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HISTORY AND RUDIMENTS

OF

THE ROMAN CIVIL LAW;

BEING CHAPTER XLIV.

OF

GIBBON'S DECLINE AND FALL OF THE ROMAN EMPIRE.

WITH NOTES, ORIGINAL AND SELECTED,

CHIEFLY FOR THE USE OF

NATIVE INDIAN STUDENTS

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NOTICE.

This celebrated Chapter, which is used as a Text-book of Civil Law in some of the Foreign Universities, may be read in College classes as a specimen of English prose, or as an elementary Law book.

Gibbon's habit of condensation sometimes makes his style obscure: that is to say, his full meaning eludes a careless or ignorant student. The notes draw attention to some of these latent obscurities, and the Tutor should be careful to ascertain that his pupil investigates each pregnant epithet, each cautious or ironical alternative, each just gradation of co-ordinate statements.

In framing those notes which are particularly designed for law students, I have consulted the Latin text of the Institutes, the translations and commentaries of Cumin and Sanders, Lindley's Thibaut's System des Pandekten Rechts, the notes of Gibbon, Milman, Warnkœnig, Guizot and Smith on the Chapter itself, and the valuable articles on Roman Law by Mr. Long in the Dictionary of Greek and Roman antiquities. The wants of the Native student have been specially kept in view.

The reader should be warned that in rudimentary treatises on law it is necessary to state many propositions unconditionally, which are only generally true; omitting exceptions and limitations which would too much increase the bulk of the work.

If any should ask why the Roman and not the English system should be appointed as the vestibule of legal study, I would refer them to a discourse of Dr. Maine, in the Cambridge Essays for 1856, in which he considers the importance of the Civil Law as a part of general and legal education. The question is too large to be discussed here. But it may be said that, looking at the present and prospective state of Anglo Indian Jurisprudence, there is

still more reason for Natives than for English lawyers, to base their law studies on that immortal system which "is fast becoming the Lingua Franca of Universal Jurisprudence" (Dr. Maine.)

Finally it should be explained that Roman Law to be well understood, can only be studied historically. Hence the necessity of reverting to the Twelve Tables and the Edict for the grounds of doctrines which to this day regulate the Courts of more than half the civilised world.

E. I. H.

Mahbleshwar, 15th May 1859.

GIBBON'S DECLINE AND FALL OF THE ROMAN EMPIRE.

CHAPTER XLIV.

Idea of the Roman Jurisprudence.—The Laws of the Kings.—The Twelve Tables of the Decemvirs.—The Laws of the People.—The Decrees of the Senate.—The Edicts of the Magistrates and Emperors.—Authority of the Civilians.—Code, Pandects, Novels, and Institutes of Justinian:—I. Rights of Persons. II. Rights of Things. III. Private Injuries and Actions.—IV. Crimes and Punishments.

THE vain titles of the victories of Justinian are crumbled into dust; but the name of the legislator is inscribed on a fair and everlasting monument. Under his reign, and by his care, the civil jurisprudence was digested in the immortal works of the Code, the Pandects, and the Institutes; the public reason of the Romans has been silently or studiously transfused into the domestic institutions of Europe, and the laws of Justinian still command the respect or obedience of independent nations. Wise or fortunate is the prince who connects his own reputation with the honor and interest of a perpetual order of men. The defence of their founder is the first cause which in every age has exercised the zeal and industry of the civilians. They piously commemorate his virtues, dissemble or deny his failings, and fiercely chastise the guilt or folly of the rebels who presume to sully the majesty of the purple. The idolatry of love has provoked, as it

The Civil or Roman Law.

usually happens, the rancour of opposition; the character of Justinian has been exposed to the blind vehemence of flattery and invective; and the injustice of a sect (the Anti-Tribonians) has refused all praise and merit to the prince, his ministers, and his laws. Attached to no party, interested only for the truth and candour of history, and directed by the most temperate and skilful guides, I enter with just diffidence on the subject of civil law, which has exhausted so many learned lives and clothed the walls of such spacious libraries. In a single, if possible in a short chapter, I shall trace the Roman jurisprudence from Romulus to Justinian, appreciate the labours of that emperor, and pause to contemplate the principles of a science so important to the peace and happiness of society. The laws of a nation form the most instructive portion of its history; and, although I have devoted myself to write the annals of a declining monarchy, I shall embrace the occasion to breathe the pure and invigorating air of the republic.

Laws of the Kings of Rome.

The primitive government of Rome was composed, with some political skill, of an elective king, a council of nobles, and a general assembly of the people. War and religion were administered by the supreme magistrate; and he alone proposed the laws, which were debated in the senate, and finally ratified or rejected by a majority of votes in the thirty curiæ or parishes of the city. Romulus, Numa, and Servius Tullius, are celebrated as the most ancient legislators; and each of them claims his peculiar part in the threefold division of Jurisprudence. The laws of marriage, the education of children, and the authority of parents, which may seem to draw their origin from nature itself, are ascribed to the untutored wisdom of Romulus. The law of nations and of religious worship, which Numa introduced, was derived from his nocturnal converse with the nymph Egeria. The civil law is attributed to the experience of Servius; he balanced the rights and fortunes of the seven classes of citizens, and guarded by fifty new regulations the observance of contracts and the punishment of crimes. The state, which he had inclined towards a democracy, was changed

by the last Tarquin into lawless despotism ; and when the kingly office was abolished, the patricians engrossed the benefits of freedom. The royal laws became odious or obsolete; the mysterious deposit was silently preserved by the priests and nobles; and at the end of sixty years the citizens of Rome still complained that they were ruled by the arbitrary sentence of the magistrates. Yet the positive institutions of the kings had blended themselves with the public and private manners of the city ; some fragments of that venerable jurisprudence were compiled by the diligence of antiquarians; and above twenty texts still speak the rudeness of the Pelasgic idiom of the Latins.

The Twelve Tables of the Decemvirs.

I shall not repeat the well-known story of the Decemvirs, who sullied by their actions the honour of inscribing on brass, or wood, or ivory, the Twelve Tables of the Roman laws. They were dictated by the rigid and jealous spirit of an aristocracy which had yielded with reluctance to the just demands of the people. But the substance of the Twelve Tables was adapted to the state of the city, and the Romans had emerged from barbarism since they were capable of studying and embracing the institutions of their more enlightened neighbours. A wise Ephesian was driven by envy from his native country : before he could reach the shores of Latium, he had observed the various forms of human nature and civil society ; he imparted his knowledge to the legislators of Rome, and a statue was erected in the forum to the perpetual memory of Hermodorus. The names and divisions of the copper money, the sole coin of the infant state, were of Dorian origin ; the harvests of Campania and Sicily relieved the wants of a people whose agriculture was often interrupted by war and faction ; and since the trade was established, the deputies who sailed from the Tiber might return from the same harbours with a more precious cargo of political wisdom. The colonies of Great Greece had transported and improved the arts of their mother-country. Cumæ and Rhegium, Crotona and Tarentum, Agrigentum and Syracuse, were in the rank of the most flourishing cities. The disciples of

Pythagoras applied philosophy to the use of government, the unwritten laws of Charondas accepted the aid of poetry and music, and Zaleucus framed the republic of the Locrians, which stood without alteration above two hundred years. From a similar motive of national pride, both Livy and Dionysius are willing to believe that the deputies of Rome visited Athens under the wise and splendid administration of Pericles, and the laws of Solon were transfused into the Twelve Tables. If such an embassy had indeed been received from the barbarians of Hesperia, the Roman name would have been familiar to the Greeks before the reign of Alexander, and the faintest evidence would have been explored and celebrated by the curiosity of succeeding times. But the Athenian monuments are silent, nor will it seem credible that the patricians should undertake a long and perilous navigation to copy the purest model of a democracy. In the comparison of the tables of Solon with those of the Decemvirs, some casual resemblance may be found; some rules which nature and reason have revealed to every society; some proofs of a common descent from Egypt or Phœnicia. But in all the great lines of public and private jurisprudence, the legislators of Rome and Athens appear to be strangers or adverse to each other.

Their Character and Influence.

Whatever might be the origin or the merit of the Twelve Tables, they obtained among the Romans that blind and partial reverence which the lawyers of every country delight to bestow on their municipal institutions. The study is recommended by Cicero as equally pleasant and instructive. "They amuse the mind by the remembrance of old words, and the portrait of ancient manners; they inculcate the soundest principles of government and morals; and I am not afraid to affirm that the brief composition of the Decemvirs surpasses in genuine value the libraries of Grecian philosophy." "How admirable," says Tully, with honest or affected prejudice, "is the wisdom of our ancestors! We alone are the masters of civil prudence, and our superiority is the more conspicuous if we deign to cast our eyes on the rude and almost

"ridiculous jurisprudence of Dracon, of Solon, and of "Lycurgus." The Twelve Tables were committed to the memory of the young and the meditation of the old; they were transcribed and illustrated with learned diligence: they had escaped the flames of the Gauls, they subsisted in the age of Justinian, and their subsequent loss has been imperfectly restored by the labours of modern critics. But although these venerable monuments were considered as the rule of right and the fountain of justice, they were overwhelmed by the weight and variety of new laws, which, at the end of five centuries, became a grievance more intolerable than the vices of the city. Three thousand brass plates, the acts of the senate and people, were deposited in the capitol; and some of the acts, as the Julian law against extortion, surpassed the number of a hundred chapters. The Decemvirs had neglected to import the sanction of Zaleucus, which so long maintained the integrity of his republic. A Locrian, who proposed any new law, stood forth in the assembly of the people with a cord round his neck, and if the law was rejected, the innovator was instantly strangled.

The Decemvirs had been named, and their tables were approved, by an assembly of the centuries, in which riches preponderated against numbers. To the first class of Romans, the proprietors of one hundred thousand pounds of copper, ninety-eight votes were assigned, and only ninety-five were left for the six inferior classes, distributed according to their substance by the artful policy of Servius. But the tribunes soon established a more specious and popular maxim, that every citizen has an equal right to enact the laws which he is bound to obey. Instead of the centuries, they convened the tribes; and the patricians, after an impotent struggle, submitted to the decrees of an assembly in which their votes were confounded with those of the meanest plebeians. Yet as long as the tribes successively passed over narrow bridges, and gave their voices aloud, the conduct of each citizen was exposed to the eyes and ears of his friends and countrymen. The insolvent debt-

Laws of the People.

consulted the wishes of his creditor; the client would have blushed to oppose the views of his patron: the general was followed by his veterans, and the aspect of a grave magistrate was a living lesson to the multitude. A new method of secret ballot abolished the influence of fear and shame, of honor and interest; and the abuse of freedom accelerated the progress of anarchy and despotism. The Romans had aspired to be equal; they were levelled by the equality of servitude, and the dictates of Augustus were patiently ratified by the formal consent of the tribes or centuries. Once, and once only, he experienced a sincere and strenuous opposition. His subjects had resigned all political liberty; they defended the freedom of domestic life. A law which enforced the obligation and strengthened the bonds of marriage was clamorously rejected; Propertius in the arms of Delia, applauded the victory of licentious love; and the project of reform was suspended till a new and more tractable generation had arisen in the world. Such an example was not necessary to instruct a prudent usurper of the mischief of popular assemblies; and their abolition, which Augustus had silently prepared, was accomplished without resistance, and almost without notice, on the accession of his successor. Sixty thousand plebeian legislators, whom numbers made formidable and poverty secure, were supplanted by six hundred senators, who held their honours, their fortunes, and their lives by the clemency of the emperor. The loss of executive power was alleviated by the gift of legislative authority; and Ulpian might assert, after the practice of two hundred years, that the decrees of the senate obtained the force and reality of laws. In the times of freedom the resolves of the people had often been dictated by the passion or error of the moment: the Cornelian, Pompeian, and Julian laws were adapted by a single hand to the prevailing disorders; but the senate, under the reign of the Cæsars, was composed of magistrates and lawyers, and in questions of private jurisprudence the integrity of their judgment was seldom perverted by fear or interest.

Decrees of the Senate.

The silence or ambiguity of the laws was supplied by the occasional edicts of those magistrates who were invested with the honours of the state. This ancient prerogative of the Roman kings was transferred in their respective offices to the consuls and dictators, the censors and prætors; and a similar right was assumed by the tribunes of the people, the ediles, and the proconsuls. At Rome, and in the provinces, the duties of the subject and the intentions of the governor were proclaimed; and the civil jurisprudence was reformed by the annual edicts of the supreme judge, the prætor of the city. As soon as he ascended his tribunal, he announced by the voice of the crier, and afterwards inscribed on a white wall, the rules which he proposed to follow in the decision of doubtful cases, and the relief which his equity would afford from the precise rigour of ancient statutes. A principle of discretion more congenial to monarchy was introduced into the republic; the art of respecting the name and eluding the efficacy of the laws was improved by successive prætors; subtleties and fictions were invented to defeat the plainest meaning of the Decemvirs; and where the end was salutary, the means were frequently absurd. The secret or probable wish of the dead was suffered to prevail over the order of succession and the forms of testaments; and the claimant, who was excluded from the character of heir, accepted with equal pleasure from an indulgent prætor the possession of the goods of his late kinsman or benefactor. In the redress of private wrongs, compensations and fines were substituted to the absolute rigour of the Twelve Tables; time and space were annihilated by fanciful suppositions; and the plea of youth, or fraud, or violence, annulled the obligation or excused the performance of an inconvenient contract. A jurisdiction thus vague and arbitrary was exposed to the most dangerous abuse; the substance, as well as the form of justice, were often sacrificed to the prejudices of virtue, the bias of laudable affection, and the grosser seductions of interest or resentment. But the errors or vices of each prætor expired with his annual

Edicts of the Prætors.

office; such maxims alone as had been approved by reason and practice were copied by succeeding judges; the rule of proceeding was defined by the solution of new cases; and the temptations of injustice were removed by the Cornelian law, which compelled the prætor of the year to adhere to the letter and spirit of his first proclamation. It was reserved for the curiosity and learning of Hadrian to accomplish the design which had been conceived by the genius of Cæsar; and the prætorship of Salvius Julian, an eminent lawyer, was immortalised by the composition of the Perpetual Edict. This well-digested code was ratified by the emperor and the senate; the long divorce of law and equity was at length reconciled; and, instead of the Twelve Tables, the Perpetual Edict was fixed as the invariable standard of civil jurisprudence.

The Perpetual Edict.

From Augustus to Trajan, the modest Cæsars were content to promulgate their edicts in the various characters of a Roman magistrate; and in the decrees of the senate the epistles and orations of the prince were respectfully inserted. Hadrian appears to have been the first who assumed without disguise the plenitude of legislative power. And this innovation, so agreeable to his active mind, was countenanced by the patience of the times and his long absence from the seat of government. The same policy was embraced by succeeding monarchs, and according to the harsh metaphor of Tertullian, "the gloomy and intricate forest of ancient laws was cleared away by the axe of royal mandates and constitutions." During four centuries, from Hadrian to Justinian, the public and private jurisprudence was moulded by the will of the sovereign, and few institutions, either human or divine, were permitted to stand on their former basis. The origin of Imperial legislation was concealed by the darkness of ages and the terrors of armed despotism; and a double fiction was propagated by the servility, or perhaps the ignorance, of the civilians who basked in the sunshine of the Roman and Byzantine courts. 1. To the prayer of the ancient Cæsars the

Constitutions of the Emperors.

people or the senate had sometimes granted a personal exemption from the obligation and penalty of particular statutes, and each indulgence was an act of jurisdiction exercised by the republic over the first of her citizens. His humble privilege was at length transformed into the prerogative of a tyrant ; and the Latin expression of " released from the laws" was supposed to exalt the emperor above all human restraints, and to leave his conscience and reason as the sacred measure of his conduct. 2. A similar dependance was implied in the decrees of the senate, which in every reign defined the titles and powers of an elective magistrate. But it was not before the ideas and even the language of the Romans had been corrupted, that a royal law, and an irrevocable gift of the people, were created by the fancy of Ulpian, or more probably of Tribonian himself ; and the origin of Imperial power, though false in fact and slavish in its consequence, was supported on a principle of freedom and justice. " The pleasure of the emperor " has the vigour and effect of law, since the Roman peo- " ple, by the royal law, have transferred " to their prince the full extent of their " own power, and sovereignty." The will of a single man, of a child perhaps, was allowed to prevail over the wisdom of ages and the inclinations of millions, and the degenerate Greeks were proud to declare that in his hands alone the arbitrary exercise of legislation could be safely deposited. " What interest, or passion," exclaims Theophilus in the court of Justinian, " can " reach the calm and sublime elevation of the monarch ? " he is already master of the lives and fortunes of his " subjects, and those who have incurred his displeasure " are already numbered with the dead." Disdaining the language of flattery, the historian may confess, that in questions of private jurisprudence, the absolute sovereign of a great empire can seldom be influenced by any personal considerations. Virtue, or even reason, will suggest to his impartial mind that he is the guardian of peace and equity, and that the interest of society is inseparably connected with his own. Under the weakest and most vicious reign, the seat of justice was filled by

Their Legislative Power.

the wisdom and integrity of Papinian and Ulpian, and the purest materials of the Code and Pandects are inscribed with the names of Caracalla and his ministers. The tyrant of Rome was sometimes the benefactor of the provinces. A dagger terminated the crimes of Domitian, but the prudence of Nerva confirmed his acts, which, in the joy of their deliverance, had been rescinded by an indignant senate. Yet in the rescripts, replies to the consultations of the magistrates, the wisest of princes might be deceived by a partial exposition of the case. And this abuse, which placed their hasty decisions on the same level with mature and deliberate acts of legislation, was ineffectually condemned by the sense and example of Trajan. The rescripts of the emperor, his grants and decrees, his edicts and pragmatic sanctions, were subscribed in purple ink, and transmitted to the provinces as general or special laws, which the magistrates were bound to execute and the people to obey. But as their number continually multiplied, the rule of obedience became each day more doubtful and obscure, till the will of the sovereign was fixed and ascertained in the Gregorian, the Hermogenian, and the Theodosian codes. The two first, of which some fragments have escaped, were framed by two private lawyers to preserve the constitutions of the Pagan emperors from Hadrian to Constantine. The third, which is still extant, was digested in sixteen books by the order of the younger Theodosius, to consecrate the laws of the Christian princes from Constantine to his own reign. But the three codes obtained an equal authority in the tribunals, and any act which was not included in the sacred deposit might be disregarded by the judge as spurious or obsolete.

Their Rescripts.

Among savage nations the want of letters is imperfectly supplied by the use of visible signs, which awaken the attention and perpetuate the remembrance of any public or private transaction. The jurisprudence of the first Romans exhibited the scenes of a pantomime; the words were adapted to the gestures, and the slightest error or neglect in the forms of proceeding was suffi-

Forms of the Roman Law.

cient to annul the substance of the fairest claim. The communion of the marriage life was denoted by the necessary elements of fire and water; and the divorced wife resigned the bunch of keys, by the delivery of which she had been invested with the government of the family. The manumission of a son or a slave was performed by turning him round with a gentle blow on the cheek; a work was prohibited by the casting of a stone; prescription was interrupted by the breaking of a branch; the clenched fist was the symbol of a pledge or deposit; the right hand was the gift of faith and confidence. The indenture of covenants was a broken straw; weights and scales were introduced into every payment; and the heir who accepted a testament was sometimes obliged to snap his fingers, to cast away his garments, and to leap and dance with real or affected transport. If a citizen pursued any stolen goods into a neighbour's house, he concealed his nakedness with a linen towel, and hid his face with a mask or basin, lest he should encounter the eyes of a virgin or a matron. In a civil action, the plaintiff touched the ear of his witness, seized his reluctant adversary by the neck, and implored, in solemn lamentation, the aid of his fellow-citizens. The two competitors grasped each other's hand as if they stood prepared for combat before the tribunal of the prætor; he commanded them to produce the object of the dispute; they went, they returned with measured steps, and a clod of earth was cast at his feet to represent the field for which they contended. This occult science of the words and actions of law was the inheritance of the pontiffs and patricians. Like the Chaldean astrologers, they announced to their clients the days of business and repose; these important trifles were interwoven with the religion of Numa; and after the publication of the Twelve Tables the Roman people was still enslaved by the ignorance of judicial proceedings. The treachery of some plebeian officers at length revealed the profitable mystery; in a more enlightened age the legal actions were derided and observed, and the same antiquity which sanctified the practice, obliterated the use and meaning of this primitive language.

Succession of the Civil Lawyers.

A more liberal art was cultivated, however, by the sages of Rome, who, in a stricter sense, may be considered as the authors of the civil law. The alteration of the idiom and manners of the Romans rendered the style of the Twelve Tables less familiar to each rising generation, and the doubtful passages were imperfectly explained by the study of legal antiquarians. To define the ambiguities, to circumscribe the latitude, to apply the principles, to extend the consequences, to reconcile the real or apparent contradictions, was a much nobler and more important task; and the province of legislation was silently invaded by the expounders of ancient statutes. Their subtle interpretations concurred with the equity of the prætor to reform the tyranny of the darker ages; however strange or intricate the means, it was the aim of artificial jurisprudence to restore the simple dictates of nature and reason, and the skill of private citizens was usefully employed to undermine the public institutions of their country. The revolution of almost one thousand years, from the Twelve Tables to the reign of Justinian, may be divided into three periods almost equal in duration, and distinguished from each other by the mode of instruction and the character of the civilians. Pride and ignorance contributed,

The First Period A. U. C. 303–648.

during the first period, to confine within narrow limits the science of the Roman law. On the public days of market or assembly, the masters of the art were seen walking in the forum, ready to impart the needful advice to the meanest of their fellow-citizens, from whose votes, on a future occasion, they might solicit a grateful return. As their years and honours increased they seated themselves at home on a chair or throne, to expect, with patient gravity, the visits of their clients, who at the dawn of day, from the town and country, began to thunder at their door. The duties of social life and the incidents of judicial proceeding were the ordinary subjects of these consultations, and the verbal or written opinion of the juris-consults was framed according to the rules of prudence and law. The youths of their own order and

family were permitted to listen ; their children enjoyed the benefit of more private lessons, and the Mucian race was long renowned for the hereditary knowledge of the civil law. The second period, the learned and splendid age of jurisprudence, may be extended from the birth of Cicero to the reign of Severus Alexander. A system was formed, schools were instituted, books were composed, and both the living and the dead became subservient to the instruction of the student. The tripartite of Ælius Pætus, surnamed Catus, or the Cunning, was preserved as the oldest work of jurisprudence. Cato the censor, derived some additional fame from his legal studies and those of his son : the kindred appellation of Mucius Scævola was illustrated by three sages of the law ; but the perfection of the science was ascribed to Servius Sulpicius, their disciple, and the friend of Tully ; and the long succession, which shone with equal lustre under the republic and under the Cæsars, is finally closed by the respectable characters of Papinian, of Paul, and of Ulpian. Their names, and the various titles of their productions, have been minutely preserved, and the example of Labeo may suggest some idea of their diligence and fecundity. That eminent lawyer of the Augustan age divided the year between the city and country, between business and composition; and four hundred books are enumerated as the fruit of his retirement. Of the collections of his rival Capito, the two hundred and fifty-ninth book is expressly quoted; and few teachers could deliver their opinions in less than a century of volumes. In the third period, between the the reigns of Alexander and Justinian, the oracles of jurisprudence were almost mute. The measure of curiosity had been filled ; the throne was occupied by tyrants and barbarians ; the active spirits were diverted by religious disputes ; and the professors of Rome, Constantinople, and Berytus, were humbly content to repeat the lessons of their more enlightened predecessors. From the slow advances and rapid decay of these legal studies, it may be inferred that they require a state of peace and refinement. From the

Second Period A. U. C. 648–988.

Third period A. U. C. 988–1230.

multitude of voluminous civilians who fill the intermediate space, it is evident that such studies may be pursued, and such works may be performed, with a common share of judgment, experience, and industry. The genius of Cicero and Virgil was more sensibly felt, as each revolving age had been found incapable of producing a similar or a second; but the most eminent teachers of the law were assured of leaving disciples equal or superior to themselves in merit and reputation.

Their philosophy.

The jurisprudence, which had been grossly adapted to the wants of the first Romans, was polished and improved in the seventh century of the city by the alliance of Grecian philosophy. The Scævolas had been taught by use and experience; but Servius Sulpicius was the first civilian who established his art on a certain and general theory. For the discernment of truth and falsehood he applied, as an infallible rule, the logic of Aristotle and the stoics, reduced particular cases to general principles, and diffused over the shapeless mass the light of order and eloquence. Cicero, his contemporary and friend, declined the reputation of a professed lawyer; but the jurisprudence of his country was adorned by his incomparable genius, which converts into gold every object that it touches. After the example of Plato, he composed a republic; and, for the use of his republic, a treatise of laws, in which he labours to deduce, from a celestial origin, the wisdom and justice of the Roman constitution. The whole universe, according to his sublime hypothesis, forms one immense commonwealth: gods and men, who participate of the same essence, are members of the same community; reason prescribes the law of nature and nations; and all positive institutions, however modified by accident or custom, are drawn from the rule of right, which the Deity has inscribed on every virtuous mind. From these philosophical mysteries he mildly excludes the sceptics who refuse to believe, and the epicureans who are unwilling to act. The latter disdain the care of the republic: he advises them to slumber in their shady gardens. But he humbly entreats that the new academy would be silent, since her bold objections

would too soon destroy the fair and well-ordered structure of his lofty system. Plato, Aristotle, and Zeno he represents as the only teachers who arm and instruct a citizen for the duties of social life. Of these, the armour of the Stoics was found to be of the firmest temper; and it was chiefly worn, both for use and ornament, in the schools of jurisprudence. From the portico the Roman civilians learned to live, to reason, and to die: but they imbibed in some decree the prejudices of the sect; the love of paradox, the pertinacious habits of dispute, and a minute attachment to words and verbal distinctions. The superiority of form to matter was introduced to ascertain the right of property: and the equality of crimes is countenanced by an opinion of Trebatius, that he who touches the ear touches the whole body; and that he who steals from an heap of corn or a hogshead of wine is guilty of the entire theft.

Arms, eloquence, and the study of the civil law, promoted a citizen to the honours of the Roman state; and the three professions were sometimes more conspicuous by their union in the same character. In the composition of the edict, a learned prætor gave a sanction and preference to his private sentiments: the opinion of a censor, or a consul, was entertained with respect: and a doubtful interpretation of the laws might be supported by the virtues or triumphs of the civilian. The patrician arts were long protected by the veil of mystery; and in more enlightened times the freedom of inquiry established the general principles of jurisprudence. Subtle and intricate cases were elucidated by the disputes of the forum; rules, axioms, and definitions were admitted as the genuine dictates of reason; and the consent of the legal professors was interwoven into the practice of the tribunals. But these interpreters could neither enact nor execute the laws of the republic; and the judges might disregard the authority of Scævolas themselves, which was often overthrown by the eloquence or sophistry of an ingenious pleader. Augustus and Tiberius were the first to adopt, as an useful engine, the science of the civilians; and their servile labours ac-

Authority.

commodated the old system to the spirit and views of despotism. Under the fair pretence of securing the dignity of the art, the privilege of subscribing legal and valid opinions was confined to the sages of senatorian or equestrian rank, who had been previously approved by the judgment of the prince; and this monopoly prevailed, till Hadrian restored the freedom of the profession to every citizen conscious of his abilities and knowledge. The discretion of the prætor was now governed by the lessons of his teachers; the judges were enjoined to obey the comment as well as the text of the law; and the use of codicils was a memorable innovation, which Augustus ratified by the advice of the civilians.

Sects.

The most abolute mandate could only require that the judges should agree with the civilians, if the civilians agreed among themselves. But positive institutions are often the result of custom and prejudice; laws and language are ambiguous and arbitrary; where reason is incapable of pronouncing, the love of argument is inflamed by the envy of rivals, the vanity of masters, the blind attachment of their disciples; and the Roman jurisprudence was divided by the once famous sects of the Proculians and Sabinians. Two sages of the law, Ateius Capito and Antistius Labeo, adorned the peace of the Augustan age; the former distinguished by the favour of the sovereign, the latter more illustrious by his contempt of that favour, and his stern though harmless opposition to the tyrant of Roman. Their legal studies were influenced by the various colours of their temper and principles. Labeo was attached to the form of the old republic; his rival embraced the more profitable substance of the rising monarchy. But the disposition of a courtier is tame and submissive; and Capito seldom presumed to deviate from the sentiments, or at least from the words, of his predecessors: while the bold republican pursued his independent ideas without fear of paradox or innovations. The freedom of Labeo was enslaved, however, by the rigour of his own conclusions, and he decided, according to the letter of the law, the same questions

which his indulgent competitor resolved with a latitude of equity more suitable to the common sense and feelings of mankind. If a fair exchange had been substituted to the payment of money, Capito still considered the transaction as a legal sale ; and he consulted nature for the age of puberty, without confining his definition to the precise period of twelve or fourteen years. This opposition of sentiments was propagated in the writings and lessons of the two founders ; the schools of Capito and Labeo maintained their inveterate conflict from the age of Augustus to that of Hadrian ; and the two sects derived their appellations from Sabinus and Proculus, their most celebrated teachers. The names of Cassians and Pegasians were likewise applied to the same parties ; but, by a strange reverse, the popular cause was in the hands of Pegasus, a timid slave of Domitian, while the favourite of the Cæsars was represented by Cassius, who gloried in his descent from the patriot assassin. By the perpetual edict, the controversies of the sects were in a great measure determined. For that important work, the emperor Hadrian preferred the chief of the Sabinians ; the friends of monarchy prevailed ; but the moderation of Salvius Julian insensibly reconciled the victors and the vanquished. Like the contemporary philosophers, the lawyers of the age of the Antonines disclaimed the authority of a master, and adopted from every system the most probable doctrines. But their writings would have been less voluminous had their choice been more unanimous. The conscience of the judge was perplexed by the number and weight of discordant testimonies, and every sentence that his passion or interest might pronounce was justified by the sanction of some venerable name. An indulgent edict of the younger Theodosius excused him from the labour of comparing and weighing their arguments. Five civilians, Caius, Papinian, Paul, Ulpian, and Modestinus, were established as the oracles of jurisprudence : a majority was decisive ; but if their opinions were equally divided, a casting vote was ascribed to the superior wisdom of Papinian.

When Justinian ascended the throne, the reformation

of the Roman jurisprudence was an arduous but indispensable task. In the space of ten centuries, the infinite variety of laws and equal opinions had filled many thousand volumes, which no fortune could purchase and no capacity could digest. Books could not easily be found; and the judges, poor in the midst of riches, were reduced to the exercise of their illiterate discretion. The subjects of the Greek provinces were ignorant of the language that disposed of their lives and properties; and the barbarous dialect of the Latins was imperfectly studied in the academics of Berytus and Constantinople. As an Illyrian soldier, that idiom was familiar to the infancy of Justinian; his youth had been instructed by the lessons of jurisprudence, and his imperial choice selected the most learned civilians of the East, to labour with their sovereign in the work of reformation. The theory of professors was assisted by the practice of advocates and the experience of magistrates; and the whole undertaking was animated by the spirit of Tribonian. This extraordinary man, the object of so much praise and censure, was a native of Side in Pamphylia; and his genius, like that of Bacon, embraced, as his own, all the business and knowledge of the age. Tribonian composed, both in prose and verse, on a strange diversity of curious and abstruse subjects—a double panegyric of Justinian and the life of the philosopher Theodotus; the nature of happiness and the duties of government; Homer's catalogue and the four-and-twenty sorts of metre; the astronomical canon of Ptolemy; the changes of the months; the houses of the planets; and the harmonic system of the world. To the literature of Greece he added the use of the Latin tongue; the Roman civilians were deposited in his library and in his mind; and he most assiduously cultivated those arts which opened the road of wealth and preferment. From the bar of the prætorian præfects he raised himself to the honours of quæstor, of consul, and of master of the offices: the council of Justinian listened to his eloquence and wisdom, and envy was mitigated by the gentleness and affability of his manners.

Reformation of the Roman law by Justinian, A. D. 527.

Tribonian, A. D. 527–546.

The reproaches of impiety and avarice have stained the virtues or the reputation of Tribonian. In a bigoted and persecuting court, the principal minister was accused of a secret aversion to the Christian faith, and was supposed to entertain the sentiments of an Atheist and a Pagan, which have been imputed, inconsistently enough, to the last philosophers of Greece. His avarice was more clearly proved and more sensibly felt. If he were swayed by gifts in the administration of justice, the example of Bacon will again occur ; nor can the merit of Tribonian atone for his baseness, if he degraded the sanctity of his profession ; and if laws were every day enacted, modified, or repealed, for the base consideration of his private emolument. In the sedition of Constantinople, his removal was granted to the clamours, perhaps to the just indignation, of the people : but the quæstor was speedily restored, and, till the hour of his death, he possessed, above twenty years, the favor and confidence of the emperor. His passive and dutiful submission has been honoured with the praise of Justinian himself, whose vanity was incapable of discerning how often that submission degenerated into the grossest adulation. Tribonian adored the virtues of his gracious master ; the earth was unworthy of such a prince ; and he affected a pious fear, that Justinian, like Elijah or Romulus, would be snatched into the air, and translated alive to the mansions of celestial glory.

If Cæsar had achieved the reformation of the Roman law, his creative genius, enlightened by reflection and study, would have given to the world a pure and original system of jurisprudence. Whatever flattery might suggest, the emperor of the East was afraid to establish his private judgment as the standard of equity : in the possession of legislative power, he borrowed the aid of time and opinion ; and his laborious compilations are guarded by the sages and legislators of past times. Instead of a statue cast in a simple mould by the hand of an artist, the works of Justinian represent a tesselated pavement of antique and costly, but too often of incoherent fragments. In the first year of his reign, he directed

The Code of Justinian, A. D. 528, February 13. A.D. 529, April 7.

the faithful Tribonian, and nine learned associates, to revise the ordinances of his predecessors, as they were contained, since the time of Hadrian, in the Gregorian, Hermogenian and Theodosian codes; to purge the errors and contradictions, to retrench whatever was obsolete or superfluous, and to select the wise and salutary laws best adapted to the practice of the tribunals and the use of his subjects. The work was accomplished in fourteen months; and the twelve books or tables, which the new decemvirs produced, might be designed to imitate the labours of their Roman predecessors. The new code of Justinian was honoured with his name, and confirmed by his royal signature: authentic transcripts were multiplied by the pens of notaries and scribes; they were transmitted to the magistrates of the European, the Asiatic, and afterwards the African provinces: and the law of the empire was proclaimed on solemn festivals at the doors of churches. A more arduous operation was still behind: to extract the spirit of jurisprudence from the decisions and conjectures, the questions and disputes, of the Roman civilians. Seventeen lawyers, with Tribonian at their head, were appointed by the emperor to exercise an absolute jurisdiction over the works of their predecessors. If they had obeyed his commands in ten years, Justinian would have been satisfied with their diligence; and the rapid composition of the Digest or Pandects in three years, will deserve praise or censure, according to the merit of the execution. From the library of Tribonian they chose forty, the most eminent civilians of former times: two thousand treatises were comprised in an abridgment of fifty books; and it has been carefully recorded that three millions of lines or sentences were reduced, in this abstract, to the moderate number of one hundred and fifty thousand. The edition of this great work was delayed a month after that of the Institutes; and it seemed reasonable that the elements should precede the digest of the Roman law. As soon as the emperor had approved their labours, he ratified, by his legislative power, the speculations of these private ci-

The Pandects or Digest, A. D. 530, Dec. 15. A. D. 533, Dec. 16.

tizens: their commentaries on the Twelve Tables, the Perpetual Edict, the laws of the people, and the decrees of the senate, succeeded to the authority of the text; and the text was abandoned as an useless, though venerable, relic of antiquity. The Code, the Pandects, and the Institutes, were declared to be the legitimate system of civil jurisprudence; they alone were admitted in the tribunals, and they alone were taught in the academies of Rome, Constantinople, and Berytus. Justinian addressed to the senate and provinces his eternal oracles; and his pride, under the mask of piety, ascribed the consummation of this great design to the support and inspiration of the Deity. Since the emperor declined the fame and envy of original composition, we can only require at his hands method, choice, and fidelity, the humble though indispensable virtues of a compiler. Among the various combinations of ideas, it is difficult to assign any reasonable preference; but, as the order of Justinian is different in his three works, it is possible that all may be wrong, and it is certain that two cannot be right. In the selection of ancient laws, he seems to have viewed his predecessors without jealousy and with equal regard: the series could not ascend above the reign of Hadrian, and the narrow distinction of Paganism and Christianity, introduced by the superstition of Theodosius, had been abolished by the consent of mankind. But the jurisprudence of the Pandects is circumscribed within a period of a hundred years, from the Perpetual Edict to the death of Severus Alexander: the civilians who lived under the first Cæsars are seldom permitted to speak, and only three names can be attributed to the age of the Republic. The favorite of Justinian, it has been fiercely urged, was fearful of encountering the light of freedom and the gravity of Roman sages. Tribonian condemned to oblivion the genuine and native wisdom of Cato, the Scævolas, and Sulpicius; while he invoked spirits more congenial to his own, the Syrians, Greeks, and Africans, who flocked to the imperial court to study Latin as a foreign tongue, and jurisprudence as a lucrative profession. But the ministers of

Praise and censure of the Code and Pandects.

Justinian were instructed to labour not for the curiosity of antiquarians, but for the immediate benefit of his subjects. It was their duty to select the useful and practicable parts of the Roman law; and the writings of the old republicans, however curious or excellent, were no longer suited to the new system of manners, religion, and government. Perhaps, if the preceptors and friends of Cicero were still alive, our candour would acknowledge that, except in purity of language, their intrinsic merit was excelled by the school of Papinian and Ulpian. The science of the laws is the slow growth of time and experience, and the advantage both of method and materials is naturally assumed by the most recent authors. The civilians of the reign of the Antonines had studied the works of their predecessors: their philosophic spirit had mitigated the rigour of antiquity, simplified the forms of proceeding, and emerged from the jealousy and prejudice of the rival sects. The choice of the authorities that compose the Pandects depended on the judgment of Tribonian; but the power of his sovereign could not absolve him from the sacred obligations of truth and fidelity. As the legislator of the empire, Justinian might repeal the acts of the Antonines, or condemn, as seditious, the free principles which were maintioned by the last of the Roman lawyers. But the existence of past facts is placed beyond the reach of despotism, and the emperor was guilty of fraud and forgery when he corrupted the integrity of their text, inscribed with their venerable names the words and ideas of his servile reign, and suppressed by the hand of power the pure and authentic copies of their sentiments. The changes and interpolations of Tribonian and his colleagues are excused by the pretence of uniformity; but their cares have been insufficient, and the antinomies, or contradictions of the Code and Pandects, still exercise the patience and subtlety of modern civilians.

Loss of the ancient Jurisprudence.

A rumour devoid of evidence has been propagated by the enemies of Justinian, that the jurisprudence of ancient Rome was reduced to ashes by the author of the Pandects, from the vain persuasion that it was now either false or super-

fluous. Without usurping an office so invidious, the emperor might safely commit to ignorance and time the accomplishment of this destructive wish. Before the invention of printing and paper, the labour and the materials of writing could be purchased only by the rich; and it may reasonably be computed that the price of books was a hundred fold their present value. Copies were slowly multiplied and cautiously renewed: the hopes of profit tempted the sacrilegious scribes to erase the characters of antiquity, and Sophocles or Tacitus were obliged to resign the parchment to missals, homilies, and the golden legend. If such was the fate of the most beautiful compositions of genius, what stability could be expected for the dull and barren works of an obsolete science? The books of jurisprudence were interesting to few, and entertaining to none; their value was connected with present use, and they sunk for ever as soon as that use was superseded by the innovations of fashion, superior merit, or public authority. In the age of peace and learning, between Cicero and the last of the Antonines, many losses had been already sustained, and some luminaries of the school or forum were known only to the curious by tradition and report. Three hundred and sixty years of disorder and decay accelerated the progress of oblivion; and it may fairly be presumed, that of the writings which Justinian is accused of neglecting, many were no longer to be found in the libraries of the East. The copies of Papinian or Ulpian, which the reformer had proscribed, were deemed unworthy of future notice; the Twelve Tables and prætorian edict insensibly vanished; and the monuments of ancient Rome were neglected or destroyed by the envy and ignorance of the Greeks. Even the Pandects themselves have escaped with difficulty and danger from the common shipwreck, and criticism has pronounced that all the editions and manuscripts of the West are derived from one original. It was transcribed at Constantinople in the beginning of the seventh century, was successively transported by the accidents of war and commerce to Amalphi, Pisa, and Florence, and is now deposited as a sacred relic in the ancient palace of the republic.

It is the first care of a reformer to prevent any future reformation. To maintain the text of the Pandects, the Institutes, and the Code, the use of ciphers and abbreviations was rigorously proscribed; and as Justinian recollected that the Perpetual Edict had been buried under the weight of commentators, he denounced the punishment of forgery against the rash civilians who should presume *to interpret or pervert the will of their sovereign.* The scholars of Accursius, of Bartolus, of Cujacius, should blush for their accumulated guilt, unless they dare to dispute his right of binding the authority of his successors and the native freedom of the mind. But the emperor was unable to fix his own inconstancy; and, while he boasted of renewing the exchange of Diomede, of transmuting brass into gold, he discovered the necessity of purifying his gold from the mixtures of baser alloy. Six years had not elasped from the publication of the Code, before he condemned the imperfect attempt, by a new and more accurate edition of the same work, which he enriched with two hundred of his own laws, and fifty decisions of the darkest and more intricate points of jurisprudence. Every year, or, according to Procopius, each day, of his long reign was marked by some legal innovation. Many of his acts were rescinded by himself; many were rejected by his successors; many have been obliterated by time; but the number of sixteen Edicts, and one hundred and sixty-eight Novels, has been admitted into the authentic body of the civil jurisprudence.

Legal inconstancy of Justinian.

Second edition of the Code, A. D. 534, Nov. 16.

The Novels, A. D. 543 - 556.

In the opinion of a philosopher superior to the prejudices of his profession, these incessant, and for the most part trifling alterations, can be only explained by the venal spirit of a prince, who sold without shame his judgments and his laws. The charge of the secret historian is indeed explicit and vehement; but the sole instance which he produces may be ascribed to the devotion as well as to the avarice of Justinian. A wealthy bigot had bequeathed his inheritance to the church of Emesa, and its value was enhanced by the

dexterity of an artist, who subscribed confessions of debt and promises of payment with the names of the richest Syrians. They pleaded the established prescription of thirty or forty years; but their defence was overruled by a retrospective edict, which extended the claims of the church to the term of a century; an edict so pregnant with injustice and disorder, that, after serving this occasional purpose, it was prudently abolished in the same reign. If candour will acquit the emperor himself, and transfer the corruption to his wife and favourites, the suspicion of so foul a vice must still degrade the majesty of his laws; and the advocates of Justinian may acknowledge that such levity, whatsoever be the motive, is unworthy of a legislator and a man.

Monarchs seldom condescend to become the preceptors of their subjects; and some praise is due to Justinian, by whose command an ample system was reduced to a short elementary treatise. Among the various institutes of the Roman law, those of Caius were the most popular in the East and West; and their use may be considered as an evidence of their merit. They were selected by the Imperial delegates, Tribonian, Theophilus, and Dorotheus; and the freedom and purity of the Antonines was incrusted with the coarser materials of a degenerate age. The same volume which introduced the youth of Rome, Constantinople, and Berytus to the gradual study of the Code and Pandects, is still precious to the historian, the philosopher, and the magistrate. The Institutes of Justinian are divided into four books: they proceed, with no contemptible method, from, I. Persons, to II. Things, and from things to, III. Actions; and the article IV., of Private wrongs, is terminated by the principles of Criminal Laws.

The Institutes, A. D. 533, Nov. 21.

I. The distinction of ranks and persons is the firmest basis of a mixed and limited government. In France the remains of liberty are kept alive by the spirit, the honours, and even the prejudices, of fifty thousand nobles.

I. Of Persons, Freemen and slaves.

Two hundred families supply, in lineal descent, the second branch of the English legislature, which maintains, between the king and commons, the balance of the constitution. A gradation of patricians and plebeians, of strangers and subjects, has supported the aristocracy of Genoa, Venice, and ancient Rome. The perfect equality of men is the point in which the extremes of democracy and despotism are confounded, since the majesty of the prince or people would be offended if any heads were exalted above the level of their fellow-slaves or fellow-citizens. In the decline of the Roman empire, the proud distinctions of the republic were gradually abolished, and the reason or instinct of Justinian completed the simple form of an absolute monarchy. The emperor could not eradicate the popular reverence which always waits on the possession of hereditary wealth or the memory of famous ancestors. He delighted to honour with titles and emoluments his generals, magistrates, and senators; and his precarious indulgences communicated some rays of their glory to the persons of their wives and children. But in the eye of the law all Roman citizens were equal, and all subjects of the empire were citizens of Rome. That inestimable character was degraded to an obsolete and empty name. The voice of a Roman could no longer enact his laws, or create the annual ministers of his power; his constitutional rights might have checked the arbitrary will of a master; and the bold adventurer from Germany or Arabia was admitted, with equal favour, to the civil and military command, which the citizen alone had been once entitled to assume over the conquests of his fathers. The first Cæsars had scrupulously guarded the distinction of ingenuous and servile birth, which was decided by the condition of the mother; and the candour of the laws was satisfied if her freedom could be ascertained, during a single moment, between the conception and the delivery. The slaves who were liberated by a generous master, immediately entered into the middle class of libertines or freedmen; but they could never be enfranchised from the duties of obedience and gratitude: whatever were the fruits of

their industry, their patron and his family inherited the third part; or even the whole of their fortune if they died without children and without a testament. Justinian respected the rights of patrons; but his indulgence removed the badge of disgrace from the two inferior orders of freedmen: whoever ceased to be a slave obtained, without reserve or delay, the station of a citizen; and at length the dignity of an ingenuous birth, which nature had refused, was created, or supposed, by the omnipotence of the emperor. Whatever restraints of age, or forms, or numbers, had been formerly introduced to check the abuse of manumissions and the too rapid increase of vile and indigent Romans, he finally abolished; and the spirit of his laws promoted the extinction of domestic servitude. Yet the eastern provinces were filled, in the time of Justinian, with multitudes of slaves, either born or purchased for the use of their masters; and the price, from ten to seventy pieces of gold, was determined by their age, their strength, and their education. But the hardships of this dependent state were continually diminished by the influence of government and religion; and the pride of a subject was no longer elated by his absolute dominion over the life and happiness of his bondsman.

Fathers and Children.

The law of nature instructs most animals to cherish and educate their infant progeny. The law of reason inculcates to the human species the returns of filial piety. But the exclusive, absolute, and perpetual dominion of their father over his children is peculiar to the Roman jurisprudence, and seems to be coeval with the foundation of the city. The paternal power was instituted or confirmed by Romulus himself; and, after the practice of three centuries, it was inscribed on the fourth table of the Decemvirs. In the forum, the senate, or the camp, the adult son of a Roman citizen enjoyed the public and private rights of a person: in his father's house he was a mere thing; confounded by the laws with the moveables, the cattle, and the slaves, whom the capricious master might alienate or destroy without being responsible to any earthly tribunal. The hand which bestow-

ed the daily sustenance might resume the voluntary gift, and whatever was acquired by the labour or fortune of the son was immediately lost in the property of the father. His stolen goods (his oxen or his children) might be recovered by the same action of theft; and if either had been guilty of a trespass, it was in his own option to compensate the damage, or resign to the injured party the obnoxious animal. At the call of indigence or avarice, the master of a family could dispose of his children or his slaves. But the condition of the slave was far more advantageous, since he regained, by the first manumission, his alienated freedom: the son was again restored to his unnatural father; he might be condemned to servitude a second and a third time, and it was not till after the third sale and deliverance that he was enfranchised from the domestic power which had been so repeatedly abused. According to his discretion, a father might chastise the real or imaginary faults of his children by stripes, by imprisonment, by exile, by sending them to the country to work in chains among the meanest of his servants. The majesty of a parent was armed with a power of life and death; and the examples of such bloody executions, which were sometimes praised and never punished, may be traced in the annals of Rome, beyond the times of Pompey and Augustus. Neither age, nor rank, nor the consular office, nor the honours of a triumph, could exempt the most illustrious citizen from the bonds of filial subjection: his own descendants were included in the family of their common ancestor; and the claims of adoption were not less sacred or less rigorous than those of nature. Without fear, though not without danger of abuse, the Roman legislators had reposed an unbounded confidence in the sentiments of paternal love; and the oppression was tempered by the assurance that each generation must succeed in its turn to the awful dignity of parent and master.

Limitations of the paternal Authority.

The first limitation of paternal power is ascribed to the justice and humanity of Numa; and the maid, who, with his father's consent, had espoused a freeman, was

protected from the disgrace of becoming the wife of a slave. In the first ages, when the city was pressed and often famished by her Latin and Tuscan neighbours, the sale of children might be a frequent practice; but as a Roman could not legally purchase the liberty of his fellow-citizen, the market must gradually fail, and the trade would be destroyed by the conquests of the republic. An imperfect right of property was at length communicated to sons; and the threefold distinction of profectitious, adventitious, and professional was ascertained by the jurisprudence of the Code and Pandects. Of all that proceeded from the father he imparted only the use, and reserved the absolute dominion; yet, if his goods were sold, the filial portion was excepted, by a favorable interpretation, from the demands of the creditors. In whatever accrued by marriage, gift, or collateral succession, the property was secured to the son; but the father, unless he had been specially excluded, enjoyed the usufruct during his life. As a just and prudent reward of military virtue, the spoils of the enemy were acquired, possessed, and bequeathed by the soldier alone; and the fair analogy was extended to the emoluments of any liberal profession, the salary of public service, and the sacred liberality of the emperor or the empress. The life of a citizen was less exposed than his fortune to the abuse of paternal power. Yet his life might be adverse to the interest or passions of an unworthy father: the same crimes that flowed from the corruption, were more sensibly felt by the humanity of the Augustan age; and the cruel Erixo, who whipped his son till he expired, was saved by the emperor from the just fury of the multitude. The Roman father, from the licence of servile dominion, was reduced to the gravity and moderation of a judge. The presence and opinion of Augustus confirmed the sentence of exile pronounced against an intentional parricide by the domestic tribunal of Arius. Hadrian transported to an island the jealous parent, who, like a robber, had seized the opportunity of hunting, to assassinate a youth, the incestuous lover of his step-mother. A private jurisdiction is repugnant to the spirit of

monarchy; the parent was again reduced from a judge to an accuser; and the magistrates were enjoined by Severus Alexander to hear his complaints and execute his sentence. He could no longer take the life of a son without incurring the guilt and punishment of murder; and the pains of parricide, from which he had been exempted by the Pompeian law, were finally inflicted by the justice of Constantine. The same protection was due to every period of existence; and reason must applaud the humanity of Paulus, for imputing the crime of murder to the father, who strangles, or starves, or abandons his new-born infant, or exposes him in a public place to find the mercy which he himself had denied. But the exposition of children was the prevailing and stubborn vice of antiquity: it was sometimes prescribed, often permitted, almost always practised with impunity by the nations who never entertained the Roman ideas of paternal power; and the dramatic poets, who appeal to the human heart, represent with indifference a popular custom which was palliated by the motives of economy and compassion. If the father could subdue his own feelings, he might escape, though not the censure, at least the chastisement, of the laws; and the Roman empire was stained with the blood of infants, till such murders were included by Valentinian and his colleagues in the letter and spirit of the Cornelian law. The lessons of jurisprudence and Christianity had been insufficient to eradicate this inhuman practice, till their gentle influence was fortified by the terrors of capital punishment.

Husbands and wives.

Experience has proved that savages are the tyrants of the female sex, and that the condition of women is usually softened by the refinements of social life. In the hope of a robust progeny, Lycurgus had delayed the season of marriage: it was fixed by Numa at the tender age of twelve years, that the Roman husband might educate to his will a pure and obedient virgin. According to the custom of antiquity, he bought his bride of her parents, and she fulfilled the coemption by purchasing, with three pieces of copper, a just introduction to

The religious rites of marriage.

his house and household deities. A sacrifice of fruits was offered by the pontiffs in the presence of ten witnesses; the contracting parties were seated on the same sheepskin; they tasted a salt cake of *far*, or rice; and this confarreation, which denoted the ancient food of Italy, served as an emblem of their mystic union of mind and body. But this union on the side of the woman was rigorous and unequal; and she renounced, the name and worship of her father's house, to embrace a new servitude, decorated only by the title of adoption: a fiction of the law, neither rational or elegant, bestowed on the mother of a family (her proper appellation) the strange characters of sister to her own children and of daughter to her husband or master, who was invested with the plenitude of paternal power. By his judgment or caprice her behaviour was approved, or censured, or chastised; he exercised the jurisdiction of life and death; and it was allowed, that in cases of adultery or drunkenness, the sentence might be properly inflicted. She acquired and inherited for the sole profit of her lord; and so clearly was woman defined, not as a person, but as a thing, that, if the original title were deficient, she might be claimed, like other moveables, by the use and possession of an entire year. The inclination of the Roman husband discharged or withheld the conjugal debt, so scrupulously exacted by the Athenian and Jewish laws: but as polygamy was unknown, he could never admit to his bed a fairer or more favoured partner.

Freedom of the Matrimonial Contract.

After the Punic triumphs the matrons of Rome aspired to the common benefits of a free and opulent republic: their wishes were gratified by the indulgence of fathers and lovers, and their ambition was unsuccessfully resisted by the gravity of Cato the censor. They declined the solemnities of the old nuptials, defeated the annual prescription by an absence of three days, and, without losing their name or independence, subscribed the liberal and definite terms of a marriage contract. Of their private fortunes, they communicated the use and secured the property: the estates of a wife could

neither be alienated nor mortgaged by the prodigal husband; their mutual gifts were prohibited by the jealousy of the laws; and the misconduct of either party might afford, under another name, a future subject for an action of theft. To this loose and voluntary compact religious and civil rites were no longer essential, and between persons of a similar rank the apparent community of life was allowed as sufficient evidence of their nuptials. The dignity of marriage was restored by the Christians, who derived all spiritual grace from the prayers of the faithful and the benediction of the priest or bishop. The origin, validity, and duties of the holy institution, were regulated by the tradition of the synagogue, the precepts of the Gospel, and the canons of general or provincial synods; and the conscience of the Christians was awed by the decrees and censures of their ecclesiastical rulers. Yet the magistrates of Justinian were not subject to the authority of the church: the emperor consulted the unbelieving civilians of antiquity; and the choice of matrimonial laws in the Code and Pandects is directed by the earthly motives of justice, policy, and the natural freedom of both sexes.

Liberty and Abuse of Divorce.

Besides the agreement of the parties, the essence of every rational contract, the Roman marriage required the previous approbation of the parents. A father might be forced by some recent laws to supply the wants of a mature daughter, but even his insanity was not generally allowed to supersede the necessity of his consent. The causes of the dissolution of matrimony have varied among the Romans; but the most solemn sacrament, the confarreation itself, might always be done away by rites of a contrary tendency. In the first ages the father of a family might sell his children, and his wife was reckoned in the number of his children: the domestic judge might pronounce the death of the offender, or his mercy might expel her from his bed and house; but the slavery of the wretched female was hopeless and perpetual, unless he asserted for his own convenience the manly prerogative of divorce. The

warmest applause has been lavished on the virtue of the Romans, who abstained from the exercise of this tempting privilege above five hundred years; but the same fact evinces the unequal terms of a connection in which the slave was unable to renounce her tyrant, and the tyrant was unwilling to relinquish his slave. When the Roman matrons became the equal and voluntary companions of their lords, a new jurisprudence was introduced, that marriage, like other partnerships, might be dissolved by the abdication of one of the associates. In three centuries of prosperity and corruption, this principle was enlarged to frequent practice and pernicious abuse. Passion, interest, or caprice, suggested daily motives for their dissolution of marriage; a word, a sign, a message, a letter, the mandate of a freedman, declared the separation; the most tender of human connections was degraded to a transient society of profit or pleasure. According to the various conditions of life, both sexes alternately felt the disgrace and injury: an inconstant spouse transferred her wealth to a new family, abandoning a numerous, perhaps a spurious, progeny to the paternal authority and care of her late husband; a beautiful virgin might be dismissed to the world, old, indigent, and friendless; but the reluctance of the Romans, when they were pressed to marriage by Augustus, sufficiently marks that the prevailing institutions were least favourable to the males. A specious theory is confuted by this free and perfect experiment, which demonstrates that the liberty of divorce does not contribute to happiness and virtue. The facility of separation would destroy all mutual confidence, and inflame every trifling dispute: the minute difference between an husband and a stranger, which might so easily be removed, might still more easily be forgotten; and the matron, who in five years can submit to the embraces of eight husbands, must cease the reverence to chastity of her own person.

Insufficient remedies followed with distant and tardy steps the rapid progress of the evil. The ancient worship of the Romans afforded a peculiar goddess to hear and reconcile the complaints of a married life; but her epi-

Limitations of the liberty of divorce.

thet of viriplaca, the appeaser of husbands, too clearly indicates on which side submission and repentance were always expected. Every act of a citizen was subject to the judgment of the censors; the first who used the privilege of divorce assigned at their command the motives of his conduct; and a senator was expelled for dismissing his virgin spouse without the knowledge or advice of his friends. Whenever an action was instituted for the recovery of a marriage portion, the prætor, as the guardian of equity, examined the cause and the characters, and gently inclined the scale in favor of the guiltless and injured party. Augustus, who united the powers of both magistrates, adopted their different modes of repressing or chastising the licence of divorce. The presence of seven Roman witnesses was required for the validity of this solemn and deliberate act: if any adequate provocation had been given by the husband, instead of the delay of two years, he was compelled to refund immediately or in the space of six months; but if he could arraign the manners of his wife, her guilt or levity was expiated by the loss of the sixth or eighth part of her marriage portion. The Christian princes were the first who specified the just causes of a private divorce; their institutions, from Constantine to Justinian, appear to fluctuate between the custom of the empire and the wishes of the church; and the author of the novels too frequently reforms the jurisprudence of the Code and Pandects. In the most rigorous laws, a wife was condemned to support a gamester, a drunkard, or a libertine, unless he were guilty of homicide, poison, or sacrilege; in which cases the marriage, as it should seem, might have been dissolved by the hand of the executioner. But the sacred right of the husband was invariably maintained to deliver his name and family from the disgrace of adultery; the list or mortal sins, either male or female, was curtailed and enlarged by successive regulations, and the obstacles of incurable impotence, long absence, and monastic profession, were allowed to rescind the matrimonial obligation. Whoever transgressed the permission of the law was subject to various and heavy penalties. The

woman was stripped of her wealth and ornaments, without excepting the bodkin of her hair; if the man introduced a new bride into his bed, her fortune might be lawfully seized by the vengeance of his exiled wife. Forfeiture was sometimes commuted to a fine; the fine was sometimes aggravated by transportation to an island, or imprisonment in a monastery; the injured party was released from the bonds of marriage, but the offender, during life or a term of years, was disabled from the repetition of nuptials. The successor of Justinian yielded to the prayers of his unhappy subjects, and restored the liberty of divorce by mutual consent; the civilians were unanimous, the theologians were divided, and the ambiguous word which contains the precept of Christ is flexible to any interpretation that the wisdom of a legislator can demand.

Incest, concubines, and bastards.

The freedom of love and marriage was restrained among the Romans by natural and civil impediments. An instinct, almost innate and universal, appears to prohibit the incestuous commerce of parents and children in the infinite series of ascending and descending generations. Concerning the oblique and collateral branches nature is indifferent, reason mute, and custom various and arbitrary. In Egypt the marriage of brothers and sisters was admitted without scruple or exception: a Spartan might espouse the daughter of his father; an Athenian, that of his mother; and the nuptials of an uncle with his niece were applauded at Athens as a happy union of the dearest relations. The profane lawgivers of Rome were never tempted by interest or superstition to multiply the forbidden degrees; but they inflexibly condemned the marriage of sisters and brothers, hesitated whether first cousins should be touched by the same interdict, revered the parental character of aunts and uncles, and treated affinity and adoption as a just imitation of the ties of blood. According to the proud maxims of the republic, a legal marriage could only be contracted by free citizens; and honourable, at least an ingenuous, birth was required for the spouse of a senator; but the blood of kings could never mingle in legitimate nup-

tials with the blood of a Roman; and the name of Stranger degraded Cleopatra and Berenice, to live the concubines of Mark Antony and Titus. This appellation, indeed, so injurious to the majesty, cannot without indulgence be applied to the manners of these oriental queens. A concubine, in the strict sense of the civilians, was a woman of servile or plebeian extraction, the sole and faithful companion of a Roman citizen, who continued in a state of celibacy. Her modest station, below the honours of a wife, above the infamy of a prostitute, was acknowledged and approved by the laws: from the age of Augustus to the tenth century, the use of this secondary marriage prevailed both in the West and East; and the humble virtues of a concubine were often preferred to the pomp and insolence of a noble matron. In this connection the two Antonines, the best of princes and of men, enjoyed the comforts of domestic love; the example was imitated by many citizens impatient of celibacy, but regardful of their families. If at any time they desired to legitimate their natural children, the conversion was instantly performed by the celebration of their nuptials with a partner whose fruitfulness and fidelity they had already tried. By this epithet of natural, the offspring of the concubine were distinguished from the spurious blood of adultery, prostitution, and incest, to whom Justinian reluctantly grants the necessary aliments of life; and these natural children alone were capable of succeeding to a sixth part of the inheritance of their reputed father. According to the rigour of law, bastards were entitled only to the name and condition of their mother, from whom they might derive the character of a slave, a stranger, or a citizen. The outcasts of every family were adopted, without reproach, as the children of the state.

Guardians and Wards.

The relation of guardian and ward, or, in Roman words, of tutor and pupil, which covers so many titles of the Institutes and Pandects, is of a very simple and uniform nature. The person and property of an orphan must always be trusted to the custody of some discreet friend. If the

deceased father had not signified his choice, the *agnats*, or paternal kindred of the nearest degree, were compelled to act as the natural guardians: the Athenians were apprehensive of exposing the infant to the power of those most interested in his death; but an axiom of Roman jurisprudence has pronounced, that the charge of tutelage should constantly attend the emolument of succession. If the choice of the father, and the line of consanguinity, afforded no efficient guardian, the failure was supplied by the nomination of the prætor of the city or the president of the province. But the person whom they named to this *public* office might be legally excused by insanity or blindness, by ignorance or inability, by previous enmity or adverse interest, by the number of children or guardianships with which he was already burthened, and by the immunities which were granted to the useful labours of magistrates, lawyers, physicians, and professors. Till the infant could speak and think, he was represented by the tutor, whose authority was finally determined by the age of puberty. Without his consent, no act of the pupil could bind himself to his own prejudice, though it might oblige others for his personal benefit. It is needless to observe, that the tutor often gave security, and always rendered an account; and that the want of diligence or integrity exposed him to a civil and almost criminal action for the violation of his sacred trust. The age of puberty had been rashly fixed by the civilians at fourteen; but as the faculties of the mind ripen more slowly than those of the body, a *curator* was interposed to guard the fortunes of the Roman youth from his own inexperience and headstrong passions. Such a trustee had been first instituted by the prætor, to save a family from the blind havoc of a prodigal or a madman; and the minor was compelled by the laws, to solicit the same protection, to give validity to his acts till he accomplished the full period of twenty-five years. Women were condemned to the perpetual tutelage of parents, husbands, or guardians; a sex created to please and obey was never supposed to have attained the age of reason and experience. Such at

least was the stern and haughty spirit of the ancient law, which had been insensibly mollified before the time of Justinian.

II. The original right of property can only be justified by the accident or merit of prior occupancy; and on this foundation it is wisely established by the philosophy of the civilians. The savage who hollows a tree, inserts a sharp stone into a wooden handle, or applies a string to an elastic branch, becomes in a state of nature the just proprietor of the canoe, the bow, or the hatchet. The materials were common to all; the new form, the produce of his time and simple industry, belongs solely to himself. His hungry brethren cannot, without a sense of their own injustice, extort from the hunter the game of the forest overtaken or slain by his personal strength and dexterity. If his provident care preserves and multiplies the tame animals, whose nature is tractable to the arts of education, he acquires a perpetual title to the use and service of their numerous progeny, which derives its existence from him alone. If he encloses and cultivates a field for their sustenance and his own, a barren waste is converted into a fertile soil; the seed, the manure, the labour, create a new value, and the rewards of harvest are painfully earned by the fatigues of the revolving year. In the successive states of society, the hunter, the shepherd, the husbandman, may defend their possessions by two reasons which forcibly appeal to the feelings of the human mind—that whatever they enjoy is the fruit of their own industry; and that every one who envies their felicity may purchase similar acquisitions by the exercise of similar diligence. Such, in truth, may be the freedom and plenty of a small colony cast on a fruitful island. But the colony multiplies, while the space still continues the same: the common rights, the equal inheritance of mankind, are engrossed by the bold and crafty; each field and forest is circumscribed by the landmarks of a jealous master; and it is the peculiar praise of the Roman jurisprudence, that it asserts the claim of the first occupant to the wild

II. Of Things: Right of property.

animals of the earth, the air, and the waters. In the progress of primitive equity to final justice, the steps are silent, the shades are almost imperceptible, and the absolute monopoly is guarded by positive laws and artificial reason. The active, insatiate principle of self-love can only supply the arts of life and the wages of industry; and as soon as civil government and exclusive property have been introduced, they become necessary to the existence of the human race. Except in the singular institutions of Sparta, the wisest legislators have disapproved an Agrarian law as a false and dangerous innovation. Among the Romans, the enormous disproportion of wealth surmounted the ideal restraints of a doubtful tradition and an obsolete statute; a tradition that the poorest follower of Romulus had been endowed with the perpetual inheritance of two *jugera:* a statute which confined the richest citizen to the measure of five hundred jugera, or three hundred and twelve acres of land. The original territory of Rome consisted only of some miles of wood and meadow along the banks of the Tyber; and domestic exchange could add nothing to the national stock. But the goods of an alien or enemy were lawfully exposed to the first hostile occupier; the city was enriched by the profitable trade of war; and the blood of her sons was the only price that was paid for the Volscian sheep, the slaves of Britain, or the gems and gold of Asiatic kingdoms. In the language of ancient jurisprudence, which was corrupted and forgotten before the age of Justinian, these spoils were distinguished by the name of *manceps* or *mancipium*, taken with the hand; and whenever they were sold or emancipated, the purchaser required some assurance that they had been the property of an enemy, and not of a fellow-citizen. A citizen could only forfeit his rights by apparent dereliction, and such dereliction of a valuable interest could not easily be presumed. Yet, according to the Twelve Tables, a prescription of one year for moveables, and of two years for immoveables, abolished the claim of the ancient master, if the actual possessor had acquired them by a fair transaction from the person whom he

believed to be the lawful proprietor. Such conscientious injustice, without any mixture of fraud or force, could seldom injure the members of a small republic: but the various periods of three, of ten, or of twenty years, determined by Justinian, are more suitable to the latitude of a great empire. It is only in the term of prescription that the distinction of real and personal fortune has been remarked by the civilians, and their general idea of property is that of simple, uniform, and absolute dominion. The subordinate exceptions of *use*, of *usufruct*, of *servitudes*, imposed for the benefit of a neighbour on lands and houses, are abundantly explained by the professors of jurisprudence. The claims of property, as far as they are altered by the mixture, the division, or the transformation of substances, are investigated with metaphysical subtlety by the same civilians.

Of inheritance and succession.

The personal title of the first proprietor must be determined by his death: but the possession, without any appearance of change, is peaceably continued in his children, the associates of his toil, and the partners of his wealth. This natural inheritance has been protected by the legislators of every climate and age, and the father is encouraged to persevere in slow and distant improvements, by the tender hope, that a long posterity will enjoy the fruits of his labour. The *principle* of hereditary succession is universal, but the *order* has been variously established by convenience or caprice, by the spirit of national institutions, or by some partial example, which was originally decided by fraud or violence. The jurisprudence of the Romans appears to have deviated from the equality of nature, much less than the Jewish, the Athenian, or the English institutions. On the death of a citizen, all his descendants, unless they were already freed from his paternal power, were called to the inheritance of his possessions. The insolent prerogative of primogeniture was unknown: the two sexes were placed on a just level; all the sons and daughters were entitled to an equal portion of the patrimonial estate; and if any of the sons had been intercepted by

a premature death, his person was represented, and his share was divided, by his surviving children. On the failure of the direct line, the right of succession must diverge to the collateral branches. The degrees of kindred are numbered by the civilians, ascending from the last possessor to a common parent, and descending from the common parent to the next heir: my father stands in the first degree, my brother in the second, his children in the third, and the remainder of the series may be conceived by fancy, or pictured in a genealogical table. In this computation, a distinction was made, essential to the laws and even the constitution of Rome; the *agnats*, or persons connected by a line of males, were called, as they stood in the nearest degree, to an equal partition; but a female was incapable of transmitting any legal claims; and the cognats of every rank, without excepting the dear relation of a mother and a son, were disinherited by the twelve tables as strangers and aliens. Among the Romans a *gens* or lineage was united by a common name and domestic rites: the various cognomens or surnames of Scipio or Marcellus, distinguished from each other the subordinate branches or families of the Cornelian or Claudian race; the default of the *agnats* of the same surname, was supplied by the larger denomination of Gentiles; and the vigilance of the laws maintained, in the same name, the perpetual descent of religion and property. A similar principle dictated the Voconian law, which abolished the right of female inheritance. As long as virgins were given or sold in marriage, the adoption of the wife extinguished the hopes of the daughter. But the equal succession of independent matrons supported their pride and luxury, and might transport into a foreign house the riches of their fathers. While the maxims of Cato were revered, they tended to perpetuate in each family a just and virtuous mediocrity; till female blandishments insensibly triumphed, and every salutary restraint was lost in the dissolute greatness of the republic. The rigour of the decemvirs was tempered by the equity of the prætors. Their edicts restored emancipat-

Civil degrees of Kindred.

ed and posthumous children to the rights of nature; and upon the failure of the *agnats*, they preferred the blood of the *cognats* to the name of the Gentiles, whose title and character were insensibly covered with oblivion. The reciprocal inheritance of mothers and sons was established in the Tertullian and Orphitian decrees by the humanity of the senate. A new and more impartial order was introduced by the novels of Justinian, who affected to revive the jurisprudence of the Twelve Tables. The lines of masculine and female kindred were confounded: the descending, ascending, and collateral series, was accurately defined; and each degree, according to the proximity of blood and affection, succeeded to the vacant possessions of a Roman citizen.

Introduction and liberty of testaments.

The order of succession is regulated by nature, or at least by the general and permanent reason of the lawgiver; but this order is frequently violated by the arbitrary and partial wills, which prolong the dominion of the testator beyond the grave. In the simple state of society, this last use or abuse of the right of property is seldom indulged; it was introduced at Athens by the laws of Solon; and the private testaments of the father of a family are authorised by the Twelve Tables. Before the time of the decemvirs, a Roman citizen exposed his wishes and motives to the assembly of thirty curiæ or parishes, and the general law of inheritance was suspended by an occasional act of the legislature. After the permission of the decemvirs, each private lawgiver promulgated his verbal or written testament in the presence of five citizens, who represented the five classes of the Roman people; a sixth witness attested their concurrence; a seventh weighed the copper money, which was paid by an imaginary purchaser; and the estate was emancipated by a fictitious sale and immediate release. This singular ceremony, which excited the wonder of the Greeks, was still practised in the age of Severus; but the prætors had already approved a more simple testament, for which they required the seals and signatures of seven witnesses, free from all legal exception, and purposely summoned for the execution of that im-

portant act. A domestic monarch, who reigned over the lives and fortunes of his children, might distribute their respective shares according to the degrees of their merit or his affection; his arbitrary displeasure chastised an unworthy son by the loss of his inheritance and the mortifying preference of a stranger. But the experience of unnatural parents recommended some limitations of their testamentary powers. A son, or, by the laws of Justinian, even a daughter, could no longer be disinherited by their silence: they were compelled to name the criminal, and to specify the offence; and the justice of the emperor enumerated the sole causes that could justify such a violation of the first principles of nature and society. Unless a legitimate portion, a fourth part, had been reserved for the children, they were entitled to institute an action or complaint of inofficious testament, to suppose that their father's understanding was impaired by sickness or age, and respectfully to appeal from his rigorous sentence to the deliberate wisdom of the magistrate. In the Roman jurisprudence, an essential distinction was admitted between the inheritance and the legacies. The heirs who succeeded to the entire unity, or to any of the twelve fractions of the substance of the testator, represented his civil and religious character, asserted his rights, fulfilled his obligations, and discharged the gifts of friendship or liberality which his last will had bequeathed under the name of legacies. But as the imprudence or prodigality of a dying man might exhaust the inheritance, and leave only risk and labour to his successor, he was empowered to retain the Falcidian portion; to deduct, before the payment of the legacies, a clear fourth for his own emolument. A reasonable time was allowed to examine the proportion between the debts and the estate, to decide whether he should accept or refuse the testament; and if he used the benefit of an inventory, the demands of the creditors could not exceed the valuation of the effects. The last will of a citizen might be altered during his life, or rescinded after his death: the persons whom he named might die before him, or reject the inheritance, or be

Legacies.

exposed to some legal disqualification. In the contemplation of these events, he was permitted to substitute second and third heirs, to replace each other according to the order of the testament; and the incapacity of a madman or an infant, to bequeath his property might be supplied by a similar substitution. But the power of the testator expired, with the acceptance of the testament: each Roman of mature age and discretion acquired the absolute dominion of his inheritance, and the simplicity of the civil law was never clouded by the long and intricate entails which confine the happiness and freedom of unborn generations.

Codicils and Trusts.

Conquest and the formalities of law established the use of codicils. If a Roman was surprised by death in a remote province of the empire, he addressed a short epistle to his legitimate or testamentary heir; who fulfilled with honour, or neglected with impunity, this last request, which the judges before the age of Augustus were not authorised to enforce. A codicil might be expressed in any mode, or in any language; but the subscription of five witnesses must declare that it was the genuine composition of the author. His intention, however laudable, was sometimes illegal; and the invention of *fidei-commissa*, or trusts, arose from the struggle between natural justice and positive jurisprudence. A stranger of Greece or Africa might be the friend or benefactor of a childless Roman, but none, except a fellow citizen, could act as his heir. The Voconian law, which abolished female succession, restrained the legacy or inheritance of a woman to the sum of one hundred thousand sesterces; and an only daughter was condemned almost as an alien in her father's house. The zeal of friendship, and parental affection, suggested a liberal artifice: a qualified citizen was named in the testament, with a prayer or injunction that he would restore the inheritance to the person for whom it was truly intended. Various was the conduct of the trustees in this painful situation: they had sworn to observe the laws of their country, but honour prompted them to violate their oath, and if they preferred their interest under the mask of patriotism, they forfeited the

esteem of every virtuous mind. The declaration of Augustus relieved their doubts, gave a legal sanction to confidential testaments and codicils, and gently unravelled the forms and restraints of the republican jurisprudence. But as the new practice of trusts degenerated into some abuse, the trustee was enabled, by the Trebellian and Pegasian decrees, to reserve one-fourth of the estate, or to transfer on the head of the real heir all the debts and actions of the succession. The interpretation of testaments was strict and literal; but the language of trusts and codicils was delivered from the minute and technical accuracy of the civilians.

III. The general duties of mankind are imposed by their public and private relations: but their specific obligations to each other can only be the effect of, 1, a promise; 2, a benefit; or, 3, an injury; and when these obligations are ratified by law, the interested party may compel the performance by a judicial action. On this principle the civilians of every country have erected a similar jurisprudence, the fair conclusion of universal reason and justice. III. Of actions.

1. The goddess of faith (of human and social faith) was worshipped, not only in her temples, but in the lives of the Romans; and if that nation was deficient in the more amiable qualities of benevolence and generosity, they astonished the Greeks by their sincere and simple performance of the most burdensome engagements. Yet among the same people, according to the rigid maxims of the patricians and decemvirs, a naked pact, a promise, or even an oath, did not create any civil obligation, unless it was confirmed by the legal form of a stipulation. Whatever might be the etymology of the Latin word, it conveyed the idea of a firm and irrevocable contract, which was always expressed in the mode of a question and answer. Do you promise to pay me one hundred pieces of gold? was the solemn interrogation of Seius. I do promise—was the reply of Sempronius. The friends of Sempronius, who answered for his ability and inclination, might be separately sued at the option of Seius: and the benefit of partition, or order of recipro- Promises.

cal actions, insensibly deviated from the strict theory of stipulation. The most cautious and deliberate consent was justly required to sustain the validity of a gratuitous promise; and the citizen who might have obtained a legal security, incurred the suspicion of fraud, and paid the forfeit of his neglect. But the ingenuity of the civilians successfully laboured to convert simple engagements into the form of solemn stipulations. The prætors, as the guardians of social faith, admitted every rational evidence of a voluntary and deliberate act, which in their tribunal produced an equitable obligation, and for which they gave an action and a remedy.

2. The obligations of the second class, as they were contracted by the delivery of a thing, are marked by the civilians with the epithet of real. A grateful return is due to the author of a benefit; and whoever is entrusted with property of another, has bound himself to the sacred duty of restitution. In the case of a friendly loan, the merit of generosity is on the side of the lender only; in a deposit, on the side of the receiver: but in a pledge, and the rest of the selfish commerce of ordinary life, the benefit is compensated by an equivalent, and the obligation to restore is variously modified by the nature of the transaction. The Latin language very happily expresses the fundamental difference between the *commodatum* and the *mutuum*, which our poverty is reduced to confound under the vague and common appellation of a loan. In the former, the borrower was obliged to restore the same individual thing with which he had been accommodated for the temporary supply of his wants; in the latter, it was destined for his use and consumption, and he discharged this mutual engagement, by substituting the same specific value, according to a just estimation of number, of weight, and of measure. In the contract of sale, the absolute dominion is transferred to the purchaser, and he repays the benefit with an adequate sum of gold or silver, the price and universal standard of all earthly possessions. The obligation of another contract, that of location, is of a more complicated kind. Lands or houses, labour or talents, may be hired for a definite

Benefits.

term; at the expiration of the time, the thing itself must be restored to the owner with an additional reward for the beneficial occupation and employment. In these lucrative contracts, to which may be added those of partnership and commissions, the civilians sometimes imagine the delivery of the object, and sometimes presume the consent of the parties. The substantial pledge has been refined into the invisible rights of a mortgage or hypotheca; and the agreement of sale, for a certain price, imputes, from that moment, the chances of gain or loss to the account of the purchaser. It may be fairly supposed that every man will obey the dictates of his interest; and if he accepts the benefit, he is obliged to sustain the expense, of the transaction. In this boundless subject, the historian will observe the location of land and money, the rent of the one and the interest of the other, as they materially affect the prosperity of agriculture and commerce. The landlord was often obliged to advance the stock and instruments of husbandry, and to content himself with a partition of the fruits. If the feeble tenant was oppressed by accident, contagion, or hostile violence, he claimed a proportionable relief from the equity of the laws: five years were the customary term, and no solid or costly improvements could be expected from a farmer, who, at each moment, might be ejected by the sale of the estate. Usury, the inveterate grievance of the city, had been discouraged by the Twelve Tables, and abolished by the clamours of the people. It was revived by their wants and idleness, tolerated by the discretion of the prætors, and finally determined by the code of Justinian. Persons of illustrious rank were confined to the moderate profit of four per cent.; six was pronounced to be the ordinary and legal standard of interest; eight was allowed for the convenience of manufacturers and merchants; twelve was granted to nautical insurance, which the wiser ancients had not attempted to define; but, except in this perilous adventure, the practice of exorbitant usury was severely restrained. The most simple interest was condemned by the clergy of the East and West: but the sense of mu-

Interest of money.

tual benefit, which had triumphed over the laws of the republic, have resisted with equal firmness the decrees of the church, and even the prejudices of mankind.

Injuries.

3. Nature and society impose the strict obligation of repairing an injury; and the sufferer by private injustice, acquires a personal right and a legitimate action. If the property of another be intrusted to our care, the requisite degree of care may rise and fall according to the benefit which we derive from such temporary possession; we are seldom made responsible for inevitable accident, but the consequences of a voluntary fault must always be imputed to the author. A Roman pursued and recovered his stolen goods by a civil action of theft; they might pass through a succession of pure and innocent hands, but nothing less than a prescription of thirty years could extinguish his original claim. They were restored by the sentence of the prætor, and the injury was compensated by double, or three-fold, or even quadruple damages, as the deed had been perpetrated by secret fraud or open rapine, as the robber had been surprised in the fact, or detected by a subsequent research. The Aquilian law defended the living property of a citizen, his slaves and cattle, from the stroke of malice or negligence: the highest price was allowed that could be ascribed to the domestic animal at any moment of the year preceding his death; a similar latitude of thirty days was granted on the destruction of any other valuable effects. A personal injury is blunted or sharpened by the manners of the times and the sensibility of the individual: the pain or the disgrace of a word or blow cannot easily be appreciated by a pecuniary equivalent. The rude jurisprudence of the decemvirs had confounded all hasty insults, which did not amount to the fracture of a limb, by condemning the aggressor to the common penalty of twenty-five asses. But the same denomination of money was reduced, in three centuries, from a pound to the weight of half an ounce; and the insolence of a wealthy Roman indulged himself in the cheap amusement of breaking and satisfying the law of the Twelve Tables. Veratius ran through the streets

striking* on the face the inoffensive passengers, and his attendant purse-bearer immediately silenced their clamours by the legal tender of twenty-five pieces of copper, about the value of one shilling. The equity of the prætors examined and estimated the distinct merits of each particular complaint. In the adjudication of civil damages, the magistrate assumed a right to consider the various circumstances of time and place, of age and dignity, which may aggravate the shame and sufferings of the injured person; but if he admitted the idea of a fine, a punishment, an example, he invaded the province, though perhaps he supplied the defects of the criminal law.

Punishments.

The execution of the Alban dictator, who was dismembered by eight horses, is represented by Livy as the first and the last instance of Roman cruelty in the punishment of the most atrocious crimes.* But this act of justice or revenge was inflicted on a foreign enemy, in the heat of victory, and at the command of a single man. The Twelve Tables afforded a more decisive proof of the national spirit, since they were framed by the wisest of the senate, and accepted by the free voices of the people; yet these laws, like the statutes of Draco, are written in characters of blood. They approve the inhuman and unequal principle of retaliation, and the forfeit of an eye for an eye, a tooth for a tooth, a limb for a limb, is rigorously exacted, unless the offender can redeem his pardon by a fine of three hundred pounds of copper. The decemvirs, distributed with much liberality the slighter chastisements of flagellation and servitude; and nine crimes of a very different complexion are adjudged worthy of death. 1. Any act of treason against the state, or of correspondence with the public enemy. The mode of execution was painful and ignominious; the head of the degenerate Roman was shrouded in a veil, his hands were tied behind his back, and, after he had been scourged by the lictor, he was suspended in the midst of the forum on a cross, or inauspicious tree.

Severity of the Twelve Tables.

2. Nocturnal meetings in the city, whatever might be the pretence; of pleasure, or religion, or the public good. 3. The murder of a citizen, for which the common feelings of mankind demanded the blood of the murderer. Poison is still more odious than the sword or dagger; and we are surprised to discover, in two flagitious events, how early such subtle wickedness had infected the simplicity of the republic, and the chaste virtues of the Roman matrons. The parricide who violated the duties of nature and gratitude, was cast into the river or the sea, enclosed in a sack; and a cock, a viper, a dog, and a monkey, were successively added as the most suitable companions. Italy produces no monkeys, but the want could never be felt till the middle of the sixth century first revealed the guilt of a parricide. 4. The malice of an incendiary. After the previous ceremony of whipping, he himself was delivered to the flames; and in this example alone our reason is tempted to approve the justice of retaliation. 5. Judicial perjury. The corrupt and malicious witness was thrown headlong from the Tarpeian rock to expiate his falsehood, which was rendered still more fatal by the severity of the penal laws, and the deficiency of written evidence. 6. The corruption of a judge, who accepted bribes, to pronounce an iniquitous sentence. 7. Libels and satires, whose rude strains sometimes disturbed the peace of an illiterate city. The author was beaten with clubs; a worthy chastisement, but it is not certain that he was left to expire under the blows of the executioner. 8. The nocturnal mischief of damaging or destroying a neighbour's corn. The criminal was suspended as a grateful victim to Ceres. But the sylvan deities were less implacable, and the extirpation of a more valuable tree was compensated by the moderate fine of twenty-five pounds of copper. 9. Magical incantations; which had power, in the opinion of the Latin shepherds, to exhaust the strength of an enemy, to extinguish his life, and remove from their seats his deep-rooted plantations. The cruelty of the Twelve Tables against insolvent debtors

still remains to be told ; and I shall dare to prefer the literal sense of antiquity to the specious refinements of modern criticism. After the judicial proof or confession of the debt, thirty days of grace were allowed before a Roman was delivered into the power of his fellow citizen. In this private prison twelve ounces of rice were his daily food ; he might be bound with a chain of fifteen pounds weight ; and his misery was thrice exposed in the market place, to solicit the compassion of his friends and countrymen. At the expiration of sixty days, the debt was discharged by the loss of liberty or life; the insolvent debtor was either put to death or sold into foreign slavery beyond the Tiber : but, if several creditors were alike obstinate and unrelenting, they might legally dismember his body, and satiate their revenge by his horrid partition. The advocates for this savage law have insisted, that it must strongly operate in deterring idleness and fraud from contracting debts which they are unable to discharge ; but experience would dissipate this salutary terror, by proving that no creditor could be found to exact this unprofitable penalty of life or limb. As the manners of Rome were insensibly polished, the criminal code of the decemvirs was abolished by the humanity of accusers, witnesses, and judges ; and impunity became the consequence of immoderate rigour. The Porcian and Valerian laws prohibited the magistrates from inflicting on a free citizen any capital or even corporal punishment ; and the obsolete statutes of blood were artfully, and perhaps truly, ascribed to the spirit, not of patrician, but of regal, tyranny.

Abolition or oblivion of penal laws.

In the absence of penal laws and the insufficiency of civil actions, the peace and justice of the city were imperfectly maintained by the private jurisdiction of the citizens. The malefactors who replenish our gaols are the outcasts of society, and the crimes for which they suffer may be commonly ascribed to ignorance, poverty, and brutal appetite. For the perpetration of similar enormities, a vile plebeian might claim and abuse the sacred character of a member of

the republic ; but on the proof or suspicion of guilt the slave or the stranger was nailed to a cross, and this strict and summary justice might be exercised without restraint over the greatest part of the populace of Rome. Each family contained a domestic tribunal, which was not confined, like that of the prætor, to the cognizance of external actions : virtuous principles and habits were inculcated by the discipline of education, and the Roman father was accountable to the state for the manners of his children, since he disposed without appeal of their life, their liberty, and their inheritance. In some pressing emergencies, the citizen was authorised to avenge his private or public wrongs. The consent of the Jewish, the Athenian, and the Roman laws, approved the slaughter of the nocturnal thief ; though in open daylight a robber could not be slain without some previous evidence of danger and complaint. Whoever surprised an adulterer in his nuptial bed, might freely exercise his revenge ; the most bloody or wanton outrage was excused by the provocation ; nor was it before the reign of Augustus that the husband was reduced to weigh the rank of the offender, or that the parent was condemned to sacrifice his daughter with her guilty seducer. After the expulsion of the kings, the ambitious Roman who should dare to assume their title, or imitate their tyranny, was devoted to the infernal gods : each of his fellow-citizens was armed with the sword of justice ; and the act of Brutus, however repugnant to gratitude or prudence, had been already sanctified by the judgment of his country. The barbarous practice of wearing arms in the midst of peace, and the bloody maxims of honour, were unknown to the Romans ; and, during the two purest ages, from the establishment of equal freedom to the end of the Punic wars, the city was never disturbed by sedition, and rarely polluted with atrocious crimes. The failure of penal laws was more sensibly felt when every vice was inflamed by faction at home and dominion abroad. In the time of Cicero, each private citizen enjoyed the privilege of anarchy ; each

of the republic was exalted to the temptations of regal power, and their virtues are entitled to the warmest praise as the spontaneous fruits of nature or philosophy. After a triennial indulgence of lust, rapine, and cruelty, Verres, the tyrant of Sicily, could only be sued for the pecuniary restitution of three hundred thousand pounds sterling, and such was the temper of the laws, the judges, and perhaps the accuser himself, that, on refunding a thirteenth part of his plunder, Verres could retire to an easy and luxurious exile.

Revival of Capital Punishment.

The first imperfect attempt to restore the proportion of crimes and punishments was made by the dictator Sylla, who, in the midst of his sanguinary triumph, aspired to restrain the license rather than to oppress the liberty of the Romans. He gloried in the arbitrary proscription of four thousand seven hundred citizens. But, in the character of a legislator, he respected the prejudices of the times; and instead of pronouncing a sentence of death against the robber or assassin, the general who betrayed an army or the magistrate who ruined a province, Sylla was content to aggravate the pecuniary damages by the penalty of exile, or, in more constitutional language, by the interdiction of fire and water. The Cornelian, and afterwards the Pompeian and Julian laws, introduced a new system of criminal jurisprudence; and the emperors, from Augustus to Justinian, disguised their increasing rigour under the names of the original authors. But the invention and frequent use of extraordinary pains proceeded from the desire to extend and conceal the progress of despotism. In the condemnation of illustrious Romans, the senate was always prepared to confound, at the will of their masters, the judicial and legislative powers. It was the duty of the governors to maintain the peace of their province by the arbitrary and rigid administration of justice; the freedom of the city evaporated in the extent of empire, and the Spanish malefactor, who claimed the privilege of a Roman, was elevated

by the command of Galba on a fairer and more lofty cross. Occasional rescripts issued from the throne to decide the questions which, by their novelty or importance, appeared to surpass the authority and discernment of a proconsul. Transportation and beheading were reserved for honorable persons; meaner criminals were either hanged, or burnt, or buried in the mines, or exposed to the wild beasts of the amphitheatre. Armed robbers were pursued and extirpated as the enemies of society; the driving away horses or cattle was made a capital offence; but simple theft was uniformly considered as a mere civil and private injury. The degrees of guilt and the modes of punishment were too often determined by the discretion of the rulers, and the subject was left in ignorance of the legal danger which he might incur by every action of his life.

Measure of guilt.

A sin, a vice, a crime, are the objects of theology, ethics, and jurisprudence. Whenever their judgments agree, they corroborate each other; but as often as they differ, a prudent legislator appreciates the guilt and punishment according to the measure of social injury. On this principle the most daring attack on the life and property of a private citizen is judged less atrocious than the crime of treason or rebellion, which invades the majesty of the republic: the obsequious civilians unanimously pronounced that the republic is contained in the person of its chief, and the edge of the Julian law was sharpened by the incessant diligence of the emperors. The licentious commerce of the sexes may be tolerated as an impulse of nature, or forbidden as a source of disorder and corruption; but the fame, the fortunes, the family of the husband, are seriously injured by the adultery of the wife. The wisdom of Augustus, after curbing the freedom of revenge, applied to this domestic offence the animadversion of the laws; and the guilty parties, after the payment of heavy forfeitures and fines, were condemned to long or perpetual exile in two separate islands. Religion pronounces an equal censure against the infidelity of

the husband; but, as it is not accompanied by the same civil effects, the wife was never permitted to vindicate her wrongs; and the distinction of simple or double adultery, so familiar and so important in the canon law, is unknown to the jurisprudence of the Code and Pandects. I touch with reluctance, and despatch with impatience, a more odious vice, of which modesty rejects the name, and nature abominates the idea. The primitive Romans were infected by the example of the Etruscans and Greeks; in the mad abuse of prosperity and power every pleasure that is innocent was deemed insipid; and the Scatenian law, which had been extorted by an act of violence, was insensibly abolished by the lapse of time and the multitude of criminals. By this law the rape, perhaps the seduction, of an ingenious youth, was compensated as a personal injury by the poor damages of ten thousand sesterces, or fourscore pounds; the ravisher might be slain by the resistance or revenge of chastity; and I wish to believe that at Rome, as in Athens, the voluntary and effeminate deserter of his sex was degraded from the honours and the rights of a citizen. But the practice of vice was not discouraged by the severity of opinion: the indelible stain of manhood was confounded with the more venial transgressions of fornication and adultery, nor was the licentious lover exposed to the same dishonour which he impressed on the male or female partner of his guilt. From Catullus to Juvenal, the poets accuse and celebrate the degeneracy of the times; and the reformation of manners was feebly attempted by the reason and authority of the civilians, till the most virtuous of the Cæsars proscribed the sin against nature as a crime against society.

Unnatural vice.

A new spirit of legislation, respectable even in its error, arose in the empire with the religion of Constantine. The laws of Moses were received as the divine original of justice, and the Christian princes adapted their penal statutes to the degrees of moral and religious turpitude. Adultery was first declared to be a

Rigour of the Christian Emperors.

capital offence; the frailty of the sexes was assimilated to poison or assassination, to sorcery or parricide; the same penalties were inflicted on the passive and active guilt of pæderasty; and all criminals, of free or servile condition, were either drowned, or beheaded, or cast alive into the avenging flames. The adulterers were spared by the common sympathy of mankind; but the lovers of their own sex were pursued by general and pious indignation; the impure manners of Greece still prevailed in the cities of Asia, and every vice was fomented by the celibacy of the monks and clergy. Justinian relaxed the punishment at least of female infidelity; the guilty spouse was only condemned to solitude and penance, and at the end of two years she might be recalled to the arms of a forgiving husband. But the same emperor declared himself the implacable enemy of unmanly lust, and the cruelty of his persecution can scarcely be excused by the purity of his motives. In defiance of every principle of justice, he stretched to past as well as future offences the operation of his edicts, with the previous allowance of a short respite for confession and pardon. A painful death was inflicted by the amputation of the sinful instrument, or the insertion of sharp reeds into the pores and tubes of most exquisite sensibility; and Justinian defended the propriety of the execution, since the criminals would have lost their hands had they been convicted of sacrilege. In this state of disgrace and agony two bishops, Isaiah of Rhodes and Alexander of Diospolis, were dragged through the streets of Constantinople, while their brethren were admonished by the voice of a crier to observe this awful lesson, and not to pollute the sanctity of their character. Perhaps these prelates were innocent. A sentence of death and infamy was often founded on the slight and suspicious evidence of a child or servant; the guilt of the green faction, of the rich, and of the enemies of Theodora, was presumed by the judges, and pæderasty became the crime of those to whom no crime could be imputed. A French philosopher has dared to remark that, whatever is secret must be

doubtful, and that our natural horror of vice may be abused as an engine of tyranny. But the favourable persuation of the same writer, that a legislator may confide in the taste and reason of mankind, is impeached by the unwelcome discovery of the antiquity and extent of the disease.

Judgments of the people.

The free citizens of Athens and Rome enjoyed, in all criminal cases, the invaluable privilege of being tried by their country. 1. The administration of justice is the most ancient office of a prince: it was exercised by the Roman kings and abused by Tarquin, who alone, without law or council, pronounced his arbitrary judgments. The first consul succeeded to this legal prerogative; but the sacred right of appeal soon abolished the jurisdiction of the magistrates, and all public causes were decided by the supreme tribunal of the people. But a wild democracy, superior to the forms, too often disdains the essential principles of justice; the pride of despotism was envenomed by plebeian envy; and the heroes of Athens might sometimes applaud the happiness of the Persian, whose fate depended on the caprice of a single tyrant. Some salutary restraints, imposed by the people on their own passions, were at once the cause and effect of the gravity and temperance of the Romans. The right of accusation was confined to the magistrates. A vote of the thirty-five tribes could inflict a fine; but the cognizance of all natural crimes was reserved by a fundamental law to the assembly of the centuries, in which the weight of influence and property was sure to preponderate. Repeated proclamations and adjournments were interposed, to allow time for prejudice and resentment to subside; the whole proceedings might be annulled by a seasonable omen or the opposition of a tribune, and such popular trials were commonly less formidable to innocence than they were favourable to guilt. But this union of the judicial and legislative powers left it doubtful whether the accused party was pardoned or acquitted; and, in the defence of an illustrious client,

the orators of Rome and Athens addressed their arguments to the policy and benevolence, as well as to the justice, of their sovereign. 2. The task of convening the citizens for the trial of each offender became more difficult, as the citizens and the offenders continually multiplied; and the ready expedient was adopted of delegating the jurisdiction of the people to the ordinary magistrates or to extraordinary inquisitors. In the first ages these questions were rare and occasional. In the beginning of the seventh century of Rome they were made perpetual; for prætors were annually empowered to sit in judgment on the state offences of treason, extortion, peculation, and bribery; and Sylla added new prætors and new questions for those crimes which more directly injure the safety of individuals. By these inquisitors the trial was prepared and directed; but they could only pronounce the sentence of the majority of judges, who, with some truth and more prejudice, have been compared to the English juries. To discharge this important though burdensome office, an annual list of ancient and respectable citizens was formed by the prætor. After many constitutional struggles, they were chosen in equal numbers from the senate, the equestrian order, and the people; four hundred and fifty were appointed for single questions, and the various rolls or decuries of judges must have contained the names of some thousand Romans, who represented the judicial authority of the state. In each particular cause a sufficient number was drawn from the urn; their integrity was guarded by an oath; the mode of ballot secured their independence; the suspicion of partiality was removed by the mutual challenges of the accuser and defendant; and the judges of Milo, by the retrenchment of fifteen on each side, were reduced to fifty-one voices or tablets, of acquittal, of condemnation, or of favourable doubt. 3. In his civil jurisdiction the prætor of the city was truly a judge, and almost a legislator; but, as soon as he had prescribed the action of law, he often referred to a delegate the determination of the fact. With the increase of

Select judges.

legal proceedings, the tribunal of the centumvirs, in which he presided, acquired more weight and reputation. But whether he acted alone or with the advice of his council, the most absolute powers might be trusted to a magistrate who was annually chosen by the votes of the people. The rules and precautions of freedom have required some explanation; the order of despotism is simple and inanimate. Before the age of Justinian, or perhaps of Diocletian, the decuries of Roman judges had sunk to an empty title; the humble advice of the assessors might be accepted or despised; and in each tribunal the civil and criminal jurisdiction was administered by a single magistrate, who was raised and disgraced by the will of the emperor.

Assessors.

A Roman accused of any capital crime might prevent the sentence of the law by voluntary exile or death. Till his guilt had been legally proved, his innocence was presumed and his person was free; till the votes of the last century had been counted and declared, he might peaceably secede to any of the allied cities of Italy, or Greece, or Asia. His fame and fortunes were preserved, at least to his children, by his civil death; and he might still be happy in every rational or sensual enjoyment, if a mind accustomed to the ambitious tumult of Rome could support the uniformity and silence of Rhodes or Athens. A bolder effort was required to escape from the tyranny of the Cæsars; but this effort was rendered familiar by the maxims of the stoics, the example of the bravest Romans, and the legal encouragements of suicide. The bodies of condemned criminals were exposed to public ignominy, and their children, a more serious evil, were reduced to poverty by the confiscation of their fortunes. But, if the victims of Tiberius and Nero anticipated the decree of the prince or senate, their courage and despatch were recompensed by the applause of the public, the decent honours of burial, and the validity of their testaments. The exquisite avarice and cruelty of Domitian appeared to have deprived the unfortunate

Voluntary exile and death.

of this last consolation, and it was still denied even by the clemency of the Antonines. A voluntary death, which, in the case of a capital offence, intervened between the accusation and the sentence, was admitted as a confession of guilt, and the spoils of the deceased were seized by the human claims of the treasury. Yet the civilians have always respected the natural rights of a citizen to dispose of his life; and the posthumous disgrace invented by Tarquin to check the despair of his subjects, was never revived or imitated by succeeding tyrants. The powers of this world have indeed lost their dominion over him who is resolved on death, and his arm can only be restrained by the religious apprehension of a future state. Suicides are enumerated by Virgil among the unfortunate rather than the guilty, and the poetical fables of the infernal shades could not seriously influence the faith or practice of mankind. But the precepts of the Gospel or the church have at length imposed a pious servitude on the minds of Christians, and condemn them to expect, without a murmur, the last stroke of disease or the executioner.

Abuses of civil jurisprudence.

The penal statutes form a very small proportion of the sixty-two books of the Code and Pandects; and, in all judicial proceedings, the life or death of a citizen is determined with less caution and delay than the most ordinary question of covenant or inheritance. This singular distinction, though something may be allowed for the urgent necessity of defending the peace of society, is derived from the nature of criminal and civil jurisprudence. Our duties to the state are simple and uniform; the law by which he is condemned is inscribed not only on brass or marble, but on the conscience of the offender, and his guilt is commonly proved by the testimony of a single fact. But our relations to each other are various and infinite; our obligations are created, annulled and modified by injuries, benefits, and promises; and the interpretation of voluntary contracts and testaments, which are often dictated by fraud or ignorance, affords a long and

laborious exercise to the sagacity of the judge. The business of life is multiplied by the extent of commerce and dominion, and the residence of the parties in the distant provinces of an empire is productive of doubt, delay, and inevitable appeals from the local to the supreme magistrate. Justinian, the Greek emperor of Constantinople and the East, was the legal successor of the Latian shepherd who had planted a colony on the banks of the Tiber. In a period of thirteen hundred years, the laws had reluctantly followed the changes of government and manners; and the laudable desire of conciliating ancient names with recent institutions destroyed the harmony, and swelled the magnitude, of the obscure and irregular system. The laws which excuse on any occasions the ignorance of their subjects, confess their own imperfections; the civil jurisprudence, as it was abridged by Justinian, still contained a mysterious science and a profitable trade, and the innate perplexity of the study was involved in tenfold darkness by the private industry of the practitioners. The expense of the pursuit sometimes exceeded the value of the prize, and the fairest rights were abandoned by the poverty or prudence of the claimants. Such costly justice might tend to abate the spirit of litigation, but the unequal pressure serves only to increase the influence of the rich and to aggravate the misery of the poor. By these dilatory and expensive proceedings the wealthy pleader obtains a more certain advantage than he could hope from the accidental corruption of his judge. The experience of an abuse, from which our own age and country are not perfectly exempt, may sometimes provoke a generous indignation, and extort the hasty wish of exchanging our elaborate jurisprudence for the simple and summary decrees of a Turkish cadhi. Our calmer reflection will suggest that such forms and delays are necessary to guard the person and property of the citizen; that the discretion of the judge is the first engine of tyranny; and that the laws of a free people should foresee and determine every question that may

probably arise in the exercise of power and the transactions of industry. But the government of Justinian united the evils of liberty and servitude, and the Romans were oppressed at the same time by the multiplicity of their laws and the arbitrary will of their master.

NOTES.

G. means Gibbon: words printed in capitals are references to articles in Smith's Dictionary of Greek and Roman Antiquities.

Page 1.

1. The vain titles.

1. In the Proem to the Institutes Justinian styles himself *Alemannicus, Gothicus, Francicus, Germanicus, Anticus, Alanicus, Vandalicus, Africanus,* (conqueror of the Alemanni, Goths, &c.)

2. The Civil Jurisprudence.

2. "*Civil*" law, the law of a particular State, is distinguished from the law of "*nature*" or "*nations*," by Roman Jurists. (English lawyers use the word *civil* as contrasted with *criminal* law). "Jurisprudence," the knowledge (*prudentia*) of what is right (*jus*), that is, the Science of Law. "*The* civil law" (or jurisprudence) is the Roman law.

3. Independent nations.

3. "Germany, Bohemia, Hungary, Poland, and Scotland have received them (the Code, Pandects and Institutes) as common law, or reason; in France, Italy, &c. they possess a direct or indirect influence, and they were respected in England from Stephen to Edward I. our national Justinian." *G.* Since Gibbon wrote, the *Code Napoléon* which "may be described, without great inaccuracy, as a compendium of the rules of Roman law then practised in France, cleared of all *feudal* admixture," has been established in France and other European States. In America the "Code of Louisiana," a masterly republication of Roman law, is adopted by the newest American States as the substratum of their laws. The international law of civilized States is Roman in its origin and terminology. And in the words of Dr. Mayne (see Preface), "the Roman law is fast becoming the lingua franca of universal jurisprudence."

4. Perpetual order.

4. The practitioners and professors of the Roman civil law are styled Civilians. They are a "perpetual order of men" in the same sense as the Clergy or the Bar, being bound together by a common academical Degree (the Doctorate of Civil Law) and common scientific and professional interests.

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5. The Anti-Tribonians.

5. There is a book by Hottoman, a lawyer of the XVIth century, styled Anti-Tribonianus,

but there was no such sect as Gibbon imagines.

6. The primitive Government.

6. Gibbon's sketch of Roman law under the kings is imperfect. Our knowledge of early Roman history has been much increased (by Niebuhr and others) since his time. See the introduction to Sandars's Institutes, page 2.

7. Thirty curix.

7. COMITIA. "After the institution of the centuries (by Servius Tullius), "the *comitia centuriata* gradually succeeded, to the political power of the *comitia curiata* and the curies only met to give a formal religious sanction to their resolutions." (Sandars.)

8. The threefold division.

8. JUS. Law (jus) is divided by Justinian (after Ulpian) into the Law of Nature, the Law of Nations, and Civil law. The first may be considered as the law of living creatures, the second the law of the human race, and the third the law of citizens (that is men living together in a civil society). The connexion of Romulus, Numa and Servius respectively with the members of this classification is wholly imaginary. The division is purely theoretical. The practical distinction drawn by jurists is that mentioned in Note 2 between natural law (*jus gentium*) "those principles of right dictated by our reason which are common to all men alike" and the positive law (*jus civile*) of each State.

Page 3.

9. The Royal laws.

9. JUS CIVILE PAPIRIANUM. Much has been written but little is known respecting the *Leges Regiæ* (Royal laws). They were probably religious regulations. A collection of them was made (or said to be made) by one Papirius in the reign of Tarquinius Superbus.

10. The mysterious deposit.

10. In early Roman history the patricians were a privileged caste, who jealously monopolised the knowledge of law and legal proceedings, which, as in all primitive communities, were bound up with the national religion. (See *post* Note 51).

11. The arbitrary sentence.

11. The object of forming the commission who drew up the law of the XII. Tables was to limit the *imperium* (military and judicial power) of the Consuls.

12. The Twelve tables.

13. They were dictated.

12. LEX DUODECIM TABULARUM. 13. But it must be remembered that the patricians originally constituted "the people" (*populus*) and that there were no other real citizens (*cives optimo jure*) besides them. The plebeians (*plebes*) were perhaps the earlier inhabitants of the country conquered by the Ramnes or Romans. PATRICII. PLEBES. There can

be no doubt, however, that the Twelve Tables were a great boon to the *plebes*, and a beginning of their participation in the private law of Rome (Sandars). "They (the XII. Tables) settled all the most important rights of a Roman citizen: the mode of suing; the penalties for theft; the rate of interest, which was not to exceed *fœnus unciarium* (8⅓ per cent. for 10 months); the rights of creditors over their debtors; the power of a *pater-familias*; the making of wills; the rules as to succession (*hereditas*); guardianship (*tutela*); ownership (*dominium*) and possession; *delicta*; breaches of trust; *prœdia rustica*; the common rights of the people forbidding special privileges" (or rather laws relating to individuals, *privilegia*). "The punishment of corrupt *judices*; trials as to life, liberty, or *status*; the expenses of funerals, and the mode of interment; the *jus sacrum*; and marriage and divorce, prohibiting intermarriage between patricians and plebeians." (Cumin). Also see the chapter in Arnold's history of Rome on the legislation of the XII. Tables. 14. AS. The Roman monetary system was probably borrowed from Etruria. The unit of value was the *as*, originally a pound weight of copper (*æs*). For its divisions see the Dictionary of Antiquities. 15. According to Dionysius three commissioners were sent (B. C. 454) to Athens and the Greek cities generally, in order to make themselves acquainted with their laws. They returned after two years. In B. C. 451, ten commissioners (including the three) were appointed to draw up a code. They produced ten tables in the course of the year which were approved by the Senate and confirmed by the *Comitia Centuriata*. In B. C. 450 ten commissioners were appointed to draw up further laws. They produced two "tables of unjust laws" (so they were considered in after times) making up the Twelve. No further attempt at drawing up a code was made till nearly 1000 years afterwards by Justinian. 16. *Hesperia*, the "western land," was the Greek name for Italy. In the eyes of the Greeks all people but themselves were barbarians. The Chinese are guilty of the same insolence. 17. The opinion of Gibbon is now generally adopted. "There is nothing whatsoever borrowed from a foreign origin, except

14. The name and divisions.

15. The deputies.

Page 4.
16. Hesperia.

17. Strangers or adverse.

some provisions respecting the law of funerals, taken from the laws of Solon" (Sandars). 18. Compare the frequent panegyrics of Lord Coke on the English common law. 19. "Civil prudence," *i. e.* jurisprudence. The fundamental principles of the Twelve Tables were never repealed, but were developed in after times to meet the necessities of a changed society. They were accounted the "source of all public and private law." (*Fons omnis publici privatique juris*, Livy.) "It is a remarkable proof of the practical skill of the Romans, that long before Jurisprudence was a science, the doctrine of *Successio per universitatem* (see HERES and UNIVERSITAS) was so completely and accurately stated in the law of the Twelve Tables that the jurists of the best period could find nothing to improve." (G. Long). 20. *Finis æqui juris* (the definition of equity and right) Tacitus.[1] 21. Livy and Tacitus both complain of the number of the laws in their day. 22. All laws (*leges*) were engraved on bronze and deposited in the public *Ærarium*. 23. *Sanction.* This term denotes such regulations as are designed for the enforcement of substantive law (*e. g.* Civil process). 24. The Twelve Tables were approved by the Senate and finally confirmed by the *Comitia centuriata*, in whom the legislative power then resided. LEX. COMITIA CENTURIATA. 25. The maxim however is unsound and unjust, for it delivers up the wealthy to taxation—it may be, confiscation—by the poor, and overwhelms the voices of the wise and educated minority by the clamour of the hasty and uninformed multitude. Compare the fall of the Athenian and Roman republics in this light. The ascendancy of a mere numerical majority is, as history shows, the sure forerunner of despotism. 26. COMITIA TRIBUTA. PLEBISCITUM. The *Lex Hortensia* (B. C. 286) which made *plebiscita*, the resolutions of the *Comitia Tributa* (*plebiscita*) binding as *leges*, on the whole nation, may be considered as closing the long struggle between the patricians and plebeians. (See Sandars' Introduction S. 13). 27. The method of voting at the Comitia is fully explained in the Dictionary of Antiquities. COMITIA. 28. The *Comitia tributa* and *Centuriata* were united (about B. C.

18. Blind and partial reverence.

19. We alone.

Page 5.

20. The rule of right.

21. At the end of five centuries.

22. Brass plates.

23. Sanction.

24. Centuries.

25. The specious and popular maxim.

26. The tribes.

27. Bridges.

Page 6.

28. Tribes or centuries.

247) and formed a very democratic assembly. 29. LEX JULIA ET PAPIA POPPÆA. 30. Tiberius transferred the legislative power to the Emperor and Senate. Gibbon supposes that under the republic the Senate had no power of legislation. But *Senatus-consulta* having the effect of laws have been preserved, which are much earlier than the reign of Augustus. It is difficult, however, to state how far the legislative power of the Senate went under the Republic. SENATUS CONSULTUM (and see Sandars' Introd. S. 16). 31. LEGES CORNELIÆ (various laws named from Sulla), LEGES POMPEIÆ (named from Pompey the Great and his father), LEGES JULIÆ (named from Caius Julius Cæsar). 32. Not so, of course, in questions of public law. 33. JUS HONORARIUM. HONORES. EDICTUM. See the Dictionary of Antiquities for an account of the officers mentioned in the text. Gibbon's views as to the prætor's edict require modification. When the Roman empire was expanded by the conquest of Italy, the narrow law of the Twelve Tables, which applied to citizens only, was no longer sufficient. Cases arose in which foreigners being concerned as plaintiff or defendant, it became necessary to consider the institutions of subject and other nations. In the language of jurists, this brought the *jus gentium*, the law of nations, side by side with the *jus civile*, the municipal law of Rome. Thus the Magistrates were compelled to recognise and give effect to principles different from those of the XII. Tables. The municipal law was still recognised where it was sufficient for the purposes of substantial justice, but where not, the prætor, the supreme judge, appealed to a wider and higher law, and "sought in the principles of equity a remedy for the deficiencies of the *jus civile*." He pronounced decrees (*Edicta*) laying down the law as he conceived it ought to be, if it was to regulate aright the case before him. In process of time it became the custom for the prætor to collect into one *Edictum* the rules on which he intended to act during his tenure of office and to publish them on a tablet (*in albo*) at the commencement of his official year. These edicts, put forward at the beginning of the year of office,

29. The freedom of domestic life.

30. His successor.

31. Cornelian, &c. laws.

32. Questions of private jurisprudence. *Page* 7.

33. Edicts.

were termed *edicta perpetua*. Thus the prætors performed the necessary and beneficent work of forming a comprehensive and equitable body of law, "the *jus honorarium*, the law of the prætors (who had the *honores* of the state), which was spoken of as having a distinct place by the side, and as the complement of the *jus civile*"—modifying and enlarging but not abrogating it. 34. M. Hugo, an eminent German jurist, has demonstrated that "the prætorian edicts furnished the salutary means of perpetually harmonising the legislation with the spirit of the times." "It was not according to their caprice that the prætors framed their regulations, but according to the methods and opinions of the great civil lawyers of their day. We know from Cicero himself that it was considered a great honor among the Romans to publish an edict well conceived and well drawn." Again; "the prætors had no power of departing from the fundamental laws, or the laws of the XII. Tables. The people held them in such consideration that they rarely enacted laws contrary to their provisions, but, as some provisions were found inefficient, others opposed to the manners of the people and to the spirit of subsequent ages, the prætors, still maintaining respect for the laws, endeavoured to bring them into accordance with the necessities of the existing time, by such fictions as best suited the nature of the case." (Warnkœnig). 35. B. C. 67. The Cornelian law made the edict *perpetuum*, that is unchangeable, during the year of office. 36. Gibbon has mistaken the meaning of the *perpetuum edictum* of Hadrian. After the Cornelian law the *edictum* was *perpetuum* in the sense explained in Note 34. There is no evidence to shew that the word *perpetuum*, as applied to Hadrian's edict, is used in a different sense, or that it was declared *for ever unalterable* by that Emperor. Other civilians before Julianus had collected and digested the edicts. 37. CONSTITUTIONES. "On the destruction of the republic, the power of the Emperor, though at first nominal—for he was styled *princeps republicæ* (chief man of the republic) gradually increased till at length he became "the state." He declared his will by —1. *Rescripta*, answers to questions asked by magistrates. 2. *Decreta*, judicial decisions. 3.

34. A jurisdiction thus vague.

Page 8.

35. Cornelian law.

36. Perpetual edict.

37. Respectfully inserted.

Edicta, proclamations of law, analogous to the prætor's edict. To these may be added *mandata*, instructions to particular officers. 38. Incorrect. "The Pandects contain many constitutions of the emperors from Julius Cæsar" (Warnkœnig). 39. *Legibus Solutus.* "It seems certain," says Dr. Smith, "that the expression *Legibus Solutus*, only meant released from *particular* laws." 40. IMPERIUM. "The first emperors were only the chief magistrates of the republic. Augustus and his immediate successors united in their own persons all the high offices of state" (consulate, censorship, tribunitian power, pontificate). "The *Imperium*, or supreme command, was conferred on them by" (a lex de Imperio, afterwards called) "the *lex regia* passed, as a matter of form, at the beginning of their reign, and by which the later jurists (Ulpian) supposed that the people devolved on the Emperor all their own right to govern and legislate." (Sandars). This view is more accurate than that given by Gibbon. The *lex Regia* of the later jurists was the same thing under another name, as the *lex de Imperio Principis* of the first Emperors. See LEX REGIA. 41. Sandars translates the passage (Hist. I. 2, § 6) more accurately "that which seems good to the Emperor has also the force of law: for the people by the *lex regia*, which is passed to confer on him his power (*quæ de ejus imperio lata est*) make over to him their whole power and authority." 42. An eminent civilian, one of Tribonian's colleagues. 43. "The Romans divide rescripts into two sorts, according as the questions are submitted by a community or a single person. Rescripts in answer to questions of the first sort, as also to questions relating to public matters, are called *sanctiones pragmaticæ*: rescripts of the other sort are called, if contained in a letter, *epistolæ*, if written on the document containing the question, *subscriptiones* or *adnotationes*." (Lindley's Thibaut). 44. A. D. 306, Gregorianus, and A. D. 365, Hermogenianus, had made collections of all the Imperial constitutions. These codes, however, had no legislative authority. A. D. 438. Theodosius II. published a code for the Eastern and Western Empire, which embraced all the constitutions of the Emperors after Constantine, (from Cumin). Justinian's code was

38. Legislative power.

Page 9.

39. "Released from the laws."

40. An elective Magistrate.

41. "The pleasure."

42. Theophilus.

Page 10.

43. Yet in the rescripts.

44. The Gregorian codes.

45. Spurious or obsolete.

drawn up on the model of these. 45. Gibbon has now enumerated the following sources of Roman legislation previous to Justinian. 1. Laws of the kings. 2. Twelve Tables. 3. Laws of the people; (*a*) passed by the *Comitia centuriata*, (*b*)passed by the *Comitia tributa*. 4. *Senatus Consulta*. 5. The prætor's edicts. 6. *Constitutiones principum*. He now proceeds to give some account of the succession of legal sages whose writings are collected in the Pandects and declared to have the force of law. 46. Compare the ceremonial of knighthood. 47. Isidorus derives *stipulatio* (a certain mode of making a contract) from *stipula*, a straw. "For the ancients, when they promised each other anything, used to break a plaited straw, and joining the ends again, they acknowledged their undertaking" (from Sandars). The word indenture in English law, refers to the ancient practise in England of writing agreements between parties in duplicate, on one piece of parchment, which was then cut in half—into the "part" and "counterpart"—by an *indented* or wavy line, which device was meant to guarantee each covenantor against any fraudulent substitution of a different document on the part of the other. This was the rude plan of a people who could not as a general rule sign their names. A similar custom prevailed among the Greeks of two contracting parties breaking a bone, or coin, and each preserving one of the halves, so as to call the contract to mind at any time by producing and matching them. These were especially used in the case of compacts of *hospitality*. See Herodt. Book VI. Ch. 86:—where a man of Miletus in Asia Minor, having converted a part of his property into cash, deposits it for safety with a Spartan—"Take my money" he says, "*and take also and keep these tallies* (*symbola*)*: and the man who brings these to you* (i. e. the *counterparts*) *and claims the money, to him you shall restore it.*" Accordingly we find the Milesian's sons claiming the money from the Spartan afterwards. After some hesitation, he paid the money back; but so sacred was this pledge considered among the Greeks, that, as the story runs, for having only formed in his mind the plan of defrauding them, the anger of the Gods destroyed his whole family, so that in the third generation

Page 11.
46. The manumission.
47. A broken straw.

there was not a descendant left. 48. MANCIPIUM. Gibbon refers to the ancient solemn form of sale, called *Mancipatio*, which was necessary in order to transfer full legal ownership in the case of certain kinds of property, called *res mancipi*. 49. An incorrect description of the old form of *cretio hereditatis*, abolished A. D. 407. 50. Nothing more is known of this ceremony. It was ridiculed, perhaps not understood, in the time of Gaius. It seems the "basin" was not used to cover the face, but either to occupy the hands of the searcher, or to put the stolen article in, if found. 51. Gibbon had conceived opinions too decided against the forms of procedure in use among the Romans. Yet it is on these solemn forms that the certainty of laws has been founded among all nations (Warnkœnig). 52. See the story of Cn. Flavius, secretary of Appius Claudius, who (B. C. 312) published a calendar in which all the *dies fasti* and *nefasti* were marked and a collection of the formulæ of the *legis actiones*. (Livy XI. 46). ACTIO. DIES. CALENDARIUM. 53. "To undermine the public institutions of their country" is not a happy expression to apply to the labours of the Roman civilians. The Roman law under Augustus "had assumed a fixed definite character, which was never after lost or materially altered. But it remained for the genius of the great jurists of the three first centuries of the empire to arrange and unfold it, to bring it into harmony with the principles of philosophy, and to give it the character and the dignity of a science." (Sandars). 54. *Jurisprudentes*, or *Jurisconsulti*. The duty of a Jurisprudent was *respondere, cavere, agere, scribere* (to answer, to protect, to act or plead, to write) Cicero de Oratore I. 48. (Sandars). 55. Horace alludes to the morning labours of the civilians :—

48. Weights and Scales.

49. The heir.

50. If a citizen.

51. The occult science.

52. The treachery.

Page 12.

53. The skill of private citizens.

54. The masters of the art.

55. As their years.

> When the client seeking a consultation knocks at his door at cockcrow,
> The master of common-right and statute law envies the cultivator of the soil.
>
> *Satires* I. 1, 10.

And again:—

> At Rome it was long a delightful usage with open House to wake early and announce the law to (or for) a client.

56. The verbal or written opinion.

56. "Such answers were of course of no legal authority, but as the sage would frequently accompany his client (as the questioner was called) before the magistrate and announce his opinion, it had frequently all the effect upon the magistrate which a positive enactment would have had, and thus the *responsa prudentum*" (answers of the prudent) "come to be enumerated among the direct sources of law. Cato the censor, and Servius Sulpicius, the contemporary of Cicero, are those otherwise best known to us." (Sandars). T. Coruncanius, a plebeian, consul B. C. 281, and the first plebeian Pontifex Maximus, is mentioned as the first who publicly professed law and he was distinguished both for his knowledge of law and for his eloquence. JURIS CONSULTI.

Page 13.

57. Mucian talk.

58. The Tripartite.

59. Three sayes of the law.

57. See Note 59 for the famous jurists of the Mucian *gens*. 58. JUS ÆLIANUM. The *Tripertita* of Sextus Ælius Catus contained the law of the XII. Tables, an *interpretatio* and the *Legis actiones*. 59. Publius Mucius Scævola, Pontifex Maximus (B. C. 131), Quintus Mucius Scævola, the Augur, and Quintus Mucius Scævola, the son of Publius, (consul B. C. 95 and afterwards Pontifex Maximus). The last named was one of the masters of Cicero and is mentioned by him as "among orators the greatest jurist, among jurists the greatest orator." He is quoted in the Digest of Justinian. He is said to be the first who gave the *Jus Civile* a systematic form by a treatise in eighteen books. 60. Servius Sulpicius was the first who handled the law in a scientific manner. We may view him as the founder of that methodical treatment of the matter of law which characterised the subsequent Roman jurists. (Long). 61. The three Imperial Schools of Civil law were at Rome, Constantinople, and Berytus (Beyruth). 62. M. Hugo thinks that the ingenious system of the Institutes, adopted by a great number of the ancient lawyers, and by Justinian himself, dates from Servius Sulpicius. 63. An allusion to the triple division of *Jus*. Positive law (*jus civile*) is founded on the dictates of reason (*jus naturæ et gentium*). 64. The heads of which were Arcesilaus and Carneades. 65. Zeno. See Sandars. Introduction S. 28 for an appreciation of the writings of the great jurists and

60. Servius Sulpicius.

61. The professors of Rome.

Page 14.

62. A certain and general theory.

63. All positive institutions.

64. The new Academy.

Page 15.

65. The Stoics.

the effect on their doctrines of the Stoic philosophy. 66. *Stoa.* 67. Vide p. 38 68. See Note 52. 69. Legal arguments before the judge. 70. The writings of the juris consulti consisted of commentaries on the XII. Tables and particular *leges*, elementary treatises (*Institutiones*), books of maxims and principles (*Regulæ, Definitiones*), collections of cases and answers (*responsa, sententiæ, epistolæ, opiniones*) and miscellaneous works. 71. Augustus found the position of the great jurists in public opinion too important to be overlooked. "He formally gave to their decisions the weight which usage had in many instances given them already; and it was enacted that their answers should be solicited and announced in a formal manner" (in writing and under seal) and "given under the sanction of the Emperor." (Sandars). The "right of answering" (*jus respondendi*) or of giving opinions binding on the judge, was not given to all, but the jurists who had not received this mark of imperial favour were not, as Gibbon perhaps implies, precluded from giving an opinion, if consulted; only, their opinion would not be binding on the judge. 72. Hadrian decided (in a rescript) that the judge should be bound by the answers of the jurisconsults only in case they were unanimous. If not, he might follow whichever he would. Gibbon's statement in the text may mislead the reader. Even after Hadrian's rescript some jurisconsults only had the privilege of giving binding opinions (*jura condere*) granted to them by the Emperor (Gaius I. § 7). Compare this privilege with the rights annexed in England to the degree of barrister-at-law. 73. Inst. II. tit. 25. "Codicils were certainly not in use before the reign of Augustus; for Lucius Lentulus, to whom the origin of trusts (*fidei commissa*) may be traced, was the first who introduced codicils. When dying in Africa he wrote several codicils which were confirmed by his testament; and in these he requested Augustus, by a *fidei commissum*, to do something for him. The Emperor complied with the request, and many other persons, following his example, discharged *fidei commissa* committed to them; and the daughter of Lentulus paid debts, which, in strictness of law, were not due from her. It is said that Augustus, having called together, upon this occasion, persons

66. The Portico.
67. The superiority of form to matter.
68. The veil of mystery.
69. Disputes of the forum.
70. Tales, axioms and definitions.
Page 16.
71. This monopoly.
72. Hadrian.
73. The use of codicils.

learned in the law (*prudentes*), and among others Trebatius, whose opinion was of the greatest authority, asked whether codicils could be admitted and whether they were not repugnant to the principles of law? Trebatius advised the Emperor to admit them, as they were most convenient, and necessary to citizens on account of the great and long journeys which they were frequently obliged to take, during which a man who could not make a testament, might be able to make codicils. And subsequently Labeo himself having made codicils, no one afterwards doubted their perfect validity." (Sandars' transl.) A codicil was an informal will. TESTAMENTUM. 74. Both these controversies were decided in favor of the Proculians or Pegasians (Labeo's sect). Gaius avows himself a Sabinian, but the antagonism of the sects was apparently dying out in his day. 75. A constitution of Theodosius II. published A. D. 426. 76. 1. Caius or Gaius wrote under the Antonines. He is known as the author of a Book of Institutes, on which Justinian's treatise is based. The discovery of the manuscript of this work by Niebuhr, in 1816, has much increased our knowledge of Roman law. The MS. had been written over with the letters of St. Jerome (palimpsest), and its existence was entirely unknown until Niebuhr brought it to light while examining the contents of the library of the Chapter at Verona. 2. Æmilianus Papinianus, prætorian prefect (supreme judge) under Sept. Severus, whom he accompanied to Britain, and was present when that Emperor died at York A. D. 211. He was executed by the tyrant Caracalla, son of Septimius Severus. He wrote books of "Questions," "Answers" and "Definitions." He is praised as the wisest of jurists. 3. Julius Paulus, pupil of Papinian, prætorian prefect under Severus Alexander (A. D. 222), author of the *Receptæ Sententiæ* (received sentences) long the source of law among the Visigoths in Spain. 4. Domitius Ulpianus, a Tyrian by birth, prætorian prefect under Caracalla, murdered A. D. 228. The Digest contains a greater number of extracts from his writings than those of any other jurist. 5. Herennius Modestinus, pupil of Ulpian and Papinian, member of the Imperial council under Alexander Severus. We have none of his works

Page 17.
74. If a fair exchange.

75. An indulgent edict.
76. Five civilians.

save the extracts in the Digest. (From Sandars). 77. That is, of course, in a literary sense. 78. Justinian was Sclavonic by origin. His name was Uprauda, said to mean upright, corresponding to the Latin Justinianus. He was born at Taurisium in Bulgaria (A. D. 482), and being adopted by his uncle Justin, succeeded him as sole Emperor A. D. 527. He died in A. D. 565. His reign was made eventful by the victories of his General, Belisarius, and the republication "of the Roman law in a form that fitted it to descend to the modern world." If we believe Procopius, his character was mean, rapacious and weak, and that of his wife Theodora unspeakably infamous. His court was as corrupt as was usual in the Eastern empire. 79. Of ships in the Iliad. 80. Officer of the Treasury. 81. *Magister Officiorum*, a high officer at court, who superintended all audiences with the Emperor. 82. Pandectæ (Greek) "general receivers"—a common title for miscellanies. "The *Digesta* (Latin) of Scævola and others were already familiar to the civilians." *G.* Salvius Julianus had used the word Digesta as the title of his chief work. PANDECTÆ. 83. INSTITUTIONES? 84. See the Proem to the Institutes. 85. The Institutes is the only book of the three that can be said to pretend to scientific method. The constitutions in the Code are arranged chronologically. CODEX. As to the method of the Pandects, see PANDECTÆ. 86. This is hardly accurate. Many constitutions earlier than Hadrian were incorporated in the writings of the Jurists, and are to be found in the Pandects. 87. Christianity directly produced some changes in the law (relative to hierarchical rank, power of religious corporations to hold property, &c.) and it had also an indirect effect, which is very remarkable. "To the community which citizenship had bound together, succeeded another, bound together by the ties of a common religion. The tendency of the change was to remove the barriers which had formed a part of the older condition of society. If we compare the Institutes of Justinian with those of Gaius, we find changes in the law of marriage, in that of succession, and in many other branches of law, in which it is not difficult to recognise the spirit of humanity and reverence for natural ties, which Christianity had inspired." 88. Out

Page 18.
77. Poor in the midst of riches.
78. As an Illyrian soldier.

79. Homer's catalogue.
80. Quæstor.
81. Master of the offices.

Page 20.
82. Digest or Pandects.

83. Institutes.
84. His pride.

Page 21.
85. The order of Justinian.

86. The series could not ascend.

87. The narrow distinction.

88. Only three names.

of forty names of Jurists quoted in the Digest, three are Republican. Alfenus Varus, a pupil of Servius Sulpicius and contemporary of Cicero, Caius Ælius Gallus, a contemporary of Cicero, and Quintus Mucius Scævola, the Pontifex Maximus, Consul B.C. 95. 89. By F. Hottoman. 90. Gibbon refers to a passage in the Code in which Justinian or Tribonian writes :—"whatever was *seditiosum* in the old laws has been cut down" or decided. But *seditiosum*, means disputed not seditious, in the language of Justinian. (From Warnkœnig). 91. See PANDECTÆ. Under the instructions of the Emperor, the extracts from the jurists could not always be given in their exact words. "It is probable that many short passages were interpolated, or altered, as a matter of necessity, though there seems to be no reason for supposing that these changes were carried farther than the nature of the case required" (Long). And as to the Code. "The constitutions as they appear in this Code have been in many cases altered by the compilers and consequently in an historical point of view the Code is not always trustworthy." (Long). CODEX JUSTINIANEUS. 92. Compare the barbarous dilemma of Omar by which he justified the burning of the Library at Alexandria. 93. "This execrable practice prevailed from the VIIIth and more especially from the XIIth century, when it became almost universal." *G.* Yet a philosopher might admit, and a Christian will insist, that in the middle ages a sermon, a prayer book, or even the half fabulous life of a saint might be more practically valuable for the best interests of civilization than a drama or a history, which few or none could understand. "The *hopes of profit*" is a gratuitous sneer. The real cause which produced palimpsests was the extreme poverty of the monks, who were the sole copyists and preservers of literature of the time. See Maitland's remarks on this subject in his Essays on the Dark Ages. 94. "*All*, in several instances, repeat the errors of the scribe and the transpositions of leaves in the Florentine Pandects. This fact, if it be true, is decisive. Yet the Pandects are quoted by Ivo of Chartres (who died in 1117), by Theobald, Archbishop of Canterbury, and by Vacarius, our first Professor" (at Oxford) "in the year 1140". *G.* Savigny has examined and discredits the

89. It has been fiercely urged. *Page* 22.

90. Condemn as seditious.

91. Fraud and forgery.

Page 23.

92. False or supposititious.

93. The hopes of profit.

94. One original.

whole story in his history of the Roman law in the middle ages. "It is still indeed an undetermined question whether other existing manuscripts of the Pandects are not derived from this illustrious copy, which alone contains the entire fifty books and which has been preserved with a traditional veneration indicating some superiority; but Savigny has shewn that Peter of Valence, a jurist of the eleventh century, made use of an independent manuscript; and it is certain that the Pandects were the subject of legal studies before the siege of Amalfi." Hallam's Literature of Europe, vol. I. p. 62. 5th Edn. 8vo. The Pisan war took place in the year 1135. The Florentine copy of the Pandects is composed of two quarto volumes with large margins, on a thin parchment, and the Latin characters betray the hand of a Greek scribe. "The discovery of the Pandects at Amalphi (A. D. 1137) is first noticed (in 1501) by Ludovicus Bolognensis, on the faith of a Pisan Chronicle without name or date. The whole story, though unknown to the XIIth century, embellished by ignorant ages, and suspected by rigid criticism, is not, however, destitute of much internal probability. The Liber Pandectarum of Pisa was undoubtedly consulted in the XIVth century by the great Bartolus." *G.* 95. "Pisa was taken by the Florentines in the year 1406; and in 1411 the Pandects were transported to the capital. These events are authentic and famous." "They were new bound in purple, deposited in a rich casket, and shewn to curious travellers by the monks and magistrates, bareheaded, and with lighted tapers." *G.* Brenkman, a Dutch jurist, travelled to Florence (in the 18th century) and spent years in the study of this venerated manuscript. 96. Accursius, a jurist of Florence, in the early part of the XIIIth century. His famous work is a compilation of "glosses"—short marginal explanations of hard words and passages—on the Code and Pandects. He is the representative of the early school of commentators, called "Glossers," whose jural acuteness and diligence have redeemed them from the censure which they had merited by barbarism of language and ludicrous historical ignorance. They are highly praised by Savigny. Bartolus, an eminent civilian and professional lawyer at Bologna in the XIVth

95. Pisa and Florence.

Page 24
96. The scholars of Accursius.

century. He was versed in scholastic logic which he applied to the analysis of law. He was ignorant of Roman antiquity, and, it is said, a poor Latin scholar; but "his copiousness" says Gravina (on the Sources of law) "and subtlety of distinction is such, that he seldom leaves those who consult him wholly at a loss." Cujacius, a great French jurist and magistrate in the XVIth and XVIIth centuries. 97. "Golden for brazen, the worth of an hundred steers for the worth of nine." Homer's Iliad, Bk. VI. line 236. In the first preface to the Pandects. "A line of Milton or Tasso would surprise us in an act of Parliament." *G.* 98. NOVELLÆ. [Constitutiones.] New constitutions. 99. Montesquieu, 100. Procopius.

97. The exchange of Diomede.

98. Novels.

99. In the opinion of a philosopher.

100. The secret history.

Page 25.

101. Theophilus and Dorotheus.

102. The Institutes.

101. Theophilus and Dorotheus were professors respectively in the schools of Constantinople and Berytus. 102. The Institutes begin with some general observations on the nature, the divisions and the sources of law (*Jus*). JUS. He divides law into public (relating to the state) and private (relating to individuals), and confining himself to the latter, he distinguishes it into the law of nature, of nations, and civil law. What is here called the law of nature is not properly a division of law at all, but "is merely the result of observing that animal instincts and wants (as the procreation of offspring) which afford matter for the regulations of human law are shared by man with the brute creation." (Sandars). The *jus gentium* (law of nations) is what modern writers call natural law, that is, the principles of right dictated by the natural feeling of justice that is common to all men. (The Roman *jus gentium* must not be confounded with *international* law, that which regulates the dealings of one state with another). *Jus civile*, the law of a particular state, is what modern writers term municipal law. The *jus civile* of the Roman state is termed *Jus civile* simply. Roman civil law being written or unwritten, the written Roman law is drawn from the following sources:—1. *Lex*, an enactment made by the Roman *populus* (in the *Comitia curiata* or *Centuriata*) on the motion of a senatorian magistrate, as a consul. 2. *Plebiscitum*, an enactment of the *plebes* (in the *Comitia tributa*) on the motion of a plebeian magistrate, as a Tribune. 3. *Senatus consulta*, decrees of the senate

(which in Imperial Rome superseded all except the Emperor's constitutions). 4. *Principum placita*, ordinances of the emperor, however made, by rescript, letter, &c. 5. *Edicta* of magistrates (as the prætor). 6. *Responsa prudentum*, answers of jurisprudents. And the unwritten law is custom (*mores*) which equally with written law is sanctioned by the national will. That a custom may have the effect of law it must be reasonable, unbroken, and not opposed to written law. (See Lindley's Thibaut, § 17-20.)

The effect of *laws*, properly so called, consists in this, that a duty is imposed on one person which he can be compelled to perform at the will of some other. The latter has a power to act (*Jus* in the sense of a *right*); the former is under a necessity of acting (*officium*, duty, or *obligation*, in the popular sense. For the legal meaning of obligation, see *post* Note.205) Rights and duties are correlative; one implies the other.

Now all rights presuppose *persons* in whom they reside; persons are the *subjects* of rights. The rights of persons may be against some other person or persons (*Jura in personam*—"rights against a person") or rights which persons have over *things*; (*jura in re*—"rights in a thing"). These conceptions also imply some mode of enforcement of rights when disputed; which brings in the subject of *actions*, or civil process.

The word *persona* in the Roman law has an artificial sense: it denotes all beings capable of having, or being the subject of *rights*. Slaves then, not having rights in the full legal sense, would not be *persons*. On the other hand, the State, a Corporation, the Church, the Imperial Treasury (fiscus) were considered as capable of having rights, and were therefore *personæ*.

The position of an individual regarded as a person, was *status*; the elements of which were (1) liberty, (2) citizenship (*civitas*), and (3) membership in a family (*familia*). 103. The reader will of course remember that Gibbon wrote before the French Revolution, which by destroying the nobility, rendered possible the despotism of the first and third Napoleon. 104. "Since the time of Gibbon the House of Peers has been more than doubled, a wise policy, to increase the patrician order in proportion to the general increase of the nation." (Milman). 105.

Page 25
103. In France

104. Two hundred families

105. In the decline of the Roman Empire

Caracalla made all the free subjects of the empire citizens; thenceforward the class of *peregrini* (strangers) ceased to exist. All beyond the civilized world were "barbarians" and "enemies." 106. SERVUS. 107. LIBERTUS. A *libertinus* was *libertus* (that is *liberatus*, "freed") with reference to his master. All free men were either *Ingenui* (INGENUI) or *Libertini*. The Romans conceived slavery as an institution of the *jus gentium*, contrary to nature (but here the *jus gentium* must be understood as equivalent to the *usages of civilized nations*, and not the law based on natural reason. This is the second sense of *jus gentium*. (See Note 102). 108. MANUMISSIO. 109. There were formerly three classes of freedmen, of which the first only were citizens. 110. LEX ÆLIA SENTIA. LEX FURIA. In the strict theory of the old Roman law, no manumission was legitimate unless the state was represented. For the state was interested in the reception of a new citizen. 111. The Christian religion. The church, in the middle ages also, energetically promoted the enfranchisement of serfs. It is the peculiar disgrace of the ministers of religion in the southern states of America that they throw their influence into the scale of slavery. 112. Happily, the law of slavery has for English subjects only a historical interest. It may be added to Gibbon's sketch, that under the Code, for the purpose of preventing unlawful detention, every free man is entitled to a judge's order for his production in court, called the "interdict concerning the production of a free man." Compare the regulations of the *Habeas Corpus Act*. Gibbon having considered two elements of the *Status*—liberty and citizenship—proceeds to consider the third—*Familia*. 113. Observe the gradation between the law of *nature* (instinct), the law of *reason* (*jus gentium* or *naturale*), and the *Roman jurisprudence* (*jus civile Romanorum*). "Dominion" is not quite an accurate term here. The paternal power (*patria potestas*) is distinguished by Roman jurists from the power of a master over his slave (*dominica potestas*) though they were nearly identical in fact. 114. Such is not the modern opinion. "Public law, the notion of a polity absorbing, colouring, permeating every relation of indivi-

106. Servile birth.
107. Libertines.
Page 27.
108. Their patron.
109. Inferior orders of freedmen.
110. Whatever restraints.
111. Religion.
112. Husbondsman.
113. The law of nature.
114. The paternal power.

dual life, ... we may venture to speak of, as belonging to the people of Romulus (the Ramnes); private law, the peculiar notions of the family and of property ("quiritarian ownership") which form so marked a feature of Roman law, belong to the people of Tatius and Numa" (*Quirites*). From Sandars. PATRIA POTESTAS. 115. The *patria potestas* could be acquired by adoption. 116. The *peculium* which came to the son as part of the father's property, and which continued to belong to the father, is termed by commentators *profectitium*, because it *proceeds* (*proficiscitur*) from the father. Constantine introduced the *peculium adventitium*, which consisted of everything received by a *filius familias* in succeeding to his mother. Justinian included under it all that came to the son from any other source than the father himself. Of this the father had the usufruct, the son the *dominium* (ownership). The *castrense* (military) *peculium* belonged absolutely to the son (it dates from about Augustus). Constantine introduced the *quasi-castrense peculium* for the advantage of certain civil officers, advocates, and ecclesiastical functionaries. It is the two last kinds of *peculium* that Gibbon terms Professional. (From Sandars). 117. "The examples of Erixo and Arius are related by Seneca, the former with horror, the latter with applause." *G.* 118. LEX CORNELIA DE SICARIIS. Gibbon here notes the limitation of the paternal power successively by Augustus, Hadrian, Severus Alexander (of whom Paulus was contemporary) and Constantine. "The wise and humane sentence of the civilian Paulus is represented as a mere moral precept by Gerard Noodt and as a positive binding law by Bynkershoek." *G.* 119. The Spartans practised it on sickly or deformed children from motives of state policy. Dr. Wilson, in his treatise on Female Infanticide in India, follows the traces of this unnatural crime in distant times and countries. 120. "When the Chremes of Terence reproaches his wife for not obeying his orders and exposing their infant, he speaks like a father and a master and silences the scruples of a foolish woman." *G.* 121. The *lex Cornelia de Sicariis et Pompeia de parricidiis*. 122. It was no doubt the "gentle influence" of Christianity that procured the "terrors

Page 28. 115. The claim of adoption.

Page 29. 116. The three fold distinction.

117. The case: Erixo.

Page 30. 118. The pains of parricide.

119. The exposition of children.

120. The dramatic poets.

121. The Cornelian law.

122. Their gentle influence.

of capital punishment" for the crime of child murder. 123. There is no single test of civilization more to be relied on than the respect paid to women. The Hindoos have lost the higher feeling on this point that the Aryans seem to have brought with them into India. See the strictures of Mill (History of India, Book II. ch. 7, with Wilson's qualifying notes). Tacitus in his "Germany," the spirit of which seems as if he prophetically anticipated the greatness of the Teutonic race, celebrates their respect for women. They were barbarians but not savages. The "refinements of social life" do not necessarily improve the condition of women: for there is a corrupt as well as a noble refinement. In the heroic ages of Greece (as in those of India) women were honored to an extent unknown in later and more refined times. "The position of a Roman woman after marriage was very different from that of a Greek woman" (the author must be understood as speaking more particularly of the *Athenians*, whose origin was half Asiatic). "The Roman wife presided over the whole household; she educated her children, watched over and preserved the honour of the house, and, as the *mater familias*" (mother of the family) "she shared the honours and respect shown to her husband" (as *pater familias*). (Dr. Smith in Dicty. of Antiquities.) MATRIMONIUM. 124. Augustus forbad the betrothal *(sponsiones)* of a girl before she was ten years old, so that the engagement might not last more than two years (betrothals were not binding on either party). Twelve years was the legal (and doubtless in Italy the physical) age of female puberty, so that "infant marriages" did not prevail at Rome. 125. Gibbon's outline of the Roman marriage law is not very clear. I. For a "just" or "lawful" *(legitimum)* marriage, according to the old *jus civile*, involving the *conventio in manum viri* (the wife coming into the husband's *manus*—hand or power) the following conditions were prerequisite. 1. *Connubium* between the parties. 2. Consent (the essence of the marriage contract); and 3. Puberty of male and female. A *justum* or *legitimum matrimonium* could be effected in three ways—(*a*) by *confarreation*, a religious rite supposed to be confined to patricians; by (*b*) *coemption*, a solemn sale before

123. Experience has proved.

124. The tender age of twelve years.

125. According to the custom of Antiquity.

witnesses (*mancipation*); or (*c*) *usus*, a year's cohabitation of a man and a woman with the matrimonial intention. In these three ways the wife came into her husband's *manus* and became in the eye of the law his daughter, and the issue of the marriage were in his power. The first and third modes fell into disuse under the Emperors. II. Under the influence of the *jus gentium* (see above, Note 102) a *consortio omnis vitæ* (consortship for the whole of life) with the matrimonial intention, was recognised as a valid marriage (*matrimonium juris gentium*). This did not put the wife into the husband's power (*manus*). III. The Roman notion of marriage was this:—the union of male and female, a consortship for the whole of life, the inseparable consuetude of life, the inter-communion of law sacred and not sacred. See MATRIMONIUM. (By a fiction of the English law a husband and wife for most purposes are considered as one person). 126. "Name." An English wife assumes the surname (family name) of her husband, retaining her Christian (personal) name. Jane Jones marrying John Smith becomes Jane Smith. "Worship." Each *gens* (caste?) and each family at Rome (as among the Hindoos) had its own *Sacra*. 127. *Mater familias*. Properly, a wife who is in her husband's *manus* (see 125). A wife not *in manu* was simply *uxor*. She was not a member of the husband's *familia* and not properly a *mater familias*. 128. Before the establishment of the British Government in Sind, the Sindian husband claimed and freely exercised the right of slaying his wife on suspicion of adultery. Under the English rule female adultery is punished by imprisonment and the right of wife killing is no longer conceded to jealous husbands. 129. This is hardly correct. No forms were required for a Roman marriage. The consent to live together as man and wife was the marriage, the *usus* for a year under the law of the XII. Tables resulted in the *manus*, (see Note 125) by analogy to the *usus* of moveables. If the wife however did not wish to come into her husband's *manus*, by an absence of three nights (*trinoctium*) in the course of the year she might break the prescription. 130. Originally the *matrimonium juris civilis* was the only marriage. Under the influence of the *jus gentium*, which recognised the unions of foreigners as lawful

Page 31.

126. She renounced the name and worship.

127. Mother of a family.

128. In cases of adultery.

129. By the use and possession.

130. They declined the sole nuptiæ.

marriages, there was established the notion of a valid marriage generally (*consortio omnis vitæ* with the *affectio maritalis*) which might be either *juris civilis* or *juris gentium*. Under Justinian the distinction had ceased (between matrimony of the civil law and matrimony of the law of nations) and there only remained the notion of a valid marriage generally. (The *trinoctium* dates from the XII. Tables, not the Punic wars.) 131. Pledged. 132. DONATIONES INTER VIRUM ET UXOREM. 133. Generally, it may be said that there was only *connubium* (legality of marriage) between Roman citizens. Originally there was no *connubium* between Patricians and Plebeians. This was given by the *lex Canuleia* (B. C. 309). 134. The Jewish law. 135. Councils of bishops and clergy. 136. The maxim is *consensus non concubitus facit matrimonium* (consent not sexual intercourse makes matrimony). 137. "According to Plutarch Romulus allowed only three grounds of divorce —"drunkenness" (it should be *poisoning*), adultery, and false keys. Otherwise, the husband who abused his supremacy forfeited half his goods to the wife, and half to the goddess Ceres, and offered a sacrifice (with the remainder?) to the terrestrial deities. This strange law was either imaginary or transient." *G.* 138. *Diffarreation* (and *coemption* by *remancipation*). 139. This statement is questionable. For the essence of marriage is consent, and, apparently, it would be discontinued by dissent of *either* party. See MATRIMONIUM and DIVORTIUM. 140. But see Note 123 *ad finem*. The first instance of divorce that occurred at Rome was that of Spurius Carvilius Ruga, who, about B.C. 234, put away a good but a barren wife. "He was questioned by the censors and hated by the people; but his divorce stood unimpeached in law." *G.* 141. LEX JULIA ET PAPIA POPPÆA. 142. See Lord Stowell's observations in Evans *v.* Evans. 143. Allusion to Juvenal, Satir. VI. 229. "*So a womangets eight husbands in the course of five autumns*"—"a rapid succession which may yet be credible, as well as the *non consulum numero*, &c." (They reckon their years not by the number of the consuls but of their husbands) "of Seneca." *G.* 144. See Note 140. The censors no doubt mitigated in practice the severity of the *patria*

Page 32.
131. Mortgaged.
132. Their mutual gifts.
133. Persons of a similar rank.
134. The tradition of the Synagogue.
135. Synods.
136. The agreement of the parties.
137. The causes of the dissolution of matrimony.
138. Rites of a contrary tendency.
139. The slavery of the wretched female.
Page 33.
140. The warmest applause.
141. The reluctance of the Romans.
142. A specious theory.
143. Eight husbands.
Page 34.
144. The first who used the privilege.

potestas. 145. As a general rule when a man divorced his wife he returned the marriage portion (*dos*). 146. The censor and the prætor. 147. For graver offences, as adultery, a sixth part might be retained; for lighter ones, one-eighth (by the *lex Papia Poppæa*). 148. The only ground of divorce allowed by Christ. 149. Entering a monastery and taking monastic vows was equivalent to civil death. 150. Matthew xix. 9: "Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery; and whoso marrieth her which is put away, committeth adultery." There is a question whether the Greek word rendered "fornication" is rightly translated. The evangelists St. Mark and St. Luke, reporting apparently the same precept of Christ, omit the exception (Mark x. 11. Luke xvi. 18). The English law only recognises divorces made by judicial authority. 151. No. Nature is not indifferent, as physiologists are well aware. Insanity, scrofula and degeneracy taint the issue of nearly related persons. 152. Affinity is the relationship created by marriage between a husband and his wife's relations, and *vice versâ*—as that of son-in-law, daughter-in-law, &c. AFFINES. The table of degrees prohibited by English law may be seen in the book of Common Prayer. 153. Gibbon now considers the "*Civil* impediments" to the freedom of marriage. There must be *connubium* (legality of marriage) between the parties to constitute *justæ nuptiæ* (lawful wedlock). 154. *Peregrina*. The laws of Menu exhibit a jealousy of mixed marriages for which no parallel can be found elsewhere. See the specimens given by Mill (Book II. ch. 7.) 155. Morals. 156. The distinction, so often recurring, between natural law (*jus gentium*) and positive law (*jus civile*) appears here, in the classification of children as *natural* and *legitimate*. Bastards (*spurii*) were regarded as fatherless, for it was uncertain who was their father. 157. TUTOR. 158. All orphan females, and orphan boys under the age of puberty, required a *tutor*. 159. In England the Lord Chancellor is the guardian of all orphans. 160. "Gibbon's theory of pupillage does not seem correct. The *tutor* certainly did not 'represent' the *pupillus*. His office is always described as *augere auctori-*

145. Whenever an action.

146. Both magistrates.

147. Sixth or eighth part.

148. The disgrace of adultery.

149. Monastic profession.

150. The precept of Christ.

151. Nature is indifferent.

152. Affinity.

153. According to the proud maxims.

154. Stranger.

155. The manners.

156. By this epithet of natural.

157. Guardian and ward.

158. The person and property of an orphan. *Page* 37.

159. If the choice.

160. Till the infant,

tatem" (to enlarge his legal power) "*interponere*" (to interpose) "*auctor fieri*," *i. e.* to fill up or complete the defective legal personality of the ward. All formal words essential to a legal transaction had to be pronounced by the ward himself, and then the *tutor*, by his assent, added the *animus*, the intention, of which the child was not capable. Hence it is additionally inaccurate to describe the *tutor* as representing the ward "till he could speak." The *infant* "(*in*, not; *fari*, to speak) the child incapable of speech could do nothing either with or without his *tutor*." 161. It was not till the age of Justinian that the controversy between the Proculians and Sabinians as to the age of puberty was finally settled in favor of the former. From birth until the seventh year a child was *infans* (not speaking). From birth until the fourteenth year (or twelfth, if a girl) *impubes*; from 14 to 25, *adultus*, *adolescens*. These three classes were called *minores* ("less"—*i. e.* than twenty-five years). From 14 (or 12) persons were *puberes*, all over 25 years were *majores* (INFANS). 162. CURATOR. The *Curator* was for the property; the *tutor* for person and property. (The English law protects "infants"—or "minors"—persons under 21 years—from the consequences of their civil acts. If sued for debt or on contract they may plead "infancy." The Roman law, by means of the *curator*, gave a still more efficient protection up to the age of 25. By the *lex Plætoria*, any one defrauding a person under that age was liable to a criminal prosecution and to "infamy." See Sandars, p. 157.) 163. TUTELA. 164. DOMINIUM. The word "thing" in the Roman law, like the word "person," had an artificial meaning—"whatever is the object of a legal act," or whatever may be considered as the object of "a right;" and the first division of things is into *corporeal* (tangible) *things*, and *rights*, or incorporeal (intangible) things. Examples; a house, and the right to live in it; which may belong to two different persons. Of corporeal things the jurists distinguish things "of divine right" (as religious buildings, burial grounds, city walls) which cannot be objects of property from things *humani juris* which may. (Observe, the former division relates to the nature of things in themselves, the latter is based on the notion of

161. The age of puberty.

162. A curator was interposed.

163. Women were condemned. *Post* 38.

164. The original right.

property in things.) Things *divini juris* are said to be *res nullius* (no man's). *Res humani juris* may be (*a*) public, belonging to the State (as a harbour), or (*b*) *private*, belonging to individuals, (*c*) *res universitatis*, belonging to a *universitas* (a corporation) or (*d*) *res communes*, things that cannot be appropriated, as the air and sea. The last are also considered as *res nullius*. (Wild animals are also called *res nullius*, in the sense that they *are not* the property of any individual though they *may be* appropriated). There are other divisions of things in the Roman law. 165. The jurists distinguish between the *natural* and *civil* modes of acquiring things. Of the former the most important is *occupation*. This must be (*a*) of a *res nullius* (in the sense of an unappropriated thing) which (*b*) must be reduced into actual possession. Gibbon gives several examples of occupation in which these two conditions are satisfied. 166. Gibbon here casts an oblique censure on the feudal game laws, of which traces still remain in England. 167. Gibbon here passes from the *natural* to the *positive* laws of property (from the *jus naturale* to the *jus civile*,) by a just gradation through the successive stages of savage, hunting, pastoral and agricultural life to the establishment of political society. (1) In the early periods of Roman law only one kind of full ownership (*dominium*) was recognised. This was called *Quiritarian* and said to be *ex jure Quiritium* (by the law of the *Quirites*). Only Roman citizens could have this full ownership. Only the *ager Romanus* could be held by the especial tenure called Quiritarian. The old law also distinguished the *res mancipi* (the plunder of the army) from *res nec mancipi*, all other things. Of the former the full Quiritarian ownership could only be passed by the solemn form of sale, with the piece of copper and scales, before witnesses, called *mancipatio*. (*Res mancipi* included all the most valuable and easily distinguishable things with which the old Romans were acquainted, slaves, beasts of burden, land in the ager Romanus). *Res nec mancipi* could be alienated without *Mancipatio*, by mere delivery. These narrow technical doctrines of the *jus civile* were unsuited to the expanding empire. The privileges of the *Ager Romanus* were extended to most land in Italy (called *solum Italicum*)

165. Prior occupancy.

166. It is the peculiar praise of the Roman jurisprudence. *Page* 39.

167. In the progress.

and finally all distinctions between "Italian soil" and *solum provinciale* were abolished by Justinian.

(2). Again the prætors, where justice and common sense required, as in the case of foreigners purchasing from Roman citizens, came to recognise a kind of *dominium* as *ex jure gentium*, which was in fact absolute ownership, though technically distinct from Quiritarian dominion. It was expressed by the term *in bonis habere* and is called by commentators *bonitarian* ownership.

168. An obsolete statute.

The distinction between these two kinds of ownership disappeared under Justinian. 168. Since the time of Gibbon we have gained more accurate views of the Agrarian laws of Rome. They related exclusively to the *public* land (*ager publicus*) the occupation of which had been monopolised by the patricians. The occupier of part of the State domain was said to "possess" it and he was called "*possessor*" (squatter) not owner (*dominus*). The Agrarian laws of Licinius and Gracchus limited a Roman citizen to the occupation, or "possession" in this sense, of more than 500 *jugera* of the *Ager publicus*. He might become the owner of any amount of private land. AGRARIÆ LEGES. 169. MANCIPIUM. 170. This assurance was given by the ancient form of sale called *Mancipatio*, thus described by Gaius: "Mancipatio is effected in the presence of not less than five witnesses, who must be Roman citizens and of the age of puberty, and also in the presence of another person of the same condition, who holds a pair of brazen scales and hence is called *Libripens*. The purchaser (*qui mancipio accipit*) taking hold of the thing says: I affirm that this slave (*homo*) is mine *Ex Jure Quiritium*, and he is purchased by me with this piece of copper and brazen scales. He then strikes the scales with the piece of money and gives it the seller as a symbol of the price (*quasi pretii loco*)." All *res mancipi* were thus transferred. To the examples given in Note 167, may be added the children of Roman parents, who, according to the old law, were *Res mancipi*. 171. Things abandoned (*derelict*) are enumerated among the *res nullius*, which might be acquired by *occupation*. 172. For this difficult subject see USUCAPIO. (1) Usucapio is the acqui-

169. These spoils.

170. The purchaser required some assurance.

171 Dereliction.

172. A prescription of one year.

sition of Quiritarian ownership by continuous possession. It was allowed to convert the imperfect ownership called *in bonis* (bonitarian) into *dominium ex jure Quiritium*. For example, if a *res mancipi* were transferred by mere delivery without *mancipation*, the first owner would still remain Quiritarian owner until the transferee had enjoyed uninterrupted possession for the time laid down in the XII Tables. The latter then became Quiritarian owner. Thus *Usucapio* originally only supplied the defect of legal form in the acquisition of things. It is, however, enumerated among the "civil modes of acquisition," by Justinian.

(2.) *Usucapio*, in its later sense, as a mode of acquiring ownership, was regularly established in the time of Gaius. It applied to things (whether *Mancipi* or *Nec mancipi*) that had come to a man by tradition from one who was not the owner, but whom he believed to be the owner. His possession was required to be (*a*) uninterrupted, (*b*) *bonâ fide*, and (c) legal in its origin (*justa causa possessionis*). But a man could never thus acquire the ownership of a stolen thing (law of XII. Tables) or a thing possessed by force (*Lex Julia et Plautia*), even though he purchased it *bonâ fide*.

(3.) When all distinction between *Res mancipi* and *Nec mancipi* was abolished, the old kind of *usucapio* ceased. All usucapio was now the same, and its general definition became the "acquisition of ownership (*dominium*) by continued possession for a time defined by law." Justinian enacted that there might be usucapion of moveable things in three years, and immoveable things "*per longi temporis possessionem*" which is explained to be ten years *inter præsentes*, and twenty years *inter absentes*. The conditions of legal origin, good faith, and the capability of the thing to be an object of *usucapion* (it must be *humani juris*) were still required. But the absence of the first and last conditions was cured by a possession of thirty or in some cases forty years.

(4.) Prescription, properly, *Temporis præscriptio* (which must not be confounded with *usucapio*) signifies the answer or plea (*præ-*

scriptio) which a defendant has to the demand of a plaintiff grounded on the lapse of time. Justinian established the general rule of thirty years within which actions must be brought. The time began to run from the accruing of the cause of action. The defendant acquired by prescription a right founded on the plaintiff's neglect, whereby he excluded the plaintiff from prosecuting his suit.

(5.) The historical distinction between usucapion and præscription does not exist in modern civil law. Gibbon uses the word "prescription" as identical with *usucapio*. PRÆSCRIPTIO.

Text to 173. The distinction of real and personal fortune.

173. In English law there is a broad distinction between the doctrines relating to land, "*real* property," and those relating to moveables, "*personal* property." The former are of feudal origin, the latter have been developed by statutes and judicial decisions, resting, in many cases, on the basis of the Roman law. A memorable instance is to be found in the exposition of the law of "bailments," from the Bench by Chief Justice Holt, in (Coggs *v.* Bernard. 1 Smith's leading cases, 82) "Simple, uniform and absolute dominion." But, as has been explained, the Romans conceived that one man might have the bare legal ownership of a thing, and another the beneficial ownership. The full idea of dominion embraces *usus*, *fructus*, *abusus* (the right of using, enjoying, and consuming) and the power of bequeathing within the limits prescribed by law. DOMINIUM. The *dominus* may part with the *usus* and *fructus* to another without ceasing to be *dominus*. BONA. 174. Servitudes (*servitutes*) were as it were fragments into which the *dominium* of a thing was conceived to be divisible. They were either *real* (relating to immoveable things only) as a right of way, or watercourse, which one man may have through the *servient* premises of another (in English law, an "easement") or *personal* (relating both to moveable and immoveable things). The principal personal servitudes were *Usus* and *Usus fructus*. (*a*) *Usus fructus* was the right of using (*usus*) and enjoying the fruits (*fructus*) of a thing (as a farm), while the *proprietas*, ownership (the residue of

174. Use, usufruct and servitudes.

the *dominium*) remained with another (the *dominus*); (*b*) *usus* was the right of using but not taking the fruits (except sufficient for daily use). Servitudes were therefore *limitations of the owner's power* over a thing. SERVITUTES USUS FRUCTUS. 175. CONFUSIO. Such as of a man making wine of another man's grapes. The Sabinians were of opinion, that the ownership of the *matter* was not changed by such labour being bestowed upon it. The Proculians held that the new thing or *form* (*nova species*) belonged to him who bestowed his labour on it; but they admitted that the original owner had a legal remedy for the value of his property. 176. Succession is either *testamentary* (under a will) or *ab intestato* (from an intestate). Gibbon first considers the latter, which is called *hereditas legitima* (legal heirship) HERES. 177. The Jewish law gave the first-born a double share of the inheritance. The Athenian law gave no portion to daughters, but the sons were bound to maintain them, (the Athenian law may be compared with the Hindoo). HERES (Greek). Under the English law the land of an intestate goes to the eldest son for reasons of feudal origin, (the widow is entitled to *dower* out of the land however) the personal property is divided among the widow, who takes one-third (or a half if there are no children), and the children of both sexes, who divide the remaining two-thirds between them. 178. The *heredes sui et necessarii* of the Roman law, viz., sons and daughters, and the sons and daughters of a son, who were in the power of a testator. The word *sui* ("own") apparently means *in the power* (of the deceased). 179. An obvious allusion to the English law of inheritance to real property. Yet it is deeply ingrained in the national character. It almost invariably happens that a testator dying the absolute owner of land, leaves the whole to his eldest son for life, with a further limitation to *his* eldest son in tail. The motive is to keep up the existence of the family among the landed aristocracy. The minute sub-division of estates which is the inevitable result of a law of equal partition among the children, produces impoverished land-owners, bad agriculture, and political degradation. (India supplies many examples of this truth). 180. The following is a specimen of a "genea-

175. The mixture of substances.

176. This natural inheritance.

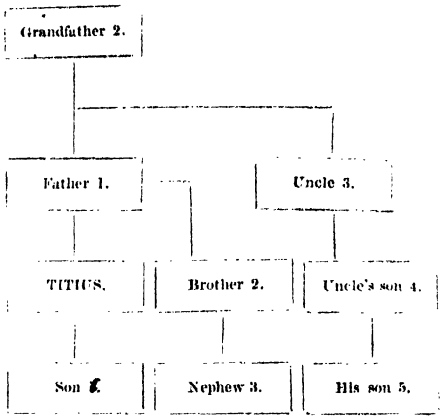
177. The equality of nature.

178. All his descendants.

179. The insolent prerogative of primogeniture.

180. The degrees of kindred.

logical table," according to the Roman law:—



Page 41.
141. The cognats of every rank.

In this table the figures indicate the degrees of kindred between Titius and the *agnati* respectively specified. COGNATI. 181. The law of the XII. Tables runs thus:—"If one die intestate without a *suus heres*, let the nearest *agnatus* have his *familia*." FAMILIA. 182. The three ancient patrician Roman tribes were divided each into ten *curiæ* (CURIA), each *curia* into several *gentes* (and each *gens* into families). The members of a *gens* were called *gentiles*, they had a common religious worship and a common name. They were conceived, as the word *gens* shows, to be connected by race (compare a *caste* in India, a *clan* in Scotland). GENS. 183. If there were no *agnati* the XII. Tables gave the *hereditas* to the *gentiles*. 184. Not quite correctly stated. The *Lex Voconia* only applied to testaments, and therefore a daughter or other female could still inherit *ab intestato* to any amount. LEX VOCONIA. 185. See above Note 125. 186. See Note 125. 187. Cato spoke energetically for the Voconian law at the age of sixty-five. 188. The Tertullian *Senatus consultum* (under Hadrian) empowered the mother, if *ingenua* and the mother of three children, or if *libertina* and the mother of four, to take the inheritance of an intestate son. The *Senatus consultum Orphitianum* (under

182. A *gens* or House.

183. The default of the agnats.
184. A similar principle.

185. As long as virgins.
186. The equal succession.
187. The maxims of Cato.
Page 42.
188. The reciprocal inheritance.

M. Aurelius) also gave the children a claim to the *hereditas* of an intestate mother. SENATUS CONSULTUM TERT. and ORPHIT. 189. TESTAMENTUM. 190. The liberty of making a testamentary disposition is limited by the Mahomedan and still more by the Hindoo law. In England a testator's power of settling his property for a period defined by Act of Parliament may be said to be unrestricted by law. The tendency of civilization is to remove restrictions on the power of making wills. 191. Originally in Rome wills were either made (*a*) solemnly before the half-yearly patrician assembly called *comitia calata* (COMITIA CALATA), or (*b*) less formally, in *procinctu*, when the testator was going to battle (called the Military Testament). A third and later mode used in cases of emergency, was that by Mancipation (*c*) described by Gibbon. This became the usual form. (*d*) The Edict established a less formal kind of will which Gibbon mentions. This "prætorian testament" was distinguished from the strict *civil* form, by Mancipatio, as not giving the legal *hereditas* but only the possession of the testator's goods (BONORUM POSSESSIO) "in accordance with the (testator's) writing (*tabulæ*)." (*e*) Justinian established the validity of a still more simple will, made orally or in writing, and acknowledged before seven competent witnesses present at the same place and time. 192. A will was called *Inofficiosum*, which was made in legal form but not "according to the duty (*officium*) of natural affection," as if a man exheredated his own children or passed over without mentioning his parents, or brothers and sisters. If there was no sufficient reason for this, the persons aggrieved might have a *Querela inofficiosi*. The portion of an *hereditas* which might be claimed by this action was one-fourth. Under the legislation of Justinian no person could maintain this action beyond the degree of brothers and sisters. 193. The one was called *universal*, the other *singular* succession. In the former the *heres* or *coheredes* succeeded to the *universitas* of the testator's rights (UNIVERSITAS), in the latter the legatee succeeded to the individual thing bequeathed. 194. SUCCESSIO, (for the Roman notion of *Successio per universitatem*). To the *hereditas* were attached the debts and credits and the *sacra* of the deceased. Compare the Hindoo with the Roman

189. The order of succession.

190. In the simple state of society.

191. Before the time of the Decemvirs.

192. Unless a legitimate portion.

193. The inheritance and the legacies.

194. The heirs who succeeded.

notion of an heir's religious duty to his ancestor (SACRA). The English maxim is "God alone can make an heir," *i. e.* in English law, heirship is by blood only: a person to whom land is devised, or money bequeathed, by will, is not called an *heir* but a *devisee* or *legatee*. 195. LEGATUM. A legacy is part of the *hereditas* which the testator gives out of it, from the *heres*. Under the law of the XII. Tables a man could thus exhaust the whole (*universum*), so as to leave the *heres* nothing. Attempts were made to preclude this result, but without success, until the *lex Falcidia* (B. C. 40) which enacted that a testator should give no more than three-fourths in legacies, so that one-fourth was secured to the *heres*. 196. By the legislation of Justinian. 197. The word *testamenti factio* expressed the legal capacity of the heir to take as well as of the testator to dispose. *Cretio hereditatis* means the *determination* of the heir to take the *hereditas*. 198. For the nature of common substitution and *pupillaris substitutio*, see HERES. 199. Gibbon alludes to the strict settlement of landed estates on the eldest and other sons successively in "tail male," which is usually adopted by the owners of landed property in England in order to keep their estates in their own family. Under this feudal tenure the owner of the land is only possessed of a "life interest," which passes on his death to his eldest son. The almost universal use of such settlements by the owners of land in England may be set off against the speculative objections to the system made by those who have not and are never likely to have any landed property of their own. 200. Observe the distinction between the *heres legitimus* (*ab intestato*) and the testamentary heir. 201. See Note 73. 202. FIDEI COMMISSUM. The person who was to receive the benefit of the *fidei commissum* was styled *fidei commissarius*, the person on whom the obligation was laid was *fiduciarius* (in the English Law of Trusts the former is the *cestui-que-trust*, the latter the *trustee*). 203. But see Note 184. 204. The *senatus consultum Trebellianum* (under Nero) transferred, on the *heres fiduciarius* giving up the *hereditas* to the *fidei commissarius*, all rights and liabilities of the *heres* to the *fidei-commissarius*. As *fidei commissa* were sometimes lost because the *heres* would not accept the

195. Under the name of legacies.

196. A reasonable time was allowed. *Page* 44.

197. Some legal disqualification.

198. He was permitted to substitute.

199. The long and intricate entails.

200. Legitimate or testamentary heir.

201. Before the age of Augustus.

202. *Fidei-commissa* or trusts.

203. The Vocontian law. *Page* 45.

204. The Trebellian and Pegasian decrees.

inheritance, the *senatus consultum Pegasianum* (under Vespasian) allowed the *fiduciarius* to retain one-fourth of the hereditas, remaining liable to all debts and charges (*onera hereditaria*) but which by agreement were shared between him and the *fidei-commissarius*. This *fourth* is in fact the "Falcidian portion" (see Note 195) applied to the case of universal *fidei-commissa*. 205. Gibbon having discussed *real* or absolute rights (*jura in re*), now passes to the other class of rights, which are called personal or relative (*jura in personam*). The latter rights, and correlative duties, are represented in the Roman law by the technical term "obligation." An obligation (*ligo* to bind) is a special tie of law whereby one person is bound to another, to give, do, or furnish something. Obligations are *natural* or *civil*. (1). The former are not properly obligations, being such as the law will not enforce as such by an action, though it allows them to be pleaded by way of defence. Those obligations which were regarded as founded on natural reason (*jus gentium*) were peculiarly considered as *bonæ fidei* (of good faith) as distinguished from obligations *stricti juris* (of strict law). Such obligations might be the foundation of *bonæ fidei actiones*, of which the law recognised a limited number. (Ecclesiastical law, aiming at higher moral objects than civil law, allows natural duties to be the foundation of suits). (2). The latter, which are obligations proper, are enforceable in all cases by action and may be pleaded as a defence to an action. Hence, obligations and actions are treated of together. Civil obligations again are either (*a*) civil obligations in the narrow sense, viz., those recognised by the civil law, or (*b*) Prætorian, viz., those created and sanctioned by the edict. It is very important to bear in mind the distinction of (*a*) actions *in rem*, for the vindication of absolute rights (*jura in re*) against *any one* who may dispute them, and (*b*) actions *in personam*, for the enforcement of *jura in personam*, rights founded on some act of a *particular person* (*e. g.* a contract or a wrong). 206. Gibbon's division of the facts whence obligations arise is not applicable to the Roman system, which distinguishes obligations as either *ex contractu* (from the consent of parties) or *ex delicto* (from a wrong done by one to another). A contract is an agreement which the law makes

205. The general duties.

206. A promise, a benefit, or an injury.

obligatory by giving an action to enforce it.

207. They astonished the Greeks

JUS. OBLIGATIO. 207. See Polyb. l. vi. c. 56. Where the honesty of the Greeks and Romans is thus compared:—"In fact, among the Greeks, those who have to administer only as much as a talent of public money, though they have ten sureties and as many seals and twice as many witnesses, yet cannot keep their faith: but among the Romans, those who, in public offices and embassies, have charge of immense sums of public treasure, preserve religiously the obligation implied by the simple oath."

208. A naked pact.

208. *Ex nudo pacto non oritur actio*—"from a bare agreement arises no action (though it may afford a *defence*.)" Consent alone was not sufficient to create an obligation except in the four instances of *(a)* purchase and sale, *(b)* location or letting and hiring, *(c)* partnership, *(d) mandatum* or commission. The obligations thus created are emphatically styled *consensual*, as being created by consent alone. Another class of obligations are called *real*, being distinguished by the delivery of a thing, *res (e. g.* in the case of a pledge, deposit or loan); a third class are marked by the utterance of certain *words* and are therefore termed *verbal;* a fourth by the use of written documents, *literæ*, and are called literal. These obligations are thus arranged in the Institutes (1) *re*, (2) *verbis*, (3) *literis*, (4) *consensu*. Gibbon first describes the 2nd of these classes.

209. A stipulation.

209. The word is derived by Festus from *stips*, coined money; by Isidorus from *stipula*, a straw (see ante Note 46) but more probably comes from *stipes*, *a root*, signifying *something firm*. The *stipulatio* was the principal, but not the only form of verbal contract. It must be observed that the *stipulator* is the party *to* whom the verbal promise is made.

210. The friends of Sempronius.

210. These accessory promisers or sureties were in Justinians time called *fide jussores*. They might be introduced in all kinds of contracts. INTERCESSIO.

211. The benefit of pratition.

211. Each *fide jussor* was liable for the whole debt, but, by a rescript of Hadrian, the creditor was compelled to divide his demand between all the *fide jussores* who were solvent, when the suit was ready for trial. There were other laws passed for the protection of sureties against unfair loss, one of which was the benefit of *order (beneficium ordinis)* enacted by Justinian and which compelled the creditor

to sue the principal debtor first, and restricted him to claiming from the sureties only so much as he could not recover from the principal. 212. An agreement (*pactum*) founded on consideration (*causa*) might form the ground of a *natural* obligation. Some of these *pacta* (as that of buying and selling) were in course of time made the foundation of an *actio civilis* (see Note 205) and some were protected by the Prætor. (ACTIO). 213. It is erroneous to apply the term benefits to the class of *real* (which Gibbon does not distinguish from *consensual*) obligations. Four contracts come under the head of obligations made *re*; *Mutuum*, *Commodatum*, *Depositum*, and *Pignus*. Of these the 2nd and 3rd only are benefits. 214. In *depositum* the benefit was on the side of the depositor and the depositarian was only liable for loss caused by his dishonesty or gross neglect, unless indeed he had voluntarily offered to receive the thing, in which case he was liable for the consequences of slight neglect. The thing might be recovered by the *actio depositi*. In the contract of pledge (*pignus*) the creditor was only bound to use the utmost diligence in keeping the thing. If it was casually lost notwithstanding his care, he was not accountable: otherwise he could be compelled by action to restore it. 215. *Mutuum*, a contract of loan, in which not the specific thing but an equivalent (*in genere*) was to be returned. In *commodatum*, the specific thing (*in specie*) was to be restored. In the former the thing lent became the property of the borrower, in the latter it remained the property of the lender. The benefit being generally received by the borrower in *commodatum*, he was bound to use as much care as the most diligent head of a family takes of his own property. 216. The contract of sale was not *real* but *consensual*. Consensual contracts were not enforced by actions of "strict law," but (resting as they did on the *jus gentium*) by actions *bonæ fidei*, prætorian actions in which equitable principles were permitted to govern the decision. The opinion of the Proculians who distinguished between sale, and barter or exchange, was upheld against the Sabinians, who considered them identical. EMPTIO. 217. LOCATIO. This was also a contract *consensu*. It was very much like the contract of sale.

Page 45.

212. A naked pact.

213. The obligations of the second class.

214. Whoever is entrusted.

215. The Latin language.

216. In the contract of Sale.

217. Location.

Location and conduction might be of things (as letting and hiring a house), of labour (as hiring a servant), or a work (as contracting for the execution of a particular work). 218. Partnership (*societas*) and commission (*mandatum*) are consensual contracts. Partnership might be universal or for some particular business, as selling wine. A contract of partnership in which one partner was totally excluded from gain (*leonina societas*), was void. One partner might sue another for an account or dissolution in the action *pro socio*. *Mandatum* was considered as originating in friendship and was gratuitous. The person trusted (*mandatarius*) was obliged to use the care of the most diligent *pater familias*, and if he failed to discharge the trust, he was condemned in an *actio mandati* and stamped with infamy. 219. A pledge is termed *Hypotheca* when the thing is made a security without being put into the possession of the creditor. The act of hypothecation (like that of pledging) required no particular form and therefore resembles contracts made *consensu*. 220. The maxim is, "*Qui percipit commodum sentire debet et onus*—he who takes the advantage ought also to bear the burden." 221. Viz. Obligations *ex contractu*. 222. This tenure (called Metayer) is still common in the north of Italy. For the peculiar tenure called *Emphyteusis*, see Dicty. of Antiquities. 223. The Twelve Tables enacted that no one should lend at more than *unciarium fœnus*, one *uncia* (twelfth of an *as*) for the loan of one *as* for the year. This rate, if calculated for the old Roman year of ten months, would give 8⅓ for the year of twelve months, which was commonly used in the time of the Decemvirs. FENUS. 224. "Justinian has not condescended to give usury a place in his Institutes, but the necessary rules and restrictions are inserted in the Pandects." *G.* 225. Twelve per cent. was the legal rate of interest under the later Republic and the Emperors. Justinian reduced it to six. (The legal rate of interest in Bombay is nine per cent. (for most purposes); in England, five. But parties may agree for any rate of interest.) 226. Singular arguments have been invented to show the wrongfulness of usury, as that money is in its nature barren and incapable of increase (*fœnus* in Latin and τόκος in Greek properly mean *increase*). "The usurer

Page 47.
218. Partnership and commission.

219. A mortgage or Hypotheca.

220. If he accepts the benefit.

221. In this boundless subject.

222. The landlord.

223. The Twelve Tables.

224. The code of Justinian.

225. Persons of illustrious rank.

226. The most simple interest.

is the worst Sabbath breaker: for his plough goeth every day," &c. Blackstone in his famous commentaries on the Laws of England discusses this question, and Mr. J. S. Mill, in his Political Economy, ascertains the causes which regulate the rise and fall of the interest of money. Perhaps no people have suffered more from usury than the inhabitants of India.—It may be useful to mention that Gibbon has taken no notice of contracts made *literis*, as by the entry in a creditor's account books of a debt with the debtor's consent. An obligation incurred under either of the other forms (*re*, *verbis*, *consensu*) might be converted into a literal obligation with the debtor's consent. 227. Gibbon here passes to Obligations *ex delicto*. The student should distinguish between private wrongs on which obligations are founded, and public wrongs or crimes which come under the criminal law. (CRIMEN). Gibbon first notices the former; which are (*a*) *furtum*, (*b*) *rapina*, (*c*) *damnum*, (*d*) *injuriâ*. 228. DAMNUM (damage to property). If *damnum* is caused by the exercise of a right, it is indirect and not wrongful (*sine injuriâ*); if otherwise it is direct and wrongful (*injuriâ datum*). The liability to compensate for direct damage arises only from *dolus malus* (dishonesty) or *culpa* (negligence) (CULPA). 229. Theft (FURTUM)—a fraudulent dealing with a thing not one's own—was either manifest or not manifest, according as the *fur* was surprised in the act or not; in the former case the penalty was quadruple, in the latter double of the thing stolen. *Furtum* with violence was *Rapina*, for which a special action was given by the Prætor. (In English law *theft* and *robbery* are crimes, and not private wrongs remediable by civil action). 230. INJURIA and DAMNUM INJURIA DATUM (the former is personal, as an assault, libel, &c: the latter relates to property).

Page 48.
227. Nature and society.

228 If the property.

229. A Roman pursued.

230. A personal injury.

231. As to the Prætorian action of *injuria*, see INJURIA. (In English law a person assaulted may sue for *damages* in a *civil* action, or prosecute the offender *criminally*, as he chooses). 232. A *lex Cornelia* specially provided for cases of *pulsatio*, *verberatio* (assault and battery) and forcible entry into a man's house. 233. Livy I. 28. 234. For the spirit of the Draconian le-

Page 49.
231. The equity of the prætors.

232. The defects of the criminal law.
233. The execution.
234. The statutes of Draco.

235. Predicem his pardon.

236. The decemvirs.

237. Treason.

238. A cross. *Page* 50.

239. Two flagitious events.

240. Parricide.

241. Enclosed in a sack.

242. The middle of the sixth century.

243. Judicial perjury.

244. The cruelty of the Twelve Tables.

Page 51.

245. The literal sense of antiquity.

gislation at Athens, see the History of Greece. 235. The Anglo Saxon laws admit and regulate pecuniary compensations for every injury done to life or limb. 236. Observe the five kinds of punishment enumerated here—*talio*, fine, whipping, slavery, death. 237. MAJESTAS. The full expression for the crime of treason was *crimen læsæ Majestatis* (of injured majesty, to wit, the majesty of the Roman state). 238. For an account of the cruel punishment of crucifixion, see CRUX. 239. Gibbon alludes to Livy xl. 43. and viii. 18. 240. The usual etymology of parricide (*pater* and *cædo*) seems doubtful. Originally it appears that every murderer was called *paricida*, or *parricida*. See LEX CORNELIA DE SICARIIS. 241. "The XII. Tables and Cicero are content with the Sack, Seneca adorns it with serpents. Juvenal pities the "guiltless monkey." Adrian, Constantine and Justinian enumerate all the companions of the parricide. But this fanciful execution was simplified in practice." *G.* He quotes Paulus—"nowadays they are burnt alive or thrown to the beasts." 242. "The first parricide at Rome was L. Ostius, after the second Punic war. During the Cimbric war, P. Malleolus was guilty of the first matricide." *G.* 243. When judicial evidence is exclusively oral the mischief of perjury is of course very great. The offence would appear highly criminal to the truth loving Roman, independently of the religious sanction. The Greeks prided themselves on being superior in their regard for oaths to the Asiatics, but the full establishment of democracy seems to have impaired this among other public virtues. The Romans of the time of Horace and Juvenal contemned *Græcia mendax* (lying Greece) as before they had branded "*Punic* faith." See JUSJURANDUM and above Note 207. 244. The ancient law of debt was very strict. See NEXUM and MANUS INJECTIO. After the thirty days of grace the debtor was *addictus* (assigned over) to the creditor by sentence of the prætor. 245. "Bynkershoek labours to prove that the creditors divided not the *body* but the *price*, of the insolvent debtor. Yet his interpretation is one perpetual harsh metaphor, nor can he surmount the Roman authorities of Quintilian, Cæcilius, Favonius and Tertullian." *G.* Hugo, an eminent German civilian, agrees with Gibbon. Gellius, says,

however, that there was no instance of a creditor ever having adopted so extreme a mode of satisfying his debt. Shakspear's Jew of Venice had no compunction in realising this bloody kind of security, but our ancestors were unjust to Jews. Romans, male and female, could see blood flow without horror. 246. LEX PORCIA. LEGES VALERIÆ. Gibbon's statement seems rather too broad. 247. The existence of private jurisdictions, so common in feudal times, is abhorrent to the spirit of modern English law. 248. Gibbon alludes to the remains of the feudal system which were still do traceable in the manners of his day. A modern "court dress" includes a sword, the symbol of a knight or gentleman. 249. As Marius, Sylla, Pompey, Julius Cæsar. 250. For these laws see the Dicty. of Antiquities. 251. Prosecutions under the Cornelian, Pompeian and Julian laws were called *judicia publica*. "Under the empire, most of the crimes not coming under these special laws, were judged by the prætor in a more summary method. The *judicium* (trial) was then said to be not *publicum* but *extra ordinem*. 252. The administration of justice in a Roman *province* was conducted according to the laws of the province, but the Governor had in practice very great power. PROVINCIA. 253. (It is said that in England a nobleman condemned to be hanged may by custom demand the employment of a silken rope). "It was a guardian who had poisoned his ward. The crime was atrocious: yet the punishment is reckoned by Suetonius among the acts in which Galba shewed himself *acer, vehemens*, &c." (active, impetuous and immoderately severe in the repression of crime.) *G.* 254. The student will remember the Roman cry of *Christianos ad leones!* the Christians to the lions! 255. Gibbon in this sentence is still speaking of criminal law in the *Provinces*. 256. Theodosius. 257. The "error" alluded to, is the confusion of sins or vices with crimes. 258. This is by no means certain. 259. *Provocatio ad populum*. See LEGES VALERIÆ. For the whole subject of *Judicia populi*, see JUDEX. 260. The aristocratic *comitia curiata*. 261. As Aristides, Militades, Themistocles. 262. This censure of the Attic and Roman public judgments is justified by the preserved judicial oratory of Demosthenes, Æschines and Cicero, into which are fre-

246. The Porcian and Valerian laws.
247. Private jurisdiction.
Page 52.
248. The barbarous practise.

249. Each minister of the Republic.
Page 53.
250. A new system of criminal jurisprudence
251. Extraordinary pains.

252. The peace of their Province.

Page 54.
253. A fairer and more lofty cross.

254. Exposed to the wild beasts.
255. The degrees of guilt.
Page 55.
256. The most virtuous.
257. Respectable even in its error.
Page 57.
258. Without law or council.
259. The sacred right of appeal.
260. The supreme tribunal.
261. The heroes of Athens.
Page 58.
262. The orators of Rome and Athens.

quently admitted such irrelevant declamation, such appeals to passion and prejudice, and such shallow sophistry as show how little those democratic courts were to be moved by genuine forensic reasoning. An English barrister must blush to own that trial by jury, at least in criminal cases, encourages and rewards similar breaches of logic, taste and honour. 263. Prætors. 264. Called *Quæsitores* (inquirers) of *Parricidium*, or capital matters. 265. *Quæstiones Perpetuæ*. JUDEX. 266. The *Quæstiones* of Sulla were on extortion (*de Repetundis*), Treason (*Majestatis*), Homicide and Sorcery (*de Sicariis et Veneficis*), Parricide, Peculation, Bribery (*Ambitus*), False money, False witness (*de falsis*) especially in relation to testaments (FALSUM). Public violence (VIS). 267. For a sketch of these "constitutional struggles" see JUDEX. A law of C. Gracchus transferred the *judicia* from the senate to the *equites*. A *lex Plautia* (B. C. 89) opened the appointment of Judex to all the people without distinction. A *lex Cornelia* passed under the influence of the aristocratic Sulla restored to the Senate their ancient monopoly of the judicial power. A *lex Aurelia* (B.C. 70) established a triple and equal division between the Senate, Equites and *Tribuni Ærarii* (who were substantial plebeians). A *lex Judiciaria* of Julius Cæsar took away the third class, which was afterwards restored by M. Antonius, without demanding any pecuniary qualification. 268. Under Augustus (who added a fourth and lower *Decuria* to the existing three) the Judices were nearly 4,000 in number. 269. Of these three guarantees (oath of judices, ballot, mutual challenge) the first and last are admitted in the English jury system. A jury however must give a unanimous verdict of acquittal or condemnation in England. (Not so in Scotland). 270. The sentence was pronounced orally, and was sometimes first written on a tablet. The letters N. L. (*non liquet*—it is not clear) expressed an inability to decide in favour of the plaintiff or the defendant. 271. The English practise recognises the distinction between questions of law and fact. The former are decided by the Judge, the latter by the Jury. The "delegate" named by the prætor was called *judex*. Observe that Gibbon is here speaking only of the *civil* jurisdiction of the

263. Ordinary magistrates.

264. Extraordinary inquisitors.

265. They were made perpetual.

266. Sylla adds new questions.

267. Constitutional struggles.

268. Some thousand Romans.

269. Their integrity.

270. Voices or tablets.

271. The determination of the fact.