation, to which end the tutor may exercise his right of com-

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¹ C. 10, 65, 1; C. 5, 75, 1, 4, 5; Paul. R. S. 2, 28, 29.
² P. 27, 7, 4, § 2.
³ P. 26, 6, 3, § 5; C. 5, 46, 3.
⁴ Nov. 4, 2.
⁵ C. 5, 75, 1, & 5; P. 27, 8, 1, § 1.
⁶ P. 27, 8, 1, § 5–7, and ult. § 4; I. 1, 24, 4.
⁷ P. 27, 8, 4.
⁸ P. 27, 8, 3, § 9; l. c. 7.
⁹ P. 27, 8, 2, & 3.
¹⁰ C. 5, 51, 3, § 2, 1. c. 6; C. 5, 52, 2.
¹¹ C. 5, 75, 6.
¹² Or *actio nemororum gestorum contraria*.
pensation and retention; ⁴ nay, the curator and protutor may take advantage of this action utiliter, ⁵ and at all times. ⁶

§ 831.

Curatorship determines ipso jure or by decree, but the guardian is bound to render his accounts, and finish ⁴ all business begun by him, and this extends even to such of his heirs as are capable of administration. ⁵

§ 832.

Ipsa jure, it terminates on the civil or natural death of the ward or guardian. ⁶

It is terminated—By arrogation of the ward, ⁷ and the legal tutelage formerly, was determined by the capitis diminutio minima of the tutor; ⁸ but this now only extends to such as are called to the charge in their quality of civil relations. ⁹

When the dies in quem arrives, or condition be fulfilled, under which the guardian was appointed. ¹⁰

When the mother or grandmother who administered remarry. ¹¹ The curatela of deranged persons, and those without property, on their recovering their understanding and capacity. ¹² By the return of an absent person.

§ 833.

The curatela of spendthrifts determines when the administration of their property is restored to them by decree. ¹³

When in cases where such a course is permitted, the guardian is excused necessarily or voluntarily.

Legal and testamentary guardians to whom no dolus is attributed are, in the case of necessary excuses, only deprived of administration, and a curator must be added; ¹⁴ but if he be removed as suspected (remotio suspecti) his functions entirely cease. ¹⁵

§ 834.

Curatio is determined by the object of it attaining the age of twenty-five, ¹⁶ being the fourth part of one hundred, a new suppositional term of life introduced by the lawyers. ¹⁷

Another mode of terminating minority before twenty-five years, is by the fiction called the venia ætatis, granted by the Regent to young men at twenty, and girls of eighteen, ¹⁸ on showing that they

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¹ P. 27, 4, 1; § 4.
² P. 27, 5, 1; § 2, & ult.
³ P. 27, 4, 3; § 3; P. 27, 3, 16; § 1.
⁴ P. 27, 7, 5; § 65 & 37; § 1.
⁵ P. 27, 7, 1.
⁶ I. 1, 22, § 1, 3.
⁷ L. c. § 1.
⁸ P. 26, 4, 5; § ult.
⁹ Nov. 118, 5.
¹⁰ I. 1, 23, § 2, 5.
¹¹ Nov. 94, 2.
¹² C. 5, 70, 6.
¹³ P. 27, 10, 1, pr.; Voet. 27, 10, § 7.
¹⁴ I. 1, 23, § 5; P. 26, 10, 9.
¹⁵ P. 38, 17, 5; § 41; C. 5, 43, ult.; comp. I. 1, 26, § 6.
¹⁶ P. 4, 4, 3; § 3.
¹⁷ P. 5, 1, 76; P. 7, 1, 56.
¹⁸ C. 5, 45, 2.
have lived a steady life up to that time, and from receiving such decree \textit{venia etatis} are unaccountable for all acts done without recourse.\footnote{1} He cannot, however, alienate his immoveables without decree\footnote{2}, and he must be actually major to perform any act\footnote{3}, which according to the provision of law renders majority necessary, as for instance, to be a tutor.

There is an exceptional sort of \textit{venia etatis}, when a person is authorised to perform certain acts under protection of the public authority\footnote{4}, the operation of which is, that the minor, without regard to the different nature of the objects, is in such business regarded as major\footnote{5}.

\footnote{1} Burchardi thinks he can claim restitution even against the \textit{venia etatis}. \footnote{2} L. c. 3. \footnote{3} L. c. 4; Thibaut, P. R. § 441. \footnote{4} P. 14, 6, 3, § 15 C. 2, 45, 15 Thib. \footnote{5} L. c.
T I T L E  VI.


§ 835.

N A T U R A L persons are individual members of the community, to whom ordinary rights and capacities attach as a matter of course; legal persons, on the other hand, are fictitious, to whom extraordinary powers belong not strictly compatible with the natural course of events.

Savigny\(^1\) rejects the term moral person as incorrect, asserting that it does not convey the essence of the idea, which is in nowise connected with morality, and because the expression is better adapted to convey the idea of a contrast between moral as distinguished from immoral persons.

§ 836.

The Romans have no generate term adapted to all persons of this description, and are constrained to use a periphrasis, saying that such are “in the stead or place of persons,” as in the expression, haereditas personæ vice fungitur sicut municipium et decuria et societas;\(^2\) vice haeredis; loco haeredis esse;\(^3\) or haeredis loco constitueri; fingeri haeredis esse. Hence the term legal and fictive persons are synonymous.

The term mystica or magica is sometimes applied to these fictive persons; but it can hardly be said, with due reference to the derivation of those words, that a legal or fictive person is either mystic or magic: these terms must be therefore looked upon rather in the light of metaphorical expressions than as belonging to a grave legal nomenclature, as which they are vague, poetical, and unprecise. The most correct expression appears therefore to be “legal person,” “fictitious or fictive person,” “a legal entity,” “juristic being,” or the like.

\(^1\) Syst. des Heut. R. R. 2 B. K. 2, § 85, 2 P. 37, 1, 2; P. 50, 17, 117; Ulp. p. 240.

\(^2\) P. 16, 1, 22.
§ 837.

Another distinction must be drawn with respect to these legal or fictitious persons, viz., whether they be regarded as a part of the public or of the private law; for, in the first case, the state or Respublica is a species of corporation,—the Collegium Consulium, the Collegium Tribunorum, the Duumviri of a municipal town; Magistratus municipales, cum unum Magistratum administrent, etiam unius hominis vicem sustinent. When several judices are nominated, and some of them, or even all, are changed, it is still the same judicium. Again, the Centuria and Tribus were legal unities.

§ 838.

The Romans, then, we find, possessed continuous societies even in the most remote ages of the city. The chief of these were in their nature connected with religion and industry; to which may be added those of inferior officers, such as lictors, which at a later period glided into the form of what would now be termed public departments.

Religious societies, although they certainly existed at a very early period, were not essentially required during the age of Paganism, the religion being an item in the state-budget. The leprosy of monastic idleness is an invention of a more advanced state of civilization, if the solitary case of the Vestal Virgins be excepted, of the strict adherence of whom to their thirty years’ vow of chastity there are now no priests to inform us. Savigny observes that it was not necessary to bequeath revenues ad pios usus, as those objects could be fully obtained by consecration of the objects given, by which they were fully protected from conversion or alienation, and taken out of the category of property, vesting neither in the priests nor the temple, but in the deity to whom they were devoted: thus the college of priests might subsist as a corporate body without the incident of property.

With respect to colonies and municipalities, it was otherwise, for there the necessity of a power to possess property is evident; and this capacity was as necessarily exposed to incidents of it, certain legal processes which led to the imperial fiscus or exchequer being converted into a legal person; and this idea was then extended to gods and priests, and changed name and hands when Christianity succeeded to the place of Paganism.

Respublica 6 anciently signified an independent community, although it was in later times applied exclusively to designate the Roman state, and is met with in the forms Respublica civitatis or

1 Hane, Archiv. B. 5. S. 67. 6 Suet. Aug. 101; Sav. I. c. p. 238; pro Domno, 47. n. f. clearly explains the above passage.
2 Liv. 10, 22, 24; Cic. in Verr. 2, 103. 6 P. 3, 4, 1; C. 11, 32, 1; Cod. 8 P. 50, 1, 25. Just. lib. 11; Tit. 29, 32.
4 P. 5, 3, 76.
municipii. Respublicae municipii alicujus. Idemque scribit et de ceteris rebus publicis (i.e. coloniae, fora, conciliabula, etc.)

§ 839.

The most important legal persons mentioned in the Roman law are communities, under which head may be placed,—Civitates, Municipes, Coloniae, Respublicae, Communitates, Curiae or Decuriones, Vici, Fora, Conciliabula and Castella, and lastly, Provinciae.

Italy was divided into many districts, and each town, as possessing its own corporate government, formed in so far an independent member of the state of Rome considered as a whole; in other words, these cities retained in a certain degree some seeds of their original and absolute independence. Their designations were different, for they are sometimes met with as Civitates; sometimes as Municipes or Municipia, which is the more usual expression, and came to signify, the first, the citizens,—the latter, the collective body. Municipes, however, appears to have been identical with Respublicae: Servum municipum posse in caput civium torquere seipissime rescriptum est, quia non sit illorum servus, sed Respublicae: idemque in ceteris servis corporum dicendum est, nec enim plurium servus videtur sed corporis. And Ulpian says, that either expression will make the institution of an heir void: Nec Municipia nec Municipes haereses institui possunt quionium incertum corpus est.

§ 840.

Before proceeding further, it will be well to premise a few remarks with reference to these Roman municipalities, which are thus defined by Aulus Gellius: Municipes erant cives Romani ex municipiis, legibus suis et suo jure utentes, muneris tantum cum populo Romano honorarii participes, a quo munere capessendo appellati videntur, nullis aliis necessitatius, neque ullâ populi Romani lege adstricti, nisi, inquam, populus eorum fundus factus est.

The citizens of such municipalities were therefore Roman citizens, and participated in many rights and privileges eminently and especially belonging to such; they were nevertheless not cives ingenui, neither were they capable of full rights except they took up their residence at Rome.

§ 841.

Municipalities were governed by their own laws, and termed legis municipales, exercising their own legislative system; nor were any laws imposed upon them by the Romans, although the reception of the laws of Rome was at their option, and in such cases they

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1 C. 11, 32, 2; P. 17, 2, 31, § 1.
2 P. 3, 4, 3, 8; P. 1, 8, 6, § 1; C. 11, 29, 4; C. 15, 30, 1, 3.
3 P. 3, 4, 2, & 7, pr. & 9; P. 4, 3, 15.
4 § 1; Gaius, 3, § 145; P. 46, 7, 22.
6 § 20, § 5.
7 N. A. 16, 13.
8 C. in Brut. 75.
9 P. 43, 24, 3, 4; P. 47, 12, 3, § 5.
THE GOVERNMENT OF MUNICIPALITIES.

were said to be *fundi fieri,* and thus the right of suffrage did not deprive them of self government; for they were no longer 
coöperate or allied, but actual citizens, which former state was, 
however, sometimes preferred. In quo magna contentio Heraclei-
sium et Neapolitanorum fuit quum magna pars in iis civitatibus 
coëdesis sui libertatem civitati anteferret.

They shared the public burdens with the citizens of Rome, especially those of a military nature; for the municipalities had the 
jus legionis, from which the Latins were originally excluded.

§ 842.

These municipalities were formerly confined to Italy; for we find many so named in the Julian and Plotian law; but when Rome 
began to extend its conquests beyond Italy, a similar institution 
sprung up in the provinces, enjoying rights according to circum-
stances greater or less, but generally less, than those of the old 
municipalities. The best information on this point is to be 
derived from the science of numismatics, and many coins are found 
on which the right of self-government possessed by the ministers, 
is remarked.

§ 843.

From Festus, it may be implied that there were three degrees or 
species of municipalities, *municipium id genis hominum dicitur, qui 
quam Romani venissent, neque cives Romani essent, particeps tamen 
fuerunt omnium rerum, ad munus fungendum una cum Romanis 
civibus, praeterquam de suffragio ferendn, aut magistratu capiendo; 
hence, while they remained at home, they were reputed *peregrini,* 
but on migrating to Rome, they acquired a qualified right of citizenship (non optimo jure), that is, they were excluded from the 
suffrage and public office.

Secondly, those were also termed municipes; *quorum civitas uni-
versa in civitatem Romanam venit.* Such were full citizens, or cives 
opimo jure.

Thirdly, *qui ad civitatem Romanam ita venerunt, ut municipes 
essent sua eujusque civitatis et coloniae, or qui ea conditione cives 
Romani fuerint, ut semper rempublicam a populo Romano separatam 
haberent.* These were neither bound by the Roman laws, nor were 
they *fundi facti;* they had neither the rights of honors nor of suffrage, 
hence they were not inscribed in any tribe, and had no community 

1 Cic. pro Balb. 3.
2 Sig. A. I. 1, 2, 7.
3 P. 50, 16, 18.
4 Caerites, Tusculani, Lanuvini, Aricini, 
Nomentani, Pedani, Fundani, Formiani, 
Campani, Equites, Cumanii, Susculani, 
Acerrani, Pibernates, Anagnini, Arpinates, 
Trebulani, Sabini, &c.—Onuphr. Puniuin.
dev. Rep. Rom. 3, p. 354; Car. Sig. de A. 
1. I. 2, 9.
5 Plin. W. N. 3, 2, sqq. enumerates thir-
teen in further Spain, eight in Bética, two 
in Sardinia, and one in Lusitania.
6 Note to Hein. A. R. 1, App. 5, 
§ 121.
7 Ad voc. Municipum.
of curule, sacred rites being confined to their own municipal religious offices.1

§ 844.

We now come to that portion of their privilege, which most nearly concerns the present investigation, their corporate government, which for the most part was moulded on that of Rome.

The collegium decurionum, variously termed amplissimus, nobilissimus, splendissimus, and sanctissimus ordo, was formed in imitation of the Senate of Imperial Rome, and its members termed viri perfectissimi, principales, conscripti, &c.

The duumviri represented the two consuls at Rome in relative authority and attributes, and were preceded by staves in the place of fasces, which they occasionally ventured to assume.9 Antehabit lectore non cum bacillis, sed ut hic Praetoribus anteunt cum fascibus duobus; nor was this all, for the duumviri in some cases even assumed the title of consul.10

Municipalities had likewise their dictators, Ædiles, Quæstors, and Censors, who were termed Quinquennales, nay, even their Praetors, Quatuorviri, Decemviri, and others. They passed their laws in the same way as was customary in Rome.16

They also had their flamines and their publica vectigalia, from which the expenses of government were defrayed.18 In short, their ambition was to ape as nearly as possible the splendor and institutions of the parent city.

These municipalities were the ancestors of the later Italian republics of the Middle Age, already alluded to in the first part of this work.19

§ 845.

Occasionally even parts of these integers were looked upon as legal persons, as, for instance, in the case of Curiae or Decuriones,—an expression sometimes used to designate individuals: Sed an. in municipes de dolo detur actio dubitabitur: Et puto, ex suo quidem dolo non posse dari; quid enim municipes dolo facere possunt? Sed

1 Festus, loco ut supra.
2 Cic. pro Cael. 2.
3 Inscript. Grut. p. 321, n. 3.
5 Id. p. 393, n. 5.
6 Id. p. 393, n. 2.
7 Id. p. 456, n. 1.
8 Lips. Elect. 1, 23.
11 Cic. pro Mil. 10.
12 Suet. de Clar. Rhet. 6.
13 Cic. Verr. 2, 52; Liv. 29, 15; Grut., Inscr. p. 364, n. 3, & 422, n. 8.
14 Liv. Epitom. 73; Plin. H. N. 177, 11; Spon. p. 182.
15 C. Sigan. l. c. 2, 8, et Noria. l. c. 1, 3.
16 Cic. de Leg. 3, 16.
17 Cic. pro Mil. 10.
18 P. 50, 16, 17, § 1.
19 § h. op.
si quid ad eos pervenit ex dolo eorum qui res eorum administrant, puto dandum; de dolo autem decurionum in ipsos decuriones dabitur de dolo actio; 1 but sometimes the town itself,—nulli permitter nomine civitatis vel curiae experiri, nisi ei cui lex permittit; 2 within which we find corporations possessing property,—in decurionibus vel aliis universitatis nihil refert. 3

§ 846.

The next in order were the Roman colonies,—so called because formed of husbandmen, coloni (colo, to cultivate). They were offsets from Rome, civitates ex civitate Romanâ quodammodo propagatae, 4 and consequently used the laws and institutions of Rome, which was the intrinsic difference between colonies and municipalities.

This first species of colonies were termed plebeiae, in contradistinction from the military colonies hereafter mentioned.

Dionysius of Halicarnassus 5 refers this institution back to the age of Romulus, the object being to hold conquered districts in check by a body taken from the conquerors. It was also a means of satisfying veterans, and relieving Rome of her surplus and disaffected population.

§ 847.

It has been presumed, with some reason, that the earlier colonies of Greece were mere armed bands of adventurers, who quitted their own cities from an excess in the male portion of the population, actuated by the desire of conquest, or rather pillage. The colonies formed the frontier defences of the Empire, and are termed by Cicero 6 propugnacula imperii. The system of colonization, however, appears to have assumed a definite and regular form at the very earliest period of the Roman history, and never to have been formed without consent of the supreme authority of the state,—that of the Kings, and afterwards of the Senate and populus, and lastly, of the Emperors. 7 The colonies, moreover, surrendered certain rights incident on his domicile in Rome, it was necessary that he should emigrate voluntarily, as he could not forfeit such rights, nisi ipse auctor factus. 8

Sigonius recapitulates six motives for forming colonies:—
The first—the holding the original settlers in check;
The second—the repression of hostile incursions;
The third—the extension of the great Roman family;
The fourth—the diminution of the plebeians of the city;
The fifth—the meeting of seditious movements;
The sixth—the reward of the soldiery; of all which he procedes to give examples.

1 P. 4, 3, 15, § 1.
2 P. 3, 4, 7, § 2.
3 C. 10, 33, 2.
5 7, 4, 39; App. de Bell. Civ. 1, 7.
6 De Leg. Agr. 27.
7 Sigon, 2, 2.
8 Liv. 10, 21.
§ 848.

On it being considered expedient to found a colony, a Senatūs Consultum or plebiscitum was introduced for that purpose, and persons appointed, coloniam deducere, to superintend the formation of it. This was generally a commission of two or more persons,—duuomviri, triumviri, quinqueviri, septemviri, decemviri, vigintiviri ad colones deducendos,—three being, however, the most usual number. The leges agrariae determined the quantity of land to be distributed among such colonists, who were then invited to inscribe their names on the proper lists; and when these were completed, which occupied a greater or less time, according to the prospects the locality offered to the settlers, all assembled under a vexillum or standard, the official persons of the new colony taking the lead; these consisted of the commissioners, with their decuriones, augures, pontifices, adiuvatores, scribae, librarii, praeces, architecuri, and household officers, beasts of burden, and utensils, the whole forming a complete colony or community, after the fashion of a small army or legion, with its ensigns.

§ 849.

On the arrival of a colony at its destination, the usual auspices having been consulted, the space intended to be occupied by the city was marked out by a plough with a brazen share, to which a bull and cow were yoked; the plough was, however, lifted where it was intended that there should be a gate, for the walls being sacred, nothing could pass over them. The clods were turned inwards, probably to represent the bank and ditch; hence the space so enclosed was termed urbs from the old word urbāre, to mark with a plough.

These animals, with others, were then sacrificed to the diis mediusumis, and the walls were then raised.

It was not unlawful to institute another colony where one had already been established, although a colony might receive additions after its formation.

§ 850.

Colonies did not usually enjoy their own laws, but, as proceeding from Rome, brought those of the fatherland with them. Coloniarum, says Gellius, alia necessitudo est (quam municiporum), non enim veniunt extrinsecus in civitatem nec sui radicibus nituntur, sed ex civitate quasi propagatæ sunt, et jura instituunt omnia

1 Liv. 4, 11—8, 16—9, 28—6, 21.
2 Cc. Agrar. 2, 35.
3 Liv. 37, 46.
4 S Ign. 2, 2.
5 Liv. 10, 21.
6 Cc. Phil. 2, 40; App. l. c. 1, 24; Plut. Cai. Gracch. 9, 19.
7 Cc. Agrar. 2, 12, 13.
8 Cc. Phil. 3, 40; App. de Bell. Civ.
10 Liv. 4, 47, & 37, 57; Cc. Philipp, 2, 40; Dion. Hal. 1, 75.
11 Varro de Ling. Lat. 4, 33, p. 24; P.
12 50, 16, 239, 6.
13 On many ancient colonial coins, these two animals are found.
14 N. A. 16, 15.
populi Romani, non sui arbitrii habent. Hence we find the Emperor Hadrian expressing his surprise that the Italicenses, an old municipality, changed their municipal constitution into a colonial one. Colonies, however, possessed magistrates,—a Consilium Decurionum, with Duumviri, Aediles, Quaestores, Censors, Sacerdotes, Pontifices, Augures, and the like,—and hence were corporate as much as municipalities, the only difference consisting in the description of laws which they used, and being obliged to adopt those of Rome; their power of legislation was of course more restricted. Gellius describes them quasi effigies parvas et simulacra majestatis populi Romani.

§ 851.

Latin colonies were formed in a similar way; but their privileges were inferior. They had, it is true, like Roman colonies, the right of internal legislation, but no civitas, and were consequently subject to Rome; but after the Julian law, which conferred the civitas on the socii and Latin colonies, the primary object in establishing Roman and Latin colonies, namely, the provision for the poorer classes of citizens, who became troublesome at home, ceased, and military settlements superseded them. From this time, too, the old practice of designating the spot with a plough fell into desuetude.

§ 852.

The position of Italian colonies, coloniae Italici juris, was not much superior to that of provinciales coloniae; the only distinction appears to have consisted in their immunity from tribute.¹

§ 853.

Military colonies² were formed by the emigration of entire legions,³ with their officers, tribunes, and centurions, and it would appear that the natives of the place were not amalgamated with the new comers, but remained subject to them in a state little above absolute serfdom. The object here was the reward of veterans who, in virtue of that capacity, were the most fit to restrain the inroads of the surrounding nations. At a later period, however, we find complaints made, that, instead of entire legions being sent as formerly, in the time of Nero masses were collected who were unacquainted with each other, and without any common bond of union, numerus magis quam colonia,⁴ and from that period the system of colonization rapidly declined.

§ 854.

A military colony was established on its arrival at the locus in

¹ Cæs. Agrar. 2, 35.
² The only advantage enjoyed by an Italian colony.
³ Cæs. 19; C. Th. de Fals. Mon. 2; C. 15 C. 5.
⁴ Appian, l. c. 2, 119, 193 Epist. Liv. 80.
⁵ Tac. Ann. 14, 27, & 1, 17.
§ 855.

Prefecturae stood in the same relation to colonies as provinces to Rome; for such cities as had evinced ingratitude to the parent state, by rebellion or otherwise, were reduced to this state. Their government was conducted by a President, chosen by the Senate, Populus, or even by the Praetor. Their social laws emanated from the Prefect by edict, their public law from the Roman Senate, which imposed upon them tribute, taxes, and military burdens at pleasure, as was the case with Capua. Some, indeed, possessed a conventus formed of the equestrian order, for the conduct of public matters; also Quæstors and Aediles were occasionally nominated.

§ 856.

Civitates federatae were neither municipalities, colonies, or prefectures, being bound to Rome by the conditions of their fœdus only, which contained various special conditions according to circumstances. Capua, before it was reduced to a prefecture, Tarentum, Tibur, Prænesta, Neapolis, &c., were in this category. They possessed their own particular form of internal government, which often resembled that of Rome. They were also often places of refuge for such as, by the interdiction of fire and water, had forfeited their Roman citizenship.

§ 857.

Until very recently, Great Britain took no interest in colonization. A few speculative individuals emigrated of their own accord to a newly discovered country, usually for the purposes of trade, and being joined by others, a colony was thus formed. When of sufficient magnitude to excite the attention of the government at home, a governor and a staff of officers was sent out, the practical

1 Port Adelaidæ. 2 Trinidade. 3 Tasmania, Van Diemen's Land. 4 Dominica. 5 St. Vincent; St. Christopher. 6 Liv. i, 38; Dion. Hal. 3, 187. 7 Test. Ad voc. Prefecturae. 8 Liv. 16, 16. 9 Sig. A. I. I. 2, 10. 10 Festus ad voc. Seviri, Quatuorviri. 11 Sig. A. I. I. 2, 14.
Colonies.

Effect of which was to cripple the energies of the original enterprise, and to protect the indigenous savages at the expense of the colonists.

Trade has been the great inducement to colonization and emigration; for colonies for the most part took their origin in a trading company.

Such, however, is the aptitude of the Anglo-Saxon race for colonization, that not even the crooked policy of the mother country has been able to prevent their proving most valuable acquisitions to her. The striking difference between Roman and British colonies consists in the fact of government; with Rome this was a condition precedent, with Britain succeeded. British colonies are divided into legislative and crown, the former possess a constitution modelled upon that of the mother country, and can make local laws where they have the right of legislation, but their acts require the confirmation and sanction of the British crown to confer validity upon them even in the colony itself; but no judicial notice is taken of these enactments in British courts. Crown colonies are governed from home like Roman provinces, and have no such right, but, if possible, fewer franchises.

§ 858.

Colonies of Great Britain are of two sorts, conquered and settled colonies; the former have been ceded to Great Britain under various treaties of peace, the latter settled in the manner above stated; the former retain in many instances the laws of the first settlers, thus the Dutch law at the Cape, French and Spanish law in many of the West India islands, forms the basis of administration. Dr. Colquhoun's work on "The wealth, power, and resources of the British Empire," gives a detail of all particulars respecting British colonies, from their first settlement down to the conclusion of the peace.

§ 859.

Vici were always a part of the territory in which they were situate, and had, as such, no independent political existence: 1 Qui ex vico ortus est, eam patriam intelligitur habere, cui reipublica vicus ille respondet. Nevertheless, the privileges of the vici were more or less large: sed ex vicis partim habent rempublicam et jus dicitur; partim nihil corum, et tamen ibi nundinae aguntur negotii gerendi causâ, et magistri vici, item magistri pagi quattuor fiant; 2 that is to say, they had some of the incidents of corporate bodies, namely, that of holding markets, and that on such occasions the magistrates came thither, as it were on circuit, to try causes.

But as, in the imperial period at least, it appears that certain vici were incorporated by rescript, 3 and made capable of holding property or taking bequests: legata perinde licere capere atque civitatibus rescripto imperatoris nostris significantur. In like man-

1 P. 50, 1, 30. 2 Festus w. Vici. 3 P. 30. 73, § 1; Caius, 3, ad Ed. Pract.
ner, certain towns in England have been, and are from time to 
time, erected into corporations.

In Justinian's age, vici appear to have become recognised as 
corporations, in which capacity they could institute suits at law: 
sive pro aliquo corpore vel vico, vel alià universitate.¹ The pro-
gressive and gradual political changes in the Roman empire are 
clearly illustrated by these passages.

§ 860.

Fora, conciliabula, and castella are mentioned in the tablet of 
Herclea² and by Paulus,³ but not by Justinian.

Savigny⁴ places them between villages and towns, to the district 
of which latter they belonged, and it is clear that they possessed 
corporate rights.

In a later age, whole provinces were treated as legal persons 
and as great communities.⁵

§ 861.

Lastly, the Agrimensores termed the communities, such as 
colonies and the like, publica personæ: Quaedam loca feruntur 
ad publicas personas attinere. Nam publicæ personæ etiam coloniae 
vocantur quæ habent assignata in alienis finibus quaedam loca quæ 
solemus praefecturas appellare. Harum praefecturarum proprietates 
manifeste ad colonos pertinent.⁶ And in another place, in the 
same author, we find: haec inscriptio videtur, ad personam coloniæ 
ipsius, pertinent quæ nullo modo abalienari possunt a republicā; ut 
si quid in tutelam aut templorum publicorum aut balneorum ad-
jungitur; habent et respublica loca suburbana inopum funeribus 
destinata.⁷

§ 862.

Both the collegia templorum et vestalium⁸ became capable of 
holding property and of the acquisition under testament: M. M. 
sol. reddas collegio cujusdam templi; quæsitum est cum id collegium 
postea dissolutum sit.⁹ Hence it appears that the Pagan temples, 
too, formed corporate bodies; but it must remain uncertain at 
what period of Roman history they attained this definite legal 
form, because we are equally at a loss as to what were the exact 
powers and capacities of corporations in the earlier times.

It was not long after the introduction of Christianity that the 
system of incorporation was applied to communities and churches, 
in imitation of the previous pagan custom, the incidents of which 
were thus transferred to the new state faith; and the following rule 
for the distribution of bequests left for the benefit of the poor is thus 
laid down: where there were many poor-houses in a district and none 
is specified, the bequest goes to the poorest; but if no poor-houses

¹ C. 2, 59, 5.
² Lex de Gallia Cibalpina.
³ R. S. 4, 6, § 2.
⁴ l. c. p. 231.
⁵ C. Th. 2, 12; Dirksen. S. 15.
⁶ Aggenius ap. Goes. 56; Idem quasi 
Verbatim, p. 67.
⁷ Aggenius, l. c. p. 72.
⁹ P. 32, 1, 38, § 6; Wasmiauer, p. 415; 
Dirksen. S. 50, 117, 118.
CORPORATIONS.

whatever exist, to the church of the late testator's last residence, for
the exclusive use of the poor; and in like manner the church takes
an inheritance falling to a captive, with condition of expending the
whole in his release. By thus making the church a general trustee,
Justinian conferred upon it an enormous power, with what prudence
and foresight the annals of subsequent ages have informed us.¹

The Emperor was, doubtless, actuated in this case by motives
of conveniency; for, as in every parish there was already a standing
corporation, he made use of what already existed, instead of creat-
ing specific corporations ad hoc finem.

§ 863.

The individual gods of antiquity were all looked upon as individu-
als persons, the house of each being his temple, his servants his
priesthood, his property consisting in things consecrated to him,
and his privileges² being those of an inheritance. Thus, each
deity can hardly be said to have formed a corporation sole; for of
that fiction there was no necessity where immortality was supposed
to attain the effect, which is the sole object of a corporation sole.

The Christian religion, instead of vesting the legal property in
the deity or saint to whom the corpus was given or bequeathed,
vested in the church in usum, or in trust, for the deity or saint; for
we find sometimes Jesus Christ, sometimes the Catholic Church,
and sometimes the visible head, the Pope, described as the owner of
property left to the Church.

Justinian³ ruled, that the institution of Jesus Christ as heir is
to be understood to indicate the church of the testator's residence;
an archangel or martyr, the church of his place of residence so
dedicated; failing which, that so dedicated in the metropolis of the
province; and should there be many so dedicated, that to which
the testator showed a preference in his lifetime; and default of
such, the poorer.

The same rule obtains with respect to inheritances or legacies
left generally to the poor, which before Valentinian III.⁴ were void
for uncertainty; Justinian⁵ distributes on the like principle, going
first to the poor-house of the residence.

Blackstone,⁶ while he attributes the invention of corporations to
the proper source, tells us the Romans had no idea of a corporation
sole; and this is true in as far as it concerns living persons, and
may, perhaps, be construed so likewise with respect to persons
purely fictitious, as the fiscus, which may consist of one or three
ideal persons.

§ 864.

The capacity of the state to possess property existed, under the
republic, in the legal person of the erarium; but when the form
of government was changed, under Augustus, nominally to a limited

¹ C. 1, 3, 46.    ² Ulp. 22, § 6.    ³ C. 1, 2, 26.    ⁴ C. 1, 3, 24.    ⁵ C. 1, 3, 49.    ⁶ Vol. i. Book 3, c. 18.
monarchy, the provinces were divided, some being termed *provinciae populi Romani*, and others *Cæsaris*, the former still belonged to the Senate, the latter became the property of the Emperor as such, and were distinct from his *res privata*, or private property, hence three several denominations of property arose. The term *fiscus* now began to be exclusively applied to these imperial revenues, and may be compared with the regal domains formerly attached to the person of the sovereign in England, before they were commuted by George IV. for a civil list, and which are now termed crown lands, and administered for the nation by the department termed the “Woods and Forests.”

The *res privata principis*, on the other hand, represent such property as the Queen now possesses in her individual capacity of a member of the British state.

§ 865.

The word *fiscus* originally signified a basket, it being the old Roman practice to use baskets, for keeping and conveying money, in the same way as bags and chests are now used. Up to the age of Hadrian,¹ the distinction between the *fiscus* and *ararium* was preserved both in name and administration; but as the power of the Emperors increased, and that of the Senate declined, the *ararium* became a matter of less importance, and was absorbed by the *fiscus*, and the latter word was more frequently used to designate both,² and the distinction becoming obliterated both words were used indiscriminately, though the old distinction is traceable in Paulus.³

§ 866.

The privileges of the *fiscus* in its legal personality are many. Attached to it were an organised band of *nunciatores* or informers, whose business it was to give notice of anything that might bring advantage to the body of the *fiscus*—a refinement on the British system. All suits which may be described as Roman *qui tam* actions, are statute run, or prescribed, in twenty years;⁴ but this term is exceptionally reduced to four in cases of inheritances, for which no owner can be found. The fiscal privileges were made to apply to even the private property of the Emperor, and extended even to that of the Empress.

§ 867.

Although the heritable capacity was denied to corporations during a series of centuries, yet this disability appears never to

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¹ Tac. A. 6, 2; Plin. Panegyr. 42; Spart. Had. 7; P. 5, 3, 20, § 6: here the *fiscus* is mentioned, but the *ararium* is meant.
² J. 2, 6, § 13; P. 49, 14, 13, Pr. § 1.
³ 3, 4, et Id. 15, § 5; P. 48, 10, 1, § 9; C. 7, 37, 3.
⁴ P. 49, 14, 1, Pr.—13·15, § 3·16—43·49.
⁵ P. 49, 14, 1, § 3·4·5.
have applied to the aerarium, or afterwards to the fiscus, although their legal position was identical. Savigny imagines the solution of this difficulty is to be sought in the nature of the thing itself, for, as all power proceeded from the populus, it was possible for that body to grant restricted privileges to individual corporations; but it was inconsistent to suppose that the conferring-power could possess anything short of the fullest possible privilege.

In England, the Sovereign is distinctly a corporation sole, and belongs to the category of the fiscus, and has nearly the same privileges. In short, the imperial exchequer bears evident traces of having been framed on the model of the fiscus of Justinian's laws.

§ 868.

The association of persons exercising a certain profession, more or less nearly connected with the state, appears at an early date as corporations, composed either of the employes in public departments, or such as performed official acts for private persons, as notaries,1 &c. Hence we find the terms Librarii, Fiscales, Censuales, or, still earlier, Scribae, who, from their original division into tens, obtained the name decuriae, which was afterwards used as a generate term, the individuals being called decuriati or decuriales; and this class of persons obtained especial privileges and distinctions in Rome, which were continued and augmented in Constantinople.8

§ 869.

Industrial societies were termed societates; nor did they, on incorporation, lose their original designation.9 If not corporate, they were subject to dissolution by notice, or on the death of each individual member, and were mere voluntary partnerships.4

The smiths had peculiar corporate privileges;5 and, in later times, the bakers in Rome and the shipowners in the provinces.6 These resembled the various corporate companies of the city of London, where the individual members worked each upon his own account.

But the companies for working mines, salt-pits, or the farming of particular branches of the revenue,7 may be more aptly compared with the chartered companies for like purposes in England.

§ 870.

Clubs for convivial purposes existed also doubtless in Rome, Clubs for convivial purposes.

2 Cic. in Ver. 31, 79; id. ad Quinct. Frat. 2, 3; Tac. Ann. 13, 27; Suet. Aug. 57, et Claud. 1; P. 37, 1, 3, § 4; P. 46, 1, 24; P. 29, 2, 25, § 1; Cod. Just. 11, 13; Cod. Theod. 14, 1; Averanius Interp.
4 P. 31, 4, 1, pr. § 1; P. 37, 1, 3, § 4; P. 47, 2, 21, § 1.
5 P. 47, 2, 21, § 1.
6 P. 31, 4, 1, pr.; P. 50, 6, 5, § 12.
7 P. 3, 4, 3, pr.; P. 17, 2, 59.
under the names Sodalitia, Sodalitates, and Collegia sodalitia. They first appeared, according to Cicero, in the age of Cato Major: Sed quid ego alios? ad meipsum jam revertar. Primum habui semper sodales, sodalitates autem me quaeore constitutae sunt, sacris Ideis Magnae Matris acceptis; epulabar igiter cum sodalibus omnino modice, sed erat quidam fervor ætatis, quà progrediente omnia fiant in dies mitiora, neque enim ipsorum conviviorum delectationem voluptatibus corporis magis, quam caetu amicorum et sermonibus metiebar.

These meetings appear to have resembled dinner clubs, and were, according to Festus, pic-nics, every one bringing his contribution in kind; and from the first-quoted passage, it may be presumed that they took place on certain festivals, and may therefore have had an appropriate significance.

It would, however, appear that it was not long before these clubs became the vehicles of political agitation and a cover for seditious assemblies; for the Senate found it necessary to dissolve them and place them in the category of illegal assemblies, under the severe penalties of a publicum judicium and extraordinarium crimen; for Cicero writes,—Sctm. factum est, ut sodalitates decurriique discedereent; lexque de iis feretur ut, qui non decessissent, eam panà quae est de vi tenerentur.

And again we find: Frequenter tum etiam causas factosorum hominum sine publicâ auctoritate male publico fiebant; propter quod postea collegia Scto. et pluribus legibus sunt sublata prater paucu atque certa quæ utilitas civitatis desiderasset quasi ut fabrorum fectorumque (al lectorumque). In like manner: qui ludi sublatis collegiis discussi sunt. Post novem deinde annos, quam sublata erant P. Clodius trib. pl. lege latà restituit collegia.

§ 871.

Up to this time, it may be perhaps presumed that a corporate capacity was recognised without any formal act of incorporation; and if so, the word collegia is to be understood in its derivative signification of an assemblage of persons to some common purpose, or held to be corporate by the fact of its existence as such for a certain period, by which a prescriptive right was obtained; but it may gravely be doubted if such collegia possessed all the incidents of corporations or chartered companies in their more developed state: neque societatem neque collegium neque hujusmodi corpus passim omnibus habere conceditur; but Savigny is, with reason, of opinion that this prohibition and dissolution of collegia could not have applied to any but assemblies injurious to the

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1 P. 47, 22, 1, pr.
2 De Senec. 13.
3 Advoc. Sodales.
4 P. 47, 22, 1, 2, 3; P. 3, 46, 1, pr.
5 Ad Quint. Frat. 2, 3.
7 Asconius in Pisonianam (p. 7, ed Orelli).
8 l. c. p. 257.
VARIOUS KINDS OF CORPORATIONS.

public peace, and by no means to the old *collegia* of the mechanics or those of the temples, and such as were recognised by public authority, and were therefore *collegia licita* and certain in their object; we may therefore distinguish between the two classes by designating the one as voluntary societies, and the other as chartered bodies, whether such charter arose from prescription or from special grant.

The Inns of Court are *societates*, but not incorporated, and consequently have no corporate capacities, although they are, in fact, legal universities, exercising one of the most important privileges in the state, and whose members rise to the highest state dignities.

The history of their origin does not belong to this subject, but they owe it to the exclusiveness of the clergy, who, by refusing to admit the common law into the universities, forfeited the greatest support which they could have had, and which alone could have permanently upheld the great share of influence which they still possess.

§ 872.

Friendly or benefit societies, *collegia tenuiorum*, appear to have been wholly distinct from these, and measures were taken to prevent their assuming the nature of political meetings by restricting their assemblies to one in the month for the purpose of paying their scot; and these were open even to slaves, with the consent of their masters. It was, moreover, provided that no individual could be member of two such societies at once; as in the case of saving banks in England, depositors are forbidden, under pain of forfeiture, to have accounts in two banks.

These benefit societies were, at a later period, termed *collegia tenuiorum*.

§ 873.

Corporations sole, according to Blackstone, consist of one person only, and his successors in some particular station, incorporated by law in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural capacity they could not have had. In this sense, Coke calls the Sovereign a corporation sole: a bishop is so; some deans distinct from their several chapters; and every parson or vicar. The necessity, or at least use, of this institution is very apparent in the case of the parson of a church; on the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage-house, the glebe, and the tithes of the parish were vested in the parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with the intent that the same emolument should con-

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1 P. 47, 22, 3, § 2.
2 P. 47, 22, 1, pr. § 2; Id. 3, § 2.
3 7 & 8 Vic. 83.
tinue ever afterwards as a recompense for the same care. Now, had the freehold vested in the parson in his natural capacity, it would after his death 1 be liable for his debts and encumbrances, and descend to his heirs, or at least his heir might be compellable at some expense to convey these rights to the succeeding incumbent; but the law, by making him a corporation—in which case the word successors is substituted for heirs—obtains perpetual succession, and though John Stiles may die, the rector of Dale dies not any more than the Sovereign.

§ 874.

Corporations aggregate consist of many persons united in one society, and kept up by a continual succession of members, so as to last for ever; of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church.

Such corporations, whether sole or aggregate, are either lay or ecclesiastical; the former are subdivided into civil or eleemosynary. Blackstone says that civil are such as are erected for a variety of temporal purposes. The Sovereign, for instance, is made a corporation to avoid in general the possibility of an interregnum or vacancy of the throne, and to preserve the possessions of the throne entire; for, immediately upon the demise of a sovereign, his heir is in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of a town or particular district, as a mayor and commonalty, bailiff and burgesses, and the like, which we have seen prevailed equally among the Romans with respect to the municipia; others for the advancement and regulation of manufactures and commerce, as trading companies; and others for the better carrying on of divers special purposes, as the Colleges of Physicians and Surgeons for the improvement of medical science, the Royal Society for the advancement of natural knowledge, the Society of Antiquaries for promoting the study of antiquities. And among these the general corporate bodies of Cambridge and Oxford must be ranked; for it is clear they are not legally spiritual or ecclesiastical corporations, although they have been made so in practice, being composed of more laymen than clergy; neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries,—these being rewards pro opere et labore, not charitable donations only, since every stipend is preceded by service and duty.

Eleemosynary foundations are such as are constituted for the perpetual distribution of free alms or bounty of the founder of them to such persons as he has directed. Of this kind are all the hospitals for the poor, sick, and impotent, and all colleges both in

1 A living may be sequestrated for the debt of the incumbent during his lifetime.
our universities and out of them, such as Westminster, Eton, and
Winchester, &c., which colleges are founded for two purposes,
namely, the promotion of piety and learning by proper regulations
and ordinances, and for imparting assistance to the members of
these bodies in order to enable them to prosecute their devotion
and studies with greater assiduity and ease, and, though composed
of ecclesiastical persons, are nevertheless, strictly speaking, lay
corporations.

§ 875.

The incorporation of ecclesiastical bodies, then, clearly had its
foundation in the law of Justinian, and was imported into England
with the Civil and Canon Law.

Spiritual or ecclesiastical corporations are composed of members
strictly spiritual, such as bishops, certain deans, parsons, and vicars
(which are sole corporations), deans, and chapters, and formerly
prior and convent, abbot and monks, and like bodies aggregate.
These are erected for the furtherance of religion and the perpe-
tuating the rights of the church.

§ 876.

The idea of a legal person in the *jus privatum* is founded on
the capacity to possess property. This may consist of *jura in re,*
*obligationes, acquisitio hereditatis, jus dominii, patronatus*; but the
*jus connubii, patria potestas, agnatio and cognatio, manus, mancipii
causa,* and *tutela* cannot be made applicable. Hence Savigny
properly defines a legal person to be "a subject fictitiously received
as capable (of the possession) of property,"—*des Vermögens fähiges
künstlich angenommenes Subject.*

§ 877.

Numa Pompilius is supposed by Plutarch 1 to have laid the
foundation of corporations, by distributing the citizens into com-
panies, according to their handicrafts and trades. The city, he
tells us, consisted of two nations, or rather factions, which did not
amalgamate, and which were unwilling to forget their original
feuds. To put a stop to this injurious state of things, he adopted,
as Plutarch expresses it, the same means as are used to incorporate
rigid bodies, by first inducing them to ponder, after which they will
unite with ease.

To illuminate the distinction of origin, Numa distributed the

In Vit. Numa. The followers of the
Niebuhr school will perhaps censure the
author for adopting what by them are
termed the exploded myths of the classical
historians; but without entering into the
question of whether it be more reasonable
to adopt facts related by native historians,
who lived in the eighth and ninth century
after the events they record, in preference
to the theories of foreigners of the 27th
century, it would be inconsistent to reject
that which the lawyers of the most flouris-
ing legal age believed, and to which they
refer the origin of the laws of their time,
which otherwise would appear without a
first cause, and be consequently incapable of
logical deduction, and it may be further
observed that there is a wide distinction
between a fact or event related, and a
mythic tale or an incidental truth related in
connection with an evident fable.
lower orders according to their several occupations, of musicians, goldsmiths, masons, dyers, shoemakers, tanners, braziers, and potters; and collected the other artificers into companies having halls, courts, and religious ceremonies, respectively applicable to each society, and thus struck a decisive blow at the distinctions between Romans and Sabines, subjects of Tatius and of Romulus, both in name and essence.

Whether Plutarch be right or not in attributing these institutions to Numa is of little consequence, his statement carries a sufficient presumption of the great antiquity of the system of association for trading purposes, nor is it improbable that Numa had in view not only the amalgamation of discordant races, and the obliteration of political and national differences, but also the consolidation of industry in its various branches; this cannot be termed a protective measure, as it does not appear that he granted them any especial privileges, although they doubtless may have acquired such at a later period, in virtue of the political power arising out of the fact of their unity; for we find under Justinian, that certain guilds possessed privileges, as for instance those of the bakers, and these guilds were probably the origin of the jus commercii, one of the incidents of citizenships.

§ 878.

The Roman institution has been imitated in all countries. In Constantinople at the present day, the idea which led to the establishment of the Esnaf, was probably borrowed from the conquered Byzantines, and the institution of the various corporations of the Yenishars (Janisaries) with their distinctive brands on the arms. The trading guilds of the Ottoman empire invariably live in the same quarter, the vendors of old clothes in the Beet bazaar or louse bazar; separate quarters are also assigned to the vendors of antiquities and arms in the Begzestuin, the silversmiths, clothiers, silk-mercers, amber-dealers, pipe-stick-mongers, coppersmiths, engravers, scribes, stationers, potters, shoemakers, saddlers, tailors, tarboosh-manufacturers (hatters), druggists, fishmongers, bakers, butchers, carpet-sellers, shawl-mercers, tobacconists, porters, and many others too diverse to enumerate. The ubiquitous occupation of the boatmen prevents their having a fixed locality, nevertheless, they are corporate with their proper officers, and every "stairs" or "hard" has its keyah or head whom all obey, whatever may be their nation or religion, and who exercises a sound and just jurisdiction in all cases of robbery, or property left behind by passengers, all being registered and personally known to him; indeed, a more perfect system of corporate superintendence exists

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1. P. 271, 1, 17, § 3; 271, 1, 41, § 3.
2. P. 271, 1, 26.
3. The singular of the Turkish or rather Arabic word Esnaf, is Zunpf; which word in German (Zunft) signifies an association for industrial and trading purposes; termed in England a guild, from the Anglo-Saxon giidan, to pay—the paying quarterage or dues of the company by its members.
in no country or one more equitably administered. The amalgamation of nations is perfect, and the distinction into quarters of the city complete, yet certain nations, or rather religions, are prone to follow particular callings, though none are excluded by the byelaws of the guilds.

In the city of Hamburg and Lübeck, no citizen can exercise a handicraft, without buying himself into the company established for the encouragement of the particular calling, for which he must, moreover, be qualified by due service, and although in the beginning this was necessary for the advantage of the particular trade, and for securing competent service to the public, it has now attained that end, and become an inconvenience, and these monopolies an abuse.

In the city of London these companies were formerly of the greatest advantage to the public; but they have now become a dead letter, since a retail trader is not obliged to belong to the company instituted, particularly for the advancement of the business he follows. A livery man or freeman of the drapers may be a cobler, of no trade at all, a parson, or a nobleman; a royal duke was member of one of them, and the present prince consort is a member of the company of Merchant Taylors. The difference between the Hamburg and Lübeck system, and that of London, consists chiefly in this, that the individual in the former must first become a citizen generally, and then be received into the proper company for the exercise of his trade, whereas in London he must enter a company to become generally a citizen.

In London the companies have entirely lost their former significance, and have resolved themselves into mere social and convivial meetings, for the purpose of squandering property originally granted to them for the real advancement and furtherance of honest commerce, as well as for the relief of decayed members, from which objects it is entirely diverted by a culpable breach of trust, and a disgraceful system of abuse, as reprehensible in those who countenance it as it is degrading to those who practise it.

§ 879.

_Mortuo reo promittendi, et ante aditam hæreditatem fidejussor accipi potest. quia hæreditas personæ vice fungitur sicuti municipium et decuria et societas._

This passage of Florentinus has given rise to the error, that an _hæreditas jacens_, viz., in the _interim_ between the testator's or ancestor's death, and the assumption by the heir is of itself a legal person, and capable of a separate and independent existence. _Nam hæreditatem ex quibusdam vice personæ fungi receptum est_; _domina locum obtinet_; _dominum habetur_; _pro domino habetur_; _quia creditum est hæreditatem dominum esse_ (et)

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1 P. 46, 1, 22.  
2 P. 41, 3, 15, pr.; P. 46, 1, 22.  
3 P. 11, 1, 15, pr.  
4 P. 41, 1, 61, pr.; P. 28, 5, 31, § 1.  
5 P. 44, 13, § 5.
defuncti locum obtinere. Lastly, we have transit ad hæredem cujus personam interim hæreditas sustinet. Such is the reading of the Florentine Pandects, but the Vulgate has transit ad hæredem (illus) cujus personam interim hæreditas sustinet.

Four positions exist,—

The first already set out, and which belongs to this place, is that an hæreditas is a fictive or legal person, in the interim between the death of the possessor and the assumption by the heir;

The second, that the possession continues fictitiously in the deceased during such interim;

The third is that the hæreditas jacens is the property of no one during such interval; and the

Fourth, that it vests at once in the heir. The first of these is the only one which concerns us at present.

The possession cannot remain in the deceased after his death, for that would be an impossible and consequently an inadmissible fiction. Persona defuncti vicem sustinet non hæredis futuri; hæreditas enim non hæredis personam sed defuncti sustinet; less positive is the expression ex persona defuncti vires assumit, or the hæreditas without an owner; cum prædium interim nullius esset . . . postea domino ad alium devoluto . . . ut puta hæreditas jacent, postea adiit hæreditatem Titius . . . quod eo tempore nemo dominus fuerit.

The practice of antiquity, when testaments were first introduced, was that the heir acquired the estate from the testator by a fictitious purchase, whence it is clear that the legal interest in it vested even before the testator’s death, though the delivery took place in the moment only at which he expired, and in later times, when the heir was instituted in a less solemn and more private manner, by his name being written in the tablets, from that moment a legal right was conveyed to him as surely as by deed. Nor was it different in the case of intestacy; for here, the heir, although not expressed, was implied; in short, the institution of any other than the heir-at-law was looked upon as a deviation from right and justice, requiring originally a special enactment; consequently, the heir-at-law had a legal title during the ancestor’s lifetime, of which he could not be utterly defeased.

There was a unitas personæ between the ancestor and heir, which also affords an argument in favor of an hæreditas vesting immediately.

It is most reasonable, then, to presume that the hæreditas immediately vests in the heir omnis hæreditas quamvis postea adeatur, tamen cum tempore mortis continuerat, omnia fere jura hæredum perinde babentur ac si continuo sub tempus mortis hæredes existissent.
THE VARIOUS KINDS OF CORPORATIONS.

The fact of the heir being unknown does not affect the question, which is merely one of evidence; for some heir must be in existence, although he be remote or unknown.

Among such conflicting testimony, it is almost hopeless to attempt a reconciliation, and the only reasonable supposition is, that in so vast and difficult a compilation as the Digest, contrary views have crept in. The following appears the only mode of reconciling these passages. It is nowhere said that an hæreditas is a legal person, but merely, that it is after the manner of one, which in some measure explains this contradiction. With respect to the hæreditas being in the place of the deceased, the unitas personæ between the deceased and the heir will in a measure elucidate it; for then it is the same thing, whether we say the estate is still in the deceased or in the heir, but it is expressly said that it is not in the heir, and that it is in the deceased. Although Savigny has endeavored to reconcile the three opposite assertions, that the hæreditas represents the person of the deceased; that it represents itself; and that it vests in the heir; his explanation is evidently not satisfactory even to himself. Yet, so much is clear, that an inheritance is not a legal person, nor would it, but for the passage first cited, have occurred to any one to suppose so unnecessary a fiction.

§ 880.

The generate term used to designate all corporate bodies is universitas,—an expression which, nevertheless, must not be taken pure, for it not only signifies stricto sensu a corporation, but lato sensu a community: thus it denotes every aggregate of persons, things, or rights, and in this respect is to be distinguished from the conception of a legal person. Thus we find in the Codex, universitas Judaerum in Antiochensium civitate for universi Judaei, which is expressly intended not to convey the idea of a corporate body, because the passage goes on to state that no legacy could legally be left to such; but when this term is used in contradistinction to persona singularis, then indeed a corporation stricto sensu is to be understood.

§ 881.

The more proper word, and that open to the least misconception, is corpus; for it denotes metaphorically a body, the members forming which are comparable to those of the natural body of an individual, and which, taken together, make up an entirety. Taking, then, corpus to signify such integer, descriptive adjectives or substantives may be added to it in order to fix the species: thus we find, quibus autem permisson est corpus habere collegii, societas sive cujusque alterius eorum nomine proprium est, ad exemplum

1 l. c. § 102, p. 366.
2 P. 46, 1, 22.
3 P. 5, 4, 1, pr. § 1, 3.
4 C. 1, 91, 1.
5 P. 4, 2, 91 § 2.
Reipublica, in imitation of the state, which doubtless gave the first idea of a corporation.

The next question is the precise meaning conveyed by collegium and societas, for here corpus conveys the abstract general idea of an indivisible aggregate alone.

The term collegia templorum occurs, being another expression for corpus collegii templorum, when such temple possessed a corporate capacity; for it is presumable that, when collegium is used without corpus, this latter is to be understood.

It is not, however, to be denied that the expression collegium often of itself was sufficient to convey the idea of corporate capacity, especially in more recent ages, when less attention was paid to legal preciseness of expression. Thus, in the Pandects, we find a title de collegiis et corporibus, treating of such as were unlawful, because voluntary, whether designated by one or the other term.

Again, in modern times, a corpus may comprise many collegia; but this is an erroneous expression, and not Roman, for the several faculties are termed on the continent collegia, belonging to the one corpus academicum; and in Cambridge and Oxford, although the colleges are of themselves perfect corporate bodies, yet they appertain and are in some respects of general jurisdiction, subordinate to the general imperial corporation of the university.

§ 882.

By the word decuriae, in like manner, corpus must be understood; but when collegia sodalitiae occurs, it may be held to stand for corpora.

Societas imports a partnership, but corpus societatis an incorporated partnership, as distinguished from such as were voluntary societies, private societates, by mutual contract and agreement.

§ 883.

When corporations had obtained a distinctive and definite form, certain types stamped a corporation as such: habere res communes, arcam communem et actorem sive Syndicam per quem tanquam in Republica quod communiter agi fierique oporteat, agatur fiat.
THE CONSTITUTION OF CORPORATIONS.

First, then, common property, for the use of no one particular member, but applicable to all as one of these things might be corporeal or incorporeal, consisting of realty, personality, or rights; as, for instance, lands, books in a library, or the right of pasturage, way, to the members, or the like.

Secondly, common property, the use of which does not belong to any individual member, but is available for the benefit of all indivisibly; under this head would come money expended on the upholding or construction of the corporate buildings, in defending corporate rights when infringed, and the like.

Thirdly, a common representative or executory officer, by whom the aggregate spoke or replied, who need not necessarily be a member of the body: thus in the Hanse towns the syndic is not a member.

To these some corporations have added a common seal; nor is it impossible that this sign was also borrowed from the less ancient times, although the signature of the actuary of the corporation in his official capacity was undoubtedly the oldest form, for seals of old were not used as now and in the Middle Age, as it were in the place of a signature, but in their proper use, to close or seal up a document.

§ 884.

Corporations may derive their right from prescriptive or special grant, and in later times a disposition to restrict corporations arose; consequently, none but such, the antiquity and utility of which were unimpeachable, and which had been wittingly and practically recognised, were allowed to exist, or were considered lícita.

Many corporations were in their origin older perhaps than Rome itself, being the continuance of such associations under the newly formed state. This, if we admit that Numa invented corporations only, applies to bodies politic.

§ 885.

It was a rule that three persons were required in order to constitute a corporation: Neratius Priscus tres facere eximiat collegium et hoc magis sequendum est; and in like manner, under the term a familia were to be understood three slaves at least. The fixing this number as a minimum may be connected with the mode of voting in corporations, for a simple majority was not all that was required, but the vote of a majority of two-thirds, which would be represented by 2 to 1, 4 to 2, 6 to 3, &c.; a principle adopted in England, in the deeds of settlement of many companies, with

1 P. 3, 4, 7-1.
3 It was held that the sealing of a will was a sufficient signing, 1 Ves. Jun. 15, but this opinion of the C. J. Willes was reversed by Court of Exchequer, Smith v. Evans (1 Wilson 313).
4 P. 50, 16, 85.
5 P. 50, 16, 40, § 3; but later one slave formed a family, P. 45, 16, 1, § 17.
The reduction of the corporation to one did not injure its corporate capacity.

Consent of the Sovereign must be expressed for incorporation; or implied.

The Crown's consent may be by charter or act of Parliament.

respect to certain vital acts of the executive committee or direction, which are hereafter enumerated. Nevertheless, if a corporation by any accident were reduced below that number, whatever its original aggregate may have been, nay, even to one,—si universitas ad unum redivit magis admiratur posse et convenire et conveniri cum jus omnium in unum residerit et stet nomen universitas,—its corporate capacity continued by the concentration of the rights of all the other members in the survivor; but in the case of the corporation being so reduced to a unit, no actor is necessary, but such corporation sole can act as such.

§ 886.

As in the Roman law, the charter of the Sovereign is always expressed, or at least implied, and corporations existing by such implied consent are said to exist by force of common law, to which the former kings are supposed to have given their concurrence. Such are the king himself, bishops, parsons, vicars, and others, who by common law have been held, as far as our books can show us, to have been corporations virtute officii; and this incorporation is so inseparably annexed to these offices, that we cannot frame a complete legal idea of any of these persons unconnected with that of a corporation capable of transmitting his rights to his successor at the same time.

Prescription always supposes a charter to have existed at some period or other, in the same way as a title by prescription to any individual right supposes the existence of a grant at a remote period: of this description is the city of London, and many others which have existed as corporations, time whereof the memory of man runneth not to the contrary, and therefore looked upon in law as well created, it being presumed that the charter is lost or destroyed.

§ 887.

The Crown's consent is expressly given either by charter or act of Parliament, of which the royal assent is an indispensable ingredient; corporations may undoubtedly be created. Blackstone remarks that "Parliament exercised this power by incorporating hospitals without any charter, and that there have been other similar instances;" this, however, amounts to the same thing, as the bill requires the royal assent to become an act. Thus it is observable that the authority of Parliament has, in these creations, been usually exercised in connection with the royal prerogative, as in the case of the charter of the Royal College of Physicians, which was afterwards confirmed by statute, or when

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1 The difference appears to be that, by the Roman Law, the presence of two-thirds of the whole is necessary to make a legal meeting, and the majority of such two-thirds to do a valid act.

2 P. 3, 4, 7, § 3.

3 39 Eliz. 5.

4 10 Hen. VIII.

5 14 & 15 Hen. VIII. 5.
the Crown was permitted by statute\textsuperscript{1} to erect the corporation of the Bank of England with certain powers, or when, by a more recent statute, it was enacted\textsuperscript{2} that, upon petition of the inhabitants, householders, of any borough in England or Wales, the King might by his charter incorporate such borough according to the provisions of the act.

The incorporation may be performed by the words \textit{creamus, erigimus, fundamus, incorporamus}, or words to that effect; and it is even held that, if the Crown grants to a set of men to have a \textit{gildam mercatoriam}—that is, to contribute each his quota—this is sufficient to incorporate and establish them for ever.

\section*{§ 888.}

Since Blackstone wrote, a species of body, partaking in part of the nature of a corporation, partly of a voluntary society, and partly of a common partnership, has been acknowledged by statute,\textsuperscript{3} which lies between corporations, \textit{universitates}, and \textit{societates}, \textit{stricto juris}, being only partially incorporated.

The Sovereign is empowered by his letters patent to grant to any company or body of persons associated for any trading or other purpose whatever, and to the heirs, executors, and assigns of any such persons, without incorporation, any privileges which the Crown may grant by charter of incorporation: these letters patent may limit the extent of individual liability; and the charters limit the period of incorporation, and are subject to all the provisions in the act as to unincorporated companies.

Joint-stock companies, or those the capital of which is divided into shares transferable at the sole will of the holder: associations for the insurance of lives and property, granting annuities: certain friendly societies, and others established for purpose of trade and profit, (except banking companies, schools, and scientific and literary institutions), and consisting of more than twenty-five members.

For such companies a set form of registration is set out, provisional on first projection, and complete on formation, when they are considered incorporate for certain purposes, but so as not in any wise to supersede the liability of the shareholders; and if due diligence has first been used to obtain satisfaction out of the corporate property, individual liability will last three years after the party shall have ceased to be a shareholder.\textsuperscript{4} Companies privileged under statute,\textsuperscript{5} and all banking companies\textsuperscript{6} consisting of more than six persons, are liable in certain cases in their corporate capacity to fiats of bankruptcy if established for commercial purposes, when the charter on representation may be revoked, and in certain cases the prosecution of the directors and other officers directed by the

\begin{itemize}
  \item \textsuperscript{1} 5 & 6 W. & M. 20.
  \item \textsuperscript{2} 5 & 6 Will. IV. 76.
  \item \textsuperscript{3} 7 Will. IV.; 1 Vic. 73.
  \item \textsuperscript{4} 7 & 8 Vic. 3.
  \item \textsuperscript{5} 7 Will. IV.; 1 Vic. 73.
  \item \textsuperscript{6} 7 & 8 Vic. 123, § 48.
\end{itemize}
attorney-general. The Act contains provision for the winding up of such companies, and the Court of Chancery may, under this Act, compel contributions among the members.

These bodies, then, may be called limited corporations, and are the result of the spirit of the times. Under all circumstances, it would perhaps have been better not to have introduced this category, but to have left all such subject to the law of common partnership. The confusion resulting from the system has been great; and the facilities of deceiving ignorant and unwary persons, with whom they pass current as corporations till found to be otherwise, increased without corresponding remedies, as is too often the case in all half measures.

§ 889.

The individual rights of the member of a corporate body are distinct from his corporate rights. Nevertheless, there are some cases in which the rights of members of certain corporations, extend to them in their capacity, such as exemption from tutorships.  

With respect to the acquisition of property, that which accrues to the corporation by no means accrues to the individual members, who have a general, but not a severable interest in the common property of the universitas, not by representation, but in virtue of the constitution.

This right extends to property of all descriptions which a corporation, according to the old law, would acquire by solemn acts, such as mancipation, though a slave already in mancipio. Negante reo, agnoscentes servos per tormenta interrogari placuit. Et quia vetere Scito. quaestio in caput domini probabilatur, callidus et novi juris repertor Tiberius, mancipari singulas actori publico jubet, scilicet ut in Laboneum, salvo Scito. quaeretur. Deliberas mexit quemadmodum pecunia quam multiplicus nostris in epulum obtulisti, post te quoque salvum sit. Equidem nihil commodius invento, quam quod ipse feci. Nam pro quinquentis milibus numum agrum ex meis longe pluris actori publico mancipavi. This actor publicus was the property of the corporation.

Slaves were not permitted to bear witness against their masters, but the slave of a corporate city could do so against a citizen thereof, because there was no individual property in him.

A corporation, even a corporate town, could manumit and retain the heritable right of patronage.

Savigny gives the history as follows:—The lex vectibulici was introduced in the age of Trajan, permitting the Italian cities to manumit their slaves, a privilege extended by Hadrian to provincial cities.

1 P. 27, 1, 17, § 2 & 42, § 3; Frag.  
Var. § 124, § 233-7; P. 50, 8, 5, § 23; Ulp. 3, § 1, 6; vide et C. Th. 14, 2, 4; C. Th. 14, 3.  
2 P. 1, 8, 6, § 1.  
3 Tac. An. 2, 30.
THE ACQUISITION BY CORPORATIONS.

§ 890.

The land belonging to corporations in England were said to be held in mortmain (in mortuā manu), because they produced no advantage to the feudal lord by way of escheat or otherwise, says Coke upon Littleton; and as all lands are held mediately of the crown as lord paramount, and ultimately lord of every fee, his licence is necessary to dispossess himself of such interest, and not, indeed, his alone, but also that of the intermediate lord.

It has been doubted if, before Magna Charta, any limit was put on alienation in mortmain; nevertheless, it is supposed that licences in mortmain were necessary, even among the Saxons above sixty years before the Norman conquest.

This principle was subsequently enforced by a variety of statutes called the statutes of Mortmain, which the clergy, who were principally affected thereby, on account of the number of religious houses existing at that period, were constantly exercising their ingenuity to evade; "for such," says Blackstone, "was the influence and ingenuity of the clergy, that notwithstanding the fundamental principle above alluded to, we find that the largest and most considerable dotations of religious houses happened within less than 200 years after the Conquest; but when these began to grow numerous, it was observed that the feudal services ordained for the defence of the kingdom were every day visibly withdrawn; the lords were curtailed of the fruits of their seignories, their escheats, wardships, reliefs, and the like; in order, therefore, to prevent this, it was ordered by the second of Hen. III.'s great charters, and afterwards by that printed in our common statute books, that all such gifts should be void, and the land forfeited to the lord of the fee.

The first fraud practised by the clergy was to obtain long leases of one thousand and more years, or buying land holden of themselves as lords of the fee; these abuses produced the statute De Religiosis, which provided that no person, religious or other, should buy, sell, or receive, under pretence of gift, or term of years or other title, or should, by any act or ingenuity, appropriate to himself any land or tenements in mortmain, upon pain of immediate forfeiture to the lord of the fee, or on his default for one year, the lords paramount, or in default of all of them, to the king.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between parties, the religious houses now began to set up

2 P. 40, 3, 12.
3 De L. L. 8, 41.
4 7 Edw. I.
a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant, who, through fraud and collusion, made no defence, and thereby judgment was given for the religious house, which then recovered the land by sentence of law on a supposed prior title. Thus, they had the honor of inventing those fictitious adjudications of right which afterwards became the great assurance of the kingdom, by the name of common recoveries. But upon this the second statute of West.\(^1\) enacted that a jury shall try the true rights of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, it shall recover seizin, otherwise it shall be forfeited to the immediate lord of the fee, or else to the right lord, and finally to the king, on the immediate or other lords default. The like provision was made by the succeeding chapter, in case the tenents set up crosses upon their lands (the badge of knights templars and hospitalers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. So careful, indeed, was this provident prince to prevent any future evasion, that when the statute \textit{Quae Emptores},\(^2\) abolished all subinfeodations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. And afterwards, when the method of obtaining the king’s licence by writ of \textit{ad quod damnum} was recognised,\(^3\) it was further provided\(^4\) that no such licence should be effectual without consent of the mesne or intermural lords.

It was still found difficult to set bounds to ecclesiastical ingenuity; for when driven out of all their former holds, they devised a new method of conveyance, by which the lands were not granted to themselves directly, but to nominal feoffees \textit{to the use of} religious houses, thus distinguishing between the \textit{possession and use}, and receiving the actual profits, while the seizin of the lands remained in the nominal feoffee, who was held by the courts of equity, then under the jurisdiction of the clergy, to be bound in conscience to account to his \textit{cestuisque use} for the rents and emoluments of the estate, whence modern conveyances derive the practice of uses and trusts.

They did not, however, long enjoy the advantage of the new device; for a new statute\(^5\) restrained this doctrine, introduced from the Roman Civil Law by foreign ecclesiastics, and initiated from the \textit{fidei commissa} about the close of the reign of Edward III., enacting that lands so purchased to uses should be amortised by licence from the crown, or else be sold to private persons, and that for the future uses shall be subject

\(^{1}\) 13 Edw. I. 52. \(^{2}\) 28 Edw. I. \(^{3}\) 27 Edw. II. \(^{4}\) 14 Edw. III. \(^{5}\) 15 Rich. II. 5.
to mortmain, and forfeitable like the lands themselves; and goes on to state that whereas the statutes had been eluded by purchasing large tracts of land adjoining to churches, and consecrating them by the name of churchyards, such subtle imagination is declared to be within the statutes of mortmain. Civil and lay corporations, as well as ecclesiastical corporations, are also declared to be within the mischief, and therefore, of course, within the remedy. Several other statutes were passed relating to this subject, of which an account will be found in Stephens's Commentaries, and the last enacted that no lands or money to purchase them for charitable uses, should be conveyed otherwise than by deed indented, executed twelve months before the death of the donor, in presence of two witnesses, and enrolled in the Court of Chancery within six months after execution. There is also an exception in the case of all conveyances by way of bond _fide_ purchase where the full value is paid down; as also with respect to stock in the funds where a transfer in the bank books six months before the donor's death supersedes the above-mentioned deed. The universities of Cambridge and Oxford, their colleges, and the scholars of the foundations of Eton, Westminster, and Winchester, are also entitled to exemption from the operation of the Act; and a similar exemption was extended to the British Museum.

§ 801.

According to the older rule of the Roman Law, a corporation which possessed a slave could acquire property mediate; but this means was inadequate for the purposes of alienation and obligation, and consequently those most important operations of bargain and sale, granting and receiving, and all legal transactions, must have been foregone. It was, therefore, indispensable to invent some other means by which these acts could be performed.

It is not possible to ascertain the precise bye-laws by which corporations were governed, and much must be inferred from the rules which applied to municipalities and provincial assemblies. With respect to those bodies, all administrative power resided in the _ordo_, which was capable of legal acts when two-thirds of its members were present, nor is there any trace of a system of proxy. _Illa decreta quae non legítimo numero decurionum coacto facta sunt non valent. Lege autem municipāli cavetur ut ordo non aliter habeatur, quam duabus partibus adhibitur._

_Ne paucorum absentia ... debilitet, quod a majore parte ordinis salubriter fuerit constituendum; cum duæ partes ordinis in urbe positæ totius curiae instar exibebant._

Thus, when two-thirds were present, the whole _ordo_ was supposed to be in activity, but otherwise its decrees were void. And this must be the meaning of the term _major pars_, which so often occurs.

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1 9 Geo. II. 36.
2 Repealed by 45 Geo. III. 101.
3 § Geo. IV. 39.
4 C. 10, 63, 5; C. 11, 51, 3; Nov. 120, 6, § 1, 2; P. 50, 17, 160, § 1.
5 P. 50, 9, 2, 3.
6 C. 16, 31, 46; C. Th. 12, 1, 142.
7 P. 50, 5, 19; C. 10, 33, 2, 3; P. 26, 5, 19.
This proportion was necessary for all important acts, especially for the appointment of an actor to represent the corporation in courts of law. These two-thirds being present, the simple majority of voices of those so present was conclusive: 1 refertur ad universos quod publice fit per majorem partem. 2 The difficulty of obtaining unanimity was well known, nor has it been attempted in any body but that of an English jury. It is erroneous to suppose that a simple majority, that is to say of one, is more than the vote of a single individual; for if of thirteen men, six vote pro, and seven contra, the six pros illustrate six of the contras, and the question is decided contra by the seventh voice, and the question is therefore at the mercy of one man. In the case of five and eight, by three,—four and nine, by five; and so on, assuming a total of thirteen, and it was probably on this arithmetical view that the English law insisted upon unanimity.

He who is nominated in any capacity in a corporation may vote for himself, for the voice of a single person is not taken into account in a corporate act. 3 Such one person, however, cannot elect himself, any more than the Prætor can appoint himself a guardian, 4 nor a patron present himself to a benefice. 5 Every member is bound to accept honores, be they personal or pecuniary burdens, or both combined, munera, personalia, realia, mixta, on the part of the community, according to his ability, save special exemptions, or immunities, or vacatio granted by the regent. 6 In the Hanse towns, a citizen who refuses the office of senator, which is a munus publicum universitatis, forfeits 10 per cent. of his property, and must quit the city.

§ 892.

A Roman universitas might make laws called statutes, or observe customs, statutæ conventionalis, without permission of the Sovereign, 7 so long as they are not contrary to the public law of the land; should the body, however, wish to make the latter statuta legalia, binding on a third party, a special permission of the prince is required. The making of statutes is sometimes called autonomy, and is treated of at length by Riccius, Müller ad Leyser, Maier, and others.

In England, a corporation may make bye-laws or private statutes for its better government, which are binding on themselves, if not contrary to, or inconsistent with, the law of the land, the charter, or manifestly unreasonable: thus, no limitation in the number of apprentices to be taken by the members, for instance, would stand good, nor any act which might prejudice the royal prerogative. This power may be delegated to a committee of the corporation by charter as to specified matters, which, however, does not prejudice the whole body as to matters not specified; and every corporation may alter and repeal bye-laws so made.

1 P. 3, 4, 3, 4. 2 P. 50, 17, 160; § 1. 3 P. 50, 4, 1 & 69—11—14—13; P. 50, 16. 4 P. 26, 5, 4. 5 Bart in l. 43, and De Vulg. Num. 33. 6 P. 4, 4. 7 Boehmer, De Nat. Stat.
THE GOVERNMENT OF CORPORATIONS.

The common law of England allows the vote of any majority to bind the minority; notwithstanding which, some founders of corporations insisted on a unanimous vote for a corporate act: this Henry VIII. found to stand in the way of his obtaining surrenders of the lands of ecclesiastical corporations, and therefore enacted, 1 "that all private statutes shall be utterly void whereby any grant or election made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more being in the minority;" but this statute does not extend to any negative or necessary voice given by the founder to the head of any such society.

The Roman law contains exceedingly little upon these subjects. Under the Emperors, the decuriones possessed an almost uncontrolled power; nevertheless, a remarkable limitation is met with in a constitution of Leo. If a town wished to alienate buildings, ground-rents, or slaves, domus aut annonae civiles, aut qualibet adicia vel mancipia, 2 in Constantinople, the consent of the Emperor was requisite, or, in other towns, that of an assembly consisting of the majority of the decurions, of the dignitaries, and the property-holders of the town, each individual member giving his vote, —præsentibus omnibus, seu plurimâ parte, tam curialium quam honoratorum et possessorum 3 civilitatis.

The Twelve Tables even contained a regulation, extracted from the laws of Solon, to the effect that collegia might make their own statutes; to which was appended the condition that such could only be made by unanimous consent or majority, and not be contrary to the general law of the land: Sodales sunt qui ejusdem collegii sunt; bis autem potestatem facit lex, pactionem quam velint sibi ferre, dum ne quid ex publicâ lege corrumpant. 4

§ 893.

It may now be inquired what acts ought, and what ought not, to be done by such majority in corporations generally, without particular reference to anything but the spirit which first suggested their introduction.

Firstly, then, The framing of new statutes for the wellbeing and government of the body.

Secondly, The taxation of the individual members pro rata for the support of the body.

Thirdly, The application to the state to dissolve the body.

Fourthly, The change in the substance of the corporate property.

Fifthly, The entire alienation of the portions of the corporate property.

Sixthly, The alienation of certain parts to individual members of the body.

1 32 Hen. 27. 2 C. 11, 31, 3. 3 This word appears to coincide with the Erbgewesene Bürgerschaft of the Hanse towns. 4 P. 47, 22, 4; Gaius, lib. 4, ad Leg. XII Tab.
Seventhly, The alienation of the use of such parts to individual members.

Eighthly, The assumption of the property of individual members by the body.

Ninthly, The contracting of loans.

For all these go to the very existence of the body, and are, therefore, vital questions, not in any way within the province of the actor.

§ 894.

On the erection of a corporation in England, a name by which it must sue and be sued, and do all legal acts, if not given to it, is implied; nor will a minute variation in the designation vitiate the proceeding; it may even be changed by competent authority without affecting the identity of the corporation. A name, however, is a necessary ingredient of its constitution; and although it is the will of the sovereign, says Blackstone, that erects the corporation, yet the name is the knot of its combination, without which it cannot perform its corporate functions. Sir E. Coke describes it as a proper name or name of baptism; thus, when a private founder gives a college or hospital a name, he does it as a godfather only, and by the same name the king baptizes the incorporation; moreover, a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal, which is the only mode of representing the joint assent of the individual members.

A corporation properly so called, may sue and be sued, plead and be impleaded, grant or receive by the corporate name and under the common seal, and is liable in the corporate property only; and all process is directed by and against the secretary, actuary, or attorney, or by whatever name he may be called of the corporation, who, by authorization of the corporation, may borrow or lend money for the use or benefit thereof.

A corporation may purchase land, and hold to them and their successors, as natural persons may to them and their heirs, subject to the statute of Mortmain.

§ 895.

The institution of legal persons as heirs was certainly not a creation of the earliest ages, and was long bound up with many difficulties, because, although a corporation might take as heir, inasmuch as it never died, there was no mutuality. For like reason, it can certainly not be made capable of intestate succession, for it has no parent; nevertheless, it might be capable of a fictive succession in the ascending line, in virtue of patronal rights.

At a later period, a peculiar faculty to succeed, ab intestato, to such members as died without any natural heirs whatever was conferred upon certain corporations, whereby such were put into the same category with the Fiscus, though in a more limited degree.¹

¹ Vide Dirksen, 5, 99.
THE ACQUISITION BY CORPORATIONS.

A not less difficulty arose with respect to testamentary succession; this was, however, a legal and not a natural one, applicable to all the several descriptions of corporate bodies: nec heredem institui nec præcipere posse rempublicam constat. But Ulpian gives a more detailed and a different reason: nec municipia, nec municipes heredes institui possunt; quamiam incertum corpus est, ut neque cernere universi neque pro herede gerere possint, ut heredes fiant.

§ 896.

There were two modes of acquiring an hereditas, of which the first is cernendis, that is, by representation, which is not possible even in the case of a tutor on behalf of his pupil; still less can a corporate body act in person, for its very existence is ideal and daily exposed to change, which is in one sense the meaning of an incertum corpus. Incertae persona were, before Justinian, incapable of inheritances, and those of which the testator had no determined idea, but whom he designated by a general term which might be applicable to individuals of the most opposite descriptions: thus, if two persons be named heirs or legatees, who should first be named consuls after the execution of the testament; but this is different from an incertum corpus, of which the testator has a definite idea, and leaves nothing to the chance of time; whatever may be the contingency of change of particles, there is none of the entirety.

To resume: it may be urged that all the individual members, universi, may have themselves separately served heirs, and thus obviate the difficulty. But this is open to three objections: firstly, that the bequest is left to the corporation, not to its component parts, and that such would be a series of individual acts, and not a corporate act; secondly, that were this permitted, each individual member would acquire in his private capacity, which was not intended; lastly, if a member in whom such share is vested leave the corporation, the object would not be attained. But, to support this argument in any way, it must be supposed that all an individual belonging to a corporation possesses is the property of the corporation, which can only happen in the case of a slave, and a slave cannot be instituted heir, or act in the necessary representative capacity.

The second mode is “gerendo,” by assuming the administration of an estate, where legal difficulties were opposed to other methods; but it is clear that a fictitious body cannot do this. Hence, although there may be the will, active interference is impossible.

These legal difficulties were only to be surmounted by an excep-

1 Plin. Ep. 5, 7. 2 Ulp. Fr. 22, § 5. 3 P. 36, 1, 65, § 3; C. 6, 30, 5. 4 I. 2, 20, § 25. 5 Gaius, 2, § 89, 90.
§ 897.

The prohibitory rule is equally applicable to other collegia or corpora, although exceptions are made in some particular cases; thus, too, special privileges were occasionally extended to the gods, who otherwise labored under an heritable incapacity. The introduction of Christianity, on the other hand, in later times, while it utterly disfranchised the old, as completely enfranchised the new dispensation, and the best of everything was seized by the Church. The statutes of Mortmain in England were scarcely effective to put a stop to the monstrous abuse of ecclesiastical acquisition.

§ 898.

The bonorum possessio was acquirable also by means of intermediate persons, such as a tutor, without the co-operation of his pupil, which would induce the belief that this mode was always open to municipal and other corporations; but Savigny thinks that Ulpian, when he says, nec municipia nec municipes hæredes institui possunt, and then mentions that the exceptions of the testament of a freedman, and the evasion by fidei commissum or trusts, would have included the bonorum possessio, if that had been also an exception, and therefore confines it to cases arising out of the intestacy or testaments of their freedmen. The ordinance of Leo, however, settled this question.

§ 899.

Legata and fidei commissa singularia were long denied to legal persons, notwithstanding the absence of all objection in point of form. Nerva was the first Emperor who granted municipalities this capacity, which Hadrian enlarged.

Collegia, licita, and templo next obtained this privilege by a Senatus Consultum under Marcus, which a particular rescript extended further to vici. The expression of Ulpian is so general,
that it would be idle to suppose its sense restricted to the *vindicationes legatum*.

The legacies to the Roman people, of which mention is made, were undoubtedly valid, though by what form is unknown; but some think it was *per damnationem*, though probably it was by a right inherent in the *aerarium*. Kings often instituted the *populus Romanus* heir.

A special *Senatūs Consultum* conferred upon municipalities the capacity of acquiring inheritances by a *restitutio fidei commissaria*.

§ 900.

It is an interesting question how a corporation legally can *manuumit*, *manumission* being an *actus legitimus*, and, as such, not *performable by deputy*; a corporation, on the other hand, can by its nature only act by deputy, except indeed in the case of an *universitas ad unum redacta*. Savigny is therefore of opinion that the liberty mentioned by Varro as conferred by corporations was merely an actual possession of freedom, or, later, the Junian Latinity. The Emperors, however, overriding legal logic, conferred the capacity of *manuumission*, with the incident of citizenship, upon corporate bodies.

The rights of patronage do not belong to the individual members, but to the aggregate.

§ 901.

The land of a corporation may be used in three ways,—by farming, by administration, by common use, or indeed by a mixed mode, where none but members can hire, but pay a certain rent to the common chest.

Some *servitus*, or services, are applicable to corporations, but others are not so, because some are inseparable from the person.

*Usufructus* is applicable, and savors of the reality: *an usufructus nomine actio municipibus dari debet quaesitum est*. . . . *Unae sequens dubitatio oritur, quosque tuendi essent in eo usufructu municipibus? Et placuit centum annis tuendos esse municipem, quia is finis vitae longavi hominis est*. Here a hundred years is taken as the extreme period of human life, which somewhat differs from other cases, where 120 — 30 = 90 is fixed; but the ten is probably added for a round number. *No usufructus jure constitutus obtained inter vivos*, but a mere *possessio usufructus*; but this fell with the corporation's fictitious life. The old law allowed its acquisition *vindicationis legato*, viz., *ipso jure*, not by *mancipatio*, which was generally inapplicable to usufructs, or *jure cessione*.

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1 Dirksen, S. 125.  
2 Ulp. Fr. 22, § 5; P. 38, 3, 1, § 1; P. 36, i, 26, 27, pr.  
3 § 727, h. op.  
4 De L. L. 8, 41.  
5 § 727, h. op.  
6 Gaius, 2, § 96; P. 7, 6, 3.
because this was denied to slaves,—the only mode by which a legal person could acquire such.

§ 902.

Servitus prædialis. again, savoir of the realty, and are acquirable by way of legacy, though not jure cessione; but a servitus prædialis (a right of way or aqueduct) is acquirable by mancipation to the slaves of a legal entity,—non dubito quin fundo municipium per servum recte servitus adquiratur; not so a servitus urbanus (such as a building), to which mancipation does not apply.

§ 903.

It has been denied that legal persons have the capacity of possession; but Savigny slightly and didactically confutes this error. He asserts that even usucapion must have a beginning in possession: thus a slave, being acquired by possession, may acquire for his owner: and states, as a parallel case, the acquisition by a pupil through his tutor, or by a person of unsound mind through his curator. In later times, it was settled that legal persons could acquire through their slaves or through free agents.

§ 904.

Corporations are capable of contracting obligations in favor of, and against themselves. An actio directa accures by means of the stipulation of the slave, but an actio utilis only results from the acts of the free representative of the body.

The action on simple contract debts, arising out of an act of giving, binds the legal entity only in as far as the thing given is expended for its benefit; but there is no difference with respect to natural or legal persons, in regard to such as arise out of acts of volition or of deeds.

And although all such obligations affect the corporation in the aggregate upon the principle, si quid universitat sui debetur singulis non debitur; nec quod debet universitas singuli debent; yet the administration can enforce its bye-laws on individual members, with respect to the payment of their contributions, for the extinction of corporate debts.

With respect to the capacity of suing or being sued, the representative of a corporation, whether termed Actor or Syndicus, possessed the same rights as an ordinary procurator or attorney of an individual, and if the corporation be reduced to one such indi-

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1 P. 8, 11, 12.
4 P. 22, 11, 11, § 1.
5 P. 13, 5, 5; § 71, 9.
6 P. 12, 1, 27.
7 Famulat servitus, finium regendorum aequa pluriae actio, P. 3, 4, 9.
THE CAPACITIES OF CORPORATIONS.

vidual, though he sue in person, must do so under the corporate name, and it is the same with one who acts as defensor.  

§ 905.

Execution can be had upon a corporation, as upon a natural person, by missio in possessionem, sale of property, concursus, and the calling in of outstanding debts.

It is presumable from analogy, that aggregate bodies swear, when such is necessary in suits, by their legal representatives: Municipibus, si jurassent, legatum est. hæc conditio non est impossibilis; Paulus quemadmodum ergo pareri potest? Per eos itaque jurabunt per quos municipii res geruntur. But it must be confessed that the making of an oath, which is a purely personal matter, and one of conscience, by representation involves an anomaly.

§ 906.

It may be a question as to how far legal persons can be guilty of crimes, and subject to the punishment of them. It is evident that there are at least some from which they must be exempted, on the ground of impossibility; for instance, a town council cannot commit adultery, nor an hospital bigamy; from others, on the ground of unconquerable difficulties, such as the transportation of a municipality, or the imprisonment of a church or almshouse.

The punishment of death involves less difficulty, since the deprivation of the charter operates the only death of which a corporation is susceptible—civil death.

But, in fact, the capacity to crime, and consequently to its punishment, applies only to a natural person, as a being capable of thought, volition, and feeling, and a legal person is a being which has a mere capacity of property, and as such is without the reach of the criminal, and is amenable to the civil law only.

It is, hence, clear that every crime committed by a corporation must be considered as committed by the member or members of such body in their private and individual capacity, and that if the actuary of a corporate body steal money not in fact for his own personal aggrandizement, but to relieve the necessities of the body he represents, he must be looked upon as a thief, and punished as such, although the conversion be not for his own benefit.

A law of Majorianus decides that a curia shall never be condemned as a whole, but only its component parts individually: Nunquam curiae a provinciarum rectoribus generali condemnatione mulctentur, cum utique hoc et aequitas suadet et regula juris antiqui, ut nosa tantum caput sequatur, ni propter nimis forisae delectum alii dispendis affligantur.

1 P. 3, 4, 7; § 2.  
2 P. 3, 4, 8; § 3.  
3 P. 3, 4, 7; § 2 & 8.  
4 P. 35; 1, 97.  
5 Nov. Major. Titt. 7 (Hugos jus civile antejus).  
6 A corporation cannot be guilty of crimes; its punishment by death.  
7 Crimes are in their nature individual.  
8 Majorianus decided that a corporation could not commit a crime.
A corporation, then, by the Roman Law, cannot as such commit offences. The law of England is similar, for a corporation can neither maintain, nor be made defendant in, an action for battery, or such like personal injuries; for it can neither be beat nor be beaten in its body politic; neither can it be excommunicated, having, as Coke observed, no soul; neither is it liable to be summoned before the ecclesiastical courts upon any account, for those courts are pro salute animae. A corporation may, however, maintain an action for breach of contract, and may even be sued as defendant in such an action.\footnote{Stark v. Highgate Archway, Co. 5, Taunt. 792.} It is, in like manner, subject to an action for damages for any tortuous acts committed by its agents, for these are chose in action; but an indictment will lie against it for allowing a bridge belonging to it to fall into decay, but in no criminal action.

\section*{§ 907.}

The Canon Law has vacillated on this subject. Innocent IV. decided that the ban should not affect a corporation as a whole, but be directed against the individual members only;\footnote{In. vi. 5, 11, 5.} but Boniface VIII. at a later period, departed from this principle,\footnote{In. vi. 3, 20, 4.} by threatening corporations as such with the interdict for a peculiar species of oppression of the clergy.

\section*{§ 908.}

The emperor Frederick II. condemned such as oppressed the church in a triple penalty, and to the ban\footnote{Auth. C. 1, 3.} after the lapse of a year of contempt.

Many German imperial laws contain threats of penalties against corporations as such, consisting in money, fines, threats of withdrawal of privileges and immunities, etc.;\footnote{Stark v. Highgate Archway, Co. 5, Taunt. 792.} but crimes against the public order and safety—riots, confederacies, and conspiracies—are only designated.

\section*{§ 909.}

So much, then, as relates to actual crimes and their consequences; the second question is more intricate, and refers to obligations arising \textit{ex delicto}. Every actual delict presupposes a \textit{dolus} or \textit{culpa}, with the concomitant consciousness and prepanse; but it is otherwise if the \textit{dolus} or \textit{culpa} of a legal person arise out of the contracts of its representative, and this Savigny\footnote{Stark v. Highgate Archway, Co. 5, Taunt. 792.} calls a modification inseparable from the chief obligation, with respect to which consciousness is as immaterial as in a physical person whose attorney is guilty of a \textit{dolus} or \textit{culpa} in a contract.\footnote{Stark v. Highgate Archway, Co. 5, Taunt. 792.}
§ 910.

It is certainly possible that such corporations as are of a political nature, as municipalities, can be punished by civil death, that is to say, by the withdrawal of that grant or capacity which is anima loco, and constitutes their very existence, or punished by the withdrawal of some part of it, whereof the city of Capua affords a rare instance, which was entirely deprived of its corporate rights. A modern instance may be taken; that of disfranchising a borough for corruption, and here the individual crime of the separate members affects their condition in the aggregate. The members are individually liable to punishment, and the corporation as a whole also.

§ 911.

The interdictum de vi lies against a municipality for an ejectment, if such body retain possession of anything in consequence. Si vi me dejecterit quis nomine municipium in municipes mibi interdictum reddendum Pompeonius ait, si quid ad eos pervenit. Restitutio in integrum, too, is granted by the actio quod metus causata, when any one has been forced into an injurious transaction by threats; and Ulpian says, in the same book wherein he asserts that a corporation is incapable of a dolus, that a populus, curia, collegium, or corpus, is exposed to the consequences of this action.

§ 912.

An obligatio ex re, ex eo quod ad aliquem pertinet, is often mixed up with the obligatio ex delicto, the which is capable of affecting the legal person as well as the minor.

Thus, if the representative of a corporation steal, whereby the funds of the body are improved, such profit must be returned: in like manner, a corporation is condemnable in costs.

§ 913.

The Roman Law distinctly provides that a municipality cannot be reached by an actio doli, but if illegitimately enriched by the fraud of its administrator, it must return the proceeds, and the doli actio lies against those actually guilty of the fraud (ex gr. the Decuriones); and quotes the case of the city of Capua, which had extracted a cautio pollicitationis, or promise in writing, from an individual, and an actio or exceptio at the option of the injured party was consequently decreed against the city. And this action extends as well against any third person who may be in a state to operate the restitution in integrum. The town of Capua was such third party in the present case, because a legal right of

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1 Liv. 26, 16.
2 P. 43, 16, 4.
3 Com. in Edict.
4 P. 4, 3, 15, § 1.
5 P. 4, 2, 9, § 1, 2.
6 P. 4, 2, 9, § 1, 3.
action had accrued to the city, to meet which the defendant required a plea with a view to relief.

§ 914.

Corporations in England have a visitor, who is the founder's heir if no special person be nominated; but, where neither exists, the sovereign visits by the chancellor. The visitor is the judge of internal corporate differences, and from his sentence there is no appeal; for though the Queen's Bench will grant a mandamus to compel the visitor to act, yet that tribunal will not supersede his authority.

The Inns of Court are voluntary societies, and have therefore properly no visitor, although they have occasionally conformed to the opinion of the fifteen judges.

§ 915.

In considering the modes by which corporations may cease to exist, Blackstone enumerates four methods, all of which are equally applicable to corporations generally.

The first mode mentioned is by "Act of Parliament." This equally applies to any state which may think fit to pass a legislative enactment to undo what it has done; and we have seen that at Rome certain corporations were dissolved in this manner, and others declared to have no status, and to be therefore illicita ab initio.

§ 916.

The second mode is by the natural death of all the members; and this position of Blackstone must be disputed.

Savigny, on the other hand, is, with more justice, of opinion that the death of all the members of a corporation does not destroy it; for, he says, why should an accident, such as a plague, which has carried off successively all the members of such a body extinguish it, and render its property a derelict? and this has a sound ground in logic, since a corporation is by its very constitution not affected by natural, although it may be by civil death; and this is probably the proper construction to be placed upon the passage—si usufructus civitati legetur et aratruin in eam inducatur, civitas esse desinit, ut passa est Carthago: ideoque quasi morte desinit habere usufructum.

If a corporation have perpetual succession, how can it naturally die? It is a legal person, and can therefore only die legally (civilly) by a legal or civil death: the same power which constituted, may dissolve it; it may incur forfeiture, or make surrender. In exemplification of this, a parson is a corporation sole, but when he dies the corporation is not extinguished, but his

1 P. 50, 12, 1, 3, 4, 7; L. 4, 13, § 1.
2 L. c. § 89, p. 280; Blackstone says, a corporation is dissolved by the death of all its members.
3 P. 7, 4, 31.
successor continues it, for the parson cannot die, though John Styles may; and this is the case even though an interval may have occurred, and the patron, by his default in presentation, have allowed the living to lapse into the hands of the bishop, during which time the corporation was certainly naturally defunct.

§ 917.

The body of a corporation certainly consists in its members, but its charter or incorporeal privilege is its soul, and the essence of its perpetual existence: the death of all the members, it is true, would suspend its executive power, yet its rights remain subsisting.

But in the above case, where a plague has carried off all the members of a certain corporation, how are new ones to be appointed to render its privilege again operative?

There can be little doubt that the first grantor, or his heirs, would have a right to nominate at least a sufficient number of members for corporate action, who would fill up the vacancies by election.

As all Roman charters were conferred by the Senate, that body, as the fictive parent or patron of a fictive son, could nominate three members to make the college, who, when they had named an acter, would proceed as before.

In England, it appears that this would be the case, for, on the civil death of a corporation, the lands revert to the grantor or his heirs; the condition being by law annexed to the grant, that when the purposes fail for which the grant was made, the grantor may have his lands again;¹ for the grant is only during the life of the corporation, and when that fails, the grantor receives back the thing granted in reversion.

§ 918.

The third mode is by the surrender of its franchises into the hands of the grantor, which Blackstone² terms civil suicide. This, we have seen, could not be done without grave consideration and solemn proceedings. As regards the individuals, they may resign their places in the corporation, or disfranchise themselves;³ for, as they have no individual responsibilities, no one can prevent them from resigning what must be presumed to be an advantage.

§ 919.

The fourth mode is by forfeiture; and we have seen that many collegia in Rome were dissolved most probably for transgressing the terms of their charters or privileges, and breaking the conditions upon which they were incorporated.

In England, the mode of proceeding against a corporation for

forfeiture is by *quod warrants*,—to inquire by what title the corporation holds its privileges, it having forfeited them by a certain transaction. Blackstone mentions the seizure of the charter of the city of London by Kings James and Charles, which, he is of opinion, was in strict conformity with law; but a reversal by act of Parliament was obtained, and which contains the illegal condition that the franchises of the city of London shall in future never be forfeited for any cause whatsoever.\(^1\) The revival of the corporation of London must now be a matter of regret to all well-wishers of unfettered commercial enterprise.

§ 920.

Finally, there are certain incidents to the dissolution of corporations. The civil death of the corporation is followed by an extinguishment of all its rights and obligations,—*si quid universitati debetur, singulis non debetur; nec, quod debet universitas singuli debent*.\(^2\) Thus, there is no one to enforce obligations on the part of a defunct corporation, and no one against whom they can be enforced; but both must act before the corporation be finally dissolved.

\(^1\) *2 W. & M. 8, § 281, p. 296, h. op.*

\(^2\) *P. 3, 4, 7.*
ERRATA ET CORRIGENDA.

P. paginam, l. pagina lineam, n. annotationem signavit.

P. 3, l. 38, pro TIB. legg 715

· 4. l. 5, pro incredibilitate, legg credibilitatem; 1. 21, pro latificias, legg latificias; 1. 37, pro legum, legg leges

104. l. 30, pro Rei, legg Res

13. l. 35, pro latificias, legg latificias

17. l. 7, pro a such bus-o, legg such abuses; 1. 56, pro is, legg are; 1. 57, pro comitia et majora, legg comitia majora

38. l. 43, pro Gallias, legg Gallia

36. l. 1, pro 26, legg 29

40. l. 38, and p. 41, l. 38, pro Altius, legg Altius

41. l. 19, pro Nervia, legg Nerva

42. l. 7, pro Uxorem, legg Oceanum

44. l. 25, pro excellent, legg an excellent

46. l. 36, pro Taruntiis, legg Taruntiis

59. l. 2 from bottom, pro deponent, legg deposita

60. l. 40, pro Quum aest, legg Quando et

65. l. 17, hum and of, dele and

76. l. 6, pro so much, legg much

80. l. 15, pro Constantine VII, legg Constantine VIII.

80. l. 34, pro 1061, legg 1086

87. l. 47, pro Salam al-Deen, legg Salah al-Deen; 1. 57, pro Emperor, legg Duke

113. l. 28, pro Macte, legg the Great

117. l. 8, pro the defendant, legg of the defendant

126. l. 20, pro qui, legg quem

131. n. 1, l. 5, pro ura, legg urum

146. l. 40, pro 57, legg 17

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187-9. l. 34 and 35, pro Ricordina et Ricaridina, legg Ricordina

178. l. 14, pro consiliis, legg consilii

184. l. 4, dele and; 1. 7, of, dele of

186. l. 21, pro to be tainted, legg became tainted

211. before l. 6 and 7, add Marianus, jun. ; 1. 39, age of, dele of

256. l. 13, pro 1541, legg 1584; 1. 14, marg. pro 1541, legg 1584

297. l. 11, pro restitutum, legg restitutum

298. l. 7, dele uno, l. 37, pro 1746, legg 1745

299. l. 36 et 48, pro economico, legg occumnicum

245. l. 3, as a historian, dele a

252. l. 36, pro Compostella, legg Compostella

264. l. 12, pro Cerealis, legg Cervus

269. l. 19, pro Pertinax, legg Pertinax

270. l. 87, pro 800, legg 897

P. 271, l. 13, pro 1046, legg 1066; et marg. idem, l. 21, pro 1087, legg 1066

274. l. 17, pro principle, add exista; l. 45, pro prescription, legg prescription; idem, l. 6

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654. l. 8, l. 11, pro Kammergerichtsordnung, legg Kammergerichtsordnung.
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