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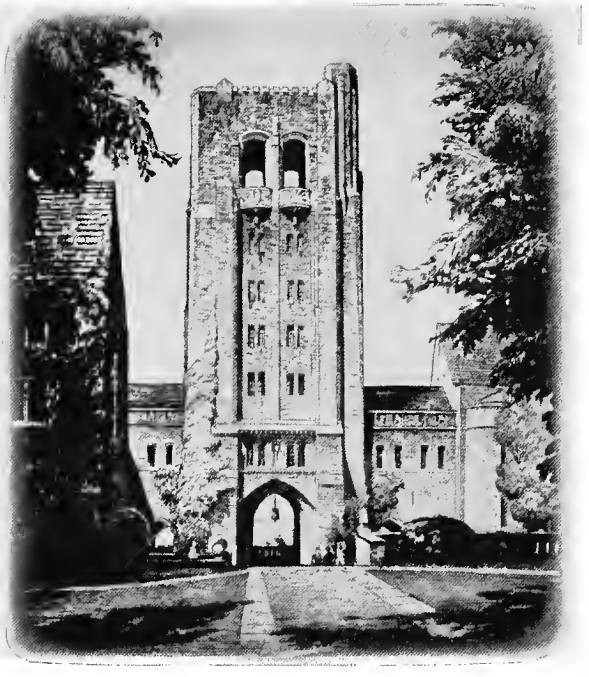

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# ROMAN LAW

# IN THE MODERN WORLD

BY

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VOL. I

HISTORY OF ROMAN LAW AND ITS DESCENT INTO ENGLISH, FRENCH, GERMAN, ITALIAN, SPANISH, AND OTHER MODERN LAW

BOSTON, U.S.A.
THE BOSTON BOOK COMPANY
1917

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*Uxor Alma Julia*
*Comes Inspirans In Roma*
*Tibi Consecratum*

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# PREFACE

The revival in the United States of the study of the Civil Law has already assumed ample proportions which are yearly increasing, and its full fruition with many far-reaching consequences is but a question of time. The greatest contribution of this revival to American law will be a powerful influence operating for the betterment of the private law of the United States, purging it of its present dross of redundancy, prolixity, inconsistency, and lack of uniformity, and crystallizing it into the compact form of a codification.

The following work is dedicated to the continuing success of this movement so fraught with benefit to the progress of American jurisprudence. It is designed to meet the requirements, both similar and dissimilar, of various classes of readers: the general reader, the non-professional student, the law student, and the law teacher. For the law and administration of Rome are to-day a living force constantly employed by the jurist, the publicist, the historian, and the theologian, as well as by others for constructing their theories or demolishing those of their opponents.

The first volume of my work is a historical introduction to the development of modern law, beginning with the genesis of Roman law as a local city law, describing its evolution into a body of legal principles fit to regulate the world, portraying its establishment as a world law, and ending with an account of the universal descent or reception of the Civil Law into modern law.

The second volume contains the principles of the Civil Law, more especially private law, arranged systematically in the order of a code, and illustrated, as to their survival, from Anglo-American law and the Modern Codes as copiously as space will permit. For almost all the Roman law of Justinian's era is still living to-day in the modern world.

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The third volume contains Roman and modern guides to the subjects of the entire book, an exhaustive general bibliography of Roman law, and the index.

For the convenience of law students and teachers the text of the volumes is divided into sections. For the same reason the volumes are indexed according to sections. Exponent figures are employed to indicate the edition cited of any book which has passed through several editions: for instance Girard, *Manuel de droit romain*[5], means the fifth edition of 1911.

C.P.S.

YALE UNIVERSITY,
JUNE 1, 1916.

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# LIST OF PRINCIPAL ABBREVIATIONS USED IN ROMAN LAW TREATISES

B.; Bas. = Basilica of Leo VI.

C.; Cod.; Code = Code of Justinian. (Code, 8, 10, 6 is 8th book, 10th title, 6th law or constitution.)

C. Th.; Cod. Theod. = Code of Theodosius. (It is cited like the Code of Justinian.)

Collatio = Mosaicarum et Romanarum legum collatio.

Const. = Constitution, sometimes referring also to a prefatory constitution of the Code or Digest, e.g. Const. "Omnem."

D.; Dig.; Digest; P. = Digest or Pandects of Justinian (Dig. 17, 1, 25 pr. is 17th book, 1st title, 25th fragment, principium or first paragraph.)

Frag. Vat. = Vatican Fragments.

G.; Gaius = Institutes of Gaius. (Gaius, 2, 1 is 2d book, 1st section.)

I.; Inst.; J. = Institutes of Justinian. (Inst. 2, 6, 10 is 2d book, 6th title, 10th section.)

l. = Constitution, law, or fragment.

L. = Book. (Unless it is the numeral "50.")

N.; Nov.; Novel = Novels of Justinian. (Nov. 18, 3 is 18th novel, 3d chapter.)

Paul. Sent.; Sent. P. = Sententiae of Julius Paulus.

Pr.; pr. = Principium, the first paragraph and preliminary section of the Institutes, or of a fragment of a title of the Digest, or of a constitution or law of the Code.

SC. = Senatusconsultum or decree of the Senate.

Theophilus; Theoph. Inst. = Paraphrase of the Institutes of Justinian by Theophilus.

Ulpian Reg.; Reg. = Regulae of Domitius Ulpian.

XII Tab.; XII Tables = Law of the XII Tables.

§ = Section.

The latest modern Civilians or Romanists, including the author, cite the Corpus Juris Civilis from the stereotyped edition of Krueger, Mommsen, Schoell, and Kroll; and the Code of Theodosius, from Mommsen's edition.

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# INTRODUCTION

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# INTRODUCTION

## CHAPTER I

### THE VALUE OF ROMAN LAW TO THE AMERICAN LAWYER OF TO-DAY[1]

**Roman law still lives in the modern world.** In spite of the recent progress of American legal education there still lingers in some places that now time-worn belief that a knowledge of Roman law is of no use at all in the legal profession. §1

This view of the present value of Roman law is obviously superficial. It is based on the assumption that, because the Roman State and tribunals perished centuries ago, therefore Roman law itself also has long been dead. Now this conception of the fate of Roman law is historically inaccurate and false. The spirit of Roman law did not die, — on the contrary it is still very much alive in our midst. Moreover it was the majestic and beneficent Roman law which more than any other single element brought civilization back to Europe following the barbaric deluge of the Dark Ages.[2] From Rome we have inherited our conceptions of law, the State, and the family.[3] The high, firm, secure legal position of woman in European and American civilization, which makes our civilization superior to all other types, is a legacy from the Roman law. The Civil Law was the first to work out and recognize the equality of women with man.[4]

The inability of the superficial observer to discern the living Roman law of to-day is on account of its modern dress:

[1] A part of this was published by the author in 60 Penn. Law Review and Am. Law Reg., p. 194, Dec. 1911, under the title of *The value of Roman law to the American lawyer of to-day*, and is reprinted by permission.

[2] See Taylor, *The medieval mind*, London, 1911.

[3] See Chamberlain, *The foundations of the nineteenth century*, London, 1911, whose work has already gone through eight editions.

[4] *Id.*

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in place of its original Latin garb, Roman law is now clothed in a twentieth century garment of various patterns such as the Roman-German law, the Roman-French law and the Roman-English law. The past and present in law are inextricably woven together.

§ 2 **Advantages obtainable from the study of the Civil Law.** But it may be argued that, admitting the survival of Roman law into all modern legal systems, what actual, concrete, present or future professional advantages can now be derived from the study of Roman law? This is the answer: that Roman law should be studied fervently with a view to the betterment of our American law, which sadly needs improvement and which in so many respects — particularly by its lack of codification — is greatly inferior to other modern legal systems. Our system of precedents and case reports is breaking down from its own weight and is becoming decadent[5]: how soon will codification take its place? We must study Roman law with this aim in view, as have the French and Germans, if we wish our law to attain foremost rank — its proper station — in the modern world.

Perhaps the most alarming portent of the twentieth century in the United States is the general unpopularity and growing disrepute into which law and the administration of justice are falling.[6] All this must be remedied or grave national peril will slowly but surely follow. The remedy for professional incompetency is to destroy the evil at its very source — before admission to the Bar — by requiring, as is already inaugurated in America, a higher standard of character and legal education. The profession of the law needs better men with a wider professional horizon. Moral perceptions and the sense of justice must be cultivated while the intellect is being trained.

There is one study which combines ethical and intellectual advantages, — Roman law. It is largely because of the past non-attention to Roman law in America that the progress of

[5] See Sheppard, *The decadence of the system of precedent*, 24 Harvard Law Review, pp. 298–305.

[6] See Coudert, *The crisis of the law and professional incompetency*, 3 American Law School Review, p. 31 (1911).

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our law has been so difficult and at times almost stationary: the Roman conception that law should be synonymous with justice[7] has been too often overlooked. When the study of Roman law shall be a prerequisite for admission to the Bar, as in Great Britain and other European countries, the advancement of our law will be so perceptibly stimulated that the fires of American popular discontent with the law will burn low and soon die out.

**Ethical value of Roman law.** Of inestimable advantage is the ethical benefit derivable from Roman law study. To conceive of the value of knowledge as based upon its utility for the acquisition of wealth or material success is to completely overlook the chief purpose in all education, — namely the development of character as well as intellect. Twenty-three centuries ago Plato laid the greatest emphasis on the adapting of the curriculum in the most perfect manner for the promotion of virtue.[8] This truth our own Milton restated nearly 300 years ago in defining education as "that which fits a man to perform justly all the offices, both public and private, of peace and war."[9] How pertinent all this is when we turn to legal education! The ideal lawyer is not one who has obtained the best legal equipment for the practice of his profession, if that professional training has not developed his character along the lines of what is just and right. §3

*What the world needs to-day is not more law, but more justice.* The great danger to our profession is that its ideals are in peril of becoming commercialized. In other words, the practice of law is in danger of becoming a mere trade and of losing its professional nobility, thus accurately described by the Roman jurist Ulpian: "When a man means to give his attention to law he ought first to know whence the term 'law' is derived. Now law [*jus*] is so called from justice: in fact . . . it is the art of what is good and fair. Of this art we may deservedly be called the priests; we cherish justice and profess the knowledge of what is good and fair, we separate

[7] See *Digest* 1, 1, 1, pr. and 1: *jus* (law) is so-called from *justitia* (justice).

[8] See *Republic*, book ii.

[9] *Tractate on education.*

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what is fair from what is unfair, we discriminate between what is allowed and what is forbidden, we desire to make men good, not only by putting them in fear of penalties, but also by appealing to them through rewards, proceeding, if I am not mistaken, on a real and not a pretended philosophy."[10]

The Roman jurists breathed deeply the pure air of ethics; they taught the never-to-be-forgotten truth that law and ethics are very closely related. An acquaintance with the loftiest system of jurisprudence the world has ever seen cannot fail to give first of all an enormous uplift to character.

§4 **Intellectual value of Roman law.** The intellectual value of Roman law study is incalculable, because it is many-sided. The most salient advantages of a Roman law knowledge are these three: the practical benefit, the philosophical benefit, the strictly professional benefit.

§5 1. **The practical benefit.** There is a very practical side of the intellectual value of Roman law: the study of Roman law greatly assists the acquisition of a correct style of legal expression. Does not the possession of a correct style help a lawyer? The style of the Roman jurists is simple, clear, brief, terse, nervous and precise. In the matter of legal expression Roman jurisprudence is far superior to the Anglo-American, and is worthy of imitation in this respect. It should never be forgotten that "Law," as Sir Henry Maine says,[11] "is the chief branch of Latin literature; it was the only literature of the Romans which has any claim to originality; it was the only part of their literature in which the Romans themselves took any strong interest and it is the one part which has profoundly influenced modern thought."

§6 2. **The philosophical benefit.** There is also a far-reaching philosophical aspect of the intellectual value of Roman law. The study of Roman law inevitably produces an ever-widening realization that Roman law is of enormous historical value to modern nations. It is at hand, ready for use and able to shed copious light on the solution of the numerous complex problems which confront the modern civilized world. How vast is

[10] *Digest* 1, 1, 1 pr. and 1 (Monro).

[11] *Early history of institutions*, p. 308.

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the scope of this aspect will be briefly indicated. In his *Valedictory* Roman law lecture at Oxford Professor James Bryce[12] most lucidly observed that "the Roman law is indeed world-wide for it represents the whilom unity of civilized mankind. There is not a problem of jurisprudence which it does not touch: there is scarcely a corner of political science on which its light has not fallen."[13] With this great truth should be carried the fact that the Roman social system more nearly resembled our own of to-day than ours does that of England two hundred years ago. Notice some of the resemblances of Rome to us: at Rome the free man constituted the State; there were no distinctions of rank except such as tenure of office temporarily gives: ownership of land was allodial or absolute; land was freely transferrable; intercourse between the Roman provinces was easy and frequent; and the face of the Roman empire was dotted with rich and populous towns and cities.[14] (§6)

Roman life and the fall of Rome are and have been an object of comparative study to the modern world. Authors, teachers, preachers, lawyers, and even rulers constantly draw upon Rome to substantiate a position taken as to some doctrine or theory of an economic, political, social, legal, or moral nature: the evidence of this is enormous and shows no diminution of bulk or interest. For instance Professor Petrie, in attacking trade-unionism, declares and offers much evidence to prove that it, and not slavery and vice, wrecked the Roman empire, and will wreck the modern world if it is not careful.[15] Another comparison is synthetically striking: "Rome, again, can teach us that the elimination of militarism and of national rivalries is not all unmixed good; that socialism in many of its forms has actually been tried, and that it drained the State of industry, energy and vitality; that it is dangerous and in the end disastrous, to encourage the unfit at the expense of the fit and thrifty; that it is a very false economy to pillage

[12] Now Lord Bryce, formerly British Ambassador to the United States. Viscount Bryce is the most famous of modern English Civilians.

[13] *Studies*, p. 898.

[14] See Morris, *History of the development of law*, p. 186.

[15] See *Janus in modern life*, 1907.

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(§ 6) the rich in the supposed interests of the poor; and that finally a bureaucracy is the worst of human plagues; . . . and that the tax-gatherer was more destructive to the Roman empire than all the barbarians together . . . At any rate these causes destroyed a magnificent and beneficent civilization, and plunged the West of Europe into darkness for a long 1000 years. Who will venture to say that many of these causes are not operating among ourselves to-day, and tending in very ominous directions?"[16] If our civilization is disregardful of the ideals, warnings, and lessons given us from past civilizations, and especially that of Rome, it can never expect to reach a very high plane.[17]

If philosophical comparison between the Roman and the modern world be now turned specifically to jurisprudence, what a grand opportunity to liberalize our preconceived ideas of justice is afforded by instituting a comparison of Roman and American law! It is a great privilege which we have of placing Roman and our law side by side for parallel comparison in order to cultivate the philosophical spirit of inquiry. This results in stamping upon the memory that law is the subject of a science. For instance, it is truly scientific to study the centralizing movements of the Roman law in order to throw light upon the question of how to behave with regard to the tendency in the United States to centralize the constitutional power of the Federal Union.[18]

Moreover there is a most useful field for comparative study of Roman and American law along this line, — to observe the effect upon each jurisprudence of the different conditions of society under which the Roman and English systems developed. For Roman law was the product of a highly civilized people secured for centuries in the enjoyment of peace within their borders; while the English Common Law is the product of a people emerging from barbaric conditions of society, fond of strife, — it is non-philosophical and ethically harsh, the very opposite of Roman law.

[16] *The Spectator*, p. 450, London, Sept. 25, 1909.

[17] See *Address* of Prof. Tracy Peck, 20 Yale Alumni Weekly, p. 989.

[18] Leonhardt, *American remembrances of a German teacher of Roman law*, 18 Yale Law Journal, p. 584.

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Again, in dealing with rules of private law, if the American and Roman rules as to a doctrine of law differ, the student is led to ask why. This gives him a better view of the origin and range of the American rule by perceiving wherein it varies from the Roman, or perhaps the Roman rule will seem the more just. By such methods as these we approach a *complete comprehension of the true nature of private law.* We cannot fail to observe as we proceed in our comparative study that the Romans were the first "to perfect a completed system of private law,"[19] a jurisprudence which has best approximated the conception of what private law would be if the legislator were perfectly wise.

§7 **3. The strictly professional benefit.** There is also a strictly professional side of the intellectual value of Roman law. It is concerned with the influence of Roman law on American law. This is a wonderfully fascinating aspect. It is beyond all others of vital interest to American lawyers. The study of Roman law soon awakens and then continually quickens this great perception: that the present development of American law into a jurisprudence is almost entirely due to its assimilation of Roman jurisprudence, and that what American law needs most to-day is more of the invigorating eternal influence of Roman law. This strictly professional point of view covers the entire history, past and present, of Anglo-American law. It embraces most extensive and varied details. And it will reveal that the goal of Roman law influence on American law has not yet been reached. For a twentieth century lawyer who wishes to reach the front rank of his profession an acquaintance with the Civil Law forms to-day a highly important element of his necessary legal equipment, and will have to be obtained either before or after admission to the Bar.

Yale was the first American law school to recognize the professional value of Roman law to the American lawyer. For many years Yale was as a light shining in gross darkness. But the blackness of ignorance and prejudice is now being rapidly dispelled. The leading American law schools, such as Harvard, Columbia, Chicago, Pennsylvania, Stanford, and

[19] See Lefroy, *Private law, etc.*, 20 Harvard Law Review, p. 606.

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(§7) numerous minor schools and colleges are now giving instruction in Roman law. Moreover this Roman law movement has proceeded still further. Already in some American states, as in England, a knowledge of Roman law is required for admission to the Bar.[20]

Ignorance and prejudice — so potent in past centuries in England and America — no longer obscure the great debt of Anglo-American law to the law of Rome and the truth that knowledge of Roman law is knowledge of our own law. It is a fact that the beginner in the law will make almost as rapid progress in American law by starting with Roman as he would if he began with our own law: for, in learning Roman law, one learns the elements of law in general and therefore of Anglo-American law in particular.[21] The *Institutes of Justinian* are to be best explained as a *common source* of the fundamental ideas of Anglo-American as well as Continental European jurisprudence. "It must be owned," said Lord Chief Justice Holt, "that the principles of our law are borrowed from the Civil Law and therefore grounded on the same reason in many things."[22]

England and the United States, although not so completely as the countries of Continental Europe and Latin America, are to-day under the dominion of Roman jurisprudence. Anglo-American law, like French or German, is Roman law of the twentieth century.

A cursory study of Roman law reveals the great debt of our law to it. The American law of Admiralty, of Wills and Probate, can show a direct descent from the imperial jurisprudence of Rome. From the Civil Law Lord Mansfield introduced into English Common Law much of our Law Merchant or Mercantile Law. The basic principles of Equity are of Civil Law origin. The fundamental doctrines of the law of Persons (including Corporations) and of our law of Property

[20] Louisiana and Kansas. Some Roman law instruction is necessary properly to apprehend the law of California, Texas, Porto Rico, and the Philippines. See *Rules for admission to the Bar*, pp. 56, 62, 18, 160, 140, 143 (West Pub. Co., 1913).

[21] Bryce, *Studies*, pp. 895, 896.

[22] 12 Modern Reports, 482; Bryce, *Studies*, p. 871.

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(especially Obligations, Contracts, and Successions) came from Roman law. The basis of Anglo-American law — if not its predominant element — is the Civil Law of Rome. (§7)

More than this. As a country we are now repeating the activity of Rome in legislation. The development of our American law into jurisprudence has been, especially during the last century and a half, most usually by a return to the Civil Law of Rome. And this returning is still in progress. The most striking illustrations — and there are many — are these three. (1) The feudal Common Law ideal that husband and wife are one and that one is the husband, has been repudiated in nearly all American states. Married women now have restored to them the power to control their separate property independently of their husbands. And this is simply the re-enactment of the doctrine of Roman law as to the freedom of married women. (2) Every American state has laws of inheritance similar to those of Rome. (3) The most pressing terrible necessity of our times is how to frame out of the gigantic mass of our reported case law an organized body of rules, — in other words how to codify our law. All civilized countries of the world except Great Britain and the United States have followed the example of Rome and codified their law. France, Germany, Spain, Italy, Austria, the Latin-American States, and Japan have adopted the Roman Emperor Justinian's solution of this problem. Our lawyers are being driven — whether they like it or not — to examine the means and results of codification. In the future — the immediate future — those in the legal profession who can do this work will reap its rewards.

Finally, no one can intelligently practise law in Louisiana, Texas, New Mexico, Arizona, California, or competently investigate the law of Porto Rico, the Philippines, the Canadian province of Quebec, and all the Latin-American republics without a knowledge of Roman law, out of which was carved the French or Spanish law which is the basis of the law of these states, territories, and countries.

The strictly professional value of Roman law to the American practitioner at the Bar looms larger as our investigation continues. A knowledge of Roman law is now bringing from

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(§7) foreign sources professional advantages which are constantly increasing. Speedy and frequent communication is making the world rapidly smaller. Business long ago ceased to be confined by national boundary lines. Law business of an international character is continually increasing in our large cities, especially those along the Atlantic seaboard. Not only does Roman law throw light upon many of the doctrines of international law,[23] but it is the key which unlocks the legal systems of modern Continental Europe as embodied in their Modern Codes. These codes have been imitated in Latin-America, Asia, and Africa. The professional benefit arising from a familiarity with the Modern Codes is self-evident.

The field of professional usefulness open to the twentieth century American Civilian is now extensive. Its limits are constantly expanding. An abundant harvest of increasing opportunities of power as a legislator and of international leadership at the bar awaits the American lawyer possessed of a Roman law knowledge.

[23] See Phillipson, *The international law and custom of ancient Greece and Rome*, London, 1911.

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# CHAPTER II

## THE VALUE OF LEGAL HISTORY

§8 **Law a science governed by evolution.** The maxim of the philosophers *Ex nihilo nihil fit*—'something does not come from nothing'—may be taken as the keynote to all legal history. To know how the development of law occurred not only imparts a realization of the incalculable benefits given to the world by lawyers throughout the ages, but also stamps upon the mind an indelible impression that law is a science developed by evolution. Maitland, the most brilliant of English legal historians and whose works are an imperishable monument of the nineteenth century, thus truly emphasizes the value of legal history: "Strenuous endeavors to improve the law are not impeded but forwarded by a zealous study of legal history. . . . To-day we study the day before yesterday, in order that yesterday may not paralyze to-day, and that to-day may not paralyze to-morrow."[1]

'The memory of mankind' as to law reveals the fact that subsequent nations are large debtors to earlier peoples for their law and jurisprudence. The quantum of legal knowledge is never lost; it descends from age to age; from people to people; it has periods of marked growth and progress; it also has periods of obscurity, followed usually by re-emergence, recovery, and further progress.

The history of modern law is but an offshoot of the history of ancient law. The line of demarcation is not easily discernible and may be invisible. "Ancient" and "modern" are at best but relative terms: that which seems to be "modern" may be found to be quite "ancient." Not only do all modern nations enjoy to a greater or less extent a heritage of Roman law, but Rome herself was debtor to Greece for legal principles. And Greece in turn probably borrowed from Babylon via Egypt.

[1] *Collected papers*, "A survey of a century," vol. iii, pp. 438–9.

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§ 9 **Scope of our investigation.** The scope of our investigation is intended to cover two fields of legal history: the development of Roman law, and the survival or reception of Roman law in modern law. In reality these two fields, owing to their adjacent situation, are but one territory: the history of modern law is the last and widest phase of the history of Roman law. Our investigation is intended to constitute a historical introduction to the history of law from Roman to modern times. An exhaustive treatment of all the multitudinous details which a complete history of law involves is impossible on account of lack of space. Our investigation will necessarily lead to an acquaintance with the legal literature of Rome and all modern countries.

§ 10 1. **The development of Roman law.** A brief consideration of the ante-Roman sources of law will preface our investigation of the development of Roman law proper. This will be followed by an account of the origin of Roman law as the local law of a city, its gradual growth to a complete system of jurisprudence, and its establishment as the law of the world. The causes of this evolution will be ascertained. The work of the Roman Emperors in transforming the chaos of Roman law into order and certainty will be examined.

Special attention will be paid to the work of the Roman jurists, the influence of Greek culture and philosophy on Roman law, and how Christianity affected Roman law. Moreover that vexed modern question of the right method of law study will be investigated from Roman sources. The Roman answer will be found to solve all our difficulties; it has lost none of its virtue by lapse of time.

The inevitable outcome of all this will be a profounder realization of this fact: that "the genius of the most legal-minded people the world ever has known developed step-by-step out of the archaic customs of a petty tribal town until the whole of the civilized world prospered under the lofty principles of justice and right worked out by the great lawyers of the Republic and the Empire."[2]

§ 11 2. **The survival or reception of Roman law in modern law.** A historical account of the universal descent or reception of

[2] *Commemorative addresses A. S. Wheeler*, 1905 (E. V. Raynolds), p. 21.

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Roman law into all modern systems of law will conclude our investigation. "Rome," says Ihering, "conquered the world three times: first by her armies, second by her religion, third by her law. This third conquest, most pacific of all, is perhaps the most surpassing of all."[3] A work of judicial conquest has already been completed, the magnitude of which is most amazing. The modern domains of Roman law extend far beyond the vast empire of the Caesars. The entire continent of Europe, the entire New World with its twin Americas, and an ever increasing portion of Asia and Africa constitute the provinces of the vast modern realm of Roman law. In its palmiest days the population of the Roman Empire numbered about 54,000,000[4]; to-day over 870,000,000[5] people, or sixteen times the population of the Roman Empire, are living under law very largely traceable to Roman law. All civilized and even many semi-civilized peoples of modern times bear witness to this universal survival or reception of Roman law. We shall investigate the facts of this survival as found in English, French, German, Spanish, Latin-American, Italian, Russian, Swiss, Scandinavian, Japanese, Roman-Dutch, and other systems of law. (§ 11)

Of the whole earth nothing now remains unconquered by the powers which may be called the offspring of the Roman Empire, but Abyssinia, Japan, Turkey, and China. In Abyssinia much of Christianity and Roman law still remains to-day; Japan has obtained from Western civilization among other things her codes of law largely Roman in essence; and even degenerate Turkey has been indirectly influenced by Roman law both as surviving in Mohammedan law and received in her modern codes modeled on the Codes Napoleon. Consequently these three Oriental countries are after all not wholly without the pale of Roman jurisprudence. All the countries of the world save China, and eventually China will be included,

[3] See Brissaud, *Cours d'hist. gen. du droit français*, vol. i, pp. 192–3.

[4] Brodie's estimate of the Roman Empire A.D. 14. See Harper's *Book of facts*, "population."

[5] *World almanac 1916*, pp. 450, 451. This estimate includes the inhabitants of Europe, both Americas, India, Egypt, Australia, New Zealand, South Africa, Japan.

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have now come under the rule of the Roman laws framed in the Eternal City and codified by Justinian. All this reveals the eternal character of Roman law, which, firmly retaining the world it has conquered, changes merely its dress with the passing centuries. "The conquest of the world by the Roman Empire has passed away, but the conquest of the world by Roman law has not passed away and there is no sign that it will pass away so long as mankind endures. It rules to-day a wider empire than the Caesars ever knew, and its empire is ever widening."[6]

§ 12 **The world-mission of Roman law since Justinian.** Gibbon's most wonderful *History of the decline and fall of the Roman Empire* bears a misnomer in the title: it should be entitled "The history of European civilization."[7] But to use the expression "History of Roman law since Justinian" to describe the survival of Roman law in modern law is quite accurate, for it is but another expression for "The history of modern law." Roman law survived the deluge of the barbarian invasions, which overwhelmed the Roman Empire; it furnished the light of progress in the darkness of the Medieval Ages; and it was revived and received with fervor and was studied as never before, — the effects of this revival have not yet passed away in the modern world. Roman law since Justinian has had and still possesses a special world mission of its own, which, as the legal history of modern countries reveals, is either accomplished or in process of being fullfilled. This world-mission will be seen to have been effectual along many lines of human activity — all making for progress in medieval and modern law. Some of these are of profoundest importance, others are of a minor value.

The **minor features** of the world-mission of Roman law since Justinian are numerous. The oldest things in modern Occidental civilization are Roman law and the Christian Church. It was Roman law which to a very large extent caused the Revival of Learning and the Renaissance, — that great movement which marks the beginnings of modern times. The oldest educational institution in the modern

[6] *Commemorative addresses A. S. Wheeler*, 1905 (E. V. Raynolds) p. 21.

[7] A favorite expression of the late Prof. A. S. Wheeler of Yale University.

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world is the law school. To study law — Roman law — was ordinarily the chief purpose for which medieval universities were founded. The first European university — Bologna — began with a law school, to which other faculties were subsequently added.[8] And wherever Roman law was revived universities with law schools sprang up, as we shall see. Another minor feature of the world-mission of Roman law since Justinian is the long roll of medieval and modern jurists, to whom by reason of their Roman law knowledge are due creations or betterments of the law of their age. These are the men who actually did the work of recovering Roman law for posterity's benefit. And our investigation would not be complete without some mention of this galaxy of most illustrious Romanists and their special labors.

But it is the following major features of the world-mission of Roman law since Justinian which should be emphasized because these have directly caused enormous contributions to the progress of modern law.

§ 13 1. **To mold the private law of every modern State.** This explains why the Roman element is the predominating element in all modern law.

§ 14 2. **To cause uniformity of law in every modern State, — one law for an entire country.** This is a strikingly large feature of the modern influence of Roman law. Some countries, such as France, Germany, and Italy, have fully realized this ideal; others, like Great Britain and the United States, are still a long way from this realization. Not only has the modern influence of Roman law caused uniformity of law within a country, but to-day it is also operating to cause the laws of different countries to become uniform and cease to be diverse. It was Austin who first made so plain that there is in the modern world a universal jurisprudence, to which all systems of law including the English must tacitly conform. This is but another side of the world influence of Roman law. The progress of the world is toward uniformity of law.[9] Each modern country, as did Rome herself, has developed its law under the stress not only of internal politics, but by

[8] See Colquhoun, *Roman civil law*, § 136.

[9] Bryce, *Studies*, p. 123.

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(§ 14) reason of the external influence exerted upon it from other countries.[10] For instance, the catholicity of jurisprudence administered in the two greatest courts of the world cannot fail to have eventually a reflex effect of paving the way for universal uniform laws.

The world's greatest court is the British Privy Council Judicial Committee, which possesses jurisdiction over nearly 400,000,000 people.[11] In its modest Downing Street home, close to the London residence of the Prime Minister, the Privy Council frequently deals with questions of French law which prevails in Canada, Mauritius and Seychelles, questions of Roman-Dutch law which is the common law of Ceylon, South Africa, and Guiana, and questions of Mohammedan law which is found in India and into which to some extent Roman law has filtered. By reason of this varied jurisdiction the Justinian Corpus Juris, the Code Napoleon, Grotius' Jurisprudence, or Pothier's Commentaries may be appropriately cited as authorities before this majestic imperial British tribunal.[12]

The next largest court in the world is the Supreme Court of the United States with a jurisdiction over nearly 110,000,000 people.[13] In addition to entertaining cases in American law, this august court may hear cases involving French law which is found in Louisiana, and Spanish law which is the common law of Porto Rico and the Philippines and partly survives in several of our southwestern American states.

The modern world has learned to think 'world-wise' largely because of the modern influence of Roman law. As Ferrero rightly says: "Rome is still in the mental field the strongest bond that holds together the most diverse peoples . . . ; it unites the French, the English, the Germans in an ideal entity which overcomes in part the diversity in speech, in traditions, in geographical situation

[10] *Id.*

[11] *World almanac 1916*, p. 451.

[12] The Judicial Committee of the Privy Council hears not only Colonial appeals but also appeals from the *ecclesiastical* courts of England. But all other English appeals, all Irish and Scotch appeals go to the House of Lords, which is the supreme appellate tribunal for Great Britain.

[13] *Id.* p. 450.

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and in history."[14] To Rome's influence in the modern world is due in no small measure the acknowledged fact that Europe and America are to-day "for intellectual and spiritual purposes one great federation," as Matthew Arnold said.

§ 15 **3. To embody the uniform law of every modern country in a codification.** To bring about a system of codified law in modern countries is perhaps the crowning feature of the modern influence of Roman law. How effective this has been is seen at a glance, when attention is directed to the fact that nearly all modern civilized States to-day possess a codified law. The way to accomplish a codification suitable to our age was first blazed by the French Codes Napoleon only a little more than a century ago, — in 1804. And in this pathway have since followed nearly all the modern civilized nations. Even the two great exceptions among nations — Great Britain and the United States — are slowly yielding to this universal trend toward codification, as will subsequently be shown.

The leaven of Roman law influence is seen at work in modern American law, in that lucid description of a codification made by David Dudley Field: "To reduce the bulk, clear out the refuse, condense and arrange the residuum, so that the people and the lawyer, and the judge as well, may know what they have to practise and obey — this is codification, nothing more and nothing less."[15] To lose this priceless classical heritage in law and politics out of our civilization would be the commencement of a reversion to barbarism.

[14] *Characters and events in Roman history*, p. 257.

[15] Legal Bibliog ., n. s. 10, p. 11 (June 1912).

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# CHAPTER III

## ANTE-ROMAN SOURCES OF LAW

§ 16 **Babylon probably the real mother of law.** The question of the origin of Roman law is now not easily answerable. But one thing is quite certain other nations of an earlier date than Rome had a law of established and well developed principles long before Roman history commences. The ultimate beginnings of law are undoubtedly ante-Roman and non-Roman.

One of the greatest German Romanists of our era — the renowned Ihering — was thoroughly convinced that if we would search out the origins of Roman law we must study Babylon.[1] This is also the view of two other eminent modern Civilians, the French Revillout[2] and the American Morris.[3] And even a cursory examination of the recently discovered Code of Hammurabi[4] reveals that over 4000 years ago Babylon or Chaldaea had a complete system of law and courts.[5] Agency, bailment, banking, carriers, pledge, warehousemen, and navigation were topics familiar to Babylonian law.

§ 17 **Influence of Babylonian law on Egyptian law. A well developed Egyptian law antedates Greek law.** It is now beyond dispute that never yet has civilization evolved from barbarism without external assistance. That Chaldaean

[1] *Vorgeschichte der Indo-Europäer* (1894); Maitland, *Prologue to a history of English law*, 14 Law Quart. Rev., pp. 13–33; *Essays on Anglo-American law*, vol. i, p. 7.

[2] *Les origines égyptiennes du droit civil romain* (particularly p. vi), Paris, 1912.

[3] *History of the development of law*, pp. 11–86, Washington, 1909. Judge Morris lays emphasis on Israelitic as well as Babylonian law as an early non-Roman source of law, although the second is the more ancient source.

[4] Found in 1902 at Susa, the old Babylonian capital. It is now on exhibition at the Louvre, Paris.

[5] See Harper's English translation of *The Code of Hammurabi, King of Babylon*, about 2250 B. C., Chicago, 1904.

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civilization was largely influential in originating and shaping Egyptian civilization is historically correct. That Egyptian civilization in turn exercised a potent influence upon Greece is well known. That Greek civilization served in many respects as a model for the later Roman civilization is equally true.

The influence of Babylonian law traveled beyond the borders of Babylon: eastward into the law of Hindustan and especially the famous Code of Manu[6]; westward into Egyptian,[7] Phoenician, and Judaean law. In course of time Egypt developed an elaborate system of private law the details of which were carefully worked out.[8] The Egyptian law of persons,[9] property,[10] obligations,[11] and actions,[12] is scientifically constructed and excellent in character. Egyptian law has contributed much to the philosophy of law.[13] The Greek historian Diodorus[14] mentions five Egyptian monarchs as great legislators: Menes, Sasychis, Sesostris, Boccharis, (called the Wise), and Amasis.[15] The last two belong to the period of the late monarchy. The view that much of Babylonian law descended into Rome[16] via Egypt and Greece must not be treated lightly or with disdain.

**Influence of Egyptian and Phoenician law on Greek law.** §18 Archaeological research in Greece since 1870 has revealed to us the very early Minoan and Mycenaean ages of Greek

[6] Written between 200 B.C. and A.D. 200. See Morris, *History of the development of law*, p. 75 et seq.

[7] See Revillout, *Précis du droit égyptien*, vol. i, p. xviii, note (1).

[8] Revillout, *Précis du droit égyptien*, 2 vols., Paris, 1903, see also pertinent note (1), p. xviii; also his *Origines égyptiennes du droit civil romain*, especially pp. 97–149.

[9] *Id.*, vol. ii, part 2, pp. 881–1151.

[10] *Id.*, vol. i, part 1, pp. 1–776; vol. ii, pp. 777–880.

[11] *Id.*, vol. ii, part 4, pp. 1150–1355.

[12] *Id.*, vol. i, part 5, pp. 1356–1508.

[13] *Id.*, vol. ii, part 6, pp. 1509–61.

[14] Diodorus Siculus, a contemporary of Julius and Augustus Caesar, was born in Sicily. He traveled in Egypt 60–57 B.C.

[15] All these and their legislation are discussed by Revillout in his *Précis du droit égyptien*.

[16] See Revillout, *Précis du droit égyptien*, vol. i, p. xviii, note (1), also pp. xix-xxi. The text of his two volumes contains very frequent comparisons of Roman and Egyptian law.

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civilization and has pushed back the starting point of Greek history to 3000–4000 B.C. Schliemann's excavations at Troy,[17] at Mycenae,[18] and Tiryns in Argolis,[19] and those of Evans in the island of Crete[20] confirm the ancient traditions that Greece was debtor to Egypt and Phoenicia for many of her earliest principles of art, religion, and law.[21] Such was the inevitable outcome of the active commerce of these maritime civilized countries with early Greece.[22] From Phoenicia came those ancient Greek rulers, the semi-legendary Minos of Crete and Cadmus of Thebes and Illyria. In later historic times the famous Greeks Pythagorus and Herodotus visited and were familiar with Egypt, — the former living, it is stated, for twenty-two years in the land of the Pharaohs.

§ 19 **A well developed Greek law antedates Roman law.** The value of ancient Greek law as a branch of comparative jurisprudence has been too long ignored. Perhaps this is due to the fact that no systematic collection of Greek laws has survived to us. An examination of the law of Greek States reveals that long before the 5th century B.C. Roman law of the XII Tables Greece had developed a law of persons, family law — including adoption, marriage, and inheritance — law of property and contracts, constitutional law, and international law,[23] all of which were far superior to the then law of Rome and became influential in assisting the subsequent development of Roman jurisprudence. That most eminent modern authority on Athenian law, the French Beauchet, lays much stress on the great debt of Roman law for legal ideas and conceptions borrowed from Greek jurisprudence.[24]

[17] 1870–73.

[18] 1876.

[19] 1884.

[20] Since 1900.

[21] See Hogarth, *Aegean civilization* (in Encycl. Britan.[11] vol. i, pp. 245, 247, 248, 250); Evans, *Crete* (in 8 Encycl. Britan.[11] pp. 421, 422, 426); Walker, *Greece*, (in 12 Encycl. Britan.[11] p. 441); Revillout, *Précis du droit égyptien*, vol. i, pp. 484, 565; Howe, *Studies in the civil law*[2], p. 87.

[22] Walker, *Greece* (in 12 Encycl. Britan.[11] p. 445).

[23] See Phillipson, *International law of Greece and Rome*, 2 vols., London, 1911.

[24] See Beauchet, *Hist. de droit privé de la répub. athén.*, 4 vols., 1897.

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But the Romans were not slavish imitators, — they transformed what they borrowed into a thoroughly Romanized product fashioned by the Roman consummate legal genius.

As recently as A.D. 1895 in their revision of the Code of Civil Procedure, the New York commissioners to revise declared that the essential principle of trial by jury was probably borrowed by the Romans from Athens — the Roman *judices* who decided questions of fact resemble the Greek dicasterion (δικαστήριον).[25] Finally, it should never be forgotten that the modern ideas of freedom, democracy, and the duty of the individual to the State are based on the writings of a few great men of ancient Greece.

The most important Greek law is that of Crete, Rhodes, Sparta, Magna Graecia or Southern Italy and Sicily, Athens, and Egypt after the Macedonian conquest.

§ 20 **Crete.** Manifestation of law in Greece begins with the earliest age of Greek civilization, — the Minoan.[26] About 1500 B.C. there reigned in the island of Crete a semi-legendary King, Minos, whose name became to the Hellenes symbolical of law and legislation. His famous code of laws[27] exercised great influence on the law of subsequent Greek States as a model law. In his palace at Cnossus has been recently uncovered the celebrated labyrinth constructed by Daedalus.[28]

The 7th century B.C. Cretan laws known as the Laws or XII Tables of Gortyna discovered in 1884 reveal a very well developed family and property law.[29]

§ 21 **Rhodes.** Less than seventy-five miles to the northeast from Crete and directly in the usual course of mariners from Phoenicia to the Aegean sea lies the island of Rhodes, a maritime State and at one time mistress of the Mediterranean in early Hellenic history about 900 B.C.[30] But it was the Rhodian law which has given this little island everlasting

[25] 52 Albany Law Journal, pp. 390–99, 408–14.

[26] Evans, *Crete* (in 8 Encycl. Britan.[11] p. 426).

[27] Herodotus, iii, 122; Thucydides, i, 4.

[28] Evans, *Crete* (in 8 Encycl. Britan.[11] p. 422).

[29] See Roby, *XII Tables of Gortyna*, 2 Law Quart. Rev., p. 135 (1886), who gives an English translation thereof.

[30] See Diodorus, v, 55–9; xiii–xx passim.

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fame. This law was composed of rules as to maritime transactions.[31] From Rhodes the Romans confessedly derived their maritime and admiralty law.[32] Consequently, as all modern law on this subject is based on the Roman, there is a perpetuity in our admiralty and maritime law of about three thousand years, all of which is a remarkable tribute to the enduring excellence of Rhodian law.

§ 22 **Sparta.** Institutions and laws were prescribed for the Lacedaemonians by Lycurgus, the traditional date of which is 884 B.C. The inspiration of the Spartan lawgiver is the Cretan laws of Minos.[33] Lycurgus reflects the Creto-Egypto-Phoenician influence.[34] Lycurgus' laws were, however, merely a body of traditional observances; for, according to Plutarch's biography,[35] these were never committed to writing.

§ 23 **Magna Graecia or Greek Southern Italy and Sicily.** In the 7th century B.C., Greek law was reduced to writing, this symptom of progress being first manifested in the western Greek colonies outside of Greece proper. In 663 B.C. Zaleucus gave a written code to the inhabitants of Locri Epizephyrii. Over two centuries later the people of Thurii adopted this same code. The Sicilian Charondas became the lawgiver of Catana and of other Greek colonies in both Italy and Sicily.[36] Androdamas of Rhegium gave laws to the Chalcidians of Thrace in Greece proper.[37] And Pythagoras[38] in 529 B.C. became the legislator of Crotona, a Dorian colony in Southern Italy situated on the Gulf of Tarentum. Returning home to Samos from his travels in Egypt and other foreign lands, he was driven away, according to tradition, by the tyranny of Polycrates and finally emigrated to Magna Graecia in the West, settling in Crotona. Here at the invitation of the citizens he

[31] The leading authority in English on the Rhodian law is Ashburner, *The Rhodian sea law*, Oxford, 1909.

[32] See *Dig.* 14, 2.

[33] Morris, *History of the development of law*, pp. 111, 112.

[34] *Id.*

[35] *Lycurgus*, 13.

[36] Aristotle, *Politics*, ii, 12, 11, vi (iv), 13, 2.

[37] At about this time Philolaus of Corinth became lawgiver to the Thebans. See Aristotle, *Politics*, ii, 12, 8–14.

[38] Born c. 582, died c. 497.

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established republican institutions along philosophical lines, combining aristocratic and socialistic principles. It is interesting to note that this attempt of the great Samian philosopher to give practical operation to the doctrines of socialism did not long survive his death.

**Athens.** In the year 621 B.C. was compiled and published the celebrated code of the Athenian Draco. To the Athenians is given the credit of the invention of lawsuits by a Roman writer.[39] Draco's laws were extremely severe, and this explains the peculiar modern significance of harshness attached to our "Draconian." By the laws of Draco a creditor was given the right to seize the person of his debtor as security for his debt. § 24

Some thirty years later in 594 B.C. appeared the greatest legislator of Athens, Solon[40] the most famous of the "Seven Wise Men of Greece." Chosen to revise the code of Draco, Solon prepared a new code of law which was the best law in all Greece. Solon's legislation affected both the private and public law of Athens. He remodeled the courts and gave to every citizen the right of appeal to them. Solon was the first to give the right to Athenians to make a will.[41] By the laws of Solon land descended equally to all male children and to females if there were no male offspring. He forbade slavery of debtors by their creditors. He provided for the appointment of guardians of orphans. Adoption was authorized by law, and adopted children inherited from their adopter equally with other children. He prohibited any increase of interest on money lent when once fixed. His punishments for defamation and theft resemble the same in Egyptian law whence these were probably borrowed.[42] Solon's laws were the basis of Athenian institutions and legislation down to the Roman conquest of Greece, suffering only two revisions, one by Aristides about a century after Solon's death, the last by Pericles a half century later. Solon's laws were accepted

[39] Aelian, *Var. Hist.* iii, 38.

[40] To him is attributed the profound maxim "*Know thyself.*"

[41] See Plutarch, *Solon*, 21; Maine, *Ancient law*, ch. vi. This right was, however, limited to citizens without male descendants.

[42] As to other borrowings from Egyptian law, see Revillout, *Précis du droit égyptien*, vol. i, pp. 484, 565.

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finally by most of the other Greek States, especially the Ionian, and came to exercise great influence on the subsequent law of Rome.

§ 25 **Egypt after the Macedonian conquest.** When Greece under Alexander the Great overcame in the 4th century B.C. the whole of civilized Asia and Africa, Egypt herself was thereafter ruled by the Greek Ptolemies for four centuries until Cleopatra's tragic death to avoid gracing the triumph of Augustus Caesar. Copies of wills and other legal documents of Greek soldiers settled in Egypt under the early Ptolemaic Pharaohs prove that the art of legal conveyancing was very familiar to the Greeks as early as the 3d century B.C. and earlier. For instance, in their wills is used that familiar modern expression "being of sound mind and good understanding" (*νοῶν καὶ φρονῶν*).[43]

[43] *Conveyancing under the Ptolemies*, 8 Law Quart. Rev., p. 56. As to the influence of Macedonian-Egyptian law, see Revillout, *Précis du droit égyptien*, vol. i, pp. 603–14.

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# CHAPTER IV

## PERIODS OF THE HISTORY OF ROMAN LAW

§ 26 **Two periods.** The history of Roman law and its descent into modern law is divisible into two great periods or parts: Roman law as a local city law, and Roman law as a world law. These periods of the history of Roman law do not ignore the subdivisions into various Roman eras, or the decisive changes in the government of Rome, or the modern nations which have arisen since the destruction of the Roman Empire. Furthermore, this arrangement of the subject emphasizes the actual juridical connection between the ancient and modern worlds.

§ 27 **Roman law as a local city law.** The first period extends from the founding of Rome in 753 B.C. to the consolidation of Italy with Rome in 89 B.C. This is the period of the ancient Roman law. It embraces all of the Monarchy and nearly all of the Republic, the last half century of the latter excepted.

§ 28 **Roman law as a world law.** The second period or part of our history commences in 89 B.C., when Roman law became truly territorial and national by the union of the Italian peninsula with Rome. It embraces the last half century of the Republic and the whole of the Empire, the Eastern Empire being finally destroyed in A.D. 1453 by the Turks. It also embraces the subsequent fate of Roman law after the barbarian Teutonic overthrow of the Roman Empire in Western Europe. An account is given of the survival and revival of Roman law in medieval and modern times, including the development of modern Anglo-American law and the Modern Codes of France, Germany, Italy, Spain and other civilized countries through the fusion of Teutonic and Roman law.

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# PART I

## ROMAN LAW AS A LOCAL CITY LAW— THE ANCIENT ROMAN LAW: 753–89 B.C.

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# PART I

## ROMAN LAW AS A LOCAL CITY LAW — THE ANCIENT ROMAN LAW: 753–89 B.C.

**A period of over 650 years.** Roman law as a local city law — the ancient Roman law — had a duration of over six and a half centuries. These include the almost entirely legendary period of the Roman Monarchy and all the historic period of the Roman Republic, except the last half century. As a result of the Social War, the Italians in 89 B.C. obtained the rights of Roman citizenship. Thereafter Roman law took on a national character and no longer remained merely the law of a city. §29

## CHAPTER I

### THE ROMAN MONARCHY: 753–510 B.C.

**Semi-legendary part of the ancient Roman law.** The traditional date of the founding of Rome is 753 B.C. Romulus, the founder, established a monarchical form of government which lasted for nearly two and a half centuries. In this semi-legendary era were the beginnings of the ancient Roman law or archaic jus civile. §30

**Credibility of early Roman history.** All Roman history, not only of the Monarchy but of the Early Republic, has been fiercely attacked as incredible by the English Sir George Lewis,[1] the Italian Pais,[2] and the French Lambert.[3] To a large extent their views are correct, and as a result all future historians §31

[1] See his *Credibility of Early Roman history.*

[2] See his *Storia di Roma*, pp. 550–605.

[3] See Nouv. revue hist. (1902), pp. 546–76, 631–5; Revue générale du droit (1902), nos. 5 and 6.

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must on no account ignore their conclusions. Fact and fiction are so closely interwoven in early Roman history that it is most difficult to-day to separate traditions from actual occurrences. But the principal features of early Roman history are not falsified; that there was a Monarchy, that it was overthrown — the traditional date being 510 B.C., that there was a struggle between the two Roman classes of patricians and plebeians, that a Republic was instituted with a senate and two legislative assemblies — the comitia curiata and the comitia centuriata — all three coming down from the regal period, are not fables.

§ 32 **Royal statutes (leges regiae).** The jurist Pomponius has described the preservation of the whole of the statutes of Romulus and subsequent kings in a collection known as the *jus Papirianum*, which compilation he says[4] was extant in his own time, — that of Hadrian. But this collection of royal laws mentioned by Pomponius was probably a private apocryphal compilation made, toward the close of the Republic,[5] of the "copies of ancient matter which had been thrown into the form of rules or ordinances."[6]

That there were royal statutes which are sources of Roman law is without doubt true.[7] Certain isolated fragments of royal statutes are extant,[8] such as those credited to Servius Tullius on contracts and delicts.[9] Probably the royal laws were in the nature of "ordinances made by proclamation, and in some cases perpetuated by public inscription." Enactments by a popular legislative assembly are improbable in the Regal period of Roman history.[10] Our scanty remnants of the

[4] *Dig.* 1, 2, 2, 2.

[5] Sohm, *Institutes of Roman law* (Ledlie[3]), § 12, p. 54, note 4; Girard, *Textes*[3], p. 3, § 1; Mommsen, *Staatsrecht*, § 3, pp. 46–50; Karlowa, *Röm. Rechtsgeschichte*, pp. 105–7; Krueger, *Quellen, etc.*, pp. 3–8: Girard, *Manuel*[5], pp. 14–15; Girard, *Ord. judiciaire*, p. 27, note 1; Dirksen, *Versuche zur Kritik, etc.*, pp. 234–358.

[6] Clark, *Sources*, p. 19.

[7] Clark, *Sources*, p. 19.

[8] See collection of each "leges regiae" made by Bruns, *Fontes Juris*[6], pp. 1–22, Girard, *Textes*, pp. 1–9.

[9] See *Dion.* iv, 13; iv, 15; iv, 22 and 25; Bruns, *Font. Juris*[6], p. 14.

[10] Clark, *Sources*, p. 19.

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Roman royal statutes are derived from the works of writers of the Later Republic or Early Empire.

**The law of the Monarchy was the archaic jus civile only.** § 33 The private law at Rome under the Monarchy was for citizens only, and did not concern itself with foreigners, who were not subject to its jurisdiction. Hence its appropriate name — the jus civile, or law belonging to Roman citizens only.[11] Moreover, its name indicates another characteristic: it was the law of a city[12] — a local law strictly.

[11] *Civile* and *civis* (citizen) come from the same root.

[12] *Civile* has the same root meaning as *civitas* (city).

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# CHAPTER II

## THE ROMAN REPUBLIC TO 89 B.C.

§ 34 **Historic part of the ancient Roman law.** From the overthrow of the Monarchy in 510 B.C. to the consolidation of Italy with Rome in 89 B.C. is over 400 years. These four centuries constitute the historic jus civile of the Republic or the historic part of ancient Roman law.

### I. The Early Republic, or first half of the Republic, prior to the conquest of Central and Southern Italy and the appointment in 242 B.C. of a praetor for foreigners (praetor peregrinus): period of the historic jus civile alone

§ 35 **Expulsion of the Tarquin dynasty; class struggles of the patricians and plebeians soon engross the young Republic.** As a result of expelling the Tarquin Kings, thereafter the Romans forever hated the name of 'King.' At the time of the overthrow of the Monarchy Rome was but a small, insignificant country town which had to struggle hard for life against its neighbors and the adherents of the monarchy. The new Republic became engrossed with the class struggles of the patricians and plebeians. The patricians — originally meaning "the sons of senators,"[1] — and the plebeians — from a Greek word[2] signifying "crowd" or "mob" — occupied the first two centuries of the Republic with their political and economic strife. Finally, the plebeians achieved full political, civil, and social equality, and were protected by a

[1] Bernard, *La première année de droit romain*, § 3; Sherman's translation, *The first year of Roman law*, § 3.

[2] Τὸ Πλῆθος.

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magistrate — the tribune of the plebs — elected annually, inviolable during his term of office, and possessed of the power to arrest by his "veto" (I forbid) all magisterial and legislative acts done within the city of Rome.

§ 36 **The Law of the XII Tables fixes the commencement of historic Republican Rome.** The beginning of the non-legendary Roman Republican period is definitely fixed by the Law of the XII Tables enacted in the middle of the 5th century B.C. The modern inquiry of Professor Goudy, "Are the XII Tables authentic?"[3] is but a continuation of the attacks of Lewis, Pais,[4] and Lambert[5] on the credibility of early Roman history. These writers attacked the XII Tables as legendary, and argued that the decemvirate never existed, nor were the XII Tables compiled under the early Republic, but that on the contrary the collection known to the ancients under this name is an apocryphal work made in the late Republican period.[6]

But the battle as to the authenticity of the XII Tables was won in 1902 by their able defender, the French Girard[7] of the law faculty of the University of Paris, who successfully refuted all these contentions.

§ 37 **The Law of the XII Tables, 450–449 B.C.** The compilation of the XII Tables was due to the persistent demands of the plebeians for a *written law*, and resulted directly from the proposal of one of their tribunes, Terentilius Arsa. According to Latin historians,[8] commissioners were sent into Greece to study Hellenic laws: this probably was Magna Graecia —

[3] 17 Juridical Review, p. 93.

[4] *Storia di Roma*, i, 1, pp. 550–605 (1898).

[5] Nouv. revue historique (1902), pp. 546–76, 631–5; Revue générale du droit (1902), nos. 5 and 6.

[6] In the 5th or 6th century of Rome, — Girard, *Textes*[3], p. 9.

[7] Nouvelle revue historique de droit (1902), pp. 381–436. Professor May, in Revue des études anciennes (1902), 3, pp. 201–12, agrees with Girard. See also Girard, *Textes*[3], pp. 9–11; Clark, *Sources*, p. 29.

[8] For the Roman account of the XII Tables, see Livy xii, 9–57; Cicero, *De repub.* ii, 36–37; Diodorus, xii, 23–26; Dionysius, x, 1–60; Digest, 1, 2, 2, §§ 3, 4, and 24 (Pomponius). See also Mommsen, *Staatsrecht*, iv, pp. 441–3; Krueger, *Quellen, etc.*, §§ 9–14. Girard, *Manuel*[5], pp. 22–8.

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the Greek colonies in Southern Italy — which for Romans was the easiest point of contact with Greek civilization.[9]

When the commissioners returned, ten magistrates, called Decemvirs, — the most celebrated of .whom was Appius Claudius — were appointed to codify the laws, or, more accurately, to reduce them to writing. The first year of their magistracy, 450 B.C., ten Tables were published in the forum, followed by two more the next year 449 B.C. This decemviral legislation was exhibited to the people in the form of a popular statute (*lex*).

The now existing fragments of the XII Tables[10] were expressed subsequently by various Latin authors living four to six centuries later, the contents of the XII Tables being "probably handed down by . . . copies from time to time renewed."[11] Things were not much improved even at the very close of the Republic: Cicero himself complained that in his time there was no official depository of the laws, which had to be sought for in private collections.[12] "For all the Roman law prior to 200 B.C. when the basis of Justinian's vast structure had long been laid, we have to rely on the secondary evidence of writers who lived in the beginning of the Christian era or just before it."[13]

§ 38 **Character of the Law of the XII Tables.** The XII Tables are a compilation or reduction to writing of the then existing customary unwritten law of Rome. That Greek elements entered into the Roman XII Tables "is beyond doubt," says the famous modern German Romanist Bruns.[14] And this

[9] Such is the view of Cuq, *Institutions*, etc., vol. i, p. 131, who is quite sceptical as to the commissioners going to Greece proper; Girard, *Manuel*[5], pp. 22–8.

[10] For the text, see Bruns, *Fontes Juris*[6], pp. 15–41; Girard, *Textes de droit romain*[3], pp. 5–23. The XII Tables have been translated into English by Howe, *Studies in the Civil Law*[2], pp. 47–59; Hunter, *Roman law*[4], pp. 17–22; and by Mears, in his *Inst.* of *Justinian*, London, 1882.

[11] See Clark, *Sources*, p. 22; Bruns, *Fontes Juris*[6], p. 22 et seq.; Girard, *Textes*[3], p. 9.

[12] About 46 B.C., — see *De legibus* iii, 20, 46.

[13] Clark, *Sources*, p. 29. Such secondary authorities include Cicero, Livy, Plutarch, Pliny, Dionysius.

[14] *Geschichte und Quellen des röm. Rechts*, § 14; see Holtzendorff, *Encyclopädie der Rechtswissensch.*[3], p. 92.

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view is substantiated by comparative study of contemporary Greek law,[15] especially the Tables of Gortyna, which embody Hellenic law much earlier than the Roman XII Tables.[16] But on their face the XII Tables are very little Greek in character, especially the peculiarly Roman constitution of the patriarchal family with absolute power wielded by the head of the family, and the extremely Roman procedure of legal actions furnished by statute (*legis actiones*).

The XII Tables embodied the jus civile or law for Roman citizens. Commerce being small at this time and the world moving but slowly, the XII Tables took cognizance of but few juristic acts and these principally relating to land, the chief property of citizens.

§ 39 **Growth of Roman law for the next three centuries is by interpretation of the XII Tables.** After the XII Tables were enacted their contents were worked out for over 300 years by a process of interpretation. Under the Republic statutory changes in matters of private law were exceptional.[17] To meet the exigencies of the growing State and the demands of a commerce which increased with the ever widening Roman conquests, new regulations of law were required: these were always represented by the interpreters of the law, as contained in the Law of the XII Tables, either by logically deducing them from that statute, or by the employment of *legal fictions*, which left the letter of the statute intact while developing its spirit — thus making new juristic transactions possible. For example, by application of a legal fiction to mancipatio (the ancient Roman law conveyance of sale) was evolved a new transaction resting on credit — the pledging of property for a loan: the mancipatio was made really fictitious by being conditioned on an understanding (*fiducia*) that the property would be reconveyed by the creditor to the debtor when the latter paid off his debt.

[15] See Goodwin, *XII Tables* pp. 6 and 7; supra §§ 19 et seq.

[16] See supra, § 20.

[17] For extant *leges* subsequent to the XII Tables, see Bruns, *Fontes Juris*[6], pp. 45–160; Girard, *Textes de droit romain*[3], pp. 24–117; and infra vol. iii, § 945.

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§ 40 **The jus civile was for citizens only; it was administered at Rome by the city praetor (praetor urbanus) created 367 B.C. Character of the jus civile.** Inasmuch as the statute law bound the citizens of Rome, it was collectively called *jus civile*, i.e. the law for citizens — the "civil law." It was administered at Rome in the court of the city praetor (*praetor urbanus*), who was created 367 B.C.[18] The jus civile was for the exclusive benefit of Romans only, and did not concern itself with foreigners and Roman provincial subjects, who were outside its jurisdiction and purview. No alien or non-citizen could appear in the court of the praetor urbanus.

Roman law under the Republic was personal, not territorial. Wherever a Roman citizen went, he carried his law with him. Although its seat was at Rome, yet with the advent of conquered provinces their governors became empowered to administer the jus civile for any Roman residing abroad. This law for citizens, or *Quiritary law*,[19] had certain peculiar characteristics: it was very formal, rigid, and personal. Its essential rigidity was not changed by any interpretation, and its formal ceremonies survived the use of fictions.

§ 41 **Birth of the jus honorarium.** The creation of the praetor urbanus in 367 B.C. had one very lasting consequence: it eventually gave birth to the jus honorarium or edictal Roman law. For by the power (*imperium*) of the praetorship the praetor had authority to issue orders — edicts — as to the remedial processes necessary to be employed in his court. Although it is not likely that the city praetor began at once to use this great power, yet gradually this power came to be exercised, and, after the creation of the praetor for foreigners (*praetor peregrinus*), this praetorian power became of the utmost importance and was the means of developing the Roman law for foreigners[20] — ultimately the most equitable part of Roman law. The jus honorarium originally was purely praetorian law, but in the Later Republic and Early

[18] By the *lex Licinia*, "Qui jus in urbe diceret" are Livy's words (vi, 42, 11). See *Dig.* 48, 19, 17, 1.

[19] From *Quirites*, the ancient title of Roman citizens.

[20] See infra § 44.

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Empire it also included the edicts of other magistrates such as aediles and provincial governors.

## II. The Later Republic, or the latter half of the Republic following the creation of the praetor peregrinus; period of the beginnings of the jus gentium as an adjunct to the jus civile

§ 42 **The Roman conquest of Southern and Central Italy.** In the 4th century B.C. Rome began the subjugation of Italy. After a half century of effort following the Second Samnite War, all the Italian peoples were brought under the Roman yoke. Not even the Greek armies of King Phyrrus of Epirus could prevent the Roman conquest of Southern Italy. Between 326 and 272 B.C. Campania, Umbria, Lucania, Etruria, Picenum, and Tarentum were subjugated. Rome became supreme mistress of Italy from the Rubicon to the Sicilian Straits. And her conquest of Italy survived the terrific strain of the Punic Wars with Carthage, in spite of the wonderful genius of Hannibal. But Rome treated the Italians as subjects. The Italians were regarded as subject foreigners (*peregrini*). Not until two centuries after the conquest of Italy were the Italians given Roman citizenship.

§ 43 **Growth of commerce; creation of a praetor for foreigners (praetor peregrinus) in 242 B.C.** What changed Roman law from a local rigid formal law into a world-wide rational formless jurisprudence? The answer is: the growth of foreign trade and commerce, the legal problems of which were solved by the praetor's application of the rules of the law of nations (*jus gentium*). With the increasing territorial conquests of Rome, foreign commerce developed enormously. Foreigners flocked in great numbers to Rome. Legal transactions arose in large volume. Two centuries after the XII Tables, in the year 242 B.C.,[21] a special praetor to dispense justice to foreigners

[21] Livy (*Epit.* 19) says it was in 512 A. U. C. Lydus (*De Magistr.* i, 38, 45), says it was 507 A. U. C.

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was created — the praetor peregrinus. He had charge of litigation in which alien foreigners or subjects were involved.[22]

§ 44 **Beginnings of the Roman law for foreigners or jus gentium; separation of Roman law into jus civile and jus gentium.** With the advent of the praetor peregrinus began that equitable praetorian adjunct to the Civil Law[23] which was known as the jus gentium or Roman law for foreigners and subjects not citizens. The Roman source of this jus gentium was the law made by the magistrates or jus honorarium. Practically the whole of the newer equitable law was to be found only in the magisterial law, and the only way it could be enforced was through the medium of legal procedure — by granting or refusing a right of action or a right of defense.

Roman law now began to develop along parallel lines. There was *the old law* for citizens — the *jus civile*. There was *the new law* for non-citizens (foreigners and subjects) — the *jus gentium*. The jus civile was composed of statutes and customs having the force of law. It was largely legislative law. The jus gentium was law made by magistrates, who drew partly on the jus civile and very largely on those rules of law common to all nations, particularly the neighboring Greeks, as the sources of their inspiration. It was a body of rules which the Roman praetor thought worthy to govern the intercourse of Roman citizens with the members of all, originally independent but now subject, foreign nations.[24] Occasionally, however, the Romans use the term jus gentium in its modern sense of the "law of nations," that is, "international law."

These two systems of law — *jus civile* and *jus gentium* — continued down through the Later Republic into the Empire, when finally the older jus civile became fused with the jus gentium losing in the refining process all its local narrowness and formal strength. The combined product became the jurisprudence of a world, — a universal and no longer a local law.

[22] Mentioned in Republican legislation and inscriptions as "Praetor qui inter peregrinos jus dicit," or "Praetor qui inter cives et peregrinos jus dicit," or simply "Praetor peregrinus." See *Dig.* 1, 2, 2, 28.

[23] The Romans meant by "civil law" the jus civile or law for citizens only, never "private law" as in modern legal phraseology.

[24] Poste, *Gaius*[4], p. 3.

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§ 45 **Secularization of the legal profession; the secret legal knowledge of the college of priests divulged. Development of the functions of the Roman jurisconsult or lawyer.** The knowledge and practice of the law, so long the secrets of the pontifices or college of priests, were gradually communicated to the world as plebeian influences, penetrated the sacred college, and finally law became secularized. This process of secularizing the law, which began in the 4th century B.C. when the actions furnished by statute (*legis actiones*) were divulged,[25] was given an enormous impetus in the 3d century[26] B.C. by the first plebeian pontifex maximus Tiberius Coruncanius, who was the first to give *public consultations* to persons needing legal advice. By the 1st century B.C. men giving legal advice and answering legal questions were called jurisconsults (*jurisconsulti*, skilled in the law), and the lawyer had long since ceased to be a priest. Moreover, the lawyer's practice soon became the stepping stone to the highest offices of the Roman State.

The functions of the lawyer or jurisconsult were developed. These were like those of his modern descendant: to give legal opinions,[27] to act in court for clients,[28] and to draw up legal papers,[29] such as contracts and wills. Cicero had a thorough Roman understanding of what a lawyer should be when he said that he must be "skilled in the laws and the usages among private citizens, and in giving opinions, in bringing actions, and in guiding his clients aright."[30]

[25] Flavius published them 302 B.C., Aelius in his *Tripertita* published them together with the XII Tables and their interpretation about 204 B.C., — see Sohm (Ledlie[3]), *Roman law*, p. 89.

[26] C. 254 B.C.

[27] *Respondere.*

[28] *Agere.*

[29] *Cavere.*

[30] See *Duties of an attorney* by Judge Gager, 21 Yale Law Journal, p. 73, wherein this is quoted and its applicability to modern lawyers set forth.

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# PART II

## ROMAN LAW AS A WORLD LAW— 89 B.C. TO THE PRESENT TIME

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# PART II

## ROMAN LAW AS A WORLD LAW— 89 B.C. TO THE PRESENT TIME

**A period of over 2000 years.** Roman law as a world law has already endured twenty centuries. This vast period includes the last half century of the Roman Republic, and the Roman Empire which existed for fifteen centuries until Constantinople was taken by the Turks in A.D. 1453. It also includes the modern realm of Roman law since Justinian to the present time, or the modern Civil Law. § 46

## CHAPTER I

### THE LAST HALF CENTURY OF THE REPUBLIC: 89–27 B.C.

**Consolidation of Italy with Rome in 89 B.C.; Roman law became widely territorial and national.** As a result of the great Italian war 90–89 B.C., called rather loosely the Social War, the revolted Italian allies and subjects of Rome obtained Roman citizenship and were enrolled in the thirty-five Roman tribes. The consolidation and incorporation of Italy with Rome was the final outcome of the Roman conquest of Italy. During the last half century of the Republic and continuing after the establishment of the Empire by Augustus in 27 B.C., Roman citizenship belonged to all the Latin peoples of the Italian peninsula. Roman citizenship and law became widely territorial. Rome and Italy thus became synonymous — the peninsula constituting the Roman State. § 47

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## 1. SOURCES OF ROMAN LAW DURING THE REPUBLIC

§ 48 **Three sources.** The sources of law during the Roman Republic were: statutes of the legislative assemblies, edicts of the praetor and other magistrates, and opinions and writings of the jurisconsults.

§ 49 **1. Statutes of the assemblies (leges, plebiscita).** The earliest source of Roman law consists of the statutes enacted by the various legislative assemblies. The principal Roman assemblies were these four: (1) the *comitia curiata* or assembly of the patricians, (2) the *comitia centuriata* or military assembly of all citizens, both patrician and plebeian, (3) the *comitia tributa* or assembly of all citizens by districts,[1] (4) the *concilium plebis* or assembly of the plebeians. The first two assemblies originated under the Monarchy. Although the assembly of the plebeians originally legislated to bind the plebs alone, the binding force of the acts of this assembly was extended by the lex Hortensia of 288 B.C. to bind the patricians also. The enactments of all these Roman assemblies were statutes, which, as in modern times, were of a general or special nature.

The enactments of all the legislatures except the assembly of the plebeians were termed *leges*. Laws passed by the assembly of the plebeians were termed *plebiscita*. The *lex* bears the names of the two consuls for the year, e.g. *lex Valeria Horatia*, while the *plebiscitum* bears only the name of the tribune who proposed it. Sometimes both *lex* and *plebiscitum* were confused, — for instance the famous *lex Aquilia* and the *lex Falcidia* were actually *plebiscita*. Frequently the legislation of a provincial governor ordered to endow his province with laws is called *leges datae*.

Senate acts or the decrees of the Senate (*senatusconsulta*) were not ordinarily a source of Roman law during the Republic. In the Republican period the Senate, which originated under

[1] *Tribus* here means a "quarter" of the city. The people were grouped according to residence in wards or districts. The assembly voted by districts. The balance of power was preserved for the better classes of citizens by dividing the districts into four urban and twenty-four suburban, — the great mass of the people residing in the urban districts.

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the Monarchy, did not often legislate.[2] The functions of the Senate during the Republic were: to prepare bills for laws, to take care of the public administration, and to register the laws enacted by the popular assemblies. Although the Senate was the real sovereign of the Republic, it was a sovereign not usually armed with legislative power.

§ 50 2. **Edicts of magistrates (edicta).** Another early source of law in the Republican period of Roman history is the edicts of magistrates, especially the praetor. When the praetor, the chief judicial magistrate of the Republic, entered annually into office, he published his edict which stated the collection of rules he intended to apply while in office. To this so-called 'permanent edict' he added from time to time decisions of cases for which his permanent edict did not apply.

In imitation of the praetor, the aediles (police magistrates) and the governors of provinces published their edicts. And this sort of law was known as the praetorian law or the law of the magistrates (*jus honorarium*) in contradistinction to the law for citizens (*jus civile*). The edictal law will be treated in a more detailed manner when the Imperial Roman law is reached.[3] The other magistrates of senatorial rank — consuls, censors, pontifices, quaestors, and the rarely existing dictator — were not judicial officers and contributed nothing in the way of judicial legislation.

§ 51 3. **Writings of the jurists.** The activities of the lawyer had one very important juridical consequence: the development of a legal literature, as is evidenced by the composition of treatises on legal subjects by distinguished jurisconsults of the Republic.

## 2. FAMOUS REPUBLICAN JURISTS

§ 52 **The dawn of jurisprudence.** With the advent of the jurisconsults began the gradual conversion of Roman law into a world law. Jurisprudence commenced with the writings of the jurists. Q. Mucius **Scaevola,** who was consul[4] a few years

[2] But toward the end of the Republic the decrees of the Senate began to be regarded as equivalent to *leges,* — see Amos, *Roman Civil Law,* p. 73.

[3] See infra §§ 60–61.

[4] 95 B.C.

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before the Social War broke out, was the father of Roman jurisprudence.[5] The Republican jurisconsults shaped the beginnings of Roman law; the jurisconsults of the Empire developed Roman law into a mature jurisprudence fitted to be a world law. The lives and toil of these jurists mark the steps and boundaries of progress in Roman law.

§ 53 **Famous Republican jurists.** Of the vast host of lawyers of Republican Rome some forty-five are mentioned by Roman writers as renowned for their legal talents or famous for their learning. Pomponius[6] — a celebrated jurist of the Imperial period — Gellius, and Cicero are our chief sources of information as to the Republican jurists.[7]

A celebrated early Republican jurist is **Cato the younger,**[8] the son of Cato the Censor. He is referred to in both the Institutes and Digest of Justinian. He died while praetor-designate in the lifetime of his father. From Cato the younger was probably derived the Regula Catoniana — a doctrine of testamentary law to the effect that a legacy invalid at the time of making a will is also invalid whenever the testator dies.[9]

Three Republican jurists were renowned for their constructive ability: Brutus, Manilius, and Scaevola. They contributed enormously to the development of a Roman legal literature. From **Brutus**[10] (not the one who conspired against Caesar but an earlier Brutus) came a familiar doctrine now encased in the modern law of bailments. Brutus held that if a man borrowed a beast of burden and used it otherwise than had been agreed upon, as for example for a longer journey or for a different journey, he is guilty of theft.[11] To

[5] Cuq, *Institutions, etc.*, vol. ii, p. 1, starts the "classical Roman law" with Scaevola.

[6] See *Dig.* 1, 2.

[7] As to their writings now extant, consult Lenel, *Palingenesia juris civilis*, 2 vols., Leipzig, 1889.

[8] See Roby, *Introduction to the Digest*, p. xcv.

[9] Dig. 34, 7, 1; Bernard, *La première année de droit romain*, and *First year of Roman law* (Sherman translator), § 890.

[10] His full name was M. Junius Brutus, See Roby, *Introduction to the Digest*, pp. xcv–xcvi.

[11] Gellius, vi (vii), 15; see also *Dig.* 47, 2, 77 (76), pr.

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**Manilius,**[12] who was consul at the siege of Carthage,[13] is largely (§ 53) due the development of the doctrine of treasure trove.[14] **Scaevola,**[15] who was consul the year of Tiberius Gracchus' legislation,[16] was a thorough jurist and decided many novel questions of law.[17] This P. Mucius Scaevola was the father of a still more famous son,[18] usually called the Pontifex.[19]

It was **Scaevola the younger**[20] who, when governor of Asia, provided in his edict that want of good faith can be pleaded against the validity of a transaction, — a principle of modern law.[21] This Q. Mucius Scaevola composed many other legal principles.[22] The glory of Scaevola as a jurist consists in the fact that he was the first to write a systematic treatise on the jus civile. It was composed of eighteen books. Scaevola's works were so valuable that these later received commentators, among these being the Republican jurist Sulpicius[23] and the Imperial jurists Gaius[24] and Pomponius.[25] Scaevola is the earliest Republican jurist whose writings are cited in the Digest of Justinian. Scaevola had some famous pupils. Among these were Cicero[26] and Aquilius Gallus.[27]

[12] His full name was M. Manilius P. F. P. N. See *Corp. Inscrip. Lat.*, i, p. 438; Roby, *Introduction to the Digest*, pp. xcvi–xcviii.

[13] 149 B.C.

[14] See *Dig.* 41, 2, 3, 3.

[15] P. Mucius Scaevola, — Roby, *Introduction to the Digest*, pp. xcviii–c.

[16] In 133 B.C. Tiberius Gracchus died the same year.

[17] See *Dig.* 24, 3, 66; *Dig.* 47, 1, 10 and 15; Cicero, *Fam.*, vii, 32; *Dig.* 49, 15, 4; *Dig.* 50, 7, 18 (71); Cicero *Or.* i, 40; Roby, *Introduction to the Digest*, pp. xcviii–c.

[18] Q. Mucius Scaevola, usually called "Q. Mucius" to distinguish him from Cervidius Scaevola, a jurist of the Early Empire.

[19] To distinguish him from his counsin Scaevola the Augur, consul 117 B.C., who bore the same names.

[20] Q. Mucius Scaevola, — Roby, *Introduction to the Digest*, pp. cv–cviii.

[21] Cicero, *Att.*, 6, 1, 15.

[22] See Roby, *Introduction to the Digest*, pp. cvii–cviii.

[23] *Dig.* 27, 2, 30; Gellius iv, 1, 20.

[24] Gaius 1, 188.

[25] *Dig.* 49, 1, 53 and 54.

[26] See *Dig.* 1, 2, 2, 41.

[27] Cicero *Am.* 1; Roby, *Introduction to the Digest*, p. cvii.

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(§ 53) As to **Cicero,**[28] the best opinion is that, although the greatest advocate ever called to the Roman Bar, he was not a great lawyer in the sense of being a jurist. But Cicero's oratory and writings bear a stamp of brilliancy and literary greatness excelled by no other ancient orator or writer — certainly of the Latin race. To Cicero must be ascribed whatever we intimately know of the Roman law of the Republic, especially of its judicial forms and remedies.

C. Aquilius **Gallus,** contemporary and friend of Cicero, was the most learned and juridically ingenious of all the pupils of Scaevola the younger. It was Gallus who advanced the doctrine that a postumous child can be heir to a succession.[29] Gallus was the author of several other new principles in Roman law.[30]

**Sulpicius,**[31] the famous pupil of Gallus, was regarded by the Digest writers as the greatest lawyer of the Republic. Stung one day by the reproach of Scaevola the younger[32] as to his ignorance of the law, he engaged in the study of law and later became a learned and prolific jurist, having written, it is said, 180 books on law. Sulpicius had many renowned pupils, such as **Varus, Gellius, Tucca, Namusa, Ofilius.**[33] Most of these are cited in the Digest of Justinian.

Aulus **Ofilius** deserves a special mention. He was a great jurist and wrote works which dealt with all branches of the Civil Law.[34] It is a suggestive coincidence of his intimate friendship with Julius Caesar that Caesar himself, amongst other plans formed before his assassination, had in mind the project of codifying and digesting Roman law,[35] — a task not however accomplished until six centuries later in the time of Justinian, whose fame to-day comes from his codification.

[28] His full name was Marcus Tullius Cicero (106–43 B.C.).

[29] *Dig.* 28, 2, 29. He was the author of the Aquilian stipulation, — see Roby, *Introduction to the Digest*, p. cx.

[30] Roby, *Introduction to the Digest*, pp. cix–cx.

[31] His full name was Servius Sulpicius, Q. F. Lemonia Rufus, — see Roby, *Introduction to the Digest*, pp. cx–cxiii.

[32] Q. Mucius Scaevola, see supra this § 53.

[33] See Roby, *Introduction to the Digest*, pp. cxiii et seq.

[34] *Id.* pp. cxiv–cxv.

[35] Suetonius, *Jul.*, 44.

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**Tubero**[36] was a pupil of Ofilius. He was very learned and is often cited in the Digest. (§ 53)

**Trebatius,**[37] contemporary of, but younger than, Cicero, is often cited in the Digest. It was Trebatius who was instrumental in introducing the doctrine of codicils into Roman law.[38]

[36] His full name was Q. Aelius Tubero, — see Roby, *Introduction to the Digest*, pp. cxxii–cxxiii.

[37] His full name was C. Trebatius Testa, — see Roby, *Introduction to the Digest*, pp. cxvii–cxx.

[38] *Inst.* 2, 25.

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# CHAPTER II

## THE ROMAN EMPIRE, 27 B.C.–A.D. 1453

§ 54 **The Roman Empire lasted nearly 1500 years.** The Roman Republic in Caesar's day was fast becoming an empire; it had markedly outgrown its archaic city government ruled by a narrow, corrupt, and tyrannical oligarchy which rapaciously plundered the Roman people as well as the provinces. It became necessary to reconstruct Rome if the Roman conquests and the Roman State were to be saved. The Graeco-Latin civilization was in great danger of being lost to the world. Julius Caesar applied himself to the much-needed task of reconstruction. What this wonder of the human race with his most astonishing political and military genius might have finally accomplished was untimely cut short by the daggers of his assassins. His clemency, unparalleled in a cruel age, was largely responsible for his martyrdom. But the eternity of Rome for which Caesar lived and died was preserved in spite of Caesar's murderers. The work of reconstruction finally devolved upon Augustus.[1] The Empire was established in 27 B.C., and continued for nearly fifteen centuries until A.D. 1453 when the Eastern Roman Empire at Constantinople was overthrown by the Turks.

### I. The Early Empire, 27 B.C.–A.D. 284: from Augustus to Diocletian

§ 55 **Dual nature of the government of the Early Empire; the Principate.** Although Augustus apparently re-established the Republic on conservative lines, restoring the authority of the people and the Senate,[2] yet this surrender of sovereign power

[1] Octavian, the nephew of Caesar, received the title of Augustus in 27 B.C. This title was subsequently incorporated by the later Emperors, not members of the Julian family, as part of the Imperial title.

[2] "Rem publicam ex mea potestate in senatus populique Romani arbitrium transtuli." — *Mon. Ancyr.* 6, 12.

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was but theoretical and illusory. Augustus ostentatiously (§55)
divided the sovereign authority between himself and the Senate, but by the terms of this division he made the Senate the weaker body and himself the ultimate though unacknowledged source of all authority whatever. Although the régime established by Augustus gave a preponderance to the Emperor, yet, because the Principate or Early Imperial government was a dual government of Senate and Emperor as opposed to the single absolute monarchical power of Diocletian and Constantine, the government of the Early Roman Empire prior to Diocletian is fittingly described as the Imperial duarchy.

Apparently the Republic continued to exist along constitutional lines with all the familiar legislative assemblies and elective magistrates exercising their usual functions. No magistracy was abolished: there were, just as during the Republican era, consuls, praetors, and tribunes. The Roman provinces were divided, as to administrative control, between the Senate and Augustus, — the latter taking care to give to the Senate only the more peaceful ones requiring scarcely any troops. The public treasury of the State, the *aerarium*, still received the taxes from the senatorial provinces, but the taxes from the provinces of Caesar went into the Emperor's treasury, the *fiscus*. Augustus received the constitutional title of *Princeps*,[3] and this title of professed humility became a formal title of his successors[4] during the Early Empire. Theoretically, the Senate elected the Emperor; and it could depose him, as it did with respect to Nero.

But in reality Augustus was far more than seemingly the first citizen of Rome: he had been made *Imperator*, which implied that his authority was supreme; he had also the *tribunician power* which made his person inviolable and gave him the right of *veto* over all magistrates; he was possessed of the *censorial power* which enabled him to fill the ranks of the

[3] In 28 B.C. the Senate conferred the title of *Princeps Senatus* upon Octavian.

[4] In course of time the Heir Apparent of the Emperor became known as *Princeps Juventutis*, 'Crown Prince' or 'Prince Imperial,' — see Hill, *Historical Roman coins:* "Caius Lucius Caesares, Augusti filii, consules designati, *principes juventutis.*"

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Senate or expel a Senator; he was *Pontifex Maximus*, which gave him the religious authority formerly exercised by the Kings of Rome; and he had full *proconsular authority*, which gave him the command of all the armies of the Empire. Finally, Augustus gradually allowed the Senate — which he really held in the hollow of his hand — to usurp the legislative powers of the *comitia*. The successors of Augustus received the same powers, all at one time, upon their accession by the effect of a statute originally re-enacted for each Emperor — called the *lex regia* or *lex de imperio*.[5] It was passed by the Senate and originally ratified by one of the *comitia*, probably the *comitia tributa*. With the decline of the legislative assemblies in course of time the existence of a *lex regia* applicable to all Emperors became implied.[6]

§ 56 **Dual nature of the Roman law of the Early Empire.** The antithesis between the Roman law for citizens (jus civile) and the Roman law for non-citizens (jus gentium) which began in the latter half of the Republic, persisted under the Early Empire for over two centuries until the Edict of Caracalla in A.D. 212. Moreover, that very practical Republican division of Roman law, according to sources, into statutes and customs (jus civile) and law made by the magistrates (jus honorarium), endured under the Early Empire down into the reign of Hadrian, when the importance of this division was nullified by the jurist Julian's compilation of the Edictal law, which was promulgated in the form of a statute.[7]

§ 57 **The classical period of Roman law, A.D. 98-244.** The culmination of the development of Roman law from a local city law into a world law occurred under the Early Empire. But this culmination came gradually and was not caused suddenly as if by the blast of a hurricane. The jus civile was slowly submerged by the jus gentium, because the latter was more

[5] See *Code*, 1, 17, 1, 7; *Dig.* 1, 4, 1, pr. There is still extant a part of the *lex regia de imperio* which conferred imperial power upon Vespasian, — see Girard, *Textes de droit romain*[3], p. 105. The practice was a survival of the *lex curiata* of the regal era of Rome, — see Cicero, *De republica*, ii, 13, 17, 18, 20, 21.

[6] See Const. *Deo auctore*, §7 (one of the prefaces to the Digest of Justinian).

[7] See infra § 61.

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inherently reasonable and just and more in accordance with the private law of other nations. From the 2d century to the middle of the 3d century A.D. was the Golden Age of Roman jurisprudence, beginning with the jurist Celsus[8] and ending with Modestinus.[9] Through the labors of the Imperial jurists, Roman law in the century of the Antonines and Severi attained to such marvelous perfection that the whole period from the reign of Hadrian[10]—better, Trajan[11]—until shortly after the close of the reign of Alexander Severus is commonly called the "classical Roman law."[12] During this era the activity of Roman jurists reached its climax. The Imperial jurisconsults accomplished the larger part of the gigantic task of *creating a jurisprudence* composed of eternal principles of justice and fitted for all subsequent ages of the world. And because of the great excellence of the private law of Rome about A.D. 100, the Romans attained to a height of civilization never reached by Rome's successors until very modern times.

**Carracalla's Edict of A.D. 212.** In the year 212[13] the Emperor Caracalla promulgated a law[14] bestowing citizenship on all free inhabitants of the Empire.[15] Thereafter, but few traces of the long-standing Roman antithesis between complete and partial citizenship remained, and these[16] were formally § 58

[8] P. Juventius Celsus *filius*, legal adviser of the Emperors Trajan (reigned A.D. 98–117) and Hadrian (reigned 117–138). See infra § 83.

[9] Died after A.D. 244. See infra § 94.

[10] See Cuq, *Institutions juridiques des romains*, vol. ii, p. 1; Leage, *Roman law*, pp. 29–30.

[11] Leage, *Roman law*, p. 29.

[12] See Cuq, *Institutions juridiques des romains*, vol. ii, p. 1; Leage, *Roman law*, pp. 29–30.

[13] The year is stated variably: A.D. 212, — Krueger, *Quellen*, p. 16; A.D. 211–17, — Smith, *Dict. of Greek and Roman antiq.*[3], vol. i, p. 450; A.D. 212–17, — Muirhead, *Roman law*[2], p. 318.

[14] See Bry, *L'édit de Caracalla de 212 d'après le papyrus 40 de Giessen* (in *Études d'histoire juridique off. à P. F. Girard*, vol. i, pp. 1–42, Paris, 1913).

[15] "In orbe Romano qui sunt, ex constitutione imperatoris Antonini cives Romani effecti sunt": *Dig.* 1, 5, 17. See infra vol. ii, § 443.

[16] The *Latina libertas* of the *Juniani* and the *peregrina libertas* of the *dediticii:* see Sohm (Ledlie[3]), *Roman law*, pp. 175, 170. These were of little importance during the Later Empire.

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abolished by Justinian. Caracalla's Edict wiped out the old Republican distinction between Roman citizens and Roman subjects, and set up a new Imperial citizenship. Local citizenship and a local private law became replaced by universal citizenship and a universal private law. *The jus civile became the jus vetus.*[17] Only actual foreigners — persons not subjects at all of the Roman Empire — and Romans who had forfeited citizenship were restricted to the old ante-Caracalla separate law for foreigners.[18]

§ 59 **The four forces which transformed Roman law into a world law.** During the Empire four forces were at work converting Roman law from a local into a world law. These were: the praetorian Edict, Greek philosophy especially Stoicism, influence of the jurisconsults, and Imperial legislation. The first three operated during the Early Empire; the last during the Later Empire accomplished the supreme task of codifying Roman law.

### (1) The Praetorian Edict and Other Edictal Law

§ 60 **Definition and scope of Edicts.** The Roman praetor, unlike the judge of modern times, was not subject to the law: he was superior to it. When in 367 B.C. the consuls were deprived of their judicial functions,[19] they lost the sovereign, almost unlimited judicial authority which they had inherited from the Kings: this fell upon the praetors.

The *edicta* were orders promulgated by the praetor. At first probably each case was decided on its merits, and it was rarely that the praetor promulgated any orders as to the granting of legal assistance. It soon became the practice, however, "to post up in the praetor's court a list of legal formulae or processes for the better information of parties to an action."[20] Gradually other tablets came into use, — the orders of the praetor as to matters of law, or *real edicts*. These praetorian tablets intended to last for a year only were made of wood and painted white, hence their name *album*.

[17] See Stephenson, *History of Roman law*, p. 291.
[18] *Dig.* 48, 19, 17, 1.
[19] By the *lex Licinia*.
[20] Sohm (Ledlie[3]), *Roman law*, § 15, p. 75.

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In course of time, each new praetor, upon entering office, (§ 60) became obliged by law to publish his Edict.[21] The quickest way to do this was to revise the album or tablets of Edicts of his predecessor and put up new ones. This annually published Edict finally became known as the *edictum perpetuum* because of its relatively 'permanent' character. It soon became the practice to repeat much of the Edict of the preceding praetor, which portion repeated came to receive the appropriate special name of *edictum translatitium*. Down to 67 B.C. the magistrate issuing the annual edict might disregard it at will during his term of office, but at that time it was made illegal for a praetor to depart from his published Edict.[22] Edictal orders issued during a praetor's term of office, as to matters not covered by the annually published edictum perpetuum, were known as *edicta repentina* or 'occasional' Edicts.

Notice what a convenient instrument the Edict was for giving new principles a trial, for the Edict lasted but a year and then the innovation could be dropped. The way the Edict worked out equitable law was: not by far-reaching generalizations, but by laying down rules for a particular case clearly understood. A second concrete case would be added to the first, for the praetors hesitated to strike out anything which had once found its way into the Edict. Hence the Edict became on its face a collection of rules as to the granting of actions, rules as to pleadings, etc., the phraseology of which was not very pleasant reading. But it was a channel for the transmission of the wisdom and experience of former ages.

The work of the praetorian law was concretely exhibited along three lines: first to give complete effect to the jus civile, next to supplement it, third — and boldest task of all — to reform it. The following is an illustration of the work of the praetors in *reforming the jus civile*. One person obtains something from another by means of threats or fraud. The jus civile generally treated the act as valid, irrespective of the threats or fraud. But the praetor gave the aggrieved

[21] "Ut scirent cives, quod jus de quaque re quisque dicturus esset": *Dig.* 1, 2, 2, § 10.

[22] By a *lex Cornelia:* see Sohm (Ledlie[3]), *Roman law*, p. 77.

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party either a right of action or a right of defense. The view of the *jus civile* is opposed to that of the jus honorarium. Now the praetor did not openly abolish the jus civile; its theoretical legal force remained untouched; but practically it was thus thoroughly reformed by remedial relief.

§ 61 **Edicts compiled by Julian and made perpetual by the Emperor Hadrian in A.D. 131.** With the advent of the Empire, the office of praetor was gradually shorn of its power. The praetorian Edicts became stereotyped and barren, for any change sought to be made in it by the praetors could be nullified by an edict or decree of the Emperor. In the reign of Hadrian the regular reissue of the praetor's Edict had become a mere matter of form. The development of the praetor's Edict really reached its climax under the Republic.

By instructions from Hadrian, the famous jurisconsult Julian[23] revised the Edicts, and made them forever perpetual. Julian also defined the relation existing between the Imperial power and the edict. He revised both the Edict of the praetor urbanus for citizens, and the Edict of the praetor peregrinus for foreigners and subjects, and added to his labor portions of the Edict of the curule aediles. The whole was then ratified by a senatusconsultum of the year 131[24] and forbidden to be thereafter changed.[25] By this statute[26] magistrates were compelled to issue the Edict as arranged by Julian.[27] Thereafter the Emperors decided ambiguities, and added supplements to be found in the Imperial statutes. *The legislation of the Emperors became the jus novum.*[28]

Julian's revision and compilation of the edictal law is known as the **Edictum Hadrianum** or **Julianum.** It foreshadowed

[23] See infra § 89.

[24] See Krueger, *Geschichte d. Quellen d. röm. Rechts*, p. 86.

[25] For text of the Edicts see Bruns, *Fontes Juris*[6], pp. 202–37, and infra vol. iii, § 946.

[26] This SC. did not apply to the whole Empire, hence the contents of the Edict were not applicable to Roman *subjects*. It did not convert the jus honorarium into jus civile. See Krueger, *G. d. Quellen d. röm. Rechts*, p. 91; Sohm (Ledlie[3]), *Roman law*, §17, p. 86, note 4.

[27] *Id.*

[28] See Stephenson, *History of Roman law*, pp. 291 et seq.

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the codification of Roman law which occurred during the Later Empire, and it was of much service to Justinian's codifying commission.[29]

### (2) Greek Philosophy, Especially Stoicism

§ 62 **An external, not an internal, force.** So far we have noticed the influence of internal forces on the development of Roman law into a world law. But the incomparable unity of form and subject-matter of the Roman law was not due solely to the existence of certain judicial officers or even to the Emperor himself. Although the Emperor was head of the State and supreme lawgiver, yet the unity caused by his political position was by itself merely formal and artificial. There were two external forces which powerfully affected for good results the progress of the Roman law: Greek philosophy, particularly Stoicism, which influence was effective during the Early Empire; and Christianity, the influence of which operated during the Later Empire.

§ 63 **Debt of Roman law to Greek culture and philosophy.** In a public classroom of the University of Edinburgh, Scotland, there is one embellishment, — a statue of Socrates under which are inscribed these words of Lord Mansfield: "I will take the liberty of calling him the great lawyer of antiquity, since the first principles of all law are derived from his philosophy."[30] While Socrates' philosophy may be regarded as indirectly influencing the Civil Law of Rome, it is certain that "the influence of his successor Zeno made a deep impression upon later Roman jurisprudence. Indeed . . . to Stoicism rather than to Christianity . . . must be attributed that ameliorating influence which manifests itself in the history of Roman law. The doctrine of the *jus naturale* — a doctrine which Stoicism made peculiarly its own — as it became gradually incorporated with the *jus civile*, was one of the main features in the amelioration of the latter, and only in so far as Stoicism was influenced by Christianity (e.g., the

[29] See infra § 137.

[30] Gibson, *Influence of Christianity on Roman law*, 31 Law Mag. and Review, p. 385, (Aug. 1906).

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effect upon Seneca by his contemporary St. Paul) can Christianity, in its early years, be said to have any influence on Roman law."[31] Or, as Professor Muirhead says, "The teaching of Seneca did quite as much, nay, far more, to influence it than the lessons that were taught in the little assemblies of the early Christian converts."[32]

Under the Republic the praetorian law as well as the jus civile had grown up and was tinkered for improvement through empirical and administrative methods, — through procedure. But the law of the Empire is characterized by the *belief that law is founded upon ethics*. After the conquest of Greece in 146 B.C. Roman thought began to be influenced by Greek culture and philosophy. The Stoic philosophy in particular appealed to the more intelligent Romans of the Later Republic. Cicero accepted the tenets of this philosophy. And from Cicero to Alexander Severus the ethical principles of Stoic philosophy played a prominent part in Roman education and culture. The Roman mind took naturally to the dignity, righteous simplicity, and austerity of Stoicism. Stoic philosophy finally ascended the throne in the person of Marcus Aurelius, perhaps its greatest philosophical exponent.

§ 64 **The exact point of contact between Stoic philosophy and Roman law was the Stoic theory of the Law of Nature.** Says Sir Henry Maine: "To live according to *nature* was to resist passion and to rise above the disorderly habits and gross indulgences of the vulgar to higher laws of action which nothing but self-denial and self-command would enable the aspirant to observe. It is notorious that this proposition — live according to nature — was the sum of the tenets of the famous Stoic philosophy. The alliance of the Roman lawyers with the Stoic philosophy lasted many centuries . . . The strength of Stoicism on Roman jurisprudence resided . . . in the single fundamental assumption lent to it. After *nature* had become a household word in the mouths of the Romans, the belief gradually prevailed among Roman lawyers that the old Jus Gentium was in fact the lost code

[31] Gibson, *Influence of Christianity on Roman law*, 31 Law. Mag. and Review, pp. 385, 386.

[32] Muirhead, *Roman Law*[2], p. 355.

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of nature and that the praetor in framing an Edictal jurisprudence on the principles of the Jus Gentium was gradually restoring a type from which law had only departed to deteriorate."[33]

Consequently the Roman jurists gave the name of *jus naturale* — natural law, law of nature — to describe the natural or ethical foundation on which the civil law must rest. Stoicism declared that the world was possessed by an all-pervading soul, which could be regarded from two different points of view, as a *universal force* or a *universal reason.* This soul is revealed both in the external law of nature and the original nature of man. *Man participates in the universal reason.* Hence the law of nature is the highest rule of human conduct; the great duty of man is to discover and conform to the highest law of reason. Before Cicero it was thought law was founded in custom or convention; after Cicero, the first Stoic, it is regarded as being founded in the very nature of things. "There is," says Cicero, "a true law, a right reason conformable to justice, diffused through all hearts, unchangeable, eternal, which by its commands summons to duty, by its prohibitions deters from evil. Attempts to amend this law are impious, to modify it is wrong, to repeal it is impossible."[34]

§ 65 **The "natural law" entered into and liberalized the Roman jus gentium. Rise of the conception of Equity.** The Greek doctrine of the law of nature first entered Roman law via that branch known as the jus gentium, and strongly affected its progress for the better. The praetors had collected some laws common to all nations. The very fact that they were common to all nations would seem to show that they were derived from universal rational principles inherent in the very nature of things: hence they are the remains of the primitive law established for all men by the universal reason. The jus gentium soon acquired a philosophical significance: it was then regarded as a body of principles founded on the law of nature. It had become a part of the praetor's edict and was definitely sanctioned. Being broader and more liberal than the jus civile it was early called the *jus aequum, equitas* or

[33] Maine, *Ancient law* 3d. Am. edition, ch. iii, pp. 52–4.

[34] Cicero, *De republica*, iii, 23; *De legibus* i, 6, ii, 4; Gibson, *Id.* p. 390.

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equity. The characteristics of the speculative Roman jus naturale are: "its potential universal applicability to all men, among all people, and in all ages, and its correspondence with the innate conviction of right." And its leading propositions are: "the recognition of the claims of blood, the duty of faithfulness to engagements, the apportionment of advantage and disadvantage, gain and loss, according to the standard of equity and the supremacy of *voluntatis ratio* over words and forms."[35] The aim of the Roman jurists now became this: to bring the Civil law into harmony with natural justice, — that is with what is ethically right. Such was finally the lofty standard of Roman jurisprudence.

The jus gentium thus became thoroughly identified with the jus naturale,—based on the universal principles of right and justice.[36] What shall serve as a moral standard by which the existing positive law shall be justified or its defects exposed or corrected? *Equity*,—the moral code of nature. "Equity will suggest this interpretation, although the law is deficient," says the Imperial jurist Paulus, in interpreting a provision of the praetor's Edict. "The contribution of the Stoics to legal studies consisted more in the informing spirit than in any definite conceptions which were borrowed. . . . Directly as private law was conceived of as a system to be developed by a process of reasoning working on fundamental principles of justice and common sense, and not consisting merely of ancient customs and ceremonies, or of rules arbitrarily imposed by authority, a true concept of law had been reached . . . this is indisputably the true conception of *lex naturae*, law of nature. To conceive of law in this way was the achievement of Rome."[37]

§ 66 **Survival to modern times of the doctrine of "natural law."** The Roman theory of natural law and its universal applicability has survived to modern times and in great vigor. The so-called "natural law" or "natural philosophers" of the 18th

[35] Muirhead, *Roman law*[2], pp. 281–2.

[36] See *Inst.* 1, 2, 11. Savigny (*System*, vol. i, Appendix), declares that the jus gentium and jus naturale were at last really the same. Von Holtzendorf (Encycl.[5] p. 121) notices the same fusion.

[37] Lefroy, *Rome and to-day*, 20 Harv. Law Review, pp. 614, 617.

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century, such as Rousseau, Montesquieu, repeat the tenets of the Greek philosophers, especially the Stoics. All the familiar phrases of the "natural rights of man to life, liberty, and the pursuit of happiness" and many other expressions cherished by the modern world as embodying eternal principles of justice merely repeat the phrases of the Roman law as furnished by philosophy. Our wonderful Declaration of Independence — a monument to 18th century philosophy — enshrines many a tenet of Roman jurists who confessed the alliance of philosophy with law. "By natural law all men are equal," is the famous statement of the great Ulpian.[38]

§ 67 **Ethical completion and maturity of Roman law attained during the Early Empire.** From Augustus to Diocletian Roman scientific jurisprudence was fully developed and just before Diocletian's reign attained its final maturity. The formative period of Roman law closed with the jurist Papinian. The jus gentium with its tenets of "natural" law and justice had now triumphed over the jus civile. Roman law became truly a world law, — suited for the wants of all mankind. After the accession of Diocletian, the development of Roman law practically ceased; it was then merely summed up by men of genius and crystallized in the form of codification.

How came Roman law to reach "its commanding position as the most magnificent system of jurisprudence ever given to the world"?[39] Why does it to-day form the basis of all the systems of law of the modern civilized world? Because such Roman jurists as Papinian, Paulus, and Ulpian "evolved and applied principles which are applicable for all time, and amid the most various conditions of mankind. Philosophers in the sphere of law, searchers after ultimate truth, they were able at the same time to apply in the concrete what they had found and to give it the force of law."[40] "That which is always equitable and good is called law: such is the natural law," says the jurist Paulus.[41] Notice to what high dignity Ulpian

[38] *Dig.* 50, 17, 32. See also *Inst.* 1, 2, 2: "Jure enim naturali ab initio omnes homines liberi nascebantur."

[39] Gibson, *Id.* p. 391.

[40] *Id.*

[41] *Dig.* 1, 1, 11.

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considered the lawyer was called. "They call us priests of justice," he says, "for we cultivate justice and profess a knowledge of goodness and equity, — separating what is lawful from what is unlawful, the right from the wrong; a true philosophy, if I mistake not, and not a sham."[42] While another of his sayings approaches the high ideal of the Sermon on the Mount. Says Ulpian: "The precepts of the law are these: to live uprightly, not to hurt a neighbor, and to render to everyone his own.[43]

### (3) Influence of the Jurisconsults

#### A. The jus respondendi and responsa prudentium[44]

§ 68 **Augustus licensed jurisconsults to give responsa, or opinions on questions of law, binding the courts.** Roman jurisprudence dates, as we have seen,[45] from the pontifices or priests, the learned class of early Rome. Pontifical jurisprudence having ceased to be the authoritative monopoly of the priests, subsequently legal learning became widespread during the Republic, and private persons other than priests freely gave *responsa* or legal opinions. These secular persons were known as lawyers (**jurisconsulti, jureconsulti, jurisperiti, jurisprudentes**). Their responsa were devoid of any authority. But with the advent of Augustus a remedy was devised whereby authority should be restored to professional legal opinions. Augustus did not, however, return this monopoly to the pontifices, but he authorized certain able jurisconsults to make *responsa*, which decisions he sanctioned by his authority. In other words Augustus licensed certain lawyers to render legal opinions citable as authority in court and binding upon judges. This new privilege granted to favored lawyers was called **jus respondendi.** And "jurisconsult" now began to mean the privileged class of Roman lawyers possessing the jus respondendi. The opinion of such a licensed jurisconsult was required to be delivered in writing

[42] *Dig.* 1, 1, 1.

[43] *Dig.* 1, 1, 10.

[44] Or *Responsa prudentum:* see Hunter, *Roman law*[4], p. 76. "Prudentium" is preferable.

[45] See supra § 45.

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and sealed, and when so submitted the judge was bound to decide accordingly, unless a conflicting opinion of another licensed jurisconsult was submitted.[46] Professor Muirhead[47] uses the English expression "patented counsel" to describe Roman jurists having the jus respondendi, while Professor Walton[48] employs the rather slight analogy of the British King's Counsel.

The famous **Sabinus**[49] was the first jurisconsult to obtain from Augustus this license of jus respondendi.[50] The successors of Augustus during the next two centuries continued his policy of licensing certain jurisconsults to exercise the *jus respondendi*. Soon the same authority was extended to previous opinions, which no longer existed, written and sealed as required by law, but only to be found in the literature of the responsa. Hence their force became extended to legal literature, which is converted into a source of law. At the close of the 3d century A.D. exercise of the jus respondendi by Roman lawyers had become very rare and had practically ceased; the last recorded holder of this privilege was **Innocentius,** who received his authorization probably from the Emperor Diocletian.[51] The Emperors alone gave responsa in the form of rescripts.

### B. CONVERTING ROMAN LAW INTO A SCIENTIFIC JURISPRUDENCE

**By assisting the Emperors in legislation.** Roman lawyers had during the Early Empire a great share in the government of the Empire. Often the Emperor had been the pupil of some law teacher.[52] It was the custom of the Emperors to consult the leading lawyers of the Empire as well as the immediate § 69

[46] See Hunter, *Roman law*[4], p. 76.

[47] *Roman law*, pp. 291–3.

[48] *Roman law*, p. 135.

[49] Masurius Sabinus, — see infra § 103.

[50] *Dig.* 1, 2, 2, 48–50.

[51] See Glasson, *Étude sur Gaius*, p. 102; Buckland, *Equity in Roman law*, p. 134. It may be that Constantine authorized Innocentius to act, although this seems doubtful.

[52] E.g. Septimius Severus was the pupil of the famous Scaevola,— see infra § 105.

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Imperial Council in framing laws or developing constitutional principles. All these opportunities gave Imperial Roman lawyers chances to put into practical operation the philosophic spirit of their age as they assisted in drafting Imperial legislation. The following are instances:

1. Slaves. To inflict unnatural cruelty upon — and finally to kill — a slave was prohibited by Augustus, Claudius, and Antoninus Pius. Moreover, because by natural law all men were born free and equal,[53] the Emperor often restored to slaves the status of a freeborn person.

2. Children and parents. Trajan punished cruelty to a son by emancipation. Proprietary rights were given by the Emperors to children under paternal power.

3. Citizenship. The Emperors finally put all citizens and free subjects on a level of equality. The legislation of Caracalla is an instance of this.

§ 70 **Through the jus respondendi.** Under the Early Empire much Greek philosophy was converted into legal principles by that privileged class of Roman lawyers possessing the jus respondendi[54] or the right to give opinions on questions of law which could be cited in courts as authoritatively binding the judge. By virtue of this privilege, jurisconsults of ability indirectly legislated the philosophical spirit into Roman law by infusing opinions or decisions rendered with liberal ideas of justice. Any questions might be discussed in these opinions of these intellectual leaders of the Bar, which when once given bound also the Roman Bench.

§ 71 **Through legal literature.** Another indirect instrumentality was legal literature or the writings of the jurists. The philosophical theories of Greece did not exist in the Roman mind as mere speculative theories: these were put into actual concrete practice by the Roman legal writers of the Empire. What were their methods? (1) To emphasize general principles in dealing with specific cases: thus declaring that a right depends upon something more ultimate than custom or statute. (2) To distinguish properly between law and morality:

[53] See *Dig.* 50, 17, 32.

[54] See supra § 68.

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namely, that although law fundamentally rests on morality, no moral duty is transformed into a legal duty except by the express or tacit sanction of some public authority.

§ 72 **Through definitions and maxims.** The scientific spirit of the Roman jurists is seen, furthermore, in their definitions[55] and maxims[56]: their definitions are made so as to afford a safe passage between the Scylla of looseness of language and the Charybdis of technical rigidity; their maxims are regarded as self-evident truths, and form the highest ethical conceptions of Roman law, — such as Pomponius' maxim "It is just by the law of nature that no one should be enriched through another's disadvantage or injury."[57]

Again, did the letter and spirit of positive law conflict? "Follow the spirit," says Julian[58]; "Adopt an application of a rule which is not harsh," says Modestinus[59]; "Verbal quibbling is not apprehension of the law," says Celsus.[60] Is there an ambiguity? "Follow the beneficial interpretation," says Marcellus.[61] "Construe law as a whole, and each part thereof with reference to all other parts," says Celsus.[62]

§ 73 **Through methods of interpretation.** The Roman jurists developed scientific methods of interpretation. Suppose the existing law were too broad or too narrow and so deficient for the case in hand? If too broad, Julian says, "Interpret it by deduction to meet the case so as to regard such case as coming under its general provision."[63] This is *restrictive* interpretation. "If too narrow, then extend some law, the letter of which does not comprehend the case in hand," the same jurist Julian declares.[64] This is *extensive* interpretation.

[55] See especially *Dig.* 50, 16 *De verborum significatione.*

[56] See especially *Dig.* 50, 17 *De diversis regulis*, etc.

[57] *Dig.* 50, 17, 206.

[58] *Dig.* 1, 3, 15.

[59] *Dig.* 1, 3, 25.

[60] *Dig.* 1, 3, 17.

[61] *Dig.* 50, 17, 192.

[62] *Dig.* 1, 3, 24.

[63] See *Dig.* 1, 3, 10 and 11.

[64] See *Dig.* 1, 3, 12 and also *Dig.* 1, 3, 13 (Ulpian).

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### C. THE TWO SCHOOLS OF IMPERIAL ROMAN JURISTS SABINIAN AND PROCULIAN

§ 74 **The lawyers of the Early Empire divided into two opposing parties. Rise of the two great Roman law schools of the Sabinians and Proculians.** Beginning in the lifetime of Augustus and continuing for about two centuries as late as the reign of Marcus Aurelius,[65] the lawyers of the Early Empire were divided into two "opposing parties"[66] or schools: the Sabinians and Proculians. These schools were originally founded by the famous jurists **Capito**[67] and **Labeo.**[68] From Capito's eminent disciple **Sabinus,**[69] the first lawyer licensed to exercise the jus respondendi, the Sabinians derived their name; from Labeo's distinguished disciple **Proculus**[70] the Proculians received their name. The **Sabinians** were sometimes called **Cassians,** from Cassius Longinus,[71] a disciple of Sabinus, while the **Proculians** infrequently were called **Pegasians** from Pegasus,[72] a disciple of Proculus. The essential differences between the Sabinian and Proculian schools of jurists cannot now be determined. Originally the Sabinians seem to have been more devoted to the jus civile, while the Proculians gave more attention to the praetorian law.[73] But the Proculians were inclined to abide by traditional rules and methods — to prefer the letter of the law to its spirit — while the Sabinians preached progress for Roman law and tried to get rid of its then old-fashioned formalism and rigidity.[74]

These two schools were also something far more than opposing camps into which Roman lawyers were divided; they

[65] Reigned A.D. 161–180. See Clark, *Roman private law: sources*, p. 128.

[66] Roby, *Introduction to the Digest*, p. cxxvii.

[67] See infra § 80.

[68] See infra § 90.

[69] See infra § 103.

[70] See infra § 103. Proculus was the second in succession to Labeo, Nerva (infra § 96) being Labeo's immediate successor.

[71] See infra § 81.

[72] See infra § 100.

[73] See *Dig.* 1, 2, 2, 47.

[74] The best account of the actual controversies of these two schools is by Roby, *Introduction to Roman law*, pp. cxxx–cxli.

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became societies organized to impart legal instruction — in other words, *law schools*.[75] The opposition of these schools was somewhat like the vague rivalry of modern universities, such as that between Oxford and Cambridge, Yale and Harvard.[76] Much of the divergence of these two great Roman schools was due to the personnel of the teachers. (§74)

The first Roman jurist to originate a real law school was Sabinus,[77] who seems to have adopted the mode of giving instruction through a corporate organization which had been prevalent among Greek schools of philosophy. These were societies of which the students were the members and the professor[78] was the president. Each student upon entering paid a fee for tuition. Certainly Sabinus was in the habit of taking fees from his pupils, — according to the jurist Pomponius, Sabinus supported himself by giving legal instruction.[79] The jurist Ulpian also speaks of the fee payable to the professor.[80] The other school, the Proculians, became organized in the same way. One professor used to succeed another as president[81] by legal succession. Pomponius always uses[82] the word *succedit* in enumerating the presidents of the Sabinians and Proculians, — a term avoided in enumerating the jurists of the Republic.

From Augustus to Hadrian the heads of these two schools were[83]: **of the Sabinians,** — Capito, Masurius Sabinus, Cassius Longinus, Caelius Sabinus, Javolenus, Valens and Tuscianus and Julian; **of the Proculians,** — Labeo, Nerva, Proculus and Nerva *filius*, Pegasus, Celsus *pater*, Celsus *filius*,

[75] As to Roman law schools and legal education in detail, see infra §§ 154 et seq.

[76] Walton, *Roman law*, p. 138.

[77] See infra § 103.

[78] *Magister, antecessor*, or *professor*.

[79] *Dig.* 1, 2, 2, 50: "Huic nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustenatus est."

[80] *Dig.* 50, 13, 1, 5.

[81] Sometimes the presidency was divided between two or more, all of whom were full presidents.

[82] See *Dig.* 1, 2, 2, 51.

[83] See *Dig.* 1, 2, 2; Clark, *Roman law: sources*, pp. 107–29; Roby, *Introduction to Roman law*, p. cxxvii.

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and Neratius Priscus. The jurist Gaius[84] mentions contemporary teachers of the Proculians, but their names have not come down to us. The organized opposition of the two schools or societies lasted down into the reign of Hadrian,[85] when owing to the reputation and influence of the then head of the Sabinians, the illustrious Julian, the Proculians gradually died out and all became Sabinian.[86]

Early in the 2d century A.D. attempts began to be made to reconcile the views of the two schools of the jurists: this is the first indication that a true spirit of *scientific jurisprudence* was affecting the welfare of Roman law. These attempts finally resulted in a fusion of both the jus civile and the jus honorarium, now stationary, with the new Imperial statutory law into one harmonious whole.

### D. FAMOUS JURISTS OF THE EARLY EMPIRE

§ 75 **The greatest Imperial jurists.** Some sixty distinguished jurists[87] of the Early Empire survived their own age, and are recorded in Justinian's Digest,[88] which was compiled[89] about three centuries later than the last great Imperial jurist[90] and

[84] Died after A.D. 180.

[85] Reigned A.D. 117–138. See Clark, *Roman private law: sources*, pp. 119, 128.

[86] Karlowa, *Röm. Rechtsgeschichte*, i, p. 709.

[87] Roby records sixty-eight jurists. For their names and biography, see Roby, *Introduction to Roman law*, pp. cxxiv–ccviii; and Clark, *Roman private law: sources*, pp. 107–44. For a restoration of the texts of their works compiled from extant sources, particularly Justinian's Digest or Pandects, see Lenel, *Palingenesia juris civilis*, 2 vols. Leipzig, 1889.

[88] In Const. *Tanta*, §§ 17 and 20, Justinian gives an account of the work of making the Digest, stating that a very large number of books were collected, being furnished principally by Tribonian, chairman of the Digest commission, and those from which extracts were made are stated to have been set down in a list prefixed to the Digest. In the Florentine MS. of the Digest (the oldest MS. in existence) there is preserved such a list — now called the *Florentine Index* — which contains the names of 38 jurists and 207 treatises in 1544 volumes, — see Roby, *Introduction to the Digest*, p. xxiv. This list of jurists is not complete: it omits those furnishing no materials for the Digest.

[89] It was promulgated Dec. 16, A.D. 533.

[90] Modestinus, the latest authentic date in whose life is A.D. 244: Clark, *Roman private law: sources*, p. 138.

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over 550 years after Augustus established the Empire. The greatest Roman jurist was **Papinian,** whose brilliancy has never been dimmed by any modern rival. Modern criticism endorses Justinian's praise of his genius as "sublimely great, profound, keen, lucid, and brilliant."[91] (§ 75)

In the 5th century, about 200 years after the last jurist of eminence,[92] the Romans thus ranked their great jurists; first Papinian, then these four: **Paulus, Gaius, Ulpian,** and **Modestinus.**[93] But this selection is defective because it ignored all the jurists save the four latest holders of the jus respondendi and Gaius. It should be enlarged to include the following eleven earlier jurists, all of whom were eminent — some of them pre-eminent for their legal genius and attainments: Labeo, Sabinus,[94] Nerva, Cassius, Proculus, Javolenus, Celsus,[95] Julian, Pomponius, Marcellus, and Scaevola.

The renowned jurist Ulpian is the largest contributor to Justinianean Roman law,[96] the next being Paulus,[97] Papinian, Pomponius, Gaius, Julian, Modestinus, and Scaevola,— in the order named.[98] Largely through the writings of Ulpian and Paulus have the labors of the Imperial jurists operated on subsequent ages. More than one-third of Justinian's monumental Digest is made up of Ulpian's works,[99] which form its groundwork. More than one-sixth of the Digest is derived

[91] See Const. *Deo auctore,* § 6; Const. *Omnem,* §§ 1, 4.

[92] Modestinus (died after A.D. 244), see infra § 94.

[93] This is the Roman order of appreciation as set forth in the famous statute known as the Valentinian "Law of the Citations," A.D. 426, whereby the Imperial sanction was given to the writings of Papinian and the four jurists above mentioned as authorities for the then Roman law. See *Cod. Theod.,* 1, 4, 3.

[94] *Masurius* Sabinus.

[95] Celsus *filius.*

[96] For this reason Clark, *Roman private law: sources,* p. 136, calls Ulpian "the greatest Jurist."

[97] He was the most prolific writer of Roman literature: see Roby, *Introduction to the Digest,* p. cci.

[98] Roby, *Introduction to Digest,* ch. x–xv. In the Digest of Justinian are 2464 extracts from Ulpian, 2081 from Paulus, 601 from Papinian, 578 from Pomponius, 535 from Gaius, 456 from Julian, 344 from Modestinus, and 306 from Scaevola. See infra §§ 108, 99, 98, 101, 86, 89, 94, 105.

[99] Roby, *Introduction to the Digest,* p. cxcix.

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from the works of Paulus.[100] Both Ulpian and Paulus have contributed over one-half of Justinian's Digest.

§ 76 **Specific contributions of Imperial jurists to Roman law.** From the time of Hadrian to Alexander Severus[101] was the greatest activity of the Imperial jurists in contributing to Roman legal literature. Distinguished jurisconsults and teachers early wrote institutional or **elementary treatises** for the use of law students. Roman elementary treatises were of many varieties. Gaius,[102] Ulpian, Marcian, Callistratus, and Florentinus published *Institutes*[103]; Neratius, Scaevola, Ulpian, and Modestinus published *Regulae;* Paulus was the author of three elementary works[104]; Pomponius published an *Enchiridion* (Handbook); Hermogenian an *Epitome;* Papinian wrote a famous work known as *Definitiones*[105]; and Modestinus was the author of a treatise entitled *Differentiae.*

Various jurists published **case-books** of Roman law. Marcellus, Scaevola, Papinian, Paulus, Ulpian, and Modestinus published *Responsa,* which are the principal works of the case literature. But Gaius' book *De casibus,* the *Epistulae* of Javolenus and Pomponius, and the *Decreta* of Paulus belong to the literature of the cases.

The **dogmatic and exegetical treatises** of the Early Imperial jurists were many and of the highest excellence. The most important dogmatic works were: Sabinus' work on the *Jus civile;* the works of Pomponius, Gaius, Ulpian, and Paulus on *Fideicommissa* (Trusts); that of Gaius on verbal obligations; Ulpian's treatise on the office of various magistrates and officials[106]; those of Paul and Callistratus on the law of the *fiscus* (Imperial treasury and revenue); the works on military law by Menander and Macer; and Paulus' works on wills and adultery. The principal exegetical works were: the Commen-

[100] *Id.* p. cciii.

[101] A.D. 117–235.

[102] Gaius also published an elementary treatise entitled *Aurea* or *Res cottidianae.*

[103] *Institutiones.*

[104] *Sententiae, Manualia,* and *Brevia.*

[105] Q. Mucius (Scaevola), the Republican jurist (see supra § 53), was the author of a work bearing the same title.

[106] Such as the *proconsul, consul, praefectus urbi.*

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taries on Sabinus written by various subsequent jurists who wrote whole treatises to discuss texts of ancient writers, — literature somewhat analogous to the work of the English Coke on Littleton; the Commentaries on the Edicts; the treatise of Gaius on the XII Tables, Pomponius on Mucius Scaevola [107]; and the works of Paulus, Marcian, and other writers on specially important Roman statutes, such as the *lex Julia et lex Papia Poppaea*, *lex Falcidia*, *SC. Turpilianum*.

Roman legal literature was also enriched by various important **miscellaneous works.** In the category of discussions belong the *Quaestiones* of Scaevola, Papinian, Africanus, Tertullian, and Paulus; the *Disputationes* of Ulpian and Tryphoninus; and probably the *Publica* of Maecian, Marcian, Venuleius, and Macer.[108] Of great excellence and value are Labeo's celebrated works the *Pithana* and *Libri posteriores;* the *Digesta* of Julian, Celsus, and Marcellus; the *Pandectae* of Ulpian and Modestinus; the *Membranae* of Neratius; and the *Variae lectiones* of Pomponius. The great epoch of Roman legal literature was during the Early Empire. The constructive legal ability, excellence of style, and charm of the Imperial Roman jurists have never been surpassed in subsequent ages. A sketch of each of the principal Roman jurists now follows.

**Africanus.** Sextus Caecilius Africanus (died before [109] A.D. 169–175) was probably a pupil of the great jurist Julian.[110] Aulus Gellius [111] gives an account of the Law of the XII Tables as discussed by Africanus, — which constitutes a large part of what is now known about that ancient Roman statute. Africanus was the author of *Epistulae* and *Quaestiones*. In the Digest of Justinian are 131 extracts from the latter work.[112] § 77

**Aristo.** Titius Aristo (died after A.D. 105) is probably the name of this jurist who was a warm friend of Pliny the younger. Aristo was a pupil of Cassius.[113] He was the author of notes § 78

[107] The Republican, not the Imperial, Scaevola: see supra § 53.
[108] Roby, *Introduction to the Digest*, pp. lxxxvii.
[109] Clark, *Roman private law: sources*, p. 120.
[110] See infra § 89.
[111] xx, 1.
[112] Roby, *Introduction to the Digest*, p. clxx.
[113] See infra § 81.

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on some of the works of Labeo, Sabinus, and Cassius. Aristo was a member of the Council of Trajan. In the Digest of Justinian Aristo is referred to eighty times.[114]

§ 79 **Callistratus.** This 3d century jurist (died after[115] A.D. 211) was probably a Greek. He wrote these important works: *De cognitionibus*, *Edictum monitorium*, *De jure fisci*, *Institutiones*, and *Quaestiones*. In the Digest of Justinian there are 101 extracts from Callistratus.[116] The following passages are from Callistratus' works: "Custom is the best interpreter of the laws.[117] The good faith of witnesses should be diligently examined."[118]

§ 80 **Capito.** Caius Ateius Capito (consul suffectus[119] A.D. 5, died A.D. 22) was the great rival of the jurist Labeo. Capito obsequiously favored the Imperial government, and was preferred by Augustus to the sturdy Republican Labeo. In addition to his consulship, he received the appointment in A.D. 16 of *curator aquarum*[120] (water commissioner of Rome), which office he held until his death. Tacitus the historian calls him a skilled lawyer. Capito wrote the *Conjectanea*, and books on the pontifical law and the senatorial office. He is cited twice[121] in the Digest of Justinian. Capito was the founder of that party of Roman lawyers later known as the Sabinian school.

§ 81 **Cassius.** Caius Cassius Longinus (died c.[122] A.D. 69–79) was the grandson of the famous Republican jurist Tubero and great-grandson of the well-known Republican jurist Sulpicius.[123] Cassius was a member of that family to which

[114] Roby, *Introduction to the Digest*, p. clvi.

[115] See *Dig.* 1, 19, 3, 2, and Clark, *Roman private law: sources*, p. 140, note 220.

[116] Roby, *Introduction to the Digest*, p. cciv.

[117] *Dig.* 1, 3, 37.

[118] *Dig.* 22, 5, 3.

[119] A sort of *vice-consul* available to act as *consul* if the latter died or was disabled.

[120] Frontinus, *Aq.* 102.

[121] *Dig.* 8, 2, 13, 1 and *Dig.* 23, 2, 29.

[122] During the reign of Vespasian: Roby, *Introduction to the Digest*, p. cxlvi.

[123] See supra § 53.

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the conspirator against Caesar belonged. Consul[124] in A.D. 30, propraetor of Syria in A.D. 49, he was of stern and dignified character. Falling under the suspicions of Nero, he was banished in A.D. 65 to Sardinia, but was recalled by Vespasian during whose reign he died.

The fame of Cassius as a lawyer was great, so much so that the school headed by Capito and Sabinus was frequently called the Cassian.[125] The subsequent jurists Aristo[126] and Javolenus[127] wrote notes on some of Cassius' works. In the Digest of Justinian there are more than one hundred references to Cassius.[128]

**Celsus** *pater*. Juventius Celsus (*c.*[129] A.D. 70–96) was the successor of Pegasus as head of the Proculian school founded by Labeo. If Celsus is mentioned without *pater*, it means his son who was more famous than the father. Celsus *pater* is mentioned a few times in the Digest of Justinian.[130] § 82

**Celsus** (*filius*). Of Publius Juventius Celsus Titius Aufidius Oenus Severianus[131] (died after A.D. 129) very little is known. He was a member of the Emperor Hadrian's Council; and consul for the second time in A.D. 129, during which year the important statute SC. Juventianum was enacted, being named after this Juventius Celsus. This Celsus was the son of Celsus *pater*.[132] When the *pater* is not added to Celsus, the son alone is meant. Celsus succeeded his father as head of the Proculian school originally started by Labeo. § 83

Celsus was "a man of sharp temper and vigorous expression."[133] During the Middle Ages the expression *responsum Celsinum* was a proverbial expression for a sharp answer.[134]

[124] *Suffectus*, see supra § 80.

[125] Pliny, *Ep.* vii, 24: Gaius 1, 196; *Vatican Frag.* 1; Ulpian, *Regulae*, 11, 28; *Dig.* 1, 2, 2, 52; *Dig.* 39, 6, 35; *Dig.* 47, 2, 18.

[126] See supra § 78.

[127] See infra § 88.

[128] Roby, *Introduction to the Digest*, p. cxlviii.

[129] Clark, *Roman law: sources*, p. 112.

[130] See *Dig.* 12, 4, 3; *Dig.* 31, 20, 29; *Dig.* 17, 1, 39.

[131] *Id.* 5, 3, 20, 6, gives his full name.

[132] See supra § 82.

[133] Roby, *Introduction to the Digest*, p. clxi.

[134] Roby, *Id.*; Girard, *Mélanges*, vol. i, pp. 1–26 (Responsum Celsinum).

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This epithet thus arose: on one occasion Celsus was consulted by a certain Domitius Labeo,— the Digest[135] report (taken from Celsus' own *Digest*) gives an interesting account of the particulars: "Domitius Labeo to Celsus, greeting: 'I ask this question, whether one who has been summoned to write a will, and has written and sealed it, may be counted as one of the witnesses to the will?' Juventius Celsus to Labeo, greeting: 'Either I do not understand why you have consulted me, or your question is extremely foolish; for it is more than ridiculous to doubt whether a man can act as a witness when he himself has written the will.'" And the name of the questioner was also applied in the Middle Ages to proverbially denote a foolish question,—*quaestio Domitiana*.[136]

Celsus was a jurist of the first rank, and his opinions were very highly regarded by subsequent jurists. His style was epigrammatic and elegant. Celsus was the author of several very valuable works: the *Digesta* in thirty-nine books, *Quaestiones*, *Epistulae*, and *Commentarii*. In the Digest of Justinian there are 141 extracts and 176 citations from Celsus.[137]

The following passages from Celsus show his style: "To know the laws is not to apprehend their words, but their force and power.[138] Justice is the art of what is just and right.[139] That which the very nature of things prevents is not to be established by any law.[140] An action is nothing else than a right to obtain in court what is due to a person.[141] There is no obligation as to things which are impossible.[142] The seashore extends as far as the highest tide reaches.[143] A lawful marriage is not contracted against the will of the parties.[144] He is in possession who possesses in the name of another.[145] No indulgence is allowable for fear that is unfounded."[146]

§ 84 **Clemens.** Terentius Clemens (c.[147] A.D. 161) was the author of a famous book on the Leges *Julia et Papia Poppaea*,

[135] *Digest* of Justinian, 28, 1, 27.
[136] Roby, *Id.*; Girard, *Id.*
[137] Roby, *Introduction to the Digest*, pp. clxii–clxiii.
[138] *Dig.* 1, 3, 17.
[139] *Dig.* 1, 1, 1, pr.
[140] *Dig.* 50, 17, 188.
[141] *Dig.* 44, 7, 51.
[142] *Dig.* 50, 17, 185.
[143] *Dig.* 50, 16, 96.
[144] *Dig.* 23, 2, 22.
[145] *Dig.* 41, 2, 18.
[146] *Dig.* 50, 17, 184.
[147] Clark, *Roman private law: sources*, p. 120.

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thirty-five extracts of which are contained in Justinian's Digest. The following is from Clemens: "He is deemed in being, who at the time of the decedent's death was in utero."[148]

**Florentinus.** The jurist Florentinus (died after[149] A.D. 161) § 85 was the author of *Institutiones* in twelve books, from which forty-two extracts have been inserted in the Digest of Justinian, and a few in the Institutes of the same Emperor.[150] The following passages are from Florentinus: "Freedom is the natural right to do as one pleases except as prevented by violence or law.[151] Betrothal is the declaration and mutual promise of a future marriage.[152] The ownership of property deposited with another remains in the depositor."[153]

**Gaius.** This talented jurist (died after[154] c. A.D. 180) § 86 lived in the latter half of the 2d century during the reigns of Hadrian, Antoninus Pius, Marcus Aurelius, and Commodus. Gaius is perhaps the Roman jurist best remembered by moderns.[155] Who Gaius was is not known,—not even his family name is known, for "Gaius" is only a first name or praenomen. It is supposed that Gaius was a Greek. Certain German scholars make the very curious claim that Gaius was really a woman,[156]—but such seems naturally impossible because of Gaius' remarkable legal genius. Gaius undoubtedly was a public teacher and law professor. To Gaius are due the beginnings of Comparative Jurisprudence: he was the first to compare Roman law with that of other nations on specific points of law.[157]

[148] *Dig.* 50, 16, 153.

[149] *Dig.* 41, 1, 16 where he calls the Emperor Antoninus Pius "divus" (deceased). See Clark, *Roman private law: sources*, p. 139.

[150] Roby, *Introduction to the Digest*, pp. ccv–ccvi.

[151] *Dig.* 1, 5, 4.

[152] *Dig.* 23, 1, 1.

[153] *Dig.* 16, 3, 17, 1.

[154] Poste, Gaius[4], p. lv.

[155] On Gaius, see *Great jurists of the world*, pp. 1–16 (vol. ii, *Continental Legal History Series*, Boston, 1914).

[156] Deutsche Juristen-Zeitung, 1 Oct.-15 Dec. 1908. See also *Dig.* 35, 1, 63, 1, "Si verum amamus durior haec condicio est quam *illa* . . . 'si non nubserit' "; Gaius, 1, 144 and 190.

[157] Gaius 1, 193, as to contracts of married women and infants, — with the law of the Bithynians; Gaius 3, 96, as to obligations contracted by

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(§ 86) The great fame of Gaius arises from the royal road he made to the study of law when he composed his wonderful and very celebrated *Institutes*,[158] which have served as a model for all subsequent writers of text-books on law, especially elementary treatises, including our own Blackstone and Kent. Gaius' Institutes have never been surpassed in excellence as an elementary law book for students. His work reveals an accomplished teacher, possessed of the power of clear and precise analysis and using no superfluous or poorly chosen words. Gaius hit most successfully the happy medium "between pedantic precision and loose generality of statement."[159] The charm and excellence of his Institutes lived for centuries after his death. Justinian's Institutes are largely a revision of Gaius, made four centuries later. The manuscript of Gaius' Institutes is a modern discovery made by Niebuhr in A.D. 1816 in the library of the Chapter at Verona.[160]

Gaius was a very voluminous writer. He wrote a Commentary on the Provincial Edict in thirty-two books; a Commentary on the Edict of the praetor urbanus; fifteen books *Ad leges* (various statutes); a work *De verborum obligationibus*, a work *De manumissionibus;* a book on Trusts; books on Cases, Rules, Dowry, and Hypothec; his work of Institutes mentioned above; and the *Res cottidianae*, or, as later admirers called it, *Aurea*, which was intended to supplement the Institutes and went more into details for practitioners. In the Digest of Justinian are 535 extracts from Gaius.[161] With Gaius, a Sabinian, the opposition of the Sabinian and Proculian schools — founded by Capito[162] and Labeo[163] respectively — came to an end.

oath, — with the laws of foreign states upon search; Gaius, 1, 55, as to the paternal power, — with the law of the Galatians. Glimmerings of the value of comparative law study are found in Caesar, *De bell. Gall.* i, 55.

[158] *Institutionum juris civilis commentarii quattuor.*

[159] Roby, *Introd. to the Digest*, p. clxxxiii.

[160] The text is given in vol. i of *Collectio librorum juris ante-Justiniani* (Krueger, Mommsen, Studemund), Berlin. Among English translations of Gaius' Institutes are those of Poste, Muirhead, and Abdy and Walker. See infra vol. iii, § 948.

[161] Roby, *Introduction to the Digest*, p. clxxxii.

[162] See supra § 80.

[163] See infra § 90.

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The following are interesting excerpts from Gaius: "A man's house is his castle.[164] In the whole is also contained a part.[165] Now the law which we use relates either to persons, or to things, or to actions.[166] Actions in personam are not generally available against an heir.[167] Defendants rather than plaintiffs are to be more favorably treated.[168] Always in ambiguities (as to legacies), the more favorable interpretation should be preferred.[169] A creditor who permits the thing pledged to be sold loses his security.[170] Want of skill is equivalent to negligence[171]."

**Hermogenian.** The 4th century jurist Hermogenianus who lived during the reign of Constantine the Great (A.D. 306–37) is customarily included in the list of the jurists of the Early Empire, for in the Digest of Justinian there are 107 extracts from Hermogenian's works.[172] Hermogenian is probably[173] the same Hermogenian who was the author of the **Hermogenian Code** (Codex Hermogenianus), which is a collection of Imperial statutes compiled in the reign of Constantine the Great. § 87

Hermogenian was the author of *Juris epitomae* and perhaps *Fideicommissa* (the latter, however, is now thought[174] to be a work of the earlier jurist Ulpian[175]). The following extracts from Hermogenian show his style: "The State always has a right of lien.[176] It is useless to make a promise how another person will act.[177] Contumacious persons are those who, when they ought to obey, refuse to do so.[178] Sureties are

[164] *Dig.* 2, 4, 18. See Broom, *Maxims*, p. 321.
[165] *Dig.* 50, 17, 113.
[166] *Dig.* 1, 5, 1.
[167] *Dig.* 50, 17, 111, 1. See Broom, *Maxims*, p. 702.
[168] *Dig.* 50, 17, 125.
[169] *Dig.* 50, 17, 56.
[170] *Dig.* 50, 17, 183. See also, Phillimore, *Maxims*, p. 249.
[171] *Dig.* 50, 17, 132. See also Phillimore, *Id.* p. 230.
[172] Roby, *Introduction to the Digest*, p. ccviii.
[173] Clark, *Id.* Contra, Roby, *Id.* See infra § 126.
[174] Clark, *Roman private law: sources*, p. 143.
[175] See infra § 108.
[176] *Dig.* 49, 14, 46, 3.
[177] *Dig.* 49, 1, 65.
[178] *Dig.* 42, 1, 53, § 2.

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not liable unless they promise to pay or do something in the future.[179]"

§ 88 **Javolenus.** Of Caius Octavius Tidius Tossianus Javolenus Priscus (consul before A.D. 90) little is known except his very odd name.[180] He received the privilege of *jus respondendi* during Trajan's reign, and in A.D. 106 or 107 was a member of Trajan's Council. Javolenus succeeded Caelius Sabinus[181] as head of the Sabinian school of jurists originally started by Capito.[182] Javolenus wrote a large book of *Epistulae* and Commentaries on works of Labeo,[183] Cassius,[184] and Plautius.[185] In the Digest of Justinian there are 206 extracts of Javolenus' works.[186] The following passages were written by him: "The State cannot lose a public highway by non-user.[187] In all acts of transferring ownership there must be a meeting of the minds of the contracting parties.[188]"

§ 89 **Julian.** Publius Salvius Julianus (died before[189] A.D. 169) held high offices of state including the praetorship, consulship, and city prefect (praefectus urbi). He was also a member of the Emperor Hadrian's Council.[190] He was the grandfather of the unfortunate Emperor Didius Julianus, who succeeded Pertinax in A.D. 193 and was murdered in the same year.[191] The jurist Julian[192] succeeded Javolenus[193] as one of the heads of the Sabinian school originally founded by Capito.[194] So

[179] *Dig.* 46, 1, 65.

[180] Clark, *Roman private law: sources*, p. 114.

[181] See infra § 104.

[182] See supra § 80.

[183] See infra §90.

[184] See supra §81.

[185] Plautius was a jurist of note of about the time of Vespasian (A.D. 69–79) or later in the 1st century.

[186] Roby, *Introduction to the Digest*, p. clx.

[187] *Dig.* 43, 11, 2.

[188] *Dig.* 44, 7, 55.

[189] Clark, *Roman private law: sources*, p. 119.

[190] Hadrian reigned A.D. 117–138.

[191] Spartianus, *Did., Jul.*, 1.

[192] An interesting book on him has been written by Buhl, *Salvius Julianus*, Heidelberg, 1886.

[193] See supra §88.

[194] See supra § 80.

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great was his ability that the Sabinian school finally triumphed over its ancient rival the Proculian, which finally died out. Ultimately all became Sabinian.[195]

The Emperor Hadrian instructed Julian to revise and arrange the Edicts of the praetors — both the praetor for citizens (*praetor urbanus*) and praetor for foreigners (*praetor peregrinus*) — and parts of the edict of the curule aediles. When Julian had completed this great and difficult task, his work was ratified by a senatusconsultum[196] of the year A.D. 131. Thereafter references to the **Edictum perpetuum** meant Julian's compilation of the Edict.[197] And thereafter the Imperial rescripts performed the legislative function of praetors prior to Julian.

Julian was the author of several works of very great value. His principal work, the *Digesta*, was in ninety books. In the Digest of Justinian there are 456 extracts and 620 citations of Julian's works.[198] The following excerpts show Julian's style: "Whenever a phrase expresses two meanings, that is to be accepted which is the more fitted for accomplishing the act[199] (in question). A person is deemed to have entered into a contract in that place where he has obligated himself to perform.[200] He ceases to be a debtor who has a just defense not inconsistent with natural equity.[201] An inheritance (*hereditas*) is nothing else than an entire succession to a deceased person.[202]"

**Labeo.** Marcus Antistius Labeo (c. 50 B.C.—A.D. 20) was a pupil of several prominent jurisconsults of the last half century of the Republic, particularly the famous Trebatius,[203] from whom largely he received his legal training. Labeo was sternly opposed to the Imperial government of Augustus, being Republican in politics. And at times he was not afraid § 90

[195] Karlowa, *Röm. Rechtsgeschichte*, vol. i, p. 709.

[196] Const., *Tanta*, § 18; Const. Δέδωκεν, § 18. See also *Code* 4, 5, 10; *Code*, 6, 61, 5.

[197] See *Dig.* 31, 77, 29; *Code*, 2, 1, 3.

[198] Roby, *Introduction to the Digest*, pp. clxvii–clxviii.

[199] *Dig.* 50, 17, 67.

[200] *Dig.* 43, 7, 21.

[201] *Dig.* 50, 17, 66. See also Phillimore, *Maxims*, p. 214.

[202] *Dig.* 50, 17, 32.

[203] See supra § 53.

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(§90) to manifest his animosity to the Imperial rule, so much so that he rejected an offer of Augustus to make him consul,[204] for which Tacitus the historian greatly praises him.[205] Labeo's great rival was the jurist Capitol,[206] whom Augustus favored.

Labeo was profoundly versed in Roman legal antiquities, and was a stickler for the old constitution. Being a man of wide culture and trained in philosophy, Labeo's criticism of the Imperial régime undoubtedly operated along scientific as well as practical lines, and indirectly assisted in developing the Imperial law into a consistent whole. Labeo was the founder of that party of Roman lawyers later known as the Proculian school.

Labeo's knowledge of the Roman law of his day was eminently profound. It was Labeo who removed all doubts as to the validity of codicils,[207] in his day an entirely new development of the Roman law of testamentary disposition. The 2d century jurist Pomponius[208] says that Labeo wrote 400 legal treatises, many of which were still useful to lawyers living one hundred years after Labeo.

Labeo's two works, the *Pithana* and *Posteriores libri*, were well-known to subsequent jurists. The *Pithana* (Probabilities) was abridged by the 3d century jurist Paulus,[209] and there are thirty-four extracts of this abridgment of Labeo in the Digest of Justinian.[210] Labeo's *Posteriores libri* were abridged by the 2d century jurist Javolenus[211]; and in the Digest of Justinian there are seventy-four extracts of Labeo abridged.[212] Labeo wrote also works on the law of the Pontifices and on the XII Tables. Labeo is cited 540[213] times in the Digest of Justinian.

[204] *Consul suffectus*, explained, supra §80.
[205] *An.* iii, 75.
[206] See supra §80.
[207] *Inst.* 2, 25, pr.
[208] See infra §101.
[209] See infra §99.
[210] Roby, *Introduction to the Digest*, p. cxxvi.
[211] See supra §88.
[212] Roby, *Introduction to the Digest*, p. cxxvi.
[213] Roby, *Introduction to the Digest*, p. cxxvii.

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**Maecian.** Lucius Volusius Maecianus (died[214] A.D. 175) was instructor of law of the Emperor Marcus Aurelius, while heir to the throne, and subsequently became one of his Council. It is quite possible that Maecian was a pupil of the great jurist Julian.[215] Maecian, while governor of Alexandria, was killed in A.D. 175 by the army, because he took part in an insurrection against his Imperial pupil. § 91

Maecian was the author of several valuable works: *Fideicommissa*, *Publica*, on the lex Rhodia,[216] and a short elementary treatise addressed to Caesar — probably Marcus Aurelius. In the Digest of Justinian there are forty-four extracts and seventeen citations from Maecian.[217] The following passage is characteristic: "In doubtful expressions the best interpretation is the purpose of the person using them."[218]

**Marcellus.** Lucius Ulpius Marcellus (died after[219] A.D. 166) was a member of the legal Councils of Antoninus Pius and Marcus Aurelius, and probably Imperial legate pro praetore in Lower Pannonia. Some authorities identify him also with that Ulpius Marcellus sent by the Emperor Commodus to Britain on a military expedition against the Britons, and who was so successful that he just escaped being put to death in A.D. 184 by that Emperor.[220] § 92

Marcellus wrote notes on the jurists Julian[221] and Pomponius.[222] Marcellus was the author also of *Digesta* in thirty-one books, a work *Ad leges*, and a book of *Responsa*. The 3d century jurist Ulpian[223] wrote notes on Marcellus' writings. In the Digest of Justinian there are 161 extracts from Marcellus.[224] The following passages from Marcellus are interesting: "An heir does not inherit a criminal action against the

[214] Capitolinus, *Vita M. Ant.*, 25.
[215] *Dig.* 34, 2, 30, 7.
[216] See *Dig.* 14, 2, 9.
[217] Roby, *Introduction to the Digest*, p. clxxiii.
[218] *Dig.* 50, 17, 96. See Phillimore, *Maxims*, p. 296.
[219] Clark, *Roman private law: sources*, p. 123.
[220] Dio Cassius, lxxii, 8.
[221] See supra § 89.
[222] See infra § 101.
[223] See infra § 108.
[224] Roby, *Introduction to the Digest*, p. clxxxv.

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deceased[225] (ancestor). A gift mortis causa takes effect immediately.[226] When equity clearly is demanded relief must be furnished.[227] In a doubtful matter it is more just as well as safe to follow the more favorable interpretation.[228]"

§ 93 **Marcian.** Aelius Marcianus (died after[229] A.D. 217) was a jurist of great ability. He wrote several important works: *De appellationibus* (on Appeals); on Rules; on *Publica* (Criminal Procedure); *De delatoribus* (on Informers); on Hypothec; notes on the jurist Papinian's[230] *De adulteriis*; and *Institutiones* in sixteen books. In his Institutes Marcian pursued the plan of Gaius'[231] Institutes, but in greater detail and with an addition of Public Law.[232] The Institutes of Marcian were made use of by the 6th century Tribonian and his colleagues in writing Justinian's Institutes.[233]

Marcian was a heavy contributor to the Digest of Justinian, which contains 283 extracts from his works.[234] The following excerpts show Marcian's style. "The burden of proof always rests on him who makes a claim.[235] A gift is that which without any legal compulsion or duty is voluntarily bestowed.[236] (Of two dying together in a common disaster) neither is presumed to survive the other.[237]"

§ 94 **Modestinus.** Herennius Modestinus (died after[238] A.D. 244) is the last Roman jurist to succeed to eminence. He was probably a pupil of the famous jurist Ulpian.[239] Modestinus was at one time a law teacher to the Emperor Maximin's son, who with the father was murdered A.D. 238. In the year

[225] *Dig.* 39, 1, 22.
[226] *Dig.* 39, 6, 38.
[227] *Dig.* 50, 17, 183.
[228] *Dig.* 50, 17, 192, 1.
[229] Clark, *Roman private law: sources*, p. 141.
[230] See infra § 98.
[231] See supra § 86.
[232] Krueger, *Quellen*, etc., pp. 229, 300; Clark, *Id.* p. 141.
[233] See *Inst.* 4, 3, 1.
[234] Roby, *Introduction to the Digest*, p. cciv.
[235] *Dig.* 22, 3, 21.
[236] *Dig.* 50, 16, 214.
[237] *Dig.* 34, 5, 18, pr.
[238] Clark, *Roman private law: sources*, pp. 138, 139.
[239] See infra § 108.

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244 Modestinus was a high officer of state (a *praefectus vigilum*[240]) under the Emperor Gordian.

Modestinus was the author of fifteen works, the chief of which are: *Responsa* (nineteen books), *Pandekton* (twelve books), *Regulae* (ten books), *Differentiae* (nine books), *Excusationes* (six books), and Punishments (four books). The *Excusationes*[241] (grounds for relieving guardians from acting as such) are unique in that this work was not written in Latin, but in Greek. Modestinus contributed very heavily to the Digest of Justinian, which contains 344 extracts from Modestinus.[242]

The following passages show that the high reputation of Modestinus as a jurist was well deserved: "The scope of law is this: to command, forbid, allow, punish.[243] Subsequent statutes have more force in law than earlier ones.[244] A debtor is understood to be a person from whom against his will money can be exacted.[245] A legacy is a gift left by a will.[246] Whoever, although very remote in degree, become heirs to a deceased person are regarded as heirs just as much as if they are heirs of the first degree.[247] Persons related by affinity are the relatives of husband and wife.[248] There are no grades of affinity.[249]"

**Neratius.** Lucius Neratius Priscus (consul A.D. 83 or 98) was a member of the Emperor Trajan's[250] Council. At one time he was so influential with Trajan that it was supposed that he, and not Hadrian, was intended as his successor. Neratius and Celsus *filius*[251] succeeded Celsus *pater*[252] as joint heads of the school started by Labeo.[253] Neratius wrote some important works: the *Regulae*, *Membranae*, and *Responsa*. In the Digest of Justinian are 64 extracts and 128 citations

§ 95

[240] See the *Lis fullonum*, Bruns, *Fontes juris*[6], pp. 362, 3.
[241] See *Dig.* 17, 1.
[242] Roby, *Introduction to the Digest*, p. ccvii.
[243] *Dig.* 1, 3, 7.
[244] *Dig.* 1, 4, 4. See Brown, *Legal Maxims*, p. 23.
[245] *Dig.* 50, 16, 108.
[246] *Dig.* 31, 36. See Phillimore, *Maxims*, p. 340.
[247] *Dig.* 50, 17, 94.
[248] *Dig.* 38, 10, 4, 3.
[249] *Dig.* 38, 10, 4, 5.
[250] Reigned A.D. 98–117.
[251] See supra § 83.
[252] See supra § 82.
[253] See supra § 90.

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of Neratius' works.[254] The following are important passages: "Fraud is always punishable.[255] Nowhere in law should ignorance of fact and ignorance of law be put on the same footing; the wisest may be mistaken on construing a fact.[256] Three members make a corporation.[257]"

§ 96 **Nerva** (*pater*). Marcus Cocceius Nerva (died A.D. 33) was the grandfather of the Emperor Nerva.[258] Nerva the jurist succeeded Labeo[259] as head of his school. Nerva held high offices of state including the consulship[260] and *curator aquarum* (water commissioner of Rome). Nerva is cited over thirty times in the Digest of Justinian.[261] Nerva was the father of a jurisconsult less distinguished than himself, — Nerva *filius*. When Nerva alone is employed, it means Nerva *pater*.

§ 97 **Nerva** (*filius*). This jurist Nerva (praetor designate A.D. 65) is called *filius* to distinguish him from his father.[262] Nerva the son was joint head with the famous Proculus[263] of the school started by Labeo.[264] Nerva was probably the father of the Emperor Nerva. The opinions of Nerva the son are frequently cited in the Digest of Justinian.

§ 98 **Papinian.** Aemilius Papinianus (died A.D. 212) was the greatest of Roman jurists. He came to Rome from the East, perhaps from the province of Syria. At one time Papinian probably taught law at Berytus — modern Beirut — (which place during the Later Empire became the seat of a very famous Roman law school). Papinian[265] was a pupil of the

[254] Roby, *Introduction to the Digest*, p. clix.
[255] *Dig.* 44, 4, 11, 1.
[256] *Dig.* 22, 6, 2. See Phillimore, *Maxims*, p. 96.
[257] *Dig.* 50, 16, 85 (Neratius as reported by Marcellus).
[258] Reigned A.D. 96–8.
[259] See supra § 90.
[260] *Suffectus*, — explained supra § 80.
[261] Roby, *Introduction to the Digest*, p. cxliv.
[262] See supra § 96.
[263] See infra § 102.
[264] See supra § 90.
[265] On Papinian, see *Great jurists of the world*, pp. 17–31 (vol. ii of *Continental Legal History Series*, Boston 1914); Costa, *Papiniano*, 4 vols., Bologna, 1894–98.

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distinguished jurist Scaevola,[266] studying under him at the same (§ 98)
time when the future Emperor Severus did. Papinian became an intimate friend and connection by marriage of Severus, who made him *magister libellorum* ("master of petitions,"[267] whose duty was to draft the Imperial rescripts) and in A.D. 203 praetorian prefect (*praefectus praetorio*[268], the highest officer of state next to the Emperor). The praetorian prefects had not only large military power, but exercised the highest criminal and civil jurisdiction next to the Emperor.

Papinian's court must have been a remarkably able tribunal, for at one time the famous jurists Ulpian[269] and Paulus[270] were among his assistant judges.[271] This court visited the island of Britain during Severus' reign. Papinian was at York at the time of Severus' death in A.D. 211. Before Severus died, he commended to Papinian his two sons Caracalla and Geta. When Geta was murdered by his imperial colleague, Papinian was asked by Caracalla to justify the murder of his brother before the Senate and people, — but refused, saying that "It was easier to commit than to defend parricide."[272] This answer cost Papinian his life. But his death was thoroughly in accord with his lofty standard of human conduct that "whatever is immoral we should consider to be impossible."[273]

Papinian was the author of *Quaestiones* in thirty-seven books, *Responsa* in nineteen books, *Definitiones*, *De adulteriis*, and a treatise written in Greek[274] the Latin title of which would be[275] *De officio aedilium curulium*. The Digest of Justinian draws

[266] See infra § 105.

[267] Roby, *Introduction to the Digest*, p. cxci.

[268] Papinian had probably already served as judge (*assessor*) in the court of the praetorian prefect: *Dig.* 22, 1, 3, 3.

[269] See infra § 108.

[270] See infra § 99.

[271] Spart. *Pescen.* 7; Lampr. *Alex. Sev.* 26. See *Dig.* 12, 1, 40; Roby, *Id.* p. cxciii.

[272] Spartian, *Caracal.* 8.

[273] See *Dig.* 28, 7, 15.

[274] The Greek title was "Αστυνομικὸς μονόβιβλος."

[275] Karlowa, *Röm. Rechtsgeschichte*, i, 737; Clark, *Roman private law: sources*, p. 130.

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(§ 98) very heavily upon Papinian,—601 extracts and 153 citations[276] from the "prince of jurisconsults." Papinian followed the casuistic methods of Scaevola. The style of Papinian is clear and profound, very adequate in expression, not too many or too few words, the right word in the right place.[277] He is the master jurist.

The 4th century Constantine the Great took away[278] all authority from the notes of Ulpian and Paulus on Papinian, thus showing how high was his authority. The 5th century Theodosius II and Valentinian III decreed that in disputed questions of law the opinion of Papinian should be decisive as against all other jurists.[279] The 6th century Justinian decreed that third-year law students should be called *Papinianistae*[280] in memory of Papinian, whom Justinian praises as *splendissimus, summi ingenii, sublimissimus, acutissimus, pulcherrimus, maximus*.[281] In Papinian Greek and Roman culture found its highest combined expression. After Papinian Roman jurisprudence began to decline.

The following extracts from Papinian's works exhibit his brilliant legal genius: "This is considered a gift which is yielded under the compulsion of no legal right.[282] No one may change his purpose to the violation of another's right.[283] A person is not regarded as having lost property which he did not own.[284] The law always draws an inference of fraud not from the event alone but from the intention.[285] In all law particular words derogate from general words, and that expression is the most potent which points to a specific object.[286] Whatever has been paid by mistake, or illegally, or for a cause followed by

[276] Roby, *Introduction to the Digest*, p. cxcvi.

[277] See Esmarch, *Röm. Rechtsgeschichte*[2], § 133.

[278] *Cod. Theod.* 1, 4, 1.

[279] *Cod. Theod.* 1, 4, 3.

[280] Const. *Omnem*, § 4. A feast was always given to celebrate the first lecture on Papinian.

[281] See Const. *Deo auctore*, § 6; Const. *Omnem*, §§ 1, 4.

[282] *Dig.* 50, 17, 182.

[283] *Dig.* 50, 17, 75. See Phillimore, *Maxims*, p. 31.

[284] *Dig.* 50, 17, 83. See Phillimore, *Id.* p. 63.

[285] *Dig.* 50, 17, 79. See Phillimore, *Id.* p. 42.

[286] *Dig.* 50, 17, 80. See Phillimore, *Id.* p. 50.

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no effect, may be recovered by an action.[287] A rule of public policy cannot be changed by a private contract.[288]"

**Paulus.** Julius Paulus[289] (died after[290] A.D. 222) was a pupil of the famous jurist Scaevola.[291] Paulus was a contemporary of the jurist Ulpian[292] and with him was an associate judge in the court of the praetorian prefect — the highest court of the Empire save the Emperor in Council — while the brilliant jurist Papinian[293] was prefect. Paulus himself subsequently served as praetorian prefect under the Emperors Caracalla or Elagabalus and Alexander Severus. Whether Paulus shared the fate of Ulpian is not known. § 99

Paulus is the most prolific writer cited by the Digest of Justinian, being the author of seventy works, the chief of which are: a Commentary on the Edict in eighty books; *Quaestiones* in twenty-six books; *Brevia* in twenty-three books; *Responsa* in twenty-three books; Commentaries on the earlier jurists Sabinus[294] (sixteen books), Plautius[295] (eighteen books), Vitellius[296] (four books), and Neratius[297] (four books); Notes on the earlier jurists Scaevola[298] and Papinian[299]; Epitomes of Alfenus Varus[300] and Labeo[301]; *Ad leges* (Julia et Papia Poppaea); *Ad legem Sentiam; Fideicommissa; De censibus;*

[287] *Dig.* 12, 6, 54. See Phillimore, *Id.* p. 69.

[288] *Dig.* 2, 14, 38. See Phillimore, *Id.* p. 66.

[289] Although the modern French and many English Civilians (e.g. Amos, Bryce, Hunter, Muirhead, Walton) call him "Paul," the name Paulus is not a praenomen or first name, but a family name; and to avoid confusion it is preferable to retain the Latin family name (as is done for L. Aemilius Paulus who conquered Macedonia in 168 B.C.), — and such is the practice adopted by Sohm (Ledlie translator), Williams, and Leage in their modern Roman law works.

[290] Clark, *Roman private law: sources*, p. 132.

[291] See infra § 105.

[292] See infra § 108.

[293] See supra § 98.

[294] See infra § 103.

[295] Lived c. Vespasian or a little later.

[296] Lived prior to A.D. 98, — the end of Nerva's reign.

[297] See supra § 95.

[298] See infra § 105.

[299] See supra § 98.

[300] Died after 39 B.C.

[301] See supra § 90.

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(§99) *De jure fisci; De officio proconsulis; De adulteriis; Decreta; Regulae Sententiae*[302]*; Institutiones; Manualia;* and forty-eight monographs on all kinds of legal subjects.[303] More than a sixth of the Digest of Justinian is taken from Paulus.[304] Paulus contributed 2081 extracts,[305] — the largest contribution of any other Roman jurist, Ulpian alone excepted.

The following excerpts from Paulus are evidence of his ability as a jurist: "Ignorance of the law does not excuse; ignorance of fact does.[306] No one should be dragged out of his house to court.[307] Later statutes repeal earlier statutes.[308] Equity is to be regarded in all things especially in administering the law.[309] It is in accordance with natural equity that the benefits of property should go to him who suffers its inconveniences.[310] No one commits an actionable wrong unless he did that which he had no legal right to do.[311] No one is a wrongdoer except him who does what the law does not permit.[312] Whatever was originally void cannot be cured by lapse of time.[313] He acts fraudulently who sues for what he must restore.[314] Change of domicil is accomplished by actions, not by a mere declaration.[315] No one can leave to his heir a greater advantage than he himself had.[316] He who is silent does not admit as

[302] For the *text* see vol. ii, *Collectio librorum juris ante-Justiniani* (ed. Krueger, Mommsen, Studemund). There is a French translation of the Sententiae: see French translation of Corpus Juris Civilis, "Le trésor, etc." See also infra vol. iii, § 948.

[303] See Roby, *Introduction to the Digest*, p. ccii, for a list of these.

[304] Roby, *Id.* p. cciii.

[305] Roby, *Id.*

[306] *Dig.* 22, 6, 1. See Code 1, 18, 10 and Broom, *Legal Maxims*, p. 185.

[307] *Dig.* 2, 4, 21. See Broom, *Legal Maxims*, p. 321.

[308] *Dig.* 1, 3, 26. See also *Dig.* 1, 4, 4 (Modestinus) and Broom, *Legal Maxims*, pp. 23–5. With Paulus' statement goes well the following from *Code*, 1, 14, 7: "A law ought to be prospective and not retrospective in its operation."

[309] *Dig.* 50, 17, 90. See Phillimore, *Maxims*, p. 265.

[310] *Dig.* 50, 17, 10. See Phillimore, *Id.* p. 138.

[311] *Dig.* 50, 17, 151.

[312] *Dig.* 12, 6, 53. See Phillimore, *Id.* p. 71.

[313] *Dig.* 50, 17, 29. See Phillimore, *Id.* p. 82.

[314] *Dig.* 50, 17, 173, 3. See Phillimore, *Id.* p. 233.

[315] *Dig.* 50, 1, 20. See Phillimore, *Id.* p. 162.

[316] *Dig.* 50, 17, 120.

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well: but yet it is true that he does not deny.[317] He who can do the greater can do the less.[318]"

**Pegasus.** The jurist Pegasus (probably consul[319] A.D. 78 or 79) held all the high offices of state and several provincial governorships before becoming *praefectus urbi* (city prefect) in the reign of Vespasian. Two very important statutes[320] were enacted during his consulship,[321] the more important of which was the famous SC. Pegasianum concerning trust-bequests (*fideicommissa*). So able a jurist was he that he succeeded Proculus[322] as head of the school founded by Labeo.[323] Pegasus is cited twenty-eight times in the Digest of Justinian.[324] § 100

**Pomponius.** Sextus Pomponius (died after[325] A.D. 161) apparently was a pupil of the famous jurists Pegasus[326] and Aristo.[327] Pomponius was a voluminous writer. He was the author of a Commentary on Sabinus in thirty-five books, a Commentary on Q. Mucius[328] in thirty-nine books, a Commentary on the Edict in probably seventy-nine books, and other works entitled *Enchiridion* (Handbook), *Senatusconsulta*, *Epistulae*, *Variae lectiones*, and Notes on Aristo.[329] In the Digest of Justinian are 578 extracts and over 400 citations of Pomponius' works.[330] The following are characteristic of Pomponius: "The laws are adapted to cases which most frequently occur.[331] What is ours cannot, without an act of ours, be transferred to another.[332] Whatever any one suffers through his own fault does not damage him.[333] Whatever not owed § 101

[317] *Dig.* 50, 17, 142.
[318] *Dig.* 50, 17 10.
[319] *Inst.* 2, 23, 5.
[320] See Gaius 1, 31; 2, 254 and 258.
[321] His colleague was Pusio.
[322] See infra § 102.
[323] See supra § 90.
[324] Roby, *Introduction to the Digest*, p. cli.
[325] Clark, *Roman private law: sources*, p. 117.
[326] See supra § 100; *Dig.* 31, 43, 2.
[327] See supra § 78.
[328] Scaevola, the famous Republican jurist: see supra § 53.
[329] See supra § 78.
[330] Roby, *Introduction to the Digest*, p. clxxii.
[331] *Dig.* 1, 3, 3. See Broom, *Legal Maxims*, p. 35.
[332] *Dig.* 50, 17, 11. See Phillimore, *Maxims*, p. 278.
[333] *Dig.* 50, 17, 203. See Phillimore, *Maxims*, p. 247.

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is paid by mistake, this or as much may be recovered.[334] In every obligation in which no time (for performance) is set, performance is due immediately.[335] There is an opposition from the very nature of things between the words 'testate' and 'intestate.'[336]"

§ 102 **Proculus.** Sempronius[337] Proculus probably was a contemporary of the Emperor Tiberius[338] and his immediate successors. What is really known about him is the statement of Pomponius[339] that Proculus succeeded Nerva[340] as head of the school founded by Labeo.[341] Because of his eminence as a jurist the school founded by Labeo was finally known as the **Proculian.**[342] Proculus wrote a valuable work of opinions on cases submitted to him, entitled the *Epistulae.* In the Digest of Justinian there are 37 extracts and 134 citations of Proculus' works.[343] Proculus is always quoted with great respect, — for instance, *Proculum, sane non levem juris auctorem.*[344]

§ 103 **Sabinus** (Masurius). The jurist Masurius Sabinus (died c.[345] A.D. 64) was the first licensed jurisconsult to exercise the privilege of *jus respondendi,* being appointed by Augustus c.[346] A.D. 14. Sabinus was the author of three famous books on the *jus civile,* upon which three great subsequent jurists — Pomponius,[347] Ulpian,[348] and Paulus[349] — wrote celebrated commentaries.[350] But Sabinus' own work is not cited at all in the Digest of Justinian, although in the latter there are over 200

[334] *Dig.* 12, 6, 7.
[335] *Dig.* 50, 17, 14.
[336] *Dig.* 50, 17, 7.
[337] Given in *Dig.* 31, 47.
[338] Reigned A.D. 14–37.
[339] See supra § 101.
[340] See supra § 96.
[341] See supra § 90.
[342] Ulpian, *Regulae,* 11, 28; *Vatican Frag.* 266; *Inst.* 2, 25.
[343] Roby, *Introduction to the Digest,* p. cl.
[344] *Dig.* 37, 14, 17, pr.
[345] He commented upon the SC. Neronianum, the date of which may be as early as A.D. 54 or as late as 64. See Gaius 2, 218; Moyle, *Inst. of Justinian,* vol. i (5th ed.) p. 290; Clark *Roman law: sources,* p. 108, n. 41.
[346] Clark, *Id.*
[347] See supra § 101.
[348] See infra § 108.
[349] See supra § 99.
[350] Pomponius' commentary was in thirty-five books, Ulpian's in fifty-one, and Paulus' in sixteen books.

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references to Sabinus' other works.[351] Sabinus was the successor of Capito in his school, and gained such a reputation as a law teacher[352] that this school of law was finally called the **Sabinian.**

**Sabinus.** (Caelius). Cnaeus Arulenus Caelius Sabinus (consul[353] A.D. 69) was the successor of Cassius as head of the school started by Capito. He became a high authority during Vespasian's reign.[354] He is cited a few times in the Digest of Justinian.[355] When Sabinus alone is mentioned, it generally refers to Masurius Sabinus.[356] § 104

**Scaevola.** Quintus Cervidius Scaevola (died after[357] A.D. 193) was the principal legal adviser of the Emperor Marcus Aurelius. The Republican jurist Scaevola[358] is generally referred to as Q. Mucius; when Scaevola alone is used, it usually means the Imperial jurist Q. Cervidius. Scaevola was a Greek by birth. He adopted the casuistic method of setting forth Roman law, expounding it by answers to concrete legal cases. Among Scaevola's pupils were the future Emperor Septimius Severus,[359] the jurist Paulus[360] who later became eminent, and the brilliant Papinian[361] — greatest of Roman jurists. § 105

Scaevola wrote some very valuable and important works: *Digesta* in forty books; *Quaestiones* in twenty books; *Responsa* in six books; *Regulae* in four books; *De quaestione familiae;* and *Quaestiones publice tractatae.* The later jurists Paulus[362] and

[351] Such as his *Memoralia; Responsa; Ad edictum praetoris urbani; Ad Vitellium; Fasti; Commentarii de indigenis.* See Roby, *Introduction* to the *Digest,* p. cxliv.

[352] See supra § 74.

[353] *Suffectus,* — explained supra § 80.

[354] See Tacitus, *Hist.* i, 77: *Dig.* 1, 2, 2, 53. Vespasian reigned A.D. 69–79.

[355] See *Dig.* 21, 1, 14, 17, 20, 38 and 65; *Dig.* 35, 1, 72, 7.

[356] See supra § 103.

[357] Clark, *Roman private law: sources,* p. 128.

[358] See supra § 53.

[359] Spart., *Caracalla,* 8.

[360] See supra § 99.

[361] Papinian (see supra § 98) was a lecturer in Scaevola's school: Roby, *Introduction to the Digest,* p. cxci.

[362] See supra § 99.

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Tryphoninus[363] wrote notes on his works. Scaevola contributed very much to the Digest of Justinian, which contains 306 extracts and 61 citations of Scaevola.[364]

The following passages show his style: "It is theft when anyone knowingly has received money not owed to him.[365] Whatever is written in a will in such a way that it cannot be understood, is regarded as if it had not been written at all.[366] What the majority of a local governing body (curia) does is regarded as if done by all."[367]

§ 106 **Tertullian.** Perhaps the jurist Tertullianus who wrote his works prior[368] to A.D. 212 is the same person as the famous Christian Church father Quintus Septimius Florens Tertullianus[369] (c. 155–c. 122). The ecclesiastical Tertullian was well acquainted with Roman law, which he studied at his birthplace, Carthage, and later at Rome where, Eusebius says, Tertullian became an eminent jurist. The ecclesiastical Tertullian was converted to Christianity in his mature manhood, and he never forgot his earlier life as a lawyer in his later career as a Christian presbyter — his extant ecclesiastical works abound in legal figures and exhibit the professional art of the advocate.[370] But to connect Tertullian with the *SC. Tertullianum* is not well founded.[371]

The probabilities are that the ecclesiastical Tertullian is the same Tertullian who wrote *Quaestiones* in eight books and *De castrensi peculio.* In the Code[372] and Digest[373] of Justinian there are five extracts and four citations from Tertullian.[374]

[363] See infra § 107.

[364] Roby, *Introduction to the Digest,* p. clxxxvii.

[365] *Dig.* 13, 1, 18.

[366] *Dig.* 50, 17, 73, 3.

[367] *Dig.* 50, 1, 19.

[368] See Roby, *Introduction to the Digest,* p. clxxxix.

[369] See Roby, *Id.* p. cxc.

[370] See Glover, *The conflict of religions in the Early Roman Empire,* ch. x.

[371] This SC. is of uncertain date, being generally referred to the time of Hadrian (A.D. 117–38) or Antoninus Pius, (A.D. 138–61). See Roby, *Introduction to the Digest,* p. clxxvi.

[372] *Code,* 5, 70, 71.

[373] See particularly *Dig.* 29, 1, 23 and 33; *Dig.* 49, 17, 4: *Dig.* 1, 3, 27; *Dig.* 41, 1, 28; *Dig.* 29, 2, 30, 6.

[374] Roby, *Introduction to Digest,* p. clxxxix.

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**Tryphoninus.** Claudius Tryphoninus (died after[375] A.D. 213) § 107 is sometimes referred to as Claudius. Tryphoninus served with the jurist Papinian[376] in the Council of some Emperor,—probably Severus.[377] Tryphoninus seems to have been a pupil of the famous jurist Scaevola,[378] on whose *Digesta* he wrote notes.[379] There are eighty extracts in the Digest of Justinian taken from Tryphoninus' *Disputationes* written in twenty-one books.[380] The following is an interesting extract: "There is no indulgence in the law on account of age for him, who, while invoking the law, breaks the law."[381]

**Ulpian.** Domitius Ulpianus (died A.D. 228[382]) was a Syrian § 108 by birth, born of a Tyrian family.[383] It is quite likely that at one time Ulpian was professor at law at Berytus,[384] modern Beirut (which during the Later Empire became the seat of a very famous law school). Removing to Rome, Ulpian with the jurist Paulus[385] became an associate judge of Papinian,[386] the greatest of Roman jurists, then praetorian prefect. Under the Emperor Alexander Severus, Ulpian filled high offices of state,[387] and in A.D. 222[388] became praetorian prefect, the office next highest to the Emperor. Six years later while instituting reforms—probably trying to subject the military to the civil power—Ulpian lost his life in a tumult of the soldiers against him.

[375] There is a rescript of Caracalla's, A.D. 213, addressed to Tryphoninus; see *Code*, 1, 9, 1.

[376] See supra § 98.

[377] *Dig.* 49, 14, 50.

[378] *Dig.* 20, 5, 12, 1; *Dig.* 49, 17, 19, pr.; and supra § 105.

[379] *Dig.* 26, 7, 58, 1; *Dig.* 18, 7, 10.

[380] Roby, *Introduction to the Digest*, p. cxci.

[381] *Dig.* 4, 4, 37.

[382] Clark, *Roman law: sources*, p. 136.

[383] *Dig.* 50, 15, 1, pr.

[384] Bremer, *Die Rechtschulen*, p. 87; Roby, *Introduction to the Digest*, p. cxcvii.

[385] See supra § 99.

[386] See supra § 98.

[387] *Praefectus annonae*,—see *Code*, 8, 37 (38), 4; *Magister ad libellos*,—Spartianus, *Vita Pesc. Nig.* vii, 3, 4.

[388] On Dec. 1: *Code*, 4, 65, 4.

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(§ 108) Ulpian was the author of twenty-three works. His huge Commentary on the Edicts in eighty-three books is his greatest work. He also wrote an exhaustive Commentary on Sabinus[389] in fifty-one books, a treatise *Ad leges* (*Julia et Papia Poppaea*) in ten books, *Disputationes* in ten books, *De omnibus tribunalibus* in ten books, *De officio proconsulis* in ten books, *Fideicommissa* in six books, *De censibus* in six books, *De officio consulis* in three books, *Institutiones* in two books, *De officio praetoris tutelaris* in one book, *De appellationibus*, *De adulteriis* in five books, *De officio praefecti urbi*, *Regulae*,[390] *Pandectae*, *Ad legem Sentiam* in four books, and notes on the earlier jurists Papinian[391] and Marcellus.[392]

Of all Roman jurists Ulpian is the largest contributor to the Digest of Justinian, which contains 2464 extracts from Ulpian.[393] More than a third of Justinian's Digest is taken from Ulpian.[394] No other Roman jurist was paid by Justinian's commission such a tribute in the use of his writings as was Ulpian.

Ledlie's characterization of Ulpian's great genius is very illuminating: "Thanks to the liberal extent which Justinian's compilers drew on his works in composing the Digest, Ulpian has probably exercised a larger influence over European jurisprudence than any other jurist. . . . Ulpian was not a lawyer of the strong originative type like Labeo, Salvius Julianus, and Papinian, the type that may be said to create — or, rather, to discover the law. Ulpian's powers did not lie in the direction of arduous pioneer-work. His was rather the faculty of lucid, orderly exposition. . . . He is a consummate master of lucid expression — indeed with Gaius, the

[389] See supra § 103.

[390] The *text* of this work is given in vol. ii, *Collectio librorum juris ante-Justiniani* (ed. Krueger, Mommsen, and Studemund). Among English translations of the *Regulae* are those of Muirhead, and Abdy and Walker. See infra vol. iii, § 948.

[391] See supra § 98.

[392] See supra § 92.

[393] Roby, *Introduction to the Digest*, p. cc.

[394] Roby, *Id.*, p. cxcix.

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greatest master of clear exposition among the Roman jurists."[395]

The following extracts are evidence of Ulpian's greatness: "No one by his own wrongdoing can make his condition better.[396] No one can transfer a greater legal right to another than he himself had.[397] Nothing is so opposed to consent . . . as force and threats.[398] For honest advice there is no liability; but if fraud and cunning intervene an action for fraud will lie.[399] The beginning and the consideration of every contract are to be considered.[400] Ratification is equivalent to a command.[401] The partner of my partner is not my partner.[402] The act of the majority done publicly binds everybody.[403] In obscure phrases we follow the least obscure.[404] The judgment of a court is accepted as the truth.[405]"

§ 109 **Venuleius.** Venuleius Saturninus (died after[406] A.D. 161) presents an interesting problem of identification. Three persons of the name of Saturninus are mentioned in the Digest,[407] all of whom are of the age of the Antonine Emperors. Probably these three are one, and Venuleius' full name was Quintus Claudius Venuleius Saturninus.[408] He was governor of a province under Hadrian, an officer of state under Antoninus Pius, and praetor under Marcus Aurelius.

[395] *Great jurists of the world*, p. 39 (vol. ii, *Continental Legal History Series*, Boston, 1914).

[396] *Dig.* 50, 17, 134. See Phillimore, *Maxims*, p. 224.

[397] *Dig.* 50, 17, 54.

[398] *Dig.* 50, 17, 116.

[399] *Dig.* 50, 17, 47. See Phillimore, *Maxims*, p. 237.

[400] *Dig.* 17, 1, 8, pr. See Phillimore, *Maxims*, p. 336.

[401] *Dig.* 46, 3, 12, 4. See Brown, *Legal Maxims*, p. 674.

[402] *Dig.* 50, 17, 47, 1. See Phillimore, *Maxims*, p. 188.

[403] *Dig.* 50, 17, 160, 1. See Phillimore, *Id.* p. 76.

[404] *Dig.* 50, 17, 9. See Phillimore, *Id.* p. 390.

[405] *Dig.* 50, 17, 207. See Phillimore, *Id.* p. 287.

[406] He wrote certainly after the death of Hadrian in A.D. 138, and probably lived into the reign of Marcus Aurelius. See Clark, *Roman private law: sources*, p. 121.

[407] *Dig.* 48, 19, 15 and 16; *Dig.* 17, 1, 6, 7; *Dig.* 34, 2, 19, 7; *Dig.* 12, 2, 13, 5; *Dig.* 4, 3, 7, 7; *Vatican Frag.* 223.

[408] Clark, *Roman private law: sources*, p. 122; Karlowa, *Röm. Rechtsgeschichte*, i, p. 730. Contra: Roby, *Introduction to Digest*, p. clxxxiv.

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Venuleius was the author of five well-known works: *Stipulationes*, *Actiones*, *De officio proconsulis*, *Publica*, and *De poenis paganorum*. In the Digest of Justinian there are seventy-one extracts from Venuleius.[409] The following passages show his style: "Buildings go with the land.[410] There is no room for conjecture as to that which is definite and ascertainable.[411]"

§ 110 **Vivian.** The jurist Vivianus must have lived during the 1st century A.D., for he reports[412] decisions of Sabinus,[413] Cassius,[414] and Proculus.[415] His own opinions were so valuable as to be referred to by the 2d century jurists Pomponius,[416] Scaevola,[417] and Ulpian.[418] Vivian is cited sixteen times in the Digest of Justinian.[419]

(4) SOURCES OF ROMAN LAW DURING THE EARLY EMPIRE

§ 111 1. **Statutes of the assemblies (leges, plebiscita).** Although the Republican legislative assemblies were not abolished by Augustus in establishing the Empire and under the first two Emperors continued to pass laws, yet with the gradual increase of the Imperial power the authority of the various comitia declined. By the end of the 1st century A.D. the Senate had superseded the various legislatures[420] of the Roman people as the law-making body. In the reign of Nerva[421] was passed the last recorded lex. There are, however, some noteworthy Imperial leges, such as the celebrated marriage laws enacted under Augustus — the leges Julia[422] and Papia Poppaea.[423]

[409] Roby, *Introduction to the Digest*, p. clxxxiii.
[410] *Dig.* 43, 24, 10.
[411] *Dig.* 45, 1, 137, 2. See Phillimore, *Maxims*, p. 368.
[412] See *Dig.* 29, 7, 14.
[413] See supra § 103.
[414] See supra § 81.
[415] See supra § 102.
[416] *Dig.* 13, 6, 17, 4; see supra § 101.
[417] *Dig.* 29, 7, 14; see supra § 105.
[418] *Dig.* 4, 2, 14, 5; see supra § 108.
[419] Roby, *Introduction to the Digest*, p. cliv.
[420] See supra § 49.
[421] A. D. 96–8.
[422] *Lex Julia de maritandis ordinibus*, enacted A.D. 4.
[423] Enacted A.D. 9.

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§ 112 **2. Praetorian and other Edicts.** For the first century and a half of the Empire the *jus honorarium* as embodied in the edicta of magistrates was a source of Imperial Roman law. But when in A.D. 131 the jurist Julian, acting under instructions from the Emperor Hadrian, finished the great work of compiling the praetorian and aedilician Edicts, the Edictal law became fixed and permanent.[424] Thereafter the jus honorarium ceased to grow, for magistrates were compelled to issue the Edictum Hadrianum as arranged by Julian. Ambiguities were decided by the Emperors, and supplements were added by Imperial statues.

§ 113 **3. Opinions of jurisconsults (responsa prudentium).** An important source of law during the Early Empire were the opinions of the Imperial jurists, particularly those jurisconsults licensed by Augustus and succeeding emperors to exercise the *jus respondendi* — thus imposing upon judges the authority of their decisions.[425] Responsa of jurisconsults were a source of Early Imperial Roman law until the middle of the 3d century,[426] if not later.[427]

§ 114 **4. Decrees of the Senate (senatusconsulta).** In A.D. 16 through the efforts of the Emperor Tiberius an attempt was made to transfer to the Senate[428] the legislative power of the assemblies of the people, which was quite successful.[429] The Senate continued to put forth more and more enactments, the validity of which as statutes was fully recognized prior to the reign of Antoninus Pius[430] and the middle of the 2d century.

At the close of the 1st century, senatusconsulta had entirely superseded leges: thereafter Senate acts or decrees were the normal source of law during the Early Empire until the reign

[424] See supra § 61.

[425] See supra §§ 68 et seq.

[426] The last jurisconsult who arose to eminence was Modestinus (died after A.D. 244): see supra § 94.

[427] See supra § 68.

[428] During the Republic the Senate rarely legislated: see supra § 49.

[429] *Dig.* 1, 1, 2, 9; Tacitus, *Annales*, 1, 15: "Tum primum e campo comitia ad patres translata sunt." But some authorities hold that this passage refers to the electoral comitia and not to the legislative bodies.

[430] A.D. 138–61.

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of Septimius Severus in the beginning of the 3d century,[431] when senatusconsulta were in turn superseded by the statutes of the Emperors. The decrees of the Senate were regarded by the Imperial jurists as statutory *jus novum*, — law often widely different from the old jus civile and more in harmony with the principles of the Edict.

A senatusconsultum was quite different in form from a lex in that it lacked the imperative character of the latter[432]: the presiding Consul or Emperor as *princeps senatus* laid his proposed law before the Senate in an *oratio* and this received the approval (*auctoritas*) of the Senate; the next step would have been to send the bill to the comitia[433] for its action, — but under the Empire this reference soon ceased. And at the end of the 2d century the supremacy of the Emperor had become so pronounced that the *oratio principis* was quoted as law instead of the Senate resolution which gave it legislative sanction.

§ 115 **5. Imperial Statutes (constitutiones).** By virtue of his supreme authority the Emperor possessed power to legislate directly. Originally and perhaps for the first century of the Empire, the Emperors were invested with absolute power by a *lex regia* which gave him Imperial authority, thus apparently recognizing the supremacy of the Senate — the Emperor was only the "first citizen" of the State.[434] Later the existence of such lex regia became presumed.[435]

Until however the decline of senatusconsulta became rapid, the Emperor legislated but rarely. But beginning with the age of the Antonines statutory and direct expressions of the Emperor's will — known under the general term of "Constitutions" — became an ever-increasing source of Roman law. And although in the 3d century A.D. the Senate theoretically had the right to legislate, yet it is doubtful if it actually legislated after the reign of Septimius Severus.[436]

[431] A.D. 193–211.

[432] For examples of senatusconsulta, see Bruns, *Fontes juris*[6], pp. 160–202.

[433] Usually the *Comitia tributa*.

[434] See supra § 55.

[435] See Const. *Deo auctore*, § 7 (one of the prefaces to the Digest of Justinian).

[436] His reign ended A.D. 211.

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From this time onward down into the 6th century and the reign of Justinian, Imperial statutes became the normal source of the Later Imperial Roman law.

The Imperial Constitutions were of three sorts: edict, decree, and rescript. An Edict (*edictum*) was a general ordinance or statute. A Decree (*decretum*) was a judgment in a suit submitted to the Emperor. It made law: courts must thereafter apply the Imperial solution to analogous cases. A Rescript (*rescriptum*) was an opinion on a point of law, — called technically a Mandate (*mandatum*) when addressed to an official who had solicited the Emperor's advice, or Epistle (*epistola*) when the rescript was addressed to an individual.

### (5) Influence of Mature Roman Law on Early Christianity

**St. Paul.** While Roman law was proceeding to its maturity, § 116
the birth of Christianity occurred and the Christian religion became formulated. Roman jurisprudence provided early Christian teachers, from the apostolic times of the 1st century down to Constantine the Great, with language and modes of thought which were used to express the truths desired to be propagated. For three centuries apostles, martyrs, bishops, and clergy drew on the storehouse of Roman law for linguistic weapons and ethical doctrines.

St. Paul was the only apostle with a legal training, and his personifications in his writings are always legal. Into the language of theology St. Paul incorporated the significance legally of the Roman law *adoption*[437]; it is peculiar to St. Paul and no other sacred writer has used it. St. Paul frequently uses the legal metaphor of the Roman law hereditas (*inheritance* or *heirship*[438]) and the phraseology of the Roman law of *guardianship*.[439]

**Ritual of the Church.** The ritual of the early Christian § 117
Church reveals the influence of Roman law: parts of the modern ceremony of *baptism*[440] must have been originally framed upon

[437] Ball, *St. Paul and the Roman law*, pp. 4 et seq.
[438] *Id.* p. 13.
[439] *Id.* p. 14.
[440] Ball, *Id.* pp. 12, 38 et seq.

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the pattern of the Roman stipulatio (question and answer) and the claiming with the rod (vindicta) as practised in the Roman law adoption. The Roman stipulatio (question and answer) is also seen in the *marriage service*[441] even as existing to-day.

§ 118 **Tertullian.** In the writings of Christian writers of the 2d and 3d centuries the influence of Roman law phraseology is marked. During these centuries Roman jurisprudence was at the height of its intellectual activity. Tertullian, one of the fathers of the church, who was converted to Christianity in A.D. 185 — five years after the death of the Emperor Marcus Aurelius—was the first to employ the word "Trinity" to express the Godhead.[442] Tertullian employed the word "Person" to differentiate the Father, Son, and Holy Spirit. He imported into the sphere of theology the Roman legal conception of a *person*[443] as an individual acting in some particular capacity or condition, and also the corollary that a single person might play many parts (personae); hence God, although a unit, might play several parts (personae) namely Father, Son, and Holy Spirit. How came Tertullian to get this conception of the manifold personality of the Deity? He was a lawyer[444] by profession, and had practised a number of years at Rome prior to his conversion.

§ 119 **Lactantius.** Another noted Church father, Lactantius, who died in A.D. 325, — the very year of the Nicene Council — called his principal work *The Divine Institutes*,[445] wherein he tries to explain the mystic relationship between God and Christ on the basis of the Roman law relationship of the paterfamilias and his son in power. The reason of this is that Lactantius was once a lawyer. He gave his book a name hitherto immemorially reserved for Roman legal text-books, namely "Institutes."[446]

[441] Ball, *St. Paul and the Roman law*, pp. 43 et seq.
[442] *Id.* p. 82.
[443] *Id.* p. 80.
[444] Perhaps actually the noted jurist Tertullian: see supra § 106.
[445] Ball, *Id.* pp. 92–4.
[446] Ball, *St. Paul and the Roman law*, p. 92.

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## II. The Later Empire, A.D. 284–1453: from Diocletian to the overthrow of the Eastern Roman Empire by the Turks

**Constitutional and political changes made by Diocletian and Constantine.** § 120 Diocletian and his successor Constantine the Great completely reorganized the Roman Empire, transforming it into a highly **centralized open absolutism.** The principate and duarchy came to an end. The autocratic power of the Emperor was no longer concealed as during the Early Empire. All power was vested in the Emperor. The **person of the Emperor** was made more highly respected. Diocletian, and after him Constantine, adopted the diadem and robes of an Asiatic monarch. This transition was easy, for during the Early Empire arose the use of the words "sacred"[447] to denote the "Imperial" dignity of a living Emperor, and "divine"[448] to mean a "deceased" Emperor.

Constantine, who had a consummate genius for organization far greater than that of Diocletian, centralized thoroughly the Roman Empire, and gave it much of the final form which it preserved for over 1100 years from the first to the last Constantine.[449] Moreover, this later Roman imperialism has exercised enormous influence on modern governments, and has reappeared in the monarchies of Western Europe. The organization of the Roman Catholic Church is largely modeled on the Imperial organization of Constantine.

Constantine made **the military power subject to the civil.** He deprived provincial governors of their military authority enjoyed under the Early Empire, which had been too often used to resist the Emperors themselves. The control of the

[447] I.e. the adjective *sacer, sacra,* etc., usually means "Imperial."

[448] I.e. the adjective *divus* or *divinus* usually means "deceased." On the decease of every Emperor the custom was introduced, beginning at the death of Augustus, that the Senate might solemnly place him among the gods or deify him. See Gibbon, *Decline and fall of the Roman Empire,* vol. i, ch. iii.

[449] But the 8th century Leo III returned to Augustus' policy as to the organization of provinces, see infra § 173.

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(§ 120) army was centralized in the Emperor, who appointed distinct military officers not exercising civil authority. Constantine thus stamped out military despotism and local revolts.

Constantine completed Diocletian's work of **reorganizing the provincial governments.** He divided the entire Empire into four parts, called **prefectures:** the East, Illyria, Italy, and Gaul. Each prefecture was ruled by a praetorian prefect subject to the Emperor. The prefectures were then subdivided into **dioceses,** each administered by a vicar who was subject to the praetorian prefect. The dioceses were subdivided into **provinces,** each under the authority of a provincial governor known as rector, president, duke, or count. Below these were the cities and towns, — the municipal corporations. The government of each city consisted generally of a city council (curia), over which magistrates known as duumvirs[450] or quattuorviri[451] presided. The inhabitants of the municipality were later[452] protected in their rights by a defensor populi, — somewhat analogous to the old Republican tribune.[453]

Constantine **removed the capital** of the Empire **from Rome to Byzantium.** The natural situation of Byzantium, renamed **Constantinople** in honor of Constantine, was most favorable for the exercise of a central authority and for purposes of defense and commerce. Constantine adorned his new capital lavishly, and invited the senators and noble families of old Rome to remove to the new city. Doubtless many of them accepted this invitation which was scarcely distinguishable from a command. To those who maintained a house in the new capital Constantine granted hereditary estates from the Imperial domains in Pontus and Asia.[454] He endowed the new capital with a Senate,[455] and gave to the citizens the privileges

[450] Two in number.

[451] Four in number.

[452] In the reign of Valentinian I., A.D. 364–75.

[453] As to the law concerning all these administrative officers, see infra vol. iii, § 956.

[454] Gibbon, *Decline and fall of the Roman Empire*, vol. ii, ch. xvii.

[455] Gibbon, *Id.*

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of the old capital Rome,[456] including frequent and regular distributions of food, wine, and oil.[457]

Constantine also transformed the **Imperial court** on an Oriental basis. He instituted a **new nobility** with high-sounding titles: the *nobilissimi*, *illustres*, *spectabiles*, *egregii*. A large retinue attended the Emperor at court, and gave him obeisance. The absolute powers of the Emperor were exercised through members of his court, whom the Emperor ennobled for their services. **The departments of state were managed by court officials**[458]: the Imperial palace, by the Lord Chamberlain,[459] the reception of ambassadors and the supervision of court officials, by the Chancellor; public revenues, by a Lord Treasurer; the proclaiming of laws, by the Quaestor; the management of the Emperor's private property, by the Lord of the Privy Purse; the Imperial bodyguard, by two military officers of high rank. The debt of modern royal courts to the Imperial court of Constantine for their organization is a large one.

Constantine's political wisdom was shown by the **adoption of Christianity** as a state religion.[460] The Empire had already become largely Christian. Constantine did not, however, prescribe the pagan worship, which was tolerated for many years later. "The new capital of the East gloried in the singular advantage that Constantinople was never profaned by the worship of idols.[461] Constantinople alone enjoyed the advantage of being born and educated in the bosom of the (Christian) faith."[462]

**Names descriptive of the Roman Empire from the 4th to the middle of the 15th century.** The Roman Empire from Diocletian to Constantine XIII has been described by many names: "Lower," "Later," "Greek," "Graeco-Roman," § 121

[456] *Cod. Theod.* 14, 13; *Cod. Justinian*, 11, 21.

[457] Gibbon, *Id.*; *Cod. Theod.* 14, 16.

[458] See infra vol. iii, § 956.

[459] This and immediately following English titles are but approximations of the Latin titles.

[460] See infra § 145.

[461] Gibbon, *Decline and fall of the Roman Empire*, vol. ii, ch. xx.

[462] *Id.*

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(§ 121) "Byzantine," "Eastern," "Eastern Roman." But although these descriptions are convenient and useful, the strictly correct name is *Roman*: for an unbroken continuity existed from Augustus to the last Constantine. To the very end the Emperor always proudly bore the title of "Roman Emperor" and his subjects were always "Romans." The heir to the throne was called "Caesar," as was the usage in Diocletian's time. The Emperor himself never lost his peculiar title of "Augustus" (Σέβαστος, in Greek),—which memorialized the first Roman Emperor, the nephew of Julius Caesar.

To describe the Roman Empire from Diocletian onward as **"Lower,"**[463] or better, **"Later,"** very aptly marks the great actual difference in the character of the Empire before and after Diocletian: the Roman Empire under Diocletian and his successors is characterized by the definite disappearance of the influence of the Senate — the principate of the Early Empire,[464] with the veiled power of the Emperor as "first citizen"[465] of the State, gave way to the undisguised authority of the Emperor as an absolute monarch.

The very words **"Greek," "Graeco-Roman,"** and **"Byzantine"** summarize the unique Graeco-Roman civilization which radiated from Constantinople — the New Rome which for centuries was the bulwark of civilization protecting all Western Europe from being submerged in gross barbarian darkness. The terms **"Eastern"** or **"Eastern Roman"** have a double meaning. Loosely, these designate the Eastern half of the Roman Empire for about a century (A.D. 395–476) prior to the Teutonic destruction of the Roman Empire in Western Europe, when two lines of Emperors ruled as colleagues at Rome and Constantinople although practically independent. But the legitimate use of the terms "Eastern" or "Eastern Roman" is to distinguish, after the year 800, the original Roman Empire at Constantinople from the so-called revived Western Roman Empire established by Charlemagne, and which lasted until 1806 when Napoleon put an end to it.

[463] In French, *Bas-empire.*

[464] In French, *Haut-empire.*

[465] *Princeps.*

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§ 122 **Diocletian's abandonment of the Republican civil procedure of the Early Empire soon obliterated all remaining differences between the jus civile and jus honorarium.** With the advent of the autocratic government of the Later Empire came a pronounced change in the Roman law of this epoch. **In the year 294** Diocletian abolished [466] the centuries-old system of civil procedure originating under the Republic, the cardinal feature of which was that, although the magistrate heard the pleadings in a lawsuit,[467] he did not ordinarily hear the evidence as a judge, but remitted by a short decree (formula) the case for trial to a referee (judex) who was a private citizen.[468]

Diocletian insisted that all causes be tried by the magistrates themselves. Only in exceptional cases was the hearing of the evidence to be delegated to a referee,[469] and even this exceptional practice soon disappeared: in A.D. 342 by a statute of the sons of Constantine, remittance by formula of a case for trial was absolutely prohibited.[470] The result was the obliteration of whatever remained of the old Republican distinction between jus civile and jus honorarium.[471]

§ 123 **The 5th century Valentinian Law of Citations.** A long preparatory step toward the codification of Roman law was the statute [472] of Valentinian III, published from Ravenna in **A.D. 426.** By this statute, which was originally drawn up

[466] *Code*, 3, 3, 2; Hunter, *Roman law*[4], p. 1013; Sohm (Ledlie[3]), *Roman law*, p. 299; Muirhead, *Roman law*[2], p. 360.

[467] The object of the pleadings was to reach a joinder of issue (*litiscontestatio*), — points in dispute which one party denies and the other affirms.

[468] See infra vol. ii, "Civil procedure," §§ 847, 851.

[469] *Code*, 3, 3, 2.

[470] *Code*, 2, 57, 1. See also *Code*, 2, 57, 2.

[471] Not only did the antithesis between proceedings *in jure* and *in judicio* formally disappear, but there was also a practical obliteration of the difference between actions *in jus* and *in factum*, and *actiones directae* and *utiles*. The interdict was transformed into an *actio ex interdicto*. Furthermore, it became possible to liberally amend the pleadings, and to give judgment for specific performance instead of solely for pecuniary damages. Finally, execution by officers of the law became the rule. See Muirhead, *Roman law*[2], p. 361.

[472] *Cod. Theod.* 1, 4, 3. Valentinian was then a child seven years old: Gibbon, *Roman Empire*, vol. iii, ch. xxxiii.

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under the Eastern Emperor Theodosius II,[473] official authority was bestowed on the extant writings of five great Roman jurists **Papinian,**[474] **Paulus,**[475] **Gaius,**[476] **Ulpian,**[477] and **Modestinus**)[478] and made their writings citable as authorities for the law in courts of justice. But if Papinian differed from the other four jurists, his statement of the law was to prevail.[479] The Valentinian law[480] also provided that generally[481] all extracts of the writings of earlier jurists used by these five in their own works should possess legal authority, if properly verified. The effect of this enactment of Valentinian III was to restrict the sources of Roman law to the writings of the five great jurists and the Imperial statutes.

### (1) Ante-Justinian Codes of Statutes and Collections of Jurisprudence

§ 124 **The Roman law of the Later Empire prior to Justinian exhibited a tendency toward codification, which finally was accomplished by Justinian.** The fourth and latest of the forces transforming Roman law into a world law was Imperial legislation,[482] which put the finishing touches on the task of making Roman law into a law fit for universal use and finally accomplished the gigantic task of embodying it in a codification. "The logical succession to judicial precedents is codification." It was true in the Roman law and will be found true in American law. The plan of digesting and codifying the Roman law was formed by that wonderfully many-sided man Julius Caesar himself and by Ofilius, his friend, the most celebrated of all the Republican jurists.[483] But Caesar's premature death removed all possibility of realization of this plan: over five centuries elapsed before it was realized.

[473] Hunter, *Roman law*[4], p. 79.
[474] See supra § 98.
[475] See supra § 99.
[476] See supra § 86.
[477] See supra § 108.
[478] See supra § 94.
[479] *Cod. Theod.* 1, 4, 3.
[480] It is translated into English by Muirhead, *Roman law*[2], p. 363.
[481] The notes of Paulus and Ulpian on Papinian were expressly excepted: *Cod. Theod.* 1, 4, 3 and 1, 4, 1.
[482] See supra § 59.
[483] See supra § 53.

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During the 200 years from Constantine the Great to Justinian, attempts were made to codify Roman law, — but with little success. The first step toward codification by Imperial legislation was naturally to revise and condense the statutes (constitutiones) of the Emperors, which were now after several centuries of Empire very numerous. The ante-Justinian official Roman codes of statutes[484] are illustrations of this line of work. All endeavors to codify Roman law made by Emperors prior to Justinian did much to pave the way for the accomplishment of this mammoth task by Justinian himself. In his reign the final step to the goal of true and complete codification was taken: a successful compilation of the writings of the Roman jurists, — the Digest of Justinian.

The ante-Justinian codes and collections are of three sorts: official Roman codes of statutes,[485] private unofficial Roman collections of jurisprudence, and Teutonic codes or Leges Romanae Barbarorum.

### A. OFFICIAL ROMAN CODES OF STATUTES

**The 3d century Gregorian Code.** A certain jurist by the § 125
name of Gregorius compiled, perhaps **about A.D. 295,** a collection of Imperial statutes (constitutiones) from Hadrian to Diocletian.[486] Mommsen thinks[487] that Gregorius was then a professor in the law school of Berytus (modern Beirut). Only a few fragments of the Gregorian Code was extant, — these are found chiefly in the ante-Justinian private unofficial Roman collections of jurisprudence[488] and some of the Leges Barbarorum.[489] For instance in the Roman law of the Burgundians[490] is this reference: "A freeman is required to

[484] The nearest approach to a real codification was the ante-Justinian Code of Theodosius II, which was part of a plan to form a general code to supersede *all* existing law. See infra § 127.

[485] See infra §§ 125 et seq.

[486] A.D. 117–284.

[487] *Z. d. Sav. Stift.*, xxii, pp. 139 et seq.

[488] The *Consultatio*, *Collatio*, and *Vatican Fragments*: see infra §§ 129–30, 132.

[489] The *Breviarium* of Alaric, and *Lex Romana Burgundiorum*. See infra § 133.

[490] 44, 4.

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support his former master; this is in accordance with the Gregorian law as to the duties of freedom."[491]

The Gregorian Code was quite a large work, arranged in books and titles.[492] Although originally only a private unofficial work, the Gregorian Code subsequently received statutory sanction from the Emperors Theodosius II and Valentinian III.[493]

§ 126 **The 4th century Hermogenian Code.** Very late in the 3d century or in the next century, **before A.D. 324,** was compiled during the reign of Constantine the Great a collection of contemporary[494] Imperial statutes, principally those of Diocletian,[495] known as the Hermogenian Code. Probably the jurist Hermogenian was its author.[496] The Hermogenian Code seems to have been supplementary to the Gregorian Code. It is much smaller, arranged only in titles.[497] Very likely there were subsequent additions to it, for its latest statute is one of the year 365. Only a few fragments of the Hermogenian Code are extant.[498] The Hermogenian Code, originally the work of private hands, subsequently obtained statutory sanction from the Emperors Theodosius II and Valentinian III.[499]

§ 127 **The 5th century Theodosian Code.** A little over a century after the death of Constantine the Great the Eastern Emperor

[491] *Id.*

[492] Extant fragments are collected in Krueger, Mommsen, and Studemund, *Collectio librorum juris ante-Justiniani*, vol. iii. pp. 236–42, Berlin, 1895. It is translated into French by Daubanton, *Le trésor de l'ancienne jurisprudence romaine* (one of the volumes of the French translation of the Corpus Juris: see infra vol. iii, § 952).

[493] Muirhead, *Roman law*², p. 366.

[494] It contains no ante-Diocletian constitutions.

[495] Especially those of A.D. 293–4.

[496] See supra § 87.

[497] The extant text is collected in Krueger, Mommsen, and Studemund, *Collectio librorum juris ante-Justiniani*, vol. iii, pp. 242–5, Berlin, 1895. The Hermogenian Code is translated in French by Daubanton (*Le trésor*, etc. — in French translation of Corpus Juris, see infra vol. iii, § 952).

[498] These come from the same sources as the Gregorian Code: see supra § 125.

[499] Muirhead, *Roman law*², p. 366.

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Theodosius II published, to go into effect in **A.D. 439,**[500] an official collection[501] of the Imperial constitutions. Valentinian III, Western Emperor in the same year, promulgated it for the Western Empire. Of all ante-Justinian codes the Theodosian is the nearest approach to a general codification. It covers all the branches of law both public and private, including criminal, fiscal, administrative, military, ecclesiastical, and civil law.[502] It was Theodosius' purpose to also codify the writings of the jurists, but it never was accomplished until the reign of Justinian.

The Theodosian Code exerted enormous influence on all barbarian law succeeding the conquest of the Western Empire: the Visigoths, Ostrogoths, Franks, Lombards, Burgundians made up their Romano-Barbarian codes[503] largely from it. The Theodosian Code also gives us a picture of industrial Rome in her last stage of paternalism, corrupting the energies of her citizens. Finally, the Theodosian Code is our principal authority for the legislation of the early Christian Emperors.

The Theodosian Code consists of sixteen books, divided into titles[504] and constitutions or leges. The leges are frequently subdivided into numbered sections. The Theodosian Code is cited as such and such a book, title, lex or constitution, section, — as for example "Cod. Theodos. 4, 19, 1, 2." With the Theodosian Code are now also included the **Sirmondian Constitutions**[505] or Imperial statutes mostly on ecclesiastical matters issued A.D. 331–425, being named after Sirmondus who first published them in 1631.[506]

**The 5th century post-Theodosian Novels.** Between the promulgation of the Theodosian Code and Justinian's reign § 128

[500] See *Novels* of Theodosius, 1 De Theodosiani codicis auctoritate (in Mommsen-Meyer edition of the Theodosian Code, vol. 2, Berlin, 1895).

[501] Called *Codex Theodosianus*, or subsequently often *Theodosianus*.

[502] Justinian's Code drew heavily upon the Theodosian: see Mommsen-Meyer edition of Theodosian Code, vol. 1, 1 pp. xiii et seq., Berlin, 1895.

[503] See infra § 133.

[504] Some of the titles are no longer extant: e.g., in book 1, titles 17–19; in book 33, titles 19–29; in book 5, parts of titles 11–12; in book 6, title 1 and part of title 2.

[505] See vol. 1, part 2 of Mommsen-Meyer edition of the Theodosian Code.

[506] Krueger, *Quellen*, p. 294.

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many Imperial statutes were enacted, which received the name of Novels (novellae leges). There were several collections of these all published by Western Emperors until A.D. 476 and the fall of the Western Empire. These statutes are generally referred to as post-Theodosian Novels. The extant post-Theodosian constitutions consist of the **Novels of Theodosius II,**[507] the **Novels of Valentinian III,**[508] the **Novels of Marcian,**[509] the **Novels of Marjorian,**[510] the **Novels of Leo and Severus,**[511] and the **Novels of Anthemius.**[512] These Imperial statutes, so far as extant, are now published in modern editions of the Theodosian Code.[513]

### B. PRIVATE UNOFFICIAL ROMAN COLLECTIONS OF JURISPRUDENCE

§ 129 **The 4th or 5th century Comparison of the Mosaic and Roman laws (Lex Dei quam praecepit Dominus ad Moysen,**[514] **or, as it is now called, Collatio legum Mosaicarum et Romanarum).** This work is clearly of the Christian era. It was written **between A.D. 390 and 428.**[515] Its author is unknown. That he was an ecclesiastic seems certain.[516] Perhaps St. Ambrose, bishop of Milan, or even St. Jerome, was the author.[517] The Collatio[518] is an attempt to compare by parallel passages the Mosaic and the Roman law, especially as to torts and

[507] Of the years A.D. 438-44, 26 in number.

[508] Of the years 438–54, 36 in number.

[509] Of the years 450–55, 5 in number.

[510] Of the years 458–60, 12 in number.

[511] Of the years 463–5, 2 in number.

[512] Of the year 468, 3 in number.

[513] See Mommsen-Meyer edition of the Theodosian Code, vol. ii, pp. 1–208, Berlin, 1895.

[514] The original title.

[515] Girard, *Textes de droit romain*[3], p. 543; Hyamson, *Mos. et Rom. leg. coll.* pp. xlix–lvi.

[516] See Girard, *Id.* But Hyamson, *Id.* p. lvi, thinks the author was probably some obscure ecclesiastic who was familiar with Roman law.

[517] *Id.*

[518] It is text given in Girard, *Textes de droit romain*[3], pp. 543, 577; Krueger, Mommsen, and Studemund, *Collectio juris ante Justiniani*, vol. iii, pp. 137–98, Berlin, 1895; Hyamson, *Mosaicarum et Rom. legum collatio*, London, 1913, who also gives an English translation thereof.

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punishments. It is one of the earliest known works on comparative law.

The author drew upon the Pentateuch for divine law, and took his human law from the writings of the Roman jurists Gaius,[519] Papinian,[520] Paulus,[521] Ulpian,[522] and Modestinus,[523] and also from the Gregorian and Hermogenian Codes.[524] His method is to cite first from Moses, then from Roman jurists and the ante-Theodosian Codes. For instance, *title 6, Of incestuous marriage*, reads in part as follows. "*Moses says:* 'Whoever shall have married his father's wife has shamed his father; let them both die; both are guilty. And whoever shall have married his daughter-in-law let them both die; both are guilty.'[525] *Paulus in his Sententiae, book 2, under the title of marriage says:* 'Between parents and children . . . marriage cannot be contracted; nor can we marry our niece or grandchild. Nor is it lawful to marry a father-in-law, or daughter-in-law, or a step-daughter, or a step-mother, without incurring the penalty for incestuous marriage.' *The Hermogenian under the title of marriage says:* 'The Emperors Diocletian and Maximian, Augusti, to Flavian. Imperial clemency is extended to those who have by mistake contracted an incestuous marriage, so as to relieve them from the penalty.' "

§ 130 **The 4th or 5th century Vatican Fragments (Fragmenta Vaticana).** In the year 1821 Cardinal Angelo Mai discovered in the Vatican Library at Rome[526] a manuscript now known as the Fragmenta Vaticana, which contains extracts from the writings of the Roman jurists Papinian,[527] Paulus,[528] Ulpian,[529] and others as well as some Imperial statutes dating from Marcus Aurelius to Valentinian I, inclusive.[530] It also quotes the Gregorian and Hermogenian Codes,[531] but not the Theodosian. What was the original title of the Vatican Fragments is not

[519] See supra § 86.
[520] See supra § 98.
[521] See supra § 99.
[522] See supra § 108.
[523] See supra § 94.
[524] See supra §§ 125, 126.
[525] See *Leviticus*, 20.
[526] See Girard, *Textes de droit romain*[3], p. 482.
[527] See supra § 98.
[528] See supra § 99.
[529] See supra § 108.
[530] A.D. 163–372.
[531] See supra §§ 125, 126.

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known; apparently it was a book of practice used in the Western Empire.[532] The Fragmenta Vaticana[533] throw special light on the subjects of dowry, sale, gifts, guardianship, and usufruct.

§ 131 **The 5th century Syrian-Roman Law Book.** In the East sometime between the Theodosian Code and that of Justinian was published a manual of Roman law, originally written in Greek, and translated into Syriac, Arabic, and Armenian. Much use was made of the Syrian Law Book[534] in the ecclesiastical courts. It is not an especially valuable collection of Roman law, but its importance lies in the evidence it gives as to the tenacity of Hellenic law in the East, which did not wholly disappear even after the Edict of Caracalla,[535] making Roman law applicable to all citizens throughout the Empire.[536]

§ 132 **The 5th or 6th century Consultatio (Consultatio veteris cujusdam jurisconsulti).** This collection[537] consists of answers given by a jurisconsult as to questions of law submitted to him, — his opinions being fortified by citations of texts of the Sententiae of Paulus[538] and the Gregorian, Hermogenian, and Theodosian Codes.[539] The Consultatio received its name from the famous French jurist Cujas,[540] who first published it in 1577.[541]

### C. TEUTONIC CODES OR LEGES ROMANAE BARBARORUM

§ 133 **Three 6th century Roman codes compiled by German Kings from ante-Justinian law.** The fall of the Roman Empire

[532] Muirhead, *Roman law*[2], p. 370.

[533] The extant text is given by Girard, *Textes de droit romain*[3], pp. 482–542: Kruger, Mommsen, and Studemund, *Coll. juris ante-Just.* vol. iii, pp. 20–106, Berlin, 1905.

[534] It is edited by Bruns and Sachau, *Syrisch-römisches Rechtsbuch aus dem fünften Jahrhundert*, Leipzig, 1880. German translation of the versions of the Syrian Law Book began to be published by Sachau in 1907 (Berlin).

[535] See supra § 58.

[536] See Sohm (Ledlie[3]), *Roman law*, p. 121.

[537] The extant text is found in Girard, *Textes de droit romain*[3], pp. 510–606; Krueger, Mommsen, and Studemund, *Collectio juris ante-Justiniani*, vol. iii, pp. 203–20, Berlin, 1895.

[538] See supra § 99.

[539] See supra §§ 125, 126, 127.

[540] See infra ch. iii, "France," § 245.

[541] Girard, *Id.* p. 590.

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in the West was in A.D. 476. But the barbarian Teutonic (§ 133) tribes who overran Western Europe respected the Roman law in their conquered territories, anciently belonging to the Empire. A man was judged according to the law of that nation to which he belonged. A dual system of law grew up: one for the Teutonic conqueror, the other for the conquered Roman. Early in the 6th century the Teutonic Kings, in addition to their own Germanic laws, caused to be prepared and promulgated compilations of Roman law drawn from the documentary sources of ante-Justinian law. Three such Teutonic Leges Romanae were conspicuous: one of the Ostrogoths in Italy, one of the Visigoths in Southern France, and one of the Burgundians. The last ceased to be effective when the Visigoths conquered Burgundy.

The Italian compilation was the **Edict of Theodoric** (*Edictum Theodorici*). It was made by the direction of King Theodoric **A.D. 500**[542] during his residence at Rome. It bound both Roman and Ostrogoth for over fifty years, until Justinian's reconquest of Italy and promulgation of his own Code.[543] The Sententiae of the jurist Paulus[544] and the Theodosian Code[545] are the chief sources of Theodoric's Edict.

The compilation made in France was the **Code of Alaric II,** also known as the **Breviary** (*Breviarium Alaricianum*[546] or *Lex Romana Visigothorum*). It was published at Aire, Gascony, in **A.D. 506.** Alaric's legislation is based on the Theodosian Code,[547] the Sententiae of the jurist Paulus[548] and the Institutes of Gaius.[549] The Breviary has preserved to our own time portions of ante-Justinian Roman law to be found nowhere else; and from it Western Europe largely acquired what little knowledge it had of Roman law prior to the dissemination of Justinianean Roman law through the Bologna revival which began late in the 11th century.[550] Furthermore, the

[542] Savigny, *Geschichte d. röm. Rechts*, vol. ii, p. 172 et seq. Others date it A.D. 506: Hunter, *Roman law*[4], p. 89.

[543] The Edict of Theodoric was thus superseded A.D. 554.

[544] See supra § 99.

[545] See supra § 127.

[546] Or *Alarici*.

[547] See supra § 127.

[548] See supra § 99.

[549] See supra § 86.

[550] See infra chapter iii, "Italy," § 211.

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Code of Alaric marks the beginning of medieval Spanish law.[551]

The Burgundian compilation was the **Lex Romana Burgundiorum,** published by King Sigismund in **A.D. 517.** Its sources were principally the Breviary of Alaric, the Sententiae of the jurist Paulus,[552] and a work of Gaius.[553]

### (2) The Codification of Justinian, — Now Known as the Corpus Juris

§ 134 **The reign of Justinian.** Flavius Anicius Justinian, the most famous of all the Emperors reigning at Constantinople, was born in 483 in a small town[554] of Illyria, that western part of the Balkan peninsula which borders on the Adriatic from Fiume to Durazzo. His family was probably Slavic. He took the name Justinian[555] from his uncle the Emperor Justin I, who adopted him and made him heir to the Imperial throne. Justinian was given the best possible education at Constantinople,[556] including very likely a legal training. The reign of Justinian (**A.D. 527–65**), lasting nearly forty years, is renowned as an age of famous men and great events. The Roman Empire regained many of her ancient boundaries in the West through the reconquest of Italy and Africa by the famous generals of Justinian. Justinian adorned Constantinople with a majestic architectural monument of his greatness, — the still extant celebrated Church of Sancta Sophia, unsurpassable in beauty, which has survived the Roman Empire herself only to be degraded into a mosque by her Moslem conquerors. But Justinian's legislation is his grandest monument and everlasting fame.

§ 135 **The 6th century codification of Justinian, — now called the Corpus Juris Civilis.** The marvelous work of codification promulgated **A.D. 529–34** by the Emperor Justinian, which

[551] See infra chapter iii, "Spain," § 280.

[552] See supra § 99.

[553] See supra § 86.

[554] Tauresium, identified generally with the modern Küstendil, although Usküb has been suggested.

[555] His own name was originally Sabatius.

[556] See Holmes, *Age of Justinian and Theodora*, vol. i, p. 302.

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marks the final step in the codification of Roman law, is the (§ 135)
greatest event of the 6th century. Justinian's magnificent codification is a concise consolidation and amalgamation in permanent shape of his own statutes,[557] the statutes of his predecessors,[558] and the writings of the Roman jurists,[559] — the whole being arranged harmoniously and down to date by excluding obsolete law or reforming it.

This gigantic task was accomplished in the short space of six years, largely under the masterly guidance of three men — **Tribonian, Theophilus,** and **Dorotheus.** Tribonian was a great statesman and served Justinian for many years as a praetorian prefect — the highest officer of state next to the Emperor. Theophilus[560] and Dorotheus were renowned professors at the law schools of Constantinople and Berytus (modern Beirut) respectively.

When his codification was completed, Justinian reserved to the Emperor the power to settle all disputed points. He then forbade the writing of any commentaries[561] concerning his codification, — a rather idle prohibition not destined to be forever observed.[562] Justinian always referred to his grand codification under the several parts of Code, Digest or Pandects, and Institutes.[563] And this mode of description continued for many centuries. But Justinian's codification as a whole, including the Novels, is now called by the general

[557] The *Novels* of Justinian or statutes enacted 535–65 were not part of the original codification, although incorporated by medieval and modern Civilians.

[558] The so-called "jus novum."

[559] The so-called "jus vetus," especially the "jus civile" literature and sources.

[560] Theophilus, professor of law at Constantinople, is famous for his Greek translation of the Institutes of Justinian which exerted enormous influence in later Byzantine or post-Justinian Roman law: see infra § 169.

[561] Const. *Tanta,* § 21 (Monro. Eng. transl. of Digest, vol. i, p. xxxiv). But the making of Greek translations and notes for difficulties were expressly excepted: *Id.*

[562] See infra "Post-Justinian law," § 169.

[563] This is the order in which the several parts were actually codified; it is not the chronological order of publication which is Code (first edition), Institutes, Digest, and Code (second edition). See infra §§ 136 et seq.

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descriptive name of "Corpus Juris Civilis,"[564] an expression[565] which came into use late in the 16th century from the famous French jurist Denis Godefroy (Gothofredus), who first used this term in his 1583 edition of Justinian's monumental codification.[566] The expression "Corpus Juris," so familiar and frequent in modern legal literature, is but a correct shortened form of Godefroy's title.

§ 136 **The Code of 529, second and revised edition, 534.** Justinian's grand codification was begun in the year 528, when he ordered the drafting of a Code of the Imperial statutes. Two editions of this Code were published, the second edition being five years later than the first. The second edition alone is now extant.

1. **First edition.** Justinian had been on the throne only a little over six months when he appointed a commission of ten, among whom were the famous **Tribonian** and **Theophilus,** to make a collection of all the non-obsolete statute law of the Gregorian,[567] Hermogenian,[568] and Theodosian[569] Codes.[570] A little over a year later this new Code of statutes (*Codex Justinianus*[571]) was published in 529.[572]

2. **Second edition.** Five years later in 534 the original edition of the Code was superseded by a revised edition, — the present Code of Justinian which has survived to modern

[564] The latest and best edition of the text is Mommsen, Krueger, Schoell, and Kroll, *Corpus Juris Civilis, editio stereotypa*, 3 vols., Berlin, 1880–1908 (for further particulars, see infra vol. iii, § 952). There are complete French and German translations of the Corpus Juris, and a partial English translation: see infra vol. iii, § 952).

[565] In one of his statutes Justinian uses the expression "corpus juris" (see *Code*, 5, 13, pr. 1). The historian Livy (iii, 34) calls the XII Tables "corpus omnis Romani juris."

[566] Smith, *Dict. of Antiquities*, "Corpus Juris Civilis." See also infra § 247.

[567] See supra § 125.

[568] See supra § 126.

[569] See supra § 127.

[570] Const. *Haec quae necessario* (Feb. 13, 528), the first preface to the Code of Justinian.

[571] It is sometimes called the *Codex vetus*. It is no longer extant.

[572] April 7, 529: see Const. *Summa rei publicae*, the second preface to the Code of Justinian.

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times. Justinian promulgated the second and final edition (§ 136) of his Code (*Codex Justinianus repetitae praelectionis*) the next year after the publication of the Institutes and Digest, in order to bring the Roman statute law down to date.[573] This new revised edition was prepared by **Tribonian, Dorotheus,**[574] and others. With its publication the grand codification of Justinian came to an end.[575]

The Code of Justinian contains much public law, including ecclesiastical, criminal, constitutional, fiscal, military, and municipal corporation law, not found in the Digest of Justinian. His Code contains about 4700 statutes, very many of which were rescripts. Fully one-half are abridged. The earliest statute is one of Hadrian's. About one-half of the statutes in the Code of Justinian antedate Constantine the Great. Justinian's Code drew very heavily on the Gregorian[576] and Hermogenian[577] Codes[578] for Imperial statutes (constitutiones) prior to Constantine the Great. More than six-sevenths of the titles[579] of the Theodosian Code[580] are repeated in the Code of Justinian.[581]

The Code of Justinian is divided into twelve **books** which are subdivided into **titles** and **laws** (leges) or **constitutions,** long laws being again divided into **section** paragraphs. All the laws are arranged chronologically, each law commencing with the names of the Emperor and the person to whom it is addressed — the *inscriptio*, and each law ending with the time and place of its promulgation — the *subscriptio.*

[573] The second edition of the Code was published and enacted Nov. 16, 534, see Const. *Cordi nobis*, the last preface of the Code of Justinian.

[574] Professor at the law school of Berytus (modern Beirut).

[575] The Digest was completed *before* the Code of 534.

[576] See supra § 125.

[577] See supra § 126.

[578] See Mommsen-Meyer, *Cod. Theod.* vol. 1, 1, p. xiii, et seq. where the titles of Justinian and these Codes (also the Theodosian Code) are arranged side by side.

[579] See Mommsen-Meyer, *Id.*

[580] See supra § 127.

[581] The Theodosian Code has 375 titles, 307 of which are repeated in the Code of Justinian.

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§ 137 **The Digest or Pandects of 533.** The successful outcome of his codification of the Imperial statute law led Justinian in the following year 530 to turn his attention to the jurisprudential law.[582] He commissioned **Tribonian,** who was the director of Justinian's law reforms and who figures in every part of Justinian's entire codification, to undertake the task of codifying the writings of the jurists.[583] He empowered Tribonian to associate with him as many colleagues as the latter saw fit. Tribonian appointed sixteen colleagues,[584] all of whom were lawyers and three of whom were renowned professors in Roman law schools — **Theophilus,**[585] **Dorotheus,**[586] and **Anatolius.**[587] Tribonian and his associates[588] were empowered to select extracts from the writings of the jurisconsults. These were to be an exposition of the law not covered in the recently completed Code of statute law. Justinian gave Tribonian a wide discretion in his selection of material. Tribonian and his associates were not limited to the instruction of Valentinian's Law of Citations.[589]

Soon after Tribonian and his associates began work, they found that there were controverted points of law which could be settled only by Imperial legislation. To decide these moot questions Justinian promulgated between the years 529 and 532 a series of enactments which later received the name of the **Fifty Decisions**[590] (*Quinquaginta decisiones*).

[582] Const. *Deo auctore* (Dec. 15, 530), the first preface to the Digest (Monro. Engl. transl. of the Digest, vol. i, p. xiii). It is also found in *Code*, 1, 17, 1.

[583] Const. *Deo auctore.*

[584] Const. *Tanta*, last preface to the Digest, § 9 (Monro. Engl. trans. of Digest, vol. i, p. xxv).

[585] At Constantinople. He had served on the Code commission of 528: see supra § 136.

[586] At Berytus (modern Beirut).

[587] *Id.*

[588] These were Constantine, a high official; Theophilus and Cratinus, professors of law at Constantinople; Dorotheus and Anatolius, professors of law at Berytus; and eleven lawyers from the Constantinople Bar, — Stephanus, Mena, Prosdocius, Eutolmius, Timotheus, Leonides, Plato, Jacobus, Constantine, and Johannes. See Const. *Tanta*, § 9.

[589] See supra § 123.

[590] Inst. 1, 5, 3 "nostras constitutiones, per quas, suggerente Triboniano . . . antiqui jus altercationes placavimus."

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(§ 137) To accomplish their task Tribonian and his associates divided themselves into three sections or subcommittees, each authorized to make extracts from a particular group of writers: (1) **the jus civile subcommittee,** which dealt with the 'Sabinian group' of writers (Sabinus[591] and his commentators, who wrote on the jus civile); (2) **the jus honorarium subcommittee,** which dealt with the 'edict group' of writers on the Praetorian and other edicts; (3) **a third subcommittee,** which dealt with writers on separate legal questions and cases, especially Papinian.[592] This plan of work pursued by Tribonian and his associates is a modern 19th century discovery by a German Romanist Bluhme,[593] being now known as **Bluhme's discovery.**

Either the whole commission or an editorial committee received and distributed under suitable rubrics the material selected by these three sections, and then revised[594] the entire work so as to remove superfluities and contradictions.[955] To make an authoritative statement of the existing Roman law, the commission, wherever necessary, altered the text of doctrines and interpolated words and phrases. These alterations are known as **interpolations** or **Tribonianisms.**[596] The entire work was then divided into fifty books.[597] All these

[591] See supra § 103.

[592] See supra § 98.

[593] Savigny, *Zeitschrift für gesch. Rechtswiss.*, vol. iv (1820), p. 257 et seq. See also Roby, *Introduction to Digest*, p. xlviii et seq.; Hunter, *Roman law*[4], p. 91; Sohm (Ledlie[3]) *Roman law*, p. 123; Muirhead, *Roman law*[2], pp. 381, 384; Krueger, *Quellen*, pp. 335–6; Girard, *Manuel de droit romain*[5], p. 80, note 1. "Bluhme" is the correct spelling (see Girard, Krueger, Sohm, Roby, Savigny). Hunter and Muirhead write "Blume."

[594] Muirhead, *Roman law*, p. 381.

[595] There are, however, some irreconcilable contradictions in the Digest, in spite of Const. *Tanta*, § 15, wherein Justinian says that the Digest is free from contradictions.

[596] *Interpolationes, emblemata Triboniani:* see Roby, *Introduction to Digest*, ch. v; Muirhead, *Roman law*[2], p. 382; Girard, *Manuel de droit romain*[5], p. 79.

[597] These fifty books are arranged in seven parts (Const. *Tanta* § 1). This division is apparently made in view of the reorganization in 533 (the same year of the promulgation of the Digest) of the courses of study in Roman law schools: see Const. *Omnem rei publicae.*

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(§ 137) things were done in compliance with the instructions contained in the decree appointing Tribonian and the commission.[598]

Each **book** of the Digest is usually subdivided into **titles,**[599] which are again divided into **laws** or **fragments** (leges, fragmenta), some of only a few words, others occupying several pages. The long laws, or better fragments, are divided into **section** paragraphs. Each fragment is an extract from the writings of some Roman jurist — the name of the jurist and the title of his treatise being stated at the commencement of the fragment, in pursuance of Justinian's instructions.

The books and titles of the Digest have a sequence which, although quite advantageous for Roman users, is rather puzzling to modern users of this collection. The explanation is that the Digest, in compliance with Justinian's instructions,[600] follows substantially the order of the Praetor's Edict as arranged and permanently consolidated by the jurist Julian.[601]

The Tribonianean commission worked with such speed that three years after the inception of their labors they accomplished the task of codifying the jurisprudential law. Their selection of extracts was promulgated by Justinian in 533 as the Digest or Pandects (*Digesta seu Pandectae*).[602] It reduced the jurisprudential law ninety-five per cent of its original bulk, — from more than 3,000,000 lines to 150,000 and from 2,000 books to 50.[603]

The oldest extant manuscript of the Digest is the **Florentine manuscript,** so called because since 1406[604] it has been preserved at Florence.[605] This manuscript was written in

[598] Const. *Deo auctore*, §§ 7–10. (Dec. 15, 530.)

[599] Three books of the Digest (nos. 30–2) on legacies are not subdivided into titles.

[600] Const. *Deo auctore*, § 5.

[601] See supra §§ 61, 89.

[602] Const. *Tanta* and Δέδωκεν, (Dec. 16, 533) in preface to the Digest; see also Const. *Omnem rei publicae*, also a Digest preface. Both are translated into English by Monro, *Digest*, vol. 1, pp. xiii et seq.

[603] Const. *Tanta*, § 1.

[604] In this year Florence conquered Pisa, and took the manuscript as part of the booty. Traces of this manuscript exist at Pisa as early as 1284.

[605] It is now in the Laurentian-Medicean Library. See Roby, *Introduction to Digest*, ch. xvii; Girard, *Manuel de droit romain*[5], p. 81.

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the 6th or 7th century by Greek copyists. There is an interesting tradition that it came originally from Constantinople and was used by Justinian himself. The profoundly learned Mommsen during the 19th century revised[606] the Florentine manuscript and settled many difficulties then not solved. Now the text is fixed probably as accurately as it ever will be. Justinian states[607] that a list of Roman jurists furnishing extracts for the Digest would be prefixed to it; such a list exists in the Florentine manuscript and is known as the **Florentine Index.** In it are the names of thirty-eight jurists and 207 treatises in 1544 volumes.[608] This is not, however, a complete list of the Imperial Roman jurists.[609] Over one-half of the Digest of Justinian is drawn from the writings of the jurists Ulpian[610] and Paulus,[611] the former contributing more than a third of the Digest.[612]

**The Institutes of 533.** When the Digest was almost completed, Justinian caused to be prepared an elementary treatise for the use of law students — the Institutes (*Justiniani Institutiones*). This work had been foreshadowed in the instructions to Tribonian's commission to make the Digest. The Institutes were published in the same year as the Digest, 533,— being promulgated about a month earlier.[613] The Institutes are arranged in four books,[614] each **book** being subdivided into **titles** and **sections.** The Institutes are the work of **Tribonian, Theophilus,** and **Dorotheus.** According to Justinian's instructions, the Institutes were founded on the 2d century Institutes of Gaius.[615] Over one-half of the Institutes § 138

[606] Mommsen, *Digesta Justiniani Augusti*, 2 vol., Berlin, 1866–70. It now forms a part of the modern Mommsen, Krueger, Schoell, and Kroll, *Corpus juris civilis, editis stereotypa*, Berlin, — see supra § 135.

[607] Const. *Tanta*, § 20.

[608] Roby, *Introduction to Digest*, p. xxiv. See also supra § 75.

[609] See supra § 75.

[610] See supra § 108.

[611] *Id.* See also supra § 99.

[612] Roby, *Id.* p. cxcix.

[613] Nov. 21, 533: see Preface (Prooemium) to the *Institutes*, 7.

[614] The work of the modern German civilian Leonhard, *Institutionen des röm. Rechts* (1894), follows the order of arrangement of subjects of Justinian's Institutes.

[615] Preface (Prooemium) to *Institutes*, 6. As to Gaius, see supra § 86.

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of Justinian is borrowed bodily from the text of Gaius. But the commission expunged everything antiquated in the 6th century, and inserted whatever was necessary to make their little book a faithful exposition of Justinianean Roman law.

§ 139 **The Novels of 535–65.** Justinian reigned for thirty years after his codification was finished, during which time he promulgated many laws, both public and private, some of which, like the laws reforming intestate succession, are very important. These latest statutes of Justinian are known as Novels (*Novellae Constitutiones post Codicem*) and are now for convenience treated as a fourth part of his grand codification. Each Novel may be subdivided into **chapters** and **sections.** The Novels modify the Code, Digest, and Institutes, and were published in **Greek,** — for the use of the multitude; while some of them were issued in Latin for use in the West. In all, 152 of these Novels remain; 30 concern ecclesiastical matters, 58 public or criminal law, and 64 private law.

A **Latin abridgment** of these Novels, covering 125 of them, was made by **Julian,**[616] professor of law at Constantinople, some five years after Justinian's death. This **Novellarum Epitome** was used in Italy and Gaul. A Latin collection of 134 of the Novels circulated in Italy, known as the **Authenticum.** The tradition was that these were the very Novels promulgated in Italy by order of Justinian in A.D. 554.

The Novels on ecclesiastical law are derived from the *Nomocanon,* an interesting work on comparative Roman and Canon law written by John, Patriarch of Constantinople, who was a contemporary of Justinian. A curious survival of the exact use of the Roman legal term "Novels" is seen in very modern times: the additions to the new German Civil Code are technically called *Novellen* — the German word for Novels.[617]

§ 140 **Abbreviations for the Code, Digest, Institutes, and Novels.** The medieval and modern abbreviations "C.," "Cod.," "Code," refer to the Code; "D.," "Dig.," "P.," refer to the

[616] See infra "Post-Justinian law," § 169.

[617] *Deutsche Juristen-Zeitung,* April 1–June 15, 1909, p. 597.

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Digest or Pandects: "l.," "Inst.," to the Institutes: and "N.," "Nov." to the Novels.[618] The Novels are cited by the number, chapter, and section: for instance "Novel 118, 3, 1, or § 1."

The abbreviations "l." or "L.," stand for "law" (lex) or "constitution," and refer to a law of some title in the *Code or Digest:* For instance "Code, 1, 4, 23" = Code, book 1, title 4, law 23; "Dig. 1, 3, 13" = Digest, book 1, title 3, law or fragment 13. The abbreviation "fr." stands for fragment, and refers to a fragment or law of some title in the Digest: For instance "Dig. 1, 3, 18" = Digest, book 1, title 3, fragment 18.

The abbreviation " § " refers either to some section of a title in the Institutes, or to some section of a law or fragment in the Code, Digest, and Novels[619]: for instance "Inst. 2, 7, § 1" = Institutes, book 2, title 7, section 1; "Dig. 1, 3, 32, § 3" = Digest, book 1, title 3, fragment 32, section 3.

The abbreviation "pr." means "principium," and refers either to the first sentence preceding the first section of a title in the Institutes, or to the first sentence preceding the first fragment of a title in the Digest: an illustration is "Dig. 1, 3, 32, pr."

**The modern mode of citing the Corpus Juris.** To the historian Gibbon, whose most brilliant chapter fifty-four of his "Decline and Fall of the Roman Empire" was for years a Roman law text-book at Continental European universities, is due the credit and honor of shaking off the pedantic yoke of citation as established by the medieval Civilians. Gibbon "dared to adopt the simple and rational method of numbering the book, the title, and the law cited." [620] His example was followed by Hugo and other modern Civilians, until it is now the universal practice to cite the Corpus Juris as part such and § 141

[618] On the entire subject of abbreviations and modes of citation of the Corpus Juris, see Hunter, Roman law[4], p. xi; Sohm (Ledlie[3]) *Roman law*, pp. 16–17; Girard, *Manuel de droit romain*[5], pp. ix–x; Mackenzie, *Roman law*[7], p. 32.

[619] The use of the section abbreviation is very frequently omitted, — see illustrations in the text.

[620] "*Decline and fall, etc.*," vol. 4, ch. 44, note 1.

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such, such and such a numbered book, title, and law, fragment, or section. For instance "Dig. 50, 17, 1" means Digest, book 50, title 17, fragment 1.

There are these slight differences in the mode of citation between the Anglo-American and German practice: (1) The **German usage** is to start first with the law, fragment, or section — which is just the opposite of the **Anglo-American usage.** The **French usage** is like the Anglo-American. To illustrate: "Dig. 17, 1, 2, pr." (Anglo-American and French mode of citation) would be cited by German writers "L. 2, pr. D. 17, 1"; "Code, 4, 34, 11, 1" (Anglo-American and French mode of citation) would be cited by German writers "L. 11, § 1, C. 4, 34"; "Inst. 2, 7, pr." (Anglo-American and French mode of citation) would be cited by German writers "pr. I, 2, 7."

(2) Sometimes the German usage as to citing the particular part of the Corpus Juris (Code, Dig., etc.) is to add the title right after the part and put the numbers of the book and title in brackets — for instance[621] "pr. I. de donat. (2, 7)."

§ 142 **The medieval mode of citing the Corpus Juris.** The medieval way of citing the Corpus Juris is as follows: a citation begins with a numbered law, fragment or section, followed by mention of the part of the Corpus Juris to which the law, fragment, or section belongs, and the citation ends by giving the title wherein the law, etc., will be found; but the book of which this title forms a part is not given at all. For instance "l. 8. C. de praescript. long. temporis" is an illustration of the medieval mode of citation.

To find the book to which a title cited belongs and to convert the medieval mode of citation into the modern, search the Index of Titles as given in the front of volumes i–ii of Krueger and Mommsen's edition of the Corpus Juris to locate the title cited: the index of titles should disclose the number of the book of the Code, Digest or Institute to which the title belongs. For instance "l. 8. C. de praescript. long. temporis" = Code, 7, 33, 8; "l. 38, § 1. D. ad leg. Jul. de adulteriis" = Digest, 48, 5, 38, 1. There are several thousand

[621] See Sohm (Ledlie[3]), *Roman law*, p. 16.

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titles in the Corpus Juris. Brissonius,[622] whose Civil Law dictionary published in the 16th century is still to-day the best on Roman law, employs the medieval mode of citation.

**How Justinian's codification was introduced into Italy and Western Europe.** § 143 Justinian's codification at first applied only to the Roman Empire in the East: Western Europe, including Italy, had fallen into the hands of barbarian Teutonic conquerors over a half century before the accession of Justinian. They, soon after their conquest, had for reasons of policy or state made Leges Romanae for their Roman subjects: this was done in Italy, Gaul or France, Spain, Burgundy.[623] These records of the Roman law, although symptomatic of the tendency of Roman Law in the 5th century towards codification, were wretched, lame compendia of Roman Law; and in these Leges Barbarorum Teutonic law is very manifest, and threatened the Roman law. Which shall prevail, Justinian's Corpus Juris, or the Code of Alaric, which was the best of the Leges Barbarorum? The answer was slowly worked out. Justinian's generals Belisarius and Narses reconquered Africa, Italy, and portions of Spain. Justinian's Codification became in **A.D. 554** [624] law in Italy, and so became known to Western Europe: for the dominion of the Eastern Empire did not altogether cease in Italy until nearly the 12th century.

Obedience to Justinian's law was preserved in Italy down practically to the 12th century Bologna revival of Roman law study.[625] In Western Europe the Breviary or Code of Alaric II exercised a dominant influence on Southern France and in South Germany. But when the Glossators revived the study of Roman law in Italy,[626] the dim star of the Code of the Teutonic Alaric sank beneath the legal horizon as the sun of the Eastern Roman Corpus Juris shed its brilliant, pure light from the borders of Italy over Western Europe.

[622] The French jurist Brisson (infra § 248), died 1591, was the Advocate-General of Henry III, and was murdered by the League party: Colquhoun, *Roman law*, § 175.

[623] See supra § 133.

[624] Hunter, *Roman law*[4], p. 89.

[625] See infra ch. iii, "Italy," § 211.

[626] See infra ch. iii, "Italy," §§ 210–11.

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### (3) The Influence of Christianity on Roman Law

§ 144 **Christianity an external force affecting Roman law from Constantine to Justinian.** The first and earlier influence of an external nature on Roman law — Greek culture and particularly Stoic philosophy — has already been discussed.[627] It was effective largely during the Early Empire. The other external influence on Roman law — Christianity — was operative during the Later Empire, beginning with the reign of Constantine the Great. Then for the first time Christianity became the favored religion of the State. "Not until Christianity had become the established religion of the Empire, can we see evidence of changes directly attributable to its influence."[628] Whatever contributions Christianity made to Roman law were imparted solely through the medium of Imperial legislation. The jus respondendi and the activity of the great jurists had ceased long before the accession of Constantine.

§ 145 **Constantine's Edict of Milan in 313.** The year following his conversion, Constantine issued[629] at Milan "the great charter of the liberties of Christianity."[630] By this statute Christianity was made a lawful religion for the worship for the Supreme Deity, and unlimited toleration was extended to all religions throughout the Empire,[631] — a reversal of the policy of Diocletian. A large part of the Empire was already Christian, and this action of Constantine gave stability to his government.

[627] See supra §§ 62 et seq.

[628] Gibson, *Influence of Christianity upon the law of Rome*, 31 Law Mag. and Rev. p. 386.

[629] It was promulgated in the joint names of Constantine and Licinius.

[630] Milman, *Hist. of Christianity*, vol. ii, p. 294.

[631] The Edict of Milan is preserved by Lactantius. *De mort. pers.* c. 48 (Latin text) and Eusebius, *Hist. eccles.* x, 5 (Greek translation). The Edict is as follows: "Haec ordinanda esse credidimus, ut daremus et Christianis et omnibus liberam potestatem sequendi religionem quam quisque voluisset, quod quidem divinitas in sede caelesti nobis atque omnibus qui sub potestate nostra sunt constituti, placata ac propitia possit existere. Etiam aliis religionis suae vel observantiae potestatem similiter apertam, et liberam, pro quiete temporis nostri esse concessam, ut in colendo quod quisque delegerit, habeat liberam facultatem, quia (nolumus detrahi) honori neque cuiquam religioni aliquid a nobis."

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It is sad that this triumph of the principle of religious liberty in the Roman world was short-lived. The pagan religion was tolerated for barely three-quarters of a century later: Theodosius the Great, who reigned 379–95, made Christianity the State religion, and proscribed and persecuted Paganism. Finally, in spite of the vigorous stand of Athanasius, Gregory of Nazianzus, and Hilary of Poitiers for liberty of conscience, orthodox Christianity also followed in the old evil path of persecution. St. Augustine's legal mind forged the weapons of all future ecclesiastical persecution by declaring that the death of the soul is worse than liberty of error and that the heterodox should be *compelled* to conform. When the time of Theodosius II is reached,[632] to deviate even slightly from orthodoxy was punished as a crime. And the code of Justinian insists that religious unity must be maintained at all costs — that principle which caused Europe in subsequent centuries to suffer greatly.

§ 146 **Constantine's later legislation.** Following the Edict of Milan came other legislation of Constantine which was extremely important and moved along the lines of "humaneness and purity — two characteristic ideas of Christian ethics."[633] Constantine decreed that Sunday should be observed throughout the Empire[634]; established prayers for the army; abolished crucifixion as a punishment; encouraged the emancipation of slaves; discouraged infanticide; and prohibited private divinations, licentious and cruel rites, and gladiatorial games. "Every one of these steps was a gain to the Roman Empire and to mankind, such as not even the Antonines had ventured to attempt, and of those benefits none has been altogether lost. Undoubtedly, if Constantine is to be judged by the place which he occupies amongst the benefactors of humanity, he would rank, not amongst the secondary characters of history, but amongst the very first."[635]

§ 147 **Controversy as to the debt of Roman law to Christianity.** Just what Roman law owes to Christianity has been long

[632] He reigned A.D. 408–50.

[633] Adeney, *Greek and Eastern churches*, p. 40, New York, 1908.

[634] In the towns.

[635] Stanley, *Lectures on the history of the Eastern Church*, lecture 6, I. (1861).

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and greatly obscured by the religious feeling and prejudice of investigators. The ecclesiastical writers on the one hand would make us believe that all that is good in Roman law can almost always be predicated as derived from Christianity. But this is too sweeping an assertion and does not recognize the influence of Greek culture, philosophy, and ethics,[636] which — long before the Empire became Christian — had already given to Roman law that vigor, strength, justice, and supreme excellence of spirit which made Roman law pre-eminently just.

The writers prejudiced against Christianity on the other hand belittle its influence and maintain that scarcely any good results came from it into Roman law, — an erroneous view, perhaps arising through a spirit of criticism deservedly passing judgment on the intolerance, scandals, and quarrels of Christian sects in the Latin Roman Empire.

The correct appreciation of the influence of Christianity lies between these two extreme points of view. It is Christianity as a system of highest ethical truths whose influence is shown in the Roman law. Christianity perfected, and at times transformed under the higher influence of Christian ideals of justice, the work of Greek philosophy in fashioning Roman law. Greek culture had already laid the foundations and nearly all of the superstructure of Roman law as a universal law of rational ethics fitted for the whole world: *the work of Christianity was to perfect* the system of law erected upon such a solid foundation by adding to the beauty of the superstructure, strengthening it by removing structural weaknesses, and enlarging or transforming Roman law in the spirit of Christian ethics so as to produce greater justice and benefit to mankind.

§ 148 **How Christianity affected Roman law.** The influence of Roman law on Christianity is clearly made manifest by the laws of the Christian Emperors and more especially by a critical study of the codification of Justinian. At the time when the seat of Empire was removed to the East, Oriental, provincial influences, particularly the Hellenic spirit, were

[636] See supra §§ 62 et seq.

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very active. These Oriental influences are now seen to have (§ 148) decidedly colored the Corpus Juris and made Justinian's law essentially different from and continually in contrast with the jurisprudence of the first three centuries of the Empire.[637] And the greatest of these influences was Christianity.[638]

Ecclesiastically, the codification of Justinian reveals great traces of Christian influence. Justinian begins his Code by formulating an Imperial Creed on the Trinity, and by hurling Imperial anathemas against heretics. Justinian asserted a majestic superiority over the clergy and canonical jurisdiction, although he makes the bishops Imperial judicial officers for certain matters; for instance, the guardians of lunatics swore before the bishop on the Gospels to administer their trust with fidelity.[639]

But in the domain of private law, the influence of Christianity is not easy to trace, and it is to be found only by indirect methods of investigation. By comparison and analysis of the doctrines of Roman law as they are manifested prior or subsequent to the Christian Emperors it is possible to observe the uplifting influence of Christian ethics. But "the changes in Roman law consequent upon the establishment of Christianity were more largely changes of machinery than of material, for though Christianity could not fail to have far reaching effects on the Corpus Juris Civilis, the principles of that magnificent system were well-nigh definitely settled before Christianity attained temporal supremacy."[640] Hence most of the private law of Justinian reads as if exclusively Roman and seemingly ignorant of the existence of Christianity. It contains quotations from Homer frequently, but never allusions to the sacred Christian writings. In fact, Tribonian, who framed Justinian's great work of jurisprudence, has even incurred the suspicion of atheism: from the Institutes of

[637] See Mitteis, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*, vol. 31, p. 393 (1910); Collinet, *Études hist. sur le droit de Justinien*, vol. i: "Le caractère oriental de l'œuvre légis. de Justinien," etc., Paris, 1912.

[638] Riccobono, *L'influence du Christianisme dans la codification de Justinien* (in 5 Rivista di Scienza, "Scientia," no. ix–1 (1909).

[639] *Code*, 1, 4, 27.

[640] Gibson, *Id.* p. 399.

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Justinian one would never easily detect the Christianity of Justinian.

The changes which Christianity effected in Roman law were along two lines: the promulgation of new law, and the amendment of the existing law. Justinian, in promulgating the Digest, says[641] that he caused to be made in the law of his time "many very important transformations on the ground of practical utility." These words have usually been regarded as a piece of Byzantine vanity; but it is not at all improbable that the spirit of Christian ethics was a far more potent factor in framing the Corpus Juris than is commonly believed. Or as Dante says:

> I was Caesar and am Justinian
> Who by the destiny of that first Love, which I still feel,
> Cleared the laws of their vain excess.
> . . . . . .
> As soon as my feet were reclaimed to the Church,
> Inspired by God's grace
> I gave myself wholly to my great task.[642]

§ 149 1. **Promulgation of new law.** With the establishment of Christianity came new corporations, new offices, new men — all of an ecclesiastical or quasi ecclesiastical character. This change demanded a fresh body of law. From the unwillingness of the Christians to bring their disputes before the civil tribunals, there had grown up beside the Civil Law another system — the Church or Canon Law, the beginnings of which mighty medieval system of law we are now recording. Constantine gave the bishop's court (*episcopalis audientia*, *episcopale judicium*) concurrent jurisdiction with the ordinary secular courts where both parties preferred the former, and perhaps[643] empowered either party to a suit to remove it to

[641] Const. *Tanta*, § 10 (Monro, Eng. transl. of Digest, vol. i. p. xxx).

[642] *Paradiso*, vi, 10–12, 22–4:

> "Cesare fui, e son Giustiniano,
> Che, per voler del primo Amor ch' io sento,
> D' entro le leggi trassi il troppo e il vano.
> . . . . . .
> Tosto che con la Chiesa mossi i piedi
> A Dio per grazia piacque d' inspirarmi
> L' alto lavoro, e tutto a lui mi diedi."

[643] The authenticity of this enactment is disputed.

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the episcopal court against the will of the other party.[644] But by the Emperors Arcadius[645] and Valentinian[646] the right to sue before an ecclesiastical tribunal was limited to cases where both parties consented,[647] — Constantine's original rule. Now this new body of law contributed by Christianity is very little secular, and is almost entirely ecclesiastical or religious.

§ 150 **2. Amendment of the existing law of persons.** Christianity decidedly improved certain parts of the Roman law of persons. The Stoic doctrine of the equality of all men was accepted by Christianity and became again a living force in the law: it is reflected in **betrothal.** Christianity endeavored to restore the dignity of **marriage.** A new conception of marriage — indissolubility — began to operate, and, although not immediately effective, it finally, in the 8th century, transformed marriage into a sacrament: about 200 years after the death of Justinian in the reign of Leo III, the Isaurian, an ecclesiastical benediction was made necessary to a valid solemnization of marriage.[648] But for over four centuries after Constantine marriage continued to be a civil contract, although the ceremony was generally a religious one.[649] Of the passages in Justinian's law which reveal the Christian legislator, the most marked of all is that which extends the prohibited degrees in marriage to spiritual relationships: for instance, marriage of a guardian, or his son, with his ward, marriage of man with a woman for whom he had acted as sponsor in baptism. Moreover, interdictory Christian statutes declared marriages with Jews and heathen not only invalid but adulterous.

Roman Christianity laid emphasis on the conjugal duties, combatted **divorce,**[650] and tried to suppress **concubinage.** It also combatted **second marriages,** probably because of the honor ascribed to personal chastity. The ancient laws to

[644] See Cuq, *Institutions juridiques*, vol. ii, p. 868, n.

[645] In 398, — Eastern Emperor.

[646] In 452, — Western Emperor.

[647] See Muirhead, *Roman law*[2], p. 357.

[648] Bury, *Later Roman Empire* (23 Encycl. Britan.[11] p. 520).

[649] Gibson, *Id.* p. 394.

[650] Justinian tried to restrict divorce and repudiation, but his legislation suffered repeal by his successor.

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increase the birth rate seemed cruel to the Christian Emperors, and the result was the repeal of the leges Julia and Papia Poppaea passed A.D. 9. The redemption of fallen women was proclaimed as a sublime work for Christian bishops.

The Roman law doctrine of **legitimation by subsequent marriage** was a piece of noble legislation by Christian Emperors. Roman Christian charity was responsible for a philanthropic movement in favor of the sick, aged and infirm, widows, and orphans by the organization of **hospitals** and **asylums.**

But it is regrettable that **Christianity did not change** other parts of the Roman law of persons, which ought to have been reformed. The chief example of this failure is slavery, which the law of Justinian fully recognized. The inertia of past centuries as to slavery was too great to be overcome. St. Paul's attitude towards slavery was to recognize the *status quo*, and he did not counsel wholesale emancipation. But Christianity continued the progress of the pagan law along the lines of mercy and kindness: for instance, to poison a slave or brand him was treated in later Imperial Roman law as homicide, and manumission was made easier; but the Church did not recognize the marriage of slaves until over 300 years after Justinian's death.[651] Christianity added very little to the work of mitigating the severity of the paternal power already accomplished by the non-Christian Emperors.

§ 151 3. **Amendment of the existing law of property.** It is not scholarly or sensible to dismiss all consideration of the influence of Christianity on the Roman law of property by taking refuge in the usual claim that here Christianity has exerted no influence whatever (even though that influence is not easy to find[652]). It is true that Christianity made **no radical changes** in the tenure or succession to property. For instance, Justinian's system of intestate succession as formulated in his famous novels 118 and 127, which underlie all modern law of intestate succession, is actually but a final completed

[651] Gibson, *Infl. of Christ.*, 31 Law Mag. and Rev. p. 394.

[652] For many seeming instances of this Christian influence, see Riccobono, *L'influence du Christianisme dans la codification de Justinien*, 5 Rivista di Scienza, no. ix-1 (1909).

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application of the old pagan praetorian law which favored the natural blood tie as a basis for the devolution of property.

But **to Christianity is due** the provision for widows out of their husband's property, which is a special feature of both the later Roman and the Canon laws. Christianity emphasized and sometimes widened the old conception of equity of the classical Roman jurisprudence. *Aequitas* in the Justinianean law is also called *humanitas*, *pietas*, *clementia*, or *benignitas*, — it seems to reflect, as it were, the spirit of the conception of the brotherhood of man. This addition to humaneness along Christian lines is visible also in later Roman law, which allowed the privilege of adoption to women "to comfort them for their children lost by death." [653]

The classical Roman conceptions of ownership and property rights were reiterated in the Christian Roman law. The ideals that inspired the Corpus Juris were inevitably Christian ideals; and undoubtedly the influence of Christian ethics was potent to retain all that was just in the classical law and, if possible, improve it. "It is not prohibited to any one to obtain anything for himself," says Justinian's Digest, "provided he does not damage another." [654]

§ 152 **4. Amendment of the existing criminal law.**[655] The later Roman law under the influence of Christianity prohibited [656] the exposure of newly-born children as well as infanticide, one of the greatest blots on ancient civilization.[657] Abortion was forbidden. Adultery was punished with far greater severity by Christian Emperors. Crimes against nature were punished by death.[658] Rape was made a capital offense.[659] Christian Roman law punished suicide,[660] — in opposition to pagan Roman law which regarded the taking of one's life as a natural right. But the cruel iniquity

[653] See *Inst.*, 1, 11, 10.

[654] "Prodesse . . sibi unusquisque dum alii non nocet, non prohibetur": see *Dig.* 39, 3, 1, 11. Compare *Dig.* 39, 3, 1, 4; *Dig.* 8, 2, 20, 5.

[655] As to the criminal law of Rome, see infra vol. ii, §§ 913–38.

[656] *Code*, 4, 43, 1.

[657] See *Cod. Theod.* 5, 9 and 10; *Cod. Justin.* 8, 51 (52); *Bas.* 33, 2.

[658] Milman, *Hist. of Latin Christianity*, vol. 1, bk. 3, ch. v, C.

[659] *Code*, 1, 3, 53.

[660] The law as to suicide is discussed in *Dig.* 48, 21; *Code*, 9, 50;

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of torture was sanctioned and continued by Christian Emperors.[661]

Christian philanthropy introduced a new feature into the criminal law: Justinian, following other Emperors, required the Christian bishops to monthly inspect the State prisons and inquire into the offenses of the prisoners.[662] The bishops were empowered to stop gambling of a certain kind.[663] The Christian Emperors abolished[664] all private prisons with their horrors, — an institution dating to Republican Roman Law. Heresy was made a crime.[665] Christianity finally put into practice the old Roman theory, which it had previously fought, that the religion of the State must be that of the people. But the bishop's court had no criminal jurisdiction: heresy was punished by the civil courts.

§ 153 **Sources of information as to the influence of Christianity.** The Theodosian Code[666] is the chief source of our information as to the legislation of the early Christian Emperors. The Code and Novels of Justinian,[667] the Ecloga, Basilica, and other post-Justinian law books[668] reveal much of the legislation of the later Christian Emperors.

The influence of Christianity survived the political vicissitudes of Western Europe and the destruction of the Roman Empire in the West. The Teutonic Leges Barbarorum[669] with their "Roman laws" for their conquered Roman subjects are even more completely penetrated with Christian influences than the ante-Justinian codes of the Roman Emperors: for the unlettered Germans and Goths had gladly accepted the aid of their Christian clergy to reduce the laws of their rude ancestors to writing.

Paulus, *Sent.* 5, 12. See Gibbon, *Decline and fall of the Roman Empire*, ch. 44.

[661] See *Nov.* 123, 31.

[662] *Code*, 1, 4, 22.

[663] *Code*, 2, 4, 14.

[664] See *Code*, 9, 5.

[665] See *Code*, 1, 5, 11; *Code*, 1, 9, 5; *Code*, 1, 5, 21.

[666] See supra § 127.

[667] See supra §§ 136, 139.

[668] See infra §§ 174 et seq.

[669] See supra § 133.

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### (4) Roman Law Schools and Legal Education[670]

**Roman law schools prior to Diocletian and the 4th century A.D. were private law schools.** § 154 The Civil Law, as the jurisprudence of the Roman State, had a continuous existence and development for nearly thirteen centuries, if the reckoning be terminated with Justinian. Because of its vast length of life, if for no other reason, the law of Rome can shed a most valuable light on the problem of how to give the best legal training and equipment to persons engaged in the study of law.

Roman legal education compared most favorably with American legal education at the present time, and in some respects was superior to ours. Legal education began at Rome during the Later Republic. As a result of the writings of the jurist Scaevola[671] Roman law first appeared in a scientific dress about B.C. 100, — Scaevola laid down general legal conceptions and outlined legal institutions, such as wills, legacies, guardianship, contracts. But the jurisconsults not only practised law and wrote on legal subjects, but also taught law. The period of "private law schools" now began: any jurisconsult who could collect a following of students was not hindered by law from giving legal instruction to them. His freedom to teach law was unrestricted, and this condition of things lasted for at least 300 years — marking the golden era of classical jurisprudence under the Early Empire — down to the last of the jurists properly so-called, or to the period of State law schools which was ushered in at about the time of Diocletian.[672]

At the very outset, in the time of Augustus, two great rival schools sprang up whose rivalry lasted as late as the reign of Marcus Aurelius.[673] These two schools bore the name of **Sabinians** and **Proculians,** each of which was so named from a

[670] A part of this was published by the author in 17 Yale Law Journal, p. 499, May, 1908, under the title of "The study of law in Roman law schools," and is reprinted by permission.

[671] Q. Mucius Scaevola: see supra § 53.

[672] Reigned A.D. 284–305.

[673] Clark, *Roman private law: sources*, p. 128.

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(§ 154) disciple of its founder.[674] Both **Capito** and **Labeo,** their founders,[675] gave legal instruction after the traditional fashion prevalent under the Republic, which was to allow young men to be present as listeners[676] while the jurisconsults gave opinions and permitted them to see how they conducted their law business,[677] occasionally arguing with their pupils but rarely giving private instruction by means of connected lectures. This practical instruction was, under the Empire, supplemented by teaching the students the elements of law, as expressed by the term "Institutes."[678]

The first real school of law was probably originated by **Sabinus.**[679] He was the first jurisconsult licensed by Augustus to exercise the jus respondendi,[680] and also supported himself by teaching law.[681] In imitation of the Greek schools of philosophy Sabinus gave instruction through a society or corporate organization, at the head of which was the "professor" and to whom the students on entering paid fees for tuition.[682] One professor used to succeed another as "president."[683] The Proculian school — the other school — became organized in the same way.[684]

Toward the end of the 2d century A.D. there were many fixed places at Rome — probably near the law courts — where law was studied.[685] Schools of law soon spread over the Empire. In the 3d century a school of law was established in Syria at Berytus, modern Beirut, of which the great jurist Ulpian was

[674] Sabinians, from Sabinus, follower of Capito; Proculians from Proculus, follower of Labeo; see supra §§ 74, 102, 103.

[675] Capito, of the Sabinians; Labeo, of the Proculians: see supra §§ 80, 90.

[676] Auditores.

[677] Cicero, *Brut.* 89, *Laelius,* I.

[678] "Institutiones." Distinguished jurists, especially from the time of Hadrian to Alexander Severus (A.D. 117–235), were in the habit of writing elementary treatises for the use of students: see supra § 76.

[679] See supra § 103.

[680] See supra § 68.

[681] See supra § 74.

[682] See supra § 74.

[683] *Id.*

[684] *Id.*

[685] Aulus Gellius, xiii, 10, 13, who wrote A.D. 169–75.

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probably at one time a professor.[686] The law school of Beirut became very famous, and bore the proud title of "mother of law."[687] It rivaled the earlier schools at Rome and the later school at Constantinople.

§ 155 **The State law schools of the Later Roman Empire.** During the Early Empire legal education was without State support; but in the time of Diocletian the advent of "State law schools" was at hand. Perhaps he gave State recognition to the law schools of **Rome** and **Beirut;** at any rate not only did these schools obtain this favor from the Emperors, but finally after a considerable time State approval became extended to those of **Athens, Alexandria, Caesarea,** and **Constantinople.**[688] One result of this movement for State law schools was the cessation in the 5th century of legal instruction in the private schools of rhetoric.[689]

In the year 425 the Emperor Theodosius the younger established at Constantinople a university apparently in imitation of that already existing at Rome.[690] Among other things this enactment created two professorships in law,[691] required the professors to teach law publicly, and forbade them to engage in private teaching. Financial support from the State was extended to the law school of Constantinople.[692] The selection of professors in this school was intrusted to the

[686] Mackenzie, *Roman law*[7], p. 19; Roby, *Introduction to the Digest*, p. cxcvii, Krueger, *Quellen, etc.*, p. 347.

[687] "Legum nutricem": Const. *Omnem*, § 7 (Eng. transl. by Monro, vol. i, of Digest, p. xviii); Libanius, *Epist.* 566.

[688] Muirhead, *Roman law*[2], p. 400; Karlowa, *Röm. Rechtsgeschichte*, i, p. 1022 et seq.; Heimbach, *Prolegomena Basilicorum*, i, ch. i, §§ 1–6; ch. ii, §§ 1–2. See Krueger, *Quellen*, p. 347.

[689] Krueger, *Quellen*, p. 348.

[690] See the titles of *Cod. Theod.* 14, 9 and *Cod. Justin.* 11, 19 (18).

[691] Krueger, *Quellen*, p. 347, holds that only one chair at this time was actually created (the *second* chair) although there were two professorships in the school; and that the jurist Leontius, who had taught law for a long time, may have held the *first* professorship: see *Cod. Theod.* 6, 21, 1; *Cod. Justin.* 12, 15, 1; *Cod. Theod.* 15, 1, 53; *Cod. Theod.* 14, 9, 1.

[692] *Cod. Theod.* 14, 9, 3; *Cod. Justin.* 11, 19 (18), 1; Krueger, *Quellen*, p. 346. A constitution of A.D. 414 as to the privileges of professors does not refer to this financial favor: *Cod. Theod.* 13, 3, 16.

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(§ 155) Senate of Constantinople.[693] The law of 425 reads as follows: "*The Emperors Theodosius and Valentinian to the city prefect.* We decree that all persons, who, usurping the title of professor, have been accustomed to assemble in public schools or rooms pupils collected from everywhere, cease to do so; and if anyone, after the publication of this law, shall again attempt what we forbid and condemn, not only shall he be marked with infamy, which he deserves, but he shall be driven out of the city wherein he is acting unlawfully. But we do not prohibit by any threat of such punishment those persons who have been accustomed to impart instruction privately in the homes of most of their pupils, provided they abstain from teaching pupils except at their homes. But let those persons who are appointed to teach in the auditorium of the Capitol know that they are forbidden to give private instruction: if they are caught teaching contrary to this Imperial statute, they shall be deprived of the privileges granted to them by reason of their appointment as professors at the Capitol. To our auditorium shall be attached of the Latin language and literature three teachers of oratory and ten grammarians, and of the Greek language and literature five sophists and ten grammarians. And since we do not wish that ambitious young men be instructed merely in these arts, we will to the aforesaid professors join teachers of more profound sciences and learning. We wish to add to the rest, one to search the arcana of philosophy, and two others to disclose the processes of law and justice. Your excellency will take care that to each professor be assigned a special room, in order that the voices neither of pupils nor of professors resound against each other, and that no mingled confusion of languages or voices distract the ears of any persons from their studies and lectures. *Given at Constantinople, February 26, in the eleventh consulship of* Theodosius and that of the first of Valentinian." In the time of Justinian four professors were officially appointed for Constantinople and four for Berytus.[694] And the same

[693] Krueger, *Quellen*, p. 347; Kuhn, *Die städtische und bürgerl. Verfassung des röm. Reichs*, i, 100 et seq.

[694] Krueger, *Quellen*, p. 348. The official title of a professor was "antecessor" or "magister": see Const. *Omnem* § 3, *Deo Auctore* § 3, *Tanta* § 9

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Emperor suppressed the law schools at Athens, Caesarea, (§ 155) and Alexandria.[695]

The law school at **Rome** together with the university survived the occupation of Italy by the Ostrogoths, — a royal ordinance of Athalaric, successor of Theodoric, relative to the university, makes mention of the professor of law, among other professors.[696] When Justinian reconquered Italy in 554, he specially provided for the maintenance of the university professors at Rome fully as bountifully as did the Ostrogothic Kings[697]; and the course of study and methods of teaching prescribed twenty years earlier for law schools of the East were applied to the law school at Rome. When the Eastern Roman Empire finally lost forever its possession of the ancient capital on the Tiber and transferred its Italian seat of authority to **Ravenna,** the law school at Rome was also removed to the same city. This law school of Ravenna — still in existence in the 11th century — helped to preserve the tradition of the legal teaching of the Roman Empire as well as the Roman jurisprudence itself until the rise in the following century of the law school of Bologna, the mother of modern universities.

In the 9th century the law schools at Beirut and Alexandria (the latter seems to have somehow survived Justinian's suppression) still taught Roman law, being undisturbed for over one hundred years after the Mohammedan conquest of Syria and Egypt.[698] From the historical point of view, very appro-

(all translated into English by Monro. *Digest,* vol. i, pp. i–xxxvi); Inst. *Prooemium* (Preface — among Eng. transl. Moyle[4]), § 3. The title "professor" was also employed: *Cod. Theod.* 6, 21; *Cod. Justin.* 12, 15.

[695] Athens in the year 529, the schools of Caesarea and Alexandria in 533: Krueger, *Quellen,* p. 347; Const. *Omnem* (Eng. transl. by Monro, *Digest,* vol. i, pp. xviii–xxiv), § 7.

[696] "Nec non et juris expositor": Cassidorus, *Var.* ix, 21, and Amos, *Roman law,* p. 103.

[697] "Quam et Theodoricus dare solitus est": *Epit.* Julian, *Nov. Tib.* ch. xvii, and Ortolan (Prichard and Nasmith transl.), *History of Roman law,* § 574.

[698] Ion, *Roman law and Mohammedan law,* 6 Michigan Law Review, pp. 48–9 (1907); Kremer, *Culturgeschichte des Orients unter den Kalifen,* i, 553. Roman law survived the capture of Constantinople by the Turks and is still administered in the Greek Orthodox Church courts between members of that faith, especially as to wills and marriage: see infra § 189.

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priate was the inauguration in the year 1913 of the present law school of Beirut.[699] Much praise is due to the French law faculty of Lyons, which is responsible for its establishment. Once again law is being taught in the home of "the mother of law," as Libanius described Berytus.[700] And the great Papinian[701] and Ulpian[702]—those famous 3d century professors at Beirut—should ever be a source of constant emulation to their modern successors.

§ 156 **A five years course of study prescribed for Roman law schools of the Later Empire.** During the Later Empire systematic legal education was established in course of time; and law students became obliged to study prescribed books in a certain order. No longer did legal training follow the whim of the particular teacher. In the year 533[703] **Justinian made reforms** in the five years course then in use,[704] the arrangement of which was poor and involved the study of books selected somewhat injudiciously. For perhaps three centuries prior to Justinian, neophytes in the law had commenced their student labors with two books of Gaius'[705] Institutes and his four books on wife's property, guardianship, wills, and legacies; the second and third years of their course, students took the Praetor's Edict[706] and Ulpian's[707] commentary thereon followed by the study of eight out of nineteen books of Papinian's[708] Responsa; and the fourth-year men read the Responsa of Paulus.[709]

In his law of 533 Justinian, although continuing the old requirement of five years' study, prescribed that thereafter students should be taught exclusively from the Justinianean

[699] On Nov. 13, 1913: see 37 *Revue générale du droit*, pp. 575–6.

[700] See supra § 154. But the fate of this school, owing to the present European war, is now (June 1, 1916) uncertain.

[701] See supra § 98.

[702] See supra § 108.

[703] On Dec. 16th.

[704] See *Inst.* Prooemium (Preface), § 3 (among English transl., Moyle[4]); Const. *Omnem*, § 1; Muirhead, *Roman law*[2], p. 400; Roby, *Introduction to the Digest*, p. xxvi.

[705] See supra § 86.

[706] See supra §§ 60 et seq.

[707] See supra § 108.

[708] See supra § 98.

[709] See supra § 99.

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law books: for the books hitherto used by students did not (§ 156) suffice to give as sufficient and satisfactory a legal equipment in the 6th century, owing to the condition of Roman law prior to the Corpus Juris.[710] Justinian, who had completed his masterly design of codifying Roman law from the dawn of that jurisprudence, then centuries past, laid down a program of studies[711] modeled according to the arrangement of the titles of the Code already published[712] and of the perpetual Edict as compiled by Julian.[713] Although curing the worst fault of the old program of study — the disregard of the order of the Edict — it was really, aside from the supreme excellence and wider range of the new books to be studied, only the continuation of the purpose and scope of the old plan of study which this decree of Justinian abrogated. For the new books to be studied contained all the old works either *in substantia* or in modified and renovated form, together with the works of very many more of the jurists, some of which were hitherto unknown or not available to lawyers.[714] Briefly, the new program required all students of law to study the entire Corpus Juris (Institutes,[715] Digest,[716] and Code[717]), — the whole to take five years' time as formerly. For the first three years, the Institutes and the first five parts of the Digest were to be taken under professional instruction, while the last two years were spent in reading the rest of the Digest and also the Code.[718]

[710] See supra § 135.

[711] Const. *Omnem*, §§ 2 et seq. (Eng. transl. by Monro, *Digest*, vol. i, pp. xx et seq.); Roby, *Introduction to the Digest*, pp. xxvi-xxvii; Muirhead, *Roman law*,[2] pp. 400–401.

[712] First edition of the Code published 529: see supra § 136.

[713] See supra §§ 61, 89.

[714] A fairly accurate list preserved in the Florentine MS. of the Digest contains the names of 38 authors, the titles of 207 treatises and 1544 volumes or rolls collected in the Digest or Pandects: see supra §§ 135 et seq.

[715] See supra § 138.

[716] See supra § 137.

[717] See supra § 136.

[718] For details of each of the five years' work, about to be given, see Const. *Omnem*, one of the prefatory statutes to the Digest. (Eng. transl. by Monro, *Digest*, vol. i, pp. xviii et seq.; and French and English translations by Ortolan, — Prichard and Nasmith Eng. transl. of Ortolan — *History of Roman law*, § 573.)

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The teaching was largely in the Greek language,[719] judging from the extant writings of professors before and after Justinian. The average age of law students in attendance was twenty to twenty-five years.[720]

§ 157 **First year.** The work of the first year commenced with the reading of Justinian's Institutes in four books, which gave the beginner in the law a rapid survey of the whole field of law, substantive and adjective, civil and criminal. The rest of the year was spent in the study of the first part of the Digest, books 1–4, which comprise introductory and general matters of law.[721] The principal subjects for the first-year students were a short history of Roman law,[722] the elements of the law of natural persons and the law of property, the jurisdiction of courts and the essentials of procedure, elementary corporation law, and a part of the law of agency.

[719] Krueger, *Quellen*, p. 348.

[720] At Beirut twenty-five years: *Cod. Justin.* 10, 50, 1. At Rome foreign students must be under twenty years of age, if older, they must return home: see *Cod. Theod.* 14, 9, 1; Cassiodorus, *Var.* i, 39, iv. 6, ii, 22.

[721] Among the matters treated of in book 1 of the Digest are: fundamental conceptions and definitions of justice and law; origin of law — historical; the kinds and divisions of law with definitions and illustrations; the essentials of the law of persons; adoption and emancipation; what things may be private property; and rights and duties of magistrates and State officials. The student then began the subject of procedure, which he did not finish until the middle of the second year. Digest, book 2, deals with the jurisdiction of courts; sessions of courts, holidays, and adjournments; appearance of parties, bills of particulars, and the production of documents; compromises of doubtful claims and bars to suits. Book 3 treats of motions; infamous persons; actions brought by agents; proceedings in behalf of or against a corporation; actions arising from voluntary agency — *negotia gesta;* and malicious suits. Book 4, which completed the work of the first year, treats "mainly of the cases, where the ordinary effect of actions and pleas is defeated by annulling the acts on which they rest, in consequence of intimidation, or fraud, or of insufficient age, or other disability of the party attacked." (Roby, *Introduction to the Digest*, p. xxxiv.) These bars to suits are discussed under *restitutio in integrum:* alienating the object of the suit; undertakings to act as arbitrator, which title probably attracted the last title of book 4, — the action against shipmasters and innkeepers to give up what they have received.

[722] See *Dig.* 1, 2.

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**Second year.** The second-year course began with either the second or the third part of the Digest: books 5–11,[723] or 12–19. Ordinarily the third part was reserved for the third year, probably so as to enable the students to finish the subject of procedure which was continued from the first year. The second-year men had to take also books 26, 28, and 30 of the Digest.[724] The principal subjects for the second year were advanced procedure; pleading; real property; and portions of guardianship, wills, and legacies. § 158

**Third year.** The third-year course of study began with the third part of the Digest: books 12–19.[725] If the professors § 159

[723] Book 5 at first treats of trials at law, — and then begins a detailed study of substantive law, or the subject-matter of suits, which topic lasted the remainder of the course given under professorial instruction. The second year men began their year's work in the subject-matter of suits by studying book 5, which treats of real rights or rights *in rem;* claims to masses of property; of undutеous will (*de inofficioso testamento*); for the recovery of an inheritance in whole or in part. Book 6 discusses claims to individual things, "it contains the claim to your own property (*rei vindicatio*); and this was treated . . . first, where the claimant has a good legal title; secondly, where he has an honest title but requires longer possession to cure defects in the conveyance to him; thirdly, when he has a perpetual lease." (Roby, *op. cit.* p. xxxv.) Books 7 and 8 treat of personal and real servitudes (which correspond respectively in some degree to "estates not of inheritance" and "easements" of the English Common Law). Book 9 deals with damage by fault and negligence (*lex Aquilia*). Book 10 treats of settling the boundaries of land (*actio finium regundorum*); the division of property (*actio familiae erciscundae* and *actio communi dividundo*); and the production of disputed property before the court or judge (*actio ad exhibendum*). Then followed book 11, of a nature supplementary to these actions *in rem* and also giving information as to various sundry matters: — interrogatories; consolidation of suits; spoiling or concealing slaves; dice playing; fraudulent surveyors; tombs; funeral expenses; and rights of burial.

[724] But in addition to completing the study of suits *in rem*, the second-year men had to take also the first of the two books on guardianship — Digest book 26, the first of the two books on wills — book 28, and the first of the seven books on legacies — book 30. Then the work of the second year was finished.

[725] Books 12 and 13 deal with loans; book 12 treats of loans of money; the recovery of money paid without consideration, or by mistake, or improperly, and summary settlements of such suits on oath tendered. Book 13 deals with the recovery of loans in general (*mutuum*); loans in specie (*commodatum*); and pledge (*actio pigneraticia*). Books 14–16,

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for any reason had required this part to be taken in the second year, the third-year course began with the second part of the Digest: books 5–11.[726]

The entire third year was devoted to a detailed study of contracts including loans, sale, letting and hiring, partnership, exchange, deposit, pledge, advanced agency, set-off, general average and jettison, and suretyship.

§ 160 **Fourth year.** The fourth-year course of study covered books 23–6 of the Digest, which comprise the latter half of the fourth part and all of the fifth part of the Digest.[727] The fourth-year men studied testamentary succession, trusts, and many topics of family law, including betrothal and marriage, divorce, dowry, parent and child, and the advanced part of guardianship.

§ 161 **Fifth year.** The fifth and last year of the Justinian program of study was devoted to reading the rest of the Digest, parts

title 1, treat of the liabilities of principals on agents' contracts; shipmasters' contracts (*actio exercitoria*); general average and jettison (*lex Rhodia*); shopkeepers' contracts (*actio institoria*); contracts made by slaves and children not emancipated (*senatusconsultum Macedonianum*); and guaranties by women (*SC. Velleianum*). The rest of book 16 treats of set-off (*compensatio*), and the contract of deposit (*depositum*). Books 17–19 contain the contracts of voluntary agency (*mandatum*); partnership (*societas*); purchase and sale (*emptio venditio*); letting and hiring (*locatio et conductio*); exchange and the like. In addition to the above-mentioned books, the third year students had to take the first half of the fourth part of the Digest, — book 20 on pledge, book 21 on the rescission of purchase and eviction (from the Aediles' Edict), and book 22 on matters supplementary to the topic of contracts, such as interest, mesne profits, delay, bottomry loans, evidence (including proofs and presumptions, witnesses, documentary evidence, the effect of ignorance of law and fact). This finished the work for the second year and also the subject of obligatory rights *ex contractu*.

[726] See supra § 158, second-year details.

[727] Books 23–5 deal with betrothal; dowry (*dos*); gifts between husband and wife; divorce; claims on dissolution of marriage; rights of unborn children; the reciprocal rights of parent and child for support (*alimenta*); and concubines. Books 26 and 27 treat of guardian and ward; the appointment and removal of guardians and their responsibility to the ward; the curators of lunatics, spendthrifts, etc. The last topic of the fourth year — successions — was then taken up: books 28 and 29 deal with wills and codicils, and books 30–36 with legacies and trusts (*fideicommissa*).

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six and seven, books 37–50, and also the entire Code.[728] The principal subjects for the fifth year were intestate succession, gifts inter vivos, criminal law, ecclesiastical law, administrative law, and other topics of public law, extraordinary legal remedies, advanced pleading and practice, the study of maxims, and the interpretation of words and phrases.

**Law school government; names of the various classes of students.** It is interesting to note that the Faculty must have been bothered with questions of school discipline and § 162

[728] The subjects dealt with are: succession in spite of and beside a will, — books 37 and 38, titles 1–5; intestate succession (in the course of time the student's attention must have been called to two Imperial statutes on this subject, promulgated ten and thirteen years respectively after the publication of the *Digest*, — Novels 118 and 127 "altering the order of intestate succession to the form of intestate succession to the form which has since prevailed in Europe, and which mainly rules intestate succession to personalty in England" and America "at the present time," Roby, op. cit., p. xxxvii.), — rest of book 38; suits between neighbors and gifts *inter vivos*, — book 39; manumission and claims of freedom, — book 40; acquisition by ownership and possession, — book 41; judgment and execution, — book 42; injunctions (*interdicta*), special pleas, bonds, and sureties, — books 43–46; crimes and criminal procedure, — books 47–9 to title 13; and topics of public law, interpretation of words and expressions, and maxims, — rest of books 49 and 50. The remaining work of the year was the study of the twelve books of Imperial statutes collected in the Code. The subjects of the Code are many and varied, and cover the fields of public law, ecclesiastical law, criminal law, and civil law. Space will not permit of a lengthy discussion of each book, but the following are some of the important titles (for a full list, see Culquhoun, *Roman law* § 60): the Catholic faith, churches, bishops, ecclesiastics, heretics, pagans, kinds of law, courts and their jurisdiction, magistrates, and procedure in civil actions, — books 1 and 2; actions *in rem* and real servitudes, — book 3; actions *in personam* and obligations *ex contractu*, — book 4; family law, marriage and guardianship, — book 5; wills, codicils, legacies, and intestate succession, — book 6; prescriptions, attachments, rights of the Imperial treasury, — book 7; injunctions (*interdicta*), the paternal power, donations and penalty for celibacy, — book 8; crimes and criminal procedure, — book 9; prerogatives of the Imperial treasury (and the State), of unclaimed property, of the kinds of public officers, — book 10; the rights of municipal towns common with the city of Rome, including the rights of bodies corporate, — books 11 and 12. It is quite noticeable that the order of subjects in the Code resembles that of the Digest, — the reason is, because the Digest was modeled partly after the arrangement of subject-matter in the first edition of the Code.

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(§ 162) government, just as now. Justinian himself legislated upon the government and discipline of the student body, in the very statute wherein he prescribed his new course of study,[729] section nine reading: "We moreover forbid, under very severe penalties, those who study in our renowned city[730] or in the fair town of Berytus, both to engage in those low and unworthy sports which suit only slaves, and which always end by injuring somebody, and to commit any offense,[731] either against their professors or against their fellow students, especially against those who are still beginners in the study of law.[732] For who would call these jokes from which wrongs result? Such conduct we do not by any means allow, and this matter we put under strict regulation for our times and for the future: since our spirits ought to be educated first and then our tongues."

Law students bore various appellations peculiarly appropriate to the various years of their course. These names of classes were very suggestive Latin or Greek expressions[733]: first-year students were, prior to Justinian, called by the ridiculous name of "Two-pennies"[734] (Dupondii), which Justinian changed to the honorable one of "New Justinians"[735] (Justiniani Novi), naming them after himself; second-year students were called by the old familiar name of "Edictals" (Edictales[736]) because they studied the Praetor's Edict[737]; third-year students bore the ante-Justinian noble title of "Papinianists" (Papinianistae[738]) in memory of the prince of Roman jurisconsults,[739]—the first lecture on Papinian of the

[729] Const. *Omnem.*

[730] I.e., Constantinople.

[731] I.e., tortious.

[732] I.e., first-year men (freshmen) were not to be hazed.

[733] These are given in the Const. *Omnem* (Eng. transl. by Monro, *Dig.* vol. i, pp. xviii et seq.).

[734] Roby, *Introduction to the Digest*, p. xxvii, note 1.

[735] Muirhead, *Roman law*[2], p. 401, translates this as "Justinian's freshmen."

[736] It was an ante-Justinian appellation.

[737] See supra §§ 60 et seq.

[738] See note 736 supra.

[739] See supra § 98.

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third-year class being always celebrated as a fête day[740]; fourth-year students were given the long-standing conventional Greek name of Λύται ("Lytae,"—"freed from lectures")[741] in recognition of their progress in jurisprudence; and fifth-year students were called Προλύται ("Prolytae" — "advanced Λύται"[742]) in recognition of the fact that they ought to want for little in legal knowledge.

**Admission to the Bar.** Every candidate for admission to the Roman bar had to produce[743] certificates showing that he had studied law for the prescribed number of years and attesting the proficiency of his legal knowledge[744]; if these certificates were satisfactory, he was then ordinarily admitted to practice.[745] § 163

**Nature of the Roman system of legal education.** Whether we consider the ante-Justinian or the Justinian program of study the system of legal education involved was primarily a text-book system. The wonderful acumen and thorough training of the Roman lawyer was thus acquired. § 164

He began and spent nearly all his first year of work by studying an elementary legal treatise, devoting his time to getting a bird's-eye view, so to speak, of the entire field of law, — the fundamental conceptions and principles of law being set forth in a logical system and lucid manner intelligible to the novice in jurisprudence. "Who has ever opened the first book of the Institutes of Justinian, or of the Digest without feeling his mind impressed by that stately sequence of definitions and foundation rules!"[746]

[740] Const. *Omnem*, § 4.

[741] Roby, *Id.* p. xxvii. Ortolan (Prichard and Nasmith Eng. transl.), *Roman law*, § 573, translates the Greek word as "licentiates," — which is far too conjectural.

[742] Roby, *Id.*

[743] Ordinarily in a hearing before the governor of the province of his birth: *Code Justin.* 2, 7, 11, 1.

[744] *Code Justin.* 2, 7, 11 (A.D. 460); *Id.* lex 17, pr. (A.D. 474); *Id.* 22, §§ 4 and 5 (A.D. 505); *Id.* 24, §§ 4 and 5; *Basilica*, 8, 1, 26 (scholium on "doctor ejus," etc.). See also infra vol. ii, § 906 (on the Roman Bar).

[745] Frequently the membership in some of the societies of advocates attached to particular Roman courts was limited: see *Code*, 2, titles 7 and 8; and infra vol. ii, § 906.

[746] Chief Justice Baldwin, *The study of elementary law*, 13 Yale Law Journal, p. 11 (1903).

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The second and third years of his law course the Roman student devoted to the study of leading illustrative cases in all branches of the law, — the Digest and Code of Justinian being replete with reported decisions of cases.[747] And the last two years of his course the Roman student gave largely to private reading and research. In other words, the remaining years of his course after the first year the student devoted to repeatedly going over and reviewing the whole ground covered in the first year, widening and deepening his knowledge of law by a careful, thorough study of the Digest and Code with their detailed expositions and ramifications of juridical doctrines and with illustrations, frequently and often copiously introduced in the text, of pertinent cases and recorded decisions. The course of instruction was really a "concentric system."[748] Mental discipline and the cultivation of habits of clear and accurate thinking were not neglected under this Roman system of legal education. The later years of the student's course could not fail to quicken and sharpen the analytical faculty and inductive ability of the student, for some of the illustrative cases of the Digest require close study to be thoroughly appreciated. The student received first a thorough drilling in the elements and principles of the law, which was followed subsequently in the program of studies by the application inductively of what he had previously deductively acquired, — in other words, he learned how to apply legal principles to states of fact.

§165 **Roman legal education reveals the right way to study law.** Roman legal education has correctly answered for all time that vexed question of the right methods of law study. The cardinal feature of Roman law instruction is that it was truly a system of legal education: Roman law schools scientifically combined instruction by text-books, lectures, and cases, — or in other words prescribed for the study of law **both the exegetical method** (for a lecture is really but a variety of a text-book) **and the analytical case method.** The purpose was to obtain the recognized advantages of both methods.

[747] This fact is also recognized by Monroe Smith, *Legal education in Europe*, Columbia University Quarterly (1908).

[748] See Wurts, *Systems in legal education*, 17 Yale Law Journal, p. 95.

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It ought not to be considered wisdom to arbitrarily limit (§ 165) the student's welfare to the benefit of one method only. Each method should be employed in that sphere where it is productive of the greatest good. Both methods should be used in turn. Both should be scientifically co-ordinated to attain a single goal, — to render students as efficient as possible in their subsequent career at the Bar by giving them the *broadest* kind of legal training.

Briefly stated, the Roman system of legal education was this: first the study of text-books, then the study of cases. This is the normal and quickest way of being introduced to the study of law. The law to the beginner is full of not only new but strange and often puzzling conceptions. The *normal way* to commence the study of law is to receive a careful explanation of its fundamental rules and doctrines given in a text-book or course of lectures by some competent person already in the law. The student is early taught that the mastery of principles is highly essential. He is soon led to see that rules of law are keys to unlock cases. To start the study of law by cases is not logical: it would be like taking a very difficult, laborious route in preference to an easier one to the same destination.

Moreover, to begin the study of law by text-books is the quickest way to accomplish the task of being introduced to the law. That nation unexcelled in creative legal genius — Rome — made *celerity* a criterion of Roman legal education. In the words of Justinian,[749] "If we at the very outset load the mind of the student, while yet inexperienced and untrained, with a multitude and variety of subjects, one of two results will follow — we shall either make him desert his studies, or, after much toil on his part and also in many cases after that self-distrust which so often turns young people aside, we shall bring *more slowly* to that very same point to which, if led by a more easy path, he could have attained quickly enough without any great trouble and without any distrust of himself."

The Roman system of *first* text-books, *then* cases, has been successfully tried and tested throughout the ages. It was

[749] *Inst.* 1, 2 (latter part).

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(§ 165) employed in the Roman world: "*First* an easy and simple explanation, and *afterwards* one thoroughly careful and exact," says the Emperor Justinian.[750] And it was expressly provided that the Roman student, after a thorough drill in elementary law, should then spend much time in the later years of his course applying inductively to the great mass of cases in the Digest that knowledge which he had previously deductively acquired. Moreover, the Roman system contributed all that is good in the law teaching of the Glossators and Commentators — those intellectual giants of the Middle Ages who made modern law possible. The wisdom of exclusively teaching Anglo-American law from start to finish by cases — a method not yet a half century old — has yet to be proved. Such great creative jurists as Lord Mansfield or Chief Justice Marshall received their legal training unaided by it. European lawyers have no difficulty in attaining eminence at the present time without any knowledge of the case method. "The European system of legal education has always been founded on that of the Roman Empire. Roman law was taught as a system of deductive science. The *Corpus Juris* proceeds from assertions of principles, to their application to various cases. The Institutes are a compendium of elementary law prepared by law school professors avowedly as a law school text-book. They are followed by the Digest in which the same principles are more fully stated and illustrated. Then follows the statute law of recent times. Can indeed, in the nature of things, a science like law be intelligently taken up by anyone who has never been introduced to an acquaintance with its fundamental terms and conceptions?" [751]

Roman law is "the most celebrated jurisprudence known to the world"; that it still lives to-day clothed in a twentieth century dress is due in no small measure to its splendid program of legal education, which so successfully trained jurists perhaps unsurpassed in creative ability by any body of lawyers in the world's history. Roman legal education, if judged by the educational *criteria* of thoroughness, completeness,

[750] *Inst.* 1, 2 (first part).

[751] Baldwin, *Id.* p. 12.

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mental discipline, and the cultivation of the power of thought, — in other words, by what it did for those whom it educated — is worthy to be ranked with the best modern legal instruction.

### (5) Post-Justinian Law to the End of the Roman Empire in 1453

**Vitality and elasticity of the Later Empire subsequent to Justinian; the Eastern Roman Empire a bulwark for Western Europe.** § 166 It is a great mistake to think of the Eastern Empire as one long decadence. On the contrary, for nearly 700 years after Justinian, the Roman Empire in Eastern Europe constantly exhibited remarkable signs of elasticity and vitality. As Professor Bury says: "Throughout the Middle Ages, till its collapse at the beginning of the 13th century,[752] the Eastern Roman Empire was superior to all the States of Europe in the efficiency of its civil and military organization, in systematic diplomacy, in wealth, in the refinements of material civilization, and in intellectual culture. It was the heir of antiquity, and it prized its inheritance — its political legacy from Rome and its spiritual legacy from Hellas. . . Yet though the political and social fabric always rested on the same foundations, and though the authority of tradition was unusually strong and persistent, the proverbial conservatism of Byzantium is commonly exaggerated or misinterpreted. The Emperors were continually adjusting and readjusting the machinery of government to satisfy new needs and changing circumstances." [753]

For nearly 900 years after Justinian, the Roman Empire in the East survived the attacks of barbarian peoples and the weight of increasing old age. Constantinople was indeed the frontier fortress of all Europe; it was until 1453 the home of the Roman law itself; it was the home of Roman civilization preserved on the Bosporus until the Western European world was purged of its barbarism and made ready to receive it. And the fall of the Eastern Empire marks the beginning

[752] By the Latin Conquest, see infra § 182.

[753] Bury, *A History of the Eastern Roman Empire: from the fall of Irene to the accession of Basil I.* (802–67 A.D.).

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of the full tide of the Renaissance when Western Europe ceased to be medieval and began to be modern, as a result of the westward flight of civilization from the invading Turks. The crumbling walls of modern Constantinople are a monument to an Empire which made Europe possible. For 1000 years Constantinople stood as an impregnable bulwark between the Orient and Europe, while Rome herself fell and the West lapsed into chaos. Suppose Constantinople had fallen sooner? What might have been, is suggested vividly by the Moorish conquest of Spain and the Turks sweeping westward to Vienna, when at last the Eastern Roman Empire did fall. The debt of Western Europe to the Byzantine Empire is too frequently underestimated.

§ 167 **After Justinian, Greek supplanted Latin as the official language of the Empire.** Although by the 4th century A.D. the conquering Roman impress and Latin language had become strong in the Greek provinces of the Empire, yet the Hellenic element in the East was only temporarily checked. And the following centuries witnessed a strong recrudescence of the native Greek language, together with a gradual de-Latinization of both the governing classes and the population generally.[754] In the 6th century it was unusual to find educated men of the East who knew Latin.[755] Justinian was the last Emperor whose mother tongue was Latin, — his successors spoke Greek preferably or solely. Even Justinian himself, devoted as he was to the Latin traditions of Rome, felt obliged for the better information of his people to publish his later statutes — the Novels[756] — in Greek. From this time onward Greek became the official language of the Eastern Roman Empire,[757] and scarcely fifty years after Justinian's death Latin ceased to be employed at all in the courts of justice.[758] In the 7th century, Latin had become a foreign lan-

[754] See Oman, *Byzantine Empire*, ch. xi.

[755] Oman, *Id.* p. 143. The foremost writer of this century, Procopius, was absolutely ignorant of Latin. Another author, Johannes Lydus, rose to distinction in the government service because, as he says, he knew Latin.

[756] Promulgated A.D. 535–65, see supra § 139.

[757] Bury, *Later Roman Empire* (23 Encycl. Britan.[11] p. 514).

[758] The artificial retention of this linguistic tie to Rome was discontinued in the reign of Heraclius (A.D. 610–41): Heimbach, *Prolegomena Basili-*

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guage to the inhabitants of the Greek and Asiatic provinces of the Empire.

**Names descriptive of post-Justinian Roman law.** The last nine centuries of Roman legal history from the death of Justinian in A.D. 565 to the end of the Empire in 1453 are variously described as "Law of the Eastern Empire," "Graeco-Roman law," "Byzantine Roman law," "Byzantine law," "Post-Justinian law," — the term open to the least misconstruction being the last. The law of the Later Empire after Justinian still retained its Roman characteristics inherited from earlier ages. For about 600 years the codification of Justinian nominally remained the law of the Eastern Empire: but in the 12th century the use of the Justinian law books ceased in the courts, and the *official Greek abridgments* of Justinian's works made by later Emperors, especially the Basilica,[759] replaced them.[760] Such a fate was inevitable owing to the change in the language of the people from Latin to Greek.[761] § 168

**The 6th century Greek jurists of the Justinianean school.** During the remainder of the 6th century following the publication of the Corpus Juris — perhaps also the early years of the next century prior to the reign of Heraclius[762] should be included — a large amount of translation and interpretation of each of the four Justinian law books was done by Greek jurists. These were nearly all law professors of the Justinianean school and bear a special collective name — **the Antiqui** ("ancients"). Nearly all of their extant works consist largely of fragments cited in the later Imperial abridgments of Justinian's Corpus Juris, especially the Basilica.[763] § 169

*corum*, book i, ch. i, § 5 (*Bas.* vol. vi, p. 7); Duck, *De usu et auctoritate juris civilis*, p. 56; Gibbon, *Rome*, ch. 53.

[759] See infra § 176.

[760] See Heimbach, *Prolegomena Basilicorum*, bk. 2, ch. 3, §§ 2–5 (in his *Basilica*, vol. vi, pp. 146 et seq.).

[761] See supra § 167.

[762] He began to reign A.D. 610.

[763] See infra § 176.

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(§ 169) The following Greek **jurists contemporary with Justinian** achieved eminence[764]: Anatolius[765] and Dorotheus[766] — both *antiqui* and law professors at Berytus[767] (Beirut); Cratinus, Julian,[768] and Theophilus[769]—all *antiqui* and also law professors at Constantinople; Isidore[770] and Thalelaeus — both *antiqui* and also professors at Constantinople or Berytus; and Basilides, Cyril[771] (sr., and *antiquus*), Constantine, Dioscorus, Eutolmius, Jacobus, Joannes, Leonides, Leontinus, Mena, Plato, Praesentinus, Prosdocius, Salaminius (an *antiquus*), Theodore[772] (an *antiquus*), Thomas, Timotheus, and Tribonian[773] — all either Imperial officials or leaders of the Bar.

There were also many eminent Greek **jurists immediately subsequent to Justinian.** These include Cyril[774] (jr.), Demosthenes, Domninus, Eudoxius, Patricius, and Stephen[775] — all listed among the *antiqui* and all also law professors at Berytus; Anastasius, Anonymus,[776] Athanasius, Cobidas, Philoxenus, Phocas, Symbatius, and Theodore[777]—all honored as *antiqui*.

Justinian, upon completing his grand work of codification, forbade the making of any commentaries or notes upon his law books,[778] — Greek translations and necessary notes

[764] See Heimbach, *Prolegomena Basilicorum*, bk. 1, ch. 2, §§ 1 et seq. (Bas, vol. vi, pp. 8 et seq.); all the prefaces to the Digest, Code, and Institutes of Justinian.

[765] See supra § 137.

[766] See supra § 135.

[767] See supra §§ 154, 155.

[768] Author of the Latin abridgment or epitome of the *Novels*, see supra § 139.

[769] See supra § 135.

[770] Isidorus.

[771] Cyrillus.

[772] Theodorus.

[773] See supra § 135.

[774] Cyrillus, perhaps a law professor.

[775] Stephanus, at one time law professor at Constantinople.

[776] His real name is unknown; he was probably a law professor at Constantinople.

[777] Theodorus, sometimes called "Scholasticus" or "Hermopolitanus."

[778] *Const.* "Deo auctore," §§ 12 and 13 (Monro, Eng. transl. *Digest*, vol. i, pp. xxvi et seq.); *Const.* "Tanta," § 21 (Monro, *Id.* p. xxxiv).

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excepted.[779] Advantage of this exception was quickly taken, and the general prohibition as to making commentaries was not long obeyed by the Byzantine jurists of this era — the increasing predominance of the Greek language in the Eastern Empire rendered such Greek books quite necessary.[780] **Translations or commentaries of the Code**[781] were made by the Greek jurists Anatolius,[782] Isidore, Stephen, Thalelaeus, and Theodore.[783] Greek translations or commentaries of the **Digest**[784] were written by Anastasius, Anonymus, Cobidas, Cyril (jr.) Stephen,[785] Thalelaeus, and Theophilus.[786] These Byzantine jurists accomplished tasks of great magnitude, and deserve the highest praise. A Greek translation of the **Institutes**[787] was written by the famous Theophilus,[788] illustrious for his participation in the work of making the Corpus Juris.[789] Greek translations or commentaries of the **Novels**[790] were made by the jurists Athanasius, Anonymus, Philoxenus, Symbatius, and Theodorus.

**Rise of the Moslem power in the 7th century; Constantinople saved from the Saracens by Leo the Isaurian (Leo III) in A.D. 718.** Barely sixty-five years after the death of Jus- § 170

[779] *Const.* "Tanta," § 21.

[780] As to the translations and commentaries made by the Greek jurists of the 6th and 7th centuries, see Heimbach, *Prolegomena Basilicorum*, bk. 1, ch. 3–7 (*Bas.* vol. vi, pp. 19 et seq.).

[781] See supra § 136.

[782] See supra § 137.

[783] Those of Anonymus, Athanasius, Cobidas, Cyril (jr.), Dorotheus, and Phocas are regarded as spurious.

[784] See supra § 137.

[785] See Sohm (Ledlie[3]), *Roman law*, p. 133.

[786] See supra § 135. Those of Anatolius, Isidore, and Theodore are regarded as falsely ascribed.

[787] See supra § 138.

[788] The Greek Institutes of Theophilus have been translated into Latin by the following: Fabrotus, 1638; Reitz, *Theophili paraphrasis Justiniani Institutionum*, 1765 (revised by Schrader, Amsterdam, 1860); Ferrini, *Institutionum graeca paraphrasis Theophilo*, etc., 2 vols., Berlin, 1897 (contains also the Greek text). There is a German translation of Theophilus by Wustemann (1823).

[789] See supra § 135. In recent years doubts have been raised as to Theophilus' authorship of this treatise: see Krueger, *Quellen*, p. 362.

[790] See supra § 139.

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(§ 170) tinian, the forces of the Emperor Heraclius[791] in Syria came into collision in 629 with cohorts of an army coming from Arabia, who fought like madmen — the followers of Mohammed. And the superior discipline of the Romans could not prevail against armies of fanatics anxious to get killed in order to reap in the next world the blessings of martyrdom. The moment of the Saracen invasion came at a most unfortunate time for Heraclius, who had just triumphed in the life and death struggle with Chosroës and the power of Persia.[792] Both countries were exhausted, and sorely needed repose: but neither country was to obtain rest.[793] Three years later the storm burst on the unhappy Roman Empire. The Caliph Abu Bekr, obeying his master who had died this same year,[794] sent an army against the Romans in Syria.[795]

The result was a succession of Mohammedan victories. All Syria east of the Jordan was lost in 634, the great city of Damascus fell the next year, Antioch — the Syrian metropolis — and all northern Syria also fell, and in 637 Jerusalem after a year's desperate resistance succumbed to the Saracens. The next year the Arabs hurled themselves against Egypt: after a two years struggle the granary of the Roman Empire was conquered. In 641[796] only Alexandria was left to the dying Heraclius.[797]

The outbreak of civil war in 656 among the Moslems — luckily for the Empire — and the remarkable vigor of the gallant descendants of Heraclius, who preserved nearly every province remaining Roman at his death, checked the power of the Saracens for the rest of the 7th century. But the reckless tyranny of Justinian II, the last of the house of

[791] Reigned A.D. 610–41.

[792] The great Persian war began (before Heraclius' reign) in 602, and lasted until Heraclius' capture of the capital of Persia in 628.

[793] Mohammed in 628 had written to both Heraclius and Chosroës, inviting them to embrace Islam; and, not receiving a satisfactory answer, he doomed both empires to destruction.

[794] Mohammed died June 8, 632.

[795] Another army was at the same time hurled against Persia.

[796] The very year of Heraclius' death witnessed also the complete destruction of his deadly enemy Persia.

[797] Alexandria was forever lost a few years later, in 644.

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Heraclius, and the anarchical times of his wretched successors set in motion again the Saracens, who in the early years of the 8th century overran a large part of Asia Minor. And in 717 the vessels of the Saracens sailed up the Propontis while their huge army attacked Constantinople itself from the western side. The city was besieged for nearly a year, but by the heroic efforts of the new Emperor, Leo the Isaurian,[798] Constantinople — and also all Christendom — was saved from the grand army of the Saracens. Leo won the greatest success in Roman history, — the Saracens never again tried to destroy the Empire. And Leo finally was able to also restore Asia Minor to the Empire, which retained it until the 11th century conquest of this province by the Turks.

§ 171 **Neglect of jurisprudence in the 7th century; the law school of Constantinople closed in the year 717.** The profound disturbances of the social order in the 7th century due to the terrible invasions of the Empire by its powerful enemies made that century a blank in Roman legal history. The activity of the Greek jurists of the Justinianean school came to an end soon after the close of the 6th century. The law of Justinian although rendered into Greek was studied and understood but little. Roman traditions declined while the influence of the Church correspondingly increased, as is seen in the sanction as the law of the Empire by Justinian II of numerous rules enacted by a synod held at Constantinople — which legislation differed from the existing law, being based on ecclesiastical and Mosaic doctrines. In 717 — not quite a century and a half after Justinian — the law school of Constantinople was closed, and remained closed for 150 years until A.D. 866. It was no time to cultivate jurisprudence: the Saracens were threatening the very existence of the Empire's capital.[799]

§ 172 **The 8th and 9th centuries are the period of post-Justinian legislation.** From about the middle of the 8th century to the end of the 9th occurred Byzantine legislation on a grand scale. The history of Roman law from the reign of Leo the

[798] He had been crowned but a few months.

[799] See supra § 170. Constantinople, the beleaguered city, was finally saved by the Emperor Leo III.

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Isaurian [800] down into the reigns of Basil [801] the Macedonian and his sons [802] constitutes the period of post-Justinian legislation. The legislative activity of these later Emperors of the Eastern Empire may be divided into two epochs: the legislation of Leo the Isaurian and the legislation of Basil the Macedonian and his sons. These Graeco-Roman Emperors not only made administrative reforms, but also published statutory manuals containing abridgments of the Justinian law books. All this Byzantine legislation was in the Greek language.

§ 173 **The 8th century administrative reorganization of the Empire by Leo the Isaurian.** Diocletian's system of central control over the provinces and of the division of power between the military and civil authorities [803] had continued almost unaltered for over 300 years until the reign of Justinian, who, to remedy corruption and oppression, inaugurated certain reforms pointing in the opposite direction. Not only did Justinian combine several of the small provinces into larger units, but he reintroduced in some cases the ante-Diocletian policy of placing military and civil authority in the same hands.

In the 7th century the Empire was beset by very powerful enemies; and military exigencies naturally had to be considered first, — everything else gave way. The beginnings of this change occurred late in the 6th century in the newly reconquered and still disturbed provinces of Italy and Africa, where the **exarchs** or military "viceroys" were made supreme over the civil governors in cases of conflicting authority. And in the East the terrible stress of the Saracenic invasion caused similar results. During the reign of Constans II (Constantine IV) [804] the civil authority throughout the Empire was entirely subordinated to the State, and the provinces of the Empire

[800] Leo III, who reigned 717–40 (741).

[801] Basil I, who reigned 867–86.

[802] Leo VI (called the Philosopher or the Wise) and Alexander, who reigned 886–912.

[803] See supra § 120.

[804] He was always known thus by his own people, and his coins bear the name of Constantine. He reigned A.D. 642–88.

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were reorganized into six **military districts.** Three of these (§ 173) were in Europe: the exarchate of Africa, the exarchate of Italy, and the strategia of Thrace. The three Asiatic districts were in Asia Minor.[805] There was also a naval district which included the south coast of Asia Minor and the Aegean.[806]

In the year 717 there was crowned at Constantinople a remarkable man, Leo the Isaurian (Leo III), one of the greatest Emperors that ever sat on the Roman throne and the equal of Charlemagne of the same century. Leo succeeded to a shattered Empire in imminent peril of destruction by the Saracens, which he not only saved[807] but "out of the wild chaos about him he built up a fresh, and in many respects an entirely new, structure of empire, throwing into the tremendous task a fierce and enduring energy, a stern and pure religious enthusiasm. Where he inherited ruin and misery, he left strength, order, peace, and reviving prosperity. He died on June 18, 740,[808] having raised the shattered heritage of the Caesars from the deepest degradation and set it once more on the high road to recovered power and prosperity."[809]

Not only was Leo successful in his foreign policy, but his internal reforms were of the highest importance. He combatted the prevailing barbaric superstition of his time by his edict forbidding image worship, — he was then called Leo *the Iconoclast;* he reorganized the finances and encouraged commerce and industry; and he reformed the administrative civil service and the judicial system. Leo completely swept away the old Roman system dating from Diocletian. The old Roman names and boundaries of the provinces disappeared, as did also the familiar offices of state based on the scalar principle — such as the praetorian prefects and vicars.[810]

[805] The strategia of the Anatolikoi, the strategia of the Armeniakoi, and the Opsikion.

[806] The old prefecture of Illyria was not reorganized in this system, because this part of the Empire was considered as lost — the Prefect of Illyria then exercising little authority beyond Thessalonica.

[807] See supra § 170.

[808] Some authorities say 741.

[809] Foord, *The Byzantine Empire*, pp. 178, 179.

[810] See supra § 120.

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As an administrative reformer Leo should be ranked with Diocletian or with Augustus. Overturning the policy of Diocletian, Leo returned to the régime of Augustus and the Early Emperors prior to Diocletian: he combined military and civil authority in the same person. Each general (strategos) commanding a military department was made also a civil governor. Leo divided the Empire anew into military departments or districts called **themes.** The word originally meant army corps. The new provinces were about the size of the Augustan provinces and much larger, usually, than the Diocletian. There were six themes in Europe and six in Asia; but in the middle of the 10th century the European had become split up into eleven, and the Asiatic into seventeen themes. One of the Asiatic, Samos, was a naval district. In addition to these administrative reforms many changes were made by Leo and his successors in reorganizing the functions of the great bureaucratic civil service of the Later Empire, creating new offices of state, and changing the administrative nomenclature by substituting Greek for the old familiar Latin titles.

§ 174 **The 8th century Ecloga of Leo the Isaurian.** To Leo III[811] belongs the honor of making in **A.D. 740** the first official Imperial collection of Roman law since Justinian.[812] It was written in Greek, Latin being extinct in the Empire of the East, and its full title is "'Εκλογὴ τῶν νόμων ἐν συντόμῳ γενομένη παρὰ Λέοντος καὶ Κωνσταντίνου τῶν σοφῶν καὶ φιλευσεβῶν ἡμῶν βασιλέων ἀπὸ τῶν 'Ινστιτούτων, τῶν Διγέστων, τοῦ Κώδικος, τῶν νεαρῶν τοῦ μεγάλου 'Ιουστινιανοῦ διατάξεων, καὶ ἐπιδιόρθωσις εἰς τὸ φιλανθρωπότερον ἐκτεθεῖσα." [813] It is now known as the *Ecloga legum* ('selection of laws'). It is also referred to as the *Enchiridium* (manual) or the *Isaurian law.* The Ecloga consists of a pref-

[811] His son and successor Constantine V (Conpronymus) was joined with Leo in the promulgation of the Ecloga: see the Greek title of the Ecloga.

[812] He died about two centuries earlier, — in 565.

[813] Zachariae, *Prochiron* (Prolegomena, ch. 2, § 5), 1837, thus translates this into Latin: "Ecloga legum compendiaria per Leonem et Constantinum, sapientes ac pios imperatores, ex Institutionibus, Digestis, Codice, et Novellis magni Justiniani Constitutionibus, et correctio in id quod aequius melius est."

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ace and eighteen titles,[814] and was prepared chiefly by three (§ 174) jurists[815] — two men by the name of **Nicetas,** and **Marinus.**

The Ecloga marked a new era in Roman law. In his legislation the Emperor Leo frequently departed from the Roman tradition as found in the law of Justinian. The Ecloga is best described as a Christian law book. The greatly curtailed *patria potestas* of Justinian's time was still further restricted by Leo, who gave the son arrived at years of discretion increased facilities for emancipation, and who substituted, to a considerable extent, a *parental* control over minors in place of the old familiar paternal power. The Ecloga also greatly modified the law of *guardianship.*

As to *marriage,* Leo accepted the Church view that it is a sacrament, and made marriage indissoluble — quite the reverse of the traditional doctrine of Roman law prior to and in the time of Justinian. The Ecloga greatly multiplied impediments to marriage due to consanguinity and affinity, and abolished concubinage.

The Ecloga made two changes in Roman *criminal law* very significant of ecclesiastical influence. First, *capital punishment* was largely replaced by bodily mutilation of some sort, such as amputation of hand, nose, and castration.[816] The death penalty was retained principally for murder and treason. This tendency towards leniency by avoiding capital punishment increased in course of time to such an extent that four centuries later in the reign of John II[817] capital punishment was never inflicted. This same tendency is also illustrated by the practice of certain Byzantine Emperors as to disposing of unsuccessful rivals or deposed Emperors: such unfortunates were not generally put to death, but were

[814] The Greek text of the Ecloga is given by Zachariae, *Collectio librorum juris Graeco-Romani ineditorum,* Leipzig, 1852. A Latin translation of the preface of the Ecloga and a Latin list of its titles (together with a short history of the Ecloga) are given by Zachariae, *Prochiron* (Prolegomena, ch. 2), Heidelberg, 1837.

[815] *Ecloga,* Prooemium (preface), § 2.

[816] This system of penalties was based on the New Testament doctrine "If thine hand or thy foot offend thee, cut them off," etc.: *Gospel of St. Matthew,* xviii, 8, 9.

[817] John II (Comnenus), 1118–43.

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deprived of eyesight or forced to take monastic orders. Second, the Ecloga granted to all Christian churches the *privilege of asylum* unreservedly and without restrictions, — thus repealing the law of Justinian which strictly limited this right.

§ 175 **The 9th century Prochiron and Epanagoga of Basil the Macedonian.** In the latter half of the 9th century a remarkably virile dynasty of Emperors, known as the Macedonian, began to rule at Constantinople. By them the Eastern Roman Empire was well governed for the next two centuries.[818] To Basil the Macedonian [819] and his sons belongs the glory of being the greatest post-Justinian legislators.[820] Their legislation, which began late in the 9th century, was in the nature of a partial reaction against the Isaurian Ecloga and a return to Justinianean law. Basil aimed to revive legal study. The Isaurian and Phrygian Emperors had apparently failed to revive Roman law study, although the law school at Constantinople was reopened the year before Basil obtained the throne, — after being closed for 150 years.[821]

During the years **870–79**[822] the Emperor Basil published, in imitation of Justinian's Institutes,[823] a manual called the *Prochiron* (ὁ Πρόχειρος νόμος [824] or Πρόχειρον νομικόν — 'manual of the law'). It consists of extracts from the Institutes, Digest, and Code of Justinian, arranged in forty titles with a preface.[825] The orthodox Basil in his Prochiron rather contemptuously abrogated the Ecloga[826] of the "Iconoclast" Leo as to many points of Civil law, and returned to Justinianean principles. For example, Basil revived the law of Justinian as to divorce, and thereafter the Civil and Canon Law were contradictory. But the Prochiron did not repeal the criminal

[818] The last Emperor of the Macedonian dynasty was Michael VI, 1056–7.

[819] Basil I, 867–86.

[820] Leo VI (the Philosopher or the Wise) and Alexander, 886–912.

[821] See supra § 171.

[822] Zachariae, *Prochiron*, p. lvi; Krueger, *Quellen*, etc. p. 369.

[823] See supra § 138.

[824] "Lex manualis" is Zachariae's Latin translation.

[825] The Greek text with a Latin translation is given by Zachariae in his *Proch ron*, Heidelberg, 1837.

[826] See supra § 174.

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law of the Ecloga. A few years later[827] Basil[828] revised the Prochiron, and published a later edition[829] called the *Epanagoga*[830] (Ἐπαναγογὴ τοῦ νόμου). It also consists of a preface and forty titles.[831]

**The 9th century Basilica of Leo VI.** In the Epanagoga § 176
Basil heralded the completion of the revision of the entire Justinian law,[832]—Basil had earlier announced this project in the Prochiron.[833] Basil planned to have this made in sixty books,[834] but subsequently changed his mind and arranged his revision in forty books.[835] This revision[836] was unsatisfactory, and a second edition was prepared under the direction of Basil's son Leo,[837]—the present Basilica which was **promulgated about A.D. 892.**[838] Who or how many were the compilers themselves is not known. Leo's edition rearranged Basil's material into sixty books, the original number had in

[827] In 884–6, — Zachariae, *Epanagoge*, p. 55 (Collectio librorum juris Graeco-Romani ineditorum, Leipzig, 1852); in 879–86, — Krueger, *Quellen*, p. 369.

[828] Or Basil and his sons and successors Leo VI and Alexander, — see Greek title of the Epanagoga.

[829] "Repetita praelectio Prochiri": Zachariae, *Id.*

[830] The word ought to end in "a" as does "Ecloga." But Zachariae, and Hunter, *Roman law*[4], use "e" as the final letter of *Epanagoga*.

[831] For the Greek text, see Zachariae, *Id.;* also his *Prochiron* (Prolegomena, ch. 4), Heidelberg, 1837, for a Latin translation of the preface and a Latin list of the titles.

[832] "Τῶν παλαιῶν νόμων . ἀνακαθαρίσασα," "veterum legum . . repurgans": *Epanagoga*, Prooemium (preface), § 1 (also in Zachariae, *Prochiron*, Prolegomena, ch. iv, § 10, pp. lxxix–lxx).

[833] "Ἀνακαθάρσεως τῶν παλαιῶν νόμων," "de repurgatione veterum legum": Zachariae, *Prochiron*, Prooemium, § 3 (p. 10).

[834] *Prochiron*, Prooemium, § 3.

[835] *Epanagoga*, Prooemium, § 1.

[836] Published about 883, — but not earlier than this year (Heimbach, *Prolegomena Basilicorum*, bk. 2, ch. 2, § 3 in his *Basilica*, vol. vi, p. 99). Basil's first edition soon fell into oblivion, and is not extant.

[837] Leo VI (called the Philosopher or the Wise) reigned with his brother Alexander, a virtual figurehead, 886–912.

[838] Heimbach, *Prolegomena Basilicorum*, bk. 2, ch. 3, § 3 (in his *Basilica*, vol. vi, p. 111): "ineunte imperio Leonis promulgata . paucis annis *ante* annum 892."

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(§ 176) mind by Basil.[839] Very likely Leo made use of the preparations of Basil, perhaps also of the latter's arrangement of books and titles.[840]

The Basilica has been called by various titles. Leo called his work by the same name as his father Basil used in the first editions, — Ἀνακάθαρσις τῶν παλαιῶν νόμων ('revision of the ancient laws'). This name was employed for a long time: it is still used by the 12th century Byzantine jurist Theodore Balsamon.[841] The Basilica were also called Ἑξάβιβλος or Ἑξηκοντάβιβλος ('the six volumes'[842] or 'the sixty books'), and Τὰ Ἑξήκοντα κεφάλαια Βασιλικῶν ('the sixty Imperial texts').[843] But the most frequent name is ὁ Βασιλικός[844] ('the Imperial law') or Τὰ Βασιλικά[845] ('the Imperial laws'). The origin of the term "Basilica" has occasioned considerable controversy. The derivation of it from the name of the Emperor Basil, although interesting, is not probable.

The Basilica are **a Greek abridgment of the entire law of Justinian,** revised to the date of publication late in the 9th century and consolidating into an amalgamation the four 6th century Justinian law books — Code, Institutes, Digest, and Novels.[846] But these distinctive names are not retained. Little use of Justinian's Institutes is made in Leo's work, because the former were designed for law students and not for use in court, while the Basilica were intended for the use

[839] In his Prooemium (preface) to the Basilica Leo makes no mention of Basil at all, and speaks as if he were the first to accomplish the work of revising the Justinian law, — see Heimbach, *Basilica*, vol. i, ante bk. 1. It has been conjectured, rather absurdly, that Basil's work supplied 40 books (*Epanagoga*, Prooemium, § 1) and that Leo added the other 20. (See Heimbach, *Prolegomena*, bk. 2, ch. 3, § 3 — in his *Bas.* vol. vi, p. 102.)

[840] Heimbach, *Prolegomena Basilicorum*, bk. 2, ch. 3, §§ 3 and 5 (in his *Basilica*, vol. vi, pp. 111, 117).

[841] See infra § 180.

[842] Leo himself divided the Basilica into six volumes, — see Prooemium to the Basilica.

[843] This title was given by Mark, patriarch of Constantinople. "Texts" really means "books."

[844] Sc. *νόμος*.

[845] Sc. *νόμιμα*.

[846] As to each of these see supra §§ 135 et seq.

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of lawyers in practice.[847] The Basilica differed from the legis- (§ 176)
lation of Justinian in this marked respect: Leo's work was **not promulgated as superseding all other earlier law,**[848] as were the Justinian law books; on the contrary the grand work of Justinian was still acknowledged as the ultimate source of the Basilica, which merely adapted Justinian's codification to the needs of the 9th century. In reality, however, because the Basilica was authorized by Imperial sanction and because it was in the Greek language, the works of Justinian were gradually supplanted; and by the end of the next century the Justinian codification, although never abrogated, fell into abeyance.[849]

The arrangement of subjects of the Basilica follows considerably the order of the Code of Justinian.[850] The extracts in the Basilica came principally from two sources: (1) the Greek writings of 6th century Greek jurists[851] who had translated, abridged, or written commentaries on the Corpus Juris; and (2) the Prochiron[852] which contains post-Justinian Imperial statutes. The original Latin text of Justinian's codification was not often used. The Basilica frequently omit portions of the Digest, and occasionally contain passages from ancient jurists not found in the Digest.[853]

The **Basilica are cited** as such and such a **book, title, fragment** or **law.** Basilica citations of the text of Justinian's Corpus Juris are frequently accompanied by numerous annotations taken from the writings of Greek jurists of the

[847] See Heimbach, *Prolegomena Bas.*, bk. 2, ch. 3, 11, § 2 (*Bas.* vol. vi, p. 127).

[848] See Hunter, *Roman law*[4], p. 95.

[849] The use of the Justinian law books did not entirely cease in the courts until the 12th century, — see supra § 168.

[850] Heimbach, *Id.* pp. 118–19.

[851] See supra § 169.

[852] See supra § 175.

[853] Furthermore, the compilers of the Basilica made some use of the **Leonine Constitutions** — the numerous statutes or **Novels of Leo VI.** Novel I contains the promulgation of the Basilica. See Heimbach, *Prolegomena Basilicorum*, bk. 2, I, ch. 3, §§ 3 and 7 (in his *Bas.* vol. vi, pp. 110, 111, 141).

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6th century.[854] These passages are known as **scholia,**[855] and these may be interpretative, illustrative, or sometimes conflicting with the text itself.

**A Latin translation** of the Basilica was first made in 1638 by the learned Fabrot[856] (Fabrotus), under the patronage of Louis XIII of France. Two centuries later, between the years 1833–70, the German Civilian Heimbach reconstructed the Basilica from all the extant MSS. and translated them into Latin — perhaps the greatest literary undertaking of the 19th century.[857]

§ 177 **Character of the post-Basilica Roman law to the end of the Empire in A.D. 1453.** During the next five centuries after the Basilica[858] there was little Imperial legislation of consequence. The excellence of the Basilica, the troubled times of the last centuries of the Empire — afflicting it, in addition to the increasing weight of old age, with much suffering from enemies, and finally in the 13th century with ruin beyond recovery through the dastardly Latin Conquest of Constantinople — all these factors both good and bad militated against further Byzantine legislation on a grand scale. Although subsequent to the Basilica there were written many commentaries, abridgments, and revisions of Byzantine Roman law, yet the Basilica[859] together with the Prochiron and Epanagoga[860] were till the end of the Eastern Empire, "the constant resource and chief authority of the lawyer."[861]

[854] See supra § 169.

[855] Annotations from 6th century Greek jurists are technically known as "Τὰ Παλαιά" or "*antiqua*": those from later Greek jurists are strictly *scholia*. See also infra § 177 and Heimbach, *Prolegomena, etc.*, bk. 2, ch. 3, § 7, ch. 5, §§ 2–31 (in his *Bas.*, vol. vi, pp. 121–4, 196–203).

[856] Heimbach, *Bas.*, vol. vi, p. 181 (Prolegomena, bk. 2, ch. 4, § 2).

[857] Heimbach's text and Latin translation is the standard work. It is entitled *Basilicorum libri LX*, 7 vols., Leipzig, 1833–97. Vol. 7 is known as "Supplementum alterum, ed. Ferrini et Mercati."

[858] The promulgator of this work, Leo VI (the Philosopher or Wise), died 912.

[859] See supra § 176.

[860] See supra § 175.

[861] Ortolan (Prichard and Nasmith transl.), *History of Roman law*, § 593.

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**10th century Roman law.** The publication of the legislation of Basil and his sons [862] naturally acted as a great stimulus to fresh Roman law literature. Commentaries, abridgments, and revisions soon followed. The post-Basilica jurists also studied the ecclesiastical law of the Eastern or Greek Church.[863] The work of the Graeco-Roman jurists subsequent to the Basilica [864] consisted principally of abridgments and manuals. They commented or wrote notes on the Justinian law, especially as contained in the *scholia antiqua* [865] or annotations of the ancient 6th century Greek jurists.[866] For this reason some of the works of the post-Basilica jurists are called "the later scholia." [867] § 178

The most celebrated of the 10th century Byzantine jurists and scholiasts was Eustathius Romanus, who lived during the reign of Basil II, 963–1025. In this same century also were published three important works: in the year 920 the Ἐπιτομὴ τῶν νόμων (*Epitome legum*) in fifty titles,[868] — based partly on Justinian and partly on the Epanagoga,[869] a revised edition being issued toward the reign of Constantine VII (Porphyrogenitus) [870]; the *Synopsis Basilicorum*,[871] — an abridgment in alphabetical order of the Basilica,[872] which with various revisions survived until the end of the Empire, five centuries later; and the *Epanagoga aucta*.[873]

**11th century Roman law.** The summit of activity in post-Basilica Roman law study and literature came in the 11th century, during which lived many Byzantine jurists of ability § 179

[862] See supra §§ 175, 176.

[863] The Western Latin Church separated from the Eastern in 1054.

[864] As to these jurists, see Heimbach, *Prolegomena Basilicorum*, bk. 2, ch. 5, § 3 and bk. 2, ch. 3, III, § 2 (in his *Bas.* vol. vi, pp. 197–203, 146–9).

[865] Known as Τὰ Παλαιά or Παραγραφαὶ τῶν Παλαιῶν.

[866] See supra § 169.

[867] Νέαι Παραγραφαί.

[868] Zachariae, *Jus Graeco-Romanum*, vols. 2 and 7; Krueger, *Quellen*, p. 370.

[869] See supra § 175.

[870] Hunter, *Roman law*[4], p. 96. This Emperor reigned 912–58.

[871] Ἐκλογὴ βασιλικῶν. To distinguish it from the later *Synopsis minor* (see infra § 181), it is frequently referred to as *Syn. Bas.* "*Major*."

[872] Zachariae, *Jus Graeco-Romanum*, vol. 6; Krueger, *Id.*

[873] Zachariae, *Jus Graeco-Romanum*, vol. 4. See also supra § 175.

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and eminence. Among them were Garidas,[874] John Nomophylax,[875] Patzus, Constantine of Nicaea,[876] Gregory,[877] Doxapater, and Calocyrus Sextus, who in his scholia contrasts Justinian's Digest with the Basilica — thus showing at the time he wrote the use of the Justinian law books had not yet ceased.[878]

In the 11th century also there was a **great revival of legal study** during the reign of Constantine IX (Monomachus),[879] who founded anew the law school at Constantinople. And during the same Emperor's reign were published two important works: *Ecloga ad Prochiron mutata*[880] and the Πεῖρα (*Experientia Romani*) of seventy-five titles containing the decisions of cases taken from the writings of Eustathius Romanus.[881]

In the latter half of the same century also appeared the excellent manual of Michael Attaliata, — the Ποίημα νομικόν (*Opusculum de jure*).[882] A few years earlier [883] had appeared the *Synopsis legum* of Psellus, which was a brief commentary on Roman law written in verse, dedicated to the Emperor Michael VII (Ducas).[884]

§ 180 **12th century Roman law.** Two Byzantine jurists of prominence lived in the 12th century: Hagiotheodorita, one of the important later scholiasts; and Theodore Balsamon, who wrote a commentary on the canon law of the Greek Orthodox Church in which he compared the Justinianean law with the Basilica,

[874] A law professor, perhaps at Constantinople, who lived during the reign of Constantine X (Ducas), A.D. 1059–67.

[875] Sometimes called by his first or his second name only (the second is a title of office). Nomophylax lived in the reign of Alexius I (Comnenus), 1081–1118.

[878] Constantinus Nicaenus, who lived prior to the reign of Alexius I.

[877] Gregorius.

[878] Heimbach, *Bas.* vol. vi, p. 199 (in his *Prolegomena*, 2, 5, 3).

[879] Reigned 1042–55.

[880] It was an amalgamation of the 8th century Ecloga of Leo the Isaurian, the 9th century Prochiron of Basil, and the Epitome Legum. See supra §§ 174–5, 178.

[881] As to both works see Zachariae, *Jus Graeco-Romanum*, vols. 2 and 4.

[882] It was published in the year 1072: Hunter, *Roman law*[4], p. 96.

[883] In the year 1070: Hunter, *Id.*

[884] Reigned 1067–78.

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insisting that the latter controls the former wherever there is a conflict.[885]

**13th century Roman law.** The Byzantine jurist Michael Chumnus, one of the later scholiasts of the Basilica, lived during the 13th century. Also two very important manuals of Graeco-Roman law appeared during this century: the *Synopsis minor*,[886] which is an alphabetical abridgment of the *Synopsis Basilicorum major*[887] and Attaliata's Ποίημα[888]; and, at the end of the 13th century, the *Prochiron auctum*,[889] a greatly enlarged revision of the Prochiron.[890] § 181

**14th century Roman law.** Two works of great importance appeared in the 14th century, both of which attained a high reputation and became well-known manuals of the law of the last century of the Roman Empire of the East. In the year 1335 the monk Matthew Blastares published his celebrated Manual of Civil and Canon Law, arranged in alphabetical order. § 182

In the year **1345,** a little over a century prior to the capture of Constantinople by the Turks, Constantine Harmenopulos, a judge at Thessalonica, published his **Hexabiblos.** The Greek title is Πρόχειρον τῶν νόμων τὸ λεγόμενον ἡ ἑξάβιβλος . . . Κωνσταντίνου τοῦ Ἁρμενοπουλοῦ ("Manuale legum dictum Hexabiblos," [891] etc.). It is sometimes referred to as the *Promptuarium*. It is an extremely clear legal manual or compendium arranged in six parts[892] and eighty-seven titles with a preface. For his material Harmenopulos drew from the

[885] Colquhoun, *Roman law*, § 196. Other Greek Canonists of importance are: John Zonaras (12th century); Psellus; Photius (9th century — tutor of Leo VI, supra § 176); John of Antioch (6th century — Justinian's age).

[886] The Greek title is Μικρὸν κατὰ στοιχεῖον, — Hunter, *Roman law*[4], p. 96. It is often called simply "Μικρόν."

[887] See supra § 178.

[888] See supra § 179.

[889] Zachariae, *Jus Graeco-Romanum*, vol. 6. It appeared about 1300: Krueger, *Quellen*, p. 370.

[890] See supra § 175.

[891] The latest edition is that of Heimbach, *Id.*, Leipzig, 1851, who gives the Greek text with a Latin translation.

[892] These are: *book i*, De legibus et ordine judiciario nec non de restitutione ac libertatibus; *book ii*, De variis causis novisque operibus; *book iii*,

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*Prochiron*,[893] *Synopsis Basilicorum*,[894] *Synopsis minor*,[895] Πεῖρα,[896] and the *Ecloga* of Leo the Isaurian.[897] The *Hexabiblos* became very famous throughout the East, and survived the Turkish conquest of the Empire; and is to-day law for the Greeks living in the Turkish dominions.[898] Notice of it also reached Western Europe.

§ 183 **Fall in 1453 of the Eastern Roman Empire; dispersion of Greek culture and the knowledge of antiquity into Western Europe; fate of Roman law in Eastern Europe.** The Eastern Empire had so long withstood the attacks of its enemies that it seemed invulnerable. Saracens, Tartars, Bulgarians, and other hostile *barbarian* nations had tried hard but never were able to conquer the proud Roman Empire with its capital on the Bosporus, — the accomplishment of this feat of arms was reserved for *Christian* nations of Western Europe. Early in the 13th century the Venetians with the help of the renegade Fourth Crusaders, wantonly invaded and overturned the Eastern Roman Empire. For the first time in her history Constantinople was captured and sacked. She was a splendid prize, — the storehouse of the treasures of the world for 900 years since the time of her founder Constantine the Great. The Crusaders, who had tampered with their oaths and shed Christian blood, indulged in a carnival of slaughter, rape, and plunder,[899] "behaving far worse than the Saracens," says a

De alienatione, mutuo, et societate; *book iv*, Sponsalibus et nuptiis; *book v*, De testamentis ac tutoribus; *book vi*, De damno et poenis.

[893] See supra § 175.

[894] See supra § 178.

[895] See supra § 181.

[896] See supra § 179.

[897] See supra § 174.

[898] It was also clothed in 1835 with statutory authority as the civil code for the modern kingdom of Greece (12 *Encycl. Britan.*[11] p. 432). See also infra chap. iii, "Greece," § 194.

[899] The western clergy in the army plundered the Byzantine churches to secure relics to take home with them, — the whole of France, for instance, awaited anxiously the distribution in the French provinces of supernatural religious relics! Such was the gross darkness of medieval western Europe. See Luchaire (Krehbiel transl.), *Social France at the time of Philip Augustus*, London, 1912.

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Greek eyewitness.[900] Not content with despoiling the Greeks of (§ 183)
a huge sum of money in hard coin—no less than $4,000,000[901]—
the despicable Crusaders put into the melting pot for the sake
of more copper money many priceless statues of antiquity,
including the Heracles of Lysippus and the brass figures
erected by Augustus after Actium. A Latin kingdom was
established, and for over a half century Latin sovereigns
reigned in Constantinople.[902]

The **Latin Conquest** was a blow to the Eastern Roman Empire from which it never recovered; the false Crusaders paved the way for the Turkish destruction of the Empire. Although the Greek Empire did partially revive and the Emperor Michael Paleologus[903] in 1261 retook Constantinople, driving the last Latin Emperor[904] into a miserable exile, the Eastern Roman Empire never again regained its strength. Not only had it suffered a great loss of European territory never to be recovered, but the centuries-old commercial supremacy of Constantinople had passed to Italian cities, — and the latter employed the greatest vigilance to prevent the Byzantine Imperial navy from increasing in strength and restoring the free navigation of the Levant to Greek merchant vessels. Finally, the entire administrative machinery of the Empire — long the pride of the East Romans — had now become hopelessly disarranged. Constantinople was no longer mistress of the sea or controller of the trade of Christendom. By the middle of the 14th century the evil day of Turkish domination was fast approaching, and the fall of the venerable Roman Empire was merely a question of time and opportunity.

During the last half century of the Empire **the Turks** were constantly menacing the very capital of the Eastern Empire. Finally it was seen that the end was near. **Constantine XIII,**[905]

[900] Oman, *Byzantine Empire*, ch. 22.

[901] Oman, *Id.*

[902] The so-called Latin Empire was from A.D. 1204–61.

[903] Michael VIII, who founded the last Imperial dynasty of the Byzantine Empire.

[904] Baldwin II.

[905] The numeral is given also as "XI" or "XIII": see the histories of Oman and Bury.

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(§ 183) the last Emperor of the Greeks, implored the Christian sovereigns of Western Europe for aid, but it came not. On the contrary over 30,000 renegade Christians — to the everlasting shame of Western Europe — were serving in the army of the Turks besieging Constantinople. On the 28th of May 1453 communion was held for the last time in Justinian's marvelous church of Sancta Sophia built by that lawgiving Emperor 800 years before; and then Constantine and his nobles went forth to die sword in hand. **The fall of the venerable Empire** gave Europe a dreadful shock of horror; Europe repented too late of her lack of interest; the Empire had weathered so many storms in the past, that she seemed invincible. Mohammed, the Turkish sovereign, took, it is estimated 50,000 captives. Over 40,000 Greeks perished in battle and massacre. It is no wonder the modern Greeks hate the Turks, and pray for a restoration of the Empire of their fathers. Upon the Roman Emperors of the West — the German princes who were the successors to Charlemagne's restored Western Empire — fell the duty of stopping the westward advance of the Turkish conquerors: that the Western Roman Emperors did stop the Turks, and so saved Europe, is well-known to history. The siege of Vienna in 1529 marks the recession of the Turks.

For more than a century prior to the fall of Constantinople many Greeks perceived the approaching doom of the Roman Empire in the East, and had fled westward, especially to Italy. These **expatriated Greeks carried to Western Europe numerous relics of their art, literature, and law.** Naples, Venice, Rome, Florence, and other cities received copies of various works on Graeco-Roman law: from these cities by purchase or gift some of these copies later found their way into France, Germany, and England. For instance, the Medicean library at Florence and the library of Francis I at Fontainebleau were filled by a Greek, John Lascaris, with valuable MSS. from his native land.[906] The Renaissance was already at hand, — that great movement whereby Greek culture became engrafted on the rising growth of late medieval life and education into

[906] Ortolan (Prichard and Nasmith transl.), *History of Roman law*, § 595.

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modern times. The mission of the Eastern Roman Empire to store up for the world the remains of Roman civilization and Greek culture was ended. This treasure, carefully guarded against the barbarians throughout the Dark Ages, was dispersed through an awakened Europe ready to receive it.

Although the death of Constantine Paleologus under the walls of Constantinople, battling in vain against the Turks, terminated the Roman State with its continuous existence of nearly 2200 years — a national existence as yet unsurpassed by any other State, ancient or modern — the **knowledge of Roman law did not die in the territories formerly belonging to the Empire:** for the conquering Turks permitted the vanquished Greeks to live under the guidance of the law of their fathers, — the Basilica and later works. And this Eastern European channel of Roman law influence has fertilized the jurisprudence of all the modern States of Eastern Europe.

### (6) Sources of Law During the Later Empire

§ 184 **Imperial legislation the sole source of the law of the Later Empire.** Roman law late in the 3d century A.D. had already become a world law, the principles of which were now expressed and scientifically arranged in a jurisprudence: such was the result of the combined forces of the praetorian Edict,[907] the influence of the jurisconsults,[908] and Greek philosophy.[909] But at the commencement of Diocletian's reign in A.D. 284 the legislative power of the Senate of the jurisconsults had long since ceased and the jus respondendi of the jurisconsults was obsolete [910]: the **statutes** or **constitutiones of the Emperors** had become the sole instrument for bettering Roman law. Imperial statutes wiped out all lingering traces of the ancient distinction between jus civile and jus honorarium. Imperial statutes put the finishing touches on the development of

[907] See supra §§ 60, 61.

[908] See supra §§ 68 et seq.

[909] See supra §§ 62–7.

[910] See supra §§ 68, 113, and 114.

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(§ 184) Roman law, polishing and filing the jus civile by the jus gentium wherever necessary on points of detail. By the legislation of Justinian, Roman law was crystallized in a codification. And by the legislation of post-Justinian Emperors, particularly Leo the Isaurian and Basil and his sons,[911] Roman law was given renewed vigor and fitted to outlive the Empire itself in Eastern Europe.[912]

[911] See supra §§ 172 et seq.
[912] See supra § 182.

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# CHAPTER III

## ROMAN LAW SINCE JUSTINIAN TO THE PRESENT TIME,—THE MODERN REALM OF ROMAN LAW

**The modern Civil Law.** Roman law did not perish with the destruction of the Roman Empire: on the contrary it has been exerting a profound influence on the formation and development of modern private law in Europe, America, Asia, and Africa. This is why the jurisprudence of modern European and allied systems of law is often collectively described as the modern Roman or Civil Law.[1] The mission of Roman law since Justinian has been world-wide; it is responsible for efforts to mold and make uniform the private law of every modern State, and to embody it in a codification.[2] It will then be realized that verily Rome has conquered the world by her law, and that the vast Empire of the Caesars is quite insignificant when compared with the modern domains of Roman law which comprise the whole civilized world of several continents.[3] §185

The history of Roman law since Justinian is brought down to modern times through two distinct channels: via Eastern Europe and via Western Europe. We shall follow the course of these two channels, exploring each in the order given with the view of ascertaining how potent has been the influence of Roman law in the development of the principal modern systems of private law. The development of the law of modern Eastern European and other countries affected by the Byzantine Roman Empire has been caused by the influence

[1] To confine the expression strictly to Continental European and allied systems of law, while apt, is too narrow; Great Britain, the English law countries of the British Empire, and the United States are also provinces of the modern realm of Roman law, even if their law is not Romanized so completely.

[2] See supra §§ 12–15.

[3] See supra § 11.

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(§ 185) of post-Justinian Roman law.[4] This Eastern European channel of the influence of Roman law since Justinian has passed into Abyssinia, the Mohammedan countries, Russia, Greece, and the Balkan States.

The development of the law of modern Western European countries and of countries throughout the world settled, acquired, or affected by these nations has been caused by the influence of the Justinian Roman law.[5] While the ante-Justinian partial Roman codifications [6] exerted some influence on Western Europe, their effect is insignificant and almost negligible as compared with the all-absorbing, far-reaching potency of Justinian's Corpus Juris following his 6th century reconquest of Italy.[7] This Western European channel of the influence of Roman law since Justinian has passed into all the States of Western Europe and the twin Americas, into those parts of Asia and Africa colonized or governed by Europeans, and finally into other countries not of a European origin which have imitated or been affected by the jurisprudence of Europe — such as Japan.[8]

One of the most important juridical phenomena of the 19th century was the meeting and merger of these two great streams of Roman law influence — the Eastern European and the Western European. When these great currents of the world influence of Roman law finally became united, the Western European was the larger and more powerful, so much so that it has submerged considerably the Eastern European even in the States of modern Eastern Europe and also in Mohammedan countries. The laws of Russia, the Balkan States, Turkey, and Egypt, with their ancient parentage from the law of the Eastern Roman Empire,[9] are now codified through the influence of the modern Western Codes (especially the

[4] See especially supra §§ 174 et seq.

[5] See supra §§ 135 et seq.

[6] See supra §§ 124 et seq.

[6] See supra §§ 124 et seq.

[7] See supra § 143.

[8] And probably China, in the near future. See Lo, *A study of Chinese jurisprudence*, 6 Ill. Law Rev. pp. 456, 518.

[9] See Amos, *Roman law*, p. vii.

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Napoleonic) — which have been inspired by Justinian's grand codification.[10]

## 1. ABYSSINIA

**Justinian Roman law the basis of modern Abyssinian law.** § 186 The present official name of Abyssinia is its ancient name, — Ethiopia. Modern Abyssinia is three-fourths the size of France.[1] In early times there was an intimate connection between Egypt and Ethiopia, both of which were now and then under the same ruler. Moreover during this period there was considerable commercial intercourse between Judaea and Ethiopia. The present Kings of Abyssinia claim descent from the marriage of Solomon and the Queen of Sheba. During the Greek occupation of Egypt under the Ptolemies, Greek colonies were established in Ethiopia. In the 4th century A.D. Abyssinia adopted Christianity, — the first bishop of Ethiopia, Frumentius, being consecrated about 330 by the famous Athanasius, patriarch of Alexandria. Since then, except in the 16th and 17th centuries when the Jesuits temporarily introduced papal authority, the Abyssinian Church has maintained allegiance to the Coptic or Egyptian Church, — the Abyssinian metropolitan (who is a foreigner) being always appointed from Egypt by the Alexandrian patriarch.[2]

The most flourishing period in the history of Ethiopia was the 6th century, when Yemen, the richest part of Arabia, was subject to Abyssinia. This Arabian conquest was made at the request of the famous Roman Emperor Justinian to avenge an Arabian persecution of Christians. The Ethiopians at this time were in constant communication with the Roman Empire of the East, from which they derived their law, — the present legal system of Abyssinia being based on the Roman law of Justinian. Following the rise of Mohammedanism[3] the Ethiopians were expelled from Arabia; and

[10] See infra, especially "France" and "Germany," — the modern codes of which former country have exerted a tremendous influence over the rest of the world.

[1] Abyssinia's area is 150,000 sq. miles.

[2] Butler, *Abyssinian church* (in 1 Encycl. Britan.[11] p. 95).

[3] See supra § 170.

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with the progress of the Moslem conquests Ethiopia finally became entirely cut off from the rest of the civilized world for 900 years until late in the 15th century, when the Portuguese reached Abyssinia in their search for the far-eastern Christian kingdom of Prester John; thereafter Abyssinia has been known to Western Europe. But, as a result of this separation of centuries from the outside civilized world and the long continued struggle against Moslem neighboring nations, the private law of Abyssinia has deteriorated from its original Roman purity.

## 2. MOHAMMEDAN COUNTRIES, ESPECIALLY THOSE ORIGINALLY PART OF THE EASTERN ROMAN EMPIRE

§ 187 **Islamic private law tinctured with Byzantine Roman law.** The rise of Mohammedanism in the 7th century was followed by the rapid Moslem conquests of infidel countries.[1] Scarcely a century had rolled by when Roman Syria, the restored Persian monarchy, and other parts of Asia,[2] Roman Africa, Egypt, and Visigothic Spain had fallen under the dominion of these Oriental conquerors vowing allegiance to Allah and His prophet Mohammed. But France and Northwestern Europe were saved for Occidental civilization by Charles Martel at Tours in the year 732. Nevertheless in the 15th century the Eastern Roman Empire, that great bulwark of medieval Western Europe against the Moslem power, was finally destroyed by the Ottoman Turks,[3] who themselves had been originally converted to Mohammedanism by the sword of the Saracens. A new law suddenly appeared in the wake of the Arab conquests — the Koran and the learned commentaries on it: was this Islamic system entirely new and original, or was it borrowed from some existing system of law? The answer is that the best part of Islamic law is really but a republication of Justinian Roman law, adapted for Moslems and clothed in an Arabic dress.

[1] See supra § 170. The first collision between the Eastern Roman Empire and the Moslems occurred in A.D. 629.

[2] The Mohammedan invasion reached India in the 11th century.

[3] See supra § 183.

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No system of law is the product of a single mind or age. (§ 187) Mohammedan legislators might, like Justinian, Basil, or Napoleon, compile or codify existing law, but could do little toward creating outright an original system of law. At the time of the Arab conquests and in the following century, Justinian Roman law in its Greek dress was to be found throughout the Eastern Empire, and was actively studied.[4] The Koran, the "divine" revelation to Mohammed, took note of but very few juridical needs; if at Bagdad, in the cities of Spain, and at Cairo philosophy, medicine, mathematics, and logic were studied from Greek sources, if Aristotle gave the Saracens their logic, Justinian, Leo, Basil, and their Greek commentators were avaliable to give them law. Again, at Damascus the entire Roman judicial system lasted a century after the Arab conquest; the Roman law schools of Beirut and Alexandria[5] continued for over a century after the Mohammedan conquest of Syria and Egypt.[6] The Mohammedan jurists **Auzay** and **Shafei,**[7] the latter one of the four founders of Islamic legislation, were admittedly well acquainted with Graeco-Roman law as enforced in Syria.[8]

The founders of the Islamic legal system who lived during the 7th to 10th centuries — the era of activity of Byzantine Roman law — borrowed as much as was not inconsistent with Mohammedanism from the law of Justinian in its Greek dress. But, not wishing to appear as borrowers, the framers of Islamic law always claimed that their conclusions were in harmony with the spirit of Islam, even if, for instance, the Moslem government in Syria, the first halting place of the Arabs, adopted the principles and often the very ordinances of the existing Roman law of land, obligations, and contracts because of the meagerness of the Koran.[9] Says Professor Goldziher of the University of Vienna: "The influence of Roman

[4] See supra §§ 169, 174 et seq.

[5] As to both, see supra § 155.

[6] See Ion, *Roman law and Mohammedan jurisprudence*, 6 Mich. Law Review, pp. 44, 187, 371.

[7] Also spelled "Shafii."

[8] Ion, *Id.*

[9] Goldziher, *Principles of law in Islam* (in 8 *Historian's History of the World*, ch. xii, p. 297, New York, 1907).

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law on the sources of a legal system in Islam is attested by the very name given to jurisprudence in Islam from the beginning. It is called *al Fikh*, reasonableness; and those who pursue the study of it are designated *Fukaha* (singular *Fakih*). These terms, which, as we cannot fail to see, are Arabic translations of the Roman (*juris*) *prudentia* and *prudentes*, would be a clear indication of one of the chief sources of Islamic jurisprudence, even if we had no positive data to prove that this influence extended both to questions of the principle of legal deduction and to particular legal provisions."[10] Finally the influence of Roman legal methods on the system of legal deduction in Islam is even more important than the direct adoption of particular points of law. "The dualism of written law (Arabic, *nazz*) and unwritten law is a mere reflection of the dualism of *leges scriptae* (*chakhamin*) and *leges non scriptae*."[11] Curiously enough, and yet it is really not at all strange, "the Islamite *prudentes* assumed the prerogative of an authoritative subjective *opinio;* for *r'aj*, as it is called in Arabic, is a literal translation of the Latin term."[12]

§ 188 **Instances of the similarity of Mohammedan and Roman law.** The principles of the several characteristic systems or "rites" of Mohammedan law — allowing for slight variations in detail — recall "the common principles, and often the specific rules, of Roman law at almost every juncture."[13] The similarity of Mohammedan and Roman law will be seen from the following instances: Mohammedan law, like the Roman, distinguishes between movable and immovable property, and contains the Roman legal institutions of usufruct and servitudes[14]; in Mohammedan law, as in the Roman, wills may be written or verbal, and the testator cannot dispose of all his property and leave his heirs nothing[15]; the

[10] *Id.* p. 296.

[11] Goldziher, *Id.* p. 297.

[12] Goldziher, *Id.*

[13] Amos, *Roman law*, p. 124.

[14] Amos, *Id.* As to the Roman law of things, usufruct and servitudes, see infra vol. ii, §§ 563, 582–591.

[15] Amos, *Id.* p. 413. These principles are embodied in the Roman *pars legitima* and *inofficiosum testamentum*, see infra vol. ii, "Wills," §§ 697, 701.

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Mohammedan law has the Roman order of succession ab intestato—namely, first the descendants, second the ascendants, third collaterals[16]; in the Mohammedan law of contracts is found the familiar Roman rule that incapacity may occur because of mental unsoundness, prodigality, and bankruptcy[17]; Mohammedan law, like the Roman, has the familiar contracts of sale, letting and hiring, partnership, loan, deposit, agency, suretyship, compromise or transaction, assignment or cession, pledge and mortgage[18]; in the Mohammedan law are found the familiar Roman prescription periods of three, ten, twenty, and thirty years together with the provision that public or government property is imprescriptible[19]; and Mohammedan law, like the Roman, has a law of guardianship for minors.[20]

Very illuminating are the words of Professor Amos, that most brilliant English Romanist: "If . . . the Mohammedan religion is nothing but Hebraism adapted to an Arabian soil, it seems also true that Mohammedan law is nothing but the Roman law of the Eastern Empire adapted to the political conditions of the Arab dominions."[21] This explains the building of the great structure of Mohammedan law which to-day governs millions of people scattered in Turkey, Cyprus, Egypt, India, Ceylon, the Philippines, Algeria, Tripoli, and other parts of Africa.[22]

**Turkey.** The Turks have not scrupled to borrow law from foreign and Christian sources: beginning in the middle of the § 189

[16] Furthermore, the Mohammedan law divided the inheritance into portions similar to the Roman divisible *as:* ½, ¼, ⅛, ⅔, ⅓, ⅙: see Amos, *Id.* As to the subject of "Intestate succession," see infra vol. ii, §§ 670–77.

[17] Amos, *Id.*

[18] *Id.* See infra vol. ii, "Contracts," §§ 755–8, 762, 768–72, 780–803, 805.

[19] Amos, *Roman law*, p. 414. See as to "Prescription," infra vol. ii, §§ 650, 653, 654.

[20] Amos, *Id.* p. 412. See the subject of "Guardianship" infra vol. ii, §§ 521–7.

[21] *Roman law*, p. 415.

[22] Cyprus, Egypt, and India are ruled by England, Algeria by France, Tripoli by Italy, the Philippines by the United States. See also infra vol. iii, § 958.

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(§ 189) 19th century the Sultans began to promulgate codes of Ottoman law, which, although containing much Mohammedan law as tinctured by the Roman law of the Eastern Empire,[23] are largely based upon the 19th century Roman-French Codes Napoleon.[24] In 1850 an Ottoman Code of Commerce was promulgated, and in 1869 a Civil Code (*Medjellé*). And Turkey now has also other codes[25]: Commercial Procedure,[26] Maritime Commerce,[27] Penal Code,[28] Lands,[29] Forests,[30] Criminal Procedure,[31] Civil Procedure,[32] and Mines.[33] These Turkish codes govern all Ottoman subjects, Mohammedan or Christian or of any other religious faith, as to civil, commercial, or criminal matters covered by the codes.

Although the present tendency of Ottoman law is to assimilate non-Mohammedans in matters of personal status as has been already done to a large degree by the above-mentioned Ottoman codes, yet matters of personal law and status — marriage, divorce, testate and intestate succession, guardianship — affecting non-Mohammedan Ottoman subjects are still assigned, as has been the practice for centuries, to the jurisdiction of their respective religious chiefs.[34] Of these the orthodox Greeks are the most favored. In the ecclesiastical courts of the Greek patriarch of Constantinople, whose civil jurisdiction is the widest of all non-Mohammedan religious heads, is still applied the post-Justinian law of the Eastern Empire as received into the Canon Law of the Greek Church.[35] The Greeks living to-day under Turkish rule[36] are still governed

[23] See supra § 188.

[24] See infra "France," §§ 254–8.

[25] All the Ottoman codes have been translated into French by Young, *Corps de droit ottoman*, vol. vi, Oxford, 1906.

[26] 1861.

[27] 1863.

[28] *Id.*

[29] 1868.

[30] 1870.

[31] 1879.

[32] 1880.

[33] 1901 and 1906.

[34] Young, *Corps de droit ottoman*, vol. ii, pp. 2, 19.

[35] Young, *Corps de droit ottoman*, vol. ii, p. 14.

[36] See supra § 183. Greeks living in the Turkish Empire commonly call themselves "Romans" (Ῥωμαῖοι) and their language "Romaic" (Ῥωμαικά), as did the inhabitants of what is now modern Greece prior to the war of Independence of 1821–33.

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by the Basilica,[37] Hexabiblos,[38] and other Byzantine manuals of Roman law.[39] For over 2600 years *Roman* rules of civil conduct, some of which tradition placed in the legendary period of the Kings, have served to guide mankind in their dealings with each other. Such a picture of direct continuous development and permanency of law has never yet been seen, and perhaps never will be again, in the history of the world.

All commercial and criminal matters between Mohammedan and non-Mohammedan Ottomans are brought before the so-called Mixed Tribunals (*tribunaux mixtes*).[40] The same tribunals now have jurisdiction of cases between Ottomans and foreigners,[41] applying the Ottoman codes. By virtue of the so-called Capitulations,[42] which are treaties exempting foreigners from the jurisdiction of local Ottoman courts, cases between foreigners resident in Turkey are litigated in their respective consular courts, — if the foreigners are of different nationalities, the court of the defendant takes jurisdiction.

**Cyprus.** The island of Cyprus — which was taken from the § 190
Roman Empire of the East in 1192 by Richard I (Cœur de Lion) of England and was subsequently possessed successively by the Knights Templar, Guy de Lusignan, his dynasty and the Genoese, and finally the Republic of Venice — was conquered by the Turks in the year 1570. Three centuries later in 1878 the Turkish dominion came to an end. Since then Cyprus, although nominally a Turkish possession,[43] has been occupied and governed by Great Britain. Laws for

[37] See supra § 176.

[38] See supra § 182.

[39] Hunter, *Roman law*[4], p. 97.

[40] Young, *Id.* vol. ii, p. 6.

[41] Young, *Id.* vol. i, pp. 239–50.

[42] On Oct. 1, 1914, Turkey abrogated the Capitulations, in spite of opposition by Great Britain, France, Russia, Italy, the United States, and other powers. At the present time (June 1, 1916) the permanency of this abrogation depends upon the outcome of the great war in Europe.

[43] On Nov. 5, 1914, Great Britain formally annexed Cyprus. The permanency of this annexation depends at the present time (June 1, 1916) on the outcome of the great war in Europe.

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the island are made by a legislative council,[44] of which the British High Commissioner is a member.

Two systems of law are applicable in Cyprus: the Ottoman and the English, both as in force in the year 1878,[45] together with all subsequent legislative modifications of either law. The Ottoman law is applied in all cases where the defendant is an Ottoman subject; in all other cases the English law is employed. The Ottoman law is composed principally of the Commercial, Maritime, and Civil **Codes,**[46] which translate or are based on the 19th century Roman-French Codes Napoleon.[47]

§ 191 **Egypt.** The land of the Pharaohs, although now nominally a Turkish tributary State ruled by a hereditary King known as Khedive, is, and has been since 1882, virtually a British possession under the control of the British Consul-General, who is also Minister Plenipotentiary.[48] The striking feature of the law of modern Egypt is the union of Byzantine Roman law with Western Roman law, as republished in the 19th century Codes Napoleon.

In all matters of personal law, such as marriage, inheritance, and guardianship, Moslem Egyptians are subject to the *Mekemehs* or courts of the cadis, which administer Mohammedan law — a legal system much in debt for its inspiration to post-Justinian Roman law[49]; but non-Moslem[50] Egyptians are subject to the jurisdiction of their respective religious

[44] It consists of eighteen members, six appointive and twelve elective, nine of the latter being elected by non-Mohammedan voters: *Statutes R. and O.* 1907, p. 192, §§ 10, 11, 15.

[45] On July 13 for Ottoman law, on Dec. 21 for English law, — see Huberich, *Cyprus* (in 16 *Commercial laws of the world*, British edition ed. by Scrutton, p. 643, London, 1912).

[46] See supra § 189 and infra vol. iii, § 958. Articles 1613–1851 of the Ottoman Civil Code (*Medjellé*) on procedure, evidence, and prescription are not in force in Cyprus; see Huberich, *Id.*

[47] See infra "France," §§ 254, 257, 258.

[48] On Dec. 18, 1914, Great Britain made Egypt a British protectorate. The permanency of this destruction of nominal Turkish sovereignty depends at the present time (June 1, 1916) on the outcome of the great war in Europe.

[49] See supra §§ 187, 188.

[50] For instance the Copts, Armenians, and Jews.

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chiefs, — the Christian ecclesiastical courts administering (§ 191)
post-Justinian Roman law[51] as received into the Canon Law of the various Eastern churches.

Since the year 1884 jurisdiction over all criminal matters, and all civil matters other than those of personal status, affecting any Egyptian, Moslem[52] or non-Moslem, has been exercised by native Egyptian courts (*tribunaux indigènes*) having both native and foreign judges which administer codes of law modeled on the Roman-French Codes Napoleon.[53] These Egyptian courts are organized in the European style, — a court of appeal for all Egypt with subordinate civil and criminal tribunals.[54] All the proceedings are in Arabic and are modeled on the French system.[55]

By virtue of the Capitulations with Turkey,[56] which apply also to Egypt as part of the Ottoman Empire, foreigners are not subject to the native Egyptian courts, but to their respective consular extraterritorial courts,[57] each of which has jurisdiction of crimes committed by, and of civil cases arising between, its own nationals. But since 1876 civil cases between foreigners of different nationalities and between natives and foreigners must be adjudicated before the Egyptian International or Mixed Tribunals (*tribunaux mixtes*), which apply codes of law[58] largely adapted from the Roman-French Codes Napo-

[51] See supra §§ 172 et seq.

[52] Turks in Egypt, being Ottoman subjects, are subject to native Egyptian courts. Other Moslems in Egypt, such as Persians, are regarded as foreigners, and are subject to the Mixed Tribunals.

[53] See infra "France," §§ 254, 257, 258.

[54] This was also the system of the Imperial Roman judicial organization, — see infra vol. ii, "Roman judicial system," §§ 894–904. For details as to all Egyptian courts see Goudy, *Administration of justice in Egypt*, 23 Law Quart. Rev. pp. 416, 417.

[55] Goudy, *Id.*

[56] See supra § 189. For changes due to the great war in Europe at the present time (June 1, 1916), see supra the first footnote of this § 191 and also the last footnote of § 189.

[57] Fifteen powers possess this right.

[58] A series of Egyptian codes was framed, — Civil, Commercial, Maritime, Penal. A member of the Egyptian international commission was an American, — Elbert Farnam, judge of the Mixed Tribunals 1880–81, who died Dec. 29, 1911.

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leon, although the Egyptian codes contain some Mohammedan law. The Mixed Tribunals are organized into appellate and subordinate courts.[59] The foreign judges are always in a majority. The official language usually employed is French, although Arabic, Italian, and English[60] are alternative "judicial languages." The proceedings are modeled on the French system. "For the student of Roman law, Egypt offers numerous points of interest. The Mixed Courts will recall the court of the peregrin praetor at Rome. The peregrin praetor had to deal, just as the Mixed Court judges have to deal, solely with actions in which either both parties or one of them was a non-citizen (*peregrinus*). And the law administered by the ancient and modern tribunals alike is *jus gentium* — a law not for the citizen as such but adapted for all peoples. Only in Egypt we have a Code in lieu of the praetor's Edicts."[61]

§ 192 **Mohammedan India.** Although much of the law of British India is codified, including criminal law, contracts, and evidence,[62] yet there is still at the present time an important field of law untouched by legislative innovation wherein the native Hindu or Mohammedan law governs. These two systems of law cover practically the same field, — family matters, such as marriage, divorce, inheritance and succession, and guardianship.[63] The Mohammedan law, like the Hindu, is not territorial but personal, — that is, it applies to anyone in India professing to be a Mohammedan.[64] Like the Mohammedan law of those European and African countries which originally formed parts of the Byzantine Empire, Mohammedan law in India, brought there by Moslem invaders from the West, is also related to Roman law of the Eastern Empire.[65]

[59] For details, see Goudy, *Id.* p. 412.

[60] English was authorized in 1905.

[61] Goudy, *Id.* p. 418.

[62] See infra "England, the English law portions of the British Empire," etc., § 404.

[63] Baptista, *India* (in 16 *Commercial laws of the world*, pp. 1, 7, London, 1912); Markby, *Hindu and Mohammedan law*, p. 2.

[64] Markby, *Id.*

[65] See supra § 188.

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## 3. MALTA

**Maltese law is of Roman origin and codified.** Situated about sixty miles south of the nearest point of Silicy are Malta and the adjacent islands.[1] In the year 870 the Maltese Islands were conquered from the Eastern Empire by the Arabs from Sicily, and until 1120 they remained under Moslem rule.[2] Falling into the power successively of the Normans, the Imperial house of the Hohenstaufens, the French, and the Spaniards, the Maltese Islands were ceded by the Emperor Charles V to the Knights of St. John Hospitaller, which military order held them until 1798, when the last Grand Master had to surrender them to Napoleon Bonaparte. The French rule lasted only a short while. Since the year 1814, the Maltese Islands have been a British crown colony, governed by a governor and council[3] at Valetta, the capital. § 193

The basis of Maltese law is the Roman law of Justinian.[4] Latin was the judicial language in Malta as late as 1784, if not later; but in 1815 it was entirely supplanted in the courts by Italian.[5] The partial use of English was authorized very late in the 19th century. The 18th century Code of Rohan,[6] which was in force at the time of the cession of the islands to Great Britain by the Treaty of Paris, has never been entirely abrogated. But since 1854[7] codes of law copied

[1] The Maltese Islands have an area of about 112 square miles, Malta 90, Gozo 20, and Comino 1.

[2] Decided traces of this long Arab domination are seen in the present Maltese language, which is largely an Arabic dialect.

[3] The council has two sections: the executive council of 11 members, and the legislative council of 19 members.

[4] Huberich, *Malta* (in 15 *Commercial laws of the world*, p. 188, London, 1912).

[5] The use of Italian began early in the 17th century, if not a little before: Huberich, *Id.*

[6] So-named from the next to the last Grand Master Emmanuele Rohan (1775–97), who made a compilation of all previous law and statutes: see Huberich, *Id.* The legislation of the Knights Hospitaller of Malta was drafted from Roman law sources.

[7] In this year were enacted the criminal laws now in force.

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largely [8] from Roman-French Codes Napoleon [9] have been introduced into Malta in the form of statutes enacted by the governor and council. The codes of Malta include a Civil Code,[10] and a Code of Civil and Commercial Procedure.[11]

## 4. GREECE

§ 194 **The Eastern Roman Hexabiblos made in 1835 the Civil Code of modern Greece.** The outcome of the Greek War of Independence of 1821–33 was the formation of the modern kingdom of Greece. After the destruction of the Byzantine Empire in 1453, the Turks permitted their Greek subjects to be governed by their own post-Justinian Roman Civil Law.[1] And the Canon Law of the Greek Orthodox Church was of great assistance in transmitting to modern times the Roman law influence of the Byzantine Empire. Soon after the War of Independence began, the Basilica [2] were clothed with statutory force in 1822, and continued to be the law for modern Greece until the year 1835, when [3] by royal decree this code was replaced by the Hexabiblos,[4] as improved by revision and expansion from the Basilica. And the Hexabiblos has remained the Civil Code of Greece until the present time.[5] But the Ionian Islands have a Civil Code of their own, based on the French and Italian. Greece now has also a Penal Code and a Code of Commerce, both derived from the French.[6]

[8] The law of England has been introduced to some extent, as in the Merchant Shipping Act.

[9] See infra "France," §§ 254, 257–8.

[10] Appeared in 1868. An ordinance on personal law was published in 1871.

[11] Appeared in 1855.

[1] See supra §§ 189, 174 et seq.

[2] See supra § 176.

[3] On Feb. 23.

[4] See supra § 182.

[5] Although a commission of jurists has prepared a new Civil Code based largely on the Italian, it has not yet been adopted by the Greek parliament.

[6] See infra "France," § 257.

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## 5. BALKAN STATES

**Roumania, Bulgaria, Serbia,[1] Montenegro.[1]** The Balkan peoples derive their law from that of the Eastern Roman Empire, which gave them also their religion and culture. Down to the 19th century and the liberation of the Balkan provinces from Turkish rule, post-Justinian Roman law in its Greek form, especially the Basilica of the Emperor Leo[2] and the Hexabiblos of Harmenopulos,[3] has exercised an unbroken and dominant influence on the law of the Balkan peoples, notwithstanding the great blight of the Turkish dominion which was established just before and after the fall of Constantinople in 1453.[4] § 195

During the 19th century the Balkan provinces of Turkey finally achieved their long-hoped-for independence, and the hateful rule of the Turks with its miseries ceased. Advantage of their autonomy or freedom was soon taken by the various newly erected Balkan States to improve their law by codification, generally by imitating as closely as possible the Roman-French Codes Napoleon.[5] In 1839 a Code of Commerce, translated from the French, was promulgated in Wallachia, now a part of Roumania. This was followed in 1852 by a Penal Code, also translated from the French. Twelve years later, in 1864, appeared the Civil Code of Roumania, which was modeled upon the French Civil Code, although taking into account the modifications introduced by the

[1] Late in 1915 this State was conquered by Austria, Germany, and Bulgaria. At the present time (June 1, 1916) the restoration of independence for Serbia and Montenegro depends on the outcome of the great war in Europe.

[2] See supra § 176.

[3] See supra § 182.

[4] Bulgaria, ruled in the 11th century by the Eastern Roman Empire, was conquered by the Turks in 1396 before the Byzantine Empire fell. Serbia, also a province of the Eastern Empire in the 12th century, was conquered by the Turks in 1459. Roumania, the ancient Dacia of Trajan and for centuries a part of the Roman Empire, fell into Turkish clutches 1416–1513. Valiant little Montenegro, although at one time under the rule of the Eastern Empire, was never conquered by the Turks.

[5] See infra "France," §§ 254, 257–8.

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Italian.[6] In 1887 the Code of Commerce of 1839 was abrogated, and was replaced the same year by a new Code which closely follows the Italian Code of Commerce.

In 1844 Serbia promulgated a Civil Code.[7] Codification of the law of Montenegro was successfully accomplished in 1888,[8] in which year was promulgated the Civil Code.[9] This Code drew much law from foreign systems, adapted to national requirements. In 1905 appeared the Montenegrin Code of Civil Procedure, which was followed a year later by a Penal Code. Bulgaria also has Civil and Penal Codes, the latter promulgated in 1896.

## 6. RUSSIA

§196 **The 10th century conversion of the Russians to Christianity as introduced from the Eastern Roman Empire.** Russian law is traceable to the two great streams which have fertilized the civilized world of Europe: German or Slavic customary law and Roman law. In the middle of the 9th century, Rurik, the leader of a band of roving Northmen, settled at Novgorad.[1] Later he migrated into southeast Russia and established himself in power at Kiev, where his descendants ruled for over 700 years.[2] This small principality finally expanded into the vast Empire of Russia. Although Rurik brought with him the laws which governed the Normans, Russia was destined to become far more receptive of the laws, religion, and culture of the Eastern Roman Empire "whence," as Professor Bryce remarks,[3] "Russia took

[6] It is well to remember that the modern Roumanian language is a Romance language, resembling closely Italian.

[7] It shows traces of the Austrian Civil Code of 1812 as well as of the French. A movement is under way to revise the Serbian Civil Code: see 37 Law Mag. and Rev., p. 127; Peritch, *Ein neues Werk . . der Kodifikation des Privatrechts*, Berlin, 1911.

[8] Montenegrin law, previously unwritten, was first put into writing in 1796 by Danilo II.

[9] It was drafted by Professor Bogishitch. It was revised in 1899.

[1] The traditional date of arrival is A.D. 862.

[2] Rurik died at Kiev in 879. The murder of Feodor I, last of the house of Rurik, occurred in 1598.

[3] *Studies in history, etc.*, p. 93.

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her Christianity and her earliest literary impulse. . . . Generally, one may say that it was by and with Christianity that Roman law found its way in the countries to the east of Germany and to the north of the Eastern Empire." During the 10th century the Russians were converted to Byzantine Christianity; and the great-grandson of Rurik, prince Vladimir, and his people were baptized in the Dnieper by Greek priests from Constantinople. Intercommunication between Russia and the Eastern Roman Empire followed. Byzantine friendship with Russia was cemented by the marriage of Vladimir in 988 to Anna, the sister of the Emperor Basil II.

§ 197 **The great influence of Byzantine art, culture, and law in Russia prior to the fall of the Eastern Empire in the 15th century.** The adoption of Christianity by Vladimir and his subjects was followed by commerce with the Eastern Empire. In its wake came Byzantine art and culture.[4] And in the course of the next century what is now Southeastern Russia became more advanced in civilization than any western European State of the period, for Russia came in for a share of Byzantine culture, then vastly superior to the rudeness of Western nations.[5] Greek Christianity introduced into Russia also the Byzantine style of church architecture.[6] The first metropolitan bishop in Russia sent by the patriarch of Constantinople was the Greek Theopemptus, who consecrated the cathedral of St. Sophia at Kiev. At his death in 1051 the Russian ecclesiastical connection with Constantinople was made still closer. Not until the middle of the 15th century, when in 1453 the Turks captured Constantinople and destroyed the Eastern Roman Empire, did the Russian Church, then the

[4] The Russian alphabet is the work of Greeks who adapted their own alphabet to the Slavic tongue, inventing new letters to represent sounds not in the Greek. From the first, Russia had the Bible in the Slavic translation: Adeney, *Greek and Eastern churches*, p. 395, New York, 1908.

[5] See Adeney, *Id.* p. 363.

[6] In the 11th century Yasolaf, the son of Vladimir, erected at Kiev "the metropolitan cathedral which he named St. Sophia, after Justinian's temple, the ideal of all Greek and Russian churches. His son built a second church of St. Sophia in Novgorod": Adeney, *Id.* p. 368.

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(§ 197) seventieth metropolitan bishropric of the patriarchate of Constantinople, gain its ecclesiastical independence.[7] But although the Russian Church became autocephalous, yet she has never lost fellowship with the mother Greek Church, — she is to-day regarded by the latter as still a part of the one holy orthodox Church.

The fall of the Eastern Empire was also nearly synchronized with the rise of a new empire, — united European Russia. Ivan III, the Great, during his forty-three years reign[8] recovered the full freedom of Russia from the Tartar invaders,[9] and consolidated the principalities, duchies, and other States of Russia into a single monarchy. Having married Zoe, a niece of Constantine Paleologus, the last Emperor of the Eastern Roman Empire,[10] Ivan adopted the double-headed eagle, the ancient badge of the Byzantine Roman Emperors, to be the arms of Russia,[11] and assumed the significant title of Tsar.[12] It is not surprising that the Russian Emperors soon put forth a claim to Constantinople as descendants of the Byzantine Roman Emperors, — a claim not yet dead.

The long ecclesiastical connection of Russia with Constantinople, lasting for five centuries, gave a permanent entrance into Russia to Byzantine Roman law[13] as appropriated by the Canon Law of the Eastern Greek Church. For instance in the 10th century, treaties were made with the Eastern Empire, assigning to the Russians a part of the foreign quarter at Constantinople where the foreign nations engaged in commerce resided and were governed by their national laws. These treaties, although drawn up by Greeks, reveal the

[7] Adeney, *Id.* p. 392. The ancient title of the Russian primate "Metropolitan of Kiev" was changed to "Metropolitan of Moscow and of all Russia," — the metropolitan being now elected by a council of Russian bishops and no longer appointed by the Greek patriarch of Constantinople.

[8] Reigned 1462–1505.

[9] Russia was subjugated by the Tartars in 1240, but in the 15th century their power had crumbled away.

[10] See supra § 183.

[11] As is the case to-day.

[12] Corresponding to the Latin "Caesar," and very likely supposed by the Russians of the period to signify supreme imperial power.

[13] See supra §§ 172, 176 et seq.

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customs of the Russians. From the provisions of these treaties it is disclosed among other things that there is then a law referred to as a "Russian" law, and — what is more important — that the Russians already made wills (evidently borrowing their use from the Roman law), it being provided that wills of Russians dying at Constantinople should be given effect.[14] And when the Russian Church became separated from the Greek Church, the Canon Law of the former had become heavily indebted to that of the latter, the sources of which are largely post-Justinian Roman law.

**The partial Russian codifications of the 17th and 18th centuries.** § 198 The influence of the Russian Church after the separation from Constantinople did much for the progress of Russian law, for the clergy were customarily consulted by the Tsars because of their education and learning. Although Ivan III in 1497[15] and Ivan IV, the Terrible, in 1550,[16] issued some regulations for compiling Russian law,[17] the first attempts to codify were made by Alexius,[18] who published in 1649 the Oulogenia,[19] a compilation divided into 968 articles embracing without any method of arrangement all branches of the law. This remained in use down to 1835. In 1700 Peter the Great,[20] perhaps in imitation of the partial French codifications of Louis XIV,[21] had the idea of uniting in one collection all the ukases published since 1649; but he did not realize it. Peter II,[22] the Empress Anne,[23] and the Empress Catherine[24] tried unsuccessfully to carry out this plan of Peter the Great.[25]

**The 19th century codification of Russian law in the reign of Nicholas I; the Civil Code of 1835.** § 199 The honor of achieving

[14] Foucher, *Code civil de l'empire de Russie*, pp. ix et seq.
[15] Approximately.
[16] Approximately.
[17] See Foucher, *Id.* pp. xxiv, xxvi.
[18] Alexius I (Michailovitch) reigned 1629–76.
[19] See Foucher, *Id.* pp. xxxi et seq.
[20] Reigned 1682–1725.
[21] See infra "France," § 251.
[22] Reigned 1727–30.
[23] Reigned 1730–40.
[24] Reigned 1762–96.
[25] See Foucher, *Id.* pp. xxxiv et seq.

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the project of Peter the Great to digest the law of Russia rests with Nicholas I,[26] during whose reign this undertaking was completed. This grand work of codification, called the **Svod,** was promulgated January 1, 1835. It consists of eight books or codes containing 36,000 articles, or over 42,000 articles if the later additions be included.[27] The fifth of these codes is the Civil Code. In its present shape the Russian Civil Law has drawn considerably on the Roman-French Codes Napoleon[28], published thirty years earlier, especially as to the principles of property rights and contracts.[29] It has also drawn slightly from the laws of the various German States of this era. The French courts have served as a model for the ordinary Russian tribunals. True is Professor Bryce's description of modern Russian law "as being Roman 'at the second remove,' and reckoned as an outlying . . . province, so to speak, of the legal realm of Rome."[30]

§ 200 **Poland.** A special notice should be given to the law of Poland, that unhappy country, so long an independent kingdom and now divided between Russia,[31] Austria, and Germany. Poland is a Catholic country forming a part of the Western Latin Roman Church. Because of this fact and its proximity to Germany, Poland early came under the influence of the Latin Canon Law and German teaching. A thorough knowledge of Roman law was acquired by Polish students of law, who studied first at the Italian universities and still later at the German.[32] And when they returned home and became judges, they naturally introduced Roman legal principles into the developing Polish law wherever possible. Thus Poland assimilated more Roman law than did Russia. To the 13th century Bologna revival of Roman law in Italy and the consequent

[26] Reigned 1825–55.

[27] Foucher, *Id.*, pp. liv et seq.

[28] See infra "France," §§ 254, 257–8.

[29] Like the Continental European States which followed France as an example, Russia has also a Code of Commerce, Penal Code, etc.

[30] Bryce, *Studies in history, etc.*, p. 93.

[31] Late in 1915 Russian Poland was conquered by Austria and Germany. The permanency of this conquest depends at the present time (June 1, 1916) on the outcome of the great war in Europe.

[32] Bryce, *Id.*

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establishment throughout Western Europe of universities with a faculty of law, is due the founding in 1364 of the Polish university of Cracow, now in Austrian Poland.

## 7. ITALY[1]

**Debt of the modern world to Italy.** How much the world owes to Italian genius and labors! For Italy is "the mother of us all." The lamp of civilization has been handed on from Rome to modern nations by Italian runners. By Italy learning was re-established and the fine arts revived; Italy is truly called "the mother of universities and the savior of learning." European commerce was originally revived by Italy, after the flood of barbarian invasions of Europe had spent itself. By Italians Roman law was recovered from antiquity, adapted for use in later times, and forever implanted as a living force in our modern civilization. § 201

These grand achievements were accomplished by a people laboring under perhaps the worst political handicap known to history. For over thirteen centuries prior to 1871 Italy never enjoyed any of the blessings of a political union, and was either a prey to foreign invaders or torn asunder by fratricidal wars. During these many centuries Italy was but "a geographical expression," — to use Metternich's illuminating description. Very youthful is modern united Italy.[2]

**Periods of Italian legal history.** The history of the development of Italian law into its present form has five well-defined periods: from the middle of the 6th to the middle of the 11th century; from the middle of the 11th to the middle of the 13th century; from the middle of the 13th century to the 16th century; from the 16th century to the rise of the modern kingdom of Italy in the 19th century; modern Italian law.[3] § 202

[1] A part of this was published by the author in 33 Canadian Law Times, p. 869, Oct., 1913, under the title of "The indebtedness of modern jurisprudence to medieval Italian law," and is reprinted by permission.

[2] She celebrated her 40th national birthday in 1911.

[3] It is possible to divide Italian legal history into three grand periods, — see Solmi, *Storia del diritto italiano* (1908), viz. I: "The Roman-barbaric, 476–1100"; II. "The renaissance, 1100–1748" (subdivided into "Period of autonomy 1100–1492," and "Period of foreign preponderance, 1492–

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## I. Italy from the middle of the 6th to the middle of the 11th century; period of the preservation of Justinian's law and the legal teaching of the Eastern Roman Empire

§ 203 **The Roman-barbaric period.** The beginnings of Italian law — using the term "Italian" in its modern sense — start with the emergence of Italy as a separate country out of the 5th century ruins of the Roman Empire of the West. From this time to the 12th century Italy was in a state of turmoil due to Teutonic invasions, the struggle between the barbarians and the Eastern Roman Empire, and medieval Italian wars. But nevertheless during these centuries of strife Roman law was known and applied in Italy, some part of which was under the authority and influence of the Byzantine Empire.[4]

§ 204 **The 6th century reconquest of Italy by Justinian and the introduction of his Corpus Juris.** In 476 the Roman Empire of the West, of which Italy was the capital province, was finally extinguished. About a century later the Ostrogothic kingdom of Italy was destroyed by the splendid military exploits of Belisarius and Narses, generals of Justinian. Once more Italy and Rome were united to the Roman Empire.[5] To the restored province of Italy Justinian extended in 554 his code of laws[6] — the Corpus Juris, as this monumental 6th century codification of Roman law was later termed.[7] Justinian himself re-established and reformed the

1748"); III. "The modern period, 1748–1870." But this division, although quite appropriate politically, does not, owing to its conciseness, clearly portray the evolution of Italian law.

[4] See infra § 206.

[5] See supra § 143.

[6] Supra § 143; Savigny, *Geschichte d. röm. Rechts*[5], *etc.*, vol. ii, § 64, note (b); Ortolan (Prichard and Masmith Eng. transl.), *History of Roman law*, § 596. The ante-Justinian Roman law had survived under the Ostrogothic monarchy in the Edict of Theodoric (A.D. 511–15), see supra § 133: Sohm (Ledlie[3]) *Roman law*, p. 126; Ortolan, etc. *Hist. etc.*, §§ 529, 531; Amos, *Roman law*, pp. 416–17.

[7] See supra § 135.

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law school at Rome [8] in imitation of those at Constantinople and Beirut.

**San Marino.** For the next 500 years Roman law in its original form retained its hold in Italy.[9] And there is one part of the Italian peninsula where this length of time should be increased to over 1300 years: the 20th century law of the tiny Appenine republic of San Marino [10] is Roman law purely and simply. § 205

**A part of Italy was governed by the Eastern Empire until nearly the 12th century.** Although three years after Justinian's death, the revived Roman Imperial authority in Italy received a very serious blow in the coming of the fiercest and rudest of all the Teutonic invaders — the Lombards,[11] who settled in Northern Italy and gradually acquired the middle and southern portions of the peninsula [12] — yet the dominion § 206

[8] The ancient imperial university of Rome had survived the Ostrogothic occupation of Italy. For the teaching of the older ante-Justinian law was substituted instruction in the Justinian law books: see supra § 156; Amos, *Roman law*, pp. 102–3; Ortolan, etc., *Hist. etc.*, § 574; Savigny, *Geschichte d. röm. Rechts*[6], vol. i, § 133.

[9] See Savigny, *Geschichte*[6], *etc.*, ch. 12; Ortolan, etc. *Hist. etc.*, §§ 597–603, 612; Amos, *Civil law*, p. 419.

[10] This mountainous republic of 38 square miles — the smallest and oldest republic in the world — lies about 14 miles southwest of Rimini and the Adriatic, and about 60 miles due south of Ravenna. According to tradition it was founded by St. Marinus during the 3d century persecution of the Christians by Diocletian. Not only does it preserve Roman law, but it also preserves Roman time: no clock ever strikes more than six, the day is divided into four quarters of six hours each. For bibliography as to San Marino, see infra vol. iii, § 962.

[11] In A.D. 568.

[12] The interior of Sardinia, "the forgotten isle of the Mediterranean," still presents features of Roman civilization as known twenty centuries ago. Here are oxen yoked and the ground is plowed, as in Roman days. The carts have solid wheels and wooden axles. Even Latin is spoken, and Greek phrases of the time of Justinian are common in the language of the Sardinian peasants. They dance as did the Roman and Greeks, while their costumes are those of Roman shepherds. Time has stood still here. See Crawford-Flitch, *Mediterranean moods*, New York, 1911.

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in Italy of the Roman Empire of the East did not entirely cease until nearly the 12th[13] century.[14]

§ 207 **Law school of Ravenna.** When Rome fell back under the sway of the Teutonic invaders, the law school at Rome was removed to Ravenna, the capital for nearly two centuries of the Eastern Roman exarchate of Ravenna; and it was thereafter known as the law school of Ravenna.[15] This law school of the Eastern Roman Empire kept alive in Italy into the 11th century the knowledge of Justinian's legal system,[16] — so much so that the law books of Justinian survived the power that introduced them, and obtained a firm hold on Italian courts and practitioners.[17]

[13] Some authorities place the date into the 13th century, — until 1231: see Ferrari, *Documenti greci medievalli di diritto privato dell' Italia meridionale* (1910).

[14] Rome was lost forever to Byzantine rule in A.D. 726, and Bologna in 728. Although the States of the Church — the Papal States — were founded in 774, and the Lombards conquered the exarchate of Ravenna in 752, the cities on the southern shores of Italy remained under the Eastern Roman Empire until into the middle of the 11th century. With the disappearance of the exarchate of Ravenna, Naples and Calabria passed under the authority of the count or patricius of Sicily until the 10th century Arab conquest of Sicily; but parts of Southern Italy remained under the authority of the Byzantine Empire for still another century until the Norman conquest of Southern Italy 1041–71. Certainly Venice nominally belonged to the Eastern Empire as late as 1081 and the reign of Alexis I: see Ortolan, etc., *Hist. etc.* §§ 597–8; 22 *Encycl. Britan.*[11] p. 927; Foord, *Byzantine Empire*, pp. 291, 289, 332, 333, 309.

[15] The 13th century Italian jurist Odofredus speaks of this law school of Ravenna as identical with that re-established at Rome by Justinian: Savigny, *Geschichte d. röm. Rechts*[2], vol. 1, § 138; Ortolan, etc., *History of Roman law*, § 599.

[16] St. Damian (A.D. 988–1072) reports a discussion as to the degrees of relationship which occurred in his time at Ravenna, his native country, which was settled by referring to the Institutes of Justinian: see Ortolan, etc., *History of Roman law*, § 612.

[17] Savigny shows as a historical fact that Roman law actually survived not only in Italy but in other parts of Europe after the destruction of the Roman imperial power. It should also not be overlooked that the maritime cities of Italy always maintained commercial relations with Constantinople from the Justinianean reconquest of Italy down to the fall of the Eastern Empire in 1453: see Savigny, *Geschichte, d. röm. Rechts*[2], vol. i, §§ 86 et seq., 105 et seq., 134 et seq., vol. ii, § 64.

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The jurists of the school of Ravenna followed in the steps of their Byzantine contemporaries. They took the easiest portions of Roman law — the Institutes and Novels[18] — and made abridgments of them on the Graeco-Roman model,[19] and ignored the Digest of Justinian. Now it was the Digest wherein the great work of the later Italian jurists — the Glossators and Commentators — was accomplished.

**Revival of the Western Roman Empire by Charlemagne in the 9th century.** § 208 In the very first year of the 9th century occurred an event of greatest importance increasingly fraught with stupendous influence upon later medieval times throughout Europe as well as Italy. On Christmas day of the year 800 Charlemagne was crowned Roman Emperor at Rome, and the Empire of the West was restored. Western Europe regarded Charlemagne as the lawful successor of Augustus and Constantine. A new joy seized all Western Europe, and it was hoped that the ancient peaceful civilization of Rome would return with the new Empire: but the restoration of the Empire failed to turn back the hands of the clock; and after Charlemagne's death Western Europe and Italy, regardless of the new Empire, soon reverted to medieval darkness, and finally very widely established a feudalistic order of society.

But in spite of the adverse conditions of medieval times, the restored Western Roman Empire continued to show an astonishing vitality[20]: it lasted for over 1000 years until Napoleon put an end to it in 1806.[21] During these ten centuries

[18] See supra §§ 135 et seq.

[19] See supra §§ 169, 172 et seq.; Sohm (Ledlie[3]), *Roman law*, p. 134.

[20] It should not be forgotten that when the lineally descended Roman Empire of the East finally fell in 1453, it was largely the zeal of the Western Roman Emperors that saved Europe from the victorious Turks — a final triumph for the glorious name of Rome. But in the familiar gibe of Voltaire as to the *Holy Roman Empire* (so the Empire had become designated) is summed up its forlorn condition when nearing the end of its existence in the 18th century: "The Holy Roman Empire, which is neither holy, nor Roman, nor an Empire."

[21] The Emperor Francis II resigned and dissolved the Imperial dignity Aug. 6, 1806: Bryce, *Holy Roman Empire*, ch. 20. The crown, scepter, and insignia may be seen to-day in the treasury of the Imperial Palace at Vienna, and form one of the most dazzling exhibits of jewels to be seen anywhere in the world.

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nearly all Italy (nominally at least), Austria, and Germany owed allegiance to the Roman Emperor, which office finally became hereditary in the present Austrian Imperial dynasty.

§ 209 **Discovery of the Florentine manuscript of the Digest.** The restoration of the Western Roman Empire had one very marked consequence: it brought Roman law into still further prominence in Italy and elsewhere. The Germanic Roman Emperors adopted for their new empire Roman Imperial methods, and called into requisition Justinian's Corpus Juris as the actual law of their dominions. Probably mythical[22] is the charming story of how the Emperor Lothaire II in 1136, while waging war in Southern Italy, took the ancient city of Amalfi, and found in the booty an ancient manuscript of the Digest or Pandects[23]—declared by some accounts to have been the copy used by Justinian himself; and that the Emperor Lothaire gave this manuscript to his ally, the city of Pisa, where it was jealously guarded; and that from it Italian jurists were led to study Justinian's law.

One thing is certain: there was a very ancient manuscript of the Digest at Pisa (perhaps written either in Justinian's time or certainly in the following century) which, when Florence conquered Pisa in 1406, was transferred to the former city where it remains to this day,[24] being known as the Florentine — the oldest and most valuable manuscript of the Digest. This Florentine manuscript is our chief authority for the text of Justinian's Digest.[25] Hence it is certain that the law books of Justinian were not unknown in Italy from the 6th to the 12th century.

## II. Italy from the middle of the 11th to the middle of the 13th century: period of the revival of Roman law by the Glossators

§ 210 **Rise of the Glossators.** The first phase in the evolution of an Italian jurisprudence began in the latter half of the 11th

[22] Savigny, *Geschichte d. röm. Rechts*[2], vol. iii, § 35; Ortolan, etc., *History of Roman law*, §§ 620–21.

[23] See supra § 137.

[24] It is a treasure of the Medicean-Laurentian Library.

[25] See Ortolan, etc., *Hist. of Roman law*, §§ 169–625.

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century when a revival of interest in Roman law became noticeable in Italy.[26] A new force arose which freed Roman law from the study of it in the Byzantine manner prevalent at Ravenna. Curiously enough it was supplied by a Germanic people in Italy, — the Lombards, in whom the legal instinct was highly developed. At the outset the Lombards had the best statute law in all Italy: this they began to study at the royal court at Pavia in a new manner — by means of "explanatory notes," *glossae*. The new method succeeded well. Later it was applied by the Glossators of Bologna[27] to the study of the texts of Roman law, being developed with great skill; and it contributed during the next 200 years most abundantly to a thorough understanding of the Corpus Juris.[28]

The traditional Ravenna method of acquiring Roman law through manuals, abridgments, and epitomes according to the Byzantine practice[29] began to succumb before the more scientific and practical exegetic method as employed by the Glossators. Not only did the Glossators elucidate the letter of the law: they also reconciled contradictions and connected mutually related parts; all of which was done by searching for "parallel passages" — passages connected with the text under discussion. The results of this labor were collected and summarized in what were called "summaries" (*summae*), also in imitation of the Lombard jurists. The provisions of pure Roman law of the Justinianean period were rediscovered and brought home to the minds of men.

**The 13th century revival of Roman law, — often called the Bologna revival.** The consequence of the labors of the Glossators was a revival[30] of Roman law study beginning in § 211

[26] In 1038 Conrad II, the Emperor whom Cnut saw crowned, ordained that Roman law should be once more the territorial law of the city of Rome. In 1076 the Digest "was cited in the judgment of a Tuscan court": see Pollock and Maitland, *History of English law*[2], vol. i, p. 23, London, 1898.

[27] This city was originally included in the Eastern Roman exarchate of Ravenna. See supra § 205.

[28] On the work of the Glossators: see Sohm (Ledlie[3]), *Roman law*, §§ 24–6; Ortolan, etc., *History of Roman law*, §§ 613–18; Savigny, *Geschichte d. röm. Rechts*[2], vol. iii, ch. 22–5, vol. iv, ch. 41.

[29] See supra §§ 169, 172.

[30] Savigny frequently uses the expression "revival." It was truly a 'revival,' a 'rebirth,' and not a 'resurrection.' "Revival" is an

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the middle of the 12th century and reaching high tide in the 13th century — frequently called from the place of its origin the Bologna revival — the influence of which was not confined to Italy but ultimately spread over all of Western Europe and molded the jurisprudence of the rising European nations.

The Glossators aimed "to re-establish the authority of Roman law as a *living* law."[31] The first step was taken by inserting in the Code of Justinian excerpts from the laws of the medieval or Germanic Roman Emperors of the West.[32] But here was the practical difficulty, — the law as applied in Italy was not altogether the pure ancient Roman law; the problem was how to adapt Roman law to the altered conditions of medieval life, so as to have it recognized in the law courts. The solution of this problem was slowly worked out by the successors of the Glossators; the Commentators finally accomplished a permanent amalgamation of Roman law and the law of the Teutonic invaders into an *Italian* law.

§ 212 **Founding of law schools and universities.** The 13th century witnessed the culmination of medieval progress. Perhaps no century — not even our own — has contributed more to advance human welfare, the arts, and literature: on account of these accomplishments the 13th century has sometimes been called "the greatest of centuries."[33] During this century the ground was thoroughly prepared for the outburst of the Renaissance which came at the end of the 15th and during the 16th century. One of the most important results of the Bologna revival of Roman law was the founding of universities throughout Italy.[34] "The university, as organized by these

excellent term. Roman law had survived in practice in many places as to various points of law, but was not cultivated; near the end of the 11th century intellectual pursuits revived and with them the study of law. This returning life did not come suddenly, but gently and slowly: it had been foretold by premonitory symptoms early in the 11th century, — Ortolan, etc., *History of Roman law*, § 612.

[31] Sohm (Ledlie[3]), *Roman law*, p. 138.

[32] See "constitutiones" or laws of the Emperors Frederick I and Frederick II (Mommsen, Krueger, etc., *Corpus Juris Civilis*, vol. ii "Codex," pp. 510–13).

[33] See Walsh, *The thirteenth — greatest of centuries*, New York, 1909.

[34] See Savigny, *Geschichte d. röm. Rechts*[2], vol. iii, ch. 21.

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wise generations of the Thirteenth Century, has come down (§ 212) unchanged to us in the modern time."[35]

The oldest Italian university is **Bologna,** the mother of all modern universities. It is not known exactly when the University of Bologna began. The ancient tradition, that it had a 5th century charter granted 433 by the Roman Emperor Theodosius II, cannot be substantiated.[36] But beginning in 1158 when it received a charter from the Emperor Frederick Barbarossa, its existence is historically certain.[37] At the start Bologna had but one Faculty, — that of Law.[38] Considerably later, however, other faculties — Medicine, the Liberal Arts, and Theology — were added.[39] The faculty of law for the training of lawyers never lost its original importance: one of the principal features of every Italian university was a faculty of law. Many of these law schools became known beyond the borders of Italy, and attracted students from all over the medieval world.

The founding of Bologna University was followed in the next century — the 13th — by the establishment of universities at Arezzo,[40] Naples,[41] Padua,[42] Salerno,[43] Genoa,[44] and Rome.[45] In the 14th century the universities of Perugia,[46] Sienna,[47] and Ferrara[48] were founded. The impetus of the movement did not soon abate; in the 15th century universities were established at Turin,[49] Florence,[50] Palermo,[51] and Parma[52]; and in the 16th century four more Italian universities came into being, —

[35] Walsh, *Id.* p. 7.

[36] Savigny, *Geschichte d. röm. Rechts*[2], vol. iii, § 62.

[37] See Savigny, *Id.* vol. iii, § 63.

[38] Colquhoun, *Roman law,* § 136, describes in detail the Bologna law school's organization, — terms, examinations, methods of instruction, etc.

[39] Savigny records how the Schools of Medicine and Arts were still under the control of the rector of the Law School as late as 1295. The Theological School was established by Pope Innocent IV in the second half of the 14th century, — *Geschichte d. röm. Rechts,* vol. iii, § 67.

[40] In 1215.
[41] In 1224.
[42] In 1228.
[43] In 1233.
[44] In 1243.
[45] In 1245.
[46] In 1307.
[47] In 1380.
[48] In 1391.
[49] In 1401.
[50] In 1439.
[51] In 1497.
[52] In 1482.

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Pisa,[53] Milan,[54] Venice,[55] and Pavia.[56] Furthermore, the development of institutions of learnings of which the Faculty of Law formed a necessary part, was not limited to Italy: this beneficent movement early in its history passed across the Alps and the Mediterranean to bless other countries of Europe.

§ 213 **Famous Glossators: Irnerius, Vacarius, Placentinus, Azo, Accursius.** The founder of the Bologna school of the medieval Roman Glossators was the 12th century Irnerius,[57] whom, because of his brilliancy as a jurist, his disciples called the "lighthouse of the law."[58] Other renowned Glossators were Vacarius, Placentinus, Azo, and Accursius.[59] Irnerius and his disciples renewed completely the study of Roman law; and by them it reigned a second time over the whole world.

Through the labors of the Lombard Vacarius[60] began the medieval reception of Roman law in England. Coming to England to act as counsel[61] for Theobald, Archbishop of Canterbury, Vacarius brought with him his manuscript of the texts of Justinian, and founded[62] about 1149 the first English school

[53] In 1552.

[54] In 1565.

[55] In 1592.

[56] In 1599.

[57] Born 1055, died about 1130. He was a native of Bologna, and his Teutonic name, variously spelled, reveals his Lombardic origin. He wrote his famous *Quaestiones de juris subtilitatibus* at Rome 1081–82. He is mentioned as in the service of the Emperor Henry V from 1116 to 1118. See Ortolan, etc., *History of Roman law* § 613; Colquhoun, *Roman law*, § 138; Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 26–7.

[58] "Lucerna juris." It was Irnerius who was the first to advance the modern Continental conception of notarial responsibility, by drawing on Roman law texts.

[59] Mention should be made also of the Glossators known as "the four doctors": Bulgarus, who died 1166; Martinus Gosia, who died not long before Bulgarus; Jacobus, who died 1178; and Ugo, whose death occurred about 1171. All of these belonged to the University of Bologna. To the founder of their school, Irnerius, is ascribed these Latin verses:

"Bulgarus est aurum,
Martinus copia legum,
Mens legum est Ugo.
Jacobus id quo ego."

See Ortolan, etc., *Hist. of Roman law*, § 615; Colquhoun, *Roman law*, § 139; Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 28.

[60] c. 1120–1200.

[61] "Causidicus."

[62] Bryce, *Studies*, p. 861.

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of law at Oxford with a system of instruction modeled on that of Bologna.[63] While a professor at Oxford,[64] Vacarius composed an abstract of the Code and Digest,[65] — the first systematic compendium or *summa* of Roman law published by any Glossator, so far as is known.[66] His example was subsequently followed[67] by Placentinus and Azo, whose summaries became renowned for their excellence. (§ 213)

To the Italian Placentinus[68] is due the founding of the first French law school, — at Montpellier in Southern France. Placentinus, who had taught at Bologna, thus introduced into France the study of law and the system of the Glassators. He wrote an excellent summary of Roman law.[69]

Perhaps the most distinguished of all the law professors of Bologna was Azo.[70] This jurist was the author of many

[63] Ortolan, etc., *History of Roman law*, § 615.

[64] Vacarius' lectures were interrupted when the teaching of Roman law was proscribed by King Stephen, and the Civil and Canon Law books imported were ordered to be destroyed. After the death of Stephen in 1154, this edict was not enforced. The study of Roman law was vigorously resumed at Oxford. It is not known whether Vacarius resumed his Oxford duties after their interruption. Vacarius was adviser and ecclesiastical judge to Roger de Pont L'Evèque, Archbishop of York, after the latter's appointment in 1154. In 1198 Vacarius was commissioned by Pope Innocent III to transact business in the north of England relative to the crusade. See Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 36; 27 *Encycl. Britan.*[11] p. 831.

[65] The "Liber ex universo enucleato juris exceptus, et pauperibus praesertim destinatus." See Colquhoun, *Roman law*, § 144; Amos, *Roman law*, p. 446.

[66] Amos, *Id.* p. 447.

[67] Amos, *Id.*

[68] He was born at Placentia, Italy, about 1120. After establishing the law school at Montpellier, he returned to Bologna, where he again taught for awhile. Later he went again to Montpellier, where he died 1192. Placentinus was at one time elected a bishop of the Church, but his election was invalidated. See Ortolan, etc., *History of Roman law*, § 615; Colquhoun, *Roman law*, § 141; Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 30.

[69] "Jurisconsulti vetutissimi summa" (London, 1536).

[70] He was born at Bologna about 1150. He was a pupil of Johannes Bassianus. In Azo's time it is said there were 10,000 students at Bologna (an almost incredible number), — to such an extent was the study of law followed. Azo was one of the most important of the Glossators. His writings on Roman law were of such weight before courts that it was commonly

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(§ 213) works[71] including a famous summary.[72] The influence of his *summa* was not confined to Italy, but spread over Europe. The 13th century English Chief Justiciar of Henry III, Bracton — the father of the English Common Law — in his own immortal treatise[73] used freely and often copied word for word Azo's *summa*.[74] Once more was English law indebted to Roman jurisprudence.

Among Azo's pupils[75] was Accursius,[76] almost as famous as his old master whose colleague[77] at Bologna Accursius subsequently became. Accursius' *glossa ordinaris*[78] — usually called the "Great Gloss" — marks the summit of the labors of the Glossators. Accursius collected into this one work the extremely numerous earlier annotations on Justinian's Code, Institutes, and Digest. To these annotations he added many of his own. The utility of the work must have been enormous: in it Accursius collected and condensed the learning of the Glossators for the previous 150 years, which had become widely

said "Chi non ha Azzo, non vada a Palazzo." Azo also found time to be extremely active in the political life of Bologna, then independent. He died about 1230. See Colquhoun, *Roman law*, § 146, Güterbock, *Bracton and his relation to the Roman law*, p. 51, Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 37.

[71] Including a gloss or continuous explanation of the whole text of the Digest.

[72] *Summa codicis et institutionum*. More than 30 editions of this work have been published. It superseded all other summae: Colquhoun, *Roman law*, § 146; Güterbock, *Bracton, etc.*, p. 51.

[73] *De legibus et consuetudinibus Angliae*, published about 1256: Güterbock, *Bracton, etc.*, pp. 27–8.

[74] Amos, *Civil law*, p. 446; Güterbock, *Bracton, etc.*, pp. 51–4.

[75] Azo had two other pupils who were renowned but not so famous as Accursius. These were Alexander (Alessandro de Santo Aegidio) and Jacobus Balduinus. See Colquhoun, *Roman law*, § 146; 3 *Encycl. Britan.*[11] p. 81.

[76] Accursius (Francisco Accorso) was born near Florence 1182. He taught at Bologna for about forty years. In 1252 he held the office of Podesta in Bologna. He died at Bologna 1260. See Ortolan, etc., *History of Roman law*, § 628; Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 41.

[77] Accursius was not only a colleague of Azo, but of Hugolinus: Colquhoun, *Roman law*, § 150.

[78] Or *magistralis*. Its Latin is barbarous. It was published about 1250. Sohm (Ledlie[3]), *Roman law*, p. 137; Colquhoun, *Roman law*, § 628.

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dispersed and often confusing.[79] For over a half century the "Great Gloss" of Accursius obtained an authority greater than the Roman texts themselves.[80] The fact that his eldest son [81] gave lectures on law at Oxford University in 1275–76, during the reign of Edward I, sheds an interesting sidelight on the continuing influence of the medieval reception of Roman law in England.

**The Consolato del Mare.** Roman law was also revived in § 214
the medieval commercial compilations of maritime law which originated in Italy. Three celebrated codes of commercial law were formulated in Europe between the latter half of the 11th and the 14th centuries: the Consolato del Mare, the Laws of Oléron, and the Laws of Wisby. The oldest of these three — the Consolato del Mare — is a regulation of the sea prepared either at Pisa [82] or Barcelona.[83] Its date of first promulgation precedes the First Crusade of 1096. The Consolato del Mare was not however the oldest Mediterranean commercial compilation of the Middle Ages: it superseded the Amalfian Tables prepared at that famous Italian seaport.[84] Both the compilation of Amalfi [85] and the Consolato del Mare were confessedly based on the Roman Civil Law.

The 11th century Consolato del Mare was subsequently adopted by many cities on the Mediterranean littoral, and

[79] It was no wonder Accursius was called "the idol of the lawyers." Accursius cited the works of many authors, some of whose manuscripts are now lost. It is said he feigned illness so as to expedite his work to its conclusion, on hearing that a similar work had been started by another lawyer of Bologna. See Ortolan, etc., *History of Roman law*, § 628; 1 *Encycl. Britan.*[11] p. 134.

[80] Ortolan, etc., *Id.*; Sohm (Ledlie[3]), *Roman law*, p. 138.

[81] Also named Francisco Accorso (1225–93). See Colquhoun, *Roman law*, 150; Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 42; 1 *Encycl. Britan.*[11] p. 134.

[82] Pisa was originally included in the Eastern Roman Imperial exarchate of Ravenna until the 8th century, — Ortolan, etc., *History of Roman law*, § 598.

[83] Barcelona received commercial laws from Count Berengarius in 1068. See 6 *Encycl. Britan.*[11] p. 790.

[84] Morris, *Hist. of law*, § 229.

[85] Amalfi was originally ruled by the Byzantine exarch of Ravenna, — Ortolan, etc., *History of Roman law*, § 598.

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from the 14th century exercised enormous influence over all Southern Europe. It became the law of Venice and Genoa, the rival maritime powers of medieval Italy. The rules of the Consolato del Mare on maritime subjects are very liberal and equitable. These are concerned with the ownership of vessels, the rights and duties of masters and captains, of seamen and freight, salvage, general average and contribution, the rights of neutrals in time of war — in short, with all admiralty matters. Its principles have been universally adopted by nations. It is one of the earliest sources of modern international law as to international trade relations.[86]

§ 215 **Rise of the Canon Law.** It should never be forgotten that Roman law was kept alive in Italy and the rest of Europe very largely through the influence of the Church, which also attempted to harmonize Roman law with the requirements of the age through its Canon Law. At this place and time by "Canon Law" is meant the law of the Western Roman Catholic Church only: the Eastern Greek Catholic Church was separated from the Latin Church in 1054. The medieval law of the Western Church became known as the Corpus Juris Canonici (in contradistinction to the Roman Corpus Juris Civilis), and was well developed at the commencement of the 11th century.[87] From the 12th century onward the Roman Church had become almost the supreme mistress of the western world. Originally confined to ecclesiastical matters, the Canon Law sought to reform the secular law as a whole — private, criminal, adjudicative — on lines approved by the Church. Corresponding to the two rulers of the world, the Roman Emperor and the Pope, were two bodies of law, Civil Law and Canon Law, — each claiming, as did its author, to be the universal binding authority. The jurisprudence of this papal law was *substantially Roman law*, modified, however, in accordance with medieval ideas. But here was the limitation of the Canon Law: it was not recognized in secular courts, — its recognition being confined solely to ecclesiastical tribunals.

[86] The text of the Consolato del Mare is given by Pardessus in his *Lois Maritimes*, vol. ii, pp. 1–360.

[87] Sohm (Ledlie[3]), *Roman law*, p. 144. The *Decretum Gratiani* was published about 1140. See infra "The modern Canon Law," § 226.

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The Church was not finally strong enough to effect full recognition of its law in secular courts.

## III. Italy from the middle of the 13th to the 16th century; period of the Commentators

**Rise of the Commentators; difference between them and the Glossators.** The second phase in the evolution of Italian jurisprudence began in the middle of the 13th century, when the school of the Glossators was succeeded by the school of the Commentators, which endured for the next 200 years. These are often called the **"Post-Glossators"** or **"Bartolists."**[88] The Commentators were most influential at the law schools of Bologna, Padua, Pavia, and Perugia. The method of the Commentators was different from that of the Glossators. The Glossators had written short, explanatory notes on the text of the Corpus Juris; the Commentators wrote exhaustive discussions of legal doctrines not having much inner connection with the passage of the Corpus Juris to which they are connected. The Commentators worked differently because their task was unlike that of their predecessors. The Commentators did not address themselves to explaining the Corpus Juris, — that task seemed finished to them; but they began the new task of trying to construct a Roman law to fit the *actual life* of their age. § 216

**The Commentators Italianized Roman law, and showed that a national jurisprudence could be formed by fusing Roman and Teutonic law.** In the 14th century the time had come for amalgamating the Lombardic and Roman population into an Italian people. While "Dante, Petrarch, and Boccaccio created a national literature,"[89] Cinus, Bartolus, and Baldus created a national law out of Roman law and Lombardic customs. The law of practical life had consisted of three parts: Roman law, statute law of Italian cities, and Canon Law. Roman law, theoretically of universal authority, § 217

[88] See Girard, *Manuel de droit romain*[5], p. 85.

[89] Sohm (Ledlie[3]), *Roman law*, p. 141.

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was combined with the German law actually in force, and with the ecclesiastical law of the Church: the result was that the Commentators Italianized Roman law, making it in its combined and composite shape a *living* common law of Italy. By their development of a scientific system of law applicable in actual life the Commentators first showed the late medieval and the rising modern world how to make a national jurisprudence out of Roman law and existing Teutonic customary law by fusing the two — the Roman law becoming the predominant element.

This new "common law," as events proved, was not to be confined to Italy, but was strong enough to exercise a dominant impulse throughout the western world. So successful were the labors of the Commentators that this new amalgamated juridical product was borrowed all over Europe. Posterity owes an incalculable debt of gratitude to the Italian Commentators for their wonderful success in accomplishing the task to which they addressed themselves.

§ 218 **Introduction of scholasticism; revival of the Greek and Roman doctrine of the Law of Nature.** The development of a *national* jurisprudence was brought about by the Commentators in this way: they introduced scholastic tenets into legal science. Scholasticism came into Italy from France.[90] Scholasticism consisted in the predominance of abstract conceptions — its essence lay in the predominance of the deductive method. The scholastic position is that science is nothing but what can be deduced from most general conceptions. It is the method of Aristotle applied to law. The Commentators endeavored by analysis of each rule to trace back the rules of law to general conceptions. Now the Roman jurists never did this: they dealt with definite legal conceptions. But *the principal concern of the medieval Commentators was with the making of definitions and distinctions.* Not yet has the influence of scholastic methods entirely passed away; it is still to be seen in modern jurisprudence.

The Commentators, in transforming Roman law into medieval law, made a sort of philosophical jurisprudence out of law. Reviving the spirit of antiquity, they revived and

[90] Sohm (Ledlie[3]), *Roman law*, p. 146.

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preached the Greek and Roman doctrine of the Law of Nature as permeating all law whatsoever. The Law of Nature was that there is an eternal, immutable Natural Law, valid at all times and at all places, which can be deduced by a purely intellectual process from the very nature of things. It took the medieval world by storm, and has continued down into modern times, surviving the advent of the nineteenth century historical school of Savigny. Where scholasticism erred was to suppose that logical inferences can take the place of observations.

**Famous Commentators: Cinus, Bartolus, Baldus.** The § 219
most famous of many renowned Commentators were Cinus, Bartolus, and Baldus, all of whom lived in the 14th century.[91] The reaction in Italy against the extreme adherence to the Glossators, especially Accursius, was led by Cinus, who ridiculed the servile adherence of his time to the gloss, irrespective of the texts of Roman law.[92] This extraordinary man[93] was famous both as a lawyer and as a poet,[94]—two dissimilar attributes ordinarily. He was associated with the greatest men of his century: Dante was his friend,[95] and Petrarch[96] and Boccaccio are said to have been his pupils. To another pupil, Bartolus, Cinus gave the impulse for his wonderful labors in the field of law.

Bartolus[97] is the greatest of the Commentators. His creative

[91] The most famous precursor of these Commentators was Gulielmus Durantis (1237–96), who was professor of Roman law at Modena and who wrote that celebrated practical treatise the *Speculum juris.*

[92] "I prefer," he said ironically, "the gloss to the text. For if I quote the text (of Roman law), both judges and advocates say to me, 'don't you think the glossator knew the text as well as you do, and that he could understand it better than you?' " Ortolan (Prichard and Nasmith Engl. transl.), *History of Roman law,* § 628.

[93] Cino de Pistoia (1270–1336). He was born at Pistoia. While in France he studied extensively the laws of that country. He was professor of Roman law at Siena (1323), Perugia (1326), and Florence (1336).

[94] See Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 50.

[95] See Colquhoun, *Roman law,* § 168.

[96] *Id.* Petrarch wrote a famous sonnet on Cinus' death.

[97] He was born 1314 at Sassoferato in Umbria, and died 1357 at Perugia where he is buried in the church of San Francisco, his monument being inscribed simply "Ossa Bartoli." He studied law at Perugia, and also at

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(§ 219) legal genius was of a very high order.[98] The great reputation of Bartolus rests on his revival of the exegetical system of teaching law. His best work is his Commentaries[99] on Roman law, which became renowned over all Europe for their excellence.[100] These actually received at one time statutory authority in Spain and Portugal.[101] In France the opinions of Bartolus were so influential in courts of justice that their weight gave rise to the proverbial expressions "*plus résolu que Bartole*" and "*résolu comme un Bartole.*"[102] The influence of Bartolus was international. He was the central figure of the Middle Ages in legal history. Not only did he create a common law for Italy, but he is to be regarded as "the creator of the common

Bologna where he received his doctorate of Civil Law in 1334. He was professor of law at Pisa and Perugia. During his long service at Perugia, 1343–57, he raised this law school to the level of that of Bologna. See Colquhoun, *Roman law*, § 155; Ortolan, etc., *History of Roman law*, § 629; Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 53; Woolf, *Bartolus of Sassoferato*, Cambridge, 1913.

[98] Here are two instances: (1) Bartolus discussed the subject of the conflict of laws, and "was the first to point out" that, in determining how far a State should enforce a foreign law, regard must be particularly paid to the question whether the rule of law is real (*circa rem*), personal (*circa personam*) or mixed (*sollemnitas actus*). This distinction of Bartolus is retained to-day in modern Private International Law; (2) Bartolus discussed the power of a corporation to make binding rules, and "was the first to point out" that there is a distinction between a rule to regulate a political community and a rule to internally regulate a corporation; that while a corporation can make rules of the latter sort, rules of the former sort can be made only by somebody having political authority. Thus Bartolus expressed for the first time the distinctive character of the State's political authority. See Sohm (Ledlie[3]), *Roman law*, p. 148.

[99] For their description, see Colquhoun, *Roman law*, § 155; Ortolan, etc., *History of Roman law*, § 629.

[100] Other valuable works were his treatises *On Procedure* and *On Evidence.* Bartolus fully developed the doctrine of notarial responsibility advanced by Irnerius (supra § 212). Bartolus' famous pupil, Baldus, enlarged some of the limits left obscure by his master.

[101] Sohm (Ledlie[3]), *Roman law*, pp. 150–51.

[102] Not until the 16th century French historical school of jurisprudence arose was there any reaction against Bartolus. But Cujas and Doneau devoted their attention to pure Roman law, and abandoned scholasticism. See Sohm (Ledlie[3]), *Roman law*, p. 151.

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law of Germany which sprang from the 'reception' of Roman law into the German States."[103]

Next in rank to Bartolus was his pupil Baldus.[104] The reputation of Baldus was great in Italy, but he was not so distinguished internationally as Bartolus. While Baldus surpassed his master in memory or subtlety,[105] his writings did not obtain the same weight.[106] When Roman law as embodied in the commentaries of Bartolus was received into Germany, those of Baldus were also received in a secondary degree.[107]

## IV. Italy from the 16th century to the rise of the modern kingdom of Italy in the 19th century; period of diversity of law

**Diversity of Italian law in the 16th, 17th, and 18th centuries.** With the fruition of the work of the Commentators began the uneventful, non-progressive, if not decadent, period of Italian legal history. This condition lasted for over 300 years down into the 19th century, when the salvation of Italian law came across the Alps from a foreign land — not until then was territorial uniformity of law and final codification realized in Italy.[108] The reason for this miserable Italian situation of late medieval and early modern times was the unhappy political condition of Italy, which, in the 16th century, although possessed of a common law as well as a national § 220

[103] Sohm (Ledlie[3]), *Roman law*, p. 151.

[104] Baldeschi (Baldus) was born at Perugia 1327, and died at Pavia 1406. During his life he held appointments as professor of law at Bologna, Perugia, Pisa, Florence, Padua, Pavia. At one time he was a colleague of his master Bartolus at Perugia. Bartolus conferred upon Baldus the doctorate of law. Baldus was often employed in diplomatic missions and state affairs. One of his pupils was Pierre de Beaufort, who later became Pope Gregory XI. Baldus' brothers Angelus and Petrus were also of renown as jurists. See Colquhoun, *Roman law*, § 157; Savigny, *Geschichte d. röm. Rechts*[2], vol. iv, ch. 55.

[105] See Colquhoun, *Roman law*, § 157.

[106] Savigny calls Baldus' commentary on the *Liber feudorum* his best work. Most of Baldus' works were unfortunately left by him in an incomplete state. See Colquhoun, *Id.*

[107] See Sohm (Ledlie[3]), *Roman law*, p. 151.

[108] See infra §§ 221, 224.

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language and literature, was not a united country but merely a geographical name of no political significance. In spite of ardent longings for political union, Italy was split into a host of states. This forlorn condition of Italian dismemberment continued until modern times and prevented any legal progress. Republics, duchies, the kingdoms of Naples and Savoy, the Papal States (the Popes having acquired much of the ancient Italian territory of the Eastern Roman Empire), and the remnants of the revived Western Roman Empire composed the fragments of Italy.

This fragmentary political condition was reflected in the great diversity of Italian law. Each state, whether republican, ducal, monarchical, papal, or imperial, had its own local law. Uniformity of Italian law was impossible so long as Italy was split into pieces. As time went on, the underlying common features of the many Italian legal systems tended to disappear or become obscured with the deepening and widening of this diversity of law. The 18th century witnessed a feeble glimmer of hope for a change for the better. Perhaps owing to the external influence of the partial French codifications of Louis XIV and Louis XV, attempts were made to codify the existing law of certain Italian states, such as the kingdoms of Savoy and the Two Sicilies, and the duchies of Modena and Tuscany. But these projects failed. The rulers of the many Italian states were usually too busy fighting or intriguing with each other for aggrandizement to devote much energy to improving their law. And yet the widespread influence of the works of two talented Italian jurists of the 18th century — the great philosopher-jurist **Vico**[109] and the Humanist **Beccaria**[110] — showed to the world that Italian juridical genius had not expired with the Bartolists.[111]

§ 221 **Incorporation of Italy in the Napoleonic Empire; the French Codes introduced into Italy.** Nevertheless the centuries' chronic diversity and sterility of law in Italy were not incurable: late in the 18th century relief was approaching. In 1796 the French Revolution overflowed into Italy; the

[109] A D. 1668–1774.

[110] 1735–94.

[111] See supra § 215.

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Italian states soon succumbed to the all-conquering French armies; and early in the 19th century Napoleon Bonaparte became the master of all Italy. Many republics and states, like Venice, were put an end to. Practically all of Italy came under French dominion. Finally, Napoleon was crowned with the iron crown of Lombardy, and his son became King of Rome and Lombardy. The revived Western Roman Empire, which had endured since Charlemagne, was terminated by Napoleon.[112] Austria surrendered her ancient imperial rights in Italy.

After the Napoleonic codification was accomplished,[113] it was proclaimed as the law of all Italy between the years 1804 and 1812, and the ancient numerous separate state laws were abrogated. For the first time in the twelve centuries since Justinian's government of the entire peninsula, Italy enjoyed the great privilege of a single codified jurisprudence uniform throughout the length and breadth of the land from the Adriatic on the East to the Mediterranean on the West. And this blessing was long remembered after the departure of the French eagles.

**Italian law after the downfall of the Napoleonic Empire and prior to the formation of modern Italy.** § 222 When the Napoleonic régime came to an end, the ancient separate laws of the old host of States were subsequently revived in vigor in the several regions of Italy, beginning in the year 1815. But the influence of the French Revolution was in Italy to stay. As a consequence the ancient laws of the restored Italian states had to be modified. Naples, Sardinia, Modena, and the Papal States were given revisions of their laws. In the kingdom of Lombardy and Venice, now restored to the Austrian House of Hapsburg, the new Austrian Civil Code of 1812[114] was promulgated.

## V. Modern Italian law: period of uniformity and complete codification of law

**Formation of modern Italy; culmination of the risorgimento italiano.** § 223 The restoration of the ancient Italian states could

[112] See supra § 208.

[113] See infra "France," §§ 254, 257–8.

[114] See infra "Austria," § 232.

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not be a permanent settlement of the Italian question, for it left Austria the real mistress of Italy. The only native dynasty was the house of Savoy (the present Italian royal house), which governed the kingdom of Sardinia. Liberalism manifested itself everywhere throughout the peninsula in secret societies, plots, and insurrections. The revolutions of 1830 and 1848 added great impetus to the movement for representative government, the expulsion of the hated Austrian authority and rulers, and a united Italy. Finally the hour of Italy's modern destiny arrived. In 1865 Austria was driven out; in 1870[115] the Pope lost his temporal power. The kingdoms of Naples and the Two Sicilies as well as the various small Italian grand duchies were no more. Mazzini, Cavour, and Garibaldi had brought about a new Italy, born again, united and possessed of its ancient capital — Rome. The dream of an *Italian nation* was at last realized.

§ 224 **The Italian Civil Code of 1866, and modern Italian law.** The modern Civil Code for Italy was promulgated in 1866.[116] Instead of six different systems of law and a host of special laws, there is now but one law for all Italy. The Italian Civil Code is modeled on and embodies many of the rules of the Roman-French Code Napoleon,[117] the grand type of all modern codes. For instance, Napoleon had established civil marriage during his occupation of Italy; after his fall it was abolished; act 93 of the Italian Civil Code again secularizes marriage. The Italian Civil Code is an excellent production most creditable to modern Italy. As a work of codification the Italian Civil Code is highly scientific in character, and its value does not diminish with the lapse of time.[118]

In imitation of the French codes, Italy has also a Code of Civil Procedure,[119] Code of Commerce,[120] Penal Code,[121] and

[115] September 20 the Italians under General Cadorna entered Rome as victors.

[116] It went into effect January 1.

[117] See infra "France," §§ 254, 258.

[118] The Italian Code has exercised considerable influence on the law of Malta, — see supra § 193.

[119] Effective 1866.

[120] Effective 1883.

[121] Effective 1890.

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Code of Criminal Procedure.[122] The last two are the best Continental European criminal codes yet framed, and are very complete. Modern Italian law is but Roman-Italian law, — Roman law clad in a 19th century *Italian* dress.[123] Easily accessible, certain, and not bulky are the characteristics of modern Italian law. The world mission of Roman law in modern Italy has been successfully accomplished: Italian law is uniform throughout Italy and is codified.

## 8. THE MODERN CANON LAW, — AN OFFSHOOT OF ROMAN LAW

**The relation of Canon law to Roman law.** With the reign of Constantine the Great, Christianity soon dominated the Roman Empire; and gradually a church law arose.[1] And this ecclesiastical law in no small measure helped to preserve the Roman Civil law itself throughout Europe. By the enormous influence of the law of the Eastern Greek Church, Russia and the Balkan States became outlying provinces of the realm of Roman law; and modern Eastern Europe is not unaffected by the world-current of Roman jurisprudence.[2] That the remnants of civilization were preserved at all in Western Europe during the Dark Ages is due largely to the Western Latin Catholic Church, the law of which was rapidly maturing in the 11th century. § 225

The devotion of the clergy to the Civil law of Rome was marked with great fervor during the early medieval period following the disruption of the lineal Roman Empire of the West in A.D. 476. More than this: during the entire Middle Ages the clergy, whether of Germanic origin or not, never submitted to any of the barbarous Teutonic law.[3] The

[122] *Id.*

[123] But Roman law as the predominating source of Italian law is still studied with ardor in Italy. And works on Roman law of a very high order have been produced by modern Italian Romanists, such as Baviera (of the University of Palermo), Bertolini (of Turin), Bonfante (of Milan), Perozzi (of Bologna), Riccobono (of Palermo), Serafini (of Pisa), and Siciliano-Villanueva (of Sassari).

[1] See supra § 149.

[2] See supra §§ 194, 195, 196.

[3] Morey, *Roman law*, p. 177.

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Roman law was always the personal law of the clergy; it followed them wherever they went. As fast as ecclesiastical courts obtained a foothold or increased their jurisdiction, they always applied the refined principles of the Roman law. This body of church law — to a very large degree secular — received after a time the generic name of Canon law.

Furthermore, as the Papacy increased in strength, the entire organization of the Roman Catholic Church became pervaded with and was modeled on the spirit and system of the Imperialistic government of the old Roman Empire. The Papacy was and is to-day in many respects a historical continuation of the ancient Roman Empire, — "the ghost of the old Empire" is Hobbes' famous characterization of the Papacy. How enormously great has been the influence of Roman law upon the Roman Catholic Church is to be seen in the latter's present centralization of power, in the absolute superiority and supremacy of the Pope, in its administration so akin to that of the Roman Empire of Constantine's time, and in its universal system of church law.

§ 226 **The Corpus Juris Canonici and modern Canon Law.** One of the great although indirect results of the Bologna revival of Roman law study[4] was the full maturing of the Western Roman Canon Law, which in the 12th century had become largely codified, — the complete codification receiving the name of Corpus Juris Canonici.[5] This code of the Latin Church[6] was the supreme ecclesiastical law of **all Western Europe,** in force long before the 16th century Protestant Reformation divided the Roman Church and Western Christendom. The modern stage of the Canon Law may be regarded as dating from the formation of the Corpus Juris Canonici. But the modern Canon Law should not be limited to the Roman Catholic Church alone; it includes also the ecclesias-

[4] See supra §§ 210 et seq.

[5] See infra § 228.

[6] In 1054 the Greek Church was excommunicated by Pope Leo IX; and thereafter the ancient Christian Church was divided (barring the *temporary* reunion of the Greek and Latin churches at the Council of Lyons in 1274). The Canon Law of the undivided church prior to its separation in the 11th century was much the same; afterwards it became quite different.

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tical law of all Protestant churches since the Reformation.[7] If the Canon Law of the Western Latin Church be examined, the Corpus Juris Canonici manifestly is a counterpart or reflection of the Corpus Juris of Justinian in name, form, substance, and authority.

**The Corpus Juris Canonici is a counterpart of the Justinian codification as to name.** The appellation "Corpus Juris Canonici" to denote the law of the Western Roman church was officially sanctioned in the 16th century by Gregory XIII.[8] But this expression was in common use much earlier; and from the middle of the 13th century it was employed[9] in sharp contradistinction to the Roman law, collectively described as the Corpus Juris Civilis.[10]

**The Corpus Juris Canonici is a counterpart of the Justinian codification as to form. Parts of the Corpus Juris Canonici.** § 227 In imitation of Justinian's monumental work, the Corpus Juris Canonici is arranged in four parts: Decree, Decretals, Extravagantes, and Institutes, which is their chronological order.

1. **The 12th century Decree (Decretum Gratiani).** § 228 This part of the Corpus Juris Canonici corresponds to the Digest of Justinian. It was prepared and published by Gratian, a Benedictine monk of Bologna, and embraces all the previous law of the Church prior to **1140** contained in acts of councils, decrees of Popes, and earlier compilations of ecclesiastical law.[11]

[7] See infra vol. iii, § 963.

[8] July 1, 1580, in "Cum pro munere." See 4 *Cath. Encycl.*, p. 391, New York, 1907–14.

[9] Gratian's *Decretum* was already called "Corpus Juris Canonici," by a 12th century Glossator; and in the next century Innocent IV, in 1253, calls by this name the Decretals of Gregory IX. See 4 *Cath. Encycl.*, p. 391.

[10] This term was definitely used by Godefroy in the 16th century, — see supra § 135.

[11] **Gratian's Decretum** is divided into three parts, which are cited as follows:

(*a*) Part I — **Distinctiones.** Is cited by the number of *Distinction*, and initial words or number of *canon* (frequently the reverse order, beginning with *canon*, is used): e.g. "Exemplo Danielis, c. 11, D. 37."

(*b*) Part II — **Causae.** Is cited (except Causa 33, quaestio 3) by *Causa, quaestio, and canon* (frequently the reverse order, beginning with

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(§ 228) 2. **The 13th and 14th century Decretals (Decretales).** This part of the Corpus Juris Canonici corresponds to the Code of Justinian. It consists of the statutes or decretals of Popes Gregory IX,[12] Boniface VIII,[13] and Clement V.[14]

3. **The 14th and 15th century Extravangantes.** This part of the Corpus Juris Canonici corresponds to the Novels of Justinian. It consists of the decretals of Popes John XXII,[15] and others from Urban VI to Sixtus IV.[16]

4. **The 16th century Institutes.** This is virtually a fourth part of the Corpus Juris Canonici, and corresponds to the Institutes of Justinian. To complete the grand canonical codification, Pope Paul IV[17] ordered the renowned canonist **Lancelot**[18] to prepare Institutes of Canon Law; Lancelot's elementary treatise[19] published in **1563** forms a part of many

*canon*, is used): e.g. "Non denegetur, c. 20, C. 2 (= causa 2), qu. 6." But Causa 33, quaestio 3 is cited like Part I, with addition of the words "de poenitentia" after the Distinction: e.g. "Dixi confitebor, c. 4, D. 1 de poenit."

(*c*) Part III — **De consecratione.** Is cited like Part I, with addition of the words "de consecratione" after the *Distinction:* e.g. "Per orbem, c. 26, D. 3 de consecrat."

[12] "Quinque Libri Decretalium Gregorii Noni" or **"Liber Extra,"** 1234. Are cited by *original name* of Liber Extra (abbreviated to *X*), *book*, *title*, and *chapter* (frequently the *chapter* comes first): e.g. "chap. 9, X., lib. iv, tit. 13."

[13] **"Liber Sextus Decretalium,"** 1294. Are cited by *original name* of Liber Sextus (abbreviated to *in Sext.* or *VI*), *book*, *title*, and *chapter* (frequently the *chapter* comes first): e.g. "cap. 1, in Sext., lib. i, tit. 2 de constitutionibus."

[14] "Clementis vel Clementinae Constitutiones" or **"Liber Septimus Decretalium,"** 1313. Are cited by *original name* of Liber Septimus (abbreviated to *in Sept.* or *VII*) *or* by *later name* of *Clementinae*, *book*, *title*, and *chapter* (frequently the *chapter* comes first): e.g. "cap. 1, in Sept. (or Clement.), lib. i, tit. 1 de summa trinitate."

[15] **"Extravagantes Johannis XXII,"** 1340. Are cited by *name* (abbreviated to *Extr.* or *Xvag.*), *title* and *chapter* (frequently the *chapter* comes first): e.g. "cap. 1, Extr. (or Xvag.), Jo. XXII, 12."

[16] **"Extravagantes Communes,"** 1483. Are cited by *name*, *book*, *title*, and *chapter* (frequently the *chapter* comes first): e.g. "cap. 2, Extr. (or Xvag.) Comm. iii, 2."

[17] Died 1559.

[18] Giovanni Paolo Lancelotti (1522–90).

[19] It is cited by *book*, *title*, and *paragraph*.

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editions of the Corpus Juris Canonici, although never having received official approval.[20] It is a very clear résumé of Canon Law, and its divisions have been broadly followed by all subsequent authors of elementary works on Canon Law. Lancelot had the great misfortune to publish his Institutes just before the legislation of the Council of Trent: but the decrees of that council have been followed by subsequent editors of his work in their notes and commentaries.

§ 229 **The Corpus Juris Canonici is a counterpart of the Justinian codification as to substance.** The Canon law contains much to indicate the survival of the Roman law in the Church legislation. The Decree reproduces many of the general principles and phraseology of the Justinian Digest. The Decretals contain the elements of Roman procedure, the various Roman contracts, and the Roman modes of acquiring property, — such as prescription, donation, and successions. In some respects the Canon law altered the Roman law taken up by the Latin Church, — for instance as to marriage and divorce, and as to the greater emphasis laid on bona fides by the possessor in acquiring a prescriptive title.

§ 230 **The Corpus Juris Canonici is a counterpart of the Justinian codification as to authority.** As was the universal Roman law administered by the Roman Emperor, the head of the State, so was the universal Canon law administered by its central head, the Roman Pope. As long as the Papal supremacy was recognized, the Canon law possessed unlimited power and formed the basis of the ecclesiastical law of every country.[21] And since the decline of the Papal power it has generally retained the force of subsidiary law in Protestant States. Even in England a considerable part of the law as to marriage, divorce, inheritance, and guardianship has been derived from the Canon law. The distinct probate or surrogate jurisdiction of the estates of deceased persons prevailing in the United States, which originated historically in the English bishops'

[20] Morey's statement that it was published at Rome under Gregory XIII is not authentic, see 8 *Cath. Encycl.*, p. 774.

[21] Pope Pius X (predecessor of the present Pope Benedict XV) had ordained the revision of the Roman Catholic Canon Law; and the work is now nearing completion.

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courts, suggests a very important point of contact between Roman Canon law and American jurisprudence.

## 9. AUSTRIA–HUNGARY

§ 231 **Austrian law prior to its 19th century codification.** The Austria-Hungary monarchy of the house of Hapsburg, the dual Empire-Kingdom and polyglot nation of central Europe, has been especially subject to Roman influences by reason of its rulers having been Roman Emperors of the West[1] for centuries down to the year 1906, if for no other reason. Most of this polyglot population is Catholic in religion, and the influence of the Latin Canon Law[2] is not wanting in the history of Austria. Indeed Roman law is very largely connected with the modern Austrian law: with the exception of Spain,[3] Austria was the first Romanized European State to endeavor to truly codify its law.

The Bologna revival of Roman law study and the consequent establishing of universities with a faculty of law[4] reached Austria in the 14th century, during which the universities of Prague[5] and Vienna[6] were founded. In 1495 (three years after Columbus discovered America) the Emperor Maximilian I organized a central Imperial court of justice, the **Reichskammergericht,** which formally adopted Roman law as the common law of the medieval Roman Empire.[7] The earliest Continental European code of criminal law was that of the Emperor Charles V, promulgated in 1532.[8]

[1] The Holy Roman Empire, as Charlemagne's revived Western Roman Empire was called in later centuries. Hence much of Italian legal history — certainly through the period of the Commentators — is relevant to Austrian legal history: see supra §§ 208 et seq. Much of the legal history of Germany prior to the Austrian-Prussian war of 1866 is also in point: see infra "Germany," §§ 315–41.

[2] See supra §§ 225 et seq.

[3] See infra "Spain," § 290.

[4] See supra §§ 211–12.

[5] In 1348.

[6] In 1365.

[7] Bryce, *Studies*, p. 91. See infra "Germany," § 322.

[8] It was called the "Constitutio criminalis Carolina": see infra § 337, note.

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Owing very likely to the influence on the rest of Europe exercised by the 17th and the 18th century partial French law codifications of Louis XIV and Louis XV, the movement to codify the Civil Law of Austria began in the 18th century. Some fifty years prior to the formation of the French Code Napoleon, the Empress Maria Theresa, the contemporary and antagonist of Frederick the Great of Prussia (that Empress who so enthusiastically aroused Hungary's devotion), decided to frame a Civil Code for Austria. The first draft of 1767 was rejected by the Empress, who ordered that the proposed code be constructed on a different basis, and prescribed the following conditions: (1) to abstain from doctrinal development; (2) to have in view juridical questions of the most frequent occurrence; (3) to be clear in expression; (4) to be governed by natural equity; (5) to simplify the laws and to refrain from too much subtlety in details.[9] About twenty years later, in 1786, the first part of the new Civil Code was published by the Emperor Joseph II for discussion by the universities and the law courts.[10]

**The Austrian Civil Code of 1812 and modern Austrian law.** § 232 In the year 1812, eight years after the Code Napoleon, the Austrian Civil Code for the German provinces was promulgated by the Emperor Francis I. Subsequently this code was extended to the rest of the Austrian Empire,[11] except Hungary.[12] The Austrian Civil Code was originally written in Latin, that language which for so many centuries had been the official

[9] See Semmes, *The Civil law and codification* (in Am. Bar Ass'n Reports for 1886, pp. 212-13). In 1769 was promulgated a criminal code known as the "Constitutio Theresiana."

[10] In 1787 a new code of Criminal Law, known as "Emperor Joseph's code," was adopted.

[11] In 1815–16 to the Tyrol, Istria, Fiume, Lombardy, and Venice (then Austrian possessions), and Dalmatia; in 1852–5 to Cracovia (Austrian Poland), Hungary, Croatia, Slavonia, and Transylvania. It is in force in Bohemia. See Scheu, *Das österreichische allgemeine bürgerliche Gesetzbuch*[6], pp. 5, 6, Leipzig, 1913; also the *Manuale codice civile generale austriaco*[3], pp. 4–6, Innsbruck, 1913.

[12] Its use in Hungary, an autonomous kingdom, was abrogated by the Hungarian law of June 21, 1860; and the old Hungarian law returned in force.

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language of the State. But there are now official texts of the code in the German, Italian, Polish, Serbian, and Slovenian languages. The Austrian Civil Code is a very scholarly work, in which the predominating element is Roman law. Owing to the fact that it was promulgated subsequently to the Code Napoleon, it is occasionally reminiscent of that monumental code. Like France, Austria has other codes, including a Code of Commerce,[13] Penal Code,[14] Code of Criminal Procedure,[15] and Code of Civil Procedure,[16] Hungary also has a Code of Commerce[17] and a Penal Code.[18] The Austrian Civil Code has exercised some influence on the law of neighboring States, particularly in Serbia[19] and in some of the cantonal codes[20] of the German cantons of Switzerland. To call modern Austrian law Roman-Austrian law is not a misnomer, — it is Roman law clad in several modern Austrian dresses.[21]

## 10. FRANCE

§ 233 **Debt of the modern world to France.** During the 17th, 18th, and early in the 19th centuries France was the predominant power in Europe. Her long ascendancy made France a model which other European States have followed or imitated. France perhaps more than any other European State has directly absorbed the principles of Roman law and also of the Roman political and governmental system.

§ 234 **Periods of French legal history.** The history of the development of French law into its present form has four well defined

[13] Promulgated 1863.

[14] Promulgated 1852, revised 1873. An entirely new code was drafted in 1906, but has not yet been adopted.

[15] Promulgated 1874.

[16] Promulgated 1895.

[17] Promulgated 1876.

[18] Promulgated 1880.

[19] The Serbian Civil Code of 1844, — supra § 195.

[20] Now abrogated by the Federal codification of 1912, — see infra "Switzerland," § 358.

[21] There have been some modern Austrian Romanists of great ability, such as Wlassak of the University of Vienna.

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periods: from the 6th to the 13th century; from the 13th to the 16th century; from the 16th century to the 19th century Code Napoleon; and modern French law.

## I. France from the 6th to the 13th century: period of partial preservation of ante-Justinian Roman law

§ 235

**Survival of Roman law in Gaul (France) after the destruction in A.D. 476 of the Roman Empire in Western Europe.** As in Italy, so in Gaul or old France, Roman law was preserved, after the fall of the Roman Empire in the West, through the influence of the Latin Roman church and clergy. The Roman law preserved in Gaul was almost entirely ante-Justinian,[1] especially the 6th century Breviary or Code of Alaric II,[2] which was observed in Provence and other parts of Southern Gaul. But during the 9th century a small portion of Justinian Roman law filtered into France: by contact of the French clergy with their Italian brethren a knowledge was obtained of Julian's Epitome of the Novels.[3] These were found of benefit in developing the Canon Law of the Church.[4]

Still another influence helped to preserve Roman law, — the operation of the ancient Teutonic rule of the nationality of laws: in the very lifetime of Justinian himself, Clothaire I, King of the Franks, decreed[5] that causes between Romans[6] should be decided by the Roman laws. This was in accordance with the ancient Teutonic principle, that each person should

[1] Gaul, unlike Italy, was never reconquered by Justinian, and consequently was never made subject to the Corpus Juris. See supra §§ 143, 204.

[2] See supra § 133; Ortolan (Prichard and Nasmith Eng. transl.), *History of Roman law*, § 607.

[3] See supra § 139; Ortolan, etc., *History of Roman law*, § 607, p. 522, § 633, p. 549.

[4] See supra §§ 215, 225.

[5] About the year 560: Ortolan, etc., *Id.* § 634, p. 548.

[6] I.e. Gallo-Romans.

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live under the law of his origin.[7] But this 6th century rule could not endure forever: three centuries later law had become territorial in France. In the 9th century, Charles the Bald refers[8] to certain districts as "under or not under" the Roman law.[9] Here is the genesis of the later *droit écrit* and *droit coutumier!* By the 11th century — A.D. 1000 — it had become impossible to say who was Roman, Frank, Burgundian, Goth: to such an extent had the intermingling of races been carried.[10] To the difference of territorial law in
§ 236 France was now added the diverse laws of multiplying feudal territorial domains.

**Laws of Oléron, — the 12th century French maritime and commercial law.** The second great maritime code of the Middle Ages was the Laws of Oléron,[11] compiled about the year 1150 for a woman, Eleanor, Duchess of Guienne, who was at one time the wife of Henry II of England. While accompanying her first husband, Louis VII of France, on the second crusade, she became acquainted in the East with the Consolato del Mare,[12] then dominant in the Levant. She found it so valuable that she first proclaimed it — after being recast and enlarged — in her own duchy of Guienne, the people of which were engaged in the Atlantic coast trade. It was promulgated at the Island of Oléron off the coast of Southwest France. It was soon thereafter adopted in both France and England, under the title of the Laws of Oléron.[13] With some changes the laws of Oléron are the maritime law of the civilized world of to-day. Like the Consolato del Mare, which inspired it, the Laws of Oléron are admittedly of Roman law extraction.

[7] See *Cod. civ. — livre du centenaire*, vol. i, p. 28, Paris, 1904.

[8] In the year 864.

[9] Ortolan, etc., *Id.* § 634, p. 548.

[10] Vigié, *De la nécessité d'une édition historique du code civil* (in *Code civil — livre du centenaire*, 1804–1904, vol. i, p. 29).

[11] Called also *Roles d'Oléron*, *La Leye Olyroun*, *Rolls* or *Judgments of Oléron*. These are contained in Pardessus, *Collection des lois maritimes antérieures au XVIII siècle*, 6 vols. (vol. i, pp. 283–354), Paris, 1828–45; Travers-Twiss, *The black book of the admiralty*, 4 vols., London, 1871–6.

[12] See supra § 214.

[13] The Laws of Oléron comprise 297 chapters.

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## II. France from the 13th to the 16th century: period of the introduction of Justinian Roman law into France via the Bologna revival

**Spread of the Bologna revival of Roman law to France; founding of French law schools and universities.** § 237 Of easy access to Italy via the Mediterranean Sea, the thought and new enlightenment of Italy from the 11th century onward quickly spread into the southern part of modern France. Late in the 12th and continuing in the 13th centuries the ante-Justinian Roman law in France was gradually replaced by the perfected Justinian law, owing to the spread of the scientific study of pure Roman law from Bologna[14] to **Montpellier,** and elsewhere in France.[15]

The earliest law school in France is that of Montpellier. This was founded in the **12th century** by the Italian **Placentinus,**[16] who had taught law at Mantua and Bologna. The study of Roman law was embraced at Paris with such extraordinary fervor that Pope Honorius III in the year 1220 had to issue a decree forbidding ecclesiastics from leaving holy orders and betaking themselves to Paris for the study of law. Paris being forbidden, law schools were then started at Toulouse[17] and elsewhere. All the French law schools taught Roman law on the basis of the texts of Justinian and according to the method of the Glossators,[18] whose system was not displaced in France until the 16th century rise of the historical Humanist school of Alciat and Cujas.[19]

[14] See supra §§ 211, 212.

[15] See supra § 213.

[16] See supra § 213. Placentinus was born c. 1120, and died 1192.

[17] One of the early professors of law at Toulouse was the Frenchman Guillaume **Durand,** who was later successively rector of this university, bishop of Mende, and governor of Romagna. He died at Rome in 1296. Durand's *Speculum juris,* which contained much Roman and Canon law, appeared about 1271. Durand was the first to affirm the civil responsibility of a notary for ignorance of the law. See Laborderie-Boulou, *Recherches sur les origines de la responsabilité notariale,* 36 Revue générale du droit, p. 393.

[18] See supra § 210.

[19] See infra §§ 241, 242, 245.

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It should not be overlooked that the French universities were established in imitation of the organization of Bologna, a principal feature of which was a faculty engaged in teaching law. During the 13th century universities were founded at Toulouse,[20] Paris,[21] Montpellier,[22] and during the 14th century at Lyons,[23] Avignon,[24] Orleans,[25] Cahors,[26] Grenoble.[27] This movement did not lose force during the next two centuries: in the 15th century universities were established at Poitiers,[28] Valence,[29] Nantes,[30] Bourges,[31] Bordeaux,[32] and in the 16th century the university of Rheims was founded.[33]

§ 238 **Difference in law between the North and the South of medieval France.** Perhaps as early as the middle of the 9th century,[34] certainly from the middle of the 13th century onward,[35] there was a well marked geographical distinction of law between the South and the North of France. The Southern provinces had always preserved the Roman law, — the "written law"[36] as it was called; while the Northern provinces had developed a "customary law"[37] of Teutonic origin. The spread of the Bologna revival of Roman law to France did not erase this medieval distinction of law in France, although

[20] In 1229. The faculty of Civil and Canon Law at Toulouse had a continuous existence until 1789. See Gadave, *Les documents sur l'hist. de l'université de Toulouse*, vol. iii, Paris, 1910.

[21] The Sorbonne was founded in 1253. But the tradition is that there was a university at Paris as early as 792.

[22] In 1289.

[23] In 1300.

[24] In 1303.

[25] In 1305.

[26] In 1332.

[27] In 1339.

[28] In 1431.

[29] In 1454.

[30] In 1460.

[31] In 1463.

[32] In 1472.

[33] In 1548. The universities of Dijon and Nancy were established in the 18th century, in 1722 and 1769 respectively. In the 19th century were established the universities of Caen (in 1803) and Lille (in 1808); and about the same time some defunct universities, such as Lyons, were re-established.

[34] See supra § 235.

[35] Vigié, *Id.* (*Code civil — livre du centenaire*, 1804–1904, vol. i, p. 29); Hunter, *Roman law*[4], p. 104; Provence was joined to France in the latter half of the 13th century.

[36] "Droit écrit."

[37] "Droit coutumier."

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it helped to finally introduce considerable Roman law into the customary provinces. One of the earliest and most important monuments of the customary law is the *Établissements* of St. Louis (Louis IX[38]) in the last half of the 13th century.[39] These frequently refer to the Roman law and translate it.[40]

## III. France from the 16th century to the 19th century Code Napoleon: period of diversity and partial codification of law

§ 239 **French made the language of the law courts in the 16th century by Francis I. Continued diversity of law in France: the droit coutumier and the droit écrit.** Prior to the reign of Francis I[41] the judicial language was still Latin[42]: but Francis made the vernacular French the language of the law courts.[43] The law of France, however, still remained diverse; France was divided into two parts, each under its own peculiar law. In the *Discours préliminaire* of the Code Napoleon commission the three sources of the old French law of the monarchy, from which they borrowed heavily, are stated as follows: "France, formerly divided into the *pays de droit coutumier* (country of customary law) and the *pays de droit écrit*[44] (country of written law), used to be governed partly by customs, and partly by the written law: there were also some royal *ordonnances* (statutes) common to the entire kingdom."[45] This geographical division of old French law into a multitude of provincial customary legal systems plus the written Roman

[38] Reigned A.D. 1258–73.

[39] Promulgated about 1270.

[40] *Great jurists of the world* (vol. ii, *Continental Legal History Series*, p. 84, Boston, 1914); Brissaud, *Histoire du droit français*, vol. i, p. 286, Paris, 1904.

[41] Reigned 1515–47.

[42] Amos, *Roman law*, p. 437.

[43] As to other legislation of Francis I, see Brissaud, *Hist. du droit français*, vol. i, p. 377.

[44] This expression had finally replaced the earlier *pays de loi romaine:* see Ortolan, etc., *History of Roman law*, § 634, p. 549.

[45] See *Code civil — livre du centenaire*, 1804–1904, vol. i, p. 28.

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law, lasted in France down to the Revolution of 1789 and the Code Napoleon.[46]

The *droit coutumier* or the customs consisted of local laws and usages going back to early Carolingian times,[47] that is to Charlemagne and his successors. The chief French provinces of the "customary" law were Normandy, Paris, Orleans, Burgundy; and the supreme appellate tribunal was the Parlement of Paris.

The *droit écrit* was peculiar to Southern France where Roman law had very extensively survived — hence its name "the written law."[48] The chief provinces of the Roman or "written" law were Provence, Guienne, Aquitaine, Dauphiny; and the supreme appellate tribunal was the Parlement of Bordeaux. Moreover, the "written" (Roman) law was often favored to the prejudice of the "customary" law. These differences of favor were: (1) a custom had to be alleged and proved,[49] but the "written" Roman law of Southern France needed only to be alleged[50]; (2) in any "customary" province the rule was that if the "customary" law was silent as to any point of law, then the "written" (Roman) law should be followed.[51]

§ 240 **Compilation of the droit coutumier by royal authority.** The first work of the rising French monarchy in the 14th and 15th centuries was to destroy feudalism, with the aid of the common people or third estate and the cities. The several parts of France became united; England was driven across the Channel. Out of this task of political union arose attempts to unify the laws of France and thus make the work of unification complete. At the start it was endeavored by royal

[46] See infra § 254.

[47] *Code civil — livre du cent., etc.*, vol. i, p. 29.

[48] Southern France was originally termed "*Pays de loi romaine*," — see supra this very section.

[49] Amos, *Roman law*, p. 438.

[50] Amos, *Id.*

[51] Amos, *Id.* Furthermore the *Coutume de Beauvosisis*, published in 1283, "shows what a great influence Roman law exercised on the usages of Northern France, and how in the hands of the judge the rules of the ancient jurisprudence often triumphed when brought into conflict with Germanic conceptions": *Great jurists of the world, etc.*, p. 84.

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authority to revise the "customary" law of Northern France by correcting its glaring defects and softening its asperities.

During the 15th and 16th centuries compilation of the custom law was the principal occupation of royalty and the lawyers.[52] In the latter half of the period the influence of Cujas and the Humanist school[53] is most marked in this work. Furthermore in the 17th and 18th centuries the Kings of France enacted legislation covering in a complete manner many matters of a general character, which statutes were made the uniform law of the entire kingdom.[54] "Customary" law thus received the seal of royal authority, became the law of a large part of France, and was not disdained as a source of the nation's law by the authors of the Code Napoleon.

**The Renaissance, and rise of the Humanists in the 16th century.** § 241 Legal instruction in France during the 16th century was marked with a scientific clearness and breadth unknown since the days of the classical Roman jurisconsults.[55] This is the era of the so-called Humanists, the French historical school of jurisprudence. "The new method introduced in the 16th century in the science of Roman law is not the result of an isolated manifestation, but is at one with the general revolt of the human mind against the burdens of traditions and its accompanying abuses. . . . Thus it has a close affinity with the religious insurrection of Luther and Calvin, with the philosophic doubt of Descartes, with the scepticism of Montaigne, . . . with the general literary revolt in Europe, with the efforts to reintroduce classical types of architecture. . . . In a word, it indicates the passing away from medievalism . . . to modernism."[56] And yet, although the Humanists were highly philosophical and systematic in considering and studying Roman law in connection with Roman literature and history, they still lacked the fundamental idea

[52] See Vigié, *Id.* (in *Code civil — livre du cent.*, vol. i, pp. 31–3).

[53] See infra § 241.

[54] *Code civil — livre du cent.*, vol. i, pp. 33–8, vol. ii, pp. 1078 et seq.; see infra § 251.

[55] See supra §§ 74, 154 et seq.

[56] *Great jurists of the world* (vol. ii, *Cont. Legal Hist. Series*, pp. 79–80, "Alciati").

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(§ 241) of the modern historical school founded by Savigny — namely that law is the product of the entire history of a people, an evolution by organic growth.[57]

Influenced by the Renaissance, the Humanists aimed to revive and introduce a better knowledge of Roman law for the practical purpose of ameliorating French law and judicial administration.[58] The founder of the Humanist school of jurisprudence was the renowned Alciat.[59] The greatest of all the Humanists was the very famous Cujas,[60] who lived during the same century. Other renowned jurists of this French historical school of jurisprudence who published editions of Roman texts were Denis Godefroy,[61] Jacques Godefroy,[62] Du Tillet,[63] the brothers Pithou,[64] and Bouchard[65] — all of the 16th century.[66] There were also other renowned jurists who applied Humanist methods to French law, such as Dumoulin,[67] Douaren,[68] Doneau,[69] Hotman,[70] Baudouin,[71] Ranconnet,[72] Connan,[73]

[57] See infra "Germany," § 338.

[58] See Flach, *Cujas, les Glossateurs, et les Bartolistes* (7 Nouvelle revue historique de droit, etc., p. 221; note 1). (1883.)

[59] *Great jurists of the world* (vol. ii, *Continental Legal History Series*, p. 87). But Pierre de l'Estoile (Pedrus Stella), professor of law at Orleans, was an earlier pioneer of the Humanist line. See infra § 242.

[60] Hunter, *Roman law*, p. 102. See infra § 245.

[61] See infra § 247.

[62] *Id.*

[63] Died 1570, edited Ulpian's *Regulae* (see supra § 108).

[64] Pierre (1539–96) who edited the Theodosian Novels, see supra § 128); and François (1543–1621), who edited Julian's Epitome of the *Novels* (see supra § 139).

[65] Edited Gaius' *Institutes* and Paulus' *Sententiae* (see supra §§ 86, 99).

[66] Except J. Godefroy, who really belongs by his work to this century.

[67] See infra § 243.

[68] See infra § 244.

[69] See infra § 247.

[70] (1524–90). He was also known as "Hotomannus": see *Great jurists of the world*, p. 104.

[71] Also known as "Balduinus" (1520–73): see *Id.* pp. 104–5. He was professor of law at Bourges, Strassburg, Heidelberg, Paris, Angers. He refused to defend the massacre of St. Bartholomew.

[72] (D. 1559.)

[73] (1508–51.)

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Le Conte,[74] and Faber[75]—all of the 16th century. France in the 16th century with her galaxy of great jurists led the world in jurisprudence.

**Famous French jurists of the 16th century: (1) Alciat.** § 242 In the year 1518 the Italian Andrea Alciati,[76] whom the French called Alciat, came to France, and was inaugurated professor of law at Avignon. Later he was at various times professor at the universities of Bourges, Pavia, Bologna, and Ferrara.[77] Alciat was the founder of the French Humanist School of jurisprudence. He had many distinguished friends, among whom were Erasmus, John Calvin, Montaigne, Sir Thomas More, and Francis I.[78]

Alciat's contemporary fame as a Romanist and a man of learning was very great. "Not only," says Mommsen, "did he reform jurisprudence but he also founded the science of epigraphy."[79] Possessed of a wide knowledge of Roman literature, Alciat also included in his consideration Canon Law,[80] French, German, and Italian law.[81] Nevertheless "times and seasons," he says, "come and go; but the Roman system remains in all its splendor and greatness."[82] Alciat's style of writing is extremely clear and pleasing. He illustrated his works[83] not only from Roman literature and antiquities, but

[74] (D. 1586.) He was also known as "Contius."

[75] (1540–1600.)

[76] He was born in 1492 near Milan, and died in 1550 at Pavia. See *Great jurists of the world* (vol. ii, *Continental Legal History Series*, "Alciati," pp. 58–82, 87).

[77] Girard, *Manuel de droit romain*[6], p. 85. Alciat was one of a contemporary triumvirate of great jurists frequently mentioned together, the other two being the Parisian **Budé** (Budaeus, 1468–1540), and the German **Zasius** (1461–1534), professor at Freiburg.

[78] Who induced him to become, in 1529, professor of law at Bourges.

[79] That is, of collecting and reading historical inscriptions. See Mommsen, *Corpus Inscriptionum Latinarum*, vol. v, pt. 2 (Berlin, 1877), pp. 624 et seq.

[80] Alciat came near to becoming a cardinal of the church, *Id.* p. 75.

[81] For instance, his *Responsa* have some comparisons of Roman and Italian law.

[82] *Great jurists of the world, etc.*, p. 80.

[83] Among his works are the following: *Paradoxa*, *Praetermissa*, *Parerga*, commentaries on the Digest and Code of Justinian, *De praesumptionibus*, *De ponderibus et mensuris*, *De verb. significatione*, and *Responsa*.

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also from medieval and contemporary history. "He was perhaps the first of lawyers, in whose writings we find purity and elegance of diction."[84] Two of Alciat's pupils were also famous jurists,—Le Conte[85] and Douaren,[86] both of whom later were professors of law at Bourges.

§ 243 (2) **Dumoulin.** The Huguenot Charles Dumoulin[87] was professor of law at Strassburg and Besançon. In his methods he was somewhat of a Bartolist.[88] Dumoulin was the author of important works on the "customary" law of Paris and the feudal law. He strongly advocated the unification of French law, and by his systematic commentary on the custom of Paris he prepared the ground for Pothier and the Code Napoleon.[89] By his contemporaries Dumoulin was called the "French Papinian."[90]

§ 244 (3) **Douaren.** The Huguenot François Douaren[91] (Duarenus)[92] was a Breton jurist of the first rank, who has now fallen into obscurity. He began to teach law at Paris, and later became professor at Bourges. Douaren was a thorough Humanist. He was also a poignant critic of the Bartolists,[93] and contributed much to purge jurisprudence from barbarous importations. Douaren was a rival of the great Cujas,[94] and manifested much hostility to him. Douaren's notable work *De jure accrescendi*, published in 1555, was of great

[84] *Great jurists of the world*, p. 80.

[85] See supra § 241.

[86] See infra this very section. But Jobbé-Duval, *François Le Douaren* (in *Mélanges P. F. Girard*, vol. i, pp. 573–621) declares that Douaren was not Alciat's pupil. Cf. *Great jurists of the world*, p. 103.

[87] Born in 1500 at Paris where he died in 1566. See *Great jurists of the world*, pp. 105–6.

[88] See supra § 216.

[89] See infra §§ 250, 254.

[90] *Great jurists of the world*, pp. 89, 105. See also supra § 98.

[91] François Le Douaren was born 1509 at Moncontour, and died at Bourges, 1559. See *Jobbé-Duval, Douaren* (in *Mélanges, P. F. Girard*, vol. i, pp. 573–621, Paris, 1912); *Great jurists of the world*, p. 103.

[92] It was still the fashion in the 16th century, owing to the prevalence of Latin as the literary and scientific language, for jurists to give themselves Latin names. See infra §§ 241, 245–8.

[93] See supra § 216.

[94] See infra § 245.

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service to his pupil Doneau,[95] later a famous professor, who owed much to his master.

(4) **Cujas.** The greatest of the Humanists was Jacques Cujas (Jacobus Cujacius).[96] He began to teach Roman law at his native Toulouse a dozen years or so after Alciat[97] began his work at Bourges. Cujas was professor of law for nearly forty years, teaching successively at Toulouse, Cahors, Bourges, Valence, Turin, and again at Bourges. Cujas gave tremendous impulse to the historical method of studying law. He struck out a new path for the critical and historical treatment of Roman law,[98] making a study of original manuscripts of the Roman law and treating the texts philologically.[99] Cujas "has explained *ex professo* most of the Roman law, and there are scarcely any points which he has not elucidated."[100] § 245

The volume of Cujas' works[101] is prodigious: everything of his writings obtainable has been published although he forbade at his death any of his works, save those already printed, to be published.[102] Cujas had a large law library, among the books of which were 500 Roman law MSS.[103] His style is very clear and pointed. His contemporary renown was so great that in the German law schools it was customary to raise one's hat when Cujas' name was mentioned.[104] Among Cujas' pupils were the brothers Pithou.[105]

[95] § See infra § 246. Doneau's own Commentary on the Civil law is modeled upon Douaren's work.

[96] He was born at Toulouse in 1522, and died at Bourges in 1590. See *Great jurists of the world*, "Cujas," pp. 83–108; Berriat Saint-Prix, *Hist. du droit rom., suivie de l'histoire de Cujas*, pp. 373–454 (1821).

[97] See supra § 242.

[98] His *Observationes et emendationes*, in 28 books, are an exegetical study of Roman law sources.

[99] Among other tasks Cujas edited the works of Ulpian and Papinian, the Theodosian Code, and the Basilica. See supra §§ 98, 108, 127, 176.

[100] Colquhoun, *Roman law*, § 175.

[101] But in his works there are no comparisons of Roman and French law.

[102] Colquhoun, *Id.*

[103] Hunter, *Roman law*[4], p. 103.

[104] Pasquier, *Recherches de la France*, vii, 8, ix, 29; Hunter, *Roman law*[4], p. 103.

[105] See supra § 241.

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§ 246 (5) **Doneau.** A colleague of Cujas at Bourges was his rival Hugues Doneau (Donellus).[106] In 1572 occurred the awful St. Bartholomew Massacre. This seriously interrupted Roman law study in France. Surviving Huguenots who were able fled from their native land. Among these was Doneau, who escaped to Germany where he became professor at Heidelberg. Later he taught law at the Dutch university of Leyden. Doneau was a brilliant and learned jurist, distinguished as a "systematizer" of legal conceptions — a field not cultivated by Cujas. Doneau's famous work, the *Commentarii juris civilis*, remained for centuries the best methodical exposition of Roman law.[107]

§ 247 (6) **Denis and Jacques Godefroy.** Owing to the Huguenot persecution Denis Godefroy (Dionysius Gothofredus)[108] went to Geneva, and later to Strassburg. He originated the term "Corpus Juris Civilis" to collectively refer to the law books of Justinian, prefixing this phrase to his famous edition of the codification of Justinian.[109] His son Jacques Godefroy (Jacobus Gothofredus[110]) was the author of a very excellent commentary on the Theodosian Code — the standard work on the subject for over two centuries until Mommsen's edition of 1905.

§ 248 (7) **Bégat, Brisson, and Gaultier.** (a) Bégat[111] was a Burgundian Romanist. He was a Bartolist and a famous lawyer. At one time he was president of the parlement of Dijon. In his works he cites Accursius, Bartolus, Baldus, and Cujas. (b) Barnabé Brisson (Barnabus Brissonius[112]) was a minister of Henry III[113] and at one time advocate-general of the Parle-

[106] Born at Chalon-sur-Saône in 1527, died at Altdorf near Nuremburg in 1591. See *Great jurists of the world*, pp. 103–4; Girard, *Manuel de droit romain*[5], p. 87.

[107] Girard, *Manuel de droit romain*[5], p. 87.

[108] Born 1549, died 1622. See Girard, *Manuel de droit romain*[5], p. 88.

[109] See supra § 135; Smith, *Dictionary of Greek and Roman antiquities*[3], vol. i, p. 551.

[110] Born 1587, died 1652. See Girard, *Manuel*[5], *etc.*, p. 88.

[111] Jean Bégat was born 1523, and died 1572. See Viard, *Un romaniste bourgignon du XVI siècle* (in *Études, etc., off. à P. F. Girard*, vol. i, pp. 435–40).

[112] Born 1531 and died 1591. His death was as tragic as that of his sovereign. See Brissaud, *Hist. du droit français*, vol. i, p. 380.

[113] Reigned 1574–89.

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ment of Paris. Brisson was an eminent lexicographer. His celebrated Roman law dictionary[114] has never been equaled. (c) Gaultier[115] was a professor of law for nineteen years at Poitiers. He was the author of an interesting elementary manual for students known as the *Triboniani genius sive de arte juris.*

**Domat, the greatest French jurist of the 17th century.** § 249 The study of Roman law in the 17th and the 18th centuries was made auxiliary to the improvement of French law. Jean Domat[116] was an intimate friend of the philosopher Pascal. Domat wrote an elaborate and very systematic treatise entitled *The civil laws in their natural order,* — perhaps the most important work ever produced in France. Domat is called the "great jurist of monarchical France,"[117] and his *Lois civiles dans leur ordre naturel* have been regarded as containing the antecedents of the Code Napoleon of 1804.[118] Domat's famous treatise or its equivalent as well as the Institutes of Justinian are among the subjects required for admission to the Louisiana Bar.[119]

**Pothier, the greatest French jurist of the 18th century.** § 250 Robert Joseph Pothier[120] was appointed in 1749 professor of law at Orleans. But he had already become in 1720 judge of the Orleans presidial court, which post he held for over fifty years, the same magistracy being filled by his father and grandfather. Following Domat,[121] Pothier arranged the Roman law scientifically in his *Pandectae Justinianae in novum ordinem digestae,* which was published 1748–52 after twelve years' toil. His Pandects were of great assistance to the framers of the

[114] *De verborum, quae ad jus civile pertinent, significatione,* etc. The best edition is that of Heinnecius, Magdeburg, 1743. See also supra § 142.

[115] François Gaultier was born 1563, died 1614. See Testaud, *Le Triboniani genius,* etc. (in *Études d'hist. off. à P. F. Girard,* vol. i, pp. 301–53, Paris, 1913); also supra § 135.

[116] Born at Clermont in Auvergne 1625, died at Paris, 1696.

[117] *Code civil — livre du centenaire* 1804–1904, vol. i, p. xix, Paris, 1904.

[118] *Id.*

[119] West Publishing Co., *Rules for admission to the Bar,* p. 62, St. Paul, 1913.

[120] He was born 1699 at Orleans, and died there in 1772. See *Great jurists of the world,* pp. 447–76.

[121] See supra § 249.

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Code Napoleon. Pothier wrote also many books on the "customary" law of France. The present French Civil Code contains more of the spirit of Pothier than of Rousseau,[122] — the works of Pothier are often almost textually embodied in the code: for instance book iii of the code on obligations is greatly indebted to Pothier's very famous treatise on the same subject.[123] This work of Pothier is to-day a required subject for admission to the Louisiana Bar.[124]

§ 251 **Attempts to codify French law; ordinances or partial codifications of Louis XIV and Louis XV.** The Kings of France did not limit themselves to merely compiling the "customary law"; they finally began the work of creating uniformity of law by means of ordinances (*ordonnances*).[125] It was Louis XI,[126] who, in the latter half of the 15th century, conceived the project "that there should prevail in this kingdom but one custom . . . and that all the customs should be put in one book, written in French, to get rid of the craft and oppression of cunning lawyers."[127] The royal *ordonnances* were at first feeble, but, with the increasing extent of the royal power, they grew stronger, and finally became very authoritative and thorough. During the 16th century controverted points of law were settled by royal ordinances; in the 17th and 18th centuries matters of a general nature were revised, fixed, and settled by royal ordinances,[128] especially those of Louis XIV[129] and Louis XV.[130]

[122] *Code civil, etc.*, vol. i, p. xx.

[123] *Id.* vol. i, p. 39.

[124] West Pub. Co., *Id.*

[125] See supra § 239.

[126] Reigned 1461–83.

[127] Philippe de Commines, *Mémoires*, bk. vi, ch. 6; *Code civil — livre du cent.*, vol. ii, p. 1077.

[128] *Code civil — livre du cent.*, vol. i, pp. 17, 33 et seq., see also vol. ii, pp. 1078 et seq.; Brissaud, *Hist. du droit français*, vol. i, pp. 374 et seq. Of the ordinances prior to Louis XIV, mention should be made of the *Ordonnance de Villers-Cotterets* of Francis I (1539), the ordinances due to Michel de L'Hospital (1560–67), the *Ordonnance* of Blois (1579), the ordinances of Henry IV (including the Edict of Nantes and the *Ordonnance* of 1629), and the "Code of Henry III," which was prepared by the jurist Brisson (see supra § 248).

[129] Reigned 1643–1715.

[130] Reigned 1715–74.

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The *ordonnances* of the two Louis are of great legal import- (§ 251)
ance and are the work of notable ministers, — **Lamoignon**[131] and **Colbert**[132] under Louis XIV, and **Aguesseau**[133] under Louis XV. The program of these ministers was to revise and coordinate the various branches of French law. But it was only partially carried out: had it been completed, France would have been endowed with a uniform, codified law by the royal authority. Colbert, the great minister of Louis XIV, had the vision of codifying the law of France[134]; and through his suggestion the King himself appointed a commission of Councilors of State, over which the King presided[135]; and this commission left so durable a souvenir of its work that it was of the greatest service nearly a century later in assisting the Napoleonic Council of State in its labors of codification of 1801–04.[136]

The partial codifications of French law made under the directions of Louis XIV and XV are very important juridical works. Louis XIV promulgated ordinances[137] on civil procedure,[138] criminal procedure,[139] waters and forests,[140] commerce,[141] maritime law,[142] and slavery in the colonies.[143] The

[131] (1617–77). He became president of the Parlement of Paris in 1658.

[132] (1619–83). The greatest statesman of the reign of Louis XIV.

[133] Henri François d'Aguesseau (1668–1751), chancellor of France from 1717.

[134] Aguesseau also tried to realize this project: Brissaud, *Hist. du droit francais*, vol. i, p. 385.

[135] *Code civil — livre du cent.*, 1804–1904, vol. i, p. xviii.

[136] *Id.*

[137] See Brissaud, *Hist. du droit français*, vol. i, pp. 380–85.

[138] In 1667. The work largely of Lamoignon and Pussort, the latter being employed by Colbert.

[139] In 1670. The combined work of Lamoignon and Pussort.

[140] In 1669.

[141] In 1673. This is often called the *Code Marchand* or *Code Savary*, because one of its principal framers was a Parisian merchant, Jules Savary.

[142] In 1681. It is divided into five books. It is the first of the Modern Codes. Colbert, before this ordinance was drafted, investigated both the French and foreign maritime law, including the Dutch. See also infra § 257 (note on Code of Commerce).

[143] 1685. There are other ordinances which are not codes; revocation of the Edict of Nantes (1685), ordinances as to the administration of cities (1683, 1692, 1702); Edict of 1659, Tariffs of 1664, 1667.

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(§ 251) present French Code of Commerce[144] is arranged almost in the same order as Louis XIV's *ordonnance* of 1673 on commerce. Louis XV promulgated ordinances[145] on gifts,[146] wills,[147] and substitutions in trusts.[148] As Sorel truly says,[149] the present French Civil Code contains "more of the essence of the *ordonnances* of the Kings of France, and particularly the most recent ones of Aguesseau on gifts and wills, than of the *social contract*."

The commercial and maritime law of the world was brought to perfection by the ordinances of Louis XIV. His statutes are true codes. They embody the substance of the Consolato del Mare,[150] Laws of Oléron,[151] and Laws of Wisby.[152] The commercial and maritime law of Louis XIV has been adopted by nearly all Europe. It was so just and wise that it everywhere received universal acceptance. All the commercial, maritime, and admiralty law of to-day is based largely on these *Ordonnances* of Louis XIV; the courts to-day apply substantially the same principles and procedure. Much of the substance of these *ordonnances* was introduced into English law by Lord Mansfield during the 18th century.[153]

The ordinances of Louis XIV and XV exerted also as codes a great influence over the rest of Europe, for France was the ascendant European power of late medieval and early modern

[144] See infra § 257.

[145] All the work of Aguesseau. See Brissaud, *Hist. du droit français*, vol. i, pp. 385–7.

[146] In 1731.

[147] In 1733.

[148] In 1747. To these should be added the *ordonnances* of 1737, 1749, and 1771 (the last not the work of Aguesseau, but like his in spirit).

[149] *Code Civil — livre du cent.*, vol. i, p. xx.

[150] See supra § 214.

[151] See supra § 236. The ordinance of Louis XIV in 1681 was influenced considerably by the "Guide of the sea (*Guidon de la mer*)," a 16th century treatise on maritime law written at Rouen by an unknown author: see Brissaud, *Hist. du droit français*, vol. i, p. 316.

[152] See infra "Germany," § 320.

[153] See infra "England." § 397. This French law of the 17th century is reflected also in the Spanish Ordinances of Bilbao: see infra "Spain," § 301.

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times. These *ordonnances* were reflected in Germany[154]: Bavaria partially codified its law in 1754; and Prussia did likewise in 1794, although the project was advanced during the lifetime of Frederick the Great.[155] Undoubtedly the influence of these French partial codifications of the monarchy penetrated Austria, and led the Empress Maria Theresa in 1754 to advance a plan to codify Austrian law.[156] Sweden codified her law in 1734.[157]

**The French philosophers of the Natural Law.** The leaders § 252
of the so-called school of the philosophers of the "Natural Law" were Fénelon, Montesquieu, Voltaire, Rousseau, and Mirabeau. The one immutable law of nature whereby all men are born free and equal, the inalienable rights of life, liberty, and the pursuit of happiness, the social contract of liberty, fraternity, and equality, constitute the teachings and legacy of this group of clerical and lay philosophers, which arose while the monarchy was at its zenith under Louis XIV, — "whom Fénelon treated more severely than the disciples of Voltaire did Louis XV."[158] The tenets of these thinkers spread over all Europe and America, and are still very much alive. Whence came this theory of theirs as to the universal Law of Nature, and the natural inalienable rights of man? From the medieval scholastics and the Canon Law, into which had descended the philosophical speculations of the Roman jurists due to the culture-influence of Greece.[159] Lord Acton did not err when he derived the chief principles of the French Revolution from the Canon Law, and he shows clearly the descent of liberal opinion from St. Thomas Aquinas down through Jurieu and Domat[160] to the eve of the Revolution.[161]

**Overthrow of the monarchy: the French Revolution of 1789.** The old régime failed in its purpose to give all France § 253

[154] See infra "Germany," § 330.

[155] See infra id.

[156] See supra § 231.

[157] See infra "Sweden," § 275.

[158] See Lord Acton, *Lectures on the French Revolution*.

[159] See supra § 64.

[160] See supra § 249.

[161] Lord Acton, *Lectures on the French Revolution*, "The Heralds of the Revolution."

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one uniform law; with the downfall of the monarchy and the death by the guillotine of Louis XVI, **the Republic** took up the task Already had preliminary measures been taken before the fall of the Bourbon dynasty, — in 1778 Louis XVI had promulgated an edict recognizing the marriages of Protestants (proscribed by Louis XIV) and also civil marriage[162]; but two years later, on July 14, 1789, came the capture of the Bastile. It was too late to save the monarchy. The successful outcome of the American Revolution swept away the French monarchy from its ancient moorings into shipwreck. It was seen in France that the new United States were founded on principles established by the English Revolution of 1688: Maultrot, the best French ecclesiastical lawyer of the day, explained in 1790 "how the Canon Law approves of the principles of 1688 and rejects the invention of Divine Right."[163] And at the outset the great debt to the Canonists was acknowledged [164]; in the drafting of the new French Constitution the commission for dealing with the clergy had thirty members, eighteen of whom were either Canon lawyers [165] or ecclesiastics. But this moderation of the early days of the Revolution did not long continue — unhappily for France.

## IV. Modern French law: period of uniformity and complete codification of law

§ 254 **Project of a Civil Code for all France, and its realization in 1804 by Napoleon.** The gibe of Voltaire that in traveling through France one changed laws oftener than he changed horses[166] was only too true of the diversified law of France prior to the Code Napoleon. Think of the cumbersome workings of justice, the lack of certainty as to private rights, and the enormous practical inconvenience caused by the existence in

[162] Brissaud, *Hist. du droit français*, vol. i, p. 387.

[163] See Lord Acton, *Lectures on the French Revolution.*

[164] See supra § 252.

[165] There were eight of these.

[166] See Saunders, *Revised civil code of Louisiana*, New Orleans, 1909, p. xxix.

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one country of over 300 different kinds or systems of custom law, — such was France prior to the Revolution of 1789.

On September 2, 1791, the National Assembly unanimously decreed the following resolution, placed in the articles of the constitution: "There shall be made a Code of the Civil Laws common to the entire kingdom."[167] But the progress of the work was retarded, owing to the confusion and turbulence of these times of the early Republic and the Reign of Terror. Down to the end of 1799 the French nation impatiently waited for the long promised code. In 1799 **the Consulate** became the form of government of France with Napoleon Bonaparte for its First Consul. Bonaparte then took hold of this work of unifying the law of France; and its accomplishment is due to his energy and genius. A first commission was appointed in 1801 to draft the code. These were Tronchet, Portalis, Bigot-Preameneu, and Malleville. Their work was submitted to the legislative section of the Council of State. When once the text was established, it was discussed by the entire Council of State at the Tuileries.[168]

On March 21, 1804,[169] the new Civil Code was promulgated as the *Code civil dès français*. Not quite two months later on, May 18th, **the Empire** was established, and Napoleon was proclaimed Emperor. Consequently the new Civil Code was soon named the **Code Napoleon.**[170] The code later passed through successive editions, that of 1816 being substantially in force in France to-day.

**Napoleon's share in the work.** Too much credit cannot be § 255
given to Napoleon Bonaparte for his share in this great work of codification. Out of more than 200 sessions of the Council

[167] *Code civil — livre du cent.*, vol. i, p. xxi.

[168] *Code civil — livre du cent.*, vol. i, p. xxv. Lord Broughton, in his *Recollections of a long life* (1909) says that the famous Scotch jurist James Erskine once told him that he (Erskine) helped to draw up a part of the Code Napoleon.

[169] On the 30th Ventôse, year XII.

[170] On Sept. 3, 1807. In 1818 its old name was restored. In 1852, March 27, it received its old name of *Code Napoleon*, — which name has never been officially displaced; but since Sept. 4, 1870, the laws quote it as the *Code civil*. See Walton, *Scope and interpretation of the civil code*, p. 23, note 2.

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(§ 255) of State to discuss the text of the Civil Code, fifty-seven sessions were presided over by the First Consul,[171] who was not contented to be merely a listener as Louis XIV had been,[172] but took a very active part in the discussion, guiding and directing it.[173] An eyewitness[174] says that Napoleon "was never inferior to any member of the Council in regard to it; he equaled sometimes the most skillful of them by his facility to seize the nub of questions, by the justness of his ideas, and by the force of his reasonings. He often surpassed them by the turn of his phrases and the originality of his statements."[175]

Napoleon constantly affirmed that law rests upon ethics. He would ask: "Is that just?" "Is it beneficial?" He kept returning to these two questions.[176] If the articles of the Civil Code "are open so easily to all the practical realities of life, are adapted with so great elasticity to the conditions of custom, it is due in great part to the intervention of the First Consul, to his insatiable desire for clearness, to his genius essentially realistic and concrete. In obliging the Councilors to expound, explain, and justify before him their propositions . . . he brought them to *realize* their ideas, and to order into precise definiteness the ideas of the Revolution."[177]

Napoleon was in blood and instinct a real successor of the Caesars; only just before he put an end to the Roman Empire of the West[178] revived by Charlemagne 1000 years earlier,[179] Napoleon remodeled Roman-French jurisprudence and published the first great code of modern Roman law promulgated since Justinian's 6th century Corpus Juris. By this act the grip of Roman law upon the modern world was forever fastened. The fame of Napoleon will last the longest as a legis-

[171] *Code civil — livre du cent.*, vol. i, p. xxv.

[172] See supra § 251.

[173] *Code civil, etc.*, vol. i, p. xxv.

[174] His name was Thibaudeau, — *Id.*

[175] *Id.* pp. xxv, xxvi.

[176] *Id.* p. xxvii.

[177] *Code civil — livre du cent.*, 1804–1904 ("Introduction" by M. Sorel, vol. i, p. xxvii.).

[178] The Holy Roman Empire terminated in the year 1806.

[179] See supra § 208.

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lator; the Justinian of France whose influence through his codification has passed over all Europe into Asia and into the new world. Said Napoleon at Saint Helena: "My glory is not from having won forty battles. . . . It is that which nothing will efface, that which will live forever, it is my Civil Code, it is the proceedings of the Council of State."[180]

**Character and scope of the Code Napoleon.** The French Civil Code is virtually a republication 1300 years, after Justinian, of Roman law adapted to the life and times of the French people. By it a "compromise between the Roman and 'customary' law is operated, and the present is bound to the past without a shock."[181] Says Thiers: the *Code Civil* is "the code of the modern civilized world"; it consecrates "the best form of the social State."[182] The *Code Civil* is not perfect, it has not anticipated everything, and doubtless in the course of time it too will suffer a general revision; but its enduring principles of right and justice are forever preserved. In spite of Savigny's famous stricture that "Whatever good" French jurists "have, they have in spite of the Code Civil, and not thanks to it,"[183] the German Code of 1900,[184] that last great codification of modern times and in Savigny's own country, is, as Professor Saleilles truly says, "the revenge of the French Civil Code against the objections brought against it by the founders of the historical school."[185] § 256

The French Private law corresponds to the Private law of the Romans; it regulates the relations of individuals; with it is contrasted Public law. But the expression "civil law" has, in France and other Continental European States, a narrower and more frequent use: it means that part of the Private law of a country which is applied to the non-commercial relations between individuals: for commercial rights and duties, see

[180] *Code civil — livre du cent.*, p. xxiv.

[181] *Code civil — livre du cent.*, vol. i, p. xxv.

[182] *Hist. du consulat et de l'empire*, vol. iii, pp. 344–5; vol. iv, p. 726; vol. xx, p. 225; *Code civil, etc.*, vol. i, p. 77.

[183] *Code civil — livre du cent.*, vol. i, p. 122.

[184] See infra "Germany," 344.

[185] *Code civil — livre du cent.*, vol. i, p. 97. The historical school referred to here is that of the 19th century which was founded by Savigny: see infra "Germany," § 338.

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the commercial code or law. Moreover the law of civil or non-criminal procedure is not contained in the Civil Code, but in a separate code — the Code of Civil Procedure.

§ 257 **Other parts of the Napoleonic codification.** In addition to the Civil Code there are in France other groups of codes, all of which form a part of the grand Napoleonic codification. The codes on Private law supplementary[186] to the *Code Civil* are as follows: (1) the **Code of Civil Procedure** of 1806, which regulates the organization and proceedings of courts exercising jurisdiction of civil matters; and (2) the **Code of Commerce** of 1808,[187] which regulates commercial transactions as such, the laws of business, bankruptcy, and the courts dealing with these subjects.[188]

The criminal law of France was also codified under the direction of Napoleon. In 1811 were promulgated the **Code of Criminal Instruction**[189] and the **Penal Code,**[190] both of which professedly incorporate much Roman law.[191] The French codes of criminal law have been imitated by all the continental European states. These later codes, especially the Italian penal code, have improved on the French. In 1827 was promulgated the **Forestry Code,** which, although not framed in the Napoleonic era, belongs to it in spirit. The *Code forestier* contains much of Louis XIV's ordonnance of 1669.[192]

§ 258 **Influence of the Napoleonic codification on the world.** The 19th century French codes have been borrowed, adapted,

[188] See supra § 256.

[187] It was revised in 1841.

[188] The Code of Commerce was framed at 61 sittings (4 of which were presided over by Napoleon) between Nov. 4, 1806 and Aug. 26, 1807. It was put into effect Jan. 1, 1808, at which time the old French commercial laws were repealed. But there are commercial matters which the Code of Commerce does not cover: as to these the French laws of the monarchy (prior to 1789) still govern, — for instance a part of Louis XIV's *ordonnance* of 1681 as to ships (see supra § 251), and the regulations of Aug. 30, 1720 and March 26, 1781 as to stockbrokers.

[189] Framed in 1808.

[190] Framed in 1809.

[191] Although both codes were framed by expert jurists, Napoleon did much to guide and even occasionally revised their labors: see 7 *Encycl. Britan.*[11] p. 461.

[192] See supra § 245; Brissaud, *Hist. du droit français*, vol. i, p. 384.

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or consulted by all other nations and States throughout the (§ 258)
world[193] which have since tried to improve their law. The influence of the French codes on **Europe** alone has been incalculable. Says the jurist Bluntschli: "This is a fact which is the justification of the French Code. . . . The conquered nations (conquered by Napoleon) kept the French laws as a benefit, — a remarkable thing." Their old law was wiped out as soon as possible. And the Civil Code of France has become the inheritance of almost all the rest of Europe. Belgium,[194] Holland,[195] Luxemburg,[196] Portugal,[197] Spain,[198] Monaco,[199] Italy,[200] Malta,[201] Greece,[202] the Balkan States,[203] and Mohammedan Turkey[204] have copied or adapted or used as a model the French Civil and other Codes.[205] Moreover, Denmark,[206] Norway,[207] Sweden,[208] Russia,[209] and Austria-

[193] The vast colonial Empire of France — the next to the largest in the world — may some day be a part of the modern realm of Roman law in its French dress.

[194] See infra "Belgium," § 265.

[195] See infra "Holland," § 267.

[196] The Grand Duchy of Luxemburg, once a part of France, still lives under the Code Napoleon which it received while French territory. See Ruppert, *Modifications apportées au Code Civil dans . . . Luxembourg* (in *Code civil — livre du cent., etc.*, vol. ii, pp. 791–803). See also *Commercial laws of the world* "Luxemburg," London, 1911 et seq.

[197] See infra "Portugal," § 277.

[198] See infra "Spain," § 305.

[199] The Principality of Monaco has a Civil Code (of 1818) almost all of which is copied from the French Code, the old law of Monaco during the Napoleonic régime. See Rolland, *Le Code civil de 1804 dans Monaco* (in *Code civil — livre du cent., etc.*, vol. ii, pp. 807–16). See also *Commercial laws of the world*, "Monaco."

[200] See supra § 224.

[201] See supra § 193.

[202] See supra § 194.

[203] See supra § 195.

[204] See supra §§ 196 and 197 (Cyprus).

[205] To the list of European States given above in the text should be added many minor German states and the French cantons of Switzerland, the *state* or *cantonal* codes of which were framed in imitation of the French, but which are now abrogated on account of the German Civil Code of 1900 for all Germany and the Swiss Civil Code of 1912 for all Switzerland.

[206] See infra "Scandinavian States," § 275.

[207] *Id.* [208] *Id.* [209] See supra § 199.

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Hungary[210] show traces of the all-pervading European influence of the 19th century codification of Roman-French law.[211]

The influence of the Napoleonic codification has passed into **Asia** and **Africa.** The Egyptian codes[212] imitate the French. In the islands of Mauritius[213] and Seychelles[214] are found to-day the Codes Napoleon. The present Japanese code[215] contains a large percentage of Roman-French law.

The Napoleonic codification has traveled to **America.** The French colony of Martinique enjoys the codes of the mother country. The Canadian Province of Quebec,[216] the American state of Louisiana,[217] all the States of Central and South America,[218] have codes modeled on and indebted to the French codes.

## 11. FRENCH LAW PARTS OF THE BRITISH EMPIRE

§259 **French law still employed in parts of the British Empire.** Great Britain — perhaps owing to the present condition of her native English jurisprudence, which is so difficult to quickly ascertain and apprehend because of its diffusely voluminous uncodified state — has never upset *in toto* the older law of colonial peoples possessed of a jurisprudence derived from some other European nation. The influence of French law and the Napoleonic codification in the British Empire has been very large. Certain British possessions having an aggregate area three times that of the British Isles are to-day guided by Roman-French law. The British possessions still employing

[210] See supra § 232.

[211] Enormous has been the influence upon the rest of the world of the writings of the 19th century and modern French Romanists. The works of Ortolan, Cuq, Girard, Saleilles, Esmein, Jobbé-Duval, May (all professors of law at Paris), Appleton (Lyons), and Petit (Poitiers) are known far beyond the confines of France.

[212] See supra § 191.

[213] See infra "French law parts of the British Empire," § 261.

[214] Id.

[215] See infra "Japan."

[216] See infra "French law parts of the British Empire," § 262.

[217] See infra "French law parts of the United States," §§ 263–4.

[218] See infra "Brazil" (§ 278) and "Spanish America" (§ 308).

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French law are: the European Channel Islands in Europe, the islands of Mauritius and Seychelles in the Indian Ocean, the Canadian province of Quebec, and the West Indian island of St. Lucia.

§ 260 **The Channel Islands: Jersey, Guernsey, Alderney, Sark, Herm, and Jethou.** Lying nearer to France than to England, the Channel Islands are the remnant of England's ancient French possessions. These islands, originally part of the Duchy of Normandy,[1] are still governed by French law — not, however, the 19th century Codes Napoleon[2] but the ancient customary law (*droit coutumier*) of Normandy,[3] except as modified by English legislation.[4]

§ 261 **Mauritius and Seychelles.** East of the coast of Madagascar in the Indian Ocean lies the island of Mauritius, formerly called Île de France. As its old name signifies, it was once a French possession. But since 1814 it has been an English crown colony, and is now governed by a governor-general and council.[5] When the English acquired dominion, they restored the old Dutch name "Mauritius," which had been given to the island by its Dutch discoverers in honor of Maurice of Nassau, their renowned military Stadtholder, the son of the famous William the Silent, Prince of Orange.

When Mauritius was ceded to England, the island by a treaty provision retained its old French laws as set forth in the Napoleonic Codes. And to-day the French Civil Code, Code of Commerce and Code of Civil Procedure are still in force in Mauritius and Seychelles, except as altered by colonial ordinances. The languages of the islands are French and English. From this bilingual situation is due the best modern English translation of the French Civil Code. In order to make it

[1] Although driven in the 15th century from the Continent (Calais excepted, which remained English until 1558), England never lost the Channel Islands.

[2] See supra §§ 254, 257.

[3] See supra § 239.

[4] For the benefit of Jersey and other Channel Islands students, the custom of Normandy is still taught to-day at the French university of Caen, the ancient capital of the Duchy of Normandy.

[5] An executive council of five members, and a legislative council of 27.

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comprehensible to English officials, Chief Justice Wright of Seychelles[6] translated in 1908 the French Civil Code.

§ 262 **Quebec.** The central province of old New France in America was Quebec or Canada. From Quebec in the 18th century was ruled the vast territory of the Great Lakes and the region embraced by the Illinois, Wabash, and Missouri rivers down the Mississippi to Louisiana and the Gulf of Mexico. The French colonial law in general was the "custom" of Paris.[7] In 1763 France lost Canada to England. But this change did not affect the common law of Quebec, which remained French.

**In 1866 a Civil Code** was promulgated for Quebec. This code is modeled quite closely on the Code Napoleon.[8] But the Quebec code differs from that of France in some respects: book iv of the Quebec code contains much commercial law which in France is separately codified in the Code of Commerce[9]; and in the Quebec code divorce is not recognized. The Quebec code, but not the French Code Napoleon, has the special titles of corporations and emphyteusis. Quebec has also a Code of Civil Procedure promulgated in 1876. The Quebec codes are written in both French and English, — one of their valuable features to students of comparative law. For this reason alone, no codification of American law can be successful which overlooks the Quebec codes.

## 12. FRENCH LAW PARTS OF THE UNITED STATES

§ 263 **Louisiana.** In 1682 La Salle sailed to the mouth of the Mississippi river, and added Louisiana to the North American

[6] Seychelles is a separate colony from Mauritius, although the law in force there is that of Mauritius.

[7] It was extended to the American territories of France in the year 1664. (The custom of Paris is also largely the common law of **St. Lucia**, one of the British West Indies). The royal *ordonnances* of Louis XIV (1673 on commerce and 1681 on maritime law) seem also to have been extended to New France; at any rate the French colonial courts regarded them as binding: see Walton, *Scope and interpretation of the Civil code of Lower Canada;* Munro, *Genesis of Roman law in America*, 23 Harv. Law Rev., p. 579. See also supra §§ 239, 251.

[8] See supra § 254.

[9] See supra §§ 256, 257.

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possessions of France. In 1664 the "custom" of Paris was extended to be the law of New France, including subsequently Louisiana.[1] After a century of Roman-French law influence in Louisiana, the Roman law again entered this territory but in a different garb. In 1763 Spain obtained Louisiana,[2] which remained under Spanish occupation for forty years, during which time the Roman-Spanish law[3] was enforced in the territory. In 1803 Napoleon regained Louisiana for France, only to sell it a month later to the United States,[4] accepting President Jefferson's offer.

With the advent of the United States the territory of Orleans was organized,[5] which embraced the present state of Louisiana. The rest of the Louisiana Purchase was organized into the District of Louisiana, later known[6] as the Territory of Louisiana, and still later[7] as the Territory of Missouri. The common law of the Territory of Orleans was the Roman-French-Spanish law; but in the rest of the Louisiana Purchase the Common Law of the English colonies came into vogue. In the year 1810 the territorial legislature of Michigan formally repealed the "custom" of Paris.[8]

**The Louisiana Civil Code of 1825.** Five years after Jefferson's Louisiana Purchase, French legal traditions were revived in 1808 by the adoption of an incomplete Digest[9] of the existing written law of Roman-French-Spanish origin. This § 264

[1] See supra §§ 262, 239. Whether the *ordonnances* of Louis XIV on commercial and maritime law were extended to Louisiana is disputed: see supra § 262, note.

[2] France ceded Louisiana to Spain, then holding Florida, when she lost Canada to England.

[3] See infra § 309. But in spite of the rigor of the Spanish governor, O'Reilly (of Irish extraction clearly) and other governors, much French law was preserved in Louisiana, — it too, as well as the Spanish, was of Roman descent.

[4] The United States took possession of Louisiana on Dec. 20, 1803.

[5] In 1804.

[6] In 1805.

[7] In 1812.

[8] *Cobam* v. *Harvey*, 18 Wisconsin Rep., p. 147.

[9] This was the work of James Brown and Moreau-Lislet. It was entitled *Digest of the Civil Laws now in force in the Territory of Orleans, etc.*

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(§ 264) compilation was based on the Code Napoleon of 1804,[10] — the works of Domat,[11] Pothier,[12] and Aguesseau[13] being used to supplement the deficiencies of the Louisiana production. Thirteen years after Louisiana was admitted as a state, there was promulgated in 1825 the Civil Code of Louisiana[14] — the first, the best, and the most famous of all American codes. The Louisiana Civil Code is the *first* code throughout the world modeled on the Code Napoleon, which it closely follows and very frequently translates literally. The Louisiana Civil Code is largely the work of Edward **Livingston,**[15] who alone wrote the most important chapters of the code, including the entire subject of Contracts. Sir Henry Maine calls him "the first legal genius of modern times,"[16] and the code of Louisiana, which Livingston helped so much to frame, "of all republications of Roman law . . . the clearest, fullest, the most philosophical, and the best adapted to the exigencies of modern society."[17]

The Louisiana Civil Code has been diffused throughout the Louisiana Purchase states as a *model* law; and without doubt

[10] See supra § 254.

[11] See supra § 249.

[12] See supra § 250.

[13] See supra § 251.

[14] It abrogated the older Louisiana law then in France, but did not alter its Roman-French-Spanish character, — in the new Code the Roman law is strikingly the predominant element.

[15] Born at Clermont, New York, in 1764, died in the same state in 1836. He was admitted to the New York Bar in 1785, and in 1801 became Mayor of New York. In 1804 he removed to New Orleans. In 1805, his provisional code of judicial procedure, prepared by order of the legislature, was promulgated, and remained the law until 1825 and the new Civil Code. In 1821 Livingston commenced to prepare, by order of the legislature, a new code of criminal law and procedure, afterwards known as "Livingston's Code." Written in both French and English, it was finally printed in 1833, but never adopted by the state. But it received great praise in Europe. It consisted really of four codes; crimes and punishments, criminal procedure, evidence, reform and prison discipline. The last named code was subsequently adopted by Guatemala. Livingston was U. S. Senator 1829–31, and Secretary of State under President Jackson 1831–3. Livingston prepared the famous anti-nullification proclamation of Dec. 10, 1832. In 1833 he was appointed minister to France, where he remained for two years.

[16] *Cambridge Essays*, 1856, p. 17.

[17] *Village communities*, p. 360 (edition of 1870).

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its influence contributed much to start the 19th century movement for codification among the older American states such as New York, and the later Western states.[18] After its amendment in 1870, so as to cut out the slavery provisions, the Louisiana code has suffered down to the present time merely a few changes of detail. Louisiana has no Code of Commerce [19] or Evidence; where the Civil Code is deficient, the Anglo-American law merchant and law of evidence govern.

No codification of American law can be successfully accomplished which ignores the Louisiana Code, — perhaps the best of *all* the modern codes throughout the world. Numerous and accomplished Romanists have come from Louisiana: the achievements of Judge Martin,[20] the "father of Louisiana jurisprudence," the immortal Livingston, Professor Denis, and Chief Justice White of the United States Supreme Court ought to make every Louisianian proud of his state and system of law.

## 13. BELGIUM [1]

**Modern Belgian law is the Napoleonic codification.** The § 265 ancient country of the Belgians was a Roman province for centuries. Later it belonged to the Duchy of Burgundy and the medieval Roman Empire. When Flanders was in the forefront of European commerce and politics, London was a third-rate town as compared with Ghent. In 1495 Roman law was definitely made the law of the land in what is now Belgium.[2] The earlier Belgian universities of Louvain,[3] Mechlin,[4] and Bruges,[5] brought to Catholic Netherlands the

[18] See infra "England, etc., and the United States," § 402.

[19] See supra §§ 256, 257.

[20] François Xavier Martin, born at Marseilles, France, in 1762, died at New Orleans in 1846. From 1813 to 1846 he was a judge of the Supreme Court of Louisiana.

[1] In 1914 almost all Belgium was conquered by Germany. At the present time (June 1, 1916) the restoration of independence for Belgium depends on the outcome of the great war in Europe.

[2] See supra § 231; Bryce, *Studies in history, etc.*, p. 91. The Low Countries (both modern Holland and Belgium) then belonged to the medieval Roman Empire.

[3] Founded in 1426. [4] 1440. [5] 1665.

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influence of the Bologna revival of Roman law and learning, to which is due the establishment of these universities. The later Belgian universities of Liege,[6] Ghent,[7] and Brussels[8] are of 19th century creation.

When in 1814 Belgium was detached from France and reunited to Holland, the French Civil Code was continued by King Louis Napoleon as the law of his new kingdom.[9] The law of Belgium is actually derived from the Napoleonic codification, for at the time of its promulgation Belgium was then a part of France.[10] And with the exception of a few changes in detail the French codes[11] have remained in force until the present time.[12] Although **Laurent,**[13] who is perhaps the greatest commentator on the French Civil Code, drafted a new Belgian Civil Code in 1885, it failed of adoption. Like France, Belgium has also a Penal Code, Code of Criminal Procedure, Code of Civil Procedure, and Code of Commerce.[14] The world-mission of Roman law has been fulfilled in Belgium,[15] the law of which is uniform and codified.

## 14. HOLLAND

§ 266 **Dutch law prior to its 19th century codification.** Holland, the ancient antagonist and despoiler of Portugal in the 17th

[6] 1816. [7] Id. [8] 1834. [9] Id.

[10] *Code civil — livre du cent.* 1804–1904, vol. ii, p. 681, Paris, 1904. The French Civil Code was promulgated in 1804.

[11] See supra §§ 254, 256, 257.

[12] Id. The present edition of the Belgian Civil Code is substantially that of 1831–6, under the direction of Leopold I, the founder of the present Belgian royal house, who became King of the Belgians in 1830, when Belgium obtained her independence of Holland.

[13] François Laurent, born at Luxemburg 1810, died 1887 at Ghent, where he was professor of civil law for 51 years (1836–87). His *Principes de droit civil,* Brussels, 1869–78, is in 33 volumes (a supplement of 8 volumes was published at Paris in 1904).

[14] The Penal Code is of the date of 1867, and follows closely the French model. The other Belgian codes are the same as the Napoleonic, and, like the Civil Code, were promulgated while Belgium was French territory: see supra § 257.

[15] The great Belgian colonial empire, the Congo Free State, which is equal in size to one-quarter of the United States, may also constitute in the future an outlying province of the modern realm of Roman law.

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century struggle for commercial supremacy in India and (§ 266)
the far East, is another country which has actually derived its present law from the Napoleonic codification. Anciently the Netherlands was a Roman province, and Roman legions were stationed at Utrecht. Later, Holland and modern Belgium — the Low Countries — became part of the Duchy of Burgundy and of the revived medieval Roman Empire of the West. Almost at the very end of the 15th century the Emperor Maximilian I by his ordinance of 1495 made Roman law the common law of the medieval Roman Empire, of which Holland then formed a part.[1] The influence of Roman law in Holland had been felt much earlier in medieval history; this influence was now openly acknowledged.

In the 16th century Holland felt the impulse of the Bologna revival of Roman law and learning which came largely via France. Dutch universities were established. The university of Leyden was founded in 1575. The famous **Doneau** (Donellus), an exiled French Protestant, was professor of law at Leyden.[2] Subsequently other Dutch universities were founded: Harderwijk in 1600, Groningen in 1614, Utrecht in 1634. In the 17th and 18th centuries Holland produced a galaxy of jurists illustrious throughout Europe: the immortal **Grotius,**[3] father of modern international law; **Vinnius,**[4] a celebrated Dutch Romanist whose Commentaries were long used in the Italian law schools[5]; **Voet,**[6] the Blackstone of both the Scotch

[1] See supra § 231: Bryce, *Studies in history, etc.*, p. 91.

[2] See supra § 246.

[3] Hugo Grotius, born 1583 at Delft, died at Rostock 1645. At the early age of 24 he was appointed Advocate-General of all Holland. In 1613 he was Dutch Ambassador to England. In 1631 he was banished from Holland because of his religious opinions. He subsequently entered the Swedish diplomatic service, and in 1635 was Swedish Ambassador to France — which post he held for ten years. During this long service he proved himself a match for the versatile Cardinal Richelieu. His greatest work *De jure belli et pacis* was written 1623–4. See *Great jurists of the world* (vol. ii, *Continental Legal History Series*, Boston, 1914), pp. 169–84.

[4] Born 1588, died 1657. He was the author of well-known Commentary and Institutes.

[5] *A general survey of events, etc.*, (vol. i, *Cont. Legal Hist. Series*), p. 158.

[6] Born 1647, died 1714. His works "were once perhaps more widely read than any others and are even still worth perusal," — see *A General*

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and the modern Roman-Dutch law[7]; **Noodt,**[8] called the Dutch Cujas[9]; **Reitz,**[10] whose Latin translation of Theophilus' Institutes[11] is still in use; **Bynkershoek,**[12] the great Dutch Romanist and jurist of whom Lord Mansfield spoke extremely well[13]; **Schulting,**[14] the scholarly Dutch annotator[15] of Justinian's Digest.

§ 267 **The Dutch Civil Code of 1838 and modern Dutch law.** There was no uniformity of Dutch law prior to the French occupation of Holland and the introduction of the Codes Napoleon. The Dutch republic was but a federation of seven sovereign provinces, each possessing legislative power. But during the Napoleonic era Holland was for three years a part of the French Empire. And in 1811[16] the five French codes, including the Civil Code,[17] became effective in Holland. Thereafter the ancient Roman-Dutch law was abandoned in Holland[18] in favor of Napoleon's codified Roman-French law.

*survey of events, etc.* (vol. i, *Cont. Legal Hist. Series*), p. 158. His Commentary on the Pandects of Justinian is still authoritative to-day in South African courts, — see infra § 137 and vol. iii, § 970.

[7] See infra "Roman-Dutch law parts of the British Empire," §§ 268–71.

[8] Gerhard Noodt, born 1647, died 1725. He was professor of law at Leyden. His Commentary on the Digest was of great excellence. He is noted for his "compressed brevity of style."

[9] See supra § 245.

[10] Died 1769.

[11] See supra §§ 135, 169; infra vol. iii, § 955.

[12] Cornelius Van Bynkershoek, born 1673, died 1743. He was a judge and president of the Supreme Court of Holland. His greatest works are his *Observationes juris Romani* (8 vols.), *Quaestiones juris publici*, and *Quaestiones juris privati.*

[13] See 2 Bur. Rep., p. 690 (margin).

[14] Died 1734.

[15] *Notae ad Digesta seu Pandectas*, 7 vols. See supra § 137.

[16] On March 1.

[17] The Code Napoleon had been introduced still earlier, — in 1809 by King Louis Napoleon. It was entitled *Code Napoléon arrangé pour le royaume de Hollande*, and was a republication of the French Code. See *Code civil — livre du cent.*, vol. ii, pp. 817, 681.

[18] Although abandoned in Holland, the ancient Roman-Dutch law still lives to-day in South Africa and other parts of the British Empire formerly belonging to Holland: see infra §§ 268 et seq.

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After the fall of the Napoleonic Empire, the Code Napoleon remained in force in Holland for about a quarter of a century. In 1838 a new Civil Code for all Holland was promulgated. Although written in Dutch,[19] it is largely but a revision of the Code Napoleon. Holland also has the other usual Continental European codes: Civil Procedure, Commerce, Criminal Procedure, and Penal.[20] The world-mission of Roman law has been accomplished in Holland,[21] the law of which is uniform and codified.

## 15. ROMAN-DUTCH LAW PARTS OF THE BRITISH EMPIRE

**The modern Roman-Dutch law countries.** The British colonies of Ceylon in Asia, South Africa, and Guiana in South America — all of which anciently were Dutch possessions — comprise those parts of the British Empire known by the collective name of the "modern Roman-Dutch law countries." In these British colonies having a combined area equal to one-quarter of the United States, the Roman law is received as a subsidium to ascertain the grounds upon which the law of these colonies rests. § 268

**Ceylon.** The island of Ceylon, which lies south of the mainland of India, is about as large as the combined size of Vermont, New Hampshire, and Massachusetts. Originally Ceylon was a Portuguese possession; but in 1658 it was taken from Portugal by the Dutch, and for nearly 150 years it continued a Dutch possession until 1796, when it was seized by the East India Company. Two years later Ceylon was taken over by the British government, and became a crown colony — its present status. § 269

Owing to the long occupation of Ceylon by the Dutch its law to-day is largely the 18th century Roman-Dutch law of Hol-

[19] A French translation of it by Triphels was published in 1886.

[20] The Dutch Penal Code is of the date of 1886, and closely follows the French as a model. All the other Dutch codes were promulgated in 1838.

[21] The present Dutch colonial empire, which is much larger than the combined area of Italy, France, Spain, and Germany, may some day be an outlying province of the modern realm of Roman law.

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land,[1] as modified and added to under English rule. Since 1890 the criminal law of Ceylon has been codified on the model of the famous Indian Penal Code[2]; and codes of Criminal and Civil Procedure have also been promulgated for Ceylon.[3] The "Reports" of the decisions of Ceylon courts are published on the English model, — the earliest being of the year 1820.

§ 270 **South Africa.** The amalgamation into one State of the four British colonies in South Africa, which was established in 1910, is called "The Union of South Africa." Its constituent provinces are the four former colonies of the Cape of Good Hope (commonly called Cape Colony), Natal, Transvaal, and Orange River. This South African Union is one-sixth the size of the United States, but is much larger than the combined area of France and Germany.

The basis of the common law of South Africa is the Roman-Dutch law, as it existed in Holland at the end of the 18th century.[4] The authorities on the South African common law are these: (1) the old Dutch commentators on Roman law, such as Voet, Bynkershoek, Vinnius, Grotius, and others[5]— they are to-day cited in South African courts as authoritative repositories of South African law; (2) the statute law of Holland prior to the 18th century; (3) the decisions of Dutch courts during this period; (4) failing these, the Corpus Juris Civilis of the Roman Emperor Justinian.[6]

Since the introduction of British rule in South Africa, beginning in 1814 when the Cape of Good Hope became a British

[1] "The whole of the law as prevailing in Holland a century ago was never bodily imported into this country. We have adopted . . . so much of it as suited our circumstances, such as the law of inheritance, etc.": per Dias, J., in 1 Supreme Court Rep. (Ceylon) p. 147. Holland has now abandoned this Dutch law in favor of the Napoleonic Roman-French codification: see supra § 267.

[2] See infra "England, English law parts of the British Empire," § 404.

[3] The Mohammedans in Ceylon are governed by the Mohammedan law as adopted 1806 and 1852: Nell, *The Mohammedan laws*, Colombo, 1874; 16 *Commercial Laws of the World*, p. 267, London, 1912.

[4] Now abandoned in Holland in favor of the Napoleonic codification of Roman-French law: see supra § 267.

[5] See supra § 266.

[6] See supra § 135.

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possession, this Roman-Dutch law has been modified and altered by legislation and judicial decisions so that now there is very little material difference in principle between English and South African law: the English law introduced has fused with the Roman-Dutch. The South African law of contract, torts, mercantile, and shipping matters is practically the same as English law. This fusion has been expedited owing to the fact that in these branches of English law the influence of Roman law has been the most potent.[7] In some respects the criminal law of South Africa is far better than the English criminal law, owing to the greater elasticity and justness of Roman jurisprudence. But English law has affected South African law in that the decisions of South African courts are published under the name of "Reports."

**British Guiana.** The only British possession in South America is Guiana. It is almost twice the size of the whole of the New England states taken together. It originally was a colony of Holland, but it has been a British possession since 1803. The law of British Guiana is very largely the Roman-Dutch law, owing to the ancient settlement of this colony by the Dutch. During the 19th century English law was to a certain extent amalgamated with this Roman-Dutch law, and is responsible for the publication of the decisions of British Guiana courts under the name of "Reports." § 271

## 16. MODERN INTERNATIONAL LAW,—AN OFFSHOOT OF ROMAN LAW

**International law not founded by Grotius: existence of a system of international law in ancient Greece and Rome.** The 20th century will ever be remembered by one great juridical monument: the discovery of a system of ancient international law very closely resembling modern international law, to which the latter has been a great debtor for principles and doctrines. Many have been the misconceptions and often-repeated blunders of modern writers on international law as to the international institutions of Greece and Rome. If they do condescend to refer to them, they either dismiss § 272

[7] See infra "England," §§ 397, 403.

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(§ 272) Greek and Roman international law "as never having existed at all," or that it was but "sporadic negligible phenomena" amounting at most to only "a few vague generalizations."[1] Very little attention has been paid by them or their predecessors to the original sources of evidence, which, when examined, utterly refute the fallacious and pernicious modern tradition of the non-existence of a system of international law in the ancient world.

The venerable fiction that international law began with Gentili and Grotius in the 16th and 17th centuries is now exploded.[2] On the contrary, ancient international law is closer akin to modern international law than to international law of the time of Grotius. A considerable body of international law existed in Greece, and to call it "intermunicipal" law does not detract from its international character. From Greece Rome undoubtedly borrowed most of her principles of international law. "In the number and variety of autonomous States; in the many different forms of their constitutions; in the existence of autonomous democratic States; in the conception of the State itself, wholly different from the feudal or patrimonial conception; in the existence of federations; in the unstable balance of power; in the relations of the mother countries to autonomous colonies; in the multitude of treaties dealing with many subjects besides peace and war; in the developed use of arbitration as a mode of settling differences; in the practice as to passports, — in these and many other matters there is more likeness between the international law in ancient Greece and that of to-day than there is between the latter and international law as described in *De jure belli et pacis*."[3]

[1] Phillipson, *International law and custom of Greece and Rome*, vol. i, p. viii, London, 1911.

[2] In the year 1912 appeared the first systematic work yet published on the international law of Greece and Rome. The two volumes of Coleman Phillipson's work "with their copious and convincing details" reveal a full and comprehensive system of international law among the Greeks and Romans.

[3] Phillipson, *Id.* vol. i, pp. xxiv (Sir John Macdonell's Introductory Note).

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**Revival of international law in the 17th century: Gentili and Grotius the fathers of modern international law.** § 273 With the advent of the Protestant Reformation "the notion of a common superior exercising sovereign rights over all nations gradually faded away."[4] The theoretical universal dominion of the medieval Roman Emperor and the Pope received its death blow when neither power calmed the turmoil of the Reformation. The united action of Pope and Emperor to oppose the Reformers wrecked all chances of restoring their ancient supremacy. The authority of the Emperor was frequently set at naught even in his own German dominions by Protestant princes in arms against him. Outside of the Empire his authority became a mere cipher. The great brutality of the age, later revealed in its horrible fullness during the Thirty Years' War, turned the attention of thinkers to the need of checking the tendency to utter lawlessness in international affairs, and of putting a curb on the ferocity of soldiers and the cruel finesse of statesmen. There was in early modern Europe no recognized law of nations to mitigate the outburst of cruelty and lawlessness that arose as old theories faded from the minds of men. But late in the 16th century and early in the 17th arose two great Protestant jurists — the Italian Gentili and the Dutch Grotius — who put new life into what very feeble and fragmentary customs of international intercourse then existed, and molded a true law of nations. In this sense they are the fathers of modern international law.

In 1588 **Gentili,**[5] who, soon after taking the degree of doctor of Civil Law at the University of Perugia, fled to England on account of his Protestant opinions and whose lectures on Roman law at Oxford during the reign of Queen Elizabeth were famous, published the first part of his *De jure belli.* With the completion of this memorable work[6] a new era of international

[4] Lawrence, *International law*[3], § 25, Boston, 1908.

[5] Alberico Gentili (Albericus Gentilis) was born at Sanginescio in Ancona, Italy, in 1552, and died at London in 1608. He came to Oxford University in 1587. There he taught law for many years. In 1600 Gentili was made a member of Gray's Inn.

[6] The whole treatise was published at Hanau, 1598, in 3 vols.

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(§ 273) law soon began in Europe. Gentili, says Professor Holland,[7] was the first writer "to grasp as a whole the relations of States one to another, to distinguish international questions from questions with which they are more or less intimately connected, and to attempt their solution entirely independent of the authority" of Pope or Emperor. Gentili introduced the reasonings of Roman and Canon law to fortify his arguments, and proclaimed as his real guide the Law of Nature.[8] Once again the just precepts of Natural Law and the inalienable rights of man were preached to a world sorely in need of them.

In 1625 the Dutch Protestant **Grotius**[9] of French ancestry and who had taken the degree of doctor of Civil Law at the University of Leyden, published while in exile at Paris his masterly work *De jure belli et pacis*. Although Grotius was considerably indebted to the Italian-Englishman Gentili for much of the plan, arrangement, and erudition of his own work, it must never be forgotten that "it was Grotius, not Gentili, who *won the ear of the civilized world*,[10] altered its theory of international relations and made its warfare indefinitely more merciful.[11] Grotius' treatise was the first effective work in influencing European sovereigns and statesmen. It "exhausted the arguments in favor of a law of nations." Nobody has since added any new conception of the foundations of international law.

Like his predecessor, Grotius introduced the ideas of Roman private law to govern the relations of States to each other.[12] He emphasized and developed at length these three basic ideas: (1) that sovereign States should be looked at as if a group of Roman proprietors of land; (2) that a treaty is a contract out of which an obligation arises as obligations arise *ex contractu* in Roman law; (3) and that States are moral persons subject to be bound by the universal Natural Law. The vast population of the modern civilized world owes a

[7] Holland, *Gentili* (in 11 Encycl. Britan.[11] p. 603).
[8] Holland, *Id.*
[9] See supra § 266.
[10] The italics are mine.
[11] Lawrence, *Internat. law*[3], § 31.
[12] See Lawrence, *Id.* §§ 36–9.

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debt of gratitude to these and other applications of Roman law to the family of States, whereby workable conditions of international amity and mercy have become permanent possessions of the modern world.

**The successors of Grotius.** The giant labors of Grotius were added to later in the same century by the English **Zouche,**[13] a systematic writer on international law; by the German jurist **Pufendorf,**[14] who searched for an ethical basis of international law; and by the great **Leibnitz,**[15] who formulated the sources of international law. The 18th century Dutch **Bynkershoek**[16] differentiated public maritime law as a special branch of international law; and his contemporary Christian **De Wolff**[17] wrote a masterly treatise of the principles of the Law of Nature and Nations, upon which the Swiss **Vattel,**[18] who popularized the study of international law, based his own charming book,[19] written in French. § 274

[13] Richard Zouche, born c. 1590 at Ansty, Wiltshire, England, and died at London 1661. Educated at Oxford, and an advocate of Doctors' Commons, he became Regius professor of Civil Law at Oxford in 1620, being the second in succession to Gentili (see supra § 273). Zouche was later twice member of Parliament and still later a judge of the Court of Admiralty. See *Great jurists of the world* (vol. ii, *Continental Legal History Series*, pp. 220 et seq., Boston, 1904).

[14] Samuel Pufendorf was born at Chemnitz in 1632, and died at Berlin 1694. He was professor at Heidelberg, and later at the Swedish university of Lund. Charles XI of Sweden made Pufendorf a baron in 1694, — the year of the latter's death. See *Great jurists of the world, etc.*, pp. 305 et seq.

[15] Gottfried Wilhelm Leibnitz was born at Leipzig, 1646, and died at Hanover, 1716. He received his doctorate of law at Altdorf, the university town of Nuremberg, where he was offered a professorship. In 1676 he entered the service of the House of Hanover, having charge of the ducal library. In addition to being a great philosopher, mathematician, and historian, he was "one of the chief founders of modern jurisprudence." See *Great jurists of the world, etc.*, pp. 283 et seq.

[16] See supra § 266.

[17] Born 1679, died 1754. He was professor at Halle and later at Marburg. In 1743 he was recalled to Halle.

[18] Emerich Vattel was born at Couvet 1714, and died at Neufchatel 1767. In 1746 he entered into the service of the Kings of Saxony where he remained until his death. Vattel advocated "the formation of a United States of Europe, in which no single state is to be allowed to have a predominating power." See *Great jurists of the world, etc.*, pp. 477 et seq.

[19] *Droit des gens*, 1758.

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The famous 18th century French jurist **Aguesseau**[20] pointed out that the "law of nations"[21] really ought to be termed the "law between nations."[22] From this expression the English jurist Bentham[23] in the 19th century was led to use the word "international"[24] to describe what originally was called "law of nations"; and "international law" it has been called ever since.

## 17. THE SCANDINAVIAN COUNTRIES

§ 275 **Denmark, Norway, Sweden.** The Bologna revival of law and learning[1] spread also to the far-northern European States: late in the 15th century were founded the Danish university of Copenhagen and the Swedish university of Upsala.[2] About two centuries later the Swedish university of Lund was established.[3] The basis of the private law of Denmark and Norway, originally united countries, is the same: the Danish Civil Code of 1683, promulgated by King Christian V.[4] This code of native customary law[5] has been modified and added to in both countries by later partial codifications derived from or imitating the Modern Codes (principally the French[6]) and

[20] See supra § 251.

[21] *Droit des gens.*

[22] *Droit entre les gens.*

[23] Jeremy Bentham was born at London in 1748, and died there in 1832. He was educated at Oxford, and later entered Lincoln's Inn, of which he became a bencher in 1817. It was the ambition of his life to draft a code of law for England or some other European country. His writings and services rendered to the world have been and still are enormously valuable. The fusion of law and equity in England in 1873, that great English legal revolution of the 19th century, is largely traceable to the influence of Bentham. Modern Anglo-American law owes much to Bentham for other juridical expressions added to our language, such as "codification."

[24] See his introduction to *Principles of morals and legislation*, 1879.

[1] See supra §§ 211, 212.

[2] Both were founded in the same year, 1476.

[3] In 1668.

[4] It became effective in Norway in 1687.

[5] This 17th century code doubtless is another instance of the influence of the partial codifications of the French Louis XIV on the rest of Europe, — see supra § 251.

[6] See supra §§ 257–8.

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intended to cover deficiencies or gaps. The Danish and Norwegian Civil Procedure and Commercial Law are included in the Civil Code. Denmark has a Penal Code.[7] Norway has a Penal Code,[8] a Code of Criminal Procedure,[9] and a Maritime Code.[10]

The Swedish Civil Code of 1734 is a codification of the native customary Swedish law.[11] But the gaps in Swedish law due to the progress of the succeeding centuries have been filled out by other codes, modeled principally on the French.[12] Although Swedish Civil Procedure and Commercial Law are included in the Civil Code, Sweden[13] has also a Penal Code,[14] a Code of Criminal Procedure,[15] and a Maritime Code.[16]

The Scandinavian countries, the home of Teutonic customary law, have not escaped the world mission of Roman law. Their law is codified and uniform for every part of each State. Although the predominance of the Roman law element is faintly marked in Scandinavian law as compared with the law of other modern European countries anciently included in the Roman Empire, yet all betterments in the law of these far northern European States have been and will be made by returning to Roman law, especially the Modern Codes.

## 18. PORTUGAL

**Portuguese law prior to its 19th century codification.** The existence of Portugal is due to the success of the Christians in § 276

[7] Promulgated in 1866. As yet there is no separate Danish Code of Criminal Procedure.

[8] Promulgated 1842, revised and enlarged 1905.

[9] 1887–89.

[10] 1894.

[11] This code is another instance of the influence on the rest of Europe of the partial French codifications of Louis XIV and XV. See supra § 251.

[12] See supra §§ 257–8.

[13] It is interesting to note that Swedish law, except as modified by Russia (supra § 199), lies at the basis of the law of Finland, once a part of Sweden.

[14] Promulgated 1866.

[15] 1866 and statutes.

[16] 1891.

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Spain in expelling the Moslem power. The county of Portugal was founded 1095 by Henry of Burgundy, a great-grandson of King Robert of France. In 1139 Henry's son, Alfonso, assumed the title of King of Portugal. For over two centuries the Spanish kingdom of Castile laid claim to Portugal, but in 1385 Portugal won her independence. The influence of the Bologna revival of law and learning[1] was exerted also in Portugal, as the founding of the Portuguese universities of Coimbra[2] and Evora[3] show.

During the 15th century Portuguese prosperity and power reached its zenith. The Portuguese passed over into Africa at Ceuta, across from Gibraltar. Portuguese navigators discovered the Madeiras and the Azores, rounded Cape Verde on the West African coast, and engaged in the African trade. Vasco De Gama rounded the Cape of Good Hope, discovered the sea route to India, and laid the foundations of the Portuguese Indian Empire. In the very last year of the 15th century one of the companions of Columbus set sail for South America; and in 1500 Brazil became a Portuguese dominion.

Towards the end of the 16th century, in 1581, by a series of misfortunes, Portugal and her vast Colonial Empire fell into the greedy clutches of Philip II of Spain; and over sixty years rolled by before Portugal shook off the Spanish yoke in 1640. The influence of the Partidas[4] and Recopilación[5] was brought into Portugal by the Spanish conquest. The chief sources of Roman-Portuguese law prior to the establishment of the present Portuguese codes are: (1) The ordinances of Alfonso, 1456, in the 15th century; (2) The ordinances of Emmanuel, in the 16th century: (3) The ordinances of Philip II of Spain, confirmed by John IV of Portugal, 1643, in the 17th century, which were a revision of the ordinances of Alfonso and Emmanuel.

§ 277 **The Portuguese Civil Code of 1868 and modern Portuguese law.** The present Civil Code of Portugal went into operation

[1] See supra §§ 211, 212, 219.
[2] In 1279.
[3] In 1533.
[4] See infra "Spain," § 290.
[5] Id. § 297.

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in 1868. This code is one of the earliest European legislative monuments modeled on the French Code Napoleon.[6] It has not made any important modifications of the essential provisions of the French code. The Portuguese Civil Code faithfully reproduces the great lines and often the errors of the Code Napoleon. But its order of arrangement is in some respects more scientific than that of the French code. The great solicitude of the Portuguese commission for completeness of statement has made some of the articles of their code far too long and too obscured by details. But at the time of its formation Portuguese jurists had not benefited from the recent progress of law and jurisprudence: the Portuguese Civil Code is therefore more deserving of eulogy than criticism. Without doubt the Portuguese Civil Code had quite an influence on the Spanish Civil Code promulgated twenty-one years later.

Following the Continental European model, Portugal has other codes: Civil Procedure,[7] Penal,[8] Commerce,[9] Commercial Procedure,[10] Criminal Procedure.[11] Roman law very strongly predominates in the modern law of Portugal.[12] The world mission of Roman law has been fulfilled in Portugal,[13] which now has a uniform law accessible in codified form.

## 19. BRAZIL (ORIGINALLY PORTUGUESE AMERICA)

**Modern Brazilian law is uniform and codified.** Brazil, a country equal in area to the United States, was for three § 278

[6] See supra §§ 254, 258.

[7] Promulgated 1876.

[8] 1886. The original Penal Code was enacted in 1852.

[9] Promulgated in 1889. The Code of Commerce was originally the earliest Portuguese code: the old Code of Commerce was promulgated in 1833, and resembled very much the present Dutch Code of Commerce: see Raikes, *Maritime codes of Spain and Portugal*, p. 133. The present Code of Commerce, effective in 1889, inclines to the Italian Code of Commerce (supra § 224).

[10] 1905. An adjunct to the Code of Commerce.

[11] 1905.

[12] The remains of the Portuguese Colonial Empire in Asia and Africa — no mean possessions — may sometimes become an outlying province of the modern realm of Roman law.

[13] In 1910 the monarchy was overthrown, and the republic of Portugal was established.

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centuries a Portuguese colony.[1] In the Napoleonic era Portugal, as a result of her alliance and ancient friendship with England, was invaded by the French in 1807, and the throne with the royal family of Braganza moved to Brazil, where the Portuguese King, John VI, remained for thirteen years. In 1822, the next year after his return, Brazil was lost to Portugal forever: Dom Pedro, eldest son of the King, led a revolt in Brazil against his own father; Portugal resisted but feebly; and finally Brazil became independent of the mother country. An Empire, with Dom Pedro as the first Emperor, was then instituted in Brazil. The Empire lasted for nearly seventy years. The successor of Dom Pedro I, his son Dom Pedro II, reigned for fifty-eight years, and did much to advance progress and material prosperity in Brazil. But in the year 1889 the Emperor Pedro II was deposed; and the Empire came to an end in favor of a Republic.

The work of constituting the present law of Brazil was done under the Empire. The Portuguese law introduced into Brazil was Roman-Portuguese law prior to 1822, — before the modern codes of Portugal came into existence.[2] In the middle of the 19th century the influence of the Napoleonic codification[3] began to be felt in Brazil; and codification of Brazilian law ensued. Brazil was the first South American State to have a code of commercial law. Brazil now has a Civil Code[4] and other codes of the Continental European type.[5]

## 20. SPAIN

§ 279 **Periods of Spanish legal history.** Spain was the first modern European State to attain to national unity. Spain was also the

[1] The expression "Spanish America" is not correctly applicable to Brazil: the appellation "Latin America" should be employed whenever it is desired to denote at the same time both Brazil and the Spanish-American republics.

[2] See supra § 277.

[3] See supra §§ 254, 257, 258.

[4] Originally promulgated in 1881, revised in 1891. A new Civil Code goes into effect Jan. 1, 1917: see *American Bar Association Journal*, vol. ii, pp. 218–23 (April, 1916).

[5] A Code of Commerce was promulgated in 1850, followed by a Mining Code in 1857. See Walton, *Civil law in Spain and Spanish America*, p. 602, Washington, 1900.

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first great modern European power: in the 16th century she was predominant in Europe. The history of the evolution of Spanish law into its present condition of uniformity and codification has four well defined periods: from the 6th century to the reign of Alfonso the Wise in the middle of the 13th century; from the middle of the 13th century to the end of the reign of Ferdinand and Isabella early in the 16th century; from the 16th century and the reign of the Emperor Charles V to the codification of Spanish law late in the 19th century; modern Spanish law.

## I. Spain from the 6th century to the reign of Alfonso the Wise in the middle of the 13th century: period of partial preservation of ante-Justinian Roman law

§ 280 **The 6th century Lex Romana Visigothorum or Breviary of Alaric II.** For over 600 years Spain was a province of the Roman Empire and governed by Roman law. Early in the 5th century Spain was lost to the Empire; and in A. D. 414 the conquering Teutonic Visigoths set up a kingdom which lasted for three centuries until the Arab invasion of Spain. The earliest collection of medieval Spanish law is the Visigothic legislation of Alaric II enacted for his conquered Roman subjects in the year 506.[1] This is often familiarly called the Breviary or Code of Alaric. It contains much ante-Justinian Roman law. The Breviary of Alaric constituted for centuries in other parts of Europe — notably France[2] — the Roman law known to Europe. It was displaced only after the 13th century Bologna revival of the perfected Roman law of Justinian's Corpus Juris[3] spread to Spain.

§ 281 **The 7th century Visigothic Code, also known as the Fuero Juzgo.** About thirty years before the Arab conquest of Spain, the Breviary of Alaric was superseded late in the 7th century

[1] See supra § 133.
[2] See supra § 235.
[3] See supra § 135.

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(§ 281) by the Roman-Visigothic *Forum Judicum*,[4] which title was corrupted in 13th century Spanish to *Fuero Juzgo*, at which time also the original Latin text was translated into vernacular Spanish.[5] The Visigothic Code consists of twelve books, divided into fifty-four titles and 578 laws.[6] It was law for all Spain, binding both the conquering Germans and the vanquished Hispano-Romans: both races at the end of the 7th century had practically coalesced into one people.

The Fuero Juzgo is the first great medieval compilation to combine systematically Roman and Teutonic law: it contains not only ancient Gothic customs and many edicts of the Visigothic kings, but it has incorporated also considerable Canon Law from the acts of ecclesiastical councils; and much of its law of inheritance, marriage, corporations, ownership, prescription, and contracts is conformable to Roman jurisprudence. Many of the germs of the great political principles, long afterwards proclaimed by far-advanced European nations, are contained in the Fuero Juzgo.[7]

Historically the modern law of Spain rests on the Fuero Juzgo. And the Visigothic Code is also the parent law of all countries in America ever under Spanish rule. Following the conquest of Spain by the Saracens, the Fuero Juzgo survived in the few regions where the remnants of Christian Spain resisted the Moslem power — such as Asturias, Leon, Castile, Navarre. And it was subsequently extended to Spanish territory reconquered from the Mohammedan States.[8] In the 14th century the Fuero Juzgo was still preserved as law in

[4] It is also known as the *Liber Judicum*, *Liber Judiciorum*, *Liber Gothorum*, *Lex Wisigothorum*. It was **compiled** at the 16th Council of Toledo in the reign of Egica (**687–700**). It contains laws of Euric, Recesvint, Ervig, and Egica. Its origin dates to the earliest history of the Goths.

[5] An English translation of the Fuero Juzgo has been made by S. P. Scott, *Visigothic Code* (*Forum Judicum*), Boston, 1910. See also Pardessus, *Lois maritimes*, vol. i, pp. 151 et seq. (where the text is also given); and Walton, *Civil law in Spain*, pp. 52–5, Washington, 1900 (where a good synopsis is given).

[6] See Walton, *Civil law in Spain, etc.*, p. 51, who tabulates the laws attributed to the various Gothic Kings.

[7] Walton, *Civil law in Spain*, p. 57, Washington, 1900.

[8] For instance, in the 13th century to Cordova: Walton, *Civil law in Spain*, p. 55.

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Castile,[9] and even late in the 18th century it was held to be in force.[10] In fact the Fuero Juzgo was not entirely annulled until the 19th century codification and unification of Spanish law.[11] Moreover, many rules of the Fuero Juzgo still persist in the present Spanish Civil Code.[12]

**The early and lasting influence of the Canon Law in Spain.** § 282 Long before the Arab invasion and conquest, the Canon Law of the Roman Church[13] received a fixed place and influence in Spanish law: this is revealed in the Acts of the seventeen Councils of Toledo prior to the 8th century, in which assemblies the King and clergy legislated together. All this helped to increase the influence of Roman law in Spain; for the Canon Law is, as to things secular, but Roman law at secondhand.[14] And the Canon Law has exercised enormous influence in Spain down to comparatively recent times: for many centuries the family was placed under the exclusive authority of the Church; marriage was regulated by the doctrines of the Council of Trent, and necessitated certification from the parochial registry as well as the ecclesiastical record of birth[15]; while death involved the certification of ecclesiastical interment.[16]

**The 8th century Mohammedan conquest of Spain.** In 711 § 283 Tarik, the Moslem governor of Northern Africa, crossed the straits of Gibraltar, now named after him, and invaded Spain. The Visigothic enemies of King Roderic had won over to their cause Count Julian, governor of Ceuta (the last African possession left to the Eastern Roman Empire[17]); and from him they obtained ships to transport the Arabs and Berbers to Europe. By these Mohammedan invaders the Visigothic kingdom was destroyed. During the next three years the

[9] In 1348, in the *Ordenamiento* of Alcalá of Alfonso XI. See Walton, *Civil law in Spain and Spanish America*, p. 56.

[10] In 1779, in the reign of Charles II. See *Id.* p. 57.

[11] See infra § 305.

[12] See Walton, *Id.* pp. 54, 57.

[13] See supra §§ 226 et seq.

[14] Id.

[15] This became a matter of civil registry late in the 19th century, — in 1870.

[16] Id.

[17] See supra § 170.

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Saracens overran all Spain. The Christian remnants were driven to the mountains of northern Spain; there they fought to preserve their independence.

In 718 the Saracens crossed the Pyrenees and invaded France. Not until they met the solid power of Charles Martel and the Franks at the Battle of Tours in 732 was the rush of the Mohammedan invasion halted and the terror of Western Europe abated. But Moslem rule continued in Spain for nearly 800 years: not until 1492 was the Mohammedan power completely expelled from the Peninsula. Consequently from early in the 8th to almost the 16th century there was no united country or nation which could be called "Spain," — this term was merely a convenient geographical expression.

§ 284 **The Christian reconquest of Spain from the middle of the 11th to the middle of the 13th century.** The Christians in the North of Spain spent the next three centuries after the Mohammedan conquest fighting for their liberty and organizing the small territories left to them. By the opening of the 11th century they had established several little States — Leon, Castile, Navarre, Aragon. The character of these States is seen from the name of one of them: Castile was so called because it was originally "a line of castles" against the Moslems. Castile was erected into a kingdom in 1037 by Sancho the Great of Navarre, who then took the title "King of the Spains." Castile was given by him to his son Ferdinand I, who later called himself "Emperor of the Spains." In the year 1050 Ferdinand took the field to increase his dominions: and the period of the great reconquest by the Christians began.

Gradually the Spaniards recovered their ancient territories by expelling the Saracens and Moors. But two centuries went by before Christian Spain became supreme. In 1082 Alfonso VI of Castile marched down the valley of the Gaudalquivir to Gibraltar, rode his horse into the sea, and claimed possession of the "last land in Spain." In 1084 he captured the great city of Toledo, the "shield" of Mohammedan Andalusia. Fresh Mohammedan invaders, the Moors, summoned to Spain from Africa to help their Moslem brethren, only temporarily checked the Christian reconquest. In the middle of the 12th century Christian Aragon and Catalonia were

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united forever. Late in the same century and early in the next, Alfonso VIII of Castile organized the celebrated military orders of Calatrava, Santiago, and Alcantara, all of which subsequently contributed to the Castilian arms many victories against the infidels.

In the year 1212 the combined armies of Castile, Navarre, Aragon, and Portugal defeated a great army of Mohammedans at the Battle of Navas de Tolosa, and laid Moslem Spain at the feet of the Christians. In 1229 and 1238 the Balearic Islands and Valencia were conquered by Aragon. In 1236, six years after the union forever of Castile and Leon, the Castilian Ferdinand III conquered Cordova with its famous Arab palaces, mosques, and associations; and he did not recall his armies until he had recovered the whole of Andalusia. Mohammedan Spain was now reduced to Granada and a few seaports round to Cadiz. The Mohammedan King of Granada became a vassal prince of the Christians, and was no longer dangerous. His expulsion was only a question of time and policy. The great Christian reconquest of Spain was now completed.

**The 11th century Consulado del Mar (Consolato del Mare) and the 12th century Fuero de Leyron (Laws of Oléron).** § 285

Late in the 9th century, about the year 864, the city of Barcelona and the district adjacent to it became independent of the Mohammedans, and were governed by a count. Two centuries later it became incorporated with Aragon, the last count of Barcelona becoming King of Aragon. The Consolato del Mare (Consulado del Mare in Spanish), the earliest of the medieval codes and adopted by the Mediterranean cities of Italy and Spain, is given a Spanish as well as an Italian origin: it is claimed that it was first prepared by order of the magistrates of Barcelona. At any rate, whether originally Spanish or Italian,[18] this remarkable compilation, so fundamental to the maritime and commercial law of the modern world, was confessedly based upon the Roman Civil Law.[19]

In the kingdom of Castile were observed the Laws of Oléron (*Fuero de Leyron* in Spanish), the second of the great medieval

[18] See supra § 214.

[19] Id.

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commercial compilations of maritime law and based on Roman law.[20] This with the Partidas[21] sufficed for the commercial necessities of Castile and Leon until the end of the Christian reconquest of Spain.[22]

§ 286 **Great diversity and localization of medieval Christian Spanish law; the fueros.** The piecemeal character of the Christian reconquest of Spain[23] was responsible for the diversity and localization of medieval Spanish law. From the Saracenic conquest down to the promulgation of the Partidas,[24] or for over 600 years, a great host of new general or special laws, customs, uses, privileges, and rights grew up — collectively known as *fueros*. Of this conglomeration of fueros some were provincial, others were municipal. The use and force of the old general law code Fuero Juzgo[25] declined. Law became localized in Christian Spain: each province, city, and town had its own special law. Each citizen, if he chose, had his own local law. Roman law in Spain seemed in great danger of being smothered by Teutonic customary law.

## II. Spain from the middle of the 13th century to the end of the reign of Ferdinand and Isabella in the 16th century: period of the introduction of Justinian Roman law into Spain via the Bologna revival

§ 287 **Continued diversity of law in the separate kingdoms of Christian Spain.** When the influence of Justinian Roman law began in the 13th century to penetrate Spain from Italy, it had to encounter not only the active hostility of a native customary law of Teutonic origin, but also the irresistible tendency of Spanish law to become localized and diverse.[26] To weld together into a harmonious whole the law of each of the separate Spanish kingdoms was the task immediately confronting progressive rulers of each. Out of this political

[20] See supra § 236.
[21] See infra § 289.
[22] See 32 *Commercial Laws of the World*, "Spain," p. 9.
[23] See supra § 284.
[24] See infra § 289.
[25] See supra § 281.
[26] See supra § 286.

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necessity arose increasing opportunities in all regions of Spain (§ 287) for the entrance of the revived Justinian Roman law with all its potent power to mold the government and jurisprudence of any people coming under its influence. But the accomplishment of the task of unifying each regional Spanish system of law was slow and often tortuous. When at the end of the 15th century the Moors were expelled and Spain became a reunited nation,[27] the problem of unifying Spanish law ceased to be wholly local and provincial and became also national. But notwithstanding all the efforts of the rulers of Spain to accomplish such unification by codification, the diversity of Spanish law persisted until the 19th century, when the present codification of Spanish law was attained and made uniform for all Spain.[28]

The history of Spanish law prior to the promulgation of the present Spanish codes really involves a discussion of the law of each of the various Christian Spanish States which were consolidated into the modern kingdom of Spain. But, inasmuch as the present kingdom grew out of Castile (with which all the rest of Spain by one means or another has been united),[29] there is little necessity of considering the old separate law of Aragon, Catalonia, Navarre, Majorca, Valencia, the Balearic Islands, and the Basques provinces[30] in order to notice the penetration of Justinian Roman law into Spain and how its influence was exercised towards uniformity and codification: the history of Castilian-Spanish law will reveal the tendencies of Spanish law from century to century. Moreover, Castilian law demands special attention; it was the best of the old separate Spanish jurisprudences; it underlies the present Spanish codes; and it also was adopted for use in the Spanish-American colonies.[31]

[27] See infra § 293.

[28] See infra §§ 297, 302–5.

[29] Modern Spain really began with the union of the kingdoms of Castile and Aragon under the joint reign of Ferdinand and Isabella (1474–1504). Of these two kingdoms Castile was the larger and more important.

[30] See *General survey, etc.*, pp. 607–16, 641 et seq., for the separate law of Aragon, etc.

[31] See infra §§ 307 et seq.

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§ 288 **Spread of the Bologna revival of Roman law to Spain; founding of universities.** The influence of the 12th and the 13th century revival of Roman law study and classical learning at Bologna [32] was soon felt in Spain. In imitation of Bologna, Spanish universities with the faculty of law a principal feature were founded at Valencia,[33] Salamanca,[34] Lerida,[35] Valladolid,[36] Saragossa,[37] Toledo,[38] Seville,[39] and Granada.[40] Justinianean Roman law was absorbed by the Spanish jurists of the 13th and 14th centuries through the medium of the writings of the Italian Glossators and Commentators.[41] The commentaries of Bartolus, the greatest of the Commentators, actually enjoyed at one time almost statutory authority in Spain and Portugal.[42] The effect on the ancient Spanish Teutonic customary law was disastrous; in the 14th century it was being superseded by the pure Roman law of Justinian.

§ 289 **The 13th century Castilian Royal Fuero (Fuero Real), Septenario, and Espéculo of Alfonso X.** The greatest Spanish legislator of the Middle Ages was Alfonso the Wise,[43] often called the Spanish Justinian. Alfonso published three important works, which foreshadowed his masterpiece of legislation — the Partidas[44]: these three were the Royal Fuero, the Septenario, and the Espéculo. In the year 1255 [45] Alfonso promulgated a collection of the laws of the kingdom of Castile, known commonly as the Royal Fuero (*Fuero Real*).[46] This work consists of four books divided into 72 titles, and 545 laws. Book III treats of marriage, gifts, successions, legacies, guardian-

[32] See supra §§ 211, 212.

[33] In 1209.

[34] In 1239.

[35] In 1300.

[36] In 1346.

[37] In 1474.

[38] In 1499.

[39] In 1504.

[40] In 1537. The University of Barcelona is of 19th century creation (1841).

[41] See supra §§ 210, 216.

[42] See supra § 219.

[43] Alfonso X, *el Sabio*, King of Castile, 1252–84.

[44] See infra § 290.

[45] *General survey, etc.*, (vol. i, *Cont. Legal Hist. Series*, p. 619, Boston, 1912).

[46] Its original title was *Fuero de las Leyes*. It was also called *Fuero del libro*, *Fuero Castellano*, and *Libro de los Concejos de Castilla* (Book of the Councils of Castile).

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ship, and other topics of civil law. The Fuero Real was intended to replace the local particular law then in force.[47]

Alfonso published also a work known as the *Septenario*, begun by Ferdinand III and designed to be in seven parts. This was not, however, promulgated as a statute, and seems to have been a sort of encyclopedic legal treatise.[48]

About the year 1258[49] Alfonso published another compilation of the fueros, known as the *Espéculo de todos los Derechos* (Mirror of all the Laws) arranged in 5 books, 54 titles, and 657 laws. It includes much Justinian Roman law, and also considerable Canon law from the Decretals.[50] The Espéculo was probably intended by Alfonso as an attempt to unify the diverse law of Castile.[51]

**The 13th century Castilian Siete Partidas of Alfonso X.** § 290 In the year 1265, after nearly ten years' labor, was finished[52] the best and most renowned of all the compilations of Alfonso the Wise: namely, the *Siete Partidas*,[53] a digest of Castilian-Spanish law framed in imitation of Justinian's Pandects.[54] The Partidas are the work of several unknown jurists[55] subject to the supervision of Alfonso, who was himself an author of merit.[56] The framers of the Partidas obtained much assistance and borrowed considerably from the 7th century Visigothic Fuero Juzgo.[57] Great praise is due to the 13th

[47] 32 *Commercial Laws of the World*, "Spain," p. 7, note 2.

[48] *General survey*, p. 620.

[49] Walton, *Civil law in Spain, etc.*, p. 72, Washington, 1900.

[50] See supra § 228.

[51] *General survey, etc.*, pp. 620–1. Although the prologue of the Espéculo states that the book is a selection of all the fueros and communicated to the cities for their government, yet Professor Altamira doubts very much if it was ever law, — that is promulgated and administered as a statute. See *Id.*

[52] *General survey*, etc., p. 621. The date of completion is also given as 1263, — see Walton, *Id.* p. 76; 32 *Commercial Laws of the World*, p. 7, note 1. The Partidas were commenced in 1256.

[53] *Codigo de las Siete Partidas* (Code of the Seven Parts). But the original title is *Libro de las Leyes* or *Fuero de las Leyes*.

[54] See supra § 137.

[55] See infra § 292 for conjectures.

[56] *General survey of events, etc.*, p. 621.

[57] Scott, *Visigothic Code*, p. xl. See also supra § 281.

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(§ 290) century Spanish jurists who wrote the Partidas; for they produced not only a highly scientific code of law, the most notable of the age, but also the most complete treatise of jurisprudence yet published.[58] The Partidas exercised enormous influence on Spanish law other than Castilian, and lie at the basis of the modern Spanish Civil Code of 1889.

The Siete Partidas, as the title indicates, are divided into seven (*siete*) parts (*partidas*). Each of the seven commenced with a letter of Alfonso's name (A-l-f-o-n-s-o). The Partidas are also subdivided into 182 titles and 2479 laws.[59] Partida I is a digest of the Canon law of the Roman Church.[60] Partida II consists of public law, including the topics of the royal prerogatives, administrative officers, and public education. Partida IV treats of family relations and feudalism. Partida VII is the criminal law. Partidas III, V, and VI succinctly abridge the Roman law of actions and civil procedure, contracts, successions, and guardianship; these Partidas frequently incorporate literal translations of parts of Justinianean Roman law, and often republish the Roman law doctrines of the Italian Glossators.[61]

The intent of Alfonso in causing the compilation of the Partidas was probably to prepare a code which should displace the Fuero Juzgo,[62] the municipal fueros,[63] and even the Fuero Real itself[64]: for in the preface of the Partidas it is ordered that all persons be governed by these laws and by no other statute or fuero.[65] But for some reason not clear — perhaps contemporary hostility to the salutary Roman innovations of the Partidas — nearly 100 years rolled by before compilation of Alfonso the Wise was given the force of law in Castile and Leon. Finally in the middle of the 14th century during the reign of his great-grandson Alfonso XI, the **Partidas were**

[58] See Walton, *Civil law in Spain*, pp. 75–6.

[59] The Siete Partidas were partly translated into English by Lislet and Carlton, New Orleans, 1820.

[60] See supra §§ 225 et seq. for a discussion of Canon Law.

[61] As to the Glossators, see supra §§ 210 et seq.

[62] See supra § 281.

[63] See supra § 286.

[64] See supra § 288.

[65] See *General survey, etc.*, p. 621.

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**promulgated in 1348 by the Edict (Ordenamiento) of Alcalá** as an obligatory statute wherever not contradicted by earlier Castilian law, especially the municipal fueros and the Fuero Real.[66] In other words, by the Ordenamiento of Alcalá, the Partidas became merely a *supplementary* code or source of law, and were denied any general authority to annul earlier law. The tendency of medieval Spanish law in the separate Christian kingdoms to become diverse and confused was too strong to be quickly checked.

**The 15th century Castilian Ordinance of Montalvo.** In the § 291
reign of Ferdinand[67] and Isabella great political changes occurred in Spain, which were followed by a large amount of legislation. Consequently, Castilian law became even more incomplete, and fell behind the times. To remedy this, Isabella commissioned two jurists, Dr. Montalvo and Dr. Carvajal,[68] to compile the laws to date. In this labor Montalvo alone was successful, and his compilation was published **about 1484** as the *Ordenances reales de Castilla*, which because of its authorship became commonly called the *Ordenamiento del Doctor Montalvo.*

This work relates principally to public law, although it contains considerable private law. It consists of 8 books and 1163 laws of which 230 belong to Ferdinand and Isabella. It contains ordinances of the Cortes since the time of the Alcalá in 1348,[69] together with various acts from Alfonso X onward.[70] But his collection is defective in that it does not contain all the law prior to Ferdinand and Isabella, or even all the law of their reign down to 1484.[71] Perhaps this may explain why Montalvo's collection was never promulgated as a statute. The long-standing necessity for a clear and orderly

[66] Walton, *Id.* p. 76; *General survey, etc.*, pp. 623, 631.

[67] Ferdinand II of Aragon, who later became also Ferdinand V of Castile and Leon as a result of his marriage with Queen Isabella of the latter kingdom. His joint reign with her was 1474–1504. After her death he reigned alone until he died in 1516.

[68] As to both of these jurists, see infra § 292.

[69] See supra § 290.

[70] See *General survey, etc.*, p. 626. Some acts were taken from earlier sources of Castilian-Spanish law.

[71] *General survey, etc.*, p. 626.

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collection of the laws still remained. And its preparation was advised by Isabella in her will.[72]

§ 292 **Famous medieval Spanish jurists.** The earliest notable Spanish jurists, whose works are known to us, are of the 13th century. The unknown authorship of the Siete Partidas has been ascribed to various eminent 13th century Spanish jurists, especially Jacobo de las Leyes (also called Jácome Ruiz), an Italian who was tutor to Alfonso the Wise.[73] The principal work of Ruiz is his summary entitled *Flores de las leyes*, which was translated into Catalan and Portuguese.[74] Much of the *Flores* was incorporated in the Partidas. To the ecclesiastic Fernando Martinez, bishop of Oviedo in 1269, and to the renowned Roldán are also ascribed a share in the framing of the Partidas. The famous Airas de Balboa[75] (known also as Valbuena), bishop of Plasencia, wrote a gloss on the Fuero Real and a commentary on the Ordenamiento of Alcalá.[76] He was also a notable Canonist.

During the 13th and 14th centuries there were eminent Spanish jurists engaged in teaching law at foreign universities.[77] At Bologna the following professors were Spaniards: Santiago de Compostela, Juan Garciá el Hispano, Teseo Valenti, and Raimundo de Peñafort — the last-named being the famous compiler of the Decretals of Gregory IX as found in the Corpus Juris Canonici.[78] At Paris lectured the Spanish Pedro Hispano and Cardinal Torquemada — the latter being the author of commentaries on Gratian's Decretum.[79]

The two greatest jurists of Ferdinand and Isabella's reign were Montalvo and Carvajal. Both were members of the royal commission of Isabella to compile the laws of Castile.[80] The former, Alfonso Diaz de Montalvo, wrote also a dictionary of law called the *Repertorio de derecho* and glosses on the Fuero Real and the Partidas.[81] Montalvo was the founder of a law school. The latter, Galindez de Carvajal,[82] was a famous law professor as well as royal counselor.

[72] *Id.*
[73] See supra §§ 289, 290.
[74] *General survey of events, etc.*, p. 654.
[75] Died 1414.
[76] See supra §§ 289, 290.
[77] *General survey, etc.*, p. 655.
[78] See supra § 228.
[79] Id.
[80] See supra § 291.
[81] See supra §§ 289, 290.
[82] Born 1472, died c. 1530.

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**Extirpation of the Mohammedan power in 1492.** Almost at the close of the 15th century, in 1492 (the very year America was discovered by Columbus), the remaining Mohammedan state in Spain, Granada, was put an end to by Ferdinand and Isabella; and the last Moorish king, Boabdil, passed across the Straits of Gibraltar into African exile. The Mohammedan conquest of the Eastern Roman Empire and the capture of Constantinople[83] were revenged forty years later by the extirpation of the Mohammedan power in Spain. Spain was at last reunited nationally under a single Christian government, after suffering Moslem rule for nearly eight centuries. § 293

**Influence of Mohammedan law in Spain.** The Saracens for a long time after their conquest of Spain maintained a highly flourishing civilization. The Arab universities in Spain were numerous, and reflected — often brilliantly — the light of the learning of classical Greece and Rome. Aristotle and Euclid were familiar names to Spanish Saracens. In the year 968, the Saracens founded a university at Cordova, which city in the 10th century is reported to have had nearly 1,000,000 inhabitants and 300 mosques. The fame of this university as a seat of liberal culture became known to the medieval European world. § 294

The law of the Saracens and Moors was composed of the Koran and borrowings from the Roman law of the Eastern Empire.[84] For the regulation of agriculture and the irrigation of land the Spanish Arabs had perhaps the most just and beneficial laws ever possessed by a people. Evidences of these laws still exist to-day in Spain — especially in Valencia where, when the Moors were driven out, King James decreed that "water should be taken and used in the order that was customary in the times of the Saracens."[85] In Granada, Ferdinand and Isabella preserved the Moorish system of irrigating canals. Many of the present irrigation rights and customs in Spain date back to the epoch of the Saracens and Moors.[86] And many of these laws as to agricultural irrigation were transplanted to America.

[83] See supra § 183.

[84] See supra §§ 187, 188.

[85] Walton, *Civil law in Spain*, p. 63.

[86] *Id.*

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§ 295 **The early 16th century Castilian Laws of Toro (Leyes de Toro).** The promulgation of the Partidas in 1348[87] did not end the conflict in Spain between the Roman and the native customary law, which continued for the rest of the 14th and throughout all of the 15th century. Castilian law continued to be in a state of doubt, diversity, and confusion. To relieve its diversity and resolve conflicts as to its sources, the Leyes de Toro were promulgated in **1505** at the Cortes of Toledo. These were intended to supplement the Fuero Real, the Partidas, and other existing law.[88] The Leyes de Toro comprise eighty-three laws arranged unmethodically and without titles.[89] All but seven concern substantive civil law.[90] At the time of their publication the Leyes de Toro were regarded very highly and were ranked first among the laws of Castile.

The Leyes de Toro generally incline more to the Roman law than to the native customary law, although in some respects they effected a compromise between the two systems. The Laws of Toro introduced still more Roman law, and generally gave a wider effect to the Partidas.[91] But the Leyes de Toro repeated the preferential order of Castilian legal sources established by the Ordenamiento of Alcalá in 1348,[92] — thus reaffirming the inferior status of the Partidas as a supplementary code.[93]

## III. Spain from the 16th century and the reign of the Emperor Charles V to the unification and codification of Spanish law late in the 19th century: period of partial codification of law

§ 296 **Ascendancy of Spain in Europe during the 16th century.** By the efforts of Ferdinand and Isabella, Spain had finally attained to political unity. But the newly acquired Spanish

[87] See supra § 290.

[88] See supra, especially §§ 289, 290.

[89] No official editions of the Leyes de Toro were published; they are contained in the Nueva and the Novísima Recopilación, — see infra §§ 297, 303.

[90] The last seven are penal legislation.

[91] *General survey, etc.*, p. 633.

[92] See supra § 290.

[93] *General survey, etc.*, p. 634.

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national strength was slowly consumed by their grandson and great-grandson, who dragged Spain into the wars and politics of central Europe. During the reigns of Charles V and his son Philip II, Spain was the paramount power in Europe and greatly feared by all other European nations. The Emperor Charles V ruled over the larger part of Europe and all the then known New World. Not only was he King of Spain,[94] but he was also in his own right ruler of Austria and Burgundy. To these vast hereditary domains his election in 1519 as Roman Emperor added other countries. His Spanish-Imperial domains practically surrounded France. Charles was the mightiest monarch of his age: all Spain together with her vast American colonial possessions, the Netherlands, Germany, and much of Italy acknowledged allegiance to him. And the revenues of Charles and his son were enormous: Mexico and Peru were apparently one immense storehouse of gold and silver to be drawn upon at will.

Although the abdication in 1556 of Charles — in favor of his gloomy son — lost for the new King of Spain the Imperial dignity, yet Philip II [95] recouped himself by the conquest of Portugal,[96] which gave him her great and rich African and East Indian possessions. Moreover, Philip was at one time King-Consort of England by virtue of his marriage to "Bloody" Queen Mary. A lasting souvenir of Philip remains in Asia to-day: the Philippines were named after him by Spaniards who during his reign sailed from Mexico and took possession of these Asiatic islands. Philip's schemes of aggrandizement and religious persecution, in which he generally had the support of his relatives, the Emperors, persisted until his death in 1598. But the English defeat of his Armada and the rise of the Dutch Republic were deadly blows to the prestige of Spain, and were largely the means of destroying Spanish supremacy in Europe.

**The 16th century Castilian Nueva Recopilación of Philip II.** § 297 The formation of genuine Spanish systems of law throughout the Peninsula was completed early in the 16th century. But a new element was introduced by the Hapsburg sovereigns of

[94] Known as Charles I, reigned 1516–56.

[95] Reigned 1556–98.

[96] See supra § 276.

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(§ 297) Spain — the spirit of absolutism. Bureaucratic methods of government steadily increased. The Cortes met infrequently: but the Hapsburg sovereigns legislated abundantly in the form of decrees, orders, pragmatics, and resolutions of Council. During the reign of Charles V the necessity for a new collection of Castilian laws became urgent,[97] but the project was not realized. His son and successor Philip accomplished this undertaking.

Through the efforts of Bartolomé de Arrieta, a collection of the ordinances of Cortes and royal decrees was finally framed, which Philip promulgated in **1567** under the title of Nueva Recopilación. It is arranged very unsystematically in 9 books, 214 titles, and 3391 laws.[98] It was intended to comprise all the law in force since the Fuero Real and the Partidas.[99] It contains some parts of the Fuero Juzgo and the ordinances of Montalvo,[100] and almost all of the Ordenamiento of Alcalá and the Laws of Toro,[101] together with subsequent statutes and decrees.

The object of the Nueva Recopilación was to clarify and render more intelligible the existing law. But the outcome did not realize this purpose and was deplorable: the explanation is that Arrieta made too narrow an interpretation of the field covered by the Castilian statutes, — limiting these probably to royal legislation enacted without the assistance of the Cortes.[102] Anyhow the result was that Nueva Recopilación became merely an elaboration of the Ordinances of Montalvo,[103] with additions subsequent to 1484. And because the Nueva Recopilación did not abrogate earlier collections of law,[104] it became merely another supplementary compilation to the

[97] In the other kingdoms there were demands for the continuation of collections already made. See *General survey, etc.*, pp. 660, 663 et seq.

[98] Later editions were published in 1581, 1592, 1598, 1640. Between 1567 and 1777 ten editions of it were published for Castile. It was re-edited five times during the 18th century.

[99] See supra §§ 289, 290.

[100] See supra §§ 281, 291.

[101] See supra §§ 290, 295.

[102] See *General survey, etc.*, p. 661.

[103] See supra § 291.

[104] For instance the Nueva did not clear up the confused status of the Fuero Juzgo and the municipal fueros: see supra §§ 281, 286.

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anterior codes, which retained most of their authority and had still to be consulted. The Nueva at best was but a partial codification. The ancient condition of confusion and diversity of Castilian-Spanish law still continued, as the same condition did elsewhere in the Peninsula. And yet because the Nueva Recopilación was an effort to codify Castilian law and did contribute to its unification, it may be regarded as marking the commencement of the movement to unify and codify the law of *all* Spain.[105]

**Decline of Spain in the 17th century. Advent of the Bourbon dynasty.** The failure of Philip II to subdue revolted Protestant Holland or to conquer England were symptomatic of the approaching decline of Spain. After his death the power, influence, and reputation of Spain rapidly waned. Portugal successfully threw off the Spanish yoke.[106] European ascendancy in the 17th century was proudly exercised by France. In the opening year of the 18th century the Spanish throne came into the possession of the French Louis XIV's grandson, Philip V,[107] from whom the present Spanish royal house is descended. But the War of the Spanish Succession[108] cost Spain Gibraltar[109] and all the domains of the Spanish crown in the Netherlands and in Italy.[110] Spain sank to the level of a third-rate power. In the 19th century Spain lost all her colonial possessions in both the Americas, and also the Philippines. § 298

**The 17th century Laws of the Indies (Recopilación de las leyes de las Indias).** The acquisition of dominions in the New World brought in its wake a body of law made applicable to the Spanish-American colonies, which soon became abundant and confused. Efforts to compile the Spanish colonial law began in the 16th century in the reign of the Emperor Charles V.[111] Other efforts were made, with partial success, during the § 299

[105] *General survey, etc.*, pp. 663, 666.

[106] See supra § 276.

[107] Reigned 1700–46.

[108] 1701–14.

[109] Which has ever since belonged to England.

[110] Which were given to the Roman Imperial House of Austria.

[111] In 1543: *General survey, etc.*, p. 665. It contained the ordinances and statutes of Charles for the colonies.

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reign of Philip II.[112] Finally in 1680 Charles II promulgated the Recopilación de Indias, which contains all the law then in force in the colonies. The Laws of the Indies are modeled on the 16th century Nueva Recopilación,[113] and comprise 9 books arranged in 218 titles and 6447 laws.[114]

§ 300 **Famous Spanish jurists of the 16th and 17th centuries.** Legal science was extensively cultivated in Spain during the 16th and 17th centuries. The many legal problems arising out of the military and religious policies of this epoch, the vast colonization of the Americas, and the tendency of the Spanish mind to concern itself with practical questions caused law to be scientifically studied with great thoroughness.

At the opening of the 16th century lived two distinguished Spanish jurists, Antonio de Nebrija[115] and Juan Lopez de Vivexro.[116] Nebrija published an excellent revision of the glosses of Accursius.[117] Vivexro, who was professor of law at Salamanca and at one time adviser to Ferdinand and Isabella, was an author of distinction — whence his popular name of "Palacios Rubios." He was an editor of the Leyes de Toro,[118] and wrote a commentary on them.

The Spaniard Covarrubias was called by his contemporaries the Bartolus of Spain.[119] And there were other distinguished jurists of this epoch[120] who published admirable commentaries on Spanish law: among them Gregorio Lopez wrote on the Partidas[121]; Antonio Gomez wrote on the Leyes de Toro[122]; and Acevedo wrote on the Nueva Recopilación.[123]

[112] *Id.* pp. 665, 666. A *Recopilación* and a *Nueva Recopilación* were framed in 1571 and 1593 respectively.

[113] See supra § 297.

[114] Later editions were published in 1756, 1774, 1791, and 1841.

[115] Born 1444, died 1522.

[116] Born 1447, died 1523.

[117] The greatest of the Italian Glossators, — see supra § 213.

[118] See supra § 295.

[119] *General survey, etc.*, p. 672.

[120] As to the Spanish jurists of the Hapsburg and Bourbon periods see *Id.* pp. 667–75, 680–83. As to Bartolus, the greatest of the Italian Commentators, see supra § 219.

[121] See supra § 290.

[122] See supra § 295.

[123] See supra § 297.

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The jurists Suarez [124] and Francisco de Arnaga [125] achieved the front rank of eminence. Antonio Augustin (Antonius Augustinus [126]), bishop of Tarragone, edited jointly with Cujas [127] the Greek constitutions of Justinian's Code.[128] Francisco Vitoria, professor at Salamanca, wrote on international law, and Vasquez Menchacha also wrote on the laws of war: both jurists may be truly called forerunners of the Dutch Grotius.[129]

**The 18th century Ordinances of Bilbao.** In the year 1737 § 301
Philip V, evidently inspired by the *ordonnances* of his grandfather Louis XIV,[130] promulgated the *Ordenanzas de Bilbao*, in twenty-nine chapters. These were necessitated by the great commercial development of the city of Bilbao,[131] and constituted a great step in advance for Spanish commercial law. These ordinances were subsequently made applicable to the American colonies, and did much to remedy the chaotic condition of colonial commerce caused by the Recopilación de Indias.[132] And the Ordinances of Bilbao underlie parts of the commercial law of some of the Spanish-American republics. Every matter of mercantile law, whether applicable to land or sea, is found in the ordinances of Bilbao.[133]

**18th century efforts to unify Spanish law.** The Bourbon § 302
sovereigns completed the work of political unification inaugurated by the house of Hapsburg. Philip V abrogated the separate public law enjoyed by Catalonia, Majorica, Valencia, and Aragon [134]; and he also annulled the old special civil law of

[124] His *Tractatus de legibus, etc.*, written in 1612, is a noteworthy production.

[125] His *Observationes juris*, published in 1643, gave him a wide reputation.

[126] Born 1516, died 1586.

[127] Cujas was the greatest French jurist of the 16th century, — see supra § 245.

[128] Girard, *Manuel de droit*[5], p. 87. See also supra § 136.

[129] See supra § 273.

[130] Especially those of the years 1673 and 1681. See supra § 251.

[131] Ordinances began to be made at Bilbao as early as 1459. There were some earlier ordinances enacted in the 16th century by Philip II (in 1590). Other notable commercial compilations of this century were the *Ordenanzas* of Burgos (1538), and those of Seville (1556).

[132] See supra § 299.

[133] 32 *Commercial laws of the world*, Spain p. 15.

[134] In 1707–15. See *General survey, etc.*, pp. 677 et seq.

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Valencia. But the Bourbon Kings did not succeed in abrogating the separate civil law of Aragon, Majorca, the Basque Provinces, and Catalonia, each of which retained its own civil law until into the 19th century. Nor did the Bourbon sovereigns abrogate anything of the law of Castile. The fusion of all this diverse Spanish law into a codification was the contribution of the 19th century.

§ 303 **The 19th century Novísima Recopilación of Charles IV.** Attempts were made during the 18th century to cure Spanish law of its longstanding confusion and redundancy, only slightly alleviated by the Nueva Recopilación[135]; but these efforts failed.[136] Finally, early in the 19th century, the jurist Juan de la Raguera Valdelomar made a compilation which rearranged the Nueva Recopilación and its supplements. This was promulgated in 1805 by Charles IV as the *Novísima Recopilación de las leyes de España.* It is a compilation of law from the 15th century to the date of publication. In addition to being law for Castile, the Novísima Recopilación was, so far as possible, made applicable to all Spain.[137]

Although the royal decree of Charles made the Novisima Recopilación superior to all earlier law, yet, inasmuch as the Novísima did not definitely repeal either the Nueva Recopilación or the Partidas,[138] its effect was to make the Novísima merely a supplementary code or partial codification; for it did not abrogate the order of the sources of Castilian-Spanish law as fixed in the Ordenamiento of Alcalá and the Laws of Toro.[139] Hence, what the Novísima Recopilación actually accomplished was to make Spanish law more obscure and confusing than ever.

The Novísima Recopilación is a massive production in 6 volumes[140] arranged in 12 books, 341 titles and 4142 laws. "Considering the age in which it was compiled, it is much

[135] See supra § 297.

[136] Such as the preparation of a supplement of statutes, etc., by the jurist Lardizabal of c. 1745, which was never published.

[137] *General survey, etc.*, p. 585.

[138] See supra §§ 297, 290.

[139] See supra §§ 290, 295; Walton, *Civil law in Spain*, p. 79; *General survey, etc.*, p. 676.

[140] The sixth is a supplement published in 1829.

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inferior to the Fuero Juzgo which preceded it by eleven centuries, and to the Partidas of six centuries before."[141]

**Later 19th century partial codifications of Spanish law.** § 304 During the years 1811–14 quite a few provisions in the law of persons and property were reformed by statute.[142] Then gradually followed much statutory legislation in the nature of partial codifications, especially after the year 1830.[143] By the publication of the **Code of Commerce of 1830** a complete differentiation between civil and commercial law was accomplished. This is the first modern code for all Spain.[144] It was modeled on the French Code of Commerce of 1807. It was superior to all such codes then published, filling in gaps left by the French; and it is perhaps the most complete ever framed.[145] It was revised in 1886.[146] Both the original and the revised Spanish Code of Commerce was extended to Cuba, Porto Rico, and the Philippines.[147] In 1870 the recording of births, deaths, and marriages ceased to be under ecclesiastical control, and was made a matter of civil registry.

## IV. Modern Spanish law; period of uniformity and complete codification of law

**The Spanish Civil Code of 1889 and modern Spanish law.** § 305 The final step in the development of Spanish law was the framing of the present Civil Code for all Spain, which abrogated the centuries-old diversity of Spanish law. This ideal of one uniform codified Spanish law was not easily realized in the 19th century. The Civil Code draft of 1851, which represented eight years of labor, was rejected. In 1880 the

[141] Walton, *Civil law in Spain*, p. 79.

[142] See *General survey*, pp. 690 et seq.

[143] *Id.*

[144] *Commercial Laws of the World*, p. 19. This code was the work of Sainz de Andino.

[145] *Id.* pp. 17, 19, 22.

[146] *Id.*, p. 19.

[147] The original code of 1830, was extended to these colonies in 1832; the revised code of 1886 was extended in the same year to Cuba and Porto Rico, and two years later to the Philippines. See 32 *Commercial Laws of the World*, "Spain," p. 19.

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project reappeared, and with it the purpose of fusing Castilian law with the other regional Spanish law. This plan did not succeed: the forces favoring the conservation of the separate civil jurisprudences were too strong. But the defeat was only temporary: five years later the preparation of a general Civil Code was again started. In 1888 the work of unifying and codifying Spanish civil law was finished. And the new Civil Code went into effect the following year, being promulgated by the Queen Regent in the name of her son Alfonso XIII.[148]

The Spanish Civil Code of 1889 is modeled on the Code Napoleon of 1804,[149] and is the latest of all the republications of that marvelous code. The plan of the Spanish Civil Code, its spirit, very many of its details, provisions, chapters, and titles are literally borrowed from the French code. It is not by any means, however, a slavish imitation of the Code Napoleon: on the contrary it is often superior to the French code in clearness, precision, and method. The Spanish Civil Code is more scientific than the French: some of its provisions embody the perfections of time and legal science for the eighty-five years since the Code Napoleon.

The Spanish Civil Code is the successful outcome of the world-mission of Roman law in Spain to produce a uniform codified national law. It contains some compromises, — for instance the recognition of the civil as well as the religious form of marriage.[150] In imitation of France, Spain has also other codes: Penal,[151] Civil Procedure,[152] Criminal Procedure,[153] Commerce.[154]

## 21. SPANISH AMERICA

§ 306 **The government of the Indies or American possessions of Spain.** The discovery of the New World by Columbus in 1492, followed by the American conquests and exploits of Cortes and Pizarro and other brave explorers, gave to Spain enormous

[148] Began to reign 1886. The regency of Maria Christina lasted until 1902.

[149] See supra § 254.

[150] Article 42.

[151] Promulgated 1870.

[152] 1881.

[153] 1882.

[154] 1890. This is inspired by the Commercial Code of 1886, which is a revision of that of 1830: see supra § 304.

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colonial dominions. Soon it became necessary to devise a government and law for the new colonial empire: in 1503 the *Casa de Contratación* or "India House" was established at Seville to regulate the colonial trade. Some twenty years later, in 1524, the Emperor Charles V enlarged the legislation of his grandfather Ferdinand, and established the Council of the Indies.[1]

Thereafter the Spanish-American possessions were governed by the Council of the Indies, subject to the authority of the King. But when in the 19th century a new form of government was established in Spain as a result of the French invasion, the colonies were placed under the control of the Cortes, which legislated for them. With the restoration of the Bourbons in 1814, the Spanish sovereigns continued to enact laws for the colonies. Prior to the 19th century revolution and separation of the colonies from Spain, there were nine distinct colonial governments in America. Four were vice-royalties: Mexico, Peru, La Plata, and New Granada. The other five — Yucatan, Guatamala, Chile, Venezuela, and Cuba — were captain-generalships.[2]

**The law of the Spanish-American colonies.** The laws § 307 enacted in Spain for the colonies in the Americas were collected and digested in the year 1680 in the famous *Recopilación de las leyes de las Indias* or Laws of the Indies.[3] This compilation is the primary source of Spanish-American colonial law. But if the far-seeing wisdom of the Recopilación de Indias with its wealth of details had not anticipated any possible case that might arise, then it was provided in the Laws of the Indies themselves that the laws of Castile should be observed.[4] The order in which these should be employed was as follows[5]: (1) the latest laws enacted for the colonies;

[1] This ordinance of 1524 is translated in full by Walton, *Civil law in Spain and Spanish America*, pp. 519–20, Washington, 1900. The Casa de Contratación was made subordinate to the Council of the Indies, being transferred in 1717 to Cadiz.

[2] As to the details of the colonial governments, see Walton, *Id.*, pp. 520–1.

[3] See supra § 299.

[4] Book 2, title 1, laws 1 and 2.

[5] This is the order of preference of the first law of Toro. See 1 *Commercial Laws of the World*, p. 5, Boston, 1911.

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(2) the Nueva Recopilación[6]; (3) the Laws of Toro[7]; (4) the royal ordinances of Castile; (5) the Ordenamiento of Alcalá[8]; (6) the Fuero Juzgo[9]; (7) the Siete Partidas[10]; (8) the Consulado del Mar,[11] and the Ordinances of Burgos[12] until the Ordinances of Bilbao were promulgated in 1737, — thereafter those of Bilbao.[13]

Thus the Castilian law became the fundamental law of the Spanish possessions in America. But the condition of the colonies was not always the same as that of the mother country: hence by the Laws of the Indies[14] it was provided that no Spanish law should be binding in America unless made applicable to the colonies by an order of the Council of the Indies. As a result not every Spanish law was extended to America; while some laws, not in force at home, were enacted specially for the colonies.

There are no official collections of the Spanish-American colonial law subsequent to the Recopilación de Indias, unless the later editions of this work in 1756, 1774, 1791, and 1841 be so considered. The colonial laws from 1680 to 1787 are contained in the accurate and painstaking work of the Mexican judge Beleña.[15] There is, however, an official Mexican collection to 1821.[16]

§ 308 **The modern Spanish-American republics codified their law during the latter half of the 19th century.** As a result of the revolution of 1810–26, all the Spanish colonies of Central and South America became independent of the mother country, and were transformed into various republics.[17] During the 19th century all the Latin-American republics[18] codified

[6] See supra § 297.
[7] See supra § 295.
[8] See supra § 290.
[9] See supra § 281.
[10] See supra § 290.
[11] See supra § 285.
[12] See supra § 301, note.
[13] See supra § 301.
[14] Book 2, title 1, law 40. See also Walton, *Civil law in Spain, etc.*, p. 526.
[15] The *Recopilación sumaria de todos los autos acordados de Real Audiencia y Sala del Crimen de esta Nueva España, etc.*, in 2 vols.
[16] The *Colleccion de los decretos y ordenes de las Cortes de España, que se reputan vigentes en la Republica de los Estados Mexicanos*, Mexico, 1829.
[17] See Walton, *Civil law in Spain, etc.*, pp. 10–17, for details.
[18] Except Panama, which inherited codes of law from Colombia.

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their law.[19] Many of their codes are excellent productions, (§ 308) comparing favorably with the modern European codes. All the Latin-American Civil Codes are modeled on the French Code Napoleon,[20] but their Commercial Codes are generally based on the Spanish.[21]

Roman law in a Spanish or a Portuguese dress has conquered the whole of South and Central America. These Latin-American provinces of the modern realm of Roman law are together far superior in size to the Roman Empire of Augustus. Most striking also is the fact that all the law of both American continents (with but few exceptions,[22]) is written in only two languages — English and Spanish, the two great languages of the New World.[23]

[19] The following is a partial list of Latin-American codes (many of these have been amended): I. *Central America.* **Costa Rica:** Civil Code (1856), Code of Commerce (1865). **Guatemala:** Civil Code (1877), Code of Commerce (1877). **Honduras:** Land Laws (1888). **Mexico:** Civil Code for Federal district (1884, repealed that of 1870), Code of Commerce (1889, repealed that of 1884), Penal Code (1871). **Nicaragua:** Civil, Commercial, and Penal Codes. **Panama:** (Colombian Codes in force prior to the Revolution of 1903. Panama now has similar codes). **Salvador:** Civil and Commercial Codes. II. *South America.* **Argentina:** Civil Code (1871), Code of Commerce (1890, repealed that of 1862), Civil Procedure (1880). **Bolivia:** Code of Commerce (1891). **Brazil** (see supra § 278). **Chile:** Civil Code (1857), Code of Commerce (1867). **Colombia:** Civil Code (1891); Code of Commerce (1887). **Ecuador:** Civil Code (1887), Code of Commerce (1878). **Paraguay:** Civil and Commercial Laws (1880–93), Land Laws (1885–92). **Peru:** Civil Code (1851), Code of Commerce. **Uruguay:** Civil Code (1895), Code of Commerce (1866, revised 1885). **Venezuela:** Commercial laws (1861–90), Civil Code (1896). As to the law of the **South American Guianas,** see supra §§ 258, 271. The law of the West Indian Island of **Trinidad,** at the time of its acquisition by Great Britain, was Spanish, but this old law is now extinct: Reis, *Spanish law in the British Empire*, Journal Soc. Comp. Legisl. n. s. no. 30, Jan. 1914.

[20] See supra § 254.

[21] See supra § 305.

[22] These are principally Portuguese, Brazil, and bilingual English and French Quebec.

[23] Spanish America can rightfully, claim the honor of having the first university in the Americas. The oldest university established in the New World is the Peruvian San Marcos, founded at Lima in 1553. There were at least six universities in Spanish America before Harvard College was founded in 1638.

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## 22. SPANISH LAW PARTS OF THE UNITED STATES

§ 309 **Spanish law in the continental United States.** A very large part of the continental United States has been subjected to the influence of the Roman-Spanish law of the period between the 16th and 19th centuries.[1] In 1512 Ponce de Leon discovered Florida, which became a Spanish possession and settlement. Three centuries later, in 1819–20, Spanish Florida was ceded to the United States. Scarcely any traces of Spanish law can be found to-day in the law of Florida, Alabama, and Mississippi.[2]

Louisiana was ceded to Spain by France in 1763. Thereafter the Laws of the Indies and other Spanish colonial law,[3] including the Nueva Recopilación and the Siete Partidas,[4] were the law of the land from the Gulf of Mexico up the Mississippi River to the Rocky Mountains and Manitoba. In 1803 France regained Louisiana, only to transfer it to the United States a year later.[5] The Roman-Spanish and the Roman-French law have coalesced in Louisiana in the modern Louisiana Civil Code promulgated in 1825.[6]

By the Louisiana Purchase of 1804, President Jefferson added to the United States a territorial area equal to half of Europe. Although the Roman-French-Spanish law became superseded north of the modern state of Louisiana by the English Common law,[7] yet traces of the former law can be occasionally found in some of the states carved from the Louisiana Purchase.[8] In the states of Arkansas, Missouri, Iowa,

[1] See supra §§ 306 et seq. and also §§ 279 et seq.

[2] Parts of the last two originally belonged to Spanish Florida. In 1829 the English Common law replaced the territorial law of old Florida. See *Florida Revised Statutes* (1906), § 59; Hart *v.* Bostwick, 14 Fla. Reports, p. 16 (1872).

[3] See supra §§ 299, 307.

[4] See supra §§ 297, 291.

[5] See supra § 263.

[6] See supra § 264.

[7] Id.

[8] For instance, Missouri's civil procedure in some respects is reminiscent of that described in Justinian's Institutes: Howe, *Law in the Louisiana Purchase*, 14 Yale Law Journal, p. 77.

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Kansas, Nebraska, Wyoming, Montana, Colorado, and the twin Dakotas, the influence of the *model* Louisiana Civil Code has been quite marked: this is a permanent tribute to the excellence of Livingston's amalgamation of Roman-French-Spanish law.[9]

As the result of the war between the United States and Mexico 1844–48, an enormous territory — equal to the combined area of Germany, France, and Spain — was ceded to the United States. The law of this region had been the Spanish law as found in Mexico: Laws of the Indies, Nueva Recopilación, Siete Partidas, and other Spanish colonial law.[10] Traces of Roman-Spanish law are visible to-day in the civil law of the states carved out of the Mexican Cession — particularly Texas,[11] Arizona,[12] New Mexico,[13] and California,[14] where the law of property, obligations, and irrigation reveal cases of direct Roman descent via Spanish colonial law.[15] The California Civil Code, promulgated in 1872, although not equal in excellence to the Louisiana Civil Code,[16] is nevertheless a meritorious production, and has materially assisted the progress of California law by giving the people of that state some of the benefits of a codified jurisprudence.

§ 310 **Spanish law in Porto Rico, the Philippines, and the Panama Canal Zone.** Prior to the cession in 1898 of Porto Rico and the Philippines to the United States as a result of the war with Spain,[17] these Spanish colonies had been given the various modern codes of the mother country.[18] And the Spanish Civil

[9] See supra § 264.

[10] See supra § 307.

[11] Adopted the English Common law in 1840.

[12] Did likewise in 1885. See *Luhrs* v. *Hancock*, 181 U. S. Supreme Ct. Reports, p. 567 (1901).

[13] See *Browning* v. *Browning*, 3 N. M. Reports, p. 371 (1886); *Albright* v. *Territory*, 79 Pacific Reporter, p. 714 (1905).

[14] California adopted the English Common law in 1850.

[15] Consult any Digest of Decisions of the Courts of the above-named states, or any state statutes. See also Ware, *Roman water law*, p. 141, St. Paul, 1905.

[16] See supra § 264.

[17] See Walton, *Civil law in Spain, etc.*, p. 17.

[18] The original Spanish Code of Commerce of 1830 was extended to these colonies in 1832; the present revised Spanish Code of Commerce of 1886

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(§ 310) Code is still law in both Porto Rico and the Philippines, having suffered only a few unimportant changes: the principles of Roman-Spanish civil law are too firmly established to be altered. But the other Spanish codes have either been superseded or amended[19]: in Porto Rico the Spanish penal code and codes of criminal and civil procedure have been abrogated,[20] and the code of commerce has been altered[21]; in the Philippines the Spanish commercial code has been amended similarly as in Porto Rico, while the criminal and civil procedure codes have been greatly altered.[22] For utilitarian reasons alone, ignoring all others, the American acquisition of Spain's former colonies has given a tremendous impulse to the study of Roman and Spanish law in American law schools. And this movement must inevitably produce a reflex influence for the betterment of the native American law — signs of it are already apparent.

The Panama Canal Zone was originally Colombian territory. In 1903, when the Republic of Panama was established,

was extended to Porto Rico in 1886 and to the Philippines in 1888; the original Code of Civil Procedure of 1856 was extended to Porto Rico in 1865, and the present revised Code to Porto Rico in 1885 and to the Philippines in 1888; the Penal Code to Porto Rico in 1879 and to the Philippines in 1884; the Code of Criminal Procedure to Porto Rico in 1889 and to the Philippines in 1888; the Civil Code to Porto Rico and the Philippines in 1889; the Mortgage Law to Porto Rico and the Philippines in 1893. See Walton, *Civil law in Spain, etc.*, pp. 601, 492 et seq; *General survey, etc.*, p. 688; 32 *Commercial laws of the world*, "Spain," p. 19; supra §§ 304, 305.

[19] The Foraker Act of 1900 as to Porto Rico expressly stated that the existing law should continue until amended or found inconsistent with the changed political conditions. 31 *U. S. Statutes at Large*, 77, § 8. See also *Fernandez y Perez* v. *the Same*, 202 U. S. Supreme Court Reports, p. 80–101; *Marmion* v. *Pelegri*, 1 Porto Rico Decisions, 225 (1902); *Rivera* v. *Cadierno*, 3 P. R. Fed. Reports, 43 (1907).

[20] New codes considerably like those of California have replaced them. Special features of English law, such as the jury system, have been engrafted on Porto Rican law.

[21] For instance, the provisions as to corporations are now covered in the latest edition of Civil Code (1902), and the Federal law of bankruptcy now applies to Porto Rico.

[22] Civil procedure is modeled on that of California. In 1909 a commission was appointed to prepare new codes for the Philippines.

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the various civil, commercial, and criminal codes of Colombia [23] were in force at the Isthmus. And these Colombian codes were at first continued as the law of the Canal Zone. But now the criminal and civil procedure codes have been repealed and replaced by other codes based on American law. Except where altered, the civil law of the Canal Zone is the same as that of Colombia.[24]

## 23. JAPAN

**The great influence of the French Civil Code in Japan after the overthrow of the Shogunate and the Restoration of the Imperial authority.** In 1868 the power of the Shogunate was overthrown and the authority of the Mikado was restored. This event marks the beginning of modern Japan. At the time of the Restoration there were few written laws in Japan, and the Japanese customary law was uncertain and variable. Hence by a decree of 1875 the judges were ordered, in deciding cases, to apply first the written law; if there was none, to apply the customary law; if there was none, to be guided by reason and equity.[1] This decree really made the legal knowledge of magistrates the sole aptitude both for determining the scope of the imperfect written and customary law and for defining the rules of natural equity. § 311

In order to decide cases according to natural equity, it became necessary for judges to know as soon as possible the principles of European law. They were at once attracted to modern Roman-French law,[2] owing to the then influence of France in the Far East caused by the policy of Napoleon III. During the last years of the Shogunate, several features of French civilization had already been introduced into Japan.[3] And after the Restoration of 1868 France remained the

[23] See supra § 308, note.

[24] See Hinckley, *Canal one laws and judiciary*, 17 Case and Comment, 220–22; 7 *Commercial Laws of the World*, "Panama Canal Zone," pp. 111–12.

[1] Goraï, *Influence du code civil français sur le Japon* (in *Livre du cent. du code civil, 1804–1904*, vol. ii, p. 781, Paris 1904).

[2] See supra §§ 254 et seq.

[3] Such as the reorganization of the army on the French model. See Goraï, *Id.* p. 783.

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(§311) directing influence in Japan. Consequently the Imperial Government chose France to direct the great work of reforming Japanese law. For not only is natural equity the very foundation of modern French law and has made it suited for other peoples of the present age, but at the time of the Japanese Restoration, France alone had a complete system of codified law, certain and easily comprehended. English law was, as it still is, uncertain and not codified.

Yeto, the first Minister of Justice after the Restoration, commissioned the Japanese jurist Hitzukuri to translate the French Civil Code.[4] But this translation alone was not sufficient to cause Japanese judges to render just and equitable decisions; persons competent to guide the magistrates were needed. And the French government was asked to send over some skilled jurists. Three distinguished Frenchmen went to Japan: Boissonade, Bousquet, and Benet. Of these Boissonade was to become the most famous. All three were appointed counselors to the Minister of Justice. Their duties were very interesting, and opened the way for French law to influence Japanese law. They endeavored to give to the Japanese judges the principles of law on which their decisions should rest; they assisted in the promulgation of isolated laws; and they did more than this, in hard cases these Frenchmen, whenever consulted by the Japanese judiciary, would render judgment themselves, and their opinions became at once the decisions of Japanese tribunals.[5] Thus a Japanese jurisprudence grew up under French direction. Naturally these French jurists in the Japanese service followed if possible the principles of French law; and consequently the Code Napoleon came to exercise great influence in Japan.

The Imperial Government also desired that law be taught to aspirants for the bench, and formed in 1872 a school of law at the Ministry of Justice.[6] This was presided over by Boissonade and Bousquet, who naturally taught French law. Four years later a "special school of French law" was established at the Ministry of Justice, where it existed for nine years.

[4] Goraï, *Id.* See also supra § 254.

[5] Goraï, *Id.*

[6] Goraï, *Id.* p. 784.

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There French law was taught in the French language by a Frenchman named Appert.[7] The graduates of this school exercised an enormous influence in Japan either as judges or law teachers. In 1877, the next year after the "special school of French law" was established, the Japanese government formed another law school: there French law was studied in the Japanese language.

A few years earlier, in 1870, the law school of the university of Tokyo had been organized. The Tokyo law school graduates of the year 1878 were the first to study Anglo-American law. French law was also studied at the Tokyo law school. And when in 1885 the school of law at the Ministry of Justice was abolished, the students were sent to Tokyo and there founded a new section, that of French law.[8] Boissonade, Appert, and other Frenchmen [9] taught here.

But in addition to the above official governmental measures for the propagation of French law in Japan, there were some unofficial private ways whereby its influence during this era entered the country. Since 1879 five private law schools were established at Tokyo, which are to-day recognized as universities by the government.[10] Two of these taught French law, and all were under its influence; their several thousand students naturally became inspired by French law. Furthermore, many standard treatises on French civil law, such as those of Laurent, Demolombe, Huc, Mourlon, Baudry-Lacantinerie, were brought to Japan, and materially aided the spread of French law influence in that country. As a result of the teaching of French law in Japan, whether at official or unofficial law schools, the French Civil Code actually served as the basis of Japanese law from 1870 to 1890.[11]

§312 **Boissonade's draft of a Japanese Civil Code, which almost went into effect.** The influence of French law penetrated Japan through still another channel: attempts to codify Japanese law. As early as 1872 the first Imperial Minister of

[7] Goraï, *Id.*
[8] Goraï, *Id.*
[9] MM. Revilliot, Revon, and Bridel.
[10] Goraï, *Id.* p. 785.
[11] Goraï, *Id.* pp. 785, 787, 788.

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(§ 312) Justice, Yeto, had proposed the making of a Civil Code for Japan, and began the work of preparation with the aid of the counselor Bousquet.[12] Count Oghi, who succeeded Yeto, commissioned in 1878 two Japanese jurists to draft a code. Their work, however, was merely an abridged translation of the French Civil Code.[13] The following year Count Oghi intrusted the project to Boissonade, who, after carefully working out the scheme of a draft, completed a part of the proposed Civil Code during the next year, 1880. But the provisions as to persons, successions, gifts, and marriage were intrusted to three Japanese jurists, in order that the native law as to these matters should receive due attention: nevertheless their completed work shows that they themselves drew heavily on the French Civil Code for the law on the subjects assigned to them, and rejected traditional Japanese legal principles.[14] The entire draft for a code was then submitted to a special commission, among which were members of the Council of State, judges, and senators. It was accepted; and the code of Boissonade was promulgated in 1890 to go into effect in 1893.

The time for giving full effect of Boissonade's code had almost been reached, when a reaction occurred. In 1892 the Japanese Diet voted to postpone the going into effect of Boissonade's code until 1896, on the ground that it ought to be revised. As it stood, his work was largely a reproduction of the French Civil Code, benefited, however, by provisions taken from the Italian code: in his commentary Boissonade indicated under each article of his draft the corresponding articles of the French and Italian codes. And the chief reasons advanced for the proposed revision were that Boissonade's code was too much like the French, did not sufficiently conform to Japanese customary law, and ignored both the German and English systems of law.[15] Furthermore, certain Japanese jurists, influenced by English law, took advantage of the oppor-

[12] Goraï, *Id.*

[13] *Id.*

[14] *Id.* pp. 786, 787.

[15] Goraï, *Id.* p. 787. The present German Civil Code was then fast approaching completi on. See infra "Germany" § 344.

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tunity to deny the necessity of any codification; but their opposition was unsuccessful. A new commission, among which were men acquainted with German and English as well as French law, was appointed to revise Boissonade's code.[16] The result of their labors for three years was an entirely new and different code, adopted in 1893 to go into effect in 1898.

Although Boissonade's code was abolished before it went into effect, yet in reality it was applied by Japanese judges from 1880 to 1896: for in order to render decisions based on natural equity, in the absence of written or customary Japanese law, the courts used to apply between the years 1880 and 1890 Boissonade's code and the French; after 1890 and until 1896 they applied Boissonade's code exclusively.[17] The influence in Japan of Roman-French law of the Napoleonic codification was unbroken from 1870 to 1896, and has been forever incorporated in modern Japanese law.

**The Japanese Civil Code of 1898 and modern Japanese law.** § 313 Although Boissonade's Civil Code for Japan failed, it prepared the way for the present Civil Code which went into effect in 1898: about one-half of the provisions of the Japanese code are derived from the French either directly or through the intermediary code of Boissonade. The Japanese Civil Code is a very excellent piece of work.[18] To the influence of the present Roman-German Civil Code [19] are due the order of arrangement and the philosophical spirit found in the Japanese code. In other words, from the French Civil Code the Japanese borrowed practical rules; from the German, theory. In one respect the Japanese code is decidedly original; the law of the family organization is traditionally Japanese.[20] From the Swiss Federal Code of Obligations of 1883 came many principles of the law of obligations.[21] To English law are due many principles of the Japanese law of torts and commercial law.

[16] Goraï, *Id.* p. 788.

[17] Goraï, *Id.* pp. 787, 788.

[18] It has been translated into English by Lönholm, Tokyo, 1898, and by De Becker, London, 1909. See also infra vol. iii, § 978.

[19] Completed in 1896, effective in 1900. See infra "Germany," § 344.

[20] See Books IV and V of the Civil Code.

[21] Book III of the Civil Code. See infra "Switzerland," § 358.

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Japan, like the states of Continental Europe, has codified other parts of her law; in imitation of the Napoleonic codification Japan has a Code of Civil Procedure,[22] a Code of Commerce,[23] Penal Code, and Code of Criminal Procedure. Japan is truly a province of the modern realm of Roman law. The Code of Justinian has been emulated by the notable codes of this Asiatic power.

## 24. GERMANY

§314 **Modern Germany is of recent creation.** Very youthful is modern united Germany, which was formed in 1871. Previously for many centuries "Germany" had been merely a geographical expression, which did not signify one united country, as now. For 1000 years following the revival of the Western Roman Empire by Charlemagne down to its extinction by Napoleon the various German States owed allegiance to the Emperor, which dignity finally became permanently fixed in the Hapsburg sovereigns of Austria.[1] But as the various German States from late medieval times onward gradually obtained virtual autonomy, the German tie of union with the old Empire — never very strong — at last became extremely loose and weak. Napoleon destroyed the vestiges of the venerable medieval Roman Empire. After the destruction of the Napoleonic Empire, Austria and Prussia became rivals for the German hegemony. The contest finally ended in a triumph for Prussia as a result of the War of 1866 with Austria. Five years later the Franco-Prussian War resulted in the formation of the modern Empire of Germany, the office of Emperor being made hereditary for the kings of Prussia.

§315 **Periods of German legal history.** The history of the development of German law into its present form has four well-defined

[22] Promulgated 1891. Being largely identical with the German Code of Civil Procedure, the promulgation of the new Japanese Civil and Commercial Codes have tended to impair its value: hence there is need of a revision of the Code of Civil Procedure.

[23] The Code of Commerce was promulgated in 1899. It is based principally on the German Code of Commerce of 1897, although the law of bankruptcy is like that of the French Code of Commerce. See infra vol. iii, § 978.

[1] See supra §§ 208, 221, 231.

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periods: prior to the 15th century; from the 15th to the 17th century; from the 17th century to the codification of German law very late in the 19th century; modern German law.

## I. Germany prior to the 15th Century: period of almost exclusively Teutonic[2] law

§316 **Ancient Germany, a country never subject to Roman rule, formed part of the medieval Roman Empire of Charlemagne and his successors.** Ancient Germany was never conquered by Rome; it was a barbarous country beyond the limits of the Roman Empire. But because Germany subsequently came to form part of the so-called revived or medieval Roman Empire,[3] it finally adopted Roman law very extensively. When Charlemagne was crowned Emperor at Rome on Christmas day 800, Germany was but a collection of rude and fierce tribes. The only town in Northern Germany was Magdeburg. Charlemagne himself founded Bremen and Hamburg. Southern Germany nearest what is now France was more civilized; the small towns of Cologne and Frankfort-on-the-Main marked places where Roman legions had been anciently stationed.

§317 **Development of a native customary feudal law in Germany after Charlemagne.** After Charlemagne's death feudalism triumphed in Germany. The early Teutonic leges[4] as well as the Imperial capitularies[5] of Charlemagne and his successors, not being studied or serving as legal literature,[6] sank into oblivion. Law in Germany, following the decay of the Frankish Empire, soon ceased to be personal[7] and became largely

[2] The word "Teutonic," as used here and infra, means "Germanic," i.e., the native customary law and usages of the various German peoples inhabiting Germany.

[3] See supra §314.

[4] These refer primarily to the early "codes" made by the Franks, Saxons, etc. for their Teutonic subjects. For the "Leges Romanae barbarorum," see supra §§133 et seq.

[5] Or statutes.

[6] As in Italy, for example.

[7] See supra §§133, 225, 235.

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(§ 317) territorial.[8] Germany was dismembered into very many districts of particular law. The racial Germanic law suffered the greatest disintegration in Bavaria, where Austria, Upper Bavaria, Salzburg, and Styria developed their individual territorial law. But the process of dismemberment of Germanic law did not stop with the formation of a regional territorial law: a manorial law arose,[9] and with the development of towns and cities a town law was engendered.[10]

All this diversified territorial law was of course additional to the Imperial law.[11] This native particular or local law was intensely feudalistic in character, so much so that the six centuries of German legal history following Charlemagne are aptly described as the feudal period of German law. Prior to the 13th century the native Germanic law is usually unwritten[12]: thereafter written law is found in Germany. Although Latin was the first language of the sources, German was soon employed and predominatingly after the middle of the 13th century.[13] But the unwritten customary law con-

[8] As to the sources of this territorial law, see *General survey, etc.* (vol. i, *Continental Legal History Series*, Boston, 1912, containing translations of parts of the works of Brunner, Landsberg, Schröder, Siegel, Stinzing, Stoffe, Zöpfl on German law), pp. 312, 317–25.

[9] As to the extant sources of the manorial, also called servitary, law see *General survey, etc.*, pp. 313, 325–7.

[10] Since the middle of the 12th century, this town law has been known in middle and Northern Germany as the "Weichbild." As to the sources of town law, see *General survey, etc.*, pp. 313, 327–31.

[11] The sources of the Imperial law (of the medieval Roman Empire) down to the middle of the 12th century are few. The legislation of the Hohenstaufen Emperors who inserted some of their laws in the Code of Justinian (see supra § 211 note) are the best remembered. Imperial Statutes were made by the Emperor with the concurrence of the Diet or Imperial assembly. The Imperial statutes fall into two classes: (1) Public Peaces (*constitutiones pacis*) proclaimed for the whole or part of the Empire and prohibiting feuds and the breaking of the peace, the earliest of which goes back to Henry IV and the year 1103; (2) Constitutional Statutes, also called *Concordats* — such as the early Worms Concordat of Sept. 23, 1122 as to the disputed question of investitures. See *General survey, etc.*, pp. 312, 315–31, 332, 434, 445.

[12] It was normally developed by the decisions of lay-judges (*Schöffen*), although in doubtful cases local "jurists" upon inquiry had power to declare what is the law. *Id.* p. 312.

[13] *Id.* p. 314.

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tinued to exist throughout much of Germany. What little Roman law drifted into Germany prior to the 15th century was confined entirely to the sphere of the Church's authority as administered through its ecclesiastical courts and Canon law.[14]

**The 13th century Sachsenspiegel.** The creative period of native Germanic law came to an end in the 13th century, when the body of Teutonic customs was reduced to writing in two remarkable compilations: the "Saxon Mirror" (Sachsenspiegel) and "Swabian Mirror" (Schwabenspiegel). The Sachsenspiegel is the earliest German treatise on the racial customary law.[15] Its author, Eike von Repkow, is the earliest known German jurist: unassisted by any predecessors and drawing his material from his long practical experience as a judge,[16] he described the traditional Saxon law then in force.[17] He wrote in the Latin language, probably in order to make his work of equal dignity to the foreign (Roman) law; but subsequently he composed a German text.[18] His compilation with its wealth of original material soon obtained great prestige, and was actually given statutory authority in the Saxon courts.[19] §318

The Sachsenspiegel became very popular and exerted a great influence over all Germany. All the immediately subsequent literary records of German law rest on the Sachsenspiegel.[20] It was subsequently translated into other German

[14] *General survey, etc.*, p. 335. See also supra §§ 225 et seq.

[15] As to editions, see Homeyer, *Des Sachsenspiegels erster Theil*[3], *etc.* (1861); *Id. zweiter Theil, etc.* (vol. i, 1842, vol. ii, 1844); Weiske, *Sachsenspiegel Landrecht*[8], (1905).

[16] It is quite possible, however, that he made some use of the Frankfort Peace Statute for Saxony of Henry VII: see supra § 317, and *General survey, etc.*, p. 318.

[17] *General survey, etc.*, pp. 318, 342. The Sachsenspiegel was composed between 1198 and 1235 during the supremacy of the Hohenstaufen Emperors.

[18] *Id.* pp. 318, 343. Probably some Saxon dialect was employed.

[19] *Id.* p. 319.

[20] The Sachsenspiegel itself was systematically revised several times. The early 14th century Saxon *Weichbild* or municipal law, the *Rechtsbuch nach Distinctionen*, the *Kleines Kaiserrecht* of the same century, and also the *Reichsteige* of Johann von Buch are the most important instances of the literature due to the influence of the Sachsenspiegel. *Id.* pp. 313, 321, 322, 343, 348.

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dialects including High German and Dutch, and also into the Polish and Latin languages.[21] The High German translation was commonly known as the *Deutschenspiegel.*[22] It is an ambitious work: in it the unknown translator made interpolations so as to present *all* the Germanic law and not merely the law of a single Germanic racial branch as did the author of the original Sachsenspiegel.

§319 **The 13th century Schwabenspiegel.** In the reign of the Emperor Rudolf I, founder of the House of Hapsburg, appeared the Schwabenspiegel.[23] The author of this work was an ecclesiastic whose name is not known. Although he followed in the pathway of the Sachsenspiegel as enlarged by the Deutschenspiegel,[24] yet his method was far different than that of the author of the Sachsenspiegel: the latter took his material from existing legal practice, but the former constructed the Schwabenspiegel from written sources of Germanic law forgotten or in disuse.[25] And very significant of the approaching of a new period in German legal history is the author's treatment of the Roman and Canon laws: in the Schwabenspiegel occur single passages of Roman law — thus heralding the reception of Roman law into Germany.

§320 **The 13th century Laws of Wisby.** Roman law early found a lasting entrance in certain German maritime cities. The third and last of the three great maritime codes of the Middle Ages was the Laws of Wisby, compiled in 1240.[26] Wisby (Visby), the capital city of Gotland, an island in the Baltic Sea, was the metropolis of the famous Hanseatic League

[21] *Id.* p. 319. Several Latin translations were made of it.

[22] Its true title is "Spiegel der deutschen Leute."

[23] It was composed about 1275; although the date has been placed as early as 1259. Its correct title is the "Kaiserliches Land- und Lehnrecht," but since the 17th century it has been known as the "Schwabenspiegel" · see *General survey, etc.*, pp. 320, 348. As to editions, see that of Lassberg (1840); Gengler (Landrecht only, 2d ed. 1875); Matile, *Le miroir de Souabe* (1843).

[24] See supra § 318.

[25] Such as primitive popular Teutonic codes, the imperial capitularies of Charlemagne and his successors. Hence the Schwabenspiegel states the law not as it was, but as it ought to be. *Id.* p. 348.

[26] 24 *Encycl. Britan.*[11] p. 536.

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inaugurated by the cities of Lübeck, Bremen, Hamburg, and Danzig. This League began late in the 12th or early in the 13th century, and its object was to protect commerce against the robber barons of Germany and the pirates of Denmark and Norway. The Hanseatic League at one time comprised over seventy cities, some in the very heart of Germany like Frankfort, Cologne, and Brunswick.[27] The Russian city of Novgorod was at one time affiliated with the League. To provide for the settlement of controversies with each other, the Hanseatic League promulgated at Wisby a code of maritime law imitating closely the earlier Consolato del Mare and Laws of Oléron,[28] both of which were confessedly based on the Roman Civil law.[29]

## II. Germany from the 15th to the 17th century: period of the introduction of Justinian Roman law into Germany via the Bologna revival

**Spread of the Bologna revival of Roman law to Germany; founding of German universities and law schools.** § 321 Because of the intercourse between Italy and Germany due to the fact that both countries were, from the 9th century onwards, the domain of the medieval Roman Emperors of German birth, German students in the 12th and 13th centuries were attracted to the famous schools of law in Italy, and brought back new legal light with them.[30] The Bologna revival of Roman law

[27] Three of the Hansa cities preserved their independence until the 19th century formation of the modern Empire of Germany in 1871, which they entered as sovereign States. These three were Hamburg, Bremen, and Lübeck, not the last important although the smallest federal States of modern Germany.

[28] See supra §§ 214, 236.

[29] The Laws of Wisby were put into final shape during the 17th century (1614) at the Congress of Lübeck, and were then called *Jus Hanseaticum maritimum*. The text of the Laws of Wisby is given by Pardessus in his *Lois maritimes*, vol. i, ch. 11, pp. 424–524 (Paris 1828–45).

[30] See supra § 212; *General survey, etc.*, p. 344. The German "nation" or organization of German students at Bologna and Padua received special privileges.

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study spread to Germany as it did to the rest of Europe. Toward the end of the 14th century the German universities began to be founded, a principal feature of which was a faculty of law. And these new universities at once commenced to pay great attention to the study of Canon law and Roman law.[31] In 1385 the University of Cologne was founded, and in the year following the university of Heidelberg. Four years later the university of Erfurt was formed. In the 15th century universities sprang up all over Germany: Wurzburg,[32] Rostock,[33] Freiburg,[34] Mainz[35] (Mayence), Trier[36] (Trèves), Tübingen,[37] Münster.[38]

At the outset foreign doctors, particularly Italian Civilians,[39] filled the first chairs in Roman law at the earliest German universities; but soon the professorships began to be occupied by Germans who had taken doctorates abroad.[40] The movement to found German universities continued during the 16th century, when Wittenberg,[41] Strassburg,[42] Königsberg,[43] and Jena[44] were established. This impulse lasted down into the 19th century: in the 17th century the universities of Kiel,[45] Dresden,[46] and Halle were founded; in the 18th century were established Stuttgart[47] and Göttingen[48]; early in the 19th century were founded the universities of Berlin[49] and Bonn.[50] The Bologna revival of learning was enormously influential in Germany, and brought Germany forever into the realm of the Roman law.

§322 **Nature of the reception of Roman law into Germany.** The native Germanic law of the 14th century was devoid of technic, system, and certainty. To cure it of these defects German

[31] *General survey, etc.*, pp. 353 et seq.
[32] In 1403.
[33] In 1419.
[34] In 1460.
[35] In 1467.
[36] In 1473.
[37] In 1477.
[38] In 1491.
[39] Some of the early law professors in Germany were French and Spanish.
[40] *General survey, etc.*, p. 354. As to the courses and work of medieval German law professors, see *Id.* pp. 394–6, 369–72.
[41] In 1502.
[42] In 1538.
[43] In 1544.
[44] In 1547.
[45] In 1665.
[46] In 1694.
[47] In 1775.
[48] In 1735.
[49] In 1810.
[50] In 1818.

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jurists naturally resorted to the study of the Imperial (Roman) law, the authority of which was inveterately believed to apply to Germany and the superior intellectual value of which was very apparent. This was conformable to the political fact that every German Emperor of the medieval Roman Empire was regarded as the successor in title to the ancient Roman Emperors from Augustus and Constantine to Charlemagne.[51] (§ 322)

The legal instruction in Roman and Canon law given at the new German universities soon resulted in the development of a large body of men, scattered throughout the towns of Germany, who were trained in the law. Inevitably these were consulted by the then lay-judges (Schöffen) and territorial rulers. Frequently they themselves became civil officials. Thus was inaugurated the evolution of a learned judiciary, which movement began in the higher German courts and worked downward.[52] And long before the end of the 17th century the lowest of the ancient courts in Germany had become filled with judges trained in Roman law. Naturally the application of Roman law widened rapidly as the exponents of that law increased their power and prestige. During the 16th century Roman law obtained such authority in Germany that it largely supplanted the old native customary law of Teutonic origin.

The wholesale character of this reception of Roman law into Germany, a country not previously owning that law, is clearly mainfested just before the close of the 15th century.[53] In **1495** (three years after Columbus discovered America) the Emperor Maximilian I organized a central Imperial Court of Justice, the **Reichskammergericht,** and made a formal declaration of Roman law as the common law

[51] The insertion of statutes of the Hohenstaufen Emperors in the Code of Justinian is the best instance of this political fact and belief. See supra § 211, note.

[52] See *General survey, etc.*, p. 337.

[53] The reception of Roman law into Germany was a slow process of several centuries' duration: see *General survey, etc.*, pp. 334, 356–60, 378–81, 384–94, 396–400.

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(§322) of the Empire.[54] The Corpus Juris of Justinian[55] thus obtained acknowledged validity in Germany and other parts of the medieval Roman Empire.[56] The example set by the Imperial Court of Justice (Reichskammergericht) was soon followed by the High Courts of the various German principalities, States, and towns. The reception of Roman law spread over all Germany from top to bottom of the political ladder. The customary Germanic law, except the land law and certain local or "particular" laws, was submerged. Only a few North German States remained faithful to the native law found in the "Sachsenspiegel" and other compilations.[57]

Roman law now triumphed over the native law of Teutonic origin; it obtained the force of law throughout most of Germany, and was called the "common law" (**gemeines Recht**)[58] or the **"law of the Pandects"** (**Pandektenrecht**).[59] The received Roman law was soon Germanized: so much so that from the middle of the 17th century onward it was technically described by the apt terms of **"Usus modernus Pandectarum"** or **"Usus modernus."**[60]

Now the Justinian Roman law was adopted in Germany under this limitation: not from the original sources of Roman law, but from the texts of the Roman law as glossed by Italian scholars.[61] Roman law doctrines not recognized by the Glossators were ignored. The German reception of the works of the Glossators on the Justinian law books was also naturally followed by the introduction of the Italianized Roman law of the Commentators,[62] which was a mixture of pure

[54] Bryce, *Studies, etc.*, p. 91; *General survey, etc.*, pp. 337, 400. See also supra §§ 231, 265, 266. This formal declaration merely emphasized what had already happened.

[55] See infra § 135.

[56] See supra §§ 231, 265, 266. It was not applicable in Switzerland or Schleswig.

[57] See supra § 318.

[58] Sohm (Ledlie[3]), *Roman law*, p. 5.

[59] *Id.* Because the Digest or Pandects form the principal part of Justinian's Corpus Juris: see supra §§ 135, 137.

[60] See Sohm (Ledlie[3]), *Roman law*, p. 152.

[61] See supra § 210.

[62] *General survey, etc.*, p. 379. See also supra § 216.

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Justinian Roman law, the Canon law, and feudal Lombardic law. Hence the Italian Bartolus,[63] the greatest of the Commentators, has been called the creator of the "common law of Germany which sprang from the reception." [64] With Bartolus were also received, but to a lesser degree, the works of his distinguished pupil Baldus.[65]

**Effect of the 16th century Protestant Reformation on the German reception of Roman law.** The development of legal science in Germany at first had no direct connection with the Protestant Reformation.[66] But when the reformatory movement advanced, as was unavoidable, from the field of faith to the domain of ecclesiastical law, a clash with positive law occurred. Luther himself repudiated the validity of the Canon law. This at once divided German jurists. Some, like Zasius,[67] abandoned the Reformation. Others, like Oldendorp,[68] and most of the younger men sided with Luther. The outcome was finally a compromise, which declared the validity of Canon law when not in conflict with Holy Scripture.[69] But the Reformation did succeed in belittling the importance of Canon law, and aroused in northern Germany great antipathy against it. Canon law ceased to be prominent in university courses, although its validity was never wholly destroyed in Protestant countries. The Reformation, however, had no effect on the secular part of the Roman-German "common law" (gemeines Recht) imported from Italy,[70] the authority of which suffered no diminution. § 323

**Famous German jurists of the 16th century: (1) Zasius.** The most distinguished German jurist of the 16th century was Zasius.[71] Although not so great as his renowned contemporary § 324

[63] See supra § 219.

[64] Sohm (Ledlie[3]), *Roman law*, p. 151.

[65] See supra § 219; *General survey, etc.*, p. 379.

[66] The subject of the influence of the German Reformation on Canon law is treated at considerable length in *General survey, etc.*, pp. 382–4.

[67] See infra § 324.

[68] See infra § 325.

[69] *General survey, etc.*, p. 382.

[70] See supra § 322.

[71] Ulrich Zasius, born at Constance 1451, died at Freiburg 1536. He studied law at Tübingen. In 1506 he became professor of law at Freiburg, having served at that university in other capacities since 1499.

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Alciat,[72] yet Zasius is rightfully considered as one of the founders of modern legal science.[73] He also was a Humanist.[74]

Zasius' attitude toward both the native Germanic and the "received" Roman law was eminently sensible and helpful: he did not hesitate to refer to the native customary law, although analyzing many of its principles from the viewpoint of Roman law; and he did not believe that *all* the Roman law should be taught — only such part "as might be useful." [75] Zasius at first favored the doctrines of the Protestant Reformation; but after 1521 he broke with Luther, and for the rest of his life vigorously opposed him.[76]

§325 (2) **Oldendorp.** Another central figure of the 16th century in Germany was the many-sided Oldendorp.[77] He was a zealous partisan of the Protestant Reformation and a doughty Humanist. One of his works[78] has given rise to the claim that he antedates the Dutch Grotius[79] as a legal philosopher.

## III. Germany from the 17th century to the unification and codification of German law very late in the 19th century: period of diversity and partial codification of law

§326 **Rise of the German Natural Law jurists in the 17th century.** Although the distinctively Roman law doctrine of an absolute universal Natural Law had received some attention by thinkers during the Protestant Reformation,[80] in the next century the full and consistent presentation of the Law of

[72] See supra § 242. Alciat founded the French Humanist school of jurisprudence.

[73] These are Alciat, Budé and Zasius. See § 242, note, for Budé.

[74] See supra § 241.

[75] *General survey, etc.*, p. 427.

[76] See supra § 323.

[77] Johann Oldendorp (1480–1567), at one time of the law faculty of the University of Marburg, the law courses of which he reformed. See *General survey, etc.*, p. 409.

[78] *Elementaria introductio juris naturae gentium et civilis* (1539).

[79] See supra § 273.

[80] See supra §§ 64, 323.

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Nature was attained as one result of Grotius' epochal work on the law of peace and war.[81] Grotius based all law, private as well as public, on the rationalism of a moral law innate in human nature.[82] German jurists of talent were thus led to study the Law of Nature, — that philosophical study which had been originally revived in the Middle Ages by the scholastics.[83] And the doctrine of Natural Law exercised in Germany during the 17th and 18th centuries a commanding influence, reflected particularly in the legislation of this era.[84]

One important result of the labors of this Natural Law school of German jurists was that from the 18th century onward the German universities taught the German private law (**deutsches Privatrecht**) in addition to the law of the Pandects[85] as a source of German law.[86] By the Privatrecht it was attempted to construct a scientific jurisprudence out of the 16th century "received" law of the Pandects,[87] — either by rounding it out with still more Roman law or by annexing to it parts of the old Germanic customary law.

To the German Natural Law jurists of the 18th century, great praise is due for one progressive measure for the betterment of German law: they taught and preached the necessity for one uniform codified system of law for all Germany. Moreover their labors bore fruit in their own century,[88] even if the truth of their teachings could not be realized until late in the following century when Germany became a united commonwealth.

**Famous German jurists of the 17th century: (1) Giffen and Althusius.** The jurist Giffen (Giffanius[89]), often called the §327

[81] See supra § 273. His *De jure pacis et belli* was published in 1625.

[82] Neither Melancthon nor Oldendorp (supra § 325) had arrived at such a conception.

[83] See supra § 218.

[84] As to the influence of Natural Law in France, see supra § 252.

[85] See supra § 322.

[86] See Sohm (Ledlie[3]), *Roman law*, pp. 4, 154; Loewy, *German Civil code*, p. xxxii, Boston, 1909.

[87] See supra § 322.

[88] See infra § 330.

[89] (1534–1616). See *Great jurists of the world*, p. 102 (vol. ii, *Cont. Leg. Hist. Series*, Boston, 1914).

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"German Cujas"[90] because of his ability as an exegetical teacher, was a vigorous personal opponent of the Huguenot Doneau while the latter taught in exile at Altdorf.[91] Perhaps the best "systematizer" of this century in Germany was Althusius.[92] His works display exceptional originality of thought, preciseness, and systematical logical arrangement.

§328 (2) **Conring.** The father of German legal history is the jurist Conring,[93] who in 1643 published a monumental work on the history of German legal sources.[94] Conring's investigations inaugurated a new epoch in the legal history of his country. He showed that German law was really national; that the Roman law received into Germany, on which the existing common law was based, had become authoritative not because it was the law of Justinian but because it was a law absorbed and transformed by German thought.[95]

§329 (3) **Pufendorf.** The great jurist Pufendorf,[96] who searched for an ethical basis of international law, formulated "the basis of a universal legal science."[97] Pufendorf's knowledge of Roman law was very thorough. He occasionally drew material from Germanic legal sources.[98] Although he paid little attention to Canon and ecclesiastical law, he was the means of introducing into German jurisprudence Dutch and English ideas.

Pufendorf's brilliant work in the field of German public law, so original, profound, and discreet, was epoch-making and exerted great influence on subsequent times. Recognizing that sovereignty actually was to be found in the various

[90] See supra § 245.

[91] See supra § 246. Altdorf was the university town of Nuremberg.

[92] Johannes Althusius or Althaus (1557–1638). See *General survey, etc.*, pp. 409–10.

[93] Herman Conring (1606–81). See *General survey, etc.*, pp. 428–9.

[94] *De origine juris Germanici liber unus*, Helmstadt, 1643.

[95] *General survey, etc.*, p. 428.

[96] Samuel Pufendorf (1632–94). See supra § 274; *General survey, etc.*, pp. 415–20; *Great jurists of the world, etc.*, pp. 305 et seq.

[97] *General survey, etc.*, p. 416.

[98] Such as the "Leges barbarorum" (supra § 133), capitularies (supra § 317): for instance in his *Libri octo de jure naturae et gentium*, ii, 5, §§ 15, 18; iii, 1, § 3, 3 § 7, 7, § 6; iv. 1, § 6.

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German territories, and that a mere confederacy — their sole relief — was impossible, he very appropriately described the existing condition of the Empire as "monstrous" [99] — a conviction which became also the contemporary and subsequent view of many, and thus materially assisted the forces paving the way for the dissolution of the medieval Roman Empire.

§ 330 **The 18th century movement for codification in Germany. The Prussian Landrecht of 1794.** The necessity of doing something to make law more uniform, certain, systematic, and accessible was strongly felt in Germany during the 18th century, especially by that great philosopher and jurist Leibnitz, who did more than any other man to inaugurate the activity of this century for the reform and codification of German law.[100] This movement, vigorously advanced by German jurists of the Natural Law school [101] and given much impetus through the extensive influence on the rest of Europe of the French codifications of Louis XIV and Louis XV,[102] resulted in the numerous German partial codifications of the 18th century.

To Frederick the Great,[103] of Prussia, belongs the glory of being "the first of the modern codifiers." [104] He formed the project of making a general code of the entire Prussian law, both public and private. But only a code of civil procedure was realized during his reign.[105] Eight years after Frederick's death was promulgated in 1794 the praiseworthy "General territorial code for the Prussian States" (*Allgemeines Landrecht für die preussischen Staaten* [106]). It combined the Germanic

[99] *General survey, etc.*, p. 419.

[100] See infra § 331.

[101] See supra § 326.

[102] See supra §§ 231, 251, 275, 301.

[103] Reigned 1740–86.

[104] Maitland, *Collected papers* (Cambridge, 1911), vol. iii, p. 433.

[105] This was enacted in 1781. It was the first book of the projected *Corpus Juris Fridericiani*, composed 1749–51 by the eminent jurist and Chancellor von Cocceji (infra § 335). This code of civil procedure was revised in 1793. The earliest Prussian judicature code is of the date of 1709. See *General survey, etc.*, p. 435.

[106] It was to a considerable extent but Cocceji's *Corpus Juris Fridericiani*, revised and completed by the great Chancellor von Carmer (1721–1801). Cocceji's code was written in Latin.

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customary law and the "received" Roman law supplemented by the Law of Nature.[107] But this 18th century Prussian code was in reality only a partial codification: it did not entirely abrogate the Prussian common law, which still retained subsidiary authority and was enforced whenever the Landrecht was silent.[108]

Partial codifications covering single fields of law were also promulgated by various minor German States,[109] such as Anhalt,[110] Bavaria,[111] Bremen,[112] Frankfort-on-the-Main,[113] Hesse,[114] Lippe,[115] Mecklenburg-Schwerin,[116] Mecklenburg-Strelitz.[117] All this particular codification is much inferior to the comprehensive codification accomplished in Prussia by direction of Frederick the Great.

§331 **Famous German jurists of the 18th century: (1) Leibnitz.** The greatest of all the German jurists of the 18th century was Leibnitz.[118] This wonderful man of genius was not only a great jurist, but also a great philosopher, historian, and mathematician. Leibnitz wielded an enormous influence on legal

[107] This Prussian *Landrecht* consists of two parts, the first part and six titles of the second part being on private law. The second part contains also ecclesiastical law (title 11); criminal law (title 20); the law as to peasants, the middle class, the nobilty, and civil servants (titles 7–10); public and administrative law (titles 12–19). It was subsequently revised, particularly in 1803. It is now replaced by the 19th century Imperial German codes, particularly the Civil Code of 1900 (infra § 344).

[108] See *General survey, etc.*, pp. 436–7; Loewy, *German civil code* (Smithers), p. xxxiv.

[109] On the partial codifications of German States in the 18th century, see *General survey*, pp. 434–5; Loewy, *German civil code* (Smithers), pp. xxxiii–iv.

[110] Laws of 1741, interpreting the "constitutions" of 1572.

[111] *Codex juris Bavarici criminalis* (1751), *Codex juris Bavarici judiciarii* (1753), *Codex Maximilianeus Bavaricus civilis* or *Bayrische Landrecht* (1756).

[112] The *Kundige Rulle* of 1756.

[113] Inheritance laws of 1734 and 1758.

[114] *Landrecht* of 1755 for Mainz; *Staadrecht* of 1775 for Wimpfen.

[115] Law of 1794 on prescription.

[116] Law of 1771 on guardianship.

[117] Law of 1779 on absence.

[118] Gottfried Wilhelm Leibnitz (1646–1716). See supra § 274; *General survey, etc.*, pp. 420–4; *Great jurists of the world*, etc., pp. 283 et seq.

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science and did much to shape the future of German law. In his extreme youth he proposed many original reforms in law teaching,[119] and in order to make Roman law suited to his proposed system of instruction he advocated its entire revision! His plan for a new and revised Corpus Juris of Justinian was actually undertaken, but it miscarried because of its impracticability.[120]

To Leibnitz is due the inception of the movement for the reform and codification of German law, which persisted throughout the 18th century and was not accomplished until the end of the 19th century. During his life he urged such legislation and codification. In his very last year, in 1716, Leibnitz advocated the formation of a new German code, "short, clear, and adequate, under governmental authority, out of the Roman statutes, records of German law, and actual legal practice, but above all from obvious principles of equity."[121] To reach this goal by imperial legislation was then impossible. Consequently Leibnitz appealed to legislation by the various German States. The movement in Prussia for law reform and codification was inaugurated by him.[122] Out of this endeavor came the Prussian code of 1794.[123] Without doubt the movement for Austrian codification owed much to the influence of Leibnitz.[124]

§ 332 (2) **Thomasius.** No German jurist did more to promote the sway of Germanic law than Thomasius.[125] He insistently advocated its teaching in the German language at the universities, and the recognition of its legal force in practice. Although Thomasius was a Romanist of renown, he insistently objected to the absolute dominance of Roman law in Germany, and urged that many Roman law doctrines ought to be tested for their practicability in German life. In other words, he was

[119] See his *Nova methodus discendae docendaeque jurisprudentiae* (1667)

[120] See *General survey*, pp. 421–2.

[121] *General survey, etc.*, p. 423.

[122] *Id.*

[123] See supra § 330.

[124] See *General survey, etc.*, p. 423; supra § 231.

[125] Christian Thomasius, born 1655, died 1728, was professor of law at Halle. See *General survey*, pp. 429–30.

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a rationalistic philosopher seeking to advance the progress of German legal science and practice.[126]

§333 (3) **Beyer.** Thomasius' life bore abundant fruit in the work of his talented pupil Beyer,[127] who was the first to give university instruction in Germanic law.[128] His attempt resulted in the movement to give Germanic law a separate systematic treatment apart from the received Roman law. With Beyer Germanic law began to obtain an independent place and literature.

§334 (4) **Heineccius.** The greatest German master of Roman law in the 18th century was Heineccius.[129] He is the most famous of all the German philosophical Natural Law jurists. Heineccius regarded law as a rational science, the rules of which are not founded in mere expediency. He was not only a thorough Civilian and an excellent Roman law historian, but was also profoundly versed in Germanic law.[130]

§335 (5) **Cocceji.** The most eminent jurist in Prussia during the reign of Frederick the Great was von Cocceji,[131] who was not only a learned man but a statesman. The legal reforms and codifications of Frederick owed much to the assistance of Cocceji.[132] He was a sincere adherent of the methods of the Italian Commentators,[133] and tried to unite their principles with those of the German Natural Law school.

[126] He showed the same characteristics in his fight against witchcraft and torture.

[127] George Beyer, born 1665, died 1714. See *General survey*, pp. 430–31.

[128] *Delineatio juris Germanici ad fundamenta sua revocati*, Halle, 1718.

[129] Johann Gottlieb Heineke (Heineccius) was born at Eisenberg in Altenburg 1681, and died in Halle, 1741. He was professor of law for twenty-three years: at Halle, Franeker in Holland, Frankfort, and finally at Halle.

[130] His works include *Antiquitatum Romanarum jurisprudentiam illustr. syntagna* (1718), *Historia juris civilis Romani ac Germanici* (1733), *Elementa juris Germanici* (1735), *Elementa juris naturae et gentium* (1737, translated into English in 1763 by Turnbull, 2 vols., London). His son edited all his works, which were published together as *Omnia opera*, 9 vols., Geneva, 1771.

[131] Samuel von Cocceji (1679–1755), Chancellor of Prussia.

[132] See supra § 330.

[133] See supra §§ 216 et seq.

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**The 19th century influence of the Code Napoleon in Germany.** Early in the 19th century during the Napoleonic era German law became tremendously affected by another foreign work of codification — the French Civil and other codes,[134] which came to be the law of the land widely in Germany. In 1806 the medieval Roman Empire of the West, then fast approaching dissolution, was put an end to by Napoleon.[135] This was soon followed by the promulgation of the Code Napoleon in the original French text as law in Alsace-Lorraine, Baden, Bavaria-on-the-Rhine, the Rhenish province of Hesse, Westphalia, and other Prussian provinces.[136] In Baden an official German translation of it with some additions was published in 1809 as the *Badisches Landrecht.* Although the downfall of Napoleon released the Germans from the French yoke, yet his Civil Code was kept in force in those South German States which had received it for the rest of the 19th century until the new imperial German Civil Code went into effect in 1900.[137] §336

**The 19th century influence of the Austrian Civil Code in Germany.** The ideal of codification — the amalgamation of the native Germanic and the Roman law — had been first realized during the medieval Roman Empire when the Emperor Charles V promulgated in the 16th century the earliest true code of criminal law.[138] The potency of the Imperial legislation, especially after the accession of the Hapsburg Emperors, has already been considered.[139] During the Napoleonic era Austrian leadership in Germany was eclipsed. But after the formation of the Germanic Confederation and the §337

[134] See supra §§ 254, 257. The first foreign code of law to mold German law was that of Justinian, — see supra § 322.

[135] See supra §§ 208, 255.

[136] The French codes went into force in these parts of Germany 1807–9.

[137] See infra § 344. See also Loewy, *German civil code* (Smithers), pp. xxxix–xli.

[138] The "Constitutio Carolina criminalis" of 1532: see supra § 231; *General survey*, pp. 402–3, 434. This exercised a dominant influence in German law for two centuries. It was not superseded until 1769 when a new code, the "Constitutio criminalis Theresiana," was enacted: *General survey*, p. 435.

[139] See supra § 317, note, and § 322.

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battle of Waterloo in 1815, the leadership of Austria in Germany was restored until 1866 when the German hegemony passed to Prussia. Meanwhile the Austrian Civil Code went into effect in 1812,[140] and this code became the law of certain small territories in Germany.[141]

§ 338 **Rise of the modern historical school of jurisprudence in the 19th century; Hugo its founder, Savigny its most distinguished representative.** With the 19th century came a reaction against the Natural Law dogmatism of the century previous. A new school of thought arose — the modern historical school, which treats the law of a people as an emanation of their national life and an evolution from their special historical development and peculiar national ideas. This is the principal school of legal thought of our own times.[142] The founder of this new German historical school was the jurist Hugo.[143] His ideas and methods were continued and developed by the greatest German jurist of the 19th century — Savigny,[144] who became the most distinguished representative of the modern historical school. Some features of this school of thought are like those of the 16th century French historical school of jurisprudence; but the French Humanists never caught the idea that law is a growth — an evolutionary product.[145]

Savigny's historical method met with strong opposition in Thibaut,[146] the chief of the Natural Law school. And this opposition to the historical method has not yet entirely ceased: the illustrious Ihering[147] late in the 19th century was a prominent antagonist, holding the "natural" view that law is the product of a conscious struggle for rights by a people and not the work of unconscious historical forces.

[140] See supra § 232.

[141] Loewy, *German civil code* (Smithers), p. xxxvii.

[142] See *Great jurists of the world* (vol. ii, *Continental Legal History Series*, Boston, 1914, p. 582). A recrudescence of the Natural Law school has, however, recently occurred.

[143] See infra § 345. The learned jurist Haubold (1766–1824) was also a precursor of the historical school.

[144] See infra § 346.

[145] See supra § 241.

[146] See infra § 348.

[147] See infra § 352.

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**The study of pure Roman law reintroduced into Germany by Savigny.** But this was not all Savigny did, — to advocate a new method of studying law. From his experiences as professor of law and Prussian minister of justice, Savigny knew the value of reducing law to a science. The then common law of Germany was the "received" Roman law of the Italian Commentators of the 14th and 15th centuries.[148] But Savigny brought into notice through various works of his own[149] the claims and study of pure Roman law, both ante-Justinian and Justinian.[150] As a result of Savigny's labors in this direction, the Germanized "law of the Pandects"[151] became rehabilitated by contact with the actual sources of Roman law, was corrected and developed scientifically by casting out its medieval features, and was made highly progressive. § 339

Moreover Savigny's labors exerted an influence which has passed far beyond the borders of Germany: through his great works the claims of pure Roman law were most powerfully brought also to the attention of jurists and scholars in other lands. The 19th century revival of Roman law in England and the United States[152] is partly attributable to the world-wide influence of Savigny during this century.

**Division of the historical school into Romanists and Germanists.** The historical school in Germany became divided into two forces — the Romanists[153] and the Germanists, both of which during the 19th century had numerous eminent representatives. The Romanists cultivated the pure Roman law from the Monarchy down through the Republic and Empire to Justinian,[154] and investigated its history. The Germanists devoted themselves principally to examining that period of § 340

[148] See supra §§ 216, 322.

[149] His celebrated treatises on possession and obligations, as well as his wonderful *System*, are based exclusively on pure Roman law, principally the Justinian sources.

[150] See supra § 135; infra vol. iii, §§ 945, 949, 951; *General survey*, p. 443. This movement came to embrace also the post-Justinian Roman law: infra vol. iii, § 955.

[151] See supra § 322.

[152] See infra "England," etc., §§ 411–2.

[153] Or "Civilians."

[154] Some cultivated also the post-Justinian law, see supra § 198.

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Germanic legal history prior to the reception of the Roman law in Germany.[155]

Gradually the labors of each of these divisions of German jurists became properly appreciated. Then came works giving Roman and Germanic law their just place as jurisprudences. This reconciliation between the Romanists and Germanists removed many of the fears of the historical school jurists as to the advisability of unifying and codifying German law, and made them favorably inclined to this movement.[156]

§ 341 **19th century efforts to codify German law prior to the establishment of the modern Empire of Germany.** The 19th century brought new life to the movement of the previous century for unifying and codifying German law.[157] It should be remembered that the 18th century was the last century of the declining existence of the aged medieval Roman Empire, — a century when territorial changes in Germany occurred so often that provinces frequently changed sovereigns over night. So great was the disintegration and multiplicity of the German States that late in the 18th century Germany consisted of about 1800 separate sovereign States of one kind or another,[158] with as many possible varieties of legal systems.

But Savigny objected to any codification by legislation, unless it was to be an elaboration of the text of the ancient Roman law.[159] On the other hand, the great jurist Thibaut ably led the natural school, and preached and urged the adoption of uniform nationl laws.[160] This controversy continued for twenty years. Finally Savigny modified his views.[161] Thibaut triumphed: for long before his death in 1840 the sentiment throughout the larger German States was in favor of codification.[162] Saxony accomplished the great undertaking of codify-

[155] See supra §§ 316–19; *General survey*, p. 443.

[156] Inaugurated in the 18th century by the Natural Law jurists, see supra § 330.

[157] See supra § 330.

[158] Loewy, *German civil code* (Smithers), p. xxxiii.

[159] *Id.*, p. xxxvi; *General survey*, p. 443.

[160] Loewy, *German civil code*, p. xxxvi, xlvi; *General survey*, pp. 441–2.

[161] Between 1842 and 1848 Savigny, as Prussian minister of Justice, helped to revise the Prussian laws.

[162] Loewy, *German civil code* (Smithers), p. xxxvi.

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ing her entire civil law,[163] while Bavaria, Hanover, Hesse, and Prussia codified parts of their law.[164]

The Germanic Confederation itself did something to accomplish national legal unity: a federation Bills of Exchange law [165] went into force throughout most of Germany through publication as local law; a federation Code of Commercial Law was adopted by the different States [166]; and a general Code of Obligations and Civil Code were planned.[167] But the march of events in Germany removed all possibility of national unification and codification of law via the Confederation. The statecraft of Bismarck aimed at political unification of Germany under Prussian domination. In 1863 he manœuvered Denmark into war. The result was the annexation of Schleswig-Holstein to Prussia. This added to the mass of "particular" laws of Germany another foreign legal system, — the Danish law as codified in 1683.[168] Austria's turn came next: as the result of the war of 1866 with Prussia, the ancient Austrian leadership in Germany disappeared. Prussia became the foremost German State. Four years later France was inveigled into war,[169] and with the Prussian triumph arose the modern Empire of Germany.

**Establishment of the modern Empire of Germany in 1871; dire necessity for one uniform codified system of German private law.** In 1871 the German Empire was proclaimed at Versailles. It was at once recognized that the new Empire must secure the cohesive force of unified law, for German private law was the most intolerable in the world. The center and central § 342

[163] The *Bürgerliches Gesetzbuch*, promulgated in 1863.

[164] Such as the Bavarian penal codes of 1813 and 1861, the Bavarian civil procedure code of 1869 and that of Hanover of 1850, the Prussian laws of 1842 and 1852 reforming criminal procedure, the Prussian law of 1849 reorganizing the courts. See *General survey*, p. 445; Loewy, *German civil code* (Smithers), p. xxxvi.

[165] Of 1848.

[166] Between 1861 and 1865.

[167] As to the work of codification instituted by the Condeferation, see *General survey*, p. 446; Loewy, *German civil code* (Smithers), p. xxxvi.

[168] See supra § 275.

[169] See Bismarck's *Reflections and Reminiscences* (Eng. transl. of his *Gedanken und Erinnerungen*), pp. 95–101, London, 1898.

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south of Germany were governed almost entirely by the common (Roman) law; the north was regulated by the Roman law, Saxon law, and Danish law; the east was governed by the Prussian Landrecht, local laws, and partial codifications; the west was a region of diversified law, which within short distances might change from Roman to Prussian or to French.[170] The Prussian law governed the most people, with the Roman law next, and then the French, Bavarian, Danish, and Austrian laws in the order mentioned. All this mass of diverse law was embodied principally in the German, Latin, and French languages.

So diverse and anomalous was law in Germany that the law of inheritance might give a female no rights in one town, equal rights with male heirs in another town only a few miles distant, and still different rights in a third town; one law might prevail within the walls of a city, and another might prevail outside the city walls.[171] One system of codified private law for the entire new Empire of Germany became inevitably the goal of German legal progress.

## IV. Modern German law: period of uniformity and complete codification of law

§ 343 **Success of the movement for national codification of German law after the formation of modern Germany.** The first effort to unify and codify German law, after the birth of the new Empire, was the re-enactment of the old federation Commercial Code and Bills of Exchange law in 1871 for the entire Empire.[172] The movement for national codification

[170] See supra §§ 318, 322, 330, 341; also *General survey*, p. 307 (map); Loewy, *German civil code* (Smithers), pp. xxxviii–xli.

[171] See Loewy, *German civil code* (Smithers), pp. xxxviii, xxxix. At the present time the United States have 48 different jurisprudences, plus the Federal Common Law and the Spanish law of our colonial possessions: our own confusion of law is no small affair and must be remedied some time.

[172] 24 *Commercial laws of the world*, Boston, 1913, p. 7. Nearly thirty years later this Commercial Code was superseded by the new Commercial Code of 1900, which was necessitated by the making of the Civil Code of the same year.

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continually grew in strength. Additional codes corresponding to the French and other Continental codes were soon framed. In 1872 was promulgated the Penal Code of Germany[173]; in 1879, the Codes of Civil and Criminal Procedure.

**The German Civil Code of 1900.** In 1873 the field of civil law was placed within the federal Imperial legislative power.[174] The following year a commission of eleven members consisting of judges, high officials, and law professors[175] was appointed to prepare a Civil Code for the whole Empire. Their task of forging a new civil law out of the many existing diverse civil jurisprudences was a tremendous one.[176] After fourteen years of the most painstaking labor the commission published in 1888 the first draft[177] of a Civil Code. § 344

It was at once subjected to a flood of adverse criticism. The outcome was the appointment in 1890 of another commission to recast the first draft. This commission was not limited to jurists only, but included also economists and trade experts. After five years of prodigious labor a second draft was published in 1895.[178] It was accepted by the Reichstag and promulgated in 1896 to go into effect January 1, 1900. A new and transformed Commercial Code was made fully operative at the same time.[179]

[173] The Imperial Penal Code superseded, among other State criminal laws, the Bavarian code of 1861 (which revised Maximilian's code of 1768) and the Prussian code of 1780.

[174] The law of Dec. 20, 1873, amended section 13 of the Imperial Constitution, which now reads: "The following matters are subject to the supervision of the Empire and its laws: — the common legislation relating to the entire Civil Law (bürgerliches Recht), the Penal Law, and Judicial Procedure": Loewy, *German civil code*, p. xlv.

[175] Two were university professors and the other nine were practical jurists. Dr. Pape, the then highest Imperial judge, was chairman of the commission.

[176] See supra § 342.

[177] Notes explanatory of this draft code, known as *Motive*, were published at the same time. These "fill 5 volumes of about 4000 pages in the aggregate, while the unpublished original notes are far more voluminous. Even the abridged edition forms . . . the most valuable treatise on comparative jurisprudence ever published:" *General survey*, p. 448.

[178] The second commission employed the first draft as a basis, but freely changed it; so much so that the second draft is really a new work.

[179] See supra § 343; 24 *Commercial laws of the world*, p. 7.

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(§ 344) The most glorious accomplishment in Germany during the reign of Emperor William II is the completion of a uniform system of codified law for all Germany.[180] And his name will be linked with those of Justinian and Napoleon as famous law-givers. On the opening day of the 20th century the new Civil Code swept away the motley collection of state private laws throughout Germany, with the exception of a few express reservations in favor of State law dealing with matters of local importance, or the laws of the princely houses of Germany. Germany, although a federated country of twenty-six States, has since 1900 been living under *one* system of private law. By its uniform and codified law modern Germany now testifies to the fulfillment within her borders of the world-mission of Roman law.

The German Civil Code is a very late 19th century republication of Roman law as adopted in Germany. It also embodies many rules of Germanic customary law, especially as to land rights. But without the Roman Corpus Juris[181] as a key to unlock it, this modern law of Germany cannot be understood. In the German code of 1900 the Roman law element is predominatingly supreme.[182] In regard to the nature and spirit of the German Civil Code, its most striking characteristics are its orderly arrangement and development and its scientific provisions. It endeavors to be complete, to provide as far as possible for all cases not anticipated. In these respects it is superior to the Code Napoleon.[183] The French Code is more open to interpretation. The German Code is very philosophical and logical. It contains carefully worded definitions. It should be remembered that the Code Napoleon is nearly a century older than the German Code, and lacks some of the light of modern scientific methods and scholarship as applied

[180] At the present time (June 1, 1916) the German colonial empire, which was of no mean dimensions, has been practically destroyed. The restoration of the German colonies depends on the outcome of the great war in Europe.

[181] See supra § 135.

[182] In remembrance of the Justinianean codification, additions to the German Civil Code are now — very interestingly — called **Novellen:** see *Deutsche Juristen-Zeitung*, 1 April — 15 June, 1909, p. 597.

[183] See supra §§ 246, 256.

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to jurisprudence. The German Civil Code, however, lacks the textual elegance of the French.

The German Civil Code is one of the greatest and perhaps the best exposition of modern Roman law ever framed. It is thoroughly suited to our age. Its influence upon the world has only just begun. The modern Japanese Civil Code of 1898 largely imitates the German, while the Swiss Civil Code of 1912 reveals marked traces of the same German influence.[184] One thing is certain: no future Civil Code anywhere in the world should ever be drawn up without consulting the German, in which the codifiers have made such a judicious use of both native and Roman law materials. The national federal codes of modern Germany are also an object-lesson to refute the fallacious argument, that a federated country must cling to diversity of State law and can never attain to a national uniformity of private law without destroying the States themselves.

**Famous German Romanists of the 19th century: (1) Hugo.** §345 A galaxy of distinguished jurists and legal historians, eminent for their varied abilities, gave Germany during the 19th century a foremost place in the fields of law and legal history. Many of these, particularly the Romanists,[185] achieved an international reputation. To the influence of the historical school in Germany is due that series of brilliant works which have brought German legal science to the highest point of excellence.[186]

The founder of the modern historical school of jurisprudence was the gifted jurist Hugo.[187] This eminent law professor adopted the methods of Leibnitz, the greatest German jurist

[184] See supra § 313, and infra "Switzerland," § 358.

[185] Or "Civilians." See also supra § 340.

[186] See supra §§ 338–40.

[187] See supra § 338. Gustav von Hugo was born in Lörrach, Baden, 1764, and died at Göttingen 1844. He studied law at the universities of Göttingen and Halle, taking his law doctorate at the latter. In 1788 he was appointed professor at Göttingen, where he taught for many years. Among his works are a history of Roman law (1790), a manual of Roman law since Justinian (1812), and an elementary history of Roman law down to the time of Justinian. See *Great jurists of the world* (vol. ii, *Cont. Leg. Hist. Series*, Boston, 1914), p. 566.

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of the 18th century.[188] Hugo investigated carefully the historic documentary sources of Roman law; and his division of Roman legal history into the period prior to the XII Tables, the Praetorian period and the Imperial period, is an excellent illustration of his scientific use of the historical method. It is interesting to note that Hugo's classification of private law lies at the basis of that existing in the present German Civil Code.[189] The historical impulses of the great Savigny were in no small measure the product of Hugo's influence on the age in which he lived.

§346 (2) **Savigny.** The greatest German jurist of the 19th century was Savigny.[190] He has been called "the Newton or the Darwin of the science of law."[191] Savigny is one of the very greatest jurists of the world. Although not the founder of the modern historical school of jurists,[192] his masterly treatise on the Roman law of possession,[193] published in 1803 when he was only twenty-four and which at once made him famous all over Europe, marks the birth of modern jurisprudence.

Seven years later he was called to become professor of Roman law at the new University of Berlin, where he taught for thirty-two years. In 1814 he attacked[194] the great jurist

[188] See supra § 331. This was the century of Hugo's birth.

[189] *Great jurists, etc.*, p. 566. See supra § 344.

[190] Friedrich Karl von Savigny, born at Frankfort-on-the-Main 1779, died at Berlin, 1861. He studied at the universities of Marburg, Jena, Leipzig, and Halle, taking his doctorate at the first named. For awhile he taught at Marburg and Landshut, but from 1810 to 1842 he was professor of Roman law at Berlin. From 1842 to 1848 he was Prussian Minister of Justice. He was an intimate friend of the great Roman historian Niebuhr. His life was crowned with honors and privileges bestowed by his sovereign. On Savigny, see supra §§ 338–41; *Great jurists, etc.*, pp. 561–89; *General survey*, pp. 442–4; Brissaud, *Hist. du droit francais*, vol. i, p. 359, Paris 1904.

[191] *Great jurists, etc.*, p. 586.

[192] This honor is due to the jurist Hugo, — supra § 345. Savigny was, however, considerably influenced by Haubold, one of the heralds of the historical school (see supra § 338, note).

[193] *Das Recht des Besitzes.* It is still a classic on this subject. The great jurist Thibaut (infra § 348), later Savigny's mighty antagonist, at once recognized the genius of Savigny,

[194] In his *Beruf unserer Zeit für Gesetzgebung, etc.*

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Thibaut, who advocated the making of a German code, and (§ 346)
vigorously opposed the whole idea of codification, — incidentally criticizing the French, Prussian, and Austrian codes.[195] But valuable as his arguments have been to the opponents of codification in England and the United States, it should be remembered that after Savigny became Prussian Minister of Justice he modified his views.[196] And the present German Civil Code which went into effect in 1900 marks the final triumph of the views of Thibaut, and is the revenge of the French Civil Code against the opposition of the historical school to it.[197]

In 1815 Savigny, with the assistance of Eichhorn[198] and Göschen,[199] established a journal[200] for the new historical school. During the same year appeared the first volume of his great history of Roman law in the Middle Ages.[201] This magnificent work not only reveals the genius of Savigny as the master legal historian, but also saliently portrays the universal descent of Roman law into modern law. He showed that Roman law, though considered dead in Western Europe from the breaking up of the Roman Empire to the 12th century, still "lived on through these dark centuries, in local customs in towns, in ecclesiastical doctrines and school teachings, until it blossomed out once more in full splendor in Bologna and other Italian cities."[202]

Twenty years later Savigny began his very elaborate work on the system of modern Roman law,[203] the first volume of which appeared in 1840. In this marvelous work "he searches

[195] See supra §§ 232, 254, 330.

[196] See supra § 341.

[197] See supra §§ 341, 256.

[198] Karl Friedrich Eichhorn, a brilliant representative of the historical school.

[199] See infra § 347.

[200] The *Zeitschrift für geschichtliche Rechtswissenschaft.* In this journal Savigny published Niebuhr's discovery at Verona of the lost text of Gaius (supra § 86).

[201] *Geschichte des römischen Rechts im Mittelalter*, 6 vols., Heidelberg, 1815–18. A second edition was published in 7 vols., Heidelberg, 1834–51.

[202] 24 *Encycl. Britan.*[11] p. 242; supra §§ 203, 206, 209, 210, 211.

[203] The *System des heutigen römischen Rechts*, 8 vols. 1840-9. The death of his only daughter in 1835 is said to have led Savigny to take up this great work in order to help him overcome his grief.

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out and rules out all that is dead in Roman law, and then proceeds to demonstrate the great and living unity of what remains."[204]

In 1842 Savigny resigned his Berlin professorship to become Prussian Minister of Justice. His service in this office was signalized by several important reforms in Prussian law, particularly reforms as to divorce and bills of exchange. On his retirement he devoted himself to literary work. In 1850, to mark the jubilee of his doctorate obtained fifty years earlier, he published his collected minor papers appearing during this period.[205]

In his seventy-fourth year appeared Savigny's last work, — a treatise on obligations.[206] This monumental work is virtually a supplement to his great *System* of modern Roman law. Gigantic as Savigny's own work was, the domain of investigation which he opened to his successors throughout the world is almost boundless. For instance, the great Mommsen[207] and his followers have labored to make certain and reliable the Roman law texts and literature; while the brilliant Maitland[208] has discussed the influence of Roman law on medieval English law.

§ 347 (3) **Savigny's pupils: Bluhme, Böcking, Dirksen, Göschen, Keller, Puchta.** It throws an interesting sidelight on Savigny's strong contemporary influence to learn that he had some very able pupils, who by adopting his historical methods became distinguished jurists.[209]

Bluhme is best remembered for his discovery of the plan of work pursued by Tribonian and his associates in regard to the composition of the Digest of Justinian.[210] Böcking[211] was a

[204] *Great jurists*, p. 583.

[205] The *Vermischte Schriften*, 5 vols.

[206] *Das Obligationenrecht* (1853).

[207] See infra § 353.

[208] See infra "England," § 411.

[209] In addition to those pupils of Savigny about to be separately considered, mention should be made of Barkow, Hollweg, Klenze, and Rudorff, all of whom were men of distinction.

[210] See supra § 137; Walton, *Roman law*[2], p. 316, Edinburgh, 1912. Friedrich Bluhme's discovery was originally prepared as a thesis when he was 23 years of age. His paper was published by Savigny's historical periodical (the *Zeitschrift, etc.*, see supra § 346) in 1820. Bluhme was also an editor of Gaius' Institutes (supra § 86) with Göschen.

[211] Born 1802, died 1870.

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critical editor of Roman law sources and an eminent philologist. Dirksen[212] was an excellent lexicographer and legal historian.

Göschen[213] published the first edition of Gaius' Institutes, discovered by Niebuhr at Verona in 1816.[214] Keller[215] was a learned interpreter of Roman law, and his very original treatise on Roman civil procedure is still valuable.[216]

Puchta's[217] works are most scientifically constructed, extremely lucid and thoroughly exhibitive of the development of law among the Romans.[218] His eminence is best revealed by the fact that to him came in 1842 the great honor of succeeding Savigny at Berlin when the latter resigned his chair of Roman law.

(4) **Thibaut.** That German jurist of the 19th century who by his learning and attainments should be placed by the side of Savigny is Thibaut.[219] In some respects his influence was superior to that of his great antagonist: the accomplishment of the unification and codification of German law — finally completed in the Civil Code of 1900 — is traceable to the great influence exerted by Thibaut's powerful essay in 1814 on the necessity of a code for Germany.[220] To Thibaut belongs the §348

[212] Born 1790, died 1868. His *Manuale* (see infra vol. iii, § 952) is still very valuable to Romanists.

[213] Johann Friedrich Göschen (1778–1837).

[214] The edition of 1820. His second edition of 1824 embraced readings by Bluhme. See also supra § 86.

[215] Friedrich Ludwig von Keller (1799–1860).

[216] *Der röm. Civilprocess und die Actionen, etc.*, Leipzig, 1852.

[217] Georg Friedrich Puchta, born of an old Bavarian Bohemian family at Kadolzburg 1798, died at Berlin 1846. He took his doctor's degree at Erlangen, where three years later he was appointed professor of law. Later he was professor at the universities of Munich, Marburg, Leipzig, and Berlin.

[218] Especially his *Lehrbuch der Pandekten* (1838) and his *Kursus der Institutionen* (1841–7).

[219] Anton Friedrich Justus Thibaut was born at Hanover 1774, and died at Heidelberg 1840; he was of French Huguenot ancestry. Thibaut was a student at Göttingen, Königsberg (here he was a pupil of the great philosopher Kant), and Kiel. He was professor of law at Kiel, Jena, and Heidelberg. At the last place he taught for many years until his death.

[220] *Die Notwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland*, Heidelberg, 1814. A part of this is translated into English in *General survey*, pp. 441–2.

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victory in the controversy with Savigny over codification.[221] Thibaut's chief work, the *System des Pandektenrechts*,[222] is really a comprehensive codification of the Roman law then existing in Germany.

§ 349 (5) **Mackeldey.** Among those German jurists of the 19th century having an international European reputation should be placed the learned Mackeldey.[223] His masterly handbook or summary of Roman law which he published in 1814 has run through many editions, and has been translated into the English, French, Greek, Latin, Russian, and Spanish languages.

§ 350 (6) **Marquardt.** One of the leading modern Roman historians is the learned Marquardt.[224] The great manual of Roman antiquities which bears his name and that of the immortal Mommsen [225] is a monumental work of erudition unexcelled in lucidity and exhaustive references to authorities. This remarkable collection consists of treatises on Roman law and antiquities, each of which is a work of the highest value and a splendid product of 19th century German scholarship.

[221] See supra §§ 341, 344.

[222] Published 1803. He wrote it at Jena in Schiller's summer-house. It has passed through many editions.

[223] Ferdinand Mackeldey, born at Brunswick 1784, died 1834. He was a student at the university of Helmstedt, where later he was appointed professor of law. When this institution was suppressed by the French Government he was removed to Marburg, where he taught for ten years until his appointment at the new University of Bonn in 1819. There he remained until 1828.

[224] Joachim Marquardt, born at Danzig 1812, died at Gotha 1882. He was a student at Berlin and Leipzig. He subsequently held appointments at Berlin, Danzig, Posen, and Gotha.

[225] Marquardt-Mommsen, *Handbuch der römischen Alterthümer*[2], (7 vols. 1877–88). The original author of the manual was the learned W. A. Becker. He formed its plan, but died in 1846, leaving most of the work unfinished. Marquardt continued it, and twenty years elapsed before the manual was finished. It was then known as the *Becker-Marquardt Handbuch, etc.* A new edition being required, Marquardt then engaged as collaborator Mommsen, who wrote the volumes on Roman public law and criminal law. See infra § 353 and volume iii, "Bibliography of Roman law," § 1027.

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(7) **Mittermaier.** The humanitarian Mittermaier[226] did much to establish the science of comparative law, of which he was an extremely influential representative. Through his prodigious literary activity German jurisprudence came into contact with foreign legal science, especially Italian, English, Scotch, and American criminal law and procedure.[227] "Of all German legal scientists, even Savigny not excepted, his name is internationally best known and most esteemed. . . . He was one of the most influential popularizers of legal science."[228] §351

(8) **Ihering.** The philosophical Natural Law conception of jurisprudence was revived in Germany during the second half of the 19th century by the great Ihering,[229] who held views diametrically opposite to those of Savigny.[230] His famous work on the essence of Roman law[231] gave him a reputation as high as that of Savigny. Some have considered him even greater than Savigny. Ihering acquired an international reputation because of his marvelous intellectual power as exhibited in his works, one of which has been translated into twenty-six languages.[232] Ihering by reason of his great intellectual vitality may truly be called the modern Papinian.[233] §352

[226] Carl Joseph Anton Mittermaier was born at Munich 1787, and died at Heidelberg 1867. Educated at the universities of Landshut and Heidelberg, he was appointed professor of law at the former, where he taught for ten years. In 1819 he accepted a chair in the new university at Bonn. Two years later he went to Heidelberg, where he taught for forty-six years. See *Great jurists of the world*, pp. 544–60.

[227] See *Id.*, pp. 548–9 for a list of some of his works. An English translation of his preface to his *English, Scotch and American criminal procedure* is given on pages 550–53 of *Great jurists of the world.*

[228] *Great jurists, etc.*, p. 560.

[229] Rudolf von Ihering, born at Aurich, Friesland, 1818, died at Göttingen 1892. He was a student at Heidelberg, Göttingen, and Berlin. He taught at, successively, Berlin, Basel, Rostock, Kiel, Giessen, Vienna, and finally at Göttingen, where he was professor for twenty years. See *Great jurists of the world*, pp. 590, 599.

[230] See supra § 338.

[231] *Geist des römischen Rechts, etc.*, ("Spirit of Roman law"), 1852–6.

[232] His "Battle for right" (*Der Kampf um's Recht*, 1872). For a list of his works, see *Great jurists, etc.*, pp. 592 et seq.

[233] See supra § 98.

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Ihering animated Roman law as did none of his contemporaries. A special feature of his teaching was his practical problem work in Roman law.[234] He knew how to treat Roman law as a *living* force effective in the modern world.[235] He correctly emphasized that the trend and drift of modern law is its idea of *universality*, — the familiar doctrine of the Natural Law school.[236] No one can know the foundations of law without going to Ihering.

§353 (9) **Mommsen.** The most eminent historian and scholar in the world during the 19th century was the great Mommsen.[237] The versatility of Mommsen was amazing: he surpassed all of his contemporaries in his triple capacity of Roman antiquarian, jurist, and historian. His fame was first acquired as an editor of Roman inscriptions. With the publication of his vivid *Roman history*,[238] he immediately acquired a European reputation. This work was shortly followed by the appearance[239] of the first volume of *Corpus inscriptionum Latinarum*. And the whole of this enormous production of recondite learning was completed under his direction and supervision.

[234] His *Praktika*. As early as 1847 he published a collection of these entitled *Civilrechtsfälle, etc.* This contained also hints for solution.

[235] See his *Scherz und Ernst*[4], p. 365.

[236] *Geist des röm. Rechts*, i, 15.

[237] Theodor Mommsen was born 1817 of Danish ancestry at Garding in Schleswig, and died at Charlottenburg 1903. He was a student at the University of Kiel, and in 1843 he was enabled by the Danish government to go to Italy. There he became interested in the study of Roman inscriptions. Four years later he returned home, and in 1848 he became professor of Roman law at Leipzig. But on account of his republican opinions he was deprived of his professorship a year later, and fled to Switzerland. There he was appointed professor at Zurich. While there he wrote his famous Roman history. In 1858 he returned to Germany, and was appointed professor at the University of Berlin, where he remained for the rest of his life.

[238] Written 1854–6. This work was translated into English by Dickson. It is in three volumes and ends with the triumph of Caesar. His *Roman provinces under the Empire* (1884) is not a continuation but a separate work.

[239] In 1861. The *Corpus inscriptionum Graecarum* had been recently completed under the direction of Boeckh in 1856 (1828–56, index published 1877).

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This huge task was not, however, sufficient to consume Mommsen's great intellectual energy. He wrote two exceedingly important works on Roman public and criminal law,[240] which have become classics in these subjects. He edited or directed a textual revision of Justinian's Corpus Juris and the Theodosian Code,[241] both of which are the standard editions now in use and indispensable to every modern investigator of Roman law. He wrote many hundreds of minor papers covering every field of Roman life. The debt of gratitude owed to the immortal Mommsen by every modern Civilian is incalculable.

(10) **Bruns, Heimbach, Huschke, Krueger, Zachariae von Lingenthal, Schrader, Studemund.** No other European country produced in the 19th century so many brilliant editors and critical reviewers of Roman law textual sources as did Germany.[242] To their labors all the world is debtor.[243] How vast these efforts have been is seen from the fact that the aggregate investigations of the following editors cover the whole field of Roman law sources from 753 B.C. to A.D. 1453 — or the entire duration of the Roman State. § 354

The Roman law of the Monarchy, of the Republic, and of the opening year of the Empire is best conserved in Bruns'[244] magnificent work of scholarship — the *Fontes Juris*, which has run through many editions and is still authoritative.[245] The Institutes of Gaius have been carefully edited by Huschke, Studemund, and Krueger.[246] All three together with the great

[240] *Römisches Staatsrecht* and *Römisches Strafrecht.* These originally formed parts of the Marquardt-Mommsen *Handbuch der röm. Alterthümer* (supra § 350, note).

[241] See infra vol. iii, §§ 951, 952. Mention should be made of his part in the supervision of the *Collectio librorum juris antejustiniani* (infra vol. iii, §§ 948, 951).

[242] See supra, §§ 339, 346.

[243] For details of those works which are to-day still authoritative publications, see vol. iii, § 1027 "Bibliography of Roman law."

[244] Karl Georg Bruns, born 1816, died 1880.

[245] See infra vol. iii, §§ 944–6, 949. The later editions have been prepared under the direction of Mommsen (supra § 353).

[246] See supra § 86. Krueger is professor at the University of Bonn.

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Mommsen have published learned editions of ante-Justinian Roman law texts.[247]

Huschke, Schrader, and Krueger edited Justinian's Institutes.[248] The work of Schrader[249] with its voluminous notes is unsurpassable in scholarliness, while that of Krueger is the standard text still in use. Krueger also edited the Code of Justinian, the authoritative text of to-day.[250]

The principal texts of post-Justinian Roman law were edited and published by Zachariae von Lingenthal and Heimbach.[251] And their works are to-day standard authorities.

§ 355 (11) **Baron, Bekker, Dernburg, Fitting, Glück, Gradenwitz, Karlowa, Kohler, Pernice, Salkowski, Sohm, Vangerow, Voigt, Windscheid.** These constitute the most distinguished of the 19th century German text-book writers on Roman law.[252] There is scarcely a corner in Roman law or legal history left untouched by the aggregate work of these jurists. Many of them have deservedly obtained an international reputation.[253] Germany in the 19th century with her many great jurists led the world in jurisprudence.[254]

[247] See supra § 353; infra vol. iii, § 951.

[248] See supra § 138; infra vol. iii, § 952.

[249] He was professor at Tübingen.

[250] See supra § 136; infra vol. iii, § 952.

[251] See infra vol. iii, § 955. Both were professors at south German universities: Zachariae at Heidelberg, Heimbach at Leipzig.

[252] See vol. iii, "Bibliography of Roman law," for details.

[253] The institutional works of Salkowski and Sohm have been translated into English — the former by Whitefield (London, 1886), and the latter by Ledlie (3d edition, Oxford, 1907).

[254] As to German jurists of the 19th century, see Salkowski (Whitefield Eng. transl.) *Roman law*, pp. 65–6; Rivier, *Introduction historique au droit romain*, pp. 623–7, Brussels, 1881. It is interesting to notice at what German universities the jurists mentioned in this section were or are professors of law: at **Berlin,** Dernburg and Kohler; at **Bonn,** Baron; at **Erlangen,** Glück (who inaugurated the celebrated series of *Pandekten*): at **Greifswald,** Bekker and Windscheid (the latter born 1817, died 1892); at **Halle,** Fitting; at **Heidelberg,** Gradenwitz, Karlowa (1836–1904), Pernice (1841–1901), and Vangerow (1805–1870, the successor of the great Thibaut — see supra § 345); at **Königsberg,** Salkowski; at **Leipzig,** Sohm, Voigt, and Windscheid.

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## 25. SWITZERLAND

**The formation of modern Switzerland.** In 58 B.C. the Helvetii, a Celtic people inhabiting the western part of modern Switzerland, were conquered by Julius Caesar. Thereafter Helvetia and subsequently all Switzerland became a part of the Roman Empire. With the break-up of the Roman Empire in Western Europe, Helvetia shared the fate of Gaul, and was overwhelmed by Teutonic invaders. When Charlemagne revived the Western Roman Empire,[1] what is now Switzerland was included in that Empire. Swiss history is the story of how some very small portions of the medieval imperial kingdoms of Germany, Italy, and Burgundy were driven to coalesce for the purpose of self-defense against a common enemy — the Austrian Hapsburgs, whose power in the 12th and following centuries rapidly developed and was greatly dreaded. §356

On August 1, 1291 the inhabitants of the valleys of Uri, Schwyz, and Nidwalden formed the Everlasting League.[2] This Swiss League, which expressly confirms a still earlier one, is the foundation of the modern Swiss confederation.[3] After the battle of Sempach in 1385, which broke forever the Hapsburg power within the borders of the confederation, the name *Switzerland* was popularly applied to the League as a whole. But it did not become the official name of the confederation until 1803. From about 1452 onward the people were called *Swiss*.

In the 16th, 17th, and 18th centuries the Swiss confederation although an independent power[4] was greatly affected by French influence, and became at times very subservient to

[1] See supra § 208.

[2] August 1 is to-day the Swiss national holiday, when all Switzerland is illuminated, and the mountains, hamlets, and cities blaze with light.

[3] Subsequently the membership of the Everlasting League was enlarged to eight and still later to thirteen.

[4] Its independence was formally recognized in 1648, although the confederation had at the opening of the previous century — the 16th — practically ceased to be a dependency of the medieval Roman Empire, which had become permanently attached to the Austrian Hapsburg sovereigns.

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France. The outbreak of the French Revolution very seriously affected the Swiss, who adopted the new ideas, instigated revolutions in Switzerland, and finally overturned the ancient confederation. In 1798 the centralized Helvetic Republic was established, which was very closely allied with the new French Republic. The Swiss administrative districts were now for the first time officially called cantons.[5] But the Helvetic Republic gradually fell into difficulties; and, after Napoleon Bonaparte withdrew in 1802 the French troops, the Swiss federalists seemed about to triumph. The result was Napoleon's Act of Mediation of 1803, the influence of which is markedly visible in the present constitution of Switzerland. For the first time the official name of the confederation was designated as Switzerland.[6]

The reactionary Pact of 1815, which followed the downfall of Napoleon and the abolition of the constitution of 1803, raised the membership of the federation to twenty-two cantons — the present number of Swiss States. In 1848 the Swiss constitution was purged of its reactionary spirit, and was made to incline to Napoleon's famous Act of Mediation. The constitution of 1874, the present constitution, is really but a revision of that of 1848.[7]

§ 357 **Swiss law prior to its complete codification in the 20th century.** After Switzerland was wrenched away from the Roman Empire of the West, the invaders' Germanic law and usages, particularly the popular codes,[8] became established in the Helvetian country, and formed the basis of the later Swiss cantonal law. This Germanic regional customary law developed and flourished in Switzerland to such an extent that the wholesale adoption and reception of Roman law, which

[5] Foreigners had used the term much earlier, e.g., Commines, Machiavelli; and the term was used in the French Treaty of Westphalia in 1648.

[6] The membership of the federation was increased to nineteen.

[7] Switzerland has always been a democratic State. The latest Swiss contribution to democratic institutions of the world is the Referendum, which has long been employed successfully in Switzerland.

[8] Such as the Leges Alemanni, Lex Burgundiorum, Lex Romana Burgundiorum (for the Helvetic Romans conquered by the Teutonic invaders), etc. See infra § 133; *General survey, etc.*, (vol. i, *Cont. Legal Hist. Series*, Boston, 1912), pp. 484–8.

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occurred in Germany, Austria, and other parts of the medieval (§ 357) Roman Empire,[9] never reached Switzerland except partially.[10] This was due to the weakness of the Swiss connection with the Holy Roman Empire, — a tie that grew more attenuated when the Austrian Hapsburg sovereigns acquired permanently the imperial dignity.[11] Nevertheless it was impossible that Switzerland should escape from being affected by the Bologna revival of Roman law[12]: in the latter half of the 14th century the University of Geneva was founded,[13] and a century later the University of Basel.[14]

For centuries and until very recently the law of Switzerland has been exceedingly diverse. For the first half of the 19th century there was no uniformity of law at all in Switzerland: Swiss law was entirely cantonal or state law. Cantonal law had, however, one redeeming feature: each canton finally codified its law, generally on the model of the Napoleonic codification.[15] The Austrian Code of 1812[16] did have considerable influence on the law of some of the German cantons. The best cantonal code is that of Zurich of 1855, the work of the illustrious Bluntschli.[17]

[9] See supra §§ 231, 265, 266, 322, 208.

[10] See supra §322 (note on the *Reichskammergericht*); *General survey*, pp. 501, 337. Political reasons were largely accountable for this.

[11] See *General survey*, pp. 489, 498–9.

[12] See supra § 211 et seq.

[13] In 1368.

[14] In 1460. The Swiss universities of Zurich and Berne were founded in the 19th century: Zurich in 1832, Berne in 1834.

[15] See supra §§ 254, 257.

[16] See supra § 232.

[17] Johann Kaspar Bluntschli, the most famous of Swiss jurists, was born at Zurich 1808, and died at Karlsruhe, Germany, 1881. He studied at the German universities of Berlin and Bonn, taking his doctor juris degree at the latter. On account of his political opinions he left Zurich and Switzerland in 1847, and went to Munich. Here he was appointed during the following year professor of constitutional law, which chair he filled until 1861 when he was called to Heidelberg. His *Privatrechtliches Gesetzbuch für den Kanton Zürich* (code of private law for the Canton of Zurich), 4 vols. 1854, became a model for Swiss and other codes. After Bluntschli went to Heidelberg, he took up international law, in which field he obtained his greatest renown as a jurist. His treatises on international law are still invaluable works.

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But in course of time the Swiss learned by sad experience that to maintain numerous different systems of state law with their resulting confusion and diversity is devoid of good sense, and presents a most serious obstacle to the accomplishment of justice. The constitution of Switzerland was revised; and beginning with the year 1874 it became possible for the federal government to establish federal laws applicable to all the cantons. A succession of federal laws including some partial codifications ensued, which abrogated the cantonal laws wherever in conflict. The most famous of these is the world-renowned Code of Obligations of 1883.[18] Other federal codifications are the Penal Code,[19] Code of Criminal Procedure,[20] Code of Civil Procedure,[21] Bankruptcy.[22] For the rest of the 19th century the law of Switzerland was partly federal and partly state or cantonal, — thus giving rise to a partial uniformity of law. Not until the 20th century completion and adoption of the federal codification of the entire Swiss law, was one codified law for all Switzerland attained.

§358 **The Swiss Civil Code of 1912 and modern Swiss law.** Early in the 20th century the unity of Swiss law was finally accomplished. In 1912 the new Civil Code for all Switzerland went into force.[23] The old federal Code of Obligations has been revised,[24] and put into accord with the Civil Code, both codes being made effective January 1, 1912. The codes of 1912 are most useful to jurists, for these are written in the three national languages of Switzerland — namely French, German, and Italian.[25] Switzerland has also the other usual

[18] Effected January 1, 1883. It was modified as to railroads by Federal law of Dec. 21, 1883, and completed as to registry of commerce by law of Dec. 11, 1888. It comprised 880 articles. In 1889 the Federal law of Bankruptcy was enacted.

[19] 1853. It is now being revised.

[20] 1851.

[21] 1850.

[22] 1889.

[23] The Civil Code was adopted Dec. 10, 1907.

[24] Adopted March 30, 1911.

[25] An English translation of the new Civil Code by Shick was published in 1915.

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codes of Continental European States — Penal, Criminal Pro- (§ 358)
cedure, Civil Procedure.[26]

The Swiss Civil Code reflects somewhat the philosophical spirit of the German Code of 1900,[27] and some features of its order are reminiscent of that magnificent work. But the Swiss Code resembles most of all the French Civil Code in its practical spirit of preciseness.[28] For the French, as was natural, has made the strongest impression on the new federal code as it did on the cantonal codes.[29] The world-mission of Roman law has been accomplished in Switzerland: one system of private law (instead of twenty-two) for the entire Swiss nation, and codified. Switzerland [30] is now a province of modern Roman law.

It should be remembered that the Swiss codification of 1912 is a *national* one, abrogating all cantonal or state private law. In creating one and only one uniform system of private law the federal union of Switzerland was not destroyed, nor did the respective cantons or states become emasculated. Switzerland thus furnishes the proof that a federated republic can attain to a national uniformity of law and still continue a federation of states. In other words, it is not impossible for a federated republic[31] to *unify* and codify its private law. In Switzerland no longer prevails diversity of state law with all the attendant evils of wanton confusion as to legal rights, chicanery, and needless expense in litigation. Switzerland has pointed out for all time to federated republics, including the United States, the pathway and ultimate goal of legal progress — a single national codified jurisprudence. Thus in federated countries may be realized the world-mission of Roman law since Justinian.

[26] These federal codes were framed and enacted during the latter half of the 19th century. Switzerland has no Code of Commerce, its equivalent being the Code of Obligations and Law of Bankruptcy. See supra §§ 356, 257.

[27] See supra § 254.

[28] See supra § 344.

[29] See supra § 356.

[30] The area of Switzerland is twice that of the American state of Massachusetts.

[31] And also for a federated empire, see supra § 344.

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## 26. SCOTLAND

§359 **Scotch law prior to the 18th century and the Act of Union with England in 1707.** Scotland, like Germany,[1] is a country which has actually accepted and received the Roman law, although not originally subject to it; for Scotland never was a province of the Roman Empire. Prior to the 14th century there are not many traces of Roman law to be found in Scotland. But the Bologna revival of Roman law[2] reached Scotland in the 15th century, when the universities of St. Andrew, Glasgow, and Aberdeen were established.[3] A century later the University of Edinburgh was founded.[4]

From the 16th century onward is the period of the reception of Roman law into Scotland. In 1532 James V, nephew of Henry VIII of England, established the present Scotch **Court of Session,** which was modeled on the French Parlement or law court of Paris.[5] This event occurred during the era of Scotch attraction to France and antagonism to England. And this new Scotch court openly and definitely adopted the Roman law to supplement the deficiencies of the then crude private law of Scotland.[6] The adoption of Roman law by the Court of Session caused little inconvenience to the legal profession, for Scotch lawyers were already well acquainted with the Civil Law, owing to the fact that it was customary to prepare for the legal profession by going abroad to study at Continental universities where Roman law was taught.[7] And this practice did not entirely cease after the Protestant Reformation and the inauguration in 1560 of Roman law instruction at the universities of Scotland.[8]

Although the influence of the Protestant Reformation in Scotland caused the practice of citing in Scotch courts Justin-

[1] See supra §§ 316, 322.

[2] See supra §§ 211–12.

[3] Founded respectively in 1411, 1450, and 1494.

[4] In 1582.

[5] Mackenzie, *Roman law*[7], p. 46.

[6] See Mackenzie, *Id.*; Bryce, *Studies in history, etc.*, p. 73, 91.

[7] Mackenzie, *Roman law*[7], pp. 46, 47. The French university law schools received the most of such Scotch students.

[8] *Id.*

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ian's Corpus Juris [9] to be regarded with religious disfavor, it did not stop private consultation of Roman law texts. And long before the close of the next century, the 17th, much Roman law became absorbed in Scotch private law. Says the learned Arthur Duck [10] in his famous treatise published in 1653: "The Scots have taken from the Civil Law their procedure and most of their national law. . . . Where the written law of Scotland is contrary to the Civil Law of the Romans, the Civil Law is not followed: but where the . . . (Scotch) law is incomplete, in such cases the judges among the Scots are not permitted to use their own discretion, but must judge according to the Roman law."[11] And this Roman-Scotch law, although not codified, became the uniform law of the Kingdom of Scotland.

§ 360 **Scotch law since the Union with England in the 18th century. Modern Scotch law.** Scotland remained separate from England for over a century after James VI of Scotland succeeded Queen Elizabeth as James I of England. But in the year 1707, during the reign of Queen Anne, the two kingdoms were merged into the United Kingdom of Great Britain. One of the provisions of this Act of Union [12] was that Scotland should retain her own law and judicial procedure. And Scotch private law to-day still contains a large amount of Roman law.[13] The authoritative works of such eminent Scotch jurists as Stair, Erskine, and Bell show great familiarity with Roman law. To be sure Scotland, as well as England, is unlike Continental Europe in that its private law is yet uncodified and is to be found chiefly in the Reports of the decisions of courts; but codification, that final stage of the influence of Roman law on all modern jurisprudence, is at last beginning to be considered in Great Britain.[14]

[9] See supra § 135.

[10] See infra § 391.

[11] *De usu et auctoritate juris civilis Romanorum in dominiis principum Christianorum* (chapter on Scotland).

[12] Of March 4, 1707.

[13] On the present authority of Roman law in Scotch law, see Erskine, *Principles of the law of Scotland*[20] (Rankine), p. 6.

[14] See infra § 404.

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The reception and survival of Roman law in Scotland are also strikingly attested at the present time by the following facts: no one can become an advocate at the Scotch Bar without passing an examination in Roman law, and no one, except a member of the Scotch Bar, can be appointed a judge of the Court of Session without undergoing an examination in Roman law.[15]

## 27. ENGLAND, ENGLISH LAW PARTS OF THE BRITISH EMPIRE, AND THE UNITED STATES[1]

§361 **England also belongs to the modern realm of Roman law since Justinian.** It was Matthew Arnold who called the only criticism that is helpful for the future "a criticism which regards Europe as being, for intellectual and spiritual purposes, one great federation."[2] The traditional assertion that English law is wholly indigenous and owes nothing to the influence of Roman law is now happily passing away. No longer are religious prejudice and insularity of feeling obscuring the fact of the survival of Roman law in English law as well as in all Continental European jurisprudence: it is diametrically opposite to actual history to assert that Roman law survived or has been received in all modern European countries, except one — namely England. To be sure the influence of Roman law on English law has been restricted as compared with the larger influence of that law on Continental European and allied systems of law. And this helps considerably to explain the present relative backward and confused condition of English and American law as compared with the jurisprudence of all other modern civilized nations.

[15] See Mackenzie, *Roman law*[7], p. 47.

[1] A part of this was published by the author in 23 Yale Law Journal p. 318, February, 1914, under the title of "The Romanization of English law," and is reprinted by permission.

[2] If this illuminating statement be revised so as to include the Americas and other civilized regions of the world which have been affected by European influences, it would succinctly describe the progress of modern civilization.

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**Periods of English legal history.** The history of the development of English law into its present form has five well-defined periods: from the Anglo-Saxon conquest of Britain in the 5th century to the Norman conquest in the 11th century; from the Norman conquest of England in the 11th century to the end of the reign of Edward I early in the 14th century; from the 14th century to the 17th century and the reign of James I; from the 17th century to the 19th century Judicature Act of 1873; modern English law in England, the British Empire, and the United States of America. §362

## I. England from the Anglo-Saxon conquest in the 5th century to the Norman conquest in the 11th century: period of almost exclusively Teutonic Anglo-Saxon law

**Britain, a Province of the Roman Empire, was governed by Roman law.** In the Island of Britain was established a Roman province which lasted 400 years. Julius Caesar's expedition into Britain in the year 55 B.C. was followed a century later by permanent conquest and occupation of the island, and the introduction of Roman civilization. Britain was from the outset an Imperial command of the first rank, garrisoned at one time by about 30,000 Roman soldiers,[3] and became an important Roman governorship.[4] §363

[3] Mommsen, *Provinces of the Roman Empire* (Dickson's translation), vol. i, ch. 5, p. 190, London, 1909.

[4] The story of Carausius illustrates the 3d century value of Britain to the Roman Empire. Incidentally it recalls the earliest known British ruler of the seas. Carausius was a Belgian, who rose in the Roman naval service from pilot to admiral. Appointed to command the Roman "Channel Fleet" with headquarters at Boulogne (Gesosriacum), he was instructed to stop the northern Teutonic sea-rovers from passing through the British Channel (Fretum Gallicum) to raid the shores of the ocean provinces. But he took advantage of his position to get rich by suffering the pirates to go through the Straits, only stopping them on their return with their booty. This he divided with his naval force. Arousing the suspicions of the Emperor Maximian, Carausius escaped arrest and execution by sailing with the Roman navy to Britain. There he established himself as an independent Emperor. For seven years owing to his sea-power he held Britain against the whole Roman Empire, ravaging the Continental coast

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South of the wall of Hadrian, built by that Emperor to protect Britain from the rude Picts and Scots and extending across the entire island from sea to sea for about seventy miles, arose numerous towns. *Eboracum* (the modern city of York) was the military capital of Roman Britain. Here early in the 4th century the Emperor Constantine the Great[5] was proclaimed Caesar. The most flourishing mercantile town in Britain was *Londinium* (London) at the mouth of the Thames. The modern English cities of Lincoln (Roman *Lindum*), Bath (Roman *Solis*), Gloucester (Roman *Glevum*) and St. Albans (Roman *Verulamium*) were among the towns founded during the Roman domination of Britain. Roman post roads were introduced all over the province, many of which are traceable at the present time. The success of the Roman occupation led to much commercial prosperity. With wealth came education of the favored youth of Britain according to Roman standards.[6]

Roman law made rapid strides in Britain during the 2d and 3d centuries A.D., as is attested by the writings of the Roman jurists Javolenus and Ulpian, who discussed cases arising in Britain.[7] Moreover an illustrious galaxy of Roman judges honored Britain with their presence. York was the seat for three years of the highest Roman tribunal with Papinian, the prince of Roman jurisconsults, as chief justice and the famous Ulpian and Paulus as associate justices[8] — a wonderfully able and brilliant court. It was as if the United States Supreme Court were to hold sessions in Alaska.

§364 **The Anglo-Saxon conquest of Britain late in the 5th century.** It should always be remembered that when the Roman

from the mouth of the Rhine to Gibraltar. Finally Diocletian and Maximian (reigned A.D. 284–305) made him their colleague in the Imperial sovereignty. The first British Emperor fell a victim to the treachery of his Prime Minister, who was subsequently slain by Constantius; and the revolted island became once more a Roman province.

[5] See supra § 120.

[6] Mommsen, *Id.*, p. 194.

[7] As to these jurists, see supra §§ 88, 108.

[8] See supra §§ 98, 99, 108; Walton, *Roman law*[2], p. 284, Edinburgh, 1912. Papinian went to Britain with the Emperor Severus, and probably drafted a law of Severus promulgated at York in the year 210.

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Empire decayed in the 5th century, "it was not Britain that gave up Rome, but Rome that gave up Britain."[9] In the year 455 the Roman legions were withdrawn from Britain to defend Italy against the barbarian Germanic invaders. Soon, in addition to the roving Scots, the Angles, and Saxons from Germany began to invade Britain, and the doom of the helpless island was settled. The inhabitants in despair addressed the Emperor Honorius for protection against the Saxons; but he replied that they must help themselves as best they could. Some of the Britons fled to Western England — to Wales and Cornwall, still partly Celtic to-day; while others exiled themselves across the channel to France — the region which they settled being called to this day Brittany. The Britains who remained in the island resisted the pagan Saxon invaders for a long time; but in 493 the invaders won a decisive battle. Thereafter they were supreme, although Cornwall in Western England resisted for a half century longer.[10]

§ 365 **Religious connection with Rome restored by the conversion of the Anglo-Saxons to Christianity.** But the influence of Rome reappeared in Britain under another guise late in the 6th century, when Christianity was reintroduced and the Anglo-Saxon invaders were converted to the Christian religion. Pope Gregory I one day noticed some comely Saxon youths in the slave market place at Rome and inquired to what nation they belonged. On being told that they were "Angels," he answered "Not Angles, but Angels[11] would they be if they were only Christians." And in 596 Gregory sent over to the island of Britain the famous St. Augustine, founder of the primate English see of Canterbury, by whose efforts and those of his colleagues the Anglo-Saxons abandoned paganism and became Christians.

[9] Mommsen, *The provinces of the Roman Empire* (Dickson), vol. i, ch. 5, p. 194.

[10] Nys, *Le droit romain, le droit des gens, et le college des docteurs en droit civil*, p. 25, Brussels, 1910. It is very interesting however to notice that soon after A.D. 511 the British writer Gildas calls the island "Romania" because of the extent to which Roman institutions had entered Britain: Amos, *Roman law*, p. 443.

[11] "Non Angli, sed Angeli, si modo Christiani": Morris, *Hist. of development of law*, p. 248, Washington, 1909.

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One of Augustine's converts was Ethelbert, King of Kent, who soon revealed Roman influences by causing to be set in writing the laws of his kingdom "according to the Roman mode." [12] This he did about the year 600. Very likely the Roman missionaries had brought to his attention the exploits of Justinian,[13] then dead scarcely forty years. Ethelbert's laws are the earliest document in the English language, the first laws written in a Germanic tongue.

§366 **Britain became known in the 9th century as "England." Legislation of Alfred the Great, Canute, and Edward the Confessor.** In 827 the united kingdoms of the Angles and Saxons received the name of "Angle-land" (England), the kingdom of England beginning in the reign of Egbert. Much legislation came from the later Saxon and Danish kings of England. There is a real continuity of English law from the time of the 9th century Alfred the Great [14] until now.

By Alfred and his Saxon successors a remarkable series of laws was published which strongly resemble the Frankish capitularies of Charlemagne and the later Carolingians.[15] Now Charlemagne, the first Emperor of the revived medieval Roman Empire of the west,[16] had tried to substitute Roman legal ideas and law for Teutonic usages. Alfred did much for the law of his age, endeavoring to gather all that seemed good in the old English laws and promulgating new laws. A visit to Rome in his youth, and his intense desire after he became King to import into England the learning of the Continent, should account for much of his inspiration as a legislator.

The 11th century Canute, the Danish King who ruled both England [17] and Denmark, was perhaps the greatest European legislator of that century.[18] He too had visited Rome; he

[12] Bede, *Hist. eccl.* ii, ch. 5, "juxta exempla Romanorum."

[13] See supra § 135.

[14] Reigned 871–901.

[15] Stubbs, *Const. Hist.* i, p. 223.

[16] See supra § 208.

[17] Reigned 1016–35.

[18] "If he is not the greatest legislator of the 11th century, we must go as far as Barcelona" (i.e. for the medieval compilation known as the Consolato del Mare, supra § 214) "to find his peer": Pollock and Maitland, *History of English law*[2], vol. i, p. 20, Cambridge, 1898.

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was personally acquainted with an Emperor and a Pope. His comprehensive statutes helped enormously to add to the continuity of English law from Alfred's day.

The restoration of the old Anglo-Saxon dynasty in the person of Edward the Confessor,[19] who had spent the best years[20] of his life in exile on the Continent, inevitably continued Roman influences in Saxon England. Edward's predilection for foreigners, especially Normans, is well-known. It is interesting to notice that Edward returned to England just before the time the rehabilitation of Roman law began on the Continent.[21] Edward is honored by tradition as a pre-eminent legislator, although what now remains of his laws was compiled after the Norman conquest.[22] The most trustworthy manuscript[23] contains quite a few fragments of Roman law.[24] One thing is certain: the Saxon law of Edward's time must be included in the basis of the later English Common Law, for this law was the standard of conduct constantly elevated before the early Norman Kings[25]—who swore to keep the laws of King Edward in order to obtain the favor of their subjects.

**Obscurity of Roman law in England from the Saxon to the Norman conquest.** The rudeness of the Germanic invaders of England and the turmoil of the centuries following the §367

[19] Reigned 1042–66.

[20] About thirty years, from about his tenth to his fortieth year, c. 1013–42.

[21] See supra §§ 209 et seq. Edward returned in 1042. The earliest date of the revival of Roman law study in Italy is A.D. 1038 (Pollock and Maitland, *History of English law*[2], vol. i, p. 23); at any rate the Institutes of Justinian (supra § 138) were studied at Pavia in the 11th century.

[22] Pollock and Maitland, *Hist. of English law*[2], vol. i, pp. 97–104: Holdsworth, *History of English law*, vol. i, p. 2. These are the *Leges Henrici I* (composed about 1118), the *Quadripartitus* (1113–8), the *Bilingual laws of William I*, and the *Leges Edwardi Confessoris*. These documents contain many laws of Canute.

[23] The *Leges Willelmi I* (*Leis Williame*), known also as the *Bilingual laws of William I*.

[24] See Pollock and Maitland, *History of English Law*[2], vol. i, p. 102, note 1; Holdsworth, *History of English law*, vol. i, p. 2, London, 1903.

[25] William the Conqueror, Henry I, and Stephen, for example: see Pollock and Maitland, *History*[2], *etc.*, vol. i, pp. 88, 95, 96.

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cessation of the Roman rule in the island down to the Norman conquest were antagonistic to civilizing influences from abroad, and unfavorably affected the development of Anglo-Saxon law.[26] England seemed in great danger of being lost to the civilizing influence of Roman law, — the native customary law of Teutonic origin almost obliterated it.

But there are a few traces of Roman law in England after the Saxon conquest,[27] even if these are obscure and hard to find. Through the fostering care of the Christian clergy of England whose personal law originally was the Roman and who were subject to the developing Canon Law of the Church,[28] knowledge of the Roman law was kept alive in ecclesiastical England from the 7th to the 11th century: it is known that during these centuries Roman law was studied in the cathedral school at York.[29]

## II. England from the Norman conquest in the 11th century to the end of the reign of Edward I early in the 14th century: period of the introduction of Justinian Roman law into England via the Bologna revival

§368 **Improvements made in English law during the reigns of William the Conqueror and his sons after the Norman con-**

[26] As to the nature of Anglo-Saxon law, see Pollock and Maitland, *History*,[2] *etc.*, vol. i, pp. 25–63.

[27] Supra § 364.

[28] See supra §§ 225 et seq.

[29] Alcuin, *Poema:* "Illos juridica curavit cote polire"; Savigny, *Geschichte d. röm. Rechts im Mittelalter*[2], ch. 6, § 135. Alcuin (c. 735–804) the eminent 8th century English educator, renowned for his work at the Palace School of Charlemagne, has left us a valuable description of the academic life at York during his fifteen years' residence there as an instructor. The great library at York was probably the finest then in all England, surpassing that of the learned Bede at Jarrow. Another invasion from Europe afflicted English learning as the English themselves had damaged Roman civilization in Britain; the great libraries of York, Jarrow, and Peterborough vanished. Not until Alfred's time (supra § 366) did the tide turn again the right way.

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quest. The winning of the battle of Hastings in 1066 made §368
the Normans from France masters of England, and brought England once more into direct relations with the Continent, whence she was to derive advancement in civilization and progress in law. Marked changes for the betterment of English law were introduced by William the Conqueror and his sons.[30]

William's great Prime Minister and right-hand man was the Italian **Lanfranc,** whom he persuaded to become Archbishop of Canterbury. It should never be forgotten that Lanfranc, although a great prelate and theologian, was a most accomplished lawyer, well-known throughout the world of his time. He had studied and taught Roman law at Pavia in his native Italy. Later, while still a layman, he went to Normandy where he taught at Avranches and Bec.[31] Here it is not at all impossible that Lanfranc gave instruction in law, and so prepared the Normans for their great undertaking by supplementing the soldier's task of conquest with the work of the lawyer. It is idle to say that the English law of the 12th century has no Roman element in it derived from Italy, when there had existed in England late in the preceding century a person of vast constructive judicial influence like Lanfranc, who possessed a most profound knowledge of Roman law and Canon Law in addition to his mastery of the rude English law of his age.

Before the middle of the 12th century was reached, three great improvements had been made in English law, all of which helped to pave the way for a real reception of Roman law into England and its establishment as a source of the English Common Law. (1) Central courts of justice were established, and the Saxon local courts fell into disfavor.[32] (2) Ecclesiastical courts were separated from civil courts[33]: this change

[30] The reigns of William the Conqueror and his sons were from 1066 to 1134 (or to 1154 if that of Stephen, William's grandson, be also included).

[31] Savigny, *Geschichte*[2], ch. 6, § 135; Pollock and Maitland, *History*[2], vol. i, pp. 77–8; Ortolan (Prichard and Nasmith Eng. transl.), *History of Roman law*, § 612, London, 1871.

[32] Pollock and Maitland, *History*[2], vol. i, pp. 108, 138.

[33] *Id.* vol. i, p. 124.

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favored the Roman law and the Canon Law, which were given a free course in the English ecclesiastical courts without any check by the English customary law. (3) The administration of justice was put in the hands of the educated men of the day — usually the men with a clerical education, who were university-trained and familiar with Latin forms of expression.[34] Norman-French was made the language of the law courts — a provision which lasted for over two centuries.[35] By these measures the old native Saxon law was very largely upset.

§369 **The new Bologna revival of Roman law brought to England in the middle of the 12th century by Vacarius.** The 12th and 13th centuries form perhaps the greatest landmark in the history of English law: for the Bologna revival of Roman law[36] reached England in the 12th century. Not long after the school of the Glossators was inaugurated at Bologna, the Lombard Vacarius[37] came over to England in 1149 with Theobald, Archbishop of Canterbury. Vacarius was appointed professor at the young university of Oxford,[38] and began to lecture on Roman law according to the methods employed by the Italian Glossators. Vacarius published an abbreviation in nine books of the Code and Digest of Justinian for the use of students too poor to obtain copies of the originals.[39] The new teaching of Vacarius aroused opposition, so much so that King Stephen, who disliked Archbishop Theobald, prohibited Vacarius from teaching, and forbade even the

[34] Amos, *Roman law*, p. 444.

[35] *Id.*

[36] See supra § 211.

[37] See supra § 213.

[38] When Oxford was founded is lost in obscurity. The traditional date is c. A.D. 879 in the reign of Alfred the Great. But the first authentic record of the existence of the town is A.D. 912, and this is the year from which anniversaries are reckoned. The university may be safely considered to have been founded early in the 12th century (c. 1100?). See Goldwin Smith, *History of England*, vol. i, p. 58, and his *Oxford and her colleges*, p. 25.

[39] Vacarius' book condensed the Code and incorporated large extracts from the Digest (supra § 135). His book was entitled ***Liber ex universo enucleato jure exceptus, et pauperibus praesertim destinatus***, and contained brief glosses. Wherefore for a long time law students at Oxford were called "Pauperistae." See Ortolan, etc., *Roman law*, § 615; Colquhoun, *Rom. law*, § 144; Pollock and Maitland, *History*[2], vol. i, p. 118.

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retention in one's possession of the obnoxious books of Roman law; but the persecution soon failed, and the royal prohibitions were speedily removed either by Stephen or his successors.[40]

That the sources of Roman law, both the Justinian and the ante-Justinian,[41] were becoming known in England by the middle of the 12th century is attested by the historical writings of William of Malmesbury,[42] who died 1142. In the 13th century the study of Roman law was introduced at the new university of Cambridge.[43] And from this time down to the 17th century the Civil Law as a study at the English universities held a rank second only to theology.[44]

**The 12th century Laws of Oléron.** During the middle of the 12th century Roman law entered England by another channel—via France. The second great code of medieval maritime law, the Laws of Oléron,[45] was introduced into England from France either by Eleanor, Duchess of Guienne and wife of Henry II, or by their son Richard I (Cœur de Lion).[46] The Laws of Oléron were inspired by the earlier Consolato del Mare, a compilation based on the Roman law.[47] The Laws of Oléron as received into English law were enlarged and perfected in the 18th century by Lord Mansfield.[48] §370

**Rise of the English Common Law in the 12th century; the jury and the system of original writs introduced under Henry II.** By the first half of the 12th century the formation of the unwritten Common Law of England has become clearly §371

[40] Hunter, *Roman law*[4], p. 109.

[41] See supra §§ 86, 135; infra vol. iii, §§ 951, 952.

[42] See Selden, *Ad Fletam dissertatio*, ch. vii; Amos, *Roman law*, p. 445.

[43] The founding of the University of Cambridge is lost in obscurity: it has been put as early as 635. The first college, Peterhouse, is known to have been definitely established in 1284.

[44] Bryce, *Studies, etc.*, p. 890, New York, 1901. See also Bellot, *Early law schools in London*, 36 Law Mag. and Rev., pp. 257–83 (12th–14th centuries).

[45] See supra § 236.

[46] See Act 1403, 5 Hen. IV, ch. 7 (Scrutton, *Roman law in Eng.*, p. 172, Cambridge, 1885) where the Admirals swear to judge according to the "Laws of Oléron."

[47] See supra § 214.

[48] See infra § 397.

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(§371) visible,[49] and the commencement of its slow progress to maturity of development begins to be discernible. The rules and enactments of the new customary law were shaped by Norman lawyers familiar with Roman and Canon Law. The very term "Common Law" is a borrowing from the Canon Law itself; it is an English translation of the Canon Law term *jus commune*.[50]

Two innovations were introduced into English law during the reign of Henry II: the jury and the system of original writs.[51] What was the origin of the jury? The answers, until recently, have been colored largely by English prejudice. The prevailing opinion now is that the jury is not of Anglo-Saxon but of Frankish or Continental European origin[52]: hence familiar to the Normans and imported into England by them. This Frankish inquest, used by the medieval Roman Emperor Charlemagne and his royal successors, quite naturally seems to imitate certain features of Roman law procedure.[53] The Roman root — the more important if not the exclusive source — of the English trial by jury is probably the *judices*, or persons selected by the praetor in Roman law to determine the facts in legal controversies.[54] The English jury is the most lauded and highly-prized feature of the Common Law. It is the only feature of the English Common Law which has exerted a universal influence, for it has been copied by numerous modern non-English foreign nations. But in these foreign countries its application has been usually restricted — perhaps wisely — to criminal or penal cases only, civil controversies being tried by the court alone as in Justinianean Roman law.[55]

[49] In the reign of Henry II (1154–89). See Holdsworth, *Hist. of English law*, vol. ii, pp. 107–69; especially p. 150 (iv), London, 1909; Hudson, *The judicial reforms of the reign of Henry II*, 9 Mich. Law Review, p. 385.

[50] Maitland, *Canon Law in England*, p. 4, Cambridge, 1898; Pollock and Maitland, *History*[2], vol. i, p. 176.

[51] Pollock and Maitland, *History*[2], vol. i, pp. 138, 150.

[52] *Id.*, vol. i, pp. 140–44.

[53] See *Id.*, p. 141.

[54] See supra § 122; infra vol. ii, §§ 881, 934.

[55] "Some day the civil jury (in English and American law) will go the way of the ordeal and the battle to the junk heap of abandoned institutions": Boston, *Defects in the administration of justice*, Penn. Law Rev., Nov. 1912, p. 10.

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In the reign of Henry II the royal courts began to issue writs, which were carefully worded and 'ready-made' to suit ordinary cases of litigation. When a litigant desired to sue out a writ he was now enabled to choose an appropriate writ, unless a new one had to be invented.[56] The drafting of these 'ready-made' writs of process must have been greatly facilitated by models of Roman law formulas to be found in the sources of Roman law, — the law familiar to the then ecclesiastical English judges.

**The 12th century Glanville.** Late in the 12th century § 372
appeared the earliest known work on English law. It was written in Latin. Its author was Glanville, an ecclesiastic, who was Chief Justiciar of England during the reigns of Henry II and his son Richard I (Cœur de Lion).[57] Glanville's work was entitled *A treatise on the laws and customs of the kingdom of England.*[58] It is more of a manual of procedure and practice than a treatise on law. In his preface Glanville imitates the *prooemium* or preface of the Institutes of Justinian,[59] and draws upon the Roman law in his discussion of agreements and contracts, although he calls Roman law a "foreign law."

**The 13th century Stephen Langton and Magna Charta.** § 373
About a quarter of a century after Glanville, Magna Charta was promulgated in the year 1215. This work of that master mind Cardinal Stephen Langton, Archbishop of Canterbury, must have been suggested to him from some source. It was the result of long continued agitation for a return to the good old legislation of Edward the Confessor,[60] it proclaimed trial by jury, and it is the cornerstone of English and American civil liberties. Where did Stephen Langton get his inspiration? Not from the then feudalistic institutions in the State. Whatever was remembered of Roman civilization as created by Roman law was preserved through the beneficent influence of the medieval Church.[61] Here is an interesting fact. About

[56] Pollock and Maitland, *History*[2], vol. i, p. 151.

[57] A.D. 1154–99.

[58] *Tractatus de legibus et consuetudinibus regni Angliae* (Eng. transl. by Beames, Washington, 1900).

[59] See supra § 138.

[60] See supra § 366.

[61] See supra § 225.

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seventy years before Magna Charta the tradition is that in the little Italian city of Amalfi was found a copy of the Digest of Justinian alleged to have belonged tc that Emperor himself. At any rate, even if this romantic story is false,[62] there was discovered somewhere in Italy about this time a splendid manuscript of the Digest, now known as the Florentine[63]; and this became very largely instrumental in causing the wonderful Bologna revival of Roman law study which spread over all Western Europe.[64] The source of Archbishop Langton's inspiration is plain: Magna Charta was drafted in the light of civil liberty as proclaimed in Roman law.

§ 374 **Bracton, the greatest English jurist of the 13th century.** Some fifty years after Magna Charta,[65] flourished the first scientific English jurist — Bracton,[66] an ecclesiastic. For about ten years during the reign of Henry III[67] he was a justice of the central court that followed the King (the "nascent court of King's Bench"[68]) — perhaps the last Chief Justiciar of England.[69] After his retirement or dismissal about the year 1257, Bracton continued as an assize judge until his death.[70] Bracton is truly the father of the English Common Law: 450 decided cases are reported in his *Notebook*.[71]

Bracton's famous work is his treatise *Of the laws and customs of England*,[72] written in Latin about the year 1258.[73] This

[62] So proved by Savigny, *Geschichte*[2], ch. 17; Rashdall, *Universities of Europe in the Middle Ages*, vol. i, pp. 99, 100.

[63] It is now preserved in the Medicean Library at Florence.

[64] See supra §§ 209, 211.

[65] Supra § 373.

[66] Henry de Bracton (Bratton was his real name) died 1268, and is buried in Exeter Cathedral, of which he was chancellor.

[67] Reigned 1216–72.

[68] Pollock and Maitland, *History*[2], vol. i, p. 206.

[69] 4 *Encycl. Britan.*[11] p. 618.

[70] Bracton had been such before becoming justiciar of the central King's court. Bracton's service as judge of various courts continued for over twenty years, 1245–68.

[71] Edited by Maitland and published in 1885.

[72] *De legibus et consuetudinibus Angliae* (Eng. translation published 1878–1883 in the Rolls Series).

[73] Pollock and Maitland, *History*[2], vol. i, p. 207, give the date as 1250–58; Güterbock (Coxe, Eng. transl.), *Bracton, etc.*, ch. i, p. 24, gives 1256–59.

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has made him the Blackstone of the 13th century. Although (§ 374)
bearing almost the same title as Glanville's work,[74] Bracton's treatise is not a mere text-book on practice, but an exposition of the law itself — the first of its kind in England. Bracton's importation of Roman law was extensive. It is said that he was a student of law at Oxford, where he is further alleged to have taken the degree of Doctor of Civil and Canon Law[75]; but proof of this is lacking, although his familiarity with the Roman law would seem to supply it. In writing his treatise Bracton followed as a model the plan of the Institutes of Justinian.[76] He shows familiarity also with other parts of the Corpus Juris.[77] Moreover he freely uses a secondary source of Roman law — the Summary (*Summa*) of the Italian Azo,[78] for Bracton was trained in the school of the Glossators. Bracton attempted, and with success, to build up the English law of this time from Roman materials.[79] Feudalism, which had been introduced into England by William the Conqueror, had no law of personal property: Bracton sought to supply the defect, and extracted from the Institutes of Justinian almost bodily all its law of personal property.

Bracton's treatise was long accepted as the standard exposition of English law. Even nearly 400 years later Sir Edward Coke,[80] that bigoted 17th century Common Law partisan, made a remarkable use of Bracton's work as an authority for existing law in his own treatise[81] on the Common Law. Bracton's treatise not only "testifies to the influence of Roman law and of its medieval exponents, but at the same

[74] See supra § 372.

[75] Spence, *Equitable jurisdiction, etc.*, vol. i, 119 (a)

[76] See supra § 137.

[77] See supra § 135.

[78] See supra § 213 See *Bracton and Azo*, Selden Society Publications, 1895; Chipman, F. E., *The beacon lights of the law*, 21 Green Bag, p. 329.

[79] In the 13th century the Roman law exerted a similar influence upon both English and French customary law, so much so that Bracton and the French Beaumanoir would have enjoyed reading each other's books: see Holdsworth, *Reception of Roman law in the 16th century*, 28 Law Quart. Rev., p. 39.

[80] See infra § 389.

[81] *Institutes* (1628).

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time remains a statement of genuine English law . . . so detailed and accurate that there is nothing to match it in the whole legal literature of the Middle Ages."[82]

§ 375 **13th century legal literature of Edward I's reign: Thornton, Fleta, Britton, the Mirror of Justices.** During the reign of Edward I appeared three important treatises on English law, all of which abridge or follow Bracton's famous work.[83] Chief Justice Thornton[84] was the author of an abridgment of Bracton entitled a Summary (*Summa*) — a technical term peculiar to the Italian Glossators.[85] Fleta, an unknown jurist, perhaps a judge confined during Edward's reign in the famous Fleet prison at London while writing his book, composed a treatise in Norman-French, which repeats much of Bracton.[86] It is entitled *A commentary of the law of England.*[87]

About the year 1290 appeared Britton's work in Norman-French, which abbreviates Bracton.[88] Its title of Summary (*Summa*) again reflects the influence in England of the Italian Glossators.[89] The last of the legal treatises of the age beginning with Glanville[90] and ending with the reign of Edward I is a book on procedure entitled the *Mirror of Justices*,[91]

[82] Vinogradoff, The Athenaeum, July 19, 1884.

[83] Supra § 374.

[84] Gilbert Thornton, Chief Justice of the court of King's Bench. See Pollock and Maitland, *History*², vol. i, p. 210.

[85] See supra § 210.

[86] Fleta's work was written about 1290, — Pollock and Maitland, *Id.* It was first printed by the talented jurist Selden (infra § 391) in 1647, together with a *Dissertatio ad Fletam*, 2d edition, 1685. See also supra § 374.

[87] The term "commentary" is peculiar to the Roman jurists, and is a contribution of the Bologna revival.

[88] See § 374. Perhaps Britton was John Le Breton, Bishop of Hereford (disputed). But Selden (infra § 391) holds that the title of Britton's book was really derived from Bracton, and that the book was an abridgment (together with some subsequent statutes) promulgated by royal authority. Britton has been translated into English by Nichols, 2 vols. Oxford, 1875. See also Pollock and Maitland, *History*², vol. i, p. 210; Carson, *A plea for the study of Britton*, 23 Yale Law Journal, p. 664.

[89] See supra § 210.

[90] Supra § 372.

[91] Translated into English by Hughes (last republication, 1840). See edition of the Mirror in the Selden Society Publications; Maitland, *Collected papers*, vol. i, p. 336.

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which is attributed to Chief Justice Hengham. It bitterly attacks King Edward's judiciary. Thereafter for a century and a half until the time of Edward IV English lawyers wrote little that might be called literature.

**English law at the end of the 13th century and during the reign of Edward I.** In the last quarter of the 13th century began the long reign of Edward I, which lasted for thirty-five years until the opening years of the following century.[92] This King is sometimes flatteringly but rather erroneously styled the "English Justinian,"[93] — because as many as twenty statutes enacted during his reign [94] have survived to our own time and have therefore been confirmed by the verdict of centuries of experience. Under Edward I the jurisdiction of the superior courts of law was fixed, the course of the Common Law was known and established, and legal remedies for wrongs and injuries became fully determined. In other words, the "very mold and model" of English law were settled in the reign of Edward I.[95] §376

The Common Law was formed not merely by the influence of legal treatises based on Roman law, such as Bracton's, but more especially by judicial decisions made with the aid of principles derived from the same jurisprudence. Much praise is due to Chief Justice Thornton [96] and other 13th century royal judges for the part they played in developing English law with the help of Roman law.

**Character of the English reception of Roman law.** From the coming of Vacarius [97] to Oxford in the middle of the 12th century to the end of the reign of Edward I over 150 years later, the influence of Roman law on the formation of English law was so great that this whole period should be styled the "Roman epoch of English legal history." [98] During this §377

[92] Edward I reigned 1272–1307.

[93] For instance, Hale, *Hist. of the Common law*[5], p. 271, London, 1794; Blackstone, *Commentaries*, Introduction, § 1, p. 23.

[94] Blackstone, *Id.*, iv, p. 426.

[95] See Hale, *History of the Common law*[6], p. 277.

[96] Supra § 375.

[97] Supra § 369.

[98] Güterbock (Coxe, Eng. transl.), *Bracton and his relation to the Roman law*, p. 16, Phila., 1866; Hunter, *Roman law*[4], p. 109.

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(§ 377) period, and even as late as the reign of Edward II in the first quarter of the 14th century,[99] Roman law authorities "were habitually cited in the Common Law courts, and relied upon by legal writers, not as illustrative and secondary testimonies as at present, but as primary and as practically conclusive." [100] For instance, early in the 14th century during the fifth year of the reign of Edward II according to the law reports, the Digest[101] of Justinian, book 50, title 17, fragment 14, was directly cited in an English case to prove that where no time is set for the performance of a promise, it is possible to demand performance at once.[102]

The opinion that English law has developed wholly freed from Roman ideas has been refuted by the works of Professor Maitland and Sir Frederick Pollock.[103] But the introduction of Roman law into England was quite different from its adoption on the Continent, especially in Germany.[104] "In England this reception was more a reception of ideas, in Germany more a reception of a Code. In the former there was a reception only of doctrines or terminologies, on the Continent there was a reception of the totality of the Roman law texts." [105]

The English adoption of Roman law was "not an act of legislation, but a long process of custom." [106] It was found necessary to supply the defects of the Common Law, which, having expended its best energies in developing the feudal system, showed no symptoms toward creating an original commercial and movable property law. Use was therefore made of the Roman law, a complete system of law at hand ready for service. But its use and reception were not always acknowledged by English courts. And subsequently this habit and practice gradually grew stronger in proportion to

[99] Edward II reigned 1307–27.

[100] Amos, *Roman law*, p. 750. See also Selden, *Dissert.*, ch. viii.

[101] See supra § 137.

[102] Amos, *Id.*, pp. 449, 450.

[103] See Maitland's *Collected papers* (3 vols., 1911); and Pollock and Maitland's *History of English law*[2], (2 vols., 1898).

[104] See supra §§ 316, 322.

[105] Leonhard, *The vocation of America for the science of Roman law*, 26 Harvard Law Rev., p. 395.

[106] Hunter, *Roman law*[4], p. 112.

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the rise and increase of English prejudice against whatever (§ 377)
bore the name "Roman."

Originally this prejudice began in a well-founded English abhorrence of the absolutism of the Roman public law. But the repudiation of this "tended to involve the rejection of the Roman private law,"[107] — *at least openly*. English suspicion, prejudice, and jealousy of "foreign laws" finally aroused much hostility to Roman law. Evidence of this English hostility is seen in the futile 12th century attempt during the reign of Stephen to proscribe the study of Roman law[108]; and also in the memorable 13th century outbreak of the barons at the Parliament of Merton in 1236, who so strenuously objected to any change in the laws of England.[109] This hostility was especially aimed at the encroaching pretensions of the Canon Law — that ecclesiastical offshoot of Roman law[110]; soon unfortunately it also became aimed at the Roman in addition to the Canon Law. Both became suspiciously regarded, owing doubtless to the arrogance of the clergy, as but mere instruments to enslave the English people to Popes and Emperors: hence the efforts made to curtail the authoritative influence in England of the Roman laws.

This unfortunate English hostility to Roman law died hard. Almost at the opening of the 19th century Sir William Jones said in 1785: "Though few English lawyers dare to make such an acknowledgment, it (the Roman law) is the source of nearly all our English laws . . . not of feudal origin." To such a state of ingratitude did insularity and religious prejudice finally reduce most English lawyers until very modern times, when at last the debt owed by English law to Roman law began to be paid.

Consequently in later English legal history even to comparatively modern times, progress in English law has frequently been paradoxical; namely to take from Roman law

[107] Hunter, *Id.*

[108] Supra § 369.

[109] "Nolimus mutari leges Angliae": Maitland, *Canon Law in England*, p. 53. On the relations of England and the Papacy during the 13th century, see Smith, *Church and State in the Middle Ages*, Oxford, 1913.

[110] Supra § 225.

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new material to be incorporated in English law or to advance its welfare, and at the same time not to acknowledge the Roman law source, or sometimes — what is far worse — even to deny that English law was ever influenced by Roman law. When judges decided cases on principles taken from the Roman law, the theory of the Common Law was that the magistrate's decisions came from his inborn wisdom: which theory was often never upset by appropriate mention of the Roman law — the only law known as a system of law to the medieval world — as a source of their information. All this has made the English reception of Roman law limited in character as compared with the Continental European reception.

## III. England from the 14th century to the 17th century triumph of the Court of Chancery over the Common Law courts: period of rivalry between Common Law and Equity, the two great systems of English law

§ 378 **Decline of the authority of Roman law in the Common Law courts after Edward I.** English prejudice against Roman law as a "foreign" law greatly increased in the 14th century, owing to the pretensions of Popes and Emperors which were regarded as inimical to the prosperity of England. And this was soon felt as a result of the curtailment of ecclesiastical control over the Common Law courts. After the reign of Edward I ecclesiastics ceased to be judges, and laymen were appointed to the bench. Consequently the influence of Roman law in English Common Law courts declined, because laymen were not then sufficiently acquainted with it.[111] The change to lay judges was detrimental to the development of the English customary law. Common Law courts finally became so narrow, rigid, and ignorant that suitors were driven

[111] Most of the medieval libraries in England belonged to ecclesiastical or quasi-ecclesiastical bodies: see Savage, *Old English libraries*, London, 1911.

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to appeal elsewhere to obtain justice. But Roman law, although then frowned upon and barred as such as closely as possible by the Common Law courts, was about to enter England more abundantly — this time in a disguise — through the medium of a new court of justice.

**Rise of the Court of Chancery late in the 14th century and the development of Equity in imitation of the Roman equity (aequitas).** § 379 The 14th century conditions of intolerance and lack of growth in English private law were gradually remedied by the royal Chancellor, "the Keeper of the King's Conscience." And the Chancellor never failed to find a remedy in the ready storehouse of the Roman law. To the legal principles administered in his "Court of Conscience," which whenever possible he adapted from Roman jurisprudence, the Chancellor gave the collective name of "Equity" — a term very familiar to any medieval Civilian from his acquaintance with the praetorian Equity of Roman law.[112] That the English Chancellors had Roman law knowledge is evident from the following fact: after the Norman conquest down to the reign of Henry VIII, or for nearly 500 years, the Chancellor was always a high dignitary of the Church, — the celebrated Cardinal Wolsey being the last of this long line of ecclesiastics. The growth of the Chancellor's jurisdiction in Equity was bitterly antagonized both by the courts of Common Law and the English parliaments. It was really a contest between feudal customary law of Germanic origin and the Roman law — the latter however disguised under the name of Equity.

Under Edward I and earlier Kings the Chancellors had devised new writs to give remedy in cases where none was before administered. In the reign of Edward III uses of land were introduced, which though invalid at Common Law were considered as binding in conscience by the clergy. This led to the rise, late in the 14th century, of the separate jurisdiction of the Court of Chancery.[113] In the reign of the next King, Richard II,[114] was devised the writ of subpoena as to uses returnable to the Court of Chancery only. Toward the end of

[112] See supra § 65.

[113] Blackstone, *Commentaries*, vol. iii, pp. 51–3.

[114] He reigned 1377–99.

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the following century — the 15th — process by bill and subpoena had been extended to all matters in Chancery.

§ 380 **Other 14th century English tribunals adopting Roman law principles: the Ecclesiastical Courts, Court of Admiralty, the military court of the Constable and Earl Marshal, the privileged University Courts.** The hostility of the English Common Law courts to Roman law, which characterized them for the next two centuries after Edward I and indirectly led to the establishment of a Court of Chancery assimilative of Roman law,[115] must not be suffered to obscure the fact that Roman law ideas and principles were already in vogue or were in process of being introduced into other 14th century English tribunals, some of which were quite important.

The numerous Ecclesiastical Courts (diocesan, metropolitan, legatine) acquiring after the Norman conquest, in addition to their extensive spiritual jurisdiction, exclusive civil jurisdiction of marriage and testate and intestate succession to personal property,[116] administered the Canon Law — which as to things secular is largely Roman law at secondhand.[117] The English Ecclesiastical Courts, always important tribunals, suffered little loss in jurisdiction from the Reformation and retained much of their civil authority until late in the 19th century.[118]

The Court of Admiralty, established in the 14th century during the reign of Edward III,[119] owing to its necessary rela-

[115] See supra §§ 378, 379.

[116] Also the administration of pious gifts and revenues until the rise of the Court of Chancery and the development of the doctrine of "uses" (supra § 379). All questions of the law of legitimation (except cases involving the rule that subsequent marriage legitimatized bastards, which the Common Law courts in the 13th century subtracted from the jurisdiction of the courts Christian) were tried by the ecclesiastical courts.

[117] See supra §§ 225 et seq. Appeals to Rome lay from both interlocutory or final judgments, or cases could be taken to Rome for trial in the first instance. English appeals to the Pope prior to the Reformation were very common. See Maitland, *Canon Law in England*, London, 1898.

[118] See infra § 384; § 401, note.

[119] In the year 1360 (See Marsden, *Select pleas in the Court of Admiralty*, Selden Society Publications). The origin of the Court is put still earlier by some — in the reign of Edward I (1272–1307); certainly the powers of the admiral are earlier than the time of Edward III.

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tions with foreign countries gradually adopted procedure and rules based on the Roman civil law. Outside of the Roman law, the Court of Admiralty [120] came to observe the partially Romanized rules of Oléron.[121] The Court of Admiralty retained its importance, name, jurisdiction, and Roman law tendencies until very modern times, when in the 19th century it became a part of the consolidated English High Court of Judicature.[122]

The military court in which the Constable and Earl Marshal of England were judges,[123] established by Edward III during the 14th century, applied the Roman law whenever possible.[124] Sometimes the judicial authority of this court was delegated to some Doctor of Civil Law or expert jurist: the learned Arthur Duck was thus honored in the 17th century during the reign of Charles I.[125] This court ceased during the following century, in 1737.

The students of Oxford and Cambridge, owing to the privileges granted to these universities by the Kings of England, could not be tried before the ordinary courts of the realm in civil suits and for minor crimes. The chancellors of these universities or their delegates had exclusive jurisdiction over students, and in their courts they judged according to the Roman law and the usages of the university.[126]

**English made the language of the Common Law courts in the 14th century by Edward III.** Since the Norman conquest and prior to the reign of Edward III the language employed in §381

[120] The courts of the early separate admirals of the north, south, and west of England were, in the 15th century, absorbed by one high court. Thomas Beaufort, afterwards Duke of Exeter, Admiral of England 1412–1426, had a regularly organized court with a marshal, officers, and forms of legal process.

[121] See supra §370; Nys, *Droit romain, etc.*, p. 65. The Admiral's jurisdiction, originally penal as to piracy and other crimes on the seas and prize matters, came to be also of a civil nature.

[122] Infra §401.

[123] Sometimes called the *Court of Chivalry*.

[124] Nys, *Droit romain*, p. 64; Amos, *Roman law*, p. 455. Its jurisdiction was partly criminal, partly civil: see Blackstone, *Commentaries*, vol. iii, p. 68.

[125] Nys, *Id.*, p. 65.

[126] Nys, *Id.*, p. 66.

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English courts had been the law Norman-French.[127] But Edward made the vernacular English the judicial language for *viva voce* proceedings in Common Law courts, the old French dialect having become "much unknown in the realm."[128] Nevertheless the ancient language lingered until considerably later for reporting court proceedings and in writing treatises, its use in the reports not being definitely prohibited until the middle of the 17th century.[129]

§382 **Rivalry between the courts of Common Law and the Court of Chancery began in the 15th century.** A contest for supremacy between Common Law and Equity commenced in the 15th century. And this rivalry led to many bitter struggles for over 200 years.[130] At first the Common Law courts were victorious: about the middle of the 15th century during the reign of Henry VI [131] they obtained a limited outward superiority over the Court of Chancery.[132] But this only intensified the contest. The shameful, tedious, and ruinous War of the Roses between the branches of the English royal family merely suspended the contest between the two systems of English law. With the accession in 1485 of Henry Tudor (Henry VII), the old struggle between the Common Law courts and the Chancery Court was again resumed, and it continued the whole of the following century.

The rivalry between Common Law and Equity became discernible in the teaching of the two branches of English law: the universities[133] taught the Civil (Roman) Law; the inns of court at London the Common Law; neither originally recognized the other branch.[134] Practitioners in the courts at Westminster who had mastered Roman law at the universities

[127] Supra § 368. Edward III reigned 1327–77.

[128] Statute 36 Edward III.

[129] By a statute of the Commonwealth in 1650. English was made in 1731 the language of *all* courts in England: see 4 Geo. II, c. 26, s. 1; Jenks, *History of English law*, p. 348, Boston, 1912.

[130] See infra § 387.

[131] He reigned 1422–61.

[132] Amos, *Roman law*, p. 450.

[133] See supra § 369.

[134] Not until the 18th century was the Common Law taught at Oxford, — being introduced there by the famous Blackstone (infra § 395).

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"were obliged . . . to disguise or disclaim any appeal to its authority."[135] And when the Protestant Reformation severed in the 16th century all connection between England and Rome, the study of the Canon Law[136] "virtually expired" in England.[137] Moreover the study of the Civil Law, notwithstanding the revival of Roman law in England during the same century of the Reformation,[138] gradually declined for the next 250 years until Roman law study was again revived in the middle of the 19th century.[139]

**The 15th century Littleton, the first true expositor of the Common Law.** In the year 1470 — two centuries after Bracton[140] — appeared the work of the first true commentator on the Common Law — Thomas de Littleton,[141] a judge for fifteen years of the Court of Common Pleas in the reign of Edward IV.[142] Littleton's famous work is a treatise on Tenures, and is the first digest and classification of the English law of property. It was written in the old law-French language.[143] §383

Unlike his predecessors, Littleton borrowed nothing from the Roman law or the medieval Romanists,[144] nor could he — for the Roman law was allodial and never feudal. On Littleton's work, which is quite exhaustive, Coke and Blackstone[145] based their works. Here is a remarkable fact about Littleton: in his treatise he does not mention equitable estates, although these then existed; but in his will, still extant, he expressly created an equitable estate.[146] Was Littleton such an intol-

[135] See Bryce, *Studies, etc.*, p. 861.

[136] See supra § 226.

[137] Bryce, *Id.*, p. 862.

[138] See infra § 384.

[139] See infra § 411. This third English revival of Roman law commenced c. 1852; Bryce, *Studies*, p. 890.

[140] See supra § 374.

[141] Sir Thomas de Littleton, born c. 1407, died 1481, and is buried in Worcester Cathedral.

[142] Reigned 1461–83.

[143] See supra § 379. Littleton's *Treatise on Tenures* has been translated into English by many editors (that of Wambaugh, Washington, 1903, is the latest).

[144] See supra §§ 372, 374, 375.

[145] See infra §§ 389, 395.

[146] Morris, *History of law*, p. 270: "equitable estates were derived from the Roman law."

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erant feudalist as not to admit the superiority of Roman law in his work, although perfectly willing to take advantage of that law when he died?

§ 384 **The 16th century revival of Roman law study in England. Rise of the Doctors' Commons.** English law, as well as the legal systems of Continental Europe, was greatly influenced by the Renaissance and its finest juridical product, the 16th century Humanist school of jurists.[147] Alciat, Budé, and Zasius, the chief representatives of this school, emphasized the necessity of studying the Roman law sources from the historical and philological points of view.[148] That the methods of the Humanists penetrated England there is no doubt. In 1523 Cardinal Wolsey was instrumental in securing the jurist Vivès, who had taught at Louvain, to come to Oxford to teach Roman law.[149] A second revival of Roman law in England ensued, which movement was fathered and favored by Henry VIII.[150]

There were two reasons for the royal patronage of Roman law study: (1) the great practical utility of having men well-acquainted with Roman law in order to intelligently handle Continental foreign affairs[151]; and (2) the excellent support which could be found in Roman public law for principles of absolutism. Moreover a project of substituting Roman law for English law actually occurred to Reginald Pole, later a cardinal; and this was reported to his cousin, Henry VIII, who, had he not obtained otherwise what he wanted, might

[147] See supra § 241.

[148] See supra §§ 241, 242, 324.

[149] Nys, *Le droit romain, etc.*, p. 53, Brussels, 1910.

[150] Reigned 1509–1547.

[151] Especially the making of treaties. The necessity of having well-informed Civilians was always experienced in Henry's reign: for instance, in his divorce proceedings, Henry sent in 1530 Edward Carne, an Oxford doctor of law, to show to the pontifical tribunals that the King should not appear in person or by representative. Even in the reign of Edward VI the same pressing necessity of state appears in a letter of June 10, 1549, from the Lord Protector, the Duke of Somerset, to Ridley, Bishop of London: "You do not know how necessary the study of the Civil Law is for the conclusion of treaties with foreign princes, and how few men there are in his Majesty's service who are versed in this knowledge." See Nys, *Droit romain*, pp. 51, 55.

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have enacted a reception of Roman law of a nature like that (§ 384
of the same century in Germany which swept like a flood over that country.[152]

The long-continued Roman law teaching at the universities[153] was greatly stimulated during Henry's reign.[154] His breach with Rome was followed in 1535 by the suppression of Canon Law study at the universities.[155] Five years later Henry inaugurated his new policy of favoring the academical study of Roman law by founding at Cambridge a Royal (Regius) professorship in the Civil Law.[156] Six years later, in 1546, Henry established another Regius professor of Civil Law — this time at Oxford.[157] Each Regius professorship was endowed by the King.[158] Both of these professorships

[152] Nys, *Id.* p. 50; supra § 322.

[153] See supra § 369.

[154] During the first forty years of the 16th century, Oxford alone graduated 270 bachelors and 35 doctors of law: Nys, *Droit romain*, p. 55.

[155] He forbade the conferring thereafter the degree of doctor in this subject. The degree of D. C. L. was substituted for the ancient degree of Doctor Juris Utriusque. Although Mary revived the study of Canon Law, it was again suppressed by Elizabeth.

[156] Its first holder was Thomas Smith, later Secretary of State under Elizabeth. To prepare himself, he studied and obtained in 1541 the degree of doctor juris at the Italian university of Padua, then a famous seat of Roman law where twenty professors taught it. In his inaugural lecture, Smith eulogized Alciat and Zasius, the great Humanist leaders. See Nys, *Droit romain*, pp. 54–5.

[157] The first Regius professor at Oxford was John Story, who obtained the chair in 1546. The most famous Regius professor during the reign of Elizabeth and the early years of James I's reign was the renowned Gentili (supra § 273, infra § 386), appointed in 1587. In the middle of this same century was formed an association of law doctors who had obtained their degrees on the Continent or at Cambridge. This association continued for many years. Among its members were Jean Louis Vivès (supra this § 384); Valentine Dale who had studied at a French university, probably Orleans; Pierre Pithou (supra § 241), a pupil of the great Cujas (supra § 245), and who lived at Oxford for several months after escaping the St. Bartholemew massacre; Jean Hotman (son of the famous François Hotman, supra § 241, whom Elizabeth unsuccessfully invited to teach at Oxford). All three were Humanists. See Nys, *Droit romain*, pp. 54–7, 60.

[158] And also the other Regius professorships of divinity, medicine, Hebrew, and Greek. The Regius Civil Law chairs were minutely regulated by Elizabeth. See Nys, *Droit romain*, p. 54.

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(§ 384) are still in existence.[159] Moreover, Henry favored the Civilians in other directions. He instituted new tribunals, and appointed preferably as judges men who had studied Roman law.[160] He made Civilians sit as judges in ecclesiastical courts,[161] after his break with Rome. The activity of Henry's new courts coupled with the diminishing business of the Common Law courts menaced the domination of the Common Law.[162]

The 16th century revival of Roman law in England did not exert merely a temporary influence.[163] Although not so vitally constructive in its effects on English law as the Bologna revival introduced by Vacarius,[164] the second English revival of Roman law had the reflex effect of contributing heavily to make Equity jurisprudence more scientific, systematic, and progressive — thus indirectly aiding the Court of Chancery to win in the next century its long struggle for supremacy against the Common Law courts.[165]

[159] Among distinguished holders of the Regius professorship of Civil Law at Oxford were the 17th century Richard Zouche (supra § 274, infra § 391), and the 19th century James Bryce, later British Ambassador to the United States, now Lord Bryce (infra § 411). The famous Sir Henry Maine (infra § 411), of the same century, was at one time Regius professor of Civil Law at Cambridge.

[160] Nys, *Id.*, p. 51; Holdsworth, *Reception of Roman law in the 16th century*, 28 Law Quart. Rev., pp. 143 et seq.

[161] See supra § 380.

[162] Holdsworth, *Reception of Roman law in the 16th century*, 28 Law Quart. Rev., pp. 131–40. Still another factor making the Henrician period critical for the supremacy of the Common Law was the cessation of the **Year Books** in 1535. These medieval English reports begin with the reign of Edward I (1272–1307): see Holdsworth, *History of English law*, vol. ii, pp. 444 et seq.; Maitland, *Collected papers*, vol. i, pp. 335, 342; vol. ii, p. 13. Not until late in the second half of the century did the now familiar "Reports" begin (the reports of the 16th century are: Plowden 1571, 1578; Brook, New Cases 1571; Dyer 1585).

[163] For instance, early in the 17th century John Cowell, a Cambridge Doctor of Civil Law, wrote a book on English law arranged according to the plan of Justinian's Institutes (*Institutiones juris anglicani ad methodum Institutionum Justiniani, etc.*). See Nys, *Droit romain*, p. 63.

[164] See supra §§ 369, 377.

[165] See supra § 382 and infra § 387.

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Moreover, the 16th century revival of Roman law in England very thoroughly fortified the field of law already in possession of the Courts influenced by Roman law.[166] In the year 1511 the law doctors in London, who formed a part of the Ecclesiastical Courts or the Court of Admiralty or who practised before these tribunals, organized themselves into a society [167] — subsequently well known as **Doctors' Commons.** A half century later, in 1567, a site [168] was purchased near St. Paul's on which were erected residences for the judges and advocates and buildings for the Ecclesiastical and Admiralty Courts. This society [169] of strictly Civilians and Canonists endured for nearly 350 years until its 19th century dissolution in 1858,[170] after the suppression of the Ecclesiastical Courts and after the extension of the privilege of practising before the courts which sat at Doctors' Commons was granted to the whole English Bar.

**Notable legislation of the reigns of Henry VIII and Elizabeth.** The period of the Tudor sovereigns constitutes the most absolute monarchy ever seen in England. And yet some of the legal enactments of Henry VIII have been perpetuated to the present time: by his Statute of Wills in 1540, real estate for the first time was made freely devisable by will — an introduction into English law of a distinct principle of Roman law. Henry's famous Statute of Uses of 1535 converted equitable estates into legal holdings, and removed some more fetters from real estate. Elizabeth is best remembered by her celebrated Statutes of Fraudulent Conveyances. But § 385

[166] Supra § 380.

[167] Nys, *Droit romain*, p. 114.

[168] In Knightrider Street.

[169] In 1768 the society received a royal charter and was incorporated as the "College of the Doctors of Law exercent in the Ecclesiastical and Admiralty Courts." Another private society in which opportunities for studying and teaching the Roman law existed during the entire 16th century was Gresham College in the City of London, founded 1597 and not dissolved until 1767: Nys, *Droit romain*, p. 70.

[170] The college of doctors had some very distinguished members, among them Sir William Scott (later Lord Stowell, infra § 399), Robert Joseph Phillimore, and Travers-Twiss. Its list of members dated from 1511: for the list see Nys, *Droit romain*, pp. 140–55.

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during the whole of the 16th century the general tendency of the ancient unwritten Common Law, now very largely entirely detached from Roman law influences, was to become stationary and rigid.[171]

§ 386 **Gentili, the greatest English jurist of the 16th century.** The naturalized Englishman of Italian birth and legal education, Gentili, who taught at Oxford for many years as Regius professor of the Civil Law, had a very thorough mastery of Roman law and was a renowned Civilian as well as one of the fathers of modern international law.[172] Gentili was a Bartolist, and defended both Accursius and Bartolus against Alciat's criticisms of these Italian jurists.[173] Gentili also vigorously opposed the teachings of the great Cujas.[174] Gentili was a partisan of absolutism, and in one of his works he declared in favor of the royal prerogative claims.[175]

## IV. England from the 17th century triumph of Equity over Common Law[176] to the 19th century consolidation of the Court of Chancery and the Common Law courts by the Judicature Act of 1873: period of gradual amelioration of the ancient Common Law[177] by statutory enactments and judicial reform

§ 387 **The centuries-old contest for supremacy between Common Law and Equity settled in the 17th century by James I in**

[171] See supra § 379.

[172] See supra §§ 273, 384 note.

[173] See supra §§ 216, 219, 213, 242.

[174] See supra § 245; Nys, *Droit romain*, p. 61.

[175] Nys, *Id.*

[176] "Common Law" here means the law resting on custom or statute which was applied by tribunals other than the Court of Chancery (e.g. that part of English law administered in the courts of King's Bench, Common Pleas, Exchequer). This is the special meaning of the phrase "Common Law."

[177] "Common Law" here means the non-statutory law which is to be found in immemorial customs or judgments of courts, — the ancient unwritten English law. This is the ordinary general meaning of the term "Common Law."

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**favor of Equity.** Early in the 17th century the long rivalry § 387
between the Court of Chancery and the Common Law courts[178] came to a head. The Chancellor had issued an injunction to prevent the enforcement of a civil judgment of a Common Law court, — an ordinary and proper proceeding to-day. Lord Coke[179] was then Chief Justice of England, and very furiously disputed this right of Lord Chancellor Ellesmere. The dispute became so warm that an appeal was had to the King in person. At this juncture Lord Bacon[180] — that wonderfully learned and great English philosopher, statesman, jurist, and thorough student of Roman law — entered the lists in behalf of the jurisdiction of Chancery. The result was a triumph for Lord Bacon over the still more furious Lord Coke. The King, James I, a Scotchman with a natural and rational predilection in favor of the Roman law,[181] decided in the year 1616 in favor of the Court of Chancery.[182] The Stuart dynasty, if not deserving to be remembered for anything else, should be remembered for what James I did to assist the progress of English law.

Thereafter Equity as administered in the Court of Chancery could and did give relief after or against a judgment at law. Equity, a system of fragmentary and often disconnected portions of Roman law, became recognized as the supreme branch of English law. Its growth continued as if by a renewed impulse: many of the latest Chancery judges, says Sir Henry Maine, have left unrecorded *dicta* containing "entire texts from the Corpus Juris imbedded with their terms unaltered, though their origin is never acknowledged."[183] This is not strange, for the Court of Chancery was largely Roman to the

[178] See supra § 382.

[179] See infra § 389.

[180] See infra § 390.

[181] See supra § 359. In an address to the English Parliament in 1609, James said that he thought much of the Roman law because it is more useful in general and necessary in making treaties with foreign nations and that to cause it to disappear would be to favor barbarism in his Kingdom: Nys, *Droit romain*, p. 80.

[182] Blackstone, *Commentaries*, vol. iii, p. 54; Morris, *History of law*, p. 285; Jenks, *Hist. of Eng. law*, p. 166, Boston, 1912.

[183] *Ancient law*, 3d. Am. ed., ch. iii, p. 43.

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backbone — as Spence, the most famous historian of that court, so clearly reveals in detail.[184] But while the progress of Equity increased, the general tendency of the Common Law towards rigidity and cessation of growth [185] also increased — so much so that early in the 18th century the Common Law seemed in great danger of being destroyed by its own narrowness and rigidity.

§ 388 **Statutory improvements of the ancient Common Law during the 17th century.** A large amount of legislation affecting English private law was enacted during the 17th century. The beneficent and safeguarding principles of Habeas Corpus were made an indisputable part of the law of England by statutes [186] of Charles I and Charles II. Feudal tenures with all their oppressiveness were abolished [187] under Charles II. In the reign of the same King were enacted the famous Statute of Frauds [188] and the Statutes of Distribution.[189] By these and other Acts of Parliament the Common Law made great strides of progress during the 17th century.

§ 389 **Lord Coke, the eminent 17th century expositor of the Common Law.** About a century and a quarter after Littleton,[190] flourished Sir Edward Coke,[191] who was an eminent lawyer during the reigns of Elizabeth, James I, and Charles I. For a few years under James I he was Chief Justice. In 1628 Coke published in English his *Institutes* (the title is a Roman

[184] *See Eq. jurisdiction of Court of Chancery*, vol. i (1826).

[185] Supra §§ 385, 379.

[186] 16 Car. I (1640) c. 10, and 31 Car. II (1679) c. 2.

[187] 12 Car. II (1660) c. 24.

[188] 29 Car. II (1677) c. 3, still found to a large extent in most of the United States.

[189] 22 and 23 Car. II (1670) c. 10; 1 Jac. II (1685) c. 17.

[190] Supra § 383.

[191] Born 1522, died at Stoke Pages 1634. He was graduated from Trinity College, Cambridge, and was a member of Lincoln's Inn. His erudition and forensic skill made him the greatest practitioner of his day In 1594 he became Attorney-General, defeating Lord Bacon (infra § 390). His brutality and violence, displayed in the trial of Raleigh, are still notorious. In 1613 he was appointed Chief Justice, which office he held for three years. Later he became a member of Parliament for several years, including the first and second Parliaments of Charles I.

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one[192]), the first part of which on the law of property is also known as *Coke on Littleton*. Although Coke treated the Roman law with contempt and only in a few cases did he compare it with the Common Law,[193] yet he did make much use of Bracton's famous Roman-English treatise,[194] then nearly 400 years old. Coke's *Institutes* became the greatest and most learned exposition of the Common Law until superseded about a century and a half later by Blackstone's more polished work.[195]

**Famous 17th century English jurists acquainted with Roman law: (1) Lord Bacon.** The 17th century did not pass without producing English jurists of note, who had been affected by the revival of Roman law in England during the previous century.[196] The greatest English jurist of the 17th century is Lord Bacon,[197] whose pre-eminence as the greatest English philosopher has obscured his merits as a jurist. He attached great value to the Law of Nature, — that liberalizing doctrine of Roman jurisprudence which had been revived in late medieval and early modern times.[198] "Our law is grounded upon the Law of Nature," he states in his argument of the *Post-Nati* case.[199] § 390

Bacon contributed heavily to the progress of English law and to the supremacy of Equity over Common Law.[200] While

[192] See supra § 138.

[193] A striking instance is *Co. Littleton*, 137 b: "Herein the Common Law differeth from the Civil Law, for *libertinum ingratum leges civiles, etc.*"

[194] *De legibus, etc. Angliae*, supra § 374.

[195] Infra § 395.

[196] Supra § 384.

[197] Francis Bacon, born at London, 1561, died there 1626. He was educated at Trinity College, Cambridge, and in 1576 became a member of Gray's Inn of which he later was made Dean. He loved the Inn, and never abandoned his chambers there. In 1584 he entered Parliament. By 1594 he had made for himself a great reputation as an advocate. In 1603 James I knighted him on his coronation day. Four years later he became Solicitor-General. In 1617 he was made Lord Chancellor. Soon he was raised to the peerage as Baron Verulam, and in 1621 he was elevated again as Viscount St. Albans. See *Great jurists of the world* (vol. ii, *Cont. Leg. Hist. Series*, Boston, 1914), pp. 144–68.

[198] See supra §§ 64, 218, 252.

[199] Also called *Calvin's Case*.

[200] Supra § 387.

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Lord Chancellor, "his hundred Rules of Court finally fixed practice in Chancery, and made the Court of Chancery a definite court of justice under ordered governance, and not a mere court of conscience dealing out an erratic measure of Equity in graciously disordered fashion. . . . It is probable that he codified the existing practice, which had been reduced to order by Lord Ellesmere, and brought into an organic form by the aid of many additions the scattered orders that existed before his time. . . . It is no mean title to juridical fame finally to have settled the procedure in Equity." [201]

Bacon was the first English jurist to advocate the codification of English law. In his *Maxims of the law* he ardently urged the necessity of codification, and reminded Queen Elizabeth of Justinian who reduced the Roman laws "from infinite volumes and much repugnancy into one competent and uniform corps of law." Bacon's plea for the codification of English law is the best that has been made before or since his time. "A general amendment of the state of . . . the laws . . . to reduce them to more brevity and certainty; that the great hollowness and unsafety in assurances of lands and goods may be strengthened; the snaring penalties that lie upon many subjects removed; the execution of many profitable laws revived; the judge better directed in his sentence; the counselor better warranted in his counsel; the student eased in his reading; the contentious suitor that seeketh but vexation disarmed; and the honest suitor that seeketh but to obtain his right relieved." [202]

§391 (2) **Arthur Duck, John Selden, Richard Zouche, Lord Hale, Thomas Hobbes.** The brilliant and scholarly Arthur Duck,[203] who was educated at Oxford where he received his law doctorate, was a product of the 16th century English revival of Roman law[204]; and he has attained lasting memory by his comprehensive treatise on the use and authority of

[201] *Great jurists, etc.*, pp. 167–8.

[202] See *Great jurists, etc.*, p. 158.

[203] Born 1580, died 1649.

[204] Supra § 384.

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Roman law in modern States[205] — the earliest work on the subject published in the world. (§ 391)

John Selden[206] was an intellectual giant. His achievements as scholar, antiquarian, historian, lawyer, jurist, and statesman have been surpassd by few, not even in very modern times. His life refuted the traditional need of the lawyer to isolate himself from other than the activities of practice. As he himself said, "the proverbial assertion that Lady Common Law must lye alone never wrought with me."[207] His famous *Dissertatio ad Fletam*[208] and *Mare clausum*[209] exhibit his knowledge of Roman law and international law.

Richard Zouche[210] was another English product of the Renaissance. This versatile and recondite jurist was profoundly versed in Roman law, which he taught at one time at Oxford.[211] Later he was an Admiralty judge. Zouche is perhaps best remembered for his systematic writings on international law.[212] Another English jurist who braved the bigoted hostility of the Common lawyers of this century against the Roman law was Lord Hale.[213] In his *History of*

[205] *De usu et auctoritate juris civilis Romanorum in dominiis Christianorum*, published 1653. The part relating to England is translated by Beaver, London, 1724.

[206] Born 1584, died 1654, and is buried in the Temple Church. He was educated at Oxford, and was a member of the Inner Temple. He was a member of some of the Parliaments of the reigns of James I and his son Charles I, both of whom sent him to the Tower for his opinions. After the learned Selden was named the Selden Society, celebrated for its scholarly publications on English law. See *Great jurists of the world, etc.*, pp. 185–94; Hazeltine, *Selden as a legal historian*, 24 Harv. Law Rev., p. 105.

[207] See *Great jurists*, p. 186.

[208] Supra § 375.

[209] Published 1635. Its learning was acknowledged by Grotius (supra § 273). It is based largely on natural law and international law.

[210] See supra § 274.

[211] He became in 1620 Regius Professor of Civil Law at Oxford, being the second in succession to the great Gentili (supra § 386). Zouche's celebrated *Elementa jurisprudentiae* is largely founded on Roman law.

[212] Supra § 274.

[213] Sir Matthew Hale, born 1609, died 1676. He was a student for a while at Oxford. Later, after being led by the eminent Serjeant Glanville to embrace the legal profession, he became in 1629 a member of Lincoln's

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*the Common Law of England*, he acknowledged the debt which English law owes to the Roman.

The great philosopher Thomas Hobbes [214] was also a profound jurist. His scheme of philosophy, while repudiating scholasticism, emphasized the Law of Nature, the precepts or rules of which are to be "found out by reason" [215] and may be described as the "dictate of right reason." [216] The sources of Hobbes' derivation of the familiar Law of Nature [217] are many. He was well versed in Roman law. His acquaintance with the English Common Law was also extensive.[218] Moreover he was an intimate friend of Lord Bacon and Selden, both of whom preached the Law of Nature in their works.[219] The influence of Hobbes on English general thought lasted for two centuries — until the advent of Darwin.

§ 392 **English law transplanted in North America during the 17th and 18th centuries.** By colonization the English system of mingled Common Law and Equity spread across the Atlantic

Inn. Possessed of great mental vigor and physical strength, he soon acquired a large practice at the bar. Remaining neutral during the Commonwealth, he become a judge of the Court of Common Pleas. At the Restoration he was made Chief Baron of the Court of Exchequer and knighted. In 1671 he was promoted to the office of Chief Justice of the Court of King's Bench.

[214] Born 1588, died 1679. He was educated at Oxford, taking his bachelor's degree in 1607. Later he made several journeys of long duration to the Continent, where he became acquainted with Galileo, Descartes, and other prominent thinkers of his age. In 1640 to escape the Commonwealth he fled to Paris, not returning to England until 1651. Then he submitted to Cromwell. After the Restoration, Charles II, whose tutor Hobbes had been at one time during his long exile, treated him with favor. See *Great jurists*, pp. 195–219.

[215] *Leviathan*, part i, ch. 14.

[216] *Liberty*, vol. ii, p. 16.

[217] Supra §§ 64, 218, 252.

[218] Hobbes quotes from Bracton (supra § 374 — whom he describes as "the most authentic author of the Common Law"), and from Fleta (supra § 375), and employs easily Coke's *Institutes* (supra § 388). He evidently studied Plowden's Reports of Cases. He also uses Christopher St. Germain's **Doctor and student** (published 1518), one of the earliest fruits of the 16th century English reception of Roman law — for it clearly and succinctly sets forth the Law of Nature.

[219] See supra §§ 389 and this very § 391 supra.

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into America. The Common Law of the 17th and the early 18th centuries — so largely Tudor in character — was introduced into the various English colonies, afterwards the United States. And the peculiarities of Tudor Common Law still survive in the United States to a larger extent than is commonly recognized. "American courts retain much of the Tudor indefiniteness. . . . They are guided to an extent unknown now in England by questions of policy and expediency." [220] Only a few years before the commencement of the American Revolution of 1775 which resulted in the separation of the colonies from the mother country, France had been deprived of her Canadian possessions by England, and the English Common Law was introduced into British North America,[221] now principally called the Dominion of Canada.[222]

**Judicial reform of English law, chiefly by Equity, during the 18th century.** § 393 During the 18th century there was scarcely any English legislation concerning the private law. Nearly all of the few statutes that were passed have left no permanent impressions on English law. But that century was not stagnant: it witnessed many law reforms by the judicial action of the courts, especially the Court of Chancery.

During the century following the Restoration of Charles II a long line of specialist Chancellors and other Chancery officials [223] developed many equitable doctrines, which adjusted the private law of England to the progress of social requirements.[224] For instance, the law of mortgages was improved by establishing the doctrines of tacking and consolidation; the law of contract was fortified by the new remedy of specific performance; the law of trusts was further developed so as to better protect the interests of the trustee and the beneficiary of the trust; the doctrine of the separate estate of a married woman was elaborated; the acquisition of a large

[220] See McIlwain, *The High Court of Parliament* (1911).

[221] Except in Quebec, — supra § 262.

[222] The British North American colony of Newfoundland is not a part of the Dominion of Canada.

[223] Such as the Masters of the Rolls, who had certain judicial functions.

[224] See Jenks, *History of English law*, pp. 207–36.

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share of the administration of the assets of deceased persons — which new jurisdiction carried over into Chancery from the ecclesiastical courts much Roman law.[225] Credit for judicial reform should not be given to the Court of Chancery exclusively: the labors of Lord Holt and Lord Mansfield in the Common Law court of King's Bench assisted in no small measure the progress of English law.[226]

§ 394 **English law in the first half of the 18th century: Lord Holt and Lord Hardwicke.** During the first decade of the 18th century the Chief Justice of the highest Common Law court [227] was the able and learned Lord Holt.[228] In the famous case of *Coggs* v. *Bernard* [229] Lord Holt drew upon his knowledge of Roman law to amplify and systematize the English law of bailments first set forth by Bracton [230] five centuries and a half earlier. Lord Holt laid some of the foundations of the 18th century English mercantile law, and prepared the way for the great labors of Lord Mansfield which began a half century later.[231]

Lord Hardwicke [232] was a most distinguished Lord Chancellor, whose consummate ability as a Chancery judge, especially his great power of generalization which had been

[225] See Jenks, *Id.*, p. 230. For instance the doctrine of marshaling, although not limited to the assets of decedents, is an application of the Roman law subrogation.

[226] See infra §§ 394, 397.

[227] King's or Queen's Bench.

[228] John Holt, born 1642, died 1710. He was educated at Oriel, Oxford. He later became a member of Gray's Inn, and was called to the Bar in 1663. He was "an ardent supporter of civil and religious liberty." Knighted in 1685, he was appointed Chief Justice four years later. He declined the Lord Chancellorship in 1700. See Alward, *Lord Holt*, 33 Canadian Law Times, p. 450.

[229] Lord Raymond's Reports, p. 909 (1703).

[230] Supra § 374.

[231] Infra § 397.

[232] Philip Yorke was born 1690 at Dover, and died 1764 at London. He entered the Middle Temple in 1708. His rise at the Bar was extremely rapid. In 1724 he became Attorney-General. Nine years later he was made Chief Justice of King's Bench with the title of Lord Hardwicke. After serving four years, in 1737 he became Lord Chancellor, which great office he held for nearly twenty years.

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developed by his studies in Roman law, contributed heavily to the progress of Equity jurisprudence — for over a century the paramount system of English law.[233]

**Blackstone, the renowned 18th century expositor of the Common Law.** Sir William Blackstone [234] published in 1765 his masterly *Commentaries on the laws of England*, the last systematic exposition of the English Common Law.[235] He seems to have been somewhat influenced, in arranging the plan of his treatise, by the form of Justinian's Institutes.[236] Moreover Blackstone makes frequent citations from the Dutch and German publicists, such as Grotius and Pufendorf,[237] whose works either entirely composed of or colored by Roman law doctrines were then very influential in England, especially in the Court of Chancery.[238] Blackstone deserves the highest praise for openly including among "the originals of our law . . . the rules of the Roman law either left here in the days of Papinian or imported by Vacarius and his followers." [239] Blackstone constantly uses the Roman law as a standard of comparison with English law. And he frequently assigns to the Civil Law the origin of an English rule.[240] §395

**Present authority of Blackstone's Commentaries in the United States.** In England as well as in the United States Blackstone's work is now far from being fully authoritative, owing to the fact that the old Common Law was practically §396

[233] See supra § 387.

[234] Born at London 1723, died 1780. He was educated at Pembroke College, Oxford. In 1741 he entered the Middle Temple. In 1758 he was elected to the newly founded Vinerian professorship of English law at Oxford, where his Commentaries were given. Later he was elected to Parliament. In 1770 he became a judge of the Court of Common Pleas.

[235] The Common Law was completely revolutionized in the 19th century. Hence the *Commentaries* of Stephen (England) and Kent (United States), although reflective of the influence of Blackstone's monumental work, do not belong to the era of the Common Law when statutory changes were rare.

[236] Supra § 138.

[237] Supra §§ 266, 273, 274, 329.

[238] See for instance *Commentaries*, vol. i, pp. 61, 259, 447.

[239] Blackstone, *Commentaries*, vol. i, p. 35.

[240] These citations have been collected by Scrutton, in his *Roman law and the law of England*, ch. ix.

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revolutionized by the rapidly progressive civilization of the 19th century, to respond to which the Common Law had to be supplemented and transformed. In the United States, book I, the first half of book II, and all of books III and IV of Blackstone's Commentaries are either discarded or obsolete. The second half of book II, on the law of personal property, alone out of Blackstone's work, remains good law to-day; and the reason for this is that Blackstone repeats Bracton,[241] who took bodily from the Justinianean codification the English law of personal property.

§ 397 **English law in the second half of the 18th century: Lord Mansfield expanded the Common Law by adopting the principles of the Law Merchant.** The work of bettering the Common Law, inaugurated by Lord Holt,[242] was continued with great success by the famous Lord Mansfield,[243] who rescued the Common Law from its long-standing tendency to cease developing and to become stationary. With the advent, in 1756, of Lord Mansfield as Chief Justice of the highest Common Law court, a new era for the betterment of English law began. During his long tenure of the bench — for thirty-two years — the ancient Common Law itself became quietly grafted with a spirit of progress.

To Lord Mansfield more than to any one else belongs the glory of having incorporated in English jurisprudence the so-called Law Merchant or mercantile law.[244] With consummate skill he introduced into the Common Law a scientific body of commercial law,[245] modeled especially along the lines of the then new Roman-French maritime and commercial

[241] Supra § 374.

[242] Supra § 394.

[243] William Murray, born 1705 at Scone, Scotland, died 1793. Educated at Christ Church, Oxford, he entered Lincoln's Inn. He was very successful at the Bar. In 1754 he was made Attorney-General, and in 1756 was appointed Chief Justice of King's Bench, being raised at the same time to the peerage as Baron Mansfield. Later he persistently declined the Lord Chancellorship. During the Gordon Riots his London house in Bloomsbury was wrecked by a mob which disliked a jury charge of his. He retired to private life in 1788.

[244] This work had been inaugurated by Lord Holt, — supra § 394.

[245] See *Luke* v. *Lyde*, 2 Burrows Rep., p. 882 (1760).

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ordinances of Louis XIV and Louis XV.[246] These salutary innovations rendered the English Common Law adequate to meet the commercial development of that country, which began early in the nineteenth century. No other judge, except perhaps Lord Bacon,[247] has done more for English law than Lord Mansfield.

**English law transplanted in India, Australia, New Zealand, and South Africa during the 18th and 19th centuries.** A diffusion of English law to Asia began in the latter half of the 18th century. And to-day the law of India as to property and contractual rights, criminal law, criminal and civil procedure, and evidence is mainly English.[248] § 398

In the 19th century there was an extension of English law to Australia, New Zealand, Ceylon, South Africa, and South American British Guiana. Australia and New Zealand were virgin territories for English law. But in South Africa, Ceylon, and Guiana, English law encountered the older established Roman-Dutch law,[249] which still persists in these countries to a greater or less degree, although now affected by the influence of English law.

**Lord Stowell, the great 19th century Admiralty judge.** What Lord Mansfield did for the Common Law,[250] Lord Stowell[251] § 399

[246] See supra §§ 251, 370.

[247] Supra § 389.

[248] As to the Anglo-Indian codes, see infra § 404. In regard to the law of Mohammedan India, see supra § 192.

[249] Supra §§ 268–71.

[250] Supra § 397.

[251] William Scott, born 1745 near Newcastle, died 1836. His brother John was also a distinguished lawyer, who later became Lord Eldon, head of the Court of Chancery. William Scott was educated at Corpus Christi, Oxford. He later entered the Middle Temple. But he still continued his academic career at Oxford, being appointed Camden Professor of Ancient History in 1774. He took the degree of D.C.L. in 1779, and then entered Doctors' Commons (supra § 384). His rise at the Ecclesiastical and Admiralty Bar was rapid. In 1788 he was made a judge of the Consistory Court, and was knighted. Ten years later he was appointed judge of the High Court of Admiralty. At the coronation of George IV in 1821, he was elevated to the peerage as Baron Stowell. He retired the same year as Consistory judge, and six years later as Admiralty judge. See *Great jurists of the world, etc.*, pp. 517–31.

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did for Admiralty.[252] But Lord Stowell's development and introduction of the law of prize has benefited the international law of the entire world as well as the law of England, while Lord Mansfield's labors have been valid or beneficial for English law countries only. Several of Lord Stowell's ecclesiastical decisions are still leading cases. All of them display his remarkable lucidity of expression and his extreme familiarity with Roman and Canon Law.[253] The acumen and discernment which Lord Stowell displayed in constructing the laws of commerce in war were in no small measure developed by his wide acquaintance with Roman jurisprudence and classical culture.

§ 400 **Statutory improvements of English law during the first half of the 19th century.** The legislative blank of the 18th century [254] in English legal history did not extend very far into the next century. The era of judicial reform by the Courts [255] was followed by numerous statutory enactments leading to further progress of English private law. Some of these, like the Prescription Act of 1832 or the Marriage Act of 1835, imported or definitely settled certain Roman law principles in the law of England. The list of statutory improvements of English law during the first half of the 19th century is a long one.[256] But among those deserving a brief notice are the Uniformity of Process Act of 1832; the Civil Procedure Act of 1833; the Wills Act of 1837; the Company Acts of 1844–1845 as to corporations; Lord Campbell's famous Act of 1846; the Common Law Procedure Acts of 1852, 1854, and 1860; and the Chancery Amendment Acts of 1852, 1858. This last statute foreshadowed the "fusion" of the Judicature Acts passed two decades later.[257]

[252] As to the Romanization of Admiralty, see supra § 380.

[253] See for instance *Dalrymple* v. *Dalrymple*, 2 Haggard's Reports, p. 54; *Evans* v. *Evans*, 1 Hagg. 35.

[254] Supra § 393.

[255] *Id.*

[256] See Jenks, *History of English law*, pp. 270, 288, 300, 307, 354, 361.

[257] See infra § 401.

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## V. Modern English law in England, the British Empire and the United States of America: period of partial codification of law

**Consolidation of all the courts of England into one supreme court by the Judicature Act of 1873; fusion, so far as possible, of Common Law[258] and Equity.** By the Judicature Act of 1873 the historically independent Common Law courts and the Court of Chancery were fused into one supreme court.[259] All the old English courts[260] were abolished. At the head of the new tribunal was placed the Lord Chancellor, the next in rank to him being the Chief Justice,[261] now called the Chief Justice of England. Provision was made for the establishment of a uniform system of pleading and procedure[262] for the various branches into which the new tribunal should be divided.[263] It was also provided that wherever the rules of Common Law and of Chancery should conflict, the rules of the latter — Equity — should prevail. The victory in England of Equity over Common Law is now complete. §401

[258] See supra Period IV of English legal history, note on special meaning of "Common Law." This Period IV follows immediately after § 386.

[259] 36 & 37 Victoria, c. 66. See also 38 & 39 Victoria c. 77 and the numerous subsequent amending acts, including those of 1899, 1902, 1909, 1910.

[260] Court of King's Bench, Court of Common Pleas, and the Exchequer, Court of Chancery, the Court of Probate, and the Court of Divorce and Matrimonial Causes which had succeeded in 1857 to these portions of the jurisdiction of the ancient ecclesiastical courts: see 20 & 21 Victoria c. 77, 85.

[261] Of King's Bench.

[262] This project had been urged successfully about thirty years earlier in the **United States** by the American law reformer, David Dudley Field (infra §§ 402, 406). The basis of his New York code of civil procedure, enacted in 1848, is the abolition of the separate procedure of law and equity and their fusion in a single action.

[263] The new tribunal was authorized to subdivide itself into various divisions for the transaction of the various classes of business. And it now consists of the Chancery Division, the King's Bench (Common Law) Division, and the Probate, Divorce, and Admiralty Division, — the old familiar names being used to designate the various branches of the tribunal. There is also a Court of Appeals.

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§ 402 **How the English law parts of the British Empire and the United States made legal progress during the 19th century.** The law of these countries as introduced from England has been improved and refined by reiterating the supremacy of Equity in the Common Law. This work has been performed by a host of statutes and judicial decisions, very many of which contain returns to Roman law doctrines. Lord Mansfield's commercial law [264] has been largely re-enacted in the British overseas dominions and the United States. By these expedients the English law States of the new worlds have kept abreast with modern civilization.

In the United States the movement for the abolition of the old separate Law and Equity procedure and their fusion in a single action began earlier than in England,[265] being inaugurated by that brilliant law reformer and advocate of codification, David Dudley Field. His project was realized in the New York code of civil procedure of 1848. This, and the code of the same state on criminal procedure [266] also largely due to Field, have exerted a large influence on the law of other American states.[267]

§ 403 **Extent of the Romanization of English and American law.** English private law, like all other modern legal systems, has been molded by Roman law. To this extent English jurisprudence and Continental European jurisprudence with its allied legal systems coincide in a common origin, although in the latter the Roman element is more markedly predominating. English law is indeed Roman-English law, even if the Roman law coloring is not so clearly discernible or is often disguised, as compared with the modern law of France, Germany, or Spanish America. The doctrines of the Justinianean codification form no small part of the jurisprudence of English-

[264] Supra § 397.

[265] See supra § 401, note; infra § 404, note.

[266] The complete New York code of civil and criminal procedure was adopted in 1850.

[267] The code of civil procedure has been substantially adopted in twenty-four states, and the criminal in eighteen states. The code of civil procedure undoubtedly advanced considerably the movement in England for the reform of procedure (supra § 401).

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speaking peoples inhabiting territories more extensive in area than three times the size of all Europe. (§ 403)

The Romanization of Anglo-American law has not been small: a summary of specific contributions from Roman to English and American law reveals the great indebtedness of our law to the law of Rome. Most of the basic principles of the Anglo-American law of Admiralty, Wills, Successions, Obligations, Contracts, Easements, Liens, Mortgages, Adverse Possession, Corporations, Judgments, and Evidence come from the survival or revival of Roman law in English law. The fundamental conceptions of Habeas Corpus and Trial by Jury as well as many principles of the law of Torts are of Roman origin. That dearly cherished principle and familiar palladium of English and American liberty, "every man's house is his castle," is not of Anglo-Saxon, but of Roman, origin. It is first found in the era of the Roman Republic, when the barbarians in Britain or Germany had no houses worthy of the name: Digest 2, 4, 18 expressly prohibits forcing a man from his house to drag him to court, thus reaffirming Cicero's statement of the same prohibition. Finally, it is interesting to note that our Reports of cases resemble somewhat in form the *Responsa prudentium* as contained in the Digest.[268]

But the other two features of the world-mission of Roman law since Justinian have not yet been realized in English law, although already realized everywhere else in the civilized world. English law lacks complete uniformity for the entire State in all English law countries, and it has not yet been put into the permanent and salutory form of a codification. For the want of these two betterments English law remains in a backward condition of development; and, until these have been accomplished, it must occupy an inferior place in the world's jurisprudence — to the great detriment of English law countries. The reason why Great Britain, those parts of the British Empire guided by English law, and the United States still live under an unwritten customary law is due to the accidents of history, the effects of which are now

[268] See supra §§ 68, 137. There is also some resemblance in form between English statutes and the *Constitutiones* of the Roman Emperors (supra § 115).

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passing away. It is to be hoped that, before the 20th century has closed, Great Britain and the United States will improve their law by complete codifications uniform for each country, — thus making the form of their law similar to that of all the rest of the civilized world.

§ 404 **Partial codifications of law in Great Britain and the English law parts of the British Empire.** When Jeremy Bentham[269] published in 1789 his *Principles of morals and legislation*,[270] which among other things contained his scheme for a Civil Code, the notion of a "codification"[271] became embodied in English legal thought to remain until accomplished. Lord Bacon's ardently cherished purpose[272] was at last revived. Bentham's proposals subsequently received much assistance of an indirect nature by the labors of John Austin,[273] whose legal philosophy emphasized the imperative necessity of formulating accurate classifications and distinctions in English law.[274] And the improvement of English law in the latter half of the 19th century by means of partial codifications is partly attributable to the influence of Bentham and Austin.

[269] Born 1748, died 1832. For his life, see supra § 274. The history of English law in the 19th century reveals many results of Bentham's legal teachings: the fusion of Law and Equity in 1873 (supra § 401) appears to have had its source in this great man; English criminal law, and criminal and civil procedure have benefited by his influence. Furthermore all subsequent attempts to reduce International law to a code may be attributed to his suggestions. The proposal of Bentham, addressed in 1816 to President Madison, to prepare a complete code of law for the United States, is famous. On his declination, Bentham made the proposal to several state Governors. But his attempts were a failure: the unwritten American Common Law was thought to be good enough as it was.

[270] In 1789.

[271] Bentham was the first to use this word.

[272] Supra § 390.

[273] Born 1790, died 1859. He was at one time a lecturer at University College. To prepare himself for his work there, he went to Germany to study how law was taught at the German universities, and resided at Heidelberg and at Bonn, meeting Savigny, Mittermaier (supra §§ 346, 351) and other distinguished German jurists as intimate friends.

[274] That brilliant English civilian, Sheldon Amos, reiterated this necessity of accurate classification in his *English code*, published in 1873, although Amos was opposed to codifying English law topic by topic, and advocated the enactment of a general code.

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In fact these codifications have been called "Benthamistic" (§ 404) because of their piecemeal character — in other words, each is a *particular* code of some *topic* [275] of law.

Sir Frederick Pollock's characterization of English law as "chaos, tempered by Fisher's *Digest*," [276] is a vivid picture of the condition of the centuries-old unwritten Common Law of England in all its pristine glory. The uncodified English law was embedded in a vast maze of statutes and reports of decisions of courts. Lack of uniformity, much confusion, and many irreconcilable contraries characterized English law. Something had to be done to improve this miserable situation. And relief was sought by reducing English law topic by topic to codification, — thus making it at once not only certain but also responsive to modern needs. The inauguration of the 19th century efforts to codify English law began — curiously enough — not in England, but in **British India.**[277] There it was first shown to the English-speaking world that English law or law of English origin is codifiable.

The commencement of the work of codifying Anglo-Indian law and its first fruits — **the Indian Penal Code** — are inseparably connected with that great Englishman illustrious not only for his remarkable literary genius but also as a statesman, Thomas Babington Macaulay, afterwards famous for his *History of England.* In 1834 a commission, of which Macaulay was the most influential member, was appointed [278] to investigate the wisdom of a general codification of Indian law. In 1837 the commission reported favorably, and submitted a draft of a code of criminal law for India. This penal code became the celebrated Indian Penal

[275] But the Roman and Modern Codes are general: they cover *the whole field* of private law, criminal law, etc.

[276] *Essays*, p. 238.

[277] The **United States** may be regarded as a close second, if not first: while Macaulay's commission reported their draft of a criminal code in 1837, it was not enacted until 1860 (see infra this § 404); but the New York code of civil procedure, largely the work of the famous David Dudley Field (infra § 406), was enacted in 1848. The New York code, however, was easier to frame than the Indian Penal Code, for the former is adjudicative law, while the latter is substantive law.

[278] 3 & 4 William IV, c. 85.

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(§ 404) Code in 1860,[279] twenty-two years after Macaulay left India and one year after Lord Macaulay's death. In their preface Macaulay and the commissioners acknowledge assistance for their labors from the French and other codes.[280] Macaulay was far in advance of his age in his desire for legal progress and in his freedom from insular prejudice, — he was willing to go to the non-British modern codes for help to frame an Anglo-Indian code which should be certain and uniform.

The Indian Penal Code [281] is the most important and successful of the Indian codified legislation. This code seeks to define every crime with precision; whereas in English law there are no authoritative definitions of such crimes as murder, manslaughter, theft, assault, and kindred offenses.[282] That most learned expositor of the English criminal law and evidence, Sir James Fitzjames Stephen, said of the Indian Penal Code that "it reproduces in a concise and even beautiful form the spirit of the law of England in a compass which by comparison with the original may be regarded as almost absurdly small. The Indian Penal Code is . . . to the French Code Pénal what a finished picture is to a sketch. It is simpler and better expressed than Livingston's code of Louisiana, and its practical success has been complete." [283]

Following the success of the penal code, various other Anglo-Indian codes of substantive and adjective law have since been enacted, so that now the law of British India, civil as well as criminal, is very largely codified and uniform. The most important of these later Indian codes are those which cover the subjects of Successions,[284] Contracts,[285] Evidence,[285] Prescription,[286] Negotiable Instruments,[287] Transfer

[279] Amended in 1861, 1870, 1872, 1873, 1882.

[280] Supra §§ 254, 257, 264.

[281] In its present form the Indian Penal Code of 1860, without detracting at all from Macaulay's creative skill as a jurist, exhibits also the work of many other experienced lawyers.

[282] See Markby, *Indian law* (in 14 *Encycl. Britan.*[11], p. 434.)

[283] 17 *Encycl. Britan.*[11], p. 194.

[284] Enacted in 1865.

[285] Enacted in 1872.

[286] Enacted in 1877.

[287] Enacted in 1881.

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of Property,[288] Easements,[288] Trusts,[288] Civil Procedure,[288] and Criminal Procedure.[288] So highly are the codes of criminal and civil procedure regarded, that these have been made applicable also to British Zanzibar in Africa.[289] (§ 404)

But the greatest external of the Anglo-Indian codes was the decisive impetus these gave to the movement for codifying topic by topic the law of the mother country, England. To the success of the Indian codes is largely due the well-known series of progressive codifications of the law of England framed late in the 19th century. The pioneer work is that of the famous Sir James Fitzjames Stephen, who, at the instigation of Lord Coleridge, then Attorney-General, finished in 1873 a complete systematic code of the English law of Evidence "drawn on the model of the Indian act."[290] Although this masterly draft of Stephen failed to become a statute, it served him well three years later as a basis for his celebrated *Digest of the law of evidence*.[291] Six years later, in 1882, appeared the first codifying statute ever enacted in England, the Bills of Exchange Act. It was followed by other partial codifications, such as the Partnership Act of 1890, the Sales of Goods Act of 1893, and the Consolidation Act of 1908 codifying the law of Companies.[292]

And in their turn the partial codifications of the law of England have exerted an enormous influence in the other English law countries of the British Empire. The British

[288] Enacted in 1882. Other important codes are: The "Court Fees Act" of 1870, "Oaths Act" of 1873, "Specific Relief Act" of 1877, "Registration Act" of 1877, "Stamp Act" of 1879, "Suits Valuation Act" of 1887, "Debtors Act" of 1888: see Preface of Stokes, *Anglo-Indian codes*, 2 vols. and supplement, Oxford, 1887–1891.

[289] See Stokes, *Id.*, vol. ii, pp. 373, 810.

[290] *Digest of Evidence*, Introduction.

[291] This is the best treatise of a summary nature ever written on that diffuse and difficult subject. It has passed through numerous English and American editions, the American edition of Professor George E. Beers (1902) being annotated by the law of many American states.

[292] I.e. corporations, associations, etc. Furthermore, other codifications are being constantly suggested: for instance in the year 1910 it was announced in the House of Lords by the Lord Chancellor that he and other jurists were engaged in an attempt to codify the criminal law of England, — Law Notes, May, 1910, p. 36.

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overseas dominions have manifested a similar desire for unity of law and its attendant effectiveness for political unity. Consequently Australia, Canada, British Guiana, South Africa, and other British colonies have enacted statutes which adopt or follow the partial codifications of the mother country.[293] And the influence of the piecemeal codifications of the law of England has spread also to the United States.[294]

§ 405 **One code for all the United States the only remedy to cure American law of its confusion and uncertainty.**[295] That English law country which to-day most needs a codified private law which shall be uniform from one border to another is the United States. Why should 91,000,000[296] Americans longer endure the miserable confusion of 48 different varieties of state "Common Law"[297] — on which is superimposed that other variety known as "federal Common Law"[298] — all of

[293] For instance, the English **Bills of Exchange Act** is now adopted by Australia (all states), New Zealand, South Africa (all provinces), and Newfoundland, it is the basis of the Canadian (Rev. Statutes Canada, 1906, ch. 119), and has been made the law of most of the smaller British colonies; the English **Partnership Act** is now adopted in Australia (all states), New Zealand, and is law in part of Canada, in Bermuda, the Bahamas, and British Guiana; the English **Sales of Goods Act** is now adopted by Australia (all states) and New Zealand, and is law in part of Canada, in Ceylon, Hong-Kong, Gibraltar, Jamaica, and Trinidad; and the English **Consolidation Act** (**Companies**) is followed almost verbatim in statutes of Transvaal and British Columbia. Canada has also adopted the Imperial Wills Act. At the Imperial Conference of 1911, resolutions were passed advocating still greater uniformity of laws throughout the British Empire, especially as to Copyright, Patents, Trademarks, and Companies. See Hart, *The uniformity of British law*, 32 Canadian Law Times, p. 167 (where the various British overseas statutes are cited).

[294] See infra §§ 406, 408.

[295] A part of this was published by the author in 25 Green Bag, p. 460, November, 1913, under the same title as the caption of this section, and is reprinted by permission.

[296] U. S. Census of 1910: our population will soon be 100,000,000.

[297] "Common Law" here means that body of law of English origin which has been developed and now obtains in each of the several states, etc., and which is partly written (statutory) and partly derived from the decrees or judgments of courts (unwritten).

[298] The special significance of "federal Common Law" is that body of legal principles and precedents derived from the decrees or judgments of the various federal courts of the United States.

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which (except in two states [299]) are largely but unwritten [300] law located in a tangled jungle of multitudinous customs, reports of decisions, and digests of these? The uncertainty of American law, its confusion, its startling bulkiness, redundancy, and prolixity, increased annually by some 20,000 new statutes and thousands of new reported cases, make our law to-day the most intolerable in the world and perhaps the worst ever known to human history — all because its form and lack of uniformity are so objectionably bad. (§ 405)

A French or German jurist who should come to the United States to prosecute legal research in American law would be lost almost hopelessly in the maze of hundreds and thousands of unsystematized decisions [301] without any possibility of systematizing or standardizing them himself, and could not discover one law for all the United States. As it is, American lawyers are finding it almost impossible to advise their clients competently — they perforce resort too frequently to guessing at the law. No wonder our courts are clogged, and the justice of American law is often excessively delayed and is in danger of becoming a by-word to the civilized world. But there is a way out for our America just as there was for Rome, France, Germany, and all the other non-English countries. *The logical succession to multitudinous precedents is codification.* Rome was at one time almost as sorely harassed as we are: then came the final codification of her law by Justinian.[302] What France and Germany did,[303] we can do. And we have

[299] Louisiana and California.

[300] Black, *Law dictionary*[2] (1910), p. 1188, defines American *unwritten* law as "all that portion of the law, observed and administered in the courts, which has not been enacted . . in the form of a statute, . . including the unenacted portions of the Common Law, general and particular customs having the force of law, and the rules, principles, and maxims established by judicial precedents or the successive like decisions of courts."

[301] It has been computed that from 1658 to 1906 there were reported 750,000 cases, — during the last ten years at the rate of 25,000 annually. In Chancellor Kent's time (infra § 412) there were about 200 volumes of American and 650 of English reports; now there are surely 10,000 volumes of American and 6,000 of English law reports. See 15 Law Notes p. 224, March, 1912.

[302] Supra §§ 135, 137.

[303] Supra §§ 254, 343, 344.

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their modern codes to help us, whereas they had to go back across the centuries to Justinian's code for help.

§406 **Objections against one and only one system of codified private law for the entire United States: Objection 1 — Anglo-American law is essentially non-codifiable.** The arguments against the formation and inauguration of a *federal* code of private law uniform throughout the United States, which shall abrogate the private law of 48 states, are broadly based on two grounds: that American law cannot be codified, and that a federal codified jurisprudence would damage if not destroy the integrity of the several states.

The argument that Anglo-American law is essentially non-codifiable constituted for many years the citadel of the opponents of codification in England and the United States. But this position is no longer impregnable, if it ever was. In every country, to discourage codification, the cry has been raised "Let well enough alone." It has been heard in more than one century: Rome, Paris, Berlin have listened to it. To "let well enough alone" is a fine principle of conduct *only* when nothing better is obtainable. If uncertainty, diversity, and diffuseness — the hallmarks of present American and English law — denote a jurisprudence needing no improvement, then wretched will be the future of American law. On the contrary, it is this long-continued lamentable condition itself of American law which is responsible for the present movement, now well under way, toward codification.

Lord Macaulay, although referring to Anglo-Indian law and the then pressing necessity for its codification, very clearly pointed out the path of future progress for English and American law when he said: "Our purpose is simply this — uniformity when you can have it; diversity when you must have it; but in all cases certainty."[304] The idea of a codified jurisprudence as applicable to English and American law did not find a ready reception when first broached; it savored perhaps too much of inferring that English law could be treated for codification purposes like any other law. English and American insularity became prejudiced against codi-

[304] See Stokes, *Anglo-Indian codes* (reverse of title page of vol. i.).

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fication; it has fiercely assailed codification — and the fighting is not yet over. But while the opponents of codification have been reiterating and fulminating that English law cannot and should not be codified, an examination of recent events and present tendencies in English law on both sides of the Atlantic and elsewhere will reveal the great fact that codification of English law is already being gradually accomplished — in other words, the citadel of the opponents of codification is now undermined and no longer tenable. (§ 406)

The glory of first showing to the world that English law can be codified belongs to English jurists.[305] Included in the Acts of the Governor-General of British India are the world-famous **Anglo-Indian codes** of criminal and civil law uniform and applicable for all India.[306] These constitute irrefutable facts, proof positive of the possibility of codifying English law. These Indian codes, by their very existence, completely upset the argument that English law wherever found is inherently non-codifiable; and pointed to the inevitable conclusion that, if it is possible to codify Anglo-Indian law, then the law of England, all British colonial law such as the Anglo-Canadian or Anglo-Australian, and the Anglo-American law of the United States, are also susceptible of codification, given the right men to do it — trained jurists familiar not only with their native law but also with the Roman law and the Modern Codes, and not politicians with a smattering of legal knowledge. In 1865 the New York codification commission, presided over by that eminent and devoted advocate of the codification of American law **David Dudley Field,**[307] when

[305] Perhaps this honor may be shared with an American jurist, the famous David Dudley Field. The New York code of civil procedure, which he fathered, was enacted in 1848, twelve years before the Indian Penal Code of 1860. But the draft of the Indian Code — and it is far more difficult to frame a code of *substantive* law — was reported eleven years before the New York code of adjective law was reported.

[306] See supra § 404.

[307] Born at Haddam, Connecticut, in 1805, and died at New York City in 1894. After graduating from Williams College in 1825, he was admitted to the New York Bar in 1828, where he soon rose to eminence. In 1836 he went to Europe to study the courts of England and the codes of France and other countries, for he had become thoroughly convinced that American

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they completed their code of the entire civil law of New York, clearly proved that American law can be codified. And this code, although it failed of enactment owing to the hostile attitude of the New York Bar, has to a large extent been adopted in several western states.[308]

Enormous was the influence of the Indian codes on the law of England: to the success of these codes is largely due the present numerous partial codifications of the law of England, which in their turn have been copied all over the British Empire, especially by Canada and Australia.[309] The English particular codifications of special legal topics by statutory enactment are now no longer strange: on the contrary this plan has been pursued in the United States — the "uniform" Negotiable Instruments, Practice, and Sales Acts bear witness to the success of the American adoption of this British method of codification.[310]

§407 **Objection 2 — A republic cannot codify its law: to do this necessitates a monarchy or an empire.** This is a weak argument, and is easily refuted. If it be argued that the codes of France and Germany, etc., were made possible only by

Common Law procedure ought to be unified and codified. His ideas were realized in the New York code of civil procedure enacted in 1848. Two years later a complete code of civil and criminal procedure was enacted, the work being largely Field's. He then advocated and took up the work of making a systematic code of the entire private law of New York state. This codification, finished in 1865, failed of adoption except only in small part, but was adopted with but few changes by other states. Field was also an ardent advocate of the codification of international law, preparing a draft for an international law code in 1872.

[308] Field's Civil Code has served as a model for subsequent codes in other states, particularly California, Idaho, Montana, North Dakota, and South Dakota. It is regrettable that Field's commission did not make a thorough use of the Louisiana Civil Code (supra §264), which is characterized by insistence on accurate classification.

[309] Supra §404.

[310] It should not be overlooked that the publications of vast encyclopedic treatises of law, like Lord Halsbury's *Laws of England* and the *Cyclopedia of American and English law* are really stepping stones to a complete codification of law in both countries. And such works as Jenks' *Digest of English civil law* show that it is also possible to make a systematic codification in brief compass.

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the power of a monarchial government, and that Napoleon[311] and William II are reminiscent in this respect of Justinian, there is one irrefutable reply: has not Switzerland, a republic — and a federated republic also — successfully codified her private law?[312]

A lesson in experience can also be taken from our Spanish American sister republics — especially Argentina and Chile — which, although republics, have excellent codes of law uniform for each country. Finally, did not Louisiana codify her law most excellently soon after her admission to our American Union, and have not many of our American states already codified parts of their own law — for example the Negotiable Instruments Act? The argument that a republic cannot codify its law falls to the ground from its own weight.

§ 408 **Objection 3 — Uniformity of American law can be obtained by making state legislation uniform: there is no necessity for a uniform codified federal system of private law.** This objection recognizes by implication the value of a codified American law, even if it is attempted to do this piecemeal: for a code is a promulgated collection of laws scientifically arranged[313] and may comprise an incomplete as well as a complete system of positive law. In other words, codes may be partial as well as complete.

The various Uniform State Acts adopted by many American states are of the nature of partial codes. If each branch or topic of the law shall be reduced to writing, eventually all our law will thus achieve full codification. Perhaps then the lack of coherence due to this piecemeal process would be remedied by welding a true code out of these many parts of a code. This method of codifying law a part at a time originated, as has been shown, in British India, whence it spread to England and America.[314] It is the easiest — but not the best — way to achieve a full codification, because the

[311] Napoleon was First Consul, not Emperor, when the Code Civil was completed; but the Empire quickly followed.

[312] Supra §§ 358.

[313] See Black, *Law dictionary*[2], p. 211, "Code."

[314] Supra §§ 404, 406.

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(§ 408) movement is along the line of least resistance, and deals with difficulties of only one legal topic at a time.

The prospect of uniformity of state laws in the United States looks very promising on the surface. Sanctioned by the American Bar Association and ably executed by the Conference of Commissioners on Uniform State Laws, the promotion of uniformity of state legislation by practically partial codifications has been greatly advanced during the past twenty years. And at the present time nearly all the American states and territories have at least one of these Uniform Acts, the earliest of which is the Negotiable Instruments Act.[315] "And the outlook for continued strength of the movement for uniformity is exceedingly encouraging," declares a former President of the Conference of Commissioners on Uniform State Laws.[316] The case for uniformity of American law via state legislation and codification is apparently won, — certainly from a superficial point of view.

But what is the meaning of the very next sentence of his article by this same President of the Conference of Commissioners on Uniform State Laws — himself a strenuous advocate of uniformity via state action only? He says: "The business world begins to realize that there is *only one alternative*[317] to an agreement among the states upon matters of vital concern to all of them . . . They must agree among themselves or the pressure of sentiment will cause amendments to the Federal Constitution that will still further

[315] The **Negotiable Instruments Act** (first published in 1896 — the conception of which was borrowed from England, supra § 404), has been adopted by forty-eight states; the **Warehouse Receipts Act** (first published in 1906), by twenty-nine states; the **Sales Act** (first published in 1906), by ten states; the **Bills of Lading Act** (first published in 1909), by eight states; the **Foreign Wills Act,** by six states; the **Uniform Stock Transfer Act** (first published in 1909), by five states; the **Family Desertion Act,** by four states; the **Divorce Act,** by three states. See 38 Am. Bar Ass'n Reports, p. 529; 23 Green Bag, p. 621. Moreover, the Conference of Commissioners has drafted or is considering these additional Uniform Acts: a Child Labor Act, Marriage and Marriage License Act, Workmen's Compensation Act, Insurance Act, Act as to the Situs of Property for Taxation.

[316] Smith, *The Outlook for uniformity of legislation*, 23 Green Bag, 621.

[317] The italics are mine.

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minimize the importance of the states and jeopardize the (§ 408)
basic principle of local self-government. Business has long since overleaped state lines." [318]

Right here crops out the fatal weakness of any scheme for making one law for the United States via uniform state legislation: when once uniform laws or partial codifications are thus obtained, *how long* will these stay uniform? The answer is, just as long as the legislatures of the states refrain from acting on the "basic principle of local self-government." Sooner or later the legislatures will inevitably tinker — each one probably a different way — these uniform acts secured after so much trouble; and then will begin again the old familiar American condition of diversity of law.[319] Already the oldest of the youthful uniform state laws, the Negotiable Instruments Act,[320] is attacked because it is beginning to cease to be uniform.[321] Permanent uniformity of American law is utterly impossible via state legislation. This magnificent movement toward one law for the United States is doomed to a miserable failure unless it be switched to the 'main line' of legal progress.

There is only one route to permanent uniformity of law in the United States — an Act of Congress. In no other way can one private law for our great republic be secured. When our business world, which "has long since overleaped state lines," realizes that diversity and uncertainty of law will not actually disappear until a federal codification be promulgated, verily "the pressure of sentiment will cause amendments

[318] Smith, *Id.*, pp. 621–2.

[319] As yet no *absolute* uniformity via state action has been secured. It has already happened that the draft Acts sent by the commissioners have been considerably altered by state legislatures. Furthermore, the courts of different states already disagree in their interpretation of the *same* provisions of certain Uniform Acts.

[320] It was first passed in 1896, and is twenty years old.

[321] Eaton, *On uniformity in judicial decisions of cases arising under the Negotiable Instruments Act*, 12 Mich. Law Rev., p. 89: "There must also be uniformity in the decisions under the uniform law . . . it is a grave and serious cause for regret that this is not being done." See also Hening, *The Uniform Negotiable Instruments law; is it producing uniformity and certainty?* 59 Penn. Law Review, p. 471 (1911); and Judge Mack's article, 6 Illinois Law Review, p. 62.

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to the Federal Constitution" to secure *one* system of law instead of forty-eight. Let all traditional prejudices be dismissed, and let the subject of a federal codification of private law be investigated intelligently: it will soon be seen that the importance of the states will not be injuriously "minimized" by the promulgation of a federal code of private law. Such legislation must come eventually. When it does come, a great debt of gratitude will be owed by every American to those who fathered and developed the movement for uniform state laws — thus revealing the fact that codification of American law was not impossible after all.

§ 409 **Objection 4 — A federal codified jurisprudence abrogating the private law of the states is impossible without impairing the integrity of the several states.** It is argued that, because the United States are an enormous country equal in area to practically all Europe, federal uniformity of private law throughout the United States would not work well or be satisfactory; that uniformity of law through federal legislation or control would be an experiment, the dangers of which are unknown.

This easy-going belief is entirely superficial, and is quickly refutable. Ignoring our uniform rules of naturalization, do not the United States already possess federal uniformity of law as to bankruptcy and admiralty? Has this worked so badly that these subjects ought to be regulated by forty-eight different state laws? On the contrary, the wisdom of the framers of the Constitution in making bankruptcy and admiralty federal matters grows more apparent, and is more highly prized than ever. Furthermore, we often feel that many of our present evils might have been avoided had more matters — such as marriage and divorce — been intrusted to federal regulation, thus securing uniformity of law thereon. Uniformity of law through federal legislation has never worked ill to the people of the United States.

If we turn to history, we find that the size of a country does not derogate from the value of uniformity of law. The vast Roman Empire found uniformity of law highly satisfactory. The vast extent of the influence of the Napoleonic codification in both Europe and the twin Americas[322] shows

[322] See supra § 258.

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the value of a simple codified legal system is not canceled (§ 409) proportionately by increasing the size of a State. Finally, it is indisputable that the elements of law in the combined vast English law countries have remained the same without suffering detriment from the enormous spread of English law by colonization.

Not well-founded is the conviction that a federal codification of our law made uniform throughout the United States is not only impossible, but, even if it were possible, it would also irreparably damage or destroy the states themselves. The facts of history point to this very solution as quite possible, and not injurious to the integrity of the states of a federal union. The best answer to the assertion that any proposition for a uniform federal codification of American law would be like a leap into the dark, is to look at federal Germany and Switzerland. Both were able to rise out of the quagmire of intensely active state pride, jealousy and historical traditions, and to enact one codified private law for over twenty Swiss or German states without in any way destroying these states themselves.[323] Is the Constitution of the United States the sole supreme wisdom of statesmanship? The framers of the Constitution never held this view as to their work; they provided for amending it whenever necessary.[324]

It is quite possible to pass an amendment to the Constitution giving Congress power to enact a federal codification for the entire United States which shall abrogate the private law of the several states. It may also be expressly stipulated in the amendment that the public law of the states shall be left untouched : such a reservation of power was left to the German states when the German Civil Code was promulgated.[325] The public law of the several American states need not be disturbed; but their private law should be replaced by a federal code of civil and commercial law,[326] — thus resulting in one and only one uniform and codified private law

[323] See supra §§ 344, 358.

[324] And 17 amendments have already been adopted.

[325] Supra § 344.

[326] Perhaps also federal codes of criminal law, civil and criminal procedure may some time be deemed advisable.

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(§ 409) throughout the entire United States. Such a single codification of American law would be of a permanent nature. At any rate future changes in law would operate uniformly throughout the whole United States. But this is centralization, greater nationalization! Very well, — it is better to hang together by the adhesive force of *one* uniform system of private law than to be pulled asunder by the disintegrating forces of forty-eight different systems.

But it may be urged, assuming the existence of a uniform federal codification, would not diversity of interpretation soon arise, and how can this be avoided as long as we retain adherence to precedent — that salient feature of the Common Law of England? This is the answer: the force of *stare decisis* no longer has to-day in Anglo-American law the binding power it once had, — it is useful but no longer controls; why not then abrogate it entirely, as Germany, France, and other countries have done? [327] Where there is a written code of law, the force of precedents is no longer binding: the code itself is its own interpreter.

The argument against one codified law for all the United States made under federal auspices gains no additional strength because the task would be very difficult to accomplish. But it should not be forgotten that the conquest of the obstacles to the codification of American law can be greatly expedited for us with the aid of the many codifications already made by other modern nations, — an inestimable privilege not so abundantly enjoyed by them when they codified their law. Justinian [328] first showed to the modern world how to remove the stones of practical difficulties so as to smooth the way to a uniform, codified private law. If the Napoleonic codification [329] was made easier of accomplishment by the example of the Justinianean, and the German and the Swiss [330] a century

[327] Continental European judges are forbidden to cite cases (decisions) in their judgments. See also Teisen, *The false theory of the binding force of precedent*, 76 Cent. Law Journ., p. 147. The 'orthodox' position as to *stare decisis* is set forth in Black, *Stare decisis*, Docket for June, 1912, p. 744.

[328] Supra § 135.

[329] Supra § 254.

[330] See supra §§ 344, 358.

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later were made easier of accomplishment by the previous examples of the Justinianean and the Napoleonic, how very much easier is our task than theirs when there are before us so many examples of successful codifications of private law? Is our problem more difficult or even as difficult as the problem of codification was in other countries, especially in France or Germany?

France can give up hope and courage for a Herculean cleaning of our Augean legal stables. It has been noticed that prior to the Napoleonic codification France had 300 different varieties of law more or less alike[331]: but French lawyers finally succeeded in accomplishing the task of obtaining one codified law for all France — the first genuine grand codification since Justinian's age, then nearly thirteen centuries in the past, and of enormous blessing in the 19th century to all mankind. Germany, to obtain one codified law, had a very difficult problem to solve. Early in the 19th century there were some 1800 different states in Germany, which left as a legacy to the modern German Empire humorous conflicting systems of law: but not even this mischievous legal heritage from the past was allowed to stop the formation of one German law in codified shape — the magnificent code of 1900.[332] It is absurd to believe that Americans are mentally inferior to Romans, Frenchmen, or Germans.

§ 410 **Objection 5 — The effect of one federal code for the entire United States would cause American law to become atrophied.** It is also claimed that to put our law into permanent shape in the form of a federal codification would cause it to become atrophied. How could it grow, if codified? The answer is so easy: amend or revise the code whenever necessary, for instance just as France has frequently done since 1804. Instead of causing a stoppage of growth, on the contrary, a code really facilitates growth in law: for a code in course of time reveals its own deficiencies, and, the law being made certain by the code, is easily alterable because of this discernible certainty, — there is no danger of "leaping into the dark" when revising a code.

[331] Supra § 254.

[332] Supra §§ 341, 342, 343.

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(§ 410) This whole argument of the atrophying influence of an American federal codification is quickly seen, when analyzed, to rest on a *very unscientific basis*. Furthermore, it demeans the dignity of the legal profession. If the enactment of a uniform federal codification of American law will have the bad consequence of introducing the 'deadening' influence of a standardized law, then such an evil ought now to be true of the effect of our Uniform State Acts: but to claim that these are exerting a 'deadening' influence is obviously nonsensical. At once *the reactionary spirit* of the argument is revealed; it would persuade us to turn back the hands of the clock of legal progress; why not let, for instance, the Texan keep and enjoy his kind of law, the Californian his variety, and the Pennsylvanian his; let them all grow and flourish *ad libitum*; standard legal ideas and principles are to be regarded as destructive of local state peculiarities of law! And so this argument totally ignores the fundamental principle of juridical evolution, that the fittest law should survive; on the contrary it seems to lay emphasis on keeping alive outworn and obsolescent law.

All this is but another and sentimental way of injuriously emphasizing "state rights." Every citizen to-day has to suffer an enormous legal risk in business because of the increasing uncertainty of knowing just what the law is throughout these United States, — a situation largely due to the present perpetuation of traditional state doctrines of law without regard to the law of any other state. Perpetuating the local dissimilarities of state law is a good thing for but one class of persons — namely pettifogging lawyers, who naturally will do their best to hold back as long as possible the chariot of legal progress. Must all the vast multitude of interstate business transactions in this country be jeopardized in order that Rhode Island or Delaware, for instance, be kept dissimilar in order to benefit the lawyers of these states?

The present malady of American law is its lack of uniformity. Sooner or later our bulky prolix, largely case law, which is increasing proportionally in bulk and which in its visible form annually deluges law libraries (alone spacious

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enough for storing the host of new reports [333]), must give way to a scientific codification of small volume wherein the law is clearly and definitely set forth, easily found, and which shall be the sole private law of the land from the Atlantic to the Pacific Ocean!

§ 411 **The 19th century and present revival of Roman law study in England and America** [334]: (1) **England.** The present revival of Roman law in England and America is largely due to Sir Henry Maine. Sheldon Amos' loyal tribute deservedly extols the genius of Maine, who "rescued the laws of Rome from the neglect into which they had fallen in England, and established forever their essential relation to every system of law having a European parentage." [335]

During the 12th and 13th centuries Roman law had been received into England in no small measure and had played an important part in the development of the English Common Law.[336] But the subsequent rise of English hostility to the Civil Law as a foreign system,[337] followed by the suppression of Canon Law teaching at the universities in the 16th century because of the Protestant Reformation,[338] finally brought the study of Roman law itself into disfavor [339] — which was only temporarily checked by the English revival of Roman law during the century of the Reformation.[340] And the narrowing influence of England's geographical separation from the Continent — always a potent factor in English history — increased during the following centuries. The study of Roman law "maintained only a feeble and flickering life," [341] and it was valuable only to the ecclesiastical Bar.[342] England

[333] See supra § 405, note.

[334] A part of this was published by the author in 23 Green Bag, p. 624, December, 1911, under nearly the same title as the caption of this section, and is reprinted by permission.

[335] See Amos, *Roman law*: dedication to Maine.

[336] Supra §§ 369–75, 377.

[337] Supra § 378.

[338] Supra § 384.

[339] See Bryce, *Studies*, pp. 861–2.

[340] *Id.*

[341] Bryce, *Id.*, p. 862.

[342] See supra §§ 384, 399.

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(§411) had become isolated from the current of European juridical thought and legal practice.

Not until very modern times, when the isolation of England and the greater isolation of America were diminished by improved and frequent means of communication, did the prejudice of English and American lawyers against Roman law disappear.[343] And even now the tradition of such prejudice and indifference still lingers too potently in some part of the United States.

The year **1852** [344] marks the beginning of this latest revival of Roman law study in England, — a movement second only in importance to the Bologna revival of the 13th century in its ultimate influence on the development of English law into a codified jurisprudence. England is now in a position to catch up in law with the rest of civilized Europe. That the law of England has progressed in the last half-century is proved, ignoring all else, by the familiar codifications of portions of English law.[345]

Another result of this latest revival of Roman law in England is that the Roman Institutes of Justinian [346] are now a required subject for admission to the English Bar. England has joined hands with Scotland [347] in requiring a knowledge of Roman law to form an essential part of a legal education. No longer is the English lawyer totally ignorant of the world-current of jurisprudence. Very fruitful have been the labors of the 19th century English Romanists [348] such as Maine,[349]

[343] In 1836 that learned American law teacher, David Hoffman, said: "The fact is indisputable, that whilst the British nation has copiously supplied itself for eighteen centuries from the streams of the Civil Law, and is perhaps more largely indebted to them than to any other source whatever, it still continues to withhold, in a considerable degree, a frank acknowledgment of the full amount of the debt which has been thus contracted": Hoffman, *Legal study*[2], vol. ii, p. 509.

[344] Bryce, *Id.*

[345] See supra § 404.

[346] See supra § 138.

[347] See Mackenzie, *Roman Law*[7], p. 47.

[348] Or "Civilians."

[349] Sir Henry James Sumner Maine, born 1822, died 1888. Studied at Pembroke College, Cambridge, where in 1847 he was appointed Regius professor of the Civil Law. This chair he held for seven years. In 1861

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Bryce,[350] Muirhead,[351] Amos,[352] Williams,[353] Hunter,[354] Roby,[355] Maitland,[356] Pollock,[357] Scrutton,[358] Clark,[359] and the Scotch Civilians Mackenzie [360] and Colquhoun.[361]

(2) **The United States.** The 19th revival of Roman law study soon passed across the Atlantic into America. During the first three quarters of that century little or no attention had been paid to the Civil Law by American law students and lawyers.[362] Roman law was known only to a few American jurists, such as the great James Wilson [363] who was the first §412

he published his work on *Ancient law*, which at once made him famous Soon afterward he was appointed legal member of the India council, which office he held until his return to England in 1869. That year he was appointed to the new chair of comparative jurisprudence at Oxford founded by Corpus Christi College. This he held for eight years, returning in 1877 to Cambridge to become Master of Trinity Hall. In 1887 he was made Whewell professor of international law at the same university.

[350] James Bryce, now Lord Bryce, formerly British Ambassador to the United States, whose twenty-three years of Activity as Regius professor of the Civil law at Oxford from 1870 to 1893 will long be remembered.

[351] James Muirhead, professor of Roman law at the University of Edinburgh.

[352] Sheldon Amos, professor of jurisprudence and Roman law in the Inns of Court, London.

[353] James Williams, professor at Oxford, died 1912.

[354] William A. Hunter, whose *Roman law in the order of a code* has never been equaled in English.

[355] Henry John Roby, professor at University College, London.

[356] Frederic William Maitland, Downing professor of laws at Cambridge, died 1906.

[357] Sir Frederick Pollock, formerly Corpus Christi professor of jurisprudence, Cambridge.

[358] Sir Edward Scrutton, a distinguished English judge, whose *Influence of the Roman law on the law of England* is invaluable.

[359] Regius professor of the Civil Law at Cambridge.

[360] Lord Mackenzie, a judge of the Court of Sessions, whose *Studies in Roman Law with comparative views of the laws of France, England, and Scotland* [7], is renowned.

[361] Patrick MacChombaich De Colquhoun, a pupil of the great Thibaut (supra §348), whose elaborate *Summary of the Roman civil law* is the pioneer work in English.

[362] Baldwin, *The study of Roman law in American law schools*, Am. Law School Review, Nov., 1911, p. 28.

[363] Appointed professor of law in 1790 at College of Philadelphia. He was thoroughly versed in Roman, French, and Scotch law in addition to

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(§ 412) American jurist to suggest the codification of the Common Law,[364] the illustrious James Kent,[365] the brilliant David Hoffman,[366] the learned Wythe,[367] the scholarly Thomas Cooper,[368] Hugh S. Legaré,[369] John Pickering,[370] and John Anthon.[371] But there was one great exception — the lawyers of Louisiana, who had been forced to study Roman law in order to better understand their own law derived from France and Spain.[372] And their devotion to Roman law began before the admission in 1812 of Louisiana to the American union of states.

But this introduction of Roman law study into Louisiana did not produce any similar effect in the various English Common Law states: for the Louisiana turning to Roman law was in reality but a consequence of the continued influence of French and Spanish law in North America. The exclusiveness of the English Common Law states continued, and was not broken down until very much later in the 19th century

his mastery of American jurisprudence. See *Great American lawyers*, vol. i, p. 212.

[364] "To form the mass of our laws into a body compacted and well proportioned": 22 Green Bag, p. 60.

[365] Born 1763, died 1847. Graduating from Yale in 1781, he was appointed in 1793 professor of law at Columbia College, New York. In 1804 he became Chief Justice of New York, and in 1814 Chancellor. In 1823 he returned to Columbia. During this service there he wrote his famous *Commentaries on American law*, 4 vols., 1826–30, which were the product of his Columbia law lectures. This work, which frankly acknowledges the debt owed by English and American law to Roman jurisprudence, has now greater authority in the United States than Blackstone's exposition of the Common Law (supra § 395).

[366] A leader of American legal education early in the 19th century, frequently overlooked, who was law lecturer at the University of Maryland. In his *Course of legal study* he emphasized Roman law as affording a wider field of knowledge than the commentaries of Blackstone (supra § 395.

[367] Professor of law for twelve years at William and Mary College. He was appointed in 1799 through the instrumentality of Jefferson. See Warren, *Hist. of Am. Bar*, p. 343, Boston, 1911; *Great Am. lawyers*, vol. i, p. 67.

[368] Who translated into English in 1812 Justinian's Institutes (supra § 138). Cooper was Jefferson's choice for the chair of law at the new University of Virginia.

[369] Of South Carolina.

[370] Of Massachusetts.

[371] Of New York.

[372] See supra §§ 263, 309.

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when the current revival of Roman law spread from England to American institutions of learning. (§ 412)

Roman law seems to have been first taught at **Yale**: late in the 18th century President Stiles of Yale College formed the project for a law lecture, which among other things should consider to what extent the Roman law had entered into English law, the parent of American law; and after the lapse of quite a number of years he himself gave in 1792 a law lecture which embraced a discussion of the "Jus Civile or antient Roman law, Pandects and ecclesiastical or Canon Law."[373] In 1843 Roman law was an elective Latin study at Yale.[374] Five years later Roman law was introduced at the **Harvard Law School** by Luther S. Cushing, who taught this subject from 1848 to 1851.[375]

About the year 1863 the eminent **James Hadley**[376] prepared and subsequently gave a short lecture course in Roman law at Yale College,[377] which he afterwards annually repeated at the **Yale Law School.** At one time Professor Hadley delivered these lectures as a part of the graduate course of the Harvard Law School, so great was the success of his work.[378] The extraordinary clearness and power of his exposition and the beautiful elegance of his style still impart luster to the fame of this pioneer Yale teacher of Roman law as a *legal study.*

The next to teach Roman law in the Yale Law School was the erudite **Simeon E. Baldwin.** Largely because of his influence, the Yale Law School was led to take that signal act of leadership which at once placed it far in advance of all

[373] Warren, *History of the American Bar*, p. 347. President Stiles formed this plan as early as 1777; but not until 1779 was it approved by the corporation; in this year was introduced Montesquieu's *Spirit of laws* (in which some notice of Roman law is given): Warren, *Id.* See also supra §§ 40, 135, 225.

[374] It was taught by tutor Joseph G. E. Larned: Baldwin, *Id.*

[375] Baldwin, *Id.* Cushing published in 1854 his *Introduction to Roman law.*

[376] Professor of Greek at Yale College 1848–72, having been appointed tutor in 1845. He died Nov. 14, 1872. He was the father of Arthur T. Hadley, LL.D., President of Yale University.

[377] Baldwin, *Id.*; Hadley, *Introduction to Roman law*, preface, p. iii.

[378] These lectures were published in 1873, after his death, under the title of *Introduction to Roman law.*

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(§412) other American law schools: in 1876 Yale organized a Law Course for graduates of law schools. Yale was "the first law school in America or England to establish a course leading to the degree of Doctor of Civil Law." [379]

A great teacher was called to take charge of the Roman law instruction at Yale — **Albert S. Wheeler.**[380] It was on his advice and in reliance upon his aid that the new Yale course and Roman law doctorate had been established.[381] Professor Wheeler was an unusually fine combination of scholar and jurist. As a Civilian he had no equal in America. He was a master of Roman law worthy to be ranked with the greatest European Romanists. During his twenty-eight years of Roman law instruction at Yale were markedly revealed all the qualities of the great teacher: profound and accurate knowledge accompanied by great capacity to impart this to others, broad vision, originality, constructive instinct, enthusiasm, and sympathetic power.

Since the last quarter of the 19th century, Roman law has come to be regarded as a subject of importance in an increasing number of American law schools. Roman law is now studied at Yale, Columbia, Pennsylvania, Chicago, Harvard, Stanford, the Catholic University, and other law schools.[382] But

[379] *Yale University catalogue*, 1915–16, p. 702.

[380] Albert Sproull Wheeler was born Dec. 1, 1832, at Warwick, New York, and died Jan. 30, 1905, at New Haven. He received the degrees of B.A. and M.A. at Hobart College in 1851 and 1854 respectively. He was professor of languages (including Greek) at Hobart College 1855–68, having been appointed Tutor in 1855. During this time he studied for the Bar of New York, and was admitted in 1865. From 1868 to 1870 he was professor of ancient languages (Greek and Latin) at Cornell University. In 1872 he became a member of the faculty of the Yale Scientific School, where he taught German for twenty-five years until 1897. In 1876 he became also connected with the Yale Law School. He had previously taught Roman law at Cornell. His masterly index to Hadley's *Introduction to Roman law* had revealed his profound knowledge of this subject. Professor Wheeler continued his work of instruction in the Yale Law School until his death in 1905. By a testamentary bequest he established the Yale Library of Roman and European law which bears his name. He was the predecessor of the author in the chair of Roman law at Yale.

[381] *A. S. Wheeler commemorative addresses* (1905), p. 16.

[382] Roman law courses are now given also in many American colleges as part of a liberal education. "What college, aiming at thoroughness,

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with all the advance made by this movement there is still room for further progress: the study of Roman law ought not to be merely a graduate or an elective undergraduate course of a law school—it should be made a compulsory undergraduate course for the degree of LL.B. or its equivalent. The rank and file, as well as a favored few, of the great army of nearly 22,000 American law students scattered in 137 American law schools[383] sadly need the uplifting professional and scientific impulses which result from contact with Roman law. (§ 412)

Our present system of legal education is defective because it does not give sufficient attention to or ignores Roman law.[384] That distinguished Englishman, Professor Dicey, from his observation of American Rhodes scholars in law at Oxford recently made the following very pertinent comment: that "there ought to be a wider knowledge of the law of Rome than is given in the celebrated law schools of America,[385] and also an acquaintance, which can hardly be obtained from cases alone, with the principles to be gathered from the works of the best . . . legal writers of England and America."[386] These defects in American legal education must be remedied. The influence exerted by the current revival of Roman law study is still on the increase; and it is inevitable that sooner

can afford to ignore it (Roman law) altogether?" : Jesse, *The strength of American law schools*, 21 Yale Law Journal, p. 396 (1912).

[383] Richards, *Pres.' address "Progress in legal education,"* Association of Am. Law Schools proceedings (1915). See also *World Almanac for 1916*, page 585.

[384] "How many of our . . . law schools give adequate instruction in the principles of Civil Law and in Modern Codes as developments thereof? . Every law school ought to require some measure of this work for every degree " · Jesse, *Id.*

[385] The position of that eminent American judge, Joseph Story (1799–1845), is practically the same: "It would betray a narrow subjection to prejudice, or wanton disregard of some of the best sources of instruction, to pass by with neglect the glorious labors of the Roman jurists" (in his preface to *Agency*, 1839); "the Roman law is an inexhaustible treasure of various and valuable learning" (in his preface to *Partnership*, 1841).

[386] Dicey, *The extension of law teaching at Oxford*, 24 Harv. Law Rev., p. 3 (Nov. 1910).

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(§ 412) or later this will destroy the present over-emphasis in certain American law schools on the "case method" as the exclusive method of teaching law.[387]

Roman law, as in England, should be required for admission to every American Bar. It would lead, among other benefits, to a diminution of the present professional incompetency[388] of too many men called to the Bar, and it would impart an altogether too much needed ethical uplift to the profession as a whole. Already two states now require a knowledge of Roman law for admission to the Bar; these are Louisiana and Kansas.[389] That it should be made requisite in Louisiana is not surprising; that it is necessary in Kansas — a Common Law state — is proof of the progress of the present revival of Roman law in the United States. Turning now to the literary productions of American Romanists, although the Civilians on this side of the Atlantic have done little as yet, compared with the labors of the modern English Romanists,[390] yet there are a few who rank with their English brethren, such as Morey,[391] Howe,[392] and the Canadian Walton.[393]

The modern world is rapidly growing together. "A knowledge of Roman law, at least in outline, and sufficient familiarity with its literature to tell . . . where to look for the rules on any point is almost a necessity for what we call the 'international' lawyer."[394] Finally, the American lawyer must no longer remain ignorant of the world-current of jurisprudence and the mission of modern Roman law. Then will he perforce naturally plan and strive for the scientific betterment of

[387] See supra § 165.

[388] On this subject, see Coudert, *The crisis of the law and professional incompetency*, Am. Bar Association Rep., 1911.

[389] See *Rules for Admission to the Bar*[5], St. Paul, 1913 (*Louisiana* and *Kansas*).

[390] Supra § 411.

[391] William C. Morey, professor at Rochester University, author of *Outlines of Roman law*[2] (1914).

[392] Judge William Wirt Howe of New Orleans, author of *Studies in the Civil Law*[2], (1905).

[393] Frederick Parker Walton, formerly dean at McGill University Law School, author of *Historical introduction to Roman law*[2], (1912).

[394] Baldwin, *Id.*, p. 30.

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American law through codification along the lines of the best modern codes, — that Herculean but not impossible task of the immediate future.[395] When this is accomplished, the American revival of Roman law study will have reached its full fruition. (§ 412)

[395] See supra § 405.

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